Public Debates on *Sharīʿa* and the "Savages-Victims-Saviors" Metaphor of Human Rights: The Case of the Hudood Ordinances and Their Reform in Pakistan, 1979–2010

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Abstract

While Pakistan's Hudood Ordinances decreed by General Zia have been analyzed from a legal, socio-economic, and feminist perspective, this article contributes to emerging scholarship that examines the problem from the perspective of secular rights and law, as well as traditional Islamic scholarship. I ask why it took 27 years and the intervention of another military dictator, General Musharraf, to reform the Zina Ordinance through the Protection of Women Act, 2006, and why the Deobandi ʿulamāʾ *declared this reform un-Islamic. I argue that the core problem was the absence of "authentic deliberation" on* fiqh*-based laws in public debates, exacerbated by what has been called the "savages-victims-saviors" metaphor of human rights discourse. Over this period, Pakistan's judiciary, however, had integrated* madrasa*-educated* fuqahāʾ*, in a limited capacity, and learned how to communicate with them in terms of the scholarship they deemed authoritative, contributing to the emergence of what has been termed an "overlapping consensus" between* fiqh *and liberal citizenship as well as to the ideal of a "public reason" for* sharīʿa.

Introduction*

Pakistan's Hudood Ordinances, decreed by General Zia-ul-Haq in 1979, have been criticized by academics, lawyers, and human rights activists, with the western media often repeating the erroneous claim that four witnesses were required to prove rape in Pakistan's *sharīʿa* courts.[1] As these Ordinances contained *ḥadd* punishments, justified through Ḥanafī *fiqh*, as well as *taʿzīr* (state-discretionary) punishments, and were enforced by common law judges using colonial legal and procedural codes, they were not purely *fiqh*-based or representative of *sharīʿa*. However, Pakistan's leading Deobandi *ʿulamāʾ*, such as Mufti Taqi Usmani, who helped draft the Ordinances, opposed repeal because they believed *sharīʿa* required the state to uphold

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1 *See Islamists debate rape law moves*, BBC (Nov. 16, 2006), http://news.bbc.co.uk/2/hi/south_asia/6153994.stm. Here the claim is repeated by Jacqueline Hunt, who was on the board of directors of Equality Now in 2005: Jacqueline Hunt, *Pakistani Rape Laws, Stuck in the Past (Letter to the Editor)*, N.Y Times (Jun. 21, 2005), https://www.nytimes.com/2005/06/21/opinion/pakistani-rape-laws-stuck-in-the-past-252395.html.

the "hudood" (limits) set by God.[2] While the Hudood Ordinances have been analyzed from a legal, socio-economic, and feminist perspective, this article contributes to emerging scholarship that examines the problem from the perspective of both secular rights and law, and traditional Islamic scholarship.[3] I ask why it took 27 years and the intervention of another military dictator, General Musharraf, to reform the Zina Ordinance through the Protection of Women Act, 2006 (PWA), and why the Deobandi *ʿulamāʾ* declared this reform un-Islamic. To do so, I integrate Urdu-language articles published in Deobandi *madrasa* journals (which function as "indigenous law schools" for *fiqh*) with Anglophone scholarship in law, political theory, and Islamic studies. I find that the core problem was the absence of "authentic deliberation"[4] on *fiqh*-based laws in public debates, exacerbated by what Mutua calls the "savages-victims-saviors" metaphor of human rights discourse.[5] Over this period, Pakistan's judiciary, however, had integrated *madrasa*-educated *fuqahāʾ* (jurists), in a limited capacity, and learned how to communicate with them in terms of the scholarship they deemed authoritative, contributing to the emergence of what March terms an "overlapping

2 Muhammad Taqi Usmani, *The Islamization of Laws in Pakistan: The Case of* Hudud *Ordinances*, 96 The Muslim World 287, 288 (2006). For a biography of Usmani, see Shoaib Ghias, The Politics of Islamic Judicial Review 123 (2015) (Ph.D. dissertation, University of California, Berkeley). Ghias writes that Deobandis gave Taqi Usmani and his brother the "honorific (not official) title of the grand mufti of Pakistan." *Id.* at 123. Articles written in *Al-Balagh*, the journal of Taqi Usmani's *madrasa*, typically take the position that there are flaws with the Zina Ordinance's enforcement but that it should not be repealed because it contains the commandments of "Hudood Allah." For one example, see Mawlana Aziz-ur-Rehman Swati, *Hudood Ordinance kay khilaf mohim* [*The campaign against the Hudood Ordinance*], 24 Al-Balagh 3 (1989).

3 *See* Moeen H. Cheema & Abdul-Rahman Mustafa, *From the Hudood Ordinances to the Protection of Women Act: Islamic Critiques of the Hudood Laws of Pakistan*, 8 U.C.L.A. J. Islamic & Near E.L. 1 (2008–2009).

4 I define "authentic deliberation" as the process of giving "reciprocal reasons," following Guttman and Thompson's argument that "[d]emocratic institutions, practices, and decisions can be judged as more or less legitimate to the extent that they are supported by reciprocal reasons, reasons that can be accepted by those who are bound by them." Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions*, *in* Truth v. Justice: The Morality of Truth Commissions 36 (Robert I. Rotberg & Dennis Thompson eds., 2000).

5 Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 Harv. Int'l L.J. 201 (2001).

consensus" between *fiqh* and liberal citizenship as well as to the ideal of a "public reason" for *sharīʿa*.[6]

This article is divided into five parts. Part I situates the problem in the academic literature and outlines the argument. Part II traces the colonial origins of the problem and Pakistan's early constitutional debates to explain the need for a "public reason" for *sharīʿa*. Part III analyzes the workings of what Rawls terms Enlightenment Liberalism and Mutua calls the "Savages-Victims-Saviors" metaphor of human rights in public debates on *sharīʿa* in Pakistan. Part IV shows how Pakistan's judiciary learned how to reason within the *fiqh* tradition rendering its deliberation legitimate in the eyes of the *madrasa*-educated *ʿulamāʾ*. Part V presents a case study of the campaign to reform the 1979 Hudood Ordinance, culminating in the PWA, 2006 passed by a parliament dominated by General Musharraf, who came to power through a military coup in 1999.

Part I: The Problem

Each of the Hudood Ordinances, which dealt with *zinā* (fornication and adultery), theft, alcohol consumption, and false accusation, contained a section for *ḥadd* punishments drawn from Ḥanafī *fiqh*, which could not be reformed without deliberation on *sharīʿa*, and a section for *taʿzīr* (state-discretionary) punishments.[7] In this article, I focus on the Zina Ordinance, which dealt with *zinā* and *zinā bi-l-jabr* (rape).[8] Under the 1860 Indian Penal Code, drafted by Macaulay and inherited by Pakistan, adultery was already a crime, though a man committing adultery was to be punished on complaint of the husband of the woman who had committed adultery, and not the woman (India's Supreme Court struck down this law as recently as 2018,

6 Andrew March, Islam and Liberal Citizenship: The Search for an Overlapping Consensus (2009). The concept of "public reason" is from John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765, 765–766 (1997).

7 The Offence of Zina Ordinance, 1979; Offences Against Property Ordinance, 1979; The Prohibition Order, 1979; The Offence of Qazf Ordinance, 1979.

8 *See Pakistan: Ordinance No. VII of 1979, Offence of Zina (Enforcement of Hudood) Ordinance, 1979*, UNHCR database, https://www.refworld.org/legal/decreees/natlegbod/1979/en/78604 (last visited June 10, 2025).

arguing that it was premised on the idea of women as property).[9] The Zina Ordinance contained the categories of *zinā* and *zinā bi-l-jabr* liable-to-*ḥadd* (punishments stipulated by Ḥanafī jurists), and *zinā* and *zinā bi-l-jabr* liable-to-*taʿzīr* (state-discretionary punishments). Theoretically, the *ḥadd* punishment of 100 lashes in public could be given for fornication and stoning to death (*rajm*) for adultery. However, the evidentiary requirement set by Ḥanafī jurists was the testimony of four Muslim male eyewitnesses of good character to the act of sexual penetration or the confession of the accused—a standard so high that no *ḥadd* punishments were given for *zinā* in Pakistan, and if given by trial courts, were reversed on appeal (Quraishi notes that jurists made these punishments practically applicable only to public sex acts).[10] However, the Zina Ordinance also stipulated *taʿzīr* punishments for *zinā*, such as imprisonment, based on other evidence, and incorporated sections for crimes such as rape, prostitution, and the kidnapping of women from the secular Pakistan Penal Code. The crime was also cognizable and non-bailable, which meant that the accused could spend years in jail awaiting trial and appeal[11] and be vulnerable to custodial rape and other police abuse.[12]

There is broad consensus among legal scholars that the Zina Ordinance led to a miscarriage of justice though scholars attribute different importance to legal design, judicial

9 Muhammad Zubair Abbasi, *Sexualization of Sharīʿa: Application of Islamic Criminal (Ḥudūd) Laws in Pakistan*, 29 Islamic L. & Soc'y 1, 12 (2021). Lau omits this from his background of the Hudood Ordinances implying that adultery had never been a crime before. *See* Martin Lau, *Twenty-Five Years of Hudood Ordinances-A Review*, 64 Wash. & Lee L. Rev. 1291, 1292 (2007). For an overview of the Indian Supreme Court judgment, see G. Ananthakrishan, *Adultery no longer a crime, wife is not property of husband: Supreme Court*, Indian Express (Sept. 28, 2018), https://indianexpress.com/article/india/adultery-no-longer-a-crime-wife-is-not-property-of-husband-supreme-court-5377499/.

10 Asifa Quraishi, *Her Honour: An Islamic Critique of the Rape Provisions in Pakistan's Ordinance on Zina*, 38 Islamic Stud. 403, 409 (1999).

11 See Abbasi, *supra* note 9, at 11–12, for a detailed breakdown of the Zina Ordinance and its comparison to Pakistan's previous law on adultery and rape.

12 For an overview of police abuse, see Human Rights Watch, Double Jeopardy: Police Abuse of Women in Pakistan (1992), *available at* https://www.hrw.org/report/1992/05/01/double-jeopardy/police-abuse-women-pakistan. Instances of the custodial rape of women held for *zinā* charges are mentioned in Quraishi, *supra* note 10, at 407.

interpretation, systemic problems in Pakistan's judiciary, and to procedure and police abuse. Using a random stratified sample of appeals filed at the Federal Shariat Court (FSC) from 1980–84, Kennedy found that most dealt with *taʿzīr* crimes, with only six *ḥadd* appeals.[13] He argued that there was "no significant discriminatory bias against women" as "84% of those convicted in district and sessions courts under the Hudood Ordinances are men and 90% of those whose convictions are upheld by the FSC are men."[14] However, the accused were "disproportionately from Pakistan's lower socioeconomic classes" with the "archetypical *zina* case involv[ing] a young, poor, probably illiterate, underemployed male villager whose victim or co-accused is an even younger girl of the village, also poor, usually the household-bound daughter of a cultivator or a laborer."[15] He found a "widespread use of the *zina* ordinance to file nuisance or harassment suits against disobedient daughters or estranged wives," and though a majority of such appeals were acquitted by the FSC, the accused incurred legal fees, social stigma, and imprisonment pending appeal.[16] Based on his research, no *ḥadd* penalty had been executed by the state; the Supreme Court had overturned the only two *ḥadd* convictions (for theft) that had been upheld by the FSC.[17] While Kennedy argues that the Hudood Ordinances had a marginal impact on Pakistan's legal system or the status of women, Abbasi argues that there was a problem not just with the *enforcement* of the law, but with its very design[18]—by mixing *ḥadd* and *taʿzīr* punishments for fornication, adultery, and rape,it "blurred the distinction between consensual sex and rape, and thus exposed victim women, who reported rape, to prosecution for consensual sex."[19] He concludes that the law itself "created, cemented, and consolidated discriminatory social attitudes against women" though he finds, like Kennedy, that

13 Charles H. Kennedy, *Islamization in Pakistan: Implementation of the Hudood Ordinances*, 28 Asian Surv. 307, 309 (1988).

14 *Id.* at 312.

15 *Id.* at 314.

16 *Id.* at 314, 315.

17 *Id.* at 315.

18 Abbasi, *supra* note 9, at 23.

19 *Id.* at 1.

"the *ḥadd* punishment was not imposed in a single case under the Zina Ordinance."[20]

This distinction between *ḥadd* and *taʿzīr* is crucial, from the perspective of deliberation, because the Deobandi *ʿulamāʾ*'s "theological red lines" primarily applied to the *ḥadd* punishments, which they believed were rooted in the consensus opinion of Ḥanafī jurists and were beyond the authority of the state to repeal. Yet the Women's Action Forum (WAF) founded in 1981 insisted on repeal for the next 27 years, and when it was unsuccessful in persuading the elected Prime Ministers Benazir Bhutto (1988–90, 1993–96) or Nawaz Sharif (1990–93, 1997–99), it supported the military dictator General Musharraf's Protection of Women Act in 2006, a reform his regime and the Pakistan People's Party (PPP) spun as a crowning achievement for women's rights. This law was primarily declared un-Islamic by the Deobandi *ʿulamāʾ* because it removed the *ḥadd* punishment for *zinā bi-l-jabr* (rape), not because it transferred rape liable-to-*taʿzīr* to the Pakistan Penal Code or due to its other procedural safeguards. Ironically, one of the reasons trial court judges convicted women of *zinā* was that they had remarried and their ex-husband had not filed a divorce notification with the union council—a procedure introduced by the Muslim Family Laws Ordinance (MFLO), 1961 decreed by another military dictator Ayub Khan (r. 1958–1969)—which Mufti Taqi Usmani argues "conflicts with *Sharīʿah*, under which notification of divorce does not need to be sent to any official authority to be effective."[21] While the middle class women's rights group of the time, All Pakistan Women's Association (APWA), celebrated Ayub Khan as a hero, a Deobandi scholar, Mawlana Tonki wrote in 1963 that "not even the worst government had the audacity

20 *Id.* at 23. He mentions that his sample consisted of 1,000 judgments of the FSC and Shariat Appellate Bench of the Supreme Court.

21 Usmani, *supra* note 2, at 298. He argues that "it was the MFLO that was said to protect the rights of women, that made it difficult for women to marry a second time after being divorced because of ill-will and delay on the part of their former husbands and gave them a pretext to file cases of adultery against their ex-wives after they had divorced them," *id.*, and cites a judgment by the Shariat Appellate Bench of the Supreme Court that this "technical" ground could not be used to convict women of adultery, *id.* at 299. This judgment was Allah Dad v. Mukhtar, (1992) SCMR 1273.

to enforce these black laws," and it was only under martial law, the "blackest period of this country," that they were imposed by force "after putting locks on people's tongues and pens."[22] Before analyzing the structures that led the women's movement, or rather WAF, a small group of upper- and middle-class women, to adopt a strategy that would put them on a collision course with *madrasa*-educated *fuqahāʾ*, it is important to understand how legal scholars saw the problem, and whether the fixation of activists on the *ḥadd* punishments, stoning and lashing, and their evidentiary requirement of four Muslim male eyewitnesses of good character to the act of penetration, was merited.

It is true that some *ḥadd* punishments were given by trial courts (later reversed on appeal), and that rape complaints were converted into *zinā* convictions, however, the western media framing that "if a woman does not produce four witnesses for rape, she gets convicted of *zinā* instead" has no basis in the legal scholarship. Chadbourne identifies the precise mechanisms through which rape complainants were convicted of *zinā*, including pregnancy and the fact they did not report rape earlier, and says that "[a]lthough the ongoing debate and publicity surrounding the Ordinance has focused on *Hadd*, and not *Ta'zir*, it is *Ta'zir* which dominates the standards and punishments administered by the courts today."[23] She writes that "[f]or almost twenty years now, the Western media and Pakistani activists have exploited the inclusion of *Hadd* punishments because they sound extreme and inordinately severe" and "activists have targeted the evidentiary standards for debate on the discriminatory nature of the Zina Ordinance because proof of sexual activity under the Zina Ordinance for *Hadd* requires: 1) a confession; or 2) four *male* Muslim (unless the victim is non-Muslim) eyewitnesses to the act of penetration."[24] Chadbourne writes that the trial court judgments in both the Jehan Mina case of 1982, in which a 15-year-old girl who had complained of rape was awarded the

22 Cited in Tabinda M. Khan, *Women's Rights between Modernity and Tradition: "Modernizing" Islam*, *in* Nation, Nationalism and the Public Sphere: Religious Politics in India 47 (Ishita Banerjee-Dube & Avishek Ray eds., 2020).

23 Julie Dror Chadbourne, *Never Wear Your Shoes After Midnight: Legal Trends Under The Pakistan Zina Ordinance*, 17 Wis. Int'l L.J. 179, 185 (1999).

24 *Id.* at 185 n.17.

ḥadd punishment for *zinā* on the basis of pregnancy, and the Safia Bibi case of 1983,[25] in which a young blind girl who had accused a landlord and his son of rape was convicted of adultery on the basis of pregnancy, were overturned on appeal to the FSC.[26] However, they led critics of the Zina Ordinance to focus on *ḥadd* punishments, despite their marginality to the legal process:

> [I]n the 1990s, the Pakistani courts almost never adjudicate on the basis of *Hadd* evidentiary standards and sentencing. In fact, the type of evidence necessary to trigger *Hadd* has always been at such a high threshold that it has been virtually impossible to successfully plead a case on this basis. Instead, the *Ta'zir* standards have been utilized. Despite these realities, however, the majority of activists and writers on the topic of the Zina Ordinance focus on either the severity and unjust "application" of *Hadd* or on Islamic arguments against the Ordinance. Consequently, almost twenty years after the inception of the Zina Ordinance, little has been said other than "they are bad—repeal, repeal, repeal."[27]

Like Chadbourne, Cheema shows that trial courts [staffed by judges untrained in *fiqh*] awarded *ḥadd* punishments to women using pregnancy as proof and the Federal Shariat Court reversed these convictions on appeal because pregnancy was not sufficient evidence for *ḥadd*.[28] Despite these precedents, trial court judges on later occasions awarded *ḥadd* punishments, such as stoning to death for Zafran Bibi in 2002, which was extensively covered in the media and the backdrop to the Protection of Women Act, 2006 (and reversed on appeal like other cases).[29] Cheema attributes this to the fact that trial court judges were

25 Charles H. Kennedy, *Islamic Legal Reform and the Status of Women in Pakistan*, 2 J. Islamic Stud. 45, 48 (1991). Chadbourne does not mention the date of the Safia Bibi case, but Kennedy provides a detailed timeline.

26 Chadbourne, *supra* note 23, at 186.

27 *Id.*

28 Moeen H. Cheema, *Cases and Controversies: Pregnancy as Proof of Guilt under Pakistan's Hudood Laws*, 32 Brook. J. Int'l L. 121, 136–49, 158–60 (2006–2007).

29 *Id.* at 148.

not following FSC precedents.[30] Among legal scholars, Quraishi considers the "four witnesses to prove rape" argument, as part of a broader theoretical argument that rape should be classified as *ḥirāba* (violent taking) and not as a subset of *zinā*.[31] As background to this theoretical discussion, she cites the 1982 Jehan Mina case, and says "[l]acking the testimony of four eyewitnesses . . . Jehan was convicted of zina on the evidence of her illegitimate pregnancy."[32] While Cheema and Chadbourne concur that pregnancy was the basis of conviction in this case, they do not mention the lack of four witnesses as a factor. Salman Akram Raja, a lawyer influential in liberal circles, too, has said that the "popular perception of the Zina Ordinance, largely based on the image carried in the press . . . that a raped woman must produce four male witnesses against the accused for a conviction" omits the fact that "a tazir punishment can be maintained on the basis of other evidence, including that of the woman herself."[33]

This is a crucial factor from the perspective of deliberation because the only "theologically untouchable" part of the Zina Ordinance, in the Deobandi *ʿulamāʾ*'s eyes, was the section with Ḥanafī opinions on *ḥadd* punishments. If these punishments were never given due to high evidentiary requirements nor did the four Muslim male eyewitness requirement have a substantive impact on rape convictions, why did women's rights activists make them a central symbol of their advocacy and the authors of the Protection of Women Act, 2006 insist on removing the *ḥadd* punishment for *zinā bi-l-jabr* (which had the four-witness requirement)? The answer to this lies in the fact that women's rights activists situated their campaign to repeal the Hudood Ordinances in international rights discourse, using the western media, policymakers, and rights NGOs, as well as

30 Moeen Cheema, *View: Is pregnancy proof of Zina?*, Daily Times, Oct. 14, 2006.

31 Quraishi, *supra* note 10, at 404, 406–407, 421. For a dissenting argument, see Hina Azam, *Rape as a Variant of Fornication (Zinā) In Islamic Law: An Examination of the Early Legal Reports*, 28 J. L. & Relig. 441 (2012–13). Quraishi translates *ḥirāba* as "violent taking," Quraishi, *supra* note 10, at 404, and Azam as "brigandry," Azam, *supra* note 31, at 443.

32 Quraishi, *supra* note 10, at 407.

33 Cited in Cheema, *supra* note 28, at 150 n.118, from Salman Akram Raja, *Islamisation of Laws in Pakistan*, 1 S. Asian J. 94 (2003).

the Pakistani English press, to exert pressure on the state. As both WAF and Pakistan's leading English dailies are dominated by Pakistan's Anglophone, westernized elite, which is separated from the *madrasa*-educated *fuqahāʾ* by a class and education cleavage originating in the colonial period, this created an echo chamber filled with exaggerations and distortions of *sharīʿa*, in general, and how it was actually working in Pakistan's legal system, in particular. Kennedy writes that the ABC documentary, "Veil of Darkness" (September 1989) exaggerated the numbers of women arrested for *zinā* (claiming that there were thousands, when his research revealed there were 300–400 women in Pakistan's jails in 1990).[34] This same documentary claimed that "the *hadd* penalty for adultery had been awarded eight times during 1989" (when it was awarded four times since 1979 by district courts and reversed on appeal to the FSC) and repeated the "erroneous" claim that "Pakistan law required four eyewitnesses for the conviction of rape."[35] As Chadbourne mentions, Pakistani activists were emphasizing this four Muslim male eyewitness requirement for the *ḥadd* penalty to make a case that the Zina Ordinance discriminated against women.[36]

It is possible that in their statements to the western press, these activists omitted that this applied only to the *ḥadd* penalty, and western journalists and rights activists generalized this to be a feature of all rape cases, Pakistan's *sharīʿa* courts, and *sharīʿa* itself. While I cannot trace the precise mechanism and date by which this erroneous claim had assumed the level of accepted fact in popular discourse, it was repeated by Nilofer Bakhtiar, the Prime Minister's Adviser on Women Development in General Musharraf's regime (in an interview to the Voice of America);[37] General Musharraf himself in his televised address after the Protection of Women Act, 2006 was passed;[38] and by the WAF leader Asma Jehangir, in a TV debate with a Jamaat-e-Islami leader, as a rhetorical exaggeration to highlight the irrationality

34 Kennedy, *supra* note 25, at 45 n.2.

35 *Id.* at 46 n.3.

