Int J Semiot Law
DOI 10.1007/s11196-016-9495-4

Al-Shāfi'ī's Position on Analogical Reasoning in Islamic Criminal Law: Jurists Debates and Human Rights Implications

Luqman Zakariyah[1]

Abstract Al-Shāfi'ī (d. 204/820) has been unreservedly credited as one of the designers, if not the "master architect," of *uṣūl al-fiqh* (Principles of Islamic jurisprudence). His most important scholarly work, Al-Risālah (The Epistle), clearly demonstrates his cognitive creativity in this field. One of the methodologies for the decision of cases under Islamic law that Al-Shāfi'ī championed is *qiyās* (analogical reasoning), which he equated with *ijtihād* (legal reasoning). His balanced approach invites further enquiry into the extensive use of *qiyās* in general and in criminal law in particular. The extent to which *qiyās* can be applied to Islamic criminal law depends upon the degree or typology of *qiyās* being used, taking into account the Islamic theory of criminology. This article will analyse the position of al-Shāfi'ī in this regard. It will critically examine al-Shāfi'ī's complex views on the use of *qiyās* as a method for establishing culpability under Islamic criminal law. It will then explore how his position corresponds to the human rights paradigm in the contemporary age. This article concludes that, while the use of *qiyās* in criminal law, especially in law of retaliation (*qiṣāṣ*) and predetermined punishments (*ḥudūd*) in accordance with al-Shāfi'ī's approach is tantamount to incriminating a person based on less than certainty (*yaqīn*), it also represents the most promising way of protecting the right of victim.

Keywords Al-Shāfi'ī · Qiyās · Analogical reasoning · Human rights · Islamic criminal law · Certainty · Probability · Doubt · Modern technology

✉ Luqman Zakariyah
luqzak@iium.edu.my; luqmanzakariyah444@hotmail.com

[1] Department of Fiqh and Usul al-Fiqh, International Islamic University Malaysia, Gombak, Malaysia

Published online: 04 November 2016

1 Introduction

Qiyās (reasoning by analogy, or "analogical reasoning") is a starting point for *ijtihād* (legal reasoning) in Islamic jurisprudence. In the Islamic tradition, it represents human intellectual inquiry into divine revelation. Through *qiyās*, human intellectual acumen is revealed in all its variety. It is undeniably the case that most departures from the earlier epoch of Islamic jurisprudence, in particular, and Islam philosophy, in general, have resulted from the human intellect.

This article aims to present Muslim classical jurist position, especially Al-Shāfi'ī (d. 204/820)[1] on the use of analogical reasoning (al-*qiyās*) in Islamic criminal law. In doing so, the extent to which *qiyās* can be applied to Islamic criminal law is thoroughly examined taking into discussion the degree or typology of *qiyās* being used and the Islamic theory of criminology. The article analyses the position of al-Shāfi'ī in this regard and critically examines al-Shāfi'ī's complex views on the use of *qiyās* as a method for establishing culpability under Islamic criminal law. It then explores how his position corresponds to the human rights paradigm in the contemporary age. The article concludes that, while the use of *qiyās* in criminal law, especially in law of retaliation (*qiṣāṣ*) and predetermined punishments (*ḥudūd*) in accordance with al-Shāfi'ī's approach is tantamount to incriminating a person based on less than certainty (*yaqīn*), it also represents the most promising way of protecting human dignity.

The article is divided into four main themes (1) an introduction (2) al-Shāfi'ī's position on the use of *qiyās* in Islamic criminal law (3) the Implication of *qiyās* in Islamic criminal law for human rights protection and (4) a conclusion . The introduction sets the aims and objectives of the article. It introduces the concept of *qiyās* in Islamic jurisprudence and compares it with the concept of analogical reasoning in pre- and post-modern western philosophers. It touches on the legality of the use of *qiyās* in Islamic. The second theme looks carefully the position of Imam al-Shāfi'ī on the use of the *qiyās* in Islamic criminal law using his two major treaties in the field of Islamic jurisprudence namely al-Ummu and al-Risalah. To examine the validity of his position on the *qiyās* in Islamic criminal law, three of distinguished supporters of al-Shāfi'ī are recourse to; al-Muzanī (d. 264/878); al-Juwaynī (d. 478/1085); and al-Sam'ānī (d. 489/1096). In this theme three areas in which *al-qiyās* can be applied are examined namely, *qiṣāṣ*; *ḥudūd* and *ta'zīr*. To make the discussion more contemporary, the third theme links the use of *al-qiyās* in Islamic criminal law with the concept of human rights and juxtaposed al-Shāfi'ī's view with Hanafi's. Then the conclusion observes that, though al-Shāfi'ī's position may incriminate someone of a crime that has no explicit punishment in Islamic texts, using *qiyās* may have positive bearing on the victim.

[1] Throughout this article, I use both Islamic Hijra and Gregorian dates respectively for the classical Muslim scholars.

1.1 What is Al-Qiyās?

In essence, *al-qiyās* is equivalent to the concept of "analogy" in English [15, p. 83; 30, p. 179]. It is a form of argument that, in the opinion of some Muslim theologians and jurists, subsumes all other forms of logical argument [15, p. 83; 17, pp. 94–95]. The word *qiyās* is taken from the root verb *qāsa*, which literally means to measure or ascertain the length, weight, or quality of something. From the root, the word *miqyās* (scale) is derived [29, p. 264]. *Qiyās* also means "comparison" or implication that two things are similar or equal [12, p. 54]. Thus, *qiyās* connotes an equality or close similarity between two things, one of which is taken as the criterion or "benchmark" when evaluating the other.

Qiyās can be technically defined as the application to a new case (*far'*), on which the law is silent, of the ruling (*ḥukm*) in an earlier case (*aṣl*) because of the "effective cause" (*'illah*) which is common to both [4, Vol. 3, p. 186]. Al-Shāfi'ī defines *qiyās* as "the accord of a known thing with a known thing by reason of the equality of the one with the other in respect of the effective cause of its law" [43, p. 479; 33, p. 140].

A quite similar definition can be found in Western jurisprudence. According to Larry and Sherwin who assert that, "analogical reasoning in law means reasoning directly from one case to another" [31, p. 66], with the assumption that the cases resemble each other. In Mill's observation, analogy can be exemplified by asserting that "two things resemble each other in one or more respects; a certain proposition is true of the one; therefore it is true of the other" [32, Vol. 2, p. 87]. According to Mill, one can conclude that "a fact M, known to be true of A, is more likely to be true of B if B agrees with A in some of its properties" [32, Vol. 2, p. 87]. *Ipso facto*, if there is no resemblance between A and B, then a conclusion about B cannot be drawn by way of analogy to A.

Sunstein [46, 1992–1993] sheds still more light on the importance of analogy for legal practitioners. In his influential commentary on reasoning by analogy, Sunstein considers the method as the "most characteristic way of proceeding in legal theory, and an exceedingly prominent means by which both lawyers and non-lawyers think about legal and moral questions" [46, p. 741]. Schauer clarifies the matter of scepticism and the unenthusiastic perception of legal practitioners to legal reasoning, saying analogical reasoning is commonly used in all legal system by both lawyers and judges "and it comes as no surprise that many commentators have sought to explain the mechanism" [38, p. 92]. This common ground between Islamic and western legal theory put *qiyās* in the realm of intellectual discourse.

