Volume 6 2025 Special Issue

JOURNAL OF ISLAMIC LAW

Special Issue: Moratoriums on Islamic Criminal Punishments: Legal Debates and Current Practices

Articles

Essays

Program in Islamic Law
at Harvard Law School

Volume 6 2025 Special Issue

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Journal of Islamic Law
Volume 6, Special Issue
2025

ISSN 2475-7985 (print)
ISSN 2475-7977 (online)

Program in Islamic Law
Harvard Law School
Cambridge, MA 02138

Editor's Introduction to the Special Issue

Between Divine Mandate and Modern State: Islamic Criminal Law and the Contested Legacy of *Ḥudūd*

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Rarely does any aspect of Islamic law command such global attention or stir such deep internal controversy as the *ḥudūd* punishments. Anchored in scripture and charged with moral gravity, these punishments occupy a complex space where divine authority, political power, and human suffering intersect. What does it mean to treat certain punishments as sacred and immutable in an era increasingly shaped by demands for human rights, rehabilitation, and legal reform? Do these ostensibly immutable decrees uphold the true spirit of justice, or do they entrench an unforgiving orthodoxy that resists ethical evolution? How have political regimes mobilized *ḥudūd* punishments to assert religious legitimacy or consolidate power? Can a faithful reading of Islamic tradition allow for the reinterpretation—or even suspension—of *ḥudūd* in light of present-day ethical concerns?

As these questions suggest, this volume aims to illuminate the theoretical foundations and practical realities of *ḥudūd* law, explore possibilities for a moratorium on *ḥudūd*

* Disclosure: In drafting this introduction, I occasionally used AI for proofreading purposes.

punishments, and offer an interdisciplinary examination of this complex and contested issue. The contributions critically engage with juristic, political, sociological, and theological discourses surrounding the implementation of *ḥudūd* punishments in the modern era. These analyses encompass interpretations of the Qurʾān and *ḥadīth*, while also addressing the conceptual tensions and practical obstacles involved in the suspension or application of *ḥudūd* laws across a range of legal and political contexts, including those of Indonesia, Iran, Morocco, Pakistan, and Saudi Arabia.

The term *ḥudūd* (sing. *ḥadd*) refers to certain major crimes and their prescribed punishments in Islamic criminal law. The punishments include such severe penalties as flagellation, amputation, and capital punishment. According to Islamic legal theory, *ḥudūd* laws are understood to have been directly specified by God in Islam's foundational texts, the Qurʾān and the Sunna.[1] Historically, as Intisar A. Rabb observes, "[f]or Muslims, Sunnīs and Shīʿa alike, *ḥudūd* laws represented a subset of divine legislation, the expression of which the Prophet and other authority figures were merely a conduit."[2] Many—though not all—Muslim jurists, particularly in the modern world, maintain that "*ḥudūd* laws were so explicit and specific that adherence to them provided a prime example of upholding divine legislative supremacy."[3]

Despite their seemingly fixed, severe, and divinely ordained nature, *ḥudūd* punishments have traditionally been exceedingly difficult to implement in practice, owing to the stringent procedural requirements established by Islamic law. Islamic law traditionally establishes rigorous procedural safeguards surrounding the implementation of *ḥudūd* punishments, including exceptionally high evidentiary standards and the restrictive legal canon to "avoid punishment in cases of doubt" (the "doubt canon").[4] Khaled Abou El Fadl underscores this point, noting

1 Intisar A. Rabb, Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law 29 (2015).

2 *Id.*

3 *Id.* at 30.

4 *See* Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century 53–65 (2005).

that "the classical jurists were keenly aware that to the extent possible, an Islamic judicial system ought to avoid applying the *ḥudūd* punishments."[5] He further explains:

> *[Ḥ]udūd* punishments were hardly ever implemented in Islamic legal history, for the most part because Muslim jurists made the evidentiary requirements and the technical pre-conditions for the enforcement of the *ḥudūd* practically impossible to fulfill or because they admitted so many mitigating factors to the point that only a criminal who was most determined to be punished could be made to suffer the *ḥudūd* penalties.[6]

Broadly speaking, the scholarly discourse on *ḥudūd* laws today delineates a tripartite scheme: at one end stand the pro-*ḥudūd* scholars (retentionists), at the other, their counterparts who categorically oppose the application of such penalties (abolitionists), and in between, a middle group of scholars who advocate for limiting or significantly reducing their implementation (reductionists). In what follows, I focus primarily on the retentionist position, as the contributions to this volume largely espouse perspectives in opposition to *ḥudūd* laws.

Retentionists view *ḥudūd* punishments as integral to the Islamic legal and moral framework, grounded in four key rationales. First, they see *ḥudūd* laws as effective deterrents against serious crimes, intended to maintain public order and curb socially harmful behavior.[7] Second, they view *ḥudūd* laws as divinely ordained limits that serve to uphold justice and safeguard core communal values.[8] Third, they understand *ḥudūd* laws as instruments of moral purification, facilitating spiritual

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For an in-depth legal-historical discussion of the "doubt canon," see Rabb, *supra* note 1, at 4.

5 Khaled Abou El Fadl, *Qurʾanic Ethics and Islamic Law*, 1 J. Islamic Ethics 7, 18 (2017).

6 *Id.* at 17.

7 *See, e.g.*, *Ijrā-yi ḥudūd ba jāmiʿ-i ārāmish mīdahad* [*The implementation of* ḥudūd *brings peace to society*], Iranian Students' News Agency (June 29, 2018), https://www.isna.ir/news/97030905005/.

8 *See, e.g.*, Abdulreza Jafari & Javad Sadati, *Aẓimat-i namādīn-i ḥudūd va mavāniʿ-i ijrāyi*, 18 Faslnāma-yi didgāhāy-i ḥuqūq -i qazā-yi 67, 74–77 (2013).

cleansing for both the individual offender and the wider society.[9] Fourth, and perhaps most distinctively, retentionists regard *ḥudūd* laws as symbolic affirmations of a legal order grounded in divine authority, rather than one shaped by human discretion or secular norms.[10] On this view, enforcement of *ḥudūd* laws is not merely a matter of legal policy but a religious imperative that fulfills "God's rights."[11]

This final rationale diverges sharply from the preceding ones in its deontological foundation. Whereas the first three justifications rest on largely consequentialist grounds—emphasizing tangible outcomes such as deterrence and crime prevention, the protection of societal values, or the moral purification of individuals and communities—the fourth justification (that views *ḥudūd* laws as symbolic affirmations of a divine legal order) is rooted in an unwavering theological and jurisprudential commitment. Retentionists who invoke this rationale do so on the basis of scriptural interpretation, classical legal precedent, and doctrinal fidelity.[12] Accordingly, and as I have argued elsewhere, *not all* retentionist positions are reducible to political or ideological motivations; many stem from a principled and conscientious reading of religious obligation.[13]

On the other hand, critics of *ḥudūd* punishments offer a variety of objections. Internally, some scholars argue that the *ḥadd* punishment for theft is irrational from a deterrence

9 *Id.* at 76.

10 Bahman Khodadadi, On Theocratic Criminal Law: The Rule of Religion and Punishment in Iran 108–109 (2024).

11 Rabb, *supra* note 1, at 29. *See also* Intisar A. Rabb, *The Islamic Rule of Lenity: Judicial Discretion and Legal Canons*, 44 Vand. L. Rev. 1299, 1315–16 (2021).

12 *See* Mohammad-Hasan Najafi, Jawāhir al-kalām 319 (2013); Mohammad Ardebili, 7 Majmaʿ al-fāʾida wa-l-burhān fī sharḥ al-Azhān 547 (1982). The Shīʿī jurists who favor the implementation of *ḥudūd* during the Occultation include Shaykh al-Mufīd (d. 412/1022), Shaykh al-Ṭūsī (d. 459/1067), al-Shahīd al-Awwal (d. 786/1385), al-Shahīd al-Thānī (d. 965/1557), Mullāh Aḥmad Narāqi (d. 1244/1829), Sāheb-i Jawāhir (d. 1265/1849), Kāshif al-Ghiṭāʾ (d. 1373/1954), Ayatollahs Rūḥollāh Khomeini (d. 1409/1989), Abū al-Qāsim Khūyī (1390/1970), Mohammad-Reza Golpāygāni (d. 1412/1992), and Mīrzā Javād Tabrīzī (d. 1412/2006).

13 For further discussion on the deontological argument, see Bahman Khodadadi, *Between Orthodoxy and Reform: Theorizing the Suspension of Islamic Corporal Punishments in Shiʿi Theocracy*, 41 J.L. & Relig. (forthcoming 2025) (manuscript at 17–23) (on file with author).

perspective, as it fails to reduce criminal behavior or enhance social order as intended.[14] Others distinguish between core Islamic principles and specific historical applications, contending that certain provisions, such as the *ḥudūd* laws outlined in the Qurʾān and *ḥadīth*, are not central to Islam's essence and could be replaced by more dignified forms of punishments.[15] Another group emphasizes the importance of contextual analysis, suggesting that a careful reading of Qurʾānic verses related to *ḥudūd* laws reveals room for implementing modern penal methods while remaining faithful to the divine commandments and their underlying purposes.[16] Finally, some scholars argue that *ḥudūd* punishments conflict with modern conceptions of justice and human dignity, viewing them as forms of state-sanctioned punitive violence that undermine moral autonomy and contribute to the normalization of violence.[17] They warn of the potential decivilization of public sensibilities, the ethical desensitization of society, and the moral corruption of spectators exposed to such public spectacles.[18]

Although one might conceive that opposition to *ḥudūd* punishments stems primarily from Western liberal or secular paradigms, it is important to recognize that resistance to these penalties is not exclusively a Western phenomenon. As the foregoing discussion shows, a robust and expanding body of critique is emerging within Muslim communities themselves—including in Muslim-majority nations. Indeed, several contributors to this volume embody this internal critique, offering nuanced analyses grounded in *sharīʿa*-based interpretive frameworks and reformist methodologies intrinsic to the tradition. For example, Amin Radmand and Mohsen Borhani, in their article, "An Intrinsic Sharīʿa-Based Approach to Reducing *Ḥudūd* Capital Punishments in Iran," highlight the potential within Shīʿī jurisprudence

14 *See, e.g.*, Moamen Gouda, *Stealing More Is Better? An Economic Analysis of Islamic Law of Theft*, 42 Eur. J. L. & Legal Econ. 103, 124–25 (2015).

15 *See, e.g.*, Liyakat Takim, Shiʿism Revisited: Ijtihad and Reformation in Contemporary Times 42 (2022).

16 *See, e.g.*, Wayel Azmeh, *Corporal Punishment Verses in the Qur'an are to be Reinterpreted to Counter Violent Extremist Practices from Within the Islamic Juristic Tradition*, 24 Dig. Middle E. Stud. 161, 163 (2015).

17 *See* Khodadadi, *supra* note 10, at 242–51.

18 *Id.* at 243.

to significantly lower execution rates while remaining within the framework of *sharīʿa*. Another such critique is found in Zubair Abbasi's article, "Sacred Texts and Profane Realities: Islamic Criminal Laws (*Ḥudūd*) and Children's Rights in Pakistan," which explores the consequences of laws like Pakistan's Zina Ordinance (laws criminalizing extramarital sex) on children's rights. Abbasi emphasizes the need for robust procedural protections within Pakistan's dual legal system, thereby demonstrating how the integration of Islamic and common law principles can safeguard vulnerable groups.

Such internal discourse reveals a complex navigation of ethical principles, textual interpretation, and practical considerations within Muslim communities themselves. This discourse further highlights ongoing processes of interpretation, negotiation, and evolution within Islamic theological, legal, and ethical thought.[19] These diverse approaches demonstrate the vibrant intellectual engagement with *ḥudūd* reform in Islamic scholarly circles. They challenge simplistic characterizations of *ḥudūd* law as static or unreformable.

Articles and essays in this volume—a total of eight contributions—add to this internal discourse by exploring several important issues, including the impact of *ḥudūd* laws in specific jurisdictions; the complex interaction between Islamic law, customary law, and state law; and the ways in which reform can be pursued through internal dynamics within Muslim communities.

Contributing Articles & Essays

The articles and essays featured in this volume constitute a significant contribution to the ongoing debate surrounding the implementation of *ḥudūd* punishments. These works engage deeply with the multifaceted discourse on this complex topic, offering diverse perspectives, challenges, and critiques. Nevertheless, as editor of this volume, I must acknowledge that the collection does not include contributions representing what I have earlier

19 *See* Sherman A. Jackson, The Islamic Secular (2024); Tariq Ramadan, Radical Reform: Islamic Ethics and Liberation (2009); Abou El Fadl, *supra* note 5.

in this introduction called the retentionist position. While this volume also lacks contributions advocating an explicitly abolitionist view, the critical perspectives offered here should still be understood, from a general theoretical standpoint, as opposing the retentionist approach. As such, it must be acknowledged that the ideal dialectic between thesis and antithesis—fundamental to robust intellectual inquiry and the development of synthesis—has not been fully realized in this volume. Recognizing this representational gap, I nonetheless view this volume's contribution not primarily as an effort to present balanced opposing views, but rather as an opportunity to explore the nuanced arguments advanced by critics to *ḥudūd* laws in greater depth. Taken together, the contributions reveal *ḥudūd* laws to be a juridical site where multiple discourses intersect. The volume thus provides a valuable platform for rethinking the conceptual boundaries of Islamic criminal law and invites further inquiry into how these boundaries are negotiated across time, space, and tradition. Like Kafka's parable of the gate of law, *ḥudūd* remains visible yet elusive, inviting some to approach, others to retreat, and many to argue endlessly over who may enter and by which reading. This volume, at the very least, opens the door a little wider.[20]

Muhammad Zubair Abbasi's (Royal Holloway, University of London) article, "Sacred Texts and Profane Realities: Islamic Criminal Laws (*Ḥudūd*) and Children's Rights in Pakistan," underscores the vital importance of procedural safeguards and legal certainty in protecting children's rights within Pakistan's hybrid legal system, which blends Islamic law with common law traditions. The article examines Pakistani court judgments involving children under the Zina Ordinance. Abbasi raises concerns about the lack of clarity in defining legal adulthood, which hinges on either a statutory age limit or the attainment of puberty, as well as the legal validity of "consent" on the part of minors. He also explores the courts' tendency to exercise leniency toward juvenile offenders, noting that courts frequently mitigate sentences for minors based on their youth and prospects for rehabilitation. Ultimately, the article calls

20 *See* Franz Kafka, The Trial (Idris Parry trans., Penguin Classics, 2024) (1925).

for stronger procedural protections and greater legal clarity to safeguard vulnerable populations—particularly children and women—from the risks posed by the politicized application of *sharīʿa*-based criminal laws.

Mohsen Borhani's (University of Tehran) and **Mohammadamin Radmand**'s (independent researcher) article, "An Intrinsic *Sharīʿa*-Based Approach to Reducing *Ḥudūd* Capital Punishments in Iran," explores the relationship between Iran's criminal laws, which are rooted in Shīʿī *fiqh*, and the country's high execution rates. They argue that, because Iran ranks among the highest in global executions, many attribute this trend to the application of *ḥudūd* punishments and call for their wholesale abolition as a result. Objecting to this view, the authors argue that wholesale abolition would contradict the values of Iran as an Islamic society. Instead, the authors adopt a modest and minimalist approach, highlighting the potential for Shīʿī jurisprudence to substantially reduce execution rates while remaining faithful to the broader framework of *sharīʿa* generally and, more specifically, to Shīʿī *fiqh*. The authors argue that the plurality of *fatwā*s and the interpretive flexibility on grounds of Islamic legal consensus offer Iran, as a Shīʿī theocracy, a viable path to uphold Islamic principles while addressing the problem of excessive capital punishment.

Hazim H. Alnemari's (Islamic University of Madinah) article, "God's Law, King's Court: *Ḥudūd* Jurisprudence under Saudi Monarchical Decrees," illustrates how top-down monarchical reform in Saudi Arabia reflects not only legal transformation but also the practical limits of *ḥudūd* law-enforcement in contemporary governance. Alnemari concentrates on significant changes introduced in Saudi criminal law in 2018 and 2019, namely, the elimination of criminal convictions based on doubt (*al-ḥukm bi-l-shubha*) and the abolition of discretionary flogging (*al-taʿzīr bi-l-jald*). He situates these reforms within a broader royal initiative to modernize the justice system. Through a detailed examination grounded in Sunnī *fiqh*, the author explores the complexities of enforcing *ḥudūd* penalties, the interpretive flexibility that can lead to inconsistent rulings, and the tensions between *ḥudūd* penalties and discretionary punishments.

Alnemari argues that Saudi Arabia's royal decrees reflect a nuanced and evolving approach to *ḥudūd* jurisprudence—one that posits the necessity of both judicial interpretation and royal authority to ensure more just and context-sensitive applications of Islamic law.

Tabinda Mahfooz Khan's (El Colegio de México) article, "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," critiques the fractured discourse between judicial interpretations and polarized public debates that, in her view, reproduce orientalist tropes against Islamic law. Khan's contribution delves into the relationship between *fiqh*-based laws and constitutional liberalism in Pakistan, particularly since 1982. She argues that Pakistan's legal-political elite has failed to engage with the *madrasa*-educated *ʿulamāʾ* (scholars) on their own *fiqh*-based terms, and that this disconnect impedes *ḥudūd* reform and perpetuates stereotypes surrounding *ḥudūd* laws and punishments. Khan further explores the ways in which Islamic jurisprudence has historically influenced Pakistan's legal system, particularly in areas concerning civil liberties, women's rights, and the judiciary. While Khan maintains that Islamic legal tradition holds the *potential* to align with democratic principles and individual rights, she contends that this possibility is often lost in both national and global debates. By tracing the evolution Islamic criminal law in Pakistan and the reform efforts it has inspired, her article sheds light on the enduring challenges of reconciling Islamic law with contemporary democratic values.

Anggi Azzuhri's (Universitas Islam Internasional Indonesia) article, "Regulating Crimes under Muslim Law and European Civil Law Framework in Indonesia: Lottery Gambling as a Case Study," examines the prohibition of the national lottery in Indonesian law. He asks how both Islamic (particularly Shāfiʿī jurisprudence) and secular legal traditions shape the country's stance on gambling. Azzuhri argues that what he calls "Muslim law" (as distinct from *sharīʿa*) allows flexibility in Indonesia's pluralistic legal framework. Moreover, he argues that the integration of customary law with Islamic legal principles has facilitated

the incorporation of Muslim moral values into the national legal system, particularly in the criminalization of gambling. For him, customary law functions as a flexible, public interest-driven framework that complements Islamic law and political goals. This fusion gives rise to the hybrid concept of "Muslim law," through which Islamic norms influence the secular legal code. Azzuhri suggests that this model of legal pluralism can offer valuable insights for rethinking the application of *ḥudūd* in Muslim-majority countries with dual legal systems.