36 Chadbourne, *supra* note 23, at 185 n.17.

37 *Hudood Ordinance is a black law and must be amended*, Daily Times, Dec. 25, 2005.

38 *More pro-women legislation soon*, Daily Times, Nov. 16, 2006).

of the law.[39] While the removal of *zinā bi-l-jabr* (rape) liable to *ḥadd* could be justified through the Mālikī doctrine that rape was a *ḥirāba* crime, as Ghamidi and Quraishi argue, Mufti Taqi Usmani insisted on the Ḥanafī opinion that *zinā bi-l-jabr* was a subset of *zinā*, an argument that is supported by Hina Azam's research on early legal reports.[40]

This article takes a fundamentally different approach than prior research by positing Muslim *fuqahāʾ* as institutional actors whose agreement is necessary for state Islamic legal reasoning to be viewed as legitimate by society, and by contrasting how *sharīʿa* debates played out in two different institutional spheres: Pakistan's judiciary and its (military-dominated) parliamentary institutions. Pakistan's judiciary learned how to reason with the *fuqahāʾ* with civility and respect, fostering authentic deliberation and a cross-fertilization of rights, democracy, and *sharīʿa*.[41] However, Pakistan's parliamentary institutions were overwhelmed by the cacophony, distortions, and external pressure generated by the echo chamber of westernized rights activists, western media, and the Pakistani English press, a gallery to which both western rulers like Bush, justifying wars in Muslim states with "imperial liberalism," and Muslim dictators like General Musharraf, courting the support of western patrons with "performative liberalism," played. The latter is a house of mirrors, where it is hard to tell fiction from fact. At first sight, it appears ill-informed but on deeper inspection, it can be seen as a fairly nefarious prism of western cultural and political

39 Gamdi Sb, *1 2 Hadood Ordinence Hot TV Debate Javed Ahmed Ghamidi*, YouTube (May 27, 2014). This is the ALIF, GEO TV, 2003 Program on Hudood Ordinance.

40 Quraishi, *supra* note 10, at 404. Ghamidi expressed this opinion in the GEO Grand Debate on Hudood reform here: Gamdi Sb, *Grand TV Debate on Hadood Ordinence Mufti Muneeb ur Rahman vs Javed Ahmed Ghamidi*, YouTube (May 26, 2014), https://www.youtube.com/watch?v=IHABMfuUD4o&list=PLZ3i5Qtr6WaqkBlPw_zwHWuNiBn6WusrS. This is the Zara Sochiye, GEO TV, 2006 Debate on Hudood Ordinance. Mufti Muhammad Taqi Usmani, Amendments in Hudood Laws: The Protection of Women's Rights Bill—An Appraisal 102–34 (2006) (page references are to the Kindle edition); Azam, *supra* note 31, at 443.

41 Several scholars have argued that Islamic legal principles were used to enhance rights. *See, e.g.*, Martin Lau, 9 The Role of Islam in the Legal System of Pakistan (2005); Karin Carmit Yefet, *Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb*, 34 Harv. J.L. & Gender 553 (2011).

domination through which the public *sharīʿa* debates of Muslim societies are distorted. By contrasting this house-of-mirrors with Pakistan's legal tradition, I seek to highlight exactly why it impedes meaningful deliberation on *sharīʿa*, conflict resolution, and legal reform.

There are several theoretical strands to this puzzle, which require engagement with different branches of literature. First, the western discourse on Islam, observable in the echo chamber of the western media and westernized Pakistani elite, follows the familiar pattern outlined by Said in *Orientalism*, and particularly scholarship on "Saving Muslim Women" from Leila Ahmad's study of arguments about the veil in colonial Egypt to Lila Abu-Lughod and Saba Mahmood's scholarship after 9/11 and the "Global War on Terror," when this argument became one of the primary modes of justifying the war in Afghanistan.[42] While this article is informed by this broader scholarship, it is not a primarily discursive analysis but seeks to trace debates on *sharīʿa*, particularly the institutional structures that led to "authentic" versus "inauthentic" deliberation between modern-educated Muslims sometimes espousing "Muslim modernist" or "liberal" identities, on one side, and *madrasa*-educated *fuqahāʾ* and what Ahmed terms "fiqh-minded" Muslims, on the other side.[43] I agree with Swaine that for liberalism to be true to its own principles of freedom of conscience and reciprocity, it must give theocrats reasons internal to their own moral traditions.[44] It is due to this belief that I evaluate the problem from the perspective of deliberative processes, rather than decision-making outcomes (as theorists of deliberative democracy do).[45]

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42 Edward W. Said, Orientalism (1978); Leila Ahmed, Women and Gender in Islam: Historical Roots of a Modern Debate (1992); Lila Abu-Lughod, Do Muslim Women Need Saving? (2013); Saba Mahmood, *Feminism, Democracy, and Empire: Islam and the War on Terror*, *in* Gendering Religion and Politics: Untangling Modernities 193 (Hanna Herzog & Ann Braude eds., 2009).

43 Rumee Ahmed, Sharia Compliant: A User's Guide to Hacking Islamic Law 31 (2018).

44 Lucas Swaine, The Liberal Conscience: Politics and Principle in a World of Religious Pluralism (2005).

45 Amy Gutmann & Dennis F. Thompson, Why Deliberative Democracy? (2004).

Second, while my approach is broadly situated in legal debates that engage with the *fiqh* tradition to varying extents, from Cheema and Ahmad's consideration of Islamic critiques of the Hudood Ordinances, to Quraishi's argument that rape should be classified as *ḥirāba*, and Abbasi's consideration of Mufti Taqi Usmani's defense of the Hudood Ordinances, it is different in a key respect.[46] Like Intisar Rabb, I believe it is necessary to analyze jurists as *institutional* actors, in a country with Islamic constitutionalism,[47] and that "a judicial approach that takes seriously the constitutional pre-commitments to both liberal rights and Islamic law provisions will . . . build grounds for legitimacy in view of the likely involvement of the jurists as well as Islamist-majoritarian politics in matters of religion."[48] There is an argument among liberal legal circles in Pakistan that the FSC was the result of a cynical strategy by General Zia to garner legitimacy, and should therefore be discounted, and that Mufti Taqi Usmani's opinions should not be given the same weight as those of liberal or Muslim modernist scholars. I believe that this argument does not hold up against Pakistan's constitutional history in which Islamic judicial review had appeared as a compromise solution in 1953[49] and was in the draft constitution to be considered by the Constituent Assembly, had it not been dissolved by the Governor General Ghulam Muhammad on October 24, 1954[50] (as explained in Part II). On the one hand, the existence of the FSC was legitimated by the eighth constitutional amendment and no government since 1985 has tried to dismantle it; on the other hand, the country's *madrasa*s, which train the preachers who staff mosques, were left to

46 Cheema & Mustafa, *supra* note 3; Quraishi, *supra* note 10; Abbasi, *supra* note 9.

47 Intisar A. Rabb, *"We the Jurists": Islamic Constitutionalism in Iraq*, 10 U. Pa. J. Const. L. 527, 530–31 (2008).

48 Intisar Rabb, *The Least Religious Branch: Judicial Review and the New Islamic Constitutionalism*, 17 U.C.L.A. J. Int'l L. Foreign Aff. 75, 85 (2013).

49 Leonard Binder, Religion and Politics in Pakistan 282–89 (1961). Binder describes the conference held on January 11–18, 1953, in which Mawdudi and the *'ulamā'* worked out this proposal. They had demanded a "transitional arrangement" through which *'ulamā'* would be appointed to the Supreme Court until law schools could train judges in the appropriate manner.

50 *Id.* at 326–27, 359–61. The version adopted in the draft constitution accepted the principle of Islamic judicial review but stipulated that it would be conducted by Supreme Court judges (not *'ulamā'*).

the control of *ʿulamāʾ* of various doctrinal orientations (*maslak*s) (including Deobandi, Barelvi, Ahl-e-Hadith, and Shia; Saleem Ali estimates that there are 12,000–15,000 *madrasa*s with an enrollment of between 1.5 and 2 million).[51] In this article, I am not concerned with which arguments about Islamic law were more rational, persuasive, or just, but about which institutions allowed debates about Islamic law to be "authentic"—which institutions fostered "reciprocal reasoning"[52]

Third, like Ghias, I regard the two FSC judgments on the *ḥadd* punishment of *rajm* (stoning to death) as a critical moment, though I interpret it in a different way.[53] In the first 1981 judgment, common law judges declared *rajm* un-Islamic, partly based on a modernist critique of the historicity of *ḥadīth*, and in the 1982 revision judgment, by a panel reconstituted by General Zia to include *madrasa*-educated *ʿulamāʾ* of different sects, *rajm* was declared Islamic by the majority, including all *ʿulamāʾ*, because it was backed by juristic consensus.[54] Ghias sees the inclusion of *ʿulamāʾ* of different sects partly as a political strategy by Zia to win the favor of religio-political groups.[55] I do not deny that Zia's motives were cynical and political, however the inclusion of *ʿulamāʾ* of the Deobandi and Barelvi doctrinal orientations (*maslak*s) alongside common law judges (who in the 1981 judgment had showed a modernist orientation) was a recognition of the diversity within Islam and a move towards what Rawls calls "public reason" —an ideal, and a practice, in which state officials and citizens formulate arguments "addressed to others . . . proceed[ing] correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept."[56] This criterion was not satis-

51 Saleem H. Ali, Islam and Education: Conflict and Conformity in Pakistan's Madrassahs 25 (2009).

52 Gutmann & Thompson, *supra* note 4, at 36.

53 Shoaib Ghias, *Rethinking Tradition: Stoning and the Politics of Islamic Judicial Review*, Academia.edu, https://www.academia.edu/41678193/Rethinking_Tradition_Stoning_and_the_Politics_of_Islamic_Judicial_Review (last visited June 10, 2025).

54 Hazoor Bakhsh v. Federation of Pakistan, (1981) PLD (FSC) 145; Federation of Pakistan v. Hazoor Bakhsh, (1983) PLD (FSC) 255.

55 Ghias, *supra* note 53, at 41, 44.

56 Rawls, *supra* note 6, at 786.

fied by public officials who wrote the 1954 Punjab Disturbances Report, in which arguments based in the *fiqh* doctrine of apostasy were countered with direct references to Qurʾānic passages to prove the unlimited freedom of religion granted by Islam;[57] or in the 1955 Muslim Family Laws Commission, in which a modernist scholar and lay Muslims used modernist arguments to justify reform and outvoted the single Deobandi alim on the commission.[58]

From my perspective, legal reasoning is political, and this extends to countries where religion has a role in the constitution and law. State officials can theoretically make laws, and arguments for them, by completely disregarding what is acceptable to religious institutions in society but this renders them illegitimate in the eyes of their followers. In Pakistan, this can lead to the assassination of officials by vigilantes who are celebrated in society as heroes, spawning political movements (the case of Salman Taseer and Mumtaz Qadri) or threats to judges who cite modernist interpretations of the Qurʾān that go against the consensus opinion of *madrasa*s (as occurred after Justice Qazi Isa's judgment in a case involving Aḥmadī freedom of religion in 2024).[59] I take a pragmatic approach to this problem, beginning with the realities of Islam's role in Pakistan's constitutional

57 Report of the Court of Inquiry constituted under Punjab Act II of 1954 to enquire into the Punjab Disturbances of 1953, at 219–20 (Punjab Gov't 1954), *available at* https://ia803204.us.archive.org/14/items/The1954Justice-MunirCommissionReportOnTheAntiAhmadiRiotsOfPunjabIn1953/The-1954-Justice-Munir-Commission-Report-on-the-anti-Ahmadi-Riots-of-Punjab-in-1953.pdf [hereinafter, Munir Report]. In this passage, the authors were speculating on the reasons why the government may have banned a pamphlet written by the Deobandi scholar Mawlana Shabbir Ahmad Usmani, titled "Ash-shahab," that argued that in Islam the punishment for apostasy was death. They speculated that perhaps this was due to the fact that this punishment was not mentioned in the Qurʾān and therefore the author's opinion was "incorrect." For a critique of the Munir Report from an Islamist perspective, and specifically of this argument, see Khurshid Ahmad, An Analysis of The Munir Report [A critical study of the Punjab Disturbances Inquiry Report] 168–69 (1956).

58 *Report of the Commission on Marriage and Family Laws*, The Gazette of Pakistan (Extraordinary), June 20, 1956; *Note of Dissent of Mawlana Ihteshamul Haqq Thanwi*, The Gazette of Pakistan (Extraordinary), Aug. 30, 1956. I have analyzed the deliberation of this Commission in Khan, *supra* note 22.

59 Sabih Ul Hussnain*, Supreme Court "Corrects" Mistakes in Mubarak Sani Case*, The Friday Times, Aug. 23, 2024.

and legal history and the fact that mosques in Pakistan are run by *madrasa*-educated *ʿulamāʾ* (who are financially autonomous from the state, unlike in many Middle Eastern countries) and not by modernist scholars of Islam (unlike in Indonesia, where modernist scholars have mass organizations; in Pakistan they have often exercised influence through the state or through proximity to state officials).

My primary contribution is to debates about deliberative democracy, and particularly public deliberation on *sharīʿa*, though the latter scholarship is in its nascent stages. Unlike Ghias, I do not use debates in American politics to view the issue because I believe the secular and liberal lens built into the discipline, and the structural division between political theory and comparative politics, makes it all but impossible to show the change in Islamist groups or the "cross-fertilization" of *fiqh* and liberal citizenship.[60] While I am building on work done by Brown and Moustafa,[61] I believe that it is necessary to unpack two levels of colonial legacies to understand why public debates on *sharīʿa* in the parliamentary sphere are different from judicial debates. First, it is necessary to understand that the "background culture"[62] of the westernized elite in countries like Pakistan contains the legacy of what Rawls describes as "Enlightenment Liberalism:" a type of liberalism that "historically attacked orthodox Christianity."[63] Though key aspects of Rawls' argument have to be modified, in order to be applied to a society with Islamic constitutionalism, his point that "political liberalism" is "sharply different from and rejects Enlightenment liberalism" is instructive for Pakistan where liberals have justified authoritarian reforms of Islamic law, and the exclusion of *ʿulamāʾ* and Islamists from deliberation and decision-making, for ostensibly liberal principles.[64] Second, it is essential to bear

60 Tabinda M. Khan, *Challenges with Studying Islamist Groups in American Political Science*, 39 Am. J. Islam & Soc'y 112 (2023).

61 Tamir Moustafa, Constituting Religion: Islam, Liberal Rights, and the Malaysian State (2018); Nathan Brown, Arguing Islam after the Revival of Arab Politics (2017).

62 Rawls, *supra* note 6, at 768. Rawls considers this "background culture" distinct from the "idea of public reason."

63 *Id.* at 804.

64 *Id.*

in mind that international human rights discourse contains what Mutua calls the "savages-victims-saviors" metaphor of colonial times, which reinforces a Eurocentric colonial project, posits western institutions and values as an ideal blueprint, and discourages the cross-pollination of cultures.[65] The parliamentary legislation analyzed in this article, and other historical cases cited as evidence, shows patterns similar to debates about the practice of sati in colonial India examined by Lata Mani; the debate on child marriage legislation in Mandate Palestine analyzed by Likhovski; and the debate preceding the Child Marriage Restraint Act, 1929 in colonial India studied by Geraldine Forbes.[66] This latter reform, like the Protection of Women Act, 2006, was given momentum by western criticism (the book *Mother India*[67]) and entailed middle class legislators responding to this criticism, using the League of Nations for activism.[68] In these kinds of reforms, identify-formation and storytelling about "us-versus-them" can be central motivations, overpowering the democratic virtue of building consensus across modern and "traditional" sectors to design a law that is both effective and viewed as morally legitimate (the two can be connected as compliance is tied to legitimacy). This article is a preliminary attempt to outline the contours of this problem in Pakistan; it is by no means exhaustive.

While I recognize the critiques in Pakistani feminist scholarship regarding the Zina Ordinance, I approach the problem from the perspective of democratic citizenship, and the virtue of authentic deliberation in endowing majority decisions with legitimacy. Jafar argues that General Zia "turned to women as a tool and as a symbol of his transformation of Pakistan into the ideal Islamic state."[69] She seeks to "shift the debate about women in Islam away from purely exegetical explanations to

65 Mutua, *supra* note 5.

66 Lata Mani, Contentious Traditions: The Debate on Sati in Colonial India (1998); Assaf Likhovski, Law and Identity in Mandate Palestine (2006); Geraldine H. Forbes, *Women and Modernity: The Issue of Child Marriage in India*, 2 Cross-Cultural Perspectives on Women 407 (1979).

67 Katherine Mayo, Mother India (1927).

68 Forbes, *supra* note 66, at 411.

69 Afshan Jafar, *Women, Islam, and the State in Pakistan*, 22 Gender Issues 35, 36 (2005).

analyses which consider the links between the state and its various institutions, cultural notions of womanhood and nationalism, and women's movements."[70] While this is a valid cultural and political critique, I believe it overstates the importance of General Zia, and understates the fact that military rulers have typically exploited existing social cleavages rather than creating them. Moreover, it neglects that Nizam-e-Mustafa was the slogan of the center-right coalition Pakistan National Alliance (PNA) that was contesting the 1977 election results, which Zia coopted, and that scholars have argued that some of his reforms like the "Islamic Law of Evidence" were actually a "pre-emptive anti-Islamization coup."[71] There is social and political support for the positions that Zia supported, and though I am sympathetic to Jafar's argument, as a scholar of politics, I cannot ignore the entrenched role of Islam, and therefore exegetical arguments, in Pakistan's legal and political institutions. Similarly, I see merit in Afiya Zia's warning to Pakistani feminists to not situate their struggle in an Islamic discourse because while Shirkat Gah (a western-funded rights advocacy NGO whose founders were WAF activists) invested considerable effort in sharing feminist interpretations of Islam, and participating in the Women Living Under Muslim Laws (WLUML) network, these were often modernist arguments which are not acceptable to the *madrasa*-educated ulama and therefore a non-starter in public debates on *sharīʿa* where the *ʿulamāʾ* are stakeholders (this fact is accepted by their inclusion in the FSC).[72] It would be more useful to (1) be aware of which arguments they are likely to accept, (2) make the argument that the FSC should use a modernist interpretation of Muslim family law as applied to individuals (the *ʿulamāʾ* accept the right of individuals to follow their own sect's interpretation), or (3) demand a parallel secular family law that individuals can opt into (like the Special Marriage Act,

70 *Id.*

71 Lucy Carroll, *Pakistan's Evidence Order ("Qanun-i-Shahadat"), 1984: General Zia's Anti-Islamization Coup*, *in* Dispensing Justice in Islam: Qadis and their Judgements 517 (Muhammad Khalid Masud, Rudolph Peters & David Powers eds., 2005); Kennedy, *supra* note 25.

72 Afiya Shehrbano Zia, *The Reinvention of Feminism in Pakistan*, 91 Feminist Review 29 (2009).

1954 in India). Collaborating with military dictators to force modernist interpretations of Islamic laws on the *madrasa*-educated *ʿulamāʾ* is the most conflict-inducing, polarizing—and in Pakistan's climate of militancy—downright dangerous strategy for women's rights activists or liberals.

A recognition is long overdue that personal religious beliefs can exist in what Rawls terms the "background culture"[73] but the "public reason" of the state is invariably rooted in Islam, barring a revolution or constitutional amendment, and this requires knowledge of Islam *and* negotiation with traditional Islamic institutions. Shahnaz Khan's approach of centering the lived experience of victims of the Zina Ordinance is also a fruitful strategy;[74] in their writings on this issue, the Deobandi *ʿulamāʾ* recognize the problems with the Ordinance but when women's rights activists demand the repeal of a Ḥanafī *fiqh* opinion they regard as authoritative, and even beyond the purview of the state to reverse, they oppose them tooth and nail.[75] Navigating these "theological red lines" and centering lived experience, especially of the working class most affected by such laws, as Shahnaz Khan does, can help avoid polarization and stalemate on reform. Moreover, Pakistani military dictators have typically used state Islamic laws to divide and rule, with Field Marshal Ayub Khan and General Musharraf coopting women's rights activists and General Zia coopting the Deobandi *ʿulamāʾ*. Feminism exists against the backdrop of the imperial liberalism of western states "saving Muslim women" through war and occupation of Muslim states, as well as the military authoritarianism that holds Pakistan's constitutional democracy hostage and has, in the past, used "performative liberalism" for political branding in western capitals. Feminist scholarship about Islam in Pakistan would benefit from integrating these themes to develop a critical approach that fits the experience of the generations that lived during the Global War on Terror, and its revival of Orientalist, racist discourse about Islam and Muslims; those

73 Rawls, *supra* note 6, at 768.

74 Shahnaz Khan, *Zina and the Moral Regulation of Pakistani Women*, 75 Feminist Rev. 75 (2003).

75 Usmani, *supra* note 2, at 287–90. He accepts the need for reform but opposes repeal.

who lived with the knowledge that nearly one million people were killed in a war that was ostensibly for democracy and saving Muslim women.[76]

In this article, I am not positing a "west versus Islam" argument. While the "west versus Islam" frame has been part of public discourse both in western countries and among Islamists, Pakistan's social, political, and legal history belies such categorization. The west is inside Muslim countries, and Muslims are inside the west. Each of the actors in the political conflict I analyze were shaped by their encounter with the west: the seminary of Deoband was modeled on a colonial school and raised money through popular contributions by using print technology introduced by British colonizers, leading to a network of schools and the new identity of a Deobandi *maslak*.[77] Mawdudi of the Jamaat-e-Islami drew on modern western political theory to formulate his idea of *sharīʿa* "sovereignty" in a modern state. And what I term Pakistan's "Anglophone, westernized elite" was socialized in the education system, language, and cultural and political values of the west. This does not imply an inescapable or mutually exclusive binary, as Pakistan's legal and political history is rife with examples of the cross-fertilization of cultures. The idea that *sharīʿa* and liberalism are two opposite ends of the spectrum is not borne out empirically by Pakistan's constitutional and legal history in which both exist. Lau has argued that Pakistani judges used Islamic principles to enhance civil liberties and their power vis-à-vis the executive, and Yefet has argued that Pakistan's *shariat* courts used Islamic principles to reinforce the prevailing liberal interpretation of the dissolution of marriage.[78]

This article makes an argument for the virtues of cross-pollination in domestic institutions and an appeal for self-criticism among activists who use hierarchical structures of international rights discourse to pressure these institutions for top-down, coercive reform, rather than engaging in lateral debates

76 *See Figures*, Watson Inst. for Int'l & Pub. Affs., https://watson.brown.edu/costsofwar/figures/2021/WarDeathToll (last visited June 10, 2025).

