THE TESTIMONY OF WITNESSES AND ITS ROLE IN ISLAMIC CRIMINAL JURISPRUDENCE

by

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In the name of Allah, the most Merciful,
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DECLARATION

I hereby declare that this dissertation has been written by me (the undersigned), and that it does not represent the work of any other person.

I.M. Ibrahim
ABSTRACT

This study is mainly intended to debate the all-important principles of criminal trials involving testimony of witnesses. Since Islamic procedural and substantive criminal doctrines are inextricably linked, it is necessary to make a general survey of the penal policy of Islamic jurisprudence, before the treatment of the testimony of witnesses. This necessitated dividing the study into two parts.

Part I deals with the criminal policy, classification and definition of crimes. Special attention has been paid to the crimes of ḥudūd and qisas as these form the major area of Islamic criminal jurisprudence. The category of crimes has been examined in detail because it is the class of a given crime that determines the grade and kind of testimony required for its proof before the courts.

Part II tackles the general theory of evidence and concentrates primarily on the testimony of witnesses as a judicial vehicle of evidence in criminal trials. The importance of this vehicle entails treating it in eight chapters which are meant to give a comprehensive idea of how the early Islamic jurists tackled and systematized this crucial segment of the jurisprudence. This examination reveals the amount of care Islamic jurists went to in the theoretical approach in order to ensure that a defendant should not be subjected to any abuse of the law. The conclusion brings together the two parts of the study and suggests possible means for further development along the lines of the principles examined in the dissertation.

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I would like to express my genuine and deep thanks and appreciation to all who have helped me complete this study. Foremost of those persons is my supervisor Dr. I.K.A. Howard to whom I express my faithful gratefulness and respect for his guidance and kindness that contributed greatly in the development and improvement of this study.

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NOTE ON THE TRANSLITERATION

This study follows, in general, the system of transliteration of the United States Library of Congress as outlined in the Cataloguing Service Bulletin No. 49 (November 1958). However, the \textit{tā marbūṭah} has been written as "h" at the end of a word when it is not part of the \textit{idāfah} construction, in which case it is written as a "t".
Islam, as a comprehensive system, contains legal as well as doctrinal principles. The link between the two kinds of principles can be easily observed from the numerous Qur'ānic and Prophetic texts. The criminal law and its procedural and judicial rules constitute an important segment of the legal principles of Islam. Also, it should be mentioned that most of these principles and doctrines have been exhaustively treated throughout the past fourteen centuries in such a manner that has led to a huge heritage of rules and scholastic production.

This thesis mainly tackles the criminal principles of this Islamic heritage with a special reference to the 'testimony of witnesses' when required as proof in criminal cases before the courts. Notwithstanding the fact that these principles, whether substantive or procedural, are not codified in a modern form, it can still be maintained that these principles have been made accessible to contemporary lawyers and scholars by the virtue of the incalculable annotations and compendiums that abound in the Muslim and Western worlds today.

The study has been divided into two parts. The first part tackles the criminal and penal principles of the Islamic legal system. It contains the underlying policies of Islam as regards the classification of crimes and their intrinsic penalties. It is not intended to give a comprehensive treatment to all crimes and penalties in this part. However, a general survey is made here to show the main tenors of the Islamic legal system in its criminal and penal aspects.

Also, the main emphasis in Part I is focused on the early Islamic jurisprudence, especially in the realm of ḥudūd, qisās and tażīr crimes and penalties. However, some reference has been made to some modern treatments of these subjects. Comparative treatment is also made, but
essentially between the main Islamic schools of law, with a special reference to their main authoritative sources. However, this did not preclude making some comparison with the modern studies in this field. Reference to the Qur'ān and Sunnah is made each time it is appropriate as these sources are the bedrock of Islam. However, the difference of interpretation and derivation from these two sources has led to different legal rules, particularly in the quantification and definition of some crimes and penalties as it is the case in adultery and theft, which in turn makes it important to give many definitions to a given crime.

This study has followed the mainly accepted classification of crimes and penalties, i.e. ḥudūd, qīsās and tażīr. Also similarities and disparities between these three kinds of crimes has been made especially in the all-important ambit of shubuḥāt (suspicious circumstances) in ḥudūd and qīsās cases. It is also intended to exhibit the effectiveness of these shubuḥāt in the final adjudication in ḥudūd and qīsās trials, and that they should be thoroughly probed by the courts as they are consistently construed on behalf of the accused. Therefore the study shows these shubuḥāt pleas and defences of the accused.

Part II of this thesis treats the all-important topic of testimony of witnesses in criminal trials. It contains ten chapters, which collectively give a detailed assessment of this important means of proof. On the other hand, it is very important to emphasise the fact that in ḥudūd and qīsās trials, which may lead to a heavy sentence, the Muslim jurists agree that some additional pre-requisites should be present in the testimony and the witness, otherwise, the principles of revocation of the ḥudūd and qīsās by viable suspicion will prevail. Therefore, the study made some emphasis on the miscellaneous requirements of admissible testimony as well as the judicial procedures of how to prove that the witness is a reliable person. The study also concentrates on the treatment of the contentious subject of the preclusive causes of testimony which must be
investigated by the court as a matter of principle. Thus the prosecuting lawyer, or the plaintiff, have to bring credible witnesses and reliable claims, otherwise these claims will collapse. Cases of wrong judicial sentences based on erroneous testimonies or blameworthy witnesses are treated in the last chapter, where it becomes clear that the witness shares the burden of the outcome of the trial. So, it is his responsibility to compensate any damages or losses incurred by the defendant if it is proved that it is his testimony that essentially led to the court's verdict. These rules are effective and operable whether the case in issue is a hadd, gisās or tazīr. Accordingly, the retraction of testimony is treated very seriously in criminal trials.
PART I : GENERAL SURVEY OF
THE ISLAMIC CRIMINAL JURISPRUDENCE
CHAPTER ONE - CRIMINAL AND PENAL POLICY IN ISLAM

1. Outlines of Penal Policy in Islam

It is held by many classical and contemporary writers in Islamic jurisprudence that Islam is a system of beliefs and the (Sharī'ah). These writers interpret (Sharī'ah) as "the collection of regulations enacted by God for the individual in order to systematize his relations with his fellow citizens, society, God, and the whole universe and life." The Qur'ānic revelation has mentioned this in many verses where the system of beliefs is referred to as (Imān) belief and (Sharī'ah) as righteous deeds.

Accordingly, Islam is not only a system of beliefs, but it is also regarded as a system of (Sharī'ah) laws and "good deeds". Also it is very important to observe the fact that beliefs (aqā'id), are the basis of (Sharī'ah). Consequently, these two elements are inherently correlated i.e. the doctrinal and legal precepts collectively constitute Islam. The criminal concepts are inevitably included in the aforementioned as being based upon expressly revealed texts in the Qur'ān and Sunnah.

Even in the realm of criminal procedure we are faced by numerous indications of the importance of adherence to the Divine Word and Prophetic traditions. Subsequently no court or jurist is allowed to deviate from the course already innovated by God, for any subsequent rules or juristic opinions will be deemed invalid and heretic. This also gives an idea of the strictness imposed by Islam upon the criminal area of its jurisprudence, in the sense that the validity and invalidity of courts' procedures and adjudications depend primarily upon the observance and non-observance of God's Will and revelation.

On the other hand, there is a vast collection of Qur'ānic texts and Prophetic traditions which serve to educate both the individual and society in a way to make them understand
and implement the Islamic norms in all walks of life. This in turn helps to give us the criteria by which any contemporary court’s rulings and procedures can be assessed, as being correct or erroneous. Also the solemnity and integrity of these rulings and procedures are susceptible to acceptance and rejection according to their conformity to already set legal principles and criteria.

Furthermore, there are many Qur’anic verses which threaten and warn those who do not adhere to God’s will and orders (3:30). In addition there are many verses which warn of the retributions prepared in the Hereafter for those who miscarry justice and implement their own concepts and values whether in courts or outside courts. Those Qur’anic warnings made many righteous jurists refrain from accepting the post of qādi (judge) during the early centuries of Islam. Abū Ḥanīfah’s rejection of this post and his subsequent imprisonment is a good example.

However, the concept of punishment has two stages: namely, punishment in the Hereafter, and punishment in this worldly life. Dr. Zaydān, the eminent contemporary jurist, elaborates this point by stating that “the punishment implemented in the Hereafter is the basic one, since it is carried out by God after the expiration of this life and according to the goodness and badness of man’s deeds in the mundane period.”

Worldly punishment has two main divisions:

(a) That which is inflicted when perversion dominates, and when people disobey God’s Will and revelation, and it depends on the laws of cause and effect. It affects all the society when it deviates from the Divine course. This form of punishment has different forms, either in the form of mass extinction of nation, or in starvation, or fear, or loss of members of society or loss of land fruits or in acute disease, or universal hardship in life or in any other unpleasant forms. This division of worldly punishment has
been mentioned many times in the Qur'ān, e.g. (33:62) (35:43) (3:137) (47:10). It is held by many exegetes that this type of punishment is an indication of God's omnipotence and omniscience, and that it is a universal phenomenon which is stated in God's scripture as a lesson to contemporary mankind to make them pursue the right way.\(^9\)

This division of worldly punishment is an essential element in mass education and general awareness in society, particularly for those who govern and legislate laws and implement them. The Prophet has made it quite clear that everyone is accountable before God according to the post he holds in society. He primarily mentioned ruler (Imām), and in many instances He warned the ruler from corruption and abandonment of God's orders, particularly in criminal issues. Consequently this punishment can be considered as one of the most important ingredients of criminal policy in Islam because it assures the strict observance and enforcement of Divine Laws by rulers and courts alike.

(b) The second division of worldly punishment is that which is enacted by Islamic jurisprudence and which is mandatory upon the courts, i.e. which the courts must carry out in cases of proved criminal acts like theft, adultery, murder, wine-drinking, etc.

This division of worldly punishment is an important aspect in this thesis, since it is the field which will be examined with regard to the testimony of witnesses. There are some important characteristics which are noticeable as far as these Islamic punishments are concerned and they can be summarized in the following points:

(i) These punishments do not preclude punishment in the Hereafter for those upon whom they were inflicted. This is because the punishment in the Hereafter can only be averted by genuine repentance made by the culprit, and not by the infliction of worldly penalties. This concept is understood from the Qur'ānic texts (5:33 - 34). Also the Prophet said
that if the thief whose hand has been cut off has genuinely repented, his amputated hand would precede him to Paradise, but if he does not, then his amputated hand would precede him to Hell fire.  

(ii) The legislation of these penalties would seem to indicate their potential occurrence among Muslims themselves, because the human self is inclined towards aggression and evil. Therefore it is crucial to legislate such penalties in order to deter crimes and criminals.

(iii) The legislation of these crimes is an apparent feature of the comprehensiveness of Islam (since these penal policies are not enacted for a particular time and place).  

2. The Basis of Punishment in Islam

The basis of the concept of punishment in Islam is the same as the one upon which the whole edifice of (Sharī'ah) is built. Thus criminal policy is an indispensable and an integral part of the (Sharī'ah).  

This fact can easily be proved by referring to the traditional books of law where all the different aspects of jurisprudence are covered and thoroughly dealt with, including the criminal disputes, whether in positive law or procedural legal norms. Nevertheless this concept of Islamic jurisprudence is based upon a unique infrastructure which is referred to in the Qurʾānic verse: "We sent thee not, but as a mercy for all creatures" (21:107). So, as Dr. Zaydan maintains, the basic infrastructure of (Sharī'ah) - including criminal policy - is based on mercy and pity from God over His servants; especially when it is observed that The Merciful and The Beneficent are divine names frequently mentioned in the Qurʾān.

It is also believed by Muslim thinkers, classical and contemporary, that this mercy and tenderness of God necessitates the provision and maintenance of interests and
benefits to the people, besides the prevention of perversion and disadvantages from them.13

The concept of the attainment of advantages and suppression of disadvantages to people which comprehends all (Sharī'ah) rules can also be understood to encompass the criminal aspects, as it is held that punishments attain interests and advantages, and on the other hand they simultaneously deter abominable acts in society.

However, the criterion by which interests - advantages - are measured is the (Sharī'ah) itself. So whatever the (Sharī'ah) attests to be good or to bring benefit is considered as desirable and advantageous. On the other hand, whatever the (Sharī'ah) attests to be disadvantageous and harmful is regarded as harmful and detrimental and is to be avoided.14

It is acknowledged that deviation from the aforementioned criterion will lead to indulgence in carnal desires and wanton whims which are made reprehensible by many Qur'anic texts e.g. "O, David, we rendered you viceregent on earth, so judge between people according to al-hagg (right), and don’t follow (personal) lusts (and whims) lest they should lead you from God’s path". (38:26).

Islamic exegetes interpret right (hagg) as what is revealed by God and enacted by Him via His Book and Prophet’s Sunnah, to which observance and adherence are imperative. Ultimately anything outside the ambit of hagg (right) is deemed perverse and null and void (bātil).

Muslim jurists hold that people’s genuine interests - (masālih) are in the maintenance and preservation of religion, life, mind, offspring and property. These are so important to be preserved against aggression to the extent that some classical scholars regarded them as "the necessary interests" (masālih darūrīyyah) whose maintenance is acknowledged by various dispensations; for, if they were
violated or desecrated, the consequences to society, the state and individuals would be catastrophic. Therefore any violation or transgression vis-à-vis those vital interests is considered as crime according to the Islamic perspective, and punishments must be inflicted herein.  

Al-Ghazālī (d. 505 A.H./1111 C.E.) gives a concise account of the importance of the maintenance of those major interests by stating that: "whatever comprises the maintenance of the aforementioned five interests (al-ṣūbū al-khamsah) is regarded as advantageous, and whatever foils these five interests is regarded as corruption (mafsadah) whose prevention is a mandatory interest." He further maintains that the prohibition of the violation of these five fundamental interests cannot be excluded from any religion or dispensation intended for the benefit of mankind. Therefore religions and dispensations agree on the ban of apostasy, murder, adultery, theft and wine-drinking (drunkenness).  

It is acknowledged by Muslim jurists that the (Sharī'ah) attains its goal in the maintenance of the mentioned vital interests by the process of educating the individual on the basis of Islamic beliefs and doctrines which are based upon the belief in God and His everlasting surveillance over people’s deeds, righteous or offensive. Besides the (Sharī'ah) implants in the individual’s conscience the fear of God and the impression that the person is accountable according to his deeds before God in the Hereafter whether being punished in this worldly life or not. This sense or realization is considered as one of the corner-stones of Islamic (Sharī'ah), especially in the criminal arena; where sometimes wrong-doers succeed in diverting justice and thus evading the due punishment. But jurists attest that in the Prophetic epoch some individuals came to confess illicit acts before the Prophet - despite the gravity of the punishments of these acts - for the sole purpose of being purified in this worldly life and as a genuine sign of their
sincere repentance, which was confirmed by the Prophet himself as in the case of al-Ghāmidīyyah and Māʾīz.\(^{17}\)

Also, (Sharī'ah) pays great attention to the correction of the society by the prescription of the rule of al-amr bi ma'rūf wa al-nahy ẓan al-munkar (the enjoinder of what is good and the prohibition of what is detestable). This is a general directive which is devised to stem perversion and evil from the society in all walks of life in order to attain the ultimate end of obtaining peace and tranquillity in society. So it can be said that the right upbringing and education of both individual and society is a basic instrument of achieving interests - advantages - and preventing corruption in the community. This conclusion in itself is a cornerstone of the criminal policy in Islamic jurisprudence.

However, some people are instinctively inclined to aggression and lawlessness, so it is inevitable to enact punishment for this particular category of people. The (Sharī'ah), therefore, has enacted penalties on the basis of mercy for individuals and society.

Punishments, having, as they do, the element of pain and suffering, resemble the prescription of an unpleasant drug to an ill person, for the sake of curing him. The element of mercy and pity as far as this ill person is concerned is apparent and quite discernible.

Ibn Taymīyyah (d. 728 A.H./1328 C.E.) vindicates the enactment and legislation of punishment in Islam by saying that the punishments were legislated by God as a sign of mercy towards His servants and a wish for beneficence for them. Therefore, as Ibn Taymīyyah holds, it is imperative upon anyone who punishes others, due to their sins, to intend beneficence towards them as when the father raises his child or as when a doctor gives medicine to his ailing patient.
Also the Shafiit jurist, al-Mawardi (d. 450 A.H./1058 C.E.) when speaking about (ta'zir) punishments states that it agrees with (hadd) punishment in the sense that it is a type of upbringing intended for correction and deterrence.

Ultimately, it can be conceded that punishment has its basis, according to the Islamic perspective, in the appreciation and strict observance of interest and the ascertainment of its attainment with regard to the individual and society.

So despite the fact that Islamic criminal jurisprudence legislates punishment for certain illicit conduct, and though these punishments involve certain degrees of suffering, pain or agony - in certain cases, it is necessary to legislate them, while it is still possible to claim that they are based on interest (maslahah). This argument can be demonstrated by saying that the pain involved in these punishments deter others, besides the offender himself, from committing these crimes. This deterrence and abstention from illicit acts implies an extremely evident advantage to both society and individual.

Even in extreme cases when execution is inflicted upon a certain offender, it can still be maintained that mercy and interest are being observed because in extreme eventualities we have to put the public’s interest prior to the individual’s interest, besides it is logically acceptable that a rotten cancerous organ must be amputated for the sake of the well-being of the rest of the whole body. So the same rule applies here. It is obviously necessary to eradicate the corrupt individuals for the sake of the rest of the society as a whole. However, the (Sharī'ah) has put certain criteria in criminal jurisprudence to restrict the jurisdiction of the hākim (ruler), or (judge) when they exercise their authority in the infliction of punishments which are not mentioned in Qurʾān or Sunnah texts, especially in cases of execution.
So, it can be said that the enforcement of punishment achieves the maintenance of society from wrong doers, besides it also achieves the correction of the criminal in the sense that it makes him feel and discern the seriousness of his crime. In many instances this discernment, on the part of the culprit, helps him in the process of rehabilitation and reinstatement in the society. This aim in itself assumes paramount importance in the Islamic criminal jurisprudence.

Evidently, the appreciation of the society's interest is maintained whenever the punishment is carried out justly. Even in cases of contradiction between society's and individual's interests, it is said, according to a fixed principle in Islamic jurisprudence, that the society's interest must have preference over the individual's.²²

Furthermore, it is imperative for the ruler or judge to inflict punishments whenever they are due, so he is not allowed, under any circumstances, to waive or suspend such punishment for the sake of mercy over the criminal. Because mercy does not mean mere pity - particularly when it leads to detrimental consequences on the public, but it rather means the attainment of advantages and the securing of public interests, though it may involve some suffering on the part of some aberrant individuals.²³

The Qur'anic texts attest to the authenticity of this concept when it expressly says "And have no mercy over them - adulterer and adulteress" (24:2).

Perhaps it can be concluded that mercy and pity as far as the criminal jurisprudence is concerned, should be assessed and treated according to its availability in society, and not just according to the individual. That is because criminal law in Islam is keen to achieve and preserve the utmost degree of public interests. This, in turn, explains why it is juristically and judicially inadmissible to forgive, excuse or waive punishments in some cases, as in
(hudūd) crimes, since it is well known that the legislation in criminal realm tends to give preference to the general public more than it does to the individual member.
References: Chapter One


2 ibid.


6 d. 150 A.H./767 C.E.


12 [For further and accurate interpretation of the terms (tā‘zīr) and (hadd) see Chapter 4 and 5.]


17 [For further and accurate interpretation of the terms (tā‘zīr) and (hadd) see Chapter 4 and 5.]


21 Ibid and Muhammad Abū Zahrah, al-Jarīmāh, pp.7-49.

23 ibid, Abd-al-Karīm Zaydān, Majmūṣat Buhūth Fiqhīyyah, p.387.
CHAPTER TWO - PARTICULAR CHARACTERISTICS OF ISLAMIC CRIMINAL JURISPRUDENCE

It is generally accepted that the Islamic criminal jurisprudence has many particular distinctive characteristics. These characteristics can be circumscribed in the following major points:

1. The oneness of criminal jurisprudence: in the sense that the court and jurisconsults are not allowed to issue verdicts or juristic opinions or proof in criminal cases outside the scope of the Islamic criminal jurisprudence. In other words, any rulings, whether judicial or jurisprudential, should conform with the Islamic criminal principles, otherwise they will be regarded as null and void.¹

This aspect of oneness of criminal jurisprudence is an approach, an end and a function of criminal policy in Islam, as Hasanayn, the prominent contemporary Egyptian scholar, maintains. It is further justified by the fact that this characteristic of oneness leaves the judge in no doubt when he adjudicates because he has to resort to one reference, i.e. the Islamic criminal jurisprudence in its known sources, without consulting other legal systems, particularly in already specified crimes and punishments such as (ḥudūd) and (qisas).² In this respect, both the court and litigant parties will be assured as to the bases upon which their dispute will be judged. Also, when the final sentence is passed the convicted party will know the principles applied vis-à-vis his pleas, and accordingly accepts or appeals against the court’s verdict.

This characteristic, if fully applied, will lead to stability in the judicial system in any legal system, besides it can also show the degree of development and improvement in legal views and judicial precedents, particularly in controversial cases.
Also, this phenomenon of uniformity in criminal jurisprudence will deter rulers and courts from exploiting their powers to legislate or enact new norms contradictory to Islamic principles, especially in new criminal cases. Consequently it can be said that this characteristic can be used as a criterion to judge and check courts and rulers alike, as far as their observance of and compliance with Islamic criminal jurisprudence is concerned.

2. The consistency of criminal principles and their applicability at any given time and place, for they observe and sustain the principal interests of any society. Also, as maintained by many Muslim thinkers, this applicability is not a sign of rigidity or lethargy, but it is rather a sign of its comprehensiveness and perfection which is sought by all jurists - of different legal systems - through the ages. In this respect one of the great American jurists in legal sociology, Mr. Roscoe Pound - who assumed the post of judge in the American supreme court and professorship of Law in Harvard University, says in the introduction of 'Fundamental Principles of Sociology of Law' that research had been undertaken for many centuries to solve the dilemma of finding a solution for the problem of obtaining an equilibrium between stability in legal doctrine and the necessity for change; which is the fundamental problem in the legal system. He also holds that many attempts have been made to link between the indispensable necessities for the existence of a legal system and an international system of law, which expresses the supreme ideals which must be maintained, and which also must be achieved. When these efforts succeed, we will eventually have, in our hands, a perfect and idealistic legal system. He also says that this newly innovated legal system must be universal (all over the world), and applicable wherever there are human beings.\(^3\)

So, as some modern Muslim writers hold, it is an idealistic end for all the legal specialists in America and elsewhere that we should achieve an internationally acceptable and
applicable legal system, as far as time and place are concerned. This characteristic can be found in the Islamic legal system since it puts into consideration the basic necessities of the individual and society, besides it organizes and protects the fundamental needs of anybody wherever and whenever he lives. This is a sign of the acknowledgement of the needs of anybody and a starting point to legislation, so it can be said that it is a realistic legal system.

It is also maintained by Muslim jurists that this merit of applicability and suitability for all times and humanity at large emanates from the fact that the Islamic legal system is basically a divinely revealed system, which is given by God who created mankind.4

3. The appreciation of interest (maṣlaḥah) as a basis for punishment. Thus the violation of this interest is regarded as crime. These basic interests are summarized as mentioned above in five major categories, namely: religion, life, mind, offspring, and property.5

According to this consideration Islamic criminal jurisprudence has bestowed the right to punish to the society because any crime committed against the individual is a violation of the social norms - which are inviolable. Nevertheless, the individual has, in certain cases, the right to abandon his legal rights in punishing the offender as in (qisās) cases, however, the public authorities have the right to inflict some sorts of penalties on behalf of the society as in (tazīr) cases.6

4. The adoption of the principle of individuality of punishment is a major pillar of the Islamic criminal jurisprudence, acknowledged and applied throughout the centuries. It also has its basis in the Qur’anic texts and Prophetic traditions. In this respect it may be appropriate to quote the following Qur’anic texts.
a. And no soul earns (evil) but against itself. Nor does a bearer of burden bear the burden of another. (6:164), (35:18), (53:38).

b. That man can have nothing but what he strives for, and that his striving will soon be seen. (53:39 - 40).

c. Whoever does good, it is for his own soul, and whoever does evil, it is against it. And thy Lord is not the least unjust to the servants. (41:46).

d. Whoever does evil, will be requited for it and will not find for himself besides God a patron (wa{lī}) or a helper (4:123).

These Qur'ānic texts have stated explicitly the doctrine of the individuality of punishment in Islamic jurisprudence. The mere mention of this doctrine in the Qur'ān is an indication of the importance of this principle, particularly when we take into consideration the fact that this principle is a novel one, never known in the pre-Islamic era amongst the Arab, who were very much under the influence of the social institution of vengeance in criminal matters.

The Prophet further confirms this new principle by saying, as narrated by al-Nasaī, "No person should be accountable for his father's or brother's crime". He also says, as narrated by al-Tirmidhī and Aḥmad ibn Ḥanbal "Oh, no one (ever) commits a crime except against himself", i.e. nobody is responsible for anything except what he has done, so each person is liable to punishment only for the crimes he commits.

It is evident that this principle was rigorously and carefully applied from the first stages of Islam without any exception save in the case of blood-compensation (diyāh) in cases of unintentional killing. Nevertheless some jurists contest this opinion saying that even in this case (blood-compensation) there is no exception and the principle of
individuality of punishment still persists. However the participation of ṣāqilah (the killer's kindred), in paying the instalments of blood-wergeld (diyah), is justified on the grounds that it is on the basis of social sympathy and cooperation without bearing any responsibility in the actual guilt for the crime.9

Further justification was propounded in this regard, but most significantly, the existence of such a legal rule or procedure highlights the social and legal importance of this procedure, especially when we bear in mind the fact that the cases of unintentional killings are far more numerous than the cases of intentional murder, where it is the offender who solely pays the instalments of diyah, (blood-compensation).10 Even in the instances where there is no ṣāqilah to share in the instalments of (diyah), it is the state that pays these instalments, besides imposing the relevant appropriate penalties.11

This sense of social sympathy and cooperation in the Islamic criminal jurisprudence is intended to suppress criminal tendencies; in the sense that the members of each group should prevent the criminally inclined persons from endangering others' lives and bodies. This concept is sustained by contemporary sociologists and criminologists like Malinawski who says

"The fundamental function of Law is to curb certain natural propensities, to stem and control human instincts and to impose a non-spontaneous behaviour; in other words, to ensure a type of cooperation based on mutual concessions and sacrifices for a common end".12

The apparent similarity between the Islamic criminal jurisprudential vindication of blood-compensation and Mr. Malinawski's opinion is undeniable, as far as the philosophical grounds for the mutual concessions and sacrifices for a common end are concerned.
5. Equality between crime and penalty is one of the basic corner-stones of the Islamic criminal jurisprudence. It is also a principle expressly mentioned in the Qur'anic texts in many places, so it can be said that the principle of equality between crime and punishment should always be strictly and rigorously observed by courts and legislators, otherwise any verdict or new rules contrary to this principle should be nullified.

Zaydan has suggested that this characteristic of equality as far as crime and punishment are concerned, is an indication of God's justice towards His servants, besides, punishment is enacted only as a necessary ultimate measure and necessary measures should be assessed and qualified according to their size, as it is understood from the principles of jurisprudence (usūl al-fiqh). Furthermore, punishment is not the unique source of correction or social rehabilitation as far as the criminals are concerned, but it is regarded as an exceptional provision; and exceptional precautions should not be widened. Also, punishment is like remedies, as far as sick persons are concerned, so they should be given cautiously and with necessary fixed amounts according to the real needs and state of the sick persons.

The Qur'an confirms this principle in the following verse:

a. "... Yet have come to pass before them (many) exemplary punishments ..." (13:6)

Some modern jurists say that this verse, which deals with the punishments inflicted on the preceding nations who disobeyed God, indicates that they were punished justly and consistently with their crimes. And this corresponding punishment should be valued as exemplary to those who come later.

The Qur'anic term sayyi'ah (injury), implies punishment because they involve some sort of injury, however it must be
equal to and congruent with the injury already caused by the crime.

In addition to the previously mentioned interpretation, the Qurʾān uses the word (qisas) in reference to murder and bodily injury cases unequivocally emphasizing the concept of equality in these categories of crimes.

The Muslim jurists and exegetes in fact hold similar opinions in their definition of the word (qisas) when they generally say that the offender should receive the amount of punishment equal and congruent to the harm he had already inflicted on his victim. Such is the significance of the principle of equality in (qisas) cases that when it cannot practically be observed, it should be abrogated or altered to diyah (blood-compensation).

Furthermore, the rule of equality should also be observed in (taʿzīr) and (hudūd) punishments. As far as (taʿzīr) punishments are concerned, they should not be executed unless the principle of equality is fully verified [and as will be amply discussed later on in the (taʿzīr) crimes and penalties are left to the ruler (hākim) and public authorities to regulate according to the ethos of (Sharīʿah). Thus no barbaric penalties should ever be entertained nor implemented for minor and trivial offences. By the same token, appropriate and harsher penalties are to be held for dangerous criminal acts whereby severe penalties can be warranteable for offences like sodomy, eroticism and to whatever induces public destablity. So the concept of equality in (taʿzīr) peripheries, though not specifically regulated by Qurʾān or Sunnah, is constantly in the mind of the Islamic legislator and court].

The same concept applies to (hudūd) treatments, despite the criticism shown here, as Zaydān maintains. It is understood that equality between crimes and punishments is not between material concrete weights and quantities, particularly in cases of (hudūd), but it is, rather a
balance between the degree of disobedience done and the ensuing harm thereof on one hand, and the prescribed punishment thereto, on the other hand. Also (hudūd) punishments are essentially legislated by God, the Law-Giver.

So, it is clear that the status of equality and equilibrium is also observed and justly maintained, since it is the Qur'ānic revelation that points to the significance of the principle of equality in criminal jurisprudence.16

It is also well known that the Islamic criminal principles do not always ratify people's customary traditions as far as the scales of goodness and badness are concerned, but they rather concentrate on the abstract reality, protecting virtues and preventing immortality.17

It can be concluded that the main function of criminal jurisprudence is to achieve justice by the means of equality and protection of the vital interests of people. So, the element of punishment is essential and indispensible, nevertheless it is not regarded as the ultimate end of Islamic criminal jurisprudence. This is why many guarantees were concocted to secure the application of punishment on those who merited punishing and by the most equitable form and in the most suitable circumstances.

As Abū Zahrah, the well-known Egyptian scholar maintains, justice, suitable punishment and interest are virtually indivisible and inherent subjects.18

Ibn al-Qayyim (d.751 A.H./1350 C.E.) further elaborates in this respect by stating that it is a token of God's Wisdom and Benevolence that He enacted punishments vis-à-vis crimes occurring amongst people as in the cases of murder, manslaughter, theft, slanderous allegations, bodily harm. So God elaborated the precautions and injunctions that deter such crimes in the utmost level of elaboration and
perspicuity, that involves the achievement of the interest of deterrence and prohibition.

So, as Ibn al-Qayyim holds, God did not enact the penalty of the amputation of tongue or execution in cases of lying, nor did He legislate ikhsāṣ (castration) in cases of adultery, nor executions in cases of theft. But instead He enacted penalties that are demonstrative of His Divine Benevolence, Sublimity, Eternal Justice and Tenderness over His servants.

Ibn al-Qayyim says that this process of God's enactment is intended to wipe out the traces of crime, to sever greediness and malice from false litigation and transgression and to make everybody contented with what is destined to him by His Creator, without looking forward to earn illegally what is not his (or hers).

Significantly, Ibn al-Qayyim comments on the characteristic of equality between crime and punishment when he calls this principle al-jaza‘ min jins al-‘amal (recompense (penalty or reward) is from the same type as act) i.e. good for good and bad for bad. He gives the example of the punishment of adultery as one that achieves equality between crime and punishment. He argues that since the act of adultery normally gives lust and carnal pleasure to the whole body, besides it usually involves the consent of the criminal's counterpart, so it is illogical to punish just the sexual organ of the offender, instead, it would be more equitable to punish the whole body, and this is what the criminal jurisprudence rules in this particular crime.

Also, it is iniquitous to punish a female in the case of adultery where she was in a state of duress, so many conditions are inherent in each case which should be met and fully verified, otherwise this characteristic of equality between crime and punishment will be non-existent. Subsequently any punishment will be invalid, and undue. This is why courts are susceptible to criminal liabilities as in cases of wilful miscarriage of justice, as when there
are not enough or credible evidence, or lack of credibility in witnesses, or absence of important elements of the crime committed.
References: Chapter Two


2. See Chapter 4 pp.4 of this thesis.


18. Muḥammad Abū Zahrah, al-Jarīmah, pp.43-44.
CHAPTER THREE - CLASSIFICATION OF CRIMES IN ISLAMIC JURISPRUDENCE

1. Introduction

The classification of crimes in Islamic criminal jurisprudence is an ancient principle clearly visible in the classical writings in each school of law. This classification produces clear distinctions between the relevant punishments and legal proceedings followed in each case as regards the evidence required.

Mainly the (Sharī'ah's) approach in dealing with this theme is that it enumerates specific crimes and enacts their relevant punishments accordingly, in addition to assigning the means of evidence required in each class. However, the largest segment of crimes is left for the legislature to define and enact their appropriate punishments. So, the first class is termed (ḥudūd), (gīsāṣ) and (dīyah), whereas the second grade (which constitutes the largest sector of Islamic criminal jurisprudence) is called (tażīr), (taṣāzīr) or (tażĪrāt).

This distinction between crimes is of a paramount importance due to the fact that certain acts are so serious and harmful to the fabric of the society that they should be specified and dealt with in a particular manner and according to a standard fixed policy, irrespective of variations of time and place.

On the other hand, the largest segment which is innumerable is left to the public authorities to deal with due to the variations of time and place as a sign that the Islamic criminal jurisprudence acknowledges these changes and renders it possible to accommodate them.

So the rigidity as far as the (ḥudūd) and (gīsāṣ) are concerned emanates from the fact that they are regarded as so serious and prejudicial that they must be treated
separately so that everybody can know them, without being a specialist or a knowledgeable jurist, as an axiomatic doctrine of Islam as a whole. Besides, the rules of evidence in this context vary a great deal from those pertaining to (ta'zīr).

And generally speaking, the pre-requisites set for the evidence of the (ḥudūd) and (qisās) are far more sophisticated and rigorous than those set for the establishment of proof in (ta'zīr) cases. This denotes the Islamic keenness not to penalize in (ḥudūd) and (qisās) cases without accomplishing the highest possible level of verification due to the severity of punishments in these cases, which are sometimes beyond redemption.

Moreover, the (ḥudūd) and (qisās) crimes are defined by Qur'ānic texts and Prophetic traditions which also assigned the appropriate punishment of each crime, so that the juristic basis of each crime and punishment is well established so much so that any repudiation or denial of crime and punishment or one of them might lead to apostasy as being an unequivocal refutation of an imprescriptible principle of Islam.²

Furthermore, all the Islamic schools of law agree on the distinctions made between crimes and punishments, and they also hold unanimous juristic points as to the means of evidence relevant in each category of crimes.³

It can be concluded that the ambit of crime and punishment is a very wide and deep one when compared with the other fields of Islamic jurisprudence. So is the sphere of evidence since it is not admissible to accept any allegation or claim without the required standard of proof in cases of crime and punishment.⁴

It is necessary to deal with the variations of crimes and their inherently innate juristic pre-requisites in order to select the means of its juristic and judicial proof or, as
in some cases, what grade of the testimony of witnesses will be required in that particular crime.

Therefore in the subsequent chapters I will confine myself to the task of examining and investigating the different grades of crimes encompassed in Islamic criminal jurisprudence and afterwards deal with the various grades of the testimony of witnesses to try to establish how effective they are in proving different kinds of crimes according to an Islamic perspective. This task is clearly a difficult one, particularly when we take into consideration that even in one school of Islamic law it will frequently appear that there is more than one juristic opinion dealing with one issue; and this, in turn, necessitates an examination of the authentic references of each school of law.

It would seem appropriate to give a technical and linguistic definition of the term 'crime' as far as Islamic legal opinions are concerned in order to give additional distinctions and clarifications to the study, and to avoid any misconception as far as the contemporary usage of the term 'crime' is concerned, particularly in traditionally Islamic countries.

2. Linguistic and Technical Definitions of Crime in Islamic Jurisprudence

A. Linguistic Definition

In Arabic usage the following terms are used for crime: (jarama jarimatan wa ajrama) and (janā jināyatan). The noun is (jurm wa jarīmah) and the plural term is (jarā'īm) which means 'crimes'. The agent of the verb (jarama wa ajram) is (mujīrim) which is synonymous with 'criminal' and 'felon'. The Arabic verb connotes the meaning of commission of an illicit act. It is worth noticing that the verb (jarama) and (ajrama) are well known in the Arabic language even before the advent of Islam; therefore it might be appropriate to presume that these terms were well known and used in the
Arabic language and that the Arabs used to criminalize certain acts by or according to their own customary traditions and culture.⁵

B. The Technical Definition

Islamic jurists paid a great deal of attention to the theme of crimes due to its juristic significance. Al-Mawardi, the famous Shafi’i jurist (d. 450 A.H./1058 C.E.), defines crimes as "legal prohibitions inhibited by God by the enactment of (hadd) or (ta‘zīr)".⁶ Abu Ya’la, the prominent Hanbali judge agrees with this definition.⁷

This definition implies that prohibitions (al-mahzūrāt) must be treated in the light and according to the criteria of the (Sharī‘ah) otherwise it can hardly be possible to specify the legal accidents of any act. Subsequently, customary traditions as far as legalizing and criminalizing are concerned bear no significance unless endorsed by the (Sharī‘ah) as it is well known in the ambits of usūl al-fiqh (origins of jurisprudence).⁸

On the other hand, the term mahzūrāt (banned or prohibited acts), is an elastic one and has many implications because it includes all illegal acts of disobedience which are manifested in the forms of obviations from and omission of imperative commandments or the commission of prohibited acts.⁹

Therefore and according to al-Mawardi’s definition crime, in Islamic criminal jurisprudence, is simply "an act or an omission banned by the regulations of the (Sharī‘ah), whether these regulations are included in the Qur’ān, Sunnah or are derived by legal consensus or analogical reasoning, which are the four pillars of rules in Islamic jurisprudence and means the of understanding God’s commandments and ahkām (sanctions and rules).¹⁰
Moreover, any act or omission cannot be regarded as crime unless there exists a compatible punishment for it. Also worth mentioning is that *jarīmah* (crime) is used repeatedly in the Qurʾān in a very broad sense which includes acts of disobedience to God’s orders that render the felon susceptible to God’s wrath and harsh retribution in the Hereafter, which makes it impossible for any disobedient person to escape His punishment, whether in this worldly life or on the Day of Judgement.11

Also the following Qurʾānic texts explicitly employ the term (*jara*ma) or its derivatives to connote an illegal act or an act of disobedience to God in one form or another:

I. "To those who reject Our signs and treat them with arrogance, no opening will there be of the gates of heaven, nor will they enter the Garden until the camel can pass through the eye of the needle; such is Our reward for those in sin *(al-mu.jirimīn)*" (7:40).

II. Where those who rejected the Prophet Ḩūd’s demand that they worship God are threatened with punishment...

"Thus do we recom pense those given to sin! *(al-mu.jirimīn).*" (46:25).

Hence, it is obvious that the term *(jarīmah)* implies sin in its widest connotations, thus the Qurʾān denotes that any form of disobedience is literally considered as a sin or is interchangeable with *(jarīmah).*

The Islamic jurists occasionally use the term *(janā jināyah)* as synonymous to the verb *(ajrama jari.matān)* which linguistically means commission of a sinful or illicit act that involves punishment in the worldly life or in the Hereafter.12

Also the verb *(janā)* has many derivatives which are widely used in the classical Islamic criminal chapters to the extent that it evolved to bear its separate or rather
independent connotations. Moreover, the word (janā) was copiously treated in the authoritative linguistic references which give the impression that (janā) is an ancient Arabic word and is approximately equivalent to the formerly explained word i.e. (jarama). Ibn Manṣūr (d. 711 A.H./1311 C.E.) invokes a Prophetic tradition which is narrated by al-Tirmidhī (d. 279 A.H./893 C.E.) to illustrate the exact meaning of the term (janā) as the Prophet says "lā yajnī jānin illā 'alā nafsihi" (no perpetrator perpetrates except a deed to which he is solely (personally) accountable (punishable).)13

The narrator al-Tirmidhī authenticates this tradition. The exact meaning of this tradition denotes that nobody is accountable (judicially and religiously) except for what he had done. Therefore no next of kin is responsible for any criminal act done by his relative and this important doctrine is based on the Qur'ānic text that rules:

"(Wa lā tazaru wāziratun wizra ukhrā)"
"No self is to be held responsible for another's sin". (6:164) (53:38) (17:15)14

The Ḥanafis are particularly interested in the specification of the term (janā) and its infinitive form, and its scope in criminal jurisprudence so much so it is necessary to quote here some of their definitions:- The most authoritative Ḥanafī statement defines (jināyah) as "any illicit act (fiṣlun muḥarram) that is inflicted on persons or bodies. Thus (jināyah) inflicted on persons is called murder (or homicide) and (jināyah) inflicted on bodies is called wounding and amputation (jarḥ wa qat'al). Al-Ṭūrī defines (jināyah) as "any illicit act that is inflicted on persons, bodies, limbs or properties (monetary belongings)". Thus (jināyah) inflicted on persons is called murder or homicide, (jināyah) inflicted on the body is legally termed as wounding, amputation and debilitating.15
This former definition is quoted by many authoritative Ḥanafī jurists particularly Al-Zaylaḥī (d. 743 A.H.) and Ibn Nujaym al-Masri (d. 970 A.H.) and many late Ḥanafī jurists.

However, Al-Kāsānī (d. 587 A.H.) gives a wider meaning to (jināyah) maintaining that it includes any "illegitimate act against a human being or quadruped animals or any other valuables, whether movables or immovables." 

Ibn Qudāmah (d 620 A.H.) gives the standard Ḥanbalī definition of (jināyah) as he says,

"(Jināyah) is any aggressive act inflicted on persons (body) or property (pecuniary belongings) but traditionally, it is restricted to the arena of bodies. But transgressions inflicted on properties are legally denominated as larceny, fraud, breach of trusteeship, burglary, pillage, loot, etc." 

The Ḥanbalis also define (jināyah) as any aggression on bodies which necessitates a punishment of (qisāṣ) or any other punishment. This is a very significant definition as far as crime is concerned because it concurs with the traditionally and contemporary accepted criterion i.e. any act cannot be juristically and judicially considered as crime unless a fixed penalty is enacted thereto.

Also, the former Ḥanbalis' definition is acceptable as a reliable one since it incorporates the crucial element of aggression besides encompassing roughly the major three categories of crimes in Islamic criminal jurisprudence. Worth mentioning also is the fact that the general Ḥanafī's definitions and those of the Ḥanbalis are consistent.

However the Mālikī school has also paid a great deal of attention and study to this theme, since it is noticeable that they have devoted long chapters to the various constituents of crimes. So we find chapters like Ahkām al-
dimā' (rules of murder and manslaughter) as well as all the chapters of the (hudūd) crimes. Moreover Ibn Rushd (d. 595 A.H./1198 C.E.) gives a general survey of crimes when he says:

"Jināyāt (crimes) which have legal punishments and definitions (hudūd mashrūʿah) are four: those inflicted on bodies, persons and limbs which are called murder and wounding and crimes involving illicit sexual acts between men and women which are called adultery and fornication and crimes against properties (and pecuniary valuables) and crimes against the integrity and chastity of persons".20

Ibn Rushd's specification of the term (jināyāt) is outstanding since it incorporates all the pre-requisites of "crime" in as much as it includes the element of punishment which is crucial to distinguish between the valid and the invalid acts. So it can be said that the Ḥanafīs, Ḥanbalis and Mālikīs are of the same juristic approach as far as the definition of crime is concerned.21

The Shāfiʿīs have carried on the work of al-Māwardī and have also contributed a great deal in this respect where they make an exhaustive treatment of all the aforesaid factors and elements of crime. They defined jirāḥ (wounding) and qatāl (murder and manslaughter) with their numerous cases and treated all the (hudūd) and (taʿzīr). Many of their juristic opinions are shared with other schools of Law (as will be shown later on).22

The Jaʿfarites have also contributed and used the same terms and acknowledge the element of punishment as inherent in any abhorrent act and they very much appreciated the element of dhanb (sin), as a decisive factor in classifying acts as crimes and non-crimes.23
From the above brief exposition it becomes clear that there is some correlation between these two key terms in both linguistic and technical dimensions. Evidently (jarīmah) and (jināyah) are linguistically synonymous, for each one of them consists of the element of aggression and sin. But in the technical usage (jarīmah) - comprehends (jināyah) and more, because (jarīmah) includes any aggression against bodies, persons and pecuniary valuables; besides it incorporates a wide spectrum of enjoinments and inhibitions so much so any violation of these religious commandments and prohibitions can be classified as (jarīmah) e.g. omission of ritual rites like prayers and pilgrimage or withholding of the due family maintenance, etc.

But jurists have restricted the term (jināyah) to a much more limited compass; as being only pertinent to aggression against bodies, persons and valuables. Moreover it becomes clear that all the discretionary punishments (taz’īr) which are left to the legislature to enact and regulate come under the umbrella of (jarīmah) and outside the scope of (jināyah) in the precise technical usage. Accordingly, it can be concluded that in the technical Islamic criminal jurisprudence each (jināyah) is a (jarīmah) whereas not all (jarā’īm) are (jināyāt).

Worth mentioning is that the Egyptian criminal law agrees very much with the above mentioned Islamic criminal methodology for Jindī ʿAbd al-Malik, the famous Egyptian lawyer, says in his famous criminal encyclopaedia

"The Egyptian Penal Code as well as most of the positive laws did not define crime (jarīmah) but it rather restricted itself in the second chapter of the first book to the elucidation of its grades according to the magnitude of the illicit act. So it says in Section '9' that crimes (jarā’īm) are three types (jināyāt), (junāḥ) and (mukhālafāt) and in section 10,
‘11’ and ‘12’ the law specifies the legal punishment to them respectively.\textsuperscript{24}

In this context ‘Abd al-Qādir Awdah says:

"The technical meaning of (jināyah) in Egyptian Criminal Law differs from that in Islamic criminal jurisprudence because in the Egyptian penal law the act is regarded as (jināyah) if it is punishable by execution or hard labour for life, or temporary hard labour or imprisonment, according to Section ‘10’. But if the act is only punishable by detention for more than a week or a fine exceeding one hundred piastres, then this act is (junahah) (Section ‘11’). But if the punishment is less than a week’s detention or less than a hundred piastres fine then such act is a (mukhālafah) according to Section ‘12’ of the Penal Code."\textsuperscript{25}

4. Grades of Crimes in Islamic Criminal Law

The principal description that unifies all crimes in Islam is that they are all illicit acts regulated by unequivocal doctrines and texts in the (Sharī‘ah). Nevertheless these crimes differ if they were looked at from various angles. Consequently if we look at them from the perspective of the magnitude of their punishments they can be classified as (hudūd), (qisas) or (diyah) and (ta‘zīr), and if we dealt with them from the angle of criminal intention, they would be classified as intentional and non-intentional crimes.

Also from the angle of surveillance they are classified as crimes disclosed while being committed and crimes that lack this factor. Also from the perspective of the method of commission they are sorted out as positive and negative crimes and simple or habitual crimes or to temporary or permanent crimes.
However, from their particular nature crimes can be mainly classified as crimes against society and crimes against the individuals, and ordinary crimes and political crimes.

However, the first method of classification can be regarded as the standard method for many reasons, foremost of which is that it is the classical method adopted by all the various schools of Islamic law, besides it easily and expediently accommodates all the remaining classifications and grades as will be shown below. Eventually the means of evidence mainly depends on the broad classes of crimes where the crime at issue is located e.g. as being under ( hudūd), ( gisās) or ( diyah) or ( tazīr) categories.

Therefore it may be more appropriate to proceed further in research using the standard triple classification of ( hudūd), ( gisās) or ( diyah) and ( tazīr) as the adopted classification bearing in mind that reference will be duly made from time to time to the other classifications where their relevancy and similarities are clear.
References: Chapter Three


4. ibid.


9. Hence the Jaʿfarites have some criterion as to the definition i.e. (mahzurat) prohibitions, so they generally omit the obviation of imperatives from the scope of prohibitions and instead they use the term (dhanb) (sin), in order to include the above segments of al-Mawardī’s definition: see for further Jaʿfarites treatment: Ṭawdah, al-Tashrīʿ al-Jināʿī, Vol.I, pp.86-88, Footnote 1.


20. Ibn Rushd, Bidāyat al-Muṣṭahid, Vol. II, p. 394, Ibn Jazay' makes further enumeration of crimes (jīnāyāt) and his statement as detailed may be understood as an elaboration of Ibn Rushd's former opinion, see Ibn Jazay', al-Qawānīn, p. 295.

21. ibid.


CHAPTER FOUR - HUDŪD CRIMES

The class of hudūd crimes comprehends many illicit acts which are considered as the first grade of crimes in the Islamic criminal hierarchy which is apparently established according to magnitude of the punishments enacted vis-à-vis each crime.

In this context perhaps it would be appropriate to define and enumerate the crimes of this class, besides establishing principal features of each crime which is a very important role as far as the process of proof is concerned.

I. Definition of Hudūd Crimes

The word hudūd is the plural form of the Arabic word hadd which linguistically carries many connotations foremost of which is: frontier, prevention, or inhibition.

Abd al-Rahmān I. Doī, the prominent writer in Islamic jurisprudence, elaborates this linguistic implication of the word hadd when he says:

"The word (hudūd) is the plural of the Arabic word (hadd) which means: prevention, restraint or prohibition, and for this reason it is a restrictive and preventive ordinance or statute of God concerning things lawful (halāl) and things unlawful (harām).

He also gives his general elucidation of hudūd as mentioned in various places in the Qurʾān which generally fit with the exegetical interpretations of the word hudūd as he says,

"Hudūd of God are of two categories. Firstly: those statutes prescribed to mankind in respect of foods and drinks and marriages and divorce, etc, what are lawful thereof and what are unlawful; Secondly: the punishments, prescribed or appointed to be inflicted
upon him who does that which he has been forbidden to do." 

Technically the word *hudūd* applies to the aforesaid linguistic meaning so it denotes all the crimes punishable by *hudūd* punishments. However, *hadd* (in a singular form) means a penalty that is legitimately quantified beforehand as an inviolate right of God (*haqq Allāh*).

The assessment of punishment here means it has a fixed limit, previously set by the Qurʾān or Sunnah, which does not involve maximum nor minimum latitudes to vary between. Also the definition includes an imprescriptible characteristic of *hadd* i.e. it is prescribed as a right of God to denote that a *hadd* punishment is in no way whatsoever susceptible to condonation, waiver, intercession or mitigation. This is the unanimously accepted criterion of *hudūd* in Islamic criminal jurisprudence which really gives them their unique stature as far as the principles of application and evidence are concerned.3

ʿAbd al-Rahmān I Doī adopts the general approach elaborated by the classical Islamic schools of law in this regard as he technically defines *hudūd* when he says,

"In Islamic jurisprudence the word *hudūd* is limited to punishments for crimes mentioned by the Holy Qurʾān or the Sunnah of the Prophet while other punishments are left to the discretion of the *qādī* or the ruler which are called *taszīr*.4

This definition is obviously compatible with a al-Māwardī’s celebrated definition which is debated above as being the standardized Islamic definition of crime5.

Some modern thinkers such as Abū Zahrah, ʿAbd al-Qādir ʿAw Dah, ʿAbd al-ʿAzīz ʿĀmir and others argue that the *hudūd* have their own independent characteristics, foremost of which is that they are enacted primarily as rights of God

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which means that they were prescribed with the aim of maintaining public order, security and tranquillity. They say that this is based on the fundamental doctrine that rules that all rights generated by crimes essentially can be divided into two major divisions i.e. ḥuqūq Allāh (rights of God) and ḥuqūq al-afrād (rights of individuals). Therefore they argue that the right is called God’s right whenever it genuinely pertains to God or preponderantly attributes to Him, on the other hand individuals’ rights are those which are genuinely or preponderantly attached to individuals. Therefore they say that punishment in Islam is called a God’s right whenever it is necessitated by the public interest and this criterion of public interest is manifested in the suppression and utter prohibition of public perversions and the attainment of whatever is beneficial for the public sector of the society. Therefore they maintain that the punishments of ḥudūd are enacted on these guidelines or criteria because all crimes in these parameters are regarded as highly offensive and very prejudicial to the public so much as they endanger the mainstays of the society’s values, beliefs and ethos.6

This contemporary argumentation has caused more serious ambiguities than the already existing ones. This is mainly because murder, usury, breach of trust, fraudulent transactions, etc., all do grievously jeopardize the fabric of human relations in the society, nevertheless they are treated outside the ambit of ḥudūd. Consequently ʿAwdah’s, Abū Zahrah’s, and ʿAmīr’s antecedent definition of ḥudūd as exclusively for the protection of society is incorrect, inasmuch as other forms of felonies are not less dangerous to the very infrastructure and fabric of the society as has just been said, though they are considered as taʿzīr offences.7

The most important thing in this context is that the Qurʾān and Sunnah have legislated the guidelines in the criminal sphere of the law by specifying certain crimes and their relevant penalties. Simultaneously these prime sources have
also vividly detested certain acts, e.g. usury, bribery, devouring of the orphan’s money, tampering with the scales, impiety towards parents, etc., by explicit texts without enacting determinate worldly penalties for them. Thus, this latter category is regulated under ta’zîr sanctions regardless of the changes of time and place, because they are expressly denounced by Qur’ân and Sunnah, so the offenders in these cases are liable to punishment at all times and places. This area of the law, despite being left to the courts and the legislature, can include penalties not less severe than those enacted in hudūd and qisâs cases if and when the objective circumstances so permit. This does not mean that the legislature is given arbitrary powers or absolute authority to penalize offenders according to the gâdî’s whims and wishes. It is rather qualified by the Shari‘ah goals and ethos and its objectives in the achievement of social equilibrium. Accordingly, a certain offensive act may receive a long-term imprisonment or any other suitable penalty if the offender is proved to be very dangerous, or a recurrent felon, and so on. Thus it could be said, without being too presumptuous, that the lines drawn between God’s rights and the individual’s rights (hugūq Allâh wa hugūq al-cabd) as discriminatory factors in the realm of the criminal jurisprudence is an inaccurate criterion. Moreover, the contemporary jurists’ innovative clause of "the maintenance of society at large by hudūd enactments" is also a vague legal concept. Because, as shown above, many non-hudūd offences do destabilize and endanger the society at large, though they are not hudūd cases according to the classical categorization of crimes.

Thus it can be suggested that the criminal studies should not be shackled by the traditional terms of God’s rights and the individual’s rights (hugūq Allâh wa hugūq al-‘abd) nor by the contemporary description: "(hudūd) are exclusively enacted for the maintenance of the fabric of the society at large." Instead, an objective treatment of crimes alongside the Qur’ân and Sunnah as being the primary sources of Shari‘ah can be more just and can also provide a mechanism
by which the criminal policies of Sharī'ah can gain sufficient equilibrium even in the contemporary epochs.

Joseph Schacht acknowledges the Islamic basis for the emphasis put on hadd punishment when he says, "The hadd is the right or claim of Allāh (hakk Allāh), therefore no pardon or amicable settlement is possible."8

But he disagrees with the above mentioned basis of the legal distinctions between crimes in the Islamic jurisprudence as he says,

"The penalties envisaged by Islamic laws consist of two disparate groups which correspond to the two sources from which all penal law is commonly derived, private vengeance and punishment of crimes against religion and military discipline. The first has survived in Islamic Law almost without modification. The second group is represented only by crimes against religion, and that in a particular sense, certain acts which have been forbidden or sanctioned by punishments in the Korān have thereby become crimes against religion".

However, it could be said that the main sources of criminalization and penalization in the Islamic Laws is the Qur'ān and Sunnah, as a principle of paramount importance. Nevertheless the classical Muslim jurists unanimously agree that consensus and analogical reasoning do not impinge upon crime and penalty, but they are essentially legal tools of deduction and derivation as well as treatment of the novel problems and their legal answers, which logically include criminal cases.

Qur'ān and Sunnah, basically changed the fundamental infrastructure of crime and punishment in the pre-Islamic era. They only retained the principle of qisas and diyah, but with considerable modifications which are visible in the numerous juristic pre-requisites and most importantly in the main indispensable areas of proof and legitimate objectives
of penalty. But the Islamic criminal jurisprudence has, on the other hand, given an enormous arena for discretionary powers to criminalize and punish and have assigned these powers to the wali al-Amr (ruler) for the specific purpose of dealing with the frequent limitless novel cases but under the strict observance of the criterion of public interest.9

Furthermore, it could be said that the ḥudūd as well as the rest of punishments in Islam derive their legitimacy from authentic reliable sources, i.e. Qurʾān and Sunnah, besides no crime or punishment can be enacted or enforced unless it is based on a juristically admitted doctrine, and this very point or characteristic has helped enormously to contest any despotic tendencies to influence this sensitive field of jurisprudence despite the fact that the political authorities in Islamic history often used to ignore the juristic injunctions in many cases.

II. The Crimes of Ḥudūd

The crimes of ḥudūd are specifically enumerated as including the following illicit seven acts:-

(i) adultery and fornication (zina)
(ii) slanderous allegation of unchastity (qadhf)
(iii) wine-drinking (shurb al-khamr) and inebriation (sukr)
(iv) theft (sariqah)
(v) high-way robbery (qatʿ al-tarīq)
(vi) apostasy (riddah)
(vii) armed rebellion (baghy)

This is the classical Mālikī, Shāfiʿī and Ḥanbalī enumeration of ḥudūd crimes. However, the Ḥanafis exclude the last two crimes of this table whereas the Zāhiris annex disavowal of borrowed valuables (jahd al-ʿarīyyah) to the category of theft.10

As mentioned above, some jurists contested the above standard classification of ḥudūd crimes by either adding
some other crimes or by reducing the number of seven to five. A distinct example of this disagreement is that the Ja'farites add three more crimes to the above seven hudūd crimes i.e.

(i) Sodomy (liwāt).
(ii) Lesbianism (siḥāq).
(iii) Procurement (qiyādah) which also involves management of premises for the exercise of sodomy, lesbianism or adultery.11

On the other hand, Joseph Schacht (like the Ḥanafis) enumerates only five hudūd crimes as he says,

"They are unlawful intercourse (zinā) its counterpart, false accusation of unlawful intercourse (kadhf), drinking wine (shurb al-khamr), theft (sarika) and high-way robbery (katc al-tarīk)."

So he omits apostasy (riddah) and armed rebellion (baghy) which are included within the classical subsumptions mentioned above. This is in total agreement with the Ḥanafī's classification.12

ʿAbd al-Raḥmān I. Doğ also presents some disagreement as he says,

"Hadd punishments are awarded in the following seven cases:-

(i) Penalties exacted for committing murder, manslaughter or bodily harm.
(ii) Punishment for theft by the amputation of a hand.
(iii) Punishment for fornication or adultery - stoning for a married person, and one hundred lashes for an unmarried person.
(iv) Punishment for slander by eighty lashes.
(v) Punishment for apostasy by death.
(vi) Punishment for inebriation by eighty lashes.
Punishment for high-way robbery (gatac al-Tariq) by death, cutting off a leg and an arm from opposite direction or an exile according to the seriousness of the crime'.

He also, apparently, excludes the crime of armed rebellion (baghy) from his classification whereas he incorporates homicide and manslaughter (gisās) and bodily injury (diyah) in the above table, seemingly he is influenced by the standard division of al-Māwardī (d. 450 A.H.) who divides crimes into two major classes as hudūd and tażīr whereby gisās and diyah cases are annexed to hudūd as being having certain assimilated characteristics.

Apparently the ostensible disparity as far as the inclusion of gisās in the hudūd is concerned can be overcome by bearing in mind that despite the similarities between hudūd and gisās, there are still important differences between them. Foremost of these is that gisās and diyah are individual's right (hagg al-ʿabd), whereas hudūd are basically God's rights (hagg Allāh). The personal element in gisās cases plays a significant role in the implementation of punishment, e.g. the victim or his family has the vested right of pardoning the culprit altogether or executing him or concluding a reconciliatory settlement mainly involving the waiving of the penalty of bodily punishment in exchange for monetary indemnities. These options do not exist in hudūd cases because they are God's right, i.e. it is society's imprescriptible duty to exact them when they are legally proved.

The following is a brief treatment of the above mentioned hudūd crimes. Emphasis is only made here to the definition and textual source of each hadd case.

I. Definition of Zinā (Adultery and Fornication)

The Islamic criminal jurisprudence purports numerous definitions of this crime. Perhaps it would be appropriate
to present each school of law’s respective definition and afterwards select the most expedient one.

A. Mālikī Definition

Zinā is a deliberate illicit sexual intercourse) done by a mukallaf (a legally responsible person).¹⁶

According to Mālikī juristic opinion in this respect the illicit act of zinā includes many cases, e.g. anal intercourse¹⁷

B. Ḥanafī Definition

Al-Kāsānī says:

"Zinā is a title for the illicit sexual intercourse voluntarily done vis-à-vis a living human female in dār al-‘Adl (Domain of Islam) by a person who has pledged to observe Islamic sanctions at the time. Thus zinā is devoid of any legal right nor does it have any shubhah (suspicion) whatsoever".¹⁸

The rest of Ḥanafī scholars generally adopt the Kāsānī former definition of adultery zinā.¹⁹

C. Shāfi‘ī Definition

Al-Shīrāzī (d. 476 A.H.) propounds a standard definition of zinā as he says,

"If a man of dār al-Islām (domain of Islam) who is legally liable for his acts and without any legitimate authority commits sexual intercourse with a woman to whom he is legally banned, he should be susceptible to legal hadd punishment of zinā."²⁰

However, some Shāfi‘ī give another synonymous definition of zinā as "An illegal insertion of the penis into a naturally
desired (sexual organ) which is devoid of \textit{shubhah} (suspicion).\textsuperscript{21}

The Shāfī-īs like the other jurists lay down many stipulations pertaining to their definition of culpable and punishable \textit{zinā}.

D. \textit{Hanbali} Definition

Abū Ya'qūb, the prominent Ḥanbalī judge (458H/1067C.E.) defines \textit{zinā} as "illicit vaginal or anal intercourse that is devoid of (plausible) doubt or legal permission". Al-Shaykh Marāṭī b. Yūsuf Al-Ḥanbālī (d. 1033 A.H.) defines \textit{zinā} as "The act of \textit{fāhishah} (sexual intercourse) whether on the vagina or in the anus".\textsuperscript{22}

These definitions are widely accepted in the Ḥanbalī school of law, also they base their pertinent sanctions on elucidating this standard definition.\textsuperscript{23}

E. \textit{Zahirī} Definition

Ibn Ḥazm defines it as "sexual intercourse with a female".\textsuperscript{24}

The Zaydis give a similar definition which involves the juristic inhibition of the place of sexual intercourse with the complete absence of any effective suspicion (\textit{shubhah}).\textsuperscript{25}

In their definitions it can be seen that there are some differences between the schools of law. The Ḥanafis and Ṣāḥirīs exclude homosexual intercourse from their definition of \textit{zinā}. Also the Ḥanafis plainly require that this crime takes place in \textit{dār al-Islām} (domain of Islam). These legal differences, in turn, do have their legal consequences on the rules of evidence and testimony of witnesses in particular as will be discussed later.
F. Textual Ban of Adultery and Fornication

This illicit act is prohibited by both Qur'ān and Prophetic traditions which also quantified its legal punishment as a genuine ḥadd. The Qur'ān says:

"The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes, let not compassion move you in their case in a matter prescribed by God if you believe in God and the Last Day and let a party of believers witness their punishment" [24:2].

This Qur'ānic text is interpreted as referring to acts committed by partners. However, for married adulterers, the penalty was regulated by the Sunnah, according to the following tradition:

"Take from me, accept from me. Undoubtedly God has now shown the path for them (adulterers). For unmarried persons (guilty of fornication) the punishment is one hundred lashes and exile for one year. For married adulterer (muhsan) it is one hundred lashes and stoning to death."

Muslim jurists, therefore, unanimously agree that the legal punishments of adultery and fornication are genuine ḥudūd pertinent to God's rights.26

II. Definition of Qadhf (Slanderous Accusation of Unlawful Sexual Intercourse)

Linguistically qadhf means throwing and hurling stones at others. Technically the unanimous juristic definition of qadhf is that it is the false accusation of a Muslim of unsubstantiated zinā (adultery, or impugning his or her affiliation to one's father)27

51
Textual Ban of Slanderous Accusation of Unlawful Sexual Intercourse

All Muslim schools of law invoke the Qur'ān and Sunnah in respect of the legal ban of this crime as well as invoking the same texts in the process of substantiating the legitimacy of the legal hadīth thereof. These texts are as follows:

First : The Qur'ānic Evidence

(i) "And those who launch a charge against chaste women; and produce not four witnesses (to support their allegations) flog them with eighty stripes, and reject their evidence ever after, for such men (persons) are wicked transgressors".

"Unless (those who allege) repent thereafter and mend (their conduct) for God is Oft-Forgiving Most Merciful". (24 : 4 - 5) 28

(ii) "Those who slander chaste women (who are) indiscrete, but believing, are cursed in this life and in the Hereafter, for them is a grievous penalty".

"On the Day when their tongues, their hands, and their feet will bear witness against them as to their actions."

"On that Day God will pay them back (all) their just dues, and they will realize that God is the very truth that makes all things manifest". (24 : 23 - 25) 29

(iii) "Those who love (to see) scandal published broadcast among the believers, will have a grievous penalty in this life and in the hereafter, God knows and ye know not." (24 : 19 ). 30
Second: The Sunnah

Al-Bukhārī (d. 256 A.H.) and Muslim (d. 257 A.H.) narrate that the Prophet said: "Avoid the seven great destructive sins". They (the people) asked: "Oh God's Apostle! What are they?" He said,

"To join partners in worship with God, to practise sorcery; to kill the life which God has forbidden except for a just cause (according to Islamic law), to eat up usury, to eat up the property of an orphan; to give one's back to the enemy and fleeing from the battlefield at the time of fighting; and to accuse chaste women never even think of anything touching chastity and are good believers". 31

These are some of the textual bases for the prohibition of gadhf and the enactment of its penalty upon which Muslim jurists diligently frame their legal and judicial decisions, as well as deducting the general policy of the Islamic criminal jurisprudence i.e. that regards the maintenance of people’s integrity as an imprescriptible duty of the Imām (supreme ruler) and his government. 32

III. The Definition of Wine-Drinking and Intoxication
(Shurb al-Khamr wa al-Sukr)

Islamic criminal law considers the act of wine-drinking as one of the major crimes of hudūd. The enactment of penalty in this context complies with the tenor of the Islamic ethos and aims of protecting the main infrastructure of the society and individuals alike. For, the protection of intellectual faculties and safety is an inviolable strategic objective of the Sharī'ah. 33

Noteworthy also is that the prohibition of wine-drinking and inebriation was not immediately legislated. It was rather revealed in gradual stages; because wine-drinking was one of the social customs in the pre-Islamic era. However when
the Prophet migrated to al-Madīnah, people began asking Him about the legal sanction of this wide-spread social phenomenon. God vouchsafed:

"They ask thee concerning wine and gambling, say, 'In them is great sin, and some profit for men, but the sin is greater than the profit ..." (2: 219).

This is the first stage of banning khamr (wine) where the Qurʾān illustrates it involves a great sin as well as some benefit embodied in trading in wine and obtaining money by gambling. The subtle allusion to the preponderance of sin over benefit is a clear sign to the abhorrence of wine, but not a distinct prohibition. Therefore some people continued to drink wine and ʿUmar called on God to reveal a clear-cut injunction banning khamr. Hence the Qurʾān says:

"Ye who believe approach not prayers with a mind befogged until ye can understand all that ye say ..." (4: 43)

This was revealed when one Imām was praying and read Sūrat al-Kāfirūn (Chapter of the Unbelievers). While doing so, he mixed the words and text which gave a totally diametrical meaning (antithetical to the concept of worshipping God alone).

This led to the third stage of khamr ban where God revealed the final and crystal-clear ban of khamr as the following verse reads:-

"O ye who believe, intoxicants, gambling, (dedication of) idols and (divination by) arrows are an abomination - of Satan’s handiwork - eschew (such abomination) that ye may prosper. Satan’s plan is (but) to excite enmity and hatred between you with intoxicants khamr and gambling and hinder you from the remembrance of Allah, and from prayers, will ye not then abstain." (5: 93).
From the above two verses, it is clear that the Qur'an has joined *khamr* with gambling, idols and divination with arrows and given them collectively the following Divine descriptions:

(i) They are *rijs* (odium and sordid) which is constantly deemed as detestable in the minds of *ulī al-albāb* (those who have good sense and sound minds).

(ii) They are handiwork and embellishment of Satan who never guides people to what benefits them, so they are to be avoided.

(iii) The abstention and obviation of these abhorrent things conduces prosperity and success in this life and the Hereafter.

(iv) The social evil conduced by wine drinking and gambling which is incontrovertibly admitted, renders *khamr* a thing to be ardently avoided.

(v) The religious detriment incurred by not remembering God and not performing prayers efficiently and punctually due to wine drinking is also an added reason for banning wine drinking. As narrated by al-Nasā'T it prevents the acceptance of prayers for forty days.\(^36\)

The Muslim community when heard the final ban of *khamr*, abruptly ceased drinking it and immediately began breaking the *khamr* containers; and *Umar b. al-Khaṭṭāb* was reported to have said: "*Intahaynā* (we stopped drinking it any more)".\(^37\)

A. **Rigorous Prohibition of *Khamr*, and Intoxication in Islamic Criminal Law:**

One of the salient characteristics of Islam as a whole and the criminal jurisprudence in particular, is the stringent inhibition of *khamr* and inebriation no matter how much false and illusive the exhilaration it may cause. So, the above Qur'ānic texts are, in fact, inhibitive and exhortative at the same time as far as the obviation of wine-drinking is
concerned. Also Muslim jurists and theologians adamantly hold that the ban of wine-drinking is compatible with the Islamic spiritual ethos and legal tenors which aspire to create a physically, mentally and socially strong person. It is an undoubtedly accepted fact that wine-drinking affects the mind and the body alike and has far reaching uncommendable consequences on the person, family and the society at large. This is why Muslim jurists incorporate wine-drinking in the orbit of hudud crimes and penalties.38

Also, criminologists generally agree that many of the heinous crimes are committed under the effect of intoxication e.g. murder, arson, as well as the misdemeanour crimes, like slanderous allegations and quarrelling, etc. So, it is reported that the Prophet called khamr umm al-khabâ’ith (mother of the odiums). He also called it umm al-fawâhish wa akbar al-kabâ’ir (mother of the insidious acts and morals) and the greatest loathsome sins). Besides, whoever drinks it, he will omit prayers and probably commit adultery with banned women (mahārim).39

Also, the traditionists report that the Prophet cursed ten persons who are involved in khamr either by drinking it or making, bringing, buying, selling, carrying or serving it, etc.

Also, an authentically narrated tradition is widely invoked in respect of the disastrous opprobrious consequences of khamr that indicates the abolition of the depiction of Iman (faith or belief) from that who drinks wine or steals or commits adultery.40

Also, the Prophet presages that those who drink wine in this mundane life will not drink it in the Hereafter even if they gain God’s permission to enter His Paradise.41

Sayyid Sābiq, the famous Egyptian jurist, mentions a great deal of the verdicts issued by scientists in various fields, i.e. medicine, economy, religion, ethics, etc., who
aggregately condemned *khamr*, and each group proved this verdict by specific results concluded by studies in their respective ambits of specialities. He also narrates the American ban of wine-drinking and the subsequent abolition of that ban in the 1933s due to the pressure of the public who suffered from this evil.42

So, it is quite clear that *khamr* is one of the evils that devitalize the family, individual and society. Therefore, the ban imposed on it, whether complete as in the Islamic criminal canons, or partial as in some modern countries, is a strong proof and justification to its inclusion within the realm of *hudūd* crimes and penalties.

B. Definition of *khamr*

*Khāmara* is an Arabic verb that means "to cover or conceal". The noun *khamr* denotes the act of covering and concealing, therefore what women usually use to cover and conceal their heads is called *khimār*. But technically *khamr* denotes all liquids which are prepared by the fermentation of some grains or fruits whereby these stuffs change to alcoholic drinks. Therefore these drinks are called *khamr* (pl. *khumūr*) because they conceal and cover the mental ability of the drinker and seriously damage discretion and the ability to distinguish between good and bad. The detrimental repercussions of intoxication are clearly visible in alcoholics and drunkards, who could not have reached this pitifully lamentable and sinister posture had they already been prevented from drinking wine in the first instance.

So, the Islamic criminal law considers any liquid capable of intoxicating as *khamr* regardless of the nature or name that liquid or material has. The Muslim jurists and traditionists invoke the following Prophetic authorities to sustain their congruous statement - that whatever intoxicates (conduces inebriation) is *khamr*:-
(i) Ahmad b. Hanbal and Abu Dawud narrate that the Prophet said "Every intoxicant (material) is khamr and every khamr is prohibited haram."\(^{43}\)

(ii) Al-Bukhari and Muslim both report that 'Umar b. Al-Khattab once addressed his audience on the Prophet's pulpit saying "Well, Oh People, verily (khamr) prohibition was vouchsafed when it was used to be made from five things: grapes, dates, honey, wheat and barley and khamr is whatever befogs (covers and conceals) the mind."\(^{44}\)

Muslim jurists adopt what 'Umar b. al-Khattab has said as far as the definition of khamr is concerned due to his proximity to the Divine revelation.\(^{45}\)

(iii) Muslim reports that Jabir narrates that a man from Yemen asked the Prophet's decision on a drinking liquid which the Yemenis used to drink made from grain called al-mazar. Hence the Prophet asked the questioner: "Is it an intoxicant (liquid)?" The man replied affirmatively, "Yes!". Then the Prophet said, warningly "Every intoxicant (material) is prohibited (haram), and God has undertaken a covenant that whoever drinks wine, that He will make (the drinker) drink from tinat al-khabal." The audience asked the Prophet "What is tinat al-khabal? He said "It is the sweat of the people of Hell!".\(^{46}\)

(iv) Al-Nu'man b. Bashir relates that the Prophet said "Verily khamr is from grapes, and verily khamr is from dates" and He emphasized by the same tone the fact that khamr is also from honey, wheat and barley.\(^{47}\)

(v) `A'ishah says "Every intoxicant is khamr and if the gauge of sixteen pounds (al-farag) conduces inebriation, then a palm-full of that liquid is haram (prohibited)."\(^{48}\)
Al-Bukhārī, Muslim and Aḥmad b. Ḥanbal report that Abū Mūsā al-Aschʿarī asked the Prophet "What is the ḥukm (legal rule) of two drinks we used to make in Yemen: al-buttā which is made from honey when it ferments, and al-mazar which is made from grain and barley, which are boiled and fermented?" The Prophet replied, "Whatever is capable of causing intoxication is ḥaram (prohibited)." 49

Alī b. Abī Ṭālib reports that the Prophet had prevented them from drinking al-jārah which is made of barley (beer). 50

The above mentioned statements and traditions are the opinions of the multitude of the Prophet’s Companions, Successors and jurists of the various provinces of Islamic countries and they are the predominant opinion in the Ḥanafī school. 51

However, some prominent jurists disagree with the above mentioned widely accepted definition of khamr and purport a different juristic opinion as far as wine-drinking is concerned. Those jurists are mainly Başrān and Kūfān including Abū Ḥanīfah, Ibrāhīm al-Nakhī, Ibn Abī Laylā Sufyān al-Thawrī and Shurayḥ. Their contention is that khamr is specifically the grape juice that is boiled and fermented - and therefore becomes - intoxicant - which is banned by the above mentioned Qurʾānic texts. Consequently any amount drunk of it is ḥaram (prohibited), even if it did not conduce inebriation. But any other intoxicant liquid or juice is not muḥarram (prohibited), if the ingested quantity thereof did not reach the degree of intoxicating the drinker. In other words, juices of other liquids are not prohibited if they are ingested in small amounts, but large amounts are ḥaram (prohibited). These jurists cite the Qurʾānic text that reads:
And from the fruit of the date palm and the vine ye get
out wholesome drink and food; behold in this also is a
sign for those who are wise. (16 : 67).

The Arabic word used in this text is sakar which means
intoxication, and since the text mentions intoxication
instead of khamr (wine), then, it is clear that the
prohibited is the act of intoxication and not khamr itself.

They also narrate that Ibn Abbas reported that the Prophet
said "Khamr is prohibited for itself li‘ayniha and also
prohibited is intoxication of anything else." Besides,
they also put forward some traditions that denote
intoxication is banned but by the quantity that conduces it,
but khamr is totally and perpetually banned however little
the amount ingested is.52

In addition they sustain their argument by analogical
reasoning saying that the cause of the ban of khamr is that
it causes omission of prayers and forgetful abandonment of
God’s remembrance and these effects are only conduced by the
inebriating quantity, therefore, this quantity (which
conduces inebriation) should be banned. However, this does
not apply on khamr because its ban is unanimously accepted.
They hold that this qiyyas (analogical reasoning), should be
given the status of nass (text), because the cause of such
qiyyas is mentioned explicitly in the text.53

C. Definition of Wine-Drinking

Wine-drinking includes:

First : The act of Drinking

The prevalent juristic opinion is that the act of drinking
is fulfilled whenever the culprit drinks an intoxicant
material regardless of its name, or source, e.g. grapes,
dates, honey, wheat or barley, or any thing else. Also the
strength of the intoxicant substance is legally irrelevant
for the principle here is that "what conduces intoxication — when ingested in big quantities, a little amount, thereof is ḥarām (prohibited)." ⁵⁴

Therefore it could be said that the prerequisite of drinking is fulfilled whenever the material ingested is proved to be intoxicant.⁵⁵

However, as already mentioned Abū Ḥanīfah puts forward a contrary opinion i.e. for he accepts the aforesaid criterion if the ingested substance is khamr which is derived from grapes but the ingestion of other intoxicants is not a crime if the amount ingested did not conduce inebriation.⁵⁶

However, the Mālikis, Shāfiʿis, Ḥanbalis and Zāhiris as well as Zaydis consider any ingestion of any intoxicant material as a crime however small the amount ingested is, because drinking is objectively prohibited.⁵⁷

Consequently no punishment accrues if the substance taken is not intoxicant even if the person ingested it as an intoxicant substance.⁵⁸

Also the Mālikī, Shāfiʿī and Ḥanafi stipulate that the ingested substance should be a liquid (sāʿīl), so the other forms of intoxicants ingested are only punishable by taʿzīr (discretionary penalties).⁵⁹

However, this is a controversial opinion, in as much as many influential jurists consider all forms of intoxicants as khamr and therefore amenable to the legal hadd of wine-drinking.⁶⁰

If the intoxicant is dissolved in water and thereby loses its taste, colour, flavour and smell, the majority of jurists consider such a liquid as not an intoxicant, therefore if it is ingested, no penalty will accrue. But the Mālikis' preponderant opinion is the prohibition of such mixture even if the intoxicant is totally dissolved.⁶¹
The intoxicant should reach the stomach so if it is spat from the mouth, such an act is not *shurb* (drinking) and therefore not liable to penalty. On the other hand many Ḥanafī and Mālikī jurists stipulate that the intoxicant substance should reach the stomach by way of the mouth, hence any conveyance through nose or anus is not *shurb* (drinking), so the *hadd* will be relinquished due to *shubhah* (suspicion). However, a discretionary penalty is due. The Shāfiʿīs have three opinions in this regard: the first is congruent with the Mālikī and Ḥanafīs' opinion; the second holds that the *hadd* will be due if the material is ingested by smelling or injection, even if it did not reach the stomach - the third opinion holds that the *hadd* is adjudicable in case of smelling and is not due in case of injection.

Ibn Qudāmah propounds the Ḥanbalis two opinions in this regard as: whatever reaches the posterior part of the mouth is *shurb* (drinking), presupposing the *hadd* punishment whether done by drinking or smelling, but whatever enters the body via the anus is not capable of conducing *hadd* penalty. The second Ḥanbalī opinion imposes the *hadd* penalty in the above two cases i.e. through mouth or anus.

In cases where duress or acute exegencies necessitate wine drinking, the drinker will be absolved from any criminal liability according to Qur'ānic texts and Prophetic tradition. The Qur'ān says:

"... But if one is forced by necessity, without wilful disobedience, nor transgressing due limits, then is he guiltless for God is Oft-Forgiving Most Merciful". (2 : 173)

The Prophet says: "My nation - believers - have been absolved from the liabilities of acts done under : mistake, forgetfulness or duress".64
Also, the majority of Muslim jurists exclude any remedy by drinking wine from the above absolutions incurred due to necessity, mistake, forgetfulness or duress. Therefore, drinking wine for the purpose of remediying an ailment is a crime in the Mālikī, Shāfi’ī and Ḥanbalī schools. However, Abū Ḥanīfah diverges and does not prescribe hadd in this case.⁶⁵

Secondly: Criminal Intention

This criminal intention is fulfilled whenever the drinker ingests something knowing that it is khamr or intoxicant. Consequently, if he drinks the substance without knowledge that it induces intoxication if it is taken in big quantities, then no criminal liability will accrue, even if he really became drunk. Also, no hadd penalty will accrue if he drinks an intoxicant thinking that it is not an intoxicant. For the crime of wine-drinking necessitates intentional commission therefore mistake and negligence do not render the drinker susceptible to the legal hadd.⁶⁶

Also, ignorance of the illegality of drinking wine is acceptable in some cases, e.g. a newly converted person who drinks wine knowing it is intoxicant but being unaware that it is prohibited. But such absolution is inadmissible vis-à-vis that who grew up in dār al-Īslām for such prohibition is one of the prevalent canons known to all who live in a Muslim country.⁶⁷

IV. The Crime of Larceny (Hadd al-Sarīqah)

Islam considers al-māl (property) as one of the most important necessities and a constituent element of a decent life. Therefore, it circumscribes al-māl with a sanctified shroud. Accordingly, any form of transgression vis-à-vis māl is deemed as a crime punishable by various penalties including, as in the case of theft, the hadd of sarīqah.
On the other hand, the protection of property is one of the fundamental five interests which are protected by the legislation of *hudūd* penalties. The Muslim jurists attach a great deal of importance to these five fundamental interests (al-*masālih al-khamsah*) so much so they deem them as *al-*masālih al-*darūriyyah* (the necessary interests that are crucial for the existence of any decent community). They are: religion, mind, chastity, body and property. The Muslim jurists, by exhaustive deductive studies, inferred that these fundamental interests are meticulously protected by a host of sanctions including the penalties of *hudūd*, consequently they consider it as an axiomatic fact that everybody should realize that infringing these interests or one of them is a crime.68

Ibn Qudāmah and others agree that theft is banned by Qur'ān, Sunnah and Consensus. The Qur'ān prohibits all forms of invalid acquisition of pecuniary properties for it explicitly says:-

"And do not eat up your property among yourselves for vanities..." (2:188).69

"O ye who believe eat up not your property among yourselves in vanities; but let there be amongst you traffic and trade by mutual good will ..." (4:29)70

So any intentional violation of these two verses will constitute a crime against property i.e. theft, fraud, breach of trust, plunderage, robbery, etc., that is definitely punishable.