Mohamed Mitiche's (University of Johannesburg) article, "A Decolonial Critique of the *Maqāṣid*-Based Approach to the *Sharīʿa*: The Call for a Moratorium on the *Ḥudūd*," critically examines reformist discourse surrounding Islamic criminal law, particularly the emphasis on *maqāṣid al-sharīʿa* (objectives of Islamic law) as a tool for justifying the suspension of *ḥudūd* punishments. Mitiche contends that such reform efforts, while framed as progressive, often reproduce colonial epistemologies by positioning *ḥudūd* laws as the central issue in Islamic law needing correction. He argues that this misguided focus reveals a form of epistemological capture by colonial narratives of Islamic law. Rather than viewing *ḥudūd* laws merely as violent relics of Islamic tradition, he calls for understanding their symbolic, ontological, and eschatological dimensions. He asserts that *ḥudūd* punishments represent a theologically grounded vision of public morality and ethical formation—one that cannot be dismissed without engaging their deeper philosophical underpinnings. According to Mitiche, the fixation on *ḥudūd* laws within reformist and rights-based frameworks reveals more about the desire to manage and render violence acceptable than about the actual elimination of violence itself. In this light, the call for reform is less about justice within Islamic law and more about conformity to dominant global norms. The article ultimately invites readers to reconsider how critiques of *ḥudūd* laws are entangled with broader hegemonic structures and to question the uncritical adoption of human rights frameworks in Islamic legal thought.

* * *

In this Special Issue of the Journal's Forum, where authors write shorter essays on the thematic issue of ḥudūd *laws, three authors offer additional perspectives on Islamic criminal law reform today. Two shorter essays explore discrete issues through case studies, and offer specific proposals for such reforms in Iran and Morocco.*

Hamidreza Asimi's (University of Turin) and **Jamshid Gholamloo**'s (University of Tehran) essay, "Reassessing *Baghy* in Islamic *Fiqh*: Legislative Discrepancies and Normative Alternatives," explores the implications of a major legal development in Iran's 2013 Islamic Penal Code. This revised criminal code, for the first time, classified *baghy* (armed rebellion) as a *ḥadd* crime carrying the death penalty for acts deemed to threaten the Islamic Republic. This reclassification, the authors argue, departs from the established interpretations within classical Shīʿī law. As a result, they argue, the departure introduces conceptual and legislative ambiguities, stretches the traditional bounds of Islamic criminal law, and complicates its enforcement in practice. Drawing from both ethical and Islamic legal principles (based in *fiqh*), the authors propose reforms to the current laws, involving negotiation and reconciliation in place of reclassification of rebellion as a *ḥadd* crime. By aligning legal reforms with rights standards rooted in both *sharīʿa* and international human rights norms, this article calls for a nuanced approach that addresses the ethical concerns surrounding the current penal code. Through this lens, the authors present a compelling case for rethinking how Islamic legal systems might respond to political dissent without resorting to the harshest penalties.

Yannis Mahil's (GISTU University) essay, "Contemporary Mechanisms to Reform Islamic Criminal Law: Between Legal Doctrine and Positive Law – The Case of Morocco," explores the evolving landscape of Islamic criminal law in Morocco. Mahil highlights how scholars and legal practitioners are increasingly employing nuanced hermeneutical methods such as "contextual and eclectic *ijtihād*" to move beyond rigid legal formalism. He contends that this shift reflects an effort to adapt Islamic legal principles to modern legal frameworks, aligning them more closely with human rights norms and contemporary

social expectations. A key strategy has been reclassifying *ḥudūd* offenses as *taʿzīr* offenses, effectively secularizing Islamic criminal law while maintaining its religious legitimacy. Taking Morocco as a case study, the author discusses the ways in which its legal system blends Islamic law and Western influences, leading to the secularization of certain traditional crimes while retaining the notion of "Islamic offenses." Mahil also explores Morocco's evolving stance on the death penalty, especially in the context of its recent support for a UN global moratorium, and argues that such developments reflect broader tensions between Islamic legal traditions and modern human rights discourse. The essay ultimately highlights the complex negotiations at play as Muslim-majority states seek to remain grounded in their legal-religious heritage while responding to changing global legal and moral expectations.

Sacred Texts and Profane Realities: Islamic Criminal Laws (*Ḥudūd*) and Children's Rights in Pakistan

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Abstract

*This article examines the impact of Islamic criminal laws (*ḥudūd*), particularly the Zina Ordinance, on children's rights in Pakistan. By analyzing the judgments of the Federal Shariat Court (FSC) and the Shariat Appellate Bench (SAB) of the Supreme Court, the study identified three key trends in case law. First, ambiguity in defining adulthood—whether based on statutory age limits or biological puberty—has resulted in inconsistent judicial decisions. Second, the judicial approach on minors' consent in sexual offenses evolved over time, shifting from accepting consent to rejecting it, aligning with the principle of statutory rape. Third, while leniency in sentencing underage offenders reflects an emphasis on rehabilitation, it raises questions about deterrence and consistency. The findings of this research underscore the critical role of procedural laws and legal certainty in safeguarding children's rights within a mixed legal framework of Islamic laws and common law tradition.*

Introduction*

The implementation of Islamic criminal laws (*ḥudūd*) in Pakistan, particularly the Offense of Zina (Enforcement of Hudood) Ordinance, 1979 (Zina Ordinance), profoundly impacted the legal status of children, both as victims and as accused in sexual offense cases. The Ordinance, introduced as part of General Zia-ul-Haq's Islamization program, sought to align Pakistan's criminal laws with *sharīʿa*.[1] However, its integration into the existing common law-based legal system created several inconsistencies, particularly in defining adulthood, determining the validity of minors' consent in sexual offenses, and sentencing juvenile offenders.

This article examines the impact of Islamic criminal laws (*ḥudūd*), particularly the Offense of Zina (Enforcement of Hudood) Ordinance, 1979 (Zina Ordinance), on children's rights in Pakistan. It highlights how the Zina Ordinance shaped legal interpretations and judicial outcomes for minors as both victims and offenders of sexual offenses. To explore this issue, the study analyzes reported judgments of the Federal Shariat Court (FSC) and the Shariat Appellate Bench (SAB) of the Supreme Court, spanning four and half decades from 1980 to 2024. It combines

* This article forms part of a broader study examining the judgments of the Federal Shariat Court and the Shariat Appellate Bench, Supreme Court to assess the impact of judicial Islamization of laws in Pakistan. I am grateful to Dr. Khalid Masud, Professor Muhammad Munir, Professor Martin Lau, Professor Shahbaz Ahmad Cheema, Professor Asifa Quraishi-Landes, and Dr. Mushtaq Ahmad for their valuable feedback on various drafts of this article. I also thank Noor Zafar and Simra Sohail for their excellent research assistance, and gratefully acknowledge their contribution. Finally, I am indebted to the anonymous reviewers for their insightful comments and constructive suggestions.

1 General Zia-ul-Haq, the Army Chief who overthrew Prime Minister Zulfikar Bhutto in July 1977, ruled as President until his death in a plane crash in August 1988. Many scholars argue that he used the Islamization of laws to legitimize his unconstitutional military rule. *See* Markus Daechsel, *Military Islamisation in Pakistan and the Spectre of Colonial Perceptions*, 6 Contemporary South Asia 141 (1997). *See also* Sadia Saeed, Politics of Desecularization: Law and the Minority Question in Pakistan 150 (2017); Osama Siddique, Pakistan's Experience with Formal Law: An Alien Justice 231 (2013); Mary Flora Hunter, Contextualising Zia-ul-Haq's Islamisation of Pakistan (1977–88) and Its Impact on 'Non-Muslims' in the Thought of Maududi and British Colonialism 12–56 (2024) (Ph.D. dissertation, University of St. Andrews).

doctrinal analysis of case law with a historical overview of legislative changes to understand the evolving judicial interpretations and their implications for children's rights.

The findings highlight key trends in the case law. A key issue arising from the implementation of the Zina Ordinance was the ambiguity in defining adulthood. Unlike the Pakistan Penal Code, 1860 (PPC), which defined adulthood based on statutory age, the Zina Ordinance considered both age and biological puberty. This dual standard led to inconsistent judicial decisions, with some courts classified minors as adults based solely on physical development rather than age. For male offenders, puberty was assessed using a range of factors, including medical examinations and external appearances, while for females, menstruation was taken as definitive proof of adulthood. This approach resulted in gender disparities, as minor girls were more frequently classified as adults than boys, subjecting them to harsher legal consequences in sexual offense cases. Another critical issue was the treatment of minors' consent in sexual offense cases. Before the Zina Ordinance, the Pakistan Penal Code, 1860 (PPC) recognized the principle of statutory rape, rendering a minor's consent legally irrelevant in rape cases. However, the Zina Ordinance removed this safeguard, creating a legal loophole that defendants initially exploited by claiming minors' consent as a defense in rape trials. Case law from the early 1980s shows that courts frequently downgraded rape (*zinā bi-l-jabr*) charges to consensual extra-marital sex (*zinā*), leading to miscarriages of justice and the prosecution of young victims as willing participants. Over time, judicial attitudes shifted, and by the mid-to-late 1980s, courts reinstated the principle of statutory rape in practice, despite its absence in the law. This shift reflects an evolving recognition of children's vulnerabilities and the need to protect them from sexual exploitation.

The sentencing of underage offenders under the Zina Ordinance was inconsistent. While the Ordinance prescribed severe punishments, courts generally showed leniency toward child offenders, often reducing sentences based on the offender's age and perceived capacity for rehabilitation. In some cases, courts imposed only nominal fines or significantly reduced

prison sentences, citing the offender's young age. However, this leniency raised concerns about deterrence and judicial inconsistency, as similar cases resulted in drastically different punishments. Additionally, procedural safeguards in bail cases played a crucial role in mitigating the harsh effects of the Zina Ordinance. Unlike in sentencing, courts refused to grant the Zina Ordinance overriding effect in bail matters. Instead, they applied the Code of Criminal Procedure, 1898 (CrPC), which allowed bail for minors (under 16 years of age) regardless of the offense. This judicial approach provided relief in many cases, ensuring that accused minors were not unjustly incarcerated while awaiting trial.

The central argument of this article is that the implementation of the Zina Ordinance created significant legal challenges for children, both as victims and as accused, due to ambiguities in defining adulthood, inconsistencies in recognizing minors' consent in sexual offenses, and the discretionary sentencing of juvenile offenders. While judicial interpretations evolved over time—particularly in rejecting minors' consent as a valid defense in rape cases—legal uncertainties continued to expose children, especially girls, to unfair treatment until the legal reform in 2006. This article highlights the crucial role of procedural safeguards and legal certainty in protecting children's rights and argues that the lack of clear legal protections under the Zina Ordinance led to inconsistent rulings, gender disparities, and increased vulnerability for minors within Pakistan's mixed legal system.

The article is divided in two sections. The first section provides an overview of the Hudood Ordinances and their historical context within Pakistan's mixed legal system. The second section explores the ambiguities in defining adulthood, the evolving judicial treatment of minors' consent in sexual offenses, and the leniency afforded to juvenile offenders. The conclusion highlights key findings and emphasizes the importance of procedural laws and legal certainty in upholding justice and protecting the rights of women and children.

Islamic Criminal Laws (*Ḥudūd*) in Pakistan

In 1979, President Zia ul-Haq introduced Islamic criminal laws (*ḥudūd*) in Pakistan. The Hudood Ordinances covered several offenses including extra-marital sex (*zinā*),[2] false accusations of extra-marital sex (Arabic, *qadhf*; Urdu, *qazf*), theft (*sariqa*), and the consumption of intoxicants (*shurb al-khamr*).[3] The Ordinances were central to Zia's Islamization program, aimed at replacing English law-based colonial regulations with *sharīʿa*-based Islamic laws. However, these Ordinances did not repeal Pakistan's secular Penal Code, enacted by the British in 1860. Instead, the Ordinances implanted Islamic criminal offenses (*ḥudūd*) in the existing criminal justice system that was based on common law tradition. Therefore, despite their name, the Hudood Ordinances encompassed not only *ḥudūd* offenses—those with fixed punishments prescribed in the Qurʾān and Sunna—but also *taʿzīr* offenses, which are punishable at the discretion of the state.[4] Many *taʿzīr* offenses in the Hudood Ordinances were directly copied from the Pakistan Penal Code, 1860 (PPC). A few changes to the wording of the substantive sections were made to "Islamize" them while most of the procedural and evidential laws remained the same.[5]

Rather than removing the adverse aspects of colonial laws, Islamization of criminal laws reinforced them. The

2 The Arabic term *zinā* refers to various sexual offenses, including fornication, adultery, and rape. Scholars have translated *zinā* as "unlawful sexual intercourse," "extra-marital sex," or "illicit sexual relations." I use the term "extra-marital sex" to describe *zinā* in this article. *See generally* Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century (2005); Intisar A. Rabb, Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law (2015).

3 The Fifth Ordinance, the Execution of the Punishment of Whipping Ordinance 1979 (repealed under the Abolition of Whipping Act 1996, which abolished whipping for all offenses except those provided for in the four Hudood Ordinances 1979).

4 Dr. Hashmi observed that, although the Hudood Ordinances were framed as divine injunctions based on the Qurʾān and Sunna, only 18 of their 101 provisions addressed *ḥadd* offenses, underscoring their human and political dimensions. Muhammad Tufail Hashmi, *Hudood Ordinance: Qurʾān aur Sunnah ki Roshnī Mein*, 4 Al-Sharīʿa 16, 16–29 (2005).

5 Asma Jahangir & Hina Jilani, The Hudood Ordinances: A Divine Sanction? 23–24 (1990).

example of the "Islamized" evidence law accurately reflects this phenomenon. The colonial law provided that in rape trials, the accused may question the moral character of the victim in his defense.[6] The Qanun-e-Shahadat Order, 1984 which replaced the colonial era Evidence Act, 1872 retained this legal provision in Article 151(4) without making any change.[7] Judges relied on this legal provision to discredit the testimony of female complainants of rape when they were found to be "women of easy virtue."[8] It was not until 2009 that the Federal Shariat Court (FSC) declared this legal provision discriminatory, as it undermined the principle of gender equality enshrined in the Qurʾān by questioning only the character of women.[9] The legislature omitted this sub-article in 2016.[10] Until then, the lack of virtue of the complainant could help the accused receive the benefit of doubt. As the discussion in the next section of this article shows, this defense was raised even in cases in which the victims of rape were minor girls.[11]

6 "When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character." The Evidence Act, 1872, § 155(4).

7 Carroll argues the Qanun-e-Shahadat Order, 1984 did not meaningfully Islamize evidence law. Despite its framing as an Islamic reform, the Order largely retained pre-existing evidentiary rules and limited the incorporation of Islamic principles. She contends that this was an "anti-Islamization coup," allowing Zia's regime to maintain the status quo while presenting the legal changes as part of his broader Islamization agenda. *See Lucy Carroll, Pakistan's Evidence Order ("Qanun-i-Shahdat"), 1984: General Zia's Anti-Islamization Coup*, *in* Dispensing Justice in Islam: Qadis and Their Judgments 517, 517–41 (M.K. Masud, R. Peters & D.S. Powers eds., 2006).

8 Such reference is made to female complainants in several reported judgments. In *Muhammad Ashraf v. Muhammad Irshad*, (2000) PCr.LJ 1756, the court noted that the victim was not a virgin before the alleged rape. In *Muhammad Siddique v. State*, (1987) PCr.LJ FSC 118 and *Tanvir Ahmed v. State*, (1996) SCMR 1549, the court observed that the female victim of alleged rape was accustomed to sexual intercourse.

9 Capt. (retd.) Mukhtar Ahmad Shaikh v. Government of Pakistan, (2009) PLD (FSC) 65.

10 The Criminal law (Amendment) (Offences Relating to Rape) Act, 2016, § 16.

11 In Nazar Hussain v. State, (1988) PCr.LJ (FSC) 1970, the defense attorney described a minor girl of 13 to 14 years as a person of "a loose character" who was a "habitual case" and already had "sexual intercourse with the appellant or with some other persons."

Before the promulgation of the Hudood Ordinances in 1979, the Pakistan Penal Code, 1860 (PPC) dealt with the offenses of adultery and rape, including marital rape. To prove these offenses, the standard of proof was beyond reasonable doubt. The punishment for rape was imprisonment for life or up to 10 years and fine; and for marital rape, the punishment was up to two years imprisonment. Adultery was punishable by imprisonment up to five years. Only a husband could be prosecuted for adultery, and a wife was exempt from prosecution for adultery even as an abettor.[12] The Zina Ordinance, however, introduced several crucial changes, which included the following.

First, the Zina Ordinance introduced a new offence of fornication and criminalized adultery for both spouses. This change in law exposed women to prosecution under the Zina Ordinance as the offense of *zinā* was difficult to hide for women who became pregnant. Belated filing of rape charges after pregnancy shifted the burden of proof to the complainant of rape.[13] The judges of the lower courts did not follow the judicial precedents of the FSC and SAB which laid down the principle that a woman could not be guilty of *zinā* if she complained of rape at any stage, no matter how belatedly; and that mere pregnancy was not sufficient to convict a woman for *zinā* especially if she claimed that the pregnancy was caused due to rape.[14]

Second, the Zina Ordinance created two new offenses of consensual extra-marital sex: *zinā* liable to *ḥadd* and *zinā* liable to *taʿzīr*. The Zina Ordinance defined *zinā* as "[a] man and a woman are said to commit '*zina*' if they willfully have sexual intercourse without being validly married to each other."[15] *Zinā* was punishable with the *ḥadd* penalty (stoning to death for *muḥṣan* and 100 lashes for non-*muḥṣan*),[16] based on either

12 *Id.* at 87.

13 Mustafa Abdul Rahman & Moeen Cheema, *From the Hudood Ordinances to the Protection of Women Act: Islamic Critiques of the Hudood Laws of Pakistan*, 17 UCLA J. Near E. & Islamic L. 17 (2008).

14 Moeen H. Cheema, *Cases and Controversies: Pregnancy as Proof of Guilt under Pakistan's Hudood Laws*, 32 Brook. J. Int'l L. 121 (2006).

15 The Offence of Zina (Enforcement of Hudood) Ordinance, 1979, § 4.

16 Section 2(d) of the Zina Ordinance defined *muḥṣan* as: "Muhsan means . . . (i) a Muslim adult man who is not insane and has had sexual intercourse with a Muslim adult woman who, at the time he had sexual intercourse with her, was

a confession before the trial court or eyewitness testimony to the act of four adult Muslim male witnesses who satisfy the Islamic test of probity (*tazkīyat al-shuhūd*). *Zinā* was punishable with *taʿzīr* (imprisonment up to 10 years) if the standard of proof for *ḥadd* was not available, but the offense was proved beyond reasonable doubt.[17] The evidentiary standards for proving rape (*zinā bi-l-jabr*) closely mirrored those for *zinā*. Rape was punishable either with *ḥadd* or *taʿzīr*, depending upon the evidence. The punishment for rape (*zinā bi-l-jabr*) liable to *ḥadd* was the same as for consensual extra-marital sex (*zinā*) liable to *ḥadd* (stoning to death or 100 lashes).[18] The *taʿzīr* punishment for rape (*zinā bi-l-jabr*) was a minimum of four and a maximum of 24 years imprisonment, and if it was committed by two or more persons (gang rape), the mandatory punishment was death.[19]

Third, the Zina Ordinance removed legal protections available to children under the Pakistan Penal Code, 1860 (PPC) which included "statutory rape" by presuming that sex with a child under the age of fourteen was a rape and treated sex with under thirteen-year-old wife as "marital rape."[20] Both these changes exposed children to sexual exploitation by grown-up men as is discussed below with reference to the facts in the relevant case law. To make things worse, the Zina Ordinance had an overriding effect on the provisions of other statutes including the Pakistan Penal Code, 1860 (PPC) which provided several protections to children. Under Section 82 of the PPC, a child below the age of seven was exempt from criminal responsibility and under Section 83, children between the ages of seven and twelve could only be punished if they were mature enough to understand the nature of the offense. These provisions aligned with the concept of *rushd* (mature

married to him and was not insane; or (ii) a Muslim adult woman who is not insane and has had sexual intercourse with a Muslim adult man who, at the time she had sexual intercourse with him, was married to her and was not insane."