77 Barbara D. Metcalf, Islamic Revival in British India: Deoband, 1860-1900 (2014).

78 Lau, *supra* note 41; Yefet, *supra* note 41.

that seek to build consensus within local society and politics. It is an argument against the *uncritical* perpetuation of western cultural and political *domination*—being westernized does not automatically imply being "westoxicated"[79] ("maghrib-zāda," as Jalal Al-e Ahmad and the Deobandi *ʿulamāʾ* say), but the difference lies in the extent to which we are self-critical and self-aware. The following part reexamines the question, in light of Pakistan's colonial heritage and constitutional history, to contribute to such a critical approach.

Part II: Colonial Legacies and Developing a "Public Reason" for *Sharīʿa*

In *Arguing Islam*, Brown has cautioned against using theories of deliberative democracy as a roadmap for how deliberation on Islam plays out in the real world.[80] In his view, theorists of deliberative democracy are unduly optimistic about the potential for rational debate to foster compromise and consensus because they do not address the fact that "publicity" renders deliberation in the public sphere substantively different from the deliberation of a jury.[81] This is because "[p]olitical leaders speaking in public often seek to appeal to and mobilize their own constituencies far more than they work to persuade their opponents."[82] In Brown's eyes, interests and power are as important for understanding the trajectory of public debates as are rational processes and ideas.[83] Tamir Moustafa, too, has observed that debates on Islamic laws in Malaysia contribute to cultural and political identity formation, as well as polarization.[84]

Based on my research in Pakistan, this finding certainly holds for debates on *fiqh*-based laws in the public sphere.

79 For two different explorations of the concept of "gharbzadegi" or "westoxication," see Hamid Dabashi, The Last Muslim Intellectual: The Life and Legacy of Jalal Al-e Ahmad (2021) and Eskandar Sadeghi-Boroujerdi, Gharbzadegi, *colonial capitalism and the racial state in Iran*, 24 Postcolonial Stud. 173 (2021).

80 Brown, *supra* note 61, at 30, 35–36.

81 *Id.* at 35–36.

82 *Id.* at 37.

83 *Id.* at 30.

84 Moustafa, *supra* note 61, at 10, 22, 30, 62.

I would add, however, that these debates—or rather polemics—are not only polarizing but follow a certain predictable, unchanging pattern due to the epistemic divide between modern-educated Muslim intellectuals and lawyers, and the *madrasa*-educated *ʿulamāʾ* that took root during the colonial period. While Sayyid Ahmad Khan, the pioneer of Muslim modernism in India, referred to himself as an Anglo-Oriental, and founded Aligarh College in 1875, partly with British assistance, to train the sons of Muslim gentlemen in modern western knowledge,[85] the *ʿulamāʾ* of north India established Deoband in 1866 and funded it through popular contributions.[86] Intellectuals from the westernized Muslim elite conducted a conversation about Islam with British rulers, intellectuals, and an English reading public that was largely divorced from the discourse of the *ʿulamāʾ* who maintained control of mosques and *madrasa*s. Many of these texts took the form of apologetics that romanticized the early Islamic period and blamed the "decline" of Muslim power on institutions in subsequent centuries, including the *fiqh* tradition which was accused of "stagnation," the most famous expression of which is Iqbal's series of lectures that were published as *Reconstruction of Religious Thought in Islam* in 1930.[87] This text, and its influence on the Muslim intelligentsia, encapsulated one of the central paradoxes of Muslim nationalism in India: it romanticized Islam while portraying the Muslim juristic tradition (*fiqh*) as "stagnant." This denigration of pre-colonial institutions and culture was not restricted to the Islamic legal tradition but extended to the Urdu *ghazal* as well; Sayyid Ahmad Khan urged Indian writers to look to Victorian English poetry

85 Peter Hardy, The Muslims of British India 102–104 (1972). For a sample of Sayyid Ahmad Khan's writings, see Modernist and Fundamentalist Debates in Islam: A Reader (Mansoor Moaddel & Kamran Talattof eds., 2002). For a detailed history of Aligarh College, see David Lelyveld, Aligarh's first generation: Muslim solidarity in British India (2003).

86 Metcalf, *supra* note 77, at 97.

87 Muhammad Iqbal, Reconstruction of Religious Thought in Islam (Stanford University Press, 2012) (1930). Ameer Ali, The Spirit of Islam (1891) is an example of a romanticized portrayal of the early Islamic period. For an analysis of this intellectual trend, see Hardy, *supra* note 85, at 94–115.

as a model.[88] It was a tendency rooted in the tripartite division of history (a golden classical period, the medieval dark ages, and a modern renaissance) that was used by Enlightenment philosophers to reimagine their past, by British writers to reimagine the history of India, and by Muslim and Hindu nationalist thinkers.[89] As Chatterjee has shown, nationalist thinkers drew on tradition to foster group identity but argued that it should be "reconstructed" or "recast" on a modern pattern (to adapt to social, political, and legal changes that had already occurred due to British colonial state-building).[90]

While the party of Deobandi *ʿulamāʾ* in India, the Jamiat-e-Ulama-e-Hind (JUH), was an ally of the Indian National Congress, and Mawlana Madani argued for territorial nationalism, it was Iqbal, a graduate of Cambridge and Heidelberg, who said that Islam needed a state to actualize itself.[91] It was only in 1945 that a group of Deobandi *ʿulamāʾ* broke off from the JUH to form the Jamiat-e-Ulama-e-Islam (JUI) and endorse the demand for Pakistan.[92] Westernized Muslim leaders of the Muslim League, such as Jinnah, used Islamic rhetoric and institutions to mobilize mass support for the demand for Pakistan but remained vague about the role of Islam in the new state.[93] Iqbal had proposed that Muslims could perform "*ijtihād*" through an assembly, "reconstructing" the Islamic tradition according to the needs of modern society, but he had never discussed this proposal with

88 Shamsur Rahman Faruqi, *From Antiquary to Social Revolutionary: Syed Ahmad Khan and the Colonial Experience*, Franpritchett.com, https://franpritchett.com/00fwp/srf/srf_sirsayyid.pdf (last visited June 10, 2025).

89 *See* Peter Gay, The Enlightenment, an interpretation: the rise of modern paganism (1966); Barbara D. Metcalf & Thomas R. Metcalf, A concise history of modern India 2–3 (2006).

90 Partha Chatterjee, Nationalist thought and the colonial world: A derivative discourse (1986).

91 Khuṭbāt-i Madnī : Jamʿiyat-i ʿUlāma-yi Hind ke sālānah ijlāsoṉ meṉ Maulānā Ḥusain Aḥmad Madnī ke sālānah ḵhuṭbāt: mas'alah-yi qaumiyat par ʿAllāmah Iqbāl se tanāzah aur Nirhū riporṭ par tanqīd o tabṣirah (Aḥmad Salīm ed., 1990). For an English analysis of this exchange, see Hardy, *supra* note 85, at 243–44.

92 Binder, *supra* note 49, at 29–30.

93 For their use of Islamic institutions and rhetoric in the 1940s, see David Gilmartin, Empire and Islam: Punjab and the Making of Pakistan (1989), and for an earlier period, see Francis Robinson, Separatism Among Indian Muslims: The Politics of the United Provinces' Muslims, 1860–1923 (1974).

the *ʿulamāʾ* (unlike the Indian National Congress which had the support of Deobandi *ʿulamāʾ* on the condition of autonomy for Muslim Personal Law in independent India).[94] For most of Pakistan's history, the central problem, therefore, in addition to the role of Islam in the legal and political system, was *who* would speak for Islam: the *madrasa*-educated *ʿulamāʾ* or modern-educated Muslims, who often used modernist reinterpretations in service of liberalizing reforms.

The problem was that Muslim modernism never developed grassroots institutions in colonial India; instead, its early thinkers addressed their arguments to Muslims as individuals, to colonial officials, or to western reading publics. Sayyid Ahmad Khan argued that the Qurʾān was "the sole authority in all matters of judgment" and introduced a principle that "only the explanation of the Quran by reference to the Quran itself" was acceptable, and not reference to "any tradition or the opinion of any scholar."[95] Sayyid Ahmad's disciple Maulvi Chiragh Ali, writing to English interlocutors, called *fiqh* "Muhammadan Common Law" and said it could not be considered "binding on any other nation than the Arabs, whose customs, usages, and traditions it contains, and upon which it is based."[96] Over time, their scholarship became more and more disconnected from that of the *madrasa*-educated *ʿulamāʾ*. For instance, in *The Spirit of Islam*, Amir Ali wrote about Islamic history through the lens of rationalism, Hegelianism, and popular Darwinism, projecting modern values of freedom and equality onto the past.[97] This explains why Muslim nationalists like Jinnah could say that Islam is the same as liberty, equality, and fraternity,[98] without needing to engage with doctrines regarding apostasy taught in *madrasa*s.

94 Hardy, *supra* note 85, at 243–44, 246. For a broad overview, see *id*. at 168–255. For a discussion of the JUH's distrust of the Muslim League, see Gilmartin, *supra* note 93, at 172–73.

95 Mansoor Moaddel & Kamran Talattof, *An Overview of Islamic Modernism: The Contributors in Context*, *in* Modernist and Fundamentalist Debates in Islam, *supra* note 85, at 7–8.

96 Maulvi Chiragh Ali, *Islamic Revealed Law Versus Islamic Common Law*, *in* Modernist and Fundamentalist Debates in Islam, *supra* note 85, at 31.

97 Hardy, *supra* note 85, at 107.

98 *See* Tariq Rahman, *Jinnah's Use of Islam in his Speeches*, 21 Pakistan Perspectives 21 (2016).

Moreover, while *madrasa*s in colonial India were divided among Deobandis, who criticized syncretic practices at Ṣūfī shrines, and Barelvis, who defended them, these two doctrinal orientations developed distinct identities with boundaries. Modernism neither became a distinct identity, nor had grassroots institutions. Robinson writes that "for the indigent alim assaults upon [Sayyid Ahmad Khan] became a profitable industry . . . one man told him that 'Shere Ali, who assassinated Lord Mayo, was an idiot for doing so, as he could have assured Paradise for himself by killing Syed Ahmed.'"[99] Though modernism did not develop roots in society, its thinkers were close to the colonial state and integrated with an English-reading public.

In light of this colonial history, I do not study this problem through a liberal or secular lens. There are two key steps to my approach. First, I take a pragmatic approach to political institutions. Following Przeworski's minimalist defense of democracy, I believe the point of democracy—and political institutions more generally—is the peaceful regulation of conflict.[100] This is why I see the Islamic provisions in Pakistan's constitution not as an undesirable deviation from a secular or liberal ideal, but as the result of constitutional struggles in which different stakeholders set their minimum conditions for endorsing constitutional democracy. As they aid the peaceful regulation of conflict among liberals and Islamists, they contribute to political stability. Second, I do not proceed from the premise that liberalism is a universally valid, desirable, or self-evident political philosophy. While political theorists such as Jennifer Pitts have shown the historical entanglement of liberalism with imperialism and the colonial civilizing mission, others such as Lucas Swaine have argued that liberalism, to be true to its own principles, must justify itself to theocrats using reasons internal to *their* moral framework.[101] This contention has long been uncontroversial in anthropology. Saba Mahmood has shown the intellectual futility

99 Robinson, *supra* note 93, at 109.

100 Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, *in* Democracy's Value 23 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999).

101 Jennifer Pitts, A Turn to Empire: The Rise of Imperial Liberalism in Britain and France (2005); Lucas Swaine, The Liberal Conscience: Politics and Principle in a World of Religious Pluralism (2005).

of viewing and judging Islamist groups from a liberal lens, and legal anthropologists, such as Sally Merry, have emphasized that rights are "a cultural phenomenon, developing and changing over time in response to a variety of social, economic, political, and cultural influences."[102] It is due to this perspective that I use the idea of "authentic deliberation" or "reciprocal reasoning" from deliberative democracy when I analyze debates between liberals, the *ʿulamāʾ*, and Islamists. As rights are a *cultural* phenomenon, *how* they are justified matters.

This is an idea that the Pakistani judiciary has taken seriously, as far back as the 1960s when Justice Cornelius proposed translating the Fundamental Rights section of the constitution into Arabic so as it to endow it with the sacredness attributed to the language.[103] By co-reading the constitution's guarantees of democracy, individual rights, and Islamic values, the judiciary has arguably "vernacularized" constitutional liberalism. It is debatable whether individual rights and democracy "within the limits of Islam"—limits that are enforced through Islamic judicial review—can be called constitutional liberalism at all. I consider constitutional liberalism to be a strand in constitutional interpretation in Pakistan, which is interwoven with Islamic constitutionalism like the double helix of a DNA strand. Due to the historical association of liberalism with western imperialism, the word "liberal" itself carries a negative valence when used in Pakistan's public sphere. The Deobandi *ʿulamāʾ* or Jamaat-e-Islami may call Pakistan's constitution Islamic and deny that it has any traces of liberalism, even though they would staunchly defend individual rights. Liberal is the word they use to describe obscenity, sexual freedoms, and gender norms as practiced in the west, almost as an antonym of Islam, whereas they use vernacular words to describe elements of constitutional

102 Sally Engle Merry, *Changing rights, changing culture*, *in* Culture and Rights: Anthropological Perspectives 39 (Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson eds., 2001); Saba Mahmood, *Religious Reason and Secular Affect: An Incommensurable Divide?*, 35 Critical Inquiry 836 (2009).

103 Ralph Braibanti, Chief Justice Cornelius of Pakistan: An Analysis with Letters and Speeches app. at 11, 34 (1999) (citing the "Leadership and Churchill: The Power of Language" address in Hyderabad, delivered on February 13, 1965).

liberalism, such as *bunyadi haqooq* (fundamental rights), *aaeeni baladasti* (constitutional supremacy or constitutionalism), *adliya ki azadi* (judicial independence), *azadi-e-sahafat* or *media ki azadi* (media freedom), *siyasi azadi* (political freedom), and *jamhooriyat* (democracy). On the other hand, Pakistani liberals tend to focus on individual rights and democracy when they speak of the constitution and still insist that its Islamic provisions ought to be abolished (even though they have been living for the past 40 years with a judiciary that has extensively integrated Islamic legal reasoning into constitutional interpretation). The fact that both sides can appeal to the constitution for their normative commitments, *sharīʿa* and individual rights respectively, and give this hybrid constitution their allegiance, is testament to the stability of this constitutional order (which faces a threat not from *sharīʿa*-related conflict but from ongoing supra-constitutional military rule). Though the *fiqh*-based laws and *shariat* courts decreed by General Zia from 1978–85 have generally been considered an illegitimate dictatorial imposition by liberals in Pakistan, the principled argument for Islamic judicial review was worked out through a give-and-take between the *ʿulamāʾ*, Islamists, and members of the Constituent Assembly in a period of Pakistan's history that *preceded* dictatorial interference (in fact, the political targets of early dictators were communists and Islamists).

It is this early constitutional history that suggests that "the idea of a public reason" for *sharīʿa* in a diverse, constitutional democracy is possible. For Rawls, "the idea of public reason" in a "well ordered constitutional democratic society" is shaped by "the fact of reasonable pluralism" intrinsic to democracy, namely "the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions."[104] This pluralism, in his view, must shape how citizens reason with one another when deliberating on political decisions:

> Citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of

104 Rawls, *supra* note 6, at 766.

> their irreconcilable comprehensive doctrines. In view of this, they need to consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake. I propose that in public reason comprehensive doctrines of truth or right be replaced by an idea of the politically reasonable addressed to citizens as citizens.[105]

When we consider Rawls' argument, in light of the constitutional history of a country like Pakistan, where the very first declaration of constitutional principles, the 1949 Objectives Resolution, promised democracy and individual and group rights *within the limits of Islam*, some adjustments are needed. First, comprehensive doctrines of truth or right, such as Islam, are not monolithic but internally diverse and pluralistic. In the landscape of Pakistan's religious institutions, there is (1) the diversity of sect: Shīʿa and Sunnī; (2) the diversity of the Muslim juristic tradition (*fiqh*) across the different schools of jurisprudence: the four Sunnī schools (*madhhab*s)—Ḥanafī, Mālikī, Ḥanbalī, Shāfiʿī —and Shīʿa school, Jaʿfarī;[106] (3) the diversity of doctrinal orientation (*maslak*) towards *fiqh* among Sunnī *madrasa*s: Deobandi, Barelvi, and Ahl-e-Hadith, and (4) the diversity *within fiqh madhhab*s, which are akin to a "discourse community"[107] with established conventions of reasoning and

105 *Id.*

106 Hefner describes the authority of the *ʿulamāʾ* as "fissiparous pluricentrism." *See* Robert W. Hefner, *Introduction: Modernity and the Remaking of Muslim Politics*, *in* Remaking Muslim Politics: Pluralism, Contestation, Democratization 8 (Robert W. Hefner ed., 2005).

107 The term discourse community has been used for scholars of various secular disciplines. For discussions in that context, see James E. Porter, *Intertextuality and the Discourse Community*, 5 Rhetoric Rev. 34 (1986) and Stanley Fish, *Interpretation and the Pluralist Vision*, 60 Tex. L. Rev. 495 (1982). The difference between secular discourse communities and the *fuqahāʾ* (Muslim jurists) is in the established conventions of authority that mediate the relation between *fuqahāʾ*, at any given time, based on their levels of expertise; between the consensus or majority opinions of past *fuqahāʾ* (juristic consensus) and contemporary scholars; and between the *fuqahāʾ* and the laity. For a detailed discussion of these patterns of authority, see Muhammad Khalid Masud, Brinkley Messick & David S. Powers, *Muftis, Fatwas, and Islamic Legal Interpretation*, *in* Islamic Legal Interpretation: Muftis and their Fatwas 3–32 (Muhammad Khalid Masud, Brinkley Messick & David S. Powers eds., 1996).

evidence that regulate the debate of scholars. Moreover, Pakistan has several religious minorities.

From Pakistan's early constitutional struggle, proponents of the "Islamic constitution," such as the Deobandi *ʿulamāʾ* and Mawdudi of the Islamist Jamaat-e-Islami, had to formulate their constitutional principles taking this internal diversity into consideration. Therefore, "comprehensive doctrines of truth," were not *replaced* by "an idea of the politically reasonable addressed to citizens as citizens"; the very demand for a constitutional role for Islamic law was formulated and adapted *in terms of* the politically reasonable, i.e., what other citizens in a diverse polity, as represented by leaders in the Constituent Assembly, could reasonably accept.

Leonard Binder shows how from 1948 to 1954, the ideas for how to achieve an Islamic constitution evolved from an *ʿulamāʾ* committee with veto over un-Islamic legislation, to parliament acting on the advice of the Council of Islamic Ideology to make laws Islamic, and finally to Islamic judicial review in 1953.[108] When some politicians claimed that an Islamic constitution itself was impossible because "the *ʿulamāʾ* could never agree among themselves," the *ʿulamāʾ* of different sects held a conference in 1951 to formulate joint proposals.[109] While each of these sects could be classified as a "comprehensive doctrine of the good," the *ʿulamāʾ* were able to organize across sect based on the recognition of sectarian diversity and toleration. The Deobandi *ʿulamāʾ* often express this through the saying:

108 Binder, *supra* note 49, at 326–27. On October 23, 1953, the Law Minister, A.K. Brohi announced the decision of the Muslim League parliamentary party to accept the model of Islamic judicial review; he accepted that the Objectives Resolution implied limits on the power of the legislature but said that "no class of persons can be the sole interpreter of God's law" and therefore, a Supreme Court bench with five judges could be given the authority to strike down un-Islamic laws.

109 *Id.* at 216. *See* Sayyid Abul A'la Maududi, The Islamic Law and Constitution 28–29 (Khurshid Ahmad trans. & ed., 1960) (1955). Ahmad mentions the secularist challenge during the early constitutional struggle that "there was such a severe conflict of opinions among the different schools of Islamic thought that no unanimous version of Islamic constitution was possible, and it was, therefore, utopian to talk of the establishment of an Islamic State" and the *ʿulamāʾ* response in the form of a joint cross-sect conference and agreement on core principles that could be used as the basis for an Islamic constitution. The 1954 Punjab Disturbances Report makes a similar charge against the *ʿulamāʾ*.

"don't leave your own *maslak* [doctrinal orientation] and don't interfere with that of others."[110] Among themselves, they know how to reason about *sharīʿa* so they don't violate one another's interpretation (their demands have typically been for public law based on Ḥanafī *fiqh*, that of the majority, and personal laws interpreted according to the *fiqh* of each sect). The challenge has been for the westernized elite to realize that modernist arguments are not acceptable to the *madrasa*-educated *fuqahāʾ*, and therefore a form of coercion.

