Post-Colonial Discourse on *Siyasah* in Islamic Criminal Law

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Abstract

In the post-colonial discourse on Islamic criminal law, more often than not the right of Allah has been deemed synonymous to public right and, thus, the doctrine of siyasah *as expounded by the Hanafi School has been generally misunderstood . Resultantly, the whole edifice of criminal justice system as developed by Muslim jurists has been turned upside down. One of the reasons for this development is that in the post-colonial discourse, scholars have generally ignored the proper legal manuals, particularly those of the Hanafi School, and have instead focused on works of general political theory. Another reason is that scholars have found it convenient to mix-up the views of the various schools. This paper critically examines this general trend and, then, elaborates the position of the Hanafi School with the help of the work of Imran Ahsan Khan Nyazee, a renowned jurist, who expounded the Hanafi doctrine of* siyasah *in detail and explained its peculiar nature. Nyazee's work shows that the Hanafi doctrine of* siyasah, *if applied properly, can provide better solution to many complicated issues of criminal justice system in the modern world.*

Keywords: *Islamic Criminal Law,* Siyasah, *Classification of Rights*

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Introduction

"*Siyasah* is a strict law (*shar' mughallaz*)", says 'Ala' al-Din Abu 'l-Hasan 'Ali b. Ibrahim al-Tarablusi (d. 844 AH/1440 CE), "and it is of two kinds: *siyasah zalimah* (tyrannical administration), which Islamic law prohibits; and *siyasah 'adilah* (just administration), which takes the right from the unjust, prevents numerous forms of injustice, deters those who seek mischief (*fasad*) and helps in achieving the objectives of the law."[1] Throughout Muslim legal history, this doctrine of *siyasah* developed by Hanafi jurists has played an important role in the administration of justice. Thus, not only the *Qanun* of the Ottoman sultans[2] was based on *siyasah* but also the *Mahzarnama* of the Mughal Emperor Jalal al-Din Muhammad Akbar (d. 1605 CE) primarily relied on the authority of the ruler to have the final word in matters of dispute.[3] Moreover, even the British invaders in the Indian sub-continent initially resorted to this doctrine for asserting the power to punish 'miscreants'.[4] Later, however, as the British consolidated its power and asserted "sovereign rights" on

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1 'Ala' al-Din Abu 'l-Hasan 'Ali b. Ibrahim al-Tarablusi, *Mu'in al-Hukkam fi ma Yataraddadu bayna 'l-Khasmayn min al-Ahkam* (Cairo: n.p., n.d.), 207. The Hanafi jurists in their manuals of law give some passing remarks to *siyasah*, generally in the chapters about the *hudud* and *qisas* punishments, but the most elaborate discussion on this doctrine is found in *Mu'in al-Hukkam* of Tarablusi who was a judge in Tripoli.

2 For an interesting discussion on the *Qanun* and *siyasah* and their relationship with *shari'ah* during the reign of the great Ottoman Sultan Suleyman the Magnificent, see: Mehmet Şakir Yilmaz, "Crime and Punishment in the Imperial Historiography of Suleyman the Magnificent: An Evaluation of Nişanci Celalzade's Views", *Acta Orientalia Academiae Sientiarum Hungaricae*, 60:04 (2007), 427-445.

3 See for the text of the *Mahzarnama* of Akbar: Nizam al-Din, *Tabaqat-i-Akbari* (Calcutta: Royal Asiatic Society, 1936), 2:523-24. See for details: Ishtiaq Hussain Qureshi, *The Administration of the Mughal Empire* (New Delhi: Atlantic Publishers, 1990). See also: Sheikh Muhammad Ikram, *Rud-e-Kawthar* (Lahore: Idara-e-Thaqafat-e-Islamiyyah, 1982). See for a critical view of this *Mahzarnama*: Abu Bakr Siddique, *Shaikh Ahmad Sarhindi and His Reforms* (Dhaka: Khankah-e-Mujaddidiyya, 2011), 90-96.