17 *Id.* § 10(2).

18 *Id.* § 5.

19 *Id.* § 10(4).

20 Pak. Penal Code, 1860, § 375.

understanding), which is an essential requirement for criminal responsibility under Islamic criminal law.[21]

Finally, in addition to the offense of rape, the Zina Ordinance categorized fornication and adultery into cognizable, non-bailable, and non-compoundable offences. Under the pre-1979 law, as stipulated in the Pakistan Penal Code, 1860 (PPC), only the husband of a married woman could file a complaint of adultery.[22] Since *zinā* was a non-compoundable offense—meaning the parties could not settle the matter privately—the complainant or aggrieved party could not withdraw the charges. Consequently, even if the accused were ultimately acquitted, they often endured prolonged detention in Pakistan's overcrowded jails. These trials were frequently plagued by excessive delays.[23]

The analysis of reported case law shows that the Zina Ordinance was applied far more frequently than any other Hudood Ordinance. We collected all the reported judgments of the Federal Shariat Court (FSC) and Shariat Appellate Bench (SAB), Supreme Court under the Hudood Ordinances from 1980 to 2024 and categorized them under each of the Ordinance. The chart below shows the number of reported judgments of the FSC under the four Hudood Ordinances.

The chart in Figure 1 (overleaf) shows that a disproportionately higher number of cases were reported under the Zina Ordinance. Charles Kennedy, who conducted an empirical study on the case law under the Hudood Ordinances in 1980s, found that 88% of the reported cases under the Ordinances were related to *zinā*.[24] The primary reason for this, according to him, was because the Zina Ordinance provided a tool to parents, guardians, and husbands to exercise control over their children, specifically disobedient daughters, and wives by bringing false accusations

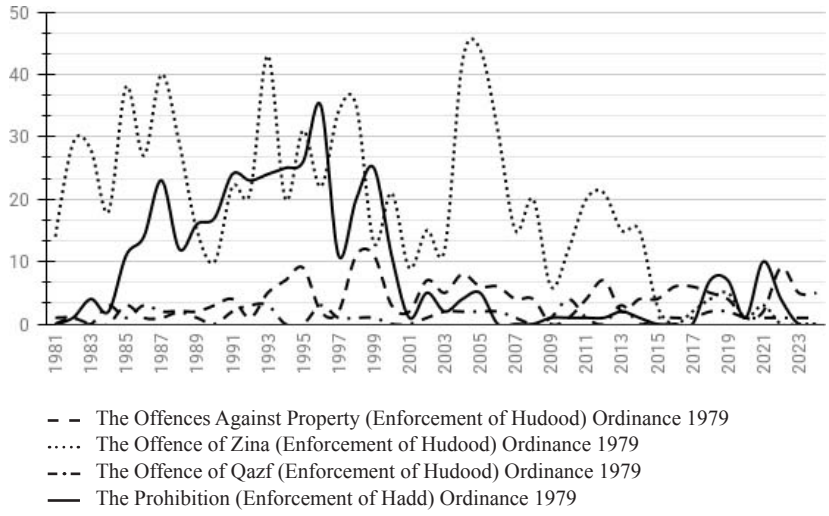
21 The Islamic Criminal Justice System 192–93 (M.C. Bassiouni ed., 1982).

22 Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf, (1963) PLD (SC) 51 (convicting the respondent for enticing and taking away the complainant's lawfully wedded wife, though the wife was not prosecuted).

23 Jahangir & Jilani, *supra* note 5, at 134.

24 Charles Kennedy, *The Implementation of Hudood Ordinances in Pakistan*, 26 Islamic Stud. 307 (1987).

Figure 1: FSC Judgments under the Hudood Ordinances (1980–2024)



of *zinā*.[25] These findings are corroborated by Jahangir and Jilani who note that 70% of the appeals filed before the FSC were related to *zinā* and 46% of all women prisoners in the jails of the province of Punjab were imprisoned on charges of *zinā*.[26] Paradoxically, while the number of cases under the Zina Ordinance was the highest, the conviction rate remained notably low. Data from 1980 to 1987 reveals an acquittal rate of 70% in *zinā* cases appealed to the Federal Shariat Court (FSC).[27] Similarly, an analysis of judgments between 1980 and 2018 shows a 55% acquittal rate in *zinā* cases at the FSC and a 34% acquittal rate at the Shariat Appellate Bench (SAB), Supreme Court.[28]

The data on sexual offenses from 1947 to 2004 shows a sharp increase in the number of *zinā* cases after the promulgation of the Zina Ordinance in 1979.[29] The Zina Ordinance is

25 *Id.*

26 Jahangir & Jilani, *supra* note 5, at 70, 134.

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

28 M. Z. Abbasi, *Sexualization of Sharīʿa: Application of Islamic Criminal (Ḥudūd) Laws in Pakistan*, 29 Islamic L. & Soc'y 319, 319–42 (2022).

29 Ministry of Interior, Bureau of Police Research and Development, Government of Pakistan, Crime in Pakistan 51 (1981); National Police Bu-

one of those curious pieces of legislation which seemingly led to a disproportionate increase in the number of cases related to the very offenses it was designed to curb. The Council of Islamic Ideology also noted a steady rise in *zinā* cases. In 2006, the Council reported that the number of cases registered under the Zina Ordinance kept on increasing during 2001 and 2004 from 3,291 to 3,522 to 3,641 to 3,817.[30] Over time, the Zina Ordinance became so prominently invoked that it symbolized the Hudood Ordinances—a trend that is described as the "sexualization of *sharīʿa*."[31]

The high rate of *zinā* prosecutions was not merely a result of procedural abuses or socio-economic conditions as is often argued,[32] rather it stemmed directly from the Zina and Qazf Ordinances, which were designed to ensure maximum prosecution. First, the Zina Ordinance incorporated several *taʿzīr* offences from the Pakistan Penal Code, 1860 (PPC), allowing prosecution under *taʿzīr* if the strict *ḥadd* standard was not met.[33] Second, by equating consensual sex (*zinā*) with rape (*zinā bi-l-jabr*), the Ordinance ensured that any report of extra-marital sex resulted in prosecution of at least one party.[34] Third, the Qazf Ordinance, rather than deterring false accusations, incentivized them by

reau, Interior Division, Government of Pakistan, Letter No. F. No. 8/5/2003-SRO, dated May 10, 2005, as reported in Pakistan mein Hudood Qawaneen 88, 108–12 (Shahzad Iqbal Shaam ed., 2006).

30 Muhammad Khalid Masud, Hudood Ordinance 1979: Final Report 3 (2006), *available at* http://cii.gov.pk/publications/h.report.pdf.

31 Abbasi, *supra* note 28.

32 Muhammad Taqi Usmani, *The Islamization of Laws in Pakistan: The Case of Hudud Ordinances*, 96 Muslim World 287, 287–304 (2006). Aarij S. Wasti, *The Hudood Laws of Pakistan: A Social and Legal Misfit in Today's Society*, 12 Dalhousie J. Legal Stud. 63, 63–95 (2003).

33 Asifa Quraishi, *Her Honour: An Islamic Critique of the Rape Provisions in Pakistan's Ordinance on Zina*, 38 Islamic Stud. 403, 403–31 (1999).

34 In Rashida Patel v. Federation of Pakistan, (1989) PLD (FSC) 95, the Federal Shariat Court (FSC) ruled that rape (*zinā bi-l-jabr*) is distinct from extra-marital sex (*zinā*), categorizing it as *fasād fī al-arḍ* (corruption on earth) and *ḥirāba* (highway robbery). The FSC directed the government to amend Sections 8 and 9(4) of the Zina Ordinance to reduce the evidentiary requirement for rape from four to two Muslim male adult eyewitnesses. It also clarified that if a complainant fails to prove *zinā* with the testimony of four Muslim male adult eyewitnesses, they will be punished with eighty lashes without the need for additional evidence. An appeal against this ruling has remained pending before the Shariat Appellate Bench (SAB), Supreme Court since 1989.

allowing complainants to claim a defense of "good faith" and "public good," concepts rooted in common law rather than Islamic principles.[35] These features of the Hudood Ordinances escalated *zinā* prosecutions of not only men but also of women and children including minor girls as shown in the next section.

From 1979 to 2006, the Zina Ordinance was the special statute governing sexual offences. Despite its flaws, the Zina Ordinance remained unchanged for 25 years, supported by religious scholars, Islamist political parties, and conservative segments of Pakistani society.[36] In contrast, human rights activists argued that it disproportionately affected women, children, and non-Muslim minorities, calling for its repeal or reform.[37] Shahnaz Khan, based on interviews with women imprisoned for *zinā* in Lahore and Karachi, argued that laws on extra-marital sex serve the interests of patriarchal families, the nation-state, and capitalists, disadvantaging lower-class women in Pakistan.[38] Afshan Jafar examined the impact of Islamization within Pakistan's cultural, historical, and political context, contending that General Zia-ul-Haq's so-called Islamic legal reforms were a political strategy to legitimize and extend his military rule.[39] She argued that these reforms were shaped by a cultural construction of womanhood that viewed women as passive yet dangerous, tying their sexuality to family honor and male ownership. Jafar emphasized that the Zina Ordinance legally reinforced patriarchal norms, leading to widespread abuse of women within both the family and the criminal justice system.[40]

After extensive public debate, the Protection of Women Act, 2006, introduced significant reforms to the Zina and Qazf Ordinances. First, the Act limited the Zina Ordinance to cases punishable by *ḥadd* and required the testimony of four adult, Muslim male eyewitnesses before a trial could start. Similarly,

35 Abbasi, *supra* note 28.

36 Usmani, *supra* note 32.

37 Jahangir & Jilani, *supra* note 5, at 32–33.

38 Shahnaz Khan, *"Zina" and the Moral Regulation of Pakistani Women*, 75 Feminist Rev. 75, 75–100 (2003).

39 Afshan Jafar, *Women, Islam and the State in Pakistan*, 22 Gender Issues 35, 35–55 (2005).

40 *See, e.g.*, *id.* at 40.

the Act confined the Qazf Ordinance to *qazf* punishable by *ḥadd* and removed *qazf* punishable by *taʿzīr*. Second, it reinstated other sexual offenses to the Pakistan Penal Code, 1860 (PPC), as was the case before 1979.[41] Third, it prohibited reclassifying rape or fornication complaints as *zinā* offenses, made *zinā* a bailable offense, and restricted police powers by barring arrests based solely on accusations. Fourth, the Act reintroduced "statutory rape" by declaring the consent of under 16 years of age for sex as invalid despite criticism from a group of religious scholars who argued that "adulthood" is based on puberty under Islamic law.[42] These reforms significantly reduced the number of *zinā* cases, especially against women.[43] Most of the judgments reported after 2006 pertain to incidents that occurred prior to that year.[44]

Impact of the Zina Ordinance on Children's Rights

Defining Adult: Age of Majority v. Puberty

The Zina Ordinance defined an adult as "a person who has attained, being a male, the age of eighteen years or, being a female, the age of sixteen years, or has attained puberty."[45] This means that if a person, whether male of female, who has attained

41 Martin Lau, *Twenty-Five Years of Hudood Ordinances — A Review*, 64 Wash. & Lee L. Rev. 1291, 1308–13 (2007).

42 The members of this group included a retired judge of the Federal Shariat Court and the Shariat Appellate Bench, Supreme Court, Maulana Taqi Usmani, who vehemently opposed most of the proposed legal amendments. Maulana Zahid Al-Rashidi, *Hudood Ordinances aūr iss par Aʿtarazāt*, 17 Al-Sharīʿa 2, 2–9 (2006).

43 Sohail Akbar Warraich, Access to Justice for Survivors of Sexual Assault 7–9 (2015), *available at* https://af.org.pk/gep/images/publications/Research%20Studies%20(Gender%20Based%20Violence)/Access%20to%20Justice%20for%20Survivors%20of%20Sexual%20Assault%20final%20with%20branding.pdf; National Commission on the Status of Women, Study to Assess Implementation Status of Women Protection Act 2006, at 7–11 (2011).

44 For example, see Moula Bux v. State, (2021) YLR 1911 (concerning the rape and murder of a seven-year-old girl in 2004); Qaisar Mehmood v. State, (2021) SCMR 662 (involving the rape and murder of a three-and-a-half-year-old girl in 2003); Muhammad Usman v. State, (2020) PCr.LJ 799 (regarding the alleged rape by a 17-year-old boy in 2004); Imran v. State, (2024) SCMR 1811 (pertaining to an incident of extra-marital sex in 2003).

45 The Offence of Zina (Enforcement of Hudood) Ordinance, 1979, § 2(a).

the statutory age or puberty, would be considered an adult. This categorization is important for two reasons: first, for the validity of the "consent" of victims, which is vital to distinguish between consensual extra-marital sex (*zinā*) and rape (*zinā bi-l-jabr*); and second, to determine the benefit of lenient punishment for underage offenders under Section 7 of the Zina Ordinance.[46] The definition of "adult" based on the age of 18 for males and 16 for females or "puberty" gives rise to several legal problems. As the law did not provide a definition of "puberty," judges determined it based on the specific circumstances of each case.

Judges considered multiple factors to determine the age of minors. A review of cases reveals three primary criteria for establishing "adulthood": age, signs of puberty, and the individual's conduct at the time of the offense. Beyond statutory age, judges also assessed physical development to determine puberty. In some instances, they relied solely on an individual's demeanor at the time of the offense to infer their age. For instance, in *Muhammad Razaq v. State*, an 11-year-old boy was accused of raping a 10-year-old girl.[47] The trial court sentenced him under the Zina Ordinance. In appeal before the Federal Shariat Court (FSC), the primary question before the court was whether the appellant, 11-year-old boy, was entitled to lenient punishment under Section 7 of the Zina Ordinance, given the findings of a medical doctor that the boy could commit sexual intercourse. The judge referred to Section 2(a) of the Ordinance under which a person is deemed to be adult if he is eighteen years of age or has attained puberty.[48] The judge acknowledged that the law did not define when a person is deemed to have attained puberty and observed that boys were likely to become sexually potent and

46 *Id.* § 7 reads: "A person guilty of *zina* or *zina-bil-jabr* shall, if he is not an adult, be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both, and may also be awarded the punishment of whipping not exceeding thirty stripes: Provided that, in the case of *zina-bil-jabr*, if the offender is not under the age of fifteen years, the punishment of whipping shall be awarded with or without any other punishment."

47 (1985) PLD (FSC) 298.

48 *Id.*

hence attain puberty when they are fourteen or fifteen years of age.[49] He relied on Modi's *Medical Jurisprudence*[50] to rule:

> *When examining an individual for sexual capacity the medical jurist should depend more on physical development than on age alone*. Capacity to commit sexual intercourse alone would not be sufficient to hold a male to be a pubert. *In order to establish puberty, it must be shown to secrete semen or the capacity to impregnate a female, that the public and axillary hair are sufficiently grown*. It would further appear that larynx should be sufficient in size so as to lead deepening of the pitch of the voice. Unless these signs are present it would be difficult to say that he has attained puberty.[51]

Based on the above reasoning, the judge held that the physical development of the appellant, who was 11-year-old, showed that he was not an "adult" under Section 2(a) of the Zina Ordinance.[52] Therefore, the boy was entitled to lenient punishment under the Ordinance.

In contrast to the judgment in the above case, a judge in another case held that a boy of 14 years of age, was an "adult" under Section 2(a) of the Zina Ordinance.[53] The judge distinguished the facts in the above case on grounds of the age of the appellant and medical evidence of the victim. He observed that the appellant in the above case was only 11 years old, and no semen was found on the body or clothes of the victim.[54] In contrast, the appellant in the instant case was a 14-year-old, and semen was found on the body of the victim.[55] In this case, the judge assessed puberty based on the overall circumstances rather

49 *Id.*

50 N. J. Modi, Modi's Textbook of Medical Jurisprudence and Toxicology (1982).

51 Muhammad Razaq v. State, (1985) PLD (FSC) 298, 303–304 (emphasis added).

52 *Id.* at 303–304.

53 Muhammad Ashraf alias Guddoo v. State, (1987) PLD (FSC) 33.

54 *Id.* at 38.

55 *Id.*

than the boy's age, ultimately concluding that the 14-year-old was an "adult" under the Zina Ordinance.[56]

The judgments in the above two cases illustrate the broad discretionary powers of judges in determining the puberty of child offenders. For male offenders, puberty was not solely based on biological age; judges considered multiple factors which included physical development and the specific circumstances of each case. In contrast, court rulings regarding female children showed less ambiguity in determining puberty. A female was considered to have reached puberty under Section 2(a) of the Zina Ordinance, if she has begun menstruating.[57] However, this criterion was reinterpreted in some cases, where judges prioritized physical appearance over medical evidence in determining a female's "adulthood." For instance, in *Lal v. State*, the appellant was accused of raping a girl approximately 13 or 14 years old.[58] The accused contended that he was legally married to the alleged victim.[59] The primary question before the court was whether the marriage contract between the appellant and the underage girl was valid.[60] The court held that there were doubts regarding the age of the girl. The medical evidence did not mention anything pertaining to the age of the girl. However, *the physical features that were mentioned in the report showed that the girl was adult* at the time of the contract of marriage.[61]

Despite the lack of conclusive medical evidence regarding menstruation, the judge based his decision on the girl's external physical appearance, assuming she had reached the age of majority. Consequently, he dismissed the rape allegation and ruled that the marriage was valid.[62]

56 *Id.*
57 Mansib Ali v. State, (1986) PCr.LJ 150.
58 Lal v. State, (1988) PLD (FSC) 15.
59 *Id.* at 18–19.
60 *Id.* at 19.
61 *Id.* at 19–20 (emphasis added) (author's translation).
62 *Id.* at 21.

Validity of the Consent of Minors and Statutory Rape

The classification of an individual as an "adult" is significant not only for determining lenient sentencing under Section 7 of the Zina Ordinance but also for distinguishing between consensual extra-marital sex (*zinā*) and rape (*zinā bi-l-jabr*). Before the enactment of the Zina Ordinance, rape was defined under Section 375 of the Pakistan Penal Code (PPC) of 1860. The Zina Ordinance later redefined it as *zinā bi-l-jabr*. However, in 2006, the offense of rape was reinstated into the PPC.

Table 1 overleaf outlines the key differences in the amended definitions of rape.

