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Significanct Features of the Ḥanafī Criminal Law

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ABSTRACT

The most distinctive feature of 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. The standard of proof for the ḥudūd punishments as well as the nature and extent of these punishments cannot be altered by the government as they relate to the rights of God. The qiṣāṣ punishment relates to the joint right of God and individual which is why it reatains some characteristics of the ḥudūd as well as those of the ta'zīr. Thus, its standard of proof cannot be changed but it can be pardoned or compounded by the victim or his legal heirs. Ta'zīr punishment may be pardoned by the affected individual, while siyāsah punishments, being related to the right of the government, 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.

Keywords: *Ḥanafī Criminal Law, Ḥudūd, Siyāsah, Ta'zīr.*

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Introduction

Modern scholars focusing on the works of Shafi'i 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 paper 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.

Section One: 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 Sharī'at Court embarked upon determining the meaning and scope of the concept of *ḥadd* in Islamic law. The views expressed in the lead judgment by Aftab Hussain, CJ, have influenced many critics of the Ḥudūd laws in Pakistan and are echoed in the 2006 CII Report on reforms in the Ḥudūd laws.[2]

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 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 Allah* (limits prescribed by Allah).[9] He also elaborates that the wider doctrine of *Ḥudūd Allah* prescribes the "fixed" or "immutable" part of Islamic law and that the "fixed punishments" form just a part of this larger whole. 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 authority to pardon the offender (as the Prophet ﷺ explicitly stated so about the offence of theft).[10] 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 the major contribution of Nyazee in this regard is his elaboration of the significance of the concept of *ḥaqq Allah* for understanding the nature of the *ḥudūd* punishments.[11]

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

1.2 The Concept of the Right of God

The definition of *ḥadd* in the Ḥudūd Ordinances is given as: "punishment ordained by the Qur'ān and [the] *Sunnah*".[12] This definition does not mention the most important characteristic feature of *ḥadd* which forms the basis of the whole juristic on criminal law. Kasānī, 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."[13] He, thus, not only explains the meaning of "fixed" (*muqaddarah*) when he asserts that its enforcement is "obligatory" (*wajibah*) but also highlights the reason for this when he adds the phrase "as a right of God". 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".[14] From the perspective of the principles of interpretation, the word "eighty" is *khass* (specific), which carries only one meaning.[15] 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," [16] 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."[17] 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 Kasānī 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 punishment surely reach the general public and the general public is surely protected from the evils of that wrong. This purpose can only 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.*[18]

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".[19] 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 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:[20]

1. *'ibādah mahdah* (pure worship), such as prayer, *zakah* and fasting;
2. *'uqubah mahdah* (pure punishment), i.e., the *ḥadd* punishments;
3. *'uqubah qasirah* (imperfect punishment), such as depriving the murderer of his right to inherit the murdered person;[21]
4. *da'irah bayn al-'ibādah wa 'l-'uqubah* (that vacillate between worship and punishment),[22] i.e., *kaffarah* (expiation) for some wrongs, such as unintentional murder or intentionally breaking fast;
5. *'ibādah fiha ma'na al-ma'unah* (worship that also has the meaning of financial liability),[23] i.e., *zakah* of *fitr* (paid at the end of the month of Ramadan before the Eid prayer);
6. *ma'unah fiha ma'na al-'ibādah* (financial liability that also has the meaning of worship),[24] i.e., *'ushr* levied on the produce of the land;
7. *ma'unah fiha ma'na al-'uqubah* (financial liability that also has the meaning of punishment),[25] i.e., *kharāj* levied on non-Muslims; and
8. *qa'im bi-nafsih* (that exists independently), 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.