4 For example, Warren Hastings, the first Governor-General of Bengal from 1772 and of India from 1773 to 1785, wanted the British magistrates to interfere with indigenous courts in order to "supply the deficiencies and correct the irregularities" in Islamic sentencing and he justified this interference on the grounds of *siyasah*. See for details: Scott Alan Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in South Asia", *Modern Asian Studies*, 35:02 (2001), 257-313.

the basis of conquest, it abandoned the doctrine of *siyasah*.[5] In the post-colonial discourse on Islamic criminal law, *siyasah* has generally been ignored or its role undermined.[6] Even when some scholars have worked on the general doctrine of *siyasah*, they have mostly concentrated on the works of Hanbali jurists, particularly the illustrious Ibn Taymiyyah (d. 728 AH/1328 CE) and his disciple, Ibn al-Qayyim (d. 751 AH/1350 CE), in the context of 'public policy' and 'political economy'.[7]

This paper first highlights the problems with the approach of Orientalists on the doctrine of *siyasah* after which it critically examines the general trend among Muslim scholars in the post-colonial world on Islamic criminal law. Finally, it shows how of late the original doctrine of *siyasah* in the Hanafi criminal law has been rediscovered.

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

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

7 See, for instance: Ibrahim 'Abd al-Rahim, *al-Siyasah al-Shar'iyyah: Mafhumuha wa Masadiruha wa Majalatuha* (Cairo: Dar al-Nasr, 1427/2006); Ahmad 'Abd al-Salam, *Dirasat fi Mustalah al-Siyasah 'ind al-'Arab* (Tunisia: np, 1978); Bernard Lewis, *The Political Language of Islam* (London: University of Chicago Press, 1988), 9-23; *idem*, "*siyasa*" in A. H. Green (ed.), *In Quest of an Islamic Humanism: Arabic and Islamic Studies in Memory of Muhamed al-Nuwaihi* (Cairo: np, 1984), 3-14; Fauzi M. Najjar, "*Siyasa* in Islamic Political Philosophy", Michael E. Marmura (ed.), *Islamic Theology and Philosophy: Studies in Honour of George E. Hourani* (Albany, 1984), 92-111; Mohamad Hashim Kamali, "*Siyasah Shar'iyyah* or the Policies of Islamic Government", *The American Journal of Islamic Social Sciences*, 06:01 (1989), 59-80; Yosseff Rapoprt, "Royal Justice and Religious Law: "*Siyasah* and *Shari'ah* under the Mamluk", *Mamluk Studies Review*, 16 (2012), 71-102.

Section One: Problems in the Post-Colonial Discourse on *Siyasah*

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

1.1. Three Kinds of Works on Islamic System of Government

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

> Broadly speaking three main formulations can be distinguished; the theory of the jurists, the theory of the philosophers and the literary theory, in which I would include primarily, mirrors for princes, but also the expositions of the administrators, since these are put forward mainly in literary works, and the scattered observations of historians on the theory of state.[9]

This classification has generally been accepted by the modern scholars.[10] Western scholars have generally ignored the so-called "theory of jurists"

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

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

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

and little, if any, discussion is found in their works on the way the Muslim jurists analyze in their law manuals issues of political economy. The books titled *al-Ahkam al-Sultaniyyah*, such as those written by Abu 'l-Hasan al-Mawardi (d. 450 AH/1058 CE) and Abu Ya'la al-Hanbali (d. 458 AH/1065 CE), are not books of law-proper even if their authors were renowned jurists.[11] The same is true of *al-Siyasah al-Shar'iyyah* written by the great Hanbali jurist of thirteenth century Ibn Taymiyyah.[12]

As far as the proper manuals of law are concerned, the Hanafi jurists generally give some passing remarks to the doctrine of *siyasah* while elaborating the rules about *hudud*, *qisas* and *ta'zir*.[13] Sometimes they refer to it while discussing the law of war in the chapters on *siyar*.[14] By far the most elaborate discussion on the doctrine of *siyasah* is found in *Mu'in al-Hukkam* of 'Ala' al-Din Abu 'l-Hasan 'Ali b. Ibrahim al-Tarablusi who was a judge in al-Quds.[15] Another important work is the *risalah* of

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Day of Judgment or of Justice), human beings will see clearly the rewards or punishments they have acquired by acting in certain ways". *Ibid*., 44.

11 Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* (Islamabad: Islamic Research Institute, 1994), 12.