The comparison above reveals that while the three definitions of "rape" were largely similar, they differed in three key aspects. First, under the Zina Ordinance, a woman could also be charged with rape (*zinā bi-l-jabr*), which was not the case under the secular Pakistan Penal Code, 1860 (PPC). Second, the Zina Ordinance eliminated marital rape as an offense when the wife was under the age of 13. Third, the Zina Ordinance removed the fifth exception of "statutory rape," which previously held that the consent of a girl under 14 for sex was legally invalid. This exception was originally intended to protect underage girls from sexual exploitation. However, the Zina Ordinance eliminated this safeguard. When the definition of rape was reinstated in the PPC under the Protection of Women (Criminal Laws Amendment) Act, 2006, it reintroduced "statutory rape" but raised the age of consent from 14 to 16. Notably, the new definition did not reinstate the provision criminalizing marital rape of a girl under 13.[63]

Despite the statutory changes introduced by the Zina Ordinance in 1979, courts in several cases continued to apply pre-1979 law, rejecting "consent" as a valid defense in rape trials and holding that the consent of a child under fourteen was legally invalid. Case law in the 1980s reflects a mixed approach

63 The Protection of Women (Criminal Laws Amendment) Act, 2006, § 5. Following the amendment to Section 375 of the PPC under the Criminal Law (Amendment) Act 2021, the section now explicitly includes non-consensual anal and oral intercourse.

Table 1

Rape under s. 375 of the Pakistan Penal Code, 1860 (pre-1979)	***Zinā bi-l-jabr* under s. 6 of the Zina Ordinance**	**S. 375. Rape inserted in the Pakistan Penal Code, 1860 under s. 5 of the Protection of Women (Criminal Laws Amendment) Act, 2006**
A man is said to commit "rape" who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions: First. Against her will. Secondly. Without her consent. Thirdly. With her consent, when her consent has been obtained by putting her in fear of death, or of hurt. Fourthly. With her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly. With or without her consent, when she is under [fourteen] years of age. Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offense of rape. Exception. Sexual intercourse by a man with his own wife, the wife not being under [thirteen] years of age, is not rape.	A person is said to commit *zinā bil-jabr* if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely: (a) against the will of the victim; (b) without the consent of the victim; (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt; or (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married. Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offense of *zinā-bil-jabr*.	A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions, (i) against her will; (ii) without her consent; (iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt; (iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or (v) with or without her consent when she is under sixteen years of age. Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

to this rule. In some instances, judges ruled in favor of underage victims by disregarding the removal of "statutory rape" under section 375 of the PPC through the Zina Ordinance. In other cases, they did not consider "consent" a material issue. Judicial interpretations of "consent" in rape cases involving minors can be categorized into three chronological phases: pre-1979, early 1980s, and the late 1980s onward.

Under the pre-1979 rape law, as outlined in section 375 of the Pakistan Penal Code, 1860 (PPC), a minor's consent was deemed legally invalid. For instance, in *Zahoor v. State*, Mst. Saban, a minor girl around 8 or 9 years old, was raped.[64] During the trial, the victim's mother did not support the prosecution's case, and the prosecution did not call the victim as a witness.[65] Given these circumstances, the court ruled:

> Non-production of Mst. Saban, at its best, could help the accused in raising an argument that she was a consenting party, but *the consent of 8 or 9 old girl has no legal consequence to the advantage of the petitioner*. . . . Witnesses other than Mst. Fattan, the mother has not supported the case for the prosecution, which could raise a possibility of the girl being a consenting party, though at this age she would hardly know what they were up to.[66]

As noted earlier, the Zina Ordinance removed the principle of "statutory rape" previously established under Section 375 of the Pakistan Penal Code, 1860 (PPC). In the early 1980s, judges began inferring "consent" from underage victims in cases involving extra-marital sex (*zinā*). A striking example is the case of Jehan Mina, a 15-year-old girl who became pregnant after being raped.[67] However, during the trial, she was unable to provide evidence proving that her pregnancy resulted from rape.[68] As a

64 (1978) PLD (Lah.) 962.

65 *Id.* at 964.

66 *Id.* (emphasis added). *See also* Mohd. Rafiq v. State, (1978) PCr.LJ 730; Haji Ahmad v. State, (1975) SCMR 69; Bashir Ahmad v. State, (1979) PLJ (Cr.C.) (Kar.) 14.

67 (1983) PLD (FSC) 183.

68 *Id.* at 187.

result, the judge concluded that she must have engaged in sexual intercourse voluntarily, with consent and free will:

> [Mst. Jehan Mina] did not take the position that the *zina* had been committed with her at a secluded place in a jungle where she could not cry for help. [Furthermore], she has not even explained as to what force or threat was used against her when she was subjected to *zina-bil-jabr* [rape] and she has also not explained as to what induced her to keep quiet for such a long time in spite of having had the full and complete opportunity of complaining to her nearest relations. . . . In these circumstances, we are of the view that Mst. Jehan Mina has had intercourse with someone out of her own free will and she has, therefore, committed an offence punishable under section 10(2) of Ordinance.[69]

The judgment in the *Jehan Mina* case was not an isolated instance. In the early 1980s, courts in several cases attributed "consent" to minors in rape trials. For example, in *Muhammad Aslam v. State*, the petitioner was convicted under the Zina Ordinance for raping a 12- or 13-year-old girl.[70] On appeal, the Federal Shariat Court (FSC) held that a minor girl of 12 to 13 years consented to sexual intercourse and reduced the punishment of the offender from rape to consensual sex.[71] On final appeal, the Shariat Appellate Bench (SAB), Supreme Court upheld the FSC's judgment.[72] Similarly, in *Muhammad Azeem v. State*, Mst. Mulko was barely 11 years old when she was gagged, dragged to a maize field, and raped.[73] The trial court convicted the accused of rape.[74] On appeal, however, the judges of the FSC ruled that the 11-year-old girl had consented to sexual intercourse.[75]

69 *Id.*
70 (1983) SCMR 866.
71 *Id.* at 866.
72 *Id.*
73 (1983) SCMR 1119; *see also* Ghulam Mustafa v. State, (2006) PCr.LJ 464 (holding that a 12-year-old might have consented to sexual intercourse, thereby reducing the sentence).
74 Muhammad Azeem v. State, (1983) SCMR 1119.
75 *Id.* at 1120.

Consequently, they converted the conviction from rape to consensual sex.[76] In another case, a 15-year-old Perveen and her two young friends, one barely 9 years old, were accosted by two men.[77] The youngest was slapped and threatened while the other two girls were raped.[78] The trial court sentenced the accused for rape, but the Federal Shariat Court (FSC) ruled that 15-year-old Perveen had consented to sexual intercourse and accordingly converted the sentence from rape to consensual sex (*zinā*).[79] On appeal, the judges of the Shariat Appellate Bench of the Supreme Court (SAB) disagreed with the FSC's decision to reclassify the conviction.[80] However, they upheld the sentence since no appeal was filed on behalf of the minor girl, Perveen.[81]

The above judgments demonstrate that the removal of "statutory rape" left children vulnerable to sexual exploitation. Recognizing this risk, judges began rejecting the validity of "consent" for underage girls in rape trials from the mid-1980s onward. For instance, in *Ishtiaq Ahmad v. State*, a minor girl, approximately 13 years old, was abducted and raped.[82] The trial court convicted the accused of rape.[83] On appeal, his counsel argued that the girl had consented to sex.[84] However, a full bench of the Shariat Appellate Bench (SAB), Supreme Court rejected this argument.[85] Justice Afzal Zullah ruled:

> Some argument was addressed to show that the abductee was a willing party because she did not raise a hue and cry when she was made to travel on a bus for some distance. The age difference between her and the accused (when she was hardly 13 years of age) was in the

76 *Id.* at 1126.
77 Ghulam Sarwar v. State, (1984) PLD (SC) 218.
78 *Id.* at 220.
79 *Id.*
80 *Id.* at 221.
81 *Id.*; *see also* Muhammad Nawaz v. State, (1986) SCMR 1812; Muhammad Amin v. State, (1985) SCMR 398; Muhammad Asghar v. State, (1985) SCMR 998; Khushi Muhammad v. State, (1986) PLD (SC) 12.
82 (1984) PLD (SC) 380.
83 *Id.* at 381.
84 *Id.* at 382.
85 *Id.* at 383.

> circumstances of the case enough to convince her that it will be futile; particularly when she had already been subjected to brute force and further that the accused had a weapon of offence.[86]

This judicial tendency to apply the principle of "statutory rape" even after its repeal is evident in the judgment of Justice Muhammad Taqi Usmani, a prominent religious scholar who served as a judge of the Federal Shariat Court (FSC) and the Shariat Appellate Bench of the Supreme Court (SAB) for nearly two decades.[87] In *Farrukh Ikram v. State*, a stepfather raped his 12-year-old stepdaughter.[88] The trial court convicted him under the Zina Ordinance.[89] He appealed the conviction before the FSC, arguing that his stepdaughter had consented to sexual intercourse.[90] In response to this plea, Justice Usmani ruled:

> However, this plea by the learned counsel for appellant does not have any force because the age of the victim, at the time of occurrence, was stated to be 12 years. This means that she was not adult at that time. Therefore, even if the victim had been a consenting party to the offence, the consent would have been legally invalid.[91]

Notably, Justice Usmani did not raise the issue of "puberty" to determine the "adulthood" of the girl. This judgment in the above case however was not an exception as Justice Usmani applied the principle of "statutory rape" in another case, stating that the consent of a minor girl 12 years of age was "legally invalid."[92] Justice Usmani decided both cases as a judge of the Shariat Appellate Bench of the Supreme Court. Therefore, his judgments

86 *Id.* Other members of the bench included Nasim Hasan Shah, Shafiur Rahman, Pir Muhammad Karam Shah, and Maulana Muhammad Taqi Usmani.

87 Kelly Pemberton, *An Islamic Discursive Tradition on Reform as Seen in the Writing of Deoband's Mufti Muhammad Taqi Usmani*, 99 Muslim World 452 (2009).

88 (1987) PLD (SC) 5.

89 *Id.* at 6–7.

90 *Id.* at 10.

91 *Id.* at 10–11 (author's translation).

92 Shaukat Masih v. State, (1987) SCMR 1308.

set the binding precedent for the Federal Shariat Court (FSC) as well as other courts. The FSC followed these judgments in *Nazar Hussain v. State*, wherein the accused was alleged to have raped Mst. Fazlan Bibi, a minor aged 13 or 14 years.[93] The trial court convicted the accused for rape under the Zina Ordinance.[94] On appeal before the Federal Shariat Court (FSC), the counsel for the appellant raised defense of "consent" while relying upon the medical report.[95] The FSC rejected the defense and held:

> It is further suggested that according to the medical evidence the prosecutrix was a habitual case and therefore, must already have sexual intercourse with the appellant or with some other persons. It is not necessary to express any positive opinion regarding this plea because in the circumstances of the case this will not help the appellant as Mst. Fazalan Bibi prosecutrix was minor at the relevant time.[96]

In the 1990s, courts continued to follow a similar approach, as demonstrated in the judgment of *Yousuf Masih alias Bagga Masih v. State*.[97] In this case, the accused, Yousuf Masih and Younus Masih, abducted a minor girl of 12 years of age, Razia, and raped her.[98] On appeal, the counsel for the accused raised the defense of "consent" of the victim.[99] However, Justice Usmani rejected this defense and held that "being a minor, her consent cannot be taken into account."[100]

A review of judicial rulings on the "consent" of minors in rape cases under the Zina Ordinance reveals a clear shift in approach over time. Despite the removal of the legal provision for "statutory rape," judges ultimately rejected the defense of

93 (1988) PCr.LJ 1970 (FSC).
94 *Id.* at 1970.
95 *Id.* at 1972.
96 *Id.*
97 (1994) SCMR 2102.
98 *Id.* at 2104.
99 *Id.* at 2106.
100 *Id.*

minors' consent.[101] In the early 1980s, courts often considered the "consent" of minors as a valid defense in rape cases, frequently reclassifying charges of rape (*zinā bi-l-jabr*) as consensual sex (*zinā*). However, by the mid-1980s, this approach began to change. Judges increasingly invoked the principle of statutory rape as provided in pre-1979 repealed law and ruled that minors' consent was legally invalid, effectively reinstating this principle in practice. The judgments of Justice Usmani played a pivotal role in driving this doctrinal change.

Judicial Attitude towards Underage Offenders

The examination of cases involving offenses committed by minors reveals that courts have generally adopted a standard of leniency in sentencing child offenders, taking into account the nature of the offense and the specific circumstances of each case. For instance, in *Zawwar Husain v. State*, the appellant, described as being of tender age (though the judgment does not specify his exact age), was convicted of consensual extra-marital sex (*zinā*) under Section 10(2) of the Zina Ordinance.[102] The trial court sentenced him to five years of rigorous imprisonment, thirty stripes, and a fine of 5,000 rupees.[103] On appeal before the Shariat Appellate Bench (SAB), Supreme Court, the key issue was whether the offender's sentence could be reduced due to his tender age under section 10(3) of the Zina Ordinance.[104] The court ruled in favor of the accused and held:

> Indeed, the nature of offence may permit to sentence the petitioner for more than 5 years of R.I [Rigorous Imprisonment]. However, the lower courts have remained satisfied with this sentence by reason of the tender age of the petitioner. Therefore, we also believe the same . . . and find no need to enhance the sentence of the petitioner.[105]

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

102 (1985) SCMR 1629.

103 *Id.* at 1630.

104 *Id.* at 1631.

105 *Id.* at 1633.

Similarly, in *Muhammad Ashraf alias Guddoo v. State*, the appellant was fourteen years at the time of the offense.[106] The trial court found him guilty of raping a seven-year-old girl and sentenced him to 20 years of rigorous imprisonment.[107] On appeal, the Federal Shariat Court (FSC) reduced the sentence to 7 years of imprisonment and held: "Keeping in view the very young age of the appellant, we feel that the sentence awarded is too harsh in the circumstances. Accordingly, while maintaining the conviction, we reduce the substantive sentence of imprisonment of the appellant to seven years."[108]

Likewise, in *Khalid Hussain alias Khalid Pervaiz v. State*, the accused, described as a person of very young age (though the judgment does not specify his exact age), was charged with raping an 11-year-old girl.[109] The trial court sentenced him to 16 years of rigorous imprisonment. On appeal, the Federal Shariat Court (FSC) reduced his sentence to 10 years by "[k]eeping in view the very young age of the appellant."[110] In *Phalla Masih v. State*, a boy aged 13 years was prosecuted for raping a seven-year-old girl.[111] The boy was convicted and sentenced to 14 years of imprisonment.[112] Keeping in view the tender age of the boy, the Federal Shariat Court (FSC) reduced the sentence to two and a half years under Section 7 of the Zina Ordinance, which provides a lesser punishment for underage convicts.[113] In this case, the court refrained from awarding the maximum punishment. Rather, it relied on the circumstantial evidence related to the age of the offender and ruled in favor of reducing the sentence.

This lenient approach of the courts undoubtedly favors minors, but it may reduce deterrence. In *Muhammad Hussain v. Muhammad Ramzan*, Zahida Perveen, a girl of approximately 6 years of age, was raped by a boy of around 12 to 14 years of age.[114] The trial court convicted the accused and sentenced him

106 (1987) PLD (FSC) 33.
107 *Id.* at 34.
108 *Id.* at 38.
109 (1987) PCr.LJ 1979.
110 *Id.* at 1985.
111 (1989) PLD (FSC) 72.
112 *Id.* at 73.
113 *Id.* at 75.
114 (1982) PLD (FSC) 11.

to pay a fine of 500 rupees.[115] The father of the victim filed an appeal for the enhancement of sentence.[116] The primary issue before the appellate court was whether the sentence awarded to the young offender, about 12 to 14 years old, was adequate given the victim was about 6 years old.[117] The appellate court enhanced the sentence from the fine of 500 rupees to 8,000, and held:

> [T]he accused was rightly found guilty under section 7 of the [Zina] Ordinance. However, in the circumstances of the case, we find that the sentence awarded to Muhammad Ramzan, accused is grossly inadequate and amounts to a miscarriage of justice. It is proved on record that the accused committed *zina-bil-jabr* [rape] with Mst. Zahida Perveen a girl of 6 years of age. We are also conscious of the tender age of the accused and therefore are not inclined to send him to the prison. Keeping in view the facts and circumstances of the case we feel that the ends of justice will be met by enhancing the fine from Rs. 500 to Rs. 8,000 or in default to undergo rigorous imprisonment for two years plus 30 stripes.[118]

In this case, the court refrained from sentencing the underage offender to imprisonment and instead imposed only a nominal fine. While this compassionate approach may benefit offenders in some cases, it also weakens deterrence and fails to rehabilitate juvenile offenders, thereby increasing the likelihood of re-offending. In a similar situation, the Supreme Court dismissed a plea for sentence reduction and observed:

> We may point out that the purpose of sentence is prevention of crime and to discourage the others to turn to crime. It is generally agreed that leniency in the matter of sentence in serious offences is against the object and wisdom of law whereas the rationale behind the deterrent

115 *Id.* at 12.
116 *Id.*
117 *Id.*
118 *Id.* at 18.

> punishment is to eliminate the crime or at least to reduce and discourage the crime in the interest of peaceful atmosphere in the Society. The ultimate purpose of deterrence or the lenient view in the matter of sentence directly or indirectly is the reformation of an individual as well as the Society. The concept of lenient view in the punishment is to bring down an offender to reform himself and restrain from repeating the crime whereas the goal of deterrence in the sentence is reduction in crime in the Society due to fear of law.[119]

In a similar case, the Sindh High Court rejected a plea for leniency in a sodomy conviction based on the Sindh Children Act, 1955.[120] Section 68 of the Act prohibited the death penalty, transportation, or imprisonment for juvenile offenders, and instead allowed the court to place the child in safe custody while referring the case to the Provincial Government for further orders. In this case, two individuals were prosecuted under Section 12 of the Zina Ordinance for committing sodomy.[121] One of the accused, Muhammad Yakoob, was a 16-year-old boy, while the other, Sajid Mehmood, was an adult.[122] The trial court ruled that Yakoob's case should be tried separately under the Sindh Children Act, 1955.[123] However, an appeal was filed against this decision.[124] The key issue before the appellate court was whether the Sindh Children Act, 1955 applied when one of the accused was a minor.[125] The Sindh High Court held that the Act was not applicable in this case, as the Zina Ordinance had an overriding effect over other statutory laws.[126]

Although not explicitly addressed in the judgment, this case highlights a significant issue concerning children's rights—the inconsistent definitions of "adult" and "child" across various

119 Muhammad Aslam v. State, (2006) PLD (SC) 465, 471–72.
120 Niaz Muhammad v. State, (1985) PCr.LJ 1030.
121 *Id.* at 1031.
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.* at 1039.

statutes. The Sindh Children Act, 1955 defined an "adult" as someone who is not a "child," with Section 5 specifying that the Act applied to children under 16 years of age. Meanwhile, the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 defined an "adult" under Section 2(a) as someone who has either reached eighteen years of age or attained puberty. In contrast, the Zina Ordinance (Section 2(a)) defined "adult" differently: as a male who has reached 18 years or a female who has reached 18 years, or as someone who has attained puberty. These discrepancies created legal uncertainty, particularly in cases involving juvenile offenders, as the applicable definition of adulthood can significantly impact judicial decisions regarding sentencing and culpability.[127] Due to the overriding effect of the Zina Ordinance, such children are deprived of the protections provided by statutory laws like the Sindh Children Act, 1955, which are specifically designed to safeguard minors. Moreover, the Hudood Ordinances' emphasis on puberty as the defining criterion for adulthood excludes the fundamental element of *rushd* (mature understanding), which is a key consideration in determining adulthood under Islamic law. This results in gender discrimination, particularly against female minors, who are more likely to be classified as adults based solely on biological changes rather than cognitive or emotional maturity.[128] By prioritizing physical puberty over a more holistic understanding of adulthood and maturity based on age, the Hudood Ordinances exposed children—especially girls—to risks, stripping them of the protections available under juvenile justice laws.[129]

In bail cases, however, courts refused to give the Zina Ordinance overriding effect. Section 497 of the Code of Criminal Procedure, 1898 (CrPC) allows bail for non-bailable offenses unless there are reasonable grounds to believe the accused is guilty of an offense punishable by death, life imprisonment, or a 10-year sentence. A proviso to this section permits bail for individuals under 16, regardless of the offense. Case law shows

127 M. Ilyas Khan, Laws Relating to Children With Juvenile Justice System Ordinance, 2000 and Juvenile Justice Rules, 2001, at 12–13 (2004).