The most difficult task for an "analogist" is to discover the '*illah* (cause) embedded in a text and then determine whether that specific cause sufficiently resembles the cause in a new case before applying the original ruling [33, p. 135]. This gives rise to the proposition that such a derived ruling is speculative. Thus, results obtained by analogy are not parallel with rulings derived directly from the texts. As al-Zarkashī states, "*qiyās* can only be an indicator of a rule of God, not as an affirmative tool" [48, p. 17]. This gives Kamali opportunity to argue further that while *qiyās* is recognized as one of the sources of Islamic law, it does not attain the capacity of affirmation because "in most cases [it] only amounts to a probability"

[29, p. 266]. This somewhat weakened interpretation of *qiyās* in Islamic jurisprudence tends to create tension between "antagonist" and "protagonist" of *qiyās*.

It is by no means that only Muslim scholars are inclined to take this position. Kant has also invited and espoused such scepticism about analogical reasoning. He asserts that "analogical reasoning cannot generate knowledge …but it can only illustrate what is already known" [28, p. 136].

It is entirely logical and understandable that analogy, as a process of human reasoning, might be considered tantamount to error. However, this is not always the case. Analogical reasoning may yield certainty in some cases. Mill pointed out that, on some occasions, while analogy "affords some degree of probability," it can still yield certainty if case *B* agrees with case *A* in nine out of ten of its known properties [32, p. 88]. According to Mill, under such conditions, the probability is nine to one "that B will process any given derivative property of A." A high degree of probability can be obtained when a new case "presents itself, in which all (the) conditions do not exist, but the far greater part of them do." Although this analogy is subject to being contested, even when the process of inductive reasoning can be carried out to its conclusion, the knowledge provided by the analogy serves as a "guide-post" to where certainty can be found. Mill considered analogical reasoning, viewed in this light, to "have the highest scientific value" [32, p. 92]. If we juxtapose Mill view with some Muslim jurists such as al-Zarkashī [48, 1994], on admission of most probability (*ghalaba ẓann*) in Islamic ruling in lieu of certainty (*yaqīn*), one can unequivocally accept the importance of *qiyās* especially in matter that involves criminal justice.

Qiyās has played a vital role in Islamic law when it comes to legal reasoning. Most scholars of Islamic legal theory such as al-Samānī [37, 1999/1418]; al-Shawkanī [39, 1999/1419]; al-Shinqiṭī [42, 2001]; and Hallaq [15, 1997/1999] have considered *qiyās* to be a primary element of *ijtihād,* if not *ijtihād* itself, as viewed by al-Shāfi'ī [44, p. 288] and other principles of legal analysis such as *istiṣḥāb* (presumption of continuity), *istiṣlāḥah* (public interest), and *istiḥsān* (juristic preference), as secondary elements [24, 2002/1423]. This intellectual tool for arriving at legal decisions by referring to text-based precedent has, since the inception of Islam, been accepted by authors of Islamic legal texts—either implicitly or explicitly.

However, opinions are mixed regarding the status and hierarchy of *qiyās* in Islamic jurisprudence. From the classical point of view, *qiyās* is one source of Islamic law [41, 2001]. However, Ẓāhirites and Shīites schools of jurisprudence unequivocally and totally reject *qiyās* [12, p. 331; 41, p. 244]. Even among classical scholars who espouse the validity of *qiyās*, some contend that the use of *qiyās* is not uniformly acceptable in all cases, and others apply certain restrictions [40, p. 424]. Yet, among those who approve the use of *qiyās* in all areas of Islamic law, several still express marked reservations as regards the issue of *qiyās* in connection with *al-maqaddarāt* (numerical objects), a concern that some commentators have called "irrational" (*ghayrmu'allal*) [37, Vol. 2, p. 106; 12, p. 48; 29, pp. 221–223].

Qiyās might well be the most controversial and complex legal tool for reaching decisions under Islamic law and its effectiveness depends upon the degree to which

humans are able to exert an impact on that divinely inspired law. This is because *qiyās* is largely reliant on human faculties, which vary according to the individual's intellectual ability. Whether *qiyās* shares the infallibility attributed to other sources of Islamic law has always been a bone of contention. Hasan [19, 2003] considers *qiyās* to be an indirectly infallible source of Islamic law. His conclusion is based on the fact that "*qiyās* derives its value from these sources (i.e., the other three sources, described above), hence it is indirectly infallible" [19, p. 21]. Hasan's submission can be seen as reductive in the sense that it does not take into account the positions of other schools of Islamic jurisprudence. As previously noted, there are Ẓāhirites and Shi'ites who vehemently reject *qiyās* [13, 1993/1413; 40, p. 434]. Abū Sulayman alludes to this fact when he states: "[t]he various schools of Muslim jurisprudence differ on the number of *uṣūl* to be used or emphasized, although all of them include the Qur'ān and the Sunnah" [1, p. 2]. That is to say, some schools are still not comfortable with *ijmā'* and *qiyās* as primary sources.

1.1.1 Justification for the Legality of Qiyās

Muslims regard the law of Islam to be universal and all-encompassing. One cannot argue the universality of Islamic law convincingly if one relies only on a limited number of divinely revealed texts. Of course, one must remember that many issues under Islamic law arose partly because Muslims migrated to other parts of the world after the demise of the Prophet. As times and circumstances changed, Muslims encountered novel issues that were not directly covered by the texts.

The responsibility of the *Ummah* (Muslim community, especially the scholars or '*ulamā*') regarding such matters is to identify congruent rulings from the available texts [43, pp. 476–486]. Abū Zahra quotes al-Sam'ānī as saying that all jurists dating from the epoch of the Messenger of God to the present (i.e., the period of al-Sam'ānī) have used analogies in all rulings related to their religion and have reached the consensus that a resemblance of truth is truth and a resemblance of falsity is falsity. According to this approach, it is not permissible for someone to deny the legitimacy of *qiyās* merely because it considers the resemblance of similar situations and operates by way of parable [2, p. 166). Abū Zahra emphasizes that "it is permissible to use *qiyās* on any original cases which emanate from the right source if the rationale in it is for deterrence and protection of public benefits and dispensation of justice among people" [2, p. 166].

Muslim jurists who espouse the legitimacy and authority of *qiyās* in Islamic law invariably refer to Qur'ānic verses that allude to the use of reasoning by "crossing over" and looking beyond the literal meaning of locution. Qur'ān 59:2 calls for "*i'tibār*" in the verse "*fa'tabirū yā ulul absār*" (learn a lesson O ye who have eyes) [15, p. 106]. According to al-Shinqītī the real *i'tibār* is to compare one thing with another [41, p. 295]. Apart from this verse, the prophetic sanctioning of Mu'ādh ibn Jabal (one of the Prophet's Companions) to exercise his personal reasoning when asked to declare how he would proceed as the Prophet's judge in Yemen should he find no answer for a legal question in the texts is also cited as justification for use of *qiyās*.

> It is reported that when the Prophet dispatched Muʿādh to Yemen to govern, he asked, "What will you use to judge?"Muʿādh replied, "With the Book of God". Then the Prophet asked, "What if you cannot find it [answers] in the Book of God?"Muʿādh replied then, "With the Sunnah of His Messenger." When the Prophet asked, "If not found in the Sunnah?," Muʿādh replied, "I will exercise my own legal reasoning*"* [40, p. 317].

The most explicit evidence for the validity of *qiyās* ostensibly surfaces in the story of a man whose wife gave birth to a black child (i.e., a child different in colour from his parents) [41, p. 296; 10, Vol. 7, p. 53].The Prophet equates the incident with that of a red camel which gave birth to grey offspring. Indeed, common sense has taught us that when two things share the same features, it is probable that the same ruling may apply to both of them. Al-Shāfiʿī argues:

> The strongest kind [is the deduction] from an order of prohibition by God or the Apostle involving a small quantity, which makes equally strong or stronger an order of prohibition involving a great quantity, owing to the [compelling] reason in the greater quantity [44, p. 308].

