DEATH PUNISHMENT UNDER SECTION 302 (B) FROM THE PERSPECTIVE OF ISLAMIC LAW

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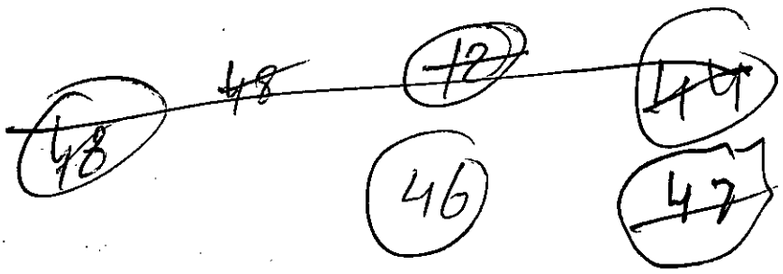

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Part One: Death Punishment as *Qisas* and as *Ta'zir*

The court can award death sentence for *qatl-e-'amd* either as *qisas* under Section 302 (a) or as *ta'zir* under Section 302 (b) if the proof as prescribed in Section 304 is not available.

Section 304 mentions two means of proving the offence of *qatl-e-'amd*: confession by the accused or evidence in the manner prescribed in Article 17 of the Qanoon-e-Shahadat Order. The referred to Article provides four principles:

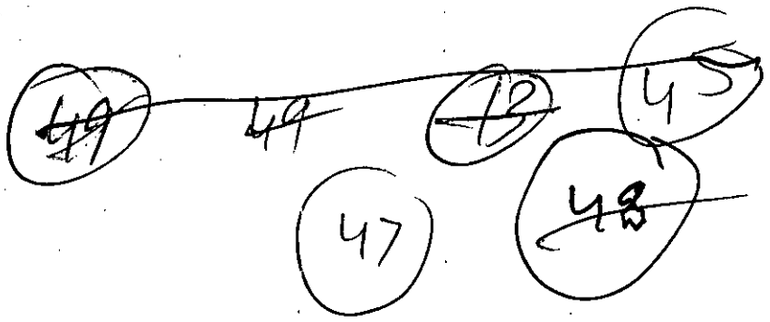
(1) The number and competence of witnesses are to be determined in accordance with Islamic law;

(2) If a special standard of evidence has been prescribed by the *hudud* or any other special law, it will be applied in those special cases;

(3) For a document relating to financial matters, two male witnesses or one male and two female witnesses have to testify; and

(4) In all other matters, the court can decide on the basis of any piece of evidence which it deems admissible.

Now, it is obvious that the last of the principles is not relevant here because if it is accepted for *qisas*, no difference can be found in the standard of evidence for *qisas* and *ta'zir*.



Similarly, the third principle is irrelevant because it is not an issue of documenting a financial transaction.

The second principle is also not applicable because even if the Qisas and Diyat Act is deemed a special law, it does not prescribe a special standard of evidence; rather, it refers back to the Qanoon-e-Shahadat Order. Hence, we are left with the first principle only.

In a nutshell, reading Section 304 PPC and Article 17 QSO leads to the inevitable conclusion that the standard of evidence for *qisas* is the one prescribed by the jurists, i.e., two adult male eye-witnesses who are trustworthy in accordance with the principles of *tazkiyat al-shuhud*. Moreover, if the accused is Muslim, the witnesses have to be Muslims.

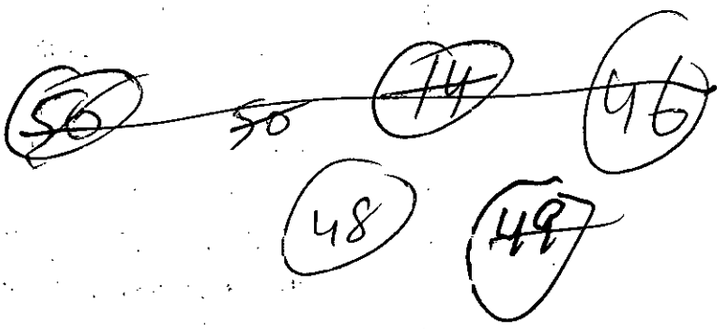
It also implies that death punishment in Pakistan is generally awarded under Section 302 (b) as *ta'zir* because the criterion for proving *qisas* as mentioned in Section 304 PPC is very strict and that standard of proof can be obtained in very exceptional circumstances only. Reference in this regard may be given to *Abdus Salam v The State*, (2000 SCMR 338), wherein the Supreme Court held that the convict deserved death punishment but that he should have been sentenced under Section 302 (b) instead of Section 302 (a).