12 Ahmad b. 'Abd al-Halim Ibn Taymiyyah al-Harrani, *al-Siyasah al-Shar'iyyah fi Islah al-Ra'i wa al-Ra'iyyah*, ed. 'Ali b. Muhammad al-'Imran (Jeddah: Islamic Fiqh Academy, n.d.). Khaled Abou El Fadl points out that even on the issue of rebellion the Western academia has generally ignored the views of the jurists, which are found in the sections on *Ahkam al-Bughah* (rules pertinent to rebels) in the classical manuals of *fiqh*. (*Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001), 8). See, for a detailed criticism on the discourse of the Western scholars on rebellion in Islamic law: Sadia Tabassum, "Recognition of the Right to Rebellion in Islamic Law with Special Reference to the Hanafi Jurisprudence", *Hamdard Islamicus* 34:04 (2011), 55-91.

13 See for details: Muhammad Mushtaq Ahmad, "The Doctrine of *Siyasah* in the Hanafi Criminal Law and Its Relevance for the Pakistani Legal System," *Islamic Studies* 52:01 (2015), 29-55 at 36-41.

14 For instance, Muhammad b. al-Hasan al-Shaybani mentions the report about the Prophet's ordering tough investigation of a prisoner and Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi explains that this was done by way of *siyasah*. *Sharh Kitab al-Siyar al-Kabir*, ed. Hasan Isma'il al-Shafi'i (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997), 1:147. At another place, he mentions that after giving quarter to some persons if anyone of them expresses disrespect for the Muslim ruler, he may discipline him by appropriate punishment, as ignoring this goes against the principles of administration and *siyasah*. *Ibid*., 2:112. There are many other interesting instances in *Sharh al-Siyar al-Kabir* of the use of *siyasah* by the ruler.

15 Al-Tarablusi, *Mu'in al-Hukkam fi ma Yataraddadu bayna 'l-Khasmayn min al-Ahkam* (Cairo: n.p., n.d.), 207–217. Muhammad Amin b. 'Abidin al-Shami says that if a person wants to have a deep understanding of the doctrine of *siyasah*, he should

the great jurist of the thirteenth/nineteenth century 'Allamah Muhammad Amin b. 'Abidin al-Shami (d. 1783 AH/1836 CE) on the issue of blasphemy. The title of this *risalah* is very suggestive: *Tanbih al-Wulah wa 'l-Hukkam 'ala Ahkam Shatim Khayr al-Anam aw Ahad Ashabihi al-Kiram 'alayhi wa 'alayhim al-Salah wa 'l-Salam* [Wakeup Call for the Governors and Officials on the Rules Applicable to the One Who Shows Disrespect for the Best of the Creatures or Any of His Noble Companions (on him and them blessings and peace].[16]As the Hanafi School brings the offence of blasphemy committed by a non-Muslim under *siyasah*, Ibn 'Abidin provides interesting details of this doctrine. He also refers to a few orders promulgated by different sultans at various times and comments on their implications.[17]

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

1.2. The Separation of "Theory" and "Practice"

Orientalists – from Goldziher to Schacht and Coulson – have envisaged a kind of tension and conflict between the jurists and the rulers – first Umayyad and later Abbasid – and that the law practiced in the official courts was not the one that is found in the manuals of *fiqh* composed by jurists.[18] Denying authenticity of the *Sunnah* of the Prophet (peace be on

carefully study the work of al-Tarablusi (*Radd al-Muhtar 'ala al-Durr al-Mukhtar Sharh Tanwir al-Absar* (Riyadh: Dar 'Alim al-Kutub, 1423/2003), 6:20).

[16] Muhammad Amin b. 'Abidin al-Shami, *Majmu'at Rasa'il Ibn 'Abidin* (Damascus: al-Maktabah al-Hashimiyyah, 1354/1935), 1:317–370. Recently, this *risalah* has been edited and published separately as: *Tanbih al-Wulah wa 'l-Hukkam 'ala Ahkam Shatim Khayr 'l-Anam aw Ahad Ashabih al-Kiram*, ed. Abu Bilal al-'Adani and Murtada b. Muhammad (Cairo: Dar al-Athar, 1428/2007).

[17] *Tanbih al-Wulah wa 'l-Hukkam*, 79. This discussion has some valuable material for understanding the Hanafi doctrine of *siyasah* in the context of criminal justice system.

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

him) and the compilations of the traditions and rejecting the legal precedents cited by the jurists, these Orientalists portray a very different picture of Islamic legal system.[19] Adding further to the confusions, they envisage that the various schools of Islamic law (*al-madhahib al-fiqhiyyah*) followed a "common legal theory" and that they differed only in minor details.[20] Hence, they pave the way for a kind of "juristic eclecticism" or "pick and choose" between the opinions of the different jurists.[21]

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

The problem is further aggravated when they also assert that even in the domain of the jurists, the law (*fiqh*) was developed independent of the legal theory (*usul al-fiqh*) and that the two fields had no link with each other.[24] This is based on the presumption that Imam Muhammad b. Idris

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Publications, 1989), xvii). See for a detailed criticism on this theory, Nyazee, *Theories of Islamic Law*.