Al-Shāfiʿī further explains that scholars are obliged to respond to rulings and deduce answers for any matter. However, while scholarly responses might differ by virtue of *qiyās*, yet each may have fulfilled the legal requirements (*ibid.*). Al-Shāfiʿī's explanation implies that rulings established by virtue of *qiyās* are not static but rather subject to modification.

2 Al-Shāfiʿī's Views on Qiyās in Islamic Law

For al-Shāfiʿī, *qiyās* is on the same footing as revealed texts in terms of its *dalāla* (implied meaning), but not in terms of its infallibility and divinity [44, p. 288]. It is used in cases where there is no explicit text to address novel issues. Of course, if a legal solution can be found in the Qur'ān and Sunnah, the use of *qiyās* will become futile.

Al-Shāfiʿī starts his discussion on *qiyās* with a controversial statement. When he was asked to define *qiyās*, he did not hesitate to compare it to *ijtihād* (legal reasoning). When responding to his interlocutor, he said *qiyās* and *ijtihād* were synonyms [43, p. 476] because *qiyās* demands cognizance of many intellectual apparatus such as linguistics, logic, and custom.

Initially, al-Shāfiʿī considers *qiyās* to have existed in two forms. The first form is *qiyās al-shaba'* (resemblance), where a new case is similar to the original case, i.e. ("one of them [forms of *qiyās*] if the case in question is similar to the original meaning [of the precedent]") [43, p. 479]. In this category, there is no disagreement as to its validity [43, p. 478].The second form is *qiyās al-ʿillah* (causative inference, *ratio legis*) [15, p. 23, p. 101]. According to al-Shāfiʿī *qiyās al-ʿillah* is when "the case in question is similar to several precedents" [43, p. 479]. Here, one must exercise analogy, although the result may be disagreeable to some jurists [43, p. 479]. Another type of *qiyās* to which he alludes at the end of his *Al-Risālah* is

what Hallaq calls "*a fortiori*" [15, p. 29; 16, pp. 224–228]. This implies that "if God forbids a small quantity of a substance, [logically], we will know that a larger quantity is equally forbidden…." [15, p. 29; 43, p. 512].

Thus, one is under an obligation to respond to the call of God by searching for appropriate rulings for novel cases with legal reasoning through any available texts, and one's opinion should be binding to the extent that one adheres to the rules of *ijtihād*. This exercise is not open to just anyone. Al-Shāfi'ī unequivocally excludes a layman from performing *qiyās* since he or she is not in the class of scholars. To perform *qiyās*, one must have vast and substantive knowledge of both texts and their forms. Thus, one is required to possess "all the tools for the purpose of *qiyās*, this includes competence in the knowledge of the book of God; its prescribed duties, its ethics, its abrogating and abrogation, its general and particular [rules], and its [right] guidance" [43, p. 509]. The same quality must be possessed in the *ḥadīth* of the Prophet. He or she must be familiar with consensus (*ijmā'*) and have vast knowledge of the language in the texts. In addition, he or she must be sane and objective, among other prerequisites. All these requirements are deemed to be a safeguard against erroneous rulings in Islamic legal theory [43, p. 509].

2.1 *Al-Shāfi'ī's Position on* Qiyās *in Criminal Law*

Deducing the position of al-Shāfi'ī on *qiyās* in Islamic criminal law requires an understanding of the personal expressions in his books, as well as what his followers have said on his behalf. Two of his main books are the primary sources for this purpose: *Al-Risālah,* which discusses his methodology for dealing with substantive law (*uṣūl*), and *Al-Umm*, which expresses his opinion on positive laws (*furū'*) in Islamic jurisprudence. Several later commentaries help elucidate al-Shāfi'ī's views on this issue. Three distinguished followers of al-Shāfi'ī are worth mentioning: al-Muzanī (d. 264/878), who was a staunch disciple of al-Shāfi'ī; al-Juwaynī (d. 478/1085), who is regarded as the "last commentator" on al-Shāfi'ī's book (*al-Risālah)*; and al-Sam'ānī (d. 489/1096), who defected from the Ḥanifite School to the Shāfi'ite School in 468/1075–76. In particular, the work of al-Sam'ānī is very important for a thorough understanding of al-Shāfi'ī's views on this topic. Al-Sam'ānī rendered accounts of both Ḥanifite and Shāfi'ite views on this particular issue, and, without doubt, his understanding of Abū Ḥanifa's disapproval of *qiyās* in *ḥudūd* has proven to be both invaluable and more comprehensive than that of any other scholar.

The crux of the debate on *qiyās* is its applicability in the three major areas of Islamic criminal law: *qiṣāṣ* (retaliation), *ḥudūd* (prescribed crimes with fixed punishments), and *ta'zīr* (other offences with discretionary punishments). Al-Shāfi'ī, along with a host of other Muslim jurists insisted that *qiyās* could be used effectively within this spectrum [27, Vol. 2, p. 68; 37, Vol. 2, p. 106]. These jurists have argued that the rules which establish the validity of *qiyās* and its legality in other spectrums of Islamic jurisprudence are general. As such, this "generality" must include Islamic criminal law [5, Vol 33, p. 171; 41, p. 174; 3, pp. 67–68]. However, Abū Ḥanīfah and some of his disciples disagree on the use of *qiyās* in *ḥudūd* in particular [5, Vol 33, p. 171].

Discussions on Islamic criminal law cover the three main aspects of crime and their corresponding punishments: *qiṣāṣ*, *ḥudūd*, and *ta'zīr*, defined above [7, pp. 1–2]. Al-Shāfiʿī sees no reason not to apply *qiyās* to cases falling within this entire spectrum of crimes, both for determining culpability and for establishing punishments, in as much the criteria for analogy are fulfilled [37, Vol. 2, p. 107].

2.1.1 Qiyās in Qiṣāṣ (Analogical Reasoning in Islamic law of Retaliation)

Qiṣāṣ is an area of criminal law within Islamic jurisprudence. Its domain includes bodily injury (*jināyahʿalā l-abdān*) and offences against souls (*jināyahʿalā l-nafs*) [7, pp. 69–95]. The established norm for punishment varies depending on the nature of the crime. Whether the *qiṣāṣ* crime claims someone's life or deforms the human body, the nature of the punishment is largely dependent upon whether the crime was committed intentionally (*'amd*) or unintentionally (*khaṭ'*) [23, pp. 24–25]. There is debate among Muslim jurists on whether the quasi-intentional (*shibh'amd*) nature of a crime can be taken into consideration when determining punishment for the offence [36, pp. 43–44].With regard to intentional bodily injury and offences to the soul, the term *qiṣāṣ* is used to indicate "equity" in punishment, otherwise known as retaliation. With regard to unintentional and quasi-intentional bodily offence, the term used for punishment is *diyah* (blood money) [36, pp. 49–53].This type of punishment, which varies according to the crime, is established in Islamic texts.[2] *Qiṣāṣ* crimes occurred infrequently during the lives of the Prophet and his Companions. However, since circumstances in which people find themselves today have changed in the sense that different ways in which crimes of *Qiṣāṣ* occurred recourse to analogy is defensible in establishing the criminality and culpability of such new ways of committing *qiṣāṣ* crimes. Fadel quite rightly remarks on the inevitability of legal reasoning in Islamic law in general, saying "the absence of revelation does not suggest the absence of regulation, because the human mind, through the use of considered judgment (*ijtihād*), could 'discover' the rule intended by God for any specified event" [11, pp. 359–362].

