

**Rape in Islamic Law: Problems of Classification and
Adjudication**

Azman Mohd Noor

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Declaration

I, THE UNDERSIGNED, HEREBY MAKE A SOLEMN DECLARATION THAT THIS THESIS IS WRITTEN BY ME AND ANY REFERENCE MADE TO THE WORKS IS DULY ACKNOWLEDGED.

AZMAN MOHD NOOR

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Abstract

This research investigates rape as a crime according to Islamic criminal law. There have been many controversial issues pertaining to the notion of rape, its penal classification, punishment, adjudication and remedies for the victim. Rape in classical Islamic law has been seen as a crime correlated with *zinā* and as such to be treated in the same way as *zinā* in terms of collecting evidence for prosecution, as well as the punishment for it. However, some modern scholars have suggested that rape is actually closer to *ḥirāba* on the basis that there are concepts of *ḥirāba*, such as physical assault, in rape. These different classifications of rape result in different procedures for prosecution, proof and punishment. This research examines the appropriate punishment for the rape as well as modern developments regarding the prosecution of rape, legal procedures, the rights of the accused and the rights of the victim, based on the opinions and arguments of classical and modern Muslim jurists from various schools of law.

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Introduction

This thesis examines rape as a specific aspect of sexual assault within the framework of Islamic law. The study will explore the possibilities of distinguishing rape from consensual intercourse outside marriage or fornication (*zinā*) according to the opinions of the schools of law. Rape *per se* has never been covered as a separate topic on its own, but always in connection with fornication (*zinā*). Rape has been defined by most Muslim jurists as *al-zinā bi al-ikrāh* i.e sexual intercourse by force. Therefore many jurists regard rape as similar to *zinā* with regard to proving and punishing. This classification of rape leads many jurists to make use of all the rulings pertaining to the prosecution of *zinā* as well as its punishment in cases of rape. Undoubtedly there is one important point which is shared by rape and *zinā*, that is illegal intercourse and its consequences. However the nature of the both crimes differs in many ways such as the absence of consent, it being forced and the innocence of the victim.

Another approach is to classify rape a crime of *ḥirāba* (armed robbery) since the crime involves physical attack and violation of the honour of others. In this context there is no longer need to provide four male eyewitnesses to convict rape. This study will clarify the classification of rape in Islamic criminal law.

The study also deals with the question of the proof of rape which should not necessarily be similar to the method of proving fornication (*zinā*). As a matter of fact, contemporary law on rape in general has been widely criticized to date on the grounds that it fails to protect the victim. There is a widespread belief that the legal process discourages victims from reporting the crimes committed against them. This belief is further strengthened by the rules of evidence applied to rape cases, which permit rapists to avoid conviction. Furthermore, the polemic of the insufficiency and inefficiency of some methods of proof needs an empirical legal revision. Therefore, the new thinking is that the law concerning rape requires modification and reformation.

The discussion centres on the concept of rape and what constitutes rape according to Islamic Law. It includes examining the doctrinal sources on which the traditional jurists have based their rulings and which may have influenced the concept of rape. Following this is a description of the penalties that can be imposed on the rapist in Islamic Law.

This thesis also examines issues related to the adjudication and prosecution of rape such as a victim's complaint of rape without sufficient evidence of four just male eyewitnesses which may be interpreted as a confession of *zinā*. Another issue is whether or not a complainant of rape without sufficient evidence will be charged with slanderous accusation (*qadhf*).

As it is suggested that the legal rulings and technicalities are open to development and systematisation in both substantive and procedural laws based on the legal doctrines and principles of Islamic law, this study will also discuss issues of procedural law such as the admissible evidence for proving rape, requirement prior to sentencing, the right of the accused as well as the right of rape victim. This includes the examination of the principle of compensation for injury (*diya*), dowry (*mahr*) for intercourse, and other legal rights. The research will make use of legal doctrines of Islamic jurisprudence such as *al-maṣāliḥ al-mursala* (consideration of the public interest), *istiḥṣān* (equity or juristic preference), *istiḥāb* (presumption of continuity), *al-siyāsa al-shar'iyya* and other legal principles within Islamic jurisprudence as the grounds and subsidiary sources of legislation.

Objectives of the Research

1. To explain sexuality and its offences from the Islamic perspective.
2. To clarify the concept of rape in Islamic Law and to understand its legal classification.
3. To investigate the Islamic penalty for rape.
4. To examine the admissible evidence for rape.
5. To clarify the rights of the accused and the victim of rape.

The Scope of the Study

Although the study focuses on the issues of rape from the framework of Islamic Law, it involves a wide variety of disciplines in Islamic studies. The study is based on the views of the major schools of Islamic Law: Ḥanafite, Mālikite, Shāfi'ite Ḥanbalite and Zāhirite. Their similarities and differences are assessed in accordance with the relevant evidence used to support their position.

However, for the purposes of comparison and to widen the scope of the discussion, the views of some other schools, particularly those of the Zāhirites and Zaidites, are also mentioned. Owing to its nature, the study is not confined to any specific period in history.

Although the main subject of the thesis is the concept of rape, issues related to the rights of the victim and those of the accused are included as well, for they are important for both the discussion and the conclusion.

Research Methodology

The research is based on library sources. It covers the operational definition, the constituents of rape, the validity of the evidence, punishment of the offender, and remedies for the victim. The study is intended to make full use of the juristic writings in Arabic in dealing with the topic, particularly legal opinions which are based on the Islamic legal maxims, arguments on the evidence, and the principal doctrinal sources of the classical works on Islamic Law.

This study is based on an analysis of various schools of Islamic Law as well as the extensive traditional and pre-modern discourse on the topic by Muslim jurists. The research focuses on the concept of rape which differentiates it from fornication (*zinā*) and how that difference may affect the prosecution of the offender and the defence of the victim according to classical Muslim jurists and the contemporary scholars of Islam. It is a vast subject and the relevant material is distributed among the writings of the early Muslim jurists, exegetes, and hadith scholars.

Besides the Qur'ān and the hadith, the principal references are the major classical books of Islamic jurisprudence continuing the views of the founders of the well-known Sunni legal schools, that is, Abu Ḥanīfa¹, Mālik ibn Anas,² Muḥammad ibn Idrīs al-Shāfi'ī³, and Aḥmad ibn Ḥanbal⁴. There are references to their opinions and those of their disciples throughout this thesis.

Since the study also discusses the application of penal law, it includes references to sources describing the practical experience of sentencing offenders. Among them are the following: Ibn Farḥūn⁵ *Tabsirat al-ḥukkām*; Ibn Taymiyya⁶ *Majmū' al-fatāwā; al-Siyāsa al-shar'īyya*; and Ibn al-Qayyim al-Jawziyya⁷ *al-Turuq al-ḥukmiyya fī al-Islām*; and *ʿIḷām al-muwaqqi'īn*.

¹He is Abū Ḥanīfa al-Nu'mān ibn Thābit, born in Kūfa in 80 AH/699 CE, the founder of Ḥanafite School of law died in 150 AH/767 CE. Among his works *al-Fiqh al-akbar* and *al-Musnad*. See 'Umar Riḍā Kaḥḥāla, *Mu'jam al-mu'allifīn* (Beirut: Dār Iḥyā al-Turāth al-'Arabī, 1980) vol.13, p.104.

²He is Abū 'Abd Allah Mālik ibn Anas ibn Mālik al-Aṣḥaḥī al-Ḥimyarī al-Madanī, born in Madīna in 93 AH/712 CE, the founder of Mālikite school who is known as the Imam of Madīna. He died in Madīna in 179 AH/795 CE. His famous work is *al-Muwaḥḥa* the greatest earliest hadith collection. See Khayr al-Dīn ibn Maḥmūd ibn Muḥammad ibn 'Alī Fāris al-Ziriklī (d. 1396 AH/1976 CE), *al-A'ḷām*. (Beirut: Dār al-'Ilm li al-malāyīn, 1986), vol.5, p.257; Abū Ishāk Ibrahim ibn 'Alī ibn Yūsuf al-Shirāzī (d. 475 AH/1083 CE), *Ṭabaqāt al-fuqahā'*, Ed. Khalīl al-Mais (Beirut: Dār al-'Ilm, n.d.), pp.53-54.

³He is Abū 'Abd Allah Muḥammad ibn Idrīs ibn al-'Abbās al-Shāfi'ī the founder of Shāfi'ites school of law born in Gaza, Palestine in 150 AH/767 CE and brought up in Mecca. He traveled to Madīna to take hadīths from Mālik ibn Anas, then to Baghdād and finally to Cairo where he died in 204 AH/820 CE. Among his famous works *al-Risāla* and *al-Umm*. See al-Ziriklī, *al-A'ḷām*, vol.6, p.26; al-Shirāzī, *Ṭabaqāt al-fuqahā'*, pp.71-73.

⁴He is Abū 'Abd Allah Aḥmad ibn Muḥammad ibn Ḥanbal al-Shaybānī, the founder of Ḥanbalite school, born (164 AH/780 CE) and died in Baghdad in 241 AH/855 CE. He traveled extensively in pursuit of the knowledge of hadith to Kūfa, Baṣra, Khurasān, Yemen, Damascus, and North Africa. His famous work is a hadith collection *al-Musnad*. See al-Shirāzī, *Ṭabāqāt al-fuqahā'*, p.101.

⁵Burhān al-Dīn Abī al-Wafā' Ibrāhīm ibn al-Imām Shams al-Dīn Abī 'Abd Allah Muḥammad ibn Farḥūn al-Yā'murī, a Mālikite jurist judge born and died in Madīna (d. 799 AH/1397 CE). See Kaḥḥāla, *Mu'jam al-mu'allifīn*, vol.1, p.68.

⁶He is Taqīy al-Dīn Abū al-'Abbās Aḥmad ibn 'Abd al-Ḥalīm ibn 'Abd al-Salām ibn 'Abd Allah ibn Taymiyya al-Ḥarrānī, born in Ḥarrān, East of Damascus in 661 AH/1236 CE, a famous medieval Ḥanbalite scholar (d. 728 AH/1328 CE). Among his works *al-'Aqīda al-ḥimawīyya*, *al-'Aqīda al-wasaḥīyya*, *Majmū' fatāwa*, *al-Ṣārim al-maslūl* and *al-Ḥisba fī al-Islām*.

⁷He is Shams al-Dīn Abū 'Abd Allah Muḥammad ibn Abī Bakr ibn Ayyūb widely known as Ibn Qayyim al-Jawziyya, born in Damascus in 691 AH/1292 CE. A famous Ḥanbalite jurist educated by Ibn Taymiyya (d. 751 AH/1350 CE). Among his books *Zād al-ma'ād*, *ʿIḷām al-muwaqqi'īn* and *Kitāb al-rūḥ*. See al-Ziriklī, *al-A'ḷām*, vol.6, p.56.

Other relevant contemporary sources on the subject have been consulted. Among these are the following: ‘Abd al-Qādir ‘Awda⁸ *al-Tashrī‘ al-jinā‘ī al-Islāmī*; Muḥammad Abū Zahra⁹ *al-Jārima wa al-‘uquba fī al-fiqh al-Islāmī*; Wahba al-Zuhailī¹⁰ *al-Fiqh al-Islāmī wa adillatuhu*. Reference has also been made to several books written in English, for example: Muhammad Iqbal Siddiqi *The Penal Law of Islam*; S. El-Awa *Punishment in Islamic Law*; Joseph Schacht (1902-1969) *An Introduction to Islamic Law*; and C. G. Weeramantry (1926-) *Islamic Jurisprudence*; and M. Cherif Bassiouni (1937-) *Islamic Criminal Justice System*.

The English interpretation of the Qur’ān used for this research is Ṣaḥeeḥ International translation¹¹, with a few modifications to clarify the meaning. Other references include classical exegeses such as al-Ṭabarī¹² *Jāmi‘ al-bayān ‘an ta’wīl al-Qur’ān*, al-Qurtubī¹³ *al-Jāmi‘ li aḥkām al-Qur’ān* and Ibn Kathīr¹⁴ *Tafsīr al-Qur’ān al-‘Azīm*. The hadiths quoted in this study are taken from the translations of authoritative books on Hadith in addition to the author’s translation.

⁸He is an eminent Egyptian contemporary Islamic jurist trained both in the Islamic and Western laws. Among his book *al-Tashrī‘ al-jinā‘ī, al-Islām bayn jahl abnā’ihī wa ‘ajz ‘ulamā’ihī*.

⁹Abū Zahra was a contemporary outstanding prominent scholar in Islamic jurisprudence, previously professor of Islamic law at Cairo University, .

¹⁰He is Wahba al-Zuhailī, an outstanding contemporary scholar, a professor at the Faculty of *Sharī‘a*, University of Damascus. Among his books *al-Fiqh al-Islāmī wa adillatuhu, Nazariyyat al-ḍamān, Tafsīr al-munīr, al-‘Alāqāt al-dawliyyah fī al-Islām, Nazariyyat al-ḍarūra al-shar‘iyya*.

¹¹The Qur’ān, Arabic Text with Corresponding English Meanings, by Ṣaḥeeḥ International (Riyadh: Abul Qasim Publishing House, 1997).

¹²Muhammad ibn Jarīr ibn Yazīd al-Ṭabarī born in Ṭabaristān in 310 AH/923 CE, a prominent Qur’ānic commentator, historian, hadith scholar and jurist (d. 310 AH/923 CE). His other works *Tārīkh al-mulūk al-umam wa al-mulūk, Tahdhīb al-āthār* and *Ikhtilāf al-fuqahā’*. See Kaḥḥāla, *Mu‘jam al-mu‘allifīn*, vol.9, p.147.

¹³Abū ‘Abd Allah Muḥammad ibn Aḥmad ibn Abī Bakr al-Qurtubī, an eminent medieval Mālikite jurist and Qur’ānic commentator, born in Cordova in 671 AH/1272 CE and died in Egypt in 462 AH/1070 CE. His other works are *al-Tadhkira bi aḥwāl al-mawtā wa al-ākhirā, al-Asnā fī sharḥ asmā’ Allah al-ḥusnā*. See Kaḥḥāla, *Mu‘jam al-mu‘allifīn*, vol.7, p.231.

¹⁴Ismā‘īl ibn ‘Umar ibn Kathīr ibn Ḍaw’ ibn Kathīr, a prominent Qur’ānic commentator, Shāfi‘ite jurist and historian, born in Damascus in 700 AH/1301 CE. He died in 773 AH/ 1371 CE. Among his other books *al-Bidāya wa al-nihāya, Mukhtaṣar ibn Ṣalāḥ, Jāmi‘ al-masānid*. See Kaḥḥāla, *Mu‘jam al-mu‘allifīn*, vol.2, p.283-284.

Notes on Transliteration

In general, the system of transliteration of Arabic words used in this thesis is the same as has been employed by the Encyclopedia of Islam (2nd edition) with a few minor but common variations: k, dh...Certain well known words, proper names, and titles have been rendered in Westernised forms, as against the encyclopedia. I have chosen not to transliterate some words, such as Allah, hadith and Madina as they have acquired common usage even in European languages.

1 Background: Sexuality and Sexual Offences in Islamic Law

Introduction

This chapter provides an overview of sexuality and sexual offences in Islam. Before discussing rape, it is necessary to understand the concept of sexuality, the permissible limits of a sexual relationship and its objectives, prohibited sexual activities and the appropriate measures to prevent sexual offences.

A. Sexuality in Islam

In Islam, sexuality is considered a normal and natural instinct implanted in human beings by Allah.¹ It is presupposed that there cannot exist any contradiction between the Law of Allah and the innate urges of human beings.² There is no indication in Islamic literature that sexual desire is evil in itself, or that it is necessarily fraught with evil consequences. Among the evidence confirming the acknowledgement of these urges is the legislation covering marriage, as stated in the Qur'ān:

And among His signs is that He created for you mates from among yourselves that you may dwell in tranquillity with them and He has put love and mercy between your hearts (30:21).

The legal provision in this regard is aimed at regulating human sexuality in a human manner. Because of human imperfection, sexuality has a problematic side which makes regulation necessary. Therefore, sexual intercourse has to be restricted to the

¹The value of sex as a natural instinct that needs satisfaction is recognized in Islam, although it differs from organic needs in its necessity of satisfaction. The organic needs if not fulfilled, will result in physical harm that may lead to death. On the opposite, sexual instincts, if not satisfied, will not lead to death. This is proven by the fact that people can spend their entire lives without satisfying some of the instincts and yet come to no harm. See Taqiuddin al-Nabhān, *The Social System in Islam*. (London: al-Khalifah Publication, 1990), p.24.

²‘Abdullah Nāṣih ‘Ulwān, *Islam and Sex* (Cairo: Dār al-Salām Publications, 2002), pp.10–11.

consummation of marriage. Unregulated sexual intercourse threatens the social order and leads to anarchy and chaos. It is assumed that the social order and the harmony of life are threatened by both the suppression of sexuality in celibacy as well as free sexual activity outside marriage, whether heterosexual, homosexual or any other form of sexual pleasure.³

Monasticism and celibacy are discouraged in Islam. Therefore, abstaining from marriage with the intention of devoting one's life to worship and performing religious duties (while one is capable financially and physically) is not in line with the teaching of Islam. An authentic hadith narrated by al-Bukhārī and others describes how a group of companions came to the Prophet's wives and asked how the Prophet conducted his worship.

When it was explained to them, they degraded their good deeds, saying: "What a difference there is between us and the Messenger of Allah, whose past and future sins have been forgiven by Allah!"

One of them said: "I will observe fasting forever and never break it up." The second one said: "I will always pray during the night." The third one said: "As for me, I will abstain from women and never get married."

When the Prophet heard what they had said, he explained to them their error and deviation from the straight path, saying: "Indeed, I swear by Allah that I am the most fearful of Allah and the most pious. However, I fast and break my fast, pray and

³Yūsuf al-Qaraḍāwī, *The Lawful and the Prohibited in Islam*, English Trans., by Kamal el-Helbawy (London: al-Birr Foundation, 2003), pp. 132-133. Sheikh Yūsuf al-Qaraḍāwī is a prominent contemporary Muslim scholar, currently dean of the Faculty of Islamic studies at Qatar University.

sleep, and I marry women. So, whoever refrains from my way is not among my followers.⁴

In another hadith, Sa‘ad ibn Abī Waqqāṣ reported that the Prophet prohibited ‘Uthmān ibn Maz‘ūn from living in celibacy: “If he had given him permission to do so, we [others] would have had ourselves castrated.”⁵ The encouragement to marry is supported by another hadith: “Whoever is able to marry should do so.”⁶

B. The Purposes of a Sexual Relationship in Islam

The purposes of a sexual relationship in Islam can be classified as follows.

(a) Mutual Companionship and Enjoyment

Marriage should be based on mutual love, peace, companionship and compassion, as stated in the Qur’ān:

And among His signs is that He created for you mates from among yourselves so that you may dwell in tranquillity with them and He has put love and mercy between you; verily, in that are signs for a people who give thought [to them] (30:21).

(b) Relaxation and Recreation for the Soul

This benefit is obtained by enjoying the company and sight of one’s wife, and by shared amusement. In this way, the heart is refreshed and strengthened for worship,

⁴Al-Bukhārī, Muḥammad ibn Ismā‘īl ibn Ibrāhīm al-Mughīrā (d. 256 AH/870 CE), *al-Jāmi‘ al-ṣaḥīḥ*, 1st edition, (Cairo: al-Maktaba al-Salafiyya, 1400 AH) hadith no.5063. Al-Bukhārī, a prominent early hadith scholar and collector, born in Bukhārā, Samarqand in 194 AH/810 CE. His other works are *al-Tārīkh al-kabīr*, *al-Sunan fī al-fiqh*, *al-Asmā’ wa al-kunā*. See *Kaḥḥāla*, *Mu‘jāma al-mu‘allifīn*, vol.9, pp.52-53.

⁵Ibid., hadith no.5073.

⁶Ibid., hadith no.5065.

for the self is prone to boredom and inclined to shun duty as something unnatural to it. If constrained to persevere in something repugnant, it becomes tired and bored, whereas if revived by pleasure, it acquires new strength and vigour. In the company of one's wife, one can achieve the relaxation to banish cares and refresh the heart. The souls of the pious need legitimate recreation.⁷ This is described in the Qur'ān as follows:

It is He Who created you from one soul and created from it its spouse
that he might find rest with her (7:189).

(c) Protection against Committing Sexual Offences

Sexual satisfaction within a valid marriage is encouraged in Islam because it prevents people from being tempted into committing prohibited sexual intercourse (*zinā*). It has been stated in a hadith that a married couple are rewarded as if they are giving charity. The Companions asked: "How can someone have marital intercourse with his wife and then be rewarded for it?" The Prophet answered: "What do you think if he has it by prohibited means?"⁸

This hadith shows that although it is wrong to indulge in unlawful sexual intercourse, on the other hand, lawful marital intercourse is rewarded. The hadith also implies that cohabitation with one's wife is not just for carnal pleasure but can also be the

⁷Abū Hāmid Muḥammad ibn Muḥammad al-Ghazālī (d. 504 AH/1111 CE), *'Ihyā' 'ulūm al-dīn*, ed. Muḥammad 'Abd al-Qādir 'Aṭā', (Cairo: Dār al-Taqwā li al-Turāth, 2000), vol.2, pp.42-43. Al-Ghazālī who is known as Ḥujjat al-Islām (proof of Islam) born in Tūs, Iran in 450 AH/1058 CE, an outstanding Shafī'ite jurist and philosopher. He lectured at the Nizamiyya Academy (*al-Madrasa al-Nizāmiyya*) Baghdad. See al-Ziriklī, *al-A'ām*, vol.7, p.22.

⁸Muslim ibn al-Ḥajjāj al-Qushairī al-Naysābūrī (d. 206 AH/821 CE), *al-Jāmi' al-ṣaḥīḥ*, ed. Muḥammad Fu'ād 'Abd al-Bāqī, (Beirut: Dār ihyā' al-Turāth, no. date), vol.2, p.697. Muslim ibn al-Ḥajjāj is a well-known hadith scholar and collector born in Naysābur in 206 AH/810 CE. His other works are *al-Kunā wa al-asmā'*, *Awhām al-muḥaddithīn*, *Ṭabaqāt al-tābi'īn*. See *Kaḥḥāla*, *Mu'jam al-mu'allifīn*, vol.12, p.232,

performance of a righteous duty that will be regarded as an act of piety and devotion, meriting Allah's pleasure and reward. To seek sexual satisfaction outside the limits set by Allah is a sin; to seek it within these limits is therefore an act of worship. In this light, marriage can prevent people from considering prohibited sexual intercourse. The Qur'an describes a wife as a garment for her husband, and a husband as a garment for his wife:

They are clothing for you and you are clothing for them (2:187).

Since ordinary clothing provides people with protection, the "garment" referred to in this verse shows the importance of marriage in protecting them and preventing them from resorting to unlawful means of sexual satisfaction. That is why in Islamic criminal law, a married person who commits adultery is called *al-zānī al-muḥṣan* which means (the protected) adulterer, because he is already protected by lawful means (marriage) from evil temptation.

(d) Procreation

Sexual satisfaction is not the sole motive of the relationship between the sexes. The preservation of the human race is an important consideration, as stated in the Qur'an:

It has been made permissible for you the night preceding fasting to approach your wives [for marital intercourse]. They are clothing for you and you are clothing for them. Allah knows that you used to deceive yourselves, so He accepted your repentance and forgave you. So now have relations with them and seek what Allah has decreed for you [that is, offspring] (2:187).

According to many commentaries as it has been reported from ‘Abdullah ibn ‘Abbās⁹, al-Suddī¹⁰ and Ḥasan al-Bāṣrī¹¹ that to “seek what Allah has decreed for you” means to make an effort to have children.¹² It is a fact that a stable family is achievable by lawful marriage. The institution of the family is the basis of the whole social order in Islam. It is the fount of the human race, its culture, society and civilization.

And it is He Who has created from water [that is, semen] a human being and made him [a relative by] lineage and marriage. And your Lord is Ever-Able [concerning creation] (25:54).

C. Sexual Offences in Islam

Sexual offences can be divided into two types. One is classified as a major sin which is strictly prohibited according to strong evidence, and for which severe penalties are prescribed. This type includes fornication, rape and homosexuality. Apart from this category, other types of sexual offences are deemed to be less severe.

There is a legal principle in Islamic Law: “*al-aṣlu fī al-‘abḏā‘ al-taḥrīm*”, which means that the general ruling for sexual relationships is prohibition.¹³ However, what is prohibited becomes permitted in a valid marriage. This is an exception to the

⁹He is ‘Abd Allah ibn ‘Abbās ibn ‘Abd al-Muṭallib al-Qurashī the Prophet’s cousin, born in Mecca and died in Tā’if in (68 AH/687 CE). See *Kaḥḥāla, Mu‘jam al-mu‘allifīn*, vol.6, p.66.

¹⁰He is Ismā‘īl ibn ‘Abd al-Raḥmān al-Suddī al-Qurashī, a great Qur’ān commentator of Kūfa (d. 127 AH/745 CE). See *Kaḥḥāla, Mu‘jam al-mu‘allifīn*, vol.2, p.276.

¹¹He is Abū Sa‘id al-Ḥasan ibn Abī al-Ḥasan Yasār al-Bāṣrī, born in Madīna in 21 AH/641 CE. He was a major theologian of Baṣra during the last decades of the first century of Islam, known primarily for his piety, died in Baṣra in 110 AH/728 CE. See al-Shirāzi, *Ṭabaqāt al-fuqahā’*, pp.91-92.

¹²See Ismā‘īl ibn ‘Umar ibn Kathīr, (d. 773 AH/1371 AD). *Tafsīr al-Qur’ān al-‘aẓīm*, (Beirut: Dār al-Fikr, 1401 AH) vol.1, p.343; Abū ‘Abd Allah Muḥammad ibn Aḥmad al-Anṣārī al-Qurṭubī, *al-Jāmi‘ li aḥkām al-Qur’ān*, (Beirut: Dār al-Kutub al-‘Ilmiyya, 1996, 5th edition) vol.2, p.212.

¹³Zain al-‘Ābidīn ibn Ibrāhīm ibn Nujaīm (d. 970 AH/1563 CE), *al-Ashbāh wa al-naẓā’ir ‘alā madhhab Abī Ḥanīfa al-Nu‘mān*, (Beirut: Dār al-Kutub al-‘Ilmiyya, 1993), p.66. Ibn Nujaīm was a famous Ḥanafite jurist born in Cairo in 925 AH/1519 CE. Among his other works are *al-Baḥr al-rā’ik*, *al-Fatawā al-zayniyya* and *al-Fawā’id al-zayniyya fī fiqh al-Ḥanafīyya*. See al-Ziriklī, *al-A‘lām*, vol.3, p.104.

general legal principle: “The general ruling is that everything is permissible until it is proven to be prohibited.”¹⁴ Therefore, the sex organs remain under legal restriction even during times of exigency, whereas other prohibited actions become permissible in an emergency, such as the consumption of pork or alcohol. Al-Suyūfī suggests that the rationale for this ruling is that illegal sexual intercourse leads to the corruption of the lineage and the destruction of the institution of the family, which threatens the survival of human society.¹⁵

Besides illegal consensual intercourse (*zinā*), the strict prohibition also includes indecent sexual assault. Most of the classical jurists imposed severe penalties for this crime based on the gravity of the offence. If it is legally proven, the culprit will be sentenced to either the prescribed (*ḥadd*) penalty of *zinā* or discretionary penalties (*taʿzīr*).¹⁶ Sexual assault can also be associated with *ḥirāba*, which is one of the crimes for which the Qurʾān prescribes a *ḥadd* penalty. It is variously described as “taking by force”, burglary, highway robbery or waging war against the authoritative Muslim leader. The penalty for this crime is based on the following Qurʾānic verse:

The punishment for those who wage war against God and His Prophet, and perpetrate disorder in the land is: kill or hang them, or amputate a hand on one side and a foot on the other, or banish them from the land (5:33).

¹⁴Jalāl al-Dīn ʿAbd al-Raḥmān ibn Abi Bakr al-Suyūfī (d.910 AH/1505 CE), *al-Ashbāh wa al-naẓāʾir*, (Beirut: Dār al-Kitāb al-ʿArabī, 1987), pp.60- 61. Al-Suyūfī was a famous Egyptian Shāfʿīte scholar born in 849 AH/1445 CE. Among his works, *al-Dur al-manthūr fī tafsīr bi al-maʿthūr*, *al-Jāmiʿ al-ṣaghīr fī al-ḥadīth* and *al-Itqān fī ʿulūm al-Qurʾān*. See Kaḥḥāla, *Muʿjam al-muʿallifīm*, vol.5, pp.128-129.

¹⁵Al-Suyūfī, *Ibid.*, p.207.

¹⁶Any kind of threat or physical force utilized by a perpetrator by whatever means will make him/her legally accountable and liable for the crime of sexual assault. This is because, as stated earlier, all promiscuous relationships, regardless of the consent of the parties concerned, are forbidden and unlawful outside marriage, not to mention when violation is included. See, Abul Aʿlā Mawdūdī, *Human Rights in Islam* (Leicester, UK: Islamic Foundation, 1980), p.18.

According to the Mālikite judge, Ibn al-‘Arabī, sexual assault could be regarded as part of *ḥirāba*. He related a story about a group of people who were attacked, one of whom, a woman, was raped (*mughālibatan ‘alā nafsihā*). When this incident was examined in a court of law, some people asserted that it was not *ḥirāba*, since no money had been taken and no weapon had been used. In their view, *ḥirāba* referred only to an attack on one’s property. Ibn al-‘Arabī replied indignantly that *ḥirāba* affecting the private parts of a human being was much worse than *ḥirāba* in which money was taken by force. He justified his argument as follows:

People will not usually fight to protect their property if their lives are in danger. However, they will fight in the same situation if their wives or daughters are going to be raped or their modesty is being outraged.¹⁷

Based on this opinion, al-Sayyid Sābiq, a modern outstanding Egyptian scholar, in his book, *Fiqh al-Sunna*, describes *ḥirāba* as a single person or group of people causing public disorder, killing, taking property or money by force, attacking or raping women (*hatk al-‘ird*), killing cattle, or disrupting agriculture.¹⁸

Besides illicit sexual relationships and all the ways which lead to them, all types of illicit sexual activity are strictly prohibited, whether they are practised between a man and a woman, or between two men, or between two women, or by individuals on their own. Such activity is considered a reversal of the natural order and a

¹⁷Abū Bakr Muḥammad ibn ‘Abdullah ibn al-‘Arabī (d. 543 AH/1148 CE), *Aḥkām al-Qur’ān*, ed. Muḥammad ‘Abd al-Qādir, ‘Aṭā,’ (Beirut: Dār al-Kutub al-‘Ilmiyya, 1997), vol.2, p.95. Ibn al-‘Arabī is a famous Spanish Mālikite born in Ishbilī, Spain in 468 AH/1076 CE. Among his other books *al-Maḥsūl fī uṣūl al-fiqh*, *kitāb al-siyāsāt* and *Kitāb mushkil al-Qur’ān wa al-Sunna*. See Ibn Khalikān, *Wafayāt al-a’yān*, vol.4, p.296.

¹⁸Al-Sayyid Sābiq, *Fiqh al-Sunna* (Beirut: Dār al-Kitāb al-‘Arabī, 1977), vol.2, p.464.

corruption of humankind's sexuality. Sexual intercourse between two men (homosexuality) and between two women (lesbianism) is treated differently by the various schools of law. Although they all regard both types as unlawful and a major sin, they differ over the severity of the penalty.¹⁹

Apart from these prohibitions, other sexual offences are not considered major sins and their perpetrators are therefore liable to a less severe penalty. As already stated, the only permissible means of sexual pleasure is within a valid marriage of husband and wife.²⁰ Nevertheless, even within the bond of marriage there are some restrictions. These can be divided into two categories: prohibition of the action itself; and prohibition of normal marital intercourse for external reasons. The prohibited action is anal intercourse. The Shāfi'ites suggest that the first time that a husband has anal intercourse with his wife, he should be reminded of his wrongdoing. If he persists in this practice, then he is liable to a *ta'zīr* penalty (discretionary penalty decided by the judge).²¹

There is also a prohibition of marital intercourse under certain circumstances. The jurists agree unanimously that marital intercourse between husband and wife is prohibited during the wife's menstruation or post-partum bleeding. Indulgence in this forbidden activity is regarded as a breach of faith. Al-Nawawī of the Shāfi'ite school stated:

¹⁹Abdur Rahman I.Doī, *Shari'ah: The Islamic Law*, (London: Ta Ha Publisher Ltd. 1997), p.241-243;

²⁰Abd al-Qādir 'Awda, *al-Tashrīh al-jinā'ī*, (Beirut: Mu'assat al-Risāla, 1985), vol.2, pp.354-369.

²¹According to classical jurists, permissible sexual relation is extended to one's own slave girls. But, for the scope of this research this point is not to be discussed.

²¹Al-Suyūfī, *al-Ashbāh wa al-naẓā'ir*, p.489. *Ta'zīr* will be discussed further in chapter 5, p.120-124.

Our colleagues and the majority of jurists from the other schools of law hold that a man who has had intercourse with his wife during her menstrual period, while believing that this is a permissible activity, will be condemned for committing a grave sin.²²

The jurists also hold that the prohibition also extends to the performance of religious rituals, such as being in the state of *iḥrām* while performing the pilgrimage, *i'tikāf* (staying in the mosque during Ramadan), and observing fasting. Although there is no physical punishment, the action invalidates the rituals. The guilty person is required to repent, make up the invalidated pilgrimage or fast, besides making amends (*kaffāra*).²³

D. Preventive Measures against Sex Crimes

In Islam, punishments are part of a much larger integrated whole. The Qur'ānic verses of punishments are less than ten out of more than six thousand verses which make up the Qur'ān. They cannot be either properly understood or successfully or justifiably implemented in isolation. Strict legislation is not the main vehicle in the legal framework for the enforcement of morality. Severe penalties are imposed as a last resort for the deviants and outlaws who are an abnormal minority or exception. The *Shari'ah* is not mainly to straighten the deviants but to guide and protect the normal majority of people from falling into the trap of crime. Punishment is not viewed in Islam as the only treatment for social deviation and crime. It is the

²²Muḥyī al-Dīn ibn Sharaf al-Nawawī (d. 676 AH/1277 CE), *al-Majmū' sharḥ al-muḥadhdhab*, ed. Maḥmūd Maṭraḥī, (Beirut: Dār al-Fikr, 1996), vol.2, p.374. Al-Nawawī a prominent medieval Shāfi'ite jurist hadith scholar, born in Nawā, Damascus in 631 AH/1233 CE. Among his other works *Riyāḍ al-Ṣāliḥīn*, *al-Azkār*, *al-Majmū'*. See al-Ziriklī, *al-A'ām*, vol.8, p.149.

²³Al-Suyūṭī, *al-Ashbāh wa al-naẓā'ir*, p.273.

prevention of crime which is the major means to eliminate it. The punishment for fornication for example, is mentioned in one single verse in the whole Qur'ān (24:2). However, the chapter in which this verse is mentioned has tens of verses that instruct us as to how to prevent the crime.²⁴

The following are some suggested preventive measures of sex crimes:

(a) Channelling the Natural Instincts through Lawful Means

In Islam, a practical alternative to committing sexual offences is the permissibility of marriage, the encouragement to marry, and the facilitating of its arrangements. The

Prophet said:

O you young men assembled here, those of you who can find the means to do so should get married.²⁵

He also said:

If a man whose religion and fidelity are pleasing to you approaches you for marriage [with one of your family], then arrange his marriage. Otherwise, there will be much turmoil and corruption on Earth.²⁶

The Qur'ān states:

²⁴Yūsuf al-Qaraḍāwī, *Introduction to Islam*, (Cairo: Islamic Inc. Publishing and Distribution, 1995), pp. 108-109.

²⁵Abū 'Īsā Muḥammad ibn 'Īsā al-Tirmidhī (d.279 AH/892 CE), *al-Jāmi' al-ṣaḥīḥ (Sunan al-Tirmidhī)*, ed. Aḥmad Muḥammad Shākir, (Beirut: Dār 'Iḥyā' al-turāth al-'Arabī), vol.3, p.392. Al-Tirmidhī was an eminent jurist, historian and hadith scholar, student of al-Bukhārī. His other works are *al-'Ilal fī al-Hadīth*, *al-Shamā'il* and *Risāla fī al-khilāf*. See Kaḥḥāla, *Mu'jam al-mu'allifīn*, vol.11, 104.

²⁶Ibid., p.394.

And marry the unmarried among you and the righteous among your male slaves and female slaves. If they should be poor, Allah will enrich them from His bounty, and Allah is All-Encompassing and Knowing (24:32).

Because sexual instinct is a special gift from Allah, it must be channelled through a lawful means. In this vein one may suggest that the correct practice of polygamy can also be a solution to sexual offences and social problems, because it controls the sexuality of men and women within the limits of a legal marriage.²⁷

(b) Preventing the Means to Evil

Among the significant legal principles in Islamic jurisprudence is *sadd al-dharā'ī*, that is, blocking the means. Here it is used in the sense of blocking the means to an end which might produce undesirable consequences.²⁸ Its concept is based on the aim of preventing evil by removing any opportunity for it to happen. However, the result may not necessarily be achieved. For example, *khalwa*, when used to refer to a man and woman meeting in seclusion, is considered unlawful, although it may not eventually lead to unlawful sexual intercourse (*zinā*). Perhaps this is the reason why the Qur'ān emphasizes:

Do not approach fornication; it is surely an indecency and evil as a way (17:32).

Thus the warning in the Qur'ān is a verbal blocking of the means to fornication with the aim of preventing evil before it occurs.

²⁷For details see Yūsuf al-Qaradawī, *The Lawful and the Prohibited in Islam*, p.174-175.

²⁸Mohamad Hashim Kamali, *Principles of Islamic Jurisprudence*, 2nd revised ed. (Kuala Lumpur: Ilmiah Publisher 2000), p.311. The author is a professor in Islamic law, currently a director of International Institute of Islamic Thought and Civilization (ISTAC), International Islamic University Malaysia.

(c) Avoiding Temptation

Blocking the means of evil also implies that Muslims should avoid anything that offers temptation and arouses desire, such as staring at women, looking at men or women provocatively (un)dressed and pornographic photographs, watching licentious films and listening to licentious songs and stories, and so on. Seeking pleasure through the presence of sexual ideas and tangible realities of other than the legal spouse that excite the sexual instinct is condemned. The prohibition becomes more viable if the staring is accompanied by sexual desire on the ground that all sexual overtures which are expected to lead to *zinā* are similarly forbidden by virtue of the likelihood that the conduct in question would lead to *zinā*.²⁹ This is in accordance with the following Qur'ānic verses:

Tell the believing men to lower their gaze and guard their private parts. That is purer for them. Indeed, Allah is acquainted with what they do (24:30).

And tell the believing women to lower their gaze and guard their private parts, and not expose their adornment except that which necessarily appears thereof (24:31).

According to the prominent contemporary scholar, Sheikh Yūsuf al-Qarāḏāwī, there are several divine injunctions in these two verses. Two apply to both men and women that is, lowering the gaze and guarding the sex organs, while the third applies exclusively to women. It should be noted that while the sex organs must be strictly guarded without compromise, however lowering of the gaze is occasionally relaxed

²⁹Mohamad Hashim Kamali, *Principles of Islamic Jurisprudence*, p.311.

guarded without compromise, however lowering of the gaze is occasionally relaxed out of necessity to meet the general interest of the people that requires some looking at members of the opposite sex.

Al-Qaraḏāwī adds that “lowering the gaze” does not mean that in the presence of the opposite sex the eyes should be shut or that the head should be bowed towards the ground, since this would be impossible. In other places the Qur’ān says, “Lower your voice” (31:19), which does not mean sealing the lips. Here “lowering the gaze” means to avert one’s gaze from the faces of the passers-by and not to caress the attractive features of the members of the opposite sex with one’s eyes.³⁰ Even looking at the covered parts (*‘awra*) of another person’s body must be avoided. In this connection, the Prophet forbade us from looking at the covered parts of other people’s bodies, whether of the same or opposite sex, and whether with or without desire.

A man should not look at the *‘awra* of another man,³¹ nor a woman that of a woman, nor should a man share a blanket with another man nor a woman with another woman.³²

Lustful stares at a person of the opposite sex as well as at the same sex are regarded as the fornication (*zinā*) of the eyes, because staring of this kind provides unlawful sexual pleasure and gratification. This judgment is based on the hadith that the eyes

³⁰Yūsuf al-Qaraḏāwī, *The Lawful and the Prohibited in Islam*, pp.136–139.

³¹The *‘awra* of an adult man is from his navel to his knees, although some scholars like Ibn Ḥazm and the Mālikite jurists do not include the knee. Whereas, the *‘awra* of an adult woman is the entire body except face and hands. See Yūsuf al-Qaraḏāwī, *Ibid.*, p.138.

³²Muslim ibn Ḥajjāj, *Ṣaḥīḥ Muslim*, hadith no.338.

also commit fornication, that is, the lustful stare.³³ Believers should always be aware that they are personally responsible for all their actions, as they are reminded in the Qur'ān:

Verily, the hearing, sight and heart of all those will be questioned
(17:36).

Allah knows the fraud of the eyes, and all that the breasts conceal
(40:19).

In this light, it is submitted that what is *ḥarām* (prohibited) to look at is also prohibited to touch with the hands or with any other parts of the body except in the case of necessity such as first aid or medical treatment. At the same time what is permissible of looking becomes void in the case of lust, as the ways leading to sin must be blocked.³⁴

However, the jurists hold that an innocent look at what is other than the *'awra* of a man or a woman is permissible as long as it does not become a stare or is repeated with perhaps a taint of pleasure and lust. The Prophet told 'Alī ibn Abī Ṭālib³⁵:
“‘Alī, do not let a second look follow the first. The first look is allowed to you but not the second.”³⁶

³³Abu Muḥammad 'Alī ibn Aḥmad ibn Ḥazm (d. 456 AH/1064 CE), *al-Muḥallā bi al-āthār*, (Beirut: Dār al-Kutub al-'Ilmiyya, 1408), vol.11, p.156. The author is born in Cordova in 384 AH/994 CE, a famous Andalusian scholar in hadith, jurisprudence and philosophy, a leading figure of the Zāhirite school of law. His other works are *Ibṭāl al-qiyās wa al-ra'y*, *al-Ijmā' wa masā'iluh* and *al-Īṣāl ilā fahm al-khiṣāl*. See al-Ziriklī, *al-A'lām*, vol.4, p.254.

³⁴Yūsuf al-Qaraḍawī, *The Lawful and the Prohibited in Islam*, p.138.

³⁵He is Abu al-Ḥasan 'Alī ibn Abī Ṭālib ibn 'Abd al-Muṭallib al-Hāshimī, the son of the Prophet paternal uncle, the first child who accept Islam and the fourth rightly guided caliph died in Kūfa, in 40 AH/661 CE. See al-Ziriklī, *al-A'lām*, vol.4, p.295.

³⁶Nasr al-Dīn al-Albānī, *Ṣaḥīḥ sunan Abī Dāwud*, (Beirut: al-Maktab al-Islāmī, 1412), hadith no.1881. The hadith has been verified as *ḥasan* (sound). Sheikh al-Albānī was an Albanian Jordanian

An Islamic society must be established on the basis of virtue, moral values, decency, modest dress, and the avoidance of licentiousness in all public forum, especially the media. Those in authority in an Islamic society are responsible to purify it from whatever evil temptations leading to illegal sex. This is in line with the injunction of the Qur'ān:

Indeed, those who like to promote sexual immorality among the believers, will have a painful punishment in this world and the Hereafter (24:19).

Hand in hand with the authority, every member of that society also plays an important role in being personally responsible for prohibiting evil. In a hadith reported by Abū Sa'īd al-Khudrī, the Prophet said:

Those of you who see vice should change it with their hands; if that is impossible, then with their tongues; and if that is impossible, then with their hearts; and the last is the lowest degree of belief.³⁷

The head of a household is responsible for providing the children with sound moral guidance, teaching them to behave modestly and abstain from immorality and indecency, as stated in a hadith: "A man is a guardian over the members of his family and shall be questioned about them."³⁸ All those who have been charged with this responsibility should co-operate in their efforts to rid society from sexual temp-

contemporary expert in hadith sciences known worldwide for his meticulous examination in verifying authentic hadith. His works can be accessed on Arabic hadith website at <http://www.dorar.net>.

³⁷Muslim ibn Ḥajjāj. *Ṣaḥīḥ Muslim*, vol.1, p.69, hadith no.49.

³⁸Al-Bukhārī, *al-Jāmi' al-Ṣaḥīḥ*, hadith no.2558.

tations. Allah has specified a role and responsibility for each member of society for the protection of the public, as confirmed in the Qur'ān:

The believing men and believing women are allies of one another. They enjoin what is right and forbid what is wrong, establish prayer, give *zakāt* and obey Allah and His Messenger. Those are the ones upon whom Allah will have mercy. Indeed, Allah is Exalted in Might and Wisdom (9:71).

(d) Observation of Islamic Etiquette in Dress

Sexual offences may also be prevented by observing the Islamic dress code. In Islam, women are commanded to observe modesty (*hijāb*) when in the presence of an *ajnābī* (a man to whom they are not related) by covering the head, shoulders and chest in accordance with the following Qur'ānic verse:

O Prophet, tell your wives and daughters and the believing women to draw their cloaks all over their bodies. That will be better, that they may be recognized and not be ill-treated. Allah is Oft-Forgiving, Most Merciful (3:59).

They have to cover the whole body, except the face and hands (up to the wrists) in accordance with the following Qur'ānic verse:

And they should not reveal their adornment except that which is apparent; and let them cast their veils over their necks and bosoms (24:31).

This verse is the basis of the preferred opinion that *zāhir al-zīna* (apparent adornment) implies the face and hands.³⁹ It must not be transparent, revealing what is underneath it. In a hadith, the Prophet has been reported to say that among the

³⁹Al-Qurtubī. *al-Jāmī' li ahkām al-Qur'ān*, vol.12, p.237.

inhabitants of Hell are those women who are clothed yet naked, seducing and being seduced.⁴⁰ Here, “clothed yet naked” means that their light, thin, transparent garments do not conceal what is underneath. It is suggested that a woman’s dress must not be too tight so as to define the parts of her body, especially curves, which would tantalizingly emphasize the bust-line, waist and hips, thus provoking lustful stares from men. This fashion can also be regarded as “clothed yet naked”, since such a style of dress is often more provocative than one which is transparent.

In the same vein, a woman should not attract the attention of men to her concealed adornment by the use of perfume or by jingling or playing with her ornaments, in compliance with the Qur’ānic verse:

They should not strike their feet in order to make known what is hidden of their adornment (33:32).

During the era of ignorance (*jāhiliyya*), the women used to stamp their feet when they passed by men so that the jingling of their anklets might be heard. A similar principle is contained in the ruling concerning the use of perfume, for this might attract the attention of men and excite their sexual desire. This type of behaviour is condemned in a hadith, in which the Prophet said: “The woman who perfumes herself and walks through a group of men so that they smell her fragrance is an adulteress.”⁴¹

The Qur’ān also advocates modest behaviour in women, as in the following verse:

⁴⁰Muslim, *Ṣaḥīḥ Muslim*, hadith no. 2128.

⁴¹Al-Albānī, *Ṣaḥīḥ al-jāmi’*, hadith no.2701. The hadith has been verified by al-Albānī as *hasan* (sound).

And stay in your houses, and do not display yourselves (*tabarruj*) as people did in the era of ignorance [before Islam] (33:33).

This verse implies that among the etiquette that Allah has made known to Muslim women in the Qur'ān is the requirement that they should remain at home and go out only when it is necessary. When they do go out, they should avoid adorning themselves, applying excessive cosmetics and perfume, displaying the good points of their bodies in a way that provokes sexual excitement, and mixing freely with men. This kind of behaviour is called *tabarruj*, which is regarded as a means to adultery. This does not mean that women in Islam should remain confined to their homes until death takes them to their graves. On the contrary, they can attend congregational prayers, pursue their studies and fulfil other lawful needs.

(e) Voluntary Fasting

Those who are unable to marry are recommended to undertake frequent voluntary fasts, for fasting nurtures willpower, teaches control of desires, and strengthens the fear of Allah. The Prophet said:

Young men, those of you who can support a wife should marry, for it keeps you from looking at women and preserves your chastity; however, those who cannot [marry] should fast, for it is a means of cooling sexual passion.⁴²

(f) Medical Precautions

From the health perspective, there are some recommendations by medical practitioners for calming excessive sexual urges, for example, bathing with cool water,

⁴²Al-Bukhārī, *al-Jāmi' al-ṣaḥīḥ*, hadith no.5065; Al-Tirmidhī, *Sunān al-Tirmidhī*, vol.3, p.394.

regular physical exercise, avoiding permissible stimulants such as tea, coffee and spicy foods, and reducing the consumption of eggs and red meat. These recommendations comply with the spirit of the *Sharī‘a* in the sense that they are permissible means of avoiding evil. Another useful suggestion is to avoid sleeping on the back or stomach. Instead, one should sleep on the right side of the body, facing the *Qibla*.⁴³

(g) Choosing Righteous Companions

There is no doubt that friends influence one’s ideas and behaviour. Young people especially should choose companions of good character and who are conscious of Allah, so that they can follow their example of righteousness, integrity and sound habits. They should avoid those of dubious character for they will lead the innocent and gullible into bad habits and unlawful behaviour. The Prophet said: “A man will follow the religion of his friends; therefore, the individual should be careful of whom he takes as a friend.”⁴⁴

(h) Sound Advice

Continual sound advice and careful counselling are also necessary to withstand evil temptations. The following hadith is a good example of how counselling can prevent sexual offences:

A man came to the Prophet, asking him for permission to commit adultery. The Prophet was not angry with him. Instead, he gave him an

⁴³Al-Nawawī, Muḥyī al-Dīn ibn Sharaf, *Riyāḍ al-ṣāliḥīn*, with the commentary of Ḥāfiẓ Ṣalāḥ al-Dīn ibn Yūsuf, Eng. trans. Muḥammad Amin et.al., (Riyadh: Darussalam Publisher, 1999) vol.1, pp. 673-674.

⁴⁴Al-Albānī, *al-Silsila al-ṣaḥīḥah*, (Riyadh: Maktabat al-Ma‘ārif, 1407 AH), hadith no. 927. The hadith has been verified by al-Albānī as *ḥasan* (sound).

explanation using analogy. “Would you allow someone to do that with your mother?”

He said, “No.”

The Prophet told him: “Similarly, no one likes that to happen to their mother.” The Prophet then asked him: “Would you allow that to happen to your daughter?”

He said, “No.” The Prophet told him that no one wanted that to happen to their daughter either.

The Prophet asked him again: “Would you be pleased if it happened to your aunt?”

He said, “No.”

The Prophet said, “Similarly, nobody is pleased if that happens to their aunt.” Finally, he asked the Prophet to invoke Allah that he would not commit such a crime. The Prophet invoked Allah: “O Allah, forgive his sin, purify his heart and preserve his private parts.”

