



Islamabad Law Review

ISSN 1992-5018

Volume 1, Number 4

October – December 2017



Quarterly Research Journal of the Faculty of Shariah & Law
International Islamic University, Islamabad

GENERAL PRINCIPLES OF CRIMINAL LAW AS EXPOUNDED BY IMAM SARAKHSI

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In an earlier essay about the methodology of the Hanafi School, we have shown in detail that this methodology primarily relies on the general principles of law. We have also explained that these principles are used not only for understanding the detailed rules of the law but also for extending the law to new cases through the methodology of *takhrij*. Now in this paper, we have compiled some of the important general principles of the Hanafi law of *hudud* from the *Kitabl al-Hudud of al-Mabsut* by Shams al-A'imma Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi. For the sake of convenience, we have categorized these principles in various sets and have given examples of the application of the principles in the footnotes. We have also retained the original Arabic wording of the principle coined by Imam Sarakhsi as we believe that he masters the art of legal drafting. We hope that these principles will illustrate the line of reasoning adopted by the Hanafi jurists for developing criminal law, particularly of *hudud* and *qisas*.

On the Use of Reason

١. الحد بالقياس لا يثبت -^١

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¹Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, *al-Mabsut* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997), 9:86. A question may be raised here about the *hadd of shurb*, which according to the famous narrative about the decision of 'Ali (Allah be well-pleased with him) was fixed on the analogy of the *hadd of qadhif*. Even the analogy seems loose and not strictly in accordance with the conditions laid down by the jurists for analogy: "the one who drinks, loses senses; the one who loses sense, makes calumny; hence, I see the punishment of calumny for him" (Ibid., 9:82). The Hanafi jurists assert that the *hadd of shurb* was not fixed by *ra'y*; it was fixed by the practice of the Prophet (peace be on him) as understood by his companions (Ibid., 24:55). As explained elsewhere, the opinion of a companion is a binding source of law for the Hanafi School. (Muhammad Mushtaq Ahmad, "Significant Features of the Hanafi Criminal Law," forthcoming in *Journal of Islamic and Religious Studies*.) Here it is not just a solitary opinion; rather, as the Hanafi jurists look at it, this was the how the companions by a consensus understood the intention of the Lawgiver. Hence, the later jurists simply assert that *hadd* is either fixed by the Qur'an, the *Sunnah* or the

1. *Hadd* is not created through analogy.

٢. اثبات الحدود وتكملها بالقياس لا يكون -^٢

2. Creation and completion of *hudud* through analogy are not valid.

٣. شرط الحد بالرأى لا يمكن اثباته -^٣

3. No condition can be added to *hadd* on the basis of reason.

On the Authority of the Ruler

٤. الامام متعين للنيابة عن الشرع -^٤

4. The ruler is entrusted with authority for enforcing the *Shar'*.

٥. ليس للامام ان يضيع الحد بعد ما ثبت عنده ببينة -^٥

5. The ruler does not have the authority to vacate a *hadd* after it is proved before him in accordance with the prescribed standard of evidence.

consensus (Muhammad Amin Ibn 'Abidin al-Shami, *Radd al-Muhtar 'ala al-Durr al-Mukhtar* (Riyadh: Dar 'Alam al-Kutub, 2003), 6:3).

²*Al-Mabsut*, 9:50. Sarakhsi mentions this principle in the context of the additional punishment of expulsion along with lashes for the convict of *zina* and asserts that some of the jurists who consider this expulsion as part of the *hadd* punishment argue on the basis of *qiyas* that expulsion deters the culprit and the purpose of the *hadd* punishment is deterrence. However, Sarakhsi refutes this argument on the basis of this principle asserting that addition to the *hadd* punishment on the basis of *qiyas* is not possible in the same way as the *hadd* punishment originally cannot be established through *qiyas*.

³*Ibid.*, 9:46.

⁴*Ibid.*, 6:94. Interestingly, the Objectives Resolution accepts this principle and holds that governmental authority is a "sacred trust" which the people of Pakistan shall use within the "limits prescribed by Allah" as "sovereignty over the entire universe belongs to Allah".