Part Two: *Ta`zir* in the Pakistani Law

Section 299 (l) defines *ta`zir* in the following words: "ta`zir means punishment other than qisas, diyat, arsh or daman."[1] This definition does not explain the nature of the punishment. The Muslim jurists, particularly the Hanafis, relate all punishments with various kinds of rights which clearly explain the nature and the legal consequences of these punishments. Hence, we have to look at the overall scheme of Chapter XVI to find out the real purport of the term *ta`zir*.

Section 302 (b) explicitly calls death punishment as *ta`zir*. The same is true of the death punishment given under Section 311. However, most of the times the word *ta`zir* has been used in Chapter XVI for the punishment of imprisonment. Moreover, the definition mentioned above also

[1] The Hudood Ordinances also use the word *ta`zir* for certain punishments and they give almost a similar definition of the term *ta`zir*. After the promulgation of the Protection of Women (Criminal Laws Amendment) Act 2006, the *ta`zir* provisions have been removed from the Offence of Zina (Enforcement of Hudood) Ordinance and the Offence of Qazf (Enforcement of Hudood) Ordinance. However, the Offences against Property (Enforcement of Hudood) Ordinance and the Prohibition (Enforcement of Hadd) Order still contain many provisions about *ta`zir*. Section 2 (g) of the Offences against Property Ordinance defines *ta`zir* as: "any punishment other than hadd." The same definition is reproduced in Section 2 of the Prohibition Order.



covers fine prescribed by the various sections of the Chapter. Hence, in Chapter XVI the term *ta`zir* means following three kinds of punishments:

i. death punishment awarded under Section 302 (b) or 311;

ii. the punishment of imprisonment; and

iii. the punishment of fine

Before we move on to specifically examine the nature of the death punishment given as *ta`zir*, we would like to highlight two important points about the other two forms of *ta`zir*, namely, fine and imprisonment.

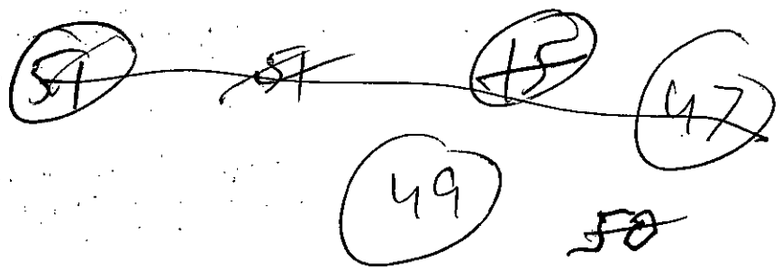
Section 299 (l) explicitly excludes *daman* from the definition of *ta`zir* while fine, as noted above, is included in the meaning of *ta`zir*. What is the difference between the two? In both cases, the convict has to pay some amount of money as determined by the court in the particular circumstances of the case. However, *arsh* is paid to the victim which is why Section 299 (d) calls it "compensation", while fine is paid to the government. This point is crucial for understanding the nature of *ta`zir*.

As far as imprisonment is concerned, it is sometimes awarded when an offence is either not liable to *qisas* or *qisas* cannot be enforced or the court finds it necessary to impose this punishment in the particular circumstances of the case, such as when the convict is murdered by one of the heirs of the victim after he was pardoned by the other heirs (Section 312). If all the provisions about the punishment of imprisonment are examined, it appears that this punishment is awarded in circumstances where the law presumes that the right of the state has also been violated. See particularly for this purpose Section 311 which declares that using the principle of *fasad-fil-arz*:

> the Court may, having regard to the facts and circumstances of the case, punish an offender against whom the right of qisas has been waived or compounded with death or imprisonment for life or imprisonment of either description for a term of which may extend to fourteen years as ta`zir.

