

An Appraisal of the Nature of Islamic Criminal Procedure: Whether Adversarial or Inquisitorial?

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Abstract

Criminal procedure is criminal justice in action. Islamic Criminal law (ICL) is being enforced through western procedural systems known as adversarial and inquisitorial which makes significant anomaly in the application of ICL. Enforcement of ICL without accompanying Islamic rules of procedure is arguably to practice ICL incompletely, inaccurately, and indeed un-Islamically. As the substantive ICL is different in its form and substance, the Islamic Criminal Procedure (ICP) is also different than the western procedural models. The ICP has many independent features which are not available in any other law. The classification of offences in ICL is linked with violation of rights; of Allah, of the individual and of the society. The kind of right violated determines the rules of procedure. Furthermore, Islamic law operates within two spheres; fixed and flexible. The Muslim jurists worked on fixed part whereas care of flexible part is left in the hand of rulers. Although the rules of ICP can be found in *Qur'ān & Sunnah* – primary sources of Islamic law - and in classical Islamic jurisprudence but neither the classical nor the contemporary

Muslim scholars set out formal code of ICP (templates) corresponding code of procedure of modern-day. By applying qualitative research methodology, this article aims to examine the nature of ICP whether adversarial or inquisitorial while examining its salient features. It discusses classification of ICP and analyzes legal consequences of its various kinds. Scientific study of ICP can play vital role to direct our ongoing revamping process of criminal justice in the right direction with the aim to make the system efficient and cost-effective in the delivery of expeditious justice.

Keywords: Adversarial; Criminal Procedure; *Hudūd*; Islamic Criminal Procedure; Inquisitorial; Nature; *qisās*; *siyāsah*; violation of right; *ta'zīr*

Introduction

The early Muslim jurists discussed substantive criminal law and Islamic law of evidence derived from *Qur'ān & Sunnah* - primary sources of law – through standard jurisprudential methods in detail but they did not set out criminal procedural laws and rules (templates) that govern the officials in investigating, prosecuting and adjudicating offenders while imposing limitation that constraints the state for protection of citizen's rights such as in the Constitutions of today's states. Even contemporary Muslim scholars did not establish such a framework; as a result, Islamic criminal procedure (ICP) operates mostly under the alien procedures borrowed from western nations which makes anomaly both practical and theoretical. "There is thus no template of procedural rules similar to the categories of substantive crime (and rules of evidence) in formal Islamic jurisprudence to govern the modern state practice of ICP".¹ However, *Qur'ān* and *Sunnah* do contain some fundamental principles and rules that govern criminal procedure in the modern sense and those are also restated and recognized by classical Muslim legal scholars in the same text in which substantive criminal law discussed. The Muslim jurists categorized Islamic legal system into two spheres; fixed and flexible. The care of flexible part is left in the hand of Muslim rulers to make changes according to the need of the time, place and Muslim

Community which is usually carry out through a policy called the '*Siyasah Shar'iyah*'.² According to Allah Iqbal, the Islamic legal system must admit changes within its framework without deviating from its foundational and permanent principles as he stated, "a society based on such a conception of reality must reconcile in its life, the categories of permanence and change."³ Under the doctrine of *Siyasah Shar'iyah*, the procedural matters are generally left to the discretion of the ruler who can devise them in accord with the objectives of *shari'ah* for securing *Maslaha* – public interest – as best as possible.⁴

One can argue that why the ICP not established as of Adversarial and inquisitorial? Firstly, Islamic Procedural system emerged in the same text where substantive law discussed but there is only lacking in its codification. Secondly, it can be derived from the basic rules as enshrined in the sources of *shari'ah* generally and particularly from the objectives of *shari'ah* (*Maqasad-e-shariah*). Thirdly, array of literature is available about *Adabul Qadi* dealing with procedural aspect of Islamic law. Fourthly, the fundamental goals of the *Shari'ah* - originally identified through *hudud* offences – can be employed for articulation of the rules and principles of criminal procedure through authentic jurisprudential methods. So, the objectives of *shari'ah* through the science of Islamic legal maxims can play a vital role in textualizing the ICP law.⁵

Significance of Islamic criminal procedure

The application of ICL is one of the most visible and controversial area of Islamic Law which attracted world-wide attention during the process of Islamization which began in the post-independence of Muslim majority states as a state program in which criminal law remained a central aspect. Islamic Penal Code was established over a thousand year ago. The Muslim jurists derived list of crimes and punishments from *Qur'an* and *Sunnah* through standard jurisprudential methods, made a comprehensive Islamic Penal Code set the rules of evidence but neither the classical nor the contemporary Muslim scholars set out formal code of ICP corresponding modern-day code of procedure; "how to, and how not to investigate crimes, interrogate the

criminal suspects, prosecute the accused, adjudicate criminal cases, and punish the convicts".⁶ So, the Muslim scholars never set out formal comprehensive code and framework for governing the officials in investigation of criminal suspects, prosecution and adjudication of accused resulting acquittal or conviction, rules of conviction and sentencing. In the present era, ICL is being enforced through western code and practices of procedure known as adversarial and inquisitorial which makes significant anomaly in the application of ICL.⁷ For instance, in Pakistan, same rules of procedure were applied for enforcement of ICL - implemented in 1979 - which were inherited from British India and applied in the enforcement of non-Islamic criminal proceedings.⁸ In United Arab Emirates (UAE), code of criminal procedure was enacted having similarity with Egyptian –molded Inquisitorial system of France – and devoid of consideration of Islamic Procedure. However, the Kingdom of Saudi Arabia enforced ICL while referring to application of ICP. Its opening Article states that *Shari'ah* principles as ordained in the *Qur'ān* and *Sunnah* shall be applied by the court while deciding cases. State promulgated laws not contrary to *Qur'ān* and *Sunnah* shall also be applied by the courts while deciding case brought before them.⁹ But what *Shari'ah* principles were intended was not explained and provisions of the Code do not reflect a *Shari'ah* provenance.¹⁰ In 1999, Iran also enacted Code of Criminal Procedure and referenced to the *Shari'ah* and Islamic norms.¹¹ Sudan also enacted criminal procedure which appears in a variety of legislation; judicature Act, criminal procedure Act, periodical judicial circulars. Many other Islamic countries are also applying ICL in their respective countries and they enacted their criminal procedural laws but there is less uniformity even little clarity and harmony with the principles of ICP.¹² The codification of detailed criminal procedure is a comparatively new phenomenon even in western countries, especially rules that specify safeguards for accused and limitations on state power. One might ask a question that why should we make code of ICP? There are many reasons for need of Code of ICP; (i) the code of criminal procedure having western origin is vulnerable to attack as illegitimate, un-Islamic, irrelevant, and simply unauthentic in the

application of ICL. (ii) Islamic Declaration of Human Rights envisaged that all freedoms and rights mentioned herein are subject to such limitations of *Shari'ah* ordained in *Qur'ān* and *Sunnah* or derived through valid methods of Islamic jurisprudence.¹³ (iii) Although, the *Shari'ah* does not discuss in detail rules of procedure, it contains the basic rules of ICP which is best reason to identify and articulate these rules in a code. Though the classical jurists did not articulate the complete and comprehensive rules of procedure however they discussed and illustrates such rules by referring the text of *Qur'ān* & *Sunnah* and principles of Islamic jurisprudence. Thus, the main reason is that enforcement of ICL without accompanying Islamic criminal procedure is arguably to practice ICL un-Islamically. Hence there is dire need to articulate ICP.¹⁴

