The Crime of Rape and The Hanafi Doctrine of Siyasah

Muhammad Mushtaq Ahmad

Abstract

The issue of rape has remained one of the most contentious issues in the modern debate on Islamic criminal law. It is generally held that because of the strict criterion for proving this offence,injustice is done with the victim of rape. This essay examines this issue in detail and shows that the doctrine of *siyasah* [the authority of the government for administration of justice] in the Hanafi criminal law can make the law against sexual violence more effective without altering the law of *hudud.* The basic contention of this essay is that a proper understanding of the Hanafi criminal law, particularly the doctrine of *siyasah,* can give viable and effective solutions to this complicated issue of the Pakistani criminal justice system. It recommends that an offence of sexual violence is created which does not involve sexual intercourse as an essential element. That is the only way to delink this offence from *zina* and *qadhf* and bring it under the doctrine of *siyasah.* This offence will, thus, become sub-category of violence, not *zina.* The government may bring sex crimes involving the threat or use of violence under one heading and, then, further categorize it in view of the intensity and gravity of the crime. It may also prescribe proper punishments for various categories of the crime. Being a *siyasah* crime, it will not require the standard proof prescribed by Islamic law for the *hadd* offences. In extreme cases, the court may award death punishment which can be commuted or pardoned only by the government, not by the victim or her legal heirs.

Keywords

Rape, Sexual Violence, *Zina*, *Qadhf*, *Hirabah*, *Hadd*, *Ta`zir*, *Siyasah*, Circumstantial Evidence.

Introduction

One of the most contentious issues in the modern debate on Islamic Criminal Law is that of rape[1]. As this offence involves sexual intercourse, the jurists had to discuss its implications in relation to the *hadd of zina* (illicit sexual intercourse)[2]. This has given an impression that because of the strict criterion for proving the offence of *zina,* Islamic law fails to do justice with the victim in rape case. This essay examines this issue in detail and shows that the doctrine of *siyasah* in the Hanafi criminal law can make the law against sexual violence more effective without altering the law of *hudud*, but for that purpose it is necessary that this offence not involve sexual intercourse as the primary element so that it becomes a sub-category

of violence, instead of *zina*. The basic contention of this essay is that a proper understanding of the Hanafi criminal law, particularly the doctrine of *siyasah*, can give viable and effective solutions to this complicated issue of the Pakistani criminal justice system.

For analyzing the law relating to sexual violence, the essay first traces the historical background of this law and the various stages through which this law passed; then legal issues are framed and the way these issues have been dealt with by the Pakistani judiciary has been thoroughly examined; after this a thorough analysis of the juristic discourse on this issue has been given; and finally a solution has been given which is compatible with the principles as well as with the higher objectives of Islamic law.

Part One

Historical Development of the Law about Rape

The discourse on the crime of sexual violence in Pakistan initiated with the promulgation of the Hudood Ordinances in 1979 even though the law dealing with this crime was much older[3]. In order to keep the things in their proper context, therefore, it is essential to draw a brief sketch of the different stages through which this law passed. Moreover, in Pakistan the discourse of the religious scholars generally revolved around the issue of whether the crime of sexual violence is a sub-category of *zina* or *hirabah*. This issue will be analyzed in detail here.

From 1860 to 1979

The origins of the present Pakistani law on the crime of sexual violence can be traced to the Indian Penal Code 1860 (renamed in Pakistan as the Pakistan Penal Code or PPC) Sections 375 and 376 of which dealt with the crime of rape[4]. Later, these Sections were repealed by the provisions of the Offence of *Zina* (Enforcement of Hudood) Ordinance 1979, which renamed it as *zina bil jabr* and made it either liable to *hadd* or *ta`zir.* In *Rashida* Patel v *The Federation of Pakistan*[5], the Federal Shariat Court concluded that rape was a form of *hirabah*, not *zina*, but the law could not be changed because appeal was preferred against this decision to the Shariat Appellate Bench of the Supreme Court which did not dispose of the case till the law was changed in 2006 by the Protection of Women (Criminal Laws Amendment) Act. This latter Act repealed the provisions of the Offence of *Zina* Ordinance relating to the offence of *zina bil jabr* and revived the PPC provisions on rape.

The Indian Penal Code did not criminalize "fornication" – consensual sexual relationship between unmarried couple. It only criminalized "sexual intercourse

with a married woman", calling it "adultery" and prescribed punishment for the female partner as an abettor only[6]. However, even adultery was essentially deemed a violation of the right of the husband. That was why no criminal proceedings could start against the man committing adultery except after the filing of complaint against him by the "aggrieved" husband and the culprit could not be given a punishment if he could prove the "connivance" of the husband. This was based on the English law concept of "tort against marital relationship". Both fornication and adultery were forms of consensual sex. Sexual intercourse without the consent of one of the partners was deemed a serious crime named as "rape" in Section 375 of the Code. Pakistan inherited this law (renamed as Pakistan Penal Code or PPC) and it remained in force till the promulgation of the Hudood Ordinances in 1979.

The Hudood Ordinances, 1979

The Offence of Zina (Enforcement of Hudood) Ordinance 1979 brought adultery, fornication and rape under the umbrella concept of *zina* and it renamed rape as *zina bil jabr*. The offence of *zina bil jabr*, like that of *zina*, was either liable to *hadd* or liable to *ta`zir*. The standard of proof for *zina bil jabr* liable to *hadd* was the same as that of *zina* liable to *hadd* (confession by the accused or four adult eye-witnesses), while *zina bil jabr* liable to *ta`zir* could be proved through any form of evidence proving the commission of the crime beyond a reasonable doubt in the particular circumstances of the case.

The Offence of Qazf (Enforcement of Hudood) Ordinance 1979 made false accusation of *zina* an offence called *qazf*,[7] which again was either liable to *hadd* or *ta`zir*. As the definition of *qazf* was borrowed from the definition of defamation in PPC, the exceptions of *good faith* and *public good* were declared as valid defenses[8]. This not only made the Qazf Ordinance ineffective but also increased the chances of misuse of the Zina Ordinance[9]. Many critics noted that the victim of rape could be further victimized under the Qazf Ordinance if she would bring a case against the culprits, although the allegation of rape was out of the scope of the definition of *qazf* because this definition confined *qazf* to allegation of *zina* only. Yet the fact remained that sometimes a victim of rape was accused by the other party – as well as the police – of not only consensual *zina* but also of committing *qazf*. As the offence of *zina* liable to *ta`zir* did not require the proof of four witnesses and as the defenses of good faith and public good were also available, the adverse party as well as the police could easily escape prosecution under the Qazf Ordinance. It was, however, also possible that sometimes a willing partner might bring an accusation of rape against the other partner so as to save itself from the operation of the Zina and Qazf Ordinances.

The Interplay Between the Hudood Ordinances and the Muslim Family Laws Ordinance 1961

The issue was further complicated by the fact that some people started using the provisions of the Muslim Family Laws Ordinance (MFLO) 1961 and the relevant case law to bring cases of *zina* against their former spouses. Section 7 of MFLO gives a detailed procedure for making the divorce effective. In *Ali Nawaz Gardezi v Muhammad Yusuf*,[10] the Supreme Court held that if the husband did not follow that procedure after pronouncing divorce, he would be deemed in the contemplation of law to have revoked the divorce and as such the couple would continue to be husband and wife.

As consensual sex was not deemed a grave offence under the law, no serious problem arose from this rule despite the fact that most of the people did not follow the Section 7 procedure after divorce. However, after the promulgation of the Hudood Ordinances in 1979 people started troubling their former wives who got married to other persons in the meanwhile and because of the good faith and public good defenses the complainant could evade the operation of the Qazf Ordinance. In *Shera v The State*[11], the Federal Shariat Court declared that one such couple was guilty of *zina*. Many such cases were registered by different people against their former wives.

As the Shariat Appellate Bench of the Supreme Court had already declared in *Federation of Pakistan v Farishta*,[12] that MFLO being included in the meaning of "Muslim Personal Law" was beyond the jurisdiction of the Federal Shariat Court, the provisions of the same could not be examined for conformity with Islamic injunctions. Finally, the Shariat Appellate Bench of the Supreme Court in *Bashiran v Muhammad Hussain*[13], formulated a kind of compromise between the provision of MFLO and those of the Hudood Ordinances by declaring that because of the *bonafide* belief of the couple that the divorce and the subsequent marriage were valid they could not be deemed guilty of *zina*. It simply meant that for the purpose of the provisions of the Zina Ordinance, the provisions of MFLO would be overlooked. Despite the fact the problems were actually created by the provisions of the MFLO, these cases were used by critics to launch propaganda against the Hudood Ordinances because of which scholars and judges who were working for the Islamization of the criminal law were on the defensive.