A. The Textual Ban on Larceny

First: The Qur'ān explicitly bans and punishes for theft as it says:

"And as to the thief, male or female, cut off his or her hands, a punishment by way of example from God, for
their crime, and God is Exalted in Power, Full of Wisdom." (5 : 38)

"But if the thief repents after his crime and amends his conduct, Allāh turneth to him in forgiveness for God is Oft-Forgiving, Most Merciful." (5 : 39).

Second: In the Sunnah the Prophet also bans any form of illicit acquisition of others’ property as He promulgated many sanctions to be observed after His death, as He says in ḥajjat al-wadā’ (pilgrimage of farewell): "Your lives and properties are forbidden to one another haramun ʿalaykum till you meet your Lord on the Day of Resurrection."71

The following Prophetic traditions are demonstrative of the pernicious consequences that theft conduces:

(i) "When an adulterer commits illegal sexual intercourse then he is not a believer (at the time he is doing it), and when somebody steals, then he is not a believer (at the time he is stealing)."72

(ii) "Allāh (God) curses a man who steals a baydah (an egg), and gets his hand cut off, or steals a rope and gets his hand cut off."73

Thus it becomes clear that the act of theft is a very detestable illicit act, as well as forming one of the means of the illegal acquisitions of others’ properties, despite the technical disparities in punishments and evidence in each separate case.74

Muslim jurists justify the exclusively harsh penalty of amputation of hand in theft saying that this hand is a sinful organ that has to be amputated to secure the safety of the rest of the body. In addition, it is a deterrence to all those malignantly-disposed persons to refrain from such illicit acts, for many persons prefer to be killed instead of having a hand cut off.75
Also al-Qadi 'Iyad (d.544 A.H./1149 C.E.) vindicates the severity of theft penalty saying:

"God has maintained properties by the legislation of the amputation of hand in theft, and without enacting such penalties on, fraud, breach of trust, plunderage, robbery, transgressions, etc., for these cases are fewer than theft cases, as well as they are easily proved and the illicitly acquired properties therewith can easily be recouped or reimbursed, whereas theft is relatively very difficult to prove; (and the wickedness of the felon is obvious); therefore it is a serious crime, that needs a harsher penalty to make it more deterring and preventive."

B. Other Forms of Illegal Acquisitions of the Properties of Others and their Legal Posture

Illegal acquisition of others' properties besides theft spans over a wide range of illicit acts i.e. breach of trust khiyānat al-amānah, plunderage al-nahb, burglary al-kasr al-manzilī, snatching al-khatf, fraud al-ihtiyāl, forced snatching al-ikhtilās. However, all these forms of illicit acquisition of properties, except larceny, are legally punishable by a mere taẓīr (discretionary penalties), because all of them do lack the mainstay of theft which is the covert taking of property, which is the essence of theft.

Muslim jurists and Companions invoke some Prophetic traditions and judicial decisions to attest the above mentioned opinion. The Prophet said "No hadd of theft is adjudicable on breach of trust (khā'īn), plunder (muntahib), nor a swift snatcher (mukhtalis)."

However, al-Khawārij hold that hadd of theft is adjudicable in these cases.
C. **Disavowal of Borrowed Property** *(Jahd al-‘Arīyyah)*

Ibn Ḥazm and the Zāhirī school consistently allege that disavowal of borrowed property is a crime penalized for by *hadd* of theft i.e. amputation of hand. Ibn Ḥazm invokes the Makhzūmīyyah case to sustain his opinion.⁸⁰

Ibn Ḥazm and Ibn Qudāmah ascribe this juristic opinion to Ahmad b. Ḥanbal who acknowledges the authenticity of the Prophetic tradition that commanded the amputation of the Makhzūmīyyah woman.⁸¹

However, the majority of Muslim jurists accept this tradition but elucidate it as that the woman concerned was a thief who used to disavow borrowed items and was accordingly punished, for the Prophet said,

"... Do you (*Usāmah*) intercede in a *hadd* of God? The nations before you perished, for they used to pardon prominent person when he stole and punish the poor (for the same offence). I swear by God if my daughter, Fāṭimah, stole, Muḥammad would cut off her hand."

Consequently the multitude of jurists, exclude the disavowal of borrowed pecuniary items from the amarts of larceny.⁸²

D. **Grades of Larceny**

Mainly theft has the following grades:

a. Theft punishable by *hadd*,

b. Theft punishable by discretionary penalties *taṣālīr*.⁸³

The first grade can be further divided, as the Ḥanafis contend, into two sub-divisions:

1. Minor larceny - *(sarigah sughrā)* and
2. Grand larceny *(sarigah kubrā)*.
Noteworthy is that the main difference between these two types of theft is that minor larceny does not involve the usage of weapons or armed acquisition of property, whereas the grand larceny essentially involves armed acquisition of property.84

On the other hand the theft punishable by discretionary penalties (ta’zīr) does encompass all cases of theft which are not punishable by ḥadd due to the lack of one or more requisites of minor thefts or grand thefts. So, technically the cases of theft punishable by discretionary penalties do constitute a final resort to courts to adjudicate when there are suspicions involving the applicability of ḥadd in cases of minor or grand larceny.85

However, this section is exclusively devoted to the treatment of minor larceny (al-sarigah al-sughra) and its pertinent juristic subjects, whereas the grand larceny (al-sarigah al-kubra) i.e. highway robbery, will be equally treated in the subsequent pages. Also it may be appropriate to note that the aforesaid distinctions of larceny are mainly innovated by the Ḥanafī jurists.86

E. Legal Definition of Larceny

Muslim jurists propound a variety of definitions of larceny which may be recapitulated in the following formula: Larceny is the wilful covert and felonious act of taking others' money, property or any valuable pecuniary property with the intention of taking it from the owner's hand and placing it permanently in the felon's proprietorship. However, the Mālikis envisage larceny vis-à-vis juveniles and slaves and subject these cases to the full sanctions of larceny committed on pecuniary properties.87

Hence, all schools of Islamic law concur on the fact that the illegal acquisition and eviction of valuables must be done furtively (khilsatan) which distinguishes the
punishable larcenies from the other similar forms of illegal acquisitions of others’ properties.88

Furthermore, the chief mainstays of larceny (that is punishable by the legal hadd - amputation of hand) can be readily deduced from the above definition (which are crucially important so much so that any dubiety involving one of them will absolve the culprit from the penalty of amputation of hand).

These mainstays are:-

1. The covert taking (al-akhdhu khifyah).
2. What is taken is legal māl (pecuniary property).
3. This pecuniary property is owned by another one.
4. The criminal intention concomitant to the act of theft.

Accordingly, if one of these four requisites is lacking, then the act of theft changes to anything else, punishable by a mere discretionary penalty (ta’zīr).89

V. Hadd Qat'ū al-Tarīq (Highway Robbery or Brigandage)

This crime is often called al-harābah (waging war) or al-sarīghah al-kubrā (grand larceny).90

The Ḥanafī scholars often use the term al-sarīghah al-kubrā (grand larceny) in their treatment of this serious hadd crime, despite the disparities between larceny as debated in the preceding pages and this crime, which mainly centre around the fact that theft intrinsically involves covert appropriation of others’ properties, whereas highway robbery (brigandage) inherently comprises the factor of overt and forcible acquisition of others’ properties. Nevertheless this crime does involve some sort of coverture as the Ḥanafis argue, namely, the culprits usually conceal their acts and themselves from the public authorities and law-enforcement quarters. So, the term al-sarīghah al-kubrā (grand larceny) is an academic and a metaphorical term.91
Apparently, the terms 'brigandage' and 'highway robbery' are completely identical to the Arabic words *gat al-tarīq*. But sometimes some jurists prefer to use the terms *muharābah* or *harābah* because they are derived from the verb *yuḥāribūn* (combating), which is specifically used in Qur'ānic text that defined this crime and its grades, and simultaneously enacted its various penalties. Therefore it might be appropriate to note that the above Arabic terms and their synonymous English counterparts might often be interchangeably used in this thesis to betoken the act of brigandage with special reference to the wide connotations and implications of the term *muharābah* which includes not only forcible robbery, but also murder, prevention of safe passage of passengers or anybody else, and the propagation of perversion and terrorism in both urban and rural areas.

Furthermore, it might also be suitable to emphasize the fact that brigandage is unanimously accepted as a *ḥadd* crime and penalty. So, all Islamic schools of law regard it as one of the major *ḥudūd*.92

Worth mentioning also is that the tenor of the ethos of Islamic criminal jurisprudence emphatically propagates the protection of the individuals' and community's interests which incorporate life and property as intrinsic interests. Therefore this crime is condemned and penalized, especially when this crime involves many illicit acts which are tokens of the criminal psyche. Noticeable, also is that the provisions of penal laws of Islam make it a bounden duty on the public authorities to protect the citizen even on highways and lonely locations. So it is a constitutional duty on the *Imām* (supreme ruler), to provide all the adequate measures and contrivances to protect those who are travelling on highways, and those who are resident in their homes and localities regardless of how far or near these residential areas are to the main cities and capitals. Some jurists even envisage the perpetration of brigandage in
heavily populated cities and capitals provided that some legal circumstances do exist.93

A. Textual Basis of the Crime of Brigandage

The legality of the punishments of this crime does emanate from solid grounds since the Qur'ān itself illustrates both crime and penalty in this respect. It says:

"The punishment of those who wage war against God and His Messenger and strive with might and main for mischief through the land is execution or crucifixion, or the cutting off of (their) hands and feet from opposite sides, or exile from the land (imprisonment outside his home-town). That is their disgrace in this world and heavy punishment is theirs in the next world (Hereafter)." (5 :33 ).

"Except for those who repent before they fall into your power. In that case know that God is Oft-Forgiving, Most Merciful." (5 : 34).

Exegetes and Traditionists like Ibn al-'Arabi, al-Jassāṣ, al-Shawkānī and Abū Dāwūd report that these two verses were revealed when a group of people from the tribe of Ukul came to the Prophet in al-Madīnah and pretended to be converted to Islam, but alleged that they could not stay in al-Madīnah and that they suffered from some infirmities and needed some remedies for their weak bodies. Hence the Prophet ordered that they were to be lent some camels so that they could drink their milk and stay outside al-Madīnah (as they wished), for there the weather and environment might help remedy their maimed bodies.

However, they malignantly killed the camels' shepherd (as they presumably had premeditated) and plundered the camels and absconded to their tribal homeland. The Prophet, when he knew of this incident, ordered His Companions to catch them and bring them back. He then ordered that they should
be executed and he gave restitution for the plundered camels.  

However, Ibn al-ʿArabī, al-Jaṣṣāṣ, Ibn Qudāmah as well as al-Shawkānī and the rest of the authoritative scholars contend that the above Qurʾānic text was specifically revealed to regulate the penalties of armed robberies committed by Muslim citizens or Dhimmis and not by apostates polytheists or ḥarabis. They sustain this deduction by the very context and history of the Qurʾānic text. So they doubt that the above verses were revealed on the occasion of the above story.

Moreover, the polytheist when converted to Islam will be exonerated from all past offences even if these offences include brigandage. This elucidation is the predominant opinion in the Zaydi school.

Dī says:—

_Hirābah_ (robbery) is not merely an offence against human society, but according to the above verse of the Qurʾān, it is as if one is waging war against God and His messenger through the use of sheer force. To wage war against the community may result in chaos and confusion and loss of peace of mind and heart. Waging war with the Creator and His Apostle is much more serious and amounts to a clear rebellion against the established principles of equity and justice and the respect for all. So any one who disturbs or attempts to disturb that system of life is an outlaw and deserves capital punishment."

B. **Definition of Ḥirābah (Brigandage)**

The broad terms of waging war against God and His Prophet and harnessing of power for mischievous acts in the land are being depicted by the Islamic criminal law as tokens of the crime of brigandage in the community. However, Muslim
jurists give different definitions to this crime as shown below.

The Mālikīs define it as

"Banditry by intimidating (people on) the roads whether the bandit intended the pillage of the travellers' belongings and properties or not; in a way that no help is accessible to the victims of this crime. This includes the usage of arms in ordinary circumstances i.e. not in a state of insurrection or civil war."

The Mālikīs emphatically stress on the point of using force in plundering others' property in a way no help can be sought or gained.¹⁰⁰

The Shāfiʿis and Jaʿfaris define it as "rebellious insurrection for the illicit acquisition of property, or murder or terrorism; depending on force in a remote area where no relief can be accessible or attainable. The factor of intimidation and terrorizing the road is crucial in this context".¹⁰¹

Ibn Nujaym and al-Kāsānī, propounding the Ḥanafī's definition of this crime, generally agree with the aforesaid Mālikī, ShāfiʿI and Jaʿfarī contentsions and definitions. However, the essential factor of using armed force and terrorism in the highways and countryside, or in the populated cities (during the night) is distinctly stressed in order to classify the accused felon as a muḥārib (a war-wager or brigand).¹⁰²

The Ṣāḥīri likewise stress the usage of force and terrorism in perpetrating an illicit act e.g. theft, adultery or fornication, murder, but if such acts were done without resorting to terrorism, force or resisting the public authorities, these acts would then be deemed as illicit.
crimes punishable by their own respective ordinary penalties.\textsuperscript{103}

The Ḥanbalis, Zaydis and Jaʿfaris agree with the rest of Islamic scholars in their treatment of this crime. They also distinguish it from the rest of crimes committed solely by specific criminal intent in default of terrorism and force of arms.\textsuperscript{104}

C. The Legal Requisites of the Crime of Brigandage

From analytical surveys of the voluminous juristic treatments of this subject within the Islamic criminal jurisprudence, it becomes clear that the legal and physical existence of this crime presupposes the fulfilment of the following four elements:

(i) The felon must be a legally accountable person (mukallaf).
(ii) The usage of armed force (al-shawkah).
(iii) The crime is committed in a highway or a lonely locality.
(iv) The overt commission of this crime (al-mujāharah).\textsuperscript{105}

VI. Hadd al-Riddah (Apostasy)

Riddah, literally, means regression and reversion to where one (or a thing) came from. It also connotes retraction of what is already confirmed.\textsuperscript{106} Technically, apostasy means voluntary regression from Islam (after the person had already accepted and practised it). This involves both males and females as long as they are sane and mature; accordingly, no legal effect is attached to apostasy perpetrated by a juvenile, lunatic, (the mentally retarded) the imbecile, forgetful or those under duress. For the Prophet says,

"The pen has been lifted (religious reprehension and criminal responsibility) from three persons: the
sleeping until he (or she) wakes up, the juvenile until the age of puberty and the lunatic until he (or she) restored mental competence."107

The Prophet also says: "My nation has been absolved from mistake, forgetfulness and duress."108

Al-Nawawī, the prominent Shāfi’ī propounds the following definition of apostasy which is generally upheld by the rest of the Islamic schools of law:

"It is the severance of Islamic adherence with the purpose of intentional repudiation of Islamic religion, or the utterance or act of infidelity, whether these acts and utterances were made wittingly, jokingly or sarcastically."109

Basically, as mentioned above, apostasy is envisaged only from a sane uncoerced mature Muslim, as a matter of principle. The rational basis for the enactment of the penalty of apostasy and its juristic implications can be discerned when we bear in mind that the interest of the maintenance of religion (maslahat hifz al-dīn) is held by all Muslim jurists and theologians to be the basis of all the other interests.110

A. Texts Banning and Penalizing Apostasy

The legality of the hadd of apostasy is derived from both Qur’ān and Sunnah as follows:

First The Qur’ānic texts

(a) "Anyone who, after accepting faith in God utters unbelief, except under compulsion, his heart remaining firm in faith - but such as open their breast to unbelief on them is Wrath from God and theirs would be a dreadful penalty." (16 : 106)
Yūsuf 'Alī comments here saying:

"The exemption refers to a case like that of ʿAmmār, whose father Yāsir and mother Summayah, were subjected to unspeakable tortures (by the Meccan pagan) for their belief in Islam, but never recanted. ʿAmmār, suffering under tortures himself and his mind acted on by the sufferings of his parents, uttered a word construed as recantation (from Islam) though his heart never wavered, and he came back at once to the Prophet, who consoled him for his pain and confirmed his faith".

The exegetical works confirm this principle i.e. that when duress leads to apostasy the victim thereof is not legally accountable for apostasy if his heart is still faithful to God. Muslim jurists furthermore consider this verse as the basis for the nullification of all acts and utterances done under duress and compulsion.

By the same token a person can never be compelled to embrace Islam. So if such a thing did take place, then the person concerned would not be held responsible for apostasy if he later chooses to repudiate Islam. Ibn Qudāmah ascribes this key opinion to Abū Ḥanīfah and al-Shāfiʿī, whereas al-Shaybānī holds the opposite opinion that legalizes such a conversion to Islam so subsequent recantation of Islam by the person concerned would amount to apostasy punishable by death. The Zaydis generally endorse al-Shaybānī’s opinion.

Moreover al-Shaybānī applies the same doctrine when a Muslim is coerced to repudiate Islam thus regarding him (or her) as an apostate. But this view is vehemently rebutted by Ibn Qudāmah and others.

With regard to apostasy made by a drunkard, the prevalent opinion of the majority of Zaydis is that the transgressing inebriate is fully responsible for that apostasy contrary to the Ḥanafis and some Zaydis opinion, which consider
inebriation as a legal excuse equal to lunacy, juvenility
and inadvertence. Nevertheless the lunatics are totally
and incontrovertibly exempt from the rigours of the
sanctions and liabilities of apostasy as held by the
consensus of Muslim jurists.

(b) "And if any of you (believers) turn back from their
faith (in Islam) and die in unbelief, their works will
bear no fruit in this life, and in the Hereafter they
will be Companions of the fire and will abide therein." (2 : 217).

(c) "If anyone desires a religion other than Islam never
will be accepted from him ..." (3 : 85).

These three verses were construed as banning a Muslim from
changing his religion either by overt repudiation or covert
sacrilegious acts, beliefs or tendencies. They furthermore
denote God's indignation with those who recant and repudiate
their Islam, and this very indignation is a token of the
seriousness of apostasy in all aspects which involve the
criminal liability.

Secondly: Prophetic Traditions:

The Prophet said, "Whoever substituted his religion (Islam
by another religion or tenors) execute him". This
tersely uttered statement has wide implications which
encompass all the forms of apostasy as will be shown below.
Also, primarily, it is understood from this tradition that
apostasy, when substantiated, involves execution as a
legally incontrovertible penalty.

B. Requisites of Apostasy

From the brief definition and texts treating apostasy it
becomes clear that apostasy involving execution should
satisfy two main requisites: a. regression from Islam, and
b. criminal intention to perpetrate this crime. Each of these two constituents will be treated separately, as follows.

(i) Recantation of Islam
This is the kernel of apostasy which means 'repudiation of Islam'. Muslim jurists unanimously hold that this recantation of Islam can be accomplished by one (or more) of three ways i.e. an act (or omission of an obligatory act), or verbal utterances or belief.

All schools hold that recantation of Islam (riddah), by way of physical acts comprises a wide spectrum of instances which all betoken the explicit repudiation of Islam. This virtually occurs when the felon intentionally does what Islamic doctrines have conspicuously banned, e.g. prostrating before an idol, the sun or any other worshipped entity. Also the ignominious treatment of the Holy Qur'ān or the books of Prophetic traditions as a sign of intentional disregard is unanimously considered as apostasy. Moreover, repudiation of Islam occurs when the felon validates and commits what Islamic teachings totally ban e.g. if the adulterer commits adultery believing that it is a legal act or validates wine-drinking, or murders innocent people, as well as legalizes whatever is unanimously understood as a banned thing like pork.

It should be noticed that if such acts of validating what is legally banned are based on a debatable pretext or reason, then we cannot rule that the doer is an apostate, due to the legal reason which the doer relies on and which, accordingly, formulates his act. This can be elucidated by the famous case of al-Khawārij who dissented and quarrelled with the majority of Sahābah and Tābi‘īn and fought them as well as depicting them as apostates whose killing is a way of worshipping God. Nevertheless the majority of jurists consider al-Khawārij as rebellious dissidents, but not apostates.
The majority of Islamic schools of law propound numerous examples to illustrate their common principle that "it is only the explicit validation of what Islam bans, without relying on any textual or rational justification, that constitutes apostasy". Accordingly, mistaken interpretation of the text that bans or validates should not be deemed as recantation of Islam.  

Furthermore, Muslim jurists acknowledge that disobeying Islamic sanctions is a normal crime adjudicable on the merits of each crime as long as such infringements are not accompanied by any form of discarding the validity of such sanctions; hence the culprit is generally called ḍithim (disobedient), but not murtadd (apostate). On the other hand omission of imperative orders, like prayers, fasting, pilgrimage, alms payments, etc., constitutes apostasy if the person repudiated the validity of such obligatories or sarcastically disavowed them.

Some exceptions are made for those who are able to plead that they did not know that the above acts and omissions are forms of apostasy e.g. a newly converted person when drinking wine as he considered it not to be banned. So these cases are to be thoroughly probed by the court in apostasy trials so as to distinguish between the veracious pleas and the false ones.

According to the doctrinal and textual references and deductions, the contemporary refusal to apply Islamic laws is deemed as an act of apostasy if such refusal is done intentionally, for the Qurʾān says:

"... And if any do fail to judge by (the light of) what God hath revealed, they are (no better than) unbelievers." (5 : 44).

"... And if any fail to judge by (the light of) what God hath revealed, they are (no better than) wrongdoers". (5 : 45).
"... They are (no better than) those who rebel" (5 :47).\textsuperscript{131}

Muslim jurists and exegetes unanimously hold that the intentional substitution of Islamic doctrines and laws by alien ones is apostasy invoking a multitude of Qur\textsuperscript{2}\textsuperscript{anic texts and Prophetic traditions that forbid such delinquencies and felonies.\textsuperscript{132} Such disobediences (omissions) of God’s laws are considered a sacrilege and profanation of God’s explicit enjoins to obey Him, His Prophet and the pious political leaders in society. Hence the implications of apostasy are not only restricted to the individual, but also they engulf the entirety of society. The legislature, the executive and the judiciary are responsible before God when they voluntarily enact and apply alien laws, thereby overtly neglecting Islamic ones.\textsuperscript{133}

**Verbal Utterances**

Verbal utterances can constitute apostasy if they involve clear infidelity or connote direct repudiation of an intrinsic Islamic doctrine, or blasphemous remarks profaning God’s attributes, the Angels, the Prophets, the Divine Books, etc. This also involves a wide range of statements that acknowledge what is Islamically untrue, or deny what is true for Islam e.g. the denial of resurrection, the Angels or Paradise or Hell Fire, etc.\textsuperscript{134}

**Inconsistent Beliefs**

Convictions and beliefs when adopted by a Muslim also can constitute apostasy if such beliefs are antithetical to the already firmly substantiated Islamic dogmas and norms e.g. the belief in the eternity or infinity of this world, or that it accidentally existed without being deliberately created by God, or that God is not Eternal and Infinite, or that the Qur\textsuperscript{2}\textsuperscript{n was innovated by the Prophet, or that ʿAlī is a god, etc. or any other belief, however covert it is which
diametrically opposes one of the fundamental Islamic bases.\textsuperscript{135}

It must be observed that unless such beliefs are openly expressed, it is impossible to prosecute a person under the provisions of apostasy, bearing in mind that this involves a ḥadd penalty which must be proved beyond any doubt.\textsuperscript{136}

**Magic and Divination (Occultism)**

Muslim jurists incorporate the topics of magical and divinational and occultism effects in apostasy based on the view of the extraordinary effects of these types of acts have on the people's minds and convictions. Primarily Muslim jurists agree on the effects of magic, but contest its nature. Some think magic effects or phenomena are just fanciful imaginative visions, whereas the others believe that they are realistic effects and each group invoke the relevant Qur'ānic verses that sustain their contention.\textsuperscript{137} Ibn Kathīr (d. 774 A.H.) narrates that Muslim jurists and exegetes generally contend that learning and teaching occultism and sorcery is a banned act and the validation of such sciences is infidelity.\textsuperscript{138}

However, they propound different opinions as to the sorcerer (and sorceress) who learn and practise sorcery: a. The majority of Mālikis, Ḥanafis and Ḥanbalis contend that such a person is to be sentenced to death whether or not he (or she) believes in the validity of sorcery. They invoke the Prophetic tradition "the ḥadd of the sorcerer is to be struck by the sword." Therefore the Ḥanafis admit the execution of the sorceress despite their prevention of executing the apostate woman. They differentiate between the penalties of sorcery and apostasy for they think it is imperative to seek and wait for the apostate's repentance whereas they do not think so in cases of sorcery.\textsuperscript{139}

Aḥmad b. Ḥanbal is reported to have another opinion that deems the sorcerer as a mere delinquent and not a felon;
accordingly he should be asked to repent, and should be given a discretionary penalty. Al-Shāfīʿi endorses a similar opinion stating that the sorcerer is merely disobedient unless he commits an act of apostasy in his magical practices e.g. prostrating to an idol or uttering partners to God, etc., or validates sorcery.

Ibn Ḥazm challenges the authenticity of the above tradition (invoked by the Ḥanafis and Mālikis) accordingly he invokes the general denotations of the Qur'ānic and Prophetic texts that forbid executions of persons without tenacious and tenable reasons. He concludes that sorcery is a sinful act punishable by taʿzīr penalties, for the Prophet says, "No Muslim is to be executed unless he commits infidelity after being a believer, or adultery after (lawful) marriage, or for murdering (unjustly) another person".

As far as divination is concerned, the same disagreement as regards to sorcery applies, but the Ḥanafis add that if the diviner believes that he harnesses the devils and the occult spirits he is an apostate, inasmuch as occultism contravenes the Islamic dogmas that exclusively assign the unseen to God. The Zaydis hold that the professed sorcerer is an apostate who should be dealt with according to the rules of apostasy as far as repentance and penalty are concerned.

(ii) **Criminal intention**

Ibn Nujaym and others contend that Muslim jurists tacitly imply the knowledge of the apostate that what he commits is apostasy and recantation of Islam whether his act is embodied in an apparent sacrilegious act or a covert, clandestine belief. The ambit of intentional commission also extends to encompass the passive abstention from the performance of imperative religious obligations. But the minor issues of worship and law, when sustained by tenable or tenuous arguments cannot be held as apostasy since such people accept the tenors and ethos of Islamic beliefs. Therefore oblivious enunciations of words and sentences that
denote unbelief, and the narration of apostasy, or mere utterances of unbelief without conscious discernment of their meanings or when in a state of ecstasy, all these instances are excluded from the standard criminal act of recantation of Islam, because the intentional factor of wilful commission is obviously absent.144

Ibn Nujaym, Ibn Ḥazm, al-Nawawī, al-Shirāzī and other Shāfiʿis make stringent stipulations in this respect as they insist that it is not sufficient to do the act or say the words of apostasy, but such acts and words must be accompanied by the culprit’s wilful and voluntary consent of apostasy. They base this opinion on the Prophetic tradition "Deeds are (appraised and accountable) according to intentions, and everybody is to gain only what he intends..." So, if the person did not intend apostasy, then he does not incur it (though he might have been responsible for words or acts that ostensibly betoken apostasy).145

Nevertheless the multitude of Islamic legal views, typified by the Mālikis, Ḥanafis, Ḥanbalis and Zaydis, contend that it suffices that the person should wittingly commit (or omit) that is deemed as incontrovertible recantation of Islam, though he (or she) might not consciously have aimed at apostasy, as long as he acted intentionally in a way which is apparently indicative of apostasy.146

Furthermore, Ibn ʿAbdīn, Ibn al-Ḥumām and al-Bahūṭī maintain that the tenor of Islamic penal law invariably holds that even humoristic acts or utterances which denote apostasy e.g. prostration to an idol despite belief in God, though apostasy is not intended are regarded as genuine recantation of Islam (riddah). This is justified by the principle that Islamic penal law renders some salient signs as irrefutable tokens of apostasy, e.g. prostration to an idol (undoubtedly conduces apostasy because it implies tacit regression from Islam).147
It is appropriate to stress, at the threshold of this topic, the fact that all legal systems, irrespective of their diverse philosophical bases, tend to enact sanctions that regulate seditious armed rebellion perpetrated against the incumbent legitimate and constitutional ruler. It is acknowledged that such criminal act may aim not only at the alteration or deposing of the existing sovereign ruler, but also may often intend a wholesale change in the structural basis of government, society or beliefs. Therefore, it becomes clear that the law - or constitution - should enshrine specific sections that treat this very serious criminal act.

Most Islamic schools, except for the Ḥanafis, regulate the crime of baghy and, due to its tumultuous results, incorporates it in the realm of ḥudūd crimes and penalties. Thus including it with all the distinctive characteristics of ḥudūd i.e. no intercession or change of penalty is acceptable nor is any form of pardon or reconciliation (when the matter is referred to the Ḥānāfī or any legally competent court) admissible.¹⁴⁸

A. Textual Ban of Baghy

First: The Qur’ānic Texts

(a) "If two parties among the believers fall into a quarrel, make ye peace between them, but if one of them transgressed beyond bound against the other, then fight ye (all) against the one that transgresses, until it complies with the command of God. But if it complies, then make peace between them with justice and be fair; for God loves those who are fair (and just)." The believers are but a single brotherhood; so make peace and reconciliation between your two (contending) brothers, and fear Allāh, that ye may receive Mercy." (⁴⁹ : 9 - 10).
Commenting on these two verses, Ibn Kathīr says:

"The Qur'ān calls these two combating parties believers, so al-Bukhārī and others inferred that sin, however, great it may be, does not excommunicate the sinner from the circumference of Īmān (faith), not as the Khārijis and Mu'tazilites contend. Al-Bukhārī also narrates that the Prophet once said: "Surely my son-pointing to al-Ḥasan b. ʿAlī is a master (sayyid) and may God make him reconcile between two great belligerent parties (of Muslims)." This has happened because al-Ḥasan b. ʿAlī has reconciled between the ʿIrāqis and Syrians after the prolonged wars between them."

Ibn Kathīr, furthermore, narrates that Ḥaḍīm b. Ḥanbal, al-Bukhārī and Muslim report that a fight broke out between some Companions and hypocrites when the Prophet intended to visit Abdullah b. Abī Ubay. Subsequently those two verses were revealed. Also Saʿīd b. Jubayr reported that these verses were revealed on the occasion of the fighting that had erupted between the Aws and Khazraj in Medina.149

Moreover, Ibn Qudāmah al-Ḥanbalī commences his treatment of baghy crime by these two Qur'ānic verses, where he comments that five principles could be derived from them, namely:-

1. The perpetrators of baghy crime are still regarded as Muslims as the text expressly calls them muʾminīn (believers).
2. That they should be fought.
3. This antecedent rule expires when the bughāt cease their armed schism.
4. They are not responsible for what they had damaged during their armed schism (baghy).
5. The Qur'ānic text indicates the necessity of fighting whoever-withholds a due legitimate right.150
"O, ye who believe, obey God and obey the Messenger, and those charged with authority (ulū al-amr) among you. If ye differ in anything among yourselves, refer it to God and His Messenger if ye do believe in God and the Last Day that is best, and most suitable for final determination." (4:59)

"If any one contends with the Messenger, (Prophet) even after guidance has been plainly conveyed to him and follows a path other than that becoming to (men) of faith, We shall leave him in the path he has chosen, and land him in Hell - what an evil refuge." (4:115).

Secondly: The Sunnah

Al-Shawkānī, Ibn Ḥajar, Muslim and the multitude of traditionists narrate many Prophetic traditions that determine the importance of obedience to wali al-amr (supreme ruler or his deputies), and the fate that awaits those who disobey and fight the ruler e.g.:

(a) "Whoever heralds his allegiance to the ruler, he must obey him as much as he can, so if someone else came disputing (or fighting) the already sworn ruler, then kill the disputant (second claimant)." 151

(b) "Many ominous discords (among the nation) will happen. O, he who declares schism while my nation is united, put him to death whatever or whoever he is". Another version reads:
"Whoever comes to you while you are a one unit under one leader, wishing to split your unity or dissipate your power, you (collectively) are to put him to death". 152

(c) "That who observes from his amīr (ruler), an obscene or repugnant act (or behaviour), he should be patient; for, verily, whoever took a discordant path even with the smallest possible dissension (ṣhibr) and dies in
his discordant state, he would die in a state of ignorance."\(^{153}\)

(d) The Prophet exhorted his Companions (and those who follow them) to faithfully honour their undertaken pledges of allegiance to their rulers, for God will ask them about their conduct in their subjects' affairs. Thus banning any form of dissension or split among the nation.\(^{154}\)

(e) The Prophet said,
"The best of your leaders (a'immatikum) are those whom you love and who love you and whom you pray for (their well-being and happy ending) and who do so to you. But the worst of your leaders are those who hate you and whom you hate, and who imprecate you and whom you imprecate."

<Awf b. Mālik said,
"We asked the Prophet: 'Then should not we fight them (the worst of your leaders)?' The Prophet replied: 'No, since they perform prayers amongst you (as a sign of obedience to God and submission to Islamic enjoins).'"

He further elaborates and warns against any form of dissensions vis-à-vis the rulers, saying:
"O, whoever is brought under the command of a ruler who disobeys God in some conduct, the subject should hate (by heart only) that disobedience, without disavowing the allegiance vested in that ruler."\(^{155}\)

(f) Hudhayfah b. al-Yamān narrates a very threatening exhortation as the Prophet says:
"I portend that some of the forthcoming leaders would not adhere to my Sunnah (path) nor would they follow my righteous straightforward doctrines, and men, whose hearts are that of the devils in bodies of human beings, would emerge amongst your (communities)."

Hudhayfah, said, "Oh Messenger of God, what shall I do if I witnessed (such ominous tokens)?"
The Prophet replied:
"You hear and obey, even if your back is beaten, and your property is plundered, you are (exhorted) to listen and obey".\textsuperscript{156}

‘Ubādah b. Al-Ṣāmit reports that they undertook their pledge to the Prophet that they would listen and obey in all various circumstances of hardship and easy orders, in opulence and destitution and in total altruism (to Him) and that they would not combat or fight our rulers, except as when they see overt atheism or undisguised infidelity, to which they have a proof as God enjoins.\textsuperscript{157}

Finally Abū Dharr al-GhiffārĪ narrates that the Prophet once asked him,

"O, Abū Dharr, what would you do if you witnessed rulers who ban you from these (immense) booties?"

Abū Dharr replied:
"I swear by Him Who sent you with the Right (path) I would wage war against them and strenuously challenge them until I reach you (in the after-death)."

The Prophet said:
"Shall I show you what is far better than that? You hold fast to patience till you meet me (in the Hereafter)."\textsuperscript{158}

Al-Ṣan‘ānĪ narrates that the Prophet addressed Ibn Mas‘ūd saying, "Do you know, Ibn Umm ‘Abd, how God had ruled on those who commit baghy amongst this nation?" Ibn Mas‘ūd replied "God and his Prophet are the Most Knowledgeable!!" The Prophet said, "The injured culprit of baghy is not to be executed nor the captive, nor do the fleeing is to be followed, nor do their booties are to be divided or distributed."\textsuperscript{159}
B. Definition of Baghy (Armed Rebellion and Sedition)

Linguistically the Arabic word al-baghy is the verbal noun form of the verb baghā yabghīt, which means to 'seek' something or to 'want'. This denotation is numerously mentioned in the Qur'ān e.g.:

a. "Moses said 'That was what we were nabghīt (seeking after) ..." (18 : 64).

b. "But seek (ibtaghī) with (wealth) which God has bestowed on thee, the home of the Hereafter, nor forget thy portion in this world; but do thou good, as Allāh has been good to thee, and seek not (occasions for) mischief in the land for Allāh loves not those who do mischief." (28 : 77).

c. "He (Moses) said 'Shall I seek (abtaghī) for you a god other than (the true) God ..." (7 : 140) 160

However, traditionally the term baghā (sought), came to bear a specific and definite meaning that essentially denotes injustice and iniquitous demand, though linguistically the verb baghā can also accommodate the just 'demand', and this meaning is indicated in the following text:

"Say, the things that my Lord hath indeed forbidden are shameful deeds, whether open or secret, sins and trespasses against truth or reason ..." (7 : 33)161

So, due to the wide connotations of the Arabic verb baghā and its Qur'ānic and juristic implication Muslim jurists propound many legal definitions to the verb baghā in its verbal noun form i.e. baghy as follows:

a. The Mālikis define baghy as armed failure of obeying the legitimately installed Ṣmām, depending on, at least a wrong religious pretext. The Mālikis furthermore derive the particular penal definition of bughāt (plural of bāghī -
that who commits baghy) as: "the group of Muslims who dissented with Imam al-ażam (the supreme sovereign ruler) or his deputy, by omitting the performance or delivering of a due right." This also includes armed insurrection to oust the Imam.

b. The Hanafī definition of baghy is that it is the unlawful schismatic rebellion committed against the justly vested Imam. The Hanafis state that the mentioned schism is bi ghayr ḥagg (unlawful split), even if the schismatics have some sort of seductive interpretation of a particular doctrine upon which they rely for their dissension.

c. The Shāfīʿis give a wide definition of bughāt that encompasses both the Malikī and Hanafī definition as they hold that bughāt are

"a group of Muslims dissidents against the Imam who reject his constitutional authority, and cease to submit to him, or prevent him from performing a due duty (or right), provided that they have armed strength, juristic pretext and a leader whom they obey, even if the Imam is an unjust ruler." So, according to this wide definition the crime of baghy occurs when an armed group of Muslims, whose leader is obeyed, and who rely on an incorrect juristic pretext, refuse to obey the legitimate sovereign ruler any more.

d. The Ḥanbalis propounded a slightly different definition as they define bughāt (perpetrators of baghy) as:

"the armed group who challenges the incumbent Imam, though he may be an unjust ruler, depending (for their split) on a legally plausible pretext (taʾwilun sā'igh), though they may not have a powerful leader." e. The Zāhiris define baghy as "insurgence done against the legitimate Imam, depending on a wrong interpretation of
a religious principle or dissension for the sake of mundane booties."\textsuperscript{168}

f. The Zaydis generally argue with the antecedent juristic definitions as they stipulate that the crime of 

\textit{baghy} is manifest when: "an armed insurrection is staged against the legitimately vested \textit{Imām};" postulating that the Imām is incorrect, whereas the \textit{bughāt} are correct in the particular cause of their 

\textit{baghy}.

Modernist jurists generally endorse the above definitions especially that which stipulate the factor of forcible schism.\textsuperscript{169}

C. The Legal Status of Suppressing \textit{Bughāt} (Instigators of Sedition)

From the mentioned definitions of the crime of 

\textit{baghy} it becomes clear that it is a grave offence, therefore al-Shawkānī reports that fighting 

\textit{bughāt} is unanimously permissible, and moreover it may be, as al-Ramlī argues, an imperative and a bounden duty (\textit{wājib}), in as much as the Qur’ān says: "So fight that (party, sect, etc.) that unjustly dissents and wage war." He furthermore reports that the leaders of the Prophet’s family (\textit{al-citrāh}), unanimously rule that waging war against the 

\textit{bughāt} is far better than waging \textit{jihād} (holy wars against the unbelievers).\textsuperscript{170}
References: Chapter Four

4. A.I. Doī, Sharīʿah, The Islamic Law, pp.41 et seq.
14. Al-Mawardi, al-Aḥkām al-Sūltānīyyah, p.220, Also Ibn Nujaym al-Ḥanāfīs opinion is that ḥudūd comprise qīṣāṣ cases though he acknowledges the postulation that qīṣāṣ varies greatly from ḥudūd in some aspects as in their susceptibility to waiver, pardoning and intercession, Ibn Nujaym al-Ḥanāfī, al-Asbāb wa al-Wazāʾīr, p.494.

17. ibid.


34. For further historical accounts of the ban of wine-drinking see Ibn Kathīr, Tafsīr al-Qurʾān al-ʿAzīm,
55. ibid.
59. ibid.
64. ibid.
65. ibid.
67. ibid.
68. ibid.
72. ibid.
73. ibid.
75. ibid.
76. ibid.
77. ibid.
79. ibid.
80. ibid.
81. ibid.
82. ibid.
83. ibid.
84. ibid.
85. ibid.
86. ibid.
87. ibid.
88. ibid.
89. ibid.
90. ibid.
91. ibid.
92. ibid.
93. ibid.
94. ibid.
95. ibid.

95. ibid.
96. ibid.
97. ibid.
108. ibid.

113. ibid.


115. ibid.


159. ibid.


CHAPTER FIVE - THE EXCLUSIVE CHARACTERISTICS OF HUDUD PENALTIES IN ISLAM

Owing to the important and crucial role of the punishments of hudūd in Islamic criminal jurisprudence they were surrounded by many characteristics which are major guarantees as far as their applicability and consequences thereof are concerned.

Also, it is noticeable that qisās and diyah cases generally share in most of these characteristics due also to the gravity of their punishments and irreparable consequences when wrongly implemented. Therefore Umar b. Al-Khaṭṭāb was once reported to have said

"It is most preferable to me as a ruler (judge) to commit a mistake in pardoning the (accused) person, than to commit a mistake in punishing him".1

1. The Limit of Punishment in Hudūd and Qisās or Diyah Cases

In all cases of hudūd, qisās and diyah we find that the legal Islamic punishment is previously fixed by clear Qur’ānic texts and Prophetic traditions. For example in the crime of theft when legally proved there will be no maximum or minimum levels between which the judge might manoeuvre; he only has one option i.e. the decision that the criminal’s right hand (palm) is to be amputated. This judicial adjudication is based on the following Qur’ānic text:

"As to the thief male or female; cut off his hands or her hands, a punishment by way of example, from God for their crime, and God is exalted in Power and Wisdom." (5:38)

The Sunnah, on the other hand, had construed the above Qur’ānic text by the practical application as in the case of
al-Makhzûmîyyah who stole and the Prophet ordered the amputation of her right palm.  

Also in cases of adultery and fornication when proved the qâdi (judge) only examines the pre-requisites of crime and evidence and the non-existence of any shubhah (doubtful circumstances which render punishment invalid), then he can adjudicate either stoning of the culprit if he is muhsan (married), or a hundred lashes if he or she is a free non-married Muslim person (bikr).

These punishments as a principal rule had to be either wholly executed or altogether waived due to lack of juristic evidence or due to any other authentic reason. The limits of punishments in adultery (zina) are specified by both Qurîân and Sunnah as shown below:

A. The Qurîân prescribed the limit of the penalty, of a non-married adulterer and adulteress (bearing in mind that no punishment whatsoever will be implemented unless the accused is fully susceptible to it as will be shown below).

"The woman and the man guilty of fornication, flog each one of them with a hundred stripes; let not compassion move you in their case, in a matter prescribed by God, if you believe in God and the Last Day and let a party of believers witness their punishment." (24:2)

B. The Prophet enacted the punishment in respect to the married adulterer or adulteress as He says:

"Take from me. Accept from me, Undoubtedly God has now shown path for them (adulterers). For unmarried persons (guilty of fornication) the punishment is one hundred lashes and an exile for one year. For married adulterers (muhsan), it is one hundred lashes and stoning to death."  

*Abd al-Rahmân I. Dol comments here saying,
"The above hadith shows that if the offender is not married he should be given 100 lashes and should be exiled from his home for a period of one year. If the offender is married he should be given 100 lashes and should also be stoned to death. But some jurists are of the view that an offender is going to be stoned to death, there is no need to punish him with 100 lashes as the Prophet put to death two Jewish adulterers and did not punish them with lashes".4

As far as the legitimacy of the punishments of adultery and fornication are concerned, it has been established according to Muslim schools that they are: stoning for the married adulterer (al-muhsan) and one hundred lashes for the unmarried free adulterer (al-bikr). In order to minimize any opposition to this, it is reported that Ibn"Abbās, the eminent Companion of the Prophet and the famous exegete, said:

"Umar said: "I am afraid that after a long time has passed, people may say, "We do not find the verses of rajm (stoning to death), in the Book of God, and consequently they may go astray by leaving an obligation that God has revealed. Lo! I confirm that the penalty of rajm be inflicted on him who commits illegal sexual intercourse if he is already married and the crime is proved by witnesses or pregnancy or confession"."5

In the fields of gisās and diyah we can also trace the consistency of the doctrine that they have a fixed level of punishment and therefore the judge can never rule otherwise. He just has to verify all the required pre-requisites and the absence of any legal impediments in respect to punishment then leave it to the plaintiff or his family (in cases of murder) to choose gisās or diyah or an amicable settlement (sulh). However many jurists hold that in cases where it becomes impossible to implement gisās or in cases
where the plaintiff voluntarily chooses diyah instead of the
due gisās the judge can, nevertheless, adjudicate a taʿzīr
punishment on behalf of the society, because each crime
generates a right of punishment on behalf of the society
which is different and depends on the gravity of the crime
committed.  

Notwithstanding the rigidity of the doctrine of a one-level
punishment in hudūd and gisās punishments, it is utterly
reversed in cases of taʿzīr (discretionary punishments)
since the nature of the crimes of taʿzīr is quite different
from that of hudūd and gisās or diyah. On the other hand
the general tendency of Islamic criminal policy acknowledges
the fact that incidents and events are infinite but the
Divine Revelation has ceased to descend with the death of
the Prophet, therefore solutions must be found for this
ostensible dilemma. Therefore as a matter of principle the
Sharīʿah assigned the power of legislating against crimes
and punishing to wali al-amr (the ruler), to regulate this
segment of the penal policy bearing in mind all the
surrounding environments and circumstance of the crime,
offender, motives, social pressures, values, etc. Hence,
it is possible to enact two or more penalties for one crime,
besides each penalty can fluctuate between two or more
levels, and it is up to the court to choose the most
appropriate penalty that achieves the aims of the criminal
policies set by the Sharīʿah.

Also in this context, pardon, waiver and mitigation are
legally admissible since their application guarantees the
aim of rectifying the culprit and protecting society.

However, the judge in the offences of taʿzīr also has to
observe the limits set in the statutes and therefore he does
not enjoy arbitrary powers even in the flexible realm of
taʿzīr. Because the judge and the legislature are legally
restricted by the criterion of public interest which makes
it imperative upon the public, courts and the legislature to
observe its implication otherwise any enactment or policy
which does not conform with the public interest is regarded as invalid (bāṭil).  

2. **Safeguards in Hudūd and Qisās**

The ostensible severity of the punishment of hudūd and qisās has been balanced and qualified by the numerous stipulations posed by the criminal jurisprudence in order to narrow their application.

Also the means of evidence required in this context are limited and rigorously elaborated to secure the maximum caution and obviation of undue punishment (since some of penalties, when inflicted, are beyond redemption). Besides, the Islamic doctrines render any *shubhah* (doubtful circumstances) as propitious signs on behalf of the accused and it must be elucidated as a matter of principle. Therefore Muslim jurists generally agree that hudūd and qisās punishments are legally relinquishable by way of credible *shubuhāt* (plural of *shubhah*).

Therefore it seems appropriate to devote some discussion to the issue of safeguards in the realm of hudūd and qisās and particularly to the concept of *shubhah* as being an effective legal impediment of the penalties *hadd* and qisās.

3. **Shubhah (Doubtful Circumstances) - and the Impediment of Hudūd and Qisās Punishments**

The doctrine upon which the basis of this principle is based is ascribed to the Prophet who acknowledges the doctrine in his famous *ḥadīth* -

"Remit (idrāʿ) the hudūd punishments from Muslims as much as you can, because, verily, that the Imam (judge) should commit mistakes in pardoning (the punishment) is indeed far better than that he should commit a mistake in enforcing the penalty."  

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Due to the acceptance of the above tradition and its various versions, most of the classical Muslim scholars have adopted and applied it with its wider implications, particularly the Ḥanafis and Shāfiʿis, who drew up regulations based on this doctrine and classified all the relevant subjects pertaining to it, as will be shown below.11

However, the Ḥāhiris categorically reject this doctrine of shubuhāt (doubtful circumstances), as they deny the authenticity of the above tradition.12

On the other hand, the shubhah in the realm of hudūd and qisāṣ is considered as a living reality by the majority of Muslim jurists, therefore it plays an important role in the evidence and refutations of these crimes and their punishments. No court can ignore the investigation of shubhah in a very thorough manner to obviate any possibility of miscarriage of justice, particularly in these serious cases. Nevertheless, the subsistence of shubhah does not whatsoever preclude the court from inflicting any other lesser penalty as tażżīr which accommodates all cases where hudūd and qisāṣ penalties are juristically inapplicable.13

A. Definition of Shubhah

The Arabic connotation of the word shubhah implies doubtfulness and suspicion.

Technically al-Kamāl b. Ḥumām defines it as "that which resembles a firm fact whereas it is not firm" (mā yashbaha al-thābit wa laysa bi-thābit).14

Also, "It is the existence of the valid evidence in an unclear form causes the default of its real binding juristic rule".15
B. Grades of Shubhah

All the Islamic schools of law accept the legal existence of the doctrine of *shubhah*, apart from the Zähiris, but they vary in respect to its grades, classifications and applications. The Shāfiʿis and Ḥanafis have made a major contribution as they have systematically divided and studied each case of *shubhah*, whereas the Mālikis and Ḥanbalis have just contented themselves by propounding numerous instances of *shubuḥāt* (plural of *shubhah*). So it might be appropriate to analyse the Shāfiʿis’ systematization and afterwards to address that of the Ḥanafis with relevant comparison and criticism when appropriate.

(i) The Shāfiʿi Classification of Shubuḥāt

The Shāfiʿis have classified *shubhah* into three broad grades:–

(a) *Shubhah fi al-mahal* (‘suspicious circumstances concerning the place of act.’) They propound many examples to elucidate their concept. To indicate this kind of *shubhah* the jurists put forward arguments about cases which, in fact, have nothing to do with crimes which would involve *ḥadd* penalties. In the cases of sexual intercourse with a menstruating wife, or when she is fasting or in the case of anal intercourse with wife, the suspicion revolves around the place where the act (of intercourse) took place. The wife is regarded as a legitimate place for the husband to exercise his imprescriptible right of conjugal intercourse (being a right of the connubial relationship). But, the husband does not enjoy the right when his wife is fasting, menstruating or in her anus. Notwithstanding this fact, his contractual right embodied in marriage, constitute a *shubhah* (suspicion) which necessitates the waiver of the punishment in those cases whether or not the husband believes in the validity of his aforesaid sexual intercourse. This justification is not based on his belief
or conjecture but rather on the place of the act, namely his wife and his legitimate right over it.

(b) Shubhah fi al-fā'il (suspicion with regard to the actor or doer). The Shāfi‘is explain this shubhah by giving the case where a man exercises sexual intercourse with a woman ceremonially presented to him as his legitimate wife (as an act of consummation of marriage); and then later on discovers that she is not his legal wife. Hence no hadd can be adjudicated since the man wrongly believed the existence of a legitimate right in his act. However, if he in the above example, knowingly acts the way he did, there would be no shubhah and consequently he is susceptible to the hadd penalty.¹⁶

(c) Shubhah fi al-jihah (suspicion about the validity or invalidity of some aspects of the act). The Shāfi‘is explain this case of shubhah as being essentially caused by the differences in the legitimacy and illegitimacy of the act in issue. So any case of juristic differences and legal inconsistencies is deemed as a legal shubhah in respect of the subject in issue. The jurists adduce the following examples to illustrate this grade of shubhah.

a. Abū Ḥanīfah validates a marriage contract concluded without the consent of the wali (legal guardian of the bride).¹⁷
b. Mālik also validates marriage contracts concluded without the presence of witnesses.
c. Ibn ʿAbbās, said at one time, that he regarded nikah al-mut'ah (temporary marriage) as valid.¹⁸

Therefore, any occurrence of sexual intercourse in the above examples cannot be regarded as zina (illicit sexual intercourse). Therefore, the perpetrator will not be legally liable to the hadd of adultery due to the presence of a valid shubhah.
Because the existing juristic dissension in this context is considered as a valid shubhah capable of causing the hadd punishment of zina to be waived, even though the offender might fully know the illegitimacy of his act in the given circumstances, because this knowledge bears no significance in this context since the Muslim jurists differ and vigorously contest the legitimacy and illegitimacy of the act.19

However, the Jaʿfarites dispute the Shāfīʿis’ criteria in penalizing or pardoning in the above cases where the culprit knows the invalidity of his act. Therefore they rule that he must be liable to hadd punishment and that the existence of juristic differences should not deter courts from the implementation of due hadd when all the pre-requisites are satisfied and no legal impediments exist.20

(ii) The Ḥanafis Classification of Shubuhāt

The major classification of the Ḥanafis is a two-fold one:-

(a) Shubhah fī al-fiʿl. Al-Kamāl b. al-Humām (d. 681 A.H.) holds that this shubhah has other names i.e. shubhat ishtibāḥ (suspicion of similitude).21

This particular case of shubhah only pertains to someone who becomes perplexed as far as the validity and invalidity of the act are concerned where there is no precise textual proof that indicates the validity of the act in issue. Subsequently, it is the exiguous evidence which is wrongly thought to be true and reliable; e.g. when a man exercises sexual intercourse with his triply-repudiated wife before the expiration of her āiddah (waiting period prescribed in cases of divorce during which the divorced wife is still legally considered as in a state of coverture i.e. a legal wife).

Hence the Ḥanafis stipulate the non-existence of any invalidating evidence whatsoever, and that the offender
believes in the legitimacy of his act. So, if there exists another evidence which determines the illegitimacy of his act or that the offender does not believe in the invalidity of his act, then the Hanafi unanimously nullify the shubhah rendering the offender liable to the hadd punishment.\textsuperscript{22}

Worth mentioning is the fact that the Hanafi have enumerated cases of shubhah in fi'il as being eight including the above mentioned one. Al-Kasani (d. 587 A.H.) and al-Haskafi enumerate them, as: adultery with slave-girl of father or mother or of his wife, or adultery with his triple-divorced wife since she is still in 'iddah and adultery with 'umm al-walad (mother of her master’s son) still in her 'iddah, a slave-man who commits sexual intercourse with his master’s slave woman, and the mortgaged slave-girl if sexually abused by the mortgagee.\textsuperscript{23}

However, the rest of Islamic schools of law differ vehemently with the Hanafi in this specific grade or type of shubhat al-fi'il; therefore they rule that the hadd punishment is due in all the cases mentioned by al-Kasani and al-Haskafi.\textsuperscript{24}

(b) Shubhah fî al-mahal. The Hanafi give two titles to this shubhah as: shubhah hukmiyyah (legal suspicion) or shubhat milk (suspicion of ownership).\textsuperscript{25}

In this respect the Hanafi stipulate that the shubhah must be generated by an injunction inherent in the general composition of Islamic Shar'Iah. They propound two texts in order to elucidate their juristic opinion e.g. The Qur’an explicitly rules that a thief must be punished by amputation (inflicted on his right palm as Sunnah rules) (5:38) at the time the Prophet once said "You and your money (to a questioner) are under the ownership of your father".\textsuperscript{26}

Ibn Abdîn authenticates this hadîth and heavily relies on its account.\textsuperscript{27}
With regard to these two texts al-Kasānī and many Ḥanafi jurists rule that the second text plays a vital role in respect to the application of the first text which determines the amputation penalty in cases of theft. But since the second text renders the son and his monetary valuables under the ownership of his father, so if this father stole his son’s money, the father would be stealing his own money (though the factor of ownership here is a nominal one and not intrinsic).

So, the Ḥanafis stubbornly hold that the shubhah of mahal (suspicion in place), exists whenever there is a legitimate evidence that nullifies the invalidity of the act in issue; irrespective of the culprit’s cognisance and conjecture. Consequently, it becomes the same whether he knows that he is stealing or not since the very illegitimacy (ḥurmah) is suspected due to the presence of the ambivalent text of validity.28

The Jaʿfarites also dissent with the Ḥanafis’ criterion referred to here and hold that the culprit must be punished by the hadd penalty in the above hypothesis if he confesses his cognisance of hurmah (invalidity).29

(c) Shubhat al-ṣagd (suspicion of the marriage contract). Al-Kasānī and al-Ḥaṣkafī hold that Abū Ḥanīfah had added a third type of shubhah as a doctrine, solely held by him, and contested by the rest of the Islamic scholars and even by Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī. All the classical Ḥanafī references mention that their Imām, Abū Ḥanīfah, nullifies any hadd punishment in cases of actual sexual intercourse exercised by a man as a consummation of marriage contract even if the bride is muḥarramah or rahim mahram (a woman perpetually rendered banned from marrying a relative specifically enumerated in the Qurʾān (4:23) and by Prophetic tradition such as “Fosterage bans from marriage what kindred does”).
Ibn ʿAbdīn (d. 1252 A.H.) further explains Abū Ḥanīfah’s contention saying that the marriage contract in this context is meant to be nominal and not a genuine one because such a marriage means that relationship, which seems to be a firm reality, really is not. But Abū Ḥanīfah, surprisingly, opposes the hadd penalty even though the culprit is fully cognisant of the legal ban of his act. However, even his closest disciples Abū Yusuf and al-Shaybānī disagreed with him and joined the majority of Muslim jurists who determined that this shubhah of ʿaqd is a genuine case of zina which presupposes the hadd punishment of adultery.30

It can be concluded that despite the Shāfiʿis and Ḥanafis enumerations of shubuhāt as well as the wide acceptance of the doctrine of nullification of hadd punishment by shubuhāt, there remain a great deal of controversy in respect of the realm of their applicability in criminal cases, particularly in cases of hudūd e.g. adultery, larceny, drunkenness, etc.

However, despite the above mentioned obstacles the application of the doctrine of "nullification of hudūd by shubuhāt" has many legal consequences which can be summarized in the following pages.

C. Consequences of Nullification of Hudūd by Shubuhāt

The consequences in this context vary from one case to another e.g. in some cases the application of the doctrine fully vindicates the accused and sets him free, whereas in some cases it mitigates the punishment or might lead to the prescription of a different punishment, namely a taʿzīr penalty.31

D. Cases of Full Vindication of the Accused

There are three cases where the accused is fully vindicated, due to the application of the doctrine of "nullification of hudūd by shubuhāt." These cases are as follows:
1. When the *shubhah* pertains to one of the major mainstays of the *hadd* crime in issue, for instance the criminal intention is a basic mainstay of any crime. Therefore when it is absolutely absent, then the accused must be acquitted instantaneously e.g. in cases when a man exercises sexual intercourse with a woman ceremonially presented to him as his bride.\(^{32}\)

Also this doctrine applies in cases where someone surreptitiously takes some money thinking that it is another's money and later on discovers that he had just taken his own money; hence no penalty can be imposed, because a vital constituent pillar of the crime in issue is missing i.e. that theft must be carried out vis-à-vis another's property.\(^{33}\)

2. When the *shubhah* exists in the applicability of the invalidating text which bans the act done by the accused. The famous examples for this case are:- marriages concluded without witnesses or guardian's consent or in cases of *mut'ah* (temporary marriage), hence the accused receives no *hadd*, nor a *tażir* punishment in his capacity as an adulterer. This is because Muslim authoritative jurists vary a great deal as to the validity and invalidity of these cases. Furthermore, this very juristic divergence connotes suspicion of the applicability of texts banning adultery in these cases. Accordingly, the accused must be vindicated and acquitted.\(^{34}\)

3. When the *shubhah* exists in the means of evidence intended to prove the *hadd* crime in issue, so if two persons presented their testimonies that the accused has drunk wine and then they retracted their testimony, and there was no other judicially acceptable means of evidence in this case, the court should forthwith waive the *hadd* punishment, because of the suspicion that the witnesses might be veracious in their subsequent retraction. Therefore the accused should be acquitted.

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Also, if someone who suffers from frequent fits of lunacy or mental derangement, and is accused of apostasy or theft, but if it could not be substantiated when he committed the *hadd* crime, in his lunatic periods or when he was fully sane, he must be acquitted and vindicated due to the suspicion involving the mainstay of criminal liability, namely the legal competence for receiving a legal penalty has become doubtful. Therefore no penalty should be administered.

However, in all the remaining cases where the *shubhah* does not lead to the acquittal and utter vindication of the accused, the court is entitled to impose another penalty which is mainly a *tażzīr* penalty. This case involves innumerable instances which give the impression that though the *hadd* or *qisas* penalties are rarely applicable, nevertheless the culprit rarely finds it easy to escape the *tażzīr* sanctions and penalties.

A practical application of the above mentioned fact is the case where the sole means of proof is confession which is retracted later on as in cases of *hudūd* crimes where retraction from confession is regarded as a legally admissible *shubhah* capable of causing the penalty to be waived. But in *qisas* and *diyah* cases such retraction bears no effect (due to the variance between God’s rights and the individuals’ rights).

So in cases where this retraction is effective - as in *hudūd* the accused would not be acquitted but would expect to have his original *hadd* punishment abrogated and substituted by a *tażzīr* penalty (which might involve imprisonment, fine or corporal punishment that corresponds with the felon’s criminality and danger to the community.)

The legal justification of differences between retraction of confession and retraction of testimony is that retraction from confession is capable of rendering the accused liable
to a penalty because normally a person does not confess to the commission of a crime that he did not perpetrate.

However, witnesses might often lie to the detriment of another person and maliciously attribute to him things he did not do. Therefore any subsequent retraction of their testimony is legally considered as a strong and effective *shubhah* as to the credibility of their former testimony. Therefore no penalty should be adjudicated and the accused should be acquitted forthwith.\(^{37}\)

This is a widely accepted doctrine within the Islamic schools of jurisprudence based on the principle that *hudūd* punishments should always be treated with great caution (*yuḥṭatu lahā*) On the other hand, *hugūq al-ṣibād* do not receive the same degree of caution. So retraction from confessions pertaining to them does not remove them as in cases of *gisās* for murder and all bodily injuries, as well as in the rest of homicidal cases.\(^{38}\)

\(\text{‘Amir, the former Egyptian high court judge, holds that if the confession was outside the court’s session and the judge is convinced or believes in the credibility of this confession, he can adjudicate a }\text{tażżūr penalty accordingly. However, if he suspects the authenticity of that confession he should accordingly acquit the accused. Most importantly if such a confession is proved to be extorted under duress, it will be ineffective, and subsequently no penalty will be determined.}^{39}\)

It can be concluded that if there are no adequate proofs in all cases of *hudūd* or if the *hadd* crime issue does not fulfil all the juristic pre-requisites, and, notwithstanding these factors, the judge believes in the actual occurrence of crime but by other means of evidence which are not as strong as the specifically required ones, he may adjudicate a lenient penalty less than the original *hadd* punishment. Hence we find a vast collection of instances where the
original ḥadd penalty is substituted by a ta’zīr penalty due to lack of adequate evidence e.g.

1. The father who steals his son’s money will receive a ta’zīr punishment instead of the ḥadd of theft.

2. The man who exercises anal sexual intercourse with his wife, ‘sodomy’.

3. A man guilty of incest (as when marrying (maḥārim)) and a man who hires a woman for adultery will not be punished according to Abū Ḥanīfah’s doctrine, whereas according to the majority opinion these two men would be punished by the ḥadd of adultery inasmuch as their acts are genuine adultery.

4. A man who steals a trivial property e.g. sand, or something which is originally unowned e.g. wild animals, will have his ḥadd quashed because of the shubhah of triviality or original non-ownership of hunted animals, but instead he will receive a ta’zīr punishment due to trespass and transgression.

5. A man who steals the mosque’s door will not be subject to ḥadd punishment (amputation of his right palm) in Abū Ḥanīfah’s doctrine based on non-ownership of that door. However, the Ja’farītes’ opposing legal concept holds the thief as responsible and consequently imposes ḥadd punishment due to the existence of the element of valid and authentic ownership of the door of the mosque.

6. If a suspected thief pleaded in court that he has not yet reached puberty and the court could not ascertain his puberty, then a ta’zīr punishment will be imposed if the theft is proved.

7. If the ḥadd accusation is substantiated solely by a confession which is later retracted, then a ta’zīr penalty
should be carried out due to the infringement of the law which is a sufficient legal pretext to punish the culprit.40

E. The Applicability of the Doctrine of Shubuhāt in Tażīr (Discretionary Penalties)

Abd al-Qādir Awdah (d.1954) maintains that

"Despite the legal restriction of the doctrine of nullification of hudūd and gisās penalties by shubuhāt, to these specific kinds of penalties, there is no legal impediment in respect to the application in tażīr realms, because the doctrine is originally innovated to achieve justice and the fulfilment of the accused persons' interests. Moreover, each impeached felon is in virtual need to these two vital factors irrespective of the grade of crime he is accused of."

He further suggests that the doctrine can be operable in the realms of tażīr in the three eventualities where it leads to the vindication and acquittal of the accused in cases of hudūd (as shown above). However, the doctrine cannot be applied in cases where a hadd is to be substituted by a tażīr penalty because the penalties of tażīr are not previously quantified as they were essentially left to the judicial discretionary powers. Furthermore, these penalties are relatively flexible and susceptible to all influences, whereas hudūd are rigid, severe and not susceptible to waiver save in cases of shubuhāt.41

F. The Doctrine of Shubuhāt and Positive Laws

Abd al-Azīz Āmir elaborates this sensitive topic in the positive laws and ultimately concludes that the positive criminal laws adopt the same approach and apply the precepts of shubuhāt though they do not use the same Islamic juristic terminology in this respect. The doctrine of interpreting suspicion on behalf of the accused, widely postulated in positive criminal laws is undoubtedly one of the
implications of *hudūd*'s recision by *shubuhāt*. He also concludes that the applications of the doctrine in the positive systems are innumerable e.g. if suspicion arises as to the existence of one of the requisites for the maximum penalty as in the case of larceny under duress, then the court should eliminate this requisite and deem it null and void and sentence the accused felon on the ground that he has just committed a normal theft, thus substantially mitigating the penalty.

Also if suspicion exists in the presence of the element of premeditation in cases of homicide, then the court simply alienates this crucial element and adjudicates as if this element is totally absent, which also results in a substantially reduced sentence if the crime in issue is legally proved.

Also, if suspicion arises in what might effect the description of the crime, then the description had to be abandoned for a lighter one, e.g. when suspicion arises as to the factor of intention in a case of unaccomplished murder (*shurūf fi al-qatl*), the court should try the case as "an incident of manslaughter" which provides substantial reduction of penalty and might allow the accused to escape severe punishment.\(^42\)

Furthermore, as *Abd al-‘Azīz ‘Āmir holds that the element of suspicion might involve the proof of one of the mainstays of the crime at issue. Then the court should vindicate the accused and set him free, e.g. if the court suspected the existence of the requisite of a surreptitious act in theft. In this case a major component of the crime has faltered due to the suspicion that encompassed it, hence the accused must be acquitted on the grounds of interpreting the aforesaid suspicion on his behalf.\(^43\)

These are major points of concurrence between the Islamic criminal doctrine and positive laws which give the impression that the concept of *shubhah* is a vital
constitutive part of any criminal proceedings in any legal system, so much so, no legal precepts have ever neglected tackling it. Even some penal codes enshrine this doctrine in their criminal codifications and judicial precedents.

However due to the lack of adequate Islamic codifications, it might be difficult to envisage the limits and practical applications of the doctrine. Nevertheless, the classical schools of Islamic law have invariably treated the doctrine of *shubuhāt* and have contented themselves by the mere enumeration of cases of rebuttals based on *shubuhāt*. Graphic examples are at hand in the realm of adultery and to some extent in theft cases.

Also, it can be concluded that the Islamic jurists’ main preoccupation has been the concept of justice which involves the obviation of undue punishment of an innocent person, therefore they fully applied the Prophetic tradition which incarnates the doctrine of *shubuhāt*, despite the Zāhirī’s schism in this context. However the Zāhirīs’ opinion is based on a technical dissension, i.e. they contest the authenticity of the tradition which is widely narrated by acknowledged traditionists. Also they were very stringent as far as the application of *ḥudūd* punishments is concerned therefore their consistent maxim is “no *ḥadd* should ever be proved nor quashed by *shubbah*” which leads to the same aims as the rest of the Muslim jurists who maintain that the means of evidence of *ḥudūd* are to be rigorously probed, and after that any acceptable *shubbah* (suspicion) must supersede any conviction; in other words, a thorough judicial inquisition should be undergone to find a credible reason that legally abrogates the pending *ḥadd* penalty. Therefore it could be said that the divergence between the Zāhirīs and the majority of jurists is a superficial one since the core of their criminal philosophy is in agreement with this particular subject."
References Chapter Five

18. Joseph Schacht, An Introduction to Islamic Law, pp.163, 301.


42. ʿAbd al-ʿAzīz ʿAbd al-ʿAzīz ʿAmīr, al-Taḍzīr, p.35.

43. ibid, Abū Zahrāh, al-Jarīmah, pp.61-97.

CHAPTER SIX - UNLAWFUL KILLING, CRIMES AGAINST BODIES, FOETUS AND TA-ZÍR

Muslim jurists and traditionists normally treat all crimes of murder, manslaughter and accidental killing as well as all the crimes committed against bodies and the foetus under the broad titles of jināyāt, jirāh or al-dimā."¹

The Ḥanafī approach is a typical one as regards this juristic phenomenon for they generally define jināyah as any illicit transgression perpetrated against persons, property or bodies. The Ḥanbalis also propound a similar definition of the legal term jināyah.²

The Mālikī School subsumes these crimes under the title of ḥākām al-dimā.³ It is also clear that this is a very important section of the Islamic criminal jurisprudence which is normally tackled under the heading of al-jināyāt or sometimes al-gisās. The term gisās which technically means equality in penalties in relation to intentional crimes against persons and bodies, is a crucial part of jināyāt. Therefore treatment will be made first to the crimes of murder, manslaughter and accidental killing and this in turn will include the all-important principles of gisās in murder cases, and then treatment will be made to crimes committed against bodies and the foetus which also include gisās rules in intentional injuries.⁴

1. The Crime of Unlawful Killing in Islamic Criminal Jurisprudence

This is a wide spectrum of Islamic criminal law which is directly influenced by Qurʾānic verses and Prophetic traditions. Muslim jurists agree as to the prohibition and abhorrence of unlawful killing in all its forms. They invoke the Qurʾān and Sunnah in respect of the human being life's sanctity and inviolability. Moreover al-ʿIzz b. ʿAbd al-Salām, Ibn al-Qayyim, al-Shaṭībī and many other leading jurists incorporate the maintenance of the human life within
the major five interests which are protected by clear provisions in the Qurʾān and Sunnah. Accordingly they hold that any aggression or violation of one of these interests will constitute a felony which is punishable by either a ḥadd, qisās or a tazār penalty.\footnote{1}

Ibn ʿArafah (716-802 H/1316-1400 C.E.), the prominent Mālikī jurist says, "The specialists of usūl al-fiqh (principles of jurisprudence) relate the consensus of religions as regards the maintenance of religion, minds, persons, chastity and properties."\footnote{6} Al-Ḥaṣkafī, from the Ḥanafī School, argues that qisās is parallel to ḥudūd penalties except in seven points, where disparities are noticeable. He enumerates these seven points as:

1. **Qisās** - as capital punishment can be decided by the evidence of the judge’s personal cognizance of the fact of murder.

2. The claim to qisās is inheritable - like any other private right.

3. Qisās can be remitted by the claimant even moments before execution takes place.

4. Lapse of time does not preclude the court from hearing the witnesses’ testimonies that pertain to qisās prosecutions and gadhāf (slander of unproved accusation of adultery).

5. Qisās indictments can be legally proved by the perceptible signs of the mute and deaf (witnesses).

6. Intercession and amicable mediations can be made to obviate qisās penalties (even right up to the last moments before execution takes place).

7. Qisās accusation must precede any claims (and testimonies) that are relevant to these cases. This restriction includes slanderous accusations of adultery gadhāf cases. Al-Ḥaṣkafī concludes that these seven distinctive characteristics of qisās are not operable in ḥudūd prosecutions except for gadhāf in certain circumstances. This is also advocated by Ibn Nujaym, who was also a very eminent Ḥanafī jurist.\footnote{7}
Ibn ʿAbdīn (d. 1255 A.H.) adds three more distinctions between *quisās* and *hudūd* prosecutions which are:

1. *Quisas* implementation presupposes the existence of the *Imām* (supreme ruler) or his authorized deputies (courts).
2. *Quisas* proved by a valid confession cannot be repealed if this confession is later disavowed.
3. The *quisās* penalty can be reduced by the claimant to specific amicable settlement that normally implies pecuniary reimbursement.

These three characteristics also do not operate in *hudūd* trials.⁸

A. The Qurʾānic Ban of Unlawful Killing

It is noticeable that the Qurʾān presents abundant texts totally prohibiting all forms of homicide—unwarrantable killings—besides demonstrating their respective penalties. The following texts prove this assertion:

(i) "O ye who believe the law of equality (*gisās*) is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman, but if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits, shall be in grave penalty. In the law of equality (*gisās*) there is (saving of) life to you, O ye men (people) of understanding." (2:178-179).

(ii) "We ordained therein for them *Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal*. But if anyone remits the retaliation by way of charity, it is an act of atonement for himself ... and if any fails to judge by
(the light of) what Allāh hath revealed they are (no better than) wrongdoers". (5 : 45).

These verses put the general judicial enactments of qisas penalties in regard to murder and injuries done to bodies. The Qurʾān also says:

"If a man kills a believer intentionally his recompense is Hell, to abide therein (forever) and the wrath and the curse of Allāh are upon him and a dreadful penalty is prepared for him". (4 : 93)

This verse demonstrates how horrible the penalty in the Hereafter for murder would be for the felon (who did not repent), which plays a crucial role in restraining felons from committing such a heinous crime.

(iii) "Nor take life - which Allāh hath made sacred - except for just cause; and if any one is slain wrongfully, we have given his heir authority (to demand qisas or to forgive) but let him not exceed bounds in the matter of taking life; for he is helped (by the law)." (17:33).

This is a verse revealed within a Meccan sūrah, in the accompaniment of numerous Divine Orders enjoining basic moralities and principles of conduct.

(iv) "Those who invoke not with Allāh, any other god, nor slay such life as Allāh has made sacred, except for just cause, nor commit fornication - and any that does this meets punishment." (25 : 68).

This is also a Meccan verse which mentions the virtues of the true faithful person. In the subsequent verse the dreadful penalty for those who commit murder, adultery or partnership to God is illustrated. This is also a strong deterrence against crimes against persons.
"Never should a believer kill a believer; but (if it so happens) by mistake, (compensation is due) ..." (4:92).

This is a Medīnan verse that also bans killing and furthermore illustrates the penalties that accrue in accidental killing where the culprit did not intend to kill his victim. Moreover, this verse enjoins expressly the doctrine of atonement in accidental killing which is an incontrovertible religious duty that is outside the judicial jurisdiction of courts, but falls within the personal accountability of the culprit before God.

Thus it could be said that murder and all forms of illegal killing are banned by God, and accordingly the culprit is liable to both temporal and religious punishments. This notion is emphasized in the above verses so much so it becomes one of the fundamental principles and dogmas of Islam.

B. The Ban on Unlawful Killing in the Sunnah

It is reported that the Prophet warned people from committing unlawful killing. He once enumerated seven major sins which He called al-mūbiqāt (the destructives); which include unlawful killing. He also bans judges from adjudicating execution except in three cases which also incorporate unlawful killing.

In His farewell pilgrimage the Prophet said:

"Surely your blood, your property and your chastity are sacrosanct to you just as this day (yawn sarafah), this month (dhū al-Hijjah) and this town (Mecca) are sacred."

Al-Suyūtī and al-Shawkānī relate that the Prophet said that "whoever murdered (maliciously) a musta‘man (non-Muslim visiting temporarily who has been granted security), he
would be deprived of Paradise (as a token of God's wrath and dissatisfaction)." \(^{12}\)

He also narrates that the Prophet has said, "Whoever murders a believer, God would not accept from him any deed or compensation". \(^{13}\) Moreover, traditionists report an enormous body of Prophetic traditions that absolutely ban unlawful killing and the severe penalties thereof. \(^{14}\)

C. **Classifications of Unlawful Killing in Islamic Criminal Law**

At the beginning of their treatment of the crimes and penalties of unlawful killing (homicide), Muslim jurists differentiate between lawful and unlawful killing. They maintain that lawful killing is that which is enjoined by legal sanctions such as judicial execution of murderers or apostates or married persons (muhsan) convicted of adultery; but unlawful killing is that which is not sustained nor warranted by any legal cause; it is rather a form of transgression. \(^{15}\)

Muhammad al-Shirbînî al-Khaṭîb al-Shâfi‘î (d. 1000 A.H.) elaborates on the classifications of killings stating that they can be classified into five categories: first wājib (obligatory), as in the case of the apostate who refused to recant his apostasy; or the harbi (the person from outside Islam) who refuses to comply with the covenant of amān (security) that permits him to enter dār al-Islām (the domain of Islam). The second category is harām (prohibited) as in the case of killing al-maṣūm (inviolable person e.g. a Muslim or dhimmi or musta‘man). The third category is mākrūh (disliked) as when a Muslim fighter kills his pagan relative in war, who did not slander God or the Prophet. The fourth category is mandūb (recommended) as when in the above case the pagan relative libels God or the Prophet it becomes recommended to kill him. The fifth category is mubah (permissible) which denotes permissible killing, as
when the ruler \((\text{amIr})\) - orders the execution of a hostile captive.\(^\text{16}\)

It is obvious that Muslim jurists exclude the lawful killing from the realm of the crimes of murder, manslaughter, and accidental killing. Therefore the discussion below will only be concerned with the categories of unlawful killing as well as their respective punishments; bearing in mind that the schools of Islamic jurisprudence differ in respect to the main grades of unlawful killing and accordingly they divide into the following main four categories concerning unlawful killings:

**First:** Mālik and Ibn Ḥazm al-Ẓāhirī and the Zaydis hold that unlawful killing is divided into only two grades: murder which is intentional killing \((\text{al-gatl al-camd})\) and unintentional or accidental killing \((\text{al-gatl al-khata})\).\(^\text{17}\)

Mālik said "There is no quasi-murder case, it is only murder and accidental killing, I do not know the quasi-murder \((\text{shibh al-camd})\)".\(^\text{18}\)

**Second:** The majority of Muslim jurists contend that there are three (broad) categories of illegal killing, i.e. intentional killing which is murder \((\text{al-gatl al-camd})\), quasi intentional killing \((\text{shibh al-camd})\) and accidental killing \((\text{al-gatl al-khata})\).\(^\text{19}\)

**Third:** Al-Kāsānī and some Ḥanbalī jurists contend that the categories of unlawful killing (homicide) are divisible to four main sections, namely: intentional killing which is murder, quasi-murder, accidental killing and quasi-accidental killing.\(^\text{20}\)

**Fourth:** Al-Nasafī, al-Qaddūrī, al-Marghīnānī, Abū Bakr al-Rāzī, (d. 370 A.H.) and other Ḥanafī jurists contend that the crimes of unlawful killing are divided into five main sections which include the previous four categories as well as the fifth category which is \(\text{al-gatl bi Sabab}\) (causal
killing) e.g. digging a well whereby someone falls in and consequently dies, and all the killings done by minors and lunatics are incorporated on second, third and forth categories.\(^21\) Ibn Ḥazm launches acrimonious attacks on the classifications as he only acknowledges murder and involuntary killing. He strenuously refutes the authenticity of the extra kinds of homicide.\(^22\) Nevertheless the second classification of unlawful killings can be regarded as the most expedient and tenable classification, because it encompasses all the major crimes of unlawful killing, besides the third classification i.e. the quasi-accidental killing and the fourth classification i.e. causal killing, can be readily accommodated within the cases of accidental killing (al-gatl al-khata\(^x\)). Accordingly, the exposition of the rules relevant to homicidal cases (unlawful killing) will be divided into three main sections i.e. murder (al-gatl al-camd), quasi murder (al-gatl shibhu al-camd), and accidental killing (al-gatl al-khata\(^x\)).

2. Crimes Committed Against Human Bodies not Involving Death (al-I:\textit{tida}’u Al\textit{a} m\textit{a} D\textit{UN} al-N\textit{af}a)

This category of criminal acts assumes a very important status in the Islamic criminal jurisprudence. This is attributed to the fact that intentional injuries committed against a living human being may lead to \textit{gig\text{"}as} or pecuniary compensation according to the law of equality. However, various juristic opinions were propounded in this realm by the Islamic schools of law to elaborate each school’s doctrine in regard to crime and penalty, hence cooccurrence and divergence in opinions and arguments are noticeable – as we have seen in the previous chapters.

It is worth mentioning that crimes against bodies are divisible into only two main categories, namely: intentional and unintentional felonies according to the Māliki and Ḥanafī opinions with the evident omission of the quasi - intentional medium category. But the Shāfi‘iis,
Hanbalis and Ibn Rushd acknowledge this medium stage of quasi-intentional injuries.23

The Textual Basis of this Crime:-

The Qurʾān sets the basic principles of crime and penalty in the ambit of transgression against bodies as it says:-

"We ordained therein for them: Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal, but if anyone remits the retaliation by way of charity, it is an act of atonement for himself ..." (5 : 45).

The Sunnah also regulates this sphere of felonies as the jurists inferred this fact from the famous Prophetic Decree sent to the people of Yaman by the Prophet’s messenger ʿAmr b. Ḥazm. The Prophet enacts the general canons of pecuniary reimbursements for homicide and bodily injuries in this kitāb (decree) whose authenticity Ibn ʿAbd al-Barr and al-Shaficī have accepted (in text and transmission). All the schools have framed their general juristic opinions according to this kitāb, and the way each school transmits and elucidates its terms and sanctions.24 Al-Shīrāzī al-Shaficī invokes both the Qurʾānic verse and Prophetic judgement as regards the legality of gīsās punishments for bodily transgressions.25

A. Divisions of Crimes against Bodies

These crimes cover a wide spectrum of illicit transgressions, but generally Islamic criminal jurisprudence as al-Kāsānī holds, classifies them into the following four main categories:

1. Amputation of limbs or organs (al-gatār).
2. Impairment or debilitation of organs (al-itlāf).
3. Head and face wounding (al-shiṣāj).
4. Bodily wounding (al-jirāh).26
However, a fifth category can be added, namely, bodily injuries that are not subsumable under the above main classes.27

It should be noted that all the mentioned categories of transgression against bodies can be perpetrated intentionally, quasi-intentionally or accidentally and accordingly variations in judicial procedures and decisions are envisageable.28

Some coverage will be made below to project the distinctive characteristics of the various injuries committed against bodies in intentional cases and accidental ones. But at the outset it may be most appropriate to make some definition of the mentioned classes of transgression in order to render it easier to distinguish between them and their ensuing punishments.

