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The Role of the Accused in English and Islamic Criminal Justice

by

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A thesis submitted in fulfilment of the requirements for the
degree of Doctor of Philosophy in Law

University of Warwick, Department of Law

October 1999

Acknowledgements

I would like to take this opportunity to thank all of those who have assisted me in so many ways to complete this work. First, there is the British Academy without whose financial assistance I would not have been able to finish. In this regard, I want also like to thank the International Office of the University of Warwick, and Anthony Gribbon in particular, who enabled my family and I to survive in the early stages. Second, there is my supervisor, Professor Mike McConville, who was always understanding and willing to help, advise and listen. Third, I would like to thank my religious teachers and guides, Sheikh ^Abdullah al-Harariyy and Sheikh Samir al-Qadi, who were my advisers for the sections on Islamic Law and always a constant source of inspiration. Last, but certainly not least, I express my deepest thanks to my long-suffering wife, Darlina, whose sacrifice and patience during hard times I will never forget.

I accept all responsibility for any errors in this thesis.

Abstract

This thesis is a comparative study of the role of the accused in the systems of English and Islamic criminal justice. It seeks to explore the underlying relationship between the individual and the state through an historical, structural and contextual analysis of their rules relating to questioning and of confessions. The analysis of the English system covers the period 1800 to 1984, with particular reference to developments during the nineteenth century when the foundations for the modern English state were established. The analysis of the Islamic system combines traditionally Islamic and modern methods, assessing the “Islamisation” movement in Malaysia through a religico-structural understanding of juristic opinion from the four main schools of Sunnite jurisprudence.

The thesis contributes to existing knowledge on a number of levels: first, it questions and revises the “myth” of “progress” that has dominated observations of the history of the English criminal justice system; second, it elucidates the relationship between Islamic law in theory and the law that is applied and proposed in its name in Muslim states; third, it provides an analytical framework for drawing comparisons between the underlying values of the systems of English and Islamic criminal justice.

While acknowledging fundamental differences in terms of outlook and articulation, the author concludes there are important similarities expressed through such notions as “suspect” in the English system and “*kāfir*”/“*fāsiq*” in the Islamic. These act as intermediate constitutional categories to whom the state owe less protection. But the author notes also that these similarities are not observed necessarily in the “law” which is implemented or proposed in Muslim states; exact correspondence depends upon the over-arching political structure and the institution of Caliphate.

The thesis is divided into six chapters: chapter one sets out the conventional view of the historical development of English criminal procedure and evidence; chapter two subjects that to a critique and chapter three offers a revised thesis. Chapter four, explores methods for interpreting and explaining Islam; chapter five sets out rules relating to confessions and questioning according to the four Sunni schools; chapter six puts them into “context” through an examination of the “Islamisation” process in Malaysia.

Table of Cases

English Law:

Alice James (1909) 4 Cr App Rep 319.
Arnold (1838) 8 Car & P. 621.
Baldry (1852) 2 Den.430.
Bate (1871) 11 Cox CC 686.
Berriman (1854) 6 Cox CC 388.
Blackburn (1853) 6 Cox CC 333.
Bodkin (1863) 9 Cox CC 403.
Booth and Jones (1910) 5 Cr App Rep. 177.
Brackenbury (1893) Cox CC 628.
Brown and Bruce (1931) 23 Cr App Rep 56.
Burrowes v Court of High Commission (1605) 3 Bulst, 81 E.R.
Cass (1784) 1 Leach CC 293.
Chic Fashions v Jones [1968] 2 QB 299.
Clewes (1830) 4 Car & P. 221.
Cook (1918) TLR 515.
Cooper v Wicks (1833) 5 Car & P. 536.
Court (1836) 7 Car & P. 487.
Cox v Coleridge (1822) 1 Barn. & Cress. 37.
Croydon (1846) 2 Cox CC 67.
Dunn (1831) 4 Car & P. 543.
Dyer (1844) 1 Cox CC 113.
Ellis (1826) Ry & M. 432.
Fennell (1881) 7 QBD 147.
Garner (1848) 1 Den. 329.
Gavin (1885) 15 Cox CC 656.
Gilham (1828) 1 Mood. 186.
Gillis (1866) 11 Cox CC 69.
Godinho (1911) 6 Cr App Rep. 12.
Grayson (1921) 16 Cr App Rep 318.
Green & Allen (1834) 6 Car & P. 655.
Green (1832) 5 Car & P. 312.
Hassett (1861) 8 Cox CC 511.
Higson (1849) 2 Car & P 769.
Histed (1898) 19 Cox CC 16.
Holgate-Mohammed v Duke [1983] 3 WLR 598.
Holmes (1843) 1 C & K 248.
Howes (1834) 6 Car & P. 404.
Ibrahim [1914] AC 599.
James Unsworth (1910) 5 Cr App Rep 1.
Johnstone (1864) 15 ICLR 60.
Kerr (1837) 8 Car & P. 177.
Kimber (1849) 3 Cox CC 223.
Knight and Thayre (1905) 20 Cox CC 711.
Lambe (1791) 2 Leach Cr. L. (3rd ed) 625.

Lemsatef (1977) 64 Cr App Rep 242.
Lilburn (1637) 3 St. Tr. 1315.
Long (1833) 6 Car & P. 179.
Male and Cooper (1893) Cox CC 689.
Massey [1964] Crim LR 848.
May (1952) 36 Cr App Rep 1.
Miller (1895) Cox CC 54.
Moore (1852) 2 Den 522.
Morgan (1895) 59 JP 827.
Osbourne and Virtue (1973) 57 Cr App R 297.
Pettit (1850) 4 Cox CC 164.
Piché [1970] 1 C.C.C. 257; (1970) 11 D.L.R. (3d) 700.
R v Bate (1871) 11 Cox CC 686.
R v Cheverton (1862) 2 F & F 833.
R v Drew (1837) 8 Car & P. 140.
R v Enoch and Pulley (1833) 5 Car. & P. 539.
R v Furley (1843) 1 Cox CC 76.
R v Gibbons (1823) 1 Car & P. 96.
R v Gibney (1822) Jebb Cr. C 15.
R v Gilbert (1977) 66 Cr App Rep. 237.
R v Harris (1844) 1 Cox CC 106.
R v Jones (1809) Russ. & Ry 152.
R v Kingston (1830) 4 Car & P. 387.
R v Malings 8 Car & P. 242.
R v Mick (1863) 3 F & F 322.
R v Mill (1833) 6 Car & P. 146.
R v Moore (1852) 2 Den. CC. 522.
R v Morton (1843) 2 Moo & Rob 514.
R v Northam (1968) 52 Cr App Rep. 97.
R v Reason (1872) 12 Cox CC 228.
R v Reeve and Hancock (1872) LR 1 CCR 364.
R v Regan (1867) 17 LT 325.
R v Taylor (1839) 8 Car & P. 733.
R v Toole (1856) 7 Cox CC 244.
R v. Jarvis (1867) LR 1 CCR 96.
R v. Thomas (1794) 2 Leach Cr.L. (3rd ed), 727.
R v. Tyler and Finch (1823) 1 Car & P 128.
Richards (1832) 5 Car & P. 318.
Rogers v Hawken (1898) QBD 192.
Row (1809) Russ & Ry 153.
Rule (1844) 8 J.P. 599.
Samsome (1850) 4 Cox CC 203.
Sergeant [1963] Crim LR 43.
Sexton (1823) Chetwynd's Supplement to Burn's *Justice of the Peace and Parish Officer*, 103.
Sleeman (1853) 6 Cox CC 245.
Smith (1961) 46 Cr App Rep. 51.
Spilsbury (1835) 7 Car & P. 187.
Stephen King [1978] Crim LR 632.

Stripp (1856) Dears. 648.
Swatkins (1831) 4 Car & P. 548.
Taylor (1923) 87 JP 104
The Yeovil Murder Case (1877) 41 JP 187.
Thomas (1836) 7 Car & P 345.
Thompson (1785) 1 Leach C.C. 291.
Thompson (1893) 2 QB 12.
Thornton (1824) 1 Mood. 27.
Toole (1856) 7 Cox CC 244.
Udall (1590) 1 St. Tr. 1271.
Voisin (1918) 13 Cr App Rep 89.
Warickshall (1783) 1 Leach C.C. 263.
Wattam (1952) 36 Cr App Rep 72.
Webb (1831) 4 Car. P. 564.
Wheeling (1789) 1 Leach C.C. 311n.
Wilde (1835) 1 Mood. 452.
Wilson (1817) Holt 597.
Winkel (1912) JP 191.
Wright's Case (1830) 1 Lewin 47.

Malaysian Law:

Abdul Ghani Bin Jusoh & Anor v Public Prosecutor [1981] 1 MLJ 25 (FC).
Boto v Jaafar [1985] 2 MLJ 98.
Che Lah v Pendakwa Jenayah, Kelantan [1401H] Jurnal Hukum 86.
Che Omar Bin Che Soh v Public Prosecutor [1988] 2 MLJ 55.
Dato Mokhtar Hashim v Public Prosecutor [1983] 232.
Empress v Babulal (1884) 6 All 509 (India).
Faridah v Pendakwa Jenayah, Kelantan [1401H] Jurnal Hukum 89.
Hashim Bin Saud v Yahaya Bin Hashim & Anor [1977] 1 MLJ 259.
Jayaraman & Ors v Public Prosecutor [1982] 2 MLJ 306.
Jubri Bin Haji Salleh v Public Prosecutor [1947] MLJ 88 (CA).
Karpal Singh v Attorney-General Malaysia [1987] 1 MLJ 76.
Maja Anak Kus v Public Prosecutor [1985] 1 MLJ 311.
Mohamed Habibullah v Faridah [1992] 2 MLJ 793.
Myriam v Muhammad Ariff [1969] 2 MLJ 174.
Nafsiah v Abdul Majid [1969] 2 MLJ 174.
Ooi Ah Phua v Officer in Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198.
Pegawai Pendakwa Muis v Haji Adib Datuk Said Besar Sigoh [1410H] Jurnal Hukum 306.
Pendakwa v Mat Isa [1401H] Jurnal Hukum 80.
Public Prosecutor v Kambe Bin Raspani [1989] 3 MLJ 269.
Public Prosecutor v Law Say Seck & Ors [1971] 1 MLJ 199.
Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219.
Tengku Mariam v Commissioner of Religious Affairs, Terrangganu [1969] 1 MLJ 110.

Table of Statutes

English Law:

- 1554 1 & 2 Phil. & Mary (Marian Statutes)
Cap. 10
Cap. 13.
- 1826 7 Geo. 4
Cap. 64.
- 1829 Metropolitan Police Act, 10 Geo. IV.
Cap. 44
- 1835 Municipal Corporations Act, 5 & 6 Gulielmi IV
Cap. 76.
- 1836 6 & 7 Wm. IV,
Cap. 114.
- 1848 Indictable Offences Act, 11 & 12 Vict. (Jervis' Act)
Cap. 42.
Cap. 78. (Court of Criminal Appeal)
- 1856 County and Borough Police Act, 19 & 20 Vict.
Cap. 69.
- 1888 Local Government Act 1888, 51 & 52 Vict.
Cap. 41.

Malaysian Law:

- 1948 Emergency Regulations
- 1950 Evidence Act, No. 56
- 1952 Dangerous Drugs Act
- 1960 Internal Security Act
- 1961 Kidnapping Act
- 1965 Muslim Courts (Criminal Jurisdiction) Act 1965
- 1971 Prevention of Corruption Act
- Criminal Procedure Code (FMS Cap 6)
Act A324

- 1977 Administration of Islamic Law Enactment of Sabah
- 1983 Syariah Criminal Procedure Enactment of Kelantan (no. 9)
- 1985 Administration of the Syariah Court Enactment of Malacca (no. 6)
- 1986 Syariah Criminal Procedure Enactment of Malacca (no. 2)
- 1990 Evidence Enactment of the Syariah Court of Kedah (no. 8)
- 1990 Evidence Enactment of the Syariah Court of Pahang (no. 1)
- 1991 Evidence Enactment of the Syariah Court of Kelantan (no. 2)
- 1991 Evidence Enactment of the Syariah Court of Sarawak (no. 2)
- 1991 Syariah Criminal Procedure Enactment of Sarawak (no. 8)
- 1991 Syariah Criminal Procedure Enactment of Selangor (no. 6)
- 1993 Syariah Criminal Code of Kelantan
- 1997 Syariah Criminal Procedure (Federal Territories) Act (no. 560)
- 1997 Syariah Criminal Offences (Federal Territories) Act (no. 559)
- 1997 Syariah Court Evidence (Federal Territories) Act (no. 561).

TABLE OF CONTENTS

<u>Title</u>	<u>Page</u>
Introduction	1
Chapter One Questioning of the Accused and the Construction of the Individual in English Law, Part One.	6
Chapter Two Questioning of the Accused and the Construction of the Individual in English Law, Part Two.	33
Chapter Three Questioning of the Accused and the Construction of the Individual in English Law, Part Three.	99
Chapter Four In Search of God's Law: Exploring Approaches to the Study of Islam and the Islamic Criminal Justice System.	150
Chapter Five Confessions and Rules of Questioning in Islamic Law.	174
Chapter Six The "Islamisation" of Criminal Justice: Contextualising the Role of the Accused Within a Muslim State; a Case Study on Malaysia.	222
Conclusion	283
Bibliography	307

Introduction

The famous comparatist lawyer, Basil Markesinis, spoke recently of the similarities between law and art. In both disciplines, he said, “most things that had to be said had, in some form or another, already been expressed by someone; and that often the only way one could stamp one’s individuality on a subject or a theme was through the way one chose to express it.”¹ His observation, while general in its terms, was made in the context of Anglo-American and European cultures; cultures which, though different, share a common Christian heritage as well as a secular ideology of “enlightenment.”

But in comparative studies of cultures that are essentially alien to each other, other comparatists suggest² that the differences are so great that their legal cultures cannot be compared. According to this view, the present study would not serve a useful purpose. English and Islamic systems of criminal justice appear to operate in different cultural spheres. The former is secular, man-made and seems to change constantly; the latter is religious, sent by God and fixed. The task of the academic would be to describe the “other” but not to compare. In fact, this has been the conventional approach in academic discussions of Islam (“orientalism”). It has been described, observed, dissected and critiqued; rarely compared. Generally speaking, the degree to which their criticisms of Islamic law could have been directed at their own systems has not been considered.

¹ “Foreign Law and Comparative Methodology: A Subject and a Thesis,” in *Foreign Law & Comparative Methodology*, (1997), Oxford, Hart, p. 1.

² See, for example, the recent work by Van Hoecke and Warrington: “Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law,” (1998), *International and Comparative Law Quarterly*, Vol 47, pp. 495-536.

The current study attempts to move beyond this insularity, and perhaps ethnocentrism,³ to embrace a broader cultural view which seeks to locate aspects of the “other” within the “self.” This should not be understood to imply a search for a new “natural law”, but a means by which communication barriers between different cultures can be lifted, common agendas pursued and informed reflection encouraged.

This cross-cultural dialogue takes place in the context of the role played by accused persons and the relationship this expresses between the individual and the state. In theory, I could have set out this relationship by examining any of the rules relating to evidence and proof, as they all, in some degree, reflect the underlying values of a system. My focus, however, has been on the rules relating to questioning and confessions. I suggest that these rules are the most appropriate for comparison because: (1) they inevitably regulate or facilitate the ability of certain representatives of the organised community (the state) to extract evidence from accused persons; and (2) the recent concern over the relationships between confessions and miscarriages of justice.⁴

The thesis thus examines in both systems the function(s) of these rules and the relationship which they exhibit between the individual and the organised community in which the latter exists. This is drawn out in English law through an

³See generally: B.S. Sayyid, (1997), *A Fundamental Fear: Eurocentricism and the Emergence of Islamism*, London and New York, Zed Books.

⁴See: Walker, C. and Starmer, K (1993), *Justice in Error*, London, Blackstone Press; McConville, M. and Bridges, L. (1994), *Criminal Justice in Crisis*, Aldershot, Edward Elgar; McConville, M.,

historical and structural analysis of the period 1800-1984, with particular emphasis on developments in the nineteenth century when the foundations for the modern English legal system were being laid. This section of the thesis contextualises English case law and statutes within contemporary ideologies and historical movements.

In the analysis of Islamic criminal justice, the relationship between the individual and the state is elucidated through a comparison of traditional juristic interpretation of the religious texts and the structural context for which they were intended, with subsequent attempts by a Muslim-dominated polity to implement an “Islamic” order. These attempts are explained through a case study of “Islamisation” in the Malaysian peninsula, charting the impact and degree of implementation of Islamic law with particular reference to the post-independence period.

In chapter one, I set out the conventional view of the historical development of English criminal procedure and evidence which conceptualises the role played by the accused in terms of linear progress and societal development: from “subject”(pre-1640) to “citizen” (1800-1852) and then to “suspect” (post-1852). In chapter two, I subject this to a critique, suggesting that it lacks the necessary data and systematic methodology to support it. In chapter three, I re-evaluate the evidence and present a different picture which sees the role played by the accused as incidental rather than fundamental to the workings of the English system.

Although fears of intrusion and of the need to protect the accused from violations by the state are expressed during the nineteenth century, I argue that there is no stage at which the accused is constructed as a “citizen.” Rather, there are judicial disagreements throughout the nineteenth century, reflecting the controversy of transition from a devolved, patriarchal regime to a more centrally-controlled and welfarist state; a process which is not complete until after the collapse of *laissez-faire* in the 1930s by which time the accused is constructed as the intermediate constitutional category “suspect.”

In chapter four, I set out and examine methods to overcome controversies between text and context in the presentation of Islamic criminal justice in order to establish appropriate data for drawing meaningful comparisons with the English system. I maintain these data must be taken from traditional juristic interpretation of the Qur’an and Sunnah, and juxtaposed with a structural analysis of efforts to put them into practice. In chapter five, I explore the variety of Islamic juridical opinion and explain their categorisations of the individual are *religious* rather than secular in nature, and that the role played by the accused is determined by a hierarchy of religious criteria that reflect individual choices and prior behaviour. Yet, whether or not this is realised in practice depends on the over-arching political structure and the institution of the Caliphate (*Khilafah*). In chapter six, I explore the consequences of developing on the periphery of or external to the Caliphal framework. I argue that in the Malaysian context, this has allowed influences anti-thetical to Islam to seep into its operating culture and to subvert the religious essence of its rules thereby serving the secular interests of traditional authority.

In the concluding chapter, I reflect on the difficulties of comparative analysis, rebut misconceptions and assess the degree of commonality and difference between the two systems. In particular, I observe how both systems categorise the individual to account for law and order concerns; for the English system, it is the “suspect”; for the Islamic, it is the “kafir”(non-Muslim) and “fasiq” (Muslim big-sinner).

Questioning of the Accused and the Construction of the Individual in English

Law

Chapter one

Introduction:

The rules relating to questioning of the accused have a long detailed history in English Law, and have considerable importance for those accused or suspected of criminal offences. Although the statements of an accused or of a suspect in response to questions may be exculpatory, often they are introduced at trial because they incriminate the accused in some material respect. This may be through a full confession, an admission, a statement leading to real evidence that connects the accused with the crime, or through an inconsistency with the accused's testimony. Even apparently exculpatory statements can be used to incriminate the accused at trial.¹ That confession can then form the basis of a valid conviction under English law, even in the absence of corroborating evidence.²

It is crucial, therefore, to determine what, if any, are the limitations to questioning of the accused and the evidential consequences for breaching those limits. The power to question and the ability of the prosecution to use statements of the accused in evidence, depends on the existing statutory framework and case law. As this and subsequent chapters will indicate, the content of this law is not fixed,

¹For a good example, see the Canadian decision of *Piche* [1970] 1 CCC 257; (1970) 11 DLR (3d) 700.

but is subject to interpretation and reinterpretation in the courts according to different sets of values that govern the proper relationship between the individual and the state.

The parameters of that relationship, I suggest, are best discovered by examining the historical development of questioning of the accused and its interrelationship with the law of confessions; in particular with the developments that took place after 1800 when different notions of the constitutional relationship between the individual and the state were being canvassed. Over the next three chapters, I will attempt to set out the trends in judicial thinking after 1800, spanning the publication of the Judges' Rules and its subsequent interpretation.

In this chapter, I will set out the conventional explanations put forward by leading writers on evidence law and by legal historians. In any historical analysis, previous projections of history cannot be ignored. History does not consist of objective accounts in which the facts speak for themselves. Rather, facts are selected, interpreted and constructed within evaluative frameworks. This generates an "image" of history which can have fundamental implications for the way a given (legal) culture is perceived and projected, particularly where that "image" carries the weight of a consensus. The extent to which any consensus has been achieved forms the subject matter of this chapter. That will be subjected to a substantive and methodological critique in chapter two. An historical re-evaluation will be set out in chapter three.

²*Wheeling* (1789) 1 Leach CC 311n.

Let us begin this chapter, however, with a brief historical outline of the position up to the beginning of the nineteenth century. This will provide not only an opportunity to lay out important statutory provisions that still governed questioning of the accused in 1800, but also an identification of important structural movements, their causes and the underlying values of the system which I draw out more fully in chapter three.

The History of Interrogation and Confessions Before 1800

The general picture emerges that up to 1640 interrogation of the accused both inside and out of court was common place, and in some cases even accompanied by torture, for purposes of social and crime control, as well as for the suppression of political dissent.³ There were no restrictions on the type of questions that could be asked, by whom nor for what purpose. Judicial interrogation could take place before the trial in the Star Chamber without the accused being notified of the charge against him. Examination was upon oath and compulsory. Any refusal to take the oath was punishable by torture.⁴ If the accused confessed under examination, he was subject to further interrogation in private and not on oath in the hope of obtaining more confessions to crimes not yet admitted.⁵ Judges also carried out preliminary examinations of the accused in the Common Law courts⁶

³See: J.H. Langbein (see *Torture and the Law of Proof- Europe and England in the Ancien Regime*, (1977), Chicago and London, University of Chicago Press, p. 81); David Jardine , *A Reading on the Use of Torture in the Criminal Law of England Previously to the Commonwealth* (1837), London, cited in Langbein p. 74; but contrast Wolchover and Heaton-Armstrong, *Confession Evidence* (1996), London, Sweet & Maxwell, p. 108.

⁴For an example, see *Lilburn* (1637) 3 St. Tr. 1315.

⁵See Williams, G. (1963), *The Proof of Guilt*, London, Stevens & Sons, p. 40.

⁶See *Udall* (1590) 1 St. Tr. 1271.

and it was not uncommon to question him/her at the trial itself,⁷ although an accused could not be punished for refusing to answer those questions.⁸

Pre-trial interrogation of the accused was also carried out by Justices of the Peace, who dealt with the cases that were less politically sensitive. By the middle of the sixteenth century, they became the pivotal figures in the collection of evidence from the accused⁹ as well as the enforcement agency of the ruling classes.¹⁰ The aftermath of the Wars of the Roses, industrial transformation and the emergence of a mobile and rapidly expanding population, which was largely unpoliced, generated fears of disorder among the landed gentry and mercantile classes who looked to the Crown for a more complete system of social control. This was secured by the King's Council who appointed justices from among the most reliable of the landed gentry and gradually equipped them with an armoury of powers, which included the authority to issue warrants of arrest, to examine suspects, to grant bail and to summarily convict in minor cases.¹¹

Concentration of power in the hands of the Justices was precipitated by the decline of the medieval self-informing Jury whose efficacy in making decisions of fact on the basis of their personal knowledge of the accused and of witnesses had been undermined by the rapid growth in population and the loosening of community

⁷See Williams, op. cit., p. 42.

⁸See Coke CJ's judgment in *Burrowes v Court of High Commision* (1605) 3 Bulst. at 50, 81 E.R. at 43.

⁹Bryan, I. (1997), *Interrogation and Confession- A Study of Progress, Process and Practice*, Aldershot, Ashgate, p. 49.

¹⁰*Ibid.*, p. 47.

¹¹*Ibid*; Langbein, J.H. (1974), *Prosecuting Crime in the Renaissance- England, Germany, France*, Cambridge, Massachusetts, Harvard University Press, p. 6.

ties.¹² Systemically, this required a re-structuring and an enhanced role for the Justice of the Peace. This was achieved by the Marian statutes of 1554¹³ and 1555¹⁴ which sought to redress the weaknesses of the community-based process for detection¹⁵ that had obtained since the Statute of Winchester in 1285.¹⁶

The “Bail Statute” of 1554 was the pre-cursor to the “Committal Statute” of 1555 which established the preliminary inquiry upon committal where bail had been denied.¹⁷ The two enactments granted similar examination powers to the Justices, but in different contexts. The former purported to collect evidence from the accused in order to evaluate the correctness of the Justices’ decision to grant bail, if the accused took flight;¹⁸ the latter, instructed them to collect evidence against the accused for the purposes of prosecution.¹⁹ The 1555 enactment provided:

“[F]rom henceforth such Justices or Justice before whom any person shall be brought for Manslaughter or Felony, or for suspicion thereof, before he or they shall commit or send such Prisoner to Ward, *shall take the examination of such Prisoner, and information of those that bring him, of the fact and circumstance thereof, and the same or as much thereof as shall be material to prove the Felony* shall [be] put in writing, within two

¹²Ibid., p. 48.

¹³1 & 2 Phil. & M. c. 13 (the Bail Statute).

¹⁴2 & 3 Phil. & M. c. 10 (the Committal Statute).

¹⁵Ibid., p. 49.

¹⁶See T.A. Critchley (1967), *A History of Police in England and Wales*, p. 7.

¹⁷Langbein, op. cit., p. 5.

¹⁸Ibid., p. 16. The ostensible object of the enactment was to avoid collusion between suspects and the justices; see: Shapiro, B.J. (1991), *Beyond Reasonable Doubt and Probable Cause - Historical Perspectives on the Anglo-American Law of Evidence*, Oxford, University of California Press, p. 149.

¹⁹Bryan, op. cit., p. 50. See also, Holdsworth, W. (1945), *A History of English Law*, London, Methuen/Sweet & Maxwell, Vol. 4, p. 529.

days after the said examination, and the same shall certify in such manner and form and at such time as they should and ought to do is such Prisoner so committed or sent to Ward had been bailed or let to Mainprise, upon such pain as in the said former Act is limited and appointed for not taking or not certifying such examinations as in the said former Act is expressed” (emphases added).

According to Shapiro, the object of the examination of the accused was not to assist the prosecution in constructing its case, but “to prevent lethargy and the biased dropping of charges.”²⁰ She maintains that the lack of attendance of justices of the peace at quarter sessions and assizes indicated the absence of any prosecutorial function.²¹ Yet this argument conflicts with the wording of the committal statute, for it instructs the justices to “take the examination of such Prisoner..of the fact and circumstance thereof..or as much thereof as shall be material *to prove* the Felony.” As Bryan observed, the justices were thus empowered to collect evidence *against* the accused and *for* the prosecution. Although oral evidence was preferred at trial, the absence of any hearsay evidential rule ensured that victim-prosecutors could supplement any deficiencies in their case through the pre-trial examinations of the accused taken and recorded by the justices.²² Furthermore, contemporary accounts indicate that pre-trial questioning of the accused was not limited and that a Justice of the Peace would

²⁰Op. cit., p. 151.

²¹Ibid., p. 150. She refers to Lambarde, and to contemporary practice manuals to support her assertion.

²²Op. cit., pp. 50-51.

try to obtain a confession wherever possible, and that this examination would then be read over to the jury at the trial.²³

In additions to Judges and Justices of the Peace, clergymen were also given powers to interrogate the accused and to inflict punishment through the Ecclesiastical Courts. Out of court, other officers or individuals involved in law enforcement, such as constables, watchmen, gaolers, bailiffs, etc., were able to interrogate the accused.²⁴

Up to 1640, therefore, it appears that the accused was subject to wide powers of interrogation. Moreover, the law of confessions had only a minor influence in restricting those powers.²⁵ By the beginning of the seventeenth century, a judge was obliged to refuse to enter a guilty plea where a confession had been obtained by “fear, menace or duress,”²⁶ but there was no rule of evidence to exclude such a confession at trial. All confessions were admissible in evidence against an accused no matter how they were obtained.

After 1640, the political and legal climate changed. In 1640 Parliament was recalled which gave an opportunity to its members to reassert the “rights and

²³Thomas Smith, *Commonwealth of England* (1583), pp 90-99, cited in Williams, p. 44. See also: Langbein (1973), “The Origins of Public Prosecutions at Common Law,” 17 *American Journal of Legal History*, p. 313; Beattie, J.M. (1986), *Crime and the Courts in England, 1600-1800*, Oxford, Clarendon, p. 271.

²⁴In the *Select Pleas of the Crown 1200-1225*, for example, it was recorded that Simon of Shedricks, who was arrested for the murder of John of Crewkerne, was questioned subsequently by the King’s Bailiff who received his confession. The record tersely concluded: “And because the king’s bailiff produces suit to prove the confession made before him, let him [Simon] be hanged,” Maitland (ed), F.W. (1887), *The Publications of the Selden Society*, Vol. 1, p. 118, para 184.

²⁵Ian Bryan notes that extra-judicial confessions did not receive attention from the judiciary until the early eighteenth century; *op. cit.*, p. 51.

liberties of Englishmen” enshrined in Magna Carta that had been violated during the reigns of the Tudors and Stuarts. One of the consequences was the abolition in 1641 of the hated Star Chamber and the prohibition of any court in the future that would “exercise the same or the like jurisdiction as is or hath been used, practised or exercised in the said court.”²⁷

What happened over the next 150 years has not been well documented. It would appear, however, that the fears of eroding the “rights and liberties of Englishmen” had some impact on judicial procedure in the Common Law courts which began to exhibit the trappings of due process. So by the early 1700s, the practice of judicial questioning had died out at the ordinary criminal trial where the accused was tried for non-political offences.²⁸ The “trial” was a public affair and for reasons of legitimacy, it was inappropriate for the judiciary to be seen adopting inquisitorial methods. In the latter part of the eighteenth century we also see the judiciary formulating rules of evidence to act as an indirect check on certain questioning practices. Thus, by the time of *Warickshall* in 1783, the court was prepared to state:

“... a confession *forced from the mind* by the flattery of hope or by the torture of fear comes in so questionable a shape when it is to be

²⁶Staundford, *Pleas of the Crown*, b. 2, c. 51 (1607), cited by Wigmore, H. (1904), *Evidence in Trials at Common Law*, Vol. 3, p. 292.

²⁷16 Car. c. 10 (1640), s. 4. See also 16 Car.c. 11 (1640) and 16 Car. c. 27 (1640), which removed all powers from the clergy to administer punishment for any crime or to empower others to make presentment of any crime. Henceforth, the clergy were stripped of all temporal jurisdiction and authority.

²⁸Fox, J.C. (1927), *The History of Contempt of Court*, Oxford, Clarendon Press, p. 75. Fox maintained (p. 76) that preliminary examination of prisoners charged with “state offences” by members of the Privy Council continued up until 1840; see the case of *Oxford* (1840) State Trials, N.S., iv, 497.

considered as the evidence of guilt that no credit ought to be given to it; and therefore it is rejected” (emphasis added).²⁹

Judicial concern for voluntariness and for the freedom of the individual appeared to dominate the need for crime control and social order. Confessions prompted by “hope” or “fear” were deemed inadmissible without qualification and irrespective of the discovery of real evidence that suggested their reliability.³⁰

Yet, this judicial development had little impact on pre-trial questioning of the accused by Justices of the Peace.³¹ The Marian statutes had been left untouched by the upheavals of the seventeenth century. Justices of the Peace, not the judges, were now the central figures in the collection of evidence from the accused.³² Although a practice had developed in preliminary examinations before a JP to administer a caution before questioning the accused,³³ the impact on procedure was not uniform. The examining powers of the JP and his ability to extract confessions from accused persons remained. A confession obtained in such circumstances was still deemed voluntary and the best indication of guilt. Indeed, it received judicial sanction.³⁴

²⁹ 1 Leach C.C. 263.

³⁰ On the facts of the case, real evidence was discovered as a result of the confession but had no effect on the latter’s admissibility. This appears to contradict Peter Mirfield’s assertion that the court rejected the confession on grounds of reliability; see *Confessions* (1985), London, Sweet & Maxwell, p. 48. Cases subsequent to *Warickshall* support this voluntarist position. See: *Thompson* (1785) 1 Leach C.C. 291; *Cass* (1784) 1 Leach CC 293n.

³¹ Bryan notes that questioning itself was not explicitly included within the *Warickshall* framework which appeared to concentrate on “threats” and “promises”; op. cit., p. 69.

³² See Bryan, op. cit., p. 52; p. 63.

³³ See Abrahams, G. (1964), *Police Questioning and The Judges’ Rules*, London, Oyez, p. 9.

³⁴ See the comments of Grose J in *Lambe* (1791), 2 Leach Cr.L. (3rd ed), 625, 628. See also: *R v Thomas* (1794), 2 Leach Cr.L. (3rd ed), 727, 729.

By the turn of the century, therefore, protection of the accused through the voluntariness principle was limited in its scope. Although the accused was protected during ordinary trials from torture and compulsory self-incrimination,³⁵ the obtaining of confessions through magisterial or extra-judicial questioning was regulated only in part. The voluntariness rule, although conceptually connected, was divorced from the power to question which enabled local justices to further needs for crime and social control without judicial interference.

The scope of the voluntariness rule and its oscillating application to confessions and powers of questioning through the nineteenth century and into the twentieth, form the subject matter of the remainder of this chapter and the subsequent two.

Setting out the consensus - 1800-1912

It will emerge from the following accounts that there exists a generally accepted view that between 1800 and 1852 the courts universally applied the voluntariness principle and extended the voluntariness “rule” to protect the accused from all manner of questioning. Between 1852 and 1912, however, the conventional wisdom seems to suggest, with one exception, that the judicial pendulum had swung the other way.

³⁵See Bryan, op. cit., p. 67.

This consensus is set out in the writings of James Fitzjames Stephen, John Henry Wigmore, Glanville Williams and Peter Mirfield. Not all of these authors have given the subject the same amount of attention because of the varying purposes of their different treatises. Stephen's observations on confessions and interrogation, for instance, form only a small part of a work devoted to the entire history of the Common Law. We cannot expect the author, therefore, to give the same amount of detail as Mirfield whose book is devoted solely to confessions. Nevertheless, these differences in approach have been taken into account and are reflected in the amount of text that I have set aside for their separate opinions.

James Fitzjames Stephen:

In relation to judicial questioning of the accused during the nineteenth century, it was Stephen's considered opinion that the courts were very protective and would try to avoid at all costs the conviction of an innocent man. Stephen wrote:

“I think it probable that the length to which this sentiment has been carried out in our criminal courts is due to a considerable extent to the extreme severity of the old criminal law, and even more to the capriciousness of its severity and the element of chance which...was introduced into its administration.”³⁶

³⁶(1883), *A History of the Criminal Law of England*, Vol. 1, pp. 438-439.

Judicial acknowledgement of the harshness of the old English criminal law and procedure was the reason why the courts had made the accused incompetent as a witness and immune from judicial questioning. Initially, this was subject to two qualifications: first, in cases of felony where the accused appeared unrepresented; second, in preliminary examinations before a magistrate or JP who was empowered, under the Marian statutes, to take the examination of the accused. According to Stephen, the first exception was no longer operative after 1836 when the accused was given the right to counsel in cases of felony. The second exception was then removed in 1848 by the Indictable Offences Act (Jervis' Act),³⁷ which Stephen maintained had curtailed the ability of a magistrate to interrogate the accused because it required the magistrate to administer a full caution. Section 18 stated:

“after the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the Justice of the Peace or One of the Justices by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: ‘Having heard the evidence do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given against you upon your trial; and whatever the prisoner shall then say in answer thereto shall be taken down in writing, and read over to him,.... and

³⁷11 & 12 Vict., c. 42.

afterwards, upon the trial of the said accused person the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: Provided always, that the said justice or justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: Provided nevertheless, that nothing herein enacted or contained shall prevent the prosecution in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, by which Law would be admissible as evidence against such person.”

Stephen concluded:

“The result of the whole is that as matters stand the prisoner is absolutely protected against all judicial questioning before or at the trial....It is, I think, highly advantageous to the guilty.”³⁸

With regard to powers of extra-judicial questioning, Stephen mentions very little.

He sums up his position in one paragraph as follows:

“At one time the courts were disposed to take almost any opportunity to exclude evidence of confessions, almost anything being treated as an inducement to confess. In 1852, however, the law was considerably modified by the decision of *R. v Baldry*, since which time the disposition has been rather the other way.”³⁹

John Henry Wigmore:

Wigmore tackles the history of questioning of the accused, both judicial and extra-judicial, and its evidential consequences, under the general heading of “Confessions” in his treatise *Evidence in Trials at Common Law*.⁴⁰

Wigmore observed four distinct stages in the history of confession evidence. In the first stage, from the time of the Tudors and Stuarts up to the second half of the 1700s, he discerned no restriction whatsoever on the admissibility of confessions. In the second stage, comprising the second half of the 1700s, some confessions were excluded if they were untrustworthy. In the third stage, comprising the 1800s, “the principle of exclusion is developed, under certain influences, to an

³⁸Op.cit., p. 441.

³⁹Ibid., p. 447.

⁴⁰(1904), revised by Chadbourn, 1970, Vol. 3.

abnormal extent, and exclusion becomes the rule, admission the exception.”⁴¹ In the fourth stage, constitutional considerations predominate.⁴²

Wigmore’s third stage, which appears to end at *Baldry* in 1852, is deemed the high water-mark of voluntarism and sentimentality. He commented:

“There was a general suspicion of all confessions, a prejudice against them as such, and an inclination to repudiate them upon the slightest pretext.”⁴³

The courts had so “disfigured the law of admissibility of confessions” that their decisions had given “an appearance of sentimental irrationality to the law.”⁴⁴ Almost anything was regarded as inducement to confess and tantamount to compulsion. In support, he cited four examples⁴⁵ which he regarded as characteristic of the age and “absurd” because of the apparently trifling nature of the threats or inducements. These included: a promise to give a glass of gin⁴⁶; a statement from the prosecutor that, if the prisoner would only give him his money, ‘he might go to the devil if he pleased’⁴⁷; a handbill, offering a few pounds reward

⁴¹Ibid., pp. 291-292. It should be noted at this point that these observations are general in their application; there is no restriction on the type of confession, the circumstances in which it was obtained, nor the person to whom it was made.

⁴²Wigmore’s fourth stage will not be examined in this thesis because it refers only to the “nationalization” of the American law of confessions; see s. 820d, pp. 306-307.

⁴³Ibid., p. 297.

⁴⁴Ibid., p. 298.

⁴⁵Ibid., p. 297.

⁴⁶*R v Sexton*, infra.

⁴⁷*R v Jones*, infra.

for evidence, posted in the magistrate's office⁴⁸; and a statement to the prisoner that 'what he said would be used *against* him'⁴⁹(his emphasis).

At page 474, under the sub-heading of **Assurance that 'what you say will be used for,' or 'against you'**, Wigmore again stated that the courts were executing "an extravagant policy of exclusion" and cited four cases in the footnotes which excluded confessions in circumstances he thought "ridiculous"; namely: *Drew* (1837),⁵⁰ *Morton* (1843),⁵¹ *Furley* (1843)⁵² and *Harris* (1844).⁵³

In *Drew's* case, Coleridge J excluded the confession because the prisoner was told that what he said would be used *for* him. In *Morton*, the same judge excluded a confession by the accused because he had been told by a police constable that "anything he did say in his defence would be listened to, or assistance would be summoned." In *Harris*, Maule J excluded a confession because the accused had been told "whatever" he said would be taken down and used against him.⁵⁴

In addition to case law, Wigmore offered some sociological insights as evidence for this "sentimental irrationality."⁵⁵ He gave three: first, social conditions and the class divide may have led judges to believe that out of respect, submission and stupidity, poor defendants would have confessed to anything that their superior charged them with; second, in the absence of a right of appeal in criminal cases,

⁴⁸*R v Blackburn*, infra.

⁴⁹*R v Furley*, infra.

⁵⁰8 Car & P. 140.

⁵¹2 Moo. & Rob. 514.

⁵²1 Cox CC 76.

⁵³1 Cox CC 106.

⁵⁴The offending statement in *Furley* has been mentioned above.

⁵⁵Op. cit., pp. 298-301.

isolated judges at Nisi Prius made their decisions without consultation and on independent responsibility.⁵⁶ They often wanted to avoid delays and long consultations with colleagues, and preferred to eliminate the evidence altogether thereby avoiding the problem; third, judges were redressing an inherent unfairness in the criminal procedure at the time which prevented an accused from testifying in his own defence but which allowed his own statements to be used against him. The balance was restored by excluding confessions upon every available pretext. Wigmore concluded that although the exclusionary rule could be legitimately applied in certain rare cases, it had been manipulated by the judiciary during the first half of the nineteenth century to suit their own purposes.

The position after 1852 is not dealt with in any detail by Wigmore. Nevertheless, he seemed to suggest that the principle of exclusion no longer operated to the same degree after that date, when a more rational approach was taken. He attributed the change in mood to “the improvements that had taken place in criminal procedure” and to a desire to “harmonize the accumulated and inconsistent precedents.”⁵⁷ The “improvements” in criminal procedure are not stated specifically, but probably he was referring to the statutory recognition of the right to be represented by counsel in 1836⁵⁸ and the cautioning procedure for the magistrates set out by the Jervis’ Act of 1848.

⁵⁶In his footnotes he mentions, as a proof, twenty Nisi Prius rulings on confessions for every full-bench decision (p. 299).

Glanville Williams:

In his book, *The Proof of Guilt*,⁵⁹ Williams provided an historical overview and critique of the Common Law's approach to interrogation and questioning of the accused in a chapter entitled: "The Right not to be Questioned." He admitted that his focus was limited as it concentrated on questioning of the accused at trial rather than pre-trial.⁶⁰ In spite of the limited scope of the work, Williams offered a generalised account of questioning of the accused which included the pre-trial position. He stated:

"In England, there is no power to interrogate accused persons, whether before the trial or at the trial itself, unless they volunteer to speak."⁶¹

This embrace of the voluntariness principle was expressed by the Indictable Offences Act of 1848 and by the practices of magistrates at the time of Bentham. It was a natural consequence of the animosity to interrogation that had grown up since the days of the Star Chamber. He wrote:

"The exclusion of interrogation at trial naturally⁶² had its effect on the preliminary enquiry, and by Bentham's day some magistrates were making a habit of nullifying the enquiry so far as the accused himself was

⁵⁷Op. cit., p. 297.

⁵⁸The Prisoners' Counsel Act 1836, 6 & 7 Will. 4, c. 114.

⁵⁹Op. cit.

⁶⁰Op. cit., p. 49.

⁶¹Ibid.

concerned, by telling him that he was not bound to answer. This was given statutory compulsion in 1848, when it was enacted in effect that the primary function of the justices was to hear the witnesses against the accused, and having done so, they should warn the accused that he was not bound to say anything in answer to the charge, though he was invited to do so.”⁶³

The basis for his assertion that magistrates had “a habit of nullifying the enquiry as far as the accused was concerned” came from Jeremy Bentham’s work: *A Treatise on Judicial Evidence*.⁶⁴ Writing during the 1820s, Bentham had observed:

“The magistrates exercise despotic power, and can show favour or rigour as they choose. It places in their hands a disguised but arbitrary power of pardon. If the magistrate intends to do justice, he conducts the examination according to the will of the legislator; if he wishes to make a parade of clemency, or show partial favour to the accused, he follows the rule of the common law, and even tells the prisoner to be on his guard, and to say nothing which may turn to his disadvantage.”⁶⁵

In his interpretation of this passage, Williams took Bentham to mean that *as a general rule*, magistrates were telling “the prisoner to be on his guard” and not to

⁶²This argument of historical inevitability applies also to the perceived extension of the rule against questioning to police officers; see Williams (1960), “Questioning by the police: Some practical considerations,” *Crim. LR*, pp. 325-346, at p. 338.

⁶³Op. cit., p. 45.

⁶⁴(1825), Vol. 2, p. 242.

⁶⁵Ibid.

say anything “which may turn to his disadvantage.” A protective cloak had thus enveloped the accused and protected him allegedly from all questioning.

As with Wigmore, Williams had his explanations for these protections.⁶⁶ First, it was natural for English judges to seek a moral high ground to distance themselves from the “hateful spectacle of torture” practised on the Continent, and from similar practices in England carried out by the Star Chamber.⁶⁷ Second, almost all felonies in the early 1800s were punishable with death, but it was not practicable to carry out the number of executions that legal theory required. The inevitable consequence was the acquittal of guilty felons via protective rules of evidence.⁶⁸ Third was the importance placed on procedural propriety and fair play (“mere sentiment”⁶⁹); that the rules of the criminal trial should resemble the rules of private combat. It was thought unfair to get an accused to give evidence against himself because it was like hitting a man when he was down.⁷⁰

Peter Mirfield:

Unlike Williams, Mirfield attempts a more comprehensive analysis of the history of pre-trial questioning of the accused and the limitations that were placed upon it during the nineteenth century in chapters two and three of his book, *Confessions*.⁷¹

⁶⁶These are also reliant upon observations made by Bentham, op. cit., pp. 243-245.

⁶⁷*Proof of Guilt*, op. cit., pp. 49-50, citing Bentham, op. cit., p. 243. Bentham does not cite any evidence for this particular assertion.

⁶⁸Op. cit., p. 51. This is based on a Bentham statement, op. cit. p. 243.

⁶⁹*Proof of Guilt*, op. cit., p. 51.

⁷⁰This is also based on a Bentham statement, op. cit., p. 245.

⁷¹(1985), London, Sweet & Maxwell.

Chapter two tackles the history of confessions from 1800 up to the decision of *Ibrahim* (1914)⁷². In this chapter he mentions the general historical trend of decisions and the judicial response to statements obtained from the accused in a variety of circumstances. He divides the case law into two periods using the decision of *Baldry* (1852)⁷³ as the dividing line: the first, he characterises as “the age of sentimental irrationality;” the second period, up to the close of the nineteenth century, he terms the “progeny” of *Baldry*. What he means by this and whether he thought there was any real distinction before and after 1852 will be mentioned below. At the end of the chapter, he also mentions the judicial response to police interrogation of the accused. This is not included in the general historical analysis. In chapter three, during a discussion of the *nemo debet* principle, Mirfield also refers to the powers of examining magistrates to interrogate the accused. His analysis is dealt with in one paragraph and stops at 1854.

In Mirfield’s assessment of the judicial response to questioning of the accused, he seems to view the period 1800-1852 as generally protective. He states that “judges seem, for the most part, to have been keen to exclude confessions.”⁷⁴ There were two triggers which, if pressed, would lead to exclusion of a confession in most cases. First, the existence of a threat or a promise simpliciter; and second, where there was something so improper in the questioning of the suspect that his statement should be excluded. The results of this approach, he urges, “were

⁷²[1914] AC 599.

⁷³Op. cit.

⁷⁴Op. cit., p. 50.

sometimes ridiculous,”⁷⁵ and quoting Wigmore, “gave an appearance of sentimental irrationality to the law.”⁷⁶

In support of this view, Mirfield cites three cases directly: *Enoch and Pulley* (1833),⁷⁷ *Croydon* (1846),⁷⁸ and *Sexton* (1823).⁷⁹ Of these cases, *Enoch and Pulley* and *Croydon* are used to exemplify the first trigger he identifies in judicial reasoning, and *Sexton* is used to illustrate the second. In *Enoch and Pulley*, a woman who had Pulley in her custody told her that “it would be better to tell the truth or it would lie upon her and the man [her co-accused] would go free.” Park J excluded Pulley’s subsequent confession “as it was made after an inducement”. According to Mirfield, this decision was “irrational” because the court had not asked themselves whether this inducement would have been likely to induce a false confession. He writes: “It is difficult to see how such an inducement could cast doubts on the reliability of the confession.”⁸⁰

In *Croydon*, the court excluded the confession of the accused because a person had told him: “I dare say you had a hand in it; you may as well tell me about it.” Platt B. ruled that the words used amounted to a sufficient inducement. Mirfield deems his decision “ridiculous” because “there is no attempt... to decide how the particular accused would have been likely to interpret the statement; the attractions of a simple, formulaic approach were obviously too great.”⁸¹

⁷⁵Ibid., p. 51.

⁷⁶Ibid., p. 52.

⁷⁷5 C & P 539.

⁷⁸Op. cit.

⁷⁹Op. cit.

⁸⁰Op. cit., p. 50.

⁸¹Ibid., p. 51.

Mirfield regards the case of *Sexton* as providing the best example of exclusion for reasons of impropriety. The accused was suspected of burglary and, while in the charge of a policeman, had told the latter he would tell him all about it if given a glass of gin. Best J refused to admit his subsequent confession on the ground “police officers must not be permitted to tamper with prisoners to induce them to make confessions.” He was afraid that “an over zealous constable might defeat the humane provisions of the law” and resort to “every sort of trick” if he were to admit evidence that had been so “very improperly obtained.” Mirfield does not express his own opinion of the judgement directly, but includes the decision within his framework of “sentimental irrationality.” He also mentions, without qualification, the criticisms of Wigmore, Deacon and Joy.

During his discussion of the decision in *Baldry*, Mirfield cites another four cases⁸² that exhibited judicial “excessive tenderness”; namely: *Drew* (1837),⁸³ *Morton* (1843),⁸⁴ *Furley* (1844)⁸⁵ and *Harris* (1844).⁸⁶ In all of these cases, the confession was excluded by the court and, according to Mirfield, “merely because the infant police caution had been administered to the suspect in a garbled manner.”⁸⁷

In order to give more weight to his observations of this period, Mirfield then proceeds to repeat Wigmore’s three reasons for the existence of this “sentimental irrationality.”

⁸²For the facts of these cases, see the account of Wigmore, op. cit.

⁸³Op. cit.

⁸⁴Op. cit.

⁸⁵Op. cit.

⁸⁶Op. cit.

Mirfield's assessment of the judicial response to questioning of the accused after 1852 is not easy to assess from his text. At one point he seems to suggest that *Baldry* represented a change in judicial thinking that exhibited less sympathy towards the accused. He cites at length the dicta delivered by the Court of Crown Cases Reserved, that they could not "without some shame...consider what objections have prevailed" and that "justice and common sense [had] been sacrificed.... at the shrine of guilt." He also refers to the "progeny" of *Baldry*: *Sleeman* (1853),⁸⁸ *Jarvis* (1867)⁸⁹, and *Reeve and Hancock* (1872),⁹⁰ in which confessions were admitted in spite of the existence of what might have been termed "inducements".

At a later point, however, Mirfield cites cases which exhibited pre-*Baldry* sentiment, such as *Fennell* (1881).⁹¹ Excluding the statement of the accused, Coleridge LCJ had stated, a confession

"must not be extracted by *any sort* of threats or violence, nor obtained by any direct or implied promises, however, slight, nor by the exertion of *any* improper influence."

He then precedes to cite a number of cases dealing with police questioning of suspects, such as *Gavin* (1885),⁹² *Histed* (1898)⁹³ and *Knight and Thayre*

⁸⁷Op. cit., pp. 54-55.

⁸⁸6 Cox CC 245.

⁸⁹LR 1 CCR 96.

⁹⁰LR 1 CCR 362.

⁹¹7 QBD 147.

(1905)⁹⁴ where the courts were also protective of the accused by restricting the ability of the police to ask questions.

Mirfield's observations on the judicial approach to pre-trial questioning of the accused can be summarised as follows: up to 1852, the courts are very protective of the accused in general and are prepared to exclude a confession in circumstances where there is little doubt in its veracity; after 1852, the courts appear less protective but not unambiguously so.

As for the interrogation powers of magistrates, Mirfield shares the same opinion as Stephen and Williams. He maintains that by 1850 "the prisoner is absolutely protected against all judicial questioning."⁹⁵ He states that this was the combined effect of section 18 of the Indictable Offences Act 1848, which required examining justices to caution the accused that he was not obliged to say anything, and the decision in *Berriman* (1854)⁹⁶ which took the view that the magistrate was prohibited from questioning the accused other than in terms specifically allowed by the Act itself. As an historical explanation, he maintains that the magistrates had assumed a more judicial role and, like judges before them, were anxious to avoid any association with the procedures of the Star Chamber.

⁹² 15 Cox CC 656.

⁹³ 19 Cox CC 16.

⁹⁴ 20 Cox CC 711.

⁹⁵ Op. cit., p. 67.

⁹⁶ 6 Cox CC 388.

Conclusion:

In this chapter, I have set out individually the views of four writers each of whom has been a leading commentator in his generation, and has presented a history of English criminal justice through the rules relating to confessions and questioning of the accused. One might have expected that over a period of more than one hundred years, different conceptions and interpretations of history would have evolved, taking into account the new understandings of the time. Yet, if we look at these presentations of history collectively, a consensual view over the role of the accused is apparent. Hence, between 1800 and 1852, Stephen, Wigmore, Williams and Mirfield all argue that the courts took a protective approach to pre-trial questioning of the accused. They maintain that the courts had placed procedural fetters on magistrates to caution the accused against self-incrimination, and had excluded both judicial and extra-judicial confessions upon the slightest pretext. This was deemed to be the product of a “sentimental irrationality” that had emerged following the collapse of the Star Chamber.

Although the position after 1852 is not as clear and far less details are provided by the writers, all agree that the accused is protected against judicial questioning. They differ only as to the extent of the protection against extra-judicial questioning. Even here, however, there appears to be a general position that the courts were less protective after 1852. Williams is the lone voice proclaiming the accused is protected from all forms of pre-trial interrogation.

In their presentation of the role of the accused, it seems that conventional wisdom has constructed the individual within a dialectical history of “progress” and “social evolution.” During the reigns of the Tudors and Stuarts where freedom, due process and the Rule of Law were barely recognized, the consensus views the individual as a “subject” of royal power. As a result of constitutional conflict during the seventeenth century, a new construction of the individual based on “sentiment” emerges: the “citizen.” The “citizen” is equipped with an armoury of rights which protects the freedom of all individuals, including accused persons, from violations by the “state.” During the second half of the nineteenth century (post-1852), “sentiment” conflicts with “reason,” producing an “enlightened” construction of the individual that separates the “citizen” from the “criminal”: i.e. the “suspect.”

I suggest that this conceptualisation of history, this presentation of the formative values of the English criminal justice system and the role which the accused is perceived as playing, cannot be accepted at face value. An honest and accurate account of history requires a re-evaluation of the data upon which such theories are built. In chapter two, therefore, I examine in detail the building blocks and evidential foundations of the consensus.

Questioning of the Accused and the Construction of the Individual

Chapter two

1. Introduction:

In the last chapter, I set out the early history of pre-trial judicial and extra-judicial questioning of the accused as understood by leading writers, and suggested that this presented a picture of development and progress. As a result of “improvements” in criminal procedure, they observed in general terms that the role played by the accused by the middle of the nineteenth century (1852) was no longer dictated by authority; the accused was a citizen with all the rights and freedoms that entailed. But liberal sentiment had taken protection of the individual too far resulting in judges excluding statements of the accused “upon the slightest pretext”¹ and wherever there was a breach of procedure. The case of *Baldry* in 1852 was deemed to represent the foundations of the modern system in which rationality rather than voluntarist sentiment informed the underlying values of the English criminal justice system.

The object of this chapter is to subject this interpretation of history to critical scrutiny, and to assess the evidential and methodological foundations upon which it has been based. It will be argued that these writers have been unsystematic, which in turn has led to a number of inconsistencies and contradictions in the picture presented. It will also be maintained that the conventional wisdom is

further undermined by its approach to the evidence and the quality of the data relied upon.

It will be apparent that as this critique unfolds various inconsistencies may arise; but this is an unavoidable consequence of having to work within the analytical framework that has been laid down. The search for an alternative analytical framework is dealt with in chapter three.

2. Examining the consensus:

a) Methodology

All of the writers argue that certain values dominated particular eras or specified time frames and that this was reflected in judicial attitudes towards questioning of the accused. Judged by academic criteria, such general conclusions would require a systematic framework for them to have any validity. Thus, we would expect the leading writers to examine both judicial and extra-judicial questioning of the accused within the same time frame. Yet, they chose to examine judicial and extra-judicial questioning separately and within different time frames, or focused on one aspect of questioning to the exclusion of the other. As a result, the arguments advanced are riddled with inconsistencies and contradictions. For instance, Stephen writes that by 1848 the accused was “absolutely protected against judicial questioning;” but he also states that by 1852, the courts were not as protective as they used to be when determining the admissibility of confessions.

¹Wigmore, op. cit., p. 297.

The former gives the impression of a system that by the 1850s is orientated around the need to protect the accused; the latter of a system that has other interests it thinks it should protect. If these rules had been analysed within a theoretical framework, these two positions might not seem so inconsistent; but in their current form it is difficult to avoid the contradiction.

This problem is even more apparent in Wigmore's analysis. Wigmore's general proposition consists of two parts. The first claims that the law of confessions can be explained through certain stages in history, each having its own defining characteristics. Within this general theory, he argues that the 1800s were characterised by "a general suspicion towards all confessions....and an inclination to repudiate them upon the slightest pretext." The second claims that judicial decisions up to 1852 gave an "appearance of sentimental irrationality to the law" as judges excluded statements of the accused due to the possible influence of social class, the absence of a right of appeal and a set of rules of criminal procedure that were regarded as unfair to the defence. After 1852 and *Baldry*, the law is rationalised and the same factors no longer appear to operate. Thus, the first part is presented as a general claim and covers the whole of the 1800s; while the second states that the values behind judicial decision-making were different before 1852 from those values that were applied after 1852. Indeed, the latter seems to suggest that there was no "general suspicion" throughout the 1800s. Contradictory propositions are advanced, therefore, within the same time period.²

²Similar contradictions are apparent in Mirfield's work as he implies, in chapter two, that the courts were less protective of the accused after *Baldry* in 1852; but then in chapter three, he states that he

The absence of a consistent analytical framework also accounts for the occasional incoherence of some of the arguments. This is particularly evident in Mirfield's work. In his description of confession evidence up to 1852, for example, he sets out two possible themes: first, judicial protection of the accused; and second, judicial method in determining admissibility of evidence. In the account that I set out in the last chapter, however, the role of the accused disappears as a theme after 1852 and then suddenly resurfaces in the discussion of *Rules on Police Questioning*. At no stage in his discussion of the case law after 1852, does Mirfield provide a general assessment of the attitudes of the courts in relation to the accused between 1852 and the decision in *Ibrahim*. Instead, he appears to focus on the methods of judicial reasoning (even this is not clear because of his discussion of police questioning). Having raised the first theme in his first section, Mirfield ought to have examined it throughout the period which he was analysing. As for his section on *Rules on Police Questioning*, it is not altogether clear why it has been included in the chapter. Although he states that the courts began to become concerned with police questioning of the accused after 1885, there is no link with the earlier passages. It is treated as a separate development that emerged "out of the blue" and which will be picked up later. Its relationship with his two possible themes is not discussed.

The absence of any systematic method is evident also in the tendency to prefer theories or explanations plucked from repositories of "common sense," rather than from verifiable data. Hence Wigmore's explanations for the judicial "sentimental

agrees with Stephen that, *by 1850*, "the accused was absolutely protected against all judicial questioning"(p. 67).

irrationality” before 1852 are not based upon case analysis or upon any other data. He argues that social conditions and class relations were behind this judicial sentiment but this is not supported by any references to the case law nor to the social situations in which many cases arose.

Even where he cites data, they are presented so as to fit his theories instead of providing the foundation from which a theory could be constructed. His historical analysis includes only those cases that appear to support his conclusions; the cases that refute it are mentioned only in the substantive chapters where they are confined to their particular facts and sub-category in the law of confessions.

Distorted evaluation of the data caused by adherence to pre-determined theories is compounded by their interpretation in the light of original premises or unacknowledged ideology. For instance, Wigmore constructs his propositions on the basis of a legal philosophy which states that the object of the criminal trial is to convict the guilty simpliciter. When a judge comes to determine the admissibility of evidence, he presumes that his decision should be based on its reliability. Thus if a confession is obtained illegally or involuntarily, it will be excluded only if, in the circumstances, it is likely to be untrue. The consequence of Wigmore’s argument is that unless a judge decides in this way, his reasoning is “irrational.” The cases which he cites as examples of “sentimental irrationality” are decisions in which the judge did not use his reliability principle.³

³It might be argued, for instance, that it is not “irrational” for a judge to be concerned with protecting individual rights because it protects the legitimacy and integrity of the system.

Mirfield is guilty of the same error. He determines the values of English law in the nineteenth century by reading Wigmore, Stephen and Bentham. Case law is cited to justify those opinions rather than to evaluate them, and any decisions that are inconsistent with their analyses are rationalised or relegated to the footnotes.⁴

b) The wrong type of evidence

Not only is the approach of the leading writers unsystematic, but it is also highly dependent upon data that are poor in quality and equivocal in nature. Three of the writers (Stephen, Wigmore and Mirfield) rely either directly or indirectly on case reports from the nineteenth century. Yet, the details of judicial reasoning for decisions are rarely stated in the reports (particularly before 1850); cases such as *Cox v Coleridge* provide the exception. Further, in a significant number of cases the judgement is not even reported verbatim. The case reporter prefers to leave us with a bare summary.⁵ Moreover, where the case report details the facts of the case and cites the judgements verbatim, there is often more than one plausible interpretation.⁶ The quality of these original data thus renders problematic any explanation through case law alone of the values which the judiciary applied. The case law is too ambiguous and, as a consequence, is open to different interpretations.

The ambiguity of the evidence cited, and the degree to which it supports the positions advanced by each writer will be explored in the next section.

⁴See p. 50, op. cit. The implication is that the cases mentioned in the footnotes are exceptional, but Mirfield does not indicate why we should treat them as such.

Assessing the Evidence

James Fitzjames Stephen:

Protecting the accused against “judicial questioning”:

In his first section, he claims that by 1848, the year in which the Indictable Offences Act 1848 was passed, the accused was “absolutely protected against *all judicial questioning* before or at the trial.” In short, he contends that English law offered to the accused every conceivable protection against improper questioning by judges at the trial and by magistrates during preliminary examinations.

The first evidence that Stephen uses to support his claim is the Indictable Offences Act 1848, section 18.⁷ He states that the accused was “absolutely protected” because the section required magistrates to warn the accused not to say anything and that if they did, it would be taken down and used in evidence.

It seems that, at first glance, the section is very protective because the procedure consists of warning the accused of the dangers not once, but twice of saying anything. The procedure appears mandatory because the section states the magistrate “shall” administer to the accused the first warning that “you are not obliged to say anything,” and “always...shall state to him and give him clearly to

⁵For example, see: Row, Thornton, Gilham and Wilde, op. cit.

⁶See, for instance, the discussions of Jarvis, Reeve and Hancock and Sleeman, infra.

understand, that he has nothing to hope from any promise of favour.” The content of the first warning also implies that the magistrate has no power to force the accused to make a statement because it states that he is “not obliged to say anything.”

While the section appears to limit the magistrate’s powers of questioning, it is doubtful it amounted to “absolute protection” from questioning because no “rights” are conferred upon the accused in the event of any breach of those powers. The first caution, for example, states “*whatever* you say will be taken down in writing, and may be given against you upon your trial” (emphasis added). The word “whatever” seems to suggest that even if the magistrate decided to interrogate the accused, with or without a caution, the answers would be admissible at the trial. The second caution admits statements of the accused explicitly even if the magistrate himself, or his clerk, had threatened the accused because it states “whatever he shall then say may be given in evidence against him upon his trial, *notwithstanding* such promise or threat.”

The final proviso precludes any evidentiary consequences if the accused is not cautioned. It states, “*nothing* herein enacted or contained shall prevent the prosecution in *any case* from giving in evidence *any* admission or confession or other statement of the person accused or charged, *made at any time*, which by Law would be admissible as evidence against such person” (emphases added). This suggests that unless the confession had been preceded by a threat or a promise, any statement made by accused persons, whether to a police officer or to a magistrate,

⁷See chapter one, p. 7.

would be admissible in criminal proceedings. If this interpretation is correct, the caution operates in order to *facilitate* the admission of evidence that would otherwise be inadmissible; it does not purport to protect the accused.

In fact, it seems that the statute is intended more as guidance for the magistrate rather than as a set of legally binding procedures. If we examine the content of the warnings, the Act does not specify the actual words to be used. The section prefaces the caution with: “and shall say to him these words, or *words to the like effect*” (emphasis added). Further, if we examine the Parliamentary debates that took place during the passage of the Bill for the Indictable Offences Act 1848, the draftsman did not use mandatory language that would place magistrates under a legal obligation to caution. To have done so, would have encouraged civil actions against magistrates which the Act was designed to prevent. Introducing the Bill to the Commons, the Attorney General lamented:

“at present, the law upon the subject was to be found scattered among many Acts of Parliament, and many recorded decisions of the courts; and it was difficult, if not almost impossible, for magistrates to execute their various functions without being subject to prosecutions or actions in the honest performance of their duty.”⁸

The object of the section was to lay down a mandatory procedure for magistrates to follow so that *they* would be protected against actions for malicious

⁸*Parl. Debates* (HC: 1848) 3rd series, vol. 96 (3rd Feb. col. 4).

prosecution, etc.;⁹ the object was not to provide a canopy of rights to protect the accused against abuses of state power.

An examination of the case law

As section 18 does not offer protection to the accused against the questioning of a magistrate unequivocally, it is important that we examine the case law. It should be noted that Stephen does not provide any specific evidence from case law. Nevertheless, he states, in general, that the courts were very protective of the accused in the nineteenth century when it came to judicial questioning.¹⁰ This would suggest that the accused was never prejudiced by the questioning of a magistrate. As the 1848 Act was intended to codify the existing law,¹¹ I will examine the case law before and after 1848.

(i) The position before 1848:

From the beginning of the nineteenth century, there was a line of judicial authority protective of the accused. Judges prohibited magistrates from questioning the accused in the same way as a witness;¹² they held that no power existed to compel the accused to make a statement,¹³ nor to trick him into making one.¹⁴ They also cautioned the accused, as a matter of practice, of the dangers of making any

⁹During the same debate, it was pointed out that some magistrates had even tendered their resignation because they were being harassed with actions (*ibid.*, at col. 6).

¹⁰*HCL*, op. cit., pp. 438-439.

¹¹See the speech of the Attorney General; *Parl. Debates* (1848 HC), op. cit.

¹²See *Wilson* (1817) Holt 597.

¹³See *Green* (1832) 5 Car & P 312.

¹⁴*Arnold* (1838) 8 Car & P 621.

statement,¹⁵ and refused to hold the caution was always curative of irregularities in questioning of the accused.¹⁶

This does not mean, however, that the courts always protected the accused from being questioned, nor that they offered him every protection. Indeed, after 1826 the courts held that the statements of an accused made during a magistrate's interrogation were admissible so long as the magistrate did not induce or threaten the accused.¹⁷ Although there are instances of the courts excluding statements of the accused because of a failure to caution, this was only because of the presence of an earlier inducement;¹⁸ confessions obtained by an inducement were inadmissible in any event.¹⁹ There is not a single decision before 1848 that held a confession should be excluded merely on the ground that a caution was not administered to the accused. The caution was not used as a protective procedure which accused persons could utilise in their defence. Moreover, in some cases possible threats were construed as cautions to facilitate the admission of evidence. In *Wright's Case* (1830),²⁰ the accused was told by the magistrate during a preliminary examination that his wife had already confessed, and that the case was strong enough against him for a bill to be sent to the grand jury. Counsel for the accused objected that this amounted to a menace and that the subsequent confession made by the accused should be excluded. But Parke J. held that the

¹⁵See: *Gilham* (1828) 1 Mood. 186; *Clewes* (1830) 4 Car & P 221 at 223; *Webb* (1831) 4 Car & P 564 at 564; *Green* (1832) 5 Car & P 312 at 312; *Drew* (1838) 8 Car & P 140 at 141.