Zina or *Hirabah*? The Dilemma of the Federal Shariat Court

It was in this background that the Federal Shariat Court in *Rashida Patel v The Federation of Pakistan*[14], declared that *zina bil jabr* was a sub-set of *hirabah*, not *zina*. For reaching this conclusion, the Federal Shariat Court heavily relied on the views of Mawlana Amin Ahsan Islahi (d. 1997), a renowned scholar who had

expertise in the Qur'anic studies, particularly the theory of coherence (*nazm*) in the Qur'an. Islahi opined in his commentary on the verses of *hirabah* that one of the punishments of *hirabah* is *taqtil* (and not *qatl*) which does not simply mean killing but killing through an exemplary way[15]. Thus, he made the ground for asserting that *rajm* (stoning) was a form of *taqtil* and as such a punishment for *hirabah*. Islahi went to the extreme of asserting that those persons whom the Prophet (peace be on him) had given the *rajm* punishment were habitual offenders and that they were given this punishment not for *zina* but for *hirabah*[16].

The Protection of Women Act 2006

The Protection of Women Act (Criminal Laws Amendment) Act 2006 repealed all the provisions regarding *zina bil jabr* from the Zina Ordinance and revived the crime of rape in PPC. Thus, rape is no more a *hadd* offence. Moreover, the new Section 375 PPC[17] does not give exception to husband, which simply means that now the Pakistani law also has the crime of "marital rape"[18]. It also created a new crime of *fornication* in PPC by inserting section 496B in it. The definition of this offence is essentially the same as that of *zina* as defined in Section 4 of the Zina Ordinance[19]. Thus, one and the same act has been given two different names and two different sets of legal consequences. Moreover, the crime of fornications has been inserted in the chapter of "offences relating to marriage", while fornication in common law essentially involved unmarried partners.

Fornication is, thus, the new name of the old crime of "*zina* liable to *ta`zir*" with the difference that fornication does not attract the rules of the Qazf Ordinance but those of another crime called "false accusation of fornication" in Section 496C of PPC. This latter crime, in turn, is the new name of the old crime of "*qazf* liable to *ta`zir*". The net result is that the Qazf Ordinance has been made even more ineffective.

The Pakistani Law on Sex Offences Now

As noted above, the offence of illicit sexual intercourse is being treated under two different laws: the Zina Ordinance makes it a *hadd* crime[20], while PPC gives it the name of *fornication* and makes it an ordinary (*ta`zir*) crime[21]. Similarly, the offence of allegation of illicit sexual intercourse is dealt with as *qadhf* under the Qazf Ordinance and as false accusation of fornication under PPC[22].

There are two grave sex offences under PPC, of course both of which are *ta`zir*: *Rape* and *Unnatural Offence*.[23] Intercourse is an essential ingredient of both of these offences. Hence, insertion of other foreign elements or oral sex, for instance, does not fulfill this requirement. Some more serious forms of rape – gang rape and rape accompanied by robbery – have been deemed acts of terrorism under the Anti-Terrorism Act, 1997.[24]

Most of other offences are found scattered in different chapters of PPC. For instance, selling of obscene literature, doing obscene acts or singing obscene songs have been mentioned in the chapter of offences against 'morals'.[25] Some offences come under the title of "criminal force and assault"[26]. Many such offences can well come under the provisions of the Qisas and Diyat Act relating to "hurt" which are now found in Chapter XVI of PPC.[27] The offence of abortion also comes under the provisions of the Qisas and Diyat Act.[28] Several offences have been mentioned under the broader concept of "abduction"[29]. Finally, some offences have been mentioned under the title of "offences relating to marriage"[30]. There is no logical relationship between these different classes of offences and there are several inconsistencies and gaps in the law.

Three Approaches to the Issue of Rape

In Pakistan, the issue of rape has been approached from thee different perspectives:

- The traditional scholars insist that rape is a form of *zina* and that it can only be proved by the confession of the culprit or the testimony of four witnesses in accordance with the prescribed standard;[31]
- Mawlana Islahi developed the wider doctrine of *hirabah* that includes all forms of *fasad* (mischief), including rape, and also asserted that circumstantial evidence can also prove a *hadd* offence;[32]
- Some of the traditional scholars who uphold the concept of "conflation" (*talfiq*), or mixing of the opinions of the various schools of law, tried to make a kind of compromise between these diametrically opposed views by suggesting that even if rape was covered by the law of *zina* it could be proved on the basis of circumstantial evidence.[33]

As far as this third approach of conflation is concerned, it needs separate detailed analysis as it involves serious issues of legal theory and principles of interpretation. Hence, it is the first two approaches that will be discussed and analyzed here. The purpose is to find out a viable solution to the problem of rape without undoing the law developed by the jurists.

Part Two

Rape as a Form of *Hirabah*: The Theory of Islahi

Generally, an analysis of the offence precedes that of the punishment, but the debate on the issue of rape in Pakistan initially started with the assertion of Mawlana Islahi that *rajm* was the punishment of *hirabah*, not *zina*[3]4. Hence, it is essential to analyze the two issues separately, namely:

1. Is *rajm* the punishment of *hirabah*?

2. Is rape a form of *hirabah*?

1. Is *Rajm* the Punishment of *Hirabah*?

Islahi briefly referred to the punishment of *rajm* while commenting on the verses about *hirabah* in *Surat al-Ma'idah* (Chapter 5), but gave a detailed exposition of his views while commenting on the verses regarding the punishment for *zina* in *Surat al-Nur* (Chapter 18).

Main points of his theory are summarized here:

- Offences are committed in two ways: one, when a person or a group of persons is overwhelmed by the evil inclination and commits a crime without disturbing the whole system; two, when a gang shakes the very foundations of the whole system; the former is ordinary crime, while the latter is *hirabah*.[35]
- The term *hirabah*, thus, is not confined to armed robbery; rather it covers many other forms, such as rebellion, kidnapping and abducting as well as rape, particularly gang rape.[36]
- The Qur'an mentions *taqtil* among the punishments for *hirabah*; *taqtil* is different from *qatl*, as the latter means killing while *taqtil* means killing through an exemplary way, such as stoning.[37]

This was how he tried to make a case for proving that *rajm* was the punishment of *hirabah*, not *zina*. As far as the verses of *Surat al-Nur* about the punishment of *zina* are concerned, Islahi is of the opinion that these verses are general in nature and, thus, the punishment of one hundred lashes mentioned therein is both for the *muhsan* and *ghayr muhsan* offenders.[38]

Here, a serious question arises about accommodating the traditions and precedents of the Prophet (peace be on him) and his Successors (God be pleased with them) about awarding the punishment of *rajm* to convicts in cases of *zina*. Islahi and his students hold in principle that the *Sunnah*, even if it is *Mutawatirah*, cannot abrogate the Qur'an.[39] Thus, although they admit that the fact of the Prophet's awarding the punishment of *rajm* to *some* offenders has been definitively proved by *mutawatir* reports,[40] they assert that these reports cannot override the text of the Qur'an. They divide the traditions into three categories:

- Traditions that are acceptable to them as they do not go against their understanding of the Qur'an, such as those mentioning the the *rajm* punishment *generally* without specifically linking it with the offence of *zina* or any other offence;[41]

- Traditions which are accepted after being interpreted in the light of their understanding of the Qur'an, such as the traditions that report that the Prophet (peace be on him) asked if the accused was *muhsan* or not;[42]
- Traditions that are rejected because they are deemed contradictory to their understanding of the Qur'an, such as those report that the Prophet (peace be on him) appreciated the character and conduct of one of the convicts after he was awarded the *rajm* punishment.[43]

The foremost problem with Islahi's theory is that it ignores, rather invalidates, the whole legal literature of fourteen centuries.[44] This is a novel idea which has never been accepted by any school of Islamic law. Earlier in Islamic history, only the Khawarij denied the punishment of *rajm*.[45] All other schools accepted this as the *hadd* punishment for *zina*.[46] None of the schools deemed it a punishment for *hirabah*. Even when some of the Maliki jurists considered sexual violence as a form of *fasad* (mischief), they did not take the position that *rajm* was the punishment for this *fasad*.[47]

As mentioned above, Islahi that the punishment of *rajm* has been proved through *khabar mutawatir* and that is why he even criticizes the Khawarij for denying the reports about the Prophet's awarding this punishment.[48] If the reports about the punishment have reached the status of *tawatur*, how then can one assert that this punishment was given for *hirabah*, not *zina*? There is not a single report about the Prophet's giving this punishment for any crime other than *zina*. Nor did the Prophet (peace be on him) ever give this punishment to anyone committing robbery, which was the more obvious form of *hirabah*.

In an earlier case, *Hazoor Bukhsh v The State*,[49] Aftab Hussain, CJ, who was much influenced by the views of Mawlana Islahi, asserted that *rajm* was not a *hadd*, but a *ta`zir* punishment[50]. In revision, however, the learned judge overturned his own decision on a technical ground asserting that the provisions regarding the *rajm* punishment being applicable only to Muslims were included in the meaning of "Muslim Personal Law" and as such beyond the jurisdiction of the Federal Shariat Court.[51]

2. Is Rape a Form of *Hirabah*?

The Federal Shariat Court concluded in *Rashida Patel* that rape is a form of *hirabah*, not *zina*. Influenced by the theory of Islahi, Fida Muhammad Khan J, observed: "*Zina bil jabr* is different from the other cases of *zina* and in our opinion it is a serious kind of *fasad fi 'l-ard* (creating mischief and disorder in the land) and *hirabah*. Hence, for proving this offence the required standard of evidence is that of *hirabah*, not *zina*."[52] It is surprising that the Court even did not take up the question as to why the jurists discuss the rules about coercion in sexual intercourse while discussing the rules about *zina*? This issue will be discussed in detail later.