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.[26] 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.[27] 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.[28] The former is violation of a private right while the latter is violation of a public right.[29] Breach of contract is violation of a private right *in personam*, while tort is violation of a private right *in rem*.[30] 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 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.[31]

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, Kasānī, 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."[32] 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 Kasānī 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*."[33]

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;[34] *ta'zīr* punishments are linked to the rights of individual;[35] while *siyāsah* punishments are linked to the rights of the community.[36] The relationship of *ta'zīr* and *siyāsah* has been

examined in detail at another place[37] 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*.[38] 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'wa*).[39]

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*.[40] 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 Shafi'i 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.[41] Similarly, they allow *ta'zīr* in the right of God.[42] Some of the later Ḥanafī jurists, under the influence of the Shafi'i jurists, accepted this latter view without appreciating that this goes against the very basis of the system erected by the Ḥanafī School.

Section 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*.

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.[43] The maximum limit of *ta'zīr* has also been fixed.[44] The court cannot award more than thirty-nine lashes in *ta'zīr*.[45]

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[46] and can define different offences, lay down a standard of evidence for proving these offences and prescribe punishments for them.[47] 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.[48]

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.[49] 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'wah* is necessary for a crime?

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.[50] 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.[51] 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.[52]

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*.[53] The strictest criterion is for the *ḥadd* of *zinā* – four adult male Muslim eyewitnesses.[54] For the rest of the *Ḥudūd* as well as for *qiṣāṣ*, there have to be two adult male eyewitnesses.[55] Moreover, if the accused is a Muslim, the witnesses have to be Muslims.[56] All these witnesses must have been proved trustworthy through secret and open inquiry (*tazkiyat al-shuhud*).[57]

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.[58] 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.

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.[59] For instance, *siyāsah* punishment can be awarded on the basis of the testimony of women alone, or of non-Muslims alone, or circumstantial evidence.

2.4 The Concept of *Shubhah*

Pakistani courts have generally deemed *shubhah* equivalent to the notion of "benefit of doubt" given to the accused.[60] 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 *doubt in the mind of the accused about the legality of the act*. This doubt may either exist actually (*haqiqatan*), or law may presume its existence (*hukman*).[61] 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 (*batil*) or non-existent.[62] 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.[63]

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'.[64] 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.[65] No such mistake suspends the *ta'zīr* or *siyāsah* punishment.[66] 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.[67]

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 God, is vested in the ruler.[68] The same is true of the *siyāsah* punishment because it directly involves the right of the ruler.[69]

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.[70] 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.[71]

It may also be noted here that the Shafi'i jurists allow masters to enforce even the *ḥadd* punishment on their slaves.[72] They also allow some other persons to enforce *Ḥudūd* in their private capacity.[73] The reason is that the Shafi'i 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 *haqq Allah*. The Ḥanafī jurists, 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. The most serious problem it causes is that of analytical inconsistency.[74]

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.[75] *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. 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.[76] Hence, the practical effects of *qiṣāṣ* and *ta'zīr* are almost similar.[77] The *siyāsah* offence involves the right of the community. Hence, the right to pardon the offender is with the government.[78]

Section 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.[79] 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.

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.

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'[80] 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.

Third, *ta'zīr* cannot be proved through circumstantial or indirect evidence, while *siyāsah* punishment can be awarded on the basis of such evidence.[81]

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.[82]

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

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 ﷺ or his Successors (God be pleased with them). Sarakshī discusses a case of a woman during the time of the Prophet ﷺ 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 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 (fasad fi 'l-ard) 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.*[83]

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

The Companions of the Prophet disagreed on the punishment for the offence of homosexuality. Abū Bakr is reported to have suggested that homosexuals must be burnt alive; 'Ali 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; 'Abdullah b. al-'Abbas suggested that homosexuals be thrown from a high place and then stoned; 'Abdullah b. al-Zubayr was of the opinion that the convicts be detained in a place where they would die from the smell of garbage.[84] Sarakhsī, while commenting on this disagreement of the Companions, comes up with a strong case for Abū Ḥanifah 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 (nāss). 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 be awarded in this case. The nature and extent of that punishment is to be determined by the ruler under the doctrine of siyāsah. If the ruler concludes that a particular form of death punishment should be given in a case, the shari'āh has given him the authority to do so.*[85]

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.[86]

After analyzing these instances, it can be safely concluded that a punishment awarded by the Prophet ﷺ or his Companions 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 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*.

