THE DOCTRINE OF *SIYĀSAH* IN THE ḤANAFĪ CRIMINAL LAW AND ITS IMPLICATIONS FOR ISLAMIZATION OF LAWS IN PAKISTAN

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AHD

1. punishment (Islamic law)
2. criminal justice, Administration of (Islamic law)

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بسم الله الرحمن الرحيم

To Professor Imran Ahsan Khan Nyazee

My Teacher, My Mentor

ستا دښائست ګلونه ډېر دي

جولۍ مې تنګه، زه به کوم کوم ټولومه !

International Islamic University Islamabad

Faculty of Shari'ah & Law

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Approval Sheet

This is to certify that we evaluated the thesis entitled "The Doctrine of *Siyasah* in the Hanafi Criminal Law and Its Implications for Islamization of Laws in Pakistan" submitted by Mr. Muhammad Mushtaq Ahmad, Reg. no. 08-SF/PhD-IJ/S10 in partial fulfillment of the award of the degree of PhD in Islamic Law and Jurisprudence. The thesis fulfills the requirements in its core and quality for the award of the degree.

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I, **Muhammad Mushtaq Ahmad,** hereby declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

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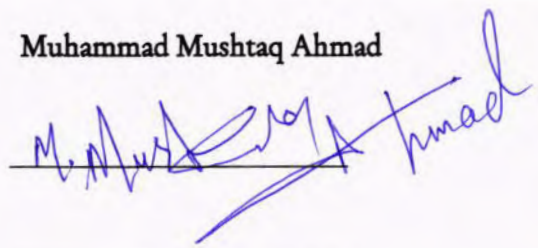
Signature: 

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ACRONYMS

AH	After Hijrah
AIR	All India Reporter
AJ&K	Azad Jammu and Kashmir
CE	Common Era
CII	Council of Islamic Ideology
CrPC	Code of Criminal Procedure
DNA	Deoxyribonucleic Acid
FSC	Federal Shariat Court
HC	High Court
IPC	Indian Penal Code
KP	Khyber-Pukhtoonkhwa
MFLO	Muslim Family Laws Ordinance
MLD	Monthly Law Digest
MMA	MuttahidaMajlis-e-Amal
NGO	Non-governmental Organization

NWFP	North-West Frontier Province
PCrLJ	Pakistan Criminal Law Journal
PLD	Pakistan Law Decisions
PO	Presidential Order
PPC	Pakistan Penal Code
POWA	Protection of Women Act
QSO	Qanoon-e-Shahadat Order
SAB	Shariat Appellate Bench
SC	Supreme Court
SCMR	Supreme Court Monthly Review

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Contents

ABSTRACT

Following Orientalists, Muslim scholars working in the post-colonial world on Islamic criminal law have generally considered the various schools of Islamic law to be based on a common legal theory. Consequently, they adopted a policy of picking and choosing from different schools. The Ḥanafī doctrine of *siyāsah*, which recognizes the parameters of the authority of the government and the judiciary, has almost wholly heen ignored. The focus has, instead, been directed at the concepts of *ḥudūd*, *qiṣāṣ* and *ta'zīr;* areas which are more or less fixed by the texts of the Qur'ān and the *Sunnah*. Calls for reform have touted such vague concepts as the 'dictates of human nature' and 'reason'.

This dissertation presumes that every school of Islamic law represents a distinct legal theory and system of interpretation. The most distinctive feature of Ḥanafī criminal law is its classification of rights which determines the legal consequences of various crimes ranging from the limits of punishments and standard of proof to the possibility of pardon and compromise. Ḥanafī jurists occasionally use the term *ta'zīr*for private disciplinary action and at times use it in the context of their discussion on the *ḥudūd*and *qiṣāṣ*punishments. The latter is a particular form of *siyāsah*, though it retains some peculiar features of its own. General criminal law is governed by the doctrine of *siyāsah* and, thus, the government should focus on *siyāsah* for improving its criminal justice system in accordance with the general principles of Islamic law.

Using the methodology of *takhrīj*, or reasoning from principles, the dissertation examines the implications of *siyāsah* for reforming Pakistani criminal law and concludes that:

- Blasphemy by a Muslim attracts the consequences of the *ḥadd* of apostasy, while blasphemy by a non-Muslim is a *siyāsah* crime;
- The only way to delink the crime of sexual violence from the *ḥadd* of *zinā* is to define it in a way that does not require the allegation and proof of sexual intercourse;
- The existing definition of *qatl-e-amd* is based on the principles of common law and it must be replaced by a narrow definition of *qatl-e-amd* based on the principles of Ḥanafī law;
- The subjective standards for determining *fasād fī 'l-arḍ* mentioned in Section 311 of PPC must be replaced by clearly defined objective standards;
- The *ḥadd* or *qiṣāṣ* offence "liable to *ta'zīr*" is a misnomer and must be replaced by separate *siyāsah* crime;
- The government can develop the law of evidence regarding *siyāsah* crimes in the light of the general principles of Islamic law, and can make circumstantial or indirect evidence admissible in these cases.

The process of Islamization will not bear fruit unless the judiciary gets rid of the presumption that Pakistan is a common law country and realizes its legal duty of interpreting all laws in the light of the principles of Islamic law.

INTRODUCTION

Pakistan is an "Islamic Republic"[1] and Islam is "the state religion"[2] of Pakistan. The Pakistani Constitution upholds the principle of God's sovereignty over the entire universe[3] and asserts that all the existing laws shall be brought into conformity with "the injunctions of Islam as laid down in the Holy Qur'ān and [the] *Sunnah*" and that future legislation will be in accordance with these injunctions.[4] For helping the Parliament in achieving this purpose, the Constitution established the Council of Islamic Ideology (CII).[5] After the military coup of 1977, the Chief Martial Law Administrator came up with major changes in the legal system in the name of "Islamization" of laws.[6] The emphasis, however, has been on the provisions of Islamic law relating to the *ḥudūd* and the *qiṣāṣ*crimes and the existing provisions of criminal law were brought under the rubric of *ta'zīr*.[7]

As common law divides legal rights into public and private and considers crime a violation of public right while Islamic law divides legal rights into three kinds – rights of God, of individual and of community – and prescribes punishments for violations of these

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[1]Constitution of the Islamic Republic of Pakistan, 1973, Article 1 (1).

[2]Ibid., Article 2.

[3]Ibid., Preamble, First Para. This is the famous "Objectives Resolution" of 1949. By virtue of Article 2-A, inserted in the Constitution through the Eighth Amendment in 1985, the provisions of this Resolution now forms operative part of the Constitution.

[4]Ibid., Article 227 (1).

[5] Ibid., Article 228.

[6] An important change relates to the establishment of the Federal Shariat Court which can nullify a law which it finds repugnant to the Islamic injunctions. See for details: Section 6.2.1 of this Dissertation.

[7] Three "Hudood Ordinances" relating to the Offence of Zina, the Offence of Qazf and the Offences against Property and a Prohibition Order relating to the Offence of Drinking were promulgated in 1979. The Qisas and Diyat Ordinance was delayed and could only be promulgated in 1990. See Chapters Six and Eleven of this Dissertation for details.

rights. The very nature of crime and criminal law is different in these legal systems.[8] Hence, the unnatural amalgamation of the principles of Islamic law and those of common law has resulted in creating anomalies. The nearest match to the common law concept of "crime" in Islamic law is the concept of "*siyāsah*" which Muslim jurists consider violation of public right. However, the concept of *siyāsah* has generally been ignored in the discourse on Islamization of the Pakistani criminal law as most of the scholars in the post-colonial world have equated concept of "the right of God" with "public right" and also ignored the distinctions between the concepts of *siyāsah* and *ta'zīr*.[9]

The present dissertation digs out the concept of *siyāsah* and assumes that this concept can offer better solutions for the more complex problems of the Pakistani criminal justice system such as blasphemy, rape, pardon in murder cases and honor killings as well as admissibility of the testimony of women and non-Muslims. For this purpose, the dissertation first dispels the basic assumption of the modern scholars that the various schools of Islamic law as based on a common legal theory and presumes that every school of law is a distinct system of interpretation based on a distinct legal theory.[10] Thus, after highlighting the peculiar features of the legal theory of the Ḥanafī School, it elaborates the characteristic feature of the Ḥanafī criminal law, namely, its classification of legal rights.[11]After recognizing the legal consequences of the violations of various rights and clearly identifying the

[8] This is elaborated in detail in Chapter Four and Five of this dissertation.

[9] See Chapter One.

[10] This explains why the jurists emphasized following a particular school *in toto* and disdained picking and choosing among the opinions of various schools.

[11] This classification of rights forms the backbone of the Ḥanafī criminal law.

parameters of the doctrine of *siyāsah*, the dissertation examines some complicated issues of Pakistani criminal law and tries to find out solution to these problems with the help of the Ḥanafī doctrine of *siyāsah*.

The Dissertation is divided into twelve chapters and three appendices.

Chapter 1 shows that modern scholars have generally ignored or summarily treated the doctrine of *siyāsah* in Ḥanafī criminal law. It shows that both Western and Muslim scholars in the post-colonial world primarily concentrated on the works of Ḥanbalī jurists, particularly on IbnTaymiyyah and Ibn al-Qayyim, and have equated their doctrine of *siyāsah* with the Ḥanafī doctrine. This, in fact, is based on another wrong assumption, namely, that "Islamic law" is based on a "common legal theory" and that schools of law do not have significant differences. The basic contention of this dissertation is that every school of law is a distinct legal system based on a distinct legal theory. As such, the Ḥanafī doctrine should be extracted from the Ḥanafī manuals using proper Ḥanafī methodology. Another point elaborated in this chapter is that instead of "separation of theory and practice" and tension between rulers and jurists – the view expounded by expounded orientalist scholar like Ignaz Goldziher, Joseph Schacht and N. J. Coulson – there was an elaborate "division of labor" between the rulers and the jurists and the Ḥanafī doctrine of *siyāsah*, as rediscovered by Imran Ahsan Khan Nyazee, is the key to understanding this division

The next two chapters concentrate on questions about methodology. Chapter Two critically examines the methodology of the Muslim scholars working in the post-colonial

world on Islamic criminal law and discusses the Report on the Hudood Laws Reforms prepared by the Council of Islamic Ideology.

Chapter Three first expounds the Ḥanafī methodology for deriving detailed rules of Islamic law and then elaborates the methodology of *takhrīj* or reasoning from principles for extending the law to new cases without undoing existing law.

Chapter Four highlights the characteristic features of Ḥanafī criminal law and elaborates the broader parameters of the doctrine of *siyāsah* in the context of criminal law on the basis of the work of the *elders* of the School-Sarakhsī, Kāsānī and Marghīnānī.

Chapter Five critically examines the work of the later Ḥanafī jurists who – under the influence of other schools, particularly the Shāfi'ī school- confused *siyāsah* and *ta'zīr*. Modern scholars of the post-colonial world have aggravated the confusion by building upon it.

The rest of the seven Chapters apply the doctrine of *siyāsah* on some contentious issues of the Pakistani criminal law. The issues selected for analysis are: blasphemy, rape, homicide and standard of evidence for proving various crimes. The reasons for selecting these issues are: first, they aptly show the scope and utility of the Ḥanafī doctrine of *siyāsah* in the context of criminal law; two, scholars have generally examined these issues from the perspective of *ḥudūd* and *qiṣāṣ* and have generally suggested picking and choosing between various schools or restructuring the whole bulk of Islamic criminal law. This dissertation holds that the doctrine of *siyāsah* can come up with viable solutions for these issues without undoing the established norms of *ḥudūd* and *qiṣāṣ*; three, the issues of blasphemy and rape show the interplay between *ḥudūd* and *siyāsah*,homicide shows the relationship of *qiṣāṣ* and

siyāsah, and the issues of evidence show that *siyāsah* can cater to the needs of the contemporary world without changing the law of *ḥudūd* and *qiṣāṣ*.

The scope of *siyāsah* in the context of the law of blasphemy has been examined in three Chapters. Thus, Chapter Six explores the historical development of the Pakistani law of blasphemy and frames issues which are then examined critically in the next two Chapters. Chapter Seven first examines the nature and scope of the crime of blasphemy in Islamic law and then explores in detail the Ḥanafī manuals about the legal consequences of blasphemy when the accused is a Muslim. It concludes that the Ḥanafī School considers this form of blasphemy a sub-category of apostasy and applies the principles of apostasy to this case. Chapter Eight first explores the Ḥanafī manuals on the legal consequences of blasphemy when the accused is a non-Muslim and concludes that the Ḥanafī School considers it a *siyāsah* crime in this situation. After this it examines the question of violation of the personal rights of the Prophet, upon him blessings and peace. Finally, it gives suggestions for improving the existing Pakistani law on blasphemy.

Chapter Nine applies the Ḥanafī doctrine of *siyāsah* on the crime of sexual violence and after critically examining Pakistani law and expounding the Ḥanafī law on the issue, it gives suggestions for improving the existing Pakistani law.

Chapter Ten first explores the general principles of Ḥanafī law about testimony and the standard of proof for various categories of crimes and then critically examines the arguments of modern scholars who call for rejecting these standards and accepting the

testimony of women and non-Muslims as well as circumstantial evidence in *ḥudūd* and *qiṣāṣ* cases.

Chapter Eleven elaborates how the Pakistani judiciary compelled the Parliament to Islamize the law of homicide and examines the various leading cases. It then gives a broader picture of the issues in the law of *qiṣāṣ* and *diyat* relevant from the perspective of the doctrine of *siyāsah*. These issues are examined in detail in Chapter Twelve which also gives recommendations for improving the existing Pakistani legal regime.

Three Appendices have been added to the dissertation.

Appendix One lists fifty-four general principles of Ḥanafī criminal law extracted from *Kitāb al-Ḥudūd* of *al-Mabsūṭ* of Imām al-Sarakhsī. The principles have been categorized for the ease of understanding and the original Arabic text is accompanied by English translation. Brief explanations of these principles have been provided in the footnotes.

Appendix Two gives excerpts from the monumental work of'Alā' al-DīnAbū 'l-Ḥasan 'Alī b. Ibrāhīm al-Ṭarāblusī titled*Mu'īn al-Ḥukkām fi-mā Yataraddadubayn al-Khaṣamayn min al-Aḥkām* on the doctrine of *siyāsah*, elaborating the main features of the doctrine, its place in the general scheme of Islamic law and its relationship with the higher objectives of Islamic law.

Appendix Three gives excerpts from the *risālah* of Ibn'Ābidīn on the effect of repentance of the convict of blasphemy where he summarizes the whole debate in the Ḥanafī School on the issue and then gives arguments for preferring the official position of the School.

Finally, the findings of the dissertation have been recorded and concrete suggestions have been given for improving the Pakistani criminal justice system in the light of the Ḥanafī doctrine of *siyāsah*.

At the end of this introduction, it may not be out of place to make a point about the use of the sources for ascertaining the "official position" (*ẓāhir al-madhhab*) of the Ḥanafī School. As explained in detail Chapter Three, the present dissertation is based on the presumption that every school of Islamic law is an internally coherent legal system. It, therefore, focuses primarily on the expositions of the Ḥanafī School only; although, where needed, references to the views of the other jurists have also been briefly made.

For understanding and explaining the legal principles of the Ḥanafī School, the dissertation primarily and heavily relies on the great compendium of Islamic law, the *al-Mabsūṭ*of Shams al-A'immah Abū Bakr Muḥammad b. Abī Sahl al-Sarakhsī (d. 483 AH/1090 CE). The reasons are manifold. First, *Mabsūṭ* is the commentary on *al-Kāfī fī Furū' al-Ḥanafiyyah* which, in turn, is the abridged version of the six most basic and most authentic texts of the School – the *Ẓāhir al-Riwāyah* – written by Imām Muḥammad b. al-Ḥasan al-Shaybānī (d. 189 AH/805 CE), the disciple of Imām Abū Ḥanīfah al-Nu'mān b. Thābit (d. 150 AH/767 CE), the founder of the School. Second, it is the most authoritative commentary of the *Ẓāhir al-Riwāyah*; so much so that the Ḥanafī jurists have explicitly and unequivocally stated that anything that goes against *Mabsūṭ* is definitely not the official position of the

Ḥanafī School.[12] Three, Sarakhsī was among the *mujtahidīn fī 'l-masā'il* – those who authoritatively determine the official position of the School on the already decided cases and extend the law to new cases. As such, his position on an issue has been considered conclusive by all those who have come after him. Four, Sarakhsī not only elaborates the meaning and necessary implications of a principle, but also relates it to other principles, differentiates between the apparently similar cases and brings under the umbrella of one principle several cases from different branches of law. This helps immensely in understanding the law and the legal reasoning adopted by the jurists of the School.[13] Five, *Mutūn* (pl. of *matn*) were composed by the jurists of the School for codifying the official position of the School and the most authoritative of these *Mutūn* is *Bidāyat al-Mubtadī* (along with its commentary *al-Hidāyah*) both written by Imām Burhān al-Dīn 'Alī b. Abī Bakr al-Marghīnānī (d. 593 AH/1197 CE). Those familiar with the manuals of the Ḥanafī jurists know very well that Marghīnānī heavily relies on Sarakhsī. Along with these two most authoritative Ḥanafī jurists, the dissertation further relies on another authoritative and very influential exposition of the School, the *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* of Malik al-'Ulamā' 'Alā'al-DīnAbū Bakr b. Mas'ūd al-Kāsānī (d. 587 AH/1191 CE).

Effort has been made to ascertain the position of the School in all these three sources, although at times reference has been given to only one or two of them. Works of the later

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[12] Muhammad Amin Ibn 'Ābidīn al-Shāmī, *Sharḥ 'UqūdRasm al-Muftī* (Lahore: Sohail Academy, 1396/1976), 15-16.

[13] Professor Imran Ahsan Khan Nyazee (b. 1945), an authority on Islamic law and jurisprudence, says that al-Sarakhsī had a "powerful legal mind" and that "there is no other law book in the entire Islamic legal literature that can match the power of this book." Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihād* (Islamabad: Islamic Research Institute, 1994), 60.

jurists have been studied with due care and, where necessary, have been checked for compatibility with these three works. Among the later jurists, the dissertation primarily relies on *Radd al-Muḥtār 'alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār*, also known in the subcontinent as *Shāmī*, written by Khātimat al-Muḥaqqiqīn al-'Allāmah Muḥammad Amīn Ibn 'Ābidīn al-Sbāmī (d. 1252 AH/1836 CE).

CHAPTER ONE: POST-COLONIAL DISCOURSE ON *SIYĀSAH* IN ISLAMIC CRIMINAL LAW

INTRODUCTION

"*Siyāsah* is a strict law (*shar' mughallaẓ*)", says 'Alā' al-Dīn Abū 'l-Ḥasan 'Alī b. Ibrāhīm al-Ṭarāblusī(d. 844/1440), "and it is of two kinds: *siyāsah ẓālimah* (tyrannical administration) which Islamic law prohibits; and *siyāsah 'ādilah* (just administration), which takes the right from the unjust, prevents numerous forms of injustice, deters those who seek mischief (*fasād*) and helps in achieving the objectives of the law."[1] Throughout Muslim legal history, this doctrine of *siyāsah* developed by Ḥanafī jurists has played an important role in the administration of justice. Thus, not only the *qānūn* of the Ottoman sultans[2] was based on *siyāsah* but also the *maḥżarnāma* of the Mughal Emperor Jalāl al-Dīn Muḥammad Akbar (d. 1605) primarily relied on the authority of the ruler to have the final word in matters of dispute.[3] Moreover, even the British invaders in the Indian sub-continent initially resorted to

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[1] 'Alā' al-Dīn Abū 'l-Ḥasan 'Alī b. Ibrāhīm al-Ṭarāblusī, *Mu'īn al-Ḥukkām fī mā Yataraddadu bayna 'l-Khaṣmayn min al-Aḥkām* (Cairo: n.p., n.d.), 207. The Ḥanafī jurists in their manuals of law give some passing remarks to *siyāsah*, generally in the chapters about the *ḥudūd* and *qiṣāṣ* punishments, but the most elaborate discussion on this doctrine is found in *Mu'īn al-Ḥukkām* of Ṭarāblusī who was a judge in Tripoli. Some excerpts from this monumental work are given in Appendix One of this dissertation.

[2] For an interesting discussion on the *qānūn* and *siyāsah* and their relationship with *sharī'ah* during the reign of the great Ottoman sultan Suleyman the Magnificent, see: Mehmet Şakir Yilmaz, "Crime and Punishment in the Imperial Historiography of Suleyman the Magnificent: An Evaluation of Nişanci Celālzāde's Views", *Acta Orientalia Academiae Sientiarum Hungaricae*, 60:4 (2007), 427-445.

[3] See for the text of the *maḥżarnāma* of Akbar: Niẓām al-Dīn, *Ṭabaqāt-i-Akbarī* (Calcutta: Royal Asiatic Society, 1936), 2:523-24. See for details: Ishtiaq Hussain Qureshi, *The Administration of the Mughal Empire* (New Delhi: Atlantic Publishers, 1990). See also: Sheikh Muhammad Ikram, *Rūd-e-Kawthar* (Lahore: Idāra-e-Thaqāfat-

this doctrine for asserting the power to punish 'miscreants'.[4] Later, however, as the British consolidated its power and asserted "sovereign rights" on the basis of conquest, it abandoned the doctrine of *siyāsah*.[5] In the post-colonial discourse on Islamic criminal law, *siyāsah* has generally been ignored or its role undermined.[6] Even when some scholars have worked on the general doctrine of *siyāsah*, they have mostly concentrated on the works of Ḥanbalī jurists, particularly the illustrious Ibn Taymiyyah and his disciple, Ibn al-Qayyim, in the context of 'public policy' and 'political economy'.[7]

This Chapter first highlights the problems with the approach of Orientalists on the doctrine of *siyāsah* after which it critically examines the general trend among Muslim scholars

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e-Islāmiyyah, 1982). See for a critical view of this *maḥẓarnāma*: Abu Bakr Siddique, *Shaikh Ahmad Sarhindi and His Reforms* (Dhaka: Khankah-e-Mujaddidiyya, 2011), 90-96.

[4] For example, Warren Hastings,the first Governor-General of Bengal from 1772 and of India from 1773 to 1785, wanted the British magistrates to interfere with indigenous courts in order to "supply the deficiencies and correct the irregularities" in Islamic sentencing andhe justified this interference on the grounds of *siyāsah*. See for details: Scott Alan Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in South Asia", *Modern Asian Studies*, 35:2 (2001), 257-313.

[5] This particularly became obvious after India was annexed into the British Empire and was termed as British India in 1858. Henceforth, the British Parliament exercised powers of legislation for India and, thus, it passed the Indian Penal Code in 1860 which altogether ignored the principles of Islamic law.

[6] This was because of the wrong presumption that the various schools of Islamic law were based on a "common legal theory" and thus it was permissible to switch over between these schools and mix up the opinions of various jurists. The fact remains that the concept of *siyāsah* as expounded by Ibn Taymiyyah and Ibn al-Qayyim– though originally borrowed from the Ḥanafī expositions – was based on principles and presumptions distinct from those of the Ḥanafī School. See below for details.

[7] See, for instance: Ibrāhīm 'Abd al-Raḥīm, *al-Siyāsah al-Shar'iyyah: Mafhūmuhā wa Maṣādiruhā wa Majālātuhā* (Cairo: Dār al-Naṣr, 1427/2006); Aḥmad 'Abd al-Salām, *Dirāsāt fi Muṣṭalaḥ al-Siyāsah 'ind al-'Arab* (Tunisia: 1978); Bernard Lewis, *The Political Language of Islam* (London: University of Chicago Press, 1988), 9-23; *idem*, "*siyasa*" in A. H. Green (ed.), *In Quest of an Islamic Humanism: Arabic and Islamic Studies in Memory of Muhamed al-Nuwaihi* (Cairo: 1984), 3-14; Fauzi M. Najjar, "*Siyasa* in Islamic Political Philosophy", Michael E. Marmura (ed.), *Islamic Theology and Philosophy: Studies in Honour of George E. Hourani* (Albany, 1984), 92-111; Mohamad Hashim Kamāli, "*SiyāsahShar'iyyah* or the Policies of Islamic Government", *The American Journal of Islamic Social Sciences*, 6:1 (1989), 59-80; Yosseff Rapoprt, "Royal Justice and Religious Law: "*Siyāsah* and *Sharī'ah* under the Mamluk", *Mamluk Studies Review*, 16 (2012), 71-102.

in the post-colonial world on Islamic criminal law. Finally, it shows how of late the original doctrine of *siyāsah* in the Ḥanafī criminal law has been rediscovered.

1.1 Problems in the Post-Colonial Discourse on *Siyāsah*

This Section briefly discusses some of the problems in the approach of Orientalists[8] towards Islamic law, in general, and the doctrine of *siyāsah*, in particular. It shows that Orientalists primarily focused on non-legal sources and there too only on a few selected works and that they generally ignored or undermined the proper manuals of Islamic law, particularly those of the Ḥanafī School. After this, it highlights a few significant problems in the works of the Muslim scholars who worked on Islamic criminal law in the post-colonial world.

1.1.1 Three Kinds of Works on Islamic System of Government

Ann Lambton (d. 2008) asserts that works on Islamic political economy can be divided into three broad categories:

> Broadly speaking three main formulations can he distinguished; the theory of the jurists, the theory of the philosophers and the literary theory, in which I would include primarily, mirrors for princes, but also the expositions of the administrators,

[8] It is not generally accepted that "Orientalism" was part of the larger enterprise of colonialism. See for the monumental work of Edward Said on this issue: *Orientalism* (London: Penguin, 2003).

since these are put forward mainly in literary works, and the scattered observations of historians on the theory of state.[9]

This classification has generally been accepted by the modern scholars.[10]Western scholars have generally ignored the so-called "theory of jurists" and little, if any, discussion is found in their works on the way the Muslim jurists analyze in their law manuals issues of political economy. The books titled *al-Aḥkām al-Sulṭāniyyah*, such as those written by Abū 'l-Ḥasan al-Māwardī (d. 450 AH/1058 CE) and Abū Ya'lā al-Ḥanbalī, are not books of law-proper even if their authors were renowned jurists.[11] The same is true of *al-Siyāsah al-Shar'iyyah* written by the great Ḥanbalī jurist of thirteenth century Ibn Taymiyyah.[12]

As far as the proper manuals of law are concerned, the Ḥanafī jurists generally give some passing remarks to the doctrine of *siyāsah* while elaborating the rules about *ḥudūd*,

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[9]Ann K. S. Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists* (Oxford: Oxford University Press, 1981), xvi.

[10] See, for instance, John Kelsay, *Arguing the Just War in Islam* (Cambridge: Harvard University Press, 2009), 43-44. Kelsay gives 'the theory of the jurists'a very interesting title: "the *shari'a* reasoning". Explaining this way of reasoning Kelsay says: "*Al-shari'a* stands for the notion that there is a right way to live. The good life is not a matter of behaving in whatever ways human beings may dream up. It is a matter of "walking" in the way approved by God; or, reflecting the notion of Islam as the natural religion, the good life involves behavior that is consistent with the status of human beings as creatures...Once God created the world in which we live... he did so in a way that distinguished right from wrong, good from evil. Further, God set these distinctions in the context of a world that ultimately moves toward judgment. On the great and singular day which the Qur'ān speaks of in terms such as *al-akhira* (the hereafter) or *yawm al-din*(the Day of Judgment or of Justice), human beings will see clearly the rewards or punishments they have acquired by acting in certain ways" (Ibid., 44).

[11]Nyazee, *Theories of Islamic Law*, 12.

[12]Aḥmad b. 'Abd al-Ḥalīm Ibn Taymiyyah al-Ḥarrānī, *al-Siyāsah al-Shar'iyyah fi Iṣlāḥ al-Rā'ī wa al-Ra'iyyah*, ed. 'Alī b. Muḥammad al-'Imrān (Jeddah: Islamic Fiqh Academy, n.d.). Khaled Abou El Fadl points out that even on the issue of rebellion the Western academia has generally ignored the views of the jurists which are found in the sections on *Aḥkām al-Bughāh* in the classical manuals of *fiqh*. (*Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001, 8). See, for a detailed criticism on the discourse of the Western scholars on rebellion in Islamic law: Sadia Tabassum, "Recognition of the Right to Rebellion in Islamic Law with Special Reference to the Ḥanafī Jurisprudence", *Hamdard Islamicus*, 34:4 (2011), 55-91.

*qiṣāṣ*and *ta'zīr*.[13] Sometimes they refer to it while discussing the law of war in the chapters on *siyar*.[14]By far the most elaborate discussion on the doctrine of *siyāsah* is found in *Mu'īn al-Ḥukkām* of 'Alā' al-Dīn Abū 'l-Ḥasan 'Alī b. Ibrāhīm al-Ṭarāblusī (d. 844/1440) who was a judge in al-Quds.[15] Another important work is the *risālah* of the great jurist of the thirteenth/nineteenth century 'Allāmah Muḥammad Amīn b. 'Ābidīn al-Shāmī (d. 1783 AH/1836 CE) on the issue of blasphemy. The title of this *risālah* is very suggestive: *Tanbīh al-Wulāh wa 'l-Ḥukkām 'alā Aḥkām Shātim Khayr al-Anām aw Aḥad Aṣḥābihi al-Kirām 'alayhi wa 'alayhim al-Ṣalāh wa 'l-Ṣalām* [Wakeup Call for the Governors and Officials on the Rules Applicable to the One Who Shows Disrespect for the Best of the Creatures or Any of His Noble Companions (on him and them blessings and peace].[16]As the Ḥanafī School brings the offence of blasphemy committed by a non-Muslim under *siyāsah*, Ibn 'Ābidīn provides

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[13] See Chapter Five of this dissertation for details.

[14] For instance, Muhamamd b. al-Hasan al-Shaybānī mentions the report about the Prophet's ordering tough investigation of a prisoner and Abū Bakr Muḥammad b. Abī Sahl al-Sarakhsī explains that this was done by way of *siyāsah*. *Sharḥ Kitābal-Siyar al-Kabīr*, ed. Ḥasan Ismā'īl al-Shāfi'ī, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), 1:147. At another place, he mentions that after giving quarter to some persons if anyone of them expresses disrespect for the Muslim ruler, he may discipline him by appropriate punishment as ignoring this goes against the principles of administration and *siyāsah* (Ibid., 2:112). There are many other interesting instances iu *Sharḥ al-Siyar al-Kabīr* of the use of *siyāsah* by the ruler.

[15] 'Alā' al-Dīn Abū 'l-Ḥasan 'Alī b. Ibrāhīm al-Ṭarāblusī, *Mu'īn al-Ḥukkām fi mā Yataraddadu bayna 'l-Khaṣmayn min al-Aḥkām* (Cairo: n.p., n.d.), 207–217. Muḥammad Amīn b. 'Ābidio al-Shāmī says that if a person wants to have a deep understanding of the doctrine of *siyāsah*, he should carefully study the work of al-Ṭarāblusī (*Radd al-Muḥtār 'alā al-Durr al-MukhtārSharḥTanwīr al-Abṣār* (Riyadh: Dar 'Alim al-Kutub, 1423/2003), 6:20).

[16] Muḥammad Amīn b. 'Ābidīn al-Shāmī, *Majmū'at Rasā'il Ibn 'Ābidīn* (Damascus: al-Maktabah al-Hāshimiyyah, 1354/1935), 1: 317–370. Recently, this *risālah* has been edited and published separately as: *Tanbīh al-Wulāh wa 'l-Ḥukkām 'alā Aḥkām Shātim Khayr 'l-Anām aw Aḥad Aṣḥābih al-Kirām*, ed. Abū Bilāl al-'Adanī and Murtaḍā b. Muḥammad (Cairo: Dār al-Āthār, 1428/2007).

interesting details of this doctrine. He also refers to a few orders promulgated by different sultans at various times and comments on their implications.[17]

How can one explain this summary treatment of the doctrine of *siyāsah* in the proper manuals of *fiqh*? Is it because of the "separation between theory and practice" as envisaged by Orientalists?

1.1.2 The Separation of "Theory" and "Practice"

Orientalists – from Goldziher to Schacht and Coulson – have envisaged a kind of tension and conflict between the jurists and the rulers – first Umayyad and later Abbasid – and that the law practiced and official courts was not the one that is found in the manuals of *fiqh* composed by jurists.[18] Denying authenticity of the *Sunnah* of the Prophet (peace be on him) and the compilations of the traditions and rejecting the legal precedents cited by the jurists, these Orientalists portray a very different picture of Islamic legal system.[19] Adding further to

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[17] *Tanbīh al-Wulāh wa 'l-Ḥukkām*, 79. This discussion has some valuable material for understanding the Ḥanafī doctrine of *siyāsah* in the context of criminal justice system.

[18] For an exposition of this theory, see Ignaz Goldziher, *Introduction to Islamic Law and Theology*, trans. A. R. Hamori (Princeton: Princeton University Press, 1981); Joseph Schacht,*Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1953); *idem*, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964). See also Noel J. Coulson,*A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964); *idem*, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: Universiry of Chicago Press, 1969). Some of the Muslim scholars are also influenced by this theory (See for instance, Mohammad Hashim Kamāli, *Principles of Islamic Jurisprudence* (Petaling Jaya: Pelanduk Publications, 1989), xvii). See for a detailed criticism on this theory, Nyazee, *Theories of Islamic Law*.

[19] See for a detailed critical review of the theory of Schacht: the unpublished PhD Dissertation of Zafar Isha0q Ansari titled *The Early Development of Fiqh in Kufah with Special Reference to the Works of Abū Yūsuf and Shaybānī* (McGill University, 1966) and Nyazee, *Theories of Islamic Law*. For detailed deconstruction of Schacht's views on hadith, see: Muhammad Mustafa al-A'zami, *Studies in Early Hadith Literature* (Lahore: Sohail Academy, 1987). For an exhaustive analysis of the western criticism on the compilation of the Qur'ānic text, see:

the confusions, they envisage that the various schools of Islamic law (*al-madhāhib al-fiqhiyyah*) followed a "common legal theory" and that they differed only in minor details.[20] Hence, they pave the way for a kind of "juristic eclecticism" or "pick and choose" between the opinions of the different jurists.[21]

This scheme of the things in which the jurists and the rulers are placed in two opposing camps fighting for authority, with each camp fabricating legal precedents for giving authenticity and sanctity its position, not only undermines the worth of the Islamic legal manuals but also creates many confusions and misunderstandings about the working of the Islamic legal system.[22] From this perspective, *fiqh* as developed by the jurists was "theory" and *siyāsah* as actually administered by the government officials and judges was "practice" and the two were poles apart.[23]

The problem is further aggravated when they further assert that even in the domain of the jurists the law (*fiqh*) was developed independent of the legal theory (*uṣūl al-fiqh*) and that the two fields had no link with each other.[24] This is based on the presumption that Imām Muḥammad b. Idrīs al-Shāfi'ī (150-204 AH/767-819 CE) was the founder of *uṣūl al-fiqh* and

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idem, *The History of the Qur'ānic Text from Revelation to Compilation* (Leicester: UK Islamic Academy, 1424/2003).

[20] Schacht, *Introduction to Islamic Law*, 57-68; Coulson, *A History of Islamic Law*, 75-85.

[21] Schacht, *Introduction to Islamic Law*, 67-68.

[22] These wrong assumptions are found in works of many modern scholars, including those who compiled the CII Report on reforms in the Pakistani Hudood Laws. See Chapter Two for details.

[23] Schacht, *Introduction to Islamic Law*, 54-57 and 91-92.

[24] Ibid., 45-48.

much of *fiqh* was developed and compiled by the jurists before that.[25] What was, then, the legal theory of those earlier jurists who preceded Imām al-Shāfi'ī?[26]

1.1.3 Focus on Selected Works

For examining the working and structure of the various governments in Islamic history, these Orientalists focused on a few selected works, mostly written by jurists belonging to the Shāfi'ī School. For instance, Hamilton Gibb and others assert that Muslim jurists generally preached passive obedience to tyrant rulers even when "theoretically" they put very strict conditions for the eligibility of a person to rule Muslims.[27] They further assert that the later jurists even theoretically abandoned those conditions and equated power with validity and, thus, justified the ruler of the usurpers.[28] For this purpose, they generally cite passages from Māwardī, Juwaynī, Ghazālī and Ibn Jamā'ah – all of whom belong to the Shāfi'ī School.[29] As far as the doctrine of *siyāsah* is concerned, generally they focus on the works of the later

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[25]ImāmAbū Ḥanīfah al-Nu'mān b. Thābit (80-150 AH/699-767 CE) died in the same year in which Imām al-Shāfi'ī was born and, of course, before his death Abū Ḥanīfah bad succeeded in developing a whole bulk of Islamic law.

[26]As noted earlier, apart from the unpublished PhD Dissertation of Ansari (*The Early Development of Fiqh in Kufah*)and the published work of Nyazee (*Theories of Islamic Law*), very little work has been done on the methodology (or methodologies) of those earlier jurists.

[27]H. A. R. Gibb, "Constitutional Organization" in Majid Khadduri and Herbert J. Liebesny (eds.), *Origin and Development of Islamic Law* (Washington DC: Middle East Institute, 1955), 6-14.

[28]Ibid., 19.

[29]Ibid. See for more details: Lambton, *State and Government*, *op. cit.*

Ḥanbalī jurists, Ibn Taymiyyah and Ibn al-Qayyim.[30] The works of the Ḥanafī jurists have generally been overlooked or dealt with suspicion and doubt.[31]

1.1.4 Confusing the Right of God with the Right of State

The work of 'Abd al-Qādir 'Awdah (d. 1954) titled *al-Tashrī' al-Jinā'ī al-Islāmī Muqāranan bi 'l-Qānūn al-Waḍ'ī* is one of the fundamental sources for scholars working on Islamic criminal law in the post-colonial world.[32] This work undoubtedly contains some invaluable material on the subject. However, the doctrine of *siyāsah* has not been analyzed in depth in this work.

'Awdah refers to the fact that the *ḥudūd* punishments are deemed the rights of God.[33] He also points out that one of the legal consequences of considering *ḥudūd* as the rights of God is that these punishments cannot be pardoned by any human authority.[34] Still he does

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[30]Aḥmad b. 'Abd al-Ḥalīm Ibn Taymiyyah al-Ḥarrānī, *al-Siyāsah al-Shar'iyyah fi Iṣlāḥi al-Rā'ī wa al-Ra'iyyah*, ed. 'Alī b. Muḥammad al-'Imrān (Jeddah: Islamic Fiqh Academy, n.d.). See also: Muḥammad Ṣāliḥ al-'Uthaymīn, *SharḥKitāb al-Siyāsah al-Shar'iyyah li Shaykh al-Islām Ibn Taymiyyah* (Beirut: al-Dār al-'Uthmāniyyah, 1425/2004). Shams al-DīnMuḥammad b.Abī Bakr Ibn Qayyim al-Jawziyah, *I'lam al-Muwaqqi'in 'an Rabb al-'Ālamīn*, ed. Abū 'Ubaydah Mashhūr b. Ḥasan (Jeddah: Dar Ibn al-Jawzi, 1423); *idem*, *al-Ṭuruq al-Ḥukmiyyah fi 'l-Siyāsah al-Shar'iyyah*, ed. Nāyif b. Aḥmad (Makkah: Dar 'Alīm al-Fawā'id, 1428).

[31] An example of this suspicion is the way the Western scholars as well as some Muslim scholars undermine the authenticity of the works of Shaybānī. Thus, Khaled Abou El Fadl doubts if Shaybānī really wrote these works, particularly those dealing with issues of war and peace (*al-Siyar al-Kabīr* and *al-Siyar al-Ṣaghīr*). The reason he forwards is very interesting: that the views expressed in these books are highly developed and could not have been written by Shaybānī! (*Rebellion and Violence*, 144). As Tabassum uotes: "It not only nnderestimates the genius of that great jnrist but also ignores the way schools of Islamic law developed." "Recognition of the Right to Rebellion", 60.

[32]'Abd al-Qādir 'Awdah, *al-Tashrī' al-Jinā'ī al-Islāmī Muqāranan bi 'l-Qānūn al-Waḍ'ī*, Beirut: Dār al-Kātib al-'Arabī, n. d.

[33]Ibid., 1:78-79.

[34]Ibid., 79.

not appreciate the fact that if the rights of God are deemed equivalent to the rights of community,[35] it leads to analytical inconsistency.

1.1.5 Ignoring the Necessary Corollaries of Rights

Although 'Awdah mentions the rule that the authority to enforce the *ḥudūd* punishments is with the government[36] and that the right to enforce *qiṣāṣ* is with the heirs of the victim,[37]yet he is not in favor of giving the individual the right to enforce the *ta'zīr* punishment.[38] The reason for this is that 'Awdah did not analyze the legal consequences of relating different punishments to different rights. Had he done so, he would have no hesitation in asserting that if the individual can enforce the *qiṣāṣ*punishment, with the help and supervision of the government, he can also enforce the *ta'zīr* punishment because *qiṣāṣ* is the joint right of God and individual in which the right of individual is predominant, while *ta'zīr* is the pure right of individual (at least for the Ḥanafī jurists).[39]

Moreover, 'Awdah does not distinguish between *ta'zīr* and *siyāsah*[40] and although he does briefly refer to the Ḥanafī doctrine of *siyāsah*,[41] his analysis of this doctrine is superficial as he confines his discussion to those cases only where the Ḥanafī jurists allow death

[35]Ibid.
[36]Ibid., 755.
[37]Ibid., 757-58.
[38]Ibid., 756-57.
[39] See for details Chapters Four and Five of this dissertation.
[40] This despite the fact that he asserts that the *ta'zīr* offence is sometimes an encroachment upon the right of an individual and at others it is encroachment upon the right of the society. (Ibid., 99).
[41]Ibid.,688-89.

punishment as *siyāsah*. The fact, as will be shown below, is that the Ḥanafī doctrine is much wider than that.[42]

Not only 'Awdah, but also most of the scholars working on Islamic criminal law in the post-colonial world have generally ignored the important doctrine of *siyāsah*. Many of them fell prey to the propaganda of the Orientalists regarding the "separation of theory and practice" in Islamic legal history. This is one of the major reasons why some of these scholars suggested a "revisiting" or even "reconstruction" of the legal thought in Islam.[43] Thus, we see some of the scholars rejecting altogether the division of crimes into *ḥudūd* and *ta'zīr*.[44]Othersthink of changing the standard of evidence required for proving the *ḥudūd* and the *qiṣāṣ* offences. [45] Still others assert that the *ḥudūd* are not *fixed* but *maximum* punishments.[46]

This confusion is found in most troubling form in the discussions on the rules relating to the offence of *zinā* and sexual violence, particularly rape. Disturbed by the criticism on the

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[42] The roots of this superficial analysis lie in the flawed methodology of *talfiq* (mixing the opinions of the various schools of law). Thus, 'Awdah summarily deals with the Ḥanafī doctrine of *siyāsah* and briefly asserts that this doctrine influenced Ibn Taymiyyah and Ibn al-Qayyim and some Mālikī jurists as well. Then, he asserts that the Ḥanafī doctrine is not that important and novel and that what the Ḥanali jurists call as *siyāsah* is included by other schools either in *qiṣāṣ* or *ḥudūd*. (Ibid). This is not how a legal issue should be analyzed. That is why we prefer the methodology of *takhrīj*, i.e., arguing on the basis of the principles expounded by the earlier jurists or extending the already existing law to new cases without creating problems of analytical inconsistency. See for details: Chapters Two and Three of this dissertation.

[43]Riazul Ḥasan Gilani, *The Reconstruction of Legal Thought in Islam* (Lahore: Law Publishing Company, 1974).

[44]*Hazoor Bakhsh v The State*, PLD 1983 FSC 1. See Section 4.1.1 of this Dissertation for a discussion on the issues raised in this case.

[45]Muhammad Tufail Hashimi, *Ḥudūd Ordinance Kitāb-o-Sunnat kī Rōshnī mēṇ* (Peshawar: National Research and Development Foundation, 2005), 79-83. See for a detailed criticism on this view: Muhammad Mushtaq Ahmad, *Ḥudūd Qawānīn: Islamī Naẓariyyātī Kōnsil kī 'Ubūrī Ripōrt kā Tanqīdī Jā'izah* (Mardan: Midrār al-'Ulūm, 2006), 79-83.

[46]Jāvēd Aḥmad Ghāmidī, *Mīzān* (Lahore: Dār al-Ishrāq, 2001), 302.

strict standard of evidence for the offence of *zinā*, some scholars suggested that the offence of rape should be deemed a sub-category of the offence of *ḥirābah*, instead of *zinā*.[47] This they did without realizing that this suggestion would not only change the meaning and concept of *ḥirābah* but also of "property".[48]

1.2 Rediscovery of the Ḥanafī Doctrine of *Siyāsah*: The Contribution of Nyazee

Professor Imran Ahsan Khan Nyazee (b. 1945) is a renowned scholar and authority on Islamic law and jurisprudence, particularly the expositions of the Ḥanafī School. Some of the scholars consider him to be the founder of a "new" school of Islamic jurisprudence, but he specifically calls for adherence to a particularly school of law and abhors switching between schools and considers formulating a new school as "reinventing the wheel". In Nyazee's opinion, each school of Islamic law is a system of interpretation with a distinct legal theory. Hence, he rejects the notions of "classical legal theory" or "common legal theory" envisaged

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[47]In Pakistan, this idea was first given by Mawlānā Amīn Aḥsan Iṣlāḥī (d. 1997) in his commentary of the Qur'ān while commenting on the verses of *Sūrat al-Mā'idah* regarding the offence of *ḥirābah*. *Tadabbur-e-Qur'ān* (Lahore: Faran Foundation, 2002), 3:505-508; 5:361-377. His disciple Jāvēd Aḥmad Ghāmidī (b. 1951) reiterated this position (*Mīzān*, 284). Asifa Quraishi preferred this view though she did not acknowledge that the idea came from Iṣlāḥī. "Her Honor: An Islamic Critique of the Rape Provisions in Pakistan's Ordinance on *Zinā*", *Islamic Studies* 38: 3 (1999), 403-32. The Federal Shariat Court also accepted this view in *Begum Rashida Patel v The Federation of Pakistan*, PLD 1989 FSC 95. See Chapter Nine of this dissertation for a detailed criticism on this view.

[48]See for details: Muhammad Mushtaq Ahmad, "Ābrūrēzī ke Jurm kī Shar'ī Takyīf", *Maarif-e-Islāmi* 9:1 (2010), 71-113. Muhammad Munir (b. 1965) after a thorough analysis of the debate on the offence of rape suggests that this offence should be deemed, not *ḥirābah*, bnt *siyāsah*. However, the question of how to change a *ḥadd* offence into *siyāsah* remains unsettled. Muḥammad Munir, "Is *Zinā bil-Jabr* a *Ḥadd*, *Ta'zīr* or *Syasa* [sic] Offence?A Reappraisal of the Protection of Women Act, 2006 in Pakistan", *Yearbook of Islamic and Middle Eastern Law* 14 (2008-09), 95-115.

by Joseph Schacht and others. For the views of the Ḥanafī jurists, Nyazee primarily relies on the works of the "Elders of the School", including *inter alia*, Abū Yūsuf, Shaybānī, Abū'Ubayd, Ṭaḥāwī, Karkhī, Dabbūsī, Jaṣṣāṣ, Sarakhsī, Kāsānī and Marghīnānī. Nyazee's work on legal theory (*uṣūl al-fiqh*) and applied law (*fiqh*) has led to some startling conclusions and refutation of some of the stereotyped notions about Islamic law and jurisprudence.[49] This Section will briefly highlight how Nyazee rediscovered the doctrine of *siyāsah* in the Ḥanafī criminal law.

1.2.1 Division of Labor, Not Separation of Theory and Practice

Nyazee in his monumental work *Theories of Islamic Law: The Methodology of Ijtihād*, conclusively refutes notion of "separation of theory and practice" and instead envisages "division of labor" between the rulers and the jurists.[50] Nyazee explains that the conceptual framework for the Islamic legal system comprises of two parts: rigid or fixed and flexible or changing.[51] "[T]he law that is stated explicitly in the texts, the Qur'ān and the *Sunnah*, or is derived through strict analogy (*qiyās*), is more or less fixed."[52]In this fixed part, Nyazee includes rules regarding *'ibādāt*, inheritance, marriage and divorce and *ḥudūd*.[53]Explaining the meaning of the "flexible" part, Nyazee says: "[I]f we make laws about income-tax, traffic, new

[49] See for details of what Nyazee means by the Elders of the School and the role they play in the legal system of the School: *Nyazee on the Secrets of Uṣūl al-Fiqh: Course Module VI: Rules for Issuing Fatwas* (Islamabad: Advanced Legal Studies Institute, 2013), 58-64 and 85-86.

[50] Nyazee, *Theories of Islamic Law*, 12-17.

[51]Ibid., 52ff. We may add here that matters settled through consensus (*ijmā'*) are also fixed.

[52]Ibid., 55.

[53]Ibid.

forms of crime and other areas in accordance with the *sharī'ah*, we might change them through fresh *ijtihād* in a later age, because these rules are not stated explicitly in the texts."[54] Nyazee is of the opinion that the jurists and the rulers divided the work and concentrated on the fixed and flexible parts of the legal system, respectively.[55] He explains this relationship by the example of an ever-growing tree: "Like the trunk of this tree, Islamic law has part that is fixed, and like its branches and leaves, the law has a part that changes in shape and color in every season."[56]

At another place in the same work, Nyazee explains the two sphere of Islamic law by reference to the two doctrines of *ḥadd*: wider and narrower.[57] He asserts that in its wider sense the phrase *ḥudūd Allāh* denotes the fixed part of the law, while in its narrower sense it only denotes the specific punishments for specific crimes.[58] Here, he also relates this discussion to the division of rights into three categories: rights of God, rights of individual and rights of community; and asserts that the doctrine of *ḥadd* "works hand in hand with the concept of the right of Allah".[59] He forcefully asserts that the right of Allah must not be confused with the right of community. "The right of Allah is fixed by Allah, once and for all and is not subject to legal or judicial review, that is, it is outside the purview of law. It can never be

[54]Ibid.
[55]Ibid., 53.
[56]Ibid., 52.
[57]Ibid., 109-26.
[58]Ibid., 114.
[59]Ibid., 115.

altered."[60] As far as the authority of the ruler is concerned, Nyazee brings it under the doctrine of *siyāsah*.[61]

1.2.2 School As A Legal Theory and System of Interpretation

Another significant aspect of Nyazee's contribution is that he shows that every school of law represented a distinct legal theory and was, thus, a distinct system of interpretation. In *Theories of Islamic Law*, he propounds three different kinds of legal theories in Islamic legal history, namely, the theories of general principles, the theories of literal interpretation and the theories of the purposes of law.[62] He places the Ḥanafī legal theory in the first of these categories and elaborates how this theory helped the Ḥanafī jurists successfully develop the huge bulk of the law before even Imām al-Shāfi'ī – whom Orientalists portray as the "master-architect" of *uṣūl al-fiqh*[63] – was born.[64]

In his other important work, *Islamic Jurisprudence*, Nyazee also elaborates the process of *taqlīd* and explains how the system of "precedents" works within a school of law, particularly the Ḥanafī School, and thus expounds on this basis an *Islamic theory of adjudication*.[65] He explains that every school has a hierarchy of the legal manuals as well as of the jurists which help in developing a coherent legal system. He further elaborates how the

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[60]Ibid.
[61]Ibid., 112.
[62]Ibid., 127-230.
[63] Coulson, *A History of Islamic Law*, 53-62.
[64]Nyazee, *Theories of Islamic Law*, 175-76.
[65] Nyazee, *Islamic Jurisprudence*, 333-338.

jurists extend the law to new cases through the methodology of *takhrīj* – reasoning through general principles – without undoing the existing law.[66] For this purpose, he also distinguishes between the sources of law for the *mujtahid*, the jurist who discovers the law for the first time, and the sources of law for the "*faqīh*", the jurist who works within the parameters of the school and extends the law to new cases on the basis of the general principles of law recognized and upheld by his school.[67] Thus, he develops a "theory of legislation" on the basis of the notion of *ijtihād* and a "theory of adjudication" on the basis of the concept of *takhrīj*.[68]

In one of his recent works, *Islamic Legal Maxims*, Nyazee further builds upon his work and elaborates how the "legislative presumptions" of the Ḥanafī School makes it a distinct legal theory and system of interpretation.[69] He further explains how the disciples of Abū Ḥanīfah followed the system of interpretation developed by the school even when they differed with him on "interpretation of facts" or *qawā'id fiqhiyyah*.[70] He also elaborates how the jurists of the School applied the general principles of law to find rulings for various sets of facts.[71] This work is, thus, an application of the theoretical discussion which Nyazee expounded in this earlier works.

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[66]Ibid., 339-353.

[67] For Nyazee, the "sources of Islamic law" mentioned generally in the books of *Uṣūl al-Fiqh* are sources for the *mujtahid*. As far as the *faqīh* is concerned, he has different sources at his disposal. For the sources of the *faqīh*, see: Ibid., 341-348.

[68]Ibid., 336-338.

[69] Nyazee, *Islamic Legal Maxims* (Islamabad: Advanced Legal Studies Institute, 2013), 32-38.

[70]Ibid., 49-54.

[71]Ibid., 65ff.

In *Fatwa Module*, Nyazee not only explains the detailed mechanism for determining the position of the School on a legal question, but also highlights the problems in "conflation" or mixing the views of the various schools of law.[72]The most important problem emphasized by Nyazee is that this process leads to "analytical inconsistency".[73]

1.2.3 Classification of Rights As the Basis

Nyazee in another important work *General Principles of Criminal Law: Western and Islamic* explains some of the very important aspects of Islamic criminal law, as expounded by that the Ḥanafī jurists.[74] His most important contribution in this regard is the classification of rights and the way this classification determines the legal consequences of various crimes.[75] Thus, he explains that the jurists divide rights into three categories: namely, the rights of God, the rights of the community or the ruler and the rights of the individual.[76] He, then, explains how the jurists deem every crime to be a violation of one of these rights. Thus, the *ḥadd* punishment is imposed on violation of a right of God; *ta'zīr* punishment is awarded for violation of a right of individual, while *qiṣāṣ* punishment is imposed on violation of a joint right of God and individual. As far as the punishment for violation of the right of the

[72]Nyazee, *The Secrets of Uṣūl al-Fiqh*, 68-77.

[73]Ibid., 9-18.

[74]*General Principles of Criminal Law: Western and Islamic* (Islamabad: Advanced Legal Studies Institute, 1998). References in this dissertation are from the second edition of the book (Islamabad: Sharī'ah Academy, 2007).

[75]Ibid., 63-64.

[76] Ibid., 64

community is concerned, explains Nyazee, the jurists call it *siyāsah*.[77] He, then, distinguishes *siyāsah* from *ta'zīr* and elaborates that the legal consequences of the various crimes, such as the nature and extent of punishment, the standard of proof, the possibility of waiver or compounding and the like, are determined by the right affected by the crime. For instance, if the right of God is violated, no one has the authority to pardon the offender. On the other hand, if the right of the community is violated, the ruler acting on behalf of the community may pardon the offender if the best interest of the community so demands.[78]

Although almost all of the modern scholars mention that the *ḥudūd* punishments are deemed the rights of God by the jurists, Nyazee is - perhaps - the only one to explain the detailed consequences of the classification of crimes on the basis of the affected right.

1.2.4 Right of God Distinguished from the Right of the Ruler

Another important contribution of Nyazee is distinction between the right of God and the right of the community. As noted earlier, modern scholars have generally deemed the two synonymous. This has caused much confusion. Nyazee points out that enforcement of the *ḥadd* punishment is a right of God and a duty of the community which is why the right of God and the right of the community cannot be the same.[79] He further points out that the

[77] Ibid.,70-72.
[78] Ibid.
[79] *Theories of Islamic Law*, 115; *General Principles of Criminal Law*, 65.

ruler does not have the authority to pardon the *ḥadd* punishment, while he can pardon the punishment for violation of the right of the community.[80]

Nyazee also criticizes the later Ḥanafī jurists who opined, contrary to the established position of the School, that *ta'zīr* can also be awarded as a right of God.[81] He asserts that this was done under the influence of the Shāfi'ī jurists who award *ta'zīr* for the right of God and who at the same time hold that some of the *ḥudūd* are the awarded for the right of the individual.[82] This has led to analytical inconsistency, asserts Nyazee, and as such even some of the later jurists felt it necessary to declare that when *ta'zīr* is awarded as the right of God it cannot be waived or compounded like the *ḥudūd* punishments.[83]

The best way, then, is to strictly adhere to the classification of rights as envisaged by the Elders of the School as it is only this way that analytical consistency in ensured.

1.2.5 The Wider and Narrower Doctrines of *Siyāsah*

Another important contribution of Nyazee is to clearly distinguish between the wider and narrower doctrines of *siyāsah*. As noted above, in his earlier works *Theories of Islamic Law* and *General Principles of Criminal Law*, he specifically concentrated on *siyāsah* in the context of criminal law, particularly in relation to *ḥudūd*, *qiṣāṣ* and *ta'zīr*. In his recent work *Islamic*

[80] *Theories of Islamic Law*, 119; *General Principles of Criminal Law*, 65.
[81] *Theories of Islamic Law*, 119.
[82] Ibid.
[83] Ibid.

Legal Maxims, he elaborated the wider doctrine of *siyāsah* and explained its relationship with the higher objectives of Islamic law (*maqāṣid al-sharī'ah*).[84]

As Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī (d. 505 AH/1111 CE), the illustrious jurist-cum-philosopher, has elaborated, the most fundamental five basic principles of Islamic law are:

- The preservation and protection of*dīn* (religion);
- The preservation and protection of*nafs* (life);
- The preservation and protection of*nasl* (progeny);
- The preservation and protection of*'aql* (intellect); and
- The preservation and protection of*māl* (property).[85]

"Preservation and protection" refer to positive and negative aspects of these principles: The positive aspect is "what affirms its elements and establishes its foundations." The negative is "what expels actual or expected disharmony."[86]

Nyazee shows that it was the great Ḥanafī jurist Abū Zayd al-Dabbūsī (d. 430 AH/1039 CE) who developed the doctrine of the *maqāṣid* and that Ghazālī and his master Imām al-Ḥaramayn Abū 'l-Ma'ālī'Abd al-Malik b. 'Abdillah al-Juwaynī (d. 478 AH/1085 CE) heavily relied on Dabbūsī. Nyazee then links *siyāsah* with these *maqāṣid*.

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[84] Nyazee, *Islamic Legal Maxims*, 67-75.

[85] Al-Ghazālī, *Shifā' al-Ghalīl fi Bayān al-Shabah wa 'l-Mukhīl wa Masālik al-Ta'līl* (Baghdad: Dār al-Kutub al-'Ilmiyyah, 1971), 186–87. See also: *idem*, *al-Mustasfā*, 1:213-222.

[86] Ghazālī, *Jawāhir al-Qur'ān* (Beirut: Dār Iḥyā' al-'Ulūm, 1985), 32–35. See for a detailed discussion: Nyazee, *Theories of Islamic law*, 241-242. See also: *idem*, *Islamic Legal Maxims*, 72-75.

> The term *siyāsahshar'iyyah* means the policy of the *sharī'ah*. The policy is just as long as the government upholds the *sharī'ah*. If it does not uphold it, the policy becomes unjust or *ẓālimah*. The policy of the *sharī'ah*is of two types: the first deals with the "preservation" aspect of the five principles listed above, while the second deals with the "protection" aspect of these five principles.

He gives the title of "social policy" to the first one and that of "legal policy" to the second one.[87]

It is worth noting here that the great Ḥanafī jurist Ṭarāblusī, whose monumental work *Mu'īn al-Ḥukkām* is deemed one of the basic sources for the Ḥanafī doctrine of *siyāsah*, asserts that the wider meaning of *siyāsah* encompasses the whole of the *sharī'ah*.[88] He, then, divides the whole of the *sharī'ah* into five categories and declares that in its narrower sense, *siyāsah* is concerned with the fifth category, namely, the rules for administration of justice. Here, Ṭarāblusī further categorizes these rules into six categories and links all issues with the *maqāṣid al-sharī'ah*.[89]

As noted earlier, scholars who worked on *siyāsah* in the post-colonial world have generally concentrated on the wider doctrine of *siyāsah*. The present dissertation will focus on

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[87]Nyazee, *Islamic Legal Maxims*, 69. He, then, further elaborates the respective tasks of the legislative and judicial branches of the government for translating these policy considerations into binding legal rules. Ibid., 74-75.

[88]Ṭarāblusī, *Mu'īn al-Ḥukkām*, 207.

[89]Ibid., 207-208.

the narrower doctrine of *siyāsah* in the context of criminal law, particularly in relation to *ḥudūd*, *qiṣāṣ* and *ta'zīr*.

CONCLUSIONS

The texts of the Qur'ān and the *Sunnah* fix punishments only for a few crimes and put certain severe conditions for proving these crimes and punishing the convicts in these cases. Muslim jurists concentrated on elaborating the rules and principles of Islamic law related to these crimes because they deemed it immutable and beyond the scope of the authority of the government. The Ḥanafī jurists devised the doctrine of *siyāsah* for explaining the basis of the validity of the decisions of the rulers and emphasized that even if the rulers could legitimately use their authority for administration of justice and thus provide detailed rules where needed, this authority was to be used within the parameters of the general propositions of Islamic law. Thus, as a result of "division of labor" the jurists and the rulers played their respective roles in developing an effective system for the administration of justice. This system was based on the trichotomy of rights in which all acts were either related to the rights of God, the rights of individual or the rights of the ruler. The jurists focused on the areas related to the rights of God and the rights of individual clearly asserting that the ruler cannot change the rules based on these rights and left to him the area they designated as the rights of the ruler where they submitted to his rule. Thus, classification of rights and the resultant doctrine of *siyāsah* played a pivotal role in the development of the Islamic system of justice.

In the following Chapters the doctrine of *siyāsah* in the Ḥanafī criminal law will be elaborated and then applied on the various significant issues of the Pakistani criminal justice system. Before doing that, however, it is important to settle a few fundamental questions about methodology. Hence, the next Chapter critically evaluates the methodology generally applied by the modern Muslim scholars.

CHAPTER TWO:METHODOLOGY OF THE CRITICS OF ISLAMIC CRIMINAL LAW

INTRODUCTION

It has already been noted that in the post-colonial world, scholars – Muslim and non-Muslim – have generally found it better to mix up the views of the jurists belonging to various schools of Islamic law under the presumption that the various schools of Islamic law followed a "common legal theory" and differed in minor details only. The basic contention in this dissertation is that every school of law presented a different and distinct legal theory, and that switching over between various schools leads to analytical inconsistency. This chapter highlights the problems in the methodology of modern scholars, and for this purpose focuses on the Council of Islamic Ideology, the constitutional body for making recommendations to the Parliament for the purpose of Islamization of laws.[1] It shows that modern critics of Islamic criminal law have not been able to develop a comprehensive and internally coherent legal theory, and have instead relied on a mix of principles of various schools joined haphazardly without resolving internal inconsistencies. It concludes that these critics, by

[1] The Council of Islamic Ideology is the institution established for the purpose of giving recommendations to the Parliament for Islamization of laws. See Articles 227-231 of the Constitution. It prepares annual reports of its recommendations and places it before the Parliament which seldom gives any importance to these reports. In 2006, the Council first prepared an interim report before the Parliament passed the Protection of Women (Criminal Laws Amendment) Act and that report bears the names of Muhammad Khalid Masud and Inam-ur-Rahman. Later, after the said Act was passed, it prepared its Final Report which now only bears the name of Muhammad Khalid Masud. It is available on the website of the Council: www.cii.gov.pk/publications/h.report.pdf (last visited: 17 August 2014). All references in this dissertation are from this Final Report.

breaking their links with valid legal sources are left with reason as their sole guide in addressing legal problems, an extremely pure form of naturalism deems reason as a complete source of law and accords too much room to discretion and "independent" reasoning.

2.1 Islamization of Laws and the Council of Islamic Ideology

The first significant constitutional document passed by Pakistan's first Constituent Assembly in March 1949 was titled the Objectives Resolution. This Resolution determined that Pakistan was going to be an Islamic State. The Constitution of 1956 retained the Objectives Resolution as its preamble and promised to bring the existing laws into conformity with the 'injunctions of Islam as laid down in the Holy Qur'ān and [the] Sunnah.'[2] For this purpose, the Constitution envisaged a Commission,[3] but the Commission could not start its functioning before the Constitution was abrogated in 1958. The Constitution of 1962 reiterated the promise of Islamizing the laws[4] and established the "Advisory Council of Islamic Ideology" for this purpose.[5] The Constitution of 1973 retained this scheme of the things but renamed the Council as the Council of Islamic Ideology.[6] It also fixed the time period of seven years for the Council to prepare the final report about the Islamicity of the existing Pakistani laws.[7] The Council was also to prepare interim reports annually till the

[2]Constitution of the Islamic Republic of Pakistan, 1956, Article 198.
[3]Ibid.
[4] Constitution of the Islamic Republic of Pakistan, 1962, Article 198.
[5]Ibid., Article 199-207.
[6] Constitution of the Islamic Republic of Pakistan, 1973, Article 228.
[7]Ibid., Article 230 (4).

preparation of the final report.[8] However, the Council started playing an active role only after the 1977 coup when the Martial Law regime re-constituted the Council so that it would help the regime in pursuing its agenda of Islamization of laws and economy. Since then, the Council has been preparing annual reports, but these reports have been kept 'confidential' and are only submitted to the concerned officials and departments.

Perhaps for the first time the Council deviated from this norm of confidentiality in 2006, when it first uploaded on its website its Interim Report and then the Final Report on reforms in the Hudood Laws. In this Report, the Council gave some details about its methodology for deriving and extending the rules of Islamic law. Some significant aspects of this methodology are examined here.

2.1.1 Defining the 'Injunctions of Islam'

The Council has been formed for the purpose of examining the existing laws for repugnancy with the 'injunctions of Islam as laid down in the Holy Quran and [the] Sunnah.' The question is: how does the Council perform this function?

First of all, it remains to be settled what exactly is meant by the term 'injunctions of Islam'. The Constitution does not define this phrase and no superior court has ever considered defining this term. The Council, while commenting in its Annual Report of 1986 on the 'Sharī'at Bill' passed by the Senate, defined *sharī'at* as: "*Sharī'at* means the injunctions

[8]Ibid.

of Islam as laid down in the Holy Quran and Sunnah."[9] Still, the Report does not offer any definition of the 'injunctions of Islam'. It, however, adds an explanation to the definition of "*sharī'at*":

> The following sources may be referred to for the exposition of the injunctions of Islam:
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> a) The Sunnahof the Rightly Guided Caliphs;
>
> b) The Acts of the Companions of the Prophet;
>
> c) The consensus of Muslim; and
>
> d) The expositions and opinions of the jurists.[10]

It is worth noting that almost the same definition and explanation has been reproduced in the Enforcement of the Shariat Act, 1991.[11]

Another question to be considered is whether the Council is bound by its own previous decisions? In other words, does the Council consider its previous reports as legally binding precedents? The answer to this question is surely in the negative. This is supported by the fact that Council has many a times changed its recommendations on the same issue.

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[9] *Annual Report, 1986-87* (Islamabad: The Council of Islamic Ideology, August 1991) 46.

[10] Ibid.

[11] Section 2 of the Enforcement of the Shariat (Act X of 1991) Act 1991. The same Act was re-legislated by the Provincial Assembly of NWFP [now KP] in 2003 when the alliance of the religious parties Muttahida Majlis-e- Amal (MMA) was in power.

For instance, in 2006 it prepared a report for amending or repealing the Hodood Ordinances, even though the draft of these Ordinances was prepared by the Council itself in 1978. Such being the case, it becomes all the more essential that a definition for the term 'Injunctions of Islam' be put forward. It is suggested here that the standard definition of the *ḥukm shar'ī* given by the jurists may be used for this purpose.[12]

Ambiguity on the meaning of the 'injunctions of Islam' has resulted in the Council's (as well as the Courts') arguing directly from the Qur'ān and the Sunnah and trying to reinvent the wheel.[13] For instance, in *Hazoor Bakhsh v The State*,[14] the Federal Shariat Court embarked on demolishing the whole edifice of criminal law as developed by the jurists and tried to lay its foundations on an altogether different basis. This attempt has also resulted in creating laws that face serious problems of analytical inconsistency. Thus, in *Rashida Patel v The Federation of Pakistan*,[15] even though the Federal Shariat Court declared that *zinā bil jabr* (rape) was a form of *ḥirābah*, not *zinā*, yet it did not settle the question of punishment for this offence. It is for this reason that Ghazālī asserts that the first source of law which the

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[12] *Ḥukm:* Rule; injunction; prescription. The word *ḥukm* has a wider meaning than that implied by most of the words of English deemed its equivalent. Technically, it means a communication from Allah, the Exalted, related to the acts of the subjects through a demand or option, or through a declaration. According to this definition, the word *ḥukm* includes obligation-creating laws, declaratory laws, and even those that may be based upon positive decrees or on custom. Thus, the meaning is much wider than the "command of the sovereign" contemplated by John Austin for positive law. See: Ṣadr al- Sharī'ah 'Ubaydullāh b. Mas'ūd al-Bukhārī, *Al-Tawḍīḥ fi Ḥall Ghawāmiḍ al-Tanqīḥ* (Beirut: Dār al-Kutub al-'Ilmiyyah, n.d.) 2:122. For further details, see Muḥammad b.'Alī al-Shawkānī, *Irshād al-Fuḥūl ilā Taḥqīq al-Ḥaqq min 'Ilm al-Uṣūl*, ed.Abū Ḥafṣ Sāmī b. al-'Arabī, (Riyadh: Dār al-Faḍīlah, 1421/2000), 1:71-77.

[13] An example of this in the context of family law is the creation of the device of "judicial *khula*" which is neither divorce nor dissolution in the sense the two terms are used by the Muslim jurists. For a detailed criticism on this device see: Imran Ahsan Khan Nyazee, *Outlines of Muslim Personal Law* (Islamabad: Advanced Legal Studies Institute, 2012), 94-97.

[14] *Hazoor Bakhsh v The State*, PLD 1983 FSC 1.

[15] *Rashida Patel v The Federation of Pakistan*, PLD 1989 FSC 95.

mujtahid should consult is *ijmā'* because if the issue is already settled by consensus of the jurists there is no room for re-opening it.[16]

2.1.2 Does the Council Have A Legal Theory?

The next question is: did the Council develop a legal theory[17] of its own? For instance, what stance has the Council taken on issues such as the interrelation of the Qur'ān and the *Sunnah*,[18] the authenticity and use of *khabar wāḥid*, the meaning and scope of *naskh* (abrogation), restricting a general word (*takhṣīṣ al-'āmm*),[19] or construing the absolute word as conditional one (*taqyīd al-muṭlaq*)[20] so forth? If the Council wants to avoid the problem of analytical inconsistency, which mars many of its recommendations in almost every one of its reports, the most crucial task for it, after it has decided on a definition of the in junctions of Islam, is to formulate principles both for the extraction of these injunctions from the

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[16] AbūḤāmid Muḥammad b. Muḥammadal-Ghazālī, *al-Mustaṣfā min 'Ilm al-Uṣūl* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n. d.), 2:205.