¹⁶See Best J in *Sexton* (1823), op. cit. at 103; Denman CJ in *Howes* (1834) 6 Car & P 404; *Rule* (1844) 8 J.P. 599.

¹⁷See *Ellis* (1826) Ry & M 432.

¹⁸See *Cooper v Wicks* (1833) 5 Car & P 536.

¹⁹The rule in *Warickshall*, op. cit.

²⁰1 Lewin 47.

statement of the accused was admissible because the magistrate's interjection amounted only to a "caution".

Further, it is unlikely that accused persons, many of whom were illiterate, would have understood the significance of the caution, as there was no guarantee of legal representation before a magistrate. In *Cox v Coleridge* (1822),²¹ the defendants were two justices of the peace who were carrying out a preliminary enquiry in relation to a felony allegedly committed by the prisoner. During the course of their proceedings, an attorney (the plaintiff) entered the room, stating he had been retained by the prisoner. Whereupon the justices ordered that the attorney be removed forcibly from the room. The plaintiff's action for trespass and common assault depended on whether there was a general "right" for the accused to have counsel during a preliminary enquiry. It was held by a majority of the court that no right to counsel (or an attorney) existed at this stage of the proceedings, although a discretion was vested in the court to allow representation in individual cases. According to the majority opinion, the magistrate's preliminary examination was, in many instances, an investigation into the circumstances of the offence and that it was not appropriate to grant representation to the accused at this stage. The attitude of the court is best summed up by Best J:

"Besides, if this right exists, there can never be any private examinations, which are very frequent, and often very necessary for the purpose of justice. They are useful, not merely to take down in writing such evidence as is to be offered at trial, but to find where further evidence may be

obtained, and to get at accomplices. These objects would be defeated if any one had a right to be present who could convey intelligence of what had passed.....It may be extremely hard that an innocent person should be confined for an hour, when, if he were allowed professional assistance and witnesses, he could demonstrate his innocence, and entitle himself to his discharge. But there is no rule, however wise, that does not produce some inconvenience or hardship, and the question always must be, does the good outweigh the evil. Considering how many desperate offenders might escape justice, and proceed uninterrupted in their guilty career, if this right were allowed, I have no hesitation in saying that it ought not to be admitted, and that we ought to give judgement for the defendants.”²²

Contrary to Stephen’s assertions, the language of Best J indicates that the court was more interested in convicting “desperate offenders” than protecting the accused against magisterial questioning. This decision is particularly severe in the light of the fact the prisoner was illiterate and not in the best position to defend himself.²³

Four years after *Cox v Coleridge*, however, it appears that the courts had changed their stand. In *Ellis* (1826)²⁴, the accused claimed “the *right* of his attorney’s attendance and assistance”²⁵ during his examination before the committing

²¹ 1 Barn. & Cress. 37.

²² Ibid., at 54-55. See also the judgment of Abbot CJ at 49 which is expressed in similar language.

²³ See defence counsel’s speech at p. 46.

²⁴ Ry & Mood. 432.

²⁵ Ibid.

magistrate, but was refused by the magistrate. Littledale J subsequently acquitted the accused because he had been denied professional assistance.

Yet, the significance of this change is not clear. *Ellis* was only authority for the proposition that the accused had a right for counsel to be present at committal proceedings where he requested it. The court was not under an obligation to provide the accused with counsel nor to tell him that he had a right to be represented. This had two consequences. First, an accused who was poor would not have been able to afford legal representation and therefore, would not have been protected. Second, if he was illiterate and ignorant, as many suspects at the time appear to have been, he might not have realised the need for a lawyer at committal proceedings.

It should also be mentioned that many of the investigative functions of magistrates were being transferred gradually to police officers, whose legal powers of questioning, although not set out by statute,²⁶ had not been limited in a significant way by the courts. By 1831, they mentioned the need for a caution, but only in very limited situations. In *Swatkins* (1831),²⁷ Patteson J believed a confession was unsafe if it was made to a constable after an interview with a different officer (because of the dangers of collusion) without a caution. He held, however that the caution was unnecessary on the facts because the accused had been “detained as an

²⁶See the Metropolitan Police Act 1829, 10 Geo. IV, cap. 44. Section 7 confers powers to “apprehend” and “secure” in custody those whom he has just cause to suspect, etc; it does not confer any power to question the accused.

²⁷4 Car & P 548.

unwilling witness” and was not under any charge at the time.²⁸ In *Kerr* (1837),²⁹ Park J made it clear that even in cases where the accused was detained under a charge or as a suspect, a police constable was not legally obliged to caution the accused before asking a question. He stated:

“there does not appear to have been anything improper in the conduct of the policeman; though, treating it as a general question, I think that it is better that it should not be done.”

As with the magistrate’s caution to the accused, it was up to the police officer to decide whether, in the circumstances of the individual case, he should caution or not (although a judge would caution the accused in similar circumstances).

Even in those cases where a police officer did caution an accused, it is unlikely that he would have understood its significance. There was no right to legal advice at this stage, so the caution would not have had, necessarily, any protective effect.

In the final analysis, up to 1848 it could not be said that the accused was “absolutely protected” against judicial questioning. A special procedure, in the form of a caution, was applied when the accused was questioned but this was not for his/her benefit. The prime objective was to ensure the admissibility of statements. Assistance of counsel was made available but only in limited

²⁸Ibid., at 550. It should be stressed that Patteson J was not saying that a statement of an accused under charge was inadmissible unless preceded by a caution. Rather, he was confirming that a confession should not be admitted when there is a possibility that a person under a charge may have been induced by a person in authority. Such a confession would be inadmissible unless the accused repeated his statement after a caution.

situations, and at a time when the real questioning powers were exercised by police officers who could question an accused in the absence of lawyers and away from the public gaze.

(ii) An examination of the case law after 1848

Questioning by Magistrates:

Stephen's claim of "absolute protection" is also difficult to accept after 1848 and the passing of the Indictable Offences Act because of continuous disagreements over the evidential effect of section 18. According to Stephen, section 18 prevented the magistrate from questioning the accused without a caution, which had the effect of sealing his lips during the preliminary examination. Although this assessment is supported by *Kimber* (1849),³⁰ *Higson* (1849)³¹ and *Pettit* (1850),³² where the prosecution was obliged to prove to the court that a caution had been duly administered to the accused *before admitting his statement*, in *Samsome* (1850)³³ Campbell LCJ held that the proviso containing the caution was "merely a direction to the magistrates how to proceed, and not a condition precedent." He continued:

²⁹8 Car. & P. 177.

³⁰3 Cox CC 223.

³¹2 Car & P 769.

³²4 Cox CC. 164.

³³4 Cox CC. 203. This decision was made "en banc."

“If he neglects his duty, there is no clause of nullity in the statute, nothing to exclude a confession which would be admissible at Common Law.”³⁴

In the eyes of this bench, therefore, the true import of section 18 lay in the expression, “or words to the like effect,” rather than the word “shall.”³⁵ The Act was intended only to guide magistrates in the execution of their functions; it was not envisaged that “obligations” would be imposed upon them which the accused could utilise in the presentation of his defence. This was confirmed by the proviso which assumed statements of the accused were admissible in the absence of a magistrate’s caution.

As no power to exclude evidence attached to the giving of a caution, its purpose and role could not have been to protect the accused, as Stephen claimed. In fact, the purpose of the caution is made clear in the earlier part of Campbell LCJ’s judgement. He states:

“in this case there was no evidence of any promise or threat whatever, and therefore there could be no necessity for showing that any caution had been given; for I am of the opinion that the giving of such a caution cannot be a condition precedent to the admissibility of every declaration made by a prisoner to magistrate read over to him and signed by him.”³⁶

³⁴Ibid., at 207. The rest of the judges state they “concur” with Campbell LCJ or are “entirely of the same opinion.”

³⁵See further, p. 6 *supra*.

³⁶Ibid.

If a caution was necessary only upon the discovery of a threat or promise, its demonstrable function was to negative the effect of that threat or promise; it was not to warn and protect the accused against making any further statement. In other words, the caution operated to facilitate the admission of statements rather than to prevent them from being made.

In *Stripp* (1856),³⁷ the pre-*Samsome* position was reaffirmed indirectly by Jervis CJ,³⁸ but there was a difference of opinion amongst the judiciary after 1848. In *R v Bate* (1871),³⁹ Montague Smith J took the same approach as the court in *Samsome*. He stated section 18 of the 1848 Act “was framed for the very purpose of *dispelling* (emphasis added) from the prisoner’s mind any hope or fear excited by a promise or threat.”⁴⁰ Consequently, written statements made before the committing magistrate were admissible notwithstanding the presence of an earlier inducement by the police officer.

If the courts were still holding that the magistrate’s caution could be curative of improper questioning of the accused by a police officer, Stephen was wrong in assuming that the courts consistently used the caution to protect the accused.

³⁷Dears. 648

³⁸By stating that “section 18 of 11 & 12 Vict. c. 42, which requires that a prisoner shall be cautioned, in order to render what he says admissible in evidence against him...”, Jervis CJ assumed that the caution was a condition precedent to admissibility. No reference was made to *Samsome* in the judgment because it was not relevant to the determination of the case.

³⁹11 Cox CC. 686.

⁴⁰*Ibid.*, p. 688.

As for the provision of legal assistance during preliminary proceedings, there is no additional case law up to the time Stephen was writing, that provided any more guidance on the issue. It appears that the issue had been settled.⁴¹

Questioning by police officers:

In the case analysis of judicial questioning before 1848, it was mentioned that the protections afforded to the accused were insignificant because the police had taken over the responsibility of investigative questioning. It was also observed that the protection afforded to the accused during such questioning was minimal. An analysis of the case law between 1848 and 1883 shows no agreement among the judges as to the circumstances in which a police officer was able to question an accused, if at all, nor as to the evidential consequences that followed if he exceeded his powers.

In *Berriman* (1854)⁴² the accused was questioned by a police officer on the basis of a local rumour that she had given birth to and killed a child. The accused made a statement to the police officer who then charged her with murder. During the course of his testimony, the police officer was about to refer to her statement when Erle J interjected:

⁴¹It should be pointed out that the Indictable Offences Act 1848, s 17 implied the right to have legal counsel present during the committal if the accused wanted, as depositions of witnesses could not be admitted at the trial unless "he or his counsel or attorney had a full opportunity of cross-examining the witness." This does not mean, however, that the accused had the right to be *provided with* counsel at this stage.

⁴²Op. cit.

“By the law of this country, no person ought to be made to criminate himself, and no police officer has any right, until there is clear proof of a crime having been committed, to put searching questions to a person for the purpose of eliciting from him whether an offence has been perpetrated or not. If there is evidence of an offence, a police officer is justified, after a proper caution, in putting to a suspected person interrogatories with a view to ascertaining whether or not there are fair and reasonable grounds for apprehending him. Even this course should be very sparingly resorted to....I wish it to go forth amongst those who are inferior officers in the administration of justice, that such a practice is entirely opposed to the spirit of our law.”

In Erle J's formulation of English law, a police officer was not allowed to question an accused without “clear proof of a crime having been committed.” He fails to elaborate upon what constitutes “clear proof,” but it is evident from the facts that this did not include mere rumour. If “clear proof” existed, a police officer had the right to question a “suspected person” in order to determine whether he should make an arrest, but only after administering a caution. Yet he stressed even that course of action should be resorted to “very sparingly.”

The evidential consequences of a police officer breaching these powers is not set out clearly by Erle J and left a lot to judicial interpretation. First, it is not apparent whether there was a new “exclusionary rule” of evidence, a discretion to exclude on the facts, or a combination of these. Second, if there was a new exclusionary rule, there was uncertainty as to its scope. The operative factor(s) were not stated;

they could have been questioning in the absence of independent proof of an offence, questioning without a caution, or a combination of these. Third, if this was a new exclusionary rule coupled with a discretionary power to exclude where questioning with a caution had been resorted to frequently rather than “sparingly,” he does not state in what circumstances a police officer would be allowed to question without judicial interference.

In general, the case appears protective of the accused, but it would be overstating the case to argue that Erle J had ensured the accused was “absolutely” protected, as Stephen implied. The evidential consequences were not set out clearly and a judge could have interpreted them very narrowly. The only absolute prohibition appears to be questioning an accused without proof of an offence having been committed. The number of situations in which that would occur, however, would be few. In all other instances, he seemed to suggest the police officer had a “right” to ask questions because he stated “no police officer has any right, *until* (emphasis added) there is clear proof of a crime having been committed.” No evidence was required to show that the suspect had any connection with the crime other than mere suspicion. The only protection afforded to the accused was the caution, the legal significance of which is unstated.

The cases between 1854 and 1883 reveal different opinions in respect of police questioning, and thus different degrees of protection extended to the accused. The full range of views is best illustrated by court decisions in Ireland during the 1850s and 1860s, and which were cited frequently in English courts. At one end of the spectrum, judges took a protective approach and excluded statements of the

accused on grounds of the unconstitutionality of police questioning, with or without a caution, before or after the charge.⁴³ They also excluded statements because custodial police questioning of the accused, even in the absence of specific threats or inducements, breached the rule that confessions must be voluntary.⁴⁴ There were Judges also at the opposite end of the spectrum, who did not view police questioning of the accused as constitutionally improper nor as a necessary violation of the voluntariness rule. Statements of the accused could be excluded only if there had been held out threats or inducements. The legality of police questioning of the accused was thus irrelevant to the issue of admissibility.⁴⁵ There were also judges who sought the middle ground; that there was nothing improper in police questioning of the accused per se, but the circumstances of that questioning, along with the absence of any caution could be factors that a judge could take into account in the exercise of his discretion.⁴⁶

In some of the English cases of that period, another judicial compromise was found: to condemn custodial police interrogations of accused persons conducted without a caution in the summing up to the jury, rather than to exclude altogether statements so obtained. In some instances, this approach did not prejudice the accused. In *R v Cheverton* (1862),⁴⁷ for example, a police superintendent had gone to see the accused with regard to the alleged murder of her illegitimate child. He asked her certain questions, without cautioning or explaining to her the object of

⁴³See : *Bodkin* (1863) 9 Cox CC 403; *Toole* (1856) 7 Cox CC 244, per Pigot CB, at 245; *Gillis* (1866) 11 Cox CC 69, per O'Hagan J at pp 72-73.

⁴⁴See: *Toole* (1856), *ibid*, especially Baron Richards at p. 245; *Hassett* (1861) 8 Cox CC 511.

⁴⁵See *Johnstone* (1864) 15 ICLR 60, especially the majority judgments of Deasy B, Ball J and Monahan CJ. Note also, however, the vigorous dissents of O'Brien J, Lefroy CJ and Pigot CB.

⁴⁶*Ibid*, per Hayes J at pp 84-85.

⁴⁷2 F & F 833.

his inquiries. The now Chief Justice Erle, did not consider the failure to caution as a ground for excluding her replies. Instead, in his summing up to the jury he commented:

“It has been suggested, on behalf of the prisoner, that the child supposed to be murdered was sent away by her, and is, or may be, alive. That is not for her to prove, but for the prosecution to disprove. To disprove it, her answers to the questions of the police superintendent on the second occasion are relied upon. To put such questions without any caution was most improper, especially since the prisoner does not seem to have been aware of their drift or object. And an unmarried woman might naturally be reluctant to answer fully as to her illegitimate children.”⁴⁸

In the event, the accused was not prejudiced. The tenor of Erle CJ’s summing up and its intimation to the jury of the evidential value of her statements did enough to secure an acquittal.

In other cases, the accused was not so fortunate. In *R v Mick* (1863),⁴⁹ the accused was charged with feloniously wounding with intent to do grievous bodily harm. On being taken into the police station, the accused was interrogated by the superintendent without a caution. The caution was administered only after the police officer knew that the accused was willing to make a statement. In considering the admissibility of the statement, Mellor J stated:

⁴⁸Ibid., p. 835.

⁴⁹Op. cit.

“I think the course you pursued in questioning the prisoner was exceedingly improper. I have considered the matter very much: many judges would not receive such evidence. The law does not intend you, as a policeman, to investigate cases in that way. I entirely disapprove of the system of police officers examining prisoners. The law has surrounded prisoners with great precautions to prevent confessions being extorted from them, and the magistrates are not allowed to question prisoners, or to ask them what they have to say; and it is not for policeman to do these things. It is assuming the functions of a magistrate without those precautions which the magistrates are required by law to use.....The evidence is admissible, but I entirely disapprove of this way of obtaining it.”

The accused was found guilty subsequently and sentenced to 12 months’ imprisonment. In the other cases that followed this compromise, there is no indication in the reports of the sentence given to the accused.⁵⁰

Although these cases do not attach any evidential significance to the legality of police questioning of the accused, in 1863 Mellor J admitted that “many judges would not receive such evidence.” Arguably, this indicates that English judges were as split over the issue as judges had been in Ireland.

⁵⁰See further: *R v Regan* (1867) 17 LT 325; *R v Reason* (1872) 12 Cox CC. 228.

In the 1870s, it is unclear which one of the approaches to police questioning of the accused prevailed in judicial thinking because of ambiguity in the case reports. In *The Yeovil Murder Case* (1877),⁵¹ for example, the accused were tried for breaking into a dwelling house and stealing. During his testimony, the superintendent reported his conversation with one of the prisoners and stated that he had asked the accused if he could account for himself on the night in question (there is no mention of a caution). Interrupting his testimony, the Lord Chief Justice stated:

“the law did not allow a man under suspicion and about to be apprehended to be interrogated at all. A judge, magistrate, or jury could not do it, and it was a very great mistake to do so in this instance.”

Although the potential protection this afforded to accused persons was much wider than that offered in *Berriman*, as a police officer was prevented even from questioning a person suspected of committing a reported offence, the case report does not state whether the statement was excluded. The possibility exists, therefore, that judges preferred to leave the matter of interrogation of the accused to the jury.

By 1883, at the time Stephen was writing, the law relating to police questioning had become very complex and uncertain, containing a variety of sentiments and approaches. In general, the courts expressed a rhetoric that was very protective of the accused, but it did not confer any necessary benefit because the evidence was

⁵¹41 JP 187.

still admitted in a significant number of cases. In the other cases, words were more than rhetoric; statements were excluded merely on account of police questioning, or because a caution had not been administered in the appropriate manner. Whether or not an accused would have been “protected” against such questioning, therefore, would have depended upon the values of the individual judge.

Protecting the accused using the law on confessions

In his second section, Stephen commented on the law of confessions and the rule that confessions must be voluntary. He stated that a very protective approach was evident up to 1852, where the courts were prepared to take “almost anything as an inducement to confess.” Stephen does not cite any direct evidence to support this assertion, but cites pages from Taylor, *On Evidence*, as the authority.

Yet, it is evident from the case law that the courts were not always so protective of the accused and did not take “almost anything as an inducement to confess.” As early as 1809, there were judges who restricted the operation of the rule in a number of respects. First, it was held that a confession could only be excluded if threats or inducements were made by “persons interested”⁵² in the prosecution of the accused. In *Row*,⁵³ the court refused to exclude a confession obtained as a consequence of threats from friends and neighbours. In *Gilham* (1828)⁵⁴ and

⁵²In later case law, the terminology is changed to “person in authority”. See further the judgments of Park J in: *R v Gibbons* (1823) 1 Car. & P 96 at 98; *R v Kingston* (1830) 4 Car. & P 387.

⁵³Russ. & Ry. 153.

⁵⁴1 Mood. 186.

Wilde (1835)⁵⁵, the rule was further refined to ignore threats or inducements that were “spiritual” in nature. Nor did the rule operate to exclude confessions that had been obtained in oppressive circumstances. In *Thornton* (1824),⁵⁶ the court admitted a confession of a fourteen year old boy notwithstanding the fact of illegal detention for nearly a whole day, food deprivation and deliberate intimidation by the police officer having charge of him.⁵⁷ In *Gilham* (1828), a confession was admitted notwithstanding persistent questioning in the course of five or six different examinations of the accused. The courts also admitted confessions where the accused was not physically in the condition to make voluntary decisions. In *Spilsbury* (1835),⁵⁸ for example, the court admitted a confession in spite of evidence from the case report itself that the accused had been “drunk at the time.”⁵⁹

In the period after 1852, Stephen argued the judicial mood swung against the accused, a trend that was exemplified initially by *Baldry*⁶⁰ which he stated “considerably modified” the law. Yet, he does not explain from the text of *Baldry* how it modified the existing law. On the facts, the accused was charged with administering poison with intent to murder his wife. A dispute arose over the admissibility of a confession made after a constable had cautioned the accused that “he need not say anything to incriminate himself, what he did say would be taken down and used as evidence against him.” The defence objected to the admissibility

⁵⁵1 Mood. 452.

⁵⁶1 Mood. 27.

⁵⁷The courts consistently held before 1852 that the fact of custody did not vitiate a confession. See: *Green & Allen* (1834) 6 Car. & P. 655; *Wilde* (1835) op. cit..

⁵⁸7 Car. & P. 187.

⁵⁹For a contrary earlier example, see the much maligned decision of Best J in *Sexton* (1823), op. cit.

of the accused's subsequent statement on the ground the caution given differed in a material respect from the statutory caution given by magistrates and amounted to an inducement. The case was argued before the Court for Crown Cases Reserved. In dismissing the objection, it was held by Pollock CB, Campbell LCJ, Parke B, Erle J and Williams J that the caution given was not the type of statement that should exclude a confession.

Stephen probably regarded the decision as a considerable departure from the existing law on the subject because some of the judges expressed attitudes that were not protective of the accused. Baron Parke stated:

“I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree...that the rule has been extended quite too far, and that justice and common sense have, too frequently, been sacrificed at the shrine of mercy;”⁶¹

Erle J agreed, confirming that,

⁶⁰Op. cit.

⁶¹Ibid., at 445.

“in many cases where confessions have been excluded, justice and common sense have been sacrificed, not at the shrine of mercy, but at the shrine of guilt.”⁶²

If we read the other judgements closely and the whole of the case report, however, it is apparent that protection of the accused against questioning by the police or the magistracy was still an important concern. Indeed, during arguments of counsel, Campbell LCJ stated categorically:

“Prisoners are not to be interrogated. By the law of Scotland they may be; but by the law of England they cannot.”⁶³

He made no distinction between interrogation by police and interrogation by magistrates; both forms of interrogation were regarded as illegal. Similarly, if we examine the interruptions of Pollock C.B during counsel’s arguments and his actual judgement, it could not be stated that he was hostile towards accused persons, nor even that he expressed the same values as Baron Parke and Erle J. During their discussion over the actual wording of the caution that was given to the accused by the police officer, the following exchange occurred:

“Parke B. - What do you contend? - Do the words amount to a promise of advantage, or to a threat?

Mills. That the words import an advantage.

⁶²Ibid., at 446.

⁶³Ibid., at 441.

Parke B. - What is the advantage?

Mills. "Whatever you say will be given in evidence."

Pollock C.B. - No: not "whatever you say"; - but "what you do say." If the word "whatever" had been employed it might have been different.

Mills. I was under the impression that the constable had used the word "whatever"; but it is not so."⁶⁴

It is apparent from this exchange that although Pollock C.B. was not prepared to countenance exclusion on the basis of the words actually used by the police officer, he would have excluded the confession if the police officer had stated: "*whatever* you say may be taken down and used in evidence." This opinion of Pollock C.B. is in *pari materia* with the judgements of Maule J in *Furley*⁶⁵ and *Harris*⁶⁶ which were two of the decisions that had been regarded as too protective of the accused.⁶⁷

If we read the judgement of Pollock C.B., it is the protection of innocence as opposed to the conviction of the guilty that is more evident. He stated:

"It is very important for the protection of innocence that any man charged with a crime should be told at the time of his apprehension what that

⁶⁴Ibid., at 437.

⁶⁵Op. cit.

⁶⁶Op. cit.

⁶⁷See the comments of Campbell LCJ who states that this decision had been referred to them in consequence of decisions reached by Coleridge J (*Drew and Morton*) and Maule J (*Furley and Harris*); at 440. It should also be added that Pollock C.B. is not consistent; in his judgment, he later criticises the decisions of Maule J, stating: "I cannot agree with his view on the subject, and I have myself decided the other way, offering to reserve a case for the consideration of the judges" (at 443). It is possible, however, that he misinterpreted Maule J's decisions.

charge is. Attention should be paid to any communication made by him at that time, because, generally a prisoner has no means of paying for witnesses. The accused may frequently be in a situation at once to say that he was in a place and could prove an alibi, and may be able to make some statement of extreme importance, in order to shew that he did not commit the crime, or was not the person intended to be charged. In criminal trials I make a point of inquiring whether the prisoner made a statement on being first taken into custody, and I have known repeatedly an acquittal occur chiefly on the grounds of what the prisoner stated at the time of his apprehension. It is proper that a prisoner should be cautioned not to criminate himself; but I think that what he says ought to be adduced either as evidence of his guilt, or as evidence in his favour.”⁶⁸

Although Pollock C.B. held there was no inducement on the facts, it is submitted that he did so because he was afraid that a decision to exclude the evidence would prevent a police officer from administering a caution. He regarded this as important to the protection of innocence because it was one of the few opportunities the accused had to put forward his side of the story.

Stephen’s assertion that *Baldry* had “considerably modified the law” seems to suggest that judges had taken a more hostile attitude towards accused persons uniformly; that they were no longer prepared to give them the benefit of the doubt and were more concerned with convicting the guilty. Yet I suggest the values that judges exhibited were different. While Baron Parke and Erle J both took a “tough

⁶⁸*Ibid.*, at 443-444.

line,” the decisions of Campbell LCJ and Pollock C.B., ostensibly, were as protective of the accused as several of the decisions that had been decided before *Baldry*.

Stephen also argued that after 1852 the courts were much less protective of the accused and were not predisposed to exclude confession evidence. But the evidence he presented is inadequate to base such an observation. He cited only *Jarvis* (1867)⁶⁹ and *Reeve and Hancock* (1872)⁷⁰ and we are not told why these two cases are peculiarly representative of the period after 1852.

Moreover, if we examine the facts and the judgements of these cases it is clear that the courts were not enunciating a new general approach to confession evidence that was any *less* protective of the accused. On the facts of *Jarvis*, the accused was charged with stealing some articles from his master. He was taken into the master’s office, whereupon he was told: “Jarvis, I think it is right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police; and I should advise you that to any question that may be put to you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue.” The prosecutor then added: “Take care, Jarvis; we know more than you think we know.” The accused subsequently made a confession and was convicted. The admissibility of the confession was then reserved for the Court of Crown Cases Reserved. Holding that the confession was rightly admitted, Kelly C.B. commented:

⁶⁹Op. cit.

⁷⁰Op. cit.

“While it is our duty to watch with a jealous caution the rules of law as to inducements to confess, for the sake of public justice we must not allow consideration for prisoners to interfere with the rules or decisions of courts of law.”⁷¹

The possibility that the words “you will answer truthfully” and, “Take care, Jarvis, we know more than you think we know,” could have been seen as a threat by the accused were dismissed by the Chief Baron. He deemed the statements “advice on moral grounds.”⁷²

In this particular decision, both sentiment and result ostensibly went against the accused. It should be noted, however, that even here the need to protect the accused was considered by the courts. Kelly C.B. also stated that it was the court’s “duty to watch with a jealous caution the rules of law as to inducements to confess,” and accepted that if the accused had been told “you had better tell the truth” this would have excluded the confession.⁷³ It could also be argued that the statement of the accused was voluntary even from a liberal perspective, as the master’s statement to his servant seemed to amount to no more than a caution. It forewarned him specifically of the presence of two police officers and the possible consequences of making a statement. In so doing, entrapment was avoided and the case for an involuntary statement all the more difficult to sustain.

⁷¹Ibid., at 98.

⁷²Ibid., at 99.

We might explain the less protective approach on the facts of the case. Although the police officers were in attendance, they were not the ones who spoke with the accused; it was his master. Masters often regarded themselves as the moral guardians of their servants and it is possible, therefore, that the accused may have perceived the statements as “moral guidance” from someone who knew his best interests (particularly as the word “advice” was used), rather than as a threat.

One can make a similar observation of *Reeve v Hancock*. In that case, the accused were told by their mother, in the presence of a police officer, that they “had better, as good boys, tell the truth,” after which they confessed. Expressing similar sentiment to his earlier judgement, Kelly C.B. refused to exclude the confession, and stated:

“The cases had no doubt at one time gone a great deal too far in the exclusion of such evidence as that now in question. But the case cited [*Jarvis*] is binding upon us; and it is a much stronger case than the present.”⁷⁴

Willes J agreed with him adding: “It seems to have been supposed at one time, that saying “Tell the truth” meant, in effect, “Tell a lie.””⁷⁵

Yet it should be noted the judges were not overruling previous decisions that had stated “You had better tell the truth” amounted to a threat. Nor were they

⁷³Willes J explicitly states that the decision would have been different if the accused had been told “It is better for you to tell the truth” (see p. 99).

exhibiting a more hostile attitude towards the accused than evinced in those cases; rather they were reacting to the particular facts of this case and to the type of person making the statement. In the previous case, it was argued that the master acted as the “moral guardian” of the accused and thus could be expected to give “moral guidance.” In this case, it was a mother giving “parental guidance” to her young children.⁷⁶ Although possible, it is highly unlikely that a mother would threaten her children to confess or that her children would think that she is telling them that they must confess to the crime.

It is submitted, then, that neither of the cases which Stephen cites provides unequivocal evidence that the courts had shifted their focus, in any considerable extent, from a desire to protect the accused. Rather, their concern was not to extend the exclusionary rule any further.⁷⁷ To do so could have had bad consequences for the protection of innocence,⁷⁸ as well as for the conviction of the guilty.

If Stephen’s conclusions have little foundation when examined in the light of case law, his rationale that the courts were still influenced by the “extreme severity of the old criminal law” also might be difficult to support. In fact, there is case law

⁷⁴Ibid., at 363.

⁷⁵Ibid.

⁷⁶According to the report, one was eight, the other was a little older.

⁷⁷It should be noted that there were Irish authorities which sought to *extend* the voluntariness rule by applying it to police questioning of the accused without any specific threats or inducements; see *Toole, Hassett, Bodkin and Gillis*, and the minority judgments in *Johnstone*, op. cit..

⁷⁸See the judgment of Pollock C.B. in *Baldry* mentioned above.

to suggest that the courts were prepared to make the finest of distinctions to admit statements where the accused stood charged with a capital offence.⁷⁹

Henry Wigmore

In relation to the first part of his proposition, that the 1800s were characterised by a “general suspicion towards all confessions,” the evidence he presented is inadequate. The cases are not representative of the century as a whole. The latest case in his historical analysis is 1853.⁸⁰

The second part of his proposition, that the courts were guilty of “sentimental irrationality” before *Baldry*, is also inadequately supported. The only proofs offered in his historical analysis are: (1) “sample” statements taken from cases neither the names nor the facts of which he cited; and (2) sociological and psychological insights into a class-based society and the motivations of judges gleaned from sources he failed to mention.

If we take the sample statements he cited, they appear only as examples of “sentimental irrationality” because of the way that Wigmore has presented them.

If the statements were identified properly by the case name, analysed in their

⁷⁹See *Swatkins*, op. cit., in which the prisoners Lloyd and Swatkins were both executed on a technicality. See also the discussion of Williams, p. 31, *infra*.

⁸⁰*Blackburn* (1853) 6 Cox CC 333.

factual context and in the light of the actual judgement, the decisions to exclude would not be as irrational nor as illegitimate as Wigmore claimed.

The first example of “sentimental irrationality” was taken from *Sexton* (1823),⁸¹ which he condemned as an “absurd” decision because a statement was excluded merely on account of “a promise to give a glass of gin.” Yet, if we read the case report, it is evident the facts have been misrepresented and the judgement inadequately analysed. According to the report, the prisoner was in custody of a police officer on suspicion of burglary. While he was in the police officer’s custody, the prisoner had told him: “If you will give me a glass of gin, I will tell you all about it.” The report then states: “Two glasses of gin were given to him, and he made a confession of his guilt.” In excluding the confession, Best J stated:

“The confession was very improperly obtained by the officer. Police officers must not be permitted to tamper with prisoners to induce them to make confessions; no kind of tampering is so dangerous as the giving them spiritous liquors. Had the magistrate known that the officer had given the prisoner gin, he would, no doubt, have told the prisoner that what he had already said could not be given in evidence against him, and that it was for him to consider whether he would make a second confession. If the prisoner had been told this, what he afterwards said would be evidence against him, but for want of this information, he might think that he could not make his case worse than he had already made it, and under this impression might sign the confession before the magistrate. If a

confession, so obtained, were allowed to be proved at the trial of a prisoner, however careful a magistrate might be that a prisoner should not be entrapped into a confession, an over zealous constable might defeat the humane provisions of the law, by so practising on the hopes and fears of a prisoner just before he came into the magistrate's presence, as to make him, when before the magistrate, appear to make an uninfluenced and voluntary confession, when every sort of trick had been made use of.”⁸²

It should be noted that it was not the promise of gin that resulted in the confession being made and in Best J's decision to exclude the confession; but the fact of *giving* the accused *two* glasses of gin. He held the confession involuntary, and therefore inadmissible, because the accused's statement was made under the influence of gin; not because of a promise to give a glass of gin. Moreover, it could not have escaped Best J's attention that the accused was possibly a drunk who was addicted to gin, which would explain why it was the prisoner who made the offer. Under such circumstances, the confession would be unreliable as well as involuntary. When analysed in the context of its facts and the case report, Wigmore's claim that the decision in *Sexton* was “absurd” appears extreme.

Wigmore's second example, “If the prisoner would only give him his money, he might go to the devil if he pleased,” was taken from *Jones* (1809).⁸³ As with his description of *Sexton*, the words of the offending statement have been carefully managed to make the case appear “irrational” and “soft” on the accused. If we read

⁸¹Op. cit.

⁸²Op. cit., at 103.

the report, however, the potential for a false confession clearly existed. The prosecutor, after a prolonged pursuit, was alleged to have told the accused, who was in the custody of a constable at the time, that “he only wanted his money, and that if the prisoner gave him that, he might go to the devil if he pleased.” The accused subsequently gave him some money, saying “that’s all he had left of it.” The trial judge left the evidence before the jury who found him guilty. The conviction was overturned by a majority of the judges on the ground that the statement was inadmissible. Although the judgements were not given in the report, we can see why the judges might have so decided. First, the accused was in the custody of a police officer and was not free to go. Second, he had been told by the prosecutor (who was a private in the Somerset militia), to the effect that so long as he gave him the money he demanded, he would be released. In the absence of any proof that the money he gave the prosecutor was actually the prosecutor’s money, he could have handed any money over merely to set himself free.

Wigmore’s third example was taken from the case of *Blackburn* (1853).⁸⁴ Far from supporting Wigmore’s argument, however, the case contradicts it because *Blackburn* was decided in 1853, *after* the decision in *Baldry*.

In his fourth example of sentimental irrationality, he stated that a confession was excluded because the prisoner was told “what he said would be used *against* him.”

⁸³Russ & Ry 152.

⁸⁴Op. cit.

The example may have come from *Furley* (1843),⁸⁵ which is one of the cases criticised by Wigmore later in the chapter.⁸⁶ In that case, Maule J excluded a statement of the accused because a police officer had told her: “*whatever* (emphasis added) she told him would be used against her on her trial.” If this is the same case referred to by Wigmore, he has misrepresented the decision by omitting the words “whatever” and stressing the word “against.” According to the judge, the statement was inadmissible because “if you promise what he states will be, *at all events* (emphasis added), used at the trial, you may thereby be inducing him to confess.”⁸⁷ By using the words “at all events”, Maule J indicated that it was the word “whatever” that might have given the accused the impression that anything she said would be held against her whether true or false. In her eyes, therefore, the best course of action would have been tell the police officer what he wanted to know. Analysed in this way, the decision to exclude the statement of the accused was not as irrational as Wigmore’s version of the facts would have us believe.⁸⁸

Even when we move to Wigmore’s sociological arguments as to why the courts were guilty of “sentimental irrationality,” Wigmore proves unconvincing. In respect of his first argument, that the courts were excluding confessions because of attitudes of subordination of the “working classes” to those who had authority over them, we would have expected to see unanimity amongst the judges for an inducement to have proceeded from “a person in authority.” Yet, in the early case

⁸⁵Op. cit.

⁸⁶See p. 474 of his chapter.

⁸⁷Ibid., at 77.

⁸⁸Indeed, this was the view of Pollock C.B. expressed in *Baldry*, supra.

law, there is no reference to “persons in authority”. In *Row* (1809),⁸⁹ the court held the inducement had to come from a “person interested” in the prosecution, by which they meant the prosecutor, a constable and the like. Unless the prosecutor was a master or an employer of the accused, there is no reason to suppose that the prosecutor was necessarily an authority figure. Furthermore, by the time the courts had started to use the terminology of “person in authority” in the 1820s,⁹⁰ there was no agreement whether or not it was a pre-condition for exclusion of any confession. In *Dunn* (1831),⁹¹ Bosanquet J stated explicitly:

“Any person telling a prisoner that it will be better for him to confess, will always exclude any confession made to that person.”

Not only would we have expected the courts to look for persons in authority before excluding a confession, but also we would have expected to see confessions excluded “upon the slightest pretext” where they were obtained by “a person in authority.” Yet it is apparent that the courts condoned such confessions even when obtained in oppressive circumstances.⁹²

In regard to Wigmore’s second observation, that the absence of a right of appeal combined with the practice of judges deciding “without consultation” had provided an excuse for excessive judicial tenderness, appears to be a direct lift

⁸⁹Russ & Ry 153.

⁹⁰For examples, see: *R v Gibbons* (1823) 1 Car & P 97; *R v Tyler and Finch* (1823) 1 Car & P 128.

⁹¹4 Car & P 543. See also *Kingston* (1830) 4 Car & P 387, where the court excluded the accused’s confession made to a surgeon after he had told her, “You are under suspicion of this, and you had better tell all you know.” Although it could be argued that the surgeon was an “authority figure” as he was empowered by the state to pronounce death, the importance of a person in authority was not expressed by the court when determining the admissibility of the statement.

from Baron Parke's judgement in *Baldry* (1852).⁹³ Baron Parke, commenting on the cases before 1852, said:

“..justice and common sense have, too frequently, been sacrificed at the shrine of mercy. We all know how it occurred. Every judge decided by himself upon the admissibility of the confession, and he did not like to press against the prisoner, and took the merciful view of it.”⁹⁴

But this observation of Baron Parke is not supported by the texts. First and foremost, judges *did* consult. In *Kingston* (1830),⁹⁵ the case report states that “Mr Justice J. Parke, having conferred with Mr Justice Littledale, held...”. In *Enoch and Pulley* (1833),⁹⁶ the confession is excluded by “Mr Justice J. Parke (having conferred with Mr. Justice Taunton).”⁹⁷ In *Croydon* (1846),⁹⁸ the presiding judge, Mr Rogers, made a specific point of telling the court that he had consulted before excluding the confession. He stated: “I have consulted with Mr Baron Platt upon the points raised, and he entirely agrees with me that there was a sufficient inducement, and that the statements of the prisoner are inadmissible.”⁹⁹ In *Kimber* (1849),¹⁰⁰ “Coleridge J., after consulting with Cresswell J” held that a statement of an accused made before a magistrate should not be received in the absence of any proof that the statutory caution had been read to the accused before hand. In

⁹²See the earlier discussion of *Thornton* (1824), op. cit.

⁹³Op. cit.

⁹⁴Op. cit., at 445.

⁹⁵Op.cit.

⁹⁶5 Car & P 539.

⁹⁷Ibid., at 540.

⁹⁸2 Cox CC. 67.

⁹⁹Ibid., at 68.

¹⁰⁰3 Cox CC. 223.

Higson (1849),¹⁰¹ “Alderson, B. (after consulting with Coleridge J)” also entertained a very strong opinion that independent proof of a statutory caution having been given was a condition precedent to admissibility of a statement of the accused made before a committing magistrate. In all of these cases, the courts appear to have approached the admissibility of statements in a way that was favourable to the accused. In none of them, however, did they decide without consultation.

Second, even in those cases where judges decided without consultation, their decisions were not always favourable to the accused. In *Richards* (1832),¹⁰² the accused was told by her mistress that if she did not tell her everything that night, a constable would be sent for the next morning to take her before a magistrate. The girl made a statement but the next morning the constable was sent for and she repeated her statement before the constable on the way to the magistrates. According to Bosanquet J, who decided without consultation, although the first statement was inadmissible because of the threat that was made by the mistress, the repeated statement made to the constable *was* admissible because

“she must have known, when she made the statement, that the constable was then taking her to the magistrates. The inducement, therefore, was at an end.”

¹⁰¹2 Car. & K 769.

¹⁰²5 Car. & P. 318.

He rejected categorically the argument that the second statement was made under the influence of the earlier inducement and should have been excluded. He did not consider the possibility, that had been opened by *Swatkins* (1831),¹⁰³ that a statement of a person held in custody as a suspect should not be received in evidence unless there was evidence of a prior caution. Nor did he consider, in the exercise of his discretion, the propriety of the police officer asking the accused questions while she was in custody.¹⁰⁴

If judges acting on independent responsibility were guilty of excessive tenderness towards accused persons, it is puzzling to discover that confessions obtained in such circumstances were nevertheless admitted. It also reveals the misleading nature of Wigmore's statement as to the extent to which the accused benefited from "generous" *Nisi Prius* rulings. Although it may be true that there were twenty *Nisi Prius* rulings on confessions to every full-bench decision, Wigmore did not indicate the percentage of *Nisi Prius* rulings against the accused. If, as may be the case, a sufficient proportion of rulings on confessions at *Nisi Prius* decided against the accused, the proportion of *Nisi Prius* rulings to full bench decisions was irrelevant. Moreover, it is ironic that one of his examples of "sentimental irrationality," taken from *R v Jones* (1809),¹⁰⁵ was decided in the Easter term before nine judges: Macdonald C.B., Chambre J., Lawrence J., Le Blanc J., Heath J., Wood B., Grose J., Mansfield C.J., and Lord Ellenborough. If

¹⁰³Op. cit. It is not being argued that this was the necessary ratio of *Swatkins* but rather a possible interpretation of it.

¹⁰⁴There are a number of decisions where judges have made decisions against the interests of the accused, without consultation. See further: *Long* (1833) 6 Car. & P. 179; *Spilsbury* (1835) 7 Car. & P. 187; *Court* (1836) 7 Car. & P. 487; *Thomas* (1836) 7 Car. & P. 345; *Kerr* (1837) 8 Car. & P. 177; *Holmes* (1843) 1 C & K. 248.

¹⁰⁵Russ. & Ry. 152.

full bench decisions were not always against an accused, and *Nisi Prius* rulings were not always in favour of the accused, Wigmore's argument is hardly convincing.

Wigmore's third argument that exclusion of evidence was an attempt by judges to mitigate the unfairness of criminal procedure that denied the accused the right to counsel or to testify on his own behalf, is also unconvincing as a general statement. As regards the right to counsel, the argument would have weight only if we could identify a protective approach taken by the courts when the accused did not have the benefit of counsel. Yet, this is contradicted by the case law. In *Long* (1833),¹⁰⁶ for example, the accused was charged with setting fire to some ricks. A constable, armed with a warrant, went to arrest the accused and upon arrest told her that a very serious oath had been laid against her by a witness. The accused made a confession subsequently which the prosecution sought to be admitted at trial. Baron Gurney admitted the confession without objection. There is no evidence from the case report that the accused was represented by counsel. If Wigmore had been right, the court would have required a caution at the time of arrest before admitting the statement,¹⁰⁷ but this was never raised.¹⁰⁸

Although the accused was incompetent to testify until the Criminal Evidence Act 1898, he was able to make unsworn statements. Sometimes, the ability to make an unsworn statement was of little avail to the accused because of the limitations

¹⁰⁶6 Car. & P. 179.

¹⁰⁷See *Swatkins* (1831), op. cit.

¹⁰⁸For another good example where the courts were not protective of the accused, even in the absence of legal counsel, see *Thornton* (1824), op. cit.

imposed by the court.¹⁰⁹ Nevertheless, the accused was not always prevented from contradicting the statements of witnesses who had given evidence against him. In *Dyer* (1844),¹¹⁰ Alderson B., interrupted defence counsel's closing speech to the jury when an appeal was made to sympathise with the accused for not being able to respond. In an impassioned reply to counsel, he stated:

"I would *never* prevent a prisoner from making a statement, though he has counsel. He may make any statement he pleases before his counsel addresses the jury, and then his counsel may comment upon that statement as a part of the case. If it were otherwise, the most monstrous injustice might result to prisoners. If the statement of the prisoner fits in with the evidence, it would be very material, and we should have no right to shut it out."¹¹¹

If, as a matter of practice, the courts were prepared to allow the accused to challenge witness statements, and his objections could be included in the defence counsel's closing speech to the jury, the handicap imposed upon the accused was not as great as Wigmore made out. As judicial practice had minimised the detrimental effects of not being able to testify, it is submitted that there was little reason for judges to exclude confessions upon every available pretext.

¹⁰⁹See *Reg v. Malings*, 8 Car & P. 242 in which Patteson J held that the prisoner was only permitted to make a statement under special circumstances.

¹¹⁰1 Cox CC. 113.

¹¹¹*Ibid.*, at 114.

His assessments of the decisions in *Drew*(1838),¹¹²*Morton*(1843)¹¹³and *Harris* (1844),¹¹⁴as “absurd” are also inappropriate if we examine the texts of the judgements in the light of their facts. Indeed, reliability, which according to Wigmore was the rationale behind the exclusionary rule, appears to have been a prominent consideration in judicial minds. In *Drew*, Coleridge J excluded the confession because he could not “conceive a more direct inducement to a man to make a confession, than telling him what he says may be used in his favour at the trial.”¹¹⁵The confession was inadmissible because he believed that the police officer’s statement could have generated a false hope in the mind of the accused; that if he co-operated with the police, it would be to his advantage at the trial. Coleridge J explained his judgement further in *Morton*. He stated:

“In *Drew*’s case the prisoner was told that what he said would be used for him. Is not that creating a hope, that if he told his story *whether true or false* (emphasis added), it might benefit him?”¹¹⁶

The implication from this judgement is that Coleridge J believed the confession was unreliable and that the confession was possibly false.

In *Morton*, it will be remembered that the accused had been told by a police constable that “anything he did say in his defence would be listened to, or

¹¹²Op. cit.

¹¹³Op. cit.

¹¹⁴Op. cit.

¹¹⁵Op. cit., at 141.

¹¹⁶Op. cit., at 515.

assistance would be summoned.” In considering whether to admit the subsequent confession, Coleridge J laid out his reasoning in the following manner:

“The true principle of the cases is a very simple one, that nothing shall be said to make an impression on the prisoner’s mind, tending to make him state a falsehood...I think this case comes altogether within the principle of it. The word ‘defence’ necessarily conveyed to the prisoner’s mind that what he said would be for his benefit, - the hope is created and remains.”¹¹⁷

This suggests that Coleridge J believed that the rationale behind the exclusionary rule was reliability and that, as a result of the police constable’s statement, he thought the accused’s confession was unreliable because it was made under the impression that he would benefit.

Similar reasoning is evident in the judgement of Maule J in *Harris*. It has been noted that the accused was told that “whatever” s/he said would be taken down and used against her/him. Maule J rejected the confession in *Harris*, stating: “I cannot say that did not induce him to say something which he thought might be favourable to him.”¹¹⁸ Also in *Furley*, he concluded: “If you promise a person that what he states will be *at all events* used at the trial, you may thereby be inducing him to confess”¹¹⁹(emphasis added). It is submitted that this shows that Maule J excluded the confessions, due to the impact the statement may have had on the

¹¹⁷Op. cit., at 515.

¹¹⁸Op. cit., at 106.

mind of the accused. In the circumstances, he doubted the reliability of the confession.

Wigmore was too selective also in the evidence he presented to support his arguments. There are several cases that were not cited in his historical analysis where the courts did not exclude confessions “upon the slightest pretext.”¹²⁰ Wigmore admitted in a later section¹²¹ that, with the exception of *Wilson*,¹²² confessions were not excluded for the mere fact the accused had been questioned by a committing magistrate. He accepted also that confessions were not excluded where they were made to a police officer while the accused was in his custody. If the courts were as protective of the accused as he claimed in his section on the history of confessions, it begs the question why there were so many exceptions.

Post 1852:

As far as the period after 1852 is concerned, he appeared to imply that *Baldry* ushered in a new era of “rationality.” Yet, there is no evidence presented to support that opinion. Moreover, the elements of “sentimental irrationality” that so appalled Wigmore were present also in *Baldry*. As far as confession evidence after

¹¹⁹Op. cit., at 77. See also the discussion of *Furley*, op. cit., supra.

¹²⁰See the earlier discussion of Stephen.

¹²¹See pp. 502-514.

¹²²Op. cit.

Baldry is concerned, it was mentioned in the discussion of Stephen that the courts exhibited primarily the same tendencies before and after 1852.¹²³

Glanville Williams

Williams stated that there was no power to interrogate the accused without his consent whether before or during the trial. He did not qualify his statement by time nor did he confine it to interrogation by judges and magistrates; it was a general statement and description of the law as it existed in the nineteenth century, which by implication included all those who question the accused. Yet, the evidence he presented related only to questioning by magistrates; there was no reference to police questioning of the accused until a later chapter, and that referred only to twentieth century practices.

Questioning by magistrates:

It is submitted that the amount of evidence presented by Williams to support his argument is inadequate. There is no discussion with the texts of primary sources. The only evidence provided is an observation made allegedly by Bentham that during his day magistrates were “nullifying the enquiry so far as the accused himself was concerned,” and a reference to the Indictable Offences Act 1848. It will be submitted that even this evidence fails to provide a sufficient foundation for his views.

¹²³See *Bate* (1871), *Fennell* (1881) and the police questioning cases cited during the discussion on Mirfield; *supra*.

It should be apparent immediately that Bentham's observation is only capable of supporting Williams up to 1825, the date *A Treatise on Judicial Evidence*¹²⁴ was published. Williams's comments in respect of the position after 1825, therefore, remain unsupported entirely. It is also submitted that Bentham's observations fail to support Williams even up to 1825. Bentham did not state that magistrates "were making a habit of nullifying the enquiry" by cautioning the accused that he was not bound to answer any of their questions. In the passage from which Williams based his remark, Bentham pointed out that the law had enabled magistrates to "exercise despotic power."¹²⁵ If the magistrate wanted to be strict, he would examine the accused under the Marian statutes and his answers would be used at trial to secure a conviction. If, on the other hand, the magistrate wanted to "make a parade of clemency" or show favour to the accused, he would apply the Common Law and tell the accused to "say nothing which may turn to his disadvantage." Bentham seemed to indicate that magistrates examined under *both* the statutes and the Common Law, but only "nullified" enquiries where they proceeded under the Common Law.

It should also be mentioned that even if Bentham had stated that magistrates were "nullifying" preliminary enquires, Bentham's account would be insufficient as a source of evidence. Bentham did not cite a single case to support his opinions. Although he was one of the most notable thinkers of his age, Bentham's unsubstantiated opinion is no substitute for case law.

¹²⁴Op. cit.

¹²⁵Op. cit., p. 242.

The second piece of evidence that Williams used was section 18 of the Indictable Offences Act 1848. According to Williams, section 18 made it compulsory to caution the accused which had the effect of sealing his lips unless he wanted to make a statement of his own volition.

Although he relied substantially upon this Act for his conclusions, Williams did not make any references to the text of the Act itself. If he had, he would have observed that section 18 was in fact ambiguous; that although the section used mandatory language, it did not state expressly that statements of the accused would be excluded if a caution was not administered, nor even if the magistrate had pressurised the accused into answering his questions. In fact, the case law indicated a section 18 caution was not regarded uniformly as “compulsory” nor was its effect always to protect the accused.¹²⁶

Questioning by police:

As Williams claimed that there was no power at all to interrogate the accused before the trial unless s/he volunteered to speak, it suggests the same rules applied to police officers and other inferior law enforcement officers as applied to magistrates. Yet, until the 1850s, few limitations were placed on a police officer’s [et al] powers of questioning; nor was he obliged to caution as a matter of

¹²⁶See further, the earlier discussion of Stephen and the different interpretations of section 18 discussed in my analysis of the case law.

routine.¹²⁷ After 1854 police powers received more attention in the courts, but it has been argued already that judicial approaches to these powers were inconsistent and vague. Although the 1880s appeared to spark in England the (re)emergence of a more protective approach towards the accused when in police custody, both in terms of questioning and the use of a caution, the subsequent cases fell far short of establishing a consensus. Indeed, by the time of the establishment of the new Court of Appeal in 1907, the case law was in a state of disarray.¹²⁸

Rationale:

Williams argued that this excessive zeal to protect the accused had its roots in prior judicial involvement in torture. Although Williams does not make this explicit,¹²⁹ the way in which this could have been done by the courts was to require that all statements of the accused should be entirely voluntary. “Voluntariness” in this sense would mean that it should be left to the accused completely whether or not to make a statement. The person who obtained the statement would not be allowed to use force, threats, intimidation, promises, nor even to question the accused unless the latter had expressly consented to questioning in full knowledge of the consequences.

¹²⁷See the discussion of Stephen, *supra*.

¹²⁸See *Gavin* (1885) Cox CC 656; *Brackenbury* (1893) Cox CC 628; *Male and Cooper* (1893) Cox CC 689; *Miller* (1895) Cox CC 54; *Rogers v Hawken* (1898) QBD 192; *Histed* (1898) Cox CC 16; *Knight v Thayer* (1905).

¹²⁹He nevertheless implies this when he states that there was no power under English Law to interrogate the accused “unless he volunteers to speak.”

Yet, only certain aspects of this principle of voluntariness were accepted universally by the courts. It is true that after *Warickshall*,¹³⁰ there was no disagreement in principle among the judges that a confession should be excluded when obtained as a result of a threat or a promise. There were disagreements, however, on how a threat or a promise should be defined. If the fear of torture dominated judicial minds as much as Williams claimed, one would have expected a unanimous application of a broad definition of a threat or promise to give the accused the benefit of the doubt. But I have indicated already that some courts applied a narrow definition.¹³¹

If Williams was right, the fear of torture and the need to distance the courts from similar practices would have been stressed in examinations before magistrates. During the times of the Tudors and Stuarts, magistrates as well as judges, had been involved in torture. Not only would the courts have been sensitive to any statement that hinted a threat or a promise, they also would have been sensitive to any interrogation of the accused where s/he did not expressly consent. Yet, the evidence suggests that the courts were not uniformly as sensitive as Williams claimed.¹³²

¹³⁰Op. cit.

¹³¹See *Gilham* op. cit.; *Wilde* op. cit.; *Sleeman* op. cit.; *Court*, op. cit.; *Holmes*, op. cit. It should be noted that Pollock C.B. in *Baldry* argued that the judges in *Court* and *Holmes* made a distinction between the statement “be sure to tell the truth” and “you had better tell the truth.” It is submitted, however, that Baron Rolfe in *Holmes* does not make any such distinction. On the authority of *Court*, he ruled that the confession was admissible in spite of “previous cases the other way, where it was held, that it was an inducement to tell the prisoner that it would be better to tell the truth. I think this statement admissible.” The fact that there were cases decided the *other way* in respect of the statement that it would be “better” to tell the truth, indicates that the distinction later made in *Baldry*, op. cit., by Pollock C.B., is not entirely accurate. See also: *Gibbons* (1823) 1 Car & P 97; *Tyler and Finch* (1823) 1 Car & P 128; *Thornton* (1824), op. cit.; *Taylor* (1839) 8 Car & P 733; *Moore* (1852) 2 Den 522.

In respect of the second rationale given by Williams, it is presented as if there is a correlation between the rules of questioning and the prevalence of the death penalty. This has been assumed as a result of the numbers of felonies that carried the death penalty at the time and the alleged desire of the courts to avoid using the accused as a source of evidence against himself. A number of points can be made in respect of this assertion: first, neither Williams nor Bentham conducted any study to compare the decision-making process of judges in death-penalty cases with non-death penalty cases. They make the assertion as if it is self-evident. It is difficult to see, however, how any assertion could be made when the decision-making process in both may have been the same. Second, both Williams and Bentham ignored the complexity of the decision-making process. Even if a comparison had been made, it is possible that a multitude of factors could have influenced the judge in his determination to exclude the evidence; from the colour of the accused's socks to the facts of the individual case. In order to discover the significance of each factor in judges' decisions, it would have required drawing up a comprehensive list of variables and a close textual analysis of reported judgements. Third, as Williams claimed that there was no right to question an accused before as well as during the trial, he should have presented evidence also on the influence of the death penalty on pre-trial questioning in addition to questioning at trial. In the event, he provided evidence of neither. As far as Bentham is concerned, the only case he referred to was Mansfield's anecdote of the priest charged with celebrating mass. But this fails to take Williams's argument any further because it concerned testimony at trial. Even then, we are not given any reported judgement, nor a detailed account of the statute under

¹³²See the discussion of Stephen, *supra*.

which the accused was charged. In that context, Bentham's evaluation of the case that the accused would have been found guilty had he been forced to testify, is questionable because alternative defences may have been available. Fourth, the assertion looks even more questionable in the light of case law.¹³³

Peter Mirfield

(1) 1800-1852 - The Period of Sentimental Irrationality:

We have encountered this expression before during our analysis of Wigmore. It was noted that it described an approach of the courts that placed the accused at the centre of judicial thinking and which was prepared to set the guilty free in order to avoid a false conviction. But the meaning which Mirfield gives to this phrase is different. For him, it means that there was a particular method of reasoning which the courts applied, that did not take the reliability of the confession into account, nor the need to discipline police officers, nor the need to protect suspects, although in general it tended to favour them during this period. The courts, in a mechanical fashion, looked merely for the existence of a threat or a promise. If absent, they would look for something improper in the questioning of the suspect.

Mirfield cited seven cases to support this position. Mirfield dubbed *Enoch and Pulley* (1833)¹³⁴ an "irrational" decision because it was too protective of the accused. He could not see how the statement: "it would be better to tell the truth or

¹³³See the earlier discussion of *Swatkins*, op. cit.

¹³⁴Op. cit.

it would lie upon her and the man would go free,” could have cast doubts on the reliability of the subsequent confession. Yet there *were* good grounds to doubt the reliability of this confession. First, it is clear from the report that the accused was emotionally distraught when she made her confession. The report states that, Abigail Commander, the witness who had made the inducement, had been asked by the attending constable to stay with the accused in order “to prevent her from laying violent hands on herself.”¹³⁵ This suicidal impulse was understandable because the victim was the newly-born child of the accused and she may have felt responsible for its death. In such circumstances, a false confession could have been expected.

Second, the evidence was equivocal that a murder had even occurred. Indeed, this appears from the remarks of Park J in response to a question whether the child had breathed. He stated: “The child might breathe before it was born; but its having breathed is not sufficiently life to make the killing of the child murder.” Park J’s scepticism seems justified if we look at the imprecision of the charges. The report states that there were four counts of murder: the first charged both of the prisoners with the wilful murder of the child by stabbing her in the head with a fork; the second charged them with killing the baby with their hands; the third charge stated that the child had been stabbed with a fork before it had been completely born and had then later died of the stab wound; the fourth charge was similar to the third, except that it charged the prisoners with killing the child with their hands. The imprecision of the charges is understandable also if we return to the circumstances of the child’s death as mentioned in the case report. It states: “A puncture was

¹³⁵Ibid., at 539.

found in the child's skull; but, when the injury that had caused it was inflicted did not appear." The point in time when the injuries were inflicted was crucial to the issue of murder, but this had not been established on the facts.

It is suggested that the prosecution already had a weak case and a confession made in the circumstances outlined above would not have made it any more convincing. In the circumstances, it would be difficult to accuse Park J of "sentimental irrationality."

Mirfield condemned *Croydon* (1846)¹³⁶ as "ridiculous" because the court had not considered "how the particular accused would have been likely to interpret the statement" and that the court had applied "a simple, formulaic approach."¹³⁷ If this were true, it is difficult to explain why the presiding judge, Mr Rogers, excluded the confession on the ground that there was a "*sufficient* inducement."¹³⁸ If the inducement was "sufficient" that implies necessarily that the court was not looking for a threat or inducement *per se*, and that it had considered the possible impact the statement had had on the mind of the accused. Furthermore, on the facts it is extreme to argue that the decision of Mr Rogers was "ridiculous." Although the person who made the statement to the accused was a lawyer, and not a police officer, the report states that he was "endeavouring to discover the criminals for the purpose of prosecution."¹³⁹ In such circumstances, it would not be unreasonable to believe that an unreliable confession would result. A statement to the accused which says, in effect, that he was known to be guilty and that he had

¹³⁶Op. cit.

¹³⁷Op. cit.

better tell the lawyer what he wants to know, might have conveyed a message that there was no point in denying the crime as that would serve only to increase his sentence.

Mirfield used *Sexton* (1823)¹⁴⁰ to suggest that the courts were so keen to exclude confessions, that factors other than reliability, such as the behaviour of the person investigating the offence, could affect the decision to admit statements of the accused. Yet, the words of Best J suggested that he excluded the confession because it was involuntary and unreliable, not because of the propriety of police behaviour per se. Best J remarked that to admit a statement of the accused in such circumstances, however a careful a magistrate might be, would make it “appear” that the accused had made “an uninfluenced and voluntary confession when every sort of trick had been made use of.”¹⁴¹ If giving the accused two glasses of gin makes the latter’s confession “appear” uninfluenced and voluntary, the necessary implication is that Best J regarded the confession as involuntary. Moreover, this necessary inference is supported by his reference to the *Warickshall* criteria of “hopes and fears” and that the police officer had given the accused the gin in order to “induce” him to make a confession.

His judgement also points to the danger of a false confession as he stated that the accused may have repeated his confession before the magistrate out of fear,

¹³⁸Op. cit., at 68.

¹³⁹Ibid., at 67.

¹⁴⁰Op. cit.

¹⁴¹Op. cit.

because to do otherwise could have made his case worse.¹⁴² It is clear, therefore, that Best J regarded this confession as unreliable.

The final pieces of evidence cited by Mirfield are the cases of *Furley*, *Harris*, *Drew* and *Morton*.¹⁴³ He argues that the judges were guilty of “sentimental irrationality” because confessions had been excluded merely on the ground that the infant police caution had been administered to the accused in a garbled manner.¹⁴⁴ Mirfield is suggesting that the judges did not consider whether the resulting confessions were involuntary and unreliable when determining admissibility. It has been submitted already during the discussion of Wigmore that although there were concerns regarding the manner in which the police caution was administered, statements of the accused were excluded because they were involuntary and unreliable.¹⁴⁵

So far, it has been argued that the cases Mirfield cites do not support his proposition that judges were “sentimentally irrational” in the sense that they decided cases mechanically. I argue also that the case law fails to support his argument that the courts were generally protective of the accused. Rather, the case law suggests the judiciary had different values and different approaches. Hence the reason for *Sexton* sitting side by side with cases such as: *Thornton* (1824),

¹⁴²As the accused had not been told by the magistrate that his first confession could not be evidence against him, Best J added that the accused “might think that he could not make his case worse than he had already made it, and under this impression might sign the confession before the magistrate.”

¹⁴³Op. cit. It should be noted, however, that these cases are cited during his analysis of *Baldry* and he does not offer any analysis that is independent of the judgments laid down in that seminal case.

¹⁴⁴Op. cit., pp. 54-55.

¹⁴⁵The only other evidence that Mirfield provides to accuse the courts of “sentimental irrationality” are the sociological “insights” mentioned by Wigmore; *supra*.

Gilham (1828), *Wild* (1835), *Spilsbury* (1835), *Court* (1836), *Thomas* (1836) and *Holmes* (1843), none of which exhibited sentiments in favour of the accused.¹⁴⁶

(2) Post 1852 - ‘The “Progeny of Baldry” and all that’:

It should be mentioned at this stage that Mirfield does not specify what he means by “progeny.” Moreover, it is not self-evident from his account. He begins by citing the dicta from *Baldry*¹⁴⁷ which condemned the extent to which earlier courts had protected the accused, and then proceeds to discuss cases such as *Sleeman*¹⁴⁸ and *Jarvis*¹⁴⁹ which took a similar approach to confession evidence and the need to protect the accused as the judgements in *Baldry*. As we read Mirfield’s account, however, they are cited not as examples of a new, less protective approach towards the accused but as instances of “irrationality.” This explains why *Fennell*¹⁵⁰ is also cited in the same breath (which decided in favour of the accused). Mirfield regarded this decision as another example of the inflexible approach to confession evidence that he had observed in the period before 1852. The actual position of the accused after 1852 is hardly dealt with except in relation to the sub-section he entitles *Rules About Police Questioning*. Here, he states that the courts “began”¹⁵¹ to be concerned with police questioning of the accused and cites cases such as *Gavin* (1885), *Histed* (1898) and *Knight and*

¹⁴⁶See further, the earlier discussions of Stephen and Wigmore.

¹⁴⁷Op. cit.

¹⁴⁸Op. cit.

¹⁴⁹Op. cit.

¹⁵⁰Op. cit.

¹⁵¹This is a curious assertion because it has already been established that the courts were concerned with police questioning as early as *Sexton* in 1824 (police officers prohibited from tricking the accused into making confessions).

Thayre (1905),¹⁵² which he regarded as generally protective of the accused. This sub-section, however, is presented as an isolated topic; there are no cross-references to his earlier discussion on confessions. We are left wondering, therefore, whether he has any opinion regarding the position of the accused after 1852.

As it is not clear what proposition Mirfield is advancing, it is problematical assessing his evidence. If by “progeny” he means that the courts were no longer prepared to protect the accused to the same extent as they had prior to *Baldry*, the only cases he cites in support are: *Sleeman* (1853),¹⁵³ *Jarvis* and *Reeve and Hancock*. In *Sleeman*, the accused was the servant of the prosecutor and had been indicted for setting fire to one of his farm buildings. The case against her was based on a confession that she had made, while in the custody of a police officer, to the married daughter of her master, Mrs Allen. Before receiving the confession, Mrs Allen had told the accused: “Jane, I am very sorry for you, you ought to have known better; tell me the truth, whether you did or no...don’t run your soul into more sin, but tell the truth.” Baron Martin postponed the judgement in order to ask the opinion of the judges whether the confession was admissible in evidence. It was held unanimously (Baron Parke giving the judgement of the court) that the confession was admissible on the ground that “there was really no threat or inducement at all; and.. that Mrs Allen was not a person in such authority that an inducement or threat held out by her would render the confession inadmissible.”¹⁵⁴

¹⁵²Op. cit.

¹⁵³Cox CC 245.

It is submitted that this case does not indicate a general approach that was new and less protective of the accused. It is entirely consistent with earlier decisions, such as *Gilham* (1828) and *Wilde* (1835), which held that spiritual inducements did not vitiate statements obtained from the accused. It can also be explained on the facts. Arguably, as the daughter of accused's master, Mrs Allen was merely tendering a "guardian's advice" and not making a threat.¹⁵⁵ The courts were refusing to extend the rule any further; they were not embarking on a new campaign against accused persons.

(3) The interrogation powers of magistrates in the nineteenth century:

It has been noted that Mirfield takes the same position as Stephen and Williams, that by 1850 the accused was "absolutely protected against judicial questioning" and also cites section 18 of the 1848 Act.¹⁵⁶ Mirfield cites the case of *Berriman*¹⁵⁷ as additional evidence, but the case was decided in 1854 and not in 1850. It cannot substantiate his argument, therefore, that by 1850 the accused was "absolutely protected against judicial questioning."