The man said, “After that meeting, there was nothing more hateful to me than adultery.”⁴⁵

(i) Severe Penalties for Sexual Offences

The purpose of the *Sharī‘a* is not the punishment of citizens, but the prevention of crime. Penalties in Islam aim at controlling the behaviour of criminals in a way that their severity will cause the culprits to feel the equivalent of the victims’ suffering as the result of the crimes. The penalties also aim at curing criminals of their inner sickness, that of ignoring Allah’s guidance. A stiff sentence is designed to deter the culprits from committing further crimes against other people, and protect individuals and the community as a whole from negative elements of destruction, corruption, calamity and all kinds of social problems. The public implementation of the sentence

⁴⁵Muqbil ibn Hādī al-Waq‘ī, *al-Ṣaḥīḥ al-musnad* (Beirut: Dār ibn Ḥazm, 1411 AH), hadith no.501. The hadith has been verified by the author as authentic.

provides an unforgettable lesson to the rest of society that the same punishment will be applied to anyone else who commits that crime.⁴⁶ This practice is based on the rule that all punishments, especially that for adultery, should be carried out in public, as ordained in the Qur'ān:

Let a group of believers witness their punishment (24:2).

Conclusion

It is concluded that sexual intercourse in Islam is not a taboo to inspire feelings of guilt. Rather, it is a natural and creative urge which is seen as special gift from God. Nevertheless, the marriage knot must be tied before the man and woman can enjoy the pleasure of marital intercourse, which is the reward for the responsibilities that they undertake in maintaining a family. It is suggested that the joy of this physical expression lightens the burden and cement the marital relationship. Therefore, marital intercourse and extra-marital intercourse are not equally legitimate. If it were, the sacred institution of the family would be gradually destroyed. That is why in Islam all forms of sexual deviation and pre- and extra-marital sexual intercourse are absolutely forbidden. Such behaviour is a serious offence and is liable to a severe penalty.

To prevent sexual offences, certain kinds of checks and controls, both internal and external must be observed.⁴⁷ Both self-control and external control need to be exercised. Self-control is based on a sincere belief in Allah and the Hereafter. It is genuine faith (*imān*) and the consciousness of Allah which teach people the

⁴⁶Şālih ibn Şālih Al-Khuzaim, *Uqūbat al-zinā*, (Riyadh: Dār Ibn al-Jawzī, 1422 AH), p.326.

⁴⁷Muhammad Iqbal Siddiqi, *The Penal Law of Islam*, (Lahore: Kazi Publication, 1979), p.15.

adherence to moral virtue, love for others, the wish to do good to others, avoidance of causing injury and harm, and the practice of chastity and humility. Thus a moral impetus is engrained in the psyche, which effectively prevents individuals from committing crimes out of fear of divine punishment. This internal deterrent prevents crime in a way which cannot be achieved by legal enforcement. Nevertheless, if, despite these safeguards, one turns to crime, then one deserves a severe punishment.

2 The Notion of Rape

Introduction

Laws defining rape and specifying the punishment for it have varied enormously among different cultures and during different periods of history. Some ancient societies considered rape an offence committed by the victim as well as the rapist, both of whom were liable to be punished. Under Assyrian law, an equal penalty was to be applied to the rapist and the victim, as required by the latter's husband, ranging from a light sentence to capital punishment. Similarly, according to the Babylonian Code of Hammurabī, a married woman who was raped had to be drowned in a river along with the rapist. However, if the husband pardoned his wife, the King had the right to grant a pardon to the rapist.¹

According to the ancient perspective, women were treated as a men's inferior and an object of sexual pleasure. Women's rightful place in the society was to serve men's destiny despite of their own.² In some ancient societies, women were also treated as a form of property. Rape, therefore, was defined as an assault against one's property. For example, under the ancient Assyrian Laws, sexual violation against a married woman is not considered as a sin against morality but a trespass against the husband's property.³ In early Hebraic law, a man who raped an unmarried virgin

¹G.R. Driver & John C. Miles, *The Assyrian Laws* (Oxford, UK: Clarendon Press, 1935), p.39.

²It is proposed that the tradition of women as being a possession of men, valued for their sexual allure, continues to influence some modern thinking. Some modern tendencies argue that rape is in some way to be expected as being natural due to the belief that a man has a superior will to the woman. Women have been oppressed by the sex industry as well as exploited for the pornographic, fashion and entertainment industries, exposing women without any help or protection to an unequal and unfair struggle in a merciless and ruthless society of economic wolves and vultures and other social ills. See Sharon L. McCombie, *The Rape Crisis Intervention Handbook. A Guide for Victim Care* (New York: Plenum Press 1980), p. 4.

³G.R. Driver & John C. Miles, *The Assyrian Laws*, p.39.

could redeem himself by paying the bride price to the girl's father. For instance, the Old Testament book of Deuteronomy provides that if an unmarried virgin is raped the offender must pay the woman's father 50 shekels and marry the woman.

When a man encounters a virgin who is not yet betrothed and forces her to lie with him, they are discovered, then the man who lies with her must give the girl's father fifty pieces of silver, and she will be his wife because he has violated her (Deuteronomy 22: 28-29).

In modern times, rape is considered a serious crime and is treated as a felony in most countries with a legal system based on common law. In Islam, rape is considered a sexual offence. Since it consists of forcible sexual intercourse, most of the classical jurists called it *zinā bi al-ikrāh*, that is, forcible unlawful sexual intercourse. The question then arises of whether rape is part of *zinā* or an isolated crime. In this chapter, the focus is on the notion of rape, including a definition of this offence, its essential elements, and a comparison between rape and *zinā*.

A. Definition of Rape

Rape is translated in Arabic as *ighṭiṣāb* or *zinā bi al-ikrāh*, that is, forcible unlawful sexual intercourse. The word *ighṭiṣāb*, or its root *ghaṣb* literally means usurpation, illegal seizure, coercion, ravishing, violation and rape.⁴ According to Ibn Manẓūr, both *ighṭaṣaba* and *ghaṣaba* are interchangeable in Arabic when used to mean rape. He quotes a hadith that includes the phrase *annahū ghaṣabahā nafsaḥā* to illustrate

⁴Muḥammad ibn Abī Bakr ibn ‘Abd al-Qādir al-Rāzī, Persian Ḥanafīte jurist and lexicographer (d. 659 AH/1261 CE), *al-Ṣiḥāḥ*, ed. Maḥmūd Kathīr, (Beirut: Maktabat Lubnan al-Nāshirūn, 1996), p.199; Harīth Sulaiman Faruqī, *Faruqī's Law Dictionary: Arabic-English* (Beirut: Librairie du Liban, 1983), p.246; Hans Wehr (1909-), *A Dictionary of Modern Written Arabic*, ed. J.M. Cowan. (Ithaca, NY: Spoken Languages Services, 1960), p.675.

the meaning. He argues that *ighṭaṣaba* is used metaphorically because it refers to the usurpation of one's property.⁵

The terms *ghaṣaba* and *ighṭaṣaba* have been used by traditional jurists to express the meaning of sexual assault.⁶ The jurists also use a direct conclusive legal meaning of rape, that is, *al-ikrāh 'alā al-zinā*.⁷

Before defining rape in Islamic Law, it is necessary to investigate the juristic definition of *zinā* or illegal sexual intercourse, because most jurists take it into account as part of the definition. Knowing the legal meaning of *zinā* is crucial since a conviction is based on what constitutes the crime. That is why the Prophet said to Mā'iz al-Aslamī, who had confessed that he had committed *zinā*, "You might have kissed or touched her." Such actions are not considered the constituents of *zinā*. However, Mā'iz denied them all. Then the Prophet asked him: "*Hal nakattahā?*"

⁵Muḥammad ibn Mukram ibn Manzūr al-Ifriqī, Egyptian lexicographer (d. 711 AH/1311 CE), *Lisān al-'Arab*, (Beirut: Dār Ṣādir, 1956), vol.1, p.634; Aḥmad ibn Muḥammad ibn 'Alī al-Muqrī al-Fayyūmī, Egyptian Arabic lexicographer (d. 770 AH/1368 CE), *al-Miṣbāḥ al-munīr*, (Beirut: al-Maktaba al-'Ilmiyya, no date) vol.2, p.770. Both authors were medieval eminent Egyptian Arabic lexicographers.

⁶Mālik for example uses the term *ghaṣāba* in his book *al-Mudawana al-kubrā*, when he discusses rape and its punishment. See Mālik ibn Anas, *al-Mudawana al-kubrā* (Cairo: Maṭba'at al-Sa'āda, 1905), vol.16, pp.213 & 361; In his book *al-Mughnī*, Ibn Qudāma (a famous medieval Syrian Ḥanbalite scholar) also uses the term *ghaṣb* when discussing the invalidation of fasting. Among the cases is that of a woman who has been raped (*ghaṣabahā rajulun*). According to him, the ruling was that her fast had been invalidated and she had to make up that day. See, Abū Muḥammad 'Abd Allah Ibn Qudāma al-Maqdisī (d. 620 AH/1223 CE), *al-Mughnī* (Beirut: Dār al-Fikr, 1405 AH), vol.3, pp.27–28. Ibn Qudāma was born in al-Quds, Palestine in 541 AH/1146 CE. His other works *al-Muqṇī'*, *'umdat al-fiqh*, *al-Kāfī fī al-fiqh* and *Rawḍat al-nāzīr*. See al-Ziriklī, *al-A'lam*, vol.4, p.67.

⁷Ibn Qudāma, *al-Mughnī*, vol.10, pp.158–159; Maṣū' ibn Yūnus ibn Idrīs al-Bahūtī, Egyptian Ḥanbalite jurist (d. 1051 AH/1642 CE), *Kashshāf al-qinā'*, ed. Hilāl Muṣailahī, (Beirut: Dār al-Fikr, 1412 AH), vol.6, p.79; Shams al-Dīn Muḥammad ibn Aḥmad al-Sarakhsī, a prominent Uzbek Ḥanafite jurist (d. 483 AH/1090 CE), *al-Mabsūṭ*, (Beirut: Dār al-Ma'ārif, 1406 AH), vol.24, p.88; 'Alā' al-Dīn Abū al-Ḥasan 'Alī ibn Sulaimān al-Kāsānī a medieval eminent Ḥanafite jurist from Samarqand, (d. 587 AH/1191 CE), *al-Inṣāf*, ed. Muḥammad Ḥāmid al-Fāqī, (Beirut: Dār Iḥyā' al-Turāth al-'Arabī), vol.10, p.182.

[Did you penetrate her?]. That is the most understandable word for sexual intercourse.⁸

In the same hadith as narrated by Abū Hurayra, the Prophet asked Mā'iz: "Was the penetration like the stick entering the kohl jar or the rope entering the well?" He said: "Yes." The Prophet asked Mā'iz another question: "Do you know what *zinā* is?" He answered: "Yes, I do, and I committed an unlawful act which a husband and wife do lawfully."

In this hadith, the Prophet emphasized the criteria that must be fulfilled for the action to be classified as *zinā*. The detailed reports of this event, as well as other hadiths are the main reference for the jurists when formulating the legal definitions of *zinā* and rape. The Ḥanafites define *zinā* as "unlawful vaginal intercourse with a living woman who is not a right-hand possession (*milk al-yamīn*) or in the quasi-ownership of the man or not freely married or quasi-married in an Islamic state."⁹

The legal meaning of *zinā* has been defined by the Mālikites¹⁰, Shāfi'ites¹¹ and Ḥanbalites¹² as the unlawful and mutually consensual vaginal or anal intercourse between a man who is sane and who has reached the age of puberty (*bulgh*) and a woman who is not in his ownership.

⁸Al-Albānī. *Da'if Abī Dawūd*, hadith no.4428.

⁹Al-Kāsānī, *Badā'i' al-ṣanā'i'*, vol.7, p.33. "Right-hand possession" is an idiomatic expression meaning "slave".

¹⁰Mālik, *al-Mudawwana al-kubrā*, vol.4, p.40; Abū al-Wālid Muḥammad ibn Aḥmad Ibn Rushd, *The Distinguished Jurist's Primer (Bidāyat al-mujtahid)*, trans. Imran Ahsan Khan Nyazee, (Reading: Centre for Muslim Contribution to Civilization, 1996), vol.2, p.520.

¹¹Al-Suyūṭī, *al-Ashbāh wa al-naẓā'ir*, p.458

¹²Manṣūr ibn Yūnus ibn Idrīs al-Bahūfī (d.1051 AH/1642 CE), *Sharḥ muntahā al-irādāt* (Madina: al-Maktaba al-Salafiyya, n.d.), vol.3, p.342.

The legal definition of *zinā* is significant when defining rape, for most jurists hold that rape is committing *zinā* by force. For instance, al-Shāfi‘i regards rape as forcing a woman to commit *zinā* against her will.¹³ According to the Ḥanafites, illegal intercourse is considered rape when there is no consent and no deliberate action from the victim.¹⁴

In Mālik’s view, rape refers to any kind of unlawful sexual intercourse (*zinā*) by usurpation and without consent. This includes instances when the condition of the victims prevents them from expressing their resistance, such as insanity, sleep and being under age.¹⁵

The Ḥanbalites hold views similar to those of the Mālikites, besides taking into account any kind of force used as a denial of consent. For them, the threat of starvation or suffering the cold of winter can be regarded as against one’s will.¹⁶

From these juristic opinions, rape can be defined in Islamic Law as forcible illegal sexual intercourse by a man with a woman who is not legally married to him, without

¹³Muḥammad ibn Idrīs al-Shāfi‘ī (d. 204 AH/820 CE), *al-Umm* (Cairo: Dār al-Sha‘b, 1321 AH), vol.3, p.230; Ibrāhīm ibn ‘Alī ibn Yūsuf Abū Ishāk al-Shirāzī, Persian Shāfi‘ite jurist (d. 977 AH/1570 CE), *al-Muḥadhdhab fī fiqh al-Imām al-Shāfi‘ī*, ed. Zakariya ‘Umayrat (Beirut: Dār al-Fikr, 1995), vol.2, p.242.

¹⁴Muḥammad Amīn ibn ‘Umar ibn ‘Ābidīn (1252 AH/1836 CE), *Hāshiat radd al-mukhtār* (Beirut: Dār al-Fikr, 1387 AH), vol.4, p.30. Ibn ‘Ābidīn was a well known pre-modern Ḥanafite jurist born in Damascus in 1198 AH/1784 CE. His other work is *Majmū‘at al-Rasā’il*. See al-Ziriklī, *al-A‘lām*, vol.6, p.42.

¹⁵Mālik ibn Anas, *al-Mudawwana al-kubrā*, vol.4, p.401; Muḥammad ibn ‘Abd al-Raḥmān al-Maghribī al-Ḥaṭṭāb (d. 953 AH/1546 CE), *Mawāhib al-jalīl*, 2nd edn. (Beirut: Dār-al-Fikr, 1398 AH), vol.6, p.294. Al-Ḥaṭṭāb was a famous Mālikite jurist born in Mecca in 902 AH/1496 CE.

¹⁶Al-Bahūtī, *Kashshāf al-qinā‘*, vol.6, p.97.

her free will and consent.¹⁷ Considering illegal sexual intercourse (*zinā*) as part of rape reveals the criminal conceptual elements in which the purpose of rape is to have sexual excitement and pleasure regardless of the means and extent of the force used.¹⁸

B. Comparison between Rape and *Zinā*

Even though rape is known as *zinā bi al-ikrāh*, rape is different from *zinā* itself, for it is a physical assault which necessarily causes bodily harm. When the victim tries to resist her aggressor, he will use whatever force he needs to fulfil his intention, even to the point of killing her. When the victim is raped, the intercourse is painful, whereas it is an enjoyable experience for the participants in fornication. Rape is also psychologically destructive, for the victim will usually suffer severe trauma for a long time afterwards. Therefore, the victim of rape is not regarded as an adulteress. However, those who indulge in *zinā* are willing participants and so there is no victim.

Rape is a violation of honour. The woman participating in fornication is willing to lose her honour (or virginity in the case of a virgin) and to allow the man to ruin her chastity and reputation. *Zinā* is regarded as a violation of the right of Allah, whereas

¹⁷The modern definition of rape according to some Muslim authorities seems to derive from the opinions of those traditional jurists. In Pakistan, Section 6 of the Enforcement of Hudood Ordinance (VII of 1979) provides the definition and punishment of rape or what is termed *zinā bi al-jabr* (forcible illegal sexual intercourse). It states: "A person is said to commit *zinā bi al-jabr*, i.e. rape, if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely against the will of the victim; without the consent of the victim; with the consent of the victim when the consent has been obtained by putting the victim in fear of death or of hurt, or with the consent of the victim who gave consent in the belief that the offender is a person to whom she is validly married."

¹⁸It is strongly asserted that rape is sexually motivated, besides being a form of power and social control. See for example Randy Thornhill & Craig T. Palmer, *A Natural History of Rape: Biological Bases of Sexual Coercion* (Massachusetts: Massachusetts Institute of Technology, 2000), p.183.

rape is regarded as the violation of not only the rights of Allah but also those of a human being. It should be noted that proving the rights of Allah is much more difficult compared with proving the rights of human beings, which is made easier and more flexible in order to restore those violated rights to their true owner.

C. How to Establish Rape

Most of the aspects of rape are related to *zinā*. In terms of coercion and absence of consent, rape and adultery are two different crimes. Similarities include full intercourse between the male and the female, all of which, together with unlawfulness, fulfil the criteria of a crime deserving a *ḥadd* penalty.¹⁹ These are the criteria that the prosecution must prove to secure a conviction of rape, and therefore they must be analysed carefully to ascertain precisely the nature of the offence.

(a) Full Intercourse (*al-waḥʻ al-kāmil*)

To constitute rape, full sexual intercourse must take place. Since rape has been associated with *zinā*, the majority of jurists hold that penetration is necessary. Copulation must have been achieved by the insertion of the male sexual organ into the female reproductive tract, no matter how little it penetrates. Some scholars limit the insertion to the corona of the glans (*ḥashafa*). It is not necessary for the whole

¹⁹Abū al-Wālid Muḥammad ibn Ahmad ibn Rushd (d. 594 AH/1198 CE), *The Distinguished Jurist's Primer (Bidāyat al-mujtahid)*. Trans. Imran Ahsan Khan Nyazee (Reading: Centre for Muslim Contribution to Civilization, 1996) vol.2, p.478. According to Ibn Rushd, there are four offences liable to the legal penalties: (i) offences against the body or limbs, that is, injuries or wounds (*ḥirāḥ*), or a person's life, that is, homicide (*qatl*); (ii) offences involving the sexual organs, that is, unlawful sexual intercourse (*zinā*), or fornication (*sifā*); offences against arms; and (iv) violation of the law by making lawful the consumption of prohibited food and drink. Ibn Rushd was a well known Mālikite jurist born in Cordova in 520 AH/1126 CE.

sexual organ to penetrate the vagina, nor for it to achieve erection.²⁰ This opinion implies that sexual assault without penetration, although there might be ejaculation, does not constitute rape.

Since the use of the male sexual organ is necessary to establish *zinā*, a man is guilty of the crime only if he has used his own natural penis.²¹ If the whole penis or part of it is artificial, then he is liable not to the *ḥadd* penalty but to the *ta'zīr* penalty.²² Ibn Nujaim of the Ḥanafites asserts that even if the penis has been amputated, but there still remains a tiny part of the glans (*ḥashafa*), the man will be liable to the legal penalty. However, if there remains nothing of the glans, then this ruling is not applicable.²³ Similarly, the jurists also hold that there is no difference between sexual intercourse with or without an intervening layer as long as the bodily warmth can be felt.²⁴ In this vein, one may suggest that any kind of modern contraceptive such as the use of condom in illegal intercourse does not make any difference in the weight of the offence.

It is observed that the jurists use the phrase *iltiqā' al-khitānain* (the meeting of two circumcised sexual organs) to elaborate the meaning of full sexual intercourse. This phrase is based on the wording of a hadith, which states that after the meeting of the two sexual organs, a full bath is compulsory.²⁵ This hadith implies that after marital intercourse, both husband and wife must take a complete bath. This hadith implies

²⁰Al-Suyūfī, *al-Ashbāh wa al-naẓā'ir*, p.271.

²¹Al-Kāsānī, *Badā'i'*, vol.7, p.181.

²²Muḥammad ibn Aḥmad al-Khaṭīb al-Shirbīnī (an eminent Egyptian Shāf'ite jurist d. 977 AH/1570 CE), *Mughnī al-muḥtāj* (Beirut: Dar al-Fikr, n.d.), vol.4, p.144.

²³Ibn Nujaim, *al-Ashbāh wa al-naẓā'ir*, p.344.

²⁴Ibid.

the accountability of any penetration of the male's sexual organ into the female's reproductive tract, regardless of seminal emission. In this light, the jurists hold that emission or ejaculation is not necessary.²⁶

To support this argument Ibn Farḥūn of the Malikites quoted the opinion of his Mālikite colleagues who stated that *ḥadd* punishment should not be applied for the case of *musāḥaqa* (two females indulging in sexual pleasure with each other, i.e. lesbianism) since there had been no *iltiqā' al-khitānain*. Although the meeting of two female sexual organs is possible, there is definitely no penetration.²⁷ Thus the legal meaning of *iltiqā' al-khitānain* is full sexual intercourse that includes penetration.

Ibn Nujaim also states some legal consequences as a result of genital penetration. Among the rulings are the obligation to take a complete bath, the restriction of participation in rituals like the obligatory and voluntary prayers, the circumambulation of the *Ka'ba* (*ṭawāf*), delivering of the Friday sermon, reciting or even touching the Qur'ān, entering the mosque, performing the Pilgrimage (Ḥajj), and becoming committed to pay the dowry and provide financial maintenance in the case of marriage.²⁸ There will be no such obligations with the absence of penetration.

²⁵ Al-Albanī, *al-Silsila al-ṣaḥīḥa*, authentic hadith no.1261.

²⁶ Ibn Nujaim, *al-Ashbāh wa al-naẓā'ir*, p.335; al-Suyūṭī, *al-Ashbāh wa al-naẓā'ir*, p.271. This is based on a legal maxim *al-tābi 'u tābi 'un*, which means that a secondary judgement must be treated as it is and should not affect the principle.

²⁷ Ibrahim ibn 'Alī ibn Farḥūn, Mālikite jurist of Madīna (d.799 AH/1397 CE), *Tabṣīrat al-ḥukkām fī uṣūl al-aqḍīyah wa al-aḥkām* (Beirut: Dār al-Kutub al-'Ilmiyya, 1995), vol.2, p.195.

²⁸ Ibn Nujaim, *al-Ashbāh wa al-naẓā'ir*, pp.334–335; al-Suyūṭī listed 150 rulings covering *taghyīb al-ḥaṣḥafa* (the insertion of the male sexual organ into the vagina) in his *al-Ashbāh wa al-naẓā'ir*, p.270. In English Law, the Criminal Law Revision Committee has recommended that the definition of rape should not be extended to cover every act of sexual assault except penetration. See, the 15th Report of the Criminal Law Revision Committee, quoted in C.M. Clarkson & H.M. Keating, *Criminal Law: Text and Material*, 4th edn. (London: Sweet & Maxwell, 1998), p.67.

(b) Other Related Sexual Assaults

Forcible acts of buggery, oral sex, and sexual assault using a physical object to perform the act of penetration do not equally constitute rape. The penetration of the vagina or anus with an inanimate object is not rape, although it may be a criminal offence. However, the definition of rape does not include forced oral sexual intercourse and sodomy, which may accompany forced vaginal sexual intercourse. This is because, as mentioned above, the concept of rape is well established in popular thought and corresponds to a distinctive form of wrongdoing. In addition, the risk of pregnancy is a further important distinguishing characteristic of rape.

As stated earlier, in Islam, any type of sexual liaison outside marriage, whether with the use of the hand, the tongue, mouth, breasts, finger, stick or other foreign object, is strictly prohibited by law and religion, and whether done voluntarily or forcibly. Although the assailant might not be charged with *zinā bi al-ikrāh*, which justifies the *ḥadd* penalty, he will be charged with other sexual offences, which are punished with the *ta'zīr* penalty. Therefore, if the accused used his finger or other object to penetrate the victim's vagina, his act cannot be classified as rape. However, he can still be charged with attempted rape, indecent assault or outrage to the victim's modesty.²⁹

(c) Unlawful Sexual Intercourse

All the jurists agree that the main feature of the crime is the engagement in unlawful sexual intercourse. A man can be charged with committing rape when he has forced

²⁹ Izzat Muḥammad al-Namīr, *Jarā'im al-'ird* (Cairo: Dār al-'Arabiyya li al-Mausū'āt, 1984), p.253.

sexual intercourse onto a woman to whom he is not legally married. Since marriage is a contract, sexual intercourse between the couple is among the matters agreed upon in the settlement. According to al-Kāsānī of Ḥanafite, the *milkiyya* (ownership), which is the privilege of a husband over his wife, means the right of sexual pleasure as well as household leadership.³⁰ Therefore, both husband and wife are bound by this agreement and the wife's consent is considered implicit. Each has to entertain and satisfy the other's needs, for this will prevent them from approaching unlawful sexual pleasure. However, it does not mean that the wife is subjugated and subordinated. She has to obey her husband as long as his wishes do not contravene the *Sharī'a*. For his part, the husband is duty-bound to provide protection, maintenance and support.

A wife should not refuse her husband's invitation to have marital intercourse unless she has a reasonable excuse, such as being in a state of menstruation, post-natal bleeding, or observing the obligatory fasting in Ramadan, or if she is too exhausted.³¹ If the husband insists on having marital intercourse regardless of his wife's condition, it is considered an act of abuse against her. The wife has the right to complain to a judge about the abuses she has suffered in order to receive advice and legal action. The judge will advise the husband on the severity of his offence. However, if he ignores the court order, the court has the authority to issue a judicial divorce. The husband is also liable for any abuse or physical assault against his wife.

³⁰Al-Kāsānī. *Badā'i' al-ṣanā'i'*, vol.2, p.331. In a hadith narrated by Abū Hurayra, the Prophet said: "When a man invites his wife to his bed [that is, for marital intercourse], but she refuses [without a reason] and the husband spends the night feeling angry with her, the angels curse her until morning." See al-Albānī. *Ṣaḥīḥ sunan Abī Dāwūd*, authentic hadith no.1874.

³¹Al-Suyūṭī, *al-Ashbāh wa al-naẓā'ir*, p.460.

The jurists hold that the forcible intercourse between husband and wife is legal and there should not be a *ḥadd* penalty since it is not considered *zinā*.³²

However, one would suggest if a man forces his irrevocably divorced wife (*al-muṭallaqa al-bā'ina*) to have sexual intercourse, it is considered rape because they are no longer married and the man no longer has any rights over his ex-wife.³³

(d) Coercion

The main element of rape is the use of coercion (*ikrāh*) to impose sexual intercourse against the other person's will. It could be imposed with violence, duress, menace, or by filling the victim with fear of immediate and unlawful bodily injury by threatening her with violence. The victim also believes that there is a reasonable possibility of the assailant carrying out his threat.³⁴ A person is exempt from punishment under Islamic Law if he or she happens to commit a wrongdoing in four circumstances: when acting under compulsion; when under the influence of intoxicants; when insane; or when under the age of puberty. However, these circumstances do not legalize the crime itself.³⁵

³²Kamāl al-Dīn Muḥammad ibn 'Abd al-Wāḥid ibn al-Humām (d.861 AH/1457 CE), *Sharḥ fatḥ al-qadīr* (Egypt: Maṭba'a Muṣṭafā Muḥammad, n.d.), vol.7, p.150. Ibn al-Humām was a prominent Egyptian Ḥanafīte jurist born in Cairo in 790AH/1388CE. Among his related works, *Fatḥ al-Qadīr*, *al-Taḥrīr fī uṣūl al-fiqh* and *Mukhtaṣar al-Risāla al-quḍsiyya*. See Kaḥḥala, *Mu'jam al-Mu'allifin*, vol.10, p.264.

³³Al-Shirāzī, *al-Muḥadhdhab fī fiqh al-Imām al-Shāfi'i*, vol.7, p.320.

³⁴Muḥammad Shaḥḥāt al-Jundī, *Jarīmat ighṭiṣāb al-ināth* (Cairo: Dār al-Nahḍa al-'Arabiyya, 1990), p.112.

³⁵'Abd al-Qādir 'Awda, *al-Tashrī' al-jinā'i al-Islāmī muqāran bi al-qānūn al-waḍ'i*, (Beirut: Mu'assasat al-Risāla, 1985), vol.1, p.562.

Ikrāh or coercion has been define as forcing others, by means of threatening behaviour, to commit acts without their willingness or consent.³⁶ There are two types of coercion:

1. *Ikrāh nāqīṣ* or incomplete coercion. The assailant seeks to control his/her victim by using a number of threats, including kidnap, imprisonment, etc. However, the coercion is not taken to the level of a death threat.
2. *Ikrāh muljī'* or complete coercion. As for *ikrāh nāqīṣ*, the assailant uses threats to subjugate his/her victim. However, these threats carry severe consequences for non-compliance, such as grievous bodily harm or even death.

The majority of jurists are of the opinion that the first type of coercion does not affect the victim's liability for any action taken under those circumstances. Conversely, action taken by the victim when threatened with the second type of coercion is considered unavoidable and therefore he/she cannot be held accountable.³⁷

(i) Specifications of Coercion which Vitiates Penalty

Clearly, the opinion of most jurists is that several conditions should be present for the charge of forcible unlawful sexual intercourse. If any of the circumstances do not fulfil these conditions, then the action cannot be regarded as *ikrāh muljī'*. The accused is acquitted only if there was dire necessity or extreme urgency, where no lawful alternative was available. The specifications of coercion are as follows³⁸:

³⁶Badr al-Dīn Abū Muḥammad Maḥmūd ibn Aḥmad al-'Aynī, prominent Turkish Egyptian Ḥanafite judge (d.855AH/1451CE), '*Umdat al-qārī*' (Beirut: Dār Ihyā' al-Turāth al-'Arabī, n.d.), vol.24, p.103, "Bāb al-Ikrāh"; 'Alī ibn Muḥammad ibn 'Alī al-Jurjānī, Persian Ḥanafite jurist (d. 730 AH/1330 CE), *al-Ta'rīfāt* ed. Ibrahim al-Abyārī (Beirut: Dār al-Kitāb al-'Arabī, 1405AH), p.50.

³⁷'Awda, *al-Tashrī'*, vol.1, p.562.

³⁸'Awda, *Ibid.*, vol.1, p.568.

1. The threat must be dire with the strong likelihood of serious consequences such as extreme torture or death. The interpretation of the gravity of the threat differs from one person to another. Some people might not suffer unduly from a beating or false imprisonment or corruption, whereas others might suffer long-term or even permanent effects from one night's false imprisonment or a single punch or slap.

Any oral threats such as cursing or swearing are not taken into account. However, the threat of losing property is classified as *ikrāh* according to Mālik, Shāfi'ī and Aḥmad.³⁹ The size and value of the property depend on the individual's circumstances. Although Abū Ḥanīfa did not consider the threat of losing property to amount to coercion, most of his followers do so.⁴⁰

2. The coerced person must be in a situation that is extremely challenging. The circumstances are such that the person is forced to carry out the prohibited action to avoid harm or loss of life.
3. The threat must be imminent. If there is a possibility of postponement, then the situation would not be regarded as desperate. The victim has to estimate the gravity of the situation to the best of his or her ability.
4. The coercer must be able to inflict the threat. If he cannot do so, then there is no point in his applying coercion.⁴¹
5. The victim must be reasonably certain that if he or she ignores the command, he or she will actually suffer.

³⁹Al-Ḥaṭṭāb, *Mawāhib al-jalīl*, vol.4, p.45; Abū Yahyā Zakariyā al-Anṣārī, prominent Egyptian Shāfi'īte jurist (d. 926 AH/1520 CE), *Asnā al-maṭālib*, (Cairo: al-Maṭba' al-Maimana, n.d.), vol.3, p.282; Ibn Qudāma, *al-Mughnī*, vol.8, p.261.

⁴⁰Zain al-Dīn ibn Ibrahīm ibn Nujaim (d. 970 AH/1563 CE), *al-Baḥr al-rā'ik*, 2nd ed. (Beirut: Dār al-Ma'rifa, n.d.), vol.8, p.82.

⁴¹Al-Suyūṭī, *al-Ashbāh wa al-naẓā'ir*, vol.1, p.210.

6. There is no other way of avoiding the situation except by carrying out the unlawful action.
7. The unlawful action must be carried out with the least possible compliance and accompanied by a feeling of utter revulsion at what one is compelled to do.⁴²

Some of the Ḥanbalite scholars are of the opinion that menace and threats alone are not sufficient, and that torture and suffering should be included as pre-requisites for complete coercion. However, as rape is concerned, the majority of the Ḥanbalites⁴³ and jurists of the other schools believe that a threat alone is sufficient to be regarded as coercion. This is because coercion itself generates fear and suffering in the victim before he or she carries out the enforced action. The coercion itself forces one to act against one's will.⁴⁴

The immediate threat to the physical well-being of the woman, by the brandishing of a weapon or a verbal threat, is not the only means of coercion into submission. There also exist threats that can seriously affect the personality and social needs of the victim, for example, the threat of the loss of a job or of a suitor, or a threat to the well-being of relatives. These circumstances have been discussed extensively by traditional jurists. Ibn Farḥūn provides that any sort of literal promised threat is considered to be compulsion in the case of rape, including the threat of injuring a relative.⁴⁵ Ibn Ḥazm regards the threat of losing property as *ikrāh muljī'*, which

⁴²Awda, *al-Tashrī'*, vol.1, p.568.

⁴³Ibn Qudāma, *al-Mughnī*, vol.8, p.260.

⁴⁴Al-Sarakhsī, *al-Mabsūṭ*, vol.24, pp.89-91; Ibn Farḥūn, *Tabṣīrat al-Ḥukkām*, vol.2, p.88.

⁴⁵Ibn Farḥūn, *Tabṣīrat al-Ḥukkām*, vol.2, p.172; Muḥammad Shaḥḥāt al-Jundī, *Jarīmat ighṭiṣāb al-ināth*, p.116.

removes the victim's liability for the coerced action.⁴⁶ Al-Suyūfī asserts that coercion could be inflicted by any means which would make a sane person act accordingly to avoid the threat, and this would vary from one person to another.⁴⁷

It can be concluded that all kinds of threats, whether *ikrāh muljī'* or *nāqīṣ*, immediate or gradual, physical or moral, are regarded as types of compulsion which constitute rape in sexual crime and cause the charge of *zinā* to be replaced with that of rape. At the same time, it exempts the victim from legal liability. This principle is based on a precedent dating from the caliphate of 'Umar⁴⁸. A woman who was desperately thirsty requested a shepherd to give her a drink. He refused to give her a drink unless she surrendered herself for sexual intercourse. 'Umar consulted 'Alī regarding the appropriate penalty for the woman. 'Alī suggested that she should be freed because she was under duress.⁴⁹ Al-Kāsānī of the Ḥanafites asserts that there is no difference between *ikrāh nāqīṣ* and *ikrāh muljī'* with regard to exempting the victim of rape from punishment.⁵⁰ Al-Nasafī, of the same school, argues that *ikrāh muljī'* results in acquittal, while *ikrāh nāqīṣ* regulates *shubha*, that is, doubt about the conviction.⁵¹

⁴⁶Ibn Ḥazm, *al-Muḥallā*, vol.8, p.330.

⁴⁷Al-Suyūfī, *al-Ashbāh wa al-naẓā'ir*, vol.1, p.229.

⁴⁸He is Abū Ḥafs 'Umar ibn al-Khaṭṭāb ibn Nufayl al-Qurashī al-'Adawī, second rightly guided caliph, born in Mecca 40 years before *Hijra* (migration to Madīna) and died in Madīna in 23 AH/644 CE. See al-Zirikī, *al-A'lam*, vol.5, pp.45-46.

⁴⁹Aḥmad ibn al-Ḥusain ibn 'Alī al-Bayhaqī, Persian ḥadīth scholar and Shāfi'ite jurist from Khurāsān (d. 458 AH/1066 CE), *al-Sunan al-kubrā*, (Ḥaidar Ābād: Dā'irat al-Ma'ārif al-Nizāmiyya al-'Uthmāniyya, 1355 AH/1934 CE), vol.8, p.236; Abū al-Wālid Sulaimān ibn Khalaf al-Bājī, Spanish Syrian Mālikite jurist (d. 474 AH/1081 CE), *al-Muntaqā sharḥ Muwaṭṭā'* (Cairo: Dār al-Fikr al-'Arabī, n.d.), vol.7, p.145.

⁵⁰Al-Kāsānī, *Badā'i' al-ṣanā'i'*, vol.7, p.181.

⁵¹Abū al-Barakāt 'Abdullah ibn Aḥmad al-Nasafī, *Kashf al-asrār*, (Cairo: Matba'at Bullaq, 1316 AH), vol.2, p.585.

(ii) The Ruling for a Person Coerced into Committing Rape

A man forced to rape another person differs from the victim of rape in terms of penal exemption. The victim of rape is exempt from the *ḥadd* penalty. However, a man who is coerced into raping others is not necessarily exempt from any legal responsibility, even though he does not commit the crime willingly.

According to the preferred opinion of Mālik, a narration of Aḥmad and Shāfi‘ī, and an earlier opinion of Abū Ḥanīfa, even though the coerced assailant has been forced to carry out the rape, he is still liable and deserves the *ḥadd* penalty.⁵² Their argument is based on the fact that a man would commit fornication only when he had sexual desire, which must be initiated by him, not the victim.⁵³

However, the opinion of most jurists, as well as the second opinion of Mālik, another opinion of Aḥmad, and the preferred opinion of Shāfi‘ī, Ibn Qudāma and Muḥammad al-Shaybānī, is that the coerced person is exempt from any legal responsibility. Their reasoning is that the serious threat and torture will be imposed when he refuses to commit *zinā*, not during the act itself. It appears that the issue is the compulsion imposed, not the pleasure of the sexual intercourse.⁵⁴ Some Ḥanafite jurists suggest that he is exempt from the *ḥadd* penalty, although he has to pay a dowry.⁵⁵

⁵²Al-Kāsānī, *Badā‘i‘ al-ṣanā‘i‘*, vol.7, p.180; al-Sarakhsī, *al-Mabṣūṭ*, vol.24, p.88; al-Ḥaṭṭāb, *Mawāhib al-jalīl*, vol.5, p.294; Shihāb al-Dīn Abī al-‘Abbās Aḥmad ibn Muḥammad ibn ‘Alī ibn Ḥajar al-Ḥaytamī, Meccan Shāfi‘ite jurist (d. 974 AH/1567 CE), *Tuḥfat al-muḥtāj bi sharḥ al-Minhāj* (Beirut: Dār Ṣādir. No date), vol.4, p.91; Ibn Qudāma, *al-Mughnī*, vol.10, p.159; al-Shirāzī, *al-Muḥadḍhab*, vol.7, p.320.

⁵³Ibid.

⁵⁴Ibid.

⁵⁵Ibn ‘Ābidīn, *Ḥāshiat radd al-mukhtār*, vol.6, p.137.

Any action associated with *ikrāh muljī*' creates doubt about the assailant's liability, since he was unwilling to carry out the action. Therefore, he should be exempt from punishment. In my opinion, a man who is forced to rape another person should be exempted from legal action only after fulfilling the conditions of *ikrāh*. The reason is simply that the action was carried out under duress, not from lustful desire. Indeed, compulsion is regarded as an element of doubt which vitiates the *ḥadd* penalty.

(e) Absence of Consent

The word "consent" connotes the self-perceived attitude of individuals, particularly in legal matters. In Islam, one's consent determines the validity of any transaction. For example, in an economic transaction, the validity of buying and selling relies completely on mutual consent. A valid purchase must be based on the mutual consent of the vendor and the purchaser. Allah says in the Qur'ān:

O you who have believed, do not consume one another's wealth unjustly, but only in lawful business by mutual consent (4:29).

In the same vein, one's consent is a pre-requisite to marriage in Islam. The female has the right to accept or to reject an offer of marriage. Her consent is necessary to determine the validity of the marital contract. If she is forced to marry a man without her consent, she has the right to dissolve the marriage or have it annulled. This ruling is based on the hadith of Khansā' bint Khidām al-Anṣāriyya, who reported that her father gave her in marriage, however, she was not happy in that marriage. So she came and complained to the Prophet, who declared that the marriage was invalid.⁵⁶

⁵⁶Al-Bukhārī, *al-Jāmi' al-ṣaḥīḥ*, vol.9, Book 85, no.78.

In another hadith, 'Ā'isha reported that she asked the Prophet:

O Allah's Messenger! Should women be asked for their consent to their marriage?" He said: "Yes." She said: "A virgin, if asked, feels shy and keeps silent." He said: "Her silence means her consent."⁵⁷

With regard to illegal sexual intercourse, consent can be defined as positive cooperation in the act or an attitude pursuant to the exercise of free will where there is no sign of resistance. Consent is the most important question in a rape lawsuit. To prove the absence of consent in the forcible sexual intercourse is regarded as the burden of proof which should be provided by the complainant of rape.⁵⁸ Thus, the victim's circumstances at the scene and her ability to relate accurately what happened are important to the court. The most obvious proof of the absence of consent is the victim's physical and verbal resistance.⁵⁹

What is meant by the absence of consent in this context is that the complainant is not a willing party to having sexual intercourse with the accused. The lack of consent can be presumed from the act of physical resistance by the complainant to protect herself from being raped, provided that she is conscious and understands the nature, quality and consequences of the act and is free from any physical force.

The main difference between Islamic Law and modern secular laws is the consideration of "consent" as an evidence for the penalty. Generally speaking, in modern

⁵⁷Ibid., no.79.

⁵⁸Al-Shirāzī, *al-Muhadhdhab*, vol.7, p.320; Ibn Farhūn, *Tabṣirat al-ḥukkām*, vol.2, p.194.

⁵⁹Jenny Bargaen & Elaine Fishwick, *Sexual Assault: A National Perspective*. (New Zealand: Office of the Status of Women, Queensland, 1995), p.62.

secular penal systems, a consensual sexual relationship outside marriage is not regarded as a crime. The accused can defend himself against the charge of rape if he has evidence that he had a reasonable belief that the victim was consenting to the act of sexual intercourse without any resistance. If the accused did not, but should have realized that the victim was not consenting, or was submitting because of a perception of force or threat of injury, the accused is guilty of rape.⁶⁰

In many rape trials, the main issue is whether or not the victim consented to sexual intercourse. The determination of consent can lead to distressing cross-examinations of rape victims in court, and in the light of this probability, many rape victims fail to report the crime to the police or refuse to press charges against their assailants.

In Islamic Law, however, the existence of consent does not necessarily mean that the rapist is exempted from legal action. It is presupposed that even though a woman offers herself to someone other than her husband to have sexual intercourse, both are responsible for the crime of *zinā*.⁶¹ Her offer is null and void because no one can legalize what has been prohibited by God. They are both liable of the act and will be prosecuted for committing the crime of *zinā*.

In Islamic criminal law, it seems that the victim's exemption from legal liability marks the difference between rape and *zinā*. At the same time the matter of mutual consent and resistance within intercourse is crucial in determining whether a

⁶⁰Menachem Amir, *Patterns in Forcible Rape* (Chicago, IL: Chicago University Press, 1971), p.21.

⁶¹Ibn Ḥazm, *al-Muḥallā*, vol.11, p.246; al-Shirbīnī, *Mughnī al-muḥtāj*, vol.4, p.146; Ibn Qudāma, *al-Mughnī*, vol.10, p.156; 'Awda, *al-Tashrī* ' , vol.2, p.367.

conviction is of rape or *zinā*. Hence, it is very important to investigate the elements of consent and resistance in a rape case to ensure that justice prevails. The victim has to defend herself by whatever means from any kind of assault if she is capable to do so. This is based on the hadith quoted above: “Her silence means consent.” In most cases, where the assailant uses force, violence, or threat of immediate bodily injury, any sort of reasonable physical or verbal resistance is significant to convict rape. However, as already mentioned, in circumstances where the victim cannot resist, some jurists like al-Bahūtī include hunger, thirst or being abandoned in the winter cold as comparable threats for the conviction of rape.⁶²

Beside elements of pressure from one party and lack of willingness from the other, there are related circumstances which are considered to constitute rape. This is because legal responsibility according to Islamic Law is based on two important pillars: *idrāk* (awareness) and *ikhtiyār* (choice). Personal consent cannot be assumed by lack of physical resistance only. In each case it must be brought within the meaning of some of the conditions which reveal elements of force or fear of bodily harm prior to conviction of rape. The unlawful sexual intercourse is considered to be rape when the victim is legally, mentally and physically incapable of giving consent, while the perpetrator reasonably knows that. These circumstances, described below, are similar to *ikrāh* (coercion), because the victim does not comprehend the nature and implications of the act, and therefore her consent becomes irrelevant.⁶³

⁶²Al-Bahūtī, *Kashshāf al-qināʿ*, vol.6, p.97.

⁶³Mālik ibn Anas, *al-Mudawwana al-kubrā*, vol.4, p.401.

(i) Being under the Age of Consent

Muslim jurists divide the development of human maturity with regard to legal capacity into three stages of the lifespan. From birth to the age of 7 a child is called *ghair mumayyiz* (unable to differentiate). At this age a child does not have a comprehensive understanding. However, age limitation is subject to environmental influence. The next stage is from 7 to 15 years, when the child is called *ṣabi mumayyiz* (discriminating minor). During this stage, a child can understand and use his senses, although he is physically and emotionally immature. Finally, he reaches the stage of puberty (*bāligh*), which is the age of majority and adulthood with the full ability to understand. At this age, a person can use his whole body fully, including his sex organ.⁶⁴ That is the rationale of the following hadith:

Three people will not be accountable for their actions: a child until he has a nocturnal emission; a sleeping person until he wakes up; and an insane person until he recovers.⁶⁵

The jurists concur that criminal responsibility starts at the age of puberty. The law fixes the age of puberty as essential for legal consent to sexual intercourse, so that sexual relations with a woman below the “statutory” age of consent is regarded as rape, whether it has been accomplished by consent or not. This is because the highest degree of legal capacity and responsibility (*mukallaf*) is to be sane (*‘āqil*) and to have reached the age of puberty (*bāligh*).⁶⁶ It is argued that legal capacity cannot be

⁶⁴Awda, *al-Tashrī‘*, vol.1, p.601.

⁶⁵Abū Dāwūd, Sulaimān ibn al-Ash‘ath al-Sijistānī al-Azdī, eminent Persian hadith compiler (d. 275 AH/888 CE), *Sunan Abī Dāwūd*, ed. Muḥammad Muḥyī al-Dīn ‘Abd al-Ḥamīd (Cairo: Dā al-Fikr, 1980), *Bāb al-ḥudūd*, vol.4, p.558; al-Albānī, *Irwā’ al-ghalīl*, (Beirut: al-Maktab al-Islāmī, 1399 AH), hadith no.2043.

⁶⁶Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), p.124.

obtained under the age of puberty owing to the child's inability to understand entirely and make sound decisions.⁶⁷

It is very important to determine the age of puberty, which has its specific legal privileges. In Islamic Law, being under age always means being under the age of puberty (*bāligh*).⁶⁸ The majority of jurists assert that puberty is determined by physical indications, that is, the growth of pubic hair or menstruation for a girl and the ejaculation of semen for a boy. Where these indications are not observed, puberty is determined as beginning at the age of 15 according to the lunar calendar. Abū Ḥanīfā, however, states that the latest age at which puberty is reached is 18 years for a male and 17 for a female. Most Mālikites hold the same opinion.⁶⁹

The reason for this debate is to set an age limit in cases where there is no physical indication or a nocturnal emission, which would clearly prove the child's sexual development. Some jurists decide that 15 is the age by which a teenage boy would normally experience sexual arousal and the ejaculation of semen. Other jurists set it later at 18, arguing that the indications would not normally appear later than that.⁷⁰

To conclude, the age at which puberty is reached ranges from 15 to 18 years. It is the teenager's personal experience that determines the precise time, the decision being based on his physical and sexual development. Generally, by the age of 18, every teenager is considered to have reached puberty.

⁶⁷ Muhammad Shaḥḥāt al-Jundī, *Jarīmat ighṭiṣāb al-mar'a*, p.108.

⁶⁸ Al-Suyūṭī, *al-Ashbāh wa al-naẓā'ir*, p.40.

⁶⁹ Awda, *al-Tashrī'*, vol.1, p.602.

⁷⁰ Al-Kāsānī, *Badā'i' al-ṣanā'i'*, vol.7, p.171.

There has been disagreement among the jurists about a man who has unlawful sexual intercourse with an under-age girl. The Ḥanbalites hold that the man is liable to the *ḥadd* penalty, which is the strict punishment for adultery, even if the victim is only one day old. They argue that his action is on the same level as having vaginal intercourse with a woman to whom he is not legally married, and that there is no doubt (*shubha*) about it.⁷¹

An alternative opinion is attributed to some Ḥanafites, Ḥanbalites and Mālikites. They suggest that the *ḥadd* penalty is applicable only in the case where intercourse is possible. If the victim was too small and intercourse was impossible, and there was no evidence of sexual assault, the assailant could not be charged with *ḥadd*.⁷²

The first opinion appears to be more convincing and more relevant than the second on the ground that the intercourse meets the requirement of conviction of *zinā*, not the issue of fulfilling sexual desire itself. The culprit must be sentenced to either the penalty for *zinā* or a severe form of the *ta'zīr* penalty.

(ii) Insanity

In accordance with explicit traditions as well as consensus, the action of an insane person is not to be taken into account. Most jurists specify that sexual relations with a mentally defective or insane woman, providing the man knows of her condition, is

⁷¹Ibn Qudāma, *al-Mughnī*, vol.9, p.25; Sulaiman ibn Muḥammad al-Bujayrimī, Egyptian Shafī'ite jurist (d. 1221 AH/1806 CE), *Ḥāshiat al-Bujayrimī 'alā al-Khatīb*, (Cairo: Maktabat Muṣṭafā al-Bābī, 1951), vol.4, p.141.

⁷²Ibn Qudāma, *al-Mughnī*, vol.9, p.25; al-Sarakhsī, *al-Mabṣūṭ*, vol.9, p.75; Abū 'Abd Allah Muḥammad ibn Aḥmad ibn 'Urfa al-Dasūqī, prominent Egyptian Mālikite jurist (d. 1230 AH/1814 CE), *Ḥāshiat al-Dasūqī 'alā al-Sharḥ al-Kabīr* (Beirut: Dār al-Fikr, n.d.), vol.4, p.279.

considered to be rape because she has no mental capacity to consent. In either case, it is presumed that the woman does not know the nature and consequences of the act. In addition, there is no doubt that prohibited sexual intercourse could be fully achieved. The question of using force or posing threat and absence of consent are not the issue in such cases.⁷³

To support this ruling, there was a case during the time of ‘Umar where an insane woman was brought to trial and charged with committing adultery. ‘Umar consulted other Companions of the Prophet. ‘Alī suggested that she must be freed, based on the previous hadith which excuses an insane from criminal responsibility.⁷⁴

(iii) Unconsciousness

A similar principle of legal incapacity which exempts one from liability, based on free will and consciousness, is to be applied when the victim was unconscious. Unconsciousness is a kind of sickness in which one loses one’s senses and self-control. It is a deeper form of sleep with a similar inability to choose, decide, react and speak.⁷⁵ In this condition, the victim is unable to resist any indecent physical assault against herself. Unconsciousness may also have been caused by an intoxicant, narcotic or anaesthetic that the assailant administered to her. Intercourse with a female who is intoxicated to the extent that she is unable to resist is classified as an act of rape because the victim does not realize what is happening to her, whereas the perpetrator knows what he is doing.

