

CRIMES AGAINST HONOUR IN ISLAMIC/OTTOMAN LAW: A STUDY OF QADHF/SLANDER IN COMPARATIVE PERSPECTIVE

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ABSTRACT

This paper examines the concept of *qadhf*/defamation in the light of the judicial registers of the Bakhchisaray (Crimea)¹ and various Istanbul law-courts. To give the reader a legal and historical background, it gives a summary of the Sunni legal doctrines. I hope this study contributes to our understanding of Sunni Islamic law and the application of the law in the *qadi* courts.

KEY WORDS: Honour, Slander, Defamation, *Ta'zir*, Criminal Law, Hanafi, Legal studies

ŞEREF KARSİ İŞLENEN SUÇLAR: HAKARET/İFTİRA KONUSUNDA KARŞILAŞTIRMALI BİR ÇALIŞMA

ÖZET

Bu çalışma, Bahçesaray/Kırım ve İstanbul Mahkemeleri tutanakları ışığında şerefe karşı işlenen suçları ele almaktadır. Okuyucuya, hukuksal ve tarihsel arka plan hakkında bilgi vermek amacıyla bu konu hakkındaki Sunni hukuk doktrinine yer verilmektedir. Umarım ki bu çalışma, İslam hukukunu ve bu hukukun kadi mahkemesinde uygulanmasını anlamamıza katkı sağlar.

ANAHTAR KELİMELER: Şeref, Haysiyet, İftira, Hakaret, *Ta'zir*, Ceza Hukuku, Hanefi, Hukuk Çalışmaları

Introduction

To begin with, since the 1940's increasing numbers of studies devoted to the *sicils* (court registers) have been appearing. However, these tend to

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¹ The original registers are located in the Saint Petersburg library in Russia. In Ukraine, the library of Crimean Tatars holds a copy of these registers, where I obtained my copies.

concentrate on the central part of the Ottoman Empire.² Apart from few studies, there is almost no work on the *sicils* of Crimean Khanate. Researchers are expected to fill this gap.

The *qadi* court was headed by a single judge who had two primary assistants, a clerk³ and a *muhzir* (summoner).⁴ The names of the *shuhud al-hal* who witnessed the proceedings of the court and ensured its fairness and justice were annexed to each case.⁵ The cases were recorded in short form and it is not clear whether they reflect the entire litigation. We also do not know what happened before and after a particular court session.

Having introduced the *qadi* court, let us look at the classification of crimes in Hanafi law. Jurists examine crimes under two main headings: *hudud* and *jinaya*. *Hadd*⁶ refers to the punishments fixed by the *shari'a* as “*haqq Allah* (the right of God)”.⁷ Whereas *jinaya* corresponds to *haqq al-adami* (the right of men).⁸ *Ta'zir* amounts to what is termed ‘*qadi* justice’, that is to say, discretionary punishment issued by the *qadi*.⁹ *Ta'zir* covers wide range of

² For a survey of the studies on sicils, see R. Cigdem, *The Register of the Law Court of Istanbul 1612-1613: A legal Analysis*, (Unpublished PhD thesis, The University of Manchester, 2001).

³ My survey of the register of the law court of Istanbul indicates that clerks were familiar with *fiqh* and frequently were sent to investigate civil and criminal disputes. Further research is needed to verify that the clerks of the Bakhchisaray court performed the same function.

⁴ Heyd, U. *Studies in Old Ottoman Criminal Law* (Oxford: The Clarendon Press 1973), p. 272 (footnote).

⁵ R. C. Jennings, “Kadi, Court, and Legal Procedure in 17th Century Ottoman Kayseri”, *Studia Islamica* III (1978); pp. 143-4; Cigdem, *The Register of the Law-Court of Istanbul*, pp. 84-60

⁶ The *hadd* crimes comprise *zina* (unlawful intercourse), *qadhif* (false accusation of *zina*), *shurb al-khamr* (wine drinking), *sariqa* (theft), and *qat' al-tariq* (highway robbery).

⁷ Shams al-Din al-Sarakhsi, *Al-Mabsut*, (Beirut: Dar al-Ma'rifa 1986), vol. 9, p. 36; Burhan al-Din al-Marghinani, *al-Hidaya* (Egypt: Matba'a Mustafa al-Halabi 1971), vol. 3, pp.194-95.

⁸ Marghinani, *Hidaya*, vol. 4, p. 167.

⁹ Abu Bakr b. Mas'ud al-Kasani, *Bada'i al-Sina'i* (Beirut: Dar al-Kutub al-Arab 1982), vol. 7, p. 63; Marghinani, *Hidaya*, vol. 2, pp. 116-18.. For more see, Muhammed b. Ali Ibn Senan, *Al-Janibu ta'zir fi jarimat-i zina*, (Riyad: Dar al-Ma'had,1982); Şekerci, O. *İslam ceza hukukunda ta'zir suçları ve cezaları*, (İstanbul: Yeni Ufuklar Neşriyat, no date); Ahmed Fethi Behnesi, *Al-Ta'zir fi*

crimes which means if the provisions of *hadd* or *jinaya* are not satisfied, the *qadi* holds the right to turn to *ta'zir* to sentence the culprit rather than let him go free.

