

**BLASPHEMY AND FREEDOM OF SPEECH: THE
ISLAMIC PERSPECTIVE**

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by
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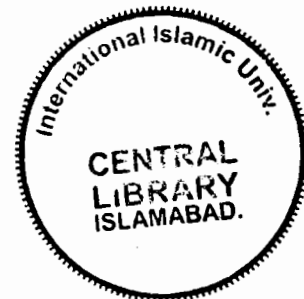
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PERSPECTIVE**

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ABSTRACT

PUNISHMENT OF BLASPHEMY BETWEEN HADD AND SIYASAH: A PURPOSEIVE APPROACH

by

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The main objective of this research is to explore and establish the position of blasphemy in the Islamic legal system within the framework of the Purposes of Islamic Law, and to see whether its punishment amounts to *hadd* or *siyasah* under the Islamic Criminal Law and its systems of punishment.

It begins with the meaning and definition of blasphemy, and what constitutes blasphemy in Islam and Christianity. The opinions of eminent scholars of both religions are stated on the issue, and a brief account of Europe's transition from blasphemy law to freedom of speech is also given. But the main highlight is how Islamic law treats blasphemy, and many verses from the Qur'an are quoted in its support. Another issue discussed is the relationship of blasphemy with apostasy as both religions treat blasphemy as a serious form of apostasy.

This is followed by a brief discussion on rights and freedoms, and in particular, the right of free speech in Islam. There can be no denying that Islamic law grants all fundamental rights and freedoms to its followers. However, these rights are not absolute and unqualified. The reasons for imposing certain limitations on these rights, and freedom of expression in particular are discussed along with the restrictions actually imposed. Blasphemy is of course one such limitation.

The next chapter deals with the status of blasphemy law in an Islamic society. This discussion would have been incomplete without the Purposes of Islamic Law. Therefore, their importance is discussed, as well as their hierarchy. Religion being the centre of all activity in Islam has the highest priority in every sphere, and blasphemy laws being there to protect the interest of religion automatically gain priority over other rights. It is how the system of an Islamic society works. Anyone attacking the interest of religion by committing blasphemy, commits an offence not just against the religion, but against the whole system.

The last chapter discusses the most important issue of the punishment of blasphemy. The majority of the Muslim scholars agree that blasphemy is to be punished by death and is dealt with under the *hadd* punishment. However, the Hanafi jurists disagree on the issue of blasphemy committed by non Muslims, as they place it under *siyasah*, considering it the right of the community at large or the right of state. This chapter explores this difference of opinion in detail and ultimately concludes by agreeing with the opinion of the Hanafi jurists. The question of repentance by non Muslim offenders is also examined here, with the conclusion that since it falls under *siyasah*, therefore governed by such rules of procedure and

standards of evidence as the state may prescribe. It is further concluded that blasphemy punishment for Muslims, although strictly falls under *hadd* due to the fact that a Muslim committing blasphemy, actually commits a grave form of apostasy. However, *hadd* has certain implications that are not present in the case of blasphemy, therefore it may be governed under *siyasah*.

TABLE OF CONTENTS

ACKNOWLEDGMENTS.....	iv
INTRODUCTION.....	1
CHAPTER 1: MEANING OF BLASPHEMY.....	3
1.1. Definition of Blasphemy.....	3
1.2. Classical Theological Approach to Blasphemy.....	10
1.2.1. Christianity's Approach to Blasphemy (Role of the Church).....	10
1.2.2. Blasphemy and Heresy: Distinguished.....	11
1.2.3. Islamic Approach to Blasphemy, (<i>Sabb Allah wa Sabb Al Rasul</i>).....	20
1.2.3.1: Scope of the concept.....	23
CHAPTER 2: RIGHT OF FREEDOM OF SPEECH IN ISLAM...	25
2.1. Definition and meaning of 'Right'.....	25
2.1.1. Kinds of Rights.....	26
2.2: Definition and meaning of Freedom.....	28
2.3: Definition and meaning of Freedom of Speech.....	29
2.3.1. Characteristics of Freedom of Speech.....	30
2.3.2: International Documents and Conventions Granting the Right of Freedom of Thought, Speech and Expression.....	31
2.4: A Brief Perspective on the Concept of Right (<i>haqq</i>) in Islam.....	37
2.5: Concept of Freedom of Thought, Speech, Opinion, and Expression in Islam.....	40

2.5.1: Classification of Opinion or <i>Ra'y</i>	42
2.6: Restrictions on Freedom of Speech and Expression	43
2.6.1: Public Utterance of Hurtful Speech.....	45
2.6.2: Slanderous Accusation (<i>qadhif</i>).....	47
2.6.3: Libel (<i>iftira'</i>).....	48
2.6.4: Insult (<i>sabb, shatm</i>) and Cursing (<i>la 'n</i>).....	49
2.6.5: Attribution of Disbelief to a Muslim (<i>Takfir al Muslim</i>).....	51
CHAPTER 3: POSITION OF BLASPHEMY LAW AND FREEDOM OF EXPRESSION WITHIN THE FRAMEWORK OF MAQASID AL SHARIAH (PURPOSES OF ISLAMIC LAW).....	54
3.1: Introduction to the <i>Maqasid al Shariah</i> (Purposes of Islamic Law).....	54
3.2: Priorities within the Primary Purposes/ Essential Benefits.....	58
3.3: Position of Blasphemy and Freedom of Speech within the Hierarchy of <i>Maqasid</i>	62
CHAPTER 4: PUNISHMENT OF BLASPHEMY.....	66
4.1: Rulings of jurists on the offence of blasphemy.....	66
4.2: Proof in the Qur'an and the <i>Sunnah</i> as expounded by the Jurists.....	69
4.3: Repentance of the Offender.....	76
4.4: Blasphemy by Non Muslims.....	77
4.5: Classification of Punishments in Islamic law.....	80
4.5.1: Punishment of Blasphemy; the Right of God, or the Right of State.....	83
CONCLUSION.....	87
BIBLIOGRAPHY.....	90

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INTRODUCTION

The offense of blasphemy and the laws proclaiming it so, in the modern times, have become the source of a number of controversies. With the rising popularity of the concept of Human Rights, the laws relating to blasphemy are coming under much criticism. Although essentially, the concept of blasphemy has been present in every religion, recently, it has been associated more with Islam. More and more it is being propagated by the West that the Islamic laws of blasphemy curtail the basic rights of persons pertaining to freedom of speech and religion. The penal laws regulating this offence have also been called to violate human rights.

This research aims at explaining the concept blasphemy in Islamic law and to explain its laws, their purpose and position in an Islamic society. The focus is mainly on how Islamic law treats blasphemy, what position does the Qur'an and the *Sunnah* take on this issue, and what are the opinions of the Islamic scholars on it. Further, what position the blasphemy laws occupy with respect to human rights, in an Islamic society when seen in the light of the purposes of Islamic law or the *Maqasid al Shariah*, and under the Islamic criminal law.

The first chapter deals with the meaning and explanation of Blasphemy in Islamic law.

The second chapter briefly explores the concept of the fundamental right of freedom of speech and expression in Islam; its various aspects and limitations.

The third chapter deals with the status of blasphemy laws and freedom of speech within the framework of the *Maqasid al Shariah*. It also talks about the hierarchy of the

purposes within the *Maqasid* and how it helps in determining the position of blasphemy within the Islamic legal and social system.

The last chapter is perhaps the most important one. It explores the legal position of blasphemy in the Islamic legal system. Various opinions of the Islamic scholars have been discussed with reference to the punishment of blasphemy, both for Muslims and non Muslims. It further explores the classification of rights within the Islamic criminal law and how they operate. This chapter especially focuses on the concepts of *hadd* and *siyasah* in Islamic law and finally attempts to answer the question that with the growing strength of the concept of human rights and particularly freedom of speech, what position does blasphemy law occupy in the Islamic criminal law and whether it falls under *hadd* or *siyasah*, especially keeping in view the purposes of Islamic law that form the basis of an Islamic society.



CHAPTER 1

CONCEPT OF BLASPHEMY

1.1: Definition of Blasphemy:

Blasphemy originates from the Greek word *blaptein*, meaning to injure, and *pheme*, meaning reputation.¹

Blasphemy is defined in the Webster's Dictionary as "[P]ropane or contemptuous speech, writing, or action concerning God or anything held as divine/ any remark deliberately mocking or contemptuous of God".² The concept is extended to irreverent remarks referring to any person or thing regarded as sacred.³

¹ www.newadvent.org/cathen/02595a.htm (February 12 2006). According to Oxford Dictionary, Blasphemy means: "behavior or language that insults or shows a lack of respect for God or religion". (*Oxford Advanced Learner's Dictionary*, Sixth Edition (London: Oxford University Press, 2000), 112) Also, to *blaspheme* means to speak about God or the Holy things of a particular religion in an offensive way". (Ibid.)

² *Webster's New World College Dictionary*, (Third edition, Simon and Schuster Inc., 1997), 147.

³ Ibid. Blasphemy is defined in Online Catholic Encyclopedia as: "Blasphemy signifies etymologically gross irreverence towards any person or thing worthy of exalted esteem. While etymologically blasphemy may denote the derogation of the honor due to a creature as well as of that belonging to God, in its strict acceptation it is used only in the latter sense... "Blasphemy, by reason of the significance of the words with which it is expressed, may be of three kinds; (1) It is heretical when the insult to God involves a declaration that is against faith, as in the assertion: God is cruel and unjust or The noblest work of man is God. (2) It is imprecatory when it would cry a malediction upon the Supreme Being as when one would say: Away with God. (3) It is simply contumacious when it is wholly made up of contempt of, or indignation towards God." "Again,



Blasphemy is defined in The Oxford Dictionary of Catholic Church, 1958 as "Speech, thought or action manifesting contempt for God."⁴

It is defined in Thomas and Gale Legal Encyclopedia as "The malicious or wanton reproach of God, either written or oral"⁵

It may be noted that the common factors in all the above definitions are that blasphemy is the utterance of some profanity against God or religion or any sort of contemptuous behavior towards the same. However, this does not seem a complete definition as it leaves out profanity against the Prophets and Apostles who are considered sacred in some religions like Islam. This is especially true for the definitions given by the Oxford Dictionary of Catholic Church and the one given in the Thomas and Gale Legal Encyclopedia. Both these definitions imply that only such words and actions may be considered blasphemous that show any malice or contempt for God. Both the definitions neglect the sanctity of the Holy

blasphemy may be (1) either direct, as when the one blaspheming formally intends to dishonor the Divinity, or (2) indirect, as when without such intention blasphemous words are used with advertence to their import."
www.newadvent.org/cathen/02595a.htm (February 12 2006)

⁴ <http://www.anglicantas.org.au/issues/jh-blasphemy.html> (February 12 2006)

⁵ "In English law, the offense of speaking disparaging words about God, Jesus Christ, the Bible, or the Book of Common Prayer with the intent to undermine religious beliefs and promote contempt and hatred for the church as well as general immorality." "In U.S. law, any maliciously intended written or oral accusation made against God or religion with the purpose of dishonoring the divine majesty and alienating mankind from the love and reverence of God." "Blasphemy is a common-law offense and also an offense by statute in certain jurisdictions. It must be uttered in the presence of another person or persons or published in order to be an offense. Mere use of profanity is not considered blasphemy." (blasphemy. "West's Encyclopedia of American Law". The Gale Group, Inc, 1998. Answers.com 13th October 2006. <http://www.answers.com/topic/blasphemy>.)



Scriptures and the Prophets of God who are just as sacred and deserving in respect. The concept that respect must be given to God as well as His Books and Prophets is a very strong one in Islam. Islam believes in the sanctity of all the above and this concept is sadly lacking in the above given definitions of blasphemy.

In this regard, preference might be given to the definition of Webster's dictionary that extends the concept to all such persons and things that may be considered to be revered by any religion. Summarizing all the above definitions, it may be concluded that the concept of blasphemy includes all sorts of profanities and malicious behavior towards God and his Apostles, or any religion or any person or thing that may be considered sacred and worthy of respect by any sect of people.

The above mentioned definitions give the literal meaning of blasphemy only. To look at its definition legally, various laws must be seen that are enforced in different parts of the world and that consider blasphemy to be a criminal offence. Since it is difficult to discuss all such laws, only the Pakistani and British law has been selected for this study.

The Pakistani blasphemy law is present in a codified form in the Pakistan Penal Code, 1860 in sections 295 to 295 C.

Pakistan Penal Code (1860):

Section 295

Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.



Section 295-A

Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of Pakistan, by words, either spoken or written, or by visible representations insults the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may exceed to ten years, or with fine, or with both.

Section 295-B

Whoever willfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract therefrom or uses it in any derogatory manner or of any or for any lawful purpose shall be punishable with imprisonment for life.

Section 295-C

Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.

Sections 295 and 295-A are general provisions that seek to protect the religious sentiments of all classes of people by making it an offence to commit any act of insult and defiling that is intended to infuriate any class or sect of people in Pakistan. This includes all persons from all religions and sects. The element of mens rea is specifically mentioned here. The intention of the offender must be malicious in order to be convicted under these two sections and the act done must be clearly intended to invoke public anger by any certain class of people.

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On the other hand sections 295-B and 295-C are very specific and aimed at protecting the honor of the Prophet (peace be upon him) and the Holy Qur'an. But there is no mention of 'intent' in these sections. This may lead us to assume that these are strict liability offences like those in the British law. However, we must also keep in mind the general principles of Islamic law that make it mandatory to look at the intention of the offender. These provisions specifically dealing with Islamic laws related to blasphemy and Muslims and therefore, the general principles of Islamic law should also be kept in mind. Another important thing to note here is that these provisions do not differentiate between Muslims and non Muslims. The same punishment has been prescribed for all offenders liable under these two sections. But the Islamic law on blasphemy as expounded by the jurists is different for Muslims and non Muslims and has been discussed in the last chapter.

As far as the definition of blasphemy is concerned, it may be noted that the Pakistan Penal Code does not define the term 'blasphemy'. It is only by looking at the literal meanings of blasphemy that we realize that these provisions are essentially talking about blasphemy and declaring it to be a punishable offence. Further, these provisions do not mention anything about the insulting or reviling God, which is the first thing that all literal definitions of blasphemy talk about.

In case of England and Wales, the legal notion of blasphemy in goes back many centuries, and the laws of blasphemy and blasphemous libel are still in force in the common law of England and Wales. But this law only protects the beliefs of the Church of England. Northern Ireland inherited Irish Common law, which included the offence of blasphemy.



However, there have been no recent cases there for blasphemy. Same is true for the Scottish law.⁶

The offence of blasphemy in England and Wales was originally part of the canon law. In the 17th century, it was declared as a common law offence by the Court of King's Bench, which was punishable by the common law courts.⁷ "All blasphemies against God, including denying His being or providence, all contumelious reproaches of Jesus Christ, all profane scoffing at the Holy Scriptures, and exposing any part thereof to contempt or ridicule, were punishable by the temporal courts with fine, imprisonment, and corporal punishment."⁸

An act of 1698, commonly known as the Blasphemy Act enacted that

"if any person, educated in or having made profession of the Christian religion, should by writing, preaching, teaching or advised speaking, deny that the members of the Holy Trinity were God, or should assert that there is more than one god, or deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he should, upon the first offence, be rendered incapable of holding any office or place of trust, and for the second incapable of bringing any action, of being guardian or executor, or of taking a

⁶ First Report of the Select Committee on Religious Offences in England and Wales.