References & Notes:

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[9] Imran Ahsan Khan Nyazee, ***Theories of Islamic Law: The Methodology of Ijtihad***, (Islamabad: Islamic Research Institute, 1994), 109.
[10] Muslim b. al-Ḥajjāj Al-Qushayrī, ***Al-Ṣaḥiḥ***, Kitāb al-Ḥudūd, Bāb Qat' al-Sariq al-Sharif wa Ghayrih wa Nahy 'l-Shafa'ah fi 'l-Ḥudūd.
[11] See particularly his *General Principles of Criminal Law: Islamic and Western* (Islamabad: Advanced Legal Studies Institute, 1998).
[12] Section 2 (b) of the Offence of Zinā (Enforcement of the *ḥudūd*) Ordinance 1979.
[13] 'Ala' al-Dīn, Abū Bakr b. Mas'ūd al-Kasānī, ***Bada'i' al-Sana'i' fi Tartib al-Shara'i'***, eds. 'Ali al-Mu'awwad and 'Adil 'Abd al-Mawjūd (Beirut: Dar al-Kutub al-'Ilmiyyah, 2003), 9:177.
[14] Qur'ān 24:4.
[15] Abu Bakr Muhammad b. Abi Sahl Al- Sarakhsī, ***Usūl al-Sarakhsī***, *(Lahore: Maktabah Madaniyyah, n.d.)*, 1:131.
[16] Ibid., 1:14.
[17] Qur'ān 2:178.
[18] Kasānī, ***Bada'i' al-Sana'i'***, 9: 248 (emphasis added).
[19] Nyazee, ***Theories of Islamic Law***, 115-116.
[20] *Sarakhsī, Usūl al-Sarakhsī*, 2:289.
[21] Section 317 of the Pakistan Penal Code also prescribes this punishment only two kinds of murder, namely, *qatl-e-'amad* and *qatl shibh-e-'amad*. The Ḥanafī law also prescribes it for unintentional murder. *Al-Mabsūt*, 26:78.
[22] It means that these acts carry the meaning of both worship and punishment.
[23] That is to say, this is primarily an act of worship but it also carries the meaning of financial liability.
[24] 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.
[25] 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.
[26] 'Awdah, ***al-Tashri' al-Jina'i al-Islāmī***, 1:79.
[27] Kasānī, ***Bada'i' al-Sana'i'***, 9:250.
[28] J. C. Smith and Brian Hogan, *Criminal Law* (London: Butterworths, 1983), 17.
[29] Ibid., 18-9.

[30] 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 instance, 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 doctrine of the "privity of contract". A right *in rem* is the one available against 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 Ranchoddas and Manharlal Ratanlal, *The Law of Torts* (Lahore: Mansoor Book House, 1989), 3-5.

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

[32] Kasānī, *Bada'i' al-Sana'i'*, 9:248.

[33] Ibid.

[34] According to the Ḥanafī School, all *Ḥudūd* punishments, except the *ḥadd* of *qadhf*, relate to the pure right of God. *See* Kasānī, *Bada'i' al-Sana'i'*, 9:248-250; Burhān al-Dīn Abū 'l-Hasan 'Ali b. 'Abī Bakr al-Marghīnānī, *al-Hidāyah fī Sharh Bidāyat al-Mubtadī* (Beirut: Dar Ihya' al-Turath al-'Arabī, n.d.), 2:339. The Shafi'i 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. (*Bada'i' al-Sana'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*. Kasānī 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).

[35] 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 Shafi'i jurists, asserted that *ta'zīr* can be awarded in *ḥaqq Allah* also. However, they faced the problem of analytical inconsistency.