In *qiṣāṣ* crimes, analogical reasoning may not always be useful for defining new types of *qiṣāṣ* crimes simply because in some cases murder will be murder and injury will be injury. However, in other cases, analogical reasoning can help establish what constitutes murder and injury under the law of *qiṣāṣ*. In this section, we will analyze a few examples where analogy has been used to establish both the substantive and the procedural from al-Shāfiʿī's perspective. The examples provided will serve as a benchmark showing that, if analogy is applicable in these cases, then such methodology can be applied to establish criminality and culpability in our contemporary era, in line with al-Shāfiʿī's own "benchmark" of analogy.

It can be demonstrated that al-Shāfiʿī used *qiyās* to establish both the substantive law of *qiṣāṣ* and its procedures. In his opening chapter on *qiṣāṣ* in *Al-Umm*, he considers the question of causing an injury which impairs someone's ability to speak, such as an injury to someone's tongue

[2] See Qur'ān, 2:178–179, 4:92; and al-Bukhari, hadith 6877.

> If a person's tongue is injured which impairs his speech…if half of his utterance is impaired then half of *diyah* will be paid. I will allot more compensation than that allotted for someone whose entire speech or tongue is injured. [45, Vol. 6, p. 129].

In this regard, criminal liability can be imposed on someone who caused damage to a person's ability to speak by analogy with the original ruling which establishes the culpability of someone who damaged someone's tongue. Al-Shāfi'ī imposes one-quarter of a dinar for such a crime, as is consonant with the case of injury to the tongue [45, Vol. 6, p. 129]. This shows Al-Shāfi'ī's consistency in application of *al-qiyās.* A methodology that is requires in any scientific knowledges. While this consistency is applauded, the certainty of congruence of the stand to the intent of the Lawgiver is uncertain.

Analogical reasoning is also used in al-Shāfi'ī's treatise to determine whether a grandfather, either paternal or maternal, can be convicted of murdering his grandson, as it is a settled rule in the Shāfi'ī school that a father would not be thought to kill his son intentionally. According to al-Muzani's narration from al-Shāfi'ī's text, "a grandfather (paternal or maternal) would not be killed in retaliation for his grandson…by analogy (on the established rule of *qiṣāṣ*) between father and his son" [45, Vol. 8, p. 343]. It is a rule in Islamic law that when the original case in unavailable for a reason, recourse to the substitution is inevitable "*Idhā baṭala al-aṣl yuṣār ilā al-badal*" [51, p. 287]. This can be found it the rules of inheritance. Thus, al-Shāfi'ī stand is not an odd. The extension and other similar analogies used by al-Shāfi'ī serve as retrospective rulings upon which decision of a similar novel issue can be based.

The essential purpose of Islamic criminal law is not to inflict punishment on humans but rather to establish justice and protect humanity through due process. One of the more intellectually arid areas of Islamic criminal law where the importance of *qiyās* comes into play, and one which would benefit from more rigorous examination, is criminal procedure. From the prophetic era, various procedures have been applied to ascertain the claims of victims of criminal offences.

The general rule in Islamic law for unintentional or quasi-intentional homicide is that a relative of the culprit takes the responsibility of paying blood money [8, Vol. 2, p. 191–202; 7, pp. 75–76]. However, if the relatives of the culprit (*āqilah)* live outside the city where their relative has committed the crime, who should then take responsibility? In al-Shāfi'ī's opinion, the culprit must shoulder this responsibility himself. Al-Muzanī curiously observes that al-Shāfi'ī departs from *qiyās* on this issue because, to Al-Muzanī, *qiyās* requires the ruler of the city where the crime has been committed to write to the authorities where the family has its domicile [34, Vol. 8, p. 355]. It appears that his student, but not al-Shāfi'ī himself, recognized analogy in this approach. It is possible that extending the period of time to retrieve *diyah* for the murdered relatives might result in injustice. Thus, for al-Shāfi'ī, departing from *qiyās* serves the purpose of justice to human rights. However, the excuse of al-Shāfi'ī' on inconsistence in this issue cannot hold water in contemporary age because of the availability of technological gadgets that can be used to realise the purpose of justice in this scenario.

Analogical reasoning may also be applied to determine what constitutes intentional, unintentional, and quasi-intentional bodily offence. Regarding intentional bodily offence, the benchmarks mentioned in the text are the sword (*sayf*) and, for unintentional offences, the whip (*sawt*), cane (‘*aṣa*) and pebble (*hajar*) [25, Vol. 8, pp. 260–264]. However, these benchmarks lack unification across the culture. Thus Muslim jurists, including al-Shāfi‘ī, sought unification in the statements what normally causes death for intentional crimes and what normally does not cause death for unintentional crimes [47, Vol. 8, p. 297; 21, pp. 119–120]. Yet there is still recourse to *qiyās* where textual benchmarks are not sufficient due to advancements in technology. Without doubt, original cases can be found in the texts regarding what constitutes intentional and unintentional offences calling for retaliation or compensation, respectively. However, the use of new ways to commit bodily harm or murder not mentioned in the texts requires clarification. How can we determine whether new weaponry is subsumed within the original tools mentioned in the text?

The opinion of al-Shāfi‘ī, as well as most Muslim jurists, is that any object customarily meant to function as a weapon or meant to cause harm, injury, or kill if used in such a manner should be considered instrumental in intentional offences. Therefore, the rule established in the texts can be applied by analogy because the end result (i.e., use of the tool resulting in injury or killing) is the same [48, Vol. 7, p. 341; 22, Vol. 10, p. 238]. This stance is consistent with the spirit of Islamic criminal law, which holds that criminals must not go free without retribution and victims’ rights must not be undermined because of the absence of direct textual evidence.

The examples mentioned here are not exhaustive. There are many other ways of applying *qiyās* in *qiṣāṣ* crimes and their punishments. However, the vocal point is whether by doing this, we have achieved the purpose of Islamic criminal law (i.e. protecting the rights of victims and accused persons). To me, it seems that there is no rigidity in application of *qiyās* in *qiṣāṣ* as it is seen in al-Shāfi‘ī departure from *qiyās* when he saw that the spirit of law in the matter would be undercut. This can be only said in crimes that involve both rights of Allah and rights of humans as the case of *qiṣāṣ*.

2.2 Qiyās in Ḥudūd (Analogical Reasoning in Prescribed Crimes with Fixed Punishments)

The law of *ḥudūd* (prescribed crimes with fixed punishments) itself is controversial due to the fact that *ḥudūd* crimes and their punishments are so severe but detterent. [9, p. 82]. For this reason, some commentators encourage clemency and indulgence before the crime is reported to the relevant authority [36, pp. 12–16]. It has been reported that ‘Umar Ibn Khaṭṭāb said that for him to have suspended the punishment *ḥudūd* in the wake of *subhah (doubt)* is more preferable to him than to inflict it on the accused [14, p. 268]. This is also the approach of other companions and their successors [14, pp. 266–271].

The term *ḥudūd* can refer to the crimes as well as the punishments; both concepts denote that which has been prescribed and ordained by the Lawgiver. Based on the

nature and characteristics of such crimes, once persons accused of these crimes have been brought before the court and found guilty, they cannot be pardoned and their prescribed punishments can neither be minimized nor increased [23, 2003; 36, pp. 53–54). To enforce the law of God and, at the same time, live within the spirit of the law, Muslim jurists classify *ḥudūd* crimes as affecting rights of God, rights of human beings, and rights held jointly by God and mankind [49, pp. 257–259; 50, pp. 98–100, pp. 122–125].