Part III: Enlightenment Liberalism and the "Savages-Victims-Saviors Metaphor" in Public Debates

The singular, and somewhat strange, idea of "reconstructing" Islam became deeply embedded in the worldview of the westernized Muslim elite in Pakistan and is an internalized civilizing narrative that is a legacy of colonialism. It was premised on the idea that modern-educated Muslims who desired liberal reforms knew Islam better than the *ʿulamāʾ* and were justified in forcing reforms on them through the state. In 1952, Dr. Khalifa Abdul Hakim, a modernist scholar who was the Director of the Institute of Islamic Culture in Lahore, published an Urdu pamphlet, *Iqbal aur Mullah* (Iqbal and the Mullah), which cited Iqbal's poetry to establish his disdain for "mullahs,"[111] a pejorative that is used among the modern-educated for the *ʿulamāʾ*, and which they in turn perceive as an insult.[112] Zaman traces the influence that Hakim, and his views on "reconstruction," had on high state officials and argues that this pamphlet "was clearly produced at

110 Mawlana Mufti Rafi Usmani, *Deeni Siyasi Jamat'on ki Khidmat mai'n* [*Advice for Religious Political Parties*], 31 Al-Balagh 3, 9 (1996) (author's translation).

111 Khalifa Abdul Hakim, Iqbal aur Mullah (1964), *available at* https://khalifaabdulhakim.com/institute%20of%20islamic.html. It was originally published in 1952 according to Zaman. *See* Muhammad Qasim Zaman, Islam in Pakistan: A History 58 (2018).

112 Mawlana Ihtesham-ul-Haqq Thanwi, *Islam aur Ilhad ki kashmakash*, 3 Bayyinat 56 (1968). Thanwi objects to the characterization of modernists as the epitome of rationalism while those who follow God's revelation are termed *laqeer ke faqir* (literalists, rigid, or dogmatic) and *mullah*s, a term that he felt was a *gaali* (insult) like *mullaism* (author's translation).

official bidding."[113] Dr. Hakim was appointed to the Commission on Marriage and Family Laws created in 1955, and the Report of this Commission is infused with his philosophy, opening with a long quote from Iqbal's *Reconstruction of Religious Thought in Islam* that mourns the "state of immobility" of the "law of Islam."[114] It then presents the following narrative of Muslim history:

> At the end of the creative Abbaside [sic] period the centres of Muslim civilization were invaded and destroyed by Tartar [sic] barbarians. Libraries and centres of learning were devastated; creative and progressive thinking became impossible. In order to save the structure of Muslim law, it was deemed expedient to stop the activities of second rate innovators who could only make cultural confusion still further confounded.
>
> After this Muslim civilization became stagnant and dormant and remained so till the awakening and stirring in the middle of the nineteenth century. Islam became identified with rigid orthodoxy in the matter of law, and the Western world which was recasting its life in the light of progressing knowledge and adapting itself to changing circumstances began to accuse Islam itself, dubbing it as an outworn creed incapable of adaptation to changing circumstances.[115]

This account idealizes the Abbasid period and claims that in the many centuries between the Tatar invasions and the "awakening" and "stirring" of the mid-19th century, Muslim civilization was "stagnant" and "dormant." Moreover, this sense of history—in

113 Zaman, *supra* note 111, at 58–59.

114 *Report of the Commission on Marriage and Family Laws*, *supra* note 58, *reprinted in* Studies in The Family Law of Islam 40 (Khurshid Ahmad ed., 1960), *available at* https://ia601302.us.archive.org/25/items/studies-in-the-family-law-of-islam/Studies%20in%20the%20family%20law%20of%20ISLAM.pdf. Reprint is cited here because it is more accessible in libraries; the author has also consulted the original in *supra* note 58.

115 *Id.* at 40–41.

which the *ʿulamāʾ* are associated with a "rigid orthodoxy" and "stagnation"—is shaped by an awareness of an onlooker, "the Western world," which begins to accuse Islam *itself* of rigidity rather than its legal system.[116]

The Report-writers see themselves as removing this conflation; they accept the western criticism of rigid orthodoxy but argue that Islam can be saved by returning to the "original spirit"[117] of the Qurʾān and Sunna: "If the reforms proposed by this Commission are welcomed by the liberal and enlightened section of the public and receive legislative sanction they will form an important contribution to the scheme of reconstruction demanded by all who are not fossilized by tradition or blinded by sheer authoritarianism."[118]

In the eyes of the Report-writers, those who demand "reconstruction" are those who are not "fossilized by tradition."[119] By labeling the two opposing views as the "enlightened liberals" and those who are "fossilized by tradition"[120] (i.e., the *ʿulamāʾ* who oppose a "reconstruction" of *fiqh*), the Report-writers attribute all that is good to liberal thought, and all that is bad to tradition. In a note of dissent, Mawlana Thanwi, the only Deobandi *ʿālim* on the Commission, objected to its interpretation of the history of *fiqh* and to its attempt to formulate Islamic jurisprudence "de novo."[121]

Parliament did not act on the Commission's advice but the military dictator Ayub Khan did, when he decreed the Muslim Family Laws Ordinance (MFLO) in 1961, for which women's rights activists of the All Pakistan Women's Association (APWA) celebrated him as a hero, giving him garlands, bouquets, and chanting "God bless the President."[122] The Jamaat-e-Islami had published its critique in *Marriage Commission*

116 *Id.* at 40–41.
117 *Id.* at 46.
118 *Id.* at 45–46.
119 *Id.* at 46.
120 *Id.* at 45–46.
121 *Note of Dissent of Mawlana Ihteshamul Haqq Thanwi*, *supra* note 58, at 1564. Extracts available in reprint, *supra* note 114, at 210.
122 Rashida Patel, Women and Law in Pakistan 91 (1979).

Report X-RAYED,[123] and Mawlana Tonki, like other Deobandi *ʿulamāʾ*, saw the 1961 MFLO as a "black law":

> Though there had been a succession of bad governments in the country before martial law, at that time, not even the worst government had the audacity to enforce these black laws. Only when the period of martial law came, which was the blackest period of this country, only at that time were these laws removed from cold storage and after putting locks on people's tongues and pens through undemocratic means were they imposed by force, an act whose parallel is difficult to find in Muslim history.[124]

Politicians shut down parliamentary debate on an MFLO repeal bill in 1962[125] and included a clause in the 1973 constitution that shielded the MFLO from judicial review (preventing it from being challenged on the ground of freedom of religion). Women's rights activists, first of APWA and later WAF, both groups of urban, middle class, professional women, made it the linchpin of their identity without any recognition that it resulted from an exclusionary, coercive process during a military dictatorship and from deliberation that was decidedly "inauthentic."

Early state officials and many judges, politicians, and dictators after them, did not necessarily make "secular" arguments when confronted with a demand for *sharīʿa*; they often castigated the *fiqh* tradition as "stagnant"; insisted on the right of contemporary Muslims to reinterpret it; offered their own interpretation of the Qurʾān and Sunna or that of a scholar they followed; and accompanied this with a caricature of the *ʿulamāʾ* (this is the pattern in the 1954 Punjab Disturbances Report, which liberals often cite as evidence of Pakistan's secular

123 Marriage Commission Report X-RAYED: A study of the Family Law of Islam and a Critical Appraisal of the Modernist Attempts to 'reform' it (Khurshid Ahmad ed., 1959).

124 Mawlana Mufti Wali Hasan Sahab Tonki, *Aa'ili Qawaneen Shariat ki roshni mai'n*, Bayyinat 230–46 (Sept. 1963) (author's translation).

125 Mr. Muhammad Munir, National Assembly of Pakistan Debates, July 2, 1962, at 883–84.

age).[126] It is easy to see why this would not meet the standard of a "public reason" for *sharīʿa* in which arguments were addressed to the *ʿulamāʾ* using reasons they could be expected to accept. This mode of argumentation was a case of Enlightenment Liberalism, a battle against orthodoxy that has been part of the culture of the Muslim intelligentsia and state elites since the late 19th century but can do great harm in a constitutional democracy that promises Islamic laws, particularly in a society like Pakistan where the orthodox *ʿulamāʾ* of various sects (Deobandi, Barelvi, Ahl-e-Hadith, Shīʿa) have almost exclusive control of grassroots Islamic institutions.

This tendency within the culture of Pakistan's liberal intelligentsia and elite was only exacerbated when women's rights activists anchored their campaign for *ḥudūd* repeal from the 1980s and 1990s within international human rights discourse, using western media, western-funded rights NGOs, and western policymakers for leverage. As Makau Mutua argues, "[t]he human rights corpus, though well-meaning, is fundamentally Eurocentric,"[127] with the following flaws: first, the fact that it "falls within the historical continuum of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions";[128] second, its rejection of "the cross-contamination of cultures" in favor of a "Eurocentric ideal" which entails an "'othering' process that imagines the creation of inferior clones";[129] third, its "arrogant and biased rhetoric" which "prevents the movement from gaining cross-cultural legitimacy";[130] fourth, the fact that it overlooks the power imbalances "among and within cultures";[131] and fifth, its tendency to reinforce a "global racial hierarchy" in which "savages and victims are generally non-white and non-Western, while the saviors are white."[132] Synder has argued that human rights campaigns run by

126 Report of the Court of Inquiry constituted under Punjab Act II of 1954, *supra* note 57, at 219–20.

127 Mutua, *supra* note 5, at 204.

128 *Id.* at 204.

129 *Id.* at 205.

130 *Id.* at 206.

131 *Id.* at 207.

132 *Id.*

"professional shamers and blamers" organized in bureaucratic, top-down structures have been ineffective,[133] but in this case, they were actively reinforcing and perpetuating a pre-existing social cleavage between the *madrasa*- and modern-educated. This is due to what Sylvia Marcos describes as "cultural mirroring;" rights activists based in the west choose local activists who mirror their discourse and values, and in the process marginalize groups with different epistemic frameworks and values.[134] In an address to women lawyers, Justice Nasim Hasan Shah explained that while Islamic law had become the "rule of decision in practically all matters" according to the constitution, the "guarantee of equality of status conferred upon women by Article 25 of the Constitution is also being fully enforced by our Courts."[135] He cited a 1990 Supreme Court ruling that according to the constitutional provisions for equality of status before law and no discrimination on the basis of sex alone, medical colleges could not set an upper limit on admissions seats for women, but could only fix a minimum number.[136] However, the top-down structure of western-funded rights NGOs made them immune to persuasion, or adaptation in light of the legal changes in Pakistan, which may explain why the demand for repeal of the Hudood Ordinances by WAF, whose activists ran the leading western-funded women's rights and human rights NGOs in the 1990s, did not change for 27 years despite the fact that it was unacceptable to the *ʿulamāʾ* and no elected government was willing to confront them on this question.

Moreover, the accusations of the Deobandi *ʿulamāʾ* that liberal reforms are part of a "western conspiracy against Islam" point to the collaboration of modernist scholars and activists from the westernized elite with military dictators who

133 Jack Snyder, *Empowering Rights Through Mass Movements, Religion, and Reform Parties*, *in* Human Rights Futures 89 (Stephen Hopgood, Jack Snyder & Leslie Vinjamuri eds., 2017).

134 Sylvia Marcos, *The Borders Within: The Indigenous Women's Movement and Feminism in Mexico*, *in* Dialogue and Difference: Feminisms Challenge Globalization 85–87 (Marguerite Waller & Sylvia Marcos eds., 2005).

135 Mr. Justice Dr. Nasim Hasan Shah, Judge SC, *Rights of Women Before Courts of Law*, J. APLD 80 (1990).

136 The case he cited was Shirin Munir v. Government of the Punjab, (1990) PLD (SC) 295.

were clients of western states. Such scholars and activists are embedded in a broader power structure, not engaging in a lateral debate with the *madrasa* educated. When Ayub Khan appointed Professor Fazlur Rahman, a scholar at McGill University, to the Council of Islamic Ideology and Islamic Research Institute, Mawlana Kandhalwi described him as among "those whose research comes from the lessons of Europe and America, who are a few decaying crumbs on their tablecloth."[137] He was angry that these western-trained scholars repeated the Orientalist argument that many *ḥadīth* were fabricated. In 2005, before the Protection of Women Act, 2006 had been passed, General Musharraf urged the Council of Islamic Ideology (CII) to rescue *sharīʿa* from its "fossilized interpreters" as "[t]he way of Islam is the path of critical thinking" and "not a rote of the sayings of jurists who are long dead."[138] Mawlana Aziz-ur-Rehman, a scholar at Darul Uloom Karachi, one of the largest and most influential Deobandi *madrasa*s in Pakistan, described Musharraf's "Enlightened Moderation" as a "lightning-speed Islam" which took its guidance from "the desires of the enemies of Islam and the signposts provided by Washington and the Pentagon."[139] This is the power context in which Ghamidi was invited to advise the CII on *ḥudūd* reform. Moreover, the labeling of Muslims as "extremist" and "moderate" by western observers has long had political origins. Hardy recounts that in "British official parlance," Muslims from the collaborating elite were "loyal" and "moderate," and were consulted in developing policy towards Muslims, while the vernacular-speaking, traditionally-educated, lower-middle class "able and willing to read the large annual output of Muslim devotional literature in Urdu" was called "fanatical" and "bigoted."[140] Western media coverage preceding the PWA, 2006

137 Mawlana Muhammad Malik Kandhalwi, *Dr. Fazlur Rahman kay deeni ta'reefat*, Al-Haqq, July 1966, at 27 (author's translation).

138 CII Annual Report 299–300, 302 (2004–2005). CII reports since 1962 are available here: https://cii.gov.pk/E-Books.aspx.

139 Mawlana Aziz-ur-Rahman Sahab (Teacher, Darul Uloom Karachi), *Enlightened and Backward Islam? (Zikr-o-fikr editorial)*, Al-Balagh, July 2003, at 4–6. (author's translation).

140 Hardy, *supra* note 85, at 169. An updated analysis of this phenomenon can be found in Mahmood Mamdani, Good Muslim, Bad Muslim: America, the Cold War, and the Roots of Terror (2004).

in Musharraf's period used these kinds of categorizations. A BBC article published after the law's passage repeated the claim that under the Hudood Ordinance "a rape victim had to provide four male eyewitnesses to the crime" and labelled the opponents of the law as "religious hardliners"—the article was applying this label to senior *fuqahāʾ* whose opinion represented the center of religious debate in *madrasa*s.[141] Instead of employing a more nuanced vocabulary, Pakistani English newspapers used similar categorizations as the western media, as the liberal editors who ran them were supporters of the PWA.[142]

Much of the public debates on *sharīʿa* in Pakistan are not about *sharīʿa* at all—if we consider *sharīʿa* in terms of the *fiqh* tradition and its various debates, opinions, and internal diversity. It is about groups forming identities, and telling stories about themselves, by contrasting themselves with an "Other." Sometimes, this Other is demonized and portrayed as a monster. As Cohen observes, monster construction is often due to "epistemic uncertainty" because the monster is a "disturbing hybrid" who refuses to "participate in the classificatory 'order of things.'"[143] Monster narratives command a grip on public discourse because they serve an emotive function; they allow groups to construct their identity in relation to an inferior object, onto which emotions such as aggression and domination are expressed.[144]A cartoon published in the Pakistani English newspaper *Frontier Post* in 1991 depicted the Hudood Ordinance as a monster and carried the caption "BHUTTO READY TO SUPPORT NAWAZ IF HUDOOD ORDINANCE REPEALED."[145] In the frame, Benazir Bhutto is nearly twice Nawaz Sharif's height and holds a sword (ready to slay the monster) in her left hand while she gestures

141 Syed Shoaib Hasan, *Strong feelings over Pakistan rape laws*, BBC News (Nov. 15, 2006). http://news.bbc.co.uk/2/hi/south_asia/6152520.stm. Another article where BBC uses "hardline" as a prefix for the mainstream leader of the Islamist Jamaat-e-Islami, Qazi Hussain Ahmad is *Islamists debate rape law moves*, *supra* note 1.

142 *See, e.g.*, *Justice delayed but done*, Daily Times, Aug. 21, 2002; Shahed Sadullah, *Musharraf 2: extremists 0*, The News, Nov. 20, 2006.

143 Jeffrey Jerome Cohen, *Monster Culture (Seven Theses)*, *in* Monster Theory: Reading Culture 6–7 (Jeffrey Jerome Cohen ed., 1996).

144 *Id.* at 17–20.

145 Image printed in *Frontier Post*, Dec. 13, 1991.

to Nawaz with her right hand.[146] He has a quizzical look on his face, appearing hesitant and doubtful.[147] To their left is the largest figure in the frame, a beast with long nails, a horn, a terrifying expression on its face, and "HUDOOD ORDINANCE" written on its back.[148] The beast hovers over a screaming woman, the smallest figure in the entire frame.[149] This image depicts Benazir Bhutto as a potential savior, the Hudood Ordinance as a savage beast, women as victims (rather than working class women *and* men as victims, as Kennedy points out).[150] This is a story, and in the case of the campaign against the Hudood Ordinance, the story—both among western observers and the westernized Pakistani elite—assumed a life of its own, precluding authentic deliberation with the Deobandi *ʿulamāʾ* and even the recognition that it was necessary. Had this kind of debate occurred earlier, it may not have taken 27 years to reform a law that was causing harm primarily to the working classes. (The *ʿulamāʾ* and Islamists, too, engage in their own monster-construction of liberals.)

Part IV: The "Cross-Fertilization" of *Sharīʿa*, Individual Rights, and Democracy in the Judiciary

While the judiciary started in the same place as the westernized ruling elite, dominated as it was by colonial law and common law judges, it has shown a remarkable evolution in its capacity to accommodate *fiqh* within a constitutional democratic framework. In the 1954 Munir Report, which was commissioned after anti-Aḥmadī disturbances, Supreme Court judges caricatured the *ʿulamāʾ* as ignorant, declaring that there was no basis for the punishment of apostasy in Islam as it was not mentioned in the Qurʾān.[151] However, since then, the judiciary has progressively

146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.*
150 Kennedy, *supra* note 13, at 312.
151 For the argument about apostasy, see Munir Report, *supra* note 57, at 220, and for its general orientation towards the question of an Islamic Constitution, see id. at 201–203, 275–76. For a critique of the Munir Report's characterization of the *ʿulamāʾ* and the Islamic legal tradition from an Islamist perspective, see Ahmad, *supra* note 57, at 2–3, 136, 146–47, 215. One of Ahmad's points was that it was wrong

moved towards greater engagement with the Islamic legal tradition. This impulse was visible as early as the time of Justice Cornelius, decades before General Zia decreed *shariat* courts or *fiqh*-based laws. As Clark Lombardi has explained, Justice Cornelius did not see an inherent contradiction between the Muslim juristic tradition and constitutional liberalism.[152] Though he had once found talk of "Islam's role in the state 'repellent,'"[153] as he saw Pakistan's drift into military authoritarianism in the 1950s, he changed his mind, and "[b]y the early 1960s, Cornelius was arguing that those committed to uphold the liberal democratic rule of law should support a constitutional structure that looked in some ways like the one Mawdudi had proposed in the early 1950s."[154] He saw that engaging with the Islamic legal tradition could lead to interpretations that strengthened "the liberal rule of law," if "the judiciary, retained the authority to define the government's official interpretation of Islamic law."[155] Cornelius reasoned that "[f]undamental rights principles might achieve the same status in Pakistan [as in Britain] if they were 're-sanctified' in the eyes of Pakistan's Muslim rulers and masses—through a process of connecting them to the religion not of the departed colonial master but of their own indigenous Islamic beliefs."[156] Through this, judges could harness popular support to restrain the executive. Cornelius, who was Catholic himself,[157] regarded it as his duty to "make the justice of our land a thing of the people, by infusion of concepts derived from Muslim law" and "by adoption of the people's language as the language of law and of justice."[158] While Professor Fazlur Rahman suggested a "revolutionary" method to re-construct the Islamic legal tradition in

to think that death was the only punishment for apostasy, as there was a difference of opinion among jurists. *See id*. at 179.

152 Clark B. Lombardi, *Can Islamizing a Legal System Ever Help Promote Liberal Democracy: A View from Pakistan*, 7 U. St. Thomas L.J. 649 (2010).

153 *Id.* at 685.

154 *Id.* at 661.

155 *Id.*

156 *Id.* at 661, 674.

157 Ralph Braibanti, *Cornelius of Pakistan: Catholic chief justice of a Muslim state*, 10 Islam & Christian-Muslim Rels. 117 (1999).

158 Ralph Braibanti, Chief Justice Cornelius of Pakistan: An Analysis with Letters and Speeches 19 (1999).

light of modern circumstances, and was propagating this view from the state Council of Islamic Ideology, on unwilling and angry Deobandi *madrasa*s, Justice Cornelius not only advocated reasoning *within* the *fiqh* tradition, but also approached the problem in a gradualist, case-by-case way.[159]

However, not all judges shared this perspective. Rashida Patel, a lawyer who served as Vice President of APWA, cites a Lahore High Court judgment reported in 1964 which ruled that "*ijma* is an important source of law-making in Islam, but . . . Legislative Assemblies are perhaps the only bodies which may perform this function."[160] She also cites a Supreme Court judgment reported in 1967 which used the famous hadith related to Muadh-ibn-e-Jabal to argue that the Qurʾān was the "primary source of law" which held a higher priority than *ḥadīth, ijtihad,* and *ijmāʿ*, adding that "[t]here is no warrant for [the] doctrinaire fossilization" that resulted from the "the doctrine of *taqlid*."[161] This explains why Mufti Taq Usmani was anxious when General Zia created the *shariat* benches in December 1978. Every time he thanked Zia for fulfilling a long-standing demand ofthe *ʿulamāʾ*, he insisted, with growing urgency, that existing judges must be trained in *fiqh* and the *ʿulamāʾ* appointed to *shariat* courts.[162] Another CII member, Mufti Kakakhel perceived a threat to *fiqh* from a group of modern-educated Muslims who insisted on their right to derive laws from the Qurʾān and Sunna,

159 *Id.* at 274 (discussing, in Appendix 14: "Paramountcy of Islamic Law: The Example of the Majelle (Mujallah) of Turkey," the address given at Karachi High Court Bar Association Dinner on February 15, 1968).

160 Rashida Patel, Socio-economic Political Status and Women and Law in Pakistan 103 n.18, 111 (1991); Mst. Khurshid Jan v. Fazal Dad, (1964) PLD (Lahore) 558.