[19] See for a detailed critical review of the theory of Schacht: the unpublished PhD Dissertation of Zafar Ishaq Ansari titled *The Early Development of Fiqh in Kufah with Special Reference to the Works of Abu Yusuf and Shaybani* (McGill University, 1966) and Nyazee, *Theories of Islamic Law*. For detailed deconstruction of Schacht's views on hadith, see: Muhammad Mustafa al-A'zami, *Studies in Early Hadith Literature* (Lahore: Sohail Academy, 1987). For an exhaustive analysis of the western criticism on the compilation of the Qur'anic text, see: *idem*, *The History of the Qur'anic Text from Revelation to Compilation* (Leicester: UK Islamic Academy, 1424/2003).

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

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

[22] These wrong assumptions are found in works of many modern scholars, including those who compiled the CII Report on reforms in the Pakistani Hudood Laws. See for details: Muhammad Mushtaq Ahmad, "Discovering the Law without A Coherent Legal Theory: The Case of the Council of Islamic Ideology," *LUMS Law Journal* 04:01 (2017), 37-55.

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

[24] *Ibid*., 45-48.

al-Shafi'i (d. 204 AH/819 CE) was the founder of *usul al-fiqh* and much of *fiqh* was developed and compiled by the jurists before that.[25] What was, then, the legal theory of those earlier jurists who preceded Imam al-Shafi'i?[26]

1.3. Focus on Selected Works

For examining the working and structure of the various governments in Islamic history, these Orientalists focused on a few selected works, mostly written by jurists belonging to the Shafi'i School. For instance, Hamilton Gibb and others assert that Muslim jurists generally preached passive obedience to tyrant rulers even when "theoretically" they put very strict conditions for the eligibility of a person to rule Muslims.[27] They further assert that the later jurists even theoretically abandoned those conditions and equated power with validity and, thus, justified the rule of the usurpers.[28] For this purpose, they generally cite passages from al-Mawardi, al-Juwayni (d. 478 AH/1085 CE), al-Ghazali (d. 505 AH/1111 CE), and Ibn Jama'ah (d. 733 AH/1333 CE) – all of whom belong to the Shafi'i School.[29]

As far as the doctrine of *siyasah* is concerned, generally they focus on the works of the later Hanbali jurists, Ibn Taymiyyah and Ibn al-Qayyim.[30] The

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[25] Imam Abu Hanifah al-Nu'man b. Thabit (d. 150 AH/767 CE) died in the same year in which Imam al-Shafi'i was born and, of course, before his death Abu Hanifah had succeeded in developing a whole bulk of Islamic law.

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

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

[28] *Ibid*., 19.

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

[30] Ahmad b. 'Abd al-Halim Ibn Taymiyyah al-Harrani, *al-Siyasah al-Shar'iyyah fi Islahi al-Ra'i wa al-Ra'iyyah*, ed. 'Ali b. Muhammad al-'Imran (Jeddah: Islamic Fiqh Academy, n.d.). See also: Muhammad Salih al-'Uthaymin, *Sharh Kitab al-Siyasah al-Shar'iyyah li Shaykh al-Islam Ibn Taymiyyah* (Beirut: al-Dar al-'Uthmaniyyah, 1425/2004). Shams al-Din Muhammad b. Abi Bakr Ibn Qayyim al-Jawziyah, *I'lam al-Muwaqqi'in 'an Rabb al-'Alamin*, ed. Abu 'Ubaydah Mashhur b. Hasan (Jeddah: Dar Ibn al-Jawzi, 1423); *idem*, *al-Turuq al-Hukmiyyah fi 'l-Siyasah al-Shar'iyyah*, ed. Nayif b. Ahmad (Makkah: Dar 'Alim al-Fawa'id, 1428).

works of the Hanafi jurists have generally been overlooked or dealt with suspicion and doubt.[31]

1.4. Confusing the Right of Allah with the Right of State

The work of ʻAbd al-Qadir ʻAwdah (d. 1954) titled *al-Tashriʻ al-Jinaʼi al-Islami Muqaranan bi ʼl-Qanun al-Wadʻi* is one of the fundamental sources for scholars working on Islamic criminal law in the post-colonial world.[32] This work undoubtedly contains some invaluable material on the subject. However, the doctrine of *siyasah* has not been analyzed in depth in this work.