The explanation of the term *fasad-fil-arz* is also very important:

> For the purpose of this section, the expression fasad-fil-arz shall include the past conduct of the offender, or whether he has any previous convictions, or the brutal or



> shocking manner in which the offence has been committed which is outrageous to the public conscience, or if the offender is considered a potential danger to the community, or if the offence has been committed in the name or on the pretext of honour.

Hence, like fine the punishment of imprisonment under this chapter is also given where the right of the community at large is violated.

This leads us to the conclusion that under the provisions of Chapter XVI the punishment of *ta'zir* is given in cases where the law presumes that the right of the community, and not just of one or a few individual, has been violated.

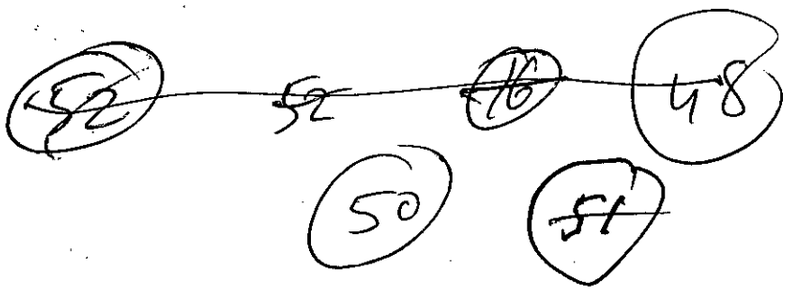
Now, the questions before us are: whether death punishment can be given in cases where the right of the community is violated? If yes, under what conditions?

Part Three: *Ta'zir* in Islamic Law

A Note on Methodology

Before we examine the provisions of Islamic law about *ta'zir*, we want to highlight an important point about the methodology of the modern scholars here. Many of these scholars switch over between schools and pick and choose from the opinions of the jurists belonging to various schools. This has been the major cause of analytical inconsistency and confusion in the modern discourse on Islamic criminal law. The fact remains that each school of Islamic law represents a full-fledged legal theory and mixing the views of the various schools leads to clash of principles. The following example will explain this point.

The Shafi'i jurists do not link the punishments with the various kinds of rights which is why they consider some of the *hudud* as the rights of God and others (such as *qadhf*) as the right of individual. Similarly, for them *ta'zir* may be given as a right of God as it may also be given as a right of individual. They also allow some individuals to enforce the *hudud* punishments on some other individuals (such as a master enforcing a *hadd* punishment on a slave). The Hanafi jurists, on the other hand, consider all the *hudud* as the rights of God, except for the *hadd* of *qadhf* which they consider as the joint right of God and individual but then declare that the right of God is predominant in it. The net result is that all the *hudud*, including the *hadd* of *qadhf*, attract the rules



pertaining to the rights of God. For instance, they do not allow any individual in his private capacity to enforce the *hadd* punishment on others and declare that only government can enforce these punishments.

Hence, for the purpose of analytical consistency – and as a matter of principle – I will confine my analysis to the views of the Hanafi jurists only. Another reason for this is that the Pakistani law is generally based on the views of the Hanafi jurists. If the court needs to examine the views of the other schools, this may be done separately.

Legal Consequences of Offences Are Determined by the Rights Affected.