128 Bassiouni, *supra* note 21, at 192–93.

129 Asma Jahangir & Mark Doucet, Children of a Lesser God: Child Prisoners of Pakistan 4 (1993).

that judges granted bail in sexual offense cases by applying these procedural protections, despite the Zina Ordinance defining adulthood based on both puberty and statutory age. For example, in *Abdul Mannan v. State*, a boy aged 15 years was alleged to have committed sodomy with a boy who was around 6 to 7 years of age.[130] The trial court denied bail based on a medical report confirming his puberty, classifying him as an "adult" under the Zina Ordinance.[131] It held that he was ineligible for bail under Section 12 of the Ordinance, which prescribes rigorous imprisonment for up to 25 years.[132] However, the Lahore High Court overturned this decision, ruling that bail matters should be decided under the CrPC rather than the Zina Ordinance.[133] The judgment established two key principles: first, the Zina Ordinance does not override the CrPC in bail cases; second, courts retain discretion to grant bail to individuals under sixteen years of age.

An analysis of case law shows that courts often granted bail when there was any doubt regarding the accused's age or the need for further inquiry, exercising their discretion in favor of minors. In most cases, the benefit of the doubt was extended to underage accused, regardless of the victim's age or the nature of the alleged offense. For example, in *Muhammad Hayat v. State*, the petitioner was accused of abducting and raping a 15 to 16-year-old girl.[134] In light of the victim's inconsistent statements and doubts regarding her consent, the court ruled that the case required further investigation and granted bail to the accused.[135] Similarly, in *Wazir v. State*, the petitioner was accused of enticing and abducting a girl under 16.[136] The court accepted the alleged victim's consent to her marriage with the accused and granted bail.[137] Similarly, in *Tariq Masih v. State*, the petitioner was accused of abduction and consensual

130 (1984) PCr.LJ 1615.
131 *Id.* at 1616.
132 *Id.*
133 *Id.* at 1618.
134 (1983) PCr.LJ 1359.
135 *Id.* at 1360.
136 (1984) PCr.LJ 1890.
137 *Id.* at 1890.

extra-marital sex (*zinā*) with a minor girl.[138] While the prosecution claimed she was 13 to 14 years old, a medical report estimated her age to be 17.[139] In view of the medical report, the court granted bail.[140]

Conclusion

This article has examined the judgments under the Zina Ordinance involving children. It has highlighted three primary trends in the case law: (1) the ambiguities in defining the legal category of "adult" and determining "puberty" of minors; (2) the legal validity of the "consent" of children; and (3) the lenient sentencing of minor offenders. The most prominent issue is the ambiguity surrounding the definition of adult, which hinges on either a statutory age limit or the attainment of puberty. Courts have often exercised broad discretion in interpreting puberty, relying on physical development, medical evidence, and even the conduct of individuals at the time of the offense. Due to lack of any conclusive relation between the age and puberty, and the absence of any legal definition of puberty, there remained an ambiguity in declaring a person adult under Section 2(a) of the Zina Ordinance. The courts filled this vacuum by frequently relying upon the secondary sources (such as the books on medical jurisprudence and *fiqh* textbooks) and the medical evidence. This lack of clarity has resulted in inconsistent rulings, leaving children vulnerable to varying standards of justice.

Another critical trend in case law is the evolving judicial treatment of minors' consent in cases of sexual offenses. Before the promulgation of the Zina Ordinance, under Section 375 of the Pakistan Penal Code, 1860 (PPC), the consent of minors in rape cases was legally invalid under a proviso to this section. However, the definition of rape (*zinā bi-l-jabr*) under the Zina Ordinance did not incorporate this proviso. Early rulings frequently considered the "consent" of minors as a valid defense in rape trials, leading to the reclassification of rape (*zinā bi-l-jabr*) as

138 (1983) PCr.LJ 325.
139 *Id.*
140 *Id.*

consensual extra-marital sex (*zinā*). Over time, however, judges began to shift towards rejecting the notion that minors could legally consent to extra-marital sex, effectively reinstating the principle of statutory rape, even though it was removed from the relevant statute. This legal change reflected an increasing recognition of the need to protect children from sexual exploitation.

Finally, judges generally showed leniency in sentencing underage offenders, often reducing penalties to account for their age and potential for rehabilitation. While this approach provided relief to minors and emphasized the importance of second chances, it occasionally raised concerns about its effectiveness in deterring reoffending. Procedural safeguards, such as granting bail to minors, have further highlighted the courts' willingness to protect the rights of children.

Overall, Pakistan's experience with the implementation of Islamic criminal laws (*ḥudūd*) underscores the importance of procedural safeguards and legal certainty to protect the rights and interests of vulnerable groups including women and children, from the potential misuse of politically motivated enforcement of *sharīʿa*-inspired criminal sanctions. To address these challenges, in 2006, Pakistan's parliament removed *taʿzīr* offenses from the Hudood Ordinances and implemented procedural safeguards to prevent false prosecutions carried out under the pretext of enforcing divine law—*sharīʿa*. By clearly specifying that the Hudood Ordinances apply only to *ḥudūd* offences, these reforms led to a marked decline in false prosecutions for *zinā*. Paradoxically, it was the "Islamization" of the Hudood Ordinances, through their doctrinal alignment with classical Islamic legal categories, that ultimately addressed the problems arising from their political exploitation.

An Intrinsic *Sharīʿa*-Based Approach to Reducing *Ḥudūd* Capital Punishments in Iran

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Abstract

*Iran's criminal laws are based on Islamic law (*sharīʿa*) in accordance with its Constitution. In recent years, Iran has been among the countries with the highest execution rates worldwide. Most of these executions are linked to ḥadd-based punishments. This has led some intellectuals and foreign observers to believe that the high execution rate is due to laws grounded in* sharīʿa*. To reduce executions, they have proposed abandoning* sharīʿa*. However, such an approach does not align with the values of an Islamic society. Shīʿa jurisprudence, with its inherent capacity, such as the diversity of* fatwās *and authoritativeness of the consensus provides an opportunity. It allows for a significant reduction in executions without partially or entirely departing from* sharīʿa*.*

Introduction*

For many years, Iran has ranked among the countries with the highest number of executions globally. Based on statistics published by Amnesty International[1] in recent years, despite some legal reforms aimed at reducing the death penalty,[2] Iran has consistently remained among the nations with the highest number of executions. The number of executions relative to the country's population of 85 million confirms that Iran holds the highest execution rate per capita globally. According to Amnesty International, based on reports from official Iranian organizations, there were 972 officially recorded executions in Iran in 2024,[3] 853 in 2023,[4] and 576 in 2022.[5] By contrast, in 2014, the number of executions stood at 289,[6] illustrating a significant increase in recent years. Amnesty International has consistently claimed that the actual number of executions exceeds the figures officially reported.

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1 Amnesty.com.

2 As in the amendment of the Anti-Narcotics Law in 2017.

3 Amnesty International, *Global Report on Death Sentences and Executions 2024*, ACT 50/8976/2025, at 4 (Apr. 8, 2025), https://www.amnesty.ch/de/themen/todesstrafe/dok/2025/amnesty-death-sentences-and-executions-2024-v2-web-1.pdf. In Amnesty International's 2024 report, no distinction is made between *ḥudūd* executions and those carried out as *qiṣāṣ* for murder, and no separate figures for each category are provided. However, another organization, Iran Human Rights, has claimed in its report that at least 975 people were executed in Iran in 2024, of which 43 percent—419 individuals—were executed as retribution (*qiṣāṣ*), while the remaining were carried out under the category of *ḥudūd* punishments.

4 Amnesty International, *Global Report on Death Sentences and Executions 2023*, ACT 50/7952/2024, at 4 (May 29, 2024), https://www.amnestyusa.org/wp-content/uploads/2024/05/Amnesty-International-Global-Report-Death-Sentences-and-Executions-2023.pdf.

5 Amnesty International, *Global Report on Death Sentences and Executions 2022*, ACT 50/6548/2023, at 4 (May 16, 2023), https://www.amnesty.org.au/wp-content/uploads/2023/05/Amnesty-International-Death-Sentences-and-Executions-2022-Report.pdf.

6 Amnesty International, *Global Report on Death Sentences and Executions 2014*, ACT 50/0001/2015 (Mar. 31, 2015), https://www.amnesty.org/en/documents/act50/0001/2015/en/.

A widely held and credible view regarding the Iranian judiciary is that, in the Islamic Republic, politics plays a significant role in judicial processes. This means that political considerations can influence the speed of case proceedings, the type and severity of punishments, and that certain political cases are prosecuted under other criminal charges. Specific examples have also been cited to demonstrate the influence of politics in legal cases.[7] While this perspective cannot be entirely dismissed—and in some instances, such politicization does indeed occur—observations suggest that, although political cases tend to be more prominently represented and publicly amplified, in many cases there is no trace of political motivation, and ordinary individuals are executed. Many of those executed come from impoverished, everyday families and have been sentenced to death for crimes such as possession of narcotics. What is particularly noteworthy is that, whether in cases where political elements are present or in those where they are absent, executions are carried out with reference to Islamic law. Even at the stage of criminalizing political actions, religious justifications are invoked.

Death penalties in Iran are based on two categories of religiously prescribed punishments: *ḥudūd* and *qiṣāṣ*.

Ḥudūd refers to punishments that *sharīʿa* explicitly prescribes for specific offenses.[8,9] These punishments are primarily physical, with executions frequently included in this category. *Qiṣāṣ*, on the other hand, is a system of proportional legal retribution for crimes against bodily integrity, ensuring that the punishment corresponds to the harm inflicted on the victim. It is distinct from personal retaliation or revenge and is carried out through a structured legal process. The principle of "an eye for

7 Arzoo Osanloo, *The Measure of Mercy: Islamic Justice, Sovereign Power, and Human Rights in Iran*, 21 Cultural Anthropology 570, 572–75 (2006) (discussing the case of Morteza Amini Moghaddam).

8 Jaʿfar b. Ḥassan Najm al-Dīn (al-Muḥaqqiq al-Ḥillī), 4 Sharāʾiʿ al-Islām fī masāʾil al-ḥalāl wa-l-ḥarām [The Laws of Islam on Matters of the Permissible and the Forbidden] 136 (2d ed. 1988).

9 Islamic Penal Code art. 15 ("*Ḥadd* punishment is defined as a punishment for which the cause, type, extent, and manner of execution are specified in Islamic law.").

an eye"[10] falls under this category.[11] For instance, if an individual intentionally kills another, they may, under certain conditions, be subject to a legal execution as retribution.

Based on the above categorization, it becomes clear that capital punishments in Iran are carried out for these two reasons. *Qiṣāṣ* is a private right, executed at the request of the victim or the family of the deceased.[12] In contrast, *ḥudūd* is not a private right; the state claims the authority to carry out executions in this category.

The majority of executions in Iran are carried out based on *ḥadd*-based punishments rather than *qiṣāṣ*.[13] The offenses under *ḥudūd* punishable by death in Iran include:

1. adultery by force (*ightiṣāb*);[14]
2. adultery with prohibited kin (*zinā maʿa al-maḥārim*);[15]
3. adultery of a non-Muslim man with a Muslim woman;[16]
4. adultery with one's stepmother, which results in the execution of the adulterer;[17]
5. male homosexual acts, (*liwāṭ*, for the receptive partner, in all cases; and for the insertive partner, if the act is committed by force, if the conditions of *iḥṣān* are met, or

10 This rule, which is found in Qurʾān 5:45 (*Sūrat al-Māʾida*), also exists in Judaism. In Leviticus 24, it is stated as follows: "Anyone who takes the life of a human being shall be put to death. Anyone who takes the life of an animal shall make restitution. Anyone who inflicts an injury on their neighbor is to be injured in the same manner: fracture for fracture, eye for eye, tooth for tooth. The one who has inflicted the injury must suffer the same injury." Furthermore, if we believe that the law of Christ was the same as the law of Moses, then this rule was also enforced in Christianity.

11 Islamic Penal Code art. 16 ("*Qiṣāṣ* is the primary punishment for intentional crimes against life, body parts, and benefits, and it shall be enforced as detailed in Book Three of this Code.").

12 Seyed Ruhollah Khomeini, Taḥrīr al-Waṣīla [The Book of Means] 878 (2d ed. 2005).

13 *See supra* notes 5 & 6 (reporting that, according to Amnesty International, while the 2024 report does not specify the number of executions for *qiṣāṣ*, out of 853 executions in 2023, 292 were for *qiṣāṣ* and 561 for *ḥudūd*; and out of 576 executions in 2022, 279 were for *qiṣāṣ* and 297 for *ḥudūd*).

14 Islamic Penal Code art. 224(t).

15 *Id.* art. 224(a).

16 *Id.* art. 224(p).

17 *Id.* art. 224(b).

if the insertive partner is a non-Muslim and the receptive partner is a Muslim);[18]
6. disturbance of the peace (*moharebeh* or *muḥāraba*);[19]
7. corruption on earth (*ifsād fī al-arḍ*);[20]
8. waging war against the state (*baghī*);[21]
9. insulting the Prophet (*sabb al-nabī*);[22] and
10. committing a *ḥudūd* offense for the fourth time.[23]

Also, the legislator has stated in a general provision that if a *ḥadd* punishment is not specified in this law,[24] reference may be made to Article 167[25] of the Constitution. This means that the judge is given the authority to go beyond the principle of legality of crimes and, by directly referring to Islamic jurisprudence (*fiqh*), punish an act that is not criminalized in the law—such as heresy (*bidʿa*) or apostasy (*ridda*)—and even sentence the accused to execution.[26]

This article addresses *ḥadd*-based offenses punishable by death and proposes strategies for reducing executions associated with these crimes.[27] The central question is whether the high number of death penalties in *ḥadd* offenses is intrinsic to *sharīʿa* itself. If such penalties are indeed inherent to *sharīʿa*,

18 *Id.* art. 234.

19 *Id.* art. 282(a).

20 *Id.* art. 286 (noting that the designation *mufsid fī al-arḍ* (corruptor on earth) or its equivalent appears in numerous other provisions of various laws, including the Anti-Narcotics Law, as discussed below).

21 *Id.* art. 287.

22 *Id.* art. 262.

23 *Id.* art. 136.

24 *Id.* art. 220.

25 This article states: "The judge is required to make every effort to find the ruling for each case in codified laws. If no such ruling is found, the judge must issue a judgment based on reliable Islamic sources or valid *fatwā*s. The judge may not refrain from hearing a case or issuing a judgment on the grounds of silence, deficiency, ambiguity, or contradiction in codified laws."

26 Bahman Khodadadi, *"Nowhere but Everywhere": The Principle of Legality and the Complexities of Judicial Discretion in Iran,* 57 Iranian Stud. 651, 661 (2024); *see also* Sajjad Adelian Tous, Managing Religion and Religious Changes in Iran 9–11 (2024).

27 As is evident, *ḥadd* punishments do not necessarily entail execution; other forms, such as flogging and exile, also exist. However, in this article, we focus solely on capital *ḥadd* punishments, while other forms of *ḥadd* will be addressed in separate studies.

there would be no way to reduce or abolish the death penalty in Iran without entirely removing *sharīʿa* as a source of legislation. However, if the prevalence of these punishments is not inherent to *sharīʿa* but rather the result of misinterpretation or selective application by Iranian lawmakers, then strategies could be developed to reduce executions while maintaining *sharīʿa* and Iran's current legislative framework.

Accordingly, we aim to explore methods for reducing *ḥadd*-based executions within Iran's existing legislative structure. We argue that the high prevalence of *ḥadd*-based capital punishments is not an inherent feature of Iran's legal system. Furthermore, without departing entirely or partially from *sharīʿa*, significant reductions in such punishments can be achieved through intra-religious solutions.

The Historical Conflict Between Tradition and Modernity in Iranian Legislation

The debate over the relationship between Islamic jurisprudence (*fiqh*) and law *(qānūn)*—an extension of the broader issue of the relationship between tradition and modernity—has persisted in Iran and other Islamic countries for decades.[28] This discourse began roughly 120 years ago with the introduction of constitutionalism and the establishment of a legislative assembly[29] in Iran.[30,31] Over time, three main perspectives emerged: some strongly

28 Numerous books have been written on the relationship between Islamic jurisprudence (*fiqh*) and law. *See, e.g.*, Wael B. Hallaq, An Introduction to Islamic Law (2009); Wael B. Hallaq, Sharīʿa: Theory, Practice, Transformations (2009); Islamic Law and the Challenges of Modernity (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., 2004); Islamic Law and International Human Rights Law (Anver M. Emon, Mark S. Ellis & Benjamin Glahn eds., 2012).

29 Regarding the Iranian Constitutional Revolution, see Edward G. Browne, The Persian Revolution of 1905–1909 (1910).

30 Davood Feirahi, Fiqh va siyāsat dar Īrān-i muʿāṣir [Jurisprudence and Politics in Contemporary Iran] 348–59 (2012).

31 This dispute has deeper historical roots and can also be observed during the early Qajar era and the Safavid period. For further analysis, see Farzin Vejdani, Private Sins, Public Crimes: Policing, Punishment, and Authority in Iran (2024).

advocating for modernity and its hallmark, modern legal systems;[32] others adamantly defending tradition and its foundation;[33] and those seeking a middle ground to reconcile the two.[34]

We can see a clear trace of this conflict in the Supplementary Fundamental Law of Iran during the Constitutional Era,[35] which established a five-member council of religious scholars (*mujtahid*) tasked with supervising the compatibility of laws passed by the National Assembly with Islamic principles.[36] This debate persisted for decades, but it reached its peak 74 years later, following the Islamic Revolution of 1979. With the establishment of a Shīʿī theocratic state, the Islamic Republic of Iran, and the formal initiation of lawmaking based on *sharīʿa*, the intensity and prominence of this conflict escalated significantly.