**Amputation of Limbs or Organs (al-Qat')**

The unanimous Islamic juristic opinion in this context is that amputation of limbs constitutes a serious crime punishable by *gisas* in intentional cases and when all requisites are precisely fulfilled.29

However, jurists in various schools adduce specific examples of these categories as they maintain that the amputation can be perpetrated against hands, legs, nose, penis, ears, lips, rupture of eyes, breaking of teeth, cutting off eye-brows, or any amputation of an exterior limb.30

**Total or Partial Impairment of a Limb without Amputating it (Idhhab al-Manfa'ah)**

This class spans the various faculties of the body, both limbs and senses. Therefore any total or partial enervation of any sense constitutes a serious crime. Muslim jurists scrupulously enumerate crimes in this
perimeter as including total or partial enervation of audition, vision, speech, smell, taste, the ability to practise sexual intercourse, or conception of embryos, walking or usage of hand, mental faculty, the colour of teeth or any envisageable felony against a certain faculty, beauty or power of a certain limb.  

(iii) **Head and Face Wounding (al-Shijāj)**

The prevalent opinion in Islamic criminal jurisprudence is that the term *al-shijāj* is exclusively confined to all wounds committed against the head or face of a living human being excluding the removal of or damage to any of them which comes under the two previous categories.

Furthermore, minor incongruities occurred between the Islamic schools in respect of the specific enumeration or number of *al-shijāj*. Al-Kāsānī, al-Dardīr, al-Shīrāzī and Ibn Qudāmah adduce the various schools’ tables of *al-shijāj* as follows (bearing in mind that the Ḥanafīs sort out these wounds into eleven kinds, whereas the Mālikis, Shāfīʿis and Ḥanbalis hold that they are only ten wounds):

1. **Al-khārisah**
   It is the head or face wound that cuts the skin but no blood flows.

2. **Al-dāmiṣah**
   It is that wound that incises the skin - of head or face, so that while blood appears, it does not flow. It resembles the tears in the eyes without flowing on the cheeks.

3. **Al-dāmiyyah**
   The wound that causes the blood to flow.

4. **Al-bādisah**
   That wound which reaches the flesh and cuts it.
5. **Al-mutalāhimah**
It is that wound that goes deeper than the bādi'ah in the flesh.

6. **Al-simḥāq**
Al-simḥāq is the name of the fragile membrane that separates bones from flesh, accordingly this wound cuts the flesh revealing this fragile cover.

7. **Al-muwaddihah**
It is deeper than the former one, because it cuts both flesh, skin and the fragile cover of the bone and exposes the bone when this wounding takes place. It derives its name from the verb waddaha (to manifest (or expose) to be seen).

8. **Al-hāshimah**
That wound that fractures the bone (but not moving it from its place). It also derives its name from the verb yuḥashshimu (to fracture and break e.g. bones).

9. **Al-munaqqilah**
It is more serious than the hāshimah, for it fractures the bone and moves it from its place. Likewise its derivative is nagala - to move.

10. **Al-āmmah**
It is that head-wound that reaches umm al-dimāgh which is the slender membrane that protects and contains the brain. But al-āmmah wound should not rupture this brain-membrane.

11. **Al-dāmīghah**
It is deeper than al-āmmah, because al-dāmīghah penetrates the fragile brain-membrane and reaches the brain itself.33

However, al-Ṭarābulṣī, the authoritative Ḥanafī jurist maintains that al-Shaybānī normally excludes the eleventh kind of head wound (i.e. al-dāmīghah) inasmuch as it precipitates death, as it ruptures the brain membrane and
reaches the brain itself. Thus al-Ṭarābulṣi considers al-shījāj as only ten kinds, whereby he solves the apparent differences between the Ḥanafīs and the rest of schools.34

Ibn al-Shuhnah propounds identical doctrine as regards the omission of al-dāmīghah.35 This Ḥanafī classification may be traced back to al-Marghīnānī (d. 593 A.H.) who had preceded both al-Ṭarābulṣi and Ibn al-Shuhnah in maintaining that al-shījāj are only ten and not eleven (as al-Kāsānī holds).36

This is the Ḥanafīs general table of head and face wound which is accepted by the rest of schools except that the Shāfīʿis and Ḥanbalis omit the second wound, namely, al-dāmīghah but sanction the other ten.

Ibn ʿAbd al-Barr (from the Mālikī school) expounds the same Ḥanafī classification.37 The rest of scholars accept the general tenor of this Ḥanafī approach.38

The Mālikis generally agree with the Ḥanafī classification, except that they omit al-hāshimah from the Ḥanafī table and subsume it under the bodily-wounds al-jirāḥ, not al-shījāj - head and face-wounds.39

(iv) al-Jirāḥ

Wounds inflicted on the body with the exclusion of head and face wounds - mentioned above. These bodily-wounds are classified by al-Kāsānī into two main sections. Jaʿifah and ghayr jaʿifah.40 He holds that the jaʿifah is that wound that penetrates the chest (thorax) cavity or the abdominal cavity (jawf), whether the wounding occurred upon the thorax, abdomen, back sides, throat, breast or via the anus.41

Ghayr jaʿifah wounds encompass all wounds that are not as deep as jaʿifah. So, they should not reach the thorax or abdominal cavities (jawf).42
(v) Wounds not Incorporated within the Aforesaid Four Classes

This class, practically, spans a wide range of transgressions committed on bodies. But such transgressions should not induce amputation of a limb or impairment of a limb's use nor should it lead to a head or face wound or jāfiḥ or na-'ifah wound. So such transgressions must not lead to a scar, or a trace which cannot be legally considered as head-wound or bodily-wound.43

B. Intentional Transgression on Bodies

The factor of intentional transgression on the body of a living human being may be considered present in all the above mentioned categories. It is generally defined as the cases where the felon intentionally assaults the victim to cause him a bodily injury.44

Accordingly, it could be said that in the realm of intentional bodily injuries two constituent elements must be present in order to hold the perpetrator fully amenable to the ensuing due gisās penalty. These elements are:

(i) An illicit act inflicted on the victim's body or harming its safety, and
(ii) That such an act should be premeditated.45

It might be appropriate to highlight these two crucial elements in an attempt to distinguish the intentional illicit transgressions in this circumference from the rest, particularly when we put into consideration that these particular intentional injuries may lead to gisās penalties which involve equal bodily injuries to be inflicted on the perpetrator's body as a recoupment of injury already done by him.
An Illicit Act is Inflicted on the Victim's Body

Muslim jurists do not stipulate a specific type of act in this context. They just make it necessary that the culprit should perpetrate a harmful, injurious act that causes damage or detriment to the victim's body. This involves all sorts of beating, shooting, injuring, pressing, squeezing or suffocating, etc. Also the general tenor of Islamic criminal law does not necessitate certain instruments or methods to accomplish any crime committed against bodies.

However, some Shafiis, Hanbalis and Ibn Rushd hold that similar to the crimes of homicide, crimes against bodies include a medium grade between intentional and accidental transgressions. Accordingly, they maintain the same gauge or standard that distinguishes between what is 'amd - intentional act, and what is quasi - intentional shibh 'amd act. Hence they argue that intentional commissions of bodily harm and injuries are those acts or methods that normally and preponderately induce the result.

An example is set here to illustrate this principle. If someone hits another with a very small piece of stone and causes a muwaddihah (a wound which reveals the bone), the case would be regarded as quasi - intentional shibh al-'amd wounding, because such a piece of stone does not preponderately cause such a wound. Also if someone slapped another on the head and caused it to swell and the skin to split as muwaddihah wound, it would be deemed as quasi - intentional injury in the Shafi school, because such a slap is not likely to cause the swelling or manifestation of bones.

But Muslim jurists who endorse the medium stage (i.e. quasi - intentional injuries) differ in their juristic assessments of some injuries. Ibn Rushd adduces the case of a slap on the cheek that ruptures the eye as an example of quasi -
intentional injuries (for a slap does not predominantly rupture the eye), whereas the Mālikis and al-Shāfiʿīs hold that such a slap is a genuine intentional injury (capable of leading to a gisās sentence), for they argue that slapping predominantly leads to eye-rupture.48

Moreover, transgression can be fulfilled by a direct or indirect act, e.g. a slap on the face or a hit with a stick or causing the victim to stumble over a clandestine barrier that was intentionally put in his way. Also, immaterial acts have the same juristic weight such as causing panic, convulsion or distress that motivates the victim to flee or fall and subsequently injures himself. If someone pulls a sword and rushes towards another who panicked and fled, but fell and broke his hand, the former would be responsible for the result incurred by the fleeing victim.

Muslim jurists stipulate ālimāt al-majnūnā alayhi (the inviolability of the victim) on the same basis they elaborated in homicidal cases. Accordingly, the bodily transgressions are not envisageable vis-à-vis, an apostate al-harbī, and their like.49

Also, the act of transgression should not lead to death, otherwise the case would be judicially tried (investigated) as murder, or quasi-murder.50

(ii) The Pernicious Act should be Intentional

The Muslim jurists repeatedly use the term āudwān (intentional transgression), to distinguish between intentional and accidental harm in both homicidal and bodily-injury crimes. On the other hand, this constituent component of the illicit act exonerates some particular persons, namely; the lunatics, juveniles and the coerced, and their like, whose criminal intentions are drastically impaired due to lunacy, juvenility and coercion.
Otherwise the felon would be liable to all the likely consequences of his criminal act even though he might not have wished them. The prevalent term relevantly used by the classical jurists is *al-sirāyah* (the ultimate injury arising from a bodily injury). Consequently they hold that no legal proceedings or claims should be initiated until the ultimate nature of the injury is known. So, they hold the perpetrator liable to the final result of his act, bearing in mind the instruments and methods used.\(^{51}\)

Mālik expressly rules that if one stroke caused a head wound and the depletion of vision and audition (or mental faculty), the felon's *āqilah* is to pay two full *diyahs* besides the wound's *diyah* (*arsh*). Thus the penalty is to be multiplied in conformity with the final state of the harm inflicted by the offender.\(^{52}\)

C. **Accidental Bodily Injuries**

Accidental injuries inflicted on the body of living human beings constitute the largest segment of bodily injuries. Therefore, the burden of proof as well as the judicial sentences, here, are much more lenient than in cases of premeditated injuries.

D. **Penalties of Bodily Transgressions**

The penalties of bodily transgressions, as Ibn Rushd and others hold, include *qisās* - in intentional offences when all requisites are fulfilled, and *arsh* (pecuniary compensation) and *tażīr* (discretionary penalty).\(^{53}\)

I. **The First Penalty (Qisās)**

*Qisās* being the legal equal penalty for the offence committed on a living human body is exclusively confined to the intentional transgressions. Accordingly, the courts exclude this punishment in the quasi-intentional and
accidental misdemeanours as well as when there is tenable suspicions in the intentional bodily injuries.

Ibn Rushd (d. 590 A.H.) enumerates the outlines and requisites of *gisās* in cases of bodily injuries as including *al-majrūh* (the victim), and *al-jāriḥ* (the offender), and *al-jarh* (the offence). Hence the offender should be a legally responsible person (*mukallaf*) which entails that he must be proved to be sane, mature and under no duress.

Besides, the injured victim should be equal to his assailant in terms of religion and liberty. Moreover, the offence should be an intentional wilful act regardless of its particular nature or the method used to achieve it. So no *gisās* whatsoever can be ruled if either of the above requisites is lacking or becomes dubious. Ibn Rushd propounds various disparate juristic views pertaining to the aforesaid main requisites of *gisās*.54

Ibn Qudāmah (d.620 A.H.) and a considerable number of classical and late jurists generally accept Ibn Rushd’s outlines of *gisās* requisites in bodily injuries. However, and as a matter of principle, the *salāmah* - safety of the felon as far as the execution of the parallel injury is concerned, is an absolute requisite of carrying out this very penalty. In other words, if it becomes dubious that the due *gisās* penalty cannot be implemented safely or that it may lead to serious results, then this legal penalty spontaneously lapses. The element of *udwān* (intentional transgression), is unanimously agreed upon as well as the requisite of the criminal responsibility of the felon.55

Al-Kāsānī expounds the Ḥanafī requirements of *gisās* in bodily injuries as being compatible with those required for *gisās* in murder cases. However, he adds some particular requisites as being indispensible in *gisās* ruling for bodily injuries which can be recapitulated as follows:
1. Equality between injured limbs and their counterparts in the felon’s body, in terms of their functions and pecuniary values (arsh).

2. Feasibility of implementing the penalty (without exposing the culprit to unwarrantable peril or damage). So, as mentioned above, the safety (al-salāmah) of the culprit when it becomes doubtful is regarded as preclusive cause of gisās in bodily injuries.

3. The verification of the freedom of both parties (the victim and the offerer) and whether male or female.

Accordingly, the Ḥanafis preclude gisās for bodily injuries when the litigant parties are from different groups in respect to sex and freedom.\(^56\)

This Ḥanafī approach was controversial since it varies a great deal from their principles of gisās for murder cases as they apply this penalty for most murder cases inasmuch as they don’t stipulate equality as regards religion, sex or liberty. The Shāfīis, though they accept the above requisites, nevertheless preclude gisās for bodily injuries that are not deep enough to reach the bone, and those head and face wounds which are too deep and fatal to be punished for by their equivalent ones (because as they maintain in the mentioned cases, the safety of the felon cannot be guaranteed).\(^57\)

The Zaydis juristic treatment of the subject of safety and the feasibility of measuring the wound is generally compatible with the rest of schools.\(^58\)

Thus, all schools stipulate the non-existence of any preclusive cause of gisās, besides the fulfilment of all the prementioned requisites. So naturally, we are to expect a miscellaneous group of stipulations and preclusions as far as the applicability of gisās for bodily injuries is concerned.
Nevertheless, the essential legal impediments of qisās in this context can be academically divided into two major sections: A. general impediments applicable to both the homicidal and bodily offences and, B. particular impediments exclusively applicable to bodily intentional offences.⁵⁹

E. General Impediments of Qisāṣ Penalty

These preclusive causes in turn can be summarised into the following six causes:

(i) **Paternity of the Offender**

The unanimously endorsed opinion is that in cases where the offender is the parent of the victim, no qisāṣ penalty can be implemented. This rule comprehends all cases of murder and bodily transgressions and all parents (or grandparents or great grandparents, etc.) and their progeny (whether grandchildren or great grandchildren, etc.). This principle is based on the Prophetic tradition:

"No father (parent) is to be punished according to qisāṣ rules in murdering his son."⁶⁰

(ii) **Inequality between Offender and Victim**

Muslim scholars differ as to the specific elements of equality in cases of qisāṣ penalties. The majority of jurists, namely the Mālikis, Zaydis, Shāfīis and Ḥanbalis contend that equality comprehends both Islam and liberty. Accordingly they insist that in murder cases the victim should be equal to or higher than the murderer in respect to the attributes of Islam and liberty. The Ḥanifis criterion of equality comprises only qīsmah (inviolability) and living in a Muslim state.⁶¹

Ibn Rushd and Khalīl maintain there are some distinctions in bodily injuries, for the Mālikis apply the rules of equality on both parties i.e. the felon and the victim. Accordingly,
if a non-Muslim or a slave intentionally amputated the hand of a Muslim or a free person, *gisās* would not be entertained by the court nor could it be held if a Muslim committed the same offence against a non-Muslim or a slave. The rest of the Shāfīs and Ḥanbalis agree in respect of the principle of preclusion of *gisās* between the free person and slave in cases where the victim is a slave, but the Mālikis extend the doctrine to encompass all cases of bodily offences between free and slave parties.⁶²

Notwithstanding their stringent statement of the applicability of *gisās* penalty in murder cases between free persons and slaves, Abū Ḥanīfah and al-Thawrī suspend this doctrine in cases of bodily offences. Abū Ḥanīfah sustains this opinion by arguing that the limbs and organs of the body are created for the maintenance and protection of the person (*nafs*) and since the value of a slave differs from the *diyāh* (blood-compensation) of a free person, it could be concluded that no equality exists between the limbs of the free person and those of the slave. Accordingly, the core of *gisās* has collapsed, therefore this penalty should be abrogated in the case in issue.⁶³

As far as the attribute of Islam is concerned the Ḥanafis focus on the domain of Islam only, therefore they contend that bodily offences committed against a Muslim or Dhimmī citizen in *dār al-Harb* do not lead to a *gisās* penalty due to the lack of Islamic jurisdiction and dominion. But all bodily offences committed in *dār al-Islām* are initially punishable by *gisās* irrespective of the religion of the parties concerned. Therefore Muslim and non-Muslim persons are equal as regards the applicability of *gisās* penalties in cases of bodily injuries (including murder).⁶⁴

However, the majority of Zaydis, Ḥanbalis, Shāfīs and Mālikis emphatically contend that there is no equality between a Muslim and a non-Muslim, accordingly the Ḥanbalis and Shāfīs preclude *gisās* in bodily offences if the offender is a Muslim and the victim is not a Muslim. But the
Mālikis extend the rule to encompass crimes committed by either parties on the other. Thus the Mālikis differentiate between murder and bodily injuries as regards the *gisās* penalty.

The prevalent juristic opinion in Islamic criminal law is that all intentional mutilations and bodily injuries between men and women are punishable by *gisās* penalties. No distinction is made according to the sex of the offender or the victim.

But the Ḥanafis and a minority of Zaydis nullify this rule as they maintain that the *diyah* (blood-compensation) of a man is not commensurable to that of a woman. Accordingly their respective bodily limbs do not match their counterparts. Therefore, no equality prevails here, consequently no *gisās* penalty is warranted between men and women in cases of bodily injuries.

The Ḥanafī doctrine of *gisās* in murder cases has a wider ambit than their doctrine on *gisās* in cases of bodily injuries which is very rigid. They even preclude *gisās* in cases of bodily injuries between slaves and free persons and vice-versa. It may be said that the Ḥanafī emphasis is focused only on the literal denotation of equality which they interpret through the pecuniary values of the *diyāt* (plural of *diyah*) of the victim and felon in murder cases. This Ḥanafī standard was criticized by many jurists due to its evident injustices.

Moreover, the Ḥanafī opinion mentioned above seems to be illogical, for since *gisās* is applicable between men and women in murder cases, it should equally be held in bodily injuries due to the fact that murder is more serious than any bodily injury. Besides, *gisās* in murder cases is also more grievous than the amputation of any limb. Therefore it seems appropriate to maintain and apply it in bodily injuries, as a further deterrent to intentional injuries committed by male offenders on women and vice-versa.
(iii) **Multiple Offenders**

The consistent and prevalent opinion as Ibn Rushd and Ibn Qudāmah contend is that *gisās* in bodily offences is applicable on the numerous accomplices who collectively participate in causing injuries to a single victim e.g. a number of participants amputate the hand of the victim, so each one of them should have his hand amputated according to *gisās* rules. This rule also applies to murder. Al-Nawawī al-Shāfi‘ī accepts this rule and applies it when the other required conditions are fully met.

Also, the Shāfi‘īs, Zaydis and Ḥanbalis stipulate that the acts of the participant accomplices should be indivisible and indistinguishable as in plural testimony or coercive instigation to cause injury. Thus if two persons co-operate in throwing a heavy instrument which results in cutting off the victim’s hand, both are liable to have a hand cut off. However, al-Shirāzī and Ibn Qudāmah narrate that if each accomplice’s act is distinguishable, then the court should issue separate verdicts of *gisās* relevant to and proportionate with each accomplice’s act.

But the Mālikis only stipulate that there should be agreement between the accomplices in order to apply *gisās*, regardless of the distinction of each one’s act. Al-Dardīr narrates that the Mālikī’s opinion in cases of coincidental acts *tawāfuq* which are distinguishable, each one should be sentenced on the merits of his own individual illegal act. However, if these acts became indistinguishable, he says that some Mālikis hold that *gisās* should be applied on all the collaborators while others state that only a pecuniary compensation should be held by the court, because such a problem constitutes an admissible preclusive cause against a *gisās* penalty. Ibn Ḥazm’s opinion is very similar to the Mālikis’ except that he rules *gisās* vis-à-vis the direct perpetrator with the acquittal of the rest of the accomplices.
The prevalent opinion is sustained by a famous judicial sentence passed by ʿAlī b. Abī Ṭālib. It was reported that two witnesses testified before ʿAlī b. Abī Ṭālib that the accused had stolen some money. According to their testimony ʿAlī passed and implemented the hadd of theft. The two witnesses later on brought another person saying that they had mistaken the first for the second one. Hence ʿAlī said "If I knew that you had wittingly testified against the first person I would have amputated your both hands." However he only made them pay arṣh as a compensation for the amputated hand.

However, al-Kāsānī and al-Marghīnānī relate the Ḥanafī opinion, in this context, as emphatically banning qisāṣ in cases of multiple accomplices, for there is no equality (muṣāwāh) between one hand and the numerous hands. Consequently the multiplicity of participant accomplices is a legal impediment of qisāṣ in cases of bodily injuries. But if each one perpetrated an independent injury that is distinguishable from the rest, then the Ḥanafīs hold that qisāṣ should be judicially inflicted on each one according to the merits of his own acts.

Thus the Ḥanafī and Zāhirī schools differentiate between murder and bodily injuries in respect of the applicability of qisāṣ penalties, for in the case of murder they allow qisāṣ penalties on multiple offenders.

(iv) Quasi-Intentional Injuries (Shibh al-ʿAmīd)

This term is introduced by the Ḥanbalīs and Shāfīʿīs and they regard these injuries as not being subject to qisāṣ penalties. They hold that quasi-intentional injuries are those which result from acts that do not normally cause such injuries, e.g. when someone slaps another and consequently ruptures his eye or cuts his skin.
But al-Ţarabulsī, al-Ḥanafī, the Žāhirī and Mālikī schools hold that there is no medium stage in the realm of bodily injuries, for those offences are only two i.e. intentional and accidental. Consequently the criminal intention of transgression is sufficient for the passing of a gisäṣ sentence.80

(v) Causation of Indirect Injury (al-Tasabbub)

Causation of indirect injury is deemed by the Ḥanafis as a preclusive cause of the gisäṣ penalty in both bodily transgressions and murder. They argue that there is no equality between the indirect offensive act and gisäṣ which is a direct act of punishment, therefore such penalty should be waived and substituted by a pecuniary reimbursement.81

The rest of Muslim jurists disagree with the Ḥanafis and maintain that the gisäṣ should take place in the mentioned proposition, for there is no tenable difference between direct and indirect offensive acts since they are accompanied by the intent to cause injury.82

(vi) Impossibility of Executing Qisäṣ

This legal impediment comprehends all cases of murder and bodily injuries. So, if there is no equality between the amputated limb and the offender’s limb no gisäṣ penalty could be carried out. An example that illustrates this preclusive cause is when the offender cuts off an infirm finger of the victim (that has only two joints) and the offender’s equivalent finger is intact and sound (has three joints), then no parallel penalty should be entertained by the court. Also in cases where the offender inflicts a jāṣifah wound - that wound which penetrates the thorax or the abdominal cavity, or causes ḍammah or dāmīghah wound that reaches the brain’s external membrane or the brain itself respectively, in all these cases gisäṣ becomes impossible due to the sensitivity of the wounds caused. Consequently,
the court should pass the alternative pecuniary penalty of arsh.\textsuperscript{83}

Ibn Rushd comments on these disparate rules saying that they were inferred from the Prophet’s inhibition of gisās sentence in cases of al-ma’mūmah, al-munaqqilah and al-jā’ifah injuries. Ibn Rushd states that Mālik and his school deduced that the above Prophetic rule applies to similar sensitive organs such as the chest bones, the thorax, etc. Therefore, whenever equality between the organs and wounds at issue is unverifiable, or when gisās may lead to excessive unwarrantable damage, then it should be waived by the court.\textsuperscript{84}

Mālik’s aforesaid opinion is unanimously accepted within the Islamic schools of law, with minor differences as to the feasibility of gisās in wounds and injuries not specifically tackled by the mentioned Prophetic tradition.\textsuperscript{85}

(vii) \textbf{Commission of Injury in Dār al-Ḫarb}

This particular doctrine is held by the Ḥanafis who maintain that the lack of judicial and political dominion and jurisdiction is a sufficient ground for relinquishing the gisās penalty in cases of bodily injuries (as well as murder offences). But the majority of jurists disagree and hold the opposing view. According to them, the place of the commission of a crime is irrelevant and is not a legal impediment of gisās (whenever that is possible).\textsuperscript{86}

\textbf{F. Particular Preclusive Causes of Qisās in Bodily Injuries}

These are the general impediments of gisās in bodily injuries (as well as in murder cases). It is obvious that they assume a very influential role in any judicial procedures relating to bodily injuries. However there are extra preclusive causes of gisās specifically pertinent to bodily offences. They are as follows:
(i) Impossibility of executing the penalty without undue grievance
(ii) Inequality between the injured limb and its counterpart.
(iii) Inequality in respect of health and soundness of the limbs or wounds at issue.87

(i) **Impossibility of Implementing the Due Qisās Penalty**

The prevalent concept in *qisās* rules is that *qisās* should not lead to injustices or excessive practices, and when this is the case, there are sufficient grounds for revoking *qisās* altogether and resorting to the alternative penalties - pecuniary reimbursements.88 However, Ibn Ḥazm vehemently refutes this principle as he constantly holds that *qisās* should be invariably carried out in all intentional bodily injuries and transgressions unless the victim voluntarily consents to remit the offence or to accept pecuniary compensation. Moreover, Ibn Ḥazm ardently criticizes all the prementioned preclusive causes as set out by the rest of the schools and he never accepts their legal justification.89

Nevertheless the majority of scholars hold that the safe application of the *qisās* penalty comprehends all grades and types of the intentional bodily injuries stated above. Furthermore, Muslim jurists have put forward some criteria in this context. So as Ibn Qudāmah reports, these jurists stipulate that the *qisās* penalty should be carried out at an appropriate bodily joint. Therefore no *qisās* penalty can be carried out for the mutilation of the leg from the middle-part, for such an application might well cause more harm than the original wound. This view is widely held by the Ḥanafis, Shāfiʿis, Ḥanbalis and Zaydis, for they argue that *qisās* cannot be cautiously executed in the mentioned case without imperiling the felon's safety to undue excessive damage.

However another body of jurists contend that the due *qisās* should be implemented on the nearest joint included in the
original bodily wound; besides al-hukūmah (a settlement reached by experienced persons who help the court in assessing due pecuniary reimbursements for wounds) should be sought for appraising the remnant injury's compensation.90

Ibn Qudāmah further confirms this principle by narrating that a man was attacked and had his arm mutilated from the middle part (between the elbow and the wrist). The Prophet adjudicated the full diyah of the hand and wisely persuaded him against the claim of qisās.91 Ibn Qudāmah makes wide application of this doctrine and states that no qisās can be judicially ruled for the amputation of the hand's palm from the middle inasmuch as there is no articulate joint where the qisās can be executed.92

On the other hand the Ḥanafis scrupulously try to conform with the very concept of equality to the extent that they have precluded qisās rulings in innumerable instances where they only maintain diyah or arsh will be the authentic judgement.93

Notwithstanding the above scrupulousness as regards the safety of the felon in carrying out the penalty of qisās, the Mālikis disapprove with the notion of amputating the nearest joint, inasmuch as the Mālikis only stipulate the possibility of executing qisās. And with the contemporary progress in medical surgery this Mālikī opinion seems to be a tenable one.94

Al-Ṣanāʿī, al-Nawawī and the Zaydis hold that the majority of jurists prevent qisās in broken bones and head and face wounds post muwaddihah - that exposes the bone, because such wounds are difficult to be implemented without excessiveness. However, this principle does not include the teeth.95 But Mālik does not accept this rule and allows qisās in bones whenever feasibility and safety are secured.96

In conformity with this concept of the practicality of implementing qisās (whenever excessiveness is avoidable)
Muslim jurists adduce practical examples to illustrate their juristic perspectives in the realm of *gisâs*. They unanimously invoke the Qur'ânic verse that says:

"... And wounds equal for equal ..." (5 : 45)

Accordingly they rule that an eye can be taken for an eye and so an ear for an ear, a tongue for a tongue, a lip for a lip and eye-lid for an eye-lid. Also this rule extends to comprehend teeth, hands, legs, fingers, penis, to have their respective counterpart limbs taken in *gisâs* because the penalty here can be safely carried out.97

It should be noticed that Ibn Ḥazm al-Ẓāhirī categorically denies the majority's distinction as regards *muwaddihah* wounds and the rest of *shijâj*. He expressly states that intentional injuries are invariably punishable by *gisâs* no matter how deep or lethal they are. Hence the pre or post *mawaddihah* gauge is entirely irrelevant, according to Ibn Ḥazm's penal precepts.

Moreover he vilifies the rest of jurists' opinion challenging them to expound an admissible textual or rational proof (inference) that legalizes the differentiation between *muwaddihah* wounds and the rest of *shijâj*.98

The rule of equality and commensurability between damaged organs and their counterparts in the felon includes the felonies of total and partial debilitation of the utility of the organ in issue. This mainly concerns the senses and faculties of the body like hearing, vision, speech, smell, etc., as well as sexual competence and the conception of foetus etc. Consequently an experienced person may be asked to cause the same injury and produce the same results. However different views can be noticed in this regard which are mainly ascribable to the keenness of avoiding any undue excessive harm on the body of the felon. Also jurists have differed greatly in their respective quantifications of
different wounds and accordingly they diverged in the practicability of implementing *qisas* in many cases.\(^9\)

Worth mentioning also is that as far as head and face wounds (*shijāt*) are concerned, the preponderate juridical opinion in Islamic criminal jurisprudence differentiates between the pre- and post *mawaddihāh* wounds. Accordingly, all the pre-*mawaddihāh* wounds, i.e. *khārisah*, *dāmiyah*, *bādiyah*, *mutalāhimah*, *simḥāq* and *muwaddihāh* can be punished with commensurable *qisas* penalties because all these injuries are not too critically deep to be executed.\(^{100}\)

However, all wounds post *muwaddihāh* i.e. *ḥāshimah*, *munagqilah*, *āmmah* and *dāmighah* cannot be implemented as *qisas* penalties inasmuch as they are so deep or so critical that any attempt to execute them may lead to excessive trespass which is not legally tolerable.\(^{101}\)

Also Muslim jurists differed a great deal in respect of the implementation of *qisas* in the chest and the rest of the abdominal wounds. Al-Shāfi‘ī and Ibn Ḥanbal contend that wounds that do not include the infracture of bones can be punished for by equivalent *qisas*, however, an influential number of jurists - in all schools - preclude any *qisas* in such bodily wounds. The apparent causes of juridical divergence in this context are the different assessments ascribed to each jurist as well as the practicability and non-practicability of executing *qisas* in each case, accordingly jurists adduce their respective opinions.\(^{102}\)

Finally it could be said that *qisas* in bodily wounds is not arbitrarily inflicted especially in the abdominal, chest and head wounds due to the requisite of safety in carrying out such penalties. For in case such *qisas* penalties conduce the death of the convicted felon, they may in turn constitute a murder case punishable by *qisas* - execution of the culprit in retaliation for murdering someone else.\(^{103}\)
(ii) **Dissimilitude between Limbs**

This is the second essential preclusion of *qisās* in bodily injuries, which is observed by all schools of Islamic law. This concept of equality and similarity between the injured limb and its counterpart in the culprit’s body emanates from the meaning and implication of the term *qisās*. therefore, this notion constitutes the basic infrastructure of the *qisās* verdict. So, when dissimilitude between concerned limbs is greater than the similarity, then *qisās* should be forthwith relinquished and substituted by a pecuniary and a proper discretionary penalty. Numerous examples are propounded in all schools of law to elucidate the rules of similitude and dissimilitude in bodily injuries. Therefore a right hand, eye, leg, ear, is not similar to the left hand, eye, leg, ear respectively. Also this criterion is rigorously operated in teeth injuries and fingers and toes and their different articulated joints.104

(iii) **Dissimilarity in Health between Injured Limbs and their Counterparts**

This is the third intrinsic impediment of *qisās* in bodily transgressions which must be fully investigated by the court. It constitutes plausible grounds for pleading to the advantage of the perpetrator. This is further explicated by the prevalent opinion held by the Ḥanbalis, Shāfi‘is and Ḥanafis who contend that *qisās* cannot be carried out for a paralysed infirm leg or hand (on a healthy, safe and sound limb). However the adverse proposition i.e. a paralysed limb can be amputated according to *qisās* for a healthy and safe one, for this is considered as a remission on the part of the aggrieved party.105

But the Mālikis categorically prevent any *qisās* between the injured healthy limbs and their infirm or paralysed counterparts even if the aggrieved person consented. But if such infirm limbs have some benefits, like using a paralysed hand to write, then they may be deemed as equal to
their counterparts and subsequently they can be amputated according to *gisās* rules.\textsuperscript{106}

Paralysed limbs are considered as equal by the Zaydis and Zufar, from the Ḥanafī school. However, a minority of jurists prevent *gisās* between paralysed limbs due to the variance of the degrees of paralysis in the limbs in issue. But the Mālikis, Zaydis, al-Shāfi‘ī and Ibn Ḥanbal hold the counter opinion and accordingly decide that *gisās* between equally paralysed limbs is a sound decision.\textsuperscript{107}

Also Muslim jurists tackled the case of missing fingers. Accordingly they state that such infirmities affect the assessment of equality between injured limbs and their counterparts. So the majority hold the consistent rule of preclusion of *gisās* in cases where the offender's hand or leg is complete whereas the aggrieved's hand or leg is missing one or more fingers or toes.\textsuperscript{108}

But the Malikis contend that missing one finger is not a grave infirmity and consequently rule that such an infirm hand or leg can be amputated as *gisas* for a perfect hand or leg without adjudicating any additional pecuniary recoupment for the victim, however the latter has a right to choose between *gisas* or *arsh* in case the culprit's counterpart hand or leg is missing two or more fingers.\textsuperscript{109}

G. The Waiver of *Qisās* penalty in Bodily Transgressions

The causes for the waiver of *gisās* in bodily injuries are distinctive characteristics of this penalty. For they are external effective factors that must be ascertained and tackled by the court in each case. On the other hand, they represent very solid grounds for the accused pleadings if he could prove them.

Those causes for the waiver of *gisās*, in this context, can be tersely enumerated as the physical absence of the counter-limb, remission of *gisās* or amicable settlement
between the litigant parties. Some detailed account would be made to these crucial factors as follows:

(i) **Physical Absence of the Counter-Limb**

This cause is deemed as an axiomatic reason for waiving the penalty of *qisās*, for no *qisās* is executeable unless the injured limb has a match equal to it. However, different opinions emerge in cases of the enforcement of the rule in issue, i.e. Mālik deprives the aggrieved party of any pecuniary recoupment in case of the waiver of *qisās* due to the absence of the counter-limb, because he contends that *qisās* is the exclusive penalty which cannot be replaced by *arsh*, unless the culprit consents.\(^1\)

Ibn Rushd reports that Mālik’s opinion is that the injured or maimed organs are not to be punished for till they are duly cured. But al-Shāfīī holds that such bodily transgressions are to be punished for forthwith. However, al-Shirāzī reports another opinion that is compatible with Mālik’s opinion.

It seems that Mālik’s opinion is more tenable as it depends on a Prophetic judgement where the Prophet refused to adjudicate further in a wounding case where he had already advised the maimed victim to wait until his wound is cured.

Moreover, the wounding may lead to death, so it is advisable to wait until the final state of the injury is settled so that the criminal litigation may be more specific.\(^2\)

Ibn Ṭālib and al-Shawkānī ascribe to Abū Ḥanīfah an opinion synonymous with the Mālik’s. Also, Ibn Qudāmah and Ibn Ḥazm maintain that waiting for the wounds to heal is the statement of the majority of scholars.\(^3\)

It may happen that the offender in bodily injuries may be attacked by another body, hence, according to the Mālikī school the right of *qisās* devolves to the second culprit who

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amputates appropriate limb.\textsuperscript{113} Abū Ḥanīfah agrees with Mālik in cases when the absence (or total debilitation) of the due limb is caused by illness, transgression, catastrophe or sinister accident. But in cases where the absence of the due limb is caused by a legitimate penalty, Abū Ḥanīfah decides that \textit{arsh} should be paid to the victim.\textsuperscript{114}

The Ḥanbalis and Shāfi‘is decide in favour of \textit{arsh} whatever the cause of the absence of the due limb is, for they hold that \textit{qisās} and \textit{arsh} are equally adjudicable, so when the first i.e. \textit{qisās} becomes impossible, the latter i.e. \textit{arsh} becomes due.\textsuperscript{115}

(ii) \textbf{Remission of the Right of \textit{Qisās}}

Both Qur‘ān and Sunnah exhort pardon and remission of due right, particularly in penal cases. This remission of the vested right of \textit{qisās} may involve \textit{arsh} for the injury done, or the offender may be allowed to go. This is in fact compatible with the Shāfi‘I and Ḥanbalī attitude.\textsuperscript{116}

The jurists invoke the incident narrated by al-Bukhārī when al-Rabī‘ bint al-Nadr (intentionally) broke a tooth of a girl whose kindred submitted their \textit{qisās} claim to the Prophet who ruled the \textit{qisās} penalty. Hence Anas b. Mālik pleaded against having his aunt’s tooth broken but the Prophet corrected his misconception saying "The prescription of Allāh is \textit{al-qisās}". (i.e. it is an inviolable rule). However, the claimants voluntarily remitted their claim (as a gesture of respect to the Prophet and kindness to Anas).\textsuperscript{117}

This tradition has been quoted as the basis of remission and reconciliation of \textit{qisās} in bodily injuries and felonies. Besides, Ibn Qudāmah and others i.e. the Zaydis and Zāhiris invoke this tradition as a graphic Prophetic illustration of the principle of equality between crime and punishment in bodily injuries.\textsuperscript{118}
Ibn Ḥazm reports that the Mālikis and Ḥanafis deem any remission of *qisas* as a free relinquishment of all rights in the case in issue; for they consider *arsh* or any settlement as *sulh* - amicable settlement and reconciliation.¹¹⁹

This right of remission is invested in the mature, sane persons, but the general rule in cases of the lunatics and minors who are victims is that their respective guardians enjoy the right of remission on condition that it should not be to the detriment of such incompetent persons.¹²⁰

(iii) **Amicable Settlement and Reconciliation (al-Sulh)**

This is an important area covering the right of remitting *qisas* penalty. The victim or his guardian can conclude a pecuniary reimbursement commensurate to the original *arsh* or more. However, the guardians of the insane and minors should not allow the reimbursement to be less than the original *arsh* of the injuries done e.g. the original *arsh* of an eye is half the complete *divah* i.e. fifty camels or their equivalent in gold or silver. Accordingly the guardian is only authorized to negotiate for the conclusion of this amount or more.

However, Ibn Ḥazm states that the above incident of al-Rabīʽ is a proof of amicable settlement in injuries as he narrates that the case was solved by paying a pecuniary indemnity but later the victim could change his mind. Thus he conspicuously diverges with the traditionists and jurists who unanimously invoke that case especially to prove that the claim of pecuniary payment waives the *qisas* penalty in bodily injuries.¹²¹

II. **The second Penalty for Bodily Injuries (Arsh)**

*Arsh* is the pecuniary penalty of bodily injuries whether intentional, quasi-intentional (as held by the Shafiʿis and Hanbalis) or accidental. However the jurists sometimes use
the term *diyāh* for the same meaning. But the word *arsh* in this realm is more precise and accurate, inasmuch as it specifies a certain penalty for certain crimes that do not involve homicide offences. Al-Shawkānī and other traditionists narrate the famous Prophetic decree sent with ṬāʿAmr b. Ḥazm to the people of Yaman, in which the Prophet states the quantities and qualities of *diyāh* in cases of murder, and the rest of homicidal cases. He also explained the rules and principles of *arsh* and *diyāh* payments for bodily transgressions. The Prophet ruled that according to the prementioned decree, the full *diyāh* is payable in compensation for 1) homicide offence, 2) the nose, 3) the tongue, 4) the two lips, 5) the testicles, 6) the penis, 7) the two eyes, 8) and half the *diyāh* is payable for one leg, 9) one third of *diyāh* for *al-maʾmūmah* wound and for *jiʿāfah* wound, 10) fifteen camels for *munagqilah* wound, 11) ten camels for each finger (of a hand or a foot), 12) five camels for each tooth, 13) five camels for *muwaddihah* wound. The Prophet also enacted the *gisās* penalty against a man who murders a woman. Besides he quantified the *diyāh* in gold as equal to one thousand *dīnārs* (for those who do not have camels, instead they possess gold).122

Despite the wide acknowledgement of the above mentioned Prophetic decree, Ibn Ḥazm al-Ẓāhirī, vehemently suspected its authenticity and inherently its concomitant injunctions. Therefore, he very much disapproves of the pecuniary penalties of the involuntary bodily injuries (that do not cause death).123

Moreover, Ibn Ḥazm has launched attacks on the Mālikis and Ḥanafīs, in particular who use *gisās* (analogical reasoning) as regards the quantifications of *arsh* for bodily injuries. He concludes that all the results of this analogical reasoning are totally wrong, mainly because there is no parallel between bodily transgressions and pecuniary damages upon which the Ḥanafīs have built their analogical reasoning.124
On the other hand the majority of jurists do not accept Ibn Ḥazm's preceding opinions, and they hold that *arsh* is mainly divisible into two main sections: a. a legally specified *arsh* and b. non-specified *arsh*. These two sections are the practical applications of the previous Prophetic decree.

Basing themselves on the previous Prophetic tradition, the jurists have elaborated a detailed system by which *arsh* can be fixed for particular bodily injuries.

III. The Third Penalty Ta'zīr (Discretionary Penalties)

The *ta'zīr* penalties are generally left to the public authorities and the legislature to decide their various rules and applicability. Therefore, the Mālikī school contend that these discretionary penalties should be held by the court, whether or not *qīsās* has been implemented, but in case the due *qīsās* penalty is executed, the subordinate *ta'zīr* penalty should be less than that prescribed in cases when the *qīsās* is waived or remitted by the aggrieved.125

But the majority of Ḥanafis, Shāfiʿis, Ḥanbalis and some Mālikis do not attach *ta'zīr* to *qīsās* when the latter penalty is implemented, because the Qurʿānic text only prescribes *qīsās* as it says,

"... and wounds are equal for equal ..." (5 : 45).126

However, the general tenor of Islamic criminal jurisprudence does impose *ta'zīr* penalties in cases where no *ḥadd* or *qīsās* punishments are carried out so, in compliance with this influential principle, a discretionary penalty should be held in all cases when *qīsās* is legally proved but impeded by way of voluntary remission, or due to a legitimate preclusive cause as mentioned above.127
IV. Penalties for Accidental Bodily Injuries

The main penalties of accidental injuries are the full *diyāḥ* or *arsh* according to the details in intentional injuries. So, the main difference between the punishments of accidental and intentional injuries is that there is no *qiṣāṣ* in the accidental injuries, besides, the full *diyāḥ* or *arsh* when adjudicated, should be deferred to span a period of three years. On the other hand this *diyāḥ* is paid by the convicted person’s *ṣāqilaḥ* (agnatic kindred) according to each one’s financial abilities.¹²⁸

Moreover, the *taṣżīr* (discretionary penalties) can be imposed by the public authorities and the legislature, in accidental bodily injuries because any detrimental or injurious act cannot escape punishment by way or another as widely held in the Islamic criminal jurisprudence.¹²⁹

3. Crimes and Penalties of Aggression Against Embryo and Foetus (*al-Iḥtīḍā' al-ʿālā al-Jānīn*)

Rules of transgressions against embryo and foetus are intrinsic constituents of the Islamic criminal jurisprudence, due to the fact that the embryo and foetus are considered to have great similitude with the normal human beings. Therefore the embryo and foetus are covered by numerous juristic rules e.g. inheritance laws and criminal laws to protect them. However, the foetus at the very instance of its birth is juristically regarded as a complete human being fully protected by all the rigours of the criminal laws. Consequently if such a newly born child is murdered, the *qiṣāṣ* penalty (as shown above) would not be at all eliminated. Thus this section would tackle the abortive criminal acts and their concomitant eventualities, i.e. death or injury of the mother, whether intentional or accidental and the relevant penalties thereof.¹³⁰

The various schools of Islamic jurisprudence nominally diverge in the title assigned to the transgression against
the embryo and foetus, but they unanimously propound their respective treatments of abortive criminal acts and their ensuing results after their coverage of homicide, and bodily injuries.131

A. Definition and Ambit of the Crime of Transgression against Embryo and Foetus

Al-Ramlī, al-Shāfiʿī and other jurists define this crime as when the culprit induces the dissociation of embryo or foetus, whether this separation resulted in the death of the embryo or not. Therefore this crime comprehends abortions as well as all the cases of the illegally caused separation of the embryo.132

The authoritative traditionists and jurists copiously report the Prophetic adjudication in the case of the two Hudhaylī women who fought and one of them hit the other with a heavy stone. The victim died with her child (who was born dead). The Prophet ruled diyah and ghurrah (payment of a slave boy or girl as compensation for the dead embryo) to be paid by the felon's Qā'ilah to the dead woman's kindred. This adjudication has been invoked as the textual regulation of crimes committed against the embryo and the foetus.133

Ibn ʿAbdīn al-Ḥanafī and Ibn Qudāmah al-Ḥanbalī agree with many Muslim jurists in their general definition of this crime and that it can be effected by beating or squeezing or giving drugs knowingly to cause abortion, or even by psychological means as when causing panic or terrorizing the mother in a way that causes abortion or premature birth.134

Muslim jurists widely relate the incident when ʿUmar b. al-Khaṭṭāb summoned a pregnant woman who panicked and gave birth to a premature baby who instantly died. ʿUmar consulted the Sahabah who exonerated him from any criminal responsibility due to the fact that he was the ruler and therefore had the legal right to summon any of his subjects. But ʿAlī b. Abī Ṭālib diverged from this verdict and held

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that `Umar should pay the due diyah of the born foetus because `Umar has caused its untimely birth and consequent death. `Umar appreciated this decision and immediately complied with it.\textsuperscript{135}

Some Shāfī`is and Mālikis include the act of starving the pregnant mother or slandering her so badly that she aborted the foetus she was carrying.\textsuperscript{136}

It must be proved, in the aforesaid cases, that the culprit’s criminal act was the sole or main reason for abortion or premature birth, to render him legally responsible. These illicit acts can even be committed by the mother herself or her husband and they are, therefore, legally liable for such acts.\textsuperscript{137} Ibn Ḥazm rules that if the pregnant woman intentionally caused the miscarriage of live embryo which she was carrying, she should be put to death according to gīṣāṣ or pay indemnities. But he reports that some leading jurists rule that only ghurrah is adjudicable. However, if this abortion leads to her death (together with the embryo) then no penalty would be carried out. Ibn Ḥazm further extends this rule to include other parties who deliberately cause miscarriage; where gīṣāṣ would be tenable when it is proved that the embryo was alive - no matter how early the embryonic stage was.\textsuperscript{138} The felon cannot inherit anything including the

The standard case of the crime against the foetus (or embryos) is that it should get out from his mother’s uterus; so, if it just stops moving (in the uterus) due to a blow, the jurists unanimously absolve the accused from any criminal liability due to suspicion of the fact of life or death of this foetus.\textsuperscript{140}

But, as `Awdah holds, with the contemporary medical progress, such suspicion can easily be removed and it could be medically determined whether or not the blow caused the death of the foetus, or whether it is still alive,
accordingly the juristic treatment of this point has to be re-examined.\textsuperscript{141}

Ibn al-Qāsim and Ashhab, from the Mālikī school, had different views about the embryonic status of the foetus at which punishment should be liable if it is destroyed by an act of aggression. But the general concept of Mālik and his disciples (including Ibn al-Qāsim) is that any embryonic composition is protected by the sanctions of this crime.\textsuperscript{142}

However, Ibn Ḥazm al-Ẓāhirī contends that the Ẓāhirī school consistently penalizes the killing of the foetus even before birth. So the ghurrah would be adjudicable if it is proved that the felon has killed the embryo in his mother’s womb.\textsuperscript{143}

This rule regulates cases where the pregnant woman and the embryo she is carrying both die due to the assault or act of the culprit. Moreover Ibn Ḥazm invokes the same Prophetic traditions (invoked by the others), but he maintains that the Prophet did specify the exact status of the embryo as regards dissociation and non-dissociation. So, as Ibn Ḥazm concludes the Prophet’s ruling should be understood in its generality.\textsuperscript{144}

But some jurists stipulate that it is only the fully-grown foetus that is meant here. However, some included the embryo whose features can be distinguished by the specialists as human features.\textsuperscript{145}

Furthermore, the criminal concepts assign enormous importance to the differentiation between cases when the foetus emerges dead and the cases when he leaves his mother alive. Also they propound many accounts of the definition and cases of how to decide the instant of the foetus separation from its mother. So, the prevalent opinion which is held by the Mālikis, Ḥanafis, Zaydis and Shāfiʿis regarding the foetus as alive if it is, as the Zaydis expressly hold, born when its age is less than six months,
on condition that he cries or sucks or perspires. They also argue, as al-Shawkānī reports, that it is sufficient when the head only emerges (and dies before a complete birth is made).\footnote{146}

But, the Ḥanbalis stipulate that the age of the foetus should be six months and above and that it shows signs of a stable living condition.\footnote{147}

Al-Shīrāzī holds that it is sufficient if four midwives proved that the miscarried embryo is a human being (even if it is at the inception of its creation). Also if a limb, e.g. hand or leg, came out would suffice to render the felon amenable for the ghurrah payment. However, complete emergence of the foetus determines whether or not it is alive, therefore if its head emerged and cried, but when it was fully born it was found to be dead, then the juristic opinion would be that the foetus is born dead.\footnote{148}

Al-Shīrāzī criticizes al-Muzanī’s opinion that holds that the aborted embryo should be at least six months old to qualify for the full diyah in case he dies after a reasonable interval of time after birth. Moreover any murder perpetrated on this newly born embryo (even if he is less than six months old) would be punishable by qiṣāṣ if the other requisites are met.\footnote{149}

This Shāfi’ī opinion is very similar to Mālik’s opinion as expounded in al-Muwatta and by Ibn ʿAbd al-Barr.\footnote{150}

As far as the death of the mother is concerned, Muslim jurists attach paramount importance to it when assessing the crimes committed against the foetus. But they propound discordant opinions on this subject. The Shāfi’īs and Ḥanbalis state that the culprit is responsible whether the foetus is dissociated during his mother’s life or after her death, and whether or not he emerges alive.\footnote{151}
However, the Ḥanafis, Zāhiris and Mālikis give maximum importance to the mother’s life during birth, so they stipulate that the foetus’ dissociation should take place when the mother is still alive. Accordingly, if it is separated after her death and the foetus is also dead, the culprit would not be liable to crime against the foetus, because the death of the mother was the apparent cause of the death of the foetus due to the close and intimate link between mother and foetus. Besides there is considerable suspicion as to the genuine cause of the death of the foetus, therefore no juristic decision should be made because suspicion does not institute rules.152

However this juristic incongruity can be determined by contemporary medical science which can remove such suspicion as to the specific causes of the death of the foetus and accordingly the criminal liability would be determined.153

B. Criminal Intention

As frequently mentioned earlier, the criminal intention is intrinsic to enable the court to decide the extent of the culprit’s liability and the ensuing proper verdict. This subject acquires additional importance in crimes that may lead to a death sentence, hence some Mālikī jurists (Ibn al-Qāsim) hold that intentional transgression against a foetus is punishable by qisās if the foetus is born alive but died as a consequential result of the transgression. However, Ashhab and Ibn al-Ḥājib maintain that even in intentional abortion transgressions only diyah is to be held against the felon (to be paid from his own resources), when the embryo dies after birth.154

This decision is based on the broad principle that the Mālikī school divide criminal offences against the foetuses to two broad sections: intentional and accidental; and the Mālikis apply the aforesaid criteria of distinguishing between intentional and accidental homicide in the realm of transgression against the foetuses. This may be due to the
fact that both homicide and offences against the foetus result in death of the victim.\textsuperscript{155}

This Mālikī opinion is also maintained by the Zaydis and a minor group of Shāfiī jurists.\textsuperscript{156}

However the predominant juristic opinion is that offences against the foetus are divisible only into two categories, quasi-intentional and accidental offences with the evident omission of intentional crimes. This is justified by arguing that intentional acts cannot be envisaged against the foetus, inasmuch as this intent depends on the realization that there is a foetus in the uterus and that it is alive. This opinion and its defensive arguments are held by the Ḥanbalis, Ḥanafis and it is the prevalent Shāfiī opinion. This camp invoke the Prophetic judicial sentence when the Prophet adjudicated diyyah on the āqīlāh of the offender whose blow lead to the abortion of a dead foetus. They inferred from this decision that the Prophet did not entertain the intentional transgression on the aborted foetus because He enjoined ghurrah on the āqīlāh who legally does not in any way participate in payments of diyyah in all the intentional homicidal and bodily offences.\textsuperscript{157}

This divergence between the Mālikis, Ẓāhiris and Zaydis and the rest of schools is extremely important in cases when the foetus is born alive but dies later on due to the former transgression against his mother, for the prevalent Zaydī, Mālikī and Ẓāhirī opinion enjoins qīṣās in intentional offences whereas the rest of schools only hold the ghurrah to be paid by the agnatic kindred of the perpetrator. However, when the foetus is killed in his mother's uterus there is still inconsistency because the Mālikis will prescribe the ghurrah on the perpetrator only, whereas the rest of the jurists will impose it on the āqīlāh of the offender inasmuch as they consider it as quasi-intentional offence (ṣibh ṣamd). But all the schools of Islamic law collectively prescribe the due ghurrah on the āqīlāh in all cases of accidental killings of the foetus (khatā) in

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compliance with the canons of homicidal killings mentioned above.158

4. Crimes and Penalties of Ta\textsuperscript{c}z\textsuperscript{z}Ir (the Discretionary Punishments)

A. Definition and Ambit of Ta\textsuperscript{c}z\textsuperscript{z}Ir

Ta\textsuperscript{c}z\textsuperscript{z}Ir semantically means to support and to rectify. The meaning (to support) is found in the following Qur\textsuperscript{\textae}nic texts:

A. "... In order that ye (O men) may believe in All\textsuperscript{h} and His Messenger, that ye may assist (\textit{tu\textacircumflex{a}zzir\textsuperscript{u}hu}) and honour Him and celebrate His praises morning and evening." (48 : 9).

B. "... So it is those who believe in Him (the Prophet) honour him, help him [\textacircumflex{a}zzar\textsuperscript{u}hu] and follow the light which is sent down with Him ..." (7 : 157).159

But technically in Islamic criminal law ta\textsuperscript{c}z\textsuperscript{z}Ir or ta\textsuperscript{\textacircumflex{a}}z\textsuperscript{z}Ir or ta\textsuperscript{c}z\textsuperscript{z}Ir\textsuperscript{t} are defined by al-Sarakhs\textsuperscript{i} and al-K\textsuperscript{\textae}s\textsuperscript{n\textae}i as unspecified punishments, due as God’s rights or individual’s right prescribed for disobediences not punished for by hadd or atonement.160 Hence they include qis\textsuperscript{\textae}\textsuperscript{a}s penalties for murder and bodily transgressions with the hadd penalties.161

This Hanafi definition of ta\textsuperscript{c}z\textsuperscript{z}Ir is fully accepted by al-\textsuperscript{c}Izz b. \textsuperscript{c}Abd al-Salam and a vast number of jurists of the Maliki, Hanbali, Zaydi and Zahiri schools.162

Al-\textsuperscript{T}ar\textsuperscript{\textae}buls\textsuperscript{T}, from the Hanafi school, gives a more comprehensive definition: "Ta\textsuperscript{c}z\textsuperscript{z}Ir is the corrective (penalty) for the purpose of edification and deterrence for sins unpunishable by hud\textsuperscript{\textae}d nor expiations". He contends that this penalty can be corporal or verbal as the Prophet had ruled.163
These definitions are compatible with al-Māwardī’s famous definition of crimes as he says, "crimes are acts legally prohibited by a ḥadd or a taẓīr (penalty)."\(^{164}\)

The ḥadd penalty mentioned in al-Māwardī’s above definition comprehends all the already legally specified penalties i.e. hudūd and qisās punishments. Therefore the realm of taẓīr circumvents all the remaining criminal acts (that are not already punished for by specifically determined penalties).\(^{165}\) In other words they are the offences whose penalties were not previously quantified by the Qurʾān, Sunnah or the jurists.

The legal consequences of the combined definitions of crimes and taẓīr are very important indeed as far as the substantive and procedural laws are concerned. Because it is quite clear that the compass of hudūd and qisās penalties and crimes is limited and well defined, whereas that of taẓīr is very wide and can accommodate all the envisageable crimes.\(^{166}\)

Al-Ramlī al-Shāfiʿī (d. 1004 A.H.) attests the legality of taẓīr penalties by invoking the Qurʾānic directives that allow husbands to rectify their disobedient wives, and also by the Prophet’s statement that rules in minor thefts (of a handful of dates) only fine and light lashes are to be held. Also ʿAlī b. Abī Ṭālib had ruled accordingly.\(^{167}\)

In addition, al-Shīrāzī (d. 476 A.H.) from the Shāfiʿī school invokes judgements passed by ʿAlī b. Abī Ṭālib and Ibn ʿAbbās that attest the legitimacy of taẓīr in Islamic criminal law.\(^{168}\)

Ibn Qudāmah from the Ḥanbalī school fully endorses the above mentioned Shāfiʿī approach.\(^{169}\) Likewise Ibn Nujaym al-Ḥanafī states that taẓīr penalties are legalized by the Qurʾān, Sunnah and consensus, thus their legality has become
an incontrovertible characteristic of Islamic criminal jurisprudence.\textsuperscript{170}

Al-M\u{a}ward\u{a}, al-Qara\u{f}i and the vast majority of jurists agree that *ta\'z\u{i}r* penalties and *hud\u{u}d* and *gis\u{a}s* have many points of agreement and others of difference. For *ta\'z\u{i}r* agrees with *hud\u{u}d* and *gis\u{a}s* in respect of the fact that they are all punishments intended to deter, edify and correct the criminal tendencies according to the gravity of the illicit act committed; besides they all care for the social and individual interests (involved in each case by the implementation of the legal retribution). However two points of divergence between *ta\'z\u{i}r* and *hadd* (which also involve *gis\u{a}s*) can be traced.

A. *Hud\u{u}d* have already legally limited ambiets that cannot be obviated by the court whenever these *hud\u{u}d* are proved; whereas *ta\'z\u{i}r* penalties are left for the discretionary powers of the *h\u{a}kim* (ruler) or his authorized deputies (the public authorities); to choose between verbal reproachment, detention, flogging, confiscation or even execution; but it is legally restricted in such choices by the tenors of *Shar\u{f}a* and the criteria of public interests.\textsuperscript{171}

B. All *hud\u{u}d* penalties are not susceptible to be waived by the ruler or courts by remissions, pardon or abrogation; whereas *ta\'z\u{i}r* penalties can be waived by rulers or courts as had already been said. An additional variance can be noticed as far as the principles of evidence are concerned. For *ta\'z\u{i}r* can be proved by miscellaneous credible means; whereas *hud\u{u}d* are mainly to be substantiated by a number of witnesses or confessions.\textsuperscript{172}

Al-\u{c}Izz b. cAbd al-Salam (d. 660 A.H.) points to a very important characteristic of *ta\'z\u{i}r* which identifies it with both *hud\u{u}d* and *gis\u{a}s* penalties. This characteristic is the right of remission and relinquishment of the due *ta\'z\u{i}r* penalty. Ibn cAbd al-Salam maintains that when this penalty pertains to a specific individual right, the *h\u{a}kim* would
never legally remit or relinquish it when the claim is legally made, hence ta‘zIr conforms with gisās penalties. However, if the pronounced penalty of ta‘zIr pertains to God’s rights, then the court would enjoy an imprescriptible right to execute or remit the penalty according to the best interest of both society and the guilty person. This characteristic is operable through the immeasurably vast realm of ta‘zIr litigations.  

Al-RamlI (d. 1004 A.H.) fully endorses this principle besides it is the predominant concept in the Ḥanafi, ḤanbalI and Mālikī schools, despite the variances of assessing the distinctions between God’s rights and the individual’s rights in some extreme cases.

It could be concluded - after a thorough survey of the criminal and penal system in Islam - that the Ṣharī‘ah did not circumscribe the crimes and penalties of ta‘zIr as it did with the crimes and penalties of hudūd and gisās and diyyah, but it sets the universal edifice of religious disobedience in the Qur‘ān and Sunnah; besides it invested vast authorities and powers on the ḥākim to legislate against and punish acts that are detrimental to the public interests and the social welfare of the state and community. However, it should be clear that the ḥākim (ruler) and all the public authorities in the state do not enjoy any arbitrary powers in their treatment of ta‘zIr crimes. Accordingly, their enactments and legislation in this regard must not contradict, repeal or violate any of the consistent principles or canons of Islam.

B. Classifications of Ta‘zIr

By a retrospective survey of Islamic criminal jurisprudence, it becomes clear that ta‘zIr crimes can be classified into the following three basic categories:

a. ta‘zIr for religious disobedience
b. ta‘zIr for public interest and
c.  \textit{ta'zīr} for delinquencies.

Some coverage will be made below for these classes in order to illustrate the Islamic criminal policies in this regard.

(i) \textbf{\textit{Ta'zīr} for Religious Disobedience}

Muslim jurists unanimously agree that \textit{ta'zīr} penalties are enacted for any religious disobedience that is not protected by a \textit{hadd} penalty or an atonement, whether this infringement affects the right of God or an individual’s right.\textsuperscript{176}

They also agree that God’s rights epitomize the public welfare and maintenance of society from any sort of perversive practices and detrimental acts.\textsuperscript{177}

Al-Qarāfī al-Mālikī elaborates on God’s rights which encompass a vast realm of religious directives whose infraction would inevitably constitute a criminal act. However, these rights are diverse as regards their stature, consequently the right of remission and invocation of penalty differs from one case to another.\textsuperscript{178}

As mentioned above the infractions of the individuals’ rights are punishable by a \textit{ta'zīr} penalty insusceptible to waiver or remission by the court’s own initiative, because it is the aggrieved party who solely enjoys such rights as it is the case in all \textit{gisās} litigations.\textsuperscript{179}

On the other hand \textit{maṣṣiyah} (disobedience) comprehends any violation of a legal order or prohibition; so, commission of forbidden acts and omission of obligatory acts are all religious disobediences. Hence the principles of \textit{usul al-fīqh} (principles of jurisprudence) propound clear cut distinctions between the obligatory commandments and the prohibited acts. Besides these principles also define \textit{mandūb} (commendable act) \textit{makrūh} (the detestable act) as well as \textit{mubah} (permissible act).\textsuperscript{180}
However, in this stage, emphasis and highlight will be concentrated on the obligatory commandments and the prohibited acts as far as ta\textsuperscript{z}Ir crimes and penalties are concerned, because these commandments and acts assume the prime posture in the Islamic criminal and penal edifice. Also the infringement of the obligatory and the prohibited acts encompasses the main three classes of crimes, namely \textit{hudūd}, \textit{qisas} and \textit{diyāh} and \textit{ta\textsuperscript{z}Ir}.

The Qur\textsuperscript{ā}n explicitly prohibits: killing one’s own offspring, murder, adultery, plunder or illicit mismanagement of an orphan’s property, a dead animal’s meat (not ceremonially slaughtered), the blood (emitted by slaughter), swine, wine-drinking, gambling, divination by any form. Other verses prohibit heft, slanderous allegations, transgressions, breach of trust, etc. Therefore, all these acts constitute crimes punishable by \textit{hudūd}, \textit{qisas} and \textit{diyāh} as in adultery, theft, slanderous allegation and murder or \textit{ta\textsuperscript{z}Ir} as in plunder and the illicit mismanagement of an orphan’s property or as in breach of trust.\textsuperscript{181}

B. Obligatory Commandments

Some Qur\textsuperscript{ā}nic texts suffice as examples of this important segment of breach of religious orders (\textit{ma\textsuperscript{s}āsī}) (plural of \textit{ma\textsuperscript{s}āsiyah}):

1. "... And establish \textbf{regular} prayer and \textbf{give} regular charity [alms]" (73:20).

2. "Allāh doth \textbf{command} you to render back your trusts to those to whom they are due, and when ye judge between man and man [the people] that ye \textbf{judge with justice} .." (4:58)

Muslim jurists derived from these Qur\textsuperscript{ā}nic texts the obligatory enjoainment of prayers and alms-giving as well as the keeping of trust (in all its forms) and the maintenance
of justice in judicial proceedings and arbitrations. Therefore, any breach of such obligatory commandments constitutes a ma'ṣiyah (disobedience). This, in turn, vindicates any ensuing penalty prescribed for such disobedience hence taʾzīr penalties assume a very significant role, because, most of the ḥudūd, qisas and diyah penalties are mainly systematized under the former categories of prohibitions. However, taʾzīr also regulates many prohibited acts as in the breach of the ban of usury, espionage etc.

Also specialists of usūl al-fiqh exhaustively elaborated mandūb (a commendable act) as those good deeds whose doer is not obliged to perform. However, if he did, he would be entitled to a good reward. But if he abstained (from doing mandūb), no penalty or retributions would accrue. The makrūh (detestable act) are similar to muharram (prohibited) except that makrūh does not involve a decisive prohibition (as muharram does). Mubah (permissible acts) are those acts which do not acquire either of the aforesaid four attributes (obligatory, prohibited, commendable, detestable), and each person is equally free to do or omit them.182

In this respect al-Tarābulṣī expressly maintains that punishments may be enacted for the violations of the obligatory, prohibited, and even sometimes the commendable and the detestable acts. These penalties coincide with the infraction done vis-à-vis each legal commandment where this differentiation becomes conspicuous in the realm of taʾzīr inasmuch as the criminal's personality and circumstances play significant roles in assessing the penalty most suitable to him. This doctrine is zealously upheld by Ibn al-Qayyim (d.751 A.H.) as al-Tarābulṣī reports.183

Hence divergence between jurists has occurred in regard to the specific criteria by which distinction between the obligatory and the commendable can be made. The same problem arose in the ambi's of the prohibited and detestable acts. But, eventually, the specialists agree that the
concomitant tokens and presumptions are the fundamental criteria by which any distinctions can be made; and accordingly an act is to be assessed and classified within the mentioned five categories.\textsuperscript{184}

The importance of the above juristic problems can be noticed in \textit{ta\textsuperscript{z}Ir} penalties as far as the circumferences of the commendable, detestable and permissible acts are concerned, because some jurists contend that the peripheries of \textit{ta\textsuperscript{z}Ir} are so elastic and resilient that it can even encompass the ban of the permissible acts when the public interest so necessitates.\textsuperscript{185}

Moreover, a substantial sector of \textit{usūlīyūn} (specialists of the origins of jurisprudence) state that 'the element of punishment' when it accompanies an order or ban is the most salient presumption as to the specific category of such an order or ban, e.g. usury (\textit{riba}), in the Qur\textsuperscript{ā}n is mentioned in concomitance with God's severe condemnation and retributive punishment. Thus usury is a \textit{ḥaram} (prohibited act). Also if a certain order is associated with a very propitious reward in the Hereafter, this act would be subsumed under \textit{wājib} (obligatory). But if no punishment nor propitious reward is mentioned in the text then the act can be \textit{mandūb} (commendable) if it comprises praise or commendation, also it may be \textit{mākrūh} if it involves some sort of reproachment. Finally it may be a mere \textit{mubāh} (permissible) if it is devoid of any form of praise, commendation, reward or retributive recompense.

(ii) \textbf{Recognizing \textit{Ma\textsuperscript{ṣ}āṭ} (Disobediences)}

The method of realizing these \textit{ma\textsuperscript{ṣ}āṭ} (disobediences) is a very easy one, for such knowledge can be acquired by referring to the texts of the Qur\textsuperscript{ā}n and Sunnah. This is unequivocally clear from the sections of \textit{ḥudūd}, bodily transgressions, and offences against the foetuses (and abortion) as being the major and fundamental disobediences. However, some \textit{ma\textsuperscript{ṣ}āṭ} are expressly mentioned in the Qur\textsuperscript{ā}n,
but are not included in the peripheries of the aforesaid crimes such as usury (rieb), espionage, (tajassus) or intentional mismanagement and plunderage committed on an orphan’s property (akl mal al-yatim). Therefore these acts are to be given the priority in ta'zir penalties by all legislative authorities in all Islamic states regardless of the variations of time and place, because these acts are deemed as sins and disobediences by irrevocable texts.

Al-‘Izz b.‘Abd al-Salam, al-Shâṭibî and many other jurists have made exhaustive treatment of the concept and criterion of jalb al-maṣâliḥ wa darṣ al-mafâṣid (procurement of interests and prevention of corrupt practices). This assists in deciding the nature of those acts which are not mentioned in the Qur‘ān nor in the Sunnah of the Prophet, such as: levying new taxes, ordinances of traffic regulations; regulation of foreign affairs with contemporary states, etc.186

It could be concluded that the entirety of the Islamic Shari‘ah when thoroughly surveyed can solve the problem of circumscribing the maṣâṣ (disobediences) in one place; bearing in mind that the basic sins and the most pernicious and immoral acts are numerously mentioned in both the Qur‘ān and Sunnah e.g. adultery and its anterior or preparatory or helpful factors, misappropriation of others’ properties, malevolent treatment of parents, the young and the elderly are all either tacitly or expressly mentioned in the Qur‘ān or Sunnah. Therefore it becomes relatively easier to the subsequent generations to enact ta’zir penalties that pertain to the aforesaid acts.

(iii) Grades of Maṣâṣ

The classical schools of Islamic jurisprudence sort out maṣâṣ generally mentioned above into the following three main channels:
(a) *Macāṣī* (disobediences) penalized by a *ḥadd*, *gisās*, *diyāh*, or *arsh* or described as murder, manslaughter, accidental killing, theft, adultery, abortion or slanderous accusation of unchastity. Some of the *macāṣī* that have legally determined limits, therefore these are generally called *hudūd*. However, some of them encompass atonements as inevitable penalties such as homicidal killings.¹⁸⁷

As discussed in the preceding chapters, the tendency of Muslim jurists is to prescribe *taʾzīr* penalties whenever the *hudūd* penalties are waived or remitted (as in murder cases). Hence the basis of a *taʾzīr* penalty is the public interest. In other words, if a notorious murderer is exonerated from a *gisās* penalty by way of remission, the prosecuting authorities can still sentence him to long imprisonment with the full consideration of his social position, danger, and circumstances. However, such alternative procedure cannot be resorted to unless the crime undergoing judicial inquiry is legally proved.¹⁸⁸

The Shāfiʿis even consider the forty lashes added to the original forty lashes in wine-drinking as a mere *taʾzīr* - liable to be revoked or upheld. Also the Ḥanbalis and Ḥanafis contend that the thief's cut off hand is to be dangled (on his neck) as a *taʾzīr*, also the exile for one year for the unmarried adulterer, is a *taʾzīr* according to the Ḥanafī school.¹⁸⁹

Al-Nawawī holds that this category encompasses a wide perimeter of *taʾzīr* punishments because (as stated before) the lack of some stipulations, with the presence of the major requisites and conditions authorizes the court to resort to *taʾzīr* punishment due to the basic maxim which states: "No transgression is to escape punishment." Accordingly, if the thief stole some money - less than the legal *nisāb* and all the rest of the conditions are fulfilled, the court will not adjudge the amputation of the hand, instead it should hold a *taʾzīr* penalty commensurable with all the relevant circumstances of crime,
criminal and victim. Hence different quantifications of *tażīr* penalties are envisageable.

This is why al-Ramlī al-Shafīʿī invokes the Prophetic tradition that rules: "In the theft of a handful of dates only a fine and a number of lashes are to be carried out."\(^{190}\)

The doctrine of passing *tażīr* sentences in cases where a *hadd* or *qisās* penalty becomes legally unwarrantable is a consistent rule in all Islamic schools of Law.\(^{191}\)

Al-Shīrāzī al-Shafīʿī reports that ʿAlī b. Abī Ṭālib, in a case where someone slandered another by calling him, "Oh, you impious and odious one" said: "These words are abhorrent words that are only punishable by *tażīr* and not *hadd*". This is held despite the vicinity of these words to slanderous accusation of adultery (*al-gadhf*) which is punishable by the *hadd* for *gadhf*.\(^{192}\)

Al-Shīrāzī further propounds numerous examples where the imminent *hadd* and *qisās* penalties are waived whereby the *tażīr* becomes inevitable. Such as incomplete sexual intercourse, stealing less than the *nisāb*, or not from the *ḥirz* or a calumny that does not involve express accusation of adultery or a felony that is not punishable by *qisās* etc.\(^{193}\)

These illustrative examples expounded by al-Shīrāzī are widely propounded in the rest of schools.\(^{194}\)

(b) *Maṣaṣī* Penalized only by Atonements

This class of *maṣaṣī* are specifically mentioned in the Qurʾān and Sunnah. They are such acts as commission of sexual intercourse during fasting (in Ramadān) and commission of such act during the period of *Iḥrām* (religious consecration for pilgrimage).
The atonements for these involves the emancipation of slaves, fasting two months consecutively or feeding the poor, as in cases of spoiling fasting *al-Siyām* or as in the withdrawal from a legal wife by *gihār* (describing her as one’s mother). Also a breach of oath involves expiation by feeding ten destitute persons or emancipating a slave or alternatively, fasting three days. 

Hence the Shāfi‘I scholars hold that atonements can be rightly conjoined with a *taẓīr* penalty as a deterrence against any infraction vis-à-vis the Divine orders. 

It could be noticed that these two categories i.e. *macāsī* that presuppose religious atonements and that which do not involve such religious sanctions, are confined to a limited number of cases. Although atonement is basically a religious act, some jurists state that it has a penal aspect, as is quite clear in the expiations of accidental killing which is specifically mentioned in the Qur‘ān (4:92), for here the killer has to manumit a slave (tacitly to compensate for the person he had killed). However, fasting two consecutive months substitutes the manumission of a believing slave (as that is impossible in our times). 

The majority of jurists hold that in cases of disobediences penalized solely by atonements, no additional *taẓīr* penalty is to be adjudged. 

(c) *Macāsiyah Devoid of Hadd and Atonement* 

This category of *macāsi* in fact incorporates a wide range of miscellaneous acts of disobedience which can roughly be classified in the following three sections:

A. Disobediences that are similar to some illegal acts punishable by a *hadd* penalty. These include thefts which do not fulfil the legal definition as when the thief steals from his father or son, preparatory acts that are considered as preambles to adultery, and all cases where a certain *hadd*
penalty lacks one condition or more. In these cases a \textit{tačźIr} penalty is to be imposed\textsuperscript{198} which should be quantitatively and qualitatively proportionate with the act of disobedience.

Thus it could be said that \textit{tačźIr} penalties assume a role of paramount importance in Islamic criminal jurisprudence, for, as we have seen the \textit{tačźIr} may be used in all the incomplete crimes of \textit{hudūd} which denote the criminality of the offender, but due to the lack of some of the miscellaneous juristic conditions required, the full \textit{hadd} penalty is not adjudicated. So, the stringency of these conditions can be qualified by the \textit{tačźIr} penalties which render the felons always liable for any offence associated with the \textit{hudūd}.

(d) Disobediences punishable by a \textit{hadd} penalty but a strong \textit{shubhah} -(suspicion), precluded this \textit{hadd} penalty, as in the cases of adultery committed with a woman in disputed marriages, or in voidable contracts of marriage\textsuperscript{199}.

This is also a guarantee that helps to deter those adulterers and adulteresses who cannot be held responsible for the full rigours of the penalties of adultery (mentioned above) due to the existence of convincing suspicious circumstances. This section also accommodates all the numerous instances where suspicions and uncertainties are involved in thefts, wine-drinking, slanderous accusation of adultery, brigandage, apostasy and armed dissension.

The court must verify by all means that the \textit{hadd} case in issue is totally devoid of any tenable suspicion or uncertainty\textsuperscript{200}.

This principle also comprehends \textit{qisās} cases where execution of the culprit or the implementation of equivalent bodily injuries are waived due to a legitimate cause\textsuperscript{201}.
However, it must be noticed that Ibn Ḥazm does not accept the principle of waiving ḥudūd and qisāṣ penalties by shubhah as he doubts the authenticity of the widely narrated Prophetic traditions that validated this principle.

Ibn Ḥazm agrees with the rest of the schools in terms of confining the realm of tazīr penalties to those spheres where no hadd is legally liable, though he differs with many others as regards the specific kinds of ḥudūd. He omits baghy (armed insurrection) and includes jahd al-ʿarīyyah (disavowal of borrowed appliances or items), in the realm of ḥudūd. Most importantly, he criticizes the Ḥanafis (and others) for their exclusion of wine-drinking in some cases which he deems as punishable by ḥadd and not by tazīr. Besides, Ibn Ḥazm tackles the crimes of homosexuality, bestiality, eating swine, and dead animals, lesbianism, sorcery, libellous accusation, which is short of qadhf, cessation of performing ritual prayer, and fasting, in different chapters and in many cases concludes that they are mere māṣāṣi punishable only by tazīr penalties and not by ḥudūd thus diverging from the views of many jurists in all schools.

Ibn Ḥazm could be said to enlarge the peripheries of tazīr penalties on a solid rationale. Ibn Ḥazm’s doctrine in this regard is that the hadd penalty is neither to be proved by a suspicious means nor is to be rescinded by such a means.

The relevance of these two sections of kinds of disobedience is quite compatible with the aims of criminal law in this area. Tazīr rules, thus, empower the judiciary and legislative authorities to enact punishments suitable to each case where the original hadd or qisāṣ penalty is quashed by a shubhah, particularly when it is well established that "mistake in the relinquishment of penalty is far better than mistake in implementing such a penalty."
(e) Disobedience which is not punished by any sort of hadd or gisas punishments. This section encompasses a vast number of offences. In effect, it can accommodate all the new offences that are harmful to social and individual interests. But we have to bear in mind that the public interest and the Sharī'ah's incontrovertible ethos and philosophy are binding criteria that qualify the freedom of the legislative authorities in their enactments, and legislation in the subsequent eras.206

Notwithstanding these broad facts, the following examples can help to illustrate the tenor of the Islamic criminal jurisprudence in this regard:

**Perjury and Untrue Testimony**

It is a repugnant marsiyah (disobedience) expressly condemned in the Qur'ān that says,

a. "Those who witness no falsehood ..." (25:72)

b. "O ye who believe, stand out firmly for justice as witnesses to God, even as against yourselves, or your parents, or your kin and whether it be (against) a rich or poor; for Allāh can best protect them ..." (4:135)

c. "Conceal not evidence for whoever conceals it his heart is tainted with sin ..." (2:283)

d. "... But shun the abomination of idols and shun the word that is false." (22:30)

The Prophet also emphatically confirmed that inveracious testimony and speech are some of the great sins (in the subsequent grade below shirk (association of partners with God).
Adulteration in Gauges, Measurements and Weights

God bans this illicit practice and the Qur’ān confirms this ban in numerous cases as follows:

a. "Woe to those that deal in fraud. Those when they have to receive by measure from men (people) give less than due." (88:1-3)

Fraud mentioned in the above context involves very wide implications; nevertheless the Qur’ānic denunciation and threat focuses on those who fraudulently tamper with the legal weights and gauges and measures to their own advantages and to the detriment of others. So, fraudulent practice is deemed as everlastingly forbidden, so much so, it is deemed a heinous offence.

b. "Give just measure, and cause no loss, (to other by fraud). And weigh with scales true and upright. And withhold not things justly due to men [people], nor do evil in the land working mischief." (26:181-183)

c. "Give full measure when ye measure, and weigh with a balance that is straight, that is the most fitting and the most advantageous in the final determination." (17:36)

Breach of Trust

This is another criminal act denounced in the Qur’ān and Sunnah. The Qur’ān says:

a. "Allāh doth command you to render back your trusts to those to whom they are due ..." (4:58)

b. "O ye that believe betray not the trust of Allāh, and the Messenger, nor misappropriate knowingly things entrusted to you." (8:27).
Amanah (trust) mentioned in the Arabic text encompasses a considerable number of things e.g. property, goods, credits, adjudication, civil and military duties and public confidential information, interests, etc. They are all to be well kept and maintained against any form of unfair breach or discretion; therefore such violations amount to a criminal act.207

c. O ye who believe eat up not your property among yourselves in vanities, but let there be amongst you traffic and trade by mutual goodwill..." (4:29)

d. The Prophet says that a genuine hypocrite is characterized by four odious attributes, one of which is the breach of what he is entrusted to keep; and the one who also breaks his 'ahd (covenant).

Partaking of a Banned Food

The Qurʾān says:-

"He hath only forbidden to you; dead meat, and blood and the flesh of swine, and that on which any other name has been invoked, besides that of God. But if one is forced by necessity without wilful disobedience, nor transgressing due limits then is he guiltless for God is Oft-Forgiving Most Merciful." (2:173) (6:119) (6:145) (16:45)

The Prophet banned some animals' meat, e.g. dogs, donkeys and snakes, rats, crows, and some animals and birds that prey on flesh e.g. lion, tiger, wolf and hyena, etc.

Usury

It is banned by expressly revealed Qurʾānic and Prophetic texts e.g.
I. "Those who devour usury will not stand (straight) except as stands one whom the Evil One by his touch hath driven to madness ..." "God will deprive usury from all blessings but will give increase for deeds of charity ..." (2:275-276)

II. "O ye who believe, fear God, and give up what remains of your demand for usury, if ye are indeed believers. If ye do it not, take notice of war from God and His Messenger. But if ye turn back ye shall have your capital sums: deal not unjustly, and he shall not be dealt with unjustly." (2:278-279)

III. "O ye who believe devour not usury, doubled and multiplied, but fear God." (3:130)

IV. The Prophet condemned usury and threatened those who recurrently deal with usury. He says,

"God has cursed ribā (usury) and those who devour it, and those who give it, and those who write and witness it."

Thus, it becomes clear that any deal that involves usury constitutes a criminal act punishable by a tãozír penalty, irrespective of the vicissitudes of time and place, because usury is banned by irrevocable Qurʾānic and Prophetic texts.

Slanderous and Abusive Utterances

The Qurʾān and Sunnah countenance good speech and encourage people to address one another in a respectful propitious language; on the other hand both the Qurʾān and Sunnah ban abusive language even in quarrelling. The Qurʾān says:

a. "Allāh loveth not that evil should be noised abroad in public speech except where injustice hath been done..." (4:148)
The prohibition mentioned in this verse includes libel, scandalous and malevolent words and any form of speech that hurts others' feelings. However, if such speech amounted to false accusation of adultery whether clear or tacit, this would be punished as a *hadd* of *gadhf*.

b. "O ye who believe let not some men laugh at others [sarcastically], it may be that the (latter) are better than the (former), nor let some women laugh at others: it may be that the (latter) are better than the (former), nor defame nor be sarcastic to each other by (offensive) nicknames, ill-seeming is a name connoting wickedness..." (49:11)

c. The Prophet denounced any form of sarcasm, abasement and depreciation of others, by language or allusions as He says:

"A Muslim is totally banned (from harming) another Muslim in respect to his blood, property and honour". "It is sufficient mischief that you may abase [sarcastically] your Muslim brother ..."

Espionage

The Qurʾān says:-

"... And spy not on each other ..." (49:12)

The Prophet also forbids spying on others' secrets and all evil forms of surreptitious eaves-dropping, watching, etc. Therefore such acts are punishable by *taẓīr* penalties which may be very severe according to the degree of harm done.