⁷³Al-Sarakhsī, *al-Mabṣūṭ*, vol.9, p.54; al-Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol.7, p.34; al-Dasūqī, *Hāshiat al-Dasūqī*, vol.4, p.279.

⁷⁴For details of the hadith see p. 45 of this thesis.

⁷⁵Al-Jundī, *Jarīmat ighṭiṣāb al-ināth*, p.104.

Muhammad Asad asserts that the Qur'ānic expression "Do not attempt to pray while you are in a state of drunkenness" (4:43) does not apply exclusively to alcoholic intoxication. The term *sukr* in its wider connotation means any state of mental disequilibrium which prevents one from making full use of one's reasoning faculties. For example, it can also apply to a clouding of the intellect caused by drugs.⁷⁶

The consent given by the victim while in a state of intoxication is void, even though her intoxication is voluntary. The reason is that she is incapable of any deliberate consent, as is an insane person.⁷⁷

The jurists hold that sexual intercourse with a sleeping woman is considered as rape. This is because, she cannot exercise her will and the act is committed without her consent. This reasoning is based on the hadith narrated by Abū Mūsā al-Ashā'arī. A woman from Yemen was brought to 'Umar, having been accused of adultery. She said that she was sleeping when a man came and raped her. She woke up only after being captured in the man's grip. She was acquitted and given compensation.⁷⁸

(iv) Fraud

Consent obtained by fraud is not considered valid. There are many situations where the consent of a woman becomes ineffective and the accused is guilty of rape. The fraud could relate to the nature of the sexual intercourse or the identity of the person.

⁷⁶Muhammad Asad, *The Message of the Qur'ān*, (Pakistan: Kazi Publications, 1992), p.111.

⁷⁷Syed Ameer 'Alī, *Student's hand book of Mahommedan Law*, 7th ed., (Calcutta, India: Thacker, Spink & Co., 1925), p.44.

⁷⁸Al-Baihaqī, *al-Sunan al-kubrā*, vol.8, p.236.

Consent is considered invalid if a man pretends to be the husband of a woman with whom he has sexual intercourse, when the woman believes, owing to the perpetrator's intentionally deceptive behaviour, that he is her spouse.⁷⁹

Therefore, this kind of unlawful sexual intercourse is classified as rape as long as there is an element of fraud or mistake as to the nature and quality of the act. In short, if consent is obtained by fraud, the victim will be exempt from liability, whereas the offender remains responsible.

Conclusion

To convict an accused man of rape, a few general elements need to be proved, namely that the accused had unlawful sexual intercourse with a woman to whom he was not legally married; that there was penetration, and that the intercourse was not consensual but obtained by violence, threat or fraud. It is also necessary to prove that the assailant actually put pressure on the victim and that she did not consent at all.

⁷⁹Al-Namīr, *Jarīmat al- 'ird*, p.257.

3 EVIDENCE OF RAPE

Introduction

This chapter examines the admissible evidence for proving rape. Evidence is of supreme importance to the administration of justice. The conclusive evidence determines the nature of the verdict on any accused person. Islamic law provides a significant formula for the rules of evidence and procedural suit as prescribed by Prophet Muhammad: “*al-bayyina li man idda‘ā wa al-yamīn ‘alā man ankara*” which means: “The burden of proof is on the plaintiff and the person who refutes it will have to swear an oath.”¹ The general principle in this hadith implies that a claim, although authentic, is of no consequence if the claimant is unable to prove it. The proof of a matter requires presentation of evidence until the matter attains the degree of certainty. Certainty is that which can be established by sight or proof. It can only be dispelled by another certainty.²

The word *bayyina* (evidence) is used to connote “strong proof” because it makes the truth evident and obvious. Hence it refers to anything that manifests the truth.³ It is not limited to the testimony of witnesses but actually connotes a wider meaning of

¹Al-Tirmidhī, *Sunan al-Tirmidhī*, hadith no.1261; Muslim, *Ṣaḥīḥ Muslim*, vol.7, p.128, with the wording “if people’s claims were accepted on their face value, some persons would claim other people’s blood and properties, but the plaintiff has to provide evidence and the defendant has to make an oath.”

²S. Mahmassānī, *Falsafat al-tashrī‘ fī al-Islām*, trans. Farhat J. Ziadeh, (Kuala Lumpur: The Open Press, 2000), p.168. It is worth highlighting the fact that rules governing criminal evidence, in general, aim not only at proving the guilt of a culprit but also at proving the innocence of someone who is not guilty. See Sanad Nagaty, *The Theory of Crime and Criminal Responsibility in Islamic Law* (Chicago: Office of International Criminal Justice, University of Illinois, 1991), p.99.

³“*Al-Bayyina ismun li kulli ma yubayyinu al-ḥaqq.*” See Ibn Qayyim, Muḥammad ibn Abī Bakr al-Jawziyya (d. 751 AH/1350 CE), *al-Ṭuruq al-ḥukmiyya fī al-siyāsa al-syar‘iyya*, ed. Zakariyyā Amīrat (Beirut: Dār al-Kutub al-‘Ilmiyya, 1995), p.19; Ibn Qayyim al-Jawziyya, *l’Ām al-muwaqqi‘īm ‘an rab al-‘ālamīn*, (Beirut: Dār al-Jail, 1973), vol. 1, p.71; Ibn Farḥūn, *Tabṣirat al-ḥukkām* vol.1, p.172.



proof. The above hadith “the burden of proof is on the plaintiff” supports the argument that *bayyina* refers to anything which clarifies the plaintiff’s claim so that a verdict can be made accordingly.⁴

Medieval jurists such as Ibn Taymiyya,⁵ Ibn Qayyim,⁶ Ibn Farhūn⁷ and Abū Ḥasan al-Ṭarabulusī⁸ expand the scope of *bayyina* extensively to encompass every general form of proof. According to them, the word ‘*bayyina*’, as it is used in the Qur’ān and the *Sunna* and among the companions, refers to everything by which the truth becomes evident. Ibn Qayyim says:

There is no doubt that besides testimony of witness (*shahāda*), sometimes other kind of proof might be stronger than *shahāda*. The law giver does not abandon *al-qarā’in* (relevant facts), *al-amārāt* (surrounding facts) and *dalālat al-aḥwāl* (circumstantial facts) as a proof. Those who have a careful study of the sources of *Shari‘a* will take this matter into account.⁹

He supports his view by quoting the verse:

O ye who believe, if a wicked person comes to you with any news, ascertain the truth, lest ye harm people unwittingly (Qur’ān, 26:6).

This is the commandment of God dealing with the status of any information brought by a *fāsiq* (wicked) person. According to this verse we should not accept a report at

⁴Ibn Qayyim, *al-Ṭuruq al-ḥukmiyya*, p.10.

⁵Aḥmad ibn ‘Abd al-Ḥalīm ibn Taymiyya, (d. 728 AH/1328 CE), *Majmu‘ fatāwā Sheikh al-Islām ibn Taymiyya*, ed. ‘Abd al-Rahmān ibn Muḥammad ibn Qāsim al-Najdī, (Riyadh: Dār ‘Ālam al-Kutub, 1991), vol.35, p. 394-395.

⁶Ibn Qayyim, *al-Ṭuruq al-ḥukmiyya*, p.19.

⁷Ibn Farhūn, *Tabṣirat al-ḥukkām*, vol.1, p.172.

⁸Al-Ṭarabulusī, ‘Alā’ al-Dīn ibn Khalīl, *Mu‘īn al-ḥukkām*, p. 68.

⁹Ibn Qayyim, *l’lām al-muwaqqi‘īn*, vol.1, p. 71.

once or reject it entirely although a reporter is qualified to give witness. In other words, even if a person is disqualified from giving *shahāda* because of being *fāsiq* or *kāfir* (infidel) he can still give *bayyina*. The report must be investigated in advance before taking any further conclusion. The word “*fa tabayyanu*” means to ascertain the report by whatever means, including the circumstantial factors and other related information.¹⁰

Some scholars like Ibn Ḥazm added *‘ilm al-qāḍī* (personal knowledge of a judge) as a part of *bayyina*.¹¹ He said:

It is an obligation for every judge to make a decision on the basis of his knowledge in cases relating to blood, *qisās*, property, dignity and *ḥudūd* regardless of whether such knowledge is received before or after his appointment as a judge. As a matter of fact, the decision based on his personal knowledge is much better because it is certain. It is the strongest and most reliable *bayyina*. It is followed by confession and then testimony.¹²

¹⁰Ibn Qayyim, *al-Ṭuruq al-ḥukmiyya*, p. 19. He further concludes: “What is actually meant by *bayyina* in Islamic law is actually anything clarifies the truth. Sometimes it comes in the form of the testimony of four male witnesses, three male witnesses as in the case of bankruptcy, two male witnesses, one male witness, one female witness, taking an oath, refusing to take an oath and ranges of circumstantial evidence.”

¹¹Al-Zuhayli, Muḥammad Mustafā, *Wasā'il al-ithbāt*, (Damascus: Maktabat Dār al-Bayān, 1987), p. 25.

¹²Ibn Ḥazm, *al-Muḥallā*, vol. 9, p.426. There is another question which arises whether or not the judge is allowed to render a criminal conviction on the basis of extrajudicial knowledge. Apart from the Zāhirites, Muslim scholars prevent the judge from using his personal knowledge as evidence to sustain a criminal conviction because by doing so he becomes both judge and witness at the same time. They also refer to the practice of Caliph ‘Umar. He refused to judge a case he was aware of, saying: “Either I judge or testify.” Some jurists do allow a judge to rule on his extrajudicial knowledge in *ta'zīr* crimes exclusively.” Modern legal systems require the judge to disqualify himself if he has extrajudicial knowledge on the case he is judging. For instance, either by investigating, prosecuting, or defending one of its parties or providing testimony or expertise. See Sa'īd ibn Darwīsh al-Zahrānī, *Ṭarā'iq al-ḥukm al-muttafaq 'alaihā wa al-mukhtalaf fihā fī al-sharī'a al-Islāmiyya* (Jedda: Maktabat al-Ṣahāba, 1415 AH/1994 CE), pp.263-284; SANwarullah, *Principles of Evidence in Islam* (Kuala Lumpur, A.S.Nordeen), pp.144-148.

A. Testimonial Evidence

The word *shahāda* stands for the statement of a witness on any matter, oral or written, before a court to prove or disprove any disputed fact.¹³ The testimony (*shahāda*) of witnesses is the most important kind of *bayyina* (evidence) so much so that the term *bayyina* is sometimes used as a synonym for witness's testimony (*al-shahāda*).¹⁴ This trend can be found in most classical works on Islamic jurisprudence written by the earlier jurists in the Shāfi'ite,¹⁵ Hanafite¹⁶ and Hanbalite schools of law.¹⁷ This is because the testimonial evidence has been widely used in the Qur'ān in many cases, including transactions between people, divorce, bequest and criminal offences. For example:

And those who accuse chaste women and then do not produce four witnesses –lash them with eighty lashes and do not accept from them testimony (*shahāda*) ever after (Qur'ān, 24:4).

In a hadith, the Prophet said to Hilāl ibn 'Umayya who accused his wife of committing adultery:

Produce evidence or otherwise your back will be flogged with the *ḥadd* punishment.¹⁸

It is clear from the above Qur'ānic verse and hadith that the word *bayyina* implies *shahāda* i.e. oral testimony of the eyewitnesses because in order to prove adultery, testimony of four witnesses is required.¹⁹

¹³Ibn Farḥūn, *Tabṣirat al-ḥukkām*, vol.1, p.164.

¹⁴Joseph Schaht, *An Introduction to Islamic Law*, p. 192.

¹⁵Al-Shīrīnī, *Mughnī al-muḥtāj*, vol.4, p.461.

¹⁶Al-Sarakhsī, *Kitāb al-mabṣūṭ*, vol. 16, p.112.

¹⁷Ibn Qudāma, *al-Mughnī*, vol.11, p.403.

¹⁸Al-Bukhārī, *al-Jāmi' al-ṣaḥīḥ*, hadith no 2671. The *ḥadd* punishment here refers to *qadhf* (scandalous accusation of committing adultery).

As regard to proving rape, admissibility of testimonial evidence is very important since it can be taken from the victim herself, or the testimonial facts of an eyewitness or witnesses who can testify how the criminal act took place as they saw with their own eyes or heard with their own ears the cries of victim. Witnesses also include authorised investigators who inspect the aftermath of the scene, medical experts who undertake thorough medical inspection and other related individuals required by the court. Witnesses have to meet certain pre-requisites to be qualified to give evidence. Muslim jurists pay so much attention to the criteria of witnesses prior to testifying. They maintain that a witness should meet the following conditions in order to provide an acceptable testimony:²⁰

(a) Physical Qualities

(i) Maturity

Generally, according to the majority of jurists, a testimony of a minor is not admissible even if he understands the nature of his testimony.²¹ They support their opinion with the Qur'ānic verse:

And get two witnesses from among your own men (Qur'ān, 2:282).

This Qur'ānic verse clearly states that the witnesses should be adult men. They also reason by analogy that, since the confession of someone underage is invalid, his testimony should also be regarded as invalid. Similarly, since their testimony

¹⁹Ibn Qudāma, *al-Mughnī*, vol.12, p.5.

²⁰Ma'moun M. Salama, "General Principles of Criminal Evidence in Islamic Jurisprudence," in *The Islamic Criminal Justice System*, ed. M. Cherif Bassiouni, (London: Oceana Publications, 1982), p.116-119.

²¹Al-Kāsānī, *Badāi' al-ṣanāi'*, vol.1, p. 267; al-Shāfi'ī, *al-'Um*, vol.7, p.43; Ibn Qudāma, *al-Mughnī*, vol.9, p.164; Ibn Farḥūn, *Tabṣīrat al-ḥukkām*, vol.2, p.36.

concerning transactions is invalid, their testimony in matters pertaining to homicide and injury must also be disregarded.²²

However, the Mālikites consider the testimony of adolescents against other minors in homicide cases. It is also reported that Aḥmad ibn Ḥanbal allowed the testimony of minors in cases of assault and battery.²³ The Mālikites, however, put some conditions on accepting the underage testimony. The witnesses must be two or more rational male Muslims. In addition there must be no adults among them and they must bear witness before they disperse at the first place. Some Mālikites assert that it must be supported with other evidence such as the existence of a dead body testified by adults.²⁴

They argue that homicide cases need proof by whatever means. Abandoning a minor's testimony leads to perverting the cause of justice. In addition, there are precedents, narrated from the rightly guided caliphs, showing that they accepted the testimony of a minor. For instance, there is a case narrated by Aḥmad from al-Masrūq:

We were with 'Alī when five underage boys came, reporting that six of them went swimming when one of them drowned. Two of them accused the other three of drowning him and the other three testified that the two had drowned him. 'Alī ruled that the two had to pay 3/5 of the *diya*, while the three had to pay 2/5 of the *diya*.²⁵

²²Ibid.

²³Ibn Qayyim al-Jawziyya, *al-Turuq al-ḥukmiyya*, p.231; 'Awda, *al-Tashrī'*, vol. 2, p. 396.

²⁴Ibn Farḥūn, *Tabṣīrat al-ḥukkām*, vol.2, p.36.

²⁵Ibid; Ibn Qudāma, *al-Mughnī*, vol.9, p.164.

In my opinion, as rape is concerned, a minor's testimony is admissible and should not be abandoned totally because it is part of *bayyina* (evidence), provided that it is supported with other evidence.²⁶

ii. Reason and Good Memory

The witness must be mentally sound, and must possess mental faculties both when he observes the incident and when he testifies to it. No testimony is acceptable from an insane or mentally retarded person. He must possess an adequate memory to recall his observations. Those who are notorious for forgetfulness are not competent as witnesses. This is because eyewitnesses are strongly exhorted to be as certain in their testimonies as when they know that they see the shining sun.²⁷

iii. Speech

The witness must be able to speak. There is a dispute concerning the testimony of deaf mutes. The Ḥanafites, some Shāfi'ites and some Ḥanbalites reject the testimony of deaf mutes under all circumstances.²⁸

However, Mālik, Shāfi'ī, Ibn Mundhir and Ibn Ḥazm hold that it is acceptable if the mute has some means of understandable communication skill like body language and writing.²⁹ Some Ḥanbalites accept the testimony of a mute person as a competent witness only if he is capable of writing his testimony. This is because body language, signals and other sorts of communication which are understandable from the disabled

²⁶Based on the practice of the Prophet's companion, it is evident that minor's testimony is accepted if it is supported with other circumstantial evidence. See al-Zahrānī, *Ṭarā'ik al-ḥukm*, pp.71-76.

²⁷Ibid. vol.2, p.397.

²⁸Al-Shirbīnī, *Mughnī al-muḥtāj*, vol.4, p.427; Ibn Qudāma, *al-Mughnī*, vol.3, p.137.

²⁹Al-Dasūqī, *Ḥāshiat al-Dasūqī*, vol.4, p.168; Ibn Ḥazm, *al-Muḥallā*, vol.7, p. 241.

are accepted in matters like contracts, marriage and divorce. Similarly, their testimony must be accepted to prove crimes.³⁰

iv. Visual and Audible Perception

The witness must be visually and audibly capable so that he would have been able to observe the incident to which he testifies. The testimony of a blind person, similar to the deaf, is inadmissible, according to most jurists.

The Ḥanafites require that the witness is able to see when he gives testimony. Should a person become blind after witnessing the act, his testimony would not be admissible in court. But, some Ḥanafites, like Abū Yūsuf, accept such evidence regardless of the circumstances while Zufar³¹ limits it to crimes other than *ḥadd* and *qiṣāṣ*.³²

However, the Mālikites, Shāfi'ites and Ḥanbalites accept the verbal testimony of a blind witness as long as he is capable of hearing. As for perception of actions, a blind person's testimony is accepted concerning all acts witnessed prior to becoming blind, as long as he recognizes the accused by name and family relations.³³

The Zāhirites, similar to Abū Yūsuf, accept the testimony of a blind person in all circumstances. They argue that if a blind person is not trusted for his assurance, then

³⁰Ibn Qudāma, *al-Muqni'*, vol.3, p.688.

³¹He is Abū Huzayl ibn Qays al-Kūfī al-'Anbarī al-Bāzātī al-Tamīmī, born in 110 AH/728 CE in Basra, a great disciple of Abū Ḥanīfa who acknowledged that *al-qiṣāṣ* was a source of law (d. 158 AH/774 CE). See Kaḥḥala, *Mu'jam al-mu'allifīn*, vol.4, p.181.

³²Al-Sarakhsī, *al-Mabsūṭ*, p.vol.9, p.89.

³³Al-Shirbīnī, *Mughnī al-muḥtāj*, vol.4, p.445; Abū Ishāk Burhān al-Dīn Ibrāhīm ibn Muḥammad ibn Muflīḥ (d. 830 AH/1427 CE), *al-Mubdi' sharḥ al-Muqni'*, ed. Muḥammad Ḥasan Ismā'īl al-Shāfi'ī (Beirut: Dār al-Kutub al-'Ilmiyya, 1997), vol.10, p.237.

it will be unlawful for him to have sex with his wife since she could be someone else (*ajnabiyya*). According to Ibn Ḥazm, Allah commands us to accept evidence irrespective of whether it is from a blind or a normal eyewitness.³⁴

(b) Moral Quality

The most important required criteria of a witness is '*adāla*'³⁵ which can be defined as being impartial, honest, morally integrated with honourable record.³⁶ The majority of jurists consider a Muslim as '*ādil*' if he persistently avoids grave and venial sins in addition to being trustworthy. To fulfil moral qualification, a witness must also be a person of manliness (*al-murū'a*) i.e. being regarded as respectable by avoiding what takes away a person's respectability, such that valour and chivalry are attained and dishonour and disgrace avoided. Manliness is considered one of the basic elements of good character by all Islamic schools although there are some small differences in definition.³⁷ In this regard, a person who is known to be *fāsiq* (disobedient) who is on the opposite of *ādil* will be disqualified. This is based on the verse:

O ye who believe, if a *fāsiq* comes to you with any news, verify it
(Qur'ān, 49: 6).

³⁴Ibn Ḥazm, *al-Muḥallā*, vol.6, p.528.

³⁵El-Awa, *Punishment in Islamic Law*, p.125.

³⁶Hans Wehr, *Dictionary of Modern Written Arabic*, p. 596. See also Farhat Ziadeh, "Integrity ('*adālah*) in Classical Islamic Law" in *Islamic Law and Jurisprudence*, ed. Nicholas Heer, (Seattle: University of Washington Press, 1990), p.75-77. According to Ziadeh, in an Islamic society everything depends on the integrity of individuals and those who administer the law. In western society, there are all sorts of safeguards, whether in law, constitution, or convention that protect the right of individuals and groups, like separation of powers and the consequent balancing of authority in a state, writs of court (habeas corpus, certiorari, mandamus) and so on.

³⁷Ibn Farḥūn, *Tabṣīrat al-ḥukkām*, vol.1, p.173; al-Kamal ibn al-Humām, *Faṭḥ al-qadīr*, vol.6, p.39; al-Sarakhsī, *al-Mabsūṭ*, vol. 16, p. 121; al-Shirbīnī, *Mughnī al-muḥtāj*, vol.4, p.428; Ibn Muḥḥib, *al-Mubdi'*, vol.3, p.69; Abū al-Barakāt Aḥmad ibn Muḥammad ibn Aḥmad al-Dardīr, *al-Sharḥ al-ṣaghīr 'alā Aqrab al-masālik*, ed. Muṣṭafā Kamāl Wasfī (Cairo: Dār al-Ma'ārif, 1986), vol.4, p.166.

In the same vein, there is a hadith supporting the ruling of disqualifying a testimony of anyone with bad reputation:

The testimony of a liar (*khā'in*) (male or female), adulterer (male or female), and a hated enemy (*zī ghamr*) is not admissible.³⁸

With regard to knowing a person to be of good character, Abū Ḥanīfa and the Ṣāḥirites assume that a witness is *'ādil* unless proven otherwise, and the judge is not required to test the probity of the witness. According to the Ṣāḥirites, a person is *'ādil* if he is not known to have committed any serious crimes or grave sin and has not openly committed a venial sin.³⁹

However, the Mālikites, Shāfi'ites, Ḥanbalites and some Ḥanafites, hold that the judge has to verify a witness's *'adāla* even if his competence is not challenged by the litigants. In other words, a witness should not be considered *'ādil* until his *'adāla* is proven.⁴⁰ A Ḥanafite jurist, al-Jaṣṣāṣ⁴¹ states:

As you can observe today, most people are not characterized by integrity. Thus there is no way out of investigating the character of witnesses in all testimony.⁴²

³⁸Abū Dāwūd, *Sunan Abū Dāwūd*, vol.2, p.275; Ibn Mājah, *Sunan ibn Mājah*, vol.2, p.792; and al-Tirmidhī, *Sunan al-Tirmidhī*, vol.4, p.545.

³⁹Ibn Ḥazm, *al-Muḥallā*, vol. 9, 393; al-Bahūṭī, *Kashshāf al-qinā'*, vol.6; p.422, Ibn Qudāma, *al-Mughnī*, vol.10, p.149.

⁴⁰Awda, *al-Tashrī'*, vol.1, p. 404, 405.

⁴¹He is Aḥmad ibn 'Alī al-Rāzī al-Ḥanafī al-Jaṣṣāṣ, a Ḥanafite jurist of Baghdad (d. 370AH/981CE). See Kaḥḥāla, *Mu'jam al-mu'allifīn*, vol.2, p.7.

⁴²Abū Bakr Aḥmad ibn 'Amr Al-Khassāf (d. 260 AH/874 CE), *Ādāb al-qāḍī*, with commentary of Abī Bakr Aḥmad ibn 'Alī al-Rāzī al-Jaṣṣāṣ, (d. 371 AH/982 CE), ed. Farhat J. Ziadeh (Cairo: American University Press, 1978), p.290. For the constitutive characteristics of *'adāla*, see Muḥammad Ḍiyā' al-Ḍīn ibn al-'Ukhuwwa, *Ma'ālim al-Qur'ān fī aḥkām al-ḥisāb*, ed. Trans. R. Levy (London: Luzac, 1937-1938), p. 211.

Hence in order to know a witness's credibility, the court should have a certain mode of enquiry which is known as "*tazkiyat al-shuhūd*" (i.e. examination of a witness is credibility). This enquiry is necessary in all cases until the court is satisfied about their credibility.⁴³

(c) Legal Disqualification of a Witness

A witness may meet the above-mentioned conditions and become qualified to give testimony, but yet the judge might reject his evidence or disregard his testimony because of blood and conjugal relationship, partiality and enmity.⁴⁴

Pertaining to blood and conjugal relationship, apart from some Shāfi'īs, the majority of jurists, including the Ḥanafites, Mālikites and Ḥanbalites disqualify the testimony of major and minor branches of families for each other. For instance, the testimony of a father in favour of his son or the other way around is deemed unacceptable. Jurists also disqualify the testimony of spouses either for or against each other.⁴⁵

With regard to enmity, the majority of jurists agree that enmity between a witness and a party to a case arising out of worldly matters disqualifies the witness. Therefore, if a witness holds any hostile feelings toward the defendant or any other

⁴³Ibn 'Ābidīn, *Ḥāshiat radd al-mukhtār*, vol.4, p.8; Ibn Qudāma, *al-Mughnī*, vol.10 p.145; Ibn Ḥazm, *al-Muḥallā*, vol.8, p.178.

⁴⁴Ibn Farḥūn, *Tabṣirat al-ḥukkām*, vol.1, p.178; Ibn Qudāma, *al-Mughnī*, vol.9, p.188.

⁴⁵Abū al-Barakāt al-Nasafī, *Kashf al-asrār*, vol.2, p.22. In the same vein, Article 1702 of *the Mejelle* (a complete code of Ottoman Islamic civil law, trans., of *Majallat al-Aḥkām al-'Adliyya*) stipulates that "there must not be enmity as regards temporal things between the witness and the person against whom evidence is given." But article 1701 accepts as valid the testimony of a person in favour of his friend, provided that the two cannot, by operation of the law, dispose the property of each other. See Wael Hallaq "Inductive Corroboration Probability and Certainty" in *Islamic Law and Jurisprudence*, ed. Nicholas Heer, (Seattle: University of Washington Press, 1990), p.9.

party, his testimony is disqualified. For example, in a case where a man had a quarrel with the inhabitants of a village regarding a certain matter, the testimonial statements of the villagers in favour of each other were rejected on the grounds that they were made in collusion. Testimony from a hostile witness is deemed to bear suspicion as well as speculation.⁴⁶

Similarly, partiality renders evidence disqualified. A claim of partiality exists when there is a relationship between the witness and one of the parties which suggests partiality or a personal interest that may be advanced by the witness through his testimony.⁴⁷ A witness is partial when personal interest influences his testimony, whether it is his own interest or someone else's.

(d) The Procedural Pre-requisites of Testimony

i. Testimony Must be Given Before the Proceeding Court

The majority of jurists hold that it is necessary for the testimony to be given before or in the court.⁴⁸ Testimony given outside a court (trial) is not acceptable. The court is however authorised to depute someone to take the testimony of a witness outside the court, if necessary, especially when a witness is unable to attend the court. It is a legal responsibility for a witness to give evidence when he or she is summoned by the court. A witness's testimony is the most important evidence for lawsuits. In Islam, it is a major sin to hide evidence especially when there is no other person

⁴⁶Al-Shirbīnī, *Mughnī al-muhtāj*, vol.9, p.427; Ibn Qudāma, *al-Mughnī*, vol.10, p.167; *al-Sharḥ al-kabīr*, vol.4, p.176; Ibn Ḥazm, *al-Muḥallā*, vol.6, p.510.

⁴⁷Ma'moun M. Salama, "General Principles of Criminal Evidence in Islamic Jurisprudence," p. 118.

⁴⁸Ibn Rushd, *Bidāyat al-mujtahid*, vol.2, p.463.

witnessing the scene of the crime.⁴⁹ There is a clear command in the Qur'ān with regard to this ruling:

The witnesses should not refuse to come out for evidence when they are called (The Qur'ān, 2: 282).

However, the jurists differ over giving witness without any prior claim or order from the court? With regard to the rights of Allah, such as drinking alcohol and adultery, the Ḥanafītes do not encourage giving witness against a person who commits these offences secretly.⁵⁰ But, if the crime is severely dangerous (*mutahattikan*), it is highly recommended to bear witness for conviction although there is no particular request. Mālikites and Ḥanbalites take the same stance of recommending the concealment of one's personal sin such as *zinā*. But, if the person openly shows off and boasts of his crime, witness should be given against him.⁵¹ This is in compliance with the following hadith:

Whoever conceals the secret sin of his fellow brother, his secret will be concealed by Allah in this world and the Hereafter.⁵²

The Shāfī'ites hold the view that it is sinful for a witness to hide testimony when it leads to punishing others with the *ḥadd* penalty. Thus, in a case of *zinā* when only three come to give evidence, the fourth one will be sinful if he conceals his testimony.⁵³

⁴⁹Ibn Qudāma, *al-Mughnī*, vol.9, p.146; al-Zuhaylī, *Wasā'il al-ithbāt*, p.121; Ibn al-'Arabī, *Aḥkām al-Qur'ān*, vol.1, p.256.

⁵⁰Ibn 'Ābidīn, *Hāshiat radd al-mukhtār*, vol., 4, p.8.

⁵¹Al-Dardīr, *al-Sharḥ al-kabīr*, vol.4, p.175.

⁵²Ibn Qudāma, *al-Mughnī*, vol.3, p.677; the hadith is narrated by al-Tirmidhī, vol.4, p.34.

⁵³Abd al-Ḥāmid al-Shirwānī, *Hāshiat al-Shirwānī 'alā Ibn Ḥajr*, (Beirut: Dār al-Fikr, n.d.), vol.9, p.112.

It is worth to note that most of the jurists hold that for offences related to the rights of human beings such as *diyya*, the *ḥadd* of *qadhf* (accusations of committing adultery) and stealing, as well as civil rights there should be prior claim from the victim, his heirs or guardian in the court.⁵⁴ On the other hand, it is observed that most of the jurists concur that no prior claim is necessary in the crimes involving the right of Allah if it is committed openly and immorally. The best explanation for this is rape. Contrary to *zinā*, rape is not a private sin. The crime itself is an infringement of an individual's personal right. Whoever witnesses such an offence should lodge a report or bear witness in order to facilitate conviction. This is to protect both the rights of Allah and the rights of other fellow human beings.

ii. Authenticity

In order to be reliable and valid, the testimony must be authentic. The witness must have perceived the events he is testifying about with his own senses. There must be an intact means of transmission between the primal event and the subsequent utterance of the testimony.

The jurists agree that for some excuses, transmitted testimony is admissible provided that the authentic or direct testimony cannot be presented due to death, sickness or travel. But they disagree over accepting it in criminal cases. Abū Ḥanifā, the Shāfi'ites and the Ḥanbalites⁵⁵ do not accept transmitted evidence because of suspicion which raises doubt. This is on the ground that if one witness is told by another witness what to say, or is influenced by the testimony of another witness,

⁵⁴Ibn Farḥūn, *Tabṣirat al-ḥukkām*, vol.1, p.165.

⁵⁵Ibn al-Humām, *Sharḥ fath al-qadīr*, vol.6, p.54; al-Shirbīnī, *Mughnī al-muḥtāj*, vol.4, p.543; Ibn Qudāma, *al-Mughnī*, vol.10, p.187; Ibn Farḥūn, *Tabṣirat al-ḥukkām*, vol.1, p.282.

then the validity of his testimony becomes highly questionable, if not altogether worthless.

However, the Mālikites⁵⁶, some Shāfi‘ites⁵⁷, the Zāhirites, the Ḥanbalites in their second opinion⁵⁸, Ḥasan al-Baṣrī, Ibn Abī Laylā⁵⁹, Sufyān al-Thawrī⁶⁰, Laith ibn Sa‘d⁶¹, Iṣḥāk Ibn Rāhūyah⁶² and al-Zuhrī⁶³ generalize the admissibility of delegated evidence in all cases including *ḥadd*.⁶⁴

iii. Starting Testimony with an Oath

In order to avoid bias, the majority of jurists hold the view that witnesses must provide testimony under oath. This means that a witness must, in the very beginning of his testimony swear to God that he is telling the truth, the whole truth, and nothing but the truth.⁶⁵ Some jurists suggest that a witness must use the phrase “*ashhadu*” which means “I bear witness”, to indicate bearing witness and being certain of one’s

⁵⁶Ibn Farḥūn, *Tabṣirat al-ḥukkām*, vol.1, p.282.

⁵⁷Al-Shīrbīnī, *Mughnī al-muḥtāj*, vol.4, p.452.

⁵⁸Ibn Qudāma, *al-Mughnī*, vol.9, p.206-207.

⁵⁹He is Abū ‘Abd al-Raḥmān Muḥammad ibn ‘Abd al-Raḥmān ibn Abī Laylā al-Anṣārī al-Kūfī, the qādī of Kūfa for 30 years during both Umayyad and Abbasid reign (d. 148 AH/765 CE). See al-Shīrāzī, *Ṭabaqāt al-Fuqahā*, p.85.

⁶⁰He is Abū ‘Abd Allah Sufyān ibn Sa‘īd ibn Masrūq al-Thawrī al-Kūfī, an outstanding scholar of ḥadīth and jurisprudence of Kūfa in the second century of Islam (d. 161 AH/777 CE). See al-Ziriklī, *al-A‘lām*, vol.3, pp.104-105.

⁶¹He is Abū al-Ḥārith al-Layth ibn Sa‘d ibn ‘Abd al-Raḥmān al-Fahmī born in Cairo in 94 AH/712 CE, one of Mālik’s companion (d. 175 AH/791 CE). See al-Shīrāzī, *Ṭabaqāt al-Fuqahā*, pp.75-76.

⁶²Iṣḥāk ibn Ibrāhīm ibn Mukhlad ibn Ibrāhīm al-Marwazī known as Ibn Rāhūya, a Persian jurist and ḥadīth scholar who used to debate al-Shāfi‘ī in Mecca (d. 237 AH/851 CE). See Kaḥḥāla, *Mu‘jam al-mu‘allifīn*, vol.2, p.228.

⁶³Muḥammad ibn Muṣlim ibn ‘Ubaid Allah ibn Shihāb al-Zuhrī, a great early jurist and ḥadīth scholar born in Madīna in 58 AH/678 CE and died in Palestine in 124 AH/742 CE. See Kaḥḥāla, *Mu‘jam al-mu‘allifīn*, vol.12, p.21.

⁶⁴Their opinions have been related by Ibn Qudāma, *al-Mughnī*, vol.9, p.206-207.

⁶⁵Sanad Nagaty, *The Theory of Crime and Criminal Responsibility in Islamic Law*, p.101.

testimony, in addition to taking an oath. No other word can be substituted because it would be less affirmative, and cast doubt on the testimony.⁶⁶

iv. Relevancy of Testimony

The testimony must be legally relevant. The contents of the testimony must be related to the facts of the disputed case. In other words, the contents of the testimony must be in conformity with the facts mentioned in the complaint and there should not be any substantial contradiction between them. Generally, any material difference in the statements of the witnesses renders their testimony inadmissible. However, if the contradiction between the contents of the evidence and the complaint can be reconciled, it is considered reliable. The relevancy of testimonial facts is determined by the court.⁶⁷

v. Immediate Presentation of Evidence

The Ḥanafites invalidate a delayed testimony regardless of the excuses.⁶⁸ This is because any delay in the presentation of confession casts doubt on the evidence, making it invalid for proving a *ḥadd* crime and nullifies the penalty. They differ in defining the period of delay. Abū Ḥanīfā does not specify any length. Instead, he leaves it to the discretion of the judge to determine the proper extent, according to the circumstances and customs of the people. Abū Yūsuf and Muhammad al-Shaibānī specify one month, al-Ṭaḥāwī puts it at six months and al-Ḥasan ibn Ziyād

⁶⁶Ibn 'Ābidīn, *Hāshiat radd al-mukhtār*, vol.4, p.7. al-Shirbīnī, *Mughnī al-muhtāj*, vol.4, p.150. Ibn Qudāma, *al-Mughnī*, vol.9, p.70. Ibn Ḥazm, *al-Muḥallā*, vol.8, p.327.

⁶⁷Aḥmad Fathī Bahnasī, *Nazarīyyat al-ithbāt fī al-fiqh al-jinā'ī al-Islāmī*, p.72.

⁶⁸Ibn 'Ābidīn, *Hāshiat rad al-mukhtār*, vol.4, p. 9. Acceptable excuses are unavoidable obstacles such as travel, sickness, distance, and mental distress due to threats and terror.

puts it at one year.⁶⁹ These periods of limitation apply to all *ḥadd* crime except drinking alcohol, where delay is determined by the absence of the smell.

Interestingly, the Ḥanafites accept a late confession on the ground that it does not affect the validity of evidence. They argue that late testimony could be as a result of hesitation. Hesitation creates the suspicion that behind the motivation of giving witness lie ulterior motives such as hatred and enmity. Such testimony is inadmissible if it is suspected of being motivated by hatred. In contrast, there is no such suspicion of enmity in confessions since a person will never hate himself or do things against his own favour.⁷⁰

However, the majority of jurists, including the Shāfi‘ites, Mālikites, and Ḥanbalites, hold that a delayed presentation of testimony or confession does not necessarily cast doubt on the evidence. In other words, testimony or confession cannot be nullified presumptively by only a delay, but it is left to the judge to determine its credibility.⁷¹

B. Decisive Evidence

The evidence must be viable and sufficient prior to criminal conviction. Decisive evidence has to meet the following conditions:

(a) Conclusiveness of Evidence

Valid evidence must prove the occurrence of the crime and the guilt of the accused, clearly and explicitly. This means that testimony must clearly and explicitly prove

⁶⁹ Al-Sarakhsī, *al-Mabsūṭ*, vol.9, p.70.

⁷⁰ Al-Marghinānī, *al-Hidāya*, vol.2, p. 105.

⁷¹ Al-Shirbīnī, *Mughnī al-muḥtāj*, vol. 4, p.151; Ibn Qudāma, *al-Mughnī*, vol.9, p.76; Ibn Ḥazm, *al-Muḥallā*, vol.8, p. 175.

the occurrence of the criminal act. The requirement of conclusiveness of evidence is a corollary to the presumption of innocence, which is seen as a cornerstone of the structure of the Islamic criminal system. The fundamental principle for this is that certainty can only be negated by another certainty. And since every man is inherently innocent, only clear and convincing evidence can overcome that presumption.

The evidence must remain conclusive until the execution of punishment. If the evidence loses its conclusiveness during any stage of the trial prior to sentencing, for example if the witness changes his testimony and deprives it of its clear and convincing quality or if the defendant confesses in the investigation stage and retracts his confession before the judge, or confesses during the trial but withdraws his confession before the rendering of the judgment, this confession is no longer conclusive and cannot support a criminal conviction. Similarly, if new facts not known to the judge during sentencing come to light which might have cast doubt on the testimony of the witnesses or the validity of the confession, then the evidence lacks credibility and the verdict must be reversed.⁷²

(b) Consistency

The evidence provided by testimony must be consistent with any other evidence adduced by the judge pertaining to the circumstances of the crime.⁷³ If there is any contradiction in the testimony of witnesses in terms of specifying time and place, the nature of the criminal act and its subject, or when a witness retracts his testimony,

⁷²Ma'moun M. Salama, "General Principle of Criminal Evidence in Islamic Jurisprudence," p.113. See also Wael Hallaq, "Inductive corroboration, probability, and certainty", in *Islamic law and Jurisprudence*, p.9.

⁷³Nagaty Sanad, *The Theory of Crime and Criminal Responsibility in Islamic Law*, p.106.

such testimony is no longer conclusive. For instance, in the case of adultery, every witness must clearly and explicitly prove the act of the act of adultery. Any inconsistency renders their evidence invalid.⁷⁴ Likewise, if a woman complains to be a rape victim or confesses of committing adultery, and at the same time she is proven to be virgin. In this case, neither the evidence, nor the verdict based thereon, is valid.

If a contradiction occurs, the evidence becomes doubtful and therefore no longer conclusive. Thus, to secure a genuine corroboration, the testimonial statements must correspond with each other on points of fact and must be given independently.⁷⁵ The burden of proof must be consistent based on the principle “Doubt nullifies the *ḥadd*.” This is because legal punishment will not be imposed in cases of doubt, and conflicting evidence precludes a *ḥadd* punishment.⁷⁶

To conclude, all types of testimony must fulfil the general requirements of evidence. In order to be conclusive, the evidence must be comprehensively investigated and supported by other corroborating proofs. Testimonial facts have to be cross-examined to reach the requisite degree of certainty without any shadow of doubt.⁷⁷ The testimony also has to be relevant and consistent. The presence of all witnesses, facts and figures, and the time and place of the crime must be specified, and must be

⁷⁴Al-Sarakhsī, *al-Mabsūṭ*, vol.9, p.37; al-Sharbīnī, *Mughnī al-muḥtāj*, vol.4, p.149; al-Dasūqī, *Ḥāshiat al-Dasūqī*, vol.4, p.186; Ibn Ḥazm, *al-Muḥallā*, vol. 8, p.176; Ibn Qudāma, *al-Mughnī*, vol.9, p.73; Ibn Qudāma says if two men witnessing that the woman who the accused committed *zinā* with was white and the other two men witnessing that she was black, the testimony becomes inconsistent.

⁷⁵Article 80, *The Mejelle*, quoted from S. Mahmassānī, *Philosophy of Jurisprudence in Islam*, p.198. If the court has already given judgement based upon the original testimony, such judgement may not be set aside, but the witnesses must pay damages equivalent to the value of the subject matter of the judgement.

⁷⁶For details of this principle, see p. 151-157 of this thesis.

⁷⁷S. Mahmassānī, *Philosophy of Jurisprudence in Islam (trans)*, p.182.

consistent with other evidence.⁷⁸ The definiteness of the evidence depends on its corroboration with other facts and circumstances of the case.

The jurists are unanimous that every court of law is under an obligation to verify the reliability and validity of the witnesses and the authenticity of their statements.⁷⁹ This is known in the modern terms as the examination and cross examination of witnesses. All schools of jurisprudence agree that the judge must be convinced on the basis of the evidence submitted during the criminal proceedings. This does not mean that he is constrained to impose punishment once the legal elements of proof have been established, for he still has the authority to evaluate the persuasiveness of the evidence. He may discard the testimony of witnesses if he is not convinced of its validity, credibility, or reliability and may reject confessions if inconsistent with the facts revealed during proceedings.⁸⁰ Besides stipulating the number and gender of witnesses in some particular cases, the judge has the prerogative of requiring additional witnesses and further corroboration if he sees fit to do so. This is because the judge has to base his judgement on conclusive presumption, which can be described as an inference which amounts to the degree of certainty.⁸¹

C. *Qarīna* (Corroborative Evidence) in Proving Rape

Among the significant evidence to prove rape is the circumstantial and corroborative evidence (*qarā'in*). *Qarīna* (pl. *qarā'in*) is part of *bayyina* which literally means

⁷⁸Ma'moun Salama, "General Principle of Criminal Evidence in Islamic Jurisprudence," p. 112

⁷⁹Giving false testimony is a major sin punishable with severe punishment. Hanafites like Abū Yūsuf and Muhammad al-Shaybānī decree that a person who gives false testimony in the court should be whipped in public and sentenced to imprisonment. See al-Sarakhsī, *al-Mabṣūṭ*, vol.16, p.145.

⁸⁰Ma'moun Salama, "General Principles of Criminal Evidence in Islamic Jurisprudence," p.115.

⁸¹S. Mahmassani, *Philosophy of Jurisprudence in Islam (trans.)*, p.197, quoting Article 1740 of the *Mejelle*: "A conclusive presumption is also a ground for judgment".

combination and companionship (*al-muqārana wa al-muṣāḥaba*) because there are always circumstantial clues for any crime committed which accompany the criminal action.⁸² From this literal meaning, Ibn Qayyim defines *al-qarīna* as an indication (*al-dalāla*), a testimony (*al-ḥujja*), a sign (*al-‘alāma*), a hint (*al-amāra*) and a proof (*al-bayyina*).⁸³ According to al-Jurjānī *al-qarīna* means something which is an indication of what is being searched for.⁸⁴

Some modern jurists try to give a more precise meaning to *qarīna*. Muṣṭafā al-Zarqā⁸⁵ defines *qarīna* as: any tangible sign which correlates something invisible for what is used as a basis of argument.⁸⁶ Agreeing with this definition, al-Zuhaylī adds that there must be an apparent fact or act as the basis of argumentation which has a link with the invisible circumstance.⁸⁷

The jurists unanimously agree over the admissibility of *qarīna* for testimonial law.⁸⁸ This view could be generalized to all sorts of lawsuits whether civil or criminal. *Qarīna* is therefore, not only circumstantial evidence which functions as supporting evidence but could also be fundamental evidence which yields a certainty.

⁸²Ja'far ibn Ahmad ibn Fāris a Persian hadith scholar and lexicographer (d. 289 AH/902 CE), *Mu'jam maqāyīs al-lughā*, ed.' Abd al-Salām Hārūn, 3rd edition, (Egypt: Maṭba' al-Ḥalabī, 1402 AH), vol.5, p.76.

⁸³Ibn Qayyim, *al-Ṭuruq al-ḥukmiyya fī al-siyāsa al-ṣyar'iyya*, p.10.

⁸⁴Al-Jurjānī, *al-Ta'rīfāt*, p.174.

⁸⁵He is Muṣṭafā ibn Aḥmad ibn Muḥammad ibn 'Uthmān al-Zarqā' (d. 1357 AH/1938 CE), an outstanding, reputable and revered Ḥanafīte scholar in his time in Syria. He wrote a valuable book on Islamic legal maxims *Sharḥ al-qawā'id al-fiqhiyya*.

⁸⁶Muṣṭafā Aḥmad al-Zarqā', *al-Madkhal al-fiqh al-‘ām*, 6th edn, (Damascus: Matba'at al-Jāmi'a, 1959, vol.2, p.909.

⁸⁷Al-Zuhaylī, Wahba, *al-Fiqh al-Islāmī wa adillatuhu*, (Beirut: Dār al-Fikr, 1984), vol.6, p.644-645.

⁸⁸Ibn 'Ābidīn, *Hāshiat radd al-mukhtār*, vol.5, p.354; Ibn Farḥūn, *Tabṣirat al-ḥukkām*, vol.2, p.93; Ahmad ibn Idrīs al-Qarāfī (d. 684 AH/1285 CE), *al-Furūq*, (Beirut: 'Alam al-Kutub, 1985), p.167; 'Izz al-Dīn 'Abd al-'Azīz ibn 'Abd al-Salām al-Sulamī (d. 660 AH/1262 CE), *Qawā'id al-ahkām fī maṣāliḥ al-anām*, (Cairo: Maktabat al-Kulliyat al-Azhariyya, 1968), vol. 2, p.107.

The jurists disagree, however, on the use of *qarīna* in the case of a *ḥadd* offence. Most jurists, among them the Ḥanafites, Ḥanbalites and Shāfi‘ites, hold the view that *qarīna* is not acceptable to prove a *ḥadd* offence.⁸⁹ They base their view on the hadith of Ibn ‘Abbās that the Prophet said:

If I were to stone someone for the crime of *zinā* without evidence (*bayyina*), I would do so against that woman because there was a doubt in her speech, character and those who visited her.⁹⁰

According to these jurists, this hadith suggests that the Prophet himself discouraged the use of *qarīna* as evidence for *zinā*. If *qarīna* is admissible for conviction, the Prophet would have punished the woman referred to in the above hadith.

However, this claim can be argued with the fact that the Prophet did not punish the woman because of lack of evidence to prove *zinā*, not because of the inadmissibility of *qarīna*. The hadith provides that, in the absence of evidence (*bi ghairi bayyina*), the availability of such circumstantial evidence should not be used as a grounds of proof in a case of *zinā*. In addition, basically, *zinā* is a private sin and should not be exposed contrary to rape. Facts such as the accused’s behaviour, his/her regulars and individual’s track record are *qarīna* evidence which could be used corroboratively.

Those who support *qarīna* evidence for *ḥadd* cases are the Mālikites and some Ḥanbalites like Ibn Taymiyya and Ibn Qayyim.⁹¹ Ibn Qayyim notes:

⁸⁹ Ibn Qudāma, *al-Mughnī*, vol.10, p.192; al-Shawkānī, *Nail al-auṭār*, vol.7, p.160; al-Kāsānī, *Badā‘i ‘al-ṣanā‘i* ‘, vol.7, p.46; al-Shirbīnī, *Mughnī al-muḥtāj*, vol.4, p.149.

⁹⁰ Aḥmad ibn ‘Alī ibn Ḥajr al-‘Asqalānī, a Shāfi‘ite hadith scholar (d. 852 AH/1448 CE). *Fath al-bārī*, (Beirut: Dār al-Ma‘rifā 1379 AH), vol. 15, p.196.

If a judge neglects to use signs and indications (*qarīna*), many rights will be lost and falsehood will prevail.⁹²

These jurists support their argument based on the following authorities:

(a) Evidence From the Qur’ān

[Joseph] said, “It was she who sought to seduce me.” And a witness from her family testified, “If his shirt is torn from the front, then she has told the truth, and he is of the liars. But if his shirt is torn from the back, then she has lied, and he is of the truthful. So when he [i.e. her husband] saw his shirt torn from the back, he said, “Indeed, it is of your [i.e. women’s] plan. Indeed your plan is great” (Qur’ān 12: 25-28).

The story as presented in the Qur’ān was about prophet Yūsuf (Joseph) and the wife of the *Azīz* who raced to the door. Yūsuf ran away from her and she ran after him to bring him back to the room. She caught up with him and held on to his shirt from the back, tearing it so terribly that it fell off Yūsuf’s back. Yūsuf continued running from her, with her in pursuit. However, they found her master, her husband, at the door. This is when she responded by deceit and evil plots, trying to exonerate herself and implicate him. Yūsuf did not stand idle, but declared the truth and exonerated himself from the betrayal she accused him of. He stated that she pursued him and pulled him towards her until she tore his shirt. Had he called her to have sex with him and she

⁹¹ Ibn Qayyim, *I’lām al-muwaqqi’īn*, vol.1 p. 87; Ibn Farḥūn, *Tabṣirat al-ḥukkām*, vol. 2, p. 11.

⁹² Ibn Qayyim, *al-Ṭuruq al-ḥukmiyya*, p.99.

refused, she would have pushed him away from her and tore his shirt from the front.⁹³

The above verses clearly show that *qarīna* is of vital importance to proving legal liability.⁹⁴ The circumstantial evidence was used to determine who was right and who was wrong in the attempt of forcible sexual intercourse. The tearing of Yūsuf's shirt from behind is a strong form of *qarīna* which indicates that he was assaulted. It means that the aggression came from his opponent. In other words he did not molest the lady, but she was the one who molested him and try to force him to have sex.