Advocates of modernity were also among the supporters of the Islamic Revolution in Iran,[37] and the revolution itself was an attempt to reconcile tradition and modernity.[38] However, during that period, traditionalists[39]—who led the revolution—held greater power. While the traditionalists dominated the legislative institutions and remained deeply committed to tradition, they could not entirely ignore the realities of the modern international world and human rights principles.[40] As a result, the balance did not

32 Among the early Iranian secularists, examples include Mirza Aqa Khan Kermani, Mirza Fath Ali Akhundzadeh, and Seyyed Hassan Taqizadeh.

33 The most prominent examples among the early figures were Sheikh Fazlullah Nouri and Seyyed Kazem Yazdi.

34 For example, Mirzaye Naeini, Mirza Hossein Khan Sepahsalar, and Malkam Khan.

35 The Constitutional Law was enacted in 1906, followed by the Supplementary Law in 1907.

36 In the first amendment to the constitution, due to pressure from traditionalists, a five-member council of top clerics was established to supervise the religious legitimacy of the laws.

37 For example, one can refer to Mehdi Bazargan and the National Front of Iran *(Jibha Melli Iran)*.

38 For efforts to reconcile Islam and modernity, see Mohsen Kadivar, Ḥaqq al-nās: Islām-i nawandīsh va ḥuqūq-i bashar [The Rights of the People: Reformist Islam and Human Rights] 112–23 (2023).

39 The Shīʿī clerics and their leading figure who was Ayatollah Khomeini.

40 Extensive discussions have taken place regarding the relationship between Islamic rulings and principles and human rights, and several valuable works have been published on the subject. *See, e.g.*, Hossein-Ali Montazeri, Mujāzathā-yi Islāmī va ḥuqūq-i bashar [Islamic Punishments and Human Rights] (2003); Rahim Nobahar, Islām va mabānī-yi ḥuqūq-i bashar [Islam and the Foundations of Hu-

entirely tip in favor of tradition. The conflict between tradition and modernity persisted and even intensified.[41]

For the first time, Shīʿī jurists assumed official roles as lawmakers, tasked with drafting legislation that was both rooted in religious principles and compatible with the needs of modern society. Post-revolutionary Iranian legislators faced relatively few challenges in civil law, as these laws had been aligned with *sharīʿa* even before the revolution. The primary challenges arose in criminal law, particularly concerning *ḥudūd* punishments.[42]

Some *ḥudūd* punishments are explicitly outlined in the Qurʾān,[43] leaving little room for interpretation or flexibility. However, these laws were not well-received by either domestic society or the international community.[44] In a world where the abolition of capital punishment was increasingly seen as a moral virtue, a political system emerged in Iran with the intent of reviving *ḥudūd* punishments—resulting in a significant increase in capital punishments.[45]

Such a situation naturally brought about its own challenges, marking this period as one of the most contentious eras in Iranian legislative history. Some post-revolution jurists also argued that there is no direct correlation between an Islamic government and the enforcement of *ḥudūd* punishments. They

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man Rights] (2010); Abdullah Saeed, Human Rights and Islam (2018); Abdulaziz Sachedina, Islam and the Challenge of Human Rights (2009).

41 Examples of escalation include the socio-political conflict in June 1981 following the introduction of the Qiṣāṣ Bill, the protest by legal scholars and the expulsion of many from universities, as well as the reinstatement of flogging as a punishment in the *ḥudūd* law.

42 Discretionary punishments (*taʿzīrāt*) are also one of the Islamic punishments, but they are under the discretion of the ruler (*ḥākim*), and the legislator had complete freedom. However, the *ḥudūd* punishments were completely clear and defined, and the legislator had little room for maneuver or change.

43 The *ḥadd* of adultery (*ḥadd al-zinā*), the *ḥadd* of theft (*ḥadd al-sariqa*), the *ḥadd* of false accusation (*ḥadd al-qadhf*), and the *ḥadd* of disturbance of the peace (*ḥadd al-muḥāraba*).

44 Some have attempted to show that there is no contradiction between *sharīʿa* punishments and human rights. For example, see Matthew Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law,* 12 B.C. Int'l & Comp. L. Rev. 29, 55–57 (1989).

45 Hussein Gholami & Bahman Khodadadi, *Criminal Policy as a Product of Political and Economic Conditions: Analyzing the Developments in Iran Since 1979*, 128 Zeitschrift für die gesamte Strafrechtswissenschaft 612 (2016).

contended that an Islamic government could be established without necessarily implementing *ḥudūd*.[46] However, this perspective did not gain much traction, and ultimately, *ḥudūd* punishments were incorporated into Iran's criminal laws. Others maintained that in the absence of the Imam (*Imām al-Zamān*), the enforcement of *ḥudūd* should be suspended—an opinion with longstanding roots in Shīʿa jurisprudence. However, after the Islamic Revolution, this view was rejected in favor of the opposing position, which advocated for the application of *ḥudūd* even during the Imam's occultation.[47] Three years after the Islamic Revolution, in 1982, the first post-revolution criminal law, titled the "Law on Islamic Punishments," was enacted. This law consisted of 41 articles and 38 notes and addressed only general provisions. However, in the same year, two other laws, the "Bill on Ḥudūd and Qiṣāṣ"[48] (containing 215 articles and 50 notes) and the "Bill on Diyah"[49] (containing 211 articles and 9 notes), were also passed. Together, these three laws revealed the structure of the new criminal justice system.[50]

As their titles suggest, *ḥudūd*, *qiṣāṣ*, and *diya* were explicitly incorporated into these laws. Despite multiple amendments to the law over the years, *ḥudūd*, *qiṣāṣ*, and *diya* remain integral components of Iran's criminal code. In fact, the most recent Islamic Penal Code, enacted in 2013, reflects an increase in the number of *ḥadd*-based offenses punishable by death. Additionally, several

46 Seyed Mostafa Mohaghegh Damad, Qawāʿid al-fiqh [Principles of Jurisprudence: Criminal Section] 291 (2000) (criminal section).

47 Bahman Khodadadi, On Theocratic Criminal Law: The Rule of Religion and Punishment in Iran 128 (2024).

48 At the time when the Qiṣāṣ Bill was introduced, opposition emerged from within Iran, including some political parties, lawyers, and judges, who objected to the bill and faced severe repercussions. Mohsen Kadivar has examined this issue in detail. *See* Mohsen Kadivar, *Chirā ḥūqūqdānān muntaqid-i lāyiha-yi qiṣāṣ budand?* [*Why Were Legal Experts Critical of the Qiṣāṣ Bill?*], Kadivar (Nov. 22, 2020), https://kadivar.com/16173/.

49 *Diyah* (*diya*) is a financial compensation that the offender or their representative must pay in cases of murder, injury to the soul, or harm to a body part. It must be paid to the victim or their legal heirs. In legal terminology, *diya* is the financial compensation determined by *sharīʿa* for certain criminal offenses.

50 Mohammad H. Tavana, *Three Decades of Islamic Criminal Law Legislation in Iran: Legislative History Analysis with Emphasis on the Amendments of the 2013 Islamic Penal Code*, 2 Elec. J. Islamic & Middle E. L. 24–28 (2014).

other laws reference *ḥudūd* punishments, the most notable being the Anti-Narcotics Law passed in 1997.

Forty-five years after the revolution and 42 years since the first *sharīʿa*-based criminal legislation, the trend in lawmaking demonstrates an increase in the number of offenses carrying the death penalty. Most of these punishments are based on *ḥudūd* offenses. In recent years, even widespread acts such as facilitating abortion or broadly promoting unveiled appearances on a large scale have been met with the imposition of capital punishment.[51]

Today, Iranians face a legislative framework in which, under Article 4 of the Constitution, lawmakers are obligated to legislate in accordance with *sharīʿa* and are prohibited from enacting laws contrary to it. This gives rise to the perception that the high number of executions in Iran stems from the application of *sharīʿa* in legislation and that the current execution rates are the inevitable and direct consequence of *sharīʿa*-based lawmaking. But how accurate is this claim? Is the high number of executions an intrinsic outcome of Islamic jurisprudence (*fiqh*), and is the only way to reduce executions to abandon *sharīʿa*?

The Perspective of Advocates for Transitioning from the Existing Jurisprudence to an Ideal Jurisprudence

What approaches have religious intellectuals and scholars adopted toward *sharīʿa* in general and capital punishment in particular? Among various scholars and religious intellectuals, differing perspectives on engaging with Islamic jurisprudence (*fiqh*) have emerged. Broadly speaking, these perspectives can be categorized into two main approaches: the traditional approach to *sharīʿa* and *fiqh* and the deconstructionist approach to *sharīʿa* and *fiqh*.

In other words, the discussion can be framed in terms of *fiqh* as the "existing reality" versus *fiqh* as the "ideal state," presenting a form of the "is versus ought" dichotomy. The approach defended by us advocates for preserving the existing *fiqh* while

51 These punishments have been prescribed as a *ḥadd* for corruption on earth (*ifsād fī al-arḍ*) and the validity of this *ḥadd* will be examined later.

utilizing its internal capacities to reduce the number of executions.[52] However, other approaches, which were sincere and intended to respect the religion, aimed at addressing the challenges posed by capital punishment and other aspects of *sharīʿa* in the modern world, seek to reform the existing *fiqh* and transition toward an ideal *fiqh*.[53]

The second group, which could be called deconstructionists, dismisses *sharīʿa* and all jurisprudential rulings in the social sphere—including those related to crimes and punishments—arguing that none of them are obligatory in today's world. Proponents of this view assert that these rulings, including the penal laws of Islam, were not intended for the present era but were historically specific and temporally bound, designed for a particular society with unique characteristics. While they may have been binding for individuals in that historical context, they are no longer applicable to contemporary times.

According to this perspective, *fiqh* represents the history of legal systems in Iran and other Islamic countries rather than a body of knowledge from which actionable behavioral norms can be derived. How can the tribal and rudimentary society of the Arabian Peninsula compare to the semi-modern or even partially modern society of contemporary Iran? Faith, they argue, has no intrinsic connection to *fiqh* and *sharīʿa*. One can maintain faith without adhering to these rulings, either in theory or practice.[54]

52 The reason we have chosen this approach is that it offers a solution that achieves much of the desired outcome of the opposing view without requiring a transformation of the political system, fundamental changes to existing legislative institutions and structures, or a departure from the established framework of Shīʿa jurisprudence.

53 There has also been an effort to abolish *ḥudūd* punishments based on intra-religious references within Sunnī Islam. For example, in an article published in 2023, the views of six prominent scholars from Al-Azhar University in Egypt—Sheikh Muḥammad ʿAbduh, ʿAlī Gomʿah, Ṣadraddīn al-Ḥilālī, Shawqī ʿAllām, Abdelazehra, and ʿAbd al-Muṭaʿal Ṣaʿīdī—were examined. It was concluded that they, too, have made efforts to abolish *ḥudūd* punishments through methods such as *fiqh al-maqāṣid* (the objectives of Islamic jurisprudence). *See* Salah al-Ansari, *Contextualising Islamic Criminal Law: An Analysis of Al-Azhar Scholars' Contributions*, 19 Manchester J. Transnat'l Islamic L. & Prac. 2 (2023).

54 Mohammad Mojtahed Shabestari, Harmanautik, kitāb va sunnat [Hermeneutics, the Book, and the Tradition] 56–66 (6th ed. 2005).

This approach seeks to abandon jurisprudential rulings using various methods and justifications. The four most significant methods are as follows:

The first method is the distinction between foundational (*taʾsīsī*) and endorsed (*imḍāʾī*) rulings. According to this method, Islamic rulings are divided into two categories: *taʾsīsī* rulings, which were originally introduced by the Prophet Muḥammad (peace be upon him) and had no precedent in the Arabian Peninsula, and *imḍāʾī* rulings, which were customary practices in the Arabian Peninsula that the sacred lawgiver approved and allowed to continue.[55] In this approach, jurisprudential rulings are further categorized into two types: acts of worship (*ʿibādāt*) and transactions (*muʿāmalāt*). The argument is that rulings related to acts of worship are foundational (*taʾsīsī*), while rulings related to transactions are endorsed (*imḍāʾī*). Since the latter category is based on customary practices, they were legislated in accordance with societal norms. From this perspective, capital punishment for certain crimes was a customary practice during that era, which Islam endorsed. However, since such practices are no longer customary today, the argument follows that these crimes and their associated punishments no longer hold validity under the principle of *imḍāʾī* rulings.[56]

The second method emphasizes the centrality of justice and rationality. This approach posits that the concepts of justice and rationality are pre-religious and supra-religious, meaning that these two principles bind Islamic rulings. In essence, justice and rationality are both conditions for the origination (*ḥudūth*) of rulings and for their continued validity (*baqāʾ*). Accordingly, any religious ruling that is deemed unjust or irrational in the contemporary era cannot be considered Islamic and cannot be attributed to *sharīʿa*. This method operates on the assumption that Islamic rulings have always been aligned with societal rationality and the principles of justice. Thus, the validity of an Islamic ruling depends on this alignment; if the alignment no longer exists, the ruling in question ceases to be an Islamic or

55 Liyakat Takim, Shiʿism Revisited: Ijtihad and Reformation in Contemporary Times 126–46 (2022).

56 Mehdi Haeri Yazdi, *Hikmat-i Aḥkām-i Fiqhī (The Wisdom of Jurisprudential Rulings)*, 46 Kiyan 2–4 (1999).

sharīʿa-based provision. Based on this approach, capital punishment and certain forms of criminalization must be abandoned because they conflict with contemporary notions of justice and rationality. Consequently, such rulings can no longer be prescribed in today's context.[57]

The third method emphasizes the primacy of ethics. This approach argues that ethics, as a concept, is distinct from rationality and, like rationality, is both pre-religious and supra-religious. Consequently, Islamic rulings are bound by ethical principles. According to this perspective, the issue lies in the fact that jurists have not considered ethics as a basis for legal rulings. If ethics were regarded as a pre-religious concept and ethical principles were considered from this perspective, many religious rulings could no longer be attributed to *sharīʿa*.[58] Based on this approach, capital punishment is deemed unethical, and therefore, religious texts that prescribe the death penalty for certain offenses are no longer relevant. Such rulings are abandoned due to their inconsistency with ethical principles.

The fourth method relies on the concept of *maqāṣid al-sharīʿa* (objectives of *sharīʿa*).[59] Advocates of this approach argue that every prescribed punishment in Islamic law has an underlying philosophy and specific purpose, and it is these objectives that hold true significance. The prescribed punishments in *sharīʿa* were merely meant to achieve these objectives during the time of the Prophet and shortly thereafter. Today, alternative methods that fulfill the same objectives and goals must be sought, even if they differ entirely from the punishments mentioned in *sharīʿa*.[60] Proponents of this view assert that the state

57 Mohsen Kadivar, Az Islām-i tārīkhī ba Islām-i maʿnavī dar sunnat va sakularism [From Historical Islam to Spiritual Islam in Tradition and Secularism] 426–31 (2d ed. 2003).

58 Abū al-Qāsim Fanaei, Akhlāq-i dīn shināsī [The Ethics of Religious Knowledge] 94–106 (2010).

59 For the precise definition of *maqāṣid al-sharīʿa* and its historical development over the centuries, see Felicitas Opwis, *Islamic Law and Legal Change: The Concept of Maṣlaḥa in Classical and Contemporary Islamic Legal Theory*, *in* Shari'a: Islamic Law in the Contemporary Context 62–82 (Abbas Amanat & Frank Griffel eds., 2007); *see also* Mohammed Fadel, *Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights*, 8 Chi. J. Int'l L. 1, 1–20 (2008).

60 Kadivar, *supra* note 57, at 426–29.

must determine whether punishments such as capital punishment (*qiṣāṣ*), *ḥudūd*, stoning (*rajm*), and discretionary punishments (*taʿzīr*) are effective tools for achieving justice and promoting social welfare. If a punishment conflicts with the values of justice, humanity, or human rights, the state—acting as both God's representative and the representative of society—should identify alternative forms of punishment that are beneficial to the community.[61] For example, monetary fines might achieve the same objectives of criminalization and punishment for offenses such as adultery (*zinā*) as those originally intended by *sharīʿa*.

As discussed above, some scholars turn to the tools of textual interpretation and attempt to utilize contemporary interpretative theories to reinterpret religious texts in ways that differ from traditional juristic understandings. This group believes that the possibility of multiple interpretations of texts allows for a rereading of the sources, enabling an alternative understanding of the texts.

In this context, jurists are often accused of failing to comprehend or engage with modern interpretative theories. It is argued that, had they considered modern interpretative theories, they would not have interpreted the texts in this manner. Consequently, these rulings are attributed to what is perceived as a flawed interpretative framework employed by the jurists.

Even if these perspectives are methodologically precise and well-reasoned, the fundamental issue with the four aforementioned approaches is their lack of jurisprudential authority among Muslims. While some proponents of these views are regarded as leading intellectuals,[62] they do not hold religious authority in issuing legal opinions (*fatwā*s) in the eyes of the general public. In contrast, the majority of *sharīʿa* specialists—who possess scholarly and social influence and hold authoritative positions in the field of *fiqh*—do not adhere to such approaches.

61 Nur Rofiah & Imam Nāhe'i, The Study of Law and Punishment in Islam: The Ideal Concept of Hudūd and Its Practice 227 (2016).

62 Among these prominent intellectuals are Dr. Abdolkarim Soroush and Mohammad Mojtahed Shabestari. For an examination of their views, refer to Kadivar, *supra* note 57. Additionally, see Mohsen Kadivar & Niki Akhavan, Human Rights and Reformist Islam (2021).

Consequently, these perspectives have little acceptance among Muslims and adherents of *sharīʿa*.

For a predominantly Muslim society like Iran, such interpretations are not widely accepted, and their proponents do not hold intellectual authority among the general public. However, recent studies indicate that adherence to *sharīʿa* among Iranians has been gradually declining, suggesting that circumstances may change in the distant or near future.[63] Nonetheless, for now, official jurists and religious authorities continue to hold more influence among the people than secular intellectuals. For instance, a public opinion poll conducted in October 2023 showed that more than 50% of respondents still identified with a *marjaʿ al-taqlīd* (source of emulation).[64]

In any case, the authors of this article seek to propose a solution for reducing executions within the existing legal framework and institutional structures of Iran, without advocating for fundamental structural changes—while acknowledging that the views of other scholars are worthy of consideration and respect. From a realistic point of view, even if a majority of the population were to demand the abolition of *ḥudūd* punishments, Iran's current legislative framework, particularly the existence of the Guardian Council, would prevents structural changes in the sources and foundations of legislation. Moreover, the establishment of institutions such as the Expediency Discernment Council has not led to any substantive changes regarding *ḥudūd*.[65]

The Diversity of *Fatwā*s and Authoritativeness of The Consensus: A Unique Capacity

Under the Iranian Constitution, the legislature is obligated to draft laws based on Islamic principles, specifically Twelver

63 Ministry of Culture & Islamic Guidance, The Fourth Wave of the National Survey on Iranian Values and Attitudes (2024).