Even if we examine the judgement and facts of *Berriman* it does not support the general argument that the accused was "absolutely protected" against questioning by a magistrate. During her appearance before the magistrate, the report states that "after the prisoner had been cautioned in the usual manner, and *had stated that she had nothing to say* (emphasis added) the presiding magistrate, before committing

¹⁵⁴*Ibid.*, at 246.

¹⁵⁵See the discussion of Stephen, *op.cit.*

her, asked her where she had put the body of the child.”¹⁵⁸ Erle J rejected this statement saying:

“I shall certainly refuse to allow such evidence to be given. The question ought never to have been put, and it would be very unfair towards the prisoner to receive in evidence an answer so irregularly elicited.”¹⁵⁹

I suggest that Erle J excluded the evidence, not because the Act absolutely prohibited questioning, but because the accused had already stated that she had nothing to say. Any questioning after that point was judicial “badgering” and any answer she gave subsequently involuntary. Mirfield states that the judge had concluded that the magistrate was prohibited from questioning the accused other than in the terms specifically allowed for by the Act itself. Yet this reasoning appears only in the argument of defence counsel;¹⁶⁰ it is not referred to by the judge. His decision to exclude the evidence was based on the exclusionary rule, not the Act.

3. Conclusion:

It has been argued in this chapter that the conceptualisation of the English criminal justice process as one in which the needs of the accused took centre stage in the first half of the nineteenth century but which then tapered off in the second half,

¹⁵⁶The criticisms levelled earlier at Stephen and Williams apply equally, therefore, to Mirfield.

¹⁵⁷Op. cit.

¹⁵⁸Op. cit., at 389.

¹⁵⁹Ibid.

¹⁶⁰See p. 389.

was ill-conceived and unsystematic. Moreover, when examined in the light of statute and case law, this version of history was found to be inaccurate and at variance with judicial thought.

I mentioned in chapter one that the consensus of leading writers was indicative of a wider historical perspective which characterised the era up to 1852 as one in which the ideology of liberal *laissez-faire* dominated. Imbued with the values of individualism and with the notion that all citizens should be able to conduct their lives without state interference, it was presumed that *laissez-faire*, through the agency of judicial sentiment, provided the accused with an armoury of rights to protect him/herself from violations by the state. Hence, why it was claimed that judges sought to exclude statements of the accused upon every available pretext.

The argument presumed the judiciary spoke with one, uniform voice that constructed the accused as a citizen before 1852, but which had reconfigured that definition in the light of new crime control imperatives after 1852. Yet, if we are to follow the case law concerning pre-trial judicial and extra-judicial questioning of the accused during the period, the judiciary spoke with a variety of voices both before and after 1852. In fact, the case law as a whole is illustrative of the absence of a judicial consensus that was presumed to exist within each time frame.

I suggest that the door is now open for a fresh analysis and explanation of the orientating values of the English criminal justice system and of the role that the accused has played within it. An analysis which, in contrast to those set out earlier, seeks to explore the accused's role within a tight conceptual framework

and in the context of driving historical forces; that builds conclusions on the basis of the data, instead of preconceived notions. This will be the task for our next chapter.

Questioning of the Accused and the Construction of the Individual

Chapter three

1. Introduction:

In this chapter, we will attempt to account for the different approaches that judges took during the nineteenth century and to explore the role that the accused has played in the English Criminal Justice System more systematically.

Since the 1960s, one of the methods most frequently used to explain the values lying behind legal rules has been Herbert Packer's two models of the criminal process: "crime control" and "due process."¹ These models are useful analytic tools, and clearly set out the essential tensions that exist within the criminal justice system, but are inappropriate for this study because of the type of data available.²

¹See Herbert L. Packer (1969) *The Limits of the Criminal Sanction*, Stanford, California, Stanford University Press, pp 149-173. Packer's work has been discussed widely and applied both here and in the United States; see further: Griffiths, J. (1970) *Ideology in Criminal Procedure*, Yale Law Journal 79, 1; Bottoms, A. and McLean, J. (1976) *Defendants in the Criminal Process*, London, Routledge and Kegan Paul; McBarnett, D. (1981) *Conviction*, London, Macmillan; McConville, M. et al (1991) *The Case for the Prosecution*, London, Routledge; Sanders, A. and Young, R. (1994) *Criminal Justice*, London, Butterworths; Ashworth, A. (1994) *The Criminal Process: an Evaluative Study*, Oxford, Clarendon; Uglow, S. (1995) *Criminal Justice*, London, Sweet & Maxwell; Choongh, S. (1997) *Policing as Social Discipline*, Oxford, Clarendon.

²A significant number of cases during the nineteenth century were poorly reported, and it was only in rare cases (see *Sexton*, *Cox v Coleridge* and *Baldry*, op. cit) that judges gave fully reasoned explanations for their decisions. Moreover, most of the cases and statutes of that period were ambiguous. Any attempts to assign a particular case, judgment or statute to one of Packer's models, therefore, would be to indulge in speculation.

Instead of models, it will be suggested that an approach that locates the values of the English Criminal Justice System within an historical framework, that sees the role played by the accused as reflective of historical forces, ideological currents and new organizational structures yields more analytical insight. As a result of this analysis, it will be advanced that the values of liberal constitutionalism, and the notion of universal citizenship that it implies, were never fully realised in the role played by the accused. Initially, this was because there was no consensus as to what values should guide the relationship between the individual and the state, which is illustrated by the variety of judicial opinion throughout the nineteenth century, and the absence of any judicial mechanism that would have been able to implement an official party line.

However, systemic concerns for crime and social control, legitimacy and efficiency, which were evident in judicial thinking from the start of the nineteenth century, became increasingly important as the influence and scope of the state expanded. As the state expanded, and as respect for it grew among the propertied classes, the role of accused persons concomitantly diminished to the point they became “suspects,” and their status as individuals divested of the rights, freedoms and protections which were accorded to “law-abiding citizens”.

It will be suggested that this construction of the individual was made possible only after a series of structural changes culminating in the formation of the Court of Appeal in 1907, which was then given practical expression through the publication of the Judges’ Rules in 1912. The judicial compromises and consensus which the

Rules represented, however, took time to permeate through all the levels of the judiciary, as the values of liberal constitutionalism and laissez-faire were still present after 1912. After 1933 and the collapse of the Gold Standard, a political, legal and moral consensus emerged in which Welfarism and the needs of the community, as expressed by the institutions of the state, took precedence over the protection of the individual. The casualty in this construction was the accused who remained disempowered and vulnerable to state power.

In this chapter, the historical analysis will begin by setting out the ideological currents which influenced the structure of the English criminal process at various points during the nineteenth century. After which, I will set out the structure of the *ancien regime* as it existed before 1829 and the values that it purported to hold and actually expressed through the case law. The chapter will proceed to explain the historical events that led to the reform of the old regime and the establishment of the “New Police,” and will discuss their role within the restructured system. The reaction to this restructuring, through the nineteenth and early twentieth century case law and the Judges’ Rules will then be examined.

The final part of this chapter focuses on the post-war developments up to 1984, and will show how these structural changes were consolidated, as exemplified through greater willingness, on the part of the judges and the legislature, to equip the police with ever increasing powers to question the accused in the manner they saw fit.

2. The role of the accused; an historical and structural analysis

a)The ideological setting:

The late eighteenth and early nineteenth centuries witnessed the culmination of a school of thought that had asserted itself following the “Glorious Revolution” in 1688. Ideological notions of the state which viewed the individual as “subjects” of the Crown, and as the emanations of the arbitrary power of the ruling monarch, justified on the basis of unquestionable divine decree, had lost popular appeal as a result of the political turmoil in the seventeenth century. Indeed, the state was increasingly viewed with suspicion, and as a threatening entity. This necessitated the establishment of the Rule of Law under which the lives of “citizens” would be protected from abuses of power and interference by the state. Thus, Blackstone wrote:

“the first and primary end of human laws is to maintain and regulate those absolute rights of individuals. Such rights as are social and relative result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration..... Political therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restricted by human laws (and no

further) as is necessary and expedient for the general advantage of the public.”³

Notions of a centralised state, equipped with arbitrary powers and supported by standing armies, or a “police force” on the lines of the French system, was anathema to Blackstone’s, and others’⁴, vision of a liberal state, and a painful reminder of the tyrannies carried out during the reigns of the Stuarts and Tudors. While such methods of administration were efficient and effective, they ran counter to the Englishman’s sense of liberty. Adherence to libertarian values might occasion inconvenience in the administration of justice, but it was “the price that all free nations must pay”⁵ lest they follow the examples of despotic regimes and arbitrary governments found elsewhere.⁶ If deterrence and prevention were aims of the criminal justice system, they could be achieved by condign penal laws, such as capital punishment. Any extension of the spheres of government through a centralised “police force”, on the pretext of crime prevention and detection, would unjustifiably interfere with the freedom of the individual.⁷

This sentiment was not reserved purely for matters in relation to criminal justice, but covered all areas of human activity over which the state could exercise some

³See, 1 Comm. 124-125.

⁴See, for instance, the writing of William Paley, and *The Principles of Moral and Political Philosophy* (17th ed., 1809), in particular.

⁵4 Comm. 350.

⁶3 Comm. 325-327. This seems to reflect a long tradition of national chauvinism in English juristic writings; see further, Shapiro, B. (1991), *Beyond Reasonable Doubt and Probable Cause; Historical Perspectives on the Anglo-American Law of Evidence*, Berkeley, University of California Press, pp. 121-124.

⁷The best example of this approach is the work of William Paley, cited above.

influence. Hence, matters of business, industry and commerce, even religion⁸, were best left to the individual. As Locke wrote, and Adam Smith affirmed: “government has no other end but the preservation of property.”⁹In short, this was the ideology of “laissez-faire”; the exaltation of the individual above the collective, the triumph of the “citizen” over the forces of state; that the best form of government was minimal government.

While this conception of the state was the ruling orthodoxy at the turn of the nineteenth century, it was not left unchallenged. It came under increasing attack from the Utilitarians, such as Bentham, who sought their inspiration from continental models. It was his and their concern that institutions and laws should make the “greatest happiness” principle a living reality. Bentham, therefore, was not for “leaving things alone, but for continually interfering with them.”¹⁰ In stark contrast to the predominant laissez-faire approach, he advocated whole-scale reform of the establishment by calling for the abolition of its laws rooted purely in custom and received wisdom, and for replacing them with new laws based upon rationality and his “felicific calculus.” These new laws would prevent and deter anti-social action by forcibly restraining it, and would encourage virtuous actions by providing certain and substantial rewards.

⁸This is exemplified by the increasing secularisation of the State that took place in the late 18th and early 19th centuries, witnessed by the repeal of both the Test and Corporation Acts and other legislation that had been passed against Catholics; see Langford, P. (1993) *State, Law and Prosecution: the Emergence of the Modern Criminal Process 1780-1910*, Doctoral thesis, University of Warwick, p. 265.

⁹ “Of Civil Government,” in *Works* (11 ed., 1812), Vol. V, p. 393. See also Adam Smith, *Wealth of Nations* (ed. of 1904), Vol. 2, Book V, p. 207.

¹⁰Benn, A.W. (1906), *The History of English Rationalism in the Nineteenth Century*, Vol. 1, p. 291.

Within Bentham's scheme of things, reform would include developing a centralised system of policing, the object of which was to "prevent evils and provide benefits," chief among which was the control of crime. In combination with other reforms, this would be secured by granting the police sufficient powers. Hence, the police would be empowered to intervene as soon as an offence would "announce itself in various manners," whether it was in the course of being carried out or immediately afterwards, and to spread information whenever a crime had been perpetrated, thereby facilitating the detection and identification of offenders and by making it more difficult for offenders to escape. Moreover, for "the preservation of public tranquillity and the execution of good laws,"¹¹ the police would be able to use spies and paid informers.

The establishment of a body of police, preventing the commission of offences and securing the detection of offenders, would be accompanied by complementary reforms in procedural and substantive law. First, the discretion handed to judges to develop the Common Law in accordance with custom and their subjective preference, would be replaced by a code that was far less amenable to manipulation. In relation to criminal evidence, this would mean that hitherto subjective and elastic principles would be substituted with strict rules of evidence that would ensure the guilty would not escape justice. Secondly, and as a consequence, penal law would be modified in the certainty that punishment would take place. Penal laws that had made the death penalty almost the norm rather than the exception, would be replaced by punishments that matched them with the severity of the offence.

¹¹See, *Principles of Penal Law*, Vol. 1, pp. 573-574.

In many respects, Bentham was ahead of his time. As A. W. Benn commented: “Benthamism seemed to promise an immense extension rather than a restriction of the functions of government,”¹² and thus flew in the face of popular opinion. The individual, as a single entity, was not the orientating unit of his conception of the state. What mattered was “aggregate” happiness, and the interests of the many over the few, which would be enforced by a centralised and powerful, yet beneficent state. However, this did not mean that he did not have his supporters. Indeed, he later worked in close collaboration with Patrick Colquhoun, who along with Robert Peel and Edwin Chadwick, played an influential role in the setting up of the Metropolitan Police Force in 1829,¹³ and as we shall see, in the consequent restructuring of the criminal process.

b) The structure of the English Criminal Justice System up to 1829 and the role of the accused:

In many ways, it could be argued that the system that entered the nineteenth century was a reflection of the dominant laissez-faire attitudes towards government. Criminal justice was largely a localized and individualistic affair, as there was no central or state direction, and operated through the individual initiatives of parish constables, Prosecution Associations, night watches and magistrates.

¹²Ibid.

The parish constables had little or no collective identity, and often operated out of their own houses and within the community which they had to police. They were also unpaid by virtue of the office itself, and relied to a large part on the person who sought their assistance for their income.¹⁴

Prosecution Associations, which existed in both rural and urban areas, owed their establishment and proliferation to the activism of magistrates and property owners, who were prompted by their dissatisfaction over the ineffectiveness of the parish constable and an increasing concern regarding the “crises” that had beset the country between 1740 and 1780.¹⁵ Their functions comprised detecting and apprehending suspected offenders by printing hand bills and placing adverts in the local press; paying persons to search for stolen goods as well as the offender, and ensuring that a solicitor would get the suspect committed for trial before a magistrate. These Prosecution Associations, however, never became a centralised or state agency. Their operation was localised and the result of private initiatives.¹⁶

The introduction of night and paid watchmen in the boroughs and larger towns was a response to the perceived inadequacies of the parish constable in the context of the changing nature of the social order caused by the Industrial Revolution. In one sense, it might be thought that this was the beginning of a paid police force;

¹³See Radzinowicz, L. *A History of the English Criminal Law*, Vol. 2, Steven & Sons, London, p. 385.

¹⁴Langford, P., (1993), op. cit., p. 13

¹⁵See D. Phillips, “Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England 1760-1860,” in Hay, D. and Snyder, F. (1989) *Policing and Prosecution in Britain 1750 - 1850*, Oxford, Oxford University Press.

¹⁶Ibid., p. 134.

an attempt by the state to show to the people the benefits of a more activist government through a system of regular and visible patrols to counter ever increasing social disturbance.¹⁷ But the image of the paid and night watches was very different from an efficient outfit that would command the respect of the people. "Many were old and ailing. Some were employed out of charity; some as an alternative to making them a charge on the poor rate. They carried lanterns and rattles and called out the passing hours - if they kept awake."¹⁸ Whether this absence of professionalism was a true representation across the country is perhaps doubtful.¹⁹ Nevertheless, it expressed the complacency and lack of interest in active government that appeared to dominate the late eighteenth and early nineteenth century.

Although these aspects of law enforcement, focusing on private, individual initiatives and the absence of state control, seem to epitomise the laissez-faire state, the spirit of individualism was not universally expressed nor did it accord with the respective roles played by the magistrate and the accused within the legal and social order.

The magistrate formed the link between the localities and the institutions of the state in the maintenance of order and the provision of information. Formally, this link was carried out by processing defendants charged with indictable offences, and conducting summary trials, but it found more concrete expression in the

¹⁷See Langford, *op. cit.*, p. 17.

¹⁸Critchley, *op. cit.*, p. 26.

¹⁹See pg. 11 post and the notes attached thereto.

nature of the prosecution process over which he presided and his societal role.

Langford writes:

“The magistrate embodied a personalised, demonstrative authority in the ‘old society’ in which social position and judicial role overlapped. Law and society had a vital and indissoluble link in the figure of the magistrate who symbolised the natural origin and truth of law and society.”²⁰

Due to the position he occupied within the social order, and the reality of private prosecution that depended upon a series of individual decisions,²¹ the magistrate was able to exercise considerable discretion and power over who and how he prosecuted, and whether to take an active or a passive role.

Similarly, during pre-trial examinations of the accused, the magistrate wielded considerable power. This was facilitated by the juxtaposition of powers conferred by the Marian statutes to take the examination of the accused,²² with those powers conferred by the Common Law. Hence, Bentham complained:

“The magistrates exercise despotic power, and can show favour or rigour as they choose. It places in their hands a disguised but arbitrary power of pardon. If the magistrate intends to do justice, he conducts the examination according to the will of the legislator; if he wishes to make a parade of clemency, or show partial favour to the accused, he follows the rule of the

²⁰Op. cit., p. 43.

²¹Ibid.

common law, and even tells the prisoner to be on his guard, and to say nothing which may turn to his disadvantage.”²³

Although magistrates occasionally suffered censure in the courts for interrogating the accused like a witness²⁴, this hardly amounted to a uniform judicial crackdown on their de facto powers to prosecute and to conduct examinations in the manner they saw fit. Indeed, some decisions appeared to facilitate this process.²⁵ When examined from this perspective, then, it places the role of the accused during the early 1800s within a different constitutional paradigm than that projected by the liberal, laissez-faire ideology. Instead of being a holder of “rights”, the accused was viewed as an object of magisterial power within a wider patriarchal social order.

It is submitted that this insight helps to throw light on controversial decisions such as *Sexton* (1823), previously cited and roundly condemned as an example of the liberal, “sentimental irrationality” that was said to pervade judicial opinion at that time.²⁶ In that case, it was not the technical violation of the voluntariness rule with which Best J was primarily concerned; but rather its impact upon proceedings

²²For a detailed discussion on the effects of the Marian statutes, see chapter one.

²³*A Treatise on Judicial Evidence*, Vol 2, p. 242. For Glanville Williams’s misinterpretation of this section, see chapter two.

²⁴See *Wilson* (1817), op. cit.

²⁵See *Ellis* (1826) and *Cox v Coleridge* (1822), op. cit., discussed in the last chapter. There is also some evidence to suggest that *Wilson* (1817) did not reflect any judicial consensus regarding the examination, as Littledale J in *Ellis* noted that Holroyd J had admitted an examination of the accused to which there was this objection. Wigmore even suggests that *Wilson* is an isolated opinion in the face of a line of authorities which authorised such an examination; see “On Evidence”, op. cit., s. 848, pp. 510-512. It could be argued that, as such, it would be mistaken to use *Wilson* as reflecting part of a general trend that led to the “judicialisation” of the preliminary enquiry by 1848 as claimed by Choongh; see *Policing As Social Discipline*, op. cit, pp. 6-7.

²⁶For the facts and various interpretations of the case given by other authors, see chapters one and two.

before the magistrate. The report states that the magistrate, before receiving the confession of the accused, had not been informed by the constable that he had given the accused two glasses of gin. As such, it amounted to a deceit practised *upon the magistrate*. Best J comments:

“Had the magistrate known that the officer had given the prisoner gin, he would, no doubt, have told the prisoner that what he had already said could not be given in evidence against him, and that it was for him to consider whether he would make a second confession. If the prisoner had been told this, what he said afterwards would have been evidence against him.”²⁷

If the judge had been concerned with the voluntariness per se of the questioning of the accused, he would have prevented his interrogation by the constable while in custody, but this occurs without judicial censure. What appears more important is the behaviour of the constable which effectively prevented the magistrate from carrying out his patriarchal role of advising the accused of what he should or should not say.

We see this elevation and negation of the respective roles of magistrate and accused more clearly in *Cox v Coleridge* (1822).²⁸ According to the majority opinion, whether an accused should have an attorney or counsel present during a magistrate’s preliminary examination, rested solely with the presiding magistrate.

²⁷Op. cit., p. 103.

²⁸Best J was also a presiding judge in this case. For the facts, see chapter two.

It was a question of his individual discretion and not in the nature of an enforceable right vested in the accused. Hence Holroyd J commented:

“... the right claimed cannot legally be supported. A magistrate, in cases like the present, does not act as a Court of Justice; he is only an officer deputed by the law to enter into a preliminary enquiry, and the law which casts upon him that jurisdiction, presumes that he will do his duty in enquiring whether the party ought to be committed or not.”²⁹

If the magistrate needed the services of counsel, then he could call upon one, but it was not something which an accused could foist upon him. While the position might be different in judicial proceedings before a “Court of Justice,” the law did not accord the same protection to the accused in preliminary enquiries before a magistrate. In effect, this meant that the magistrate, when investigating the circumstances of an offence, was the master of his own bench and the sole source of authority.³⁰

As we observed in the last chapter, the relative unimportance of the role of the accused did not apply only to magisterial questioning, but was expressed more generally in rules of questioning. From the beginning of the nineteenth century, for example, we can observe a gradual narrowing of the potentially expansive

²⁹Op. cit., at 51 and 52.

³⁰The reluctance to impose any form of judicial control is indicated by the court’s presumption that the magistrate “will do his duty in enquiring whether the party ought to be committed or not.” This judicial attitude is further illustrated by their approach to the magistrate’s caution, which was generally left to the discretion of the magistrate. There is no case law up to 1829 which required him to administer a caution, though *Sexton* (1823), op .cit., seems to suggest that a magistrate would do this as a matter of practice, particularly if there was an earlier inducement.

voluntariness rule first enunciated in *Warwickshall*.³¹ It was held in that case that if a confession had been “forced from the mind by flattery of hope or the torture of fear” it should be rejected as evidence; but it did not require that “flattery of hope” or “torture of fear” should come from any person connected with the prosecution nor that he should hold a position of authority. Yet, it was held by nine judges, as early as 1809, that the exclusionary rule would not operate unless the inducement proceeded from a person who had “a concern in the business” and not from one who merely “officiously interfered”.³² In *Gibbons* (1823)³³, Park J further narrowed the operation of the rule to persons having “authority”, by which he meant, “the prosecutor, constable, &c.”³⁴ It did not apply to inducements made by surgeons whilst administering treatment to the accused. The narrow operation of the rule before 1829 is further exemplified by judges condoning custodial interrogation of the accused by constables, even where that interrogation was illegal and oppressive in the circumstances.³⁵

It is suggested that if the individualistic, liberal, laissez-faire state ever existed in reality, it certainly had not been fully realised by 1829. Although in terms of structure and organisation, the system appeared to conform to the laissez-faire model, the broad powers conferred on state officials and the lack of concern for the “rights” of the individual as expressed through the case law on questioning,³⁶

³¹Op. cit. For a discussion of this case, see chapter one.

³²*Row* (1809) Russ. & Ry 154.

³³1 Car. & P 97.

³⁴*Ibid*, at 98.

³⁵See *Thornton* (1824), op. cit., discussed in chapter two.

³⁶This is also reflected in actions for malicious prosecution or false imprisonment. As of the beginning of the nineteenth century, the rights that existed to bring such actions were purely formal. The absence of financial assistance for the poor (who were the majority of criminal defendants) and the restrictive approach adopted by the courts when prosecutions were challenged, militated against successful challenges to their legality. See further: Hay, D. (1989), “Prosecution

indicated that the individual was not the orientating unit of analysis. Rather, instead of a criminal justice system dominated by liberal values, the evidence pointed to a continuation and perpetuation of the eighteenth century decentralised social order dominated by patriarchy and paternalism. A legal system in which the treatment afforded to an accused was solely dependent upon the discretion of officials, who, because of their social standing and local connections, were presumed to know best.

c) 1829-1912 - Reconfiguring the System in a Climate of Crisis:

Between 1780 and 1848, much of Europe, including England, was in the throes of a social revolution. The ideas of “the Enlightenment,” the industrial revolution and massive growth in urban populations were effecting social transformation at a number of levels in society, placing considerable strain on existing social structures and hierarchies. Inevitably, the strains and social tensions led to breakdowns in law and order, violence and social upheaval. The “Gordon Riots” of 1780,³⁷ the French Revolution of 1789 and its aftermath, the emergence of British Jacobins in the 1790s, the Burdette and Luddite riots of the early 1800s, the Ratcliffe murders of 1811, increasing crime rates and a perceived decline in moral standards,³⁸ all played their part in generating a “climate of crisis”³⁹ and in

and Power, *Malicious Prosecution in the English Courts, 1750-1850* in Hay and Snyder, *Policing and Prosecution in Britain 1750-1850*, Oxford, Clarendon Press, pp. 350-352.

³⁷According to Clive Emsley, the event still preyed on the minds of magistrates and politicians as late as 1815; see *Policing and Its Context 1750-1870*, (1983) Macmillan Press, London, p. 46. See also by the same author: “The Military and Popular Disorder in England 1790-1801”, *Journal of the Society for Army Historical Research* (1983).

³⁸See *Parlt. Debates* HC (1812), Vol. 21, 195-204; *Parlt Debates* HC (1828), Vol. 18, 784-804, in which Robert Peel referred extensively to increases in crime rates and the threat to security for property to justify his call for a “New Police.”

sowing fears of revolution in the minds of the established order.⁴⁰ Even in 1829, during the passage of the Metropolitan Police Bill, and when London was enjoying a period of relative calm, rioting was still taking place elsewhere.⁴¹

Although its efficacy has been underestimated by most historical accounts,⁴² the old localised system of parish constables and watchmen acting under the direction and supervision of magistrates, was perceived as being incapable of managing these crises and of imposing social order. Moreover, the fail-safe mechanism of calling in the army to quell social unrest,⁴³ was generating fears of a standing army,⁴⁴ and criticized for its unconstitutionality.

The ongoing process of rationalising the criminal law and punishment, and the institutional reforms that took place after 1829 which accompanied it, namely the establishment of the “new police” and the judicialisation of the magistracy, were attempts to manage these crises at the structural level. The restructuring was not at any stage an expression of the values of individualism nor of the need to protect the accused as portrayed by the consensus in the previous chapter.⁴⁵ The form that restructuring took, however, and the rhetoric which promoted it, had to bow to

³⁹Emsley, (1983), op. cit., pp. 51-52; Reiner, R. (1985), *The Politics of the Police*, Brighton, Wheatsheaf, p. 12.

⁴⁰This was particularly true in the big towns and cities which faced the full brunt of social rebellion in the late eighteenth century up to the 1840s. But an “ideology of order” also later manifested itself in rural areas; see Storch, R. “Policing Rural Southern England before the Police” in Hay and Snyder (1989), op. cit., pp. 211-264.

⁴¹Hay and Snyder (1989), op. cit., p. 10.

⁴²See: Phillips, D. (1977), *Crime and Authority in Victorian England: The Black Country 1835-1860*, London, Croom and Helm, chapter three.

⁴³In some parts of the country, especially in rural areas, the desire of magistrates to call out the army to quell riots and other serious forms of disorder remained well into the Chartist period of 1830-1843. See: Radzinowicz, L. (1968), *A History of English Criminal Law and its History from 1750*, Vol. 4, Steven & Sons, London, pp. 141-157; Langford, op. cit., p. 22.

dominant values and interests for it to succeed. The systemic need for social control necessitated a particular type of model of law enforcement which was unpalatable to “traditional” English sensitivities. It required a professionally trained, disciplined and centrally organised form of policing, instructed by the Home Office, with expansive powers to suppress and control all of the social elements that had exposed the existing legal infrastructure. But such a reform itself would represent a fundamental assault on traditional libertarian values, the social structure, its hierarchies and on vested interests. It would entail transferring power and reorienting the system of criminal justice from local bodies and justices to the organs and representatives of a new centralised state. Such a controversial and radical measure could generate intense opposition from many quarters, in particular from the local justices who were pivotal figures in the ancien regime.

In its pure form, as expressed in the writings of Bentham and Chadwick, there was little chance of such radical reform plans becoming a reality. Indeed, the centralised police force eventually established by Robert Peel in 1829⁴⁶ in the Metropolitan districts of London, although intended as a prototype for the rest of the country,⁴⁷ was not adopted nation-wide because of vested interests and persistent resistance from the counties and boroughs.⁴⁸ The solution lay in a compromise in which the “new system” would incorporate the “old”. While

⁴⁴Emsley notes that by 1801 there were 71 permanent and 21 temporary barracks set up in different parts of the country; *op. cit.*, p. 46.

⁴⁵See chapter two.

⁴⁶See the Metropolitan Police Act 1829 (10 Geo. IV c. 44).

⁴⁷See Emsley, C, *op. cit.*, p. 67; Radzinowicz, L. (1968), *op. cit.*, p. 159; *Parl. Debates* (1828), n.s., vol. 18, cols 784-798.

⁴⁸See: Langford, *op. cit.*, p. 27; Storch, R., “Policing in Southern England before the Police”, *op. cit.* Chadwick’s centralizing ambitions specifically failed in 1839 because of the political strength of the magistracy which was heavily represented in Parliament; see Hay and Snyder, *op. cit.*, p. 11.

institutional change was necessary and inevitable (because of the social turbulence in the 1830s and early 1840s caused by Chartism), control of the police, ostensibly, had to remain with the localities themselves rather than with the institutions of the central state. Control by magistrates at quarter sessions thus remained intact by virtue of the Municipal Corporations Act 1835,⁴⁹ the County and Borough Police Act 1856⁵⁰ and the Local Government Act 1888,⁵¹ with additional supervision of the Borough forces provided by the Watch Committees.

It would be misleading to suggest, however, that the new system had effectively established the new police as “agents” of local government. The County Police forces, now led by County Chief Constables, exhibited a high degree of independence from magistrates in particular. The high social status of these Chief Constables,⁵² in conjunction with the indirect links between them and the Home Office established by the 1856 legislation,⁵³ had the effect of granting them de facto autonomy and undermined the amount of local control given to magistrates. Although the supervisory regime imposed upon borough police forces was much tighter,⁵⁴ even Borough Chief Constables were able to exercise increasing independence from the Watch Committees by the 1860s.⁵⁵ As the nineteenth century came to a close, the ties between local government and the police became even looser as the responsibilities of Watch Committees in other local government

⁴⁹5 & 6 Gulielmi IV, C. 76, s. lxxvi.

⁵⁰19 & 20 Vict. C. 69, s. vii.

⁵¹51 & 52 Vict. C. 41, s. 9(3).

⁵²See Langford, *op. cit.*, p. 50.

⁵³The County and Borough Police Act 1856 imposed a duty upon all Chief Constables to provide the Home Office with information.

⁵⁴According to Critchley, the control of the Watch Committees was “absolute”; see *A History of Police in England and Wales*, *op. cit.*, p. 124. But, as Langford notes, this was only true of the early period, after which the ties were gradually loosened by the activities of borough police Chief Constables, who by the 1860s were increasingly autonomous; *op. cit.*, pp. 51-53.

business began to increase, and as central government upped its financial contribution towards the running of the New Police.⁵⁶ The combined effect was increased centralization.

The replacement of parish constables and night watches by an organised police force, also enabled a new system of prosecution to gradually assert itself. The old system of private prosecution and individually initiated investigations, with the active support of magistrates and prosecution associations, was taken over by the new police with the financial support of the State.⁵⁷ According to Hay and Snyder, the reason for this development was because the “police had become convenient substitutes for private prosecutors who would not, or could not, go to the trouble or expense of proceeding.”⁵⁸ While the pace with which this occurred and the form that it took was not uniform across the country, by mid-century the police were either conducting in person the majority of prosecutions or nominating able solicitors to act on their behalf.⁵⁹

⁵⁵See Langford, *ibid.*

⁵⁶See the Police Expenses Act 1874; Critchley, *op. cit.*, p. 127; Langford, *op. cit.*, p. 53. The operational independence of the police is neatly illustrated by Maitland. Commenting on the usual procedure of applying for a warrant from a magistrate to search places for stolen goods, he states that by 1885 there were cases in which an authority in writing from the chief police officer of the district would serve as a sufficient substitute; *op. cit.*, p. 115.

⁵⁷Up to 1836, the costs of all prosecutions were a local burden. But since 1836 one half of those costs, and from 1846 the whole, were repaid to the counties by the central state; see F.W. Maitland, (1885) *Justice and Police*, London, Macmillan, pp. 141-142.

⁵⁸*Op. cit.*, p. 37.

⁵⁹*Ibid.*, pp. 39-40. According to Jennifer Davis, of the 83, 582 offences that were proceeded against in London in 1869, only 11, 631 charges were the result of private summonses. See “Prosecutions and Their Context,” in Hay and Snyder, *op. cit.*, p. 419.

Although there were attempts in the 1850s⁶⁰ and the 1870s⁶¹ to introduce a system of public prosecutors to avoid too much power being concentrated in the hands of the police,⁶² by the time of the introduction of the office of the Director of Public Prosecutions in 1879, the police was already accepted as a legitimate institution in the eyes of many, especially the new middle classes.⁶³ There was insufficient motivation, therefore, to remove those powers of prosecution which they had arrogated for themselves.⁶⁴ Hence, the new office of the DPP was not established as the separate body of public prosecutors which Bentham and his supporters had demanded and which had been advocated in the 1850s, but as a “supervisory” body which would intervene only in “exceptional cases.” The existing system of prosecution, was perceived as working well,⁶⁵ with the DPP needed only “to give advice in cases of importance and difficulty to justices of the peace, and to Chief Officers of Police, who may apply for his advice in such cases...subject to any special instructions which he may receive from the Attorney-General.”⁶⁶

The increasingly “state-like” system of prosecution, however, was still projected as “private” and individually-initiated. The incumbent DPP, during the first inquiry into the office, justified his infrequent intervention on the ground that the

⁶⁰See *The Report of the Select Committee on Public Prosecutors*, Parl. Papers 1856 Vol. VII, cited in Langford, op. cit., pp. 110-116.

⁶¹See *The Fifth Report of the Judicature Commission*, Parl. Papers 1874, Vol. XXVI, cited in Langford, op. cit., pp 124-134.

⁶²There were also fears of police bias because of their dual role of prosecutor and witness, and the possibility that this would be exploited by defence counsel. See Langford, op. cit., p. 127.

⁶³See Emsley, *Policing and Its Context*, op. cit., ch. 9. Police involvement in prosecution was increasingly viewed as unproblematic; see *The Fifth Report of the Judicature Commission*, op. cit., and the discussion by Langford, op. cit., pp 125-127.

⁶⁴See the Correspondence of E.H. Leycester Penryhn, Chairman of Surrey Quarter Sessions, Parl. Papers 1875 Vol. LXI, p. 541, cited in Langford, op. cit., and the latter’s discussion, p. 133.

⁶⁵See Langford, op. cit., p. 131.

Prosecution of Offences 1879 had enshrined the right of private prosecution.

Maule stated:

“The seventh section of the ‘Prosecution of Offences Act 1879’, contains this material restriction with regard to my interference: ‘Nothing in the Act shall interfere with the right of any person to institute, undertake, or carry on any criminal proceeding.’ Therefore, *as long as people elect to carry on their own prosecutions*, I have no legal right to intervene or interpose, and it is only when they apply to me, and I learn in that way that they wish for my interposition, that that interposition is well-founded or warrantable”⁶⁷ [my emphasis].

The fact that, in the 1880s, “private prosecution” had become a rarity and by then a police domain, was not expressed in official rhetoric. The police officer was conceptualised not as an agent of state, but as an individual citizen providing a service to complainants who, by reason of their financial difficulties, would be otherwise unable to get redress. As with the reform of policing itself, the new system of prosecution was not *presented* as a radical departure from the old. In so doing, historical continuity was preserved and the legitimacy of the new system established. Thus by the time of the Royal Commission on Police Powers and Procedure in 1929, lawmakers were still prepared to state:

⁶⁶Evidence of John Blosset Maule Q.C., incumbent DPP, in the *Report of the Committee Appointed to Inquire into the Office of the Public Prosecutor*, Parl. Papers 1884 Vol. XXII, p. 317, cited in Langford, op. cit., p. 138.

⁶⁷Ibid, cited in Langford, op. cit., p. 139.

“Despite the imposition of many extraneous duties on the police by legislation and administrative action, the principle remains that a policeman, in the view of the common law, is only ‘a person paid to perform, as a matter of duty, acts which if he were so minded he might have done voluntarily’”.⁶⁸

The establishment of the police as law enforcers, investigators and de facto prosecutors also enabled reform of the magistracy to take place. Utilitarian-led rationalisation of the criminal law that had begun in the 1820s, and which continued for much of the nineteenth century, led to a massive growth in the number of summary offences.⁶⁹ This had the effect of transferring the majority of criminal cases from Quarter Sessions and Assizes to the new, and specially constructed, Magistrates Courts thereby establishing the Magistrates Court as the principal site of guilt determination.⁷⁰ Although the magistrate had always acted in some judicial capacity, this shift in case orientation served to highlight the judicial role over the administrative one. In terms of legitimacy, therefore, and for presentational purposes, it was increasingly important for the magistrate to act “judicially.”⁷¹

⁶⁸London, HMSO Cmnd 3297, para 15.

⁶⁹By 1856, the expansion of summary jurisdiction was already halving the number of indictable offences that reached Quarter Sessions; see the comments of Thomas Puckle, Chairman of Quarter Sessions at Newington, in *The Report of the Select Committee on Public Prosecutors*, Parl. Papers 1856 Vol. VII, p. 373, cited in Langford, op. cit., p. 120.

⁷⁰F. W. Maitland notes that by 1883, only 14000 persons were tried for an indictable offence while the number of summary convictions for larceny alone had risen to 27000; see *Justice and Police* (1885), London, Macmillan & Co, p. 128.

⁷¹This was one of the objects of the 1848 Act; see Freestone D. and Richardson J.C. “The Making of English Criminal Law : Sir John Jervis and his Acts,” *Crim.L.R.* [1980], pp 5-16, at p. 10.

It is in this context that we can view in part the greater frequency of cautioning amongst magistrates before 1848 that we observed in the last chapter, and the desire of judges to impose a form of discipline upon wayward magistrates.⁷² Although Jervis's Act of 1848 was concerned with setting up a series of procedures that would protect magistrates from legal challenge,⁷³ it is also clear that it was intended to consolidate the existing law which by that time favoured strict procedural control of magistrates. Furthermore, later nineteenth century case law also indicates that it was not expected that magistrates would question accused persons outside the framework of the 1848 Act. Hence the case reporter for the *The Justice of the Peace* in 1877, commended "to the attention of *all justices of the peace* and police officers" (emphasis added) the comments of the Lord Chief Justice that the law did not allow a judge, magistrate, jury or police officer to question an accused.⁷⁴ The office of magistrate was no longer characterised by its wide discretionary powers in symbolic recognition of his status within the local community. Rather, he was now a state functionary equipped with specific and limited powers, and expected to perform a specific function at a specific place in a specified manner.

This increased supervision of the magistrate through cautioning and the removal of questioning powers, however, did little to benefit accused persons. Its purpose was not to endow the accused with an armoury of enforceable rights should the

⁷²See the discussion of *Arnold*, op. cit., in chapter two.

⁷³See chapter two, pp 6-7. According to Langford, as a result of the last bill during the passage of the Indictable Offences Act 1848, it was also assured that magistrates would be protected against legal suits challenging the validity of their decisions unless malice was proved; op. cit., p. 42.

⁷⁴See *The Yeovil Murder Case* (1877) 41 JP 187. See also the earlier decision of *Berriman* (1854), op.cit., in which it was held that the magistrate had no right to question the accused (though no

magistrate overstep his powers,⁷⁵ but to enable the new system to work more harmoniously. By off-loading questioning powers onto the police, questioning of the accused could take place outside the court, in private and hidden from public scrutiny. Thus confessions could be obtained using oppressive tactics with little danger of the legitimacy of the system being threatened. If oppression came to light in subsequent proceedings, the “voluntariness” of the confession could be assured by the appearance of the accused before the magistrate who would read the second caution as stated in the 1848 Act, a procedure that was likely to facilitate the admission of a confession no matter how oppressive or illegal police questioning may have been.⁷⁶

In terms of the whole restructuring process, the judicial role was not excluded from this process of reform. Under the old system, watchmen and constables had acted individually under the auspices of Justices of the Peace. The new system, however, had enabled an increasingly autonomous police force to emerge with only loose external supervision.⁷⁷ In the context of the late nineteenth century, with ever increasing powers conferred directly or indirectly on the police by statute,⁷⁸ this led some commentators to doubt the legitimacy of the extent of these

reference was made to the 1848 Act itself). For a detailed discussion of this decision, see chapter two.

⁷⁵See the discussion of *Samsome* in the previous chapter.

⁷⁶Although there appear to have been some differences in opinion amongst the judiciary as to the role of the caution after 1848 (see the discussions of *Samsome*, *Stripp*, *Bate* in chapter two), the dominant position was that the role of the caution was to facilitate the admission of confessions, and not to provide a means by which they would be excluded.

⁷⁷The “looseness” of this supervision is illustrated by the extent of the autonomy granted to chief police officers in the early 1880s. According to Maitland, where there was a need to search for stolen goods, there were cases in which an authority in writing from the chief police officer in the relevant district was deemed as good as a magistrate’s warrant; *op. cit.*, p. 115.

⁷⁸This included powers conferred by the Licensing Acts [see, for example: the Licensing Acts of 1872, c. 94, s. 35 (concerning inspection of houses providing intoxicating liquor); of 1878, c. 12 (concerning powers of entry onto premises to inspect threshing machines)]and by virtue of their

powers without any corresponding supervision. Hence, Maitland remarked: “In truth, the very large inspectorial powers given by this statute and by that are becoming consolidated in the hands of the police.”⁷⁹

It was important, in terms of police legitimacy, for a new form of supervision to be established. A form of supervision that was independent of government. This was to be achieved by subjecting police officers to “the Rule of Law;” namely, to control by the judiciary. In order for this form of control to be effective and for the system to work efficiently, it was necessary to generate a sufficient consensus amongst the judiciary as to the extent of that control. But this was necessarily problematic because of the individualised nature of the judiciary and the lack of a formal and hierarchical decision-making structure in the nineteenth century. Although consultation amongst them was common, the responsibility for the majority of decisions resided with individual judges which gave them the ability to interpret the common law or statute in accordance with their own sets of values rather than in compliance with the values of a corporatised judiciary. When faced with a politically and constitutionally controversial subject, such as the control of the police, it was inevitable that different values would be expressed from the Bench and different rules would be set out concerning the proper scope of police questioning.

appointment as inspectors by local authorities of such matters as food and drugs, weights and measures, explosives, etc. See further, F. W. Maitland, *op. cit.*, p. 116.

⁷⁹*Ibid.*, p. 117. It should be noted that I am not arguing that the police were regarded as uncontroversial before this point, nor that there were no calls for strict supervision of the police. Indeed, the opposite has been argued in the foregoing section.

Control of police officers by the judiciary did not suddenly emerge in the early 1880s, as Mirfield suggested.⁸⁰ It had been an ongoing process since the early 1830s and the increased nation-wide presence of the police. Moreover, differences of opinion were present even then. In *Swatkins* (1831),⁸¹ Patteson J was prepared to impose some form of legal control upon the questioning of an accused (albeit very limited in scope) by requiring a police officer to first caution him when he was formally detained as a suspect under charge.⁸² While in *Kerr* (1837),⁸³ Park J left the need to caution the accused entirely with the police officer himself.

As it became apparent that a police force was being established nation-wide, that was responsible for collecting evidence and prosecuting cases against an accused, the need for clear and authoritative guidance from the courts became increasingly important. The clarity of that guidance, however, was obscured by the differing opinions of the Bench as to the extent and nature of police powers of questioning. In the early 1850s, it seemed that some of the senior judiciary realised the importance of a judicial consensus on such matters in the wake of a series of decisions from Maule J and Coleridge J in the 1840s.⁸⁴ These had left the police officer in a quandary whether to question the accused at all, and if so, how he should administer a caution without it being regarded by the courts as an inducement in contravention of rule in *Warickshall*. The newly established Court of Criminal Appeal in 1848,⁸⁵ provided the structural means by which the

⁸⁰Op. cit.

⁸¹Op. cit.

⁸²For a discussion of this case, see chapter two, p. 9

⁸³Op. cit.

⁸⁴See the cases of *Drew*, *Morton*, *Furley* and *Harris* referred to in the last two chapters.

⁸⁵11 & 12 Vict. c. 78.

differences amongst the judiciary could be minimised and thus better guidance to the police provided.

It is submitted that the case of *Baldry* (1852) was a formal recognition by some of the senior judiciary for a new consensus to emerge. Three of the five judges refer to the “wayward” decisions of judges Maule and Coleridge and the need for clarity on the issue.⁸⁶ A sentiment, perhaps, best expressed by Baron Parke who states:

“I have the most unfeigned respect for Coleridge J and Maule J; and in deference to their decisions, I offered to reserve a case at Aylesbury, but I cannot concur in their judgement. I have reflected on *Reg. v Drew*, and *Reg v Morton*, and I have never been able to make out that any benefit was held out to the prisoner by the caution employed in those cases. We ought therefore to be extremely obliged to Lord Campbell for having reserved the point in order that it might be *settled*”⁸⁷(emphasis added).

It is clear from Campbell LCJ’s concluding remarks that this sentiment (the need for a formal consensus) was shared by all of the Court:

“With regard to the decisions of my brother Coleridge and by Brother Maule, with the greatest of respect for them, I disagree with their conclusions. It was in deference to their ruling that I reserved this point, not that I entertained any doubt upon the question myself. I am very glad

⁸⁶See the judgments of Chief Baron Pollock at 442-3, Baron Parke at 445, Campbell LCJ at 447. It is also apparent from their earlier interjections with counsel at 440.

to find that all this Court concur in the view which I took at the trial, that the evidence was admissible.”⁸⁸

But is it not apparent that this formal recognition of the need for a consensus extended to their substantive opinions and values. Hence, it was noted in the last chapter that while Erle J and Baron Parke exhibited similar values and opinions, these were different from the opinions of Chief Baron Pollock and Campbell LCJ. Campbell LCJ’s concluding remarks should be read, therefore, as an attempt to *present* a consensus more than an actual consensus on the extent of police powers and the manner in which they were exercised.⁸⁹

This lack of substantive consensus is evident throughout the rest of the nineteenth century, as judicial opinion reacted to the controversial changes that were taking place in the structure of the criminal process. The re-emergence of an activist administration in the 1870s and 1880s, and renewed interest in police reform,⁹⁰ culminating in the Local Government Act 1888,⁹¹ aroused the liberalist and

⁸⁷Ibid.

⁸⁸Ibid, at 447.

⁸⁹This is also apparent from the first decision of the Criminal Court of Appeal in *Garner* (1848) 1 Den. 329, in which Maule J and Erle J clearly had different perspectives as to the application of the voluntariness rule. For Erle J, its application was discretionary: “I think, in every case, it is for the Judge to decide whether the words were used in such a manner, and under such circumstances, as to induce a prisoner to make a confession of guilt.” Whereas, for Maule J, it was simply a question of applying a verbal formula. Hence in response to counsel’s question whether the statement, ‘you had better tell the truth’, rendered a statement involuntary, he replied: “They have been held to do so over and over again.” The need for a presentational consensus to conceal differences, however, is clear from Chief Baron Pollock’s statement: “We are *all* of opinion that the conviction cannot be sustained.” (emphasis added).

⁹⁰In 1874, it was decided to increase the Exchequer grant towards the cost of all police forces from one-quarter to one-half of the cost of pay and clothing. This was part of a policy to increase the supervisory powers of the Home Secretary over the county police forces; see Critchley, *op. cit.*, p. 127.

⁹¹Chap. 41, p. 257. The motivation for the Act was to improve police efficiency and to increase the supervisory powers of ‘democratic’ organs of government over the police (see Critchley, *op. cit.*, pp. 132-139). This was sought by abolishing police forces in towns with a population of less than

decentralist tendencies of some members of the judiciary. This was reflected subsequently in the case law on police powers of questioning in the 1880s and 1890s, with some judges roundly criticising the police questioning of accused persons when in custody and excluding any statement obtained thereby.⁹² But these opinions were not universally shared.⁹³ Some judges remarked they knew of “no such rule of evidence” and saw nothing wrong in police questioning of the accused whether in custody or not. A caution would be preferable, but it was not essential to admissibility. They also echoed the sentiments behind the Criminal Evidence Act 1898, that a rule which prevented the accused from making a statement to the police when first arrested or charged would cause “mischief” and would be against the interests of those accused who were factually innocent.⁹⁴ Other judges made a compromise; that while there was no rule of evidence which prohibited police officers from questioning the accused in custody, there was a discretion which could be exercised depending on the facts of the individual case.⁹⁵

10,000 people and by vesting supervisory powers in a joint standing committee of the county council and quarter sessions (section 9)

⁹²See the judgment of Smith J in *Gavin* (1885) 5 Cox CC 656 at 657, and the judgments of Cave J in *Thompson* (1893) 2 QB 12, *Male and Cooper* (1893) 17 Cox CC 689 at 690 and *Morgan* (1895) 59 JP 827. In the latter case, the report states that Cave J ruled “that the prisoners, having been taken into custody at the house, what they said in answer to the charge at the police station could not be given in evidence against them, as it was not right, when once a prisoner was in custody, to charge him again at the police-station in the hope of getting something out of him. A detective had no earthly business to examine a prisoner.”

⁹³See *Brackenbury* (1893) 17 Cox CC 628 in which Day J expressly dissented from the decision of Smith J in *Gavin*, op. cit.

⁹⁴See the judgments of Russell LCJ and Mathew J in *Rogers v Hawkin* (1898) 19 Cox 122.

⁹⁵See the judgment of Hawkins J in *Histed* (1898) 19 Cox CC 16 at 17n where he states: “I entirely agree with the ruling of Smith J in *Gavin*. Cross-examination of a prisoner by a policeman should not be permitted, and in my *discretion* I should exclude evidence obtained in that way” (emphasis added). See further *Miller* (1895) 18 Cox CC in which the same judge decided not to exercise his discretion. See also the judgment of Channell J in *Knight v Thayre* (1905) 20 Cox CC 711.

The confusion that this must have engendered in the police force with regard to their powers of questioning over the accused was all too apparent. In the Preface to Vincent's Police Code in 1882, Justice Hawkins, had given a clearer impression to police officers as to the path they should take. He wrote:

“When a crime has been committed, and you are engaged in endeavouring to discover the author of it, there is no objection to you making enquiries of, or putting questions to, any person from whom you think you can obtain useful information. It is your duty to discover the criminal if you can, and to do this you must make such enquiries; and if in the course of them you should chance to interrogate and to receive answers from a man who turns out to be the criminal himself, and who inculpates himself by these answers, they are nevertheless admissible in evidence, and may be used against him...When, however, a constable has a warrant to arrest, or is about to arrest a person on his own authority, or has a person in custody for a crime, it is wrong to question such person touching the crime of which he is accused. Neither judge, magistrate, nor juryman, can interrogate an accused person - unless he tenders himself as a witness - or require him to answer questions tending to incriminate himself. Much less, then, ought a constable to do so, whose duty as regards that person is simply to arrest and detain him in safe custody. On arresting a man a constable ought simply to read his warrant, or tell the accused the nature of the charge upon which he is arrested, leaving it to the person so arrested to say anything or nothing as he pleases. For a constable to press any accused to say anything with reference to the crime of which he is accused is very wrong.....There

is, however, no objection to a constable listening to any mere voluntary statement which a prisoner desires to make, and repeating such statement in evidence; nor is there any objection to his repeating in evidence any conversation he may have heard between the prisoner and any other person. But he ought not, by anything he says or does, to invite or encourage an accused person to make any statement without first cautioning him that he is not bound to say anything tending to incriminate himself, and that anything he says may be used against him. Perhaps the best maxim for a constable to bear in mind with respect to an accused person is, 'Keep your eyes open, and your mouth shut.'.... Never act unfairly to a prisoner by coaxing him word by word or conduct to divulge anything. If you do, you will assuredly be severely handled at the trial, and it is not unlikely that your evidence will be disbelieved.

“In detailing any conversation with an accused person, be sure to state the whole conversation from the commencement to the end in the very words used; and, in narrating facts, state every fact whether you think it material or not, for you are not the judge of its materiality....I cannot too strongly recommend every constable, however good he may fancy his memory to be, to write down word for word every syllable of every conversation in which an accused has taken part, and of every statement made to him by an accused person, and to have that written memorandum with him at the trial.”⁹⁶

⁹⁶Cited in Abrahams, G, 1964, *Police Questioning and the Judges' Rules*, Oyez Publications, London, pp 13-14.

According to Justice Hawkins, therefore, it was the duty of a police officer to question persons in order to discover the author of a crime. If that person later turned out to be the criminal himself, the answers he gave could be evidence against him at the trial. But once that person had become an “accused”, that is a warrant of an arrest had been issued against him, or he had been arrested on the authority of the police officer, or he was in custody for a crime, he was not allowed to be questioned in relation to that crime. The officer could ask him if he had anything to say, but only after a proper caution had been administered to the accused reminding him that he was not obliged to say anything and that what he said would be used in evidence. Should a police officer stray from these guidelines, the statement of an accused would not be inadmissible at the trial. Nevertheless, he might receive a rebuke from the trial judge which could adversely influence the jury in their determination of guilt.

This would have given the police the impression that they had wide questioning powers, especially if they managed to avoid instigating formal legal proceedings by questioning their suspect without arresting him. If they wanted to detain the suspect for questioning, detention would have to be justified on grounds other than their suspicion the person committed the crime, such as: flight,⁹⁷ the investigation of other crimes, or of other persons involved in the crime. If they needed to question the accused after they had arrested him, there was less room for manoeuvre but so long as they cautioned him before doing so, any statement given

⁹⁷This possible justification for custodial questioning had been opened up as early as 1831 by the case of *Swatkins*, op. cit. For discussion of this case, see chapter two.

would still be admissible. Technically, they ought only to enquire whether the accused wanted to make a voluntary statement, but more detailed questioning could be justified on grounds of “clarification” without any judicial reprimand because of the emphasis laid on a verbatim record and the likelihood that most accused persons would be illiterate and unable to write their own statements.

It is submitted, therefore, that the “progeny of *Gavin*” must have caused confusion in police ranks because there is no indication of an extension to the rule in *Warickshall* in these guidelines, nor of a discretion vested in the judge to exclude statements obtained in breach of them according to the facts of particular cases. The discretion mentioned in the text refers only to how a judge refers to the evidence in his summing up to the jury.

Moreover, it is from this context that we understand better the communications between the Chief Constable of Birmingham and Alverstone LCJ in 1906, the formation of the Court of Appeal in 1907 and the publication of the Judges’ Rules in 1912. The Chief Constable of Birmingham had written to Alverstone LCJ seeking advice in respect of the police caution. The request appeared to be for some rules that would clearly guide police practice because one judge on his circuit had disapproved of a caution in one set of circumstances, another judge referring to a different set of circumstances had disapproved of the omission of a caution. In response to this request, Alverstone LCJ referred to the following as a guideline. He said:

“There is, as I far as I know, no difference of opinion *whatever* among any of the judges of the King’s Bench Division upon the matter. The practice which has been *definitely* followed, and approved for many years, is that whenever a constable determines to make a charge against a man he should caution him before taking any statement from him. Whether there is any necessity for a caution before a formal charge is preferred must depend upon the particular circumstances of the case: no definite rule can be laid down.

“In many cases a person may wish to give an explanation which would have exonerated him from any suspicion, and he ought not to be prevented from making it. On the other hand, there are cases in which it would be the duty of the constable to caution the person before accepting any further statement from him, even though no charge has actually been formulated”⁹⁸ (emphases added).

The need to present a judicial consensus to the Chief Constable is clear from his statement that there is “no difference of opinion whatever among any of the judges of the King’s Bench” and that the practice of requiring a caution to be administered at the time of the formal charge had been “definitely followed.” But it is not clear from Alverstone LCJ’s statement that a consensus had been reached in respect of either the caution before charge or in relation to any evidential consequences. Nor is it clear whether interrogation of a suspect should stop upon

his arrest or when in custody. Unlike Justice Hawkins in 1882, the emphasis in Alvestone LCJ's statement is on the formal charge and not on the arrest. It could be argued that he was silent about these matters and refused to lay down any definite rules because he was aware of the variety of judicial opinion on the matter.

The formation of the Court of Appeal in 1907 provided the mechanism by which compromises could be effected and judicial consensus achieved. Ostensibly, the reason for the establishment of the Court of Appeal lay in two notorious miscarriages of justice, the cases of *Beck* and *Edalji*. The reports of the two committees which had looked into these cases had focused on remediable errors found in the trial. In order to restore confidence in the system, and thus its legitimacy, the structure of the criminal justice system was changed with a new Court of Appeal that would check for defects in the original trial by giving an accused a right to appeal against his conviction. However, as Langford has noted,⁹⁹ the real motive for the change lay less in the need to give an accused the right to protect himself from a false conviction, and more in the systemic need to renew and maintain the criminal process. He writes:

“This ‘project’ of renewal of the criminal process...was specifically orientated towards the maintenance and reproduction of the efficiency and

⁹⁸Cited in Abrahams, G, op. cit., p. 16.

⁹⁹*State, Law and Prosecution: The Emergence of the Modern Criminal Process 1780-1910*, op. cit., pp 240-260.

organisational coherence of the criminal process. This was the conceptual environment in which the Court of Appeal was shaped.”¹⁰⁰

What had formally been an application of mercy to the Home Office became a “right” of appeal to the Court of Appeal. The Home Office had been inundated with more than 6000 applications each year and did not have the resources nor the expertise to deal with such numbers. This in turn, had focused attention on the role of central government in matters of criminal justice and reawaken the fears of liberal constitutionalists.¹⁰¹ It was necessary, therefore, to off-load these cases onto an independent, non-governmental body to promote both the efficiency and legitimacy of the system. In the new set-up, the Home Office retained its prerogative of mercy, but with the Court of Appeal acting as a filter to substantially reduce the numbers applying, thereby relieving the pressure and strain on the Home Office. Flooding of the new court was also avoided by limiting the right of appeal to indictable offences only (the majority of offences by this time were summary), by the application of maximum time limits for appeal and through internal guidelines given to prison officers. In so doing, the efficiency of the system was maintained.

The new Court of Appeal promoted efficiency in another important respect. The unreformed court structure had facilitated individualism and differences of opinion among judges. Although they frequently consulted in the Inns of Court and in their determination of certain difficult cases, the structure was insufficiently

¹⁰⁰Ibid, p. 259.

¹⁰¹Ibid., pp 242-243.

corporatised and harmonised to promote unanimity of opinion. The notion of “binding precedent”, in particular, had yet to be fully articulated as there was no hierarchical court structure that could enforce it. The new court provided a forum in which the most senior judges could agree, and for that consensus to be set down in specially formulated case reports, the Criminal Appeal Reports, and for it to be communicated to all circuit judges.

That a consensus was reached by senior judges¹⁰² is evident from both the content and form of the case reports on police questioning of the accused between 1907 and 1912. As for the latter, the individualised judgements that we witnessed in *Baldry* (1852), for example, are replaced by a single judgement read on behalf of all the appellate judges. Thus, in *Alice James* (1909)¹⁰³ the agreed judgement is given by Darling J; in *James Unsworth* (1910)¹⁰⁴ by Bucknill J; in *Booth and Jones* (1910)¹⁰⁵ by Darling J, and in *Godinho* (1911)¹⁰⁶ by Hamilton J. In terms of content, all of the judgements refuse to both extend the application of the voluntariness rule to statements made during *de facto* custodial questioning, and to exercise their discretion to exclude statements of the accused made in response to questions after cautioning.

The new “corporate spirit” of the Court of Appeal is perhaps best illustrated by *Booth and Jones*.¹⁰⁷ The appellants had been convicted of demanding money on a

¹⁰²This “spirit”, however, was not shared by all trial judges; see *Winkel* (1912) JP 191 and the judgment of Avory J as an example.

¹⁰³4 Cr App Rep 319.

¹⁰⁴5 Cr App Rep 1.

¹⁰⁵5 Cr App Rep 177.

¹⁰⁶6 Cr App Rep 12

¹⁰⁷Op. cit.

forged document and claimed that a statement “forced” from them by a series of questions put by a Post Office investigating official at the appellant’s house, with a police detective present, should have been excluded at the trial. It was submitted by the appellants’ counsel that as the investigating official knew a fraud had been committed, that he had gone to question the accused in relation to that offence, and that he would not have let them go (according to the police detective), they were in custody at the time and so should not have been questioned. Two of the appeal judges interjected at this point:

“Lawrance J: A policeman’s eye is not custody.

Darling J: If this sort of investigation were not allowed very few crimes would ever be discovered.”¹⁰⁸

Then without requiring any assistance from counsel for the Crown, Darling J delivered the judgement holding that the voluntary rule had not been breached and that “custody” was a factual question for the trial judge to determine on the basis of the interrogator’s state of mind. He stated:

“The evidence before the learned judge was that the person putting the questions had not determined to take the prisoner into custody, and he had to make up his mind whether that was so or not. The learned judge came to the conclusion that there was no evidence to justify him in holding that

¹⁰⁸Ibid., p. 179.

the interrogator had already determined to take Booth into custody or that he was practically in custody.”¹⁰⁹

By leaving in part the question of custody to the individual interrogator, the Court of Appeal facilitated police interrogation of suspects and enabled them to collect sufficient evidence from an accused before having to charge. Any hint of involuntariness was removed by the interrogator “giving the appellant a *definite* option either to speak or not to speak”¹¹⁰(emphasis added). The presence of the caution precluded the operation of the voluntariness rule.

The collective desire to equip the police with sufficient powers to investigate crime by allowing questioning of suspects in *de facto* custody is more evident in this consensus than any need to protect the individual accused. Where some judges had once sought to protect an accused by restricting questioning and demanding that their very words be recorded to prevent police officers from fabricating any statements,¹¹¹ senior judges at the beginning of the twentieth century no longer thought it necessary.¹¹² Suspects were already protected by the voluntariness rule and the police had to be trusted to carry out their duties of detecting and investigating crime. The state, through the agency of the police, was now a servant of the people; the suspect was the enemy.

¹⁰⁹Ibid., p. 180.

¹¹⁰Ibid.

¹¹¹See *Sexton* (1822), op. cit. and Justice Hawkins’s guidelines to the police in 1882.

¹¹²See *Godinho* (1911) op. cit. “The other point raised, that the confession must be excluded unless the *ipsissima verba* are given, does not actually arise, because the uncontradicted evidence is that the words in question were the actual words. Moreover, the case relied upon, *Sexton*, has been much, and probably justly, doubted,” per Hamilton J at p. 14. The implication is that if the

These notions of the state and of the suspect we also see present in the Judges' Rules in 1912. The original rules, which did not have the force of law,¹¹³ were drawn up by the judges at the request of the Home Secretary and were intended as guidance for the police, who were still in considerable doubt as to the procedure they ought follow¹¹⁴ in their questioning of suspects. The rules stated as follows:

- “1. When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.
2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions or any further questions as the case may be.
3. Persons in custody should not be questioned without the usual caution being first administered.
4. If the person wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words “be given in evidence.”¹¹⁵

The spirit they express is that of the new Court of Appeal, and not the old liberalism, nor even the sentiments of Justice Hawkins in 1882. Under rule 1, the

words had been contradicted, it would not have affected the decision because *Sexton* was a bad decision in any event.

¹¹³*Voisin* (1918) 13 Cr App Rep 89.

¹¹⁴See the comments of Darling J in *Cook* (1918) TLR 515 at 516.

¹¹⁵L.R. [1918] 1 KB 539.

judges clearly sanction questioning of suspects without a caution - that is, persons who were already suspected before police questioning. The person questioned is not merely a witness who “turns out to be the criminal himself, and who inculcates himself by these answers.”¹¹⁶ Under rule 2, the questioning is allowed to continue without a caution until the police officer feels that he has enough incriminating evidence to charge the suspect (see *Booth and Jones*). Under rule 3, questioning of the suspect can continue even if the accused is in custody so long as a caution is given (ibid.; though what amounts to ‘custody’ is not defined). Under rule 4, any defects apparent in the foregoing questioning are removed by the administration of a proper caution (ibid.).

It is relevant that the rules do not state the evidential consequences for their breach. It is suggested that this was done for two reasons: first, to maintain the consensus among senior judges and to promote a wider consensus among circuit judges. If the rules had stated that they were rules of law, and that any breach would lead to exclusion of statements of the accused, some judges would have argued such a position was “against the balance of decided authority” (see Sumner LJ in *Ibrahim* below) and unnecessarily restrictive of the police. If, on the other hand, the rules had stated they were only rules of guidance to the police with no evidential consequences arising from their breach, it would have removed the discretionary power to exclude evidence which some judges had arrogated to themselves to exercise in appropriate circumstances.¹¹⁷ By focusing on police questioning powers per se rather than on the consequences for breaching the rules,

¹¹⁶per Justice Hawkins, op. cit.

controversy would be avoided among senior judges and they would thus be in a better position to enforce a consensus wholesale and provide better guidance to the police. Secondly, by reserving a discretion to exclude, the rules provided another device through which the legitimacy of the system would be maintained. In extreme cases of police malpractice, but which did not technically come under the voluntariness rule, judges would have the power to exclude evidence where the moral integrity of the system was threatened.

This consensus of senior judges and the desire to make it more widespread in the judiciary is further illustrated by the Privy Council in *Ibrahim* [1914].¹¹⁸ In refusing to exclude a confession that had been obtained from the accused while he was in custody and without the proper caution, Sumner LJ (on behalf of the whole court) stated:

“The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others, less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had

¹¹⁷For a good example of how this discretion would be exercised, see the judgment of Channell J in *Knight v Thyre* [1905], op. cit.

occurred.....Having regard to the particular position in which their lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English law ought to be, much as it is desired that the point should be settled by authority, so far as a general rule can be laid down when circumstances must so greatly vary. That must be left to a Court which exercises, as their lordships do not, the revising functions of a general Court of Criminal Appeal.”¹¹⁹

Although Sumner LJ (on behalf of all the judges) admits that “the English law is still unsettled”, the disagreement is only in relation to the consequences of “improper questioning of *prisoners*” (emphasis added); that is, those persons who were in official legal custody for the commission of a crime. Some would exercise a discretion to exclude the evidence, whereas others (the implication is the majority) would admit such statements. Even in this matter, there is an expressed desire for the issue to be “settled by authority” in the new Court of Appeal. There is no expressed disagreement, however, over the questioning powers of the police in relation to *suspects*. Those persons who had fallen under police suspicion for the commission of a crime (“suspect”), but were not legally in custody or arrested (i.e. not a “prisoner”), or had not been formally charged (i.e. not an “accused”) would not be granted any protection from police questioning other than the formal application of the voluntariness rule.¹²⁰ That was stated by Rule 1 and then confirmed by *Ibrahim*.

¹¹⁸AC 599.

¹¹⁹Ibid, p. 614.

¹²⁰This was not a hypothetical situation as by the middle of the nineteenth century, the police had become the initiators of investigations, and could determine when to arrest, detain, and charge

It is submitted, therefore, that by the time of the Judges' Rules in 1912, a consensus had been achieved. The category of "prisoner" had been sub-divided into sub-categories of "accused" and "suspect". Although the degree of legal protection afforded to "prisoners" and "accused persons" had yet to be fully worked out, there was a judicial consensus that those who fell into the category "suspect" would have the least protection in order to maximise police efficiency and their ability to investigate crime.

d) The rise and fall of Welfarism and the ascendance of the suspect

Welfarism, that is the notion that the state accepts responsibility for and actively promotes the interests of the community through state intervention in the lives of its citizens, did not suddenly emerge post-1945 when the new Labour administration established the Welfare State (though, perhaps, that was when it was at its peak). The Utilitarians, through the figure of Jeremy Bentham, had as early as the 1820s, advocated an activist and centralised state that would promote the collective welfare of its citizens. We have seen how, as the nineteenth century progressed, although the Benthamite project was never completed, the state became increasingly interventionist, powerful and representative. Reform of the police, the judicialisation of the magistracy and the corporatisation of the judiciary, reflected a much broader programme of reforms in parliamentary democracy, local government and central government that had been begun in the

'suspects'; see Bryan, I. (1997), *Interrogation and Confession - A Study of Progress, Process and Practice*, Dartmouth & Ashgate, Aldershot, p. 133.