In the above situation, *qarīna* was the only evidence to uphold justice. The parties involved were the wife of the governor ('Azīz) who had a public reputation, Yūsuf who was regarded as her slave and the governor himself who was the adjudicator in this particular case. Yūsuf had no other witness to testify for him except that certain *qarīna*.

Al-Rāzī points out that there are six *qarā'in* (pl. of *qarina*) that made the 'Azīz conclude that Yūsuf was innocent. Firstly, Yūsuf is a servant of both of the 'Azīz and his wife. Being the servant, it is impossible for him to betray his master by doing such an immoral action. Secondly, those who were present at the scene of the crime bore witness that Yūsuf was going toward the door. If he wanted to seduce her, he would not have run away from her. Thirdly, all of them knew that she had made

⁹³Şafī al-Rahmān al-Mubārakfūrī, *al-Misbāh al-munīr fī tahdhīb tafsīr ibn Kathīr*, translated and abridged *Tafsīr Ibn Kathīr* (London: al-Bīr Foundation UK, 2000), vol. 5, p.155-158.

⁹⁴Ibn Qayyim, *al-Ṭuruq al-ḥukmiyya*, p.5.

herself up beautifully while this was not the case with Joseph. Fourthly, from Joseph's humble lifestyle and decent behaviour, it was believed that he would not do such an indecent act. Fifthly, she expressed her accusation against Joseph in an unclear and fearful manner while he gently denied the act. Normally, it is the one who has done wrong who will feel afraid and nervous. Sixthly, it is said that the husband was a sexually weak person, so it was not bizarre if he was doubtful about his wife's statement."⁹⁵

According to al-Rāzī, after cross-examining the circumstantial evidence, the husband became certain that Yūsuf was telling the truth, and that his wife was lying when she hurled the accusation of betrayal at Yūsuf, and so said, "This false accusation and staining of the young man's reputation is but a plot among many that you women have."⁹⁶

Based on this verse, many Qur'ānic commentators and jurists approve the legitimacy of *qarīna* as a reliable evidence in solving legal disputes in the absence of other main evidence.⁹⁷

(b) Evidence from the Sunna

There was consensus among the Prophet's companions and the rightly guided caliphs about using *qarīna* to support a verdict. There was an incident where a woman came

⁹⁵ Al-Rāzī, Fakhr al-Dīn, Muḥammad ibn 'Umar a Persian jurist and commentator (d. 606 AH/1210 CE) *al-Taḥfīr al-kabīr* (Beirut: Dār 'ihyā' al-turāth al-'Arabī, 1999), vol.18, p. 123.

⁹⁶ Ibid., p.123-124.

⁹⁷ Al-Qurṭubī, *al-Jāmi' li ahkām al-Qur'ān*, vol.9, p.115; Ibn Farḥūn, *Tabṣirat al-ḥukkām*, vol. 2, p.101.

to caliph Omar complaining that she had been raped. She happened to fall in love with a youth from the Anṣār, but he paid no attention to her. She was angry with him. She took white egg and rubbed it on her clothes and between her thighs. Then, she came to ‘Umar crying that the man forced her to have sex and degraded the honour of her family, showing the marks on her clothes and body. ‘Umar consulted some women of Madina and they said that they found semen on her cloth and body. He wished to punish the accused. However, the accused appealed: “O *Amīr al-Mu‘minīn*, please reinvestigate my case. In the name of Allah I never committed the crime nor did I love her. She molested me but I refused. ‘Umar consulted ‘Alī. He asked permission to check up the proof. He took very hot water and poured it on the woman’s cloth and it boiled the egg. He took the cooked egg, smelled it and tasted it. He concluded that it was only an egg, not semen. He interrogated the woman and she confessed that it was her trick.⁹⁸

The lesson from this incident is that ‘Alī used a scientific method before arriving at the conclusion that the fluid was egg. This was accepted by ‘Umar and the rest of the Companions. There was no objection from the rest of the Companions regarding the reliability of ‘Alī’s method in proving the guilt of the woman. This precedent should be followed because they were decided by ‘Umar who was an authority and in viewing the fact that the Prophet in a most reputed statement said: “Abide by my *Sunna* and the *sunna* of the rightly guided caliphs after me.”⁹⁹

⁹⁸ Ibn Qayyim, *al-Ṭuruk al-ḥukmiyya*, p.49.

⁹⁹ Al-Albānī, *al-Silsila al-Ṣaḥīḥa*, hadith no 2735. The hadith has been verified as authentic.

To conclude, *qarīna* is admissible as supporting evidence, not the main and only evidence of conviction. Rape, as stated earlier, is a special case which deserves special criteria of prosecution, proof and punishment. Therefore, *qarīna* is essential and fundamentally acceptable evidence. Based on the array of authorities, views and arguments it is evident that *qarīna* is in itself an evidence (*bayyina*). Although it is not genuinely sufficient to convict *zinā*, it is admissible to deny it. Hence, any circumstantial evidence to show victim's resistance and unwillingness of intercourse is acceptable to deny *zinā*. Abandoning *Qarīna* evidence makes conviction more difficult. As a consequence, criminals will easily escape punishment. This is against the nature of Islamic law which is to preserve people's rights and restore justice.

D. Women's Testimony in Proving Rape

The jurists agree to accept testimony of women in matters other than *ḥadd* and *qiṣāṣ*. They also recognize the fact that women's testimony is admissible in circumstances not accessible to men such as virginity, menstruation, suckling etc. This is based on the report of Ibn Shihāb al-Zuhrī:

It is according to the *Sunna* that the testimony of women is permissible in matters to which men have no access.¹⁰⁰

However the general stance of the mainstream schools of law such as the Mālikites, Ḥanafites, Shāfi'ites and Ḥanbalites is to reject women's evidence in *ḥadd* and *qiṣāṣ* crimes.¹⁰¹ They deduce this ruling from the verse:

¹⁰⁰Abū Bakr 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaf*, ed. Ḥabīb al-Raḥmān al-A'zamī (Beirut: al-Maktab al-Islāmī, 1983), vol. 8, p.333; Fakhr al-Dīn 'Uthmān ibn 'Alī al-Zaylā'ī, Egyptian Ḥanafite jurist (d. 743 AH/1342 CE), *Tabyīn al-ḥaqā'ik*, ed. Aḥmad 'Izz 'Ināya (Cairo: al-Matba'a al-Amīriyya, 1315AH), vol. 4, p. 209. This ruling is cited in the Majelle, Art.1685. This includes birth, female defects, etc.

And for those of your women who commit lewdness call to witness four of you against them (Qur'ān, 4:15).

They base their argument on the ground that Arabic grammatical rules which states that numbers are marked with the opposite gender to their subjects. Thus, if a subject is feminine, the number is marked in the masculine. The number "arba 'atun" in this verse is marked with the feminine. Therefore the subject must be masculine. They also argue that, a woman's testimony may contain doubt, and, as is agreed, the *ḥadd* penalty is to be avoided when there is doubt.¹⁰² The jurists also rely on the report expressed by Ibn Shihāb al-Zuhrī,¹⁰³ that it was the practice from the time of the Prophet and the first two Caliphs that the testimonies of women in *ḥadd* crimes and murder are not acceptable.¹⁰⁴

However, there are some moderate opinions with regard to the testimony delivered by women in *ḥadd* cases. Ibn Ḥazm, in spite of his reputed strictness, insists that any evidence is essential to all judgements. According to him, a woman's testimony is undoubtedly evidence and it is acceptable in all cases provided the testimony of two women is considered as equivalent to that of a man. In order to convict *zinā* for instance, according to this school, there could be three men and two women

¹⁰¹ Al-Sarakhsī, *al-Mabsūt*, vol. 6, p.114; al-Shirbīnī *Mughnī al-muḥtāj* vol. 4, p. 441; Ibn Qudāma, *al-Mughnī*, vol. 9 p. 69; al-Mardawī, *al-Insāf*, vol.12, p. 86; Ibn Qudāma, *al-Kāfī fī fiqh Ahmad ibn Ḥanbal*, vol. 4, p. 537.

¹⁰² Awda, *al-Tashrīḥ*, vol.2, p.410. The linguistic hypothesis could be rebutted with the fact that in general, any command which comes in plural masculine "minkum" refers to both sexes male and female. And in Arabic, if the audience is males and females the masculine word is used to refer to the both sexes.

¹⁰³ Ibn Shihāb al-Zuhrī a well known hadith and fiqh scholar of Madina died 124 AH/742 CE. See A'zamī, M.M., *Studies in Early Ḥadīth Literature* (Beirut: al-Maktab al-Islāmī, 1968), p.278-92.

¹⁰⁴ According to al-Albānī, this report is weak (*da'if*), see *Irwā' al-ghalīl*, hadith no 2682; al-Shīrāzī, *al-Muḥadhdhab*, vol. 2, p. 333. Mālik ibn Anas, *al-Mudawwana al-kubrā*, vol. 4, p.83-84.

witnesses, or two men and four women, or one man and six women, or eight women.¹⁰⁵

Ibn Qayyim accepts a woman's testimony only when a male eye-witness is not available. This is based on the reason that rejection of a woman's testimony in this case will deny conviction. This will result in abandoning implementation of the *ḥadd*. Ibn Qayyim relates 'Atā' ibn Abī Rabāḥ¹⁰⁶ statement: "If eight women testified to me that a woman had committed *zinā*, I would convict her."¹⁰⁷ Ibn Qayyim also suggests that women's testimonies, alongside those of men are acceptable in any *ḥadd* crime, even *zinā* where the testimonies of two women and three men can establish the case. The same opinion was related from the reputed jurist, Ṭāwus.¹⁰⁸

Some modern Muslim scholars such as Professor Muḥammad Sidahmad,¹⁰⁹ are inclined to accept women's testimony in general, including *ḥadd* offences. Sidahmad argues on the basis of the well reported case of the Ghāmidīyya woman who made a confession which was accepted by the Prophet. Her confession was tantamount to making testimony against herself in a *ḥadd* crime. It was admitted as valid evidence (*bayyina*) and she was executed. Sidahmad concludes that women's testimony is admissible in *ḥadd* cases. He observes that the statement made by Ibn Shihāb al-Zuhrī is without any single clear supportive verses from the Qur'ān or authentic

¹⁰⁵ Ibn Ḥazm. *al-Muḥallā*, vol. 6, p.483.

¹⁰⁶ 'Atā' ibn Aslam ibn Ṣafwān al-Jundī, a prominent second generation jurist (*tābi'īn*) and Qur'ān commentator (d. 114 AH/ 732 CE). See Kaḥḥāla, *Mu'jam al-Mu'allifīn*, vol.6, p.283.

¹⁰⁷ Ibn Qayyim, *al-Turuq al-ḥukmiyya*, p.153.

¹⁰⁸ *Ibid.* p.153.

¹⁰⁹ Muhammad Ata Alsaid Sidahmad, *The Ḥudūd*, (Kuala Lumpur: 1995). p.174. The author was a professor at the Faculty of Law, International Islamic University Malaysia.

hadith. This assertion thus, cannot rebut the above proof. In addition, there is no explicit or implicit text bearing *qaṭ'ī al-thubūt* (definitive authentic evidence) or *qaṭ' al-dilāla* (definitive meaning) against women's testimony. He also argues that people's lifestyle has changed, women are more exposed and involved in a wide range of daily activities by engaging themselves in employment, education, traveling and business transaction.

Supporting the idea of admitting women's testimony in *ḥadd* crimes, Sidahmad goes further to assert that it would be irrational if an Islamic judicial system today were to reject the testimonies of women living in a hostel strictly prohibited for men who witness a rapist or male sneaker in the full act of *zinā*. It must be seriously noted that acceptance of this gender limitation in proving *ḥadd* crimes might enable criminals to avoid *ḥadd* punishments. Although *ta'zīr* punishment can be given instead, the enormously effective deterrence of the *ḥadd* punishment is lost.

With regard to the issue of two women witnesses equal that of a man, he advocates that it is true the Qur'ān mentions the substitution of a man's testimony with two women's testimony but in regard to the attestation of debt contracts. There is no verse or hadith which indicates the generality of the rule that, in everything, the testimony of one man always equals that of two women.¹¹⁰

Another contemporary scholar in Islamic criminal law, professor Anwarullah suggests that the tendency to disregard women's testimony in matters of *ḥadd* and

¹¹⁰Sidahmad, *The Hudūd*, p.174.

qiṣāṣ is a juristic view that aims at protecting the sanctity and modesty of women. It has nothing to do with degrading or dishonouring their status. This is actually based on the social structure of Muslim society wherein women are not involved in outdoor activities, not to mention to observe the incidents of the offences of *ḥadd* and *qiṣāṣ*. The testimony of women is not to be abandoned in total, he notes.¹¹¹

In my opinion, the rationale why classical jurists outlined restrictions such as the requirement of masculine eyewitnesses for a testimony is in order to reach certainty. They don't mean to disregard women's evidence in total. This does not also mean that the accused is free from the charge due to lack of evidence. Even if the numbers are sufficient, further investigation is still necessary. For the conviction of rape particularly, lack of male witnesses should not be a reason to negate conviction. A woman's testimony is similar to other testimonies, subject to scrutiny, examination and cross-examination and to all advanced methods of verification and checks of trustworthiness. Furthermore, any testimony either from a sufficient or insufficient number of witnesses, must be corroborated with further investigation and other supporting evidence to clear any doubt.

¹¹¹Anwarullah, *Principles of Evidence in Islam*, (Kuala Lumpur: A.S. Nordeen, 1999), p.22. It is regretted that no biographical data of the author available.

E. The Testimony of Non-Muslims in Proving Rape

Muslim jurists agree that adherence to the Islamic faith is a precondition for the acceptability of testimony. This is because one of the essential requirements of *'adāla* (religiously credible) of a witness is the observance of religious teaching.¹¹²

Muslim jurists are unanimous that in order to convict an accused Muslim who commits adultery there must be four religiously credible male Muslims. This is based on the word "*minkum*" mentioned in the Qur'ānic text:

And call to witness two just men among you (*minkum*) (Qur'ān, 65:2).

If any of your women are guilty of lewdness, take the evidence of four (reliable) witness from among you (*minkum*) against them (The Qur'ān, 4:15).

According to the jurists, the word (*minkum*), which means "from among yourselves" refers to the Muslims.¹¹³

In the case of *zinā* between non-Muslims, the testimonies of Muslim and non-Muslims are admissible. There is a clear authority for this ruling as the Prophet accepted the testimonies of four non-Muslims in a case of two Jews committing *zinā* in which both parties were executed.¹¹⁴

¹¹²Most of the jurists opine to accept non-Muslim testimony in matters other than *ḥadd* cases. In *ḥadd* cases, their testimony is not sufficient to impose the *ḥadd* penalty. However, the punishment will be substituted with *ta'zīr* punishment. See Anwarullah, *Principles of Evidence in Islam*, p.12.

¹¹³Ibn al-Humām, *Fath al-qadīr*, vol. 6, p.43; al-Shirbīnī, *Mughnī al-muhtāj*, vol. 4, p. 427; Ibn Ḥazm, *al-Muḥallā*, vol. 6, p.495; Ibn Qudāma, *al-Mughnī*, vol.9, p.70; al-Dardīr, *al-Sharḥ al-kabīr*, vol. 4, p. 184.

¹¹⁴Al-Bukhārī, *al-Jāmi 'al-ṣaḥīḥ*, (*bāb fī al-janā'iz*), vol. 2, p. 90; Muslim, *Ṣaḥīḥ Muslim*, (*Kitāb al-ḥudūd*), p.1326.

The jurists, however agree that evidence of two non-Muslims is generally acceptable in connection with a Muslim's will at the point of his death during a journey if Muslims are not available.¹¹⁵ This is based on the verse:

O you who believe! When death approaches any of you, and you make a bequest, (then take) the testimony of two trustworthy witnesses from among you (*minkum*) or two from other than you, while you are traveling and death befalls you (Qur'ān, 5:106).

However one can suggest that testimonies of reliable non-Muslims are admissible regardless of the presence or absence of Muslim witnesses. This is based on the fact that the Qur'ān describes the People of the Book as also subject to the normal moral variations which are distinctive of all human communities. Some non-Muslims are described by the Qur'ān as being of remarkable integrity:

Among the People of the Book are some who, if entrusted with a *qintār* (hundred pounds) of gold, will render the trust back. And among them are those who if entrusted with a single dinar (less than one ounce) of gold, will not give it back (Qur'ān, 3:75)

One can suggest that the above Qur'ānic description is applicable to all human beings in all times and all communities, and Muslims are no exception. There are some Muslims today who, if entrusted with a dinar, will also not give it back. So how is it possible for some to ignore the direct affirmation of the integrity of many non-

¹¹⁵Anwarullah, *Principles of Evidence in Islam*, p.11-12. According to the author, the situation in the present day has greatly changed. Many Muslims reside in non-Islamic states, and all countries around the world are connected and tied with one another through mutual pacts and different international and territorial organizations under which every state is bound to give rights to all its residents which are available to the residents of the other states. Moreover, all Islamic countries have signed the Geneva Convention and Charter of Human Rights which oblige them to treat non-Muslims like Muslims as far as possible keeping in view the laws of Islam. Thus depriving non-Muslims of giving testimony for and against one another is not fitting in present day circumstances.

Muslims and the express provision of admissibility of their testimonies as furnished by the two Qur'ānic verses quoted above.¹¹⁶

It appears to me that the jurists do not mean to reject non-Muslims' evidence in general. Being *'ādil* (religiously credible) is one of the most important requirements of a witness. Actually, all requirements regulated by jurists for admissible testimony aim at producing convincing certainty for a conviction. A judge must be very careful since a single reliable testimony is part of the court decision. Based on the above verse (al-Qur'ān, 5:106), a non-Muslim's testimony is admissible in circumstances where no Muslim witness is available. This principle is also applied in situations where there is no female Muslim medical expert to inspect a woman's private parts to confirm rape and to clarify other scientific evidence. On many occasions, it is not easy to get a single eyewitness, irrespective of his religion, who has seen the crime. Furthermore, a Muslim's evidence is not necessarily admissible. It has to meet the above-mentioned criteria and be corroborated by further investigation. Similarly, a non-Muslim's evidence also needs further inspection and clarification. Other corroborative evidence is necessary to reach certainty prior to conviction. It is possible that the evidence of non-Muslims' can be classified as circumstantial evidence which is also an essential means of establishing guilt.

¹¹⁶Sidahmad, *The Hudūd*, p. 185-187.

F. Experts' Reports in Proving Rape

Authoritative reports of forensic and DNA specialists, qualified surgeons and medical practitioners are widely acceptable method of proving guilt in modern times.¹¹⁷ The clarification of specialists in their realm of expertise is highly recommended in Islamic law. It is stated in the Qur'ān:

Ask those who have knowledge if you know not (Qur'ān, 16:43).

This verse is a command to the believers to approach a knowledgeable person or the expert on a matter about which they are ignorant.¹¹⁸ For judges, an expert report will assist the court to determine a fact at issue.

As a matter of fact, testimony of the eyewitnesses of the scene must be supported and collaborated with other corroborative evidence such as the opinion of experts. Hence seeking testimonial corroboration beyond the required standard of evidence is permitted by the *Sharī'a*.¹¹⁹ This is because the verdict must be based on conclusive evidence which leaves no reasonable doubt. The more serious the crime, the more convincing and satisfying evidence the court requires. While one witness's testimony would yield doubtful knowledge, the testimony of two trustworthy witnesses would enhance the credibility of testimonial evidence enough to render it highly probable.

¹¹⁷The expert's evidence was also recognized in the tradition. 'A'isha reported the occasion where the Prophet was extremely happy when an expert of lineage called Mujazzaz al-Mudlajī came while Usāma and his father Zaid ibn Ḥāritha were sleeping covering their heads. After a brief inspection he clarified that: "these legs are from one another" (they are related). The Prophet's foster son, Zaid was black while his son Usāma was white. The Prophet was very pleased with the confirmation. This tradition shows that an expert's report is admissible in supporting the fact. See Muḥammad ibn 'Alī ibn Muḥammad al-Shawkānī (d. 1255 AH/1388 CE), *Nail al-awṭār* (Beirut: Dār al-Jail, 1973), vol. 9, p. 80.

¹¹⁸Al-Qurṭubī, *Aḥkām al-Qur'ān*, vol. 3, p. 1083.

¹¹⁹'Abd al-Mālik ibn 'Abdullah, al-Juwainī (d. 477 AH/1085 CE), *al-Burhān fī uṣūl al-fiqh*, ed., 'Abd al-'Azīm al-Dīb, (Cairo: Dār al-Ansār, 1400 AH), vol. 1, p.573.

This highly probable knowledge assures our hearts and minds that the probability of an error is quite slim. Muslim jurists unanimously agree that the judge has the right to seek the opinion of experts in order to solve a delicate lawsuit.¹²⁰

In modern Islamic courts, the charge of rape must be corroborated with medical evidence to prove penetration and any forcible action, which can only be done by experts. A victim will have to go through a thorough medical check up. The medical experts will inspect her private parts, which includes vaginal swabs in order to find the existence of semen or any internal injury, in addition to other related tests in order to establish if there was penetration. A general physical inspection is also necessary because a victim will normally sustain injuries like bruises, contusions, scratches or abrasions on different parts of her body, as a victim is supposed to put up resistance.¹²¹

Interestingly, the classical jurists had already highlighted the importance of expert opinion in convicting illegal intercourse. They differ when there is a conflict in delivering testimony. If there are four male eyewitnesses who bear witness that a woman committed *zinā*, while four female witnesses bear witness that the woman is still a virgin, what will be the verdict? Al-Sha‘bī¹²², Abū Ḥanīfa and his disciples, Sufyān al-Thawrī and Shāfi‘ī hold the opinion that there is no *ḥadd* punishment to

¹²⁰ Al-Sarakhsī, *al-Mabsūṭ*, vol.9, p.178; Ibn Nujaim, *al-Ashbāh wa al-naẓā’ir*, 1985, p.223; ‘Abd al-Karīm Zaidān, *Niẓām al-qaḍā’ fī al-sharī‘a al-Islāmiyya*, (Baghdad: al-Maṭba‘at al-‘Āni, 1984), p.228.

¹²¹ See M. Waqar ul-Haq, *Islamic Criminal Laws, Hudud Laws & Rules* (Lahore: Nadeem Law Book House, 1994), p. 248.

¹²² He is Abū ‘Amr ‘Āmir ibn sharāhīl al-Sha‘bī, one of the eminent *ṭāb ‘īn* jurist and hadith scholar in Kūfa (d. 103 AH/721 CE). See al-Shirāzī, *Ṭabaqāt al-Fuqahā’*, p.82.

be inflicted on her. However, Mālik, Zufar and some of the Zāhirites take the stance of sentencing her.¹²³

In response to such circumstance, Ibn Ḥazm comments:

If the testimony is reliable and based on truth, it must be relied upon. It should not be abandoned since Allah commands us to pass judgement when the testimony is deemed to be correct. In contrast, if the testimony is dubious because of the nature of the witnesses, we cannot make any judgement because we are not commanded to pass a judgement upon baseless evidence. If those women say that she is a virgin, because the hymen in the vagina is not broken, it means that there was no physical penetration. The absence of penetration will nullify the requirement of implementing the *ḥadd* of *zinā* since there has not been complete intercourse. But if the women witnesses proclaim that the virginity wall is too deep inside the vagina, then the probability of penetration is high, and the punishment has to be implemented because we are quite sure that there is no doubt or suspicion on the male witnesses' testimony.¹²⁴

Interestingly, al-Nawawī, a Shāf'ite, asserts that if four men testified against a woman that she committed *zinā* and four women testified that she was a virgin, neither she nor her slanderer would be punished with the *ḥadd*.¹²⁵

¹²³Those jurists who chose not to implement *ḥadd* penalty on her support their argument based on the verse: "O You who believe! Stand out firmly for justice, as witnesses to Allah even though it is against yourselves" (Qur'ān, 4:135).

Their opponents who are in favour of conviction base their argument on the injunction of the verse of the Qur'ān pertaining to the requirement of four male witnesses to prove *zinā*. "And those who accuse chaste women, and produce not four witnesses, flog them with eighty stripes, and reject their testimony forever; they indeed liars (disobedient of Allah)" The Qur'ān, 24:4. For them, the implementation of the *ḥadd* is inevitable since it is clearly stated in the verse that the conviction is based on the testimony of four male witnesses. See Ibn Ḥazm, *al-Muḥallā*, vol. 12, p. 216.

¹²⁴Ibn Ḥazm, *al-Muḥallā*, vol.12, p. 217; al-Ramlī, *Nihāyat al-Muḥtāj*, vol.7, p.431; al-Sayyid Sābiq, *Fīqh al-Sunna*, vol.2, p.439.

¹²⁵Al-Nawawī, *al-Minhāj fī sharḥ Ṣaḥīḥ Muslim*, (Beirut: Dār al-Kayr, 1994), vol. 4, p. 151.

However, there has been a dispute among the jurists whether to determine the classification of expert evidence as a *khobar* (information) or a *shahāda* (testimonial evidence). Some scholars are of the opinion that expert evidence is to be considered as *khobar*. Generally, *khobar* is not subject to the requirements and restrictions of *shahāda*. Based on *khobar*, the opinion of a non-Muslim specialist is acceptable. Similarly, a female expert's report is not limited to cases or matters attended by the female gender, such as birth, determination of virginity and *'idda* only, but could be extended to a wide range of crimes.¹²⁶

The majority of jurists consider an expert's report to come under *shahāda*. Therefore, delivering a report is highly confidential and tantamount to giving *shahāda*. There must be pre-requisites and conditions prior to accepting this testimonial evidence as "*shahāda*". However, a testimony of a female expert is acceptable in the matters related to females' experience and privacy.¹²⁷

The Ḥanbalīte school holds that the evidence of experts is binding on the judge, especially if these witnesses are upright and men of integrity. But, a *ḥadd* conviction could not be imposed if there is doubt resulting from a few upright female experts. This opinion was agreed by al-Thawrī, al-Shāṭibī, Abū Thawr and others.¹²⁸

¹²⁶ Aḥmad al-Ḥuṣairī. *'Ilm al-qadā'*. (Egypt: Maktabat al-Azhar, 1977), p.35-36.

¹²⁷ Ibn Qayyim, *al-Ṭuruq al-ḥukmiyya*, p.84. According to Ibn Qayyim, the opinion of a medical practitioner is sufficient in serious injuries if two witnesses are not available. Even the statement made by a veterinarian pertaining the injury and illness of the animal is admissible.

¹²⁸ Aḥmad al-Ḥuṣairī. *'Ilm al-qadā'*, (Beirut: Dār al-kitāb al-'Arabī, no date), p.350.

The Mejlle states that reports of skilled persons are acceptable as authentic testimony, even if they do not use the word *shahāda*.¹²⁹ Documentation is also admissible instead of oral testimony. Thus the expert does not need to appear in person during the court trial. Article 69 of the Mejlle states:

Correspondence by writing is similar to oral communication.

Conflict between experts can be classified as a *shubha*. Articles 1712 and 1713 of the Mejlle state:

If witnesses make contradictions in respect of the subject-matter of the evidence, their evidence is not admissible. A conflict of expert evidence can also take place with documentary evidence and oral testimony.

However, an expert's opinion cannot provide an ultimate decision for the verdict because it is the judge who will decide. The opinion of an expert by itself may be relevant but would carry little weight in a court unless it is supported by other clear evidence such as confession and testimony of eyewitness. Invariably an expert's report amounts to important corroborative evidence.¹³⁰

To conclude, expert reports can be regarded as a part of *bayyina*, which includes "everything which clarifies the truth."¹³¹ An expert's clarification is extremely important regardless of sex and belief. I would incline to the opinion of classifying

¹²⁹*The Mejlle*, section 1689.

¹³⁰ Ārif 'Alī 'Ārif, *Başmat al-jīnāt wa dauruhā fī al-ithbāt al-jinā'ī: ru'ya Islāmiyya*. (Kuala Lumpur: Kaci Trading Sdn.Bhd. 2002), p. 49; Anwarullah, *Principles of Evidence in Islam*, p.118. Both authors opine not to inflict a *zinā* penalty if the conviction is based solely on an expert's report. The evidence would lead to *ta'zīr* penalty.

¹³¹The word *bayyina* in the hadith "*al-bayyina li man idda'ā wa al-yamīn 'alā man ankara*" refers to whatever method of is available whether it is testimony, confession or circumstantial evidence which can provide reliable evidence. See Sāliḥ ibn Ghānim al-Sadlān, *al-Qarā'in wa dauruhā fī al-ithbāt fī al-shari'a al-Islāmiyya*. (Riyadh: Dār Balansia, 1416 AH), p.51.

an expert's report as a type of *shahāda* for the conviction of rape. The report must fulfil the standard requirement of *shahāda* to avoid any bias. The fact that the jurists firmly accept female testimony for matters involving a female's private parts shows the importance and admissibility of their expertise. Similarly, the testimony of a non-Muslim is also acceptable in circumstances where there is no Muslim expert.

G. Deliberate Confession as Proof of Rape

Iqrār or confession has been defined as admission by the defendant of the matter claimed against him.¹³² It is the strongest proof and foremost admissible evidence for criminal conviction in Islamic law. Al-Māwardī observed that establishment of guilt happens in two ways: by admission and by proof.¹³³

Confession (*iqrār*) is different from testimony (*shahāda*) in term of admitting the accusation against oneself, while the latter aims at proclaiming accusation against others. Confession helps the court to conclude investigation. It is highly recommended for an offender to tell the truth although it is against him/herself. This is in conformity with the provision of the Qur'ān:

O you who believe, be staunch in justice, witnesses for God, even though it be against yourself (Qur'ān 4:135).

¹³²S. Mahmassani, *The Philosophy of Jurisprudence in Islam*, p.173. The author quotes Article 79 of *the Mejlle*: "A person is bound by his own admission."

¹³³Abū al-Ḥasan 'Alī ibn Muḥammad ibn Ḥabīb al-Baṣrī al-Baghdādī al-Māwardī (d. 450 AH/1056 CE). *al-Aḥkām al-ṣulṭāniyya*, (The Ordinances of Government), translated by Wafaa H. Wahba. (UK: Centre for Muslim Contribution to Civilization, 1996), p. 240.

This is also supported by the hadith: “Speak the truth even though it be against yourself.”¹³⁴

Ibn Qudāma states that it is necessary for the validity of a confession for the offences involving the rights of fellow human beings, such as *qiṣāṣ* and theft, that there must be a prior complaint against the accused in a court by the victim or his/her representative.¹³⁵

The jurists however concur that no prior complaint is necessary for confession in offences related to the pure rights of Allah such as *zinā*. The jurists are unanimous that voluntary confession which satisfies all requirements is acceptable as a means of proof. It is acceptable from a male, female, Muslim or non-Muslim. The hadith about the Prophet stoning an adulterer, based on admission, is very clear:

Avoid this abominable crime which God has prohibited. Whoever commits it, let him conceal himself with the protective concealment of God and repent to Him. Verily, whoever divulges his evil act to us, the book of God will be applied to him.¹³⁶

For *zinā* in particular, the jurists disagree on whether it is recommended to expose or hide. The Mālikites hold that hiding this kind of evil is incumbent.¹³⁷

¹³⁴ Jalāl al-Dīn al-Suyūṭī, *al-Jāmi‘ al-ṣaḡhīr*, (Beirut: Dār al-Kutub al-‘Ilmiyya, 1990), hadith no. 5004, on the authority of Ibn Najjar.

¹³⁵ Ibn Qudāma, *al-Mughnī*, vol.6, p.299.

¹³⁶ Muḥammad ibn ‘Abd Allah, al-Hākim al-Nīsābūrī (d. 404 AH/1014 CE), *al-Mustadrak ‘alā al-Ṣaḥīḥayn*, (Cairo: Dār al-Ḥaramain, 1997) vol.4, “Kitāb al-ḥudūd,” p.383; al-Baihaqī, *al-Sunan*, vol. 8 p.330.

¹³⁷ This is al-Dasūqī’s opinion in his *Hāshiat* on *al-Sharḥ al-kabīr*, as he narrates it from al-Mawaq, see al-Dasūqī, *Hāshiat al-Dasūqī*, vol. 4, p.175.

For Ḥanafites, it is optional, but concealing it is better because the Prophet taught Mā'iz to retract his confession.¹³⁸ The Zāhirites, however, opine that confession is recommended because the Prophet said that there is nothing that makes a person more honoured than his confession.¹³⁹

(a) Distraction and Withdrawal of Confession

Since confession is voluntary, it follows that the accused should be allowed to retract his confession. Muslim jurists opine that withdrawal of confession in *ḥadd* crimes such as adultery and drinking alcohol, and *qiṣāṣ* crimes, prevents the judge from rendering criminal conviction on the basis of such confession. If the retraction takes place after the judgment is rendered but before it is enforced, the judgment must be suspended. If it takes place after the start of enforcement and before its completion, the judgment must be suspended immediately and its consequences must be abrogated.

One may argue that, as a matter of fact, this concession is not applicable in litigated matters involving the rights of individuals. When a defendant makes an admission, he is not entitled to retract it if such an admission pertains to the rights of other individuals. As far as rape is concerned, both the right of God and the right of other fellow human beings are involved, thus other corroborative evidence should be taken into account in order to clear the ambiguity.

¹³⁸Ibn al-Humām, *Sharḥ fath al-qadīr*, vol.6, p.246.

¹³⁹Ibn Ḥazm, *al-Muḥallā*, vol.8, p.183.

(b) The Requirements of an Admissible Confession

The validity of a confession as criminal evidence sustaining a criminal conviction in Islamic law depends on conditions that the person making confession must be of sound mind (*‘āqil*), free from duress, threat and interdiction (*mukhtār*). In other words, confession must be rendered by the confessor when he/she is totally free from compulsion and provocation.¹⁴⁰ The confessor should also be of the legal adult age of majority (*bāligh*), and be able to understand the substance of what he is admitting and its legal consequences.¹⁴¹

According to Abū Ḥanīfa and some Ḥanbalites, a confession of *zinā* has to be repeated four times. Each confession stands for the testimony of one of the four witnesses required by the Qur’ān. They also base their opinion on the hadith referring to Mā‘iz who confessed to committing *zinā* when the Prophet ignored him at first, second and the third times. The Prophet only considered his confession at the fourth time.¹⁴²

Most Mālikites and Shāfi‘ites, on the other hand, do not require such repetition on the ground that confession is a sort of information (*al-khabar*) whose repetition bears no particular significance. Thus, according to them, a confirmation of admission is sufficient to render a verdict of guilty of illegal intercourse.¹⁴³ They base their argument on the hadith in which the Prophet delegated Unais to question a woman in

¹⁴⁰Mālik ibn Anas, *al-Mudawwana al-kubrā*, vol.4, p.426.

¹⁴¹Ibn Farḥūn, *Tabṣirat al-ḥukkām*, vol.2, pp. 56-59.

¹⁴²Ibn al-Humām, *Sharḥ fath al-qadīr*, vol. 4, p.117; Ibn Qudāma, *al-Mughnī*, vol. 10, p. 165.

¹⁴³Muḥammad ibn ‘Abd al-Bāqī al-Zurqānī (d. 1122 AH/1710 CE), *Sharḥ al-Zurqānī ‘alā al-Muwattā’*. (Egypt: Matba‘at Muṣṭafā Muḥammad, 1936), vol.4, p.175; al-Shirbīnī, *Mughnī al-muḥtāj*, vol. 4, p.150

a case of *zinā* and told him to stone her if she confessed. The Prophet did not instruct him about any repetition of the confession.¹⁴⁴

The confession must assert the commission of the crime unequivocally and explicitly without casting any doubt. The requirement calling for assertion in a confession has led some Muslim jurists like Ḥanafites to sanction that the confession must take place in and during a legal hearing.¹⁴⁵

The confession must also be in accordance with the factual situation. According to Abū Ḥanīfa, if a man confesses to an act of *zinā* with a woman the court has to get clarification from her for further investigation. But the majority of jurists hold the position that she does not need attend the trial for clarification, and, even if she denies the act, the court is obliged to sentence him with the penalty. Their argument is based on the hadith recorded by Abū Dāwud that the Prophet asked Mā'iz about the woman with whom he conducted the affair and named her, but there is no report that the Prophet summoned or questioned the woman. Abū Dāwud also includes a chapter entitled "If a man confesses to *zinā*, but the woman denies", where he narrates the case of a man who confessed to the Prophet that he had committed *zinā* and named a woman as his lover. The Prophet asked the woman about the incident, and she denied it. The man was flogged with the *ḥadd* but the woman was not punished.¹⁴⁶

¹⁴⁴Al-Bukhārī, *al-Jāmi' al-ṣaḥīḥ*, "kitāb al-wakāla, bāb al-wakāla fī al-ḥudūd", vol. 3, p.65.

¹⁴⁵Ibn al-Humām, *Sharḥ fatḥ al-qadīr*, vol. 4, p.118.

¹⁴⁶Abū Dāwud, *Sunan Abī Dāwud*, (*kitāb al-ḥudūd*), vol. 4, p.159. In another hadith, a man came to the Prophet confessing that he had committed *zinā* four times with a woman whom he named. The woman swore by God that she did not do it and flung the lie back at her accuser. He was flogged with

To conclude, the judge should ensure that the confession meets all the pre-requisites comprehensively. He is privileged to determine its validity to sustain criminal conviction. He also has the right to disregard such a confession if he realizes that it contradicts other circumstances in the case. For instance, a judge can reject a woman's confession to adultery if it is proven that she is still a virgin.

Even if the judge admits the confession, he is entitled to determine the scope of its validity. A confession implicates the confessor and no one else, not even his accomplice in the crime. If a man confesses to adultery with a certain woman, she should not be convicted on the basis of such a confession unless she makes a similar confession willingly.

In my opinion, as far as rape is concerned, a victim's complaint should not be regarded as a confession of *zinā*. This is because, contrary to confession, which entails one's claim of guilt, a rape victim has not caused the crime to take place. It is her right to name the criminal for further investigation in order to defend herself as well as to demand her right. The court should take immediate action to investigate the case. Her confession-cum- accusation alone is not enough to convict the criminal without further investigation. Similarly, if a person confesses to committing rape and names his victim, further investigation is necessary to provide conclusive evidence. To conclude, both the confession of the criminal and self-exculpatory statement of

the *ḥadd* of *zinā* and asked to furnish evidence regarding the woman. Unable to do so, he was again punished for *qadhf*. (Ibid 159-160).

the victim in the case of rape must fulfil all the requirements of validity. An admission of committing rape must go through a thorough inspection and be complemented with other corroborative evidence in order for the judge to reach a definitive conviction.

Conclusion

In Islamic criminal law, it is undeniable that evidence of an eyewitness's testimony is the most admissible and acceptable form of evidence. But it is not the only method of providing proof. It is a much more acceptable and realistic view to include certain modern approaches to prove crimes. Besides the prescribed methods of proving certain crimes, there is no restriction at all in the Qur'ān and the Sunna against adopting any other universally acceptable methods of proving. It is absolutely certain that most crimes will only be proven in accordance with reliable assessment. In other words, besides the confession of criminals, oaths and the testimony of witnesses, various other methods of proving such as medical check-ups, post mortem reports, finger-prints are perfectly acceptable by Islamic law. This in line with the notion that *bayyina* includes anything that clarifies the truth.¹⁴⁷

To prove rape in particular, some modern evidence such as CCTV, DNA tests and other scientific means can be regarded as fundamental corroborative evidence prior to conviction. They must not be abandoned in order to reach the certainty of identifying the victim and the criminal as well as to confirm that penetration has

¹⁴⁷The word *bayyina* in the hadith "*al-bayyina li man idda'ā wa al-yamīn 'alā man ankara*" refers to whatever method of proving whether it is testimony, confession or circumstantial evidence which can provide reliable evidence. See Šāliḥ ibn Ghānim al-Sadlān, *al-Qar'ā'in wa dauruhā fī al-ithbāt fī al-sharī'a al-Islāmiyya* (Riyadh: Dār Balansia, 1416 AH), p.51.

taken place and that there was forcible assault and resistance beyond reasonable doubt. This is not in any conflict at all with the principles of *Sharīʿa*. The different views of the jurists as mentioned above which are based on *ijtihād* supported by evidence from the Qurʾān and the Sunna provide us with a plethora of resources for further deduction to meet modern necessities in compliance with the spirit of the *Sharīʿa*.

4 The Victim's Evidence in Prosecuting Rape

Introduction

Prosecution of rape is complicated because it involves violence, oppression, and usurpation of an individual's personal rights; it also contains elements of *zinā* in terms of sexual intercourse. The problem arises in some modern Islamic courts whether or not to adopt the same standard of proof for *zinā*. In Pakistan, the legal system has provided the same standard of proof requiring the testimony of four male witnesses. As a result many rape offences fail to be convicted due to lack of witnesses.¹ On the contrary and unfortunately, sometimes the court has concluded that intercourse was therefore consensual, and consequently charged rape victims with *zinā*.² This chapter examines the position of victim's evidence in proving rape.

A. Fornication (*zinā*) and Rape: Different Method of Obtaining Proof

Based on the general assumption, the testimony of four male eyewitnesses, or a criminal's confession is the only way of convicting *zinā*. To convict a person for the offence of *zinā* based on the testimony of four eyewitnesses is almost impossible. Throughout recorded history, no one has been convicted of *zinā* by four witnesses.

¹ The Offence of *zinā* (Enforcement of Hudood) Ordinance, 1979, Section 8 provides the proof of *zinā* or *zinā bi al-jabr* liable to *hadd* either by confession of the accused or the testimony of four male adult witnesses. See M. Waqar ul-Haq, *Islamic Criminal Laws (Hudood) Laws and Rules with up to Date Commentary*. (Lahore: Nadeem Law Book House, 1994), p.151.

² This is because of the assumption that an allegation of rape is an admission of sexual intercourse, therefore the dismissal of the prosecution case amounts to an implied confession of adultery or fornication. In Pakistan, in 1985, Safia Bibi, a sixteen year old nearly blind domestic servant reported that she was repeatedly raped by her employer and his son, and became pregnant as a result. When she charged the man with rape, the case was dismissed for lack of evidence, as she was the only witness against them. Safia, however, being unmarried and pregnant, was charged with *zinā* for not having conclusive evidence to show that the unexplained pregnancy was because of rape. The Session court at Sahiwal convicted her for zina and sentenced her to 3 years rigorous imprisonment, 15 lashes, and a fine of Rs.1000/-. (Bibi v. State, 1985 P.L.D Fed. Shariat Ct.120). See Asma Jahangir and Hina Jilani. *The Hudood Ordinances: a Divine Sanction?* (Lahore: Rhotas Books, 1990), p.88.

Circumstantial evidence in the absence of direct and positive evidence about penetration does not constitute the offence of *zinā*. Circumstantial evidence may be used as corroboration but cannot be made the basis of a conviction for *zinā*.³

The requirement of proof and its exigencies is precisely to prevent carrying out severe punishment which could be recovered by sincere repentance. By limiting conviction to only those cases where four individuals actually saw sexual penetration take place, the crime will realistically only be punishable if the two parties are committing the act in public, in the nude. Thus, the wisdom of this harsh penalty is to deter the public aspect of this form of sexual practice. The crime is, therefore, linked to gross public indecency rather than private sexual conduct.

There is no justification for applying those evidentiary restrictions in forcible sexual assaults. Rape is an indecent assault against a person's honour, not a personal sin. It does not make sense to restrict the evidence of rape to four male eyewitnesses' testimony. In other words, it is not appropriate to apply the same mechanism of proof for crimes of two different natures. There are convincing arguments to support this proposition.

a. Textual Evidence

The texts of the Qur'ān and *Sunna* admittedly cover all events either explicitly or through indirect indications. There is explicit textual evidence proving that rape is a different notion from *zinā*, especially in terms of proving.⁴

³M. Waqar al-Haq, *Islamic Criminal Laws*, p.128.

‘Abd al-Jabbār ibn Wā’il reported that at the time of the Prophet a woman was raped and she was vindicated from punishment:

When a woman went out for prayer, a man attacked and raped her. She shouted for help and the man ran away. When a man came by, she said: “That man did such-and-such to me.” When a group of the *Anṣār* came by, she said: “That man did such-and-such to me.” They went and seized the man whom they thought had had intercourse with her and brought him to her. She said: “Yes, this was the one.” Then they brought him to Allah’s Messenger.

When Allah’s Messenger was about to pass sentence, the man who had assaulted her stood up and said: “Apostle of Allah, I was the man who forced her against her will.”

The Prophet said to the woman: “Go away, for Allah has forgiven you.” Regarding the man who had had intercourse with her, he said: “Stone him to death.”⁵

From an analysis, it is noted that this hadith is mentioned by al-Tirmidhī, al-Nasā’ī and Ibn Abī Shaiba.⁶ It is observed that there are narrations from different chains supporting the same meaning, if not the wording. However, all chains reporting the incident go back to ‘Abd al-Jabbār ibn Wā’il.⁷

⁴According to Shāfi‘ī, Aḥmad ibn Ḥanbal and one view which is attributed to Abū Ḥanīfā, whenever there is a *naṣ* on a matter, *qiyās* is absolutely redundant. *Qiyās* is only applicable when no explicit ruling could be found in the sources. Since recourse to *qiyās* in the presence of *naṣ* is *ultra vires* in the first place, the question of the conflict arising between the *naṣ* and *qiyās* is therefore of no relevance. See Muḥammad Abū Zahra, *Uṣūl al-Fiqh*, (Cairo: Dār al-Fikr al-‘Arabī, 1958), p. 200.

⁵Al-Bukhārī, *al-Jāmi‘ al-ṣaḥīḥ*, vol.6, p.254; al-Bayhaqī, *al-Sunan al-kubrā*, vol.8, p.235; al-Suyūfī, *Jāmi‘ al-uṣūl*, vol.3, p.504.

⁶‘Abdullah ibn Muḥammad ibn Abī Shaiba, *al-Muṣannaḥ fī al-‘aḥādīth wa al-āthār*, ed. ‘Abd al-Khālīq al-Afghānī (Bombay: al-Dār al-Salafīyya, 1983), vol.5, p.504.

⁷Most of the commentators and critics of the books of hadith suggest that this hadith is weak because ‘Abd al-Jabbār could not have heard it from his father. He was either not yet born or too young when his father passed away. How then could he have narrated it from his father? Al-Mubārakfūrī asserts that al-Tirmidhī suggests that the hadith is *gharīb* (strange), because ‘Abd al-Jabbār did not take

According to this hadith, proving rape seems to be different from proving *zinā* because the Prophet accepted the solitary evidence of the raped woman, in the absence of testimony from four male eyewitnesses. Her statement alone is not regarded as failing to provide four male eyewitnesses. Her statement, despite being by a woman and in spite of being the only evidence, was sufficient to convict someone with rape as it is clearly mentioned in the above hadith. This hadith also leaves absolutely no doubt about the validity of evidence given by women in rape cases in spite of the strict requirement of four competent male witnesses in cases of *zinā*.

Ibn Qayyim, a Ḥanbalite, observes that the order of the Prophet in the above hadith was based on circumstantial evidence, the silence of the accused, his being arrested by the persons who were present and the testimony of the victim who was also present.⁸

Ibn Ḥazm asserts that any evidence of rape could be admitted even if it is from another person who did not watch the scene. He narrates a rape case at the time of ‘Umar ibn ‘Abd al-‘Azīz. There was a *mu’azzin* who heard a cry of a woman for

hadiths from his father. See Muḥammad ‘Abd al-Raḥmān ibn ‘Abd al-Raḥīm al-Mubārakfūrī (1283-1303AH), *Tuhfat al-Aḥwadhī* (Beirut: Dār al-Kutub al-‘Ilmiyya, no.date), vol.5, p.13. Ibn al-Jawzī quoted a comment by al-Nasā’ī that ‘Abd al-Jabbār was weak. See Abū al-Faraj ‘Abd al-Raḥmān ibn ‘Alī ibn Muḥammad ibn al-Jawzī (d. 579 AH/1183 CE), *al-Du‘afā’ wa al-matrūkīn*, ed. Abu al-Fidā’ ‘Abdullah al-Qādī (Beirut: Dār al-Kutub al-‘Ilmiyya, 1986), vol.1, p.321. al-Dhahabī noted that ‘Abd al-Jabbār was *thiqah* (reliable), although Muslim quoted only from ‘Abd al-Jabbār’s brother, ‘Alqamah. See Shams al-Dīn, Muḥammad ibn Aḥmad ibn ‘Uthmān al-Dhahabī (d. 748 AH/1347 CE), *al-Mughnī fī al-du‘afā’*, ed. Nur al-Dīn ‘Iṭr, vol.1, p.367. Al-Shawkānī also made the same suggestion that ‘Abd al-Jabbār did not take hadiths from his father, and that the members of his family were unknown. See al-Shawkānī, *Nail al-awṭār*, vol.2, p.192.

⁸Ibn Qayyim, *I‘lām al-muwaqqi‘īn*, vol.4, p.328.

help. He appeared in the court to give testimony of what he heard in favour of the rape victim. As a result, she was released from the charge of *zinā*. This case was tried before the caliph ‘Umar ibn ‘Abd al-‘Azīz.⁹

This event again supports the view that evidence for rape is admissible even from one person. In the light of this precedent and the above hadith, we can summarize that the evidence for proving rape can be divided into three forms:

- i) Firstly, the testimony of the victim which does not require four eyewitnesses. Any reliable proof of the occurrence of rape will save her from the charge of *zinā* as well as *qadhf*.
- ii) Secondly, evidence against the culprit which requires a stringent standard of proof. This evidence can be deemed as a reason to avoid a severe *ḥadd* penalty. But, collaborative evidence is significant in deciding a suitable *ta‘zīr* penalty.
- iii) Thirdly, a valid confession from the accused.¹⁰

(b) Disagreement over Applying Analogy in Assessing Penalties for crimes (*al-Qiyās fī al-‘uqubāt*)

It is suggested that the root of dispute in adopting an appropriate approach of proving rape stems from the disagreement on the principle issue of whether or not *qiyās* is

⁹Ibn Ḥazm, *al-Muḥallā*, p. 259.

¹⁰Based on the hadith narrated by ‘Abd al-Jabbār ibn Wā’il, the rapist was convicted by his own confession. See al-Bukhārī, *al-Ṣaḥīḥ*, vol.6, p.254; Aḥmad ibn Muḥammad ibn Ḥanbal al-Shaybānī(780-855), *al-Musnad*, (Egypt: Mu’assat Qurṭuba, n.d.), vol.4, p.318; Muḥammad ibn ‘Abdullah al-Tibrīzī, (d.737AH/1337CE) *Mishkāt al-maṣābīḥ*, (ed. Muḥammad Nāsir al-Dīn al-Albānī, Beirut: al-Maktab al-Islāmī, 1405/1985), hadith no. 3504. This hadith has been verified as authentic.

applicable in punishments. Presumably, those who treat proving rape as similar to proving *zinā* support their opinion based on the mechanism of *qiyās*.