Nature of Islamic criminal procedure

The contemporary Muslim scholars discussed the nature of ICP. Some argued that ICP has resemblance with both the inquisitorial and the accusatorial methods.¹⁵ Its mixed system has features of inquisitorial and adversarial models of procedure.¹⁶ Some argued that the ICP is more inquisitorial than adversarial because of the dominant role of the *qadi* and the minimal role of the defense counsel yet features of adversarial system are available in ICP as the accused is presumed innocent until proved guilty before impartial judge, right of silence, right of confrontation, right of fair trial and many more are found.¹⁷

Inquisitorial Nature

The judge has an active and dominant role in criminal cases and there is little division between the judge and the investigator.¹⁸ Dr. Mehmood Ahmad Ghazi pointed out that Criminal Procedural Law which based on adversarial system of procedure is so lengthy, inefficient, and inadequate for our legal system where many laws and provisions of laws based on ICJ System such as *qisās-o-Diyat* and *hudūd* laws. The procedural system is one of the causes of the failure of *hudūd* and *qisās -o-Diyat* Laws in Pakistan. He stated that ICLs were enforced since second *Hijri* till 18th century through a procedural law which resembles with Inquisitorial System of France and courts were

empowered with those powers which are available to the criminal courts in France and Germany.¹⁹ He also suggested to the then Prime Minister to change the existing Criminal Procedure for speedy, inexpensive, and efficient CJS in Pakistan and prepared a draft of Criminal Procedure for him. Dr. Ghazi also consulted with Irshad Hassan Khan (the then Chief Justice) during preparation of that draft.²⁰ Imran Ahsan Nyazee also has an opinion that from the start, Islamic law had an inquisitorial system. In Pakistan, “more and more laws are Islamized; we might find ourselves moving towards a system that is inquisitorial in nature.”²¹ In Pakistan, the process of Islamization remained limited to the substantive laws and procedural laws remained neglected even the Federal *Shari’at* Court constitutionally restricted to review the procedure laws.

Adversarial Nature

The judge has a passive role and the parties, through their lawyers, dominate the proceedings of the case and play a prominent role. John A. *Makdisi* has tried to show that probably the English judges followed the procedural model practiced by the Muslim *Qadis*.²² Some Muslim scholars argued that the ICP has adversarial nature because all the guarantees provided for accused’s protection during investigation; prosecution and trial in the adversarial system are available in ICJ system. The accused is presumed innocent until proved contrary before impartial judge. The burden of proof is upon the accuser. Many features of adversarial systems are found in the ICP but that are less than the inquisitorial features. Very few commentators took the opinion of adversary nature of ICP.²³

Independent Islamic Nature

The researcher is in the opinion that the ICL generally and ICP particularly has many independent features which are not available in any other law. The *Qur’ān & Sunnah* is the primary sources of law. The principles of Islamic jurisprudence are different than secular law. Supremacy always lies with *Shari’ah*. In the ICP, as the qualities and role of judge is given more paramount importance and much emphasized in the discovery of truth, likewise the classification of offences is linked with the various kinds of rights

which determine the rules of the procedure. Some of the distinctive features of ICP are listed below.

Islamic Life Style

Procedural laws are the lifestyle of any nation.²⁴ The ICL is different in its form and substance therefore; the ICP is different from the other legal systems of the world. It is a religious observance as the establishment of justice and doing justice between the people is considered ritual, act of worship, religious observance, and servitude to Allah Almighty. Doing justice is one of the most honorable worships which brings the doer closer to Allah Almighty and raises the degree of human ability.²⁵ Many verses of the Holy *Qur'ān* and Hadiths of the Holy Prophet (ﷺ) indicate it. The Messengers of Allah were obligated to judge between the people in truth and establish justice.²⁶ The administration of justice in truth is one of the utmost responsibility and mandatory obligation (*Farz-e-ain*) of Islamic State after its existence and obligation (*farz-e-kafaya*) against the whole *Ummah Muslimah* as in absence of establishment of justice in truth, the whole *Ummah* will be sinner.²⁷ The Prophet (ﷺ) recognized a high station of the *qadi* by stating that “the just ones in this world shall on the Day of judgment be (seated) on platforms of light in front of the Merciful for the justice they practiced in this world.”²⁸ In ICJ system, the judicial proceedings focus on the discovery of truth. Although vast discretionary powers of the judge is subject to abuse the power but substance is more important than form. Rule by law does not mean rule of law. That is why the personal qualities of the judge are deemed more paramount during his selection.²⁹ Discovery of truth is the main goal of criminal proceedings.

Division of Work between Muslim Jurists and Rulers

Islamic law operates within two spheres; fixed and flexible like ever-growing tree having trunk and branches and leaves. The labor was divided between jurists and rulers for looking after these two spheres. Throughout, the legal history of Islamic law, - especially after its maturity - the Muslim jurists mostly worked on fixed part of Islamic law, devoted themselves for its refinement and strengthen and looked after it with loving care. The care of

flexible part of Islamic law - changes according to needs of the time and place – left in the hand of Muslim rulers especially after its maturity with the condition that he should either himself or through delegation extract this flexible part from Islamic sources while applying valid methodology and devoting themselves for the service of Islamic state. Therefore, two cooperating spheres; fixed and flexible are visualized in Islamic state. The former governs the later which changes time to time. The jurists work on the former however the rulers take care the later in the light of the rules devised by the jurists.³⁰ However, in some ages, the rulers took interest, did care about it and in others, they did not.³¹ The jurists discussed the general propositions and general principles for extraction of rules for flexible and changeable part of Islamic law.³² The primary sources of Islam prescribed some procedural rules and safeguards but generally left it to the discretion of the ruler who has authority under the *siyāṣah Sharʿiyyah*'s doctrine (*shari'ah*-oriented police) to devise procedural rules and safeguards that are in harmony with the objectives and goals of the *shari'ah* particularly public interest. The rulers have authority to devise, develop and refine the procedural rules but according to the spirit of *shari'ah* for achievement of its broader goals.³³