Legal Doctrines

Let us now go over the legal doctrines. *Qadhf* protects people, particularly free Muslims against only the *zina* (unlawful intercourse, fornication, adultery) accusation.¹⁰ It does not provide a comprehensive protection against defamation as is the case in modern secular laws.¹¹ However *ta'zir* can fill this loophole and provide a general protection against all sorts of insults and defamation based on the customs of a particular society. The distinction between general insults and *qadhf* is that the latter has a specific meaning i.e., an explicit accusation of *zina* whereas all other insults are general and merit only *ta'zir*. Each society defines what it considers to be general insults.

Having said that, let us now go over the theoretical basis of *qadhf*. It literally means defamation, slander, or false accusation.¹² As a legal term, it signifies “an unambiguous accusation of fornication, or impugning the legitimacy of a Muslim and free woman’s child by an adult and sane person”.¹³

Islam, (Cairo: Muassasa al-Halij al-Arabi, 1988); Cigdem, R., “The Concept of Ta’zir (Discretionary Punishment) in Theory and in Practice”, *Selçuk Üniversitesi Hukuk Fakültesi Dergisi*, 12/1-2, (2004), pp. 167-179.

¹⁰ For an independent and comprehensive study on *zina* see, Riyad Abdullah, *Al-zina ‘abr al-usur wa mawakif al-adyan minhu*, (Beyrut: Muassasa Jami’a li-dirasat, 1988); Boynukalin, M. *İslam hukukunda zina suçu ve cezası*, (Unpublished MA thesis: Marmara Üniversitesi Sosyal Bilimler Enstitüsü, 1995); Salih b. Nasır b. Salih Huzeyyim, *‘Uqubat al-zina wa shurut tanfizuhā*, (Jidda: Dar Ibn al-Jawzi, 2001); Çelen, M, *İslam hukukunda zina ve recm*, (Istanbul: Denge Yayınları, 2006); Çiğdem, R., ‘The judicial records of the Bakhchisaray (Crimea) law-court: A Study of Fornication’ (Forthcoming).

¹¹ Modern Turkish Criminal law deals with defamation in detail (articles 125-131, 267). For more see, Centel, N & Zafer, H. & Çakmut, Ö. *Kişilere Karşı İşlenen Suçlar*, (Istanbul: Beta Yayınevi, 2007), Vol. 1; No author, ‘Şerefe Karşı Suçlar’, <http://www.ceza-bb.adalet.gov.tr/makale/175.doc> ; No author, ‘Türk Ceza Hukukunda Şerefe Karşı Suçlar’, <http://www.baskent.edu.tr/~zekih/uygulamaci/hakaret.doc>.

¹² Wehr, H. *A Dictionary of Modern Written Arabic: Arabic-English*, ed. M. J. Cowan (Wiesbaden: Librairie du Liban 1980).

¹³ Ibrahim al-Halabi, *Multaqa al-Abhur* (Istanbul: Güryay Matbaası 1981), pp. 196-98; Muhammed b. Ahmed Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-*

Only the *muhsan*, i.e., a man or woman who is free,¹⁴ sound of mind, adult, Muslim, and free of any *zina* conviction, is protected by this punishment.¹⁵ *Ihsan* is established with the evidence of two male or one male and two female witnesses, or with the confession of the slanderer.¹⁶

In the view of jurists, if the prescribed punishment is not applicable because one of the above conditions is missing, e.g., if *qadhif* is directed against a *dhimmi* (a non-Muslim living in Muslim territory),¹⁷ or a slave, *ta'zir* is applicable.¹⁸ Likewise, if one person calls another an “infidel”, “villain”, or “thief”, *ta'zir* is applicable, because the definition of *qadhif* is not satisfied.¹⁹ Quoting an earlier doctrine that calling somebody “donkey” does not merit *ta'zir*, Marghinani states: “in our custom, it [viz., the word ‘donkey’] is an insult, and so s/he is to be chastised”.²⁰ This indicates that if a particular society considers a word or an expression to be an insult, *ta'zir* prosecution can be started.

In line with other schools of law, Hanafi *madhab* holds the view that the victim must formally requests the *qadhif* punishment,²¹ otherwise, no prosecution

Muqtasid, (Beirut: Dar al-Fikr, no date), vol. 2, p. 330; Karaman, H. *Mukayeseli İslam Hukuku* (Istanbul: Nesil Yayinlari 1996), vol. 1, p.183.