Qiyās or analogical reasoning is one of the sources of Islamic law after the Qur'ān, Sunna and *ijmā'*.¹¹ Most jurists use *qiyās* in many legal issues when there is no direct textual evidence, they take different stances with regard to the applicability of *qiyās* in criminal procedure and penalties.

The majority of jurists apart from the Ḥanafites and the Zahirites do not make any distinction in this respect, and maintain the view that *qiyās* is applicable to these circumstances in the same way that it is to other rules of the *Shari'a*. They support their view by generalizing the indicators of the Qur'ānic passages and hadiths which are quoted in favour of the admissibility of *qiyās*. Since the evidence in the sources does not impose any restriction on *qiyās*, it is therefore applicable in all spheres of the *Shari'a* including penalties.¹² An example of *qiyās* with regard to penalties is the application of the same punishment and method of proof for sodomy as for *zinā*. The jurists draw an analogy between *zinā* and sodomy and apply the strict procedure as well as the *ḥadd* punishment of the former to the latter by analogy.¹³

The Ḥanafites concur with the majority to the extent that *qiyās* may validly operate in *ta'zīr* penalties, but they oppose the application of *qiyās* in *ḥadd* penalties and

¹¹Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, p.197.

¹²Abū Zahra, *Usūl al-fiqh*, p.205.

¹³Muḥammad ibn 'Alī al-Shawkāni (d.1255AH/1839CE), *Irshād al-fuḥūl*, ed. Abū Muṣ'ab Muḥammad Sa'id al-Badrī, (Beirut: Muassasat al-Kutub al-Thaqafiyya, 1998), p. 222; al-Sharbīnī, *Mughnī al-muḥtāj*, vol.4, p.144; Ibn Qudāma, *al-Mughnī* vol.10, p.160; Ibn al-Humām, *Sharḥ fath al-qadīr*, vol.5, p.262.

kaffāras (expiation of sins). They do not approve analogy between *zinā* and other sexual offences. According to them, these offences should be penalized under *ta'zīr*.¹⁴ The reason for their argument is that the *'illa* (rationale) of the *qiyās* founded in *ḥadd* cases involves a measure of speculation and doubt, and the general *ḥadd* doctrine eliminates the implementation of the punishment when there is any sort of doubt about the conviction. This is based on the hadith: “Drop dubious *ḥadd* cases as far as possible. If there is a way out, then clear the way, for in penalties, it is better for the *imām* to err in pardoning than to err in sentencing.”¹⁵ Ibn Ḥazm al-Zāhirī who never considers *qiyās* as a legal principle, concurs with the Ḥanafites in negating the validity of *qiyās* in penalties.¹⁶

It can be concluded that adopting the same method and mechanism to prove rape as is done for *zinā*, based on *qiyās*, is refutable. This is because of the fact that rape entails the right of Allah (illegal sexual intercourse) and the right of a fellow human being (i.e. usurpation) which is not the case in *zinā* as it is regarded as a violation of the right of Allah alone. As a matter of fact, there is no victimization in *zinā* which is contrary to rape since the former takes place by mutual consent.

In addition, besides investigation to convict the criminal, the court is also duty-bound to consider the impact suffered by the victim such as physical injury, trauma and other medical consequences.¹⁷ In my opinion, there is a special provision in Islamic

¹⁴Ibn Nujaim, *al-Ashbāh wa al-nazā'ir*, p. 334.

¹⁵Ibn Qayyim, *I'lām al-muwaqqi'īn*, vol. I, p.209.

¹⁶Ibn Ḥazm says: “Whoever considers sex with animal and sodomy as similar to *zinā* is ignorant of the meaning of *zinā*.” See Ibn Ḥazm, *al-Muḥallā*, vol.12, p.401.

¹⁷Details of the rights of rape victim will be discussed in chapter 7.

law called the law of *jirāh* (wounds) which should also be taken into consideration. It is not only the issue of penetration, but the victim has the right of compensation for every single injury to any part of her body. All these harms need to be proven and valued, after which the criminal is liable to pay all the financial compensation demanded by the victim once it has been scrupulously examined by the experts.

Based on these arguments, I am inclined to the idea of making a separation between the requirements of proving *zinā* and those of proving rape. Rape deserves a different approach of proof for both the victim and the criminal respectively. The proof of victimization is acceptable however slim it is, such as a scream for help, because it aims at avoiding punishment. In contrast, it is made difficult to prove the guilt of a criminal, because it will end up in severe punishment.

B. A Victim's Insufficient Evidence and the Charge of *Qadhf*

Qadhf means falsely accusing another person of committing *zinā*.¹⁸ *Qadhf* as one of the fixed *ḥadd* crimes aims at safeguarding human dignity and virtue. In modern society, as in earlier times, the accusation of rape is sometimes used as weapon to attack a person's reputation and position, for personal reasons as well as publicity. No wonder that the cause for that evil has been prevented in advance through the provision of *qadhf*. The person making the accusation has to produce the required

¹⁸*Qadhf* linguistically means throwing and hurling stones at others. Technically, it refers to a slanderous accusation against a Muslims of fornication or adultery or raising doubts about his paternity. See al-Qarāfī, *al-Furūq*, vol. 8, p.175; al-Baḥūtī, *Kashshāf al-qinā'*, vol.6, p.183; al-Shirbīnī, *al-Iqnā'*, vol.2, p.183; 'Awda, *al-Tashrī'*, vol.2, p.455; Abdur Rahman I. Doi, *Sharī'ah: the Islamic Law*, (UK: Ta Ha Publishers, 1997), p.246.

evidence. Otherwise, his/her accusation will be considered malicious, and is punishable by eighty lashes.¹⁹ It has been clearly stated in the Qur'ān:

And those who accuse chaste women and then do not produce four witnesses – lash them with eighty lashes and do not accept from them testimony ever after. And those are the disobedient to Allah. Except for those who repent thereafter and reform, for indeed, Allah is Forgiving and Merciful (Qur'ān, 24: 4).²⁰

This Qur'ānic verse prescribes a punishment for making false accusations against chaste women. However, Muslim jurists unanimously generalize the prohibition of this defamation to include men as well. Failure to provide the concrete evidence of four male witnesses makes the incriminator a criminal, liable to the punishment for slander of eighty lashes. The person pressing false charges will also be labelled as a liar besides facing the threat of being disqualified as a competent witness in the future.

Qadhf is simply understood as an accusation from a third person that a specific man and woman have committed *zinā*. It could take place between a husband and a wife. In the first case of *li'ān*²¹ in Islam, Hilāl ibn Umayya accused Sharīk ibn al-Sahmā' the brother of al-Barā' ibn Mālik, of having sex with his wife. He lodged a report

¹⁹ Ibn Ḥazm narrates views of al-Zuhrī and Qatāda regarding a woman's complaint that a man raped her when she has no evidence (*bayyina*). According to them, she must be punished for *qadhf*. This means that a complaint without supporting evidence is not encouraged as she is responsible for what she claims. See Ibn Ḥazm, *al-Muḥallā*, p. 259.

²⁰ Ā'isha was accused of committing such a crime. The verse 24:4 was specially revealed to clean her from the allegation.

²¹ *Li'ān* is a procedure of oath taken by a husband and his wife which ends up with irrevocable divorce and denial of the husband's lineage of the child. The husband who accuses his wife of committing adultery has to swear 4 times that he is telling the truth and at the fifth he ought the wrath of God if he tells lies. The wife has to swear 4 times that the husband is telling lies and at the fifth, the wrath of Allah will be upon her if he tells the truth. See the Qur'ān 24: 6-9.

with the Prophet against his wife and Sharīk, so that he will take action. The answer from the Prophet was, “*al-bayyina* (evidence), or the *ḥadd* penalty on your back.”²² The same hadith in another narration clarifies the *bayyina* as “*arba ‘atu shuhadā*” i.e. four witnesses.²³ Since Hilāl could not provide sufficient evidence, his wife was not convicted of *zinā*. Instead, he was charged of *qadhif*. Before he was punished for committing *qadhif*, a particular verse was revealed establishing *li ‘ān* as a solution for *qadhif* between husband and wife²⁴ prescribing that both husband and wife must end up with a judicial separation where the husband has no paternity right on the child.²⁵

Another precedent is the *athar* mentioning the occasion where Caliph ‘Umar punished witnesses accusing al-Mughīra ibn Shu‘ba, governor of Basra, because of inaccuracy of testimony. There were only three witnesses who gave the same consistent description of how the crime took place, while the fourth witness gave an inconsistent account in his testimony.²⁶ It is understood that even if four witnesses

²²Al-Albānī, *Irwā’ al-ghhalīl*, the hadith has been verified as authentic, no 2098; Abū Ja‘far Muḥammad ibn Jarīr al-Ṭabarī, *Jāmi‘ al-bayān ‘an ta’wīl al-Qur‘ān*, (Beirut: al-Dār al-Shāmiyya, 1997), vol. 9, p. 270-275.

²³Al-Albānī, *Ṣaḥīḥ sunan al-Nasā’ī*, (Maktab al-Tarbiyya al-‘Arabi li Dual al-Khalīj, 1409AH), hadith no. 3246.

²⁴The Qur‘ān, 24:6-9.

²⁵It seems that for the accusation of *zinā* (infidelity) which happens between a husband and wife, *li ‘ān* is the way out of the problem. *Li ‘ān* in this particular case is regarded as an alternative of the charge of committing *qadhif* on the accuser or the charge of *zinā* on the accused regardless of any circumstantial evidence supporting the accusation. In the same event of the first *li ‘ān*, the Prophet said “Were it not for the oath that she swore, I would deal with her based on circumstantial evidence”. He stated: “If she gives birth to a red-haired child with skinny thighs and thin leg, then he is Hilāl’s child, but if she gives birth to a curly-haired child with thick legs and plump buttocks, then this is what she is accused of.” See al-Ṭabarī, vol.9, p. 270-275.

²⁶Al-Ṭabarī, *Jāmi‘ al-bayān*, 1997, vol.9, p. 267; Ibn al-‘Arabi, *Aḥkām al-Qur‘ān*, vol.3 p.348; al-Qurṭubī, *al-Jāmi‘ li aḥkām al-Qur‘ān*, vol.12, p.110. The witnesses were Abū Bakra, Shibl, Nāfi‘ and Ziyād. Ziyād was not so sure about the identity of the accused woman whom al-Mughīra had allegedly committed *zinā* with in addition to the fact that he did not watch with his naked eyes how the penetration took place.

saw a couple having sex, but with some slight inconsistency, the testimony would not only fail to support a *zinā* charge, but make the witnesses liable for *qadhf*.²⁷

The crux of the issue here is whether a rape victim who complains about aggression against her will be charged with committing *qadhf* because of her failure to bring four witnesses. This is misunderstood by many, including some jurists and more so to many Muslim feminist groups of today.²⁸ It is argued that the rationale for this injunction is to deter scandalous accusations that interfere in the private matters of families. This is backed by the severity of the sentence for uncertain or mistaken allegations.²⁹

The proposition that insufficient evidence of rape will make a rape victim liable for *qadhf* can be countered with the fact that the nature of *qadhf* itself as a particular crime has a close connection to *zinā*, and there is no such *zinā* in a rape case. *Qadhf* should not be a result of a rape victim's complaint. It is significant and impressive to note that, in the hadith of 'Abd al-Jabbār ibn Wā'il³⁰ which reported a rape case that occurred at the time of the Prophet, the female victim's statement is not considered as *qadhf*. She was never asked to produce four eyewitnesses and she was not punished for her failure in so doing. It is considered as a complaint-cum-accusation of rape, not *zinā*. It is also worth pointing out that her statement was not considered

²⁷This high standard of proof in Islamic procedure is intended to avoid error and to prevent abuse of judicial discretion as well as to maintain respect of the court. See Matthew Lippman et al, *Islamic Criminal Law and Procedure: an Introduction* (New York, London: Praeger, 1988), p. 121.

²⁸See, for example, Zainah Anwar, "Islamization and its Impact on Democratic Governance and Women's Rights in Islam: A Feminist Perspective," Centre for the Study of Islam and Democracy, Fourth Annual Conference Washington, DC, May 17, 2003 at http://www.islam-democracy.org/4th_Annual_Confernece-Anwar_address.asp

²⁹Afiya Shehrbano Zia, *Sex Crime in the Islamic Context* (Pakistan: Hoshruha Group, 1994), p.9.

³⁰See p.100-101 of this thesis.

as a confession of *zinā*. A similar ruling is reported from caliph ‘Umar ibn al-Khaṭṭāb.³¹

With regards to the incident of Abū Bakra making an accusation against al-Mughīra, this particular case should not be generalized to the prosecution of rape. This is because the accusation made against al-Mughīra was one of committing *zinā*. A complaint of rape is different since it does not involve a third party. Indeed the litigation is between the criminal and his victim.

Ibn Ḥazm, in clarifying the issue, makes a remarkable observation. According to him, a complainant is either committing *qadhf* and should be punished with the *qadhf* penalty upon conviction, or lodging a complaint for her rights seriously. The victim’s complaint should not be treated as similar to *qadhf* since *qadhf* results in embarrassing and degrading one’s reputation. In this situation she is not making an accusation. Instead, she is complaining and prosecuting. But, she has to produce evidence (*bayyina*). If she manages to produce evidence, the accused must be punished with the penalty of *zinā*. If there is no evidence, he is released. With the absence of evidence she must not be charged with *qadhf* because rape itself entails the right of Allah and the right of individuals (the victim’s right). The right of Allah is the crime of *zinā* i.e. the illicit intercourse itself which requires mandatory penalty but could not be proved. Meanwhile, her right involves usurpation and aggression against her honour. For her right, the accused has to swear in the name of God that he never acted violently against her and never usurped her, and declare that he is

³¹Ibn Qudāma, *al-Mughnī*, vol.8, p.129. For details of ‘Umar’s verdict see pp.39, 48,112-113 of this thesis.

innocent of the accusation against him. This is similar to other disputes involving the right of another fellow human being. He should not swear that he did not commit *zinā* because that is the right of God and therefore will be reserved between him and God.³²

Ibn Ḥazm asserts:

Giving testimony of *zinā* is not committing *qadhf*. If a witness is to be punished of *qadhf* for the lack of number of the eyewitnesses, the crime of *zinā* will never be convicted. Supposed that a person gives a testimony of *zinā* alone, then he will be charged with *qadhf*. The next eyewitness also will be charged with *qadhf*. Then, there will never be a conviction of *zinā*. This is against the injunction of the Qur'ān to provide witnesses for *zinā*. It is also against the teaching of the Sunna to accept a *bayyina* for *zinā*. This is also against *ijmā'* (consensus) to accept eyewitness testimony to prove *zinā*. Moreover it is against logical argument as well as sound sense to perceive that a witness is similar to an accuser or vice versa.³³

In my opinion, the penalty of *qadhf* aims at protecting people's honour against the accusation of committing *zinā*. A rape victim who makes a complaint should not be charged with *qadhf* if the claim is accompanied with reliable evidence that forcible rape has taken place. As the right of God (the prohibition of *zinā*), and the right of a human being (violence against a person's honour) are concerned, the victim has the right to make a report of rape and proceed with prosecution. It is not the prerogative of the victim to prosecute the culprit for rape. Instead, it is the task of judicial authority. Initial investigation will determine whether or not it is possible to proceed

³²Ibn Ḥazm, *al-Muḥallā bi al-āthār*, vol.12, p.261.

³³Ibn Ḥazm, *al-Muḥallā*, vol. 12, p.212-213.

with the prosecution. On the other hand, in the lack of sufficient evidence, it is the right of the accused to plead not guilty and deny the accusation by taking an oath.

In conclusion, the misconception and confusion of standardizing the prosecution of rape with adultery should not happen as they differ in proving and convicting. Besides the testimony of eyewitnesses other fresh evidence such as cuts, semen, saliva, blood, hair, fibers, skin scrapes, bite marks, and other related evidence are acceptable to prove rape. This would involve medical inspection of penetration, forcible assault and unwillingness and resistance of the victim. In fact in the case of rape, the culprit must be traced and identified with the highest accuracy. These proofs are admissible and it is unnecessary for a rape victim to present four witnesses to prove the crime. Suffice it to say here that Islam places justice as its most important principle in its legislation. Any evidence for prosecution and conviction will be seriously scrutinized and examined so as to avoid any injustice. In addition, the assumption that failure of providing sufficient evidence of rape as an admission of *zinā* is against the principles of evidence and common sense, because a confession is an admission of guilt while an allegation of rape is a repudiation of guilt.

C. Admissibility of a Victim's Claim of Rape for Unjustified Pregnancy

Pregnancy is known as a result of sexual relations. The sexual relations could be either lawful within lawful marriage or unlawful (*zinā*). Some jurists would consider charging the woman who cannot justify her pregnancy with committing *zinā* on the ground that a person will only become pregnant if there was intercourse. However, if she can provide evidence of marriage, then she is free from the accusation of

committing *zinā*. However the trouble is when she has no evidence of being married but claims that the pregnancy was the result of rape. In other words, should the pregnancy be considered as a self-implicating confession of *zinā* if she fails to prove that the intercourse was by force.³⁴

Muslim Jurists disagree about the application of the *ḥadd* punishment due to the appearance of pregnancy along with a claim of rape. There are two views regarding this matter. The majority of the classical schools of Islamic law hold that unmarried pregnancy, being only circumstantial evidence, is not admissible as a proof of *zinā*. This is the position of the Ḥanafites, Shāfi'ites, Ḥanbalites and Zāhirite schools of law.³⁵ According to them, the *ḥadd* is not to be applied to her due to the appearance of pregnancy accompanied by the claim of coercion, or the claim of marriage, even if she does not come up with the evidence. They argue that the Qur'ānic verses on *zinā* have established an exclusive method of proof of the crime, that is by eyewitness testimony or confession only. Anything else is merely circumstantial evidence and not admissible in *ḥadd* prosecution. They support their argument with a precedent as reported by al-Nazzāl ibn Sabra:

We were in Makkah when there were many people surrounding a woman. It seems that they were about to kill her shouting: "She has committed adultery. She has committed adultery." When Caliph 'Umar came out, he found that she was pregnant. Her tribe tried to defend her

³⁴For example, in 1982, fifteen-year old Jehan Mina became pregnant as a result of a reported rape. Lacking the testimony of four eyewitnesses that the intercourse was in fact rape, Jehan was convicted for *zina* by Pakistan's Islamic Court on the evidence of her illegitimate pregnancy. (Mina v. State, 1985 P.L.D. Fed. Shariat Court. 120). See also Afiya Sherhbano Zia, "Sex Crimes in the Islamic Context, Rape, Class and Gender in Pakistan," p. 27.

³⁵Ibn Qudāma, *al-Mughnī*, vol.8, p.129; Abū Bakr Aḥmad ibn 'Alī al-Jaṣṣāṣ al-Rāzī, *Aḥkām al-Qur'ān*, (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1405), vol. 5, p.106; al-Shirbīnī, *Mughnī al-muḥtāj*, vol.4, p.139-40; Ibn Ḥazm, *al-Muḥallā*, vol.11, p. 339.

from punishment. ‘Umar asked her: “What has happened to you”? She said: “O *Amīr al-Mu‘minīn!* I was unlucky on that night. I performed the night prayer and then fell asleep. I only woke up when I realized that there was a man between my legs. He did it very quickly and ran away. Listening to her explanation, he said: “If they kill her, they will be cursed by Allah.” He set her free and wrote to his governors throughout the Muslim lands not to implement capital *ḥadd* punishment except with his permission.³⁶

The lesson from this incident is that ‘Umar exempted her from the *ḥadd* punishment although she was pregnant without marriage. Based on the above *athar*, Ibn Qudāma, a prominent jurist of the Ḥanbalite school is of the view that the *ḥadd* punishment is not to be inflicted in the case of sexual intercourse made under duress or by mistake.³⁷

Secondly, circumstantial evidence always entails an element of doubt, and this is against the fundamental principle of the *Shari‘a* that *ḥadd* punishments are not to be carried out if there is any doubt.³⁸ The state of being pregnant does not by itself mean that the woman engaged voluntarily in consensual extra-marital intercourse. The classical jurists acknowledge that one might become pregnant through other means, such as unknowing intercourse while asleep, a mistaken belief of one’s marital status or forcible intercourse. A woman could also be pregnant without having sexual intercourse, for instance as in the case where sperm is inserted in her vagina either by

³⁶ Al-Baihaqī, *al-Sunan al-kubrā*, vol. 8, p.236.

³⁷ Ibn Qudāma, *al-Mughnī*, vol 10, p. 159.

³⁸ This is based on the hadīth : “*idra‘ū al-ḥudūd bi al-shubuhāt*” which means: “Drop the ḥudūd in all cases of doubt.” This hadīth is reported by al-Baihaqī, see Ibn Ḥajr al-‘Asqalānī, *Bulūgh al-marām*, (Riyadh: Dār al-Salām, 1996), (*Kitāb al-ḥudūd*), p. 436. See chapter 6, p.150-156.

herself or by somebody else.³⁹ With modern medical advances, this cautionary approach is commendable, for we now know that a woman might become pregnant through artificial insemination where there is no intercourse at all. These possibilities create doubt in any rape prosecution to consider it as *zinā*.

Finally, the Qur'ānic verses specifically assert the need to protect women against charges of sexual misconduct. As if anticipating the misogynistic tendency of society, the Qur'ān first establishes that there is to be no speculation about a woman's sexual conduct by insisting that no presumptions be made against her without four witnesses to the actual act. No one may cast any doubt upon the character of a woman except by formal charges, with very specific, secured evidence.⁴⁰

Moreover, the Qur'ānic insistence on four witnesses establishes that it is the act of intercourse that must be taken into account, not its consequences. It is illegal intercourse which is deterred, not public pregnancy. If pregnancy alone constitutes sufficient evidence of *zinā*, the result seems to forget that the very purpose of the *zinā* verses is to protect women's honour.⁴¹

The second view is held by Mālik,⁴² some Ḥanbalites such as Ibn Taymiyya and his disciple Ibn Qayyim.⁴³ According to this view, when pregnancy is proved to have

³⁹Ibid., vol. 10, p.193; Ibn al-Humām, *Fatḥ al-qadīr*, vol.5, p. 237-238.

⁴⁰Ma'moun M. Salama, "General Principles of Criminal Evidence in Islamic Jurisprudence", p.6.

⁴¹Ibid., p.6.

⁴²Mālik ibn Anas, *al-Muwaffā'*, (trans.) (Cambridge: Diwan Press, 1982), p.392; Ibn Farḥūn, *Tabṣirat al-ḥukkām*, vol.2 p.88.

occurred in the case of an unmarried woman, she is presumed to have committed *zinā*. In other words, pregnancy is considered as prima facie evidence of *zinā*. Some jurists even include the pregnancy of a married woman whose husband is still a minor, or physically impotent.⁴⁴

These jurists argue that certain types of circumstantial evidence are admissible in *ḥadd* cases. They reason that the Qur'ānic references to *ḥadd* evidence indicate a general form of anything manifesting the truth which is not limited only to the testimony of witnesses.⁴⁵ They also rely on the reported statement of 'Umar as recorded by Mālik: "Adultery is public when pregnancy appears or confession is made".⁴⁶

It is clear that 'Umar would punish a person for the *ḥadd* of *zinā* in the case of an unmarried person if it was proved that she had become pregnant. Interestingly this statement was made in front of the companions who raised no objection. It has been regarded as the consensus of opinion of the Companions (*ijmā' al-ṣaḥāba*).⁴⁷ Thus, the Mālikite school of law admits a variety of types of non-eyewitness evidence in the *ḥadd* cases such as pregnancy in cases of *zinā*.⁴⁸

Secondly, they rely on 'Alī ibn Abī Ṭālib's statement:

⁴³Ibn Qudāma, *al-Mughnī*, vol.10, p.121; Ibn Taymiyya, *Majmū' al-fatāwā*, vol 28, p.334; Ibn Qayyim, *al-Ṭuruq al-ḥukmiyya*, p. 5.

⁴⁴Ibn Farḥūn, *Tabṣīrat al-ḥukkām*, vol. 2, p.88-89.

⁴⁵Ma'moun M. Salama, "General Principles of Criminal Evidence in Islamic Jurisprudence", p.110-111.

⁴⁶Al-Bukhārī, *al-Jāmi' al-ṣaḥīḥ*, vol.8 (*Kitāb al-muḥaribīn*), p.539.

⁴⁷Ibn Qudāma, *al-Mughnī*, vol.10, p.122.

⁴⁸Al-Dardīr, *al-Sharḥ al-ṣaghīr*, vol.4, p.454.

O people! Actually there are two types of adultery: Hidden adultery and apparent adultery. Hidden adultery must be proved by eyewitness and these witnesses must be the first persons to throw a stone, then the *Imām* and then the rest of the people. Apparent adultery is when pregnancy is obvious or there is a confession. In this case, the *Imām* will be the first person to cast a stone.⁴⁹

For them, the validity of the use of pregnancy as a proof of committing adultery is unobjectionable. The reason is simple. If a pregnancy is not due to lawful marriage, it must be caused by an unlawful relationship. But in the case of rape, one might argue that such a pregnancy could happen without her consent, or by force. The onus of proof that she has been raped or that the pregnancy has been caused by other factors is on her. Some jurists, like Ibn Qudāma, assert that such arguments can be made at the defence stage since the accused can rebut this presumption.⁵⁰ She will not be sentenced immediately, until she is given a right of defence.

Mālik's suggestion could be very useful with regard to the issue. He wrote:

Our position with regard to a woman who is found to be pregnant and has no husband and she says: "I was forced" or she says: "I am married" is that it is not to be accepted and the *ḥadd* will be inflicted on her unless she has clear proof of what she claimed about the marriage, or evidence of bleeding if she was a virgin, or evidence of calling for help from someone who saw her in that state or situation in which the violation occurred. If she does not produce any of those, the *ḥadd* will be inflicted on her and what she claims will not be accepted.⁵¹

⁴⁹Ibn Qudāma, *al-Mughnī*, vol. 10, p.193.

⁵⁰Ibid., vol. 10, p.192.

⁵¹Mālik ibn Anas, *al-Muwattā'*, p.392.

It should be noted that the *qarīna* of pregnancy is not direct evidence in order to punish the woman for the *ḥadd* of adultery but is in fact only a kind of presumption that can always be refuted by other kinds of proof.

To conclude, it seems that the position of the majority of jurists disallowing circumstantial evidence of pregnancy as a proof of *zinā* is more reasonable and compelling when viewed in the spirit of the Qur'ānic verses condemning any accusation of women without four eyewitnesses and the importance of avoiding doubt in *ḥadd* punishments.

Even those who accept pregnancy as a proof of *zinā* acknowledge the possibility that the pregnancy may have resulted from an unwilling sexual encounter. This is because the pregnancy itself is a *qarīna*. If it is admissible as evidence, then why not other sorts of circumstantial evidence which show forms of coercion and unwillingness? Perhaps that is reason why the Mālikites allow a woman to rebut a pregnancy-based *zinā* prosecution with evidence of coercion. This may come in the form of evidence of physical resistance such as bruises, bleeding, crying out, etc.

The way of rebutting such a presumption is by invoking one of the general defences that are available in Islamic law such as having made a mistake (*al-khaṭa'*) or being under duress (*al-ikrāh*).⁵² It is accepted by all jurists that if anyone can invoke one of the above defences he or she will not be held responsible for the wrongful act that he/she has committed.

⁵²Al-Bahūtī, *Kashshāf al-qinā'*, vol. 6, p.97.

The *qarīna* of pregnancy for an unmarried woman is only an assumption that she has committed adultery. This refutable assumption can not be the sole ground for conviction. The assumption can be refuted by other possible assumptions and doubts. The conviction can only be issued after this assumption is corroborated by other circumstantial evidence which makes evidence conclusive.

5 Penalties for Rape

A. Islamic Penal Law: Introduction

Crimes (*jināyāt*) in Islamic penal law can be defined in general as actions forbidden by religious law and discouraged by Allah Almighty with mandatory or discretionary penalties.¹ Prohibited behaviour includes the commission of a forbidden act or the omission of the performance of a duty. Every act of disobedience to Allah (*ma'ṣiya*) whether a commission or an omission, is considered as an offence. In juristic parlance, the term *jināya* is usually applied to injuries inflicted with aggression on a human body, ranging from assault and battery to grievous bodily harm and death, and giving rise to the culprit's liability to retribution or the payment of compensation.²

The penalties imposed in Islamic penal law are divided into two groups: prescribed penalties, which include *ḥadd* and *qiṣās*; and the unspecified penalty, which is known as *ta'zīr*.

(a) *Qiṣās*

The term *qiṣās* is derived from the Arabic root *qaṣṣa*, meaning "he cut", and *qaṣṣa atharahu* – "he followed someone's tracks."³ Legally, *qiṣās* is used to mean the law

¹Al-Māwardī, *al-Aḥkām al-ṣultāniyya*, p.219; al-Jurjānī, *al-Ta'rīfāt*, p.89; al-Zuhaylī, *al-Fiqh al-Islāmī wa adillatuhu*, (Damascus: Dār al-Fikr, 1984), vol.6, p.215.

²Al-Shāfi'ī, *al-'Umm*, vol.6, p.3; Ibn Rushd, *Bidāyat al-mujtahid*, vol.2, pp.296 & 303; Ibn Taymiyya, *al-Siyāsāt al-shar'iyya*, (Cairo: Dār al-Kutub al-'Ilmiyya, 1955), p.87; al-Kāsānī, *al-Badā'i' al-ṣanā'i'*, vol.7, p.233; Abdur Rahīm, *Principles of Muhammadan Jurisprudence* (Lahore: Mansoor Book House, 1976), p.351.

³Ibn Manẓūr, *Lisān al-'Arab*, vol.11, p.190; Hans Wehr, *A Dictionary of Modern Written Arabic*, p.765.

of equality or equitable reprisal for a murder.⁴ Equality in reprisal is prescribed with a strict sense of justice. *Qiṣāṣ* covers homicide, quasi-intentional murder, manslaughter, and intentional or unintentional injuries.⁵

Although *qiṣāṣ* crimes infringe on the rights of Allah and of individuals, the rights of the individual take precedence where the personal element plays an important role in the implementation of a penalty. The victim or his/her family has the right to determine whether to impose any reprisal by having the criminal executed or to pardon him by means of a reconciliatory settlement, that is, waiving the penalty of corporal punishment in exchange for financial compensation. The ruler or court cannot pardon crimes incurring the *qiṣāṣ* penalty. However, if the nearest relative grants a pardon, the judge may, at his discretion, impose a *ta'zīr* penalty on the criminal. This arrangement is not applicable to *ḥadd* offences.⁶

(b) *Ḥudūd*

The linguistic meaning of *ḥadd* (plural: *ḥudūd*) is frontier, prevention or limit.⁷ Legally, it refers to the types of penalties divinely prescribed by Allah in the Qur'ān and Sunna. The criterion of a *ḥadd* is that the rights of Allah take precedence. It means that these penalties are unchangeable, that is, they cannot be reduced or increased, nor is there a range of penalties from which to choose. Finally, there is no

⁴ Abd al-Rahman I. Doi, *Shari'ah: The Islamic Law*, p.232.

⁵ Awda, *al-Tashrī'*, vol.1, p.79.

⁶ El-Awa, *Punishment in Islamic Law*, p.74.

⁷ Ibn Manzūr, *Lisān al-'Arab*, vol.4, p.93; Hans Wehr, *Dictionary of Modern Written Arabic*, p.159.

possibility of a pardon or intercession by the judge, political authority or the victim of the offence.⁸

There has been disagreement among the jurists of different schools of law over what constitutes a *ḥadd*. According to the majority, there are seven *ḥadd* crimes: theft, highway robbery, adultery, defamation (that is, false accusation of adultery), consumption of intoxicants, apostasy, and armed rebellion. However, the Ḥanafites exclude armed rebellion, apostasy (*ridḍa*), and consumption of intoxicants from the *ḥudūd* and treat them as *ta'zīr* instead, since neither the Qur'ān nor the Sunna prescribed specific penalties for them.⁹

A number of modern Muslim scholars like El-'Awā assert that by taking into consideration that a *ḥadd* penalty is defined by Allah in the Qur'ān and Sunna, it appears that it is applicable to only four offences. Apostasy and consumption of intoxicants cannot be classified with this group since neither warrants a penalty which has been strictly defined.¹⁰

The notion of a *ḥadd* penalty being divinely fixed does not mean to confine the crimes to those mentioned in textual evidence. It appears that these penalties have been distinguished with a detailed description of the type of evidence required and the penalty to be applied in each case. Therefore, the *ḥadd* crimes differ from others

⁸Al-Kāsānī, *Badā'i' al-ṣanā'i'*, vol.7, p.3; Ibn al-Humām, *Sharḥ fath al-qadīr*, vol.3, pp.112–113; al-Māwardī, *al-Aḥkām al-ṣulṭāniyya*, pp.221–223; 'Awḍa, *al-Tashrī'*, vol.1, p.79. It is noted that the prerequisites for the evidence of the *ḥadd* and *qiṣāṣ* are far more sophisticated and rigorous. Owing to the severity of the penalty, the highest possible level of verification must be achieved before convicting the accused.

⁹'Awḍa, *al-Tashrī'*, vol.1, p.79.

¹⁰Ibid.

in having a standardized and unchangeable penalty as well as particular rules of evidence. This notion also implies that the fixed *ḥadd* penalties cannot be implemented when the evidence required is insufficient. However, a less severe penalty could be imposed on the accused, based on the *ta'zīr* provision. Other serious crimes such as terrorism, rape, treason, spying, paedophilia and a range of sophisticated modern crimes must be dealt with severely. In these cases, the authorities are given the right to adopt the appropriate methods of conviction as well as imposing the penalties.¹¹

(c) *Ta'zīr*

The term *ta'zīr* is derived from the root verb *'azzara*, which means to censure, reprimand, prevent, respect and reform.¹² In Islamic penal law, *ta'zīr* is defined as the discretionary penalty to be imposed for the infringement of the rights of Allah and those of the individual as edification and a deterrent, where there is neither a fixed penalty nor *kaffāra* (expiation of sins).¹³

It is the flexibility of *ta'zīr* which distinguishes it from *ḥadd* and *qiṣāṣ*. The ruler or his/her authorized deputies are given the right to determine and impose the appropriate penalty for crimes in line with the spirit of the Shari'ah.¹⁴ *Ta'zīr* crimes can be dealt with by the ruler or the courts by remission, pardon or abrogation, which does not apply to *ḥadd* penalties. Finally, the principles of evidence applied to *ta'zīr*

¹¹ Abdur Raḥmān I. Doi, *Sharī'ah: the Islamic Law*, pp.221-228.

¹² Ibn Manẓūr, *Lisān al-'Arab*, vol.9, p.184; Hans Wehr, *Dictionary of Modern Written Arabic*, p.610.

¹³ Al-Kāṣānī, *Badā'ī 'al-ṣanā'ī'*, vol.7, p.325; El-Awā, *Punishment in Islamic Law*, pp.96-97.

¹⁴ Ibn Qudāma, *al-Mughnī*, vol.7, pp.801-802; Ibn 'Ābidīn, *Ḥāshiat rad al-mukhtār*, vol.6, pp.589-592; al-Shirbīnī, *al-Mughnī*, vol.4, pp.94-96.

vary from those applied to *ḥadd* penalties. Crimes liable to a *ta'zīr* penalty can be proved with credible evidence from a wide range of sources, whereas crimes liable to a *ḥadd* penalty are mainly proved by evidence from witnesses or the confession of the accused.¹⁵ The *ta'zīr* penalty can therefore also act as a complementary means of punishing those accused of *ḥadd* or *qisās* crimes that are “not proven”.

When the judges decide which penalty to apply in *ta'zīr* offences, they are governed by the Qur'ānic injunctions to judge with justice (4:58) and to find a punishment to fit the crime (42:40). Furthermore, the flexibility of the *ta'zīr* system makes it as suitable for application today as it was in the past.

In modern times, *ta'zīr* penalties can be interpreted as those laws passed by the legislative authority. Sentencing according to the *ta'zīr* system does not mean that a judge is given an arbitrary power. The judge's authority is confined to applying the legal texts to the case under consideration. Only the most appropriate penalty will be imposed. The freedom given to the judge is in choosing the penalty considered most suitable from the legal provisions stated for the crime, that is, from the lightest to the heaviest penalty.¹⁶

Ta'zīr penalties come in many forms: *wa'z* (pointing out to the offender the error of his/her ways and recalling him/her to God and His teachings); *al-tawbīkh* reprimand; *al-tahdīd* (warning); *al-ḥajr* (boycott); *al-tashhīr* (public disclosure); *al-mughārama* (fine); and *al-muṣādara* (confiscation of property). Traditionally, there has been

¹⁵ Awda, *al-Tashrī'*, vol.2, p.294.

¹⁶ Ibid., vol.1, pp.142–143.

disagreement among the jurists over the legitimacy of imposing fines and confiscating property as penalties. Although these penalties have been approved by the Mālikites, Shāfi'ites and Ḥanbalites, they are opposed by the Ḥanafites. *Ta'zīr* may also include a prison sentence if deemed fitting by the court; exile, which was discussed by jurists in the past as a means of removing an offender from a locality where he/she had committed a *ḥadd* offence; and corporal punishment.¹⁷

Imprisonment was introduced as a means of punishment during the early years of Islam. It is said that during the caliphate of 'Umar ibn al-Khaṭṭāb (634–644 AC), a house was purchased in Madina to detain prisoners, a practice that was followed by subsequent governors. Imprisonment came to be used mainly for discipline and correction, both of which objectives, it was thought, would be promoted by self-reflection.¹⁸

Although the agreed minimum length of incarceration is one day, there are differences over the maximum period. According to the Shāfi'ite school of law, the maximum length of detention should be one month during the investigation and one year as punishment. The Shāfi'ite view is that imprisonment is of the same nature as banishment or exile. Since the period of punishment prescribed for fornication is one year's banishment, imprisonment should also be limited to one year.¹⁹ However, the

¹⁷ Ibid., pp.145–149.

¹⁸ Ahmad 'Abdul 'Azīz al-Alfī, "Punishment in Islamic Criminal Law", in M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System* (London: Oceana Publications, 1982), pp.235–236.

¹⁹ Awda, *al-Tashrī'*, vol.1, p.694-695.

majority of the Ḥanafite, Mālikite and Ḥanbalite jurists do not fix a maximum period for *ta'zīr* imprisonment because it varies according to the offence and the offender.²⁰

All the schools of Islamic jurisprudence allow a prison sentence in addition to other punishments.²¹ Although prison has come to be viewed as an institution of correction, some judges impose fixed sentences with an exact termination date. Some jurists argue that indeterminate sentences should be reserved only for dangerous criminals until they show signs of repentance and rehabilitation or until death.²² The Shāfi'ites, the majority of the Mālikites and some Ḥanbalites maintain that dangerous criminals can be imprisoned for unlimited periods until they repent and become good and responsible members of society.²³

Since the offender's right to freedom of movement is necessarily removed by incarceration, it is believed that the state should provide food, clothing and medical care. Some Islamic jurists argue that wives should be allowed to visit male prisoners occasionally for "conjugal privileges". This is the practice today in Saudi Arabia, where both sexes may have conjugal visits. Some jurists hold that the prisoner's dependants should also be supported by the state.²⁴

Some Shāfi'ites, such as al-Ghazālī, contend that a *ta'zīr* penalty should not result in death or serious injury. Therefore no amputation or capital punishment should be

²⁰Ibn Farḥūn, *Tabṣīrat*, vol.2, p.225; Abū al-Ḥusayn Muḥammad ibn Muḥammad ibn Abī Ya' lā, *al-Aḥkām al-ṣulṭāniyya*, (Cairo: Maktabat Muṣṭafā al-Bābī al-Ḥalabī, 1938), p.263; Ibn 'Ābidīn, *Ḥāshiat rad al-mukhtār*, vol.4, p.62.

²¹Muhammad Iqbal Siddiqi, *Penal Law of Islam*, p.171.

²²Al-Alfī, "Punishment in Islamic Criminal Law", p.236.

²³Izz al-Dīn 'Abd al-Salām, *Qawā'id al-aḥkām*, vol.1, pp.5–10, 17–20.

²⁴Al-Alfī, "Punishment in Islamic Criminal Law", p.236.

entertained by the court, not should it adjudicate putting a limb partly or fully out of action.²⁵ The Ḥanbalite scholars Ibn Taymiyya and Ibn Qayyim, and also the Ḥanafites, exempt some cases from the general prohibition of capital punishment, for they accept the concept of *al-qatlu siyāsatan/al-siyāsa al-sha‘iyya* (government public interest policy).²⁶ The view of some jurists, such as some Ḥanbalites, most Ḥanafites and Mālikites, is that a capital penalty for *ta‘zīr* can be carried out for serious crimes, such as the propagation of heresy, homosexuality, espionage and reoffending by dangerous criminals.²⁷ Accordingly, there are some differences over the clear evaluation and classification of these crimes and their punishments.²⁸

The Shāfi‘ite scholar al-‘Izz ibn ‘Abd al-Salām and some Ḥanbalites argue that dangerous criminals deserve severe penalties increased in proportion to their criminal tendencies. The versatility of the *ta‘zīr* penalties accommodates the most severe punishment, such as crucifixion, when no other penalty can prevent the criminal predilections of a particular felon.²⁹ Al-Ṭarābulūsī reports that Abū Bakr al-Siddīq, the first rightly guided caliph, imposed capital punishment in cases of sodomy, and that ‘Abdullah ibn al-Zubair and Hishām ibn Mālik also imposed similar sentences during their periods in office.³⁰

²⁵ Al-Ghazālī, *al-Wajīz fī fiqh al-Imām al-Shāfi‘ī*, ed. ‘Alī Mu‘awwad, ‘Adil ‘Abd al-Mawjūd, (Beirut: Dar al-Arqām, 1997), vol.2, p.182.

²⁶ Ibn Taymiyya, *al-Siyāsa al-shar‘iyya*, pp.110–120; Ibn Qayyim, *al-Ṭuruq al-ḥukmiyya*, pp.12–15; al-Bahūtī, *Kashshāf al-qinā‘*, vol.6, p.125; al-Māwardī, *al-Aḥkām al-sultāniyya*, pp.236–237; al-Qarāfī, *al-Furūq*, vol.4, p.177–183;

²⁷ Aḥmad Fathī Bahnasī, *Nazariyyāt al-ithbāt fī al-fiqh al-jinā‘ī al-Islāmī*, (Beirut: Dār al-Shurūq, 1988), p.182.

²⁸ Al-Ṭarābulūsī, *Mu‘īn al-ḥukkām*, pp.194–195; al-Bahūtī, *Kashshāf al-qinā‘*, vol.6, pp.156–126; Ibn ‘Ābidīn, *Hāshiat radd al-Mukhtār*, vol.4, pp.62–63.

²⁹ Al-Qarāfī, *al-Furūq*, vol.4, pp.177–183; ‘Izz al-Dīn ‘Abd al-Salām, *Qawā‘id al-aḥkām*, vol.1, p.195; al-Bahūtī, *Kashshāf al-qinā‘*, vol.6, p.124; Ibn Nujaim, *al-Baḥr al-rā‘ik*, vol.5, pp.44–45.

³⁰ Al-Ṭarābulūsī, *Mu‘īn al-ḥukkām*, p.195; Ibn ‘Ābidīn, *Hāshiat rad al-mukhtār*, vol.4, pp.62–63.

B. Penalties from a *Maqāsid* Perspective

The primary objective of Islamic Law is to preserve the public interests or *maṣāliḥ*. There are five essential interests: faith, life, intellect, lineage and property.³¹ These are regarded as crucial for the survival and spiritual well-being of individuals, to the extent that their destruction would precipitate chaos and disorder in society. Therefore, the Islamic legal system validates all measures necessary for the protection and advancement of these values. Murder, blasphemy, theft, adultery, and the consumption of intoxicants are punishable offences, for they pose a threat to life, religion, the immunity of private property, the well-being of the family, and the integrity of human intellect respectively.

Al-Ghazālī gives a concise account of the importance of maintaining these essential interests:

Whatever comprises the maintenance of the *al-uṣūl al-khamsa* (five basic interests of safeguarding faith, life, intellect, lineage and property) is regarded as advantageous, and whatever infringes these five interests can be excluded from any religion or dispensation intended for the benefit of humankind. Therefore, all religions and dispensations agree on the ban of blasphemy, murder, adultery, theft and the consumption of intoxicants.³²

Punishment is a means of establishing justice. Justice should be the basis of all human relations³³ as it is divinely commanded in the Qur'ān.

³¹Al-Ghazālī, *Shifā' al-ghalīl*, p.103; Ibrāhīm ibn Musā al-Lakhmī al-Shātībī (d.790AH), *al-Muwāfaqāt*. (Beirut: Dār al-Ma'rifa, no date), vol.3, p.29.

³²Al-Ghazālī, *Shifā' al-ghalīl*, p.103.

³³Yūsuf al-Qaradāwī, *Introduction to Islam*, pp.106-107.

Certainly We sent Our Messengers with clear Signs and We revealed to them the Book and the Balance so that the people may observe justice (57:25).

In this light, criminals should receive their just retribution. Therefore, it is not just to treat lightly a criminal who is a serious threat to the security of society. Since crime is deemed to be a challenge to the prevailing values of society and a violation of the victim's rights, punishment must also bring justice to the victims of crime. This does not mean that judges are in favour of revenge. Rather, the search for justice entails a measured response which serves as an index of social values and progress. Satisfaction for the victim and his/her family is an essential part of that search, which, in turn, plays an important role in social control.

Penalties in Islam also aim at reforming the criminals by punishing their actions. Fair retribution will let the criminals feel the severity and pain of their evil behaviour which their victims suffer. This will cure the criminals of their inner illness of criminal tendencies. In short, awareness of the punishment will discourage the criminals from repeating the offence.

It is believed that the imposition of an exemplary punishment on stubborn wrongdoers will produce a psychological effect on the rest of society, particularly those who have criminal tendencies and intentions. Public awareness of the effects of legal penalties will act as a deterrent and so prevent them from falling into evil ways. Perhaps that is the rationale for holding executions in public, for that gives everyone a clear reminder that the same punishment will be imposed on anyone else who

commits the same crime.³⁴ That is why the general public is gathered to witness the punishment of the offender in broad daylight,³⁵ as stated in the Qur'ān:

And let a group of the believers witness their punishment (24:2).

Achieving the goals of justice and deterrence does not mean that the goal of reformation is diminished, for its importance in Islamic Law cannot be disputed. The success of a criminal and penal policy in any society is measured by the degree to which it harmonizes these goals. The rehabilitation and re-education of criminals must be taken into consideration during the punishment stage to ensure that it is compatible with the actual punishment imposed.³⁶

As to the wisdom of divine punishment, Ibn Qayyim proposes:

It is a token of God's Wisdom and Benevolence that the punishments are not by removing every limb with which the crime was committed. The thief's hand is to be cut off but not the adulterer's sexual organ. It is the wisdom and mercy of God to preserve man's interest as the punishment is not to remove any part of criminal's body for the crime committed with it. Therefore, God Almighty never gave any command to remove the eye of a person who looks at the prohibited things, or to cut off the ear for listening to the prohibited, or tongue of the liar, or the hand which slaps others with aggression.³⁷

It is argued that adulterers commit sexual intercourse with the whole body, which experiences the enjoyment of fulfilling sexual desire. Most fornication takes place with mutual consent and so, unlike stealing, there is no fear and panic. Therefore,

³⁴Šāliḥ ibn Šāliḥ al-Khuza'im. ' *Uqūbat al-zinā* (Riyadh: Dār ibn al-Jawzī, 1422AH), p.326.

³⁵Siddiqi, *The Penal Law of Islam*, p.326.

³⁶Al-Alfī, "Punishment in Islamic Criminal Law", p.231.

³⁷Ibn Qayyim, *l'lam al-muwaqqi 'in 'an rab al-'alamīn*, vol.1, p.320.

fornicators are punished with flogging, since most of the body will feel the pain. The majority (*jumhūr*) of jurists hold that a male fornicator is also liable to banishment, which entails his removal from society, or imprisonment for one year. This arrangement is to ensure that he is not ostracized for what he has done and that in the course of time, people may forget about it. Mālik believed that banishment should not apply to women convicted of *zinā*, clearly out of fear of immorality and corruption.³⁸

With regard to the death penalty for the married adulterer, it is argued that *zinā* is considered one of the major sins and a very serious crime, causing corruption in lineage, which is almost similar to the destruction of humankind. As the law of retaliation (*qiṣāṣ*) is applied as the punishment for murder because of the gravity of the crime in causing destruction on earth, a married adulterer should be sentenced to the same punishment.³⁹ However, the conviction of *zinā* has been made extremely difficult – indeed, almost impossible – so as to avoid the severe penalty, for it requires the testimony of four reliable, sane, adult male Muslim witnesses who have seen the act clearly take place.

³⁸See ‘Alī Maṣṣūr, *Nizām al-tajrīm wa al-‘iqāb fī al-Islām*, (Madina: Mu’assasat al-Zahrā’, 1976), pp.181–182; Abū Zahra, *al-‘Uqūba*, p.98.

³⁹Ibn Qayyim, *l’lām al-muwaqqi ‘in*, vol.2, pp.74–75.

C. The Penalties for Rape

Ibn Rushd observes that most scholars agree that the *ḥadd* penalty for *zinā* should be applied to a convicted rapist.⁴⁰ They base their argument on the hadith of ‘Abd al-Jabbār ibn Wā’il⁴¹, which reports a rape case at the time of the Prophet. According to this particular hadith, there was no legal action taken against the victim of rape. As to the convicted rapist, the Prophet commands that he must be put to death by stoning which is similar to the punishment of *zinā*. As it is submitted that the jurists are unanimously agreed to impose the punishment of *zinā* on a convicted rapist who is convicted by the same way of the standard of conviction in *zinā*, it is necessary to explain the penalty for *zinā* in Islamic criminal law in the first place before we investigate other possible punishments for rape.

(a) Penalty based on the Punishment of *zinā*

There is unanimity among the Muslims that the punishment of flogging for *zinā*, as prescribed in the Qur’ān, applies to unmarried men and women, who are described in Islamic legal terminology as *ghayr muḥṣan*. In the view of the Sunni jurists, the punishment of stoning to death is applicable only to a convicted married *zinā* offender (*al-zānī al-muḥṣan*).

⁴⁰Ibn Rushd, *Bidāyat al-mujtahid*, vol. 2, p.324. Pakistan’s Offence of *zinā* (Enforcement of Hudood) Ordinance (VII of 1979) provides the definition and punishment of rape or what is termed as *zinā bi al-jabr* (*zinā* by force). Section (6) provides the punishment for the guilty of rape in the sub-section no 3:

(a) if he or she is a *muḥṣan* to be stoned to death at a public place or if she or he is not a *muḥṣan* to be punished with a whipping numbering one hundred stripes, at a public place, and with such other punishment, including the sentence of death, as the court may deem fit having regard to the circumstances of the case.

⁴¹For details of the the hadith, see chapter 4, pp.100-101 of this thesis.

