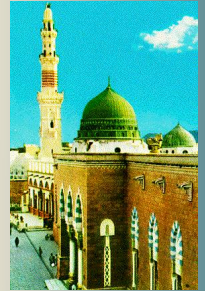


Exercise 3: Grave and Sudden Provocation in Islamic Law

Imran Ahsan Khan Nyazee

info@nyazee.com

December 9, 2000



ABOUT THIS EXERCISE

The law of grave and sudden provocation as it obtained in Pakistan was altered when the law was Islamized. This is an exercise to determine on the basis of legal reasoning emerging from the texts whether this law should be reintroduced if it is found to conform to Islamic law.

Contents

- 1 The English Common Law 2
- 2 The Law in Pakistan Before Amendment and After 3
- 3 The Rationale of the Rules of Grave Provocation 4
- 4 The Discussion of Exceptions to §300 in *Federation of Pakistan v Gul Hasan Khan* PLD 1989 SC 633, 674-76. 4

ZOOMIN CTRL= ZOOMOUT CTRL-

©Advanced Legal Studies Institute

[Home Page](#)

[Title Page](#)

[Contents](#)



[Page 1 of 7](#)

[Go Back](#)

[Full Screen](#)

[Close](#)

[Quit](#)

1. The English Common Law

In the English common law, in cases of homicide, the doctrine of provocation effects a change in the nature of the offence itself from murder, for which the penalty is fixed by law (formerly death and now imprisonment for life), to the lesser offence of manslaughter, for which the penalty is at the discretion of the judge. In crimes of violence which result in injury short of death, the fact that the act of violence was committed under provocation, which has caused the accused to lose his self-control, does not affect the nature of the offence of which he is guilty. It is merely a matter to be taken into consideration in determining the appropriate penalty.¹

Section 3 of the Homicide Act, 1957 now deals with provocations.² The section states:

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

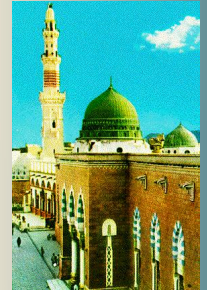
Thus, the section retains the dual test for provocation:

1. that provocation must not only have caused the accused to lose his self-control
2. but also be such as might cause a reasonable man to react to it as the accused did.

The section also clarifies that words can also cause provocation. The section also emphasises the reasonable man concept, which was firmly established for provocation in *R v Lesbini* [1914].

¹ *Director of Public Prosecutions v Camplin* [1978] 2 All ER 168.

² It alters the law as it had been developed in *Mancini v Director of Public Prosecutions* [1942], *Holmes v Director of Public Prosecutions* [1946] and *Bedder v Director of Public Prosecutions* [1954]. Most of these changes pertain to the instructions to be given to the jury.

[Home Page](#)[Title Page](#)[Contents](#)[Page 2 of 7](#)[Go Back](#)[Full Screen](#)[Close](#)[Quit](#)

2. The Law in Pakistan Before Amendment and After

The law in Pakistan was almost similar, and was laid down in the exceptions to §300, as follows:

When culpable homicide is not murder. Exception 1. Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception was subject to the following provisos:

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

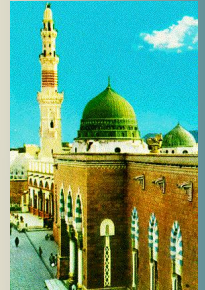
Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Provocation was, therefore, associated with case of “mistake” and “accident” or manslaughter in other words. The punishment for death caused under provocation was provided in §304:

304. Punishment for culpable homicide not amounting to murder. Whoever, commits culpable homicide not amounting to murder, shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

The exceptions to 300 were dropped in the law of Qisas and Diyat in accordance with the directions given in *Federation of Pakistan v Gul Hasan Khan* PLD 1989 SC 633, 674-76.