Theories of Adjudication

The process of adjudication has a special and principal place in every legal system for resolving disputes or deciding cases. The theories of adjudication are different in Islamic and other legal models. In Islamic legal system, the minds of the judges and the jurists are governed by the discipline of Islamic jurisprudence (*usul al-fiqh*) that provides detailed methodology of adjudication. Application of theories of adjudication of common law system will pull the judge or *qadi* to one direction, however, application of Islamic theories of adjudication will pull to another direction.³⁴

Repentance and Forgiveness in Penal Philosophy of Islam

The Islamic penal philosophy contains features of reformatory justice and principles of repentance and forgiveness. Repentance pertains to the rights of Allah; however, forgiveness is to the individual's rights. The provisions of repentance, forgiveness and reform are provided by the *Qurʾān* and *Sunnah*

wherever, the punishment specified even they encourage the believers for repentance, forgiveness, and reform the behavior. However, neither the juristic blueprint³⁵ had discussed the consistent feature of repentance in the penal philosophy of Islam, nor legislators of various Muslim countries who enacted ICL in recent decades. *Qur'ān* lays emphasis on both; punishment and repentance but the classical jurists and the modern legislators paid their attention to punishment and ignored the feature of repentance.³⁶ Now we must turn towards the directives of *Qur'ān* on repentance and reform. “As to the thief, male or female, cut off their hands as retribution for their deeds *But if he repents after his crime and amends his conduct, God redeems him. God is Forgiving, Most Merciful.*”³⁷ The first part of the verse provides punishment, and second part provides a provision of repentance reform and self-emendation. The door of repentance is not for habitual or recidivist offenders but for first time offenders as *Qur'ān* says: “repentance with God is only for those who do evil in ignorance, then turn [to God] soon.”³⁸ The implication of ‘ignorance’ widens the span of its application in context of repentance; so, the remorseful youth; one who has no previous criminal record should be permitted for this relief.³⁹ Repentance and its broader perspective are mentioned in the *Qur'ānic* verse; “God loves those who turn to Him in repentance, and He loves those who purify themselves.”⁴⁰ After mentioning the punishment of *zina* and *qadf*, the *Qur'ān* says, “Except for those who repent thereafter and reform themselves, then God is Forgiving, Most Merciful.”⁴¹ The punishment of *ḥirābah* is fourfold punishment and is very harsh in its nature but the door of repentance is also open in it. *Qur'ān* says; “Except for those who repent before they fall into your power. In that case know that God is Forgiving, Most Merciful.”⁴² In the offence of lewdness, the *Qur'ān* says; “if the two of them are guilty of lewdness, punish them both. If they repent and amend, leave them alone; for God is Oft Returning, Most Merciful”.⁴³

When some persons confessed the offences of *ḥudūd* before the Prophet (ﷺ), he tried to persuade them to retract from their confessions and instructed them to ask forgiveness of Allah and His repentance.⁴⁴ Even in

renowned case of *Mā'iz b. Mālik*, after receiving information of his running during execution, the Prophet (ﷺ) said "Did you not leave him alone to repent so that God would have granted him pardon."⁴⁵ Even during the execution of punishment, people are encouraged to give way to the convict to repent and reform. The Prophet said, "forgive the infliction of prescribed penalties among yourselves, for any prescribed penalty of which I hear must be carried out."⁴⁶ So *ḥudūd* offences can be pardon prior taking them to the authorities. This narration encourages people not to be eager in reporting the offences but conceal and turn a blind to the offenders as they can repent, amend, and reform themselves. The Prophet (ﷺ) said "One who conceals the nakedness of a believer; God will conceal his nakedness in this world and the hereafter."⁴⁷ In Islam, concealment of nakedness of others is advice and broadcasting of evil is strictly prohibited however witness has option to report or not but when he called for evidence he must testify. One of the consistent features of the penal philosophy of *ḥudūd* offences is Repentance mentioned in all *ḥudūd* verses of *Qur'ān* so, it should not be excluded altogether but in the general run of *ḥudūd* debate, the subject of repentance is absent in Pakistan and other Muslim countries. So, the balanced approach is that the prospects of repentance & reforms and notion of decisiveness & certainty in the punishment must be reconciled. For reflection of repeated directives of *Qur'ān*, the court procedure and adjudication of *ḥudūd* should be suitably changed and amended.⁴⁸ It should be used as an educational approach for reforming the first-time offender, who has no criminal record and who feels remorse. Keeping in view, the *Qur'ānic* scheme of repentance and forgiveness, it is preferable to make error on leniency side than on the severity side.

Forgiveness

The ICL encourages the wrongdoers to convey repentance, victims to forgive and forget and societies to reconcile among the quarrelers and to reintegrate them. By this way, try to better heal the victim and reconcile the offender as they can move on their lives and even can work normally. Remorse and apology of wrongdoers normally open the door of forgiveness by the victim

and society voluntarily which fosters healing and reconciliation. Admission of guilt is an essential step for remorse, apology, and forgiveness. The victim's wrongdoer's mediation increases the chance that wrongdoer will apologize, and victim will forgive. Islam encourages for admission of guilt which leads to remorse, apology, and repentance by the offender and to heal the victim for forgiveness. Victims naturally are angry, sorrowful, scared even grief-stricken therefore, naturally they want vengeance so want to see justice but due to remorse, apology, and repentance of offender, they are open to mercy therefore, Islam encourages the victims to forgive. The principle of forgiveness is provided in verse no. 178 of second surah of the *Qur'ān*.⁴⁹ Forgiveness is beneficial for offenders to repudiate the wrong, victims to let go of anger and grief and society to reintegrate the wrongdoer. In reformatory justice, repentance, admission of guilt and clemency are time-honored ways. The verses of *Qur'ān* and reports of the Prophets (ﷺ) encouraging for forgiveness are discussed in detail under the head of pre-investigation stage of criminal procedure in another article of the researcher.

Restorative Justice in Islam

By looking at the philosophy of ICL carefully, it can be visualized that all the elements and forms of restorative justice⁵⁰ known today and being advocated since 1970s as an alternative does exist in penal philosophy of ICL as general rules, however retribution is an exception. Rehabilitation of offenders and satisfaction of the victims by the way of his restitution or awarding punishment are the prime goals of the Islamic penal philosophy. The practices of pardon, compensation, apology, conciliation, warning, community services, fining, probation and reintegration are known as forms of restorative mechanism.⁵¹ The concept of monetary compensation to the victim by the accused through *Diyyah*, *Arsh* and *Daman*, practices of conciliation through *sulh*, forgiveness, isolation, warning, fining and reintegration of the offenders are key elements of Islamic penal philosophy.⁵² In restorative justice, crimes are assumed to be private relations between people and not public matter where final say in determination of the matter rests with victims (victim's family) and offenders so, victims can give up their

right to prosecute and offenders are hold liable for compensation.⁵³ Conceptually, all three parties; the victim, the offender and community are involved in restorative justice.⁵⁴ Under restorative justice, the community is basically responsible to prevent the crimes, so this system is community-centric where it engages with offenders, victims and right-thinking members of the society for settlement of disputes while focusing on reconciliation, repairing of harm and integration of the offender in the society.⁵⁵ By look the recent, the objectives of the restorative justice may be categorized as; supporting victim, denouncing criminal behavior as unacceptable, renovating the relationship broken due to crime, persuading the offenders to take responsibility, discovering factors that lead to crime and looking to the future conduct.⁵⁶ “It is potentially less costly and more efficient both in monetary and deterrent effects than conventional penological practices”.