On what ground the Federal Shariat Court considered rape as serious form of *hirabah*? The Court has come up with an interesting argument:

> If attack on the property of a person is called *hirabah*, why not the attack on a person's honor should also be deemed so? After all, in all that a person has what is more precious than his honor and as such what can be the worst form of *fasad* except attacking his honor?[53]

This may appeal to emotions but legally speaking this argument does not carry any weight. Firstly, does the Court have the authority to expound new principles of Islamic law and go against the established boundaries of the schools of Islamic law?[54] Even if this basic question is ignored and it is assumed for the sake of argument that the Court has such an authority, the next question is: did the Court check the compatibility of this 'new' principle with the already established norms of the system?[55] The answer to this question is clearly in negative. Thus, the Court did not consider the consequences of considering "honor" as "property"[56]. Thus, it did not explain if this property will be *mutaqawwam* (marketable) or *ghayr mutaqawwam* (non-marketable)[57]? If it is *ghayr mutaqawwam*, how can it be brought under the concept of *hirabah*? If, on the other hand, it is presumed *mutaqawwam*, what will be the standard of *taqwim* (valuation)? Will the honor of different persons have different *qimah* (value) and, as such, the one "looting" this property from different persons will deserve different punishments? How will the law prescribe a minimum *nisab* for this "property" for the purpose of imposing the *hadd* of *hirabah*?[58]

Even if all these questions are ignored and rape is presumed *hirabah*, some more serious questions arise on the way the Court disposed of this issue without checking the analytical inconsistency. Thus, even though it declared that rape was a form of *hirabah*, it did not order the government to remove the provisions regarding rape from the Offence of Zina Ordinance and place them in the Offences against Property Ordinance. It also did not ask the government to change the definition of *hirabah* so as to include rape in its scope. Finally, the Court did not apply the punishment of *hirabah* to rape even after declaring that rape was a serious form of *hirabah*. Significantly, the Court declared that the *hadd* punishment could not be given on the basis of the testimony of women. It also reaffirmed the legal position adopted by the Hudood Ordinances that *ta`zir* can be awarded on the basis of any evidence which satisfies the court about the guilt of the accused. Hence, the only change directed by the Court in the law regarding rape was to reduce the number of witnesses from four to two for the punishment of *hadd*.

Can Circumstantial Evidence Prove the *Hadd* Offences?

For accepting circumstantial evidence in a rape case and considering it a form of *hirabah*, the Federal Shariat Court relied on an incident that is reported to have taken place during the lifetime of the Prophet (peace be on him). Before we evaluate the inferences of the Court it seems proper to briefly mention the report of the incident:

> A woman went out during the time of the Prophet (peace be on him) for offering the *fajr* prayer. She was caught by a person who fulfilled his desire from her. She cried and he ran away. When people gathered she informed them of the incident. She also came across a group of the *muhajirin* and told them about it. They went to capture the culprit and brought the person whom she believed to be the culprit. She said: "Yes, this is the one." They brought him to the Prophet (peace be on him). When he ordered that he be stoned, the actual culprit (who was watching all these developments silently) stood up and said: "O Messenger of Allah! I am the one who did it to her." The Prophet said to the woman: "Go. Allah has forgiven your mistake." He also said good words about the first accused and told the about the actual culprit: "He has repented in such a way that if the whole population of Madinah had repented his way it would have sufficed them."[59]

This incident has been narrated by different reporters, who contradict each other in some details, but they agree on the following points:

- That sexual violence was committed against the woman;
- That when the woman claimed that sexual violence was committed against her, she was not asked to bring four witnesses;
- That the detailed procedure for proving the *hadd* offence was not followed; for instance, no inquiry was made about the culprit if he was *muhsan* or not;
- That the first accused was given punishment on the basis of circumstantial evidence.[60]

The Federal Shariat Court raised some important questions on this report:

> Whether the first accused was awarded the *rajm* punishment or he was about to be awarded this punishment when the actual culprit came forward? Whether he was *muhsan* or *ghayr muhsan*? The punishment awarded to him by the Prophet (peace be on him) was *hadd* or *ta`zir*? Whether this punishment was actually awarded for the purpose of being enforced or the Prophetic genius had seen that because of the spontaneous reaction of awarding this punishment the actual culprit would come out with his confession? Whether the first accused was awarded the punishment on the basis of the testimony of the complainant alone or on the basis of the overall corroborative circumstances of the case? Whether that person remained silent or had denied the allegation? If he denied the allegation, why was his denial not accepted? Why was the woman not asked to bring four witnesses?[61]

It is, however, surprising that even after raising these questions the Court preferred not to answer them and quickly jumped to conclusions. The fact remains that unless these questions are answered, the true nature of this punishment cannot be understood and this report cannot be used to modify the structure of the *hudud* as developed by the jurists. We have the following objections on this summary treatment of the issue by the Federal Shariat Court:

- This report is used in this summary fashion by those who assert that *hadd* punishment can be awarded on the basis of circumstantial evidence.[62] If this report is accepted on the face of it, the same conclusion must be accepted even if it was deemed an issue of the *hadd* of *hirabah*, not of *zina*, as the Court wants us to believe.
- The report mentioned above explicitly mentions that the first accused was awarded the punishment. Hence, it becomes necessary to ascertain if this punishment was *hadd* or *ta`zir*. If it was the *hadd* punishment and even then the rest of the questions are not answered, it simply implies that these questions are not important even in cases of *hudud*.
- Is there any other example of the Prophet (peace be on him) using his "prophetic genius" in awarding punishment to someone with the intention of getting the real culprit on the basis of a "spontaneous reaction"?
- How could the Court ignore the most important question of the standard of evidence?
- Even if the real culprit was awarded punishment on the basis of his confession, the procedure for the confession of *zina* was not followed. Even then, the Court ignored this issue and deemed it a case of *hadd*.[63]

To conclude then, instead of changing the structure of the *hudud* on the basis of this solitary report, the proper way to deal with this report is to interpret it in such a way that it becomes compatible with the structure of *hudud*, which in turn is based not only on a number of texts but also on the principles of law. Such an interpretation is not only possible but also plausible.

The woman was going for *fajr* prayer and was attacked near mosque. This was undoubtedly an act of *fasadfi 'l-ard* (creating mischief and disorder in the land) attracting the principle of *siyasah*. The circumstances clearly suggested that violence was committed against the woman. It must be presumed here that the woman was complaining about violence, even if it was in the form of sexual assault, and was not specifically alleging the offence of *zina*. Thus, the allegation did not attract the rules of *zina* and *qadhf*. This becomes the basis for absolving the woman from the liability of bringing four witnesses or facing the *qdhf* punishment.

The only question that remains unanswered is: can circumstantial evidence prove a *siyasah* offence?

Circumstantial Evidence in *Siyasah* Cases

If one examines the instances where the Prophet (peace be on him) awarded a punishment and the jurists call it *siyasah*, one finds that in many of these cases the conviction was based on circumstantial evidence or previous record of the convict. A glaring example is the following case.

During the time of the Prophet (peace be on him) a woman was found seriously injured and when asked about the culprit she could not pronounce his name; people mentioned many names and on one name she nodded. This was considered a conclusive proof against the culprit who was given similar punishment for causing the death of the woman. The illustrious Sarakhsi commenting on this incident says:

> The true purport of this report is that the punishment was awarded as *siyasah* because the culprit was creating mischief and disorder in the land (*fasad fi 'l-ard*) and was well-known for such activities. This is evident from the fact that when the woman was found seriously injured, people asked her about the culprit and mentioned many name which she rejected by the movement of her head and finally when the name of that Jew was mentioned she nodded in favor. Obviously, only those people are named in such a situation who are well-known for such activities and in our opinion the ruler can give death punishment to such a person under the doctrine of *siyasah*.[64]

This implies that in cases of *siyasah*, any kind of evidence that satisfies the court can be deemed admissible.[65] Thus, the *siyasah* punishment can be awarded on

the basis of the testimony of women alone, or of non-Muslims alone, or circumstantial evidence. It is now time to turn to the Hanafi classification of offences and punishments.