¹⁴ According to Malik, *hadd* for *qadhif* protects anyone irrespective of his gender or religious affiliation, or social status. This means that in his view there is no difference between a Muslim and *dhimmi* or free and slave, man and woman. Ibn Rushd, *Bidaya*, vol.2, p. 330

¹⁵ Halabi, *Multaqa*, p. 196; Ibn Rushd, *Bidaya*, vol.2, p. 330; Abdullah b. Ahmad Ibn Qudama, *al-Mughni*, (Beirut: Dar al-Fikr, 1992), vol.10, p. 193.

¹⁶ Ibn Humam, Kamal al-Din, *Fath al-Qadir*, (Egypt: Matba'a Mustafa al-Halabi, 1970), vol. 5, p. 319.

¹⁷ Halabi, *Multaqa*, p. 217 (margin note).

¹⁸ Marghinani, *Hidaya*, vol. 2, pp. 116-17; Ibn Qudama, *Mughni*, vol. 10, pp. 216-7.

¹⁹ Marghinani, *Hidaya*, vol. 2, pp. 116-17; Ibn Qudama, *Mughni*, vol. 10, p. 200; Bilmen, Ö. N. *Hukuku İslamiyye ve Istilahatı Fikhiyye Kamusu*, (Istanbul: Bilmen Basımevi, 1969), vol.3, p. 237.

²⁰ Marghinani, *Hidaya*, vol. 2, pp. 116-17.

²¹ Likewise, according to the Turkish criminal code, the proceeding of defamation is subjected to the complaint of the victim unless he was a civil servant and the defamation was related to his service. This means that unless the victim takes the case to the court, the prosecutor is not entitled to deal with it. This means that it is seen as a personal rather than a public issue. Here, the right of a particular person is violated. Turkish Criminal Code, *Article*, 131/1.

is available.²² If *qadhif* is directed against a deceased person,²³ his ascendants or descendants are entitled to demand the punishment.²⁴ However, according to Hanafi school, if the object of *qadhif* dies before prosecution,²⁵ the *hadd* lapses.²⁶

While in the Hanafi view, *afw* (pardoning the criminal by the victim) does not drop the *hadd*, it does so in the Shafi and Hanbali view. According to the Maliki point of view, *afw* drops the *hadd* unless the case has been taken to the court; once the case has been brought to the attention of the court, *afw* is not available.²⁷

The punishment of *qadhif*²⁸ is eighty stripes for a free person; forty stripes for a slave.²⁹

It is now worth looking at the collection of the *fatwas* of the muftis as they represent the living tradition of the *fiqh* and they give us clue about the real life of the time in which they were issued. I would like to quote *Ali efendi* who held the office of *sheikh al-Islam* while our documents from Crimea were being recorded.³⁰

²² Ibn Humam, *Fath al-Qadir*, vol. 5, pp. 316-17; Ibn Qudama, *Mughni*, vol. 10, pp. 195, 220-2.

²³ Turkish Criminal Code has a similar principle. The code reads: 'if the crime is directed against a deceased person, his ascendants and descendants until the secondary degree or his spouse or his splings can file a complaint. Turkish Criminal Code, *Article*, 131/2.

²⁴ Halabi, *Multaqa*, p. 196; Bilmen, *Hukuku Islamiyye*, vol.3, pp. 240-2.

²⁵ Turkish criminal code has a different rule entitling his relatives to bring the case to the attention of the court. Turkish Criminal Code, *Article*, 131/2.

²⁶ Marghinani, *Hidaya*, vol. 2, p. 113.

²⁷ Ibn Qudama, *Mughni*, vol. 10, p. 196; Ibn Rushd, *Bidaya*, vol. 2, p. 331; Bilmen, *Hukuku Islamiyye*, vol.3, pp. 239-240.

²⁸ According to the Turkish criminal code, defamation may result in a minimum punishment of 3 months' imprisonment or a monetary fine. Turkish Criminal Code, *Article*, 125.

²⁹ Marghinani, *Hidaya*, vol. 2, 112; Muhammed al-Shirbini al-Khatibi, *al-Mughni al-Muhtaj ila Ma'rifat Ma'ani al-Alfadh al-Minhaj* (Egypt: Matba'a Mustafa al-Halabi 1958), vol. 4, p. 156; Ibn Qudama, *Mughni*, vol. 10, pp. 192,198; Ibn Rushd, *Bidaya*, vol. 2, p. 331.

³⁰ He was the *Sheikh al-Islam* from 14.11.1084/21.2.1674 until his dismissal on 8.11.1097/26.9.1686, and from 23.6.1103/10.3.1692 until his death on

A- *Fatwas* about the *hadd* for *qadhif*:

1-Question: If Zayd says to his *muhsan* sister Hind, ‘Oh, Prostitute, harlot, fuck your vagina’, what is required to Zayd?