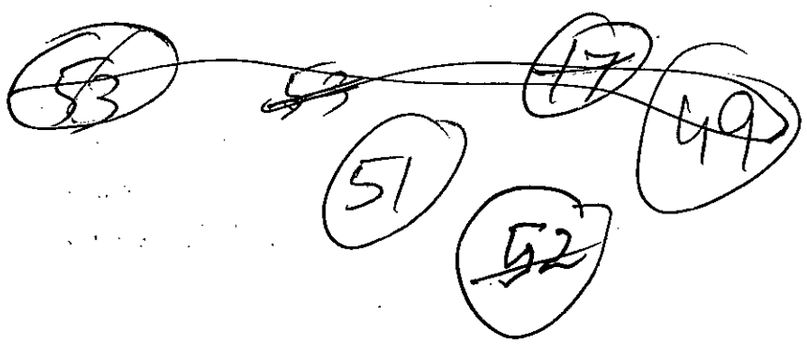
Islamic law, as noted earlier, links all crimes and their respective punishments with various kinds of rights. This classification of rights is very important because it is this classification that clearly distinguishes between the legal consequences of various offences. Thus, all rights are initially divided into three categories: rights of God, rights of individual and rights of the community (or the government). The *hudud* punishments are linked to the rights of God; *ta'zir* punishments are linked to the rights of individual; while *siyasah* punishments are linked to the rights of the community.[2]

The problem with the concept of *siyasah*, however, is that the jurists give little details about it; at many places they mention it along with *ta'zir*; and sometimes they use it interchangeably with *ta'zir*. This has led many of the modern scholars to equate *siyasah* with *ta'zir*. The issue is further complicated by the fact that some of the modern scholars have confused the rights of God with the rights of the community. Resultantly, there are many confusions and inconsistencies in the work of the modern scholars working on Islamic criminal law. For clearing these confusions and explaining the principles of Islamic law about *ta'zir*, we have framed the following issues:

- Is *ta'zir* the right of individual or community?
- Can *ta'zir* be awarded in the right of God?
- What is the standard of evidence for proving *ta'zir*?
- What is the extent and nature of the *ta'zir* punishment?

We will examine each of these issues separately.

[2] Sometimes a wrong is considered violation of the joint right of God and of individual. In such a situation, sometimes the right of God is predominant – as in case of the *hadd* of *qadhf* – while in other cases the right of individual is deemed predominant – such as in case of *qisas*.



Is *Ta'zir* the Right of Individual or Community?

Some passages of the jurists clearly establish that *ta'zir* is the right of individual. For instance, Imam Kasani while enumerating the characteristics features of *ta'zir* says:

و منها انه يحتمل العفو و الصلح و الابراء لانه حق العبد خالصاً فتجرى فيه هذه الاحكام كما تجرى فى سائر حقوق للعباد من القصاص و غيره ، بخلاف الحدود -

Similarly, he also explicitly mentions that *ta'zir* can be given to a minor having discretion (*sabiyy mumayyiz*) because it is not proper *'uqubah*. Another important principle in this regard is that the Hanafi jurists allow the concerned individual whose right has been violated to enforce *ta'zir*.

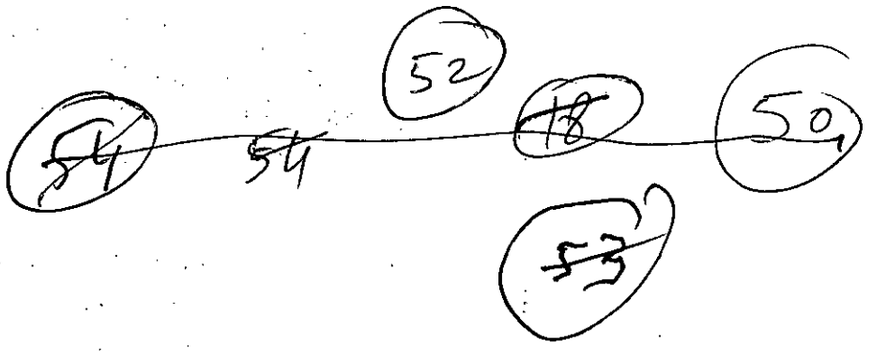
However, there are many instances of *ta'zir* where the jurists link it with the right of the ruler (or community at large). The most important example of such *ta'zir* is the one mentioned in the chapters on the *hudud* punishments. Thus the Prophet (peace be on him) is reported to have mentioned the punishment of expulsion for a period of one year along with the *hadd* punishment of 100 lashes for *zina*. Imam Marghinani, the author of the *Hidayah*, has the following to say in this regard:

و ذلك تعزير و سياسة، لأنه قد يفيد فى بعض الأحوال، فيكون الرأى فيه الى الامام- و عليه يحمل النفى المروى عن بعض الصحابة رضى الله عنهم-

The jurists assert that this *ta'zir* is enforced by the government. Furthermore, they deem it punishment-proper which is why they assert that it cannot be imposed on minors.