<http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrelof/95/9505.htm> (accessed July 17, 2007)

⁷ http://www.martinfrost.ws/htmlfiles/scottish_anatomy/blasphemy_law.html (accessed July 18, 2007)

⁸ Ibid.

legacy or deed of gift, and should suffer three years imprisonment without bail”.⁹

The detail of how English law treats blasphemy has been discussed in detail later. The important point to note here is that this provision provides protection to Christian beliefs only and does not extend to any other religion or sect. This makes its scope very narrow.

According to a report submitted by the Committee on Culture, Science and Education to the Parliamentary Assembly of the Council of Europe (on June 8, 2007), under the English common law of blasphemy, protection is extended to the Church of England only and does not include all religious beliefs and organizations. As the above given provision shows, it includes any thing that shows contempt for God, Jesus or the Bible, or the teachings of the Church of England.¹⁰ This clearly does not give a complete definition of blasphemy and leaves out a lot of things.

However the Committee, in its report, has given its own definition that should be considered. “Blasphemy can be defined as the offence of insulting or showing contempt or lack of reverence for God and, by extension, toward anything considered sacred.”¹¹

⁹ http://www.martinfrost.ws/htmlfiles/scottish_anatomy/blasphemy_law.html. (accessed July 18, 2007)

¹⁰<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11296.htm>. (accessed July 17, 2007)

¹¹ Ibid.

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This seems to be a complete definition that considers almost all aspects of blasphemy and therefore, may be preferred. It includes everything that is sacred to any class or sect of persons.

1.2. Classical Theological Approach to Blasphemy

1.2.1. Christianity's Approach to Blasphemy (Role of the Church):

Before the fourth century, Christianity was heavily influenced by Greek language. Accordingly, impiety, which was the Greek equivalent of blasphemy, rivaled it as the name of the crime.

“To the Greeks, blasphemy meant any sort of speaking evil, verbal abuse, or defamation, especially profane speech”¹². Although the English word impiety has a softer meaning, signifying lack of piety or something impertinent, in Greek the word signified “shocking and abhorrent ideas about religion”¹³. In early Christian thoughts, impiety, like blasphemy, assumed several multifaceted meanings. Blasphemy became more than just cursing or reproaching of God. It came to imply severing of Christian unity. Any viewpoint or statement that digressed from the true faith was considered blasphemous or impious.¹⁴

¹² Leonard W. Levy, *Blasphemy, Verbal Offense Against the Sacred, From Moses to Salman Rushdie*, (United States of America: The University of North Carolina Press, 1993), 31. (hereinafter referred to as *Levy, Blasphemy*)

¹³ Ibid.

¹⁴ Ibid.



1.2.2: Blasphemy and Heresy: Distinguished:

Under Christianity, up till the fourth century blasphemy was a concept that was encompassed by the concept of heresy. Blasphemy was considered impiety and a species of heresy until the time of Thomas Aquinas in the thirteenth century. It was in this time that an attempt was made to coherently define blasphemy.¹⁵

Heresy, according to the Oxford English Dictionary, is a theological view or a religious dogma that conflicts with, or held contrary to the catholic or Orthodox beliefs of the Christian Church. It may be extended to any church, doctrine, or religious system that is considered to be orthodox.¹⁶ By extension, it may also be said that heresy is any opinion or doctrine that is considered contrary to generally accepted beliefs, especially in religion.¹⁷ It must be kept in mind that heretics usually did not define their own beliefs as heretical. Heresy is a value-judgment and the expression of a view from within an established belief system. For instance, Roman Catholics held Protestantism as a heresy while some non-Catholics considered Catholicism as the Great Apostasy.¹⁸

Before Thomas Aquinas, for almost twelve centuries after the “Trinitarian Controversy”¹⁹, blasphemy itself has no history as from the Church’s standpoint it was

¹⁵ Ibid.

¹⁶ heresy. Reference.com. *Wikipedia, the free encyclopedia*. <http://www.reference.com/browse/wiki/Heresy> (accessed: November 08, 2006).

¹⁷ *Oxford Advanced Learner’s Dictionary*, Sixth Edition, (London: Oxford University Press, 2000), 558.

¹⁸ heresy. Reference.com. *Wikipedia, the free encyclopedia*. <http://www.reference.com/browse/wiki/Heresy> (accessed: November 08, 2006).

¹⁹ This means the Christian concept of “Trinity” that arose in the fourth century in the time of Constantine that resulted in a big controversy as many religious leaders of that time disagreed with it. However, the origins

essentially the same crime as heresy. The reason for this was that at that time, the Church faced a propagation of other competing religious doctrines that challenged its mastery. The preoccupying problem of the Church was the different interpretations of the faith rather than abusive speech. The Church was in a position to enforce its will on the people as the State supported its orthodoxy. Therefore, people were declared as heretics and were made to suffer if their views differed from that of the Church even though they may have been devout Christians.²⁰

The first Catholic theologian who promoted systematic persecution for heresy and blasphemy was Augustine (354-430 A.D.), the bishop of Hippo Regius (now in Algeria). His contributions to the Church made him the most respected figure from his death in 430 to the time of Thomas Aquinas in the Thirteenth Century.²¹ He is also the most authoritative name in the history of the Theory of Persecution. Although he did not originate that theory, he gave it substance and force which led to the medieval mentality and the Inquisition.²²

It would have been un-Christian for the Church to have any direct hand in murder of those declared heretics or blasphemers. Therefore, Augustine though opposed death penalty, he nevertheless justified it. While the Church kept the image of charity, the State inflicted the death penalty wherever it thought necessary. The Church would hand over the religious offenders to the State for this purpose. The logic was that such an offender, being a

of this theory go as far back as 2nd and 3rd century in the time of Irenaeus who was the first to propagate "orthodoxy" and to establish the doctrine of four gospels. (ibid)

²⁰ Levy, *Blasphemy*, 32-45.

²¹ Edgar Bodenheimer, *Jurisprudence; The Philosophy and Method of the Law* (Massachusetts: Harvard University Press, 1962), 22. (hereinafter referred to as Bodenheimer, *Jurisprudence*)

²² Levy, *Blasphemy*, 46.



rebel against God and religion was also a rebel against the State²³. Augustine believed that the State being a defender of the Church and an Executor of its commands²⁴, therefore, must deal with heretics²⁵. The State must protect itself and the society by using force against them.

The Church of Rome believed that Christ acted through the Church and salvation can come through Rome only. As long as the Church could continue its claim on salvation and deliverance, it could control all state policies regarding offenses against religion. The theory was that a society gives up its right to be protected by the heaven against natural disasters when it offends divine powers. Augustine said that rulers were ministers of God and had the power to correct all wrongs and to take revenge from evil doers. A heretic was an obstacle in the path of salvation and was a serious threat to himself as well as to the State, the Church and the society. This made him a public enemy and he must be corrected for the sake of the State and society or else be removed.²⁶

The concept of salvation was the Church's strongest point and the source of persecution. Because salvation could only be attained through the Church, the State had to cooperate with the Church in all matters of faith and religion. Furthermore, toleration and mercy towards the heretic transferred his guilt to the Church and the State for allowing him to infect others with his ideas and sins. According to Augustine, "toleration could bring a curse to State and Church; indulging willful error in a matter of salvation betrayed the

²³ Ibid.

²⁴ Bodenheimer, *Jurisprudence*, 22.

²⁵ It may be noted here that heresy itself remained an officially punishable offence in Roman Catholic nations till the late 18th century. heresy. Reference.com. *Wikipedia, the free encyclopedia.* <http://www.reference.com/browse/wiki/Heresy> (accessed: November 08, 2006).

²⁶ Levy, *Blasphemy*, 46-49.

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revealed faith and risked the worst calamities that could befall mankind in his life and the after life”²⁷. From the standpoint of the State, no one who betrayed the faith could be a dutiful subject. The heretic could cause wars and treasons. Blasphemy was the most “diabolical heresy.”²⁸

Augustinian thought represented the final stage of Roman Catholicism under the old Roman Empire.

“The Greek Orthodox Church prevailed in Byzantine, which was the Eastern half of the old Empire. Emperor Justinian I supported a substantial codification of laws called the Corpus Juris Civilis. It influenced the subsequent legal development in Europe to a great extent.”²⁹

“Its provision on blasphemy, dating from 529, alleged that famine, earthquake, and pestilence occurred because a failure to punish blasphemy provoked God’s wrath. Although blasphemers would ultimately lose their souls, the Code fixed the punishment in this world as death, in order to bring offenders into anguish. Imperial officers who were slack in enforcement would be damned by God and subject to the Emperor’s displeasure. Charlemagne, who in 800 founded what became the Holy Roman Empire in Central Europe, endorsed this provision in Justinian’s Code as did successors.”³⁰

²⁷ Ibid.

²⁸ Ibid

²⁹ Ibid. 49-50.

³⁰ Ibid. 50.

During all this time, the concepts of blasphemy and heresy overlapped and no attempt was made to distinguish blasphemy as a separate crime and a separate legal concept. Heresy superseded blasphemy and the theologians and the Church identified the two crimes as one and the same.

“The theology and philosophy of Medieval Catholicism reached its culmination in the monumental system of Thomism. Thomas Aquinas (1226-1274) was the greatest of the scholastic philosophers of the Middle Ages and his teachings may still be regarded as an authoritative expression of the theological, philosophical and ethical convictions of Roman Catholicism.”³¹ He arduously illustrated on the various offenses against religion.

Heresy is defined by Thomas Aquinas as “a species of infidelity in men who, having professed the faith of Christ, corrupt its dogmas.”³² “The Catholic Church teaches that its doctrines are the authoritative understandings of the faith taught by Christ and that the Holy Spirit protects the Church from falling into error when teaching these doctrines. To deny one or more of those doctrines, therefore, is to deny the faith of Christ. Heresy is both the non orthodox belief itself, and the act of holding to that belief.”³³

According to Thomas Aquinas, there were several species of unbelief, some which are; heresy, paganism, Judaism, apostasy, and blasphemy. One thought was that since blasphemy meant an utterance of an insult against God, therefore it could not come within the ambit of species of unbelief. But Thomas Aquinas opposed this view. His stance was that blasphemy opposed the confessions of faith and was therefore an untrue belief.

³¹ Bodenheimer, *Jurisprudence*, 23-24.

³² heresy. Reference.com. *Wikipedia, the free encyclopedia*. <http://www.reference.com/browse/wiki/Heresy> (accessed: November 08, 2006).

³³ Ibid.

According to him blasphemy denigrated and mocked the faith, thus constituting species of unbelief.³⁴

He asserted that to say or think something false about God was heresy as much as it was blasphemy because he believed that both were deviations from the true faith and therefore both were species of unbelief. Both were mortal sins as both claimed a falsity against God, therefore, both cannot be tolerated. Thus, heretics and blasphemers must be executed.³⁵

Thomas Aquinas not only defined blasphemy in terms of heresy, he condemned all heresies as blasphemy. According to him, heretics, "by right --- can be put to death and despoiled of their possessions by the secular [authorities], even if they do not corrupt others, for they are blasphemers against God, because they observed a false faith. The reasoning about the blasphemer was similar. Blasphemy was the most grievous and the greatest sin."³⁶

Thomas Aquinas in regard to blasphemy, agreed, that blasphemy could not do any harm to God himself. He was primarily concerned with the fact that a blasphemer could bring about much harm by infecting others and tempting others to his sin and damnation. He still favored the death penalty even if the blasphemer seemed to have no effect on the public at large and he could not undoubtedly harm God, his reason being that heretics blaspheme against God and therefore follow a false faith.³⁷ So it can be seen that even Thomas Aquinas considered heresy and blasphemy to be interchangeable terms and made no attempt to draw a line between the two.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid. 52.

³⁷ Levy, *Blasphemy*, 52.

This position on blasphemy continued throughout the Middle Ages until the Reformation period.

It may be noted here that according to the teachings of the Church, as already mentioned, any one who deviated from the true Christian faith was punishable for the crime of heresy and was thus declared a heretic. Under these teachings, only a Christian could be a heretic. It may again be noted that no formal distinction was made between heresy and blasphemy and these terms were interchangeable for a Christian. Therefore, in the late Middle Ages, Jews were the only people who were regarded as true blasphemers rather than as heretics. In the beginning of the thirteenth century Jews were habitually described as blasphemers. The Church identified Jesus Christ as God and it was the greatest form of blasphemy to reject this. The Jews being guilty of this were punished for blasphemy. Many of them were killed as a consequence and their Holy books were burned.³⁸

In later years, the Church instituted the Inquisition, an official body charged with the suppression of heresy. The Inquisition was active in several nations of Europe, particularly where it had fervent support from the civil authority. The Spanish Inquisition was particularly brutal in its methods, which included the burning at the stake of many heretics. However, it was initiated and substantially controlled by King Ferdinand of Spain rather than the Church; King Ferdinand used political leverage to obtain the Church's tacit approval.³⁹

³⁸ Ibid. 53.

³⁹ Heresy. Reference.com. *Wikipedia, the free encyclopedia*. <http://www.reference.com/browse/wiki/Heresy> (accessed: November 08, 2006).

Throughout the history of the Inquisition, the Church handed over blasphemers to the State to be punished for “heretical pravity,”⁴⁰. This was in conformity with the teachings of Thomas Aquinas’s that, all heretics blasphemed God, and that blasphemy was not in principle different from heresy.⁴¹ The frequency of punishment for blasphemy in the Middle Ages cannot be easily determined and there seems to be a stagnancy in Christian thought on the issues of blasphemy and heresy from the Middle Ages to the Reformation, although, “penalties short of death also existed, including imprisonment on bread and water (then a lingering substitute of death), cutting off the lips or slitting them, burning through the tongue, and tearing it out or cutting it off”.⁴²

This position was maintained from the late twelfth century till Reformation. During this time, many figures emerged who advocated doctrines that were different from that of the Catholic Church and they were all condemned by the Church to be heretics and blasphemers. Until the Modern period, concept of blasphemy was essentially the same as advocated by Augustine and Thomas Aquinas.

However, with the beginning of Enlightenment and the separation of the Church and the State, religion was considered to be something personal that not for State to administer. Also, the emergence of the concept of fundamental rights, especially the advocacy of the Right of Freedom of Speech and Expression had a considerate effect on the implementation of blasphemy laws in England. Slowly, they were abandoned in favor of toleration and fundamental freedoms. The last man to be sent to prison for blasphemy was

⁴⁰ Levy, *Blasphemy*, 56.

⁴¹ Ibid.

⁴² Ibid. 49.