161 Patel, *supra* note 160, at 107 n.19, 111; Mst. Khurshid Bibi v. Muhammad Amin, (1967) PLD (SC) 97. The *ḥadīth* was reported in the judgment as follows: "Muadh-ibn-e-jabal . . . was sent by the Prophet as Governor and *Qazi* of Yemen. The Prophet asked him, how he would adjudicate cases. 'By the book of God', he replied: 'But if you find nothing in the Book of God, how?' 'Then by precedent of the Prophet.' 'But if there is no precedent?' 'Then I will diligently try to form my own judgement.' On this, the Prophet is reported to have said, 'Praise be to God who hath fulfilled in the messenger sent forth by his apostle that which is well-pleasing to the apostle of Allah,'" Patel, *supra* note 160, at 107.

162 Mawlana Muhammad Taqi Usmani, *Zikr-o-fikr: General Zia kay aylanat* [*Editorial Zikr-o-Fikr: General Zia's Announcements*], Al-Balagh, Mar. 1978, at 5.

unconstrained by the principles of reasoning accepted in the *fiqh* tradition, such as the authority of *ijmāʿ*:

> [F]or some time, such a social group has arisen among us which neither has that kind of belief-connection with the religion of Islam, as is required for the faithful, nor are those people bound to Islamic commands and laws in practice. But day, and night . . . with great gusto, they talk of new ijtihad and the codification of Islamic laws afresh. . . . These people declare only the Qurʾān as the source of Islamic law . . . when interpreting the Qurʾān, they don't consider themselves bound to any tradition or practice of the Companions, or the *ijmāʿ* of the community, or the exegesis of the Aaima . . . .
>
> [L]ike the Qurʾān , they interpret Prophetic traditions according to their free opinion. They have no fixed principles and rules for *istinbāṭ* and *istikhrāj* but because of being influenced by western education, western politics and the philosophies and rules of the west, and by Orientalists, their *ijtihād* and *istinbāṭ* is in reality a reflection of western thought and western laws.[163]

At an October 1979 seminar on *sharīʿa* application, organized by the Ministry of Law and Parliamentary Affairs, Justice Zakaullah Lodhi (Baluchistan High Court) seemed to personify Mawlana Kakakhel's fear when he repeated the "stagnation thesis" regarding the juristic tradition.[164] When he found himself on the Federal Shariat Court in 1981, he set his theory into motion by declaring the punishment of *rajm* (stoning to death) in the Hudood Ordinances to be un-Islamic arguing that the *ḥadīth* reports on which it was based were contradictory and unreliable.[165]

163 Mawlana Mufti Siyah-ud-din Kakakhel (Member CII), *Islami qanun ki tadveen-e-jadeed kay ausool aur tareeqay* [*The principles and method of the modern codification of Islamic law*], Al-Balagh, Mar. 1979, at 15–16 (author's translation).

164 Justice Zakaullah Lodhi, Ijtihad in the Process of Islamization of Laws (Oct. 9–11, 1979).

165 Hazoor Bakhsh v. Federation of Pakistan, (1981) PLD (FSC) 145.

This judgment led to outrage among the Deobandi *ʿulamāʾ*. *Al-Balagh*, the journal of Taqi Usmani's *madrasa*, published a joint statement by sixteen influential *ʿulamāʾ* condemning the FSC judgment as a violation of the fourteen-hundred year "*ijmai musallimat* of the *ummat*" (consensus-based established beliefs of the community).[166] A delegation of forty-five *ʿulamāʾ* visited General Zia to protest against the judgment and demand the appointment of *ʿulamāʾ* to the FSC.[167] Ghias recounts that the very next day, General Zia announced that the FSC would be reorganized and ordered a constitutional amendment providing for the inclusion of *ʿulamāʾ* and power for the FSC to review its decisions.[168] The bench reconstituted by Zia to review the 1981 *rajm* judgment comprised two "professional judges," Zahoor-ul-Haq and Siddique, and three "scholar judges:" two *madrasa*-educated *ʿulamāʾ*, the Deobandi scholar, Muhammad Taqi Usmani, and the Barelvi scholar, Muhammad Karam Shah, and Malik Ghulam Ali, who Ghias refers to as a "Jama'ati scholar" (that is, he was aligned with the Islamist Jamaat-e-Islami and Mawdudi).[169] With the participation of Acting Chief Justice Aftab Hussain, who had previously ruled in the 1981 judgment that stoning was a *taʿzīr* punishment not a *ḥadd*, this restructured bench "conducted 17 hearings, heard expert opinions of juriconsults, and unanimously overturned *Hazoor Bakhsh* on June 20, 1982." [170] Ghias is correct to note that Zia included the *ʿulamāʾ* in the FSC at this juncture, rather than before, because he needed to divide the opposition, which had coalesced in the Movement for the Restoration of Democracy (MRD) in 1981, including the Deobandi *ʿulamāʾ* party, the Jamiat-e-Ulama-e-Islam led by Mawlana Fazlur Rahman.[171] I agree with him that this increased the "bargaining power" of the *ʿulamāʾ*; however, I am concerned

166 Mawlana Muhammad Taqi Usmani, *Sharai adalat ka ghayr sharai faysla* [*The non-sharai decision of a Shari'at Court*], Al-Balagh, Mar. 1981, at 19–20 (author's translation).

167 Ghias, *supra* note 53, at 39; Mohammad Amin, Islamization of Laws in Pakistan 74 (1989).

168 Ghias, *supra* note 53, at 40.

169 *Id.* at 40–41. Ghias provides detailed biographies as well. *See id.* at 41–44.

170 *Id.* at 44.

171 *Id.* at 39.

less with the immediate political reason for the inclusion of *ʿulamāʾ* judges and more with how this inclusion *shifted the process of deliberation* inside the Federal Shariat Court, which can be seen through a comparison of the 1981 and 1982 revision judgment.[172] This inclusion bound common law and *ʿulamāʾ* judges in a long-term relationship based on civility and respect. Whereas polemics between liberals and Islamists in the public sphere were characterized by mutual demonization, in the FSC, the judges, following court procedure, addressed one another as "my learned brother." Nasim Hasan Shah, who served on the Supreme Court Shariat Appellate Bench under General Zia, cited a judgment of this court reported in 1986 that detailed its methodology—the crux of which was that judges were required to deeply engage with the *fiqh* tradition, considering "the accepted rules and principles of Ijtihad and Ijmah" and consulting "well-known authentic works" for precedents because if "judgments and opinions of foreign judges and jurists are accepted as legitimate guide" then "there should be no hesitation in examining the judgments and precedents from our own masters including Sahaba, Aimma and Ulema, old and new."[173] I believe this shift to "reciprocal reasoning" or reasoning *within* the fiqh tradition is a core reason why the deliberation of these courts is perceived as legitimate by the Deobandi *ʿulamāʾ* and Islamists, and why they can give principled commitment to constitutional democracy.

In the revised judgment, the main argument of both *ʿulamāʾ* judges, Usmani and Shah, from the Deobandi and Barelvi *maslak,* respectively, is that the understanding of the majority of *fuqahāʾ*, *ḥadīth* critics (*muḥaddithīn)*, and exegetes in the past is a more reliable guide to what is Islamic than individual opinions, and that these consensus opinions (*ijmāʿ)* of earlier scholars are binding on later generations.[174] Usmani asks how it was possible for these individual opinions on *rajm*, based on a re-interpretation of the Qurʾān and *ḥadīth*, to be "correct" when "for 1300 years all the . . . exegetes and *ḥadīth*-compilers,

172 *Id.*

173 Pakistan v. Public at Large, (1986) PLD (SC) 240, cited in Nasim Hasan Shah, Islamization of Law in Pakistan 9 (1992).

174 Federation of Pakistan v. Hazoor Bakhsh, (1983) PLD FSC 455–56, 479–80 (Taqi Usmani), 406–407 (Shah).

all the *fuqahāʾ* . . . and all those people of knowledge who spent their entire lives on the interpretation of every single word of the Qurʾān, all of them together remained under this error."[175] Both Deobandi and Barelvi *ʿulamāʾ*, and the lay judge who sided with them, spent considerable time explaining the criteria used by *muḥaddithīn* to evaluate the reliability of *ḥadīth*, in order to counter Justice Lodhi's blanket condemnation of *ḥadīth* as unreliable in the 1981 judgment because they were compiled 250 years after the Prophet's death and were based on "memories" rather than "chronicles" or "records."[176] The Barelvi *ʿālim* blamed Orientalist scholarship for leading modern Muslims astray.[177] *Madrasa*s studied sources of traditional Islamic literature and had never absorbed Muslim modernist scholarship from the 19th century that sought to interpret Islam in light of modern western thought and practices. By gaining a voice in the judiciary, the *ʿulamāʾ* had a chance to express why this kind of reasoning was unacceptable to them, as a matter of religious belief.

In their effort to explain themselves in the revision judgment, the *ʿulamāʾ* bridge concepts and principles from the common law tradition with the *fiqh* tradition. Mufti Taqi Usmani also endeavors to give common law judges reasons from within *their* legal tradition for the importance of respecting juristic consensus. He argues that just like the principle of *stare decisis* (precedent) is considered mandatory in the interpretation of secular laws, the principle of community consensus (*ijma-e-ummat*) was fundamental in the interpretation of Islamic laws.[178] Justice Zahoorul Ikhlaq also explains the authority of *ijmāʿ* in terms of common law jurisprudence, though he does not focus on the "truth" or "error" of religious doctrine (which was a concern for Usmani as a religious leader) but on how the courts should treat what was *regarded as true* by the Muslim community. For instance, he argues that the *ḥadīth* reports justifying *rajm* should

175 *Id.* at 456 (Taqi Usmani's opinion) (author's translation).

176 Justice Lodhi's reasoning is found in Hazoor Bakhsh v. Federation of Pakistan, (1981) PLD (FSC) 145, 212; the defense in the revision judgment is found in Federation of Pakistan v. Hazoor Bakhsh, (1983) PLD (FSC) 298, 311, 455–66.

177 Federation of Pakistan v. Hazoor Bakhsh, (1983) PLD (FSC) 406 (Shah's opinion) (author's translation).

178 *Id.* at 456.

be accepted as reliable not only because they are *mutawātir al-maʿānī* (continuous in meaning), a principle established in *fiqh*, but because they were *regarded as mutawātir al-maʿānī* by the Muslim community—because "they are part of the history of Muslims and even history can provide the basis of a law."[179] To support his argument, he draws on his training in English common law reasoning:

> In Maxwell on *Interpretation of Statutes* (12th Edn.) at page 56, we find the following principle:--"Lord Ellenborough C.J. said in *Isherwood v. Oldknow*, it is truer to say 'communis opinion is evidence of what the law is'. It would be unfortunate if doubt had to be thrown on a statement which has appeared in a well-known textbook for a great number of years without being judicially doubted and after it had been acted on by justices and their clerks for many years.[180]

In this judgment, the *ʿulamāʾ* explain why they regard *ijmāʿ*, rather than individual legal opinion, as an authoritative source of law, and Justice Zahoorul Ikhlaq finds a reason in common law jurisprudence for why Muslims, whose understanding of Islam may lead them to reject the binding authority of *ijmāʿ*, as the authors of the first *rajm* judgment had, should accept it as a legal convention (which, if overthrown, could threaten the integrity of the Islamic legal tradition).[181] To support the principle of *ḥadīth* criticism that oral reports that were "continuous in meaning," if not in words, could be considered reliable, Justice Ikhlaq cites an 1847 Privy Council judgment[182] that disagreement by witnesses on minute details made their testimony more credible, a judgment echoed by the Supreme Court of Pakistan in 1956.[183] He concludes that:

179 *Id.* at 311.

180 *Id.*

181 *Id.*

182 *Id.* Judgment cited by Ikhlaq is Josia Patrick v. Kishan Kumar Bose [1847] 4 MIA 201 (PC).

183 Federation of Pakistan v. Hazoor Bakhsh, (1983) PLD (FSC) 311. Judgment cited by Ikhlaq is (1956) PLD (FSC) 126.

> In the light of such dictum it is obvious that to expect that every Hadith will tally in every detail with a Hadith narrated by another person in respect of the same incident would be a futile hope as discrepancies are inevitable in different narrations. Therefore to discredit Ahadith on the basis of discrepancies would be wrong and would result in the destruction of one of the basic sources of Muslim Law.[184]

Similarly, Mufti Taqi Usmani not only explains why the 1981 *rajm* judgment used the terms "naskh" and "takhsees" in contrast to how they were understood in the *fiqh* tradition, using sources from the *fiqh* literature, but also explains the principle of "takhsees"—through which the punishment for violation of a general rule can be modified for particular cases of that general rule—through the secular Pakistan Penal Code (PPC).[185] He argues that Clause 379 of the PPC prescribes as a punishment for theft either three years of imprisonment, a fine, or both, and Clause 380 of the PPC prescribes the punishment of up to 7 years of imprisonment and a fine for the particular case of theft "in any building . . . used as a human dwelling."[186] In this way, he explains the logic behind the punishment of 100 lashes for *zinā*, if a person was unmarried, and stoning to death if he was married (conditioned on the testimony of four Muslim male eyewitnesses of good character).[187]

The inclusion of *ʿulamāʾ* on the reconstituted FSC panel had not silenced judges who wanted to make modernist arguments, but it compelled them to frame these arguments in terms of the *fiqh* tradition and *ḥadīth* criticism, to show why a certain legal position departed from the principles of reasoning and ideals of evidence-gathering that were considered authoritative by the *ʿulamāʾ* themselves. In the 1982 revision judgment, Justice Aftab Hussain disagrees with the *ʿulamāʾ* because he believes that the timing of hadith reports show that *rajm* was a discretionary state punishment (*taʿzīr*) rather than a fixed punishment

184 Federation of Pakistan v. Hazoor Bakhsh, (1983) PLD (FSC) 311.
185 *Id.* at 414.
186 *Id.*
187 *Id.*

commanded by God (*ḥadd*).[188] His argument was based on scholarship on the history of evolution of *fiqh* (presented by Prof. Ghazi[189]) that showed that the terms "*ḥadd*" and "tazir" were developed by jurists after the Prophet's death and that he awarded stoning only as a "tazir" punishment.[190] He notes how his "learned brother Peer Mohammad Karam Shah and Maulana Muhammad Taqi Usmani maintained the juristic definition of Hadd and Tazeer" and "did not consider my reasoning on the subject."[191] He also cites the legal opinion of Allama Anwar Shah Kashmiri that the real (and primary) *ḥadd* was that described by Qurʾān (100 lashes), while *rajm* is a secondary *ḥadd*, which was not mentioned in the Qurʾān so that it remained unknown and it could be repelled from the people.[192] The punishment that could not be repelled was the sentence of lashes.[193] While in the 1981 *rajm* judgment, Justice Lodhi condemns *ḥadīth*, in general, because oral reports compiled 250 years after an event couldn't possibly be as reliable as a chronicle or record,[194] Justice Aftab Hussain argues that "[t]he only satisfactory criteria to judge authenticity of traditions are those laid down by traditionists," and criticizes the jurists who used the *ḥadīth* reports on *rajm* as evidence, for not stringently evaluating these reports based on the criteria of *ḥadīth* criticism, and instead just accepting that these incidents had been "proved" or that "there is ijma on this point."[195]

The institutional learning set in motion by the inclusion of *ʿulamāʾ* as judges in the FSC and Shariat Appellate Bench of the Supreme Court allowed common law judges to develop what Rabb regards as deliberative legitimacy, in reference to the Egyptian judiciary.[196] Judges not only supported the *ʿulamāʾ* in certain cases, such as in declaring *rajm* Islamic or recommending the Qisas and Diyat ordinances, but they also pushed back against

188 *Id.* at 287 (Justice Aftab Hussain's opinion).
189 *Id.*
190 *Id.*
191 *Id.*
192 *Id.* at 291.
193 *Id.*
194 Justice Lodhi's reasoning is found in Hazoor Bakhsh v. Federation of Pakistan, (1981) PLD (FSC) 145, 212.
195 Federation of Pakistan v. Hazoor Bakhsh, (1983) PLD (FSC) 298.
196 Rabb, *supra* note 48.

the *ʿulamāʾ*'s interpretations when they were unacceptable to them. For instance, when a citizen filed a petition challenging the requirement for photographs for the national ID card as un-Islamic, both the *ʿulamāʾ* and common law judges on the Shariat Appellate Bench of the Supreme Court agreed that the use of photographs in this case was not un-Islamic because they were required for security reasons.[197] However, Justice Shafi-ur-Rehman and Justice Nasim Hasan Shah disagreed with *fiqh* opinions on the impermissibility of human representation in art, and Justice Shah cited the Qurʾān (5:6) to argue that these opinions would hamper "development" and "progress."[198] For the purposes of this case, the *ʿulamāʾ* and common law judges did not need to spend so much time on discussing the Islamic tradition but the fact that they had the discursive tools to do so—despite their deep moral disagreements—is testament to the possibility of evolving a "public reason" for *sharīʿa* in an internally diverse Muslim polity.

Part V: The Case Study of Hudood Reform in Pakistan

The drafting and decree of the Hudood Ordinances, 1979 was the result of an exclusionary and coercive process. General Zia gave the Deobandi *ʿulamāʾ* a voice in its drafting but was actively repressing activists of the center-left Pakistan People's Party (PPP), denying them not only a voice in this legislation but political freedoms more broadly. Its reform through the Protection of Women Act, 2006 was also the result of an exclusionary and coercive process. In what follows, I discuss (1) the origins of the Hudood Ordinance, 1979; (2) the demand

197 (1986) PLD (SC) 642–43 (Barelvi scholar Pir Muhammad Karam Shah's arguing that photographs representing a full physical form are "*makrooh*" (not liked) but since the photo on an ID is not of the full body, it is permissible; and that the principle of "*zaroorat*" (necessity) in *fiqh* renders photographs permissible for state security); 672 (Deobandi scholar Mufti Taqi Usmani, taking the most conservative position, arguing that it is impermissible to make and keep pictures, but also saying that where there is a "real need," pictures are permitted).

198 *Id.* at 622 (Justice Nasim Hasan Shah's opinion); 623, 628–29 (Justice Shafi-ur-Rehman's opinion), 578 (Justice Muhammad Afzal Zullah's opinion, which provided a middle ground between the two *ʿulamāʾ* judges and the common law judges who disagreed on the permissibility of photographs in Islam).

for repeal by the Women's Action Forum from 1981 to 1999; (3) General Musharraf's initial cooptation of women's rights groups and shift to an alliance with the Islamist Muttahida Majlis-e-Amal (MMA) from 2002 to 2005; (4) the marginalization of Deobandi *ʿulamāʾ* in debates preceding the Protection of Women Act, 2006; (5) Federal Shariat Court's judgment in 2010, which struck down several provisions of the PWA, 2006 as un-Islamic; and (6) Mufti Taqi Usmani's theological critique of the PWA, 2006.

1. Origins of the Hudood Ordinance, 1979

While Prime Minister Zulfiqar Ali Bhutto was in jail, General Zia coopted the influential Deobandi scholar Mufti Muhammad Taqi Usmani into the Council of Islamic Ideology (CII) and between 1977 and 1978, the CII deliberated on *fiqh*-based laws. One of its proposals was to re-institute the *ḥadd* punishments given in Ḥanafī *fiqh*: public stoning to death, lashing, and the amputation of limbs. In December 1978, General Zia announced that the *ḥadd* punishments of *sharīʿa* would be enforced on the Prophet's birthday on the 12th of Rabiul Awal (February 10, 1979). In an *Al-Balagh* editorial, Usmani said that "the entire nation" listened to the President's announcement of the Hudood Ordinances with "great enthusiasm" and "generally in the entire country happiness was expressed on them."[199] The re-institution of punishments from Ḥanafī *fiqh* won General Zia the enthusiastic support of the country's leading Deobandi *ʿulamāʾ* at the time when he most needed it: he decreed the laws just before the Supreme Court announced that Bhutto would be hanged (a sentence now widely considered as "judicial murder").[200] However, as he coopted the *ʿulamāʾ*, he was repressing the center-left PPP, and progressives were entirely excluded from the drafting of these ordinances.

199 Mawlana Muhammad Taqi Usmani, *Tareekhi aylanat aur fauri islah talab amoor* [*Historic Announcements and matters requiring immediate reform*], Al-Balagh, Jan. 1979, at 3 (author's translation).

200 Bhutto's sentence can be found in (1979) PLD (SC) 53 (Criminal Appeal No. 11 of 1978). The Supreme Court announced its verdict on February 6, 1979. Bhutto was hanged on April 4, 1979.

Since CII reports were not publicly disseminated until the 2000s, clues about the *ʿulamāʾ*'s thought process did not filter into liberal discussions about the Hudood Ordinances for decades. For instance, a *Dawn* editorial from October 2000 reported the perspective of Dr. Faqir Hussain, an official of the Pakistan Law Commission.[201] Hussain felt that the Hudood Ordinances "had come as a bolt from the blue" because General Zia's regime "held no debate on the ordinances, simply because the reasons behind the enforcement of the laws were political."[202] The *Dawn* editor agreed with him.[203] He said that "while a school of ulema approves these ordinances—for it cooperated with the Zia regime in their enactment—many ulema and Islamic scholars have serious reservations about them."[204] Since General Zia timed the Hudood Ordinances to extract maximum political gain, it is plausible that his primary, if not sole, motive was political. But the Deobandi *ʿulamāʾ* who sat on the 1977–78 commission were not simply his puppets. Their interpretation of Ḥanafī *fiqh*, particularly their belief that the juristic consensus on *ḥadd* punishments had binding authority for contemporary Muslims, was shared by the country's leading *madrasa*s.

Liberals from the westernized Muslim bourgeoisie writing in Pakistan's English newspapers did not see this institutional point. They could have—had they access to CII reports and to the *ʿulamāʾ*'s discussions in *madrasa* journals—but the former were not publicly available, and the latter were buried in archives, known only to specialist scholars of Islam. In the absence of genuine knowledge about the Muslim juristic tradition or the Deobandi *ʿulamāʾ*, this class viewed the problem through its cultural blinders—a process that was only aggravated by international rights discourse that mirrored their own prejudices.