Bribes, Gambling, Unpermitted Entrance to Private Homes

Are expressly denounced and banned by Qurʾānic and Prophetic texts. Accordingly the legislature and courts are legally empowered to set the most suitable penalties for them with special reference to the gravity of the injurious act and

The aforesaid ten banned acts can be considered as the most dangerous acts in the realm of masā'īf (acts of disobedience) not punished by hudūd or qisās where tażīr as discretionary penalties assigned to the Imām and legislative authorities plays a very important role indeed. On the other hand, it is also proved that tażīr completes the picture of the scales of crimes in Islamic jurisprudence; and it extends to all acts that are injurious to the public or the individual, or are inconsistent with Islamic way of life. So later generations cannot escape their legal duties and rights to legislate for novel cases in compliance with the general principles and philosophy of the criminal rules. The famous judge, Shurayḥ b. Umayyah (d. 78 A.H.) once said that "Novel judicial decisions are to be contrived as long as people innovate new problems."208

It must be added that al-Ramlī (d.1004 A.H.) maintains that tażīr penalties can be enacted for acts which are not statutory masā'īf (acts of disobedience) such as the felonies and misdemeanours committed by a minor, a lunatic, an imbecile, or an inadvertent person (whose acts are legally regarded as excused thus no criminal liability will ordinarily accrue). This category may also include, as al-Ramlī contends, pecuniary acquisitions gained by over-indulgence in frivolous activities which are normally permitted where the judicial authorities may enact appropriate tażīr penalties.209 The Ḥanbalis accept this Shāfīʿi opinion.210

C. Penalties of Tażīr

It could be said that the Islamic laws have put the general demarcations of tażīr as these laws had already defined what is masā'iyah which must be obviated and punished for when committed.
Al-Ṭarābulṣī and others hold that taʿziyār penalties are not confined to a specific number of penalties. So there are a miscellaneous variety of penalties from which the court selects the most suitable. He attests this principle by the Prophetic judicial rulings passed in different occasions and for different persons.

However, the general tenor of Islamic criminal law as regards taʿziyār penalties gives the ruler discretionary powers to choose the appropriate penalty for each māṣiyah. Thus the term māṣiyah is equivalent to offence.211

But it must be noticed that the power to enact any penalty is not arbitrary. It is restricted by the criterion of achieving the goal of the penalty i.e. the education, deterrence and correction of the culprit besides compensating for any damages. Below are the main discretionary punishments in taʿziyār realm:-

(i) **Execution (Capital punishment)**

Al-Ghazālī contend that a taʿziyār penalty should not lead to death or grievous bodily injuries; therefore no amputation or capital punishments are to be entertained by the court; nor should it adjudicate a partial or total debilitation of a limb.212

Nevertheless an influential body of jurists disagree with al-Ghazālī’s aforesaid opinion arguing that the ethos and canons of Islam prevent perversion and decadence.

Therefore, Ibn Taymīyyah and Ibn al-Qayyim and the Ḥanafis, exempt some cases from the general prohibition of capital punishment for they accept the concept of al-qatlu siyāsatan (execution by discretion policy assigned to the Imām). This Ḥanafī approach, in fact, is equal to giyās cases in the other schools, because the Ḥanafis preclude capital punishment for murder committed by a heavy instrument or stone, but they sanction this penalty on the basis of
ta'zīr, whereas the rest of the schools impose the same penalty on the grounds of qisas. This is a serious difference because according to the divergence in assessing and classifying such crime and its judicial penalties, the right of waiver, compensation and relinquishment accrues, (as discussed above). Also, this divergence has its effects on the law of evidence and the powers of the courts.\textsuperscript{213}

Also some jurists namely the Ḥanbalis, Ḥanafis, Mālikis, hold that a capital penalty can be carried out in crimes of the propagation of heresy, homosexuality, espionage, recurrence of dangerous offences. Nevertheless, as mentioned above, apostasy involves heresy, and adultery involves homosexuality in the statements of some jurists. Accordingly, some difference took place as to the proper evaluation and classification of such crimes and their punishments.\textsuperscript{214}

Al-ʿIzz b. ʿAbd al-Salam and some Ḥanbalis hold that dangerous criminals can have their penalties augmented in proportion with their criminal tendencies. This versatility of ta'zīr penalties accommodates the severest punishments such as crucifixion when no other penalty can repel the criminal predilections of a certain felon.\textsuperscript{215}

Moreover, al-Ṭarābulṣī reports that Abū Bakr al-Ṣiddīq has adjudicated capital punishment in sodomy cases and that ʿAbdu Allāh b. al-Zubayr and Hishām b. ʿAbd al-Malik have also held similar rulings during their periods in office.\textsuperscript{216}

Nevertheless the Ṣḥāfiʿis, the majority of Mālikis and some Ḥanbalis maintain that dangerous criminals whose criminal tendencies could be constrained by the implemented punishments can be imprisoned for unlimited periods until they repent and become good and responsible members of the society.\textsuperscript{217}
However, Ibn Hazm does not accept such penalties, as he only argues for the lashing of those who obstinately cease to pray. Even in such disobedience, he maintains that only ten lashes are to be carried out each time he offends till the person ceases his bad conduct.\footnote{218}

He even extends his punishment to homosexuals, thus agreeing with the Ḥanafis who differentiate between homosexuality and adultery, linguistically and juristically.\footnote{219}

The same Zāhirī approach and rationale is applied in bestiality, for basically Ibn Ḥazm investigates the Qur’anic and Prophetic texts which do not expressly penalize such abhorrent acts. Therefore Ibn Ḥazm incorporates this crime in the realm of taʾzīr.\footnote{220}

(ii) Lashing (al-Jald)

The legitimacy of lashing is enshrined in the Qur’ānic verses that penalized adultery (unmarried adulterers) and slanderous imputation of adultery against an innocent person, and in the crime of wine-drinking and inebriation. However, the latter is enacted by Sunnah, and consensus of the Companions of the Prophet.\footnote{221}

Therefore, the Islamic schools of law unanimously accept the legislation of lashing in the realm of taʾzīr due to the merits of this kind of penalty, because it can be adjudged according to the gravity of the crime committed as well as not involving any unwarrantable public expenditure as in the penalties of detention and imprisonment. In addition, the culprit's family will suffer no unjustified harm, for the culprit directly leaves for his work after receiving the designated number of lashes.\footnote{222}

The maximum limit of lashing is a point of some difference in the Islamic jurisprudence. The Ḥanafis generally impose a number of lashes that should not reach the lowest hadd; so, Abū Ḥanīfah and al-Shaybānī hold that the highest taʾzīr
here should not exceed thirty nine lashes, but Abū Yūsuf limits the highest grade to seventy five lashes.

This is based on the Prophetic tradition that precludes judges from exceeding the ٍـُـَّٓ penalty when adjudicating a تاـَزـِّر crime. This Prophetic order has been widely explained and understood in various ways. As a result, conflicting juristic opinions were propounded. For instance, al-Ṭarābulṣī and many Ḥanafis argue that Abū Ḥanīfah and al-Shaybānī hold that this order is based on the assessment of the ٍـُـَّٓ of slave - which is forty lashes in adultery - and accordingly subtracted one lash to conclude that in all circumstances the maximum penalty in this context should not exceed thirty nine lashes. Abū Yūsuf on the other hand accepted the same Prophetic tradition but based his evaluation on the maximum ٍـُـَّٓ of the free persons, i.e. eighty lashes, and in compliance with this and Ṣalīb’s judicial precedents concluded that the maximum تاـَزـِّر penalty in this context should not exceed seventy five lashes.\\

The Mālikī school assigns the right to determine the maximum limits to the discretionary powers of the ruler because تاـَزـِّر should initially be held according to the public interest and according to the magnitude of the crime in issue. Therefore it is possible that the limit might exceed the one hundred lashes (which is the highest ٍـُـَّٓ penalty as far as lashing is concerned).\\

The Shāfiʿis, as Ghazālī, al-Nawawi and al-Ramlī elaborate, have three opinions in this context: the first agrees with Abū Ḥanīfah and al-Shaybānī, the second one agrees with Abū Yūsuf; but the third opinion endorses surpassing the limit of seventy five lashes up to the limit of one hundred lashes, on condition that each تاـَزـِّر offence is to be assessed by an analogical comparison with a ٍـُـَّٓ crime similar to it e.g. penalties of preparatory acts of adultery should be punished by less than the penalty for adultery.
(even if this ta'zīr penalty does practically exceed the penalty of slanderous accusation of adultery al-gadhf).\textsuperscript{225}

The Ḥanbalis maintain very similar ideas in this respect that are generally held by the Shāfīis.\textsuperscript{226}

In conformity with the Shāfīis and Ḥanbalis, crimes of kissing a woman to whom one is not legally married, and all illicit sexual acts that do not amount to adultery are punishable by less than one hundred lashes or more as some of them hold in cases of married persons. This also might be held by a Mālikī court.\textsuperscript{227}

Al-Bahūtī al-Ḥanbalī reports that ʿAlī b. Abī Ṭālib held that one hundred lashes are to be inflicted on the felon who drank wine during Ramadān, when fasting is compulsory. Thus the legal hadd can be conjoined with a taʿzīr penalty (proportionate with the seriousness of the infraction).\textsuperscript{228}

But the Ḥanbalis also propound an authentic Prophetic tradition that clearly limits the range of taʿzīr to ten lashes only as He says:

"Nobody is to receive a penalty above ten lashes except in a hadd of God the Exalted".\textsuperscript{229}

The apparent contradiction with these two traditions means that those who do not enact according to the wording of these two hadīth argue that they are abrogated or that they are restricted to the Prophet's era. Besides those who accepted the first tradition have differed in its elucidation as the Ḥanafis did.\textsuperscript{230}

(iii) \textbf{Detention (Habs)}

This penalty is divided into limited detention and unlimited detention. As far as the limited detention, it is tenable for a wide range of taʿzīr crimes. But there is no unanimity as to the specific period of detention (imprisonment) so they vary according to the merits of each case; despite the
fact that Muslim jurists hold that the minimum limit of
detention is one day. However the Shāfī'is stipulate that
the maximum limit of detention should not exceed one year.\textsuperscript{231}

Some care should be given to the following points:-
1. Detention should lead to the education and correction
of the criminality of the culprit. Therefore, if it
becomes clear that this penalty will be of no avail,
then it should be substituted for an alternative
appropriate punishment.
2. Another penalty can be conjoined with detention when
such procedure is legitimately warrantable.
3. This penalty is regarded as a secondary penalty totally
at the discretion of the judicial powers of the
court.\textsuperscript{232}

As for the unlimited detention or imprisonment it is
predominantly accepted by all schools of Islamic
jurisprudence, especially in the most serious crimes e.g.
recurrent murder, thefts, dissemination of pornography etc.

The maximum limit to this \textit{tażżīr} penalty is until death or
genuine repentance that renders the culprit a responsible
good citizen. This concept is widely accepted in the realms
of positive laws, particularly the Italian, French and
Egyptian.\textsuperscript{233}

Ibn Nujaym and Ibn Ābdīn from the Ḥanafī school maintain
that imprisonment can be for life in cases of diffusion of
perversion as when someone seduces a married woman and
marries her off to another one, or for commission of
procurement (and management of brothels).\textsuperscript{234}

Thus, the gravity of the felonious act determines the
quality and quantity of the \textit{tażżīr} penalty.\textsuperscript{235}
(iv) **Banishment or Exile (Taghrīb)**

The basis of this penalty is the penalty for unmarried adulterous persons as the Prophetic tradition says:

"For the unmarried *al-bikr* adulterous person one hundred lashes and exile for one year ..."

Abū Ḥanīfah considers this punishment as a mere *taqżīr* penalty added to the one hundred lashes mentioned above. But the rest of the jurists consider it an inherent penalty in adultery cases, therefore it is a *ḥadd* penalty (for non-married persons). It is therefore unanimously accepted that banishment and exile of the convicted persons is enforceable in *taqżīr*. No limit is set beforehand for banishment, nevertheless, it should be compatible with the general rules of *taqżīr*. The Shāfiʿīs further confine the duration of exile to one year or less, as an attempt to restrict the powers of courts in these cases.

Al-Ṭarābulṣī reports that the Prophet has exiled the licentious sinners and effeminate men (who emulate women in their appearances, behaviour and manners) from Medina. The Ṣahābah did the same, as ʿUmar banished Dubaycb to al-Ǧarrah, and also exiled Naṣr b. ʿAbd Allāh from Medina. Al-Ramlī and others consider such *taqżīr* penalties i.e. banishment, is exclusively intended for the public welfare of the community and not as a deterrence of a specific *mağsiyah* (disobedience of a religious sanction).

**D. Miscellaneous Secondary Penalties**

Reproachment, exhortation, boycott, public reprimand, confiscation of goods are all a host of *taqżīr* penalties legitimately invocable according to the personal and social implications of each case. Nevertheless each punishment must be suitable to the personal, social and cultural status of the offender. Hence the merits of the offence and offender
play the crucial role in validating or rescinding the impending *tażīr* penalty.

The main aim is to restore a respectable and responsible personality to the convicted persons by all valid ways. Accordingly, prison and detention are places to correct and teach the inmates the ethical background that makes them change the criminal course of their careers. These are the gauges by which validity of the *tażīr* penalty is measured and appreciated, so this is a fertile arena for change. This is also why some judicial procedures can be added to the list of penalties stated above such as: fine, deprivation of some rights, or jobs, destruction of unlawfully built houses, etc. which are all restricted by the general nature of *tażīr* penalties.²⁴⁰

Hence, it may be appropriate to reiterate that al-Māwardī, al-Qarāfī, al-Ramlī and many other leading jurists expressly state that the above mentioned *tażīr* penalties must coincide with the cultural, social and scholastic stature of the convicted persons. Accordingly, the punishments imposed must vary from one case to another in compliance with the objectives of punishment and the criteria of public interests.²⁴¹
References Chapter Six

13. ibid.


29. ibid.


31. ibid.


34. Al-Taḥrīb, Muṣīn al-Ḥuḳkām, p. 184.


64. ibid, al-Ḥaṣkafī, al-Durr al-Mukhtar, Vol.VI, p.554.
68. ibid.
77. ibid.
92. ibid.


129. ibid, al-Mawardī, al-ʿĀghām al-Suṭṭānīyyah, pp. 234-35. 130. ibid.


132. ibid, al-Mawardī, al-ʿĀghām al-Suṭṭānīyyah, pp. 234-35. 130. ibid.


170. ibid.


175. ibid.


191. Al-Sarakhsī, al-Mabsūṭ, Vol.IX, p.36, also see ibid.


196. ibid.


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PART II THE MEANS OF EVIDENCE AND
THE TESTIMONY OF WITNESSES IN
ISLAMIC CRIMINAL JURISPRUDENCE
CHAPTER SEVEN - GENERAL OUTLINES OF EVIDENCE

1. Introduction

The means of proof have a vital role to play in both criminal and civil cases with regard to the individual and society. The theory of proof has an important place in the different legal systems. In Islamic jurisprudence this also applies and there are numerous writings in the field of proof. All the Islamic schools of law have expounded their respective points of view and the adopted concepts in regard to the constituents of the theory of proof.

As there are no systematically compiled codifications, one has to refer to the literature left by the scholars and jurisconsults of every particular school of law.

There are also several Qur'ānic verses and Sunnah traditions that refer specifically to the principles and doctrines of proof that regulate all the spheres of the legal activity of the individual.

It should be clear that in the Islamic criminal law we find that the crimes are classified according to their gravity to both individual and society. Consequently there are many juristic and legal principles regulating, defining and classifying the means of evidence or proof required in each category of crime. Therefore, it seems appropriate to make constant reference to the definitions of crimes and their categories as classified by the Islamic jurists in their authoritative writings and as has already been outlined.

2. General Theory of Evidence

Some reference should be made to the general theory of evidence in Islamic jurisprudence in order to state and define the paramount importance of the testimony of witnesses in Islamic criminal jurisprudence inasmuch as
testimony of witnesses is an integral and an indivisible component of the general jurisprudence of Evidence in Islam.

It would seem to be of paramount importance to give at the initial stages of this part of the thesis some reference to the definition of "evidence" or proof since the main stream of the study is in the field of "evidence" as represented here by the "testimony of witnesses". It also seems equally appropriate to specify the Islamic jurists' approach to the specification of the means of evidence, purpose or objective of evidence, ambit of evidence, prerequisites of evidence, burden of proof (onus probandi). Since it is generally known that criminal cases are litigable before the courts, it is also important to state the Islamic juristic concepts determining the valid prerequisites of a criminal suit (al-da'wā al-jinā'īyyah). Because, as discussed above, all the individual's right ḥuquq al-fard cannot be held by the court unless a law suit da'wā is already filed. This crucial principle, legally comprehends all homicide cases and transgressions against bodies and embryos as well as whatever constitutes a private right. However, God's right i.e. the public interests can be secured by anybody as it is the public who are to protect these rights.

In pursuance of these all-important issues, it is relevant to indicate the Islamic scholars' approaches in differentiating between the litigant parties in a criminal case before a court of justice, namely 'who is the plaintiff and who is the defendant?' For it is usually the plaintiff who is legally required to adduce valid, credible and authentic evidence to support his claim; and by the same criterion and juristic standards, it is the defendant who is required to answer and refute, by valid means, the plaintiff's claim. (Each side should adduce incontrovertible evidence or testimony according to the legal proceedings before a judge who has the appropriate jurisdiction.)
Thus, perhaps it may be clear that there is a correlation between any envisageable criminal act and the judicial proceedings required to prosecute the offender thereof. In other words, the nature of the given felony determines crucial questions namely: who is to sue the offender? who is to prosecute and sentence him? what is the required kind of evidence? And what is the grade required of this very evidence? Moreover, and most importantly, what are the admissible pleadings that may mitigate, alter or totally relinquish the penalty (or penalties) in the given case? Hence the principles of proof (including the testimony of witnesses) do play a strategic role in the dispensation of justice; accordingly the court has to verify two inherently correlated subjects: the criminal allegation and its proof.

3. **Definition of Proof**

Linguistically, the term 'proof' is equivalent to the Arabic word ḳẖẖbāt which means the establishment and institution of proof.¹ Technically, the Islamic jurisconsults used the term 'proof' as it is used in its normal linguistic definition, namely, the establishment and institution of proof so as to evince, verify and confirm a right, an incident or an allegation which is disputed. Consequently, the main general function of proof as envisaged by the Islamic jurists is to prove the authenticity of some statement, allegation, incident or right. Therefore the term 'proof' is used in general and specific technical forms.

Highlighting the above-mentioned claim, we can say that the Islamic jurists normally use the term 'proof' in its general definition when they endeavour to establish and institute a general proof, whether to verify an incident, right or a claim, and whether this process is done before a legally authorized judge or not, or whether this process of adducing proof is pre-litigation or not.² In addition to that, al-Jurjānī (1340-1413 C.E.) has given us a specific definition of the general connotation of the term 'proof' in his maxim
'proof is the rule - or injunction - of the verification of another thing'. Through an analytical assessment of al-Jurjānī's maxim it can be noticed that his specification epitomises the general juristic approach as far as the term 'proof' is concerned. It can, also, be stated that the theory of proof, concerning criminal jurisprudence, can be generally included in al-Jurjānī's doctrine because the criminal act generates rights vis-à-vis the aggrieved victim. These rights are generally the claim of the ḥadd, qisas, diyah or any other legal compensation (as discussed earlier).

As for the specific connotation of the term 'proof', it is used to mean 'the establishment and institution of authentic proof, by juristic means, before an authorized court of justice (with valid and legal jurisdiction) upon a specific right or an incident that has had effective consequences.' The previously mentioned definition or specification implies the essential constituents of the pillars of proof under the Islamic juristic perspective, for the process of litigation, as far as the litigant parties are concerned, must take place before a legally established court of law.

The technical specific connotation also implies juristic restriction or boundaries as to the means, instruments and vehicles which can be legitimately accepted by an authorized court, particularly in the criminal realm. It is a legitimate conclusion, in regard to the specific technical connotation of the term 'proof', that the consequences of proof derive their validity from the fulfilment of all the constituents of that definition. Subsequently, the results of the litigation can and should be accepted by the disputing parties.

It is worth mentioning that it is the specific connotation of 'proof' which is intended in this thesis, since it is concerned with the exposition of the testimony of witnesses as a vehicle and instrument of proof in criminal cases.
It is axiomatic that criminal cases, disputes and criminal activities are both litigable and justiciable; therefore they have received a thorough treatment in the works of Islamic jurisprudence. It is equally axiomatic that the gravity and seriousness of the criminal activity makes the inclusion of the testimony of witnesses in the specific definition of the term 'proof' inevitable and of paramount importance, since there are serious results and consequences induced by the criminal activities. So these consequences of criminal activities, as highlighted above, are legally prohibited and justiciable by authorized judges.

4. **Comparison**

The positive laws have also defined the term 'evidence' as 'that which leads to the manifestation of reality'; and in criminal suits, 'it is that which leads to the verification of the criminality of the accused'. From an analytical point of view, it can be observed that the legal Islamic connotation in its specific definition of the term 'proof' and the positive law definition are synonymous, though the wording might be a bit different.

**MEANS OF PROOF**

The term 'means of proof' is intended to indicate the ways and instruments by which an allegation can be legally proved. It also connotes the presentation of verification by the plaintiff vis-à-vis the defendant as far as the matter in issue is concerned, whether the cause of the litigation is a criminal offence or a civil right.

There is no consensus in Islamic jurisprudence regarding the specific number of means of proof. We can roughly distinguish two academic approaches in this regard which can be expounded as follows:

Firstly, Ibn al-Qayyim (1292-1350 C.E.), Ibn Farhūn (799 H.) and some Ḥanafi scholars had adopted the concept of
accepting any available authentic proof which verifies the plaintiff's claim or allegation. Ibn al-Qayyim further elaborates the above-mentioned precept by saying that the ruler or judge should never rebut or refute a right after being wholly and legitimately proved, and after that right has had all its aspects clearly manifested and highlighted. In this regard he puts a very interesting and important specification of the term bayyinah, which means 'testimony', by saying that this term virtually possesses a comprehensive connotation for it means, linguistically, any means or method by which a certain right is verified and legally manifested - beyond reasonable doubt. Furthermore, Ibn al-Qayyim expounds his argument by inferring that the term bayyinah - testimony has never occurred in the Qur'an as referring to witnesses, but it frequently occurs in the various Qur'anic texts whether in the singular or plural form, as an indicative to proof, verification, confirmation and proof of the matter at issue. Obviously, Ibn Farḥūn and some Ḥanafī jurists have adopted Ibn al-Qayyim's definition of the term 'testimony'.

Secondly, most of the Islamic jurists, adopted the contention of the specific enumeration of the means of proof and the specification of these means or vehicles in a countable circumscribed number. This doctrine is upheld by what Ibn Ṭābdīn (d. 1252 H.) says when he maintains that the way to a judicial verdict differs according to the variance of the points at issue before a judge. He further elaborates, stating:

In the cases of the genuine rights of people (ʿibād) being at issue, the means of proof are enumerated as: the testimony of witnesses, admission, confession, oath, rebuttal of oath, gasāmah (a procedure of taking oaths in cases of homicide), judge's cognisance of proof and irrefutable presumptions.

Ibn Ṭābdīn further explains his idea in this regard by a specific statement of the number of means or proof saying
that there are seven means, but later he contradicts this statement by reducing them to three: confession, testimony and rebuttal by oath. Ibn ʿAbdīn means by 'testimony' its technical connotation which refers to the testimony of witnesses and not the linguistic one which means, as Ibn al-Qayyim had held, the verification and proof by any credible instrument.

The evident divergence between Ibn al-Qayyim and Ibn ʿAbdīn in this regard lies in their academic approach. For, as Ibn al-Qayyim refers essentially to the semantic definition of testimony and supports his academic approach by a retrospective scrutiny of the Qur’ānic verses to substantiate his claim, Ibn ʿAbdīn is contented to rely heavily on the technical specification of the term 'testimony', thus restricting and circumscribing its effective legal realm to the testimony of witnesses only.

There is, within the realm of the second juristic approach regarding the means of proof, a very interesting and important statement by al-Qarāfī al-Mālikī (d.1285 C.E.) who proclaims that the number of the means of proof at the judge’s disposal are 17. In pursuance of this principle he elaborates on them as follows: two witnesses, two witnesses and oath, four witnesses in adultery cases, one witness and oath, two women witnesses and oath, one witness coupled with a rebuttal of oath, two women coupled with a rebuttal of oath, oath coupled with rebuttal of oath, four oaths in līqān,12 fifty oaths in gasāmah,13 two women witnesses exclusively in cases of women’s affairs being at issue, division of two oaths between litigant parties, confession, juveniles' testimony, al-qāfah,14 frontiers or shawāhid al-ḥītān in cases of disputes between neighbours in farming lands or gardens - and acquisition or appropriation by long undisputed usage of land. These are the specific means of proof as far as al-Qarāfī’s concept is concerned. He also mentions them as the exclusive collection of means of proof; outside them there can be no legitimate verdict.15
For further analysis we can note that al-Qarāfī's theory or statement comprehends Ibn ʿAbdīn's statement, but with wider approach and coverage particularly in the sphere of the testimony of witnesses and its grades. We can also infer that both Ibn al-Qayyim and al-Qarāfī have a broad approach in the field of the means of proof, but al-Qarāfī, despite his comprehensive treatment of the topic, has demonstrated all the means of proof that can be exploited and fully utilized by a judge, whereas Ibn al-Qayyim gives a general criterion which can be interpreted by courts according to the claims of the litigant parties, and according to the credibility of proof adduced.

Another influential and authoritative Mālikī jurisconsult, Ibn Juzay', (d. 741 A.H.) refers specifically to the means of proof in homicide cases saying that these cases can be proved by only three means: confession of the killer, testimony of two trustworthy, credible witnesses, and these two means of proof are unanimously accepted by Islamic jurists as Ibn Juzay' says, and the third means is al-gasāmah (a procedure of taking oaths in cases of homicide.) So Ibn Juzay' has excluded in this statement the proof required in civil transactions. His emphasis on the evidence in homicide cases can be attributed to the seriousness and gravity of these acts upon the individual and community.

There is a very interesting point of view in the Shāfiʿī School of Law as far as homicide cases are concerned, for the general concept here is that these cases can be proved by confession, two trustworthy male witnesses, the judge's personal cognisance, the abstention or rebuttal of oath by the defendant (accused) coupled with the oath of the plaintiff, a male witness and two female witnesses (combined testimony), one male witness coupled with the plaintiff's oath and al-gasāmah.

The Ḥanbalī School of Law has also made a contribution in this regard and have agreed with the general Islamic juristic approach of defining the means of proof,
particularly in criminal cases, and this can be deduced from their literature of criminal jurisprudence.\(^{18}\)

In conclusion, there seems to be a general approach within the Islamic schools of law towards the acknowledgement of the importance of proof and its various aspects, especially in the writings in the criminal area of Islamic jurisprudence.

Owing to the absence of scientific methodological and systematic codifications, the means of proof are, nowadays, restricted exclusively to the realm of family laws and civil transactions; but as far as the criminal spheres are concerned, they are mainly governed and codified within the perspectives of non-Islamic laws, as can be easily seen from the collections of judicial precedents throughout the Islamic world.\(^{19}\)

5. **Objectives of Proof**

The main objective of proof is to persuade and convince the judge - or court - of the authenticity of the plaintiff's claims and the real existence of a legal right vis-à-vis the defendant (accused). Consequently, the judge should issue a judicial ruling indicating the plaintiff's right in the litigation. This is built on the logical basis that a claim without a proof is equal to nothing, so that persuasion should be via the valid means or vehicles specified by the Shari'ah laws through its fundamental sources: the Qur'\textsuperscript{a}n, Sunnah, consensus and analogical reasoning.\(^{20}\)

The process of adducing proof is one of the necessities of social life, since it is the instrument by which the individual's and society's infringed rights are secured and maintained. Subsequently we can state that the theory of proof is vital for the attainment of social order and security. Besides, evidence, when lawfully sound, is the sign of the claim's credible ground. This can be deduced from the following Prophetic tradition,
'If people were given what they claim, some people would claim others’ bloods and properties, but the defendant (mudda'ā alayhi) has to swear oath.'

The above-mentioned Prophetic tradition is further interpreted by al-Nawawi (d.676 A.H.) as one of the fundamental bases of Islamic jurisprudence, since the mere utterance of a person’s allegation is not legally sufficient but needs a valid proof or the defendant’s confession. Therefore, continues, al-Nawawi,

If the claimant asks for the defendant’s oath, it is his legal and irrefutable right, for the Prophet had made clear why the claimant should not be given what he claims by his mere claim. For if this is so, people will spontaneously claim others’ properties and blood and chaos will inevitably predominate. Subsequently the defendant’s status will be very vulnerable and untenable, whereas the claimant’s side will be protected by the presence of proof (with its different grades).

Thus it would appear that the legitimate objectives of evidence, as far as crimes are concerned, are the conviction of the accused persons and their being sentenced by the specified penalties according to the gravity of each crime (as defined earlier).

Besides, there are some pertinent objectives of evidence which can be stated as: the deterrence of potential criminals, thus securing the public order. So it is clear that evidence has personal and social functions. As for the personal function of evidence, it pertains to the claimant’s right for the accused person to be sentenced in criminal cases, whether by qisāq, blood compensation, ḥadd, or any legal punishment ratified by the Islamic law, whereas for the social function of evidence, it is represented in the
maintenance of public order. This is an inseparable part of the judicial function of the courts in any country.

In conclusion, it would appear that proof has multilateral objectives and functions in the sphere of Islamic criminal jurisprudence. The prime function seems to be the prevention of crimes. Thus proof leads to the cleansing of society: and that function is coupled with the attainment of a just legal system. Furthermore, there is an objective that holds paramount importance, namely the deterrence of potential criminals, particularly in the domain of youngsters and juveniles. Also, proof is intended indirectly to lead to the reformation and education of offenders according to virtuous careers. Of course, these stated functions and objectives necessitate the establishment and organization of a highly competent legal and judicial system.
References Chapter Seven

   (Mawsū‘at al-Fiqh al-Islāmī).
   (Mawsū‘at al-Fiqh al-Islāmī).
5. Impliedly the evidence adduced before an indigenous arbitrator is irrelevant in this context.
   (Mawsū‘at al-Fiqh al-Islāmī).
8. As note 7 above.
9. For further elaboration and pursuance, refer to Tabṣirat al-Ḥukkam, Vol.1, p.113 and Muṣīn al-Ḥukkam, p.78.
11. al-Qafah - the procedure in cases of ascription or affiliation of newly born children to their mother’s husbands by a searching scrutiny exercised by a judge or an arbitrator. This process or procedure was widely practised in pre-Islam epochs and there are some Prophetic authorities in this regard.
13. As above.
16. See Cross and Wilkins, Outline of the Law of Evidence, "The Introduction", pp.1-2. The means of proof according to Cross are five: testimony (the statements of witnesses), hearsay (the assertion of non-witnesses), documents and things which may be produced to the court as exhibits, and finally facts as evidence of other facts.
18. For further elaboration see ibid, and its interpretation by al-Nawawi.

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CHAPTER EIGHT – THE REALM OF PROOF AND ITS FOCUS

1. Introduction

The realm of proof is where there is a disputed right. This dispute consists of two essential constituents, namely, the claim or allegation which is petitioned by the claimant or plaintiff; and the second is the juristic or legal injunction of the claim.1

As for the first essential constituent in the realm of evidence, Islamic jurists usually use various names according to the different vehicles of proof. Thus it has the following vehicles: the judged right or claim, the witnessed, the confessed, the sworn for or upon or attested, or the right for which a legal document is written. So the claim varies according to and in conformity with the means - vehicle - of proof that proves the authenticity of the allegation. And that alleged right is the essential area for the evidence and constitutes the nucleus of proof and verification. In other words, it is the right that the plaintiff strives to prove.

Furthermore, proof may focus on the absolute right which has been violated as in the cases of debts or property, or the proof may focus on the source and initiation of the litigation that is considered that which establishes the disputed right (e.g. in cases of disputed contracts or damages); or it may focus on a merely material incident (e.g. the delivery of a child). Eventually, proof may focus on both the right and its instituting cause (e.g. a dispute over ownership because of purchase, or a dispute over blood compensation because of homicide).

Consequently we can say that the place or realm of proof has many forms or grades: an absolute right, cause of right, or both the right coupled with its instituting cause; and those causes which institute or establish rights are called sources of right in Islamic jurisprudence.2
As far as criminal litigation and its proceedings are concerned, the focus of the evidence will be on the criminal acts and damages done by the accused - inflicted on the plaintiff or his client. An example set by Ibn Taymīyyah is as follows:

"If the witness in a case of murder, adduces his testimony saying that the accused had killed the victim, or had injured him and he subsequently died, this testimony is admissible on the ground that the witness had attested the instituting cause of the claimant's right in this case namely: the wounding that led to subsequent death."

The previously mentioned criterion is further expounded by al-Bahūṭī al-Ḥanbalī (1591-1641 C.E.) who says:

"If a witness testifies in a homicide case he should mention that the accused had wounded the victim by a sword (or anything else,) or he had wounded him and killed him as a consequence."  

The second constituent of the focus of proof is the juristic injunction of the plaintiff's right. It is unanimously agreed upon that any authorized judge must know and fully understand all the relevant juristic rules and injunctions that can be applied justly to the disputed cases before him. So in criminal cases, the legally authorized judge should be fully cognizant with the juristic rules, injunctions and proceedings pertaining to the many different kinds of crimes, and he should have the capacity and competence to deliver the most appropriate ruling in each case. This point is much discussed in the juristic literature whereby some Islamic scholars had stipulated the status of mujtahid as a prerequisite of the appointment of any judge.

In this regard we refer to what Ibn al-Qayyim has said, for he states that the ruler or jurisconsult can never rule
justly unless he has two types of cognition: firstly, the perfect cognizance and realisation of the facts of the incident by way of presumptions and signs indicative to that incident. Secondly, the virtually perfect cognizance of the injunction or ruling applicable in the case or point at issue. So he has to apply the first and second phases of this process in order to reach a just conclusion or verdict. Ibn al-Qayyim further gives us an explanation of his criterion saying that anybody who tries to issue a ruling or verdict concerning two disputing parties should know in a definite way what had happened and then issue the relevant ruling; the first stage of this process concerns credibility and the second stage involves justice.7

In criminal cases it is the criminal incident that must be proved, for it is axiomatic that the judge should know all the sections and provision pertaining to this realm of jurisprudence (according to the prerequisites set by the authorizing authority).

2. Prerequisites of Proof

The Islamic jurists have stipulated the need for the fulfilment of some juristic prerequisites in legally valid and authentic evidence. These stipulations are the following seven:

I. The evidence should be preceded by legal litigation da‘wā (before a competent court or magistrate in conformity with the procedural ordinances and regulations of the judicature);
II. The evidence should be held and adduced in a court of law (according to the acts and ordinances that regulate such proceedings);
III. The evidence should bear fruit and yield legal results in the matter at issue;
IV. The evidence should conform with the allegation;
V. The evidence should be in agreement with reason and apparent state of things;
VI. The evidence must rely on cognition, knowledge or reasonably admissible conjecture; and finally
VII. The evidence should be held according to and in conformity with the instruments and vehicles specified by injunctions of the Sharī‘ah.

These key points are further discussed as follows due to their generality in all criminal prosecutions:

I. **Evidence should be Preceded by *Darwā* (allegation before a court of law)**

This is a very important stipulation to which Islamic jurists attach great importance. For instance, as discussed above, homicide engenders rights for the killed person’s heirs to claim *gisās* (retaliative killing of the killer) or blood-compensation. Besides the mere killing of a person represents a violation of that person’s right to enjoy his life and his body’s security from any illegal form of assault or injury.

Furthermore, in the case of crimes leading to a claim for *gisās*, the rights originated by such crimes are classified as people’s rights (*hugūq al-‘ibād*), and this class of rights requires a legal allegation to restore or compensate them, whereas in the case of God’s rights (*hugūq Allāh*), which epitomize and symbolize the collective rights of people and society, no legal suit or allegation is stipulated. This juristic concept applies to *hudūd* crimes and punishments because they are classified as crimes that originate in and induce God’s rights which can be legally litigated by anybody on the grounds that they violate and desecrate not only the individual, but also they primarily destabilize the society in its entirety.

As far as *gisās* crimes are concerned, they require legal suits to secure the rights that these crimes involve (on the basis that they violate the individual’s rights in the first place). This stipulation is justified by many juristic
considerations for, primarily, evidence is a confirmer or a manifester of the claimant’s right vis-à-vis the defendant (accused). Besides, the plaintiff has the valid legal right of waiving, abandoning and reconciling his right against the defendant. Moreover, the plaintiff might have secured or satisfied his rights from the defendant without the knowledge or cognizance of the witnesses. For all the previously stated factors Islamic jurists have stipulated the precedence and filing of legal suits in cases of an individual’s rights (which include *qisas* crimes and punishments).¹⁰

The stipulation of a legal suit preceding evidence in the case of *qisas* criminal cases includes two major elements. Firstly, the submission of a legal suit - which in this regard verifies the plaintiff’s desire to attain his right (to expel the possibility of a past waiver, excuse or execution). Secondly, the submission of a legal suit also enables the plaintiff to enjoy the legal right of witnesses’ (attendance at court to testify before the judge.) Also the right of demanding that the defendant swear an oath, cannot be secured or fulfilled unless preceded by a valid legal suit.¹¹

The original basis of the above-mentioned prerequisite is a Prophetic tradition narrated by ʿImrān b. Ḫusayn (d.672 C.E.) who narrated that the Prophet had said:

"The best of my nation - people - are those of my century and those who come afterwards - two or three centuries - then come people who testify before being asked to ..."¹²

But, as mentioned above, on the other hand, the witnesses are morally obliged to testify before being asked if the plaintiff is totally ignorant of his rights because of the fear of his loss of rights in this case. The jurists have elicited the above-mentioned exceptional case from the Prophetic tradition that says, "Shall I tell about the best
type of witnesses? It is he that adduces his testimony before being asked to."13 In other words these good witnesses present their testimonies before being served by the court’s subpoenas.

The jurists solve the apparent contradictions of the two above traditions in this regard by attributing the latter to the case - and applying it in the circumstances - when the person who has this right is totally ignorant of its existence, but the preceding tradition is mainly intended for those cases or circumstances when the person who has this right realizes it without being in need of witnesses to testify to this fact.14

II. Evidence should Correspond with the Allegation Made in the Plaintiff’s Legal Suit

This condition can be explained by the fact that evidence with all its instruments and vehicles is intended to prove the plaintiff’s right in the adjudication of the alleged right or rights. Therefore, the proof adduced should coincide with the alleged claim in the legal suit in order to render it possible to have a legal ruling on behalf of the plaintiff’s side. On the other hand, a contradiction between proof and claim indicates that the proof actually does not support the claim whereas it should verify its legality and authenticity. So, in this case the evidence adduced is rebuttable because both the allegation and proof are incompatible, for in this case the allegation is for something specific while the proof focuses on something else.15 This requisite, of course, is applicable in all the forementioned legal means of proof whether testimony or something else.

III. Evidence must Support the Allegation

Evidence is intended to support the right at issue and to lead to a ruling binding on the other party. Also, if two witnesses testified on behalf of one of two plaintiffs
without the definite specification of one of them, or one witness testified that the accused defendant had killed one of two murdered victims, in these cases the witnesses' testimonies are not admissible because they did not attest or signify the claimed allegation. In addition, the testimony of witnesses in the mentioned hypotheses do not reach the latitude of lawth (irrebuttable presumptions in homicide cases which favour the assumption of the claimant's veracity in what he claims or alleges) because the testimonies in these hypotheses do not specify about whom it really testifies, therefore none of the claimants can possess adequate grounds for gasāmah proceedings, so no gasāmah nor diyah (blood-compensation) will be adjudicated.16

IV. Evidence should be Adduced in a Court of Law (majlis al-qadā').

It is the legal function of evidence to initiate a judicial ruling pertaining to the claimant's allegation. And a ruling cannot be valid and legitimately binding unless it is held by a legally valid court of law.17 Furthermore, it is the judge who assesses the validity of evidence and its pertinence to the matter under consideration in order to issue a just ruling especially in criminal cases involving hudūd and gisas punishments. Consequently, if the plaintiff adduces his evidence outside the court, this evidence, regardless of its relevancy or strength, will bear no fruit and will be considered ineffective.18 Also, some vehicles of evidence are juristically ineffective unless coupled with a judicial adjudication such as testimony of witnesses and attestation of oath - as in gasāmah - therefore such things must be done in a court of law otherwise they will be legally invalid. Also it is juristically inadmissible to transfer a confession which is announced outside courts to a court of law especially in hudūd cases; for if the confessor disavowed his confession, it would be considered a retraction, and this retraction in hudūd cases is considered to provide sufficient doubt to nullify hudūd penalties as it
is well known from the Prophetic traditions and juristic literature in the various schools of Islamic law. That was in contrast with confession of homicide with all its grades, which can be transferred to a court of law on the grounds that retraction of confessions in cases of an individual’s rights is not legally admissible (as has been discussed in the chapters on hudūd and murder).19

V. Evidence must Rely upon True Cognition or Maximum Latitude of Conjecture

Islamic juristic concepts have stipulated that evidence should lead to credible cognition or to a higher degree of reasonable conjecture in order to be legally valid and effective, particularly in criminal cases which may lead to gisās or hudūd penalties. Therefore evidence must be established on solid grounds of certainty and veracity. So the evidence based upon mere presumption or doubt is inadmissible and the judge simply rejects it. Islamic jurists even elicited the mentioned criterion from Qur’ānic verses and Prophetic tradition such as:

A. "Except those who testify with haqq whereas they fully know ... Only who bears witness to the Truth ..." (43:86).
B. "We, but, testify what we really know." (12:51).
C. The Prophet had said "If you have known something to be as clear and distinct as the sun then testify, otherwise halt."20
D. The Prophet had said "al-bayyinah (testimony) is upon the plaintiff". The word bayyinah is that which demonstrates, explains and clarifies something else; and it cannot be so unless it is established upon a solid basis of knowledge and preponderant conjecture."21

Furthermore, it is well known that one of the means that indicates knowledge of the matter at issue is the judge’s cognizance or personal knowledge of the claimed fact,
right(s) - which is at issue. Besides, it is a well accepted criterion within the Islamic schools of law that preponderant conjecture when available is juristically accepted when there is no or absolute knowledge of the authenticity of the facts at issue. This criterion includes: testimony of witnesses, confession, oath, omission of oath, gasāmah, irrebuttable presumptions. This can be justified by the fact that, when there is a preponderant and strong conjecture of the credibility and trustworthiness of the means of evidence of the facts at issue, it can stand for and legally substitute full cognition in numerous cases. This can be considered as a feasible and highly practical juristic stipulation since it is very rare to reach the latitude of maximum conjecture or full cognition (certitude) in most cases, particularly the criminal ones, with the exception of cilm al-qādī (a judge's personal cognition) where the judge sees the incident happen or it occurs before his eyes. But this means of evidence is overwhelmingly rejected, for fear of a judge making unjust rulings and in order to arrange the highest possible level of just adjudication and equity.

Subsequent to this prerequisite, the Islamic jurists stipulate that the wording of evidence should be explicit, distinct, doubtless and perspicuous (jali). Therefore, they have specified particular formulas in regard to testimony of witnesses, oaths, confessions and gasāmah procedures. The stipulation of cognition and preponderant conjecture does not at all contradict the conjectural nature of evidence, inasmuch as the Muslim jurists conceive that the means of evidence mostly indicate preponderant conjecture or cognition of the strength of these means, and we are generally ordered to accept preponderant cognition, particularly in the dispensation of justice and derivation of juristic injunctions, for it is practically impossible to attain absolute cognition in all cases. This precept was enacted by the Prophet who once said to the disputants:-
"You are litigating before me, and I am just a person like you and some of you might be more eloquent and fluent than the others (in the presentation and exposition of his claims or defences) and this might make me rule accordingly. So if I give one the other's right, it is but a bit of Hell Fire that I give."

VI. Evidence should Coincide with Reason or Religion or the Obvious State or Nature of Things.

It is of paramount importance that evidence, particularly in criminal cases, should not contradict reason, religion, or the obvious nature of things. Therefore, if evidence contravened one of these things, it should be forthwith invalidated, and consequently deemed baseless for a judicial ruling. This is based on the assumption that evidence should be preponderantly truthful and authentic. Therefore it should not at all contradict an already verified fact.

The following examples demonstrate the above-mentioned prerequisite:

a. In the case of evidence contradicting reason: if someone confesses the killing of another one who had already died before the one who made the confession was even born: or as when the witnesses testify to this killing. Also if the one making the confession admitted the affiliation of someone who cannot be born to him by comparison of their ages.

b. In the case of contradicting the obvious nature of things: when someone confesses or testifies to the amputation of a limb which still exists in its natural place. In this case evidence should be rejected because it is unbelievable.
VII. Evidence should be Dispensated According to the Means and Vehicles Specified by the Rules of the Sharî'ah

This is a very important stipulation since evidence is considered as one of the means of administering justice and equity in society in all legal disputes. Therefore all the relevant legal procedures must be done according to the rules of the Sharî'ah. Subsequently the proving of facts should be through the means of evidence. Hence, all the primitive superstitious ways of cognition and knowledge are unacceptable in the Sharî'ah courts, particularly in criminal cases. And that is based on the fact that all the means of evidence are in fact binding legal rules like: testimony, confession, gasâmah, presumptions and oath, which were prescribed by binding texts of the Qur'ân and Sunnah.

The above stated principle is unanimously accepted within all the Islamic schools of law. However, Muslim jurists, as mentioned before, are not totally in agreement on the specific means of evidence for each specific group of cases, e.g. in the case of ḥudūd crimes: the majority of scholars mentioned: testimony of witnesses and confession as the sole means of proof whereas a minority add irrebuttable presumptions to the mentioned classical means. In the case of gisâq, the testimony of witnesses, confession, and gasâmah are unanimously accepted. However, some scholars differ in the sub-conditions or stipulations which are normally included under the generally accepted terms as far as punishment, conviction and criminal behaviour are concerned.

So we can say that the Muslim scholars are in agreement in their general approach in this respect, but they differ in minor points which do not nullify or invalidate their common care for the administration of justice and implementation of equitable rulings. By further studies we can understand their philosophical standpoints and juristic justifications in each case of divergence. Consequently the judge must first of all verify the legitimacy of the means of evidence.
of the case at issue, namely that it should be within the realm of the rules of the Shari'ah. Otherwise he should reject it, e.g. if the plaintiff alleged murder and claimed qisās, but failed to bring two trustworthy male witnesses he would have this claim rejected due to the lack of adequate evidence, and so on in all the rest of crimes.

3. **Burden of Proof** (ṣib' al-Ithbāt) **Onus Probandi**

This is an integral element of the whole edifice of the theory of evidence. Therefore it is necessary to place some emphasis on this part of the study due to the crucial role it plays in the criminal procedures.

Firstly, I shall explain the linguistic and technical connotations of the burden of proof (ṣib' al-Ithbāt) and secondly, I shall highlight the importance of the 'burden of proof' and in the third stage I shall speak about topics that have vital pertinence to this theme like da'wā and its prerequisites. Finally, I will put forward the jurists' opinions on differentiating between the litigant parties in a legal suit in order to define and specify each one's role as far as the burden of proof is concerned.

Firstly:

a. The linguistic meaning of ṣib' al-Ithbāt : burden of proof : the word ṣib' means burden (himl pl. ahmāl). The word ṣib' implies also a strenuous heavy burden, usually needing some sort of strength.

b. The technical meaning : the term 'burden of proof' means ordering each one of the litigant parties to substantiate his allegation or defence by verifiable means in conformity with Islamic jurisprudence.

c. The role of the burden of proof (onus probandi): knowing the principles of the burden of proof has an essential role in legal procedures, since it is very
important to differentiate between a sound authentic and genuine allegation and a false one. Besides the court must distinguish between the plaintiff and the defendant in order to distribute the burden of proof accordingly and in conformity with the juristic requirements. This is based on the following authentic Prophetic tradition narrated by Muslim in his *Sahih*.

The Prophet says: "If people are given according to their claims, people will allege - claim others' blood and properties, but testimony is on behalf of the claimant [to verify - prove his claim] and oath is on behalf of the defendant [to refute the claimant's allegation]."³⁰

Some narrations of this *hadith* say: "Testimony is on the side of the claimant and oath is on the side of the defendant."³¹

The jurists deduced from the above mentioned tradition that, according to the basic directives of the Prophet himself, the claimant is always required to adduce his testimony and, on the other hand, it suffices on the part of the defendant to deny these allegations and rely on his oath, which vindicates his innocence. Therefore it is very important for the claimant to succeed in establishing his case by adducing a credible testimony (*bayyina*) otherwise he will lose his case. Likewise, in the face of credible testimony put forward on behalf of the claimant, the defendant should substantiate his innocence by credible reliable means, otherwise he will lose his case.³²

Secondly:

It is of paramount significance to specify the *da'wā* embodied in a legal suit as it is considered a vital pillar in the edifice of the theory of evidence in Islamic jurisprudence in both criminal cases and civil suits.
Linguistically *daʿwa* means alleging something, e.g. a right to oneself.\(^{33}\) Technically it means appropriating to oneself the ownership of something, e.g. a right which is in the hand of another person.\(^{34}\)

The above-mentioned definition includes all the allegeable rights: financial and the allegation of punishments based on committed crimes. Some jurists defined *daʿwa* as the claiming of one's right vis-à-vis another one before a judge.\(^{35}\) Some Ḥanafis, however, defined *daʿwa* as an acceptable claim before a judge intended by the claimant to claim a right vis-à-vis others, or depriving the adversary from one's right.\(^{36}\) They also say, it is the adding of something to oneself in the instance of disputation.

4. **Prerequisites of Legal Allegation in Criminal Cases**

I intend to take the case of murder and the rest of illegal killing as an example when discussing the conditions required in criminal legal suits. Most of the required stipulations can apply to the rest of the criminal suits.

Firstly, the allegation (*daʿwa*) must be well known, explicit and detailed, e.g. in the case of murder, the claimant should explain his allegation by explaining the type of the criminal killing he alleges by saying: A has killed B intentionally, or mistakenly, or *Shibh Khata*\(^{3}\) (which is a stage between murder and mistaken killing). Furthermore the plaintiff should state the number of the conspirators and accomplices, particularly in criminal cases which do not lead to the prescription of *qisas*, namely *shibh Khata* and *khata*\(^{3}\) killings i.e. involuntary homicide and manslaughter cases.

But in cases of intentional murder some Shāfiʿī scholars do not prescribe the mentioning of accomplices because, if the allegation is legally substantiated all the accused must be put to death according to the injunctions of *qisas*.\(^{37}\) The court should ask the claimant to elaborate when necessary as
far as the type of killing and number of accused accomplices are concerned.

Secondly, the allegation must be in an obligatory form, i.e. it must be serious (intended to bear its legal anticipated consequences).

Thirdly, the claimant must specify the accused in his legal suit whether they are numerous or only one person. So he may claim that the deceased was killed by three persons who were present; but if he said, 'One of them killed him' and accordingly asked for their oath, the judge should refrain from taking their oath due to ambiguity in the claimant's allegation. However, if there is a credible irrefutable presumption on one of the accused, the judge may refer to the alternative procedure of gasāmah (whereby he asks the accused to make fifty oaths in order to refute the allegation, and subsequently pay diyahl(blood-compensation) to the claimant). 38

Fourthly, the allegation (daqwā) must be submitted by a mature and sane person. Therefore no juvenile's nor insane person's allegations are legally acceptable. However, it is not necessary that the claimant should be a decent respectable person. Therefore an allegation by a dissolute person is juristically acceptable; as the final ruling in the case at issue is wholly dependent on the tenacity of the claim and the veracity of its proof.

Fifthly, the defendant must be legally liable by being sane and mentally mature. Hence no legal suit can be filed against an insane person, nor can it be directed against a person under the age of puberty. However, in the case of the latter persons, their respective legal guardians represent them before the courts of law, whatever the case or cases against them may be.

The above-mentioned stipulation includes the interdicted mentally incompetent, interdicted insolvent and interdicted
slave, whereby they are legally responsible and liable to any criminal allegation which can be proved by their confessions. Therefore they are liable or responsible in murder cases which might lead to *qisās* ruling. However, they are not accepted in cases where a criminal conviction might lead to the ruling of *diyah* (blood compensation). This is justified by the legal precept that the interdicted person’s confessions in monetary liabilities are not acceptable.39

Sixthly, the allegation should not contradict itself. Therefore, if the claimant accused a single person as being the sole perpetrator of a criminal killing, and later on accused another one as being an accomplice to the former one, or being the sole killer, here, the second allegation or accusation against the second person is legally invalid because the second accusation contradicts the preceding one. This rebuttal of the second accusation is done whether a ruling concerning the preceding allegation has been issued or not.40 However, if the second accused person ratified the claimant’s second allegation, the majority of Shāfī’is say that the second person’s confession should be accepted.41

Furthermore, if the claimant described the criminal killing in a wrong juristic and legal way, the Shāfī’ school nullify only the wrong description but the main corpus of the allegation should be accepted because the different forms of criminal killing might be mixed up in the claimant’s mind, and therefore the court should depend on the interpretation of the allegation when verified by the credible means of evidence.42

Seventhly, the allegation should not be frivolous and should be a call for a real ruling, e.g. when a certain judicial case has completed its legal proceedings and before the court pronounces its verdict, the defendant asks the judge to take the claimant’s oath that his witnesses are not blameworthy. In this case the Mālikī school rejects the
defendant's request, because if implemented, it will make witnesses refrain from attesting before the courts.\textsuperscript{43} However, the real reason for rejecting such a request is that it is simple time-wasting because the investigation of witnesses has taken place before they gave their evidence.

Eighthly, the allegation should be definite and unequivocal. Therefore both the allegation and defence should be in definite words, e.g. if he alleges by saying 'I think I gave him what I owed him', hence both the allegation and defence should be invalidated. However, preponderant conjecture may be given the status of perfect knowledge.\textsuperscript{44}

Ninthly, the allegation should be in a way that does not contradict the norms of life or natural realities, e.g. if the claimant alleges the killing of his relative and accuses a certain person who was born many years after the death of the claimant's relative. Here this allegation must be rejected because it contradicts a natural reality. So if all the above-mentioned requirements are fulfilled, the judge proceeds further in the litigation process, which inherently includes the identification of the concerned parties, whether litigants or witnesses or experts.

5. Criteria to Distinguish between Litigant Parties

The terms \textit{mudda}f\textit{â} and \textit{mudda}f\textit{â} \textit{âlayhi}, which respectively represents the plaintiff and the defendant, are widely used in Islamic juristic and judicial circles. It is also worth mentioning that both terms are involved in criminal and civil suits. However, some modern writings in Islamic juristic and judicial spheres use the term \textit{muttaham} - (accused), to point to the defendant (\textit{mudda}f\textit{â} \textit{âlayhi}), but they imply the same meaning. Therefore the classical Islamic schools of law paid great attention and emphasis on the definition of who is the \textit{mudda}f\textit{â} (plaintiff), and who is the \textit{mudda}f\textit{â} \textit{âlayhi} (accused or defendant). Furthermore, as previously mentioned, the distinction between the two litigant parties is a crucial element of the study of the
'burden of proof', since this distinction, when based on the right principles, facilitates the judicial proceedings and maximizes the degree of authenticity in the pending ruling. This is further justified by Saδıd b. al-Musayyib (634-713 C.E.) who said that, whoever could distinguish between muddṭI (plaintiff), and muddṭā alayhi (defendant), he could issue a just verdict, because he knew the real scope in which the adjudication could take place.⁴⁵

Also, the eminent Qādī Shurayh (d. 78 H.) said:

"I am appointed a judge, and I was thinking that it will not be difficult for me to rule between litigant parties. However, at the first case submitted to me, it became apparently difficult to differentiate between the plaintiff (muddṭI) and defendant (muddṭā alayhi)."⁴⁶

So whenever we know the plaintiff, we ask him to present his evidence and proof that his claim is legally valid, whereas it suffices on the part of the defendant to keep silent and his primary denial of the case is initially acceptable, and he also enjoys the state of al-brāʾah al-aslīyyah (original innocence) until it is proved otherwise.

In addition, the distinction between the two litigant parties requires duties and rights on each, e.g. it is the plaintiff's right to ask for the postponement of the trial until he presents (brings) his evidence to the court, whereas, on the other hand, the accused does not enjoy this right. However he enjoys the right of acquittal whenever the plaintiff fails to substantiate his allegation.⁴⁷

This Islamic judicial and juristic opinion is also adopted in some modern positive laws as maintained by Jundī ʿAbd al-Malik when he says:

"At the instance of the plaintiff's failure to present the required evidence, the defendant must be acquitted

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and set free, and this principle must be particularly observed in criminal sections and trials. Therefore, since the plaintiff did not present the acceptable evidence that leads to the accused’s conviction, the latter should be released and his innocence must be judicially declared.48

However the classical Islamic schools of law differ in their approach in distinguishing between the two litigant parties. They have the following opinions:

First, the majority of Ḥanafī jurists adopted the criterion that 'when muddaţ I (plaintiff) withdraws the case, it is abandoned' or 'He is the party who is not obliged to proceed with the trial if he opts to withdraw his allegation'. On the other hand, Muddaţā alayhi (defendant) is the party who cannot withdraw from the case unless it is withdrawn' or 'He is the party who is obliged to answer the charge)'.49

The above-mentioned criteria are widely accepted in the Ḥanafī school besides being appreciated by some Shāfi‘ī scholars, namely al-Gazālī, al-Māwardī. Also al-Amīr al-Mālikī adopted the Ḥanafī criteria.50

Second, some Ḥanafī scholars and the majority of Shāfi‘ī scholars put the following criterion 'al-Mudaţ I -(the plaintiff)- is the one who holds to the non-apparent nature of things al-zāhir, whereas the defendant is the one who holds to the apparent nature of things'. This term 'the apparent nature of things' is elaborated by a prominent Shāfi‘ī jurist al-Shihāb al-Ramlī as he says:

"The apparent nature of things includes the following implications:

a. The question at issue which is proved by its evidence, or

b. preponderant conjecture, or

c. the accompaniment of what was existent or non-existent (istishāb).51
Also this term is interpreted within the Ḥanafī early sources, namely Sharḥ al-‘Ināyah ʿalā al Hidāyah, which says:

"The apparent nature of things (al-zāhir) is the presumption:

a. that properties are in the hands of the owners, and

b. of the innocence of persons (from both criminal and civil liabilities (al-barāʾah).

Therefore it is the plaintiff who tries to change, alter or amend the 'apparent nature of things' whereas it is the defendant who tries to cling to the 'apparent nature of things' and whole-heartedly wishes its continuation".52

Evidently the above-mentioned Shāfiʿī and Ḥanafī criteria can be utilized to cover the whole spectrum and ambit of criminal cases (besides the civil ones).

The third opinion - as far as the process of distinction between litigant parties is concerned - is adopted in the Mālikī School of Law. They specified the plaintiff muddaṣī as the party who is the remotest one whereas the defendant muddaṣā ʿalayhi is the nearest one as to the cause of allegation. The second opinion in the Mālikī school holds that the plaintiff is the party whose speech is in contradiction with either asl (an origin, source) or ʿurf (tradition). On the other hand, the defendant muddaṣā ʿalayhi is the party who adheres to an asl or ʿurf.53 The Mālikī jurists give examples of the above-mentioned criterion as when someone alleges debt, theft or crime. Hence, it is the original nature of things that those alleged things should not occur, so the one who pertains to this original status is the defendant, whereas it is the plaintiff who contravenes this original status of things, as he endeavours to prove the contrary inasmuch as he alleges that these things did occur.

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We can say that there is great similarity between the Shafi'i, some Hanafi and Maliki schools of law in their approach to specifying and defining the litigant parties in any trial. So the Maliki jurists, together with the remaining jurists, maintain that in the above-mentioned examples the defendant (muddaṣṣa 'alayhi) is on the strongest side of the litigation and therefore possesses the right of attesting an oath to defend himself, whereas it is the plaintiff's duty to substantiate his claim by testimony, because he contravenes the asl (origin). Furthermore, we find an interesting definition in the Maliki School of Law regarding asl when they state that al-asl is the accompaniment istishāb of prevailing circumstances. This interpretation is in total agreement with the Shafi'i interpretation previously spoken of. We also find similar opinions in this regard embodied in the original classical sources of the Maliki School of Law.54

As far as the contemporary writings are concerned, we find an excellent contribution by al-Zarqa when he states that asl in the technical form, within the terms of proof, means the general circumstances or condition which is initially considered as a binding law that does not need to be proved, but is considered axiomatic.55 What is said by al-Zarqa can be regarded as a summary of the classical definitions of the term asl in the field of evidence, and regardless of its juristic meaning in usūl al-fiqh. Nevertheless the similarity and concurrence between the two meanings, i.e. in evidence and usūl al-fiqh, is noticeable and cohesive. However, we find an additional definition to the defendant and plaintiff in the words of Ibn Abd al-Barr (978-1071 C.E.) who says:

"When the distinction between muddaṣṣI (plaintiff) and muddaṣṣa 'alayhi (defendant) gets perplexed and entangled, then you should take into consideration who the one is who is making the claim and who the one is who is defending, whether the litigant alleges the
ownership of something or denies it. So the claimant is always \textit{mudda}\textsuperscript{a} plaintiff, and the one defending and denying is always the defendant. So stand firm upon this tenet".\textsuperscript{56}

The significance of Ibn Abd al-Barr’s former definition is manifested by its adoption and incorporation in the codification of \textit{Majallat al-Ahkām al-Adliyyah} as it says: ‘The plaintiff \textit{mudda}\textsuperscript{a} is the claimant, and the defendant \textit{mudda}\textsuperscript{a} alayhi is the asked.’\textsuperscript{57} It is worth mentioning that the former codification is essentially based on juristic opinions of the Ḥanafī school which was the official school of Islamic law during the epochs of the Ottoman Empire.

4. The final stage in this regard is the Ḥanbalī contribution. They have the following opinions:

Firstly: The plaintiff is he who seeks to take something which is in another’s hand, or tries to prove a right vis-à-vis another one, whereas the defendant \textit{mudda}\textsuperscript{a} alayhi is the one who denies that.

Secondly: the defendant is the one to whom a due right is attached or required.

Thirdly: al-\textit{mudda}\textsuperscript{a} (the plaintiff) is the party who claims his right from another by citing the cause of this right, and if he chooses to be silent, then no one would coerce him to continue (the trial); however, the defendant, on the contrary, is always followed and obliged to answer, and if he opts to be silent, he will not enjoy this right.\textsuperscript{58} It is also observed that these two terms, i.e. \textit{mudda}\textsuperscript{a} and \textit{mudda}\textsuperscript{a} alayhi (the plaintiff and defendant) are widely interpreted by many scholars in the early stages of Islamic jurisprudence due to their enormous importance in legal proceedings. On the other hand, the majority of the juristic opinions are based upon the Prophetic tradition ‘Testimony is on the side of \textit{mudda}\textsuperscript{a} (plaintiff) and oath is on the side of the denying (party)’ or as in some narrations. ’... and oath is on the part of the \textit{mudda}.
calayhi (defendant). This is why Muḥammad b. al-Ḥassan al-Shaybānī said that the defendant is the denying litigant. This definition can be considered as a standard criterion.

6. The Preferred Definition

Perhaps the definition which is put forward and adopted by the majority of the Shāfiʿī jurists and some Mālikī and Ḥanafī jurists that defines the plaintiff muḍḍaṣ as the one who claims against the obvious (apparent state of things), whereas the defendant muḍḍaṣ alayhi, is the one whose claim or status is initially in agreement with the apparent nature of things is the most convincing one. So, in the case of murder, the (asl) apparent nature of things is the innocence of the defendant as far as the murder accusation is concerned, because the original and apparent nature is the existence of the person whose death is contested. Also, when a person is born alive, his life is presumed existing and continuing as the apparent nature of things. Subsequently, whoever alleges the killing of someone else, is alleging something opposite to the apparent nature of things, so he is considered as a muḍḍaṣ and is consequently asked to present his evidence as to the truthfulness of this claim. On the other hand, we can easily distinguish the defendant in the previous example - according to the predominant criterion - as the person who upholds the apparent nature of things asl, so he is virtually the accused person who sticks to the principle of asl original nature of things and the non-responsibility of everybody from committing any crime (until it is proved otherwise). It is also noticeable that the explanations presented in numerous juristic opinions have actually one goal and one meaning, i.e. to distinguish between the litigant parties, besides they in fact derived their specifications from the Prophetic tradition that distributed the burden of proof between the two litigant parties and, in so doing, has set the fundamental bases for the differentiation between the plaintiff and the defendant.
References Chapter Eight

8. Further exhaustive coverage has been made of the distinctive characteristics and divergence between crimes in Islamic criminal jurisprudence on the basis of the legal valid rights that they induce and originate.
18. References as in note 16 above.
34. Al-Shirāzī, Mughnī al-Muḥtār, Vol.IV, pp.233-37, Mukhtar al-Ṣīḥāḥ, pp.205-06. And this covers all sorts of allegations— in criminal and civil cases.
38. See the above-mentioned ʿAḥāfī references.
40. See the above-mentioned Shāfī’ī references.
41. As note 39.
42. As note 39.
54. As note 52.
57. Section 1612.

CHAPTER NINE - GENERAL OUTLINES OF THE TESTIMONY OF WITNESSES

Introduction

The crimes previously discussed cannot be punished for unless they are proved beyond any doubt particularly in cases where a severe penalty is imminent i.e. capital punishment as in cases of adultery committed by a married free person, or as in murder (when the essential requisites are fully fulfilled). This principle also includes qisās penalties held for intentional bodily transgressions (and for killing fetuses in some extreme opinions).

The legal means of evidence in this context are mainly confession and testimony of witnesses. However, some jurists maintain that circumstantial evidence and presumptions as well as gasāmah (compurgation of oath) are additional means of proof as far as crimes are concerned.1

2. The Importance of Testimony of Witnesses

The testimony of witnesses is of paramount importance in Islamic criminal jurisprudence. The Qurʾān and Sunnah mention shahādah (testimony) on various occasions, but both of them expressly regard it as a means of verification absolutely indispensable in judicial proceedings.

Ibn ʿArfah (716-803 A.H.) (1316-1400 C.E.) says that since the testimony of witnesses entails the court or (hākim) to rule accordingly, it acquired honour and an estimable stature in Islamic legal principles. Therefore it has become subject to miscellaneous legal stipulations.2

Al-Kāsānī, (d.587 A.H.) confirms Ibn ʿArafah’s opinion as he maintains that the testimony of witnesses (al-Shahādah) presupposes the court to rule.3 Al-Ḥaškaftī says that testimony is a vehicle for adjudication which is its intended purpose. Therefore the Ḥanafis usually treat the
issues of *al-qada'* (adjudication) just before *al-shahādāt* (testimonies of witnesses).

Moreover Ibn Qudāmah, (d. 620 A.H.) maintains that the legality of the testimony of witnesses has been upheld by Qur'ān, Sunnah, Consensus and rational deduction. Thus it becomes one of the pillars of the Islamic legal literature.

3. **Shahādah (Testimony) and its Recurrence in Qur'ān and Sunnah**

**First : The Qur'ān**

1. "And get two witnesses out of your own men and if there are no two men, then a man and two women, such as ye choose for witnesses, so that if one of them errs, the other can remind her ..." (2:282).

2. "Conceal not evidence (*shahādah*), for whoever conceals it, his heart is tainted with sin and Allāh knoweth all that ye do." (2:283).

3. "O ye who believe, stand out firmly for justice as witnesses to Allāh even against yourselves or your parents or your kin, and whether it be (against) rich or poor ..." (4:135) (5:8).

4. "... And take for witnesses two persons from among you endued with justice, and establish the evidence (as) before Allāh ..." (65:2).

5. "... For truly Allāh is witness to all things" (4:33).

This last verse includes a very important concept in Islamic theological and judicial circles, because it emphasises the fact that God is a perpetual witness to whatever takes place in this world and accordingly He will judge us in the Hereafter. The Arabic words *shāhid* and *shahīd* equals
witness, has occurred in the Qur'an many times with its derivatives *shahida, shuhūd, shuhada*.

Second: The Sunnah

Also the verb *shahida* and its numerous derivatives has abundantly recurred in the Prophetic traditions, but the following selected ones can suffice:

1. "The best of witnesses are those who adduce their testimony before being asked to do so ..."7

2 "The best centuries are: my century, and that following it, and that following it, then comes time when (perversion prevails) and come people who testify before being asked to ..."8

4. Definition of Shahādah - Testimony

The word *shahādah* implies the sense of witnessing and being present at a certain incident, event, etc.9 This specific sense of witnessing and being present at a certain given event is exhaustively referred to in the Qur'an as it says,

"... So every one of you who is present *shahida* (at his home) during that month (Ramadān) should spend it in fasting". (2:185).

However, *shahādah* also means *bayan* (elucidation and illustration) and this sense is also used in the Qur'an as it says:

"There is no god but He, this is the witness of Allāh (*shahida Allāhu*) His Angels and those endowed with knowledge, standing firm on justice ..." (3:18).

So, the phrase *shahida Allāhu* referred to in the above verse is elucidated as that God has explained and illustrated
"alima wa bayyana to His creation that He is the only one God Exalted in His Justice and Oneness.\textsuperscript{10}

Therefore the philologists concluded that the term \textit{shahādah} does imply an irrebuttable item of news (\textit{khabar gāti}); so the witness must convey knowledge or information that is based on certainty and solid bases.\textsuperscript{11}

Technically \textit{shahādah} (testimony of witnesses) has been defined in all the early juristic literature of Islam regarding it as an inseparable part of this literature particularly in its judicial and criminal ambits. On the other hand, it is very important to notice that each school of Islamic law adduces numerous, but relatively parallel definitions to testimony of witnesses (\textit{shahādah}).

It is appropriate to present each school’s definitions and later on analyse them, as follows:-

\textbf{A. The Ḥanafī Definition}

Al-Marghīnānī (551-616 A.H. / 1156-1219 C.E.) and al-Ḥaḍkafī define \textit{shahādah} as the giving of truthful information for the purpose of substantiating a legal right before a court of law with the articulation of the phrase: \textit{ashhad} (I testify).\textsuperscript{12} Al-Nasāfī al-Ḥanafī says that testimony of witness is: an eye-witness account (based on witnessing and seeing the event) and not according to conjecture.\textsuperscript{13} Also some Ḥanafī jurists define it as giving information pertaining to a specific (person or incident) and denoting specification.\textsuperscript{14}

Al-Ṭarābulṣī defines testimony of witnesses (\textit{shahādah}) as giving information pertaining to a right that is due for someone vis-ā-vis someone else which is based on \textit{mushāhada} (witnessing) and not on conjecture.\textsuperscript{15}
B. The Mālikī Definition

Ibn al-ʿArabī (468-543 A.H. / 1076-1148 C.E.) defines it as the (legal) enforcement of the statements of others about others.16

Ibn ʿArafah (716-803 A.H. / 1316-1400 C.E.), who is one of the most influential Mālikī jurists defines testimony of witnesses as: the binding statement that obliges the judge to hear it and adjudicate accordingly if the witness’s veracity is proved and when more than one witness is present or when the claimant swears the concomitant oath.17

Ibn Farḥūn al-Mālikī (d. 799 H.) defines it as a statement pertaining to a specific (person or event, etc.) and denoting specification. This definition is quite parallel to the Ḥanafī one put forward by al-Ṭarābulṣī.18

Al-Dardir (d. 1201 A.H.) gives a similar definition as he says that testimony of witness is a statement before a ḥākim (judge) based on knowledge for the purpose of rendering him capable of giving judgement according to it.19

However, al-Dusuqī (d. 1230 A.H.) relates that some Mālikī jurists hold that testimony of witnesses is an official statement pertaining to the core of litigation for the purpose of a legal adjudication and the termination of dispute.20

C. The Shāfiʿī Definition

Al-Nawawī (631-676 A.H.) al-Ghazālī (450-505 A.H.) and the majority of Shāfiʿī jurists define shahādah as a statement pertaining to something accompanied by a specific word. Or, it is a statement involving a (due) right of others vis-à-vis others by the expressly articulated phrase of ashhad (I testify). This is very similar to the preceding Ḥanafī definition.21
D. The Ḥanbalī Definition

The Ḥanbalis generally state that testimony of witnesses is a legal evidence that manifests and denotes the (due) right, but it does not decide it. However, the judge should rule and adjudicate (this manifested right) when the required legal conditions are fulfilled.22

The modern codification of Majallat al-Aḥkām al-Adlīyyah generally defines testimony of witnesses as a statement with the articulation of Ashhad (I testify), to prove a legal right for a definite person vis-à-vis another one before a judge and in the presence of the litigant parties.23

Perhaps it could be concluded that the above mentioned Islamic definitions of testimony of witnesses are very similar, for they expressly stipulate the universally agreed mainstays of this vehicle of evidence, the phrase: asḥad (I testify) to a certain fact, before a court with the clear purpose of attaining a judicial decision. These are all tacitly or explicitly held by the consensus of Islamic jurists. Furthermore as al-Ṭarābulṣī holds, the attestation and testimony of any witness must be based on knowledge. Accordingly the majority of Ḥanafis, Shāfī-īs and Ḥanbalis stipulate that the witness must begin his deposition of testimony (before the court) saying asḥad (I testify). If he used any other form of verbs - no matter how definite they are - his testimony would be objectionable.24

The Mālikis, on the other hand, hold that any confirmatory verb will suffice in the discharging of testimony before the court.25

On the other hand, Ibn al-Qayyim and al-Ṭarābulṣī maintain that the term bayyīnah which is frequently used in these fields is broader than the testimony of witnesses; because as Ibn al-Qayyim holds, bayyīnah semantically and technically comprehends whatever reveals, manifests and indicates the truth, whether this means is the testimony of
witnesses or something else. Thus Ibn al-Qayyim and al-Ṭarābulṣī expand the peripheries andambits of bayyīnah to its widest possible dimensions.\(^\text{26}\)

Al-Qarāfī, al-Mālikī, also extends the realms of testimony of witnesses over a wide arena of rights, but he confines himself to the strict term of testimony of witnesses.\(^\text{27}\)

It should also be observed that Muslim jurists often use the term bayyīnah as synonymous with "testimony of witnesses". This is mainly due to the similarities between bayyīnah and shahādah in the sense that both of them involve a great number of different litigations and disputes whether criminal, civil or family affairs.\(^\text{28}\)

Also, the Prophet used bayyīnah and shāhidān interchangeably, as will be discussed below.

5. **Legality of Shahādah**

Ibn Nujaym holds that the legal pretexts that validate the judicial reliance on testimony of witnesses can be traced back to Qur ʿān, Sunnah, consensus and rational deduction, as explained below.\(^\text{29}\)

**First : The Qurʿān**

The Qurʿān refers to the legality of shahādah as in the following verses:

1. "... And get two witnesses out of your own men, and if there are not two men, then a man and two women, such as you choose for witnesses, so that if one of them errs, the other can remind her ..." (2:282).

2. "... And take for witnesses two persons from among you, endowed with justice, and establish the evidence (shahādah) as before Allāh ..." (65:2).
It must be observed that the first verse refers, specifically, to attestation and documentation of pecuniary debts. The second one refers to attesting revocation of divorce as a matter of paramount importance in family matters.

"... Conceal not evidence (al-shahādah) for whoever conceals it, his heart is tainted with sin ..." (2:283).

This Divine order comprehends all sorts of testimony needed to prove others' rights in criminal, civil and family disputes, etc.

"And those who stand firm in their testimonies (shahādātihim)" (70:33).

This is meant as a commendation of the best qualities that a good person must possess.

"... He said (to His Apostles): 'Then bear witness, and I am with you among the witnesses'." (3:81)

Thus the Qur'ān confirms the importance of the testimony of witnesses in serious disputes as in cases of financial transactions, divorce and revocation of divorce and similar or less serious disputes.

Second : The Sunnah

Al-Bukhārī, al-Tirmidhī and other traditionists report that Wā'il b. Ḫajar (d.50 A.H.) narrates that "A man from Ḥadramoat and a man from (the tribe of) Kindah submitted a dispute to the Prophet. The Ḥadramī began the case addressing the Prophet saying: 'O Apostle of Allāh, this man has trespassed and illegally occupied land of mine!'. The Kindī man replied: 'It is my land and under my ownership, and he has no (legal) right over it.' The Prophet said to the Ḥadramī, "Do you have bayyīnah (reliable witnesses to
attest your claim)?" The Ḥadramī replied: "No". The Prophet said, "You have his oath (to prove that he is truthful in his claim)". The Ḥadramī abruptly objected saying, "The man is a wicked (person) who will not hesitate to swear the oath (or anything that can sustain his false pleas)." The Prophet replied "You have nothing but that (his oath)". Wā'il b. Ḥajar - the narrator of this tradition - said that the defendant went to swear the oath (that will uphold his ownership of the disputed land). The Prophet commented, "If this man falsely swears the oath on purpose of unjustly devouring the claimant's land, he will meet Allāh, who will receive him angrily."³⁰

Al-Sarakḥsī and Ibn Qudāmah comment here saying that the bayyīnah mentioned in the aforesaid Prophetic tradition betokens: the two witnesses. Thus the testimony of witnesses obtains additional legality from the Sunnah.³¹

1. Al-Bukhārī, Muslim, al-Tirmidhī, as well as the rest of the authoritative traditionists report that ḍAmr b. Shu'ayb (d.118 A.H.) narrates that the Prophet said, "bayyīnah (testimony of witnesses) is on the part of the plaintiff (al-muddācī), and oath is on the part of the defendant (al-muddācā ´alayhi)."³²

Ibn al-Qayyīm has put forward an explanation of the word bayyīnah ‘testimony’, just mentioned. He firmly holds that this specific word was consistently used in the Qur’ān, Sunnah, and by the Ṣaḥābah to betoken whatever evinces and establishes a ḥagg (the due right, or the eligibility for a given claim). Therefore he concludes that the bayyīnah has a wider denotation other than the way it was used by the jurists. Because these jurists have restricted bayyīnah only to the testimony of two witnesses, and the one witness’s account when confirmed by the plaintiff’s corroborating oath. Therefore Ibn al-Qayyim criticized those jurists whom he regards, as having misconceived the exact and precise meaning of the all-important bayyīnah interpretation. He supported his inference by quoting
numerous Qur'ānic texts that clearly uphold his conclusions.\textsuperscript{33}

Ibn al-Qayyim's concept is compatible with his master's Ibn Taymīyyah's own legal precepts inasmuch as Ibn Taymīyyah says, "\textit{bayyīnah is the ḥujjah sharī'yyah}" i.e. the legal proof, which has miscellaneous forms; because it sometimes takes the form of the two trustworthy male witnesses, or a male and two female witnesses, or four witnesses (as in the establishment of adultery) or three male witnesses to prove insolvency (of the relative in order to obtain a judicial ruling of eligibility for maintenance). Also this legal proof may be the testimony of one witness affirmed by the plaintiff's oath, according to the prevalent opinion of the Ḩijāzī Jurists and traditionists, as Ibn Taymīyyah holds. The legal proof may also take the form of one or more females, or an irrebuttable presumption when confirmed by the fifty oaths of the plaintiffs as in homicidal cases, (\textit{al-gasāmah}). All these are \textit{ḥujja sharī'yyah} - (legal proofs), which can easily and legitimately be derived from the term \textit{bayyīnah} as Ibn Taymīyyah maintains. Thus both he and his famous disciple Ibn al-Qayyim agree in their interpretation of \textit{bayyīnah} and the verification of legality of testimony of witnesses.\textsuperscript{34}

Al-Qarāfī from the Mālikī school also gives a wide interpretation to the term \textit{ḥujjah}, which is very similar to Ibn Taymīyyah's interpretation.\textsuperscript{35} Ibn Qudāmah also gives \textit{bayyīnah} the same wide interpretation that comprehends whatever reveals the truth.

Al-Dāraqūṭnī reports another narration in which the Prophet said, "\textit{bayyīnah} is on the plaintiff and the oath on the defendant (the denying disputant) except in \textit{al-gasāmah} litigations."\textsuperscript{36}

2. Al-Ḥākim reports that the Prophet said to Ibn ʿAbbās: "Do not testify except to that which illuminates you as the sun does."\textsuperscript{37}
This tradition also denotes the Prophetic directive to all witnesses that they should only testify to what is conspicuous and true as the brightness of the sun is, bearing in mind that both Qurʾān and Sunnah vehemently reproach any kind of false or malicious testimony.38

Third: The Statements of the Companions

Ibn al-Qayyim, al-Dāraqūṭnī and many jurists and traditionists quote ʿUmar b. al-Khaṭṭāb’s famous letter to Abū Mūsā al-Ashʿarī, in which ʿUmar sets the fundamental infrastructure and principles of the judicial proceedings. One of these basic principles is that bayyInah is the burden of the plaintiff and oath is the burden of the defendant. This is clearly derived by ʿUmar from the Prophetic traditions and judicial precedents.39

Fourth: Consensus

The legality of testimony of witnesses and its admissibility in all the various disputes are unanimously accepted by the authorities in Islamic jurisprudence. Al-Tirmidhī (209-279 A.H.) attests to this fact and holds that it was the universally admitted approach of the Prophet’s companions and those who came later on.40

Fifth: Rationality:

Al-Sarakhsī and Ibn Qudāmah argue that testimony of witnesses is rationally necessary in law due to the frequent and occurrence of disputes (and crimes) where witnesses are the only available means of proof, besides, witnesses are indispensable in attesting and documenting the rights of others in numerous transactions.41
6. The Mainstays and Requisites of the Legally Admissible Testimony:

Al-Nawawī, al-Shāfi‘ī, and the multitude of the Shāfi‘ī jurists contend that the legally admissible testimony of witnesses has five inseparable arkān (mainstays). These mainstays are:

1. the witness (al-shādid);
2. the plaintiff (al-mashhūdu lahu);
3. the defendant (al-mashhūdu alayhi);
4. the core of the dispute (al-mashhūdu bihi); and
5. the articulation of the phrase ashhad ("I testify") (bearing in mind that any other phrase would not be admitted). 42

According to this Shāfi‘ī opinion any lapse of one or more of these mainstays completely waives the testimony, for example, if there is no plaintiff in the case or if the defendant is anonymous, or if the witness refused to articulate the phrase ashhad.

However, al-Marghīnānī, al-Kāsānī, al-Nasafī and all the Ḥanafī jurists and commentators maintain that the legally admissible testimony has only one basic rukn (mainstay) which is the articulation of the phrase ashhad. 43

It should be noticed that the word rukn (mainstay) is deliberately intended to make clear the important distinction between the mainstays and conditions (shurūt) inasmuch as the rukn is a major constituent part of the admissible testimony whereas the conditions (shurūt) are not intrinsic components but should be fulfilled to alienate any doubt in the reliability of the testimony. Hence an interesting difference can readily be observed, for the Ḥanbalis generally agree that the phrase ashhad ("I testify") is important but it is a condition and not a mainstay rukn of testimony. 44
The Ḥanafis, on the other hand, reject any testimony that is devoid of the term *ashhad*; however, although the Mālikis made an exhaustive coverage of all the requisites of admissible testimonies, they did not use the above mentioned Ḥanafī or Shāfīī terminology.