John William Gott. In 1922 he was sentenced to nine months hard labor for comparing Jesus with a circus clown. In Scotland, there has not been a public prosecution since 1843.⁴³

The blasphemy law of England, though still in force, is no longer in practice, especially after the enactment of The Human Rights Act 1998. No blasphemy case has been prosecuted in England and Wales since the passage of this Act, that incorporates elements of the European Convention on Human Rights, but it is a reasonable said that as a consequence of it, any prosecution for blasphemy today would probably fail and even if it did not it would probably be overturned on appeal (if not by the House of Lords then by the European Court of Human Rights) on grounds of denial of the right to freedom of speech and expression.⁴⁴

Such a position in fact shows that it has been abandoned for all practical purposes, as in many other European countries in favor freedom of speech, but it has not been abolished, and many human rights activists are calling for its abolition. The emphasis has shifted from observing religious duties to ensuring freedom of expression.

However, before this, the offence of blasphemy was a common law offence that carried with it strict liability. In other words, intention was considered irrelevant and a person was prosecuted on the grounds whether he had in fact committed the blasphemous act or not. Also, the intention of the law it self, seemed to be the protection of the Church

⁴³ <http://news.bbc.co.uk/1/low/uk/3753408.stm> (accessed 2nd December 2006)

⁴⁴ First Report of the Select Committee on Religious Offences in England and Wales.

<http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrelof/95/9505.htm> (accessed July 17, 2007)

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of England and applied only to Christians. Other religions were not included in it.⁴⁵ This stance is widely different from that of Islamic law where the question of intent is always considered important, and the law on blasphemy applies to all people and all religions.

1.2.3. Islamic Approach to Blasphemy (*Sabb Allah wa Sabb Al Rasul*):

Classical Islamic law penalizes both blasphemy and apostasy (*riddah*) with death⁴⁶. The various schools of Islamic law seem to have the same stand point. “A consensus had developed among Muslim jurists that someone who insults the Prophet (peace be upon him) - or, by extension, one of his Companions- has apostatized and committed an act of infidelity (*kufr*), for which he or she should be executed.”⁴⁷

“In Islam the Arabic terms commonly used in order to describe the practice of vilification of, or blasphemy against, God, the Prophet (peace be upon him), and historical personalities venerated by the Muslim community or different groups within this community are *sabb* (abuse, insult) and *shatm* (abuse, vilification). In addition, there are a number of other terms that are used less frequently in order to describe acts of blasphemy such as *la 'n*

⁴⁵ Ibid.

⁴⁶ Muhammad Hashim Kamali, *Freedom of Expression in Islam*, Revised Edition, (Cambridge: Islamic Texts Society, 1997), 212.(hereinafter referred to as Kamali, *Freedom of Expression*). However, some modern jurists disagree on the punishment of apostasy being death. See Javed Ahmad Ghamidi, *The Penal Shari'ah of Islam*, (Lahore: Dar al Tazkeer,2004).

⁴⁷ David S. Powers, *Law, Society and Culture in the Maghrib, 1300 – 1500* (United Kingdom: Cambridge University Press, 2002), 175.

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(cursing, malediction), *ta 'n* (accusing, attacking), *iddha'* (harming, hurting), or
the verb *nala* with the preposition *min* (do harm to somebody, defame).⁴⁸

Some of the above mentioned terms are used in the following verses of the Qur'an that deal with blasphemy and condemn its perpetrators:

- **“O You who have attained to faith! Do not say [to the Prophet], “Listen to us,” but rather say, “Have patience with us,” and hearken [unto him], since grievous suffering awaits those who deny the truth.”⁴⁹**
- **“Among those of the Jewish faith there are some who distort the meaning of the [revealed] words, taking them out of their context and saying, [as it were,] “We have heard but we disobey,” and, “Hear without hearkening,” and, “hearken though unto us, [O Muhammad]”- thus making a play with their tongues, and implying that the [true] Faith is false. And had they but said, “We have heard, and we pay heed,” and “Hear [us], and have patience with us,” it would indeed have been for their own good and more upright: but God has rejected them because of their refusal to acknowledge the truth- for it is in but few things that they believe.”⁵⁰**

⁴⁸ Lutz Wiederhold, “Blasphemy against the Prophet Muhammad and his Companions (Sabb al Rasul wa Sabb al Sahabah): The Introduction of the topic into Shafi Legal Literature and its relevance in legal practice under the Mamluk rule” (Journal of Semitic Studies, XLII/1, Spring 1997), 40.

⁴⁹ Al Qur'an. 2:104.

⁵⁰ Al Qur'an. 4:46.



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The word 't 'an' in the verse literally means "making a thrust against the Faith.- i.e., attributing to it a fundamental defect".⁵¹

Another verse clearly orders to avoid all blasphemous and disrespectful talks and to reprimand those who indulge in such a practice:

- **"Now, whenever though meet such as indulge in [blasphemous] talk about Our messages, turn thy back upon them until they begin talk of other things; and if Satan should ever cause thee to forget [thyself], remain not, after recollection, in the company of such evildoing folk, for whom those who are conscious of God are in no wise accountable. Theirs, however, is the duty to admonish [the sinners], so that they might become conscious of God."**⁵²

Also,

- **"But if they break their solemn pledges after having concluded a covenant, and revile your religion, then fight against these archetypes of faithlessness who, behold, have no [regard for their own] pledges, so that they might desist [from aggression]."**⁵³

The above mentioned verse clearly talks about fighting those revile Islam

⁵¹ Muhammad Asad, *The Message of the Qur'an*, (Dar al Andalus, Gibraltar, 1984), 112.

⁵² Al Qur'an. 6:68-69.

⁵³ Al Qur'an 9: 12.



1.2.3.1: Scope of the concept:

Jurists of Islamic law faced difficulty in legislating laws for blasphemy due to the fact that in Islamic law, no specific definition of blasphemy was found, it being a somewhat open and broad concept. One reason for the lack of a specific definition in Islamic law is the fact that blasphemy has been treated in conformity with apostasy and also as part of it.

The main characteristic of blasphemy is a disdainful and antagonistic attack on the fundamentals of religions, which offends the feelings of its followers. It is on this basis that blasphemy can be differentiated from apostasy, because apostasy can occur without any antagonistic attack or disrespect being committed. The scholars of Islamic law generally count blasphemy under apostasy with the view that a person who commits blasphemy against the fundamentals of the faith also renounces the faith at the same time. This may perhaps be correct from the Islamic point of view but a separate and distinct definition for blasphemy is still required, especially with reference to non-Muslims who can commit blasphemy but not apostasy.⁵⁴

Dr. Muhammad Hashim Kamali, in his book *Freedom of Expression in Islam* quotes from the *Encyclopedia of Religion and Ethics*, that blasphemy in Islam is a very broad concept and comprises “all utterances expressive of contempt for God, for His Names attributes, laws, commands and prohibitions ... such is the case for instance if a Muslim declares that it is impossible for Allah to see and hear every thing, or that Allah cannot endure to all eternity, or that He is not one (*wahid*) All scoffing at Muhammad (peace be upon him) or any other Prophets of Allah is also to be regarded in Islam as blasphemy.”⁵⁵

⁵⁴ Kamali, *Freedom of Expression*, 213.

⁵⁵ *The Encyclopedia of Religion and Ethics*, vol. II, (England: The Scholar Press Ilkley, 1981), 672.

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It may be noted here that the above definition does not attempt to distinguish between the offence of blasphemy from its allied concepts like apostasy, disbelief (*kufr*) and heresy. Some prominent scholars like Ibn e Taymiyyah and some others have attempted to differentiate blasphemy from apostasy, but the majority of jurists, as already stated, treat blasphemy under apostasy. In other words, there is a tendency to treat blasphemy, apostasy, and heresy essentially under the same species and as interchangeable. This may be, perhaps, due to the fact that during the lifetime of the Prophet (peace be upon him) almost all the cases of apostasy were accompanied by opposition against and abuse of the Prophet (peace be upon him), and as such, it was difficult to distinguish apostasy from blasphemy. In that period, the 'repudiation of Islam', rather than 'insulting the Prophet' (peace be upon him), was seen to be the more serious charge against the enemies of Islam.⁵⁶

⁵⁶ Kamali, *Freedom of Expression*, 215.



CHAPTER 2

RIGHT OF FREEDOM OF SPEECH IN ISLAM

2.1: Definition and meaning of 'Right':

Etymologically speaking the word 'right' is derived from: "Middle English, from Old English *riht*; akin to Old High German *reht* right, Latin *rectus* straight, right, *regere* to lead straight, direct, rule, *rogare* to ask, Greek *oregein* to stretch out."⁵⁷

It is defined in Thomas and Gale Legal Encyclopedia as "In an abstract sense, justice, ethical correctness, or harmony with the rules of law or the principles of morals. In a concrete legal sense, a power, privilege, demand, or claim possessed by a particular person by virtue of law."⁵⁸

"Each legal right that an individual possesses relates to a corresponding legal duty imposed on another. For example, when a person owns a home and property, he has the right to possess and enjoy it free from the interference

⁵⁷ The Merriam-Webster's Online Dictionary. Available at : (<http://www.m-w.com/cgi-bin/netdict?right> accessed May 19th 2007)

⁵⁸ Right. West's Encyclopedia of American Law. Copyright © 1998 by The Gale Group, Inc. All rights reserved. Answers.com May 19th 2007. <http://www.answers.com>.

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of others, who are under a corresponding duty not to interfere with the owner's rights by trespassing on the property or breaking into the home.”⁵⁹

2.1.1: Kinds of Rights:

Rights are usually classified as natural, civil, and political. “Natural rights are those that are believed to grow out of the nature of the individual human being and depend on her personality, such as the rights to life, liberty, privacy, and the pursuit of happiness.”⁶⁰

“Civil rights are those that belong to every citizen of the state, and are not connected with the organization or administration of government. They include the rights of property, marriage, protection by law, freedom to contract, trial by jury, and the like. These rights are capable of being enforced or redressed in a civil action in a court.”⁶¹

“Political rights entail the power to participate directly or indirectly in the establishment or administration of government, such as the right of citizenship, the right to vote, and the right to hold public office.”⁶²

These are usually fixed by the Constitution.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.



Rights can also be perfect and imperfect. "When the things which we have a right to possess or the actions we have a right to do, are or may be fixed and determinate, the right is a perfect one; but when the thing or the actions are vague and indeterminate, the right is an imperfect one."⁶³

Rights are also absolute and qualified. "A man has an absolute right to recover property which belongs to him; an agent has a qualified right to recover such property, when it had been entrusted to his care, and which has been unlawfully taken out of his possession."⁶⁴

Rights can also be divided into legal and equitable. "The former are those where the party has the legal title to a thing, and in that case, his remedy for an infringement of it, is by an action in a court of law. Although the person holding the legal title may have no actual interest, but hold only as trustee, the suit must be in his name, and not in general, in that of the cestui que trust. The latter, or equitable rights, are those which may be enforced in a court of equity by the cestui que trust."⁶⁵

The above definition of 'right' signifies the general view towards this concept. It mostly signifies how the West looks at the concept of right and its relationship with law and society. According to this definition, right basically means a benefit or claim that is bestowed

⁶³ Right. The Lectric Law Library. <http://www.lectlaw.com/def2/q167.htm> (accessed May 19th 2007)

⁶⁴ Ibid.

⁶⁵ Ibid.



upon an individual in any society by virtue of any law in that society. It is, in a way, an authority that law bestows upon a person in a state.

The concept of right in Islam and its relationship with society people and God will be discussed in the later pages as it differs with the western concept on some fundamental principles and approaches although the meaning may be the same.

2.2: Definition and meaning of Freedom:

Freedom is defined in Barron's Legal dictionary as "The state of being free; the absence of restrictions."⁶⁶

It is defined on Word Net Online as "The condition of being free; the power to act or speak or think without externally imposed restraints."⁶⁷

Freedom implies that a person has the right to think, act and express him self in any way he wishes without the fear of any repercussions from any authority and without any external control or limitations.

⁶⁶ freedom. Answers.com. LawDictionary, Barron'sEducationalSeries, Inc, 2003.

<http://www.answers.com/topic/freedom>, accessed May 21, 2007.

⁶⁷ freedom. Answers.com.WordNet1.7.1, Princeton University, 2001.

<http://www.answers.com/topic/freedom>, accessed May 21, 2007.



2.3: Definition and meaning of Freedom of Speech:

Freedom of Speech is defined in Barron's Legal Dictionary as "Freedom of speech is the right to express one's thoughts without governmental restrictions on the contents thereof."⁶⁸

It is defined in Britannica Concise Encyclopedia as "Right of free speech is to express information, ideas, and opinions free of government restrictions based on content."⁶⁹

Columbia Encyclopedia defines it as "It is the liberty to speak and otherwise express one self and one's opinions."⁷⁰

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Freedom of thought, speech or expression means that a person or persons or an association or community is free to express, confirm or study any idea and observation in a civilized and refined way as allowable under the general norms of law ethics and values in a given society at any time. Any kind of restraint or bar on the expression, communication and propagation of the views and opinions of people deprives of them of their basic in alienable right.⁷¹

Generally speaking, freedom of thought, speech and expression means that every individual has the right to express and communicate any idea that he entertains and that

⁶⁸ Freedom of speech. Answers.com. Law Dictionary, Barron's Educational Series, Inc, 2003. <http://www.answers.com/topic/freedom>, accessed May 21, 2007.

⁶⁹ freedom of speech. Answers.com. Britannica Concise Encyclopedia, Encyclopædia Britannica, Inc., 2006. <http://www.answers.com/topic/freedom-of-speech>, accessed May 21, 2007.

⁷⁰ freedom of speech. Answers.com. The Columbia Electronic Encyclopedia, Sixth Edition, Columbia University Press., 2003. <http://www.answers.com/topic/freedom-of-speech>, accessed May 21, 2007.

⁷¹ Dr.Shafique Ali Khan, *Freedom of Thought and Islam*, (Karachi: Royal Book Company, 1989), 1-2.

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there should not be any curbs on him in the exercise of such right by the state or any of its agencies.

Of all the rights and liberties, the liberty of freedom of thought and free speech and expression is the most basic and valuable requirement of any dynamic and progressive society. In order to retain the creativity of a society, the right of free thinking and free speech must be granted to its individuals without any reservations and without any discrimination.⁷²

2.3.1. Characteristics of Freedom of Speech:

Freedom of thought and speech is essential for the promotion of new ideas so that human knowledge and culture can progress. Curbs and restrictions on this right will discourage learning and discovery in all fields that will result in the stagnation of society and culture.⁷³

“Freedom of thought presupposes a high stage of consciousness, moral sophistication and spiritual excellence, which opens new vistas of self exploration and understanding of the objective atmosphere.”⁷⁴

It logically envisions three things: to wit;

1. that freedom of thought is endured, supported and highly appreciated within a certain framework of life or culture or faculty of learning, that is of immediate and ultimate concern for mankind. It should conform either to the standards and customs of the immediate and ultimate requirements of life and its realities. However, a thinker can not demand an

⁷² Ibid. 3.

⁷³ Ibid. 5.

⁷⁴ Ibid. 8.