201 *Need for a review*, Dawn, Oct. 26, 2000.
202 *Id.*
203 *Id.*
204 *Id.*

2. Demand for Repeal by the Women's Action Forum, 1981–1999

Opposition to the Hudood Ordinances was led by the Women's Action Forum (WAF) from 1981, and in the 1990s, by western-funded rights NGOs founded by WAF members, such as Aurat Foundation and Shirkat Gah, though perhaps the most influential voice was that of Asma Jehangir, a lawyer who ran a legal aid center for women. The first detailed study of the legal and social impact of the Hudood Ordinances was Asma Jehangir and Hina Jilani's *The Hudood Ordinances: A Divine Sanction?*.[205] In its foreword, Dorab Patel, a retired Supreme Court justice, explained the structural reasons why the Hudood Ordinances led to human rights abuses, but in the book itself, Jehangir and Jilani framed these structural issues within a broader attack on the religious beliefs and intellectual integrity of the *'ulamā'*.[206] Dorab Patel explained that rape complainants were convicted of *zinā* because of two incorrect assumptions by the police:

> The first is that the allegation of rape by the victim was false, because the accused was acquitted . . . . The second assumption is 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 . . . . This assumption is against common sense, because a confession is an admission of guilt while an allegation of rape is a repudiation of guilt. Further the law declared on this question by the Supreme Court (PLD 1978 SC 200) is clear beyond any doubt. We held in this case that only a statement which is a clear admission of guilt, or of the facts constituting the guilt, is a confession . . . a statement cannot be treated as a confession by relying on the inculpatory part and excluding the exculpatory part.[207]

205 Asma Jehangir & Hina Jilani, The Hudood Ordinances: A Divine Sanction? (A research study of the Hudood Ordinances and their effect on the disadvantaged sections of Pakistan society) (Sang-e-Meel Publications 2003) (1990).

206 Dorab Patel, *Foreword* to Jehangir & Jilani, *supra* note 205, at 13–15.

207 *Id.* at 14.

According to his explanation, the Zina Ordinance led to the prosecution of rape complainants because the crime was made cognizable, according to the criminal procedural code, giving the police the authority to register First Information Reports (FIRs). Women were convicted because sessions court judges ignored the Supreme Court precedents on what counted as an acceptable confession. Neither of the problems he identified occurred due to the *text* of the Ḥanafī doctrine used in the law. Second, he explained that trial court judges wrongly took pregnancy as evidence of *zinā*, viewing it either as circumstantial evidence or an implied confession.[208] Third, Patel observed that sessions courts continued to convict couples of *zinā* based on the lack of a marriage or divorce certificate even though judicial precedents were clear that a couple only had to produce a *nikāḥnāma* or give a statement that they were married to be acquitted.[209] He noted that although the FSC struck down these convictions on appeal, "agony [was] inflicted on the accused in contesting such charges."[210] Moreover, most poor defendants did not have "the luxury of appeal."[211] Patel's analysis attributes the problem not to the Ḥanafī opinion in the text of the law but to the fact that trial court judges were co-reading the *taʿzīr* section of the law with the modernist Muslim Family Laws Ordinance (MFLO), 1961, which introduced mandatory documentation for marriage and divorce.

However, Jehangir and Jilani encased their legal analysis in a criticism of the *ʿulamāʾ* and Islamists:

> While the fundamentalists always wanted to enforce Islamic laws, they were themselves not clear or agreed on the basic concept of an Islamic State[212]. . . . Nevertheless, a strong lobby of obscurantists kept working for changing the entire legal system to an Islamic form. This lobby despite being active, organized and politicised, lacked and still lacks mass popular support.

208 *Id.*
209 *Id.* at 15.
210 *Id.*
211 *Id.*
212 Jehangir & Jilani, *supra* note 205, at 17.

> Their inability to capture public support is an indication of the people's desire to keep religion and politics separate. Perhaps another reason for lack of support to the Islamic political parties is their pre-Partition political stance. Most of them opposed the creation of Pakistan and strongly criticised the founder of the nation, Muhammad Ali Jinnah.[213]

The authors invoked the 1954 Munir Report's caricature of the ulama as evidence of the *ʿulamāʾ*'s conceptual confusion and tried to de-legitimize their demand for Islamic laws by branding them as anti-nationalists.[214] They argued that several provisions of the Hudood Ordinances were "unacceptable to the contemporary educated mind," including the different weight accorded to the testimony of men versus women, Muslims versus non-Muslims, which discriminated on the basis of sex and religion.[215] They referred to the *ḥadd* punishments as "barbaric."[216] When the PPP came to power in 1993, Iqbal Haider, the Federal Minister for Law promised at an event sponsored by the Human Rights Commission of Pakistan (HRCP) on International Human Rights Day that laws with gender discrimination would be "repealed" and that the Qisas and Diyat Ordinance, a "discriminatory law," and Hudood Ordinances were under review.[217] Speaking at the same event, Asma Jehangir, both a WAF leader and now Chairperson of the HRCP, called the Hudood Ordinance an "anti-women" law and demanded its repeal, adding that it was "not Islamic in any way" and "was passed in the days of Martial Law."[218] In January 1994, the advisor to PM Benazir Bhutto on education, Shahnaz Wazir Ali, said that the Zina Ordinance had "legalized rape,"[219] and the next year, as the special

213 *Id.*
214 *Id.*
215 *Id.* at 21–22.
216 *Id.* at 47.
217 *Iqbal promises women's courts: Zina, Diyat laws being reviewed*, Dawn, Dec. 11, 1993.
218 *Victim women narrate tales on Human Rights stage: Hudood, Diyat, Qisas laws under review, says Iqbal*, The Nation, Dec. 10, 1993.
219 *Zina Ordinance has legalized rape, says Shahnaz*, The News, Jan. 29, 1994.

assistant to Benazir Bhutto, she said that Bhutto would fulfill her 1988 campaign promise by repealing all ordinances passed by Zia that "degrade women to a second class citizen."[220] In 1996, under Bhutto, Pakistan ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Asma Jehangir and Shahla Zia, WAF members who headed HRCP and the women's rights group Aurat Foundation respectively, were appointed to the Commission of Inquiry for Women, headed by Justice Nasir Aslam Zahid.[221] In its 1997 report, this Commission recommended repeal of the Hudood Ordinances, a fact that Justice (r.) Majida Rizvi, the Chairperson of the National Commission on the Status of Women (NCSW) appointed by General Musharraf, cited as support for her own insistence on repeal rather than reform.[222]

Western-funded women's rights groups, such as Aurat Foundation, backed the 1997 Report of the Commission of Inquiry for Women.[223] A newsletter published by Aurat Foundation argued that the authority to discuss and decide gender-related issues should reside with parliament, not with a few judges on the FSC.[224] They also branded the Hudood Ordinances as discriminatory towards women because *ḥadd* punishments could only be given on the testimony of four adult Muslim male eyewitnesses of good character.[225] The gender equality screening requirement

220 *Hadood Ord to be repealed, says Shahnaz*, Dawn, May 29, 1995.

221 Ayesha Khan, Pakistan's National Commission on the Status of Women: A Sandwich Strategy Initiative (2021), *available at* https://accountabilityresearch.org/wp-content/uploads/2022/05/Khan_Ayesha_2021_Pakistan_NCSW_A-Sandwich_Strategy_Initiative.pdf (last visited June 10, 2025).

222 *See* Kamran Haider, *These laws are full of copious lacunas and other anomalies*, The News on Sunday (Sept. 14, 2003) (Interview with Justice (r.) Majida Rizvi, Chairperson National Commission on the Status of Women). Dr. Zaman, the CII Chairman at the time, urged reform, rather than repeal, through consultation with religious scholars, so that the law was acceptable to a "majority" of Muslims. His position can be found in Kamran Haider, *It can't be a simple yes or no*, The News on Sunday (Sept. 14, 2003) (Interview with Dr. S.M. Zaman). The two reports are Report of the Commission of Inquiry for Women: Pakistan (Pakistan Law Commission 1997); Report on Hudood Ordinances, 1979-2003, National Commission on the Status of Women (Gov't of Pakistan 2003).

223 Aurat Foundation, Legislative Watch Quarterly Newsletter 5, at 2 (1997).

224 *Id.*

225 *Id.*

of the international rights bureaucracy led them to focus their campaign on changing the text of the *ḥadd* section of the law, which had no practical consequences (on its own, without interaction effects with colonial procedural codes and legal interpretation) *and* was regarded as unchallengeable religious doctrine by Deobandi *ʿulamāʾ*. For instance, an Aurat Foundation newsletter (funded by Norway) repeated the story that the Hudood Ordinances were a "politically expedient" measure, neglecting the *ʿulamāʾ*'s moral (*fiqh*-based) reasons for wanting the laws.[226] It argued that the Hudood Ordinances satisfied CEDAW's requirements for gender discrimination by highlighting that *ḥadd* punishments could only be given on the testimony of four male Muslim eyewitnesses of good character.[227]

The newsletter then called on the two mainstream political parties not to "remain hostage to the negligible religious orthodoxy" in the country and to repeal the laws, in order to demonstrate to women that they were equal citizens.[228] Activists framed the repeal of the Hudood Ordinances as a self-evident and uncontroversial matter and portrayed their position on Islam as "correct" and that of the Deobandi *ʿulamāʾ* who drafted the *ḥadd* section as "false." They did not address the issue that the *madrasa*-educated *ʿulamāʾ* and their followers regarded the Ḥanafī doctrine used in the *ḥadd* section as authoritative and that a Pakistani ruler who repealed this law, was, in the eyes of conservatives, declaring their belief to be false.[229]

226 Aurat Foundation, Legislative Watch Quarterly Newsletter 2–3, at 1 (c. 1990). The editorial explains that women's and human rights groups have opposed the Hudood Ordinances, "from the very beginning" as being "unjust" and "un-Islamic" because they saw them as a "politically expedient measure on the part of the then martial law regime for justifying its unlawful continuance in power." *Id.* The demand for repeal is repeated in Aurat Foundation, Legislative Watch Quarterly Newsletter 24, at 1 (Apr.–June 2008). Newsletters since 2001 are available here: https://www.af.org.pk/newsletter-archive.php.

227 *Id.*

228 *Id.* In 2002, they asked General Musharraf to repeal the Hudood Ordinance. *See* Aurat Foundation, Legislative Watch Quarterly Newsletter 17, at 1 (Feb. 2002).

229 The newsletter describes all these legal effects due to the *tazir* section as "inherent dangers of the Hudood Ordinances" and removing the law as the only solution.

Occasionally, the newsletter hinted at the deeper structural problems that led to rights abuse, but it still focused on the Ḥanafī doctrine regarding *ḥadd* punishments, which created a sensational story of Islam brutalizing women. For instance, the newsletter states that the Fehmida-Allah Buksh case was "the first sentence of stoning to death and flogging for zina . . . passed by a Sessions Court in 1981" because the couple had not registered their marriage in time.[230] It added that the Supreme Court dismissed this judgment because the *ḥadd* punishment for *zinā* could not be given without the requisite four male Muslim eyewitnesses.[231] But instead of recognizing that *ḥadd* punishments were awarded due to the mistakes of trial court judges and reversed on appeal to the superior judiciary, activists highlighted the *ḥadd* punishments as if they were the main source of rights abuse (an instance of what Saba Mahmood has called "selective omission").[232]

The newsletter referred to the *ʿulamāʾ* and Islamists as either a "negligible religious orthodoxy" or as "vested interest groups" who have "tried to create the impression that the opposition to the Hudood laws is restricted to just a handful of 'westernized' women."[233] Instead of acknowledging the moral reasons of the *ʿulamāʾ*, the newsletter represented them as cartoons and monsters.[234] At the end was a demand for repeal[235]—not consensus-building, amendment, or reform—and a footnote in small print acknowledged: "Printing funded by the Royal Netherlands Embassy."[236] This was the form that European efforts to promote women's rights and liberalism took in Pakistan, when these ideas were articulated by activists from the westernized Muslim elite. Western funding enabled activists to present their historical (and unexamined) prejudices towards the Muslim juristic tradition as a question of "self-evident" rights and diverted them from engaging in a *political* struggle for rights, which

230 Aurat Foundation, *supra* note 226, at 1–4.
231 *Id.* at 1–4.
232 This is a term used by Mahmood, *supra* note 42, at 201.
233 Aurat Foundation, *supra* note 226, at 1–4.
234 *See id.* at 1–4.
235 *Id.* at 4.
236 *Id.* at 4 n.

would have required building mass-membership associations, engaging in a lateral conversation with other social and political actors, and subjecting their beliefs about Islam to scrutiny.

It would be unfair to characterize all western-funded NGO activists as the same. Essays in *Shaping Women's Lives*, a volume published by Shirkat Gah, which was funded by Germany, Norway, and Holland,[237] showed the variation among activists. In one essay, Hassam Qadir Shah acknowledged Mufti Taqi Usmani's argument, from a 1989 judgment, that the reasoning of common law judges that honor killings were motivated by "grave and sudden provocation," and therefore deserved a lower punishment, was un-Islamic.[238] In another essay, Farida Shaheed—a sociologist, WAF member, and Director of Shirkat Gah—urged a cultural approach to rights, arguing that "[i]n the context of human rights discourses and activism, the dissociation of the law from culture fosters an illusion of the law being an independent entity . . . that can be seen and therefore addressed divorced from its surrounding; a tendency that may be encouraged by the current emphasis on the universality of rights."[239] Shaheed, and the Women Living Under Muslim Laws (WLUML) transnational solidarity network in which she participated, devoted significant effort to engaging with the Islamic tradition.[240] However, since the Women's Action Forum, and the western-funded rights groups run by several of its members, worked as lobby-cum-pressure groups, relying on media

237 *Shaping Women's Lives* was an edited volume published by Shirkat Gah Resource Center in 1998, with funding from the Heinrich Boll Foundation (Germany) and help from NORAD (Norway) and NOVIB (Holland). See the Acknowledgements section in Shaping Women's Lives (Farida Shaheed, Sohail Akbar Warraich, Cassandra Balchin & Aisha Gazdar eds., 1998), *available at* https://shirkatgah.org/shirkat/wp-content/uploads/2017/01/Shaping-Womens-Lives.pdf.

238 Hassam Qadir Shah, *Reflections on the Law of Qisas and Diyat*, *in* Shaping Women's Lives, *supra* note 237, at 263 (discussing Federation of Pakistan through Secretary Ministry of Law v. S. Gul Hassan Khan, (1989) PLD (SC) 633.

239 Farida Shaheed, *Engagements of Culture, Customs and Law: Women's Lives and Activism*, *in* Shaping Women's Lives, *supra* note 237, at 63–64. For an internal critique of the strategies adopted by the Pakistani women's rights movement *vis a vis* religion, see Farida Shaheed, *The Other Side of the Discourse: Women's Experiences of Identity, Religion and Activism in Pakistan*, in Shaping Women's Lives, *supra* note 237, at 415.

240 *Id.* at 64. Shaheed mentions her association with WLUML.

campaigns to publicize human rights abuses, the voices of activists who used the most sensational, black-and-white language about Islamic laws became amplified, drowning out the voices of those with a more nuanced approach who were willing to give the *ʿulamāʾ* credit where it was due.

3. General Musharraf's Initial Cooptation of Women's Rights Groups and Shift to Alliance with Islamist Muttahida Majlis-e-Amal (MMA), 2002–2005

The first impetus for *ḥudūd* reform in the Musharraf period came from the sensational media coverage, particularly in the west, of the trial of Zafran Bibi.[241] In April 2002, a sessions court awarded Zafran Bibi the punishment of stoning to death.[242] The judge took her pregnancy, and the fact that her husband was in prison, as proof of adultery, even though she had accused a male relative of rape.[243] Within two weeks, a newspaper article by a Pakistani legal expert appeared in *Dawn* explaining that Zafran Bibi was convicted of adultery and sentenced to stoning because the sessions court judge had overlooked the precedent set by the FSC on the question.[244] But *The New York Times* represented the issue with the following sensational headline: "In Pakistan, Rape Victims Are The 'Criminals.'"[245] The journalist, Seth Mydans, gave a pithy summary of Zafran Bibi's plight: "Her crime: she had been raped. Her sentence: death by stoning."[246] His main sources for the article were Rukhshanda Naz, an Aurat Foundation activist, and Asma Jehangir, former Chairperson of the

241 Zafran Bibi v. State, (2002) PLD (FSC) 1, discussed in Cheema, *supra* note 28, at 146.

242 *Id.* at 147.

243 Abdul Sami Paracha, *Fair retrial of female convict urged*, Dawn, Apr. 21, 2002.

244 Waseem Ahmad Shah, *Precedent overlooked in Zafran case: legal experts*, Dawn, May 5, 2002. The cases are (1986) PLD (FSC) 274 and (1988) PLD (FSC) 42.

245 Seth Mydans, *In Pakistan, Rape Victims Are the 'Criminals,'* N.Y. Times (May 17, 2002), https://franpritchett.com/00indislam/12now/txt_pakistan_rape.htm.

246 *Id.*

Human Rights Commission of Pakistan.[247] Based on his research, he portrayed the law in the following terms:

> The man Ms. Zafran accused, Jamal Khan, was set free without charges. A case against him would have been a waste of the court's time. Under the laws of zina, four male witnesses, all Muslim and all citizens of upright character, must testify to having seen a rape take place. . . . The victim's accusation also carries little weight; the only significant testimony she can give is an admission of guilt.[248]

Similar to *The New York Times*, the BBC cited this NGO-spin as a statement of fact four years later, claiming that "[u]ntil now, rape cases were dealt with in Sharia courts. Victims had to have four male witnesses to the crime – if not, they faced prosecution for adultery."[249] Four male witnesses were not required to prove rape according to *sharīʿa* but somehow this claim found its way from the statements of Pakistani rights activists into the western media and even into western scholarship. For instance, Leila Ahmed, in *Women and Gender in Islam*, relied on a volume of essays published by the Pakistani women's rights NGO Shirkat Gah (funded by Germany, Norway, and Holland) to give the following assessment of the Hudood Ordinances:

> Four adult male Muslim eyewitnesses were required to convict anyone of adultery or rape, and the testimony of women for either was excluded. Women who accuse men of rape or who become pregnant are thus open to punishment for adultery, while men go unpunished for lack of evidence. The researchers whose work I report here cite a number of cases of monstrous brutality and

247 *Id.*

248 *Id.*

249 *Islamists debate rape law moves*, *supra* note 1. The same claim can be found in Hasan, *supra* note 141. The following earlier article had ascribed the four witnesses to prove a rape claim to "Pakistan's independent human rights commission." Zaffar Abbas, *Women's bill splits Pakistani MPs*, BBC News, Mar. 31, 2004.

> injustice meted out by the Islamic courts under the penal code.[250]

Anita Weiss repeated the "four-male-witnesses-required-to-prove-rape" statement in 1993, although she specified that it was the claim of women's rights activists.[251] Publications by women's rights activists in Pakistan reflected the perspective of women from its westernized, Anglophone elite who wanted the Hudood Ordinances to be repealed. These publications were sometimes closely tied to the authors' advocacy and did not incorporate any of the Urdu-language scholarship of the *ʿulamāʾ* and Islamists. They did not analyze the FSC and Supreme Court judgments in which judges gave reasons for why the *ḥadd* punishments had to be upheld due to juristic consensus. By drawing on these feminist advocacy materials for data about the Hudood Ordinances, scholars of feminism based in the west sometimes—perhaps unwittingly—reproduced the biases of Pakistan's westernized elite.

Once the western media gave sensational coverage to the Zafran Bibi case, Pakistani rulers jostled with one another to establish their liberal credentials. Benazir asked General Musharraf to "commute" the stoning sentence given to Zafran Bibi and told reporters that she was worried that "General Musharraf and his team were in the grip of hardliners, as evidenced by the treatment meted out to Zafran Bibi."[252] By using the term "hardliners," she was invoking War on Terror rhetoric and in calling for the sentence to be "commuted," she was, in essence, challenging General Musharraf to attack the beliefs of traditional Islamic institutions to prove that he was not a

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250 Ahmed, *supra* note 42, at 234, taken from Women of Pakistan: Two Steps Forward, One Step Back? (Khawar Mumtaz & Farida Shaheed eds., 1987).

251 Anita Weiss, *The Transformation of the Women's Movement in Pakistan*, *in* Contemporary problems of Pakistan 200 (J. Henry Korson ed., 1993): "The argument forwarded by women's groups was that besides making a woman suffer twice, the use of an illegitimate birth as a criterion for a woman's 'self-confession' was discriminatory as it could not be used for men. Yet it is nearly impossible to prove a man's guilt without his verbal confession, for what four salah (pious) Muslim men would stand by and let a woman be raped?"

252 *Benazir urges commutation of Zafran's sentence*, Dawn, May 15, 2002.

"hardliner."[253] Women's rights activists echoed Benazir's stance. WAF activists called the Hudood Ordinance not only "unjust" but also "un-Islamic" and a "black law;" Hina Jilani, Asma Jehangir's sister and Secretary of the Human Rights Commission of Pakistan (HRCP), demanded repeal of the *ḥudūd* and of the FSC, arguing that "if one general could introduce an obnoxious law another could certainly repeal it."[254]

The FSC exonerated Zafran Bibi in June 2002 but the media attention and NGO protests during her case had led General Musharraf to set up committees to review the Hudood Ordinances in the National Commission on the Status of Women (NCSW), which he established as a permanent body in 2000, and in the Council of Islamic Ideology.[255] In May 2002, Musharraf appointed the NCSW Chairperson Justice (retd.) Majida Rizvi as the head of an 18-member special committee and it was reported in August 2003 that the committee had decided by majority vote that the Hudood Ordinance should be repealed rather than amended.[256] The NCSW ignored the suggestion of two members, the CII Chairman Dr. S.M Zaman and Dr. Fareeda, that the *ḥadd* punishments ought to be retained and changes be made only to the state-discretionary (*taʿzīr*) section.[257] Justice Rizvi began a campaign for repeal through the English print media, seminars co-organized with western-funded women's rights NGOs, and vernacular television channels, all the while maintaining that the decision for repeal was the *official* NCSW proposal based on a majority vote.[258] She neglected to mention that liberals on the Commission had ignored the moral reasons of the *ʿulamāʾ* and Islamists for why the Hudood Ordinances ought to be amended rather than repealed.

253 *Id.*

254 *WAF vows to fight for Hudood laws' repeal*, Dawn, May 15, 2002.

255 *FSC exonerates Zafran Bibi*, Nation, June 7, 2002; Imtiaz Gul, *Hudood Laws review committee set up*, Daily Times, May 9, 2002; *CII to revise Hadood laws*, Daily Times, May 17, 2002.