[17] In other words, has the Council identified the 'sources' of law which it consults for deriving a rule of Islamic law? Has it determined the priority order of these sources and their mutual relationship? Has it developed some 'principles of interpretation'? These are some of the significant questions for any legal theory as far as Islamic law is concerned.

[18] For instance, does the *Sunnah* abrogate the Qur'ān or not? Can a *khabar wāḥid* (individual narration about a saying, act or approval of the Prophet) restrict the implications of the general word of the Qur'ān? What is meant by abrogation and restriction?

[19] The Ḥanafī theory requires that the restricting evidence must be definitive like the general word, while the Shāfi'ī theory deems the general word probable and thus allow its restriction through a probable evidence. See for details: Abū BakrMuḥammad b.Abī Sahl al-Sarakhsī, *Tamhīd al-Fuṣūl fi 'l-Uṣūl* (hereinafter, *Uṣūl al-Sarakhsī*), ed. Abū 'l-Wafā'al-Afghānī, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1414/1993), 1:132-151. See also: Ghazālī, *al-Mustaṣfa*, 2:20-48.

[20] As the absolute (*muṭlaq*) and the restricted (*muqayyad*) both are forms of the specific (*khass*) evidence, the Ḥanafī theory disallows construing the absolute as restricted, unless definitely proved so. As opposed to this, the Shāfi'ī theory presumes that the absolute shall be construed in the light of the restricted, unless proved otherwise. See for the arguments of both sides: *Uṣūl al-Sarakhsī*, 1:266-270 and Ghazālī, *al-Mustaṣfa*, 2:70-72.

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Qur'ānand the *Sunnah*, and for deciding how the conflicts between these injunctions and positive laws are to be resolved.

The Council, in its interim report, has elaborated some features of its legal theory in the following words:

> *Sharī'ah* foundations means the Qur'ān and *Sunnah*, which are the sources for finding the laws. The methods of *qiyās*and *ijtihād* are employed to find a law in the light of these sources when a law is not given in the Qur'ān and *Sunnah*. The legal position of a law deduced on the basis of *qiyās* and *ijtihād* varies, depending on whether they agree or differ on the validity of a deduced law. The weakness and the strength of this validity are categorized accordingly into *farḍ, wājib* and *Sunnah*.[21]

This exposition has several serious problems. First of all, the use of *ijtihād* is not limited to cases where the rule is not found in the texts of the Qur'ān and the Sunnah; *ijtihād*is also used for interpreting and elaborating the rules found in the texts.[22] Secondly, how can one have recourse to *ijtihād* or *qiyās* in case the rule is not found in the Qur'ān and the Sunnah, when the Council has already declared that only these two constitute the sources for Islamic laws? The meaning of *ijtihād* as the use of "personal opinion" by the *mujtahid* would not be

[21]CII, *Final Report on Reforms in the Hudood Laws*, 14.

[22] In the parlance of Islamic law, this is called *bayān*. See *Uṣūl al-Sarkhasī*, 2:26-53; Ghazālī, *al-Mustasfā*, 1:238-244. .

acceptable, for it would amount to giving him the status of the lawgiver.[23] Thirdly, the strength or weakness of a rule derived on the basis of *qiyās* does not depend on the agreement or disagreement of the *mujtahidīn*but on the strength of the two premises on which a *qiyās* is based: the first premise pertains to the *ratio* or active cause (*'illah*) of the rule and the second one is concerned whether the same *ratio* is found in the new case. Hence, if the two premises are definitive (*qat'ī*), the *qiyās* will also be definitive; and if any one of these premises is probable (*zannī*), the *qiyās* will also be probable.[24] Finally, the categorization of the obligation-creating rules (*ḥukm taklīfī*) into *farḍ, wājib or Sunnah,* is not brought about by the weakness or strength of the *qiyās* or *ijtihād* which is used to derive the rule, but on the definitive or probable nature of the evidence and the binding or non-binding nature of the command. Moreover, this categorization is not limited to laws derived by *qiyās* and *ijtihād* only, but applies to laws clearly given in the texts as well.[25]

2.2 Choosing Principles from Various Schools

As noted in the previous chapter, modern Muslim scholars have generally accepted the "common legal theory" view. This has helped the critics of Islamic criminal law to pick and choose from the various schools those principles which suited their call for 'reason' and

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[23] On Lawgiver (*al-Shāri'*), see: Shawkānī, *Irshād al-Fuhūl*, 1:78-83. It was to avoid this error that the *fuqahā'* decided, as a principle, that for exercising analogy, an exact match must be found in the texts called the *maqīs 'alayh* (that with which the analogy is being made). Similarly, it has been decided, as a principle, that for all the different modes of *ijtihād*, the basis must also be present in the Qur'ān and the *Sunnah*. Ghazalī, *al-Mustasfā*, 2:149.

[24]Shawkānī,*Irshād al-Fuhūl*,1:71-77.

[25] See for more detailed criticism: Ahmad: *ḤudūdQawānin*, 12-39.

'discretion'. The problem of inconsistency arising from such picking and choosing will be highlighted in the next chapter. Here, four important principles of the legal theory of these critics - if it can be called a legal theory - are analyzed here to show that these principles are of little help in creating room for discretion. Hence, these critics are compelled to abandon even these principles and instead rely on naturalist argument of the use of discretion based on reason.

2.2.1 The Presumption of Permissibility

The general practice of the courts as well as of the Council, as candidly shown in its Report, has been to treat everything permissible if no explicit text of the Qur'ān or the *Sunnah* is found prohibiting it.[26] The fact remains that something may not be against the explicit text, yet it may be conflicting with the general principles and the purposes (*maqāṣid*) of Islamic law. The presumption of permissibility - expressed by the jurists as "the original rule for all things is permissibility"[27] - does not have enough strength for becoming the basis of new legislation, or for changing the structure of the established norms of Islamic law.

First, this presumption is not widely accepted by the jurists. The celebrated Shāfi'ī jurist Jalāl al-Dīn al-Suyūṭī asserts that the Ḥanafīs apply the presumption of prohibition,

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[26] The Federal Shariat Court in *Ansar Burney v The Government of Pakistan*, PLD 1983 FSC 73, declared on the basis of the presumption of permissibility that a woman could become a judge in all cases. The Court even did not bother to consider the question that eligibility for a post requires positive evidence from the law and it cannot be decided on the absence of negative evidence.

[27] Jalāl al-dīn al-Suyūṭī, *al-Ashbāh wa 'l-Nazā'ir* (Cairo: Dār Iḥyā' al-Kutb al-'Arabiyyah, 1959), 66.

instead of permissibility.[28] The reason for this is that the Ḥanafīs resort to the general principles of law when they come across something about which the texts are apparently silent. Still when they do mention this presumption as a hypothetical possibility, they consider it as having been derived from the following verse: "It is He Who hath created for you all things that are on earth."[29]

Second, the large number of exceptions to this presumption renders it impossible to consider it as a general principle. Thus, the jurists unanimously agree that the presumption about rituals is of prohibition.[30] The same is true of forming sexual relationship with a woman,[31] taking of a human life[32] and eating the meat of a slaughtered animal.[33] Similarly, many other prohibitions have greatly limited the scope of this presumption of permissibility.

Third, one may argue further that since Adam, upon him peace, in addition to being the Father of all mankind, was a prophet, human beings have had recourse to revelation ever since the very beginning. It follows that some things must necessarily have been prohibited from the very start.[34] Hence, the presumption that in the absence of any text everything is permissible is not tenable.

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[28]Ibid.

[29]Qur'ān2:29.

[30]Suyūtī,*al-Ashbāh wa 'l-Naẓā'ir*, 66.

[31]Ibid.

[32]Muḥammad b.Abī Bakr Ibn Qayyim Al-Jawziyah, *Ahkām Ahl al-Dhimmah* (Beirut: Dār al-Kutub, al-'Ilmiyyah, 2002), 1:25.

[33]Ibid.

[34]*Uṣūl al-Sarakhsī*, 2:20.

If one still insists on accepting this presumption as a general principle, the question remains as to whether it is a good tool for IslamizingPakistani law?[35]

2.2.2*Qiyās* (Analogy)

Critiques on the *ḥudūd* laws have been accompanied by suggestions coming forward from some 'experts' of the need for *qiyās* and personal opinion. Some commentators, for example, have declared that the *niṣāb*[36] for the *ḥadd* of *sariqah* (theft) is very meager and that the amount should be raised.[37] Then there are those who have tried to fit in rules from other areas of law into the *ḥūdūd*.[38]

The Ḥanafī jurists do not apply *qiyās* to each and every legal issue. For instance, the number of *sijdah* (kneeling prostration) in every unit (*rak'ah*) of prayer being two, this fact cannot be subjected to *qiyās* so that the number of *rukū'* (standing prostration) should be made two as well. Like these rituals, the *ḥūdūd* concern what are called the rights of God (*ḥuqūq Allāh*)[39] which are not to be subjected to personal opinion or *qiyās*.

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[35] Some 'legal experts' are of the view that only 5% of the laws in Pakistan need to be Islamized and there is nothing un-Islamic about the rest. This is, again, equating non-repugnancy with conformity. Is that really the case? See for a criticism on this view: *Theories of Islamic Law*, pp 293-301; *Islamic Jurisprudence*, pp 239-240, 325-353.

[36]*Niṣāb*: "The minimum scale provided for an area of the law." For *zakāh* and theft, for example, it is a minimum amount of wealth that imposes liability.

[37] Muhammad Tufail Hashmi, *Islami Ta'līmāt kī Roshnī men Ḥudūd Ordinance kā Ik Jā'izah* (Peshawar: National Research and Development Foundation, 2005).

[38]Ibid., p 111-115. Many such examples are found even in the *CII Final Report*.

[39] This concept is explained in a little detail io Chapter Four of this dissertation.

Thus, the Companions of the Prophet (peace be on him) disagreed among themselves regarding the punishment for sodomy. Abū Hanīfah inferred from this difference of opinion that the Companions did not hold sodomy as *zinā* for if they regarded it as *zinā*, they would not have differed concerning its punishment. Sarakhsī explains the principle of Abū Ḥanīfah in the following manner:

> The Companions agreed that this act [sodomy] is not *zinā* as they were cognizant of the text for *zinā* and yet they disagreed as to what punishment this act made the perpetrator liable to. It is established that they would not practice *ijtihād* in the presence of a text. This proves their agreement on sodomy not being *zinā* and inapplicability of the *ḥadd* of *zinā* to it. Hence, this act is a crime which does not have a prescribed punishment in the *sharī'ah*. However, it is certain that it does call for punishment. The question as to what should be the punishment falls within the ambit of *siyāsah* which is to he left to the discretion of the ruler. If he holds an opinion regarding this matter, he is entitled by the *sharī'ah*to implement it.[40]

Similarly, punishments cannot be established by *qiyās* alone; there has to be a text, as creating an offence on the basis of analogy in the absence of a text amounts to *ex post facto* creation of the offence.[41] Neither may rules be gleaned from the other areas of law and superimposed on the *ḥudūd*using *qiyās*. Sarakhsī has given some important principles here:

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[40]Abū BakrMuḥammad b.Abī Sahl al-Sarkhasī, *al-Mabsūṭ*, ed. Ḥasan Isma'il al-Shāfi'ī (Beirut: Dār al-Kutub al-'Ilmiyyah, 1421/2001), 9:91.

[41] This is a necessary corollary of "the principle of legality" – *nulla peona sine lege* (no punishment without law). See for a detailed discussion: Nyazee, *General Principles of Criminal Law*, 75-83.

"Punishment cannot be established by *qiyās*; there has to be a text."[42]

"There is no place for *qiyās* in determining the amounts in *ḥūdūd*. Nothing can be added by *qiyās* to [what is given in] the text."[43]

"Obligatory amounts cannot be determined by personal opinion. As there is no text available to us [here], the best course to follow is to relegate the matter to the *ijtihād* of the ruler."[44]

Similarly, the *niṣāb* also cannot be determined by personal opinion or *qiyās* but has to be based on the text. However, where no text is present, the ruler may determine it.[45] In the same way, no condition may be added to or retracted from the *ḥūdūd* on the strength of one's personal opinion.

2.2.3*Istiḥsān* (Juristic Preference)

The term *Istiḥsān* in Islamic law should not be confused with 'equity' of English jurisprudence.[46] Historically, English "common law" was based on traditional customs and, as it was not made to change in order to meet the demands of newer ages, it stagnated and was

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[42]Sarakhsī, *al-Mabsūṭ*, 24:165.
[43]Ibid., 16:132.
[44]Ibid., 10:60.
[45]Ibid., 2:189.
[46] See, for instance: Muhammad Hashim Kamāli, *Equity and Fairness in Islam* (London: Islamic Texts Society, 2005). As meticulnus a research scholar as the worthy Mahmood Ahmad Ghazi has considered *Istiḥsān* to be synonymous to equity, even though he mentions differences between the two concepts. *Muḥāḍarāt-e-Fiqh* (Lahore: al-Faisal Publishers, 2005), 102.

unable to satisfy the public demand for justice. People increasingly felt that the law was inadequate for their needs.[47] People began petitioning the king. The king, being the 'Fountain of Justice,' would redress the grievance using his own 'discretionary sense of justice.' As more people turned to the king for justice, he delegated the authority of the use of discretion to the Lord Chancellor who would administer justice on the king's behalf. As the burden mounted still further, special courts had to be constituted in different regions of the realm. These came to be known as 'Chancery Courts', and later 'Equity Courts'. The continual practices of these courts led to the development of their own special principles which were referred to as 'principles of equity'. These included many novel principles and ways of doing things. The important fact to keep in mind here is that the reason for the formation of these courts was the periodic stagnation of the common law.

Islamic law, on the other hand, never faced such problems. Equating *qiyās* with common law and *Istiḥsān* with equity implies that the jurists deviated from the established rule of Islamic law, thinking it too stringent, and instead came up with a 'better', more just rule, using the principles of natural justice; and that this process was called *Istiḥsān* because it was an improvement upon the original rule. If this is true, then Shāfi'ī jurists were right to condemn it and assert: "Whoever practices *Istiḥsān* assumes the role of the Lawgiver."[48]

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[47] In many cases they would claim a right but the law would not recognize it and where it did recognize it, no adequate remedy was available to avail the right. Sometimes, where the law did furnish some remedy, it would not be to the satisfaction of the claimants. The law had simply ceased to be in touch with the times and made it appear increasingly unjust to the people. See for details: Graham Virgo, *Principles of Equity and Trusts* (Oxford: Oxford University Press, 2012).

[48] Ghazālī, *al-Mustaṣfā*, 1:213.

The Ḥanafīs, who accept *Istiḥsān* as a valid means of extracting legal rules, consider it a mechanism for ensuring harmony and analytical consistency within the law. If something appears prohibited in the light of the general principles of law, but has been explicitly permitted by one of the texts, the Ḥanafīs take the position that it is permissible as an exception to the general principle. They use the formula: "prohibited under *qiyās*but permissible under *istiḥsān*" for this purpose. Exceptions to the general principles are made on the basis of the text, consensus, necessity or some other "concealed principle" (*qiyās khafiyy*). Sarkhasī is worth quoting here:

> This [*istiḥsān*] is the evidence coming in conflict with that apparent principle (*qiyās ẓāhirī*) which comes into view without one's having looked deep into the matter. Upon a closer inspection of the rule and the resembling principles, it becomes clear tbat the evidence that is conflicting with this apparent principle is stronger and it is obligatory to follow it... The one choosing the stronger of the two evidences cannot be said to be following his own personal caprices.[49]

Another important point made by Sarakhsī is that when the jurist uses *istiḥsān* and prefers the stronger rule, he *abandons* the weaker one and as such it is not permissible for him or his followers to follow the latter.[50] He goes on to explain that when *Istiḥsān* is carried out on the

[49] *Usūl al Sarkhasī*, 2:200-202.
[50] Ibid.

basis of a concealed principle (*qiyās khafiyy*), the established rule does not amount to an exception but becomes a general principle in itself.[51]

2.2.4 *Maṣlaḥah* (Protecting the Objectives of the Law)

Contemporary scholars have generally equated *maṣlaḥah* with the principle of "utility" expounded by Jeremy Bentham (d. 1832),[52] apparently because literally *maṣlaḥah* means "acquiring benefit or repelling harm (*jalb al-manfa'ah aw daf' al-maḍarrah*)".[53] The technical meaning of *maṣlaḥah* by virtue of which it becomes an accepted principle of Islamic law has been explained by Ghazālī in the following words:

> As for *maṣlaḥah*, it is essentially an expression for acquiring benefit or repelling harm, but that is not what we mean; by it because acquiring benefit or repelling harm represents human goals, that is, the welfare of human beings through the attainment of these goals. What we mean by *maṣlaḥah*, however, is *the preservation of the objective of the law* (*al-muḥāfaẓah 'alā maqṣūd al-shar'*).[54]

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[51] Ibid., 206.

[52] Bentham's *Of Laws in General* greatly influenced his student John Austin and other legal philosophers. See for a detailed critical analysis of his views and particularly the way he uses the principle of utility in criminal law: H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982).

[53] Ghazālī, *al-Mustaṣfā*, 1:216.

[54] Ibid., 1:216-217.

Although Ghazālī is considered the foremost expositor of the principle of *maṣlaḥaḥ*, yet it may surprise many that he places *maṣlaḥaḥ* in the category of *al-usūl al-mawhūmah*, that is, 'uncertain principles'. He gives reasons for doing this:

> This is among the uncertain principles and whoever considers it as a fifth source is mistaken. This is because we linked *maṣlaḥaḥ* to the objectives of the law (*maqāṣid al-sharī'ah*), which are known by the Book [Qur'ān], the *Sunnah* and consensus. Thus, a *maṣlaḥaḥ* which cannot be linked to an objective derived from the Qur'ān, the Sunnah or consensus, and is of those alien interests (*al-maṣāliḥ al-gharībah*) which are not compatible with the propositions of the law (*taṣarrufāt al-shar'*), is void and abominable. Whoever uses such interests assumes the position of the Lawmaker, just as whoever presumes a rule on the basis of his personal preference (*istiḥsān*)[55] assumes the position of the Lawmaker.[56]

Thus, from the perspective of compatibility with the objectives of Islamic law, *maṣlaḥaḥ* may be divided into three categories:[57] the one proved compatible (*maṣlaḥaḥ mu'tabarah*), the one proved incompatible (*maṣlaḥaḥ mulghāh*)[58] and the one which is neither proved compatible nor incompatible (*maṣlaḥaḥ gharībah*).[59]

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[55]Shāfi'ī rejected the principle of *Istiḥsān* considering it to be a way of following personal whims. As already explained above, the Ḥanafī principle of *istiḥsān* is absolutely different from this. Ghazālī also acknowledges that the explanatinn of *istiḥsān* by the great Ḥanafī jurist Karkhī is acceptable to him asserting that if this is what is meant by *istiḥsān* he could only object to its title! (*al-Mustaṣfā*, 1:215-16.) Sarakhsī explains that even the title *istiḥsān* is not objectionable. (*Uṣūl al-Sarakhsī*, 2:199-200)

[56]*Al-Mustaṣfā*, 1:222.

[57]Ibid., 1:216.

[58] The example given by Ghazālī is that of the *fatwa* (legal verdict) given by a jurist to a rich person who had intentionally broken his fast and had sought the verdict about expiation. The jurist had told him that he was supposed to keep fast for sixty consecutive days, although the text of the tradition about expiation puts it on the

The first of these, the "compatible interests", are acknowledged by Islamic law either at the level of a specie (*naw'*) or at the level of a genus (*jins*).[60] Ghazālī explains that *qiyās* is nothing but extending the law to a new case on the basis of an interest acknowledged at the level of specie.[61] He further explains that the law can be extended to some new cases on the basis of an interest acknowledged at the level of genus, calling it *maṣlaḥah mursalah*, provided three conditions are fulfilled:

1. That the new principle does not conflict with any text (*naṣṣ*) or modifies its implications;
2. That the new principle does not conflict with the general propositions of the law, i.e., the existing principles and rules of the system; and
3. That the new principle is not alien (*gharīb*) to the system,[62] i.e., it finds a basis in the system.[63]

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third number in the priority list: manumission of a slave; feeding sixty needy people; fasting for sixty days. The argument forwarded by this jurist was that the purpose of expiation was to deter the lawbreaker from breaking it again and as the person was rich the first two forms of expiation could not achieve the purpose! Ghazālī and other jurists deem this line of reasoning flawed and consider this presumed "*Maṣlaḥah*" as *mulghāh* because it goes against the text (Ibid.). In other words, the *Maṣlaḥah* determined by God cannot be defeated by the *Maṣlaḥah* presumed by human beings.

[59] Ghazālī says that the example of this kind of *Maṣlaḥah* is difficult to find. Hence, he came up with the hypothetical example of a situation of war in which *all* Muslims were facing a definite death if they would not kill the *few* Muslims whom the invading enemy had taken as shields (Ibid., 1:218). It must be noted here that the choice is not between saving a few Muslims on the one hand or more Muslims on the other; rather, it is between saving a few Muslims or saving *all*. Thus, the choice was between *juz'* (part) and *kull* (whole), not between *qalīl* (few) and *kathīr* (more). That is why Ghazālī goes into great details in order to find out the *Maṣlaḥah* upheld by the Lawgiver in this situation (Ibid.).

[60] *Al-Mustasfā*, 1:222.

[61] Ibid.

[62] Ibid., 1:217.

[63] Ibid., 1:218.

An alien principle cannot be accommodated in the legal system, unless it fulfills three further conditions:[64]

1. It is related to any of the five primary objectives of the law (*ḍarūrāt*), i.e., it must aim at preserving and protecting religion, life, progeny, intellect or wealth;
2. It is definitive (*qat'ī*), i.e., it must certainly lead to the preservation and protection of the above-mentioned objectives; and
3. It is absolute (*kullī*) i.e. it must concern the *whole* of the Muslim *ummah* and not be limited to a certain group or individual.

Hence, it is impossible to pick at will concepts and principles from other legal systems and 'transplant' them in the Islamic legal system. The compatibility test is a must.

These conditions clearly show the limits of personal opinion and discretion in Islamic law. This issue also leads us to examine in a little detail the approach of those advocating reason untied to legal text, a pure form of naturalism manifest in the work of many of the contemporary Muslim scholars, including those who drafted the Report of the Council.

[64]Ibid., 1:222. Ghazālī then discusses various hypothetical examples to explain these three conditions. In each of these examples one of the conditions is missing. These examples are not only illustrative of the genius of that great jurist-cum-philosopher but also of the simplistic approach which many modern scholars have adopted towards this issue.

2.3 The Naturalist Argument

The analysis in the previous Section establishes that modern Muslim scholars have not followed the legal theory of a particular school, nor have they come up with a coherent theory of their own. They have, instead, chosen those principles from various schools which they consider helpful in giving more room to discretion. This section explains how this approach, directed at Islamic criminal law, draws from the "naturalist" argument. It calls for considering 'reason and nature' (*'aql-o-fiṭrat*) as the basis for *ijtihād* and, thus, wants to get rid of the stringent conditions laid down by the jurists. If accepted, this approach will demolish the whole edifice of the legal system developed by centuries of legal scholarship and will leave everything to the unbridled discretion of the modern 'sovereign' state.

2.3.1 Commonsense, Nature and *Ijtihād*

Those calling for reforms in Islamic law generally, and critics of Islamic criminal law particularly, come up with the "naturalist" argument when they talk of *ijtihād*.[65] The call for the use of 'commonsense', 'reason' and 'natural instincts' for discovering the rules of Islamic law or for extending the law to the new cases is, in fact, based on the concept of natural law. Jāvēd Aḥmad Ghāmidī(b. 1951), an exponent of this approach, writes:

[65] Effects of this approach are found in the CII Report too. The concept of 'natural law' is summarized by H. L. A. Hart (d. 1992), well-known legal positivist, in these words: "there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid." *The Concept of Law* (Oxford: Clarendon Press, 1961), 186.

> The *sharī'ah* concerns itself only where reason has erred or is liable to err; such as the few laws relating to economics, politics, society and etiquettes. There are only five crimes of *ḥūdūd* and *ta'zīr* for which a fixed penalty has been determined. Everything else has been left to human reason."[66]

Defining the scope of *ijtihād*, Ghāmidī says: "This [*ijtihād*] means that where the Qur'ān and the *Sunnah* are silent, *reason and nature* (*'aql-o-fiṭrat*) should be consulted. This is what is really meant by *ijtihād*."[67] Amīn Aḥsan Iṣlāḥī (d 1997), teacher of Ghāmidī, better known for his peculiar thesis of coherence in the Qur'ān (*naẓm-i-Qur'ān*),[68] explaining his position that 'the most obvious realities of nature' (*badīhiyyat-i-fiṭrat*) are part of the Divine law says:

> [The verse of the Qur'ān] "You may approach them [your wives] in the manner as Allah commanded you" (Al-Quran 2:222), makes it clear that all the most obvious realities of nature fall within the commands of Allah and form part of the *sharī'ah*, even though these have not been expressly stated. For example, we have not been ordered to take our food through our mouths and neither through our noses or eyes, but this is something that has been decreed by Allah as He has fashioned us in such a way. One going against this [not expressly stated] ordinance, goes against Allah's clear, or rather most manifest, law and will be liable to His punishment. We have called it as

[66]Jāvēd Ahmad Ghāmidī, "Ijtihād Kī Zarūrat awr Ahmiyyat", Monthly 'Ishrāq' Lahore, August 2000, 44-45.

[67]Ibid., 44 (Emphasis added).

[68] See for details about this theory: Mustansir Mir, *The Coherence in the Qur'ān: A Study of Iṣlāḥī's Concept of Naẓm in Tadabbur-i-Qur'ān* (Indianapolis: The American Trust Publications, 1987). See for an overview of the life and work of Iṣlāḥī: Akhtar Ḥusayn `Azmi, *Mawlānā Amīn Aḥsan Iṣlāḥī: Ḥayāt-o-Khidmāt* (Lahore: Nashriyyāt, 2009).

'most manifest' because Allah has *left such matters solely to our nature,* which is needless of any guidance respecting them.[69]

This is exactly how the 'religious' naturalists approach this issue.[70]

2.3.2 Religious Naturalists and the "Neo-Mu'tazilah"

John Austin (d. 1859), the famous English jurist of the nineteenth century, sums up the thesis of the proponents of this view:

> Of the divine laws, or the laws of God, some are revealed or proclaimed, and others are unrevealed. Such of the laws of God as are unrevealed are not infrequently denoted by following names and phrases: 'the law of nature' 'Natural Law'; 'the law manifested to man by the light of nature or reason'... Paley and other divines have proved it beyond a doubt, that it was not the purpose of revelation to disclose the whole of these duties. Some we could not know, without the help of revelation; and these the revealed law has stated distinctly and precisely. The rest we may know, if we will, by the light of nature and reason; and these the revealed law supposes or assumes. It passes them over in silence, or with a brief and incidental notice.[71]

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[69] Amīn Aḥsanīṣlāḥī, *Tadabbur-i-Qur'ān* (Lahore: Faran Foundation, 2001), 1:526 (Emphasis added).

[70] For detailed analysis of the views of the famous Christian theologian Thomas Aquinas (d. 1274) about natural law being part of the Divine law, see: N. Kretzmann and E. Stump (eds.), *The Cambridge Companion to Aquinas* (Cambridge: Cambridge University Press, 1993).

[71] John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995), 38-39.

The Mu'tazilah in the early Islamic history approached Islamic law in a similar way, asserting that goodness or badness is an inherent quality of acts which can be discovered by reason.[72] The 'neo-Mu'tazilah', as they should be called, have the same view. Thus, Islahī asserts: "It would be incorrect to think that difference between the good or evil of a thing is merely an acquired characteristic, and does not have any reasonable, ethical or natural grounds. To consider such is nothing less than sophism."[73]

The vast majority of Muslim scholars, however, have historically supported the opposing view; that the good or evil of something is not to be determined by reason but through the dictates of the *sharī'ah*; as reason is liable to err in recognizing good and evil, it cannot be taken as a standard. [74] Even if it is admitted that reason can identify the goodness or badness of an act, the question remains: how does a declaration of reason in a particular case acquire the status of law? To put it in the *sharī'ah* terminology, how does it become a *ḥukm shar'ī*. It is for this reason that the *fuqahā'*explicitly defined the *ḥukm shar'ī* as the address of the Lawgiver.[75]

The same debate is found among Western legal philosophers. The positivists take the view that the 'positive law' is valid and binding irrespective of the moral considerations about its goodness or badness, while the naturalists take the view that an immoral law is no law as it

[72]Ghazālī, *al-Mustasfa*, 1:59-66; Shawkānī, *Irshād al-Fahūl*, 1:78-83.
[73] Islāhi, *Taddabbur-i-Quran*, 3:194.
[74]Ghazālī, *al-Mustasfā*, 1:59-66; Shawkānī, *Irshād al-Fahūl*, 1:78-83.
[75]Shawkānī, *Irshād al-Fahūl*, 1:71-77.

violates the superior natural law.[76] For Oliver Wendell Holmes, the famous judge of the US Supreme Court, arguing on the basis of the dictates of nature is nothing but 'ominous brooding in the sky'.[77]

2.3.3 Where the Law is Silent

A question arises here: if the naturalist argument is rejected, how are the gaps in the law to be filled? How is the law extended to *novel* cases? The Muslim jurists discuss an interesting aspect of this issue by framing the question: what was the rule for various acts *before* the advent of the revelation? Ghazālī asserts that at that stage acts were *legally* neither permissible nor prohibited. This is because permissibility and prohibition both are forms of *ḥukm sharʿī*, which requires the address from the Lawgiver.[78] Hence, the rule, according to Ghazālī, was *tawaqquf*, i.e. waiting for revelation. After the advent of revelation, it alone is the standard for determining the goodness or badness of an act.[79] But what is to be done for matters where the *sharīʿah* outwardly seems silent? Obviously, *tawaqquf* is no more the option.

Ronald Dworkin (d. 2014), the famous American jurist, calls such issues as *hard cases*. These are cases where the law is apparently silent or where the rule apparently violates an

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[76] Sean Coyle, *From Positivism to Idealism: A Study of the Moral Dimensions of Legality* (Hampshire: Ashgate, 2007).

[77] Nyazee, *Islamic Jurisprudence*, 87.

[78] Ghazālī, *al-Mustaṣfā*, 1:66-67.

[79] Ibid., 67 and 76.

established principle of law.[80] Dworkin has shown, with considerable force, that for hard cases, the judge relies on *the general principles of law* rather than his own discretion.[81] The same is the approach of the Ḥanafī jurists. Nyazee, explaining the position of the Ḥanafī jurists, asserts: "Once revelation has come, such laws may only be discovered in the light of revelation, because revelation does not pass them over in silence; *it indicates them through general principles.*"[82] For covering new cases, newer principles can be formulated, provided it is done in accordance with the standard procedure for ensuring the compatibility of the new principles with the existing legal norms. This is what the Ḥanafī methodology is all about. Some of the details of this methodology will be explained in the next chapter.

Conclusions

Critics of Islamic criminal law have generally relied on the naturalist argument presuming that human reason may singly be used as a source for judging the goodness or badness of an act. While this approach may have led to moral criticism of the positive laws in the West, it has certainly caused serious problems for those who believe in the divinity of Islamic law, as it results in a conflict between reason and revelation. Critics have also found it better to take help from some principles of the various schools of Islamic law which in their opinion

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[80] Ronald Dworkin, "Hard Cases", *Harvard Law Review*, 88:6 (1975), 1057-1109.

[81] The issue has implications for the debate whether the judges make the law or merely discover it. See for a detailed discussion: Muhammad Munir, "Are Judges Makers or Discoverers of the Law: Theories of Adjudication and *Stare Decises* with Special Reference to Pakitan," *Annual Journal of the International Islamic University Islamabad*, 11 (2013), 7-39.

[82] Nyazee, *Islamic Jurisprudence*, 85 (Emphasis added). For details, see: *idem*, *Theories of Islamic Law*, 147-176 and 189-230.

created room for discretion. They have also been trying to distinguish between "*sharī'ah*", which is Divine, and "*fiqh*" which is human effort, and then asserting that "very few" issues have been touched by revelation, which has left the rest of the issues to reason. Thus marginalizing and undermining the rich legal heritage of fourteen hundred years, these critics have called for what amounts to demolishing the whole legal edifice of Islamic law. The present dissertation is an effort to elaborate the approach of the jurists who negate the basic presumptions of the "neo-Mu'tazilah".

In the next chapter, therefore, the distinctive features of the Ḥanafī legal theory will be elaborated to show how the Ḥanafī School developed a comprehensive and internally coherent system of interpretation for deriving the rules and principles of Islamic law and finding viable solutions to new issues only after ensuring their compatibility with the already existing legal regime.

CHAPTER THREE:METHODOLOGY OF THE ḤANAFĪ SCHOOL

INTRODUCTION

Many questions have been raised in the modern world about the doctrine of *taqlīd* (following a particular school of law).[1] Various answers have been provided by different scholars. The position taken in this dissertation is that every school of law represents a peculiar 'legal theory' and a specific 'system of interpretation', which is why mixing the opinions of the jurists belonging to different schools leads to analytical inconsistency. Thus, the basic premise of this thesis, as explained in chapter One, is that there is nothing in Islamic jurisprudence known as the 'common legal theory'. In this chapter, some significant aspects of the Ḥanafī legal theory will be briefly highlighted which will be followed by a discussion on the nature of disagreements within the School. Finally, the methodology of *takhrīj*, or reasoning from principles, will be elaborated to show how the jurists can extend the law to new cases without undoing the existing law.

[1] Schacht, *Introduction to Islamic Law*, 69-75; Coulson, *A History of Islamic Law*, 75-85.

3.1 Significant Features of the Ḥanafī Legal Theory

First, some of the important 'legislative presumptions'[2] of the Ḥanafī School will be briefly presented followed by a discussion on the 'sources' of Islamic law recognized by the Ḥanafī School. Finally, the relationship of the various sources with each other and the methodology devised by the Ḥanafī School for resolving conflicts in these sources will be explained.

3.1.1 Legislative Presumptions of the Ḥanafī School

In his monumental work, *al-Muwāfaqāt fi Uṣūl al-Sharī'ah*, the very first presumption of Abū Isḥāq al-Shāṭibī (d. 790 AH/1388 CE), the famous Mālikī jurist well-known for elaborating the theory of the higher objectives of Islamic law, is that "*uṣūl al-fiqh*" are definitive (*qaṭ'ī*).[3] This statement of Shāṭibī has been interpreted in many different ways.[4] Several scholars find it difficult to accept that all the *uṣūl* of *fiqh* are definitive. They point out that some of the *uṣūl* of *fiqh*, such as *khabar wāḥid* or *qiyās*, are *ẓannī* (probable), not *qaṭ'ī*.[5] Others say that Shāṭibī meant the sources of law 'generally' (*kulliyyatan*) so that *sunnah* generally is a definitive source even if individual reports may not be definitive.[6]

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[2]Legislative presumptions are like principles that help in interpretation. They are irrebuttable and are considered to be implied within the text of the statute. Examples include: "text to be the primary indication of intention of the legislature"; "the enactment is to be given the literal meaning"; "the court is to apply the remedy provided for the mischief". Francis A. R. Bennion, *Statutory Interpretation* (London: Longman, 1990), 325.

[3]Abū IsḥāqIbrāhīm b. Mūsā al-Shāṭibī, *al-Muwāfaqātfi al-Sharī'ah*, ed. Abū 'Ubaydah Mashhūr b. Ḥasan (Al-Khobar: Dar Ibn 'Affān, 1417/1997), 1:17-18.

[4] See, for instance, Aḥmad al-Raysūnī, *Imām al-Shāṭibī's Theory of the Higher Objectives and Intents of Islamic Law*, tr. Nancy Roberts (Herndon, VA: The International Institute of Islamic Thought, 2005).See also: Muhammad Khalid Masud, *Shāṭibī's Philosophy of Islamic Law* (Islamabad: Islamic Research Institute, 2003).

[5]Ḥusayn Hamid Hassan, *Uṣūl al-Fiqh* (Islamabad: Dār al-Sidq, 1423/2003), 11.

[6]Ibid., 12-13.

Nyazee has a different position on this issue.[7] After a thorough analysis of the work of Shāṭibī, he concludes that by *uṣūl al-fiqh* he means "the legislative presumptions" (*qawā'iduṣūliyyah*) of a school. These are definitive for the school as "evidence cannot be led by the jurists of the school to refute these rules".[8] Thus, for instance, the Ḥanafī School presumes: "Each time a *ḥukm* is discovered through the opinion of a Companion it is said to be proved",[9] i.e., it is said to be the *ḥukm* of Allah.[10] The jurists of the School have to presume this and they cannot challenge this presumption. If they do, they do not remain Ḥanafīs.[11]This explains the nature of the disagreements among the jurists of the school. They may have disagreed on the "interpretation of facts" (*qawā'id fiqhiyyah*), but they certainly did not disagree on the legislative presumptions. This will be explained more detail in Section 3.1.4 below.

Some of the legislative presumptions of a school relates to the so-called "sources of law". For instance, as opposed to the Mālikī School, the Ḥanafī School did not deem the

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[7] See his detailed note on this statement of Shāṭibī: Imran Ahsan Khan Nyazee, *The Reconciliation of the Fundamentals of Islamic Law* (Reading: Garnet Publishing Limited, 2011), 13-15.

[8]Nyazee, *Islamic Legal Maxims*, 21.

[9]Sa'd al-Dīn Mas'ūd b. 'Umar al-Taftāzānī, *al-Talwīḥ fi Kashf Ḥaqā'iq al-Tanqīḥ* (Beirut: Dār al-Kutub al-'Ilmiyyah, n.d.), 1:20. This wonderful book of Taftāzānī (d. 791 AH/1398 CE), who was a Shāfi'ī jurist is commentary on the *matn* of *al-Tanqīḥ* and its commentary *al-Tawḍīḥ fi Hall Ghawāmiḍ al-Tanqīḥ* both by the Ḥanafī jurists Ṣadr al-Sharī'ah 'Ubaydullāh b. Mas'ūd al-Bukhārī (d. 747 AH/1346 CE). Ṣadr al-Sharī'ah initially compiled the *matn* of *al-Tanqīḥ* on the basis of *Uṣūl al-Bazdawī*. Later, he wrote the commentary *al-Tawḍīḥ* to incorporate the discussions in *al-Maḥṣūl fi 'Ilm Uṣūl al-Fiqh* of Fakhr al-Dīn al-Rāzī (d. 606 AH/1210 CE), a Shāfi'ī jurist, and *Muntahā 'l-Wuṣūl wa 'l-'Amal fi 'Ilmay al-Uṣūl wa 'l-Jadal* of Ibn Hajib 'Uthmān b. 'Umar (d. 647 AH/1249 CE), a Mālikī jurist. These works of Ṣadr al-Sharī'ah and Taftāzānī greatly influenced the later jurists belonging to various schools of Islamic law many of whom deviated in one way or the other from the original position of their respective schools as they got influenced by the views of the other schools. It is for this reason that the works of the later jurists, both in *uṣūl* as well as *fiqh*, must be 'handled with care'.

[10] Taftāzānī, *al-Talwīḥ*, 1:20.

[11]Ibid. Nyazee, *Theories of Islamic Law*, 173-74.

"practice of the people of Madinah" as a valid source of law.[12] Similarly, contrary to the position of the Shāfi'ī School, the Ḥanafī School does not deem *istiṣḥāb* valid for creating a new right even if it accepts it for the continued existence of the already established rights.[13] Other legislative presumptions relate to the "principles of interpretation", such as the following principles of the Ḥanafī School:

> Each time a command (*amr*) is found in the texts it conveys an obligation, unless another evidence indicates the contrary;
>
> Each time a *ḥukm* is expressed in general terms it applies to all its categories with certainty, unless restricted by equally strong evidence;
>
> The *ḥukm* is found through the persuasive power of the evidence and not through the number of the evidence.[14]

Nyazee points out that it is these legislative presumptions which determine the true color of a school and distinguishes it from other schools:

> The first set of rules or presumptions are what are called *uṣūl al-fiqh*. These are rules that determine the character of the school and identify its methodology. They are

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[12] See for a detailed criticism on the legal theory of the Mālikī School: Muḥammad b. al-Ḥasan al-Shaybānī, *al-Ḥujjah 'alā Ahl al-Madīnah*, ed. Abū 'l-Wafā'al-Afghānī, (Deccan: Lajnat Iḥyā' al-Ma'ārif al-Nu'māniyyah, 1385AH).

[13] See for details: *Uṣūl al-Sarakhsī*, 2:223-226.

[14] Nyazee gathers these principles from *al-Talwīḥ*. See:*Islamic Jurisprudence*, 36-37.

> rules that elaborate the "theory of law" of the school. It is for this reason that there is unanimity about these rules, *or at least about the most important rules in the entire set.* Where there is a disagreement about any in this sense, *it has to be a minor or less important rule.* In this sense, the whole set consists of rules that are irrebuttable, that is, *evidence cannot be led by the jurists of the school to refute these rules.*[15]

This point will be further elaborated below.

3.1.2 The Characteristic Flavor of the Ḥanafī School

As noted earlier, the Ḥanafī School developed a "theory of general principles" for deriving and extending the rules of Islamic law. Nyazee expounds the Ḥanafī theory in the following words:

> The first task for the Ḥanafī jurist, when he is faced with a new case, is to see whether this case can be accommodated under a general principle. If the case is covered directly by a principle, the jurist finds no difficulty in assigning to it the *ḥukm* of the governing principle. If the case does not fall under one principle, the jurist would try to accommodate it under another principle. A principle that governs a case may itself be a sub-principle of a wider principle, or even be an exemption from it or a corollary.[16]

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[15] Nyazee, *Islamic Legal Maxims*, 21 (Emphasis added.)
[16] Nyazee, *Theories of Islamic Law*, 173.

As to where these principles are found, Nyazee explains that some of the principles are explicitly laid down in the texts of the Qur'ān or the *Sunnah*, while others are derived from the already settled cases. In the latter case, the jurist may derive a principle for the first time, or it may have been derived already by an earlier jurist and the school deems it binding on the later jurists.[17] The derived principle is not equal in strength to the one explicitly stated in the texts, but it may be strengthened by other evidences, such as the opinion of a Companion or the tacit consensus of the Companions.[18] The "main features" of the Ḥanafī methodology, according to Nyazee, can be summed up in the following points:[19]

1. The definitive nature of the general word (*'āmm*);[20]
2. The use of the general principle as the starting point of all legal reasoning;[21]
3. The opinion of a Companion as a binding precedent that not only governs the meaning of the *Sunnah* but also gives strength to a derived principle of law;[22]
4. Tacit consensus of the Companions as a strengthening evidence for a derived principle of law;[23] and
5. The non-acceptance of the apparent meaning of a *khabar wāḥid* if it clashes with an established principle of law, which it cannot restrict.[24]

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[17]Ibid., 173-74.

[18]Ibid., 174-75.

[19]Ibid., 175.

[20] *Uṣūl al-Sarakhsī*, 1:131.

[21] *Al-Mabsūṭ* of Sarakhsī is full of examples for this methodology. On every issue he begins with citing the principle of law on which the whole issue is based and then interprets the various texts which apparently seem to deviate from that principle. See for some examples of this methodology: Muhammad Mushtaq Ahmad, "Ta'āruż awr Raf'-i-Ta'āruż ke Muta'alliq Ḥanafī Madhhab kīTaḥqīq", *Fikr-o-Naẓar*, 50:3 (2013), 29-85.

[22] *Uṣūl al-Sarakhsī*, 2:104-113.

[23] The title given by Sarakhsī to the analysis of the principle governing the status of the statement of a Companion is very significant: "On following the Companion (*taqlīd al-Ṣaḥābī*) when he gives a statement and no dissenting statement [from another Companion] is known". Ibid., 2:104.

Nyazee further points out that the use of the general principles enhanced the analytical consistency of the system and resulted in rapid development of the law. However, this also necessitated the "warding off or evading the effect of the traditions" which were not consistent with the general principles.[25] Thus, traditions with weaker or disconnected chains, such as *mursal* traditions, were deemed acceptable if they were consistent with the general principles and traditions with sound chains were made subservient to these principles.[26]

How do the Ḥanafī jurists ensure analytical consistency in the system by reconciling between the apparently conflicting texts and principles? The answer to this question highlights the true worth of the Ḥanafī methodology.

3.1.3 Ensuring Analytical Consistency in the System

One important tool developed by the Ḥanafī School for ensuring analytical consistency in the system is *istiḥsān*.[27]This has already been explained in the previous chapter.[28] The point emphasized here is that this concept has generally been misunderstood; so much so that the Ḥanafīs were specifically charged for abandoning Divine law and creating rules on the basis of

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[24] See for a detailed discussion on this principle: Ibid., 1:337-344.

[25]*Theories of Islamic Law*, 175-76.

[26]Ibid., 176. This was not acceptable to the Ahl al-ḥadīth and when Imām al-Shāfi'ī expounded his theory he attacked each of these characteristic features of the Ḥanafī methodology. Ibid., 177-185.

[27] See for a detailed exposition of the Ḥanafī principle of *istiḥsān*: *Uṣūl al-Sarakhsī*, 2:202-206. As an example of how *istiḥsān* resolves conflicts and ensures analytical consistency in the system, see: Ahmad, *ḤudūdQawānin*, 25-29.

[28] See Section 2.2.2 of this Dissertation.

personal whims and caprices.[29] This was one of the reasons why they were termed as *ahly al-ra'y* as distinguished from the *ahl al-ḥadīth*.[30]

Another significant feature of the Ḥanafī methodology for ensuring analytical consistency in the system was the way they resolved conflicts in the various evidences (*adillah*) of law.[31] Some of the later jurists assert that in case of conflicting evidences, the Ḥanafī School first opts for abrogation (*naskh*), failing which it goes for preference (*tarjīḥ*) and finally it tries reconciliation (*jam'*).[32] This view has generally been accepted by the modern scholars.[33] However, a thorough review of the classical manuals of the Ḥanafī School, both on legal theory (*uṣūl al-fiqh*) as well as settled law (*fiqh*), reveals that this view does not accurately represent the Ḥanafī methodology for resolving conflicts.[34]

The Ḥanafī School, instead, first determines the grading and strength of the conflicting evidences; then, it derives a general principle from the superior evidence; after this, it interprets the subordinate evidence in the light of the superior evidence; if that is not possible, it presumes that the superior evidence has abrogated the subordinate evidence; if no evidence of abrogation is available, it abandons the subordinate evidence presuming that the narrator

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[29]Muḥammad b.Idrīs al-Shāfi'ī, *al-Risālah*, eds. Khālid al-Sab'and Zuhayr Shafīq (Beirut: Dār al-Kitāb al-'Arabī, 1426/2006), 326-352. See also: Ghazālī, *al-Mustaṣfa*, 1:213-316.

[30] Nyazee, *Theories of Islamic Law*, 161.

[31] The jurists discuss it under the notion of *mu'araḍah* or *ta'āraud*. See: *Uṣūl al-Sarakhsī*, 2:11ff. Some very important aspects of the issue are discussed under the notion of *tarjīḥ*. Ibid., 2:249ff.

[32]*Fawātiḥ al-Raḥmūt*, 2:236.

[33]Wahbah al-Zuḥaylī, *Uṣūl al-Fiqh al-Islāmī* (Beirut: Dār al-Fikr, 1406/1986), 1176-1181.

[34] See for a detailed analysis of this issue: Ahmad, "Ta'āruż awr Raf'-i-Ta'āruż ke Muta'alliq Ḥanafī Madhhab kīTaḥqīq", *op. cit.*

may have committed a mistake in understanding or narrating this evidence. A summary of the Ḥanafī methodology as expounded by Sarakhsī is given here.

The first significant point Sarakhsī makes is that conflict exists only if the two evidences are equal in status and negate each other.[35] In case of an apparent conflict between two verses of the Qur'ān, the first thing the Ḥanafīs do is to find a way out (*makhlaṣ*) in the verses themselves.[36] If that is not possible, distinction has to be made between the rules of the two verses.[37] If that is also not possible, one rule is applied to one situation and the other to another.[38] If these three options are exhausted and the conflict is not resolved, this is the case of the "conflict proper" and it is here that the Ḥanafīs go for the option of abrogation.[39] If no direct or indirect evidence of abrogation[40] can be found, the Ḥanafīs hold that the two evidences negate each other and one has to look for another source to find the law.[41]

A question arises here about preference. When the Ḥanafīs prefer one of the evidences to the other, do they abandon the latter as they do in case of abrogation? Sarakhsī answers in

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[35] *Uṣūl al-Sarakhsī*, 2:18. Hence, there can be no conflict between *muḥkam* and *mujmal* or between a *khabar wāḥid* and a verse of the Qur'ān. Ibid. See also: 'Alā'al-Dīn 'Abd al-'Azīzb. Aḥmad al-Bukhārī, *Kashf al-Asrār 'an Uṣūl Fakhr al-Islām al-Bazdawī* (Beirut: Dār al-Kitāb al-'Arabī, n.d.), 3:88.

[36] For instance, if one is can be restricted by the other, the conflict is resolved. *Uṣūl al-Sarakhsī*, 2:18. Thus, the Ḥanafī School does not apply the verse about cutting of hand (Q 5:38) to the alien non-Muslim who commits theft after entering into the Muslim territory with the permission of the Muslim authority (*musta'min*) as they restrict this verse by Q 9:6 which commands Muslims to refrain from any hostile act against such a person.

[37] For instance, Q 2:225 declares that a person will be held liable if he intentionally takes an oath and this includes a false oath for asserting or denying an act done in past (*yamīn ghamūs*), while Q 5:89 prescribes expiation only for the breaking oaths taken for doing or omitting an act in future (*yamīn ma'qūdah*). The Ḥanafī School distinguishes between the 'liability' mentioned in these verses by asserting that Q 2:225 prescribes liability in the hereafter, while Q 5:89 prescribes the worldly expiation. *Uṣūl al-Sarakhsī*, 2:19.

[38] Ibid., 2:19-20.

[39] Ibid., 2:20.

[40] Ibid., 2:20-21.

[41] This final situation is only hypothetical, as many jurists assert.

negative.[42] By preference, the Ḥanafīs only mean that the issue is governed by the preferred evidence and that the other evidence will be *interpreted* in the light of the preferred evidence.[43]

3.1.4 The Nature of Disagreements within the School

Many contemporary scholars highlight the differences among the jurists of the Ḥanafī School, particularly the Great Imām and his Two Disciples, on the rulings about the various sets of facts in order to prove that the practice of *taqlīd* – which these scholars criticize – was developed quite late, and that the founding Fathers of the School did not deem it necessary. In this section, the work of a great scholar will be critically evaluated who has thoroughly examined the *uṣūl* as well as *fiqh* of the Ḥanafī School and has then concluded that Shaybānī, the disciple of Abū Ḥanīfah, was a *mujtahid muṭlaq* in his own right, and that he followed Abū Ḥanīfah neither in *uṣūl* nor in *fiqh*. Muhammad al-Dasūqīwrote his PhD dissertation on *al-Imām Muḥammad bin al-Ḥasan al-Shaybānīwa Atharuhū fi al-Fiqh al-Islāmī*. It was later published and translated into many languages, including Urdu.[44] Dasūqī devoted Section One of Chapter Three for proving the above contention, and tried to show that Shaybānī had a separate and distinct set of principles and hence a separate and distinct theory.[45] Although Dasūqī has tried to make a long list of such "distinct" principles of Shaybānī, most of them

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[42] *Uṣūl al-Sarakhsī*, 23.

[43] This is what he does so often in *Mabsūṭ*. This is what the Ḥanafī methodology is all about. See for a few examples of the application of this methodology: Ahmad, "Ta'āruz awr Raf'-i-Ta'āruz", 69-83.

[44] Muhammad al-Dasūqī, *al-Imām Muhammad bin al-Ḥasan al-ShaybānīwaAtharuhūfi al-Fiqh al-Islāmī* (Doha: Dār al-Thaqāfah, 1407/1987). Muhammad Yusuf Farooqi translated it into Urdu under the title: *Muhammad bin ḤasanShaybānī: Ḥayāt-o-Khidmāt* (Islamabad: Islamic Research Institute, 2003).

[45] Dasūqī has tried to accumulate from *Uṣūl al-Sarakhsī* and other books the points where Shaybānī is reported to have disagreed with Ahū Ḥanīfah, Abū Yūsuf or others in the School on some principle.

relate to minor issues and they can be easily reconciled with the major Ḥanafī theory. Three issues, however, need some consideration: the authenticity of the *mursal* traditions, consensus of a later generation after disagreement of the earlier generation and conflict between a general word and a specific word.

Dasūqī quotes Shāfi'ī who ascribes an important principle to Shaybānī which, if proved definitively, makes Shaybānī's theory distinct from that of the Ḥanafī School, namely that Shaybānī did not deem the *mursal* traditions as valid, particularly those of Muḥammad Ibn Shihāb al-Zuhrī.[46] However, Dasūqī does not deem this report authentic and shows that Shaybānī did use *mursal* reports and accepted the *mursal* reports of al-Zuhrī.[47]

The second important issue highlighted by Dasūqī relates to the binding nature of the consensus of a later generation when the earlier generation had disagreed on an issue. Dasūqī asserts that Abū Ḥanīfah and Abū Yūsuf are of the opinion that disagreement of the earlier generation cannot be eliminated by the consensus of the later generation, while Shaybānī holds the opposite view.[48]Dasūqī cites the example of the validity of the sale of *umm al-walad*.[49] The Companions of the Prophet (peace be on him) disagreed on the validity of this transaction, but the Followers of the Companions reached a consensus on disallowing it.[50] As Abū Ḥanīfah and Abū Yūsuf enforce the decision of the judge about the validity of such a

[46]Dasūqī, *al-Imām Muhammad bin al-Ḥasan*, 216.
[47]Ibid., 217.
[48]Ibid., 230.
[49]Ibid., 231.
[50] *Uṣūl al-Sarakhsī*, 1:318.

transaction and Shaybānī disagrees with them. Dasūqī infers from this that Abū Ḥanīfah and Abū Yūsuf did not deem it a valid consensus while Shaybānī deemed it so.[51]

It seems that, in his eagerness to prove Shaybānī as a *Mujtahid Muṭlaq*, Dasūqī has oversimplified the issue. As Sarakhsī asserts, there is no disagreement in these three giants on this issue; all of them deem the consensus of the later generation after disagreement of the earlier generation valid and binding. However, AbūḤanīfah and Abū Yūsuf deem the disagreement of the earlier generation as a *shubhah* (mistake of fact or law)[52] because of which they enforce the decision of the judge regarding the validity of such transaction.[53]Hence, it was a disagreement on the interpretation of facts (*qā'idah fiqhiyyah*), not on the legislative presumptions (*qā'idahuṣūliyyah*).

Among the hundreds of principles of interpretation, Dasūqī could find only one principle on which, in his opinion, Shaybānī differed with the position generally held by the School. This is the case of conflict between *'āmm* (general) and *khāṣṣ* (specific).[54] In this case, the Ḥanafī School generally deems a general text as equal to a specific text.[55]Dasūqī cites two examples to prove that Shaybānī preferred the specific to the general.

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[51]Dasūqī, *al-Imām Muḥammad bin al-Ḥasan*, 2:231-232.
[52] For details about the notion of *shubhah*, see Section 4.2.4 of this dissertation.
[53] *Uṣūl al-Sarakhsī*, 1:319.
[54]Dasūqī, *al-Imām Muḥammad bin al-Ḥasan*, 223-24.
[55]*Uṣūl al-Sarakhsī*, 1:132.

One issue is the conflict of the general command of keeping away from urine[56] with the specific command given to the people of the tribe of 'Uranah to drink the urine of camels.[57] As the Ḥanafīs generally hold the urine of the camels as *najas* (ritually unclean), and Shaybānī does not deem it so, Dasūqī infers that Shaybānī, like the Shāfi'īs, held that the second narration specified the first one while the Ḥanafīs prefer the first one because of its being general.[58] This is, however, not acceptable because in Sarakhsī has cited many cases from the texts of Shaybānī which definitely prove that Shaybānī, like Abū Ḥanīfah, deems the general and the specific equal in status.[59] How then has Shaybānī disagreed with Abū Ḥanīfah on the issue of the urine of camels? Sarakhsī explains this case in *Mabsūṭ* and states that the reason for Shaybānī's disagreement with Abū Ḥanīfah was that *he saw no conflict in the two texts.*[60]

The other example given by Dasūqī is of the apparent conflict in two narrations about the *zakāh* imposed on agricultural produce.[61] One of the traditions is general, prescribing no *niṣāb* for such produce,[62] while the other specifically prescribes the *niṣāb* as 5 *awsuq*.[63]Abū Ḥanīfah interprets this latter tradition as referring to the *zakāh* of trade, not agricultural

[56] The tradition in which the command is mentioned has been narrated in *Sunan al-Dāruquṭnī*, Kitāb al-Ṭahārah, Bāb Najāsat al-Bawl wa 'l-Amr bi 'l-Tanazzuh minh. The tradition about punishment in grave because of not avoiding the urine has been narrated by many Companions. See, for instance: Bukhārī, Kitāb al-Wuḍū', Bāb Min al-Kabā'ir allā Yastatira min al-Bawl.

[57] Bukhārī, Kitāb al-Wuḍū', Bāb Abwāl al-Ibil wa 'l-Dawābb wa 'l-Ghanam wa Marābiḍihā; Kitāb al-Maghāzī, Bāb Qissat 'Ukl wa 'Uraynah.

[58]Dasūqī, *al-Imām Muḥammad bin al-Ḥasan*, 224-25.

[59] *Uṣūl al-Sarakhsī*, 1:131-32.

[60]See for explanation of this disagreement: *al-Mabsūṭ*, 1:164-67.

[61]Dasūqī, *al-Imām Muḥammad bin al-Ḥasan*, 223.

[62] "In what the sky waters: one-tenth." 'Abd al-Razzāq al-Ṣan'ānī, *Muṣannaf*, Kitāb al-Zakāh, Bāb Mā Tasqi al-Samā'.

[63] "No *ṣadaqah* in what is less than five*awsuq*." Bukhārī, Kitāb al-Zakāh, Bāb Zakāt al-Wariq.

produce, as traders used to sell and buy through *wasaq*. Shaybānī and Abū Yūsuf disagree with him saying that the tradition prescribes *niṣāb* for the *zakāh* of agricultural produce. Here again, Sarakhsī explains the position of Shaybānī and Abū Yūsuf without in any way linking it to the conflict of the general and the specific.[64]Interestingly Abū Yūsuf shares the view of Shaybānī in the case while no one says that he preferred the specific to the general.

The conclusion, then, is that Shaybānī, like Abū Ḥanīfah and Abū Yūsuf, equated the general and the specific, as definitely proved by the cases referred to by Sarakhsī in his *Uṣūl*. In the two *apparently* deviant cases, Shaybānī preferred one tradition to the other for other reasons, as elaborated by Sarakhsī in *Mabsūṭ*. Yet again, it is a disagreement on the interpretation of facts, not on the legislative presumption. God knows best.

3.2 *TAKHRĪJ*: METHODOLOGY FOR EXTENDING THE LAW TO NEW CASES

A major trend among the contemporary scholars of Islamic law is that they mix up the opinions of the jurists belonging to the various schools, practicing a kind of *talfīq* or "conflation".[65] This section will first identify a few serious problems in this approach, after which it will describe the methodology of *takhrīj* or reasoning by principles for extending the law to new cases.

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[64]Sarakhsī, *al-Mabsūṭ*, 3:3-6.

[65] For views of Orientalists on *talfīq* see: Schacht, *Introduction to Islamic Law*, 106; Coulson, *A History of Islamic Law*, 196-201.

categories, these *mujtahidīnfi al-masā'il* may determine the official position of the School after a thorough analysis of the principles and manuals of the School.[82] Finally, they extend the law to new cases using the established principles of the School.[83]

The work of all these three categories of the *mujtahidīn* forms the binding source for the *aṣḥāb al-takhrīj*, who are not *mujtahidīn* but who extend the law to new cases using the established principles of the School.[84] Jurists in the category of *aṣḥāb al-tarjīḥ*, those who are skilled in finding the preferred opinion of the School, also exercise *takhrīj* for some new cases.[85] The major difference between the jurists categorized as *mujtahidīnfi al-masā'il* and those termed as *ashba al-takhrīj* and *aṣḥāb al-tarjīḥ* (or even *aṣḥāb al-fatāwā*) is that jurists of these latter categories are not deemed *mujtahidīn*; otherwise, they all extend the law to new cases through the methodology of *takhrīj*.[86] This difference, in practical terms, means that the work of the *mujtahid* jurist is a binding source for the non-*mujtahid* jurist (called *faqīh* by Nyazee).[87] This hierarchy of the jurists is the cornerstone of the methodology of *takhrīj*.

Another important tenet is the strict observance of a hierarchy of manuals that record the decisions of the jurists of the School on various issues. The *Ẓāhir al-Riwāyah* is placed on

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[82] Ibid.

[83] Ibid.,7-8; Nyazee, *Islamic Jurisprudence*, 335.

[84] Ibn 'Ābidīn, *Sharḥ 'Uqūd Rasm al-Muftī*, 8.

[85] Nyazee, *Islamic Jurisprudence*, 335-336.

[86] Nyazee draws parallels between the work of the *mujtahidīn* and that of the legislature and between the work of the *aṣḥāb al-takhrīj* and others with that of the superior judiciary. (*Islamic Jurisprudence*, 336-338). Nyazee's theory of legislation and theory of adjudication is a great contribution towards understanding the internal intricacies of the Islamic legal system and calls for further research in this area.

[87] Ibid., 341.

the top of the hierarchy.[88] This is the title given to the six texts composed by Shaybānī.[89] The decisions of the cases recorded in these books definitively represent the official position of the School. Even in these books, one occasionally finds differences of opinion among the jurists of the School – mostly between the Imām and his Two Disciples. However, two of these books, namely, *al-Siyar al-Ṣaghīr* and *al-Jāmi' al-Ṣaghīr*, record the preferred opinion of the School. Nyazee deems them the prototype of the *mukhtaṣarāt* or the *mutūn* of the School – manuals that record the official position of the School on the cases listed therein.[90]

Among these *mukhtaṣarāt*, an earlier example is that of *Mukhtaṣar al-Ṭaḥāwī*. Another important example is *Mukhtaṣar al-Qudūrī*. The six books of *Ẓāhir al-Riwāyah* were also abridged in a *mukhtaṣar* called *al-Kāfi fiFurū' al-Ḥanafiyyah*. However, perhaps the most influential text was composed by Burhānal-Dīn'Alī b Abī Bakr al-Marghīnānī under the title of *Bidāyat al-Mubtadī*, in which he combined the texts of *al-Jāmi' al-Ṣaghīr* and *Mukhtaṣar al-Qudūrī*. Thus, the *mutūn mu'tabarah* are the basic source for determining the official position of the School.[91]

These *mutūn* were then explained with the help of authoritative commentaries by jurists of high caliber. For instance, Sarakhsī, who was among the *mujtahidīnfi al-masā'il*, dictated a thirty-volume commentary on *al-Kāfi* under the title of *al-Mabsūṭ*, which till date

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[88]Ibid., 341-42.

[89] These six books are: *al-Aṣl*, *al-Ziyādat*, *al-Jāmi' al-Kabīr*, *al-Jāmi' al-Ṣaghīr*, *al-Siyar al-Kabīr* and *al-Siyar al-Ṣaghīr*. Al-Hakim al-Mirwazi (d. 334), after removing repetitions and some minor cases, combined these six texts in one book called *al-Kāfi fi Furū' al-Ḥanafiyyah*. Sarakhsī's *al-Mabsūṭ* is a thirty-volume commentary on this latter book which he dictated to his students from inside a pit in which he was imprisoned.

[90]Nyazee, *al-Hidāyah*, xiv.

[91]Ibid.,xix-xxiii. See also: Ibn 'Ābidīn, *Sharḥ 'Uqūd Rasm al-Muftī*, 11-16.

continues to be the most authorative text on Islamic law.[92] Similarly, Marghīnānī himself wrote two commentaries on *Bidāyat al-Mubtadī*. The detailed one is titled *Kifāyat al-Muntahī*, and the brief one is called *al-Hidāyah*. It is this later work which captured the jurists of the Ḥanafī School of the following generations who wrote detailed commentaries (*shurūḥ*) on it.[93] Later, glosses, or *ḥawāshī*, were written on these *shurūḥ*.[94] It is well-established that the *matn* has priority over the *sharḥ*, and *sharḥ* has priority over the *ḥāshiyhah*. Yet another category of manuals is titled *fatāwā*, such as the *al-Fatāwā al-Hindiyyah* and *Fatāwā Qāḍīkhān*.[95] All these manuals have a priority order and a hierarchical structure. As jurist of a lower category cannot override a jurist of a higher category, the same is true of the manuals of the various categories.

In Chapter Seven of this dissertation, a detailed example of how the official position of the School is determined will be given with the help of the invaluable work of Ibn ʿĀbidīn on the legal consequences of the offence of blasphemy.

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[92]Ibn ʿĀbidīn, *Sharḥ ʿUqūd Rasm al-Muftī*, 15-16.

[93] Some of the famous *shurūḥ* ofthe *Hidāyah* include: *Fatḥ al-Qadīr* by Kamāl al-Dīn Ibn al-Humām al-Iskandarī; *al-Bināyah* by Badr al-Dīn al-ʿAynī; and *al-ʿInāyah*by Akmal al-Dīn al-Bābartī.

[94] A famous example is that of the ḥāshiyah of Muḥammad Amīn Ibn ʿĀbidīn al-Shāmī titled *Radd al-Muḥtār*on *al-Durr al-Mukhtār* of ʿAlā' al-Dīn Muḥammad b.ʿAlī al-Ḥaṣkafī (d. 1088/1677) which, in turn, is *Sharḥ* of the *matn* of *Tanwīr al-Abṣār* by Muḥammad b. ʿAbdullāh al-Tamartāshī (d. 1004/1596).

[95]Ibn ʿĀhidīn, *Sharḥ ʿUqūd Rasm al-Muftī*, 12.

3.2.3 Reasoning from Principles

Nyazee identifies three tasks[96] for the *faqīh* or the jurist who, without deviating from the already settled cases, extends the law to new cases on the basis of the established principles of the School:

1. Follow the "precedents"[97] of the Elders of the School;[98]
2. Extend the law to new cases on the basis of the established principles; and
3. Where necessary, formulate a "new principle" which is compatible with the already established norms of the School.[99]

As far as the "sources" for the *faqīh* are concerned, Nyazee mentions two things:[100]

1. The manuals of the School, particularly those compiled by the *mujtahidīn* of the School;
2. The established principles of the School.

The manuals of the School and their hierarchy have already been described above. Details about the principles of the School are discussed below.

As noted earlier, some principles have been explicitly stated in the texts of the Qur'ān and the *Sunnah*, while others have been derived by the jurists of the School. Moreover, principles of this latter category may have been strengthened by the opinion of a Companion

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[96] Nyazee, *Islamic Jurisprudence*, 340-341.

[97] In what sense the decisions of the great jurists of the School are deemed "precedents" explains the true meaning of the doctrine of *taqlīd*. See, Nyazee, *Islamic Jurisprudence*, 333-338.

[98] For an explanation of the phrase Elders of the School, see Nyazee, *The Secrets of Uṣūl al-Fiqh*, 58-64 and 85-86.

[99] *Islamic Jurisprudence*, 341.

[100] Ibid., 341-343.

or the tacit consensus of the earlier generations. For these principles, scholars generally refer to the works titled *al-Ashbāh wa'l-Naẓā'ir.*[101] However, Ibn 'Ābidīn points out that these works must be 'handled with care,' and that the principles, along with their restrictions and exemptions, if any, must be checked from the proper manuals of the School.[102] The compilation of the principles by al-Karkhī and al-Dabbūsī are a rich source for this purpose.[103]Sarakhsī's *al-Mabsūṭ* is not only a treasure-trove of principles, but also explains how the principles are derived and then used for extending the law to new cases.[104]

As for formulating a new principle for novel cases, it is permitted on the condition that the new principle is compatible with the system. This, in essence, necessitates three tests:

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[101] Zayn al-'Ābidīn b. Ibrāhīm Ibn Nujaym (d. 970/ 1563) and the influence of the Shāfi'ī jurist Jalāl al-Dīn al-Suyuti (d. 911 AH/1505 CE) who wrote a similar book with similar title is more than obvious on this work.

[102]Ibn 'Ābidīn, *Sharḥ 'Uqūd Rasm al-Muftī*, 8.

[103]*Risālah fi 'l-Uṣūl allatī 'Alayhā Madār Furū' al-Ḥanafiyyah* by Imām Abū 'l-Ḥasan 'Ubaydullāh b. al-Ḥusayn al-Karkhī (d. 340 AH/951 CE) is among the earliest –and by far the best– compilations of the principles. Najm al-Dīn Abū Ḥafṣ 'Umar b. Aḥmad al-Nasafi (d. 537 AH/1142 CE) added to it explanatory notes and examples of cases. See: *Uṣūl al-Karkhī ma' Dhikr Amthiliatihā wa Naẓā'irihā wa Shawāhidihā* (Karachi: Mīr Muḥammad Kutubkhāna, n.d.). This *risālah* has thirty-nine principles. Nyazee has translated these principles, notes and cases in his *Islamic Legal Maxims*, 245-280.Among the disciples of Karkhī, it was Abū Bakr Aḥmad b. 'Alī al-Jaṣṣāṣ al-Rāzī (d. 370 AH/980 CE), who further built upon the work of his great master. See his: *al-Fuṣūl fi 'l-Uṣūl*, ed. 'Ujayl Jāsim al-Nashmī, (Kuwait: Ministry of Religious Affairs, 1414/1994). However, Nyazee is of the opinion that the works of Abū Zayd 'Ubaydullāh b. 'Umar b. 'Īsā al-Dabbūsī (d. 430 AH/1038 CE) is more important although scholars have not given it the attention it deserves. Nyazee shows that Dabbūsī greatly influenced not only the great Ḥanafī jurist Sarakhsī but also the revivalists of the Shāfi'ī legal theory Imām al-Ḥaramayn al-Juwaynī and his disciple Ghazālī. Dabbūsī's *Ta'sīs al-Naẓar*, ed. Muṣṭafā Muḥammad al-Dimashqī (Beirut: Dar Ibn Zaydun, n.d.) and *Taqwīm al-Adillah fi Uṣūl al-Fiqh*, ed. Al-Shaykh Khalīl Muḥy al-Dīn, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1421/2001), indeed contain treasure-troves of the legal principles and Nyazee has heavily relied in his *Islamic Legal Maxims* on these works. He also translated excerpts from *Ta'sīs al-Naẓar*. See: *Islamic Legal Maxims*, 281-302.