Part Three

The Hanafi Classification of Offences and Punishments

The Hanafi School links all punishments to various kinds of rights and for this purpose divides all rights into three broad categories: rights of individual, rights of community and rights of God.[66] This is presumably the most important feature of the Hanafi criminal law and it ensures analytical consistency in the system. All the punishments are linked to one or more of these rights. Thus, all the *hudud*

punishments – except the *hadd* of *qadhf* – are linked to the pure rights of God; *ta`zir*[67] punishments are linked to the rights of individual, while *siyasah* punishments are linked to the rights of the community. Sometimes a wrong is considered violation of the joint right of God and of individual. In such a joint right, sometimes the right of God is predominant – such as in case of the *hadd* of *qadhf* – while sometimes the right of individual is deemed predominant – such as in case of *qisas*. Thus, *qisas* attracts some of the rules of the rights of individual, such as the possibility of waiver and compromise, as well as some of the rules pertaining to the right of God, such as suspension of the punishment due to the existence of *shubhah* (mistake of law or of fact).[68]

The Right of God Distinguished from the Right of the Community

One of the reasons for the confusion of modern scholars in this area of law is that because of a superficial reading of the texts of the jurists they did not appreciate this intricate system of rights and equated the right of God with the right of the community. For instance, Kasani while elaborating the nature of the punishment of *qadhf* says: "If the evil effects of a wrong reach the general public and the good effects of its punishment also reach the general public, the obligatory punishment for such wrong is the pure right of Allah, Great is His Majesty."[69] This statement may be wrongly construed to prove that the right of God is the same as the right of the community. This wrong construction ignores the fact that Kasani uses the word "obligatory" for the punishment which is awarded as a right of God. The use of this word indicates that the punishment can neither be commuted nor pardoned. This is what Kasani explicitly says in the next part of the same statement:

> The obligatory punishment for such wrong is the pure right of Allah, Great is His Majesty, so that the general public surely gets the benefits of this punishment and is surely protected from the evils of that wrong. This
>
> purpose can only be achieved if a human being does not have the authority to waive this punishment. *That is exactly what is meant by ascribing these rights to Allah*, Blessed and High is He.[70]

Hence, the right of God cannot be deemed equivalent to the right of community.

Kasani further elaborates this point by enumerating the consequences of considering the *hadd* of *qadhf* as the right of God. Thus, he says:

> Now that it has been proved that the *hadd* of *qadhf* is pure right of God, or at least the right of God is predominant in it, we conclude: it cannot be pardoned because the authority to pardon vests in the one whose right has been violated; it cannot be waived through compromise or compensation

> because a person cannot get compensation for the violation of the right of another; it cannot be inherited because the rules of inheritance apply to the property owned by the deceased or his rights… and as nothing of the sort exists, the rules of inheritance will not apply; and only one punishment will be given even if the wrong was committed more than once.[71]

The net conclusion is that the rules relating to the right of God are generally applied to *qadhf*. On the contrary, *ta`zir* is the pure right of individual.[72]

Some of the later Hanafi jurists, who were influenced by the views of the Shafi`i jurists, asserted that *ta`zir* can be awarded in the right of God also. However, this led to analytical inconsistency and Ibn `Abidin had to assert that in such cases, *ta`zir* cannot be pardoned because the right of God cannot be pardoned by any human authority.[73]

Significant Features of the Doctrine of *Siyasah*

Here, we should also briefly mention some important features of the *siyasah* punishment. As this punishment involves a right of the community, the ruler may pardon the offender because he acts as the agent (*wakil*) of the community. As *ta`zir* is not suspended even in the presence of a *mistake of law* (which the jurists call "*shubhah*"), the same is true of the *siyasah* punishment. The standard of evidence has been fixed by the texts of the Qur'an and the *Sunnah* for the *hudud*, *qiṣaṣ*and *ta`zir* offences, but for the *siyasah* punishments the authority for prescribing the standard of evidence has been given to the ruler. Resultantly, the court may award the *siyasah* punishment on the basis of the testimony of women alone, or of non-Muslims alone, or circumstantial evidence. Similarly, the court may decide about the minimum or maximum limit of the punishment keeping in view the restrictions imposed on it by the texts of the Qur'an and the *Sunnah* as well as by the general principles of Islamic law.[74]

Ta`zir* and *siyasah* have many characteristics in common[75] which is why sometimes these terms are used interchangeably.[76] However, an analysis of the sections on *ta`zir in the classical manuals of Islamic law suggests that the jurists were dealing with two kinds of *ta`zir*: one, the cases that fall under the notion of *ta'dib* (disciplinary measures), such as rebuking a child of ten years for non-performance of prayer or a master's punishing his servant for not obeying his lawful commands; two, the cases where the court awards a lesser punishment because a condition of the *hadd* punishment is missing or a *shubhah* exists. In the former case, *ta`zir* is a pure right of individual. In the latter case, it is the right of the community and when the jurists use the word *ta`zir* for this punishment it is just because in its wider sense the word includes *siyasah*. In the former case, *ta`zir* is not "punishment

proper" and that is why it can be awarded even to a minor above the age of seven and it is neither necessary nor convenient for the government to enforce it.[77] In the latter case, it is the government which will enforce the punishment because it involves the right of the community at large.[78]

Part Four

Relationship of Rape and *Zina*: The Approach of the Jurists

After analyzing and refuting the theory of Islahi about considering rape as a form of *hirabah*, it is time now to turn the manuals of the jurists to see how do the jurists analyze cases of sexual violence? It is only after identifying the legal principles developed by the jurists that one can think of bringing the offence of sexual violence under the rubric of *siyasah* without violating those principles. Hence, this Section will first identify the legal principles developed by the jurists for this issue.

Unfortunately, the discussion of the issue of rape has generally been marred by a kind of emotional and sentimental approach which is based on the presumption that only is this crime invariably committed by man but also that the complainant in a rape case is always considered a victim of rape.[79] The jurists, however, had to analyze this issue dispassionately and objectively. Hence, they looked at it from all the various perspectives and divided the issue of rape into three sub-issues:

Legal Position of the Complainant and the Victim

Legal Position of the Accused

Legal Position of the Convict

Each of these sub-issues will be analyzed separately here.

Legal Position of the Complainant and the Victim

There are two possible situations for determining the legal position of the complainant: when she proves that she was coerced and when she does not prove coercion. In both cases, the application of the rules of *zina* must be examined separately from that of the rules of *qadhf*.

Thus, if it is proved that the woman was forced to have sexual intercourse, she cannot be given the *hadd* of *zina* under any circumstances[80] even if it was *ikrah naqis* (deficient form of coercion).[81] She cannot be given the punishment of *qadhf* also as her being a victim of the worst form of sexual violence will be deemed a *shubhah* to suspend the operation of the law of *qadhf*.

On the other hand, if no proof of her being coerced is given, the accusation will attract the rules of *qadhf* because it is an accusation of illicit sexual intercourse. Sarakhsi, for instance, says that if two witnesses give testimony of consensual sexual intercourse and two witnesses say that the woman was coerced, neither the man nor the woman will be given the *hadd* punishment of *zina*.[82] It simply means that the case attracts the rules of *zina* because the guilt can be proved only through the testimony of four witnesses. A necessary corollary of this rule is that if four witnesses are not there, the rules of *qadhf* will be applied. However, this complaint will not be deemed a confession of *zina* on the part of the complainant because confession of *zina* has a peculiar form and procedure.[83]

Legal Position of the Accused

When a person is accused of a crime, he cannot be given a punishment unless it is proved beyond a reasonable doubt that he committed that crime.[84] When a woman accuses a man of committing rape with her, there are many possibilities, apart from the truth of the accusation. Thus, for instance, she might have been a willing partner who later turned hostile against her friend; or it might be a plot against the accused. The court will have to consider all the hypothetical possibilities and will not punish the accused unless all other possibilities, except his guilt, are eliminated.

Even when it is proved that the woman was assaulted and that she was not a willing partner, this will not be enough to prove the guilt of the accused. The complainant being innocent or aggrieved does not automatically prove that the accused is the culprit; positive evidence of his being guilty is required. Hence, the position of the complainant must be dealt with separately from that of the accused.

Legal Position of the Convict

When it is proved that the accused had committed sexual violence, the next task before the jurist and the judge is to determine the nature and extent of the crime

because different forms of sexual violence will attract different rules. A thorough analysis of the manuals of the jurists shows that they checked various possibilities to assert or deny the application of various rules:

If the culprit causes a hurt or injury while committing the offence of *zina*, he is *also* liable for the hurt or injury. Thus, if he caused a minor damage to her sex organ, he will pay one-third of *diyah* for causing *jurh ja'ifah*,[85] while he will be liable to pay full *diyah* if he completely damaged it.[86] Similarly, if he broke her limb, he will pay the *arsh* for it.[87]

If a person coerces a minor girl for sex and causes damage to her, *hadd* punishment will not be imposed on him because the act lacks an essential condition

of *zina*, but he will be given *ta`zir*[88] and he will also be liable to pay one-third of *diyah* as well as *mahr* (dower). But if he is to pay full *diyah*, he will not be asked to pay *mahr*.[89] In such situations, *mahr* does not mean recognition of marital relationship between the couple; rather, it is based on the principle of law that illicit sexual intercourse will attract one of the two rules: either *hadd* or *mahr*. Thus, this *mahr* results from illicit sexual intercourse, not from marital relationship.

The *`aqilah* (allies of the convict) will not share the responsibility of paying such *diyah* or *arsh* because it is deemed *`amd* (intentional murder or hurt).[90]

One the same principle, if a person commits sexual intercourse with a concubine and thereby causes her death, he is liable to *hadd* punishment as well as to pay the *qimah* (value) of the concubine.[91]

Zina coupled with violence or *ikrah* (coercion) is a more grievous offence than ordinary *zina*.[92] It means that in some cases of rape the court may award death punishment as *siyasah* even if the offender is not *muhsan*.