Answer: Severe *ta‘zir* and *hadd* for *qadhif*.³¹

2- Question: If Zayd says to Amr’s *muhsan* wife Hind, ‘Oh, fornicator’, what is required to Zayd?

Answer: *Hadd* for *qadhif*.³²

3-Question: If Hind insults Amr, the son of the deceased Zeynep, ‘Oh, bastard’, and Zeynep is *muhsan*, is *hadd* for *qadhif* required to Hind if Amr demands it?

Answer: Yes.³³

4-Question: If Zayd insults Amr, who is *muhsan*, ‘Oh, illegitimate child/bastard’, what is required to Zayd?

Answer: *Hadd* for *qadhif*.³⁴

These *fatwas* are in accordance with the juristic theories and indicate that slang words were used in the society and that the victims did not hesitate to apply to a *sheikh al-Islam* to get a *fatwa*. These *fatwas* might have been used in a court of law; otherwise why should s/he try to get one.

B-*Fatwas* about the *ta‘zir*:

1-Question: If Zayd insults Amr, ‘Oh, cuckold (*deyyüs*)’, what is required to Zayd?

Answer: *Ta‘zir*.³⁵

2-Question: If Zayd insults Amr who is a pious man, ‘Oh, pimp’, what is required to Zayd?

Answer: *Ta‘zir*.³⁶

2.8.1103/19.4.1692. Akgündüz, M. *Osmanlı Devletinde Şeyhulislamlık*, (Istanbul: Beyan Yayınları, 2002), p. 330

³¹ Salih b. Ahmed al-Kafawi, *Fatawa Ali Efendi ma‘a Nuqul lil Kafawi*, (Istanbul: Matba‘a ‘Amira, no date), vol. 1, p. 136.

³² Kafawi, *Fatawa*, vol. 1, p. 137.

³³ Kafawi, *Fatawa*, vol. 1, p. 137.

³⁴ Kafawi, *Fatawa*, vol. 1, p. 137.

³⁵ Kafawi, *Fatawa*, vol. 1, p. 137.

³⁶ Kafawi, *Fatawa*, vol. 1, p. 137.

3-Question: If Hind insults Zeynep who is known as a pious woman, ‘Oh, pimp’, what is required to Hind?

Answer: *Ta ‘zir*.³⁷

4-Question: If Zayd insults Amr who is Muslim, ‘Oh, pig, cursed’, what is required to Zayd?

Answer: *Ta ‘zir*.³⁸

5-Question: If Zayd insults Amr who is scholar, ‘Oh, labour/servant (irgat), donkey’, what is required to Zayd?

Answer: *Ta ‘zir*.³⁹

6-Question: If *dhimmi* Zayd, using sexual words insults priest Amr, ‘Oh, fuck your religion and belief’, what is required to Zayd?

Answer: *Ta ‘zir*.⁴⁰

These *fatwas* are also in corroboration with the legal doctrines. However, it is to be noted that the expression ‘*muhsan*’ is eliminated or replaced with ‘pious’, this is because *ihsan* is not required in cases amounting to *ta ‘zir*. The fourth question suggests that calling a scholar, a servant, or a labour was considered as offensive word and amounted to *ta ‘zir*. This in turn implies that this word was used for the socially inferior people.

The court cases

A-Cases From the Istanbul Law Courts

I would like to examine four cases from the registers of Istanbul law courts, one of which is about the *hadd* for *qadhif*. The second also amounted to slander punishment but the accused escaped it as the plaintiff’s chastity was not established as a fact. The remaining two cases are about *ta ‘zir*.

Case 1:⁴¹

From the *Zuama*,⁴² *Multezim*⁴³ Ahmed *ağa* b. (son of) Abdullah, resident in the quarter of Davutpasha near Beyazıd-ı cedid, in the presence of his

³⁷ Kafawi, *Fatawa*, vol. 1, p. 137.

³⁸ Kafawi, *Fatawa*, vol. 1, p. 138.

³⁹ Kafawi, *Fatawa*, vol. 1, p. 138.

⁴⁰ Kafawi, *Fatawa*, vol. 1, p. 141.

⁴¹ İstanbul Müftülüğü Şer’iyye Sicilleri Arşivi, *İstanbul Kadılığı*, 25, p. 142.

⁴² Holder of a large military fief. *New Redhouse Turkish-English Dictionary*, (Istanbul: Redhouse Yayınevi, 1994).

neighbour *Sipahi*⁴⁴ *Al-Hac* Mustafa b. Ahmed, whom he [Ahmed] had him summoned to the noble court, [Ahmed] stated:

‘The aforesaid Mustafa, one night before, just before the nightfall, in front of the door of his house, slandered and insulted me face to face by [saying] ‘unbeliever, pale head, fornicator, you take woman to your house’. Shame has attached to me. I demand the requirement of the *shari‘a*.’