1820s to ensure the system's survival through periods of crisis. As the state became more representative through the gradual extension of the franchise, the notions of liberal constitutionalists that the state was an evil to be avoided and that all-embracing laissez-faire should be promoted, became less popular. The state was increasingly perceived as acting on behalf of the whole community as opposed to sectional interests. Even opposing political parties by the end of the nineteenth century and into the Edwardian period had accepted as legitimate state intervention in citizens' lives, as evidenced by the number of bi-partisan state programmes,¹²¹ and the commitment of governments to redistributive policies.¹²² If it ever had been, individualism, by the beginning of the twentieth century, was no longer the orientating ethos of English government or of society.

We see this communitarianism reflected in the case law on the Judges' Rules and in judicial rhetoric in particular. The emphasis on rising crime and the need to facilitate police investigations for the benefit of the community as a whole is apparent from the early cases. Thus, in *Voisin* (1918), in refusing to regard breaches of the Rules per se as a reason for excluding statements of the accused, the Court of Appeal commented:

“It is desirable in the interests of the community that investigations into crime should not be cramped.”¹²³

¹²¹See Pugh, 'M. (1994) *State and Society - British Political and Social History 1870-1992*, Edward Arnold, London, pp 109-121.

¹²²Such as Lloyd George's "People's Budget" in 1909; see Smith, M. (1990), *British Politics, Society and the State Since the Late Nineteenth Century*, Macmillan, London, pp 49-50.

¹²³per Lawrence J at p. 95.

Similarly, in *Cook* (1918) Darling J opined on behalf of the Court:

“It would be a lamentable thing if the police were not allowed to make enquiries, and if statements were excluded because of a shadowy notion that if prisoners were left to themselves they would not have made them.”¹²⁴

That is not to say, however, that the values of individualism and of laissez-faire were dead. After the First World War, they were seen to dominate temporarily in economic policy as Britain sought to regain its position in world trade through its advocacy of a return to the Gold Standard.¹²⁵ Respect for individual rights was also present in the case law on questioning, and evident in the language of the newly constituted Court of Appeal. Hence, the liberal judge Avory LCJ, threw out statements of the accused that had been obtained by questioning in custody on the ground that “an informal preliminary trial in private by the police is not fair to prisoners.”¹²⁶ Moreover, even in those cases where concern for the rights of accused persons was not paramount, there was still a recognition of the need to protect the individual as expressed through the continued usage of words such as “prisoner”. Such words evoked violation of the freedom of the individual, and stressed the importance for judicial regulation and protection. Hence in *Voisin* (1918), Lawrance J commented:

¹²⁴at p. 516.

¹²⁵Pugh, M, op. cit., pp 165-166.

¹²⁶*Grayson* (1921), at p. 8. See also: *Taylor* (1923); *Brown and Bruce* (1931). Differences of opinion were still prevalent in the late 1920s and early 30s, focusing on the wording of Rule 3 of

“statements obtained from *prisoners* contrary to the spirit of the rules may be rejected” (emphasis added).¹²⁷

But following the debacle of Stanley Baldwin and his government in 1929, the massive rise in unemployment, and then the collapse of the Gold Standard, disenchantment with the free market and with private enterprise became more entrenched, and belief in the virtues of active government grew.¹²⁸ The formation of a National Government and then the inexorable march to war rang the death knell for *laissez-faire* and the pre-eminence of individual rights. In the case law on police questioning, the term “prisoner” disappeared from judicial vocabulary and was replaced by the more manipulable and less evocative language of the Judges’ Rules, as the “prisoner” became a “person in custody”.¹²⁹

It is submitted that this symbolized a turning point in police powers and the role of the accused. A welfarist consensus had been reached in that the needs of the individual were perceived as inextricably linked to the strength and capacity of the state to intervene. This is well illustrated by the substantive decisions and rhetoric of the Court of Appeal after the Second World War. First, there is the image of the police officer, as an impeccable representative of the state, fighting the ever rising tide of criminality with his hands tied behind his back. In the words of Winn LJ:

the 1912 Rules; see Wolchover D. and Heaton-Armstrong A. (1996), *Wolchover and Heaton-Armstrong On Confession Evidence*, London, Sweet & Maxwell, p. 113.

¹²⁷Op. cit., at p. 96. See also *Cook* (1918), op. cit., where Darling J uses the same terminology.

¹²⁸See Pugh, M., op. cit., pp 169-174.

¹²⁹See Abrahams, G., op. cit., pp 32-33, and Home Office Circular (1930), 536053/23.

“In these days the criminal classes are only too well aware of their position of virtual immunity in the hands of the police. It does seem that some of the present doctrines and principles have come down in our law from an earlier time when the police of this country were not to be trusted, as they are now to be trusted in almost every single case to behave with complete fairness towards those who come into their hands or from whom they are seeking information.”¹³⁰

Second, there is a “demonisation” of suspects as they become associated with “ever-increasing wickedness.”¹³¹ This lays the groundwork for equipping the police with greater powers of questioning, and removing the remaining rights from suspects. Police interrogation and cross-examination of a suspect when in custody or under arrest, which had been prohibited by Justice Hawkins at the end of the nineteenth century and by Avory J in the 1920s and early 1930s, is now positively endorsed through a number of devices. First, the police are allowed to take a suspect to the police station to “help them with their enquiries” and to thereby place him in de facto custody. They are not placed under a duty to tell the accused that he is not under arrest nor free to go.¹³² Second, even if the suspect is in legal custody and the statement is obtained in breach of the rules, the court has a discretion to admit the evidence.¹³³ Third, where a caution is normally required, such as before the making of a voluntary statement, it is no longer necessary if

¹³⁰*Northam* (1967) , at p. 102.

¹³¹*Chic Fashions* (1968), per Denning MR at p. 313. See also the judgments of Diplock LJ at p.316 and Salmon LJ at p. 319. See also the extra-judicial pronouncements given in Choongh, S. (1997), *Policing as Social Discipline* , Clarendon, Oxford, pp. 18-19.

¹³²*Wattam* (1952).

¹³³See: *May* (1952) 36 Cr App Rep 1; *Smith* (1961); *Massey* (1964).

“impractical.”¹³⁴ Judicial devices for circumvention of the rules culminate in reformulation of the Rules in 1964 which gives the police official licence to question suspects between arrest and charge.¹³⁵

By the 1970s, although the post-war consensus on the role of the state in economic affairs, at least, had begun to break down and with it the consensus on the virtues of an all-embracing Welfare State, the virtues of strong government and the need for expansive police powers to check the advance of the criminogenic classes, remained a constant. The Court of Appeal had become so disenchanted with the “tenderness” of the rules, that it dispensed with the need for a caution at all in the interrogation of suspects until the “beginnings of evidence” (i.e. a *prima facie* case) had been established.¹³⁶ It castigated those who exercised their ‘right to silence’ as “probably guilty,”¹³⁷ and coached the police to circumvent rights that had been given to suspects. In *Lemsatef* (1976), Lawton LJ reproached the police officer for refusing to give the suspect access to a solicitor on the ground that he could not just state the wording of the Judges’ Rules verbatim. He went on to say:

“The answer should have been that solicitors could not reasonably be expected to turn up until ordinary business hours and that delaying interrogation until then might have caused unreasonable delay.”¹³⁸

¹³⁴See *Sargeant* (1963) in which the court allowed a police officer to delay giving a caution to a suspect until after the latter had made a statement 100 words long.

¹³⁵Wolchover and Heaton, *op. cit.*, p. 114.

¹³⁶*Osbourne and Virtue* (1972), p. 307.

¹³⁷See *Gilbert* (1977), per Viscount Dilhorne at p. 253.

¹³⁸p. 246.

The Court of Appeal also rendered the rights meaningless in any event by not imposing any duty upon the police to inform the suspect of his rights.¹³⁹

By the early 1980s, laissez-faire economics was back in full swing and the massacre of Welfarism became a prime objective of the New Right, through the guise of individualism. The whole premise upon which Thatcher had built her election victory was the necessity of rolling back the state to free the individual. It seems, however, that criminal justice had developed a logic all of its own. In spite of a series of miscarriages of justice that occurred in the late 1970s and early 80s, the wheels of English criminal justice appeared impervious to the need to protect suspects from abuses of police power. The courts continued to validate custodial interrogation of suspects, and, on the eve of PACE, finally subverted the Rules by endorsing arrest and detention for questioning.¹⁴⁰ The distinction between “persons in custody” and “suspect” that was present in the Judges’ Rules, no longer had substantive meaning. All persons who fell under police suspicion, whether in custody or under arrest, were now “suspects.”

¹³⁹See *Stephen King* (1978).

¹⁴⁰See *Mohammed Holgate v Duke* [1983].

Chapter Four

In Search of God's Law: Exploring Approaches to the Study of Islam and the Islamic Criminal Justice System

1. Introduction:

Over the past three chapters, I have attempted to set out and explain the role of the accused in the English criminal justice system through an historical and contextual analysis of English case law and statute. This has entailed setting out the conventional wisdom, subjecting it to scrutiny and suggesting a re-evaluation in the light of historical trends, contemporary ideologies and enforcement structures. Attempting to explain the role of the accused in the Islamic legal system in the same manner and through the same types of sources, however, would be fraught with difficulty.

For those who are schooled in the Anglo-American legal tradition, the “law” which counts consists of those rules which are formulated by the state: statutes, regulations, guidelines and judicial decisions. Yet, for the Muslim, what appears in a country’s posited laws has no necessary correlation with the Islamic tradition. The real “law” is found in holy texts: the Qur’ān and the Sunnah, and in juristic interpretation of those texts. If the study emphasized the traditional texts and ignored developments in Muslim states, this could prove frustrating for those who are ignorant of the Islamic tradition. It would provide no answers to important issues such as the inter-action between “text” and “context.”

My analysis of the role of the accused in Islamic criminal justice purports to bridge this gap. Chapter five sets out rules of confessions and questioning in Islamic Law, as has been expounded by the four main schools of Sunni jurisprudence. Chapter six examines the extent to which these positions have been reflected in the posited laws of a Muslim (or Muslim-dominated) state. This will enable readers to draw conclusions on the relationship between Islamic law in theory, and the “law” that is applied in practice.

Examination of appropriate sources, however, is not the only difficulty in this comparative exercise. One must also recognise the potential for bias and the need to use methodological tools that reduce such potential. This is true particularly when one remembers the secular context of Anglo-American legal writing. A “secular” re-interpretation or analysis of Islamic criminal justice might obscure one’s understanding of what is a “religious” system. As John Esposito has observed:

“Modern, post-Enlightenment secular language and categories of thought distort understanding and judgement. The modern notion of religion as a system of personal belief makes an Islam that is comprehensive in scope, with religion integral to politics and society, ‘abnormal’ insofar as it departs from an accepted ‘modern’ norm, and nonsensical.”¹

¹*The Islamic Threat: Myth or Reality*, (1992), New York and Oxford, Oxford University Press, p. 198.

An analysis dominated by secular values and interests would contribute more to distortion than real understanding of the Islamic tradition. If we are to avoid stereotyping Muslims as “throwbacks to medieval civilizations,”² it is necessary to explain the role played by the accused as the *Muslim* sees it. This does not mean that one ignores concerns for “critical reflexivity”³ and for “distance”; rather, it stresses the importance of cultural self-analysis when embarking on comparative study. For I suggest that it is only when communities speak for themselves, rather than through the filter of “foreign experts,” that we can achieve more accurate understanding.

The entry point into Islamic juristic culture which follows is “traditional” and with a Sunnite bias. I am a “traditional” Sunni who does not regard his thinking as “free” but as limited to the parameters that have been laid down in the Qur’ān, Sunnah, and in the opinions of the scholars from the principal schools of Islamic Jurisprudence. As a corollary, I reject thinking which goes beyond those parameters.

The substantive analysis of confessions and rules of questioning which appears in chapter five, therefore, should not be seen as a comprehensive analysis of all those communities who give themselves Islamic labels.⁴ It is merely an exposition of the values of Sunnite legal culture through traditionalist methods.⁵

²Bobby S. Sayyid (1997), *A Fundamental Fear: Eurocentrism and the Emergence of Islamism*, London and New York, Zed Books, p. 1.

³For a useful account of the need to be critically reflexive, see: Said, E. *Orientalism* (1995), London, Penguin, pp. 25-28.

⁴The Shi’a and the Qadiyanis (Ahmadis) provide but two examples of the groups who operate outside *Ahlus-Sunnah wa-l Jam’ah* (the People of the Sunnah and the Majority; ie. the Sunnis).

⁵Even here, I do not pretend to be exhaustive; see chapter five.

Analysis of the *implementation* of this juristic tradition in chapter six takes place within a set of typologies. These typologies have been formulated by a writer working within the Sunnite tradition and also within the particular culture that forms the subject-matter of my case study in that chapter.

Before I proceed to lay out these typologies, it is important to explain why existing methodological overviews, including Orientalist perspectives, are inadequate or inappropriate for my current purposes. The chapter will begin, therefore, with an examination of some existing approaches.

2. Existing methodological frameworks

i) Orientalism:

According to Edward Said, 'Orientalism' can be defined as "a way of coming to terms with the Orient that is based on the Orient's special place in European Western experience."⁶ Yet, the European's experience of the Orient is complex. How they come to terms with the Orient, and Islām depends on their background, their subjective experiences and interaction with Muslims and their works, on the institutions they are tied to, as well as on their particular system of beliefs.

⁶Op. cit, p. 1.

For the older generation of writers, “Islam” has been an object of critique and, on occasions, of ridicule. They have sought legitimacy for this denigration by clinging to notions of objectivity and to a claimed intellectual superiority over their Muslim counterparts. Even so-called “enlightened” Orientalists such as Bernard Lewis have argued:

“Though often marred by prejudice and interest, it (orientalism) has nevertheless produced an understanding which is far deeper, knowledge far more extensive and more accurate than the corresponding and simultaneous observation of Christendom from Islam.”⁷

This “greater understanding” interprets Muslim texts from a secular viewpoint which seeks to distinguish the West from Islām. The West is politically democratic, the guardian of libertarian values of individualism, free speech, freedom of thought, equality and progress. Islām, on the other hand, is characterised as authoritarian, illiberal, oppressive, fanatical⁸, backward⁹ and threatening. The work of Bernard Lewis provides a good example. He breaks Islām into atomistic units for ease of reference. Many of these units, however, are selected because of the relevance and importance they represent to thought in the West rather than to the Islamic East. Hence, in his book, *Islam - from the Prophet Muhammed to the capture of Constantinople*¹⁰, which is meant to be general in

⁷*Islam in History: Ideas, People and Events in the Middle East*, 1993, 2nd Ed, Open Court, Chicago, p. 8.

⁸Lewis mentions at one point that “men are still willing to kill and be killed” for the sake of Islām, *ibid.*, p. 6.

⁹The traditional Muslims are castigated for being “out of touch with the modern world”, *ibid.*, p. 4.

¹⁰1974, Macmillan Press, London and Basingstoke.

coverage, emphasis is on race, ethnicity¹¹, servitude¹², religious minorities¹³, heresy and revolt¹⁴, and the economy¹⁵. These are all matters in which the West has undergone a distressing and turbulent history. The central aspects of Islām, its system of belief and the Sharʿiah, occupy less than fifty pages of a book which is two hundred and eighty six pages long.

The attempt to present Islam as hostile and racially exclusive, is evident from the chapter entitled *Race, Creed and Conditions of Servitude*. Lewis wants to present Islām as an Arab religion which was imposed on non-Arabs by violent conquest. His object is also to show that the Arab Muslim regarded the non-Arab Muslim as a legal and moral inferior. Thus, introducing the chapter, he comments:

“In principle, the Islamic Caliphate was a theocracy, a single universal state of which God was the ultimate sovereign and in which all Muslims were brothers. In fact, of course, it was an empire created by conquest, in which before long the inevitable inequalities between conquerors and conquered appeared. The conquerors were Muslims; they were also -and primarily- Arabs and showed a normal human unwillingness to concede equality to aliens and inferiors, even when these adopted the dominant faith and thus claimed membership of the ruling community.”¹⁶

¹¹See part II, ch. 7; part VI, chs 8, 9 and 10.

¹²Part VI, ch. 12.

¹³Part VI, ch. 11.

¹⁴See part II.

¹⁵See part IV.

¹⁶Op. cit., p. 193.

He then isolates and translates (his own translation) some sayings that he ascribes to the Prophet which he thinks supports his case, such as:

Love the Arabs and desire their survival, for their survival is a light in Islam, and their passing is a darkness in Islam

Those who revile the Arabs are polytheists

Love the Arabs for three reasons: because I am an Arab, because the Qur'an is in Arabic, and because the inhabitants of Paradise speak Arabic

If the Arabs are humbled, Islam is humbled

There are seventy parts of wickedness. The Berbers have sixty-nine, and mankind and the Jinns have one

May God curse both lots of foreigners, the Persians and the Byzantines¹⁷

The context of these statements is not given in his text, nor are any explanations provided (from Muslim or non-Muslim authors). We are intended to take the necessary inferences having already read his introduction. Importantly, we have no idea of the accuracy of these statements - are they *mutawatir*¹⁸, *mashhur*¹⁹ or

¹⁷Ibid., p. 196.

¹⁸ This term refers to a hadith of the Prophet that was witnessed and related (from the beginning to the end of its chain of narration) by a large number of Muslims to another large group of Muslims. Hadith *mutawatir* have the highest rank and are deemed the most authentic.

ahad²⁰? If the latter, are they saheeh²¹, hasan²² or da'if²³? Lewis cannot provide us with any of these answers because his operative concern is not with accuracy (contrary to his earlier protestations), but with presentation. Thus, he relies on one source only, *Kanz al-^Ummal* by al-Muttaqi, for these particular sayings. The result is a narrow, unrepresentative and distorted account. It is also inaccurate as the Prophet exhorted his community to respect one another and not to differentiate on grounds of colour or ethnicity. He is reported to have said by mutawatir in his last sermon:

“O people, all of you are children of Adam, and Adam was created from dust. There is no superiority for an Arab above a non-Arab, nor for a non-Arab above an Arab, or for a white above a non-white. All of you are equal. The men honoured in the sight of God are those who fear God most.”²⁴

Bernard Lewis is not alone in following this methodology. Similar treatment of Muslim texts can also be observed in the works of N. J. Coulson²⁵ and J.

¹⁹This refers to Prophetic hadith which have at least three different narrations the contents of which are substantially the same.

²⁰ Hadith ahad refer to solitary narrations from the Prophet the reliability of which may vary.

²¹Literally, this means correct. In reference to hadith of the Prophet, it means that there is no defect in the chain of narration.

²²Literally, this means “good.” Hadith which are saheeh or hasan can be used for religious judgments.

²³Literally, this means “weak”. There is a defect in the chain of narration (eg one or more of the narrators is untrustworthy) which prohibits its use for religious judgments.

²⁴This translation of the meaning of the Prophet’s statement is by Dr Muhammed Ibraheem El-Geyoushi: *Teachings of Islam*, n.d., Islamic Cultural Centre, London.

²⁵See *A History of Islamic Law*, 1964, Edinburgh University Press, Edinburgh; *Conflicts and Tensions in Islamic Jurisprudence*, 1969, University of Chicago Press, Chicago.

Schacht²⁶. What also unites them is a deep scepticism of oral accounts, no matter how careful the *muhaddithun* were in authenticating statements of the Prophet. Commenting on the Sunnah, Professor Coulson states:

“Later generations falsely ascribed to Muhammed a great corpus of legal decisions, and the extent of his extra-Qur’anic law-making is the subject of the greatest single controversy in early Islamic legal history.”²⁷

This means that when they look at *ahādīth*, there is no attention paid to the strength of the reports, because they reject them out of hand, *a priori*. It is presumed that oral accounts must be fabricated and that only posited texts, which have been ratified by Western historians, are authentic.²⁸ Thus *all* statements ascribed to the Prophet (falsely or otherwise) are deemed relevant for the purpose of revealing Islam’s alleged worldview and its social relations. Which statements will be selected will depend on the orientalist project.

As for the younger generation of Orientalists, they do not share many of the preconceptions and prejudices of their older colleagues. Their presentation is fair and humanistic, though inevitably reflecting western values. Matthew Lippman,

²⁶See *An Introduction to Islamic Law*, 1964 (rept 1979), Clarendon Press, Oxford; “Law and Justice” in *The Cambridge History of Islam*, 1970, vol. 2B, p. 539.

²⁷*History*, op. cit., p. 22. It is important to note that Coulson does not give any evidence for this view.

²⁸It should be remembered that the vast majority of the Arabs at the time of the Prophet, and in later history were illiterate and were accustomed to learn by oral narration. Moreover, it would not be unreasonable to assume that they would remember the exact words, especially when their salvation depended on it. In particular, there can be no doubt in the authenticity of the *ahādīth mutawātir* (which number about 40), as it is highly unlikely that so many witnesses who say the same thing would all have been wrong.

Sean McConville and Mordechai Yerushalmi,²⁹ for instance, are not openly hostile to Islamic law. They refer to Muslim authors, such as Muhammad Iqbal Siddiqi, Ma'moun M. Salama, Osman Abd-el-Malek al-Saleh, Awad M. Awad, Mohammad Salim al-'Awwa and M. Cherif Bassiouni, who promote human rights perspectives in Islam. Their selective citation of Muslim commentators, however, is important because these are writers who accept the underlying value premises of human rights discourse: freedom of the individual, equality before and under the law, political and social democracy. In many respects, the whole notion of "universal rights" is a secular framework which springs from concepts of "progress" and an alternative tradition rooted in late eighteenth century France.³⁰

A similar critique can be directed at John Esposito. He has his own liberal agenda which is not content to see Islam presented as the majority of Muslims would prefer. He demands "a reinterpretation of the classical Islamic legal doctrine"³¹ so that Islam can become more pluralist and accommodating.

Even the arch-critic of Orientalism, Edward Said, falls on his own secular sword. In his wish to free interpretation from the orthodoxy of "dogma," he views traditional Islam as an intellectual and civilizational threat. He states:

"underlying every interpretation of other cultures - especially of Islam - is the choice facing the individual scholar or intellectual: whether to put intellect at the service of power or at the service of criticism, community,

²⁹*Islamic Criminal Law and Procedure*, (1988), Praeger, London and New York.

dialogue, and moral sense...About this one cannot be too emphatic. For otherwise we will not only face protracted tension and perhaps even war, but we will offer the Muslim world, its various societies and states, the prospect of many wars, unimaginable suffering, and disastrous upheavals, not least of which would be the victory of an 'Islam' fully ready to play the role prepared for it by reaction, *orthodoxy*, and desperation. By even the most sanguine of standards, this is not a pleasant possibility"³²(emphasis added).

There is no intention here to search for an "authentic" Islam. Rather, the intention is to promote an intellectual pluralism in which the so-called "orthodox" are sidelined to facilitate the establishment of an intellectual elite. Only then can community and "moral sense" claim victory.

I suggest that this above analysis of Orientalist and secular perspectives demonstrates the difficulties of utilizing non-Muslim methodologies. Islam must be allowed to breathe freely and to articulate itself independently of liberal and secularist agendas. I contend that one is more likely to obtain a clearer understanding of the role of the accused in Islamic criminal justice if we adopt Muslim perspectives and methods.

³⁰See Sklair, L. (1970), *The Sociology of Progress*, Routledge and Keegan Paul, London, pp. 28-29.

ii) Akbar Ahmed:

One of the most recent and well publicised works which lays out a Muslim's methodological approach to Islam, is Akbar Ahmed's *Postmodernism and Islam*.³³ In the chapter entitled "Studying Islam," he separates Muslim and non-Muslim writers and divides both of them into three sub-categories.³⁴ The former are divided into: traditionalists, radicals and modernists; the latter into orientalist, "new scholars" and generalists and media persons. He notes that within the triangle of Muslim writers, it is the traditionalists who believe in "the larger message of Islam, rather than the narrower sectarian or personal squabbles... They believe in the universal message of God and in inter-faith dialogue."³⁵ Their interests are Arab philosophy, mysticism and sectarian polemics. Within this group, he includes such writers as: Ismail Faruqi, Ali Shariati, Hossein Nasr, Ali Ashraf and Fazlur-Rahman.

The second group, which he terms the "radicals", comprise "angry young men" writing political diatribes in response to the injustices which they see around them. Ahmed writes: "Some of the radicals are not scholars of any kind and wish to implement an Islamic order through armed struggle or confrontation. They are usually driven by hatred and contempt for what they call 'the West'."³⁶ Included within their ranks are: Shabbir Akhtar, Parvez Manzoor, Ziauddin Sardar, M.W. Davies and Kalim Siddiqui.

³¹(1992), op. cit., p. 189.

³²*Covering Islam*, op. cit., pp. 172-173.

³³1992, Routledge, London and New York.

³⁴Ibid, pp. 154-191.

³⁵Ibid., p. 158.

His third group, the modernists, share a “general belief that religion as a force, nostrum or guide is no longer valid.”³⁷ They have succumbed to the intellectual (and other) temptations of the West and prefer Marxist, socialist and secular patterns of thought to Islamic traditions. Within this group, Ahmed includes Hamza Alavi, Eqbal Ahmed, Tariq Ali and Salman Rushdie.

Ahmed’s triangle of non-Muslim writers begins with the Orientalists; those traditional scholars who occupy chairs in the most famous universities of the West and whom I have examined earlier. Ahmed rebukes Edward Said for his vitriolic attack on Orientalists³⁸ and his reductive characterisation of them as sharing “a pathological hatred towards Islam”.³⁹ Some, he argues, were sympathetic and positive in their representations of Islam. Ahmed admires their command of foreign languages and the contribution which they have made through their translations of classical works. But he also condemns their desire to control the production of Islamic knowledge and their attempts to secularise Islam. As a result of their determination to gag native Muslim voices, and their dehumanizing characterisations of them, Orientalism ended up as “either cultural schizophrenia or a complex form of racism.”⁴⁰

In Ahmed’s scheme of things, the “new scholars” do not share the cultural prejudices of the earlier generations. They are deemed scholarly, fair,

³⁶Ibid., p. 160.

³⁷Ibid., p. 163.

³⁸See: *Orientalism*, (1995), reprint with a new Afterword, Penguin, London.

³⁹Op. cit., p. 180.

⁴⁰Ibid., p. 183.

sympathetic, genuinely inquisitive and impeccable in their methodology (because they allow Muslims to speak for themselves). They are still in the minority and are often drowned out by media personalities who form the third group, but he argues that they have dispelled Edward Said's myth that Western scholars are incapable of knowing the Orient except through a prism of cultural dominance and intellectual superiority.⁴¹ Among this group, he includes John Esposito, Michael Gilson, Francis Robinson and William Chittick.

Ahmed's final group comprises the generalist and the media person. Spectacle, imagery and general impression are more important to this group than facts and fair treatment. Their intent is to sensationalise and to provoke fear and hatred towards Muslims. They do not pretend to be scholars, but often rely parasitically on the more culturally biased orientalist works. Ahmed writes:

"For most people in this group Islam is an instant media villain, a monstrosity to be reviled and beaten. It is the volume and power of these voices in the media that have drowned the more sober tones of the scholar. Indeed, they raid the orientalist cupboard for alimentation, picking up old prejudices and scatological bits of information. In turn, they use these in the most tendentious and absurd manner."⁴²

In several respects, Akbar Ahmed's categorisations provide a useful, contemporary analysis of those who claim to speak on behalf of Muslims or who

⁴¹Ibid., see pp 184-185.

⁴²Ibid., p. 186.

write about Islām. In contradistinction to the images presented by the media, he presents different faces of Islām and admits there are elements within the ranks of Muslims who provide the ammunition for media polemics and invective. He also points to more humanitarian, liberal and free-thinking commentators whose views are often ignored by press and television because they are neither sensationalist nor in line with media stereotypes.

Yet, there are a number of problems with Ahmed's analysis. While he admits his definitions and categorizations are "broad," "in need of clarification" and even "crude,"⁴³ he cannot rely on this waiver to ignore, as he does, a large shaft of Muslim opinion. It is revealing that in his description of the so-called "traditionalists", he mentions only those writers who subscribe to a certain form of universalism and who hold themselves above "the narrower sectarian or personal squabbles." By this, he means that if you regard yourself as a Sunni by conviction, for example, and oppose those who depart from the accepted practices and beliefs of the Sunnis, you are not following the "Islamic" tradition. In his construction, Islām has a broad canvas and is inclusive rather than exclusive. Thus, if you are a Shi'ī, a philosopher, a Sufi (however that is defined), an orthodox or an heterodox Sunni, you are all included within the complex tapestry of Islām. Yet one's views are only given weight if one espouses values which rise above such sectarian divisions.

Paradoxically, what seems an inclusive and universal approach is in effect *exclusive* in that it denies authenticity to those who follow the footsteps and

methodology of Ahlus-Sunnah wa-l Jam^{ah} (or any other so-called “sect”). It promotes the elevation of the free-floating intellectual (such as Fazlur Rahman) at the expense of the [^]*alim* (religious scholar) who binds himself to the texts and to expounding the “truth.” Inevitably, the latter may denounce “falsehood” wherever it appears because that is a *religious* obligation.⁴⁴ Complying with an Islamic obligation, however, seems a strange reason for exclusion and isolation from interpretative frameworks of Islam.

As for his other categories of Muslim writers or commentators, on the whole Ahmed has identified the radicals correctly as being “angry young men” and extreme, but he has not illustrated their methodology nor the channels through which they gain their knowledge of Islam and by which they seek legitimisation of their views. In fact, this is true in respect of all his categories. For a chapter entitled, “Studying Islam,” it is a serious omission not to include the mechanics and processes by which Islam is actually studied.

In respect of his so-called “modernists,” it is difficult to see why they have been included within the triangle of Muslim writers. If they no longer believe that religion is a force or a guide to life, they are not Muslims. Being Muslim is a religious matter and a question of conviction; it is not based on ethnic or racial identity, though in certain instances that may provide an external indication. The meaning of the Islamic testification of faith, *ash-hadu alla ilaha illallah, wa ash-hadu anna Muhammadar-Rasulullah*, is: “I know, *believe* and declare that no one

⁴³Ibid., p. 157.

is God but Allāh and that Muḥammad is the Messenger of Allāh.”⁴⁵ The person is not called a Muslim unless he accepts the tenets of the Islamic belief (ʿaqidah). It would have been more appropriate if the so-called modernists had been placed within the triangle of non-Muslim writers.

In his depiction of the non-Muslim writers and commentators, Ahmed is right to point out that they are not uniform in their views, and that a new perspective has emerged among the younger generation which allows for Muslim writers to speak for themselves.⁴⁶ Yet, he has failed to emphasise the secular and liberal values which these writers articulate and which affect the way they express their interpretation of Islam. One of the important insights of Michel Foucault⁴⁷ and Edward Said⁴⁸ is that interpretation is not a value free exercise and is never without interest, and that however benign it may appear to be, it has a tendency to support particular patterns of thought.

3. An Alternative Framework:

I suggest that because of the deficiencies of Ahmed’s approach a different method of analysis is required which combines an explanation of the sources and processes by which Islam is studied and interpreted, with an analysis of the over-

⁴⁴The Qur’an states: “Kuntum khaira ummatin ukhrijat linnas wa ta’muruna bi-l m’arufi wa tanhawna ‘an-il munkari wa tu’minuna billah” (You are the best of nations brought to the people, bidding the lawful and prohibiting the unlawful, and believing in Allāh); Surah al-ʿImrān, v. 110.

⁴⁵Scholars from all of the four main Sunni schools (madhāhib) agreed that if one does not *believe* in Allāh, His Messenger, His Rules and His Rites, one is a non-Muslim (kafir); Shaykh ʿAbdullah al-Harariyy (1999), *Ash-Sharḥ-ul Qawim fī Jal al-Fadz As-Sirat-ul Mustaqim*, Beirut, Dar-ul Mashariʿa, p. 33.

⁴⁶This observation has also been made by Edward Said, who calls the new generation, writers of “antithetical knowledge” (*Covering Islam*, op. cit., pp. 157-161).

⁴⁷See *The Archaeology of Knowledge* (1972), London, Tavistock.

arching structure in which those interpretations are given effect. This will provide the reader with a better understanding of the relationship between theory and practice.

i)The Juridical Tradition:

I argue that the Islamic juridical tradition is best explicated through a “traditionalist” framework. Unlike Akbar Ahmed, I use this term in its original sense. Linguistically, the word “traditionalist” means a person who transmits a narrative, belief or custom by word of mouth from age to age.⁴⁹ In the Islamic context, it refers to three types of people: first, those who orally transmit the *Sunnah*⁵⁰ of Prophet Muḥammad, the *Athar*,⁵¹ the *Ijmaʿ*,⁵² and the *Ijtihad*⁵³ of the top Muslim scholars (the *Mujtahidun*⁵⁴), such as Al-Shafʿi, Abu Ḥanīfah, Aḥmad Ibn Ḥanbal, Mālik and others. Second, it refers to those who interpret and apply

⁴⁸ *Covering Islam*, op. cit., pp 164-165.

⁴⁹ See *Collins Universal Dictionary*, (1973), ed. Irvine, A.H., Collins, London and Glasgow.

⁵⁰ Op. cit.

⁵¹ Literally, this means “trace or mark.” In this context, it refers to the sayings and precedents of the Companions of the Prophet; see Kamali, M.H., op. cit., glossary.

⁵² Op. cit.

⁵³ In this context, this means the effort that is exerted by the top Muslim scholars to deduce the rule or judgment directly from the Qurʾān and the Sunnah (in the case of a mujtahid mutlaq [the complete scholar]; see below), or from the opinions of another scholar. The opinions of a layman are not regarded as *ijihad*; see Kamali, M.H., op. cit., pp 488-492.

⁵⁴ Obtaining a PhD does not qualify a person to exercise *ijihad*. In order to be able to deduce the judgment directly from the original sources, prospective candidates must satisfy the following conditions: 1) they are an authority in the Arabic language; 2) they have memorised all the verses of the Qurʾān pertaining to rules (a minimum of 500); 3) they have memorised all the ahadith of the Prophet referring to rules (minimum of 500), along with their chains of narration and the reliability of those who narrated them; 4) they know those verses and ahadith which abrogate rules contained in earlier verses and ahadith, as well as those verses and ahadith that contain rules which have been abrogated; 5) they know which verses and ahadith are general in application and those which are confined; 6) they have superior intelligence; 7) they know and do not contradict the consensus of the Muslim scholars (the *ijmaʿ*); 8) they are trustworthy (ʿadl). See: Shaykh ʿAbdullah al-Harariyy, (1999), *Ash-Sharḥ-ul Qawim*, op. cit, pp. 404-413. See: Al Ghazzālī, *Mustasfa*, vol. II, pp. 101-103; Al-Mawardi, *Al-Aḥkam al-Sultāniyya*, pp. 61-63.

the above narrations: the *Faqih*⁵⁵, the *ʿAlim*⁵⁶ and the *Mujtahid* (i.e. the Muslim scholars). Third, it applies to those who learn from and copy the above by way of oral transmission. These categories are not mutually exclusive, as a *Mujtahid* may be a transmitter of the Sunnah, an interpreter and a student. Imam Al-Shafʿi, for example, was a transmitter and an interpreter, as well as a former student of Imam Malik.

The object of the traditionalists is to maintain the link with the Companions (the *Sahāba*) of Prophet Muḥammad who were the most pious generation of Muslims and the best interpreters of what the Prophet said and of what was revealed to him. Some of these matters are very well known and are transmitted by *at-tawātur* (from one large group of people to another and then to another). Other matters are known by solitary narrations (i.e. *aḥad*) the reliability of which are determined according to very strict criteria, and which are known and applied by the *Muḥaddithun*.⁵⁷

According to al-Khatīb al-Baghdādīyy, “Knowledge is taken from the mouths of the scholars and not from the pages of books.” Yet, this emphasis on oral narration (*talaqī*), does not mean that the traditionalists object to written accounts. Indeed, they authored thousands of books. However, ambiguities, unintentional errors and even fabrications appear occasionally or have been inserted in these texts, and which require clarification, explanation and correction from the original scholar,

⁵⁵This refers to a scholar of *fiqh* (ie. the rules relating to prayer, transactions and the like).

⁵⁶This is the general word for a scholar.

⁵⁷This refers to the scholars of *ḥadīth*.

or from a reliable teacher⁵⁸ who received the explanation directly or indirectly from him/her. This methodology preserves the accuracy and authenticity of the Islamic knowledge which has been passed down from generation to generation since the time of the Prophet.⁵⁹

Another characteristic of the traditionalists is their advocacy, application and adherence to the doctrine of *ijma*⁶⁰. This is defined as the unanimous agreement (whether explicitly stated or through silence) of the *Mujtahidun* during any period of time after the demise of the Prophet on an Islamic matter.⁶⁰ It gains its doctrinal authority from both the Qur'an⁶¹ and the Sunnah⁶² and is regarded as impeccable.⁶³ Its object is to preserve the Islamic tradition bequeathed by the Prophet and to protect it from corruption.

To form a consensus does not need the agreement of laymen, politicians, heads of state nor of academics. Nor does it require the agreement of those who hold opinions which are deemed untrustworthy or those who have contravened the

⁵⁸There are also criteria as to who can give these explanations. A Muslim cannot blindly take knowledge from anyone. Imam Muslim (one of the famous narrators of hadith) narrated that Ibn Sirin said: "This knowledge is religion, so look thoroughly at whomever you take your religion from." If there is no one who fits the criteria in your locality, one is encouraged to travel to find a trustworthy and knowledgeable teacher. Ibn Rishwan said: "If one does not find a teacher where he is residing, then let him go to where he can find a trustworthy and knowledgeable teacher." See: "Knowledge: The Gateway To Success," published on the internet by the Association for Islamic Charitable Projects at : // www.aicp.org. See also: Association of Islamic Charitable Projects, *Knowledge: The Gateway to Success*, (1995), pamphlet, 4431 Walnut St, Philadelphia, PA 19014, pp. 12-13.

⁵⁹Ibid., p. 10.

⁶⁰See Kamali, op. cit., p. 213; Mahmassani, op. cit., p. 77.

⁶¹See An-Nisa', v. 59, v. 115; al-Baqarah v. 143; al-Imran v. 8, vv 102-103, v. 110; al-Tawbah, v. 119; al-Shura v. 10. See also the opinions of Imam Ghazali and al-Shafi'i cited in Ghazali, op. cit., p. 111;

⁶²There are a number of ahadith which support it. See Kamali, op. cit., pp. 224-226; Ghazali, op. cit., p. 111; Al-Amidi, *Al-Ihkam fi Usul al-Ahkam*, vol. 1, pp. 220-221.

consensus on previous occasions, however qualified they may otherwise be,⁶⁴ as they are not included within the definition of *Mujtahid*.⁶⁵

I have written chapter five within this traditionalist framework. It refers, without critique, to previous juristic opinion documented within the four main schools of Islamic jurisprudence. In compliance with the methodology, I have sought corroboration for my findings by *talaqi* (oral narration) from Sheikh ^Abdullah al-Harariyy (known as “al-Habashi”), a Mujtahid from the school of Imam Shaf^i and the Muhaddith of the countries of ash-Sham.⁶⁶

The questions and answers were all made in Arabic, the accuracy of which were checked by this Sheikh’s students before and after our meeting. Where possible, the question and answer sessions were tape recorded and then later transcribed. On some occasions, however, meetings were held impromptu due to the Sheikh’s heavy schedule and/or illness in which tape recorders were not used. During these occasions, the Sheikh’s answers were immediately noted down on paper. English translations of his answers have also been checked and double-checked by his students who were present during our meetings.

⁶³The content of many of the ahadith is that the scholars would not agree upon an error. These ahadith are saheeh (authentic without any defects in the chain of narration) and narrated by Ahmad ibn Hanbal (in his Musnad), at-Tabaraniyy, al-Hakim, al-Khatib and Ibn Hajar.

⁶⁴Hashim Kamali’s view that no *ijma*^ can be formed without the agreement of these groups (op. cit., p. 217) does not represent the beliefs of the traditionalists. This would also explain why he regards the doctrine as utopian - for if all groups were included within the ranks of the *mujtahidun*, it would be impossible to denounce anyone.

⁶⁵For definition, see earlier. It is on this basis that the traditionalists do not regard the opinions of Ibn Taymiyyah and Ibn Qayyim al-Jawziyyah as authoritative. Ibn Taymiyyah was imprisoned in Damascus, along with his student, Ibnul Qayyim al-Jawziyyah, for contravening *ijma*^ in more than sixty issues according to the *fatwa* (religious ruling) given by four judges from the four main *madhahib* (schools of Islamic jurisprudence). This ruling is recorded by the historian Ibn Tulun in his book: “Dhkha’ir-ul-Qasr fi Tarajimi Nubala’-il-^Asr”, and manuscripted in al-Khazanah at-

ii) The law in practice:

The contextualisation of the Islamic juridical tradition can be explained through a set of typologies that are sensitive to Islam's internal dynamics and to the particular culture in which that contextualisation takes place. For reasons of familiarity and experience, I have chosen to analyse the implementation of Islamic Law in the Malaysian peninsular, and have selected the typologies adopted by "Za'ba", a famous Malay commentator and critic.⁶⁷ Although he was writing in the 1930s, I suggest that the following typologies are broadly representative of the dynamics found in the Muslim world today and in earlier generations.

He identified a number of different movements which had conservative, reformist or secular tendencies. They were called the: *Kaum Tua*, *Kaum Muda* and *Modernists*, respectively. The *Kaum Tua* represented the "traditional" view point. They claimed to follow *taqlid* and thus adhered strictly to the teachings of the four great imams⁶⁸ and the first three generations of scholars. They argued that as these scholars were closer in time to the Prophet and more qualified than scholars of the present, they understood Islamic teachings better. They also maintained that it was unnecessary for Islam to find ways of incorporating western education, its

Taymuriyyah in Cairo. This is evidence that the consensus of the scholars is not a hypothetical issue.

⁶⁶ Lebanon, Jordan and Syria.

⁶⁷ His views are reproduced in the article, "The Malays and Religion", published in *Tamadun Di Malaysia* (1980), op. cit., pp. 103-112.

⁶⁸ Abu Hanifah, Malik, al-Shaf'i and Ahmad ibn Hanbal.

lifestyle and its frameworks. Islam would regain its position in the Peninsular by exhorting Muslims and modern society to become more religious.⁶⁹

The *Kaum Muda* opposed the *Kaum Tua* and stated that Muslims had departed from the original teachings of Islam found in the Holy Qur'an and in "genuine" traditions of the Prophet. They claimed that the four great imams and those scholars who followed them were not infallible. They had formed their opinions on the basis of texts which were still available today and which could be re-interpreted in the light of modern understandings and current circumstances. Their first reference was to verses of the Qur'an and to *ahādīth* rather than to the opinions of scholars. They stressed *ijtihād* and denounced *taqlīd* as "blind following" and contrary to the Qur'an. This group was influenced strongly by the opinions of Jamaluddīn al-Afghānī, Muḥammed ^Abduh and the Wahhābis.⁷⁰

The *Modernists* were a group of independent-minded, western-educated intellectuals whose views echoed the secularists in Kemalist Turkey. They refused to follow the *Kaum Tua* on intellectual grounds and because they were reluctant to accept the mere authority of religious teachers. They also rejected the opinions of

⁶⁹,"The Malays and Religion", op. cit., pp. 108-109.

⁷⁰Ibid., pp. 109-110. More recent examples of this "reformist" approach are found in the works of Abul A'la Mawdudi (see: *Human Rights in Islam* (1990), Leicester, The Islamic Foundation; *Islamic Law and Constitution* (1983), 8th Edition, Lahore, Islamic Publications Ltd), and Sayyid Qutb (see *Al-^Adalah al-Ijtima'iyah fī'l Islam* (1954), 4th Edition, Cairo, ^Isa al-Bābī). Works on 'Human Rights' in Islam tend to rely on their methods and analyses; see, for instance: Mohammad Hashim Kamali (1986), "The Citizen and State in Islamic Law," *Syariah Law Journal*, International Islamic University, Kuala Lumpur, pp. 15-46; Ismail Faruqi (*Islamic Thought and Culture*, 1982, IIIT, Herndon; *Tawhīd: Its Implications for Thought and Life*, 2nd ed., 1992, IIIT, Herndon.), Mohammed Arkoun, 1994, *Rethinking Islam*, Westview Press, Oxford; Abdul Hamid Abu Sulayman (*Crisis in the Muslim Mind*, 1993, IIIT, Herndon); Fazlur Rahman, 1982, *Islam and Modernity*, Chicago and London, University of Chicago Press.

the *Kaum Muda* because they had no means by which to judge the validity of their claims. They judged matters, therefore, according to their individual conscience.⁷¹

I utilize these typologies in my analysis of the “Islamization” of criminal justice in chapter six.

⁷¹ “The Malays and Religion”, op. cit., p. 111.

Chapter Five

Confessions and Rules of Questioning in Islamic Law

1. Introduction:

The following account of confessions and rules of questioning in Islamic Law should not be read as an exhaustive account and complete coverage of the subject. Islamic law is vast, multi-dimensional and with a number of competing, and sometimes conflicting interpretations. It is not possible, within a doctoral thesis, to give an account of every single opinion within one recognized school of Islamic thought, let alone the four main schools that are currently applied by Sunni Muslims across the world. Rather, the object of this chapter is to provide a glimpse of its richness, and to construct a window through which Muslims and non-Muslims might better observe and understand the categorizations which Muslim scholars have made, and the impact which they are making on the present.

Yet, our understanding of the role of the accused cannot begin until we have set out the fundamentals upon which interpretations of Islamic law have been built, and the administrative structure(s) into which they have been fed.

2. Unity within diversity -interpretative pluralism:

The point which is made repeatedly in this chapter may appear obvious, but which is frequently forgotten, is that Islamic Law in traditional formulations is fundamentally a *religious* law, and should be understood in *religious* terms. Islam, in terms of religion and law, has existed to guide Muslims and the whole of humankind to worship God correctly, and to follow His commandments. These commandments are embedded in revealed scripture (*Qur'an*) and Prophetic example (*Sunnah*); it being the job of the Islamic scholar to *extract and discover* them rather than to formulate anew or develop.

In some cases, the source of a ruling is found explicitly in the revealed texts. The scholar extracts the rule and applies it to his situation. In other cases, where he cannot find an explicit text, he is encouraged to exercise his individual judgement (*Ijtihad*). It should not be thought, however, that this *ijtihad* is either a mechanical and formulaic exercise or a case of free interpretation. Each scholar brings with him his interpretative baggage which weighs heavily on the way he performs his *ijtihad*. This will comprise his understanding of the essential benefits and interests which underlie the Shari^{ah} (*Maqasid al-Shari^{ah}*), and which may receive different emphasis from scholar to scholar. Yet, in contradistinction to formulations of the Common Law, they are not historically, ideologically or politically contingent. They are rooted in the Shari^{ah} itself. Although the scholar's thought processes cannot be divorced from his experiential reality and contemporary circumstance, this interpretative exercise is a quest to discover the "truth" within the boundaries of the Shari^{ah} as he honestly perceives it. This is

reflected in his references to the Qur'an and Sunnah, or as in the case of a scholar confined to a particular school, to the sayings and methodology (*usul-al fiqh*) of the scholar who founded his school and who based his judgements upon those sources. It is also reflected in his memorisation and knowledge of the different narrators of the Sunnah and their particular qualities. This would include their memories, piety, knowledge of the religion and source of their religious instruction. For it is by these tools that he gives precedence of one hadith over another, or gives more weight to one issue than another.¹

In certain instances, these approximations of truth that are arrived at independently, assume certainty and permanence. This is given concrete expression in the doctrine of consensus (*Ijma'*) which binds all future scholars to its substantive rulings. In other instances, approximations of truth remain (*Ikhtilaf*). It is in this way that we observe both agreements and disagreements within and between the various schools of Islamic Law. These agreements and disagreements occur *irrespective* of time and place; that is, they may be found in the same time and place, or at different times and different places.² They provide a core of certainty while simultaneously allowing for change as a society changes.

The differences between the Muslim scholars have been manifested in the formation of separate schools of thought (*madhahib*). Historically, four schools

¹All of these matters were confirmed by Shaykh Samir al-Qadi, by talaqi, on 10/9/97 at 6.05pm, during a session at the Musolla Ahlus-Sunnah Wa-al Jama'ah, in Philadelphia, USA. It represents his explanation of the texts: *Sirat-ul Mustaqim*, (1993), Shaykh ^Abdullah al-Harariyy, Dar ul-Mashari'a, Beirut, pp. 103-106, and the recently published *Al-Sharh-ul Qawim fi jal al fadz As-Sirat-ul Mustaqim*, (1999), Dar-ul Mashari'a, Beirut, pp. 404-421.

²See *The Ethics of Disagreement in Islam*, (1993), Taha J. al-^Alwani, IIIT, Herndon, Virginia, p. 80.

have been pre-eminent in the elaboration of Islamic law: the schools of Abu Hanifah, Malik, Shaf'ī and Aḥmad ibn Hanbal. Technically, however, there is (and has been) no limitation to the number of schools, as once a scholar reaches the level by which he can exercise *ijtihād* directly from the Qur'an and Sunnah³(*Mujtahid Mutlaq*), he is prohibited from merely imitating previous scholars or even the Imam of his previous school. It is known, for example, that although Muḥammad al-Shaybaniyy and Qadi Abu Yusuf began by applying the sayings of their Imam Abu Hanifah, they eventually formulated their own opinions independently.⁴

Nor is there any evidence to suggest that the ability to exercise *ijtihād* has been limited to earlier generations.⁵ Imam ʿAlī, the fourth Caliph, is reported to have said: "The Earth will not be without one who defends the religion with its evidences."⁶ Implicit within this statement⁷ is the notion of at least one scholar

³These include: memorisation of the verses of the Qur'an and ahadith of the Prophet which pertain to religious judgments; knowledge of the chains of narrators of these ahadith and their different statuses; knowledge of those verses of the Qur'an and ahadith of the Prophet which abrogated earlier verses and ahadith; knowledge of those verses and ahadith which are general in application and those which are confined to their particular context; knowledge of those verses and ahadith which are absolute and those which are qualified; knowledge of Arabic to the extent that he has memorised the meanings of the statements found in the texts in accordance with their original meanings when the text was revealed; knowledge of all those cases where a consensus has been reached; knowledge of mathematics; superior intelligence, and a deep understanding of the purposes behind the rules and the benefits (which are regarded as beneficial by the Shari'ah) they convey to the people. See Shaykh ʿAbdullah al-Harariyy, op. cit., p. 104 (confirmed by Shaykh Samir al-Qadi, op. cit.). See also: Mohammed Hashim Kamali, *Principles of Islamic Jurisprudence*, (1989), Pelanduk Publications, Petaling Jaya, pp473-479.

⁴Shaykh Samir al-Qadi, op. cit., Mohammed Hashim Kamali, op. cit., p. 489.

⁵After the fall of Baghdad in the 13th century (C.E.), many Sunni jurists declined from exercising or advocating *ijtihād* for fear of persecution. This gave the impression to many that "the door to *ijtihād* had been closed" (S.Mahmassani, *Falsafat al-Tashrī' fi al-Islam*, (1987), Pernerbitan Hizbi, Malaysia, p. 93). It should be noted, however, that to view this event as prohibiting all future *ijtihād* would be to denounce the traditional doctrine of consensus (*ijma'*) which contemplated the formation of opinions and agreements during "any period of time" (see chapter four).

⁶Qala Imam ʿAlī: Lā takhlū-l arḍu min qa'imīn lillāhi biḥujajihī. This saying of ʿAlī is narrated by Ziyad and has been categorized as saḥeeḥ (see Shaykh ʿAbdullah al-Harariyy, *Al-Sharh-ul Qawim*, op. cit., p. 416).

⁷"Evidences" (*ḥujajah*), refer to the Qur'an and Sunnah, in this context.

(*Mujtahid Mutlaq*) who has reached the level to deduce religious judgements directly from the Qur'an and the Sunnah, and to perform his *ijtihād*. Furthermore, the nineteenth century jurist, al-Shawkāni, wrote in respect of the alleged closure of the 'door of *ijtihād*': "Praise be to God, this is the greatest lie - *buhtānun* [^]*adzīm* - and there is no reason in the world to vindicate it."⁸

Nevertheless, it is equally apparent that since the fall of Baghdad, the number of scholars satisfying the criteria to make independent *ijtihād* has fallen, and there has been greater evidence of scholars making opinions in accordance with the methodology and sayings of the Imam of the school to which they belong. It is this historical circumstance, rather than any alleged consensus precluding all future *ijtihād*,⁹ which explains the crystallization and entrenchment of the four schools in Islamic law.

3. A Plurality of Enforcement Structures

Although their respective functions and duties were not always demarcated or separated,¹⁰ in one sense it was the function of the scholar to *discover* the legal rule, and the job of the Caliph (*Khalifah*) to enforce it.¹¹ The organizational form enforcement took depended on the *ijtihād* of the Caliph or the ruler specially

⁸*Irshad*, p. 94, cited in Mohammed H. Kamali, op. cit., p. 494.

⁹See Mahmassani, op.cit.

¹⁰In order to be appointed as Caliph, the appointee had to be a great scholar (a *mujtahid*) himself. See: Ibn Khaldun, *The Muqaddimah - An Introduction to History* [trans. Franz Rosenthal], (1967), 2nd Edition, Routledge & Keegan Paul, London and Henley, Vol. 1, p. 395; Al Mawardi, *Al-Ahkam as-Sultaniyyah* - The laws of Islamic Governance [trans. Dr Asadullah Yate] (1996), Ta-Ha Publishers, London, p. 12.

¹¹Ibn Khaldun, op. cit., p. 449; al-Mawardi, op. cit., p. 28.

appointed by the Caliph,¹² and was not restricted to any definitive framework. In the history of Islamic criminal justice, we have thus witnessed a variety of legal structures in different areas of the Islamic world and at different times.

During the Prophet's reign in Medina there was no separation of powers, owing to the Prophetic nature of his rule, the size of the community and the relatively small number of cases. The positions of Ruler (Khalifah), Judge (Qadi) and Supervisor of Torts/Judicial Investigator (Sahib-al Madzalim) were combined in the one figure of Prophet Muhammad.¹³ Further, the collective duty to "command the good and forbid what is bad,"¹⁴ otherwise known as the *hisbah*,¹⁵ was not performed by any designated policing body, but was taken up by all members of the Muslim community.¹⁶

Gradually, as Muslim territory and community expanded, powers were allocated to governors of new lands (*Emirs*),¹⁷ such as ^Ali who was dispatched to Yemen.¹⁸ These provincial governors combined administrative and judicial functions. In Medina itself, the legal structure remained unitary¹⁹ until the accession of the first of the four rightly-guided Caliphs (*Khulafa Rashideen*), Abu

¹²Shaykh Samir al-Qadi, op. cit.

¹³See: Hassan Ibrahim Hassan, "Judiciary System From the Rise of Islam to 567 AH", *The Islamic Quarterly* (1963), London, Vol. 7, p. 23; Hamoodur Rahman in Mahomed Ullah, (1986), *The Administration of Justice in Islam - An Introduction to the Muslim Conception of the State*, Kitab Bhavan, New Delhi, pp. 3-4; Taha J. al-'Alwani, (1994), "The Rights of the Accused in Islam", *The American Journal of Islamic Social Sciences*, Vol. 11, No. 3, p. 349.

¹⁴This is taken from the Qur'anic verse: "Wa-l takum-minkum ummatun yad^una ila-l khairi wa ya'muruna bi-l ma^rufi wa yanhawna ^an-il munkari" (Surah al-^Imran, verse 104).

¹⁵Al-Mawardi, op. cit., p. 337.

¹⁶See Dr Asadullah Yate's Forward to his translation of al-Mawardi's *Al-Ahkam as-Sultaniyyah*, op. cit., p. 6.

¹⁷Hamoodur-Rahman, op. cit., p. 4.

¹⁸Taha J. al-^Alwani, op. cit., p. 349.

¹⁹Hamoodur-Rahman, op. cit., p. 4.

Bakr as-Siddiq, who delegated the judiciary to ^Umar al-Khattab.²⁰ This practice was carried on by ^Umar, the second Caliph, who appointed Abu Dardah, Abu Musa al-Ash^ariyy and Shurayh as judges in Medina, Kufa and Basra respectively.²¹

There also arose a practice at this time of limiting judicial jurisdiction to civil matters,²² leaving the Caliph or his appointed Governor (*Emir*) to handle cases of *qisas*,²³ *hudud*²⁴ and *ta^zir*.²⁵ It is clear from the instructions of ^Umar al-Khattab, that no punishment which involved execution, could ever be carried out without presenting the accused to the Caliph;²⁶ a practice which was explicitly continued

²⁰Ibid., p. 5. According to Hassan Ibrahim Hassan, although ^Umar was entrusted with passing judgments, he was not officially given the title of “judge” (op. cit., p. 24). See also: Taha J. al-^Alwani, op. cit., p. 350. The first Caliph to officially nominate judges, as such, was ^Umar himself.

²¹Taha J. al-^Alwani, op. cit., p. 350; Hamoodur-Rahman, op. cit., p. 5.

²²Taha J. al-^Alwani, op. cit., p. 352; Hamoodur-Rahman, op. cit., p. 9.

²³This refers to all cases of intentional killing and intentional injury where the victim, or his heirs, are given the right to respond in kind, or to ask for “*diyat*” (a specific sum of money representing compensation for the type of harm caused), if they so wish. See : al-Mawardi, op. cit., pp. 325-326; ^Abdul Qadir ^Oudah, (1987), *Criminal Law of Islam*, Vol. 1, Aklaq Hussain, International Islamic Publishers, Karachi, Pakistan, p. 86.

²⁴Literally, “*hadd*” means limit or boundary (Dr Rohi Baalbaki, (1997), *Al-Mawrid*, 9th Edition, Dar-al-^Ilm LilMalayin, Beirut, p. 455), but in this context it refers to those offences with punishments prescribed in either the Qur’an or the Sunnah, and which cannot be annulled or pardoned: ^Oudah, op. cit., p. 85; ^Abdur-Rahman I. Doi, (1984), *Shari’ah: The Islamic Law*, Ta-Ha, London, p. 221. Al-Mawardi also defines it as those “restraints imposed by Allah ta’ala, to prevent people committing what He has forbidden, or from abandoning what He has commanded them to do” (op. cit., p. 312). He includes a failure to perform obligations, such as prayer, fasting, payment of zakat and pilgrimage, in addition to committing the offences of *zina* (fornication and adultery), *qadhaf* (imputation of *zina* without four witnesses), *sariqah* (theft), *hirabah* (brigandage), *shurb* (drinking intoxicants), *riddah* (apostacy) and *bughat* (rebellion against the Caliph), which are mentioned as “*hadd* offences” by most writers. See: ^Oudah, op. cit., p. 84; Hashim Mehat, (1993), *Islamic Criminal Law and Behaviour*, Muslim Youth Movement of Malaysia, Kuala Lumpur, pp. 15-48.

²⁵Al-Mawardi defines it as comprising “discretionary punishments” which “are imposed for wrong actions [so defined by the Shariah], but are not defined as *hadd* punishments by the law” (op. cit., p. 332). Instances of this would include ‘*khalwat*’ (unlawful proximity) and offences associated with *zina* that did not involve penetrative intercourse; theft of an amount below the minimum threshold figure (*nisab*) or of an amount above the *nisab* but which was not secured in a place of safe-keeping (al-Mawardi, op. cit., pp. 333-334). These offences can be pardoned by the Amir or the Khalifah (ibid).

²⁶Abu Yusuf reported that ^Umar al-Khattab “wrote to the governors of the towns that none should be killed without presenting him to him” (*Kitab-ul Kharaj* (1979), trans. Dr Abid Ahmad ^Ali,

by the Mujaddid²⁷ of the second Hijri century, Caliph ^Umar ibn ^Abdul ^Aziz. He is reported to have said: “The ruler will deal with one who fights against religion, even if he kills the brother of a man or his father.”²⁸ The Caliph would act as the final judge, and would review the evidence even if the offence was committed openly, in full view of the public.²⁹ It should be remembered that the Caliph was not simply a political appointment; he was also a judge and a *Mujtahid*.³⁰

In terms of procedure, it remained relatively simple under the rule of the four Rightly-Guided Caliphs (and after). Arrests and initiation of proceedings were conducted by a Department of Police (*Ahdas*)³¹ acting under the Caliph or *Amir* (Governor).³² There was no perceived need for elaborate procedural mechanisms, as accused persons sought not to avoid legal censure. Al-Mawardi wrote:

“No one sought redress for a wrong from any of the four khulafa as they were at the very beginning of the affair when the deen had just appeared among them - among men who willingly allowed themselves to be guided to the truth and who desisted from wrong action by mere admonition; any disputes occurring between them were confined to dubious matters, which judicial judgement then explained to them; if a

revised by Professor ^Abdul Hameed Siddiqui, Islamic Book Centre, Lahore, p. 308); see also the original Arabic text, “*Kitab-ul Kharaj*” (1346H), Al-Matb^at al-Salafiyyah, Cairo, p. 183.

²⁷This means a “renewer” of the Faith. It is reported that one mujaddid appears every century (check this).

²⁸Abu Yusuf, op. cit., p. 308.

²⁹Ibid., p. 309.

³⁰Al-Mawardi, op.cit., p. 12; Ibn Khaldun, op. cit., p. 395. For the conditions of a Mujtahid, please see the previous chapter.

³¹Hamoodur-Rahman, op. cit., p. 8.

³²Al-Mawardi, op. cit., pp. 310-312.

brutish bedouin committed an injustice, admonition alone sufficed to make him renounce it, and rough treatment made him act correctly.”³³

After the Caliphate of ^Ali ibn Abu Talib, however, people began to act more openly hostile to each other, and it was difficult to enforce legal judgements. This necessitated separating the legal office of Judicial Investigator (*Sahib-ul Madz_{alim}*), that combined the “power of authority with the fairness of the legal system.”³⁴ If the Caliph was able, he took up the post personally,³⁵ or else he personally delegated a Wazir or an Amir.³⁶ This did not mean that the Caliph, his ministers or his governors were free to disobey the Shari[^]ah themselves. Indeed, during the ^Umayyads, judicial authority expanded to include criminal jurisdiction³⁷ which brought Governors, Ministers (*wuzura*’), their assistants and even the Caliph under the supervision of the Qadi.³⁸

Organizational structure and procedure became more sophisticated during the rule of the ^Abbasids. This was the so-called “golden age” of Islam which witnessed not only a flourishing of scholarship in the figures of the four great Imams, but

³³Al-Mawardi, op. cit., p. 117.

³⁴Al Mawardi, op. cit., p. 117.

³⁵It is reported that ^Umar ibn ^Abdul ^Aziz was the first Caliph to perform this task, and that it was continued by the ^Abbasid Caliphs: al-Mahdi, al-Hadi, ar-Rashid, al-Ma[^]m^{un} and al-Muhtadi; with the result that goods which had been illegally seized were returned to their rightful owners (ibid., p. 118).

³⁶Ibid., p. 127.

³⁷Hamoodur-Rahman, op. cit., p. 10.

³⁸Hassan Ibrahim Hassan, op. cit., p. 26; Hamoodur-Rahman, op. cit., p. 10; Taha J. al-^Alwani, op. cit., p. 352 (citing Ibn Khaldun, *AlMuqaddimah*, p. 741). During the rule of the Khulafa Rashideen, it was not necessary to have separate judicial procedures to bring the Caliph to account, because of their great piety and their proximity to the Holy Prophet. ^Umar, for instance, even applied the hadd to his son for drinking alcohol. It should be noted that the Caliph or the Governor *never* enjoyed immunity for offences committed against individuals. If immunity ever existed, it was only in relation to hudud crimes where there was no victim. This was for the reason that the Caliph was the one responsible for carrying out such punishments and that there would be no

also greater “institutionalization.” Apart from reviewing death penalty cases,³⁹ the control of crime was no longer the particular responsibility of the Caliph or Governor, but was delegated as a special task to the *Sahib ash-Shurṭah* (Chief of Police) and the *Muhtasib* (Market Controller).⁴⁰ They were given executive as well as investigative powers.⁴¹ Less serious *taʿzīr* or uncomplicated offences,⁴² forming the *hisbah*, fell within the jurisdiction of the *Muhtasib*.⁴³ The more serious and complicated offences were handled by the *Sahib ash-Shurṭah* and *Qadi*. Although the *hisbah* also came within the latter’s general jurisdiction, as a rule he did not intervene unless a matter was in dispute.⁴⁴ In matters where the *Muhtasib* and *Qadi* had insufficient authority to compel compliance with the law, it was left to the *Sahib-ul Madzalim*.⁴⁵

After the collapse of ʿAbbāsīd rule, following the sacking of Baghdad by the Mongols in 1258 C.E. (606AH), separate states emerged in the Muslim world with their own legal institutions.⁴⁶ Although the principal foundations upon which they were based were the same as their predecessors, they differed quite substantially in

beneficial deterrent if he inflicted it on himself; Hamoodur-Rahman, op. cit., p. 17 (citing Marghinani’s *Hedayah*).

³⁹This is confirmed by Abū Yūsuf, who was the *Qadi al Qudāh* (Chief Justice) during the reign of the ʿAbbāsīd ruler, Ḥarūn ar-Rashīd (op. cit., pp. 308-309). It was also clearly revived by the later Ottoman Caliphs; see Hamoodur-Rahman, op. cit., p. 15.

⁴⁰Ibn Khaldun, op. cit., pp. 456-457.

⁴¹Ibid., and p. 463.

⁴²Eg: unlawful obstruction of the highway, unlawful beatings of pupils by their teachers, fraud and deception in weights and measures (ibid); non-payment of debts when the debtor is able to pay; failure to perform congregational prayer, or the call to prayer; improperly performing the prayer; unlawful proximity (*khalwat*); blatant drinking of wine or alcohol; etc. See further: Al-Mawardi, op. cit., pp. 341-362.

⁴³Al-Mawardi, op. cit., p. 356.

⁴⁴Op. cit., pp. 338-340.

⁴⁵Al-Mawardi, op. cit., p. 125.

⁴⁶The seeds of independence had been sown early in ʿAbbāsīd rule, when the toppled ʿUmayyad ruler fled to Spain establishing his own sultanate. See further, the History of Aṭ-Ṭabari.

matters of organization and procedure.⁴⁷ Due to weaknesses in the Caliphate, a process of secularization also began, which separated the Caliph from legal administration. He no longer assumed the post of Judicial Investigator/Supervisor of Torts; this was transferred to the rulers without any delegation. The correct processes of appointment and delegation, which had been a feature of the Rightly-Guided Caliphs, the early ^Abbasids, Ar-Rashīd and some of his children,⁴⁸ and which attempted to ensure the competence, ability and loyalty of those entrusted with enforcing the Shari^ah, were neglected by later rulers.⁴⁹ *Officials were* appointed in the service of the political establishment without reference to the religious laws, and who commanded little respect. Ibn Khaldūn wrote:

“In the kingdoms that succeeded the rule of the caliphs, the functions of the caliphate became the prerogative of this kind of urban weakling. They were no longer exercised by people of prestige, but by persons whose qualifications were limited, both by their descent and by the habits of sedentary culture to which they had become accustomed. They were despised as sedentary people are, who live submerged in luxury and tranquillity, who have no connection with the group feeling of the ruler, and who depended on being protected by others.”⁵⁰

In this brief review of the history of the Islamic criminal justice system, we can draw some important observations. First, the system was not static or fixed to a particular organizational framework. The Caliph, in his capacities of defender of

⁴⁷Taha J. al-^Alwani, op. cit., p. 353.