Similarly, unnatural sexual intercourse also attracts the rules of *siyasah*.[93]

The jurists disagreed on whether or not a man can be coerced to have sexual intercourse because sexual intercourse is not possible in the absence of erection and erection shows the desire for sex.[94] However, the official position of the Hanafi School is that erection can be caused by other causes, such as intoxication.[95] Moreover, even if erection shows desire it does not prove "consent".[96] Hence, Sarakhsi has mentioned it explicitly that if a man is coerced to have sexual intercourse, *hadd* punishment will not be imposed upon him provided this was *ikrah tamm*.[97]

Now, if a man can be coerced to commit this act, the coercion may come from another man who wants him to have sexual intercourse with a woman or it may come from a woman. Last but not least, a woman may coerce a man to have sexual intercourse with her. While this final act may or may not be called "rape", it has to be criminalized.

If a man is forced to have sex with a woman he has to pay *mahr*. This rule is applicable in case where the man under coercion coerces that woman as well as in case where the woman willfully allows him to have sexual intercourse with her because such permission has no legal consequence.[98]

Creating the *Siyasah* Offence of Sexual Violence

This overview of the various rules of Islamic law proves that the legal regime as developed by the jurists is based on fundamental principle: that whenever sexual intercourse is there, the rules of *zina* and *qadhf* will be applicable. Hence, the only way to avoid the application of the rules of *zina* and *qadhf* and to bring this offence

under the doctrine of *siyasah* is to define it in such a way that *sexual intercourse* does not constitute the essential element of the offence. The essential element of this new offence shall be coercion or violence, not sexual intercourse.

Thus, oral sex, unnatural offences and other forms of sexual violence can all be brought under this wider concept. It will, thus, fill the gaps found in the present rape law. Last but not least, it will not require four witnesses.

Importantly, the new offence will become a sub-group of violence, not *zina*. This question is important from the perspective of the theory of purposes of Islamic law (*maqasid al-shari`ah*)[99].According to Ghazali, the purposes of the *Shari`ah* are of two types: the *dini* or the purposes of the Hereafter and the *dunyawi* or the purposes pertaining to this world. He further divides the worldly purposes into four types: the preservation of *nafs* (life), the preservation of *nasl* (progeny), the preservation of *`aql* (intellect), and the preservation of *mal* (wealth). When all types are taken together we have five basic purposes of law, which are also called *darurat* (primary purposes). The values in the priority order are: *din*, *nafs*, *nasl*, *`aql* and *mal*.[100]

The jurists hold that the punishment of *zina* is for the protection of the value of *nasl*.[101] However, the offence of sexual violence is different from *zina* as it does not have the element of sexual intercourse and as such it will not be deemed an attack on the value of *nasl*. It will be more appropriate to consider it an attack on the value of *nafs*, which will also be in conformity with the priority order of the *maqasid al-shari`ah* mentioned above.

Recommendations

For bringing the existing Pakistani law into conformity with the *ahkam* of the Noble *Shari`ah*, it is necessary that:

- An offence of sexual violence is created which does not involve sexual intercourse as an essential element. That is the only way to delink this offence from *zina* and *qadhf* and bring it under the doctrine of *siyasah*. This offence will, thus, become a sub-category of violence, not *zina*.

  The government using its authority under the doctrine of *siyasah shar`iyyah*(administration of justice in accordance with the principles of Islamic law) may bring sex crimes involving the threat or use of violence under one heading and, then, further categorize it in view of the intensity and gravity of the crime. It may also prescribe proper punishments for various categories of the crime.

  Being a *siyasah* crime, it will not require the standard proof prescribed by the Noble *Shari`ah* for the *hadd* of *zina* or other *hudud*. Rather, the court may decide the case on the basis of the available forms of evidence,

including forensic and medical reports as well as the testimony on women and non-Muslims. Indirect and circumstantial evidence may also be deemed admissible if it satisfies the court.

In extreme cases, the court may award death punishment which can be commuted or pardoned only by the government, not by the victim or her legal heirs.

The crime of sexual violence so defined may also include violence against men and, thus, it will be gender-neutral.

Zina has to be kept separately from the crime of sexual violence and its sub-categories because it is a *hadd* offence, but it must be correlated with the offence of *qadhf* and the law of *qadhf* must be made more effective by removing the exceptions of good faith and public good which have no justification in the Noble *Shari`ah*.

End Notes

[1]In Pakistan, the law of rape has been examined from various perspectives and different scholars have come up with divergent views on the issue. See for a good compilation of the works produced in Urdu: Khurshid Ahmad Nadim, *Islam ka Tasawwur-e-Jurm-o-Saza* [Islamic Concept of Crime and Punishment] (Islamabad: International Institute of Islamic Thought, 1997), Vol. 2. For an analysis of the relevant case law, see: Charles Kennedy, *Islamization of Laws and Economy in Pakistan* (Islamabad: Institute of Policy Studies, 1991). For one of the most severe critiques of the Hudood Laws, see: Rubya Mehdi, *The Islamization of Laws in Pakistan* (Richmond, Surrey: Curzon, 1994). For a kind of patch-up between the traditional and the liberal view, see: Asifa Quraishi, "Her Honor: An Islamic Critique of the Rape Provisions in Pakistan's Ordinance on *Zina*", *Islamic Studies* 38: 3 (1999), 403-32. See also: Muhammad Tufayl Hashimi, *Hudud Ordinance Kitab-o-Sunnat ki Roshni men* (Peshawar: National Research and Development Foundation, 2005).

[2]*Hadd* is a specific kind of punishment enforced as the 'right of God'. Details are given below.

[3]The four Hudood Ordinances of 1979 incorporated some of the principles of Islamic law in the Pakistani criminal justice system. The draft of the Ordinances was prepared by the Council of Islamic Ideology which comprised of some renowned legal experts and religious scholars of the various schools of thought including: Justice (r) Muhammad Afzal Cheema, Justice (r) Salahuddin Ahmad, A. K. Brohi, Mawlana Muhammad Yusuf Binnori, Khwaja

Qamaruddin Pir Siyal Sharif, Mufti Siyahuddin Kakakhel, Mufti Muhammad Husayn Na`imi, Zafar Ahmad Ansari, Mufti Muhammad Taqi Usmani, Mufti Ja`far Husayn Mujtahid, Mawlana Muhammad Hanif Nadvi. Dr. Zafaruddin Ahmad, Mawlana Shams al-Haqq Afghani, `Allamah Sayiid Muhammad Razi and Dr. Mrs. Khawar Khan Chishti. See for details: Muhammad Mushtaq Ahmad, *Hudud Qawanin: Islamic Nazriyati Council ki `Uburi Report ka Tanqidi Ja'izah* [*Hudud Laws: Critical Analysis of the Interim Report of the Council of Islamic Ideology*](Mardan: Midrar al-`Ulum, 2006), 7-8.

[4]Throughout this essay, the phrase "sexual violence" is preferred to "rape" primarily because rape essentially involves sexual intercourse while sexual violence is a generic term which includes other offences as well. It may be noted here that the recent changes in the Indian law have brought all the various offences under the umbrella concept of rape. This law needs separate analysis.

[5]*Rashida Patel v The Federation of Pakistan*,PLD 1989 FSC 95.

[6]Section 497 of the Indian Penal Code defined adultery as: "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall be punishable as an abettor."

[7]Proper transliteration is *qadhf*. The term denotes false accusation of *zina*. In this essay, it has been generally transliterated as *qadhf* except where a reference has been made to the said Ordinance.

[8]See Section 3 of the Qazf Ordinance.

[9]The various provisions of the Qazf Ordinance require separate detailed analysis.

[10]PLD 1963 SC 51. The same was reaffirmed in *Abdul Mannan v Safuran Nisa*, 1970 SCMR 845, as well as *Muhammad Salahuddin v Muhammad Nazir Siddiqi*, 1984 SCMR 583.

[11]PLD 1982 FSC 229.

[12]PLD 1981 SC 120.

[13]PLD 1988 SC 186.

[14]*Rashida Patel v The Federation of Pakistan*, PLD 1989 FSC 95.

[15]*Tadabbur-i-Qur'an* (Lahore: Faran Foundation, 2001), 2: 505-508.

[16]Ibid., 5: 361-77.

[17]See Sections 5 and 13 to 16 of the Act.

[18]Till quite recently, the Indian Penal Code contained this exception: "Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape." The law has, however, been changed in 2013.

[19]Section 4 of the Zina Ordinance defines "*zina*" as: "A man and a woman are said to commit *'Zina'* if they willfully have sexual intercourse without being married to each other." Section 496B of PPC defines "fornication" in similar terms: "A man and a woman not married to each other are said to commit fornication if they willfully have sexual intercourse with one another."

[20]Section 4 of the Offence of Zina Ordinance.

[21]Section 496B of PPC.

[22]Section 3 of the Offence of Qazf Ordinance and Section 496C of PPC.

[23]Ss. 375-377 of PPC.

[24]Section 6 (c) of the Anti-Terrorism Act, 1997. Importantly, under the present Pakistani Law, a man cannot be raped because Section 375 of PPC confines rape to the act of a man against a woman: "A man is said to commit rape who has sexual intercourse with a woman…"

[25]PPC Ss. 292-294.

[26]Ibid., Ss. 354-354A.

[27]Ibid., Ss 332-337Z.

[28]Ibid., Ss. 338-338C.

[29]Ibid., Ss. 365-74.