This apparent variance of methodology may be proved to be only a superficial one when we encounter the detailed requisites of the admissible testimony of witnesses in each set of crimes involving *hudūd, qisās, diyah* and *ta'zīr*, and when we discuss the preclusive causes of testimony.
References Chapter Nine

10. ibid.
11. ibid.
15. al-Ṭarābulṣî, Muʿīn al-Ḥuḵkām, p.69.


CHAPTER TEN - THE LEGAL REQUISITES OF THE ADMISSIBLE TESTIMONY

1. Introduction

In general Muslim jurists hold that there are two main categories of requisites (ṣurūt) which must be satisfied. These requisites are:

a. requisites for bearing testimony (tahammul al-shahādah); and

b. requisites of discharging of testimony (adā’u al-shahādah).

Al-Ḥaškafī holds that, generally, admissible testimony has twenty one conditions, one pertaining to where it should be discharged (the legitimate court session), three to bearing witness, and the remaining (seventeen) conditions pertaining to the witness himself and the process of discharging his account before the court.\(^1\)

The following treatment is made to highlight the Ḥanafīs approach in conjunction with the rest of the most authoritative statements in Islamic law (with special reference, of course, to the criminal precepts). Also, Muslim jurists were extremely cautious in their treatment of this topic inasmuch as no authentic judgement can ever be based on a dubious testimony. This is why they hold that the testimony must be based on veracious knowledge and reliable perception of all the crucial facts pertaining to the case. This in turn vindicates the following meticulous requisites that must be probed by the court, particularly in ḥudūd and gīsās prosecutions.

2. Requisites for Bearing Testimony (Tahammul)

This is the preliminary stage of any legally admissible testimony of witnesses, for this is the stage where the witness obtains knowledge of the subject of the dispute or
crime whether this crime is classified under *hudud*, *gisas* and *diyah* or *tażīr*.  

The main requirements in this stage are the following requisites:

A. **Legal competence of the Witness (Taklīf)**

This requisite is of paramount importance for it implies that the knowledge of the criminal incident must be realized by a mature, sane person, besides, this person should be mentally able to recall the event and its implications in a credible way.  

This faculty of retentive memory is essential in crimes punishable by capital punishment as in the *hadd* of adultery and murder punishable by *gisas* or any other serious felony punishable by a *hadd* or *gisas* penalty.

Moreover, this condition excludes the juveniles, lunatics, and persons not capable of remembering and such like.

B. **Sight (Basar)**

The witness in the stage of *tahammul al-shahādah* (bearing witness), should not be a blind person when a major felony of *hudūd* or *gisās* is involved, because the distinction of concerned parties (the plaintiff victim and the accused) is a fundamental requisite which entails that the witness, at the time of the perpetration of crime, should see the acts before his eyes, otherwise his account may be seriously flawed. Moreover, hearsay accounts are inadmissible except in very restricted areas (as will be shown below). So Muslim jurists stipulate the direct seeing of the incident. (Accordingly they generally reject hearsay accounts.)

According to the most reliable legal precepts in this context crimes of adultery, murder and manslaughter, cannot be proved by a witness who was absent from the scene of the...
crime, nor can be attested to such events by mere hearsay evidence.8

Moreover the principle of rejection of ḥudūd and qīṣāṣ penalties due to suspicious circumstances precludes the admissibility of accounts based on hearsay evidence.

Nevertheless, hearsay evidence is acceptable in facts known to the public and the multitude as in cases of death, marriages, birth, kindred, etc.9

The Mālikis, on the other hand, admit hearsay testimonies to prove brigandage that become notorious and known to commonality. Also this precept comprehends homicide crimes committed before the public eyes; thus the plaintiff(s) is to swear the fifty oaths of gasāmah (compurgation of oath), in order to obtain a judicial ruling on his behalf. Hence the hearsay evidence is a mere presumption and not a legally independent or indelible proof of homicide.10

Also the Mālikis accept hearsay testimony in the tazkiyah (the establishment of the witness’ probity in court).11 The Ḥanāfī commentators generally approve of the Mālikī opinion, particularly in the stipulation of the public knowledge of the subject at issue, e.g. marriages, endowments, death, affiliation of children, manumission of slaves, etc.12

Ibn Taymīyyah and Ibn Qudāmah hold that the majority of Mālikis, Ḥanbalis, Shāfi‘is and others accept the testimony of witnesses based on hearsay evidence in the verification of the witness’s improbity before the court. Ibn Taymīyyah very much accepts this opinion by propounding numerous proofs from the Sunnah, and history where the Muslims attested the probity of some figures only by public knowledge, and the improbity of others by the same means of evidence.13

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Furthermore, facts known by a non-Muslim, minor, or a slave can be accepted as evidence whenever the preclusive causes (encompassing the mentioned persons) cease to exist, according to a substantial body of jurists. However, some juristic dissonance did take place in cases of the blameworthy witnesses, and husbands whose accounts were previously rejected by the court, but later on the preclusive causes became defunct.14

Al-Mawwāq and al-Dardīr, the prominent Mālikī commentators, narrate that Mālik holds that if a juvenile, non-Muslim or slave was a witness to a crime and later on, reached puberty, converted to Islam or was manumitted, they would all be legally eligible and fully competent to discharge their testimonies before the court.15

The Shāfiʿis and Ḥanbalis endorse the same Mālikī opinion except that the impious whose testimony is rejected cannot be admitted later on even if he repented due to the suspicion that he may just be keen to have his testimony accepted (as a matter of reinstatement before the public eyes).16

On the other hand, the Ḥanafis also accept this opinion unreservedly.17 Also the Ḥanafis reiterate the principle that if the court rejected the testimony due to impiety or blameworthiness (fisq) of the witness, it would never accept it later on even if the witness became a pious person. This rule also comprehends the spouse, the forgetful and the dubious witnesses (al-muttaham).18

Al-Shaykh MarṣĪ Ibn Yūsuf (d.1033 A.H.) from the Ḥanbalī school endorses the opinion that admit the accounts of the formerly inadmissible witnesses when the legal causes of inadmissibility cease to exist e.g. juvenility, blameworthiness, hostility, etc.19

However, Ibn Qudāmah holds that if the dissolute witness has amended his character and became a trustworthy witness
before the commencement of hearing his testimony, he should not be precluded from such hearing. But if he was proved to be trustworthy and later on was discovered or became a blameworthy person before the judgement was pronounced in the case, then this judgement should be suspended. This is maintained by the Ḥanbalīs, Abū Yūsuf and al-Shāfi’ī whereas Abū Thawr and al-Muzanī oppose the opinion as they validate the testimony even if the witnesses became apostate or blameworthy during the trial.20

Also as mentioned earlier, the occurrence of blameworthiness after the court had passed its verdict only suspends the execution of hudūd and gisās penalties due to the shubhah (suspicion) centring around the means of evidence in this case. But this conclusion is subjected to some debate in the various schools of law in cases of hudūd and gisās. However, in pecuniary judgements (which include diyah and arsh indemnifications) the courts enforce these verdicts because the doctrine of rebutting hudūd and gisās penalties by suspicious circumstances or facts only operates in hudūd cases whilst pecuniary rulings are enforceable even if there are some suspicious facts in the case.21

3. Legal Competence and Requisites of Discharging of Testimony in Court (Adāʾ al-Shahādah)

Al-Shāfi’ī holds that the judge in the outset of the trial should register the witnesses’ names, addresses, occupations, etc. and all identifications whereby they can be accessible when required. This procedure, of course, is conjoined with the following procedural steps relevant to the case.22

Moreover, conveying the details of an event, particularly in criminal prosecutions before a court, is the core of the juristic literature of the testimony of witnesses. Consequently, all Islamic schools tackled this topic exhaustively, so far as they have assigned separate chapters to elaborate the required legal qualifications, in each
group of crimes, that render the testimony of witnesses admissible. The Ḥanafi school has elaborated a classification of the subject of legal qualifications of the admissible testimonies. So, it may be appropriate to follow the Ḥanafi general outline in this subject bearing in mind that the rest of the schools have also debated the relevant legal implications of this topic.  

Al-Kāsānī, al-Marghīnānī as well as other leading Ḥanafi jurists contend that the legal qualifications and requisites of the discharging of the testimony of witnesses in the court are classified into the following four closely correlated groups:—

A. Requisites pertaining to the witness (himself);  
B. Requisites pertaining to the testimony;  
C. Requisites pertaining to the place where the witness conveys his testimony; and finally:  
D. Requisites relating to the subject of the litigation.

It should be noticed that the discharging of testimony (adā' al-shahādah) is an obligatory rule upon the witness when he (or she) is one of the required number. However, such process ceases to be binding if the witness is superfluous as regards the required number of witnesses.

Al-Māwardī (d.450A.H.) narrates that Ibn Shubrumah (d. 144 A.H.) said "Two things never happened before me and will never be abandoned after me : namely, the registration of the witnesses' identification and the inquiry about their character."  

Due to the importance of fulfilling these requisites in criminal disputes and due to the plausibility of the Ḥanafi classification (of the theme), the analysis will be made as follows:
Requisites Pertaining to the Witness

At the first stage, the Ḥanafis divide these requisites into two main subdivisions, namely:

1. General stipulations that must be fully met in each criminal prosecution; and
2. Particular or exclusive conditions lawfully required in ḥudūd and qisās offences (where capital or severe corporal punishment is involved).²⁷

The general conditions are enumerated as puberty, sanity, liberty, vision, ability to speak, trustworthiness and probity, Islam, vigilance and perspicacity. As far as the exclusive requisites of witnesses in ḥudūd and qisās cases, they are generally summarized in the attributes of Islam, masculinity, multiplicity and that the conveyance of testimony is to be made in person.²⁸

These broad principles were detailed by the Ḥanafī school and were simultaneously dealt with by the rest of the schools, that eventually produced a great deal of judicial material in relation to the Islamic criminal jurisprudence. However, it may be of great significance to tackle these mentioned requisites in some detail as follows:

I. The General Requisites of Witnesses

(a) Puberty (al-Bulūgh)
The majority of Muslim jurists stipulate that legally admissible testimony should be discharged by a mature person, consequently minors' testimonies are not acceptable.²⁹

This opinion is supported by the following Qur'ānic and Prophetic texts:

a. "... And get two witnesses from your own men ..." al-Qurtubī (d.671 A.H.) elucidates this directive saying:
"from your men" is conspicuous (denotation) of rejecting the testimony of non-Muslims, juveniles and women.\textsuperscript{30}

b. "... And take for witness two persons from among you endowed with justice..."

Thus this text explicitly stipulates the quality of \textit{adalah} (probity and trustworthiness) in the witness and this very stipulation implies the rejection of juveniles' testimony before the courts. This is because one of the basic requirements of probity is puberty.\textsuperscript{31}

Ibn Qudāmah, Ibn Rushd and Ibn Ḥazm also attribute this statement to Ibn "Abbās and Ibn Abī Laylā (74-148 A.H.), Makhūl and their fellow Successors (\textit{tābisīn}).\textsuperscript{32}

c. The Prophet said: "The pen has been raised from (no legal liability emanates from the acts of) the juvenile until he (or she) reaches puberty, the sleeping person until awakes, and the lunatic until recovers mental faculties."\textsuperscript{33}

Moreover, the juvenile's confessions are legally inadmissible, as well as his accounts (testimony) that pertain to others.\textsuperscript{34}

However, Ibn Qudāmah relates a statement from Aḥmad b. Ḥanbal that holds: A ten-year old juvenile's testimony can be admissible. Some Ḥanbalī jurists explicate this statement as exclusively restricted to testimonies for proving minor crimes and delinquencies. In this way \textit{hudūd} and \textit{gisās} felonies are clearly excluded.\textsuperscript{35}

On the other hand the view of Mālik and his school accepts the juveniles' testimony for murder and injuries perpetrated among them on condition that the following conditions are incontrovertibly satisfied:
1. The juveniles should propound their testimony before they disperse, otherwise, their accounts would be legally inadmissible unless some mature trustworthy men witness the testimony before they disperse;

2. No mature person, whatsoever, should be present at the time the crime took place. This is stipulated so that no external insinuation should be dictated or alluded to the accounts of the juveniles;

3. That they should be males and free;

4. They should be Muslims;

5. That two or more of them should attest the murder or injury;

6. Their testimonies should be consistent and concordant;

7. Besides no legal suspicions should shadow their accounts, e.g. the victim should not be a close relative nor a hostile to the witness;

8. They should be mumayyizin (a juvenile whose age is above seven years and below adolescence); accordingly those under seven years of age are excluded from these rules;

9. That the incident should be confined to them only, where no mature person is implicated either as a witness, victim, or plaintiff;

10. That all the parties concerned should be in one group; and

11. That the victim’s body should be seen by trustworthy mature men (after the murder had already taken place), so if the witnesses testified that A. has killed B. and threw his body in the sea, then such testimony would not judicially be accepted.36 (However it may be a circumstantial fact but not the sole evidence in the case).

The Mālikī and Ḥanbalī statements in respect of the admissibility of juveniles’ testimony in murder and injuries amongst them, is supported by a judicial precedent decided by ʿAli b. Abī Ṭālib as Masrūq narrates that he was present attending a meeting with ʿAlī when five juveniles entered and said: “We were six, swimming, and one of us drowned".

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Three of them accused the other two that it was they who caused the drowning (of the sixth boy) and those two in turn accused the former three (of the same crime). Masrüq relates that 'Alî accepted the testimonies of those juveniles and accordingly held that diyâh of the deceased is to be jointly paid by the five delinquent minors and he allotted three-fifths of it to be paid by the two firstly accused delinquents, and the remaining two fifths were to be paid by the three delinquents (who initiated the accusation). Ibn Qudâmah, further, contends that Masrüq adjudicated in parallel cases as 'Alî had done. Also Ibn Qudâmah ascribes the admissibility of juveniles' testimony for proving murder among them, to the prominent judge Shurayḥ b. Umayyah, al-Ḥasan al- Başrî and Ibrâhîm al- Nakhaî.37 Al-Qarâfî says that 'Alî, Ibn al-Zubayr, ʻUmar b. al-Khattâb and Muṣâwiyyah accepted the aforesaid Mâlikî opinion whereas Ibn ʻAbbâs has rejected it.38

Also Ibn al-Qayyîm and Ibn Qudâmah report similar endorsement by some Companions and Successors who hold that the admissibility of such testimonies is an exceptional matter presupposed by training the juveniles in the arts of war and the sports that enhance their bodily faculties; so quarrels and injuries may take place in their gatherings therefore it is necessary to accept their testimonies when they fulfil the mentioned requisites.39 So Ibn al-Qayyîm’s argument is compatible with the Mâlikis as regards the admissibility of children’s testimonies in certain conditions.40

However a logical question imposes itself: what is the legal weight of such testimony in crimes other than murder and bodily injuries? The response to this question necessitates that distinction should be drawn according to the grades of crimes and penalties mentioned in the preceding chapters. Also, it must be noticed that the admission of juveniles’ testimonies is considered as exceptional rules of the general tenors and canons of testimony of witnesses. But it could be rightly argued that
if the juveniles' testimony is accepted in murder and injuries cases, it can be accepted in less serious offences e.g. all ta'zIr and offences unpunishable by capital punishments.

However, where there are no juristic opinions or judicial precedents restricting the admissibility of juveniles' testimony, such testimony can be rightly held as presumptions and circumstantial evidence that can be sustained by stronger means of proof, namely, confession, or testimony of witnesses that have some shortcomings, which are discussed in gasāmah rules (compurgation of oath) in homicidal cases.

(b) **Sanity ("Aql)**

The unanimous opinion in the Islamic criminal jurisprudence is that the insane, imbecile and all the mentally infirm persons do not qualify to testify for any crime (or right) before the court.41

This is one of the major principles of Islamic criminal law, because the insane and mentally retarded persons lack the faculty of mental discernment which is the core of religious and criminal liabilities. This rule, as numerously mentioned above, is derived from the Prophetic traditions that fully exonerate the lunatics, juveniles and the sleeping from any liability till their legal excuses cease to exist.42

Also the inebriate persons are ineligible to testify before a court, despite the fact that the state of inebriety may soon cease to exist, because the statements of the inebriates are deemed unreliable and suspicious especially in the serious felonies of ḥudūd and qisās.43
Islamic juristic opinions are inconsistent as far as the admissibility of slaves' testimony is concerned, hence the following two tendencies can be detected:-

1. Many Ḥanafī, Shāfī, Mālikī jurists reject the slaves' testimony for they contend that slavery is a disqualifying infirmity, particularly in the criminal conflicts.44

The proponents of this opinion invoke the Qur'ānic verse: "And take for witnesses two men from among you ..." al-Qurtubi comments on this text saying: "This is textual authority (nass) for excluding the testimony of non-Muslims, juveniles and women. As for the slaves, the same inhibition includes them."45

Al-Jaṣṣāṣ, al-Ḥanafī (d.370 A.H.) and Ibn al-ʿArabī, al-Mālikī, contend that those who reject the testimony of slaves have outweighed the infirmity of slavery (over the other merits and virtues of the slave-person).46

The Ḥanafī base their objection to the testimony of slaves on an additional rational basis, namely the testimony connotes some sort of wilāyah (authority) and therefore slaves cannot be admissible witnesses inasmuch as they lack such wilāyah - because they themselves are under others' authority, namely their masters.47

Nevertheless Ibn Taymīyyah and Ibn Qudāmah report that some prominent tābiʿīn (successors) namely Mujāhid b. Jabr, Abū Thawr as well as ʿUthmān al-Battī, Abū Ishāq and the majority of Ḥanbalī jurists contend that liberty is not a requisite of testimony of witnesses, accordingly a slave can attest to any crime.48

Ibn al-Qayyim and the holders of this opinion support it by invoking the same Qur'ānic text, mentioned above, saying that the ostensible connotation of this text and the other
relevant texts regulating the admissibility of witnesses, do not exclude the slaves. Besides, these persons are among 'our men' and members of the community, as well as the fact that the slaves' narrations of traditions (and religious commandments) are acceptable. This fact is further supported by the narration of ʻUqbah b. al-Ḥārith who relates that he had married Umm ʻAdhār Bint ʻAbī Ihāb, when a black slave-woman came and alleged that she had fostered the spouses (by breast-feeding them when they were infants). ʻUqbah submitted the case to the Prophet who accepted the testimony of the slave-woman thus rescinding the marriage saying, "How, when she alleged that she had suckled you (and your wife)".49

(d) Sight (Bāsār)

The majority of jurists preclude the blind from testifying before a court, especially in crimes that need to be seen and fully discerned by the witness e.g. murder, manslaughter, adultery and the rest of bodily injuries, particularly when the element of premeditation is involved.50

However, if the witness bore the evidence when he was seeing, but became blind later on, his testimony may be admitted if he managed to describe and identify the accused (by his name, character, or any other indelible distinguishing characteristics). Because, blindness (and partial lack of vision) does not completely impair the legal competence nor does it disqualify the witness.51

So, even if blindness occurred after the witness had discharged his testimony before the court, still his reliability is deemed intact, because blindness does not debilitate the probity and credibility of the testimony, because it is quite dissimilar to impediments such as the subsequent blameworthiness or apostasy of the witness concerned.52 However, Abū Ḥanīfah and al-Shaybānī dismiss
the blind's testimony whether or not he was blind at the
time of bearing witness.53

e) The Faculty of Speech (Nutg)

The admissibility of the testimony of the dumb (akhras) has
aroused a great deal of controversy due to the need of
articulately detailed accounts in criminal prosecutions. So
the Mālikis and a group of Shāfiʿis and Ḥanbalis contend
that the mute's testimony is legally admissible if his signs
are discerned without any ambiguity especially in hudūd and
gisās prosecutions; inasmuch as these crimes can be
seriously affected by all forms of tenable suspicions
(shubuḥāt).54

Moreover, these proponents argue that graphic writing and
signs can alternately substitute the articulation of sounds
and discernible speech. Besides necessity (darūrah)
presupposes the acceptance of the dumb's testimony.55

Notwithstanding the appropriateness of the former
justifications, the majority of Ḥanafis, Shāfiʿis and
Ḥanbalis reject the testimony of the dumb persons, for the
witness should be able to speak and articulate what he had
witnessed. This is compatible with the Ḥanafis' consistent
principle of rebuttal of hudūd and gisās by suspicious
circumstances (darʿ al-hudūd bi al-shubuḥāt).56

Apparently an equilibrium between the interests of the
litigant parties and the attainment of justice is the core
of the former discordant juristic opinions and their
justifications. However, the dumb's testimony can be
accepted in the minor misdemeanours where no capital
punishment nor corporal penalty are involved. Consequently
such witnesses can testify in a vast realm of crimes such as
tezīr (discretionary penalties) and manslaughter cases as
well as accidental homicide where a blood-compensation is
the only adjudicable decision.
Moreover dumb witnesses can attest in cases of bodily injuries and transgressions on foetus that are not punishable by *gīsās*, on condition that the inarticulate witness contrive to explicitly illustrate his testimony by indisputable signs which are discernible by the litigant parties in the matter. Since the scholars meticulously stipulate that the witness must explain what he saw or heard in full details, any ambiguity as regards *hudūd* and *gīsās* litigations annuls these penalties. The court is also bound to ask for these details especially in *hudūd* cases to find a legal cause of eschewing the adjudication of these penalties. This in turn justifies the Ḥanafis’ keenness to reject the dumb person’s testimony in these cases.57

(f) **Probit and Trustworthiness of the Witness (Adālah)**

This is a prerequisite of paramount significance in each witness, so far as the court can never issue a verdict, whatsoever, unless the character and conduct of the witness is fully probed and a final verification of his probity is concluded. This is held by all Muslim jurists, irrespective of their allegiances to various schools.58

Al-Qarāfī states that the verification of probity of witness is God’s right thus no court can ever neglect this procedure. However, Abū Ḥanīfah presumes the Muslims as trustworthy unless the defendant impugns his character. Al-Shaybānī and Abū Yūsuf disagree with him and therefore consistently ask the court to order the probing of the witness’s character; particularly in *hudūd* and *gīsās* trials. Hence Abū Ḥanīfah agrees that such trials presuppose this action even if the defendant kept silent.59

So it could be said that the Islamic criminal laws attach additional emphasis on the verification of probity and trustfulness (*adālah*) of the witnesses, for they may be testifying in a case that may result in issuing a death sentence as in adultery (if the accused is a *muhsan*) or as in murder, or espionage (as some jurists hold) or the
verdict may be a severe corporal penalty as in larceny, intentional bodily injuries punishable by *qisās*. Consequently al-Shaybānī and Abū Yūsuf as well as the multitude of Islamic jurists make it an imperative duty on the court to probe the character of the witnesses in any *hadd* or *qisās* dispute before proceeding further in the case, even if the accused did not impugn the reliability or credibility of the plaintiff’s witnesses.60

Furthermore, the irrefragible requisite of ʿadālah (probity) in the witness is supported by the following Qur’ānic texts:

a. "... And take for witness two persons from among you, endowed with justice ..." (65:2).

b. "... Such as you choose for witnesses (those whom you content to accept) ..." (2:282).

Al-Qurṭubī and al-Jassās comment that these two verses indicate that the witness should be ʿAdl (trustworthy) and one whom ‘we consent to accept’ as a witness. By the same token we are implicitly ordered to refute and reject the accounts and testimonies of the blameworthy, the dissolute and the liars. Moreover the Qurʾān expressly says,

"O ye who believe if a wicked person (fāsīq) comes to you with any news, ascertain the truth, lest you harm (innocent) people unwittingly, and afterwards become full of repentance for what ye have done (by accepting the news of the wicked person)" (49:6). 61

These are the Qurʾānic commandments in respect of the exclusive admission of testimony of the ʿadl and the ascertainment of the accounts and information conveyed by al-fāsīq which incorporates the wanton, unscrupulous and licentious persons. The Sunnah of the Prophet confirms and explains these Qurʾānic commandment, inasmuch as the Prophet says "Muslims are ʿudūl (trustworthy persons) except those
punished by the *hadd*). Also ʿUmar b. al-Khaṭṭāb once asked the witnesses to bring someone who knows them. ʿUmar questioned this man and finally rejected him after discovering that he only knew a little about the witness as he did not deal with them in financial matters, travel or neighbourhood.\(^62\)

However, despite the universality of the qualities of ʿ*adālah* (probit) Muslim schools of law propound specific definitions of this term, which can be mentioned as follows:-

The Ḥanafis propound numerous definitions to ʿ*adālah* but al-Sarakhsi (d.450 H.) says:

"*al-ʿadālah* is *al-istiqāmah* (probit and uprightness and utter honesty of conduct and character). It has no maximum limit, but regard is only made to the attainment of the possible qualities which is the obviation of what is deemed *harām* -(prohibited)in one’s religion."\(^63\)

The generally adopted definition in the Ḥanafī school is that ʿ*adālah* is the state and circumstance where the person’s virtues and merits outweigh his bad attributes. It also denotes the reluctance to commit what the religion bans and this implies the avoidance of great sins and at the same time the abstention from obstinate commission of little sins.\(^64\)

The Ḥanafis propound numerous examples that illustrate when the depiction of ʿ*adālah* can be regarded as missing due to commission of an obscene or sordid act e.g. wine-drinking, very offensive behaviour, etc.\(^65\)

Ibn Shass al-Mālikī (d.610 A.H.) presents an interesting definition of ʿ*adālah* as he says:
"It is an impregnable psychological situation which exhorts (the person) to steadfastly hold to piety by virtue of avoiding the great sins and refraining from the small ones and even desisting from permissible trivialities."

Ibn Shass, al-Mālikī, further elaborates:

"al-ʿadālah is intended to denote equilibrium and balance in religious affairs which imply that the ʿadl person should be apparently trustful, avoiding committing banned things, desisting from sins, aloof from suspicious situations, totally trusted in anger and contentment."66

Nevertheless some Mālikī jurists hold that ʿadālah does not mean that the person should be completely pure in his worship and conduct so far as no sins should mix in it, as this is obviously impossible save in Prophets and Saints. Whoever preponderately refrains from grievous sins and avoids intransigence and habitual commission of small sins, generally keeping his ritual practices steadfastly, then this person is ʿadl whose testimony should be judicially admitted.67

Al-Shāfiʿī (and Ibn ʿAbd al-Barr) adduced similar definition of the ʿadl person as they say:

"If the prevalent and evident state of the man of obedience (to his religion's commandments) and, of magnanimity (murūbāḥ), I will accept his testimony, but if disobedience and omission of magnanimity are the apparent and predominant attributes of the man, I will reject his testimony."68

The Shāfiʿī scholars accept the above demarcations of ʿadālah mentioned by their leader al-Shāfiʿī and those mentioned by the Ḥanafis and Mālikis, but they define al-kabīrah (great sin), as that whose perpetrator is grievously
warned by Qur'ān or Sunnah e.g. adultery, theft, devouring the orphan’s property, discourteous misconduct towards parents, dissemination of pornographic literature, etc.⁶⁹

The Ḥanafis, Ḥanbalis and Ṣāḥiris as well as the Zaydis give the same outlines of ʿadālah. Therefore they generally endorse the previous Mālikī and Shāfi‘ī statements.⁷⁰

Thus it could be said that there is general consensus between the Islamic schools of law that ʿadālah is a conglomerate of attributes mainly characterized by the apparent trustworthiness and ostensible probity acquired by maintenance of performing the ritual practices and simultaneously keeping away from major sins and sacrilegious acts and that the person’s prevalent attribute is piety and observance of God’s obedience and obviation from prohibited things. This connotation is what Ibn Rushd (d.595 A.H.) later confirmed in his compendium "Bidāyat al-Mujtahid wa Nihāyat al-Muqtasid".⁷¹

It should be observed that the Mālikis and Shāfi‘is regard al-muruḍah -(magnanimity and propitiousness), as independent qualities which must be procured by the witness to qualify him to testify in a court session. Thus they explicitly exclude murūḍah from ʿadālah conglomerate qualities. But the Ḥanbalis and Ḥanafis, incorporate the murūḍah attributes in ʿalādah.⁷²

Ibn Muhriz, al-Mālikī (d.655 A.H.), and Ibn al-Hajib (570-646 A.H. / 1174-1249 C.E.) contend that al-muruḍah is a host of human qualities that presuppose the person to be decorous and conform to the proprieties of the society - and even to desist from ignominious jobs that do not suit his social, cultural or scholastic status.⁷³

The Shāfi‘is maintain that al-muruḍah (magnanimity and propitiousness) means al-istigāmah (uprightness) for, whoever lacks it will say and do whatever he wishes - even false statements. But it could be generally concluded that
al-muru9ah - is a very important branch of 'adālah - because both of them help to qualify the person to be a reliable witness before the court so they are intimately correlated and interdependent.\textsuperscript{74}

The Ḥanbalis agree with the Shāfī'ī and Mālikī concepts as regards the good qualities of murū9ah (the magnanimity). This apparent juristic scrupulousness as far as the quality of 'adālah (probity and trustworthiness) of the witness is concerned emanates from the numerous Prophetic traditions and statements of the Companions that order the courts to accept only the 'adl's testimony e.g. the Prophet says:

"No testimony of khā'in (deceitful men) nor khā’inah (distrustful woman) nor dhī ghamr (a person imbued with malignance) should ever be accepted vis-ā-vis his brother (the accused or defendant)."\textsuperscript{75}

Moreover, as al-Sarakhsi al-Ḥanafi expounds "The testimony of witness is a khabar (a statement) susceptible to credence and impugnation, so it cannot be ḥujjah (proof) unless the witness's probity is verified."\textsuperscript{76}

The later Ḥanafis accept al-Sarakhsī's argument as to the necessity of probing the witness's character before accepting his testimony.\textsuperscript{77}

**The admissibility of al-Fāsiq's testimony after repentance:**

The Fāsiq is diametrically opposed to the 'adl witness. Accordingly, fāsiq can be defined as the prevalently disobedient person who unscrupulously breaks the law whether by commission of evident illicit acts e.g. theft, adultery, false accusations, or by passive omission of religious imperatives e.g. prayers, alms giving, etc.

Initially it should be confirmed that repentance from any form of disobedience coupled with the manifest good conduct of the person render him a reliable and trustworthy witness
as maintained by the unanimity of Islamic schools. However, these schools diverge in their assessments of the admissibility of a gādhif (the person who falsely imputes and accuses another with adultery) when later on this gādhif, repents and adjusts his conduct. Hence divergence occurred, for many of the Mālikis, Shafi‘is, Hanbalis, Zāhiris, and Zaydis accept his testimony, because fisq (disobedience and infringement of religious laws) do encorporate al-qadhf (false accusation of adultery). And since repentance obliterates and fully erases whatever is previously committed, then there is no reason why the repentant gādhif should be excluded from this area. Besides the Qurʾān texts that regulate the penalty of gadhf exclude the repentance of the gādhif from the penalty of rejecting his testimony.⁷⁸

However, Khalīl and the prominent Mālikī commentators of his compendium contend that the witness can never testify in a hadd case, if he was previously punished for committing its like. This means the repentant slanderer of gadhf is permanently dismissable from the gadhf and adultery trials. Likewise the repentant wine-drinker is dismissable in future litigations pertaining to wine-drinking, etc.⁷⁹

But Ibn Ḥabd al-Barr and al-Bājī report that the prevalent Mālikī opinion accepts those who repent and amend their conduct even in trials pertaining to crimes they had previously committed. So there are two disparate Mālikī opinions as regards the admissibility of testimonies in criminal cases that are similar to ones already the witness was convicted for.⁸⁰

The Ḥanafī school holds that the perpetrator of gadhf would have his testimony rejected even if he repented and adjusted his conduct. The Ḥanafis invoke the Qurʾānīc text that rules: "... and reject their evidence (shahādah) ever after (abadan)" (24:4). They argue that prevention from testimony before the courts is an integral part of the hadd penalty of al-qadhf (insusceptible to revocation). Besides the Qurʾān
explicitly mentions *abad* (infinity), and this *abad* has no time to end and consequently such testimonies are to be rebutted in any court at any time.\(^8\)

It should be reiterated that the Ḥanafis invariably hold that the ban from testifying before courts is an indivisible part of the legal *hadd* penalty of *gadhf* (slanderous accusation of adultery). But the witness only loses his competence as a witness if he is punished by the prementioned penalty of *gadhf*. Therefore he is considered as an admissible witness before the aforesaid punishment is carried out. The Ḥanafis ascribe these rules, particularly the perpetual ban of testimony to ʿUmar b. al-Khaṭṭāb.\(^2\)

However, the above mentioned ban can be lifted if the witness adduced the required four witnesses who proved the accusation of adultery or alternatively, two witnesses who proved that the slandered had confessed that he had committed adultery. Also one male and two female witnesses can (collectively) qualify to propound the mentioned confession whereby the slanderer of *gadhf* recovers his capacity as a reliable witness in future trials.\(^3\)

Despite the plausibility of the Ḥanafis reservations as to the credibility of the *gadhif* testimonies, even after his penitence is proved, it could be argued the majority's statements are more tenable. Because these statements which admit the repentant slanderers are compatible with the Islamic ethos and theology which regard the genuine and conscientious repentance as capable of erasing the previous sins particularly those for which this genuine repentance is made. The Qur'ān espouses these doctrines as it says:-

A. "Allāh, forgiveth not that partners should be set up with Him; but He forgiveth anything else to whom He pleaseth ..." (4:48).

B. "Say, 0 my servants who have transgressed against their souls despair not of the Mercy of Allāh, for Allāh
forgiveth all sins for He is Oft-Forgiving, Most Merciful." (39:53).

Besides, the qāḍhīf is not worse than the murderous adulterous, and larcenists, etc, who enjoy the legal eligibility of testimony if they repented and rectified their past misconducts. Therefore, the qāḍhīf should recoup his probity and eligibility as a witness if he became a good person. On the other hand the Ḥanafīs linguistic inference that abad (forever) comprehends the perpetual deprivation from testifying (before courts) does not stand for close scrutiny. Because the very subsequent Qur'ānic text has exempted those slanderers who repented by using the Arabic formula of exclusion ʿilla which literally means "except". Hence the majority of jurists' conclusions are quite congruous with both the linguistic, the juristic and practical considerations.84

On the other hand, Khalīl, Ibn ʿArafah and the rest of the famous Mālikī jurists usually discuss the heterodox persons' testimonies are regarded as null and void. This rule comprehends the Khārijīs and Qadarī sects, as Ibn ʿArafah maintains that the mentioned two sects are either apostates or dissolutes (fāṣiqīn) and both of these two depictions preclude the hearing of testimony.85

Also, Mālik's rigorous criteria of probity of witnesses exclude the famous singers (males and females) from the compass of the trustworthy witnesses. Also, the gamblers and the dissipated adherents of frivolous sports are regarded as unreliable witnesses in Mālik's statements.86 The Ḥanbalīs accept these legal concepts.87

However, the occurrence of fisq - (moral dissolution) or apostasy of witnesses after the pronouncement of the court's judgement do not annul this judgement according to the Mālikī opinions.88
The Ḥanafis accept similar juristic statements. But in many cases they give the subsequent preclusive causes of testimony the same weight as if they occurred before the court pronounces its judgement, so, subsequent apostasy precludes the execution of all hudūd and gīsās judgements.

Moreover it was reported that Abū Yūṣuf contend that he admits the testimonies adduced by the impious and dissolute witnesses if their veracity is proved as regards the particular core of their testimonies. Also the distinguished but dissolute witnesses can be accepted as Abū Yūṣuf argue, provided that these persons are not liars or avowed dissipated characters.

(g) **Vigilance, Precision and Memory of Witnesses**

The consensus of jurists rules that the witness must be a vigilant, accurate and capable of remembering all that he had seen or known of the crime at issue.

Consequently the oblivious, absent-minded imbecile and one who is predominantly inattentive cannot testify in any crime lest that they mix up essential facts, decisive in determining the final outcome of the trial particularly when the life of the accused (or his body) is at stake.

Moreover the court is obliged to ask for detailed accounts of all the pertaining elements and facts of the crime. The witness must give a detailed account of whatever he had seen so far as if he missed out something, the court should ask him to recall and tell it accurately about what he had missed out; otherwise the witnesses of adultery would be susceptible to the penalties of gadhīf as being gādhīfīn (perpetrators of false accusation of adultery).

On the other hand murder (punishable by capital punishment as gīsās) cannot be proved by inconsistent testimonies that lack coherence due to forgetfulness of a witness or inaccurate or imprecise narration of facts.
Even in the somewhat lax realm of ta'zīr witnesses' testimonies will gain no judicial weight unless they are precise, accurate and fully remember all that was seen, heard or known.94

(h) Islam

The majority of Islamic jurists hold that a non-Muslim does not qualify to testify before a court to attest any crime if the litigant parties are Muslims.95

This opinion is strenuously sustained by Qur'ānic and Sunnah texts; the Qur'ān says:

a. "... And take for witness two men from among you ..."

Al-Qurtubī, al-Jassāṣ, Ibn al-ʿArabī and other prominent exegetes elucidate the phrase min rijālikum (from your men) as evidently excluding the non-Muslims.96

b. "... And take as witnesses two from you endowed with justice ..." (65:2).

Al-Qurtubī al-Tabarī, Ibn Kathīr and other exegetes also invoke this text to sustain the exclusion of non-Muslim witnesses as being not 'from our men'.97

c. Al-Dāraqūṭnī relates that Muḥādh b. Jabal (d. 18 A.H.) (603-639 C.E.) narrates that the Prophet said:

"No people of a (certain) religion can testify against people of another religion except Muslims, for they are ʿudūl (plural of ʿadil) trustworthy among (and against) themselves and against others."98

However, the Ḥanafis and some Successors contend that in cases where the litigant parties are non-Muslims, then no restriction is imposed as far as the religious denomination
of the witness is concerned. The Ḥanafis narrate the Prophet’s adjudications in cases where the litigant parties were non-Muslims. Thus the testimonies of the non-Muslims are valid in cases that involve non-Muslims as a general rule according to the Ḥanafis juristic perspectives. However, Ibn Qudāmah holds that most of these textual proofs are spurious in terms of their transmission.\(^9\)

Nevertheless the majority of Muslim jurists still regard the ban of such testimonies as definite.\(^{100}\)

But the unanimous opinion of jurists states that such witnesses would be eligible to testify if they later on converted to Islam; for the restriction of eligibility is confined to non-Muslim, and is accordingly removed by embracing Islam.\(^{101}\)

These are the fundamental requisites of testimony that are legally required in any criminal trial. However, if the crime is a ḥadd or qisās felony, the following additional requisites should be met (in addition of course to the above discussed conditions).

II. **Particular Requisites of Witnesses of Ḥudūd and Qisās Crimes**

Islamic criminal jurisprudence attaches great importance to testimony of witnesses in ḥudūd and qisās crimes; inasmuch as these felonies may conduce a capital punishment or a severe corporal penalty as has been discussed concerning adultery, thefts, false accusation of adultery; murder, intentional bodily injuries, brigandage, apostasy and transgressions against foetuses. Consequently, these offences have to be proved by witnesses that satisfy the highest possible degrees of probity and credibility (when there is no confessions pertaining to the crime). Therefore the Ḥanafī school, in particular introduced this method of differentiation between testimonies of witnesses in compliance with the nature of the subjudice crime. The rest
of the schools discuss the same principle and requisites but not necessarily under the same Hanafi titles.

And this very subject is a graphic example of the above observation, for the Hanafi scholars maintain that in addition to the general requisites stated above, the witnesses of ḥudūd and ḡisās crimes have to be males and they should testify in person before the court.¹⁰²

These two requisites, also aroused some controversies that can be debated as follows:

(a) **Masculinity of Witnesses (Dhukūrah)**

The vast majority of Islamic schools of law hold that ḥudūd and ḡisās crimes witnesses should be exclusively males consequently no women, whatsoever, can be accepted as witnesses.¹⁰³

The proponents of this contention invoke the following Qur'ānic text:-

"... And get two witnesses out of your own men, and if there are not two men, then a man and two women such as ye choose for witnesses, so that if one of them errs the other can remind her ..." (2:282).

They argue that ḥudūd and ḡisās penalties are revocable by any credible shubhah (suspicious circumstances), and the Qur'ān has explicitly stated a very effective shubhah, namely, forgetfulness and deviation, an ʿadilla ʿihdāhumā (lest one of the women witnesses should deviate from the subjects of testimony). The Hanafis emphatically contend that this is a reason why women should not testify in a crime primarily punishable by what could be waived by shubuhāt (suspicions) so they are excluded from the realms of ḥudūd and ḡisās prosecutions.¹⁰⁴
A large segment of jurists accept the Ḥanafis statement and argument, however, some of them add extra justifications to this opinion saying that women normally do not witness gatherings where murder, theft, bodily injuries, adultery etc. are committed.\(^{105}\)

Also as regards the inadmissibility of women’s testimonies in \textit{hudūd} and \textit{gisās} cases, al-Kāsānī propounds additional rational argument to maintain this key legal principle. He holds that these penalties are not to be inflicted whenever there exists a plausible shubhah. And since women’s testimonies are (often) fraught with doubtfulness, they should be dismissed in such trials. Besides the women’s witnesses are resorted to as a substitute procedure when reliable males are not available, and \textit{al-abdal} -(substitutes) are inadmissible in the realm of \textit{hudūd} and atonements unlike proxies and legal authorizations (\textit{al-wikālāt}). However, these legal inhibitions and discriminations do not apply in all pecuniary matters, therefore women’s accounts are unreservedly admissible in whatever accrues or conduces a pecuniary right e.g. murder, or manslaughter not punishable by \textit{gisās} as well as bodily injuries that only generate financial or discretionary penalties.\(^{106}\)

It should be noted that most jurists contend that the testimonies of women-witnesses are entirely admissible in murder not punishable by \textit{gisās} (capital punishment) also they are admissible in manslaughter trials as witnesses and in accidental killing as well as all bodily transgressions and \textit{ta’zīr} crimes. This is based on the principle that women’s testimonies are admissible in prosecutions involving pecuniary claims or rights pertaining to such claims.\(^{107}\) And as shown in part of this thesis the largest sector of the penal law does not prescribe \textit{hudūd} or \textit{gisās} penalties, therefore women witnesses do play significant roles in these cases particularly in cases of \textit{shubuhāt} in \textit{hudūd} and \textit{gisās} prosecutions.
However, the Malikis explicitly accept women's testimony in murder committed in their gatherings, as an irrebuttable presumption that entails the procedure of Qasāmah fifty oaths to be sworn by the plaintiff.

But the Zāhiris state that women witnesses are admissible in all ḥudūd and gisās crimes (as well as in taʿzīr). 108

They argue that the testimony of witnesses in financial disputes is analogous to testimony in criminal cases, and since the Qurʾān conspicuously admits women's testimonies in financial affairs then there is no tenable or warrantable cause why they should not be accepted in criminal prosecutions. 109

Nevertheless a point of substantial importance should be always born in mind, in such controversial juristic opinions, namely, financial matters such as sales, rents, endowments, etc. and their relevant rights such as postponements of debts, etc, can be proved even though there is shubhah. In other words, the principles of evidence in these areas are more flexible than those specifically dealing with the ḥudūd and gisās crimes. Hence Ibn Ḥazm's analogical reasoning that considers financial and criminal prosecutions as the same as far as the required degrees of evidence are concerned can be disputed. 110

(b) The Witness should Testify in Person (Asālah)

This is specifically intended to exempt testifying through proxy; because such accounts are conducive to suspicion which is a main cause of revoking a ḥadd or gisās penalty. 111

However, this very issue will be treated later in the independent principles of al-shahādah ʿalā al-shahādah (testimony on testimony or conveyance of others' testimony to the court). And due to the importance of these principles of conveying others' testimonies and the concomitant juristic disputes in respect to their
admissibility in criminal prosecutions, they were usually subsumed under the titles of *shahādat al-istikhlāf* or *al-shahādah al-ṣīlah al-shahādah* indicating testimony by proxy or testimony of testimony respectively. Accordingly these intrinsic principles will be discussed in a separate section.\textsuperscript{112} However, this juristic restriction is irrelevant in all pecuniary claims and litigations.\textsuperscript{113}
References Chapter Ten

5. ibid.
11. ibid.
21. ibid.
67. ibid.

93. ibid, al-Shaykh Marī Ibn Yusuf Dalīl al-Ṭālib, p.347.


101. ibid.


106. Al-Kāsānī, al-Badāʾī, Vol.VI, pp.279-80, see also ibid.
107. ibid.
109. ibid.
112. ibid.
113. ibid, also see Ibn ʿĀbdīn, al-Yaṣṣiyah, Vol.V, p.462.
CHAPTER ELEVEN - REQUISITES OF THE CORE OF TESTIMONY

These were introduced by the Ḥanafis in their general treatment of the testimony of witnesses, though it should be borne in mind that the scholars of the rest of schools treated the same subject but under slightly different titles. The core of the testimony of witnesses should meet the following requisites:

1. The phrase *ashhad* (I testify);
2. The required number of witnesses in conformity with the crime;
3. The testimony should be preceded by a law-suit;
4. The testimony of witnesses should not contradict the claims of the plaintiff; and
5. The witnesses accounts should agree with each other.

These broad essential requisites will be elaborated as follows.¹

1. **The Witness should Say Ashhad (I testify)**

The majority of Ḥanafis, Shāfiʿis and Ḥanbalis concordantly stipulate that the witness should commence his testimony in the court, saying: "*Ashhad* (I testify) that A. murdered B. with a knife". Accordingly, any other form (e.g. I knew, I am aware, I saw, I believe) would not amount to ‘I testify’.²

Ibn Nujaym and Ibn ʿĀbdīn justify the strict stipulation of this formality by saying that the phrase *ashhad* (I testify ...) incorporates some sort of oath, so it is as if the witness is saying, "I swear by God that I have known so and so and I am now telling the court". All these connotations are readily available in the term *ashhad* whereas they are non-existent in the other forms. Therefore it is imperative for the witness to articulate it, so much so if he adds a dubious expression such as *fīmā aʿlam* (as I know) would render his testimony rebuttable, due to dubiety in his
account. Besides, the term ashhad carries additional caution for rights (especially in criminal prosecutions) as well as it having a religious aspect in as much as no other forms were ever narrated.3

This phrase is regarded in the Ḥanafī and Shāfī'ī schools as rukn (a cornerstone or mainstay) of the testimony and as it is well known in usūl al-fiqh that the lapse of rukn terminates the existence of the subject. Therefore, if the witness is reluctant to say ashhad, then the essence of his testimony would be judicially null and void (no matter how persuasive his alternative terms are).4

The Mālikis oppose the above stipulation of a specific form, as they hold that any affirmative and conclusive form suffices in discharging the testimony before the court e.g. "I knew, I confirm, I verify", and their synonyms are admissible.5

Perhaps it could be said that the above divergence as regards the formality of commencing the testimony is a procedural difference which can be overcome by the procedural statutes bearing in mind that some witnesses may be illiterate or totally ignorant of the linguistic variances between ashhad and a-lam ("I testify - I know) respectively. Therefore if the witness used a certain term the court has the full powers to ask him to elaborate. Accordingly, the court should appraise the testimony without restricting itself to a static formality that is crucial in the final verdict of the case.

2. Fulfilment of Required Number of Witnesses (Nisāb)

Al-Qarāfī makes significant distinctions between the adillah (sources of jurisprudential proofs) which are usually employed by mujtahidīn (knowledgeable jurists who derive their statements from the original sources of shari'ah) and the hujaj (legal evidence which are employed by the judges and courts - as well as the arbitrators). He further
divides the second category to seventeen sub-sections and consequently holds that they are the sole means of proof as far as the judicial judgements are concerned. Moreover he discusses those numerous means one by one whereby he gives a panoramic idea about the Islamic principles of proof. It is noticeable that the testimony of witnesses occupies paramount importance in al-Qarafî’s approach. It should be also observed that Ibn al-Qayyim, al-Ṭarābulasī and Ibn ʿAbdīn generally agree with al-Qarafî’s method with some marginal variances as far as the proof of some family and financial disputes are concerned. 6

As a matter of principle Islamic criminal law designates certain degrees of evidence for each class of crimes (hudūd, gīsās or taʿzīr). So, by a thorough survey of these differentiations it becomes clear that even the testimony of witnesses (when it is the sole means of proof in the crime) is sub-divided according to the scale or class of the crime at issue. Hence the following divisions are made and rigorously debated even in the early stages of Islamic jurisprudence. 7

A. In Hudūd Crimes Except Adultery

Most Islamic jurists - through the ages - hold that hudūd crimes, namely: false accusation of adultery, wine-drinking and inebriation, theft, brigandage and highway-robbery, armed-rebellion and sedious dissension and apostasy cannot be legally proved by testimony unless this testimony is discharged by two male witnesses (who have fulfilled the aforementioned general requisites). 8

The main rationale of this key legal doctrine is that the testimony of the two trustworthy witnesses is the most reliable evidence upon which a sound verdict can be held. Besides, the aforesaid hudūd crimes are not sustainable in the case of a variety of shubuhāt. Therefore women, juveniles, slaves, non-Muslims, hostile-witnesses, and close
kindred, are all excluded due to the suspicions which might involve their accounts.⁹

The Ḥanafī authoritative sources narrate the Prophetic tradition narrated by al-Zuhri (d.124 A.H./742 C.E.) that the established Sunnah during the Prophet’s times and his two Caliphs was that women witnesses were inadmissible in ḥudūd and qisāṣ prosecutions.¹⁰

On the other hand the jurists acknowledge the severity of the punishment of ḥudūd felonies and their repercussions e.g. the qāḍī is to be banned for ever from qualifying to testify before any court according to the Ḥanafī. Therefore all jurists use the word yuḥtātulidaihā (caution is to be made in order to waive them) Hence they insist on calling two male witnesses to prove these crimes accordingly any less number would be immediately rejected even if the plaintiff offered to swear an oath.¹¹

However Ibn Qudāmah reports that ʿAṭāʾ b. Abī Rabāḥ (27 - 114 A.H./647-732 C.E.) and Ḥammād b. Abī Sulaymān (d.120 A.H./738 C.E.) admit the testimonies of one male and two female witnesses in proving all ḥudūd crimes (except adultery) and all qisāṣ prosecutions (which include murder and intentional bodily transgressions). This is held to be based on analogy with the scale of proof required in pecuniary disputes. Ibn Qudāmah strenuously refutes this opinion and its rationale. He based his criticism on the apparent differences between financial transactions and criminal disputes which juristically preclude any process of analogical reasoning.¹²

B. Four Witnesses in Adultery Prosecutions

As far as prosecutions of adultery are concerned, the standard requirement of the witnesses’ number is four males; and not less than that. This is also maintained by the unanimous opinions of ǧaḥābah, tābiʿīn, and the leading subsequent generations of jurists.¹³
This opinion is based on the Qur'anic verses that regulate the penalty of adultery for they rule:-

a. "If any of your women are guilty of lewdness (al-fāhiṣah) take the evidence of four (reliable) witnesses from amongst you against them ..." (4:15).

b. "And those who launch a charge (of adultery) against chaste women and produce not four witnesses (to support their allegations) flog them with eighty stripes and reject their evidence everafter, for such men are wicked transgressors." (24:4).

c. "Why did they not produce four witnesses to prove it, when they have not brought the witnesses, such men (the accusers) in the sight of Allāh (stand forth) themselves as liars". (24:13).14

The Muslim scholars argue that the specific stipulation of four witnesses in adultery is intended to safeguard the integrity and honour of the individual. Therefore it becomes clear that no conviction can ever be sustained unless the accused is really a wanton person, especially when we bear in mind that even if the culprit chose to confess the commission of adultery he must be subjected to rigorous judicial inquisition. This is intended primarily to waive the pending penalty even if the defendant is not a muhsan, whose penalty would be only one hundred lashes.15

The court has a bounden duty to ask the witnesses in all ḥudūd and qīṣās cases for a detailed account inasmuch as these penalties are to be repealed by any viable doubt. Besides in apostasy trials the sacrilegious and blasphemous acts are innumerable and controvertible as far as their legal weight are concerned. So the court must receive a very precise account of what has been imputed against the defendant in order to determine his guilt and at the same time to give him a fair chance to defend himself. This
scrupulousness applies also to slanderous accusations of unchastity (gadhf) as it is a verbal felony (in most cases) and may be committed by abusive indirect words, besides the jurists differ a great deal as to what is the specific meaning of many slanderous words.16

Ibn Qudāmah explicates the specific requirements of witnesses of adultery saying that these requisites are the following seven ones:-

1. **That they should be four**, in compliance with the number mentioned in the above Qurānic texts. Besides Mālik and Abū Dāwūd narrate that Sa'ad b ʿUbādah said to the Prophet: "If I found a man with my wife (committing sexual intercourse) shall I let them until I bring four (male) witnesses?" The Prophet responded. "Yes".17

2. **The witnesses should be males**, inasmuch as no women are admissible in these cases. However a tenuous statement ascribed to ʿAtā b. Rabāḥ and Ḥammād b. Sulaymān contends that three men and two women's testimony is admissible to prove adultery crimes. But Ibn Qudāmah forthwith refutes this opinion arguing that the very term *arbaʿah* is the masculine form for the number 'four'; besides women's testimony is amenable to deflection and forgetfulness which is unequivocally mentioned in the Qurān: "Lest one of them errs (deflects - or forgets) ...".18

3. **Liberty**, accordingly the slave's testimony is inadmissible in adultery prosecutions - due to the wide divergence in its legal weight, and this very juristic inconsistency is a *shubhah* capable of revoking the *hadd* of adultery. However, there is a narration attributed to Ahmad b. Ḥanbal and Abū Thawr that legalizes slaves' testimonies in adultery cases.19

4. **Probity**

5. **That the witness should be Muslims**20
6. The testimony should explicitly attest the physical penetration, and nothing less than this (intrinsic physical act without the least doubt). Ibn Qudāmah ascribes this juristic condition to Muḥāwiyyah b. Abī Sufyān, al-Zuhrī, al-Shāfi`ī, Abū Thawr, Ibn al-Mundhir and the “Irāqians.”

This apparent legal stringency is derived from the Prophetic judicial inquiry when Māʾīz came forward and avowed the commission of adultery. He asked him, “Did you have intercourse with her?” Māʾīz replied: "Yes". The Prophet further asked, "Till that (of you) disappeared in that (of her) like the rope in the well?" Māʾīz, also replied in the affirmative. So Ibn Qudāmah and most jurists inferred that this detailed elaborations will also be required in the testimonies of witnesses in adultery cases inasmuch as these very elaborations were needed in confessions of the same crime.

AbūDāwūd reported that Jābir said:

"The Jews came to the Prophet with a man and a woman who committed adultery. The Prophet asked them to bring two men of the most knowledgeable amongst them (the Jews). They brought the two sons of Ibn Sūrīyyah. The Prophet asked them in the name of God, what the penalty of adultery was in the Tawrah. They said: "We find in the Tawrah if four witnesses attested that they had seen his penis in her vagina like al mirwad fī mukhalah then they should be stoned to death."

The Prophet then asked "What then does impede you from stoning them?" They said, "Our dominion has gone, and we hated execution". Hence the Prophet asked for the four witnesses who testified and attested the very physical act, then the Prophet ordered the implementation of stoning.
7. The performance of testimony in one session. This requisite is maintained by Mālik, Abū Ḥanīfah, and the Ḥanbalis.24

Nevertheless al-Shāfiʿī, Ibn al-Mundhir (242-319 A.H./856-931 C.E.) and others contend that it is not necessary to give testimony (in adultery crimes) in one session, invoking the ostensible connotations of the above Qurʾānic texts where there is no mention of concourse testimonies in one session. Besides the testimony of witnesses in adultery prosecutions is analogous to the rest of testimonies which are legally admissible when delivered in different court sessions.25

Ibn Qudāmah rigorously refutes this latter opinion saying that Abā Bakrah, Nāfiʿ and Shibl b. Maʿbad testified before ʿUmar b. al-Khaṭṭāb that al-Mughirah b. Shuʿbah had committed adultery whereas the fourth witness Ziyād did not testify. Hence ʿUmar inflicted the penalty of ḡadhf (slanderous accusation of adultery) on the former three witnesses. Therefore testifying in one session is imperative for it is possible that the fourth witness might have testified later on. On the other hand, even if the fourth witness later testified, still his testimony would be invalid. Therefore the testimony of witnesses in adultery cases differs from the rest as far as the performance in one session is concerned.26

Moreover, the relevant Qurʾānic texts did not mention all the required conditions e.g. ʿadālah -(probity), physical act of sexual intercourse, etc. Hence the generality of these verses should be qualified by this procedure (one court session) which is the most convenient gauge in this respect.27

Moreover, the Ḥanbalis, al-Qarāfī and Shāfiʿīs do not stipulate that the four witnesses must attend the Court together, for it suffices that they come one after another to attend one session where they depose their testimonies.28
But Mālik and Abū Ḥanīfah emphatically insist on the witnesses’ concurrence (before the commencement of the prosecution) otherwise if they came one after another, they would be deemed gadhafah (slanderous accusers of adultery).29

However, Ibn Qudāmah accepts the first opinion over the latter according to the judicial precedent of al-Mughīrah’s case where the three witnesses came one after another in a sequence but all testified in one session, but they were particularly punished by ḥadd of gadhf because their testimony was short of the juristically required degree. This is confirmed by one of the witnesses who asked Ī‘mar b. al-Khaṭṭāb, "Suppose another one (a fourth witness) came forward and testified (according to our former testimonies) are you going to punish (al Mughīrah) by ḥadd of adultery?" Ī‘mar replied, "Yes, and I swear by God".30

So the predominant opinion in the Islamic criminal jurisprudence is that the witnesses of adultery would be punished by the penalty of ḥadd al-gadhf if they were not four, this is held by the Mālikis, Shāfis and Ḥanbalis.31

In this context the Mālikis stipulate that the judge must ask each witness for a detailed account of the incident of adultery. Moreover they stipulate that the court should hear the accounts singlely. Thus the Mālikis differentiate between adultery and the rest of crimes as regards the method of hearing the witnesses’ accounts.32

The Shāfī‘is agree with the Mālikis as regards the necessity of asking for a detailed account of the adultery but the Shāfī‘is do not insist on asking for time and place to be disclosed lest contradiction should be manifest.33

However, the Zāhiris and a second statement of al-Shāfi‘ī and Āḥmad Ibn Ḥanbal invalidates punishing the witnesses in this proposition on the grounds that they are witnesses, and
not slanderers which is analogous to the four witnesses of whom it is discovered, that one is an inadmissible witness due to blameworthiness.³⁴

However Ibn Qudāmah rejects the previous opinion by invoking al-Mughīrah case.³⁵

It is worth mentioning that if the condition of four witnesses is met, but later on (during the judicial inquiry in the adultery case) it is revealed that one or more of these witnesses is (or are) legally unqualified to testify due to slavery, lewdness or blindness, then the following are the three opinions as far as their susceptibility to the penalty of gadhf is concerned:-

1. They should be sentenced to the penalty of gadhf i.e. eighty lashes; because it is incomplete testimony in adultery case. This is Mālik’s opinion and it is the first statement of the Shāfi‘is and Aḥmad b. Ḥanbal which is advocated by some Ḥanbalis.³⁶

2. The second opinion is diametrically opposed to the first one. It states that no punishment of gadhf whatsoever is legally adjudicable because these are four witnesses who are incorporated in the general connotations of the Qur’ānic verses that stipulate the presence of four witnesses. Besides the rebuttal of their testimony is ascribable to an external element not relevant to an unwarranted slanderous allegation. In this case they are analogous to the (presumed) four witnesses whose probity is not yet revealed or probed. This opinion and its argument is expounded by the Ḥanafis, al-Ḥasan al-Baṣrī, and al-Sha‘bī.³⁷

3. The third opinion differentiates between the lewd slaves and the blind witnesses. Accordingly it maintains that if all the witnesses or some of them are blind then they should be sentenced to the penalty of eighty lashes because it is obvious that they are liars. By the same token if all the witnesses or some of them are lewd or
slaves then this punishment should not be held. This opinion is held by al-Thawrī and Ishāq b. Rāhawayhih.38

However if three male witnesses and two women testified before the court in an adultery case, they would all be subject to the eighty lashes penalty (as being slanderers) inasmuch as women are legally inadmissible witnesses in proving adultery crimes. This opinion is held by the Ḥanbalis, Ḥanafis and Suṭyān al-Thawrī.39 But ʿAṭāʾ and Ḥammād regard such testimonies as admissible.40

Sodomy (al-lijāt) allegations have to be proved by the same standard of proof required in adultery cases. So four witnesses who fulfil the above requisites are also required here according to the Mālikis, Shāfīʿis and Ḥanbalis opinions.41

Moreover al-Ramlī, from the Shāfīʿī school, extends this principle to the crimes of bestiality and necrophilia.42

But Ibn al-Qayyim relates that the Ḥanafis and Ẓāhiris disagree with these opinions as regards the standard of testimonies required for the substantiation of sodomy, bestiality and the rest of the illicit sexual offences that are not adultery. Hence the Ḥanafis and Ẓāhiris differentiate between these crimes on the basis of the linguistic differences in of their titles. Accordingly, they maintain that the prementioned offences are proveable by the normal standards of testimonies required in the rest of crimes (with the exclusion, of course, of adultery).43

Also al-Kāsānī reports that the predominant Ḥanafī opinion does not stipulate masculinity of the witnesses of iḥsān of the accused which when proved renders that person liable to the augmented penalty of al-rajm (stoning to death). But Zufar, from the Ḥanafī School, stipulates the masculinity of the witnesses of iḥsān since this fact is the cornerstone of the prescription of the rajm sentence.44
Besides all taʿzīr (discretionary penalties)—pertaining to all illicit sexual behaviours must be exclusively proved by male-witnesses as al-Ramlī contends. He makes an analogy of these offences with the standard adultery crime. Therefore he concludes that men-witnesses are the only required witnesses in illicit sexual offences that do not amount to sexual intercourse.\(^{45}\)

Furthermore, al-Māwardī reports that Abū Ḥanīfah totally annuls the penalty of adultery if the witnesses thereof waited for a whole year before they propound their testimonies to the court. However, the majority of jurists disagree with Abū Ḥanīfah in this regard as they do not consider the elapse of one year as sufficient grounds for the abrogation of the penalty of adultery.\(^ {46}\)

C. Two Witnesses in the Prosecutions of Murder (al-Qatl ḈAmd) Punishable by Qisās

In the outset of this topic, discrimination must be made between murder punishable by qisās, where all the miscellaneous conditions are met (as shown above); and murder punishable only by blood-compensation (diyah) due to the lack of one or more of the requisites of crime and penalty e.g. as when a father murders his son, or when the murderer dies before a judicial sentence is passed where diyah would be imperative. This differentiation is of paramount significance as far as the number of required witnesses is concerned. And due to the importance of testimony of witnesses in this specific subject (since it may lead to a verdict of capital penalty according to qisās rules), it may be appropriate to draw attention to the following points:

**First:** Murder that fulfils the juristic and judicial conditions of qisās.
In this proposition there are four distinct opinions pertaining to the required degrees of the testimony of witnesses; which are:

A. Two trustworthy male witnesses are exclusively admissible to prove murder punishable by *gisāś*. This is maintained by all the Mālikis, Ḥanafis, Shāfiʿis, and Ḥanbalis.47

Therefore women are excluded in this connection48 except that their testimony can be judicially regarded as an irrebuttable presumption (*qarīnah-gātīʿah*) and accordingly *gasāmah* can be undergone.49

The proponents of this widely endorsed opinion invoke the Qurʿānic text that rules:

"... And get two witnesses out of your own men ..."

(2:282)

Ibn al-ʿArabī and other authoritative exegetes like al-Jassāṣ and al-Qurṭubī infer the exclusion of women from this text as an explicit ban of women’s testimonies in *hudūd* and *gisāś* cases.50

Moreover, Ibn Nujaym, al-Kāsānī, Ibn ʿAbd al-Barr and the leading authorities maintain that the Qurʿānic former text was revealed in the context of pecuniary transactions and their pertinent inseparable rights, and despite the importance of these matters, the penalty of *gisāś* for murder is more grievous (and incontrovertibly irredeemable when wrongly executed); besides as a matter of principle, the maintenance of persons (*al-Nufūs*) is antecedent to and outweighs the maintenance of monetary or financial interests. Therefore these considerations necessitate the highest possible degree and quality of witnesses which is available in the testimony of two trustworthy males.51
Moreover the exclusion of women’s testimonies in murder punishable by *qisas* is further supported by suspicion of forgetfulness and that one of them might ‘err’ as specifically mentioned by the Qur’anic text that regulates the grades of legal testimonies in pecuniary matters mentioned above. Besides the presence of *shubhat al-badalīyyah* (suspicion of substitution) inasmuch as two female witnesses stand for one male witness (in financial transactions and disputes) so that they are not to be accepted in establishing crimes that are not sustainable as a result of *shubuhāt*. This clearly encompasses only *hudūd* and murder punishable by *qisas*.

Second Ibn Rushd, Ibn Qudāmah and Ibn al-Qayyim all report that al-Ḥasan al-Baṣrī contends that murder punishable by *qisas* is only to be proved by four male witnesses, inasmuch as the penalties of adultery and murder are analogous in respect to the anticipated capital punishment (*itlāf al-nafs*) for both crimes; therefore the kind of testimony and its pertinent conditions in adultery should be applied in murder prosecutions.

Thirdly Ibn Ḥazm and his *Ẓāhirī* school argue that murder punishable by *qisas* is flexibly proveable either by the testimony of two trustworthy Muslim males, or one male witness corroborated by two female witnesses, or finally, by four female witnesses.

The *Ẓāhirī* widen the scope of proof by testimony of witnesses in murder punishable by *qisas* mainly because these vehicles are valid means of evidence generally and avowedly admissible in an enormous realm of disputes and facts, besides they maintain that there is no credible rationale that precludes the effectiveness of these flexible grades of testimony of witnesses in *qisas* prosecutions.

Fourthly: Murder punishable by *qisas* can be proved by the testimony of one male witness coupled with two female witnesses as analogized with the acceptance of this method
in financial matters. Al-Shawkānī, Ibn Qudāmah and Ibn al-Qayyim attribute this statement to al-Awzā‘ī (d. 157 A.H.). Sufyān al-Thawrī (97-161 A.H.) and cAtā’ (27 - 114 A.H./647-732 C.E.). Ibn Qudāmah, Ibn al-Humām and al-Kasānī support the first opinion that holds that capital punishment according to qisās rules in murder cases is to be proved by two male witnesses. Accordingly no women can legally qualify in this respect, due mainly to the shubuhat al-badal (suspicion of substitution) for two women’s account are judicially deemed as commensurate to one man’s account. Furthermore, four witnesses are not required in these disputes because there are fundamental differences between adultery and murder in respect to both crime and penalty. On the other hand qisās is a grievous penalty where extra caution is to be exerted, besides, it is the maximum corporal penalty. Therefore it should be adjudged after a maximum degree of evidence is procured, (confession, or testimony of two trustworthy male witnesses). Hence, testimony of witnesses in murder punishable by qisās is not to be juristically nor judicially compared with disputes or litigations involving pecuniary transactions and their inherent rights i.e. sales, rents, companies damages, debts, postponements of financial obligations and debts etc. Here emerges the strategic differentiation between murder punishable by qisās and murder which did not fulfil the fundamental prerequisites of qisās penalty, manslaughter, and accidental homicide. Inasmuch as these forms of illegal homicide are prosecuted essentially to secure diyah (blood compensation) which is a pecuniary matter. Therefore all these forms of illicit killing can be proved by the rest of scales of testimony of witnesses, one male witness and two female witnesses, etc. as is detailed below.

However, most of the Mālikis accept the testimony of women in cases of murder and bodily transgressions that take place in their normal gatherings such as marriage festivals, etc. on condition that in murder cases (qasāmah) is to be
undertaken by the plaintiff whereby fifty oaths are to be sworn, to prove the veracity of the claim.\footnote{57}

D. Grades of Testimonies of Witnesses in Homicides Punishable only by Blood Compensations

As mentioned above Islamic criminal jurisprudence allocates the various grades of the testimony of witnesses according to the nature of the crime, as a consistent incontrovertible principle, despite the marginal differences as to what is the specific grade needed in each particular crime. Hence the vast majority of scholars maintain that all illicit homicidal cases that do not legally lead to a qisās verdict (capital punishment) can be legally substantiated either by two trustworthy male witnesses, one male witness and two female witnesses, or one male witness and the corroborative oath of the plaintiff.\footnote{58}

Al-Qarāfī reports that four kinds of claims can be proved by the testimony of one witness and the corroborative oath of the plaintiff according to the Mālikī school, namely pecuniary claims, warrants or sureties, qisās in bodily injuries and al-khultah (financial transactions as in trade).\footnote{59}

This means that it is widely accepted that all homicide cases devoid of capital punishment as qisās can be legally proven by the evidence of one witness and the confirmatory oath of the plaintiff as well as the eligibility of recoupment of the stolen item in larceny.\footnote{60}

This apparent flexibility as far as the grades of testimony of witnesses in illicit killing not punishable by qisās are concerned, is ascribable to the fact that all these crimes are to be proved by the same parallel grades of testimony legally required in pecuniary prosecutions.\footnote{61}

But it should be noticed that the Hanafis, despite their general agreement with the other schools in the aforesaid opinion, and its pertinent rationale, have disagreed with
these schools as regards the admissibility of the testimony of one male-witness when it is conjoined with the corroboratory oath of the plaintiff. This crucial and famous legal disagreement can be discussed as follows:

E. The Judicial Status of the Testimony of One Witness Corroborated by the Plaintiff’s Oath

Al-Qarāfī, from the Mālikī school, holds that this grade of testimony of witnesses is widely admissible in the jurisprudential opinions of the Mālikis, Shāfi'is and Ḥanbalis. But the Ḥanafis vehemently contest this opinion, and accordingly exclude this grade of testimonies from all testimonies in criminal prosecutions. Each side have expounded its opinions and rationale as follows.\(^6\)

1. Muslim narrates in his Ṣaḥīḥ that Ibn ʿAbbās says: "The Prophet had adjudicated (in a case) by the (evidence) of one testimony and the oath (of the plaintiff)".\(^6\)

Abū Hurayrah narrates a parallel tradition\(^6\). Al-Nawawī, Ibn Taymīyyah and Ibn al-Qayyim hold that these traditions denote the admissibility of the one male’s testimony when corroborated by the confirmatory oath of the plaintiff.\(^6\)

Also Ibn Ḥajar (773-852 A.H.), the authoritative traditionist and commentator, says that the various narrations of the above mentioned traditions were copiously reported by numerous authorities and by famous chains of transmitters, not only this, but also, Ibn Ḥajar further comments that the very authenticity of the traditions has been verified by various ways which include Ibn ʿAbbās’ narration mentioned above. Ibn Ḥajar quotes Ibn ʿAbd al-Barr (368-463 A.H. / 978-1071 C.E.) the famous and influential Mālikī traditionist and jurist, who says, "No one can ever impugn the authenticity nor the transmission of the tradition (at issue that legalizes the admissibility of one witness’s testimony and the corroborative oath of the plaintiff"). So Ibn Ḥajar has undertaken the verification
of all the various narrations of the tradition at issue and attempted to refute the argument propounded by the Ḥanafīs who suspect the authenticity of these narrations.66

Al-Ramlī says that the above traditions were narrated by more than twenty Companions.67

Moreover, al-Nawawī further confirms this contention, namely, the admissibility of one male witness's testimony confirmed by the claimant's oath saying "The multitude of Muslim scholars from the Prophet's Companions and Successors and those who followed them as leading regional jurists maintain that adjudication can be made upon the proof of one witness (testimony) and the oath of the plaintiff in pecuniary properties and whatever is intended for pecuniary (affairs). This is held by Abū Bakr al-Ṣiddīq and ʿAlī, ʿUmar b. ʿAbd al-ʿAzīz, Mālik, al-Shāfiʿī, Abū Ḥanīfah and the majority of Provinces' jurists."

Their argumentation is based on the numerous traditions in connection with this question via the narrations of ʿAlī, Ibn ʿAbbās, Zayd b. Thābit, Jābir, Abū Hurayrah and others. Al-Nawawī further says: "The Ḥuffāẓ specialists of traditions and memorizers of great numbers of them, have maintained that "Ibn ʿAbbās's narrative is the most veracious one in this subject". Ibn ʿAbd al-Barr said, "No one can oppose its transmission, and there is no disagreement between the specialists as regards its veracity."68

Also al-Bājī (403-474 A.H. / 1012-1081 C.E.) reports Mālik's narrations that confirm the legality of the proof presented by the testimony of one witness and the plaintiff's oath.69

The advocates of this further sustain their opinion by the consensus of the major ṣaḥābah as held by al-Qarāfī (d.684 A.H./ 1285 C.E.) and Ibn Qudāmah (d.620 A.H./ 1223 C.E.)70
As well as the advocacy of the leading jurists and their disciples.\textsuperscript{71}

Thus it becomes obvious that the testimony of one male witness when corroborated by the confirmatory oath of the plaintiff plays a significant role in the substantiation of all homicidal killings not punished by \textit{qisāṣ}.\textsuperscript{72}

Ibn al-Qayyim (691-751 A.H./1292-1350 C.E.) makes a significant juristic contribution in this context, for he adduces rational justifications as to why the testimony of one witness can be corroborated by the confirmatory oath of the plaintiff (in criminal and pecuniary prosecutions).

He and al-Qarāfī maintain that the oath is enacted on the litigant party whose veracity has been manifested and strengthened by the available evidence. Accordingly the plaintiff's side in the current proposition is the strongest and most credible due to the presence of his witness (besides him). So the plaintiff has to take the corroborative oath to finalize the case and secure a judicial decision.\textsuperscript{73}

Al-Qarāfī, Ibn al-Qayyim and his famous teacher Ibn Taymiyyah extend this doctrine over all the judicial proceedings pertaining, specifically to proof of all cases, particularly criminal ones. So he deduced that if the claimant's side is strengthened by \textit{al-lawth} (irrebuttable presumptions in homicidal cases where there is no confession nor the required testimony of witnesses to prove the commission of homicide), for then the claimant has to swear the oath of \textit{gasāmah} inasmuch as his side is visibly strengthened by the existence of this \textit{lawth}.\textsuperscript{74}

This principle also applies in cases when the defendant refuses to swear an oath (\textit{nakala}) or as when the plaintiff propounds only one male witness to prove his case. Hence Ibn al-Qayyim concludes that the oath, is consistently validated on the strongest side in any judicial trial which
definitely incorporates homicidal killings not punishable by qisas.\textsuperscript{75}

It should be also readily noticed that al-Shāfi‘ī (d. 204 A.H.) al-Qarāfī (d. 684 A.H.), Ibn Taymīyyah, (d. 721 A.H.), as well as many leading jurists have reached the same conclusions.\textsuperscript{76}

This important principle is not confined to the plaintiff, it rather devolves to the strongest side in the case. Therefore if the claimant refused to swear the confirmatory oath in the current case, then the defendant’s side would be the strongest due to the presence of \textit{al-barā’ah al-aslīyyah} (original state of innocence presumed intact) on the accused until his guilt is proved, so he can swear the oath and escape any criminal liability. Ibn al-Qayyim explicates this fundamental principle of judicial proceedings saying that all defendants are presumed not guilty or liable according to the principle of \textit{istishāb al-barā’ah al-aslīyyah} (the presumption of the continuation of the original state of guiltlessness and irresponsibility) which is an initial evidence on the part of the accused in any criminal trial. However this initial presumption is not unshakeable, for, it can be easily removed by any stronger evidence propounded by the claimant as when he brings one witness and takes the oath to confirm his veracity and so forth in all trials.\textsuperscript{77}

Hence it should also be observed that the principles of \textit{istishāb} (accompaniment and inherent concomitance) play a major role in this jurisprudential issue, though they were initially debated in the ambits of \textit{usūl al-fiqh}.\textsuperscript{78}

\textbf{F. The Hanafis Objection to the Admissibility of One Witness and the Confirmatory Plaintiff’s Oath}

This is a famous Ḥanafi opinion held and sustained by their leading and classical jurists. Al-Kāsānī says that the testimony of one male witness aided by the corroborative
1. The widely narrated Prophetic tradition that says: Al-bayyinah ṣalā al-muddacaTI wa al-yamīn ṣalā al-muddacaT alayih ("Testimony is the onus of the plaintiff and oath is on the side of the defendant.")

Al-Kāsānī deduces from this Prophetic traditions that the Prophet has made the oath as an imperative judicial procedure consistently on the side of the defendant. So, if it is devolved to the side of the plaintiff it would not be an incumbent procedure on the defendant any more and this is antithetical to the tradition’s text. Moreover, the Prophet has explicitly made the various forms of oath (in its entirety) on the part of the defendant. Accordingly it can never be envisaged on the part of the plaintiff, which will also result in rejecting the Prophetic tradition.

Ibn Qudāmah ascribes the illegality of the means of proof of one male witness and the plaintiff’s confirmatory oath to ahl al-Ra’y, al-Sha’bī, al-NakhaʾI and al-AwzāʾI as well as to al-Shaybānī. The latter said, "Whoever adjudicated via the evidence of one witness and the oath (of the plaintiff) I would repeal his judgement; because the Qurʾān has defined the means of evidence as two males, and one male and two female - witnesses according to Chapter 2: Verse 281. Moreover, the Prophet has made the bayyinah (testimony) on the part of the plaintiff and the oath on the part of the defendants. Therefore any alteration of these principles would be deviation from these Qurʾanic and Prophetic texts which is a form of naskh (abrogation)." Nevertheless Ibn Qudāmah refutes al-Shaybānī’s opinion and its rationale due to the arguments and proofs propounded by the Ḥanbalis, Shāfiʿis and Mālikis in this respect.

Nevertheless, al-Kāsānī alleges that the prominent traditionist, namely Yahyā b. Maʿīn has impugned the authenticity of the Prophetic tradition mentioned by the
Shafiis, Malikis and Hanbalis "that the Prophet has adjudicated according to the evidence of one male witness aided by the corroborative oath of the plaintiff". Also al-Zuhri (d. 120 A.H.) when asked about this tradition he said that such procedure was a heterodox, as al-Kasani reports.\textsuperscript{82}

He further maintains that it was Muawiyyah who firstly introduced the admissibility of the testimony of one male witness aided by the plaintiff’s oath. Also cAbd b. Abi Rabah ascribes the same opinion to cAbd al-Malik b. Marwan. Al-Kasani finalizes his onslaught of the admissibility of the testimony of one witness with the corroborative oath of the plaintiff by saying: "It is an invalid vehicle of proof and obviously opposed to the authentic Prophetic tradition that assigns the onus of proof and defence on the litigant parties."\textsuperscript{83}

It is worth mentioning that the leaders of the Hanafi school adopt and endorse al-Kasani’s opinion and argument as far as the controversial issue of the admissibility of the testimony of one witness and the plaintiff’s oath is concerned.\textsuperscript{84}

G. The Rebuttal of the Hanafi’s Argument

Ibn al-Qayyim (d. 751 A.H.) and al-Qarafi (d. 684 A.H.) have rebutted the Hanafi opinion that invalidates the legitimacy of the testimony of one witness and the corroborative oath of the plaintiff according to the following points:-

1. The invocation of the authentic Prophetic tradition that assigns the onus of proof and defence as being solely testimonies and oath on the plaintiff and defendant respectively, as the Hanafi contend is incorrect. Ibn al-Qayyim holds that this Hanafi approach is extremely tenuous according to the following inferences:-

A. The entirety of the Prophetic traditions that legalize the adjudication according to the testimony of one witness...
helped by the confirmatory oath of the plaintiff were more authentic and famous than the tradition that assigns the onus of proof and defence (which is not narrated even by one of the major six collections of traditions).  

B. Ibn al-Qayyim further elicits that if the tradition narrated by the Ḥanafis (particularly al-Kāsānī) is to oppose or contrast the numerous traditions that validate the admissibility of the testimony of one witness and the plaintiff's oath, we have to conclude that preference should be given to these traditions (invoked by the majority). Because the Ḥanafis tradition denotes a general ruling (ḥukm ʾām), whereas the majority's invoked traditions give a particular ruling (ḥukm ḫāṣṣ), and the ḫāṣṣ always outweighs and surpasses the ʾām.  

C. The oath was initially made on the part of the defendant (al-muddaṣṣ alayhī), because if the plaintiff's (al-muddaṣṣ) part was in default of any preponderating evidence except his claim (or allegation), then, the defendant's side would be the most eligible side for placing the confirmatory oath. In such circumstances the defendant's part would be spontaneously sustained by the key principle of asl baraṣṣat al-dhimmah (the original status of exoneration). Therefore the defendant becomes the most credible litigant party in the case by the virtue of the concomitance of this key principle which concludes that each person is innocent and irresponsible until the opposite is proved. Consequently the corroborative oath should be assigned to him. However, as Ibn al-Qayyim further argues, since the plaintiff has succeeded in propounding one trustworthy witness, then he becomes the strongest litigant party, and accordingly the confirmatory oath has to be transferred to his side.  

Ibn al-Qayyim establishes this key inference from the doctrine that asl baraṣṣat al-dhimmah (the incipient state of exoneration) mentioned above, despite its validity and tenability, it is a slender proof which can easily be
depleted by stronger proofs e.g. one trustworthy witness, irrebuttable presumptions, refusal to swear the oath.88

2. Al-Qarafi maintains that the Hanafi objection to the admissibility of the testimony of one witness and the confirmatory oath of the plaintiff is a flimsy deduction; because the oath assigned to the denying party (defendant) tenaciously sticks to his side since it is a defensive proof al-yamīn al-dāfi-ah (the oath of rebuttal) whereas the oath on the side of the plaintiff is another kind for it is al-yamīn al-jālibah or al-muthbitah (the procuring or proving oath). Hence al-Qarafi concludes that the oath on each side of the litigation is absolutely different from that on the other one.89

Thus al-Qarafi invalidates the Hanafis contention that confines the oath to the defendant's side which induced their rejection of the admissibility of the testimony of one witness and the corroborative oath of the plaintiff.90

It could be concluded that perhaps the opinion of the majority of Muslim jurists and the relevant sustaining arguments propounded on behalf of the admissibility of the testimony of one male witness with the corroborative oath of the plaintiff in criminal prosecutions not leading to serious corporal punishments are tenable. Thus it could be maintained that a wide area of crimes can be legally proved by this means of proof, inasmuch as the procurement of two witnesses who qualify in each case is practically very difficult to obtain, so, the allegation that the principles of proof in the Islamic criminal jurisprudence are too stringent or rigid is not veracious, as could be easily detected from the somewhat prolonged argumentations in respect to the testimony of witnesses.

However, a key point in this context should be made clear, namely, if a judge held a final decision in a manslaughter case according to the available proof which was the testimony of one witness confirmed by the corroborative oath.