⁵ *Ibid.*, 9:84 Hence, Article 45 of the Constitution of Pakistan is repugnant to Islamic law, if it includes the power to pardon or change the *hadd* punishment and also if it includes the power of pardoning or changing the *qisas* punishment even when neither the victim nor (in case of his death) any of his legal heirs waives or compounds the right of *qisas*. In *Hakim Khan v The State*, PLD 1992 SC 595, the Supreme Court could not resolve this issue and referred it to the Parliament which did not as yet come up with any solution. Hence, the issue remains unsettled. Section 18 (iii) of the Protection of Women Act, 2006, repealed Section 20 (5) of the Offence of Zina Ordinance and, thus, authorized the government to pardon the *hadd* punishments awarded under this Ordinance. The Federal Shariat Court in its decision on the compatibility of the provisions of the POWA with Islamic law simply ignored these provisions.

٦. ان هذا حق الله تعالى ، يستوفيه الامام بولاية شرعية ، فلا يشاركه غيره في استيفاءه^٦.

6. This [*hadd*] is the right of Allah which the ruler enforces by virtue of the authority given to him by the *Shari'ah*; hence, no other person shares this authority with him.

On the Characteristic Features of the *hudud* Punishments

٤. الحد أقرب الى السقوط من الاثم^٧.

7. *Hadd* is more likely to dissolve than sin.

٨. الحدود لا تقام بالأيمان^٨.

8. *Hudud* cannot be imposed on the basis of oaths.

٩. مبنى الحدود على التداخل^٩.

9. *Hudud* inherently require concurrent enforcement (*tadakhul*).

١٠. الحد لا يتجزأ، فاستيفاءه لا يكون الا باتمامه^{١٠}.

10. *Hadd* is indivisible; hence, it can only be deemed enforced when it is enforced completely.

⁶*Al-Mabsut*, 9:94. Hence, if the ruler – above whom there is no other ruler, commits a *hadd* crime, the punishment cannot be imposed on him (Ibid., 9:121-22).

⁷Ibid., 9:61. It means that if a person cannot be deemed to have committed sin, such as a child or an insane person, *a fortiori* he cannot be given the *hadd* punishment. Sarakhsi mentions this principle while negating the criminal liability of a woman who is coerced to sex and asserts that as she cannot be held sinner *a fortiori* she is not liable for the *hadd* punishment.

⁸Ibid., 9:59. Thus, if the accused denies the commission of the *hadd* crime but refuses to deny this on oath, he cannot be given the *hadd* punishment, if there is no evidence against him in accordance with the prescribed *nisab*.

⁹Ibid., 9:81. Hence, if a person more than once commits the same *hadd* crime before the whole of the *hadd* punishment is enforced on him, he can only be given the remaining part of the *hadd* punishment. The rule for *ta'zir* is different as the culprit is liable to separate punishments for separate instances of committing a *ta'zir* crime ('Ala' al-Din Abu Bakr b. Mas'ud al-Kasani, *Bada'i' al-Sana'i' fi Tartib al-Shara'i'* (Beirut: Dar al-Kutub al-'Ilmiyyah, 2003), 9:274).

¹⁰Sarakhsi, *al-Mabsut*, 9:55. Thus, if the *hadd* crime of *qadhif* is proved only by the confession of the accused and he retracts from his confession before the completion of eighty lashes, he is not deemed to have received the *hadd* punishment and as such he is not regarded as disqualified for giving testimony against others.

١١. الحدود في ما دون النفس لا تقام في حالة المرض -^{١١}

11. *Hudud* which do not entail death punishment cannot be enforced when the convict is ill.

On the Effect of *Shubhah*

١٢. اذا امتنع وجوب القصاص للشبهة ، وجبت الدية في ماله -^{١٢}

12. When due to the presence of *shubhah* it becomes impossible to enforce *qisas*, *diyah* must be paid out of the property of the convict.