[104] For a selection of more than fifty principles taken from *Kitāb al-Ḥudūd* in *al-Mabsūṭ*, see Appendix One of this dissertation.

1. That the new principle does not alter the implications of the texts of the Qur'ān and the *Sunnah*;[105]
2. That the new principle does not go against the already established principles of the School; and
3. That there is some positive evidence within the system in favor of the new principle that indicates that it is not altogether 'stranger' to the system.[106]

This discussion may be concluded with the following quote from Nyazee:

> It should not be assumed that the *faqīh* cannot approach... the sources for the *mujtahid* [the Qur'ān and the *Sunnah*]. He certainly can, but the system erected by the *fuqahā'* appears to be saying that there is no need to reinvent the wheel. The entire law, after analytical systematization, bas been organized around a large hody of principles, precedents and rules. This body... provides enough flexibility for expansion and change. So wby go througb the whole process once again, a process over which centuries of labor has been expended by the *mujtahid*? Why not build on the work that has been done already? Why lose the heritage?[107]

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[105] This simply means that the interpretation of these texts already adopted by the School must be accepted. Sometimes people refer to the report of a saying of Abū Ḥanīfah: "When a *hadith* is sound, take it as my legal position." See for a detailed discussion on the correct interpretation of this statement: Nyazee, *The Secrets of Uṣūl al-Fiqh*, 65-68.

[106] Gbazālī calls it *Maṣlaḥah gharībah*, as explained in tbe previous Cbapter.

[107] Nyazee, *Islamic Jurisprudence*, 339.

CONCLUSIONS

Ḥanafī School has a comprehensive and internally coherent legal theory the most important characteristic of which is the use of the general principles of law. The School also developed a system of 'precedents' and, for that purpose, the grading of jurists and manuals of law which help in resolving analytical inconsistencies and resultant in a smooth functioning of the system. The jurists of the School have occasionally differed, but the disagreement has always remained at the level of 'interpretation of facts' and not at the level of 'legislative presumptions' of the School. It is these latter principles – the legislative presumptions – which determine the core legal theory of the School and give it a peculiar flavor.

The School also developed the detailed methodology of *takhrīj* or reasoning from principles for the purpose of extending the law to new cases and thus finding viable solutions to new issues without causing problems of analytical inconsistency. This methodology allows introducing new principles, if and when needed, provided the new principle is compatible with the already existing legal system.

In the remaining chapters of this dissertation, effort will be made to apply this methodology of *takhrīj* for finding viable solutions to some complicated problems faced by the Pakistani criminal justice system. For this purpose, the foremost task is to determine the fundamental principles of Ḥanafī criminal law. This is to be done in the next chapter.

CHAPTER FOUR: SIGNIFICANT FEATURES OF THE ḤANAFĪ CRIMINAL LAW

INTRODUCTION

Modern scholars focusing on the works of Shāfi'ī and Ḥanbalī scholars – whose classification of crimes on the basis of rights is somewhat muddled – have caused distortions in the original doctrine of *siyāsah* as conceived by the Ḥanafī school; a doctrine that divides crimes into the three major categories of *ḥadd*, *siyāsah* and *ta'zīr*. This division is based on three different kinds of rights and determines the legal consequences of crimes pertaining to the standard of evidence, the enforcing authority and the power of pardon or compromise. This chapter, therefore, focuses on the classical manuals of the Ḥanafī School for analyzing the classification of rights in the Ḥanafī law. It is this classification which determines the nature and consequences of offences in the Ḥanafī system. Once this is done, an analysis of the nature of *siyāsah* is undertaken for determining its distinctive features.

4.1 THE ḤANAFĪ THEORY OF RIGHTS

Before exploring the Ḥanafī manuals on the issue, it is imperative to briefly examine the important case of *Hazoor Bakhsh v The State*[1] in which the Federal Shariat Court embarked upon determining the meaning and scope of the concept of *ḥadd* in Islamic law. The views

[1] *Hazoor Baksh v The State*, PLD 1981 FSC 243.

expressed in the lead judgment by Aftab Hussain, CJ, have influenced many critics of the Hudood laws in Pakistan and are echoed in the 2006 CII Report on reforms in the Hudood laws.[2]

4.1.1 Questioning the Basis for the *Ḥadd-Ta'zīr* Division

Major issue before the Court in this case was whether the punishmentof *rajm* was *ḥadd* or *ta'zīr*. Chief Justice Aftab Hussain, however, deemed it better to examine the concept of *ḥadd* as developed by the jurists and concluded that the division of punishments into *ḥadd* and *ta'zīr* was of little significance and a later innovation. His criticism of the concept of can be summarized in the following points:

1. *Ḥadd* literally does not mean punishment and the Qur'ān nowhere uses the word *ḥadd* for punishment,[3] while in the Prophetic traditions, this word has been used for punishments generally and not specifically for a 'fixed' punishment.[4]
2. Despite the fact that the jurists have declared *ḥudūd* to be 'fixed punishments', they disagreed on the inclusion or exclusion of a number of punishments in this category.[5]
3. The punishment of *rajm* is not mentioned in the Qur'ān, but the jurists deem it *ḥadd*.[6] Moreover, the Qur'ān does not prescribe any penalty for the consumption

[2] *Final Report on Reforms in the Hudood Laws*, 135ff.
[3] PLD 1981 FSC 1.
[4] Ibid.
[5] Ibid.

of alcohol, and the traditions report varying punishments, but the jurists included it among the the *ḥudūd*.[7]

Similar observations are found in the CII Report.[8]

Nyazee points out that the Court could not appreciate the difference between the wider and the narrower doctrines of *ḥudūd Allāh* (limits prescribed by Allah).[9] He also elaborates that the wider doctrine of *ḥudūd Allāh* prescribes the "fixed" or "immutable" part of Islamic law and that the "fixed punishments" form just a part of this larger whole.[10] Nyazee also emphasizes that the jurists were not fond of classification just for the sake of classification and that they were concerned with the legal consequences of the various wrongs which compelled them to categorize certain specific offences in the category of the *ḥudūd*. These included, *inter alia*, special standard of proof for an offence, (as the Qur'ān prescribes for the offence of *zinā*) and the fact that nobody had the authoriry to pardon the offender (as the Prophet (peace be on him) explicitly stated so about the offence of theft).[11] Although the emphasis in the post-colonial discourse on Islamic criminal law has been on the fixed or discretionary nature of the punishment, that is just one aspect of the issue. The other aspects must not be ignored and, as noted in Chapter One, the major contribution of Nyazee in this

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[6]Ibid.

[7]Ibid.

[8]*Final Report on Reforms in the Hudood Laws*, 143.

[9] Nyazee, *Theories of Islamic Law*, 109ff.

[10] This has been explained in Section 1.2.1 of this dissertation.

[11]Muslim b. al-Ḥajjāj al-Qushayrī, *al-Ṣaḥīḥ*, Kitāb al-Ḥudūd, Bāb Qaṭ' al-Sāriq al-Sbarīf wa Ghayrih wa Nahy 'l-Shafā'ah fī 'l-Ḥudūd.

regard is his elaboration of the significance of the concept of *ḥaqq Allāh* (right of God) for understanding the nature of the *ḥudūd* punishments.[12]

It is time now to explore some details of the concept of the right of God in the Ḥanafī jurisprudence.

4.1.2 The Concept of the Right of God

The definition of *ḥadd* in the Hudood Ordinances is given as: "punishment ordained by the Qur'ān and [the] *Sunnah*".[13] This definition does not mention the most important characteristic feature of *ḥadd* which forms the basis of the whole juristic on criminal law. Kāsānī, the renowned Ḥanafī jurist of the sixth/twelfth century, defines *ḥadd* in the following words: "fixed punishment [the enforcement of] which is obligatory as a right of God."[14] He, thus, not only explains the meaning of "fixed" (*muqaddarah*) when he asserts that its enforcement is "obligatory" (*wājibah*) but also highlights the reason for this when he adds the phrase "as a right of God" (*ḥaqqan lillāh*). This point needs a little elaboration.

First, why is a particular punishment "fixed"? One may refer to the punishment of *qadhf* which the verse of the Qur'ān ordains as "eighty lashes".[15] From the perspective of the principles of interpretation, the word "eighty" is *khāṣṣ* (specific), which carries only one

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[12] See Section 1.2.4 of this dissertation.

[13] Section 2 (b) of the Offence of Zina (Enforcement of the Hudood) Ordinance 1979. The same definition is found in the other Ordinances too.

[14] 'Alā' al-Dīn, Abū Bakr b. Mas'ūd al-Kāsānī, *Badā'i' al-Ṣanā'i' fi Tartīb al-Sharā'i'*, eds. 'Alī al-Mu'awwaḍ and 'Ādil 'Abd al-Mawjūd (Beirut: Dār al-Kutub al-'Ilmiyyah, 2003), 9:177.

[15] Qur'ān 24:4.

meaning.[16] Hence, it must be no more than or less than eighty lashes. The second question is: why is the enforcement of this punishment obligatory? Here another principle of interpretation tells us that "command is for obligation,"[17] and as Allah has given us command for this purpose, it has become obligatory on us.

At this point, one may argue that Allah has also made the punishment of *qiṣāṣ* obligatory when He said: "O believers! *Qiṣāṣ* has been made obligatory on you in matters of the murdered."[18] Why, then, not categorize it as a *ḥadd* punishment? The answer to this question leads us to the crux of the matter. The same verse allows the legal heirs of the victim to pardon or conclude a compromise with the murderer. The rule, then, is that enforcement of the *qiṣāṣ* punishment is obligatory, except where the legal heirs of the victim do not pardon or conclude a compromise with the murderer. This exception does not exist for the *ḥadd* punishment, and it is for this reason that it is called "the right of God". This is how Kāsānī explains the meaning of this concept:

> The obligatory punishment for such wrong is the pure right of Allah, Great is His Majesty, so that the benefits of this punisbment surely reach the general public and the general public is surely protected from the evils of that wrong. This purpose can only

[16] *Uṣūl al-Sarakhsī*, 1:131.
[17] Ibid., 1:14.
[18] Qur'ān 2:178.

be achieved if a human being does not have the authority to waive this punishment. *That is exactly what is meant by ascribing these rights to Allah*, Blessed and High is He.[19]

The concept of the Right of God, thus, signifies the immutable sphere of Islamic law. At times, the concept is also used for "God-given" rights to individuals because they are also "inalienable".[20] However, in the context of *ḥudūd* and *ta'zīr*, this concept primarily signifies that no human authority can suspend this punishment. There are other important legal consequences related to this concept which will be analyzed in section 4.2 below. Presently, the various categories of the rights of God mentioned by Sarakhsī may be briefly given here so as to have a broad sketch of this concept.

Sarakhsī mentions the following eight categories of the right of God:[21]

1. *'ibādah maḥḍah* (pure worship), such as prayer, *zakāh* and fasting;
2. *'uqūbah maḥḍah* (pure punishment), i.e., the *ḥadd* punishments;
3. *'uqūbah qāṣirah* (imperfect punishment), such as depriving the murderer of his right to inherit the murdered person;[22]

[19]Kāsānī, *Badā'i' al-Ṣanā'i'*, 9: 248 (emphasis added).

[20] Nyazee, *Theories of Islamic Law*, 115-116. See for more details: Imran Ahsan Khan Nyazee, "Islamic Law and Human Rights", *Islamabad Law Review*, 1:1-2 (2003), 13-63.

[21]*Uṣūl al-Sarakhsī*, 2:289.

[22] Section 317 of the Pakistan Penal Code also prescribes this punishment only two kinds of murder, namely, *qatl-e-amd* and *qatl shibh-e-amd*. The Ḥanafī law also prescribes it for unintentional murder. *Al-Mabsūṭ*, 26:78. See for details: Section 11.2.2 of this Dissertation.

4. *dā'irah bayn al-'ibādah wa 'l-'uqūbah* (that vacillate between worship and punishment),[23] i.e., *kaffārah* (expiation) for some wrongs, such as unintentional murder or intentionally breaking fast;
5. *'ibādah fihā ma'nā al-ma'unah* (worship that also has the meaning of financial liability),[24] i.e., *zakāh* of *fiṭr* (paid at the end of the month of Ramadan before the Eid prayer);
6. *ma'unah fihāma'nā al-'ibādah*(financial liability that also has the meaning of worship),[25] i.e., *'ushr* levied on the produce of the land;
7. *ma'unah fihā ma'nā al-'uqūbah* (financial liability that also has the meaning of punishment),[26] i.e., *kharāj* levied on non-Muslims; and
8. *qā'im bi-nafsih* (that exists independently),[27] such as *khums* levied on minerals.

The point is that all these may be termed as matters of "ritual obedience" insofar as they are beyond the scope of the exercise of reason. In the previous chapter, it has already been explained that there is very little scope for rational reasoning in matters pertaining to *ḥudūd* punishments.

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[23] It means that these acts carry the meaning of both worship and punishment.

[24] That is to say, this is primarily an act of worship but it also carries the meaning of financial liability.

[25] It means that, as opposed to the previous category, this is primarily a financial liability but it also carries the meaning of worship. It is because of the meaning of worship in it that it cannot be imposed on non-Muslims.

[26] Thus, the difference between *'ushr* and *kharāj* is that even when both are financial liabilities, the former contains the meaning of worship in it and will bring reward in the hereafter to the one who pays it.

[27] These may be called "miscellaneous".

4.1.3 Distinguishing the Right of God from the Right of the Community

Scholars working on Islamic criminal law in the post-colonial world have generally considered the right of God synonymous with the right of the community.[28] Perhaps they were influenced by the binary division of English law – public and private. This has caused several problems. For instance, it is an established rule of Islamic law that the government cannot commute or pardon a *ḥadd* punishment. The reason for this rule, as noted above, is that *ḥadd* is the right of God.[29] Had the right of God been the same as the right of the community, the government would have the right to pardon the *ḥadd* punishment.

Under the English legal system, which Pakistan inherited from the British Raj, legal wrongs are divided into two broad categories: civil and criminal.[30] The former is violation of a private right while the latter is violation of a public right.[31] Breach of contract is violation of a private right *in personam*, while tort is violation of a private right *in rem*.[32] Sometimes a wrong is deemed violation of both a private right *in rem* as well as a public right. Thus, at the same time it is both a tort as well as an offence – the so-called "felonious tort". A good example is that of defamation, which is considered both a tort as well as a crime. The

[28] 'Awdah, *al-Tashrī' al-Jinā'ī al-Islāmī*, 1:79.

[29] Kāsānī, *Badā'i' al-Sanā'i'*, 9:250.

[30] J. C. Smith and Brian Hogan, *Criminal Law* (London: Butterworths, 1983), 17.

[31] Ibid., 18-9.

[32] A right *in personam* is the one available only against a particular person or group of persons. Generally, this right is created by a contract. Thus, parties to a contract have rights *in personam* against each other. For iostance, if a person buys a car from another, the buyer has the right to seek the delivery and possession of the car from the seller in accordance with the terms of the contract. Similarly, the seller has the right to demand the payment of the price as agreed upon in the contract. A third person – a non-party – generally has no right and no duty under the contract. This is known as the doctrine of the "privity of contract". A right *in rem* is the one available agaiost the whole of the world. For instance, nobody is allowed to enter into the premises of another person without his permission. That is why "trespass" is violation of a right in *rem* and is, therefore, considered a tort. *See* Ratanlal Raochoddas and Manharlal Ratanlal, *The Law of Torts* (Lahore: Mansoor Book House, 1989), 3-5.

aggrieved party has both the right to seek damages from the defendant as well as to file a criminal case against him and get him punished by the court.[33]

The jurists have an altogether different approach. One reason for confusion of the contemporary scholars could be a superficial reading of the texts of the jurists. For instance, Kāsānī, while elaborating the nature of the *ḥadd* punishment of *qadhf*, says: "If the evil effects of a wrong reach the general public and the good effects of its punishment also reach the general public, the obligatory punishment for such wrong is the pure right of Allah, Great is His Majesty."[34] A person with the background of English criminal law may wrongly construe this statement as equating the right of God with the right of the community. This wrong construction ignores the fact that Kāsānī uses the word "obligatory" for the punishment which is awarded as a right of God. The use of this word indicates, as noted above, that the punishment can neither be commuted nor pardoned and "*that is exactly what is meant by ascribing these rights to Allah.*"[35]

Hence, Ḥanafī law has an altogether different classification of rights. It divides rights into three kinds: rights of individual, rights of community and rights of God. All punishments in the Ḥanafī law are linked to one or more of these rights. Thus, *ḥudūd* punishments are linked to the rights of God;[36] *ta'zīr* punishments are linked to the rights of

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[33] *See* Sections 499 and 500 of the Pakistan Penal Code, 1860.

[34] Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:248.

[35] Ibid.

[36] According to the Ḥanafī School, all *ḥudūd* punishments, except the *ḥadd* of *qadhf*, relate to the pure right of God. *See* Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:248-250; Burbān al-Dīn Abū 'l-Ḥasan 'Alī b. Abī Bakr al-Marghīnānī, *al-Hidāyah fī Sharḥ Bidāyat al-Mubtadī* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.), 2:339. The

individual;[37] while *siyāsah* punishments are linked to the rights of the community.[38] The relationship of *ta'zīr* and *siyāsah* will be examined in detail in the next chapter because some of the later jurists have confused these concepts by overlooking the classification of rights.

A wrong may be considered a violation of the joint right of God and of individual. In such a joint right, sometimes the right of God is predominant – such as in case of the *ḥadd* of *qadhf* – while in others the right of individual is deemed predominant – such as in case of *qiṣāṣ*.[39] In these cases, the wrong attracts some of the characteristics of the right of God (*ḥadd*) as well as of the right of individual (*ta'zīr*). For instance, the punishment of *qiṣāṣ* is fixed like *ḥudūd*, while it may be pardoned like *ta'zīr* by the person aggrieved. As the right of God is predominant in *qadhf*, it generally attracts the rules of *ḥudūd*; except that like *ta'zīr* its proceedings cannot be initiated unless the aggrieved person files a formal complaint (*da'wā*).[40]

Shāfi'ī jurists considered *qadhf* to be a right of individual. The Ḥanafī jurists hold that *qadhf* is the mixed right of God and of individual, but the right of God is predominant in it. (*Badā'i' al-Ṣanā'i'*, 9:248) The net conclusion according to the Ḥanafī jurists is that the rules relating to the right of God are to be applied to *qadhf*. Kāsānī after proving that the right of God dominates the right of individual in the case of *qadhf* says: "Now that it has been proved that the *ḥadd* of *qadhf* is pure right of God, or at least the right of God is predominant in it, we conclude: it cannot be pardoned because the authority to pardon vests in the one whose right has been violated; it cannot be waived through compromise or compensation because a person cannot get compensation for the violation of the right of another; it cannot be inherited because the rules of inheritance apply to the property owned by the deceased or his rights... and as nothing of the sort exists, the rules of inheritance will not apply; and only one punishment will be given even if the wrong was committed more than once." (Ibid., 250).

[37] This is official position of the Ḥanafī School. (Ibid., 9: 274). Some of the later Ḥanafī jurists who were influenced by this views of the Shāfi'ī jurists, asserted that *ta'zīr* can be awarded in *ḥaqq Allāh* also. However, they faced the problem of analytical incoosistency. This issue is discussed in detail in the next Chapter.

[38] Unfortunately, modern scholars have generally ignored the important concept of *siyāsah* in the Ḥanafī criminal law.

[39] Thus, the rules relating to the right of individual are applied to *qiṣāṣ*. However, due to the presence of the right of God in it, some rules relating to the right of God are also applied to it. For instance, *shubhah* (mistake of law or of fact) suspends the punishment of *qiṣāṣ* as it suspends the *ḥudūd* punishments.

[40] Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:241.

When this system is compared with the English legal system, the first thing that strikes the mind is that *ḥadd*, *ta'zīr* and *qiṣāṣ* cannot be properly called "crimes" because crime in English law is violation of public right. In other words, the nearest match in Islamic law for the English law concept of "crime" is *siyāsah*.[41] Is it not surprising, then, that the post-colonial discourse on Islamic criminal law has generally ignored the concept of *siyāsah*?

It is worth noting here that jurists of the other Schools, particularly the Shāfi'ī jurists, have a different classification of rights and related crimes. Thus, for instance, they deem the punishment of *qadhf* as *ḥadd* despite the fact that they deem it a right of individual.[42] Similarly, they allow *ta'zīr* in the right of God.[43] Some of the later Ḥanafī jurists, under the influence of the Shāfi'ī jurists, accepted this latter view without appreciating that this goes against the very basis of the system erected by the Ḥanafī School. This has caused problems which need a detailed analysis. This will be done in the next chapter.

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[41] *Siyāsah* is "the act of the ruler on the basis of *maṣlaḥah* [protection of the objectives of the law], even if no specific text [of the Qur'ān or the *Sunnah*] can be cited as the source of that act." Zayn al-'Ābidīn b. Ibrāhīm Ibn Nujaym, *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq* (Beirut: Dār al-Ma'rifah, n. d.), 5:11. This authority if used within the constraints of the general principles of Islamic law, is called *siyāsah 'ādilah* (just administration) making the directives issued by the ruler under this authority binding on the subjects; on the other hand, the violation of these constraints amounts to *siyāsah ẓālimah* (tyrannical administration) and such directives of the ruler are invalid. Muḥammad Amīn b. 'Ābidīn al-Shāmī, *Radd al-Muḥtār 'alā 'l-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār*, ed. 'Ādil Aḥmad 'Abd al-Mawjūd and 'Alī Muḥammad Mu'awwaḍ (Riyadh: Dār 'Ālam al-Kutub, 2003), 6:20.

[42] Shams al-DīnMuḥammad b. al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj ilā Ma'rifat Alfāẓ al-Minhāj* (Beirut: Dār al-Ma'rifah, 1418/1997), 4:203.

[43] Thus, Yaḥyā b. Sharaf al-Dīn al-Nawawī (d. 676 AH/1277 CE) defines *ta'zīr* as the punishment "for every violation of law for which there is no *ḥadd* and no *kaffārah*". Shirbīnī in his commentary adds: "irrespective of whether this is in the right of God or the right of individual, and irrespective of whether it is for an act related to what attracts *ḥadd*, such as... stealing that does not attract the punishment of cutting, ... or not, such as cheating, false testimony, beating without a lawful cause and disobedience of a wife to her husband and denial of his rights despite her being able to perform them." Ibid., 4:251-252.

4.2 Legal Consequences of the Various Crimes

For ascertaining the legal consequences of crimes, the primary tool is the classification of rights explained above. This classification is the most important feature of the Ḥanafī criminal law because the Ḥanafī system determines all the consequences on the basis of the affected right. This point is elaborated here by discussing the important features of *ḥudūd*, *qiṣāṣ* and *ta'zīr* and comparing them with the characteristic features of *siyāsah*.

4.2.1 Maximum and Minimum Limits of Punishments

Ḥudūd and *qiṣāṣ* are fixed punishments and there is no room for a lesser or alternative punishments in these cases.[44] In the same way, the maximum limit of *ta'zīr* has also been fixed.[45] The court cannot award more than thirty-nine lashes in *ta'zīr*.[46]

Under the doctrine of *siyāsah*, the government has the authority to prescribe detailed rules for the maintenance of public order. It can take preventive measures as well[47] and can

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[44] Some of the contemporary scholars have tried to prove that the *ḥudūd* are not *fixed* but *maximum* punishments. *See* Jāvēd Aḥmad Ghāmidī, *Mīzān* (Lahore: Dār al-Ishrāq, 2001), 302. See also the CII's *Final Report on Reforms in the Hudood Laws*, 146ff. Two factors seem to have influenced these scholars: they deem the *ḥudūd* punishments very harsh and they confine Islamic criminal law to *ḥudūd* and *qiṣāṣ*. It is, thus, ignoring the doctrine of *siyāsah* which has caused this confusion. See for a detailed discussion on this issue: Aḥmad, *Ḥudūd Qawānīn*, 56-58.

[45] This is the case where *ta'zīr* is awarded in the form of lashes for crimes which fall within the genus of the *ḥudūd* or the *qiṣāṣ* crimes. (Kāsānī,*Badā'i' al-Ṣanā'i'*, 9:271-72). *Ta'zīr* may take other forms as well, such as internment, rebuke and the like. In these cases, the judge has to decide the extent of the punishment keeping in view the facts and circumstances of each case. (Ibid., 271). See for details: Section 5.5 of this Dissertation.

[46] This is the opinion of Imām Abū Ḥanīfah al-Nu'mān b. Thābit (d. 150/767) and this is the preferred view of the Ḥanafī School. Abū Yūsuf Ya'qūb b. Ibrāhīm (d. 183/799), the famous disciple and successor of Abū Ḥanīfah, was of the opinion that the maximum limit of *ta'zīr* is seventy-five lashes because the least of the *ḥudūd* is that of *qadhf*, which is eighty lashes, and the fourth caliph 'Alī b. Abī Ṭālib (Allah be pleased with him) would award five lashes less than the least of the *ḥudūd*. (Kāsānī,*Badā'i' al-Ṣanā'i'*, 271-72). Abū Ḥanīfah argued that the least of the *ḥudūd* is forty lashes for slave (as his punishment would be half that of a free person), and as such the maximum limit for *ta'zīr* is thirty-nine lashes. (Ibid).

define different offences, lay down a standard of evidence for proving these offences and prescribe punishments for them.[48] Detailed rules are laid down by the government, but it is to act within the restrictions imposed on it by the texts of the Qur'ān and the *Sunnah* as well as by the general principles of Islamic law.[49]

4.2.2 The Right to Initiate Proceedings

In English law, torts are deemed civil wrongs and the aggrieved person may or may not initiate legal proceedings against the wrongdoer, while crimes are deemed public wrongs and the state takes it upon itself to initiate proceedings even if the aggrieved person does not want to move the court.[50] In Islamic law also, the right to initiate proceedings depends on the right affected. However, as it has three kinds of rights the situation is different. The jurists frame this issue as whether *da'wā* is necessary for a crime?

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[47] It has been reported that the second caliph 'Umar b. al-Khaṭṭāb (Allah be pleased with him) ordered a person named Naṣr b. al-Ḥajjāj to leave the capital city of Madīnah even though he did not commit any wrong but there was a possibility that if he continued living there a heinous wrong might be committed by others. This preventive measure of 'Umar is justified by the Ḥanafī jurists on the basis of the doctrine of *siyāsah*(*Al-Mabsūṭ*, 9:52). Schacht starts discussion on *siyāsah* in the following words: "*Special measures*, preventive or punitive, may be taken for reasons of public policy *(siyasa)*, e.g. the banishment *(nafy)* or the imprisonment *(habs)* of a beautiful youth, or the execution of criminals who strangle their victims in a city..."*Introduction to Islamic Law*, 187.

[48] This explains that Islamic law is not as rigid as Schacht and others portrayed. It also gives satisfactory answer to the allegation of the separation of "theory" and "practice".

[49] For instance, the government cannot change the standard of proof for *zinā* because it has been explicitly laid down in the texts of the Qur'ān and the *Sunnah* and the jurists have a consensus on it. Thus, changing this standard will amount to destruction of the whole system.

[50] The Code of Criminal Procedure, 1898, divides offences into "cognizable" and "non-cognizable" so that in the former case the police on getting information (FIR or First Information Report) about the commission of an offence can initiate investigation and can make arrests without the warrant of the magistrate, while in the latter the aggrieved person files a complaint to the magistrate who may then direct the police to initiate investigation or make arrests. Classification of offences on this basis, aloug with other relevant issues, is given in the Second Schedule of this Code.

Ta'zīr punishment cannot be awarded unless the affected individual brings the case to the court. This is because *ta'zīr* is awarded for violation of the right of individual who also has the right to pardon the offender or conclude a compromise with him.[51] The same is true of *qiṣāṣ* because, as noted above, the right of individual is predominant in *qiṣāṣ*. As far as *siyāsah* is concerned, the ruler may initiate proceedings even if the person directly affected by the crime does not file a complaint as the law presumes the violation of the right of the ruler. The same is true of *ḥudūd* generally, because the enforcement of *ḥudūd* is the duty of the ruler.[52] There are two exceptions, however. For the *ḥadd* of *qadhf* and the *ḥadd* of *sariqah*, the jurists deem complaint essential, though for slightly different reasons.[53]

4.2.3 The Standard of Evidence

According to Ḥanafī jurists, the standard of evidence has been fixed by the texts of the Qur'ān and the *Sunnah* for the *ḥudūd*, *qiṣāṣ* and *ta'zīr* offences. Thus, the testimony of women is not admissible in cases involving the right of God, i.e., *ḥudūd* and *qiṣāṣ*.[54] The strictest criterion is for the *ḥadd* of *zinā* – four adult male Muslim eyewitnesses.[55] For the rest

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[51]Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:274.

[52]Ibid., 9:241.

[53]For *qadhf*, they deem it essential because if the *maqdhūf* (the one accused of *zinā*) remains silent, it may be deemed a *shubhah* which suspends the *ḥadd* punishment. For *sariqah*, they deem it essential because many conditions of the *ḥadd* of *sariqah* depend on verification by the aggrieved person and his silence, or not preferring criminal proceedings, is deemed a *shubhah* about the existence of those conditions. Ibid., 9:241-48.

[54]Sarakhsī, *al-Mabsūṭ*, 16:134; Marghīnāī, *al-Hidāyah*, 3:116. This is not to deprive women of the right to testify, but to save the accused from the punishment of *ḥadd* and *qiṣāṣ*. See Chapter Ten of this dissertation for a detailed analysis of the issues regarding the standard of proof for various crimes.

[55] The Qur'ān explicitly mentions the condition of four witnesses in Q 4:15 and 24:4. See for a detailed analysis of this issue: Sarakhsī, *al-Mabsūṭ*, 16:134ff.

of the *ḥudūd* as well as for *qiṣāṣ*, there have to be two adult male eyewitnesses.[56] Moreover, if the accused is a Muslim, the witnesses have to be Muslims.[57] All these witnesses must have been proved trustworthy through secret and open inquiry (*tazkiyat al-shuhūd*).[58]

As far as *ta'zīr* is concerned, the testimony of two women can prove it only if their testimony is also corroborated by the testimony of at least one man.[59] Hence, *ta'zīr* cannot be awarded on the testimony of women alone. Similarly, *ḥadd*, *qiṣāṣ* and *ta'zīr* punishments cannot be awarded on the basis of circumstantial or indirect evidence. It means that *ḥudūd*, *qiṣāṣ* and *ta'zīr* can cover just a small area of criminal law. In the majority of cases, the court will be unable to award either of these punishments. This does not mean that the offender should go scot-free, as this area is covered by the doctrine of *siyāsah* and the authority for this purpose has been granted to the ruler.

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[56] Marghīnānī, *al-Hidāyah*, 3:116.

[57] Ibid., 3:117.

[58] The term *tazkiyat al-shuhūd* implies secret and open inquiry about the character and trustworthiness of the witnesses (Ibid., 3:118). The Hudood Ordinances require that the court must confirm that the witnesses "are truthful and persons and abstain from major sins". See, for instance, Section 8 of the Offence of Zina Ordinance.

[59] For *ta'zīr*, the jurists apply the same standard which they have derived from the Qur'ān and the *Sunnah* for the rights of individual. Thus, Kāsānī says: "It is proved through all that can prove the other rights of individuals, that is, confession, testimony, refusal to take oath (*nukūl*) and knowledge of the judge (*'ilm al-qāḍī*). Moreover, the testimony of women, along with the testimony of men, is admissible in it in the same way as testimony about testimony (*shahādah 'alā al-shahādah*) and official correspondence of a judge to another judge (*Kitāb al-qāḍī ilā al-qāḍī*), as is the rule for other rights of individual" (*Badā'i' al-Ṣanā'i'*, 9:274). As far as the prescribed quantum of testimony is concerned, it is the same as the Qur'ān has prescribed for recording financial matters (Qur'ān 2: 282). The reason for this is obvious: the financial matters relate to the right of individual and the same is the case with *ta'zīr* (Zayn al-'Ābidīn b. Ibrāhīm Ibn Nujaym, *al-Ashbāh wa 'l-Naẓā'ir 'alā Madhhab Abī Ḥanīfah al-Nu'mān* (Cairo: Maṭba'at Muṣṭafā al-Bāhī, n. d.), 152). An important question arises here: If *ta'zīr* is to be applied in *ḥaqq Allāh*, as the Shāfi'ī jurists assert and some of the later Ḥanafī jurists accepted this view, what will be the standard of evidence for such *ta'zīr*? This issue will be discussed in more details in the next Chapter.

In case of *siyāsah*, thus, the ruler has the authority to prescribe the standard of evidence and whatever kind of evidence satisfies the court can be deemed admissible.[60] For instance, *siyāsah* punishment can be awarded on the basis of the testimony of women alone, or of non-Muslims alone, or circumstantial evidence.

4.2.4 The Concept of *Shubhah*

Pakistani courts have generally deemed *shubhah* equivalent to the notion of "benefit of doubt" given to the accused.[61] Even a cursory look at the manuals of the jurists shows that this is not correct. In case of giving the 'benefit of doubt', the doubt exists in the mind of the judge about the guilt of the accused; the judge is not sure if the accused committed the act or not; or he is not sure if all the conditions have been fulfilled or not. Hence, he gives the benefit of the doubt to the accused and acquits him since the prosecution has to prove the guilt of the accused 'beyond reasonable doubt.' On the other hand, the cases of *shubhah* mentioned by the jurists show that the punishment is suspended because of the existence of a *doubtin the mind of the accused about the legality of the act*. This doubt may either exist actually (*ḥaqīqatan*), or the law may presume its existence (*ḥukman*).[62]

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[60] The jurists cite many examples from the cases decided by the Prophet (peace be on him) or his Companions wherein the strict criteria of evidence mentioned above for the *ḥudūd*, *qiṣāṣ* or *ta'zīr*, were not observed. In all such cases, as shown in Section 4.3.2 below, the punishment awarded is termed *siyāsah* by the Ḥanafī jurists.

[61] This is one of the wrong presumptions on which the decisions of the Federal Shariat Court in *Hazoor Bakhsh* is based. See: PLD 1983 FSC 1.

[62] Sarakhsī, *al-Mabsūṭ*, 9:63. D.F. Mulla in his *Principles of Muhammadan Law* mentions this as an example of irregular contracts. See Section 254. This is based on a wrong appreciation of the legal principles. An

For instance, the absence of two witnesses in a contract of marriage is a defect which is irreparable and as such the contract must be deemed void (*bāṭil*) or non-existent.[63] However, if the parties consummate marriage, they cannot be given the punishment of *zinā* because the 'form of contract' (*shubhat al-'aqd*) suspends the *ḥadd* punishment.[64] The same is true of the case when the *umm al-walad* is sold and the buyer commits sexual intercourse with her.[65]

Hence, *shubhah* has more in common with the concept of *mistake of law or fact* than it has with the notion of 'benefit of the doubt'.[66] The jurists hold that some of these *mistakes of law or fact* suspend the *ḥudūd* as well as the *qiṣāṣ* punishments because they involve the right of God.[67] No such mistake suspends the *ta'zīr* or *siyāsah* punishment.[68] It is worth noting here that English law considers some mistakes of fact as mitigating factors, but it does not deem a mistake of law to be a valid defense.[69]

4.2.5 The Authority to Enforce Punishment

The authority to enforce punishments is also dependent on the right affected by a particular wrong. Thus, the authority to enforce the *ḥudūd*, which involve a violation of the right of

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irregular contract can become valid when the cause of irregularity is removed. In this case, if the witnesses are brought and offer and acceptance are made in their presence, it will be a *new* contract. No one can be a witness on the offer and acceptance made in past. Hence, this defect is irreparable and the contract is a nullity. However, if consummation takes place, some consequences of irregular contract are assigned to it because of the operation of *shubhah*. See for more details: Nyazee, *Outlines of Muslim Personal Law*, 39 and 67-68.

[63] Sarakhsī, *al-Mabsūṭ*, 5:29-30.

[64] Ibid., 31-37. That is why some of the consequences of irregular contract are assigned to it.

[65] This has been explained in the previous Chapter.

[66] Nyazee, *General Principles of Criminal Law*, 142-43.

[67] Abū 'Īsā Muḥammad b. 'Īsā al-Tirmidhī, *al-Jāmi'*, Kitāb al-Ḥudūd, Bāb Mā Jā' fī Dar' al-Ḥudūd.

[68] Ibn Nujaym, *al-Ashbāh wa 'l-Naẓā'ir*, 152.

[69] See Section 79 of the Pakistan Penal Code, 1860.

God, is vested in the ruler.[70] The same is true of the *siyāsah* punishment because it directly involves the right of the ruler.[71]

In the case of *ta'zīr*, the right of individual is affected and, as such, the particular individual has the authority to enforce it and the government assists him.[72] It is the duty of the government to ensure that the aggrieved person does not commit any wrong while enforcing his right. That is why it is preferred that the punishment is enforced by the government on behalf of the individual. The same is the case with the *qiṣāṣ* punishment, which involves the joint right of God and individual. As the right of individual is predominant, the affected individual or his legal heirs have the right to enforce the punishment.[73]

It may also be noted here that the Shāfi'ī jurists allow masters to enforce even the *ḥadd* punishment on their slaves.[74] They also allow some other persons to enforce *ḥudūd* in their

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[70]Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:251-53. In case of the *ḥadd* of *qadhf*, however, the presence of the aggrieved person at the time of the enforcement of the punishment is essential because even if at that time he accepts the accusation as true, the *ḥadd* of *qadhf* will not be enforced on the accuser (Ibid., 246). As only the ruler can enforce the *ḥadd* punishment, the jurists assert that if the ruler commits a *ḥadd* offeoce, including *qadhf*, the punishment cannot be enforced (*Al-Mabsūṭ*, 9:121). If a private person takes the law into his own hands and enforces the *ḥadd* punishment without any legal authority, the jurists discuss the implications and consequences of this act under the doctrine of *iftiyāt 'alā ḥaqq al-imām* (encroachment on the right of the ruler). As such, it will attract the rules of *siyāsah*. It may also attract the rules of *ḥudūd*, *qiṣāṣ* or *ta'zīr* depending on the circumstances of the case. See for details: Muhammad Mushtaq Ahmad, "Tawhīn-e-Risālat kī Sazā: Fiqh Ḥanafī kī Rōshnī mēṇ", *Al-Sharī'ah*, 22:3 (2011), 29-40.

[71]Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:253.

[72] An analysis of the sections on *ta'zīr* on the classical manuals of *fiqh* suggests that the jurists were dealing with three different kinds of *ta'zīr*. This will be explained in the next Chapter.

[73]Qur'ān 17:33. If the iodividual commits any wrong while enforcing his right, the issue comes under the doctrine of *fasād* and all the relevant rules of *ḥudūd*, *qiṣāṣ*, *ta'zīr* and *siyāsah* will be applied. For instance, if while enforcing the right of *qiṣāṣ* for a hurt, the individual causes the death of the person, it will attract the rules of *qiṣāṣ*, *diyah*, *ta'zīr* and even *siyāsah*. See for details: Ahmad, "Tawhīn-e-Risālat kī Sazā", 32-33.

[74]Shirbīnī, *Mughnī al-Muḥtāj*, 4:197.

private capacity.[75] The reason is that the Shāfi'ī jurists do not divide *ḥudūd* and *ta'zīr* on the basis of the rights of God and of individual. As noted above, they deem the *ḥadd* of *qadhf* as the right of individual and they allow *ta'zīr* even in *ḥaqq Allāh*. The Ḥanafī jurists, however, clearly distinguish between *ḥadd* and *ta'zīr* on the basis of the rights of God and of individual. This is why the mixing up the views of the different schools is a defective and misleading approach. As explained in the previous Chapter, the most serious problem it causes is that of analytical inconsistency.

4.2.6 The Right of Pardon and Compromise

No human authority has the right to pardon the offender in a *ḥadd* case because the enforcement of *ḥadd* punishment is a right of God.[76] *Ta'zīr* can be pardoned by the aggrieved individual, or, in case of his death, by his legal heirs because it is a right of the individual.[77] In *qiṣāṣ*, the right of the individual is predominant and, as such, the individual or his legal heirs have the right to pardon the offender.[78] Hence, the practical effects of *qiṣāṣ* and *ta'zīr* are

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[75] Ibid., 197-200.

[76] Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:250.

[77] As noted earlier, some of the later Ḥanafī jurists accepted the Shāfi'ī opinion that *ta'zīr* can be awarded in the right of God. However, they faced the problem of analytical inconsistency. This point is elaborated in the next Chapter.

[78] *See* Qur'ān 2:178. As the heirs can pardon the offender, they can waive the punishment after concluding a compromise with the offender. The Prophet (peace be on him) is reported to have said: "If a person's near relative is murdered, he may choose the better of the two options: either to accept compensation or to get the right of *qiṣāṣ* enforced." (Abū 'Abdillāh Muḥammad b. Ismā'īl al-Bukhārī, *Al-Jāmi' al-Ṣaḥīḥ*, Kitāb al-Diyāt, Bāb Man Qutila Lahū Qatīl). See for a detailed legal analysis of this tradition: Sarakhsī, *al-Mabsūṭ*, 26:68-73. See also: Marghīnānī, *al-Hidāyah*: 4:442.

almost similar.[79] The *siyāsah* offence involves the right of the community. Hence, the right to pardon the offender is with the government.[80]

4.3 Determining the Nature of the *Siyāsah* Punishment

Scholars in the post-colonial world have generally either ignored the concept of *siyāsah* or have equated it with *ta'zīr*. In fact, some of the later jurists also deemed *siyāsah* and *ta'zīr* as synonyms.[81] This issue will be analyzed in detail in the next chapter. For completing the broad sketch of the system, however, this section tries to ascertain the nature and scope of the concept of *siyāsah* in Ḥanafī criminal law and briefly examines some of the distinctive features *siyāsah* and examples of *siyāsah* punishments from the Ḥanafī manuals.

4.3.1 Distinctive Feature of *Siyāsah*

Ta'zīr and *siyāsah* have many characteristics in common. Thus, both of these punishments are compoundable and can be pardoned. Moreover, *shubhah* can neither suspend *ta'zīr* nor *siyāsah*. This may have caused some jurists at times to use these terms interchangeably. The two terms, however, have some major differences which must not be overlooked.

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[79] There are two important distinctions in the legal consequences of *ta'zīr* and *qiṣāṣ*. Firstly, the punishment of *qiṣāṣ* is suspended by *shubhah* because of the presence of the right of God, the Ḥanafī jurists have explicitly stated that *ta'zīr* is not suspended by *shubhah*. Ibn Nujaym, *al-Ashbāh wa 'l-Naẓā'ir*, 152. Secondly, *qiṣāṣ* is a fixed punishment like *ḥudūd*, while *ta'zīr* is generally not fixed, although if *ta'zīr* is to be awarded in the form of lashes, its maximum limit is also fixed, as noted above in Section 4.2.1.

[80] This is because Islamic law deems the ruler as the agent (*wakīl*) of the community.

[81] Muḥammad Amīn Ibn 'Ābidīn al-Shāmī (d. 1252 AH/1836 CE), one of the greatest jurists of the later times, assert that the wider doctrine of *ta'zīr* covers *siyāsah* as well. This will be analyzed in detail in the next Chapter in Section 5.1.2.

First and foremost, *ta'zīr* relates to the right of individual and that is why the particular individual has the right to pardon the offender or conclude a compromise with him"[82] while *siyāsah* relates to the right of the ruler and the right of pardoning the offender or commuting the sentence vests in the ruler. No individual in his private capacity can waive or commute this punishment.

Second, in the case of *ta'zīr*, the particular individual whose right has been violated has the right to enforce the punishment; while in the case of *siyāsah*, the authority to enforce punishments vests in the ruler.[83]

Third, *ta'zīr* cannot be proved through circumstantial or indirect evidence, while *siyāsah* punishment can be awarded on the basis of such evidence.[84]

Fourth, if *ta'zīr* is awarded in the form of lashes, the maximum number is fixed which cannot be exceeded, while no such restriction exists for *siyāsah* punishments.[85]

Fifth, *ta'zīr* can be awarded by way of *ta'dīb* (disciplining) to a minor having discretion (*ṣabiyy mumayyiz*), while *siyāsah* can only be awarded to an adult and sane person.

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[82] Sarakhsī has explicitly stated the principle that the ruler does not have the authority to waive the right of individual (*al-Mabsūṭ*, 10:139).

[83] Sometimes *ta'zīr* is awarded by the court because due to the lack of a precondition or the existence of a *shubhah* the *ḥadd* punishment cannot be awarded. Who enforces this particular form of *ta'zīr*? This is explained in detail in the next Chapter.

[84] This point will be elaborated below.

[85] It simply means that if the effects of the wrong are limited to a particular individual, the punishment will be awarded as *ta'zīr* and as such the maximum limit will not be crossed. However, if the effects of the wrong are widespread and a major portion of the society is affected by it, the punishment will be given as *siyāsah* and in severe cases the court may even award death punishment.

4.3.2 Examples of *Siyāsah* Punishments in Ḥanafī Manuals

The Ḥanafī jurists bring under the rubric of *siyāsah* many instances of punishments awarded by the Prophet (peace be on him) or his Successors (God be pleased with them).

Sarakshi discusses a case of a woman during the time of the Prophet (peace be on him) who was found seriously injured and when asked about the culprit, she could not pronounce his name. Those present mentioned names to her. Upon hearing one name, she managed to nod. . This was considered conclusive proof against the perpetrator who was given death punishment for murdering the woman. The illustrious Sarakhsī comments on the example:

> The true purport of this report is that the punishment was awarded as *siyāsah;* because the perpetrator was spreading evil in society (*fasād fi 'l-arḍ*) and was well-known for such activities. This is evident from the fact that when the woman was found seriously injured, people asked her about the culprit and mentioned many names which she rejected by the movement of her head and finally when the name of that Jew was mentioned she nodded in affirmation. Obviously, only those who are well-known for such activities are mentioned on such occasions and, in our opinion, the ruler can give death punishment to such a person under the doctrine of *siyāsah*.[86]

This passage clearly shows the Ḥanafī line of reasoning. The following example will further explain this point.

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[86]Sarakhsī, *al-Mabsūṭ*, 26:126.

The Companions of the Prophet (peace be on him) disagreed on the punishment for the offence of homosexuality. Abū Bakr (God be pleased with him) is reported to have suggested that homosexuals must be burnt alive; 'Alī (God be pleased with him) was of the opinion that one hundred lashes would be awarded to the convict if he was unmarried and he would be stoned if he was married; 'Abdullāh b. al-'Abbās (God be pleased with them) suggested that homosexuals be thrown from a high place and then stoned; 'Abdullāh b. al-Zubayr (Allah be pleased with them) was of the opinion that the convicts be detained in a place where they would die from the smell of garbage.[87]

Sarakhsī, while commenting on this disagreement of the Companions, comes up with a strong case for Abū Ḥanīfah who considered the offence of homosexuality as a *siyāsah* offence:

> The Companions agreed on one point: that this act was not covered by the term *zinā*, because they were well aware of the text regarding *zinā* and even then they disagreed on the punishment of homosexuality. We cannot say that they exercised *ijtihād* in the presence of the definitive text (*naṣṣ*). Hence, their disagreement on the punishment clearly proves that they agreed that the act did not amount to *zinā*. As application of the *ḥadd* of *zinā* to an act other than *zinā* is not allowed, this act remains an offence for which no specific punishment has been prescribed in the texts. Hence, *ta'zīr* must he awarded in this case. The nature and extent of that punishment is to he determined by the ruler under the doctrine of *siyāsah*. If the ruler concludes that a particular form

[87]Ibid., 9:90-91.

of death punishment should be given in a case, the *sharī'ah* has given him the authority to do so.[88]

It is on the basis of these principles that the Ḥanafī jurists bring under the rubric of *siyāsah* the death punishment for the one who habitually commits anal intercourse with his wife, habitual thiefs, magicians and other offenders who commit widespread *fasād* in society.[89]

After analyzing these instances, it can be safely concluded that a punishment awarded by the Prophet (peace be on him) or his Companions (God be pleased with them) is deemed *siyāsah* by the Ḥanafī jurists:

- if the punishment was awarded on the basis of circumstantial evidence; or
- if death punishment was awarded but it could neither be classified as *ḥadd* nor as *qiṣāṣ*.

CONCLUSIONS

The most distinctive feature of the Ḥanafī criminal law is the classification of rights which determines the legal consequences of various crimes. Thus, three kinds of rights – the rights of God, the rights of the ruler and the rights of individual – divide crimes into *ḥudūd*, *siyāsah* and *ta'zīr*. *Qiṣāṣ* and *qadhf* are deemed violation of the joint right of God and individual; but in *qiṣāṣ* the right of God and in *qadhf* the right of God is deemed predominant. The legal

[88]Ibid.,9:91.
[89]Marghīnānī, *al-Hidāyah*, 2:346-47.

consequences – such as the maximum and minimum limits of punishments, the standard of proof, the right to pardon and the like – are determined by the affected right. Confusing the right of God with the right of the ruler is one of the main reasons for misunderstandings and misgivings about Islamic law in the post-colonial world. The roots of this confusion can be found in the works of the later jurists who also could not maintain distinction between *siyāsah* and *ta'zīr*.

It is, therefore, imperative to critically analyze the works of the later jurists and clarify the confusions about the Ḥanafī criminal law, particularly *siyāsah* and *ta'zīr*. This will be done in the next chapter.

CHAPTER FIVE: THE NATURE AND SCOPE OF *SIYĀSAH* AND *TA'ZĪR*

INTRODUCTION

The confusion about *siyāsah* in the works of the later Ḥanafī jurists stems from two basic reasons: equating the right of the community with the right of God and ignoring the distinctions between the spheres of *siyāsah* and *ta'zīr*. In fact, in their eagerness to make their analysis comprehensive, they include in their classification categories that should be analyzed separately.[1] This chapter critically examines the views of the later Ḥanafī jurists and suggests that private disciplinary matters should be excluded from the scope of criminal law and that *ta'zīr* should be brought under the broader category of *siyāsah* in accordance with the original position of the Ḥanafī School.

5.1 *SIYĀSAH* AND *TA'ZĪR* IN THE WORKS OF THE LATER JURISTS

In this chapter, some passages from an important manual of the later Ḥanafī jurists—*Radd al-Muḥtār*—will be analyzed as illustrative of the confusions of the later jurists on this issue. Before an analysis of the issues, however, it is important to note a few points about the significance of *Radd al-Muḥtār*.

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[1]For example, the discussion of the right of God leads them to stating that everything is the right of God. That is correct when one acknowledges the fact that all duties are claimed by the Almighty and are really His rights. This, however, does not help us in analyzing the categories of criminal law and in deciding whether *ta'zīr* too is a right of God. The same is the case with matters that are purely private and the law does not interfere with them, such as a Father rebuking his minor son for not offering prayer.

5.1.1 Significance of *Radd al-Muḥtār*

Ibn ʿĀbidīn, the author of *Radd al-Muḥtār*, was undoubtedly one of the most learned and brilliant jurists of later times.[2] He had a powerful legal mind and an amazing memory. He cites numerous texts of the jurists on any issue and brings various perspectives to the limelight.

Radd al-Muḥtār is a *ḥāshiyah* (glosses/notes) on *al-Durr al-Mukhtār*,[3] which in turn is the *sharḥ* (commentary) on the legal text (*matn*) of *Tanwīr al-Abṣār*.[4]The analysis in the present chapter will show the relationship between the notes and the commentary with the text. The Ḥanafī jurists, including Ibn ʿĀbidīn, have emphasized thatthe substantive law is found in the *matn*; the *sharḥ* explains the legal principles and may bring some other cases under the same principles; and the notes fill the gaps and build upon the rules and principles already expounded by the jurists.[5] At times, however, the later jurists through their commentaries and notes try to correct the mistakes found in the earlier texts.[6] Hence, for getting the most benefit from works like *Radd al-Muḥtār*, the best way is to first look at the *matn* in isolation; then, consider the *Sharḥ*; and finally analyze the *ḥāshiyah*.

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[2] For a biographical note of Ibn ʿĀbidīn, see the introduction to *Radd al-Muḥtār* written by the editors of the text: ʿĀdil ʿAbd al-Mawjūd and ʿAlī Muḥammad al-Muwaʿawwaḍ: *Radd al-Muḥtār*, 1:53-56.

[3] *Al-Durr al-Mukhtār* has been written by Muḥammad b.ʿAlī al-Ḥaṣkafī (d. 1088/1677). For his bibliographical note, see: Ibid., 1:50-52.

[4] The author of *Tanwīr al-Abṣār* is Muḥammad b. ʿAbdullāh al-Tamartāsbī (d. 1004/1596). See for his biographical note: Ibid., 1:52-53. *Matn* tries to give an authoritative exposition of the legal position of the School on the most important legal issues in a precise and concise language. Nyazee, *al-Hidāyah*, xiv.

[5] The position taken here is based on the work of Nyazee. See his introduction to *al-Hidāyah*: xxv-xxvii. See also: *The Secrets of Uṣūl al-Fiqh*, 25-34.

[6] Ibn ʿĀbidīn does this at many places. An interestiog example is found in *Kitāb al-Ashribah* where Ḥaṣkafī states that smoking is *Haram* because the then rule (Sultan Murad IV) had prohibited it. Ibn ʿĀbidīn wrote a detailed note there asserting that this was not the correct position according to the Ḥanafī School as the ruler has no authority in matters of *taḥlīl* and *taḥrīm* (*Radd al-Muḥtār*, 10:42-44).Some examples of this great contribution of Ibn ʿĀbidīn will be given below.

Importantly, in no case these later texts, commentaries or notes can override the works of the Elders of the School (*Mashā'ikh*), such as Sarakhsī, Kāsānī and Marghīnānī.[7]

Hence, the texts of the later jurists must be 'handled with care'. If a statement found in the texts of the later jurists does not conform to the works of the Elders of the School, it must either be interpreted in the light of the works of the Elders; or, if that is not possible, it must not be accepted as the official position of the School (*ẓāhir al-madhhab*).

5.1.2 *Siyāsah* as the Equivalent of *Ta'zīr*: The View of Ibn 'Ābidīn

The traditions report that for an unmarried person committing *zinā*, the Prophet, upon him blessings and peace, mentioned expulsion (*nafy*) for one year along with one-hundred lashes as the punishment.[8] It is well-known, however, that the Ḥanafī jurists do not consider this *nafy* as part of the *ḥadd* punishment. Following is the text of *Bidāyat al-Mubtadī*: "The lashes and expulsion will not be joined for the unmarried person, except when the ruler finds *maṣlaḥah* in doing so. In that case, he may order expulsion for a period he deems fit."[9] This rule has been explained in *al-Hidāyah* in the following words: "This expulsion is *ta'zīr* and *siyāsah* because it sometimes proves beneficial. Hence, it is up to the ruler to decide. The expulsion reported from some of the Companions, God be well-pleased with them, is to be interpreted

[7] This has already been explained in Section 3.2.2 of this Dissertation while explaining the hierarchy of the jurists and the manuals in the Ḥanafī School.

[8] Ibn Mājah, *Sunan*, Kitāb al-Ḥudūd, Bāb Ḥadd al-Zinā.

[9] Marghīnānī, *Al-Hidāyah*, 2:343-44.

accordingly."[10] Similar passages appear in the text of *Tanwīr al-Abṣār* and its commentary *al-Durr al-Mukhtār*. Ibn 'Ābidīn finds it suitable to give some details about *ta'zīr* and *siyāsah* at this point.

After quoting some earlier jurists explaining this rule, Ibn 'Ābidīn makes the first point that *siyāsah* is not confined to cases of *zinā* only and that the ruler can exercise this authority in other cases also.[11] Then, he gives quotes the following definition of *siyāsah*: "Hence, *siyāsah* means the effort to improve the condition of the people (*istiṣlāḥ al-khalq*) by guiding them to the way of salvation in this world and the hereafter." Ibn 'Ābidīn notes that this is a very wide definition which includes every rule of the *sharī'ah*. However, he explains that another specific usage of *siyāsah* means deterrence and chastisement, even in the form of death punishment.[12] He quotes another definition of *siyāsah*: "it is the act of the ruler on the basis of *maṣlaḥah* [protection of the objectives of the law], even if no specific text [of the Qur'ān or the *Sunnah*] can be cited as the source of that act." He further asserts that this authority if used within the constraints of the general principles of Islamic law, is called *siyāsah 'ādilah,* (just administration) making the directives issued by the ruler under this authority binding on the subjects; on the other hand, the violation of these constraints amounts to *siyāsah ẓālimah* (tyrannical administration); and such directives of the ruler are invalid.[13]

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[10]Ibid., 2:344.
[11]Ibd 'Ābidīn, *Radd al-Muḥtār*, 6:19-20.
[12]Ibid., 20.
[13]Ibid.

At this point, Ibn ʿĀbidīn compares *siyāsah* and *taʿzīr* and asserts that the two terms are synonymous.[14] The first argument he forwards is that the *Hidāyah* and other authorities used the two terms in conjunction, as in the passage cited above. Some authorities even do not use the word *siyāsah* and simply call the extra punishment of *zinā* as *taʿzīr*. The second argument he makes is that some disciplinary actions, in the absence of a sin, have been called *siyāsah* while others have been called *taʿzīr*.[15]

None of these arguments is convincing, however. The most that can be proved by these arguments is that sometimes a particular punishment has been given the names of *taʿzīr* and *siyāsah* and, as such, both have "something" in common. This does not prove them to be synonymous. As noted in the previous chapter, the two terms share some other common features too, such as the rule that *shubhah* does not suspend any of these punishments. That does not make the two terms to be denoting one offence. The reason, as explained in the previous chapter, is the difference in the rights affected in the two cases; in the case of *siyāsah*, it is the right of the ruler, while in case of *taʿzīr* it is the right of the individual.

Some of the later jurists have asserted that *siyāsah* is the punishment awarded by the ruler while *taʿzīr* is the one awarded by the judge. Ibn ʿĀbidīn does not accept this distinction and cites many authorities who use these terms for the ruler as well as for the judge.[16] He points out that the judge uses the power delegated to him by the ruler and as such the

[14]Ibid.
[15]Ibid., 20-21.
[16]Ibid., 21.

authority of the judge is also based on *siyāsah*.[17] This is a valid point, but what he infers from this – that *ta'zīr* is the general term that covers *siyāsah* – is not acceptable, as it contradicts his very first statement about the general doctrine of *siyāsah* covering the whole of the *sharī'ah*. A better interpretation, would be that it is *siyāsah* which covers the particular form of the *ta'zīr* mentioned in the chapters of the *ḥudūd* and *qiṣāṣ*. Hence, *ta'zīr* in these chapters is not the ordinary *ta'zīr* which is violation of the right of individual; rather, in these chapters, *ta'zīr* is a form of *siyāsah* and as such a violation of the right of the ruler. This point will be further elaborated in the remaining part of this chapter. It may be noted at this point, however, that during this discussion one must not lose sight of the classification of rights envisaged by the Ḥanafī School and explained by the Elders of the School. It is that classification which helps in clearly distinguishing between the various instances of "*ta'zīr*" in the manuals of *fiqh*.

5.2 Nature of the Right Affected by *Ta'zīr*

After highlighting the confusion about the relationship of *siyāsah* and *ta'zīr* in the works of the later jurists, the root cause of this confusion is discussed. This section analyzes the passages in *Radd al-Muḥtār* about the nature of the right affected by *ta'zīr* and finds that it is here that the confusion has its source.

[17]Ibid.

5.2.1 Whose Right Violated?

The first significant point about *ta'zīr* in the text of *Tanwīr al-Abṣār* is the following:

> *Ta'zīr* is the right of individual (*ḥaqq al-'abd*) and that is why relinquishment (*ibrā'*) and pardon (*'afw*) are allowed in it; moreover, [the various modes of proof in the form of] oath (*yamīn*), testimony on behalf of the original witnesses (*shahādah 'alā al-shahādah*) and testimony of one man with two women are admissible .[18]

This is exactly what the Elders of the School have heen saying, as noted in the previous chapter.[19] However, *al-Durr al-Mukhtār* – the commentary – modifies the implications of this statement by adding an adjective: "*Ta'zīr* is the right of individual – predominantly."[20] Now, this addition can mean two things:

- "in most cases", i.e., *ta'zīr* is the right of individual in most, not in all, cases; or
- *ta'zīr* is predominantly the right of individual, i.e., even if it involves the right of God, it predominantly affects the right of the individual and thus attracts the legal consequences of *ḥaqq al-'abd*, not *ḥaqq Allāh*, so far as pardoning and commuting the sentence are concerned.

If the first interpretation is accepted, it changes the whole meaning of the *Tanwīr*, because the next sentence of *Tanwīr* starts with ف, which simply means: "As *ta'zīr* is the right of

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[18] *Radd al-Muḥtār*, 6:123-24.
[19] See Section 4.2 of this dissertation.
[20] *Radd al-Muḥtār*, 6:123.

individual, that is why relinquishment and pardon are allowed in it." However, if this addition by *al-Durr* is accepted and *ta'zīr* is considered the right of individual in most cases, then relinquishment and pardon would be allowed in *most*, not all, cases. Hence, this addition goes against the *matn*.

The addition may, however, mean that *ta'zīr* is the joint right of God and individual in which the right of the individual is predominant – just the opposite of *qadhf*. This is what Ibn 'Ābidīn prefers.[21]

Ibn 'Ābidīn makes his case in the following way:

1. He accepts that the *matn* on the face of it confines *ta'zīr* to the right of individual only.
2. He further reports that the same has been the apparent meaning of the texts in *al-Zayla'ī* and *Qāḍīkhān*.
3. However, *al-Durar* and Ḥaṣkāfī have preferred to add the phrase "predominantly".
4. Ḥamawī has preferred the interpretation: "in most cases".

[21]Ibid. In the final analysis, everything is the right of God and there is nothing known as the pure right of individual. Still, when the Elders of the School preferred to consider some rights as the pure rights of individual, they did have a valid point. They were trying to separate and distinguish between the consequences of various acts. Bringing everything under the domain of the right of God demolishes that whole edifice. This has already been explained in the previous Chapter. Ibn 'Ābidīn was well aware of these issues. The only reason for Ibn 'Ābidīn preferring this interpretation seems to be that because of his utmost respect for Ḥaṣkafī, he did not want to explicitly assert that this was a mistake of him; otherwise, he should have straightaway declared that this addition is baseless.

5. However, Ibn ʿĀbidīn quotes a later statement of Ḥaṣkafī where he explicitly says that sometimes *taʿzīr* is given in the pure right of God. Hence, infers Ibn ʿĀbidīn, Ḥaṣkafī here means that *taʿzīr* generally involves the joint right of God and individual but the right of the individual is predominant.

5.2.2 Is *Taʿzīr* the Right of God Too?

Here a question arises: how can one say that *taʿzīr* involves the right of God too? In answer to this question, Ibn ʿĀbidīn refers to the cases listed in the *matn* of *Tanwīr* before this discussion, such as: 'o sinner!' or 'o thief!'[22] He asserts that these statements violate a fundamental Divine prohibition of abusing[23] and, as such, these are violations of the right of God too even if the right of individual is predominant. Can one imagine a case where a wrong may violate the right of an individual without violating the right of God? Ibn ʿĀbidīn gives the example of a child swearing at an adult![24]

If this interpretation is accepted, every violation of law – by a sane adult – will be deemed violation of the right of God because, in the final analysis, each of these acts will be deemed a sin.[25] This too wide an interpretation makes the concept of the right of God ineffective and practically useless, as it does not help in identifying the legal consequences of a wrong. This point is further elaborated below.

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[22]Ibn ʿĀbidīn, *Radd al-Muḥtār*, 6:123.
[23]Qur'ān, 49:11.
[24]*Radd al-Muḥtār*, 6:123.
[25] Interestingly, Ibn ʿĀbidīn accepts the rule that *taʿzīr* can be awarded without a sin (Ibid., 6:113).

5.2.3 Is *Ta'zīr* Given in a Pure Right of God?

The *matn* of *Tanwīr* does not have any statement about *ta'zīr* in a pure right of God. However, Ḥaṣkafī in his commentary acknowledges the existence of such *ta'zīr*. Thus, he says: "*Ta'zīr* can be given as a right of God."[26] This statement compels Ibn 'Ābidīn to cite two examples: kissing a strange woman and attending a place where sins are committed.[27] The examples are telling. At least apparently, one of them involves an encroachment on the right of an individual (the woman, if she is a victim and not a willing partner); and the other example involves a violation of the right of God, not of individuals, as it is a sin and not a crime.

Can these wrongs be pardoned? Ḥaṣkafī says: "When *ta'zīr* is given as a right of God, it cannot be pardoned, except where the ruler finds that the offender has been deterred."[28] The question is: if it is the right of God, how can it be pardoned by the ruler? If the ruler can pardon it, does it not mean that the right of the ruler was violated and that the punishment was *siyāsah*?

Ibn 'Ābidīn, in his characteristic meticlousness, comes up details of the views of various jurists. Thus, he quotes Ibn al-Humām who says that if *ta'zīr* is given as the right of God, it cannot be pardoned.[29]However, Ibn 'Ābidīn quotes the author of *Qunyah*[30] who

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[26]Ibid., 6:124.
[27]Ibid.
[28]Ibid.
[29]Ibid.
[30]Ibid.

reports that according to ImāmṬaḥāwī such a wrong is pardonable. As to who has the authority of pardoning, the report mentions two opinions:

a. the ruler has this authority; this is the opinion narrated from Imām AbūḤanīfah and the Disciples;

b. the victim has this right; this is the opinion of ImāmṬaḥāwī.[31]

The author of *Qunyah* says that the opinion of the Imām and the Disciples is valid about the *ta'zīr* in the pure right of God, while that of Ṭaḥāwī is about the case when the act is committed against an individual.[32]

5.2.4 Is It Obligatory to Enforce *Ta'zīr*?

At this point, Ibn 'Ābidīn adds another aspect to the discussion. He raises a question: is it obligatory to enforce *ta'zīr* in the same way as it is obligatory to enforce *ḥadd*? He quotes Ibn al-Humām who visualizes three situations for *ta'zīr*:

a. in some cases the texts mention that the person must be given *ta'zīr*; in such cases, there is no choice; the enforcement of the punishment is obligatory;

b. in some other cases where the matter is left to the ruler, it becomes obligatory only when the ruler concludes that the culprit can be deterred only by punishment; and

[31] Ibid.

[32] Thus, according to this view, in case of attending a place where sins are committed the right of pardon vests in the ruler, while in the case of kissing a stranger woman, this right is with the lady provided she was a victim, not a partner.

c. when the ruler concludes that he can be deterred by other means, punishment is not obligatory.[33]

From this, Ibn 'Ābidīn concludes that the enforcement or waiver of the *ta'zīr* punishment is the prerogative of the ruler.[34] It simply means that in such cases *ta'zīr* is given not *as* the right of God, but *as* the right of the ruler or the community. In other words, the examples mentioned by Ibn 'Ābidīn are not of *ta'zīr* as *ḥaqq Allāh*; these are examples of *siyāsah*.

5.3 The Authority to Enforce *Ta'zīr*

Like the confusion about the nature and scope of *ta'zīr*, the later jurists also had problems with the authority to enforce the various kinds of *ta'zīr*. Some significant aspects of this debate are examined here.

5.3.1 Two Basic Rules about Enforcing *Ta'zīr*

The text of *Tanwīr* mentions two rules about the enforcement of the *ta'zīr* punishment:

i. at the time of the commission of the *ta'zīr* offence, any Muslim can enforce the *ta'zīr* punishment;

[33] *Radd al-Muḥtār*, 6:124-25.
[34] Ibid.,6:125.

ii. after the commission of the offence, the punishment shall be enforced by the ruler.[35]

Ibn 'Ābidīn says that the first rule relates to only those forms of *ta'zīr* which violate the right of God. In the previous section, the concept of '*ta'zīr* in the right of God' has been analyzed and it was concluded that it is actually *siyāsah*. In any case, even if this is '*ta'zīr* in the right of God', how can *any* Muslim enforce this punishment at the time of the commission of the offence when there is a parallel principle of law, acknowledged by the Ḥanafī School, that punishments pertaining to the right of God are enforced by the ruler?[36]

It is obvious here that by enforcing *ta'zīr* in such cases Ibn 'Ābidīn actually means that every Muslim must try to *prevent* the violation of the law. This is because he refers here to the famous tradition about the three stages of the duty of enjoining right and forbidding wrong (*al-amr bi 'l-ma'rūf wa al-nahy 'an al-munkar*).[37] However, it must be unequivocally mentioned here that prevention of the offence does not mean that individuals should take the law into their own hands. The authoritative manual of the School, *al-Hidāyah*, explicitly says that force for the purpose of *amr bi 'l-ma'rūf*can be used only by the ruling authorities.[38]

The second rule, that afterthe commission of the offence the punishment is enforced by the ruler, is based on a very fundamental principle: that the right of God is enforced by

[35]Ibid.,6:111.
[36]Kāsānī, *Badā'i' al-Sanā'i'*, 9:251-53.
[37]Ibn 'Ābidīn, *Radd al-Muḥtār*, 6:111.
[38]Marghīnānī, *al-Hidāyah*, 4:307. See for details: Ahmad, "Tawhīn-e-Risālat kī Sazā", 29-40.

the ruler, as is the case with the *ḥudūd*.[39] However, there are other details which give a different picture.

Ḥaṣkafī says even about *ta'zīr* in the rights of individual that it can be enforced only by the ruler. The principle on which he relies is that such a punishment requires the filing of complaint (*da'wā*) before the judge.[40] Ibn 'Ābidīn reports another opinion here: that it is enforced by the one whose right is violated, as is the case in *qiṣāṣ*.[41] However, he justifies the opinion of Ḥaṣkafī on the basis that the individual may be excessive while enforcing his right.[42]

Yet again, Ibn 'Ābidīn reaches the real issue, but then withdraws from it. If one considers this issue from the perspective of rights as elaborated by the Elders of the School, everything becomes clear. Thus, ImāmKāsānī says that the right of individual can be enforced by the concerned individual, such as a Father enforcing it on his minor son, or a master enforcing it on his slave.[43] Similar cases have been enumerated by Ḥaṣkafī and Ibn 'Ābidīn, as discussed below. The only reason for this confusion is ignoring the structure and implications of rights which results in *ta'zīr* being mixed up with *siyāsah*.