[30]Ibid., Ss. 493-496C.

[31]See, for instance, Mawlana Muhammad Yusuf Ludhyanawi, *Rajm ki Shar`i Haythiyat* [The Legal Status of Stoning] (Karachi: Maktabah Ludhyanawiyyah, n.d.).

[32]Javed Ahmad Ghamidi (b. 1951), the famous disciple of Islahi went into great details while defending this theory and giving rejoinders to those who criticized his master. See: *Mizan* (Lahore: Danish Sara, 1982).

[33]Mahmood Ahmad Ghazi (d. 2010), a renowned scholar, was among those who while sticking to the tradition tried to accommodate the view of Islahi by suggesting to accept the views of those jurists who allowed awarding the *hadd* punishment on the basis of circumstantial evidence. See: Ghazi, "*Hudud* awr *Qisas* kay Muqaddimat men`Awraton ki Gawahi" [The Testimony of Women in Cases of *Hudud* and *Qisas*], *Fikr-o-Nazar*, 30: 3 (1993), 3-20.

[34]Islahi was the disciple of a famous scholar of the Qur'anic sciences Mawlana Hamid al-Din Farahi (d. 1930) who is given the credit for expounding the theory of *Nazm-i-Qur'an* (coherence in the Qur'an). Farahi did not leave much of his work in written form apart from a few booklets on the principles of the Qur'anic exegesis and commentary of a few small chapters of the Qur'an. It was Islahi who in many of his books, particularly the nine-volume exegesis of the Qur'an titled *Tadabbur-i-Qur'an*, elaborated the principles and theories of Farahi. Thus, although Farahi commented briefly on the verses regarding *hirabah* and mentioned that the punishment covered *rajm*, it was Islahi who developed a full-fledged theory in *Tadabbur-i-Qur'an*. See for details about the peculiar principles and contribution of the "Farahi School": Sharf al-Din Islahi, *Dhikr-e-Farahi* (Lahore: Dar al-Tadhkir, 2002). For details about the theory of *Nazm-i-Qur'an*, see: Mustansir Mir, *The Coherence in the Qur'an: A Study of Islahi's Concept of Nazm in Tadabbur-i-Qur'an* (Indianapolis: The American Trust Publications, 1987). See for an overview of the life and work of Islahi: Dr. Akhtar Husayn `Azmi, *Mawlana Amin Ahsan Islahi: Life and Thought* (Lahore: Nashriyyat, 2009).

[35]In the post-9/11 debates in Pakistan on terrorism and Islamic law, Ghamidi tried to distinguish in the same way between ordinary crime and terrorism. (Afzal Rehan, "Interview of Javed Ahmad Ghamidi on Distinguishing Jihad from Terrorism", Monthly "Ishraq" Lahore (November 2001), 59.) Thus, he specifically declared that the term *hirabah* included terrorism also. (See: Javed Ahmad Ghamidi, *Mizan* (Lahore: Dar al-Ishraq, 2001), 284.)

[36]This means that Islahi and his disciples could not appreciate the distinction between the operation of criminal law and that of the law of war. The jurists deal rebellion under the law of war while deal with *hirabah* under criminal law. See for details about the distinction in the legal status of rebels and ordinary gangsters: Sadia Tabassum, "Combatants, Not Bandits: The Status of Rebels in Islamic Law", *International Review of the Red Cross*, 93: 881 (2011), 121-139.

[37]Does it mean that other forms of *taqtil* can replace *rajm*? In other words, even if *rajm* was the punishment for *hirabah*, it remains to be ascertained if it was a *hadd* or *ta`zir*. Islahi did not elaborate this issue, while Ghamidi appears to deem it *ta`zir*.

[38]*Muhsan* is the one who fulfills the conditions of *ihsan*. The term *ihsan* is used in two different meanings in the Hanafi criminal law: *ihsan* for the purposes of the offence of *qadhf* and *ihsan* for the purposes of the *rajm* punishment for *zina*. The former, i.e. *ihsan al-qadhf* entails five conditions: that the person must be sane, major, Muslim, free and not proved to have committed *zina*. This existence of this last condition is presumed for every person. Similarly, every person is generally presumed free. Hence, generally three conditions are

deemed essential: sanity, puberty and Islam. As far as *ihsan al-rajm* is concerned, it necessitates the following seven conditions: sanity, puberty, Islam, freedom, the fact that the spouse of the person has also fulfilled these four conditions, valid contract of marriage between the spouses and intercourse after the fulfillment of these six conditions. See for details: `Ala' al-Din, Abu Bakr b. Mas`ud al-Kasani, *Bada'i` al-Sana'i` fi Tartib al-Shara'i`*, eds. `Ali al-Mu`awwad and `Adil `Abd al-Mawjud (Beirut: Dar al-Kutub al-`Ilmiyyah, 2003), 9: 217-220.

[39]See for a detailed discussion on this issue: Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, *Tamhid al-Fusul fi 'l-Usul* [hereinafter *Usul al-Sarakhsi*] (Lahore: Maktabah Madaniyyah, 1981), 2: 53–86; AbuHamid Muhammad b. Muhammad al-Ghazali, *al-Mustasfa min `Ilm al-Usul* (Beirut: Dar Ihya' al-Turath al-`Arabi, n. d.), 1: 107–128. See also: Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 2000), 317–24. About abrogation of the verses of the Qur'an, `Abd al-Majid Daryabadi (d. 1977), a famous Indian scholar of the twentieth century, says: "There is nothing to be ashamed of in the doctrine of certain laws, temporary or local, being superseded or abrogated by certain other laws, permanent and universal, and enacted by the same lawgiver, especially during the course of the promulgation of that law. The course of Qur'anic Revelation has been avowedly gradual. It took about 23 years to finish and complete the Legislation. Small wonder, then, that certain minor laws, admittedly transitory, were replaced by certain other laws, lasting and essential… It must be, however, clearly understood that the doctrine of abrogation applies to 'law' only… Beliefs, articles of faith, principles of law, narratives, exhortations, moral precepts and spiritual verities — none of these is at all subject to abrogation or repeal. See, *Tafsir al-Qur'an* (Karachi: Dar al-Isha`at, 1991), 1: 71.

[40]*Mutawatir* or continuous narration of a tradition technically means that the report is narrated by such a large number of narrators in each generation that the possibility of fabrication is negated. See for details: *Usul al-Sarakhsi*, 1: 282-291.

[41]For the jurists, as all other traditions report the *rajm* punishment for the offence of *zina*, these general reports are also about the offence of *zina*.

[42]Ghamidi says that these reports mention it as one of the factors, and not the sole factor, for deciding about the punishment.

[43]This because these reports refute the idea that the convict was a habitual offender and that he was given the punishment for making him an example for others, and not for the offence of *zina per se*.

[44]Many scholars have written in support of, or against, Islahi's theory of *rajm*. See for a compilation of some selected works: Khurshid Ahmad Nadim, *Islam ka Tasawwur-e-Jurm-o-Saza* [Islamic Concept of Crime and Punishment] (Islamabad: International Institute of Islamic Thought, 1997), Vol. 2.

[45]Khawarij (lit. those who went out) were those rebelled against the fourth caliph `Ali (God be pleased with him) after the latter agreed to a compromise settlement with Mu`awiyah (God be pleased with him) to put an end to the civil war. The Khawarij developed a system of creed and law and emerged as a puritanical sect. They were anarchists in essence. See for details: Shihab al-Din Ahmad Ibn Hajar al-Haytami, *al-Sawa`iq al-Muhriqah `ala Ahl al-Rafd wa 'l-Dalal wa 'l-Zandaqah* (Cairo: al-Matba'ah al-Maymaniyyah, 1312 AH.), 1: 26).

[46]See for a comparative description of the views of the various jurists about the punishment of *zina*: Abu Bakr Ahmad b. `Ali al-Jassas al-Razi, *Mukhtasar Ikhtilaf al-`Ulama'*, ed. `Abdullah Nadhir Ahmad (Beirut: Dar al-Basha'ir al-Islamiyyah, 1995), 3: 277-280.

[47]Asifa Quraishi referred to the views of some of the Maliki jurists who included rape in the wider doctrine of *fasad* (causing mischief and disorder) but she could not prove that these jurists deemed *rajm* as the punishment for this offence. Moreover, she did not acknowledge that the idea came from Islahi. *See*: "Her Honor: An Islamic Critique of the Rape Provisions in Pakistan's Ordinance on *Zina*", *Islamic Studies* 38: 3 (1999), 403-32. See also: Hashimi, *Hudud Ordinance*, 47ff.

[48]Islahi says that the "neo- Khawarij" [the modernists] are more dangerous than the "ancient Khawarij" because the latter only denied the punishment of *rajm* while the former deny the punishment of lashes also. *Tadabbur-i-Qur'an*, 5: 365.

[49]*Hazoor Bukhsh v The State*, PLD 1983 FSC 1.

[50]Justice Aftab made a few important observations about *hudud*, which – if accepted – could demolish the whole edifice of the criminal law as developed by the jurists. See for a detailed criticism of his theory: Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* (Islamabad: Islamic Research Institute, 1994), 109-124.