١٣. الأموال تثبت بالشبهات -^{١٣}

13. Financial obligations are enforced even in the presence of *shubhah*.

On the *Hadd* of *Qadhf*

١٤. من قذف حيا ثم مات ، لا يقام عليه حد القذف -^{١٤}

14. The *hadd* of *qadhf* is not enforced on the one committing *qadhf* against a living person who dies following the allegation (*qadhf*).

١٥. من قذف ميتا ، يلزمه الحد -^{١٥}

¹¹Ibid., 9:84.

¹²Ibid., 9:72. However, in the absence of *shubhah*, *qatl-e-amd* attracts only the *qisas* punishment and *diyat* can be imposed on the murderer only as a result of a compromise between the legal heirs of the victim and the murderer with the mutual consent of both parties. In such case, the *diyah* is paid only by the murderer and his *'aqulah* is absolved from sharing his liability (Ibid., 9:72).

¹³Ibid., 9:85. Thus, a *ta'zir* crime is also proved in the presence of *shubhah* (Kasani, *Bada'i' al-Sana'i'*, 9:274) because the *ta'zir* crimes, like financial obligations, relate to the right of individual.

¹⁴Sarakhsi, *al-Mabsut*, 9:55. This rule applies where the one against whom the allegation of *zina* was made dies before making a complaint against the calumniator and even he dies after making the complaint. In the former case, only the *maqdhuf* had the right to file a complaint and as he died without doing so, the case ends with that. In the second case, even when the *maqdhuf* dies after making the complaint, the case ends because the law deems it a right of God, not of the *maqdhuf*; hence, it cannot be inherited by his legal heirs (Kasani, *Bada'i' al-Sana'i'*, 9:250).

15. The *hadd* of *qadhf* is enforced on the one who commits *qadhf* against a dead person.

١٦. الحاكى للقدف عن غيره لا يكون قاذفاً -^{١٦}

16. The narrator of the *qadhf* of another person does not thereby commit *qadhf*.

On the *Hadd* of *Zina*

١٧. الزنا فعل يختلف باختلاف المحل والمكان والزمان؛ وما لم يجتمع الشهود الأربعة على فعل واحد، لا

يثبت ذلك عند الامام -^{١٧}

17. *Zina* is an act which varies for different subjects in different places and times; hence, unless the four witnesses agree on one act, it is not proved before the ruler.

١٨. الزنا ليس الا وطء متعرعن العقد والملك وشبههما -^{١٨}

18. *Zina* is nothing but intercourse in the absence of the contract [of marriage], or ownership [of the slave-girl] or the form of any of them.

١٩. ان مكنت نفسها من فاعل لم يآثم ولم يخرج، فلا يلزمها الحد -^{١٩}

19. If the woman allows a person to commit intercourse with her who does not thereby commit sin or is not guilty, she is [also] not liable to *hadd*.

¹⁵Sarakhsi, *al-Mabsut*, 9:55. This is because accusing his death without ever punished for committing *zina* proves his chastity (*ihsan*) and accusing a chaste Muslim amounts to *qadhf*. In this case his living heirs are aggrieved persons and as such they have the right to file complaint (Ibid., 9:130).

¹⁶Ibid., 9:76. If Mr. A says that Mr. B alleged Mr. C of having committed *zina*, A is a reporter and his 'reporting' does not make him liable for the *hadd* of *qadhf*. On the other hand, if Mr. A, believing the allegation of Mr. B against Mr. C as true, informs someone else saying: 'Mr. C committed *zina*', this is not mere report and it attracts the *hadd* of *qadhf*. Sarakhsi gives this principle while explaining the rule that although *shahadah 'ala al-shahadah* does not prove the crime of *zina*, the reporters of the original testimony are not liable for the punishment of *qadhf* even if original witnesses shall be liable for the *hadd* of *qadhf* if their number is reduced from four (See Principle no 45 below).

¹⁷Ibid., 9:69.