ZOOMIN CTRL+= ZOOMOUT CTRL-



[Home Page](#)

[Title Page](#)

[Contents](#)



[Page 3 of 7](#)

[Go Back](#)

[Full Screen](#)

[Close](#)

[Quit](#)

3. The Rationale of the Rules of Grave Provocation

The underlying basis for the rules of grave provocation is “the law’s compassion to human infirmity.”³ Islamic law is a humane and wise law. It can be said with confidence that it takes “human infirmity” into account more than any other legal system. The legal injunctions of Islam considered collectively are enough proof of this concern. The Prophet (p.b.u.h.) is reported to have said: “(The liability) for three things has been lifted from my *Ummah*: mistake (*khata’*), forgetfulness (*nisyān*) and duress/coercion (*ikrāh*)” and also “The Pen has been lifted for three things: mistake, forgetfulness and duress.” Each one of these terms can be interpreted to include cases of grave provocation. There is no reason why the jurists should interpret forgetfulness for forgetting to pray or for eating during a fast out of forgetfulness. What about a person, who in a rage of passion, has forgotten his self-control?

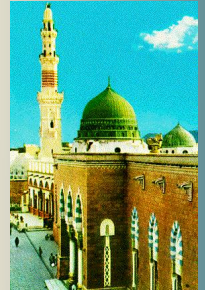
4. The Discussion of Exceptions to §300 in *Federation of Pakistan v Gul Hasan Khan* PLD 1989 SC 633, 674-76.

Justice Taqi Usmani has argued that Islamic law does not recognise grave provocation. The cases cited from traditions, he maintains, about concessions given to persons killing their wives or their paramours, when they catch them in the illicit act, are not cases of grave provocation. The reason for absence of liability or mitigation of sentence is that the victims by committing an act entailing the death penalty had lost the “protection to their lives” afforded to them by the law. In other words, they are no longer *ma’sūm ud-dam*. The offender is not being absolved of liability due to grave provocation, but for killing someone who had lost the protection of the law for his life. He may be punished only for “taking the law into his own hands.”

It is true that there are other cases reported in the traditions where a similar conclusion may be drawn,⁴ but this argument does not appear to be convincing for the following reasons:

³ Tindal CJ, echoing Sir Michael Foster, in *Hayward* [1833].

⁴ See, e.g., the tradition quoted below about the blind man and his wife.



[Home Page](#)

[Title Page](#)

[Contents](#)

[◀](#) [▶](#)

[◀](#) [▶](#)

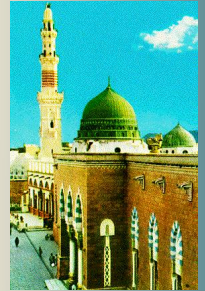
[Page 4 of 7](#)

[Go Back](#)

[Full Screen](#)

[Close](#)

[Quit](#)



1. If the argument is accepted, the exemption would be available to the offender even if he kills his wife and or her paramour after premeditation, i.e., planning, and sudden provocation would be of no consequence. A closer examination of these cases shows that there has been grave and sudden provocation in these cases, or it has been contemplated in the description.
2. The argument opens the way for killing anyone accused of an offence punishable with death: one accused of blasphemy, apostasy, murder, treason, unlawful sexual intercourse.
3. Islamic law presumes an accused person to be innocent until proven guilty. How can the impression in the mind of the offender that someone is now subject to death and he has the right to kill him? What if his wife's paramour is a *ghayr-muḥṣan*, who is not subject to death? The shedding of his blood is still protected and he is *ma'sūm ud-dam*. Such cases may be considered to be applicable to a time when the law for such acts is not clear. This is called *shubhah fi'd-dalīl* a kind of “mistake of law” applicable to cases of *ḥadd* and *qiṣās*. Once the law has been published and is known “ignorance of law is no excuse.” Islamic law provides detailed procedures and modes of proof for sex offences, and unless a person is proved guilty with the due process of this law no one can be presumed to be guilty and thus having lost protection of the law. In fact, Islamic law punishes a person who falsely accuses another of unlawful sex and is unable to prove it. How can such a law remove its “protection” from a person who has not been proved guilty as yet. In technical terms, the days of *shubhah fi'd-dalīl* are over and everyone is presumed to be innocent until proven guilty by the due process of law. In addition to this, the claims of killing a wife under such an impression have been clearly negated by the procedure of *li'ān*. After this provision no one could take the plea of killing a person who had lost the protection of the law. The law in the Qur'ān gives protection to such a person.
4. Finally, even if the argument about loss of “protection” is conceded, it would necessitate the retaining of the deleted exception, at least for such cases. It appears that this was suggested in the draft law proposed by the CII, but was omitted later. This in itself amounts to a selective application of the law, thus, negating its spirit.