[51]In 1979, when the Hudood Ordinances were promulgated, Shariat Benches were also established in the High Courts with two-fold jurisdiction: to hear appeals in the Hudood Cases and to examine the existing laws for compatibility with Islamic law. However, four laws were excluded from the jurisdiction of the Shariat Benches. "Muslim Personal Law" was one of those laws. In *Farishta v*

The Federation of Pakistan, the Peshawar High Court Shariat Bench asserted jurisdiction to examine Section 4 of the Muslim Family Laws Ordinance, 1961, and declared it null and void for repugnancy with the provisions of Islamic law. (PLD 1980 Pesh 47). However, in appeal the Supreme Court declared that the law was excluded from the jurisdiction of the High Court's Shariat Bench as it was covered by the definition of "Muslim Personal Law". (PLD 1981 SC 120). For the Supreme Court, this phrase meant the state legislation applicable on Muslim citizens only. This decision remained in field till the Supreme Court revisited and overturned it in *Dr. Mahmoodurrahman Faisal v Government of Pakistan*, PLD 1994 SC 607.

[52]PLD 1989 FSC 95 at 134.This is the translation by the present author as the judgment was written in Urdu.

[53]PLD 1989 FSC 95 at 127.

[54]In Pakistan, the superior judiciary has on different occasions asserted that it is not bound by the opinions of the jurists of a particular school. It has even claimed the right to give new interpretation of the Qur'an and the *Sunnah* in violation of the established principles of the various schools. See, for instance:*Khurshid Bibi v Muhammad Amin*, PLD 1967 SC 97. It is strange, however, that the courts after asserting this right of absolute *ijtihad* did not as yet come up with a coherent legal theory for this purpose. Most of the times, the judges pick and choose between the views of the various schools and filling the gaps by faulty reasoning based on the notions of natural law, equity and discretionary sense of justice. See for a detailed criticism on this: Muhammad Mushtaq Ahmad, "Pakistan men Ra'ij Fojdari Qawanin: Islami Qanuni Fikr kay Chand Aham Mabahith" [Pakistani Criminal Law: Some Important Issues of Islamic Legal Thought], *Fikr-o-Nazar*, 50-51: 4-1 (2013), 111-154.

[55]Ghazali (d. 505/1111), the illustrious jurist-cum-philosopher, who expounded the theory of the objectives of Islamic law prescribes three conditions for accepting a new principle in the legal system: that it does not alter the implications of a text of the Qur'an or the *Sunnah*; that it does not violate the general propositions of the law; and that it is not strange to the legal system. (Ghazali, *al-Mustasfa*, 1: 217.) This simply means that the new principle can be accommodated only if it is compatible with the already existing legal system.

[56]A legal concept (called *bab* by the jurists and *Nazariyyah* by the modern Arab scholars) does not come into existence spontaneously. Rather, first issues are framed and rules are derived for them in accordance with a specified - and internally coherent - methodology. Then, these various rules are brought under a broader principle. After this, various principles are combined under a broader

concept, such as property, contract, ownership and so on. See for a good discussion on this issue: Imran Ahsan Khan Nyazee, *Islamic Legal Maxims* (Islamabad: Federal Law House, 2013), 23-37.

[57]Marketable property is the one whose use has been allowed by Islamic law, while the use as well as sale and purchase of non-marketable property are prohibited for Muslims. They also include things which cannot be converted into private property.

[58]*Nisab* is the minimum amount of property which if stolen or robbed will attract the *hadd* punishment. Section 6 of the Offences against Property (Enforcement of Hudood) Ordinance 1979 fixes this amount as 4.457 grams of gold or property of the same value.

[59]Sunan Abi Dawud*, Kitab al-Hudud*; Sunan al-Tirmidhi, *Kitab al-Hudud*.

[60]See for details: Ahmad, *Hudud Qawanin*, 86-90.

[61]PLD 1989 FSC 95 at 126.

[62]Hashimi, *Hudud Ordinance*, 72-75.

[63]It may be noted here that appeal was preferred to the Shariat Appellate Bench of the Supreme Court against this decision and, as the Constitution has it, when appeal is preferred against the decision of the Federal Shariat Court, the operation of the decision is automatically suspended and it does not require a stay order by the Supreme Court. It is unfortunate that the Shariat Appellate Bench of the Supreme Court could not decide the fate of the appeal in 23 long years! In the meanwhile, the law on which the Federal Shariat Court had given this decision has been changed by the Protection of Women Act in 2006. Hence, the *Rashida Patel* judgment is now redundant.

[64]*Al-Mabsut*, 26: 126.

[65]As we shall show below, the jurists cite some examples from the cases decided by the Prophet (peace be on him) or his Companions wherein the strict criteria of evidence mentioned above for the *hudud*, *qisas* or *ta'zir*, were not observed. In all such cases, the punishment awarded is termed *siyasah* by the Hanafi jurists.

[66]Modern scholars of Islamic law, in general, have classified rights into two categories: rights of God and rights of individual. *See* `Abd al-Qadir `Awdah, *al-Tashri` al-Jina'i al-Islami Muqaranan bi 'l-Qanun al-Wad`i* (Beirut: Dar al-Katib al-`Arabi, n. d.), 1: 79. This is, however, a misconception.

[67]*See* Kasani, *Bada'i` al-Sana'i`*, 9: 248-250; Burhan al-Din Abu 'l-Hasan `Ali b. Abi Bakr al-Marghinani, a*l-Hidayah fi Sharh Bidayat al-Mubtadi* (Beirut: Dar Ihya' al-Turath al-`Arabi, n.d.), 2: 339.

[68]*Shubhah* has generally been deemed synonymous to the English law concept of "benefit of the doubt". However, even a cursory look at what constitutes *shubhah* in Islamic law tells that it has more in common with "mistake of law or of fact" than with the "benefit of the doubt". Imran Ahsan Khan Nyazee, *General Principles of Criminal Law* (Islamabad: Advanced Legal Studies Institute, 1998), 142-43.

[69]*Bada'i` al-Ṣana'i`*, 9: 248.

[70]Ibid. (emphasis added).

[71]Ibid., 250.

[72]Ibid., 274.

[73]Muhammad Amin Ibn `Abidin al-Shami, *Radd al-Muhtar `ala al-Durr al-Mukhtar*(Cairo: Matba`at Mustafa al-Babi, n.d.), 3: 192.

[74]For instance, the government cannot change the standard of proof for *zina* because it has been explicitly laid down in the texts of the Qur'an and the *Sunnah* and the jurists have a consensus on it. Thus, changing this standard will amount to destruction of the whole system.

[75]For instance, both of these punishments are compoundable and can be pardoned and *shubhah* can neither suspend *ta`zir* nor *siyasah*.

[76]*Radd al-Muhtar*, 3: 162.

[77]*Bada'i` al-Sana'i`*, 9: 253.

[78]*Al-Hidayah*, 2: 343-44.

[79]See, for instance, Hashimi, *Hudud Ordinance*, 72ff.

[80]Sarakhsi, *al-Mabsut*, 9: 77.

[81]Kasani, *Bada'i` al-Sana'i`*, 10: 109. However, if a man is coerced to have sexual intercourse, *hadd* punishment will not be imposed upon him only if this was *ikrah tamm* (serious form of coercion). Ibid.

[82]Sarakhsi, *al-Mabsut*, 9: 77.

[83]Ibid., 9: 91.

[84]The presumption of innocence stems from one of the most fundamental principles of Islamic law: اليقين لا يزول بالشک [Certainty is not done away through doubt.]. See for details: Shihab al-Din al-Sayyid Ahmad b. Muhammad al-Hamwi, *Ghamz `Uyun al-Basa'ir Sharh al-Ashbah wa al-Naza'ir* (Beirut: Dar al-Kutub al-`Ilmiyyah, 1985), 1: 193-245. See also: Nyazee, *Islamic Legal Maxims*, 122-29.

[85]*Diyah* is the specified amount of property paid by the convict or his allies to the legal heirs of the deceased, while *jurh ja'ifah* is the hurt caused to a person in his/her abdominal cavity.

[86]Sarakhsi, *al-Mabsut*, 9: 86.

[87]Ibid. 9: 87. *Arsh* is the specified amount of property paid to the victim by the convict for causing hurt.

[88]*Ta`zir* in such situations means *siyasah*.

[89]*Al-Mabsut*, 9: 88.

[90]Ibid.

[91]Marghinani, *al-Hidayah*, 2: 348.

[92]Sarakhsi, *al-Mabsut*, 9: 67.

[93]Ibid., 91.

[94]Ibid., 67.

[95]Ibid.

[96]Ibid…

[97]Ibid., 24: 105-06. See also: Kasani, *Bada'i` al-Sana'i`*, 10: 109.

[98]Sarakhsi, *al-Mabsut*., 24: 104-05.

[99]Scholars working on the theory of the objectives of Islamic law have generally focused on a much later Maliki jurist of Andalus Abu Ishaq Ibrahim b. Musa al-Shatibi (d. 790/1388) and his monumental work *al-Muwafaqat fi Usul al-Shari'ah* (Cairo: al-Maktabah al-Tijariyyah, 1975).See for a detailed discussion on the work of Shatibi: Ahmad al-Raysuni, *Imam al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law*, tr. Nancy Roberts (Herndon, VA: The International Institute of Islamic Thought, 2005).