¹⁸Ibid., 9:62.

¹⁹Ibid.

٢٠. المعتبر حال [الزاني والزانية] فيما يقام من العقوبة بعد تقرر السبب.^{٢٠}

20. When the cause of the punishment is established, the legal status of the couple is considered for the purpose of imposing the punishment.

٢١. المباشر للفعل هو الرجل ، والمرأة تابعة .^{٢١}

21. The act of intercourse is ascribed to the man and the woman acts as a subsidiary.

٢٢. ان لم يكن اصل الفعل زنا فهي لا تصير زانية ، لأن ثبوت التبع بثبوت الأصل .^{٢٢}

22. If the primary act is not *zina*, she does not become *zaniyah* because the subsidiary act is proved only when the primary act is proved.

٢٣. الزنا فعلان من الرجل والمرءة ، وانما يقام الحد على كل واحد منهما بفعله .^{٢٣}

Zina comprises two separate acts: one by the man and the other by the woman; and each one of them is punished for his or her own act.

٢٤. قولنا (ان الزنا فعلان) يعنى من حيث الحكم ، فاما فى الحقيقة فالفعل واحد- ولهذا لو تمكنت

الشبهة من احد الجانبيين ، يصير ذلك الشبهة فى اسقاط الحد عن الآخر .^{٢٤}

When we say: “*Zina* comprises two separate acts,” we mean: for the purpose of legal consequences. Otherwise, in reality, it is one act. Hence, if *shubhah* becomes the obstacle for enforcing the punishment on one party, it also becomes *shubhah* for saving the other party from the punishment.

²⁰ Ibid., 9:63

²¹ Ibid., 9:62 Hence, if the man is not liable for the *hadd* punishment of *zina*, his woman partner is also saved from this punishment. This is explained by the principles which are corollaries of this basic principle.

²² Ibid.

²³ Ibid., 9:77. This is an explanation of the legal principle that everyone is punished for his/her own wrong.

²⁴ Ibid.

٢٥. زنا المكرهه لا يوجب حد الزنا عليها بحال.^{٢٥}

24. *Zina* with a woman who is coerced does not make her liable for *hadd* under any circumstances.

٢٦. لا شركة للمرأة في الفعل اذا كانت مكرهه -^{٢٦}

25. When the woman is coerced, she has no share in the act [of *zina*].

٢٧. الوطاء في غير المملك لا ينفك عن عقوبة أو غرامة -^{٢٧}

26. Intercourse without lawful ownership must have either of two consequences: punishment or dower.

On Resident and Alien Non-Muslims

٢٨. الكفار لا يخاطبون بالشرائع وما هو خالص حق الله تعالى -^{٢٨}

27. Religious obligations and pure rights of Allah are not imposed on non-Muslims.

٢٩. معنى قولنا (الكفار لا يخاطبون بالشرائع): العبادات التي تتبني على الاسلام - فاما الحرمات ،
فثابتة في حقهم -^{٢٩}

²⁵ Ibid. This is the rule even if the coercion (*ikrah*) was imperfect (*naqis*), as explicitly asserted by Kasani (*Bada'i' al-Sana'i'*, 10:109). If a man is coerced to commit *zina*, the *hadd* punishment cannot be imposed on him but only if *ikrah* was complete (*tamm*), as imperfect coercion will not suspend this punishment for him (Ibid.). This distinction again is based on the principle mentioned above that *zina* is primarily ascribed to man and that woman is deemed facilitator.

²⁶ Sarakhsi, *al-Mabsut*, 9:77. This is very important principle for the purpose of ascertaining the nature of the so-called *marital rape* from the perspective of Islamic law. The spouses act as “partners” in sexual intercourse and here the principle of law says that when she is coerced she is not a partner; hence, the husband must not commit sexual intercourse with his wife without her consent. However, to call it “rape” and entail criminal liability for the husband goes much beyond what this principle means. The very purpose of the contract of marriage is to allow sexual intercourse; hence, the presence of consent is legally presumed which is enough for negating criminal liability. What is meant here is simply that husband should not coerce wife to sex; but *marital rape* is an oxymoron from the perspective of Islamic law.