256 Khawar Ghumman, *Repeal of Hudood law recommended*, Dawn, Aug. 31, 2003.

257 *The News on Sunday* conducted interviews with both, which illustrate their positions. *See* Haider, *These laws*, *supra* note 222; Haider, *It can't be a simple yes or no*, *supra* note 222.

258 Haider, *These laws*, *supra* note 222.

Meanwhile, Islamist women protested that the NCSW did not speak for them. A Muttahida Majlis-e-Amal (MMA) legislator from Baluchistan, Bilqees Saif, said that the *ḥudūd* were "divine laws that cannot be repealed" and it was "only some westernized women with no roots in our society who are demanding a repeal of the Hudood."[259] She said that the problem was with the implementation of laws, which ought to be fixed to protect women.[260] Similarly, at a seminar, the Jamaat-e-Islami women's commission passed the resolution that "the violation of women's rights stems not from the Hudood laws, but from the way that they are implemented."[261] They supported their case by citing a Human Rights Watch report, which attributed the rights abuses under these laws to legal procedure and the police, and recommended that the government create women-staffed medico-legal boards and train them to examine women victims of crime.[262] The Jamaat women offered concrete and theologically uncontroversial solutions. Yet liberals ignored this suggestion to adopt a conciliatory approach and insisted on repeal.

General Musharraf used the division between liberals and Islamists to his advantage. The Islamist MMA, a coalition of ulama parties and the Jamaat-e-Islami, reportedly received reassurance from the regime that it would leave the Hudood Ordinances alone if MMA endorsed the Legal Framework Order (LFO), which provided constitutional cover for Musharraf's rule.[263] The MMA had been opposing the LFO along with other political parties but in December 2003, it gave in; MMA leader Qazi Hussain Ahmed said a constitutional amendment "was needed because President Musharraf had changed the shape of the Constitution, but sought an assurance from the ruling party that Islamic provisions and the Hudood laws enforced by former

259 Nadeem Iqbal, *Head-on on Hudood*, The News on Sunday, Sept. 24, 2003.

260 *Id.*

261 *JI for new body to deal with crimes against women*, Daily Times, Oct. 24, 2003.

262 *Id.*

263 Raja Asghar, *NA okays 17th Amendment: ARD, allies boycott vote*, Dawn (Dec. 30, 2003), https://www.dawn.com/news/131650/na-okays-17th-amendment-ard-allies-boycott-vote.

president Gen Ziaul Haq would not be touched."[264] General Musharraf, in turn, stepped back from *ḥudūd* reform. Justice Rizvi, however, persisted, and in January 2004, she launched the NCSW report that recommended *ḥudūd* repeal; newspapers carried a photo of the event showing Justice Rizvi, Sherry Rehman of the PPP, and European ambassadors side by side.[265] Despite their best efforts, General Musharraf did not budge.

It was only from late 2005 onward, when General Musharraf was closer to the end of his agreed term, that his government showed an interest in the campaign. In early November, the *Daily Times* reported that the International Religious Freedom Report[266] was released by the U.S. State Department, which revealed that the U.S. was pressing the Pakistani government to revise the Hudood Ordinances and blasphemy laws.[267] Nilofer Bakhtiar, the Adviser to the PM on Women Development in Musharraf's regime, said in a Voice of America interview on December 25, that the Hudood Ordinance was a "black law" and needed to be amended.[268] She added her own doctrinal interpretation, which echoed the NGO-spin on the issue:

> Some people claim that it is a Quranic Law, but it is not written anywhere. . . . It is not written anywhere that a woman has to produce four Muslim witnesses when she is raped. They should be good Muslims and should have seen the rape with their eyes. If she cannot prove it then she will be put behind bars. Now a debate is continuing on the issue in the country.[269]

General Musharraf's support for the *ḥudūd* amendment campaign intensified after news broke that Condoleezza Rice was

264 *Id.*

265 *Reports on Hudood ord, women status launched*, Dawn, Jan 23, 2004.

266 U.S. State Department, *International Religious Freedom Report for Pakistan*, 2005, https://2009-2017.state.gov/j/drl/rls/irf/2005/51621.htm (last visited June 10, 2025).

267 *US censures Pakistan for religious discrimination*, Daily Times, Nov. 10, 2005.

268 *Hudood Ordinance is a black law and must be amended*, Daily Times, Dec. 25, 2005.

269 *Id.*

mediating talks between Musharraf and Benazir Bhutto of the Pakistan People's Party (PPP) for Pakistan's future political set-up.[270] It was from this point that the Musharraf regime actively pursued *ḥudūd* reform, echoing NGO talking points and excluding the *madrasa*-educated *ʿulamāʾ* from decision-making in the CII and parliament.

4. Marginalization of Deobandi ʿUlamāʾ *in Debates Preceding Protection of Women Act, 2006*

i. Television Debates on GEO: A Step Forward or a Trap?

In June 2006, GEO News sponsored a debate on the Hudood Ordinances under the banner of its "Zara Sochiye" (Just Think) initiative.[271] This gave the reform process the illusion of a free and fair debate but, in reality, General Musharraf had excluded influential Deobandi *ʿulamāʾ* from the CII that was examining the Hudood Ordinances, and the Select Committee in the National Assembly had reduced the Islamist MMA to a minority. Though some Deobandi *ʿulamāʾ* suspected these debates to be a "trap" set by the regime to spin their comments as an endorsement of its *ḥudūd* reforms, they were a step forward in terms of the liberal versus Islamist debate on this issue. For the first time, both sides had to justify their positions in Urdu to a national audience; the *ʿulamāʾ* and Islamists had to come out of their specialist circles of the "*fiqh*-minded," and modernist scholars and rights activists had to respond to the religious arguments of the *fiqh*-minded.[272] The following two programs illustrate the key dynamics at play.

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270 *Govt to woo BB on Hudood law amendment*, The News, July 25, 2006; Robin Wright & Glenn Kessler, *U.S. brokered Bhutto's return to Pakistan*, NBC News (Dec. 27, 2007), https://www.nbcnews.com/id/wbna22414361. Regarding Musharraf's promise that National Assembly would consider Hudood Amendments "soon," see *Pakistan: Reform Hudood Laws Now*, Hum. Rts. Watch (N.Y) (Nov. 14, 2006), https://www.hrw.org/news/2006/11/14/pakistan-reform-hudood-laws-now.

271 *GEO TV debate on Hudood laws*, Dawn, June 11, 2006.

272 "*Fiqh*-minded" is a concept from Rumee Ahmed, Sharia Compliant: A User's Guide to Hacking Islamic Law 31 (2018).

One of these debates had occurred earlier in 2003, on GEO's program "Alif," which brought together Asma Jehangir, Justice (r.) Majida Rizvi, Javed Ghamidi, and Dr. Kausar Firdaus, a former senator and secretary of the Jamaat-e-Islami Women's Wing.[273] Ghamidi argued that *zinā bi-l-jabr* was a *ḥirāba* crime and that there were fundamental flaws in the *fiqh* interpretation adopted in the Hudood Ordinances.[274] Rizvi argued that the Hudood Ordinance was contrary to the Qurʾān and agreed with Ghamidi's interpretation that *zinā bi-l-jabr* was a *ḥirāba* crime.[275] Dr. Kausar Firdaus, the only speaker wearing a *niqāb*, read Surah Nur from the Qurʾān as evidence that the punishment for *zinā* was 100 lashes.[276] Jehangir interrupted to say that this meant that the punishment of *rajm* was wrong because it was not mentioned in the Qurʾān.[277] The anchor tried to mediate by asking Firdaus to explain the different punishments stipulated for married and unmarried persons. At this point, Rizvi interrupted to ask why he was asking Firdaus to elaborate this difference between married and unmarried when it was not mentioned in the Qurʾān.[278] Amid some cross talk, Firdaus said that there were *ḥadd* punishments for *zinā* and *zinā bi-l-jabr*, which was the greatest crime for which 4 male witnesses were required to award the punishment of 100 lashes.[279] In response to this, Jehangir said: "four men . .

273 Gamdi Sb, *supra* note 39, at 22:20. All translations from this program are the author's translation.

274 *Id.* at 2:28 (*zinā bi-l-jabr* was *ḥirāba*); 37:33 (opposition to Hudood Ordinance); 36:34 (opposition to existence of FSC). At one point, the anchor asks Ghamidi whether the problem is the difference in *fiqh* interpretations to which he replies that it is not a question of different interpretations but of "mistakes" in how *fiqh* was understood, which led to the creation of the Hudood Ordinances, and the "real" law stated in the Qurʾān that has come through the Prophet is different. *See id.* at 6:03, 6:20.

275 *Id.* at 24:52 (Hudood Ordinance contrary to Qurʾān); 25:14 (agreement with Ghamidi).

276 *Id.* at 14:50, 15:17.

277 *Id.* at 15:18, 15:32.

278 *Id.* at 15:52, 16:02. Throughout the program, Jehangir and Rizvi emphasize the point that *rajm* was not mentioned in the Qurʾān. Jehangir challenges Kausar on this point again and asks Kausar why she should accept her interpretation and not that of the judges who declared rajm un-Islamic in 1981. *Id.* at 18:18, 18:35. Rizvi says that "at least she [Kausar] has admitted that it is not mentioned in the Qurʾān." *Id.* at 18:27.

279 *Id.* at 16:47, 17:37.

. that means if a rape is committed in a women's hostel there will be no punishment."[280] Jehangir omitted the fact that four witnesses were only required to award the *ḥadd* punishments, not state-discretionary punishments for rape. Dr. Firdaus did not challenge her on this but continued to elaborate that 100 lashes was the *ḥadd* punishment for unmarried and *rajm* for married,[281] and that *rajm* was not mentioned in the Qurʾān but in Sunna, which was also a source of law.[282] She then said to Jehangir: "If you want to argue about Sunna and do not accept the Qurʾān, then it is a separate matter."[283] At this, the audience applauded.[284]

Jehangir had typically communicated her comments on the *ḥudūd* in English publications. But now she had to address an audience of believing Muslims, some of whom respected the *ʿulamāʾ*, or at least desired to know more about what the Qurʾān and Sunna said. After sharing her doctrinal perspective, Dr. Kausar Firdaus said that *ḥadd* punishments mentioned in the Qurʾān and Sunna were unchangeable but the Hudood Ordinances could be debated.[285] To that Asma Jehangir said that at least they [Islamists] finally acknowledged that there was a problem with this law after 23 years but who would apologize to the women who were victimized by it for so long?[286] She did not really recognize that this admission was tied to the distinction Firdaus was making between the "unchangeable *ḥadd* punishments" and the Hudood Ordinances—a distinction lost in a campaign centered on repeal. For someone like Jehangir, who had long witnessed the suffering of impoverished men and women due to the *zinā* laws, through her work in a legal aid center, Firdaus's insistence to view the issue solely through a

280 *Id.* at 17:40, 17:44 (Jehangir's comments about the women's hostel). *See also id*. at 11:45, 11:52 (arguing that "according to this law, a man can go into a women's hostel and rape all the women and he will not be punished").

281 *Id.* at 17:45, 18:16.

282 *Id.* at 18:30, 19:47 (arguing that *rajm* was established by Sunna).

283 *Id.* at 19:48, 19:51.

284 *Id.* at 19:50, 19:53 (audience applause followed by a break).

285 *Id.* at 20:35, 20:52. *See also id*. at 39:00.

286 *Id.* at 22:14, 22:58 (in an antagonistic exchange, Jehangir interpreting Firdaus' comment that *rajm* was not mentioned in the Qurʾān as an admission that it was not sanctioned by Islam, and that there was a problem with the Hudood Ordinance for including it; saying that this was the first time in 23 years that Islamists had acknowledged any problem with the Ordinance).

doctrinal lens may seem cruel. But the Islamist defense of the Hudood Ordinances was a response to the liberal demand that these Ordinances be repealed outright including their doctrinal interpretation of *ḥadd*. At the end of the program, Jehangir stated her view that Islam and the state should be kept separate and that the state was not fit to interpret Qurʾānic verses and give them legal form in a way that society could progress.[287] The key takeaway from the Alif debate is that it is difficult, if not impossible, to evolve a "public reason" for *sharīʿa* if Muslims who are not "*fiqh*-minded" have no desire to engage with *fiqh* and also do not accept the premise that this is inevitable in a constitution that promises Islamic laws.

The 2006 Zara Sochiye Debate on GEO between scholars of Islam was different because they were all deeply engaged with the tradition though from different perspectives.[288] In this program, which preceded the Protection of Women Act, 2006, two popular journalists, Iftikhar Ahmad and Hamid Mir, moderated a debate in Urdu between two panels of Islamic scholars: one panel comprised Mufti Muneeb-ur-Rehman, a Barelvi *ʿālim*, and Mawlana Abdul Malik, a Deobandi *ʿālim* and MMA legislator, and the other panel featured the modernist scholars Javed Ghamidi and Dr. Tufail Hashmi.[289] The program gave the speakers an opportunity to present their opening and closing positions, and in the interim, the moderators asked structured questions about specific aspects of the Hudood Ordinances, such as whether an FIR should be filed with the police and whether the *ḥadd* punishment for *zinā* and *zinā bi-l-jabr* was the same. This mediation helped streamline the discussion and generate consensus on amendments, despite doctrinal disagreements. While Hashmi and Ghamidi argued that *zinā bi-l-jabr* should be classified as a *ḥirāba* crime,[290] Malik and Rehman reiterated the opinion of influential *madrasa*-educated ulama that the *ḥadd* punishments for *zinā* and *zinā bi-l-jabr* were the same,

287 *Id.* at 29:14, 29:42 (Jehangir's argument that the state and Islam should be kept separate); 29:52, 30:12 (arguing that state is unfit to apply Islamic law).

288 Gamdi Sb, *supra* note 40.

289 For introductions of the speakers, see *id.* at 2:54, 3:40.

290 *Id.* at 59:38, 1:00:37 (Ghamidi's comments); 1:06:00 (Hashmi's comments).

except that in case of *zinā bi-l-jabr*, the punishment would be suspended for the victim.[291]

Their greatest common ground was the recognition that legal procedure needed to be changed to prevent police abuse and the imprisonment of women, and that the *taʿzīr* punishments could be transferred to the Pakistan Penal Code, changed, and separated from the *ḥadd* punishments to prevent confusion. Mufti Rehman said that "we will never support repeal" of the hudood of Allah but that amendments in the Hudood Ordinances were acceptable, including transferring the *taʿzīr* section to the Pakistan Penal Code and keeping *ḥadd* punishments separate from *taʿzīr* ones.[292] He accepted that the Hudood Ordinances had been ineffective but attributed this to procedure rather than doctrine:

> The reason why the Hudood Ordinance failed to be effective is that while the hudood were enforced, the procedural law was still Anglo-Saxon, and in the presence of this, the hudood can never be effective. Our demand is that the hudood be kept in their original form while the role of the police should be removed. And if someone comes to file a report, he should approach either the Federal Shariat Court or qadi courts formed under its auspices. The report should be filed directly there, so that from the very first day the procedure can begin according to Islam.[293]

Mufti Rehman said that the *ḥadd* punishment for *zinā* could not be made different from that of rape (*zinā bi-l-jabr*) and claimed that the mindset of those making this argument was to separate *zinā bi-l-riḍā* (consensual sex) and make it legitimate as it is in the west.[294] He said that "*zinā* is *zinā*, whether it is done forcibly or willingly, it is punishable."[295] While the structured format of

291 *Id.* at 18:27, 18:50 (Mufti Muneeb-ur-Rehman's [hereafter as Mufti Rehman] comments).

292 *Id.* at 15:00, 15:40 (Mufti Rehman's comments).

293 *Id.* at 16:01, 16:50 (Mufti Rehman's comments).

294 *Id.* at 18:27, 18:43 (Mufti Rehman's comments).

295 *Id.* at 18:43, 18:50 (Mufti Rehman's comments).

this debate did not allow cross-talk, or much participation by audience members who were not *fiqh*-minded, Mufti Rehman's comment that "*zinā* is *zinā*" caused some outrage. One woman in the audience rose up during his concluding comments to ask how he could equate rape and consensual sex, and then led a walkout as he spoke, with at least a dozen audience members behind her.[296] By saying that there was no connection between *ḥadd* punishments and imprisoning women, Mufti Rehman had arguably taken a "progressive" position that addressed one of the central complaints of the anti-Hudood campaigners. However, it seemed difficult for those who weren't *fiqh*-minded to understand why the *fuqahāʾ* created categories that did not distinguish based on consent (even though the same punishments for the two crimes were only for *ḥadd*, and Mufti Muneeb-ur-Rehman said that in the case of *zinā bi-l-jabr*, the *ḥadd* punishment would be given to the rapist and not the victim[297]).

Their differences were over doctrinal interpretations, with Ghamidi insisting on removing the current law and replacing it with one that was more coherent. He argued that a case of *zinā* should only be registered if there were four witnesses required by *sharīʿa* for a *ḥadd* punishment,[298] and that the entire law be redrafted so that it included *ḥirāba* crimes (under which he would place *zinā bi-l-jabr*) and removed the religious and gender differentiation for witnesses.[299] Hashmi, who had written a book published by Aurat Foundation,[300] said that Hudood Allah should not be removed but rape be classified as a form of *ḥirāba* (which is a position different from WAF's demand for repeal).[301] Mufti Muneeb-ur-Rehman maintained his position that repeal was unacceptable.[302] In his concluding comments, Ghamidi applauded

296 *Id.* at 1:16:00 (walkout).

297 *Id.* at 1:00:45, 1:01:28; 1:11:43 (Mufti Rehman's comments). His remarks that there was no connection between *ḥadd* punishments and imprisoning women are at *id.* at 17:48.

298 *Id.* at 33:16, 33:20 (Ghamidi's comments).

299 *Id.* at 1:12:53, 1:14:25 (Ghamidi summing up his position in five points).

300 Muhammad Tufail Hashmi, Hudood Ordinance Kitab-o-Sunnat ki Roshni mein (2004).

301 Gamdi Sb, *supra* note 40, at 1:06:00 (Hashmi's comments).

302 *Id.* at 1:11:43 (Mufti Rehman's comments).

the organizers for creating an environment where everyone was free to speak their mind so that the nation could listen to different voices and reach its own conclusion about who was "right."[303] Implicit in his argument was the premise that a Muslim majority could make laws on all matters, including Islam, without necessarily engaging with grassroots Islamic institutions, building consensus, or giving the *madrasa*-educated *ʿulamāʾ* reasons internal to their tradition, as they understood it through their scholarship. While this idea sounds reasonable, in principle, at the time of this debate Pakistan was not ruled by a democratic majority as its parliament, as well as executive-appointed institutions like the NCSW and CII, were dominated by General Musharraf.

Such debates, therefore, were not enough to bridge the distrust between liberals and Deobandi *ʿulamāʾ*. An editorial in *Al-Haqq* criticized Mufti Muneeb-ur-Rehman for being naïve enough to participate in the GEO Debate, which it saw as an orchestrated conspiracy to defame the Hudood Ordinances and lay the ground for repeal.[304] Moreover, the doctrinal subtleties discussed in the debate were lost in the coverage of this issue in Pakistani English newspapers. The GEO Debates gave the *ʿulamāʾ* a chance to talk back, to explain themselves. But they did not lead the liberal intelligentsia to see the *madrasa*-educated differently, or to take their *fiqh*-based arguments seriously.

ii. Council of Islamic Ideology: Modernists In, Deobandi *ʿUlamāʾ* Out

The key problem was that General Musharraf had re-engineered the CII, which was an executive-appointed body, so that leading Deobandi *ʿulamāʾ* were excluded. After the GEO debate, Musharraf instructed the CII to propose amendments "with a consensus" by August 2006.[305] He also ordered the release of 2,000 women held in jails, awaiting trials, within the next few

303 *Id.* at 1:22:45 (Ghamidi's comments).

304 Rashid-ul-Haq Sami Haqqani, *Hudood Ordinance par tanqeed kis kay isharo'n par? (Naqsh-e-Aghaz editorial)*, Al-Haqq, June 2006, at 2–3.

305 *CII told to propose changes in Hudood law*, Dawn, July 2, 2006.

weeks.[306] This headline-grabbing move won him accolades in Pakistani English newspapers for his liberalism, even though Mawlana Muneeb-ur-Rehman had also said in the GEO debate that there was no connection between the *ḥudūd* punishments and jail; that they did not ask for women to be imprisoned.[307] The next day, leading *ʿulamāʾ* of different schools passed a resolution demanding the re-constitution of the CII and decided to hold a national convention on July 6 in an Islamabad mosque to "protect Hudood laws."[308] The *ʿulamāʾ* were being rigid but not without reason (as writers in English newspapers thought).[309] They could anticipate the kind of reforms the CII would endorse. And they weren't off the mark. The CII supported comprehensive amendments in the *fiqh* interpretation adopted in the law.[310]

On August 30, 2006, the CII Chairman Dr. Khalid Masud requested the modernist scholar Ghamidi—not Mufti Muneeb-ur-Rehman or Mawlana Malik—to convene the legal committee examining whether the Hudood Ordinances were compatible with Islam.[311] During the committee's deliberation, it was clear that Ghamidi rejected the authority of juristic consensus, when he justified the compilation of the *sharʿī aḥkām* on *ḥudūd* "*az-sar-e-no*" (or from scratch).[312] The "reconstruction" of Islamic thought was the dream of every modernizer and for the Deobandi *ʿulamāʾ*, a demon that despite their best efforts, refused to die. The influence of Ghamidi's thought on what became the "official" CII proposals was problematic, not because his proposals were less reasonable, but because they weren't the result of authentic deliberation, compromise, and consensus

306 *President, PM favour Hudood laws proposals*, The News, July 2, 2006.

307 Gamdi Sb, *supra* note 40, at 17:48 (Mufti Rehman's comments).

308 *Ulema to protect Hudood law*, Dawn, July 3, 2006.

309 *Repealing Hudood laws*, Dawn (July 4, 2006), https://www.dawn.com/news/1069157. This editorial, too, repeats the four witnesses to prove rape claim and calls religious conservatives "obscurantists."

310 *CII unanimous on amending Hudood Ord*, Daily Times, July 4, 2006.