The role of the victim is central and fundamental in Islamic penal philosophy (individual rights affected) which is precondition and mandatory in contemporary restorative justice practices.⁵⁷ As discussed below in detail, the offences in Islamic criminal law are categorized into three types based on violation of right. Restorative justice in all its forms exists in offences affecting the rights of individuals. In the offences affecting the individual's rights, all the viable options; to take *qisās* (retribution, retaliation), take monetary compensation (*Diyyat, Arha, Daman*), enter compromise, forgive the offenders, are placed in the hands of victims or his legal heirs if victim died. Even in the *Hudūd* cases, *Hudūd* offences can be settled and forgiven between the victim and offenders prior moving the court to initiate the trial proceedings. So, offences affecting the right of the society, community or right of the ruler can be given in the hand of the rightly thinking community members for conciliation, forgiveness, or compromise with the offenders for their rehabilitation and reintegration into the society as the state possessed this right legally under clemency jurisdiction. Islam is a religion of peace and compassion and should not be recognized by the severity of *hudūd* punishments, but by the concepts of restorative justice, which have been deeply entrenched in the very framework of the Islamic law and have been

practiced since seventh century. The concept of *Diyya* is unique in being the greatest help that the victim of the crime could possibly expect. Provisions of forgiveness, mercy and conciliation are even more significant than *Diyya*, from the point of view of restorative justice. Further, there is plenty of scope of applying the tenets of restorative law in *ta'zīr* offences in which judges, having discretionary, generally show compassion while pronouncing punishments. What is more important is that all these provisions of restorative justice in Islamic criminal justice system are not confined to books of jurisprudence only but are also routinely practiced.⁵⁸

The Islamic teaching encourages forgiving and directs the followers of Islam to repent after coming any sin or crime. It has and is being routinely practiced in Muslim society.

Impartiality but Not Passive Role of the Judge

The *Qur'ān* requires atmosphere of impartiality during the justice's administration from all the members including the judges, witnesses, lawyers, and law enforcement agencies. According to the verse number 135 of fourth *surah* of the *Qur'ān*, the believers must uphold justice in accordance with truth for the sake of Allah even the decision goes against them or their parents or relatives or rich or poor. This verse prohibits the believers to follow their desires keeping them away from justice and turning away from the truth.⁵⁹ So, in the justice's administration, impartiality is emphasized and demanded by Islamic law. Obviously, it means the proceedings in criminal case beginning from investigation, prosecution and ending with trial must be impartial and objective.⁶⁰ *Qur'ān* also prohibits being a pleader or advocating for dishonest and treacherous people as he says "Surely, We have revealed to you the Book with the truth, so that you may judge between people according to what Allah has shown you. Do not be an advocate for those who breach trust".⁶¹ Whether the active role of judge in digging & unearthing the truth can harm his impartiality? Whether the neutral role of the judge ensures his impartiality? Whether Islamic law required the judge to remain passive during the hearing of the case? Some argue that the judge should hear only the evidence which was produced before him relying upon the saying of the

prophet (ﷺ), “I am only a human being, and you bring your disputes to me, some perhaps being more eloquent in their plea than others, so that I give judgment on their behalf according to what I hear from them. Therefore, whatever I decide for anyone that by right belongs to his brother, he must not take anything, for I am granting him only a portion of Hell”.⁶² Obviously, the judicial decision must base on apparent truth supported by valid evidence. It is well settled principle of Islamic law that judge must hear both the sides and must avoid indicating the witnesses about the contents of their evidence.⁶³ In Islamic law, discovery of truth is responsibility of the judge and for that purpose he should play his active role and not remain passive however, he must remain impartial and decide the matter without fear and favor.

Classification of criminal procedure

In the opinion of researcher, Islamic Criminal Procedure is different from both European; Adversarial and inquisitorial systems of procedure, in its nature and its basic structure. The most significant difference is in objectives as objectives of the Islamic law are different than European substantive and procedural system. In Islamic law, classification of offences based on rights which divided into three kinds of rights: Individual, of community and of Allah corresponding crimes of *ta'zīr*, *siyāsah*⁶⁴ and *Hudūd* respectively and all punishments are linked with the violation of one or more rights.⁶⁵ In some cases, joint rights exist and right of the one predominates the right of the other such as in case of the *qadhif* in which Allah's right predominate and the other example is of *qisās* in which the individual's right predominate on the Allah's right. Thus, *qisās* attracts some of the rules of Allah's right as existence of *Shubhah* suspends the punishment and some of the rules of the individual's right such as the possibility of compromise and waiver by the victim.⁶⁶

The classification on the basis of rights is linked directly with procedure. The kind of right violated determines the procedure to be followed in courts. If the right of Allah is violated, the procedure followed is that for *Hudūd* and *qisās*. When the right of the individual is violated, the procedure followed is

that prescribed for *ta'zīr*, which maintains the *nisab* in evidence of two females for one male. When the right of the state is violated, the procedure followed is that of *siyāsaḥ*⁶⁷

In Islamic legal system, this most important classification has tremendous explanatory power and many important consequences. The some of the consequences of this classification are (a) commuting the sentences and pardon, (b) the operation of *shubhat* (mistakes and doubts), (c) initiation of criminal proceedings and evidence. The standards of evidence change according to the right violated and *siyāsaḥ* offences are proved more easily as its standard of evidence is lowered than other category of offences.⁶⁸