Al-Shāfi'ī reticently assents to the general use of *qiyās* in *ḥudūd* [27, Vol. 2, pp. 68–70; 37, Vol. 2, pp. 107–114; 6, Vol. 3, pp. 171–73; 26, p. 463]. He alludes to the spirit of Islam in connection with *ḥudūd* crimes by acknowledging that concealment of the crime is preferable to exposure. In this regard, he states, "We prefer for someone who committed any *ḥadd* crime (singular of *ḥudūd)* to conceal it (*satarahu*) and to fear Allah the Exalted. And he should not embark on sinful acts against Allah" [45, Vol. 6, p. 149]. This indicates that in espousing the use of *qiyās* in criminal law, al-Shāfi'ī' did not seek to undermine the remediation of human rights violations by establishing criminality and culpability through *qiyās*, but rather to elaborate upon the rules of God and to accommodate dynamism.

Two issues often cited in debates about the applicability of *qiyās* in *ḥudūd* concern the crimes of *liwāt* (sodomy) and *nabbāsh* (grave-robbery) [37, Vol. 1, p. 284; 35, Vol. 4, p. 929; 39, Vol. 2, pp. 143–44; 30, pp. 199–214].Whether these two crimes can be equated with the original crimes of *zinā* (adultery or fornication) and *sarqah* (taking away the property of another without their knowledge), respectively, as defined by law, is hotly debated between the Shāfi'ites and Ḥanifites [27, Vol. 2, pp. 68–70; 37, Vol. 2, pp. 107–111]. For al-Shāfi'ī, *liwāt* and *nabbāsh* share the same attributes of the original crimes in the sense that the former includes penal penetration into forbidden genitalia (*farj*) [42, Vol. 2, p. 196] while the later subsumes "taking away the property of another without their knowledge" [29, p. 293; 42, Vol. 2, p. 196].

The argument put forward by the proponents of *qiyās*, including al-Shāfi'ī, in support of using *qiyās* in connection with the *ḥudūd* crimes of *liwāṭ* and *nabbāsh* is that because the four schools of Sunni jurisprudence agree that *qiyās* is one of the four sources of Islamic law, *qiyās* should be included in *ḥudūd* crimes [37, Vol. 7, p. 109]. According to al-Aṣfahānī, "the evidence from which *qiyās* attains its legality does not exclude any sort of matter or issues, thus, *ḥudūd*… must be included" [6, Vol. 3, p. 171]. Moreover, lexicographically, *zinā* and *liwāṭ* are described as "abominable acts" (*fāhisha*) and, therefore, if *zinā* deserves *ḥadd* punishment then this may also apply to *liwāt* [30, p. 295].

When refuting the issue of uncertainty in applying *qiyās* in *ḥudūd*, scholars also argue that if the application of *qiyās* in other areas of Islamic law has been received with approval, then what hinders its application in *ḥudūd* jurisprudence? Moreover, there is no doubt about the legality of *qiyās* in Islamic jurisprudence from the viewpoint of its supporters and, therefore, by extension, its opponents should not doubt its application for *ḥudūd* [27, Vol. 2, p. 70; 37, Vol 2, pp. 107–109]. They further argue that the settled rule regarding application of *qiyās* in any aspect of Islamic jurisprudence requires fulfilment of conditions; if those conditions are attainable in *ḥudūd*, then *qiyās* should be applicable to *ḥudūd* [37, Vol. 2, p. 109].

Al-Shāfi'ī consistently and persistently extends the binding relation between the two acts to evidence of their criminality. In cases of sodomy, he insists upon the testimony of four witnesses who can verify having seen the act take place (as required in cases of adultery or fornication) to prove guilt beyond any reasonable doubt. Al-Shāfi'ī argues that both sodomy and bestiality are sexual intercourse and thus, less than four witnesses in the two cases will not be accepted as it is the case in the rules of fornication and adultery [45, Vol. 7, p. 59].

To the opponent of Al-Shāfi'ī such as the Hanifites, though there is resemblance between adultery and sodomy in the sense of penetration of penis, however, both are not corresponding legally [37, Vol 2, p. 110]. This dispute stems from the fact that the Shafi'ite considers the penetration of penis into the anus with pleasure regardless of kind of gender. While to the Hanifi'ites, the speciality of the penetration must be woman virginal before one can be considered to have committed adultery. This feature does not exist in sodomy, thus the punishment of adultery cannot be inflicted. This last opinion is very apt to the spirit of Islamic law where one cannot be punished for a crime that Allah has absolute right in it without explicit directive from the Lawgiver. The crime of *zinā* and the punishment associated to it is believed to have been originated form Allah and there is no human right affected when it is committed. Thus punishing the perpetrator of sodomy with such prescribed punishment by analogy will tantamount to unfair [4, Vol 4, p. 66].

With regard to grave robbers, their crime is analogous to *sarqah*, i.e., taking someone's property without permission. Thus, if a grave robber has exhumed a coffin from its grave and if the coffin's value can be ascertained, then his or her hand will be amputated, but if the perpetrator is caught before carrying out said crime, then *ḥadd* punishment will not be inflicted. Al-Shafi'ī states thus:

> The hand of the grave robber will be amputated if he removed the coffin from the grave entirely, because [the act is charged as taking property] from its secured place; if he is caught before he removed it entirely from the grave, his hand will not be amputated) [45, Vol 6, p. 161].

The stand Al-Shafi'ī in this matter can be upheld for the reason we mentioned in favour of non *ḥaḍḍ* in the sodomy. The grave robber here has taken a property that does not belong to him/her in a secured place. The rights of the deceased is still under Islamic law protection. Thus, his/her relatives have rights to accuesed the grave robber of stealing and law of *sarqah* ensues.

In *ḥudūd* jurisprudence, al-Shāfi'ī does not hesitate to link the criminal culpability of armed robbery with the crime of theft, although the consequences for the former are much more severe than for the latter. However, since neither the *Qur'ān* nor the *Sunnah* provides specific punishment for a bandit who steals, in addition to other crimes committed during the act of banditry, the need for analogy in this case is of paramount importance. Al-Shāfi'ī takes into consideration the *ḥadīth* of the Prophet in which the value of stolen property for which the punishment is amputation is mentioned. In Al-Umm, he says, "the arms of a bandit will not be amputated except if he has taken [during the act of banditry] what is equivalent to the value of ¼ dinar (equivalent to gold) or more by analogy [to the prescribed punishment] in the *Sunnah* on theft") [45, Vol. 6, p. 164].

The provision of clemency in the verse on banditry is not explicit in the verse on theft. According to al-Shāfi'i, by analogy, according to the rules on clemency in the verse about banditry, if a person accused of theft has repented before being caught, he or she will be exonerated of amputation, but what has been stolen will be recovered from the thief even if the stolen item has been used [45, Vol. 6. p. 166].

2.3 Qiyās and Ta'zīr (Analogical Reasoning and Discretionary Punishment)

Qiyās comes into play in connection with some contemporary issues in the field of Islamic criminal law as well. For instance, one such issue arises when modern technology such as CCTV, DNA, video-recording, tape recording and forensic evidences are used to determine the criminal liability of one accused of *ḥudūd* crimes. Such technology is generally regarded as having the highest probability of establishing criminal liability in the modern world.

Haneef has argued strenuously for the adoption of modern means of proof in all aspects of Islamic law. In his polemic article, he asserts, "The DNA (deoxyribonucleic acid) test of semen stains found in the bed of a hotel room that was occupied by two persons is considered sufficient to sustain their conviction for fornication" [18, p. 33]. This generalisation may indeed bring about the misconception that all means of proofs by analogy can be used to establish the criminal guilt of the accused in Islamic law. It is argued that while, in some cases, all efforts should be explored to establish the guilt of the accused, especially when the alleged crime is based solely upon the right of humans, if the crime is based solely upon the right of God, concealment is the best option from an Islamic point of view, as "the right of God is based on forgiveness and remission, while the right of man [human right] is based on contention" [49, p. 258]. This is not to say that methods such as those championed by Haneef should never be used in *ḥudūd* jurisprudence, depending on whose rights the crime affects. If the crime affects God's right, and the consequence redounds to the public at large, those methods are appropriate to protect the interest of the public and to deter subsequent occurrence of the crime. By and large, however, *ḥudūd* punishment should not be applied simply because a method of proof was not textually mentioned. Moreover, the person convicted by means of these methods may be awarded discretionary punishment (*ta'zīr)*.