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intellectual or moral completely free rein, because such an absolute freedom will cause a chaos of ideas and actions;⁷⁵

2. that freedom of thought definitely allows and encourages criticism, consideration and evaluation of everything and every point of view, in an objective way, with the condition that a better view of life and future will be projected by the thinkers. Any sort of criticism that does not improve upon the prevailing notions and concepts of life or its ideas and ideals, is not worth anything;⁷⁶

3. besides, every type of thinking, whether original or secondary, creates its own limitations in a natural way. Every concept has certain natural or logical limitations and inherent barriers that keeps it in check and within its proper confines. A thinker must be aware of such limitations that are naturally attendant upon his thinking and as such he should not try to go beyond them.⁷⁷

2.3.2: International Documents and Conventions Granting the Right of Freedom of Thought, Speech and Expression:

The Universal Declaration of Human Rights (1948)

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

⁷⁵ Ibid. 10

⁷⁶ Ibid.

⁷⁷ Ibid.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The European Convention on Human Rights (1950)

Article 9

- 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
- 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

Article 10

- 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

The International Covenant on Civil and Political Rights (1966)

Article 18

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

Article 19

1. *Everyone shall have the right to hold opinions without interference.*

2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

(a) *For respect of the rights or reputations of others;*

(b) *For the protection of national security or of public order (ordre public), or of public health or morals.*

All the above international documents give an almost absolute right of freedom of thought, speech and expression. But as already explained in the previous article that each freedom has certain inherent limitations and restrictions, therefore, these documents also place some curbs on this otherwise absolute right. Under the conventions above, this right is subject to such conditions as are prescribed by law that are necessary for the smooth functioning of a democratic society and that is in the interest of national security and territorial integrity. Certain restrictions are also necessary for the protection of public order

and safety, protection of rights and freedoms of others and for protection of health and morals. However, 'morals' is a relative term that may be different for each society.

The International Covenant on Civil and Political Rights also restricts this freedom where it is necessary to maintain the authority and impartiality of the judiciary. It is the most comprehensive one in all international instruments providing freedom of speech.

As far as the restrictions on freedom of speech and blasphemy laws are concerned, according to Dr. Agnes Callamard, "States may, but are not required to, introduce legislation on blasphemy."⁷⁸ She states in her article on Article 19 that many European states like Sweden and Spain have repealed their laws on blasphemy, while other states like England and Norway, though the laws have not been abolished, yet they are no longer in use for all practical purposes. However, she further states in article that the European Court of Human Rights has ruled that blasphemy laws are "within the parameters of a democratic society" and in her view, the purpose of article 19 differs with the European Court and with other practices through out various countries.⁷⁹

As far as blasphemy is concerned, under Islamic law, it is an exception and limitation of freedom of speech. Where there are other restrictions imposed on the right of freedom of speech by international covenants, Islamic law also imposes certain restrictions on this right. The Fundamental Rights in the Constitution of Pakistan is an example of this. Article 19 of the Constitution of Pakistan confers the right of free speech to its citizens, but this right is not an unqualified one. It states:

⁷⁸ Dr. Agnes Callamard, "Article 19", (Equal Voices, 18/June 2006).

<http://eumc.europa.eu/eumc/material/pub/ev/ev18/ev-18.pdf> (accessed July 17, 2007)

⁷⁹ Ibid.

Article 19 of The Constitution of Pakistan:

Every citizen shall have the right of freedom of speech and expression, and there shall be freedom of the Press, subject to any reasonable restrictions imposed by law in the interests of the glory of Islam or the integrity, security or defense of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, [commission of] or in incitement of an offence.

It should be noted here that all the restrictions imposed by this article on the freedom of speech and expression are the same as those imposed by the international covenants. The only exception is that this article restricts any negative propaganda or derogatory and disrespectful expression against the glory of Islam. This undoubtedly includes any disrespectful or offensive expression against God, His religion, His Holy Books or His Prophets. However, this does not prohibit the propagation of ones religion under article 20 of the Constitution of Pakistan, nor does it prohibit positive criticism. But it does prohibit maliciously insulting and disparaging expressions towards Islam.

In *Nawabzada Nasrullah Khan v. Government of West Pakistan* it was held that the freedom of speech and expression are not absolute and unqualified rights. They are relative and can not be absolute and at all times and in all circumstances. In other words, a person can not always express himself at any time anywhere he chooses.⁸⁰

Also, it was held in *Muzaffar Qadir v. District Magistrate Lahore*, that the concept of freedom of speech implies that every citizen has the right to say or publish what ever he

⁸⁰ PLD 1965 Lah. 642.

wishes, provided that he does not trample upon the rights of other individuals and this freedom should not become a mockery and delusory.⁸¹

2.4: A Brief Perspective on the Concept of Right (*haqq*) in Islam:

“At the outset it is noted that rights and duties in Islamic law originate in the Qur’an and in the authentic *Sunnah* of the Prophet (peace be upon him).”⁸² So, in other words, rights are granted by the *Shariah* that can not be taken away or suspended at any time and under any circumstances by any authority. The idea is that such rights are granted by God and are protected as the right of God. Therefore, no human authority or power can change or suspend them in any way, and they can be implemented through courts, whether or not they are recognized by any constitution or any other document.⁸³ However, we see that there are certain restrictions imposed on the rights in various international documents. Under the Islamic law, a restriction could be imposed on a basic right, only when such restriction is directly stated or acknowledged in the Qur’an or the *Sunnah*.⁸⁴ Further, the rights in Islamic law may also be governed under the Purposes of Islamic Law or the *Maqasid al Shariah*.⁸⁵

“The juristic manuals of *Shariah* often speak of *hukm shar’i*, that is a ruling, typically communicated in the form of a command or a prohibition, which

⁸¹ PLD 1975 Lah 1198.

⁸² Kamali, *Freedom of Expression*, 17.

⁸³ Imran Ahsan Khan Nyazee, “Islamic Law and Human Rights”, (Islamabad Law Review, Vol. 1:1 &2), 24.

⁸⁴ Ibid. 25.

⁸⁵ This issue will be discussed in detail later.

regulates the conduct of a legally responsible individual (*mukallaf*). These may convey a variety of concepts, including legal rights and obligations. Although the nature of these communications and the language in which the *hukm* is conveyed may tend toward obligation rather than right, a closer examination of *hukm* reveals that a mere propensity in the style of communication does not negatively affect the substance and validity of rights in the *Shariah*. An insight into the language of the Qur'an and *Sunnah* would confirm that Islam has its own perspective on *hukam* and on the allied subject of rights and liberties."⁸⁶

According to Professor Imran Ahsan Khan Nyazee, "each *hukm taklifi* is based on right. There are three kinds of basic rights in Islamic law: the right of Allah, the right of the individual, and the right of the individuals collectively or the right of the state (*haqq al saltanah*). This kind of right is sometimes designated as the right of the ruler (*Haqq al sultan*)."⁸⁷ However, our purpose here is to discuss the rights of individuals, the rest of the rights will be discussed later in this research.

It may be noted here that there is no formal distinction between fundamental rights and other rights in the Qur'an and the *Sunnah*, or between constitutional law and other laws. This indicates a certain attitude of Islamic law that in developing the *juris corpus* of the law, the source materials of the *Shariah* show a large influence of the concept of 'tawhid'. And there is a strong inclination towards turning away from approaches that may interfere with the holistic and Unitarian philosophy of the principle of *tawhid*. Since the *Shariah* attaches an

⁸⁶ Kamali, *Freedom of Expression*, 17.

⁸⁷ Imran Ahsan Khan Nyazee, *Theories of Islamic Law* (Islamabad: Islamic Research Institute), 58.(hereinafter referred to as Nyazee, *Theories of Islamic Law*)

overwhelming importance to the authority of divine revelation, the sense of mission and duty to God and to society has attained a certain eminence in the concept of *hukam* over the concept of an individual's right or his claim in respect of God. It is mainly a question of the pattern of relationship between the Lawgiver and the recipient of the law that is enthused by the ideal of unity and integration rather than a duality of their respective interests.⁸⁸

The modern constitutional law conferred the rights of the citizen in the face of the expanding power of the state, which was, on the whole, considered to be a threat to individual rights and liberties. On the other hand, Islamic law does not advance from a situation of conflict between the respective rights or interests of the individual and state, which are realized through the implementation of the *ahkam* of the *Shariah*. When the state succeeds in doing this, it satisfies the basic purpose of its existence that includes upholding the rights of the individuals. In doing so, both the individual and the state obey the *hukm* of the *Shariah* and in turn obey the One God. Thus, the duality of interest which is often envisaged in the modern constitutions presents a concept widely different from that in Islamic law.⁸⁹

Islamic law functions on the principle that God command the people to act, or to refrain from acting, toward His own illustrious Self, and then toward each other, in certain ways. Individuals must worship and obey God, and there is no room in their pattern of relationships for anything else except to submit to His will. God has expressed His will and *hukm*, and has conferred upon human beings certain rights, as an expression of His divine grace. Once aware of this perspective of Islamic law commentators cannot deny the position and reality of rights in Islamic law. Islam maintains a certain position on the rights and duties

⁸⁸ Kamali, *Freedom of Expression*, 17.

⁸⁹ *Ibid*, 17-18.

of individuals with the affirmative substance of the *Shariah* on this theme. For centuries, Muslim jurists and scholars have time and again discussed of the virtues of submissiveness to God and of obeying His *hukm* and law. At the same time they also speak of the rights of individuals, and of the safety and sanctity of their lives and properties. They assert effusively that the interests and benefits of people are the ultimate objective of the *Shariah*. These jurists have never entertained any doubts about the importance of individual's rights in the whole concept of *hukm*. It would appear that *Shariah's* general outlook towards rights and obligations has been taken by some commentators to mean a negation of the idea of rights in favor of obligations. This predisposition in favor of obligations over rights can be found in varying degrees in almost any legal system, and Islamic law is no exception. For obligation has a stronger foundation than right, and it carries a binding force which is lacking in the concept of a right. But the actuality of rights, and its existence and significance in Islamic law cannot be denied. The *Shariah* is merely the form in which these concepts are communicated, expressing a certain outlook on the same reality rather than a denial of that reality.⁹⁰

2.5: Concept of Freedom of Thought, Speech, Opinion and Expression in Islam:

“Islam confers freedom of thought and conscience along with the right to communicate it to others within its ideological orbit and ambit, with the ultimate objective of replacing the contemporary disorder created by the

⁹⁰ Ibid.

derelict mortals for their ulterior motives and sinister ends, by divine order, in the form of creating a culture without strains, doubts and debts to other cultural communities, to be wrought about by the thinkers who come up to the standards of piety and learning as prescribed or appreciated by the Qur'an and the *Sunnah*.”⁹¹

It is noted while studying the Islamic scholastic traditions that the phrase *hurriyyat al-ra'*, literally meaning 'freedom of opinion' has been used to denote 'freedom of speech', rather than using the term *hurriyat al-qawl*, which is the more precise equivalent. One reason for using this term maybe that the freedom to express an opinion is probably the most important aspect of freedom of speech, since the latter may comprise other discernible varieties of expression such as a simple narration of facts, or comedy and fiction. Specifically to express an opinion on a matter implies a level of involvement, commitment and competence which may or may not be the case in a factual narration of an event. Also, the fact that Islamic jurists have used this phrase consistently for freedom of speech shows that personal opinion and the freedom to express it is the most important feature of freedom of speech.⁹²

As discussed earlier, there exists a relationship between the right and obedience to God and the rights can be exercised within the framework of *Shariah*. This framework classifies the freedom of speech or opinion into certain categories that has been discussed later.

⁹¹ Dr.Shafique Ali Khan, *Freedom of Thought and Islam*, Introduction, (Karachi: Royal Book Company, 1989).

⁹² Kamali, *Freedom of Expression*, 61.

2.5.1: Classification of Opinion or *Ra'y*:

“Although the nature of *ra'y* and the very diversity of its scope and subject matter defies the idea of a predetermined framework, the ‘*ulama*’ have nevertheless attempted to divide *ra'y* into the following four types: valid or praiseworthy opinion (*al-ra'y al-sahib*), void opinion (*al-ra'y al-batil*), opinion whose validity is in doubt (*al-ra'y fimawdi al-ishtibah*) and blameworthy or objectionable opinion (*al-ra'y al-madhmum*).”⁹³

A valid or praiseworthy opinion is one which is “in accord with authoritative precedent and the approved opinion of past *ulema* who have acted in harmony with such *ra'y*, and accepted it in principle in the formulation of their own *fatwas* and *ijtihad*. In other words, its harmony with the accepted norms of the *Shariah* is not in question.”⁹⁴

“At the opposite pole of valid opinion stands the void opinion, which is of no account and carries no authority at all.”⁹⁵ As opposed to the valid opinion, it may safely be concluded that a void opinion is one that is in contradiction to the approved precedents of the past *ulema*.

“As for *ra'y*, the validity of which is open to doubt, it is equivalent to a conjecture (*zann*). This type of *ra'y* is accepted as a basis of judicial decision and legal opinion in cases of emergency, or where no better alternative may be known to exist. Unless it is adopted in a court decision, a doubtful opinion or a conjecture does not bind anyone.”⁹⁶

⁹³ Ibid. 69.

⁹⁴ Ibid.

⁹⁵ Ibid. 70.

⁹⁶ Ibid. 72.

In simpler terms it can be said that all such opinions are acceptable that come within the ambit of shariah and that does not directly violate any rules or principles of Islamic law. Lastly, there is blameworthy opinion. "It is a type of *ra'y* which is neither completely false nor totally invalid, and yet is misguided and reprehensible."⁹⁷ This type of *ra'y* can be subdivided into further categories. Some of these categories will be discussed in the following article under the restrictions on freedom of speech and opinion.

2.6: Restrictions on Freedom of Speech and Expression:

Generally speaking, freedom of speech and expression is subject to the same limitations that may be applicable to all rights and liberties. The most important of these is that other persons should not be harmed in anyway. Therefore freedom of speech must not be hurtful to others and it should not infringe their rights or affront their dignity. Also, freedom of speech can not be used to create chaos or promote violence and social strife. This would fall beyond the scope of the valid and justifiable exercise of freedom of speech. Furthermore, freedom of speech, like other rights, is subservient to the essential interests and values that are important to sustain a stable socio-political order. Therefore, the exercise of this freedom must not put at risk the five essential values of life and the purposes of Islamic law.⁹⁸ i.e. faith, life, lineage, intellect and property. As a general rule, the underlying intention of an utterance and the motive behind such an utterance plays a significant role in determining its legality or illegality. The questions that frequently arise in a judicial dispute over the abuse of

⁹⁷ Ibid. 130.

⁹⁸ The purposes of Islamic law and their relation ship with freedom of speech will be discussed in detail in the next chapter.

freedom of speech are whether the right of free speech was exercised in order to discover the truth and attract some legitimate benefit or need? Or the motive was just to hurt the sentiments of the people and to injure others? The question of the intention behind words uttered rightly commands attention; however, there may be instances when the freedom of speech is violated but only the words uttered are of importance, the question of intention being rendered insignificant – such as in the case of a person being abused or insulted.⁹⁹

Under the *Shariah*, violations of the freedom of speech can be either in the form of particular offences – such as:

- blasphemy,
- public utterance of hurtful speech,
- slanderous accusation (*qadhf*),
- attribution of lies or libel (*iftira*),
- insult (*sabb*) and cursing (*la 'n*), and
- the labeling of others as disbelievers (*takfir*)

Or they may take the form of a contempt for, or a denial of, the accepted norms and principles of Islam, which may fall under the general headings of infidelity or disbelief (*kufr*) and heresy. Some of these are well defined and established criminal offences and carry specific penalties, whereas others are not so well defined and are morally disapproved only.¹⁰⁰

⁹⁹ Kamali, *Freedom of Expression*, 166.