Anglo-Saxon Jurisprudence & Islamic Jurisprudence on Classification of Crimes

In the western legal system, legal wrongs are divided into two major kinds namely civil and criminal. The latter is infringement of public rights while the former is infringement of a private right.⁶⁹ Some wrongs may amount to infringement of both rights; public and private, such as defamation and so-called felonious tort.⁷⁰ Public wrongs are deemed crime and violation or breach of public rights or the rights of the society. But the classification of crime in Islamic criminal law based on violation of right of Allah known as *Ḥudūd*, violation of right of individual known as *ta'zīr* and violation of right of the society or state known as *siyāsaḥ* so the punishment of *Ḥudūd* linked to the right of Allah, punishment of *ta'zīr* linked to the violation of individual's right and punishment of *siyāsaḥ* linked to right of society or state. So, the offence or crime in English law cannot be equated to *Ḥudūd*, *ta'zīr* or *qisās* but may be equated with *siyāsaḥ* only.⁷¹ The main confusion created due to the Anglo-Saxon classification of offence in which offence is violation of right of the community. Most of the scholars associated the Allah's rights with the rights of the society due to the influenced of division of wrong into public and private. This English classification is crux of the many problems. The state can relieve, commute and pardon the offence but in Islamic law, the government has no power to pardon even commute or relieve the punishment of any *ḥadd* related to the Allah's rights or forgive

the offender in *qisās* offences without the consent of victim (legal heirs in case of death of the victim).⁷² However, in Islamic law, the crimes are categorized into *Hudūd*, *ta'zīr* and *siyāsah* on the basis of violation of rights; the of Allah, of the individual and of the ruler respectively and this classification has legal consequences; i.e., standard of proof, nature and extent of the punishments, compromise, pardon, commutation of the punishments and enforcing authority.⁷³

Procedure for *Hudūd* Cases

The term *ḥadd* is defined as “punishment ordained by the *Qur’ān* and *sunnah*”⁷⁴ by the *Hudūd* laws of Pakistan but it is lacking most important characteristic of *ḥadd* as described by the Muslim Jurists. The *ḥadd* is defined by well renowned jurist *Kasani* as “fixed punishment (the enforcement of) which is obligatory as a right of Allah.”⁷⁵ So, he mentioned the phrase ‘as a right of Allah’ besides the fixed punishment and its obligatory enforcement. This phrase ‘right of Allah’ has much significance and particularly important consequences in the ICP which will be discussed in coming pages.⁷⁶ *Kasani* elaborate *ḥadd* as;

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 ascribed these rights to Allah, Blessed and High is He.

The *ḥadd* punishment is linked with the right of Allah. In *Hudūd*, the main concept is that no one can suspend these punishments. The basic rule of *Hudūd* is that even the government cannot pardon or commute *Hudūd* punishments. All the *Hudūd* punishments are Allah’s right except the *ḥadd* of *qadf* which is mixed with right of Allah and individual, but Allah’s right predominates therefore all the rules of *ḥadd* will apply to the offence of *qadf*.⁷⁷ Nyazee classified the *ḥadd* into two doctrines; wider and narrower.

The former doctrine of *ḥadd* denotes the fixed part of the law however; the latter denotes the specific punishments for specific crimes. *Hadd* is punishment in violation of Allah's right which is fixed by Him once and for all, which is not subject to judicial review and can never be altered.⁷⁸ Imam *Kasani* used word "obligatory" instead of *ḥadd*. According to him, the benefits of obligatory punishments go to the general public as they are protected from evils of *Hudūd* offences. These benefits can only be secured if no one has power to waive punishments of *Hudūd* offences.⁷⁹

Procedure for *ta'zīr*

The *ta'zīr* is defined as "punishment other than *qisās*, *diyat*, *arsh* or *daman*."⁸⁰ In Islamic criminal law, *ta'zīr* is awarded in the wrongs affecting the right of individual only in which he has right to initiate the proceedings before the competent authorities, right to exercise the clemency authority and right to enter compromise with the accused/convict. In *ta'zīr*, the standard of evidence is set by the texts of *Qur'ān* and *Sunnah*, however, that is little lighter than *Hudūd* and higher than *siyāsah*. *Ta'zīr* cannot be proved only with the testimony of woman however, the testimony of two woman when collaborated with the testimony of one man can prove it. In *ta'zīr* cases, an offender could not be convicted based on circumstantial evidence alone. In *ta'zīr* offences, pardon (*afw*) and relinquishment (*ibra'*) are allowed because they belong to the individual's right (*haqq al-'abd*). Moreover, in *ta'zīr* cases, *shahadah 'ala 'l-shahadah*, *yamin* (oath) and testimony of one male along with two female are permissible.⁸¹ The maximum limit of *ta'zīr* is fixed which cannot be more than thirty-nine lashes and form of *ta'zīr* is also fixed which is lashes.⁸² Consequences of *ta'zīr* and *siyāsah* are almost similar except the limits of the punishments and standard of proof.⁸³ These consequences are discussed below in detail.

Procedure for *siyāsah Shariyah*

The term *siyāsah* is defined by the prominent Muslim jurist as "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'an* or the *Sunnah*), can be cited as the source of that act."⁸⁴ It may be interpreted as the justice's administration in accordance

with the principles of *Shari'ah* or use of the ruler's authority within the limitations prescribed by the *Shari'ah*.⁸⁵ So, it is a policy or administration of ruler conformed to the objectives of *Shari'ah* or administration according to justice. It is also called *siyāsah adilah* contrast with *siyāsah zalimah* or tyrannical administration.⁸⁶ Many characteristics of *siyāsah* and *ta'zīr* are common as they are compoundable and can be pardoned. The punishments of *siyāsah* and *ta'zīr* cannot be suspended due to *shubhah*. Due to these common characteristics of *siyāsah* and *ta'zīr*, some jurists used both the terms interchangeably however, there are some major differences between *siyāsah* and *ta'zīr*; a) *siyāsah* is pure right of the state whereas *ta'zīr* pertains to individual's right. The former is mainly offence against the public order however; in the later the offence also caused private injury; b) The clemency authority vested with government in *siyāsah* offences however, clemency authority in *ta'zīr* cases vested with the individual or with his legal heirs in case of his death; c) The enforcing authority in *siyāsah* offences vests with the government however, in *ta'zīr* cases primarily enforcing authority vests with the affected individual or his legal heirs; d) The *nisab* of evidence is different in both; in *ta'zīr*, the evidence is same as in commercial transaction (two female witnesses equal to one male witness) as it pertains to individual's rights, however in *siyāsah*, the state or ruler may determine the standards different than *ta'zīr*, as there is no such limitation and less standard may be set for this kind of offences. "In *siyāsah* the standards of testimony are lowered, and the case can be proved more easily;"⁸⁷ e) In *ta'zīr* cases, the punishment can be in form of lashes in which highest limit is set could not exceed however, there is no any limitation in *siyāsah* offences and government can award any kind of punishment and; f) The punishment of *ta'zīr*, can be awarded to the minor having discretion (*sabiyyumayyiz*) by the way of *ta'dīb* (discipline) however the punishment of *siyāsah* can be inflicted only to the sane and major or mature person.