Abū Zahra has quoted one of al-Shāfi'i's disciples, al-Muzani, who supposedly said:

> All jurists from the epoch of the messenger of God until our era (al-Muzanī) have used analogies in all rulings related to their religion and they have come to a consensus that a resemblance of truth is a truth and a resemblance of falsehood is a falsehood [2, p. 166].

Abū Zahra further states (on the justification of using analogy in discretionary *ta'zīr* that:

> it is permissible to use *qiyās* on any original cases emanating from right sources if the rationale for it is for deterrence and protection of public benefits and dispensation of justice among people [2, p. 166].

Al-Shāfi'ī's position is not an exception in this regard. To cite an example, El-Awa observes that al-Shāfi'ī connects banishment (which is a form of *ta'zīr*) for the crime of *zinā* (fornication) with imprisonment [7, p. 105]. The rule calls for one year of banishment for *zinā* [10, Vol. 3, p. 171]. According to al-Shāfi'ī, by analogy to this rule, imprisonment should not be more than one year for any *ta'zīr* offence. This should include a maximum of one month for investigation and six months for punishment of the offence; in any case, the total period of time from investigation to punishment to release of the offender should not exceed one year [7, p. 105]. This may not be universally accepted because there could be some legal constraints which could make the criminal investigation take longer than a year. However, al-Shāfi'ī's regulation serves to protect human rights and reflects sympathy for minor offenders, in particular, whose rights might be infringed upon by more severe sentences, as will be discussed in the next section [6, Vol. 3, p. 173].

3 Implications of *Qiyās* for Human Rights Under Islamic Criminal Law

In Islamic criminal law, the effect of analogical reasoning on human rights has not been given adequate attention. To date, commentators have focused on its implications for justifying rules other than the rule of God or for inventing rules in God's name [37, Vol. 2, pp. 108–09; 39, Vol. 2, p. 144]. Lange has brilliantly connected the opposition to the use of *qiyās* in *ḥudūd* to the protection of human rights from "all-too extensive uses of the repressive authority of the ruling classes", in the sense of restricting the "administration of punishment" by narrowing the "scope of criminal law" [30, p. 198]. This is true for the generation in which the principle of prohibition of analogical reasoning was first heralded in the West, and the circumstances in which Islamic law found itself in Saljuqi regimes.

Lange has also drawn parallels between the slogan "no analogy in the divinely ordained punishment" in Abū Ḥanifa and the jurisprudential treatises of his disciples and that of the German jurist Feuerbach (d. 1833), who pronounced the prohibition of analogy in criminal law as "*nulla poena sine lege*". The notion of the principle in Western criminal law was to protect the law "from excessive and arbitrary uses of coercive force by the repressive state apparatus" (although in hanifite jurisprudence this is not explicit) [30, p. 248].

The approach of these authorities leads to rejection of analogical reasoning in criminal law because of its potential for "arbitrary penal adjudication" [30, p. 180]. Studying why Western jurisprudence largely prohibits analogical reasoning in criminal law helps us to appreciate and discover similarities and differences between Islamic and Western criminal law, especially with regard to the human rights paradigm.

The doctrine of human rights is not alien to the Islamic concept of justice. The concept of human rights has been recognised in Islam not only in the context of criminal justice but also in all other facets of Islamic law [9, 2003]. In this section, the focus will be on the impact of *qiyās* in criminal law on the concept of human rights in Islam.

Those who oppose the use of *qiyās* in *ḥudūd* jurisprudence base their arguments on many premises, not all of which are relevant to this discussion. This article will

discuss two main premises: (1) to what extent can *qiyās* produce certainty?, and (2) how can *qiyās* ascertain the intentionality of the Lawgiver when outlawing particular acts and prescribing punishments.

With regard to *qiyās* in *ḥudūd*, opponents are concerned that, while *ḥadd* is intended as a deterrent, no one other than the Legislator (God) can know what will deter someone from committing a crime. If *qiyās* qualified as *ratio legis* for the simple fact that it serves the public benefit, then it would be inappropriate because a settled principle states that public interest cannot be established by virtue of *qiyās* [37, Vol. 2, pp. 108–109]. In addition, *ḥudūd* punishments vary according to the gravity of the crime, which cannot be determined by *qiyās*; the same is true for the numerical objects (*muqaddirāt*) which are ordained for certain reasons that are not subject to *qiyās*. Finally, *qiyās* is subject to *shubah'*(ambiguity) because it is "assimilation of a branch most similar to the two origins". The original case remains dubious, and the legal maxim states that in *ḥudūd* one should avoid doubt. This is based on the hadith of avoidance of *ḥudūd* punishment when there is doubt [20, p. 375]. Thus, imposing punishment on someone although proof is uncertain is tantamount to *shubah* and therefore it may be unjust [27, Vol. 2, p. 69; 39, Vol. 2, pp. 144–45; 30, p. 204].

The disciples of al-Shāfi'ī have vehemently responded to their opponents' arguments. Al-Sam'ānī provides several reasons for allowing *qiyās* in *ḥudūd*, stating:

> Our argument is that analogy is God's proof and God's proof has capacity of establishing ruling on *ḥudūd* and expiations as other proofs. The proof that establishes validity of analogy does not specify or restrict it to a particular area of rulings, thus, the generality should be *modus operandi* until proven otherwise [37, Vol. 2, p. 109].

He continues by saying:

> If solitary ḥadīth (*ḥadīth aḥādī*) can be used to establish rulings [in Islamic jurisprudence], then analogy should apply to *ḥudūd* as both [solitary ḥadīth and analogy] imply *ẓann* (probability) [37, Vol. 2, p. 109].

In addition, it is clear that the testimony of witnesses in *ḥudūd* is acceptable despite the fact that their witness yields only *ẓann*. However, once the requirement of witness is fulfilled, then *ḥudūd* punishment must be applied [37, p. 108].

The "anti-analogy" camp in *ḥudūd* jurisprudence argues that *ḥudūd* punishment is meant for deterrence, expiation is meant to cover the sin, and one's reasons cannot be known via analogy. One can refute this argument by saying that if the effective meaning (*maʿna muaththir*) can be extracted from the original ruling, then once that meaning has been transposed upon a new case, that case may aptly be considered as certain and known. As in the cases of *zinā* and *liwāt*, discussed above, if the purpose for imposing *ḥadd* punishment for *zinā* is known, then transposing that punishment to *liwāt* should not be problematic if *liwāt* shares the same features with *zinā*. Similarly, if the reason for punishing thievery with amputation is known, and both thievery and *nabbāsh* share the same reasoning, then amputation can be transposed to *nabbāsh* [37, Vol. 2, pp. 109–110].

Extending culpability via analogy to include novel criminal activities of any generation supports the protection of the rights of victims of those crimes. At the same time, it promotes criminal justice for accused persons in the sense that it allows other modern tools of investigation to be used in ascertaining criminal culpability and intent. However, analogical reasoning does have the potential for incriminating humans in a way irreconcilable in the sight of God. In essence, human rights may be violated by inflicting punishment on a person convicted of a crime established by the virtue of *qiyās*.