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[39]Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:251-53.

[40]*Radd al-Muḥtār*, 6:111.

[41]Ibid.

[42] This again is a flawed argument because it relies on a relatively weaker argument of blocking the lawful means to unlawful ends (*sadd al-dharī'ah*). The Ḥanafī jurists use this argument only as a last resort and not as the basis of the whole legal reasoning. See for details: Nyazee, *Islamic Jurisprudence*, 250-51.

[43]Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:253.

5.3.2 Enforcing *Ta'zīr* in the Right of Individual

Ḥaṣkafī says that the master will enforce *ta'zīr* on his slave and the husband will enforce it on his wife.[44] Ibn 'Ābidīn explains that here *ta'zīr* is for the purpose of disciplining (*ta'dīb*).[45] Ḥaṣkafī further asserts that the husband cannot give *ta'zīr* to his wife if she does not offer prayer, because its benefits are confined to herself alone.[46]

After this, Ḥaṣkafī comes up with another case: the Father can give *ta'zīr* to his minor son if he does not offer prayer.[47] With this he adds another important principle: that *ta'zīr* can be enforced on minors – because it is *ta'dīb*, explains Ibn 'Ābidīn, but he cannot resort to hitting with a stick for this purpose.[48] Moreover, such *ta'dīb* is only permissible (*mubāḥ*)[49] and, as such, the general restriction of due care (*salāmah*) is always there, i.e., this authority must not be used in a way to harm others: المباح يتقيد بشرط السلامة.[50]

Here, a very interesting question arises: when a person gives *ta'zīr* to his minor son, does he give it because of violation of his personal right or violation of the right of God? Can a minor commit a violation of the right of God? Ḥaṣkafī has an interesting statement here:

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[44]Ibn 'Ābidīn, *Radd al-Muḥtār*, 6:128.

[45]Ibid.

[46]Ibid., 129. This simply means that the husband can take a disciplinary action against his wife only where his personal right is violated. This is very important for those who want to work on issues of domestic violence from the perspective of Islamic law.

[47]Ibid., 130.

[48]Ibid.

[49]*Mubah* is the act which the subject may or may not perform at his choice (Ṣadr al-Sharī'ah, *al-Talwīḥ*, 2:122).

[50]*Radd al-Muḥtār*, 6:131.

> Minority is not an obstacle for *ta'zīr*... if it is in the right of individual; however, if it is in the right of God, such as when a minor commits illicit sexual intercourse or theft, his being minor becomes an obstacle in enforcing the punishment on him.[51]

Apparently, two conflicting rules emerge here about giving *ta'zīr* punishment to a minor for violating a right of God:

1. If he does not offer prayer, he can be given *ta'zīr*;
2. if he commits *zinā*, he cannot be given *ta'zīr*.

This analytical inconsistency can be resolved only by presuming that when a minor does not offer prayer and his Father punishes him, he does so for enforcing his personal right in the form of a disciplinary action against a person over whom he has legal authority.

What about minor's committing illicit sexual intercourse? Technically, it is not *zinā*;[52] as such, it cannot attract the rules of *zinā*; hence, no *ḥadd*.[53] What about giving him *ta'zīr*? If his being minor cannot prevent *ta'zīr* in the right of individual, why should it not be enforced in this case? The answer by now should be very clear: because it is punishment-proper; it is not mere disciplinary action. A child does not have the requisite legal capacity for the commission of a crime or for enforcing a punishment-proper on him, which is why he cannot be given any kind of punishment-proper.

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[51] Ibid., 130.

[52] See for the technical definition of *zinā*, al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:70.

[53] Sarakhsī, *al-Mabsūṭ*, 9:62–63.

To conclude, disciplinary action can be taken against a minor but no punishment-proper can be imposed on him. Hence, when the jurists assert that in such cases the minor cannot be given *ta'zīr* punishment:

1. *Ta'zīr* in this case does not mean *ta'zīr* in the right of God; rather, it is *siyāsah*.
2. *Siyāsah* being punishment-proper requires that the culprit must have the requisite legal capacity, i.e., he must be major and sane at the time of the commission of the offence.

5.4 Standard of Proof for *Ta'zīr*

In the previous chapter, it was shown that according to the Elders of the School, *ta'zīr* has the same standard of evidence as the law prescribes for recording financial matters, i.e., two male witnesses or one male and two female witnesses. The reason for this rule, as explained by these jurists, is that *ta'zīr* like financial matters relate to the right of individual. The later jurists, however, talk about *ta'zīr* in the right of God and thus face the dilemma of how to apply the standard of evidence for financial matters to such *ta'zīr*. This discussion again shows that if the classification of rights as envisaged and explained by the Elders of the School is ignored, analytical inconsistency is the result.

5.4.1 Standard of Proof for "*Ta'zīr* in the Right of God"

Ḥaṣkafī mentions two conflicting rules on this issue. Initially, he says that it requires the same standard of proof as that of the *ḥudūd* generally, other than *zinā*, i.e., two adult male eye-witnesses. Thus, he asserts that the complainant can be deemed a witness and punishment can be awarded if his statement is corroborated by another witness.[54] Later, however, he changes his stance and asserts that complaint of *ta'zīr* in the right of God is not "testimony" (*shahādah*) but "report" (*riwāyah*) only.[55] Ibn 'Ābidīn objects to this second rule and explains that Ḥaṣkafī misunderstood the text from which he derived this rule.[56]

Ḥaṣkafī, however, further builds upon this wrong presumption and asserts that if the "report" of one trustworthy (*'adl*) person reaches the judge, he can award punishment on that basis. He brings another argument at this stage to substantiate his case: that the judge can award punishment in the rights of God on the basis of his personal knowledge (*'ilm al-qāḍī*).[57]

Ibn 'Ābidīn objects as this position contradicts with what Ḥaṣkafī stated about the testimony of the complainant being corroborated by the testimony of another witness. However, he tries to reconcile between the two apparently conflicting rules by asserting that one of the rules is applicable when the complainant is not trustworthy, and the other is applicable when the complainant is trustworthy.[58] This, however, is not tenable.

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[54]*Radd al-Muḥtār*, 6:125.
[55]Ibid.
[56]Ibid.
[57]Ibid.,6:127.
[58]Ibid.

5.4.2 Necessary Corollaries of the Principle

If the "report" of one person is deemed enough to prove the so-called "*ta'zīr* in the right of God", some of its necessary corollaries are:

1. that this "report" is not testimony-proper (*shahādah*);[59]
2. that it is not essential that it is made in the court room (*majlis al-qaḍā'*) in front of the judge.[60]

Not only this, the learned Ibn 'Ābidīn also links it with the personal knowledge of the judge (*'ilm al-qāḍī*). Following is the line of argument:

1. The *report* of one trustworthy person causes *ẓann* (probability),[61] i.e., one tends to accept his report as true;
2. *ẓann* is deemed enough for practice, not belief, in religious matters,[62] such as when a trustworthy person reports about the purity of water for the purpose of making ablution;
3. Hence, the *qāḍī* has to act on his *ẓann* in this religious matter, as it involves violation of the right of God, or – in other words – commission of a sin![63]

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[59]Ibid., 6:126. The jurists mention many differences between *riwāyah*(report) and *shahādah* (testimony). For instance, testimony is recorded before the judge in courtroom but this is not necessary for report. The report of a woman in matters of *ḥudūd* and *qiṣāṣ* is accepted but her testimony in these matters is not admissible;if a person is given the punishment of *qadhf* and he afterwards repents his report is deemed acceptable but his testimony remains unacceptable; a slave is competent to give report but not to give testimony; the report of a single narrator is also acceptable but the testimony of one witness must be corroborated by that of at least another witness. See for details: *Radd al-Muḥtār*, 8:272-74.

[60]Ibid., 6:126.

[61]Ibid., 127. This is the generally accepted presumption about *khabar al-wāḥid*. See for details: *Uṣūl al-Sarakhsī*, 1:320ff.

[62] Ibid.

[63]*Radd al-Muḥtār*, 6:127.

Ibn 'Ābidīn infers from all this that the judge can award *ta'zīr* in the right of God on the report of a single person who is trustworthy for the judge.

5.4.3 Punishment on the Testimony of One Witness?

Actually, the learned Ibn 'Ābidīn wants to avoid a serious objection: how the judge can award punishment on the basis of the testimony of one witness? His answer is this: the report is not testimony and the judge does not award punishment on the basis of the testimony of one person; rather, he awards punishment on the basis of his knowledge!

However, another question arises here: can the judge award punishment in the right of God on the basis of his personal knowledge? The Elders of the Ḥanafī School, and even the later jurists, do not allow this.[64] What about punishment in the right of individual? The Elders of the School allow this only if an act is committed in his court in front of the judge.[65] Even that has been prohibited by the later jurists on the ground that judges have become corrupt.[66] As such, the scope of this principle is very narrow and it is not applicable to the case at bar.

Hence, this whole edifice is baseless. The first rule mentioned by Ḥaṣkafī is valid, as it is in conformity with the position of the Elders of the School as well as with the principles of law upheld by the School. Accepting another position only leads to analytical inconsistency.

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[64]Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:240-241; For views of the later jurists on this issue, see: *Radd al-Muḥtār*, 8:140-141.

[65]Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:112-14.

[66]*Radd al-Muḥtār*, 6:127 and 8:140-141.

Hence, one has to take a position: either *ta'zīr* is not awarded in the right of God; or if it is awarded in the right of God, it must require the standard of proof which the law has prescribed for the *ḥudūd*. This dissertation takes the first position.[67] God knows best.

5.5 DISTINGUISHING *SIYĀSAH* FROM *TA'ZĪR*

Now that the confusions regarding *ta'zīr* in the works of the later jurists have been cleared, it is time to draw clear distinctions between *ta'zīr* and *siyāsah* in the light of the established principles of the School as expounded by the earlier jurists. For this purpose, the various usages of the word *ta'zīr* in the works of the Elders of the School will be explained and then the relationship between *ta'zīr* and *siyāsah* will be elaborated.

5.5.1 Three Situations of *Ta'zīr*

A careful examination of the works of the earlier jurists shows that they used the word *ta'zīr* in three distinct, though interrelated, meanings:

1. Sometimes they would give the title of *ta'zīr* to the disciplinary action undertaken by a person having authority over his subordinates, such as a Father rebuking his

[67] Thus, what is considered as "*ta'zīr* in the right of God" is actually either a disciplinary action (*ta'dīb*) which is not punishment-proper or a form of the *siyāsah* punishment. In the first case, it is the right of the individual and in the latter it is the right of the ruler. This point is further elaborated in the following Section.

minor child for not offering prayer, a husband trying to discipline his rebellious wife or a master disciplining his slave;[68]

2. Generally, however, the jurists discuss *ta'zīr* in the chapters of *ḥudūd* and *qiṣāṣ* where an unlawful act does not fulfill *all* the prerequisites of a *ḥadd* or *qiṣāṣ* crime[69] or where the *ḥadd* or the *qiṣāṣ* punishment cannot be enforced because of a *shubhah*;[70]
3. At times, they assert that a *ta'zīr* punishment is awarded for certain violations of the law for which the texts do not prescribe a particular punishment, such as giving false testimony, consumption of pork or involving in usurious transaction.[71]

The question that needs to be asked here is: do these three various forms of *ta'zīr* have the same legal consequences? This question cannot be answered unless one refers to the right affected by these various forms of *ta'zīr*.

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[68] Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:270-71.

[69] For example, if a person accuses an insane person of committing *zinā*, this crime does not attract the *ḥadd* punishment of *qadhf* asone of the conditions of the *ḥadd* punishment is missing in it (namely, that the one on whom the allegation is leveled must be a sane person), but it necessitates the *ta'zīr* punishment (Ibid., 9:217-18).

[70] Thus, a father cannot be given the *ḥadd* punishment of *qadhf* for accusing his son of committing *zinā* in the same way as he cannot be given the *qiṣāṣ* punishment for murdering his son (Ibid., 9:221), but he can be given the *ta'zīr* punishment (Ibn Nujaym, *al-Ashbāh wa 'l-Naẓā'ir*, 152).

[71] For instance, if a person calls another: "O thief", this does not entail the *ḥadd* punishment of *qadhf* because that necessitates the allegation of *zinā*, but *ta'zīr* punishment can be awarded on this because he violated the general prohibition of abusing others (Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:270). For more examples, see *Radd al-Muḥtār*, 6:113.

5.5.2 *Ta'dīb*, *Ta'zīr* and *Siyāsah*

Sarakhsī has clearly mentioned that using the authority of *siyāsah*, the ruler may take a preventive action against a person even if he did not personally commit a violation of the law, provided the ruler does so for the protection of the rights of the community. He refers to the instance of expulsion of one Naṣr b. al-Ḥajjāj by the Caliph 'Umar, God be well-pleased with him. Naṣr had not committed any offence, but the action was necessary for preventing a serious violation of the law.[72] Ibn 'Ābidīn while trying to make the case for equating *ta'zīr* with *siyāsah* points out that *ta'zīr*, also, does not necessarily require the violation of the law.[73] This is correct, but the real issue is whether this act of *siyāsah* or that instance of *ta'zīr* are forms of "punishment-proper"? If not, the question is: can a punishment-proper, whether *ta'zīr* or *siyāsah*, be awarded without a violation of the law? The answer is clearly in negative. Thus, Kāsānī asserts that the *ratio* of *ta'zīr* is "commission of a violation of law (*jināyah*) for which there is no fixed punishment".[74] In other words, when *ta'zīr* means "punishment-proper", it can only be awarded for a violation of the law.

How can *ta'zīr* then be awarded to a minor having discretion when he cannot be held liable for violation of the law? Kāsānī gives the principle which explains the nature of this particular form of *ta'zīr*:

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[72]Sarakhsī, *al-Mabsūṭ*, 9:52.

[73]*Radd al-Muḥtār*, 6:20. He gives the example of disciplinary action against a child of ten years for not offering prayer.

[74]Kāsānī, *Badā'i' al-Ṣanā'i'*,9:270.

> He is given *ta'zīr* as a disciplinary action (*ta'dīban*), not as a punishment (*'uqūbatan*), because he has the capacity for being subjected to disciplinary action [not to punishment]. Do you not see what has been reported about the saying of the Prophet, upon him blessings and peace: "Guide your children to offer prayer when they reach the age of seven, and beat them for not offering it when they reach the age of ten"? This is by way of disciplining and teaching manners, not by way of punishment; because that necessitates violation of the law (*jināyah*) and the act of the minor cannot be termed *jināyah*. Such disciplinary action cannot be taken against an insane person or a child who has not reached the age of discretion, because these two neither have the capacity for being subjected to punishment nor the capacity for being subjected to disciplining.[75]

Hence, the point to note is that *ta'zīr*, which the earlier jurists consider the right of individual is a form of *ta'dīb* or disciplining and not punishment-proper. It is for this reason that the jurists allow the private person to enforce such *ta'zīr* on persons under their authority and they do not consider it necessary to enforce it through the judge or the ruler.[76]

The second form of *ta'zīr* which is awarded on the commission of a crime from the genus of the *ḥudūd* or *qiṣāṣ*[77] is punishment-proper. The same is true of the *ta'zīr* punishment independent of the *ḥudūd* and *qiṣāṣ*. Hence, the jurists assert that this *ta'zīr* must be enforced by the ruler or the judge as a delegate of the ruler.[78] This clearly establishes the point that

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[75]Ibid.

[76]Ibid., 9:253.

[77] Both where the *ta'zīr* crime lacks a condition of the *ḥadd* or the *qiṣāṣ* crime as well as where the *ḥadd* or the *qiṣāṣ* punishment cannot be awarded due to the existence of a *shubhah*.

[78] Marghīnānī, *al-Hidāyah*, 2:344.

these two forms of *ta'zīr* are violations of the right of the ruler, not the individual and, as such, they attract the consequences of *siyāsah*.

However, for the sake of clarity, it is suggested that these three categories of *ta'zīr* are given three different titles: *ta'dīb* for private disciplinary action; *ta'zīr* for the punishment given in the context of the *ḥadd* or the *qiṣāṣ* punishments; and *siyāsah* for punishments awarded for other violations of the law for which there is no fixed punishment.

Ta'dīb is not punishment-proper and must not be confused with issues of criminal law. *Ta'zīr* is similar to *ḥudūd* and *qiṣāṣ* from two perspectives: it has a fixed standard of evidence which is slightly different from the one prescribed for the *ḥudūd* and *qiṣāṣ*; and its maximum limit is fixed at thirty-nine lashes. The rest of its qualities are those which the jurists mention for *siyāsah*. These issues have already been explained in the previous chapter.

CONCLUSIONS

This analysis of the manuals of the Ḥanafī School finds that the Ḥanafī jurists use the word *ta'zīr* in three different, though somehow interrelated, meanings: disciplinary action; lesser punishment in cases of *ḥudūd* and *qiṣāṣ*; and punishment for offences generally, which is laid down by the ruler – *ta'dīb*, *ta'zīr* and *siyāsah*. The first of these relate to the right of individual and the next two relate to the right of the ruler. These latter two categories, *ta'zīr* and *siyāsah*, have almost similar consequences, except for the standard of proof and the limit of

punishment. In Pakistani criminal law, the spheres of *ta'zīr* and *siyāsah* have already been amalgamated. The present dissertation substantiates this position. It must be made clear, however, that in cases of *ḥudūd* and *qiṣāṣ*, *ta'zīr* has a special standard of proof and its maximum limit is fixed.

For the sake of clarity, it is suggested that disciplinary action should be termed as *ta'dīb*; *ta'zīr* in cases of *ḥudūd* and *qiṣāṣ* may continue to have the same title; while *ta'zīr* in criminal law generally may be called *siyāsah*. The bottom line is that it is the classification of rights that removes all confusions and puts everything in its right place.

In the chapters that follow, the focus will be on *ta'zīr* and *siyāsah*, not on *ta'dīb*.

CHAPTER SIX: PAKISTANI LAW OF BLASPHEMY

INTRODUCTION

The Pakistani law on offences against religion (Pakistan Penal Code Sections 295-298C), often termed as blasphemy law, has been the subject of much controversy in the recent past.[1] The present chapter traces the historical development of the Pakistani law of blasphemy from its inception in the 1860 Indian Penal Code to the present day. After this is done, the next two chapters will focus on two provisions of the Pakistani blasphemy law, namely, desecration of a copy of the Qur'ān (Section 295B) and defiling the name of the Holy Prophet (peace be on him) (Section 295C) and will examine if the consequences of these offences differ for Muslim and non-Muslim convicts.

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[1] Pakistani blasphemy law has been examined from various perspectives. See for an earlier study of the impact of the law: Charles Kennedy, *Islamization of Laws and Economy in Pakistan* (Islamabad: Institute of Policy Studies, 1991), 143-184. See for an earlier criticism on the law: Rubya Mehdi, *The Islamization of Laws in Pakistan* (Richmond, Surrey: Curzon, 1994). For a detailed defense of the law by the one who played a pivotal role in the making of the law, see: Muhammad Ismail Qureshi, *Nāmūs-i-Rasūl aur Qānūn-Tawhīn-i-Risālat* (Lahore: Al-Faysal Nashiran-i-Kutub, 2006). For a representative Western criticism, see: David Forte, "Apostasy and Blasphemy in Pakistan", *Connecticut Journal of International Law*, 10: 27 (1994), 27-68. For an example of the perspective of the NGO's, see: *Jinnah Institute Briefing Pack: Amendments to Blasphemy Laws Act 2010* (Islamabad: Jinnah Institute, 2010).See also: Nu'mān 'Abd al-Rāziq al-Samarra'ī, *Aḥkām al-Murtadd fi al-Shari'ahal-Islāmiyyah* (Beirut: Dār al-'Arabiyyah, 1968); Tayyab Mahmood, "Freedom of Religion and Religious Minorities in Pakistan: A Study of Judicial Practice", *Fordham Intnational Law Journal*, 19 (1995-1996), 40-100; Riaz Hassan, "Expressions of Religiosity and Blasphemy in Modern Societies", *Asian Journal of Social Sciences*, 35 (2007), 111-125; Osma Siddique and Zahra Hayat, "Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan-Controversial Origins, Design Defects, and Free Speech Implications", *Minnesota Journal of International Law*, 17:2 (2008), 303-385. For an exposition of the views of the Ḥanafī jurists, see: Muhammad Mushtaq Ahmad, "Tawhīn-i-Risālat ki Saza Ḥanafī Fiqh ki -Islām men", *al-Shari'ah*, March 2011, 29-40 (http://www.alsharia.org/mujalla/2011/mar/fiqah-Hanafi-mushtaq-ahmad last accessed Augnst 10, 2014).

6.1 The Pre-Partition Law of Blasphemy

The Pakistani law of blasphemy passed through many stages before it reaching its present shape. For a better understanding of the law it is imperative to briefly discuss these various stages from 1860 to the present day.[2] However, before going through the histoy, a few points must be noted about the meaning and scope of the concept of 'blasphemy'.

6.1.1 Defining Blasphemy

'Blasphemy' means showing disrespect to something sacred. Thus, *The Oxford Dictionary of Law* defines it as: "statements or writings that deny – in an offensive or insulting manner – the truth of the Christian religion, the Bible, the Book of Common Prayer, or the existence of God."[3]The word has its origins in the Greek word *βλασφημέω,* which means defaming or speaking evil. The same meaning is conveyed by the Latin word *blasphemare.*[4] In the Jewish context, the concept originated from the prohibition of pronouncing the 'ineffable' Name of God.[5] Later, it came to include every kind of irreverent statements that outrage religious

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[2] In October 1860, the British Government enforced the Indian Penal Code (IPC) in 'British India' which till date forms the bulk of the criminal law in the Indian sub-continent.

[3] *A Dictionary of Law*, ed. Elizabeth A. Martin, (Oxford: Oxford University Press, 2003), 51.

[4] Leonard W. Levy, "Blasphemy: Jndeo-Christian Concept" in *The Encyclopedia of Religion*, Ed. Mircea Eliade (New York: Macmillan Publishing Company, 1987), 2: 238. Blasphemy means "any word, sign or action which intentionally insults the goodness of or is offensive to God." *The Wordsworth Dictionary of Beliefs and Religions* (London: Wordsworth, 1995), 70.

[5] In the Ten Commandment, the third one prohibits the Israelis from taking the name of the Lord in vain (Exodus 20:7; Deuteronomy 5:11). The Jewish Rabbis developed a detailed law about pronouncing the ineffable name of God. So much so that the later generations forgot to pronounce the name correctly and could only remember the four consonants of the name YHWH. They would use the word 'Adonai', meaning 'my Lord' in place of the 'Tetragrammaton' (four-lettered) name of God. In Judaism, blasphemy can be committed only against God the punishment for which is death by stoning, but it is applicable only if the blasphemer offeoded the ineffable Name of God. In other cases, excommunication is the most common punishment. However, two witnesses were necessary who must have warned the person about the consequences of his or her

sensibilities.[6] In Christian tradition, blasphemy originally means disparaging and evil remarks about God or the 'Holy Ghost'.[7] *The New Encyclopedia Britannica* relates the concept of blasphemy with that of profanity and distinguishes it from 'beresy' in that heresy consists of holding a belief contrary to the orthodox one, while blasphemy necessarily involves an irreverent statement or attitude.[8] *Black's Law Dictionary* defines the term blasphemy in the following words: "Irreverence toward God, religion, religious icon, or something else considered sacred."[9]

The point is that 'blasphemy', in the Judeo-Christian tradition – and, because of its influence, generally in the Western legal systems – basically involves an irreverent statement or attitude toward God. In Pakistan, however, the discussion on 'blasphemy law' generally revolves around the issue of derogatory remarks against the Prophet (peace be on him). That is the reason why in the Pakistani context 'blasphemy' is generally translated as *tawhīn-i-risālat* or 'ridiculing prophethood'.[10]

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action. See: Jewish Encyclopedia, at http://www.jewishencyclopedia.com/articles/3354-blasphemy (accessed on 21-06-2012 at 12:06 pm).

[6] *The Encyclopedia of Religion*, 2:238.

[7] Ibid. Some of the Christian theologians called it "treason against God."

[8] "Blasphemy" in *The New Encyclopedia Britannica*, Ed. Philip W. Goetz, (Chicago: Encyclopedia Britannica, Inc., 1986), 2:74-75. "Thus it is not blasphemous to deny the existence of God or to question established tenets of the Christian faith unless this is done in a mocking and derisive spirit."

[9] *Black's Law Dictionary*, Ed. Bryan A. Garner, (Minnesota: West Group, 1999), 164.

[10] A plethnra of books have appeared in Pakistan the last two decades, particularly in Urdu, on the issue of '*Tawhīn-i-Risālat*' in Pakistan. See, for instance: Muhammad Ismail Qureshi, *Nāmūs-i-Rasūl awr Qānūn-Tawhīn-i-Risālat* (Lahore: Al-Faisal Nashiran-i-Kutub, 1994 and 2006); MawlānāWāḥiduddin Khan, *Shatm-i-Rasūl kā Mas'ala* (Lahore: Dār al-Tazkir, 1996); H. SājidA'wān, *Taḥaffuẓ-i-Nāmūs-i-Risālat awr Gustākh-i-Rasūl ki Sazā* (Multan: 'Ālami Majlis-i-Taḥaffuẓ-i-Khatm-i-Nubuwwat, 1996; MawlānāSājid Khan Atlawī, *Tawhīn-i-Risālat ka Shar'īḤukm* (Lahore: Maktaba-i-Abū Bakr 'Abdullāh, 2012).

Significantly, the Pakistani Statute Book has no provision specifically dealing with 'blasphemy against God'.[11] There is one specific provision – Section 295B – about desecration of a copy of the Qur'ān or an extract thereof and, as the Qur'ān is the Spoken Word of God[12] according to Muslim belief, this provision definitely falls within the scope of the 'blasphemy law'. Surprisingly, however, most of the authors in Pakistan when writing about blasphemy law concentrate only on Section 295C which penalizes derogatory remarks about the Prophet (peace be on him). Moreover, although the offences under Sections 295B and 295C are of the same nature from the perspective of Islamic law,[13] yet the Pakistani law has prescribed different punishments for these offences.[14] However, the issue has never been raised before the Federal Shariat Court (FSC)[15] or debated as such by scholars in Pakistan.

Hence, in this dissertation, blasphemy means all the three offences – blasphemy against Allāh, against the Qur'ān and against the Prophet (peace be on him) – and the rules and principles of Islamic law elaborated in this dissertation are equally applicable to all the

[11] Section 295A of PPC may indirectly cover this offence as it deals with 'insults, or attempts to insult the religion or the religious beliefs' of a class of people 'with deliberate and malicious intention of outraging the religious feelings' of that class. See below for details.

[12] The great Ḥanafī jurist ImāmAbū BakrMuḥammad b.Abī Sahl al-Sarakhsī (d. 483/1097) gives the following definition of the Qur'ān: "The Book that was revealed to the Prophet (peace be on him), recorded in the *masahif*, and has been narrated to us ... through *mutawātir* report" (*Tamhid al-Fuṣūl*, 1: 279). *Masahif* is the plural of *mushaf* which may be translated as 'canon'. *Mutawātir* or continuous report of a narration technically means that the report is narrated by such a large number of narrators in each generation that the possibility of fabrication is negated. See for details: Ibid., 1:282-291.

[13] This point is explained in the next Chapter in Section 7.1.

[14] Punishment for desecrating a copy or an extract of the Qur'ān is life imprisonment, while blasphemy against the Prophet (peace be on him) is punishable with death. See below for details.

[15] This is the forum which under the Constitution of Pakistan has the authority to decide if a particular law is repugnant to Islamic law. See Section 6.2.1 below for details.

three offences even if most of the times the discussion is presented in the context of blasphemy against the Prophet (peace be on him).

6.1.2 From 1860 to 1927: The Original Provisions of the Indian Penal Code

After the British successfully defeated the Indian insurgency of 1857, India was made part of the British Empire. In October 1860, the British Government enforced the Indian Penal Code (Act XLV of 1860) or IPC in India, which generally continues to be the criminal law in India, Pakistan and Bangladesh. The provisions about blasphemy law are found in the same Code, which in Pakistan is called the Pakistan Penal Code or PPC.

The Indian Penal Code 1860 had provisions about "Offences Relating to Religion" in Chapter XV (Sections 295 to 298). The first of these provisions, Section 295, relates to 'defiling a place of worship'.[16] Section 296 is about 'disturbing religious assembly'.[17] Section 297 gives provisions about 'trespassing on burial places',[18] while Section 298 deals with 'uttering words etc. with deliberate intent to wound the religious feelings' of a person.[19]

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[16] "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."

[17] "Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

[18] "Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sculpture, or any place set apart for the performance of funeral rites or as a, depository for the remains of the

In 1898, an important provision was added through Section 153A in Chapter VIII dealing with "Offences against Public Tranquility", which governed the issue of 'promoting enmity between different groups on grounds of religion.'[20]

Even a cursory look at all these provisions reveals the fact that the British Government looked at this issue from the perspective of 'public order' and 'harmony'. In other words, in their opinion the issue fell within the domain of *siyāsah*.[21] A very significant point common to all these provisions is that none of these offences was a strict liability

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dead, or offers any indignity to any human corpse or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

[19] "Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year or with fine, or with both."

[20] "Whoever (a) by words, either spoken or written, or by signs, or by visible representations or otherwise, promotes or incites, or attempts to promote or incite, on grounds of religion, race, place of hoth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities; or (b) commits, or incites any other person to commit, any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities or any group of persons identifiable as such on any ground whatsoever and which disturbs or is likely to disturb public tranquility; or (c) organizes, or incites any other persnn to organize, and exercise, movement, drill or other similar activity intending that the participants in any such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in any such activity will use or be trained to use criminal force or violence or participates, or incites any other person to participate, in any such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in any such activity will use or be trained, to use criminal force or violence, against any religious, racial, language or regional group or caste of community or any group of persons identifiable as such on any ground whatsoever and any such activity for any reason whatsoever cause or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community, shall be punished with imprisonment for a term which may extend to five years and with fine."

[21] In chapter 4 of this dissertation, a comparison has been made between the concepts of *siyāsah* and offence.

offence;[22] all of them required the essential element of *mens rea*.[23] Hence, these provisions use the words and phrases 'deliberate intent', 'knowledge', 'intention', 'maliciously' and the like.

6.1.3 The Raj Pal Incident and the Insertion of Section 295A

In 1924, in Lahore a Hindu publisher, Raj Pal, published a pamphlet which had very provocative content and an even more provocative title: *Rangīlā Rasūl*.[24] A case was filed under Section 153A of IPC against Raj Pal in the court of Magistrate First Class, Mr. C. H. Disney, who sentenced Raj Pal to imprisonment for 6 month and a fine of Rs. 1000. Raj Pal went on appeal against this decision to the Court of Sessions. The Judge Col. F. B. Nicolas reduced the punishment but maintained the conviction. Raj Pal challenged this decision before the Single Bench of the Lahore High Court which acquitted him. Justice Kunwar Dilip Singh Masih who wrote the judgment observed that Section 153A was not meant to stop polemics against a deceased religious leader 'however scurrilous and in bad taste such attack might be!'[25] This decision, of course, infuriated Muslims. In another case in the same year, however, the Division Bench of the Court comprising of the same Justice Dilip and Justice

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[22] This was a departure from the common law tradition because in common law the principle was that when a blasphemous statement is 'published,' there was "no need to show an intention to shock or insult or awareness that the publication is blasphemous" (*A Dictionary of Law*, 51).

[23] "Liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe. Strict liability most often applies either to ultra-hazardous activities or in products-liability cases. Also termed *absolute liability; liability without fault*." (*Black's Law Dictionary*, 998). *Mens rea* means: "The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness <the *mens rea* for theft is the intent to deprive the rightful owner of the property>. *Mens rea* is the second of two essential elements of every crime at common law, the other being the *actus reus*. Also termed *mental element; criminal intent; guilty mind*."(Ibid., 1075).

[24] A series of blasphemous pamphlets and books appeared in that era in India. See for some details: A'wān, *Taḥaffuẓ-i-Nāmūs-i-Risālat*, 559-760.

[25] AIR 1927 Lah 250.

Broadway (who headed the Bench) held that Section 153A covered literature which would cause communal violence and religious hatred.[26]

The incident, however, compelled the British Government to introduce in 1927 Section 295A in the Indian Penal Code.[27] This section prescribes the punishment of imprisonment for two years for the one who 'insults, or attempts to insult the religion or the religious beliefs' of a class of people 'with deliberate and malicious intention of outraging the religious feelings' of that class.[28]

Yet again, the offence did not attract the principle of strict liability as *mens rea* was its essential element.

6.2 Amendments during the Zia-ul-Haq Regime

In July 1977, General Muhammad Zia-ul-Haq, the then Chief of the Army Staff, imposed martial law in Pakistan and abrogated the Constitution. He legitimized his stay in power under the pretext of 'Islamization' of laws and economy. Hence, he came up with some

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[26] In April 1929, Ghazi Ilam Din killed Raj Pal. The Court of Sessions awarded him death punishment under Section 302, IPC. The High Court also confirmed the decision in appeal. In his arguments before the High Court, Muhamamd Ali Jinnah (who would later become the Quaid-i-Azam), the defense lawyer of Ghazi Ilam Din, took the plea of grave and sudden provocation and asserted that the law could not adequately punish the wrongdoer, Raj Pal, which was what prompted Ghazi Ilam Din to take the law into his own hands. The Court did not accept the plea and confirmed the death punishment for Ghazi Ilam Din. Zafar Iqbal Nagina, a Lahore-based journalist, has compiled all the relevant documents of the case, including the police challan and statements of the accused and the witnesses, the order sheets as well as the decisions of the lower court and the High Court in his book: *Ghazi Ilam al-Dīn Shahīd* (Lahore: Jang Publishers, 1988).

[27] Criminal Law Amendment Act (XXV of 1927). The idea of a new law on the issue was generated by Mawlānā Muhammad 'Ali Jawhar in the backdrop of the acquittal of Raj Pal by the Lahore High Court. He proposed a new legislatiou to fill the vacuum in the law.

[28] See Section 295A of IPC. Later, India enhanced the punishment to three years and Pakistan enhanced it to teo years.

drastic changes in the system. The changes in the legal system which are directly relevant to the issue at bar are briefly discussed here.

6.2.1 Establishment of the Federal Shariat Court

In 1979, General Zia promulgated the Hudood Ordinances and introduced some principles of Islamic criminal law into the Pakistani legal system.[29] Simultaneously, he established the 'Shariat Benches' in the High Courts. Later, these Benches were abolished and in their place 'The Federal Shariat Court' (FSC) was established.[30] This new Court has been given two-fold jurisdiction: to hear appeals in the cases under the Hudood Ordinances and to hear the 'Shariat Petitions'.[31]This latter category is directly relevant to the issue at hand.

Under Article 203D (1) of the Constitution, any citizen may file a 'Shariat Petition' in the Federal Shariat Court challenging any provision of the existing laws on the ground of inconsistency with 'the injunctions of Islam as laid down in the Holy Qur'ān and [the] Sunnah'. [32] The Court, if convinced, may order the relevant (Federal or Provincial)

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[29] Some of the provisions of these Ordinances about rape and the relevant principle of Islamic law have been analyzed in detail in Chapter 5 of this dissertation.

[30] From the purpose of creating the Federal Shariat Court and settling issues of its jurisdiction, the Constitutional provisions were modified 28 times between 1980 and 1985 through 12 separate Presidential Orders (P.O.'s). These are: P.O. no. 1 and P.O. no. 4 of 1980; P.O. no. 5 of and P.O. no. 7 of 1981; P.O. no. 5 andP.O. no. 12 of 1982; P.O. no. 7 and P.O. no. 9 of 1983; P.O. no. 1 and P.O. no. 2 of 1984; and P.O. no. 14 and 24 of 1985. Later, the Parliament approved all these provisions throughthe Eighth Constitutional Amendment of 1985. Now, the provisions about the FSC are found in Chapter 3A (Articles 203A to 203J) of the Constitution of Pakistan 1973.

[31]Article 203D (1) of the Constitution.

[32] In 1982, an amendment was made in the said Article allowing the FSC to *suo moto* examine a provision of a law. As discussed in Chapter Two of this Dissertation, the "injunctions of Islam" remain undefined and it is not clear how does the FSC find these injunctions. See for more details: Muhammad Mushtaq

government to make such changes in the law as directed by the Court for the purpose of bringing the law into conformity with the Islamic injunctions within the prescribed time; failing this, the impugned provisions of the law would cease to have effect after the prescribed date; unless, of course, the 'Shariat Appellate Bench' (SAB) of the Supreme Court suspends or overturns the decision of the FSC.[33] Using this mechanism, the FSC and SAB have made many significant changes in the Pakistani legal system.[34] The present Pakistani law on blasphemy is glaring example of the efficacy of this mechanism. This point is elaborated below.

6.2.2 Protection of the Honor of the Companions: Section 298A

In 1980, General Zia added Section 298A in PPC[35] penalizing the 'use of derogatory remarks against holy personages'.[36] The section was added in the backdrop of the escalating tension between the Shī'ah and the Sunnī sects, and it penalized derogatory remarks against the Wives of the Prophet (peace be on him), members of his household, his Rightly-guided Successors or

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Ahmad, "Pakistan men Ra'ij Fojdari Qawānin: Islami Qānūni Fikr kay Chand Aham Mabahith", *Fikr-o-Naẓar*, 50-51:4-1 (2013), 111-154.

[33]Article 203F of the Constitution.

[34] Leading cases decided by the FSC and the SAB include, *inter alia*: *Bashiran v Muhammad Hussain*, PLD 1988 SC 186 (on resolving conflict between the provisions of the Muslim Family Laws Ordinance 1961 and the Offence of Zina Ordinance 1979), *Qazalbash Waqf v Chief Land Commissioner Punjab*, PLD 1990 SC 99(on land reforms) and *Allah Rakha v The Federation of Pakistan*, PLD 2000 FSC 1 (on the compatibility of the provisions of MFLO 1961 with Islamic law).

[35]Inserted through the Pakistan Penal Code (Second Amendment) Ordinance (XLIV of 1980).

[36] "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 any wife (*Ummul Mumineen*), or members of the family (*Ahle-bait*), of the Holy Prophet (peace be upon him), or any of the righteous Caliphs (*Khulafa-i-Rashideen*) or companions (*Sahaaba*) of the Holy Prophet (peace be upon him) shall be punished with imprisonment of either description for a term which may extend tn three years, or with fine, or with both."

Companions (Allah be well-pleased with them all) and imposes the punishment of imprisonment for three years or fine or both.

Significantly, this section does not have any reference to 'intention', 'knowledge' or 'malice'. In other words, this offence is a strict liability offence which does not require the proof of *mens rea*.

6.2.3 Blasphemy against the Qur'ān: Section 295B

In 1982, General Zia added yet another Section to the Chapter on the Offences Relating to Religion. This new Section 295B[37] imposes the punishment of life imprisonment for the one who 'defiles, damages or desecrates' a copy of the Holy Qur'ān or any extract thereof or uses it in a 'derogatory manner'. This section uses the word 'willfully', which is why the proof of intention becomes necessary for this offence.[38]

6.2.4 Action against the Ahmadis: Section 298B

In 1974, the Pakistani Parliament declared that both the factions of the Ahmadis – those who believe that Mirza Ghulam Ahmad (d. 1909) was a prophet and those who consider him a

[37]Inserted through the Pakistan Penal Code (Amendment) Ordinance (I of 1982).

[38] "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 for any unlawful purpose shall be punishable with imprisonment for life."

reformer – were non-Muslims.[39] The Parliament passed a Constitutional Amendment and added to this effect Article 260 (3) to the Constitution which said:

> A person who does not believe in the absolute and unqualified finality of the Prophethood of Muhammad (peace be upon him), the last of the Prophets, or claims to be a Prophet in any sense of the word or of any description whatsoever, after Muhammad (peace be upon him), or recognizes such a claimant as a prophet or a religious reformer, is not a Muslim for the purpose of the Constitution or law.[40]

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[39] The Qadiani issue always remained a cause of serious problems of law and order even during the lifetime of Mirza Ghulam Ahmad. After the establishment of Pakistan, the issue caused riots in Punjab in 1953 and the first Martial Law was imposed to control the miscreants. A judicial commission was formed with Justice Munir as its head to probe into the matter which published its findings in the form of a report. Similar incident took place in 1974 which compelled the then Prime Minister Zulfikar Ali Bhutto to bring this matter before the National Assembly. Both the factions of the 'Ahmadis' wanted representation before the Assembly which was not possible as they were not members of the Parliament. Hence, the whole Assembly was converted into a special committee in which the leaders of both the factions presented their case and they were cross-examiued in detail hy the then Attorney-General of Pakistan Mr. Yahya Bkhtiar. After a thorough debate finally both the houses of the Parliament hy a consensus passed the Second Constitutional Amendment declaring both the factions of the 'Ahmadis' as non-Muslims. The proceedings of this Special Committee comprising of the whole National Assembly were held *in-camera* and were kept confidential for thirty years under the Official Secrets Act. Recently, however, Fehmida Mirza, the Speaker of the National Assembly got the whole proceedings published. The Alami Majlis-e-Taḥaffuẓ-e-Khatm-e-Nubuwwat also published these proceedings in the form of a five-volume book: Mawlānā Allāh-Wasāyā (ed.), *Qawmī Asambli mēṇ Qādiyānī Mas'alay par Beḥeth kī Mūsāddaqa Ripor*t (Multan: Alami Majlis-e-Taḥaffuẓ-e-Khatm-e-Nubuwwat, 2012).

[40] In 1983, the said provision was modified through Article 6 nf the Constitution (Third Amendment) Order. The new Article 260 (3) of the Constitution, which was later approved by the Parliament through the Eighth Constitutional Amendment in 1985, now reads as: "In the Constitution and all enactments and other legal instruments, unless there is anything repugnant in the subject or context: (a) "Muslim" means a person who believes in the unity and oneness ofAlmighty Allah, in the absolute and unqualified finality of theProphethood of Muhammad (peace be upon him), the last of theprophets, and does not believe in, or recognize as a prophet orreligious reformer, any person who claimed or claims to be aprophet, in any sense of the word or of any description whatsoever,after Muhammad (peace be upon him); and(b) "non-Muslim" means a person who is not a Muslim and includes aperson belonging to the Christian, Hindu, Sikh, Buddhist or Parsicommunity, a person of the Quadiani Group or the Lahori Group whocall themselves 'Ahmadis' or by any other name or a Bahai, and aperson belonging to any of the Scheduled Castes."

However, the Ahmadis continued to present themselves as Muslims and used Muslim religious terminology[41] for their religious concepts. This created serious problems of law and order for the government[42] and led to the addition in 1984 of sections 298B and 298C to PPC[43] penalizing such acts and prescribing punishments for them.

Yet again, it should be noted that the offences created by Sections 298B and 298C are strict liability offences, which do not require the proof of *mens rea*.

6.2.5 *Ismail Qureshi v General Muhammad Zia-ul-Haq* and Section 295C

In 1984, Muhammad Ismail Qureshi, an advocate of the Supreme Court, filed a Shariat Petition in FSC challenging the provisions of Section 295A contending that these provisions were repugnant to Islamic injunctions.[44] The basic contention of the petitioner was that Section 295A prescribed the punishment of imprisonment for the one who makes a blasphemous statement against the Prophet (peace be on him), while Islamic law prescribes the punishment of death penalty for this heinous crime.[45] The full bench of the FSC heard the case titled *Ismail Qureshi v General Muhammad Zia-ul-Haq and Others* and reserved its

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[41] Why the Ahmadis were singled out among the other religious minorities? Charles Kennedy tries to find answer to this question: "Defining a Muslim in an Islamic State: The Case of the Ahmadiyya" in Dhirendra Vajpeyi and Yogindra Malik (eds.), *Ethnic Minority Politics in South Asia* (Delhi: Manohar, 1989), 71-108. The National Assembly proceedings have many detailed reasons to show why all the members reached a consensus on this issue.

[42] Sir Muhammad Iqbal (d. 1938) wrote a detailed article oo showing the religious, social and political problems created by the Qadianis for Muslims and it was his suggestion that the Qadianis must be declared a non-Muslim community. Muhammad Iqbal, *Islam and Ahmadism* (Islamabad: Dawah Academy, 1994).

[43] Inserted through Anti-Islamic Activities of Qadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance (XX of 1984).

[44] Shariat Petition no. 1/L/84 of 1984.

[45] Qureshi, *Qānūn-i-Tawhīn-i-Risālat*, 365-378.

judgment. Before the Court could pronounce judgment, the Parliament changed the law and inserted Section 295C in PPC.[46]

Ismail Qureshi, the petitioner, had in the meanwhile drafted a new law and introduced it to the Parliament through Apa Nisar Fatima, a respected and pious Member of the National Assemby.[47] The proposed law had only death punishment for the offender,[48] but Iqbal Ahmad Khan, the Minister for Religious Affairs, proposed that the court should be given the choice of imposing either death punishment or the punishment of life imprisonment. This proposal was accepted by the Parliament and the text of the law passed by the Parliament in 1986 is as follows:

> Whoever by words, either spoken or written, or by visible representations, or by any imputation, innuendo, or institution, 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.[49]

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[46] Thus, the decision of the FSC in this case became redundant and it could never be pronounced.

[47] The Deputy Attorney-General Mr. Sayyid Riaz-ul-Ḥasan Gilani, though agreeing with the petitioner's stance that blasphemy is punishable with death, was of the view that as the petition was not about examining the conformity of the present legal provisions with Islamic law but about new legislation, the proper forum for this purpose was the Parliament and not the FSC (Qureshi, *Qānūn-i-Tawhīn-i-Risālat*, 42-43). Perhaps this prompted Qureshi to go for an alternate route. Qureshi notes that he opted for legislation because he knew that the judicial route was quite long as the aggrieved party might have gone on appeal to the SAB (Ibid., 312).

[48] Ibid.

[49] Section 295C, inserted in PPC through Section 2 of the Criminal Law (Amendment) Act (III of 1986).

This remained the law for almost five years till the FSC in another case changed it in 1991. This is discussed below.

6.2.6 *Ismail Qureshi v The Government of Pakistan*: Mandatory Death Penalty

Ismail Qureshi was not satisfied with the Islamicity of Section 295C after the provision about life imprisonment was added in it. Hence, he challenged the new law through another Shariat Petition in FSC. The new case *Ismail Qureshi v The Government of Pakistan* was decided by the FSC in December 1991.[50] The Petitioner raised two major issues in his petition: one, that Islamic law prescribes death punishment as *ḥadd* for the offence of blasphemy; and that the same punishment should be given to the one who commits this crime against any other prophet. The Full Bench of the FSC accepted both pleas and directed the Federal Government to make the necessary changes in Section 295C by April 30, 1992 failing which the same changes would automatically take place.[51]

The Government went on appeal against this decision to the SAB of the Supreme Court. However, Ismail Qureshi approached Mian Muhammad Nawaz Sharif, the then Prime Minister, and convinced him to withdraw the appeal. After the Government withdrew its appeal, the case could not be heard by the SAB and it hence it was disposed of.[52] In the

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[50]PLD 1991 FSC 10.

[51]Ibid., paras 67 and 68.

[52] Mian Muhammad Nawaz Sharif in his letter to Qureshi said that the appeal might have been preferred by some notorious employee of the Ministry and that he personally favored the death punishment. "Had there been a punishment stricter than death punishment, I would have preferred that for this heinous crime," wrote Sharif (Qureshi, *Qānūn-i-Tawhīn-i-Risālat*, 405).

meanwhile, the time fixed by the FSC for amending the law had lapsed and the Parliament could not make the necessary changes in the law. However, as the decision of the FSC had become binding and effective, the changes took place automatically. Hence, the phrase "or imprisonment for life" in Section 295C has no legal effect. Similarly, even though Section 295C specifically mentions the name of Prophet Muhammad (peace be on him), the same is the law for blasphemy against other prophets as per the decision of the FSC in *Ismail Qureshi*.[53]

The FSC has primarily relied on the legal evidence about the punishment of apostasy in Islamic law, declaring it a *ḥadd* punishment which could not be changed or commuted.[54] It, however, could not satisfactorily address the question of how a non-Muslim could be given the punishment of apostasy?[55] Similarly, the FSC concluded that repentance by the convict would not suspend his punishment.[56] This was surprising, as it went against the established

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[53] This position has been reiterated by the FSC in 1994 in *Allama Bishop Danial Tasleem v The Federal Government of Pakistan* and in 2001 in *Dr. Muhammad Masood Ahsan v The Federal Government of Pakistan*. Appeal against the former decision was preferred to the SAB but was dismissed on 21 April 2009 for non-prosecution. No appeal against the latter decision was preferred.

[54] See paras 17, 21 and 27-32 of the judgment.

[55] In paras 24 and 25, the Court quoted many instances of death punishment during the lifetime of the Prophet (peace be on him) and his Companions (Allah be well-pleased with them) for those who committed blasphemy. However, the Court did not examine these instances in detail and did not distinguish between the legal status of these various culprits – Muslim, non-Muslim residents (*dhimmīs*), non-Muslim visitors (*musta'minīn*) and non-Muslim alien enemies (*muḥāribīn*). This issue is analyzed in Chapter Eight of this Dissertation.

[56] In para 26, the Court comes up with a strange assertion: ""It is pertinent to mention here that Holy Prophet (peace be on him) had pardoned some of his contemners but the Jurists concur that Prophet (peace be on him) himself had the right to pardon his contemners but the Ummah has no right to pardon his contemners.". The Court refers here to *al-Ṣārim al-Maslūl* of Ibn Taymiyyah. This is astonishing because, as explained below in Section 7.4, the jurists are divided on this issue and the official position of the Ḥanafī School is that repentance suspends this punishment.

principle of Islamic law that repentance suspends the punishment of apostasy.[57] The basis of the decision of the Court is the presumption that blasphemy also violates the right of the Prophet (peace be on him) which cannot not be pardoned by any other person.[58]

In fact, the FSC in this case, as in many others, has not followed a particular legal theory and has instead mixed up the views of the jurists belonging to various Schools without ensuring analytical consistency.[59] The views of the Hanfi jurists, in particular, have been taken summarily without analyzing the legal principles on which these views are based. Had the Government not withdrawn the appeal, these points may have been taken into consideration by the SAB.[60] In any case, this decision needs a thorough examination in the light of the principles of Islamic law. This is what is to be done in the following sections of this chapter.[61]

In *Dr. Muhammad Amin v Muhammad Mehboob and Another*, the Lahore High Court not only acquitted the accused of blasphemy on the ground of lack of evidence in accordance with the standard prescribed by Islamic law, but also observed that repentance of the convict would suspend the punishment. In appeal, which was again argued by Ismail Qureshi for the

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[57] This issue is discussed in detail in the next Chapter in Section 7.4. In another case, the Lahore High Court concluded that the punishment for blasphemy can be given on the basis of the testimony of one witness (1995 PCrLJ 811). This is surprising because if this is a *ḥadd* crime, as the FSC concluded in *Islamel Qureshi*, it necessarily requires at least two witnesses.

[58] *Ismael Qureshi*, para 26 of the judgment.

[59] This has already been discussed in the first two chapters of this Dissertation.

[60] Two seasoned scholars Mawlānā Muhammad Taqi Usmani and Pir Karam Shah al-Azhari were members of the SAB at that time and they could have rectified the problems in this judgment.

[61] In 2005, General Pervez Musharraf brought many changes in the procedure of the blasphemy cases but it is beyond the scope of the present Chapter to discuss those changes because the Chapter focuses on the substantive law only.

petitioner, the Supreme Court declared that in matters pertaining to the exclusive jurisdiction of the FSC, the decision of the FSC would bind all courts, unless it was modified by the SAB of the Supreme Court.[62] Hence, the law in Pakistan remains that the repentance of the convict has no legal effect for his punishment.

CONCLUSIONS

The overview of the development of this law and analysis of the decision of the FSC in *Ismail Qureshi* brings us to some important issues which will be analyzed in the next two chapters. An important issue is: does Islamic law distinguish between the offence of desecration of a copy of the Qur'ān and passing derogatory remarks about the Prophet (peace be on him)? The FSC could not address this issue – for the obvious reason that the Petitioner had not challenged the provisions of Section 295B. This question, however, is important for understanding the nature and concept of 'blasphemy' from the perspective of Islamic law. Another related question is: what if a person makes a blasphemous statement against Allah? Again, this issue was not raised before the FSC. The position under the Pakistani law seems to be that this situation will either be covered by Section 295A or 153A.[63] But what is the position under Islamic law?

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[62] Qureshi cites the full judgment in *Qānūn-i-Tawhīn-i-Risālat*, 394-396.

[63] As noted earlier, the British Government added Section 153A in IPC in 1898 for the purpose of dealing with the issue of 'promoting enmity between different groups on grounds of religion,' while it added 295A in 1927 for punishing the one who the one who'insults, or attempts to insult the religion or the religious

Moreover, when a Muslim commits the offence of 'blasphemy' – whatever that concept means from the perspective of Islamic law – is he given the punishment for blasphemy *per se* or for blasphemy as a form of apostasy? The FSC seems to have preferred the former possibility though the arguments it recorded are generally related to the punishment of apostasy. Then, what is the nature of this offence when committed by a non-Muslim? These and other related issues will be analyzed in the next chapter in the light of the principles recognized by the Ḥanafī School.

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beliefs' of a class of people 'with deliberate and malicious intention of outraging the religious feelings' of that class.

CHAPTER SEVEN: BLASPHEMY AND THE *ḤADD* OF APOSTASY

INTRODUCTION

Pakistani law does not have a specific offence of 'blasphemy against God,' and it prescribes different legal consequences for 'blasphemy against the Qur'ān' and 'blasphemy against the Prophet, upon him blessings and peace; while the established position of the Ḥanafī jurists is that Islamic law considers these three offences as forms of one and the same offence, and attaches the consequences of apostasy to them if committed by a Muslim. The present chapter analyzes this issue in detail. After determining the nature and scope of the concept of blasphemy in Islamic law, it examines the nature and consequences of the offence of blasphemy committed by a Muslim after which it considers the question of whether the Ḥanafī School treats blasphemy *per se* as a separate offence from apostasy.

7.1 DETERMINING THE SCOPE OF THE OFFENCE OF BLASPHEMY

The jurists discuss the consequences of the crime of blasphemy in their manuals of law. However, some of the jurists devoted whole books or larger sections of their books to the analysis of the consequences of blasphemy. Foremost among them is the Andalusian judge Abū 'l-Faḍl 'Iyāḍ b. Mūsā b. 'Iyāḍ (d. 544 AH/1149 CE), a great jurist of the Mālikī School, who worked on elaborating the rights of the Prophet, upon him blessings and peace and, in that context, devoted sections to the issue of blasphemy in *al-Shifā bi-Ta'rīf Ḥuqūq al-*

Muṣṭafā.[1]The other significant work on this issue is by the famous Ḥanbalī jurists Taqī al-Dīn Aḥmad b. 'Abd al-Ḥalīm Ibn Taymiyyah al-Ḥarrānī (d. 728 AH/1328 CE) titled *al-Ṣārim al-Maslūl 'alā Shātim al-Rasūl*.[2] These two works have influenced all jurists of the various schools coming after them, even when some of them disagreed with these great jurists on some of the conclusions. The great Shāfi'ī jurist Taqī al-Dīn 'Alī b. 'Abd al-Kāfī al-Subkī (d. 756/1355), for instance, disagreed with Ibn Taymiyyah on some of his findings, but he nevertheless relied greatly on the work of Ibn Taymiyyah and even the title of his book shows that influence: *al-Sayf al-Maslūl 'alā Man Sabb al-Rasūl*.[3] Finally, Muḥammad Amīn b. 'Umar Ibn 'Ābidīn al-Shāmī (d. 1252 AH/1836 CE), presumably the greatest of the later Ḥanafī jurists, not only summarized the works of these three great jurists, but also gave a thorough analysis of the manuals of the Ḥanafī School establishing beyond any doubt the official position of the Ḥanafī School on issues relating to blasphemy in his *risālah* titled *Tanbīh al-Wulāh wa al-Ḥukkām 'alā Aḥkām Shātim Khayr al-Anām aw Aḥadi Aṣḥābih al-Kirām*. This *risālah* was included in the compilation of his other *rasā'il* in *Majmū'at Rasā'il Ibn 'Ābidīn*,[4]and has recently been published separately in the form of a booklet.[5]

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[1] Many editions of the book are available. The one used in this Dissertation is edited by'Āmir al-Jazzār (Cairo: Dār al-Ḥadīth, 2004).

[2] The edition used in this dissertation is edited byMuḥammad b.'Abdullāh b. 'Umar al-Ḥalwānī and Muḥammad Kabīr Aḥmad Shūdarī (Riyadh: Ramādī, 1417/1997).

[3]Edited byIyād Ahmad al-Ghawj (Amman: Dār al-Fatḥ, 1421/2000).

[4] Damascus: al-Maṭba'ah al-Hāshimiyyah, 1325AH.

[5]Edited byAbū Bilāl al-'Adanī and Murtaḍā b. Muḥammad (Cairo: Dār al-Athar, 1428/2007).In this dissertation, this edition has been used.

7.2 Punishment for a Muslim Who Commits Blasphemy

The jurists generally link this issue with the concept of apostasy as blasphemy against the Prophet, peace be on him, necessarily amounts to apostasy. However, some jurists deem blasphemy a separate and distinct offence having a specific punishment. This issue will be analyzed in detail in this section.

7.1.1 Views of the Jurists on the Issue

Qāḍī 'Iyāḍ reports:

> Abū Bakr b. al-Mundhir says: scholars have a consensus that whosoever commits blasphemy against the Prophet (Peace be on him), he must be punished with death. This is the opinion, *inter alia*, of Mālik b. Anas, al-Layth, Aḥmad and Isḥāq. The same is the view of al-Shāfi'ī.[6]

This is a very important passage. It records the consensus of the jurists on the death punishment for the one who commits blasphemy. Apparently, the statement is general and it covers the case of the convict who was a Muslim before committing this offence. This is the statement generally quoted by contemporary scholars for proving that the punishment of blasphemy is fixed and immutable by the consensus of the jurists. However, it is important to note here that the passage does not mention the names of many prominent jurists, the most

[6] *Al-Shifā*, 428.

obvious being Abū Ḥanīfah, in the list of the jurists who agree on this point! Can one imagine the consensus of the jurists on a point on which Abū Ḥanīfah disagrees with them?

Let us see what Qāḍī 'Iyāḍ says about the opinion of Abū Ḥanīfah. In the very next passage, he reports: "The same is the opinion of Abū Ḥanīfah and his companions as well as of al-Thawrī, the jurists of al-Kūfah and al-Awzā'ī, *if the convict was a Muslim* as they consider it apostasy."[7] This is very important passage. Here, Qāḍī 'Iyāḍ explicitly asserts that Abū Ḥanīfah considers blasphemy by a Muslim a form of apostasy.

What about the claim of consensus (*ijmā'*) on the death punishment of the convict? What Qāḍī 'Iyāḍ has said above clearly suggests that consensus is found on this punishment only when the culprit was a Muslim, and that some of the jurists, particularly the Ḥanafīs, have a different position about the punishment of a non-Muslim who commits this crime. What Qāḍī 'Iyāḍ has said next proves this conclusively. Thus, he reports: "Abū Sulaymān al-Khaṭṭābī says: I know of no Muslim who disagrees with the death punishment of the convict *when the convict is a Muslim*."[8]

These significant passages record two important points for our purpose:

- that the consensus of the jurists on the issue relates to the case of a Muslim convict; and

[7] Ibid.
[8] Ibid., 429.

- that the basis of the consensus is the fact that blasphemy for a Muslim convict amounts to apostasy.

Hence, the consensus of the jurists does not relate to the case of a convict who was a non-Muslim before the commission of the offence. Ibn 'Ābidīn says about the evidence for the consensus of the jurists on the issue:

> If a person examines the lives of the Companions of the Prophet (Peace be on him), he comes to the conclusion that they had a consensus on this rule, because this rule has been reported from them in a great number of cases and none among them expressed his disagreement or dissatisfaction with the decisions of the courts.[9]

As to why the act of such a culprit amounts to apostasy, the jurists cite many Qur'ānic verses and Prophetic traditions as well as the precedents of the Companions. These evidences will be briefly analyzed here.

7.1.2 Blasphemy as a Form of Apostasy: Legal Evidence

One of the most oft-quoted verses is: "Those who malign Allah and His Messenger, Allah has cursed them in this world and in the hereafter and He has prepared for them a humiliating punishment."[10] The jurists also cite the famous tradition about the incident of *Ifk* (false

[9] *Tanbīh al-Wulāh*, 22-23.

[10] Qur'ān 33:57.The word used in these verses is *adhā*, which literally refers to a little trouble; the word used for a greater trouble is *ḍarar*. See: Ibn 'Ābidīn, *Tanbīh al-Wulāh*, 24.

allegation against 'Ā'ishah(God be well-pleased with her). This tradition reports that the Prophet (peace be on him) gathered the Companions and gave them a sermon about the grievous calumny against his wife:

> Allah's Messenger said: "Who will support me to punish the person who has hurt me by slandering the reputation of my family? Sa'd b. Mu'ādh got up and said: "O Allah's Messenger! By Allah, I will relieve you from him; if that man is from the tribe of the Aws, then we will chop his head off; and if he is from among our brothers, the Khazraj, then order us, and we will fulfill your order."[11]

The jurists argue on the basis of the statement of Sa'd b. Mu'ādh, Allah be well-pleased with him, that the rule of death punishment for the one who commits blasphemy against the Prophet (peace be on him) was well known for them. Moreover, this is also deemed tacit approval by the Prophet (peace be on him), called *sunnah taqrīriyyah*, because he did not say that killing the culprit was not allowed.[12]

Another argument from the *sunnah* is the tradition about 'Abdullāh b. Sa'd b. Abī Sarḥ. According to this report the Prophet (peace be on him) announced general amnesty for the whole population of Makkah, except for four men and two women who were specifically named and the name of Sa'd was included in this list. However, when the Prophet (peace be

[11]Bukhārī, Kitāb al-Maghazi, Bāb Hadith al-Ifk.

[12]*Tanbīh al-Wulāh*, 24. Tacit approval of the Prophet (peace be on him) called *sunnahtaqrīriyyah* is one of the sources of Islamic law which establishes the permissibility of the act. See for details: *Uṣūl al-Sarakhsī*, 2:85ff.

on him) called people for the oath of allegiance, 'Uthmān b. 'Affān, God be pleased with him, brought Sa'd and sat him before the Prophet (peace be on him) asking him to take the oath from him. The Prophet (peace be on him) raised his head and looked at him for a while, as if he was refusing him the oath. 'Uthmān repeated himself two times after which the Prophet (peace be on him) took oath from Sa'd. Then, he turned to his Companions and said:

> "Was there not a single wise person among you who, seeing my reluctance to take the oath from him could rise and slay him?" They replied: "O Messenger of Allah! We did not know what was going through your mind; would that you had signaled (your wish) to us. He said: it is unbecoming of a Prophet to have treachery in his eye (*khā'inat al-a'yun*).[13]

Sa'd b. Abī Sarḥ was among the scribes of revelation in the beginning. Later, he committed apostasy, turned to paganism and allied with the people of Makkah. The Prophet (peace be on him) had ordered his killing, but took his oath and spared him after he was brought to him by 'Uthmān. Ibn 'Ābidīn rightly infers from this the rule that the repentance of such convict is accepted. This issue will be analyzed in detail later.

Another argument from the *sunnah* is the one reported by Qāḍī 'Iyāḍ and other authorities. According to this report, the Prophet (peace be on him) declared: "If someone

[13] Abū Dawud Sulayman b. al-Ash'ath al-Sijistānī, *al-Sunan*, Kitāb al-Jihad, Bāb Qatl al-Asīr wa lā Yu'raḍ 'alayh al-Islām.

commits blasphemy against any of the Prophets, kill him; and if a person commits this act against any of my companions, beat him."[14]

Many texts prescribe death punishment for the apostate. These include, *inter alia*, the saying of the Prophet (peace be on him): "Kill the one who changes his religion."[15] Some modern scholars have tried to link the punishment of apostasy with the issue of rebellion. A detailed analysis of this issue is beyond the scope of the present dissertation. It may be commented briefly that as far as the jurists are concerned, particularly those belonging to the Ḥanafī School, they deem apostasy *per se* as the offence punishable with death even if the apostate does not commit any act of rebellion against the political authority.[16]

7.3 Blasphemy *Per Se* or Apostasy?

Some of the later jurists in the Ḥanafī School have asserted that death punishment is awarded for blasphemy *per se* and not because it is a form of apostasy.Before getting into the issue, it is appropriate to settle a few other issues about the punishment of apostasy so as to ascertain the nature and consequences of this punishment.

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[14] *Al-Shifā*, 433.

[15] Bukhārī, Kitāb al-Jihād wa 'l-Siyar, Bāh Lā Yu'ādhdhabu bi-'Adhāb Allāh.

[16] For a detailed discussion on the punishment of apostasy and the relevant legal evidences, see: Sarakhsī, *al-Mabsūṭ*, 10:107-109.

7.3.1 Difference between Alien and Apostate

First, the jurists distinguish between the status of an ordinary non-Muslim and that of an apostate. Thus, for instance, an ordinary non-Muslim – even an alien (*ḥarbī*) – can become a permanent resident of *Dār al-Islām* after agreeing to pay *jizyah* and acquire protection of law equal to that accorded to a Muslim.[17] This is not permitted for an apostate.[18] Similarly, an ordinary non-Muslim can be given temporary *amān* (quarter) for entering into *Dār al-Islām*under the full protection of the Muslim community and government;[19] this also is not permitted for an apostate, except if the ruler deems it necessary and helpful for his re-embracing Islam.[20] From these and similar rules of Islamic law, a fundamental principle emerges: that the underlying cause of the death punishment for apostate is not infidelity *per se*, but infidelity *after* embracing Islam.[21]

Another important principle that emerges from these rules is: the court has no choice but to award death punishment to the apostate if he does not repent. In other words, the punishment is fixed and no one has the right to pardon or commute it. This is a characteristic of the *ḥadd* punishment, as explained in detail in Chapter 2 of this dissertation. This point needs a bit further elaboration.

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[17]Ibid., 10:93; Marghīnānī, *al-Hidāyah*, 2:396. See for details: Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat awr BaghāwatIslāmī Sharī'At awr Bayn al-AqwāmīQānūn kī-Islām mēṇ* (Gujranwala: Al-Sharī'ah Academy, 2012), 561-570.

[18]Marghīnānī, *al-Hidāyah*, 2:402.

[19]Ibid., 2:396-98.

[20]Ibid., 2:382.

[21]Sarakhsī, *al-Mabsūṭ*, 10:118. Ibn 'Ābidīn, *Tanbīh al-Wulāh*, 31.

7.3.2 Punishment of Apostasy: Is It *Ḥadd*?

Some contemporary scholars presume that *ḥudūd* punishments are confined to only those punishments which are mentioned in the *Kitāb al-Ḥudūd* in a *fiqh* manual.[22] This is a wrong presumption. Thus, for instance, the Ḥanafī jurists generally mention only the *ḥudūd* of *zinā* and *qadhf* in *Kitāb al-Ḥudūd*, while they mention the punishments for *ḥirābah* (highway robbery), *sariqah* (theft), *shurb al-khamr* (drinking wine) and *iskār* (intoxication) in separate chapters and specifically call them as *ḥudūd*.[23] Hence, it is the legal features of the punishment which explain if it is *ḥadd*, *ta'zīr* or *siyāsah*.[24] Significantly, all the characteristic of the *ḥadd* punishment mentioned by the Ḥanafī jurists are found in the punishment of apostasy. As such, it qualifies to be considered a *ḥadd* punishment.[25]

An objection may be raised here: *ḥadd* punishment is not suspended by the repentance of the convict while the punishment of apostasy cannot be enforced when the culprit repents and re-embraces Islam. A deeper analysis, however, shows that the underlying cause of the death punishment of apostate is not apostasy *per se*, but apostasy accompanied by the

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[22] The Council of Islamic Ideology in its 2006 Report on Reforms in the Hudood Laws came up with an interesting theory about the 'evolution' of the doctrine of *ḥadd* in Islamic law. The author of the present dissertation has criticized this theory in detail. See: Ahmad, *ḤudūdQawānin*, 49-56.

[23] This is true of all the three giants of the Ḥanafī School: Sarakhsī, Kāsānī and Marghīnānī.

[24] These characteristics have been explained in detail in Chapter Four of this dissertation.

[25] Ibn 'Ābidīn explaining the relationship of this punishment with the *Maqāṣid al-Sharī'ah* (objectives of Islamic law) says: "The *ḥadd* of apostate protects the most important of the interests for human beings because preservation of *dīn* (religion) is more important than the four interests mentioned earlier [preservation of life, intellect, progeny and wealth]. Moreover, if one apostate is left unpunished, other people of weaker faith will follow suit" (*Tanbīh al-Wulāh*, 31). For a discussion on the theory of the objectives of Islamic law, see: Ghazālī, *al-Mustasfa*, 1:213-222.

intention to continue with infidelity (*iṣrār 'alā 'l-kufr*).[26] In other words, the *ratio* of the rule comprises two elements and as such apostasy alone does not attract death punishment when the apostate re-embraces Islam.

It is an established fact that the other *ḥudūd* punishments are not suspended by the repentance of the convicts, and perhaps this was the reason why al-Ḥasan al-Baṣrī (d. 110 AH/728 CE) is reported to have opined that death punishment should be enforced even if the apostate re-embraces Islam.[27] However, the majority of the jurists held that repentance would suspend the punishment and that the *ratio* of the rule comprises of two elements. These jurists cite many texts to substantiate this position. These include, *inter alia*, the following verse: "Say to the unbelievers if they desist, that which is past shall be forgiven them."[28] Similarly, the Prophet (peace be on him) said: "Islam quashes what precedes it."[29]

These texts are general and, in their generality, they also cover apostasy. An important similar principle is found in the law about *zinā* which prescribes that when the offence of *zinā* is proved by the confession of the accused and he retracts from his confession, the *ḥadd* of *zinā* is suspended and the case is not re-initiated.[30]

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[26]Sarakhsī is explicit on this point: "Death punishment is awarded not on apostasy but on persistence to continue with infidelity (*isrār 'alā 'l-kufr*). Do you not see that when he re-embraces Islam, his death punishment is not enforced due to lack of persistence on infidelity? (*Al-Mabsūṭ*, 10:118).

[27]*Tanbīh al-Wulāh*, 31.Subkī doubts the authenticity of the report ascribing this view to al-Ḥasan (*al-Sayf al-Maslūl*, 152).

[28]Qur'ān 8:38.

[29]Muslim, Kitāb al-Imān, Bāb al-Islām Yahdimu Mā Qablahū; Musnad Aḥmad, Musnad al-Shāmiyyīn, Ḥadith 'Amr b. al-'Āṣ.