In the concept of *ta'zīr*, there is a difficulty in case of murder or *qatl-i-amd*, when two male *adl* witnesses are not available but ample circumstantial evidence available for the conviction of criminal. Will the accused be tried

under *ta'zīr* or under *siyāsah*? For the trial of *ta'zīr* offences, two male witnesses or one male with two female witnesses are again required. However, in *siyāsah* offences, case can be proved more easily with low standards of proof.⁸⁸ The state/ruler can determine standards of proof and modes of procedure in *siyāsah*.⁸⁹ During the Ottoman Empire, various offences were declared, and their punishments were prescribed through *qanun*, or royal decree and they were validated by *fuqaha* such as *Ibn Abidin* on the basis of the doctrine of *siyāsah*.⁹⁰ Under the umbrella of *siyāsah*, the government - while adhering the parameters of general principles of *shari'ah* - can declare certain acts or omissions as offences, prescribe their punishments, set standards of their proof and can make detailed laws on the subject.⁹¹

Legal Consequences Of The Various Islamic Criminal Procedure

Maximum And Minimum Limits Of Punishment

There are fixed punishments in *ḥudūd* and *qisās* cases and no room for alternative or lesser punishments. In *ta'zīr* cases, the maximum limit is also fixed which cannot be more than 39 lashes. However, the government under the doctrine of *siyāsah* has vast power to make some act as offence for the safeguarding the public order and to take measures for prevention of offence. Under *siyāsah* doctrine, the government can make different offences, prescribe different punishments, lay down different standard of proof within restrictions imposed by the injunctions as lay down by the Qur'an and *Sunnah* and by the general principles of Islamic law.⁹²

Commencement of criminal Proceedings

In English law, there are two wrongs; civil and public. In the former, the aggrieved party can or cannot start the proceeding against the wrongdoers, however in the latter; the state is responsible to initiate proceedings against the wrongdoers even if the victim party does not want to commence the proceedings. In Islamic law, a criminal case can also be initiated in the court by the party whose right was affected by the wrong. The situations are different in Islamic law, as it has three kinds of rights. The Muslim jurist discussed it in the topic 'whether filing of case (*da'wah*) is necessary for an initiating a crime case? In *ta'zīr* cases, *Da'wah* is necessary by the aggrieved

party so without initiating case in the court by the affected person, *ta'zīr* punishment cannot be awarded since *ta'zīr* is awarded in the infringement of individual's right who can enter compromise with the wrongdoer or to completely pardon him.⁹³ The same is true in *qisās* cases, though there is mixed right; of Allah and of individual but individual's right is predominated. As for as *hudūd* cases are concerned, the ruler can initiate proceedings in the court as he is the enforcing authority in the *hudūd* cases.⁹⁴ In *siyāsah* offences, ruler can initiate the proceedings against the criminals as his right is violated even if the aggrieved does not want to initiate the criminal proceedings against the criminals.⁹⁵

The Standard of Evidence

For proving the cases of *Hudūd*, *qisās* and *ta'zīr*, the *Qur'ān* or the *Sunnah* set the standard of evidence. In the cases involving right of Allah, the testimony of woman is not admissible especially in *ḥadd* of *zina* in which four male adult Muslim eyewitnesses are required⁹⁶ and other *Hudūd* and *qisās* cases two male adult witnesses are required. The witnesses also must pass the standard of *tazkiya al shuhud* through secret and open inquiry⁹⁷. The offence of *ta'zīr* can be proved based on two female witnesses when corroborated with one male witness. The offence of *ta'zīr* cannot be proved through the testimony of woman alone. The offences of *Hudūd*, *qisās* and *ta'zīr* cannot be proved through indirect evidence or circumstantial evidence. *Hudūd*, *qisās* and *ta'zīr* offences are small part of Islamic criminal law however major part of offences dealt under the doctrine of *siyāsah* that authorizes the rulers to punish the criminals⁹⁸ In *siyāsah* cases, the ruler can determine the standard of evidence for proving them. The ruler can set high or lower standard of evidence in *siyāsah* cases. What kind of evidence is admissible can be determined by the ruler and court can award the punishments of *siyāsah* offences on the evidence fixed by the ruler. So, in *siyāsah* offences, a person can be convicted on the grounds of circumstantial evidence, testimony of non-Muslim, testimony of woman alone or even based on forensic or electronic evidence.

The Concept of *Shubhah*

The word *shabdhah* is translated as doubt in its literal meaning however, its technical meaning should be mistake, *jahl* (uncertainty, ignorance) or *khata* (mistake). The Holy Prophet said the “*ḥudūd* penalties are to be waived in case of *shubhah*”.⁹⁹ The punishment of *ḥadd* and *qisās* is suspended due to the existence of *Shubhah*. The notion of ‘*shubhah*’ is not comparable with the concept of ‘benefit of doubt’ as the former is “existence of a doubt in the mind of the accused about the legality of the act” however; the latter is “the existence of doubt in the mind of the judge about the guilt of the accused.” The judge is not sure about the commission of offence by the accused, or he is not sure about the fulfillment of all the conditions of the offence or the procedure hence he acquits the accused while giving him benefit of doubt.¹⁰⁰ In Islamic jurisprudence, the *Shabdhah* can be compare with the concept of mistake of fact or law and it may exist actual (*haqiqatan*) or the law may presume its existence (*hukman*). Hence the *shubhah* has no equivalence with the nation of ‘benefit of doubt’.¹⁰¹ The punishment of *ta’zīr* or *siyāsah* is not suspended due to *shubhah*.¹⁰²

The Authority to Enforce Punishments

The right affected determined the authority to enforce the punishments. In *Ḥudūd* cases, the authority to enforce the punishment is vested with the ruler. In *siyāsah* cases, the authority to enforce the punishment is also vested with ruler as his right directly violated. In *ta’zīr* cases, the authority to enforce the punishment is vested with the individual whose right was directly affected, however, assistance is provided by the government to avoid any misuse of enforcing power. The aggrieved person can commit excessiveness while exercising this power therefore, the government enforces *ta’zīr* offences as well on behalf of the individual.¹⁰³ In *qisās* cases, - where the right of Allah with the individual’s right however the individual’s right predominates – the authority to enforce the punishment is also vested with the aggrieved individual or his legal heirs.¹⁰⁴

Compromise and Pardon

In *Hudūd* case, no human even the government has authority to grant pardon to the convict or enter in compromise with the convict because they belong to the right of Allah. The holy prophet (PBUH) said to his beloved *Usama bin Zaid* (R.A);

Do you try to intercede for somebody in a case connected with Allah's Prescribed Punishments? Then he got up and delivered a sermon saying, 'what destroyed the nations preceding you, was that if a noble amongst them stole, they would forgive him, and if a poor person amongst them stole, they would inflict Allah's Legal punishment on him. By Allah, if Fatima, the daughter of Muhammad stole, I would cut off her hand.'¹⁰⁵