ʻAwdah refers to the fact that the *hudud* punishments are deemed the rights of Allah.[33] He also points out that one of the legal consequences of considering *hudud* as the rights of Allah is that these punishments cannot be pardoned by any human authority.[34] Still he does not appreciate the fact that if the rights of Allah are deemed equivalent to the rights of community,[35] it leads to analytical inconsistency.

1.5. Ignoring the Necessary Corollaries of Rights

Although ʻAwdah mentions the rule that the authority to enforce the *hudud* punishments is with the government[36] and that the right to enforce *qisas* is with the heirs of the victim,[37] yet he is not in favor of giving the individual the right to enforce the *taʻzir* punishment.[38] The reason for this is that ʻAwdah did not analyze the legal consequences of relating different punishments to different rights. Had he done so, he

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

[32] ʻAbd al-Qadir ʻAwdah, *al-Tashriʻ al-Jinaʼi al-Islami Muqaranan bi ʼl-Qanun al-Wadʻi* (Beirut: Dar al-Katib al-ʻArabi, n. d.).

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

[34] *Ibid*., 1:79.

[35] *Ibid*.

[36] *Ibid*., 2:755.

[37] *Ibid*., 2:757-58.

[38] *Ibid*., 2:756-57.

would have no hesitation in asserting that if the individual can enforce the *qisas* punishment, with the help and supervision of the government, he can also enforce the *ta'zir* punishment because *qisas* is the joint right of Allah and individual in which the right of individual is predominant, while *ta'zir* is the pure right of individual (at least for the Hanafi jurists).[39]

Moreover, 'Awdah does not distinguish between *ta'zir* and *siyasah*[40] and although he does briefly refer to the Hanafi doctrine of *siyasah*,[41] his analysis of this doctrine is superficial as he confines his discussion to those cases only where the Hanafi jurists allow death punishment as *siyasah*. The fact, as will be shown below, is that the Hanafi doctrine is much wider than that.[42]

Not only 'Awdah, but also most of the scholars working on Islamic criminal law in the post-colonial world have generally ignored the important doctrine of *siyasah*. Many of them fell prey to the propaganda of the Orientalists regarding the "separation of theory and practice" in Islamic legal history. This is one of the major reasons why some of these scholars suggested a "revisiting" or even "reconstruction" of the legal thought in Islam.[43]

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[39] See for details: Ahmad, "The Doctrine of *Siyasah* in the Hanafi Criminal Law," 43-50.

[40] This despite the fact that he asserts that the *ta'zir* offence is sometimes an encroachment upon the right of an individual and at others it is encroachment upon the right of the society. *Ibid*., 99.

[41] *Ibid*., 688-89.

[42] The roots of this superficial analysis lie in the flawed methodology of *talfiq* (mixing the opinions of the various schools of law). Thus, 'Awdah summarily deals with the Hanafi doctrine of *siyasah* and briefly asserts that this doctrine influenced Ibn Taymiyyah and Ibn al-Qayyim and some Maliki jurists as well. Then, he asserts that the Hanafi doctrine is not that important and novel and that what the Hanafi jurists call as *siyasah* is included by other schools either in *qisas* or *hudud*. *Ibid*. This is not how a legal issue should be analyzed. That is why we prefer the methodology of *takhrij*, i.e., arguing on the basis of the principles expounded by the earlier jurists or extending the already existing law to new cases without creating problems of analytical inconsistency. See for details: Ahmad, "Discovering the Law without A Coherent Legal Theory," 37-55. See also: *idem*, "The Hanafi Legal Theory: Some Significant Issues," *Peshawar Islamicus* 08:02 (2017), 1-14.