After his lawsuit, and the denial [of the defendant], the aforesaid plaintiff brought [to the court] the persons named *Al-Hac* Bekir b. Ahmed and Ahmed b. Muhammed, residents in the aforesaid quarter and they testified in his favour. For their [witnesses] *tazkiya* (legal integrity) in their quarter, Mehmed Emin *efendi* was sent by the noble court. When he arrived in the quarter, and carried out the *tazkiya*, twenty nine people whose names are recorded informed that the two aforesaid witnesses are not known with telling a lie and they are just people. Their [two witnesses] testimony was accepted.

From the residents of the aforesaid quarter, eleven trustworthy persons named Imam Süleyman *efendi*, and butcher İlyas, and preacher *sheikh* Hasan *efendi*, and the preacher of the Naili beşe mosque the other *sheikh* Hasan, and the *khatib* of the mosque Beyazıd-ı Cedit *Seyyid*⁴⁵ Abdurrahman *efendi*, and *Al-Hac* Ahmed, and *Al-Hac* Süleyman and *Al-Hac* İbrahim and fruit seller *Seyyid* Musa and *Sipahi Al-Hac* Ömer and *Kayyim Al-Hac* Muhammed and Ömer *ağa* came to the noble court and testified that the aforesaid Ahmed *ağa* is *muhsan* and free of *zina*.

Accordingly, upon the request of the aforesaid Ahmed *ağa*, the *hadd* for *qadhif*, beating with eighty lashes is required to the aforesaid *Sipahi Al-Hac* Mustafa. This has been presented to his Excellency. On 24 *Rabi‘ al-Awwal* 1180/30.08.1766

Here, we see the principles of the law at work. In detail, a man named Ahmed filed a complaint against his counter part named Mustafa. As we understand from their title, both were the fief holders, well-to-do men. Ahmed accused Mustafa of calling him unbeliever, fornicator etc. The defendant denied the charge. Upon his denial, the plaintiff brought two witnesses to testify in his

⁴³ A tax farmer. Bayerle, G. *Pashas, Begs, and Efendis: A Historical Dictionary of Titles and Terms in the Ottoman Empire* (Istanbul: The Isis Press 1997), p. 152.

⁴⁴ Cavalry soldier, holder of fief in knight service. New Redhouse.

⁴⁵ This is a title given to the descendants of the Prophet Muhammed. Bayerle, *Pashas*, p. 136.

favour and they did so. As required by the law,⁴⁶ the credibility of the witnesses investigated by the court. Once twenty nine persons testified that they hold the legal integrity, the court accepted their testimony. However, there remained the question of whether the plaintiff was a *muhsan* and a chaste person. We see eleven men attending the court to testify to this effect. Once the requirements of the law were satisfied, the judge passed his judgement condemning the accused to eighty lashes.

Although the testimony of two male witnesses is sufficient to establish the legal integrity of the witnesses,⁴⁷ the judge employed many witnesses. This is perhaps because the judge wanted to ensure that they were qualified to stand witness and to eliminate any doubt and suspicion.

The expression ‘this has been presented to his Excellency’ suggests that the case was submitted to the Sultan for approval. This verifies the following statement of Heyd: ‘the result of their [the *qadis*] investigation was to be submitted to the Sultan...The *buyruldu* registers contain a large number of such decisions in criminal matters.’⁴⁸ This however contradicts the requirement of the penal code of Süleyman which was the code of the time:

“If according to the customary law it is proved and evident that a person has committed a crime, he who serves as *qadi* shall give a certificate (*hüccet*) [to that effect] to the executive officers (*ehl-i ‘örf*). In accordance with that certificate, the executive officers shall hang the person who incurs hanging and cut off a limb of the person who incurs the cutting off of a limb. And the *qadi* shall not prevent this and shall not cause the punishment to be postponed [but] let the punishment be carried out at the place where the crime was committed.”⁴⁹

Case 2:⁵⁰

A woman called Ayşe bt. (daughter of) *Al-Hac* İsmail, whose identity has been clarified with a *shar‘i* description, holder of this document, in the

⁴⁶ Although according to Abu Hanifa the inquiry of the witnesses is not required except for intentional homicide and *hudud*, Abu Yusuf and Muhammed have the opinion that the open and the secret inquiry in each case are to be carried out. Muhammed b. Faramudh, Molla Husrev, *Durar al-Hukkam fi Sharh al-Ghurur al-Ahkam* (Istanbul: Sahaf al-Osmani 1310) vol. 2, p. 743; Abdullah b. Sheikh Muhammed, Damad effendi, *Majma al-Anhur fi Sharh al-Multaqa al-Abhur*, (Istanbul:Matbaa al-Amira 1316), vol.2, p. 189.

⁴⁷ Marghinani, *Hidaya*, vol. 3, p. 119.