The terms *al-zānī al-muḥṣan* and *al-zānī ghayr al-muḥṣan* can be translated into English as adulterer and fornicator respectively. The legal distinction between them is that a married person has no excuse for committing *zinā*, since he or she can enjoy lawful sexual relations with his or her spouse. This opportunity is not available to the unmarried, and therefore, the punishment of the unmarried should be lighter than that of the married.⁴²

The legitimacy of stoning to death is based on the Sunna of the Prophet. Among the reported hadiths prescribing stoning are the following:

1. It is related on the authority of Abū Hurayra that a bedouin man came to the Prophet, complaining to him about his son, who had committed *zinā* with his employer's wife. He said: "O Prophet of Allah, in the name of Allah I want you to pass judgment from Allah's Book. My son committed adultery with his employer's wife, and I was told that the penalty for my son is *al-rajm* (stoning). Hence, I want to pre-empt his offence with 100 sheep and a slave. After asking some of your knowledgeable Companions, they told me that the penalty for my son is 100 lashes and one year in exile and the penalty for the woman is *al-rajm*."

The Prophet said, "I will judge based on the Book of Allah. The sheep and slave girl should be returned to you. And your son deserves 100 lashes and one year in exile." With regard to the woman, the Prophet ordered a Companion

⁴² El-Awa, *Punishment in Islamic Law*, p.19.

called Unais to investigate the matter, “If she confesses, then stone her to death.”⁴³

2. ‘Ubāda ibn al-Ṣāmit reported that the Prophet said: “Take it from me. Take it from me. Allah has revealed to me the penalty for adulteresses. For the unmarried it is 100 lashes and for the married it is stoning (*al-rajm*).”⁴⁴
3. Ibn Mas‘ūd reported that the Prophet said: “A Muslim should not be killed (his blood is protected), except for three offences: adultery committed by a married person, a murder, and apostasy.”⁴⁵
4. The majority of jurists also base their position on a report that a Qur’ānic verse was originally revealed prescribing this punishment: “The old married man and woman who commit adultery, stone them to death as a deterrent from Allah and Allah is Most Powerful, Most Wise.” However, the text of this verse was abrogated, although its instructions continued to be applied.⁴⁶
5. There is also a reported occasion when ‘Umar made the following statement while delivering a sermon: “Indeed Allah sent Muḥammad with the truth and revealed a book to him. Among the revealed verses was the verse prescribing *al-rajm*. We used to recite and comprehend the message, and the Prophet implemented the punishment as we have ourselves. I am afraid that one day someone will say, ‘We do not find the verse of stoning in the Qur’ān, and thus

⁴³Al-Bukhārī, *al-Jāmi‘ al-ṣaḥīḥ*, hadith no. 6827. The hadith appears in most books of hadith such as Malik’s *Muwatṭā’*, Muslim’s *al-Ṣaḥīḥ* and authors of *al-Sunan* such as Ibn Mājah, al-Nasā’ī, al-Tirmīdhī and Abū Dāwūd.

⁴⁴ See Muslim ibn al-Ḥajjāj, *Ṣaḥīḥ Muslim, The Book of Hudūd*, vol.3, no.1316.

⁴⁵Al-Bukhārī, *al-Jāmi‘ al-ṣaḥīḥ*, hadith no. 6878.

⁴⁶Ibid., vol.12, p.119; al-Shawkānī, *Nail al-awṭār*, vol.7, pp.254–255.

abandon the punishment. Indeed, this punishment is valid for anybody, male or female, who commits such a crime and who is married.”⁴⁷

There are other hadiths confirming that the Prophet implemented the penalty of *rajm* (stoning). It is recorded that the penalty was applied on four occasions during his 23 years of prophethood. The first case was that of two Jews convicted of adultery, where the Prophet ordered the sentence based on their own law, as prescribed in the Old Testament.⁴⁸ The other three cases were the hadith about Mā‘iz (male),⁴⁹ that of the Ghāmidiyya woman,⁵⁰ and the above-mentioned hadith of al-‘Asīf (the employer’s wife).⁵¹

The penalty of stoning to death is clearly prescribed in most of the known books of hadith. All the reports state that the Prophet received the revelation and then told his Companions that a new piece of legislation had been revealed to him, namely, that a married man or woman should be given one hundred lashes and then stoned to death, while an unmarried man or woman should be given one hundred lashes and then banished for one year.⁵² Thus, based on this hadith, Muslim jurists unanimously agree on implementing the punishment of stoning for the married offender.

⁴⁷This hadith appears in most of the books of hadith and has been verified as authentic. See, al-Albānī, *Ṣaḥīḥ ibn Mājah*, hadith no.2067. The opponents of *rajm* from the Khārijites and the Mu‘tazilites advocate that abrogation of the words of a Qur’ānic verse and continuity of its instructions are a controversial point. Hence it cannot be of any help to assert that the Qur’ān prescribed stoning as a punishment.

⁴⁸Al-Bukhārī, *al-Jāmi‘ al-ṣaḥīḥ*, authentic hadith no.7543.

⁴⁹Muslim, *Ṣaḥīḥ Muslim*, authentic hadith no.6824.

⁵⁰Ibid., authentic hadith no.1695.

⁵¹Al-Bukhārī, *al-Jāmi‘ al-ṣaḥīḥ*, authentic hadith no.6827.

⁵²Muslim, *Ṣaḥīḥ Muslim*, hadith no.1690; Abū Dāwūd, *al-Sunan*, hadith no.3713; Ibn Mājah, *Sunan ibn Mājah*, hadith no.2066; al-Tirmidhī, *Sunan al-Tirmidhī*, hadith no. 1161.

However, there is disagreement over whether a married adulterer should also be flogged and whether one year banishment should be imposed on unmarried adulterers.⁵³ This disagreement arises from the fact that when the Prophet ordered the punishment of stoning to be carried out, he did not order flogging to precede it, nor did he order banishment with flogging, except on one occasion when banishment was said to have been imposed in the public interest.⁵⁴

It is noteworthy that the hadiths describing the implementation of *rajm* show how the Prophet was not interested in sentencing such a severe penalty. As to those who confessed voluntarily, the Prophet gave them opportunity to leave, to change their minds and repent. In the case of the Ghāmidīyya woman, for example, he did not act promptly to execute her. On the contrary, he gave her the chance to go home and await the birth of the baby. On the second occasion of her confession, he told her to go home and nurse the baby. The execution only took place after the third time of confession where she was still adamant to purify herself.⁵⁵

Besides the view of the majority of Muslim jurists, as detailed above, there is another view suggesting that the penalty for *zinā* is confined to a flogging of 100 lashes,

regardless of the offender's marital status. Its proponents are mostly Khārijites and Mu'tazilites.⁵⁶ Their arguments are based on the following grounds:

⁵³ Ibn Ḥazm, *al-Muḥallā*, vol.11, p. 183.

⁵⁴ Ibn Qudāma, *al-Mughnī*, vol.8, p.166; Ibn al-Humām, *Sharḥ Faḥ al-qadīr*, vol.6, p.135.

⁵⁵ Muslim, *Ṣaḥīḥ Muslim*, authentic hadith no.1695.

⁵⁶ Abdullah ibn Yūsuf al-Zailā'ī, *Naṣḥ al-rāya li ahādīth al-Hidāya*, (Cairo: Dār al-Ḥadīth, 1992), vol.3, p.330.

1. They assert that no punishment of stoning to death is mentioned in the Qur'ān. This view is based on the analysis that the Qur'ān has provided a uniform punishment of 100 lashes and is totally silent about *rajm*:

“The fornicatress and the fornicator: flog each of them with a hundred lashes. And do not be overcome with pity for them in the religion [that is, law] of Allah, if you believe in Allah and the Last Day.” (24:2)

According to this Qur'ānic verse, there is no difference between a married or unmarried adulterer. The supporters of this view argue that the evidence in the Sunna is in the form of isolated (*aḥād*) hadiths, which are not elevated to the level of being *mutawātir*. Only a *mutawātir* hadith is totally convincing and precludes the possibility of lying and doubt in its transmission. Stoning to death is the most severe penalty. It should therefore be proven by decisive evidence from the Qur'ān and a *mutawātir* hadith. Only these two sources provide certainty (*qat ʿ al-thubū*).⁵⁷ Indeed, the hadiths on *rajm* fall short of being *mutawātir*. Although an *aḥād* hadith can create obligation and a *ḥukm* (ruling), it cannot override what is proven by decisive evidence.

Countering this hypothesis, the majority of jurists argue that the hadiths of stoning to death, such as the cases of Mā'iz and the Ghāmidīyya woman, were reported by numerous Companions. They can be seen in any book of hadith, with details of the chain of transmission from various Companions, who

⁵⁷Ibn Qudāma, *al-Mughnī*, vol.10, pp.120–121.

themselves attended the scene. These chains support one another, thus proving that there is no possibility of fraud or doubt.

2. It is also possible that this punishment was prescribed by the Qur'ān, but was abrogated afterwards. This is based on al-Bukhārī's narration that someone asked Ibn Abī 'Awfā, a Companion of the Prophet, if the Prophet had ordered stoning to be carried out before or after the prescription of one hundred lashes in the Qur'ān (24:2). Ibn Abī 'Awfā replied that he did not know which one was first. Based on this case, one can assume that the reported instances of stoning actually took place prior to the revelation of the Qur'ānic verse in *Sūrat al-Nūr* (24:2), which prescribes the punishment of flogging. This means that the Qur'ānic provision on flogging in fact abrogated stoning.

This assertion is refuted by the fact that the tradition of Ibn Abī 'Awfā does not provide any evidence of abrogation. The narrator's uncertainty about the timing of the stoning does not mean that the punishment was abrogated, since it is known that the Prophet's Companions imposed the same punishment later.⁵⁸ Therefore, it can be stated that the punishment of stoning to death is prescribed by the Sunna, though not by the Qur'ān.

In this light, Ibn 'Āshūr observes that there is no doubt that the Sunna confirming *rajm* was created after the revelation of *Surat al-Nūr*. Ibn Abī 'Awfā's uncertainty about the timing can be clarified by Abū Hurayra's

⁵⁸Ibn Qudāma, *al-Mughnī*, vol.8, p.160.

statement that he witnessed the stoning. It confirms that the penalty was implemented after the revelation because Abū Hurayra converted to Islam in year 7th AH. He adds that *rajm* is also valid according to *ijmā'*, that is, the consensus of the *Umma* (Muslim community), for the Prophet had confirmed that the *Umma* would never agree on an error.⁵⁹

El-Awa argues that it is hard to believe that this penalty could have been abrogated without the knowledge of any of the Companions. Such a baseless supposition could lead to the assertion that every rule of Islamic Law had been abrogated.⁶⁰

3. It is possible that the Prophet had the Jews guilty of *zinā* stoned according to their own law. Since there had been no revelation concerning the offence, he had the same punishment applied to the guilty Muslims.

As to the argument that this law is borrowed from Judaism, as a matter of fact the source of both laws is Allah's revelation, so it can rightly be expected that many rules in both religions will be similar in nature.

4. The opponents of stoning have also cited in support of their argument a verse of the Qur'ān, which seems to confirm flogging as the only Qur'ānic punishment for *zinā* provided by the Holy Book:

And whoever among you cannot [find] the means to marry free, believing women [*muḥṣanāt*], then [he may marry] from those whom

⁵⁹Muḥammad Tāhir ibn 'Āshūr (d.1379AH/1973CE), *Tafsīr al-taḥrīr wa al-tanwīr* (Tunisia: Dār al-Kutub al-Sharqīyya. 1984), vol.18, p.149.

⁶⁰El-Awa, *Punishment in Islamic Law*, p.16.

your right hands possess of believing slave girls. And Allah is Most Knowledgeable about your faith. You believers are of one another. So marry them with the permission of their people and give them their due compensation, that is, *mahr*, according to what is acceptable. They should be chaste (*muḥṣanāt*), neither of those who commit unlawful intercourse randomly nor those who take secret lovers. However, once they are sheltered in marriage (*idhā 'uḥsinna*), if they commit adultery, then for them is half the punishment for free unmarried women. (4:25)

According to them, the indication from this verse is the statement that the penalty for a slave wife who commits adultery is half of that of a free woman. Clearly, it does not make sense to halve stoning (*al-rajm*). It is interesting to note that all the jurists of all the schools of law agree that the *ḥadd* penalty for *zinā* committed by a slave woman is 50 lashes, no more than that. 50 lashes are half of 100 lashes. Therefore, it can be concluded that flogging is the only Qur'ānic punishment in all cases of *zinā*.⁶¹

The majority of jurists have responded that the word *uḥsinna* at the beginning of the latter part of this text means marriage, though the second occurrence, namely, *al-muḥṣanāt*, in the subsequent part of the same text means freedom and virginity instead of marriage.⁶²

⁶¹Al-Zailā'ī, *Naṣḥ al-rāya*, vol.3, p.330; Abū Zahra, *al-'Uqūba*, p.78.

⁶²Abū Zahra, *Ibid.*, p.79.

The opponents of *rajm* regard this interpretation as rather strange, for the same word is read with one meaning at the beginning of the verse, but with a different meaning at its end.⁶³

According to Tāhir ibn ‘Āshūr, verse 2 of *Sūrat al-Nūr* refers to both the married and the unmarried. Nevertheless, the Sunna has specified that the ruling applies only to the unmarried. This is agreed upon among Muslim jurists apart from the Khārijites.⁶⁴

Ibn ‘Āshūr argues that to interpret *iḥsān* as Islam in the context of the verse is less accurate. He quotes the suggestion of al-Qādī Ismā‘il ibn Ishāk that to interpret *iḥsān* as Islam is not accurate because their faith has been mentioned at the beginning of the verse (*min fatayatikum al-mu‘mināt*). He supports the opinion of al-Zuhrī that the penalty for an unmarried slave is prescribed in the Sunna, while the penalty of a married slave is prescribed in the Qur‘ān. The verse implies that a slave should not be punished with *rajm*, and that the only punishment applicable to a slave for committing *zinā* is a flogging of 50 lashes. That is the opinion of the majority.

Abū Thawr has a remarkable interpretation of the verse. He states that even if the ruling of *rajm* appeared after this verse, yet the halving confirms that the

⁶³ Alī Mansūr, *Nizām al-tajrīm wa al-‘Iqāb fī al-Islām*, p.172.

⁶⁴ Ibn ‘Āshūr, *Tafsīr al-tahrīr wa al-tamwīr*, vol.18, p.149.

punishment of a slave must be less than that of a free woman. Therefore, it is impossible to impose *rajm* on her since it can never be halved.⁶⁵

(b) Penalty Based on *ḥirāba*

Some contemporary scholars of Islam are inclined to categorize rape as a *ḥirāba* crime. Therefore, the method of proving guilt and conviction is based on the principle of *ḥirāba*, not that of *zinā*. This means that the punishment of the rapist is in the same category as that of outlaws, who are considered a threat to the security and peace of society, as described in the following Qur'ānic verse:

The recompense of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed or crucified or their hands and feet on opposite sides be cut off, or be exiled from the land. That is their disgrace in this world, and a great torment is theirs in the Hereafter (5:33).

Among the modern authors who support this opinion are Asifa Qureishi,⁶⁶ Muḥammad Shaḥḥāt al-Jundī,⁶⁷ al-Sayyid 'Abd 'Azīz al-Hindī, Muḥammad Ṭayyib al-Najjār, and Muḥammad Salīm al-'Awwā.⁶⁸ The Religious Council of Egypt (Dār al-Ifṭā' al-Miṣriyya) has issued a fatwa that a violent attack consisting of forcible sexual intercourse is an act of *ḥirāba*.⁶⁹ Al-Ṭabarī, for example, interprets *al-fasād* as

⁶⁵ Ibid., vol.5, p.17.

⁶⁶ Asifa Qureishi, *Her Honour: An Islamic Critique of the Rape Provisions in Pakistan's Ordinance on Zina* (Kuala Lumpur: Islamic Book Trust, 2002), p.21.

⁶⁷ Muḥammad Shaḥḥāt al-Jundī, *Jarīmat ighṭiṣāb al-ināth fī al-fiqh al-Islāmī muqāran bi al-qānūn al-waḍ'ī*, p.268.

⁶⁸ Al-Sayyid 'Abd al-'Azīz al-Hindī, *al-Jarīmat wa al-'Iqāb*, p.38; Muḥammad Tayyib al-Najjār, *al-Ahrām* (26 January 1985); Muḥammad Salīm al-'Awwā, *al-Ahrām* (7 March 1992) quoted from Ashrāf Tawfīq Shams al-Dīn, "al-Ḥimāya al-jinā'iyya li al-ḥaq fī ṣiyānat al-'ird fī al-sharī'a al-Islāmiyya wa al-qānūn al-waḍ'ī", unpublished PhD thesis, Faculty of Law, Cairo University, 1995, p.210.

⁶⁹ Statement of Dār Ifṭā' no.276 (1985). See, Shams al-Dīn, "al-Ḥimāya al-jinā'iyya", p.210.

causing mischief and chaos on the earth by whatever violent means, including usurping other people's property and honour.⁷⁰

The Mālikites regard *ḥirāba* as an act of aggressive assault, although it does not include taking valuables.⁷¹ Some of them, such as Ibn al-ʿArabī, specify that the infringement of honour, that is rape, is more serious than taking property.⁷² Their argument is that rape contains elements of *ḥirāba* such as assault, battery, using force, instilling fear, usurpation, and torture. It is inevitable that rape is similar to *ḥirāba* in that respect, which is regarded as *fasād* or mischief and causing trouble.

According to Asifa Qureishi:

This cursory review of traditional Islamic *Sharīʿa* shows that the crime of rape is not a subcategory of *zinā*, but rather a separate crime of violence under *ḥirāba*. This classification is logical because the taking is of the victim's property (the rape victim's sexual autonomy) by force. In Islam, sexual autonomy and pleasure is a fundamental right of both women and men.⁷³

Some of the scholars prefer to classify rape as a *ḥirāba* crime for reasons of prosecution. According to Asifa, *zinā* requires a high standard of proof. Unlike *zinā*, *ḥirāba* does not require four witnesses to prove the offence. Circumstantial evidence and expert testimony, then, presumably form the evidence used to prosecute such crimes. In addition to using eyewitness testimony, medical data and expert

⁷⁰ Al-Ṭabarī, *Jāmīʿ al-bayān*, vol.10, p.257.

⁷¹ Khalīl ibn Ishāq al-Jundī (d. 766 AH/1365 CE), *Mukhtaṣar khalīl*, ed. Tāhir Aḥmad al-Zawī, (Cairo: Dār Iḥyāʾ al-Kutub al-ʿArabiyya, n.d.), vol.7, p.104; al-Ḍasūqī, *Hāshiyat al-Ḍasūqī*, vol.4, p.309.

⁷² Ibn al-ʿArabī, *Aḥkām al-Quʾrān*, vol.8, p.594.

⁷³ Asifa Qureishi, *Her Honour*, p.19.

testimony, a modern *ḥirāba* prosecution of rape would be likely to take advantage of the latest technological advances such as forensic evidence and DNA testing. Finally, the classification of rape as *ḥirāba* promotes the principle of honouring women's dignity as established in the Qur'ānic verses of *zinā*. Rape as *ḥirāba* is a separate violent crime which uses sexual intercourse as a weapon. The focus of a *ḥirāba* prosecution would be the man accused of rape, his intention and physical actions, rather than just guessing the consent of the rape victim, which, as we have seen, is likely to happen if rape is classified as a type of *zinā*. In addition, for the *ḥadd* of *ḥirāba*, there is no consideration of marital status.⁷⁴

This opinion can be argued by the fact that it is considered *ta'wīl* to include every single crime as part of *ḥirāba* in its original textual meaning. The result will not be regarded as a valid *Sharī'a* rule, but rather a personal legal opinion. This is a dangerous trend, since any simple mistake could be construed as *ḥirāba*. At the same time, tyrannical rulers could take advantage of the situation to criminalize opposition to their policies and practices by introducing new laws to punish the opponents.⁷⁵

It could be argued that if rape in the form of a violent attack is to be categorized as *ḥirāba*, how would rape without violence and usurpation be classified? It could also be argued that if extending the meaning of *ḥirāba* is in line with the commandment of the Law-giver (Allah), why does He provide different penalties for stealing, *zinā*, and defamation instead of the *ḥirāba* penalty?

⁷⁴Ibid. p.19.

⁷⁵Abd al-'Azīz Muḥammad Muḥşin, "*Jarīmat al-ḥirāba wa 'uqūbatuhā fī al-sharī'a al-Islāmiyya wa al-qānūn al-jinā'ī*", unpublished PhD thesis (Cairo: Cairo University, Faculty of Law), 1983, pp.67–80. See also Shams al-Dīn, *al-Ḥimāya al-jinā'iyya*, p.214.

Rape should not be categorized as a *ḥirāba* offence because of its different nature and criminal conceptualization. Although it is considered *ifsād fī al-'arḍ*, which constitutes *ḥirāba*, it does not make sense to widen the scope of this category to include every crime, since *ḥirāba* has its own definition.

Furthermore, it is not correct to say that the punishment for adultery is more severe than *ḥirāba* without looking at its strict procedure. In addition, the penalty for an unmarried adulterer is 100 stripes and not the death penalty, whereas under *ḥirāba*, the death penalty could be passed regardless of the criminal's marital status. In addition, those who commit crimes other than *ḥirāba* are not labelled as waging war against Allah and His messenger.⁷⁶

It is noteworthy that the concept of *ḥirāba* is that the punishment of the criminal should be based on the severity of the crimes committed. The criminal should be executed or crucified if he has killed; if he takes property, his right hand must be amputated; if he poses threat, he should be exiled.⁷⁷ This is applicable to crimes of rape and homicide, rape and robbery, or attempted rape.⁷⁸

In Islamic discourse, the literal meaning of *muḥāraba* is to contest, to disobey, or to fight. By itself, the word is value-neutral. It does not necessarily connote something

⁷⁶Shams al-Dīn, *al-Ḥimāya al-jinā'iyya*, p.217.

⁷⁷Abdur Raḥman I.Doī, *Sharī'ah: Islamic Law*, pp.250-252.

⁷⁸In this regard, al-Nawawī, a Shāfi'ite jurist states: "If punishments, which are purely the right of Allah, accumulate, the lightest to be endured by the convict will be implemented first, followed by the next lightest and so on." See al-Shirbīnī, *Mughnī al-muḥtāj*, vol.4, p.185.

illegal or immoral. However, it is widely used in Islamic jurisprudence to refer to brigandage and armed robbery. A criminal is considered to have committed *ḥirāba* when he has trespassed, killed, taken valuables or caused threat.⁷⁹

(c) Penalty based on *Ta 'zīr*

Some modern researchers consider rape a *ta 'zīr* offence.⁸⁰ As it is submitted that offences which have not been prescribed specific penalties in the authentic sources are categorized as *ta 'zīr* crimes,⁸¹ one may suggest that under doctrine of *ta 'zīr*, rape is punishable with severe punishments such as imprisonment, lashes, banishment and even death penalty.⁸² This implies that if a conviction is reached regardless of the number of witnesses supported with other corroborative and circumstantial evidence such as marks of violence on or around the genitals, marks of violence on the body of the victim or that of the accused, the presence of semen or bloodstains on the body or clothes of the victim or the accused, or a medical report, all of which provide sufficient evidence, the convicted criminal must be punished with *ta 'zīr* penalties.⁸³

(d) Penalty for Gang Rape

Rape can be planned and committed by more than one criminal, which is known as gang rape. In this case, the accused is either a direct participant (*mubāshir*) or an indirect participant (*mutasabbib*). A person is classified as a *mubāshir* when he or she initiates a crime intentionally, regardless of whether the action is accomplished.

⁷⁹Khaled Abou el-Fadl, *Rebellion and Violence in Islamic Law* (New York: Cambridge University Press, 2001), p.32.

⁸⁰Nagaty Sanad, *The Theory of Crime and Criminal Responsibility in Islamic Law*, p.64.

⁸¹Ibn Nujaim, *al-Ashbāh wa al-naẓā'ir*, p.188.

⁸²For details of *ta 'zīr* corporal penalties see p. 125 of this thesis.

⁸³Anwarullah, *Criminal Law of Islam* (Brunei: Islamic Da'wah Centre, Ministry of Religious Affairs, 1995), p.118.

According to a general *Shari‘a* doctrine, whenever the criminals are enumerated, each is responsible and therefore liable as if each had committed the crime independently. Thus the penalty is still the same. Each member of the group is also treated separately in terms of *mens rea*, having accomplished the criminal action in addition to other relevant considerations.⁸⁴ Indirect causation (*tasbīb*) creates liability only if the act in question was unauthorized.⁸⁵

It is observed that most jurists place greater emphasis on the *mubāshir* than on the *mutasabbib*, because the general principle of sentencing is that the *ḥadd* penalty should be imposed on the *mubāshir*, that is, the person who commits the crime directly. In other words, one who plays a direct role in committing is fully liable to the fixed penalty.⁸⁶ In a rape case, the convicted rapist who directly participated in the scene of the crime is liable to a severe punishment, while the indirect participant is liable for less severe penalty.

Some jurists refer to the types of direct participation in committing crimes such as *al-tawāfiq* and *al-tamālu’*. The former means an unplanned action. For example, although the gang did not plan to commit rape, when they came across a situation apparently to their advantage, they all committed the crime. Everyone participated following a swift decision. On the other hand, the latter means a plot in which all the members of a gang have agreed to take part and work together to accomplish their

⁸⁴ Awda, *al-Tashrī‘*, vol.1, pp.357–359; Sanad, *The Theory of Crime*, p.64.

⁸⁵ Schacht, *Introduction to Islamic Law*, p.182.

⁸⁶ Awda, *al-Tashrī‘*, vol.1, pp.357–359.

evil action.⁸⁷ In the opinion of Abū Ḥanīfa, there is no difference between the two situations. Each member of the gang is liable to be punished for what he did.⁸⁸ Some Ḥanbalites and Shāfi‘ites also agree with this opinion.⁸⁹

Conclusion

Rape is a serious crime and should be treated as such, and as a separate criminal offence.⁹⁰ The penalty for rape differs according to the circumstances and consequences of the crime. Under some circumstances, the rapist is liable to the *ḥadd* of *zinā* and possibly also to the *ḥadd* of *ḥirāba*, and the penalty may be complemented by *ta‘zīr*. Although the penalty for rape is extremely severe, it must be based on conclusive and definitive evidence as well as a scrupulous investigation of aggravating and mitigating circumstances.

The jurists’ decision to impose the *zinā* penalty reflects the gravity of the crime. This type of penalty is chosen on the grounds that a sentence for a *ḥadd* crime is mandatory and the same for all offenders in that category. The problem of disparity will not arise in sentencing. Capital punishment for a rapist is also justifiable according to the doctrine of *ta‘zīr* and the principle of *al-siyāsa al-shar‘iyya*.⁹¹ Based

⁸⁷ Awda, *al-Tashrī‘ al-jinā‘ī*, vol.1, pp.357–359

⁸⁸ Al-Dardīr, *Sharḥ al-Dardīr ‘alā Mukhtaṣar Khalīl*, vol.4, p.217; al-Ramlī, *Nihāyat al-muḥtāj*, vol. 7, p.261.

⁸⁹ Al-Shirāzī, *al-Muḥadhdhab*, vol.2, p.716; Ibn Qudāmah, *al-Mughnī*, vol.9, p.366.

⁹⁰ Some modern Western writers, such as Colin Imber, assert that Islamic Law does not provide punishment for rape. It is treated as fornication and, in theory, the woman (victim of rape) is as culpable as her attacker. This assertion is baseless, for there are clear evidence from the hadiths and works of Muslim jurists to penalizing the rapist only and upholding the innocence of the victim as this thesis is inclined to. See, Colin Imber, *The Islamic Legal Tradition*, (Edinburgh: Edinburgh University Press, 1997), p.267.

⁹¹ Ibn Taymiyya, *al-Siyāsa al-shar‘iyya*, p.121-124.

on this principle, the ruler should implement the most effective penal system to combat crime, even by imposing the death penalty.

In my opinion, rape is punishable with the *ḥadd* of *zinā* only if the crime was convicted based on the same standard of proof for *zinā* on the ground that rape could be committed by the criminal in public or in front of a group of people elsewhere with the intention of humiliating the victim and her family. However, the evidence should not only be limited to the testimony of four integrated male eyewitnesses as rape is also punishable by other sort of severe punishments. As such rape could be proved by other means of evidence. Again, the general principle that the severity of the penalty must match the gravity of the crime should be followed.

In addition, a rape victim has the rights of compensation, that is, a dowry, which should be paid to the victim.⁹² Other injuries and fatalities related to the rape must be recompensed accordingly. Trauma, homicide, and other consequences could be evaluated on the basis of *jirāḥ*. This view supports the proposition that rape should be treated separately although in association with other sexual offences.⁹³

⁹²Ibn Farḥūn, *Tabṣīrat al-Ḥukkām*, vol.2, p.194.

⁹³The victim's legal rights will be discussed in chapter 7 of this thesis.

6 Requirements of Sentencing and the Rights of the Accused

In the previous chapters we have discussed the penalty of rape as well as the rules of evidence and the due process of law which must be properly and strictly followed within the Islamic criminal justice system. In order to prove and establish the criminal guilt of the accused, the evidence must remain legally valid, sound and conclusive throughout all stages of the criminal proceedings and the execution of the sentence.

A. Pre-requisites of Sentencing

Based on most of juristic works, the following criteria can be regarded as pre-requisites for sentencing a convicted rapist:

(a) Legal Capacity

The highest degree of legal capacity of a free Muslim is to be *‘āqil* (sane) and have reached the age of majority (*bāligh*). In this case s/he is fully responsible (*mukallaf*) for his action. Majority is determined by physical indications, by the declaration of the youth in question, or failing this, by reaching the age of fifteen lunar years. The *mukallaf* has the capacity to contract and to dispose (*taṣarruf*), he is bound to fulfil the religious duties, and he is fully subject to criminal law, and being capable of deliberate intent (*‘amd*).¹

(b) Criminal Intention (Mens Rea)

In Islamic Criminal Law, criminal intention determines criminal liability of the accused person. It means that a person only becomes criminally liable when he decides to commit a crime intentionally, freely and willingly. In general, one is

¹ See Joseph Schacht, *An Introduction to Islamic Law*, p.124. See also pp. 45-46 of this thesis.

considered as having a criminal intention if he or she is aware that the act he/she committed was against the law. Degrees of culpability are commonly referred to by terms such as “intentionally”, “knowingly”, “recklessly”, and “negligently”.²

In this light one may suggest that as for the crime of rape, a person is considered to having this intention when he has intercourse with a woman by force and without her consent while he is aware that the act he is committing is against the law.

Criminal responsibility exists only if a person has a criminal intent at the moment he engages in criminal conduct. The criminal intention which is accountable in this regard is the one which is accompanied with a compatible action. This is referred to in legal terms as the concurrence between criminal conduct and criminal intent.³ Muslim jurists unanimously agree that no one shall be held criminally responsible for *ḥudūd* or *qiṣās* crimes unless he or she has intentionally committed the act. For example, if a woman is brought to a man on his wedding night and, mistakenly believing she is his wife, he has sexual intercourse with her, he would not be legally liable nor would he be considered to have committed adultery. This is on the ground that he had no criminal intention to commit an illegal act against the woman.⁴

²Awda, *al-Tashrīʿ*, vol.2, p.374; Sanad Nagaty, *The Theory of Crime and Criminal Responsibility in Islamic Law*, p.86-88.

³Awda, *Ibid.*; Sanad Nagaty, *Ibid.*

⁴Al-Namīr, ʿIzzat, Muḥammad, *Jarʿim al-ʿirdfī qānūn al-ʿuqūbā al-Miṣrīyya*, p.249.

Al-Bahūtī of the Ḥanbalites makes an almost similar statement:

If a person is newly married and a woman was mistakenly sent to him as his bride and he copulates with her, there will be no *ḥadd*.⁵

An unintentional wrongdoing, however, is not an excuse as far as the rights of people are concerned. A person who is accidentally causes damage to other's belongings is liable for his mistake. In this case he has to compensate the estimated loss.⁶

The plotting and planning of the crime is of the utmost importance as a part of mens rea.⁷ Any attempt of rape is regarded as an offence. The perpetrator is liable to a *ta'zīr* penalty although the criminal action has not been completed. However, the penalty will not exceed the limit of the *ḥadd* penalty. This is because to be engaged in the beginning of illegal intercourse is not the same as accomplishing it. Ibn Taymiyya asserts:

For an offence for which a penalty has not been prescribed such as kissing a woman to whom one is not legally married or having sexual enjoyment without intercourse and so on, the convicted is liable for a *ta'zīr* penalty.⁸

⁵Al-Bahūtī, *Kashshāf al-qinā'*, vol. 6, p.78.

⁶See M. Cherif Bassiouni, *The Islamic Criminal Justice System*, p.77-78.

⁷One of the main characteristics of rape is that it is a planned event. A study suggests that in 71 percent of the 646 cases under investigation the offense was planned, while in 11 percent of the cases it was partially planned; only in 16 percent could be defined as explosive. See Menachem Amir, *Patterns in Forcible Rape*, p.213.

⁸Ibn Taymiyya, *al-Siyāsa al-shar'īyya*, p.56.

(c) Awareness of the penalty

Islamic jurisprudence shares the general maxim that ignorance of the law is not an excuse for committing the crime.⁹ Al-Shāfi‘ī, for example, points out that if ignorance is allowed as an excuse for wrongful acts, then ignorance will become more favoured than knowledge, and people would prefer to stay ignorant.¹⁰

However, it has been observed that there are some isolated circumstances where ignorance can be an excuse. There are instances such as the decision of ‘Umar Ibn al-Khaṭṭāb refraining from inflicting punishment on defendants because of their ignorance of the law. ‘Umar imposed a *ta‘zīr* punishment of a few lashes on a couple who had got married and had consummated their marriage before the wife had finished her waiting period (*‘idda*). He said: “Had you known that it was an offence I would have punished you with the *ḥadd* penalty for *zinā*.”¹¹ Some jurists argue that ignorance in such isolated cases causes doubt which preempts the *ḥadd* punishment.¹²

(d) Absence of *Shubha* (Doubt)

The fundamental principle of Islamic Criminal law holds that criminal guilt must be proven beyond any shadow of doubt. The word *shubha* means obscurity, vagueness,

⁹Ibn al-Humām, *Sharḥ fath al-qadīr*, vol.4, p.116; al-Shirāzī, *al-Muhadhdhab*, vol.2, p.384; Ibn Qudāma, *al-Mughnī*, vol.10, p.156; Ibn Ḥazm, *al-Muḥallā*, vol.11, p.176; Abū Zahra, *al-Uqūba*, p.158.

¹⁰Muḥammad ibn Bahadur al-Zarkashī (d. 794 AH/1392 CE), *al-Manthūr fī al-qawā‘id*, ed. ‘Abd al-Sattār Abū Ghudda, (Kuwait: Wizārat al-Awqāf, 1985), vol.2, p.176.

¹¹Ibn Ḥazm, *al-Muḥallā*, vol.11, p.188.

¹²Ibn al-Humām, *Sharḥ fath al-qadīr*, vol. 4, p.147; al-Shirāzī, *al-Muhadhdhab*, vol.2, p.285; Ibn Qudāma, *al-Mughnī*, vol.10, p.156.

uncertainty and doubt.¹³ The existence of doubt results in uncertainty about the guilt of the offender. The proof of *ḥadd* must be clear of doubt. Any doubt, however slight, degrades the reliability of that proof in a sense that it fails to establish prevailing certainty based on relevant facts and thus invalidates conviction. Doubt in conviction preempts the execution of the *ḥadd* penalty.¹⁴ This means that a punishment cannot be applied unless the criminal guilt of the accused can be truly proven and established. Any suspicion or doubt which may weaken the validity of evidence of criminality or guilt, must lead to averting the punishment. This basic postulate is also upheld in contemporary legal systems especially with reference to the two procedural rules of presumption of innocence and resolving doubtful propositions.¹⁵

It is noteworthy that besides the stipulated number of witnesses, the judge has the prerogative of requiring additional witnesses if he sees fit to do so. Al-Juwainī for example asserts that seeking testimonial corroboration beyond the required standard evidence is permitted by the *Sharīʿa*.¹⁶ To yield a genuine corroboration, the testimonial statements must correspond with each other on points of fact and must be given independently of one another. They must not be adulterated by extrinsic factors.

¹³Hans Wehr, *Arabic English Dictionary*, p. 454.

¹⁴Abū Zahra, *al-ʿUqūba*, p.150.

¹⁵Muhammad Salim al-Ewa, "The Basics of Islamic Penal Legislation" in C. Bassiouni, ed., *The Islamic Criminal System*, p.146.

¹⁶Al-Juwainī, *al-Burhān fī uṣūl al-fiqh*, vol.1, p.573.

The authority of this significant procedural principle is the hadith: “Avert *ḥadd* punishments by suspicions or doubts and if the accused has a way out, release him. It is better for the Imām (Muslim ruler) to pardon erroneously than to punish erroneously.”¹⁷ In another narration, three prominent companions ‘Abdullah ibn Mas‘ūd, Mu‘ādh ibn Jabal and ‘Uqba ibn ‘Āmir report: “If doubt befalls you concerning a *ḥadd*, suspend it.” This hadith is supported by a statement made by al-Zuhri, a famous hadith reporter who had the chance to meet companions of the Prophet. Al-Zuhri’s knowledge led him to the statement that the Sunna of the Prophet and his companions was to suspend the *ḥadd* in all cases of doubt.¹⁸ The substance of the above-mentioned hadith has also been articulated in a legal maxim of Islamic jurisprudence which states that the authority should suspend the *ḥadd* penalty in doubtful situations.¹⁹

All jurists except the Zāhirites have adopted the substance of the hadith under discussion and ruled that doubt invalidates the *ḥadd*.²⁰ This is actually a degree of flexibility provided by the Prophet. It is one of the most viable defenses against the sternness of the *ḥadd*. The defense of *shubha* contains a very basic legal principle that if any doubt arises in any criminal case, the accused would be the beneficiary, because it is better for the judge to err in forgiveness than to err in conviction and

¹⁷Al-Albānī, *Irwā’ al-ghalīl*, hadith no.2316. According to him the hadith is *ḍa‘īf* (weak).

¹⁸Jamāl al-Dīn ‘Abdullah ibn Yūsuf al-Zayla‘ī(d.761AH/1360CE), *Naṣb al-rāya li ahādith al-hidāya* (Cairo: Dār al-Hadīth, 1992), vol.2, p. 333.

¹⁹See ‘Abdullah ibn Sulāiman al-Jarhazī, *Kitāb al-mawāhib al-sunniyya ‘alā sharḥ al-fawā'id al-bahīyya*, on the margin of Jalāl al-Dīn al-Suyūfī, *al-Ashbāh wa al-nazā'ir*. (Beirut: Dār al-Fikr), p.189-190. In a commentary of this maxim, al-Jarhazī discusses the authenticity of its underlying hadith and wrote that the hadith under consideration was reported by al-Tirmidhī, al-Ḥākim, al-Baihaqī, al-Ṭabrānī, and Ibn Mājah, and that in view of the numerous chains of transmission, many scholars including Ibn Ḥajar al-Asqalānī, concludes that it is authentic.

²⁰Abū Zahra, *al-'Uqūba*, pp.150-151.

punishment. Only the Zāhirites hold otherwise on the reason that the authorities narrating the hadith are weak. Ibn Ḥazm proposes that if the notion of *shubha* were accepted, the *ḥadd* would be abandoned completely since it would be easy for all perpetrators of *ḥadd* to claim *shubha*.²¹

Jurists from different schools of law discuss extensively about the doubt which invalidates the conviction of adultery. As far as doubt in convicting rape is concerned, some of the doubts in convicting *zinā* have to be taken into consideration such as issues of convincing evidence, criminal intention, and other procedures which amounts to doubt (*shubha*). In general, *shubha* can be summarized as follows:

i. *Shubha* in the Evidence.

This can arise when there is a conflict of evidence which results in doubt. Among the jurists, al-Nawawī gives an interesting hypothetical case.

If four men testify that a woman has committed *zinā* and four women testify that she is a virgin, neither she nor her slanderer should be punished with the *ḥadd* punishment.²²

Al-Shirāzī mentions the same case and explains that the woman would not be punished because her imperforated hymen indicates the physical state of not having experienced sexual penetration.²³ But, the *shubha* would crumble if the woman was

²¹ Ibn Ḥazm, *al-Muḥallā*, vol. 8, p.154.

²² Al-Shirbīnī, *Mughnī al-muḥtāj*, vol.4, p. 151.

²³ Al-Shirāzī, *al-Muḥadhdhab*, vol.4, p.151.

found to be *ghawrā'*, i.e. with a deeply situated hymen which could remain imperforated in spite of a partial penetration.²⁴

The Mālikites have discussed the same hypothetical case but differ among themselves. Some support the notion of *shubha* fending off the *ḥadd* and some support the notion of finding her to be *ghawrā'* which would make the testimonies of the *zinā* witnesses valid.²⁵

ii. *Shubha* in Interpreting Textual Evidence.

There are circumstances where two authorities appear to be in conflict with each other, one of which legalizes an action which is the preponderant view, while the other prohibits it. In this case the *ḥadd* is exempted despite the preponderance of the prohibiting evidence. There are circumstances where the jurists have different arguments based on authentic tradition, such as *nikāḥ al-mut'a* (contract marriage for a specified times only), *al-taḥlīl* (wedding a divorced woman for a short time for the purpose of legalizing her to remarry her former husband), marriage without the consent of parents or guardian (*walī*) and the pronouncement of marriage without witnesses.²⁶ In these circumstances, the person involved cannot be charged with committing illicit intercourse since there are opinions legalizing the acts.²⁷

²⁴Ibid. vol. 4, p. 151.

²⁵Al-Dasūqī, *Hāshiat al-Dasūqī*, vol.4, p.319.

²⁶Ibrāhīm Ṣabrī, *Aḥkām jar'īm al-'ird*, (Cairo: Dār al-Misr li al-Tibā'a, 1983), p. 48; Ibn 'Ābidīn, *Hāshiat rad al-mukhtār*, vol.4, p.24.

²⁷A *shubha* can also arise in a case where there is a partial fulfilment of the law, such as marrying a woman without witnesses and having sexual intercourse with her. But if he marries a fifth wife and copulates with her, it will not be regarded as a *shubha* to fend off the penalty because the prohibition not to have more than four wives is generally known to all Muslims. See, Abū Zahra, *al-'Uqūba*, p.151; Sayyid Sābiq, *Fiqh al-Sunna*, vol.2, p.439.

iii. *Shubha* Pertaining to Knowledge of Prohibition.

A person could wrongly believe an unlawful act or conduct to be lawful owing to ignorance, such as sexual intercourse with one's estranged wife during her waiting period (*'idda*) or intercourse which occurs between an irrevocably divorced couple who might have thought they were still in a lawful marriage and assume that it is still lawful.²⁸

iv. *Shubha* Pertaining to Conjugal Rights.

This could be within the existing conjugal right or the continued existence of the right.²⁹ As to the *shubha* in the existing right, if a man has intercourse with a woman sleeping in his bed with the faith that she was his wife. In this case, he is not considered as committing *zinā* or rape. This is simply because the man thought the woman was his legal wife. The Shāfi'ite scholar al-Shirāzī makes an example:

If a person finds a woman in his bed and mistakenly copulates with her on the assumption that she is his wife, he should not be punished if he has a strong justification.³⁰

An example for the continued existence of conjugal rights is sexual intercourse with one's estranged wife who has been divorced in allusive words that did not convey a clear meaning.³¹

²⁸ Al-Kāsānī, *Badāi' al-ṣanāi'*, vol.7, p.42; 'Awda, *al-Tashrī'*, vol. 2, p.209.

²⁹ al-Bahūtī, *Kashshāf al-Qinā'*, vol.5, p.82; Sayyid Sābiq, *Fiqh al-Sunna*, vol.2, p.438.

³⁰ Al-Shirāzī, *al-Muhadhdhab*, vol. 2, p. 268.

³¹ 'Awda, *al-Tashrī'*, vol.2, p. 209.

v. Delayed Evidence.

The jurists hold different opinions with regard to a delay in giving witness. The majority of jurists hold that a delay in trial and giving evidence should not affect the punishment, while the Ḥanafites maintain that delay in testimony and confession without a valid excuse amounts to a *shubha* that suspends the *ḥadd* punishment in crimes such as theft, *zinā*, and drinking alcohol but not in *qadhf*. According to the prominent Ḥanafite jurist Ibn Abī Laylā, delay (*ta'khīr*), invalidates all types of proofs and causes suspension of the *ḥadd* penalties. This is because delay has an adverse effect on deterrence. It also raises the possibility that the offender might have regretted his conduct and repented, or the witnesses might have had certain conspiracy. By contrast, the majority of jurists hold that delay by itself does not invalidate a confession or testimony which is sound in all other respects.³²

The Ḥanafites as well as the Zaydites also maintain that the inability of the defendant to reveal a *shubha* may also be a *shubha* which invalidates the *ḥadd* such as in the case of a dumb person, who might have spoken about possible doubt if he or she could speak.³³

vi. Consequences of *Shubha* in Sentencing

The consequences of applying the principle “doubt invalidates the *ḥadd*” tend to vary in the sense that it may either completely absolve the accused of all charges or it may exempt him from the prescribed punishment and leave open the possibility of applying a lesser punishment under *ta'zīr*. The accused is thus cleared of all charges

³² Anwarullah, *Principles of Evidence in Islam*, p.95; 'Awda, *al-Tashrī'*, vol.1, p.778.

³³ 'Awda. *Ibid.*, vol.2, p.398.

of committing a *ḥadd* offence but could be charged with a *ta'zīr* offence. In other words, a *shubha* may suspend the punishment of the *ḥadd* but a lesser punishment may still be imposed. Similarly a person who retracts his or her confession is acquitted of the *ḥadd* offence but may still be punished under *ta'zīr*.³⁴

B. The Application of Rape Penalty on Non-Muslims

Non-Muslims who live in an Islamic state and enjoy all the rights enshrined for them in the *Sharī'a* are called *aḥl al-dhimma* or *dhimmis*. The literal meaning of *dhimma* is pledge, guarantee and safety. They are called so because they are under the pledge of Allah and His messenger and the pledge of the Muslim community so that they live under their protection. The pledge of security and guarantee given to the non-Muslims is tantamount to the political nationality given in modern times on the basis that nationals are entitled to certain privileges as they are bound by certain obligations, besides being subservient to the law of the state.³⁵

As stated earlier, the jurists unanimously agree that the penalty for a convicted rapist who fulfils all the pre-requirements is death as prescribed in the penalty for *zinā*.³⁶ A question arises here as to whether or not a non-Muslim rapist should be treated in the same way? Most of the scholars agree that there are areas where Muslim and non-Muslim citizens are under the same obligations in civil and criminal laws while there are legal matters which are only applicable to Muslims, such as religious rituals and beliefs. Another related issue is the notion of the *ḥadd* punishment which is regarded

³⁴Abū Zahra, *al-'Uqūba*, pp.219, 228.

³⁵Abdur Rahman I. Doi, *Shariah: The Islamic Law*, p.426.

³⁶See p. 131 of this thesis.

as a retribution as well as expiation of sin (*kaffāra*), and it is only a Muslim who deserves such expiation and purification so that he will not be punished again in the hereafter.³⁷

There are two dominant views with regard to implementing the *ḥadd* penalty, particularly stoning to death, on a non-Muslim offender. The opinion of the majority of jurists, mostly Shāfi‘ites, Ḥanbalites and some Ḥanafites is to standardize the punishment for both Muslims and non-Muslims.³⁸ For them, the hadith of stoning the Jewish couple who committed adultery is sufficient enough to support their argument. This hadith implies that the penalty for *zinā* is absolutely the same whether it is committed by a Muslim or non-Muslim. Countering the opponents who argue that the case of stoning the Jews was based on the Torah, they argue that the Prophet passed the law which was revealed unto him. He only referred to the Torah to convince them about the same punishment.³⁹ In addition, it is not permissible for him to follow any other law other than what was revealed to him.⁴⁰

Al-Nawawī, a prominent medieval Shāfi‘ite jurist, argues that being a Muslim is not a pre-condition for the punishment to take place. Therefore any non-Muslim committing *zinā* will also be sentenced with the same penalty as to that of the Muslim. He asserts:

³⁷ Ibn al-Ḥumām, *Sharḥ Faṭḥ al-qadīr*, vol.5, p. 211; Ibn ‘Ābidīn, *Ḥāshiat radd al-mukhtār*, vol.4, p.3; al-Bujairimī, *Ḥāshiat al-Bujairimī ‘alā al-Khatīb*, vol.4, p.140.

³⁸ Al-Sarakhsī, *al-Mabṣūṭ*, vol.9, p.39; Ibn Qudāma, *al-Mughnī*, vol.5, p.150; al-Sharbīnī, *Mughnī al-muḥtāj*, vol.4, p.147; Ibn Ḥazm, *al-Muḥallā*, vol. 8, p.192.

³⁹ The Qur’ān, 5: 44.

⁴⁰ Ibn Qudāma, *al-Mughnī*, vol. 9, pp. 40-41.

The penalty for a married adulterer (*al-zānī al-muḥṣan*) is stoning, and the *muḥṣan* is a free mature person of legal capacity even if he is a *dhimmī*.⁴¹

Al-Sharbīnī, another Shāfi‘ite jurist, supports this ruling based on the Prophet’s verdict to stone the Jews who committed *zinā*. According to him, hadith scholars confirm that both the Jews convicted were married (*muḥṣan*). Besides this argument, the Shāfi‘ites also reason that the covenant of *dhimma* makes a *dhimmī* subject to the penalty of *zinā*.⁴²

Al-Shirāzī among the Shāfi‘ites states:

If any *dhimmī* commits a crime, I will consider whether that particular crime is prohibited in his religion. If it is so, such as murder, adultery, theft and *qadhf*, he will be liable for the same punishment as the Muslim is. This is based on the case of the two convicted Jewish adulterers who were stoned during the time of the Prophet because it was prohibited in their religion and because they had accepted to abide by the laws of Islam as was implied in their *dhimma* contract.⁴³

In the same vein, the Ḥanbalites also take into account the status of a particular offence and whether or not it is considered as a crime. For them, as long as the act is regarded as an offence according to the criminal’s religion, irrespective of its provision of modes of penalty, the *ḥadd* penalty will be imposed on him. Ibn Qudāma among the Ḥanbalites states:

⁴¹Al-Shirbīnī, *Mughnī al-muḥtāj*, vol.4, p.146.

⁴²Al-Shirbīnī, *Ibīd* vol.4, p.147.

⁴³Al-Shirāzī, *al-Muḥadḍḥab*, vol.2, p.256.