⁴⁸Ibn Khaldun, op. cit., pp., 412-414.

the religion, guarantor of rights and enforcer of the Shari^h,⁵¹ was obliged to exercise his *ijtihād* to ensure that the commandments of God were implemented to the best of his ability. This necessitated establishing new offices and changing procedures to fit with contemporary reality. Second, many criminal matters came within the purview of executive authority. Although the Qadis were able to hear *ḥudud*, *qisas* and *ta^zir* cases,⁵² their jurisdiction was sometimes limited to civil matters, particularly in the centuries following the fall of Baghdad.⁵³ This meant that the competency, character and religious integrity of those holding the key executive positions of : Caliph, Wazir, Amīr, *Sahib-ash-Shurṭah* and Muhtasib were central to the proper administration of Islamic criminal justice.

4. The Necessity and Integrity of Executive Authority:

The Caliph was the fount of executive authority and the most important of all offices of state. Although some factions, such as the Mu^htazilah and the Khawarij, regarded the Caliph as unnecessary, this did not reflect the predominant position. It was generally stated that the Shari^h itself demanded an Imām (Caliph).⁵⁴ This general agreement covered the majority of qualities and competencies required of the Caliph-to-be.⁵⁵ First, he had to be *ʿadl*⁵⁶ and have high moral rectitude⁵⁷.

⁴⁹Ibid., p. 457.

⁵⁰*Al-Muqaddimah*, op. cit., p. 458.

⁵¹Al-Mawardi, op. cit., p. 28.

⁵²Ibid., pp. 107-108.

⁵³Taha J. al-^hAlwani, op. cit., p. 354.

⁵⁴Al-Mawardi, op. cit., p. 10; Ibn Khaldun, op. cit., pp. 390-391. Ibn Khaldun states there is a general consensus on the matter, op. cit., p. 390.

⁵⁵These are set out by both al-Mawardi and ibn Khaldun at op. cit., p. 12 and op. cit., pp. 394-402, respectively. Although they differ in the *number* of conditions, substantively they are the same. Similarly, although the schools differ on the number of persons who are given the power to appoint

Known commission of unlawful acts disqualified him from the post.⁵⁸ Second, he had to be a *Mujtahid*.⁵⁹ Ibn Khaldun wrote:

“His knowledge is satisfactory *only* if he is able to make independent decisions. Blind acceptance of tradition is a shortcoming, and the imamate requires perfection in all qualities and conditions”⁶⁰ (emphasis added).

Third, he had to be brave and willing to go to war against the enemies of Islam and to carry out the *hudud*.⁶¹ Fourth, he had to have a vast knowledge and understanding of the arts of war, diplomacy and political administration.⁶² Fifth, it was essential that he was physically able and free from any defects that would have impaired his administration of the Shari^{ah}.⁶³ Sixth, he had to be from the tribe of the Quraysh (the Prophet’s tribe).⁶⁴

the Caliph, there is agreement with respect to *who* has the power to decide which candidate is the best qualified. If the Muslim Ummah is currently without a Caliph, the process will be by election from the “people of power and influence.” This is not a general election, but a choice made by a select group each member of which must be *^adl* and possess the knowledge to determine who would have the right to be Caliph. They must also have the wisdom and insight that would lead them to select the best qualified candidate who would be the most likely to command obedience from the whole of the Muslim Ummah (see al-Mawardi, op. cit., pp 11-16). If the Caliph was still alive, and still had the capacity for making informed decisions, he would appoint a council of appropriate persons to elect a suitably qualified successor after his death, or before his death if he gave his consent (ibid).

⁵⁶This means just and trustworthy, such that his testimony would be acceptable in an Islamic court.

⁵⁷Al-Mawardi, op. cit., p. 12; ibn Khaldun, op. cit., p. 395.

⁵⁸Ibn Khaldun, ibid; al-Mawardi, op. cit., p. 30.

⁵⁹See p. 1 ante, for the pre-conditions of exercising juridical *ijtihad*.

⁶⁰Op. cit. See also al-Mawardi, who stated that Caliphs must have “knowledge which equips them for *ijtihad* in unforeseen matters and for arriving at relevant judgments”, op. cit.

⁶¹Ibn Khaldun, ibid; al-Mawardi, op. cit., p. 12 and p. 29.

⁶²Ibn Khaldun, ibid; al-Mawardi, op. cit., p.12.

⁶³Ibn Khaldun, op. cit., pp. 395-396; Al-Mawardi sub-divides these requirements into (1) good quality of hearing, sight and speech; and (2) normal limb movement (ibid).

⁶⁴This is derived from the agreement of the companions on the day of Saqifah, when the Ansaris agreed with Abu Bakr’s repetition of the Prophet’s statement that “the Imams are from among the Quraysh” (ibn Khaldun, op. cit., pp. 306-307; al-Mawardi, op. cit., p. 12). According to Ibn Khaldun, the purpose behind requiring Qurayshi descent was to facilitate acceptance of the Caliph by the whole Muslim community. The Quraysh was the only Arab tribe that was universally respected and revered for its nobility (op. cit., pp. 399-400).

If the appointee satisfied all of the pre-conditions of the Caliphate, it was more likely that he would take an active concern in the proper administration of the Shari^h and appoint only those persons whose piety, reliability and competency he was certain. In order to ensure efficient administration, the Caliph was encouraged to appoint a *Wazir of Delegation* (First Minister) to carry out some of his affairs. The Wazir, who was entrusted with appointing judges, listening to grievances and correcting abuses (or appointing another to act on his behalf), et al, had to conform to all of the above pre-conditions of the Caliphate⁶⁵ apart from lineage.⁶⁶ His actions were also subject to the overall supervision of the Caliph. Al-Mawardi wrote the Caliph,

“should inspect the actions of the wazir and his management of affairs, so that he may endorse what is correct and curtail what is incorrect, as government of the Ummah is entrusted to him and is dependent upon his efforts.”⁶⁷

In certain circumstances, the Wazir would be appointed as an Amir of a province, and he would have the same responsibilities of appointing magistrates and judges, collecting zakat and land revenue (kharaj), establishing Friday Prayer and implementing hadd punishments. According to al-Mawardi, the only difference

⁶⁵ Al-Mawardi, op. cit., p. 37.

⁶⁶ This is derived from Abu Bakr's statement to the Ansaris on the day of Saqifah: "From us the Amirs; from you the Wazirs" (see al-Mawardi, op. cit., p. 12).

⁶⁷ Op. cit., p. 41.

between a Wazir of Delegation and this type of Amir⁶⁸ was that the former had a general as opposed to a specific jurisdiction. The same pre-conditions of appointment applied to both.⁶⁹ If, however, the appointment was contracted as a *Special Amirate*, the Amir's jurisdiction was limited to the scope of his particular contract: to public order, organization of the army or defence, for example. In terms of public order, he was not authorised to act as a quasi judge. His authority extended only to administering punishments or helping plaintiffs/victims in the fulfilment of their rights. Because of this limited jurisdiction, ability to exercise *ijtihād* was an advantage as opposed to a pre-requisite.⁷⁰

It has already been mentioned that the Wazir of Delegation/Provincial Amir was responsible for the appointment of *Qadis*. Appointment was a serious matter that required careful investigation of the appointees. The view most widely accepted among the different schools, was that the investigation had to confirm the appointee was among those qualified to exercise *ijtihād*, in addition to being *ʿadl*, free, male,⁷¹ extremely intelligent⁷², Muslim,⁷³ and sound of hearing and

⁶⁸The Amir of a province could be a specific prior appointment by the Caliph, or an ex-post fact acknowledgment by the Caliph where the Amir had successfully conquered new territory. If the latter category of Amir did not satisfy all of the conditions of the Wazir of Delegation, the Caliph would have to appoint a Wazir or representative for him who possessed all of the necessary qualifications stated earlier. See al-Mawardi, op. cit., pp. 54-56.

⁶⁹Op. cit., p. 49.

⁷⁰Ibid., pp. 51-53.

⁷¹Abu Hanifah allows a woman to be a judge in those cases where she can give testimony. Ibn Jarir at-Tabari allows a woman to be a judge in all cases; see al-Mawardi, op. cit., p. 98.

⁷²According to Sheikh ʿAbdullah al-Harariyy, profound understanding and discernment is not simply a pre-requisite for the proper exercise of *ijtihād*, but a fundamental pillar ("*rukunun ʿadzimun*"); *Al-Sharḥ-ul Qawim*, op. cit., p. 412.

⁷³This referred only to cases where Muslims were litigants. If the case involved non-Muslims only, it was permitted to appoint a non-Muslim judge to hear their case; *ibid.*, p. 99.

sight.⁷⁴ However, he did not have to be a complete Mujtahid (muṭlaq); he could be a mujtahid within a school, within a given area or in relation to a particular case.⁷⁵

Beneath the Qadi, was the Muḥtasib (Market Controller). He was appointed by the properly delegated authorities and had to be “a free man, just (ʿadl), of sound judgement, firm and severe in the deen, and clearly aware of what evil behaviour is.”⁷⁶

It is apparent that at all levels of authority, the fairness, religious integrity and competence of those holding executive offices were pre-conditions for appointment. Further, that those who held the positions of Caliph, Amīr (with general jurisdiction) and Qadi had to be Mujtahids. They were responsible for the subordinate appointments⁷⁷ and for ensuring that those whom they appointed, conformed to the conditions required by the Shariʿah.

It will be suggested that when we come to analyse the various positions taken by the principal schools of thought in respect of the rules pertaining to the powers and limits of questioning of the accused, these pre-conditions for appointment were crucial for the proper running and fairness of Islamic criminal justice; for in practice, it was these pre-conditions, in addition to the substantive rules on

⁷⁴Ibid., pp. 98-101; see also: ibn Qudamah, *Al-Mughni*, Dar al-Manar, (1367H), Vol. 9, pp. 39-41; al-Marghinani, *al-Hidayah*, nd, Qur'an Mahal, Karachi, Vol. II, p. 131. Abu Hanifah allowed a non-Mujtahid to sit in judgment, but only where he asked the opinions of a Mujtahid (al-Mawardi, op. cit., p. 100). Shaykh ʿAbdullāh al-Harariyy confirmed that a Mujtahid must be appointed except in cases of *darurah* (necessity); meeting 11 March, 2000.

⁷⁵This is implicit in al-Mawardi's work, because he states that the jurisdiction of a qadi can be limited in this manner (op. cit., p. 110).

⁷⁶Al-Mawardi, op. cit., p. 338.

⁷⁷This would have included the Ṣahib al-Shurṭah (Chief of Police), who would have been a specific delegate of the Amir/Caliph, depending on the circumstances.

confessions and powers of questioning, which determined (and determines) the role played by the accused.

5. Confessions, Questioning and Categorizations of the Accused

i) The Centrality of Confessions:

Although there are other methods of proving criminal cases, such as direct testimony (shahādah), judicial knowledge (^ʿilm-ul Qadi) and oath-taking (yamīn and qasamah),⁷⁸ there is no doubt that the confession (*iqrar*), occupied an important place in Islam's system of proof. First, in practical terms, and with the exception of the oath (qasamah), it may have been the only means to secure a conviction because of the secretive circumstances in which some offences were committed. Second, the confession was seen as the strongest proof for the establishment of a claim or charge.⁷⁹ It was assumed that an accused, who knew⁸⁰ the punitive consequences of his confession, would not admit to something which he had not committed. Moreover, for Muslims in particular, there was no

⁷⁸ Ibn Qayyim al-Jawziyyah is among a small minority who also allow circumstantial evidence (qarā'in) to prove any type of case (hudud, qisas, ta'zir, diyat or kaffarah) in relation to any accused. The majority reject circumstantial evidence as a *sole* base for conviction unless it comes in the form of qasamah. According to Shaykh ^ʿAbdullāh al-Harariyy, circumstantial evidence can form the basis for a conviction if the accused is known to be a bad person; meeting, 11 March 2000.

⁷⁹ Mahmassani, S. (1987), *Falsafat at-Tashri' fī al-Islam*, Penerbitan Hizbi, Malaysia, p. 173; as-Suyuti, Jalāl ad-Dīn, (1983), *Al-Ashbah wal- Nadzā'ir*, Dār-ul Kutub ^ʿIlmiyyah, Beirut, p. 53; Shaykh Ibrāhīm ibn Muḥammad ibn Salīm ibn Dūyan, *Manār al-Sabīl* ("Crime and Punishment Under Hanbali Law" trans. George M. Baroody), n.d., SOAS catalogue no: 350706, p. 113.

⁸⁰ Sinful and punishable acts under the Shari'ah, and basic evidential matters, are included in summaries of individual obligatory knowledge taught to children and adults. See for instance: Mukṭasaru ^ʿAbdullāh al-Harariyyu, *al-Kaḥḥil bi-^ʿIlmi-d-Dīni-d-Daruriyy*, (1996), Dār-ul Mashāri'a, Beirut, pp. 39-46. This book is based on a much older text from a Yemeni scholar, ^ʿAbdullāh Ibn Husayn Ibn Tahir.

value in making a confession that was false because of the dictates of their faith.⁸¹ Confessions, in part, were associated with sincere repentance (*tawbah*) which relieved the believer from possible punishment in Hellfire.⁸² It was envisaged that a Muslim's conscience would be pricked, and that s/he would come forward voluntarily.⁸³ This is illustrated by a *ḥadīth* (tradition) of the Prophet relating to the case of Ma'iz, which is mentioned across the four principal schools. Having confessed to *zina* (adultery/fornication) four times, and at different sittings, Ma'iz came again to the Holy Prophet who asked him a series of questions in order to check his sanity and to confirm that Ma'iz had not mistaken *zina* for a less serious sexual offence. After he had completed his questioning, the Prophet asked Ma'iz, "What do you want from me?" Ma'iz replied: "To be purified."⁸⁴ Third, in legal terms, it was an irrevocable source of evidence as it could never be removed by positive legislation. Confessions had clear Qur'anic authority for their place within the Shari'ah. Surah an-Nisa' exhorts the believers:

*Stand out firmly for justice, as witnesses to God, even as against yourselves.*⁸⁵ (emphasis added)

⁸¹ See: al-Sarakhsi, Muḥammad ibn Aḥmad, (1987), *Al-Mabsut*, vols 17-18, Idarat 'Ulum-ul Qur'an, Karachi, p. 298.

⁸² Voluntary confessions relieve the Muslim from punishment in the Hereafter only where all of the conditions for a valid repentance (which include regret and desisting from the conduct) are present; meeting with Shaykh 'Abdullah al-Harariyy, 11 March 2000.

⁸³ See the comments of al-Mawardi cited earlier in the chapter at p. 5.

⁸⁴ See: Al-Qurtubi, op. cit., vol. 9, pp 104-105. There is also Imam Muslim's version of this *ḥadīth* (*ḥadīth* no. 1695, Kitab-ul Hudud), which is reprinted in the footnotes to al-Mawardi's *Al-Hawi al-Kabir*, op. cit., p. 38, in which Ma'iz said to the Prophet four times: "Yā Rasūlullāh ṭahhirni" (O' Messenger of Allāh, purify me!) The Prophet responded: "fīma aṭahhiruka?" (From what do you wish to be purified?). Ma'iz replied: "Man-iz-zina" (From adultery).

⁸⁵ "Yā ayyuhalladhīna amanu kunu qawwāmīna bi-l qistī shuhadā' lillāhi wa law 'ala anfusikum" (v. 135). The Shaf'i scholar, ar-Ramli, confirms this verse as a proof (*Nihayat-ul Muhtaj*, (1967), Vol. 5, Maṭba'at Mustafā Albābi, p. 65). See also: Surah al-Baqarah, v. 282; Surah al-Qiyamah, vs

Fourth, a confession could form the sole basis for a conviction. If the Caliph, Qadi or Amir was satisfied with the confession, there was no need to confirm the conviction from evidence independently obtained. Abu Yusuf, who was the Chief Qadi of the ^Abbasid Caliph Harun ar-Rashid, the best student of Abu Hanifah, and a complete mujtahid in his own right, wrote:

“..if a murderer confesses his murder willingly *without any evidence*,⁸⁶ even then punishment would be imposed on him”⁸⁷ (emphasis added).

It is evident from the above, that a possible tension existed between the spiritual dimension of the confession and the temporal temptations of those in authority to extract it when there was no other evidence available to secure a conviction, or to vindicate the rights of victims. The *fuqaha*⁸⁸ recognized that the benefits (*maqasid*) underlying the Shari^ah presented a balance between facilitating a genuine repentance on the one hand, and enforcing the Shari^ah on the other. But as that balance depended on the *ijtihad* of the particular scholar and the social circumstances he was asked to address, it had the potential of producing different interpretations as to the role played by the accused within the legal process. This

14-15. The Hanbali scholar, Ibn Qudamah, reports a juristic consensus on the validity of confessions as a source of evidence (see *Al Mughni*, op. cit., Vol. 5, p. 271).

⁸⁶The Arabic text uses the words “min ghairi bayyinat” (op. cit., p. 183). “Bayyinat” is a general word that can refer to both eye-witness testimony (*shahadah*) and circumstantial evidence (*qara'in*) [see Othman, M.S.A (1991), *Undang-Undang Keterangan Islam*, Dewan Bahasa, Kuala Lumpur, p.p. 8-9]. *Iqrar* is a separate species of proof with its own conditions (*arkan*) and procedures.

⁸⁷Abu Yusuf, (1979), *Kitab ul-Kharaj*, trans. Dr Abid Ahmad ^Ali, revised by Professor ^Abdul Hameed Siddiqui, Islamic Book Centre, Lahore, p. 309. This is also explicitly stated by Hanbali scholars; see Ibn Qudamah, *Muwaffiq al-Din*, Abu Muhammad, ^Abdullah, bin Ahmad, bin Muhammad, (1983), *Al-Mughni*, Dar ul-Kitab-ul ^Arabiyy, Beirut, Lebanon, Vol. 5., p. 281. There are no reported disagreements in the Maliki or Shafi schools.

⁸⁸Scholars of “fiqh” (rules drawn from the Shari^ah).

will be illustrated by setting out the opinions of the four main schools in relation to powers of questioning and the admission of confessions.

ii) Questioning of the Accused:

Powers to question accused persons were based on distinctions found in both the Qur'an and Sunnah which appeared to construct the accused in terms of piety and degree of adherence to the religion.

In his interpretation of the meaning of the Qur'anic verse: "O ye who have faith! Avoid being overly suspicious; for suspicion *in some cases* is wrong; and spy not on one another", Al-Qurtubi mentioned that according to the religious scholars,⁸⁹ in this context the word "dzann (suspicion)" meant "tuhmat (accusation/charge)." He continued:

"And the evidence that 'suspicion' here means 'accusation' is the saying of Allah ta ^ala: 'And do not spy on one another'. This is because one might be tempted to make an accusation and then confirm it through spying, *inquiry*, surveillance, eavesdropping and other things. Thus, the Prophet, sallallahu ^alayhi wa sallam, prohibited spying. If you wish, you may say that what distinguishes the kind of suspicion (which is prohibited) that must be avoided from all other kinds of suspicion, is that the former is

without a valid proof or known apparent reason. *So, where there is no good reason, it is prohibited to suspect a person of corruption or fraud when he is well-known for his virtue and respected for his apparent honesty. The case is different, however, when the person is notorious for dubious dealings and unabashed iniquity.* Thus, there are two kinds of suspicion: first, that which is brought on and then strengthened by proof which can form the basis of a ruling; second, that which occurs for no apparent reason...This second type of suspicion is the same as doubt, and no ruling can be based on it. This is the kind of suspicion that is prohibited in the verse”⁹⁰ (my emphasis).

Al-Qurtubi thus reports that the scholars differentiated between those who were well-known for their piety with those who were well-known for their bad character. The powers of ordinary individuals and legal officials to question (and other similar activities) against pious individuals would not be triggered without valid proof (e.g. the testimony of just persons). These limitations on power, however, did not apply when the accused was already known for his bad character.

These categorizations were also based on the Sunnah. On the one hand, there were hadiths (traditions) of the Prophet which prohibit Muslims from suspecting a fellow Muslim of wrong doing, such as:

⁸⁹He does not refer to any exceptions in his text.

⁹⁰Al-Qurtubi, (1967), op. cit., vol. 16, pp. 331-332. See also the English translation of this passage by Yusuf Talal Delorenzo in Taha J. al-[^]Alwani’s work, “The Rights of the Accused in Islam (Part one)”, op. cit., pp. 362-363.

Do not seek to uncover their secrets (ʿawrat), for certainly he who seeks to uncover the secrets of his fellow Muslim, Allah will expose what *he* has kept hidden.⁹¹

If Muslims were known to be pious, or nothing was known about them, it was prohibited to question them about an offence without evidence because this was “seeking to uncover” unlawful behaviour which had not been made apparent. In the words of the Shafʿi scholar and Judge, al-Mawardī, this was a case of “mere suspicion,” (*wahm*) so “immunity is required by the dictates of the deen [religion].”⁹² Similarly, Abu Yusuf, from the Hanafi school, stated: “The Holy Prophet (ṣallallāhu ʿalayhi wa sallam) did not take people to account because of mere accusation.”⁹³

On the other hand, this protection from questioning did not apply to those Muslims whose illicit behaviour was widely known or against whom there was pre-existing evidence.⁹⁴ Malik,⁹⁵ for instance, appeared to allow questioning of an accused even in hudud cases involving the pure rights of Allāh, so long as there

⁹¹This is reported by Imam Aḥmad ibn Ḥanbal, in his *Musnad*, Vol. 19, Dār-ush-Shihāb, Cairo, n.d., ḥadīth no. 124, *Bāb ma jāʾ fī-t-tarḥībī min-at-tajassasi wa suʾ-udz-dzann*, pp. 241-242. The application of this ḥadīth to powers of questioning (whether by properly designated officials of the state or ordinary individuals) was confirmed in my meeting with the Muḥaddith, and Mufti of Somalia, Shaykh ʿAbdullah al-Harariyy. The Shaykh said: “If he is not known to be a bad person or if he is pious, he cannot be questioned because we presume the Muslim is virtuous - <Lā taṭlubu ʿawratin-naṣ>[ḥadīth]” (do not seek to uncover that which is concealed); July, 1998, Beirut, Lebanon.

⁹²Al-Mawardī, Abu Ḥasan, (1996), *Al Aḥkam al-Sultaniyyah: The Laws of Islamic Governance* [English trans. Dr Asadullah Yate], Ta-Ha Publishers, London, p. 309.

⁹³*Kitab-ul Kharaj*, op. cit, p. 356. The original Arabic uses the words “bi-l qaraf”, which means “loathing” literally. The editors of the text, however, have provided a footnote in which they explain the meaning as “tuhmat” (accusation) [op. cit., p. 209].

⁹⁴This was confirmed by Shaykh ʿAbdullah, op. cit.

⁹⁵See also the comments on duress by al-Mawardī, ibn Abidin, Sahnun, ibn Qayyim and others, referred to below. They all allowed duress to be applied to suspected thieves with a previous record for theft, which implies that they also allowed questioning.

was strong circumstantial evidence against him.⁹⁶ He reported ^Umar al-Khattab had once said: “ I have found the smell of wine on so and so and he claimed that it was the drink of boiled fruit juice and I am inquiring about what he has drunk, and if it intoxicates, I will flog him.”⁹⁷ The fact that ^Umar mentioned the man “claimed” to have taken a certain drink, implied that ^Umar, *after* noticing the smell of wine on the man’s breath, had questioned the man what he had had to drink.

This protection against questioning did not apply to non-Muslim subjects of the Islamic state (*dhimmis*).⁹⁸ They did not come explicitly within the protective parameters of the Qur’anic verses and Prophetic traditions. Their “case” was not the same as a pious Muslim or the Muslim about whom nothing was known because their disbelief in the basic tenets of Islām was already public knowledge. By a process of inductive logic, the scholars maintained that a person who did not avoid blasphemy, also might not avoid less serious matters that were prohibited by the Shari’ah.⁹⁹ This position also received support from the traditions of the Prophet. First, there was the ḥadīth of Ibn ^Umar in which he reported the aftermath of the battle between the Muslims and the non-Muslim inhabitants of

⁹⁶In this context, circumstantial evidence refers to external probative signs of guilt; it does not include obtaining physical evidence from a Muslim accused, such as fingerprints, hair or blood (confirmed by Shaykh ^Abdullah, *ibid*). This is based on a ḥadīth of the Prophet which means: “Verily, your blood, your wealth, your reputations, and your skins are inviolable.” This is reported by Ibn Ḥazm in *al-Muḥalla*, (reprinted 1352H), Muḥammad Munir ad-Dimashqiy, [SOAS catalogue no. A345.6] Vol. 11, p. 141. Blood samples, etc, could not be “extracted”; they could only be “volunteered” by an accused.

⁹⁷*Al-Muwatta*, narration of Yahya ibn Yahya al-Laythi al-Qayrawan (English trans), (1982), Diwan Press, Norwich, Kitāb al-Shurb, p. 401. This saying of ^Umar al-Khattab also provides some authority for judges relying upon their own knowledge before pronouncing a verdict and administering a sentence.

⁹⁸Confirmed by Shaykh ^Abdullah, *op. cit*.

⁹⁹*Ibid*.

Khaybar.¹⁰⁰ The latter had sought refuge in their fortress and, upon seeing that they had lost possession of their land and crops, agreed to make a treaty with the Prophet. It was agreed that their lives would be spared and that they could take with them all that they could carry on the condition that they did not hide anything. If they ignored this warning, there would be no treaty and no protection. However, some musk, money and jewellery belonging to Huyayy ibn Akhtab had been hidden. This prompted the Prophet to ask Huyayy's uncle: "What happened to the musk that your nephew brought from the Nadir?" He replied: "The wars and other expenses took it". The Prophet responded: "But he arrived very recently, and there was more money than that... ." If we examine this hadith, questioning took place without pre-existing evidence. An evidential foundation was established only *after* the Prophet had questioned Huyayy's uncle. This suggests that it was the state of disbelief of the accused which gave the power to question. Secondly, there was the hadith related by Anas ibn Malik, and included in the collections of Bukhari, Muslim, Abu Dawud, Ibn Majah, Ahmad and others, in which a Jew was alleged to have crushed the head of Muslim girl with a stone. Just before she died, the girl made a declaration that the offence had been committed by the Jew. In the reports of this hadith, it was then mentioned that the Prophet questioned the Jew.¹⁰¹

¹⁰⁰This is reported by Abu Dawud, hadith no. 3006; al-Bayhaqi, *Sunan al-Ahkam*, vol. 9, p. 137; Ibn Hajar al-Asqalani, *Fath al-Bari*, Vo. 7, pp. 366-367. It is also referred to by Ibn 'Abidin in his *Hashiyah*, see below, Vol. 3, p. 270; and by Ibn Qayyim al-Jawziyyah, in *At-Turuk al-Hukmiyyah*, see below, pp. 7-8. [These references are mentioned by Taha J. al-Alwani, "The Rights of the Accused in Islam (Part Two)", *The American Journal of Islamic Social Sciences*, (1994), Vol. 11, No. 4, p. 511 footnote].

¹⁰¹Shaykh 'Abdullah al-Harariyy confirmed that this hadith is a proof for being able to question the non-Muslim; op. cit. The dying declaration of the victim should not be read as pre-existing evidence against the Jew. For in essence, it was only an accusation made by the victim. If the rules for pious Muslims and Muslims about whom nothing was known, were the same as for non-Muslims, the accusation would have been disregarded as "mere suspicion", and not used as a basis for questioning.

While the power to question the accused seems to have relied upon the extent to which s/he adhered to the religion of Islam, there is no evidence from the Qur'an, Sunnah or juristic opinion that improper questioning would have excluded any confession subsequently obtained. Indeed, this was confirmed in my first meeting¹⁰² with Shaykh ^Abdullah al-Harariyy, who is a contemporary Muftahid within the school of Imam Shaf'i. To suspect of wrong-doing a pious Muslim or a Muslim about whom nothing was known, was a "sin of the heart."¹⁰³ The one who carried and acted out these suspicions would be accountable for that in this world¹⁰⁴ and in the Hereafter. Questioning itself did not vitiate a confession. First, it was not included within the categories of duress which, according to the majority of scholars (see below), would have absolved the accused from legal liability. Second, it was rationally assumed that ordinary individuals would not have felt coerced into making a false confession simply by questioning. Islamic Law had already taken into account vulnerable persons. Ibn Qudamah, the famous Hanbali scholar, reported that the Prophet had said:

"The pen (responsibility) is lifted from three types of persons: from the child until he becomes pubescent; from a person who is insane until he recovers his sanity, and from the person who is asleep until he awakes."¹⁰⁵

¹⁰²Op. cit.

¹⁰³Shaykh ^Abdullah al-Harariyy, (1996), *Bughyat-Talib*, Dar-ul Mashari'a, Beirut, p. 352.

¹⁰⁴In our second meeting (11 March, 2000), Shaykh ^Abdullah stated that a police officer who questioned a pious Muslim without legal authority and harmed him could be punished by the Muslim authorities.

¹⁰⁵*Al-Mughni*, (reprint 1983), Dar-ul Katib-ul ^Arabi, Beirut, Vol. 5, p. 271. See also: Sayed Sikander Shah Haneef, (1994), *Islamic Law of Evidence*, Pelanduk Publications, Petaling Jaya, Malaysia, pp. 33-35; Dr Anwarullah, (1994), *Islamic Law of Evidence*, Shar'iah Academy, International Islamic University, Islamabad, Pakistan, p. 44; Dr Mahmud Saedon Awang Othman,

In criminal matters, therefore, confessions obtained from pre-pubescent children or from adults of “unsound mind” were generally regarded as inadmissible.¹⁰⁶

iii) Voluntary Confessions:

As a general rule, the majority of Islamic scholars ruled that legal liability could not flow from confessions which had been obtained by duress. This was based on both Qur’anic verses and on traditions of the Prophet. First, the Qur’an clearly exempted from liability a person who was forced to utter words of disbelief:

*Anyone who, after accepting faith in Allāh, utters disbelief, **except** under compulsion- his heart remaining firm in faith-,...on them is ghaḍab¹⁰⁷ from Allāh. And they will have a grievous penalty¹⁰⁸ (emphasis added).*

The scholars reasoned that if compulsion exempted liability from apostacy (*kufr*), which was the most serious offence in Islam, then it would also exempt accused

(1991), *Undang-Undang Keterangan Islam*, Dewan Bahasa dan Pustaka Kementerian Pendidikan Malaysia, Kuala Lumpur, pp. 46-47.

¹⁰⁶Ibid. The Hanafis and Hanbalis allowed children below the age of puberty, but who had reached the age of discernment (*mumayyiz*) to make admissions in respect of transactions and property matters; see Sayed Iskander Shah Haneef, op. cit., p. 34.

¹⁰⁷This relates to the punishment of Allāh. Its meaning should not be translated as “wrath”, as this would attribute an emotion to Allāh. Emotions are created attributes and are applicable only to the Creation (Shaykh ^Abdullah al-Harariyy, *Ṣirat-ul Mustaqim*, (1993), Dar-ul Masharī^a, Beirut, pp. 38-39).

¹⁰⁸Surah an-Nahl, verse 106.

persons in offences which were less serious.¹⁰⁹ The Sunnah was even more explicit in the general applicability of this exemption. The Prophet informed us:

Responsibility is lifted from my people in cases of mistake, forgetfulness and duress.¹¹⁰

On the basis of these texts, the majority of the scholars (*jumhur*), across the four schools held that a confession had to be voluntary (*mukhtar*). For instance, *Malik* [died 179H/759CE] and his companions generally considered that a confession obtained from the accused by any form of duress or deception¹¹¹ was inadmissible and could not be relied upon in *hudud* or non-*hudud* cases.¹¹² Duress included beating, threatening, handcuffing,¹¹³ or imprisoning the accused. Even if the accused was a *dhimmi*, *Malik* ruled that questioning could not take place while s/he was detained. Detention was a discretionary punishment, and could not be authorised without the testimony of *just* witnesses. In support of his view, *Malik* referred to a saying of *^Umar ibn al-Khattab* who, having been informed that people were being detained in Iraq on the basis of false testimony, replied: “By *Allah*! A man is not detained in Islam without just witnesses.”¹¹⁴ If the confession

¹⁰⁹Sayed Iskander Shah Haneef, op. cit., p. 38.

¹¹⁰ “Rufi[^]a ^an ummati -l-khata’u, wa an-nisyānu, wa ma-stukrihu ^alayhi”, Ibn Qudamah, op. cit., vol. 5, p. 273; Abu Ishaq al-Shirazi, *al-Muhadzdzab*, Vol. 2, op. cit., p. 343; Shaykh Ibrahim ibn Muhammad ibn Salim ibn Duyan, op. cit., p. 113. Shaykh ^Abdullah confirmed in my meeting with him that this hadith is a proof, op. cit.

¹¹¹Taha J. Al. ^Alwani, (1994), “The Rights of the Accused in Islam (Part Two)”, *The American Journal of Islamic Social Sciences*, Vol 11, No. 4, Association for Muslim Social Scientists and the International Institute for Islamic Thought, Kuala Lumpur, Malaysia, p. 514.

¹¹²Sayed Sikander Shah Haneef, (1994), *Islamic Law of Evidence*, Pelanduk Publications, Petaling Jaya, Malaysia, p. 39.

¹¹³Muhammad ^Ata Al-Sid Sid Ahmad, (1995), *The Hudud*, Muhammad ^Ata Al-Sid Sid Ahmad, Kuala Lumpur, Malaysia, p. 160.

¹¹⁴Imam *Malik*, *Al-Muwatta*, narration of Yahya ibn Yahya al-Laythi al-Qayrawan (English trans), (1982), Diwan Press, Norwich, *Kitab al-Ahkam*, pp. 337-338.

was ruled involuntary, punishment could not be imposed even if the confession was corroborated through subsequent discovery of items mentioned by the accused in his confession.¹¹⁵

According to Imam Shaf'arī [died 204H/784CE], any harm or threat which reasonably diminished free will, such as beating, imprisonment, detention and starvation, was enough to invalidate a confession. He did not distinguish between the type of offence, nor whether it involved the rights of Allāh or the rights of persons.¹¹⁶ Imam Ghazzālī [died 505H/1085CE] also objected to beating an accused with a previous record for theft on the ground that it was “better for a thief to be spared a beating than for an innocent man to be beaten.”¹¹⁷

According to Imam al-Sarkhasī [died 483H/1063CE], the majority of Hanafi scholars had held that the accused could not be held liable on the basis of a confession which had been obtained by duress.¹¹⁸ Qadi Abu Yusuf [died 182H/762CE],¹¹⁹ for example, adhered strictly to the need for a voluntary confession. He stated in general terms:

“He who is doubted or is charged with theft or any other offence, should not be penalised with beating and should not be threatened and frightened.

If a person makes a profession (admission) of theft, or an offence invoking

¹¹⁵Sayed Iskander Shah Haneef, op. cit., p. 39; see also al-Zarqanī, *Sharh alMuwatta*, cited by Taha J. al-[^]Alwani, “The Rights of the Accused in Islam (Part Two)”, op. cit., p. 514.

¹¹⁶Sayed Iskander Shah, op. cit., p. 40.

¹¹⁷al-Ghazzālī, Abu [^]Hamid Muḥammad, (1937), *Al-Mustasfa min [^]Ilm al-Uṣul*, Cairo, vol. 1, pp. 139-144, cited in Subḥī Maḥmasānī, op. cit., p. 89.

¹¹⁸*Al-Mabsut*, vol. 9, pp184-185, cited in Taha J. Al-[^]Alwani, op. cit., p. 510.

¹¹⁹N.B. He was a Mujtahid Mutlaq in his own right.

punishment, or murders while he is charged with any of these offences, his confession will have no validity and it will not be lawful to cut off his hand or to take him to task for his confession.”¹²⁰

Abu Yūsuf also mentioned the case of a known thief who had been suspected of stealing. He referred to a man who had been brought to Tariq in Syria on a charge of theft. While under arrest, he was flogged and subsequently confessed to the offence. He was then brought to Ibn ^Umar who was asked for his opinion. Ibn ^Umar replied: “His hand should not be cut off, for he has made the confession only after receiving a beating.”¹²¹

He also clearly stated:

“Also you (addressing the Caliph, Harun al-Rashid) should not accept the charge of a man against another man in regard to murder and theft; nor should punishment be imposed upon him except upon the valid evidence [i.e. testimony of two ^adil witnesses] or confession without coercion by the Governor or a threat. It is not permissible to put a person into prison on account of an accusation.”¹²²

The context of these statements seems to suggest that Abu Yūsuf deemed imprisonment as a form of duress, in addition to beating and verbal threats. This is supported by his reference to the opinion of his colleague, Muḥammad al-

¹²⁰ Abu Yusuf, (1979), *Kitab ul-Kharaj*, trans. Dr Abid Ahmad ^Ali, revised by Professor ^Abdul Hameed Siddiqui, Islamic Book Centre, Lahore, p. 355; original Arabic text, op. cit., p. 209.

Shaybani [died 189H/769CE], who informed him that ^Umar al-Khattab had once said: “A man who is kept hungry, or frightened *or imprisoned*, is not secure from making a confession against his own self”¹²³(emphasis added). The implication is that imprisonment, which was a discretionary punishment, could not be authorised without valid evidence, and that along with food deprivation, threats and beatings, it could produce doubt in the truthfulness of any confession obtained. Hence in an earlier passage, when commenting on the need to avoid doubt before imposing punishment, he cites with approval the following saying of ^A’isha, the Prophet’s wife:

“Ward off punishments from the Muslims in doubtful cases as far as you can. If you find a way out for a Muslim, then set him free. If the Imam makes a mistake in granting forgiveness, it is better for him than that he should commit a mistake in imposing punishment.”¹²⁴

The mainstream position of the Hanbali school has been transmitted to us by Ibn Qudamah [died 630H/1252CE]. In his famous work *Al-Mughni*,¹²⁵ he stated that a confession which had been obtained by duress, generally had no legal validity. Causation, however, had to be established. If, for instance, the accused was

¹²¹Ibid., pp. 355-356; original Arabic text, op.cit., p. 209.

¹²²Ibid., p. 356; original Arabic text, ibid.

¹²³Ibid., p. 355; original Arabic text, ibid.

¹²⁴Ibid., pp. 307-308; original Arabic text, op. cit., p. 183.

¹²⁵Ibn Qudamah, Muwaffiq ad-Din, Abu Muhammad, ^Abdullah, bin Ahmad, bin Muhammad, (reprint 1983), Dar ul-Kitab-ul ^Arabiyy, Beirut, Lebanon.

coerced to confess in relation to property X, but his confession related to property Y, the confession was deemed voluntary and admissible.¹²⁶

It is suggested that this demand for voluntariness reflected: i) a reluctance to impose punishment unless the charge was manifestly proved;¹²⁷ and ii) a recognition of the spiritual dimension of the confession. The latter was evidently apparent in hadd punishments categorised as *haqqullah*, such as zina (adultery/fornication) and shurb (drinking alcohol) where it was *sunnah* (rewardable on the part of the decision maker) to *discourage* the accused from making a confession.¹²⁸ They based their opinions on the hadith relating to Ma[^]iz and the saying of [^]Umar: “Turn away those who commit zina”.¹²⁹ Some Hanafi scholars, in particular, argued that “concealment” and private acts of repentance were sometimes more appropriate.¹³⁰ Abu Yusuf appeared to extend this practice to persons accused of theft. He stated:

¹²⁶ See the explanation of *al-Mughni* by Ibn Qudamah al-Maqdisiyy, Shamsuddin Abu Farj [^]Abdur-Rahman, (1983), *Al-Sharh-ul Kabir* (printed in the footnotes of *al-Mughni*, vol. 5), p. 35. See also: Shaykh Ibrahim ibn Muhammad ibn Salim ibn Duyan, op. cit., p. 114; Sayed Iskander Shah Haneef, op. cit., p. 40.

¹²⁷ The majority of Islamic scholars do not accept circumstantial evidence as an independent source of proof in criminal cases because they believe it is more prone to error. This conforms to the meaning of the Prophet’s statement: “It is better if the Imam errs in forgiveness than if he errs in punishment” (see Abdul Qadir [^]Awdah, *Criminal Law of Islam*, Vol. 1, Karachi, International Islamic Publishers, p. 264; see also Abu Yusuf, op. cit.). According to Shaykh [^]Abdullah al-Harariyy, generally a confession could not be used against an accused where it had been obtained by force even if it was supported by circumstantial evidence. The confession was a basis only if the judge had his own personal knowledge of the issue, and was certain as to its truth (meeting in Beirut, op. cit.). The latter form of evidence is categorised as “[^]ilm-ul qadi” (judicial knowledge) and is accepted among some of the scholars of the Shafi school. It is based on the status of the judge himself. For the qualifications required of the qadi, see my earlier comments in the chapter.

¹²⁸ Confirmed by Shaykh [^]Abdullah; meeting 11 March, 2000.

¹²⁹ Mahmud Saedon Awang Othman, (1996), op. cit., p. 41.

¹³⁰ Ma[^]moun M. Salama, op. cit., p. 119; Osman [^]Abd-el-Malek al-Saleh, op. cit., p. 73; Muhammed [^]Ata al-Sid SidAhmad, op. cit., p. 162. They maintain that this is implied from the Prophet’s questioning of Ma[^]iz. They also rely on the hadith of the Prophet which means: “He who has committed a big sin, he conceals and privately repents of it; but if he has revealed to us his

“The Companions of the Holy Prophet (peace and blessings be upon him) avoided to inflict punishment which is unnecessary and preferred to postpone it due to doubt, so that they used to say to a thief brought to them: Have you committed theft? Say: No.”¹³¹

These concerns were also reflected in the requirements that the legal decision-maker carefully examine the validity of the accused's confession, particularly in cases of zina.¹³² For the Hanafis¹³³ and the Hanbalis,¹³⁴ their carefulness was such that they required the accused to repeat the confession four times and on four different occasions. Some of the scholars from these schools also required

face, we administer the hadd punishment of Allah upon him”(narrated by Zayd bin Aslam, cited by Al-Mawardi, *ibid.*, footnote).

¹³¹Op. cit., p. 357; original Arabic text, op. cit., p. 209. Some writers have argued (Muhammad ^Ata al-Sid, *supra*) that judicial dissuasion was limited to cases where the accused voluntarily came forward, and did not apply where he was arrested following an investigation. The words of Abu Yusuf, however, do not appear as restrictive, as it mentions the words “brought to them”. Perhaps, Mahmud Saedon Awang Othman is more accurate when he states that this practice was “commendable”, rather than a legal obligation imposed upon the judge (op. cit., p. 41), and that it was subject to judicial discretion. It could also be argued that this was merely an illustration of the fine qualities of a Qadi; namely, that he would not suspect another of wrong doing without valid evidence.

¹³²See the case of Mā'iz cited earlier.

¹³³Al Mawardi, *Al Hawi al-Kabir*, op. cit., vol. 17, p. 38; Abu Yusuf, op.cit., pp. 327-328; Mahmud Saedon Awang Othman, op. cit., p. 39; Sayed Sikander Shah Haneef, op. cit., p. 64; Muhammad ^Ata al-Sid SidAhmad, op.cit., p. 161. They base their opinion on the hadith of the Prophet relating to Mā'iz. In the version reported by Imam Bukhari, the accused's confession was accepted only after he had confessed a fourth time. The Shāfi'is and a majority of the Malikis held that one confession was sufficient in all cases. They based their decision principally on the case of Aseef, in which the Holy Prophet told Unais to “go to the woman, (and) if she confesses, stone her to death.” There is no mention in this hadith that the woman had to confess a specific number of times or on different occasions. The Malikis reasoned that the hadith relating to the case of Mā'iz, necessitated judicial questioning of the accused to ensure that he knew precisely the nature of the offence to which he was confessing. See: Syed Iskander Shah, op. cit., p. 64; Bahnasi, Ahmed Fathi, (1983), *Nadzariyyat Al-Isbat Fi-l Fiqh al-Jina'i Al-Islami*, Dar Al-Shuruk, Beirut, p. 177; Dr N. Sanad, (1991), *The Theory of Crime and Criminal Responsibility in Islamic Law*, University of Illinois, Chicago, p. 103; Muhammad ^Ata al-Sid SidAhmad, op. cit., p. 162. In the *Muwatta*, op. cit., Malik cites different prophetic traditions, some of which appeared to require the accused to repeat his confession four times; others once (see pp. 390-391). Al-Mawardi maintained that the school of Malik and of Ibn Abu Layla would not accept a confession for zina unless it was made four times (it could be made at the same sitting): *Al Hawi al-Kabir*, (1994) Dar al-Fikr, Beirut, *Kitab ul-Hudud, Bab ul-Zina*, p. 28.

¹³⁴They required the accused to repeat his confession four times in cases of zina, and twice in theft and hiraba cases Sayed Iskander Shah Haneef, op. cit., p. 67; Dr Anwarullah, op. cit., p. 43; Dr

repetition in cases of theft. Abu Yusuf held that the accused should repeat his confession twice.¹³⁵ Even in those cases where the accused had repeated his/her confession, the four principal schools allowed the accused to retract it before any punishment was administered.¹³⁶ They based their rulings on the Sunnah,¹³⁷ the practices of the Companions of the Prophet¹³⁸ and on their consensus.¹³⁹ These scholars wanted to be sure that the accused was completely conscious of what s/he was saying, and aware of the temporal consequences that would befall him/her.¹⁴⁰

Nagaty Sanad, op.cit., p. 103; ^Abdul Rahman al-Jaziri, op. cit., p. 74 (but this view is contradicted without evidence by ^Ata al-Sid SidAhmad). They refer to the same proofs as Abu Yusuf.

¹³⁵He relies upon a saying of Imam ^Ali, the fourth Khalifah, who demanded that a man testify against himself twice before applying the hadd punishment; see al-Mawardi, *ibid*; Abu Yusuf, op. cit., p. 343. See also: Sayed Iskander Shah Haneef, op. cit., p. 67. He applied the same reasoning to cases of intoxication when the smell of wine could be detected on the breath of the accused: Abu Yusuf, op. cit., p. 342; Mahmud Saedon Awang Othman, op. cit., p. 40. But according to Abu Hanifah, these cases were different from zina, and ruled that the hadd punishment could be imposed on the accused if he confessed once, so long as he was steadfast in the confession. Al-Mawardi, *Al-Hawi al-Kabir*, op. cit., p. 209; Mahmud Saedon Awang Othman, op. cit., p. 40; Sayed Iskander Shah Haneef, op. cit., p. 67.

¹³⁶This includes Abu Hanifah (see al-Mawardi, *al-Hawi al-Kabir*, op. cit., p. 43; Muhammed ^Ata al-Sid SidAhmad, op. cit., pp. 163-164) and Abu Yusuf, op. cit., p. 343. The Malikis allowed the accused to retract his confession in cases involving the rights of Allah, such as zina (adultery and fornication), sariqah (theft), hiraabah (robbery) and shurb (consuming intoxicants), so long as he offered a reason (Malik, *Muwatta*, op. cit., p. 391; Muhammad ^Ata Al-Sid SidAhmad, op. cit., pp. 163-164). According to Abu Ishaq al-Shirazi, the general position within the Shafi school was that an accused could retract his confession in hudud or non-hudud cases where only the rights of Allah were involved (therefore theft would not be included; per Shaykh ^Abdullah, meeting 11 March, 2000). The retraction, however, would have to be made expressly; *al-Muhadzdzab*, op. cit., Vol. 2, p. 345. See also: Dr Anwarullah, op. cit., p. 57; Ma^mun M. Salama, "General Principles of Criminal Evidence in Islamic Jurisprudence" in M. Cherif Bassiouni, (1982), *The Islamic Criminal Justice System*, Oceana Publications, London, p. 119. The Hanbalis also allowed retraction in hudud cases where the pure rights of Allah were involved; ^Abdur-Rahman al-Jaziriyy, op. cit., p. 87.

¹³⁷Specifically, they cite the hadith relating to Ma^iz (narrated by Abu Hurayrah and reported by at-Tirmidhiyy), in which the Prophet, after seeing the former's attempt to run away, is reported to have said to the stoners: "Why didn't you leave him?" They also cite the hadith which has general application in cases relating to hudud, which means: "Avoid the hudud where there is doubt" (see al-Mawardi, *Al-Hawi al-kabir*, op. cit., p. 44). The retraction, according to these scholars, generates a doubt in the genuineness of the confession which prevents the hadd punishment from being applied.

¹³⁸They refer to sayings of ^Umar al-Khattab (reported by al-Bayhaqiyy - see al-Mawardi, *ibid*., p. 45; Abu Yusuf, op. cit., p. 343).

¹³⁹This is cited by al-Mawardi, *ibid*. See also: ^Abd-ur-Rahman al-Jaziriyy, *Kitab al-Fiqh ^ala al-madhahib-il Arb^ah*, Dar al-Kutub al-^Ilmiyyah, Beirut, Lebanon, vol. 5, Kitab-ul Hudud, p. 87.

¹⁴⁰It should be mentioned that Imam Shafi and his followers did not require the accused to repeat his confession for any type of case. They relied upon the Prophet's instruction to Unays, as well as upon the practices of Abu Bakr and ^Umar al-Khattab (Al-Mawardi, *Al-Ahkam al-Sultaniyyah*, op. cit., p. 316). There do not appear to be any differences within the Shafi school in this respect. See: Al-Mawardi, *Al-Hawi al-Kabir*, op. cit; Abu Ishaq al-Shirazi, *Al-Muhadhdhab*, vol. 2, Matba^ah

In spite of the concern to avoid punishment and to facilitate genuine repentance, the rights of victims were not ignored. Hence, if the case was categorized¹⁴¹ as *Haqqun-Nas* (a right of persons) retraction was never allowed.¹⁴² In this category of cases, the rights of the victim predominated. Hence Abu Yusuf wrote: “nothing will render the verdict invalid due to his revoking the confession.”¹⁴³ In other

¹⁴¹Isa Albani al-Halabi, Egypt, n.d., p. 343-345; Mahmud Saedon Awang Othman, (1996), *An Introduction to Islamic Law of Evidence*, Hizbi, Shah Alam, pp. 39-40. Nevertheless, they still required careful questioning of the accused before accepting his confession. Hence, they explained that in the hadith relating to Ma'iz, the Prophet hesitated and did not record his confession the first time because he doubted his sanity; see Ahmad Fathi Bahnasi, (1983), *Nazariat al-Isbat Fi-l Fiqh al-Jing'i al-Islami*, Beirut, Dar al-Shuruk, p. 177, cited in Syed Iskander Shah Haneef, op. cit., p. 64; Dr Nagaty Sanad, (1991), *The Theory of Crime and Criminal Responsibility*, University of Illinois, Chicago, p. 103.

¹⁴¹Not all cases which involved victims were categorized as “*Haqqun-Nas*.” The categorization related only to those offences which the scholars stated invested a right in the victim (or his heirs) to remit punishment, such as: qadhif, qisas and diyyat, which were actionable in response to a demand (see Al-Mawardi, *Al-Ahkam as-Sultaniyyah*, (1996), op. cit., p. 323 and pp. 325 post et seq. See also: Mahmud Saedon A.Othman (1991), *Undang-Undang Keterangan Islam*, op. cit., p. 46; Mohamed Hashim Kamali, (1995), *Punishment in Islamic Law*, Kuala Lumpur, Institut Kajian Dasar, p. 73; Abdul Qadir ^Oudah, (1987), *Criminal Law of Islam*, Vol. 1, Karachi, International Islamic Publishers, p. 111) Where the punishment was fixed, such as for “sariqah” (theft), this was classified as a “*Haqq Allah*” notwithstanding the presence of a victim.

¹⁴²The Hanafis agreed that it was unnecessary for the accused to repeat his confession if the case related only, or predominantly, to the rights of persons ; see Abu Yusuf, op. cit., p. 342.

¹⁴³Op. cit., p. 342. Although he states that revocation is valid in cases of theft, he subsequently mentions that in cases of qisas, minor offences and *property* (my emphasis), the revocation will be invalid. This suggest that the accused, when he is charged with theft, will not be allowed to deny the victim his right to his property. The revocation, therefore, will work only to commute the punishment. For the similar Maliki view, see Al Qarafi, Shihab al-Din, (1976), *Al-Dhakhirah*, Dar al-Ma'rifah li al-Taba'ah, Beirut, vol. vii, p. 126, cited in Anwarullah, op. cit., p. 58; Ibn ^Arabi, Muhammad Ibn ^Abdullah, (1972), *Ahkam Al-Qu'ran*, Dar al-Ma'rifah, Beirut, vols 1-3, p. 506; Al-Qurtubi, Muhammad Ibn Ahmad Al-Ansariyy, (1967) [1378A.H.], *Al-Jami'a li Ahkam Al-Qu'ran*, vol. 18, Dar-ul Katib-ul ^Arabi, Cairo, p. 102; Taha J. Al-^Alwani, “The Rights of the Accused in Islam (Part Two)”, op. cit., pp. 515-516. The evidence allowing for retraction in cases involving the pure rights of Allah, is based on the hadith of the Holy Prophet who, when he heard that Maiz had attempted to escape, is reported to have said: “I wish you had left him and brought him to me.” The reason the Malikis did not allow retraction in cases involving peoples' rights was because the Qur'an informs: *Nay man will be evidenced against himself, even if he were to put his excuses* (Surah al-Qiyamah, verse 15). In the Shaf'i school, if the offence entailed breaching the rights of persons, such as: murder, intentional injuries against the person (qisas) and cases of imputation of fornication without witnesses (qadhif), the accused was not allowed to retract his confession on the ground that the rights of persons (victims) could not be nullified by doubt; Abu Ishaq al-Shirazi, op. cit., p.345 (this is also the position of the Hanbali school; see Ibn Qudamah, *al Mughni*, op. cit., p. 288.) In cases of theft, the retraction would have no effect if the stolen goods were subsequently found at the house of the accused (ie. the hadd would be imposed); per Shaykh ^Abdullah, meeting 11 March 2000.

offences which also involved a victim, but in which the *Huququllah*¹⁴⁴ (Rights of Allah) were said to predominate, confessional rules recognized the interests of victims only in part. Hence, for the offences of *sariqah* and *hirabah*, retraction commuted the sentence; it did not frustrate the victim's right to his/her property.¹⁴⁵

iv) The Validity of Confessions Obtained Under Duress - Another View:

Notwithstanding the position held by these Islamic scholars, there was a body of opinion, *held across the four schools*, that endorsed the application of duress to certain types of accused persons and in specified situations. Their opinion also had evidential foundations in the Sunnah of the Prophet. They cited the *ḥadīth* relating to the non-Muslim inhabitants of Khaybar¹⁴⁶ in which, according to al-Bayhaqī's report of this event,¹⁴⁷ the Prophet handed the accused to Zubayr who tortured the man in order to extract information or to obtain a confession.

Explicitly, this *ḥadīth* referred to non-Muslims in a state of war, but a group of scholars interpreted this as a *general* matter of politics and proper administration which empowered a *Qadi*, a Caliph, a properly appointed *Amīr* or his assistants, to inflict duress upon accused persons where appropriate. They reasoned that where

¹⁴⁴ This includes abandonment of religious obligations (such as prayer and fasting) as well as commission of religious prohibitions where the punishments are stated specifically in the Qu'ran or Sunnah and which are not open to pardon. See al-Mawardi, op. cit., pp. 95-96 and pp. 312-322.

¹⁴⁵ See footnote 140. According to Abu Yusuf (see p. 18), the companions "avoided to inflict punishment" when they discouraged persons accused of theft who had been brought before them. If the accused initially confessed to the crime, that confession would confirm the victim's right to his property but it would not guarantee the *ḥadd* punishment for theft unless the accused remained steadfast in his statement. Rationally, an accused person in possession of property which he knew belonged to another may have thought he was guilty of theft and initially confessed. But on subsequent reflection, he may consider his sin to be "handling stolen goods" (which is a *ṭ'azir* offence) and retract the initial confession.

¹⁴⁶ The substantive facts of this *ḥadīth* were cited earlier.

the rights of victims were involved, these powers could be exercised against those whose previous behaviour resembled that of the non-Muslims of Khaybar (i.e. they were known for their bad character), and against whom there were additional reasons to suspect of the crime with which they had been charged.

For example, within the school of Imam Maḥlik, Saḥnūn [died 240H/820CE] accepted the truth and validity of an involuntary confession¹⁴⁸ and the majority of Maḥlik's companions validated beating for matters *other than* determining judgement. Hence, in cases of theft, they allowed the detention and beating of an alleged thief only for the purpose of recovering the stolen property.¹⁴⁹

Similarly, in the school of Imam al-Shaf'ī, al-Mawardī [died 450H/1072CE], among others,¹⁵⁰ allowed duress in certain circumstances. The power to effect duress on an accused depended on three matters: first, the amount of evidence already amassed against the accused; second, which legal official had been empowered to investigate the case; and third, whether the accused was known to be pious and honest, or was well-known for his bad character.¹⁵¹ In respect of the first matter, if it was a case of "mere suspicion" [*wahm*] (i.e. there was no pre-existing evidence against the accused), there was no power to question, detain or force the accused to speak, irrespective of the nature of the office of the

¹⁴⁷ *Sunan al-Aḥkam*, vol. 9, p. 137, cited in Taha J. al-ʿAlwani, *ibid*, p. 511.

¹⁴⁸ Al-Shaṭībī, Abu Ishaq Ibrāhīm, *Al-Iʿtiṣām*, Cairo, 1332 A.H., Vol. II, pp. 95-116, cited in Mahmassani, S. (1987), *Falsafat al-Tashrīʿ fī al-Islam*, Penerbitan Hizbi, Malaysia, p. 89.

¹⁴⁹ *Ibid*. This stolen property, however, could not be used to strengthen or corroborate the original confession: Awad M. Awad, "The Rights of the Accused Under Islamic Criminal Procedure", published in M. Cherif Bassiouni, (1982) *The Islamic Criminal Justice System*, Oceana Publications, London, p. 106.

¹⁵⁰ Al-Mawardī's views are not isolated opinions within the Shaf'ī school. See also ar-Ramlī [died 1004H/1584 CE], *Nihayat-ul Muḥtāj*, *op. cit.*, p. 71, whose views are remarkably similar.

investigating official, or of the background of the accused.¹⁵² If, on the other hand, suspicion against the accused was supported by some evidence, but not enough to obtain a conviction [*dzann*] (eg. there was only one trustworthy male Muslim witness, or there existed merely circumstantial evidence against the accused), the situation was different. Where the investigator was a *Qadi* (Judge), and the accused was charged with *zina* (fornication/adultery) or theft¹⁵³ al-Mawardi maintained:

“this accusation is of no effect for him; he may not imprison him, be it to investigate or to await his being proved innocent, *and he may not proceed* after compelling him to confess”¹⁵⁴ (emphasis added).

Any such compulsion which the judge authorised would invalidate any confession obtained, even if the accused was known for committing offences similar to that which he had been charged.¹⁵⁵

These restrictions on applying duress to the accused, however, did not apply where the investigator was an *Amir* (including his deputies or assistants)¹⁵⁶ or a

¹⁵¹ Al-Mawardi, Abu Hasan, (1996), *Al Ahkam al-Sultaniyyah: The Laws of Islamic Governance* [English trans. Dr Asadullah Yate], Ta-Ha Publishers, London, p. 309.

¹⁵² Ibid.

¹⁵³ In an earlier passage, al-Mawardi also applied this voluntariness rule to “*riddah*” (apostacy), “*bughat*” (rebellious against the Caliph) and “*hirabah*” (highway robbery); *ibid*, pp 87-95.

¹⁵⁴ Ibid., p. 309.

¹⁵⁵ Ibid., p. 310.

¹⁵⁶ This refers to a military leader or governor appointed by the Caliph (not the people or their elected representatives) and whose trustworthiness and religious credentials had been checked before appointment. According to Shaykh ^Abdullah al-Harariyy, if a confession had been obtained coercively by *^adl* (ie. just, trustworthy, avoids religious prohibitions, etc) police officers from a person accused of theft and the goods were found where the accused stated them to be in his confession, the judge could impose the appropriate punishment by relying upon their statements (meeting, 11 March, 2000).

Muhtasib. According to al-Mawardi, the different scope of their powers was due to “the Amir’s concern with administration and the qadi’s concern with the laws.”¹⁵⁷ He gave similar reasons for the differences in power between a Muhtasib and a Qadi, stating:

“The Muhtasib has to exercise the sovereignty of a government official, and so he may have recourse to the haughtiness and arrogance of the forces of order when dealing with reprehensible matters, whereas the judiciary may not: hisbah involves enforcement and any excessive behaviour on behalf of the Muhtasib is not regarded as an injustice or undue harshness; the Qadi, however, is there to establish justice and should rather act with gentleness and gravity - and so any departure from this, such that he assumes the imperiousness of the hisbah, represents an outrage and an excess: thus the sphere of each is different, and when the authority of each is exceeded, the limits are infringed.”¹⁵⁸

In respect of the powers given to the Amir, he was allowed to imprison the accused for the purposes of an investigation and enquiry. He was also empowered to apply duress. Al-Mawardi continues:

“if the grounds for the accusation are sufficiently strong, the Amir may have the accused beaten as a discretionary measure...in order to compel him to be truthful regarding his situation and the crime of which he has

¹⁵⁷Op. cit., p. 312.

¹⁵⁸ Op. cit., p. 340.

been accused; if he confesses during the beating, then account must be taken of the reason for the beating: *if he has been beaten to compel him to confess, this confession has no legal status; if, however, it was to extract the truth about his situation and he confesses during the beating, then the beating is stopped and he is asked to confess again; if he confesses, then he is judged according to this second confession, and not the first; if he restricts himself to the first confession and a second is not asked of him, then he is not put under any more pressure, because one proceeds according to the first confession - although we dislike this*¹⁵⁹(emphases added).

Although al-Mawardi allowed beating to occur in this instance, it should be mentioned that it was not to be applied as a customary practice. First, he mentions that it is a discretionary measure. Second, he states that it was evidently better for the accused to be asked to confess a second time when he was not being beaten, and for the beating to stop even in the case of withdrawal or denial. It was better for a confession to be given voluntarily, and not directly in response to a beating. It is apparent, however, that he did not presume that a confession given under such stressful circumstances would be untrue. Hence, he allowed the Amir's judgement to proceed even on the basis of the first confession. The beating was seen as a means for *releasing* the truth, as opposed to obtaining a confession per se.

¹⁵⁹Op. cit., p. 310. Ar-Ramli makes the same distinctions, op. cit. Al-Mawardi also comments that the Amir (rather than the Qadi/Judge) was empowered to compel such an accused to swear on oath, and to exert pressure on him during the course of an investigation, regardless of whether he was charged with an offence involving the rights of Allah or the rights of man (op. cit., p. 311).

It should also be noted, however, that even here the ability to apply duress required strong grounds. It was incumbent upon the Amīr to become actively involved in the investigations and to check the statements of his assistants regarding the circumstances of the accused. If he was satisfied with their statements that the accused had carried out similar acts in the past, or that he had a “suspicious character” or was known to be “a scoundrel”, or (in cases of murder or violent assault) there were signs of blows on his body or that he had been found with a sharp instrument at the time, only then could he be subjected to “rough treatment.”¹⁶⁰

In al-Mawardī’s view, the Muhtasib (the Market Controller/Chief Inspector of Police), had similar powers of intimidation.¹⁶¹ In terms of investigative powers, he was able to investigate serious crimes - both relating to hudud and qisas and he could exercise them in an intimidatory manner. Yet, as with the Amīr, in the application of these powers recourse was always made to the character of the accused and the amount of evidence against him or her.¹⁶²

According to the minority of the Hanafi school, the validity of coercion as a means of extracting the truth was not dependent upon the status or office of the person who used it. Ibn ^Abidin [died 1252H/1802CE]¹⁶³ sanctioned beatings to obtain a confession in proceedings before a Qadi. So long as the accused had the capacity

¹⁶⁰Op. cit., p. 310.

¹⁶¹Op. cit., p. 340.

¹⁶²He is not allowed to punish a person merely on the basis of accusation or suspicion (op. cit., p. 347).

¹⁶³ Ibn ^Abidin’s general position on coercion is confirmed by modern text writers. See: Taha J. al-^Alwani, “The Rights of the Accused in Islam (Part Two)”, op. cit., p. 511; Awad M. Awad,

to commit the act to which he had confessed, had been charged with an offence such as theft or killing (i.e. involving victims), and was “ma[^]rufun bi-ha” (well-known for it), the confession remained valid.¹⁶⁴ However, he did not allow a Qa[^]di to use such powers against an accused who was “maw[^]sufan bi s-sal[^]ahi” (attributed with good qualities).¹⁶⁵ The same considerations applied if the confession had been obtained during extra-judicial proceedings carried out by an Am[^]ir and his assistants. If the accused was well-known as a “scoundrel,” he could beat the accused to confess if the charge concerned the rights of people. Where, however, the accused was “shareef” (widely respected), the Am[^]ir (or a person specifically delegated by the Sultan) was empowered only to question and use “harsh words” (“bi-l kalam khashan”).¹⁶⁶ The presumption was that persons known for their prior criminality would need to be pressurized more than those from respectable backgrounds, if the authorities were going to be successful in securing a confession. According to the editors of this text, these powers were also given to ordinary members of the public where there had been a general break-down in law and order and the Sultan had lost his authority.¹⁶⁷

Even some of the Hanafi scholars from the selaph era,¹⁶⁸ seemed to have endorsed, or at least tolerated, a similar approach. It was reported that [^]I[^]sam ibn

(1982), “The Rights of the Accused Under Islamic Criminal Procedure” in M. Cherif Bassiouni, (1982), *The Islamic Criminal Justice System*, op. cit., p. 106.

¹⁶⁴Muhammad Am[^]in Ibn [^]A[^]bid[^]in, (1966), *Radd ul-Muhtar*, [^]Ala ad-Durr-ul Mukhtar: Sharh Tanweer al-Absar, Vol. 6, 2nd Edition, Dar ul-Fikr (1979) [reprint], *Kitab ul-Ikrah*, pp. 128-129 and p. 140.

¹⁶⁵Ibid., p. 140.

¹⁶⁶Ibid., pp. 128-129. Nevertheless, the power to question necessitated pre-existing evidence against such an accused; see the earlier section of questioning.

¹⁶⁷Ibid., p. 129 (footnote).

¹⁶⁸This spans the first 300 years after the migration of the Prophet to Medina. This period has important connotations for Muslims, as the scholars of this era were deemed to have more piety than the generations who came after them. The four great Imams: Abu Hanifah, Malik, Shafi and

Yusuf, a companion of Abu Hanifah's disciples Abu Yusuf and Muhammad al-Shaybani, indirectly approved an Amir's beating of a thief which had resulted in a confession and the subsequent discovery of the stolen goods. On seeing the stolen goods, he remarked: "Praise Allah! Never have I seen injustice appear so similar to justice in this case."¹⁶⁹

Duress was also validated in certain circumstances by those who purported to follow the Hanbali tradition. Ahmad Ibn Taymiyyah [died 728H/1308] and his student, Ibn al-Qayyim al-Jawziyyah [died 751H/1331], for example, endorsed beatings of someone accused of theft (etc.) if he was known for his bad character and had a previous record for similar acts. According to Ibn al-Qayyim:

"If the accused is beaten in order to obtain his confession, and he does confess, and then the stolen goods are found where he said they would be, his hand may be severed. The sentence will not be carried out as a hadd penalty on the basis of the confession obtained under duress, but because the stolen goods were found where he, in his confession, had indicated they would be."¹⁷⁰

It would appear from this account that beating an accused into a confession was tolerated and validated even for hadd punishments. Although formally, the

Ahmad ibn Hanbal, and their companions, were all Selaph. They established their schools during the rule of the Abbasids.