¹⁰⁰ Ibid. 166-167.

All of these varieties can be considered forms of blameworthy opinion and fall under the limitations and restrictions on freedom of speech. The right to free speech and expression does not extend to these areas. The term restriction here does not necessarily mean prohibition. For, as this section shall show, the whole of this field is governed, not only by legal prohibitions, but also by moral restraints.¹⁰¹

The position of blasphemy under Islamic law has already been discussed in the chapter 1 of this dissertation. This section will deal with the other limitations of the right of free speech as those enumerated above.

2.6.1: Public Utterance of Hurtful Speech:

The title of this speech is a direct translation of the Qur'anic phrase '*al-jahr bi'l-su' min al-qawl*'. It is perhaps one of the most comprehensive of the Qur'anic enactments that offers the guiding principle on the limitations that may be imposed on the freedom of speech.¹⁰² The verse where this phrase occurs is:

- **“God does not like any evil speech (*al-jahr bi'l-su' min al-qawl*) to be mentioned openly except by one who has been wronged (thereby). And God is indeed ever Hearer and All-knowing. If you do good openly or in secret, or pardon others for evil (done unto you), God is indeed an absolver of sins, infinite in His power.”¹⁰³**

¹⁰¹ Ibid. 130.

¹⁰² Ibid. 167.

¹⁰³ Al Qur'an. 4:148-149

Words that are uttered publicly and which hurt another person by affronting his dignity and honor or become the cause of some kind of physical harm to him or cause him loss of his property, either directly or indirectly (such as by abusing his close relatives or homeland), are all covered by this verse. In this text, hurtful speech encompasses all that which is addressed to any individual or person, or to more than one person, or to the community at large. Furthermore, the text is extensive enough to realize all modern methods and facilities that are used for publicity, advertising and broadcasting.¹⁰⁴

The text above condemns the utterance of hurtful speech in absolute terms. It does not distinguish as to whether the speech uttered contained any truth or was it falsehood, or whether it could have resulted in any kind of benefit. There is only one exception to this absolute rule that has been specified in the verse itself and that is for a person who has been wronged, and his cry for justice must be heard even if it is hurtful.¹⁰⁵

“Public utterance of evil speech may consist of speaking ill of others and finding faults in their character, or of attributing misdeeds to individuals and their families. It may also consist of self-indulgent speech concerning misdeeds committed by oneself, such as adultery, wine-drinking, gambling, or designs with these in mind. Also forbidden is the publication and display of obscene literature, and any other forms of misleading advertising which are all different manifestations of *al-jahr bi'l-su*. The only exception that the Qur'an has granted aims at encouraging the quest for justice, which is given priority over the prevention of evil speech. However, even then *al-jhar bi'l-su'*

¹⁰⁴ Kamali, *Freedom of Expression*, 167.

¹⁰⁵ Ibid. 169-170.

must be limited to only that which is deemed necessary in the circumstances.”¹⁰⁶

The scope of the verse under discussion is wide enough to include virtually all the limitations of freedom of speech, including slander, insult, cursing, sedition, and so forth. We may also include blasphemy under this topic as it is also a form of hurtful speech that is aimed at either God or His Messenger (peace be upon him) or His religion and that also results in hurting the sentiments of the its followers. Since this verse gives the exception of justice, and justice is generally to be given to everyone, regardless of their faith, we may also infer that the rule given in this verse is for both Muslims and non muslims. And that public utterance of hurtful speech is forbidden for all individuals and persons.

2.6.2: Slandorous Accusation (*qadhf*):

Islam and Islamic law takes a very serious notice when the honor, dignity and good name of any respectable law-abiding individual is attacked. The Qur’an prescribes a mandatory and obligatory punishment for slander and slandorous accusation that comes under the ‘*hudud*’¹⁰⁷. Furthermore, if slander is proved by due course of law, and the slanderer has been punished, he is then permanently barred from being a witness in any court of law. The reason is that

¹⁰⁶ Ibid.

¹⁰⁷ Our purpose here is not to discuss hudud or how and when slander is punished under hudud. Our purpose is only to point out that slandorous accusation is a limitation of freedom of speech. Therefore details of hudud punishments will not be discussed here. For details on hudud, see Wahbah Al Zuhaili, *Al Fiqh al Islami wa Adillatahu*.

slander, once committed, taints the good reputation of its victim, who may have suffered irreparable damage.¹⁰⁸

“Literally, *qadhf* means throwing words of abuse at others. In this general sense, *qadhf* could comprise all forms of abusive words including slander, libel, insult, cursing etc. However, the Qur’anic offence of *qadhf* is a more specific concept which consists of either accusing another person of committing the act of adultery (*zina*), or denying the legitimacy of his or her child. In the former case, if the accuser can produce four witnesses to testify to the truth of his or her accusation, then the charge is proven and the accused becomes liable to the punishment of *zina*. If the accuser fails to provide evidence, then he becomes liable to the punishment of *qadhf* (that is eighty lashes). All other types of allegation, such as accusing another person of bribery or other offences, are liable to the discretionary punishment of *ta’zir*.¹⁰⁹

Therefore, any such speech that consists of words and accusations as enumerated above are not allowed under the Islamic law and the person uttering such words cannot claim immunity under the freedom of speech as this would actually be an abuse of this right.

2.6.3: Libel (*iftira*):

“*Iftira*’ means the attribution of lies to another person, maliciously accusing another person of criminal acts, or inventing something false about an

¹⁰⁸ See Al Qur’an. 24:1-5

¹⁰⁹ Kamali, *Freedom of Expression*, 171.

individual. In its Qur'anic usage, *iftira'* is synonymous with lying (*kidhb*), and in the juristic manuals of *fiqh*, *iftira'* (also referred to as *firyah*) is treated as a sub-category of slanderous accusation, *qadhf*, and the rules that apply to *qadhf* are also applicable to *iftira'*.¹¹⁰

“The maximum penalty for *iftira'* is the same as that for *qadhf*, namely, eighty lashes. All other varieties of false accusation, whether of adultery or other offences, which do not amount to *qadhf* may amount to criminal libel and invoke a deterrent punishment of *ta'zir*.¹¹¹

2.6.4: Insult (*sabb*, *shatm*) and Cursing (*la 'n*):

Any word, expression, or gesture that assaults and assails the dignity and honour of the person to whom it is addressed, and that humiliates and embarrasses the latter in the eyes of his or her compatriots and other fellows may be termed insult. An exhaustive and comprehensive list of words and expressions that may classify as *sabb* can not be provided by any legal authority. Instead, reference is made to the prevailing social customs, norms and standards that are accepted as the key indicators by which to assess the abuse. There are certain words and expressions that are generally considered to be insulting, but there may be cases where their precise and specific significance needs to be measured in the light of prevailing circumstances, such as the social status of the victim, and the context in which the words were expressed. A word may amount to *sabb* in certain circumstances but it may not

¹¹⁰ Ibid. 175. See also, Al Qur'an. 10:38 & 69, 60:12, where *iftira'* is used synonymously with *kidhb*.

¹¹¹ Ibid.

be so at other times. There can not be definitive guidelines without the accurate knowledge of the circumstances and context in which the words or the expression was used.¹¹²

Generally speaking, the words must be hurtful in order to be considered as an insult. But there is no condition that they must be uttered in public in order to qualify as insult. Also, the intention behind the words or expression uttered is not carry a lot of importance, especially when the words in question are common words of insult whose contention can be objectively determined.¹¹³

“Cursing (*la ‘n* or *la ‘anh*) normally consists of an expression of disapproval or displeasure and an innovation of malediction upon the object of the curse. Curses are often uttered by calling the curse and wrath of God upon someone, or by an invocation in the passive voice where the agent is not always specified, for example: may God’s curse be upon him; may he be cursed.”¹¹⁴

Instances of cursing are found in the Qur’an, for example:

- “... those who lie about their Lord; verily, the curse of God is upon the unjust”¹¹⁵

¹¹² Ibid. 177-178

¹¹³ Ibid; Al Imam Taqi uddin Ibn e Taymiyyah, *Al Sarim al Maslul ala Sbatim al Rasul*, (Dar ul kutb al Amliyya, Beirut, Lebenon, 1978), 541. (hereinafter referred to as Ibn e Taymiyyah, *Al Sarim*)

¹¹⁴ Ibid. 182.

¹¹⁵ Al Qur’an. 11:18

- “those who annoy God and His Messenger, God has cursed them in this world and in the hereafter, and He has prepared for them a painful punishment”¹¹⁶
- “... and [those who] spread mischief on earth, those are they on whom is the curse and for them is the ill abode.”¹¹⁷

The general rule for insult and cursing is the same under Islamic law. They are both forbidden and come under the abuse of freedom of speech and is a limitation of this right. Cursing is allowed only in cases of those people and communities that have been cursed upon by God Almighty and that too, is also not very much recommended. Generally speaking, they are both to be treated as a legal restraint to the right of free speech that may be punished by *ta'zir*.¹¹⁸

2.6.5: Attribution of Disbelief to a Muslim (*Takfir al Muslim*):

“The *Shariah* forbids the attribution of disbelief, blasphemy or heresy to a Muslim. This is a normative principle which is applied even to cases where one suspects another of disbelief (*kufi*). Thus, if a believer observes a fellow Muslim uttering words or indulging in acts which might be suggestive of disbelief, he must give him the benefit of the doubt, and avoid charging him

¹¹⁶ Al Qur'an. 33:57

¹¹⁷ Al Qur'an. 13:25

¹¹⁸ Kamali, *Freedom of Expression*, 177-183.

with disbelief in all cases which fall short of self-evident proof. Even in the latter event, it is strongly recommended that people should avoid charging others with infidelity and disbelief.”¹¹⁹

In other words, a Muslim may not be declared a disbeliever or an apostate when he says or does something which carries only the probability of disbelief. Such accusations can not be made against any believer without solid proof. Otherwise, this would be a gross violation of the exercise of the right of free speech.

As far as the nature of the evidence in concerned that needs to be produced to be able to prove any attribution of disbelief to a believing person, the general rule is that the determination of faith or disbelief of a person is to be based entirely on unambiguous and explicit evidence and no reference can be made to the hidden thoughts and feelings of people, as they are known only to God. The thoughts and feelings of people are not proof enough and can not be made a basis of any such conviction.¹²⁰

The Holy Qur’an strongly asserts the above mentioned view when it instructs the believers not to say to any believing person that he or she is not a believer or a Muslim. The following verse is relevant is support of the above mentioned view:

- **“Say not to those who greet you with peace (*al-salam*): ‘you are not a believer’.”¹²¹**

¹¹⁹ Ibid.186.

¹²⁰ Ibid. 186-187.

¹²¹ Al Qur’an. 4:94

This verse gives a clear understanding that if just the utterance of the *salam* is evidence enough to establish a presumption in favor of person being a believer, then it is obvious that the Qur'an does not allow any inquisitions and accusations of any kind to establish whether an individual is a believer or not. Such an accusation would be a violation of the right of freedom of speech, expression and opinion according to the norms of *Shariah*.

CHAPTER 3

POSITION OF BLASPHEMY LAW AND FREEDOM OF EXPRESSION WITHIN THE FRAMEWORK OF *MAQASID* *AL SHARIAH* (PURPOSES OF ISLAMIC LAW)

3.1: Introduction to the *Maqasid al Shariah* (Purposes of Islamic Law):

Maqasid al Shariah, or the purposes of Islamic law, is an important doctrine of Islamic law or *Shariah*.

Abu Ishaq Ibrahim ibn Musa al-Lakhmi al-Shatibi (d. H 790/CE 1388), a Maliki jurist, talks about this doctrine in detail in his book *Al Muwafaqat* that marks a major development in the history of Islamic law, while it was originally expounded very systematically by the famous jurist Abu Hamid Muhammad ibn Muhammad Al Ghazali (d. H 505/CE 1111). Our purpose, in this chapter is to look at the *maqasid al shariah* in terms of the role they play in an Islamic society and to see their order of priority and how they are relevant to our discussion about blasphemy and freedom of speech, and finally what role they can play in establishing their positions in an Islamic society and under Islamic law.

“The main objective of this doctrine was to establish the authority of law on rational basis in addition to the already established principle of authority of law derived from the will of the Law Giver. Shatibi combined both

theological and rational arguments to conclude that the objectives of the *Shariah* as found in the will of the Law-giver are based on the principle of the general welfare of the mankind.”¹²²

The general idea is that “the *Shariah* is predicated on the benefits of the individual and that of the community, and its laws are designed so as to protect these benefits and facilitate improvement and perfection of the conditions of human life on earth.”¹²³

These benefits have been categorized by the *ulema* into worldly benefits and the benefits of the hereafter. The worldly benefits have been further divided by the scholars into three categories in a descending order according to their importance for the community. These are; essential/necessary benefits or *daruriyyat*, followed by the needs or the *hajiyyat*, and then the supplementary benefits or *tahsiniyyat*. The essential benefits are five, namely; religion (*din*), life (*nafs*), lineage (*nasl*), intellect (*aqal*) and property (*maal*). These are, by definition vital for a normal order in the society and for the survival and spiritual well being of the individuals. And their destruction and collapse will cause chaos in the society. *Shariah* seeks to protect these values and authorizes measures for their protection and progression. Thus, *jihad* has been authorized in order to protect religion, just as *qisas* has been designed for the protection of life. *Shariah* also takes positive as well as punitive measures for the preservation and advancement of these values. Thus, theft, adultery and drinking wine are offences liable to be punished under *Shariah* as they pose a danger to the protection of private property, the

¹²² Muhammad Khalid Masud, “*Shatibi’s Theory of Meaning*”, (Islamic Research Institute, Islamabad, Occasional Papers; no. 6), 5. (hereinafter referred to as Masud, *Shatibi’s Theory of Meaning*)

¹²³ Muhammad Hashim Kamali, “*Maqasid al Shariah: The Objectives of Islamic Law*”, (Islamic Research Institute, Islamabad.1999, Occasional Papers; no. 33), 5. (hereinafter referred to as Kamali, *Maqasid al Shariah*)

welfare of the family and the integrity of human intellect respectively.¹²⁴ It is these benefits that are important for the purpose of our study and the following articles will discuss their priorities and how blasphemy laws and freedom of speech play their roles within the essential benefits in an Islamic society. These are in fact the basic *Maqasid* on which an Islamic society stands.