So, neither any intercede can be made to the authority for pardon nor the enforcing authority has any right to pardon or make compromise in *Hudūd* case. In *ta'zīr* cases, the affected individual, or his legal heirs - in case of his death – can pardon the accused/convict or can enter *sulh* (compromise). The same is true in *qisās* cases as individual's right is predominate so he or his family may forgive the accused or make compromise with the accused/convict person. In *siyāsah* cases, the ruler can grant pardon or make compromise with the accused/convict persons where the right of the society is violated.¹⁰⁶ So, in *siyāsah* cases, the jurisdiction of clemency/mercy vested with the government as in common law offence.¹⁰⁷

Articulation of Islamic Criminal Procedure and Higher Judiciary of Pakistan

The Higher Judiciary of Pakistan can play a pivotal role in articulation of rules of Islamic Criminal Procedure. Section 4 of the Enforcement of the *Shari'ah* Act, 1991 mandates the higher judiciary to lean towards the perspective aligned with Islamic principles and jurisprudence. When more than one interpretation is possible, the court shall adopt the one consistent with the Islamic principles and jurisprudence. Furthermore, when court faced with multiple plausible interpretations, the court is directed by this Statute to favor the one that not only upholds the Principles of Policy but also adheres to Islamic provisions enshrined in the Constitution.¹⁰⁸ A noteworthy

extension of this principle is also enshrined in the review case of the Supreme Court (Practice and Procedure) Act, 2023. In this landmark decision, the full Bench of the Supreme Court of Pakistan with 10/5 ratio held that in instances where two interpretations stand on equal footing, the one that harmonizes with the Injunctions of Islam shall prevail. This judicial precedent underscores the commitment of the judiciary to prioritize interpretations that are not only legally sound but also align with the ethical and moral compass embedded in Islamic teachings.¹⁰⁹

This jurisprudential stance not only underscores the commitment to legal precision but also emphasizes the judiciary's dedication to upholding the principles of justice rooted in the rich tapestry of Islamic law. In navigating the intricate landscape of legal interpretation, the Higher Judiciary of Pakistan emerges as a stalwart guardian, ensuring that the sanctity of Islamic principles permeates the fabric of the legal framework, thereby enhancing both the accuracy and attractiveness of the legal discourse.

Conclusion

Many features of inquisitorial procedure are found in ICP. The ICP has more resemblance to inquisitorial procedure than adversarial. However, ICP has many additional and unique features which distinguish it from the other systems of the procedure. Fundamental rules and principles of ICP pertaining to Investigation, prosecution and trial appeared in primary sources of Islamic law i.e., *Qur'ān* & *Sunnah* and in traditional Islamic jurisprudence but in the present-day practice, unfortunately, very few are in practice even those Muslim states that claim to practice ICL, they follow western law of criminal procedure either adversarial or inquisitorial. Application of ICL without accompanying procedural rules is to practice ICL incompletely, inadequately inaccurately and indeed un-Islamically. Therefore, it is necessary to identify, articulate and enforce ICP for the application and enforcement of ICL after recognizing rules and principles pertaining to investigation, prosecution, trial, conviction and sentence justly from its traditional sources. ICP can be determined and articulated according to the kinds of crimes known as *ḥudūd*, *ta'zīr* and *siyāsah* based on violation of any rights; of Allah, of individual and

of community, respectively. Various offences and their punishments are linked to the violation of various rights. The procedure of investigation, prosecution, adjudication, standard of evidence, power of reprieve and pardon after conviction, compromise, launching or withdrawal of prosecution, extent of punishments and enforcing authority or other legal consequences of crimes are determined according to the category of the crime. ICP seeks to strike a fair balance between the interests of victims, society and accused. Justice must be achieved for the victim, accused and the society through fair determination the guilt of accused and protection to the victim and the society.

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- ³ Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam*, (London: Oxford University Press, 1934), 147. Nyazee also discussed a conceptual framework fixed/rigid and changeable or flexible See Imran Ahsan Nyazee, *Theories of Islamic Law, The Methodology of Ijtihad*, (Islamabad, Advance Legal Studies Institute, 2016), 52-55.
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- ¹⁰ Reza, "Due Process in Islamic Criminal Law", 8.
- ¹¹ Criminal Procedure Code for Public and Revolutionary Courts (Qanun-i-A'yin-I Qadisiya Dadgahhayih Umumiva Inqilab dar Umur-i-Kayfari), Tehran 1999, (1378).
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- ¹³ Art. 18, Universal Islamic Declaration of Human Rights,
- ¹⁴ Reza, "Due Process in Islamic Criminal Law", 12.
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¹⁸ Reichel, 13.

¹⁹ Shahzad Iqbal Sham, *Pakistan me Hudood Qawaneen*, (Islamabad, Shariah Academy, 2005), 27.

²⁰ Ibid, 30-31

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²² John A. Makdisi, "The Islamic Origins of the Common Law", *North Carolina Law Review* Vol. 77 (1999); 1650.

²³ M. Cherif Bassiouni, "Crimes and the Criminal Process", *Arab Law Quarterly*, Vol. 12, No. 3 (1997), 271-72.

²⁴ Justice Fazal Karim, *Change is the Only Constant*, (Karachi, Pakistan Law house, 2019), 99.

²⁵ Dr. Nasir Al-Tarefi, *Al-Murafaat Al-Shariah*, (Riyhad, Muhammad Bin Saood University, 2000), 10.

²⁶ See verse No. 26 Surah No. 38 and verses 48 to 50 of Surah No. 5.

²⁷ Mahmood Ahmed Ghazi, *Adab-ul-Qadhi*, (Islamabad: Islamic Research Institute, 1999), 75.

²⁸ Hadith No. 4721 from One Islam App, also quoted by Ghazi, in *Adab-ul-Qadhi* at 76.

²⁹ Bassiuni, "Crimes and the Criminal Process," *Arab Law Quarterly*, Vol. 12, No.3 (1997), 271. pp. 269-286.

³⁰ Nyazee, *Theories of Islamic Law*, 327.

³¹ Imran Ahsan Khan Nyazee, *The Lex Islamica: Islamic Law for the New Millenium*, (Islamabad, Advance Legal Studies Institute, 2018), 56-59.

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³³ Kamali, "The Right to Personal Safety...", 249.

³⁴ Samia Maqbool Niazi, "Theories of Adjudication in Western and Islamic Law with Reference to the Islamization of Laws in Pakistan," *Islamic Studies* (2018), 233.

³⁵ The view of the majority of Muslim jurists regarding to all the rest of the *ḥudūd* crimes except *ḥirābah*, is that punishment could not be suspended by the way of repentance when reported to the authorities. The minority view is that "repentance suspends the *ḥudūd* punishments generally.

³⁶ Muhammad Hashim Kamali, *Crime and Punishment in Islamic Law: A fresh Interpretation*, (New York: Oxford University Press 2019), 27. During the period of Maoist (1949 – 1976) in China, the CJS was unique based on basic principle of "leniency with those who confess and severity with those who resist." The attitude of the offenders was one of the pertinent factors for determination of sentence. A more severe sentence resulted in case of any attempt to appeal against conviction. The spirit of this principle appears to run through-out the criminal process, though it is not formally incorporated in the criminal justice codes.