⁴⁸ Heyd, *Criminal Law*, pp. 255-6.

⁴⁹ Heyd, *Criminal Law*, p. 118.

⁵⁰ İstanbul Müftülüğü Şer‘iyye Sicilleri Arşivi, *İstanbul Kadılığı*, 25, p. 137.

presence of *Al-Hac* Salih b. *Al-Hac* Ali, whose name is recorded, [Ayşe] stated in the noble court:

‘One day before the date of this document, in my own house, without a right, the aforesaid *Al-Hac* Salih insulted me face to face saying ‘brothel keeper, prostitute, you came here from your town because of improper act’. I demand the requirement of the *shari‘a*.’

After her lawsuit, and the denial [of the defendant,] the aforesaid plaintiff established her above written claim with the testimony of the persons named Muhammed *efendi* b. Ebu Bekir and coal dealer Muhammed *efendi* b. Mustafa whose being just persons have been informed after the *tazkiya*.

Since Ayşe’s being chaste woman is not clear, *hadd* for *qadhif* dropped. Accordingly, *ta‘zir* is required to the aforesaid *Al-Hac* Salih. This has been written and presented to his Excellency. On 20 *Rabi‘ al-Awwal* 1180/20.8.1766

In this case, a woman was the plaintiff. A certain Ayşe brought a case against a man called Salih. Her accusation amounted to *hadd-i qadhif*, as she was labelled as prostitute and she was able to establish her claim with the testimony of two male just witnesses. However, she was not able prove that she was a chaste and uncorrupted woman. This turned the case to *ta‘zir*. Although the document clearly records that the accused received *ta‘zir* penalty it does not make it clear what kind of punishment it was. It seems to me that it was certain strokes, meaning that he was sentenced to corporal punishment. The number of lashes might have varied from 1 to 75 stripes. This is because, while Abu Yusuf (d.182/798) sets its highest limit as seventy five stripes, Abu Hanifa (d.150/767) and his disciple, Muhammad al-Shaibani (d.189/805) limits its maximum to thirty nine.⁵¹

The judgment of the court suggests that she was a corrupt woman. It is also possible that since she was a new resident in the quarter, nobody knew her and so she was not able to establish her being an honourable woman. The entry does not reveal why the problem broke out, was she a nuisance to the defendant or to the quarter? However, we learn from the record that some residents of the quarter witnessed the incidence.

Case 3:⁵²

İbrahim *efendi* b. Mustafa, in the presence of Süleyman b. Muhammed who has been summoned to the Istanbul Bab law court brought a case against him [stating]:

⁵¹ Marghinani, *Hidaya*, vol. 2, p. 117.

⁵² İstanbul Müftülüğü Şer‘iyye Sicilleri Arşivi, *İstanbul Bab Mahkemesi*, 235, p. 59.

‘Two days ago, the aforesaid Süleyman insulted me by saying ‘pimp and brothel keeper’. I demand the requirement [of the law.]’

He [the defendant] denied the accusation.

The aforesaid plaintiff established his above written claim in accordance with *shari‘a* with the testimony of the persons named Osman *efendi* b. Hasan and *Seyyid* İsmail b. Mustafa whose being just persons have been informed.

Accordingly, *ta‘zir* is required to the aforesaid Süleyman. This has been presented to his Excellency. On 26 *Sha‘ban* 1179/7.2.1766.

In this case, a man named Süleyman was sentenced to *ta‘zir* punishment on the ground of the testimony of two witnesses that he insulted the plaintiff İbrahim uttering words amounting to *ta‘zir*. Although we know that the witnesses were credited by a number of people as the expression ‘whose being just persons have been informed’ suggests, their names were not disclosed. This gives the impression that in cases amounting to *ta‘zir*, the scribe of the court preferred a short writing. As we have seen above, in *hadd* cases, the document was written in detail disclosing the names of the creditors of the witnesses.

The defendant was summoned to the court. This implies that there was an earlier complaint by the plaintiff and that the defendant did not come to the court voluntarily. When he abstained from attending the session of the court, he was brought to the court by the police force.

Case 4:⁵³

The initiator of this document, *Seyyid* Abdullah, in the presence of *Seyyid* Mustafa brought a case against him in the Istanbul Bab law court [stating]:

‘On the day of this document, the aforesaid Mustafa insulted me saying ‘*puşt* (catamite?),’ and [insulted] my mother and wife using the words of sex’. I demand the requirement of the *shari‘a*.’

He [the defendant] denied the accusation.

The aforesaid plaintiff was not able to establish his case [with the testimony of two witnesses].

When the aforesaid *Seyyid* Mustafa was offered to take an oath upon request, he abstained from taking the oath.