The second class of benefits known as *hajiyat* is not an independent category as their aim is also to promote and preserve the essential benefits but in a secondary capacity. These are those benefits that aim at removing hardship and severity that do not present a danger or threat to the actual survival of the normal order of society. Many concessions (*rukhsas*) granted by the *Shariah*, such as the shortening of the prayer and the opening of the fast for the sick and the traveler, seek to prevent hardship, but they are not essential as people can live without them if they had too and the society will not collapse in their absence. *Shariah* has provided these concessions in all areas of law.¹²⁵ Other examples can be in adapt, by making hunting lawful, in *muamalat* where *qirad* (money lending) has been permitted, and in *janayat*, where allowances are made for weak an insufficient evidence in decisions relating to public interest.¹²⁶

A benefit of second class is elevated to the rank of the essential benefit when it concerns the public at large. And in case of a conflict arising between the various categories

¹²⁴ Ibid. 7; Muhammad Khalid Masud *Shatibi's Philosophy of Islamic Law* (Islamabad: Islamic Research Institute, 1995), 151-152.(hereinafter referred to as Masud, *Shatibi's Philosophy of Islamic Law*); Nyazee, *Theories of Islamic Law*, 214.

¹²⁵ Ibid. 8; Masud, *Shatibi's Philosophy of Islamic Law*, 151-152; Nyazee, *Theories of Islamic Law*, 214.

¹²⁶ Masud, *Shatibi's Philosophy of Islamic Law*, 152.

of benefits, the lesser of these may be given up so as to protect the higher benefit.¹²⁷ This will be discussed in detail later in this chapter.

The third category of benefits called *tahsinīyyat* seek to “attain refinement and perfection in the customs and conduct of people at all levels of achievements.”¹²⁸ This includes for example, encouraging cleanliness of body and clothes before prayer, or recommending wearing perfume when attending the Friday prayers, or discouraging eating raw garlic on that occasion. Similarly, giving charity to the needy is also encouraged. The objective of all this is to adopt the best customs and acquire perfection in all areas of human conduct.¹²⁹

An important thing to note here is that a lack of *hajīyyat* does not necessarily amount to a negation of the *daruriyyat*, and also, the deliberation and realization of the *hajīyyat* must not cancel out the essential purposes or objectives of *Shariah*. If the consideration of *hajīyyat* results in the termination of *daruriyyat* then such consideration will not be valid.¹³⁰

On the basis of the above observation, Dr. Khalid Masud notes that Shatibi deduced the following five rules:¹³¹

1. *Darura* is the basis of all benefits and interests.
2. The disruption of *daruriyyat* causes the disruption of all other benefits.

¹²⁷ Kamali, *Maqasid al Shariah*, 8-9.

¹²⁸ Ibid. 9.

¹²⁹ Ibid.

¹³⁰ Masud, *Shatibi's Philosophy of Islamic Law*, 153. See also Nyazee, *Theories of Islamic Law*, 240-243.

¹³¹ Ibid. 154.

3. The disruption of *hajiyyat* or *tahsiniyyat* does not necessarily cause the disruption of the *daruriyyat*.
4. However, in a certain sense, an absolute disruption of the *hajiyyat* and *tahsiniyyat* can cause the disruption of the *daruriyyat*.
5. The preservation and protection of the *hajiyyat* and *tahsiniyyat* is essential for the existence and continuance of the *daruriyyat*.

In other words, the *daruriyyat* or the essential benefits are the primary purposes of the *Shariah*. These purposes are supported by the other two categories of benefits. However, even if the last two categories are eliminated, the primary purposes will stand on their own. But, the existence of the latter two is dependant upon the primary purposes and they can not stand on their own if the primary purposes or essential benefits are abolished.¹³²

In short, the *daruriyyat* are generally considered to be the back bone of an Islamic society and they must be upheld for the preservation and advancement of such society. The rest of the benefits are there to complement and supplement the *daruriyyat*.

3.2: Priorities within the Primary Purposes/ Essential Benefits:

The importance of the individual *maqasid* within the primary purposes is seen in the order in which they are represented. Thus religion has priority over life, life has preference over lineage that in turn is preferred over intellect and finally intellect has precedence over

¹³² Nyazee, *Theories of Islamic Law*, 240-243

property. But, looking at the priorities within these *maqasid* gives a very simplistic view of things.¹³³

Therefore, each of the primary purposes is further categorized into public and private purposes or interests. The public interests seek to maintain the interests of the community as a whole. On the other hand the private interest seeks to preserve the interests of the individuals. Furthermore, these interests are divided into those securing the rights of God and those protecting the rights of individuals or the right of the community as a whole. A third right is also of much significance here, that is the right of state or the right of the ruler or imam.¹³⁴ Distinction between these rights and interests is rather important to understand the working of Islamic law for any given issue.

“The relationship that exists between the primary purposes may be highlighted by visualizing outer shells serving or protecting inner shell or shells. Thus, the inner most shell is represented by the preservation and protection of *Din*. This represents the foremost purpose of the *Shariah*. The shell surrounding it is that of life, which is itself surrounded by *nasl* and so on. The outermost shell is that of the preservation of wealth that serves all the inner shells and is subservient to them.”¹³⁵

Now, keeping in view the above discussion, if we consider that to honour and preserve God’s name and that of His Prophet (peace be upon him) from blasphemy and to protect the Holy Book from any desecration is part of our religion then this would automatically take precedence over all other purposes, especially the protection of intellect,

¹³³ Ibid. 243-244

¹³⁴ Ibid.

¹³⁵ Ibid. 243.

under which freedom of speech undoubtedly falls. However, as already stated, that looking at the priorities within the *maqasid* only would be a simplistic view of things, and there are other factors to be considered as well before a final conclusion can be drawn. Furthermore, there are a few rules that have been discussed by scholars in this regard that must be taken into account for the above mentioned object.

One such rule is that “the stronger interest shall prevail.”¹³⁶ This means, as already mentioned that the *maqasid* have strength and precedence in the order in which they are stated. Thus, religion has the highest priority and it is preferred over life, life has priority over lineage and so on. So if a person is asked to take part in jihad and give up life in the cause of Allah, then there is a legal justification for it, as under the priorities within the *maqasid, din* had the highest priority and it has precedence over life.¹³⁷

Another rule that is relevant for our purpose is that “the public interest is prior to the private.”¹³⁸ This means that whenever there is a clash between the public and the private interests or if a public interest conflicts with a private interest, the public interest will prevail and it will have priority over the private interest.¹³⁹

“The example used by jurists is that of material handed over to artisans and craftsmen. The original rule of deposit required that this material being a deposit would not be compensated by the craftsman in case it was destroyed, and the burden of proving the tort or negligence would be upon the customer, the owner of the property. This rule was changed to conform with

¹³⁶ Ibid. 245.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

the public interest, because the craftsmen were misusing the facility. The burden of proof was shifted to the craftsmen, who had to show the absence of negligence. The Hanafis based this change on *istihsan*. The example is expected to show that the public interest requiring security of transactions and protection of property of the general public was given preference over the interest of individuals, that is, the craftsmen.¹⁴⁰

It may be noted that in the above example, both the public and private interests pertain to the same class, that is, the preservation of wealth. But the question may be asked whether the rule of public interest prevailing over the private interest can cut across all the other classes? In other words, can a lower category of primary purposes be given preference over a higher category of primary purpose, because the former pertains to public interest and the latter to private interest?¹⁴¹

It has been stated above that religion has a preference over life, life has preference over lineage, lineage has preference over intellect, and intellect has precedence over property or wealth. So, according to this hierarchy of priorities within the *maqasid*, if there is a conflict between life and any other *maqasid* of a lower category, then life would be given priority. An example can be that drinking wine is permissible in order to save life. Stealing of property is also allowed to save life during a drought. But, on the other hand, in normal circumstances, theft is punished with the amputation of the hand. Here, theft is an offence that is related to the interest of property and wealth, while amputation of a limb is related to the interest of life. The benefit of preservation of wealth and property is being given preference over the essential benefit of life. This means that protection of property being a public interest, being

¹⁴⁰ Ibid. 245-246

¹⁴¹ Ibid.

important for the welfare of the community as whole, has been given a higher priority to the protection of life and limb of individuals, that being a private interest.¹⁴²

The same may be applied to the penalties that have been provided by the shariah for committing adultery, are for the protection and preservation of lineage. However, the penalties themselves assail the interest of life that has a higher priority. The private interest of protection and preservation of life and limbs of individuals is being set aside in favour of the public interest of protection of lineage, which is necessary for strengthening the family unit within the society that in turn strengthens the society. Another such example is that of whipping for the offence of drinking wine. Clearly, in both these examples, a public interest of a lower category is being given precedence over a private interest of a higher category.¹⁴³

3.3: Position of Blasphemy and Freedom of Speech within the Hierarchy of *Maqasid*:

Keeping in view the above discussion, question may be raised as to the position of blasphemy laws and the right of free speech within an Islamic society. It has already been established that the *Maqasid al Shariah* are the backbone of an Islamic society. These are the essential purposes on which such society stands. All interests are, therefore, measured and categorized according to the standards set by the *Maqasid*. Therefore, if we are to ascertain the priority between blasphemy law and the freedom of speech in Islam, then it must be done under the essential purposes of Islamic law.

¹⁴² Ibid. 248.

¹⁴³ Ibid.

It has already been established in the previous chapter that under Islamic law, blasphemy is treated as an exception to the right of free speech. Freedom of speech has been guaranteed to individuals under Islamic law but it is subject to certain limitations that have been mentioned in the previous chapter. The reason for this may be understood by looking at the priorities within the *Maqasid*.

The meaning and definition of blasphemy has been established in the first chapter of this dissertation. Blasphemy laws seek to protect the interest of religion by serving to protect the name and honor of God and His Messenger (peace be upon him) from being reviled maliciously. Religion, being the highest category of interests must be protected first. Freedom of speech, on the other hand, pertains to the interest of the intellect that certainly has a lower priority within the essential purposes. Looking at the general hierarchy of the categories of interests, religion would always take precedence as it is the inner most shell of interests and all the other categories of interests are there to protect this interest. Therefore, in any conflict between religion and any other interest, religion would always have priority.

Furthermore, if the question of blasphemy and freedom of speech is raised under the rule "public interest prevails over private interest", then again, right of free speech is a private right that is given to each person as an individual. But if the exercise of this right affects the community as a whole, then it comes in a direct conflict with the public right and therefore, can not stand. The right to stop individuals from reviling any religion, religious figure or religious book is a public right as it affects the sentiments of religious communities as a whole. This would hold true not just for an Islamic society but also for any religious community within any society. This is probably the reason why the classical Islamic jurists have prescribed such strict punishments for committing the offence of blasphemy (see chapter 4). It appears that they too, sought to protect the interests of religion over and

above all other interests, and that freedom of speech has a much lower priority when the interest of religion is in question.

However, the explanation for the priority between blasphemy laws and freedom of speech may not be that simple. There is an added complexity of defining and distinguishing them within the ambit of right of God, right of state and the right of the individual. This has been discussed in the next chapter.

The following points may be considered at the end of this discussion.

First, the primary purposes of *Shariah* are the foundations on which an Islamic society stands, and religion is the central interest that has precedence over all other interests, and all other interests serve to protect it.

Second, blasphemy against God and His Prophet (peace be upon him) is an attack against the interest of religion, and measures must be taken to protect this interest from such attacks. Therefore, blasphemy laws may be made and applied.

Last, freedom of speech pertains to the interest of intellect, and belongs to a lower category than the interest of religion. It is to be protected as being part of the essential purposes of *Shariah* but it can not be given precedence over religion. Therefore, in a conflict between freedom of speech and blasphemy laws, the latter can not be considered a violation of the former, and may be treated as its exception.

This makes the position of blasphemy law and freedom of speech in an Islamic society very clear. Blasphemy laws can not be abrogated in favor of freedom of speech. However, a regulatory system is required so that such laws are not abused and false cases are not registered out of hatred and malice towards some one or due to any personal grudges. Islamic law guarantees freedom of speech as being part of the essential benefits, but it is not unlimited. Freedom of speech that hurts the sentiments of the public at large or that

infringes any other interests or rights in a community can not be allowed as it disrupts the peaceful and smooth functioning of a society.

CHAPTER 4

PUNISHMENT OF BLASPHEMY

4.1: Rulings of jurists on the offence of blasphemy:

As mentioned, classical Islamic law punishes blasphemy with death¹⁴⁴, the reason primarily is that when a Muslim commits blasphemy, he at the same time, also commits apostasy.

It is important to note that blasphemy consists of insult and scorn which is not required in other species of disbelief or *kufr*. More importantly it offends the feelings of religious communities. In view of this, it can be said that blasphemy can not be part of apostasy, as apostasy amounts to a rejection of faith and not an insult to it. However, it can be considered as a form of apostasy. Also keeping in mind the classical view of the Islamic jurists that when a Muslim insults his faith, he also renounces it, blasphemy would include apostasy with reference to a Muslim only because a non Muslim can not commit apostasy as he has not accepted the Islamic faith in the first place. (Blasphemy by a non Muslim will be discussed later along with its implications and punishments.)

Blasphemy is an offence that can be committed by both Muslims and non Muslims. But it must be kept in mind that in order to commit blasphemy, explicit words must be used to insult and a non Muslim, especially, cannot be punished for blasphemy merely by asserting ideas that conflict with Islamic beliefs.¹⁴⁵ As far as blasphemy by a Muslim is

¹⁴⁴ Kamali, *Freedom of Expression*. 212.

¹⁴⁵ Ibid.

concerned, according to Imam Ibn e Taymiyyah, if a Muslim commits a blasphemous act, he automatically abandons his faith because an insult or abuse towards God or His Prophets is a much greater offence than disbelief or *kufr*.¹⁴⁶

There is also a minority opinion on this issue given by some Iraqi jurists that insulting and abusive speech amounts to blasphemy only when the blasphemer considers what he says to be permissible in principle. However, it would not amount to blasphemy if he does not claim it as such. In such a situation, only transgression (*fisq*) can be attributed to him. He would not be guilty of disbelief (*kufr*). This view has been recorded by Ibn e Taymiyyah in his book *Al Sarim Al Maslul ala Shatim al Rasul*. He has also stated that Abu Muhammad ibn al Hazm also recorded this point of view. It has been further recorded that in the reign of Caliph Harun al Rasheed, some Iraqi jurists gave the ruling regarding some one who had insulted the Prophet (peace be upon him), that the perpetrator should be punished by flogging. However, when this ruling was brought into the notice of Imam Malik, he rejected it.¹⁴⁷

The views of many of the jurists have been recorded by the Maliki jurist Qadi Iyad ibn e Musa al Yahsabi in his work *Al Shifa* which deals with the rights of the Prophet (peace be upon him) and a large part has been devoted to the topic of blasphemy against the Prophet (peace be upon him).

Qadi Iyad gave the ruling that blasphemy is to be punished by death. "Know that all who curse Muhammad, (may Allah bless him and grant him peace), or blame him or attribute imperfection to him in his person, his lineage his *din* or any of his qualities, or alludes to that or its like by any means whatsoever,

¹⁴⁶ Ibn e Taymiyyah, *Al Sarim*, 561.