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of the plaintiff and consequently a blood-compensation was adjudicated, this specific judicial ruling would be based solely on the testimony of the witness which is enhanced and corroborated by the oath of the plaintiff. So if this very witness later on withdrew and impugned his testimony the whole indemnification would be exclusively paid by him (without any participation by the plaintiff). This is Ahmad b. Hanbal's opinion as sustained by Ibn al-Qayyim who propounds the following points in justifying this important juristic and judicial procedure:

1. The witness's testimony is the evidence upon which the claim is held;
2. The corroboratory oath is the mere saying of the adversary which is not a proof vis-à-vis his counterpart, it is, rather a condition for the judicial decision; and
3. If we agreed to render this oath as evidence it would be so according to the existence of the testimony of the witness, thus the oath cannot be an independent proof; and

Finally: If this oath is a perfect proof, it can surpass the testimony of the witness as when there are two equal witnesses, but no one in the Hanbalī school has ever held such a statement. Therefore, the oath of the plaintiff does not procure any reimbursement if the witness opts to withdraw.91

Nevertheless some Mālikis and the Shāfiʿis hold that the retraction of the witness in the above propositions results in adjudging half of the indemnifications on him and the other half on the plaintiff because the verdict is reached according to two proofs i.e. testimony and oath, where this oath does represent a witness. Accordingly any future liability should be shared equally.92

The Mālikis apply the above mentioned principle of proof in larceny cases to prove the plaintiff's eligibility for the recoupment of the stolen pecuniary item; and not for the
amputation of the larcenist hand. This is because the amputation is a *hadd* penalty, whereas the pecuniary damage is not, so any plausible male and two females, or either of them aided by oath of the claimant can prove the pecuniary claim but not the *hadd*.⁹³

The rest of schools accept the above precepts except that the Shāfiʿīs and Ḥanbalis do not accept the proof adduced by two women witnesses and the plaintiff’s oath as far as the eligibility for the stolen item is concerned.⁹⁴

It could be maintained that the Mālikis and Shāfiʿīs opinion in imposing an equal share of liability on the plaintiff in the above case is a tenable one since the loss incurred by the defendant is caused by joint factors, namely, the testimony of one witness and the corroborative oath of the plaintiff; particularly when it is quite clear that each one of these two factors is essential in the admissibility of the other one; for it is proved that they are judicially interdependent means of proof.

Of course these eventualities are only envisageable in homicidal trials that do not end in the pronouncement of *gisāṣ* penalties as frequently emphasized above.
References Chapter Eleven


19. ibid.

20. ibid.

21. ibid.


27. Ibid.
31. Ibid.
33. ibid.
39. ibid, see also al-Qarafi, al-Furuq, Vol.IV, pp.94-97.
43. ibid, see also al-Qarafi, al-Furuq, Vol.IV, pp.94-97.
44. Al-Kāsānī, al-Badā`i, Vol.VI, p.280.

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88. ibid.
90. ibid.
CHAPTER TWELVE - MISCELLANEOUS STANDARDS AND REQUISITES OF ADMISSIBLE TESTIMONY

1. Standards of Testimonies Required in Bodily Transgressions

Crimes of bodily injuries unpunishable by qisās are generally encompassed in the ambit of homicidal killing unpunishable by qisās as regards their legal proof via the testimonies of witnesses. Hence Mālik explicitly says, "Women's testimonies are admissible in involuntary homicide gatl al-khata and also in (the establishment of) involuntary bodily injuries." Because all these are crimes punishable only by pecuniary reimbursements as bloodwit or arsh. So if women testified in conjunction with a male-witness in order to prove the intentional commission of al-munaggilah or al-ma'mūmah wounds, their testimonies should be admitted inasmuch as the intentional and unintentional perpetrations of the aforementioned wounds are the same as regards their punishments which are solely pecuniary recoupments payable to the victims. Consequently women witnesses are admissible in these cases, irrespective of the depiction of "intentional".1

Thus all bodily transgressions not conducive to qisās penalties, even though they were intentionally perpetrated, can be proved by miscellaneous grades of testimonies according to the Mālikī school.2

Ibn al-Qāsim (132-191 A.H./750-806 C.E.) and the leading Mālikī commentators further elaborate the above key conclusion as they hold that Mālik maintains that intentional bodily transgressions and felonies can be legally substantiated by the testimonies of one male-witness conjoined with two female-witnesses, or either of these two kinds of testimonies when corroborated with the plaintiff's confirmatory oath (as shown above).3
However it was reported that Ibn al-Qāsim does not wholly countenance Mālik’s somewhat lenient statement as mentioned above because Ibn al-Qāsim stipulates the same rigorous requisites of testimony in murder cases to be present in intentional bodily felonies trials. Thus neither women witnesses, nor one male-witness and the plaintiff’s confirmatory oath would be admissible according to Ibn al-Qāsim’s opinion.

Nevertheless Sahnūn (160-240 A.H. / 777 - 854 C.E.) - the narrator of al-Mudawwanah - prefers Mālik’s statement and rationale as regards the precise means of proof in bodily transgressions and injuries. The late Mālikī jurists accepted Sahnūn’s conclusions. ⁴

However, Ibn ‘Abd al-Barr and al-Qarāfī have aligned themselves with Ibn al-Qāsim in the matter at issue. So they never accept the proof based on the testimony of one witness and the plaintiff’s confirmatory oath in intentional bodily injuries and transgression. Al-Qarāfī argues that Mālik acceptance of flexible means of proof in such cases conflicts with his school’s sources of jurisprudence. ⁵

The Shāfi‘īs accept the prementioned rules with slight differences as to what is specifically punishable by gisās in wounding and the rest of bodily felonies. Subsequently the Shāfi‘īs maintain that bodily transgressions and wounds punishable by gisās penalty presuppose the testimonies of two male witnesses to prove the allegations. Also, and by the same token all bodily transgressions conducive only to pecuniary reimbursements are proveable by the testimony of one male and two female witnesses, or the one male witness and the confirmatory oath of the plaintiff. The Ḥanbalis propound very similar opinions. ⁶
2. Testimony of Two Male Witnesses Conjoined with the Confirmatory Oath of the Plaintiff

If the plaintiff succeeded in bringing two trustworthy witnesses who judicially qualify to testify, some debate has arisen as to whether he should still swear the confirmatory oath. The following juristic difference has occurred in regard to the admissibility of this means of evidence in criminal cases:

1. 'Ali b. Abī Tālib, the qādī Shurayḥ (d. 78 A.H.) Ibn Abī Laylā, al-Awzā'ī (88 - 157 A.H./707-774 C.E.), Mālik and a statement of Ahmad b. Ḥanbal, all contend that the plaintiff has to swear an oath even though his claim is proved by two admissible witnesses.7

It is reported that 'Ali ordered the plaintiff to swear the oath, besides his two witnesses, who refused hence 'Ali said, "I will not adjudicate something (to you) to which you do not take oath".8

Also Ibn al-Qayyim relates that the prominent judge, Shurayḥ, asked the plaintiff to take oath, due to the dissemination of allegations at his time. The people asked him: "Why do you innovate this procedure (in judicial judgements)?" He replied, "I noticed that people have innovated novel problems so I have to contrive (new means of evidence)."9

Ibn al-Qayyim justifies this procedure by saying: "This statement is not too remote from the legal principles of sharī'ah, particularly with the likelihood of indictment"10

2. The vast majority of leading classical jurists contend that the plaintiff should not be asked to swear an oath when he presents two trustful male witnesses.11
Ibn al-Qayyim, al-Qarafī, and al-Sarakhsi propound the following argument to sustain the prevalent opinion in the current question:

a. The Qur'anic verse that stipulate "the procurement of two male witnesses from our men, or (when non-existent) one male witness and two female witnesses..." (2:282).

So the general connotation of this key procedure does not incorporate the oath of the plaintiff to prove the veracity of his claim.

b. The Prophet once addressed a plaintiff saying

"(Bring) your two (male) witnesses or the defendant would swear the (defensive) oath".

Hence the plaintiff said, "O, Apostle of Allah, the man (defendant) is a fājir (wanton) who does not care about swearing an oath". The Prophet replied, "You are not entitled to anything except that (his oath)".12

Al-Qarafī comments, "The ostensible meaning of the above (Qur'ānic and Prophetic) texts is that the two male witnesses do constitute a perfect admissible proof (hujjah tāʾammah), consequently the plaintiff's oath would be of no avail and is utterly superfluous."13

3. al-Sarakhsī adduces the aforesaid Hanafi statement that the Prophet has made the oath exclusively on the part of the defendant thus the plaintiff is consistently immune from swearing it. Moreover al-Sarakhsī holds that oath is initially intended for defensive purposes and not for proof so the plaintiff does not need it.14

For all these juristic considerations the plaintiff should not be made to swear oath when he had already presented the required legal proof. Consequently all crimes of hudūd murder and quasi-murder, and accidental killing as well as
the transgressions perpetrated on bodies, foetuses and the vast compasses of ta’zīr crimes, can be proved by the testimony of two male witnesses (when fully qualified to attest) without further burdens on the plaintiff. But we have to observe that adultery is exempted from this realm, for it presupposes four reliable male witnesses (when there is no confession as discussed above).

Nevertheless, the justification adduced by the qāḍī Shurayh that people had become perverse and false allegations had prevailed is a reasonable one. However, (as will be exposed below), the authenticity of testimony and the veracity and credibility of witnesses is to be absolutely ascertained by the trying court especially in hudūd and qisas cases, in so far as the largest segment of Muslim jurists contend that it is imperative on the court to verify the credence and reliability of witnesses in each legal dispute. Consequently it is clear that the oath of the plaintiff becomes a mere superfluous.

3. Two Female Witnesses Besides the Confirmatory Oath of the Plaintiff:

This is a possible proposition, because women may witness a commission of a homicide offence that does not involve qisas (capital punishment). As mentioned above the majority of Muslim jurists accept the testimony of one male witness coupled with the testimony of two females in substantiating all crimes that are not punishable by hadd or qisas. Consequently women’s testimonies are legally admissible in murder which is not punishable by qisas, manslaughter, and accidental killing, because basically all these crimes only lead to the verdict of guilt punishable by diyah. This rule is extended to bodily injuries that are only punishable by arsh or diyah as a pecuniary reimbursement of the damage incurred by the victim. Nevertheless, as reported by al-Qarāfī, Khalīl (d.767 H/1365 C.E.) and a number of leading Mālikis and Ḥanbalis, a juristic disagreement emerges when the only proof adduced by the plaintiff is the testimony of
two women and his corroborative oath. Hence the following two tendencies are the dominant ones in this respect:

1. The Mālikīs and Ẓāhirīs and Ibn Taymīyyah agree that two women’s testimony coupled with the plaintiff’s oath is a legally admissible proof in crimes not punishable by gīsās or hadd. Basically inasmuch as two women’s testimony represent a testimony of one male witness in all pecuniary disputes, and since this male witness’s testimony is admissible when corroborated with the plaintiff’s confirmatory oath, then and by the same token, two women can testify instead of this male witness and to the same effect as far as the judicial weight of their testimonies are concerned.¹⁵

Al-Qarāfī expounds the Mālikī opinion arguing that the Qurʾān (tacitly) regards the testimony of two women as commensurate to the testimony of one male witness, so, two women can testify in addition to the plaintiff’s oath as the one male witness does. Moreover the Prophet ruled to the same effect as he states that the two women’s testimony equals the testimony of one male witness, and al-Qarāfī maintains that since the Prophet has not restricted this key judgement to a specific periphery of disputes, then this essential Prophetic judgement should be generalized to comprehend crimes not punishable by gīsās and ħudūd penalties.¹⁶

Furthermore al-Qarāfī sustains the Mālikīs opinion saying that since it is admissible to accept the oath of the plaintiff when the defendant refuses to swear it, then it should be more tenable and reasonable to accept this oath when corroborated by the testimony of two female witnesses, inasmuch as this testimony is stronger than the mere refusal of the oath by the defendant.¹⁷

2. Most of the Shāfiʿī, Ḥanafī and Ḥanbalī jurists object to the admissibility of the testimony of two women aided by the confirmatory oath of the plaintiff.¹⁸
The proponents of this opinion argue that the testimony of two women is the weakest half of the complete bayyinah. Likewise, the oath is also a very weak evidence, therefore the trying court should not content itself by conjoining a weak proof to a similarly weak one, inasmuch as the court would not be persuaded by the amalgamation of the testimonies of two females to the testimonies of another two females.\[19\]

Moreover the Shāfī‘is and Ḥanbalis argue that the Islamic legal norms do not incorporate a text that validates the admissibility of the testimony of two women coupled with the plaintiff’s oath. However, there is a clear Qur’ānic text that legalizes the testimony of two women coupled with the testimony of one male witness. Subsequently there is no juristic basis for drawing any analogical deductions between these two apparently different propositions.\[20\]

Furthermore the majority of jurists contend that if the proof by testimony is in default of at least one male witness it would not be admissible as when the plaintiff succeeds in procuring four women to attest his pecuniary claim. This presumption is avowedly unacceptable in the Mālikī, Shāfī‘ī and Ḥanbalī schools. Subsequently such testimony would not be admitted in crimes that induce a pecuniary sentence e.g. murder unpunishable by gisās quasi-murder, accidental killing, bodily injuries not punishable by gisās and all the rest of the felonies and misdemeanours.\[21\]

However Ibn Ḥazm diametrically opposes the majority of jurists as he contends that two women invariably equal one male as far as the legal weight of testimony is concerned, therefore four women witnesses are admissible even in murder cases punishable by gisās, let alone the rest of homicide crimes and ta‘zīr offences.\[22\]
Despite Ibn Ḥazm’s opinion and its sustaining argument, the majority’s statement which negates the ostensible equilibrium between the testimony of one male witness and the testimony of two female witnesses, the latter is more reasonable particularly when we note that Ibn Ḥazm basically does not uphold analogical reasoning in contrast with the ostensible connotations of the Qurʾān and Sunnah.

On the other hand Ibn Ḥazm sequence of arguments leads to the admissibility of women (as witnesses) in hudūd and gīsās felonies, which is evidently antithetical to the general tendencies in Islamic criminal jurisprudence in this context. Inasmuch as the key principle here is that these two categories of crimes, namely hudūd and gīsās, not carried out as a result of plausible suspicions, shubuḥāt, but Ibn Ḥazm, as mentioned before, challenges this principle.

Finally, as far as the required grades of testimony of witnesses are concerned, they are to be rigorously observed by the trying court and the litigant parties, though as it has been proved in the previous pages, Muslim jurists and their various schools have greatly differed in specifying the criteria required in felonies not punishable by gīsās. However the following examples may help to clarify the question of what is the specific grade required in the major crimes.

A. If the plaintiff accused the defendant of murdering his relative, but only succeeded in bringing one male witness coupled with the testimony of two female witnesses, or opted to swear the corroborative oath with his one male’s testimony, al-Šāfiʿī and Ibn Qudāmah rule that no gīsās, whatsoever, can be entertained by the court in this case, because it is imperative on the plaintiff to satisfy the condition of procuring the testimony of two male witnesses.23

Also if a felonious act led to murder and manslaughter instantaneously and the above degree of testimony was only
the available proof (as when the accused fires a bullet with the purpose of killing A. and in addition to this end he also killed B.). The second victim's case would be legally proved whereas A's murder would be dependent to the procurement of another male witness's testimony.24

Al-Shāfiʿī further explicates the major criminal tenor in this context. If someone claims that the accused has stolen a nisāb (the minimum value of stolen property), but presented only one male witness and he swore the confirmatory oath, or that he only propounded one man and two women as witnesses, al-Shāfiʿī rules that the court would only adjudicate the recoupment of the stolen item or, if consumed or destroyed, full reimbursement of its value.

This is because all pecuniary claims can be proved by one male witness with the plaintiff's oath, or one male witness coupled with two women witnesses but the hadd of theft i.e. the amputation of hand would not be proved in this case because all hudūd are to be exclusively proved by testimony of two male witnesses, except adultery which needs a further two male witnesses.25

Mālik expressly endorses the same criteria thus he holds that only the compensation of the stolen property can be proved by the testimony of one male witness corroborated by the confirmatory oath of the plaintiff, or this witness when two other women witnesses are present, or these two women witnesses when sustained by the plaintiff's oath. However, no amputation of hand, whatsoever can ever be ruled by the court according to these means or grades of testimony as Mālik admittedly says.26

Al-Qarāfī maintains that the testimony of one witness aided by the refusal of the defendant to swear the oath is an independent means of proof according to the Mālikis and contrary to the Shāfiʿī opinions.27
This is because this means of proof is an extension of the preceding means, namely, the testimony of one witness and the confirmatory oath of the plaintiff. So if the plaintiff refused to take this crucial oath, the court would ask the defendant to swear the rebuttal oath, that acquires him from the claim of the plaintiff. If the defendant refused, then the Mālikis spontaneously adjudicate the plaintiff's claim.28

Moreover al-Qarāfī expounds the testimony of two female witnesses and the refusal of the defendant to swear the oath, as a legal proof parallel to the former one. He also mentions that the Shāfī’is disagree and object to this means.29

However in the previous cases where the defendant is asked to swear the acquitting oath, the Mālikis contend that the mere refusal of this oath is not sufficient, because the plaintiff must be asked for the last time - to swear if he did, then he would be eligible, for the claim. However, as al-Qarāfī narrates, al-Shāfī’ī, Abū Ḥanīfah and Ibn Ḥanbal disagree with the Mālikis as they state that the mere refusal of the defendant is sufficient grounds for the court to rule on behalf of the plaintiff. This is mainly based on analogy with confession, besides the Qur’ānic and Sunnah texts did not endorse this means of proof as they have done vis-à-vis the other credible vehicles of evidence.30

4. Oath of Witnesses

Ibn al-Qayyim relates that Ibn Ḥazm and some leading Mālikī jurists (and judges) do countenance the oath of witnesses that they say but the truth. This opinion is also ascribed to Ibn ’Abbās and Aḥmad Ibn Ḥanbal. The main reason for such innovative judicial procedure was the corruption of people and unreliability of many witnesses, Ibn al-Qayyim concludes that this new procedure does conform with the general philosophy of the sharī‘ah inasmuch as it achieves higher degrees of authenticity in judicial decisions.31
Also the Hanafis accept this judicial procedure due to the unfeasibility of finding the standard trustworthy witness who qualify to attest in the criminal prosecutions. They also attribute this opinion to Ibn Abī Laylā (d. 148 A.H. /765 C.E.).

5. **A Law Suit should Precede the Discharging of Testimony**

Al-Kāsānī, as well as the majority of the prominent Islamic jurists, differentiates between God’s rights (ḥuqūq Allāh), and individual’s rights (ḥuqūq al-fard), as far as the requisite of a law suit is concerned.

Moreover, it should be noticed that ḥudūd crimes and penalties are generally regarded as God’s rights for they impinge on the fundamental basis of the texture and ethos of the society; accordingly anybody can initiate a legal case pertaining to a hadd crime and claim the application of the relevant penalty.

However, some juristic debate took place as far as the applicability of this rule in each hadd crime, so the following elaboration may prove to be indispensable to investigate the approach of each school in respect to the requisite of a law suit in ḥudūd crimes.

Ibn al-Qāsim ascribes to Mālik the opinion that in theft cases if a third person submitted the accusation to the Imam (court) even though the owner (the victim) had already relinquished his right in suing the larcenist, the hadd should be enforced.

Mālik also applies this rule in adultery cases thus authorizing the Imam (court) to proceed in the case and even to hold the legal punishment of hadd of adultery, without waiting for a law suit to be filed by the direct victims of this hadd felony.
However, Mālik does not make it incumbent on the trying tribunal to stipulate a law suit in the cases of *gadhf* (slanderous accusations of adultery), though it is a *ḥadd* crime but the personal element in this case is very dominant in so far as the social repercussions of *gadhf* are deemed less stigmatic than the personal ones. Subsequently it is necessary that the victim of *gadhf* should file a law suit in order to allow the court to initiate the discharging of the testimony of witnesses.37

Al-Kāsānī elaborates the Ḥanafis doctrine in this respect saying that in individuals' rights (*ḥugūq al-cibād*) which inherently incorporate all homicidal cases as well as bodily injuries and transgressions on foetuses and all *tażīr* offences pertaining to a personal right cannot be proved by testimony of witnesses unless the victims, thereof, had already filed law suits claiming redemptions and justice.38

Al-Kāsānī extends this doctrine to engulf *ḥudūd* felonies that involve an infringement (or damage) to a direct personal interest, and this fully applies to larceny and false accusations of unproved adultery, so these two cases presuppose a law suit as a requisite to admit the testimony of witnesses relating to the mentioned felonies.39

Also al-Kāsānī demonstrates that *tażīr* offences are subject to the same principles as far as their required legal proof is concerned. So practically their means of evidence are somewhat resilient and wide accordingly they are subject to the same rule of the precedence of a law suit as prerequisite to hear the testimony of the plaintiff's witnesses.40

Al-Ḥāṣkafī summarizes the Ḥanafi juristic requisites of the admissibility of witnesses' testimonies as being based on the following fundamental principles:

1. The individual's right cannot be attested by testimony unless preceded by a law-suit. However God's rights
are exempted from this restriction inasmuch as anybody can file a law suit to secure such rights. (Because the infringement here is on the society in its entirety.)

2. The testimony that exceeds the (plaintiff's) claim is null and void. Contrary to that proves less than the claimed right.

3. Agreement between the two witnesses' testimonies (in meaning and letter) is indispensable.

4. The testimony should coincide with the law suit's claim in terms of essence only.

5. (In civil claims) unqualified ownership transcends that which is qualified, and that ownership confined to a specific cause would be restricted to the time of that cause.\(^4\)

Nevertheless, it should be noticed that a vast realm of \textit{ta\textasciitilde{z}ir} offences pertains to God's rights e.g. omission of religious rites and duties and similar infractions of doctrinal orders which do not constitute a particular personal damage to a specific member in the society. Hence \textit{ta\textasciitilde{z}ir} penalty is said to be a God's right, accordingly such cases should be subjected to the general rules that regulate litigations relating to God's rights.

So, in such cases, a law suit is not to be legally regarded as a requisite for hearing the testimony of witnesses. The Sh\textasciitilde{a}fi\textasciitilde{i}s generally endorse the aforesaid Hanaf\textasciitilde{i} doctrines.\(^4\)

Apparently the results of this juristic opinion assign great authorities to the members of the public to be vigilant as far as the \textit{hudud} offences and the rest of God's rights are concerned. For anyone of the public can file an indictment pertaining to such cases. But these very persons enjoy the invariably avowed principles of a fair trial as we notice that any ensuing or emergent plausible suspicion would be
held on their behalf e.g. in theft, adultery, brigandage and the rest of _hudūd_ and _qisās_ offences there are innumerable instances where the _shubhah_ (suspicion), precludes the passing of any _hadd_ or _qisās_ sentence.

Thus it could be concluded that the wide area of the public rights to litigate in any crime pertaining to God’s rights irrespective of the personal status of the plaintiff, is matched by the great number of requisites before the penalties can be carried out, especially the influential principle of rebuttal of _hudūd_ and _qisās_ penalties by credible suspicions.\(^43\)

The Ḥanbalis endorse the above precepts.\(^44\)

Ibn ḤAbd al-Barr states that the Mālikī general legal precepts accept the testimonies of the victims of brigandage provided that they are trustworthy persons. But each two of them can only attest the felony vis-à-vis their co-victims (without testifying on behalf of themselves) and so on. This exceptional rule includes victims of piracy in high seas due to the necessity in such circumstances.\(^45\)

Al-Ghazālī (450-505 H.) propounds similar Shāfi‘ī opinion.\(^46\)

6. The testimony of Witnesses should not Contradict the Plaintiff’s Law Suit

This is essentially agreed on by all the Muslim jurists, because the testimony of witnesses is supposed to sustain, substantiate and confirm the plaintiff’s claim, thus if a serious contradiction took place, the testimony would be regarded as being discredited and impugned, thus totally losing its binding legal effect.\(^47\)

Ibn ḤAbdīn, and other Ḥanafī jurists adduce further elaboration to this key requisite as it is sufficient to procure consistency between the claim and the testimony of witnesses in meaning but not necessarily in words, e.g. _al-
*gatl, al-ītlāf, izhāg al-rūh* are all synonymous words denoting 'killing': therefore the plaintiff and his witnesses are not legally bounded to use one specific term when it is possible to use other forms or words that give the same specific meaning.⁴⁸

This discussion is obviously relevant in *qadhf* crimes which are essentially committed by verbal utterances, hence very complex legal debates have surfaced in respect to what are the explicit and tacit words that create the expressions of *qadhf*. This question would be more exigent when we observe that many jurists regard the allusive forms of *qadhf* as punishable by *ḥadd* on the same grounds of the direct clear words. Thus the witnesses' testimony should be avowedly congruous with what the plaintiff claims at least according to the semantic denotations of the words.⁴⁹

Moreover the *ḥudūd* and *gisās* crimes are not to be proved by a dubious proof, so any contradiction between the law suit and the testimony of witnesses is a strong reason for waiving the penalty. So if the plaintiff alleges that the accused had killed his relative by the sword, but the witnesses testified that the deceased was killed by a heavy stick or fire, this testimony should be rejected by the trying tribunal for the obvious contradiction between the claim and its (supposed) testimony. Thus no *gisās* nor *diyāh* would be adjudicated.

However innumerable instances of ostensible divergences between the claims of the plaintiff and his witnesses can be modified during the course of the trial without infringing the principle of congruity between the law suit and its evidence.

Hence it could be said that if the plaintiff claimed the murder of two of his relatives but the witnesses proved the murder of only one victim, then their testimony would be legally admissible.
Moreover in offences other than *hudūd* and *qisas* some flexibility is maintained as far as the ostensible differences that can be amended without the impingement of the law or the interests of the litigant parties. This rule practically extends over many cases, because the *ta’zīr* case legally accommodate such flexibility.

Al-Māwardī from the Shāfi‘ī school makes a remarkable contribution in this context as he has assigned a separate title for hearing the testimonies of witnesses where he maintains that this hearing is only valid vis-à-vis the denying defendant and not against the one who confesses inasmuch as confession is legally stronger than testimonies.

Therefore the courts only procedurally ask for testimonies when there are no confessions. Al-Māwardī moreover mentions the following main conditions that must be met to allow the court to hear and register the witnesses’ testimonies:

I. The testimonies (*al-bayyīnah*) should coincide with the *da’wā* (plaintiff’s law suit). Accordingly if they are contradictory, the court should dismiss these testimonies and ask for more proof.

II. The two witnesses (*shāhidā* *al-bayyīnah*) should propound corresponding accounts. So the essentially irreconcilable inconsistent accounts are rebuttable. However, minor and marginal discrepancies may be adjusted in due course, as it is the case in the previous condition.

III. That the hearing should be procedurally made after filing a law suit and the disavowal of the defendant. Accordingly any hearing of testimonies prior to a legal claim would be regarded as null and void, (especially in disputes pertaining to the individual’s right e.g. homicide, slander, etc.).

IV. That the witness must commence the discharging of his testimony by saying: *ashhad* (I testify that...) and
articulate his account in a clear way that is coincident with the way or method he obtained his information (especially in cases of conveying confessions and testimonies by representation). Al-Māwardī makes it mandatory on the court to give the litigant parties their legal right in hearing the witnesses in their presence; particularly the defendant when the prementioned conditions are fulfilled in order to allow him to adduce his pleas and impugnations of the plaintiff’s witnesses. Furthermore the defendant may confess due to the mentioned meticulous proceedings, thus the court would base its rulings on the merits of this confession.  

Al-Māwardī reports that al-Shāfi‘ī was particularly keen that the defendant should be given the full opportunity to hear the plaintiff’s claim and witnesses. Besides the defendant should be allowed to prove the blameworthiness of his adversary’s witnesses especially when the testimonies were heard in the absence of the defendant. This is in addition to the plaintiff’s legal right in hearing the causes of his witnesses’ alleged disqualifications (and blameworthiness).

These counter-rights are scrupulous elaborations of the Prophetic firm directives that the judge should be fair to both litigant parties as regards hearing their claims, pleas, treatment, etc.  

7. The Testimonies of the Witnesses should be in Accord

As shown above numerous criminal claims presuppose a multiplicity of witnesses as is apparent in cases of adultery, where four male witnesses are required to prove the case, or two male witnesses in the rest of ḥudūd and gīsās cases. Also it is obvious according to the dominant Islamic opinions two female witnesses can attest a vast number of crimes, particularly those cases where no hadd or gīsās penalty is anticipated.
So a great number of criminal offences can be proved by testimonies of women according to the merits of each case and in compliance with the broad category of the crime.

Thus it could be said, multiplicity of legal testimonies are the main vehicles of proof in criminal claims and prosecutions. Therefore the invariably held view in Islamic criminal jurisprudence is that these multiple accounts of the witnesses must be logically and legally in accord as far as the constituent elements of the crime at issue are concerned.52

So, as disparity between the plaintiff’s claim and his witnesses' testimonies nullifies these testimonies so does the inconsistencies between these testimonies themselves.53

The Ḥanafīs, Mālikīs and Shāfī`is contend that it is legally sufficient that the testimonies should concur in their connotations and not necessarily in their verbatim wording.54

However, al-Marghīnānī, al-Nasāfī, and the leading Ḥanafī scholars report that Abū Ḥanīfah invariably stipulates that the testimonies of witnesses should concur both in their wording and connotations, for, Abū Ḥanīfah argues that the judicial judgement cannot be perfected (in cases that presuppose multiple testimonies) unless there is a ḥujjah (proof) and this evidence in case of witnesses should agree in their accounts, otherwise their ḥujjah would be impugnable and incapable of proving the subjudice case.55

Despite Abū Ḥanīfah’s keenness in this respect it could be said that the court enjoys ample powers in trying to explain and derive facts from the witnesses’ accounts, therefore Abū Ḥanīfah’s firm stipulation of complete concurrence between testimonies in both, wording and connotations is somewhat impracticable especially when we are to expect that a certain crime may be witnessed by persons of different
cultural levels and linguistic proficiency. Therefore, it is the tribunal that should be invested with the right of deducing facts from the available testimonies, thus guaranteeing a higher degree of justice by benefiting to the utmost extent from the only available evidence.

On the other hand, Ibn ʿAbd al-Barr put forward the all important Mālikī precept that "in cases of disparate testimonies that are equal in terms of their admissibility, preference should be given to the proving (positive) testimony vis-ā-vis the rebutting (negative) testimony." He propounds the following examples to illustrate this precept:

1. The witnesses attested the slander offence whereas some others testified to the contrary.

2. The witnesses testified that 'the husband has divorced his wife' whereas others testified 'he has not'.

3. The witnesses attested the payment of debt and others testified that he did not.

In all these cases the court will only accept the accounts of the proving witnesses (ṣuhūd al-ithbāt) and will reject the refuting testimonies (ṣuhūd al-nafy) according to Mālik’s opinion as narrated by Ibn ʿAbd al-Barr.

Moreover, Ibn ʿAbd al-Barr even reports that the official Mālikī opinion is that if the witnesses attested murder in respect to time and place, and that another complete testimony proved an alibi that at that time the defendant was in a far away place, still the proving testimony is admissible vis-ā-vis the defense testimony.

However Ibn ʿAbd al-Barr relates that Ismāʿīl b. ʾIshāq (200-282 A.H./815-896 C.E.), the eminent Mālikī jurist, disapproves of the above precept; and precludes any judicial adjudication in that case. Ibn ʿAbd al-Barr favours this opinion and sustains it by invoking the all important
doctrine of rebuttal of hudūd and qisāṣ penalties by shubuhāt. Ibn ʿAbd al-Barr concludes: "No capital punishment (al-damm) should ever be held unless certainty (yaqīn) is obtained and verified, and that suspicion is proved to be non-existent." 56

8. Assessment of Divergent Testimonies

Al-Sarakhsī and al-Ṭarābulusi, from the Ḥanafī school contend that divergence in testimonies may centre around the act (al-fīṣīl) or confession (al-iṣṭirāf) or cause (al-sabab) or finally around time and place, that constitute the core of the alleged felonious act. 57

The majority of scholars hold that divergence of testimonies that pertains to act, and confession concerning this act is effective in the nullification of these testimonies. The following illustrative example is made to clarify this crucial precept. If the first witness attested the incident of murder (as an eye witness) whilst the second witness attested the confession of the murderer. Hence the majority of jurists conclude that both accounts should be abrogated and dismissed inasmuch as their discordance pertains to "the act" (al-fīṣīl). 58

The proponents of this rule argue that in the given example the claimed right that is attested by the witnesses became spurious and diversified thus each of these testimonies is imperfect to prove the right that it testified to prove. Therefore the court should set aside such testimonies forthwith. 59

However Ibn ʿAbd al-Barr and al-Bāji propound the Mālikī opinion on this issue as diverging from the above predominant opinion, accordingly the Mālikis validate the testimonies of witnesses in the given example. 60

Perhaps it may be said that the Mālikī opinion is more plausible and tenable because the core of the crime is

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proved beyond any reasonable doubt inasmuch as the first witness has attested the incident and the second one has conveyed the murderer's confession to the court thus the disputed incident is proved beyond any plausible suspicion. However the court (as unremittingly said) has the vested legal right to investigate the conveyed confession and probe its authenticity, so if substantiated the court may proceed further in the case as being aided by the criminal's own voluntary confession.

As far as the admissibility of testimonies that concur in conveying confessions is concerned, the majority of jurists acknowledge the legality of such testimonies.61

The majority furthermore, contend that in the above case if the witnesses diverged in time or place of such (conveyed) confessions, still their testimonies would be valid and admissible. For instance, if the first witness testified "that the culprit had confessed his crime to me in Damascus on Thursday" whereas the second witness testified "that the culprit had confessed the same murder before him in Hims on Saturday", these two testimonies would be deemed legally as complete, veracious and admissible.62

But if the two witnesses testified to confessions pertaining to different acts, then the legally required number of witnesses would be apparently imperfect so, the whole testimonies are to be rejected due to abatement (of the required standard).

For instance, if the first said, "I testify that the accused had confessed that he had murdered the victim on Thursday" and the second witness said, "I testify that the accused had confessed that he had murdered the victim on Friday", hence Ibn Qudāmah alleges that the two given accounts are visibly inconsistent, because the second witness testified to a totally different subject as far as the core of the first one's testimony is concerned.
However Abu Bakr al-Ḥanbalī accepts the aggregate account in the given proposition, because he argues, concurrence in time and place is insignificant. But Ibn Qudāmah criticizes this opinion and regards it as the weaker contention in the Ḥanbalī school.\textsuperscript{63}

However, in the previous propositions if the plaintiff had already alleged manslaughter or accidental killing or murder unpunishable by gisās (capital punishment) he enjoys the vested right of swearing the confirmatory oath with the testimony of either of the two witnesses and thus the court would adjudicate diyah blood compensation to him.\textsuperscript{64}

Al-Sarakhsī, al-Ḥanafī, Ibn ʿAbd al-Barr al-Mālikī and the rest of leading jurists unanimously agree that in case the disagreement between the testimonies occur in the physical felonious act of the crime in respect to time, place or method, these testimonies should forthwith be rejected.

Consequently, if the witnesses disagreed with each other in regard to time, place, instrument or method of murder, their testimonies would be imperfect and infirm, and therefore, rejected. Because the felonious act of murder attested by the first witness is entirely different from that attested by the other witness. Thus each case is being proved by only one witness, and this is not sufficient in murder (punishable by gisās).\textsuperscript{65}

Moreover, the Ḥanafis and Ḥanbalis postulate that if each felonious act is attested by the testimonies of two witnesses, but the two attested acts differed in time, place or method of commission, then both of them would be legally and procedurally substantiated, inasmuch as each criminal act has been judicially proved by evidence i.e. the testimony of two witnesses, which does not contradict the other one.\textsuperscript{66}

Notwithstanding this conclusion, in cases where the indictment centres around an act that is not repeatable e.g.
murdering a specific person, then the mentioned testimonies would practically contravene each other, for we can easily determine that one of them is definitely untrue without being able to specify in a decisive way what this testimony is. This is why the Ḥanbalis and Ḥanafis reject both of them.67

The proponents of this doctrine further explicate it by saying that if the first two witnesses testified that the murderer had murdered Zayd in Mecca on the Great Festive Day (Yawm aL-Nahr), but the second two witnesses testified that the same person was murdered on the same day by the same accused person in Egypt, the court should reject both of them, because one of these two proofs is definitely false, and both of them coincide in their trustworthiness and admissibility. So there is no legal or logical grounds for preferring one of them over the other. Thus both of them should be rejected.

Furthermore, murdering a given person is an act that is not repeatable and this applies to all felonious acts that are of that nature.68

Also the same judicial decision would be anticipated if the contradiction mentioned above revolved around the instrument or method of murder.69

However, a matter of paramount importance should be conspicuously discerned, namely, if in the above hypothesis the court had already sentenced the accused to capital punishment in compliance with gisās regulations, according to the testimony of the first two witnesses, and afterwards came the second two witnesses and refuted their testimonies, the court should not rescind the former sentence despite the evident contradiction of the second testimony.

The Ḥanafis justify this rule by arguing that the first testimony has already been preponderated by the coherent judicial sentence (established upon it). In other words
since it has been legally decided that the victim was murdered in Mecca, this implies that he has never been murdered elsewhere because murdering a given person is not a repeatable act.\textsuperscript{70}

Al-Shīrāzī (393-476 H.) and al-Ghazālī (450-505 H./1058-1111 C.E.) from the Shāfī‘ī school propose that if the two witnesses testified that the two accused persons had murdered the plaintiff’s relative, but the accused persons pleaded that "it is the two witnesses who actually murdered the victim!!" then if the plaintiff’s allegations coherently complied with the testimonies of the first witnesses, then the court should decide accordingly, inasmuch as these witnesses are not accusable in their account.

But the testimonies of the accused persons are untenable because they are just defending themselves vis-à-vis the original evidentiary testimony. Therefore their pleading, or counter-testimony is incompetent to convince the court to rule accordingly, namely, to sentence the witnesses to a \textit{gisās} ruling.\textsuperscript{71}

Furthermore, as al-Shīrāzī and al-Ghazālī argue, if the plaintiff sided with the accused persons allegation that "it is the two witnesses who have actually murdered the deceased" then both testimonies would be procedurally rebutted, because the plaintiff has discredited the original (first) two witnesses.

As for the account of the two accused persons, their pleading (that the former witnesses are the real murderers) is juridically objectionable because they are presumed \textit{muttahamayn} (unplausible) in this specific pleading because they are contriving to escape the imminent judicial sentence of \textit{gisās}.\textsuperscript{72}

Nevertheless the accused do have ample ways of proving their innocence, but they have to propound the required degree of
proof that outweighs the plaintiff's indictment or at least stirs suspicions around the present (admitted) testimony.73

Al-Sarakhsi and some leading Ḥanafī jurisconsults propose that if the testimonies of two witnesses attested murder vis-ā-vis a given person, whereas another legally admissible testimony attested the same murder vis-ā-vis another person, and the plaintiff said to the accused persons "Both of you murdered the deceased!", his case would collapse due to contradiction between the allegation and its evidence for he claimed that his relative was killed by one person whereas he later on alleges conspiracy and participation.

Even if the plaintiff accepted both accounts, still his case would fail due to the irreconcilable contradiction between the two given accounts, inasmuch as each one of them proves murder devoid of conspiracy.

Nevertheless if the plaintiff alleged that "This specific person has murdered my relative, according to one of the aforesaid accounts", then the court can issue a death sentence according to gisās regulations, inasmuch as the specification of the accused by the plaintiff renders the relevant testimony as predominating over the second one.74

Al-Shīrāzī puts forward a case that illustrates the delicacy of criminal trials as he says "If a man alleged that the accused has murdered his relative, but the defendant confessed that he killed the deceased accidentally, the plaintiff brought two witnesses, one of them attested that the accused had confessed the commission of murder, but the second one testified that the defendant confessed the accidental killing." Al-Shīrāzī concludes that in this case the defendant enjoys taking the vindicatory oath, because the attribute of homicide cannot be proved by one witness.

So, if the defendant swore the oath, he would only be responsible for paying the blood compensation for an accidental killing. However, if he refuses to swear the
oath, the plaintiff would be asked to swear (the confirmatory) oath, if he did then, the court would adjudicate *qisās* or heavy *diyāh* blood compensation, on the defendant as al-Shīrāzī contends.\(^7\)

Also al-Ţarābulṣī, the prominent Ḥanafī jurist, gives the following two cases that expounds the Ḥanafis approach in cases where contradictory testimonies and pleading are the only available evidence.

1. A man was murdered; he left two sons as the sole heirs. The elder son propounded two witnesses who testified that "it is the younger son (of the deceased) who has murdered him". The younger son also adduced two witnesses that testified "it is a foreign person who actually perpetrated the crime!" Al-Ţarābulṣī states that in this case Abū Ḥanīfah accepts both contravening testimonies (without favouring one over the other) and accordingly holds that the court should adjudicate half the blood compensation to be paid to each son by the *āqilah* (agnatic relatives) of the other one.

But Abū Yūsuf and al-Shaybānī disagree and hold that the prior testimony of the elder son is more tenable so it should be admitted and the court should adjudge *qisās* on the younger son; because this later testimony *vis-à-vis* the foreign person is voidable.

However, both of Abū Yūsuf and al-Shaybānī maintain that the inheritance is wholly for the elder son, but al-Ţarābulṣī prefers Abū Ḥanīfah's opinion that allots the inheritance into two equal shares; one of which is to be given to the younger son because his cause of eligibility is invariably ascertained by his indisputable kinship.\(^7\)

2. Al-Ţarābulṣī presents another case. The murdered person left a son and a brother, and each of them expounded a legal testimony that the other one is the real murderer. Al-Ţarābulṣī maintains: "The court should admit the son's
evidentiary testimony and hold *gisâs* ruling vis-à-vis the deceased's brother. Inasmuch as the son is an incontrovertible heir, whereas the brother is not a legal heir in this case, so he assumes the status of an alien (in respect to the case in issue).

Therefore the son became the representative of the deceased, so his proof should be accepted. And, simultaneously, the deceased's brother would not be regarded as a legal representative of the deceased, therefore his proof should be dismissed.77

As far as the Mâlikis opinion on these matters is concerned, Ibn ʿAbd al-Barr reports that Ibn al-Qâsim rejects the discrepant testimonies that attempt to prove a murder case when they adduce inconsistent information as to the tools or methods by which this crime is perpetrated. On the other hand, if the witnesses concerned were equal in terms of their number and probity, all their accounts would be legally rejected.

But in the previous cases the court should accept the testimonies of the most trustworthy witnesses vis-à-vis their counterparts, regardless of the mere number of both parties. Moreover Ibn Wahb (Mâlik's prominent disciple) reports that "Mâlik favours that the court should admit the testimonies of the most veracious witnesses under oath; even if these witnesses are less numerous than their counterparts who are discovered to be less trustworthy".78

If the plaintiff's witnesses attested to the murder crime, but another person voluntarily came forward and confessed murdering the very victim, Ibn ʿAbd al-Barr reports the following three Mâlikî statements as regards the judicial judgement suitable in the mentioned case.

The first statement gives the plaintiff the free legal choice thereby he claims the *gisâs* (capital punishment) on either of the two defendants.
The second statement contends that both of the defendants are to be put to death according to *qisās* sanctions.

The third statement adjudicates *qisās* only on the voluntary confessor (on the grounds that confession is the strongest proof).

The aforementioned numerous cases and hypotheses demonstrate the flimsy lines that separate the legally admissible testimonies and those ones which are to be rejected in cases where irreconcilable differences do occur. Especially in murder cases where capital penalties according to *qisās* rules are apparently imminent. Also it becomes clear that according to the Ḥanafis consistent reliance on the principle of "Rebuttal of *hudūd* and *qisās* penalties by *shubuhāt*, the trying panel or court should exert extra vigilance and circumspection in cases where the contrasting testimonies are of the same statutory weight.

Therefore if the court finally pronounced a *diyah* sentence in the above cases, this judgment would be deemed as fair and compatible with the Ḥanafis reiterated keenness in avoiding the application of a *hadd* or *qisās* penalty as much as possible.

The rest of jurists share the same Ḥanafi keenness in these matters as will be proved by the subsequent passages that tackle some important *hudūd* crimes.

Al-Ṭarābulī presents additional illustrative cases of inconsistent testimonies in various criminal disputes. He maintains that if one of the witnesses attested the incident of slanderous accusation of adultery *gadhf* and the second one attested the confession of the *gādhif* -(slanderer), the aggregate testimony of both witnesses would be objectionable - though both the original crime and its proof are 'words'.
Al-Ṭarābulṣī vindicates this rule saying that there are great differences between the wording of a confession of gadhf and the actual words of gadhf, therefore the conveyed facts of the case by the mentioned means would be incomplete.\(^80\)

Even in infamous and sordid accusation other than gadhf the wording of the two testimonies should be congruous e.g. if the first attested the slanderous word of \(\text{vā fājir}\) (sexually wanton person) and the second witness attested the word of \(\text{vā Fāsīg}\) (a disobedient or violater of religious commandments), the ultimate conclusion should be the rejection of both testimonies because they are incompatible.\(^81\)

Al-Ṭarābulṣī, Ibn Nujaym and some Ḥanafis report that if the witnesses proved the case of theft of a cow but differed in specifying the colour of this cow, Abū Ḥanīfah holds that this testimony is admissible but Abū Yūsuf and al-Shaybānī disapprove. Abū Ja'far al-Ṭahāwī (d.321 A.H./933 C.E.) expounds the reason of this disparate opinions as that it pertains to difference over two opposite colours e.g. white and black; but if this difference occurred in reporting two similar or adjacent colours, then it should not affect the precision of the testimonies.\(^82\)

Ibn al-Qāsim presents Mālik's opinion in this context stating that if the witnesses testified that the thief has stolen a property but one of them said it was a goat, and the other one said it was a lamb, the court should not hold the hadd of theft due to variance of testimonies. The same rules apply according to Mālik's opinion if the witnesses differed in defining the day the theft took place.\(^83\)

Moreover Ibn al-Qāsim reports that Mālik takes a very cautious approach in admitting testimonies that convey confessions relating to perpetrations of adultery or theft. He argues that if the felon withdraws his former confession, the court should accept this denial if he adduced a credible
argument for his confession and denial (coercion, or illegal inquiry, etc.).

Moreover Ibn Qudāmah elaborates on the issue of disparate testimonies pertaining to larceny sarīgah, saying that if this disparity related to time or place or a distinctive characteristic of the stolen item then all these testimonies should be nullified.

The Ḥanafis and al-Ramlī, al-Shīrāzī and the rest of the Shāfī̄s jurists agree with this opinion. However, the Shāfī̄s maintain that in case where the witnesses differ in specifying a certain accident of the stolen property (when they agree on the incident of theft), the plaintiff can swear the corroborative oath with either one of his witnesses and thus the court would rule the recoupment of the pecuniary value of the stolen item.

Al-Ramlī from the Shāfī̄s school moreover maintains that if the first witness attested theft of one sheep, but the other one attested theft of two sheep, then, one sheep would be proved to be stolen, thus the hadd of larceny would be due if the remaining requisites were present, and in addition to this the plaintiff can swear the confirmatory oath with the testimony of the second witness whose testimony adds extra right, and thus the court would decide on the restoration of the second additional sheep to the plaintiff. This rule is based on the doctrine that all pecuniary claims and disputes can be proved by the testimony of one witness corroborated by the confirmatory oath of the plaintiff, as widely held by the majority of Muslim jurists.

But, it should be noticed that al-Ramlī and al-Shīrāzī and the rest of Shāfī̄s as well as other jurists hold that in the above theft cases if each account is related by two witnesses and it became clear that the aggregate two accounts diametrically oppose each other, then both of them should be rejected, even though each account was related by
two admissible witnesses, because irreconcilable contradiction precludes the admission of testimonies. 

Precision and concurrence of testimony of witnesses in zina (adultery) prosecutions is of paramount importance. Consequently if each one of the four witnesses attested the incident of adultery in a different corner of the room, their aggregate account would be legally regarded as infirm and accordingly inadmissible, as al-Shīrāzī, al-Ramlī (and others) contend.

This rule condones the accusation of these four witnesses of gadhaf (slanderous accusation of adultery) according to one of the two Shāfiʿī opinions.

Moreover, ibn Qudāmah, al-Shīrāzī, al-Ramlī and other prominent jurists stipulate that the four witnesses in adultery cases should not give divergent accounts as far as the element of the voluntary commission of adultery by the woman is concerned. Subsequently if two witnesses testified that the woman was content and the other two said that she was coerced then no hadd penalty would accrue, because, as al-Shīrāzī maintains, the testimony is incomplete as far as the adulterous act of the woman is concerned. He also holds that the prevalent Shāfiʿī opinion is to exonerate the male co-partner in this case from the hadd.

Ibn Qudāmah propounds additional instances in an effort to explain the effectiveness of differences in testimonies pertaining to adultery prosecutions. He holds that if two witnesses attested the event of adultery in a given house, whereas the remaining two provide the same incident as being perpetrated in another house or that they, respectively, define a different town, or that they gave different dates, all of these four witnesses are gadhafah (slanderers of unsubstantiated adultery) and are, accordingly, fully liable for the hadd of gadhaf.
Ibn Qudāmah and Ibn ʿAbd al-Barr ascribe this opinion to Mālik and al-Shāfiʿī, and report that al-Nakhaṣī, Abū Thawr and aṣḥāb al-raʿy, as well as Abū Bakr al-Ḥanbalī have diametrically opposed the former conclusion and, accordingly, maintain that those four witnesses are legally immune from the ḥadd of gadhf - despite their obvious variance, because they have reached the "number of four".93

Nevertheless Ibn Qudāmah rejects their conclusion and its inherent argument, saying that the number of four witnesses was not reached in respect of the case of adultery, therefore, they should be punished by the ḥadd of gadhf, as when there are only two witnesses.94

Moreover, Ibn Qudāmah argues that in cases where the witnesses diverge in respect to the specific corner of the room where the adultery is attested, the court should measure the distance. If it is not too far, the aggregate testimonies should be admitted. Otherwise where the distance is enormous, the court should conclude that these different accounts are irreconcilable and thus judicially to be rejected. Thus Ibn Qudāmah rejects al-Shāfiʿī's contention that even if the distance between the two or more corners are short, the testimonies are still unacceptable.95

Furthermore Ibn Qudāmah rejects al-Shāfiʿī's contention that difference that occurs in specifying the clothes of the adulterous persons or its colour is effective in rejecting their testimonies, arguing that this is not a genuine variance because it is probable that the actual act of adultery did take place where there are many clothes proved by each or more witnesses.96

However, in adultery trials, if all the requisites of testimony are readily fulfilled, and the adulterer confirmed the witnesses' account, Ibn Qudāmah, holds that still the ḥadd of adultery would be due, but Abū Ḥanīfah quashes this penalty in the given proposition, inasmuch as one of the requisites of testimony of witnesses, in Abū Ḥanīfah's
doctrine, is "the (constant) disavowal of the accused". However Ibn Qudāmah strenuously criticizes Abū Ḥanīfa's mentioned opinion, sustaining his criticism by the apparent denotation of the relevant Qur'ānic and Sunnah texts, that generally favour confession to the testimony of witnesses.

He also argues that the (required) testimony of witnesses, in this regard, has been perfected, then the judicial decision should be built upon it as when there is no confession. Moreover, this is one of the means of proof of adultery crime (and the other means is confession) therefore testimony of witnesses should not, whatsoever, be annulled by the presence of the other means of proof, i.e. confession.

Besides, the available confession confirms and sustains the testimony of witnesses, therefore it does not contradict nor does it oppose the testimony. The key issue is that in this proposition if the felon confesses the commission of adultery and simultaneously four witnesses testified the same incident and he later on recanted his confession, he would still be liable to the hadd of adultery by virtue of the existing testimony of the four witnesses, though retracted confessions of hudūd crimes prevent the execution of their penalties.97

Notwithstanding this principle of evidence in this context, the unanimously held opinion is that if two witnesses are procured in adultery cases where the accused confessed twice still, the proof required would be regarded as non-existent, because the two means of proof in this particular case are infirm, and moreover, are not to be intermingled to obtain a composite aggregate.98

Al-Māwardī envisages the substantiation of confession pertaining to adultery by witnesses. He reports that there are two opinions in this regard as to the number of these witnesses required, the first opinion contends that two
witnesses can be enough to prove the accused's confession, the other opinion stipulates four witnesses. 99

The accused persons of adultery enjoy their irrefragable rights in adducing their pleas. So, when the four witnesses prove the case, and the woman co-partner presents four trustworthy women who attested her virginity, she, as well as the former four male witnesses are legally to be exculpated from the pending hadd of zina (adultery) and gadhf (slanderous accusation of adultery) respectively.

Al-Shīrāzī and Ibn Qudāmah ascribe this opinion to al-Shāfi‘ī, Abū Thawr, al-Shā‘bī, al-Thawrī and Aṣḥāb al-Ra‘y. However Mālik disagrees and accordingly holds that the hadd of adultery is still due and intact vis-à-vis the accused adulteress, because her defence which is based on the testimonies of the four women is inadmissible since women are not admissible witnesses in hudūd trials. 100

Ibn Qudāmah refutes Mālik’s previous contention arguing that one of the basic principles in Islamic procedural principles is that virginity (and all women’s infirmities) are legally proveable by the testimonies of reliable female witnesses. Thus the fact of adultery in the above given proposition would be doubtful. Accordingly no hadd penalty should ever be held for "doubt precludes the passing of such penalties". Ibn Qudāmah deems this case as analogous to the case where the male co-partner in adultery trial is proved to be having a severed penis (majbūb). Besides, he argues that this shubhah, is also the basis for acquitting the witnesses, because they may be veracious in their testimonies. Moreover Ibn Qudāmah contends that the tribunal should even accept a testimony of one female defence witness inasmuch as one woman’s testimony is legally and consistently admissible in feminine private affairs that are normally not known to men. 101

But if the male co-partner is proved to be a majbūb (whose penis is severed), then the witnesses of adultery should be
subject to the full hadd of gadhf because they are undoubtedly liars.102

A contradictory case may emerge if the adultery case is proved by four witnesses when the accused propounds another four witnesses who allege that it is the former four witnesses who are the real perpetrators of adultery.

Ibn Qudāmah and Abū Ḥanīfah conclude that no hadd of gadhf would result vis-à-vis any of these two camps. Because the first four witnesses became legally blameworthy witnesses whose testimonies are judicially objectionable. As for the other four they are implausible witnesses because they are suspicious in their alignment with the original accused person. However Abū Yūsuf and Abū al-Khaṭṭāb al-Ḥanbalī hold that the first four witnesses should be punished by hadd of gadhf according to the testimonies of the second four (defensive) witnesses, because as they maintain, the latter's accounts are valid and authentic.103

Ibn Ḥazm launches an acrimonious attack on the former statements of the Ḥanafī, Mālik, Ḥanbalī and Shāfiʿī opinion in respect of nullification of witnesses' testimonies when they differ in defining time, place, or a salient characteristic of an intrinsic part of the hadd crime. He emphatically trivializes the rejection of such contrasting accounts maintaining that these ostensibly contravening testimonies prove a variety of offences and not one offence.

Besides Ibn Ḥazm rejects the mentioning of time, place or attributes of the crime as insignificant facts whose absence is not important. Accordingly he concludes that contradiction relating to such information would not waive nor weaken the testimonies concerned.104

Accordingly Ibn Ḥazm considers all the aforesaid contrasting testimonies relating to hudūd cases as legally complete and reliable.105
He supports his conclusion by invoking the Qur’ān and Prophet’s Sunnah which, as he maintains, intentionally do not stipulate the elaboration of testimonies in terms of time, place, attributes or any other extrinsic element of the felony at issue.¹⁰⁶

Notwithstanding Ibn Ḥazm’s refutation of the majority’s keenness in terms of stipulating detailed testimonies, especially in ḥudūd and qisas offences, his final conclusion of admitting disparate testimonies pertaining to one offence is at least not tenable, particularly when it is related that the Prophet scrupulously asked Mā`iz who confessed adultery so far as He ultimately concluded that Mā`iz had really committed his avowed crime. Therefore the Prophet sanctioned the penalty for it.

On the other hand Ibn Ḥazm attacks the majority’s analogical reasoning that, in many cases, concludes similar rules to those already held by the Prophet, as in Mā`iz’s or Ṣafwān’s case so the aforesaid meticulous conditions are compatible with the ethos of the Islamic Shariʿah in general and its criminal principles in particular.

Besides, Ibn Ḥazm’s constant dependence on the ostensible generality of the Qur’ānic and Prophetic texts could be said, is the main source of subsequent disparities between his jurisprudence and that of the other schools whose jurists also primarily derive their legal opinions by the same method as Ibn Ḥazm does, but they elaborate and elucidate these texts in the light of the ethos of the Shariʿah which emphasize justice and equity so much so any inconsistent account pertaining to a criminal prosecution is interpreted on behalf of the accused as invariably concluded in the above selected cases.

9. Place of Discharging Testimonies of Witnesses

The Ḥanafis explicitly stress that the testimonies of witnesses should be made before a legally competent court in
order to decide the criminal case. So this requisite, as the Ḥanafī contend, is one of the corner-stones of testimony of witnesses.107

The remaining schools fully concur with the Ḥanafis in this point, though they discuss this requisite in the juristic questions of legal claims - al-da'āwī (plural of da'wā) and in the independent chapters of ḥikam al-qadā' (rules of judiciary and adjudications).108

The importance of stipulating a court in this context is obviously incontrovertible especially in felonious acts e.g. murder, adultery and bodily injuries which, if not decided by a court would lead to tumult and counteractions.

Moreover it is a constitutional duty of the sovereign ruler to appoint his judiciary and assign their legal powers and jurisdictions. Besides, the admissibility of testimonies and the trustworthiness of witnesses and the impugnations pleaded by the accused presuppose an independent authoritative power that determines such procedural issues as well as the core of the claim and its counter-claims.

However, an arbitrator may be appointed by the disputant parties, who enjoys vast judicial powers, but in grave felonies the state usually assigns the power to decide these cases to a specific judicial sector. So the perplexities of modern times attest the realistic stipulation of this classical maxim.

So it can be concluded that the testimonies of witnesses before being legally made before a court bear no significance irrespective of the seriousness of the matter they bear witness of.

10. The Testified Right’s Requisites

This separate title, as introduced by the Ḥanafis in their broad treatment of the requisites of testimony, is intended
to denote that the testimony of witnesses should involve a disputed right, or the substantiation of a claim. So in murder, the plaintiff’s witnesses should prove that the accused has murdered the deceased by a lethal instrument or method, thus the plaintiff’s claim of qisas or blood compensation would be proved (when all the rest of conditions are fulfilled).

The same thing can be said in all the rest of criminal disputes and trials. Moreover the plaintiff’s claim, here, is in accord with the subject of the testimony of his witnesses; accordingly this claim should meet all the mentioned requisites of crimes, e.g. in qisas claims, the crime alleged should fulfill the requisites of qisas and so on.109

Al-Kasānī and the rest of the leading Ḥanafis, specifically state that the requisite at issue is primarily intended to confirm that the core of the testimony must be a conceivable issue (not abstract or ambiguous).

Moreover the witness must know what he is testifying for (or against); this is why the Ḥanafis specifically stipulate the legal term ashhad (I testify), to exclude knowledge based only on conjecture or hearsay or rumours.110

Finally the Shāfīʿis state that if the judicial ruling is found to be based on nullifiable testimony this ruling should be forthwith abrogated. This expressly includes the testimonies of non-Muslim, slaves, or any person whose account is undeniably rebuttable.111

This repeal of course does subject to the school to which the court’s proceedings adhere. Thus not all revocations are incontrovertible, as has been seen in the various requirements of each crime that render it as a justifiable subject. So not always do we expect to find that the disputed criminal act is unanimously regarded as such.
References Chapter Twelve

4. ibid.
8. ibid.
10. ibid.
17. ibid.
24. ibid.
28. ibid.
29. ibid, p.92.
37. ibid.
40. ibid.
49. ibid.

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64. ibid.


69. ibid, al-Ghazālī, al-Wajīz, Vol.II, pp.163-64.

70. ibid.


72. ibid.

76. Al-Ṭarabulsī, Mu‘īn al-Ḥukkām, p.85.
77. ibid.
80. ibid.
81. ibid.
87. ibid.
88. ibid.
90. ibid.
94. ibid.
96. ibid.
98. ibid, p.207.
101. ibid.
102. ibid.
103. ibid.
105. ibid, p.342.
106. ibid.

110. ibid, al-Kāsānī, al-Badā'ī, Vol.VI, pp.266–70, 276.

CHAPTER THIRTEEN - CONVEYED TESTIMONIES OR TESTIMONY BY REPRESENTATION (al-Shahādah 'alā al-Shahādah)

1. Introduction

This is a subject of importance as far as the verification of facts by witnesses in criminal disputes is concerned. Some strong factors may impede the witness from testifying in person before the court at the time when his information about the crime may be essential in determining the outcome of the trial (i.e. death, illness, absence from place of trial, etc.). These factors were debated by the classical schools of Islamic jurisprudence in respect of the feasibility of authorizing another witness to testify in place of the original witness. Therefore al-Kāsānī and the leading Ḥanafī jurists called it al-shahādah bi-tarīq al-niyābah (discharging testimony by way of representation).¹

The Mālikis call it shahādat al-naql (testimony of conveying or transferring).²

This is because the second authorized witness conveys the original witness’s testimony to the court.³

Thus it is apparent that discharging of testimony by representation implies al-shāhid al-asl (the original witness who witnessed the crime) and al-shāhid al-far (the subsidiary witness who is authorized by the first original witness to testify in his place).⁴

It may be appropriate here to examine the legality of this type of testimony in an attempt to illustrate its judicial and evidentiary weight especially in grievous felonious questions e.g. hudūd and gīsās cases.

Al-Ṭarābulṣī, al-Marghīnānī and the other authoritative Ḥanafī jurists contend that testimony by representation is juristically and judicially valid by way of īstiḥsān,
(preference) but is invalid according to analogical reasoning.⁵

Al-Marghînânî and al-Ţarâbûlsî justify the Ḥanafî opinion that this form of testimony should be invalidated in compliance with the principles of analogical reasoning, on the grounds that the delegated witnesses do not discern the original implication of the matter at issue and its source due to the possibility of an untruthful account by the original witnesses themselves.⁶

Consequently, the Ḥanafis categorically dismiss all testimonies by representation in all the ambitsof hudûd and gisâs prosecutions, due to the presence of the irrefutable doubt about the veracity of facts conveyed to the tribunal by this means, particularly in cases where strong doubt invalidates the pending hadd or gîsâs penalty.⁷

Nevertheless the rest of schools diverge with the Ḥanafis in this respect and hold that testimony by representation is a legal means of proof and is strong enough to be used in all criminal disputes. Therefore, all hudûd, gîsâs and tażîr offences can be legally substantiated by authorized witnesses when all the other requisites are fulfilled.⁸

The significance of the prementioned legal disagreement manifests itself in criminal prosecutions pertaining to hudûd and gîsâs cases. The vast number of criminal prosecutions is immune from this academic difference inasmuch as all of them can be legally proved by the means of testimony by representation. Mainly because these cases are not conducive to verdicts of capital punishment according to gîsâs rules or any other grievous penalty according to the principles of hudûd and gîsâs sanctions.

This conclusion, in turn, helps the plaintiff to resort to this means of evidence in numerous criminal disputes even if the court’s jurisdiction adheres to the Ḥanafî legal precepts. Furthermore, this very topic can be considered as
one of the clear instances of the Ḥanafī's keenness not to make a hadd or qisāṣ judgement except when the crime is proven by absolute proof.

This topic essentially involves the following broad lines: a. the required conditions that, when met, legalize this means of evidence and; b. the legal weight of this means when it fulfils the required stipulations, especially in offensive transgressions; and the results thereof.

So, it may be appropriate to tackle these key points as follows:

2. The Legal Requisites of Testimony by Representation

This title actually incorporates the following subjects; requisites pertaining to the instance of bearing witness (al-tahammul) and secondly; requisites pertaining to the giving of this testimony in court. So, these two issues would be discussed as follows:-

A. Requisites of Bearing Witness in Cases of Testimony by Representation

The majority of Ḥanbalī, Shāfiʿī and Mālikī propound detailed statements as to the method by which the delegated witness bears witness; hence the following three methods are debated:-

(a) When the delegated witness hears the original witness say: "I testify (ashhad) that (a given person) owes (a given) person so and so" mentioning a legal cause that induces a pecuniary right, e.g. dower, sale, rent, etc. This logically incorporates crimes that involve financial commitments or whose sentences would do so like manslaughter, theft, fraudulent transactions, bodily injuries punishable by diyah or arsh, etc. This opinion is endorsed by some Ḥanafis, some Shāfiʿis, and it is one of Ahmad b. Ḥanbal’s statements. However al-Nawawī and al-
Balqīnī - the prominent Shāfiʿī jurists, hesitate in accepting this opinion, particularly when and if the witnesses involved may be unscrupulous.

However, there is another statement in the Shāfiʿī and Ḣanbalī schools that stipulates explicit permission by the original witness; because this kind of testimony implies authorization and permission therefore the second (delegated) witness cannot transfer the information unless sanctioned by the original witness.

(b) When the original witness discharges his testimony before a court; the delegated witness can testify according to what he heard assuming that he is present in that particular court session. This opinion is countenanced by some prominent jurists in the famous four school of law.

Abū Yūsuf and the Ḣanbalis, particularly Abū Yaʿlā (380 - 458 A.H. / 990 - 1066 C.E.) argue that the deposition of testimony before a judicial session negates any suspicion of mistake or fraud in the fact that the original witness testifies that he knows so and so. Moreover the proponents of this statement argue that the second witness actually transfers the original witness's cognizance of the case at issue and does not represent him because the second one just 'attests the testimony of the first witness.'

The Mālikis, Shāfiʿis and Ḣanbalis sanction this method, and accordingly the second witness can relate the testimony, for they argue that "deposition of testimony before a judge is analogical to: "Giving authorisation to give testimony for my testimony".

However, a second narration in the Ḣanbalī school objects to this form of bearing witness, since testimony by representation involves permission therefore the second witness should be banned from testifying on this basis.
(c) The final method of bearing witness is by *istirā'ā* (direct information and permission given by the original witness to the delegated second witness to bear his testimony). This is widely agreed on in all schools of law, as a valid means of evidence, though the ʿAṣirīs exclude *hudūd* and *qisās* cases from this context.15

This means of proof is further elaborated by jurists as they maintain that *istirā'ā* (verbal sanction by the original witnesses), can be effected by one of the following ways:-

(a) The original witness verbally says to the delegated witness: "Bear witness of my testimony that I testify that (the given person) owes this given person so and so, or that he avowed before me in respect to so and so".

This is the universally accepted form of *istirā'ā* in the Shāfiʿī, Ḥanbalī and Mālikī schools. However it should be noticed that the Ḥanafīs as well as al-Ḥattāb, al-Dardīr and other Mālikī jurists name this form as *ishhād* (authorizing some one else to bear witness).16

The Ḥanbalīs consider *istirā'ā* as one of the pillars of testimony by representation.17

The Ḥanafīs in this respect propound two forms of *ishhād*, one of which is the succinct form and the other one is the detailed form. The succinct form of the Ḥanafīs opinion applies and is congruous with the Ḥanbalī and Shāfiʿī form of *istirā'ā*. However the detailed form runs as follows: the original witness must verbatim say to the delegated witness: "I testify that X owes Y so and so, I (hence) make you bear witness of my testimony, and I order you to testify according to (the exact wording of) my testimony, so do".18

Al-Nawawī al-Shāfiʿī considers this form of authorization as being a reliable evidence. He maintains that the original witness delegates the subsidiary witness in an indispensable matter and thus it is a legal ascertainment and
documentation of the subject of the testimony. Thus this means should be admitted.19

The second way of effecting istirā' is if and when a bystander hears some one verbally delegate another one to testify according to the previous principle. Muslim jurists diverge in respect to the validity of the bystander's right and duty to convey or testify instead of the authorized person. The majority of the Mālikis and Shāfī'is and some Ḥanbalis legalize this form of istirā' and consequently regard the bystander's account as tenable as far as the crime is concerned.20

However, al-Shāfiʿī, and Ahmad Ibn Ḥanbal as well as the Ḥanafis and one opinion in the Mālikī school contest the legitimacy of this means of proof, inasmuch as the original witness did not specifically warrant the bystander to bear witness in regard to the testimony at issue.21

B. The Requisites of Witnesses in Testimony by Representation

Muslim jurists have stipulated a host of conditions to qualify testimony by representation. These stipulations can be treated as follows:-

(a) The original witness should be practically unable to discharge his testimony in court due to death, severe illness or absence from the place of the trial. This is held by the majority of jurists.22

However, al-Marghīnānī and the leading Ḥanafī jurists relate that Abū Yūsuf and al-Shaybānī propound a more tolerant statement in this specific stipulation as they contend that the delegated witness can discharge the testimony by representation (in the court) even though the original (authorizing) witness is present in the city or place of trial, because the second (delegated) witness just transfers and conveys the original witness's account to the court.
This is analogous to transferring others' confessions to courts. Moreover, al-Shaybānī goes on to permit such judicial procedure even if the original witness is virtually present in the same court session.23

On the other hand, Ahmad Ibn Hanbal and al-Sha'bī (19-103 A.H./640-721 C.E.) argues that: testimony by representation is utterly inadmissible as long as the original delegating witness is still alive. This opinion is plainly opposed to al-Shaybānī's previous statement.24

Thus the obvious disagreement between Abū Yūsuf and al-Shaybānī on one hand and Ibn Hanbal and al-Sha'bī on the other hand is irreconcilable. So the judicial proceedings in such eventualities should be determined beforehand for each contention enjoys its particular merits as well as its shortcomings.

The proponents of admissibility sustain their opinion by the following arguments:—

1. It is the original witness's testimony that substantiates the very disputed fact or claim, whereas the delegated witness's testimony only proves the fact of authorization and permission to transfer the original testimony. Therefore, the latter means should not be resorted to unless the former original testimony becomes impossible to procure for the court.25

2. Ibn Farḥūn and al-Dusūqī, the eminent Mālikī jurists, argue that the presence of the original witness and his reluctance to testify in person arouses grave doubts as to his credibility and veracity as when he just tries to avoid being questioned by the tribunal. Subsequently ibn Farḥūn concludes that this testimony should not be conveyed to the court by an authorized witness unless a contingent case of necessity emerges, e.g. death.26
3. Moreover Ibn Farḥūn (d. 799 A.H.) and Khalīl (d. 767-1365 C.E.) add that the judicial cognizance realized by hearing the direct testimony of the original witness is stronger than that obtained from the authorized witness's account. Therefore the court should not content itself by the weaker evidence when it is possible to procure the stronger one.27

Ibn Qudāmah attacks Abū Yūṣuf and al-Shaybānī's opinion that does not stipulate the impossibility of bringing the original witness to the court basing his refutation on the widely accepted principle that the badāl (substitution) should always be excluded whenever it is feasible to procure the original thing.28

Besides it could be said that the principles of evidence as well as the penal jurisprudence are very stringent in respect of miscarriage of justice. So Ibn Qudāmah's rebuttal of Abū Yūṣuf and al-Shaybānī's aforesaid opinion can be deemed as sustainable. On the other hand, Abū Yūṣuf and al-Shaybānī's analogical reasoning that makes transference of confession equal with the testimony by representation is incorrect due to the contrasting aspects between these two means of evidence; because confession does not necessitate the trustworthiness of the confessor because it is a qualified means, judicially confined to the confessor, nor does it imply multiplicity or masculinity. However, all these elements must be met in the realms of testimony of witnesses, particularly in criminal prosecutions. Thus the pillars of Abū Yūṣuf and al-Shaybānī's argument collapse.

As far as the distance, which the original witness is from the court, which permits the judicial hearing of his authorized witness, is concerned, many opinions were propounded to demarcate it. However, it could be said that this issue can be rightly left to the trying court to decide, inasmuch as this distance is subject to the changes of time and place. So it may be more just and practicable
to authorize the courts to specify this distance according to the principles of justice and equity.  

(b) The state of inability of the original witness that impedes him from coming to the court should continue till the final judicial sentence in the case is passed. So, if he came to the court session before such a sentence is pronounced, the court should hear his testimony as the unanimous opinion of Muslim jurists contend. The original witness's testimony cannot be heard if a final judicial sentence is passed.

(c) The ascertainment of the probity of both the original and the authorized witness. This is a crucial stipulation which is endorsed by all the Islamic schools, particularly in grave felonies such as hudud and murder offences. The importance of this requisite also emanates from the consistent principle that al-'adālah (trustworthiness and probity) of the witness is necessary as a prime essential element of any testimony. Moreover the original witness may be a reckless impious person whose testimony is not admissible, so, and by the same token, he cannot authorize another one to convey his testimony.

Hence the question arises as to whether or not it is imperative on the delegated witnesses to attest the probity of the original witnesses. The majority of Muslim jurists assign this duty to the court so that the delegated
witnesses are legally absolved from this onus. However, a group of the Shafi’i scholars, al-Thawri and al-Shaybani insist that the delegated witnesses should attest the trustworthiness of the original witnesses, because, as al-Shaybani says, "There is no (admissible) testimony without ‘adālah (probity). So if the delegated witnesses did not know it, they should not convey the testimony." 34

However, the majority opinion that assigns the onus of verifying the original witness’s probity on the tribunal, is more tenable, because this is a judicial procedure vested in the courts whose duty it is to probe the trustworthiness of witnesses. Moreover the verification of the probity of witnesses is a controversial subject. So the delegated witnesses should not be asked to prove it unless they are capable to do so according to the required qualifications. 35

Moreover the Mālikis state that it is invalid for the delegated witness should attest the probity of the original witness due to the strong suspicion in this regard. 36

But Ibn ‘Abd al-Barr permits the above procedure and does not invalidate it when properly carried out. 37

(d) Both the original and delegated witnesses’ qualifications for testimony should persist till the case is settled, inasmuch as this judicial decision is based on both testimonies. The Ḥanbalis contend that all the witnesses must maintain their legal competence of testimony until the crime at issue is finally decided. 38

Consequently, if a legal impediment of testimony occurred on either of the original or delegated witnesses before a judicial decision is finally passed in the case, the court refrains from passing a verdict because the testimony by representation would be invalidated, as the majority of scholars state. 39
However, no significance is given to the occurrence of legal impediments of testimony after a judicial ruling is held except in cases where this ruling is *gisās* or *hadd* penalty; for, such impediments create suspicions that nullify these penalties. Of course this moderate opinion is held by those who accept testimony by representation in *hudūd* and *gisās* crimes.⁴⁰

Also, the following propositions were heavily debated in the Shāfi‘ī and Ḥanafī schools. If the delegated witness was legally unqualified to testify when he first bore witness of the original witness’s testimony, but later on qualified to testify, then his testimony would be deemed valid.⁴¹

Besides the Ḥanafis argue that if the original witness’s testimony is rebutted due to *fisq* (impiety and profligacy), then he and his delegated witness would be barred from testifying henceforth in the crime.⁴²

But if the original witness became impious and profligate after *al-ishhād* (authorizing the delegated witness), but later on repented and became *ṣadl* (trustworthy), his delegated witness’s testimony would be valid.⁴³ The same rule applies vis-a-vis the delegated witness.⁴⁴

However the Ḥanafis contend that if the court rejected the delegated witnesses’ account it could accept the original witnesses’ accounts if these witnesses are trustworthy. Besides, these witnesses can delegate other witnesses to bear and relay their testimonies.⁴⁵

Notwithstanding these Ḥanafī principles they state that if the original witness apostasized and later on repudiated his apostacy, the ban on his delegated witness’s testimony would be perpetual. Thus, the original witness must give his testimony in person.⁴⁶

(e) The delegated witness should be male. Muslim jurists diverged in respect to the stipulation of masculinity of the
delegated witness in cases where testimony by representation is legally admissible. The following two tendencies are detectable:-

A. The majority of Ḥanafis, Mālikis and a narration from Aḥmad Ibn Ḥanbal nullify this requisite. Accordingly they admit female witnesses when delegated by original witnesses to transfer their testimonies to the court, except that most of the Mālikis stipulate that women in this context should be conjoined with male witnesses no matter how numerous these women are.47

The proponents of this argue that the testimony by representation is intended to prove the disputed issue, so women are admissible as delegated witnesses in all crimes that are capable of being proved by testimonies of women witnesses, e.g. manslaughter, accidental homicide, tazīr crimes, etc. Accordingly women witnesses do share in relaying testimonies in the largest sector of criminal disputes.48

Moreover al-Kāsānī argues that the Qurʾān specifically mentions the testimonies of women in connection with the testimonies of men so he concludes that "The apparent text of the Qurʾān presupposes that women witnesses should unreservedly share in testifying with men witnesses except where this rule is qualified by a legal evidence (dalīl)." Al-Kāsānī further states "... Although analogical reasoning requires that masculinity should not be stipulated, its specific stipulation in respect to the original witnesses' testimonies in hudūd and gisās crimes was required by the Prophetic tradition narrated by al-Zuhrī (d.124 A.H.), due to the existence of extra suspicion in women's testimonies that is not found in men's accounts. Moreover, the stipulation of originality of witnesses in these crimes is meant to avert the additional doubt implied by the two accounts in testimony by representation especially in cases of hudūd and gisās crimes which the courts have a bounden duty to do their utmost to waive. But pecuniary properties
and their inherent rights can be proved even if there are (trivial) doubts in the means of proof. So women as delegated witnesses should be judicially admissible inasmuch as this very case complies with the original analogical reasoning."

B. Al-Shāfiʿī and his followers, al-Thawrī, and the first statement of Ahmad Ibn Ḥanbal persist in excluding women from the realms of testimony by representation. Only men can be delegated to transfer the original witnesses' accounts to the courts.

The supporters of this opinion sustain it by invoking the widely accepted norm that women's testimonies are confined to all pecuniary claims and disputes as well as feminine private affairs. By the same token, they are exempted from realms which are exclusive for men. Thus, women cannot be delegated witnesses because testimony by representations is not a pecuniary issue nor is it a feminine matter. The delegated witnesses do not legally prove the disputed subjudice issue, they rather establish the testimonies of the absent original witnesses. Accordingly women should be excluded.

By analysing these two conflicting opinions it could be concluded that the second opinion could be accepted in cases where the crime is one which is appropriate for women's testimonies. This encompasses the largest segments of criminal offences, except hudūd and qisās. But in these latter cases women can be excluded from conveying the original testimonies because they are inadmissible even as original witnesses, let alone as delegated ones. So a combination of the aforesaid opinions can be workable if the courts distinguish each case on its own merits.

(f) Fulfilment of nisāb in the delegated witnesses.
Muslim jurists unanimously stipulate that the delegated witnesses should be more than one witness.
This principle is based on the postulate fact that testimony by representation is a kind of testimony that establishes disputed rights. Therefore the minimum number of witnesses is stipulated.53

Notwithstanding this unanimity, Muslim jurists differ in regard to the specific number needed to convey each original witness's testimony. They propound the following two statements

A. In cases where there are two male witnesses each one of them can delegate only one witness to transport his testimony to the court. So, practically two delegated witnesses suffice in this proposition. This opinion is supported by the Ḥāhirī school, the majority of Ḥanbalis, Shurayh, al-Sha'bī, al-Ḥasan al-Ḥaḍrī, Ibn Shubrumah and al-Thawrī.54

Ibn Qudāmah and the leading Ḥanbalis expound this opinion saying that the right which is sought to be established is legally proveable by two witnesses. On this basis two admissible witnesses are procured then this right is deemed substantiated as if these two delegated witnesses were essentially the original ones. Moreover, the delegated witnesses are substitutes of the original ones, so the same number should be deemed sufficient. Besides, the delegated witnesses do not attest a disputed right vis-à-vis the original witnesses. Hence it is incumbent to accept the report of one trustworthy witness as is the case in reporting religious information. Because they are just narrating the original witnesses' testimony, which is not a disputed right, if these subsidiary witnesses disavowed this testimony the court would not coerce them to discharge it.55

B. Each original witness is to delegate two subordinate witnesses (shāhidā farṣa). This is supported by the Mālikis, Ḥanafis, Shāfiʿis and Abū ʿAbd-Allah b. Baṭṭah al-Ḥanbalī (304-387 A.H./917-997 C.E.)56
The majority sustain this opinion by the principal postulate that in confessions being relayed to courts by third parties it is inadmissible that only one witness should prove such confessions. Therefore two subordinate witnesses are indispensable to relate the testimony of only one original witness.57

Notwithstanding this, they differed as to whether or not the two subsidiary witnesses can be delegated to relay the testimony of the original two witnesses, each of whom independently authorized the two delegated witnesses in one session. The Ḥanafīs, the famous Mālikī statement and an opinion in the Shāfi′ī and Ḥanbali schools contend that the mentioned proposition is a legally tenable one. So, two subsidiary witnesses can bear witness to the testimony of each one of the original witnesses, because the statutory number of two witnesses it met since the two subordinate witnesses convey independently each original witness’s account.

Al-Sharakhsī, the leading Ḥanafī jurist supports this opinion by saying: "Our evidence is that the subordinate two witnesses pluraly attest the testimony of each one of the original witnesses, and as the statement of one person can be substantiated in the court session by the testimony of two witnesses also the statement of a group of persons can be (legally) proved by the same vehicle as the principles of confession rule. This is because the two subordinate witnesses are the valid and required number of testimony of witnesses. Besides, they attest the testimony of the principal witnesses and not the (disputed) right, therein. Subsequently if they attested the testimony of one of the principal witnesses in the court it would be deemed proved as if this principal witness came and gave his testimony in person. By the same token the other principal witness’s testimony can be legally proved inasmuch as there is no difference between the transference of the second original witness’s account by the same subsidiary witnesses and the
testimony of two different subsidiary witnesses on the same issue.”

C. There is another opinion that stipulates that the subsidiary witnesses should be four: two of them independently relay only one account of the principal witnesses. This is an opinion in the Mālikī and Shāfi‘ī school and is supported by al-Muzanī (175-264 H./791-878 C.E.), al-Shāfi‘ī’s closest disciple. They argue that the evidence that substantiates one section of the testimony cannot legally prove the second section of the same testimony. Besides, the two subsidiary witnesses stood for one principal witness in the disputed issue. Therefore, if these delegated witnesses also attested the second principal’s testimony, this would be the same as when one principal witness twice testifies the same disputed claim, which is legally inadmissible. So, the proposal that two subsidiary witnesses can attest independently each principal witness’s testimony is an invalid proposition.

It could be concluded that the first opinion, endorsed by the majority of jurists is more practicable and tenable. Moreover, the core of the above controversy originates from the different angles of legally weighing and assessing the nature of testimony by representation: is it a mere transference (nagl) of the principal witnesses’ accounts or is it a testimony on the core of the disputed claim? So, the ramifications stated above can be said, mainly to emanate from answering this question.

The above juristic debates involve cases of murder, manslaughter, accidental homicide as well as in all bodily offences and pernicious felonies in addition to ta‘zīr crimes.
Testimony by Representation when the Principal Witnesses are One Male and Two Females

It has already been established that the testimony of one male and two female witnesses is admissible in all criminal cases except hudūd and qisāṣ ones. Also all pecuniary claims can be substantiated by this means. Even in larceny the stolen item can be restored to the plaintiff according to this means, except that the hadd of amputation lapses.