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

Thus, we see some of the scholars rejecting altogether the division of crimes into *hudud* and *ta'zir*.[44] Others think of changing the standard of evidence required for proving the *hudud* and the *qisas* offences.[45] Still others assert that the *hudud* are not *fixed* but *maximum* punishments.[46]

This confusion is found in most troubling form in the discussions on the rules relating to the offence of *zina* and sexual violence, particularly rape. Disturbed by the criticism on the strict standard of evidence for the offence of *zina*, some scholars suggested that the offence of rape should be deemed a sub-category of the offence of *hirabah* (robbery with violence), instead of *zina*.[47] This they did without realizing that their suggestion would not only change the meaning and concept of *hirabah* but also of "property".[48]

Section Two: Rediscovery of the Hanafi Doctrine of *Siyasah*: The Contribution of Nyazee

Professor Imran Ahsan Khan Nyazee (b. 1945) is a renowned scholar and authority on Islamic law and jurisprudence, particularly the expositions of the Hanafi School. Some of the scholars consider him to be the founder of a "new" school of Islamic jurisprudence, but he specifically

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

[45] Muhammad Tufail Hashimi, *Hudud Ordinance Kitab-o-Sunnat ki Roshni men* (Peshawar: National Research and Development Foundation, 2005), 79-83. See for a detailed criticism on this view: Muhammad Mushtaq Ahmad, *Hudud Qawanin: Islami Nazariyyati Konsil ki 'Uburi Riport ka Tanqidi Ja'izah* (Mardan: Midrar al-'Ulum, 2006), 79-83.

[46] Javed Ahmad Ghamidi, *Mizan* (Lahore: Dar al-Ishraq, 2001), 302.

[47] In Pakistan, this idea was first given by Mawlana Amin Ahsan Islahi (d. 1997) in his commentary of the Qur'an while commenting on the verses of *Surat al-Ma'idah* regarding the offence of *hirabah*. *Tadabbur-e-Qur'an* (Lahore: Faran Foundation, 2002), 3:505-508; 5:361-377. His disciple Javed Ahmad Ghamidi (b. 1951) reiterated this position (*Mizan*, 284). Asifa Quraishi preferred this view though she did not acknowledge that the idea came from Islahi. "Her Honor: An Islamic Critique of the Rape Provisions in Pakistan's Ordinance on *Zina*", *Islamic Studies* 38:03 (1999), 403-32. The Federal Shariat Court also accepted this view in *Begum Rashida Patel v The Federation of Pakistan*, PLD 1989 FSC 95.

[48] See for details: Muhammad Mushtaq Ahmad, "Abrurezi ke Jurm ki Shar'i Takyif", *Maarif-e-Islami* 09:01 (2010), 71-113. Muhammad Munir (b. 1965) after a thorough analysis of the debate on the offence of rape suggests that this offence should be deemed, not *hirabah*, but *siyasah*. However, the question of how to change a *hadd* offence into *siyasah* remains unsettled. Muhammad Munir, "Is *Zina bil-Jabr* a *Hadd*, *Ta'zir* or *Syasa* [sic] Offence? A Reappraisal of the Protection of Women Act, 2006 in Pakistan", *Yearbook of Islamic and Middle Eastern Law* 14 (2008-09), 95-115.

calls for adherence to a particular school of law and abhors switching between schools and considers formulating a new school as "reinventing the wheel".

In Nyazee's opinion, each school of Islamic law is a system of interpretation with a distinct legal theory. Hence, he rejects the notions of "classical legal theory" or "common legal theory" envisaged by Joseph Schacht and others. For the views of the Hanafi jurists, Nyazee primarily relies on the works of the "Elders of the School", including *inter alia*, Abu Yusuf (d. 182 AH/798 CE), Shaybani (d. 189/805 CE), Abu 'Ubayd (d. 224 AH/838 CE), Tahawi (d. 321 AH/933 CE), Karkhi (d. 340 AH/1039 CE), Dabbusi (d. 430 AH/1039 CE), Jassas (d. 370 AH/980 CE), Sarakhsi (d. 483 AH/1090 CE), Kasani (d. 587 AH/1191 CE) and Marghinani (d. 593 AH/1197 CE).

Nyazee's work on legal theory (*usul al-fiqh*) and applied law (*fiqh*) has led to some startling conclusions and refutation of some of the stereotyped notions about Islamic law and jurisprudence.[49] This Section will briefly highlight how Nyazee rediscovered the doctrine of *siyasah* in the Hanafi criminal law.

2.1. Division of Labor, Not Separation of Theory and Practice

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

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

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

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

[52] *Ibid*., 55.