311 CII Annual Report 2006–2007, at 36 (Office Order by Dr. Khalid Masud (Chairman CII)). This and past CII reports are available at https://cii.gov.pk/E-Books.aspx.

312 *Id.* at 41 (Minutes of Legal Committee Meeting, Sept. 18, 2006, Islamabad, Chaired by Ghamidi).

with eminent Deobandi *ʿulamāʾ*, whose interpretations most grassroots Islamic institutions considered legitimate.[313]

Excluded from the CII, the *madrasa*-educated *ʿulamāʾ* took to the streets, leading to an escalating cycle of polarization. The next day, an *ʿulamāʾ* convention issued a joint declaration that the Qurʾānic punishments in these laws were irrevocable; they said people calling Islamic punishments "brutal" were committing "blasphemy," and threatened to sue newspapers for blasphemy.[314] Jamaat-e-Islami leaders tried to persuade NGO activists to "seek positive changes" in the *ḥudūd* rather than demanding repeal because "this stance would widen the gulf between the religious forces and the liberal forces."[315] This suggestion fell on deaf ears. Najam Sethi, the editor of *The Daily Times* said that "orthodox clerics" were "not prepared to understand reason."[316] WAF decided to launch a signature campaign and demonstrations from July 20 demanding immediate repeal."[317] As NGOs dug in their heels, so did the *ʿulamāʾ*. On July 14, 2006, Mawlana Asadullah Bhutto, provincial president of MMA, said at the Ulema Convention held at the Jamaat-e-Islami headquarters in Karachi that "[a]nyone who opposes the Hudood Ordinance opposes the Quran and Sunnah," and accused General Musharraf of "toeing the line of his Western masters only to save his uniform."[318]

iii. Parliament: General Musharraf vs. PML-Q's *ʿUlamāʾ* Committee

On August 1, 2006, newspapers reported that the proposed *ḥudūd* amendments would (1) remove the *ḥadd* punishment

313 Hudood Ordinance 1979: A Critical Report (Council of Islamic Ideology, Gov't of Pakistan 2007), *available at* https://cii.gov.pk/publications/h.report.pdf.

314 *Ulema convention vows to defend Hudood laws*, Dawn, July 7, 2006.

315 *Hudood ordinances: Civil groups asked to suggest amendments*, Dawn, July 13, 2006.

316 *CII amendments to Hudood must be legalized*, Daily Times, July 8, 2006.

317 *WAF demands repeal of Hudood laws*, Dawn, July 14, 2006.

318 *Countrywide protest against proposed Hadood amends*, The News, July 22, 2006.

for rape, transferring it to the secular PPC (non-negotiable for *ʿulamāʾ*); (2) remove the *taʿzīr* punishment for *zinā* because it was not required by the Qurʾān and Sunna (negotiable as it was not mandated by authoritative religious doctrine); and (3) change the requirement of four adult male Muslim eyewitnesses to prove *zinā*-liable-to-*ḥadd* and replaced it with four adult people (non-negotiable for *ʿulamāʾ* but a key NGO talking point).[319] General Musharraf found the center-right PML-Q to be a reluctant ally; many of its legislators were afraid that this cabinet-approved draft would lead the religious leadership to "direct the wrath of the people against them" in the 2007 elections.[320] They wanted the government to seek consensus. An editorial in *The Daily Times* said that elected leaders were hesitating because they lacked "moral courage" and were plagued by "raw fear"—and urged General Musharraf to "get on with it."[321] When PML-Q finally tabled a bill on August 21, under pressure from General Musharraf,[322] MMA legislators tore up copies of the bill and staged a token walkout.[323] They also boycotted the 24-member parliamentary Select Committee and instead led rallies and protests of the *madrasa*-educated, terming the Protection of Women Bill an attempt to "protect adultery under the guise of women's protection."[324] Jamaat-e-Islami leader Professor Ghafoor Ahmad said in Karachi that the government was insisting on amending Hudood "under pressure from US administration and western governments which propagate that the sentences prescribed under sharia laws are inhuman."[325] He added that "in their bid to get the Hudood laws repealed, the US and the West have been sponsoring and patronizing big

319 *Draft of Hudood amendments: Rape to be tried under criminal law*, Daily Times, Aug. 1, 2006.

320 *Coalition MPs divided on Hudood bill*, Dawn, Aug. 9, 2006.

321 *Retreat in the face of extremism*, Daily Times, Aug. 10, 2006.

322 *Moving women protection bill in NA: Musharraf upset by govt failure*, Daily Times, Aug. 20, 2006; *MMA, ARD clash over Hudood amendment bill*, The News, Aug. 24, 2006.

323 *Gov tables Hudood bill*, Daily Times, Aug. 27, 2006.

324 *Hudood Ord amends negation of Objective Resolution*, Nation, Aug. 24, 2006.

325 *JI sees US, West behind changes in Hudood laws*, Dawn, Aug. 25, 2006.

campaigns through media and NGOs and using Pakistani women influenced by the western lifestyle."[326]

Though the PML-Q could have passed the Bill with just PPP support, it reached out to the Islamist MMA for talks.[327] In a private meeting, the PML-Q and MMA formed a committee of eight *ʿulamāʾ* to "evolve consensus" on the Bill, four were nominated by the government and four by the MMA including Mawlana Taqi Usmani, Mufti Muneeb-ur-Rehman, and Dr. Sarfaraz Naeemi, who had not been included in the CII consultations.[328] Their three points included the demand that the *ḥadd* punishment for rape (*zinā bi-l-jabr*) be retained as well as the *taʿzīr* punishment for *zinā* (as the crime of "lewdness").[329] Though PML-Q leaders signed the statement, they reneged on their promise as the final draft removed the *ḥadd* punishment for rape. They were reportedly facing pressure from another direction. On September 9, "sources" in the PML-Q revealed that the government wanted to pass the Bill quickly "given the foreign pressure" and because a top Musharraf aide was in the midst of talks with Bhutto for a future political setup.[330] The final draft, backed by the center-left PPP, reflected key NGO talking points. Liberals pushed Musharraf to pass this draft and ignore the *ʿulamāʾ*. The editor of the *Daily Times* wrote:

> The consequences of caving in to the mullahs will be grave for Pakistani women, of course, but General Musharraf's personal credibility will also take a big hit. He will surely be put on the mat by the international media while he is in the US and all his hard work in getting this bill to pass before he lands in Washington to crow about his enlightened moderation will have been in vain . . . It is still not too late for the Musharraf regime to

326 *Id.*

327 Dilshad Azeem & Naveed Siddiqui, *Govt gives into MMA, to review Hudood Bill*, Nation, Sept. 7, 2006.

328 *Govt foot-dragging on Women's Protection Bill*, Daily Times, Sept. 7, 2006. Others were Hafiz Hussain Ahmad, Syed Naseeb Ali Shah, Asadullah Bhutto, and Mawlana Abdul Malik.

329 "Hudood Bill to be re-drafted," Nation, Sept. 12, 2006.

330 Nadeem Syed, *MMA out, PPP in*, Nation, Sept. 9, 2006.

> align with the mainstream PPPP[331] and tell the mullahs to go fly a kite.[332]

WAF said it was "outraged" by the "political expediency exhibited by the government by complying with the proposals of a handful of anti-women zealots" and worried that the government's "political machinations" with the MMA would yield amendments that would be "even more barbaric."[333] In a press release from its New York office, Human Rights Watch pushed Musharraf to pass the PPP-supported Select Committee Bill.[334] Ali Dayan Hasan, South Asia researcher at Human Rights Watch said that "General Musharraf claims he is an 'enlightened moderate' in favour of women's rights, but so far he has been all talk and no action. Failure to act this time will irrevocably damage his credibility."[335]

By November 8, 2006, President Musharraf had assumed a tough rhetoric against the Islamist MMA and vowed to "push through" the Protection of Women Bill in the National Assembly, asking "the silent majority to assert itself in support of building a moderate, progressive and enlightened society in the country in true spirit of Islam."[336] The bill tabled on November 15 included the Select Committee's proposal to abolish the *ḥadd* punishment for rape.[337] The bill also included the *'Ulamā'* Committee propos-

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331 PPPP refers to Pakistan People's Party Parliamentarians, the name the main faction of PPP adopted during General Musharraf's regime due to political restrictions on Benazir Bhutto.

332 *Has Musharraf caved in to the mullahs?*, Daily Times, Sept. 13, 2006.

333 *WAF 'outraged' at govt-MMA 'machinations,'* Daily Times, Sept. 13, 2006.

334 *Govt must honour pledge to table Women's Bill: HRW*, Daily Times, Nov. 15, 2006.

335 *Id.*

336 *Women's Bill: Musharraf willing to take on the MMA*, Nation, Nov. 9, 2006.

337 *Repeal of Hudood Ordinances demanded*, Dawn, July 31, 2006; *Redrafted bill not discussed with us: MMA*, Nation, Sept. 13, 2006 (article reporting that MMA was not in the loop regarding final version); *Debate on Women's Protection Bill: Parties, rights groups and lawyers denounce changes*, Daily Times, Sept. 13, 2006 (article reporting on PPP's condemnation of the agreement between the government and the *'ulamā'*); *Hudood Bill put on hold . . . indefinitely*, Dawn, Sept. 14, 2006 (reporting on stalemate); *Women's Bill deferred as NA prorogued indefinitely*, Dawn, Sept. 19, 2006 (same).

al to add a *taʿzīr* punishment for *zinā* (imprisonment), which the PPP had originally objected to,[338] and which ironically was part of the *ʿulamāʾ*'s demands but not a non-negotiable position from the perspective of the juristic tradition (because it was up to state discretion).[339] In a televised address, Musharraf said that nothing in the bill violated the Qurʾān and Sunna.[340] He repeated the NGO claim that under the Hudood Ordinance "women victims of rape needed to produce four male eyewitnesses failing which they were thrown into prison and charged with adultery," a problem he claimed was solved by making rape an offense under the secular PPC.[341] PPP leader Sherry Rehman said her party wanted total repeal but supported the bill as the "first step towards equal rights for women in Pakistan."[342]

5. Federal Shariat Court's 2010 Judgment

It is ironic that the PWA, 2006 was made theologically controversial because the *ḥadd* punishment for *zinā bi-l-jabr* was removed, which the *ʿulamāʾ* regarded as a violation of Islamic injunctions, and in 2010, the FSC ruled that "[n]o legislative instrument can control, regulate, or amend" its jurisdiction "in matters relating to Hudood" as this was "exclusive" under Article 203DD.343 This judgment did not invalidate the entire PWA, 2006 but struck down Sections 11, 25, and 28 as un-Islamic, on citizen petitions filed from 2007 to 2010.344 The PPP government announced that it would challenge the verdict in the Shariat Appellate Bench of the Supreme Court, but

338 *PPPP might not vote if zina brought under PPC*, Daily Times, Sept. 2, 2006.

339 The demands by the *ʿUlamāʾ* Committee that negotiated with PML-Q included keeping the *ḥadd* punishment for *zinā bi-l-jabr* and replacing *zinā*-liable-to-*taʿzīr* with the crime of "lewdness." *See Hudood Bill to be re-drafted*, *supra* note 334.

340 *More pro-women legislation soon*, *supra* note 38.

341 *Id.*

342 *NA passes Women's Protection Bill*, Daily Times, Nov. 16, 2006.

343 (2010) PLD (FSC) 145–47, 152–53. *Id.* at 147: "[*Hudood* punishments] prescribed by Holy Quran or *Sunnah* of the Holy Prophet PBUH . . . can be awarded by trial courts duly constituted under law."

344 *Id.* at 154–55.

it is not clear what became of this appeal.345 In this judgment, Justice Syed Afzal Haider said that in reaching its conclusion, the FSC had to balance three elements, namely, "[t]he legislative competence; the touchstone of Fundamental rights and the yardstick of Islamic injunctions"346 and it had this power not because it was superior to parliament but for the following reasons:

> (a). Dignity of law and legal principles have to be maintained; (b). Constitution has to be upheld and enforced; (c). Above all the people of Pakistan have to be enabled to live upto the permanent values and guiding principles enunciated by Islam; and (d) Members of Superior Judiciary are under oath to do all these things.[347]

Coincidentally, he also added that in *Reconstruction of Religious Thought in Islam*, Iqbal had said that "the right to undertake *Ijtehad* should be conceded to the Muslim Parliament but he was also conscious of the fact that technical assistance should be available to the legislative bodies to ensure correct interpretation and enforcement of *Shariah*."[348] Liberals and modernist reformers had often cited Iqbal's text as evidence of *fiqh*'s stagnation and of the untrammeled right of lay Muslims to interpret Islam through parliament. After decades of legal evolution and political strife on the question of *sharīʿa*, the FSC read Iqbal's text differently. It did not invalidate the juristic tradition as "stagnant" or call jurists its "fossilized interpreters."[349]

6. Mufti Taqi Usmani's Theological

345 Qaiser Butt, *Women Protection Act: Top Islamic court rules against law*, The Express Tribune (Dec. 23, 2010), https://tribune.com.pk/story/93167/shariat-court-terms-women-protection-act-clauses-repugnant.

346 (2010) PLD (FSC) 148.

347 *Id* at 148–49.

348 *Id.* at 134–35.

349 *See, e.g.*, *Report of the Commission on Marriage and Family Laws*, *supra* note 58, at 45–46.

Critique of PWA, 2006

In his critique of the PWA, 2006, Usmani's primary doctrinal objection was to the removal of the *ḥadd* punishment for *zinā bi-l-jabr* (rape). He cited the Qurʾān 24:2 and 24:33 as evidence that the Qurʾān prescribed the *ḥadd* of 100 lashes for *zinā* and specified that this punishment would be suspended for women who were molested or raped.[350] In addition, he argued that the punishment for adultery was *rajm* (stoning to death) and cited the following *aḥādīth* to demonstrate that this applied to both *zinā* and *zinā bi-l-jabr* (rape):

> "It has been narrated by Wā'il bin Hujr that during the life time of Sayyidna Rasūl Allah a woman set out of her home to perform regular Prayer. A person forcibly got hold of her in the way and committed adultery. As she raised hue and cry, the man fled away. Later on, however, he admitted of his crime. On this the Holy Prophet (PBUH) enforced *Hadd of Rajm* on him, while the woman was awarded no punishment." (*Jāmi'e Imām Tirmizi*, *Kitāb Al-Hudood*, Chapter 22, Hadith # 1453 & 1454).

> "A slave committed Rape with a slave woman. The Second Caliph Hadhrat Umar punished him with *Hadd* but spared the woman who was wronged without her consent." (*Sahīh Al-Bukharī*, *Kitāb Al-Ikrāh*, Chapter 6).[351]

Mufti Usmani attributed the removal of the *ḥadd* punishment for rape to the "highly misleading propaganda against the Hudood Ordinances" that a rape complainant who failed to produce four witnesses to the crime in court would herself be convicted and imprisoned.[352] One can sense his exasperation when he writes: "Even the President in his address to the nation

350 Usmani, *supra* note 40, at 102–13.
351 *Id.* at 113–34.
352 *Id.* at 134–54.

mentioned this as the sole justification for the so-called Protection of Women's Rights Bill."[353]

Several scholars, such as Ghamidi and Quraishi, have argued that rape should be classified as a *ḥirāba* crime, but Mufti Taqi Usmani clearly did not agree.[354] After the Deobandi *ʿulamāʾ* most respected by *madrasa*s had been sidelined from the CII, and the *ʿulamāʾ* had taken to the streets in protest, PML-Q reached out to them to include them in an *ʿUlamāʾ* Committee that could advise parliament. This instinct, whether motivated by religious conviction or electoral self-preservation, was the right one. Unless the *ʿulamāʾ* respected by Islamic institutions in the country endorsed the law as Islamic, a politician could expect the *ʿulamāʾ* to use their pulpits to condemn the law. It is not that the Deobandi *ʿulamāʾ* had not endorsed a Mālikī opinion, in lieu of a Ḥanafī opinion, before. This is what led to the Dissolution of Muslim Marriages Act, 1939, which broadened the grounds for the dissolution of marriage. However, that legislative reform was initiated by a Deobandi *ʿālim*, Mawlana Ashraf Ali Thanwi, who spent significant effort in consulting *ʿulamāʾ* in India and abroad before a law was drafted and steered through parliament by a legislator.[355]

Conclusion

When it comes to public debates on *sharīʿa*, both ideas and institutions matter. In recent years, Arafat Mazhar has devoted considerable effort to finding arguments within *fiqh* to reform Pakistan's blasphemy laws,[356] yet the capacity of such efforts to be translated into reform depends on how the Pakistani state and its rulers interact with juristic institutions. Judicial reasoning in Pakistan can serve as a model for how to achieve authentic deliberation.

353 *Id.* at 144.

354 *See* Quraishi, *supra* note 10; Zara Sochiye GEO TV Debate, *supra* note 40, at 59:38, 1:00:37 (Ghamidi's comments).

355 Muhammad Qasim Zaman, The Ulama in Contemporary Islam: Custodians of Change 29–30 (2002).

356 Sarah Alvi, *Campaigning to reform Pakistan's deadly blasphemy law*, Al Jazeera, (Apr. 28, 2015), https://www.aljazeera.com/features/2015/4/28/campaigning-to-reform-pakistans-deadly-blasphemy-law.

For instance, in 2005, the Supreme Court struck down several provisions of a Hasba Bill[357] passed by the Islamist Muttahida Majlis-e-Amal (MMA) government in the Khyber Pakhtunkhwa provincial assembly.[358] In its judgment, the court seamlessly combined arguments from the perspective of fundamental rights, the principle of sectarian toleration advocated by Deobandi *ʿulamāʾ*, and western historiography on the institution of Hasba in Islam.[359] In late 2006, the MMA passed a new version of the Hasba Bill, which had been modified in light of Supreme Court recommendations, but a month later, the Governor was still deciding whether to sign it into law, and President General Musharraf once again challenged the Bill's constitutional status in the Supreme Court.[360] The MMA Chief Minister said that "[w]e had respected the Supreme Court verdict earlier and will respect it again but the provincial government will defend its constitutional right in the apex court."[361] He emphasized that they had followed Supreme Court directives and removed the clauses from the bill which had been declared unconstitutional; he said that "[t]here was no absolutely no reason for the federal government to again move the Supreme Court as all the objectionable portions had already been removed from the bill," and accused the Federal Government of trying to destabilize democratic institutions.[362]

The Supreme Court issued a stay order on the bill, but on February 19, 2007, Justice Khalilur Rehman Ramday, a member of the bench hearing the reference, asked the Attorney General: "Legislation is the right of parliament. Why are you opposing a good piece of legislation that is meant for enforcement of Islamic injunctions?"[363] When the Attorney General said it was

357 Spelled as "Hisba" in the judgment and as "Hasba" in news sources.

358 Reference No. 2 of 2005, Reference by the President of Pakistan under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973, In the Supreme Court of Pakistan (Advisory Jurisdiction), *reprinted in* Makhdoom Ali Khan, *Pakistan: Legality of a Hisba Bill to introduce an Islamic Ombudsman in the North-Western-Frontier Province*, 11 Y.B. Islamic & Middle E.L. 413 (2004–2005).

359 *Id.* at 420, 427, 430–31, 433, 436–38, 441.

360 *Hasba stalemate lingers*, Dawn, Dec. 14, 2006; Zulfiqar Ali, *NWFP to defend Hasba bill in SC*, Dawn, Dec. 16, 2006.

361 Ali, *supra* note 360.

362 *Id.*

363 Iftikhar A. Khan, *SC seeks reason for opposition to Hasba*, Dawn, Feb. 20, 2007.

vague because it didn't specify the sect or school followed by the Mohtasib, and would lead to chaos and confusion, Justice Ramday said that Islamic injunctions were mentioned in the constitution and asked: "Would you call it a vague constitution? If it is so then will all our Islamic laws and provisions be rendered ineffective."[364] The Attorney General spoke of fears that vague and open-ended powers would create "Taliban-style rule" in the province, and the bench headed by the Chief Justice asked the Attorney General to submit a comparative chart showing the differences between the two bills.[365]

On February 20, 2007, the Supreme Court upheld the Hasba Bill, only objecting to the clause that defined a "religious scholar" as a seminary graduate, ruling that it was discriminatory (and clarifying one another clause).[366] The nine-member bench constituted to listen to the Federal Government's reference gave the following short order:

> For reasons to be recorded later, in our unanimous view, opinion expressed in reference No 2 of 2005 (Hasba Bill 2005) has been complied with except the provisions of Section 2 (1) and Section 3 (2) of the Hasba Bill, which appears to have escaped the notice of the provincial legislature, which now may be given the due consideration. We are further of the opinion that any violation of the provision of Section 23 of the Hasba Bill, 2006, shall not be subject to Section 14 hereof.[367]

364 *Id.*

365 *Id.*

366 Iftikhar A. Khan, *SC upholds most parts of Hasba*, Dawn, Feb. 21, 2007. In March 2007, General Musharraf suspended Chief Justice Iftikhar Chaudhry, which sparked the Lawyers' Movement and led to Musharraf's imposition of a state of emergency. After the 2008 elections, the MMA no longer had a provincial government and therefore, the question of the Hisba authority was moot.

367 *Id.* The bill said that the Mohtasib would be a religious scholar who was eligible as appointment of judge of FSC; an *ʿālim* was someone who had graduated from a *madrasa* run by Wafaqul Madaris. The SC judgment clarified that a citizen who didn't comply with the Mohtasib's discouragement of one of the "vices" could not be given the punishment allowed for the "Contempt of the Mohtasib" under a different section.

This defended the MMA's right as a provincial government to pass its law, since it had complied with the Supreme Court directive, and addressed the objection of liberals that the Hasba institution would lead to a permanent rule of the clergy. The fact that the Islamist MMA, a coalition that included the Deobandi *ʿulamāʾ* party JUI-F, accepted the 2005 judgment and revised its bill shows the legitimacy that the Supreme Court's reasoning had in its eyes, from an individual rights and Islamic perspective. This was no small feat in a country with as much religious strife as Pakistan, but it demonstrates that perhaps the sources of that strife are not in the doctrinal capacity of *fiqh* to co-exist with constitutional democracy but in military authoritarianism, western imperialism, and the enabling role of international human rights discourse in perpetuating colonial legacies.