Thus, a thorough analysis of the sections on *ta'zir* in the classical manuals of *fiqh* suggests that the jurists were dealing with two kinds of *ta'zir*: one, the cases that fall under the notion of *ta'dib* (teaching manners), such as rebuking a child of ten years for non-performance of prayer or a master's punishing his servant for not obeying his lawful commands; two, the cases where the court awards a lesser punishment because a condition of the *hadd* or the *qisas* punishment is missing or a *shubhah* exists which suspends the *hadd* or the *qisas* punishment.

In the former case, *ta'zir* is a pure right of individual. In the latter case, it is the right of the community and the jurists use the word *ta'zir* for this punishment in its wider sense which includes *siyasah*. In the former case, it is neither necessary nor convenient for the government to enforce it. In



the latter case, it is the government which will enforce the punishment because it involves the right of the community at large. Similarly, *ta'zir* being the right of individual can be pardoned only by that individual as he may instead conclude a compromise with the offender. Imam Sarakhsi has explicitly stated the principle that the ruler does not have the authority to waive the right of individual. As opposed to this, *siyasah* relates to the right of the ruler which is why the right to pardon or commute vests in the ruler and no individual in his private capacity can waive or commute this punishment.

Can *ta'zir* be awarded in the right of God?

As noted above, the earlier Hanafi jurists explicitly mention that *ta'zir* is the right of individual. However, some of the later Hanafi jurists who were influenced by the Shafi'is accepted that *ta'zir* might also be given in the right of God. This caused problem of analytical consistency which was solved by Ibn 'Abidin by asserting that such a *ta'zir* would attract the relevant rules of the right of God. For instance, he asserts that such a *ta'zir* cannot be pardoned or compounded, like the *hudud*.

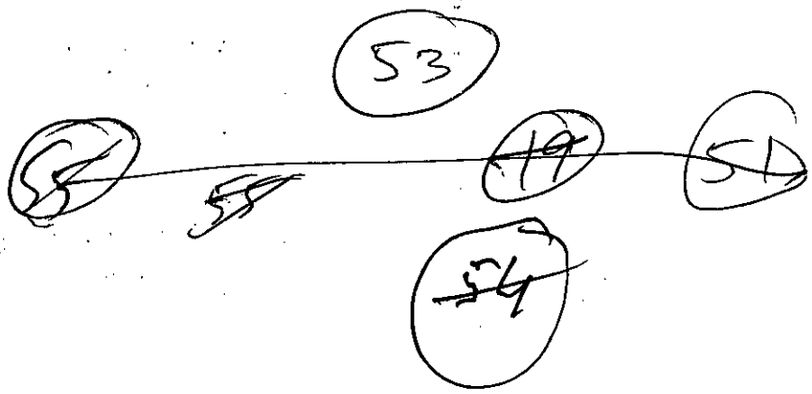
It is important to note that when *ta'zir* is given in cases where *hadd* cannot be given due to *shubhah*, this *ta'zir* is not given as the right of God; rather, it is given as the right of the community for curbing the evil. The Hanafis deem it *siyasah*, as noted above.

What is the standard of evidence for proving *ta'zir*?

As far as *ta'zir* as *ta'dib* is concerned, it does not require a specific standard of evidence because it is not a justiciable issue. Hence, we will concentrate only on the standard of evidence for *ta'zir* as *'uqubah*.

Here again, we have to distinguish between the punishment given in a *hadd* or *qisas* case and the one given in other cases of widespread *fasad*. For the sake of clarity and distinction, we will call the former as *ta'zir* and the latter as *siyasah*.

For the former, the jurists mention a specific standard of evidence: two male or one male and two female eyewitnesses. This standard of evidence is just a little lighter than that for the *hadd* or *qisas* punishment. Hence, this punishment cannot be awarded on the basis of circumstantial or indirect evidence. For the cases of *siyasah*, the jurists leave the standard of evidence to the discretion of the court. As such the court may give that punishment on the basis of circumstantial or indirect evidence. This point will be further elaborated below with examples from the *sunnah* of the Prophet (peace be on him) and his companions.