[30]Sarakhsī, *al-Mabsuṭ*, 9:109. Sarakhsī asserts that this rule applies to all *ḥudūd* which are pure rights of God. Hence, the only exception is that of the *ḥadd* of *qadhf* (Ibid.).

Another objection may be that the law of the *ḥudūd* does not distinguish between male and female convicts and is equally applicable to all; while according to the Ḥanafī jurists, a female apostate is not given death punishment; rather, she is imprisoned for life or until she re-embraces Islam.[31] The answer to this objection is that the Ḥanafī jurists acknowledge this as an exception from the general principle of law because of the general prohibition of killing an infidel woman. Many Companions report that the Prophet (peace be on him) prohibited killing women and children in war.[32] The Ḥanafī jurists cite these precedents as bases for the rule that the female apostate cannot be given death punishment.[33]

7.3.3 Blasphemy: A Grievous Form of Apostasy

If a Muslim commits blasphemy, it definitively amounts to apostasy, as no act of apostasy can be imagined which is not deemed infidelity (*kufr*) by Islamic law and when a Muslim commits an act of infidelity he is deemed apostate. Hence, all the rules of apostasy will apply and his death punishment will attract the rules of the *ḥudūd* punishments.[34]

For proper legal analysis, the most important legal question is: what is the *ratio* of this rule? Is the convic awarded death punishment *because of apostasy*, or because of blasphemy, which is *a particular form of apostasy*, or because of blasphemy *as well as* apostasy?

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[31]Marghīnānī, *al-Hidāyah*, 2:407.

[32] See, for instance: Bukhārī, Kitāb al-Jihād wa al-Siyar, Bāb Qatl al-Nisā' wa al-Ṣibyān. See for a detailed discussion: Muhammad Mushtaq Ahmad, "JangīAkhlāqiyātSīrat-e-Nabawī awr Fiqh-e-Islāmi ki Rōshnī mēṇ", *Peshawar Islamicus*, 4:2 (2013), 1-25.

[33]Marghīnānī, *al-Hidāyah*, 2:406-07.

[34] Ibn 'Ābidīn narrated many passages to this effect from the classical and later sources of the Ḥanafī School. See: *Tanbīh al-Wulāh*, 50-53.

7.4 REPENTANCE OF THE CONVICT

The repentance of such a convict has been an issue of contention in the contemporary debate on blasphemy law.[39] Many different passages of the jurists belonging to various schools are cited often without caring for analytical consistency and, sometimes, ignoring the context of the passages. Like all other issues analyzed in this dissertation, here also one should look for the principles of law and argue on the basis of those principles.

7.4.1 The Ḥanafī Position? Testimony of the Jurists of Other Schools

Among the jurists, one finds three trends:

- Some jurists do not accept repentance because they hold that this is a *ḥadd* punishment for blasphemy *per se*, and not for blasphemy as a form of apostasy;
- Some apply the rules of apostasy on blasphemy and, as such, they accept the repentance of the convict, unless he is deemed a potential threat to the community in which case he is given punishment under the doctrine of *siyāsah* and not as a *ḥadd* punishment; and
- Finally, some look at blasphemy as a form of *zandaqah* (heresy) and that is why they do not accept the repentance of the convict.

[39] Religious scholars who appeared before the FSC in the *Ismail Qureshi Case* gave different opinions on the effect of repentance (See paras 3-10 of the judgment) and the FSC found it better to cite the verses and traditions relied upon by these scholars instead of analyzing the legal principles on which the views of these scholars were based.

All the three opinions are found in the Mālikī School. Thus, Qāḍī ʿIyāḍ, who belongs to the same School and who is personally of the opinion that the repentance of such a person is not acceptable,[40] honestly reports:

> Abū Bakr b. al-Mundhir says: scholars have a consensus that whosoever commits blasphemy against the Prophet (peace be on him), he must be punished with death. This is the opinion, *inter alia*, of Mālik b. Anas, al-Layth, Aḥmad and Isḥāq. The same is the view of al-Shāfiʿī. The same is the opinion of Abū Ḥanīfah and his companions as well as of al-Thawrī, the jurists of al-Kūfah and al-Awzāʿī, if the convict was a Muslim because they consider it apostasy. Walīd b. Muslim has reported similar opinion from Mālik ... Saḥnūn considered that blasphemy against the Prophet is apostasy of the kind of *zandaqah*. He reported this opinion from many jurists of the Mālikī School and he recorded the arguments of this opinion.[41]

At another place, he says even more explicitly: "Abū Ḥanīfah and his companions are of the opinion that a Muslim who declares himself free from the Prophet (peace be on him) or bellies him becomes apostate and is thus liable to death punishment, except when he repents."[42]

Ibn Taymiyyah, a great jurist of the Ḥanbalī School and an authority on blasphemy law, gives exactly the same report about the opinion of the Ḥanafī jurists. Thus, he says:

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[40] *Al-Shifā*, 456-58.
[41] Ibid., 428-29.
[42] Ibid., 441.

> Large groups of our [Ḥanbalī] jurists say that the one who commits blasphemy against the Prophet (peace be on him) shall be punished with death and that his repentance is not acceptable irrespective of whether the culprit is Muslim or non-Muslim... A majority of these jurists, while giving their opinion, also mention that this is against the opinion of Abū Ḥanīfah and al-Shāfi'ī. These two, that is to say Abū Ḥanīfah and al-Shāfi'ī, are of the opinion that if the convict is Muslim, he will be asked to repent. If he repents [punishment will not be imposed on him]; otherwise, he will be given death punishment like the apostate.[43]

At another place, he reports:

> We have mentioned that the famous opinion of Mālik and Ahmad is that he will not be asked to repent and that it will not suspend his death punishment. This is the opinion of al-Layth b. Sa'd... However, the acceptance of repentance has also been reported from Mālik and Ahmad and this has been the opinion of Abū Ḥanīfah and his companions and this is also the famous opinion of the Shāfi'ī School. The basis of this opinion is that the repentance of the apostate is acceptable.[44]

Taqī al-Dīn al-Subkī (d. 756 AH/1355 CE), a great jurist of the Shāfi'ī School, and an authority on the law of blasphemy, gives similar report about the position of Abū Ḥanīfah. Thus, he says:

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[43] *Al-Ṣārim al-Maslūl*, 3:556.
[44] Ibid., 3:578-79.

> The gist of what has been reported from the Shāfi'ī jurists is that if the culprit does not re-embrace Islam, be must be given death punishment; but if be re-embraces Islam and the blaspbemy also amounted to *qadhf*, there are three opinions of death punishment, lashes or no punishment; and if the blasphemy did not amount to *qadhf*, I know of no report from the Shāfi'ī jurists, except that his repentance is acceptable... This was what I concluded from the analysis of the opinions of the Shāfi'ī jurists.[45]

After this, he gives his findings about the views of the Ḥanafī jurists:

> The views of the Ḥanafī jurists regarding the acceptance of the repentance of the convict are similar to those of the Shāfi'ī jurists. Rather, the Ḥanafī jurists have no other opinion, except the acceptance of the repentance of the convict.[46]

As Ibn 'Ābidīn points out, the testimony of these great jurists about the position of Abū Ḥanīfah is enough to prove that Abū Ḥanīfah brought the issue of blasphemy under the doctrine of apostasy.[47] The same is further substantiated by the texts of the Ḥanafī manuals in many different ways. These texts are analyzed below.

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[45] *Al-Sayf al-Maslūl*, 173.
[46] Ibid.,174.
[47] *Tanbīh al-Wulāh*, 50.

7.4.2 Exploring the Ḥanafī Manuals

Imām Abū Yūsuf Ya'qūb b. Ibrāhīm al-Anṣārī (d. 183 AH/799 CE), the successor of Imām Abū Ḥanīfah in his School, explicitly asserts in *Kitāb al-Kharāj* in the Chapter on the Rules ahout Those Who Renounce Islam:

> Any male Muslim who commits blasphemy against the Prophet (peace be on him), or rejects his message, or ascribes any defect or shortcoming to him, renounces faith in Allah and his marriage to his wife is annuled. If he repents [well and good]; otherwise, he is given death punishment. The same is the rule about a female, except that, according to Abū Ḥanīfah, the convict will not be given death punishment, but will be forced to re-embrace Islam.[48]

This passage, indeed, is a masterpiece of legal drafting. It very clearly and very accurately gives the gist of the Ḥanafī law on the issue. His statement "if he repents [well and good]; otherwise, he is given death punishment" can only mean that repentance suspends his death punishment. Hence, those among the later jurists and some contemporary scholars who assert that acceptance of repentance means 'for the purpose of hereafter' are clearly mistaken.[49]

Imām Abū Ja'far Aḥmad b. Muḥammad b. Salāmah al-Ṭaḥāwī (d. 321 AH/933 CE), one of the *mujtahidīn fi al-masā'il* in the Ḥanafī School, says: "Our companions say about the

[48] Abū Yūsuf Ya`qub b. Ibrāhīm al-Anṣārī, *Kitāb al-Kharāj* (Beirut: Dār al-Ma`rifah, 1399/1979), 182.

[49] Some of the later Ḥanafī jurists have expressed this view. Ibn 'Ābidīn takes note of it and gives detailed arguments against this proving that this is not the official position of the Ḥanafī School. See: *Tanbīh al-Wulāh*, 70-71.

one who is a Muslim and yet insults the Prophet (peace be on him) or finds a fault in him: he becomes apostate; if he is *dhimmī*, he is given *ta'zīr*, but he is not killed."[50]

This position is reiterated by many of the later jurists. For instance, Shaykh al-Islām al-Sa'dī says: "If someone commits blasphemy against the Prophet (peace be on him), he is an apostate. His legal position is that of the apostate and he is dealt with in the same way as the apostate."[51] Many other jurists have asserted even more explicitly: "If someone commits blasphemy against the Prophet (peace be on him), he renounces faith and his repentance can only be through his reembracing the faith."[52]

From another aspect, many of the Elders of the School mention in the chapter of apostasy statements that amount to renunciation of faith and they generally mention blasphemy against the Prophet (peace be on him) in the list, declaring that a person making such statement "renounces faith" or that "he is an infidel". For instance, in *Tatārkhāniyyah*, it

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[50]Abū BakrAḥmad b.'Alī al-Jaṣṣās al-Rāzī, *Mukhtaṣarīkhtilāf al-'Ulamā'*, ed. 'AbdullāhNadhīr Ahmad, (Beirut: Dār al-Bashā'iral-Islāmiyyah, 1416/1995), 3: 454. "He is not killed" means that he is not awarded death punishment as a *ḥadd*; otherwise, some of them may be given death punishment by way of *siyāsah*. See Section 8.1.3 in the next Chapter.

[51]Quoted by Ibn 'Ābidīn, *Tanbīh al-Wulāh*, 51.

[52]Ibid., 52. Even more detailed and explicit is the following passage: "If a person commits blasphemy against the Prophet (May Peace be on him), he becomes infidel and his repentance can only be through reaffirmation of the faith. Some of the jurists of the latter periods have said that his repentance is not acceptable at all and that he will be given death punishment as *ḥadd*. The basis for this opinion is the commandment of the Prophet (May Peace be on him) at the eve of the cnnquest of Makkah 'kill the one who commits blasphemy against any of the prophets'. However, the correct opinion is that such a person will not be given death punishment when he reaffirms faith because after issuing the aforementioned commandment regarding death punishment of those who commit blasphemy against the Prophet (May Peace be on him), he prohibited 'Alī (May Allah he pleased with him) from killing those among the people of Makkah who declared that their belief in the unity of God and the prophethood of Muhammad. This is because the legal consequence of blasphemy is that the culprit becomes infidel and as such deserves death punishment [for apostasy], but reaffirmation of faith nullifies this infidelity and as such it also suspends death punishment." (*Ḥāwī al-Zāhidī bi Ramz al-Asrār*, as quoted by Ibn 'Ābidīn, *Tanbīh al-Wulāh*, 52.)

is mentioned: "A person renounces faith if he does not accept any of the Prophets, or ascribes any defect to any of the Prophets, or does not like any of the practices of the Prophet (peace be on him)."[53] Ibn 'Ābidīn explains:

> These and similar words have been explicitly equated blasphemy with apostasy without any qualification by anyone that repentance from these statements is not acceptable nor that the person making such statement must be given death punishment even if he re-embraces Islam. Rather, they leave these statements unqualified, meaning thereby that the rules they mention in the beginning of the chapter of apostasy, including the rule that he will not be given death punishment if he re-embraces Islam, are applicable to him. Had the rule for these statements been different from other statements of apostasy, they must have explained it by declaring that such person would be given death punishment even if he re-embraced Islam.[54]

However, this is not merely an inference. As noted earlier, there are many explicit verdicts of the jurists to the same effect.

From yet another perspective, the texts of the *mutūn mu'tabarah* of the school also give the same rule in a general manner. Thus, in *Mukhtaṣar al-Qudūrī*, it is declared:

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[53]Quoted by Ibn 'Ābidīn, *Tanbīh al-Wulāh*, 53.
[54]*Tanbīh al-Wulāh*, 54.

> When a Muslim renounces his belief in Islam, he will be asked to re-embrace Islam. If he has any doubt, it must be removed. He will be detained for three days. Thereafter, if he embraces Islam [well and good]; otherwise, death punisbment will be imposed on him.[55]

Similar rules have been mentioned in other *mutūn* including, *inter alia*, *al-Hidāyah* and *al-Jāmi' al-Ṣaghīr* of Imām Shaybānī. As explained above, the one who commits blasphemy apostasizes and, as such, the rules mentioned in these *mutūn* about the apostate cover him. Otherwise, the drafters of the *mutūn* wouldhave explicitly excluded him.[56]

CONCLUSIONS

Blasphemy from the perspective of the Ḥanafī School includes disrespectful statements against God, the Qur'ān and any of the Prophets, upon them blessings and peace. A Muslim becomes apostate when he commits blasphemy and all the rules of apostasy become applicable.

Thus, if the convict is male, he deserves death punishment as the *ḥadd* of apostasy if he does not repent. Being a *ḥadd* crime, however, it must be proved through the strict standard of proof required for proving the commission of a *ḥadd* crime. Moreover, it will not be enforced if a *shubhah* exists. Thus, this crime necessitates *mens rea*. Moreover, the convict shall be given opportunity to repent. Following his repentance, if the court is satisfied that he

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[55]Abū 'l-Ḥusayn Aḥmad b. Muḥammad al-Qudūrī, *Mukhtaṣar al-Qudūrī fi al-Fiqh al-Ḥanafi*, ed. Kāmil Muḥammad Muḥammad 'Uwaydah (Beirut: Dār al-Kutub al-'Ilmiyyah, 1418/1997), 237.

[56]*Tanbīh al-Wulāh*, 54-55.

has mended his ways, his punishment will not be enforced and his case shall be disposed of. If the convict is a female, she cannot be given the death punishment of apostasy and shall, rather, be imprisoned and efforts shall be made to convince her to renounce disbelief and re-embrace Islam.

Some of the later Ḥanafī jurists, influenced by the views of Qāḍī ʿIyāḍ al-Mālikī and Ibn Taymiyyah al-Ḥanbalī, adopted a different approach to the issue. As their views go against the established position of the School and none of them is based on the principles recognized and upheld by the School, they have no value and, for the followers of the School, they are null and void.

CHAPTER EIGHT:BLASPHEMY BETWEEN *ḤADD* AND *SIYĀSAH*

INTRODUCTION

If a Muslim is given the punishment of apostasy when he commits blasphemy, it is more than obvious that the same punishment cannot be given to a non-Muslim as he can never be deemed an apostate. This is what the Ḥanafī jurists have explicitly stated and this is clear in the light of the general principles of law. A non-Muslim may have been deemed to have increased in *kufr*, but this increase in *kufr* can never be deemed apostasy.[1] In other words, the very nature of the act is different; hence, the punishment has to be different. The Ḥanafī jurists discuss this issue under the concept of the termination of the contract of *amān* (peace), as they discuss the issue of Muslim culprit under the doctrine of apostasy. Hence, it is necessary to briefly discuss the kinds of *amān* in Islamic law and the classification of non-Muslims on the basis of the kind of *amān* concluded with them; following which the principles about the termination of the contract of *amān* will be briefly discussed. It is only then that the nature of the offence is clearly determined and the legal consequences of the offence may be elaborated.

[1]Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:447-48; Marghīnānī, *al-Hidāyah*, 2:405.

8.1 Legal Status of a Non-Muslim Accused

The legal status of the non-Muslim accused depends on the existence and nature of the contract of peace which he concludes with Muslims. In the absence of such a contract, the non-Muslim cannot enjoy the protection of Islamic law and the Muslim courts cannot enforce his legal rights. Similarly, the temporary or permanent nature of the contract of peace can also affect his legal position. From another perspective, some acts on the part of the non-Muslim can terminate the contract of peace while others cannot terminate it, even if those acts were punishable under the law of the Muslim territory. This is how the Muslim jurists determine the legal consequences of blasphemy committed by a non-Muslim.

8.1.1 Classification of Non-Muslims

The jurists divided non-Muslims into three basic categories: *ḥarbī*, *musta'min* and *dhimmī*. *Ḥarbī* was a non-Muslim who was a permanent resident of a territory beyond the territorial limits of *Dār al-Islām*;[2] he could enter *Dār al-Islām* only after concluding a contract of peace (*amān*) with an individual Muslim or the Muslim community through the authorized officials.[3] After the contract of *amān*, the position of the *ḥarbī* would change to that of a *musta'min* (literally, the one who seeks *amān*). If a *ḥarbī* or a *musta'min* would wish to become a permanent resident of the *Dār al-Islām*, he was required to conclude a contract of

[2] This did not mean that he was deemed an "enemy" *by definition*, as Bernard Lewis (b. 1916), the 'guru of the neo-cons', asserts in his *Political Language of Islam* (Karachi: Oxford University Press, 1987), 77. Rather, this term is equivalent to "alien" in common law. Sometimes a *Ḥarbi* could convert to *muḥarib* in the same way as an alien can become "alien enemy."

[3] See for details of the doctrine of *amān*: Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:411-458.

perpetual peace, called *dhimmah* with the government of the *Dār al-Islām*. In that event, he would be called *dhimmī*. A *ḥarbī* could not enjoy the protection (*'iṣmah*) of Islamic law because the courts of the Islamic state lacked jurisdiction on him.[4] A *musta'min* was protected by the law of the land in the same way as the rights of a *dhimmī* were protected.[5]

The temporary or perpetual contract of *amān* could be concluded either by the explicit statement or implied conduct of the non-Muslim.[6] Moreover, people of the conquered territory could also be given the status of *dhimmīs* if they were willing to live under Muslim rule and Muslims were willing to grant them that status.[7]

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[4] On the application of the principle of territorial jurisdiction in the Ḥanafī jurisprudence, see: Ahmad, "The Notions of *Dār al-Ḥarb* and *Dār al-Islām*", 5-37.

[5] However, certain legal duties were imposed only on *dhimmīs* and not on *musta'mins*. For example, the law regarding the *ḥudūd* punishments was not applicable to *musta'mins*, althongh *dhimmīs* could be subjected to *ḥudūd* punishments, except the punishment for drinking wine. See, Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:187–189 and 214.

[6] For example, if a non-Muslim *musta'min* marries a non-Muslim resident of *Dār al-Islām*(*dhimmiyyah*) he does not thereby become a *dhimmī*; rather, he remains a *musta'min* "because by this marriage, he does not thereby become a permanent resident of our *dar*. Rather, [we will presume that] he came to us for trade purposes and traders sometimes marry in places where they do not want to settle permanently (*tawaṭṭun*)" (Sarakhsī, *al-Mabsūṭ*, 10:91). However, if he overstays in *Dār al-Islām* the ruler should give him a notice to either leave the territory or accept the status of *dhimmī*. If he chooses to become a *dhimmī*, or does not leave the territory after the time prescribed in the notice, the ruler may impose *jizyah* on him thereby making him *dhimmī*. This is not compulsion "because his overstay after the lapse of the time prescribed in the notice implies that he is willing to settle permanently in our *dar*" (Ibid). When a non-Muslim woman comes to *Dār al-Islām*with *aman* and marries a Muslim or *dhimmī*, she thereby becomes *dhimmiyyah* because this marriage implies that she wants to permanently settle in *Dār al-Islām*(Ibid).

[7] This was because under the prevalent legal order at that time, conquest was one of the lawful means to acquire the title of a territory and its people. It was only in the aftermath of the First World War that the international legal order outlawed this mode of acquiring territory. Hence, this rule will not apply in the contemporary legal order. See for details: Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2008), 500-502.

There was another class of non-Muslims called *ahl al-muwāda'ah*. They were people with whom Muslims had concluded a peace treaty (*muwāda'ah*).[8] Their legal position was like that of the *musta'mins* and they had the same rights and obligations, although they were not required to get fresh quarter (*amān*) before entering the *Dār al-Islām*.[9]If any among them entered another non-Muslim state and Muslims captured that territory, Muslim were bound to respect his rights even there because "his position is like that of a *dhimmī* who enters a foreign territory, which later comes under the domination of Muslims."[10]

8.1.2 Termination of the Contract of Peace

According to Ḥanafī jurists, the contract of *dhimmah* is *lāzim* (binding) for Muslims, so that they cannot unilaterally denounce it under any circumstance, but it is *ghayr lāzim* (non-binding) for non-Muslims.[11] On the other hand, they hold that the contract of *muwāda'ah* is *ghayr lāzim* for both parties so that any of the parties may terminate the contract after giving due notice to the other party.[12]

Now, what are the acts that may amount to termination of the contract of *dhimmah* by non-Muslims? According to Ḥanafī jurists, there are only two factors that terminate the

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[8] See for a discussion on the Qur'ānic verses about treaties: Muhammad Mushtaq Ahmad, "Alliance and Treaty" in Muzaffar Iqbal et al. (eds.), *The Integrated Encyclopedia of the Qur'ān* (Sherwood Park: Centre for Islamic Sciences, 2013), 1:155-163.

[9] Sarakhsī, *al-Mabsūṭ*, 10:89.

[10]Ibid.

[11] Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:446.

[12] See for more details: Muhammad Mushtaq Ahmad, "Peace Treaties and the Conduct of Jihad" in Nedzad Basic and Anwar Hussain Siddiqui, eds., *Rethinking Global Terrorism* (Islamabad: International Islamic University, 2008), 133–58.

contract of *dhimmah*, namely, permanent settlement in a territory outside *Dār al-Islām* and rebellion against Muslims, provided that all rebels are non-Muslims.[13] If a *dhimmī* refuses to pay *jizyah*, or makes insulting remarks about Islam or the Qur'ān, or commits blasphemy against any of the Prophets (peace be on them), or coerces a Muslim for abandoning his religion, or commits adultery with a Muslim woman, he does not, by any of these acts, terminate the contract of *dhimmah* according to Ḥanafī jurists.[14] Thus, Kāsānī says: "If a *dhimmī* commits blasphemy against the Prophet (peace be on him), his contract of *dhimmah* is not terminated as this is increase in *kufr*; when the contract remains intact with the original *kufr*, it is not terminated by increase [in that *kufr*]."[15] Marghīnānī explains the underlying principle in a more elaborate manner in these words: "Blasphemy against the Prophet (peace be on him) is *kufr*; when the *kufr* at the time of the conclusion of the contract could not become an obstacle in its conclusion, the *kufr* that came into existence after the contract was concluded cannot terminate it."[16]

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[13] A third factor is also mentioned, namely, embracing Islam. (*Bada'i` al-Sanai'i`*, 7:112) But, of course, this is not a cause of loss of citizenship.

[14] Jurists of the other sunni schools generally consider that the contract of *dhimmah* is terminated by these acts, although some of them hold that the contract is terminated only when it was mentioned in the contract that they must avoid such acts. (Ibn Qudāmah, *al-Mughnī*, 8:525; Abū 'Ubayd, *Kitābal-Amwāl*, 178; al-Dasūqī, *Ḥāshiyat al-Dasūqs*, 2:188; Shirbīnī, *Mughnī al-Muḥtāj*, 4:258)

[15] Kāsānī, *Badā'i' al-Ṣanāi'i'*, 9:447-48.

[16] This is based on an established general principle of law which holds that after the contract is concluded many acts are tolerated which may not be tolerated at the time of the conclusion of the contract. Commission of the Ottoman Jurists, *Majallat al-Aḥkām al-'Adliyyah*, Article 55.Some of the later jurists deviated from this established position of the School but their opinion could not replace the official position of the School. Thus, for instance, Kamāl al-Dīn Muhammad Ibn al-Humām al-Iskandarī asserts: "In my opinion, if blasphemy against the Prophet (peace be on him) or ascribing an unacceptable attribute to Allah, Most High, does not form part of their beliefs – such as ascribing son to Allah, Exalted and Sacred is He – he will be given death punishment if he publicly expresses such a statement and his contract will be terminated. However, if he does not publicly express it and was secretly caught, his contract is not terminated." (*Fatḥ al-Qādir 'alā al-*

Does all this mean that Ḥanafī jurists tolerate these acts and prescribe no penalty for them? The answer to this is an emphatic 'no' and this leads us to the crux of the matter. The Ḥanafī jurists deem these acts as crimes punishable under the law of the land and bring them under the doctrine of *siyāsah*.[17] This point is elaborated below.

8.1.3 Blasphemy by a Non-Muslim: A *Siyāsah* Offence

All the four great authorities on the law of blasphemy – Qāḍī 'Iyāḍ, Taqī al-Dīn al-Subkī, Ibn Taymiyyah and Ibn 'Ābidīn – have unequivocally asserted that Abū Ḥanīfah brings the commission of blasphemy by a non-Muslim, *dhimmī* or *musta'min*, under the rubric of *siyāsah*. Thus, Qāḍī 'Iyāḍ says:

> When a *dhimmī* makes a derogatory remark against the Prophet (peace be on him), explicitly or implicitly, or insults him, or talks about him in a manner which is different from his disbelief in him,[18] our [Mālikī] jurists have no disagreement on giving him death punishment, unless he embraces Islam because we did not give him peace for allowing him to do so. This is the opinion of the jurists generally. However, Abū Ḥanīfah, al-Thawrī and their followers from Kūfah say: he will not be given

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Hidāyah Sharḥ Bidāyat al-Mubtadī (Cairo: Dār al-Kutub al-'Arabiyyah, 1970), 5:303). This goes absolutely against the official position of the School. Thus, Khayr al-Dīn al-Ramli said criticizing Ibn al-Humām: "What he said about the termination of the contract, and not what he said about the death punishment, is definitively against the position of the School" (*Radd al-Muḥtār*, 6:346).

[17] Abū Yūsuf, *al-Kharāj*, 189-90; Ibn al-Humām, *Fatḥ al-Qādir*, 4:381.

[18] Thus, a Christian cannot be punished for ascribing son to God even if that is blasphemy according to Muslim belief because this forms part of the Christian creed and Christians are given peace despite this creed.

death punishment[19] because his disbelief is a more grievous offence than this act, but he will be rebuked and given *ta'zīr*.[20]

Similarly, Subkī asserts: "The jurists have a consensus that this act is an offence punishable either with death, according to the jurists generally, or with *ta'zīr* according to the Ḥanafī jurists. No one allows silence on this issue or that it should be tolerated."[21] Ibn Taymiyyah is more elaborate:

> As for Abū Ḥanīfah and his disciples, they say: his contract is not terminated by blasphemy and the *dhimmī* is [ordinarily] not given death punishment for committing it; he is, however, given *ta'zīr* in the same way as he is given *ta'zīr* for publicly committing other prohibited acts... It is one of their principles that all offences which do not have death punishment in their opinion - such as murder with a heavy stone and anal intercourse – when committed repeatedly, entitle the ruler to give death punishment to the offender. In such cases, he may give more punishment than the fixed punishment of *ḥadd*, if he deems it better for the community. They call it 'death punishment by way of *siyāsah*,' which means that the ruler can award death punishment by way of *ta'zīr* for offences which are aggravated when repeatedly committed, provided the law prescribes death punishment for the genus of those offences.[22]

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[19] As noted earlier, this is a negation of death punishment as *ḥadd* and not as *siyāsah*.See for details: Ibn 'Ābidīn,*Tanbīh al-Wulāh*, 104-110.

[20] Ṭyāḍ, *Al-Shifā*, 462.

[21] Subkī, *Al-Sayf al-Maslūl*, 366.

[22] Ibn Taymiyyah, *al-Ṣārim al-Maslūl*, 2:13.

This, indeed, is an accurate and precise summary of the position of the Ḥanafī School on the issue. Ibn 'Ābidīn has gone into much detail while elaborating this position.[23]

8.2 Nature of the Affected Right

Now that it has been established that the Ḥanafī jurists deem blasphemy committed by a Muslim a form of apostasy calling it a *ḥadd* offence; and that they discuss the implications of blasphemy committed by a non-Muslim under the broader concept of termination of the contract of *amān* considering it a *siyāsah* offence, it is is clear that, in the former case, they deem it violation of the right of Allah and in the latter they deem it an attack on the right of the Muslim community. Hence, all the legal consequences of these rights – right of Allah and right of the community – elaborated earlier must be accepted in both cases as necessary corollaries.[24]

8.2.1 Blasphemy by A Muslim: The Right of Allah Violated

Thus, when a Muslim is alleged to have committed blasphemy, the offence must be proved through the particular – fixed – standard of evidence, namely: confession of the accused or testimony of two adult, male, Muslim eye-witnesses who pass the tests of *tazkiyat al-shuhūd*; no other piece of evidence can prove this offence. If any of the witnesses retracts his

[23] Ibn 'Ābidīn, *Tanbīh al-Wulāh*, 104-110.

[24] See Section 4.2 of this dissertation.

testimony, rendering the number of witnesses less than the prescribed number, the case shall end there and then and no re-trial shall take place.[25] The same is the case where the guilt is proved through confession and the accused retracts his confession any time before the enforcement of the punishment.[26] Significantly, even if testimony of witnesses in accordance with the prescribed standard of evidence is available and still the accused denies his having committed blasphemy, his denial will entitle him to be acquitted because this denial is deemed repentance and repentance suspends the punishment of apostasy.[27]

As blasphemy by a Muslim is a form of apostasy, it attracts all the consequences of apostasy, including – most importantly – the rule that repentance suspends the punishment of apostasy. The Ḥanafī jurists particularly cite the repentance of Ibn Abī Sarḥ on the eve of the conquest of Makkah as a precedent in this regard. Another important legal principle of apostasy equally applicable to blasphemy is that no statement or act is deemed disbelief if it can be given a better interpretation.[28] This necessitates consideration of *mens rea* for the commission of the offence. In other words, blasphemy is *not* a strict liability offence,[29] unless it amounts to *qadhf* also, in which case it becomes a strict liability offence.[30]

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[25]Sarakhsī, *al-Mabsūṭ*, 9:120.

[26]Ibid., 9:109.

[27]Ibn al-Humām, *Fatḥ al-Qādir*, 5:332.

[28] Mullā 'Alī al-Qārī (d. 1013 AH/1605 CE) explaining the position of Abū Ḥanīfah on the issue of *takfīr* (declaring someone as an unbeliever) says: "In an issue of *kufr*, if ninety-nine interpretations of a statement prove *kufr* but oneinterpretation negates *kufr*, the Muftī and the qāḍī both should adopt the interpretation that negates *kufr* because mistake in letting a thousand unbelievers alive is lesser than mistake in killing a believer" (*Sharḥ al-Fiqh al-Akbar* (Karachi: Muḥammad Sa'īd and Sons, n.d.), 195).

[29] Ismail Qureshi, the Petitioner in the famous casethat resulted in the mandatory death punishment for blasphemy, is of the opinion that intention must be taken into consideration by the trial court in a blasphemy case (*Qānūn-i-Tawhīn-i-Risālat*, 336-47). The FSC judgment on the issue also contains detailed discussion the rule

Moreover, as blasphemy by a Muslim is a *ḥadd* offence, it necessarily follows that even the Prophet (peace be on him) in his lifetime could not forgive the offender if the latter did not re-embrace Islam,[31] just as the Prophet (peace be on him) could not forgive any offender in other *ḥudūd* cases.[32] This point is important for understanding the error of later jurists and contemporary scholars who hold that only the Prophet (peace be on him) could forgive the offender, and that punishment today cannot be suspended by the offender's repentance and re-embracing Islam.[33]

Yet another important legal consequence of considering blasphemy a *ḥadd* offence is that it must be enforced by the competent authority – the courts.[34] Individuals must not take

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and importance of intention (See paras 35-64 of the judgment). It is surprising, however, that the FSC did not give any directive to the Government for making intention an essential part of the offence of blasphemy and the offence continues to attract the principle of strict liability.

[30] The Qur'ān has explicitly ordered to give eight lashes to the one who accuses a chaste woman of *zinā* and cannot bring four witnesses to prove the accusation (Qur'ān 24: 4). The Prophet (peace be on him) told the one who had accused his wife of *zinā* that he should either bring the testimony in accordance with the prescribed standard or else he would be given eight lashes (Bukhārī, Kitāb al-Shahādāt, Bāb Idhā Idda'ā aw Qadhafa fa-lahū an Yaltamisa al-Bayyinah). It is on the basis of these and other legal evidences that the Ḥanafī jurists have laid down the principle that even the testimony of a witness in case of *zinā* amounts to *qadhf* and as such if three witnesses give the testimony and the fourth one refrains, the first three witnesses shall be given the punishment of *qadhf*; however, when all the four witnesses give the testimony in accordance with the prescribed procedure and standard, their combined testimony becomes a proof against the accused and then the latter shall be given the punishment of *zinā* (Sarakhsī, *al-Mabsūṭ*, 9:104-105).

[31] Ibn 'Ābidīn says that all the instances of killing a culprit of blasphemy were those where the culprit did not embrace Islam after this offence and that in no case the culprit was killed after embracing Islam (*Tanbīh al-Wulāh*, 93).

[32] Even the Prophet (peace be on him) could not pardon the *ḥadd*punishment. Thus, the famous tradition reports the saying of the Prophet (peace be on him):"Do you intercede in a *ḥadd* of Allah?" Then, he gave the people a sermon in which he said: "By Allah, if Fāṭimah, the daughter of Muḥammad, were to commit theft, I would have her hand cut off" (Muslim, Kitāb al-Ḥudūd, Bāb Qat' al-Sāriq al-Sharīf wa Ghayrih wa al-Nahy 'an al-Shafā'ah fi 'l-ḥudūd).

[33] This point is further elaborated below in Section 8.2.3.

[34] This has already been explained in Section 4.2.5 of this dissertation.

the law into their own hands by killing the accused without following the legally binding procedure.[35]

8.2.2 Blasphemy by a Non-Muslim: The Right of the Community Violated

As noted earlier, if an alien non-Muslim community commits blasphemy against the Prophet (peace be on him), it is deemed an act of war and the contract of peace with that community is terminated. This act attracts the law of war the details of which are beyond the scope of the present dissertation.[36] The discussion here will be confined to issues of criminal law.

If an alien non-Muslim commits this act beyond the territorial limits of the *Dār al-Islām*, the Muslim courts lack jurisdiction on the crime and, as such, this case is also excluded from the scope of the present dissertation.[37]

If a non-Muslim visitor to the *Dār al-Islām* (*musta'min*) or a permanent resident of the *Dār al-Islām* (*dhimmī*) commits blasphemy within the territorial limits of the *Dār al-Islām*, it becomes an issue of criminal law of the land. In both cases, the Ḥanafī jurists hold it a *siyāsah* offence and following are the necessary corollaries of this legal position:

First, a non-Muslim – visitor or permanent resident – cannot be given any punishment if the statement formed part of his/her recognized religious beliefs, because it is understood at the time of the giving of *amān* that they are given protection despite their beliefs.[38]

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[35] This issue is further analyzed below in Section 8.3.

[36] See for details: Ahmad, *Jihād, Muzāḥamat awr Baghāwat*, 222-225.

[37] Ibid., 93-101.

Second, as it is a *siyāsah* offence, it essentially involves an act that affects the public at large. Thus, anything that is said or done in private will not attract the punishment of *siyāsah*.[39]

Third, being a *siyāsah* offence, it does not have a fixed standard of evidence; the matter is left to the judge; any piece of evidence that he deems convincing, or which is allowed by the law of the land, will prove the offence.[40]

Fourth, being a *siyāsah* offence the nature and extent of the punishment is not fixed and it may be determined by the government and applied by the judge keeping in view the facts and circumstances of each case. As a general principle, death punishment must not be awarded except in the most serious cases where no allowance can be given to the accused.[41]

Fifth, as it is a *siyāsah* offence, the punishment may be pardoned or commuted by the government if it is convinced that the offender has mended his ways and that he therefore deserves leniency.[42]

Finally, being a *siyāsah* offence, only the competent authority is entitled to enforce it and no individual should take the law into his/her own hands by killing or wounding the accused. This point is further elaborated below.

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[38] This is expressed in the form of a general principle: "We have been ordered to leave them and what they believe in." Marghīnānī, *al-Hidāyah*, 1:208; Nyazee, *Islamic Legal Maxims*, 212-215.

[39]Some of the passages cited earlier explicitly mention this.

[40] This has been briefly discussed in Section 4.2.3 and will be further elaborated in Chapter Ten of this dissertation.

[41] Section 311of the Pakistan Penal Code. See for a detailed discussion on this issueSection 12.5 of this dissertation.

[42]Ibn 'Ābidīn, *Tanbīh al-Wulāh*, 111-114.

8.2.3 Personal Right of the Prophet (peace be on him)?

Some of the later jurists in the Ḥanafī School have accepted the view of the jurists of other schools that the Prophet (peace be on him) in his lifetime could pardon the offender in a case of blasphemy. They hold this because they assert that he was the owner of the right and that later generations have no option but to enforce the punishment even if the convict repents.[43] This view goes against the official position of the Ḥanafī School, and this is not compatible with the principles upheld by the School. If the position is accepted, it changes the whole structure of the legal rights and consequences which forms the foundation of Ḥanafī criminal law.[44] A few problems in this approach will be highlighted here.

First, if it was the right of the Prophet (peace be on him) which is violated by blasphemy, what kind of right is it? Ḥanafī criminal law recognizes three rights: right of individual, right of Allah and right of the community. Is it his personal right as an individual or his right as a prophet of Allah or his right as the head of the Muslim community? Obviously, the third possibility is ousted, as accepting it will necessitate that anyone who insults a head of the Muslim community in the later generations will deserve the same punishment. Hence, the choice is between considering it the right of Allah (his right as the prophet of Allah) or the right of individual (his personal right).

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[43] The FSC also accepted this view (See para 26 of the judgment). This view is based on some passages Qāḍī 'Iyāḍ and Ibn Taymiyyah on which some of the Ḥanafī jurists of the later period relied, but Ibn 'Ābidīn has given a detailed analysis of this view proving conclusively that this view goes against the official position of the Ḥanafī School (*Tanbīh al-Wulāh*, 93-96). See Appendix Two of this Dissertation for the translation of this great contribution of Ibn 'Ābidīn.

[44] This has heen explained in detail in Chapter Four of thisdissertation.

One may recall here the established principle of the Ḥanafī School that *qadhf* is not deemed violation of the personal right of the victim, even if it harms his reputation; rather, it is deemed the right of Allah and is, as such, unpardonable. Similarly, when a person first acknowledges the prophethood of Muḥammad (peace be on him) and then commits blasphemy against him, he does not violate of the personal right of the Prophet (peace be on him) but the violation of his right as the prophet of Allah. Thus, in essence, it is the violation of the right of Allah. As far as a non-Muslim is concerned, he does not believe in the prophethood of Muhammad (peace be on him) in the first place; hence, if he commits blasphemy against him, it cannot be legally deemed a violation of the right of Allah[45] and will not be considered *ḥadd*. However, as the convic attacks the most venerated personality in Muslim consciousness, he undoubtedly encroaches upon the collective right of the Muslim community and definitively goes against the very foundation of the Muslim legal and political system; hence, it is the right of the Muslim community at large – and not the personal right of the Prophet (peace be on him) or his right as the prophet of Allah – which is violated in this case.

Second, the vew that punishment in both cases, that is, where theconvict is Muslim or non-Muslim – is unpardonable even when the convicts repents and embraces Islam, violates another fundamental principle of law recognized by the Ḥanafī School, namely, that

[45] This is what is meant by the saying of the Elders of the School that "Blasphemy against the Prophet (peace be on him) is *kufr*; when the *kufr* at the time of the conclusion of the contract could not become an obstacle in its conclusion, the *kufr* that came into existence after the contract was concluded cannot terminate it" (Marghīnānī, *al-Hidāyah*, 2:405).

embracing Islam quashes all previous sins.[46] While general principles may also have exceptions, Ḥanafī jurists require specific and definitive evidence for creating an exception from the general principle.[47] No exception can be created on the basis of analogy.[48] Here, an exception can be accepted by either of two means: one, if it is proven that the Elders of the School held that embracing Islam would quash every sin but would not suspend the death punishment of the one who committed blasphemy; and two, that they held that the punishment for every kind of apostasy could be suspended by repentance and re-embracing Islam, except for blasphemy. No evidence is found for any of these two contentions in the writings of the Elders of the School, as elaborated above. The Elders of the School held the opposite of both of views. Hence, this *new* rule cannot be accepted by the School.

Third, if it is deemed the personal right of the Prophet (peace be on him), the result according to the principles of the Ḥanafī School is not that it becomes unpardonable, but that it becomes unenforceable! The reason is very obvious: the Prophet (peace be on him) in his lifetime could enforce his right against those who violated it, but no one can enforce his right after him unless it is established that the Prophet (peace be on him) authorized him to enforce

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[46]Muslim, Kitāb al-Īmān, Bāb al-Islām Yahdimu Mā Qablah; Musnad Aḥmad, Musnad al-Shāmiyyīn, Ḥadīth ʿAmr b. al-ʿĀṣ.

[47] *Uṣūl al-Sarakhsī*, 1:131ff; Nyazee, *Theories of Islamic Law*, 163-173.

[48] This is expressed in the form of a *qāʿidah uṣūliyyah* (principle of interpretation) in the following words: ما ثبت على خلاف القياس فغيره عليه لا يقاس (No analogy is permitted on the basis of what itself has been established against analogy). *Majallat al-Aḥkām al-ʿAdliyyah*, Article 15.

on his behalf his rights after him.[49] No evidence is found for this contention – at least not one acceptable to the Elders of the School.

Had it been the personal right of the Prophet (peace be on him), he would always have preferred to pardon the offender.[50] The fact that he enforced the punishment on some of them establishes the fact that he had no choice but to enforce it; and the fact that he never enforced this punishment on any person who embraced Islam establishes the fact that repentance suspends the punishment.

8.3 Taking the Law into One's Own Hands

What if a person takes the law into his own hands and 'enforces' the punishment on the convict? The jurists call it *ifityāt 'alā ḥaqq al-imām* (encroaching on the right of the ruler) and deem it a form of *fasād* which requires a reasonable punishment.[51]

8.3.1 The Doctrine of *Iftiyāt*

The jurists discuss two possibilities:

- If the person gives the same punishment which the law had prescribed for the offence, and in accordance with the procedure laid down in the law; and

[49]Ibn 'Ābidīn, *Tanbīh al-Wulāh*, 95.

[50]Ibid., 93.

[51] See for details the entry on "*ifitiyāt*" in *al-Mawsū'ah al-Fiqhiyyah* (Kuwait: Ministry of Religious Affairs, 1986), 5: 280-281.

- If the person gives a different punishment or is excessive in the enforcement of the punishment.[52]

In both cases, the jurists hold the person responsible for *iftiyāt* and call for a proper punishment for him.[53] The nature and extent of the punishment is determined by the judge keeping in view the facts and circumstances of the case because *iftiyāt* is a *siyāsah* offence.[54]

It is important to note that this rule is applied only where the guilt of the convict stood proved in a court of law, or was later proved. If his guilt is not proved in accordance with the particular standard of evidence, he shall be presumed innocent and the one 'enforcing' punishment on him shall be given appropriate punishment for the kind of excess he committed.[55]

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[52] *Radd al-Muḥtār*, 6:14.

[53] Ibid. It is an established principle of the Ḥanafī jurisprudence that even if an act in itself is permissible (*mubah*) but it results in violation of the right of the ruler, the latter can award him an appropriate punishment. Thus, for instance, Imām Sarakhsī says that no one should give quarter to the enemy during war without the permission of the ruler, although if he did so the quarter shall be enforced and shall bind all Muslims because the Prophet (peace be on him) declared that the quarter given by one Muslim binds all. However, as it may result in encroaching on the right of the ruler (*iftiyāt 'alāḥaqq al-imām*), the ruler may award him appropriate punishment (*Sharḥ al-Siyar al-Kabīr*, ed. Muḥammad Ḥasan Ismā'īl al-Shāfi'ī, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), 2:108-109). On the same principle, although the Ḥanafī jurists hold that some of the prisoners of war can be given death punishment (Ibid., 3:124) because their lives are not legally protected like apostates (Ibid., 126), still they have explicitly held that no one should kill any of them without the permission of the ruler (Ibid., 2:197) and that if someone violates this principle, the ruler may award him appropriate punishment for committing *iftiyāt* (Ibid., 3:126).

[54] As explained in Chapter Four, the ruler may pardon or commute the *siyâsah* punishment.

[55] Thus, the punishment of *qiṣāṣ*, *diyat*, *arsh* or *ḥukūmat 'adl* (called *ḍamān* in the Pakistan Penal Code) may be given to the culprit keeping in view the kinds of excess he committed against a person whose rights had legal sanctity. Some of the details about these terms will be discussed in Chapter Eleven of this dissertation.

8.3.2 *Iftiyāt* in Enforcing the Punishment of Blasphemy

Thus, if a person kills a Muslim who was accused of committing blasphemy, and the guilt of the latter cannot be proved in accordance with the prescribed standard of evidence, the one who killed him shall be liable for the *qiṣāṣ* punishment for killing an innocent Muslim and shall also be liable for *siyāsah* punishment for committing *fasād*. On the other hand, if the guilt of the deceased could be proved in accordance with the prescribed standard, the one who killed him shall not be liable to *qiṣāṣ* but he may be given proper punishment for committing *iftiyāt* or taking the law into his own hands.

Similarly, if the deceased is a non-Muslim and he is proved to have committed blasphemy, the one who killed him shall be liable for proper punishment for *iftiyāt;* but he shall not be liable for *qiṣāṣ* if the deceased deserved death punishment under the law of the land. Thus, if his guilt was not proved, or he did not deserve death punishment under the law of the land, or his death punishment was pardoned or commuted by the competent authority, and still he was killed, the murderer shall be liable for *qiṣāṣ* for killing a person whose life was protected by the law (*ma'ṣūm al-dam*); and shall also be liable for the appropriate *siyāsah* punishment for taking the law into his own hands.[56]

[56] See for details: Ahmad, "Tawhīn-i-Risālat ki Saza", 32-33.

Conclusions

The Ḥanafī jurists consider the issue of blasphemy by a non-Muslim from the perspective of the termination of the contract of peace, which forms the basis for the legal protection of a non-Muslim under Islamic law and hold that the contract of peace, temporary or perpetual, is not terminated by such acts of the non-Muslim visitor or permanent resident of the Muslim territory. This, however, is a serious violation of the right of the Muslim community and a grave form of *fasād* which is why it attracts the principles of *siyāsah*. Hence, the legal consequences of *siyāsah* are applied to this act when committed by a non-Muslim. Some of the later jurists deviated from the established position of the School by considering it a violation of the personal right of the Prophet (peace be on him) and ignored that this makes the right unenforceable. The punishment of blasphemy, *ḥadd* for Muslims and *siyāsah* for non-Muslims, is to be enforced by the ruler and individuals who take the law into their own hands are liable for appropriate *ḥadd*, *qiṣāṣ* or *siyāsah* punishment. God knows best.

CHAPTER NINE: *ZINĀ*, *ḤIRĀBAH* OR *SIYĀSAH*: ISLAMIZING THE LAW ABOUT SEXUAL VIOLENCE

INTRODUCTION

One of the most contentious issues in the modern debate on Islamic criminal law is that of rape.[1] As the offence involves sexual intercourse, the jurists had to discuss its implications in relation to the *ḥadd* of *zinā*. This has given an impression that because of the strict criterion for proving the offence of *zinā*, Islamic law fails to do justice with the victim in rape case. This chapter examines this issue in detail and shows that the doctrine of *siyasāh* can make the law against sexual violence more effective without altering the law of *ḥudūd*, but for that purpose it is necessary that this offence not involve sexual intercourse as the primary element, so that it becomes a sub-category of violence, instead of *zinā*. The basic contention of this chapter is that a proper understanding of the Ḥanafī criminal law, particularly the doctrine of

[1] In Pakistan, the law of rape has been examined from various perspectives and different scholars have come up with divergent views on the issue. See for a good compilation of the works produced in Urdu: Khurshīd Aḥmad Nadīm, *Islām kā Taṣawwur-e-Jurm-o-Sazā* [Islamic Concept of Crime and Punishment] (Islamabad: International Institute of Islamic Thought, 1997), Vol. 2. For an analysis of the relevant case law, see: Charles Kennedy, *Islamization of Laws and Economy in Pakistan* (Islamabad: Institute of Policy Studies, 1991). For one of the most severe critiques of the Hudood Laws, see: Rubya Mehdi, *The Islamization of Laws in Pakistan* (Richmond, Surrey: Curzon, 1994). For a kind of patch-up between the traditional and the liberal view, see: Asifa Qureshi, "Her Honor: An Islamic Critique of the Rape Provisions in Pakistan's Ordinance on *Zinā*", *Islamic Studies* 38: 3 (1999), 403-32; *idem*, "Who Says Sharia demands the Stoning of Women? A Description of Islamic Law and Constitutionalism", *Berkley Journal of Middle Eastern and Islamic Law*, 1 (2007), 163-177. See also: Muhammad Tufail Hashimi, *Ḥudūd Ordinance Kitāb-o-Sunnat kī Rōshnī mēṇ* (Peshawar: National Research and Development Foundation, 2005) See for a detailed analysis of the issue from the perspective of the Ḥanafī jurisprudence: Muhammad Mushtaq Ahmad, "Ābrūrēzī ke Jurm kī Shar'ī Takyīf", *Maarif-e-Islāmi* 9:1 (2010), 71:113.

siyāsah, can give viable and effective solutions to complex issues of the Pakistani criminal justice system.

The chapter has been divided into two major parts, the first of which gives a detailed analysis of the legal issues surrounding the crime of sexual violence while the second examines the issue of the standard of proof for the *ḥudūd* and the *siyāsah* cases.

For analyzing the law relating to sexual violence, the present chapter traces the historical background of this law and the various stages through which this law passed; legal issues are framed and the way these issues have been dealt with by the Pakistani judiciary has been thoroughly examined; following this, a thorough analysis of the juristic discourse on this issue has been given; and finally, a solution has been given which is compatible with the principles as well as with the higher objectives of Islamic law.

9.1 Historical Development of the Law about Sexual Violence

The discourse on the crime of sexual violence in Pakistan began with the promulgation of the Hudood Ordinances in 1979 even though the law dealing with this crime was much older.[2] In

[2] The four Hudood Ordinances of 1979 incorporated some of the principles of Islamic law in the Pakistani criminal justice system. The draft of the Ordinances was prepared by the Council of Islamic Ideology which comprised of some renowned legal experts and religious scholars of the various schools of thought including: Justice (r) Muhammad Afzal Cheema, Justice (r) Salahuddin Ahmad, A. K. Brohi, Mawlānā Muḥammad Yūsuf Binnōrī, Khwāja Qamar al-Dīn Pīr Siyāl Sharīf, Muftī Siyāḥ al-Dīn Kākākhēl, Muftī Muḥammad Ḥusayn Na'īmī, Zafar Ahmad Ansari, Muftī Muḥammad Taqī Usmani, Muftī Ja'far Ḥusayn Mujtahid, Mawlānā Muḥammad Ḥanīf Nadwī, Dr. Zafaruddin Ahmad, Mawlānā Shams al-Ḥaqq Afghānī,

order to keep things in their proper context, therefore, it is essential to draw a brief sketch of the different stages through which this law passed. Moreover, in Pakistan the discourse of the religious scholars generally revolved around the issue of whether the crime of sexual violence is a sub-category of *zinā* or *ḥirābah*. This issue will be analyzed in detail here.

The origins of the present Pakistani law on the crime of sexual violence can be traced to the Indian Penal Code 1860 (renamed in Pakistan as the Pakistan Penal Code or PPC) Sections 375 and 376 of which dealt with the crime of rape.[3] Later, these Sections were repealed by the provisions of the Offence of Zinā (Enforcement of Hudood) Ordinance 1979, which renamed it as *zinā bil jabr* and made it either liable to *ḥadd* or *ta'zīr*. In *Rashida Patel v The Federation of Pakistan*,[4] the Federal Shariat Court concluded that rape was a form of *ḥirābah*, not *zinā*, but the law could not be changed because appeal was preferred against the decision to the Shariat Appellate Bench of the Supreme Court which did not dispose of the case till the law was changed in 2006 by the Protection of Women (Criminal Laws Amendment) Act. This latter Act repealed the provisions of the Offence of Zina Ordinance relating to the offence of *zinā bil jabr* and revived the PPC provisions on rape.

'Allāmah Sayyid Muḥammad Razī and Dr. Mrs. Khawar Khan Chishti. See for details: Muhammad Mushtaq Ahmad, *Ḥudūd Qawānin*, 7-8.

[3] Throughout this Chapter, the phrase "sexual violence" is preferred to "rape" primarily because rape essentially involves sexual intercourse while sexual violence is a generic term which includes other offences as well.

[4] *Rashida Patel v The Federation of Pakistan*,PLD 1989 FSC 95.

9.1.1 From the Indian Penal Code to the Hudood Ordinances

The Indian Penal Code did not criminalize "fornication" – consensual sexual relationship between unmarried couple. It only criminalized "sexual intercourse *with* a married woman", calling it "adultery" and prescribed punishment for the female partner as an abettor only.[5] However, even adultery was essentially deemed a violation of the right of the husband. That was why no criminal proceedings could start against the man committing adultery except after the filing of complaint against him by the "aggrieved" husband and the convict could not be given a punishment if he could prove the "connivance" of the husband. This was based on the English law concept of "tort against marital relationship". Both fornication and adultery were forms of consensual sex. Sexual intercourse without the consent of one of the partners was deemed a serious crime named as "rape" in Section 375 of the Code. Pakistan inherited this law (renamed as Pakistan Penal Code or PPC) and it remained in force till the promulgation of the Hudood Ordinances in 1979.

The Offence of Zina (Enforcement of Hudood) Ordinance 1979 brought adultery, fornication and rape under the umbrella concept of *zinā* and it renamed rape as *zinā bil jabr*. The offence of *zinā bil jabr*, like that of *zinā*, was either liable to *ḥadd* or liable to *ta'zīr*.[6] The

[5] Section 497 of the Indian Penal Code defined adultery as: "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall be punishable as an abettor."

[6] The Offence of Zina (Enforcement of Hudood) Ordinance, 1979, Sections 5 to 10 of. It is to be noted here that the provisions relating to *zinā bil jabr* (liable to *ḥadd* or *ta'zīr*) as well as *zinā* liable to *ta`zīr* have been repealed by the Protection of Women (Criminal Laws Amendment) Act 2006.

standard of proof for *zinā bil jabr* liable to *ḥadd* was the same as that of *zinā* liable to *ḥadd* (confession by the accused or four adult eye-witnesses),[7] while *zinā bil jabr* liable to *ta'zīr* could be proved through any form of evidence proving the commission of the crime beyond a reasonable doubt in the particular circumstances of the case.[8]

The Offence of Qazf (Enforcement of Hudood) Ordinance 1979 made false accusation of *zinā* an offence called *qadhf*, which again was either liable to *ḥadd* or *ta'zīr*.[9] As the definition of *qadhf* was borrowed from the definition of defamation in PPC, the exceptions of *good faith* and *public good* were declared as valid defenses.[10] This not only made the Offence of Qazf Ordinance ineffective but also increased the chances of misuse of the Offence of Zina Ordinance.[11] Many critics noted that the victim of rape could be further victimized under the Qazf Ordinance if she would bring a case against the culprits, although the allegation of rape was out of the scope of the definition of *qadhf* because this definition confined *qadhf* to allegation of *zinā* only.[12] Yet the fact remained that sometimes a victim of rape was accused by the other party – as well as the police – of not only consensual *zinā* but also of committing

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[7] The Offence of Zina Ordinance, Section 8.

[8] Ibid., Section 10.

[9] The Offence of Qazf (Enforcement of Hudood) Ordinance, 1979, Sections 3 to 5.

[10] Ibid., Section 3. This Section reproduces the text of Section 499 PPC *verbatim et literatim*, with one modification only, namely, that in Section 499 PPC the accusation is general while in Section 3 of the Ordinance the accusation is specifically about the commission of the offence of *zinā*.

[11] For instance, even when the police would falsely implicate a couple in a case of *zinā*, it could shield behind the cover of good faith and public interest.

[12] Section 3 of the Offence of Qazf Ordinance says: "Whoever by words either "spoke" or intended to be read, or by signs, or by visible representations, makes or publishes an imputation of 'zinā' concerning any person intending to harm or knowing or having reason to believe that such imputation will harm the reputation, or hurt the feelings, of such person, is said, except in the cases hereinafter excepted, to commit 'qazf'." There is no reference to *zinā bil jabr* in this Section. Hence, the allegation of *zinā bil jabr* could not be deemed qazf under this law.

qadhf. As the offence of *zinā* liable to *ta'zīr* did not require the proof of four witnesses and as the defenses of good faith and public good were also available, the adverse party as well as the police could easily escape prosecution under the Qazf Ordinance. It was, however, also possible that sometimes a willing partner might bring an accusation of rape against the other partner so as to save itself from the operation of the Zina and Qazf Ordinances.

9.1.2 The Interplay between Criminal Law and Family Law

The issue was further complicated by the fact that some people started using the provisions of the Muslim Family Laws Ordinance (MFLO) 1961 and the relevant case law to bring cases of *zinā* against their former spouses. Section 7 of MFLO gives a detailed procedure for making a divorce effective. In *Ali Nawaz Gardezi v Muhammad Yusuf*,[13] the Supreme Court held that if the husband did not follow the proper procedure after pronouncing divorce, he would be deemed in the contemplation of law to have revoked the divorce and as such the couple would continue to be husband and wife.

As consensual sex was not deemed a grave offence under the law, no serious problem arose from this rule despite the fact that most people did not follow the Section 7 procedure after divorce. However, after the promulgation of the Hudood Ordinances in 1979 people started troubling their former wives who got married to other persons. Moreover, because of

[13] *Ali Nawaz Gardezi v Muhammad Yusuf*, PLD 1963 SC 51. The same was reaffirmed in *Abdul Mannan v Safuran Nisa*, 1970 SCMR 845, as well as *MuhammadSalahuddin v Muhammad Nazir Siddiqi*, 1984 SCMR 583.

the good faith and public good defenses the complainant could evade the operation of the Qazf Ordinance. In *Shera v The State*,[14] the Federal Shariat Court declared that one such couple was guilty of *zinā*. Many such cases were registered by people against their former wives.

As the Shariat Appellate Bench of the Supreme Court had already declared in *Federation of Pakistan v Farishta*,[15] that MFLO being included in the meaning of "Muslim Personal Law" was beyond the jurisdiction of the Federal Shariat Court, the provisions of the same could not be examined for conformity with Islamic injunctions. Finally, the Shariat Appellate Bench of the Supreme Court in *Bashiran v Muhammad Hussain*,[16] formulated a kind of compromise between the provision of MFLO and those of the Hudood Ordinances by declaring that because of the *bonafide* belief of the couple that the divorce and the subsequent marriage were valid, they could not be deemed guilty of *zinā*. It simply meant that for the purpose of the provisions of the Zina Ordinance, the provisions of MFLO would be overlooked. Despite the fact the problems were actually created by the provisions of the MFLO, these cases were used by critics to launch propaganda against the Hudood Ordinances because of which scholars and judges who were working for the Islamization of the criminal law were on the defensive.

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[14] *Shera v The State*, PLD 1982 FSC 229.
[15] *Federation of Pakistan v Farishta*, PLD 1981 SC 120.
[16] *Bashiran v Muhammad Hussain*, PLD 1988 SC 186.

9.1.3 *Zinā* or *Ḥirābah*? The Dilemma of the Federal Shariat Court

It was in this background that the Federal Shariat Court in *Rashida Patel v The Federation of Pakistan*,[17] declared that *zinā bil jabr* was a sub-set of *ḥirābah*, not *zinā*. For reaching this conclusion, the Federal Shariat Court relied heavily on the views of Mawlānā Amīn Aḥsan Iṣlāḥī (d. 1997), a renowned scholar who had expertise in Qur'ānic studies, particularly the theory of coherence (*naẓm*) in the Qur'ān. Iṣlāḥī opined in his commentary on the verses of *ḥirābah* that one of the punishments of *ḥirābah* is *taqtīl* (and not *qatl*), which does not simply mean killing but killing in an exemplary way.[18] Thus, he made the ground for asserting that *rajm* was a form of *taqtīl* and, as such, a punishment for *ḥirābah*. Iṣlāḥī went to the extreme of asserting that those persons whom the Prophet (peace be on him) had given the *rajm* punishment were habitual offenders and that they were given this punishment not for *zinā* but for *ḥirābah*.[19]

9.1.4 The Protection of Women Act 2006

The Protection of Women Act (Criminal Laws Amendment) Act 2006 repealed all the provisions regarding *zinā bil jabr* from the Offence of Zina Ordinance and revived the crime of rape in PPC.[20] Thus, rape is no more a *ḥadd* offence. Moreover, the new Section 375 PPC does not give exception to the husband, which means that now the Pakistani law also

[17] *Rashida Patel v The Federation of Pakistan*, PLD 1989 FSC 95.
[18] *Tadabbur-i-Qur'ān* (Lahore: Faran Foundation, 2001), 2:505-508.
[19] Ibid., 5:361-77.
[20] See Sections 5 and 13 to 16 of the Act.

punishes the crime of "marital rape".[21] It also created a new crime of *fornication* in PPC by inserting section 496B in it. The definition of this offence is essentially the same as that of *zinā* as defined in Section 4 of the Zina Ordinance.[22] Thus, one and the same act has been given two different names and two different sets of legal consequences.[23] Moreover, the crime of fornications has been inserted in the chapter of "offences relating to marriage", while fornication in common law essentially involved unmarried partners.

Fornication is, thus, the new name of the old crime of "*zinā* liable to *ta'zīr*" with the difference that fornication does not attract the rules of the Qazf Ordinance but those of another crime called "false accusation of fornication" in Section 496C of PPC. This latter crime, in turn, is the new name of the old crime of "*qadhf* liable to *ta'zīr*". The net result is that the Qazf Ordinance has been made even more ineffective.

9.1.5 Present Pakistani Law on Sex Offences

As noted above, the offence of illicit sexual intercourse is being treated under two different laws: the Zina Ordinance makes it a *ḥadd* crime,[24] while PPC gives it the name of

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[21] The Indian law still retains this exception: "Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

[22] Section 4 of the Offence of Zina Ordioance defines "*zinā*" as: "A man and a woman are said to commit '*Zinā*' if they willfully have sexual intercourse without being married to each other." Section 496B of PPC defines "fornication" in similar terms: "A man and a woman not married to each other are said to commit fornication if they willfully have sexual intercourse with one another."

[23] See for a detailed analysis of this law: Munir, "Is *Zinā bil-Jabr* a *Ḥadd*, *Ta'zīr* or *Syasa* Offence?" *op. cit.*

[24] Section 4 of the Offence of Zina Ordinance.

*fornication*and makes it an ordinary (*ta'zīr*) crime.[25] Similarly, the offence of allegation of illicit sexual intercourse is dealt with as *qadhf* under the Qazf Ordinance and as false accusation of fornication under PPC.[26]

There are two grave sex offences under PPC, both of which are *ta'zīr*: *Rape* and *Unnatural Offence*.[27] Intercourse is an essential ingredient of both of these offences. Hence, insertion of other foreign elements or oral sex, for instance, does not fulfill this requirement. Some more serious forms of rape - gang rape and rape accompanied by robbery – have been deemed acts of terrorism under the Anti-Terrorism Act, 1997.[28]

Most of other offences are found scattered in different chapters of PPC. For instance, selling of obscene literature, doing obscene acts or singing obscene songs have been mentioned in the chapter of offences against 'morals'.[29] Some offences come under the title of "criminal force and assault".[30] Many such offences cancome under the provisions of the Qisas and Diyat Act relating to "hurt" which are now found in Chapter XVI of PPC.[31] The offence of abortion also comes under the provisions of the Qisas and Diyat Act.[32] Several offences

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[25]Section 496B of PPC.

[26]Section 3 of the Offence of Qazf Ordinance and Section 496C of PPC.

[27]Ss. 375-377 of PPC.

[28]Section 6 (c) of the Anti-Terrorism Act, 1997. Importantly, under the present Pakistani Law, a man cannot be raped because Section 375 of PPC confines rape to the act of a man against a woman: "A man is said to commit rape who has sexual intercourse with a woman..."

[29] PPC Ss. 292-294.

[30]Ibid.,Ss. 354-354A.

[31]Ibid.,Ss 332-337Z.

[32]Ibid.,Ss. 338-338C.

have been mentioned under the broader concept of "abduction".[33] Finally, some offences have been mentioned under the title of "offences relating to marriage".[34] There is no logical relationship between these different classes of offences and there are several inconsistencies and gaps in the law.

9.1.6 Three Approaches to the Issue of Rape

In Pakistan, the issue of rape has been approached from thee different perspectives:

- traditional scholars insist that rape is a form of *zinā* and that it can only be proved by the confession of the culprit or the testimony of four witnesses in accordance with the prescribed standard;[35]
- Mawlānā Iṣlāḥī developed the wider doctrine of *ḥirābah* that includes all forms of *fasād*, including rape, and also asserted that circumstantial evidence can also prove a *ḥadd* offence;[36]
- some traditional scholars who uphold the concept of "conflation" (*talfiq*), or mixing of the opinions of the various schools of law, have tried to make a kind of compromise

[33]Ibid.,Ss. 365-74.

[34]Ibid.,Ss. 493-496C.

[35] See, for instance, the review judgment of the Federal Shariat Court on the issue of *rajm* in the *Hazoor Bakhsh v The State*.

[36] Jāvēd Ahmad Ghāmidī (b. 1951), the famous disciple of Iṣlāḥī went into great details while defending this theory and giving rejoinders to those who criticized his master. See: *Mizan* (Lahore: Dār al-Ishraq, 1982).

between these diametrically opposed views by suggesting that even if rape was covered by the law of *zinā* it could be proved on the basis of circumstantial evidence.[37]

As far as the concept of conflation is concerned, it has already been critically evaluated in Chapter Three of this dissertation. The issue of standard of proof for the *ḥadd* offences will be discussed in Chapter Ten. Hence, it is the first two approaches that will be discussed and analyzed here. The purpose is to use the methodology of *takhrīj* to find a viable solution to the problem of rape in the light of the doctrine of *siyāsah* without undoing the law developed by the jurists.

9.2 Rape As A Form of *Ḥirābah*: The Theory of Iṣlāḥī

Generally, an analysis of the offence precedes that of the punishment, but the debate on the issue of rape in Pakistan initially started with the assertion of Mawlānā Iṣlāḥī that *rajm* was the punishment of *ḥirābah*, not *zinā*.[38] Hence, it is essential to analyze the two issues separately, namely:

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[37] Mahmood Ahmad Ghazi (d. 2010), a renowned scholar, was among those who while sticking to the tradition tried to accommodate the view of Iṣlāḥī by suggesting to accept the views of those jurists who allowed awarding the *ḥadd* punishment on the basis of circumstantial evidence. See: Ghazi, "*Ḥudūd* awr *Qiṣāṣ* kay Muqaddimāt meṇ 'Awratōṇ kī Gawāhī" [The Testimony of Women in Cases of *Ḥudūd* and *Qiṣāṣ*]," *Fikr-o-Naẓar*, 30:3 (1993), 3-20.

[38] Iṣlāḥī was the disciple of a famous scholar of the Qur'ānic sciences Mawlānā Hamid al-Dīn Farāhī (d. 1930) who is given the credit for expounding the theory of *Naẓm-i-Qur'ān* (coherence in the Qur'ān). Farāhī did not leave much of his work in written form apart from a few booklets on the principles of the Qur'ānic exegesis and commentary of a few small chapters of the Qur'ān. It was Iṣlāḥī who in many of his books, particularly the

1. Is *rajm* the punishment of *ḥirābah*?

2. Is rape a form of *ḥirābah*?

9.2.1 Is *Rajm* the Punishment of Ḥirābah?

Iṣlāḥī briefly referred to the punishment of *rajm* while commenting on the verses about *ḥirābah* in *Sūrat al-Mā'idah* (Chapter 5), but gave a detailed exposition of his views while commenting on the verses regarding the punishment for *zinā* in *Sūrat al-Nūr* (Chapter 18).

The main points of his theory are summarized here:

1. Offences are committed in two ways: one, when a person or a group of persons is overwhelmed by evil inclinations and commits a crime without disturbing the whole system; two, when a gang shakes the very foundations of the whole system; the former is ordinary crime, while the latter is *ḥirābah*.[39]

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nine-volume exegesis of the Qur'ān titled *Tadabbur-i-Qur'ān*, elaborated the principles and theories of Farāhī. Thus, although Farāhī commented briefly on the verses regarding *ḥirābah* and mentioned that the punishment covered *rajm*, it was Iṣlāḥī who developed a full-fledged theory in *Tadabbur-i-Qur'ān*. See for details about the peculiar principles and contribution of the "Farāhī School": Sharf al-Dīn Iṣlāḥī, *Dhikr-e-Farāhī* (Lahore: Dār al-Tadhkir, 2002). For details about the theory of *Naẓm-i-Qur'ān*, see: Mustansir Mir, *The Coherence in the Qur'ān: A Study of Iṣlāḥī's Concept of Naẓm in Tadabbur-i-Qur'ān* (Indianapolis: The American Trust Publications, 1987). See for an overview of the life and work of Iṣlāḥī: Dr. Akhtar Ḥusayn `Azmi, *Mawlānā Amīn Aḥsan Iṣlāḥī: Ḥayāt-o-Khidmāt* (Lahore: Nashriyyāt, 2009).

[39] In the post-9/11 debates in Pakistan on terrorism and Islamic law, Jāvēd Aḥmad Ghāmidī (b. 1951), a famous disciple of Iṣlāḥī, tried to distinguish in the same way between ordinary crime and terrorism. (Afzal Rehan, "Interview of Jāvēd Aḥmad Ghāmidī on Distinguishing Jihad from Terrorism", Monthly "Ishraq" Lahore (November 2001), 59.) Thus, he specifically declared that the term *ḥirābah* included terrorism also. (See: Jāvēd Ahmad Ghāmidī, *Mizan* (Lahore: Dār al-Ishraq, 2001), 284.)