If a *dhimmī* commits what is prohibited in his religion such as adultery, theft, *qadhf*, or murder, he will be punished with the *ḥadd* penalty.⁴⁴

Against the preponderant view of his Ḥanafīte school of law, al-Sarakhsī holds the view that the *ḥadd* penalty is applicable to the *dhimmī*. The only exemption is a *musta'man* i.e. a foreign citizen who is given permission to live in an Islamic state. The Muslim and the *dhimmī* will be punished with the *ḥadd* but not the *musta'man* (foreign citizen). According to al-Sarakhsī, nothing forbids us from implementing the *ḥadd* penalty on the Muslim or the *dhimmī*. The supporting proof for his stand is the action of the Prophet in stoning the Jewish adulterers which should be followed. Moreover, the *dhimmī* is a citizen of our country and he is bound by our laws. Another reason is the fact that he believes in the prohibition of *zinā* as the Muslim does. As a matter of fact a *dhimmī* is under the jurisdiction of the Islamic state factually (by his presence) and legally (by his *dhimma* contract). Therefore, he is subject to the same criminal laws. al-Sarakhsī explains that the exemption of the *musta'man* is because of the *shubha*. The case of the *musta'man* is different as he is not under the legal jurisdiction of an Islamic state (*Dār al-Islām*) as he cannot be forbidden from returning to his/her country of origin.⁴⁵

The second opinion, which is the prevailing view of the Ḥanafītes and Mālikites, confines the implementation of the law to Muslims.⁴⁶ This opinion also asserts the importance of considering the other religions' injunction about the particular crime for their followers. Mālik was asked, if a *dhimmī* (non Muslim citizen living in an

⁴⁴Ibn Qudāma, *al-Mughnī*, vol. 10, p.199-200.

⁴⁵Al-Sarakhsī, *al-Mabṣūṭ*, vol. 9, p.57.

⁴⁶Al-Khurashī, *al-Mukhtaṣar*, vol.8, p.81.

Islamic state) commits *zinā*, should the *ḥadd* penalty of stoning be inflicted on him or not? He answered that the *ḥadd* penalty should not be inflicted on him. Instead the case must be referred to the clergy of his or her religion to determine what penalty should be imposed. Mālik was also asked if the *dhimmīs* decide to stone the offender, will they be allowed to do that? He said:

He or she is to be referred to the people of his or her religion and they will pass whatever judgment they think fit. They should not be forbidden from doing so as they are free to act according to the dictates of their religion.⁴⁷

With regard to the hypothetical case if four Muslims give testimony that a Muslim man committed *zinā* with a *dhimmī* woman, according to the Mālikites, the convicted Muslim should be punished according to Islamic law while she should be referred to the people of her religion. This ruling is based on the opinion of both ‘Umar and ‘Ali who viewed delegating the punishment of illegal sexual intercourse committed by non-Muslims to their own religion.⁴⁸

Interestingly for the case of rape in particular, Ibn Farḥūn, a leading Mālikite jurist, clearly endorses the rule that the same penalty for rape applies irrespective of one’s religion. He states:

For the case of rape, the criminal will be punished with the *ḥadd* penalty and killed. If a *dhimmī* rapes a free Muslim woman, he has actually breached his *dhimma* contract.⁴⁹

⁴⁷Malik ibn Anas, *al-Mudawwana*, vol.4, p.415.

⁴⁸Ibid., vol.4, p.384.

⁴⁹According to Ibn Farḥūn, the *ḥadd* for adultery will not be inflicted on the Christian and he will be referred to his religious authority. He will only be punished if he or she publicizes his or her act. The second view as quoted from al-Mughīra suggests that in all cases of *zinā*, the *dhimmī* will not be

The preponderant view of the Ḥanafites is not to apply the penalty of stoning on a *dhimmī* as he is not fully *muḥṣan*, on account of being a non-believer. Contrary to the Shāfi'ites, most of the Ḥanafites hold the notion that Islam is the main condition of *iḥṣān*. Ibn 'Ābidīn among the Ḥanafites exempts a married *dhimmī* from stoning even if his partner is a Muslim woman.⁵⁰

Al-Kāsānī among the Ḥanafites states:

A person qualified with *iḥṣān* means being sane, adult, and a Muslim who is married and has had sexual intercourse with his legal spouse. Being *'Aqil* (sane) and reaching the age of puberty are requirements of criminal liability. But the particular requirement of *iḥṣān* for stoning is stipulated because the crime becomes graver when the bounty denied is greater.⁵¹

According to Ibn al-Humām, the rationale of requiring Islam and marriage as essential criteria of *iḥṣān* is on the grounds of the great bounty a Muslim has received by being guided to Islam. The non-believer, even if he is married, has not been privileged with the guidance of Islam. In addition, being married is an additional bounty for a person where s/he has got a spouse with whom legal sexual satisfaction is attainable.⁵²

punished with stoning, instead he should only be punished with the *ḥadd* for a non-*muḥṣan* (i.e. flogging). The third isolated view as attributed to Rabī'a, is that his covenant with the Islamic state will be repudiated, thus he must be punished the same. See Ibn Farḥūn, *Tabṣirat al-ḥukkām*, p.174

⁵⁰ Ibn 'Ābidīn, *Ḥāshiat radd al-mukhtār*, vol.4, p.16-17.

⁵¹ Al-Kāsānī, *Badāi' al-ṣanā'i'*, vol.7, p.37

⁵² Ibn al-Humām, *Sharḥ fath al-qadīr*, vol.5, p.236.

Ibn Ḥazm criticizes the opinion of the Mālikites and the Ḥanafites. He describes their stand as a baseless arbitrary judgment without any support from the Qur'ān, Sunna, or *ijmā'*, or even the opinion of any companion. According to him, illegal sexual intercourse is similar to other dangerous crimes such as robbery, theft and murder where the Mālikites and Ḥanafites themselves were inclined to impose the same severe *ḥadd* penalty on non-Muslim convicts.⁵³

To conclude, my analysis of these legal arguments suggests that the Shāfi'ites, Hanbalites and a few Ḥanafites agree on the liability of all Muslims and *dhimmi* in criminal laws. The Mālikites are unanimous in their view to refer *dhimmi* adulterers and fornicators to the people of their religion to deal with them in their own way. Most of the Ḥanafites are of the opinion that a *dhimmi* is not *muḥṣan* and, therefore, not liable to stoning but only to flogging.

As the penalty of rape is concerned, it is observed that the rules of conviction pertaining to stoning in adultery are extremely strict but cannot be applied without the credible evidence of four integrated eyewitnesses. Since rape is a transgression of another's modesty and is regarded by all religions and nations as a serious crime, any credible and convincing evidence is sufficient for conviction. This could be the reason why Ibn Farḥūn does not differentiate between a Muslim and a non-Muslim. As a matter of fact it is only by having a uniform penalty that we will be able to accomplish the objectives of the *Sharī'a* in purifying the country and the community from immoralities. Based on the principle of *al-Siyāsa al-Shar'iyya* (Shari'a oriented

⁵³Ibn Ḥazm, *al-Muḥallā*, vol. 8, p.159.

policy), the Islamic authority could introduce a stringent penalty such as capital punishment for a certain crime because of the severity of the crime itself.

It seems that the idea to standardize the punishment for rape for both Muslims and non-Muslims, particularly the Jews and Christians (People of the Book), does make sense. This is on the grounds that the severest punishment, i.e. the death penalty, for a convicted rapist is legitimate in Islamic law and also in Judaism and Christianity, as the Old Testament clearly states:

When a virgin is pledged in marriage to a man, and another man encounters her in town and lies with her, bring both of them out to the gate of that town and stone them to death; the girl because although she was in the town, she did not cry for help, and the man because he violated another man's wife: you must rid yourselves of this wickedness. But if it is out in the country that the man encounters and rapes such a girl, then the man alone is to be put to death because he lay with her (Deuteronomy 22: 23-25).

Therefore, Non-Muslims from the "People of the Book" i.e. the Jews and Christians should not have any problem with regard to the penalty. With regard to other religions, such a penalty is not against their rights, since rape itself is a serious crime and the prescribed penalty aims at safeguarding the community as a whole from this inhuman crime. As a matter of fact, any citizen is bound by the law of the country he or she lives in.

C. The Effect of *Tawba* (Repentance) on the Punishment for Rape

Repentance or *tawba* refers to self-regret about committing a crime with the sincere intention of reformation and rehabilitation. Muslims are generally recommended to repent and always ask for forgiveness from God Almighty.

And all of you beg Allah to forgive you all, O believers, that you may be successful (Qur'ān, 24:31).

Truly Allah loves those who turn unto Him in repentance and loves those who purify themselves (Qur'ān, 2:222).

In terms of a criminal justice system, and with regard to rape in particular, the principle of repentance raises a number of difficulties. The notion of getting a pardon through sincere repentance would appear to contradict that of individual criminal responsibility and liability. As for the effect of repentance in sentencing, the jurists hold three different views.

i. The First Opinion

The majority of jurists are adamant that *tawba* can never exempt a *ḥadd* punishment after charges are pressed. The only exception is the repentance of a *muḥārib* (highway robber) which is qualified by his willing surrender to the authorities before capture.

The recompense for those who wage war against Allah and His messenger and do mischief in the land is that they shall be killed or crucified or their hands and feet be cut off from opposite sides, or they be exiled from the land. That is their disgrace in this world, and a great torment is theirs in the Hereafter (Qur'ān, 5:33-34).

The Mālikite, Zāhirite,⁵⁴ Ḥanafīte, most Ḥanbalite and some Shāfi‘ite jurists are unanimous on this legal stand. A Mālikite jurist, al-Dasūqī says:

The *ḥadd*, whether for *sariqa*, *zinā*, or *qadhif* will never be precluded by repentance.⁵⁵

Ibn Farḥūn, another reputed Mālikite jurist, says:

No *ḥadd* punishment can ever be preempted by repentance or the passage of time.⁵⁶

Al-Māwardī, a Shāfi‘ite jurist, states: “If a sexual offender repents after he is caught, he is not exempted from punishment, but if he does before he is caught, he is forgiven according to the prevailing view.” This is based on the verse:

And then, indeed for those who do evil out of ignorance and later repent and mend their ways, God is afterwards forgiving and merciful (Qur’ān, 16:119).

The phrase “out of ignorance” may be interpreted in two ways: “In ignorance of the evil involved”, or “out of submission to desire, knowing that it is bad.” Al-Māwardī holds that this verse refers to a person who is unaware that his action is unlawful.⁵⁷

The Ḥanafītes such as Ibn al-Ḥumām, Ibn Nujaim and Ibn ‘Ābidīn claim that there is a consensus that apart from *ḥirābah*, repentance has no effect on punishment,⁵⁸ based on the Qur’ānic evidence:

⁵⁴ Ibn Ḥazm, *al-Muḥallā*, vol.8, p.129.

⁵⁵ Al-Dasūqī, *Hāshiat al-Dasūqī*, vol.4, p.347.

⁵⁶ Ibn Farḥūn, *Tabṣirat al-ḥukkām*, p.170.

⁵⁷ Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, p.245.

⁵⁸ Ibn al-Ḥumām, *Sharḥ fatḥ al-qadīr*, vol.5, p.211; Ibn Nujaim, *al-Baḥr al-rā‘iq*, vol.5 p.3 ; Ibn ‘Ābidīn, *Hāshiat rad al-mukhtār*, vol.4, p. 3-4.

A fornicator, -female or male-, flog each of them hundred strokes
(Qur'ān: 24:2).

A thief, male or female-, cut off their hands (Qur'ān: 5:38).

The proponents of this view argue that the wording of these Qur'ānic verses concerning the punishment of *zinā* and theft are general (*'āmm*) and thus must apply to both repentant and non-repentant sinners alike. They also maintain that the references to repentance in the verses are concerned with repentance after the imposition of punishment and not before. This assertion is further consolidated by the practice of the Prophet. He ruled the stoning of Mā'iz, and of the woman from the Ghāmid tribe, and amputated the thieves who confessed to stealing despite their declared repentance, as many of them asked the Prophet that they wished to be purified of their sins; the Prophet nevertheless enforced the *ḥadd* punishment on them. The Prophet confirmed their genuine repentance when he said regarding the stoned woman: "she made such a genuine and intensive repentance that, if distributed among seventy of the people of Madīna, it would have sufficed them." It appears that repentance is likely to lighten the spiritual guilt of the offender but does not relieve him of [the] punishment in this world. In addition, the *ḥadd* is a *kaffāra* (expiation) which can not be exempted by repentance, as is the case with the non-exemption of *kaffārat al-yamīn* (expiation for a serious oath) or of *qiṣāṣ* by repentance, no matter how genuine it may be.⁵⁹

The proponents of this view also argue that it is not reasonable to extend the ruling of repentance in *ḥirāba* by analogy to other offences. This is because, in a *ḥirāba* case,

⁵⁹Ibn Qudāma, *al-Mughnī*, vol.10, p. 316.

prior to capture, the offender is out of reach of the law enforcement authorities. It is the offender's own incentive to repent and to be exempted from the severe penalty which is not the case in other ordinary offences. They also assert that opening the door for repentance in all *ḥadd* crimes leads to abeyance in the enforcement of the *ḥadd* punishment since it is much easier for an offender to offer repentance in order to escape execution of the punishment.⁶⁰

The Ḥanafites' claim of consensus about this legal stance needs a scrupulous review. This is because there are opinions suggesting that the repentance in verses 24:2-6 and 5:38, where the punishment of flogging and amputation are prescribed, refers to the crimes themselves. Some commentators have raised questions about the precise implications of the pronoun in the words "*illa alladhīna*" (except for those), whether the reference is to slanderous accusers, or transgressors (*fāsiqūn*) in general, and whether adulterers would also be included among those who may be allowed to repent.⁶¹

It is suggested that based on the general principles of Islamic criminal legislation, all the preceding categories of offenders are included in the meaning of the last section of the above Qur'ānic verse. Thus, the accused should be given the opportunity, on a selective basis at least, to repent and to reform.⁶²

⁶⁰Al-Kāsānī, *Badāi' al-ṣanāi'*, vol.8, p. 96; Ibn Qudāma, *al-Mughnī*, vol.10, p.316; 'Awda, *al-Tashrī'*, vol.1, p.354.

⁶¹Mohamad Hashim Kamali, *Punishment in Islamic Law*, p.56-57.

⁶²Ibid., p.57.

Abū Zahra, among modern scholars, observes that apart from *ḥirāba* he finds no authority to confine the admissibility of repentance to a particular time frame, whether before or after the matter is brought to the attention of the court.⁶³

ii. The Second Opinion

The second opinion, which is attributed to some Shāfi'ites and Ḥanbalites, holds that any prescribed punishment other than *ḥirāba* is subject to consideration. If it relates to an individual's right, such as *qadhf* and stealing, repentance will have no effect on its implementation. But if it is a pure right of Allah, such as *zinā*, homosexuality and drinking alcohol, provided that the offender sincerely repents, quits the crime and makes a positive change, punishments for such offences can be suspended by repentance.⁶⁴ This is based on the following evidence:

1. The Qur'ānic statement pertaining to *zinā*:

If they repent thereafter and do righteous deeds, verily Allah is Oft-Forgiving, Most Merciful (Qur'ān, 24: 5).

2. The Qur'ānic statement regarding stealing:

Whoever repents after his crime and makes amendments, God forgives him (Qur'ān, 5:39).

3. The hadith: "Repentance preempts previous sins."⁶⁵

⁶³Abū Zahra, *al-'Uqūba*, p.247.

⁶⁴Shams al-Dīn Muḥammad ibn Abī al-'Abbās Aḥmad ibn Hamzah ibn Shihāb al-Ramlī (d. 1004 AH/1596 CE), *Nihāyat al-muḥtāj*, (Cairo: Mustafā Bābī al-Ḥalabī, 1967), vol.7, p.8; Abū Zahra, *al-'Uqūba*, p.250; 'Awda, *al-Tashrī'*, vol.1, p.354.

⁶⁵Al-Albānī, *al-Silsila al-ḍa'īfa*, (Beirut: Maktab al-Ma'ārif li al-nashr wa al-tawzī'), hadith no.1039.

The proponents of this view support their argument based on analogy with *ḥirāba*, which is the most serious crime, but where repentance is still admissible, as it is stipulated in a clear text; thus the argument for its admissibility is even stronger in lesser crimes, namely *zinā*, drinking alcohol, and theft. They also corroborate their argument with reference to *zinā*, that the initial ruling of the Qur'ān on the punishment of *zinā* contains an equally explicit provision on repentance. Repentance in this case is similar to that of the highway robbery (*ḥirāba*), and repentance in both cases leads to suspension of the *ḥadd*.⁶⁶

The relevant verse states:

If any of your women are guilty of lewdness, take the evidence of four witnesses from among you against them. [And] if they testify, confine them to their houses until they die or Allah ordains for them some other way. If two of them are guilty of lewdness, punish them both. If they repent and amend, leave them alone; for Allah is Oft-returning, Most Merciful (Qur'ān, 4:15-16).

Abū Zahra asserts that this verse is not amenable to abrogation, and the wording of this verse makes the suspension of punishment obligatory upon repentance, for the text here contains a command to leave them alone (*fa a'riḍū*), once they have sincerely repented. There is no conflict, and therefore no abrogation, between this verse and the one that specifies the punishment of one hundred lashes. The command concerning repentance in this verse is therefore still operative.⁶⁷ This opinion is also supported by the hadith:

⁶⁶Ibn Qudāma. *al-Mughnī*, vol.1, p.316; 'Awda, *al-Tashrī'*, vol.1, p.353.

⁶⁷Abū Zahra. *al-'Uqūba*, p.244.

One who repents from a sin is like one who has no sin.⁶⁸

In addition, the Prophet is also recorded to have said, concerning the renowned case of Mā'iz ibn Mālik, when he was informed that Mā'iz ran away while being stoned for *zinā*: "Why did you not leave him alone to repent so that Allah would have granted him pardon?"⁶⁹ This hadith shows that it is recommended to avoid inflicting a severe *ḥadd* punishment on a sincerely repentant sinner.⁷⁰

Some of the proponents of this view suggest that in order to make repentance admissible and convincing, it should be accompanied by amendment of conduct, both of which are to be ascertained over a reasonable duration.⁷¹

iii. The Third Opinion

This view, which is mainly attributed to Ibn Taymiyya and his disciple Ibn Qayyim al-Jawziyya, is that punishment purifies one from criminality and sin, and so does repentance. The punishment should be suspended if the perpetrator of an offence affecting [only] the right of God repents and does not himself insist on being punished. If he is serious in asking to be sentenced, then he or she must be punished even after repentance. The proponents of this view also emphasize, like the other two groups above, that repentance does not have the same effect with reference to the

⁶⁸ Al-Albānī, *Ṣaḥīḥ Sunan Ibn Majah*, (Riyadh: Maktab al-tarbiyya al-ʿArabī li duwal al-khalīj, 1988), hadith no.3427. The hadith has been authenticated as sound (*ḥasan*).

⁶⁹ Al-Bukhārī, *al-Jāmiʿ al-ṣaḥīḥ*, hadith no.6824.

⁷⁰ Ibn Qudāma, *al-Mughnī*, vol.9, p.40 and 130; al-Shirbīnī, *Mughnī, al-muḥtāj*, vol.4, p.150.

⁷¹ Al-Shirāzī, *al-Muhadhdhab*, vol. 2. p. 285-286.

rights of people. In such offences, it is not repentance but pardon that may be granted by the victim or his/her heirs that absolves the offender from punishment.⁷²

Based on these opinions, one can conclude that the effects of repentance vary based on the nature of the crime and other aggravating and mitigating considerations. It appears that repentance cannot exempt a convicted criminal from major offences such as murder and rape. If a case is reported to the authorities by witnesses or by the victim and the offender is convicted, the *ḥadd* punishment is certain whether the offender repents or not. If the offender voluntarily surrenders to the authorities, confessing to a *ḥadd* crime and declares *tawba* (repentance), the judge has to look into the nature of the crime committed. Rape involves the right of Allah as well as an individual's right. The victim and her family do not have the right to pardon the criminal. There is only one case in which punishment can be lifted, and that is the case of *qiṣāṣ*, where the right of the individual is given priority so that the family of the victim can pardon the criminal and accept blood-money instead.

D. The Rights of the Accused

Despite the severe penalty for a convicted rapist, a person accused of committing rape, like others, has the right of legal protection. Muslim jurists unanimously agree that an Islamic government through its criminal justice system is responsible for securing the individual's fundamental rights to life, bodily safety, freedom and honour. Most of the substantive as well as procedural rules known to ensure the protection of human rights and the dignity of individuals within Islamic criminal

⁷² Ibn Qayyim al-Jawziyya, *I'ḥām al-muwaqqi'īn*, vol.2, p.97-98; 'Awda, *al-Tashrī'*, vol.1, p.355.

procedure has been endorsed in the first International Conference on the Protection of Human Rights in the Islamic Criminal Justice System. These include the rules of equality, the presumption of innocence, a fair court trial before a competent, independent and impartial judge or court, and the right to a judicial review before a higher court.⁷³

(a) The Right to be Tried by an Authorized Judicial Body

In Islam, criminal cases must be handled by the requisite authority, not by individuals. This authority has the full right to delegate the power to the court as well as to the enforcing body, such as the police department, to carry out detention and execution. Thus the administration of justice, as well as the conviction and implementation of judgement should only be done by authorized individuals. The punishment should be administered by the authorized judicial body, i.e. an officially appointed judge. Muslim jurists unanimously agree that the right to execute punishments meted out by courts of law is an exclusive right of the state, i.e. the Imam or his representative.⁷⁴ In this regard, no individual can take revenge on the criminal who violates their rights. For any case, no law can be applied except through the judiciary as any individualistic right is subject to the general welfare of

⁷³The first International Conference on the Protection of Human Rights in the Islamic Criminal Justice System was held at the International Institute of Advanced Criminal Sciences in Siracusa, Italy, May 28-31, 1979. The conference was chaired by Professor M. Cherif Bassiouni and Ahmad Fathi Sorour. In attendance were 55 jurists from 18 countries. The participants voted unanimously in support of the resolution that the basic human rights embodied in the principles of Islamic Law were in complete harmony with the prescriptions of the International Covenant on Civil and Political Rights which has been signed or ratified by many nations including a significant number of Muslim and Islamic nations and which reflects generally accepted principles of the International Laws contained in the Universal Declaration of Human Rights of 1948, and the UN Declaration on the Standard Minimum Rules for the Treatment of Offenders held at Geneva in 1955.

⁷⁴Ibn 'Ābidīn, *Hāshiat al-dūr al-mukhtār*, vol.4, p.13; Ibn Qudāma, *al-Mughnī*, vol.9, p.52; al-Shirbīnī, *Mughnī al-muhtāj*, vol. 4, p.152; Ibn Ḥazm, *al-Muḥallā*, vol. 8, p.200; Nasir ibn Ibrahim Mehemeed, "Basic Principles of Criminal Procedure under Islamic Shari'a" in Muhammad Abdel Haleem et.al, *Criminal Justice in Islam*, (London: I.B.Tauris &Co. Ltd., 2003), pp.17-34, p.29.

the society through the uniformity of punishments and their orderly administration.⁷⁵

The justification of having a uniform authorized judicial body is to ensure that the accused is given the right to have a just and impartial trial where the rules of evidence and due process of law must be thoroughly and strictly observed.

In this light, al-Qurṭubī expresses the Mālikites' view:

There is no difference of opinion that execution in *qiṣāṣ* is to be imposed by legal authorities because God's commandment of *qiṣāṣ* is addressed to all believers and it is obvious that it cannot be carried out by all of them at the same time to avoid all expected excesses.⁷⁶

Al-Kāsānī of the Ḥanafites states:

One of the important conditions of the *ḥadd* punishments is that their administration is under the jurisdiction of the legal authority and whomever it may delegate to carry them out. This is our opinion and that of Shāfi'ī.⁷⁷

Al-Bahūtī of the Ḥanbalites says:

No one is allowed to administer a *ḥadd* punishment except the legal authority or its delegate because it is the right of God. This is to avoid any excess of individualistic administration. This ruling is based on the practice of the Prophet and his successors.⁷⁸

Another Ḥanbalite, Ibn Qudāma, observes:

⁷⁵ Ibn Qudāma, *al-Sharḥ al-kabīr*, vol.4, p.322.

⁷⁶ Al-Qurṭubī, *al-Tafsīr al-kabīr*, vol.2, p.245-246.

⁷⁷ Al-Kāsānī, *Badā'ī 'al-ṣanā'ī*, vol.7, p.57.

⁷⁸ Al-Bahūtī, *Kashshāf al-qinā'*, vol.6, p.78.

Should anyone execute a punishment in the absence of the legal authorities, he would be breaking the law and should be punished for it.⁷⁹

These juristic opinions stress that it is against Islamic law to judge and act individually in the name of justice. Criminal justice procedures should be administered by the authority.

(b) Presumption of Innocence

According to one of the legal principles of Islamic law “*Barā’at al-dhimma al-aşliyya*” every individual is presumed innocent and non liable until proven otherwise. Accusation alone does not invalidate this presumption. This is because accusation by nature is not devoid of doubt, and doubt does not negate certainty. In this case the prior innocence of the accused is a certainty. Hence, his dignity and his personal freedom and safety must be respected, preserved and protected throughout all stages of establishing his guilt until the final definitive judgement.⁸⁰ This is actually in line with the teaching of the Qur’ān that God has created man innocent and pure, and has dignified him. The Qur’ān states:

We have honoured the sons of Adam, provided them with transport on land and sea; given them for sustenance things good and pure, and conferred on them special favours, above a great part of our creation (Qur’ān, 17:70).

This verse and many other verses in the Qur’ān show that God has honoured and dignified man by creating him clean and innocent in nature. Thus, this gift of honour,

⁷⁹Ibn Qudāma, *al-Mughnī*, vol.9, p.393

⁸⁰Gamil Muhammad Hussein, “Basic Guarantees in the Islamic Criminal Justice System,” in Muhammad Abdel Haleem et.al, *Criminal Justice in Islam* (London: I.B. Tauris & Co. Ltd., 2003), pp.35-53, p.48.

dignity, and purity of every man must be fully respected and observed by every other man. This implies that unjustifiable impulsive arrest or detention is proscribed. Spying and other forms of unlawful interference in the private life of an individual are absolutely prohibited. Those who violate such rules are in fact criminally liable for trespassing.⁸¹

In this respect, there is no disagreement among the jurists with regard to the inviolability of a person living under an Islamic state. The principle of presumption of innocence implies that the accused is immune from punishment until evidence of guilt is established. However, as far as the interest of the whole society in punishing outlaws and maintaining peace and social security is concerned, the state has a right to search a person and his dwelling and seize anything useful for further investigation.

With regard to ensuring the inviolability of an individual and his dwelling, the Qur'ān commands:

Do not spy (Qur'ān, 49:12).

O you who believe! Enter not houses other than your own, until you have asked permission and greeted those in them; that is better for you, in order that you remember (Qur'ān, 24:27).

According to the Sunna, a man should not look inside a house of others unless he receives permission. The Prophet said:

⁸¹Abū Zahra, *al-Uqūba*, p.240.

If a person looks into your house without your permission and you pelt him with a stone and put out his eye, no guilt will be on you.”⁸²

It is reported that Caliph ‘Umar was very concerned and careful in securing the inviolability of the individual’s dwelling. ‘Abd al-Raḥmān ibn ‘Awf stated: “One night I was on guard duty with Caliph ‘Umar in Madina. We noticed a night light through an open door, where we heard the loud and noisy voices of some people. ‘Umar said: “This is the residence of Rabī‘a ibn ‘Umayya ibn Khalaf and they have been drinking. What is to be done?” I said: I think we have done what is prohibited. God forbids us to spy.” ‘Umar left the scene and ignored them.”⁸³

In this light al-Māwardī states that an authorized judge may not listen to charges lodged by authorized officers against an individual without scrutinizing such charges. The reports in the records of the accused must be considered thoroughly. Is he a person of questionable morals? Has he been known to commit similar acts in the past? If they clear him on such points, the charge is thereby extenuated, if not altogether dropped, and he should be released without delay. The charge however becomes heavier and stronger if there is evidence that the suspect is known for indecent behaviour or has a previous criminal record. In this case, certain means of investigation may be applied.⁸⁴

⁸² Ibn Ḥajr al-‘Asqalānī, *Fath al-bārī*, Kitāb al-diyāt, vol.15, p.267.

⁸³ Awda, *al-Tashrī‘*, vol.1, p. 117.

⁸⁴ Al-Māwardī, *The Ordinances of Government*, p.238. He also remarks: “A governor may consider circumstantial evidence and the qualities of the accused in determining the relative strength or weakness of the charge. A charge of fornication for instance may become stronger in the case of a witty and charming man who has a weakness for women, but would be weakened otherwise. A charge of larceny is strengthened if brought against a person known to be a scoundrel, has marks of beating on his body, or is caught with a drill in his possession, but is weakened by contrary evidence.

(c) Guarantees of the Accused during Investigation

A criminal trial normally takes place after prior investigation. However, the investigation is not always regarded as an autonomous phase to be conducted by a competent judicial authority. Investigation through interrogation usually involves charging the allegation (*tuhma*) against the suspect as well as confronting him with the established evidence. This instrument aims to discover the truth through confession or denial of the accused.⁸⁵

The jurists agree that it is the right of the accused to be protected against unreasonable preventive detention. It is the right of the officials in charge of enforcing laws to arrest and frisk suspected individuals.⁸⁶ Such detention can only be applied to serious crimes, such as rape, murder, manslaughter, grievous bodily harm, as it is the right of the public authority to investigate the case and enforce the law.

In connection with this, al-Māwardī states:

A governor may place the defendant in immediate custody pending investigation and establishment of innocence. Opinions vary regarding the term of such detainment. While the Shāfi‘ite ‘Abdullah al-Zubairī sets a limit of one month to it, others have left it to the sovereign’s discretion, and that is more appropriate. Judges, on the other hand may not detain people except when there is established guilt.⁸⁷

⁸⁵Awad M. Awad, “The Rights of the Accused under Islamic Criminal Procedure,” in ed. Bassiouni, *Islamic Criminal Justice System*, pp.91-108, p.94.

⁸⁶Ibn Farḥūn. *Tabṣirat al-ḥukkām*, p. 316-17.

⁸⁷Al-Māwardī. *The Ordinances of Government*, p.239.

This is actually an exception to the general rule that no person should be deprived of his liberty except for securing public interest. It is argued that such a measure might be necessary to uncovering the truth in an investigation. Moreover, one may argue that holding the accused under preventive detention will help prevent him from influencing the witnesses, altering or demolishing the evidence against him, as well as stopping him from running away.⁸⁸

The accused should not be subjected to any sort of inhumane treatment such as torture, coercion, beating and threats to admit guilt. The majority of jurists hold that a confession should be issued by the accused of his free will. If it is the result of inhumane treatment, the confession must be disregarded, even if it is true, and the official who conducted this unlawful practice is subjected to punishment.⁸⁹ Obtaining confession under duress or coercion, or any type of illegal pressure is a crime in itself according to the *Sharī‘a*. Ibn Ḥazm quotes the *ijmā‘* (consensus) of the whole *umma* (Islamic nation) pertaining to the prohibition and illegitimacy of abusing the accused:

Neither the Qur’ān nor the Sunna, nor *ijmā‘* allow such kind of abuses.⁹⁰

However, some medieval jurists allowed a degree of coerced confession. Ibn ‘Ābidīn relates that some of his Ḥanafite colleagues permit the beating of the accused to force him to admit guilt, as long as it does not wound the flesh and expose the bones.⁹¹

⁸⁸Osman Abd el Malik al-Soleh, “The Rights of the Individual to Personal Security in Islam” in ed. Bassiouni, *Islamic Criminal Justice System*, pp.55-89, p.74.

⁸⁹Al-Dasūqī, *Hāshiat al-Dasūqī*, vol. 4, p.345; Ibn Ḥajr al-‘Asqalānī, *Fatḥ al-bārī*, vol.12, p.324.

⁹⁰Ibn Ḥazm, *al-Muḥallā*, vol. 8, p.330.

⁹¹Ibn ‘Ābidīn, *Hāshiat radd al-mukhtār*, vol.7, p. 182; Abū al-Wālid Ibrāhīm ibn Muḥammad ibn al-Shihnaḥ, *Kitāb lisān al-ḥukkām fī ma‘rifat al-aḥkām*, (Cairo: al-Bābī al-Ḥalabī, 1973, 2nd ed), vol.1, p. 248.

Some Ḥanbalītes hold that an [involuntary] admission made under duress corroborated with strong circumstantial evidence, is acceptable.⁹²

Al-Māwardī of the Shāfi‘ites points out the manner of establishing guilt. According to him it is permissible for the officers, in view of the seriousness of the charge, to order a discretionary flogging of the accused to persuade him to make a true confession concerning the criminal act attributed to him. If beaten to get him to tell the truth, beating should be discontinued as soon as he confesses. He must be invited to repeat his confession, in which case the second statement is the one that counts. The accused may be asked to take an oath as a part of his examination and a means of exerting pressure on him to find out the truth of a charge that affects the claims of God Almighty or those of human beings.⁹³

It seems to me that any form of torture during the interrogative is blameworthy. This stance is in harmony with the basic presumption of the *Sharī‘a* which maintains original non-liability (*barā’at al-dhimma al-aṣliyya*) to be the normal state of every individual unless proven otherwise. With regard to involuntary confession, the accused is still liable if the case is supported and corroborated by other compelling evidence.

⁹²Abū ‘Abdullah Muḥammad ibn Muflīḥ, *al-Furū‘*, ed. Abū al-Zahrā’, Ḥāzīm al-Qāḍī, (Beirut: Dār al-Kutub al-‘Ilmiyya, 1418 AH), vol.6, p.523; al-Mardawī, *al-Inṣāf*, vol.12, p.133.

⁹³Al-Māwardī, *The Ordinances of Government*, ibid. p. 239.

(d) The Right of Defense against Accusation

The right to defense has been recognized and established along with other rights intimately connected with it. In a hadith the Prophet said to ‘Ali, after appointing him as governor to Yemen:

O Ali. People will appeal to you for justice. If two adversaries come to you for arbitration, do not rule for the one before you have similarly heard from the other.⁹⁴

It is related that the caliph ‘Umar ibn ‘Abd al-‘Azīz addressed the judges of his time saying:

If an adversary whose eye had been blinded by another comes to you, do not rule until the other party attends, for perhaps the latter had been blinded in both eyes.⁹⁵

Al-Māwardī considers defense during a trial as a religious policy, as he states:

Crimes are actions forbidden by religious law and discouraged by God Almighty through mandatory or discretionary punishment. They go through an accusation stage in which self defence is required by religious policy.⁹⁶

The right to a defense during trial is crucial since it gives the accused a chance to be heard either by denying the accusation against him, refuting the incriminating evidence or submitting exonerating evidence such as an alibi. A mere accusation in the absence of tangible proof is insufficient and an accuser who is an interested party cannot offer the sole evidence to sustain a criminal conviction. It appears that the

⁹⁴ Al-Albānī, *Irwā’ al-ghalīl*, hadith no. 2647. The hadith has been verified as authentic.

⁹⁵ Quoted from Awad M. Awad, “The Rights of the Accused under Islamic Criminal Law,” p.97.

⁹⁶ Al-Māwardī, *The Ordinances of Government*, p.238.

justification for the right of defense is to avoid a situation where the accusation becomes a verdict. The accused or the suspect has the right to be informed about the particulars of the indictment and its supporting material, and must be allowed to confront and cross examine the evidence and witnesses against him.

The jurists unanimously agree that a defendant may contest the integrity of the witnesses after their integrity has been accepted by the judge. In this particular case, the judge is to repeat the scrutiny of the witnesses by asking some other trustworthy people about them. If this latter should mention any factor that would nullify the witnesses' integrity (*'adāla*), the judge should not give force to their testimony.⁹⁷

Another aspect of the right to defense is that the accused must be capable in fact of defending himself. Interestingly, most of the Ḥanafites are against infliction of penalties for capital crimes on a mute offender even when conclusive evidence is demonstrated against him. This is based on the reason that had the mute individual been capable of speech, he might have been able to raise a doubt that would have invalidated his guilt. Since such a person cannot express everything in clear sign language, it would be unjust to inflict the *ḥadd* penalty on him because of the possibility of doubt.⁹⁸

In my opinion, as the charge with rape is concerned, it is noteworthy that in modern conventional laws the accused has the right to counter-argue that the intercourse was

⁹⁷ Abū Bakr Aḥmad ibn ' Amr al-Khassāf, *Ādāb al-qāḍī*, p. 301.

⁹⁸ Al-Sarakhsī, *al-Mabsūṭ*, vol.9, p.75; Ibn Nujaim, *al-Baḥr al-rā'ik*, vol.5, p.7. Similarly, a testimony of a mute against others is subject to inspection since he is not qualified to give evidence, see p.57 of this thesis.

consensual by providing evidence that the act was a result of her permission. However, this argumentation cannot be compromised in Islamic law where the existence of consent could save him from a rape charge but not that of illegal intercourse, which carries almost the same severe penalty.

(e) The Right to be Represented

The issue of using a lawyer for defense was not widely known in the past. The litigant in civil cases as well as the accused in criminal cases used to attend the trial session for prosecution, and give evidence and defence in person. Although the classical jurists did not specifically include any express provision which obliges the court to avail the accused of the right to use a lawyer, the essential requirement of a fair and just trial under Islamic law cannot be satisfied in any modern society without ensuring the right of the accused to be represented if he or she wishes. Most contemporary writers who base their views on the opinions of traditional scholars recognize the right to use a lawyer or attorney as one of the most basic rights of the accused in any criminal proceedings. It is argued that a thorough observation of Islamic legal evidence shows that nothing prevents the accused from being represented by an attorney before the judge.⁹⁹

The jurists unanimously agree that for civil disputes, both the accuser and the accused have the right to appoint another person to represent him before the judge. This is based on the principle of *wakāla* in litigation as it is reported that the

⁹⁹Gamil Muhammad Hussein, "Basic Guarantees in the Islamic Criminal Justice System", p.50.

companions of the Prophet agreed on the right to obtain counsel and none of them denied its permission. It is reported that ‘Alī ibn Abī Ṭālib always appointed ‘Ākil ibn Abī Ṭālib to represent him in any litigation.¹⁰⁰

This precedent implies that the accused may defend him- or her self, or may select experts and lawyers to assist in the defence. Such a right may become a practical requirement of defence because confronting the accused with an indictment affects his clarity of mind, and this might deprive him of the ability to defend himself. Moreover, the accused is often unaware of legal procedures and of efficient ways to disprove or submit evidence. The accused must be given a reasonable opportunity to present his defence and should be permitted to meet and correspond, in private, with his counsel.¹⁰¹

All Muslim jurists agree on the major point that the right to counsel applies to disputes and offenses involving the violation of a right of man whether or not counsel is actually present at the trial. However they disagree over the right to be represented with respect to *ḥadd* offences. This dispute stems from their disagreement over the evidence required to prove *ḥadd* or *qiṣāṣ* offences.

¹⁰⁰Al-Baihaqī, *al-Sunan al-kubrā*, p.253; al-Kāsānī, *Badāi‘ al-ṣanāi‘*, p. 225; al-Bahūtī, *Kashshāf al-qinā‘*, vol.3, p.483; ‘Alī ibn Abī Bakr al-Marghinānī (d. 593 AH/1197 CE), *al-Hidāya sharḥ al-Bidāya*, (Beirūt: al-Maktaba al-Islāmiyya), vol.3, p.136.

¹⁰¹Gāmil Muhammad Hussein, “Basic Guarantees in the Islamic Criminal Justice System”, p.50.

The Mālikites¹⁰² and the majority of the Ḥanbalites¹⁰³ maintain the view that representation is valid in all offences, including *ḥadd* offences. Their argument is based on the statement of the Prophet in the case of illicit intercourse: “Go, Unais, to the wife of this man, and, if she confesses, stone her.”¹⁰⁴ This tradition indicates that counsel is permissible for *ḥadd* crimes even with respect to punishments for violations of a right of God. The proponents of this view also argue that as a matter of fact the agent substitutes for the principal to verify the right things.

It is noteworthy that al-Bukhārī includes a chapter entitled *Bāb al-wakāla fī al-ḥudūd* which means “representation in the *ḥadd* crimes” prior to mentioning the above hadith.¹⁰⁵ Al-Bukhārī’s unique style in his headings literally indicates that he is in favour of the ruler’s delegating power to prosecute, collect evidence and enforce the law. One may argue against the Mālikites and Ḥanbalites that this sort of representation which took place during the time of the Prophet shows the legitimacy of delegating [enforcing] the power of enforcement on behalf of the authority, but not on behalf of the accused.

The Ḥanafites, Shāfi‘ites and some Ḥanbalites have expressed reservations over *wakāla* for the prescribed *ḥadd* offences which consist mainly of the rights of God.¹⁰⁶ Thus it is said that in *ḥadd* offences, such as adultery or drinking alcohol, the issue before the judge is usually over whether the evidence is sufficient. These offences

¹⁰²Muḥammad ibn Yūsuf ibn Abī al-Qāsīm al-Mawaq (d. 897 AH/1492 CE), *al-Tāj wa al-iklīl*, (Beirut: Dār al-Fikr, 1398 AH), vol.5, p. 181.

¹⁰³Ibn Muflīḥ, *al-Mubdi‘* vol.4, p.368; al-Bahūtī, *Kashshāf al-qinā‘*, vol.3, p.465.

¹⁰⁴For details of the hadith, see pp.130-131.

¹⁰⁵Al-Bukhārī, *al-Jāmi‘ al-ṣaḥīḥ*, vol. 2, p. 813.

¹⁰⁶Al-Marghinānī, *al-Hidāya*, vol.3, p.136.

usually do not involve litigation, and judicial proceedings over them consist of the presentation of evidence, often with no plaintiff or private litigant. Since the *ḥadd* offences of adultery and wine drinking do not usually involve a private claim, representation is then unnecessary. On this ground, the Ḥanafite jurists only permit representation in cases of violation of the right of individuals.¹⁰⁷ In the same vein, the Ḥanbalites argue that the right of counsel does not apply in *ḥadd* offences since their evidentiary requirements are initially established prior to the trial. They also argue that if the case cannot be proved beyond reasonable doubt, the punishment will not be imposed for any offence of a divine right.¹⁰⁸

The jurists also state that counsel is also allowed at the enforcement stage on the grounds that the judges of the Prophet ruled in different places and enforced *ḥadd* punishments which were abandoned in cases of doubt. They argue that even at the final stage of execution, there is a possibility of retraction of confession or testimony. It is noteworthy that the accused has the right under Islamic law to withdraw his confession at any time prior to the execution of the sentence. The jurists agree that in cases where the only evidence of guilt is based on personal confession, that particular confession cannot constitute positive evidence if the accused withdraws it before the execution of the sentence, and this execution must be stopped.¹⁰⁹

¹⁰⁷ Al-Sarakhsī, *al-Mabṣūṭ*, vol.9, p.107.

¹⁰⁸ Al-Kāsānī, *Badāi' al-ṣanā'i'*, vol.7, p.83.

¹⁰⁹ Mubārak 'Abd al-'Azīz al-Nuwaybit, "*al-Da'wā al-jinā'iyya fī al-sharī'a al-Islāmiyya wa al-qānūn al-waḍ'ī*," (Criminal Proceeding in Islamic and Conventional Law), (Cairo: Cairo University, Ph.D. dissertation 1972), p.333.

Despite disputes over the right to representation in criminal lawsuits, it seems that the permission is conditional. The reason for permission is to defend the innocent party from being oppressed through an unjust trial, to vindicate the truth and facilitate justice. Representation may not, in other words, seek to distort justice and advocate falsehood. The scholars unanimously agree that it is strictly prohibited for lawyers to defend a person who really committed a crime¹¹⁰ as it is clearly stated in the Qur'ān:

Surely we have sent down to you the Book in truth that you might judge between men by that which Allah has shown you, so be not a pleader for the treacherous (4: 105).

In this verse, the sentence “Be not a pleader for the treacherous” is a command to all believers as it was a command to the Prophet, to rule with justice and impartiality and not to support, or become inclined to an oppressor. This fact is supported by the following hadith as narrated by ‘Ā’isha:

The most disliked man before God Most High is one who stubbornly litigates in pursuit of falsehood.¹¹¹

One who litigates in pursuit of falsehood while he knows it shall remain afflicted with the wrath of God until he disengages himself from it¹¹².

As far as rape is concerned, a lawyer must strive in favour of justice, not for gainful payment. Some scholars maintain that it is not permissible for anyone to litigate on behalf of another unless he knows the truth of the matter and that the represented is

¹¹⁰Al-Mardawī, *al-Inṣāf*, vol.5, p.394; al-Bahūtī, *Kashshaf al-qinā'* vol.3, p.483.

¹¹¹Al-Tirmīdhī, *Sunan al-Tirmīdhī*, hadith no 2976.

¹¹²Abū Dāwūd, *Sunan Abī Dāwūd*, vol.3, p.305;

truly innocent.¹¹³ Representation is hence unlawful in the event that it seeks to distort the truth in pursuit of falsehood.¹¹⁴

(f) The Right of Appeal against the Verdict

The notion of mandatory execution could be misunderstood. Some might tend to think that there is no way out of punishment once the accused is convicted. Joseph Schacht acknowledges the Islamic basis for the emphasis put on the *ḥadd* punishment when he says:

The *ḥadd* is the right or the claim of Allah (*ḥakk Allah*), therefore no pardon or amicable settlement is possible. On the other hand, prosecutions for false accusation of unlawful intercourse and for theft, crimes which include infringing a right of humans (*ḥakk al-ādamī*), take place only on the demand of the persons concerned, and the applicant must be present both at the trial and the execution.¹¹⁵

This statement shows that there is absolutely no pardon for someone who has been convicted in terms of execution, but this does not negate his right of having the chance to escape the severe penalty through a retrial at a court of appeal or other higher court. One can argue that the fixed penalty cannot be reduced or pardoned by the ruler, but there is no dispute that other technical procedures, as well as the presentation of evidence, are always open to petition.

¹¹³ Al-Ḥaṭṭāb, *Mawāhib al-jalīl*, vol.5, p.185.

¹¹⁴ Ibn Farḥūn, *Tabṣīrat al-ḥukkām*, vol.1, p.159.

¹¹⁵ Joseph Schacht, *An Introduction to Islamic Law*, p.176.

(g) The Right to Compensation over an Erroneous Sentencing

Muslim jurists agree that judges are responsible for any serious mistakes or wrongdoing in passing a judgement. If the judge is found to be intentionally partial by issuing an unjust judgment favourable to a certain party because of their position, wealth, or power he is liable to *ta'zīr* penalties such as facing disciplinary legal actions as well as financial compensation to the accused. However, in a case where a judge renders an erroneous decision unintentionally, the mistaken victim is entitled to compensation from the public treasury.¹¹⁶

¹¹⁶Osman Abdel Malek al-Soleh, "The Right of Individuals to Personal Security in Islam", p.84.

7 The Rights of a Rape Victim in Islamic Law

Introduction

As mentioned earlier, this research asserts that rape is different from *zinā* because it involves violence against individual's dignity which leaves behind an injured party as a victim suffering the agony. This chapter will examine the fundamental rights of rape victims provided in Islamic law. This will include the right to be protected, the legitimacy of reaction against physical assault, the right to exemption from punishment, the right to choose to terminate or continue the unwanted pregnancy and other remedies.¹

A. The Rights of Protection

In Islam, a woman's chastity must be respected and protected at all times regardless of her religion. She must not be abused physically and morally under any circumstances. All promiscuous relationships are forbidden to men, irrespective of whether the woman is willing or against the act.² Each individual has to defend his/her own or another person's life, property, and honour. Rape is an aggression not only against the woman's personal honour but also her family. Physical reaction against an intruder has been legalized in the *Sharī'a* based on the following verses:

¹In Resolution A/res.40/34 29 November 1985 the UN General Assembly demands that all member countries actively carry out the principles of the "Declaration of the Fundamental Principles of Justice for the Victims of Crime and Power Abuse." This law is of great juridical importance and officially attracts the attention of large international organizations on victims' rights. Among the important issues highlighted in the declaration are providing means of access to justice and the right to be treated respectfully within a legal environment, an adequate compensation to be paid by the offender and an efficient form of compensation scheme provided by the government.

²Abul A'la Mawdudi, *Human Rights in Islam*, p.18.

And indeed whosoever takes revenge after he has suffered an aggression, for such, there is no way of blame against them (Qur'ān, 42: 41).

Whoever transgresses against you, transgress likewise against him (Qur'ān, 2: 194).

These verses imply that there is nothing wrong with an oppressed person opposing his /her oppressor. His/her reaction against [the] violence is legitimate. The intruder is a transgressor and reaction against him is considered to be defending oneself against a crime.

There are many authentic hadith of the Prophet supporting the injunctions of the above-mentioned verses. Among them are the following:

A hadith reported by Abū Sa'īd al-Khudrī:

Those of you who see vice should change it with their hands; if unable, then with their tongue; and if unable, then with their heart; and this [last manner] is the lowest degree of belief.³

A hadith reported on the authority of Abū Hurayra:

If someone is spying on you in your home without permission, and you stone him, even if you injure his eye, you are not liable for that.⁴

And another hadith on the authority of Sa'īd ibn Zaid:

He who is killed in shielding his family is a martyr; he who is killed in protecting his property is a martyr; he who is killed for defending his life is a martyr; and he who is killed for the sake of his religion is a martyr.⁵

³Muslim ibn al-Ḥajjāj, *Ṣaḥīḥ Muslim*, vol.1, p.69, no.49.

⁴Ibn Ḥajr al-ʿAsqalānī, *Fatḥ al-bārī*, (kitāb al-diyāt), vol.15, p.267.

⁵Al-Nasāʾī, *al-Sunan*, vol. 7, p.116; al-Tirmidhī, *al-Sunan*, vol. 6, p.191. Al-Tirmidhī authenticated the hadith and classified it as *ḥasan ṣaḥīḥ*; al-Albānī, *Irwāʾ al-ghalīl*, hadith no. 708.

These hadiths in general show the importance of prohibiting evil, and rape is an evil which must be resisted. Based on these hadiths, Muslim jurists unanimously agree that it is recommended for every individual to resist sexual usurpation. A rape victim is allowed to cause even severe injury or casualty on the usurper provided there is no other way out. This is based on the reason that consenting to illegal intercourse is strictly prohibited. At the same time, absence of resistance signifies giving permission to the evil action. This ruling also implies that the evil should be stopped and prevented regardless of the time and place. Everyone is responsible for defending his dependants, particularly his wife, daughters and sisters from indecent assault.⁶

With regard to protecting family members from sexual usurpation, the Ḥanbalites assert that resisting aggression against one's own wife is obligatory because it is a defence of his honour as well as the right of Allah.⁷ They support their opinion with a hadith narrated by al-Mughīra, that Sa'd ibn 'Ubāda said: "If I find a man sleeping with my wife, I will strike him with my sword." When the Prophet heard what was said, he said: "Are you amazed with Sa'd's jealousy? I am more jealous than him and Allah is more jealous."⁸

⁶Awda, *al-Tashrī' al-jinā'i*, vol.1, p.474.

⁷Al-Bahūtī, *Kashshāf al-qinā'* vol. 6, p.104.

⁸Al-Bukāhri, *al-Jāmi' al-ṣaḥīḥ*, vol.8, p.210.