²⁷ Ibid., 9:86. Thus, where the *hadd* punishment cannot be enforced because of the presence of *shubhah*, dower must be imposed on the man.

²⁸ Ibid., 9:64. This becomes the basis for recognizing some kind of “personal law” for non-Muslim inhabitants of the Muslim territory.

The meaning of our statement: “Religious obligations are not imposed on non-Muslims” is: rituals which are built upon Islam. As far as the prohibitions are concerned, they are established against them.

٣٠. المستأمن ملتزم لحقوق العباد - ٣٠

28. The alien undertakes to fulfill the rights of individuals.

٣١. المستأمن ما التزم شيئاً من حقوق الله تعالى - ٣١

29. The alien does not undertake fulfilling any of the rights of Allah.

٣٢. الربا مستثنى من كل عهد - ٣٢

30. *Riba* has been excluded from every treaty.

٣٣. حد الزنا يقام على اهل الذمة --- لأن الذمي من اهل دارنا وملتزم احكامنا فيما يرجع الى المعاملات - ٣٣

31. The *hadd* of *zina* is imposed on the people of *dhimmah*... because *dhimmi* is among the people of our territory and has undertaken to abide by our laws in matters other than worship.

٣٤. من كان من اهل دارنا فهوتحت يد الامام حقيقةً وحكماً، حتى يمنعه من الرجوع الى دارالحرب،

فيقيم عليه الحد ايضاً - ٣٤

²⁹ Ibid. Hence, *hadd* punishments are imposed on them, except where an act punishable with *hadd* is deemed permissible by the religion of the non-Muslims, such as drinking wine.

³⁰ Sarakhsi, *al-Mabsut*, 9:128. As such, the *hadd* of *qadhif* can be imposed on aliens because it also involves the right of individual even if the right of God is predominant in it (Ibid., 9:64). The same is *a priori* true of the *qisas* punishment because the right of individual is predominant in it (Ibid.).

³¹ Ibid., 9:64. Thus, the *hudud* punishments, other than the *hadd* of *qadhif*, are not enforced on him.

³² Ibid. This cardinal principle of Islamic law means that although Muslims are bound to fulfill the treaty obligations towards non-Muslims, they are not permitted to accept a condition about the payment of *riba* (interest) and that every such condition in a treaty is null and void for Muslims. Under no condition whatsoever shall interest be permitted in Muslim territory. This, then, becomes one of the least essentials for declaring a territory as *Dar al-Islam*. The Prophet (upon him blessings and peace), for instance, accepted other conditions which the people of Ta'if laid down for submitting to the rule of Muslims, except the condition of permitting *riba*. Similarly, one of the reasons for the expulsion of the Jews of Khaybar by 'Umar (God be pleased with him) was that they indulged in interest-bearing transactions.

³³ Ibid., 9:65.

32. The one who is from among the people of our territory is under the control of the ruler, physically as well as legally, so that he can stop him from going to a foreign territory; hence, he can impose *hadd* on him.

٣٥. [المستأمن] ليس تحت يد الامام حكماً، حتى لا يمنعه من الرجوع الى دار الحرب-^{٣٥}

33. The alien is not legally under the control of the ruler so that he cannot stop him from going back to his home territory.

On Testimony

٣٦. بمجرد الدعوى لا تقام العقوبة على أحد-^{٣٦}

34. Punishment cannot be imposed on any person on the basis of complaint alone.

٣٧. لا شهادة للخصم-^{٣٧}

35. The litigating party does not have the right to testify.

٣٨. ما ينكره المسلم، لا يثبت بشهادة اهل الذمة-^{٣٨}

36. What a Muslim denies is not provable through the testimony of *dhimmis*.

٣٩. فيما يجب حقاً لله تعالى، تمام القضاء بالاستيفاء-^{٣٩}

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid., 9:124.