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

[37] See for details: Muhammad Mushtaq Ahmad, "The Doctrine of *Siyāsah* in the Ḥanafī Criminal Law and Its Implications for the Pakistani Legal System," *Islamic Studies*, 52:1 (2015), 29-55.

[38] 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.

[39] Kasānī, *Bada'i' al-Sana'i'*, 9:241.

[40] *Siyāsah* is "the act of the ruler on the basis of *maslahah* [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-'Abidīn b. Ibrahim Ibn Nujaym, *al-Bahr al-Ra'iq Sharh Kanz al-Daqā'iq* (Beirut: Dar al-Ma'rifah, n. d.), 5:11. This authority if used within the constraints of the general principles of Islamic law, is called *Siyāsah 'adilah* (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 zalimah* (tyrannical administration) and such directives of the ruler are invalid. Muhammad Amin b. 'Abidīn al-Shami, *Radd al-Muḥtār 'ala 'l-Durr al-Mukhtār Sharh Tanwīr al-Absār*, ed. 'Adil Ahmad 'Abd al-Mawjud and 'Ali Muhammad Mu'awwad (Riyadh: Dar 'Alam al-Kutub, 2003), 6:20.

[41] Shams al-Dīn Muhammad b. al-Khatīb al-Shirbinī, *Mughnī al-Muḥtāj ila Ma'rifat Alfāz al-Minhāj* (Beirut: Dar al-Ma'rifah, 1418/1997), 4:203.

[42] Thus, Yahya 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 *kaffarah*". Shirbini 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.

[43] Some of the contemporary scholars have tried to prove that the *Ḥudūd* are not *fixed* but *maximum* punishments. *See* Javed Ahmad Ghamidi, *Mizān* (Lahore: Dar al-Ishraq, 2001), 302. See also the CII's *Final Report on Reforms in the Ḥudūd 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 details on this issue: Ahmad, *Ḥudūd Qawanin*, 56-58.

[44] 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. (Kasānī, *Bada'i' al-Sana'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.

[45] This is the opinion of Imām Abū Ḥanifah al-Nu'mān b. Thabit (d. 150/767) and this is the preferred view of the Ḥanafī School. Abu Yusuf Ya'qub b. Ibrahim (d. 183/799), the famous disciple and successor of Abū Ḥanifah, 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 'Ali b. Abī Tālib (Allah be pleased with him) would award five lashes less than the least of the *ḥudūd*. (Kasānī, *Bada'i' al-Sana'i'*, 271-72). Abū Ḥanifah 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).

[46] It has been reported that the second caliph 'Umar b. al-Khattāb (Allah be pleased with him) ordered a person named Nasr b. al-Hajjāj 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-Mabsūt*, 9:52). Schacht starts discussion on *Siyāsah* in the following words: "*Special measures,* preventive or punitive, may be taken for reasons of public policy *(siyāsah),* e.g. the banishment *(nafy)* or the imprisonment *(ḥabs)* of a beautiful youth, or the execution of criminals who strangle their victims in a city…"*Introduction to Islamic Law*, 187.

[47] 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".

[48] 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.

[49] 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, along with other relevant issues, is given in the Second Schedule of this Code.

[50] Kasānī, *Bada'i' al-Sana'i'*, 9:274.

[51] Ibid., 9:241.

[52] For *qadhf*, they deem it essential because if the *maqdhuf* (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.

[53] Sarakhsī, *al-Mabsūt*, 16:134; Marghinānī, *al-Ḥidāyah*, 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*.

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

[55] Marghinānī, *al-Ḥidāyah*, 3:116.

[56] Ibid., 3:117.

[57] The term *tazkiyat al-shuhūd* implies secret and open inquiry about the character and trustworthiness of the witnesses (Ibid., 3:118). The Ḥudūd 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 Zinā Ordinance.