¹⁶⁹See Taha J. Al-Alwani, "The Rights of the Accused in Islam (Part two)", op. cit., p. 512.

¹⁷⁰*Al-Turuk al-Hukmiyyah fi Siyasati-Shar'iyah*, n.d., Matb'ah al-Madani, Cairo, p. 104 (see generally pp. 93-108). This is the translation of Yusuf Talal Delorenzo, where the passage is reprinted in Taha J. al-Alwani's article : "The Rights of the Accused in Islam (Part Two)", op. cit., p. 513.

accused was formally convicted on the basis of the discovery of stolen goods in the place where he said they would be found, this statement clearly encouraged coercive methods for extracting information from accused persons.

Ibn al-Qayyim's sheikh, Ibn Taymiyyah, argued on similar lines. He maintained that if the accused was charged with *sariqah* (theft), *hiraba* (highway robbery), or *qisas* (murder and the like), that he was known for his bad character, and there was corroborative evidence linking him with the crime, it was not prohibited for the investigator (no restriction is made on the type of official) to extract his confession by beating or detention.¹⁷¹

Conclusion:

At the beginning of this chapter, I set out some of the principles and sources of Islamic Law and emphasised its potential for plurality of opinion within defined and consensual frameworks. In the analysis of rules pertaining to powers of questioning and confessions, it was apparent that all of the applicable schools accepted the validity of uncorroborated confessions for determining judgement, irrespective of the nature of the case, severity of possible sentence or type of accused. Further, none of the schools objected to questioning of the accused provided there existed grounds for reasonable suspicion. At the heart of this consensus lay an assumption that confessions were the "best evidence" and the most reliable indication of truth. In rational terms, it was presumed that accused

persons would not speak against their own interests unless it was the truth. But the confession was also regarded as something spiritual; an acknowledgement of the truth that would facilitate a Muslim's repentance (*tawbah*) and save him/her from the torments of Hell. The grant of powers of questioning over such individuals was *a means* by which they¹⁷² could spiritually "purify" themselves as well as a way of arriving at the truth.

For the majority of the scholars across the main schools, the rational and the spiritual considerations coincided in their stipulation that confessions be voluntary. Involuntary confessions were both unreliable indications of the truth and unhelpful in facilitating the individual's repentance; for it was only a *willing* acknowledgement of wrong-doing which would constitute part of the individual's repentance. The Holy Qur'an states there is no coercion in matters of faith;¹⁷³ true belief comes from the heart.

This emphasis on repentance and voluntariness might indicate that respect for the freedom of all individuals was a corner stone of Islamic criminal justice. But that would be a reductive analysis. Individuals were graded in terms of their piety and degree of adherence to the religion. Freedom from questioning, for instance, depended on whether suspects were known for their religiousness, or simply

¹⁷¹See Sayed Iskander Shah, op. cit., p. 41. He cites Abu al-Ainain al Fattah, (1983), *Al-Qada wal Ithbat fi Fiqh al-Islam*, Maktabat-al-Damanyah, Egypt, pp. 304-306. He also referred to the hadith of Ibn 'Umar cited earlier, relating to the inhabitants of Khaybar.

¹⁷²Yet, this means of releasing the truth was restricted to those, such as the "*fasiqun*" (big-sinners), who were undeserving of the presumption of innocence. For the "*muttaqun*" (the pious), it was prohibited to question them because it was suspecting bad behaviour which was in opposition to the known fact of piety. Rationally, it might be said that if such people had committed an offence questioning would be redundant in any case because they would not need any prompting. Indeed, this was the practice of the sahabah at the time of the Holy Prophet; see p. 5.

¹⁷³Surah al-Baqarah, verse 256.

whether nothing was known about them. Other individuals, such as the *Kafir* (unbeliever)¹⁷⁴, *Murtad* (apostate) and *Fasiq* (big-sinner) enjoyed no such immunity. The scholars had understood that not everyone shared their discipline nor their love for the religion. To have applied universal standards would have been detrimental to the collective needs of the community for peace and security, and against the rights of individual victims to seek redress or compensation.

Yet for some of the scholars, their interpretations of the religious sources exhibited a different perspective on rationality and spirituality. Their understanding of the *maqasid-ash-Shari'ah* emphasised externals over internals; *active enforcement* over repentance. It was an obligation to follow the Shari'ah and religiously rewardable to "bid the good and prohibit the forbidden." If the collective needs of the community and the rights of individual victims were to be upheld, strong-arm methods were occasionally required. Truth did not always come forward of its own accord; sometimes it had to be *extracted*. But even here, religious gradation operated to mitigate potential abuse. Coercion was only legitimated for irreligious Muslims¹⁷⁵ with a previous record and who had been accused of violating, in some respect, the rights of others.

The views of these scholars were not reserved for a particular generation. It is apparent from the various opinions that I have collated, that these differences

¹⁷⁴This includes the *dhimmi* (covenanted citizen of the Islamic state) and the *harbi* (non-muslim with no treaty relations); see further, ^Oudah, op. cit., pp. 331 post et seq.

¹⁷⁵It might be thought that the prohibition of coercion against the *dhimmi* is inconsistent in this respect. But their rights to be beaten and detained flowed, not from their religious status, but from the specific contract which they had entered into with the Islamic state; see al-Mawardi, op. cit., pp 207-208. It should be regarded, therefore, as a specific exception which does not vitiate the general rule.

existed within and between the different generations. ^Isam ibn Yusuf and Sahnun, for instance, were contemporaries of Abu Yusuf and Malik, respectively, but their views could not have been more different. Differences and agreements existed side by side.

I also suggest that the substance and plurality of opinion was not necessarily affected by the changes in administrative structure and the developing power of the Islamic state. In the earlier chapters observing the developments in English Law, I observed a gradual consensus of opinion regarding the appropriate relationship between the individual and the state. The more powerful and “welfarist” the state became, the more the accused was reduced to a “suspect” with fewer freedoms and rights. In the juridical history of Islamic criminal justice, however, even when the state was at its height during the rule of the ^Abbasids, scholars such as Abu Yusuf were still reprimanding the Caliph’s governors for abusing their powers and failing to accord the accused his/her proper role within the system. Islamic scholars were striving *independently* to expound the correct interpretation of Islamic Law as they saw it.

Although the administrative structure and respective power of the Islamic state was generally irrelevant with respect to the formation of juristic opinion, it was far from irrelevant when it came to its enforcement. The practical justice of the Shari^ah depended to a great extent on the qualifications and the integrity of those who held power. Islamic law of confessions in general admitted extra-judicial confessions when they were witnessed by two male Muslims, who satisfied all the

conditions of *ʿadālah*.¹⁷⁶ This, in turn, was dependent upon the Amīr who was charged with appointing *appropriate* and *suitably qualified* persons to investigate offences and enforce the Shariʿah. The likelihood of the Amīr to carry out this function, however, was reliant upon the religious integrity and piety of the Wazīr of General Jurisdiction and the Caliph. If their qualifications and piety were lacking, it would infect the whole system and the role which the accused was purported to play. Instead of being marginal, duress and oppression had the danger of becoming increasingly central as the Islamic state became more separated from its religious essence. The collapse of ʿAbbasid rule in the thirteenth century following the Mongol invasion was a disaster for the integrity of the Islamic state. Although it was temporarily revived by the Ottomans, secular authority was beginning to hold the reigns of power as royal clans set up their independent states. Religious gradation which had been enshrined in Islamic law would diminish as individual states embarked on their process of secularisation; a process which did not seek to protect the individual or the community, but which endeavoured to enforce secular and royal power.

I will suggest in the following chapter, that the process of “Islamisation,” upon which several Muslim states are currently embarking, should be read as a process of “secularisation.” I will also argue that it carries with it some serious

¹⁷⁶ For the Maliki position, see: Maʿmoun M. Salama, “General Principles of Criminal Evidence in Islamic Jurisprudence” in M. Cherif Bassiouni, (1982), *The Islamic Criminal Justice System*, Oceana Publications, London, p. 119. For the Shafʿi position, see: Mahmud Saedon Awang Othman, (1996), op. cit., p. 40; Maʿmoun M. Salama (1982), op. cit., p. 119; Dr Nagaty Sanad, (1991), op. cit., p. 103. For the Hanbali position, see: Maʿmoun M. Salama, op. cit., p. 119. According to Abu Hanifah and other Hanafi scholars, a confession would be invalid in cases categorized as “Haqqullah” unless it was made in a court and before a judge; see Maʿmoun M. Salama, op. cit., p. 119; Dr Nagaty Sanad, op. cit., p. 103. It was unnecessary, however, for it to be made in judicial proceedings. A special session of the court set aside for that purpose would be sufficient; Mahmud Saedon Awang Othman, op. cit., p. 40.

consequences for accused persons which, if not addressed, could impact on the perceived legitimacy of Islamic Law itself.

Chapter Six

The “Islamisation” of Criminal Justice: Contextualising the Role of the Accused in a Muslim State; a Case Study on Malaysia

Introduction:

Islamic development in Malaysia needs to be understood in the context of the historical decline of the Caliphate and the development of autonomous Muslim states. In the absence of this over-arching religious and political framework, Muslim states (such as Malaysia) have engaged in a “rationalization” process through a series of compromises with social and cultural influences antithetical to Islam.¹ In the pre-colonial period² when the Malay states were under the influence of purportedly “Islamic” rulers who were given the titles of “Khalīfatu’l Mu’minīn” (Caliph of the Faithful) and “Zillu’ Allāhi fi-l ‘alam” (the so-called ‘Shadow’ of God on Earth),³ a hybrid system of criminal justice developed in which Malay customary law/ “^adat” mixed uncertainly with the Shari^ah and

¹ Sharifah Zaleha Syed Hassan, “Towards a Syariah-based Society: Religious Rationalization and the Development of the Islamic Legal Order in Malaysia”, *Jurnal Antropologi Dan Sociologi* (1990), Vol. 18, p. 41.

² See further: Ibrahim, A., Saedon, M. and Hassan, M.K. (1992), “Islamisation of the Malay Archipelago and the Impact of Al-Shafi’s Madhhab on Islamic Teachings in Malaysia,” *International Islamic University Law Journal*, K.L., Vol. 2; Balogun, S.U. (1997), “The Status of Shari’ah in Malaysia,” *Hamdard Islamicus*, Vol. XX, no. 2; Sandu and Wheatley (eds) (1983), *Melaka- The Transformation of a Malay Capital - c. 1400-1980*, Vol. 1, K.L., Oxford University Press.

³ See the *Undang-Undang Melaka*, Bibliotheca Indonesia, Koninklijk Instituut Voor Taal Land-En Volkekunde, Leiden, Volume 13, introduction, lines 45-46.

Islamic belief.⁴ In the various legal digests compiled under the auspices of the Malay Sultans,⁵ the protections which the Shari'ah afforded to accused persons through a system of religious gradation⁶ and through adherence to religious criteria in the appointment of officials, were either absent or expressed equivocally.⁷ Although rules pertaining to duress appeared to conform in part to the school of Imam Shaf'i,⁸ they co-existed and interacted with customary rules which stressed traditional authority⁹ and which seemed, at times, to subvert categorisations made by Islamic scholars.¹⁰ As a result of political and religious

⁴The Malay criminal procedure of ordeal provides explicit evidence of fusion between the two traditions (see the *Undang-Undang Melaka*, *ibid.*, lines 458-475). For further evidence of hybridity mentioned in texts other than the *Undang-Undang Melaka* and *Undang-Undang Laut*, see W.H. Shellabear (1967), *Sejarah Melayu*, Fajar Bakti, p. 28; Abdul Monir b. Yaacob, "Ulama Dan Fiqh Di Malaysia," *IKIM Law Journal* (1997), Vol. 1, No. 1.

⁵See: *Undang-Undang Melaka*, *ibid.*, (trans) Liaw Yock Fang, (1976), *The Laws of Melaka*, The Hague, Martinus Nijhoff; *Undang-Undang Laut* (Maritime Code), (trans) Stamford Raffles (1879) "The Maritime Code of the Malays," *Journal of the Southern Branch of the Royal Asiatic Society*, No. 3, pp. 62-84; J.E. Kempe and R.O. Winstedt, (eds) (1947), "A Malay Legal Digest Compiled for 'Abd al-Ghafur Muhaiyu'd-din Shah, Sultan of Pahang 1592-1614," *Journal of the Malayan Branch of the Royal Asiatic Society* (1948), Vol. 21, Pt 1, pp. 1-67; R. Winstedt and P.E.J. de Jong, "A Digest of Customary Law from Sungai Ujong," *Journal of the Malayan Branch of the Royal Asiatic Society*, (1954), Vol. 27, Pt 3, pp. 1-71; R. Winstedt, "Legal Digest from Perak," *Journal of the Malayan Branch of the Royal Asiatic Society*, (1953), Vol. 26, Pt. 1.

⁶This means that the powers granted to officials or other individuals to question an accused, and the limitations on these powers, depended on whether he was known to have committed offences against the Shari'ah. Chapter six of the *Undang-Undang Melaka* authorises ministers of state to 'examine' ("periksa") accused persons during investigations ("siasat") [line 169] and chapter 35 (see *infra*) allows questioning to clarify what the accused may have confessed [line 1596]; but there are no signs of any relevant religious categorisations. See also the Maritime Code which appears to allow questioning of both a slave's master (Raffles, *JSBRAS*, 1879, *op. cit.*, p. 83) and a Nakhoda (*ibid.*, p. 84) without any religious qualification.

⁷The Pahang Legal Digest contains the most direct references to religious criteria in the appointments to ministerial and legal office; but the *Undang-Undang Melaka* itself refers to traditional rules of appointment (termed "kanun"; *ibid.*, chapter 1.3, lines 81-83) rather than to the Islamic. There are no references to a required level of religious knowledge nor to 'adalah. There are more specific religious requirements mentioned of the Sultan's ministers, but it has been argued forcefully that these are part of the *Undang-Undang Negeri* which is an independent text that was copied and added later to the *Undang-Undang Melaka* (see Liaw Yock Fang, *The Laws of Melaka*, *op. cit.*, p. 36). It seems to have been incorporated by one of the compilers of the code as a religious "reminder" rather than as legal doctrine.

⁸*Undang-Undang Melaka*, *op. cit.*, chapter 35, lines 1581-1598; Liaw Yock Fang, *op. cit.*, p. 149.

⁹See: *Undang-Undang Melaka*, *op. cit.*, chapter 1.2, lines 74-79, chapter 12 (*infra*).

¹⁰See chapter 12 of the *Undang-Undang Melaka* in particular, which appears to convert the *hadd* offence of *zina* (which scholars classified as *haqq Allah*) to *ta'zir* and *haqqun-Nas*, by empowering the judge to order the guilty party to surrender himself to the wronged party or to fine him ten and a quarter *tahil* if he refuses (*ibid.*, lines 374-377). In the latter section of the same chapter which appears to apply to rape (*zina b-il jabr*), the perpetrator is given a choice to marry his victim or to pay a fine (lines 394-400).

conflict between the various layers which made up Malay society,¹¹ it was probable that those charged with administering the law were given a discretion as to which law to apply¹² and, as a consequence, accused persons might not have been guaranteed the protections which the Shari'ah provided.¹³

The hybridity within the system was given a further injection of non-Islamic influence after the arrival of the colonial powers who utilised initially, and then adapted, existing legal structures for their own purposes.¹⁴ The only Malay official involved in the administration of criminal justice to survive colonial rule was the Penghulu or Village Headman. Yet, he was no longer the representative of Islamic or customary authority; he had become an agent of the new colonial regime.¹⁵ The legal infrastructure of the ancien regime consisting of Sultan, Bendahara, Temenggung and Syahbandar was replaced eventually by an English

¹¹See: C.H. Wake, "Melaka in the Fifteenth Century: Malay Historical Traditions and the Politics of Islamisation," in Sandhu and Wheatley, op. cit., pp. 146-151; J.E. Kempe and R.O. Winstedt (1952), "A Malay Legal Miscellany," *Journal of the Malayan Branch of the Royal Asiatic Society*, Vol. 25, Pt. 1, pp. 17-18. There is also some evidence to suggest that the method of proselytization taken by Muslim missionaries took account of traditional Hindu and Buddhist customs and sensitivities; see Mohd Taib Osman, "Islamisation of the Malays: A transformation of culture," in *Tamadun di Malaysia* (1980), op. cit., pp. 1-7; Syarifah Zaleha Syed Hassan (1990), op. cit., pp. 41-53.

¹²See Tome Pires, (1944), *The Suma Oriental*, The Hakluyt Society, 2nd Series, No. XC, p. 241. The factual dominance of one over the other may have depended on the religious zeal of the sultan; see: W.R. Roff (1974), *Kelantan, Religion, Society and Politics in a Malay State*, Oxford University Press, K.L.; H. Clifford, "Expedition: Terrangganu and Kelantan," *JMBRAS*, (1961), Vol. 38, Pt. 1; B. Watson Andaya, "Melaka Under the Dutch, 1641-1795," in Sandhu and Wheatley, op. cit., pp. 195-237.

¹³This evidence of hybridity leads one to doubt the accuracy of the assertions of Tun Salleh Abas that Islamic Law was applied throughout Dar-ul Islam before those states became the victims of the western colonial powers; see "Perlaksanaan Undang-Undang Islam di Malaysia," *Jurnal Hukum* [1404H], p. 143.

¹⁴See B. Watson Andaya, op. cit; C.M. Turnbull, "Melaka under British Colonial Rule," in Sandhu and Wheatley, op. cit, pp. 242-293.

¹⁵This was given official recognition in Melaka which was under direct British rule (see: A.H. Dickinson, "The History of the Creation of the Malacca Police," *Journal of the Malayan Branch of the Royal Asiatic Society*, (1941), Vol. 19., Pt 2, p. 252). In other states, the Penghulu was used informally according to particular circumstances (see infra).

policing¹⁶ and judicial system with its own set of competing values.¹⁷ Islam was incorporated instead within the “court system” established and then administered by the British through the formal authority of the Sultan and the State Council operating within each state.¹⁸ They enacted laws providing for courts, personnel and procedure for those professing the religion of Islam.¹⁹ These laws, including the codes relating to evidence and procedure,²⁰ were based on principles of English law adapted to the colonial context.²¹ Non-Muslims and colonials were

¹⁶ See further: P. Morrah, “The History of the Malayan Police,” *Journal of the Malayan Branch of the Royal Asiatic Society*, (1963), Vol. 36, Pt 2, No. 202; Hasan Yusoff, (1983), *Perhubungan Polis Dan Orangramai Di Malaysia – Satu Kajian Kes Tentang Sikap Penduduk-Penduduk Kuala Lumpur*, Masters Thesis, Universiti Kebangsaan Malaysia, Bangi, Malaysia.

¹⁷ Tensions between crime and social control and due process were transported inevitably to the colonies. While the evidential and procedural framework seemed more protective than that enacted in England because of liberal sympathies and suspicions of malpractice by the new police forces in Britain’s colonies (see: sections 25, 26 of the Evidence Ordinance; section 113(1) of the old Criminal Procedure Code; *Empress v Babulal* (1884), 6 All 509 (FB), per Mohammad J at 532; *Abdul Ghani Bin Jusoh & Anor v Public Prosecutor* [1980] 1 MLJ 25 (FC), per Wan Suleiman FJ at 27), there were still “gaps” and “devices” that could be exploited. There was no prohibition on police questioning of the accused per se and no requirement for it to take place in public or in the presence of an independent party. Questioning was not preceded by any caution. Although section 24 of the Evidence Ordinance (which referred to confessions) contained the same protections as English law, it also had the same “get out” clauses. Sections 25 and 26 applied only to “confessions” and not to other statements obtained from the accused. Case law also facilitated the practice of using Penghulus, who had powers of arrest (see Mimi Kamariah Majid (1987) *Criminal Procedure in Malaysia*, University of Malaya, K.L., p. 30), rather than “police officers” to question accused persons thereby enabling the police to avoid the protection afforded by sections 25 and 26 altogether (see: *Jubri bin Haji Salleh v Public Prosecutor* [1947] MLJ 88, CA, where the Court admitted a confession made to a Penghulu because he did not have the same powers as a police officer and could not be regarded as such).

¹⁸ See further: M. Yegar, (1979), *Islam and Islamic Institutions in British Malaya: Policies and Implementation*, The Magnum Press, Jerusalem; Syarifah Zaleha Syed Hassan, (1990), op. cit., pp 45-47.

¹⁹ These laws, however, referred only to: matrimonial offences; unlawful sexual intercourse; consumption of intoxicating liquor; offences relating to the spiritual aspects of individual and communal life; offences connected to the teaching of Muslim doctrines, and to conversion; see Mahmud Zuhdi, (1984), *Criminal Responsibility in English and Islamic Law*, op. cit., pp. 267-268. In the Federated States, the majority of criminal laws were enacted first through a central body under the direction of a British Resident General, and then through the British-directed Federal Council; see R. Emerson, (1979), *Malaysia: A Study in Direct and Indirect Rule*, University of Malaya Press, Kuala Lumpur, p. 139. For detailed treatment of the wider structure of “indirect rule”, see Jan Pluvier (1974), *South-East Asia from Colonialism to Independence*, Oxford University Press, K.L., pp. 12-15.

²⁰ See: the Evidence Ordinance and the Code of Criminal Procedure.

²¹ See: Azizan bin Abdul Razak, “The Law in Malacca Before and After Islam,” in *Tamadun di Malaysia*, op. cit. Administrative familiarity and confusion over the precise relationship between [^]adat and Islamic law (see R. Emerson (1979), *Malaysia: A Study in Direct and Indirect Rule*, University of Malaya Press, K.L., p. 139), led to the importation of the Indian Penal Code of 1860 and the Indian Evidence Act 1872. These were adopted officially by the Federated States through

now pulling the strings of a criminal justice system whose values were orientated within a secular legal structure. Islam had become marginalised as a “personal law” rather than a law of general application.²²

The de facto divorce between the state and Islam under the influence of colonialism, gave rise to the perspectives which inspired Za’ba’s typologies which I set out in chapter four. The role that the accused has played within these perspectives has never been set out or explored, but certain observations can be made if we apply their broad orientation. One might expect the *Kaum Tua*, for instance, to reflect the positions outlined in chapter six, with particular emphasis on the school of Imam Shaf’i. Thus, powers given to state officials would reflect the religious status of the person whom they wanted to question, as well as their degree of Islamic knowledge and *^adālah*. Confessions would be valid only if obtained before a *Qadi* or in front of two *^adil* witnesses. Any confessions secured while the accused was detained, in hand-cuffs or through beating would be inadmissible or discouraged.²³ Invalid confessions would remain invalid irrespective of the discovery of circumstantial evidence suggesting their truth. And finally, if the offence related to the rights of Allāh, the accused would be able to retract his confession but not if it related predominantly to the rights of persons.

the Penal Code and the Evidence Enactment of 1909 (see *The Annotated Statutes of Malaysia, Evidence Act 1950*, Malayan Law Journal, (1996), K.L., p. 1).

²²This should not be understood as implying that Islam had “stagnated” under colonial rule and influence; indeed, in terms of education, links between religious schools in Mekkah, Medina, Jeddah, Baghdad, Damascus and the Azhar in Egypt were enhanced (see: Syarifah Zaleha Syed Hassan, (1990), op. cit., p. 44; Mohd Taib Osman, “Islamisation of the Malays: A Transformation of Culture”, op. cit., p. 7. For more detailed treatment of the development of Islamic education, see Abdullah Alwi Haji Hassan, “The Development of Islamic Education in Kelantan”, in *Tamadun Di Malaysia*, op. cit., pp. 190-223). Rather, its values and laws had been made structurally inferior.

The position of the accused within the projections of the *Kaum Muda* is more difficult to assess. This is for the simple reason that within their framework, interpretation of Islam's primary sources, the Qur'an and the Sunnah, are released from the confines of previous juridical opinion. This leaves open the possibility of interpretations which are in contrast to the received wisdom but are justified still according to verses of the Qur'an and to certain statements of the Holy Prophet.

The role of the accused within the *Modernist* paradigm is easier to predict. This would apply a fundamentally secular model, according powers to state officials and rights to accused persons that reflected secular criteria. Religion would be a "personal" matter, and would be irrelevant in the general administrative affairs of the state. In all probability, this would mean a continuation or adaptation of the values and principles of English Law that had been applied during the colonial period.

I suggest that Za'ba's typologies, and the role which the accused has played within them, may provide a useful insight into "Islamisation" initiatives when examined in the context of the structural and historical forces which have influenced developments in criminal justice in Malaysia since Independence. The rest of this chapter then, will examine how they have been reflected in existing and proposed rules pertaining to questioning and confessions within the "new" Malaysia.

²³The Shaf'i scholars al-Mawardi and al-Ramli permitted coercive techniques to "release the truth" but did not encourage it; see further, chapter five.

This chapter will begin with a summary of the new constitutional set-up, and the structure of criminal justice which the new Malaysian government inherited and then continued. This will include a detailed treatment of the organizational values of the Malaysian police force through a contextual analysis of statements of their premier officers, through case law in the High Court and through an analysis of relevant sections of the Code of Criminal Procedure. Police handling of the Arqam Movement and the case of former Deputy Prime Minister Anwar Ibrahim, will also provide recent examples of these operative values.

The second part of the chapter will concentrate on movements within Islamic Law itself through an analysis of reported cases on *iqrar* in the Syariah²⁴ Courts and current strategies for “Islamisation”. The latter will refer, in particular, to rules of questioning and of confessions that have been stated in the government-sponsored Federal Territories Syariah Laws of 1997, in the PAS-proposed Hudud Bill of 1993 and in relevant state legislation referring to evidence and criminal procedure. The final part of the chapter will analyse these existing and proposed rules in the context of the over-arching structure of the system described in the first section of the chapter.

2. The structure of criminal justice under “new” constitutional arrangements

The operation of Malaysia’s criminal justice system since Independence, and the role which the accused has played and is likely to play in it the foreseeable future, cannot be divorced from the constitutional framework that was set up, nor from

the cultural values of its founding fathers. The orientating ethos of this framework was secularist. That is not surprising because first, the majority of indigenous political leaders belonged to the Western-educated intellectual elites;²⁵ and second, the composition of the various states of Malaya had changed appreciably under colonial rule.²⁶

As a result of migration from China and from the Indian subcontinent during British rule, Malaya had become an ethnically tripolar state with large groups of ethnic minorities having religious beliefs that were associated, generally speaking, with their ethnicity; Malays were Muslims,²⁷ Chinese and Indians were non-Muslim.²⁸ Moreover, because of de facto ethnic separation, each of the communities was deeply suspicious of the other.²⁹ In this context, sections of the Malay intellectual elite, corresponding to Za'ba's *Modernist* typology, began to regard the development of "Malayan nationalism" and secularism as pre-requisites for self-government. As early as 1951, Dato Onn had founded the Independence of Malaya Party upon a secular creed: "to unite the people in common loyalty, irrespective of creed, class or race and 'to work together towards the goal of an independent state of Malaya.'"³⁰

²⁴This is the Malaysian spelling of "Shari'ah."

²⁵J. Pluvier, (1974), *South-East Asia from Colonialism to Independence*, Oxford University Press, Kuala Lumpur, p. 78.

²⁶On Independence, Malaya was no longer a predominantly Muslim country. In 1962, 44% were Muslim; 43% Buddhist; 11% Hindu and 2% Christian. See: Wan Hussein Azmi, "Islam di Malaysia: Kedatangan dan Perkembangan," in *Tamadun di Malaysia*, op. cit., p. 150.

²⁷This was given official recognition by the Federal Constitution which stated that Malays are Muslims; see further, Wu Min Aun, (1990), *The Malaysian Legal System*, Longman Malaysia, Petaling Jaya, p. 37.

²⁸See Wan Hussein Azmi, op. cit.

²⁹See: Wu Min Aun, *ibid*; J. Pluvier, op. cit., p. 401.

³⁰*Ibid.*, p. 336.

Nevertheless, the Malay community still retained its Muslim identity and the Malay rulers, in particular, sought guarantees that in the new constitutional set-up Islam would be given a special status. It was felt necessary, therefore, to balance the perceived need for non-communalism with the need to retain a semblance of Islamic identity. This was given effect by Articles 3 and 11 of the new Federal Constitution. Under Article 3, Islam was made “the religion of the Federation” and its followers protected against other religious beliefs by virtue of Article 11(4) which provided that “state law and in respect of the Federal Territory, federal law may control or restrict the propagation of any religious doctrine among persons professing the religion of Islam.” At the same time, non-Muslims were given freedom of religious belief and to proselytise among other non-Muslims. Thus under Article 11(1), the Federal Constitution stated: “Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.”

Although Islam was the official religion of the country, the new Federation of Malaya was not an Islamic state (in spite of recent attempts to have it defined otherwise³¹). This was emphasised by the first Prime Minister, Tunku Abdul Rahman, who stated during a debate in the Federal Legislative Council:

³¹See *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55, where the Supreme Court, in a unanimous decision delivered by Salleh Abbas L.P., held that “Islam” in Article 3 referred only to rituals and ceremonies. They stated also that it did not imply that Malaysian law should be imbued with Islamic principles. See also: Muhamad Suffian Hashim, “The Relationship between Islam and the State in Malaya”, *Intisari*, Vol. 1, p. 8; Ahmad Ibrahim (1978), *The Position of Islam in the Constitution of Malaysia*, Oxford University Press, Kuala Lumpur, pp. 48-49.

“I would like to make it clear that this country is not an Islamic State as it is generally understood, we merely provide that Islam shall be the official religion of the State.”³²

Secularism, therefore, was the official ideology and its essential orientating cultural value. It would be a mistake, however, to associate this secularism with liberalism or with its underlying notions of the primacy of the individual. Although Part II of the Federal Constitution set out “Fundamental Liberties,” including rights of non-discrimination, and Article 5 promised: “No person shall be deprived of his life or liberty except in accordance with law,”³³ the Malayan State and its organs of enforcement were endowed with considerable powers. The new Federation of Malaya had been formed in the context of an ongoing confrontation with communist guerilla forces and, since 1948, had been in the grip of an officially declared Emergency.³⁴ The original constitution, therefore, incorporated “special provisions” that would exempt the executive and legislature from compliance with provisions protecting fundamental rights and the stated division of powers between the Federation and individual states,³⁵ when passing ordinances and legislation to target subversive elements during periods of “Emergency.” Following Independence,³⁶ states of emergency were proclaimed on four occasions (1964, 1966, 1969 and 1977), with some overlapping others. The

³²Official Report of the Legislative Council Debates, 1 May 1958; cited in Wu Min Aun, *op. cit.*, p. 37.

³³Article 5(3) also states that the accused has a right to consult a lawyer.

³⁴This first period of emergency lasted until 1960.

³⁵See further, Wu Min Aun, *op. cit.*, pp. 179-189.

³⁶The 1948 declaration of emergency remained until 1960.

emergency proclaimed in 1969 to contain racial riots, was never revoked and technically remains in force.³⁷

The perceived need for a strong and secure central state with a very limited role accorded to individual rights, is reflected in the powers that have been given to the Royal Malaysian Police Force. It was noted earlier³⁸ that colonial legislators, fearful of widespread abuse and malpractice, were reluctant to accord the police the same degree of powers that had been handed to police in England. It was envisaged that the magistrate would play a more active and supervisory role. Following Independence, however, Malaysian legislators thought it necessary to equip the police with more powers, and proceeded to pass a number of statutes³⁹ which gave them legal authority to formally question and obtain “caution statements” from the accused which would be admissible for all purposes. When the Criminal Procedure Code was amended in 1976,⁴⁰ these powers were extended to cover all areas of police investigation.

Sub-section (1) of the new section 113 of the CPC admits in evidence “any” statement of the accused, made to “or in the hearing of” any police officer of the rank of Inspector or higher, and “whether or not wholly or partly in answer to questions by that person.” Similar to English legislation, these police powers are balanced with procedural “safeguards” for the accused, through a statutory caution

³⁷See Wu Min Aun, *ibid*.

³⁸See footnote 17.

³⁹See: the Internal Security Act 1960, s. 75; Kidnapping Act 1961, s. 15; Prevention of Corruption Act 1971, s. 15. These existed in addition to legislation that had been passed at the end of the colonial era, such as the Dangerous Drugs Act 1952, s. 37A, and the Emergency Regulations 1948, reg. 33. For further details, see: Mimi Kamariah Majid, (1987), *Criminal Procedure in Malaysia*, University of Malaya, Kuala Lumpur, pp. 80-82.

upon arrest and the requirement that all such statements be given without “any inducement, threat or promise.” Yet, these safeguards have little impact because questioning can take place without the above caution if the accused is not technically under arrest.⁴¹ The only protection afforded to the accused lies in section 112 of the CPC, as subsections (2) and (4) state that a police officer “shall first inform” such a person that s/he is not bound to answer any question which would have a tendency to expose him to any criminal charge, penalty or forfeiture. Unlike section 113, however, there is no legal sanction if the police officer fails to do so.

Further, the voluntariness requirement appears unenforceable. Even where the suspect is under arrest and detained in custody, there is no requirement for tape recording to take place or for an independent party, such as a lawyer, to be present during the investigation.⁴² The police can continue questioning the accused for up to fifteen days, without the presence of a lawyer, and without informing the accused of his right to consult one,⁴³ so long as they can convince a Magistrate that further detention is necessary because “it appears that the investigation cannot

⁴⁰See now the Criminal Procedure Code, FMS Cap 6; Act A324.

⁴¹This was given official recognition by the Federal Court in *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306. As with English law, the person is not under arrest unless he is touched with a view to detention, or a form of words are used that are calculated to and bring to his attention that he is under *compulsion*; see Mimi Kamariah Majid, *op. cit.*, p. 23. It is not an arrest, therefore, if the person is merely “helping the police with their enquiries;” see *Shaabab & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219 at 220. Although the person has a right to remain silent whether before or after arrest (see *Karpal Singh v Attorney-General Malaysia* [1987] 1 MLJ 76), he has no right to be informed of this until after arrest under the cautioning procedure.

⁴²The Federal Court in *Ooi Ah Phua v Officer in Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198, held that although the accused has a right to consult a lawyer upon arrest by virtue of Article 5(3) of the Federal Constitution, that right cannot be “exercised” immediately after arrest because of the duty of the police to protect the public from wrongdoers by apprehending them “and collecting whatever evidence exists against them”; per Suffian L.P. at 200. This position was taken a step further in *Hashim bin Saud*, see below.

⁴³See: *Hashim bin Saud v Yahaya bin Hasim & Anor* [1977] 1 MLJ 259.

be completed within the period of twenty four hours.”⁴⁴ There will be no evidence, therefore, that the statutory caution has been given or that an inducement, threat or promise has not been made, apart from the police officers themselves.

The Federal Court has also made it more difficult to establish involuntariness. Although the burden of proof is on the prosecution to prove beyond reasonable doubt that a confession is obtained voluntarily,⁴⁵ in *Abdul Ghani bin Jusoh*⁴⁶ the court held that a signature or thumb print on any statement of the accused is prima facie evidence of its voluntariness.⁴⁷ This leaves the accused with the difficult task of establishing that the confession was obtained involuntarily to the satisfaction of the court.⁴⁸

It is apparent from this account that the police have been given a de facto discretion by the legislature and the Malaysian courts in relation to their conduct of investigations. The scope of their powers of questioning, and the unenforceable

⁴⁴Section 117 of the Criminal Procedure Code. It is clear from judicial decisions that the purpose of this detention is not to prevent flight, but to complete the investigation. See further: *Hashim bin Saud v Yahya bin Hashim & Anor* [1977] 1 MLJ 259, per Harun J at 262; *Maja Anak Kus v Public Prosecutor* [1985] 1 MLJ 311. Prevention of abuse rests with the ability of the Magistrate to observe accurately what has occurred during detention of the accused from the arresting officer’s police diary.

⁴⁵*Public Prosecutor v Kambe bin Raspani* [1989] 3 MLJ 269; *Dato Mokhtar Hashim v Public Prosecutor* [1983] 232.

⁴⁶[1981] 1 MLJ 25 at 28.

⁴⁷Arguably, this position has statutory justification through section 114 of the Evidence Act 1950. This states that the court may presume the existence of any fact which it thinks likely to have happened. This may include the fact “that judicial and official acts have been regularly performed” (illustration (e)).

⁴⁸The Malaysian courts have interpreted “if the making of the confession *appears* to the court” in section 24 of the Evidence Act 1950 as implying an evidential burden of proof on the accused, but with a lower standard of proof than that required of the prosecution. A “well-grounded conjecture” based reasonably upon circumstances disclosed in the evidence is sufficient; see *Public Prosecutor v Law Say Seck & Ors* [1971] 1 MLJ 199. However, there is no necessary reason why there should be any evidential burden on the accused on the wording of section 24. A bald allegation of

limits to those powers, has meant that protection of accused persons has not been a focal concern.

It is submitted that this climate of state power has generated a culture of executive “untouchability” in the enforcement of criminal justice, and has had a profound effect on the value orientation of the police force. They have regarded themselves as a *political* organisation as opposed to one that is concerned merely with enforcing the substantive law. Indeed, Tan Sri Mohd Haniff Omar, the former Ketua Polis Negara (Chief Commissioner of Police), admitted candidly that he regarded the police force as an extension of government. He stated:

“The Police is the *executive right arm of the Government* in the maintenance of law and order”⁴⁹ (emphases added).

According to him, allegiance, is not to “law”, the Federal Constitution or to the Malaysian people,⁵⁰ but to the government of the day. “Policing” is not simply about the detection and apprehension of criminals; it is also about “*removing* threats to the peace and tranquillity of the populace” originating from “communal/racial/religious issues or differences, communist-inspired political agitation, student unrest or industrial dispute;”⁵¹ as the *government* perceives it.⁵²

involuntariness is equally consistent with the wording of the section, for it does not state the allegation must be “well-grounded.”

⁴⁹Mohd Haniff Omar, (1990), *Kepolisian Dan Keselamatan*, AMK Interaksi, Kuala Lumpur, p. 51.

⁵⁰In a later chapter of his book, he equates the government with the people: “The government and not the people is our direct and immediate employer but our government is the government of the people in a free expression of choice” (ibid., p. 400).

⁵¹Ibid., pp. 52-53, emphases added.

⁵²For the Malaysian government’s perception of the relationship between “national security” and Islam, see Government of Malaysia White Paper, 8/11/84. After this paper, the following religious groups were placed under the Internal Security Act 1960: Golongan Rohaniah, KARIM, Golongan

The political nature of the police function is clearly expressed in the role and position given to the Inspector General of Police (IGP) who is the third most senior public servant in the Malaysian government. He meets with all permanent secretaries of the ministries once a month, to appraise them of any problems that need addressing and those “of national and grave importance, particularly (to) those engendered by race, language and religion.”⁵³ He also sits on the National Security Council where similar matters are discussed.⁵⁴ If any Muslim groups are causing disturbances among non-Muslims, the IGP can appeal to the Conference of Rulers (held four times a year), which is empowered to pass measures against such Muslim groups in any Malaysian state.⁵⁵ All matters pertaining to race, religion and the functioning of Malaysia’s government, potentially, are within the scope of “national security.”⁵⁶ Tan Sri Mohd Haniff Omar gives the latter a very broad definition. He states:

“It is related to the national interest of the country which can be described as the forging of a *strong, united*, socially just, economically equitable, *progressive* Malaysian nation through *the process of parliamentary democracy*”⁵⁷(emphases added).

Crypto, the Haji Muhammed Kamaruddin Group, Golongan Mohd. Nasir Ismail and Tentera Sabilullah.

⁵³Ibid., p. 72.

⁵⁴Ibid.

⁵⁵Ibid., p. 73.

⁵⁶This triggers the powers conferred under the Internal Security Act 1960.

⁵⁷Ibid., p. 197.

Any person or group which is perceived as threatening these state objectives, however peaceful and law-abiding they may be, is potentially an object of “national security.” This includes those who speak openly of a more complete process of “Islamization” and seeking to convert non-Muslims to the faith. The same author cautions:

“To the Malays, Islam is Malay and Malay is Islam...The Chinese viewed Islam, therefore, as an ethnic as well as a religious matter. This situation is unique only in Malaysia. So in our country religious extremism is nearly synonymous with racial polarisation.”⁵⁸

The role of the police, he repeats, is to “lend an important helping hand ...to concentrate on *seeking out and destroying* the organised terrorists *and the subversives, be they ideological or criminal*”⁵⁹ (emphases added).

It is clear from these statements that even if the police impose their own restrictions on the powers that have been given to them, the degree of ostensible piety of an accused, in the sense set out in chapter five, is not the principal trigger for the exercise of their powers. Rather, it is the perceived potential for threatening the political status quo that matters. Some recent high-profile examples relating to Dar al-Arqam and Anwar Ibrahim may serve to illustrate this.

⁵⁸Ibid., p. 381.

⁵⁹Ibid., p. 403.

Dar al-Arqam was a tariqah religious movement which had existed in Malaysia and outside the Peninsula since 1968.⁶⁰ It revolved around the charismatic figure of Asaari Mohamed who attracted followers because of his “Medinan lifestyle,” knowledge and apparent attention to religious detail.⁶¹ During most of those years, they had operated without government interference, setting up their own schools, mosques, shops, businesses, medical clinics and residential communities. They were very successful. They had become a self-sustaining, independent community in which the values of Islam appeared to dominate. They had followers from all sectors of the community, including professionals and intellectuals. They had never threatened violence, nor had any of their members engaged in criminal activities or proposed any violent overthrow of the Malaysian government.

Initially, they merely presented themselves as an alternative “way of life”. But in 1992, the strategy of al-Arqam appeared to change, when they attempted to challenge the political hegemony of the current government, under the leadership of Prime Minister Mahathir Mohamed.⁶² It was envisaged by al-Arqam members that Asaari would be the next Prime Minister,⁶³ and by July 1994 they were convinced that the Malaysian government would soon fall. This prompted a series of events⁶⁴ (including the publication of an official decision by the National Fatwa

⁶⁰Zabidi Mohamed, (1998), *Tersungkur Di Pintu ‘Surga’; The Untold Truth and Inside Story of al-Arqam & I.S.A. (Detention Without Trial)*, Zabidi Publications, Kuala Lumpur, p. 20. The author was a legal advisor and former committee member of the al-Arqam movement. His text inevitably carries an anti-government bias, but it is the first non-government and inside account of what occurred to the movement in the mid 1990s.

⁶¹Ibid., p. 23.

⁶²In 1992, Asaari Mohamed was reported to have told a journalist that a referendum should be held to see whether he was more popular than the Prime Minister; *ibid.*

⁶³Ibid.

⁶⁴On 12 July 1994, an article appeared in *Utusan Malaysia* claiming that al-Arqam had a suicide army based in Thailand which was preparing to overthrow the Malaysian government by force. The existence of a military base in Thailand was proved false subsequently by Thai authorities.

Council denouncing the movement and its tariqah, the “*Aurad Mohammadiyah*,” as deviationist) which culminated in the leaders of al-Arqam being detained under the Internal Security Act 1960 on September 6, 1994. No attempt was made to charge them with a specific offence, or to bring them before any type of court, religious or secular.

What occurred during their detention has never been acknowledged officially. If the notes of Zabidi Mohamed’s personal experiences are credible, they provide clear indications of the operating culture of the Malaysian police force. Allegedly, Zabidi was questioned continuously for weeks, threatened and abused. During his detention, he was told by one officer: “Ok, if you don’t want to cooperate by giving information, we will use forceful methods. All of us have belonged to CID, so you don’t want us to use our CID experience!”⁶⁵ Another officer threatened him saying: “I hate your face, if you don’t cooperate with us I will ask my boys to kick you!”⁶⁶ Yet another, resorted to the following mixture of temporal and religious threats:

“I hate looking at your face, people like you, if you die, are not fit to be bathed, prayed for, and are not fit to be buried; because even the earth will not accept you. It’s appropriate for your carcass just to be thrown in a ditch. I will remember you Zabidi, so long as I work in the police force, for as long as that I will make sure that you will be under arrest until you die,

This claim was followed quickly by another allegation that Arqam women were “sex slaves,” and the more damaging allegation (supported by a tape recording) of a so-called “conversation” between Asaari and Prophet Muhammed; *ibid*, pp 31-37.

⁶⁵*Ibid.*, p. 137.

⁶⁶Zabidi Mohamed reports this threat in English; *ibid*, p. 142.

whatever island it is. Are you prepared for that, Zabidi? You will be imprisoned on an island separated from your wife and children, are you prepared for that? Are you willing to spend forty years in jail? I don't know what to do with you, Zabidi, STUPID! IDIOT! STUBBORN.. I hate looking at your face! Do you know that according to Islamic law, people like you can be executed by me, you're lucky that the Hudud has not been implemented; if it had been, I know what your fate would have been...Your prayer is not valid, your fasting is not valid....”⁶⁷

No details were ever published regarding the treatment of Asaari while in police custody. It appears, however, that police interrogation methods were successful in securing his “confession,” along with the confessions of other senior members of al-Arqam, on live television at Masjid Negara before a nationwide audience of millions.⁶⁸

Owing to the biased nature of the account, it is necessary to look for additional evidence to support the allegations of a coercive, and secular culture operating within the Malaysian police force. I suggest that further light can be shed on this issue by examining statements given by witnesses during the trial of the former Deputy Prime Minister, Anwar Ibrahim who, in November 1998, was charged with four counts of corruption and five of sodomy.

⁶⁷Ibid., pp. 149-150. The implication of all these threats, is that the officer regarded Zabidi Mohamed as an apostate.

⁶⁸The transcriptions of the confessions are given in chapter 10 of Zabidi Mohamed's book.

During their testimony, prominent members of Malaysia's Special Branch stated that they used "turning over" and "neutralising"⁶⁹ techniques, but "*only...in cases of communist ideology, religious fanaticism and extremism.*"⁷⁰ Yet, who is labelled a "communist", "religious fanatic" or "extremist" will be a question of interpretation that is left to certain sectors within the government.⁷¹ Moreover, it appears that these categories have been drawn too narrowly. The black eye which Anwar Ibrahim received while in police custody,⁷² for example and, if true, the torture suffered by Sukma Darmawan and Dr Munawar Ahmad Anees,⁷³ were not the result of an allegiance to communist ideology or to a form of religious extremism. Rather, they were the product of a general set of values operating within the police force in which the protection of accused persons was clearly subordinate to the political needs of the state to maintain its authority.⁷⁴

⁶⁹Per Special Branch Director, Datuk Mohd Said Awang, reported in *New Sunday Times*, 8/11/98, p. 3; *The Sun, Megazine*, 31/12/98, p. 14. One of the corruption charges against Anwar Ibrahim related to his alleged instructions to senior police officers to force two members of the public to withdraw their sexual allegations against him. One of the Special Branch investigating officers, ASP Mazlan, admitted to "turning over" the witnesses responsible for the allegations. He attempted to justify his actions, saying: "I had to follow the order" (*New Straits Times*, 13/11/98, p. 4). The precise details of these "turning over" operations are unclear. Datuk Amir Junus stated merely that they involve "going for the truth of the facts pertaining to the case;" *The Sun*, 26/11/98, p. 4.

⁷⁰*Ibid.*

⁷¹All of the police officers who gave evidence during the Anwar Ibrahim trial stated that they were following orders. See: *New Sunday Times*, op. cit; *New Straits Times*, op. cit; *The Sun* 26/11/98, p. 4.

⁷²*The Sun*, 21/12/98, p. 2.

⁷³*The Sun, Megazine*, 31/12/98, p. 14. Both were charged on counts of sodomy with Anwar Ibrahim; both claimed that they were forced to make admissions.

⁷⁴The pressure group ALIRAN claims that the incidences of police abuse and brutality are "numerous;" *The Sun*, 9/1/99. Allegations of brutality against the Malaysian police force are not new. Before the "Salleh System" of policing was introduced in 1968, for instance, one researcher noted that laws were imposed by force rather than by cooperation and trust; Hasan Yusoff, (1983), *Perhubungan Polis Dan Orangramai Di Malaysia - Satu Kajian Kes Tentang Sikap Penduduk-Penduduk Kuala Lumpur*, Masters thesis, UKM, Bangi, Malaysia, pp. 73-90. I suggest, therefore, that the treatment meted out to Zabidi Muhamad and to Anwar Ibrahim are not explicable on political grounds alone. It is part of the operating culture of the Malaysian police.

I argue that these experiences of al-Arqam and Anwar Ibrahim (who was a former President of the Muslim organization, ABIM) demonstrate the dominance of Za'ba's *Modernist* grouping in the current administration of criminal justice. There is no recourse to religious criteria either in the allocation or application of police powers. These powers are not limited by the extent to which an accused adheres, ostensibly, to the religion. Rather, the institutional framework is secular in orientation and one in which *political* considerations can determine when coercive state powers are triggered against the individual.

It appears from the above, therefore, that the values of Islam have not been incorporated within the *general* structure of Malaysian criminal justice. This does not mean, however, that Islamic rules relating to confessions and questioning no longer exist. Indeed, the Modernist institutional framework has continued to identify Islam as a separate and distinct feature of Malaysian life, with its own laws, courts and set of officials, but which is subordinate to the overarching secular structure.⁷⁵ Their rules of questioning and of confessions are expressed instead as part of a “personal law.” The next section of this chapter charts the development of this “personal law” up to the 1980s when a series of reforms began.

⁷⁵Until the amendment to Article 121 of the Federal Constitution, this subordination to secular values was given official and legal sanction through the courts which continued to uphold the right of the Civil Law to determine matters within the jurisdiction of Islamic law. See: *Myriam v Muhammad Ariff* [1969] 2 MLJ 174; *Tengku Mariam v Commissioner of Religious Affairs, Terrangganu* [1969] 1 MLJ 110, [1970] 1 MLJ 222; *Nafsiah v Abdul Majid* [1969] 2 MLJ 174; *Boto v Jaafar* [1985] 2 MLJ 98.

3. The Role of the Accused in the Rules of the Syariah Courts of Pre-Reformist Malaysia

According to the Federal Constitution, the power to administer Islamic law is left to individual states. The exception is the Federal Territories of Kuala Lumpur and Labuan where the law is enacted by the Federal Parliament.⁷⁶ Their powers, however, are limited to those areas set out in the State List (Ninth Schedule, List II) and are specifically confined to “persons professing the religion of Islam”. In terms of criminal jurisdiction, the Syariah Courts have been subjected to limitations imposed by federal law that restrict their powers to offences punishable with short terms of imprisonment, fines or whipping.⁷⁷ These criminal matters relate to sex offences, such as *khalwat* (close proximity), unlawful sex, incest, prostitution, consumption of alcohol and failures to perform religious obligations, such as obligatory fasting and payment of *zakat*.⁷⁸ The Syariah Courts are presided over by a *Kadi* or *Chief Kadi*, who hears complaints or prosecutions brought by a prosecutor, or *Pendakwa Agama*. Investigation of offences is carried out by a combination of personnel that may include: *Penyelia Ugama*⁷⁹ (Religious Supervisor); *Pegawai Masjid* (Mosque Officer); *Penggawa* (Village Headman or

⁷⁶See: Ahmad Ibrahim, (1992), “Islamic Law in Malaysia since 1972”, in *Developments in Malaysian Law - Essays to Commemorate the Twentieth Anniversary of the Faculty of Law*, Universiti Malaya, (1992), Petaling Jaya.

⁷⁷Current provisions provide up to three years imprisonment, fines up to \$5000, or whipping up to six strokes, or a combination thereof; Muslim Courts (Criminal Jurisdiction) Act 1965, section 2 (as amended in 1984).

⁷⁸Wu Min Aun, op. cit., p. 41.

⁷⁹In other states, this officer is called the *Pemeriksa Agama* (Religious Examiner). See further, the Administration of the Syariah Court Enactment 1985 of Malacca (No. 6 of 1985).

Captain); *Penghulu* (Village Headman); *Guru Ugama* (qualified Religious Teacher), or a police officer.⁸⁰

Until the mid 1980s, the rules of procedure and evidence governing questioning powers and the receipt of confessions (*iqrar*) in Syariah Courts were unclear. The only legislation on the administration of Muslim law in the states was the Administration of Muslim Law Enactment, which generally required Kadis, if in doubt, to refer to rules of evidence and procedure applied in the secular courts.⁸¹ According to research carried out in 1983 by Abdullah Bin Abu Bakar⁸² in Pahang, Terengganu, Kelantan, Johor, Melaka, Pinang and Kedah, Kadis did not refer to Islamic sources⁸³ when making their decisions in run-of-the-mill cases. The usual practice was to base their decision on state legislation.⁸⁴

Yet, if we examine cases on *iqrar* from the 1970s that have been reported in *Jurnal Hukum*, we observe different approaches taken by adjudicating officers. These differences are rooted in fundamental disagreements over the nature of the state legislation, and their relationship to Islamic Law. These approaches also accord different roles to the accused in the legal process.

⁸⁰ See, for instance, the Syariah Criminal Procedure Enactment 1983 of Kelantan (no. 9 of 1983), section 9.

⁸¹ Ahmad Ibrahim and Ahilemah Jones, (1995, revised), *The Malaysian Legal System*, 2nd Edition, Dewan Bahasa Dan Pustaka, Kuala Lumpur, p. 59. This implies that rules of evidence and investigation powers were determined by the Criminal Procedure Code and the Malaysian Evidence Act 1950.

⁸² "Pentadbiran Keadilan Di Mahkamah-Mahkamah Syariah Malaysia", *Jurnal Hukum* [1404H], p. 149.

⁸³ The Qur'an, Sunnah, and books of fiqh by well-known Islamic scholars.

⁸⁴ Abdullah Abu Bakar, op. cit., pp. 176-177.

In *Che Lah v Pendakwa Jenayah, Kelantan* (1978),⁸⁵ the appellant had pleaded guilty to a charge of “unlawful sexual intercourse” (*persetubuhan haram*) with a young girl under section 94(2) of the 1966 Kelantan Syariah Enactment. In the Kadi’s court, the Chief Kadi, Haji Yusoff bin Haji Mohd Othman, held that a guilty plea was sufficient to prove guilt under the terms of the Enactment,⁸⁶ and fined the appellant \$1000 and pronounced a six month jail sentence if he defaulted.⁸⁷ It appears from the decision of the Chief Kadi, that “unlawful sexual intercourse” was not regarded in the same terms as “zina,”⁸⁸ so he had not questioned the accused to verify that knowingly, and in full presence of mind, he had physically penetrated his co-accused “as a bucket enters a well.”⁸⁹ Nor was there any evidence that the Chief Kadi had dissuaded the accused from making the confession. The prosecutor had merely read out the report of the Penyelia Ugama containing the appellant’s confession, which the latter had accepted as a correct version of events.⁹⁰

It should be remembered that the offence with which the accused had been charged did not carry the *hadd* penalty, for the Chief Kadi had pronounced the maximum sentence available. This was a *ta’zir* offence which had been so defined by the *state*, so it was deemed unnecessary to refer to the values and the protections which *Islam* provided for accused persons in the context of the *hudud*. What appears paramount in his judgment is the need to enforce the *substantive*

⁸⁵[1401H] *Jurnul Hukum* 86.

⁸⁶There was no reference to Islamic precepts or sources.

⁸⁷In recognition of the appellant’s position as a teacher, and the abuse of the teacher/pupil relationship, the Chief Kadi regarded this as a very serious matter, and pronounced the maximum sentence available.

⁸⁸The word “zina” is not mentioned anywhere in his judgment, *op. cit.*, p. 87.

⁸⁹See chapter five, ante, and the famous case of Ma’iz bin Malik.

law, and to reduce the prevalence of actions which Allāh has prohibited. He states:

“In this matter, the Court regrets and feels saddened that this very serious matter occurred between a teacher and a pupil when the teacher educates and is a leader within a school. Yet, they allow themselves to do or commit something prohibited by Allāh, subḥānahu wa taʿāla. For these reasons, there is no other option but to pronounce the maximum sentence in order that a lesson is taken and an example set for other young people so that this matter does not happen again.”⁹¹

The *individual* nature of *zina*, with its stress on individual repentance, has been superseded by a concern to enforce a *collective* morality, which has redefined the offence in terms of abuse of power and trust. This could be interpreted in two ways. First, it could provide an illustration of the second approach that we observed in chapter five, the primary concern of which is *active enforcement* of the obligation to “bid the good and to prohibit the forbidden.” The stated concern is to send a message to “other young people” not to “allow themselves to do or commit something prohibited by Allāh.” Alternatively, the Chief Kadi is merely giving religious justification to an offence framed within *secular* criteria and formats. He has not referred to any Islamic sources in making his determination because he regards this as an offence *defined by the state*. References are to statute, guilty pleas and aggravating circumstances. In other words, this is another

⁹⁰p. 87.

⁹¹pp. 87-88.

example of hybridity, enforcing Islamic precepts through secular formats and concepts.

On appeal, the Justice Committee, headed by the Mufti of Kelantan, Dato' Haji Mohd Noor Haji Ibrahim, reversed the Chief Kadi's decision. They held that a guilty plea (*pengakuan salah*) to a charge of "unlawful sexual intercourse" (*persetubuhan haram*) had to satisfy the conditions of *iqrar* for the offence of *zina*. The Mufti stated:

"the guilty plea that has been made by the accused cannot be used to prove unlawful sexual intercourse (*zina*) in relation to this accused, according to what has been stated in books of fiqh about an *iqrar* made in respect of *zina*. Nevertheless, we accept that *khalwat* has taken place between the first accused (the appellant) and the second accused."⁹²

In the opinion of the Justice Committee, "unlawful sexual intercourse" and "*zina*" were the same substantive offence. Moreover, as "guilty pleas" were unknown in Islamic terminology, the statements of the accused had to be presented in terms of an *iqrar*, the conditions of which had not been established for *zina*. It was valid only to establish the offence of *khalwat* (close proximity), which carried a lighter sentence.

The approach of the Justice Committee seems more "Islamic" than the approach of the Chief Kadi. Primary reference is to Islam rather than to secular legislation.

This is evident in their utilisation of Islamic as opposed to English legal terminology and procedures. Although the judgment is lacking in detail, it also makes some reference, however cursory, to “books of fiqh” and thus implicitly, to the opinions of Muslim scholars. They are followers of *taqlid*, therefore, and belong to Za’ba’s *Kaum Tua* typology. It might also be argued that their views are in line with the majority opinions that were given in chapter five. They make a clear distinction between *zina*, which is a *hudud* offence where the rights of Allah predominate, and *khalwat* which is a *ta’zir* offence where the type and extent of punishment, if any, is left to the discretion of the state. They have afforded more protections to the accused in the former than in the latter.

Yet, there is also evidence of a hybrid approach even here. The majority opinions of the Muslim scholars that were set out in chapter five were in the context of *complete* implementation of the Shar’iah. In this instance, because of the limited criminal jurisdiction of the Syariah Courts, the Justice Committee have fused Islamic procedures and rules of evidence with state legislated punishments that have no origin in revealed scripture. According to Islamic Law, the punishment for *zina* is either stoning to death or one hundred lashes plus a year’s banishment.⁹³ There is no unabrogated provision in the religious sources for imprisonment, a fine, or a combination of the two.

⁹²per Dato Haji Mohd Noor Haji Ibrahim.

⁹³Shaykh ^Abdullah al-Harariyy, (1996), *Bughyat-Talib*, Dar-ul Mashari’a, Beirut, p. 410; ^Abdur-Rahman I. Doi, (1984), *Shari’ah: The Islamic Law*, Ta Ha Publishers, London, pp. 237-238.

Similar tensions are evident in another case on *iqrar* from Kelantan that was decided on the same day. In *Faridah v Pendakwa Jenayah, Kelantan* (1978),⁹⁴ the appellant had pleaded guilty to attempted unlawful sexual intercourse with her father (*mencuba melakukan persetubuhan*). After her conviction, she tried to retract her plea and the issue before the Kadi's court, and then Appeal Committee, was whether the retraction vitiated the initial judgment and sentence.

In the Kadi's court, the presiding Deputy Chief Kadi held that the guilt and sentence of the accused remained valid for five reasons. First, the conviction was based on legislative authority. Sections 31(2) and 30(3) of the 1966 Kelantan Enactment provide that if someone has been accused, they must be formally charged, and where they plead guilty, they can be sentenced on the basis of that plea. Section 173(b) of the Federal Criminal Procedure Code also provided that after a guilty plea has been noted, it could be used to confirm guilt so long as the Court was satisfied that the accused understood what was taking place and the consequences that would follow.⁹⁵ Second, if the Court were to accept her lawyer's application to withdraw the guilty plea, it would encourage people to do criminal acts as they pleased (*menggalakkan orang yang melakukan jenayah dengan sewenang-wenangnya*).⁹⁶ Third, the most severe sentence available to the court was a \$1000 fine or a six month jail sentence, which could not be compared against the very heavy sentences prescribed by Islamic Law (*tidak dapat mengimbangi hukuman Syara' yang memandang sangat berat*).⁹⁷ Fourth, the sentence would help a little to reduce similar sins from occurring within the

⁹⁴[1401H] *Jurnal Hukum* 89.

⁹⁵Per Haji Mustapha bin Haji Idris, p. 89.

state.⁹⁸ Fifth, the offence was a disgraceful (*keji*) act that occurred between a father and daughter, and which was condemned by the whole community, Muslim and non-Muslim.⁹⁹

As with the Chief Kadi in the *Che Lah* case, Haji Mustapha bin Haji Idris has taken state and federal legislation rather than Islamic sources as his first point of reference. He has proceeded to view the offence as a state-defined offence which *does not* conform to Islamic law because the sentence is too lenient. He has assumed, therefore, that the protective procedures which Islam provides for accused persons when determining the admissibility of confessions in such cases, are irrelevant. Other than legislative authority, the main reasons for his decision lie in the temporal consequences, and the need to enforce a collective morality. He is attempting to enforce Islamic prohibitions through secular forms and concepts.

The Justice Committee, however, reversed the Deputy Kadi's decision on the ground that the guilty plea to the charge was the same as "Iqrar bizzina"¹⁰⁰ that had been mentioned in books of fiqh.¹⁰¹ The rules which applied to *iqrar* therefore applied to guilty pleas. They stated that in cases where the rights of Allah predominated, such as theft, drinking alcohol and *zina*, the accused was allowed to retract his *iqrar*. It necessarily followed that this accused should be allowed to

⁹⁶Ibid.

⁹⁷Ibid, p. 90.

⁹⁸Ibid.

⁹⁹Ibid.

¹⁰⁰Ibid.

¹⁰¹He refers to Sharwani's explanation of al-Mughni and al-Raudat, Vol. 9, p. 113, and to two other texts, the authors of which are not mentioned.

withdraw her guilty plea.¹⁰² As with its other decision, the Justice Committee had interpreted Islam according to the *Kaum Tua* perspective; that is in terms of previous juridical opinion. It also sought to apply the first position set out in chapter five which emphasised a *procedure* that sought to encourage genuine repentance of an individual accused, over *punishments* enforced for the public benefit. They had applied the voluntarist position which stressed the need for individuals to *willingly* accept the sinful nature of their actions. But in the current context, this represented another hybrid. Voluntarist positions were being applied without the context of *hudud* punishments.

Kelantan is not the only jurisdiction where confessions were discussed in the Syariah Courts before the changes in the 1980s. In *Pendakwa v Awang Mat Isa* (1979),¹⁰³ the Syariah Courts in Penang had to decide a case in which the appellant had been charged with unlawful sexual intercourse (*persetubuhan secara haram*) with a woman contrary to section 150(3) of the Penang Administration of Islamic Law Act 1959. The appellant had made a written and oral confession (*iqrar*) before two Kadis but at the trial, he refused to plead guilty. Apart from the Kadis who had listened to and noted his confession, the prosecution did not call any other witnesses to establish that a confession had been made. The appellant was found guilty and given a three month jail sentence.

There is no evidence from the case report that the accused received any legal advice in making his appeal, and it appears from the judgment of the Chief Kadi

¹⁰²p. 90.

¹⁰³[1401H] *Jurnal Hukum*, 80.

that he appealed only on the basis of mitigation of sentence.¹⁰⁴ There was no challenge to the legality of the initial judgment. Nevertheless, the Chief Kadi was prepared to offer his reasons for confirming the decision (and sentence) in the lower court. He stated¹⁰⁵:

“The Court has weighed the evidence provided by the witnesses, in particular that of the first witness who is a Kadi and who confirmed that the admission made before the Kadi was correct. That admission ought to have been accepted for passing judgment, but due to the fact the law limits the Kadi’s power, this case had to be brought before the Court of the Chief Kadi. An *iqrar* can be given in two ways, orally and in writing. In this case, both methods have been used. The law of *iqrar*, such as has been mentioned in the book *Tahrir* by Sharkawi, volume 2, p. 140, (as translated), states:

‘And any valid *iqrar* cannot be retracted except in matters of apostacy, drinking alcohol, theft and robbery *in cases where there is a heavy sentence*, but not in property cases. This is based on the hadith narrated by Abu Daud, <You must avoid and drop *the hadd punishment* where there are doubts in the evidence,>’¹⁰⁶(emphases added).

¹⁰⁴The accused appealed to reduce his sentence because he had to look after his sick mother; p. 80.

¹⁰⁵p. 80.

¹⁰⁶The Sharkawi text has been translated from the Arabic to Malay, and is unclear. The translation given, therefore, is approximate. However, it remains problematic because the text does not mention that one can retract a confession in cases of *zing*. This does not reflect the position of the Sunni schools that was outlined in chapter five. Only the *Dzakhiris* refused to accept a retraction, but they applied it to all cases.

The reference to the Islamic rules relating to retraction of an *iqrar* seems to suggest that the Chief Kadi had considered the refusal to plead guilty following the appellant's earlier confession, as a retraction. Yet, because the confession had been witnessed by the two Kadis (thus valid), and the offence which the accused had been charged did not carry the *hadd* punishment, the retraction was deemed ineffective. This supports the basic approach taken by the Kadis in Kelantan. Namely, this is a *state-defined* offence, so the confessional rules and the additional protections that Islam provide for the accused in matters of the *hudud* do not apply. What matters is the enforcement of the substantive prohibitions.

It is submitted that the above analysis of these three cases¹⁰⁷ establishes a tension between the different levels of decision-making that existed in the Syariah Courts. These disagreements were not on facts, but on matters of fundamental approach. Deputy Kadis, Kadis and Chief Kadis, at least in Kelantan and Penang, were more concerned with enforcing Islamic prohibitions than in adhering to Islamic procedure and form. The role played by the accused was not an important factor in their decision-making process. Yet, the reverse was true in the case of State Muftis and appellate boards. They sought a more voluntarist approach in which Islamic procedure was emphasised.

In one sense, these approaches of the 1970s (and perhaps earlier) appear reflective of the differences which I observed in chapter five. In their desire to enforce Islamic prohibitions, Kadis had interpreted state legislation as *ta'zir* offences

because the terminology of *hudud* had not been used by legislators. Words such as “*persetubuhan secara haram*” (unlawful sexual intercourse), for instance, were used rather than “*zina*” which had a specific definition in Prophetic *hadith*.¹⁰⁸ As a consequence, they regarded the offence as state-defined, and did not look to the protections which Islam had provided for persons accused of *zina*. Muftis, on the other hand, in their desire to facilitate the role of the accused, interpreted the legislation in terms of the nature of the offence and saw no material distinction between “unlawful sexual intercourse” and “*zina*.” Consequently, they provided the concomitant protections for the accused which the majority of Islamic scholars had set out.