2. The term *ḥirābah*, thus, is not confined to armed robbery; rather it covers many other forms, such as rebellion, kidnapping and abducting as well as rape, particularly gang rape.[40]
3. The Qur'ān mentions *taqtīl* among the punishments for *ḥirābah*; *taqtīl* is different from *qatl*, as the latter means killing while *taqtīl* means killing in an exemplary way, such as stoning.[41]

This was how he tried to make a case for proving that *rajm* was the punishment of *ḥirābah*, not *zinā*. As far as the verses of *Sūrat al-Nūr* about the punishment of *zinā* are concerned, Iṣlāḥī is of the opinion that these verses are general in nature and, thus, the punishment of one hundred lashes mentioned therein is both for the *muḥṣan* and *ghayr muḥṣan* offenders.[42]

Here, a serious question arises about accommodating the traditions and precedents of the Prophet (peace be on him) and his Successors (God be pleased with them) about awarding the punishment of *rajm* to convicts in cases of *zinā*. Iṣlāḥī and his students hold in principle

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[40] This means that Iṣlāḥī and his disciples could not appreciate the distinction between the operation of criminal law aod that of the law of war. The jurists deal rebellion under the law of war while deal with *ḥirābah* under criminal law. See for details about the distinction in the legal status of rebels and ordinary gangsters: Sadia Tabassum, "Combatants, Not Bandits: The Status of Rebels in Islamic Law", *International Review of the Red Cross*, 93:881 (2011), 121-139.

[41] Does it mean that other forms of *taqtil* can replace *rajm*? In other words, even if *rajm* was the punishment for *ḥirābah*, it remains to be ascertained if it was a *ḥadd* or *ta'zīr*. Iṣlāḥī did not elaborate this issue, while Ghāmidī appears to deem it *ta`zīr*.

[42] The term *iḥṣān* is used in two different meanings in the Ḥanafī criminal law: *iḥṣān* for the purposes of the offence of *qadhf* and *iḥṣān* for the purposes of the *rajm* punishment for *zinā*. The former, i.e. *iḥṣān al-qadhf* eotails five conditions: that the person must be sane, major, Muslim, free and not proved to have committed *zinā*. This existence of this last condition is presumed for every person. Similarly, every person is presumed free, except in four cases (Sarakhsī, *al-Mabsūṭ*, 9:91). Hence, generally three conditions are deemed essential: sanity, puberty and Islam. As far as *iḥṣān al-rajm* is concerned, it necessitates the following seven conditions: sanity, puberty, Islam, freedom, the fact that the spouse of the person has also fulfilled these four conditions, valid contract of marriage between the spouses and intercourse after the fulfillment of these six couditions. See for details: Kāsānī, *Badā'i' al-Ṣanā'i'*, 9: 217-220.

that the *Sunnah*, even if it is *Mutawātirah*, cannot abrogate the Qur'ān.[43] Thus, although they admit that the fact of the Prophet's awarding the punishment of *rajm* to *some* offenders has been definitively proved by *mutawātir* reports,[44] they assert that these reports cannot override the text of the Qur'ān. They divide the traditions into three categories:

1. Traditions that are acceptable to them as they do not go against their understanding of the Qur'ān, such as those mentioning the the *rajm* punishment *generally* without specifically linking it with the offence of *zinā* or any other offence;[45]
2. Traditions which are accepted after being interpreted in the light of their understanding of the Qur'ān, such as the traditions which report that the Prophet (peace be on him) asked whether accused was *muḥṣan* or not;[46]

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[43] See for a detailed discussion on this issue: Abū Bakr Muḥammad b. Abī Sahl al-Sarakhsī, *Tamhīd al-Fuṣūl fī 'l-Uṣūl* (Lahore: Maktabah Madaniyyah, 1981), 2: 53–86; AbūḤāmid Muḥammad b. Muḥammad al-Ghazālī, *al-Mustasfā min 'Ilm al-Uṣūl* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n. d.), 1: 107–128. See also: Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 2000), 317–24. About abrogation of the verses of the Qur'ān, 'Abd al-Mājid Daryābādī (d. 1977), a famous Indian scholar of the twentieth century, says: "There is nothing to be ashamed of in the doctrine of certain laws, temporary or local, being superseded or abrogated by certain other laws, permanent and universal, and enacted by the same lawgiver, especially during the course of the promulgation of that law. The course of Qur'ānic Revelation has been avowedly gradual. It took about 23 years to finish and complete the Legislation. Small wonder, then, that certain minor laws, admittedly transitory, were replaced by certain other laws, lasting and essential... It must be, however, clearly understood that the doctrine of abrogation applies to 'law' only... Beliefs, articles of faith, principles of law, narratives, exhortations, moral precepts and spiritual verities — none of these is at all subject to abrogation or repeal. See, *Tafsīr al-Qur'ān* (Karachi: Dār al-Ishā'at, 1991), 1:71.

[44] *Mutawātir* or continuous narration nf a tradition technically means that the report is narrated by such a large number of narrators in each generation that the possibility of fabrication is negated. See for details: *Uṣūl al-Sarakhsī*, 1: 282-291.

[45] For the jurists, as all other traditions report the *rajm* punishment for the offence of *zinā*, these general reports are also about the offence of *zinā*. Thus, for instance, in one of the traditions it is reported that the Prophet (peace be on him) said: "The child belongs to [the owner of] the bed and for the adulterer is stone."(Muslim, Kitāb al-Rada', Bāb al-Walad li 'l-Firash wa Tawaqqi al-Shubuhat). Scholars of the Farāhī School say that the word ثیب is general and does not mean the one who is married; while the jurists interpret it in the light of other traditions and presume the existence of the conditions of *iḥṣān* in such person.

[46] Ghāmidī says that these reports mention it as one of the factors, and not the sole factor, for deciding about the punishment.

3. Traditions which are rejected because they are deemed contradictory to their understanding of the Qur'ān, such as those report that the Prophet (peace be on him) appreciated the character and conduct of one of the convicts after he was awarded the *rajm* punishment.[47]

The foremost problem with Iṣlāḥī's theory is that it ignores, rather invalidates, the whole legal literature of fourteen centuries.[48] This is a novel idea which has never been accepted by any school of Islamic law. Earlier in Islamic history, only the Khawārij denied the punishment of *rajm*.[49] All other schools accepted this as the *ḥadd* punishment for *zinā*.[50] None of the schools deemed it a punishment for *ḥirābah*. Even when some of the

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[47] This because these reports refute the idea that the convict was a habitual offender and that he was given the punishment for making him an example for others, and not for the offence of *zinā per se*.

[48] Many scholars have written in support of, or against, Iṣlāḥī's theory of *rajm*. See for a compilation of some selected works: Khurshid Ahmad Nadim, *Islām kā Taṣawwur-e-Jurm-o-Sazā*, *op. cit.*

[49]Khawārij (lit. those who went out) were those rebelled against the fourth caliph 'Alī (God be pleased with him) after the latter agreed to a compromise settlement with Mu'āwiyah (God be pleased with him) to put an end to the civil war. The Khawārij developed a system of creed and law and emerged as a puritanical sect. One of the basic tents of the Khawārij was their belief in the infidelity of all the Companions (God be pleased with them) who accepted the compromise settlement. They were anarchists in essence. Shihāb al-Dīn Aḥmad Ibn Ḥajar al-Haytamī, the famous sunnī jurist of the tenth/sixteenth century, summarizes the arguments of the Khawārij in these words: "Establishing governmental setup brings harm as it makes the commands of the ruler binding on the subjects even though both are equal and as such it results in mischief (*fitnah*). Moreover, the ruler is not infallible (*ma'ṣūm*) from infidelity and sins. If he is not removed, he inflicts harm on people and overthrowing him is not possible without bloodshed." Ibn Ḥajar al-Haytamī, *al-Ṣawā'iq al-Muḥriqah 'alā Ahl al-Rafḍ wa 'l-Ḍalāl wa 'l-Zandaqah* (Cairo: al-Maṭba'ah al-Maymaniyyah, 1312 AH.), 1: 26).

[50]See for a comparative description of the views of the various jurists about the punishment of *zinā*: Jaṣṣāṣ, *Mukhtaṣar Ikhtilāf al-'Ulamā'*, 3:277-280. Jaṣṣāṣ (d. 370 AH/980 CE), who himself was a great jurist, abridged the work of another great jurist Abū Ja'far Aḥmad b. Muḥammad b. Salamah al-Ṭaḥāwī (d. 321 AH/933 CE) *Ikhtilāf al-`Ulamā'*. Importantly, -Ṭaḥāwī and Jaṣṣāṣ mention consensus among the jurists of various schools on prescribing the punishmeot of *rajm* to the one who commits *zinā* if he/she is *muḥṣan* even if they mention disagreement on the conditions of *iḥṣān*. The same is the case with any other manual of *fiqh* in any school of Islamic law. See for the views of the various schools of Islamic law about the punishment of *rajm*: [Ḥaoafī] Marghīnānī, *al-Hidāyah*, 2:341; [Mālikī] Khalīl b. Isḥāq al- Mālikī, *Mukhtaṣar al-'Allāmah Khalīl* (Beirut: Dār al-Fikr, n.d.), 286; [Shāfi`ī] Shams al-Dīn Muḥammad b. Abī al-'Abbās al-Ramlī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2003), 7:426; [Ḥanbalī] Sharaf al-Dīn Mūsā b. Aḥmad al-Maqdisī, *al-Iqnā' li-Ṭālib al-Intifā'* (Riyadh: Dārat al-Malik 'Abd al-'Azīz, 2002), 4:217; [Ẓāhirī] Abū Muḥammad 'Alī b. Aḥmad Ibn Ḥazm, *al-Muḥallā bi al-Āthār* (Damascus: Idārat al-Ṭibā`ah al-Mutūriyyah, 1352AH), 11:233-237; [Zaydī] Muḥammad b. Isma'īl al-Ṣan'ānī, *Subul al-Salām Sharḥ Bulūgh al-Marām min Adillat al-Aḥkām*, ed. Muḥammad Nāṣir al-Dīn al-Albānī (Riyadh: Maktabat al-Ma'ārif, 1427/2006), 4:99ff.

Mālikījurists considered sexual violence as a form of *fasād*, they did not take the position that *rajm* was the punishment for this *fasād*.[51]

As mentioned above, Iṣlāḥī holds that the punishment of *rajm* has been proved through *khabar mutawātir* and that is why he even criticizes the Khawārij for denying the reports about the Prophet's awarding this punishment.[52] If the reports about the punishment have reached the status of *tawātur*, how then can one assert that this punishment was given for *ḥirābah*, not *zinā*? There is not a single report about the Prophet's giving this punishment for any crime other than *zinā*. Nor did the Prophet (peace be on him) ever give this punishment to anyone committing robbery, which was the more obvious form of *ḥirābah*.

In an earlier case, *Hazoor Bukhsh v The State*,[53] Aftab Hussain, CJ, who was much influenced by the views of Mawlānā Iṣlāḥī, asserted that *rajm* was not a *ḥadd*, but a *ta'zīr* punishment.[54] In revision, however, the learned judge overturned his own decision on a technical ground asserting that the provisions regarding the *rajm* punishment being applicable

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[51] Asifa Quraishi referred to the views of some of the Mālikī jurists who included rape in the wider doctrine of *fasād* but she could not prove that these jurists deemed *rajm* as the punishment for this offence. Moreover, she did not acknowledge that the idea came from Iṣlāḥī. *See*: "Her Honor", *op. cit*.See also: Hashimi, *Ḥudūd Ordinance*, 47ff.

[52] Iṣlāḥī says that the "neo- Khawārij" [the modernists] are more dangerous than the "ancient Khawārij" because the latter only denied the punishment of *rajm* while the former deny the punishment of lashes also.*Tadabbur-i-Qur'ān*, 5:365.

[53]*Hazoor Bukhsh v The State*, PLD 1983 FSC 1.

[54] Justice Aftab made a few important observations about *ḥudūd*, which – if accepted – could demolish the whole edifice of the criminal law as developed by the jurists. See for a detailed criticism of his theory: Nyazee, *Theories of Islamic Law*, 109-124.

only to Muslims were included in the meaning of "Muslim Personal Law" and as such beyond the jurisdiction of the Federal Shariat Court.[55]

9.2.2 Is Rape a Form of *Ḥirābah*?

The Federal Shariat Court concluded in *Rashida Patel* that rape is a form of *ḥirābah*, not *zinā*. Influenced by the theory of Iṣlāḥī, Fidā Muḥammad Khan J, observed: "*Zinā bil jabr* is different from the other cases of *zinā* and, in our opinion, it is a serious kind of *fasād fi 'l-arḍ* and *ḥirābah*. Hence, for proving this offence the required standard of evidence is that of *ḥirābah*, not *zinā*."[56] It is surprising that the Court did not even take up the question as to why the jurists discuss the rules about coercion in sexual intercourse while discussing the rules about *zinā*? This issue will be discussed in detail later.

On what ground did the Federal Shariat Court consider rape as serious form of *ḥirābah*? The Court had an interesting argument:

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[55]PLD 1983 FSC 1. As noted in Chapter Seven of this Dissertation, in 1979, when the Hudood Ordinances were promulgated, Shariat Benches were also established in the High Courts with two-fold jurisdiction: to hear appeals in the Hudood Cases and to examine the existing laws for compatibility with Islamic law. However, four laws were excluded from the jurisdiction of the Shariat Benches. "Muslim Personal Law" was one of those laws. In *Farishta v The Federation of Pakistan*, the Peshawar High Court Shariat Bench asserted jurisdiction to examine Section 4 of the Muslim Family Laws Ordinance, 1961, and declared it null and void for repugnancy with the provisions of Islamic law. (PLD 1980 Pesh 47). However, in appeal the Supreme Court declared that the law was excluded from the jurisdiction of the High Court's Shariat Bench as it was covered by the definition of "Muslim Personal Law". (PLD 1981 SC 120). For the Supreme Court, this phrase meant the state legislation applicable on Muslim citizens only. This decision remained in field till the Supreme Court revisited and overturned it in *Dr. Mahmoodurrahman Faisal v Government of Pakistan*, PLD 1994 SC 607.

[56] This is the translation by the present author as the judgment was written in Urdu.

> If attack on the property of a person is called *ḥirābah*, why should attack on a person's honor not be deemed so? In all that a person possesses, what is more precious than his honor and as such what can be the worst form of *fasād* than attacking his honor?[57]

This may appeal to emotions but, legally speaking, the argument does not carry any weight. First, does the Court have the authority to expound new principles of Islamic law and go against the established boundaries of the schools of Islamic law?[58] Even if this basic question is ignored and it is assumed for the sake of argument that the Court has such an authority, the next question is: did the Court check the compatibility of this 'new' principle with the already established norms of the system?[59] The answer to this question is clearly in negative. Thus, the Court did not consider the consequences of considering "honor" as

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[57]PLD 1989 FSC 95 at 127.

[58] In Pakistan, the superior judiciary has on different occasions asserted that it is not bound by the opinions of the jurists of a particular school. It has even claimed the right to give new interpretation of the Qur'ān and the *Sunnah* in violation of the established principles of the various schools. See, for instance: *Balqis Fatima v Najm-ul-Ikram Qureshi*, PLD 1959 (W.P.) Lah 566. See also: *Khurshid Bibi v Muhammad Amin*, PLD 1967 SC 97. It is strange, however, that the courts after asserting this right of absolute *ijtihād* did not as yet come up with a coherent legal theory for this purpose. Most of the times, the judges pick and choose between the views of the various schools and filling the gaps by faulty reasoning based on the notions of natural law, equity and discretionary sense of justice. See for a detailed criticism on this: Muhammad Mushtaq Ahmad, "Pakistan meṇ Rā'ij Fōjdārī Qawānīn: Islāmī Qānūnī Fikr kay Chand Aham Mabāḥith" [Pakistani Criminal Law: Some Important Issues of Islamic Legal Thought], *Fikr-o-Naẓar*, 50-51:4-1 (2013), 111-154.

[59] As noted in Chapter Three of this Dissertation, Ghazālī prescribes three conditions for accepting a new principle in the legal system: that it does not alter the implications of a text of the Qur'ān or the *Sunnah*; that it does not violate the general propositions of the law; and that it is not strange to the legal system. (Ghazālī, *al-Mustaṣfā*, 1:217.) This simply means that the new principle can be accommodated only if it is compatible with the already existing legal system. See for details: Nyazee, *Islamic Jurisprudence*, 341.

"property".[60]Thus, it did not explain if this property will be *mutaqawwam* (marketable) or *ghayr mutaqawwam* (non-marketable)?[61] If it is *ghayr mutaqawwam*, how can it be brought under the concept of *ḥirābah*? If, on the other hand, it is presumed *mutaqawwam*, what will be the standard of *taqwīm* (valuation)? Will the honor of different persons have different *qīmah* (value) and, as such, the one "looting" this property from different persons will deserve different punishments? How will the law prescribe a minimum *niṣāb* for this "property" for the purpose of imposing the *ḥadd* of *ḥirābah*?[62]

Even if all these questions are ignored and rape is presumed *ḥirābah*, some more serious questions arise concerning the way the Court disposed of this issue without checking for analytical inconsistency. Thus, even though it declared rape a form of *ḥirābah*, it did not order the government to remove the provisions regarding rape from the Offence of Zina Ordinance and place them in the Offences against Property Ordinance. It also did not ask the government to change the definition of *ḥirābah* so as to include rape in its scope. Finally, the Court did not apply the punishment of *ḥirābah* to rape even after declaring that rape was a serious form of *ḥirābah*. Significantly, the Court declared that *ḥadd* punishment could not be

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[60] A legal concept (called *bāb* by the jurists and *Naẓariyyah* by the modern Arab scholars) does not come into existence spontaneously. Rather, first issues are framed and rules are derived for them in accordance with a specified - andinternally coherent - methodology. Then, these various rules are brought under a broader principle. After this, various principles are combined under a broader concept, such as property, contract, ownership and so on. See for a good discussion on this issue: Nyazee, *Islamic Legal Maxims*, 23-37.

[61] Marketable property is the one whose use has been allowed by Islamic law, while the use as well as sale and purchase of non-marketable property are prohibited for Muslims. They also include things which cannot be converted into private property.

[62] *Niṣāb* is the minimum amount of property which if stolen or robbed will attract the *ḥadd* punishment. Section 6 of the Offences against Property (Enforcement of Hudood) Ordinance 1979 fixes this amount as 4.457 grams of gold or property of the same value.

given on the basis of the testimony of women. It also reaffirmed the legal position adopted by the Hudood Ordinances that *ta'zīr* can be awarded on the basis of any evidence which satisfies the court about the guilt of the accused. Hence, the only change directed by the Court in the law regarding rape was to reduce the number of witnesses from four to two for the punishment of *ḥadd*.[63]

9.3 Relationship of Rape and *Zinā*: The Approach of the Jurists

After analyzing and refuting the theory of Iṣlāḥī about considering rape a form of *ḥirābah*, it is time now to turn the manuals of the jurists to see how do the jurists analyze cases of sexual violence? It is only after identifying the legal principles developed by the jurists that one can consider bringing the offence of sexual violence under the rubric of *siyāsah* without violating those principles. Hence, this section will first identify the legal principles developed by the jurists for the issue.

Unfortunately, the discussion of the issue of rape has generally been marred by a kind of emotional and sentimental approach which is based on the presumption that rape is invariably committed by males. Also, the complainant in a rape case is always considered a victim of rape.[64] The jurists, however, had to analyze this issue dispassionately and

[63]This judgment even did not satfisfy the liberals. Rashida Patel, the Petitioner, had to file an appeal against this decision in the Supreme Court of Pakistan which could not be decided in more than two decades.

[64] See, for instance, Hashimi's analysis of the issue.

objectively. Hence, they looked at it from all the various perspectives and divided the issue of rape into three sub-issues:

1. Legal Position of the Complainant and the Victim
2. Legal Position of the Accused
3. Legal Position of the Convict

Each of these sub-issues will be analyzed separately here.

9.3.1 Legal Position of the Complainant and Victim

There are two possible situations for determining the legal position of the complainant: when she proves that she was coerced and when she does not prove coercion. In both cases, the application of the rules of *zinā* must be examined separately from that of the rules of *qadhf*.

Thus, if it is proved that the woman was forced to have sexual intercourse, she cannot be given the *ḥadd* of *zinā* under any circumstances[65] even if it was *ikrāh nāqiṣ*.[66] She cannot be given the punishment of *qadhf* also, as her being a victim of the worst form of sexual violence will be deemed a *shubhah* to suspend the operation of the law of *qadhf*.

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[65]Ibid., 9:77.

[66]*Badā'i' al-Ṣanā'i'*, 10:109. However, if a man is coerced to have sexual intercourse, *ḥadd* punishment will not be imposed upon him only if this was *ikrāh tamm*. Ibid.

On the other hand, if no proof of her being coerced is given, the accusation will attract the rules of *qadhf* because it is an accusation of illicit sexual intercourse. Sarakhsī, for instance, says that if two witnesses give testimony of consensual sexual intercourse and two witnesses say that the woman was coerced, neither the man nor the woman will be given the *ḥadd* punishment of *zinā*.[67] It simply means that the case attracts the rules of *zinā* because the guilt can be proved only through the testimony of four witnesses. A necessary corollary of this rule is that if four witnesses are not there, the rules of *qadhf* will be applied. However, the complaint will not be deemed a confession of *zinā* on the part of the complainant because confession of *zinā* has a particular form and procedure.[68]

9.3.2 Legal Position of the Accused

When a person is accused of a crime, he cannot be given a punishment unless it is proved beyond reasonable doubt that he committed that crime.[69] When a woman accuses a man of raping her, there are many possibilities as to what might actually have occurred. Thus, for instance, she might have been a willing partner who later turned hostile against her friend; or it might be a plot against the accused. The court will have to consider all these possibilities and will not punish the accused unless all other possibilities, except his guilt, are eliminated.

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[67] Sarakhsī, *al-Mabsūṭ*, 9:77.

[68] For a detailed discussion on the form of the confession for *zinā*, see: Ibid., 9:106-109.

[69] The presumption of innocence stems from one of the most fundamental principles of Islamic law: اليقين لا يزول بالشك [Certainty is oot done away through doubt.]. See for details: Shihāb al-Dīn al-Sayyid Aḥmad b. Muḥammad al-Ḥamwī, *Ghamz 'Uyūn al-Baṣā'ir Sharḥ al-Ashbāh wa al-Naẓā'ir* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1985), 1:193-245. See also: Nyazee, *Islamic Legal Maxims*, 122-29.

Even when it is proved that the woman was assaulted and that she was not a willing partner, this will not be enough to prove the guilt of the accused. The complainant being innocent or aggrieved does not automatically prove that the accused is the culprit; positive evidence of his guilt is required. Hence, the position of the complainant must be dealt with separately from that of the accused.

9.3.3 Legal Position of the Convict

When it is proved that the accused had committed sexual violence, the next task before the jurist and the judge is to determine the nature and extent of the crime, asdifferent forms of sexual violence will attract different rules. A thorough analysis of the manuals of the jurists shows that they checked various possibilities to assert or deny the application of various rules:

If the culprit causes a hurt or injury while committing the offence of *zinā*, he is *also* liable for the hurt or injury. Thus, if he caused a minor damage to her sex organ, he will pay one-third of *diyah* for causing *jurḥ jā'ifah*, while he will be liable to pay full *diyah* if he completely damaged it.[70] Similarly, if he broke her limb, he will pay the *arsh* for it.[71]

If a person coerces a minor girl for sex and causes damage to her body, *ḥadd* punishment will not be imposed on him because the act lacks an essential condition of *zinā*,

[70] Sarakhsī, *al-Mabsūt*, 9:86.
[71] Ibid. 9:87.

but he will be given *ta'zīr*[72] and he will also be liable to pay one-third of *diyah* as well as *mahr*. But if he is to pay full *diyah*, he will not be asked to pay *mahr*.[73] In such situations, *mahr* does not mean recognition of marital relationship between the couple; rather, it is based on the principle of law that illicit sexual intercourse will attract one of the two rules: either *ḥadd* or *mahr*. Thus, this *mahr* results from illicit sexual intercourse, not from marital relationship.

The *'āqilah* will not share the responsibility of paying such *diyah* or *arsh* because it is deemed *'amd*.[74]

One the same principle, if a person commits sexual intercourse with a concubine and thereby causes her death, he is liable to *ḥadd* punishment as well as to pay the *qīmah* of the concubine.[75]

Zinā coupled with violence or *ikrāh* is a more grievous offence than ordinary *zinā*.[76] It means that in some cases of rape the court may award death punishment as *siyāsah* even if the offender is not *muḥṣan*.

Similarly, unnatural sexual intercourse also attracts the rules of *siyāsah*.[77]

The *fuqahā'* disagreed on whether or not a man can be coerced to have sexual intercourse because sexual intercourse is not possible in the absence of erection of the male

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[72] *Ta`zīr* in such situations means *siyāsah*, as elaborated in Chapter Five of this Dissertation.
[73] *Al-Mabsūṭ*, 9:88.
[74] Ibid.
[75] Marghīnānī, *al-Hidāyah*, 2:348.
[76] Sarakhsī, *al-Mabsūṭ*, 9:67.
[77] Ibid.,9:91.

sexual organ, and erection establishes the desire of the act.[78] However, the official position of the Ḥanafī School is that erection can be caused by other causes, such as intoxication.[79]Moreover, even if erection shows the desire for tbe act, it does not establish "consent".[80] Hence, Sarakhsī is explicit that if a man is coerced to have sexual intercourse, *ḥadd* punishment will not be imposed upon him provided there was *ikrāh tāmm* (complete coercion).[81]

If a man can be coerced to commit such act, the coercion may come from another man who wants him to have sexual intercourse with a woman or it may come from a woman. Last but not least, a woman may coerce a man to have sexual intercourse with her. While this last act may or may not be called "rape", it has to be criminalized.

If a man is forced to have sex with a woman, he has to pay *mahr*. This rule is applicable in case where the man under coercion forces the woman as well as in case where the woman willfully allows him to have sexual intercourse with her because such permission has no legal consequence.[82]

[78]Ibid.,9:67.
[79]Ibid.
[80] Ibid.
[81]Ibid., 24:105-06. See also: Kāsānī, *Badā'i' al-Ṣanā'i'*, 10:109.
[82] Sarakhsī, *al-Mabsūṭ*., 24:104-05.

9.4 CREATING THE *SIYĀSAH* OFFENCE OF SEXUAL VIOLENCE

This overview of the various rules of Islamic law proves that the legal regime as developed by the jurists is based on fundamental principle: that whenever sexual intercourse is there, the rules of *zinā* and *qadhf* will be applicable. Hence, the only way to avoid the application of the rules of *zinā* and *qadhf* and to bring this offence under the doctrine of *siyāsah* is to define it in such a way that *sexual intercourse* does not constitute the essential element of the offence. The essential element of this new offence shall be coercion or violence, not sexual intercourse.

Thus, oral sex, unnatural offences and other forms of sexual violence can all be brought under this wider concept. It will, thus, fill the gaps found in the present rape law. Last but not least, it will not require four witnesses.

Importantly, the new offence will become a sub-group of violence, not *zinā*. This question is important from the perspective of the theory of purposes of Islamic law (*maqāsid al-sharī'ah*).[83] According to Ghazālī, the purposes of the *Sharī'ah* are of two types: the *dīnī* or

[83] Scholars working on the theory of the objectives of Islamic law have generally focused on a much later Mālikī jurist of Andalus Abū Isḥāq Ibrāhīm b. Mūsā al-Shāṭibī (d. 790/1388) and his monumental work *al-Muwāfaqāt fi Uṣūl al-Sharī'ah* (Cairo: al-Maktabah al-Tijāriyyah, 1975).See for a detailed discussion on the work of Shāṭibī: Aḥmad al-Raysūnī, *Imām al-Shāṭibī's Theory of the Higher Objectives and Intents of Islamic Law*, tr. Nancy Roberts (Herndon, VA: The International Institute of Islamic Thougbt, 2005). The illustrious jurist-cum-hilosopher Abū Ḥāmid Muḥammad b. Muhammad al-Ghazālī (d. 505 AH/1111 CE) elaborated the general theory of *Maṣlaḥah* and *maqāṣid* much before Shāṭibī. Generally, Imām al-Ḥaramayn Abū 'l-Ma'alī 'Abd al-Malik b. 'Abdullāh al-Juwaynī (d. 478 AH/1085 CE) is credited with expounding this theory for the first time in a systematic way. See his: *al-Burhān*, vol 2. However, the great Ḥanafī jurist Sarakhsī talks about the *maqāṣid* at many places in his 30-volume commentary *al-Mabsūṭ*. See, for instance, the following passage where he talks about the *maqāṣid* while elaborating the rules about the punishment of apostasy: "Changing oue's religionand original unbelief are the greatest of all offences,but this is something between the slave and hisCreator. Consequently, the recompense is deferred till(reaching) the House of Recompense (the Hereafter). What has been hastened in this world are the legalpolicies (*siyasat mashru'ah*) for securing interests that (ultimately)

the purposes of the Hereafter and the *dunyawī*, or the purposes pertaining to this world. He further divides the worldly purposes into four types: the preservation of *nafs* (life), the preservation of *nasl* (progeny), the preservation of *'aql* (intellect), and the preservation of *māl*(wealth). When all types are taken together we have five basic purposes of law, which are also called *ḍarūrāt* (primary purposes). The values in the priority order are: *dīn*, *nafs*, *nasl*, *'aql* and *māl*.[84]

The jurists hold that the punishment of *zinā* is for the protection of the value of *nasl*.[85] However, the offence of sexual violence is different from *zinā* as it does not have the element of sexual intercourse and as such it will not be deemed an attack on the value of *nasl*. It will be more appropriate to consider it an attack on the value of *nafs*, which will also be in conformity with the priority order of the *maqāsid al-sharī'ah* mentioned above.

Conclusions

The Indian Penal Code defined rape in a way that made sexual intercourse its essential part and, thus, it created the offence of so-called *zinā bil jabr*. The Hadd of Zina Ordinance retained this scheme but imposed two punishments for this offence: *ḥadd* and *ta'zīr* requiring

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revertto the servants, like *qiṣāṣ*for the protection of lives, the*ḥadd*of *zinā*for the protection of progeny and family, the *ḥadd*of *sariqah* for the protection ofproperty, the*ḥadd*of *qadhf* for the protectionof reputations, and the*ḥadd*of *khamr* for the protectionof intellects." (*al-Mabsūṭ*, 10:118). Nyazee has showo with considerable details that even before Sarakhsī, it was the great Ḥanafī jurist Abū Zayd al-Dabbūsī (d. 430 AH/1039 CE) who for the first time expounded this theory. See: Nyazee, *Islamic Legal Maxims*, 67-75.

[84] Al-Ghazālī, *Shifā' al-Ghalīl fiBayān al-Shabah wa 'l-Mukhīl wa Masālik al-Ta'līl* (Baghdad: Dār al-Kutub al-'Ilmiyyah, 1971), 186–87. See also: *idem*, *al-Mustaṣfā*, 1:213-222.

[85] Sarakhsī, *al-Mabsūṭ*, 10:118.

two different standards of evidence for this offence for the purpose of the two different kinds of punishments. The anomalies caused by this scheme of the things led some of the scholars to declare that *zinā bil jabr* was a form of *ḥirābah*, not *zinā*; others suggested changing the standard of evidence for this offence as well as for the other *ḥudūd*; and some suggested changes from both perspectives, a view that demolishes the whole edifice of criminal law developed by the jurists.

As the rules about the *ḥadd* of *zinā* and the *ḥadd* of *qadhf* are immutable, focus should be shifted to other variables. The only way to delink this offence from *zinā* and *qadhf* and bring it under the doctrine of *siyāsah* is to create an offence of sexual violence which does not involve sexual intercourse as an essential element after which it will become a sub-category of violence, not *zinā*. In its present form, Pakistani law about sex crimes contained in Sections 375-375 and 496B-496C is repugnant to Islamic law.

CHAPTER TEN: ISSUES REGARDING THE STANDARD OF PROOF

INTRODUCTION

Accepting the criticism of Orientalists on the Islamic law of evidence and its emphasis on testimony,[1] the critics of the Islamic criminal law deem the standard of proof derived and approved by the jurists as unacceptable and out of tune with the realities of the modern age. It is generally argued that the requirement of four witnesses for proving *zinā*makes it impossible to prove the case of rape and it causes serious problems for the victim of rape. Thus, while some of the critics suggest making medical and forensic reports and other forms of indirect or circumstantial evidence admissible for the purpose of preventing injustice to victims of rape,[2] others call for excluding rape altogether from the scope of the *ḥudūd*.[3] Moreover, for many critics the conditions for testimony are discriminatory against women and minorities.

This chapter first presents the basic principles of the Ḥanafī School regarding "testimony" (*shahādah*), which are important for understanding the detailed law about standard of evidence. After this, it focuses on the admissibility of the testimony of women and non-Muslims in *ḥudūd* cases. Then, it examines the arguments of those who favor

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[1] See, for instance: Schacht, *Introduction to Islamic Law*, 192-195.

[2] Recently when the CII concluded that the *ḥadd* punishment cannot be awarded on the basis of the DNA tests, it was severely criticized in media.

[3] This was done by the Protection of Women (Criminal Laws Amendment) Act 2006. As noted in the previous Chapter, it repealed all the provisions of the Offence of Zina Ordinance relating to the so-called *zinā bil jabr* and revived the old PPC provisions about rape.

conviction on the basis of circumstantial evidence in *ḥudūd* cases. Finally, it presents the standard of proof for *siyāsah* offences so as to find out if the doctrine of *siyāsah* can provide a better solution to this important issue of criminal justice system in the contemporary Muslim world.

10.1 Exploring the Ḥanafī Law about Testimony

For understanding Ḥanafī law about testimony, it is essential to recall the discussion on the relationship of *qiyās* and *istiḥsān* as elaborated in Chapter Two of this dissertation. *Istiḥsān*, as explained there, is a methodology for ensuring analytical consistency in the system by bringing conflicting rules under different principles and thus putting everything in its proper place. In the following passages, Sarakhsī explains how the principle of *istiḥsān* has helped in developing the detailed law of testimony. Tbis discussion has important implications for the debate in Pakistan on the Islamic law of evidence in the context of the criticism on the Hudood Ordinances and the Qisas and Diyat Act.

10.1.1 General Principles of Law about Testimony

The first statement of Sarakhsī in *Kitāb al-Shahādat* may astonish many people because he rejects *shahādah* (testimony) altogether, saying it goes against the basic principle of law:

> *Qiyās* (the general principle) refuses to accept testimony as a valid proof (*ḥujjah*) for legal issues because it is a report (*khabar*) which may or may not be true; and with this possibility [of being untrue], it cannot be a binding argument (*ḥujjah mulzimah*). Moreover, individual narration (*khabar al-wāḥid*) does not give conclusive knowledge (*al-'ilm*), while judgment [of the court] is binding and as such it requires a conclusive argument, such as [the judge's] witnessing the event directly.[4]

What he is trying to establish is simple: if the law requires a definite proof of the fact that the accused committed the crime, it is impossible to prove so through testimony because there is always a possibility that the witnesses – even if apparently trustworthy – may have fabricated the story. Such an absolutely definite proof can only be available to the one who sees the event with his own eyes,[5] but how can we be so sure of a witness' claim of seeing the event? Thus, Sarakhsī actually negates the necessity of an "absolutely definite" proof. That is why he explains that the law does not require such a proof and has accepted the testimony of the witnesses despite its being not so definite: "But we have abandoned this [requirement of absolutely definite proof] because of the texts [of the Qur'ān and the *Sunnah*] which give command for acting on the testimony [of the witnesses]."[6] In other words, the original *qiyās*has been ahandoned and the testimony of the witnesses has been accepted on the basis of *istiḥsān*.[7]

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[4]Sarakhsī, *al-Mabsūṭ*, 16:112.

[5] Unless, of course, if he is among the Sophists!

[6]Sarakhsī, *al-Mabsūṭ*, 16:112.

[7] The meaning of *qiyās* and *istiḥsān* has been explained in Chapter Two of this dissertation. It may be added here that after *qiyās* is abandoned, it no more remains a valid evidence and *istiḥsān* 'replaces' it completely.

Hence, the general principle of law is that testimony is a valid proof. Under this general principle, the testimony of one person – male or female, Muslim or non-Muslim – should be acceptable, but again other principles of law restrict the generality of this principle and this *qiyās* is abandoned through another *istiḥsān*:

> After accepting this [testimony as a valid proof], *qiyās* is that the testimony of one witness is enough because the possibility of his truth is greater due to his trustworthiness (*ṣifat al-'adālah*). It is for this reason that acting on the individual narration (*khabar al-wāḥid*) becomes binding. If definitive knowledge (*'ilm al-yaqīn*) is not established by the individual narration, it is also not established by the report of two or more persons, unless the number reaches the level of *tawātur*. Hence, the requirement of two witnesses seems meaningless. However, we abandoned this *qiyās* because of the texts [of the Qur'ān and the *Sunnah*] which prescribe the minimum number of witnesses for testimony generally.[8]

The concept that emerges from these principles is that although testimony may not be an absolutely definite proof of an act, the law has generally accepted the testimony of two witnesses as a valid proof. This latter requirement of a minimum number of two is peculiar to testimony because the law does not prescribe this condition for accepting a report (*riwāyah*), and this is one of the major differences between testimony and report.

Sarakhsī quotes various precedents from law to substantiate this principle and concludes that as *qiyās* in such cases is *matruk* (abandoned), it is prohibited to act on it because *matruk* cannot be acted upon. *Uṣūl al-Sarakhsī*, 2:200-201.

[8]Sarakhsī, *al-Mabsūṭ*, 16:112.

10.1.2 The Deviant Case: Accepting the Testimony of One Witness

At this stage one may refer to an apparently deviant case in which the law has accepted the testimony of one woman as a valid proof. This is the case of the issues which can be observed only by women, such as defect in the sexual organ of a woman. Sarakshi explains with the help of many examples from the texts of the Qur'ān and the *Sunnah* that the general principle of law (*qiyās*) requires that the testimony of women must be corroborated by the testimony of men, but in some specific cases the testimony of a single woman has been accepted using *istiḥsān* yet again because of the precedents of some renowned Followers of the Companions.[9]

He further explains that the statement of the woman in such a case resembles both testimony as well as report and that is why it attracts some of the consequences of both of these concepts. Thus, like report, it does not require the minimum number of two and, like testimony, it necessitates that the woman must not be a slave and that she must give her statement in a court of law.[10] He also explains that if a man coincidentally observes such an event and then testifies, his testimony alone will be accepted in the same way as the testimony of a single woman is accepted.[11]

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[9] These include, *inter alia*, Sa'īdb. Jubayr (d. 94 AH/714 CE), Sa'īd b. al-Musayyib (d. 95 AH/715 CE), Mujāhid b. Jabr (d. 102 AH/722 CE), 'Aṭā' b. Abī Rabāḥ (d. 114 AH/732 CE) and Ṭāwūs b. Kaysān (d. 103 AH/723 CE). Ibid., 16:142-43.

[10] Ibid.,16:143.

[11] Ibid.,16:144.

10.1.3 Capacity for Testimony (*Ahliyyat al-Shahādah*)

After explaining these basic principles regarding testimony, Sarakhsī comes to the issue of "capacity for testimony" (*ahliyyat al-shahādah*)[12] and explains that it basically depends on three conditions: intellect, memory and trustworthiness, not on religion or gender.[13] To take the case of non-Muslims first, Sarakhsī says that a non-Muslim is *basically* competent to testify, but his testimony in matters of religion or against Muslims is not acceptable because of difference of religion:

> Islam is not a condition for the capacity to testify because if a person avoids what he believes to be probibited by his religion, his testimony is presumed to be true. However, his report in matters of religion is not accepted because of his bias in such matters as he believes in opposing the religion. It is on this basis that his testimony against Muslims is not accepted as he believes in having enmity against them.[14]

As far as woman as a witness is concerned, the Shāfi'ī jurists assert that woman originally is not eligible for testimony because of defect in her intellect and memory.[15] They further assert

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[12] This may be compared with the English law doctrine of *voir dire* (literally: to tell what is true) incorporated in Article 3 of the Qanoon e Shahadat Order 1984: "All persons shall be competent to testify unless the Court considersthat they are prevented from understanding the questions put tn them, or from givingrational answers to thnse questions, by tender years, extreme old age, disease, whetherof body or mind or any other cause of the same kind." The principle here is that basic competence of the witness is determined by the capability to give rational answers to questions posed to him. This is exactly what is said by Sarakhsī and Marghīnānī. Hence, when they do not accept the testimony of women or non-Muslims in some cases, it is not because they deny this capacity to them; rather, it is because of other reasons mentioned in the texts.

[13] Sarakhsī, *al-Mabsūṭ*, 16:113.

[14] Ibid.

[15] Shirbīnī, *Mughnī al-Muḥtāj*, 4:587-591.

that even though the Qur'ān allows the testimony of two women if corroborated by the testimony of one man, this is not the original rule and that it is an alternate – and lesser – form of evidence.[16]

Sarakhsī refutes both of these presumptions by first asserting that originally woman is capable of testifying, but as the Qur'ānic verse explicitly mentions the possibility of her forgetfulness, this creates a kind of *shubhah* in her testimony, which is why it is not admissible in cases where the punishment is suspended by *shubhah*, i.e., *ḥudūd* and *qiṣāṣ*; and is admissible in the rest of the cases.[17] He also asserts that the testimony of two women coupled with that of one man is *not* an alternative and lesser form of evidence so that it is admissible originally, as opposed to *shahādah'alā al-shahādah* which is admissible only in case of necessity.[18]

Sarakhsī further elaborates that another basis for the Shāfi'ī principle is the presumption of denial of a woman's capacity for offer or acceptance in a contract of marriage.[19] The Ḥanafī School, explains Sarakhsī, presumes her to be competent and, as such, she is also capable of becoming witness to a contract of marriage.[20]

After intellect, memory and trustworthiness, explains Sarakhsī, the capacity for testimony rests on *ahliyyat al-wilāyah* (capacity for binding others). Hence, slaves are not

[16]Ibid.

[17]Sarakhsī, *al-Mabsūṭ*, 16:114. Sarakhsī has discussed this issue in more details in *Kitāb al-Nikah* where he explains the Ḥanafī position about accepting the testimony of two women in the contract of marriage if it is accompanied by the testimonyof one man, while the Shāfi'ī jurists do not allow this. See: *al-Mabsūṭ*, 5:32.

[18] Ibid.

[19] Ibid.

[20]Ibid.

eligible to testify as they lack the authority (*wilāyah*) to bind others, while women are competent to testify because the law acknowledges *wilāyah* for them, even if their *wilāyah* is *naqisah* (defective) as compared to that of men:

> After this, capacity for *wilāyah* is prescribed for testimony so that a slave is not competent to testify even if his report in religious matters is acceptable, because testimony has binding character which is not found in the absence of *wilāyah*. Hence, we deem the capacity of *wilāyah* essential in the same way as we prescribe the [minimum] number [of witnesses]; and we put the female witnesses in a lower category [not accepting their testimony in some cases] as compared to men [whose testimony is accepted in all cases] because the *wilāyah* of women is defective [as compared to men].[21]

It may be noted here that the Ḥanafī jurists base the capacity for judicial post (*ahliyyat al-qaḍā'*) on the capacity for testimony so that if a person is competent to testify in a case, he is also eligible for becoming judge in that case. Marghīnānī says: "The validity of judicial post is based on the validity of testimony as both of them are forms of *wilāyah*. Hence, everyone having the capacity of testimony has the capacity of becoming a judge, and whatever condition is prescribed for testimony is also prescribed for the judicial post."[22] This implies that a woman has the capacity to become judge in all cases, except *ḥudūd* and *qiṣāṣ*.[23] The

[21]Ibid.,16:113.
[22]Marghīnānī, *al-Hidāyah*, 3:117.
[23]Ibid., 3:106.

Shāfi'ī jurists do not accept this because, as noted earlier, they do not deem her capable for testimony except as an alternate and lesser form of evidence and also because they prescribe for judge the *wilāyah* of the ruler (*wilāyat al-imārah*) and the Prophetic tradition prohibits appointing a woman as a ruler.[24]Marghīnānī refutes these arguments and gives a summary of the Ḥanafī position on this issue which may be deemed the concluding remarks here:

> The testimony of woman is originally acceptable because she has all the prerequisites of the capacity for testimony (*ahliyyat al-shahādah*), i.e., observing [an event] (*al-mushāhadah*), remembering [it] (*al-ḍabṭ*) and narrating [it] (*al-adā'*). The first of these traits [i.e. observing] gives knowledge [of the event] to the witness; the second [remembering] preserves that knowledge; and the third [narrating] brings it to the knowledge of the judge. It is on this basis that her report is accepted [by all Schools of law]. The defect in her memory because of excess of forgetfulness is compensated for by the corroborative testimony of another woman after which only *shubhah* remains. Hence, her testimony is not accepted in cases where punishment is suspended by *shubhah*.[25]

10.1.4 The Standard of Testimony for Various Cases

After exploring the basic principles of the Ḥanafī law about testimony, a brief mention is made here of the *niṣāb al-shahādah* (standard of testimony) for various cases as expounded by the Ḥanafī School.

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[24] "The people who assign their affair to a woman will never flourish." Bukhārī, Kitāb al-Maghāzī, Bāb Kitāb al-Nabiyy sallallāhu 'alayhi wa sallama ilā Kisra wa Qayṣar. The Shāfi'ī jurists base their denial of judicial post to women on this hadith. See: Shirbīnī, *Mughnī al-Muḥtāj*, 4:501-502.

[25]Marghīnānī, *al-Hidāyah*, 3:117.

The Ḥanafī jurists relate the issue of *niṣāb al-shahādah* with the right affected. The jurists generally do not talk about the right of the ruler (*ḥaqq al-imām*); hence, the analysis here is confined to rights other than the right of the ruler.

The first of the categories is that of the pure rights of God, that is, all the *ḥudūd*, except the *ḥadd* of *qadhf*. For the purpose of testimony, *ḥudūd* are divided into two sub-categories: the *ḥadd* of *zinā* requires *four male* witnesses; while the rest of the *ḥudūd* require *two male* witnesses.[26]

The second category is that of the mixed rights of God and individual, which is further divided this into two sub-categories:

a. where the right of God is predominant, i.e., the *ḥadd* of *qadhf*; and

b. where the right of individual is predominant, i.e., *qiṣāṣ*.

Both of these sub-categories require *two male* witnesses.[27]

The third category is that of the pure rights of individual, such as *nikāḥ*, *ṭalāq*, *hibah* and the like. [28] This category requires *two male* witnesses or *one male* and *two female* witnesses. As *ta'zīr*punishment also relates to the right of individual, the jurists prescribe for it the same *niṣāb* of *shahādah*.[29]

Sarakhsī explaining the *niṣāb* of *shahādah* for these three categories says:

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[26]Ibid.,3:116.
[27] Ibid.
[28]Ibid.,3:116-117.
[29]Ibid.;Kāsānī, 9:274.

> This kind of *shahādah* is divided into three categories from the perspective of the number of witnesses: one of them requires four witnesses, and this is the case of *zinā* which attracts the punishment of *ḥadd*... the other category requires the testimony of two males, and this is the case of *qiṣāṣ* and other punishments which are suspended by *shubhah* [i.e., *ḥudūd*]; and the third category requires the testimony of two male witnesses or one male and two female witnesses, and these are the cases which can be proved even in the presence of *shubhah* [i.e., *ta'zīr*].[30]

Hence, where the right of God is involved (*ḥudūd* and *qiṣāṣ*), the punishment is suspended by *shubhah* and as such the testimony of women is not admissible in these cases. The strictest criterion is prescribed for the *ḥadd* of *zinā*. Sarakhsī explains the principle behind this rule in the following words:

> Four witnesses are not required for any other case, criminal or otherwise. The reason for this is no other than the fact that Allah, the Exalted, wants to conceal the sins of His servants and does not like the spreading of indecency (*ishā'at al-fāḥishah*). That is why He prescribed an extra number of witnesses in [cases related to] *zinā*. That is also why, as opposed to allegations of other crimes, He made the allegation of *zinā* against other women a cause for *ḥadd* punishment and allegation of *zinā* against wives a cause of imprecation (*li'ān*), so that people conceal each other's sins.[31]

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[30]Sarakhsī, *al-Mabsūṭ*, 16:114-15.
[31]Ibid., 16:134.

In all these cases, if the accused is a Muslim, the witnesses have to be Muslims.[32] Moreover, the judge must conduct open and secret inquiry about the trustworthiness of the witnesses (*tazkiyat al-shuhūd*).[33]

The fourth category is of the cases which can generally be observed only by women, such as defect in the sexual organ of a woman. These cases may also be proved by the testimony of one woman because they attract the rules of testimony as well as those of report.[34]

As far as the standard of proof for *siyāsah* offences is concerned, the jurists leave the matter to the ruler and the judge who may decide about the admissibility of the various forms of evidence, direct and indirect, within the parameters of the general principles of Islamic law. This point will be elaborated below in Section 10.3

10.2 Discourse in Pakistan on the Standard of Proof

Critics of the Huood Laws in Pakistan have generally regarded the exclusion of women and non-Muslim witnesses as discriminatory and have also targeted the emphasis on testimony and number of witnesses instead of other forms of evidence, more particularly in the wake of modern day technological advancements. Some critics have also quoted from classical sources

[32] Marghīnānī, *al-Hidāyah*, 3:117.

[33] The term *tazkiyat al-shuhūd* implies secret and open inquiry about the character and trustworthiness of the witnesses. Marghīnānī, *al-Hidāyah*, 3:118.

[34] Ibid.,3:117.

to prove that *ḥudūd* can be proved through the testimony of women and non-Muslims as well as circumstantial and indirect evidence. This section analyzes these issues in a bit detail.

10.2.1 Quality or Quantity?

As opposed to this approach of the jurists, the Pakistani judiciary has asserted in many cases that the quality of evidence is more important than its quantity. For instance, in *Muhabbat v The State*, the Sind High Court observed:

> Mere quantity of evidence leads us nowhere. As a rule, witnesses are weighed and not numbered. Under Article 17 of the Qanoon-e-Shahadat, 1984, no particular number of witnesses is required for the proof of a murder charge. Volume and weight of the evidence may be considered together, but if there is a conflict between the two, the quantity will certainly give way to quality.[35]

This interpretation of Article 17 is not acceptable because the said Article primarily gives the general principle that the standard of evidence is to be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'ān and the *Sunnah*.[36] Ghamidi, one of the foremost critics of the Hudood Laws, writes:

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[35] *Muhabbat v The State*, PLD 1990 PCrLJ 73 at 77.

[36] In Chapter Twelve of this dissertation, a thorough analysis of this Article has been made and it has been shown that this Article prescribed the same standard of proof for *Qiṣāṣ* which the jurists mentioned in the manuals of Islamic law. See Section 12.2.

> Nowhere does the Quran obligate the following of any determined standard of proof. It is obvious, therefore, that crimes (in Islamic law) may he proved hy all methods recognized by ethics and reason as heing sufficient for proving something in a legal matter. Circumstances, medical inspections, post mortem, finger prints, testimony of witnesses, confessions, oaths, *qasāmah* (...) and all other similar evidences that may lead to the proving of a crime are all recognized by Islamic law.[37]

This view is echoed in the Report of the Council of Islamic Ideology on Hudood Laws as well. This sweeping statement cannot, however, be taken as correct for all cases. Crimes in general may obviously be proved by these methods. But are we to follow the same approach in cases of *ḥudūd* as well? As already explained in Chapter Four of this dissertation, the *ḥudūd* do not fall within the general category of crimes in Islamic law and cannot be made subject to the methods of proofs that are used for establishing crimes in general. Ghāmidī himself admits that in case of *zinā*, the Quran does stipulate a fixed standard: "The Quran is aḍamānt here (for *zinā*) that under all circumstances (if *zinā* is to be proved), the accuser has to come up with four witnesses; failing which, he would have no case. Circumstantial evidence, medical reports etc., all mean nothing in this particular case."[38] Why, if for *zinā*, the usual rules and methods of testimony and proof are abandoned for a prescribed procedure, can such procedures not be accepted for other *ḥadd* crimes? To put it more clearly, if we can acquire

[37] Jāvēd Ahmed Ghamidī; *Burhān* (Lahore: Dār al-Ishrāq, 2001), 24.
[38] Ibid.

the fixed standard for one *ḥadd* crime from the Qur'ān, why we cannot derive it for other crimes from the *Sunnah* or *ijmā*?

10.2.2 Admissibility of the Testimony of Women

The critics of the jurists have presented their case in the following manner:[39]

First, they have tried to support their view by verses of the Qur'ān exhorting Muslims to give forth true testimonies.[40] However, they have not cited any verse establishing the validity of female testimony in cases of *ḥudūd*. From the traditions of the Prophet (peace be on him), they have come up with only one incident where sexual violence was committed against a woman during the *fajr* prayer time and the accused was convicted based on the testimony of the complainant.[41] Support from this tradition is problematic; firstly, because it comes from varying chains which contradict and conflict with each other; secondly, even if the validity of the tradition itself is granted, the woman in the case was the complainant and not a witness; thirdly, and this will be discussed later, this incident is concerned with *siyāsah* and not with *ḥadd*.

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[39] Hashimi, *Ḥūdūd Ordinance Kā Ik Ja'izah*, 79-83, and 111-117

[40] Qur'ān 2:140, 283; 4:135; 5:8; 65:2; and 70:33.

[41] Abū 'Īsā Muḥammad b. 'Īsā al-Tirmidhī, *al-Sunan*, Kitāb al-Ḥudūd, Bāb Mā Jā' fī 'l-Mar'ah Idhā Ustukrihat; Abū Dāwūd, Kitāb al-Ḥudūd, Bāb al-'Afw 'an al-Ḥudūd Mā Lam Yablugh al-Sulṭān. The title Abū Dawud gives to the Chapter for this hadith is very interesting. He suggests that this was not judicial decision of the Prophet, upon him blessings and peace.

More strangely yet, some of these critics claim that 'Ā'ishah (God be pleased with her) narrated almost a third of the legal rules.[42] It is quite amazing that those of this view do not know the difference between such distinct concepts as testimony (*shahādah*) and reporting (*riwāyah*).[43]

The verse of debt, which clearly calls for the testimony of two males, or, if two males are not available, of one male and two females witnesses, has also been taken by some to support the case for female witnesses. Some of them assert that this verse talks about the 'calling forth' of a witness and not about 'being' a witness.[44] This position is unfounded for the following reasons:

First, the verse that stipulates the requirement of four witnesses for the offence of *zinā* uses the same term i.e. *fa-stashhidū*.[45] Are we to take its meaning as 'calling forth' of four witnesses there too?

Second, even if one were to grant the 'calling forth' interpretation, the question still remains as to why only men were commanded to come forward as witnesses?

Third, why, where the testimony of women was allowed, the testimony of one male was equaled to that of two females? How can one claim that the verse maintains that only one of the two females called forth would testify and that the other would only 'help' her? Who is

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[42] Hashimi, *Ḥudūd Ordinance kā Ik Jā'izah*, 80.
[43] For distinction between *Riwāyah* and *shahādah*, see: *Radd al-Muḥtār*, 8:272-74.
[44] Ghāmidī, *Burhān*, 28.
[45] Qur'ān, 4:15.

to be the witness and who the aide? What position would the court take in case only one of them is found to be present? If the court should give the same value to the testimony of the witness t in the absence of the aide as it would in the aide's presence, why was the latter summoned for testimony in the first place?

One awkward solution presented to this problem has been that the stipulationin the verse does not mean the testimony produced before a court and that it is to be taken as a 'social' instruct.[46] That, of course, does not help; for failure to solve a problem 'socially' would again compel us to refer to a court of law. But even if the above interpretation is granted, the problem still remains as to why was such a 'social' instruct given in the case of females only? That is to say, the stipulation still looks quite discriminatory with regards to gender - an accusation which themodern apologetics want to refute.

Fourth, these efforts at an unnecessary interpretation again stem from the confusion that Islamic law is limited to *ḥadd* punishments only. Thus, one critic says:

> This law can certainly be objected to; for what are we to do if a deranged individual were to enter a place where only women resided, or a girls' hostel and commit the crime of rape? Surely, the production of four male eye-witnesses in such a case would he impossible.[47]

[46] Ghāmidī, *Burhān*, 29.
[47] Hashimi, *Ḥudūd Ordinance kā Ik Jā'izah*, 78

This is again taking the erroneous view that Islamic law does not recognize any other form of punishment. The above mentioned individual can be satisfactorily dealt with under the doctrine of *siyāsah*, where the state has the power and authority to prescribe a suitable punishment for such a heinous offence.

10.2.3 Admissibility of the Testimony of Non-Muslims

Regarding the admissibility of the testimony of non-Muslims in *ḥadd* cases, some present the following verse in support of their argument:

> O you who believe! call to witness between you when death draws nigh to one of you, at the time of making the will, two just persons from among you, or two others from among others than you, if you are travelling in the land and the calamity of death befalls you.[48]

This is again problematic for reasons given below:

First, one cannot say with certainty that *min ghayrikum* (those other than you) here refers to non-Muslims; especially, if one looks at the last part of the verse:[49]

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[48]Qur'ān, 5:106.

[49] It is for this reason that Imām Abū Ja'far Muḥammad Ibn Jarīr al-Ṭabarī (d. 311 AH/923 CE), while himself maintaining that the words refer to non-Muslims, relates the opinion of the great Followers 'Ikrimah (d. 105 AH/724 CE), Ibn Sīrīn (d. 110 AH/728 CE) and Ibn Shihāb al-Zuhrī (d. 124 AH/742 CE) that *min*

> The two (witnesses) you should detain after the prayer; then if you doubt (them), they shall both swear by Allah, (saying): We will not take for it a price, though there be a relative, and we will not hide the testimony of Allah for then certainly we should be among the sinners.[50]

Second, the jurists who do take it to mean non-Muslims, accept the testimony only as a special case relaxation.[51] The wording of the verse also supports the interpretationnn that due to the peculiar circumstances during travelling, this exemption was given from the general rule of inadmissibility.

Finally, those jurists who do accept the testimony of non-Muslims, still maintain that a *ḥadd* punishment cannot be awarded on the testimony of non-Muslims. [52] The reason is the same as has been pointed out earlier; that the procedure to be followed in a *ḥadd* case is different from all the other punishments. One cannot not haphazardly select rulesfrom other areas of Islamic law and superimpose them on *ḥudūd*.

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ghayrikum here means Muslims not related to the testator (*Jāmi' al-Bayān 'an Ta'wīl Āy al-Qur'ān* (Damascus: Dār al-Fikr, 1982), 7:85).

[50]Qur'ān, 5:106.

[51] Ṭabarī, *Jāmi' al-Bayān*, 7:86

[52] Shurayḥ b. al-Ḥārith al-Kindī, the famous judge during the reign of the rightly-guided caliphs, accepted the testimony of non-Muslims but his stance on their testimony in *ḥadd* cases was: "Except in the case of testation he would not accept the testimony of Christians and Jews as against a Muslim; and even for testation he would only grant it if the case came up during traveling." Ibid., 7:84.

10.2.4 Admissibility of Circumstantial Evidence

For accepting circumstantial evidence in a rape case and considering it a form of *ḥirābah*, the Federal Shariat Court relied on an incident that is reported to have taken place during the lifetime of the Prophet (peace be on him). Before we evaluate the inferences of the Court it seems proper to briefly mention the report of the incident:

> A woman went out during the time of the Prophet (peace be on him) for offering the *fajr* prayer. She was grabbed by a person who had his way with her her. She made a cryand he ran. When people came about, she informed them of what had occured. She also came across a group of the *muhājirīn* and told them about it. They went to capture the perpetrator and brought the person whom she believed to he the perpetrator. She said: "Yes, this is the one." They brought him to the Prophet (peace be on him). When he ordered that he be stoned, the actual perpetrator [who was watching silently] stood up and said: "O Messenger of Allah! I am the one who did it to her." The Prophet said to the woman: "Go. Allah has forgiven your mistake." He also said good words about the first accused and said regarding the actual perpetrator: "He has repented in such a way tbat if the wbole population of Madinah had repented his way, it would have sufficed them."[53]

This incident has been narrated by different reporters, who contradict each other in some details, but they agree on the following points:

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[53] Tirmidhī, Kitāb al-Ḥudūd, Bāb Mā Jā' fī 'l-Mar'ah Idhā Ustukrihat; Abū Dāwūd, Kitāb al-Ḥudūd, Bāb al-'Afw 'an al-Ḥudūd Mā Lam Yablugh al-Sulṭān.

i. That sexual violence was committed against the woman;

ii. That when the woman claimed that sexual violence was committed against her, she was not asked to bring four witnesses;

iii. That the detailed procedure for proving the *ḥadd* offence was not followed; for instance, no inquiry was made about the culprit, whether he was *muḥṣan*;

iv. That the first accused was given punishment on the basis of circumstantial evidence.[54]

The Federal Shariat Court raised some important questions concerningthis report:

> Whether the first accused was awarded the *rajm* punishment, or he was about to be awarded this punishment when the actual culprit came forward? Whether he was *muḥṣan* or *ghayr muḥṣan*? The punishment awarded to him by the Prophet (peace be on him) was *ḥadd* or *ta'zīr*? Whether this punishment was actually awarded for the purpose of being enforced, or had the Prophetic genius seen that because of the spontaneous reaction of awarding this punishment, the actual culprit would come out with his confession? Whether the first accused was awarded the punishment on the basis of the testimony of the complainant alone or on the basis of the overall corroborative circumstances of the case? Whether that person remained silent or had denied the allegation? If he denied the allegation, why was his denial not accepted? Why was the woman not asked to bring four witnesses?[55]

[54] See for details: Ahmad, *ḤudūdQawānin*, 86-90.
[55]PLD 1989 FSC 95 at 126.

It is, however, surprising that even after raising these questions the Court preferred not to address them and proceeded to jump to conclusions. The fact remains that unless these questions are answered, the true nature of this punishment cannot be understood and this report cannot be used to modify the structure of the *ḥudūd* as developed by the jurists. We have the following objections on this summary treatment of the issue by the Federal Shariat Court:

i. This report is used in this summary fashion by those who assert that *ḥadd* punishment can be awarded on the basis of circumstantial evidence.[56] If this report is accepted on the face of it, the above position would have to be accepted for the *ḥadd* of *ḥirābah* as well, and not just of *zinā*, as the Court wants us to believe.

ii. The report mentioned above explicitly mentions that the first accused was awarded the punishment. Hence, it becomes necessary to ascertain if this punishment was *ḥadd*or *ta'zīr*. If it was the *ḥadd* punishment and even then the rest of the questions are not answered, it simply implies that these questions are not important even in cases of *ḥudūd*.

iii. Is there any other example of the Prophet (peace be on him) using his "prophetic genius" in awarding punishment to someone with the intention of getting the real culprit on the basis of a "spontaneous reaction"?

[56] Hashimi is an example.

iv. How could the Court ignore the most important question of the standard of evidence?

v. Even if the real culprit was awarded punishment on the basis of his confession, the procedure for the confession of *zinā* was not followed. Even then, the Court ignored this issue and deemed it a case of *ḥadd*.[57]

To conclude then, instead of changing the structure of the *ḥudūd* on the basis of this solitary report, the proper way to deal with the report is to interpret it in such a way that it becomes compatible with the structure of *ḥudūd*, which in turn is based not only on a number of texts but also on the relevant principles of law. Such an interpretation is not only possible but plausible.

The woman was going for *fajr* prayer and was attacked near the mosque. This was undoubtedly an act of *fasādfi 'l-arḍ* attracting the principle of *siyāsah*. The circumstances clearly suggested that violence was committed against the woman. It must be presumed here that the woman was complaining about violence, even if it was in the form of sexual assault, and was not specifically alleging the offence of *zinā*. Thus, the allegation did not attract the rules of *zinā* and *qadhf*. This becomes the basis for absolving the woman from the liability of bringing four witnesses or facing the *qdhf* punishment.

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[57] It may be noted here that appeal was preferred to the Shariat Appellate Bench of the Supreme Court against this decision and, as the Constitution has it, when appeal is preferred against the decision of the Federal Shariat Court, the operation of the decision is automatically suspended and it does oot require a stay order by the Supreme Court. It is unfortunate that the Shariat Appellate Bench of the Supreme Court could not decide the fate of the appeal in 23 long years! In the meanwhile, the law on which the Federal Shariat Court had given this decision has been changed by the Protection of Women Act in 2006. Heoce, the *Rashida Patel* judgment is now redundant.

The only question that remains unanswered is: can circumstantial evidence prove a *siyāsah* offence?

10.3 Admissibility of Circumstantial Evidence in *Siyāsah* Cases

In Pakistan, the discourse on the crime of rape has given birth to three different approaches to the issue of standard of proof for this crime:

- Traditional scholars, who consider rape as a form of *zinā*, insist on the standard of proof for the offence of *zinā* as determined by the jurists;
- Mawlānā Iṣlāḥī and his disciples suggest that rape is a form of *ḥirābah* and that it does not have any prescribed standard of proof; hence, they leave the matter to the discretion of the judge;[58]
- The drafters of the Offence of Zina Ordinance 1979 have tried to tread the middle path by envisaging that if the offence of *zinā bil-jabr* was proved by the standard of proof for *ḥadd*, it will attract the *ḥadd* punishment; otherwise, it will be punishable with *ta'zīr*.[59]

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[58] The grounds for this opinion have already been discussed in the previous Chapter.

[59] Police interpreted this law to mean that the allegation of *zinā bil jabr* also attracted the rules of *qadhf*. Thus, an apparent victim of this crime would also face the charge of *qadhf* if she could not prove the allegation. This was, however, a misinterpretation of the law. Section 3 of the Offence of Qazf ordinance defines *qazf* [*qadhf*] as: "Whoever...makes or publishes an imputation of *zinā* concerning any person...is said...to commit *qazf*." Section 2 of this Ordinance explains that the *zinā* given in the definition above will be taken to mean the one defined by the ordinance itself. This makes it clear that an accusation of *zinā bi al-jabr* could not be called *qadhf*. If the police or the subordinate courts were in the practice of calling it as such, this flaw at least should not be attributed to the Ordinance.

In the previous chapter, it has been suggested that a *siyāsah* offence of 'sexual violence' can be created which will not attract the rules of *ḥudūd*, including the *niṣāb* of *shahādah*. It is time now to see if the jurists allow *siyāsah* punishment on the basis of circumstantial and indirect evidence.

If one examines the instances where the Prophet (peace be on him) awarded a punishment and the jurists referred to it as *siyāsah*, one finds that in many of these cases the conviction was hased on circumstantial evidence or previous record of the convict. A glaring example is the following case.

10.3.1 A Prophetic Precedent

During the time of the Prophet (peace be on him), a woman was found seriously injured and when asked about the culprit she could not pronounce his name; people repeated names to one of which the dying woman nodded. This was considered conclusive proof against the culprit who was given death for murdering the woman. The illustrious Sarakhsī commenting on this incident, says:

> The true purport of this report is that the punishment was awarded as *siyāsah;* because the perpetrator was spreading evil in society (*fasād fi 'l-arḍ*) and was well-known for such activities. This is evident from the fact that when the woman was found seriously injured, people asked her about the culprit and mentioned many names which she rejected by the movement of her head and finally when the name of that Jew was

mentioned she nodded in affirmation. Obviously, only those who are well-known for such activities are mentioned on such occasions and, in our opinion, the ruler can give death punishment to such a person under the doctrine of *siyāsah*.[60]

This implies that in cases of *siyāsah*, any kind of evidence that satisfies the court can be deemed admissible.[61] Thus, *siyāsah* punishments can be awarded on the basis of the testimony of women alone, or of non-Muslims alone, or circumstantial evidence.

10.3.2 Conditions for Circumstantial Evidence

It may be noted, however, that before awarding punishment on the basis of circumstantial evidence, the courts have to ensure that certain conditions have been fulfilled. In *Muhabaht v The State* referred to above, the Sind High Court mentioned the following conditions:

A conviction may be based on circumstantial evidence alone, but to establish an offence by circumstantial evidence four things are essential:

i. The circumstances from which the conclusions are drawn should be fully established.
ii. All the facts must be consistent with the hypothesis.

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[60] *Al-Mabsūṭ*, 26:126.

[61] As shown in Section 4.3.2 of this dissertation, the jurists cite many examples from the cases decided by the Prophet (peace be on him) or his Companions wherein the strict criteria of evidence mentioned above for the *ḥudūd*, *qiṣāṣ* or *ta'zīr*, were not observed. In all such cases, the punishment awarded is termed *siyāsah* by the Ḥanafī jurists.

iii. The circumstances should be conclusive in nature and tendency. The circumstances should, to a moral certainty, actually exclude every hypothesis, but the one proposed to be proved.[62]

As far as the *siyāsah* offences are concerned, this view is acceptable to the jurists. For the cases of *ḥudūd*,*qiṣāṣ* and *ta'zīr*, they hold that quantity is as important as quality.

CONCLUSIONS

Ḥanafī School accepted testimony as a form of proof because of some texts of the Qur'ān and the *Sunnah* and then developed detailed standard of testimony (*niṣāb al-shahādah*) for the *ḥudūd*, *qiṣāṣ* and *ta'zīr*, the areas covered by the rights of God, the joint rights and the rights of individual, respectively. It left for the ruler the standard of evidence for *siyāsah* as this area related to the rights of the ruler.

The standard of evidence for *ḥudūd*, *qiṣāṣ* and *ta'zīr* is immutable and, hence, quantity of witnesses in these cases is as important as quality of the testimony. Resultantly, these offences cannot be proved through indirect or circumstantial evidence. As *siyāsah*, or general criminal law, falls within the domain of the ruler, he – or the court – may consider indirect or circumstantial evidence admissible in this area and may even allow death punishment on this basis provided it fulfills other rational and logical requirements.

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[62] *Muhabbat v The State*, PLD 1990 PCrLJ 73 at 78.

CHAPTER ELEVEN:ISLAMIZING THE PAKISTANI LAW ON HOMICIDE

INTRODUCTION

Islamizing the Pakistani law on homicide has proven a comparatively difficult task as it took almost eighteen years to permanently replace the provisions of the Penal Code with those of the Qisas and Diyat Act.[1] This chapter first briefly presents a summary of the old law on homicide and then traces the various stages in the process of Islamization from the decision of the Shariat Bench of the Peshawar High Court against the old law in 1980 till its permanent replacement by the Qisas and Diyat Act in 1997. After this it gives a summary of the new law about homicide and frames issues which shall he analyzed in the next chapter. It is shown that successive governments tried to evade the inevitable task of amending the law on homicide and it was finally under intense pressure from the superior judiciary when the government half-heartedly changed the law. Even so, it has tried to retain some of the important principles of the old law and, thus, the unnatural amalgamation between the old and the new law has been identified as the main cause of incoherence and inconsistency in the system.