³⁷ *Qur'ān* 5:38-39. Naturally repentance and reforms come as a result to advice, enlightenment and education therefore, punishments should not be hastily carried out and

time should be given even some positive incentives on the selective basis for this purpose. See Kamali, *Crime and Punishment in Islamic Law* p. 29.

³⁸ *Qur'ān* 4:17.

³⁹ Fathī b. al-Tayyib al-Khamāsī, *al-Darūrah al-Marḥaliyyahfi-Taṭbīq al-Qānūn alJinā'i al-Islāmī*, (Damascus and Beirut: DārQutaybah, 1421/2001), 2.

⁴⁰ *Qur'ān* 2:222.

⁴¹ *Qur'ān* 24: 2-5.

⁴² *Qur'ān* 5:34.

⁴³ *Qur'ān* 4:15-16.

⁴⁴ See the narrations regarding the cases of Mā'iz and al-Ghamidiyyah. Bukhari, Hadith No. 6824, Muslim, Hadith No. 4424, 4428, 4431, 4432, Dawud, Hadith Nos. 3186, 4419, 4420, 4421, 4422, 4426, 4431, 4442, Majah, Hadith No. 2554, Mishkat Hadith Nos. 3561, 3562 and 3581.

⁴⁵ Abu Dawud, Sunan, Hadith No. 4419.

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⁴⁷ al-Nawawī, Riyāḍ al-Ṣāliḥīn, 488, hadith 1530.

⁴⁸ Kamali, *Crime and Punishment in Islamic Law*, p. 31.

⁴⁹ *Qur'ān* 2:178.

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⁵² Absar Aftab Absar, "Restorative Justice in Islam with Special Reference to the Concept of Diyya", *Journal of Victimology and Victim Justice* Vol.3:1 (2020), 38. pp. 38-56.

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⁵⁴ Absar, 40.

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⁵⁶ Carrie Menkel-Meadow, "The Restorative Justice: What Is It and Does It Work", *Annual Review of Law and Social Science* (2007), 163. pp. 161-187.

⁵⁷ Absar, 38.

⁵⁸ Absar, 56.

⁵⁹ *Qur'ān* 4:135, translation by Syed Abul Ala Maududi.

⁶⁰ Kamali, "The Right to Personal Safety and the Principle of Legality in the Shariah", 262.

⁶¹ *Qur'ān* 4:105, translation by Muhammad Taqi Usmani.

⁶² Abu Dawud, Sunan, hadith No. 3583.

⁶³ Kamali, "The Right to Personal Safety and the Principle of Legality in the Shariah", 261.

⁶⁴ see Nyazee, *General Principles of Criminal Law: Islamic and western*, (Islamabad, Shariah Academy, 2007), 70-71.

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⁶⁸ Ibid., 71.

- ⁶⁹ J. Smith and B. Hogan, *Criminal Law*, 5th ed. (London: Butterworths, 1983), 3.
- ⁷⁰ See Section 499 and 500 of the Pakistan Penal Code, 1860.
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- ⁷⁷ Ibid., 14.
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- ⁸⁰ See Section 299 (1), Pakistan Penal Code, 1860.
- ⁸¹ Muhammad Amin Ibn Abidin Ash-Shami, *Radd al-Muhtar*, (Beirut: Dar Al Kotob Al-Ilmiyah), 6:123-24.
- ⁸² Ahmad, "Significant Features of the Hanafi Criminal Law", p. 1-7.
- ⁸³ Ibid., 54.
- ⁸⁴ Zayn al-Abidin, *Al-Bahr Al-Ra'iq Sharh Kanz al-Daqaiq* (Beirut: Dar al-Ma'rifah, n.d.), 5:11.
- ⁸⁵ Ahmad, "The Doctrine of Siyāsah in the Hanafi Criminal Law", 30.
- ⁸⁶ Nyazee, *General Principles of Criminal Law: Islamic and western*, 66.
- ⁸⁷ Ibid., 66.
- ⁸⁸ Ibid., 68.
- ⁸⁹ Example of this situation can be found in *ḥudūd* Ordinances enforced in Pakistan, in which two male witnesses are not required in case of *ta'ẓīr* and case can be proved through the testimony of one witness, even the witness is a female.
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- ⁹¹ Ahmad, "Significant Features of the Hanafi Criminal Law", 1.
- ⁹² Ibid., 7.
- ⁹³ Al-Mawardi mentioned that petition is necessary in all those cases where rights of the people are affected however, in *ḥudūd* cases, *Qadi* can initiate proceeding acting on his own without any complaint from any private person and can examine the case alone however he mentioned that according the *Abu Hanifa*, neither the *qadi* can initiate the proceedings in *ḥudūd* without a specific demand nor he can examine the case alone without recourse to him by a plaintiff. See Abu'l Hassan al-Mawardi, *Al-Ahkam as-Sultaniyyah (The Laws of Islamic Governance)*, translated by Asadullah (London: Ta-Ha Publishers Ltd.). 107-08.
- ⁹⁴ However, in *qadf* and *sariqah*, the jurist created two exceptions where complaint is necessary from the affected persons. See Ahmad, "Significant Features of the *Hanafi* Criminal Law" 16.
- ⁹⁵ Ibid, 7.

⁹⁶ The condition of four witnesses is mention explicitly by the Qur'ān in the verses 4:15 and 24:4.

⁹⁷ Section 8 of the Offence of Zina Ordinance.

⁹⁸ Ahmad, "Significant Features of the Hanafi Criminal Law" 6.

⁹⁹ Nyazee, *General Principles of Criminal Law*, 146-47.

¹⁰⁰ Ahmad, "Significant Features of the Hanafi Criminal Law", p. 8. Generally, the courts in Pakistan considered the notion of *Shubhah* equivalent to the notion of 'benefit of doubt' which is incorrect and misconception of the courts. Even this wrong presumption was applied by the Federal Shariat Court in *Hazoor Bakhsh* case. See PLD 1983 FSC 1.

¹⁰¹ Nyazee, *General Principles of Criminal Law*, 146-47.

¹⁰² Some mistakes of fact are considered as mitigating factors in English law; however, mistake of law is not deemed valid defense. See Sec. 79 of the Pakistan Penal Code, 1860.

¹⁰³ Ahmad, "Significant Features of the Hanafi Criminal Law", 8.

¹⁰⁴ Qur'ān 17:33.

¹⁰⁵ Sahih Bukhari Hadith No. 3475 from one Islam application.

¹⁰⁶ Ahmad, "Significant Features of the Hanafi Criminal Law", p.9.

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¹⁰⁸ Section 4, Enforcement of *Shari'ah* Act, 1991.

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