Al-Shāfi'ī's position on analogical reasoning in Islamic criminal law takes these dual implications into consideration. At some point, al-Shāfi'ī ceases using analogy when he detects a contradiction in applying literal interpretation of a text with the spirit of the Islamic law. He challenged his interlocutor on the issue of whether a woman who committed apostasy should be killed. While his opponent considered *qiyās* to have been effective in this regard (as the Prophet is reported to have disapproved killing female inhabitants of a war zone), al-Shāfi'ī does not appear to favour such analogy in the sense that an apostate woman shares no clear similarity with a woman in a war zone. With regard to the apostate woman, both al-Shāfi'ī and his opponent (we assume) acceded to killing her on the basis of general prophetic tradition: "condemn whoever changes his religion" [45, Vol. 8, p. 181]. Applying *qiyās* in the aforementioned case would have been a credit to al-Shāfi'ī's espousal of the doctrine. However, as noted above, al-Shāfi'ī's consistency is one of his contributions to *uṣūl al-fiqh*. *Qiyās* will not be admitted when text (*naṣṣ*) is explicit.

However, the question of the retrospective nature of Islamic law in general and criminal law in particular may also be raised against the use of *qiyās* in *ḥudūd*. Natural justice requires that human beings are regarded as innocent of any wrongdoing until proven otherwise. God states in the Qur'ān, "And We never punish until We have sent a Messenger [to give warning]" (Q17:15). It has been a settled principle in Islamic criminology that one shall not be criminalized until he or she is aware of the law and its facts. Ignorance of the law or the fact of the law affects the determination of criminal intent of the accused [8, Vol. 1, p. 430].

In Islamic criminal law, one remains free from guilt for any criminal behavior until the rule is promulgated via due process. The agreed upon principle invoked is the legal maxim "no criminal without textual evidence" [2, pp. 133–143].

The law of *ḥudūd* is categorically stated in the Qur'ān and further explained in the *ḥ*adīth. The same is true for *qiṣāṣ*, although its procedural implementation is opened to various interpretations. Under *qiṣāṣ*, many decisions are left to the court's discretion to decide the appropriate punishment, according to the circumstances and situation.

From a human rights perspective, if the rule of law declares that no one shall be punished except as stipulated from an Islamic point of view, then God alone has the legitimate right to declare an act lawful or unlawful and thus punishable or not by law. If that is the case, why would analogy parallel God's ordained laws and established prophetic principles? The answer to this question may not be farfetched, as al-Shāfi'ī himself has defended this position. In al-Shāfi'ī's response, God has called human beings to establish His will on earth and has called some leaders to judge; if justice be done, then *ijtihad* will be applied from where *qiyās* stems. As

revelation ceased upon the Prophet's demise, scholars have been obliged to search for God's law by deduction from explicit texts—and this is what *al- qiyās* is all about. *Qiyās* transposes the rule or norm of an original case upon a new case based on one or more similarities between particulars in both cases. In doing this, scholars have obeyed God overtly and the covert certainty is left to God's decision.

4 Conclusion

While analogical reasoning in criminal law may be seen as a detriment to and infringement on human rights, it has also proved to safeguard the rights of both the accused and the victim. Had analogical reasoning been rejected and abandoned as espoused by its antagonists, rights of either the accused or the victim might have suffered in the process. It has been seen how al-Shafi'i and his supports have carefully applied *al- qiyās* in Islamic criminal law. It seems that they also take into consideration when the application goes contrary to the spirit of Islamic law as the case in issue of *āqilah* who live outside the city where their relative has committed homicide crime. Putting the responsibility on the shoulder of the culprit as opposed the analogy that requires the ruler of the city where the crime has been committed to write to the authorities where the family has its domicile. Nevertheless, it is of my opinion that *al-qiyās* cannot be applied always in Islamic criminal law given the nature of the crime and the rights violated. In some cases where the crime and its punishment involves absolute the right of Allah, applying *al-qiyās* may not be appropriate to serve the purpose of the Law as the case of sodomy. Perhaps, more severe punishment may be allotted to the perpetrator of such crime and not just as 100 lashes for unmarried before and stoning to death for married before perpetrator.

It has also been shown that al-Shāfi'ī's position does not oppose the use of modern technology for establishing criminal convictions in the present age as espoused by Haneef. To what extent analogy should be used in Islamic criminal law is a topic for further open-ended debate because *'illah* for those crimes and their punishments may not be easily identified. Al-Shāfi'ī's resilience in maintaining his position is unique. If *qiyās* can be applied to other areas of Islamic jurisprudence, and the proof of its validity is general, then to "exempt" Islamic criminal law and *ḥudūd* in particular would be inconsistent.

By and large, al-Shāfi'ī's contribution to the issue of applying *qiyās* in criminal law is invaluable, as his contribution to the substantive metholodogy of Islamic jurisprudence is. Any of al-Shāfi'ī's shortcomings in his treatises surely depicts the inherent fallibility of mankind.

References

1. Abu Sulayman, Abdul Hamid A. 1987. *The Islamic theory of international relations: New directions for Islamic methodology and thought*. Herndon, VA: International Institute of Islamic Thought.
2. Abū Zahra, Muhammad. 1998. *Al-Jarīmawa l-'uqūbafī l-fiqh al-islāmī*. Cairo: Dār al-Fikr al-'Arabī.