[1] The Hudood Ordinances were promulgated in 1979 while the Qisas and Diyat Act was passed by the Parliament in 1997.

11.1 Historical Development of the Law about Qiṣāṣ and Diyat

Like the Pakistani law about blasphemy and rape, the historical development of the law of homicide will also be traced from the promulgation of the Indian Penal Code (IPC) in 1860, because it is that law which remained enforced in Pakistan till the promulgation of the first Qisas and Diyat Ordinance in 1990,[2] and it was this law the Islamicity of which was challenged before the Pakistani superior judiciary during the Ziaulhaq regime and afterwards. Moreover, the procedural aspects[3] of this offence were governed by the Code of Criminal Procedure (CrPC) 1898 and some provisions of this Code were also later amended so as to bring them into conformity with Islamic law.

11.1.1 From 1860 to 1980: Provisions of the Penal Code

The IPC (later the Pakistan Penal Code or PPC) dealt with the offence of homicide in Chapter XVI under the broader concept of "Offences Affecting Human Body".[4]

The offence of 'culpable homicide' was defined in the following words: "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely

[2] Ordinance VII of 1990.

[3] These included issues such as if the offence was bailable or not, cognizable or ooo-cognizable.

[4] The Chapter consisted of Sections 299 to 377, but the Qisas and Diyat Ordinance replaced only Sections 299 to 338.

by such act to cause death, commits the offence of culpable homicide."[5] This offence could convert into "murder" in four situations, namely:[6]

- If the intention of causing death was present;
- If the intention of causing such bodily injury was present which was likely to cause the death of the person;
- If the intended bodily injury ordinarily caused death;
- If the act was so imminently dangerous that it must, in all probability, cause death.[7]

There were, however, five exceptions from this definition of 'murder', which meant that in five situations, culpable homicide would not amount to murder. These exceptions were:

- Grave and sudden provocation;[8]
- Exceeding the limits of the right of private defense;[9]

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[5]Repealed Section 299 of PPC. It still remains operative in the IPC.

[6]Repealed Section 300 of PPC.

[7] A cursory look at the definitions of *qatl-e-amd* and *shibhe-e-amd* in the new law reveals that these definitions heavily rely on the old provisions of PPC regarding culpable homicide and murder.

[8] This defense was restricted by three provisos mentioned in the Section. It may be noted that even though these provisions have been repealed, the judges still consider the defense of grave and sudden provocation in many cases, including honor killings. How can this be explained? See: Nyazee, *General Principles of Criminal Law*, ...

[9] Section 100 of PPC mentions the situations in which exercising the right to private defense a person may cause the death of the assailant. One of such situations is when "such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault". Interestingly, PPC now does not contain a definition of "grievous hurt" as the new provisions divide hurt initially into five categories of *itlaf-e-udw*, *itlaf-e-salahiyyat-e-udw*, *shajjah*, *jurh* and other types (Section 332) and then divides *shajjah* and *jurh* into many sub-categories (Sections 337 to 337-F). Which of these hurts can be called grievous hurt for the purpose of Section 100 PPC? It is up to the courts to decide!

- Exceeding the limits of the authority conferred by law on a public servant provided he committed the act in good faith;
- If it was committed in a sudden fight without premeditation; and
- When the victim takes the risk of his death.[10]

The punishment for murder was death or life imprisonment along with fine.[11] Furthermore, under the provisions of the CrPC, the offences of culpable homicide and murder were non-compoundable.[12]

This law remained in force in Pakistan even after the 1977 Revolution when the Martial Law regime declared its intention to Islamize the Pakistani criminal law. The focus of the government was on the laws relating to the *ḥudūd* offences and for some reasons the law of homicide was neglected and it was only because of pressure from the judiciary that the government finally had to amend it. This is explained in the next sections of this chapter.

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[10] Section 302 (c) of PPC provides for the punishment of imprisonment for *qatl-e-amd* "where according to the injunctions of Islam the punishment of *qiṣāṣ* is not applicable". Does this Section apply to situations mentioned in Section 306 of PPC "cases in which *qatl-e-amd* is not liable to *qiṣāṣ*"? The Supreme Court in *Ali Muhammad v Ali Muhammad and Another*, PLD 1996 SC 274, answered this question negatively and concluded that Section 302 (c) is applicable in situations which were mentioned as exceptions to Section 300 before the promulgation of the Qisas and Diyat Ordinance, i.e., the five situations mentioned here in the text. This is a strange conclusion because these exceptions were based on the principles common law while Section 302 (c) refers to the injunctions of Islam.

[11] Repealed Section 302 of PPC.Punishment for culpable homicide not amounting to murder was given in Section 304.

[12] Schedule II of CrPC contained these features and has been amended by the provisions of the Qiṣāṣ and Diyat law.

11.1.2 *Gul Hasan v The Federation of Pakistan*

In Chapter Six of this dissertation,[13] it has been briefly mentioned that in 1979 General Zia promulgated the Hudood Ordinances and simultaneously established the 'Shariat Benches' in the High Courts which had the jurisdiction to nullify a law which it found repugnant to 'the injunctions of Islam as laid down in the Holy Qur'ān and [the] *Sunnah*'.

In the same year, Gul Hasan Khan, who was condemned to death under Section 302 of PPC, challenged through a 'Shariat Petition' in the Shariat Bench of the Peshawar High Court the compatibility of the provisions of the said section and many other related provisions of PPC and the Code of Criminal Procedure 1898 with the principles of Islamic law.[14] His main contention was that under the principles of Islamic law the offence of murder was compoundable by the consent of the legal heirs of the victim, while Section 302 of PPC and the related provisions of CrPC were directly in conflict with these principles. Another petitioner, Alam Khan, had also filed a petition[15] in the same court praying for similar declaration that the law was repugnant to the Islamic injunctions as it did not allow the heirs of the victim to pardon the offender or conclude a compromise with him. The two petitions were joined together. After a thorough analysis of the literature on the issue, the Court concluded:

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[13] See Section 6.2.1 of this dissertation.

[14] Shariat Petition no.7 of 1979 in the Peshawar High Court. The Petitioner challenged Section 302 of PPC and Sections 401, 402 and 403 of CrPC. These provisions dealt with the powers of the Provincial Government and the President regarding remission, suspension and commutation of sentences.

[15] Shariat Petition no.13 of 1979 in the Peshawar High Court.

> We entertain no doubt that the holy Quran, all the authentic compilations of the Hadis [*sic.*], the great Imāms and the jurists who followed them to date are unanimous on the point that an offence affecting the human body can be disposed of on the basis of a pardon or on payment of *diyat* by the person affected, if he is alive, or in case he is dead, by his heirs.[16]

The Court, therefore, directed the Government to amend the impugned provisions of the law within two months of the announcement of the judgment.[17]The Government went on appeal against the decision of the Peshawar High Court Shariat Bench to the Supreme Court, which could dispose of the case only in 1989. That decision will be briefly examined below. In the meanwhile, the Shariat Benches of the High Courts were abolished and the FSC was established. All the petitions pending before the Shariat Benches were transferred to the FSC. Some of these petitions had challenged the provisions of Section 302 PPC and other related provisions before the Shariat Benches of the Lahore High Court and the Sind High Court.[18] The FSC clubbed these petitions in another famous case titled *Muhmmad Riaz v The Federal Government of Pakistan*[19] and gave its decision on them, which is analyzed below.

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[16] *Gul Hasan Khan v The Government of Pakistan*, PLD 1980 Pesh 1.

[17]Ibid. The judgment was announced on October 1, 1979.

[18] Shariat Petition no. 15 and 69 of 1979 and 9 of 1980 in the Lahore High Court; and Shariat Petition no. 1, 2, 12 and 20 of 1979 and 4 and 7 of 1980 in the Sind High Court.

[19]*Muhammad Riaz v The Federal Government of Paksitan*, PLD 1980 FSC 1. Significantly, this was the first reported case of the FSC.

11.1.3 *Muhammad Riaz v The Federal Government of Pakistan*

The foremost issue before the FSC was: could it re-examine an issue already adjudicated upon by the Shariat Bench of the Peshawar High Court and was now pending adjudication by the Supreme Court of Pakistan?[20] Although the five-member Bench was divided on the issue, Justice Aftab Hussain who wrote the lead judgment supported by Justice Salahuddin Ahmed, Chairman of the Bench, moved on to re-evaluate the issue.

The Court was also divided on the compatibility of the provisions of PPC and CrPC with the Islamic injunctions. Thus, Justice Hussain concluded that for intentional murder, Islamic law provided two options, namely, *qiṣāṣ* or *diyat*.[21] Thus, he was against the option of 'pardon' or complete waiver of the punishment. Justice Karimullah Khan Durrani, who was also member of the Shariat Bench of the Peshawar High Court, had reiterated his position in *Gul Hasan* that pardon was also one of the options given by Islamic law.[22] Justice Zakaullah Khan Lodhi, on the other hand, emphasized the need of *ijtihād* on the issue asserting that the Quranic verses and the Prophetic traditions were given in a particular tribal context and that the new realities of the modern world necessitated reinterpretation of these sources.[23] In any case, the Court decided by a majority of three to two that the provisions of Section 302 were against Islamic injunctions.

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[20] Interestingly, one of the members of the Bench in FSC, Justice Karimullah Khan Durrani, was also member of the Shariat Bench of the Peshawar High Court in *Gul Hasan*.

[21] PLD 1980 FSC 1 at 23.

[22] Ibid., at 53.

[23] Ibid., at 46-47.

11.1.4 *The Federation of Pakistan v Gul Hasan Khan*

The two cases analyzed above came for examination before the Shariat Appellate Bench of the Supreme Court, which gave its verdict on both of them along with nine other appeals in *Federation of Pakistan v Gul Hasan Khan.*[24] The five-member bench was headed by Muhammad Afzal Zullah, Chief Justice of Pakistan; and comprised Justice Nasim Ḥasan Shah, Justice Shafiqur Rehman, Justice Pir Muhammad Karam Shah and Justice Muhammad Taqī Usmani. The unanimous judgment, written by Justice Karam Shah, declared, *inter alia*, that the provisions of Chapter XVI of PPC (Section 299 to 338) were repugnant to the Islamic injunctions and asked the government to amend the same by March 23, 1990, failing which the law would cease to effect after that date.[25]

11.1.5 *The Federation of Pakistan and Another v The Government of NWFP and Others*

A serious legal crisis ensued when the Government did not amend the law by the deadline given by the Supreme Court. Just a day before the end of the deadline, the Government succeeded in getting extension from the Supreme Court till May 30, 1990. On that date, the Government again sought extension for six months but the Court granted it time till June 6, 1990. Later, the Court granted indefinite extension after which the Government filed a review petition in the Supreme Court praying for reconsidering the decision given by the

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[24]*Federation of Pakistan v Gul Hasan Khan*, PLD 1989 SC 633. The Court disposed of eleven appeals in this case, two of which were filed by the Government against the above-mentioned two cases while the remaining nine appeals were file by private citizens.

[25]PLD 1989 SC 633.

Supreme Court in *Gul Hasan* and other related cases.[26] During the proceedings of the case titled *The Federation of Pakistan and Another v The Government of NWFP and Others*,[27] the Supreme Court made it clear that it was not willing to give the Government more time particularly when the Attorney-General also conceded that the Government was prepared to amend the impugned law.

Thus, the caretaker government had to come up with an Ordinance in September 1990 which was re-promulgated twenty times till was enacted by the Parliament in April 1997.[28] The role of the various successive governments from 1980 till 1997 will be briefly discussed in the next section.

11.1.6 From 1980 to 1997: Efforts to Avoid the Inevitable

The first draft of the "*Qisas and Diyat Ordinance*" was prepared by the Council of Islamic Ideology (CII) under the Chairmanship of Justice Afzal Cheema in 1979 along with the draft of the Hudood Ordinances[29] but while the Government immediately promulgated the Hudood Ordinances it sent back the draft Qisas and Diyat Ordinance to the CII. In 1980, when Justice Tanzil-ur-Rahman became the Chairman of the CII, he succeeded in preparing

[26]In the meanwhile, the National Assembly was dissolved by the President and a caretaker government was established for running the affairs of the government till the new government took its charge after fresh elections.

[27]*The Federation of Pakistan and Another v The Government of NWFP and Others*, PLD 1990 SC 1172.

[28] Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan* (Leiden: Brill, 2009), 165.

[29]CII Annual Report 1979. See also: Wasti, *The Application of Islamic Criminal Law in Pakistan*, 116.

the draft Ordinance and placing it before the President/Chief Martial Law Administrator.[30] The draft was sent to the Ministry or Religious and Minority Affairs, Ministry of Law and the Ministry of Interior as well as the Provincial Governments for seeking their comments. Later it was also sent to Women's Division in the Research Wing of the Secretariat, Government of Pakistan.[31] In 1981, the CII came up with another (third) draft of the Ordinance accommodating some of the suggestions of the various critics of the first two drafts.[32] The earlier draft prepared had three kinds of murder: '*amd*, *shibh-e-'amd* and *khaṭa'*, while the new draft added the fourth category of *qatl bis sabab*. Significantly, both the drafts had provisions about *'āqilah*.[33]

The Draft Ordinance of 1981 was tabled in the Federal Council (*Majlis-e-Shoora*) in January 1982. The Council referred it to the Select Committee of Law and Parliamentary Affairs. After the Committee came up with its report, the Council sent the draft to another Standing Committee. The report of this Committee was at variance with that of the previous Committee. Hence, the Draft along with both the reports was sent to a third Committee for final recommendations. The report of even this Committee did not satisfy the Council and yet again it constituted another Committee for improving the Draft. In July 1984, finally, the

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[30]CII Report Annual 1980.

[31] Wasti, *The Application of Islamic Criminal Law in Pakistan*, 122-130.

[32]CII Report Annual 1981. Wasti finds 136 differences in the two drafts. *The Application of Islamic Criminal Law in Pakistan*, 130.

[33]*'āqilah* is the term referred to the allies and supporters of a person who come to his aid when he is in need. Islamic law puts on them the burden to share the liability for payment of *diyah* in case of *qatl-i-khaṭa'*. See for an explanation of the principle of vicarious liability on which this rule is based: Sarakhsī, *al-Mabsūṭ*, 26:74-76.

Council passed the Draft after a hot debate on many of its provisions.[34] The President, however, did not promulgate the new law and the issue lingered on.

In February 1985, elections were held for the National Assembly as well as the Provincial Assemblies. The newly elected National Assembly, with Muhammad Khan Junejo as the Prime Minster, did not debate the law about *qiṣāṣ* and *diyat*. In 1988, fresh elections were held but again the proposed law never came up before the new Parliament when Benazir Bhutto was the Prime Minister even when, in 1989, the Supreme Court declared in *Federation of Pakistan v Gul Hasan Khan* that the provision of Chapter XVI of PPC were repugnant to Islamic injunctions and directed the Government to amend the same till March 23, 1990. The time was later extended till June 6, 1990, after which the Government filed a review petition which was dismissed by the Supreme Court in August 1990 and the caretaker government of Prime Minister Ghulam Muṣṭafā Jatoi had to promulgate the Qisas and Diyat Ordinance in September 1990.[35]

On 13 October 1990, the Criminal Laws (Fourth Amendment) Bill was tabled in the newly elected National Assembly led by Mian Muhammad Nawaz Sharif as the Prime Minister, which referred it to a Standing Committee. The report of the Committee was presented to the Assembly in June 1993 by which time the Ordinance was re-promulgated twelve times.[36] In July 1993, the Assembly finally passed the Bill but a week later the

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[34] Wasti, *The Application of Islamic Criminal Law in Pakistan*, 145-157.
[35] Ordinance VII of 1990.
[36] Wasti, *The Application of Islamic Criminal Law in Pakistan*, 159.

Assembly was dissolved after which new elections were to be held. Hence, the Bill never converted into an Act of Parliament. Again, from 1993 to 1996, the new Parliament with Benazir Bhutto as the Prime Minister never once discussed the provisions of this law and Ordinances continued to be promulgated from time to time.

In February 1997, after fresh elections Nawaz Sharif became the Prime Minister for the second time. In April 1997, the Criminal Laws (Amendment) Act was passed by the Parliament by virtue of which the provisions of Sections 299 to 338 of PPC were permanently replaced with the law of *qiṣāṣ* and *diyat*.[37]

11.2 The New Law of Qiṣāṣ and Diyat

The new law is primarily based on the expositions of Ḥanafī jurists, although some of its provisions are in conflict with the established norms of the Ḥanafī School – or any other school of Islamic law for that matter. For instance, the new law does not have any provision about *'āqilah*, while all schools of Islamic law agree that in case of unintentional murder it is the *'āqilah* which pays the *diyat* to the legal heirs of the victim.[38] In this section, a brief sketch

[37] Act II of 1997.

[38] The absence of *'āqilah* in the law has made the burden of *diyat* too cumbersome on the convict. The excuse that *'āqilah* could only be determined in a tribal setup is not acceptable as the jurists have discussed the principles of 'creating' *'āqilah* in non-tribal setup right from the period of 'Umar, God be well-pleased with him. Moreover, *diyah* and *'āqilah* are inexplicably related with each other and if one of these is absent the other cannot be imposed. Finally, in case of the absence of *'āqilah* for a particular person, the whole Muslim community acts as his *'āqilah*. Hence, in such an eventuality, the liability for the payment of *diyah* is to be borne by the *bayt al-māl*.

of the Ḥanafī law on the issue is given after which it is compared with the new law found in Chapter XVI of PPC now.

11.2.1 Kinds of *Qatl*

The Ḥanafī law has divided homicide into five categories:[39] *'amd, shibh al-'amd, khaṭa', shibh al-khaṭa'* and *bi al-sabab*.[40] The first of these – *'amd* – requires the intention to kill on the part of the offender,[41] while *shibh al-'amd* requires the intention to hurt even if it results in the death of the victim.[42] As is obvious, the classification revolves around the notion of "intention". This intention, according to the Ḥanafī jurists, is known through the weapon used for the offence.[43] *Khaṭa'* involves no intention to kill or hurt, although the intention to *act* is present[44] and that act causes the death of the victim because of a mistake of act[45] or mistake of fact[46] on part of the offender. As far as *shibh al-khaṭa'* is concerned, it does not

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[39] Sarakhsī, *al-Mabsūṭ*, 26:67.

[40] *Shibh al-khaṭa'* or *jārī majrā al-khaṭa'*, though attracts the rules of *khaṭa'*, is different from *khaṭa'* insofar as it does not involve 'intention to act' on the part of the culprit. In *khaṭa'*, the intention to act is fouud along with a 'mistake'. Ibid., 26:78. See also Section 318 of PPC for the definition of *qatl-e-khata*.

[41] See Section 300 of PPC defines *qatl-e-amd* in the following words: "Whoever, with the intention of causing death or with the intention of causing bodily injuryto a person, by doing an act which in the ordinary course of nature is likely to cause death,or with-the knowledge that his act is so imminently dangerous that it must in all probabilitycause death, causes the death of such person, is said to commit qatl-e-amd."

[42] Section 315 of PPC defines *qatl shibh-e-amd* as: "Whoever, with intent to cause harm to the body or mind of any person, causes the death ofthat or of any other person by means of a weapon or an act which in the ordinary course ofnature is not likely to cause death is said to commit qatl shibh-i-amd."

[43] For details on the kind of weapon proving the intention to kill, see: Sarakhsī, *al-Mabsūṭ*, 26:146-150.

[44] Following is the definition of *qatl-e-khata* given in Section 318 of PPC: "Whoever, without any intention to canse death of, or cause harm to, a person causes deathof such person, either by mistake of act or by mistake of fact, is said to commit qatl-i-khata."

[45] For explain mistake of act, Section 318 gives the following illustration: "A aims at a deer but misses the target and kills Z who is standing by, A is guilty ofqatl-i-khata."

[46] Sectioo 318 explains mistake of fact with this illustration: "A shoots at an object to be a boar but it turns out to be a human being. A is guilty ofqatl-i-khata."

involve even the intention to act and is generally illustrated through the example of a mother who is asleep and turns over her baby who dies of suffocation.[47] *Qatl bi al-saBāb* involves an unlawful act on the part of the offender *without* the intention to cause death or hurt but it results in the death of the victim partly because of negligence on the part of the latter.[48] These various kinds of *qatl* have been explained through Table 4.1.

Qatl shibh al-khaṭa' is not found in the new Pakistani law and the definitions of *amd* and *shibh al-amd* are borrowed from the old provisions of PPC,[49] which is why they do not have any reference to the weapon used for the *qatl*; although in the Ḥanafī law it is the weapon that determines the existence or non-existence of the intention to kill.

11.2.2 Legal Consequences of *Qatl*

As far as the legal consequences of the various kinds of *qatl* are concerned, Ḥanafī jurists concentrate on six issues: punishment in the hereafter,[50] expiation,[51] *qiṣās*, *diyat*, consideration

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[47] Sarakhsī, *al-Mabsūṭ*, 26:78.

[48] Ibid., 26:223-230.

[49] The old Section 299, repealed by the Law of Qisas and Diyat, defined 'culpable homicide' as: "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide." As is obvious, the definitions of *qatl-e-amd* and *shibh-e-amd* are based on this definition, not on the definition given by the Muslim jurists.

[50] This depends on whether the act is *also* a sin (*ithm*) or not. While *'amd* is undoubtedly one of the most serious sins, the same cannot be said of *khaṭa'*, although the sin of negligence may be found there as well. Hence, the jurists had to discuss the various aspects of the issue.

[51] As noted Section 4.1.2 of this dissertation, expiation is *'ibādah* (worship) as well as *'uqūbah*(punishment). It may also be noted here that while according to the Shāfi`ī jurists as the Qur'ān imposes expiation in case of *khaṭa'*, it is *a priori* imposed in case of *'amd* (*Mughnī al-Muḥtāj*, 4:138), while the Ḥanafījurists hold that the rule of expiation is not applicable in case of *'amd* because it has not been mentioned in the verses and traditions prescribing the consequences of *'amd* and it cannot be added by analogy (Sarakhsī, *al-Mabsūṭ*, 27:84-87).

for compromise and deprivation from share in inheritance or will of the victim. The discussion here is confined only on the worldly consequences which fall in the domain of the *qāḍī*, not the *muftī*. Thus, the first two are excluded from discussion.

Ḥanafī jurists hold that *amd* is primarily punishable with *qiṣāṣ*and that *diyat* can be imposed on the murderer only in two cases: where *qiṣāṣ* cannot be enforced because of a *shubhah* or where the heirs of the victim and the culprit conclude a compromise for waiving the *qiṣāṣ* in consideration of the payment of *diyat*.[52] Similarly, the parties may agree on any other lawful *badal al-ṣulḥ*.[53] Furthermore, the convict is deprived of the share in inheritance from, or will that was made in his favor by, the victim.[54]

The punishment of *qiṣāṣ* is not imposed for any other kind of *qatl*. All the various kinds of *qatl* are primarily punishable with *diyat*, but there are two points worth considering:

- the value of *diyat* in case of *shibh al-'amd* is much higher than that of *diyat* in the rest of the three kinds of *qatl*; in the former case, it is *mughallaẓah* while in the latter it is *mukhaffafah*;[55] and

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[52] Sarakhsī, *al-Mabsūṭ*, 26:68. In this latter case, *diyat* is actually *badal al-ṣulḥ* as it is a result of a compromise settlement between the parties. Ibid.

[53] Ibid.

[54] The Prophet, upon him blessings and peace, said: "The murderer shall not inherit [the deceased]" (Abū 'Abdillāh Muḥammad b. Yazīd Ibn Mājah al-Qazwīnī, *Sunan*, Kitāb al-Diyāt, Bāb al-Qātil Lā Yarith).

[55] The staodard form of *diyah* is to pay one hundred camels. In case of *diyah mughallaẓah* the number of the camels remains the same but the age of some camels is more than those in the ordinary *diyah* which is why it is called *mughallaẓah* (stricter). Apart *shibh al-'amd*, in all other cases *diyah* is *mukhaffafah* and apart from the *diyah* in the forms of camels the other two forms of *diyah* (one thousand gold dinars and ten thousand silver dirhams) are not subjected to *taghlīẓ*, i.e., their amount is not increased in case of *shibh al-'amd* (Marghīnānī, *al-Hidāyah*, 4:460).

- *diyat* in these cases is paid by the *'āqilah*, while in case of *'amd* – when *diyat* is imposed – it is paid by the convict.[56]

According to the Ḥanafī jurists, in all cases of *qatl*, except *qatl bi al-sabab*, the culprit is deprived of the share in inheritance and will of the victim.[57]

As far as the legal consequences of *badal al-ṣulḥ* – such as the amount of *badal al-ṣulḥ*, mode of payment, person(s) liable for payment, distribution among the heirs of the victim and the like – are concerned, they depend on the terms and conditions of the compromise settlement.[58]

As noted earlier, Pakistani law does not have any provision about *'āqilah* which makes the whole law of *diyat* questionable from the perspective of Islamic law. Moreover, Pakistani law does not distinguish between the *diyat* of the various kinds of *qatl*.

11.2.3 *Siyāsah* Punishment for *Qatl*

Ḥanafī jurists give passing remarks to the punishment of *siyāsah* while discussing the issues relating to the offence of *qatl*. Thus, for instance, the official position of the Ḥanafī School is that if a person is killed with a heavy stone, it is not *'amd*.[59] In some narrations, it is reported that the Prophet (peace be on him) had the head of a murderer crushed who had done the

[56] Sarakhsī, *al-Mabsūṭ*, 26:68-72.
[57] Ibid., 26:68 and 76-78.
[58] Ibid., 26:70-72.See Table 4.2 for the legal consequences of the various kinds of *qatl* in the Ḥanafī law.
[59] Sarakhsī, *al-Mabsūṭ*, 26:73.

same to his victim. Sarakhsī says that this punishment was not *qiṣāṣ* but *siyāsah*. His extract is again reproduced here:

> The true purport of this report is that the punishment was awarded as *siyāsah;* because tbe perpetrator was spreading evil in society (*fasād fi 'l-arḍ*) and was well-known for such activities. This is evident from the fact that when the woman was found seriously injured, people asked her about the culprit and mentioned many names which she rejected by the movement of her head and finally when the name of that Jew was mentioned she nodded in affirmation. Obviously, only those who are well-known for such activities are mentioned on such occasions and, in our opinion, the ruler can give death punishment to such a person under the doctrine of *siyāsah*.[60]

This proves that the culprit of *shibh al-'amd* can be given death punishment under the doctrine of *siyāsah*. Similarly, in a narration, the Prophet (peace be on him) is reported to have said: "We will drown the one who drowns another."[61] Marghīnānī says that this punishment can be given by way of *siyāsah*, not *qiṣāṣ*.[62] Hence, the rules of *siyāsah* remain applicable notwithstanding the application of the rules of *qiṣāṣ* and *diyat*.

Pakistani law has accepted this principle and applied it extensively. Some significant aspects of this principle will be examined in the next section.

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[60]Ibid., 26:126.

[61] The tradition is deemed weaker as it is narrated only by Bayhaqī in his *Sunan*, Kitāb al-Jināyat. See for details: Jamāl al-Dīn Abū Muḥammad 'Abdullāh b. Yūsuf al-Zayla'ī, *Naṣb al-Rāyah li-Aḥādīth al-Hidāyah*, ed. Muḥammad 'Awwāmah (Jeddah: Mu'assasat al-Rayyān, n.d.), 4:343-44.

[62] Marghīnānī, *al-Hidāyah*, 4:447.

11.2.4 Two Kinds of Death Punishment for *Qatl-e-Amd*

Under Pakistani law, death punishment can be awarded for *qatl-e-amd* in either of two forms: by way of *qiṣāṣ*or by way of *ta'zīr*. The principle is: that if the offence is proved through the standard of evidence prescribed in Section 304, death punishment is awarded as *qiṣāṣ*; and if the offence is proved through other kinds of evidence, death punishment may be awarded as *ta'zīr*.[63] Interestingly, Section 304 does not provide any specific standard of evidence, apart from the confession of the accused, and refers for this purpose to Article 17 of the Qanoon-e-Shahadat Order, 1984.[64]

The conclusion, then, is that if the offence of *qatl-e-amd* is proved through the confession of the accused or the standard of evidence prescribed by Article 17 of the Qanoon-e-Shahadat Order, only then death punishment is given as *qiṣāṣ*; ordinarily, death punishment is given on the basis of other kinds of evidence and as such it is not *qiṣāṣ*but *ta'zīr*.[65]

Sections 309 and 310 of PPC give rules about the waiver or compounding of the right of *qiṣāṣ*.[66] These are obviously not applicable to death punishment as *ta'zīr*. For suspending the death punishment awarded as *ta'zīr*, Section 345 of CrPC provides the mechanism of

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[63] See Section 302 (a) and (b) of PPC.

[64] Section 304 (1) of PPC says: "Proof of qatl-i-amd shall be in any of the following forms, namely: (a) the accused makes before a Court competent to try the offence a voluntary and trueconfession of the commission of the offence; or(b) by the evidence as provided in Article 17 of the Qanoon-e-Shahadat, 1984 (P.O. No.10 of 1984)."

[65] This issue will be explained in a bit detail in the next Chapter in Section 12.2.

[66] The main difference between waiver (*'afw*) and compounding (*ṣulḥ*) is that the former is done without a material consideration (*'iwaḍ*) while the latter is done in lieu of a material consideration. See: Marghīnānī, *al-Hidāyah*, 4:442.

"composition" instead of "compounding".[67] As opposed to compounding which can be made effective by any one legal heir of the victim, composition requires the consent of all legal heirs. Thus, if only one of the legal heirs refuses to enter into compromise with the offender, death punishment awarded as *ta'zīr* cannot be suspended.

Section 311 gives yet another important principle in this regard. It authorizes the court to award death punishment as *ta'zīr* to the offender even if all the legal heirs conclude a compromise with him if he committed murder in such a way that it amounted to *fasād fil arz*.[68]

This law poses many serious questions from the perspective of Islamic law, which will be analyzed in detail in the next part of this chapter.

CONCLUSIONS

The Pakistani legal regime on *qatl-e-amd* has come into existence as a result of a half-hearted reconciliation between the Parliament and the judiciary and is based on an unnatural amalgamation of the principles of two distinct legal systems. In particular, the definition of *qatl-e-amd*, the nature and scope of *ta'zīr*, the two parallel regimes of *qiṣāṣ* and *ta'zīr* and the

[67] The implications of the difference between the two terms are explained in the next Chapter in Section 12.4.

[68] Section 311 defines the term in the following words: "For the purpose of this section, the expression *fasad-fil-arz* shall include thepast conduct of the offender, or whether he has any previous convictions, or the brutal orshocking manner in which the offence has been committed which is outrageous to thepublic conscience, or if the offender is considered a potential danger to the community, or if the offence has been committed in the name or on the pretext of honour."

nature and scope of the doctrine of *fasad-fil-arz* need to be thoroughly examined and improved in the light of the general principles of Islamic law. It is hoped that the Ḥanafī doctrine of *siyāsah* can come up with viable and effective solutions for the problems faced by this regime. This will be done in the next chapter.

CHAPTER TWELVE: *SIYĀSAH* AND THE PAKISTANI LAW ON *QATL-E-AMD*

INTRODUCTION

The Common law considers homicide a violation of public right which is why it does not allow private individuals to pardon the punishment of the offender, while Islamic law considers homicide a violation of the joint right of God and individual in which the right of individual is predominant and, as such, it allows the legal heirs of the victim to waive or compound the right of *qiṣāṣ*. The legislature, in its half-hearted effort to make the law of homicide compatible with the injunctions of Islam, has instead brought into existence an incoherent legal regime based on an unnatural amalgamation of the principles of common law and Islamic law. The judiciary also could not adequately perform its duty of interpreting the provisions of the new law in accordance with the principles of Islamic law.[1] The present chapter shows that the Ḥanafī doctrine of *siyāsah* can adequately address the concerns of the

[1] At the end of the Chapter of PPC regarding the law of *qiṣāṣ* and *diyat*, Section 338-F titled "Interpretation" says: "In the interpretation and application of the provisions of this Chapter, and in respect of matter ancillary or akin thereto, the Court shall be guided by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah." This is a very important provision and the courts can use it for filling the gaps in the law with the help of the principles of Islamic law. However, as noted in Chapter Two of this dissertation, the phrase "injunctions of Islam" has not been defined as yet and it is generally construed as equivalent to "the verses of the Qur'ān and the traditions of the Prophet". Moreover, judges are trained in common law and, as shown below, they consciously or unconsciously apply the principles of common law while interpreting the provisions of the *qiṣāṣ* and *diyat*. In its most recent decision on interpretation of this Chapter of PPC in which the five-member bench of the Supreme Court was trying to "an authoritative judgment... removing the prevalent confusion in this important field of criminal law and conclusively setting the controversy at rest", the none of the five honorable judges examined the issue from the perspective of the principles of Islamic law and one of the learned judged Mr. Justice Faez Isa admitted: "I must, however, at the outset acknowledge my inadequacy to interpret Almighty Allah's commands with certainty and seek His protection and mercy for any mistake in my understanding." *Zahid Rehman v The State*, judgment pronounced on January 15, 2015, separate judgment of Justice Faez Isa, para 2.

critics of the Islamic law of *qiṣāṣ* and can help in improving the present Pakistani legal regime on homicide.

12.1 THE NATURE AND SCOPE OF *QATL-E-AMD*

As noted in previous chapter, the old law used the terms culpable homicide and murder, while the new law brought forth four kinds homicide, the most serious of which is the *qatl-e-amd*. This is the only form of homicide which is punishable with death, although in some specific circumstances the death punishment may be replaced by *diyat* or *badal al-ṣulḥ* or may be altogether waived by the legal heirs of the victim.[2] Significantly, the death punishment for *qatl-e-amd* may either be given by way of *qiṣāṣ* or by way of *ta'zīr*.[3] Hence, this section first focuses on the definition of *qatl-e-amd* and then analyzes the meaning and scope of *ta'zīr* in the law.

12.1.1 Defining *Qatl-e-Amd*

Section 300 defines the offence of *qatl-e-amd* in the following words:

> Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to

[2] PPC, Sections 306-310.
[3] Ibid., Section 302 (a) and (b).

> cause death, or with-the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit *qatl-e-amd*.[4]

As noted earlier, the emphasis here is on intention to kill, or 'to cause death', and the Pakistani law here follows the common law tradition of accepting the subjective standard for ascertaining the intention.[5] The Ḥanafī School, on the other hand, looks at the 'external standard' as it considers the weapon used for causing death as conclusive proof of the existence or non-existence of the intention to cause death. Thus, if the weapon is one 'readied for killing,' the intention to kill is established; otherwise, not.[6] Accepting the opinion of its founder Abū Ḥanīfah, the Ḥanafī School holds that if a person is killed with a blunt weapon, such as a heavy stone, it is not *'amd* but *shibh al-'amd*.[7]

This really narrows down the scope of *qatl-e-amd*, which is the only form of *qatl* that necessitates *qiṣāṣ* punishment. Furthermore, as the standard of evidence for proving it is very strict, [8] the probability of the implementation of the *qiṣāṣ* punishment is really

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[4] As noted in previous Chapter, this definition is borrowed from the old definitions of culpable homicide and murder and has little relevance with Islamic law which lays emphasis on the weapon used for the crime as the decisive factor for ascertaining the intention to murder.

[5] Following the common law tradition, the Pakistani law here prescribes subjective standards for ascertaining the existence of intention to kill.

[6] For details on the kind of weapon readied for killing, see: Sarakhsī, *al-Mabsūṭ*, 26:146-150.

[7] Ibid., 73-73. See also: Marghīnānī, *al-Hidāyah*, 4:443.

[8] The punishment of *qiṣāṣ* cannot be awarded by the court unless the crime of *qatl-e-amd* is proved either through the confession of the accused or the testimony of two adult male witnesses who must be Muslims if the accused is a Muslim and who must be proved to trustworthy after they are subjected to *tazkiyat al-shuhūd*. See for details: Section 4.2.3 and 10.1.4 of this dissertation.

low,[9] particularly when it can be waived or compounded by a single legal heir of the victim.[10] Hence, if the principles of the Ḥanafī law regarding *amd* and *qiṣāṣ* are properly applied in Pakistani law, the resulting narrow scope of the death penalty may be acceptable even to those human rights activists who want to abolish the death penalty.[11]

12.1.2 The Nature of *Ta'zīr* in PPC

Section 299 (l) defines *ta'zīr* in the following words: "*ta'zīr* means punishment other than *qiṣāṣ*, *diyat*, *arsh* or *ḍamān*."[12] This definition does not explain the nature of tbe punishment. As explained in Chapter Four of this dissertation, Ḥanafī jurists relate all punishments with various kinds of rights, which clearly explain the nature and the legal consequences of these

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[9] Hence, death punishment for *qatl-e-amd* is generally awarded under Section 302 (b) as *ta'zīr* (read *siyāsah*) and not under Section 302 (a) as *qiṣāṣ*.

[10] "*Qiṣāṣ* is indivisible" is an acknowledged principle of Islamic law. Hence, if any single legal heir of the deceased pardons the offender or concludes a compromise with him, the punishment of *qiṣāṣ* cannot be enforced. See Sections 309-310 of PPC. See for a discussion on this principle and related issues: Sarakhsī, *al-Mabsūṭ*, 26:72-73.

[11] What are other instances of obligatory death punishment in Islamic law? Apart from *qiṣāṣ*, only *ḥudūd* punishments are obligatory. Among the *ḥudūd* punishments, death punishment is awarded in the following instances: *rajm* (stoning) for the offence of *zinā* if committed by a *muḥṣan*; *taqtīl* or *taṣlīb* for *ḥirābah* if murder was committed during *ḥirābah*; and death pnnishment awarded to a male apostate, if he does not repent. This latter includes blasphemy (when committed by a Muslim). The conditions of these punishments of so difficult to fulfill and the standard of proof so stringent to prove the crime that these punishment –even if they remain on the statute book– can be imposed in very rare cases, particularly when one considers the rule that *ḥudūd* (as well as *qiṣāṣ*) are not enforced when some mistakes of law (called *shubhah* by jurists) are found. Hence, if *qatl-e-amd* is narrowly defined, in accordance with the principles of the Ḥanafī School, the issue of abolition of death penalry can be addressed in a better way. Apart from these fuur instances of obligatory death punishments, death punishment can only be awarded by way of *siyāsah* but, as explained in detail in this dissertation, that is not obligatory and the government can pardon, remit or commute it.

[12] The Hudood Ordinances also use the word *ta'zīr* for certain punishments and they give almost a similar definition of the term *ta'zīr*. After the promnlgation of the Protection of Women (Criminal Laws Amendment) Act 2006, the *ta'zīr* provisions have been removed from the Offence of Zina (Enforcement of Hudood) Ordinance and the Offence of Qazf (Enforcement of Hudood) Ordinance. However, the Offences against Property (Enforcement of Hudood) Ordinance and the Prohibition (Enforcement of ḥadd) Order still contain many provisions about *ta'zīr*. Section 2 (g) of the Offences against Property Ordinance defines *ta'zīr* as: "any punishment other than ḥadd." The same definition is reproduced in Section 2 of the Prohibition Order.

punishments.[13] Hence, one has to look at the overall scheme of Chapter XVI to find out the real purport of the term *ta'zīr*.

Section 302 (b) prescribes death punishment as *ta'zīr* for *qatl-e-amd* where proof according to Section 304 is not available.[14] The same is true of the death punishment given under Section 311.[15] However, most of the times the word *ta'zīr* has been used in Chapter XVI for the punishment of imprisonment.[16] Moreover, the definition of *ta'zīr* mentioned above also includes "fine" prescribed by the various sections of the chapter. Hence, in Chapter XVI the term *ta'zīr* means following three kinds of punishments:

i. death punishment awarded under Section 302 (b) or 311;

ii. the punishment of imprisonment, including imprisonment for life; and

iii. the punishment of fine

Before specifically examining the nature of the death punishment given as *ta'zīr*, it is deemed better to highlight two important points about the other two forms of *ta'zīr*, namely, fine and imprisonment.

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[13] See Section 4.2 of this dissertation.

[14] Interestingly, Section 304 only mentions confession of the accused and then for other form of proof it refers to Article 17 of the Qanoon-e-Shahadat Order, 1984. This issue is analyzed in a bit detail below in Section 12.2.

[15] As noted earlier, this Section allows the court to award death punishment by way of *ta'zīr* even if all the legal heirs of the accused pardon the offender, if the court concludes that the offender committed the offence in a manner constituting *fasād fil arz*. See Section 12.5 below for a detailed analysis of this provision.

[16] See the following Sections of this Chapter of PPC: 302 (b), 308 (1) and (2), 311, 316, 319, 334, 337A (i) to (vi), 337D, 337F (i) to (vi), 337G, 337H, 337K, 337M (a) to (d), 337N (1) (b) and (d) and 337N (2), 337V, 338A and 338C (c).

Section 299 (l) explicitly excludes *ḍamān* from the definition of *ta'zīr* while fine, as noted above, is included in the meaning of *ta'zīr*. What is the difference between the two? In both cases, the convict has to pay some amount of money as determined by the court in the particular circumstances of the case. However, *ḍamān* is paid to the victim which is why Section 299 (d) calls it "compensation", while fine is paid to the government. This point is crucial for understanding the nature of *ta'zīr*.

As far as imprisonment is concerned, it is sometimes awarded when an offence is not liable to *qiṣāṣ*, or when *qiṣāṣ* cannot be enforced[17] or when the court finds it necessary to impose it in the particular circumstances of the case, such as when the convict is murdered by one of the heirs of the victim after he is pardoned by the other heirs.[18]Thus, if all the provisions about the punishment of imprisonment are examined, it appears that this punishment is awarded in circumstances where the law presumes that the right of the community at large has also been violated.

Hence, like fine, the punishment of imprisonment under Chapter XVI of PPC is a form of *siyāsah*. This is particularly made clear by Section 311 which specifically refers to the concept of *fasad fil arz*. This will be analyzed in detail below.[19]

This leads us to the conclusion that under the provisions of Chapter XVI the punishment of *ta'zīr* is given in cases where the law presumes that the right of the

[17]Ibid., Section 308 (1).
[18]Ibid.,Section 311.
[19] See Section 12.5 below.

community, and not just of one or a few individual, has been violated. Hence, death punishment as *ta'zīr* for *qatl-e-amd* means death punishment as *siyāsah*.

12.2 STANDARD OF EVIDENCE FOR *QATL-E-AMD*

As noted earlier, Section 304 mentions two means of proving the offence of *qatl-e-amd*: confession by the accused[20] or evidence in the manner prescribed in Article 17 of the Qanoon-e-Shahadat Order (QSO), 1984.[21]

12.2.1 The Four Principles of Evidence

The first principle provided by this Article is that the number and competence of witnesses are to be determined in accordance with Islamic law: "The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah."[22] The next para is very important for the determining the standard of evidence for *qiṣāṣ*:

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[20] For an examination of the principles of Islamic law regarding confession, see: *Sanaullah v The State*, PLD 1991 FSC 186.

[21] Presidential Order X of 1984.

[22] QSO, Article 17 (1). This is a general statement and it again necessitates a precise definition of the term "injunctions of Islam". See Section 2.1.1 of this dissertation.

Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law: —

> (a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly ; and
>
> (b) in all other matters, the Court may accept, or act on the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.[23]

This sub-article, thus, provides three principles:

1. If a special standard of evidence has been prescribed by the *ḥudūd* or any other special law, it will be applied in those special cases;
2. For a document relating to financial matters, two male witnesses or one male and two female witnesses have to testify; and
3. In all other matters, the matter has been left to the discretion of the court which may decide a case on the basis of any piece of evidence which it deems admissible in the given circumstances.[24]

Now, it is obvious that the second principle is irrelevant because the issue of *qiṣāṣ* does not pertain to reducing a financial transaction into writing. Similarly, the last of the

[23]QSO, Article 17 (2).

[24] Circumstantial evidence, forensic and medical reports, opinion of expert and other forms of evidence become admissible under this principle.

principles is not relevant here because if it is accepted for *qiṣāṣ*, no difference can be found in the standard of evidence for *qiṣāṣ* and *ta'zīr*. This will make the distinction between Section 302 (a) and 302 (b) absurd and it is an established principle of interpretation that absurdity must be avoided.[25] In the same way, the first principle is also not applicable because even if the Qisas and Diyat Actis deemed a special law, it does not prescribe a special standard of evidence; rather, it refers back to the QSO.

Hence, the only option left is the principle mentioned in sub-Article 1 of Article 17, i.e., for awarding death punishment as *qiṣāṣ* the offence must be proved by the standard prescribed by Islamic law.[26]

12.2.2 Case Law on the Standard of Evidence for *Qiṣāṣ*

Now, the question remains: what is the standard of proof prescribed by Islamic law for awarding the punishment of *qiṣāṣ*? As for the standard of evidence according to Ḥanafī jurists, it has already been explored earlier in this dissertation.[27] In a nutshell, reading Section 304 PPC and Article 17 QSO leads to the inevitable conclusion that the standard of evidence for *qiṣāṣ* is the one prescribed by the jurists. However, the Pakistani judiciary has generally

[25] "An absurd result is not intended" is one of the basic presumptions of interpretation. Bennion mentions six different types of 'absurdity' and lists some interesting cases: *Statutory Interpretation*, 168-173.

[26] This is based on the presumption that "the injunctions of Islam" are not confined to the verse and traditions but rather include the rules and principles of Islamic law.

[27] See Sections 4.2.3 and 10.1 of this dissertation.

overlooked the issue of standard of evidence for *qiṣāṣ*[28] and has concentrated on the condition of *tazkiyat al-shuhūd* only, ignoring the questions of quantum, gender and religion of witnesses.[29]

The Azad Jammu and Kashmir Shariat Court in *State v Nazir*[30] declared that the testimony of women is not admissible in cases of *ḥudūd* and *qiṣāṣ* and that if there are only women witnesses in such a case the prosecution must not record their testimony unless there be at least two male witnesses.[31] It must be noted here that the Court examined this issue from the perspective of Islamic law only and did not consider the provisions of Article 17 of the QSO because the same was not enforced in the State of Azad Jammu and Kashmir. The Court, however, held that confining the rule of two male witnesses or one male and two female witnesses to matters of financial obligations is against the purpose and spirit of Islamic law.[32]

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[28] In *Ghulam Murtaza v The State*, PLD 1989 Kar 171, the Sind High Court decided that the *qiṣāṣ* punishment can be given only if the offence of murder was proved by the confession of the accused or the testimony of two adult male witnesses. This conclusion was, however, based on the "injunctions of Islam as laid down in the Holy Qur'ān and Sunnah" and not on the provisions of the Pakistani law of *qiṣāṣ* as that law was not yet promulgated at that time.

[29] Before the promulgation of the Qisas and Diyat Ordinance, the condition of *tazkiyat al-shuhud* was laid down for witnesses giving testimony in cases filed under the Hudood Ordinances. See, for instance, Section 7 of the Offences against Property Ordinance. A leading case for interpreting this concept is *Ghulam Ali v The State*, PLD 1986 SC 741. After the promulgation of the Qisas and Diyat Ordinance, the Federal Shariat Court examined the concept of *tazkiyat al-shuhud* in *Sanaullah v The State*, PLD 1991 FSC 186.

[30] *State v Nazir*, PLD 1986 Shariat Court (AJ&K) 143.

[31] Ibid., at 199.

[32] Ibid., at 194.

In *Rashida Patel v The Federation of Pakistan*,[33] the issue before the Federal Shariat Court was the standard of evidence for the *ḥadd*of *zinā*. The Court, however, mentioned the standard of evidence for *qiṣāṣ* also and declared as obiter dictum that neither the *ḥadd* nor the *qiṣāṣ* punishment can be given on the basis of the testimony of women.[34] The Federal Shariat Court adopted a different position from that of the Shariat Court of AJ&K insofar as it declared that the *ta'zīr* punishment can be given on the testimony of women thus making it admissible even in the absence of the male witnesses.[35] Again, the Court did not examine the issue from the perspective of the provisions of Article 17 of the QSO.

In *Muhabbat v The State*,[36] the Sind High Court declared that Article 17 of the QSO prefers the quality of the evidence to quantity. The extract is cited here again:

> Mere quantity of evidence leads us nowhere. As a rule, witnesses are weighed and not numbered. Under Article 17 of the Qanoon-e-Shahadat, 1984, no particular number of witnesses is required for the proof of a murder charge. Volume and weight of the evidence may be considered together, but if there is a conflict between the two, the quantity will certainly give way to quality.[37]

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[33]PLD 1989 FSC 95.

[34]Ibid., at 128.

[35]Ibid.This finding of the Court is based on the wrong presumption that Islamic law prescribes two different standards of evidence for one offence. This presumption will be critically evaluated in Section 12.3 below.

[36]*Muhabbat v The State*, 1990 PCrLJ 73.

[37]Ibid., at 77.

This finding of the Court is acceptable only in cases other than the *ḥudūd* and *qiṣāṣ* because in these latter cases quantity is as important as quality; so much so that if the number of witnesses is less than four in case of *zinā* all of them are held liable for committing the offence of *qadhf* (false allegation of *zinā*) and the Court is not allowed to examine the "weight" of their testimony.[38] Moreover, as noted above, if this proposition is accepted, there remains no difference in the standard of evidence for *qiṣāṣ* under Section 302 (a) and the standard of evidence for *ta'zīr* under Section 302 (b), which in turn amounts to ascribing absurdity to the legislature.

The problem with all the three cases mentioned above is that they were decided before the promulgation of the law about qiṣāṣ and diyat and, thus, the Courts in these cases did not examine the provisions of Section 304, PPC. After the promulgation of the first Qisas and Diyat Ordinance in 1990, the courts have accepted the proposition that there is, indeed, a difference in the standard of evidence under Sections 302 (a) and 302 (b). However, after acknowledging this reality, the courts have generally concentrated only on the condition of *tazkiyat al-shuhūd*. As this condition is generally not fulfilled, a necessary corollary of this is that death punishment in Pakistan is generally awarded under Section 302 (b) as *ta'zīr*. Reference in this regard may be given to *Abdus Salam v The State*,[39] wherein the Supreme

[38] See Section 12.3 below for details.

[39] *Abdus Salam v The State*, 2000 SCMR 338. Some of the other cases in which the death punishment of *qiṣāṣ* was converted in appeal to death punishment as *ta'zīr* include: *Wajid Umar v The State*, 1992 PCrLJ 1536; *Shujat Ali v The State*, 1996 MLD 1325; *Mudassar v The State*, 1996 SCMR 3; *Muhammad Ziaulhaq v The State*, 1996 SCMR 869; *Muhammad Yaqub v The State*, 1998 PCrLJ 638; *Sarfraz v The State*, 2000 SCMR 1758.

Court held that the convict deserved death punishment but that he should have been sentenced under Section 302 (b) as *ta'zīr* instead of Section 302 (a) as *qiṣāṣ*.

12.3 *QIṢĀṢ* AND *TA'ZĪR*: TWO SEPARATE OFFENCES

Like the *ḥudūd* offences in the Hudood Ordinances,[40] the offence of *qatl-e-'amd* in the Qisas and Diyat Act has also been divided into two categories: liable to fixed *qiṣāṣ* punishment and liable to discretionary *ta'zīr* punishment.[41] The basis for the difference in punishment is based on the difference in the standard of evidence. Thus, if the offence is proved by the specific standard of proof, the *ḥadd* or the *qiṣāṣ* punishment, as the case may be, is awarded; but if the offence is proved on another form of evidence, which the court deems conclusive enough, an appropriate *ta'zīr* punishment may be awarded by the court. There is one major difference, however; in the Hudood Ordinances, *ta'zīr* punishment is generally given in the form of imprisonment,[42] while in Section 302 (b) of PPC, even death punishment may be given as *ta'zīr*. It means that if the offence of *qatl-e-'amd* is proved through one standard, death punishment is given as *qiṣāṣ*; and if it is proved through another standard, death punishment

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[40] According to Section 10 of the Offence of Zina Ordinance, the *ḥadd* offences of *zinā* and *zinā bil jabr*could be liable to *ta'zīr*. Similarly, Sections 4 and 11 of the Offence of Qazf Ordinance made *qazf* [*qadhf*] either liable to *ḥadd* or liable to *ta'zīr*. These Sections have been repealed by the Protection of Women (Criminal Laws Amendment) Act 2006. See Sections... of this Act. However, this scheme of the things remains there for the other hudood [*ḥudūd*] crimes, i.e., *sariqah*, *ḥirābah* and drinking. See Sections 13, 14 and 20 of the Offences against Property Ordinance and Section 7 and 11 of the Prohibition Order.

[41]Section 302 (a) and (b) of PPC.

[42]The provisions of the Hudood Ordinances and Prohibition Order relating to *ta'zīr* generally prescribe the punishment already mentioned in the relevant provisions of the Pakistan Penal Code. See, for instance, Section 14 of the Offences against Property Ordinance.

may be given as *ta'zīr*. Thus, it is these two different standards of evidence which determines two different sets of consequences for the same offence and the same punishment.

12.3.1 Two Separate Legal Regimes for Qiṣāṣ and Ta'zīr

If death punishment for *qatl-e-'amd* is given either as *qiṣāṣ* under Section 302 (a) or as *ta'zīr* under Section 302 (b), a very serious question arises: whether the provisions of Section 309 and 310 regarding waiver and compromise apply only to death punishment as *qiṣāṣ*? Moreover, Sections 306 and 307 mention situations where *qatl-e-amd* is not liable to *qiṣāṣ* or where *qiṣāṣ* cannot be enforced. In these cases, the court is empowered to impose *diyat* and to award *ta'zīr* punishment in the form of imprisonment, not death sentence.[43] The question is: how to distinguish between the application of Section 308 and 302 (b)?

On these issues, the superior judiciary, including the various benches of the Supreme Court, has given conflicting judgments. Hence, the Supreme Court formed a five-member bench so that "an authoritative judgment may be rendered removing the prevalent confusion in this important field of criminal law and conclusively setting the controversy at rest". The bench comprised of Justice Asif Saeed Khan Khosa, Justice Ejaz Afzal Khan, Justice Ijaz Ahmed Chaudhry, Justice Dost Muhammad Khan and Justice Qazi Faez Isa. On January 15, 2015, the judgment was given and, unfortunately, the judges could not reach a consensus.[44] By

[43] See Section 308 of PPC.

[44] Lead judgment was written by Justice Asif Saeed Khan Khosa. Justice Dost Muhammad Khan and Justice Qazi Faez Isa agreed with him but wrote concurring notes explaining some different grounds for

a majority of three to two, the Court declared that death punishment as *qiṣāṣ* and death punishment as *ta'zīr* attract two different and separate legal regimes. Justice Khosa writing for the majority observed:

> If the conviction is based upon proof as required by section 304, PPC then the sentencing regime applicable to such convict is to be that of *Qiṣāṣ*but if the conviction is based upon proof other than that required by section 304, PPC, then the sentencing regime relevant to such convict is to be that of *Ta'zir*. It is only after determining that the sentencing regime of *Qisas*is applicable to the case of a convict that a further consideration may become relevant as to whether such convict is to be punished with *Qiṣāṣ*under the general provisions of section 302(a), PPC or his case attracts the exceptions to section 302(a) in the shape of sections 306 or 307, PPC in which cases punishments different from that under section 302(a), PPC are provided.[45]

After a thorough analysis of the relevant case-law on the issue, Justice Khosa reached the following conclusion:

> The provisions of and the punishments provided in section 308, PPC are relevant only to cases of *Qisas*and they have no relevance to cases of *Tazir*and also that any latitude or concession in the matter of punishments contemplated by the provisions of sections 306, 307 and 308, PPC and extended to certain categories of offenders in *Qisas*cases

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reaching that conclusion. Justice Ejaz Afzal Khan wrote dissenting opinion and Justice Ijaz Ahmed Chaudhry concurred with him without writing a separate judgment.

[45] *Zahid Rehman v The State*, para 5.

> mentioned in such provisions ought not to be mistaken as turning those cases into cases of *Tazir* with the same latitude or concession in the punishments... I, therefore, declare that *Qisas*and *Tazir* are two distinct and separate legal regimes which are mutually exclusive and not overlapping and they are to be understood and applied as such.[46]

It may be noted, however, that for reaching this conclusion the honorable judges did not examine the issue from the perspective of the principle of Islamic law which is a mandatory requirement under Section 338-F of PPC. The Court should have framed the issue of whether Islamic law treats *ta'zīr* a separate and distinct offence from *qiṣāṣ* or not. At one point, the honorable judge turned to the question of "injunctions of Islam," but instead of interpreting the provisions of this Chapter of PPC in the light of Islamic injunctions, turned to the issue of repugnancy of these provisions with Islamic injunctions and declared that it was the function of the Federal Shariat Court to examine the issue:

> One thing may, however, be clarified here that section 302(c), PPC and section 338-F, PPC, both falling in Chapter XVI of the Pakistan Penal Code, speak of the

[46]Ibid., para 29. The same conclusion was reached upon by a five-member bench of the Supreme Court in *Faqir Ullah v Khalil-uz-Zaman and others*,1999 SCMR 2203, and was reiterated in a series of cases by the various henches of the Supreme Court. However, in many other cases, some other benches of the Supreme Court reached a different conclusion. Justice Khosa shows that in none of these cases the case of *Faqir Ullah* was cited and he holds that this decision "still remains to be the largest Bench of this Court deciding the legal question involved and, thus, on account of its numerical strength the judgment passed by that Bench still holds the field overshadowing, if not eclipsing, all the other judgments rendered on the subject by the other Benches of lesser numerical strength." Ibid., para 28. Justice Ejaz Afza Khan in his dissenting note, however, holds that thisdecision "being *per incuriam* does not have that binding force." Ibid., dissenting note of Justice Ejaz Afzal Khan, para 12.

> Injunctions of Islam and it must never be lost sight of that by virtue of the provisions of Article 203G of the Constitution of the Islamic Republic of Pakistan, 1973 this Court, or even a High Court, has no jurisdiction to test repugnancy or contrariety of any existing law or legal provision to the Injunctions of Islam as laid down in the Holy Qur" an and Sunnah and such jurisdiction vests exclusively in the Federal Shariat Court and the Shariat Appellate Bench of this Court. It, thus, may not be permissible for this Court, in the context of the present set of cases, to compare two or more provisions falling in Chapter XVI of the Pakistan Penal Code for holding or declaring as to which provision is in accord with the Injunctions of Islam and which provision is not.[47]

The point is that Section 338-F does not require the Court "to compare two or more provisions... for... declaring as to which provision is in accord with the Injunctions of Islam and which provision is not"; rather, it requires the Court to interpret all the provisions of this Chapter and "matter ancillary or akin thereto" in the light of the injunctions of Islam - a duty which unfortunately the Court did not fulfill.

In any case, the root cause of all the problems arising out of this scheme of the things is that the two different legal regimes – of *qiṣāṣ* and of *ta'zīr* – are applied on one and the same offence. This point is further elaborated in the next section.

[47]Ibid., para 30.

12.3.2 Problems with Two Standards for One Offence

A serious problem with this scheme of the things is that it violates one of the most fundamental principles of the criminal justice system, which holds that an offence is either proved or not proved and that there is no third option between the two extremes;[48] in the former case, the accused may be given an appropriate punishment; in the latter case, he cannot be given any punishment. Hence, if the accused is not proved to have committed the *qiṣāṣ*(or*ḥadd*) offence, which can only be proved through a specific standard of evidence, he cannot be given any other punishment for the same offence because his guilt remains unproved.

The case will be different if the accused is proved to have committed *another* crime in which case he may be given an appropriate punishment for committing that crime. Thus, for instance, if sexual intercourse is neither alleged nor proved, but indecent contact is alleged and proved, the culprit may be given an appropriate *ta'zīr* punishment. The Qur'ān, the *Sunnah* and the expositions of the jurists make it quite clear that a *zinā* allegation, if proved through the prescribed standard, necessitates the *ḥadd* punishment; but if the complainant fails to prove the case on the prescribed standard, he must be given the punishment of *qadhf*."[49]Hence, the complainant will not be allowed to present circumstantial or indirect

[48] A stark critic of the Hudood Ordinances, Justice (retired) Javed Iqbal, says: "The basic rule of modern criminal jurisprudence is *autrefois acquit*, which propounds that when a person accused of a crime is found innocent after the examination of eyewitnesses and other evidence, the court is bound to acquit him and he cannot be punished for the same crime on the basis of lesser evidence regarding the same offence." *CII Final Report on Reforms in Hudood Laws*, 95. The same is the rule of Islamic law because, as explained in Section 5.5of this dissertation, the *ta'zīr* offence is different ad distinct from the *ḥadd* offence.

[49] The Qur'ān prescribes the rule in the following words: "Those who accuse chaste women [of fornication] but do not produce four witnesses, flog them with eighty lashes, and do not admit their testimony

evidence or medical or forensic reports, unless he alleges the commission of an offence other than *zinā*. The same is true of '*qadhf* liable to *ta'zīr*' or any other *ḥadd* offence declared as liable to *ta'zīr* by the Hudood Ordinances and the same is the case with *qatl-e-'amd* liable to *ta'zīr*.[50]

Thus, if the offence of *qatl-e-'amd* is proved on the prescribed standard of evidence, *qiṣāṣ* punishment must follow;[51] if it is not proved on that standard of evidence, it is not proved *at all*. What is proved through another standard of evidence may be a different

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ever after; they are indeed rebellious" (Qur'ān 24:4). When the hypocrites brought a grievous calumny against the mother of the believers 'Ā'ishah, God be pleased with her, the Qur'ān rebuked them saying: "Why did they not bring four witnesses to prove it? Now that they have brought no witnesses, it is indeed they who are liars in the sight of Allah" (Qur'ān, 24:13). Sarakhsī observes: "Four witnesses are not required for any other case, criminal or otherwise. The reason for this is no other than the fact that Allah, the Exalted, wants to conceal the sins of His servants and does not like the spreading of indecency. That is why He prescribed an extra number of witnesses in [cases related to] *zinā*. That is also why, as opposed to allegations of other crimes, He made the allegation of *zinā* against other women a cause for the *ḥadd* punishment and allegation of *zinā* against wives a cause of imprecation (*li'ān*), so that people conceal each other's sins" (*al-Mabsūṭ* 16:134). As for disqualifying the calumniator's future testimony, Mālikī, Sbāfi'ī and Ḥanbalī jurists hold that he may repent and so become again an eligible witness (Ibn Rusbd, *Bidāyat al-Mujtahid* 2:443; Shirbīnī, *Mughnī al-Muḥtāj* 4:584-586; Ibn Qudāmah, *al-Mughnī*, 14:191). This is argued on the basis of the exception mentioned in the very next verse: "except those of them that repent thereafter and mend their behavior. For surely Allah is Forgiving, Merciful" (Q 24:5). However, the Ḥanafī jurists hold that the disqualification endures (*abadan*) and that the exception in the following verse instead pertains to Q 24:4 declaring them rebellious (*fāsiqūn*) (Jaṣṣāṣ , *Aḥkām al-Qur'ān*).

[50]*Muhammad Saleem v The State*, 1988 PCrLJ 2321, is in an interesting case in which the couple was accused of attempt to commit *zinā*, which was a *ta'zīr* offence under Section 18 of the Offence of Zina Ordinance. The Assistant Sub-Inspector had raided the house of the appellant and had found the couple, according to the prosecution story, as kissing and embracing each other. Full bench of the Federal Shariat Court held that this was not attempt to commit *zinā* even if it might have indicated the intention to commit *zinā*. "By no stretch of imagination it can be stated that the two appellants by kissing and embracing each other had attempted to commit *zinā* with each other. If they had been embracing or kissing each other, it can be said that at the most they had an intention to commit *zinā*, but no one can be punished for mere intention to commit a crime" (Ibid., at 2322). The Court further held that the action of the couple was not punishable under any law: "Moreover, the alleged act of the two appellants in kissing and embracing inside a house is not covered by any of the laws relating to Hudood. This action is not punishable even under any section of Penal Code or any other penal law" (Ibid.). The Court also rebuked the police officer for violating the law in this regard: "Another irregularity committed by Niazul Hassan, ASI, in this case was that he raided the house of the appellant without any search-warrant. Even if it was a prostitution den, the ASI could not have entered the house without proper search-warrant" (Ibid.).

[51]Unless, of course, it is pardoned or compounded by the victim or his/her legal heirs.

offence, not *qatl-e-'amd*. That different offence may attract *ta'zīr* punishment, but this offence must not be categorized as '*qatl-e-'amd* liable to *ta'zīr*'.

12.3.3 Dilemma of the Drafters

The drafters of the law were probably perplexed by the utter difficulty, almost impossibility, of meeting the required standard of proof for establishing the crime necessitating the *qiṣāṣ* punishment;[52] whereas there might be evidence enough which (though unable to award the *qiṣāṣ* punishment) may convince a judge that intentional murder has definitely been committed. Should the accused go scot-free in the situation? To solve this dilemma, they came up with the solution of putting two standards in the law; so that where the prosecution fails to fulfill the specific standard of proof required for the implementation of the *qiṣāṣ* punishment, the accused may still be made liable to *ta'zīr*.

The correct application, then, is to get rid of '*qatl-e-'amd* liable to *ta'zīr*' and to declare that *qatl-e-'amd* is only liable to *qiṣāṣ* if it is proved on the specific standard of evidence. All other forms of intentional murder, which fall short of *qatl-e-'amd*, may be put in a different category and a distinct standard of evidence and a separate punishment be prescribed for them.[53]

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[52]The Assembly debates on this issue show the concerns of the various persons and the half-hearted efforts of the treasury benches.

[53] But if someone accuses another of *zināper se*, and fails to meet the required standard of proving his allegation, no other evidence by accepted of him and he be made liable to *qadhf*. This is evident from the decision of 'Umar, God he pleased with him, in the case of the allegation of *zinā* against Mughīrah b. Shu'bah,

12.4 COMPOSITION AND *SIYĀSAH*

Islamic law allows the legal heirs of the victim the right to suspend the punishment of *qiṣāṣ*. This is because the right of individual is deemed predominant in the case. This suspension may be with or without a consideration. In the former case, it is called *ṣulḥ* (compounding), while in the latter it is called *'afw* (waiver). Sections 309 and 310 of PPC deal with the issues of waiver and compounding, respectively.

12.4.1 Principles of Islamic Law about Waiver and Compounding

An important principle in this regard is: "*qiṣāṣ* is indivisible."[54] This principle means that if one of the legal heirs waives or compounds the right of *qiṣāṣ*, the convict cannot be given *qiṣāṣ* punishment because *qiṣāṣ* is either given in full or is not given altogether.[55]A question may arise here: if some of the legal heirs waive or compound *qiṣāṣ* and others do not, what will be the right of the latter heirs who do not waive or compound it? The answer is that their right of *qiṣāṣ* converts into their respective share in *diyat*.[56]

God be pleased with him. When three witnesses gave testimony of *zinā* and the fourth one refrained from this, instead of punishing Mughirah with a *ta'zīr* punishment, 'Umar punished the three witnesses with the punishment of *qadhf* (Sarakhsī, *al-Mabsūṭ*, 9:104).Sarakhsī expounds the principle nf law in the following words: "Testimony of *zinā* is *qadhf* in reality; but its legal status changes when the [required] number [of witnesses] is accomplished and it becomes the proof for the *ḥadd*." Similarly, *sariqah* should be taken to mean *sariqah* alone, i.e. which, all conditions of proof prescribed by Islamic law being met, necessitates the *ḥadd* for it. If a case of theft does not fulfill the prescribed standard of proof, it is not to be called *sariqah* at all and a different standard be adopted for its proof. The same method should be followed in the case of *ḥarābah*, *qadhf*, and *shurb*.

[54]Sarakhsī, *al-Mabsūṭ*, 26:73.

[55]Section 309 (1) of PPC.

[56] To give an illustration, if the victim has three brothers as his legal heirs and one of them waives the right of *qiṣāṣ*, the convict cannot be givin the *qiṣāṣ* punishment and the rest of the two legal heirs will get entitled to their respective share in *diyat*, i.e., one-third nf *diyat* will be given to each one of them. See Section 309 (2) of PPC.

As far as *ṣulḥ* is concerned, it attracts the relevant rules and principle of *ṣulḥ* in Islamic law.[57] One such principle is that the consideration for *ṣulḥ* (*badal al-ṣulḥ*) is determined by the parties through mutual consent. Hence, it may be equal to, lesser than, or greater than *diyat*.[58] If the parties agree on an invalid consideration, the compromise will still be deemed valid; *qiṣāṣ* will not be enforced; however, the invalid consideration must be replaced with a valid consideration.[59] The consideration must be in the form of some property, moveable or immovable, tangible or intangible.[60] It is not necessary that the *badal al-ṣulḥ* should be distributed in the legal heirs in accordance with their respective shares in inheritance. Rather, it may be distributed in them on whatever terms and conditions they agree.[61] The same is true about the mode and time of payment of *badal al-ṣulḥ*. It is determined by their mutual consent.[62]

12.4.2 Misuse of the Right by the Heirs

If the legal heirs of the victim misuse the right given to them by the law, the government has the right to correct the mistake. It is under this principle that the court may award appropriate punishment to the legal heirs if they accept the marriage of a female as *badal al-*

[57] See for details: Marghīnānū, *al-Hidāyah*, 4:451.
[58] Ibid.
[59] Ibid., 4:452.
[60] Kāsānī, *Badā'i' al-Ṣanā'i'*, 7:472.
[61] Ibid., 7:480-82.
[62] All these rules and principles have been incorporated in Section 310 of PPC.

ṣulḥ.[63] Under the same principle, it has been laid down in Section 311 that the court may award *ta'zīr* punishment to the convict even after the legal heirs waive or compound the right of *qiṣāṣ*. The provisions of the section will be analyzed below.

All the rules and principle mentioned above were about death punishment as *qiṣāṣ* under Section 302 (a). Wbat about death punishment under Section 302 (b)? Who has the right to settle a compromise? What if some of the heirs compound the right and others do not? Reference in this regard must be given to Section 345 of the Code of Criminal Procedure (CrPC), 1898, which prescribes the law for suspending punishment on the basis of compromise.[64]

The Supreme Court in *Sheikh Muhammad Aslam v The State* has declared that if any one of the legal heirs refuses to compound the offence the death punishment cannot be suspended.[65] Thus, as opposed to death punishment as *qiṣāṣ* which can be compounded by any legal heir, death punishment as *ta'zīr* can be compounded only if all the legal heirs agree. The former is called "compounding", while the latter is called "composition".[66]

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[63]Proviso to Section 310 (1) lays down that this is not a valid *badal al-ṣulḥ*and Section 310 A provides punishment for this.