[58] 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, Kasānī says: "It is proved through all that can prove the other rights of individuals, that is, confession, testimony, refusal to take oath (*nukul*) and knowledge of the judge (*'ilm al-qadi*). Moreover, the testimony of women, along with the testimony of men, is admissible in it in the same way as testimony about testimony (*shahadah 'ala al-shahadah*) and official correspondence of a judge to another judge (*Kitab al-qadi ila al-qadi*), as is the rule for other rights of individual" (*Bada'i' al-Sana'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-'Abidīn b. Ibrahim Ibn Nujaym, *al-Ashbah wa 'l-Naza'ir 'ala Madhhab Abi Hanifah al-Nu'man* (Cairo: Matba'at Mustafa al-Babi, n. d.), 152). An important question arises here: If *ta'zīr* is to be applied in *ḥaqq Allah*, as the Shafi'i jurists assert and some of the later Ḥanafī jurists accepted this view, what will be the standard of evidence for such *ta'zīr*? See for a detailed analysis of this issue: See for details: Ahmad,"The Doctrine of *Siyāsah* in the Ḥanafī Criminal Law,"43-50

[59] The jurists cite many examples from the cases decided by the Prophet ﷺ 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 3.2 below, the punishment awarded is termed *siyāsah* by the Ḥanafī jurists.

[60] 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.

[61] Sarakhsī, *al-Mabsūt*, 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 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*. Nyazee, *Outlines of Muslim Personal Law*, 39 and 67-68.

[62] Sarakhsī, *al-Mabsūt*, 5:29-30.

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

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

[65] Abu 'Isa Muhammad b. 'Isa al-Tirmidhi, *al-Jami'*, Kitāb al-Ḥudūd, Bab Ma Ja' fi Dar' al-Ḥudūd.

[66] Ibn Nujaym, *al-Ashbah wa 'l-Naza'ir*, 152.

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

[68] Kasānī, *Bada'i' al-Sana'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* offence, including *qadhf*, the punishment cannot be enforced (*Al-Mabsūt*, 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 *iftiyat 'ala haqq al-imam* (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, "Tawhin-e-Risalat ki Saza: Fiqh Ḥanafī ki Roshni men", *Al-Shari'ah*, 22:3 (2011), 29-40.

[69] Kasānī, *Bada'i' al-Sana'i'*, 9:253.

[70] See for details: Ahmad, "The Doctrine of *Siyāsah* in the Ḥanafī Criminal Law," 45-48.

[71] Qur'ān 17:33. If the individual 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, "Tawhin-e-Risalat ki Saza", 32-33.

[72] Shirbinī, *Mughni al-Muḥtāj*, 4:197.

[73] Ibid., 197-200.

[74] See for detailed explanation of this analytican inconsistency in the works of the later jurists: Ahmad, "The Doctrine of *Siyāsah* in the Ḥanafī Criminal Law," 43-50.

[75] Kasānī, *Bada'i' al-Sana'i'*, 9:250.

[76] *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 ﷺ 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." (Abu 'Abdillah Muhammad b. Isma'il al-Bukhari, *Al-Jami' al-Sahih*, Kitab al-Diyat, Bab Man Qutila Lahu Qatil). See for a detailed legal analysis of this tradition: Sarakhsī, *al-Mabsūt*, 26:68-73. See also: Marghinānī, *al-Ḥidāyah*: 4:442.

[77] 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-Ashbah wa 'l-Naza'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 2.1.

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

[79] Muhammad Amin Ibn 'Abidīn al-Shamī (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. See for a detailed analysis: Ahmad, "The Doctrine of *Siyāsah* in the Ḥanafī Criminal Law," 43-50.

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

[81] This point will be elaborated below in Section 3.2.

[82] 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.

[83] Sarakhsī, *al-Mabsūt*, 26:126.

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

[85] Ibid., 9:91.

[86] Marghinānī, *al-Ḥidāyah*, 2:346-47.