³⁷ Ibid., 9:77.

³⁸ Ibid., 9:49.

³⁹ Ibid., 9:55 Thus, an accused may retract from his confession, or a witness may retract from his testimony, before the punishment is completely enforced after which the remaining punishment shall not be enforced and, as noted earlier, the accused shall not be deemed to have received the *hadd* punishment. Thus, he does not become disqualified for giving testimony (Ibid., 9:80-81).

37. In what is obligatory as the right of Allah Most High, judgment is accomplished when the sentence is enforced.

٤٠. الشهادة لا تكون حجةً موجبةً ما لم يتصل بها القضاء -^{٤٠}

38. Testimony does not become a binding argument unless it is accompanied by judgment.

٤١. العارض بالشهود قبل القضاء ، كالمقترن بأصل الاداء -^{٤١}

39. A legal impediment arising concerning the witnesses before the judgment has the same legal effect as the one arising at the time of the recording of testimony.

٤٢. العارض بعد القضاء ، فيما يندرى بالشبهات ، كالعارض قبله -^{٤٢}

40. In what is not enforced in the presence of *shubhah* [i.e., *hudud* and *qisas*], a legal impediment arising after the pronouncement of the judgment has the same effect as the one arising before such pronouncement.

٤٣. رجوع الشاهد بعد القضاء قبل الاستيفاء ، فيما يندرى بالشبهات ، كالرجوع قبل القضاء ؛

وفما يثبت مع الشبهات ، كالرجوع بعد الاستيفاء -^{٤٣}

41. In what is not enforced in the presence of *shubhah* [i.e., *hudud* and *qisas*], the retraction of a witness [from his testimony] before the enforcement of punishment has the same effect as that of retraction before the pronouncement of judgment; and in what is

⁴⁰Ibid., 9:54.

⁴¹ Ibid. Thus, if a witness was trustworthy at the time of giving testimony but loses this characteristic because of committing a major sin after giving testimony before the enforcement of the complete punishment, his testimony becomes unacceptable and the remaining punishment must not be enforced.

⁴² Ibid. This is because, as noted above, in the cases relating to rights of God, the judicial proceedings do not end with the pronouncement of the judgment but, rather, continue till the punishment is enforced completely.

⁴³ Ibid. The distinction stems from the basic presumption that in the rights of God, judicial proceedings continue till enforcement, while in the rights of individual judicial proceedings end with the pronouncement of the judgment.

enforced in the presence of *shubhah* [i.e., *ta'zir* and *siyasa*], it is as if he retracted after the enforcement of the punishment.

٤٤. الشهادة على الشهادة بدل ، والأبدال منصوبة للحاجة ، ولا تقام الحدود بمثلها ، لأنها مبنية على الدرأ -^{٤٤}

42. Testimony about testimony is a substitute; substitutes are accepted on the basis of need; *hudud* are not imposed on such basis because they are meant to be suspended [in such a situation].

٤٥. التعزير غير مسقط للشهادة -^{٤٥}

43. *Ta'zir* punishment to a person does not disqualify him for testimony.

٤٦. الثابت بالبينة ، كالثابت باقرار الخصم -^{٤٦}

44. What is proved through testimony is like what is proved through the confession of the other party.

٤٧. الشهادة على الزنا قذف في الحقيقة ، ولكن بتكامل العدد يتغير حكمها ، فيصير حجة الحد -^{٤٧}

45. Testimony of *zina* is *qadhf* in reality; but its legal status changes when the [required] number [of witnesses] is accomplished and it becomes the proof for *hadd*.

On Delay in Filing Complaint

٤٨. حد الزنا لا يقام بحجة البينة بعد تقادم العهد ، وكذلك كل حد هو محض حق لله تعالى -^{٤٨}

46. The *hadd* of *zina* is not enforced on the basis of testimony after a long period is lapsed; and the same is the rule for every *hadd* which is the pure right of Allah Most High.

⁴⁴Ibid., 9:76.