¹⁴⁷ Ibid. 513- 514.

whether in the form of a curse or contempt or belittling him or detracting from him or finding fault with him or maligning him, the judgment regarding such a person is the same as the judgment against anyone who curses him. He is killed as we shall make clear. This judgment extends to any thing which amounts to a curse or disparagement.”¹⁴⁸

Qadi Iyad states in his book that Abu Bakr ibn al-Mundhir said that the bulk of the people of knowledge agree that anyone who curses the Prophet should be killed. These include al-Layth, Ahmed ibn Hanbal and Ishaq ibn Rahawayh, and it is the position of the Shafi school as well.¹⁴⁹ Qadi Iyad also gives the opinion of Qadi Abu al-Fadl, who said that it is based on the statement of Abu Bakr al Siddiq that such person’s repentance is also not accepted. He further goes on to say in his book that something similar was stated by Abu Hanifa and his people, al Thawri and the people of Kufa and al Awazai about the Muslims. However, they said that it constitutes apostasy.¹⁵⁰

Qadi Iyad also gave the opinion of al Tabari that he related something similar from Abu Hanifa and his companions about anyone who ridicules the Prophet (peace be upon him) or declares that he renounces him or calls him a liar. He also quotes Muhammad ibn e Sahnun that anyone who abuses the Prophet (peace be upon him) and belittles him is not a believer and the threat of Allah’s punishment is on him. The community’s judgment on him

¹⁴⁸ Qadi Iyad, *Al Shifa*, translated by Aisha Abdarrahman Bewley (Madinah Press, Granada, Spain, 1991), 373. (hereinafter referred to as Qadi Iyad, *Al Shifa*)

¹⁴⁹ Ibid

¹⁵⁰ Ibid

is that he be killed. He further adds that anyone who has any doubts about such a person's disbelief and ultimate punishment is also a non believer.¹⁵¹

Ibn Attab's opinion is also given in Qadi Iyad's book and according to him the Qur'an and the *Sunnah* require that any person who intends to even slightly harm or insult the Prophet must be killed, whether he does it by making a clear statement or he only hints at it or merely suggests it.¹⁵²

4.2: Proof in the Qur'an and the *Sunnah* as expounded by the Jurists:

One of the most detailed works on blasphemy against the Prophet (peace be upon him) has been done by Ibn e Taymiyyah and Qadi Iyad. They have both discussed and analyzed almost the same verses from the Quran and have ultimately drawn the same conclusions.

Qadi Iyad has discussed the following verses of the Qur'an in support of his view of punishing the blasphemer with death:

- **“Verily as for those who (knowingly) affront God and His Apostle- God has cursed them in this world and the life to come; and shameful suffering will be ready for them.”**¹⁵³

Qadi Iyad drew the conclusion that, “Part of the curse on them in this world is that they are killed”.¹⁵⁴ Ibn e Taymiyyah also drew the same conclusion, that this verse makes

¹⁵¹ Ibid. 374.

¹⁵² Ibid.

¹⁵³ Al Qur'an (33:57)

¹⁵⁴ Qadi Iyad, *Al Shifa*, 377.

death penalty mandatory for the perpetrator. He also quotes a *Hadith* in support of this verse that cursing a believer amounts to killing him. He further concludes that God is a higher being than the Prophet (peace be upon him), therefore a person blaspheming against God will also be liable for death penalty. Further, cursing is the opposite of mercy and a person who has been excluded from God's mercy is a non believer and therefore it is permissible to kill him.¹⁵⁵

Qadi Iyad further explains his stance with the help of the following verse:

- **“Cursed they will be. Wherever they are found, they are seized and all humiliation in this world for them.”¹⁵⁶**

Also,

- **“Do they not know that for him who sets himself against God and his Messenger, there is instore for him the fire of hell, therein to abide; that is the most terrible disgrace.”¹⁵⁷**

On the other hand Ibn e Taymiyyah concluded from the above verse that opposing and annoying the Prophet (peace be upon him) in any way amounts to opposing and

¹⁵⁵ Ibn e Taymiyyah, *Al Sarim*, 40-42.

¹⁵⁶ Al Qur'an (5:45)

¹⁵⁷ Al Quran (9:63)

annoying God Almighty for which there is fire of hell. This is supported by the following verse:¹⁵⁸

- **“And among those [enemies of truth] there are such as malign the Prophet by saying: “He is all ears”. Say: [Yes] he is all ear, [listening] to what is good for you! He believes in God, and trusts the believers, and is [a manifestation of God’s] grace towards such of you as have [truly] attained to faith. And for those who malign God’s Apostle- grievous suffering awaits them [in the life to come]”.** ¹⁵⁹

Ibn e Taymiyyah further concludes that annoyance/ insult and opposition have been used synonymously in the Quran.¹⁶⁰

Qadi Iyad has recorded the following verses in his works in support of his ruling:

- **“O you who have attained faith! Do not raise your voices above the voice of the Prophet and neither speak loudly to him, as you would speak loudly to one another, lest all your [good] deeds come to nought without your perceiving it.”**¹⁶¹

¹⁵⁸ Ibn e Taymiyyah, *Al Sarim*, 20-22.

¹⁵⁹ Al Qur’an (9:61)

¹⁶⁰ Ibn e Taymiyyah, *Al Sarim*, 20-22.

¹⁶¹ Al Qur’an (49:2)

“Such an action only comes about through disbelief and the unbeliever is killed”¹⁶²

Ibn e Taymiyyah also gives these verses in favor of his ruling:

- **“Verily, those who contend against God and His Apostle- it is they who [on Judgment Day] shall find themselves among the most abject. [For] God has thus ordained: “I shall most certainly prevail, I and my Apostles!” Verily God is powerful, almighty!”¹⁶³**

Here he concludes it means that a person is humiliated when he loses the protection for his life and property. He further supports this conclusion by the following verse:¹⁶⁴

- **“Verily, those who contend against God and His Apostle shall be brought low even as those [evil doers] who loved before them were brought low after We had bestowed [on them] clear messages from on high. And [so,] for those who deny the truth there will be shameful suffering in store.”¹⁶⁵**

Both the learned scholars have recorded some traditions in their works that support their views.

¹⁶² Qadi Iyad, *Al Shifa*, 377.

¹⁶³ Al Qur'an (58:20-21)

¹⁶⁴ Ibn e Taymiyyah, *Al Sarim*, 22.

¹⁶⁵ Al Qur'an (58:5)

Those common in both their works are:

- Ibn e Abbas reports that a blind man had a slave-mother who used to curse and disparage the Prophet (peace be upon him). He scolded her and restrained her, but she would not be restrained. One night she began to attack and revile the Prophet (peace be upon him), so he took a dagger, placed it on her belly and killed her with blood spattering the place. He told the Prophet (peace be upon him) about that and the Prophet (peace be upon him) said 'take heed, I stand witness that shedding her blood was lawful'.¹⁶⁶
- Ali said: A Jewess used to abuse the Prophet (peace be upon him) and insult him. A man strangled her till she died. The Apostle of Allah (peace be upon him) declared that no recompense was payable for her blood.¹⁶⁷
- In the hadith of Abu Barza al Aslami it says, "One day I was sitting with Abu Bakr al Siddiq and he became angry at one of the Muslim men." Qadi Ismail and other Imams said the man had cursed Abu Bakr. An-Nasai related it as, "I came to Abu Bakr and a man had been rude and answered him back. I said, 'Khalifah of Allah, let me strike of his head!' He said, 'Sit

¹⁶⁶ Sunan Abu Dawood, Book 33, Prescribed Punishments, Hadith 4348; Ibn e Taymiyyah, *Al Sarim*, 67-69; Qadi Iyad, *Al Shifa*, 379.

¹⁶⁷ Ibid.Hadith 4349; ibid; ibid.

down. That is not for anyone except the Messenger of Allah, may Allah bless him and grant him peace.”¹⁶⁸

Imam Ibn e Taymiyyah has also quoted this hadith from al Bukhari in addition to ones given above:

- Narrated Jabir bin Abdullah: Allah’s Messenger (peace be upon him) said, “Who will kill Ka’b bin Al Ashraf who has hurt Allah and his Messenger?” Thereupon Muhammad bin Maslama got up saying, “O Messenger of Allah! Would you like that I kill him?” The Prophet (peace be upon him) said, “Yes”.¹⁶⁹

Qadi Iyad has also recorded the following incidents:

- “There is also the letter of ‘Umar ibn Abdu’l-Aziz to his governor in Kufa. He had asked his advice about killing a man who had cursed ‘Umar. ‘Umar wrote back him, “It is not lawful to kill a Muslim for cursing anyone except the Messenger of Allah (peace be upon him). Whoever curses him, his blood is lawful.”¹⁷⁰

¹⁶⁸ Ibid.Hadith 4350; ibid. 93; ibid.

¹⁶⁹ Sahih Al Bukhari (5:369). See also, Ibn e Taymiyyah, *Al Sarim*, 67-69.

¹⁷⁰ Qadi Iyad, *Al Shifa*, 379.

- “Hurun ar-Rashid asked Malik about a man who had reviled the Prophet (peace be upon him) and he mentioned to him that the *fuqaha* of Iraq had given a *fatwa* that he be flogged. Malik became angry and said, “*Amir al-Muminin!* There is no continuation for a community after it curses its Prophet! Whoever curses the Companions of the Prophet (peace be upon him) is to be flogged.”¹⁷¹

The conclusion that may be drawn from these *ahadith* is that it is lawful to kill the person who reviles and disparages the Prophet (peace be upon him) in any situation and that there is no penalty for it. However, Professor Imran Ahsan Khan Nyazee while quoting the first two *ahadith* in his translation of the *Kitab al Amwal* gives his opinion in the foot note (no. 153) that

“This tradition and others like it, may give the impression, when these alone are read, that it is permitted to take the law into ones own hands. It is not. The tradition must be read with other evidences of the Qur’an and *Sunnah*, especially those pertaining to the proving of offences and acquittal. This leads to the obvious question: should an offender be acquitted merely on his own testimony? Should a person guilty of blasphemy be slain without being given a chance to defend himself? The answer is no in both cases; Islamic law does not permit this. In fact the statement here is a confession that will work against the offender and not for him, that is, he has confessed to the crime, but the fact that the woman really indulged in slander was not proved. It is obvious that there were more details, but these have not been recorded

¹⁷¹ Ibid.

by the tradition. Yes, the tradition does provide some support for mitigation of sentence due to grave provocation, but that too needs to be proved.”¹⁷²

We may agree and prefer the above given opinion especially when one takes into consideration the general principles of Islamic criminal law derived and explained by the jurists, especially the Hanafis. However, it is quite clear that the classical jurists such as Imam Ibn e Taymiyyah took the traditions literally thus concluding that the blood of a blasphemer is lawful and requires no penalty.

4.3: Repentance of the Offender:

There is a difference of opinion among the various jurists as to whether a blasphemer should be asked to repent and whether his repentance is acceptable and admissible or not.

“While the Hanafis maintain that it is recommended to ask the blasphemer to repent (*istitabah*) and return to Islam, Imam Malik has considered this to be unnecessary. The Shafis and Hanbalis have each recorded two different views, one of which corresponds with that of the Hanafis and the other with that of Imam Malik. The majority opinion thus stipulates *istiabah* as a requirement prior to the enforcement of punishment: over a period of three days, the convict should be asked whether he or she wishes to repent.”¹⁷³

The dominant view within the Malikis and Hanbalis is that “repentance will not absolve the blasphemer from punishment in this world, although it may, if he is sincere,

¹⁷² Abu Ubayd al Qasim Ibn Sallam, *The Book of Revenue*. Translated by Professor Imran Ahsan Khan Nyazee, First Edition, (United Kingdom: Garnet Publishing Ltd, 2002), 257.

¹⁷³ Ibn e Taymiyyah, *Al Sarim*, 302; Kamali, *Freedom of Expression*, 232-234

benefit him in the hereafter.”¹⁷⁴ However, there is another opinion within these two schools that makes it obligatory that the blasphemer be given opportunity to repent.¹⁷⁵

“The Hanafis and Shafis, on the other hand, consider blasphemy to be in the same category as apostasy and have ruled that repentance is admissible in both cases.”¹⁷⁶

The latter view appears to be more favorable and more in conformity with the spirit of the religion that means peace.

4.4: Blasphemy by Non Muslims:

There are three possible situations where a non-Muslim may be involved in blasphemy against Islam:

- (a) When a non Muslim expresses a view that is part of his own faith but is contradictory to the Islamic faith, such as when a Christian states that Jesus is the son of God. According to Hashim Kamali this would be a simple variety of disbelief rather than actual blasphemy.¹⁷⁷ We disagree with him on this last point. This would be actual blasphemy from the Islamic perspective and not just a simple variety of disbelief. However, a Christian can not be punished for it for two reasons, namely, Islam does not allow the Muslims to interfere in the beliefs and religious matters of non Muslims, and Muslims are prohibited from imposing their faith on non Muslims.

¹⁷⁴ Kamali, *Freedom of Expression*, 234.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid. 235.

(b) When a non-Muslim professes something maliciously in an offensive manner which, although part of his faith and religion, he would be considered to have committed blasphemy. In this case, according to Hashim Kamali, if the non-Muslim is a *dhimmi*, he loses his protected status and becomes liable to punishment.¹⁷⁸

(c) When the abuse and insult uttered by the non Muslim is not a part of his beliefs and consists of something which is equally prohibited in his own religion. In such a situation, no distinction is made, between Muslims and non-Muslims, as anyone who insults or reviles God is considered to have committed a blasphemous offence, regardless of his or her religious beliefs or values.¹⁷⁹

There is a difference of opinion among the jurists on the admissibility of the repentance of a blasphemer. However, most jurists are of the opinion that it is admissible. But, in the case of a non Muslim, repentance means and includes conversion to Islam.

“Some ‘*ulema*’ of Medina have also held that repentance is acceptable from a *dhimmi* in the same way as it is from a Muslim, and that the non-Muslim does not lose his protected status either. Imams al-Shafi and Ahmad bin.Hanbal, according to one of two reports, maintained that the *dhimmi* may not be asked to repent, but if he converts to Islam at his own initiative, he is not liable to any punishment. According to a variant report, Imam Malik and Ahmad bin Hanbal have held that the *dhimmi* is liable to the mandatory death

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

penalty; however some Malikis maintained that if the insult perpetrated by a non-Muslim consists of attributing a lie to the Prophet (peace be upon him) (*takdhib al-Rasul*), then there is no liability to capital punishment. In yet another report, Imam al Shafi is said to have held that the protected status of the *dhimmi* terminates when he commits blasphemy and that, consequently, he becomes an enemy of war (*harbi*), in which case the head of state is within his rights to punish him as such. Imam al Shafi adds that in this matter the head of state has discretionary powers similar to those he has with regard to prisoners of war, that is, over whether to kill the offender or ask for ransom, or whether to expropriate his property or not. On the other hand, Imam Abu Hanifa and his disciples have maintained that the covenant with the *dhimmi* (*ahd al-dhimmah*) is not terminated as a result of blasphemy consisting of *sabb Allah* and / nor is liable to a deterrent punishment of *ta 'zir* in the same way as when he commits other evil acts (*munkarat*) which are forbidden to him.¹⁸⁰

Summing up the above opinions, it is clear that the scholars have discussed the punishment of blasphemy by a non Muslim in the context of his contract of *dhimmah*.