[53] *Ibid*.

laws about income-tax, traffic, new forms of crime and other areas in accordance with the *shari'ah*, we might change them through fresh *ijtihad* in a later age, because these rules are not stated explicitly in the texts."[54]

Nyazee is of the opinion that the jurists and the rulers divided the work and concentrated on the fixed and flexible parts of the legal system, respectively.[55] He explains this relationship by the example of an ever-growing tree: "Like the trunk of this tree, Islamic law has part that is fixed, and like its branches and leaves, the law has a part that changes in shape and color in every season."[56]

At another place in the same work, Nyazee explains the two sphere of Islamic law by reference to the two doctrines of *hadd*: wider and narrower.[57] He asserts that in its wider sense the phrase *hudud Allah* denotes the fixed part of the law, while in its narrower sense it only denotes the specific punishments for specific crimes.[58] Here, he also relates this discussion to the division of rights into three categories: rights of Allah, rights of individual and rights of community; and asserts that the doctrine of *hadd* "works hand in hand with the concept of the right of Allah".[59]

He forcefully asserts that the right of Allah must not be confused with the right of community. "The right of Allah is fixed by Allah, once and for all and is not subject to legal or judicial review, that is, it is outside the purview of law. It can never be altered."[60] As far as the authority of the ruler is concerned, Nyazee brings it under the doctrine of *siyasah*.[61]

2.2. School as a Legal Theory and System of Interpretation

Another significant aspect of Nyazee's contribution is that he shows that every school of law represents a distinct legal theory and is, thus, a distinct system of interpretation. In *Theories of Islamic Law*, he propounds three different kinds of legal theories in Islamic legal history,

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[54] *Ibid*.

[55] *Ibid*., 53.

[56] *Ibid*., 52.

[57] *Ibid*., 109-26.

[58] *Ibid*., 114.

[59] *Ibid*., 115.

[60] *Ibid*.

[61] *Ibid*., 112.

namely, the theories of general principles, the theories of literal interpretation and the theories of the purposes of law.[62] He places the Hanafi legal theory in the first of these categories and elaborates how this theory helped the Hanafi jurists successfully develop the huge bulk of the law before even Imam al-Shafi'i – whom Orientalists portray as the "master-architect" of *usul al-fiqh*[63] – was born.[64]

In his other important work, *Islamic Jurisprudence*, Nyazee also elaborates the process of *taqlid* and explains how the system of "precedents" works within a school of law, particularly the Hanafi School, and thus expounds on this basis an *Islamic theory of adjudication*.[65] He explains that every school has a hierarchy of the legal manuals as well as of the jurists which help in developing a coherent legal system. He further elaborates how the jurists extend the law to new cases through the methodology of *takhrij* – reasoning through general principles – without undoing the existing law.[66] For this purpose, he also distinguishes between the sources of law for the *mujtahid*, the jurist who discovers the law for the first time, and the sources of law for the "*faqih*", the jurist who works within the parameters of the school and extends the law to new cases on the basis of the general principles of law recognized and upheld by his school.[67] Thus, he develops a "theory of legislation" on the basis of the notion of *ijtihad* and a "theory of adjudication" on the basis of the concept of *takhrij*.[68]

In one of his recent works, *Islamic Legal Maxims*, Nyazee further builds upon his work and elaborates how the "legislative presumptions" of the Hanafi School makes it a distinct legal theory and system of interpretation.[69] He further explains how the disciples of Abu Hanifah followed the system of interpretation developed by the school even when they differed with him on "interpretation of facts" or *qawa'id*

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[62] *Ibid*., 127-230.

[63] Coulson, *A History of Islamic Law*, 53-62.

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

[65] Nyazee, *Islamic Jurisprudence*, 333-338.

[66] *Ibid*., 339-353.

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

[68] *Ibid*., 336-338.

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

fiqhiyyah.[70] He also elaborates how the jurists of the School applied the general principles of law to find rulings for various sets of facts.[71] This work is, thus, an application of the theoretical discussion which Nyazee expounded in this earlier works.

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

2.3. Classification of Rights as the Basis

Nyazee in another important work *General Principles of Criminal Law: Western and Islamic* explains some of the very important aspects of Islamic criminal law, as expounded by that the Hanafi jurists.[74] His most important contribution in this regard is the classification of rights and the way this classification determines the legal consequences of various crimes.[75] Thus, he explains that the jurists divide rights into three categories: namely, the rights of Allah, the rights of the community or the ruler and the rights of the individual.[76]

He, then, explains how the jurists deem every crime to be a violation of one of these rights. Thus, the *hadd* punishment is imposed on violation of a right of Allah; *ta'zir* punishment is awarded for violation of a right of individual, while *qisas* punishment is imposed on violation of a joint right of Allah and individual. As far as the punishment for violation of the right of the community is concerned, explains Nyazee, the jurists call it *siyasah*.[77]

He, then, distinguishes *siyasah* from *ta'zir* and elaborates that the legal consequences of the various crimes, such as the nature and extent of punishment, the standard of proof, the possibility of waiver or

[70] *Ibid*., 49-54.