In the light of these arguments, one is compelled to conclude that in the cases reported in the traditions,

the issue was not that of being *ma'sūm ud-dam* or otherwise, but of grave and sudden provocation. Islamic law, therefore, acknowledges the concept and affirms it.

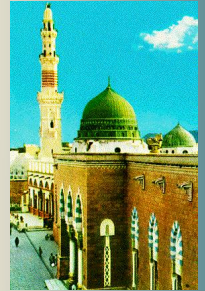
In *Ghulam Yaseen v The State*, PLD 1994 Lahore 392, the issue of *ghairat* has been discussed in detail. It is suggested here that killing on account of *ghairat* is a right of private defence. If this is accepted, this right should be available only where a woman of a person's family or even a male child is under threat of being subjected to rape. If a woman has invited her paramour, the man has lost his *ghairat* anyway and cannot redeem it by killing. This right is available under the law already. Mixing up this right with grave provocation would lead to many problems, some of them being those of human rights. For example, can a woman kill her husband if she finds him in a compromising position, or even involved, with another woman? Is *ghairat* to be interpreted in terms of the customs prevailing in some areas in Pakistan or is it to be given a general meaning for all Muslims? Further, is it available to Muslims alone or is to be given to non-Muslim minorities as well?

In the light of the above, it is suggested that the exceptions to §300 be recalled insofar as they pertain to grave and sudden provocation. Care has, of course, to be exercised and the law should be re-drafted to take into account certain cases in which it can be misused. As an example, the tradition number 482 is reproduced from the *Kitāb al-Amwāl* by Abū 'Ubayd ibn al-Sallām:

482) Ibn Abī Adī related to us from 'Uthman al-Shahhām from 'Ikrima that a man had an *umm walad* (slave mother of the master's child), who constantly used bad words about the Messenger of Allah (p.b.u.h.). The man used to stop her from doing this, but she persisted. He, therefore, killed her (one day) and the matter was referred to the Messenger of Allah (p.b.u.h.). He deemed the shedding of her blood as lawful.

5. Andhi Larai (Blind Fight) and Chance Medley

The second argument advanced by Justice Taqi Usmani in *Federation of Pakistan v Gul Hasan Khan* PLD 1989 SC 633, 675-76, is that liability for *qisās* cannot be waived in case of a blind fight. He quotes scholars to show that a "blind fight" *andhi larā'ī* is one in which people are killed. There can be two situations to which the broad meaning of a blind fight may be applied:



[Home Page](#)

[Title Page](#)

[Contents](#)

[◀◀](#) [▶▶](#)

[◀](#) [▶](#)

[Page 6 of 7](#)

[Go Back](#)

[Full Screen](#)

[Close](#)

[Quit](#)

1. Where two groups, armed with weapons and clubs, clash with each other. In this clash and commotion someone kills another person without knowing who he is killing.
2. A group of friends are sitting in a restaurant, but due to some arguments they suddenly start fighting and one of them picks up a bottle and hits one of his friends on the head thus killing him.

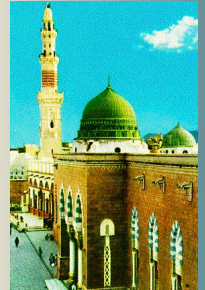
Exception 4 to §300 stated the following:

Exception 4. Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken an undue advantage or acted in a cruel or unusual manner.

A simple reading of the exception makes it plain that the second type of case is contemplated here. At the same time, it is obvious that a blind fight as described in the traditions applies to the first case where the two groups have faced each other with the intention of fighting. Even if the term is considered to be general and may be thought to apply to the second case, it is not certain that it does. The benefit should be given in this case to the accused and the term "blind fight" should be interpreted to apply to the first case.

What in your opinion is the position of Islamic law on grave and sudden provocation?
Is the issue of *ghairat* related to honour killings?

Imran Ahsan Nyazee
September 15, 1999



[Home Page](#)

[Title Page](#)

[Contents](#)



[Page 7 of 7](#)

[Go Back](#)

[Full Screen](#)

[Close](#)

[Quit](#)