Such an observation, however, would not take into account the hybridity which was evident in all of these decisions. Rather, what we see is a process of interaction between the different elements of the *Kaum Tua* and the *Modernist* typologies. Inevitably, the positions taken were subordinated to the constitutional and legislative framework in which they had to operate. That structure was established by elements within the secular-minded Modernist typology, which, in turn, filtered into the decision-making process of the Kadis. Thus, they referred either exclusively, or in part, to state legislation to justify their decisions.¹⁰⁹ The decisions of the Muftis were expressed through Islamic terminology and justified according to texts from Islamic scholars. Previous Islamic scholars, however, had made their interpretations in the context of full implementation of the *Shar'iah*.¹¹⁰

¹⁰⁷These are the only reported cases on *iqar* before the 1980s.

¹⁰⁸See the *hadith* relating to *Mā'iz bin Malik* that was mentioned in chapter five.

¹⁰⁹This was confirmed by Abdullah bin Abu Bakar in his observational study, *op. cit.*

¹¹⁰That is, there was no necessary structural impediment. I do not mean to imply that there was always an exact convergence between what was said by Islamic scholars, and what was

State Muftis, on the other hand, were confronted with state legislation that restricted sentencing powers to the parameters that Federal Government, rather than Islam, had provided.

It will be apparent from the above discussion of the 1970s, I did not observe any influence from the *Kaum Muda*. It would be wrong to imply from this, however, that the *Kaum Muda* were having no effect on the contextualisation of Islamic law. Indeed, in the 1970s, as in the 1920s and 1930s, they were manifested as “reform groups” which were to operate in the forefront of government and opposition strategies of “Islamisation” in the 1980s and 1990s.

4. Re-orientating the system in a climate of reform

In the 1970s, a number of Muslim reformist and missionary organizations became prominent in Malaysia, such as ABIM (Malaysian Youth Movement), al-Arqam and “Da^wah India” (Indian Mission). Their main object was to put pressure on the Malaysian government to change its policy towards Islamic beliefs and to re-orientate the people in the direction of Islam.¹¹¹ This was successful not only in triggering greater Islamic awareness within Malaysia’s existing Malay political parties, PAS (Pan-Malaysian Islamic Party) and UMNO (United Malay National Organisation), but also in changing their party agendas.

implemented by Islamic rulers. Much would have depended on the piety and knowledge of the particular ruler.

¹¹¹See Mahmood Zuhdi bin Haji Abdul Majid, (1984), op. cit., pp. 269-270; Alias Mohamed, (1994), *PAS’ Platform: Development and Change 1951-1986*, Gateway Publishing, Shah Alam, pp. 167-177.

Before the late 1970s, the PAS leadership had concentrated more on ethnic issues and Malay rights than implementation of Islam. This approach alienated a section of their *Dewan Pemuda* (Youth Wing), which had become attached to ABIM,¹¹² who wanted to see Islam figure more prominently in Malaysian society. ABIM was a “revivalist” movement very reminiscent of the *Kaum Muda*, and which sought the re-introduction of Islamic law as the law of general application in Malaysia. In its ranks, it included Haji Hadi Awang, Haji Fadzil Noor, Haji Nakhaie Ahmad and Anwar Ibrahim. Hadi Awang and Fadzil Noor, came to dominate the Youth wing of PAS and eventually, were successful in pushing the political party in a more radical direction. Educated in Saudi Arabia and the Azhar, Hadi Awang, in particular, condemned the traditional leadership of “straying from the true path of Islam.” In the minds of him and his supporters, “true” Islam was defined primarily in contrast to the status quo; Islam was to be implemented in its entirety, including the *hudud*. Poverty, injustice, corruption, racism, promiscuity and illiteracy all existed because the state was not Islamic; it was secular.¹¹³ In 1982, they took over the PAS leadership, and the establishment of an Islamic State, therefore, became its central goal.¹¹⁴

The change in PAS’ leadership was expressed as a return to leadership by the “ulema” (Muslim scholars) to ensure that “the PAS struggle would never run from the path of Islam.”¹¹⁵ Hadi Awang, Fadzil Noor and Nakhaie Ahmad had all witnessed the events and success of the Iranian revolution, which had convinced

¹¹²ABIM was founded in 1971 by the leaders of the National Association of Islamic Students of Malaysia (Persatuan Kebangsaan Pelajar-Pelajar Islam Malaysia/PKPIM) which at that time was led by former Deputy Prime Minister, Anwar Ibrahim; Alias Mohamed, op. cit., p. 167.

¹¹³Ibid, pp. 185-189.

¹¹⁴Ibid, p. 189.

them that religious elites could form a strong and viable leadership in the administration and politics of a modern state.¹¹⁶ They argued it was *^ulema* who would determine what was “Islamic”, using the Qur’an, Sunnah, *Ijma^* and *Qiyas*, as their sources. They would ensure that Islam would be the sole criterion of social change; social change and new circumstances would not be the basis of Islamic interpretation.¹¹⁷

UMNO was forced to respond to the new PAS agenda by adopting their own “Islamic” initiatives,¹¹⁸ that were the product of a broad “*shura*”(consultation) between secular politicians and the Muslim intelligentsia.¹¹⁹ BERJASA (Malaysian-Islamic Front), because of its moderate approach to the Islamic movement, was incorporated by UMNO into the ruling National Front in order to balance the so-called “fundamentalist” approach of PAS.¹²⁰ Anwar Ibrahim, former leader of ABIM, was also head-hunted and appointed as a deputy minister

¹¹⁵Ibid.

¹¹⁶Ibid.

¹¹⁷See their 1986 election pamphlet entitled: “The struggle for Islam: The Islamic Party of Malaysia’s Perspective”, cited in Alias, op. cit., p. 192.

¹¹⁸Mahmood Zuhdi bin Haji Abdul Majid, op. cit., p. 271.

¹¹⁹Prime Minister Mahathir Mohamed has condemned PAS’s “narrow” approach to *ijtihad*, and has explained in public seminars that the Malaysian government is more “flexible” and “inclusive” in its approach. He has stated: “The problems that arise due to the multi-racial nature of the society of this country needs serious and special consideration. The types of crimes committed, besides sentencing under common law, also have to be reckoned with...To satisfy all these parameters, views and contentions from experts in criminology - not only in Kelantan but also nationwide - have to be sought in the process of *ijtihad*. Such a move is imperative since the law to be legislated will involve the whole nation, directly or otherwise. There is no proof that these experts have taken an active part in creating PAS law; in other words, this aspect of the *ijtihad* process was ignored...The whole consultation process was superficial and did not comply with the proper spirit of *ijtihad*”; cited in Rose Ismail (ed), (1995), *Hudud in Malaysia - The Issues at Stake*, SIS Forum (Malaysia Berhad), Kuala Lumpur, p. 74.

¹²⁰Ibid, p. 270.

within the Prime Minister's department as an attempt to reconcile the different Islamic groups.¹²¹

This "Islamic" re-orientation of the political parties directed attention towards and sparked a number of reforms in the administration of Islamic Law in the various Malaysian states. A government committee was set up which suggested measures to improve and raise the status of judges and officers of the Syariah Courts. It recommended that the Syariah Courts be separated and made independent from the Council of Muslim Religion;¹²² that steps be taken to improve the training of and recruitment of judicial and legal officers of the Syariah Courts, and that existing facilities of the Syariah Courts be improved.¹²³ Legislation was passed subsequently which upgraded the existing system of Kadi courts, reorganizing them into a three-tier system of Subordinate, High and Appeal Courts. Linkages were formalized with Islamic legal institutions and with secular bodies, such as the Legal Aid Bureau, Police, law firms and the High Court.¹²⁴ The Syariah judiciary were also "professionalised," sent on training courses to the newly established International Islamic University, to "upgrade" their knowledge of the legal system, the Constitution, laws of evidence and procedure and their professional skills in legal administration.¹²⁵ Syariah lawyers (Pegum Syarie)

¹²¹Ibid., p. 272. Many ABIM members subsequently left the organization and joined PAS where they thought the cause of Islam could be best pursued; see Alias, op. cit., p. 182.

¹²²Before the changes, the Syariah courts were under the control of the Council of Islamic Religion or the Religious Department of the state; see Ahmad Ibrahim (1992), "Islamic Law in Malaysia Since 1972", op. cit., p. 307. This made the courts formally independent of government. Arguably, however, it was also an attempt by the federal government to take further power away from PAS which had sizable electoral constituencies in Kelantan, Terengganu and Kedah.

¹²³Ahmad Ibrahim, (1995), *The Malaysian Legal System*, 2nd Edition, op. cit., pp. 58-59.

¹²⁴Sharifah Zaleha Syed Hassan, (1990), "Towards a Syariah-based Society: Religious Rationalization and the Development of the Islamic Legal Order in Malaysia," *Jurnal Antropologi Dan Sociologi*, Vol. 18, pp. 49-50.

¹²⁵Ahmad Ibrahim (1995), op. cit., p. 62.

with degrees in Malaysian and Islamic Law from the International Islamic University were also introduced to the courts, thereby exposing more of the lay public to the Syariah and removing the monopoly enjoyed previously by state *^ulema*.¹²⁶ As an important symbolic gesture (if nothing else), Article 121 of the Federal Constitution was also amended which stated that the High Courts, and courts subordinate to it, would not have jurisdiction in any matter that came within the jurisdiction of the Syariah Courts.¹²⁷

These changes, however, did not represent moves to implement Islamic law proper; rather, they provided evidence of the secular system “co-opting” Islamic law for its own purposes. *Kaum Muda* “revivalism” (through the agency of ABIM) had integrated with the structures, personnel and procedures of the secular legal system. Hence, rules of evidence and criminal procedure in the Syariah Courts were rationalized in many states,¹²⁸ using the Evidence Act 1950 and the Code of Criminal Procedure as their respective templates. For instance in Kelantan, the rules that related to questioning,¹²⁹ apart from a few amendments, replicated the pre-1976 rules of the Criminal Procedure Code. Hence, it stated that no statement made by any person to a *Penyelia Ugama* in the course of an investigation would be admissible at his trial,¹³⁰ and that no *Penyelia Ugama* or “person in authority

¹²⁶Syarifah Zaleha Syed Hassan (1990), op. cit., p. 51.

¹²⁷Act A 704. The Act was designed to prevent any of the non-Syariah courts from making decisions on Islamic law. The distinct jurisdictions of these courts were confirmed in *Mohamed Habibullah v Faridah* [1992] 2 MLJ 793.

¹²⁸For examples, see: Syariah Criminal Procedure Enactment of Kelantan 1983 (no.9 of 1983); Syariah Criminal Procedure Enactment of Malacca 1985 (no. 2 of 1986); Syariah Criminal Procedure Enactment of Sarawak 1991 (no. 8 of 1991); Syariah Criminal Procedure Enactment of Selangor 1991 (No. 6 of 1991); The Evidence Enactment of the Syariah Court of Kedah 1990 (no. 8), of Pahang 1990 (no. 1), of Kelantan 1991 (no. 2) and of Sarawak 1991 (No.2).

¹²⁹No. 9 of 1983.

¹³⁰Section 59(1).

shall offer or make any inducement, threat or promise.”¹³¹ Only the Qadhi was empowered to record a statement or confession of the accused, and then only after satisfying himself that the confession or statement was made voluntarily.¹³² But at the same time, the accused could be arrested,¹³³ detained and questioned,¹³⁴ without a caution,¹³⁵ by a *Penyelita Ugama* for up to twenty four hours¹³⁶ without any lawyer present. The *Penyelita Ugama* was also legally obliged not to discourage the accused from making a statement.¹³⁷

It has been assumed, therefore, that for all intents and purposes rules of questioning in Malaysian criminal procedure pre-1976 and Islamic law were the same. Yet, there were some notable discrepancies with the positions that we set out in chapter five. In particular, no account appears to have been taken of the religious criteria in questioning of accused persons. Moreover, no account has been taken of the *Sunnah* in discouraging persons accused of certain offences from making any statement. Other than the terminology and the provision for making an oath at the end of the prosecution’s case in place of the submission of no case to answer, there is very little to indicate that this is an Islamically-inspired piece of legislation.

¹³¹Section 60(1). This section represents an amended version of section 113(i)(a) of the CPC because it has removed that portion of the section which allowed an officer or person in authority to administer religious threats to the accused.

¹³²Section 61, subsections (1) and (3).

¹³³Section 11.

¹³⁴Section 58(1).

¹³⁵Although section 58(4) states that a *Penyelita Ugama* “shall first inform” the suspect he is questioning that he may refuse to answer questions on grounds of self-incrimination, there are no legal sanctions for failing to do so nor any lawyer present who could otherwise enforce it. Moreover, this “caution” would be confusing in any event because the *Penyelita Ugama* is also obliged to tell him that “such person shall be bound to answer *all* questions” (emphasis added), section 58(2).

¹³⁶Section 22(3).

One can make similar observations of the Kelantan Evidence Enactment of 1991 and the provisions which relate to confessions. Although sections 17 to 19 are otherwise in line with the Shaf[^]i school,¹³⁸ there is no reference to any right of the accused to retract his confession, and the distinctions which the scholars made between the rights of persons and the rights of Allah. It represents, therefore, either a rationalization of the religious texts or an unintended omission.

A deeper analysis of these changes may be viewed by examining the judgment of the leading case on *iqrar* that was given while the Islamisation programme was in full flow. In *Pegawai Pendakwa Muis v Haji Adib Datuk Said Besar Sigoh* (1988),¹³⁹ the accused was a famous Sabah politician and a Muslim convert who had been charged with “sexual intercourse outside of marriage” (*persetubuhan luar nikah*) under Sabah’s Administration of Islamic Law Enactment 1977, ss 47(3), 54(1) and 102(3). Circumstantial evidence, witness testimony and the confession of a co-accused were all presented by the prosecution to substantiate the charge, in addition to an alleged signed confession made by the accused himself before the investigating officer.

In acquitting the accused of the charge, the Hakim Syariah, Ahmad bin Lakim, interpreted the offence as *zina*, prefacing his decision with comments on the sinful

¹³⁷Section 60(2) states: “No Penyelia Ugama or other person shall prevent or discourage by any caution or otherwise any person from making in the course of an investigation under the Chapter any statement which he may be disposed to make on his own free will.”

¹³⁸Section 17(2) states that a confession may be made outside of court if witnessed by two [^]adil witnesses. Section 18(5) states that a confession is inadmissible unless made voluntarily “without coercion”.

¹³⁹[1410H] *Jurnul Hukum* 306.

nature of the offence, the importance of repentance and the seriousness of the consequences. He stated:

“Whoever is guilty of zina (and) is released from its Had repents to Allah; the repentance will be accepted in every respect and the sins forgiven by Allah. There are also sins committed against people, from which (an accused) will not be released and which will not be eliminated until the Day of Judgment so long as the person (in question) does not pardon him. In this case, the act of zina has very serious consequences. Whether the accused committed it or not, it has certain consequences. Therefore, according to Islamic Law, the process and procedure for proving a case of zina is very strict and must be (followed) very carefully.”¹⁴⁰

He continued:

“Even though the punishment is lenient¹⁴¹ and not based on Islamic Law, the Court is still tied to the principles of proof and procedure according to Islamic Law. *This is because of s. 54(1) which requires and thus provides that the Court must comply with all the provisions of Islamic Law relating to the number, standard and quality of witnesses or evidence*@bayinnah in order to prove a fact”¹⁴²(His emphases).

¹⁴⁰pp. 309-310.

¹⁴¹Under the Sabah Enactment of 1977 (s. 102(3)), a person found guilty was liable only to a \$500 fine or six month jail sentence.

¹⁴²p. 310.

The approach of this Hakim Syariah mirrors, in some respects, the approaches of the Muftis of Kelantan before the 1980s. Contrary to his statement of feeling “tied” to these principles of proof and rules of evidence, this was not the only interpretation of the legislation he could have made. As with the Kadis in Kelantan and Penang, he could have held that first, “sexual intercourse outside marriage” did not constitute the same substantive offence as “zina” because the words used connoted different actions (however slight); and second, the absence of a hadd penalty. If this had been his interpretation, we might have seen less attention given to voluntarism and more to the needs of the state in enforcing Islamic precepts. By defining the offence as “zina”, however, the need for individual repentance through a willing acknowledgement of guilt was given precedence. In conformity with the first position noted in chapter five, the rules he stated regarding the admission of iqrar were very protective of the accused. Hence, the burden of proof was on the prosecution to establish beyond *any* doubt that he had made the confession. Ordinarily for an extrajudicial confession to be admitted in accordance with the school of Shaf[^]i, it would need two [^]adil (just) male witnesses. In the current circumstances, the investigating officer was the only witness, and because he belonged to “Wilayah al-Hisbah,”¹⁴³ (the religious police) his testimony was void on grounds of doubt (tohmah)¹⁴⁴ or suspicion (keraguan), even though he was satisfied in all other respects that the confession had been given voluntarily (“sukarela”), consciously (“sedar”) and in full knowledge of the consequences of making such a confession (“tahu akibat dari pengakuanya”). Moreover, even if the confession had been witnessed in the

¹⁴³p. 314.

¹⁴⁴p. 316.

appropriate manner and the accused had repeated his confession four times before a judge, he was still entitled to retract (“tarik balik”) his confession.¹⁴⁵ In his opinion, there was still doubt in the evidence, which entitled the accused to an acquittal in line with the meaning of the Prophetic ḥadīth: “Reject cases in ḥudūd where there is doubt.”¹⁴⁶

On the basis of the *substance* of this decision and the sets of values which it expresses, it appears that the majority position within the Kaum Tua has merged with the Modernist secular legal structure. If we analyse the judgment more carefully, however, one can observe traces of Kaum Muda *methodology*. In the cases before the 1980s, there were no direct references to the Qur’ān or to the Sunnah. The Muftis, in particular, made their decisions in the light of *previous juridical* opinion only (consistent with the Shaf’ī school). In line with the rules of taqlīd, they did not attempt to offer their own interpretation of the original sources, nor did they state whether one scholar’s opinion was more accurate than another. They merely reported the juridical opinion and applied it to the facts. At times in this case, however, the Hakim refers directly to the Sunnah, without referring to any juridical opinion to justify his interpretation and application. For instance, when referring to the evidential effect of the confession of the co-accused, the Hakim refers to the meaning of the following Prophetic ḥadīth:

¹⁴⁵pp. 316-317.

¹⁴⁶p. 318.

“O Unais! Go to that woman and question her; if she confesses stone her.

The aforementioned woman confessed, and the Prophet ordered that she be stoned.”¹⁴⁷

According to him, these words imply that a confession is evidence only against its maker; it cannot implicate a co-accused.¹⁴⁸ There is no reference to a famous text, or known scholar to justify his interpretation of this ḥadīth. According to the rules of taqlīd, this methodology is valid only for the judge who has reached the level of “mujtahid.”¹⁴⁹ Yet, according to one famous Muslim academic, it is highly unlikely that any of the Malaysian judges have satisfied the criteria to be given that title.¹⁵⁰

When the opinions of previous Muslim scholars are mentioned, loyalty to one particular school has also disappeared. By tradition, Malaysians follow the school of Imam Shāfʿī, so we might have expected reference to scholars such as an-Nawawī, al-Ghazzālī, ar-Ramli, ash-Shirāzī and al-Mawardī. Instead, we find the Hakim has “mixed” schools. Although he cites opinions of ash-Shāfʿī himself, as stated in the Hanbali text “Al Mughni” by Ibn Qudāmah, he prefers to base part of his judgment on opinions found in the Hanafi text, “Badaʿī as-Sanaʿī fī Tartīb ash-Sharaʿī” by al-Kasānī, and on the Maliki text, “ad-Dakhīrah,” by al-Qarāfī.¹⁵¹

¹⁴⁷p. 314.

¹⁴⁸*Ibid.* I am *not* saying that a confession of a co-accused can be used as evidence; the point is in relation to methodology *only*.

¹⁴⁹Shaykh ʿAbdullah al-Harariyy, (1993), *Sirat-ul Mustaqim*, Dar-ul Mashariʿa, Beirut, p. 104.

¹⁵⁰Dr Mahmud Saedon Awang Othman, “Syarat Menjadi Kadi,” *Jurnal Hukum* [1409] 29, at 42-43.

¹⁵¹pp. 316-317.

I suggest that the Hakim's willingness to refer directly to the primary sources for legal rulings and the move away from a single school of juridical thought, is demonstrative of a shift of perspective; from the "traditional" to the "revivalist"; from the "Kaum Tua" to the "Kaum Muda." It also introduces more uncertainty as to the role which the accused will play in the "Islamisation" process, because this approach lifts many of the restrictions in the interpretation of the religious texts. Although the Hakim was very protective of the accused in the instant case, and it appeared to follow the values of the majority opinion discussed in chapter five, that is no reason to suggest he would apply the same values in a later case. Adherents of the Kaum Muda argue that justice is secured through "ijtihād" which would imply, necessarily, that he would not be bound by his previous decision even where the point of law was the same. If, for instance, we substituted a Sabah politician with a teacher accused of having sexual intercourse with one of his pupils, the approach could be different.

The extent to which this approach represents a more general shift, is difficult to assess as this is the only reported decision on *iqrar* since the reforms in the 1980s. Although there are signs that the decision was intended as a "model", because of its high profile,¹⁵² the length of the judgment¹⁵³ and its attention to detail,¹⁵⁴ further data are required before we can arrive at a more definitive conclusion.

¹⁵²It should not be forgotten that the accused was a well-known politician in Sabah. His case, therefore, would have attracted a lot of attention.

¹⁵³The case is fourteen pages long; the majority are two or three at most.

¹⁵⁴The judgment even sets out the system of proof in Islamic law, and the role that *iqrar* plays within it; p. 310. There was no attempt to do this in any of the previous reported judgments.

I submit that further evidence of a more general shift in perspective, if any, might be obtained by examining the most recent legislative attempts at “Islamisation”: first, the PAS opposition “Hudud Bill” of 1993¹⁵⁵ and second, the Federal Government-sponsored Syariah Criminal Procedure (Federal Territories) Act 1997 and the Syariah Evidence (Federal Territories) Act 1997.¹⁵⁶ Ostensibly, these laws have their origin at completely opposite ends of the political spectrum in Malaysia and represent opposing interpretations of Islam. One might expect, therefore, a number of differences in the rules that have been mentioned in relation to questioning and confessions, and the role which the accused appears to play. The following analysis will show that although differences do exist, the ground separating the two sides has narrowed, and that they are both operating, essentially, within a framework where *Kaum Muda* and *Modernist* perspectives dominate.

The Hudud Bill of Kelantan 1993

The Shari^h Criminal Code Bill 1993 of Kelantan was passed unanimously by the PAS-led state legislature on 25 November 1993. Although the Kelantan government was aware that the enactment would never be implemented while the current Federal Government remained in power,¹⁵⁷ and had been passed merely to force the Federal Government’s hand, the rules pertaining to questioning and to

¹⁵⁵Syariah Criminal Code Bill 1993 of Kelantan.

¹⁵⁶Act no. 560.

¹⁵⁷The Chief Minister of Kelantan admitted to the New Straits Times that the Bill “could not be implemented until the Federal Government of Malaysia made changes to the Federal Constitution”

confessions that are contained within still provide an insight into PAS interpretations of Islamic Law and the role which they think the accused should play in the legal process.

The Enactment represents an attempt to codify Islamic Criminal Law and is divided into six parts. Part I sets out “hudud offences” which are stated to include: sariqah (theft), hirabah (robbery), zina (unlawful sexual intercourse), qadhif (unlawful imputation of sexual intercourse outside of marriage), liwat (sodomy), musahaqah (sexual gratification between females), ittiyan al-maitah (necrophilia), ittiyan al-bahimah (bestiality),¹⁵⁸syurb (consumption of intoxicants) and riddah (apostacy). Part II contains provisions on qisas (homicide and intentional injuries) and diyat (monetary compensation for death or injuries following a pardon); Part III refers to rules of evidence; Part IV details the procedure for carrying out punishment; Part V mentions miscellaneous matters, and Part VI sets out the Court structure and rules for the appointment and qualifications of the judiciary. In terms of jurisdiction, the Enactment states that it does not apply to non-Muslims unless they “elect” for the Enactment to apply.¹⁵⁹ Further, all of the offences and provisions relating thereto are to be interpreted in accordance with the Syariah Law, and where any ambiguities or difficulties arise in their interpretation, the Court trying the case has jurisdiction to resolve them.¹⁶⁰

(NST, 25/11/93, p. 8, cited by Mohamed Hashim Kamali (1995), *Punishment in Islamic Law: An Enquiry Into the Hudud Bill of Kelantan*, Institut Kajian Dasar, Kuala Lumpur, p. 7).

¹⁵⁸Musahaqah, ittiyan al-maitah and ittiyan al-bahimah are included within the section titled “hudud offences”, but their punishment is stated as “ta[^]zir.”

¹⁵⁹Section 56(2).

Sections 44 and 45 set out the rules on confessions. Section 44 provides:

“(1) The best evidence to convict the accused and make him liable to hudud punishments is his own confession.

(2) The confession must be made voluntarily and without any force before a judicial officer and shall afterwards be repeated before the trial judge during the course of the trial, and if the trial is one of zina the confession shall be repeated four times before the judge during the course of the trial:

Provided that both the making and the repetition of the confession must be without any threat, promise or inducement and must clearly prove in detail that the accused has actually committed the offence with which he is charged and that he understands that he will be punished for making such a confession.

(3) The confession shall be admissible only against the accused who makes it, and cannot be used against any other person; and to be valid the confession must not be a retracted confession.”

Section 45 mentions further rules which relate specifically to the evidential consequences on retraction of a confession. It states:

¹⁶⁰Section 62, sub-sections (1) and (2).

“(1) A confession may be retracted by the accused who makes it at any time even while he is undergoing the punishment.

(2) If the confession is retracted before the execution of the punishment on him, the accused shall no longer be liable to punishment and if he retracts the confession at the time when he is undergoing the punishment such execution shall forthwith cease.

(3) If at any time before or at the time when the punishment is being executed the accused manages to escape from the authorities, he shall be deemed to have retracted the confession and as such the provision of subsection (2) shall apply.”

In some respects, these provisions correspond with the values and majority position of previous juridical opinion. Confessions are the “best evidence”, but they must be “voluntary” and given without any force, which specifically refers to any threat, promise or inducement.¹⁶¹ Judicial officers¹⁶² and trial judges receive confessions, rather than police officers or members of the Hisbah. If a confession has been made outside of court, the accused has to repeat it at trial, four times in the case of a charge of zina. The accused is also given the opportunity to retract his confession.

¹⁶¹There are no definitions of “force” or intimations whether it would include handcuffing, detention and starvation.

¹⁶² “Judicial officer” is not defined anywhere in the enactment. It is possible, therefore, that this section could be construed as allowing police officers to receive confessions, so long as they have been delegated by a judge.

Not all of these provisions, however, are in accordance with the school of Shaf[^]i. According to the Shaf[^]i school, for instance, there is no requirement for a confession to be repeated four times or for it to be made before a judge. An extra-judicial confession made on one occasion can be used to convict the accused so long as it was made before two [^]adil male witnesses. The rules stated in the section have borrowed from the school of Abu Hanifah.

There are also provisions that have *no* basis in any of the Sunni schools of jurisprudence. Section 44(3) states in general terms that for a confession to be valid it “must not be retracted.” This certainly includes all offences which carry the hadd punishment. It also seems to include qisas because there is no provision to qualify its operation. Although the Sunni schools disagreed over the scope of retraction, none of them allowed a retraction to vitiate the punishment for offences categorised as “Haqqun-Nas”, such as qadhif and qisas.¹⁶³ Sections 44 and 45 appear to have rationalised the rules pertaining to confessions by removing the distinction between Haqq Allah and Haqqun-Nas.¹⁶⁴

The state government has engaged, therefore, in its own process of *ijtihad*¹⁶⁵ and appears to have gone out of its way to emphasise the protective nature of evidential rules, particularly for hudud and qisas offences.¹⁶⁶

¹⁶³See chapter five.

¹⁶⁴Yet this distinction is found in the religious sources. According to Shaykh [^]Abdullah al-Harariyy (meeting 11 March, 2000), the evidence is derived from a mashhur hadith of the Holy Prophet that allocates rights to a Muslim where he has become the victim of his fellow Muslim’s tongue (eg. qadhif) or hand (eg. qisas) [“Al-muslimu man salima-l muslimuwna min lisanihi wa yadahi”].

¹⁶⁵I suggest that this refutes Hashim Kamali’s statement that the Kelantan Enactment is “typically imitative and taqlidi”; op. cit., p. 1.

¹⁶⁶The standard of proof required for these offences is “absolute certainty and free from any ambiguity or doubt”; section 42(1). Although the provisions appear protective, there is nothing

The role which the accused plays generally in the PAS scheme of things, however, remains unclear. The framework for determine guilt in ta[^]z_ir offences is not set out in this enactment, other than the rules pertaining to witnesses.¹⁶⁷ The confessional rules are very ambiguous as it is not clear whether they refer only to hudud, to hudud and qisas, or to hudud, qisas and ta[^]z_ir. If ta[^]z_ir offences are not included, it means that the admissibility of confessions will be determined according to the Evidence Enactment of the Syariah Court 1991.¹⁶⁸ This is based on the Malaysian Evidence Act 1950, as adapted. That Enactment does not require confessions to be made before a judge, nor for them to be repeated, nor to be retracted. The only relevant requirements are that the confession should be witnessed by two [^]adil witnesses,¹⁶⁹ that it was made “voluntarily without coercion,”¹⁷⁰ and by a person who is “akil baligh.”¹⁷¹ The role which pre-trial detention, powers of arrest and of questioning may have in obtaining these confessions has not been explained. While the Hudud Enactment 1993 states: “The Syariah Criminal Procedure Enactment 1983 shall apply to *all proceedings of the Courts* with or without such modifications as the Courts think fit,” (emphases added)¹⁷²; it seems to make no provision for what occurs *outside* of courts.

explicit or implicit which requires or encourages the judge to dissuade the accused from making a confession to a hudud or qisas offence. For further details on this issue, see chapter five.

¹⁶⁷Two male and [^]adil eye witnesses to the commission of the actual offences are required; section 40 (1).

¹⁶⁸Section 39(1).

¹⁶⁹Section 17(2).

¹⁷⁰Section 18(5).

¹⁷¹Section 18(1).

¹⁷²Section 65.

There is a general lack of detail in these provisions and much would depend on judicial interpretation of the sections. Section 62(1), for instance, states that reference to the Syariah law “shall be made in respect of any matter not provided for in this Enactment,” and section 62(2) empowers the trial court to “give meaning” to any word, expression or term relating to Syariah Law, if any doubt or “difficulty” arises in their interpretation. On one construction, this appears to give the judges *carte blanche* to give alternative interpretations. “Difficulty” could mean any problem relating to the enforcement of Islamic precepts. In the event of a “crime wave,” this could enable a Kadi to avoid the apparently voluntarist approach that has been taken. He might point, in particular, to an absence of provisions in the Enactment relating to enforcement and the powers of the Hisbah to “bid the good and prohibit the bad.” This could entail a compromise on rules of questioning and an application of the opinions of al-Mawardi or other scholars who allowed or tolerated degrees of duress. It might also enable a Kadi to ignore even the religious categorisations which the scholars made, because the PAS legislators have evidently released judicial interpretation from being *bound* by previous juridical interpretation.

There would be no religious objection to this position if all of the judges in Kelantan were “mujtahids.” Yet, under Part VI of the Enactment this is not made a condition for their appointment. At the trial court level, a case is to be heard by three judges, two of whom must be “ulamak” (section 66). At the appeal level, a case is heard by five judges, three of whom must be “ulamak” (section 67). “Ulamak” is defined in section 68 as a person “who holds or has held office as a

Qadhi¹⁷³ Besar or Mufti Kerajaan or any one who has the qualification to hold any of those offices and is known to have a deep knowledge of Syariah Law.” The extent of the required knowledge depends on the judgment of the Sultan after consultation with the State Service Commission and the Jumaa Ulama (section 69). There is nothing explicit or implicit in the Enactment that requires any of the “ulamak” to be “mujtahid”, as traditionally defined.¹⁷⁴ In fact, the Enactment allows one who is “jahil”¹⁷⁵ to sit in judgment. Under section 68, persons who have been appointed as judges of the High Court of Malaya or Borneo or the Supreme Court of Malaysia are allowed to sit with “ulamak” in the trial court or the appeal court. This represents a distortion of the schools of Islamic jurisprudence, some of whom allowed a “muqallid”¹⁷⁶ to sit if he consulted a mujtahid¹⁷⁷ or in instances of *darurah*.¹⁷⁸ None of them allowed someone who was ignorant of the details of Islamic Law. It is especially disturbing when one remembers that “judicial officers” are allowed to sit alone and receive confessions.¹⁷⁹

There is, I suggest, some truth to the assertion that the perspective which PAS seeks to implement is not a traditionalist view; that in similar fashion to other so-

¹⁷³The alternative Malaysian spelling is “Kadi.”

¹⁷⁴See chapter five.

¹⁷⁵Linguistically, this means “ignorant”, but in law it refers to someone who is not a faqih or mujtahid.

¹⁷⁶This means a judge who follows and applies the opinions of a particular school; see Ghulam Murtaza Azad (1994), *Judicial System of Islam*, Kitab Bhavan, New Delhi, p. 26.

¹⁷⁷For details of this, see Ghulam Murtaza Azad, *ibid* pp. 24-27. See also the comments made in chapter five.

¹⁷⁸Per Shaykh ^Abdullah al-Harariyy; meeting 11 March, 2000.

¹⁷⁹These observations seem to support former Vice-President of PAS (now UMNO deputy information chief), Haji Nakhaie Ahmad, that PAS lacked the infrastructure to implement hudud laws, as well as an in-depth understanding necessary for successful implementation; cited in Maria Luisa Seda-Poulin, (1993), “Islamization and Legal Reform in Malaysia: The Hudud Controversy of 1992,” *Southeast Asian Affairs*, pp. 224-242, at p. 236.

called “ideologues of Islamisation,” their vision is “not so much of the past itself but of the future as a restoration of the past...from a past that has been re-imagined and also legitimated through the mediation and meaning of modern political concepts and terms.”¹⁸⁰ In its stated desire to establish a so-called “Islamic State,” it has reinterpreted the sources and reassessed previous juridical opinion in the light of contemporary circumstances and conditions. The Enactment does not represent a complete implementation of Islamic Law, first and foremost. According to the scholars of Islamic Law,¹⁸¹ hadd and qisas cannot be imposed without a Caliph. Yet, according to the Kelantan Enactment, even a judge from the Malaysian High Court can assist in passing the sentence; a choice made for the simple reason that the Muslim world, currently, does not have a Caliph. Similarly, according to Islamic scholars¹⁸² the public laws of Islam, including most hudud offences and qisas, must be applied to non-Muslims as well as Muslims. The Kelantan Enactment, however, makes application of the Hudud and Qisas voluntary. The Kelantan Government has not given reasons for this,¹⁸³ but it could be based on their attempts to woo non-Muslim voters in the elections¹⁸⁴ in addition to its recognized difficulties over the Federal Constitution.

¹⁸⁰Norani Othman (1993), “The Socio-Political Dimensions of Islamisation in Malaysia: A Cultural Accommodation of Social Change?” *Jurnal Antropologi Dan Sociologi*, Vol. 20, pp. 109-127, at pp. 113-114.

¹⁸¹See chapter five. This was confirmed by Shaykh ^Abdullah; meeting 11 March, 2000.

¹⁸²See al-Shafi’s *Kitab al-Umm*, and al-Mawardi’s *al-Ahkam al-Sultaniyyah*.

¹⁸³According to Kamali (op. cit., p. 21), the original enactment applied to non-Muslims, but the state government changed its mind a week before it was tabled without giving any reasons.

¹⁸⁴There has been a concerted effort to get the support of non-Muslims ever since PAS changed direction; see Alias Mohamed, op. cit., pp. 185-191.

These modifications to modern circumstances, the move away from taqlīd, as well as the rationalizations on rules relating to retraction of confessions, provide evidence of a shift in the direction of the *Kaum Muda* perspective.

The “Islamic” Response of the Federal Government

In 1997, the Federal Government passed a series of laws in the Federal Territories, as part of its competition with PAS as to which party was the most “Islamic.”¹⁸⁵ Rather than set out its own version of the hudūd,¹⁸⁶ and its respective rules and procedure, the Federal Government chose to pass an Act detailing “Syariah Criminal Offences,”¹⁸⁷ none of which carried hudūd or qisas punishments. The Act included offences relating to matters of belief and doctrine (*ʿaqīdah*),¹⁸⁸ to failures to respect the basic practices of Islam or to perform basic religious obligations,¹⁸⁹ offences against decency¹⁹⁰ (including “sexual intercourse out of wedlock”¹⁹¹), qazaf¹⁹² (false imputation of zina)¹⁹³ and other offences classified as “miscellaneous.”¹⁹⁴ Offences that had their parallel in the Penal Code, such as sariqah (theft), hirabah (robbery), and qisas (homicide and non-fatal offences against the person), however, were omitted.

¹⁸⁵See further, the party political positions and debates presented in Rose Ismail, ed, (1995) *Hudud in Malaysia - The Issues at Stake*, SIS Forum (Malaysia Berhad), Kuala Lumpur.

¹⁸⁶The Chief Minister of Kelantan challenged the Federal Government to come with its own version of the law (New Straits Times, 2/10/1994, p. 6, cited in Kamali, op. cit., p. 17).

¹⁸⁷Syariah Criminal Offences (Federal Territories) Act 1997 [Act 559].

¹⁸⁸Sections 3-6.

¹⁸⁹Sections 7-19.

¹⁹⁰Sections 20-29.

¹⁹¹Section 23.

¹⁹²This is the Malaysian spelling; the alternative is “qadhif.”

¹⁹³Section 41.

¹⁹⁴Sections 30-42.

The Syariah Criminal Offences Act 1997, was accompanied with “sister” legislation on criminal procedure and evidence: the Syariah Criminal Procedure (Federal Territories) Act 1997¹⁹⁵ and the Syariah Court Evidence (Federal Territories) Act 1997.¹⁹⁶ These were based on the Criminal Procedure Code and the Malaysian Evidence Act 1950, respectively. The Syariah Criminal Procedure Act empowers Religious Enforcement Officers, Police Officers and Pegawai Masjid to arrest suspects without warrant.¹⁹⁷ Religious Enforcement Officers and Police Officers also have the power to detain a suspect for up to twenty four hours.¹⁹⁸ Only Religious Enforcement Officers are explicitly given the power to question “any person supposed to be acquainted with the facts,”¹⁹⁹ but there is nothing to prohibit a Police Officer or Pegawai Masjid from asking questions. The latter is important because section 60(1) states:

“No statement made by any person to a Religious Enforcement Officer in the course of an investigation under this Chapter shall...be used as evidence.”

It does not prevent from being admitted statements made to a Police Officer or Pegawai Masjid. If the statement amounts to a confession, it will be admitted so long as there are at least two male ^adil witnesses present,²⁰⁰ and the confession

¹⁹⁵ Act No. 560.

¹⁹⁶ Act No. 561.

¹⁹⁷ Section 18.

¹⁹⁸ Section 22, subsections (2) and (3).

¹⁹⁹ Section 59(1).

²⁰⁰ Syariah Evidence Act 1997, section 17(2)(b). There is no mention that the witnesses have to be other than police officers.

has been made voluntarily.²⁰¹Section 55 of the Syariah Evidence Act 1997, however, appears to give Religious Enforcement Officers and Police Officers, ample opportunity to get round this. Sub-section two states:

“An admission made in a document which is written or caused to be written by a person under his signature or seal and handed over to another person shall be admissible as an iqrar, provided that subsection 17(2) is complied with.”

Once the accused signs any statement, this seems to suggest that the statement will be admissible and presumed to be voluntary. The only safeguard is the necessity of two male ^adil witnesses. When we remember, however, that no Malaysian police officers are appointed according to religious criteria, that no lawyers are present, and that even Religious Enforcement Officers have not been appointed by officials properly delegated according to Islamic rules,²⁰² illegal coercion of an accused remains a real prospect. If some of the offences, such as “unlawful sexual intercourse outside marriage,” had been categorised as “hudud” rather than as “ta[^]zir,” there may well have been provisions relating to retraction of the confession which would have mitigated some of the potential for abuse. As it is, the existing provisions appear to have invested the state with a lot of powers over an accused who has been given very little protection in the event of their abuse.

²⁰¹Ibid, section 18 (e).

²⁰²See chapter five.

Although the majority of its laws are determined according to the Penal Code, Criminal Procedure Code and the Evidence Act 1950,²⁰³ and are secular in origin, the Federal Government seems to suggest their continued application alongside the Syariah Laws, is justified according to Islam and, therefore, is “Islamic.” They state that it is not possible to apply the *hudud* in a just manner according to current circumstances. They purport to justify this position according to the Qur’an, the Prophet’s Sunnah and to the “*maqasid ^am Shari’a* (underlying purposes of the Shari’a).”²⁰⁴ In the words of the Malaysian Prime Minister:

“In this instance, there is a fiqh view that says: ‘Laws may vary due to changes with regard to time, place and situation’, while yet another states: ‘The actions of an imam or head of state on the populace depend on the *maslahah*.’ Both of these methods are contained in major principles known as *siyasah shari’ah*.”²⁰⁵

Islam is now interpreted as a system of broad values and principles the application of which depend on political convenience, rather than as a set of immutable rules. Previous juridical opinion is deemed irrelevant²⁰⁶ and the primary sources are interpreted anew in the light of current circumstances and modern understandings.

²⁰³For the role of the accused as expressed by these rules, see the earlier part of this chapter.

²⁰⁴Per Prime Minister Mahathir Mohamed, cited in Rose Ismail (1995), op. cit., p. 68.

²⁰⁵Ibid., p. 69. In this instance, the Prime Minister is merely repeating the methodology of the Kaum Muda in his government coalition, and who belong to his advisory bodies. The stress is on *usul ul-fiqh* (principles of Islamic jurisprudence), *ijtihad*, *siyasah al-shari’ah* (the politics of the shari’ah) and securing the “*maslahah*”. See further the guidelines in the working paper of the technical committee set up by the Government to discuss the implementation of “the politics of the Shari’ah”: *Ijtimak Haiah Ulama Malaysia* (1994), *Garispanduan Perlaksanaan Siasah Syariyyah Dalam Pentadbiran Negara*, Yayasan Dakwah Islamiah Malaysia (YADIM).

²⁰⁶He states: “Only the Qur’an and the Prophet’s Sunnah form the basis and source of Islam” (ibid., p. 70).

Hence, he refers to meanings of the Qur'an²⁰⁷ and of the Hadith²⁰⁸ that apply to equal application of the law and relaxation of rules in the event of hardship or necessity, to show that,

“Islam is not a religion that simply ignores prevailing conditions or problems faced by its adherents wherever they reside....If there are concessions pertaining to acts of devotion, shouldn't the same apply to legal matters?”²⁰⁹

The posited solution, therefore, is not application of the hudud. “Islamisation” in this context refers to a re-appraisal of the secular law in the light of Islamic values and principles. Where the two are seen to conflict, the former is replaced by a rule inspired by the latter until there is a new body of “Malaysian Common Law.”²¹⁰ It seems that this meeting ground of *Modernists* with *Kaum Muda* has thus either jettisoned the Shari'ah, or re-defined it without hudud, qisas, or diyat in favour of a new “Islamic” hybrid.

²⁰⁷He mentions the meaning of Surah al-Hajj, verse 78, which states that Allah “..hath not laid upon you any hardship” (ibid., p. 70).

²⁰⁸ “Verily, the destruction of people of the past was brought about by their deeds of letting go the well-heeled among them who stole, and amputating the hands of the weak who stole,” (ibid.).

²⁰⁹Ibid.

²¹⁰See further: Zainur Zakaria (1992), “Dari Common Law Kepada Common Law Malaysia,” Seminar Syariah Dan Common Di Malaysia, sponsored by UKM, the Malaysian Lawyers Association and the Prime Minister’s Islamic Department, Dewan Mukhtar, Pusat Islam, Kuala Lumpur.

Conclusion:

Over the past two chapters, I have suggested that the role which the accused plays in the “Islamisation process” cannot be examined solely in the light of Islamic Law, as it is conventionally understood. Since the collapse of the ^Abbasid caliphate in the twelfth century, Muslim states have ruled autonomously which has enabled non-Islamic influences, either from indigenous cultures, or from external colonial powers, or from secularist values generated locally, to have an impact on their criminal justice systems.

In the Malaysian context, the protections which Islam gave to accused persons through a religious construction of the individual and through strict criteria in the appointment of officials have never been apparent whether before colonialism, during colonialism or after independence. Rather, it has been the needs of political authority, however constituted, and of state power that have been given primacy. Even in the new climate of reform, of “Islamisation,” traditional interpretations which sought to adhere to the rules and values of previous generations have been supplanted by a new system of interpretation which, although perhaps unintended, has given a state inspired by secular values, the tools to reassert and legitimise its power.

PAS and the Malaysian Government may appear to be at opposite ends of the political and religious spectrum; in reality, however, they are merely different faces of a process which is taking place within the same secular framework. The PAS government has not stated at any stage how they would enforce their laws in

detail, and what the role of the police will be, and the extent of their powers. In the light of the secular orientation of the current police force, and their tendency to follow orders irrespective of their legality or relationship to the Shari[^]ah, I suggest that this is a serious omission.

I also suggest that their version of hudud laws are ostensibly so protective of the accused, that it is highly likely that law and order concerns will operate to convert most of the offences to ta[^]zir. The 1993 hudud legislation is not free from ambiguity and it gives Syariah judges every opportunity to take a more enforcement-driven approach.

If the developments of Malaysian history can be our judge, there is unlikely to be much *real* change in the foreseeable future. Even if PAS were to win a general election, the old system and pattern of traditional authority would soon dominate, albeit in Islamic form and with purported Islamic justifications.

Conclusion

Over the past six chapters, I have explored, examined and interpreted rules pertaining to powers and limits on questioning of accused persons in two different and unrelated systems of criminal justice with a view to comparing the role played by the accused in each respective system. Some authors¹ might argue such an enterprise is unlikely to yield reliable data from which meaningful comparisons could be made. This is especially true when, as in the current case, the two systems are not deemed to fall within the same “legal family” or “legal culture”; for it can be difficult to know whether you are comparing like with like. Formally, rules and concepts in the two systems may look the same, but on closer analysis fulfil very different functions. Any perceived similarities and differences, therefore, would be distortive and misrepresentative of the systems being compared.

One method for avoiding the fallacies of the “law as rules” approach,² therefore, is to compare only those rules which fulfil the same function. Zweigert and Kotz write:

“The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means...The question to which

¹See, for instance, M. Van Hoecke and M. Warrington, “Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law,” *International and Comparative Law Quarterly*, (1998), Vol. 47, pp. 495-536, at pp. 508-509.

²Van Hoecke and Warrington, *op. cit.*, p. 495.

any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concepts of one's own legal system...One must never allow one's vision to be clouded by the concepts of one's own national system; always in comparative law one must focus on the concrete problem.”³

In this thesis, the concrete problem has been the role played by the accused in criminal justice systems and the relationship this expresses between the individual and the state. The assumption has been that in both English and Islamic Criminal Justice, the criminal process describes more than the formal mechanics by which the community or an individual seeks redress for a wrong that has been inflicted. It assumes that in both systems the rules which determine how evidence is collected give powers to persons other than those immediately involved, and which, in some respect, represent and reflect the interests of the wider society in which those individuals exist. The scope and limitations of those powers inevitably impact upon the individuals concerned, and upon those who have been accused in particular. They reflect the degree to which they participate in the process and include the criteria that must be satisfied before their freedom is affected, if at all. The level of participation and those criteria which are set, provide an indication⁴ of the relationship of accused persons to the wider community.

³ K. Zweigert and H. Kotz, (1993), *An Introduction to Comparative Law*, 2nd Edition (trans. Tony Weir), Oxford University Press, Oxford, p. 31.

⁴I do not suggest that these rules express the role of the accused necessarily. Rather, they have to be examined *in context*. See the later comments.

How this is expressed and articulated, however, will depend on the overarching values of the system. These values, in turn, are products of “world views”⁵ and of the interaction between social, cultural and political forces in points of time and place. The methodology which I adopted, therefore, sought to place these rules within their historical, cultural and structural contexts.

Nevertheless, this functionalist approach combined with a sociological understanding of the various forces in which rules are framed will not exempt the comparatist from distortion and from misrepresenting the systems that are studied. The cultural and personal experiences of the writer also play a role in attempts to view “the other.” Separate histories, value systems, as well as personal and collective experiences all play a part in constructing the lens through which “the other” is viewed. Indeed, the usual practice of placing one particular legal system within one “legal family” or “legal culture” as opposed to another,⁶ involves processes of definition, of categorisation and generalisation that are, by nature, exclusionary. One “legal family” is said to carry certain *general* features which *distinguish* it from another. Thus, it emphasizes boundaries and difference, rather than linkages and similarity. These generalisations are not representations of objective “truth,” but the product of the author’s conscious choice to present a particular system in a *particular* way.⁷ Where conscious choices are acknowledged, the reader becomes aware that “the other” has been placed within an interpretative framework that advocates a certain “world view,” and can make

⁵These include, among others, the “material” vs the “spiritual”; the “secular” vs the “religious;” the “individualist” vs the “collectivist.”

⁶For examples of the “legal family” approach to comparative law, see: Van Hoecke and Warrington, *ibid*; Zweigert and Kotz, *ibid.*, chapter five.

⁷Zweigert and Kotz criticized Rene David’s classification of broad ideology in particular for being too “one-dimensional;” *op. cit.*, p. 68.

the appropriate judgment. Where, however, they remain unacknowledged, observations are given an objectivity and neutrality that are rarely deserved. They become instead part of the propaganda machine that asserts its own supremacy at the expense of dehumanising “the other.”⁸ I hope that my acknowledgement in chapter four to certain working assumptions and background values serves to reduce that possibility.

The danger of distortion is at its most acute when the object of comparative law is to illustrate the supremacy of one system over the other, or to seek legal reform. Invariably, the writer is committed to some universal principles, or some variant of “natural law,” and hopes either to change the “other” in the light of these preferences, or to effect reform in the “domestic” legal system.⁹ This is not the object of the current thesis. When two systems are perceived as essentially “alien” to each other, which I would suggest is true in the current instance, proposals for any legal reform as a result of one’s findings must be deemed premature. Rather, the object of such a study is to explicate the similarities and dissimilarities of two legal traditions from which a greater understanding of the “other” may be fostered and informed judgments made¹⁰ by dispelling some of the myths and distortions that have evolved in a historical climate of enmity. My emphasis, therefore, has been on building bridges of communication and a

⁸See further, Edward Said, *Covering Islam*, (1997) op. cit; *Orientalism* (1995), op. cit. See also chapter four.

⁹See: M.B. Hooker (1975), *Legal Pluralism*, Clarendon Press, Oxford, p. 458; Van Hoecke and Warrington, op. cit., p. 497; Zweigert and Kotz, op. cit., pp. 23-27.

¹⁰On the need for this even between the different European legal systems, see Basil Markesenis (1997), *Foreign Law & Comparative Methodology*, Hart Publishing, Oxford, p. 6; John Henry Merryman, (1985), *The Civil Law Tradition*, 2nd Edition, Stanford University Press, Stanford, p. 150.

common framework of analysis that can stimulate reflection and understanding on both sides.¹¹

Such a common framework of analysis, however, can only be achieved if both sides share the same problem.¹² The unit of analysis throughout this thesis has been the “individual,” an emphasis which, it might be thought, reflects only the concerns of a society whose values purport to revolve around notions of individual freedom; a liberal society which claims that freedom is an end in itself and which, in its rhetoric, legislates only to protect the freedom of others. One might argue that in an Islamic community, freedom is valued differently. It is constrained by religious precepts and norms which impose individual and community obligations.¹³ In the English secular state, individuals are encouraged to tolerate that which they disapprove; in the Islamic, they are exhorted to “bid the good and prohibit the bad.” The freedom to commit hated behaviour is not a freedom that is deemed worth having. This would appear to illustrate, therefore, the fundamental problem of cultural perspective, and the danger of imposing one set of values upon another.

But such criticism, I suggest, misses the point. The object of the analytical framework has not been to advocate notions of individual freedom or liberty, far

¹¹This corresponds with new movements within the comparative tradition, in which observation, description and critique, are coupled with theoretical insights to shed light on another legal system or one's own. See further: P. Legrand (1995), “Comparative Legal Studies and Commitment to Theory,” 58 *Modern Law Review*, pp. 262-273. On the need for reflection and understanding as a “two-way” process, see Dr Ralf Rogowski, “The Art of Mirroring Comparative Law and Social Theory” in *Challenges to European Legal Scholarship: Anglo-German Legal Essays*, (1996), Blackstone Press, London, pp. 215-232 at p. 229.

¹²That problem may or may not be recognized in the legal culture; much will depend on the orientation and state of current scholarship.

¹³This is expressed by the Islamic concepts of “fard ‘ain” (individual obligation) and “fard kifayah” (community obligation).

from it; but to examine relationships between individuals and the organised community to which they “belong.” These relationships are often more complex and “layered” than is commonly assumed and require further illumination.

In chapter one, I set out common assumptions regarding the values of the English criminal justice system that were expressed through rules relating to confessions and questioning, and focused on the opinions of leading writers such as Stephen, Wigmore, Williams and Mirfield (the “consensus”). They believed the spectre of the Star Chamber had so affected judicial and legislative minds that, by the late eighteenth century, the individual, including the accused, was constructed as a “citizen.” According to them, liberal sentiment had reached such levels that between 1800 and 1852 English judges were excluding confessions en masse “upon the slightest pretext.”¹⁴ I argued in chapter two that this historical presentation of English criminal justice based on notions of individual freedom and liberty was without evidential foundation. They had relied on polemical writings, ignored the inherent ambiguity of existing case law and legislation, and cited only those data which supported their pre-conceived notions. In chapter three, I demonstrated through a historical and structural analysis of nineteenth century case law on confessions and questioning, that the reality was more complex and reflected the ideological competition between Benthamite utilitarianism and liberal laissez-faire in a secular reconfiguration of the English state.

¹⁴Wigmore, op. cit.

The whole nineteenth century was a time of transition and I observed these ideological conflicts operating throughout. For liberal-minded judges, the accused was regarded as an equal “citizen” and a “prisoner” who needed an armoury of rights to protect him/her from an increasingly expansionist state. The case of *Warickshall* had set a liberal precedent at the end of the eighteenth century in which any violation of the principle of voluntarism warranted exclusion of a confession. “Voluntariness” was a state of mind that was free from any type of external influence. The reliability and truth of the confession did not make an involuntary confession admissible. As we passed into the nineteenth century, this approach to confessions was reflected in a number of decisions.¹⁵ Yet, it should not be thought that the principle of voluntarism applied only to the “law of confessions.” Indeed, it was reflected in different ways in order to account for the structural changes within the English criminal justice system. In the first half of the century, for example, liberal judges also focused on the role of magistrates and sought to curtail their questioning powers.¹⁶ In the second half of the century, their concern shifted to curbing questioning powers of the New Police as they had become part of the “state” apparatus.¹⁷

¹⁵See, for instance: *Dunn* (1831), op. cit; *Drew* (1838), op. cit; *Morton* (1843), op. cit; *Furley* (1843), op. cit, *Harris* (1844), op.cit.

¹⁶See: *Wilson* (1817), op. cit.; *Gilham* (1828), op. cit; *Clewes* (1830), op. cit; *Webb* (1831); *Green* (1832), op. cit; *Drew* (1838), op. cit; *Arnold* (1838), op. cit; *Kimber* (1848), op. cit; *Higson* (1849), op. cit.; *Pettit* (1850), op. cit; *Stripp* (1856), op. cit.

¹⁷Although the need for some restrictions on police powers of questioning had been stated soon after the formation of the New Police in 1829; see *Swatkins* (1831), op. cit.. These concerns were given fuller expression in *Baldry* (1852), op. cit, [in the judgment of Campbell LCJ]; *Berriman* (1854), op. cit., *Toole* (1856), op. cit.; *Hassett* (1861), op. cit; *Bodkin* (1863), op. cit; *Johnstone* (1864), op. cit [minority judgments of O’Brien J, Lefroy J, and Pigot CB]; *Gillis* (1866), op. cit., and *The Yeovil Murder Case* (1877), op. cit.; *Gavin* (1885), op. cit; *Thompson* (1893), op. cit; *Male and Cooper* (1893), op. cit., and *Morgan* (1895), op. cit. all of which are discussed in chapters two and three.

Yet, values of liberal individualism and of laissez-faire were not universally held by English judges. Many of them inclined towards more state-orientated theories which did not regard the expansion of state power as necessarily inimical to the interests of the individual. Indeed, they located the individual within the collective welfare. Law and order was a pre-requisite to individual freedom, which required “criminals” to be convicted and law enforcement officers to be “empowered.”

The law relating to confessions and questioning reflected this value framework. For these judges, therefore, voluntariness was meaningful only in the context of “reliability” and the likelihood of a false confession. Threats and inducements were analysed “objectively” (ie. according to the court) rather than from the subjective standpoint of the accused. Thus, not every perceived threat excluded a confession.¹⁸ Unless the threats or inducements issued from “persons in authority”¹⁹ and were temporal in nature,²⁰ it was assumed that any subsequent confession was true and therefore admissible. In contrast to the liberal-minded members of the Bench, the voluntariness principle was given limited scope and hardly applied to rules of questioning. Cautioning was an optional extra, essential only where a confession had been preceded by a threat or inducement.²¹ Custodial interrogation of the accused without a lawyer present, intimidation and particular vulnerability were also condoned.²² According to this line of judicial thinking, the accused was not accorded the same constitutional status as other individuals

¹⁸This approach is seen explicitly in the leading judgments of Baron Parke and Erle J in the famous case of *Baldry* (1852), op. cit., discussed in chapters two and three. See also *Court* (1836), op. cit.; *Holmes* (1843), op. cit.

¹⁹See: *Row* (1809), op. cit.; *Gibbons* (1823), op. cit.; *Wilde* (1835), op. cit.

²⁰See: *Gilham* (1828), op. cit.; *Wilde* (1835), op. cit.; *Sleeman* (1853), op. cit.

within the English state. Concerns for “crime control” and “law and order” had divested the accused of his/her equal status.

Conventional wisdom, in its description of the values underlying the English criminal justice process, had over-emphasised the accused as a “citizen” and almost ignored the growing momentum among the judiciary for making accused persons a separate constitutional category deserving of less protection. The judiciary were not making decisions in isolation from the political and ideological controversies of their time. They were contributing to or reacting against a re-configuration of the system. This constant conflict, however, was not conducive to systemic efficiency and inevitably generated confusion among the police force. It was necessary, therefore, to establish the mechanisms out of which a compromise could be forged and a consensus communicated. The formation of the Court of Appeal in 1907 provided a new hierarchy of judicial opinion which, in conjunction with a more uniform system of law reporting, facilitated judicial agreement and communicated the consensus. By 1912 and the publication of the Judges’ Rules, the means for a judicial consensus on the appropriate role of the accused had been reached. Liberal judges had won the right to exclude statements of any person questioned after being formally arrested, charged or when in legal custody, but they had not emasculated police powers of questioning. By restricting protection to these categories, the reformers had succeeded in empowering the police in relation to “suspects” who had not been charged, who were not technically “under arrest” and who were not in “legal custody.” As the twentieth century progressed and liberal *laissez-faire* lost its currency, even those

²¹There are no decisions before 1848 which excluded a confession because no caution had been administered; see chapter two.

distinctions became blurred and “the suspect” was entrenched as an intermediate constitutional category with little protection against the power of the state.

It was noted in chapter four, that western commentators commonly construed Islamic criminal justice in secular terms, defining it as a “religious *law*” rather than as a “*religion*.”²³ They had concluded that as the number of juristic writings far outweighed the number of writings on religious doctrine, that the religion’s creed was not central to the operation of its Law.²⁴ According to this perspective, it seemed to follow that the “Islamic Legal System” or “Islamic Law” was not a fixed system of *religious* rules that had originated from religious scripture and Prophetic practice and which had supported a unified system of faith. Rather, “Islamic Law” was deemed to express an Arab society’s rules,²⁵ which were rationalised and modified by “*ʿulama*” and by its rulers to fit in with the changing circumstances of society.

This secular perspective was further expressed by their separation of the “Islamic Legal System” from the “*Shariʿah*.”²⁶ The latter was seen as a juristic construction and an ideal that was never realised in practice. Although the “*Shariʿah*” was deemed generally protective of the accused,²⁷ they argued that *qadis* often circumvented its rules in their attempts to achieve “justice.”²⁸ Moreover, a “dual system of courts”²⁹ obtained in which the majority of criminal cases were

²²See: *Thornton* (1824), op. cit.; *Gilham* (1828), op. cit..

²³See Schacht, J. “Law and Justice”, op. cit., p. 539.

²⁴See also the works of Bernard Lewis mentioned in chapter four.

²⁵For the importance orientalist attached to ethnicity, see: Lewis, op. cit., p. 196; Schacht, op. cit., pp. 546-547.

²⁶Coulson, *Conflicts and Tensions*, op. cit., p. 76.

²⁷*Ibid.*, pp. 64-65; Lippman, McConville, Yerushalmi, op. cit., pp 60-68.

²⁸See Lippman, McConville and Yerushalmi, op. cit., p. 73.

²⁹Coulson, N.J. (1964), *A History of Islamic Law*, Edinburgh University Press, Edinburgh, p. 128.

determined according to the “extra-Sharī’ah jurisdiction”³⁰ of the rulers. Coulson wrote:

“These courts considered circumstantial evidence, heard the testimony of witnesses of dubious character, put them on oath and cross-examined them; they imprisoned suspects, convicted them on the basis of known character and previous offences, might make the accused swear the oath by a local saint instead of on the Qur’ān, and in general could take measures to discover guilt, including the extortion of confessions, as they saw fit.”³¹

Indeed, the orientalist perception of the “Islamic Legal System” defined the accused as an object of political authority, rather than as a citizen protected by rights or as a religious individual whose interests were protected by the Sharī’ah. Legal proceedings took place close to government buildings, rather than in the mosque, and before government-appointed officials (eg the Sahib al-Madzālim) rather than before independent judges. Political concerns for speed and efficiency in the administration of justice were thought to predominate to such an extent, that torture was regarded as a “fixed institution.”³²

In chapter five, I observed that the orientalist association of Islam with temporal and secular concerns rather than with the religious and spiritual, was a distortion of the values espoused by the various schools of Islamic Law. Through an

³⁰Coulson, *Conflicts and Tensions*, op. cit., p. 66.

³¹Coulson, *A History of Islamic Law*, op. cit., pp. 127-128.

³²Schacht J., op. cit., p. 561.

analysis of the rules pertaining to *iqrar* (confessions) and questioning,³³ I found religious and non-material values clearly evident. The accused was not constructed as a “subject” or an object of political power, but as a *religious* entity whose protections depended first on the extent to which he or she could be presumed to adhere to the faith and teachings of Islam and second, on the religious knowledge, status and integrity of the person receiving the *iqrar*.

The *iqrar* was not simply an admission of guilt that could form the sole basis for a conviction. It was a particular procedure by which a case could be determined and was separate from, and better than, cases decided upon testimony (*shahadah*), oath (*yamin* and *qasamah*) and circumstantial evidence (*qara'in*). If made willingly, it was a form of spiritual purification (*taharah*) which constituted part of a Muslim's repentance (*tawbah*). Within the different schools, I observed confessional rules requiring absence of coercion (which included freedom from torture, from detention, from imprisonment, and from hunger), repetition and non-retraction. Qadis, Imams, or delegated officials were encouraged to dissuade the accused from confessing for *Haqq Allah* offences and to *exculpate* the accused through detailed questioning. *Inculpatory* questioning was reserved for those with a known history of contravening the Shari'ah. According to the majority of the

³³ It might be thought that a comparison between the oath in English Law and the confession in Islamic law would provide a more suitable comparison because of the linkage between religious belief and conditions of evidence. But this would be distortive because the oath in English law operates to validate testimony either from the accused or from a witness (see Williams, G. (1963), op. cit., pp. 66-71); it is not a form of proof or species of evidence. In Islam, the confession is a form of proof (see chapter five). Even if we compared the English oath with “al-yamin” or “qasamah” in Islamic law, the comparison would not be the same. In certain offences, both operate as a form of proof which either exculpates (as in the “yamin”) or inculpates (“qasamah”) the accused (see: Anwarullah, (1994), op. cit., pp 74-78; Mahmassani, (1987), op. cit., pp. 189-195). Although Islamic rules pertaining to questioning and confessions perform more than one function because of the religious nature of its system, (see below), I suggest that, in part, they form the same function as in English Law. Both sets of rules lay out the conditions by which information from accused persons can be elicited, and what use, if any, can be made of them in the determination of guilt or innocence.

scholars (*jumhur*), the *iqrar* served an important religious purpose that was to be facilitated by religious officials, rather than frustrated. That purpose was not determined by independent rational means, but was found in the primary religious texts themselves: the Qur'an and the Sunnah.

Yet, it might be said that this emphasis on voluntariness and its relationship with spirituality and individual salvation is a distortion. First, there was a sufficient number of Muslim scholars who validated coercion as a means for securing a confession in one form or other. Second, even where voluntariness was stressed, the majority of Muslim scholars included the confessions of non-Muslims who did not share in the community of faith (*Iman*). Whatever they confessed to, it would have had no bearing on the salvation of their soul because they did not accept, or state a belief in, the basic tenets of the Faith.³⁴ According to this view, voluntariness must have served an ulterior purpose.

Although I accept that individual salvation could not have been the sole purpose behind the rules of *iqrar*, that does not mean that the confessional rules as expounded by the second group of scholars or those that were applied to the non-Muslims were any less *religious*. In relation to the group that allowed duress in certain circumstances, their primary concern was to enforce Islamic precepts, beliefs and values throughout the community: to bid the good and prohibit the bad. They believed that if certain degrees of coercion were applied to particular people whose piety was in question, the "truth" would will out³⁵ and Allah's commands would be enforced. These commands, or the substantive law, were not

³⁴ Although as individuals, they might think it did if repentance was central to their particular religious belief.

secular in origin, but were found in the *religious* texts.³⁶ With respect to the first group's requirement of voluntariness for the non-Muslim, this arose as an aspect of their *covenanted* status with the Islamic State rather than as a means to achieve spiritual purification. It operated, therefore, as an exception to the general rule. Yet, even their constitutional rights to security of the person³⁷ originated from *Prophetic practice*³⁸ and from the practices of the pious *sahābah* who established peace agreements with their Christian and Jewish citizens.³⁹ Their constitutional rights, therefore, were *religious* in nature.

In addition, there were, of course, rational reasons behind the rules of *iqrār*. Confessions were also regarded as the best evidence because it was assumed that individuals, who were aware of the serious consequences of their actions, would not willingly confess to something which they had not done.⁴⁰ Moreover, according to some scholars, voluntariness was an important requirement as a confession obtained by a beating had doubtful reliability and could be false.⁴¹ The mere reason a rule may have such "rational" explanations, however, should not preclude the operation of religious values. Indeed, as I have shown, they may co-exist and complement one another.

The developmental arguments of the Orientalists hinge, I suggest, on their secular stereoptype of the Islamic state and their decision to ignore the structural context of Islamisation. The enforcement and contextualisation of Islamic Law was

³⁵See the views of al-Mawardi, mentioned in chapter five, pp. 22-23.

³⁶See chapter five, pp. 13-14.

³⁷For a full elucidation of their obligations and rights; see al-Mawardi, op. cit., pp. 207-212.

³⁸See: ^Abdur-Rahman I. Doi, op. cit., pp. 430-435.