64 *Id.*

65 Antonia F. Fujinaga, *Islamic Law in Post-Revolutionary Iran*, *in* Oxford Handbook of Islamic Law 618 (Anver Emon & Rumee Ahmed eds., 2018).

Shīʿa jurisprudence (*fiqh*).[66,67] In the realm of criminal law, the primary source for deriving Islamic rulings is the writings of Shīʿī jurists. Naturally, the foundation for legislation is traditional *fiqh* and the prevailing interpretations in Shīʿa Islamic centers, rather than the deconstructionist approaches mentioned in the previous section.

Although divine *sharīʿa* is immutable, the interpretations of Islamic sources by jurists are highly diverse. Pluralism is inherent to the discipline of *fiqh*, and it is impossible to impose a uniform understanding of the Qurʾān and *ḥadīth* upon all jurists or to expect unanimous rulings on every issue. Throughout Shīʿa history, numerous jurists have analyzed Qurʾānic and narrational evidence and, based on their independent reasoning (*ijtihād*), have offered differing opinions on the definition of crimes, methods of proving crimes, punishments for crimes, and the means of their implementation.

An examination of these writings reveals a variety of opinions on any given issue, with few instances in which all jurists, across all periods, have arrived at a single, unanimous ruling. This raises a fundamental and unresolved question, which has persisted throughout 42 years of criminal and non-criminal legislation: Which *fatwā* or interpretation of *sharīʿa* should be incorporated into law?

Specifically in the context of this article, if one *fatwā* holds that an individual who commits a particular crime should be executed, while another *fatwā* states that this individual should

66 In Shīʿa Islam, there are several sects, the most important of which are the Twelver Shīʿa, Ismāʿīlī Shīʿa, and Zaydī Shīʿa. Since the official sect in Iran's constitution is Twelver Shīʿa, whenever we refer to Shīʿa jurisprudence, we are specifically referring to Twelver Shīʿa.

67 Within Twelver Shīʿa jurisprudence, there are also various sub-schools such as the Akhbārī, Uṣūlī, Neo-Muʿtazilī, Shaykhī, and others—each with its own distinct characteristics. However, the school of jurisprudence adopted by the Iranian legislator is the traditional Uṣūlī school, or as Ayatollah Khomeini described it, the Jawāhirī jurisprudence. Therefore, any reform in the path of legislation in Iran—regardless of whether we consider it right or wrong—must be based on the Uṣūlī branch of Shīʿa jurisprudence. To see the opinion of the founder of the Islamic Republic regarding his preferred jurisprudential method, consult Ruhollah Khomeini, 21 Ṣaḥīfa-yi imām 289 (1999). To explore the various sub-schools within Twelver Shīʿa jurisprudence, see Jaʿfar Subhani, Tārīkh al-fiqh al-islāmī wa-adwāruhu [The History of Islamic Jurisprudence and its Periods] (1997).

not be executed, which of these two interpretations should be enshrined in law?

For example, regarding the punishment for the crime of *sabb al-nabī* (insulting the Prophet), some jurists explicitly consider *sabb* (insulting) Ḥaḍrat Fāṭima[68] to be punishable by execution.[69] However, others express doubt about whether Ḥaḍrat Fāṭima should be equated with the Prophet or the Imams in this ruling; they hold that such an insult warrants execution only if it ultimately constitutes an insult to the Prophet himself.[70]

Regarding the *sabb* of other prophets, there is significant juristic disagreement. Some scholars do not consider insulting them to be punishable by execution,[71] while others rule that sabb directed at any prophet entails capital punishment.[72]

Another example pertains to *zinā* (fornication or adultery) with *maḥram sababī* (in-laws) and *maḥram riḍāʿī* (relations through nursing). Some jurists consider a man's *zinā* with these categories of *maḥram* to be punishable by execution.[73] However, others do not regard such cases as warranting the death penalty.[74]

From an external perspective, rather than the viewpoint of jurists, one might argue that there is no inherent preference among the various interpretations of *sharīʿa*, nor is there any tool to definitively determine which interpretation is superior or aligns most accurately with the will of God. This uncertainty regarding the correspondence of these interpretations to the true *sharīʿa* represents one of the unique capacities of *fiqh* to adapt to the modern world.

Unfortunately, the Iranian legal framework has failed to capitalize on this capacity. Despite the passage of many years, it remains unclear what criteria are used to select a *fatwā* for incorporation into the law.

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68 The daughter of the Prophet and the mother of two Shīʿī Imams.

69 Seyed Abolqasem Khoei, Mabānī takmīlat al-Minhāj [Foundations for Completing al-Minhāj] 321 (2001).

70 Khomeini, *supra* note 12, at 878.

71 Khoei, *supra* note 69, at 321.

72 ʿAbd al-Aʿlā al-Mūsawī al-Sabzawārī, 28 Muhadhdhab al-aḥkām fī bayān ḥalāl wa-l-ḥarām [The Refinement of Rulings in Explaining the Permissible and the Forbidden] 32 (4th ed. 1992).

73 Khoei, *supra* note 69, at 233.

74 Khomeini, *supra* note 12, at 867.

The diversity of *fatwā*s is such that if a legislator adopts a pro-execution stance, operating under the assumption that executions can resolve societal problems, reduce crime rates, and deter others, they can easily justify capital punishment for dozens of criminal behaviors based on the plurality of *sharīʿa* interpretations. Conversely, if a legislator adopts a more humane perspective, seeking to minimize executions as much as possible and believing that executions neither bring about societal change nor serve as a deterrent, they can likewise reduce the number of capital punishments in the law to the bare minimum and attribute this reduction to *sharīʿa*.

The question then arises: based on the theory proposed by the authors, how can executions be reduced while preserving *sharīʿa* and adhering to traditional methods of jurisprudential reasoning? Furthermore, to what extent can this reduction be practically implemented to remove the death penalty from a significant percentage of criminal offenses?

Another notable capacity of Shīʿa jurisprudence is its authoritativeness of the consensus (*ḥujjīyat-garāʾī*), which supports its pluralistic nature. The foundation of this pluralism lies in the understanding that the divine will does not always perfectly align with a jurist's interpretation of *sharīʿa*, even after extensive scholarly effort. This difference occurs because jurists attempt to discern the divine will (*Lawḥ Maḥfūẓ*) based on jurisprudential sources. However, their conclusions may or may not align with the *Lawḥ Maḥfūẓ*. Most Shīʿī jurists and some Sunnī scholars adhere to this view.[75]

In contrast, an alternative theory, supported by some Sunnī scholars, suggests either that the *Lawḥ Maḥfūẓ* and divine preordainment on specific issues do not exist, or that the *Lawḥ Maḥfūẓ* changes based on the jurist's interpretation.[76] Under both theories, *fiqh* is recognized as a discipline characterized by multiplicity. This means that instead of a single jurisprudence, there are multiple valid interpretations. This pluralism is inherent to the process of interpreting *sharīʿa* and cannot be eliminated.

75 For Sunnī views, see Abū Ḥāmid al-Ghazālī, 1 al-Mustaṣfā fī ʿilm uṣūl al-fiqh 352 (1993). For Shīʿa views, see Muḥammad Kāẓim al-Khurāsānī, Kifāyat al-uṣūl 88 (1409 [1988]).

76 Al-Ghazālī, *supra* note 75, at 352.

Therefore, diverse interpretations, if derived through rigorous scholarly methods, are considered authoritative before God and valid as jurisprudential and *sharīʿa*-based opinions.

Proposed Solutions, Intra-*Sharīʿa* Reductionist Approach

Our proposed solution involves establishing a new framework—not for the methodology of deriving Islamic rulings (*aḥkām al-sharīʿa*) but for setting a clear and definitive criterion for selecting *fatwā*s to be incorporated into legislation and applying this standard consistently across all relevant laws. This approach is entirely rooted in *sharīʿa* and simultaneously addresses the issue of the high number of executions. It is not a jurisprudential theory but rather a supra-jurisprudential concept grounded in the philosophy of *fiqh*.

Under this framework, *fiqh*—or more precisely, the various schools of *fiqh* and the differing interpretations of jurists—remains unchanged. There is no alteration to the traditional methods of deriving rulings. Jurists in Islamic seminaries (*ḥawza*) will continue to engage in the derivation of *sharīʿa* rulings, with each jurist issuing rulings (*fatwā*s) that are binding for themselves and their followers. This theory applies specifically to the point at which one of these *fatwā*s is selected for incorporation into legislation, focusing on the criteria for such selection.

The key strength of this theory lies in its realism. The complete elimination of capital *ḥudūd* punishments from Iran's legal system is neither feasible nor desirable. It is not feasible because, according to several constitutional principles—most notably Article 4—all laws in Iran must be based on *sharīʿa*, and some of the existing capital punishments are derived from Islamic law. Eliminating the death penalty entirely would require abandoning the Constitution itself. It is also not desirable, as Iran is a majority-Muslim society where the belief prevails that one of God's attributes as the Divine Legislator is *ḥikma* (wisdom). If God has prescribed the death penalty for certain offenses, then this punishment carries divine wisdom, and failing to implement it would constitute disobedience to divine command. While some studies claim that public attitudes in

Iran have shifted in recent years,[77] unless such changes are definitively and officially established, the traditional stance must still be regarded as valid.

What can serve as a practical solution to the issue of *ḥadd*-based capital punishment is the establishment of a robust, definitive, and transparent criterion for selecting *fatwā*s and legislating based on that criterion.

According to this theory, when legislators face cases where jurists differ in their rulings—such that some prescribe capital punishment for a crime while others prescribe a non-capital punishment—the legislator must codify the *fatwā* that does not endorse capital punishment. In this process, it makes no difference whether this opinion aligns with the majority view (*qawl mashhūr*),[78] the jurisprudential opinion of the Guardian Council's jurists,[79,80] or the jurisprudential view of the Supreme Leader (*walī al-faqīh*),[81,82] nor does it matter whether this opinion is consistent with societal interests (*maṣlaḥa*).

Furthermore, in cases where one jurisprudential opinion requires stricter conditions for implementing capital punishment

77 *See* GAMAAN Public Opinion Research Group, *Iranian Attitudes Toward the Death Penalty* (Oct. 2020), https://gamaan.org/wp-content/uploads/2020/10/GAMAAN-Iran-Death-Penalty-Survey-2020-Persian.pdf (reporting that less than fifty percent of participants (43%) supported the complete abolition of the death penalty from criminal laws).

78 For the opinion of those who support the necessity of following the majority view, refer to Mohammad Ebrahim Jannati, Sources of Ijtihad from the Perspective of Islamic Sects 118 (1991).

79 In Iran, there is an institution called the Guardian Council, which is composed of six jurists and six legal experts. All parliamentary legislation must be approved by this council to ensure that it does not contradict *sharī'a* or the Constitution. The review of compliance with *sharī'a* is the responsibility of the six jurists, while the review of compliance with the Constitution is the responsibility of all 12 members.

80 For the opinion of those who support the necessity of following the views of the jurists in the Guardian Council, refer to Abdolrahim Cheghini Zadeh, The History of Legislation in the Islamic Republic of Iran with Regard to the Role of the Guardian Council and with Reference to Article 2 of the Amendment to the Iranian Constitutional Law 103 (1998) (Master's thesis, University of Tehran).

81 The Supreme Leader (*walī al-faqīh*) is a political-religious position in the Iranian legal system, and the duties and powers of this position are defined in the Constitution. The Supreme Leader must be a jurist (*mujtahid*).

82 Hadi Hajizadeh, *A Look at the Dimensions of Constitutional Law in Iran: The Fatwa as a Criterion in Legislation 18, No. 12044*, Legal Rsch. Ctr. of the Islamic Consultative Assembly (2011), https://rc.majlis.ir/fa/report/show/800660.

and another prescribes simpler conditions, the legislator must incorporate the opinion that establishes stricter conditions for its implementation. As a result of these stricter requirements, the frequency of capital punishment would naturally decrease. Traces of this approach can, albeit unintentionally and in a very limited manner, be observed in earlier periods as well. For instance, under the previous Islamic Penal Code, the punishment for both the active and passive participants in the crime of *liwāṭ* was execution under all circumstances.[83] However, in the current Islamic Penal Code, the death penalty for the active party applies only if the condition of *iḥṣān* is met.[84] In drafting the new law, the legislature adopted a more lenient jurisprudential view—one that exists in the writings of certain jurists.

According to this theory, in cases where overarching principles and higher-level rules exist, the legislator is obligated to adhere to them. These principles and rules hold a position above the specifics of individual *fatwā*s and serve as a guiding light, offering a roadmap for lawmakers.

These overarching principles and rules assist legislators in navigating between differing *fatwā*s, enabling them to make methodical and logically sound decisions grounded in clear reasoning.

This theory asserts that in the context of capital punishment, there exists a category of fundamental and overarching principles that serve as both *sharīʿa*-based and rational criteria for prioritizing certain *fatwā*s over others. Therefore, if two conflicting jurisprudential opinions exist on a single issue—one advocating for execution and the other opposing it—the legislator is obligated to codify the opinion that rejects execution.

83 Islamic Penal Code art. 110 (1991).

84 Islamic Penal Code art. 234 (2013). *Iḥṣān* for a man means that he is married to a permanent wife who is of legal age, has had vaginal intercourse with her while both were mature and sane, and still has access to her for intercourse whenever he wishes.

Evidentiary Basis for Intra-*Sharīʿa* Reductionist Approach

To substantiate and justify this theory, it is essential to explore several principles and rules found in jurisprudential and foundational Islamic texts. These principles emphasize the profound significance and meticulous care that *sharīʿa* assigns to matters of human life (*dimāʾ*), and serve as a guiding light, illuminating the path through other challenges. Before elaborating on these principles, it is important to note that their content may sometimes overlap, and at first glance, they might appear redundant. However, given that jurists have referred to these principles using different terminologies in their works, this discussion addresses them separately, preserving the distinctions found in those sources.

*I. The Principle of Precaution in Matters of Human Life (*Dimāʾ*)*

In Islamic jurisprudence (*fiqh*), two matters are considered of paramount importance: human life (*dimāʾ*) and honor (*ʿirḍ*).[85] While the general principle of exoneration (*barāʾa*) applies to all cases of doubt, both doubt concerning the subject and doubt concerning the ruling, caution (*iḥtiyāṭ*) is specifically emphasized in these two areas. This study is particularly concerned with the principle of caution in matters of *dimāʾ*.

Caution in *dimāʾ* implies that individuals in society, and particularly judges, must approach issues involving human life with the utmost care and precision. They should refrain from issuing judgments against *dimāʾ* unless complete certainty is achieved. This principle can be likened to the doctrine of interpreting the law in favor of the accused. Under this doctrine, judges are obligated to adopt interpretations of the law that benefit the accused in cases where the law allows for multiple interpretations. Similarly, in the principle of caution in *dimāʾ*, texts

85 Shaykh Murtaḍā Anṣārī, Farāʾid al-uṣūl [The Pearls of Principles] 376 (5th ed. 1996); al-Khurāsānī, *supra* note 75, at 355.

must be interpreted, as far as possible, in a manner that minimizes any harm to *dimāʾ*.

If this well-established principle of jurisprudence is to be applied to legislators, it mandates that lawmakers adopt a cautious approach when drafting laws related to matters of life. In cases of doubt or when conflicting juristic opinions exist, the principle of caution in *dimāʾ* necessitates a restrained approach, avoiding the enactment of laws that authorize capital punishment.

Some texts reference the opposite of this principle, referred to as the rule of avoiding recklessness with regard to *dimāʾ* (*qāʿidat ʿadam tahajjum ʿalā al-dimāʾ*). This rule has been cited in several contexts as a basis for issuing jurisprudential rulings.[86] By *tahajjum*, jurists mean recklessness and the failure to observe necessary precautions. Consequently, not only is adherence to caution in *dimāʾ* considered essential, but failure to observe it is deemed reprehensible and unacceptable.

II. The Principle of Leniency in the Application of Ḥudūd

One of the issues highlighted in Imāmī jurisprudence (*fiqh*) is the principle that divine *ḥudūd* (punishments) are founded upon leniency and flexibility.[87] This means that in matters of *ḥudūd*, efforts should be directed toward leniency rather than pursuing the establishment of guilt or the imposition of punishment. As can be inferred from prophetic traditions (*nuṣūṣ riwāʾī*), the Shariʿah's approach to *ḥudūd* is based on moderation and ease. Wherever possible, the removal of punishment is preferred over its enforcement.[88]

86 Hassan b. Yūsuf al-Ḥillī (ʿAllāma al-Ḥillī), 9 Mukhtalaf al-Shīʿa fī aḥkām al-sharīʿa [The Disagreements of the Shīʿa on the Rulings of Islamic Law] 314 (2d ed. 1993).

87 Fāḍil Ābī, Kashf al-rumūz fī sharḥ Mukhtaṣar al-Nāfiʿ [Unveiling the Mysteries in Commentary on the Mukhtaṣar al-Nāfiʿ] 496 (3d ed. 1996).

88 The Islamic rule of lenity is a shared principle with American law, where the rule of lenity also exists. For a comparative study of this principle, see Intisar A. Rabb, *The Islamic Rule of Lenity: Judicial Discretion and Legal Canons,* 44 Vand. J. Transnat'l L. 1299 (2021).

*III. The Principle of Preserving Human Life (*Ḥaqqn al-Dimāʾ*)*

One of the established principles in Shīʿa jurisprudence (*fiqh*) is the preservation of human life (*ḥaqqn al-dimāʾ*). This principle asserts that human blood must remain protected, and no one has the right to infringe upon it except in cases where *sharīʿa* explicitly permits taking a life. Therefore, the default assumption is that blood is sacrosanct (*maḥqūn*), and anyone seeking to justify the shedding of another's blood must provide sufficient evidence to substantiate their claim.

For example, in matters of dissimulation (*taqiyya*), jurists have stipulated that dissimulation (*taqiyya*) is valid as long as it does not involve issues related to bloodshed. Once it pertains to matters of blood, the validity of dissimulation (*taqiyya*) ceases. Jurists have attributed this exception to the principle of preserving human life (*ḥaqn al-dimāʾ*).[89]

IV. Avoiding Ḥudūd *due to* Shubha *(*Qāʿidat al-Darʾ*)*

The *qāʿidat al-darʾ* is among the most significant principles in Islamic criminal jurisprudence (*fiqh*) and has been widely discussed in legal scholarship. Linguistically, *darʾ* refers to warding off, repelling, or averting. The principle is defined as follows: divine *ḥudūd* (punishments) are nullified when doubt or ambiguity exists.[90] This principle is supported by traditions found in both Imāmī[91] and Sunnī sources.[92]

However, some Sunnī scholars argue that the Prophetic origin of this narration is not definitive, and the approximately 12 related *aḥādīth* lack reliable chains of transmission. Despite

89 ʿAbbās b. Ḥasan b. Jaʿfar al-Najafī (Kāshif al-Ghiṭāʾ), al-Fawāʾid al-Jaʿfariyya [The Jaʿfarī Benefits] 86 (1994).

90 The most significant example of the *qā'idat al-dar'* (principle of doubt) is the case of *Mā'iz*. For an analysis of the *Mā'iz* case, see Intisar A. Rabb, '*Reasonable Doubt' in Islamic Law*, 40 Yale J. Int'l L. 41 (2015).