Accordingly, *ta‘zir* is required to the aforesaid *Seyyid* Mustafa. This has been presented to his Excellency. On 23 *Ramadan* 1179/5.3.1766

⁵³ İstanbul Müftülüğü Şer‘iyye Sicilleri Arşivi, *İstanbul Bab Mahkemesi*, 235, p. 6.

This case involved two *Seyyids*, the descendants of the Prophet, one accused the other of insulting him. According to the claimant, the defendant offended him by not only insulting himself but also his mother and wife. The document did record the offensive words directed to the plaintiff's mother and wife. The offensive word might have been 'fuck your mother and wife', which is still used in Turkish society.

The plaintiff was not able to substantiate his claim with the testimony of two witnesses. He, however, demanded that the defendant take an oath. The defendant did not take it and so the case ended in favour of the plaintiff as the defendant indirectly admitted the accusation. This is because in Hanafi law, civil and criminal trials follow the same judicial procedure: claim of the plaintiff, statement of the defendant, and evidence of the plaintiff or oath of the defendant. If the defendant opposes to taking an oath, he loses the case.⁵⁴

On the question of why the defendant refused to take the oath, it is highly likely that he did not want to tell a lie under oath. In addition, Ramadan, a sacred month may have played an important role in his abstaining from taking the oath. It is interesting to see a *Seyyid*, a descendant of the Prophet, violating the sacredness of the holy month of Ramadan. Muslims are expected not to utter offensive words in Ramadan. The Prophet is reported to have said: 'Whoever does not abandon the words of *zur* (lie, offensive words), there is no need for God in his abandoning his food and drink.'⁵⁵

On the question of why the fathers' name of both the plaintiff and the defendant are missing, it is possible that since they were well known, the scribe did not record, or else the clerk forgot to record them.

B-Cases From the Bakhchisaray Law Court

Our source contains two cases involving insulting language. Neither of these two cases satisfies the *qadhf*. However, they can be classified as defamation and general insult, and may trigger *ta'zir*. Although neither of these cases is related to *qadhf* itself, we are justified in examining them here, as they show the procedure of the court and establish as a fact that people did not tolerate defamation and sought justice when insulted. These also indicate that they were protected by the law against defamation.

The first document, which records only the facts without stating the decision of the court, reads as follows:

⁵⁴ Halabi, *Multaqa*, pp. 320-2.

⁵⁵ Abu Dawud, Sulayman b. Al-Ash'ath, *Sunan*, (Beirut: Dar al-Janani, 1988), *Sawm*, 25/2363, vol. 1, p. 720.

Case 1:

1/?/11⁵⁶ The case is as follows:

Musa, a bathhouse keeper, summoned *Haci* Hüseyin, a bathhouse keeper, [to the court] and said:

“He slandered (*qadhif*) me, saying, ‘you are a Jew,’ for no reason”.

Haci Hüseyin admitted [the accusation].

Recorded in *Sha‘ban* 1018 [October 1609].

Shuhud al-hal: Mehmet *efendi*, the *qadi* of Korkir, *Haci* Mehmet from Gözleve (Evpatoriya), *Müezzin*, *Hoca* Mustafa, *Perviz*, *Muhzir*, and others.

In this document, a Muslim claimed that a man named Musa had called him ‘a Jew’. Once the plaintiff had made his charge, the defendant admitted the accusation. Although we do not know the result of the trial, according to Hanafi legal doctrine, the defendant deserved a *ta‘zir* punishment, but not *hadd*, for calling the plaintiff a Jew.

This case involved two Muslims, and shows that they were very sensitive about being called ‘a Jew or an unbeliever’. This is because such accusation if proved has fatal consequences, as it may bring about capital punishment. This may also indicate that “*kafir* or Jew” was a word employed for teasing, and irritating and that its legal meaning is not meant. In other words, it was an instrument used by the people to disturb or irritate one another. Sometimes it became a matter of dispute in the court. However, it is very unlikely that all such cases were reported. This is why it is quite difficult to estimate how common it was among people and how many were taken seriously.

In this case, the accused and the plaintiff were a bathhouse owner, doing the same business. The dispute might have been the result of an economic concern. It is possible that it was the fierce economic competition which caused the dispute. Once the defendant insulted him by an offensive word, he brought it to the court. By this, he may have wished to show that he will seek justice and will not hesitate to go to court for any other disputes should one arise. This could have been a way of intimidation for the defendant. By bringing the case to the court, the plaintiff may have intended to do harm to his competitor’s business or get some sort of relief (economic advantage).

Case 2:

15/?/7 The case is as follows:

⁵⁶ I use the following system to identify a case from Bakhchisaray law court: “1/49/3,” means sicil 1, page 49, entry 3. A question mark e.g., “22/?/10,” indicates that the number is illegible.

From the quarter of Derib (?), Habib b. Derviş, *sufi*, summoned Kösep veled-i⁵⁷ (child of) Mustafa to the court and stated:

“The aforementioned Kösep insulted me by calling me an ‘unbeliever (*kafir*)’. I request that he should be interrogated according to *shari‘a* and that justice should be established.”