⁴⁵Ibid., 9:80. It is only after a person is given the complete *hadd* of *qadhf* that he becomes disqualified for giving testimony in any case in future.

⁴⁶Ibid., 9:97.

⁴⁷Ibid., 9:104. Thus, if three witnesses give testimony but the fourth one abstains, the first three are given the punishment of *qadhf*.

⁴⁸Ibid., 9:79. This is because the filing of a complaint after a long period creates a doubt the benefit of which goes to the accused.

٤٩. هذه الحدود تقام بالاقرار بعد تقادم العهد -^{٤٩}

47. These *hudud* are imposed on the basis of confession even after the lapse of a long period.

Miscellaneous

٥٠. الناس أحرار في كل شيء الا في أربعة : في الشهادة ، والعقل ، والحد ، والقصاص -^{٥٠}

48. People are presumed free [not slaves] in every matter, except four: in testimony, blood-money, *hadd* and *qisas*.

ثبوت الحرية لمجهول الحال باعتبار الظاهر ، وهو ان الدار دار الاسلام --- أو باعتبار استصحاب الحال من حيث ان الناس أولاد آدم وحواء عليهما السلام ، وهما كانا حرين - وهذا يصلح حجة لدفع الاستحقاق ، لا لاثبات الاستحقاق -^{٥١}

Proof of the freedom of an unknown person is the apparent position as the territory is the territory of Islam... or it is on the basis of the presumption of continuity as all humans are the descendants of Adam and Hawwa', peace be on them both, and they both were free. This presumption is valid for repelling an obligation, not for creating a right.

٥١. حرمان الميراث جزاء على القتل المحذور عقوبةً -^{٥١}

⁴⁹ Ibid.

⁵⁰ Ibid., 9:91. As explained in the next para, the presumption of freedom is based on the presumption of continuity which the Hanafi School considers valid for negating an obligation, not for creating a right. Thus, a free person is competent to become a witness but this competence is not established by the presumption of freedom. On the same ground, in case of *qatl-e-Khata*' the presumption of freedom for a deceased is not deemed enough to entitle him to full *diyah*; because of the presence of *shubhah*, the killer shall be liable only to pay half *diyah*. Similarly, in case of *qatl-e-amd*, if a deceased is deemed free, his killer becomes liable for *qisas* punishment which again is suspended by *shubhah*. Finally, if the accused in a *hadd* case is free, he is given full punishment while a slave is given half punishment; thus, because of *shubhah* the presumption of freedom is not deemed enough for awarding the full punishment.

⁵¹ Ibid., 9:92.

49. Deprivation from inheritance is a result of a culpable homicide as punishment.

٥٢. العاقلة لا تعقل العمد -^{٥٣}

50. The 'aqilah does not bear the responsibility of intentional wrong.

٥٣. الفعل في محل مباح لا يكون سبب وجوب الضمان -^{٥٤}

51. An act performed on a permissible subject does not become a cause for the obligation of compensation.

٥٤. المباحات تتقيد بشرط السلامة -^{٥٥}

52. Permissible acts are restricted by the condition of harmlessness.

٥٥. أمرنا ببناء الأحكام على ماهو الظاهر المعروف -^{٥٦}

53. We have been ordered to build determine legal consequences on the basis of the apparent and well-known position.

٥٦. ان المخلوق من ماء الزنا له من الحرمة والعهد ما لغيره -^{٥٧}

57. The one created from the water of *zina* has the same sanctity and protection as others have.

⁵²Ibid., 9:71. Under this principle, the killer is liable to deprivation from the inheritance of the deceased even in case of *khata* because even in this cases he is liable to offer expiation (*kaffarah*) which is an indication of the culpability of the act. Pakistani law confines deprivation from inheritance to 'amd and *shibh al-'amd* (Section 317 of PPC).

⁵³Ibid., 9:72.

⁵⁴Ibid., 9:71.

⁵⁵Ibid., 9:73.

⁵⁶Ibid., 9:78.

⁵⁷Ibid., 9:84.