What is the extent and nature of the *ta'zir* punishment?

Again, we need not discuss *ta'zir* as *ta'dib*. We will concentrate only on *ta'zir* and *siyasah*.

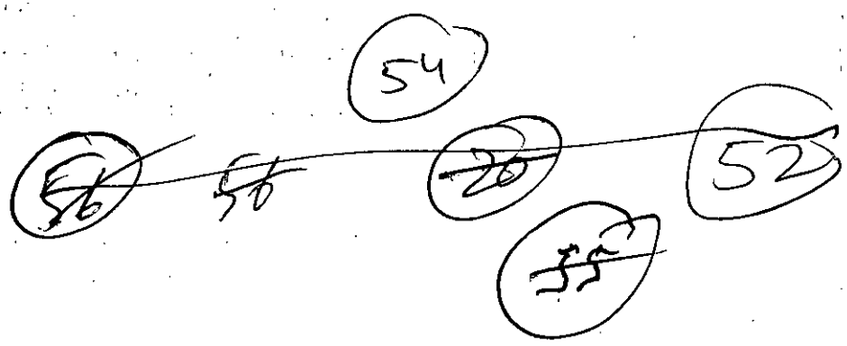
In the former case, if the punishment is given in the form of lashes, it must not exceed the least of the *hadd* punishment. Thus, the maximum limit of the *ta'zir* punishment in this case is 39 lashes. For the *siyasah* punishment, the jurists again leave the issue to the discretion of the court which may award appropriate punishment in the particular circumstances of the case. In the most extreme cases where the evil is widespread and the convict deserves no leniency the court may even award death punishment under the doctrine of *siyasah*. However, this punishment being given as the right of the community may be pardoned or commuted by the government acting on behalf of the community.

Now, we will turn to discuss a few examples of the death punishment given under the doctrine of *siyasah* by the Prophet (peace be on him).

Examples of the *Siyasah* Death Punishments from the *Sunnah* of the Prophet and His Companions

The Hanafi jurists include in *siyasah* many punishments awarded by the Prophet (peace be on him) or his Companions. For instance, during the time of the Prophet (peace be on him) a woman was found seriously wounded and when asked about the culprit she could not pronounce his name; people mentioned many names and on one name she nodded. This was considered a conclusive proof against the culprit who was given similar punishment for causing the death of the woman. The illustrious Sarakhsi commenting on this incident says

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



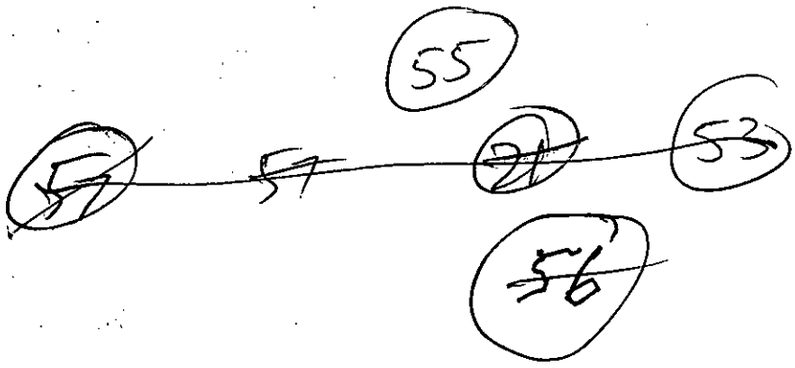
This passage clearly shows the Hanafi line of reasoning. The following example will further explain this point.

The Companions of the Prophet (peace be on him) disagreed on the punishment for the offence of homosexuality. Abu Bakr (Allah be pleased with him) is reported to have suggested that homosexuals must be burnt alive; 'Ali (Allah be pleased with him) was of the opinion that one hundred lashes would be awarded to the culprit if he was unmarried and would be stoned if he was married; 'Abdullah b. al-'Abbas (Allah be pleased with them) suggested that homosexuals be thrown from a high place and then stoned; 'Abdullah b. al-Zubayr (Allah be pleased with them) was of the opinion that the culprits be detained in a place where they would die due to the smell of the garbage.