After interrogation and denial and failing to produce evidence, the aforesaid Kösep was offered to the oath.

He swore by God who sent down the Gospel to Jesus (peace be upon him).

It was recorded that he was acquitted.

[The case was probably recorded in the second ten days of *Safar* 1086 [May 1675], the date of the previous entry. R. C.]

Shuhud al-hal: Ebu Bekir *celebi*, *Muhtesib*,⁵⁸ Bayram Ali [b.] Zülgaffar.

Unlike the case above, here, the dispute involved a Muslim called Habib and a *dhimmi* named Kösep, whose father’s name implies that he was the child of a convert. The plaintiff was a *sufi* meaning that he was a pious man. He might have reported the case out of religious concerns, due to the fact, compared with lay persons, religious ones are easily offended by such a word. There should be some reasons why he called him as such. It must be the result of a dispute. Otherwise, why should he insult him? The document does not specify the reasons why he was insulted, and this was not the business of the court, as they are concerned with the facts but not with the reasons.

The outcome of the case was disappointing for the *sufi*, as the accused was acquitted upon oath and the lack of evidence. When the defendant refuted the accusation, and there was no evidence to corroborate the plaintiff’s statement, in accordance with standard judicial procedure, the defendant was offered the oath, and he took it. He was thereby acquitted. In *hadd* cases (apart

⁵⁷ A Muslim is identified as Ahmed *bin* (son of) Recep while a *dhimmi* is identified as Atnos veled-i (child of) Nikola, the word *bin* being replaced by the word *veled-i*. However, the word *bint-i* ‘the daughter of’ is used for identifying the father of both Muslim and *dhimmi* women. Cigdem, *The Register of the Law-Court of Istanbul*, p. 52.

⁵⁸ The *muhtesib* was a market inspector who attempted to ensure that the markets conformed to the official price (*narh*) and standard forms set up by guild regulations. He was under the supervision of the *qadi*. Akgündüz, *A. Osmanli Kanunnameleri ve Hukuki Tahlilleri*, (Istanbul: Fey Vakfi 1990), vol. 1, p. 212; Bayerle, *Pashas*, p. 112.

from *sariqa*), the oath cannot be offered to the defendant.⁵⁹ The fact that it was offered here shows that the court did not consider the case as falling under the category of *hadd*.

It is worth pointing out that the case indicates that the court was not influenced with the social or religious status of the plaintiff. In other words, the court had no bias against the *dhimmi* in favour of the *sufi*. The *dhimmi* did not suffer discrimination. Along with many other cases, this suggests that *dhimmis* had a fair trial, and that they did not hesitate to go to the court to defend themselves or initiate a case against a Muslim. Although they had some legal disadvantages, they employed the Muslim courts to enforce their rights. They expected and hoped justice as much as their Muslim counterparts.

Dhimmis employed Muslims as their witnesses against Muslims to overcome one of their main legal disadvantages and to get the *qadi*'s decision in their favour. The court registers is full of the Muslim witnesses employed by *dhimmis*. This suggests that they did not hesitate to stand witness against their religious counterparts in favour of *dhimmis*.⁶⁰

Conclusion

The primary aim of this article has been to find out the theoretical basis of *qadhf*, and the application of the laws in a court of law. As has been pointed out, *qadhf* does not provide a general protection against defamation. Rather, it protects Muslims against one type of crime, which is unambiguous accusation of *zina*. People, irrespective of their religious affiliation or social status/class, are protected against slander by *ta'zir*, a concept not fully developed by the jurists.

The court procedure in our documents follows the theoretical structure of *fiqh*. As we have seen, once a case is established, the *qadi* did not hesitate to issue his judgment in accordance with legal doctrines. Apart from the first case in which the defendant was condemned to *hadd-i qadhf*, the others amounted to *ta'zir*. In one case, the accused was acquitted of the crime on the grounds of lack of evidence.

My examination of the court registers further indicates that *dhimmis* lived in harmony with Muslims. They built houses next to each other and stayed as neighbours. They did not live in ghettos as suggested by *fiqh*⁶¹ and as Jews lived in medieval Europe. They established good relations with each other. They set up joint businesses and extended loans to each other. They enjoyed the

⁵⁹ Halabi, *Multaqa*, p. 320; Ibn Qudama, *Mughni*, vol. 10, p. 181.

⁶⁰ For more, see, Cigdem, *The Register of the Law-Court of Istanbul*.

⁶¹ Ibn Nujaym, *Zayn al-Din b. Ibrahim, Al-Ashbah wa al-Nazair*, (Beirut: Dar al-Maktaba al-Ilmiyya 1985), vol. 4, p. 458.

protection of the court and were treated fairly and impartially and did not suffer injustice.

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