[100]Al-Ghazali, *Shifa' al-Ghalilfi Bayan al-Shabah wa 'l-Mukhil wa Masalik al-Ta`lil* (Baghdad: Dar al-Kutub al-`Ilmiyyah, 1971), 186–87. See also: *idem*, *al-Mustasfa*, 1: 213-222.

[101]Sarakhsi, *al-Mabsut*, 10: 110.

References

Articles

Ahmad, Muhammad Mushtaq. "Pakistan men Ra'ij Fojdari Qawanin: Islami Qanuni Fikr kay Chand Aham Mabahith" [Pakistani Criminal Law: Some Important Issues of Islamic Legal Thought], *Fikr-o-Nazar*, 50-51: 4-1 2013, 111-154.

Ghazi, Mahmood Ahmad. "*Hudud* awr *Qisas* kay Muqaddimat men`Awraton ki Gawahi" [The Testimony of Women in Cases of *Hudud* and *Qisas*], *Fikr-o-Nazar*, 30: 3 1993, 3-20.

Munir, Muhammad. "Is *Zina bil-Jabr* a *Hadd*, *Ta`zir* or *Syasa* Offence? A Reappraisal of the Protection of Women Act, 2006 in Pakistan". *Yearbook of Islamic and Middle Eastern Law* 14 2008-09, 95-115.

Quraishi, Asifa. "Her Honor: An Islamic Critique of the Rape Provisions in Pakistan's Ordinance on *Zina*", *Islamic Studies* 38: 3 1999, 403-32.

Rehan, Afzal. "Interview of Javed Ahmad Ghamidi on Distinguishing Jihad from Terrorism", Monthly "Ishraq" Lahore November 2001, 59.

Tabassum, Sadia. "Combatants, Not Bandits: The Status of Rebels in Islamic Law", *International Review of the Red Cross*, 93: 881 2011, 121-139.

Books

Ahmad, Muhammad Mushtaq.*Hudud Qawanin: Islamic Nazriyati Council ki `Uburi Report ka Tanqidi Ja'izah* [*Hudud Laws: Critical Analysis of the Interim Report of the Council of Islamic Ideology*].Mardan: Midrar al-`Ulum, 2006.

`Awdah, `Abd al-Qadir.*al-Tashri` al-Jina'i al-Islami Muqaranan bi 'l-Qanun al-Wad`i*. Beirut: Dar al-Katib al-`Arabi, n. d.

`Azmi, Akhtar Husayn.*Mawlana Amin Ahsan Islahi: Life and Thought*. Lahore: Nashriyyat, 2009.

Daryabadi, `Abd al-Majid.*Tafsir al-Qur'an*. Karachi: Dar al-Isha`at, 1991.

Ghamidi, Javed Ahmad.*Mizan*. Lahore: Danish Sara, 1982.

_____.*Mizan*. Lahore: Dar al-Ishraq, 2001.

Ghazali, AbuHamid Muhammad b. Muhammad.*al-Mustasfa min`Ilm al-Usul*. Beirut: Dar Ihya' al-Turath al-`Arabi, n. d.

_____.*Shifa' al-Ghalilfi Bayan al-Shabah wa 'l-Mukhil wa Masalik al-Ta`lil*. Baghdad: Dar al-Kutub al-`Ilmiyyah, 1971.

Hamwi, Shihab al-Din al-Sayyid Ahmad b. Muhammad.*Ghamz `Uyun al-Basa'ir Sharh al-Ashbah wa al-Naza'ir*. Beirut: Dar al-Kutub al-`Ilmiyyah, 1985.

Haytami, Shihab al-Din Ahmad Ibn Hajar.*al-Sawa`iq al-Muhriqah `ala Ahl al-Rafd wa 'l-Dalal wa 'l-Zandaqah*. Cairo: al-Matba'ah al-Maymaniyyah, 1312 AH.

Islahi, Amin Ahsan.*Tadabbur-i-Qur'an*. Lahore: Faran Foundation, 2001.

Islahi, Sharf al-Din.*Dhikr-e-Farahi*. Lahore: Dar al-Tadhkir, 2002.

Kasani, `Ala' al-Din, Abu Bakr b. Mas`ud.*Bada'i` al-Sana'i` fi Tartib al-Shara'i`*, eds. `Ali al-Mu`awwad and `Adil `Abd al-Mawjud Beirut: Dar al-Kutub al-`Ilmiyyah, 2003.

Kennedy, Charles.*Islamization of Laws and Economy in Pakistan*. Islamabad: Institute of Policy Studies, 1991.

Ludhyanawi, Muhammad Yusuf.*Rajm ki Shar`i Haythiyat* [The Legal Status of Stoning]. Karachi: Maktabah Ludhyanawiyyah, n.d..

Marghinani, Burhan al-Din Abu 'l-Hasan `Ali b. Abi Bakr.*al-Hidayah fi Sharh Bidayat al-Mubtadi* Beirut: Dar Ihya' al-Turath al-`Arabi, n.d..

Mehdi, Rubya.*The Islamization of Laws in Pakistan* Richmond, Surrey: Curzon, 1994.

Mir, Mustansir.*The Coherence in the Qur'an: A Study of Islahi's Concept of Nazm in Tadabbur-i-Qur'an* Indianapolis: The American Trust Publications, 1987.

Nadim, Khurshid Ahmad.*Islam ka Tasawwur-e-Jurm-o-Saza* [Islamic Concept of Crime and Punishment]. Islamabad: International Institute of Islamic Thought, 1997, Vol. 2.

Nyazee, Imran Ahsan Khan.*General Principles of Criminal Law*. Islamabad: Advanced Legal Studies Institute, 1998.

_____.*Islamic Jurisprudence*. Islamabad: Islamic Research Institute, 2000.

_____.*Islamic Legal Maxims*. Islamabad: Federal Law House, 2013.

_____.*Theories of Islamic Law: The Methodology of Ijtihad*. Islamabad: Islamic Research Institute, 1994.

Raysuni, Ahmad.*Imam al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law*, tr. Nancy Roberts Herndon, VA: The International Institute of Islamic Thought, 2005.

Razi, Abu Bakr Ahmad b. `Ali al-Jassas.*Mukhtasar Ikhtilaf al-`Ulama'*, ed. `Abdullah Nadhir Ahmad Beirut: Dar al-Basha'ir al-Islamiyyah, 1995.

Sarakhsi, Abu Bakr Muhammad b. Abi Sahl.*Tamhid al-Fusul fi 'l-Usul*. Lahore: Maktabah Madaniyyah, 1981.

Shami, Muhammad Amin Ibn `Abidin.*Radd al-Muhtar `ala al-Durr al-Mukhtar*.Cairo: Matba`at Mustafa al-Babi, n.d..

Shatibi,Abu Ishaq Ibrahim b. Musa.*al-Muwafaqat fi Usul al-Shari'ah*. Cairo: al-Maktabah al-Tijariyyah, 1975.

Sijistani, Abu Dawud Sulayman b. al-Ash`ath. *al-Sunan*. Karachi: Nur Muhammad Kutubkhanah, n.d.

Tirmidhi, Abu `Isa Muhammad b. `Isa. *al-Shunan*. Lahore: Idara-e-Islamiyat, n.d.

Cases

Abdul Mannan v Safuran Nisa, 1970 SCMR 845.

Ali Nawaz Gardezi v Muhammad Yusuf, PLD 1963 SC 51.

Bashiran v Muhammad Hussain, PLD 1988 SC 186.

Farishta v The Federation of Pakistan, PLD 1980 Pesh 47.

Federation of Pakistan v Farishta, PLD 1981 SC 120.

Hazoor Bukhsh v The State, PLD 1983 FSC 1.

Khurshid Bibi v Muhammad Amin, PLD 1967 SC 97.

Mahmoodurrahman Faisal v Government of Pakistan, PLD 1994 SC 607.

MuhammadSalahuddin v Muhammad Nazir Siddiqi, 1984 SCMR 583.

Rashida Patel v The Federation of Pakistan,PLD 1989 FSC 95.

Shera v The State, PLD 1982 FSC 229.

Legislation

The Anti-Terrorism Act, 1997

The Indian Penal Code, 1860.

The Offence of Qazf (Enforcement of Hudood) Ordinance, 1979.

The Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

The Offences against Property (Enforcement of Hudood) Ordinance 1979.

The Pakistan Penal Code, 1860.

The Protection of Women(Criminal Laws Amendment Act), 2006.

The author Mr. Muhammad Mushtaq Ahmad (b. 1976) is Assistant Professor of Law and doctoral candidate at the Department of Shariah in the International Islamic University, Islamabad. He is the author of two books: *Jihad, Muzahamat awr Baghawat* (2008 and 2012) and *Hudud Qawanin* (2006). He also translated from Arabic into Urdu a book for the International Committee of the Red Cross on *International Humanitarian Law and Islam* (2012). His book on *An Islamic Theory of Biblical Criticism* is forthcoming in 2015. Moreover, he authored more than twenty research papers for international and national journals on various aspects of Islamic law, criminal law and international law. He can be reached at mushtaqahmad@iiu.edu.pk