Sarakhsi, while commenting on this disagreement of the Companions, comes up with a strong case for Abu Hanifah who considered the offence of homosexuality as a *siyasah* offence:

> The Companions agreed on one point: that this act was not covered by the term *zina* because they were well aware of the text regarding *zina* and even then they disagreed on the punishment of homosexuality. We cannot say that they would exercise *ijtihad* in the presence of the text. Hence, their disagreement on the punishment clearly proves that they agreed that this act did not amount to *zina*. As application of the *hadd* of *zina* to an act other than *zina* is not allowed, this act remained an offence for which no specific punishment was prescribed in the texts. Hence, *ta'zir* must be awarded in this case. What can be the nature and extent of that punishment is to be determined by the ruler under the doctrine of *siyasah*. If the ruler concludes that a particular form of death punishment should be given in a case, the *shari'ah* has given him the authority to do so.

After analyzing these instances, our conclusion is that whenever a punishment was awarded on the basis of circumstantial evidence, the Hanafi jurists deem it a *siyasah* punishment. Similarly, whenever a death punishment was awarded by the Prophet (peace be on him) or his Companions and the punishment lacked any of the characteristic features of both *hadd* and *qisas*, the Hanafi jurists deem it a *siyasah* punishment.



Part Four: Stricter Evidence or Specific Evidence

The petitioner argues that death sentence under Section 302 (b) is unjust because it is given when the evidence for *qisas* is not available. The presumption behind this argument is that the testimony of eyewitnesses is always better than other forms of evidence. This because the punishment of *qisas* is given either on the basis of confession or the testimony of eyewitnesses, as noted above, while the *siyasah* offence of Section 302 (b) can also be proved through other forms of evidence. This presumption, however, is rebuttable. Sometimes circumstantial evidence can be more powerful than the testimony of eyewitnesses. Still, *qisas* and *hudud* can only be proved through the specific standard of evidence because they are special offences. This does not undermine other forms of evidence because the purpose of the law is to minimize the possibility of imposing these special punishments and to leave the matter to God. This is why they are considered the rights of God.

Having said that, it must also be appreciated that due care must be taken while deciding on the basis of circumstantial evidence because only a small shift in the angle of looking at the circumstances may lead to an altogether different conclusion. The courts have taken note of this point in many cases. For instance, in *Muhabbat v. The State*, 1990 PCrLJ 73 at 78, the Sindh High Court laid down the following conditions for death sentence on the basis of circumstantial evidence:

> A conviction may be based on circumstantial evidence alone, but to establish an offence by circumstantial evidence four things are essential:
>
> i. The circumstances from which the conclusions are drawn should be fully established.
> ii. All the facts must be consistent with the hypothesis.
> iii. The circumstances should be conclusive in nature and tendency.
> iv. The circumstances should, to a moral certainty, actually exclude every hypothesis, but the one proposed to be proved.

Finally, it is also worth noting that although death sentence under Section 302 (b) is discretionary, the court must give all possible allowances to the accused and must use the discretion judiciously as laid down by the Supreme Court in many cases, such as *Abdus Salam v The State*, (2000 SCMR 338).

Judgment of Pakistan Against 'Honour' Killing

Muhammad Akram Khan vs. State, PLJ 2001 SC 29

"Legally and morally, no body has any right nor any body be allowed to take law in his own hand or take life of any body in name of "Ghairat"—So called honour killing amounting to Qatl-i-Amd is violative of fundamental rights enshrined in Articles 9 & 8(1) of the Constitution."

Ashiq Hussain vs. Abdul Hamed, 2002 P.Cr. L.J. 859 [Lahore]

"No Court could and no civilized human being should sanctify murders in the name of tradition, family honour or religion."

Muhammad Saleem vs. State, PLD 2002 SC 558

"Nobody had the legal or moral right to take the life of a human being in the disguise of '*Ghairat*'."