Majority of the schools of thought are of the opinion that when a non Muslim commits blasphemy, his contract of *dhimmah* is automatically terminated making him liable to punishment, which, as quoted above, is, death, according to these schools of thoughts. On the other hand, according to the Hanafi school of thought, the contract is

¹⁸⁰ Ibid; Ibn e Taymiyyah, *Al Sarim*, 8-25, 559-561.

not terminated, unless the contract clearly mentions that it would be so terminated in case of blasphemy. However, another opinion within the Hanafi school of thought is that the contract does not terminate at all.

As far as the actual punishment of blasphemy is concerned, the majority of the Schools of *fiqh* are of the view that the death penalty should be awarded to the non Muslim for the offense of blasphemy. However, the Hanafis hold a different point of view. According to them, death penalty may be awarded to the non Muslim for committing blasphemy, in the event that he blasphemes in a very offensive manner or he does it repeatedly without showing any remorse.¹⁸¹ This view of the Hanafis is quoted in Ibn Taymiyyah's *Al Sarim*, and also by his student Ibn Qayyim Al Jawziyah in his book *Abkam Abl al Dhimmah*.¹⁸²

The same view has been accepted and quoted by a Hanafi jurist Ibn e Abideen in his book *Radd al Mukhtar ala al Dar al Mukhtar*.¹⁸³

Further, the Hanafis hold the punishment of blasphemy of non muslims within the ambit of *siyasah*¹⁸⁴ and this concept has been discussed in section 4.5.

4.5: Classification of Punishments in Islamic law:

An analysis of the work of the Islamic scholars in the field of Islamic legal system shows that they regard the Islamic legal system to be operating through two linked spheres. The first part of this system is fixed, while the second is flexible and it changes with changing times

¹⁸¹ Ibn Qayyam al Jawziyah, *Abkam Abl al Dhimmah*, (Beirut: Dar al Ilm, 2002), vol.ii, 214.

¹⁸² Ibid.

¹⁸³ Ibn Abideen al Shami, *Radd al Mukhtar ala al Dar al Mukhtar* . (Cairo: Matb'at Mustafa, 1366 A.H) vol. iii, 303-306.

¹⁸⁴ Ibn al Hamam al Iskandri, *Fath al Qadir Sharh al Hadayah*,(Cairo: Matb'at Mustafa, 1352 A.H) vol. v, 304.

and needs of the Muslim community. The scholars developed and explained the fixed part, and left the development of the flexible part to the ruler or the imam, who was to develop it according to the changing times and circumstances. This function of the ruler is called '*siyasah shari'iyah*'. This maybe translated as 'administration of justice according to the *Shariab*'. This conceptual separation in the Islamic legal system can be distinguished and understood by understanding and appreciating the doctrine of *hadd* and the classification of laws on the basis of rights.¹⁸⁵

Generally, the doctrine of *hadd* is linked to the law of crimes and punishments, and usually it is understood to mean fixed punishments that are considered to be the right of Allah (*haqq Allah*). This is the narrow concept of *hadd*. However, the term *hadd* occurs thirteen times in the Qur'an and no where does it imply the meaning of fixed punishments. In fact, it may be said that all the *ibadat*, the fixed punishments that are usually termed as *hadd*, and most of the laws that are prescribed in the Qur'an and the *Sunnah* are considered to be part of the broader concept of *hadd*. In simple words, it may be said that all the issues of law that are clearly and explicitly stated in the Qur'an and the *Sunnah* or those that are closely related to them are considered to be within the sphere of the wider doctrine of *hadd*. This doctrine of *hadd* works together with the concept of the right of Allah.¹⁸⁶

It has already been mentioned that right of Allah is separate and independent from the right of the state or the right of the individuals as a whole, or the right of the community collectively. This is called *haqq al salatanaah*. The Muslim community owes the right of Allah to Allah Almighty. The persons living in a Muslim community do not owe this right to the community at large or to the State or its ruler. This right is fixed by Allah Himself and it can

¹⁸⁵ Nyazee, *Theories of Islamic law*, 111-112.

¹⁸⁶ Ibid. 114-115.

not be changed or altered. Therefore, the laws falling under the right of Allah form the fixed part of the Islamic legal system. On the other hand, all such laws that have not been fixed by Allah and fall within the ambit of the right of individuals or the right of state are flexible and can be altered keeping in view the changing times and circumstances.¹⁸⁷

However, in this research, we are basically concerned with differentiating between the right of Allah and the right of state or *haqq al saltanah*. Following are a few points of distinction:

First, “the penalty for an offense against the right of Allah can not be waived or commuted after apprehension and conviction. However, the penalty for an offense against the right of an individual alone or the right of state, can be commuted.”¹⁸⁸ In other words, there exists a major difference in the procedure of the implementation and execution of punishments after the offense violating these rights is proved.

Second, “*Shubah* (doubt) in the right of Allah has the effect of waiving the penalty of *hadd*, while it does not have the same effect in *ta ‘zir*.”¹⁸⁹ But, it must be kept in mind that doubt over here does not mean the benefit of doubt given to an accused in positive law. Here, it means the doubt or confusion that may exist in the mind of the accused at the time of the commission of act with regard to the act itself as being lawful for him under any principle of Islamic law or due to any particular circumstances or set of facts.¹⁹⁰ Also, since *ta ‘zir* is the right of the individual, *shubah* or doubt can not apply here.¹⁹¹

¹⁸⁷ Ibid. 115-116.

¹⁸⁸ Ibid. 119.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

Lastly, “the evidence of women is not admissible in the right of Allah, that is, in *hudud*, while it is in case of *ta ‘zir*, which is the right of the individual, but the *nisab* of one man and two women has to be maintained, as in the case of other rights of individuals. No such restriction is applicable to the right of the state and a single woman can furnish evidence that is admissible in cases falling under *siyasah*, just as circumstantial evidence is admissible whenever the *haqq al salatanah* is in issue.”¹⁹² In other words these rights differ in terms of their rules and procedure of evidence as well.

It may be noted that *siyasah* or the right of state relates to the right of the community at large and the rules and standards of evidence are more relaxed and lenient and it depends on the ruler or *imam* to determine them according to needs and requirements of his times.

4.5.1: Punishment of Blasphemy; the Right of God, or the Right of State:

The jurists of Islamic law draw distinctions between three kinds of rights; the right of God, the right of state (*haqq al saltana*) and the right of individual. The right of state, also called the right of community can be equated to public right or public interest. Originally the right of God and the right of state were taken to be one and the same. The right of state as an independent right emerged later. After its emergence, the jurists classified all the *hudud* punishments as the right of God. In case of any conflict between these three rights, the right of God will take precedence over all other rights.¹⁹³

This raises the question whether the offence and the ultimate penalty for blasphemy is classified under the right of God or the right of state. The answer appears to favor the

¹⁹² Ibid. 120.

¹⁹³ Nyazee, *Theories of Islamic Law*, 58, 249.

latter view. We stated in the previous chapter that blasphemy pertains to public interest as it attacks and hurts the sentiments of religious communities as a whole, and affects the public at large, and disrupts its peace and tranquility. Blasphemy can not be considered under the category of *hudud*. Since it pertains to public interest and the right of state is also equated to public interest, therefore, blasphemy undoubtedly falls within the ambit of the right of state or the right of community at large, that is, *siyasah*. As earlier noted, Muslim jurists discuss the offence of blasphemy committed by a Muslim under the doctrine of apostasy, and they of course consider apostasy as a *hadd* offence. However, it is well established that *siyasah* punishment can be given even in *hadd* case, keeping in view the circumstances of the case. For instance, the punishment given by the Prophet (peace be upon him) to ‘*Uraniyin*’ which according to the Hanafi jurists was neither *qisas* nor *hadd*, rather it was *siyasah*, because it neither fulfilled the criteria of *qisas* nor of *hadd*.¹⁹⁴

The establishment of the offence of blasphemy under the state right has certain legal effects that must be considered when dealing with cases of blasphemy.

In cases falling under the right of God, as in the case of *hudud*, neither the state nor any individual has the right to forgive. All such offences are liable to be punished absolutely provided that all the prescribed evidence is complete, such as the prescribed number of witness, *tazkiyah al shuhud* etc. On the other hand, offences falling under the right of state are liable to be punished under *siyasah* and the extent of the sentence along with the standard of evidence is at the discretion of the state or ruler. In all such cases, the sentence may be given keeping in view the circumstances of the case and the intention of the offender. Also, as already mentioned in the previous article, the element of *shubah* results in the suspension of *hadd*. But it has no effect in the case of *siyasah*.

¹⁹⁴ Al Sarakhsi, *Al Mabsut*, (Beirut: Dar al Fikr, 1998) vol.25, 126.

Furthermore, in all such offences, the offender has the right to repent and ask for forgiveness, and the state has, in turn, the right to forgive.¹⁹⁵ If it is proved in case of blasphemy that the offender did not act maliciously or acted out of ignorance then he may either be forgiven or at least his sentence may be reduced to minimum as the circumstances allow.

In short, it may be said that blasphemy is a criminal offence but there is no prescribed mandatory punishment for it. This means that it falls under *siyasah*, and its punishment may be prescribed by the state or its judicial authorities.¹⁹⁶ However, it is important that the exact meaning, nature and circumstances of the offence are considered before deciding upon any such case.

An important thing to note under this subject is that the scholars of Islamic law have taken a more serious view of reviling of the Prophet Muhammad (peace be upon him) as compared to the insult to God. This does not mean that they consider the latter to be less important or that it does not amount to blasphemy, but it seems that they consider the honor of God can not be harmed the senseless conduct of a misguided person. In such a situation, the individual only brings upon him self dishonor and the curse of God. And this does not, in any way, compromise the status of God. But, the Prophet (peace be upon him), being a human being is vulnerable to abuse and therefore, his rights must be protected. This view was taken by a few jurists probably due to the reason that they considered the insult to the Prophet (peace be upon him) as an infringement of the Prophet's (peace be upon him) personal right that must now be secured by the Muslims. Elaborating on this view, these scholars also consider that this offence could only be pardoned by the Prophet (peace be

¹⁹⁵ Muhammad Mushtaq Ahmad, *Hudud Qawaneen* (Madrar al Uloom, Mardan, Pakistan, 2006.), 40-44

¹⁹⁶ Kamali, *Freedom of Expression*, 244.

upon him) himself. Therefore, if such a case arises, then there is no room for forgiveness by the state even if the offender repents.¹⁹⁷

However, keeping in view the discussion in the preceding articles, it is humbly submitted that the analysis that blasphemy is a pardonable offence in case the offender repents, and that it falls under the right of state and is thus governed by such rules as may be laid down by the head of state, is the preferred point of view. In this regard, both the blasphemy against God, and the blasphemy against the Prophet (peace be upon him) are to be taken under the same category, and are not to be taken as separate offences.

This discussion may be concluded by saying that the offence of blasphemy may not be treated under *hudud* as the right of God. It, in fact, pertains to public interest and should, therefore, be considered to fall under the right of state. The same rules and procedure will apply to this offence, as will apply to any other offence that falls within the ambit of the right of state. Therefore, it falls under *siyasah* and does not have any mandatory punishment nor any fixed rules of evidence and procedure, therefore it is subject to such rules of procedure and standards of evidence as the head of the state may prescribe from time to time. Further, the head of the state has the right to forgive the offender if he repents.

Also, the blasphemy provisions given in the Pakistan Penal Code (1860) were discussed in the first chapter and some observations were made. It may also be concluded that those provisions also do not fall under *hadd* and are in fact regulated under the doctrine of *siyasah*.

¹⁹⁷ Ibid. 232.

CONCLUSION

The principle objective of this research has been to explore and determine the status of blasphemy within the Islamic legal system, while also determining its position as compared to Human Rights, especially the right of freedom of speech and expression, keeping in view the Purposes of Islamic Law that form the basis of an Islamic society.

The first chapter attempted to explain blasphemy in terms of Islamic law by quoting the various verses in the Holy Qur'an that deal with the issue. It established that Islamic law not only recognizes blasphemy as a penal offence, but takes a very serious notice of it, making the offender liable to serious punishments.

The second chapter briefly discussed the modern concept of freedom of speech and the position that it occupies within the frame work of Islamic law. It was concluded that the claim that Islam does not grant freedom of speech to its followers is plainly wrong. However, this right is not an unqualified one and is subject to certain restrictions in the interest of the public, and blasphemy is one such limitation. Limitations on certain rights in certain circumstances is not an alien concept as the various international instruments that grant the right of freedom of speech, also, do not give completely unqualified right of free speech and it is subject to certain restrictions, for example, national security, contempt of court etc.

The third chapter attempts to determine the status of blasphemy within the framework of the Purposes of Islamic Law. By exploring the hierarchy of the purposes, where the interest of religion takes precedence over all other interests, in all circumstances, and the blasphemy laws being incorporated to protect the interest of religion, it can be safely

concluded that they shall take priority over all other forms of rights, including freedom of speech. Islam guarantees freedom of speech in every way except when such freedom results in the abuse and vilification of the religion. Islamic society stands on the ground that the protection and interest of religion comes before any other interest. Therefore, blasphemy laws are not to be set aside in favor of freedom of speech and expression.

The last chapter is the most important as it seeks to establish the punishment of blasphemy for both Muslims and Non Muslims within the Islamic Criminal Law. Repentance of the offender is also discussed, with the conclusions that it can be pardoned. The crucial question was whether the punishment of blasphemy falls within the ambit of *hadd* or *siyasah*? The classification of punishments in the Islamic Criminal Law and its system of rights had to be explored for this purpose. The subsequent division and explanation of rights in The Rights of God, The Rights of Individual and The Rights of the State or The Community as a whole helped in understanding how blasphemy laws generally fall within the ambit of the Right of the State or *siyasah* and not under Right of God or *hadd*.

The main conclusions that may be drawn from this research are:

First, that the offence of blasphemy is one that has been declared so in the Qur'an and the *Sunnah*.

Second, as it pertains to the interest of religion, it occupies the highest position in the hierarchy of the Purposes of Islamic Law, and no other interest can be given precedence over it. An attack against this interest would constitute an attack against the system of Islamic law.

Third, Islamic law grants the right of free speech and expression to its followers but it is not an unqualified one and is subject to some exceptions, as is every law.

Fourth, the Hanafi scholars place its punishment within *siyasah* when the offender is a non Muslim. They also consider it a pardonable offence where the state has the right to pardon it or devise rules of procedure and standards of evidence for it according to the circumstances of the case. Also, majority of the scholars consider death penalty to be mandatory for the offender especially in the case of a Muslim, as they consider blasphemy to be the worse form of apostasy. The Hanafis agree that it is a worse form of apostasy and, hence, it requires a *hadd* punishment. However, *siyasah* punishment can be given even in a *hadd* case.

It is finally concluded that blasphemy is a penal offence liable under *siyasah*. It falls within the interest of religion and therefore, the crime must be prevented through laws formed by the state that are properly regulated.

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