The Shāfi‘ites generalize the responsibility of stopping sexual aggression even if it is against an *ajnabī*⁹ woman on the ground that no-one’s honour can ever become legitimate. Thus, it must be defended and protected.¹⁰ The Ḥanbalites also hold the same idea that if someone attacks another wanting his money, life or a woman for sex, everyone at the scene is responsible to repel the aggression.¹¹

(a) Legitimacy of Self-Defence

The jurists extensively discuss the issue of a woman’s causing harm to an assailant of her honour. The majority of jurists are of the opinion that there is no retaliation against a defendant who causes death to an assailant in defending her life and honour provided that there is no other way to defend herself except by doing so.¹² This is on the ground that the culprit has committed a sin which makes his blood unprotected and thus he is no longer protected (by the law).¹³ Forcible sexual intercourse itself is against the right of Allah for which sentencing should not be postponed. It is also argued that sometimes criminals might run away or might not be charged by the court.¹⁴ Thus, any harm to the assailant caused by a victim’s prompt reaction in resisting violence is justified.

Ibn Qudāma reports that Imām Aḥmad was asked about the verdict for a woman who resisted and killed an intruder who forced her for sex, in order to defend herself. He said: “if she knew that he seriously wanted to have sex with her by force, and she

⁹A person who is unrelated either by blood or marriage.

¹⁰Al-Shirāzī, *al-Muḥadhdhab* vol. 2, p. 224; al-Ḥaṭṭāb, *Mawāhib al-jalīl* vol.6, p.323; Ibn ‘Ābidīn, *Hāshiat rad al-mukhtār*, vol. 6, p.454.

¹¹Ibn Qudāma, *al-Mughnī*, vol. 8, p.322.

¹²Awda, *al-Tashrī‘*, vol.1, p. 473.

¹³Ibid., vol. 1, pp. 474-478; J. Schacht, *The Origin of Islamic Law*, p.184.

¹⁴Al-Khurashī, *Sharḥ mukhtaṣar Khalīl*, vol. 5, p.4 ; al-Bahūtī, *Kashshāf al-qinā‘*, vol.5, p.607.

killed him she was innocent.” Aḥmad narrated a hadith reported by al-Zuhrī from ibn ‘Umar that a man invited a number of people from Hudhail tribe. The host insisted on having forcible sex with a woman. She hit him with stone to defend herself, and he was killed. In this particular case, ‘Umar ruled that his relatives were not entitled to blood money. Ibn Qudāma hence concludes that since it is compulsory to defend her property from aggression, it is more obligatory for her to defend her honour.¹⁵

Among the Ḥanafites, Ebu’s-su‘ud, a famous Ottoman grand mufti, issued a religious decree with regard to fighting for self defense. Killing in order to prevent sexual assault or for the reason of protecting one’s honour is a related category of homicide, which Ebu’s Su‘ud enthusiastically exempts from liability. He was asked a hypothetical question: “Zeyd enters Hind’s house and tries to have intercourse forcibly. Since Hind can repel him by no other means, she strikes and wounds him with an axe. If Zeyd dies of this wound, is Hind liable for anything? He answered: “She has performed an act of Holy war.”¹⁶ This is because, by wounding and ultimately killing her assailant, the woman has prevented an act of fornication, which is an offence against God.¹⁷

¹⁵Ibn Qudāma, *al-Mughnī*, vol.10, p. 352.

¹⁶Colin Imber, *Ebu’s-su‘ud: The Islamic Legal Tradition*, (Edinburgh: Edinburgh University Press, 1997), p.250. Ebu’s-Su‘ud is equally forceful in applying the same principle to cases of homosexual assault. It is quoted from him, “if Zeyd wishes to sodomize the beardless Amr, Amr has no other way to escape, and so kills Zeyd with a knife. He explains the case in the presence of the judge, and the people of the village bring testimony saying Amr is truthful. Is their testimony heard? Ebu’s-su‘ud stated: There is no need for testimony. As long as Zeyd is a wicked person, Amr cannot be touched. Their testimony merely reinforces this.”

¹⁷*Ibid.*

(b) Pre-requisites to React Harmfully Against the Assailant¹⁸

In Islamic law, legal self-defence decriminalizes an act under certain limited conditions. Muslim jurists hold that coercion and duress renders a person exempted from liability. The legal principle “Necessity renders prohibited things permissible”¹⁹ implies that a person is allowed to commit an act or to neglect an obligation under the compelling physical violence caused by another human being. The jurists unanimously hold that the compelled person is not legally responsible for any wrongdoing he commits. As protecting one’s honour is concerned, there are pre-requisites for the permissibility of physical reaction:²⁰

1. The nature of usurpation is basically against one’s honour i.e. sexually oriented. Simultaneously, the reaction is done in order to protect oneself or another.

2. The defender should use only the degree of force that is necessary to repel aggression without abuse or excess. If the force used is excessive, the defender will be held criminally responsible. Evaluation of the degree of force is left to the judge’s discretion, based on the circumstances surrounding each case.

3. The reaction must be an immediate response when it is impossible to rely at the crucial moment on the protection of public authorities. The reaction must be the last option when there is no other way to avoid the crime except by physical reaction.

¹⁸Al-Bahūtī, *Kashshāf al-qinā’*, vol.6, p.155; Ibn Qudāma, *al-Mughnī*, vol.10, p.352; al-Shirāzī, *al-Muhadhdhab*, vol.2, p.224; al-Ḍasūqī, *Hāshiat al-Ḍasūqī*, vol.4, p.239; Ibn ‘Ābidīn *Hāshiat rad al-mukhtār*, vol.6, p.546.

¹⁹*The Mejelle*, article 21, *al-Darūra tubīh al-mahzūrāt*. See also Muṣṭafā ibn Aḥmad al-Zarqā’, *al-Madkhal al-fiqhī*, vol.2, p.995-996.

²⁰Ṣāliḥ ibn Nāṣir al-Khuzaim, *‘Uqūbat al-zinā*, p.312-314; ‘Awda, *al-Tashrī‘ al-jinā’ī*, vol.1, p.478-486.

The defendant should reasonably believe that any harm he causes will prevent a greater harm, i.e. indecent assault.

4. The intruding perpetrator must be in a position of committing the physical violence of rape and be capable of doing so. It is not to be considered a compelling situation if the coercer is a young child.

5. The victim must reasonably believe that her prompt action is necessary to avoid infringement of honour and other possible imminent serious damage. Most of the jurists argue that in the case of sexual usurpation, the victim has the right to react harmfully against the assailant regardless of the procedural steps, based on two reasons: Firstly, a sexual assailant will normally end up with intercourse, therefore an instant reaction is necessary by whatever means including causing injury to the assailant. Secondly, the crime of illegal sexual intercourse is a very serious *ḥadd* crime where there is no compromise at all. Thus, a prompt reaction is justified.

B. Exemption from Punishment

As stated earlier, a rape victim who has been forced into sex is not liable for the crime where she has no choice and intention in it. In other words, she is not to be blamed and punished.²¹ The *ḥadd* punishment for fornication is therefore waived from her in this case based on the following Qur'ānic verses:

And force not your maids to prostitution, if they desire chastity, in order that you may make a gain in the perishable goods of this worldly life.

²¹ Al-Sarakhsī, *al-Mabṣūṭ*, vol.24, p.88; al-Dasūqī, *Ḥāshiyat al-Dasūqī*, vol.4, p.282; al-Mardawī, *al-Insāf*; al-Bahūtī, *Kashshāf al-qinā'*, vol.6, p.79; Ibn Qudāma, *al-Mughnī*, vol.10, p.158-159.

But if anyone compels them to prostitution, then after such compulsion, Allah is Oft-Forgiving Most Merciful (Qur'ān, 24: 33).

This is very clear evidence that Allah forgives those women who have been forced to do this evil act unwillingly. The above verse is corroborated with some hadiths among them the Prophet's statement:

My *umma* (community) will be forgiven for things they have done either mistakenly, or out of forgetfulness or by compulsion.²²

As far as the victim's innocence is concerned, the hadith of 'Abd al-Jabbār ibn Wā'il²³ which we discussed earlier is a clear evidence to excuse her from any legal action or penalty which is different from the case of *zinā*. In this event the rape victim was neither charged with any wrongdoing nor she was blamed for the calamity she was afflicted with. She was not asked to bring four male eyewitnesses to support what she claimed. Her prompt complaint to a group of men from the *Anṣār* was sufficient evidence that she was indecently attacked.

In another precedent, at the time of 'Umar, there was a case where a woman who was desperately thirsty requested a shepherd to give her a drink. He refused to give her a drink unless she surrendered herself for sexual intercourse. 'Umar, who was the caliph consulted 'Alī regarding the appropriate penalty for the woman. 'Alī suggested that she should be freed because she was under duress.²⁴

²² Al-Albānī, *Irwā' al-ghalīl*, hadith no. 2566. The hadith has been verified as authentic.

²³ For the details of the hadith, see chapter 4, p. 100.

²⁴ Al-Baihaqī, *al-Sunan al-kubrā*, vol.8, p.236; al-Bājī, *al-Muntaqā*, vol.7 p.145.

It is upheld in Islamic law that a rape victim is not to be charged with committing fornication since there are elements of forcible aggression against her will. This is also in compliance with the principle “suspend *ḥadd* in all cases of doubt.”²⁵

C. Compensation for Illegal Intercourse

Ibn Rushd observes that most scholars agree with applying the *ḥadd* penalty for *zinā* to a convicted rapist.²⁶ However, they disagree on the second part of penalty, i.e. whether the convicted rapist has to pay a dowry besides being sentenced to the *ḥadd* penalty. The basis of the dispute is their disagreement over considering *ṣadāq* as a compensation for utilization which should be imposed in lawful as well as prohibited cases, or as a gift required exclusively for marriage and not for any other purpose.²⁷ The majority of jurists, including Mālik, Shāfi‘ī, the Ḥanbalites and Laith ibn Sa‘d take the stance of imposing a convicted rapist a *ṣadāq* (dowry)²⁸ besides the *ḥadd* penalty.²⁹ The same opinion is reported from ‘Alī ibn Abī Ṭālib, Ibn Mas‘ūd, Sulaimān ibn Yasār, Rabī‘a and ‘Aṭā.³⁰ Mālik generalizes the verdict to cover also an insane woman and also an unconscious sleeping woman. His argument is based on the fact that rape involves the right of Allah and the right of an individual and these must be dealt with separately. Both deserve different treatment, as is the ruling

²⁵See pp. 152-153 of this thesis.

²⁶Ibn Rushd, *Bidāyat al-mujtahid*, vol. 2, p.324.

²⁷Ibn Rushd, *Bidāyat al-mujtahid*, vol.2, p.530

²⁸The dower is a sum of money or other property which becomes payable by the husband to the wife as an effect of marriage. This is ordained in the Qur’ān: “And give the women (on marriage) their dower as free gift” (4:4). It is an obligatory and fit gift by the man to win her heart and to honour marriage. Contrary to some cultures, dower is not a bride price given to the father or the guardian. See Jamal J. Nasir, *The Status of Women Under Islamic Law and Under Modern Islamic Legislation*, 2nd ed., (London: Graham and Trotman, 1994), p.46.

²⁹Al-Shāfi‘ī, *al-Umm*, vol.3, p.230; Mālik ibn Anas, *al-Mudawwana al-kubrā*, vol.4, p.401; Ibn Muflīḥ, *al-Mubdi‘*, vol.9, p.72; Ibn Rushd, *Bidāyat al-mujtahid*, vol.2, p.324.

³⁰Mālik ibn Anas, *al-Mudawwana al-kubrā*, vol.4, p.401; Ibn Farḥūn, *Tabṣirat al-ḥukkām*, vol.2, p. 256; Ibn Juzayy, *al-Qawānīn al-fiqhiyya*, p. 285.

in the case of stealing.³¹ The Mālikites make no difference between a virgin victim and a non-virgin in terms of receiving a dowry compensation.³² They support the notion of imposing a dowry in addition to the *ḥadd* penalty with the hadith:

If any woman gets married without the permission of her (father) *walī*, the marriage is nullified. If the man consummates the marriage with her, he is obliged to pay her the dowry for legitimizing the sexual relation. If there is a conflict, the sultan i.e. authority, is the *walī* for those who have no *walī*.³³

In another hadith, the Prophet decreed that a man has to pay the dowry for an invalid marriage such as a marrying a woman who has not completed her *‘idda* (waiting period for a legitimate divorce with her former husband.)³⁴ This hadith shows that the action of “legalizing” sexual intercourse itself is the reason which makes him accountable for paying the dowry.³⁵

Looking at it from a different angle, the Shāfi‘ites support the idea of imposing a dowry based on the *qiyās* (analogy) that the illegal intercourse in rape is similar to the one in invalid marriage (*nikāḥ fāsid*) where the so-called husband has to pay a fair *mahr* if there had been consummation. Similarly, a rapist is considered to be liable for compensation (*ḍamān*) in a rape case because of intercourse.³⁶

³¹Mālik ibn Anas, *Ibid*.

³²Al-Ḥaṭṭāb, *Mawāhib al-jalīl*, vol.3, p.518.

³³Al-Albānī, *Irwā‘ al-ghalīl*, no 1944. The hadith has been verified as *ṣaḥīḥ* (authentic).

³⁴Al-Albānī, *ibid*, no 2124. The hadith has been verified as *ṣaḥīḥ* (authentic).

³⁵Ibn Qudāma, *al-Mughnī*, vol.7 p.209.

³⁶Al-Shirāzī, *al-Muhadhdhab*, vol.2, p.62.

However, Abū Ḥanīfa, al-Thawrī and Ibn Shubruma hold the opinion that a rapist is liable for the *ḥadd* penalty only, and not for the dowry (*ṣadāq*). They argue that when the right of Allah meets the right of individuals (dowry), the right of Allah (*ḥadd* penalty) prevails. They also reason that *ṣadāq* is not a redemption for sexual pleasure, but for a ritual purpose. Therefore they maintain there should be no *ṣadāq* for illegal intercourse.³⁷ These three scholars base their argument on the very same hadith of ‘Abd al-Jabbār ibn Wā’il which clarifies that no dowry was charged on the man.³⁸ In fact, the hadith clearly mentioned that there was no monetary penalty (*ṣadāq*) imposed on the offender. [It is] Abū Ḥanīfa [who] also maintains that if a man has intercourse with a free woman by force and she dies because of the violence, he must pay *diyya* besides being liable for the *ḥadd* penalty.³⁹

Ibn Ḥazm reported a case of sexual assault brought to Ḥasan ibn ‘Alī where a virgin girl lost her virginity because of physical attack by one girl using her bare finger to penetrate her vagina, while her friends held the victim. Ḥasan judged that they all had to pay a fair dowry. On another occasion, ‘Iyād ibn ‘Abdullah, a judge in Egypt, consulted ‘Umar ibn ‘Abd al-‘Aziz regarding a boy who penetrated a girl’s vagina with his finger and broke her hymen. The Caliph asked the judge to decide based on *ijtihād*. He ordered that the boy’s family had to pay 50 dinars.⁴⁰

Contrary to this, Ibn Ḥazm opposes the proposition of imposing any fair dowry (*mahr mithl*) in the case of breaking virginity, because it is not a marriage. He

³⁷ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 2, p.324.

³⁸ For details of the hadith see page 98-99.

³⁹ Al-Kāsānī, *Badāi‘ al-ṣanā‘i‘*, vol.7, p.61; Ibn ‘Ābidīn, *Hāshiat radd al-mukhtār*, vol.4, p. 30.

⁴⁰ Ibn Ḥazm, *al-Muḥallā*, vol. 8, p.476.

supports his opinion with the hadith: “Indeed your property, your life are protected.” The *mahr* is only necessary in legal marriage. There is no evidence from the Qur’ān, hadith or *ijmā‘* imposing such a monetary penalty irrespective of having it broken either by a man or a woman. Therefore, he maintains that the ruling is baseless since it is not the command of Allah and his Messenger.⁴¹

However, Ibn Ḥazm’s argument can be refuted by the fact that in some other transmission of the same hadith, the Prophet mentioned “your honour and your body” (*a‘rāḍakum wa abshārakum*).⁴² Breaking one’s virginity by whatever means is definitely an infringement against the body which renders compensation due. As compensation is compulsory in the case of blood and property, it is also compulsory in the case of physical attack. Committing illegal intercourse is actually a severely disgusting crime against the human body.⁴³

D. Remedies Based on the Principle of *al-Jirāh*

The punishment for homicide and the infliction of injury (*jirāh*) in Islamic law could be either *qiṣās* (retaliation) or the payment of *diyya* (blood money). *Qiṣās* itself is divided into two categories: *qiṣās* for homicide (*al-nafs*) and *qiṣās* for wounds or injuries (*dūn al-nafs*) which is usually known as *qawad* or *arsh*.⁴⁴ A full *diyya* is worth 100 camels or the equivalent. The full blood money may be paid not only for homicide but also for physical injury.

⁴¹ Ibn Ḥazm, *al-Muḥallā*, vol.8, p.476.

⁴² Al-Bukhārī, *al-Jāmi‘ al-ṣaḥīh*, hadith no. 7078.

⁴³ ‘Abd al-Mālik ‘Abd al-Raḥmān al-Sa‘dī, *al-Ālāqāt al-jinsiyya ghair al-shar‘iyya wa ‘uqūbatuhā fī al-sharī‘a wa al-qānūn*, 1st ed. (Baghdad: Matba‘at al-Irshād, 1975), p.479.

⁴⁴ El-Awa, *Punishment in Islamic Law*, p.71.

As rape may involve bodily injury, rape victims are entitled to civil redress according to the law of *jirāh* (wounds). Everybody is designated ownership rights to each part of his or her body, and a right to corresponding compensation for any harm done unlawfully to any of those parts. Harm to the sexual organ, therefore, entitles a victim to the appropriate financial compensation.

The majority of jurists opine that the loss of function is reckoned as equivalent to the loss of the same organ. For example, the loss of reproductive function is similar to the loss of the organ.⁴⁵ If damage does not involve the whole organ, or if the amount of loss of function is difficult to evaluate, a special formula of assessment called “*al-ḥukūma*” is undertaken.⁴⁶ A calculation is applied to work out the percentage of loss of function which, when applied to the amount of the full *diya*, yields a precise figure. In the light of this, al-Māwardī states that the guilty party is liable, however, for the compensation of the victim’s severed limbs even if they are healed, and even if their total value is several times less than the blood money for murder.⁴⁷

Thus, the value of compensation differs based on the circumstances of the damages and the nature of the crime. The judge will decide the proper *diya* for the damage. If an offender cannot afford to pay the *diya*, his *‘āqila* (blood relatives) are called upon first to reimburse the amount. If the family is unable to pay, the clan or tribe may be

⁴⁵Al-Kāsānī, *Badā’i’ al-ṣanā’i’*, vol.7, p.311; al-Zayla’ī, *Tabayīn al-ḥaqā’ik*, vol.6, p.131; al-Khurasī, *Hāshiat al-Khurasī ‘alā mukhtaṣar Sīdī Khalīl*, vol. 8, p.35; al-Mardāwī, *al-Insāf*, vol.10, p.88-90. al-Shirāzī, *al-Muhadhdhab*, vol.2, p.207.

⁴⁶Ibn Nujaīm specifies the admissibility of expert’s opinion on some issues which he accounts eleven cases from among which the evidence by an expert on determining the amount of compensation. See Ibn Nujaīm, *al-Ashbāh wa al-naẓā’ir*, p.223.

⁴⁷Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, p.255.

required to pay. Even if the offender dies, the debt is passed on to the offender's heirs.⁴⁸

In the same sense, it is asserted⁴⁹ that the Muslim authority is also responsible for providing compensation to the victim if the family members or the tribe of the criminal cannot afford to pay. This is because it owes the victim the right of protection and it owes his family the right of care. If the state cannot obtain payment from the murderer, then the *diyya* is incumbent on the treasury. If payment to the victim's family will burden the treasury, the state can levy a general tax for this purpose, since the whole nation becomes like an '*āqila* on the basis of the following Qur'ānic teachings:

[The] believing men and women are supporters of each other (Qur'ān: 9:71).

In the case of damage caused by more than one person, such as in gang rape, each of the involved persons will be liable for the extent of the damage caused by his act.

As compensation for rape is concerned, besides imposing a fair dowry, the Shāfi'ites also impose *arsh* (financial compensation) if the man has caused injury to the hymen of virginity. The hymen is regarded as personal property, and the legal principle states that any infringement of others' belongings renders compensation due. Ibn Qudāma of the Ḥanbalites, however, opposes this opinion arguing that the dowry itself entails

⁴⁸The heirs or '*āqila* responsible for paying *diyya* for the victims are male relatives who have a right to inherit from the murderer by means of relation (*nasab*) or *walā'* (emancipation of slavery). The '*āqila* of a person are actually his agnates ('*aṣaba*). See al-Shirbīnī, *Mughnī al-muḥtāj*, vol.4, p.95.

⁴⁹Muhammad Abdel Haleem. "Compensation for Homicide in Islamic Sharia" in *Criminal Justice in Islam Judicial Procedure*. ed. Kate Daniels et.al. (London: I.B.Tauris, 2003), p.101-102.

all sorts of compensation. According to him, a virgin victim must be given a higher compensation than a widow because of her virginity. This extra payment is part of that *arsh*.⁵⁰ Ibn Qudāma argues further that the criminal has to pay *diyya* if the victim becomes pregnant and dies upon delivery, because this has been caused by his violence.⁵¹

E. Remedies Based on *Ta'zīr*

Women who are raped suffer a sense of violation that goes beyond physical injury. They usually suffer psychological trauma which varies from individual to individual, such as the feeling of perpetual defilement, an overwhelming sense of vulnerability, being distrustful of men and experiencing feelings of shame, humiliation, and loss of privacy and autonomy. They may also develop psychological disturbances related to the circumstances of rape such as intense fears. In addition, they most probably will experience social consequences such as a difficulty in getting married. Besides the principle of *al-jirāh*, these sorts of moral damages and consequences can also be compensated based on the principle of *al-fi' l al-dārr* (Tort).⁵² Damages are generally assessed according to the extent of the loss and damage suffered by the victim, provided always that the damage is the natural result of the criminal act.

Under the principle of *al-fi' l al-dārr*, it is possible for a victim to make a claim for moral damages. These may include violation of a person's freedom, dignity, reputation, social or financial status. The victim or his heirs may claim additional

⁵⁰ Ibn Qudāma. *al-Mughnī*, vol.7 p.209.

⁵¹ Ibn Qudāma, *al-Kāfī fī fiqh ibn Ḥanbal*, ed. Zuhair al-Shāwis, (Beirut: al-Maktab al-Islāmī, 1988), vol.4, p. 61.

⁵² See Abdul Basir bin Mohamad, "The Islamic Law of Tort" (unpublished PhD thesis), University of Edinburgh, 1997, pp.55-63.

compensation if they have legal grounds to do so. These claims may also include, for example loss of future earning, moral pain and suffering or any other damages that the heirs have suffered as a direct result of the crime. These financial compensations can be included under the principle of *ta'zīr* which allows the authority to impose financial penalty on the criminal provided that there are justifications to do so.⁵³

F. The Right to Abort Unwanted Illegitimate Pregnancy Stemming from Rape

Since there is a chance that rape may result in pregnancy, it is necessary to examine the stance of Islamic Law about inducing abortion. Undoubtedly a rape victim is not guilty and never becomes religiously responsible for the assault and its consequence. But, the question is about the fundamental social right of the rape victim if she becomes a mother. She has to face a dilemma and all sorts of difficulty in bringing up the innocent illegitimate child while surviving pressures from friends and family members. As far as the rape victim is concerned, physiological interruption and other external pressure usually cannot be avoided when she becomes pregnant as a result of forcible intercourse. The usurper however, has no right at all to claim the child, based on the hadith:

A child obtains legitimate fatherhood only by legal marriage and for the adulterer is stoning.⁵⁴

The jurists in general agree that unnecessary abortion is blameworthy and it is considered as murder to expel the foetus unnecessarily. It is regarded as committing infanticide which is strongly prohibited in Islam. Ibn Taymiyya, for instance, rules that a mother who intentionally and unjustifiably aborts her baby has to pay *ghurra*

⁵³See chapter 5, p. 124.

⁵⁴Al-Bukhārī, *al-Jāmi' al-ṣaḥīḥ*, no.2745. (*al walad li al-firāsh wa li al- 'āhir al-ḥajar*)

(one fifth of the *diyya*) as a punishment for her offence irrespective of the age of the foetus.⁵⁵ Most jurists do not legalize abortion except for compelling reasons such as a threat to the mother's life, and if strongly recommended by reliable specialists. This is in line with the following verse:

O Prophet! When the believing women come to you pledging to you that they will not associate anything in worship with Allah, nor will they steal, nor will they commit unlawful sexual intercourse, nor will they kill their children, nor will they bring forth a slander they have invented between their arms and legs (by attributing illegal children to their husbands), nor will they disobey you in what is right - then accept their pledge, and ask forgiveness for them of Allah. Indeed Allah is Forgiving and Merciful (The Qur'ān, 60:12).

And do not kill your children for fear of poverty. We provide sustenance for them and for you. Indeed their killing is ever a great sin (The Qur'ān, 17:31).

Say: "Come, I will recite what your Lord has prohibited to you. [He commands] that you do not associate anything with him in worship; be good to your parents and do not kill your children out of poverty (The Qur'ān, 6:151).

In the pre-Islamic period, the pagan Arabs used to kill their innocent daughters after birth inhumanly because of their belief that it was a shame to give birth to a girl. There was no means to know the sex of the foetus in the womb. Hence, they waited until the mother gave birth. They used to kill their daughters by burying them alive in the desert as daughters were regarded as a shame to the family as a result of the

⁵⁵Ibn Taymiyya, *Majmū' fatāwā*, vol. 34, p. 161.

prevailing condition of continuous warfare and poverty. In the light of this, Sheikh Abū Zahra, former professor of Islamic law at the Faculty of Law, Cairo University interprets the “killing” mentioned in the verse as including both infanticide and abortion since what is involved is the slaying of a human being which Allah has prohibited.⁵⁶

The juristic position from different schools of law towards abortion varies despite their consistent stance on contraception which most jurists permit. Many regulations in Islamic law pertaining to abortion depend directly on the religious view of foetal development. These stages are based on the following Qur’ānic verses:

Then We placed him as a sperm-drop in a firm lodging [i.e., the womb]. Then We made the sperm-drop into a clinging clot, and We made the clot into a lump [of flesh], and We made from the [lump], bones, and We covered the bones with flesh; then We developed him into another creation. So blessed is Allah the best of creators (The Qur’ān, 23:13-14).

Was he not been a sperm from semen emitted? Then he was a clinging clot, and Allah created [his form] and proportioned [him] (The Qur’ān, 75: 37-38).

O mankind, what has deceived you concerning your Lord, the Generous, Who created you, proportioned you and balanced you perfectly, and in what ever form He willed, He has assembled you (The Qur’ān, 82:6-8).

O people, if you should be in doubt about the resurrection, then [consider that] indeed We created you from dust, then from a sperm-drop, then from a clinging clot, and then from a lump of flesh, formed and

⁵⁶Abū Zahra, “*Tanzīm al-nasf*”, in *Liwā al-Islām*, quoted from Abdel Rahim Omran, *Family Planning in the Legacy of Islam*, (London: Rutledge, 1994), p.204.

unformed, that We may show you [our power]. And We settle in the wombs whom We will for a specified term, then We bring you out as a child, and then [We develop you] that you may reach your time of maturity (Qur'ān, 22:5).

Indeed, We created Man from a sperm-drop mixture that We may try him; and We made him hearing and seeing (Qur'ān, 76:2).

These verses in general prescribe the stages of embryo development from the time of conception. The following verses highlight a very special stage in the development of the embryo which is known as *nafkh al-rūh* (breathing in the soul) as clearly mentioned in the Qur'ān and Prophetic hadith:

Then He fashioned him in due proportion, and breathed into him His soul; and He gave you hearing, sight and hearts. Little is the thanks you give (Qur'ān, 32:9).

And certainly did We create man from an extract of clay. Then We placed him as a sperm-drop in a firm lodging [i.e., womb]. Then We made the sperm-drop into a clinging clot, and We made [from] the lump, bones, and We covered the bones with flesh; then We developed him into another creation. So blessed is Allah, the best of creators (Qur'ān, 23:12-14).

This phenomenon is further explained in the following hadith:

Verily the creation of each one of you is brought together in his mother's womb for forty days in the form of a life germ (*nutfā*) for forty days, then he becomes a clot of congealed blood (*'alaqa*) for a similar period, then he becomes a lump (*mudgha*) for a similar period; then the angel is sent to breathe into him the soul.⁵⁷

⁵⁷Al-Bukhārī, *al-Jāmi' al-ṣaḥīḥ*, hadith no.6594.

According to the above-mentioned verses, when a foetus is formed and begins to get fashioned by showing signs of the beginning of a human body, an angel is sent to put the breath into it. The hadith clarifies that the foetus is alive and has the human soul as early as four months of pregnancy. This is the reason why a foetus has the same human value in the sight of Almighty God. Ibn Qayyim asserts that religion and true science agree on the nature of parental contribution to the development of the foetus through a series of transformations. However, he clearly identifies an area where only revelation and not science has meaning. Based on the hadith about the timing of foetal development, he says that the foetus is given the soul and becomes human in the fourth of four forty day periods i.e. after 120 days. He adds that this can be known only through revelation. As a result, the best physicians and philosophers have been perplexed by this issue and say it cannot be known except by conjecture (*al-zan al-ba'id*). While breathing in the soul is a normal part of God's way in the generation of human beings, its understanding is not open to the methods of science. This phenomenon belongs to a different realm of meaning, outside science but at the centre of religion. Applying the same argument, sex differentiation is divinely predetermined. He insists that being male or female is like being human in its divine origin which cannot be explained by natural science.⁵⁸

Based on these sequences, most jurists believe that a foetus becomes a perfect human being after four months of pregnancy. And as a human being, it should be valued and respected and it deserves honour. They attached a special importance to "another creation" at the end of the phrase mentioned in the Qur'an and similar importance to

⁵⁸Ibn Qayyim, *Tuḥfat al-mawlūd*, ed. 'Abd al-Qādir al-Arna'ūt, (Damascus: Dār al-Bayān, 1971), vol.1, p.168; Basim Musallam, *Sex and Society in Islam: Birth Control before the nineteenth century*, (Cambridge: Cambridge University Press 1983), p. 57.

the “breathing the soul into him” mentioned by the Prophet at the end of the same third stage, but this time the Prophet detailed the time involved in each of the three phases, i.e. 40 days in each: a total of 120 days. So at the end of 120 days, there comes into being a different and separate creation with a *rūh* (soul). Most jurists agree that abortion after 120 days is categorically prohibited except for extremely life-threatening circumstances, such as ectopic pregnancy, to save the mother’s life.⁵⁹

Muslim jurists also consider the stage of breathing in the soul after four months of pregnancy as the crucial event, before which the foetus is not a person. If someone hurts a pregnant woman and she aborts, the amount of blood money depends on whether the foetus is formed or unformed. If a formed foetus is aborted as a result of physical assault the full *diyya* has to be paid, just as in the case of an adult person. A religious ceremony for burial is permitted in the case of a formed foetus, and prohibited otherwise. Al-Shāfi‘ī says: “If the foetus goes beyond the stage of *mudgha* or *‘alaqa*, where a finger, a nail or an eye can be discerned, then a *ghurra* is due.”⁶⁰

The jurists, however, disagree with regard to abortion within the first 120 days of pregnancy, i.e. before the breathing in the soul. The most tolerant school on this issue is the Ḥanafīte. The Ḥanafītes permit abortion until the end of the fourth month. The Ḥanafītes grant a pregnant woman the right to abort even without her husband’s

⁵⁹Abdel Rahim Omran, *Family Planning in the Legacy of Islam*, p.191.

⁶⁰Al-Shāfi‘ī, *al-‘Umm*, vol. 6, p. 107; Ibn Muflīh, *al-Mubdi‘* vol.4, p.123; al-Mardawī, *al-Inṣāf*, vol.4, p.475; Abū ‘Umar, Yūsuf ibn ‘Abdullah ibn ‘Abd al-Bār (d. 463 AH/1071 CE), *al-Tamhīd*. Ed. Muṣṭafā ibn Aḥmad al-‘Alawī, (Morocco: The Ministry of *Waqf* and Islamic Affairs, 1387 AH), *al-Tamhīd*, vol.6, p.483,

permission, but they maintain that she should not do so without a reason.⁶¹ One reason which is often mentioned is the existence of a nursing infant. A new pregnancy puts an upper limit on lactation where it is believed that if the mother could not be replaced by a wet-nurse, the infant would die.

Some Ḥanafite jurists like Alamghir assert that if a breastfeeding woman becomes pregnant, and consequently her milk dries up and her husband could not afford a wet nurse, she is allowed to procure an abortion so long as the pregnancy is in one of the stages of *nuffa*, or *mudga*, or *‘alaqa* with no defined limbs.⁶²

In the same sense, Ibn Nujaim asserts it is regarded as a baby when the limbs appear to resemble a complete human look which differentiates it from ordinary blood clot and congealed meat.⁶³

Many Shāfi‘ites and Ḥanbalites agree with the Ḥanafites in their toleration of the practice, some putting an upper limit of forty days for a legal abortion, others eighty days or 120 days. Al-Ramlī, a Shāfi‘ite jurist, rules that when the zygote has turned into a human shape, it deserves the legal right of a human being, that is, the full *diyya* should be paid for its life. He quotes an opinion of al-Karābīsī who asked Abū Bakr ibn Sa‘īd al-‘Irāqī about some one who gives his wife medicine for the purpose of abortion; al-Iraqī says as long as it is a *nuffa* there is no accountability for it before

⁶¹ Ibn Nujaim, *al-Baḥr al-rā‘ik*, vol.3, p.214; Ibn ‘Ābidīn, *Minḥat al-khālik*, vol.3, p.215.

⁶² Al-Kāsānī, *Badā‘i ‘al-ṣanā‘i*, vol.7, p. 325. Ibn ‘Ābidīn, *Hāshiat radd al-mukhtār*, vol.3, p.176.

⁶³ Ibn Nujaim, *al-Baḥr al-rā‘ik*, vol.3, p.214.

completing 120 days.⁶⁴ Al-Bahūtī of the Ḥanbalites states that aborting a pregnancy so long as the soul (*rūh*) has not been breathed in is permitted.⁶⁵

According to the Zaydite School of law, since the unformed foetus, like semen, has no human life, abortion, like contraception, is unconditionally permitted.⁶⁶

Those jurists who tolerate abortion before 120 days of pregnancy for valid reasons support their argument with the following evidence from the Qurʾān and Sunnah:

Allah intends for you ease, and does not intend for you hardship (Qurʾān, 2:185).

Allah does not charge a soul except [with what is within] its capacity (Qurʾān, 2:285).

And Allah wants to lighten for you [your difficulties]; and mankind was created weak (Qurʾān, 4:28).

The hadith:

There should be neither harm[ing] nor reciprocating harm in Islam.⁶⁷

(a) Opponents of Abortion within 120 Days

Some jurists oppose abortion even if it takes place within the first 120 days of pregnancy. They argue that even before 120 days the foetus has the potential to become a complete human being, and therefore must not be aborted. Most of the

⁶⁴Al-Ramlī. *Nihāyat al-muhtāj*, vol.8, p.442.

⁶⁵Al-Bahūtī. *Sharḥ muntahā al-irādāt*, vol.1, p. 115.

⁶⁶Aḥmad ibn Yahyā al-Murtadhā. *al-Baḥr al-zakḥkhār al-jāmi‘ li madhāhib‘ ulamā’ al-amṣār*, (Beirut: Mu‘assasat al-Risāla. 1975), vol.3, p.81.

⁶⁷Ibn Mājah. *Sunan Ibn Mājah*, vol.2, p.784.

Mālikites prohibit abortion absolutely. They agree with others that the foetus is not a human being before ensoulment, but they assume that ensoulment could take place any time from when the semen has settled in the womb. Ibn Juzayy, a Mālikite, narrates the consensus of Mālikite scholars that after conception has taken place, there should not be interruption. It becomes more prohibited when the zygote has appeared in the shape of a human being, foremost when the soul is breathed with it, when it is considered murder by consensus.⁶⁸

Only a small minority of the Mālikites permit abortion of a young embryo of forty days or less. Al-Dardīr clarifies that dislodging the semen that has developed within the womb, even before completing forty days, is not permissible (*lā yajūz*). As for dislodging the products of conception after the breathing in the *rūḥ* (soul) into it, it is strictly forbidden.⁶⁹

In the same sense, al-Ghazālī notes that while contraception does not amount to killing since it does not affect a being that exists, abortion does affect a being that already exists and the degree of prohibition and the magnitude of the crime increases with the progress of the pregnancy.⁷⁰

⁶⁸Ibn Juzayy, *al-Qawānīn al-fiqhiyya*, p.141.

⁶⁹Al-Dardīr, *Sharḥ mukhtaṣar Khalīl*, vol.2, p.267; Muḥammad ibn Aḥmad ibn Juzayy, *Qawānīn al-aḥkām al-sharʿiyya*, (Beirut: Dār al-ʿIlm li al-Malāyīn, 1968), p.212; al-Dasūqī, *Hāshiat al-Dasūqī*, vol. 2, p.267. According to al-Dasūqī, it is only a *makrūh* i.e. not recommended before forty days. They do not explain how did he arrive at this figure of forty days, but it is obviously related to the medieval understanding of the first stage of foetal development where the embryo starts the formation of human being.

⁷⁰Al-Ghazālī, *Iḥyā*, vol. 2, p.53.

It appears that the jurists who believe that breathing in the soul happens after 120 days of pregnancy tolerate inducing abortion for acceptable reasons up to that limit. Those who hold that even before 120 days the foetus is alive and has the potential to become a complete human being, disallow or discourage taking abortion. The rest assume that the foetus takes some form after 40 days and allow abortion only before that period. As a matter of fact, it is irrefutable that the zygote itself is alive. But it can be argued that the sperm and the egg are naturally alive, but their life is very different from the life of a living human being.

The discussion of abortion is related to that of contraception in two ways. In the first place, some jurists, in order to strengthen their argument for the permission of contraception, maintain that it is preferable to abortion, as noted by al-Ghazālī.⁷¹ The Ḥanafites argue, since a pregnant woman has the right to induce abortion before the foetus is 120 days old, she also should be given the right to use female contraceptives. Thus, compared to abortion, contraception is preferable.⁷²

Aborting a pregnancy resulting from rape is regarded as a valid reason and a recognized necessity. For example, a Muslim woman victim who has been raped by an evil enemy, has a strong reason for her and her family to induce abortion. This is based on the legal principles (*al-ḍarar yuzāl*) meaning “harm is to be avoided.” If an innocent victim who is exposed to bestial aggression fears that such an unwanted tragedy may affect her and her family’s reputation, or fears that she may be an outcast or be subjected to harms, facing unbearable psychological or nervous

⁷¹Al-Ghazālī, *‘Ihyā’*, vol.2, p.41

⁷²Ibn ‘Ābidīn, *Minḥat al-khāliq*, vol.3, p.215.

diseases because of pregnancy or begetting delinquent children resulting from rape and the hardship in finding a safe place to bring up the illegitimate child,⁷³ then abortion is permitted provided that it is done during the early period of pregnancy before the period of breathing the soul. This is because, the development of a zygote will influence the mother physiologically and psychologically to make her decision of taking abortion.

As far as pregnancy as a result of unwanted sexual assault is concerned, it seems that immediate contraception and abortion at the early stage of conception is the most recommended means since most of the jurists permit contraception and abortion before the embryo takes form.⁷⁴ Nevertheless, there is nothing wrong with a rape victim keeping the foetus without terminating it until she gives birth. The child is innocent, as the Prophet said:

Every newborn is born in a state of *fitra* (natural nature of innocence).⁷⁵

(b) Permissible Means of Abortion

With regard to means of abortion, most jurists agree that it is permissible to terminate pregnancy by taking medicines which lead to abortion on condition that it is within

⁷³This was among the reasons for allowing contraception as mentioned by the Mufti of Egypt in 1937. See Fatwa by Sheikh 'Abd al-Majīd Salīm the Mufti of Egypt, issued by *Dār al-iftā'*, no. 81, regd:43, 25 January 1937, published in *Journal of the Egyptian Medical Association*, vol.20, no.7, July, 1937, p.55, quoted from Abdel Rahim Omran, *Family Planning in the Legacy of Islam*, p. 250. It does not seem that consensual illegal intercourse, i.e. *zinā*, justifies abortion. This is based on the case of the Ghāmidīyya woman who had confessed to *zinā* and insisted on being sentenced. The Prophet told her to go away until she had given birth, then after she had given birth, he told her to go away until the child was weaned.

⁷⁴Muḥammad ibn Abī Bakr al-Razī, (d. 666 AH/1268 CE), *Tuhfat al-mulūk*, ed. 'Abdullah Nāzīr Aḥmad, (Beirut: Dār al-Bashā'ir, 1417 AH), vol.1, p. 239.

⁷⁵Al-Bukhārī, *al-Jāmi' al-ṣaḥīḥ*, hadīth no 1358.

the first forty days of pregnancy provided that it is a virtual necessity.⁷⁶ Exemption from this prohibition must be justified by compelling conditions approved by religious and medical experts.

All modern methods of contraception are approved by a fatwa endorsed by the Fatwa Committee of *al-Azhār* provided that they are safe, legal and approved by Muslim physicians.⁷⁷ In the light of this fatwa, as *al-‘azl* or coitus interruptus was the method available in the early period of Islam, there is absolutely no difference between using a chemical method, such as the morning-after pill, intra-uterine mechanical devices (the loop), injection and other methods discovered by modern medicine which are used in family planning with the permission of Muslim jurists.⁷⁸

Conclusion

Rape victims deserve adequate legal protection as well as a fair trial. According to Islamic law, every individual has the legal right to defend him/herself and to be protected from any physical violence. A person who reacts in honour and self defence or securing his family or others from any sexual assault is divinely rewarded

⁷⁶*Majallat al-buḥūth al-fiqhiyya* (contemporary jurisprudence research journal) signed by Grand Mufti of Saudi Arabia ‘Abd al-‘Azīz ibn Bāz, et.al, Riyadh: 1991, Re/fatwa no.42, p.105.

⁷⁷This fatwa was published in 1988, and is cited in Abdel Rahim Omran, *Family Planning in the Legacy of Islam*, p. 259.

⁷⁸Aḥmed ‘Abd al-‘Azīz Yacoub, *The Fiqh of Medicine*, (London: Ta Ha Publishers, 2001), p. 215. The author states that mechanical devices such as plastic filament known as the coil (IUD) is definitely a foreign body inserted into the uterus, which, by causing contractions, prevents the fertilized egg from attaching itself to the uterine wall, and thus the uterus expels it instead. According to modern medical science it takes up to 72 hours for fertilization or conception. The product of fertilization would still be navigating within the fallopian tube and would not have implanted itself in the wall of the uterus. There are means to stop conception following rape such as by inducing hormonal intervention. It can be a morning after pill (4 pills taken two at a time every 12 hours within 72 hours after exposure.) If fertilization has occurred, it will stop further development than the stage reached within the 72 hours frame. Unwanted illegitimate pregnancy can also be stopped at an early stage by using RU 486 (anti-progestan), a hormone based, oral, or gel application. This method induces abortion in the early stages of pregnancy, normally within 12 weeks.

and should not be criminally responsible. Rape is a crime against one's honour and dignity and must be resisted and prevented by whatever means. Rape is different from *zinā* in terms of victimization, usurpation and absence of mutual consent. Besides being exempted from punishment, a rape victim is entitled to legal remedies. The Muslim legislative body of today must outline an efficient form of compensation for damages to be paid to the victim. As for unwanted pregnancy, the rape victim has the right to take any contraception means or to induce abortion at the early stage of conception.

General Conclusion

Sex in Islam is perceived as a special gift from God Almighty. Sex and sexuality is not evil in itself, but it should be channelled through the lawful means of marriage. Illegal sex, sexual perversion, and indecent assaults are strictly prohibited. It is not the purpose of Islamic law to punish people. Laws and rules aim at regulating people's behaviour in order for them to live with dignity in a peaceful and harmonious world. These regulations in the mean time provide alternatives and practical solutions to prevent the crimes beforehand.

All in all, the Muslim jurists have showed their interest in dealing with rape in Islamic law by considering it as sexual violence and a dangerous crime which should be punished severely. Rape as a sex crime according to the majority of jurists is a *zinā* related crime. This is obvious as the jurists define rape as illegal sexual intercourse with force (*al-ikrāh 'alā al-zinā*). Based on this basis, most jurists apply the same method of proving and sentencing a case of rape as for a case of *zinā*. Since the conviction of *zinā* is very unlikely because of the stringent features of proving, there is a tendency by some modern jurists to regard rape as a crime of *ḥirāba* or *ta'zīr*.

It is noteworthy that the jurists' classifications of rape as coming under the *ḥadd* of *zinā* or the *ḥadd* of *ḥirāba* or as a *ta'zīr* offence is very important as this will affect the approaches of tackling the rulings over problems related to rape. The significance lies in the method of proving, and adjudication as well as punishment.

This thesis asserts that although rape and *zinā* involve the same criminal action of engaging in illegal sexual intercourse which is the basis of any conviction, rape is not *zinā* and should not be treated like *zinā* for many reasons. The nature of the two crimes differs as there is no mutual consent in rape compared to *zinā*. There is a victim in rape while there is no victim in *zinā*. Rape is also connected to other severe physical attacks against the victims which often leave them struggling with trauma through out life. And finally, unlike *zinā*, the victim of rape is not liable for any criminal act. On contrary the indecent assailant of rape is fully criminally liable for

the crime. These significant features of rape presuppose that rape is a separate crime which is not *zinā* which has its own concept and definition. As rape has been defined as non-consensual illicit forcible intercourse, it should be treated as such in terms of prosecution, rules of evidence and punishing.

An analysis concerning the evidence of rape leads the researcher to assert that it is the nature of the crime that determines the nature of its proof. As far as prosecution for rape is concerned, the strict standard of proving through the testimony of four just eyewitnesses should not be the only means of conviction. As long as the proving is beyond any shadow of doubt, any modern method of proving is acceptable. This includes circumstantial evidence, DNA tests of blood and semen stains, CCTV, and other related evidence. The pieces of evidence must corroborate and be in harmony with each other. This is the preferred opinion of the researcher on the grounds that *bayyina* (evidence) is open to any methods of proof besides the prescribed ones.

As to a non-Muslim's testimony in proving rape, this research suggests that such testimony is admissible and subject to further inspection and investigation similar to other evidence although it is not acceptable in the case of *zinā*. This is compatible with the spirit of the Shāri'a to make sure that justice prevails. The present situation shows that interaction between Muslims and non-Muslims is inseparable. The rationale argued by the Ḥanbalites, such as Ibn Qayyim, who expands the concept of *bayyina* to include everything that can be a clue or evidence of the crime, does make sense. A non-Muslim's testimony in proving rape, like any other type of evidence, is necessary, particularly when there is no Muslim eyewitness available.

With regard to the punishment imposed on a convicted rapist, the jurists are agreed in implementing the same penalty of stoning to death on a convicted rapist provided the conviction is based on the same required evidence. The penalty for rape is very severe but it must be based on conclusive and definitive evidence in addition to scrupulous inspection of mitigating and aggravating factors.

This research supports the idea of imposing capital punishment for a convicted rapist as the maximum punishment based on the aggravating factors. Stoning to death as the penalty for a married criminal should only be implemented when the conviction is based on the scrupulous inspection –without any shadow of doubt- of the testimony of four reliable male Muslim eyewitnesses who saw the scene with their naked eyes supported with convincing corroborative evidence. Although it appears to be quite impossible for such a conviction, this severe maximum penalty must be provided in the legislation to fight the crime. The severity of the execution is a warning and a lesson for everybody not to commit the crime. Capital punishment for a rapist is also justifiable on the principle of *al-siyāsa al-shar‘iyya* (*sharī‘a* oriented policy). Accordingly, the authority has the right to regulate the most effective penal system in order to combat the crime, even by imposing the death penalty.

As rape also involves other crimes apart from sexual violence, the penalty can also be on the basis of *ḥirāba* or *ta‘zīr*. This includes a wide range of penalties, with death at the top followed by life imprisonment, public lashing and other kinds of punishment as approved by the authority. Such consideration is of crucial importance since rape usually involves other types of violation against the victim such as physiological and psychological attack, torture, abuse and even murder. This research negates the assumption that if there are not four eyewitnesses, then the criminal will go free from any charge as it also holds that the rapist must be punished by whatever means of penalties available for his inhuman crime.

Interestingly, besides this physical punishment, the majority of jurists including the Mālikites, Shāfi‘ites and Ḥanbalites, hold that the criminal is also liable for financial compensation to the victim. This thesis suggests that modern Islamic courts should adopt this view to guarantee more rights to a rape victim. As far as financial compensation is concerned, this thesis suggests that there could be three types: dowry for the intercourse, *arsh* for loosing virginity and *diyya* for injury. This compensation will undoubtedly help the victim to recover from the ordeal as well as redeem her honour. Such financial penalties, in addition to other severe corporal

punishment seem likely to be very effective to combat the crime, since people in general love their money.

With regard to the penalty for a non-Muslim, the majority of jurists hold that Islamic criminal law within the domain of Islamic sovereignty is applicable on all people irrespective of their denomination. The legal provision should make no distinction between Muslims and non-Muslims committing rape. All citizens should work together to prevent the crime. To differentiate in sentencing between a Muslim and a non-Muslim, or between a citizen and a non-citizen in a Muslim state would certainly undermine the sovereignty of that state.

This thesis asserts that a person accused of rape, has the right of legal protection which includes the presumption of innocence, a fair trial, the right to be represented, and the right of appeal. The courts should construe all doubts on behalf of the accused, giving him or her good grounds of defence. Any viable suspicion should be interpreted on behalf of the accused. The majority of jurists extend the principle of avoiding *ḥadd* execution with the presence of *shubha* (doubt) through all the substantive and procedural rules in criminal cases. With the existence of a *shubha* (doubt), the accused may enjoy the chances of acquittal or a reduced sentence as it is incumbent on the court to verify all the requirements of prosecution.

As for the rape victim, Muslim jurists agree that a rape victim who suffers forcible sexual intercourse shall not be liable for any criminal action. The *ḥadd* punishment for fornication is not to be applied to her. Rape is a crime against one's honour and dignity and must be resisted and prevented by whatever means. A person who reacts in honour and self defence to any sexual assault is not criminally responsible. A rape victim deserves adequate legal protection. The victim who makes a complaint should not be charged with *qadhf* if the claim is accompanied by reliable evidence that forcible rape has taken place. This conditional ruling is only applicable in the case of *zinā*. However an irresponsible complainant who might foul the charge against others but fail to provide any evidence should be liable of fraud. As the right of God (the prohibition of *zinā*), and the right of a human being (violence against a person's

honour) are concerned, the victim has the right to make a report of rape and proceed with prosecution. On the other hand, in the absence of evidence, it is the right of the accused to plead not guilty and deny the accusation by taking an oath.

Besides being exempted from any punishment, a rape victim is entitled to legal remedies. The Muslim legislative body of today must outline an efficient form of compensation packages for damages in favour of the victim.

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