[64]"The offences punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table" Section 345 (2) of CrPC. In the given table it is mentioned that the offence under Section 302 of PPC may be compounded by the heirs of the victim.

[65]*Sheikh Muhammad Aslam v The State*, 1997 SCMR 1307.

[66] See Section 345 (5) of CrPC.

12.4.3 Bringing Composition under the Purview of *Siyāsah*

The doctrine of composition can be explained by reference to the Ḥanafī doctrine of *siyāsah*. As noted earlier, *ta'zīr* in Chapter XVI of PPC means *siyāsah*.[67] This simply means that the law presumes that by committing this wrong, the culprit violated the right of the whole community and not just of a few individuals; and the government, as the representative of the community, has the authority to enforce or waive this right. Hence, the government delegated has this authority to *all* the legal heirs of the victim making it necessary for the waiver of the death punishment that all of them must agree to it. As such, composition is permissible only within the restrictions allowed by the government.

This conclusion is further substantiated by the fact that permission of the court is necessary for enforcing the right of composition by the legal heirs.[68] Furthermore, the Supreme Court has in many cases declared that death punishment under Section 302 (b) of PPC is not mandatory, but discretionary, meaning thereby that if the offence is proved in accordance with the provisions of Section 304 of PPC the Court is left with no choice hut to award death punishment as *qiṣāṣ*, while in case of *ta'zīr*, the court may instead of awarding death punishment opt for the other punishments prescribed by Section 302 (b).[69] Hence, this particular part of the legislation is an example of the application of the Ḥanafī doctrine of *siyāsah* in the Pakistani criminal law. To this may be added the fact that even where *all* the legal heirs conclude a compromise with the culprit, the court may still award the appropriate

[67] See Section 12.1.2 above.

[68] Section 345 (2) of CrPC.

[69] See, for instance: *Abdussalam v The State*, 2000 SCMR 338; *Saleemuddin and Others v The State*, 2011 SCMR 1171.

punishment, including death punishment, to the culprit under the doctrine of *fasād fil arz*.[70] This issue is analyzed in the next section.

12.5 Meaning and Scope of *Fasad fil Arz*

Ḥanafī jurists devised the doctrine of *siyāsah* with two main objectives: one, to explain the justification of the use of governmental authority for bringing order and peace in society in cases where the Qur'ān and the *Sunnah* has not given specific instructions; and two, to keep check on the use of this authority so that the government does not transgress the limits prescribed by Divine law. The present section analyzes the provisions of PPC about *fasād fil arz* and the authority of the court for dealing with it so as to determine if these provisions fulfill the two main objectives of the doctrine of *siyāsah*.

12.5.1 Defining *Fasād*

Section 311 declares that using the principle of *fasad-fil-arz*:

> the Court may, having regard to the facts and circumstances of the case, punish an offender against whom the right of *qiṣāṣ* has been waived or compounded with death or imprisonment for life orimprisonment of either description for a term of which may extend to fourteen years as *ta'zīr*.

[70]Proper transliteration is *fasād fi 'l-arḍ*. In this dissertation, it has been generally transliterated this way, except where a reference has been made to the provisions of PPC where it has been transliteraated as *fasad fil arz*.

The explanation of the term *fasad-fil-arz* is also very important as it provides the "standards" for ascertaining the parameters of *fasad-fil-arz*:

> For the purpose of this section, the expression *fasad-fil-arz* shall include the past conduct of the offender, or whether he has any previous convictions, or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience, or if the offender is considered a potential danger to the community, or if the offence has been committed in the name or on the pretext of honour.[71]

Section 311 gives the court the authority to award appropriate punishment, which may even amount to death, in the following two cases:

a. When the right of *qiṣāṣ* is not waived or compounded by all the legal heirs; and
b. When the offence attracts the doctrine of *fasadfilarz*.

It may be noted here that prior to 2005 the court could not award death punishment under Section 311.[72] The section was amended to grant the court the power to award death

[71] The provision about honor killing was added to this explanation in 2005 through Section 8 (v) of the Criminal Law Amendment Act (I of 2005).

[72] The pre-2005 version of the Section held that: "the Court may, having regard to the facts and circumstances of the case, punish an offender against whom the right of *qiṣāṣ* has been waived or compounded with imprisonment of either description for a term of which may extend to fourteen years as *ta'zīr*."

punishment under this section as *ta'zīr*.[73] The explanation to the section was also amended so that the notion of *fasad-fil-arz* now also includes honor killing and, as such, the court may award death punishment in case of honor killing even if the convict is pardoned by all the legal heirs.[74]

12.5.2 Standards for Determining the Existence of Fasād

As far as the standards prescribed for ascertaining the existence of *fasād* are concerned, these leave a lot of space for "discretion" of the judge and, as such, the same situation is termed by some judges as attracting the principle of *fasād* and is termed by others as an ordinary crime governed by general criminal law.

Following are the "standards" for ascertaining the applicability of Section 311:

1. Past conduct of the offender;
2. Previous convictions of the offender;
3. The brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience;
4. If the offender is considered a potential danger to the community;
5. If the offence has been committed in the name or on the pretext of honor.

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[73]Section 8 (iii) of the Criminal Law Amendment Act (I of 2005).

[74] Moreover, a proviso has been added to Section 311 of PPC by Section 8 (iv) of the Criminal Law Amendment Act (I of 2005), which declares that in case of honor killing, the imprisonment must not be less than ten years.

What is meant by "past conduct" of the offender and can it be used to determine the existence or non-existence of *fasād*? If it only means his "general reputation", it means nothing because that is so vague that it cannot be used as a standard in a criminal case. If it means his criminal record and convictions, it is not different from the second standard. Finally, it may mean his "bad character" but it is an established principle of the law of evidence that "previous bad character" is irrelevant in criminal cases except in reply, i.e., "when evidence has been given that he has good character".[75] Even in that case, this bad character is generally proved through evidence about previous convictions.[76] Hence, "past conduct" cannot be used as a "standard" unless it means "previous convictions". This leads us to the next standard mentioned in Section 311.

Now, as far as the standard of "previous convictions" is concerned, the law does not specifically talk about conviction in murder cases and, thus, it leaves it open to the judge to decide if the fact of the offender's previous conviction in other criminals cases, such as theft or cheating, can elevate his new crime from *ordinary* murder to *fasād fil arz*. When the jurists allow the *siyāsah* death punishment of a "habitual offender" committing an offence which is ordinarily not punishable with death, they do so when three pre-requisites are fulfilled:

1. That the act in itself is a heinous offence even if the Divine law did not prescribe death punishment for it;[77]

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[75] The Qanoon-e-Shahadat Order, Article 68.

[76] Ibid., Explanation 2.

[77] See Section 4.3.2 of this dissertation for the examples of the offences for which the jurists allow the *siyāsah* death punishment.

2. That the offender was punished, or given a lesser punishment, but he continues to commit the *same* offence;[78]
3. That the circumstances convince the judge that the convict cannot be deterred by any punishment other than death.[79]

In the absence of these three conditions, the phrase "previous convictions" remains too vague and cannot justify the *siyāsah* death punishment.

As far as the next two standards are concerned,[80] they are so vaguely worded that they are open to many interpretations and thus to abuse. Similarly, the final standard – honor killing – added in 2005, is based on the presumption that every time a person kills his near relative and the right of *qiṣāṣ* is waived or compounded by all or some of the legal heirs, it amounts to honor killing and *fasād*. While this may sometimes help in preventing culprits from bypassing the criminal justice system,[81] in some cases, it may defeat the very purpose of the Islamic law about waiver and compromise.[82]

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[78] In a tradition, the Prophet (peace he on him) is reported to have prescribed death punishment for the one who committedtheft after being punished for it many times (Abū Dāwūd, Kitāb al-Ḥudūd, Bāb fī 'l-Sāriq Yasriq Mirāran. The same rule is reported for the one who was punished several times for committing the offence of drinking (Tirmidhī, Kitāb al-Ḥudūd, Bāb Mā Jā' Man Shariba 'l-Khamra fa-Jlidūhu wa Man 'Āda fī 'l-Rābi'ah fa-Qtulūh. From the perspective of the Ḥanafīlawthis is a *siyāsah* death punishment.

[79] This is so because death punishment is the last resort and can only be given where no other option is left.

[80]"The brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience; and "if the offender is considered a potential danger to the community".

[81] This is the basic criticism on the rules of waiver and compromise in the law of *qiṣāṣ*.

[82] As noted earlier, the rules of waiver and compromise may help in minimizing, if not altogether abolishing, death penalty – a goal which the human rights activists want to achieve.

CONCLUSIONS

The Pakistani law on homicide is supposedly based on the principles of the Ḥanafī criminal law, but it has retained many significant features of the old law which were based on the principles of common law. This has resulted not only in analytical inconsistencies but also in strange anomalies.

"*Qatl-e-amd* liable to *ta'zīr*" is a contradiction in terms for Islamic law considers the *ta'zīr* (or *siyāsah*) offence different and distinct from the *qiṣāṣ* offence. As for "*qatl-e-amd* liable to *qiṣāṣ*", it must be defined strictly in accordance with the principles of Islamic law, which will help in minimizing, if not abolishing, the chances of death penalty being awarded.

The principle upheld by Section 311 of PPC is compatible with the principles of Islamic law, but the standards for ascertaining the existence of *fasad fil arz* are vague and subjective and thus open to different interpretations. These standards must be *standardized* so as to minimize the use of discretion by the judges. Moreover, death punishment must he awarded only in the most serious situations.

CONCLUSIONS AND RECOMMENDATIONS

The main findings of the dissertation are recorded here which shall be followed by recommendations for improving the Pakistani criminal justice system in the light of Ḥanafī criminal law and its doctrine of *siyāsah*.

CONCLUSIONS

This dissertation started with an overview of the works of Orientalists and Muslim scholars in the post-colonial world on Islamic criminal law. It was concluded that in these works the Ḥanafī doctrine of *siyāsah* has either been ignored or its role has been undermined. Three major reasons were identified, namely:

- The wrong assumption that the various schools of Islamic law were based on a common theory of interpretation and as such picking and choosing between the opinions of the various schools was not a serious issue;
- The wrong assumption that the manuals of the jurists only represented 'theory'; and that the 'practice' of the administration of justice was distinct and separate from this theory;
- Reliance on the works of the later jurists who, under the influence of other schools, sometimes ignored the classification of rights which forms the backbone of criminal law as developed by the Ḥanafī School.

Moreover, the works of modern Muslim scholars, particularly those who criticize the jurists and call for reforms in Islamic law, are marred by a lack of a comprehensive and internally coherent legal theory. After rejecting the necessity of following a particular school of law, they pick and choose between the principles of the various schools but seldom try to ensure the compatibility of these principles with each other and thus their work is, more often than not, characterized by analytical inconsistency. Furthermore, these scholars calling for reforms in Islamic law primarily rely on the 'naturalist argument' which presupposes that human reason, independent of revelation, can determine the goodness or badness of an act. Resultantly, not only are the gaps in the law filled with the help of 'nature and reason;' but also even the 'revealed law' is made subservient to the so-called 'unrevealed law of nature and reason'. In essence, this methodology is meant to demolish the whole edifice of Islamic law as developed by the jurists and to leave the field wide open for discretion and tyranny of the state.

As opposed to these scholars, the jurists generally and the Ḥanafī School particularly tries to relate and link each and every rule with revelation. Thus, where the law is apparently silent the Ḥanafī School tries to fill in the gaps with the help of the general principles of law instead of resorting to 'ominous brooding in the sky'. These principles coupled with the system of 'precedents' and the 'grading' of jurists and legal manuals help in developing an internally coherent and efficient legal system. The jurists of the School may have a difference of opinion on the legal consequences attached to an act, but they have a general consensus on

the 'legislative presumptions' of the School which form the core legal theory of the School. For finding viable solutions to new issues without causing problems of analytical inconsistency, the Ḥanafī School developed the detailed methodology of *takhrīj* or reasoning from principles. For the solution of an issue to be acceptable to the School, the foremost requirement is to determine the fundamental principles of the School with which the new solution must be compatible.

This Dissertation concludes that the most distinctive feature of the Ḥanafī criminal law is its classification of rights which determines the legal consequences of various crimes. Thus, the three kinds of rights – the rights of God, the rights of the ruler and the rights of individual – divide crimes into *ḥudūd*, *siyāsah* and *ta'zīr*. When two of these rights are combined in one act, such as *qiṣāṣ* and *qadhf*, most of the legal consequences are determined by the right which is deemed predominant though some consequences of the subservient right also endure.

The *ḥudūd* punishments are related to the right of God which is why the government cannot pardon these punishments and cannot change their standard of proof. The same is true of the *qiṣāṣ* punishment, except that it can be pardoned or compounded by the victim or his legal heirs because the right of individual is predominant in it. *Ta'zīr* punishment may be pardoned by the affected individual, while *siyāsah* punishments may be pardoned only by the government. In the domain of *siyāsah*, the government may make detailed laws, within the parameters of the general principles of Islamic law for the purpose of defining various crimes,

fixing the forms and limits of punishments for these crimes and prescribing the standard of proof for them.

Modern scholars have generally considered the right of the ruler synonymous with the right of God and have also overlooked the distinctions between *ta'zīr* and *siyāsah*. The roots of these confusions can be traced to the works of the later Ḥanafī jurists who, under the influence of the Shāfi'ī jurists, accepted the position that *ta'zīr* punishment can be awarded for the violation of some rights of God. They have thus deviated from the established position of the Ḥanafī School which is based on the classification of rights.

A thorough analysis of the manuals of the Ḥanafī School shows that that the Ḥanafī jurists use the word *ta'zīr* in three different meanings: disciplinary action by a person having authority against his subordinates, lesser punishment in cases where the punishment of *ḥadd* or *qiṣāṣ* cannot be enforced and punishment for crimes generally which is prescribed by the ruler. The first of these relate to the right of individual and is beyond the domain of the criminal justice system. The next two, however, relate to the right of the ruler and they have almost similar consequences. The amalgamation of the spheres of *ta'zīr* and *siyāsah* in the Pakistani law can be tolerated, but with two provisos:

- That in cases of *ḥudūd* and *qiṣāṣ*, *ta'zīr* has a special standard of proof – slightly lower than that of *ḥadd* and *qiṣāṣ*; and
- That in these cases its maximum limit is fixed, i.e., if it is awarded in the form of lashes, it cannot exceed thirty-nine lashes.

With this background in mind, the dissertation first examines the Pakistani blasphemy law contained in Sections 295B and 295C of the Pakistan Penal Code as interpreted and applied by the superior judiciary, particularly by the Federal Shariat Court in *Ismail Qureshi v The Government of Pakistan*. It is concluded that the Pakistani law treats blasphemy against God, desecration a copy or part of the Qur'ān and passing derogatory remarks against any of the Prophets, upon them blessings and peace, form as three different crimes. They are all different forms of one crime from and all of them have the same legal consequences.

If a Muslim commits any form of this crime, the Ḥanafī School deems him an apostate and applies on him all the legal consequences of apostasy. Thus, as apostasy is not a strict liability crime in Islamic law, the proof of *mens rea* is essential for establishing the criminal responsibility of the accused and all efforts must be made to give his statement or conduct such an interpretation which does not make him apostate in the eyes of the law. Being a *ḥadd* crime, some mistakes of law, called *shubhah* by the jurists, also become obstacles in the way of enforcing the punishment. The convict is given the *ḥadd*punishment of apostasy, which is death, if proven through the particular standard of proof for *ḥadd* crimes, provided the convict does not repent. If the court is satisfied with the repentance of the convict, it will quash the case against him and will not award him the *ḥadd* punishment. If the convict is female, she cannot be given death punishment and shall be, rather, kept in custody and advised to repent.

When a non-Muslim commits this crime, he cannot be deemed an apostate and that is why the Ḥanafī School treats him differently from a Muslim accused of committing the crime. It holds that even after committing this crime, the contract of peace with that non-Muslim remains intact but the culprit may be given appropriate punishment for injuring the feelings of the Muslim community and this punishment may, in extreme cases, take the form of death punishment. Thus, in this case, it is a *siyāsah* crime, not a *ḥadd* crime, and it attracts all the legal consequences of *siyāsah*.

As both the *ḥadd* and *siyāsah* punishments are enforced by the government, the one who takes the law into his own hands by killing the one who, in his opinion, committed any form of the crime of blasphemy, encroaches upon the legal authority of the government and is, thus, liable for appropriate *siyāsah* punishment. Moreover, he will also be liable for *qiṣāṣ* punishment if he is unable to prove that the deceased deserved death punishment either by becoming apostate due to blasphemy or, being a non-Muslim, by committing the most serious form of the *siyāsah* crime of blasphemy.

After blasphemy, the dissertation examines the implications of the Ḥanafī doctrine of *siyāsah* for the Pakistani legal regime on the crime of rape. As sexual intercourse is an essential ingredient of this crime, it certainly attracts the legal consequences of *zinā* and *qadhf*. Hence, the only way to make it a *siyāsah* crime is to make it a sub-category of violence by defining it in a way that does not involve sexual intercourse as an essential element. The government may, thus, bring sex crimes involving the threat or use of violence under one heading and

further categorize it in view of the intensity and gravity of the crime. It may also prescribe proper punishments for the various categories of the crime. Being a *siyāsah*crime, it will not require the standard of proof prescribed by Islamic law for the *ḥadd* of *zinā* or other *ḥudūd*. In extreme cases, the court may award death punishment which can be commuted or pardoned only by the government, not by the victim or her legal heirs.

Another area of the Pakistani criminal law examined in the present dissertation for the implications of the Ḥanafī doctrine of *siyāsah* is that of the legal regime on homicide. This regime, which is supposedly based on the principles of the Ḥanafī criminal law, retains many significant features of the common law and this unnatural amalgamation between the principles of two different legal systems has caused several serious anomalies and analytical inconsistencies. One significant issue is that the Pakistani law about *qatl-e-'amd*, like the Hudood Ordinance, prescribes two different standards of evidence and two different punishments for one and the same crime. This goes against the fundamental principles of Islamic criminal law as developed by the Ḥanafī School. *Qatl-e-'amd* is liable to *qiṣāṣ* and Islamic law does not recognize *qatl-e-'amd* which is liable to *ta'zīr*. The so-called "*qatl-e-'amd* liable to *ta'zīr*" must be made a separate and distinct crime attracting the consequences of *siyāsah*.

The definition of "*qatl-e-'amd* liable to *qiṣāṣ*" in PPC is based on the principles of common law regarding culpable homicide and murder. The scope of *qatl-e-'amd* in the Ḥanafī law is too narrow and is the only form of homicide which attracts the death punishment of

qiṣāṣ. Hence, if it is defined strictly in accordance with the principles of Islamic law as expounded by the Ḥanafī School, it will minimize the chances of awarding the death penalty.

As Islamic law considers *qatl* a violation of the joint right of God and individual in which the right of the individual is predominant, it allows the legal heirs of the victim of pardon or compound the punishment of the offender. However, using the authority of *siyāsah*, the court may still award appropriate punishment to the convict if it finds that the right of the community at large has *also* been violated. Thus, the provisions of Section 311 of PPC, by virtue of which the court may award appropriate punishment if it finds that the convict has committed *fasād fil arz*, are compatible with the principles of Islamic law, but the standards for ascertaining the existence of *fasād fil arz* are subjective and open to different interpretations and abuse. For the purpose of minimizing the use of discretion by judges, it is imperative to prescribe objective standards which are carefully defined.

The dissertation also examines some important issues regarding the Islamic law of evidence in the context of the criminal justice system. It concludes that Islamic law has accepted testimony as valid proof in criminal cases even though it is hypothetically possible that witnesses fulfilling all the strict conditions of Islamic law may still lie or commit a mistake. This margin of error has been ignored by the jurists because of the explicit texts of the Qur'ān and the *Sunnah* asking Muslims to decide in accordance with the testimony of the witnesses. On the same principle, the jurists accept the prescribed conditions for witnesses regarding their gender and religion. Hence, despite the fact that they acknowledge the basic

capacity of testifying for women and non-Muslims, they do not consider their testimony admissible in the *ḥudūd* and *qiṣāṣ* cases. That is also the basis of their sticking to the prescribed number of witnesses required for proving the crimes of various categories.

Thus, four male witnesses are required for proving the *ḥadd* of *zinā*, while for all other *ḥudūd* as well as *qiṣāṣ* two male witnesses are required. Islamic law does not prescribe two different standards of evidence for one and the same crime. Hence, one crime cannot be both liable to *ḥadd/qiṣāṣ* as well as liable to *ta'zīr*. Rather, the *ta'zīr* crime is separate and distinct from the *ḥadd/qiṣāṣ* crime and each of these crimes must be proved separately in accordance with their peculiar standard of proof.

Thus, a *ta'zīr* crime relating to the genus of the *ḥudūd* or *qiṣāṣ* crimes can be proved either through the testimony of two male witnesses or one male and two female witnesses, but not through the testimony of women alone. *Ta'zīr* cases related to the right of individuals can be proved through other forms of evidence which are admissible for the purpose of proving the right of individuals, such as 'testimony aboutb the testimony', personal knowledge of the judge, official correspondence of one judge with another judge and the refusal to take oath.

For the *siyāsah* crimes, the standard of proof is prescribed by the ruler or he may leave it to the judge who may decide the case on the basis of the circumstantial or indirect evidence; or any other new forms of evidence which may become available due to technological

advancement, provided the judge does not violate the general principles of Islamic law while using these forms of evidence.

RECOMMENDATIONS

Following are the recommendations for improving the Pakistani criminal justice system:

1. The various institutions entrusted with the responsibility of Islamization of laws in Pakistan, particularly the superior judiciary and the Council of Islamic Ideology, must consider the various schools of Islamic law as representing distinct legal theories and, as such, these institutions must either follow a particular school of law or they should develop their own comprehensive and internally coherent legal theory. In any case, they must not simply pick and choose between the opinions of the jurists belonging to different schools without ensuring that the principles on which these opinions are bases are mutually compatible.
2. The Ḥanafī methodology of the use of general principles of law can help today, as it historically has, in the rapid development of law for new cases without demolishing the legal edifice erected by centuries of legal scholarship. Judges of the superior judiciary in particular should use these principles while performing their duty of interpreting the law, instead of relying on the principles of common law

regarding 'interpretation of statutes' or on the 'naturalist argument' which leaves a wide room for discretion.

3. The classification of rights in Islamic criminal law is very different from the classification of rights in the common law; and lawmakers as well as judges should never lose sight of the particular legal consequences of various rights while making or interpreting a provision of Islamic criminal law.
4. The law relating to *ḥudūd* and *qiṣāṣ* as developed by the jurists from the texts of the Qur'ān and the *Sunnah* has little room for improvement and as the bulk of this law relates to the right of God, it remains fixed, immutable and, resultantly, beyond the scope of the authority of the State. Efforts to change this part of the law will always prove futile as the Muslim community has never accepted such changes. Hence, the government should instead focus on the domain which the jurists have relegated to it and which covers the large bulk of criminal law. In the process of Islamizing criminal law, or improving the present criminal justice system, the focus should shift from *ḥudūd* and *qiṣāṣ* to *siyāsah*.
5. As far as *ta'zīr* is concerned, in the manuals of Islamic law, the term has occasionally been used for private disciplinary action by a person having legal authority for that purpose. These issues of *ta'dīb* do not form a part of criminal law today when crime is primarily considered a violation of public right. Hence, *ta'zīr* as the right of individual should be discussed separately from issues of criminal law. Then, *ta'zīr* is also used within the scheme of the *ḥudūd* and *qiṣāṣ*.

Here again, very little room is available for the government's interference or the court's interpretation. Hence, the government, the judiciary and the scholars should concentrate on *ta'zīr* when it is used as a synonym of *siyāsah*.

6. For improving the Pakistani law on blasphemy, the following amendments are suggested:
    a. Making of a special law about blasphemy;
    b. Defining the crime in such a way that it covers blasphemy against God, desecrating the Qur'ān and passing derogatory remarks against any of the Prophets, upon them blessings and peace;
    c. Making two separate classes of the crime: blasphemy committed by a Muslim and blasphemy committed by a non-Muslim; in the former case, the legal consequences of the *ḥadd* of apostasy should be applied, and in the latter, the legal consequences of *siyāsah*.
7. The Pakistani law on sex crimes should be amended along the following lines:
    a. By bringing sex crimes involving the threat or use of violence under one heading and, then, further categorizing it in view of the intensity and gravity of the crime prescribing proper punishments for various categories of the crime;
    b. Defining the crime of sexual violence in a way that it does not require the allegation and proof of sexual intercourse so that it becomes a sub-category

of violence and thus attract the consequences of *siyāsah*, not the *ḥudūd* of *zinā*, *qadhf* or *ḥirābah*;

c. Keeping *zinā* separate from the crime of sexual violence and its sub-categories and correlating it with the crime of *qadhf*;

d. Making the law of *qadhf* effective by removing the exceptions of good faith and the public good.

8. The following changes are necessary for improving the Pakistani law on homicide and bringing it into conformity with the principles of Islamic law:

a. Defining *qatl-e-'amd* strictly in accordance with the principles of Islamic law as expounded by the Ḥanafī School;

b. Declaring unequivocally that *qatl-e-'amd* can only be proved through the standard of proof prescribed by Islamic law for the *qiṣāṣ* crimes;

c. Repealing the provisions about *qatl-e-amd* liable to *ta'zīr* and make it a separate crime attracting the legal consequences of *siyāsah*;

d. Allowing the court to award appropriate *siyāsah* punishment to the convict in cases where any of the legal heirs waive or compound the right of *qiṣāṣ;* but the court is satisfied that the convict has also committed *fasād* by violating the right of the community;

e. Defining the standards for ascertaining the existence of *fasād* in clear and precise terms minimizing room for discretion and abuse.

9. For bringing the law of evidence into conformity with the principle of Islamic law, the following amendments are essential:

    a. Abolishing the two standards of evidence for the same crime and treating the *ta'zīr* and *siyāsah* crimes distinctly and separately from the *ḥudūd* and *qiṣāṣ* crimes;

    b. All crimes, including the *ḥudūd* and *qiṣāṣ* crimes, are proved by the confession of the accused provided the confession fulfills the conditions prescribed by Islamic law;

    c. In *ḥudūd* and the *qiṣāṣ* crimes, the convict may retract from his confession any time before the complete enforcement of the punishment after which the case shall be quashed and no retrial shall take place if testimony on the prescribed standard for proving the crime is not available;

    d. In *ta'zīr* and *siyāsah* crimes, the culprit may retract from his confession before the judgment is pronounced but the court may award appropriate punishment on the basis of the available evidence;

    e. Apart from confession, the *ḥudūd* and *qiṣāṣ*crimes as well as the *ta'zīr* crimes relating to the genus of the *ḥudūd* or *qiṣāṣ* crimes, should be provable only through the testimony of eyewitnesses;

    f. The minimum number of witnesses must be four for proving the crime of *zinā;* while for all other *ḥudūd* and *qiṣāṣ* crimes the minimum number of witnesses has to be two;

g. All the eyewitnesses in *ḥudūd* and *qiṣāṣ* cases must be adult, sane, male, proved trustworthy after *tazkiyat al-shuhūd* and must be Muslims if the accused is Muslim;

h. *Ta'zīr* crimes relating to the genus of the *ḥudūd* or *qiṣāṣ* crimes may be proved through the testimony of two male, or one male and two female eyewitnesses who fulfill the other conditions of the witnesses of the *ḥudūd* and *qiṣāṣ* crimes;

i. For general criminal law covered by *siyāsah*, the existing law of evidence may remain in the field unless a provision of this law is found incompatible with the general principles of Islamic law.

10. Finally, the courts must get rid of the presumption that Pakistan is a common law country and they must fulfill their legal duty of interpreting all Pakistani laws in accordance with principles of Islamic law.

APPENDIX ONE

GENERAL PRINCIPLES OF THE ḤANAFĪ CRIMINAL LAW

القواعد الفقهية المستخرجة من كتاب الحدود للسرخسي

In Chapter Three of this dissertation, the methodology of the Ḥanafī School has been described in detail and it has been shown that this methodology primarily relies on the general principles of law. These principles not only help in understanding the detailed rules of the law but also in extending the law to new cases through the methodology of *takhrīj* described in Chapter Three. In this Appendix, therefore, some of the important general principles of the Ḥanafī law of *ḥudūd* have been compiled from the *Kitābl al-Ḥudūd* of *al-Mabsūṭ* by Shams al-A'immah Abū BakrMuḥammad b.Abī Sahl al-Sarakhsī. It is hoped that these principles will illustrate the line of reasoning adopted by the Ḥanafī jurists for developing criminal law, particularly of *ḥudūd* and *qiṣāṣ*.

On the Use of Reason

1. الحد بالقياس لا يثبت.[1]

1. *Ḥadd* is not created through analogy.

2. اثبات الحدود وتكميلها بالقياس لا يكون.[2]

2. Creation and completion of *ḥudūd* through analogy are not valid.

3. شرط الحد بالرأي لا يمكن اثباته.[3]

3. No condition can be added to *ḥadd* on the basis of reason.

On the Authority of the Ruler

4. الامام متعين للنيابة عن الشرع.[4]

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[1] *Al-Mabsūṭ*, 9:86. A question may be raised here about the *ḥadd* of *shurb*, which according to the famous narrative about the decision of 'Alī (Allah be well-pleased with him) was fixed on the analogy of the *ḥadd* of *qadhf*. Even the analogy seems loose and not strictly in accordance with the conditions laid down by the jurists for analogy: "the one who drinks, loses senses; the one who loses sense, makes calumny; hence, I see the punishment of calumny for him" (Ibid., 9:82). The Ḥanafī jurists assert that the *ḥadd* of *shurb* was not fixed by *ra'y*; it was fixed by the practice of the Prophet (peace be on him) as understood by his companions (Ibid., 24:55). As noted in Chapter Three, the opinion of a companion is a binding source of law for the Ḥanafī School. Here it is not just a solitary opinion; rather, as the Ḥanafī jurists look at it, this was the how the companions by a consensus understood the intention of the Lawgiver. Hence, the later jurists simply assert that *ḥadd* is either fixed by the Qur'ān, the *Sunnah* or the consensus (Ibn 'Ābidīn, *Radd al-Muḥtār*, 6:3).

[2] *Al-Mabsūṭ*, 9:50.Sarakhsī mentions this principle in the context of the additional punishment of expulsion along with lashes for the convict of *zinā* and asserts that some nf the jurists who consider this expulsion as part of the *ḥadd* punishment argue on the basis of *qiyās* that expulsion deters the culprit and the purpose of the *ḥadd* punishment is deterrence. However, Sarakhsī refutes this argument on the basis of this principle asserting that addition to the *ḥadd* punishment on the basis of *qiyās* is not possihle in the same way as the *ḥadd* punishment originally cannot be established through *qiyās*.

[3] Ibid.,9:46.

4. The ruler is entrusted with authority for enforcing the *Shar'*.

5. ليسللامامانيضيعالحدبعدماثبتعندهببينة.[5]

5. The ruler does not have the authority to vacate a *ḥadd* after it is proved before him in accordance with the prescribed standard of evidence.

6. انهذاحقاللهتعالى ،يستوفيهالامامبولايةشرعية ،فلايشاركهغيرهفياستيفائه.[6]

6. This [*ḥadd*] is the right of Allah which the ruler enforces by virtue of the authority given to him by the *Sharī'ah*; hence, no other person shares this authority with him.

On the Characteristic Features of the *ḥudūd* Punishments

7. الحدأقربالياالسقوطمنالاثم.[7]

7. *Ḥadd* is more likely to dissolve than sin.

8. الحدودلاتقامبالأيمان.[8]

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[4]Ibid.,6:94. Interestingly, the Objectives Resolution accepts this principle and holds that governmental authority is a "sacred trust" which the people of Pakistan shall use within the "limits prescribed by Allah" as "sovereignty over the entire universe belongs to Allah".

[5] Ibid., 9:84 Hence, Article 45 of the Constitution of Pakistan is repugnant to Islamic law, if it includes the power to pardon or change the *ḥadd* punishment and also if it includes the power of pardoning or changing the *qiṣāṣ* punishment even when neither the victim nor (in case of his death) any of his legal heirs waives or compounds the right of *qiṣāṣ*. In *Hakim Khan v The State*, the Supreme Court could not resolve this issue and referred it to the Parliament which did not as yet come up with any solution. Hence, the issue remains unsettled. Section 18 (iii) of the Protection of Women Act, 2006, repealed Section 20 (5) of the Offence of Zina Ordinance and, thus, authorized the government to pardon the *ḥadd* punishments awarded under this Ordinance. The Federal Shariat Court in its decision on the compatibility of the provisions of the POWA with Islamic law simply ignored these provisions.

[6]*Al-Mabsūṭ*, 9:94. Hence, if the ruler – above whom there is no other ruler, commits a *ḥadd* crime, the punishment cannot he imposed on him (Ibid.,9:121-22).

[7]Ibid.,9:61. It means that if a person cannot be deemed to have committed sin, such as a child or an insane person, *a fortiori* he cannot be given the *ḥadd* punishment. Sarakhsī mentions this principle while negating the criminal liability of a woman who is coerced to sex and asserts that as she cannot be held sinner *a fortiori* she is not liable for the *ḥadd* punishment.

8. *Ḥudūd* cannot be imposed on the basis of oaths.

9. مبنيا لحدود عليا لتداخل .[9]

9. *Ḥudūd* inherently require concurrent enforcement (*tadākhul*).

10. الحد لا يتجزأ ، فاستيفاؤه لا يكونا لا بتمامه .[10]

10. *Ḥadd* is indivisible; hence, it can only be deemed enforced when it is enforced completely.

11. الحدود فيما دونا لنفس لا تقام في حال مرض المرض .[11]

11. *Ḥudūd* which do not entail death punishment cannot be enforced when the convict is ill.

On the Effect of *Shubhah*

12. اذا امتنع وجوبا لقصاص للشبهة ، وجبت الدية في مال .[12]

12. When due to the presence of *shubhah* it becomes impossible to enforce *qiṣāṣ*, *diyah* must be paid out of the property of the convict.

13. الأموال تثبت بالشبهات .[13]

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[8]Ibid.,9:59. Thus, if the accused denies the commission of the *ḥadd* crime but refuses to deny this on oath, he cannot be given the *ḥadd* punishment, if there is no evidence against him in accordance with the prescribed *niṣāb*.

[9]Ibid., 9:81. Hence, if a person more than once commits the same *ḥadd* crime before the whole of the *ḥadd* punishment is enforced on him, he can only be given the remaining part ofthe *ḥadd* punishment. The rule for *ta'zīr* is different as the culprit is liable to separate punishments for separate instances of committing a *ta'zīr* crime (Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:274).

[10]Sarakhsī, *al-Mabsūt*, 9:55. Thus, if the *ḥadd* crime of *qadhf* is proved only by the confession of the accused and he retracts from his confession before the completion of eighty lashes, be is not deemed to have received the *ḥadd* punishment and as such he is not regarded as disqualified for giving testimony against others.

[11]Ibid.,9:84.

[12]Ibid.,9:72. However, in the absence of *shubhah*,*qatl-e-amd* attracts only the *qiṣāṣ* punishment and *diyat* can be imposed on the murderer only as a result of a compromise between the legal heirs of the victim and the murderer with the mutual consent of both parties. In such case, the *diyah* is paid only by the murderer and his *'aqulah* is absolved from sharing his liability (Ibid., 9:72).

13. Financial obligations are enforced even in the presence of *shubhah*.

On the *Ḥadd* of *Qadhf*

14. منقذفحيا ثمات، لايقامعلىحد القذف.[14]

14. The *ḥadd* of *qadhf* is not enforced on the one committing *qadhf* against a living person who dies following the allegation (*qadhf*).

15. منقذفميتا، يلزم الحد.[15]

15. The *ḥadd* of *qadhf* is enforced on the one who commits *qadhf* against a dead person.

16. الحاكيللقذفعنغيرهلايكونقاذفا.[16]

16. The narrator of the *qadhf* of another person does not thereby commit *qadhf*.

On the *Ḥadd* of *Zinā*

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[13]Ibid.,9:85. Thus, a *ta'zīr* crime is also proved in the presence of *shubhah* (Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:274) because the *ta'zīr* crimes, like financial obligations, relate to the right of individual.

[14]Sarakhsī, *al-Mabsūṭ*, 9:55. This rule applies where the one against whom the allegation of *zinā* was made dies before making a complaint against the calumniator and even he dies after making the complaint. In the former case, only the *maqdhuf* had the right to file a complaint and as he died without doing so, the case ends with that. In the second case, even when the *maqdhuf* dies after making the complaint, the case ends because the law deems it a right of God, not of the *maqdhuf*; hence, it cannot be inherited by his legal heirs (Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:250).

[15]Sarakhsī, *al-Mabsūṭ*, 9:55. This is because accusing his death without ever punished for committing *zinā*proves his chastity (*iḥṣān*) and accusinga chaste Muslim amounts to *qadhf*. In this case his living heirs are aggrieved persons and as such they have the right to file complaint (Ibid., 9:130).

[16]Ibid.,9:76. If Mr. A says that Mr. B alleged Mr. C of having committed *zinā*, A is a reporter and his 'reporting' does not make him liable for the *ḥadd* of *qadhf*. On the other hand, if Mr. A, believing the allegation of Mr. B against Mr. C as true, informs someone else saying: 'Mr. C committed *zinā*', this is not mere report and it attracts the *ḥadd* of *qadhf*. Sarakhsī gives this principle while explaining the rule that although *shahādah 'alā al-shahādah* does not prove the crime of *zinā*, the reporters of the original testimony are not liable for the punishment of *qadhf* even if original witnesses shall be liable for the *ḥadd* of *qadhf* if their number is reduced from four (See Principle no 45 below).

17. الزنا فعل يختلف باختلاف المحل والمكان والزمان

؛ وما لم يجتمع الشهود الأربعة على فعل واحد ، لا يثبت ذلك عند الامام .[17]

17. *Zinā* is an act which varies for different subjects in different places and times; hence, unless the four witnesses agree on one act, it is not proved before the ruler.

18. الزنا ليس إلا وطء متعرى عن العقد والملك وشبههما .[18]

18. *Zinā* is nothing but intercourse in the absence of the contract [of marriage], or ownership [of the slave-girl] or the form of any of them.

19. إن مكنت نفسها منفاعل عليماً بأنه ليحرج ، فلا يلزمها الحد .[19]

19. If the woman allows a person to commit intercourse with her who does not thereby commit sin or is not guilty, she is [also] not liable to *ḥadd*.

20. المعتبر حال [الزاني والزانية] فيما يقام عليه العقوبة بعد تقرر السبب[20]

20. When the cause of the punishment is established, the legal status of the couple is considered for the purpose of imposing the punishment.

21. المباشر للفعل هو الرجل ، والمرأة تابعة[21]

21. The act of intercourse is ascribed to the man and the woman acts as a subsidiary.

22. إن لم يكن صلا لفعل الزنا فهي لا تصير زانية ، لأن ثبوت التبع بثبوت الأصل.[22]

22. If the primary act is not *zinā*, she does not become *zāniyah* because the subsidiary act is proved only when the primary act is proved.

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[17]Ibid.,9:69.

[18]Ibid., 9:62.

[19]Ibid.

[20] Ibid., 9:63

[21]Ibid.,9:62 Hence, if the man is not liable for the *ḥadd* punishment of *zinā*, his woman partner is also saved from this punishment. This is explained hy the principles which are corollaries of this basic principle.

[22]Ibid.

23. الزنا فعلان فعل الرجل والمرأة، وإنما يقام الحد على كل واحد منهما بفعله[23]

Zinā comprises two separate acts: one by the man and the other by the woman; and each one of them is punished for his or her own act.

قولنا (الزنا فعلان) يعني من حيث الحكم، فأما في الحقيقة فالفعل واحد. ولهذا لو تمكنت الشبهة من أحد الجانبين، يصير ذلك الشبهة في إسقاط الحد عن الآخر.[24]

When we say: "*Zinā* comprises two separate acts," we mean: for the purpose of legal consequences. Otherwise, in reality, it is one act. Hence, if *shubhah* becomes the obstacle for enforcing the punishment on one party, it also becomes *shubhah* for saving the other party from the punishment.

24. زنا المكرهة لا يوجب الحد الزنا على حال.[25]

24. *Zinā* with a woman who is coerced does not make her liable for *ḥadd* under any circumstances.

25. لا شركة للمرأة في الفعل إذا كانت مكرهة.[26]

25. When the woman is coerced, she has no share in the act [of *zinā*].

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[23]Ibid.,9:77. This is an explanation of the legal principle that everyone is punished for his/her own wrong.

[24]Ibid.

[25]Ibid. This is the rule even if the coercion (*ikrāh*) was imperfect (*nāqiṣ*), as explicitly asserted by Kāsānī (*Badā'i' al-Ṣanā'i'*, 10:109). If a man is coerced to commit *zinā*, the *ḥadd* punishment cannot be imposed on him but only if *ikrah* was complete (*tāmm*), as imperfect coercion will not suspend this punishment for him (Ibid.). This distinction again is based on the principle mentioned above that *zinā* is primarily ascribed to man and that woman is deemed facilitator.

[26] Sarakhsī, *al-Mabsūṭ*, 9:77. This is very important principle for the purpose of ascertaining the nature of the so-called *marital rape* from the perspective of Islamic law. The spouses act as "partners" in sexual intercourse and here the principle of law says that when she is coerced she is not a partner; hence, the husband must not commit sexual intercourse with his wife without her consent. However, to call it "rape" and entail criminal liability for the husband goes much beyond what this principle means. The very purpose of the contract of marriage is to allow sexual intercourse; hence, the presence of consent is legally presumed which is enough for negating criminal liability. What is meant here is simply that husband should not coerce wife to sex; hut *marital rape* is an oxymoron from the perspective of Islamic law.

26. الوطء في غير الملك لا ينفك عن عقوبة أو غرامة.[27]

26. Intercourse without lawful ownership must have either of two consequences: punishment or dower.

On Resident and Alien Non-Muslims

27. الكفار لا يخاطبون بالشرائع وما هو خالص حق الله تعالى.[28]

27. Religious obligations and pure rights of Allah are not imposed on non-Muslims.

معنى قولنا (الكفار لا يخاطبون بالشرائع) العبادات التي تبتنى على الإسلام فأما الحرمات فثابتة في حقهم.[29]

The meaning of our statement: "Religious obligations are not imposed on non-Muslims" is: rituals which are built upon Islam. As far as the prohibitions are concerned, they are established against them.

28. المستأمن ملتزم لحقوق العباد.[30]

28. The alien undertakes to fulfill the rights of individuals.

29. المستأمن ما التزم شيئا من حقوق الله تعالى.[31]

29. The alien does not undertake fulfilling any of the rights of Allah.

30. الربا مستثنى من كل عهد.[32]

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[27]Ibid.,9:86. Thus, where the *ḥadd* punishment cannot be enforced because of the presence of *shubhah*, dower must be imposed on the man.

[28]Ibid., 9:64. This becomes the basis for recognizing some kind of "personal law" for non-Muslim inhabitants of the Muslim territory.

[29]Ibid. Hence, *ḥadd* punishments are imposed on them, except where an act punishable with *ḥadd* is deemed permissible hy the religion of the non-Muslims, such as drinking wine.

[30]Sarakhsī, *al-Mabsūṭ*, 9:128. As such, the *ḥadd* of *qadhf* can be imposed on aliens because it also involves the right of individual even if the right of God is predominant in it (Ibid., 9:64). The same is *a priori* true of the *qiṣāṣ* punishment because the right of individual is predominant in it (Ibid.).

[31]Ibid.,9:64. Thus, the *ḥudūd* punishments, other than the *ḥadd* of *qadhf*, are not enforced on him.

30. *Ribā* has been excluded from every treaty.

31. حد الزنا يقام على أهل الذمة

لأن الذمي منا أهل دارنا وملتزم أحكامنا فيما يرجع إلى المعاملات.[33]

31. The *ḥadd* of *zinā* is imposed on the peope of *dhimmah*... because *dhimmī* is among the people of our territory and has undertaken to abide by our laws in matters other than worship.

32. منكا منا أهل دارنا فهو تحت يد الإمام حقيقة وحكماً، حتى يمنع من الرجوع إلى دار الحرب، فيقيم عليه الحد أيضاً.[34]

32. The one who is from among the people of our territory is under the control of the ruler, physically as well as legally, so that he can stop him from going to a foreign territory; hence, he can impose *ḥadd* on him.

33. [المستأمن] ليس تحت يد الإمام حكماً، حتى لا يمنع من الرجوع إلى دار الحرب.[35]

33. The alien is not legally under the control of the ruler so that he cannot stop him from going back to his home territory.

On Testimony

34. بمجرد الدعوى لا تقام العقوبة على أحد.[36]

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[32]Ibid. This cardinal principle of Islamic law means that although Muslims are bound to fulfill the treaty obligations towards non-Muslims, they are not permitted to accept a condition about the payment of *riba* (interest) and that every such condition in a treaty is null and void for Muslims. Under no condition whatsoever shall interest be permitted in Muslim territory. This, then, becomes one of the least essentials for declaring a territory as *Dār al-Islām*. The Prophet (upon him blessings and peace), for instance, accepted other conditions which the people of Ṭā'if laid down for submitting to the rule of Muslims, except the condition of permitting *ribā*. Similarly, one of the reasons for the expulsion of the Jews of Khaybar by 'Umar (God be pleased with him) was that they indulged in interest-bearing transactions.

[33]Ibid.,9:65.

[34]Ibid.

[35]Ibid.

34. Punishment cannot be imposed on any person on the basis of complaint alone.

35. لاشهادة للخصم.[37]

35. The litigating party does not have the right to testify.

36. ماينكره المسلم، لايثبتبشهادة اهلالذمة.[38]

36. What a Muslim denies is not provable through the testimony of *dhimmīs*.

37. فيمايجبحقاللهتعالى، تمامالقضاءبالاستيفاء.[39]

37. In what is obligatory as the right of Allah Most High, judgment is accomplished when the sentence is enforced.

38. الشهادةلاتكونحجةموجبةمالميتصلبهاالقضاء.[40]

38. Testimony does not become a binding argument unless it is accompanied by judgment.

39. العارضبالشهودقبلالقضاء، كالمقترنبأصلالاداء.[41]

39. A legal impediment arising concerning the witnesses before the judgment has the same legal effect as the one arising at the time of the recording of testimony.

40. العارضبعدالقضاء، فيمايندرئبالشبهات، كالعارضقبله.[42]

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[36]Ibid., 9:124.

[37]Ibid., 9:77.

[38]Ibid., 9:49.

[39] Ibid., 9:55 Thus, an accused may retract from his confession, or a witness may retract from his testimony, before the punishment is completely enforced after which the remaining punishment shall not be enforced and, as noted earlier, the accused shall not be deemed to have received the *ḥadd* punishment. Thus, he does not become disqualified for giving testimony (Ibid., 9:80-81).

[40]Ibid., 9:54.

[41]Ibid. Thus, if a witness was trustworthy at the time of giving testimony but loses this characteristic because of committing a major sin after giving testimony before the enforcement of the complete punishment, his testimony becomes unacceptable and the remaining punishment must not be enforced.

[42]Ibid. This is because, as noted above, in the cases relating to rights of God, the judicial proceedings do not end with the pronouncement of the judgment but, rather, continue till the punishment is enforced completely.

40. In what is not enforced in the presence of *shubhah* [i.e., *ḥudūd* and *qiṣāṣ*], a legal impediment arising after the pronouncement of the judgment has the same effect as the one arising before such pronouncement.

41. رجوع الشاهد بعد القضاء قبل الاستيفاء، فيما يندرئ بالشبهات، كالرجوع قبل القضاء؛ وفيما يثبت مع الشبهات، كالرجوع بعد الاستيفاء.[43]

41. In what is not enforced in the presence of *shubhah* [i.e., *ḥudūd* and *qiṣāṣ*], the retraction of a witness [from his testimony] before the enforcement of punishment has the same effect as that of retraction before the pronouncement of judgment; and in what is enforced in the presence of *shubhah* [i.e., *ta'zīr* and *siyāsah*], it is as if he retracted after the enforcement of the punishment.

42. الشهادة على الشهادة بدل، والأبدال منصوبة للحاجة، ولا تقام الحدود بمثله، لأنها مبنية على الدرء.[44]

42. Testimony about testimony is a substitute; substitutes are accepted on the basis of need; *ḥudūd* are not imposed on such basis because they are meant to be suspended [in such a situation].

43. التعزير غير مسقط للشهادة.[45]

43. *Ta'zīr* punishment to a person does not disqualify him for testimony.

44. الثابت بالبينة، كالثابت باقرار الخصم.[46]

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[43]Ibid. The distinction stems from the basic presumption that in the rights of God, judicial proceedings continue till enforcement, while in the rights of individual judicial proceedings end with the pronouncement of the judgment.

[44]Ibid., 9:76.

[45]Ibid., 9:80. It is only after a person is given the complete *ḥadd* of *qadhf* that he becomes disqualified for giving testimony in any case in future.

[46]Ibid., 9:97.

44. What is proved through testimony is like what is proved through the confession of the other party.

45. الشهادة على الزنا قذف في الحقيقة ، ولكن بتكامل العدد يتغير حكمها ، فيصير حجة الحد [47].

45. Testimony of *zinā* is *qadhf* in reality; but its legal status changes when the [required] number [of witnesses] is accomplished and it becomes the proof for *ḥadd*.

On Delay in Filing Complaint

46. حد الزنا لا يقام بحجة البينة بعد تقادم العهد ، وكذلك كل حد هو محض حق الله تعالى [48].

46. The *ḥadd* of *zinā* is not enforced on the basis of testimony after a long period is lapsed; and the same is the rule for every *ḥadd* which is the pure right of Allah Most High.

47. هذه الحدود تقام بالاقرار بعد تقادم العهد [49].

47. These *ḥudūd* are imposed on the basis of confession even after the lapse of a long period.

Miscellaneous

48. الناس أحرار في كل شيء إلا في أربعة : في الشهادة ، والعقل ، والحد ، والقصاص [50]

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[47] Ibid.,9:104. Thus, if three witnesses give testimony but the fourth one abstains, the first three are given the punishment of *qadhf*.

[48] Ibid.,9:79. This is because the filing of a complaint after a long period creates a doubt the benefit of which goes to the accused.

[49] Ibid.

[50] Ibid.,9:91. As explained in the next para, the presumption of freedom is based on the presumption of continuity which the Ḥanafī School considers valid for negating an obligation, not for creating a right. Thus, a free person is competent to become a witness but this competence is not established by the presumption of

48. People are presumed free [not slaves]in every matter, except four: in testimony, blood-money, *ḥadd* and *qiṣāṣ*.

ثبوتا لحرى فلج هو لالحال باعتبار الظاهر ، وهو انالدار دار الاسلام –
أو باعتبار استصحابالحالمنحيثانالناسأولاد آدموحواء علىهما السلام ، وهماكانا حرين
. وهذا يصلححجةلدفعالاستحقاق ، لالاثباتالاستحقاق .[51]

Proof of the freedom of an unknown person is the apparent position as the territory is the territory of Islam... or it is on the basis of the presumption of continuity as all humans are the descendants of Ādam and Ḥawwā', peace be on them both, and they both were free. This presumption is valid for repelling an obligation, not for creating a right.

49. حرمانالميراثجزاء عليالقتلالمحظورعقوبة .[52]

49. Deprivation from inheritance is a result of a culpable homicide as punishment.

50. العاقلةلاتعقلالعمد .[53]

50. The *'āqilah* does not bear the responsibility of intentional wrong.

51. الفعلفيمحلمباحلايكونسببوجوبالضمان .[54]

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freedom. On the same ground, in case of *qatl-e-Khaṭa'* the presumption of freedom for a deceased is not deemed enough to entitle him to full *diyah*; because of the presence of *shubhah*, the killer shall be liable only to pay half *diyah*. Similarly, in case of *qatl-e-amd*, if a deceased is deemed free, his killer becomes liable for *qiṣāṣ* punishment which again is suspended by *shubhah*. Finally, if the accused in a *ḥadd* case is free, he is given full punishment while a slave is given half punishment; thus, because of *shubhah* the presumption of freedom is not deemed enough for awarding the full punishment.

[51]Ibid.,9:92.

[52]Ibid.,9:71. Under this principle, the killer is liable to deprivation from the inheritance of the deceased even in case of *khaṭa'* because even in this cases he is liable to offer expiation (*kaffārah*) which is an indication of the culpability of the act. Pakistani law confines deprivation from inheritance to *'amd* and *shibh al-'amd* (Section 317 of PPC).

[53]Ibid.,9:72.

[54]Ibid.,9:71.

51. An act performed on a permissible subject does not become a cause for the obligation of compensation.

52. المباحات تتقيد بشرط السلامة.[55]

52. Permissible acts are restricted by the condition of harmlessness.

53. أمرنا ببناء الأحكام عليها هو الظاهر المعروف.[56]

53. We have been ordered to build determine legal consequences on the basis of the apparent and well-known position.

54. ان المخلوق من ماء الزنا هنا حرمة و الع هدم الغيره.[57]

54. The one created from the water of *zinā* has the same sanctity and protection as others have.

[55]Ibid.,9:73.
[56]Ibid.,9:78.
[57]Ibid.,9:84.

APPENDIX TWO: ṬARĀBLUSĪ ON THE PARAMETERS OF *SIYĀSAH*

[As noted in Chapter 5 of this Dissertation, for the purpose of understanding the doctrine of *siyāsah* the later Ḥanafī jurists generally refer to the work of 'Alā' al-Dīn Abū 'l-Ḥasan 'Alī b. Ibrāhīm al-Ṭarāblusī, *Mu'īn al-Ḥukkām fī mā Yataraddadu bayna 'l-Khaṣmayn min al-Aḥkām*. The discussion on *siyāsah* which is spread over almost forty pages is found in the last part of this wonderful book. Some passages from this invaluable work are translated here.]

SIYĀSAH: A DOUBLE-EDGED SWORD

Know that *siyāsah* is a strict law (*shar' mughallaẓ*) and it is of two kinds: *siyāsah ẓālimah* (tyrannical administration) which Islamic law prohibits; and *siyāsah 'ādilah* (just administration) which takes the right from the unjust (*al-ẓālim*), prevents numerous forms of injustice, deters those who seek mischief (*fasād*) and helps in achieving the objectives of the law (*al-maqāṣid al-shar'iyyah*). Islamic law obligates using *siyāsah 'ādilah* and reliance on it for upholding the rights[1] and it is a big concept which is misunderstood and misapplied by many. Thus, ignoring it leads to wasting of rights, suspension of the *ḥudūd* and encouraging those

[1] This is a very important point which Ṭarāblusī makes at the very beginning of the discussion on *siyāsah*. He emphasizes that although the use of the *siyāsah* powers is essential for achieving the objectives of Islamic law,can be misused by tyrannical rulers if it is left to their discretion; hence, the use of *siyāsah* can be justified only if it promotes the *maqāṣid al-sharī'ah*. In other words, *siyāsah* must work within the confines of the general principles of Islamic law.

who seek mischief and instigates habitual offenders, while excessive use of it opens the gates of severe injustice and necessarily leads to shedding the blood and usurping the property of others without legal grounds.[2]

Hence, a group chose minimizing its role and refused to consider it, except very rarely, as they presumed that using this authority goes against the principles of Islamic law and, thus, closed many clear ways of justice and turned to a dangerous road of injustice because rejecting the *siyāsah shar'iyyah* means violating many texts of Islamic law and ascribing injustice to the Rightly-guided Caliphs.

Another group chose to excessively use this concept and resultantly crossed the limits of God and went out of the Divine law to many kinds of injustice and innovations in administration as they presumed that the *siyāsah shar'iyyah* falls short of securing the rights and benefits for the people. This is ignorance and grave mistake because Allah Most High says: "Today I have completed for you your religion"[3] and this includes all the benefits of the people relating to this world and the hereafter in the best form. Similarly, the Prophet, upon him blessings and peace, said: "I have left in you two things; if you stick to them you will never go astray: the Book of Allah and my conduct."

[2] It was on this ground that it was concluded in the Dissertation that that the standards mentioned in Section 311 of PPC are not in accordance with the norms of *siyāsah* as developed by the jurists because they are too vague and open to abuse.

[3] Q 5:3.

A third group chose a middle way which is the right way as they combined *siyāsah* and the Divine law and, thus, demolished and eliminated the wrong and upheld and supported the law; "and Allah guides those whom He wills to the right way."[4]

[After this Ṭarāblusī explains the place of *siyāsah* in the general scheme of the *sharī'ah* and for this purpose divides Islamic law into five categories: rules of rituals, rules for catering the needs of survival of human beings (such as food and shelter), rules for fulfilling necessities (such as sale and partnerships), rules for moral considerations (such as manumission and charity) and rules for administration of justice. It is this last category which is given the title of *siyāsah* and Ṭarāblusī divides it into six sub-categories.][5]

SIX SUB-CATEGORIES OF *SIYĀSAH*

The fifth category, which is the main issue here, has been given for the purpose of administration (*siyāsah*) and deterrence (*zajr*). This has six sub-categories:

The first sub-category is of the rules given for protecting human existence, such as *qiṣāṣ* for life and hurts... This sub-category also includes the rules about fighting the rebels and

[4]Q 2:213.
[5]*Mu'in al-Ḥukkām*, 207.

bandits... However, the rules about fighting the non-Muslims have an additional purpose of dominating the true word and eliminating polytheism.

The second sub-category of the rules has been given for protecting lineage, such as the *ḥadd* of *zinā*... Look at the statement of the author of *al-Wiqāyah* as he says: Neither lashes and stoning nor lashes and expulsion shall be combined except by way of *ta'zīr* and *siyāsah*.

The third sub-category of the rules has been given for protecting honor because the protection of honor is one of the higher objectives... The law has added to the *ḥadd* punishment of *qadhf*, the *ta'zīr*punishment as per the *ijtihād* of the rulerfor slander and injurious statements.

The fourth sub-category of the rules is given for the purpose of protecting property...

The fifth sub-category of the rules is given for protecting intellect...

The sixth sub-category of the rules is given for deterrence (*rad'*) and prevention (*ta'zīr*).[6]

[Here, Ṭarāblusī accumulates numerous examples of this sixth category from the Qur'ān, the *sunnah* and the precedents of the Rightly-guided Caliphs. These include, *inter alia*, the following: punishment for hunting in the Inviolable Place, expiation of the illegal act of *ẓihār*, husband's taking disciplinary action against his rebellious wife, the treatment meted out at the three Companions who did not go with the Prophet, upon him blessings an peace,

[6]Ibid., 207-208.

for the Tabūk expedition, interning a suspect of stealing cattle, the punishment given to Kinānah b. al-Rabī', the tough interrogatory treatment meted out at the maid of 'Ā'ishah, God be pleased with her, for the purpose of getting information from her, the war led by Abū Bakr, God be pleased with him, against those who refused to pay *zakāh* and the order of 'Umar, God be well-pleased with him) to burn the palace erected by his governor.[7]

After this, he raises the legal question: do the judges have the authority to use *siyāsah* for the purpose of extracting information from the accused or checking the veracity of the statements of the accused or the witnesses and other similar purposes? He first cites the Ḥanbalī jurist Ibn al-Qayyim, the Mālikī jurist al-Qarāfī and the Shāfi'ī jurist al-Māwardī who answer this question in affirmative[8] and then accumulates heaps of evidence from the manuals of the Ḥanafī School to prove that the Ḥanafī jurists uphold this principle.[9] Then, he makes distinctions between the authority of the judge (*qāḍī*) and the executive magistrate (*wālī 'l-jarā'im*).[10] Then, he gives details of the *siyāsah* jurisdiction of the judge and the ruler from various chapters of the law manuals.[11] This undoubtedly is a treasure-trove of the rules and principles of the Ḥanafī doctrine of *siyāsah*.]

[7]Ibid., 208-212.
[8]Ibid., 212-213.
[9]Ibid., 213-14.
[10]Ibid., 214-215.
[11] Ibid., 215-244.

APPENDIX THREE: IBN 'ĀBIDĪN ON THE ḤANAFĪ POSITION ON REPENTANCE OF THE CONVICT OF BLASPHEMY

You know that the [later] Ḥanafī jurists have expressed three views about the culprit in case of blasphemy:

First is the view that his repentance is acceptable and that his death punishment is suspended by his repentance.

This is the view of Mālik, as narrated by Walīd, and this is the view reported from Abū Ḥanīfah and his companions, as explicitly stated by the jurists of the three schools. Thus, Qāḍī 'Iyāḍ narrated it in *al-Shifā* and said that Imām al-Ṭabarī also narrated it from Abū Ḥanīfah. Similarly, it has been narrated by Shaykh al-Islām Ibn Taymiyyah and Shaykh al-IslāmTaqīal-Dīn al-Subkī.

This view is in conformity with what the Ḥanafī jurists have explicitly stated. For example, ImāmAbū Yūsuf mentioned it in his book *al-Kharāj* when he declared that "if the culprit did not repent he would be given death punishment". Thus, when he made the death punishment conditional on the non-repentance of the culprit, it necessarily implies that he would not be given death punishment after he repents.

It is also explicitly stated in *al-Natf*.

Several manuals report from *Sharḥ al-Ṭaḥāwī* that the legal position of this culprit is that of the apostate and that he is to be dealt with like the apostate.

It is also affirmed by what is mentioned in *al-Ḥāwī* that his repentance can only be through re-embracing Islam.

Furthermore, this is the view which is in conformity with the unconditional statements of all of the *Mutūn*, which are laid down for reporting the established view of the School. These unconditional statements are applicable to the culprit both before as well as after he is brought before the judge.

Second view is mentioned in *al-Bazzāziyyah* that the repentance of the culprit is neither acceptable before nor after he is brought before the judge.

This is based on the report from *al-Shifā* and *al-Ṣārim al-Maslūl*, [not on a manual of the Ḥanafī School] and this is the opinion of the Mālikī and the Ḥanbalī jurists.

[Among the later Ḥanafī jurists] this has been followed by 'Allāmah Khusraw in *al-Durar*, the Muḥaqqiq Ibn al-Humām in *Fatḥ al-Qadīr*, Ibn Nujaym in *al-Baḥr* and in *al-Ashbāh*, al-Tamartāshī in *al-Tanwīr* and in *al-Minaḥ*, Shaykh Khayr al-Dīn in his *Fatāwā* as well as several other jurists.

Third view is expressed by the MuḥaqqiqAbū 'l-Sa'ud Āfandī al-'Imādī and according to this view the repentance of the culprit is acceptable before he is arrested and not after that.

This has been accepted by Shaykh 'Alā'al-Dīn in *al-Durr al-Mukhtār* considering it to be reconciliation between the first two views.

However, you know that this view cannot reconcile the two views, which are in absolute conflict with each other. You also know that many of the Ḥanafī jurists rejected the second view saying that the author of *al-Bazzāziyyah* followed the view of other schools and that the author of *al-Baḥr* was criticized by his contemporaries [for accepting this view against the established position of the School].

Moreover, you know that the statement of Abū 'l-Sa'ūd ended with an affirmation that according to our School the repentance of the culprit is acceptable and that it suspends his death punishment even if he repented after he was brought before the judge. This is exactly the same view as the first one and it, thus, disproves the view of the author of *al-Bazzāziyyah* and his followers. However, we considered it a third view on the basis of the first part of his statement reducing the tone of our criticism because of respect for him.

Preferring the Stronger View and the Arguments for Preference

My brother! Now, these are the three views for your consideration. I explained these for you and presented these before you. Now, you may choose for yourself the position which will help you at the time of reckoning and you do justice with yourself so that the right separates from the wrong and the precious pearl is distinguished from the imitation.

In this very serious and difficult issue, what seems to me the better view and which I prefer for myself on the basis of my humble research and poor insight, although I do not ask others to follow me, is to act upon the view that has been definitively narrated from Abū Ḥanīfah and his companions. There are several arguments for this, including the following:

1. As a *mujtahid* is bound to follow the conclusion of his *ijtihād*, his *muqallid* is bound to follow him in this regard. This is clearly laid down by the jurists...

2. When one of his two disciples is with Abū Ḥanīfah, it is not allowed to deviate from their view. So, how will it be allowed when it is proved that the particular view is not only of Abū Ḥanīfah but also of his two disciples?

3. When the earlier and the later jurists disagree on an issue, the view of the earlier jurists is to be followed...

4. The jurists have declared that in case of a conflict between the text of the *mutūn* and that of the *shurūḥ*, the former will prevail because the *mutūn* have been compiled for stating the preferred rules of the School. And you know how clearly the text of the *mutūn* covers the issue at hand.

5. The culprit has come up with the Two Declarations [of faith in the unity of God and prophethood of Muhammad, upon him blessings and peace], which according to rule laid down in the text [of the Hadith] give legal protection to his life and property and on that basis we declared that his Islam and repentance are acceptable before Allah. Hence, if someone says that his

obligatory death punishment is a *ḥadd* which is not suspended by his repentance, he has to come up with a definitive argument because *ḥudūd* are fixed punishments and fixing of punishment by human reason is not allowed. There is no authentic narration of the statement or argument [to this effect] from our *mujtahid* to whose authority we have submitted ourselves, which we should have followed. Rather, we found authentic narrations of his view, which is contrary to this position. So, how can we stick to this position when we are neither ourselves *mujtahidīn* and nor are *muqallidin* of another *mujtahid* who took that legal position?

6. The issue of shedding blood is very serious. That is why if the ruler conquers a city or a forte and he knew that there is a Muslim in the inhabitants thereof, he cannot give death punishment to any person there because of the possibility that he might be that Muslim. Hence, if we presume that these narrations contradict each other, the safer position for us would be to say that death punishment should not be given because we are not sure if the culprit really deserves death punishment. This is because when the choice is between leaving the culprit free even when he deserves death punishment and giving him death punishment when he does not deserve it, we have to opt for the former choice, as shedding the blood of the believers is a grave offence. In *al-Shifā*, it is said: "Mistake in leaving one thousand infidels is better than mistake in shedding blood from a minor wound of a single Muslim." The Prophet, upon him

blessings and peace, said: "When they say that – that is, the declaration of faith – they protect from me their lives and property, except on the legal ground, and their reckoning [accounts] will be done by Allah." Thus, *'iṣmah* (legal protection) is definitively proved by virtue of the declaration of faith and the opposite of it cannot be proved and shedding the blood cannot be allowed except by similar definitive evidence. There is no definitive evidence from the *Shar'* and no basis for analogy. Rather, there are conflicting evidences open to interpretation, as there is no explicit text. Moreover, we do not have the authority to fix punishments and means of deterrence on the basis of our reason alone. Rather, we are bound to act on what appears to be the *Shar'* of our Prophet, upon him blessings and peace. Hence, where the Lawgiver commands us to give death punishment, we must give it; where he prohibits us from awarding this punishment, we cannot award it; and where we could neither find a definitive text nor a narration from our preferred *mujtahid*, we have to pause there. We cannot say that our love for the Prophet, upon him blessings and peace, requires that we must kill the one who used foul language against him even if he re-embraces Islam. This is because the foremost prerequisite of love is to follow, not to innovate. We fear that the Prophet, upon him blessings and peace, might be the first one to ask about the murder of this person on the Day of Resurrection. Therefore, it is obligatory upon us to avoid it when he embraced Islam and to leave his matter to his Master who

knows all that lies in his heart, as the Prophet, upon him blessings and peace, would accept the apparent act of Islam and would leave the decision to the One who knows all secrets.

7. If, according to our School, his *ḥadd* is death punishment even if he repents, it implies that the *ratio* of the death punishment is blasphemy *per se* and not because it is a kind of apostasy. If this is the case, a necessary corollary would be that death punishment must be awarded to the culprit even if he is *dhimmī*. This would contradict the explicit declaration of the *mutūn* of the School that the contract of *dhimmah* is not terminated by the offence of blasphemy, although the ruler can give him death punishment if he considers it *siyāsah*...

8. When two evidences conflict with each other, one permitting an act and the other prohibiting it, the evidence prohibiting it will prevail, as our jurists have explicitly stated.

9. *ḥudūd* are suspended when there is *shubhah*. It is mentioned in *al-Ashbāh wa al-Naẓā'ir*:

> The Sixth Maxim is: "*Ḥudūd* are suspended by *shubuhat*." This is a hadith narrated by al-Jalāl al-Suyūṭī on the authority of Ibn 'Adī from the narration of 'Abdullāh b. 'Abbās (God be pleased with them both). Ibn Mājah narrated the hadith of Abū Hurayrah (God be pleased with him): "Suspend the *ḥudūd* as far as possible for you." Tirmidhi and al-Hakim narrated from the

hadith of ʿĀ'ishah (Allah be well-pleased with her): "Suspend the *ḥudūd* from the Muslims as far as you can. If you can find a way out for Muslims, leave their way because if the judge commits a mistake in forgiving [a culprit] is better than his committing a mistake in punishing [an innocent]." Al-Ṭabarānī narrated a hadith of Ibn Masʿūd (God be pleased with him), which is *mawqūf*: "Suspend the *ḥudūd* and death punishment from the slaves of God as far as you can." In *Fatḥ al-Qadīr*: "The jurists of the various cities have a consensus that the *ḥudūd* are suspended by *shubuhat* and they agree on the hadith narrated on this issue because the *ummah* accepted it as authentic."

10. We earlier referred to the incident of Ibn Abī Sarḥ who renounced faith after embracing Islam and committed the heinous crime of blasphemy against the Prophet (upon him blessings and peace), but when ʿUthmān (God be pleased with him) brought him, the Prophet (upon him blessings and peace) took oath of allegiance from him, accepted his re-embracing Islam, and did not execute him. Had this been one of the *ḥudūd* the enforcement of which could not be abandoned and in which pardon and appeal for clemency were not allowed, the Prophet (upon him blessings and peace) would not have let him go scot-free

and initially he had turned away from him so that some of the companions should have him executed.

As for the report that he had embraced Islam before he came to the Prophet (upon him blessings and peace), it is not an authentic report and, as ImāmSubkī says, it has been rejected by the scholars of *Siyar*.

It is also reported that 'Uthmān said to the Prophet (upon him blessings and peace): 'Whenever Ibn AbīSarḥ sees you, he tries to avoid you.' He replied: 'Did I not take oath of allegiance from him and give him quarter?' He said: 'Why not? But he recalls his offences against Islam.' The Prophet replied: 'Islam annuls all that was before it.' This tradition proves that both the death punishment as well as the sin was annulled by his embracing Islam and that his death punishment is *ḥaqq Allāh*, not *ḥaqq al-'abd*. Otherwise, it would not have been quashed by his embracing Islam.

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