Mālik maintains that women as subsidiary witnesses must be accompanied in this context by a male witness. He justifies this saying, "They, however numerous they may be, stand equal to one man. This is consistent whether the female subsidiaries are relaying from male or female witnesses." However, as Mālik accepts the testimony of women in bodily transgressions, the testimony by representation will assume a significant role indeed in qisāṣ crimes pertaining to bodily injuries.60

Furthermore, al-Shaykh Marī Ibn Yūsuf (d.1033 H.) from the Ḥanbalī school, holds that the two females and the male witnesses can legally be admissible as subsidiary witnesses if the principal witnesses are two males or a male and two females.61

The majority of Mālikis, Ḥanbalis and Ḥanafis as well as the first statement of the Shāfīis contend that two male witnesses suffice in transferring the testimonies of the male and two female principal witnesses.62

But a second opinion in the Shāfī school maintains that it is imperative that the subsidiary witnesses should be four males; two transferring the principal male's testimony, and the other two transferring the account of the two principal females.63

Furthermore, al-Nawawī al-Shāfī, reports that there is a third view in the Shāfī school that stipulates six
subsidiary male witnesses; each two of them relay the account of one of the principal witnesses, irrespective of his or her sex.64

In concluding this survey it could be held that the first view, which requires only two subsidiary male witnesses to transfer the testimony of the principal male and two females testimonies to the court is more feasible. Therefore, a substantial damage may result if the courts adopted the second or third Shāfiʿī opinions that stipulate four and six subordinate witnesses respectively.

On the other hand, the general Islamic view prevents the original witness from bearing witness as a subsidiary witness in the same crime. Al-Sarakhsī endorsed this opinion by the following two points:-

A. This principal witness possesses *ilm al-muʿāyanah (discernment of the incident by his material vision as an eye-witness). So, he acquires nothing more by being a subsidiary witness in the same issue.

B. The testimony of *al-farʿ (subsidiary witness) is a substitute of the original’s account. Accordingly, the court should not refer to it unless the original testimony becomes inaccessible due to death, illness or absence of the original witness. A person cannot be a principal and subsidiary witness simultaneously in the same subject. Al-Sarakhsī explains this conclusion by saying "The testimony of the principal witness substantiates one half of the matter. Thus if we validated his testimony in his capacity as a principal and subsidiary witness, we would be admitting the proofing of three quarters of the claim by the testimony of only one witness. This proposition is legally not permissible."65

Al-Sarakhsī, Ibn Qudāmah, al-Mawwāq al-Mālikī and al-Shīrāzī report that most jurists permit the hearing of the testimony of the principal witness and the two subsidiary ones in the
same court session. The Ḥanbalis even accept one principal witness corroborated by the testimony of one subsidiary witness in the same session, hence the principal’s account is always heard before the subsidiary’s because the first is original whereas the second is a substitute.66

In adultery cases the Mālikis unequivocally stipulate (at least) four subsidiary witnesses to convey the original testimonies to court. Ibn al-Qāsim explains this point saying "This is as when four subsidiaries attest the testimony of the original four or two subsidiaries transfer the testimony of two original witnesses and likewise two more subsidiaries relating the testimony of the remaining two original till the required number of four is reached."67

This point is not debated by the Ḥanafis as they dismiss testimony by representation in ḥudūd cases, which includes adultery.

Seventhly: The original witness should not discredit, disavow, impugn or retract his testimony prior to the final judicial verdict in the crime. This is a unanimously sustained principle.68

However if the pending judicial sentence is issued, and afterwards the original or delegated witness repudiated his testimony, this judicial ruling would still be intact and irrevocable except when it involves a ḥadd or qisṣa corporal penalty, where it should be suspended.69

However Mālik contends that if the original witness disavowed the authorization of testimony after a judicial ruling is held, this ruling should be forthwith rescinded. But some leading Mālikis disagree and uphold this ruling as when the witness recants his testimony after all the judicial proceedings were completed.70
Also, al-Shaykh Marī the Ḥanbālī, totally exonerates both the principal and subsidiary witnesses in the aforesaid eventuality.⁷¹

The Ḥanafis expressly invalidate the testimony by representation if the principal witness became an incompetent witness due to dissolute life, or deafness or blindness in cases where his testimonies will be legally inadmissible e.g. murder, adultery, slanderous accusation of unproved adultery, etc.⁷²

C. **Requisites of Discharging Testimony by Representation**

The antecedent requisites should be fully met to legalize the subsidiary witnesses’ testimonies. However the following conditions are also imperative when the court begins hearing such testimonies:-

(a) The subsidiary witness must give his testimony exactly in conformity with the method by which he initially bore witness.

This encompasses the following methods:-

(i) If the subsidiary witness had heard the original witness giving his testimony in a court session he must mention this fact at the beginning of his testimony.

(ii) If the original witness just mentioned a lawful cause of the disputed right that he attested, the subsidiary witness should expressly mention this fact. These two points are elaborated by the Shāfīis and Ḥanbalis.⁷³

(iii) In the istirā‘ or ishād explicit authorization by the principal witness of the subsidiary one, the latter should unequivocally mention this fact at the beginning of the trial. This is the unanimously accepted procedure in this context.⁷⁴
The Hanafis adduce three formulas for giving testimony by representation all of which expressly imply the delegation uttered by the original witness and the permission to transfer his testimony to the court, besides stating the core of the dispute.  

(b) The subsidiary witness must identify the original witness’s character by what makes him well known to the court. Abū Ya‘Lā says: "... Even if two (subsidiary) tābi‘īyyān said that two Companions, have delegated them to testify in their place, their account would be invalid till they specify the names and personalities of the Companions." 

The Mālikis allow the subsidiary witness to report the original one’s probity.

However al-Ṭabarī (224-310 A.H.) the famous exegete, dissented and said that "If the subsidiary witnesses said that the original witnesses who are two trustworthy and free males delegated us to testify in their place", such account would be a valid one, even though they did not mention the names, because it is the attributes of the original witnesses which are the required objectives and not their characters." 

Perhaps it can be said that this requisite is an indispensible one, and al-Ṭabarī’s opinion in this context is highly controversial. On the other hand the accused enjoys the right of knowing the characters of the original witnesses in order to impugn their accounts or personalities, when possible. Besides, as mentioned above, the process of tazkiyah (verification of the probity of the witness) is a duty of the court insofar as it cannot legally proceed further in the trial proceedings unless it has absolutely clarified this point.

Moreover, if the subsidiary witness ignores the name of the original witness, this will in turn strengthen the suspicion
of his credibility. For all these considerations the character of the principal witness must be known to the court through the present subsidiary witness.\textsuperscript{75}

Thus the required conditions of testimony by representation are satisfied and similarly must be met in trials where such evidence is legally admissible. Muslim jurists debated the question of what classes of crime was this means of evidence to be accepted, even though all the above conditions are fulfilled?

D. The Realm of Testimony by Representation

Basically the admissibility of this type of testimonies varies in correspondence with the crime. The following main trends are visible:-

First: In cases where the crime is not a \textit{hadd} or \textit{qisās} case, Muslim jurists unanimously contend that testimony by representation is an admissible legal evidence.\textsuperscript{80}

According to this fundamental opinion all crimes that are punishable by only a pecuniary penalty can be proved by testimony by representation, inasmuch as pecuniary disputes and claims are legally capable of being proved even if there is \textit{shubhah} implicated either in the constituent elements of the crime or in the evidence of such crimes.\textsuperscript{81}

Therefore the various means of proof are generally more flexible in these areas.

Secondly: In cases where the crime is a \textit{hadd} or \textit{qisās}. Muslim jurists diverged in regard to the admissibility of testimony by representation. They propound the following two opinions:-

(a) Mālik and his followers, some Shāfi'is and a group of Ḥanbalis state that the testimony by representation is also a valid means of evidence in \textit{hudūd} and \textit{qisās} offences.\textsuperscript{82}
(b) The Ḥanafis and a group of Ḥanbalis ban this method of testimonies in cases of *hudūd* and *gisās* trials.\(^83\)

The Shāfiʿis accept testimony by representation in all individuals' right including all homicide trials, as well as *ḥadd* of *gadhf* because, though it is a *ḥadd* penalty, nevertheless the aggrieved's right here is predominant so that this crime is included with the rest of the individual's rights.

However, the Shāfiʿis categorically exclude all the rest of *hudūd* trials and claims from testimony by representation as they are God's right which are revocable by *shubuhāt* in addition to involving *al-musāḥalah* (leniency).\(^84\)

Ibn ʿAbdīn further reports that Abū Yūṣuf accepts the evidence propounded by testimony by representation in *taʿzīr* crimes but Abū Ḥanīfah still excludes this means of evidence even in this latter category of crimes, especially when *taʿzīr* includes God's rights which are not fully proved when there is *shubhah*.\(^85\)

Al-Shaykh Marī enumerates the conditions of testimony by representation which include the crucial point that they are only admissible in disputes pertaining to individual's rights. Accordingly, *gisās* and all the remaining bodily injuries are included. Also this means that the official Ḥanbalī opinion in this regard does exclude the *hudūd* crimes from this context.\(^86\)

This Ḥanbalī opinion has already been reported by Ibn Qudāmah. Thus, the official Ḥanbalī opinion only excludes *hudūd* from this vehicle of proof.\(^87\)

Also there is a statement attributed to Aḥmed b. Ḥanbal that is compatible with the above Ḥanafī opinion that excludes all *hudūd* and *gisās* cases from being proved by testimony by
representation. But the official Ḥanbali opinion only excludes ǧudūḍ crimes.88

The fundamental argument in favour of this opinion is that ǧudūḍ and ǧisās penalties are revocable and rebuttable by shubuhāt which occur in the means of evidence or in the crime itself. Al-Ḳasānī says, "Ḥudūḍ and ǧisās penalties are not allowed as a result of shubuhāt. Testimony by representation is not without shubhah. Therefore women are inadmissible in this context due to the inherent shubhah that surrounds their testimonies due to forgetfulness and inadvertence. More than that the weakness involving testimony by representation is more likely than women's testimonies due to different sessions, which means that the delegated witnesses account consists of an extra element which is not present in the original's testimonies."89

Abū Ḥanīfah and Abū Yūṣuf argue the court's adjudication will be based on the testimonies of the subsidiary witnesses, whilst al-Shaybānī, ascribes such ruling to the aggregate testimonies, e.g. the principal and subsidiary testimonies. The rest of schools predominantly endorse the first Ḥanafi opinion, whereas a minority of jurists uphold al-Shaybānī's opinion.

This juristic disagreement becomes significant in cases of subsequent retraction of testimony made by some of the witnesses before, during or after the criminal trial is finalized. Because, as will be discussed later, such retraction entails various criminal responsibilities on the witnesses which include, in some cases, capital punishment according to ǧisās rules.90

Perhaps it can be said that the elaborate stipulations as far as the implications of testimonies by representations are concerned can mollify the Ḥanafis apprehensions that lead to the ban of this means of evidence in ǧudūḍ and ǧisās realms, because the grievous penalties of these crimes are well qualified by the numerous requisites which must be
fulfilled. Thus the scope of testimony by representation is not absolute. On the other hand this very kind of testimony can be regarded as extenuating causes in hudūd and murder cases where the judges enjoy ample powers to prosecute these cases as taʿzīr offences. Thus capital punishment as well as the hadd penalty are to be replaced by qualified and mitigated penalties according to taʿzīr principles.
References: Chapter Thirteen


6. ibid.


10. ibid.


16. ibid, al-Dardxr, al-Sharḥ al-Kabīr, Vol. IV, pp. 204-06.


37. ibid.
40. ibid.
42. ibid.
43. ibid.
44. ibid.
45. ibid.
46. ibid.
48. ibid.
51. ibid.

CHAPTER FOURTEEN - THE JUDICIAL PROCEDURE FOR THE
VERIFICATION OF THE WITNESS'S CHARACTER (al-Jarḥ wa al-
Tardīl)

1. Introduction

According to al-Māwardī, the process of examining the witnesses' characters procedurally follows the registration of their names, addresses, identifications, etc. This procedural measure is supported by al-Shāfi’ī, Ibn Shubrumah (d.144 A.H.) and many jurists because it gives the defendant ample chances of discrediting the plaintiff's witnesses besides it helps the court's examiners (muzakkīn) to scrutinize the trustworthiness and blameworthiness of the witnesses, particularly in serious crimes like hudūd and qisas cases.

As has been mentioned, it is imperative for the court not to admit a testimony of unreliable and blameworthy witnesses. Moreover, the requisite of probity in witnesses is a coherent and an indivisible ingredient of testimonies as a whole. This is why the Muslim classical law paid special attention and care to this element. Thus, the process of examining the probity and competence of witnesses in criminal trials, in particular, constitutes an important element in the subject of testimonies of witnesses.

2. The Juristic Status of Examining the Credibility of Witnesses (al-Tazkiyah)

Al-Bājī al-Mālikī (403-474 A.H./1012-1081 C.E.) al-Mawardi (364-450 A.H./974-1058 C.E.) and al-Shīrāzī (393-476 H.) classify witnesses, as far as their probity is concerned, into three major categories. The first categories are those whose probity and trustfulness is well-known to the judge (al-qādī). The second group are those whose blameworthiness is, also, well known to the judge. The third category are those whose probity or blameworthiness is unknown to the judge.
Al-Bājī and Ibn ʿAbd al-Barr narrate the Mālikī opinion which empowers the tribunal to admit the testimonies of the first category of witnesses immediately without asking for further examination of their credibility. Sahnūn also maintains this key point saying: "This rule applies in respect to a man (witness) whose probity is famous and well known to the whole public to the extent that the judge’s knowledge of this probity is commensurate with that of those who will prove it before him. This is the kind of witnesses whom the judge should admit."

Also Ibn al-Qāsim, Mālik’s prominent disciple, is reported to have said: "If the judge knows the man (witness) so that he would have attested his probity, had he not been in his post, he, then, should forthwith admit this man’s testimony." 

As for the second category of witnesses whose blameworthiness (fisq) is well known to the judge, the court should reject their testimonies, whether the judge knows this fact personally, or because the witness’s blameworthiness was proved by others who attested that the witness had committed adultery, wine-drinking, larceny, or that he transacted usurious dealings, etc.

But as for the third class of witnesses whose credibility and blameworthiness is totally unknown to the court, the majority of Muslim jurists make it imperative on the court not to adjudicate in the case till these facts are clarified by virtue of the judicial process of tazkiyah (examining the competence of witnesses in terms of their probity).

Al-Māwardī propounds identical Shāfiʿī opinions and concludes that they are al-Shāfiʿī’s consistent statements.

He also maintains that Abū Yūsuf and al-Shaybānī from the Hanafi school, and the majority of jurists uphold the pre-mentioned legal precepts. These are some of the instances
where the judge’s personal knowledge of some facts is legally admissible as irrebuttable evidence.\textsuperscript{10}

However, al-Sarakhsi, al-Marghīnānī, and the rest of the leading Hānafī scholars give greater details of the Hānafī view in this issue. They classify the criminal allegations into two main grades namely: a. \textit{hudūd} and \textit{qisās} allegations and b. the rest of criminal trials that do not involve \textit{hudūd} nor \textit{qisās} claims.

Consequently the Hānafī hold that in the first case the court must ask for the disclosure of the witnesses' probity or blameworthiness even if the accused did not impugn the personalities of the witnesses, inasmuch as these particular criminal cases are rebuttable by suspicious circumstances (\textit{shubuhāt}) and the court should do its best to waive them. But divergence did take place between Abū Ḥanīfah and his disciples in respect to the second grade of crimes (that do not involve \textit{hudūd} nor \textit{qisās} allegations) so far as \textit{tazkiyah} of witnesses is concerned. Hence Abū Ḥanīfah presents a flexible opinion that do not oblige the court to ask for \textit{tazkiyah} of witnesses unless the accused impugns or discredits their accounts or characters. Abū Ḥanīfah supports his view by ʿUmar’s famous statement: "Muslims are trustworthy amongst themselves except him who is punished by \textit{hadd} of \textit{gadhf} (slanderous accusation of unproved adultery)". He also invokes Ibrāhīm al-Nakhaʿī’s statement: "\textit{al-ʿadl} (the trustworthy witness) amongst Muslims is he who is not indicted in \textit{batn} nor \textit{fari} (a man who does not fraudulently or unlawfully usurp or devour other’s properties, and never commits unlawful sexual acts)". Therefore Abū Ḥanīfah admits the testimonies of a \textit{mastūr shāhid} (the witness whose genuine state of probity and blameworthiness is unknown), by the virtue of the postulate that the ostensible state of a Muslim is probity unless this apparent fact is refuted by the proof of the contrary as when the accused impugns and proves that the witness is a blameworthy and unreliable person. Āḥmad Ibn Ḥanbal has a second opinion that agrees with Abū Ḥanīfah’s above perspective. According to this
view, the ostensible postulate of probity suffices in admitting the witness’s testimony unless challenged and the contrary is proved.\(^1\)

Nevertheless, Abū Yūsuf and al-Shaybānī have adopted a more rigorous approach in this respect as they maintain that the procedure of examining the witness’s credibility and veracity is invariably imperative in all trials: civil or criminal, whether the defendants discredited their accounts or not.\(^2\)

Abū Yūsuf and al-Shaybānī argue that the legal judgement is based on evidence (hujjah) which is the testimony of the trustworthy witnesses. Therefore, it is incumbent on the tribunal to seek to substantiate the witnesses’ probity. In addition this judicial proceeding maintains and protects the adjudication from any vitiation or invalidity.\(^3\)

Al-Sarakhsī comments that Abū Yūsuf and al-Shaybānī’s opinion is the publicly endorsed Ḥanafī view in this context. Subsequently, examining the witnesses’ veracity and probity is an obligatory judicial duty in all criminal disputes as well as civil ones without making this process dependent on the accused’s or defendant’s impugnation of the plaintiff’s witnesses.\(^4\)

It could be argued ʿUmar’s statement, "All Muslims are trustworthy witnesses amongst themselves save that is punished by ḥadd of qadhf", does not preclude the process of probing the witness’s probity (tazkiyah) since ʿUmar himself is reported to have said to two witnesses: "I do not know you, and this does not harm you, procure whoever knows you". Hence they brought a man whom ʿUmar addressed "Do you know them?" The man replied: "Yes". ʿUmar said "Did you accompany them in an arduous journey that manifests the essence of people?" He replied: "No". ʿUmar then asked him: "Were you a neighbour of theirs who knows their morning and evening?" He said: "No". Hence ʿUmar asked "Did you deal with them in danānīr and darāhim for which kinship are

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being severed?" He also replied in the negative. "Umar then concluded "Oh son of my brother, you do not know them". He then addressed the witnesses saying: "Bring whoever knows you". This meticulous inquiry by "Umar shows that nothing less can suffice, as Ibn Qudāmah and Ibn "Abd al-Barr and others maintain.\textsuperscript{15}

Besides, the probity of a witness, is a matter that should be made clear due to the urgency of the judicial proceedings. Therefore the process of \textit{tazkiyah} is a necessary procedure.\textsuperscript{16}

However, Ibn Abī Laylā and Ibn al-Qayyim as well as the late Ḥanafīs accept the innovative procedure of taking the witness's testimony under oath due to the scarcity of the legally reliable persons.\textsuperscript{17}

3. **Formulas and Grades of Tazkiyah**

The unanimous opinion in Islamic jurisprudence is that \textit{tazkiyah} (the process of probing of witnesses' probity) has two grades: a. confidential examination and: b. public examination. Each one of these grades has a certain method.\textsuperscript{18}

Accordingly these two grades of \textit{Tazkiyah} will be detailed as follows:-

(a) **The Furtive Probing of Witnesses' Probity (Tazkiyat al-Sirr)**

Al-Marghīnānī and al-Sarakhsī, from the Ḥanafī school, state that the judge should send, confidentially (\textit{mastūrah}) the legal writ or document that includes the names of witnesses and their addresses, characteristics and all relevant information, to \textit{muzakkī} or \textit{mu'addil} (the person who scrutinizes this information). The latter should collect and compile the information relating to the witness's
character from his neighbours, market, etc. and confidentially send back this information to the judge.19

The Shāfi‘is, Ḥanbalis and Mālikis generally endorse the same Ḥanafī formula of the confidential investigation of the witness’s character.20

Most of the jurists state that the court should be extremely diligent and cautious that the court’s messengers and investigators should be anonymous to all parties involved in the case (e.g. witnesses and their neighbours, plaintiff, and defendants), lest any of these persons should falsely and maliciously commend a blameworthy witness, or defame or debase a pious trustworthy one.21 The court should also take the same precaution that the messengers and investigators should not know each other lest they should malevolently forge or collaborate in tampering with the required information.22

In addition, al-Shāfi‘ī, the Ḥanafis and Ḥanbalis stipulate that the court’s messengers and investigators must be persons of quality in terms of their outstanding trustworthiness, piety, veracity and their expertise in distinguishing between people. They should also not be known to the public lest they should be subject to fraud or deception in their inquiries.23

If the inquiries of two of the court’s messengers confirmed the probity or blameworthiness of the given witness, then the court should admit or reject this witness’s testimony respectively. But if one of the examiners attested the probity of the witness whereas the other one proved the contrary, the court would have to send two other examiners. If they attested the probity or blameworthiness of the witness, the court would rule accordingly. However, if they also propounded conflicting assessments, then the two testimonies of probity and blameworthiness would be complete but contradicting. Therefore the court should give more weight to the account of the depravity and blameworthiness
of the witness and reject his testimony. Then the court should ask the plaintiff to present another witness to replace the defective one.\textsuperscript{24}

(b) \textbf{The Public Probing of Witnesses’ Probity (Tazkiyat al-\textsuperscript{2}Al\textsuperscript{3}fyan\textsuperscript{4}yah)}

This is a further guarantee against any mistakes in respect to the witness’s person, identity, etc. The Ḥanafis say that the court should bring its judicial examiners and the witnesses together in one session where the examiners attest the probity of witnesses by saying: "They are \textit{Udūl} (trustworthy witnesses)."\textsuperscript{25}

It is reported that the process of examining the witnesses’ credibility and probity was at first a public judicial procedure, but judges later on contented themselves with the confidential method as al-Shaybānī says, "Public \textit{tazkiyah} is an occasion of tribulation and discord \textit{(balā\textsuperscript{2}unwa fitnah)}."\textsuperscript{26}

However, al-Sarakhsī ascribes the innovation of the public \textit{tazkiyah} to the prominent judge Shurayh\textsuperscript{5} after it has been a confidential judicial procedure. People said to him in surprise, "You have made an innovation. Oh. \textit{Abū Umayyah}". He replied, "You (people) have made innovations so that we (judges) have to contrive and make innovations (to deal with them)."\textsuperscript{27}

The Ḥanafī’s prevalent opinion and al-Bājī as well as al-Hattāb from the Mālikī school contend that the confidential examination of witnesses’ characters is sufficient, but it would be better to join this procedure with the public \textit{tazkiyah} as Shurayh used to do.\textsuperscript{28}

Al-Shāfīī maintains that if the witness is discovered to be a man of probity, by virtue of the confidential \textit{tazkiyah} then the court should ask for the public examination to be made for the same witness in an attempt to avoid any mistake
in names, characters, etc. It seems that al-Shāfi‘ī makes it as a bounden duty on the court to conjoin the two processes of tazkiyah together so that no room would be left for any doubt or impugnation as far as the conduct of the witness is concerned. Thus both litigant parties can proceed further in their case. It should also be borne in mind that al-Shāfi‘ī stipulates that the court is not to pass a sentence based on the evidence of unknown witnesses.29

4. Requisites of Tazkiyah

Due to the importance of examining the character of the witness in respect to his probity and competence, which are crucial elements of his testimony’s admissibility, Muslim jurists stipulate the following requirements in this judicial procedure to effect its validity:-

(a) Al-Nisāb (the Minimum Required Number of the Judicial Examiners)

In the public tazkiyah the investigators should be two males because, as it is deemed as a legal testimony, it has to fulfil this requisite according to the predominant Islamic opinion.30

Besides these two male investigators should fulfil the aforesaid requisites of the admissible witnesses especially the requisite of probity and trustworthiness.31

However, the Shāfi‘is and a statement of Ibn Ḥanbal contend that if the court appointed a specific person assigned particularly to investigate the probity of the witnesses, such person must fulfil the requisites of a lawful judge, hence he may be one.32

As far as the number of the inquirers is concerned there are diverse opinions: the first of which accepts the account of only one inquirer. This is endorsed by Abū Ḥanīfah, Abū
Abū Ḥanīfah and Abū Yūsuf support this opinion by arguing that the confidential examination (tazkiyyat al-sirr) is not testimony but rather religious information that can be validly reported by one trustworthy person. The requisite of a number of witnesses is restricted to testimony and it should not be extended to other ambits.\(^{34}\)

Al-Bājī reports that Mālik also argues that the confidential inquirer is the judge’s proxy. Therefore he should be one representative on condition that he is ādil (a man of probity).\(^{35}\)

Ibn Qudāmah relates that Aḥmad b. Ḥanbal held the same Ḥanafi view that the confidential examinations and reports are pure information (narration) where no explicit formula of asḥād ("I testify") is required, inasmuch as it is a narration. Therefore one person suffices.\(^{36}\)

Notwithstanding the arguments in favour of this opinion, the majority of Mālikis, Shāfiʿis, Ḥanbalis and al-Shaybānī from the Ḥanafi school contend that it is imperative that the confidential examiners must be two trustworthy men. The proponents of this opinion argue that the confidential report is a genuine testimony (shahādah) involving the attestation of the witness’s probity or depravity. This in turn presupposes a number of reporters as is required in the rest of testimonies. Moreover this opinion emphasizes that masculinity, number, probity, liberty, sanity, puberty, discretion and Islam must all be found in the confidential examiners.\(^{37}\)

However al-Mirdāwī al-Ḥanbali (817-885 A.H./1414-1480 C.E.) propounds a very important criterion that helps remove the apparent disagreement in the above two opinions as he says "The examining of the witness’s character, as far as his probity and blame-worthiness are concerned, is a testimony
that necessitates number and probity and the rest of requisites that are necessary in testimonies that report confessions pertaining to the (disputed) rights. Then if the subjudice matter is a ḥadd or qīṣās claim, the account of tazkiyah must be made by two trustworthy free men. By the same token, if the issue is a pecuniary claim (as in manslaughter and accidental killing) where a male and two females are admissible witnesses, the inquirers of the witness's probity and blameworthiness are not required to be free nor is the term asshad (I testify) also required.\textsuperscript{38}

Perhaps it could be concluded that the requisite of two (or more) reporters in the confidential judicial examination is a sound approach, particularly in the cases of ḥudūd and murders punishable by qīṣās. Moreover, the Ḥanafī statement that obliges the courts to investigate the probity of witnesses in all prosecutions, even when the defendant forgoes his right to discredit the witnesses, attaches additional significance to the requisite of a number of reporters in the confidential examinations; inasmuch as they consider this grade as the main reliable formula of tazkiyah as al-Shaybānī contends. Besides a number of investigators guarantees higher levels of veracious accounts, so it becomes less likely that a blameworthy witness will be accredited or a trustworthy one disparaged.

(b) \textbf{The Term Ashhad (I testify)}

Some Ḥanbalis and Shāfīis stipulate this formula at the commencement of the tazkiyah report before the court, because this judicial report is procedurally a genuine testimony.\textsuperscript{39} Al-Māwardī supports this opinion.\textsuperscript{40}

But the majority of Muslim jurists do not stipulate this condition. For them it suffices to say: "I verify", or "I know that ..."\textsuperscript{41}
(c) **The Investigator should be a Knowledgeable Person**

This is a unanimously accepted principle because unless the investigator knows how to distinguish between the conflicting qualities of people, he may erroneously recommend a bad witness or exclude a good one.42

Mālik confirms this doctrine as he says "A man’s account of verification of a witness’s probity would be invalid till he knows (precisely) the origin (wajh) of this account."43

(d) **Elucidation of the Witness’s Blameworthiness**

Muslim jurists differ as to the necessity of elucidating the causes of blameworthiness of the investigated witness. Some Ḥanafis and the majority of Shāfīʿis and Ḥanbalis as well as Ashhab – Mālik’s disciple (145-204 A.H./762-819 C.E.), all contend that the inquirer must specify the cause of the depravity of the probed witness when he acquires this information by direct knowledge.44

Therefore these jurists stipulate that the inquirer should say: "I attest that I saw him (the witness) drinking wine, or concluding usurious contracts, or unlawfully devouring others’ properties, etc, or I heard him calumniating (a given person), etc."45

However the Shāfīʿis and Ḥanbalis contend that a general report of undetailed account of blameworthiness can be admitted if the inquirer is an appointed judicial official.46

Also Abū Ḥanīfah, Ahmad b. Ḥanbal and some others authenticate the general brief account of the blameworthiness of the witness. They sustain this opinion arguing that since the report of trustworthiness is legally admissible in its undetailed formula then the same principle should coincide with the report of blameworthiness (al-jarḥ).
Besides the elaborate account of blameworthiness may involve an independent crime as when the inquirer says that "I attest that the witness has committed adultery" which would result in the inquirer himself being subject to possible legal proceedings.\(^{47}\)

Ibn Taymīyyah holds that the majority of Muslim scholars legalize the hearsay evidence as regards the fact that the given witness is majrūḥ (blameworthy) for being dissolute or a heretic. Accordingly it is not necessary to bring two witnesses to prove this fact when it can be proved by hearsay evidence.\(^{48}\)

Al-Māwardī also authenticates such accounts and holds that this is accepted by the Shāfiʿī school.\(^{49}\)

Perhaps it could be said that the account of the blameworthiness of the witness must be a detailed one due to the apparent variance between the causes that debase and smear the character of the witness, especially, when it is well known that the social norms, culture and proprieties vary from time to time and from one place to another. Moreover, even the classical jurists vary in assessing some illicit acts, e.g. usury dealings in a non-Islamic country. So the inquirers into the probity of witnesses should have to articulate their accounts to make it easy for the court to make a thorough and formal judicial evaluation of the witness's testimony.

As for the account of trustworthiness (al-taṣdīl), the unanimously agreed opinion is that no detailed account is needed, because as mentioned above, the postulate is that the Muslim is presumed trustworthy (ṣadl) till the contrary is proved.\(^{50}\)
This condition is expressly stipulated by the majority of jurists in an attempt to exclude superficial recommendations made by those who have no profound relations with others.  

However, al-Shīrāzī, al-Māwardī (364-450 A.H./974-1058 C.E.) elaborate the Shāfi'īs’ opinion in this context; stating that they only stipulate this condition in a report of trustworthiness of the witness, whereas in cases of blameworthiness it is not necessary that the reporter should be well acquainted with the witness by virtue of prolonged relation inasmuch as all reports discrediting the witnesses’ characters should be detailed and elaborate (depending on facts discerned through watching, hearsay, etc.).

Nevertheless al-Māwardī reports another Shāfi'ī view in this context which only stipulates the thorough and complete probing of the witness’s conduct and character even if this mission is carried out by a stranger.

(f) The Inquirer should be a Circumspect, an Astute and a Perspicacious Person

This is stated by the Ḥanafis and Mālikis in order to prevent any attempt by malicious persons who would be interested in altering facts relating to the case.

The Ḥanbalis and Shāfi'īs generally accept this condition as they stipulate stringent characteristics in the social and personal conduct of the inquirers.

(g) Masculinity of the Inquisitor

This is a controversial requisite much debated in Islamic jurisprudence, where the following two opinions seem to be the most perceptive ones.
First: The Shāfi‘ī, Ḥanbalī and the famous Mālikī opinion is that the inquirer (muzakkī) of the witnesses’ probity and competence for testimony must be a male whereby no women whatsoever are to be involved in this judicial procedure.56

Ibn Farḥūn says, "No women inquirers are admissible vis-à-vis, male or female witnesses."57

In this context Mālik says: "No less than two men are admissible in tazkiyah and if the judge appointed a man for the sole purpose of disclosing the probity of witnesses, it will be a valid procedure.58

Ibn ʿAbd al-Barr states that, women witnesses are only to be recommended by the tazkiyah of two male investigators inasmuch as women are excluded from the ambit of making tazkiyah as the Mālikī contend.59

Therefore this Mālikī opinion involves all litigations that do not involve the ħadd and qisās claims. Accordingly, all the vast realms of pecuniary and discretionary adjudications where a female witness is involved come within the terms of Ibn ʿAbd al-Barr’s statement.

However, the Ḥanafis accept this requisite in ħudūd trials as regards the public tazkiyah, inasmuch as it is a normal testimony where no women are admissible.60

Secondly: Abū Ḥanīfah and Abū Yūsuf accept women as inquirers in the confidential examination of witnesses’ characters if these women are credible and trustworthy persons. This opinion is based on the presumption that 'the judicial confidential examination of the character of the witness is a mere religious information totally commensurate to riwāyah (narration of Prophetic tradition).’61

Also the proponents of this opinion invoke the famous incident of ifk (calumny against ‘Aishah, the Prophet’s
wife). He asked Zaynab Bint Jaḥsh and BarIrah about the personality of Ḥishah and accepted their response.62

Thirdly: Ibn Nāfi‘, Ibn al-Mājshūn (d.212 H.), the prominent Mālikī jurists, al-Shaybānī and al-Mirdāwī al-Ḥanbalī, all validate the inquiries made by women when the crime is one in which women‘s testimonies are allowed.63

Accordingly women can be judicial examiners of witnesses‘ probity in murder that is not punishable by qisāṣ, manslaughter, accidental killing, larceny not punishable by ḥadd (amputation of hand) and all pecuniary offences which do not amount to larceny e.g. fraud, unarmed robbery etc, as well as in all ta‘zIr offences.64

The third opinion is seemingly more tenable as it puts some significance to women‘s reports of tazkiyah, especially in cases where women witnesses are involved. Thus this opinion does enlarge the scope of judicial inquiries into the probity and blameworthiness of witnesses that results in allowing a higher degree of protection for the litigant parties.

Al-Mawardī analyses the aforesaid disagreement as pertaining to the fact that the Shāfi‘is and the jurists regard tazkiyah as a mere testimony that must satisfy all the prementioned requisites, whilst Abū Ḥanīfah considers it as mere information. Thus no rigorous rules should be met, as in riwāyah (narration of traditions).

5. Admissible Wording of Tazkiyah

Muslim jurists propound the following five formulas of ta‘dīl (attestation of the witness‘s probity):

(a) Al-Marghīnānī ascribes to the leading Ḥanafī jurists that the inquirer should clearly state in his report: "He (the witness) is a person of probity, and is commended as one whose testimony is valid."65
This Ḥanafī formula is intended to exclude any doubts from this crucial judicial procedure as they hold that "a slave may be a magnanimous, righteous and pious person but nevertheless is judicially inadmissible."  

(b) Saḥnūn (160-240 A.H./777 - 854 C.E.) Usbāgh, some Mālikis and the prevalent Shāfiʿī and Ḥanbalī view and some Ḥanafis and Shurayḥ all contend that it suffices if the muzakkī (examiner) said: "He is ṣadīl (a man of probity)."  

(c) Ibn ʿAbd al-Barr and the leading Mālikis report Mālik's condition that the investigators of witnesses' probity should bring together ideas of ṣadālah (probity) and ṣājdah (satisfaction) in their reports. Only one of these would not be sufficient, inasmuch as both these meanings are mentioned in the relevant Qur'ānic verses.  

This opinion is advocated by most of the late Mālikī jurists.  

(d) Some late Mālikis validate the formula that is confined to ṣājdah (satisfaction) or to ṣadālah (probity) and Ibn ʿAbd al-Barr also ascribes this statement to Mālik, and he prefers this opinion.

Al-Shāfiʿī and most of his followers only accept the formula, "The witness is a person of probity for and against myself."  

The Shāfiʿis justify this formula as being the sole confirmative wording of the attestation of the witness's probity in all cases where no suspicion can impinge upon his accounts.  

The majority of jurists object to all other forms of taṣdīl that do not unequivocally contain the above mentioned elements, e.g. it is legally inadmissible if the examiner said: "The witness is but a good person", etc.
However the Hanafis accept other forms of commendation of witnesses as valid forms of *taṣdīq*, particularly when and if the court's investigators are specialists and well acquainted with the given witnesses.74

6. **Formula of Jarḥ (Disparagement of Probity)**

When the inquiry discloses that the witness is a distrustful person, the Hanafis and Ḥanbalis content themselves by the form: "He is a person of improbity" or "God knows". But if no conclusive decision could be obtained, then the inquirer should say "He is of unknown character (*mastiḥ*)."75

The Shāfiʿis only accept the detailed account where the causes of the improbity of the witness are revealed. The Mālikis also accept the Shāfiʿī criterion on condition that the inquirers should put forward harmonious reports, or say that the witness is blameworthy and his testimony is invalid.76

7. **The Legal Status of Witness's Probity when Attested by the Accused**

A juristic controversy arises in cases where the accused person attests the probity of his adversary's witnesses. This eventuality has brought about the following two opposing opinions:-

(a) The majority of the Ḥanbalis and Shāfiʿis validate this attestation and accordingly allow the court to rule in the case. They argue that the judicial inquiry about the witness's credibility and character is solely for the benefit of the defendant and most importantly his mentioned statement is a valid confession since he has admittedly acknowledged the veracity of his adversary's witnesses. Subsequently, he is to be prosecuted on the merits of this very confession.77
The Ḥanafī scholars accept this opinion if the defendant is legally capable of making such statement.78

(b) The court should not accept such an attestation due to the following considerations.

(i) This attestation is adduced by only one person when two (or more inquirers are needed, and
(ii) The revealing of the witness’s probity is God’s right, not the accused’s. Thus if he accepted to be sentenced on the merits of a blameworthy witness’s account, this acceptance is totally invalid.79

However, the Mālikis differentiate between confidential and open forms of examination. Accordingly they acknowledge the legality of the attestation of the witness’s probity by the accused in the confidential form, while the opposite rule applies in the open form.60

However, the Ḥanafis present a detailed account (of another approach) as they postulate that:

(a) If the defendant commended the plaintiff’s witnesses before the commencement of the trial but later on or during the trial disavowed their testimonies and his former commendation of their characters and asked the court to probe their characters, the prementioned attestation would be null and void, and the court has to initiate new inquiries in the witness’s probity.81

(b) The defendant should acknowledge the probity of his opponent’s witnesses after the trial has begun. Hence the Ḥanafis say that the above acknowledgement may be formed in one of the following contexts:

(i) The accused should say: "They are upright witnesses, who are veracious in what they testify vis-à-vis myself", or
(ii) "They are "udūl (men of probity) whose testimonies are valid for or against myself" or
(iii) "They are 'udūl (persons of probity) without any supplementary comments.\textsuperscript{82}

Subsequently the Ḥanafis rule that in the first and second examples the judge should adjudicate in the case on the merits of the accused’s confession, as he would be legally considered as a confessor. Accordingly the court would not seek to reveal the witnesses’ probity inasmuch as their testimonies will be superfluous beside the defendant’s lawful confession.\textsuperscript{83}

As for the third example where the accused only says "They are 'udūl (persons of probity) without additional comments, or that he said: "They are 'udūl but have erred in their testimonies or they forgot", there are two possibilities:-

(a) The accused is a straightforward person who can be admitted as a judicial examiner of others’ characters. He did not deny the plaintiff’s claim but kept silent. After the witnesses’ testimonies were heard he just said: "They are 'udūl". Hence Abū Ḥanīfah and Abū Yūṣuf authorize the court to adjudicate according to the witnesses’ account without asking for their probity to be investigated, even in cases of ḥudūd and qisas where suspicion annuls the penalty. Because multiplicity of the judicial investigators is not a binding requisite in Abū Ḥanīfah’s and Abū Yūṣuf’s opinion.

However, al-Shaybānī propounds a more cautious opinion and asks the court to make further inquiries, though he accepts the given attestation of the accused but he emphatically stipulates multiplicity of attesters of the witness’s probity.\textsuperscript{84}

(b) The defendant should deny the plaintiff’s claim when asked to reply to the charge. If he is a trustworthy person and is eligible to inquire in witnesses’ probity, and when the court heard the witnesses’ testimonies, he just said that they were 'udūl, some Ḥanafī jurists contend that the above mentioned opinions in the first possibility also apply
here. Accordingly Abū Ḥanīfah and Abū Yūsuf allow the court to issue its verdict without ordering a judicial inquiry of the given witnesses' probity, however al-Shaybānī holds the opposite opinion as he insists on the initiation of this judicial inquiry.\footnote{85}

It should be noticed that the aforesaid Ḥanafī elaboration is exclusively operable in cases where the defendant is a trustworthy person who is legally eligible to commend others as reliable witnesses. Consequently the other defendants are legally excluded. Any accreditation or commendation made by these persons about the plaintiff’s witnesses’ characters is deemed null and void. Nevertheless the court should ask such defendants, "Are the witnesses veracious in what they have testified?" If they replied, "Yes" then this is legally a confession. If they said, "No", then the court would not adjudicate till the remaining requisites of legal testimonies are fulfilled.\footnote{86}

The defendant is not obliged to answer the court’s question "Are they veracious in what they testified for?" The reason is that if the response is affirmative, it will be regarded as an express confession about the disputed right. However, if he replied negatively, then the court should start its inquiry in the trustworthiness of the witnesses according to the antecedent principles. Thus the court’s questioning of the defendant as to the veracity of the witnesses is not a futile attempt as it may result in the extortion of a voluntary and valid confession which substantially reduces the judicial procedures as well as giving the court’s final verdict an extra strength because essentially the valid confession is the prime evidentiary vehicle in all legal disputes and prosecutions. Besides the above Ḥanafī detail gives additional credence to the judicial procedure of tazkiyah as it leads in many instances to the attainment of credible and valid confessions whereby the court simply dispenses with the testimony of witnesses or at least considers it as a secondary evidence in the subjudice case.
8. **Principles of Distinction between Inconsistent Accounts of Judicial Examinations of the Witnesses' Characters**

Al-Mawardî from the Shāfi‘ī school and the Ḥanafis presume that the final conclusions of the judicial examiners may either be:-

(a) **Consistent in attesting the witnesses’ probity.** Accordingly the court admits their testimony and proceeds in the case; or

(b) **Consistent in their proof of the lack of probity of witnesses.** Consequently the court rescinds their testimonies and ask for other witnesses, or

(c) **Inconsistent in their final assessments of the probity of witness, e.g. one proves it while the other proves the contrary.**

Apparently the inconsistency in the third hypothesis is a subject of dispute. The Ḥanbalis, Ḥanafis and Shāfi‘īs authorize the court to send a third inquirer for the same purpose so if this third inquirer proved the probity of witness, then the final court’s conclusion should be "The acceptance of the witness’s testimony due to the verification of his probity". By the same token if this third inquirer proved the witness’s improbity the opposite judicial rule should be held.

However if the additional judicial inquiry reached an impasse as when each one of the additional enquirers agrees with one of the former inquirers the aggregate reports show that two of them have proved the probity whilst the remaining two have proved the improbity. Hence, obviously we would be before antithetical recommendations. In this case most of Muslim jurists preponderate the report that proves the improbity of witnesses.

This opinion has been sustained by the following arguments:-
(i) The report that proves the probity of a witness depends essentially on his outward conduct, whereas the opposite report of lack of probity probes deeper in the witness's secret conduct. And since it is postulated that the investigation of secret circumstances is stronger than the outward ones, then the report of lack of probity should outweigh the other one. Moreover, this preferred report adduces additional facts that are apparently revealed to the inquirers who concluded that the witness was a reliable person.

(ii) The report of lack of probity of a witness, includes 'substantiation' of a fact whereas its counterpart comprises denial of knowledge of lack of probity. It is, also, firmly postulated that the substantiating evidence (dalīl muthbit) always overrides denial (al-nafy). Inasmuch as the commending inquirer simply denies that the witness has committed banned things, whereas the inquirer of the lack of probity proves these facts. Moreover, the latter says "I saw him doing so and so", whereas the former says, "I did not see or hear or know that he did so and so."90

Mālik put forward another method of solving inconsistent accounts, as he maintains that the court should admit the report of the most trustworthy inquirers due to the apparent dilemmas of admitting both inconsistent reports.91

Al-Mawwāq and Ibn Farḥūn quote al-Lakhamī (d.498 A.H.) the leading Mālikī jurist, who elaborates on this point by adding other criteria to put at the disposal of the court in its final assessment of the contrary accounts e.g. time, place, trustworthiness of inquirers.92

Al-Māwardī agrees with al-Lakhamī in cases where both reports were dated but the report of probity is more recent than its opposite one.93
However, Sahnūn expressly states that he would always outweigh the account of the blameworthiness of the witness even if it is filed by two persons when the trustworthiness account is reported by four witnesses who transcend their counterparts in terms of probity and veracity.94

Ibn Nujaym narrates a similar opinion and ascribes it to the leading Ḥanafī jurists.95

Nevertheless the precedence of the report of the probity of the witness can be legally valid in the following instances:-

(a) According to the Shāfi‘ī and Ḥanabī schools if the inquirer into the lack of probity says clearly: "I knew the cause of the witness’s blameworthiness but he repented and has redeemed his conduct."

(b) If the witness’s improbity is reported in a place and his probity was proved in another place.

(c) If both reports were dated but the probity report is found to be the latter.

(d) If the inquirers into lack of probity did not illustrate its cause.96

Evidently the above detailed criteria of how to distinguish between the valid report in cases of inconsistencies, give the court reasonable criminal powers, especially in grievous felonies, e.g. armed robberies, larceny, murder, adultery, etc. where, as frequently mentioned above, tenable uncertainties legally revoke the pending ḥadd or qisās penalty. Moreover it could be said that even in this subsidiary issue the defendant’s rights are fully observed as it is held that "the report of lack of probity of the inquirers often outweighs the opposing report that verifies the probity of witnesses. Thus the defendant enjoys a stronger possibility of evading the statutory ḥadd, qisās or even a minor penalty due to lack of reliable evidence."
This topic is relevant in cases where the witness's testimony is admitted as he is proved to be a trustworthy veracious person. Later he testified in a new dispute before another new court of law. In this proposition the following two possibilities are evident:

(a) The new law suit should be very near in time to the former one. Hence the majority of jurists authorize the court to admit the witness as trustworthy due to the former inquiry.\(^97\)

However, the Mālikī only endorse this opinion in cases where the witness is famous in terms of his probity and quality. However, unknown witnesses are to be scrutinized time after time till their probity becomes established, as Sahnūn argues. Ibn ʿArafaḥ (716-803 A.H./1316-1400 C.E.) concludes that Sahnūn's contention is the officially adopted and followed opinion in the Mālikī school.\(^98\)

The proponents of these opinions argue that people normally do not change in short periods of time, so there is no need for a new judicial inquest in the witness's character in the above given proposition.\(^99\)

(b) A long time has elapsed between the two cases. The Ḥanafis order the judge (presiding in the second case) to initiate a new inquiry according to the aforesaid steps and principles.\(^100\)

The Mālikī school roughly agree with the Ḥanafis, but only if and when the witness is not well known, and that one year should elapse between the two cases, and that he was not previously commended by many inquirers.\(^101\)

The Ḥanbalis prevalent opinion is fully in agreement with the above Ḥanafī and Mālikī opinion.\(^102\)
However, the Shāfi‘is and a minority of Ḥanbalis maintain that the court should content itself by the previous inquiry that proved the witness’s probity; inasmuch as it is presumed that probity is a constant quality as a principle unless the contrary is proved.  

Perhaps it could be said that renewal of probity inquiries, especially when a considerable period of time has elapsed between the two cases is more just, inasmuch as people’s conducts, moralities and attitudes are changeable.

10. **Duration of Proved Probity**

Muslim jurists have split into the following two camps in their treatment of this sensitive issue, namely:

(a) The first camp holds that a definite period of time should elapse, but they adduce different limits. Some Ḥanafis and some Shāfi‘is state that it is six months.

Nevertheless Ashhab says that it is five years, whereas Ibn al-Qāsim, from the Mālikī school, specifies a duration of one year.

Accordingly the court should order a new investigation in respect to the probity of witness if either of the above durations elapsed between the subjudice case and the former one when the (given) witness was first proved to be a trustworthy person.

(b) The second camp of jurists leaves the specification of the duration of the witnesses’ probity to the discretion of the court which defines it by the virtue of *urf (customs and social convention). This camp encompasses the majority of Ḥanbalis, some Ḥanafis and some Shāfi‘is.

Ultimately, it could be said that the second camp’s opinion that assigns the specification of the duration to the court’s discretionary powers is more reasonable and closer to
justice, because people differ greatly in their susceptibility to change. Therefore a fixed duration would not help the court in its efforts to reach the truth as to the veracity of witnesses and the authenticity of the allegation of the crime.

Al-Ḥaṣkafī, the prominent Ḥanafī commentator, holds that an authoritative body of the Ḥanafī jurists maintain that the witness’s testimony should be given under oath due to the practical dilemma of obtaining a proper tazkiyah. However, some Ḥanafis leave this judicial procedure to the court’s discretion.\textsuperscript{108}

On the other hand al-Mawardī reports that al-Shāfīī states that “it would be preferable to separate doubtful witnesses and to hear their accounts singley.”\textsuperscript{109} In this context al-Mawardī invokes Alī b. Abī Ṭalib’s judgement when he separated apparently suspicious witnesses and thereby he discovered their blameworthiness. Al-Mawardī further holds that this procedure should precede the registration of the witnesses’ identifications.\textsuperscript{110}

The judge has to exhort and warn the witnesses against perjury and false testimony as Alī b. Abī Ṭalib and some prominent judges used to do in their judicial inquiries.\textsuperscript{111}

Clearly it is necessary that the court must address the ‘legal impediments of testimony’, inasmuch as despite the ascertainment of the witness’s reliability, any legal impediment will very much impinge on the validity of his testimony. This in turn constitutes solid grounds for the defendant pleadings. Therefore this subject will be carefully studied in the subsequent chapter.
References: Chapter Fourteen

2. ibid.
6. ibid.
7. ibid.
10. ibid, also see Ibn Qudamah, al-Mughni, Vol.IX, pp.63-66.
13. ibid.
14. ibid.
45. ibid.
46. ibid.
53. ibid.


64. ibid.


77. ibid.


83. ibid.

84. ibid, al-Ṭārābulṣī, Muṭʿīn al-Ḥukkām, pp.86, 88.
85. ibid.
86. ibid.
99. ibid, also see Ibn Qudāmah, al-Mughnī, Vol. IX, p. 71.
106. ibid.

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110. ibid.
CHAPTER FIFTEEN - LEGAL IMPEDIMENTS FOR THE TESTIMONY OF WITNESSES (Mawāni' al-Shahādah)

1. Introduction

Certain factors, outside the conditions described in the previous chapters, prevent certain witnesses from giving testimony. Accordingly, Islamic criminal jurisprudence deals with this subject as being relevant to the general principles of legal evidence in its treatment of valid testimonies.

Al-Shaykh Mar'ī (d.1033 H.) from the Ḥanbalī school holds that the mawāni' al-shahādah (impediments of testimony) arise as a result of the following six cases:

I. Paternity between the witness and the plaintiff, or that the witness is wholly or partially a slave of the plaintiff.
II. Procurement of advantage by giving testimony.
III. Prevention of disadvantage by giving testimony.
IV. Hostility based on personal grounds and not for the sake of God or religious causes.
V. Bigotry, particularly when the person is renowned for bigotry.
VI. If the testimony has been previously rejected because of the impiety of the witness or for any of the above reasons and these reasons later were removed. However, a non-Muslim, the dumb, and juveniles are exempted from this restriction. Therefore these persons can be legally admitted later on if they have changed and fulfilled the required qualifications.

This is the general Ḥanbalī outline of this issue. These legal precepts and their parallel in the rest of schools will be aptly discussed below.

Also these exclusions from testimony are generally:
A. Tuhmah, sceptical relation between the witness and the plaintiff or that the witness is interested in having his account admitted, and B. Hostility between the witness and the accused, and C. Lapse of testimony in certain cases. These issues will be treated as follows.²

2. Tuhmah

This literally means that a special relationship between the witness and the plaintiff or the core of the case at issue causes reasonable scepticism in the veracity of the given witness’s testimonies. Muslim jurists further elaborate this tuhmah as encompassing the following three items:-

(a) Kinship between the witness and the plaintiff;
(b) The witness is interested in his testimony in order to obviate a detrimental result; or
(c) The testimony of the witness, if admitted, would procure advantage to him.

So either of these three items, when verified, seriously weakens the testimony and renders it inadmissible. On the other hand, these could be used by the defendant and be legally advantageous to him. Some discussions as to the validity of these three legal impediments took place as will be explained below:-

(a) Kinship between the Witness and the Plaintiff

This category includes paternity, matrimonial relations, and the rest of kin, and each one of these relations is debated as follows:-

(i) Parents and Offspring

There are four opinions in this respect:-
First: Most jurists consider the relationship between parents and their offspring as a legal impediment for
testimony. Accordingly no father or mother can testify on behalf of his or her offspring.\(^3\)

The proponents of this principle support it by the following different evidences:

The Prophet says "Testimony is to be precluded between father for his son and vice-versa, and wife for her husband, and vice-versa and a slave for his master and vice-versa and a hired person for his employer and vice-versa."\(^4\)

Muslim and al-Tirmidhi narrate that the Prophet says, "Fātimah is a part of mine. I would be distressed by whatever distresses her."\(^5\)

C. The Prophet also says, "No testimony is (lawful) by a suspected person (muttaham)".\(^6\)

The majority of jurists explain this Prophetic tradition by saying that suspicion may occur towards some persons by virtue of their special relationship which may reasonably suggest partiality. Therefore, their testimonies in these circumstances are presumed biased in law and prejudiced against the accused and to the advantage of the plaintiff. Moreover, the innate predilection of fathers and mothers towards their progeny is incontrovertible.\(^7\)

Second: Ahmad b. Ḥanbal contends that the testimony of offspring in favour of parents is valid but the adverse proposition is invalid. He invokes the Prophetic tradition: "You and your māl (property) belong to your father."\(^8\)

Ibn Qudāmah says that Ahmad b. Ḥanbal argued that this tradition ruled that the properties of the son were nominally at the disposition of his father. Accordingly if the latter stole it, he would be absolved from the hadd of theft as he would be assumed to be a person who stole his own property. Therefore this father cannot testify on behalf of his son because his accounts could be considered
to be advantageous to himself and this is a legal impediment.

Ibn Ḥanbal also invokes the Prophetic tradition "The very best thing one can eat is that which he earns, and verily your sons are among the best of your earning. So eat from their property."9

Al-Tirmidhī authenticates this tradition and accordingly it could be invoked as proof in this context.10

Therefore, Ahmad b. Ḥanbal inferred that the father's testimony on behalf of his son does imply an apparent suspicion. Thus it should be precluded, whereas this cannot be envisaged in the adverse situation. Therefore the son can testify on behalf of his father.11

Third: Ahmad b. Ḥanbal is also reported to endorse another statement that validates testimonies of parents and their offspring in support of each other in what does not induce any advantage or suspicion if these parties are totally independent persons.12

Fourth: ʿUmar b. al-Khaṭṭāb, Shurayh, al-Muzanī, the Zāhiris, and other prominent scholars diametrically oppose the first opinion as they unreservedly accept testimonies of parents and offspring in support of each other. They invoke the general connotation of the Qurʾānic verses that regulate testimonies of witnesses. The core of the witness's admissibility is his probity and trustworthiness; and parents and their offspring should not be discriminated against in this respect.13

Ibn al-Qayyim analyses the above disparate opinions as regards the admissibility of parents' and their offsprings' testimony, in support of each other. He gives the impression that the prohibition of such testimonies was made in the late eras, and earlier such ban had never existed.14
Ibn al-Qayyim finally concludes that the parents' and their offspring's testimonies should be admissible in favour of each other where there is no *tuhmah*. He ascribes this statement to ʿAbd al-Malik Ibn Ṭāhir al-Shāfiʿī who advocated also two more statements that are similar to the rest of opinions mentioned above.\(^\text{15}\)

However the majority of Mālikis accept the testimonies of both father and son when discharged at the same time in the court. This rule also applies to the attestation of either's judicial ruling by the other.\(^\text{16}\) However neither a father nor a son can attest the other's probity (*yuʿaddil*) before a court of law.\(^\text{17}\)

Al-Ramlī al-Shāfiʿī and a considerable body of jurists accept the testimony of parents against their offspring and vice-versa if they are not hostile witnesses.\(^\text{18}\)

The majority of jurists maintained that the parent can testify against his son and vice-versa.\(^\text{19}\)

(ii) **Fosterage Relationship**

Foster parents and sons, at whatever degree, are not included in the general ban of testimony in favour of each other, though matrimonial relations are banned for life, according to the Ḥanafis and Ḥanbalis.\(^\text{20}\)

These jurists argue that foster relationship only affects the conjugal ban but has no effect whatsoever on the principles of inheritance, maintenance or housing.\(^\text{21}\)

(iii) **Testimony of Spouses**

Conjugal relationship produced three distinguishable tendencies in respect to its effect on the testimony of spouses in favour of each other.
First: The majority of jurists consider the conjugal relationship as a legal impediment of testimony by spouses in favour of each other. They invoke the famous Prophetic tradition that precludes a husband from testifying for his wife and vice-versa.22

Second: The matrimonial relationship is not regarded as a legal impediment of testimony by spouses in favour of each other. Thus, each one of them can testify on behalf of the other one. This is endorsed by the Shāfi‘ī and Zāhirī schools as well as Shurayh, Abū Thawr, al-Ḥassan al-Ṭabarī, and it is one of Ahmad b. Ḥanbal’s statements. They adduce rational argument in support of this opinion, for they say that the conjugal relationship is a contractual tie which can be terminated at any time. In this respect, it is similar to the contractual relationship between the employer and his employee. Moreover al-Shāfi‘ī supports this opinion and argues against the argument that propounds inheritance as a major factor in precluding spouses from testifying for one another. Al-Shāfi‘ī also rejects the authenticity of the tradition narrated by the majority that precludes spouses from testifying for each other. He says, "I don’t find a cause in the spouse and the brother that allows me to reject their testimonies, neither tradition (khabar), nor analogical reasoning (qiyyās), nor rational deduction (maqūl).23

Third: Ibn Qudāmah and Ibn Rushd relate that Ibn Abī Laylā (74 - 148 A.H. / 693 - 765 C.E.) and al-Nakhī admitted the testimony of the husband for his wife but precluded the wife’s testimony for her husband. This differentiation is due to the suspicion that involves the wife’s testimony for her husband, since her increased welfare and maintenance may result in this testimony (in pecuniary claims which spontaneously involve all homicide cases not punishable by gisās, transgressions against properties not punishable by hadd of larceny, etc.). Whereas this doubt would be absent in the husband’s testimony for his wife. Al-Thawrī agrees with Ibn Abī Laylā in this regard.24
It could be argued that the majority’s preclusion of testimony by spouses in favour of each other is very reasonable due to the following considerations:

The Prophetic prohibition of such testimonies is given in many traditions.

Conjugal relationships generate mutual and reciprocal interests e.g. inheritance, maintenance, obedience and a close bond. Therefore each one of the spouses will eventually benefit from the other’s fortune and income. Hence a testimony in pecuniary claims, which are the most enormous part of judicial trials, will lead to the unanimously banned *tuhmah* (suspicion) in the witness’s genuineness.

This is further proved by the fact that the property of each is figuratively ascribed to the other as the Qur’ān says: "And stay quietly in your homes" (33:33). "...And fear Allah your Lord, and evict them not out of their houses ..." (65:1). These two Qur’ānic verses assign ‘the houses’ to the wives whereas these houses are intrinsically under the ownership of the husbands.

However, it must be noticed that in all the aforesaid cases of impediments of testimony, the persons involved can testify against those whom they cannot testify for. Thus parents and their offspring can testify against each other as can husbands and wives. This is because the Qur’ān explicitly commands when it says: "O ye who believe stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents or your kind, and whether it be (against) rich or poor, for Allah can best protect both ..." (4:135).
(iv) Testimony on Behalf of Brothers

The majority of jurists accept the testimony of brothers as they considered any *tuhmah* (doubt) as very tenuous in such testimonies.26

However, there is a famous Mālikī opinion which bans testimonies of brothers, especially in serious crimes e.g. murder, due to the innate likelihood of supporting one’s brother. Nevertheless, the Mālikis allow such testimonies when the following three conditions are satisfied:-

The witness should excel others in the attribute of probity and veracity.
The witness should be entirely independent of his brother and does not depend on his financial aid for his livelihood in any way.
The witness should not testify in a *gisās* case. Accordingly murder and bodily injuries punishable by *gisās* cannot be proved by the testimony of the brother of the victim in the Mālikī school.27

Thus, the Mālikis accept the other schools opinion that legitimizes testimonies of brothers when these conditions are satisfied. In this way the most considerable corpus of the criminal claims and prosecutions can be primarily proven by testimonies of brothers according to the prevalent Islamic opinion.28

(v) Testimonies of the Rest of Kinship

The majority of jurists accept testimonies by all the rest of kindred i.e. agnatic and uterine relatives no matter how close or remote they are in favour of each other as they maintain “there is a lack of doubt in such testimonies”.29

The admissibility mentioned above also includes the testimonies of friends in favour of each other as doubt about their evidence is remote.30
However, the Mālikis stipulate that a friend can only testify for his friend if the former is renowned for his probity and that he is not dependent on his friend with respect to his maintenance and livelihood.31

The Mālikis famous statement rules that six kinds of testimonies, exclusively need the highest degrees of probity of witnesses, namely: testimony for the brother, a manumitted slave, an intimate friend, a partner in disputes other than trade, alteration of testimony by increasing or decreasing its contents.32

Some Ḥanafis accept the testimony on behalf of the intimate friend with restrictions very similar to those stipulated by the Mālikis.33

Also the Ḥanafis and Suḥnūn from the Mālikī school do not regard the relationship of affinity as a legal impediment of testimony. Consequently, a man can testify for his wife’s mother or for his daughter’s husband. They argue that the relationship of affinity, similar to the foster relationship, only influences the ban of matrimonial ties. However, the majority of Mālikis oppose this Ḥanafi statement as they consider affinity as a legal preclusive cause of testimonies. Therefore, the husband cannot testify for his wife’s son and vice versa. Nor can the husband testify on behalf of his wife’s parents due to the doubt induced by affinity. Nevertheless, the Mālikis relax this rule outside the very close relationship of affinity. Accordingly, a man can testify on behalf of his wife’s brothers due to the lack of doubt due to the remoteness of the relationship.34

The above exposition of Islamic attitudes in regard to the witnesses’ relationship to those whom they are testifying on behalf of their closely related kin shows scrupulous and keen Islamic tendencies to guarantee safeguards for the defendants. Thus the latter enjoy additional means of
defence, particularly if the court’s proceedings follow the Mālikī legal preclusive causes against testimony.

3. **Prevention of Disadvantage (Daf’ al-Durr)**

This is one of the key preclusive causes against testimony, no matter how trustworthy the witnesses are. So the unanimous opinion is that any probable expulsion of disadvantage by the testimony renders it inadmissible due to the conspicuous doubt in the genuineness of the witness. 35

The majority of jurists invoke the Prophetic traditions that preclude testimonies of hostile and doubtful witnesses. 36

So the witness who contrives to alienate a detrimental result (or liability) by his testimony is legally considered as disingenuous; therefore jurists rebut his accounts by the same token as they do in respect of testimonies on behalf of parents, offspring, or spouses. 37

The following is a graphic example of the above maxim’s application: when the agnatic kindred of the accused impugn the witnesses in homicide cases not punishable by gisāq penalty. Because those kindred ultimately aim at absolving themselves from paying their legal shares of diyah - blood compensation payable to the victim’s family in homicide cases. By the same token, the defendant’s kindred former impugnation of witnesses can only be admissible if the subjudice case is murder punishable by gisāq or diyah because the Prophet expressly says ʿāqilah (the accused agnatic kinship) do not share in paying compensations in murder, confession, amicable settlement or a slave’s felonious damages.” 38

Consequently, and in conformity with this Prophetic tradition, confessed homicides and amicable reconciliations sulh of murders, manslaughters, and accidental killing warrant the accused’s family to discredit the plaintiffs’ witnesses because these cases when proved and sentenced
would not involve the accused’s family in the payments or any pecuniary obligations.39

In cases where the agnatic kindred are involved in paying the blood-compensations as in manslaughter and accidental killing; and the remote or destitute member of the ‘Agilah impugned the witnesses; divergent solutions were made: namely al-Mirdāwī al-Ḥanbalī states that the Ḥanbalis authentic opinion consistently disapproves of the mentioned objection because this objector may be involved in the payment of *diyah* if a closer agnate died or if he became opulent later on. Some Shāfī‘īs endorse the same opinion. But a group of Ḥanbalis and Shāfī‘īs, accept the above impugnation as being ingenuous and legally plausible because the agnatic kin in the given proposition is not liable to participate in paying *diyah* because he is a remote or a destitute relative.40

The leading Mālikī jurists propound the cases where the witness is biased against the accused in terms of an indelible stigma (which the witness suffers from and ardently wishes others to share him in his opprobrium, e.g. a bastard, a slave, a permissive wanton person etc. are deemed prejudiced vis-à-vis the defendant so their testimonies would be dismissed, in cases that relate to their respective stigmatic or disgraceful suffering.41

However Ibn Qudāmah vigorously opposes the mentioned Mālikī opinion as he narrates that the majority of jurists accept the testimonies of the illegitimate persons if they are qualified witnesses in all criminal trials, which include adultery and slanderous accusations of unchastity. This opinion is compatible with the Islamic ethos and fundamental precepts that render everybody only accountable for his own sins and crimes.42
This is one of the impediments against testimonies which is similar to the previous two. Accordingly the Muslim jurists unanimously debar such testimonies by the same previous Prophetic traditions that prohibit testimonies of the doubtful witnesses.\textsuperscript{43}

The following are some examples that can illustrate the mentioned principle:

(a) Testimony of the master on behalf of his slave, is apparently objectionable due to the fact that any advantages held on behalf of this slave would finally rest in the master’s hand. Therefore the latter is a doubtful witness and accordingly he is legally impeded from testifying in the given case.

(b) Testimony of the heir on behalf of his wounded kin from whom he will inherit before his wound is healed is rejected. The reason is wounding may result in the death of the relative and the witness would inevitably share in the ensuing diyah. So the witness would be virtually testifying on his own behalf. Thus he is regarded as a doubtful witness, whose testimony should be rejected.

(c) If the witness testified that a married relative, from whom he would be entitled to inherit had committed adultery (zina) or murder punishable by gisas when the accused was opulent, this testimony would be deemed doubtful, for the witness would eventually benefit if his relative is condemned to death for adultery or murder, as he will inherit all or some of his estate.\textsuperscript{44}

By the same token, if the indicted relative of the witness in the above examples is destitute, the latter’s testimony would be admissible because the legal impediment has gone, i.e. the witness would not benefit from his testimony.\textsuperscript{45}
Al-Ṭarābulṣī (d. 844 H.) from the Ḥanafī school propounds a controversial case where Abū Ḥanīfa’s famous disciples diverge. Three persons murdered someone; and two of them pleaded that the plaintiff (waṭṭ) has pardoned their third accomplice. Al-Shaybānī ruled that Their plea was valid inasmuch as the accused had attested someone else’s act. But Abū Yūsuf diametrically opposed al-Shaybānī and argued that the above plea was null and void inasmuch as the defendants intended to procure an advantage by their given testimony (i.e. the waiver of gisās penalty vis-à-vis themselves and having it changed to diyah). This was based on the fact that if this testimony proved to be veracious, then the gisās would spontaneously become invalid with regard to all the three accomplices. This is why Abū Yūsuf emphatically rejected their testimony about the third accomplice.46

Also, al-Shīrāzī and some subsequent Shāfiʿis propose that if two witnesses attested a pernicious wounding of their relative whose son is alive, their testimony would be admissible because, in this proposition, the witnesses are debarred from inheritance due to the existence of the victim’s son. Even if this son died after the judicial sentence is passed, the mentioned testimony would still be intact and irrevocable though the witnesses had become legal heirs and had gained benefit by virtue of their testimony. However, and by the same token, if the son died before the judicial verdict was announced, the testimonies would be forthwith rejected because it would inevitably lead to advantageous results to the witnesses, thus rendering them doubtful witnesses.47

5. **The Second Main Preclusive Cause of Testimony: Hostility**

Animosity between witnesses and defendants is a legally admissible preclusion of testimony equal to mutual or reciprocal interests between witnesses and plaintiffs, for
each of these possibilities induces conviction that the
given witnesses are motivated by hostility and should be
rejected.

The Prophet's clear ban of doubtful testimonies surely
encompasses hostile witnesses. He is also reported as
saying "The testimony of the doubtful and the enemy are
voidable"."^48

Also He says, "Hostile and malevolent testimony is null and
void (lā tajūz)."^49

The widely held opinion in this context that it is open
hostility that is regarded as a legal impediment of
testimony, inasmuch as the unknown inclinations are
irrelevant, because these tendencies are only known to God.
The Prophet says, "Some people will come at a later time who
are brothers outwardly but enemies (in their innermost
feelings)."^50

It is the temporal enmity that is intended in this regard,
whether this animosity were inherited or not.51

The Ḥanafis, Shāficis and Ḥanbalis propound the following
illustrative examples to the above specified hostility:

(i) Testimony of the victim of calumny and slanderous
   allegation of adultery vis-à-vis the slanderer;
(ii) Testimony of husband vis-à-vis his wife in an adultery
case;
(iii) Testimony of the murdered's relative vis-à-vis the
   murderer (in a subsequent case);
(iv) Testimony of the perniciously injured vis-à-vis his
   former injurer; and
(v) The victim of a highway robbery vis-à-vis the
   perpetrator."^52

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Ibn Taymiyyah (d.721 A.H.) also nullifies the testimony of the co-wife (darrah) in disputes that involve her co-wife (due to the natural presumable animosity between them).53

The witnesses in the above examples are presumed unreliable in the respective cases due to the incontrovertible temporal hostilities existent between them and their respective counterparts. However, religious enmities do not constitute legal preclusions of testimonies so, a Muslim can testify against a non-Muslim, and an orthodox (Sunnī) person can also testify against a heretic. The Shāfiʿis and Ḥanbalis contend that religion inhibits its adherents from transgressing its prohibitions.54

Ibn Taymiyyah holds that Muslims unanimously permit the punishment of the propagator of heterodoxy. This penalty varies between capital punishment and less severe punishments. Earlier scholars had condemned to death some heretics like al-Jahm b. Ṣafwān, al-Jaʿd b. Darhim, Ghaylān al-Qadarī and others. Furthermore heterodoxy that renders a person as a heretic is that which, according to the authoritative scholars, contravenes the Qurʾān and the Prophet’s Sunnah. It seems that Ibn Taymiyyah is one of the most rigorous opponents of the heretics and very much narrows the admissibility of these heretics as witnesses in all sorts of judicial trials.55

However, the majority of jurists acknowledge the testimonies of the heretics who are not dissipated or apostates. Nevertheless, those who calumniate the Prophet’s Companions are regarded as persons whose testimony is rejected. Also, the armed insurgents who shed their opponents bloods and destroy their property are inadmissible as witnesses.56

The Shāfiʿis have introduced a criterion that can help the court assess the existence of hostility between the concerned parties. They say that it is customary convention (ʿurf) that can really decide who is the hostile witness. Moreover it is he who abhors his opponent and wishes his
misfortune and laments his fortunes that can be considered as a hostile witness according to the Shāfi‘is classical jurisprudence.\[57\] The Mālikis furthermore dismiss the testimony of the bigot.\[58\]

This Mālikī restriction is accepted by al-Kāsānī, from the Ḥanafī school, as well as by an influential body of jurists. However, al-Kāsānī accepts the testimony of the impious witness provided that he is not a propagator of perversion or seduction. Besides, he totally bans the Rāfidis who admittedly calumniate the Prophet’s Companions.\[59\]

However, the Shāfi‘is only dismiss the testimonies of the sectarian partisans whose religious beliefs are unequivocally inconsistent with the Islamic ethos and dogmas, such as the Khattābīyyah who believe in the divinity of Ja‘far al-Ṣādiq (and their similitudes).\[60\]

On the other hand, Ibn Taymīyyah propounds a detailed account of the heterodox sects who should constantly be rejected and contested. He mentioned the Khārijis, Rāfidis, Murji‘ah and al-Qadarīyyah (and their sub-sects) as unacceptable witnesses.\[61\]

The Ḥanafis, notwithstanding their preliminary rejection of the heterodox’s testimony, explicitly admit the testimonies of the Rāfidis, Qadaris, and other sects except the Khattābīyyah sect, inasmuch as the former sects are not apostates whereas the latter are not Muslims, according to the Ḥanafī’s theological precepts. Hence, it is apparent that the final legal appraisal of the various Islamic schools of law of what is objectionable heterodoxy that flaws the testimony is very much affected by their respective theological beliefs and literature.\[62\]

Consequently, one may expect some legal conflicts to occur as when a Ḥanafī judge accepts either of the above-mentioned sect’s testimony and later on the judicial verdict is
subject to the scrutiny of a Mālikī, Ḥanbalī or Shāfiʿī court.63

Testimony on Behalf of a Hostile Defendant

As mentioned above, one can testify on behalf of his avowed inimical opponent on condition that there is no other legal impediment e.g. parentage, matrimonial relation, or advantage, or prevention of disadvantage via the very testimony.64

The Shāfiʿis, moreover, admit the testimony of the hostile person’s father or son, and testimonies made against them. The Mālikis diametrically oppose this opinion as they reject such testimonies, and moreover they even reject a Muslim’s testimony vis-à-vis a non-Muslim when temporal hostility exists between them.65

6. Lapse of Testimony (Taqādum al-Shahādah)

The court is legally bound to inquire thoroughly into preclusions of testimony. However, it is also asked to inquire in the dates of the crime and its proof. When this proof is the testimony of witnesses, the duration of time vis-à-vis these testimonies may prove to be a crucial factor in the subsequent judicial proceedings.

In this respect Islamic criminal jurisprudence presents the following two main tendencies:

First: The majority of Muslim jurists, namely the Mālikis, Zāhiris, Shāfiʿis, Zaydis and the Ḥanbalis prevalent opinion is that lapse of time does not impinge on the durability and validity of the testimony of witnesses or confessions pertaining to the issue whether it is a hadd, qisāṣ or taʿżīr case, because these means of evidence engender rights vis-à-vis the plaintiffs. Accordingly these persons are entitled to these rights whenever they are made manifest.66
However, in cases of *taqżīr* crimes where the public authorities enjoy the discretionary legal rights to pardon, mitigate or relinquish the penalty, lapse of time may empower the court to reject the testimony of witnesses when the public interest permits such a decision. Besides the Islamic criminal precepts do not include any doctrine that waives the penalties of *hudūd* and *qisas* due to the lapse of a certain period of time. Also the courts do not possess the right to waive, extenuate or pardon these penalties. Therefore their respective legal proofs would remain constantly sound and valid regardless of the date when these crimes were perpetrated.67

In this context Khalīl and some leading Mālikis dismiss the testimony of the witness who is extraordinarily eager to have it admitted, as when he voluntarily swears that he is veracious or as when it is proved that this witness is an eavesdropper. This is held no matter how long or near the lapse of time is.

On the other hand the above impediment is extended to the voluntary deposition of testimony that pertains to a specific private individual's right, without waiting for the court's summons.68

The Shāfiʿis accept the above stringent Mālikī doctrine as they expressly consider the *mubādir* (the keen voluntary witness) as unreliable and suspicious, regardless of the factor of time or dates. However, as mentioned before this ban would be ineffectual in cases where the concerned plaintiffs are totally unaware of the crimes in which they are legal litigants.69

It should also be noticed that crimes that violate God's right (e.g. adultery, larceny, wine-drinking and inebriation and the rest of *hudūd* felonies) can be attested in courts even before a law suit is filed and before the reception of the judicial summons, due to the seriousness of such felonies.70
These statements are based on two seemingly conflicting authentic Prophetic traditions. The first one reproaches one who testifies in the court before being asked to, while the second one complements one who voluntarily and expeditiously propounds his testimony before being asked to. Al-Suyūṭī and al-Nawawī solve the apparent paradox in the above traditions, saying that the reproach is intended for the obtrusive witness in cases where the plaintiff is fully aware of his legal rights and can easily do without this witness. On the other hand, praise and commendation are intended for the witness whose accounts are totally unknown to their legal claimants and these rights would inevitably lapse unless the witness make the plaintiff acquainted with. The latter includes the witnesses of hisbah who are the volunteers for looking after the general welfare of the society by enjoining good and forbidding evil.

So the factor of lapse of time as shown above may be irrelevant due to other considerations such as the very nature of the crime; whether it is an infringement of an individual's right or a God's right.

Secondly: The leading Ḥanafī jurists, al-Kāsānī, al-Marghīnānī and al-Sarakhsī, as well as the Mālikis, contend that the lapse of a relatively long duration of time does not affect the testimony that pertain to the individual's rights (ḥuqūq al-ḥibād) including all assault. This is also the generally endorsed tendency in the Islamic criminal policies. However, this doctrine also encompasses the proof of slanderous accusation of adultery (Qadhf) inasmuch as it is the only hadd crime that necessitates a law-suit before the witnesses can discharge their relevant testimony before the court, due to the intrinsic individual's right involved in this case. However, all the rest of hudūd crimes are affected by lapse of time when they are to be proved by testimonies of witnesses. Thus, the Ḥanafis unequivocally regard lapse of time as a legal impediment of testimony of witnesses in all hudūd cases except al-qadhf.
The advocates of this opinion argue that the witness in hudūd crimes has the option of resorting to the court according to the Qur'ānic text that obliges all believers to "... establish evidence (as) before Allāh ..." (65:2) and "... to stand out firmly for justice as witnesses to Allāh, even as against yourselves, or your parents or your kin ..." (4:135). On the other hand this witness may opt to conceal the incident and keep silent for the purpose of maintaining the culprit's reputation and integrity in accordance with the authentic Prophetic commandments: "Whoever protects (ṣatara) his brother's integrity and reputation, God will protect him in the Hereafter.

The Ḥanafis infer that in the above proposition if the witness kept silent for a relatively long duration, this means that he has opted to protect and maintain the culprit's reputation. But if this very witness later on attempted to disclose the issue by attesting it before the court, then he would be presumed as malevolent and malicious witness who is motivated by spiteful prejudices vis-à-vis the culprit.74

Thus this witness is regarded as muttaham (doubtful) according to the Ḥanafi school. As discussed above tuhmah particularly when it pertains to the genuineness of witnesses, impedes and invalidates their testimony.75

The Ḥanafis invoke ʿUmar's statement: "Those who attest a ḥadd, without doing so at the time this ḥadd crime is committed are actuated by malevolence. So they have no right to give testimony."76

However, the Ḥanafis do validate confessions of hudūd much earlier, due to the exceptional strength of confession vis-à-vis testimony of witnesses in respect to the veracity of the confessor.77
Ibn Abī Laylā (74 - 148 H. / 693 - 765 C.E.) holds that both confession and testimony are diluted by lapse of time and therefore become inadmissible means of proof.  

Abū Ḥanīfah and Abū Yusuf stipulate that in cases of wine-drinking, the smell of the intoxicant substance must be existent if the culprit is not visibly inebriated. Thus the lapse of time and smell impinge upon the verdict. However, al-Shaybānī disapproves of this statement, and therefore does not stipulate the presence of the smell of wine.

The duration of lapse of time is defined as one year whilst another opinion specifies one month as the utmost period. Abū Ḥanīfah leaves the specification of this period to the jurisdiction of the court whereby it assigns different periods according to the merits of each case.

It must be noticed that the Mālikis expressly debar the testimony when the witness was reluctant to testify in a reasonable time regardless of whether it is God's right or man's right which is violated. This rule is based on the presumption that earlier reluctance to give the testimony in such circumstances renders the witness as unreliable and suspicious as he may be later motivated by personal animosity, bias, or malice vis-à-vis the accused.

Moreover it should be reiterated that the majority of jurists disapprove of the Ḥanafis' opinion that lapse of time in ḥudūd trials is a legal impediment of testimony. In other words the majority of jurists, save the Ḥanafis, do not consider the lapse of time as a viable defensive plea for the defendant when his ḥadd offence is being proved by testimony of witnesses.

Notwithstanding the above mentioned impediments of testimony, there are controversial preclusive causes which were debated in classical jurisprudence. These additional impediments can be recapitulated as follows.
First: If the witness became a blameworthy witness before the court reaches its verdict in the case. Ibn ʿAbd al-Barr and Ibn Qudāmah maintain that the court should forthwith suspend its proceedings, and simultaneously reject the testimony of this witness.

By the same token the court’s verdict would be upheld if the witness became a blameworthy witness but after this ruling had already been passed. Therefore the witness’s character, conduct and social behaviour are under constant supervision.

Second: Loss of the witness’s credibility and trustfulness after the court pronounces its ḥadd or gisāṣ sentences according to the Ḥanāfī legal precepts. However, the rest of the schools do not agree with the Ḥanāfīs in this respect. Therefore the above case is not a wholly accepted impediment nor is it a viable defence for the accused according to the predominant opinion.

Thirdly: Death of witnesses is not a barrier to the subsequent adjudication when all the procedural steps were legally made, as the majority of jurists contend. However the Ḥanāfī school suspends the penalty of rajm (stoning to death) as a matter of caution and application of the doctrine of waiving ḥudūd penalties by viable causes or suspicion. It should be noticed that the predominant Islamic opinion disagrees with the Ḥanafī school in this respect. Therefore neither the death nor the absence of witnesses would preclude the adjudication or the implementation of any ḥadd (or gisāṣ) sentence.

Also it is noticeable that the second and third preclusive causes just mentioned have already been debated with the preclusive causes of gisāṣ and ḥudūd penalties, particularly according to the Ḥanafī school.

Thus when all the essential legal components of the preclusive cause of testimonies are proved to be non-
existent, this would further strengthen the authenticity and reliability of the testimony of the witnesses.

Nevertheless, the court, after the ascertainment of the meticulous and miscellaneous rules, must also ensure that the witnesses did not retract their testimonies before its verdict is finally pronounced. The retraction of testimonies may induce separate criminal liabilities vis-à-vis the witnesses. These may amount, in some cases, to murder or felonious damage, which in turn impinges upon the tenacity of the judicial sentence, and so renders it susceptible to rescission.
References: Chapter Fifteen

1. Al-Shaykh Marçf Ibn Yusuf, Dalîl al-Ťâlib pp.348-49
10. ibid.
12. ibid.
17. ibid.
21. ibid.
38. ibid.
39. ibid.
47. ibid, al-Shaykh Mar'i, Ibn Yusuf, Dalil al-Ta'lib, pp.347-49.
49. ibid, al-Shaykh Mar'i, Ibn Yusuf, Dalil al-Ta'lib, pp.348-49.
75. ibid.
76. ibid.
77. ibid.
78. ibid.
80. ibid.
83. ibid.
84. Prevention from giving testimony in court is thoroughly debated in positive laws, for example and for further discussion and comparison see: Cross & Wilkins, op. cit. p.100 et seq, D. Field, op. cit. pp.204-05, 226-30.
CHAPTER SIXTEEN - THE RETRACTION OF TESTIMONY AND ITS LEGAL CONSEQUENCES (al-Rujū‘ an al-Shahādah)

1. Introduction

The retraction of testimony may occur in all criminal prosecutions (as well as the civil trials), and constitutes an inseparable part of the general rules of the testimony of witnesses. This is why Muslim jurists have attached particular significance to this topic. When a given witness later retracts his testimony, key legal results will accrue vis-à-vis this very witness, the plaintiff, the defendant and, as in some cases, the judicial sentence itself. Therefore this subject will be tackled under the following sub-headings in order to highlight the grave judicial results.