3. Hasan, Ahmad. 2009. Analogical reasoning. In *Study of the judicial principes of qiyas*, ed. A. Islamic Jurisprudence. New Delhi: Adam Publishers & Distributors.
4. Al-Amidi, Ali bn Abi Ali bn Muhammad. 2003/1424. *Al-Ihkām fī usūl al-ahkām* (Abdul Razzaq Afifi, Ed.). Riyadh, Dar al-Sumai ī.
5. Al-Asfahānī, Maḥmud ibn Abdul Raḥmān. 1996/1406. *Bayān al-Mukhtasar Sharḥ bn al-ḥājib.* Saudi Arabia: Dar al-madani.
6. Al-Asfahani, Mahmud ibn Abdul Rahman. 1986/1407. *Bayān al-Mukhtasar Sharh Mukhtasar bn al-hājib* (Muhammad M. Baqa, Ed.). Saudi Arabia: Dār al-Madani.
7. El-Awa, Mohamed S. 2000. *Punishment in Islamic law: A comparative study*. Plainfield: American Trust Publication.
8. Awda, Abdul Qadir. 2001/1422. *Al-Tashrīʿ al-Jinā'ī al-Islāmī, Muqāranan bi l-Qānūn al-Wadaʿī.* Beirut: Mu'assasah al-Risalah.
9. Baderin, Mashood. 2005. *International human rights and Islamic law*. Oxford: Oxford University Press.
10. Al-Bukhari, Muhammad ibn Isma'il. 1422H. *al-Jami' al-Musnad al-Sahih* (Muhammad Zuhayr bn Nasir al-Nasir, Ed.). Dar Tuq al-Najah.
11. Fadel, Mohammad. 2000–2001. Book Review: "Analogical reasoning in Islamic jurisprudence: A study of the juridical principle of Qiyās by Ahamd. *Journal of Law and Religion* 1/2(15): 359–62.
12. Al-Ghazali, Abu Hamid Muhammad bn Muhammad. 1998/1419. *Al-Mankhūl min taʿliqāt al-usūl* (Muhammad bn Hasan Haytu, Ed.). Damascus: Dār al-Fikr al-Mu'asir.
13. Al-Ghazali, Muhammad bn Muhammad. 1993/1413. *Al-Mustasfā min 'ilm al-usūl* (Muhammad Abdul Salām Abdul Shāfī, Ed.). Beirut: Dār al-Kutub al-'Ilmiyya.
14. Al-Hafnawi, Mansur Muhammad Mansur. 1986/1406. *al-subhat wa atharuha fi al-'uquba al-jina'iyyah fil fiqh al-islami muqaranan bil qanun,* n.p., Matba' al-Amana,.
15. Hallaq, Wael B. 1997/1999. *A history of Islamic legal theories: An introduction to Sunni Uṣūl al-Fiqh.* Cambridge: Cambridge University Press.
16. Hallaq, Wael B. 2004. *Authority, continuity and change in Islamic law*. Cambridge: Cambridge University Press.
17. Hallaq, Wael B. 1985–1986. The logic of legal reasoning in religious and non-religious cultures: The case of islamic law and the common law. *Cleveland State Law Review* 34.
18. Haneef, SayedSikandār Shah. 2006. Modern means of proof: Legal basis for its accommodation in Islamic law. *Arab Law Quarterly* 20(4): 33.
19. Hasan, Ahmad. 2003. *The doctrine of Ijmaʿ: A study of the juridical principle of consensus*. New Delhi: Kitab Bhaban.
20. Ibn Hajar, Ahmad bn Ali. 1996/1416. *Bulugh al-Maram with translation*. Riyadh: Dār us-Salaam Publications.
21. Ibn Mulaqqan, Sirajuddin Umar ibn Ali al-Shāfiʿī. 2006/1427. *Al-Tadhkira fī l-fiqh il-Shāfiʿī* (Muhammad Hasan Ismail, Ed.). Beirut: Dār al-Kutub al- 'Ilmiyyah.
22. Ibn Najjar, Muhammad ibn Ahmad ibn Abdul Azeez. 1999. *Sharh al-Kawkab al-Munir*. Riyadh: Maktaba al-'Ubaykan.
23. Ibrahim, S.H. 2003. Basic principles of criminal procedure under Islamic Shari'a. In *Criminal justice in Islam: Juridical procedure in the Shari'a*, ed. Muhammad Abdel Hameed, O.S. Adel, and D. Kate. London, NY: I.B. Tauris.
24. Ibn Qudamah, Abdullah bn Ahmad bn Muhammad. 2002/1423. *Rawdat al-NāzirwaJunnat al-Munāzir.* Beirut: Muhassasa al-Rayyan.
25. Ibn Qudama, Abdullah bn Ahmad bu Muhammad. 1968/1388. *Al-Mughnīl bn Qudāmah.* Cairo: Maktaba al-Qahira.
26. Al-Isnawi, Abdul Rahim ibn al-Hasan. 1400H. *Al-Tamhīd fī Takhrīj al-Furūʿʿalāl-Usūl* (H.H. Muhammad, Ed.). Beirut: Mu'assasat al-Risālah.
27. Al-Juwaynī, Abdul Malik ibn Abdullah ibn Muhammad al-Juwaynī. 1997/1418. *Al-Burhān fī Usūl al-Fiqh* (Salah Muhammad 'Uwaydah, Ed.). Beirut: Dār al-Kutub al- 'Ilmiyya.
28. Kant, Immanuel. 1928. *The critique of judgment (originally published in 1781)*, 136.
29. Kamali, Muhammad Hashim. 1991. *Principles of Islamic jurisprudence*. Cambridge: Islamic Text Society.
30. Lange, Christian. 2008. *Justice, punishment, and the medieval Muslim imagination*. Cambridge: Cambridge University Press.
31. Larry, Alexander, and Emily Sherwin. 2008. *Demystifying legal reasoning*. Cambridge: Cambridge University Press.

32. Mill, John Stuart. 1847. *System of logic ratiocinative and inductive.* London: Longman.
33. Muslehuddin, Muhammad. 1985. *Philosophy of Islamic law and orientalists*. Lahore: Kazi Publications.
34. Al-Muzanī, Ismail ibnYahya. 1990/1410. *Mukhtasar al-Muzani. appendix to al-Shāfiʿī, Al-Umm,* Beirut: Dār al-Maʿrifah.
35. Al-Namlah, Abdul Karim bn Ali bn Muhammad. 1999/1420. *Al-Muʾadhdhab fī usūl al-fiqh al-muqārana.* Riyadh: Maktabat al-Rushd.
36. Peters, Rudolph. 2005. *Crime and punishment in Islamic law: Theory and practice from the sixteenth to the twenty-first century*. Cambridge: Cambridge University Press.
37. Al-Samānī, Manṣūr bn Muḥammad ibn Abdul Jabbār. 1999/1418. *Qawāʾiʿ al-adillah fī l-usūl* (Hasan bn Muḥammad Hasan Ismāʿil, ed.). Beirut: Dār al-Kutub al-ʿIlmiyya.
38. Schauer, Frederick. 2009. *Thinking like a lawyer: A new introduction to legal reasoning*. Boston/London: Harvard University Press.
39. Al-Shawkanī, Muhammad ibn Ali. 1999/1419. *Irshād al-fusūl ilā tahqīq al-haqq min ʿilm al-usūl* (AzuI naya Ahmad, Ed.). Beirut: Dār al-Kutub al-ʿArabī.
40. Al-Shirāzī, Ibrahim bn Ali. 1983/1403. *Al-tabsira fī usūl al-fiqh* (Muhammad bn Hasa Haytu, Ed.). Damascus: Dār al-Fikr.
41. Al-Shinqiṭī, Muḥammad al-Amīn bn Muḥammad al-Mukhtār. 2001. *Mudhakkira fī usūl al-fiqh*, 5th ed. Al-Madīnat al-Munawwarah: Maktabat al-ʿUlūmwa l-hikam.
42. Al-Shinqiṭī, Muḥammad al-Amīn bn Muḥammad al-Mukhtār. 1995. *Adwāʾ al-bayān fī īdhāʾ al-qurʾān bi l-qurʾān*. Beirut: Dār al-Fikr li-Tibaʿwa l-Nashr.
43. Al-Shāfi ī, Muhammad bn Idrīs. 1940/1358. *Al-Risāla* (Ahmad Shakir, Ed.). Cairo: Maktabat al-Halabi.
44. Al-Shāfiʿī, Imām Muhammad ibn Idrīs. 1987. *Al-Risālah fī usūl al-fiqh [Treatise on the Foundations of Islamic Jurisprudence],* 2nd edn. (trans. Majid Khadduri.). Cambridge: Islamic Texts Society.
45. Al-Shāfi ī, Muhammad bn Idrīs. 1990/1410. *Al-Umm.* Beirut: Dār al-Maʿrifah.
46. Sunstein, Cass R. 1992–1993. *Commentary on analogical reasoning*. USA, Harvard Law Review.
47. Al-Umarani, Yahay ibn Abi l-Khayr. 2000/1421. *Al-Bayān fī Madhhab al-Imām al-Shāfiʿī* (Qasim Muhammad al-Nuri, Ed.). Jeddah: Dār al-Minhāj.
48. Al-Zarkashi, Muhammad bn Abdullah bn Bahadir. 1994/1414. *Al-Baḥral-muḥīṭ fīuṣūl al-fiqh.* Beirut: Dār al-Kutubi.
49. Zakariyah, Luqman. 2010. Confession and retraction: The application of Islamic legal maxims in Safiyyatu and Amin's Cases in Northern Nigeria. *Journal of Muslim Minority Affairs*.
50. Zakariyah, Luqman. 2015. *Legal maxims in Islamic criminal law: Theory and applications*. Leiden/Boston: Brill Nijhoff.
51. Al-Zarqa, Ahmad bn Muhammad. 1989/1409. *Sharḥ al-qawāʿid al-fiqhiyyah,* Damuscus, Syria: Dār al-Qalam.