[71] *Ibid*., 65ff.

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

[73] *Ibid*., 9-18.

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

[75] *Ibid*., 63-64.

[76] *Ibid*., 64

[77] *Ibid*.,70-72.

compounding and the like, are determined by the right affected by the crime. For instance, if the right of Allah is violated, no one has the authority to pardon the offender. On the other hand, if the right of the community is violated, the ruler, acting on behalf of the community, may pardon the offender if the best interest of the community so demands.[78]

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

2.4. Right of Allah Distinguished from the Right of the Ruler

Another important contribution of Nyazee is distinction between the right of Allah and the right of the community. As noted earlier, modern scholars have generally deemed the two synonymous. This has caused much confusion. Nyazee points out that enforcement of the *hadd* punishment is a right of Allah and a duty of the community, which is why the right of Allah and the right of the community cannot be the same.[79] He further points out that the ruler does not have the authority to pardon the *hadd* punishment, while he can pardon the punishment for violation of the right of the community.[80]

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

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

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[78] *Ibid*.

[79] Nyazee, *Theories of Islamic Law*, 115; *idem*, *General Principles of Criminal Law*, 65.

[80] Nyazee, *Theories of Islamic Law*, 119; *idem*, *General Principles of Criminal Law*, 65.

[81] Nyazee, *Theories of Islamic Law*, 119.

[82] *Ibid*.

[83] *Ibid*.

2.5. The Wider and Narrower Doctrines of *Siyasah*

Another important contribution of Nyazee is to clearly distinguish between the wider and narrower doctrines of *siyasah*. As noted above, in his earlier works *Theories of Islamic Law* and *General Principles of Criminal Law*, he specifically concentrated on *siyasah* in the context of criminal law, particularly in relation to *hudud*, *qisas* and *ta'zir*. In his *Islamic Legal Maxims*, he elaborated the wider doctrine of *siyasah* and explained its relationship with the higher objectives of Islamic law (*maqasid al-shari'ah*).[84]

As Abu Hamid Muhammad b. Muhammad al-Ghazali, the illustrious jurist-cum-philosopher, has elaborated, the most fundamental five basic principles of Islamic law or *maqasid al-shari'ah* are:

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

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

Nyazee shows that it was the great Hanafi jurist Abu Zayd al-Dabbusi who developed the doctrine of the *maqasid* and that Ghazali and his master Imam al-Haramayn Abu 'l-Ma'ali 'Abd al-Malik b. 'Abdillah al-Juwayni heavily relied on Dabbusi. Nyazee then links *siyasah* with these *maqasid*.

> The term *siyasah shar'iyyah* means the policy of the *shari'ah*. The policy is just as long as the government upholds the *shari'ah*. If it does not uphold it, the policy becomes unjust or *zalimah*. The policy

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

[85] Al-Ghazali, *Shifa' al-Ghalil fi Bayan al-Shabah wa 'l-Mukhil wa Masalik al-Ta'lil* (Baghdad: Dar al-Kutub al-'Ilmiyyah, 1971), 186–87. See also: *idem*, *al-Mustasfa*, 1:213-222.

[86] Ghazali, *Jawahir al-Qur'an* (Beirut: Dar Ihya' al-'Ulum, 1985), 32–35. See for a detailed discussion: Nyazee, *Theories of Islamic law*, 241-242. See also: *idem*, *Islamic Legal Maxims*, 72-75.

> of the *shari'ah* is of two types: the first deals with the "preservation" aspect of the five principles listed above, while the second deals with the "protection" aspect of these five principles.

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

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

Conclusion

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

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

[88] Tarablusi, *Mu'in al-Hukkam*, 207.

[89] *Ibid*., 207-208.

the rules based on these rights and left to him the area they designated as the rights of the ruler where they submitted to his rule. Thus, classification of rights and the resultant doctrine of *siyasah* played a pivotal role in the development of the Islamic system of justice.