Firstly: Rules of Retraction of testimony and its consequences when made by all the witnesses.

Secondly: Rules and consequences of retraction of testimony by representation.

Thirdly: Retraction of the reports of the investigators of the probity of witnesses.

Fourthly: Consequences of Retraction of the testimony of some of the witnesses and the quantities of compensation due.

These broad and key issues will be further detailed below.

Al-Kāsānī and al-Marghīnānī - from the Ḥanāfī school hold that "the legal retraction of testimony presupposes specific rules that pertain to the pecuniary liability of the witness as follows by: 1. mandatory indemnification for damage (or losses) incurred by the defendant, and, 2. rules that directly pertain to the witness himself."
On the other hand Ibn Taymīyyah encourages the witness to withdraw his testimony when it is proved to be erroneous; without impinging upon his trustworthiness. Besides, Ibn Taymīyyah concurs with the majority's opinion that precludes the court from going any further if this retraction is made before the judicial verdict is passed.2

Also, in this inceptive stage it may be appropriate to state that ṭuṣū (retraction) is linguistically antithetical to ḏhiḥāb (advancement or forward progress).3

Technically the Ḥanafis define it as the disavowal (nafy) what the witness has already established.4

The Ḥanafis, accordingly, regard the retraction of testimony as a practical revocation thereof.5

Ibn ʿArafah al-Mālikī, propounds an approximate definition as he includes even the suspicious statements appended by the witness to his account whereby this previous testimony becomes dubious.6

Hence Mālik says that in larceny cases if the witnesses avowedly say that, "We were deluded in our testimonies but we have now brought the real larcenist", Mālik nullifies both their accounts vis-à-vis both accused persons, and this conclusion is constant in all similar cases.7

Also, this retraction must be made in court and before the announcement of the judicial sentence.6

2. Formula of Admissible Retractions of Testimonies

The Ḥanafis argue that if the witness said: "I retract what I have already testified for" (rājāʿu ʿan mā shahidtu bihi) or any parallel sentence, or that he just said, "I falsely testified" (shahidtu bi zurīn) or "I lied in what I testified for" (kadhabit bi ḍmā shahidtu bihi), all these
formulas - and their parallel forms are authentic retractions of testimonies.9

The Mālikis, Shāfiʿīs and Ḥanbalis accept these formulas, but the Mālikis add that if the witness said "I doubted my testimony (shakakatu fiḥā), it is an admissible form of retraction that revokes the testimony.10

Nevertheless the Ḥanafis maintain that the mere disavowal of the former testimony after a judicial sentence is passed is not a legal retraction of testimony, therefore, this ruling would stand.11

However the Shāfiʿīs and Ḥanbalis maintain that if the witness did not articulate an unequivocal form of retraction, but only asked the judge to suspend transcribing the testimony, and he soon after, reiterated the testimony, the court should accept it because there might be some temporary doubt in the witness's memory which soon lapsed.12

However, unlike the Ḥanafis, the Ḥanbalī jurists hold that if the witness later on testified diametrically contrary to his previous testimony after a judicial decision has been passed, the latter would be deemed to be retracted.13

3. Requisite of Valid Retraction

The Ḥanafis assert that the retraction of testimony can only be legitimate when performed in a legal court whether this court is the court where the witness first discharged of his testimony or not.14

To sustain this requisite the Ḥanafis argue that retraction of testimony is a virtual rescission. Accordingly it has to be scrutinized by the same judicial authority. Besides retraction is virtually a sort of repentence from perjury and false testimony, therefore it should fully be commensurate to the regrettable act done.15
The Hanafis also argue that retraction of testimony outside the court is **null and void**. Accordingly no evidence will be legal in respect to this event. Nor can the court coerce the witness to swear an oath that he did not retract his testimony if the defendant alleged that he had done so.\(^{16}\) However, if the defendant alleged that the witness has recanted his testimony in another court which, accordingly, had imposed the statutory compensation on the witnesses then the defendant would be allowed to prove this allegation (which when established would be to his advantage).\(^{17}\)

The Mālikis, Shāfī'is and Hanafis narrate that the Prophet commented in a case where a witness had testified and later on retracted his testimony after a judicial decision was held: "His former testimony should be upheld and his second one is **null and void.**"

Jurists inferred from this tradition the viability of retraction of testimony before a judicial decision; and that the second testimony that contravenes an antecedent one that is corroborated by the judicial ruling is **null and void.**\(^{19}\)

Also it was widely reported that two witnesses brought a man to ʿAli b. Abī Tālib alleging that he committed larceny. Accordingly ʿAli held that ḥadd of theft and amputated the man's hand. The two witnesses later on brought another person saying that they were deluded and the second person is the real larcenist. Hence ʿAli reproached them and held: "I do not believe you vis-à-vis the second indicted (larcenist) and I command you to pay the diyah of the first man's hand (i.e. fifty camels). If I had thought that your former testimony was malicious, I would have amputated your hands."

Al-Sarakhsī comments: "That judicial decision is an inference that the witness's retraction is valid, and that by virtue of this retraction, he is fully liable to indemnify what his earlier testimony had brought about; and
that he is not to be believed in his second account, due to inconsistency." 19

4. The Legal Status of Retraction of Testimony

Ibn Nujaym (d. 970 A.H.) holds that retraction of (false) testimony is a highly commendable thing, inasmuch as shahādat al-zūr (perjurious testimony) is one of the great sins. He further says: "The spurious testimony and the concealment of the veracious testimony are the same in terms of the sins they produce. So if the witness willingly or erroneously gave a false testimony, it would become imperative on him to repent before a judge. No diffidence should ever preclude him from announcing his repentence and the denunciation of his former false testimony, for this act would compensate for what was done by the discreditable testimony." 20

Ibn Taymīyyah, exhorts the witness to retract his testimony if he suspected the contents thereof or when he discovers mistakes. This retraction will not impinge on the witness's trustworthiness. So this witness should not be regarded as a blameworthy person in that case or in future cases. 21

5. Legal Consequences of Retraction of Testimony

It should be noticed that the legal consequences of recantation of testimony differ in respect to the time when this act takes place i.e. before or after a sentence is passed and prior to or after a penalty is executed. On the other hand, these consequences also differ with regard to the number of the witnesses who retract their testimonies and the remainder. Also they differ in terms of the nature of the crime at issue. So it may be appropriate to treat these rules and the concomitant results of retraction of testimony according to the aforesaid broad lines:-
A. The Legal Consequences and Rules of Retraction made by all Witnesses before a Verdict is Issued

Muslim jurists unanimously state that if all the witnesses retracted their testimonies before a judicial decision is made, the court should not go further and, also should not entertain any verdict according to these testimonies; besides no indemnification would accrue vis-à-vis the witnesses.²²

Ibn al-Hājib (570-646 A.H. / 1174-1249 C.E.) the prominent Mālikī jurist says, "Retraction (of testimony) before the adjudication (qadā) precludes this adjudication."²³

However Abū Thawr (d.240 A.H.) disagrees and states that the court should not suspend its proceedings if the witnesses retracted their testimonies before the final verdict is announced. He argues that the testimony has been discharged in conformity with the law. Therefore it should not be abrogated as if this retraction had been made after the judicial sentence is passed.²⁴

However Abū Thawr’s opinion is apparently untenable for many considerations, foremost of which is that the court should not hold any decision based on a dubious evidence, particularly in hudūd and qisas cases, which presuppose the highest levels of authenticity in their means of evidence. Besides the similarity thought to be present between the retraction before and after the adjudication is a dubious analogy because most of the jurists admit that the adjudication is not revocable as a result of subsequent retractions of testimonies, as the judicial proceedings would be presumed completed according to the law. However, before a judicial decision is issued the case would still be investigated and the facts would still be scrutinized. Therefore there are no close similarities between the two propositions upon which Abū Thawr has based his opinion. Also, the retraction of testimony shows that the witnesses have lied in their former accounts which suffices to stop
the trial. Some Shāfiʿīs and some Ḥanafis warrant the court to penalize the retracting witnesses according to its discretionary powers. The majority of jurists hold the unanimous opinion that no adjudication should be made if the witnesses retracted their testimonies before such adjudication takes place, by the following argument:-

I. Retraction of testimony before adjudication causes the case to lapse due to inconsistency, inasmuch as the judge would not hold a ruling based on inconsistent accounts.

II. No indemnification would be due vis-à-vis the witnesses, because the testimony would not be hujjah (legal evidence), unless it agreed with the adjudication. Therefore this testimony would not induce damage, losses or disadvantages until a judicial sentence is based upon it. However, Al-Ramlī maintains that if the witnesses confessed the malicious intention of false testimony, they should receive a taʿzīr penalty, besides they are to be regarded as unreliable witnesses due to fisq (impiety).

B. The Legal Consequences of Retraction of Testimony after Adjudication and before Execution of Penalty

The judicial decision may be a hadd, qisṣās or a taʿzīr, or a pecuniary penalty. So, when the witnesses opt to retract their testimonies after such a penalty is adjudicated, the consequences would vary according to the type of the penalty adjudicated by the court and according to the following principles:-

First: In ḥudūd and qīsṣās cases no penalty would be enforceable according to the majority of Mālikis, Shāfiʿīs and Ḥanbalis. They sustain this principle by arguing that these penalties are revocable by shubuhāt and the retraction of testimony is one of the most salient and greatest suspicions. Accordingly no penalty for adultery, slanderous accusation of adultery, theft, wine-drinking (and inebriation) armed insurgence, brigandage, apostasy, or
murder punishable by capital punishment (according to the rules of *gisās*) can ever be executed in the given situation. Moreover, it is the defendant's right to make his pleas on the basis that the witnesses have already retracted their testimonies in the case he was convicted for. This inference further necessitates appealing against the judicial decision when the witnesses subsequently retract their accounts. Furthermore, the majority of jurists maintain that *gisās* and *hudūd* penalties when implemented are irredeemable, so they should not be enforced in the first instance. Besides, the inviolability of persons and bloods precludes the implementation of such penalties unless entirely free from any plausible suspicion.\(^\text{28}\)

Islamic criminal law imposes the *hadd* of *gadhf* (slanderous accusation of adultery) eighty lashes in case the witnesses of adultery retract their testimonies, Plurally or singlely. Moreover, the retraction of only one witness will still render the remaining witnesses liable to the mentioned penalty according to widely held opinion.\(^\text{29}\)

The Ḥanafis consistently hold fast to this principle even if the accused is put to death (by *rajm*). However Zufar disagrees as he totally exonerates the witnesses in the given proposition because he maintains that the *hadd* of *gadhf* is uninheritable.\(^\text{30}\)

But the *diyāḥ* payments will be due if the defendant is executed by *rajm* or if he died due to the infliction of the hundred lashes. Hence the retraction of testimony will not lead to the prescription of the same penalty.\(^\text{31}\)

Notwithstanding this stringency, the majority of jurists warrant the court to make the substitute penalty of *gisās* in murder cases i.e. *diyāḥ* (blood compensation) which is a pecuniary penalty that can be established and held even though there are suspicious circumstances shrouding the means of evidence. This is corresponding with the Islamic tendency in these cases where the levels of proof required
in pecuniary adjudications and trials are less stringent than that required in ḥudūd and qisāṣ prosecutions.32

Secondly: In cases other than ḥadd or qisāṣ trials the retraction of testimony and its legal affects on the consistency of the judicial decisions have elicited the following juristic opinions:-

(i) The majority of jurists hold that the judicial decision would not be repealed; therefore the blood compensations and all of the other pecuniary penalties should be executed; and the witnesses should indemnify all these payments to the (aggrieved) defendant, inasmuch as they were the principal (and sole) cause of these losses.33

The multitude of jurists strenuously contend that the judicial ruling in the above case should be irrevocable due to the following reasons:-

(a) This ruling is based on the witnesses’ testimony, so their subsequent retraction would be ineffectual and futile as it did not comply with its aim, i.e. the vitiation of the testimony before the judicial verdict is finally passed.

(b) If the witnesses said, "We have premeditated perjury and false discharging of testimony", they would consequently be deemed as Fasagah (dissolute witnesses). Therefore they are presumed suspicious in respect of their intention to repeal the court’s ruling. Ibn Qudāmah al-Ḥanbali makes an analysis of this proposition with two dissolute witnesses testifying that the retracting witnesses are dissolute. This would not dissuade the court from accepting the latters’ account."

(c) Also if the witnesses say, "We have erred" the ruling will still be intact because they may have likewise erred in their retraction.
Moreover the subsequent retraction induces inconsistency and as long as the court does not adjudicate according to a contradictory evidence, it also cannot countermand a judicial decision by an inconsistent evidence. Inasmuch as both the original testimony and its subsequent recantation are commensurable with regard to their veracity and trustworthiness; however, the original testimony outweighs its retraction because it has already been cohered with a judicial ruling.

Al-Zaylați (d.743 A.H.) further says, "This is analogical to the case where the witnesses testify that Bakr has murdered cAmr in al-Kūfah whilst two other witnesses testify that the murder has taken place in Egypt. These two accounts would definitely be rebutted before the adjudication. However after such an adjudication has taken place the relevant account would be irrevocable because it would be preponderated by its concomitant judicial ruling."

The Ḥanbalis, moreover, contend that the witnesses should indemnify the incurred losses adjudged by the court vis-à-vis the defendant according to their earlier testimony; as being solely responsible for the losses incurred. Thus the witnesses would have precluded the defendant from his property as if they had physically damaged it.

This conclusion would only be correct if the plaintiff did not corroborate this testimony. However, if he attested to the invalidity of the previous testimony, he should return or reimburse the losses incurred by the defendant due to his
acknowledgement that he has wrongly acquired his counterpart's payment without a valid cause.  

This means that the plaintiff's statements in the dispute carry weight in respect to the veracity of his witnesses so that his corroboratory or contradictory comments vis-à-vis his witnesses' testimonies may result in the abrogation of the ruling already held on his behalf.

The Mālikis rescind the judicial ruling if the witnesses' testimonies are later on proved to be false, e.g. if the alleged deceased person appeared, or when the alleged adulterer is proved to be sexually impotent or that he has had his penis severed (majbūh) before, etc.  

Furthermore the Ḥanafis justify that the onus of reimbursements should be required of the witnesses because of their firm principle that, "Causation of damage for the purpose of transgression prescribes indemnification" e.g. digging a well or placing a big stone in the street etc. Since the witnesses have caused the same results, they are to be held liable for the due remunerations.

Secondly: The Ẓāhiris, Saʿīd b. al-Musayyab, al-Awzāʾī, and al-Ḥassan al-BAṣrī contend that if the witnesses retracted their testimony after the judicial ruling has been pronounced this ruling should be countermanded even if the pecuniary penalty has been enforced.  

Saʿīd b. al-Musayyab and al-Awzāʾī argue: "The right (adjudicated) has been established by the testimony of witnesses; so if they retracted this testimony then the ruling's basis spontaneously vanishes. Therefore this ruling is to be repudiated."  

Ibn Ḥazm further sustains this opinion when he says "As for his withdrawal of his earlier testimony (this can well be depicted) if two trustworthy persons attested the witness's blameworthiness at the time he performs his testimony; the
court would be obliged to rebut this testimony. And since his explicit disavowal of his credibility (at the time of discharging of his testimony) is stronger and more veracious than the mentioned testimony of his blameworthiness; therefore the judicial ruling should be countermanded by the subsequent recantation of testimony."

Thirdly: The Ḥanafī school propounds the third opinion as far as the tenability of repealing the judicial ruling due to withdrawal of earlier admissible testimonies is concerned. This opinion scrutinizes the trustworthiness of the witnesses at the time of the retraction and regards it as a viable criterion. So it contends that if the witnesses withdrew their testimony after the judicial ruling is issued, there are three probabilities in regard to their veracity and trustworthiness:

(a) If they were more trustworthy and righteous at the time they withdrew their testimony, the judge should believe them and accept their retraction and accordingly rescind the judicial ruling.

(b) and (c) If their credibility at the time they retract their testimonies is equal to or less than that when they had earlier testified with respect to their probity, the Court should abide by their earlier testimony and it should not give any credence to this subsequent recantation of testimony. Therefore the relevant judicial ruling should remain intact. Besides no reimbursements should be held against these witnesses. This elaboration is endorsed by Abū Ḥanīfa's first opinion and his master Ḥammād b. Abī Sulaymān (d.120 H./738 C.E.).

Al-Sarakhsī explicates this opinion by maintaining that both the testimony and the subsequent retraction thereof are two reports (*khabar*), oscillating between veracity and mendacity. The veracity of either report can only be deduced from the real personal state of the witness as far as his probity is concerned. So if he was apparently more
truthful and righteous at the time of retraction, then the retraction would be more tenable and plausible than the previous testimony. Since the court only follows what is visible and sustainable (zāhir), then it should admit the retraction and abandon its previous testimony. However, if the witness's trustworthiness at the time of retraction is less than that at the time he first tendered his testimony, the court should disbelieve this retraction due to its flimsy credibility. But if the two states of the witness are proved to be commensurable, then the previous testimony will preponderate, inasmuch as it has preceded and furthermore was corroborated by the coherent judicial ruling. Besides nothing can be abrogated by its equal or lesser counterpart, but it is only revocable by what is stronger.43

Notwithstanding this late Ḥanafī opinion, al-Sarakhsī reports that Abū Ḥanīfah later on abandoned it, and adopted the majority view which precludes any subsequent revocation of the judicial rulings due to retracted testimonies. Abū Ḥanīfah said: "I will not countermand the adjudication (gada*), by the witnesses' second statement (retraction), even though they were more trustworthy and veracious than when they had previously testified. However, I would rather hold them responsible for the reimbursement of the pecuniary penalty to which they had attested."44

It may be claimed that despite the strong arguments of the second and third opinions held by Ibn Ḥazm, Ibn al-Musayyab, al-Awzāʾī and Ḥammād respectively, the opinion of the majority of jurists is more sustainable due to the following considerations:-

1. The claimant's case is established by the adjudication so it cannot be nullified by the witnesses' statement: "We have retracted our testimony" - or "we have withdrawn our accounts". This is further emphasized by the fact that when one's right is established, it cannot be relinquished or waived except when there is a legal confession or a stronger
evidence challenging the earlier one. And since the retraction is not a legal testimony nor is it a confession of the plaintiff which could abrogate his adjudged claim, then the relevant judicial ruling remains intact and irrevocable.

2. The assertion that the retraction of testimony is totally dissimilar to the proposition that the witnesses were discovered to be non-Muslims at the time of discharging of testimony because in this assumption the court discovers that its former ruling was based on a mistaken procedure as it was not established on the testimony of trustworthy Muslim witnesses. So Ibn al-Musayyab and al-Awzā'ī's analogy was incorrect because the basis of the judicial ruling is not discovered to be illegal, since the witnesses may be veracious in their testimony but have later on lied in their retraction.

3. On the other hand the pecuniary penalties e.g. blood compensations and *diyāh* as well as the rest of financial infringement are not analogous to *ḥudūd* and *qisās* penalties because the former claims can be established despite the existence of suspicious circumstances (*shubuhāt*) whilst the *ḥudūd* and *qisās* penalties can never be established when such circumstances do exist as has been frequently mentioned.

4. Moreover Ibn Ḥazm’s and al-ʿāṣrī’s opinion that abrogates the judicial ruling when the witnesses retract their testimony can be challenged by the fact that, though the retraction indicates that the witness impugns himself, we cannot determine whether he is believable in his testimony or his retraction thereof. Therefore we just reprieve the *ḥudūd* and *qisās* penalties because they are revocable by plausible suspicions and reasons (*shubuhāt*) whereas the voluminous corpus of crimes that span all the rest of criminal litigations can be proved by less stringent requisites. So they are judicially adjudicable and their judicial decisions would be intact even if the witnesses retracted their testimonies.
5. Furthermore, Ḥammad b. Abī Sulaymān's opinion, which warrants the revocation of the judicial decision according to the probity of the witness both at the time of delivering his testimony and when he retracts, is untenable, since it leads to the repetition of the judicial process of inquiring about the witness's probity time after time. Besides, the recantation of testimony is not a testimony in itself. Therefore it would be illegal to order such an inquiry when the witness retracts his testimony.⁴⁵

C. The Legal Consequences of Retraction of Testimony by all Witnesses and after the Penalty is Executed

The witnesses may recant their testimonies upon which the judicial sentence is based after this sentence is entirely, or partially, executed. So the major two consequences are that this sentence would not be abrogated and that the witnesses are to reimburse the penalty which has been decreed. Thus the plaintiff would be immune from such reimbursements vis-à-vis the defendant or his family. This tenet is held by the majority of scholars.⁴⁶

Al-Ramlī, Ibn Nujaym and others explicate that the above tenet of the irrevocability of the judicial sentence is due to the fact that the recantation is contradictory to the original testimony; and that the judicial rulings are irrevocable by the inconsistent accounts; besides the likelihood of the veracity of the witness's testimony has been confirmed by the issuing of that sentence. Moreover an established fact cannot be disavowed by a probable one.⁴⁷

On the other hand, holding the witnesses responsible for the ensuing reimbursements is attributed to the fact that they were the principal cause of damage or losses, and since "causation of undue harm or damage is one of the legal reasons for indemnification, the witnesses are fully susceptible to the onus of this principle.⁴⁸
6. Formality of Retracting Testimonies in Cases where a Hadd or Qisās penalty is Executed

As mentioned above when the indirect forms of murder were discussed, the defendant may be sentenced to death as a result of a false testimony. Therefore Muslim jurists add some details in the instances when the witnesses retract their testimonies after a sentence of death has been executed e.g. in murder, adultery,brigandage, apostasy. Accordingly they propound the following formalities in respect of the wording of the retraction of witnesses:-

(i) If the witnesses said: "We have deliberately testified against the defendant to have him executed"; they would be liable to the capital punishment according to the opinions of the majority of Shāfi‘is, Ḥanbalis, the Mālikis, Ibn Shubrumah, Ibn Abī Laylā, al-Awzā‘ī, and Abū ʿUbayd as well as the disciples of Mālik.49

Moreover the Ḥanafis and Mālikis put the entire liability on the witnesses of adultery even though there were witnesses of the marital status (iḥsān) who have simultaneously retracted their testimonies as regards the iḥsān of the adulterer. This is held even though the witnesses of iḥsān were essential for the penalty of stoning to death (rajm).50

However the Ḥanafī school and Ibn al-Qāsim disagree and instead of qisās they prescribe diyah (blood-compensation) in the given proposition.51

Al-Shāfi‘ī contends that the defendant's relatives have the options of qisās and diyah as they wish.52 The majority of Muslim jurists sustain the sentencing to death in the above proposition by the following argument:-

(a) Two witnesses brought a man to ʿAlī b. Abī Ta‘lib and testified that he was a thief. Accordingly ʿAlī had that man's hand amputated according to the rules of the hadd of theft. Later on they brought another person and said, "This
is the real thief, and we mistook the first for this man". At this 'Ali said, "If I had thought that you deliberately testified to the detriment of the previous defendant I would have amputated your hands. However you are to reimburse him for the loss of his hand". The proponents say that no one of the contemporary Sahābah objected to 'Ali's ruling. Thus, this ruling becomes an opinion held by the consensus of authoritative jurists (ijmā').

(b) In conformity with the rules of gisās the witnesses have contrived and conspired to cause the death of the defendant by a means that proponderately induces such a result. So they are fully liable to all the rigours of gisās.

(c) The witnesses have surreptitiously and maliciously coerced the judge to issue the death sentence. Therefore they would be legally responsible for this result as if they have compelled some one else to murder the defendant.

On the other hand the Ḥanafīs support their opinion that no capital punishment according to gisās rules can ever be entertained by the court if the witnesses regressed and avowedly confessed perjury, by propounding the following points:

(a) Despite the fact that the given testimony has really caused the death of the defendant, gisās is only adjudicable for murder perpetrated by direct means or methods gatlub mubāsharatan and not by causation (gatlubi al-tasabbub). Moreover, any indemnifications for transgressions committed vis-à-vis any person are legally subjected to the firm criterion of equality (musāwāh) between offence and reimbursement. Since there is no equilibrium between perjurious malicious testimony and the physical act of capital punishment according to gisās rules, then the only viable option before the court is the blood-compensation sentence instead of gisās. Therefore, as the Ḥanafī contend, there is no tenable analogy between false testimony.
and coercion as the majority of jurists argue, because the coerced person becomes legally a tool in the hands of the coercer therefore the ensuing felonies will be ascribed solely to the coercer, even in murder cases.55

(b) Moreover, al-Kamāl b. al-Humām (790-861 A.H./1388-1457 C.E.) the prominent Ḥanafī jurist, even denies the assumption that false and malicious testimonies are some of the methods of murder by causation, inasmuch as murder by causation should be accomplished by a method or means that predominantly leads to death. However, malicious and false testimonies are not capable of inducing this effect because the deceased relatives are exhorted to remit gisās. Thus the testimony becomes "a testimony not predominantly leading to gisās".56

(c) Furthermore, shubhah (suspicion involving one or more of the requisites of a hadd or gisās crime or its proof) prevents the penalty thereof. Therefore the retraction of testimony after the convicted is executed is not sufficient grounds for inflicting the same penalty vis-à-vis the witnesses.57

(d) Capital punishment according to gisās and hudūd rules is the ultimate corporal punishment which can only be prescribed vis-à-vis an ultimate offence, particularly in the realms of murder. Since causation (tasabbub) is relatively lower than the direct material act (mubāsharah) then causation should not be legally considered with the direct material act when they both conjoin or corroborate in fulfilling murder except when it is impossible to prosecute the person of the direct material act as in murder by coercion. Thus the suspicion of deficiency is logically established as regards the malicious and false testimonies. So they are not capable of being regarded as solid basis for a gisās verdict. Moreover gisās is not to be adjudicated in manslaughter and accidental homicide, though they were erroneously committed. Accordingly only the diyah would be envisageable, despite the fact that mistake is more serious.
and grievous than causation. Since a mistake only leads to a pecuniary penalty i.e. *diyah*, causation of homicide should be at least given the same legal status. Thus malicious and mendacious testimonies should never elicit a death sentence on the recanting witnesses.⁵⁸

Perhaps it could be concluded that inspite of the plausability of the Ḥanafis' opinion in prohibiting *gisās* in this matter, the majority of jurists' opinion that imposes *gisās* is a more sustainable one due to the following considerations.

1. ʿAlī's judicial ruling, which was unchallenged by his contemporary Companions unequivocally renders the mendacious witnesses legally liable to the penalty which has been inflicted on the defendant.

2. Causation of murder is not, in any way, less sinful or less atrocious than murder by direct material acts especially when the culprit confesses his malicious and malignant intent to cause death.

3. Moreover capital punishment according to *gisās* rules becomes imperative according to the key principle of *saddu al-dharaʿi* (closing of means and methods that are conducive to pernicious results vis-à-vis the individual and the society).⁵⁹

Therefore hostile and spiteful adversaries cannot resort to getting rid of their foes by means of murder by causation.⁶⁰

The aforesaid juristic controversies and argumentations as regards the proper criminal liability of the retracting witnesses in cases where a death sentence has been implemented also apply to theft where the amputation of hand has been carried out. Thus the Ḥanafis consistently reject adjudication of *gisās* for murder or bodily injuries no matter how malicious the witnesses are.⁶¹
Thus the first form of retraction of testimony conjoined with the explicit intention to cause the death of the defendant is covered. The remaining probabilities of retractions after the sentence of penalty is executed are less controversial as will be seen below.

(ii) The witnesses retract their testimony after the defendant has been put to death according to their testimony. However, they confessed that they have erred in their testimony or that they did not anticipate a death sentence would be passed when they were in a position that justified their ignorance. In this case a mere pecuniary penalty would be adjudicable in such propositions as the Islamic schools of law contend.62

(iii) If the witnesses recanted their testimony after the death sentence has been implemented but gave contrary or divergent explanations as regards their previous intentions, Ibn Qudāmah, and al-Shīrāzī as well as some Ḥanbalis and some Shāfiʿis argue that the following eventualities are detectable:

(a) One of the witnesses says, "We all intended (to cause the death of the defendant by our malignant and false testimony). However, the other one says, "We have all erred". Hence Ibn Qudāmah and al-Ramlī hold that the first confessor should be sentenced to death according to gisṣā rules and the second witness is to be held liable for paying half of the blood-compensation (diyāḥ) from his own financial resources i.e. the qāgilah would not participate in sharing because the homicidal case in this context is proved by confession. This conclusion is also held by the rest of Ḥanbalis and Shāfiʿis.63

(b) If each one of them said, "I maliciously premeditated the false testimony, but I do not know what my fellow's intention was", the Shāfiʿis and Ḥanbalis expound two opinions. The first of which prescribes the death sentence on each of the witnesses but the second opinion rules that
neither of them is liable to such a penalty inasmuch as each one’s confession cannot singlely be solid grounds for such a penalty. In addition, a person is only answerable for his own confession, therefore each one of the witnesses should not be held responsible by the terms of his accomplice’s statements especially in *hudūd* and *qisāṣ* cases.  

(c) If one of the witnesses avows his malicious premeditation, and simultaneously acknowledges his ignorance as regards his accomplice’s intention due to his death, lunacy, etc., hence no *qisāṣ* would be entertained by the court which should only hold the confessor liable for the payment of his share of *diyah* which would be half of the blood-compensation in case when the witnesses were two.  

(d) If each one of the witnesses says, "I premeditated the malicious testimony whereas my fellow has erred", or that the second witnesses says, "I have erred" only blood-compensation would be adjudicated in these propositions and will be allotted vis-à-vis each one in compliance with his confession’s essence and wording. But it should be noticed that the *ṣāqila* (agnatic kindred), of each of these witnesses would never share in the ensuing payments, because these *diyah* payments were established by the virtue of confessions and as mentioned above the Prophet has explicitly absolved the *ṣāqila* from sharing in the payments of *diyah*, when the accused confesses to homicide.  

However, in adultery trials, if the defendant was executed as a result of testimonies which were later on legally recanted, the Mālikis predominant opinion is that the witnesses are to be punished by the *hadd* of *gadhf* even if they enunciated their retraction before the sentencing of the accused. This is compatible with the Shāfi’is and Ḥanbalis opinions.  

Moreover, the retraction in the prementioned proposition presupposes the adjudication of *diyah* payment as a
recoupment for the defendant's life if he is executed by rajm.69

As mentioned above the retraction of witnesses after the pecuniary penalty held by the court has been implemented would not impinge upon the tenacity of the judicial ruling. Nor can it prescribe any reimbursements by the plaintiff. However it is the witnesses who are liable to pay the losses incurred by the defendant.70

As mentioned above, the Mālikis rescind the court's decision when it is proved to be based on a false testimony. So recoupment must be made when this decision results in undue payments or punishments.71

Nevertheless, al-Kāsānī holds fast to the doctrine of non-abrogation of the judicial ruling when the witnesses retract their account maintaining that the retraction of testimony does not render the witness as credible in this retraction for two reasons.

A. Retraction is equally susceptible to veracity and mendacity. However, the adjudication made was based on the testimony which was ostensibly trustworthy. Therefore the already verified ostensible matter would not be susceptible to something that is based on probability i.e. the retraction. Thus the judgement persists as valid.

B. The retracting witness is deemed as implausible (muttaham) vis-à-vis the plaintiff because the defendant might have tempted the witness to retract by bribe, intimidation, etc. Therefore this witness should not have his retraction legally validated due to the possibility of implausibility which precludes the initial acceptance of testimony. Likewise, this inhibits the legal admission of retraction. Subsequently the judicial ruling must not be repealed.72
As al-Kāsānī and al-Qarāfī hold, the above rules of retraction of testimony are compatible with the general tenets of Islamic principles of reimbursements which mainly prescribe indemnifications for default of contractual obligations, injuries and damage. Thus the testimonies when retracted are the main cause of damage or losses therefore it is the witnesses who are to remunerate such losses.

However, al-Shaybānī, al-Nasafī and the leading Hanafī jurists contend that in cases where the alleged dead person comes alive after his heirs have received the diyah from the defendant’s āqilah, the latter have the choice of recouping this diyah from either the witnesses or the plaintiff. If the defendant’s āqilah recouped the diyah from the witnesses, the latter can, in turn, recoup this payment from the plaintiff, because in this proposition the judicial ruling is proved to be wrong. Therefore any payments received by the plaintiff would be undue.

The majority of jurists, except the Hanafis, extend the above sanctions to both the presiding judge and the wa‘īl al-damm (the deceased relative who enjoys the right of gisās). So if either of them confessed the premeditated intention of false adjudication or implementation of gisās, then he would be liable for the gisās penalty. This is because both methods of legal judgement and implementation of the penalty are predominant forms of causing death. When conjoined with the criminal intention of murder, this renders the culprits answerable for murder punishable by gisās. Al-Ramlī and others hold this doctrine even if all the parties concerned unequivocally avowed the intentional causation of death.

7. Retraction of Witnesses of Pardon in Gisās (Murder) Cases

The plaintiffs in gisās cases enjoy the irrefragable right to pardon the convicted murderers on condition that they
should pay the *diyah* or any other sums of money accepted as a conciliatory settlement. This remission of the right of *gisās* has to be established and attended by witnesses.

Furthermore, al-Sarakhsī al-Ḥanafī contends that: in compliance with the general rules of retraction of testimonies, if this retraction occurred before the court issues the final verdict, this retraction would be of no avail. Accordingly, there would be no legal impediment of issuing a death sentence. But if the witnesses of *gisās* remission retracted their accounts after the court has passed the *diyah* sentence, the majority of jurists absolve the witnesses from any reimbursements vis-à-vis the plaintiff, whose right of *gisās* claim has been waived. The proponents of this opinion argue that the retracting witnesses did not damage any pecuniary property, nor did they cause its loss. They have just caused the plaintiff's loss of the right of *gisās* claim vis-à-vis the accused, and this legal right is not a pecuniary property nor has it any concrete or tangible value.78

Nevertheless, Abū Yusuf, Ibn 'Abd al-Ḥakam, the prominent Mālikī jurist, and Abū Ya'lā (380-458 A.H./990-1066 C.E.) the eminent Ḥanbalī judge, all contend that the witnesses are to be held liable for *damān* (reimbursement) if they retracted their testimony that attests the remission of the right of *gisās* after the court had ruled so. Abū Ya'lā argues that *gisās* penalty for murder may lead to a ruling of *diyah*, which is one of the two principal penalties of murder. Thus the witnesses of remission of *gisās* have virtually foiled the plaintiff's claim vis-à-vis both *gisās* and *diyah*. This is based on the opinion that murder is only punishable by *gisās* while *diyah* would not be unadjudicable if the *gisās* is waived by the remission, unless this *diyah* was claimed in the inception of the law suit filed by the plaintiff.79 Nevertheless, Ibn 'Abd al-Ḥakam says, "The witness has to pay *diyah* because the plaintiff is entitled to *diyah* according to one of Mālik's two statements."80
On the other hand Abu Yusuf strongly argues: "The two witnesses should *yadmanān* (remunerate *diyah*) to the *wali al-magtul* (relative of the victim i.e. murdered) because their testimonies have virtually caused undue forfeiture to the plaintiff, inasmuch as the murderer becomes the right of the victim's relative as far as the *qisās* is concerned. So the witnesses have foiled the right of *qisās* for the victim, which practically equals one thousand *dīnārs* or ten thousand *darāhim*, therefore they have to pay back this sum to the plaintiff."81

Al-Kasānī categorically rejects Abu Yusuf's former argumentation as he says, "This (i.e. Abu Yusuf's argument) is not sound because we don't accept the postulate that the person of the murderer becomes the right of the plaintiff, inasmuch as the plaintiff only possesses the act (of *qisās*) and not the place thereof (i.e. the person of the murderer) as it is well known from the questions of *qisās*. Therefore the witnesses' testimony of remission of *qisās* did not damage the person of the murderer nor did it induce loss of property. Accordingly, they are not liable for any legal recoupments."82

8. Retraction of Testimony Pertaining to Amicable Settlement in Murder Punishable by *Qisās*

The amicable settlements concluded in *qisās* cases fully absolve the murderer from the death penalty, as does the remission of *qisās*. Moreover, there is no limit for the amicable settlements between the plaintiff and the convicted murderer, so such contracts may exceed the limits of *diyah* i.e. one hundred camels or one thousand *dīnār* or ten thousand (twelve thousand) *darāhim* as the Hanafī and the rest of schools, respectively, contend. Also such agreements should be witnessed by trustworthy persons. So, if these persons testified that the murderer had pledged to pay one thousand *darāhim* to the plaintiff as an exoneration from *qisās* penalty and the court ruled accordingly, but later on the witnesses withdrew their testimony, the Hanafis
state that no reimbursement is required from such witnesses, as when they retract their testimony that attests the remission of gişâş. This rule applies whether the person making the denial is the murderer or the plaintiff.83

However, if the amount of amicable settlement (sulh) in the above case was more than the legal diyah, the witnesses would be obliged to pay back the excess, because they would have caused this extra quantity by their mendacious testimony. Therefore they have to compensate the murderer.84

However al-Sarakhsî and Ibn Nujaym argue that the subsequent disputes pertaining to the exact amounts of the pecuniary settlements, are to be settled according to the general principles of proof as do the subsequent retractions of such proof when presented by witnesses.85

Notwithstanding the above ھanafî details, they hold that if the witnesses attested the relinquishment of diyah in all homicidal cases or wounding payments and the court accordingly ruled exonerating the defendants from all these financial reimbursements, any subsequent recantation of such testimonies would inevitably render the witnesses fully susceptible to reimburse these payments from their own financial resources.86

9. The Legal Consequences of the Retraction of Testimony by Representation (Al-Ruju' ِAn al-Shahâdah ِAlâ al-Shahâdah)

As stated above, a subordinate witness (shâhid farî) can represent the original witness (shâhid asl) in conveying the testimony to the court and in all criminal conflicts according to the majority of jurists. On the other hand, the general rules of retraction of testimony also apply in cases of testimony by representation as far as the irrevocability of the judicial ruling and the burden of indemnifications are concerned.87
It is also unanimously accepted that the retraction of the principal (original) witnesses before the court's ruling is issued totally nullifies the testimony of the subsidiary witnesses.88

This rule is justified by the logical inference that if the asl is annulled, then its subsidiary (far) would spontaneously be abrogated.89

Nevertheless in cases the retraction from the earlier testimony occurs after a judicial verdict is pronounced one of the following three eventualities is expected:

(a) That the retraction was made by all the original and the subsidiary witnesses;

(b) That it was made by the original witnesses only; or

(c) That it was made by the subsidiary witnesses only.

Therefore these three probabilities would be discussed below as follows:

(a) **Retraction of Testimony made by the Subsidiary Witnesses only (Ruj al Far Wahdahu)**

This is the simplest eventuality in this context. Accordingly, it is these subsidiary witnesses who are to reimburse the losses incurred by the defendant, given that the court had ruled according to the testimony by representation, and that the original witnesses (usul) did not change their accounts. Besides, Muslim jurists argue that the losses incurred here are exclusively deductible from the subsidiary witnesses (fur). Moreover, it is they who practically testified before the court.90
(b) Retraction made by the Original Witnesses only (Rujūc al-Usūl Waḥdahum)

If the original witnesses disavowed their testimonies which had already been conveyed to the court by the subsidiary witnesses, given that the latter remained consistent and that the court ruled according to the latter's testimony. The Ḥanafis and Ḥanbalis present the following two opinions:

(i) Abū Ḥanīfah, Abū Yūsuf and the Ḥanbalis maintain that the original witnesses are fully immune from any legal reimbursements.⁹¹

Al-Marghīnānī and al-Kāsānī relate that Abū Ḥanīfah and Abū Yūsuf argue that the original witnesses' testimony is declared outside the realms of the court, when they first warranted the subsidiaries to bear witness, and it is a consistent principle that testimonies declared outside the court session, or any judicial jurisdiction, are not binding, nor can they be deemed as legal causes for any ensuing damage (or losses). Therefore no reimbursement can ever be claimed vis-à-vis the original witnesses because it is also well-known that both the discharging of testimony and recantation thereof should be exclusively made before a legal court. Al-Sarakhsī says: "We have demonstrated that the retraction of testimony outside the peripheries of judicial jurisdiction does not lead to imposition of remuneration (daman) upon the witnesses, so does the discharging of testimony outside such ambits."⁹²

Al-Sarakhsī continues: "And we don't say that the subsidiary witnesses are proxies of the original ones in conveying their information to the judge, for, if the latter precluded the subsidiaries from the formal discharging of the testimony, it would be a futile and fruitless preclusion if the plaintiff asked the subsidiaries to propound the testimony. So if the subsidiary witnesses were really proxies of the original ones, the latter's inhibitions would be heeded and would be legally effective. Moreover, the
role of the subsidiary witnesses is exclusively to attest the testimony of the principal witnesses and the attendant permission to bear witness. So if the subordinate witnesses attested the disputed right, which is the core of the testimony and the allegation, they would still be outside the realm of proxy, likewise if they verified the principal’s testimony."93

Thus al-Sarakhsi and the leading Ḥanafi authorities conclude that no reimbursements should ever be judicially prescribed upon the original witnesses if they retracted their testimonies, given that the subsidiary witnesses positively asserted their testimonies.94

The Ḥanbalis expound a parallel argument to uphold their opinion which agrees with the Ḥanafi opinion as they maintain that since the judicial ruling is based on the testimony of the subsidiary witnesses, the retraction of the original witnesses is legally ineffectual and has no consequences as regards the reimbursements, or the abrogation of the court’s ruling.95

(ii) Al-Kasānī, al-Marghīnānī, and al-Sarakhsi report that al-Shaybānī diverged from Abū Ḥanīfah and Abū Yūsuf and held that the usūl (original witnesses) in the given case are legally bound to reimburse the damages and losses incurred by the defendant if they retracted their testimony after a judicial ruling had been given.96

Al-Shaybānī argues that the subsidiary (farāʿ) witnesses do not attest their own cognizance of the disputed facts. They rather attest the knowledge of the original witnesses and the meticulous wording of the permission to transfer this knowledge to the court. Therefore when the subsidiary witnesses testify in the court, they will just be manifesting the accounts of the original witnesses, as if the latters have personally come and done so. Accordingly they are fully responsible for any subsequent retraction which renders them liable to pay compensation.97
Some of the Ḥanbalis adopt al-Shaybānī’s opinion and argument, especially when the original witnesses avowedly say, "We have lied" or "We have erred."  

Ibn Qudāmah justified this opinion saying that the judicial decision in the case at issue is based on the testimony of the original witnesses, inasmuch as if they were not trustworthy the court would not have accepted the testimony of the subsidiaries. Therefore the retraction made by the original witnesses entails their criminal liability.

Perhaps it could be said that the above two contrasting opinions provide the courts with a wide range of alternative choices and discretionary powers as each case of retraction should be examined on its own merits. If the malicious intent is visible in the original witnesses’ accounts, it would be a fair treatment if they were held liable to pay compensation if they had retracted their testimonies. Also the judicial procedure should specify the legal weight and depiction of testimony by representation and its various inherent rules which inevitably include the retraction of testimony by representation. Accordingly the process of designating the party who is to reimburse the losses in cases when the retraction is made by the original witnesses would be much easier and clearer.

(c) **Retraction made by both the Original and the Subsidiary Witnesses**

After a judicial decision is announced, the retraction of testimony by all the witnesses (i.e. original and subsidiary) has generated two conflicting opinions. Abū Ḥanīfah, Abū Yūṣuf and the Shāfiʿī school put the onus of reimbursements on the subsidiary (*furūʿ*) witnesses, exclusively. So nothing is to be prescribed on the original witnesses, because the testimony has intrinsically been discharged by the subsidiaries. The Shāfiʿīs, moreover, make an analogy of this case with the case of coercion or
the verification of the probity of the witness which legally oblige the court to admit the testimony thereof.  

Hence, al-Shaybānī expounds a more flexible opinion as he authorizes the defendant to choose between claiming the recoupment of his losses from either the subsidiaries or the originals, due to the fact that both parties are participants in testimonies by representation. Therefore both parties are equally answerable for the losses incurred by the defendant.

10. Disavowal of Warrant in Testimony by Representation (Inkār al-Ishhād)

The principal witnesses and their subsidiaries may not retract their testimonies neither before the adjudication nor after it, but the principal witnesses may simply repudiate their authorization of their subsidiaries. The majority of jurists hold that if such repudiation took place before the court issues its ruling, the testimony of the subsidiaries would be null and void.

However, if the principal witnesses just disavowed their previous authorization designated to their subsidiaries after a judicial ruling has been issued, the Ḥanafis, Ḥanbalis and a group of Mālikis contend that this judicial ruling remains intact and irrevocable and no one of the witnesses, whatsoever, is liable to pay any reimbursements. Because the given disavowal of authorization is not a legitimate retraction of testimony therefore it is incapable of impinging upon the court’s ruling.

However, Ibn al-Qāsim narrates that Mālik holds the opposite opinion as he contends that the judicial ruling in the given premise is revocable, inasmuch as the subsequent repudiation of authorization amounts to the retraction of testimony made by all witnesses concerned. Accordingly this testimony becomes entirely null and void. So the germane judicial ruling loses its legal grounds and has to be revoked.
Apparently the courts can favour either of these opinions when the case allows it, namely in ḥudūd and qisāṣ trials the court would be fully vindicated if it preferred Mālik’s opinion that rescinds the judicial ruling due to the subsequent repudiation of authorization, since the doubt generated in this proposition is incontrovertibly strong enough to repeal the ḥadd or qisāṣ penalty. However, in less serious cases which do not involve severe corporal penalties, i.e. tażīr cases, the courts may rightly be justified had they opted to choose the majority’s opinion that preserve the irrevocability of the judicial ruling, when the original witnesses disavow their preceding authorization to their subsidiary witnesses.

11. Retraction made by the Investigators of Probit of Witnesses (Rujūʿ al-Muzakkīn)

As mentioned earlier, no witness can ever have his testimony legally admitted unless his probity and trustworthiness is verified by the judicial investigators (muzzakkin). In other words those investigators’ report of commendation (taʾdīl) of a witness plays a crucial role in the subsequent judicial ruling. Therefore the majority of jurists hold that these verifiers, when retracting their report of the probity of witnesses, are to reimburse the losses held by the court vis-à-vis the defendant.106

This agreement of opinions encompasses all pecuniary penalties, e.g. blood compensations, or injuries, or tażīr, which virtually constitute the greatest segment of the penal jurisprudence and trials. However, discordant juristic opinions emerged in cases where the investigators retract their commendation (taʾdīl) after the capital punishment according to qisāṣ had been executed, Abū Ḥanīfah and his followers only prescribe diyah in this proposition as they even exonerate the witness who retracts his testimony after the defendant is sentenced and put to death.107
But the Shāfiʿīs most authentic opinion prescribes *qisas* on the investigators whether they solely retracted their account or were coupled by the witnesses, bearing in mind that the *diyah* will substitute the *qisas* ruling in this case according to the Shāfiʿī contention.\(^{108}\)

Al-Ramlī, also propounds the less accepted Shāfiʿī opinion in this context that fully absolves the investigators from both the *qisas* and the *diyah* penalties due to the fact that the relevant judicial ruling is based entirely on the testimony of the witnesses and not on the commendation report pertaining to the same witnesses.\(^{109}\)

However, Abū Ḥanīfah's contention that only imposes reimbursement on the retracting investigators of probity is justifiable by the fact that this report is commensurate to the legally admissible testimony in respect of reimbursements. Besides the testimonies of witnesses cannot cause any losses or damages unless the investigators positively verify the probity of witnesses. Therefore this verification really assumes the status of *ṣillat al-ṣillah* - (the cause of the cause), as regards the final outcome. Since it is a consistent tenet that the *ḥukm* (rule) should be ascribed to the effective cause of the cause, then it would be fairer to ascribe the losses generated by the testimony to the investigators of the witnesses' probity.\(^{110}\)

Ibn Qudāmah also argues: "The inquirers have falsely testified in their report by a method that likely leads to the death of the defendant, therefore they have to remunerate this loss as when the witnesses of adultery retract their testimony after the defendant has been executed."\(^{111}\)

Also al-Ramlī deduces the same conclusion but on the ground that the investigators of the witness's probity have indirectly coerced (*akrahū*) the judge to rule according to the witness's account. Therefore these investigators should be made to remunerate the ensuing losses or damages.\(^{112}\)
Notwithstanding the above arguments, the Mālikis, Abū Yūsuf and al-Shaybānī and Abū Ya'la and Abū al-Khaṭṭāb from the Ḥanbalī school and a minority of Shāfi'is, hold that no remuneration is exigible vis-à-vis the investigators of probity if they retracted their recommendation after the court had issued its ruling according to the testimony of witnesses.\textsuperscript{113}

The Mālikis, Abū Yūsuf and al-Shaybānī argue that the retraction of investigators of probity is equal to the retraction of the witnesses of married status (\textit{ihsān}) in adultery indictments, because these two accounts merely verify the good qualities of the persons concerned. Since there is no legal responsibility vis-à-vis the retraction of the witnesses of \textit{ihsān}, then the same rule should apply with regard to the retracting investigators of the probity of witnesses. However, Abū Ya'la al-Ḥanbalī categorically disapproved of the Ḥanafī argument that the verification of the probity is the effective cause (\textit{al-ʾillah}). He argues "No compensation is imposeable on the investigator (\textit{muzakkīn}) who verify the probity of witnesses, because their testimony is a condition (\textit{shart}), and not the obligatory evidence (\textit{mūjibah})".\textsuperscript{114}

The Shāfi'is absolve the \textit{muzakkīn} from any penalty due to their subsequent retraction, on the grounds that these persons just commend the witness’s character as a trustworthy person, therefore the \textit{muzakkīn}’s role is a very marginal one in the establishment of the crime and the penalty inflicted upon the defendant.\textsuperscript{115}

The Mālikis also have reached the same conclusion as they maintain that the damage caused is only ascribable to others, and not the \textit{muzakkīn}. Therefore, the latter have nothing to do with the ensuing reimbursements due to the defendant.\textsuperscript{116} The Mālikis hold the same opinion and justification in cases of retraction of witnesses of adultery and the witnesses of \textit{ihsān}.\textsuperscript{117}
Finally, it may be concluded that the first opinion that endorses the prescription of indemnification on the *muzakkīn* seems to be a tenable one, since these persons' reports are judicially essential in the assessment of the witness's credibility, especially when we know that *hudūd* and *gisās* penalties cannot be warranted unless the witnesses thereof are unequivocally proved to be trustworthy. But, no *gisās* should be adjudicated vis-à-vis these *muzakkīn* in cases where the defendant is put to death, unless these persons expressly confess that they had maliciously commended the witnesses with the intention of getting rid of the defendant by a legally effective means, i.e. a death sentence, that is based on their combined reports and the testimony of witnesses. This rule should be complied with only in cases where all of the witnesses and the *muzakkīn* collectively retract their respective accounts, as the Shāfiʿis maintain.

On the other hand, Abū Yūṣuf and al-Shaybānī as well as Abū Ya`lā can be opposed by the fact that the *muzakkīn*'s recommendation is the key reason for the admissibility of the testimony of witnesses and it is unlike the testimony of *iḥsān* in adultery cases, because *iḥsān* is a conditional requisite *shart*, for a specific penalty and not the cause (*sabab*) of this penalty. Therefore the two issues are not analogous either in nature or in their respective judicial weight and significance as regards proof and the retraction of evidence.

Therefore the general Islamic tendency in this context maintains that the intrinsic factors of any judicial sentence, should be assessed according to their role in this sentence both during the trial and in the case of retraction after this judicial sentence is implemented. Hence the Islamic rules of *damān* (indemnification), really do have a judicial role to play in cases of retractions made by the *muzakkīn*. A matter of undisputed relevancy is being debated here, namely: the retraction of the witnesses of *iḥsān*, when the defendant was put to death (*rujima*) in an adultery case.
Hence the majority of jurists propound the aforesaid opinions and rationale as regards the liability of the witnesses of *ihsān*. Therefore these witnesses are to be exonerated from all criminal liabilities because the judicial sentence is primarily based on the testimonies of the witnesses of adultery and not on the accounts of the witnesses of *ihsān*. Besides, these witnesses are similar to the *muzakkin*, because all of them have only recommended the defendant and the witnesses respectively.\textsuperscript{119}

Al-Shirāzī reports another opinion in the Shāfi‘ī school which holds the witnesses of *ihsān* as fully responsible and utterly liable to indemnify the death of the defendant in the above case by sharing in paying the blood-wit with the other four witnesses.\textsuperscript{120} On the other hand the Hanafis unanimously absolve the witnesses of *ihsān* from all criminal liabilities as the rest of scholars hold.\textsuperscript{121} However, the Ḥanbalī school agrees with some Shāfi‘īs in holding the witnesses of *ihsān* as fully responsible for the death of the accused in adultery trials. So these witnesses share in paying the *diyān* if the defendant is executed.\textsuperscript{122} This ruling is based on the fact that the *ihsān* fact when proved is essential in the death sentence passed on the defendant.\textsuperscript{123}

It can be said that the aforementioned legal discrepancies show to what extent the witnesses are responsible for their testimonies, as well as the investigators of probity and *ihsān*. This fact has to be appreciated in conjunction with the legal and moral duty of those persons in the discharging of their testimonies when summoned to the court to do so. Thus they will be responsible for discharging their evidence and secondly for bearing the consequences thereof if they are discovered to be untrue or retracted their testimony after a penalty had been executed.
12. The Judicial Consequences of Retraction of Testimony made by some of the Witnesses (Rujūʿ baʿd al-Shuhūd)

It is possible that not all the witnesses involved in the case should retract their testimonies, due to different reasons and incentives. However, the general rules governing the retractions of all witnesses in the given cases roughly apply in cases where one of two witnesses retracts his evidence according to the following detail.

If this retraction is made before the court's sentence is announced, the judicial decision should be forthwith suspended due to the lapse of the testimony of the retracting witness and due to the lack of the required number of witnesses. This proposition is applicable in ḥudūd with the exception of adultery cases and all qisās cases. However, if the witness retracts his testimony after a hadd or qisās sentence had been issued, these penalties should be immediately withdrawn, due to the grave suspicion surrounding the relevant evidence thereof. However, a substitute pecuniary penalty may be adjudicated instead, as in homicide cases a diyah may be laid down by the court.

Finally, if the witness retracted his testimony after a hadd or qisās penalty had been executed, e.g. amputation of hand in theft or execution of the defendant in a murder case, then this witness would be subjected to the terms and significance of his retraction. So if he voluntarily confessed a premeditated intention of murder, then he would be liable to a qisās penalty as held by the Shāfiʿī and Ḥanbalī schools; however, the Ḥanafis only impose a heavy diyah in this very proposition.124

However, if the court passed a pecuniary penalty, the witness would only be answerable for his share of the losses incurred by the defendant. So in the above hypothesis, the retracting witness would only be liable for compensating half of the diyah.125
Hence it is extremely important to confirm the widely accepted and applied maxim in this context, namely: "In pecuniary judicial sentences, even in criminal trials, the quantity of indemnifications imposeable on the retracting co-witness depends on the number of the remaining (persistent) witnesses. Thus a superfluous witness's recantation is of no legal consequences as long as there remains a legal quorum for the testimony."\(^\text{126}\)

The Ḥanafīs' maxim in this context rules: \(\text{daman}\) (indemnification of damage and losses) is commensurable with the damage done \(\text{itlāf}\)."\(^\text{127}\)

These precepts are operable throughout the vast realms of criminal and civil prosecutions that presuppose compensation for undue losses or damage. Because essentially the deposition of testimony is regarded as one of the various means of damage and criminal acts when the intent to cause such harmful results is proved.

Also, Muslim schools of law have put forward numerous juristic solutions to the questions of retractions made by some of the witnesses after the capital penalty based on \(\text{gisās}\) or \(\text{hadd}\) regulations has been implemented.

So they postulate that:-

A. If there are only two witnesses who proved the murder offence, but one of them retracted his testimony after the defendant had been convicted and executed, the majority of the Mālikis, Shāfi'is and Ḥanbalis hold that an equivalent \(\text{gisās}\) penalty is adjudicable vis-à-vis this witness. This rule of course is dependent on the express avowal of premeditated intention of murder, in addition to the complete fulfilment of the miscellaneous requisites of \(\text{gisās}\) discussed above.\(^\text{128}\)

However, al-Marghīnānī and al-Kāsānī propound the Ḥanafī opinion which insists on the prescription of half of the
diyah upon the witness's own financial resources in the proposition at issue, no matter how avowedly the witness later on pronounces his premeditated malice for causing the accused's death via the false testimony. In fact, the Ḥanafi school never contemplates sentencing a retracting witness to death in any cases where capital punishment has been implemented on the wrongly convicted defendant, on the grounds that such penalty is waiveable by any viable shubhah (suspicious circumstance).

B. If the plaintiff's witnesses in the above case were more than two witnesses, where only two witnesses were the required minimum judicial number, and the superfluous witness retracts his testimony after the sentence of death has been carried out, Muslim jurists provide us with the following two juristic opinions as regards the legal liability of the retracting superfluous witness:

(i) The majority fully absolve this witness from all penalties, i.e. qisās and diyah. They hold this opinion even if this witness conspicuously avows the malicious intention of causing the death of the defendant. The proponents of this statement sustain it as they argue that the remaining witnesses legally suffice to prove the case at issue. Therefore, the superfluous witness's testimony and retraction thereof bear no judicial significance, especially when it is determined that the dividend of indemnifications is constantly settled according to the factual damage or losses incurred. Besides, as a matter of principle, judicial decisions are always delimited and evaluated in correspondence with their ʿillah (effective causes). Therefore the majority of Muslim jurists conclude that in such similar cases: priority is consistently given to the number of the remaining witnesses, and not to those who recant.

(ii) Nevertheless, the Ḥanbalis, al-Muzanī, the disciple of al-Shāfiʿī and a host of jurists hold that the retracting witness is fully responsible according to the terms and
implications of his own recantation of his testimony, no matter how many witnesses uphold their testimonies. Consequently the superfluous witness is legally liable for *qisāṣ* or heavy pecuniary penalties in the given supposition.\textsuperscript{134}

Al-Mirdāwī al-Ḥanbalī expounds this statement saying that Ahmad b. Ḥanbal says, "If four witnesses proved the *qisāṣ* claim which is held and executed, but one of them later on retracted and said, "We had maliciously intended his death", *qisāṣ* would be held vis-à-vis this witness. If he said, "We have erred", then he is to reimburse one quarter of *diyāh* to the deceased relatives. So the same rule applies if two witnesses later on retracted their testimonies". Al-Mirdāwī further comments applying the same rule in adultery cases. "If six persons proved the adultery accusation and thereby the accused was put to death, but one of them recanted his evidence, he would be susceptible to the *qisāṣ* penalty or the payment of one-sixth of the *diyāh* according to the terms of his disavowal of testimony; likewise if two witnesses did the same act." He concludes "It is the endorsed statement of our school which is sustained by the majority of our adherents."\textsuperscript{135}

Ibn Qudāmah vigorously supports this Ḥanbalī opinion by propounding the following argument:

First: The damage done is made by the virtue of the aggregate and cumulative testimonies of witnesses, so the retracting witness does implicitly profess the participation in premeditated murder as if he confesses to illicit collaboration to cause direct murder. Therefore the magnitude of guilt is equal in the two propositions.

Second: Moreover, the retracting witness, though superfluous in regard to the required number of witnesses, is still factually one of the witnesses whose testimonies have induced the death of the defendant. Hence he actually
resembles both the second witness of *qisas* and the fourth witness of adultery.

Third: Emphasis is persistently being made to the cumulative aggregate number of witnesses in the case at issue, no matter how numerous or few they are. The Shāfiʿis have a similar opinion and rationale as detailed by al-Nawawī.

Perhaps it can be held that despite Ibn Qudāmah’s tenacious argument, the majority opinion is more tenable and sustainable as it primarily emphasizes the remaining number of witnesses and the compatibility of this number with the required standard of proof. So the superfluous witness’s recantation of his previous testimony is ineffectual as long as his co-witnesses satisfy the required legal number of witnesses (*al-nisab*). However, it may be more equitable to impose a *taẓīr* (discretionary penalty) on the recanting witness, particularly when he voluntarily confesses to the premeditated malicious intent of causing illegal losses or irreparable damages vis-à-vis the accused, and he has attempted to undermine justice and wasted the court’s time and efforts. As far as Ibn Qudāmah’s argument is concerned the following points may match and rebut his rationale:

First: The *qisas* punishments are only to be made when no viable suspicious circumstances whatsoever are involved. Besides, the alleged parallelism between the retracting and the persistent witnesses is legally and logically incompatible, inasmuch as the persistent witness does not confess causing murder, etc., and his persistence is a strong presumption that he is veracious in his testimony.

Second: The Ḥanbalis statement that the recanting witness is one of the witnesses whose cumulative testimonies have lead to the death of the accused, thereby resembling the second witness of *qisas* (for murder) and the fourth witness of adultery, cannot rightly be postulated. Because the recanting witness is basically a superfluous witness who can
be disposed of at the outset of the trial without violating the validity of the subsequent judicial proceedings, whilst, the second witness in a *qisâs* trial and the fourth witness in adultery cases are indispensable witnesses whom the court cannot do without at any time. Consequently Ibn Qudâmah's analogical deduction is proved to be untenable.

Third: When the Ḥanbalis postulate that "the recanting witness is one of those whose testimonies aggregately have conduced damages and losses incurred by the defendant and therefore he is responsible for his share of indemnification as when all of the witnesses collectively retract their testimonies, this is a contentious opinion, because the retraction made by all of the witnesses certainly enhances the probability of their veracity in their retraction. So, they would be equitably treated by the prescription of reimbursements. But the retraction made by some of the witnesses at the time the remaining ones steadfastly persist with their former testimonies, strengthens the veracity of the persistent witnesses and, simultaneously, betokens the mendacity of the recanting witnesses.

Therefore, the two Ḥanbalî postulates are not apparently congruent, so no analogical reasoning can be correctly made; nor can an authentic induction be inferred as the accepted principles of analogical reasoning rule. Subsequently, the majority's robust statement can be proved to be a tenacious and a reasonable one. Therefore, preference should be given to the number of the remaining persistent co-witnesses; no matter how numerous the regressing ones are.

13. The Judicial Quantification of Indemnities when some of the Witnesses Retract their Testimonies

Muslim jurists give differing assessments as to the specific amount of remuneration due for the defendant or his family when some of the witnesses retract their testimonies after a *qisâs* or *diyâh* penalty is executed. Accordingly the following cases may help explain the general tenors of
Islamic criminal jurisprudence as far as the quantities of indemnifications are concerned.

First: If two witnesses attested manslaughter or accidental killing and the court held *diyāh* vis-à-vis the defendant but after exacting this financial penalty one of the witnesses later on retracted his testimony, this witness would be asked to pay back half of the adjudicated *diyāh* to the defendant as the majority of jurists unanimously maintain.138

However, it should be observed that the Ḥanafis, Mālikis and Shāfī’is base the mentioned opinion on the fact that there still remains one witness who legally establishes half the adjudicated right and therefore the other half should be compensated by the retracting witness.139

According to Ibn Qudāmah, the Ḥanbalis, though they impose the same quantity of reimbursement (*damān*), do so on the grounds that such reimbursement should be divided equally between the aggregate number of the witnesses whose accounts were initially accepted by the court. Accordingly, the Ḥanbalis contend that the retracting witness must reimburse his share of the losses incurred by the defendant, whether he solely retracts his testimony or that his co-witnesses do the same.140

Al-Ramlī maintains that the Shāfī’is endorse a similar doctrine whereby the quantity of indemnification (*damān*), will be invariably decided by the total number of witnesses involved, no matter how numerous they are; and regardless of the number of the remaining persistent witnesses.141

Therefore, the above Ḥanbalī criterion is also operable in the Shāfī’ī judicial assessments of indemnification in cases of retractions made by the superfluous witness(es).142

The fundamental juristic difference in this respect is that the Ḥanbalī school even endorses the death sentence on the retracting malicious superfluous witness(es) even if the
remaining witnesses are legally sufficient to prove the crime. This opinion is contested by the rest of schools, especially the Ḥanafī school.\textsuperscript{143}

Ishaq b. Mansūr (d. 251 A.H.) narrates that Aḥmad b. Ḥanbal says: "If a man had testified but later on recanted his testimony after a pecuniary damage had been caused by his testimony, he would be legally liable for indemnities according to the total number of witnesses involved. So if they were two, he would be liable for half of the compensations. If they were three, then the retracting witness is to remunerate one third of the aggregate losses and so if they were ten, he has to pay one tenth of these losses whether he retracts singly or all of the witnesses collectively recant their testimonies, no matter whether the retracting witness (or witnesses) is the superfluous number or not."\textsuperscript{144}

Second: The above essential juristic difference will be clearer when four witnesses attest a homicide case punishable by diyah and one of them retracts after this diyah was paid, he would be liable for one quarter of this payment according to the Ḥanbalis' opinion, because he is one of the four witnesses who caused the losses incurred. However, this very witness would be fully immune from such indemnity according to the majority of jurists, inasmuch as the remaining witnesses do fully establish the disputed right.\textsuperscript{145}

By the same token, if two witnesses recanted their testimonies, they are to reimburse half of the diyah as the Ḥanbalis contend, but the rest of the schools would still totally exonerate them from this payment. However, if three witnesses regressed, they would reimburse three quarters of diyah according to the Ḥanbalī contention but these very witnesses are only to pay half of the diyah as the rest of schools contend because the remaining witness establishes the other half.\textsuperscript{146}
14. Quantity of Indemnities in Cases of Male and Female Co-witnesses

As discussed above, a great number of cases of criminal prosecutions are proveable by the combined testimonies of one male and two females. This specifically incorporates all claims that do not involve hudud or qisas penalties. Therefore, Muslim jurists tackled the envisageable instances of retraction of testimony in such litigations and adduce the following cases to clarify their respective opinions and arguments.

(i) If a male and two female witnesses proved a homicidal case where diyah was decreed and paid by the defendant, but later on the male witness retracted his testimony, he is to pay half of this diyah to the defendant because the other half is still intact and durable by the persistence of the two female witnesses as is unanimously held by all the schools of law. By the same token, the two female witnesses would reimburse half of the diyah, if they retracted their testimonies, each one of them being liable for one quarter, inasmuch as the residue is still preserved by the remaining male witness. However, if the male and one female witnesses retracted their testimonies, they would be liable for three quarters of the diyah, one half is to be recouped by the male and the remaining quarter is to be paid by the female co-witness, as the majority of jurists contend.

(ii) If the above case was proved by a male and ten female witnesses, but a subsequent retraction occurred, the quantities of indemnities would be settled according to the following five eventualities:

If all of the witnesses retracted their testimonies, the Ḥanafis, Ḥanbalis and Shāfī’is propound the following two opinions:
First: The due indemnity should be divided between the male and the ten female co-witnesses into six equal shares: one sixth is to be reimbursed by the male witness and the remaining five sixths are payable by the ten women, each female paying half a sixth. This opinion is endorsed by Abū Ḥanīfah and it is the Ḥanbalis first statement as well as the authentic Shāfiʿī statement.¹⁵⁰

This opinion is sustained by the basic postulate that each two female co-witnesses are commensurable to one male witness in all cases of financial claims and litigations. Therefore, it would be more equitable to divide the ensuing damages according to this basic principle. This principle is explicitly enacted by the Prophetic tradition that rules: "Two women's testimony has equalled one man's testimony." Thus it becomes as if six male witnesses had testified in the given case (instead of one male and ten women).¹⁵¹

Second: The Mālikis, Abū Yūsuf, al-Shaybānī, and the second Ḥanbalī and Shāfiʿī statements contend that the indemnities should be divided up into two equal shares: one half payable by the male witness and the remnant half is payable by the ten women witnesses.¹⁵² This opinion is supported by the fact that the female witnesses when conjoined with a male co-witness only establish half the legal evidence no matter how numerous these females are. Consequently, the damage done by them is invariably half the aggregate losses incurred. Accordingly, they are to be held responsible only to this quantity.¹⁵³

It may be concluded that the second opinion is a tenable one due to the fact that the male's testimony is consistently regarded as commensurate to two females' testimony. Besides, these females would not be accepted as witnesses, no matter how numerous they are, unless they are conjoined by a male witness. Moreover, if this male witness retracted singly before a judicial decision is passed, his fellow females would not establish the case on their own. Also if this male witness recanted after the court's sentence has
been pronounced and executed, he would be legally responsible for paying half of the enforced pecuniary penalty. Thus it becomes clear that the females plurally do equal one male as far as the weight of their respective testimonies and retraction thereof are concerned.

If the male witness solely retracted his testimony he would be answerable for half of the aggregate indemnities as is held by the majority of Ḥanafis, Mālikis, Ḥanbalis and Shāfiʿis. The same rule applies if the ten women co-witnesses solely retracted their testimonies.\textsuperscript{154}

If eight female witnesses retracted, thus only two females and the male co-witnesses persist, the majority of jurists rule that these eight females are immune from any legal indemnifications because the remaining co-witnesses still render the case of the plaintiff legally proven. But the Ḥanbalis hold that these women are still responsible for indemnifying the court's ruling as if all of the witnesses have collectively recanted their testimonies. So, the eight females are to reimburse either one fifth or two thirds according to the previously mentioned juristic differences.\textsuperscript{155}

If nine women co-witnesses renounced their testimonies thereby leaving only one male and one female co-witnesses, the majority of jurists hold these retractors are responsible for one quarter of the total net reimbursements inasmuch as the remaining male and female co-witnesses do legally establish the three quarters of the claimed adjudicated pecuniary right. Therefore, the nine female co-witnesses in this proposition have practically caused the loss of one quarter of the right. Accordingly, they have to remunerate it.\textsuperscript{156}

Ibn Qudāmah propounds the Ḥanbalī answer to this case, which states that those nine female co-witnesses are to pay three quarters of the adjudicated indemnities on the grounds that a female co-witness only pays half what her male co-witness
pays. However, the second statement contends that these nine women are to pay nine twentieths on the grounds that the ten women involved aggregately only pay half of the total payment of diyah.\textsuperscript{157}

In case the male and only one female co-witnesses renounce their testimonies, the Ḥanafis, Mālikis and Shāfīs will impose half of the adjudicated diyah reimbursements on these two witnesses according to the principle that the female co-witnesses are constantly held parallel to only one male co-witness as far as the legal weight of their respective testimonies are concerned. Thus half of the adjudicated right would be presumed intact and tenacious by virtue of the remaining nine female co-witnesses.\textsuperscript{158}

Nevertheless, the Ḥanbalis still propound two assessments to this probability: as they contend that the male co-witness is to pay half of the diyah compensation while his female co-witness is to pay one-twentieth on the grounds that the male’s testimony equals one half of the legal evidence and the females’ aggregate testimonies equal the other half, no matter how numerous these female co-witnesses are. The second Ḥanbalī statement proposes that the retracting male co-witness is to pay one-sixth of the total diyah compensation and that his female co-witness should only pay one-twelfth of this compensation on the grounds that each two women’s testimonies constantly equal one man’s testimony in all the pecuniary litigations.\textsuperscript{159}

As mentioned above, the Shāfīs endorse criteria similar to the Ḥanbalis’ as far as the assessments of indemnification is concerned.

It appears that the majority’s view that attention is only to be paid to the number of the remaining witnesses and their compatibility with the legally required criterion, irrespective of those who renounce or retract their testimonies, is a reasonable one. So the Ḥanbalis (and some Shāfīs) rigorous emphasis on the sheer aggregate number of
the witnesses, thereby designating the shares of reimbursements, irrespective of the element of partial and total retraction, is a highly controversial approach.

The above mentioned criteria of assessing the quantities of the due indemnifications on the superfluous co-witness(es) is applied by the Mālikis in adultery trials that result in the execution of the defendant. Khalīl (the prominent Mālikī author of *al-Mukhtasar*) says: "If two (co-witnesses) out of six retracted their testimonies, after the accused adulterer had been executed, no indemnification, nor any *hadd* of *gadhf* would ever be adjudicable."\(^{160}\) Also in adultery cases, if the accused is convicted and was put to death but one witness recanted his testimony, Mālik holds that this witness is to pay one-fourth of *diyah*, besides he is to be punished the full *hadd* of *gadhf* (eighty lashes).\(^{161}\) The Mālikis apply this rule even if the witnesses, or one of them, is proved to be an objectionable witness, and whether or not the pending penalty is carried out or not.\(^{162}\)

Al-Shīrāzī, from the Shāfiʿī school, endorses the same opinion. He also reports that the remaining three witnesses are not legally liable to the penalty of *gadhf*.\(^{163}\)

The Mālikis commentators explicate this terse maxim saying that as long as the persistent witnesses legally confirm the plaintiff's adjudicated right, no legal liability will ever accrue on the retracting superfluous witnesses, no matter how malicious or numerous they are.\(^{164}\) But a *taẓīr* (discretionary penalty) is to be held vis-à-vis the retractors due to their conduct and transgression.\(^{165}\)

However, if one of the remaining four witnesses retracted his testimony, he and the former two co-retractors are to pay one-fourth of *diyah* besides the infliction of *hadd* of *gadhf* on each, whether the three witnesses have singly or severally retracted. If another witness retracted, then he would pay one-fourth of *diyah* in collaboration with the
previous three witnesses. Thus they will all be paying half the diyah of the deceased defendant and so on as regards the remaining two witnesses.\textsuperscript{166}

Moreover, Khalîl emphatically dismisses the withdrawal of retraction of testimony. Besides, the retraction should be officially recorded in the court, otherwise it would be subject to the normal procedure of proof.\textsuperscript{167} Accordingly, the Malikis allow the defendant in all criminal trials to prove the fact that the plaintiff’s witnesses have already retracted their testimonies.\textsuperscript{168} Moreover, the Mâlikîs hold the judge fully responsible if he wittingly decreed capital punishment, which was then implemented, at the time when he knew that the witnesses were consummate liars.\textsuperscript{169} Hence the qisâs sentence would be very probable vis-\(\text{"a\text{"-vis the judge if he confessed to malice or intention of conspiracy.\textsuperscript{170}

The Ḥanafis sustain the above Mâlikî concepts, as they generally endorse the same principles of indemnification (\textit{daman}).\textsuperscript{171} Nevertheless, an influential tenor in the Ḥanbalî school strongly imposes the death sentence in the mentioned cases, no matter how numerous the witnesses are and irrespective of the number of the persistent witnesses.\textsuperscript{172} Also some opinions of the Islamic criminal law countenance the imposition of \textit{tażîr} penalties on the retracting witness(es) inasmuch as this act very much impinges upon the course of justice, and it also constitutes an act of contempt for the law. However, the Ḥanafis constantly do not endorse this \textit{tażîr} penalty vis-\(\text{"a\text{"-vis the witnesses of adultery because, any way, they will receive the gadhf penalty which fulfils the \textit{tażîr} objectives.\textsuperscript{173}
References: Chapter Sixteen


37. ibid.


ibid.
58. ibid.
61. ibid.
63. ibid.
64. ibid.
65. ibid.
66. ibid.
70. ibid.
72. ibid.
73. ibid.
74. ibid.
75. Al-Shaybānī, al-Jāmi', al-Kabīr, p.150.
77. ibid.
120. ibid.


130. ibid.


142. ibid.
144. ibid.
149. ibid.
151. ibid.
153. ibid.
158. ibid.
159. ibid.
162. ibid.
164. ibid.
165. ibid.
166. ibid.
167. ibid.
168. ibid.
169. ibid.
170. ibid.
According to the brief treatment of the criminal and penal rules made in Part I of this thesis, it is clear that these rules emanate from solid Islamic grounds as they are basically based on Qur'ān and Sunnah. However consensus and analogical reasoning, though secondary sources of jurisprudence, play significant roles. It may also be presumed that the criminal policy in Islam is consistent as far as the basic classification of crimes is concerned. Nevertheless, this ambit of the law contains a wide range of different opinions even in the unanimously accepted realm of ḥudūd. The Ḥanafī school, for instance, excludes the crimes of riddah (apostasy) and baghy (armed rebellion and sedition) from the ḥudūd, whereas the majority of schools hold that these two crimes are located in the realm of ḥudūd. Also, some criminal acts have caused a lot of discussion and controversy even in the ambit of ḥudūd, such as homosexuality, lesbianism, management of brothels and procurement for illicit sexual intercourse. The Ja'faris, for example, consider these acts as genuine ḥudūd crimes, accordingly, they treat them under this title. However, some schools like the Ḥanafis and Ḥāhiris exclude them from the ḥudūd circumference, and consider them as taṣzīr cases. This important example has its features on trials relating to these acts. Therefore, those who consider such crimes as adultery insist on presenting four male witnesses on behalf of the accusation, whereas this condition would be irrelevant according to those jurists who treat these cases as taṣzīr. This leads to the conclusion that it is the nature of crime that determines the nature of its proof, particularly if this proof is the testimony of witnesses.

It may be important to mention in this context that the principle of revocation of ḥudūd and gisās by viable suspicious circumstances is accepted by all Islamic schools of law except the Ḥāhiris, who are doubtful as to the authenticity of the Prophetic tradition that enacted this principle. The majority of jurists extend the effects of
this principle through all the substantive and procedural rules in the criminal ambit of the law. The study has, therefore, highlighted the great difficulty in securing a sound conviction in all *hudūd* and *qīsās* accusations, due to the difficulty of meeting all the numerous requirements of crime, penalty and proof. However this conclusion, in turn, elevates the role of the *tażīr* realm where conviction can be secured in many less serious cases, where the requirements of evidence are less stringent. This claim should be borne in mind together with the fact that the *tażīr* realm encompasses the largest segment of the criminal law except for *hudūd* and *qīsās* which occur less frequently. Notwithstanding these claims, it is apparent from the treatment that the *tażīr* ambit stands on solid ground for it derives its legality from both Qur'ān and Sunnah. Besides, no criminal act can ever escape punishment as it is clear that *tażīr* may also include those *hudūd* and *qīsās* crimes that do not satisfy the legal requirements of those two kinds of crimes. So it becomes obvious that the *tażīr* realm is the most resilient division of the criminal jurisprudence, which can accommodate the constant occurrence of new crimes. However, the legislature does not enjoy arbitrary powers in this regard because it must abide by the general spirit and ethos of the shari'ah which make the public interest in attaining what is good and stopping what is bad as the guiding criterion in this context.

According to the treatment made in Part II of this thesis the principles of proof have been tackled in early Islamic law side by side with the other divisions of the law. Therefore, the pace of development and dormancy in both the substantive and procedural principles is the same. It is also apparent that the testimony of witnesses gains the most thorough coverage when compared with the other means of evidence.

The testimony of witnesses can, with its various kinds and grades, be an effective proof in all criminal trials. However, it is also clear in *hudūd* and *qīsās* cases that the
testimony should acquire some additional requisites to qualify it as a viable and tenable proof as it is the case in adultery, theft, murder, slander and marital status, etc. The Ḥanafī school does not accept the testimony of one male witness corroborated by the oath of the plaintiff, an opinion which was strongly contested by the other schools. Also it is obvious that the testimony of one male witness and the confirmatory oath of the plaintiff has been an arena of debate between the four famous Sunnī schools of law. We also have to observe that some jurists disagree with the general rules of the grades of testimony and the compatibility of these grades with the grades of crimes. Therefore, some jurists require four male witnesses to prove a murder case, whereas Ibn Ḥazm, for instance, entertains female witnesses in murder cases. These examples are contrary to the widely accepted principles in this context, but they show how controversial the subject of these grades is.

The principles of shubuhāt (suspicious circumstances) also affect the tenacity of the testimony of witnesses. Therefore, it becomes clear that the accused enjoys very good chances of acquittal or a reduced sentence, as it is incumbent on the court to verify all the requirements of both: accusation, crime and proof. Hence Islamic criminal law construes all doubts on behalf of the accused, giving him or her good grounds of defence.

The study also highlighted the responsibility of the witness when retracting his testimony. Some jurists maintain that in some circumstances the retracting witness may face a death sentence in a separate trial if a viable confession is obtained from him. This shows how important and how serious it is to give testimony. However, this issue is also governed by the same procedural and substantive criminal precepts. It becomes clear that a biased or malicious witness is immediately to be expelled during or before the trial. The discovery of these disqualifications after the trial had been concluded, does not preclude accountability
or even prosecution of such witnesses. This may be one of the most important features of Islamic criminal law. Although the procedures of examination-in-chief, cross-examination and re-examination of witnesses is not treated in early Islamic law, there is no reason why it should not be accepted today since it leads to a fair trial. However, this measure should be adopted in combination with the procedure of tazkiyah (the probing of the witness's character), because both procedures aspire to obtain a credible account from a reliable witness and the rejection of the liars and blameworthy accounts. Also, it is obvious that the jury system in criminal trials is not adopted in the Islamic legal system. It is also known that the jury system in criminal trials is intended to achieve the all-important objective of justice and equity. This goal is also the prime target of the Islamic criminal prosecutions whose classical jurists agree that the judge should be a mujtahid who acquires the competence of interpretation, understanding and derivation from the Qur'ān and Sunnah. However, since this requisite of high competence is rarely achievable, Muslim jurists have introduced another legal device that can help the court reach sound decisions. This device is the court's committee of the most knowledgeable jurists available in the place of this court. This committee enjoys the duty of advising the judge in all matters relating to the substantive law as annotated or explained in the various schools of Islamic law. This procedure has to be developed and enshrined in the criminal procedures as a mandatory vehicle, and adequate powers have to be assigned to this committee, by which its conclusions should be accepted by the court. This becomes more urgent in cases where there are great differences between the authoritative opinions as in the case of shubuhāt involved in murder, theft, or fornication, for instance. It is very important to mention that in these examples any viable suspicion should be interpreted on behalf of the accused. Since the juristic opinions differ in many cases as to the assessment and appreciation of such viable suspicions, it becomes necessary to survey all these issues via authorised
panels of judicial jurisdiction. Therefore, a committee of jurors can be consulted in criminal cases, on the condition that they should be well versed in the law and that their consultation should be followed by the court. This measure does not preclude the right of appeal which is also regarded by early Muslim jurists as imprescriptible. Moreover, many Muslim jurists urge the judge to review his judicial decisions from time to time and amend or repeal what is necessary. The judge is also asked to review previous judicial decisions made by his predecessors where he enjoys the right to amend or repeal. This precept was put in general terms which can be developed and systematized to take the form of appellate procedures since these will lead to the fulfilment of justice.

It is very important to conclude that the Islamic legal system leaves wide areas for development and systematization in both areas of substantive and procedural laws. This claim can be confirmed by the fact that the principles of jurisprudence consist of subsidiary sources and doctrines, e.g. ṣurf, maslahah, istihsān, etc. which are capable of giving the legislator good grounds and substance to attain the objectives of the Islamic law.
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