³⁹See al-Mawardi, op. cit., p. 210.

⁴⁰See chapter five, p. 10.

divorced from the piety of its rulers and from the historical ruptures in the thirteenth century. Hence, the term “Islamic” was applied to *any* legal development within a state ruled by Muslims, irrespective of the Islamic qualities and knowledge of the ruler. An “Islamic Legal System” properly called, however, required its political and military leaders, and its legal officials, to satisfy strict criteria of appointment. It also required those leaders to delegate, under specified conditions for monitoring, to facilitate appropriate enforcement of the religious law. Yet, even before the Mongol invasion, these conditions and responsibilities were not satisfied under every ruler. Correct enforcement and application of Islamic Law depended on the individual ruler and the people who supported him. The situation was aggravated in the thirteenth century when, for all intents and purposes, links were severed between the Caliphate and its satellite states. This *de facto* independence enabled those rulers to continue or establish legal systems in their own image.

In chapter six, I looked at the contextualisation of the Islamic criminal justice system in more detail, and in a non-Arab context. In one respect, my observations of Islamisation in Malaysia tended to confirm the comments of traditional Orientalists: that there was a separation between Islamic law in theory and the law that was applied in practice; and that Muslim states had gone through a process of reform and change to account for new circumstances and conditions. Yet, we part ways in how we analyse and term those developments.

⁴¹See the opinion of al-Ghazzali, chapter five, p. 16.

In their adoption of linear theories of progress, they assume that all states, religious and secular, go through a process of reform. The “Islamic” state, like any other, they argue, had to amend its procedures, rules of evidence and categorisations as a reaction to current realities. According to them, in the “Islamic” context, this had the effect of jettisoning the Shari^h, and replacing it within an “Islamic legal system” in which power rested firmly with the political state, rather than with the individual.

Yet, this separation of “Sharīa^h” from the “Islamic Legal System” does not appear anywhere in the traditional texts; the former was seen as an intrinsic aspect of the latter.⁴² The Shari^h itself, always allowed for flexibility and variety of opinion within and between its schools of jurisprudence,⁴³ so long as that opinion adhered to juristic consensus (*ijma^h*). This plurality of opinion, in turn, was reflected in different enforcement structures which changed according to the *ijtihad* of the Caliph. Any separation of the Shari^h from the applicable law, however, was strictly non-Islamic.⁴⁴

That is not to say such separation,⁴⁵ or partial separation did not occur, nor that it did not receive the legitimating appellation of “Islamic,” or some other religious label to justify it. Indeed, I observed in the “Islamic/^{adat}” hybrid system of pre-colonial Melaka, where the Sultan and his ministers were not appointed according to religious criteria, the text writers still gave the Sultan the title of “Caliph of the

⁴²See ^Abdur-Rahman I. Doi, op. cit., pp. 1-6.

⁴³See chapter five.

⁴⁴Ibid., pp. 448-475.

⁴⁵See above.

Faithful.”⁴⁶ In post-independence Malaysia also, this partial separation from the rules and values of Islam has been manifested in the development of an “Islamic/Secular” hybrid, in both government and opposition strategies for “Islamisation.” The balance between these elements may be different, but there is no doubting that both sides have utilised secular procedures, concepts and “rationalities,”⁴⁷ with *Kaum Muda* methodology and “reformist” ideas providing the “Islamicity.”

There is also no doubt that both sides are operating within a constitutional framework, and within a system of values that is orientated upon a secular and authoritarian paradigm. The Malaysian state was forged in a climate of “crisis,” and sought to suppress ethnic and ideological conflict through a commitment to the nation state. The association of Islam with the Malays led, therefore, to the adoption and continuation of the colonial secular framework and a constitutional settlement that limited the operation of Islam and the operative scope of Islamic values. In the absence of a referendum or some fundamental constitutional reform, and recognizing the current composition and ethnic mix of the Malaysian state, this is likely to continue even if PAS were to win future general elections.

Although the reasons for a strong and centrally-directed state are understandable in light of Malaysia’s history and current circumstances, that should not blind us to the reality of Malaysian “Islamisation,” and the role which the accused in fact plays within it. In contrast to the general position that was stated in chapter five, there is no evidence that the individual is construed in religious terms. Rather, the

⁴⁶Chapter six.

evidence suggests, certainly within the Federal Government's programmes,⁴⁸ that the individual is deemed an object of executive and political authority. The reforms that have been set in motion have released the interpretation of Islam from previous juridical opinion, and from the interpretative constraints of *taqlid* in particular.⁴⁹ This has enabled governmental authority to co-opt and sponsor⁵⁰ the developments of "Islamic" Law in the region. Although this does not necessarily imply that accused persons will be denied protection,⁵¹ it suggests that the religious values behind Islamic criminal justice may be trumped when deemed politically inconvenient. This is especially a danger when the agencies of enforcement follow executive leads irrespective of their tangential relationship with, or violation of Islamic rules, norms and values.⁵²

My response to the Orientalist argument, therefore, is not that there has been no separation between Islamic Law in theory and the law that has been applied in practice, but that when there is no authentic, over-arching Islamic authority⁵³ which has the power and capacity to enforce an *Islamic* framework, it is inevitable that such separation, in total (that is, through renunciation⁵⁴) or in part

⁴⁷I define this as a state of mind which seeks to reconcile systems and procedures with "modern" circumstances.

⁴⁸There is no evidence yet of a cross-party *consensus* on "Islamisation" and the role which the accused may play. It was stated in chapter six that the reforms proposed by PAS appear very protective of the accused, but many of the sections remain ambiguous and could be interpreted in different ways. There is also a lack of detail, particularly with respect to enforcement. Any construction of the accused will depend, therefore, on future developments.

⁴⁹See chapter six and the case law from *Jurnal Hukum*.

⁵⁰Financially, as well in terms of intellectual and official support. The International Islamic University, which was established by Mahathir Mohamed, is pivotal in the secular state's "acquisition" of Islam. Syariah Court judges receive training and are now employed directly through the institution.

⁵¹Indeed, *Pegawai Pendakwa Muis v Haji Adib Datuk Said Besar Sigoh*, op. cit., suggests a voluntarist approach.

⁵²See chapter six.

⁵³ie. a Caliph who complies with all of the pre-conditions of appointment; see chapter five.

⁵⁴Kemalist Turkey provides the best example.

(that is, through hybridisation⁵⁵), will occur. I argue that it necessarily follows that one should hesitate to call such separations “Islamic.”

So far, I have attempted to shed light on common assumptions of the two systems and the role which the accused was *perceived* as playing, and have argued that a more accurate portrayal is achieved by examining systems in their structural and historical contexts. The fostering of greater understanding between different traditions, however, requires more than dispelling myths and mistaken assumptions; it also needs to emphasize similarities, where they exist, in order to build “communicative bridges.”

It might be thought that a similarity exists in the relationship in both systems between the severity of punishment and the protection afforded to the accused. The greater the punishment, the more protection the accused receives. Superficially, this seems an attractive thesis because of the Benthamite rationalization of English criminal law in the nineteenth century (see chapter three) and the distinction between hudud and ta[^]zir punishments in Islam (see chapter five). Yet, I suggest that this similarity is more apparent than real. If it was true of English Law, then one would have expected the courts to be especially protective of the accused prior to the 1850s when this rationalization was expedited. Yet, it was noted that there has never been a moment in English Law when protection of the accused was the primary or sole concern (see chapter three). If it was true of Islamic Law, I would have expected more protection for

⁵⁵Eg. Malaysia.

the accused in hudud cases than for ta[^]zir. Yet, the majority of scholars offered the same protection for the accused in both types of cases.⁵⁶

Nevertheless, a cursory examination of the chapters⁵⁷ on English and Islamic criminal justice does reveal a similarity of underlying tensions with which both systems purport to deal. Although they define “crime” differently and the background values are different, because of the nature of their sources of law, the same tensions have existed within *both* legal frameworks. In each system, the role of the accused has shifted between a voluntary and participative approach, and one which is more coercive; each competing with the other. In the English context, this has been a product of competing ideological positions over the proper relationship between the individual and the state; one liberal laissez-faire, the other welfarist or utilitarian. In the Islamic, it has resulted from different emphases by different jurists on their interpretations of the religious texts; some stressing individual repentance and salvation, others collective enforcement of Islamic precepts. This has had a concomitant effect on the powers which they give to officials of the state, and the relationship which the individual is projected as having with the state.

Where that relationship is posited⁵⁸ in any given time, however, is contingent, in both systems, upon historical circumstances and their effects upon enforcement structures. In times of transition and “reform,” it is evident that no core set of values has emerged. Different roles for the accused have competed for

⁵⁶I suggested that the distinctions in evidential rules rested not on the severity of punishment, but on the *nature* of the offence; ie. whether it was categorised as Haqq Allah or Haqq-un-Nas.

⁵⁷Chapters three and five. I stress that “Islamic” should be interpreted as what the scholars have deemed as conforming to the primary sources, the Qur’an and the Sunnah.

supremacy. As that configuration of the state has come to completion, it has allowed a consensus⁵⁹ to form and to be communicated. This has effected a construction of the individual and crystallized his or her relationship with the state.

Hence, in the English criminal justice system, its period of transition was the nineteenth century. The change from a religious, decentralised and patriarchal society⁶⁰ to a secular, urban-based, and centrally-directed “popular democracy” was controversial and gave rise to response and counter-response. This was particularly evident in the case law from the late 1840s to the 1860s and from 1880 to the early 1900s as the judiciary reacted to changes in local and central government, and to the powers which had been delegated to the New Police.⁶¹ It was not until the 1930s and after the collapse of the gold standard, that a consensus over the role of the state in the life of the individual had its full effect. By that time, governmental and legal structures had changed fundamentally to facilitate the transmission of a “welfarist” consensus⁶² which held that the agencies of enforcement were to be helped rather than hindered. *Universal* citizenship and the general allocation of rights that would follow, was deemed obstructive of law and order concerns. This necessitated separating accused persons from the status of “citizens” and placing them within the new intermediate constitutional category of “suspects” where protection of the individual was subordinated to systemic concerns.

⁵⁸By this, I mean the contextualisation of the role of the accused.

⁵⁹In the Islamic context, I do not mean “ijmāʿ” here as technically defined. Rather, I am referring to an “agreed working compromise” between executive, legislative and judicial actors.

⁶⁰See Langford, P., op. cit, pp. 43-47; E.P. Thompson (1977), *Whigs and Hunters - The Origin of the Black Act*, Harmondsworth, Penguin, p. 263. See also, chapter three.

⁶¹See chapter three.

Islamic criminal justice has been in a state of transition and flux whenever a Caliph is absent from the centre directing and delegating operations. Thus, when “gaps” between Caliphates occur, this has enabled matters, unconnected with religious concerns, to shape the role which the accused has played. In the Malaysian context, where Islam developed “indigenously” and external to the Caliphal framework, Islamic values had to compete with values that had not originated in Islam. The competition was not just between different interpretations of and emphases on the Islamic texts, but also between Islam and traditional Malay culture, or Islam and secular culture. In pre-colonial Melaka and its satellites, Islam had won a victory but not in totality. A working compromise had been reached in which Malay rulers (ie. not Caliphs) determined that Islamic rules and values were targets and ideals to work towards, rather than the operative “law,” which was based on traditional Malay culture. Over time, this “law” began to incorporate different aspects of Islam but this reform had not been completed. Hence, there is no evidence of detailed investigation and questioning procedures which employed the religious categorisations of the individual referred to in chapter five. Within this incomplete process of reform, the accused remained an object of traditional authority.

Colonial intervention further retarded the “Islamisation” process and brought about a set of “ethnic” and “ideological” tensions. Fear of instability required cross-cultural mechanisms for consensus, such as the “nation state,” and “secularism,” which inevitably sidelined religious gradation in the construction of

⁶²See chapter three, pp. 18-21.

the individual. The perceived need to maintain peace and security ensured that state bodies, such as the Royal Malaysian Police Force, were equipped with wide powers and that the accused was stripped of rights and protections. The latest reform process sought to continue with “Islamisation”, but within pre-existing frameworks. This hybrid re-configuration of the Malaysian state remains incomplete and, as Syariah case law indicates, different sets of values pertaining to the relationship between the individual and the state are still jostling with each other for position. The role of the accused within the “new” Malaysian state, therefore, remains unclear.

Although these similarities exist, it would be facile to state that there are no differences between the role played by the accused in English and Islamic criminal justice. English criminal justice is orientated towards secular concerns and values, whereas the Islamic “ideal” and “state,” when realised in practice, clearly views the world and constructs frameworks with a view to a life in the Hereafter. In the English system, we have observed the emergence of the category “suspect” which leaves the protection of the individual to the “good sense” or discretion of a police officer.⁶³ Yet, who becomes the object of police suspicion is unrestricted in practice which allows factors such as race, ethnicity, gender, social status, class as well as a prior criminal record to influence police decision-making.⁶⁴ In Islamic criminal justice, it is the *Kafirun* (unbelievers) and the

⁶³See: Lustgarten, L. (1986), *The Governance of Police*, London, Sweet & Maxwell.

⁶⁴See further: Steven Box, “The Criminal Justice System and ‘Problem Populations’” in Lacey, N. (1994), *Criminal Justice*, Oxford Readings in Socio-Legal Studies, Oxford, Oxford University Press, pp. 49-56. For an account of the problems of such ‘targeted policing,’ see Choongh, S. (1997), op.cit., pp. 230-237; Rawlings, P., “‘Bobbies, ‘Aliens’ and Subversives: The Relationship Between Community Policing and Coercive Policing” in Baxter J. and Koffman L.(eds) (1985), *Police - The Constitution and the Community*, Abingdon, Professional Books, pp. 74-77; Smith, D.J., “Race, Crime and Criminal Justice,” in Maguire M., Morgan R. and Reiner R. (eds), (1994), *The Oxford Handbook of Criminology*, p. 1088.

Fasiqun (known big-sinners) who provide the comparator. They are accorded less protection than others because *they* have *chosen* a particular path rather than because of any arbitrary criteria chosen by a police officer. The Islamic framework is there to encourage the “right” choices and discriminates where individuals have chosen to take a different path.

The Islamic criminal justice system also recognizes that the over-arching *values* and *integrity* of those applying the rules plays just as or more important a role than the existence of the rules themselves. I suggest that this is an important insight in contexts of miscarriages of justice and their proposed solutions. After all, it is not the voluntariness rule which questions the accused, but a police officer who is often in a position to side-step them.

Bibliography

The English Criminal Process:

- Abrahams, G.** (1964), *Police Questioning and The Judges' Rules*, London, Oyez Publications.
- Ashworth, A.** (1994), *The Criminal Process: an Evaluative Study*, Oxford, Clarendon.
- Baxter, J. and Koffman, L.** (1985), *Police - The Constitution and the Community*, Abingdon, Professional Books.
- Beattie, J.M.** (1986), *Crime and the Courts in England, 1600-1800*, Oxford, Clarendon.
- Benn, A.W.** (1906), *The History of English Rationalism in the Nineteenth Century*, Vol. 1, London, Longmans.
- Bentham, J.** (1825), *A Treatise on Judicial Evidence*, Vol. 2., London, Baldwin, Craddock and Joy.
- _____ (1827), *Rationale of Judicial Evidence*, Vol. 5., London, Hunt & Clarke.
- Bottoms A. and McLean, J.** (1976), *Defendants in the Criminal Process*, London, Routledge and Keegan Paul.
- Bowring** (ed) (1843), *The Works of Jeremy Bentham*, Edinburgh, W. Tait.
- Bryan, I.** (1997), *Interrogation and Confession - A Study of Progress, Process and Practice*, Aldershot, Dartmouth & Ashgate.
- Choongh, S.** (1997), *Policing as Social Discipline*, Oxford, Clarendon.
- Critchley, T.A.** (1978), *A History of Police in England and Wales*, London, Constable (1st edition 1967).
- Emsley, C.** (1983), *Policing and Its Context 1750-1870*, London, Macmillan Press.
- _____ (1983), "The Military and Popular Disorder in England 1790-1801," *Journal of the Society for Army Historical Research*.
- Foucault, M.** (1972), *The Archeology of Knowledge*, London, Tavistock.
- Fox, J.C.** (1927), *The History of Contempt of Court*, Oxford, Clarendon.
- Freestone, D. and Richardson, J. C.** (1980), "The Making of English Criminal Law (7) Sir John Jervis and His Acts," *Crim. L.R.*, pp. 5-16.
- Griffiths, J.** (1970), "Ideology in Criminal Procedure," *Yale Law Journal* 79.
- Hay, D. and Snyder, F.** (1989), *Policing and Prosecution in Britain 1750-1850*, Oxford, Oxford University Press.
- Holdsworth, W.** (1903-66) *A History of English Law* (16 vols) London, Methuen/Sweet & Maxwell.
- Irvine, A.H (ed)** (1973), *Collins Universal Dictionary*, London and Glasgow, Collins.
- Langbein, J. H.** (1974), *Prosecuting Crime in the Renaissance- England, Germany, France*, Cambridge, Massachusetts, Harvard University Press.
- _____ (1977), *Torture and the Law of Proof*, Chicago and London, University of Chicago Press.
- _____ (1973) "The Origins of Public Prosecution at Common Law," 17 *American Journal of Legal History*.
- Langford, P.** (1993), *State, Law and Prosecution: the Emergence of the Modern Criminal Process 1780-1910*, Doctoral thesis, University of Warwick, Coventry.
- Locke, J.** (1812), *Works*, 11th edition, Vol. 5.
- McBarnett, D.** (1981), *Conviction*, London, Macmillan.

- McConville M. and Bridges, L. (eds)** (1994), *Criminal Justice in Crisis*, Aldershot, Edward Elgar.
- McConville M., Sanders, A. and Leng R. (eds)** (1991) *The Case for the Prosecution*, London, Routledge.
- McConville M. and Mirsky, C.L.**, "Criminal Defense of the Poor in New York City," *Review of Law & Social Change* (1986-7), Vol. XV, No. 4, New York University, pp. 584-964.
- Maitland, F.W.** (1885), *Justice and Police*, London, Macmillan.
- (1887), *Select Pleas of the Crown 1200-1225*, Vol. 1, The Publications of the Selden Society.
- Maguire, M., Morgan R. and Reiner, R. (eds)** (1994), *The Oxford Handbook of Criminology*, Oxford, Clarendon Press.
- Mirfield, P.** (1985), *Confessions*, Modern Legal Studies, London, Sweet & Maxwell.
- Packer, H.** (1969), *The Limits of the Criminal Sanction*, Stanford, California, Stanford University Press.
- Parliament Debates**, (H.C. 1848), Vol. 6.
- (H.C. 1828), Vol. 18.
- (H.C. 1812), Vol. 21.
- Paley, W.** (1809), *The Principles of Moral and Political Philosophy*, 17th edition, London, J. Faulder.
- Pugh, M.** (1994), *State and Society - British Political and Social History 1870-1992*, London, Edward Arnold.
- Radzinowicz, L.** (1968), *A History of the English Criminal Law*, Vols 2 and 4, London, Stevens & Sons.
- Reiner, R.** (1985), *The Politics of the Police*, Brighton, Wheatsheaf.
- Royal Commission on Police Powers 1929** (Cmnd. 3297).
- Sanders, A. and Young, R.** (1994), *Criminal Justice*, London, Butterworths.
- Shapiro, B.** (1991), *Beyond Reasonable Doubt and Probable Cause; Historical Perspectives on the Anglo-American Law of Evidence*, Berkeley, University of California Press.
- Sklair, L.** (1970), *The Sociology of Progress*, London, Routledge & Keegan Paul.
- Smith, A.** (1904), *Wealth of Nations*, Vol. 2, Book V, London, Methuen.
- Smith, M.** (1990), *British Politics, Society and the State Since the Late Nineteenth Century*, London, Macmillan.
- Stephen, J.F.** (1883), *A History of the Criminal Law of England*, Vol. 1, London, Macmillan & Co.
- (1996 reprint) *A History of the Criminal Law of England*, Vol. 1, London, Routledge/Thoemmes.
- Taylor, P.** (1931) *A Treatise on the Law of Evidence*, 12th Edition (Croom-Johnson, R.P. and Bridgman, G.F.L.)
- Thompson, E.P.** (1985), *Whigs and Hunters - The Origin of the Black Act*, Middlesex, Penguin.
- Uglow, S.** (1995), *Criminal Justice*, London, Sweet & Maxwell.
- Walker, C. and Starmer K (eds)** (1993), *Justice in Error*, London, Blackstone Press.
- Wigmore, H.** (Chadbourn rev. 1970), *Evidence in Trials at Common Law*, Vol. 3, Boston and Toronto, Little, Brown and Company.
- Williams, G.** (1960), "Questioning by the police: Some practical considerations," *Crim.LR*, pp. 325-46.

_____ (1963), *The Proof of Guilt- A study of the English Criminal Trial*, 3rd Edition, London, Stevens & Sons.

Wolchover, D. and Heaton-Armstrong, A. (1996), *Wolchover and Heaton-Armstrong on Confession Evidence*, London, Sweet & Maxwell.

The Islamic Criminal Process:

^Abdu'l Hamid, Abu Sulayman (1993), *Crisis in the Muslim Mind*, Herndon, IIIT.

^Abdur-Rahman al-Jaziri (nd), *Kitab al-Fiqh ^ala al-Madhahib-il Arb^ah*, Vol. 5, Beirut, Dar al-Kutub al ^Ilmiyyah.

^Oudah, ^Abdul Qadir, (1987), *Criminal Law of Islam*, Vol. 1, Karachi, International Islamic Publishers.

Abu Ishaq ash-Shirazi, Ibrahim bin ^Ali bin Yusuf (nd), *Al-Muhadhdhab*, Vol. 2, Cairo, ^Isa Al-Babi al-Halabi.

Abu Yusuf, Y^aqub ibn Ibrahim (1346H), *Kitab-ul Kharaj*, Al-Matba^t al-Salafiyyah, Cairo.

Abu Yusuf (trans. Dr Abid Ahmad ^Ali and Professor ^Abdul Hameed Siddiqui) (1979), *Kitab-ul Kharaj*, Lahore, Islamic Book Centre.

Ahmad Ibn Hanbal (nd), *Musnad*, Vol. 19, Cairo, Dar-ush-Shihab.

Ahmad, A. (1992), *Postmodernism and Islam*, London and New York, Routledge.

Al-^Alwani, T.J. (1993), *The Ethics of Disagreement in Islam*, Herndon, IIIT.

_____ (1994), "The Rights of the Accused in Islam (Part One)," *The American Journal of Islamic Social Sciences*, Vol. 11, No. 3.

_____ (1994), "The Rights of the Accused in Islam (Part Two)," *The American Journal of Islamic Social Sciences*, Vol. 11, No. 4.

Al-Ghazzali, Abu Hamid Muhammad (1937) *Al-Mustasfa min ^Ilm al-Usul*, Vols 1 and 2, Cairo.

Al-Harariyy, ^Abdullah Ibn Muhammad, (1996)[1416], *Mukhtasaru ^Abdullah al-Harariyyu, al-Kafilu bi-^Ilmi-d-Dini-d-Daruriyy*, Beirut, Dar-ul Mashari^a.

_____ (1996)[1416H], *Bughyat-Talibi li-M^arifat-il ^Ilm-id-Diniy-il Wajibi*, 3rd Edition, Beirut, Dar-ul Mashari^a.

_____ (1999)[1419H], *Ash-Sharh-ul Qawim fi Jal al-Fadz As-Sirat-ul Mustaqim*, 1st Edition, Beirut, Dar-ul Mashari^a.

_____ (1993)[1413H], *As-Sirat-ul Mustaqim*, 9th Edition, Beirut, Dar-ul Mashari^a.

_____ nd, *Al-Maqalat-us-Saniyyah Fi Kashfi Dalalati Ahmad Ibn Taymiyah*, Beirut, Dar-ul Mashari^a.

Al-Marghinani, nd, *Al-Hidayah*, Vol. 2, Karachi, Qur'an Mahal.

Al-Mawardi, Abu' l Hasan, ^Ali ibn Muhammad, n.d., *Al-Ahkam as-Sultaniyyah*, SOAS reference: 25641; shelf A 345. 6.

_____ (trans. Dr Asadullah Yate) (1996), *Al-Ahkam as-Sultaniyyah - The Laws of Islamic Governance*, London, Ta Ha.

_____ (1994)[1414], *Al Hawi al-Kabir*, Beirut, Dar-ul Fikr.

Al-Qurtubi, Abdullah Muhammad bin Ahmad al-Ansari (1967), *Al-Jami^u li Ahkam-il Qur'an*, Vol. 16, Cairo, Wazaratu-th-Thiqafah, Dar-ul Katib-ul ^Arabi.

Al-Sarakhsi, Muhammed ibn Ahmad (1987), *Al-Mabsut*, Vols 17-18, Karachi, Idarat ^Ulum-ul Qur'an.

- Al-Shafi'i, Muḥammad ibn Idrīs** (1334H), *Kitāb al-Umm*, Vols. 6 and 7, 1st Edition, al-Kubra al-Amīriyyah, Bulaq, Egypt.
- Ar-Ramli, Shamsud-Dīn, Muḥammad, Shihab-ud-Dīn** (1967), *Nihayat-ul Muhtaj*, Vol. 5, Cairo, Mustafa Al-Babi al-Halabi.
- Arkoun, M.** (1994), *Rethinking Islam*, Oxford, Westview Press.
- Association for Islamic Charitable Projects**, "Knowledge: The Gateway to Success," //www.aicp.org.
- Baalbaki, R.** (1997), *Al-Mawrid*, 9th Edition, Beirut, Dar-ul 'Ilm Lil-Malayin.
- Bahnasi, F. A.** (1983), *Nadzariyyat Al-Ithbat fi-l Fiqh al-Jina'i al-Islami*, Beirut, Dar al-Shuruk.
- Bassiouni, M. Cherif** (1982), *The Islamic Criminal Justice System*, London, Oceana Publications.
- Coulson, N.J.** (1964), *A History of Islamic Law*, Edinburgh, Edinburgh University Press.
- Coulson, N.J.** (1969), *Conflicts and Tensions in Islamic Jurisprudence*, Chicago, University of Chicago Press.
- Doi, A. I.** (1984), *Shari'ah - The Islamic Law*, London, Ta Ha.
- Dr Anwarullah** (1994), *Islamic Law of Evidence*, Islamabad, Pakistan, Shar'iah Academy, International Islamic University.
- El-Geyoushi, M.E.** (nd), *Teachings of Islam*, London, Islamic Cultural Centre.
- Esposito, J.** (1992), *The Islamic Threat: Myth or Reality*, New York and Oxford, Oxford University Press.
- Faruqi, I.** (1982), *Islamic Thought and Culture*, Herndon, International Institute for Islamic Thought (IIIT).
- _____ (1992), *Tawhid: Its Implications for Thought and Life*, Herndon, IIIT.
- Gibb, H.A.R. and Kramers, J.H.** (1974), *Shorter Encyclopaedia of Islam*, Leiden, EJ Brill.
- Haneef, Sikander Shah** (1994), *Islamic Law of Evidence*, Petaling Jaya, Malaysia, Pelanduk Publications.
- Hassan, H. I.** (1963), "Judiciary System From the Rise of Islam to 567AH," *The Islamic Quarterly*, Vol. 7, London.
- Ibn 'Abidin, Muḥammad Amin** (1966), *Hashiyah, Radd-ul Muhtar 'ala ad-Durrul Mukhtar: Sharh Tanwir al-Absar*, 2nd Edition, Vol. 6, Dar-ul Fikr.
- Ibn 'Arabi, Muḥammad Ibn 'Abdullah** (1972), *Ahkam Al-Qur'an*, Beirut, Dar-ul Ma'rifah, Vols 1-3.
- Ibn Hazm, Abu Muḥammad 'Ali Bin Ahmad Bin Sa'eed** (1352H reprint), *Al-Muhalla*, Vol. 11, Muḥammad Munir ad-Dimashqi, SOAS shelf no: A345.6.
- Ibn Khaldun (trans. Franz Rosenthal)** (1967), *The Muqaddimah - An Introduction to History*, 2ns Edition, London and Henley, Routledge & Keegan Paul, Vol. 1.
- Ibn Qayyim al-Jawziyyah, Muḥammad ibn Abu Bakr** (nd), *At-Turuq al-Hukmiyyah fi-s-Siyasati-sh-Shar'iyah*, Cairo, Dar-ul Madani.
- Ibn Qudamah, Muwaffiq al-Din, Abu Muhammad, 'Abdullah ibn Ahmad** (1983), *Al-Mughni*, Vol. 5, Beirut, Dar-ul Kitab-ul 'Arabi.
- _____ (1367H), *Al-Mughni*, Vols 5 and 9, Dar-ul Manar.
- Ibrahim, Ibn Muḥammad Ibn Salim Ibn Duyan, (trans. George Baroody)(nd)**, *Manar al-Sabil (Crime and Punishment Under Hanbali Law)*, SOAS catalogue no. 350706.

- Imam Malik** (1982), *Al-Muwatta* (English trans.), narration of Yahya ibn Yahya al-Laythi al-Qayrawan, Norwich, Diwan Press.
- Iqbal, M.** (1982 reprint), *The Reconstruction of Religious Thought in Islam*, Lahore, Sh. Muhammad Ashraf.
- Kamali, M.H.** (1989), *Principles of Islamic Jurisprudence*, Selangor, Malaysia, Pelanduk Publications.
- _____ (1986), "The Citizen and State in Islamic Law," *Syariah Law Journal*, International Islamic University, Kuala Lumpur, pp. 15-46.
- Lewis, B.** (1993), *Islam in History: Ideas, People and Events in the Middle East*, 2nd Edition, Chicago, Open Court.
- _____ (1974), *Islam - from the Prophet Muhammed to the capture of Constantinople*, London and Basingstoke, Macmillan Press.
- Lippman M., McConville S., and Yerushalmi, M.** (1988) *Islamic Criminal Law and Procedure*, London and New York, Praeger.
- Mahmassani, S.** (1987), *Falsafat al-Tashri' fi al-Islam*, Selangor, Malaysia, Penerbitan Hizbi.
- Mawdudi, Abul A'la**, (1990), *Human Rights in Islam*, Leicester, The Islamic Foundation.
- _____ (1983), *Islamic Law and Constitution*, 8th Edition, Lahore, Islamic Publications.
- Mehat, H.** (1993), *Islamic Criminal Law and Behaviour*, Kuala Lumpur, Muslim Youth Movement of Malaysia.
- Othman, Mahmud Saedon Awang** (1991), *Undang-Undang Keterangan Islam*, Kuala Lumpur, Malaysia, Dewan Bahasa Dan Pustaka Kementerian Pendidikan.
- _____ (1996), *An Introduction to Islamic Law of Evidence*, Shah Alam, Malaysia, Hizbi.
- Qutb, Sayyid** (1954), *Al-Adalah al-Ijtima'iyah fi'l Islam*, 4th Edition, Cairo, ^Isa al-Babi.
- Rahman, F.** (1982), *Islam and Modernity*, Chicago and London, University of Chicago Press.
- Said, E.** (1997), *Covering Islam*, London, Vintage.
- _____ (1995), *Orientalism*, London, Penguin.
- Sanad, N.** (1991), *The Theory of Crime and Criminal Responsibility*, Chicago, University of Illinois.
- Sayyid, B.S.** (1997), *A Fundamental Fear: Eurocentricism and the Emergence of Islamism*, London and New York, Zed Books.
- Schacht, J.** (1964, reprint 1974), *An Introduction to Islamic Law*, Oxford, Clarendon.
- _____ (1970), "Law and Justice" in *The Cambridge History of Islam*, Vol. 2B, p. 230 post et seq.
- Sid Ahmad, Muhammad ^Ata Al-Sid** (1995), *The Hudud*, Kuala Lumpur, Malaysia, Muhammad ^Ata Al-Sid.
- Suyuti, Jalal ad-Din** (1983), *Al-Ashbah wal-Nadza'ir*, Beirut, Dar-ul Kutub ^Ilmiyyah.
- Ullah, M.** (1986), *The Administration of Justice in Islam- An Introduction to the Muslim Conception of the State*, New Delhi, Kitab Bhavan.

The Contextualisation of Islam in Malaysia

- Abdul Monir, bin Yaacob** (1997), "Ulama Dan Fiqh Di Malaysia," *IKIM Law Journal*, Vol. 1, No. 1.
- Abdullah, bin Abu Bakar** (1404H), "Pentadbiran Keadilan Di Mahkamah-Mahkamah Syariah Malaysia," *Jurnal Hukum*, 149.
- Alias, Mohamed** (1994), *PAS' Platform: Development and Change 1951-1986*, Shah Alam, Malaysia, Gateway Publishing.
- Malayan Law Journal** (1996), *The Evidence Act 1950*, Annotated Statutes of Malaysia, Kuala Lumpur.
- Aun, Wu Min** (1990), *The Malaysian Legal System*, Petaling Jaya, Malaysia, Longman.
- Azad, Ghulam Murtaza** (1994), *Judicial System of Islam*, New Delhi, Kitab Bhavan.
- Balogun, S.U.** (1997), "The Status of Shari'ah in Malaysia," *Hamdard Islamicus*, Vol. XX, No. 2.
- Choi, L.** (1998), *Kamus Perwira - Bahasa Melayu/Bahasa Inggeris*, Selangor, Penerbitan Daya Sdn Bhd.
- Clifford, H.** (1961), "Expedition: Terrangganu and Kelantan," *JMBRAS*, Vol. 38, Pt. 1.
- Dickinson, A.H** (1941), "The History of the Creation of the Malacca Police," *JMBRAS*, Vol. 19, Pt. 2.
- Fang, L.Y.** (1976), *The Laws of Melaka*, The Hague, Martinus Nijhoff (published with the Malay text: *Undang-Undang Melaka*, Bibliotheca Indonesica, 13, Koninklijk Instituut Voor Taal, Land En Volkenkunde).
- Hashim, Muhamad Suffian**, "The Relationship between Islam and the State in Malaya," *Intisari*, Vol. 1.
- Hassan, Syarifah Zaleha Syed** (1990), "Towards a Syariah-based Society: Religious Rationalization and the Development of the Islamic Legal Order in Malaysia," *Jurnal Antropologi Dan Sociologi*, Vol. 18, pp. 41-53.
- Havinden and Meridith** (1993), *Colonialism and Development - Britain and its tropical colonies, 1850-1960*, London and New York, Routledge.
- Hooker, M.B.** (1968), "A Note on the Malaysia Legal Texts," *Journal of the Malayan Branch of the Royal Asiatic Society* (JMBRAS), Vol. 41, Pt. 1, pp. 157-163.
- Ibrahim, A.** (1965), *Islamic Law in Malaya*, Singapore, Malaysian Sociological Research Institute.
- _____ (1978), *The Position of Islam in the Constitution of Malaysia*, Kuala Lumpur, Oxford University Press.
- _____ (1992), "Islamic Law in Malaysia since 1972," in *Developments in Malaysian Law - Essays to Commemorate the Twentieth Anniversary of the Faculty of Law*, Petaling Jaya, Universiti Malaya.
- Ibrahim, A. and Ahilemah Joned** (1995, revised), *The Malaysian Legal System*, 2nd Edition, Kuala Lumpur, Dewan Bahasa Dan Pustaka.
- Ibrahim, A., Othman, M.S.A. and Hassan, M. K.** (1992), "Islamisation of the Malay Archipelago and the Impact of Al-Shaf'i's Madhhab on Islamic Teachings in Malaysia," *International Islamic University Law Journal*, Vol. 2, Kuala Lumpur.

- Ijtimak Haiah Ulama Malaysia** (1994), *Garis panduan Perlaksanaan Siasah Syariyyah Dalam Pentadbiran Negara*, Kuala Lumpur, Yayasan Dakwah Islamiah Malaysia (YADIM).
- Ismail Mohd, Abu Hassan** (1997), *The Theory of Evidence in the Islamic Tradition And in the Law of Malaysia: A Comparison*, Phd thesis, Manchester, University of Manchester.
- Ismail, Rose (ed)** (1995), *Hudud in Malaysia - The Issues at Stake*, Kuala Lumpur, SIS Forum (Malaysia Berhad).
- Kamali, Mohamed Hashim** (1995), *Punishment in Islamic Law: An Enquiry Into the Hudud Bill of Kelantan*, Kuala Lumpur, Institut Kajian Dasar.
- Kempe, J. E. and Winstedt, R.O.** (1952), "A Malay Legal Miscellany," *JMBRAS*, Vol. 25, Pt 1.
- _____ (1948), "A Malay Legal Digest Compiled for ^Abd al-Ghafur Muhaihu'd-din Shah, Sultan of Pahang 1592-1614," *JMBRAS*, Vol. 21, Pt 1, pp. 1-67.
- Kim, Khoo Kay (ed)** (1980), *Tamadun Di Malaysia*, Kuala Lumpur, Persatuan Sejarah Malaysia.
- Mahmud Zuhdi, Bin Haji Abdul Majid** (1984), *Criminal Responsibility in English and Islamic Law*, Masters thesis, Canterbury, University of Kent.
- Majid, Mimi Kamariah** (1987), *Criminal Procedure in Malaysia*, Kuala Lumpur, University of Malaya.
- Mohamed, Zabidi** (1998), *Tersungkur Di Pintu 'Syurga'; The Untold Truth and Inside Story of al-Arqam & ISA (Detention Without Trial)*, Kuala Lumpur, Zabidi Publications.
- Morrah, P.** (1963), "The History of the Malayan Police," *JMBRAS*, Vol. 36, Pt 2, No. 202.
- Omar, Haniff** (1990), *Kepolisian Dan Keselamatan*, Kuala Lumpur, AMK Interaksi.
- Othman, Mahmud Saedon Awang** (1409H), "Syarat Menjadi Kadi," *Jurnal Hukum* 29.
- Othman, Norani** (1993), "The Socio-Political Dimensions of Islamisation in Malaysia: A Cultural Accommodation of Social Change?" *Jurnal Antropologi Dan Sociologi*, Vol. 20, pp. 109-127.
- Pluvier, J.** (1974), *South-East Asia from Colonialism to Independence*, Kuala Lumpur, Oxford University Press.
- Raffles, S.** (1879), "The Maritime Code of the Malays," *Journal of the Southern Branch of the Royal Asiatic Society*, No. 3, pp. 62-84.
- Roff, W.R.** (1974), *Kelantan, Religion, Society and Politics in a Malay State*, Kuala Lumpur, OUP.
- Salleh Abas** (1404H), "Perlaksanaan Undang-Undang Islam di Malaysia," *Jurnal Hukum*, 143.
- Sandhu and Wheatley (eds)** (1983), *Melaka - The Transformation of a Malay Capital - c. 1400-1980*, Vol. 1, Kuala Lumpur, Oxford University Press.
- Seda-Poulin, Maria Luisa** (1993), "Islamization and Legal Reform in Malaysia: The Hudud Controversy of 1992," *Southeast Asian Affairs*, Singapore, pp. 224-242.
- Winstedt, R.O.** (1961), *The Malays - A Cultural History*, London, Routledge & Keegan Paul.
- _____ (1953), "Legal Digest from Perak," *JMBRAS*, Vol. 26, Pt. 1.
- Winstedt, R.O. and de Jong, P.E.J.** (1954), "A Digest of Customary Law from Sungai Ujong," *JMBRAS*, Vol. 27, Pt 3, pp. 1-71.

Yegar, M. (1979), *Islam and Islamic Institutions in British Malaya: Policies and Implementation*, Jerusalem, The Magnum Press.

Yusoff, Hasan (1983), *Perhubungan Polis Dan Orangramai Di Malaysia - Satu Kajian Tentang Sikap Penduduk-Penduduk Kuala Lumpur*, Masters thesis, Bangi, Malaysia, Universiti Kebangsaan Malaysia.

Zakaria, Zainur (1992), *Dari Common Law Kepada Common Law Malaysia*, Kuala Lumpur, Seminar Syariah Dan Common Law Di Malaysia, sponsored by UKM, the Malaysian Lawyer's Association and the Prime Minister's Department, Dewan Mukhtar, Pusat Islam.

Newspapers:

New Straits Times

New Sunday Times

The Sun (Malaysia)

Comparative analyses:

Hooker, M.B. (1975), *Legal Pluralism*, Oxford, Clarendon Press.

Legrand, P. (1995), "Comparative Legal Studies and Commitment to Theory," 58 *Modern Law Review*, pp. 262-273.

Markesenis, B. (1997), *Foreign Law & Comparative Methodology*, Oxford, Hart Publishing.

Merryman, J.H. (1985), *The Civil Law Tradition*, 2nd Edition, Stanford, Stanford University Press.

Van Hoecke, M. and Warrington, M. (1998), "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law," *International and Comparative Law Quarterly*, Vol. 47, pp. 495-536.

Wilson, G. and Rogowski, R. (1996), *Challenges to European Legal Scholarship: Anglo-German Legal Essays*, London, Blackstone Press.

Zweigert, K. and Kotz, H. (1993), *An Introduction to Comparative Law*, 2nd Edition (trans. Tony Weir), Oxford, Oxford University Press.

[illegible]

Bibliography

The English Criminal Process:

- Abrahams, G.** (1964), *Police Questioning and The Judges' Rules*, London, Oyez Publications.
- Ashworth, A.** (1994), *The Criminal Process: an Evaluative Study*, Oxford, Clarendon.
- Baxter, J. and Koffman, L.** (1985), *Police - The Constitution and the Community*, Abingdon, Professional Books.
- Beattie, J.M.** (1986), *Crime and the Courts in England, 1600-1800*, Oxford, Clarendon.
- Benn, A.W.** (1906), *The History of English Rationalism in the Nineteenth Century*, Vol. 1, London, Longmans.
- Bentham, J.** (1825), *A Treatise on Judicial Evidence*, Vol. 2., London, Baldwin, Craddock and Joy.
- _____ (1827), *Rationale of Judicial Evidence*, Vol. 5., London, Hunt & Clarke.
- Bottoms A. and McLean, J.** (1976), *Defendants in the Criminal Process*, London, Routledge and Keegan Paul.
- Bowring** (ed) (1843), *The Works of Jeremy Bentham*, Edinburgh, W. Tait.
- Bryan, I.** (1997), *Interrogation and Confession - A Study of Progress, Process and Practice*, Aldershot, Dartmouth & Ashgate.
- Choongh, S.** (1997), *Policing as Social Discipline*, Oxford, Clarendon.
- Critchley, T.A.** (1978), *A History of Police in England and Wales*, London, Constable (1st edition 1967).
- Emsley, C.** (1983), *Policing and Its Context 1750-1870*, London, Macmillan Press.
- _____ (1983), "The Military and Popular Disorder in England 1790-1801," *Journal of the Society for Army Historical Research*.
- Foucault, M.** (1972), *The Archeology of Knowledge*, London, Tavistock.
- Fox, J.C.** (1927), *The History of Contempt of Court*, Oxford, Clarendon.
- Freestone, D. and Richardson, J. C.** (1980), "The Making of English Criminal Law (7) Sir John Jervis and His Acts," *Crim. L.R.*, pp. 5-16.
- Griffiths, J.** (1970), "Ideology in Criminal Procedure," *Yale Law Journal* 79.
- Hay, D. and Snyder, F.** (1989), *Policing and Prosecution in Britain 1750-1850*, Oxford, Oxford University Press.
- Holdsworth, W.** (1903-66) *A History of English Law* (16 vols) London, Methuen/Sweet & Maxwell.
- Irvine, A.H** (ed) (1973), *Collins Universal Dictionary*, London and Glasgow, Collins.
- Langbein, J. H.** (1974), *Prosecuting Crime in the Renaissance- England, Germany, France*, Cambridge, Massachusetts, Harvard University Press.
- _____ (1977), *Torture and the Law of Proof*, Chicago and London, University of Chicago Press.
- _____ (1973) "The Origins of Public Prosecution at Common Law," 17 *American Journal of Legal History*.
- Langford, P.** (1993), *State, Law and Prosecution: the Emergence of the Modern Criminal Process 1780-1910*, Doctoral thesis, University of Warwick, Coventry.
- Locke, J.** (1812), *Works*, 11th edition, Vol. 5.
- McBarnett, D.** (1981), *Conviction*, London, Macmillan.

- McConville M. and Bridges, L. (eds)** (1994), *Criminal Justice in Crisis*, Aldershot, Edward Elgar.
- McConville M., Sanders, A. and Leng R. (eds)** (1991) *The Case for the Prosecution*, London, Routledge.
- McConville M. and Mirsky, C.L.**, "Criminal Defense of the Poor in New York City," *Review of Law & Social Change* (1986-7), Vol. XV, No. 4, New York University, pp. 584-964.
- Maitland, F.W.** (1885), *Justice and Police*, London, Macmillan.
- (1887), *Select Pleas of the Crown 1200-1225*, Vol. 1, The Publications of the Selden Society.
- Maguire, M., Morgan R. and Reiner, R. (eds)** (1994), *The Oxford Handbook of Criminology*, Oxford, Clarendon Press.
- Mirfield, P.** (1985), *Confessions*, Modern Legal Studies, London, Sweet & Maxwell.
- Packer, H.** (1969), *The Limits of the Criminal Sanction*, Stanford, California, Stanford University Press.
- Parliament Debates**, (H.C. 1848), Vol. 6.
- (H.C. 1828), Vol. 18.
- (H.C. 1812), Vol. 21.
- Paley, W.** (1809), *The Principles of Moral and Political Philosophy*, 17th edition, London, J. Faulder.
- Pugh, M.** (1994), *State and Society - British Political and Social History 1870-1992*, London, Edward Arnold.
- Radzinowicz, L.** (1968), *A History of the English Criminal Law*, Vols 2 and 4, London, Stevens & Sons.
- Reiner, R.** (1985), *The Politics of the Police*, Brighton, Wheatsheaf.
- Royal Commission on Police Powers 1929** (Cmnd. 3297).
- Sanders, A. and Young, R.** (1994), *Criminal Justice*, London, Butterworths.
- Shapiro, B.** (1991), *Beyond Reasonable Doubt and Probable Cause; Historical Perspectives on the Anglo-American Law of Evidence*, Berkeley, University of California Press.
- Sklair, L.** (1970), *The Sociology of Progress*, London, Routledge & Keegan Paul.
- Smith, A.** (1904), *Wealth of Nations*, Vol. 2, Book V, London, Methuen.
- Smith, M.** (1990), *British Politics, Society and the State Since the Late Nineteenth Century*, London, Macmillan.
- Stephen, J.F.** (1883), *A History of the Criminal Law of England*, Vol. 1, London, Macmillan & Co.
- (1996 reprint) *A History of the Criminal Law of England*, Vol. 1, London, Routledge/Thoemmes.
- Taylor, P.** (1931) *A Treatise on the Law of Evidence*, 12th Edition (Croom-Johnson, R.P. and Bridgman, G.F.L.)
- Thompson, E.P.** (1985), *Whigs and Hunters - The Origin of the Black Act*, Middlesex, Penguin.
- Uglow, S.** (1995), *Criminal Justice*, London, Sweet & Maxwell.
- Walker, C. and Starmer K (eds)** (1993), *Justice in Error*, London, Blackstone Press.
- Wigmore, H.** (Chadbourn rev. 1970), *Evidence in Trials at Common Law*, Vol. 3, Boston and Toronto, Little, Brown and Company.
- Williams, G.** (1960), "Questioning by the police: Some practical considerations," *Crim.LR*, pp. 325-46.

_____ (1963), *The Proof of Guilt- A study of the English Criminal Trial*, 3rd Edition, London, Stevens & Sons.

Wolchover, D. and Heaton-Armstrong, A. (1996), *Wolchover and Heaton-Armstrong on Confession Evidence*, London, Sweet & Maxwell.

The Islamic Criminal Process:

^Abdu'l Hamid, Abu Sulayman (1993), *Crisis in the Muslim Mind*, Herndon, IIIT.

^Abdur-Rahman al-Jaziri (nd), *Kitab al-Fiqh ^ala al-Madhahib-il Arb^ah*, Vol. 5, Beirut, Dar al-Kutub al ^Ilmiyyah.

^Oudah, ^Abdul Qadir, (1987), *Criminal Law of Islam*, Vol. 1, Karachi, International Islamic Publishers.

Abu Ishaq ash-Shirazi, Ibrahim bin ^Ali bin Yusuf (nd), *Al-Muhadhdhab*, Vol. 2, Cairo, ^Isa Al-Babi al-Halabi.

Abu Yusuf, Y^aqub ibn Ibrahim (1346H), *Kitab-ul Kharaj*, Al-Matba^t al-Salafiyyah, Cairo.

Abu Yusuf (trans. Dr Abid Ahmad ^Ali and Professor ^Abdul Hameed Siddiqui) (1979), *Kitab-ul Kharaj*, Lahore, Islamic Book Centre.

Ahmad Ibn Hanbal (nd), *Musnad*, Vol. 19, Cairo, Dar-ush-Shihab.

Ahmad, A. (1992), *Postmodernism and Islam*, London and New York, Routledge.

Al-^Alwani, T.J. (1993), *The Ethics of Disagreement in Islam*, Herndon, IIIT.

_____ (1994), "The Rights of the Accused in Islam (Part One)," *The American Journal of Islamic Social Sciences*, Vol. 11, No. 3.

_____ (1994), "The Rights of the Accused in Islam (Part Two)," *The American Journal of Islamic Social Sciences*, Vol. 11, No. 4.

Al-Ghazzali, Abu Hamid Muhammad (1937) *Al-Mustasfa min ^Ilm al-Usul*, Vols 1 and 2, Cairo.

Al-Harariyy, ^Abdullah Ibn Muhammad, (1996)[1416], *Mukhtasar al-Harariyyu, al-Kafilu bi-^Ilmi-d-Dini-d-Daruriyy*, Beirut, Dar-ul Mashari^a.

_____ (1996)[1416H], *Bughyat-Talibi li-M^arifat-il ^Ilm-id-Diniy-il Wajibi*, 3rd Edition, Beirut, Dar-ul Mashari^a.

_____ (1999)[1419H], *Ash-Sharh-ul Qawim fi Jal al-Fadz As-Sirat-ul Mustaqim*, 1st Edition, Beirut, Dar-ul Mashari^a.

_____ (1993)[1413H], *As-Sirat-ul Mustaqim*, 9th Edition, Beirut, Dar-ul Mashari^a.

_____ nd, *Al-Maqalat-us-Saniyyah Fi Kashfi Dalalati Ahmad Ibn Taymiyah*, Beirut, Dar-ul Mashari^a.

Al-Marghinani, nd, *Al-Hidayah*, Vol. 2, Karachi, Qur'an Mahal.

Al-Mawardi, Abu' l Hasan, ^Ali ibn Muhammad, n.d., *Al-Ahkam as-Sultaniyyah*, SOAS reference: 25641; shelf A 345. 6.

_____ (trans. Dr Asadullah Yate) (1996), *Al-Ahkam as-Sultaniyyah - The Laws of Islamic Governance*, London, Ta Ha.

_____ (1994)[1414], *Al Hawi al-Kabir*, Beirut, Dar-ul Fikr.

Al-Qurtubi, Abdullah Muhammad bin Ahmad al-Ansari (1967), *Al-Jami^u li Ahkam-il Qur'an*, Vol. 16, Cairo, Wazaratu-th-Thiqafah, Dar-ul Katib-ul ^Arabi.

Al-Sarakhsi, Muhammed ibn Ahmad (1987), *Al-Mabsut*, Vols 17-18, Karachi, Idarat ^Uloom-ul Qur'an.

- Al-Shafi'i, Muḥammad ibn Idrīs** (1334H), *Kitāb al-Umm*, Vols. 6 and 7, 1st Edition, al-Kubra al-Amīriyyah, Bulāq, Egypt.
- Ar-Ramli, Shamsud-Dīn, Muḥammad, Shihab-ud-Dīn** (1967), *Nihayat-ul Muhtaj*, Vol. 5, Cairo, Mustafā Al-Babī al-Halabī.
- Arkoun, M.** (1994), *Rethinking Islam*, Oxford, Westview Press.
- Association for Islamic Charitable Projects**, "Knowledge: The Gateway to Success," //www.aicp.org.
- Baalbaki, R.** (1997), *Al-Mawrid*, 9th Edition, Beirut, Dar-ul 'Ilm Lil-Malayin.
- Bahnasi, F. A.** (1983), *Nadzariyyat Al-Ithbat fi-l Fiqh al-Jina'i al-Islami*, Beirut, Dar al-Shuruk.
- Bassiouni, M. Cherif** (1982), *The Islamic Criminal Justice System*, London, Oceana Publications.
- Coulson, N.J.** (1964), *A History of Islamic Law*, Edinburgh, Edinburgh University Press.
- Coulson, N.J.** (1969), *Conflicts and Tensions in Islamic Jurisprudence*, Chicago, University of Chicago Press.
- Doi, A. I.** (1984), *Shari'ah - The Islamic Law*, London, Ta Ha.
- Dr Anwarullah** (1994), *Islamic Law of Evidence*, Islamabad, Pakistan, Shar'iah Academy, International Islamic University.
- El-Geyoushi, M.E.** (nd), *Teachings of Islam*, London, Islamic Cultural Centre.
- Esposito, J.** (1992), *The Islamic Threat: Myth or Reality*, New York and Oxford, Oxford University Press.
- Faruqi, I.** (1982), *Islamic Thought and Culture*, Herndon, International Institute for Islamic Thought (IIIT).
- _____ (1992), *Tawhid: Its Implications for Thought and Life*, Herndon, IIIT.
- Gibb, H.A.R. and Kramers, J.H.** (1974), *Shorter Encyclopaedia of Islam*, Leiden, EJ Brill.
- Haneef, Sikander Shah** (1994), *Islamic Law of Evidence*, Petaling Jaya, Malaysia, Pelanduk Publications.
- Hassan, H. I.** (1963), "Judiciary System From the Rise of Islam to 567AH," *The Islamic Quarterly*, Vol. 7, London.
- Ibn 'Abidin, Muḥammad Amīn** (1966), *Hashiyah, Radd-ul Muhtar 'ala ad-Durr-ul Mukhtar: Sharh Tanwir al-Absar*, 2nd Edition, Vol. 6, Dar-ul Fikr.
- Ibn 'Arabi, Muḥammad Ibn 'Abdullah** (1972), *Aḥkam Al-Qur'an*, Beirut, Dar-ul Ma'rifah, Vols 1-3.
- Ibn Hazm, Abu Muḥammad 'Alī Bin Aḥmad Bin Sa'eed** (1352H reprint), *Al-Muhalla*, Vol. 11, Muḥammad Munir ad-Dimashqi, SOAS shelf no: A345.6.
- Ibn Khaldun (trans. Franz Rosenthal)** (1967), *The Muqaddimah - An Introduction to History*, 2ns Edition, London and Henley, Routledge & Keegan Paul, Vol. 1.
- Ibn Qayyim al-Jawziyyah, Muḥammad ibn Abu Bakr** (nd), *At-Turuq al-Hukmiyyah fi-s-Siyasati-sh-Shar'iyyah*, Cairo, Dar-ul Madani.
- Ibn Qudamah, Muwaffiq al-Din, Abu Muḥammad, 'Abdullah ibn Aḥmad** (1983), *Al-Mughni*, Vol. 5, Beirut, Dar-ul Kitāb-ul 'Arabi.
- _____ (1367H), *Al-Mughni*, Vols 5 and 9, Dar-ul Manar.
- Ibrahim, Ibn Muḥammad Ibn Salīm Ibn Dūyan, (trans. George Baroodi)**(nd), *Manar al-Sabil (Crime and Punishment Under Hanbali Law)*, SOAS catalogue no. 350706.

- Imam Malik** (1982), *Al-Muwatta* (English trans.), narration of Yahya ibn Yahya al-Laythi al-Qayrawan, Norwich, Diwan Press.
- Iqbal, M.** (1982 reprint), *The Reconstruction of Religious Thought in Islam*, Lahore, Sh. Muhammad Ashraf.
- Kamali, M.H.** (1989), *Principles of Islamic Jurisprudence*, Selangor, Malaysia, Pelanduk Publications.
- _____ (1986), "The Citizen and State in Islamic Law," *Syariah Law Journal*, International Islamic University, Kuala Lumpur, pp. 15-46.
- Lewis, B.** (1993), *Islam in History: Ideas, People and Events in the Middle East*, 2nd Edition, Chicago, Open Court.
- _____ (1974), *Islam - from the Prophet Muhammed to the capture of Constantinople*, London and Basingstoke, Macmillan Press.
- Lippman M., McConville S., and Yerushalmi, M.** (1988) *Islamic Criminal Law and Procedure*, London and New York, Praeger.
- Mahmassani, S.** (1987), *Falsafat al-Tashri[^] fi al-Islam*, Selangor, Malaysia, Penerbitan Hizbi.
- Mawdudi, Abul A[^]la**, (1990), *Human Rights in Islam*, Leicester, The Islamic Foundation.
- _____ (1983), *Islamic Law and Constitution*, 8th Edition, Lahore, Islamic Publications.
- Mehat, H.** (1993), *Islamic Criminal Law and Behaviour*, Kuala Lumpur, Muslim Youth Movement of Malaysia.
- Othman, Mahmud Saedon Awang** (1991), *Undang-Undang Keterangan Islam*, Kuala Lumpur, Malaysia, Dewan Bahasa Dan Pustaka Kementerian Pendidikan.
- _____ (1996), *An Introduction to Islamic Law of Evidence*, Shah Alam, Malaysia, Hizbi.
- Qutb, Sayyid** (1954), *Al-[^]Adalah al-Ijtima[^]iyah fi'l Islam*, 4th Edition, Cairo, [^]Isa al-Babi.
- Rahman, F.** (1982), *Islam and Modernity*, Chicago and London, University of Chicago Press.
- Said, E.** (1997), *Covering Islam*, London, Vintage.
- _____ (1995), *Orientalism*, London, Penguin.
- Sanad, N.** (1991), *The Theory of Crime and Criminal Responsibility*, Chicago, University of Illinois.
- Sayyid, B.S.** (1997), *A Fundamental Fear: Eurocentricism and the Emergence of Islamism*, London and New York, Zed Books.
- Schacht, J.** (1964, reprint 1974), *An Introduction to Islamic Law*, Oxford, Clarendon.
- _____ (1970), "Law and Justice" in *The Cambridge History of Islam*, Vol. 2B, p. 230 post et seq.
- Sid Ahmad, Muhammad [^]Ata Al-Sid** (1995), *The Hudud*, Kuala Lumpur, Malaysia, Muhammad [^]Ata Al-Sid.
- Suyuti, Jalal ad-Din** (1983), *Al-Ashbah wal-Nadza'ir*, Beirut, Dar-ul Kutub [^]Ilmiyyah.
- Ullah, M.** (1986), *The Administration of Justice in Islam- An Introduction to the Muslim Conception of the State*, New Delhi, Kitab Bhavan.

The Contextualisation of Islam in Malaysia

- Abdul Monir, bin Yaacob** (1997), "Ulama Dan Fiqh Di Malaysia," *IKIM Law Journal*, Vol. 1, No. 1.
- Abdullah, bin Abu Bakar** (1404H), "Pentadbiran Keadilan Di Mahkamah-Mahkamah Syariah Malaysia," *Jurnal Hukum*, 149.
- Alias, Mohamed** (1994), *PAS' Platform: Development and Change 1951-1986*, Shah Alam, Malaysia, Gateway Publishing.
- Malayan Law Journal** (1996), *The Evidence Act 1950*, Annotated Statutes of Malaysia, Kuala Lumpur.
- Aun, Wu Min** (1990), *The Malaysian Legal System*, Petaling Jaya, Malaysia, Longman.
- Azad, Ghulam Murtaza** (1994), *Judicial System of Islam*, New Delhi, Kitab Bhavan.
- Balogun, S.U.** (1997), "The Status of Shari'ah in Malaysia," *Hamdard Islamicus*, Vol. XX, No. 2.
- Choi, L.** (1998), *Kamus Perwira - Bahasa Melayu/Bahasa Inggeris*, Selangor, Penerbitan Daya Sdn Bhd.
- Clifford, H.** (1961), "Expedition: Terrangganu and Kelantan," *JMBRAS*, Vol. 38, Pt. 1.
- Dickinson, A.H** (1941), "The History of the Creation of the Malacca Police," *JMBRAS*, Vol. 19, Pt. 2.
- Fang, L.Y.** (1976), *The Laws of Melaka*, The Hague, Martinus Nijhoff (published with the Malay text: *Undang-Undang Melaka*, Bibliotheca Indonesica, 13, Koninklijk Instituut Voor Taal, Land En Volkenkunde).
- Hashim, Muhamad Suffian**, "The Relationship between Islam and the State in Malaya," *Intisari*, Vol. 1.
- Hassan, Syarifah Zaleha Syed** (1990), "Towards a Syariah-based Society: Religious Rationalization and the Development of the Islamic Legal Order in Malaysia," *Jurnal Antropologi Dan Sociologi*, Vol. 18, pp. 41-53.
- Havinden and Meridith** (1993), *Colonialism and Development - Britain and its tropical colonies, 1850-1960*, London and New York, Routledge.
- Hooker, M.B.** (1968), "A Note on the Malaysia Legal Texts," *Journal of the Malayan Branch of the Royal Asiatic Society (JMBRAS)*, Vol. 41, Pt. 1, pp. 157-163.
- Ibrahim, A.** (1965), *Islamic Law in Malaya*, Singapore, Malaysian Sociological Research Institute.
- _____ (1978), *The Position of Islam in the Constitution of Malaysia*, Kuala Lumpur, Oxford University Press.
- _____ (1992), "Islamic Law in Malaysia since 1972," in *Developments in Malaysian Law - Essays to Commemorate the Twentieth Anniversary of the Faculty of Law*, Petaling Jaya, Universiti Malaya.
- Ibrahim, A. and Ahilemah Joned** (1995, revised), *The Malaysian Legal System*, 2nd Edition, Kuala Lumpur, Dewan Bahasa Dan Pustaka.
- Ibrahim, A., Othman, M.S.A. and Hassan, M. K.** (1992), "Islamisation of the Malay Archipelago and the Impact of Al-Shaf'i's Madhhab on Islamic Teachings in Malaysia," *International Islamic University Law Journal*, Vol. 2, Kuala Lumpur.

- Ijtimak Haiah Ulama Malaysia** (1994), *Garis panduan Perlaksanaan Siasah Syariyyah Dalam Pentadbiran Negara*, Kuala Lumpur, Yayasan Dakwah Islamiah Malaysia (YADIM).
- Ismail Mohd, Abu Hassan** (1997), *The Theory of Evidence in the Islamic Tradition And in the Law of Malaysia: A Comparison*, Phd thesis, Manchester, University of Manchester.
- Ismail, Rose (ed)** (1995), *Hudud in Malaysia - The Issues at Stake*, Kuala Lumpur, SIS Forum (Malaysia Berhad).
- Kamali, Mohamed Hashim** (1995), *Punishment in Islamic Law: An Enquiry Into the Hudud Bill of Kelantan*, Kuala Lumpur, Institut Kajian Dasar.
- Kempe, J. E. and Winstedt, R.O.** (1952), "A Malay Legal Miscellany," *JMBRAS*, Vol. 25, Pt 1.
- _____ (1948), "A Malay Legal Digest Compiled for ^Abd al-Ghafur Muhaihu'd-din Shah, Sultan of Pahang 1592-1614," *JMBRAS*, Vol. 21, Pt 1, pp. 1-67.
- Kim, Khoo Kay (ed)** (1980), *Tamadun Di Malaysia*, Kuala Lumpur, Persatuan Sejarah Malaysia.
- Mahmud Zuhdi, Bin Haji Abdul Majid** (1984), *Criminal Responsibility in English and Islamic Law*, Masters thesis, Canterbury, University of Kent.
- Majid, Mimi Kamariah** (1987), *Criminal Procedure in Malaysia*, Kuala Lumpur, University of Malaya.
- Mohamed, Zabidi** (1998), *Tersungkur Di Pintu 'Syurga'; The Untold Truth and Inside Story of al-Arqam & ISA (Detention Without Trial)*, Kuala Lumpur, Zabidi Publications.
- Morrah, P.** (1963), "The History of the Malayan Police," *JMBRAS*, Vol. 36, Pt 2, No. 202.
- Omar, Haniff** (1990), *Kepolisian Dan Keselamatan*, Kuala Lumpur, AMK Interaksi.
- Othman, Mahmud Saedon Awang** (1409H), "Syarat Menjadi Kadi," *Jurnal Hukum* 29.
- Othman, Norani** (1993), "The Socio-Political Dimensions of Islamisation in Malaysia: A Cultural Accommodation of Social Change?" *Jurnal Antropologi Dan Sociologi*, Vol. 20, pp. 109-127.
- Pluvier, J.** (1974), *South-East Asia from Colonialism to Independence*, Kuala Lumpur, Oxford University Press.
- Raffles, S.** (1879), "The Maritime Code of the Malays," *Journal of the Southern Branch of the Royal Asiatic Society*, No. 3, pp. 62-84.
- Roff, W.R.** (1974), *Kelantan, Religion, Society and Politics in a Malay State*, Kuala Lumpur, OUP.
- Salleh Abas** (1404H), "Perlaksanaan Undang-Undang Islam di Malaysia," *Jurnal Hukum*, 143.
- Sandhu and Wheatley (eds)** (1983), *Melaka - The Transformation of a Malay Capital - c. 1400-1980*, Vol. 1, Kuala Lumpur, Oxford University Press.
- Seda-Poulin, Maria Luisa** (1993), "Islamization and Legal Reform in Malaysia: The Hudud Controversy of 1992," *Southeast Asian Affairs*, Singapore, pp. 224-242.
- Winstedt, R.O.** (1961), *The Malays - A Cultural History*, London, Routledge & Keegan Paul.
- _____ (1953), "Legal Digest from Perak," *JMBRAS*, Vol. 26, Pt. 1.
- Winstedt, R.O. and de Jong, P.E.J.** (1954), "A Digest of Customary Law from Sungai Ujong," *JMBRAS*, Vol. 27, Pt 3, pp. 1-71.

Yegar, M. (1979), *Islam and Islamic Institutions in British Malaya: Policies and Implementation*, Jerusalem, The Magnum Press.

Yusoff, Hasan (1983), *Perhubungan Polis Dan Orangramai Di Malaysia - Satu Kajian Tentang Sikap Penduduk-Penduduk Kuala Lumpur*, Masters thesis, Bangi, Malaysia, Universiti Kebangsaan Malaysia.

Zakaria, Zainur (1992), *Dari Common Law Kepada Common Law Malaysia*, Kuala Lumpur, Seminar Syariah Dan Common Law Di Malaysia, sponsored by UKM, the Malaysian Lawyer's Association and the Prime Minister's Department, Dewan Mukhtar, Pusat Islam.

Newspapers:

New Straits Times

New Sunday Times

The Sun (Malaysia)

Comparative analyses:

Hooker, M.B. (1975), *Legal Pluralism*, Oxford, Clarendon Press.

Legrand, P. (1995), "Comparative Legal Studies and Commitment to Theory," 58 *Modern Law Review*, pp. 262-273.

Markesenis, B. (1997), *Foreign Law & Comparative Methodology*, Oxford, Hart Publishing.

Merryman, J.H. (1985), *The Civil Law Tradition*, 2nd Edition, Stanford, Stanford University Press.

Van Hoecke, M. and Warrington, M. (1998), "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law," *International and Comparative Law Quarterly*, Vol. 47, pp. 495-536.

Wilson, G. and Rogowski, R. (1996), *Challenges to European Legal Scholarship: Anglo-German Legal Essays*, London, Blackstone Press.

Zweigert, K. and Kotz, H. (1993), *An Introduction to Comparative Law*, 2nd Edition (trans. Tony Weir), Oxford, Oxford University Press.