91 Muḥammad b. Ḥasan al-Ḥurr al-ʿĀmilī, 28 Wasāʾil al-Shīʿa [The Means of the Shīʿa] (1995).

92 For all Sunnī *ḥadīth*s and their chains of narrators, see the chart in Intisar A. Rabb, Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law 332 (2015).

this skepticism regarding its Prophetic authenticity, the principle is widely applied in practice.[93] Others have dismissed the principle entirely.[94] For example, they reason that if God explicitly prescribed severe punishments such as flogging or amputation in the Qurʾān, it would be contradictory to allow leniency.

Critics of this argument often point out the failure to distinguish between the severity of the punishment itself and the difficulty of proving the crime. These are two distinct aspects. For instance, in the context of punishment for adultery, the Qurʾān explicitly states in the subsequent verse that anyone accusing another of adultery without presenting four witnesses will themselves be subject to eighty lashes (Qurʾān 24:4). This distinction highlights a deliberate separation between the policy of determining punishments and the policy of establishing guilt.

There is a difference of opinion regarding what constitutes "doubt" (*shubha*) in the traditions underpinning the *qāʿidat al-darʾ* (avoiding *ḥudūd* due to *shubha*).[95] Some scholars argue that the doubt must reside in the mind of the judge, while others believe it must be present in the mind of the accused.[96] Still, others hold that doubt in either party is sufficient to nullify the *ḥadd* punishment.[97] It appears that, under this principle, the obligation to avoid punishment is intrinsically linked to the very essence of doubt itself, without being confined to a specific type of doubt (whether it arises in the judge's or the accused's mind).

93 *Id.* at 318.

94 For a comprehensive report on all arguments made by opponents, see *id.* at 229–59. Among Iranian Shīʿī scholars, some interpret the *qāʿidat al-darʾ* (principle of doubt) very narrowly. For an example, see Ahmad Haji Deh Abadi, *Qāʿidat al-darʾ dar fiqh-i Imāmī-yi va ḥuqūq-i Īrān* [*The Principle of Darʾ in Imami Jurisprudence and Iranian Law*], 6 Fiqh & L.J. 60 (2005).

95 This difference also exists among the various Sunnī sects. For example, see Nasimah Hussin & Majdah Zawawi, The Application of the Rule of "Avoiding Hudud Due to Shubhah" as a Mechanism for Ensuring Justice in the Determination of Punishments in Islamic Criminal Law 5–7 (2013).

96 On the intent of the perpetrator, see Zayd b. ʿAlī al-ʿĀmilī, 14 Masālik al-ifhām 329 (1423 [2002]). On the intent of the judge, see Muḥammad Fāḍil Lankarānī, Tafsīl al-sharīʿa (al-ḥudūd) 34 (2d ed. 1422 [2001]).

97 Mahmoud Pourbafrani & Hamed Rostami Najafabadi, *Shumūl-i shubh-i dar qāʿidat al-darʾ* [*The Scope of Doubt in the Principle of Darʾ*], 12 J. Islamic Juris. & L. Stud. 108–10 (2020).

Therefore, the doubt in question could originate in the mind of the judge, the accused, or both.[98]

It can be argued that the concept of doubt in the *qāʿidat al-darʾ* has not deviated from its literal meaning. *Shubha* means ambiguity or the lack of clarity about reality.[99] If we accept that doubt in this principle retains its literal meaning, there is no reason to limit its application to the stage of proving guilt. Instead, this principle can also apply during the stages of issuing legal opinions (*iftāʾ*) and legislation (*taqnīn*). As noted earlier, the obligation to avert punishment is linked to the very nature of doubt itself. Consequently, at the legislative stage, this principle also encompasses doubts faced by lawmakers. For instance, when a legislator is confronted with multiple juristic opinions and is uncertain about which to incorporate into the law, the *qāʿidat al-darʾ* applies. In such cases, the legislator must act in accordance with the principle and refrain from enacting laws that impose capital punishment on offenders.

V. The Principle of Preferring Errors in Clemency Over Errors in Punishment

If an Imam (judge) finds themselves in a situation where they have not reached certainty or valid conjecture regarding a matter, and they must either issue a ruling of clemency or impose punishment—knowing that only one of these rulings aligns with the objective reality—they face the possibility of error in either case. The judge may choose clemency and risk erring in doing so, or they may choose punishment and risk erring in that decision.

The principle under discussion asserts that if the judge errs by issuing a ruling of clemency, this is preferable to erring by imposing punishment. Therefore, in such cases, the judge is obligated to rule in favor of clemency.

Regarding the evidence for this principle, it should be noted that in foundational legal texts (*kutub uṣūl*), references are

98 Seyed Mustafa Mohaghegh Damad, 4 Qawāʿid fiqh [Principles of Jurisprudence] 72–73 (12th ed. 2004).

99 Aḥmad Haji Deh Abadi, Qawāʿid fiqh-i jazāʾī [Principles of Criminal Jurisprudence] 57 (2d ed. 2008).

made to evidence from Sunnī sources in the context of discussions related to the *qāʿidat al-darʾ*.[100] One such reference is a *ḥadīth* that explicitly addresses this principle. The text of the *ḥadīth* is as follows: "From ʿĀʾisha: The Messenger of Allah (peace be upon him) said, 'Avert the *ḥudūd* punishments from Muslims as much as you can. If there is any way out for them, let them go free, for it is better for the Imam to err in granting clemency than to err in imposing punishment.'"[101] This narration provides direct support for the principle, emphasizing the preference for clemency over punitive measures, particularly in cases of doubt or uncertainty.

The concluding part of this *ḥadīth* refers to a general principle: if the Imam (judge) errs in granting clemency, it is better than erring in imposing punishment. This reflects the overarching perspective of Islamic law.[102] Although this *ḥadīth* is not found in Shīʿa sources, its content can be accepted based on supporting evidence and reasoning. On one hand, it aligns with other principles and rules in Imāmī jurisprudence (*fiqh*), particularly the *qāʿidat al-darʾ*. The very possibility of error in a punitive ruling constitutes a form of doubt, and punishment is nullified in the presence of doubt.

On the other hand, from a rational perspective, it is self-evident that punishing an innocent person is far more reprehensible than granting clemency to a guilty one. Many wrongdoers exist who, in reality, are guilty but are never brought to trial or punished.

In Shīʿa jurisprudential texts, discussions also address whether the *qāʿidat al-darʾ* applies to discretionary punishments (*taʿzīrāt*). One of the arguments supporting its application is the general nature of the *ḥadīth*: "It is better for the Imam to err in granting clemency than to err in imposing punishment."[103]

100 Mohaghegh Damad, *supra* note 98, at 44.

101 Muḥammad b. ʿĪsā al-Tirmidhī, 2 Ṣaḥīḥ sunan al-Tirmidhī 238 (Mustafa al-Babi ed., 1937).

102 Sadiq Reza, *Due Process in Islamic Criminal Law*, 153 Geo. Wash. L. Rev. 22 (2013).

103 Mohammad Mousavi Bojnourdi, 1 Qawāʿid fiqhiyya [Jurisprudential Principles] 185 (3d ed. 2022).

VI. The Principle of Non-Punishment as a Preferential Criterion

In most foundational legal texts (*kutub uṣūl*), there is a section titled *taʿāḍul wa tarājiḥ* (Equilibrium and Preferential Criteria) or *kitāb al-taʿāruḍ* (The Book of Contradictions). This section addresses the issue of what should be done when two (or more) conflicting, credible, yet conjectural pieces of evidence come to light. Some scholars, relying on *riwāyāt ʿilājiyya* (narrations providing solutions), argue that preference (*tarjīḥ*) should be applied.[104] However, others reject the validity or reliability of such narrations, instead resorting to practical principles (*uṣūl ʿamaliyya*).[105] Among this group, some believe in *tasāquṭ* (mutual invalidation of the conflicting evidence) and apply the principle of *barāʾa* (exoneration), while others advocate for *takhyīr* (choosing one of the conflicting options).[106]

Regarding preferential criteria (*marājiḥ*), the predominant view is that such criteria are exclusive and must be limited to those explicitly mentioned in narrations. The explicitly stated preferential criteria include the sequence of issuance, the characteristics of the narrator, widespread acceptance (*shuhra*), consistency with the Qurʾān, and opposition to the general consensus of the *ʿāmma*.[107]

However, a review and thorough investigation of jurisprudential texts reveal instances where jurists, when faced with two pieces of evidence—one advocating punishment and the other negating it—have considered non-punishment as the preferred option and deemed punishment as less favorable. For example, the late Mujāhid Ṭabāṭabāʾī (d. 1242/1826) in his work *Mafātiḥ al-uṣūl* states:

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104 Mohammad Reza Muzafar, 2 Uṣūl al-fiqh [The Principles of Jurisprudence] 575 (2007).

105 Al-Khurāsānī, *supra* note 75, at 443.

106 On the view of discretionary choice, see *id*. at 443. On the view of mutual nullification, see Sayyid Abū al-Qāsim al-Khūʾī, 4 Dirāsāt fī ʿilm al-uṣūl 388 (1420 [1999]).

107 Muzafar, *supra* note 104, at 198.

> When two conflicting reports exist, one affirming the enforcement of a *ḥadd* and the other negating it, jurists differ on which is preferable. The first group believes that the evidence negating the *ḥadd* is preferable, while the second group considers the evidence affirming the *ḥadd* to be superior.[108]

The late Mujāhid sides with the first group. In explaining the rationale for prioritizing the negation of the *ḥadd*, he refers to the harm caused by enforcing a *ḥadd*, the obligation to prevent harm, the *qāʿidat al-darʾ*, and the principle of preferring errors in clemency over errors in punishment.[109]

VII. The Principles of Ease and Leniency

Islamic sources emphasize both the ease (*suhūla*) of religion and tolerance (*tasāhul*). The implications of these two concepts differ. Ease refers to the inherent simplicity of religion, while tolerance pertains to leniency in its application. The ease of religion primarily addresses the essential and fixed nature of Islamic law and is more evident in the legislative process within an Islamic government that considers itself committed to Islamic rulings. In contrast, tolerance and leniency are more related to the implementation phase and reflect the conduct of law enforcers.[110]

Several verses in the Qurʾān highligh the principle of ease in religion.[111] Additionally, there are narrations that convey similar meanings.[112] This collection of Qurʾānic verses and narrations reflects the overarching spirit of Islamic law, which is fundamentally rooted in ease and simplicity.

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108 Muḥammad b. ʿAlī al-Ṭabāṭabāʾī al-Mujāhid, 1 Mafātiḥ al-uṣūl [The Keys to the Principles of Jurisprudence] 713 (1879).

109 *Id.*

110 Jalāl al-Dīn Qiyāsī, Uṣūl-i sahūlat va mudārā dar siyāsat-i jinā-yi ḥukūmat-i Islāmī [The Principles of Ease and Leniency in Islamic Penal Policy] 20 (7th ed. 2006).

111 For example, see Qurʾān 2:185, 2:286, 5:6, 22:78.

112 Muḥammad Ṭāqī Majlisī, 68 Biḥār al-anwār [Seas of Light] 211 (1983).

The seven aforementioned principles are not merely isolated and independent rules. Instead, as the Gestalt theory suggests, the combination of these individual components creates a holistic picture. This overarching image underscores the extraordinary emphasis that Islamic law places on the sanctity of human life. This focus represents a general approach in Islamic criminal law, which lawmakers are also expected to follow.

The implication of this approach is that criminal laws, especially those concerning *ḥudūd* punishments, must be designed with the utmost caution, prioritizing the protection of human life to the greatest extent possible. Naturally, in cases where, despite all precautions, a crime still warrants a punishment involving the deprivation of life, such a punishment must undoubtedly be carried out. This theory does not claim to reduce capital punishments under *ḥudūd* to zero. Eliminating capital punishments altogether would imply the abandonment of a portion of *sharīʿa* —an outcome that, as previously discussed, is neither feasible nor desirable and would not be accepted by Muslims in an Islamic society.

A significant feature of this theory is that it is entirely intra-religious and grounded in legitimate *sharīʿa* evidence. Therefore, the citizens of an Islamic society would not perceive it as contradictory to *sharīʿa* and would not oppose it.[113] This foundation for selecting juristic opinions not only preserves the sanctity of *sharīʿa* but also claims to adhere to it more rigorously than other theories. This is because it aligns with both the detailed rulings of *sharīʿa* and its overarching spirit, which emphasizes maximum caution in matters related to *dimāʾ* (human life).

113 According to a Pew Research Center survey conducted in the United States between February 24 and May 3, 2012, an overwhelming majority of Iranians (83%) stated that they support the application of *sharīʿa*. Although this number has likely declined over time, it remains significant. See Pew Research Center, *Iranians' Views Mixed on Political Role for Religious Figures* (June 11, 2013), https://www.pewresearch.org/religion/2013/06/11/iranians-views-mixed-on-political-role-for-religious-figures/.

Application of Intra-*Sharīʿa* Reductionist Approach to Iran's Current Law

Now that the proposed theory for the maximal reduction of *ḥudūd*-based capital punishments has been presented, it is time to examine the potential effects and outcomes of implementing this theory within Iran's legal framework.

A meticulous examination reveals that Iran's current laws include 72 instances of capital punishment. If this theory were implemented, 60 instances of capital punishment would be entirely removed from the legal framework. In three additional cases, the enforcement of capital punishment would be significantly curtailed due to the increased difficulty in proving and executing such sentences—similar to the punishment for *moharebeh* (or *muḥāraba*), is discretionary or sequential.

Eliminating 60 out of 72 instances is undoubtedly significant. This importance becomes even more apparent when we consider that the majority of *ḥadd*-based executions in Iran pertain to drug offenses—505 out of the 972 total executions in 2024,[114] and 481 out of the 561 *ḥudūd* punishments involving the deprivation of life in 2023.[115] Notably, the *ḥadd* punishment for drug offenses is among the 58 instances that would be eliminated under the theory proposed in this article. This is because such punishments are rooted in the *ḥadd* of *ifsād fī al-arḍ* (corruption on earth), a punishment that is highly debated and not widely recognized as an independent *ḥadd* by Shīʿī jurists.

In Shīʿa jurisprudence (*fiqh*), extensive discussion have taken place regarding this *ḥadd*, with 99% of Shīʿī jurists maintaining that it does not exist as an independent punishment and is instead a subset of the *ḥadd* for *moharebeh*, which applies under very specific conditions, such as bearing arms.[116] Only a small minority—around 1% of jurists[117]—recognize it as an indepen-

114 Amnesty International, *supra* note 3, at 10.

115 *See supra* note 2.

116 Seyed Maḥmūd Hashemi Shahroudi, *Baḥth fī taḥdīd ḥadd al-muḥārib* [*Discussion on Defining the Ḥadd for Muḥārib*], 9 Fiqh Ahl al-Bayt J. 73 (1997).

117 Muḥammad Muʾmin, Kalimāt sadīda fī masāʾil jadīda [Sound Words on New Issues] 410 (1994).

dent *ḥadd*.[118] Unfortunately, the opinion of this small group of jurists has been incorporated into Iranian law and is cited in multiple statutes. However, this approach clearly contradicts the principles of precaution regarding human life and conflicts with the overarching principles of *sharīʿa*. According to the theory proposed in this article, it should be eliminated.

The implementation of this theory results in the removal of ḥadd-based capital punishment from the following legal provisions:

Name of Law	**Article Number**
Law on Preventing Hoarding	6
Law on Punishing Disruptors in the Iranian Oil Industry	1
Law on Regulating the Distribution of Essential Goods and Punishing Hoarders and Overcharges	1
Amendment to the Law on Combating Narcotics	Clause 4 of Article 2; Clause 4 of Article 4; Note to Article 4; Clauses 4, 5, and 6 of Article 5; Article 6; Clause 6 of Article 8; Articles 9, 11, 18, 35
Law on Punishing Economic Disruptors	2
Law on Punishing Offenses by Armed Forces	Articles 17, 20, 21; Clause A, C, and E of Article 24; Note 2 to Article 24; Articles 29, 30, 31, 32, 34, 35, 37; Clause A of Article 42; Article 43; Clause A of Article 44; Clause A of Article 51; Articles 71, 72, 73, 74, 87, 92

118 For an overview of jurists' opinions on this issue, see Mohsen Borhoni, *Ifsād fī al-Arḍ: Conceptual Ambiguity and Practical Corruption*, 2 Crim. L. & Criminology Stud. 19, 21–27 (2015).

Name of Law	Article Number
Islamic Penal code	Article 130; Note 1 to Article 234; Note 1 to Article 236; Article 262 (regarding other prophets); Articles 286, 304, 350, 357, 423
Law on Intensifying Punishments for Bribery, Embezzlement, and Fraud	4
Law on Intensifying Punishments for Forgers and Distributors of Counterfeit Banknotes	Single Article
Law on Punishing Individuals Engaging in Unauthorized Activities in Audiovisual Matters	Clause A of Article 3
Law on Combating Smuggling of Goods and Currency	31
Law on Countering Hostile Actions of the Zionist Regime	6
Law on Supporting Families and Population Growth	61
Law on Supporting Families Through Promoting the Culture of Modesty and Ḥijāb	37

To gain a clearer understanding of the implications of applying this theory, one may consider several high-profile cases from recent years in Iran's judicial system.

Case One: In 2018, due to severe economic crises, the price of gold coins and foreign currency rose sharply in Iran. Two individuals, Vahid Mazloumin—known as the "Sultan of Coins"—and his associate Mohammed Esmail Ghasemi, known as Mohammed Salem, were executed.[119] They were charged with corruption on earth (*ifsād fī al-arḍ*) through disrupting the

119 Full text of the Verdicts Issued in the Case of Vahid Mazloumin, Ekhtebar (Nov 28, 2018), https://www.ekhtebar.ir/متن-کمال-دادنامه های-صادره-در-پرونده/.

country's economic system. The sentence was carried out in November 2018.[120] However, based on the theory endorsed in this article, there exists a juristic opinion in Shīʿī jurisprudence that does not recognize corruption on earth as an independent crime warranting the death penalty. Thus, had the theory proposed in this article been implemented, a death sentence would not have been issued in this case.

Case Two: In April 2018, Imam Hosseini Moghaddam was executed on the charge of corruption on earth due to assaults against forty women and girls.[121] He reportedly posed as a postal worker and gained entry into residential buildings under the pretext of delivering packages, then assaulted the victims using threats and force.[122] The case was originally filed in 2012, and no incidents of proven rape by force (*zinā bi-l-ʿunf*) were established during the proceedings.[123] Nevertheless, the defendant was executed under the charge of corruption on earth.[124]

Case Three: An individual named Rastgouye Kandelaj was arrested in 2017.[125] His alleged crime involved riding a motorcycle through city streets and, using a sharp tool, suddenly striking women from behind on their buttocks, thereby causing fear and public panic.[126] In 2024, he was executed on the charge of corruption on earth.[127]

In all three cases above, the individuals were executed based on the charge of corruption on earth (*ifsād fī al-arḍ*). However, as discussed earlier in this article, there is significant disagreement among Shīʿī jurists regarding the validity of such a charge and

120 *Id.*

121 *Imam Hosseini-Moghadam, Known as "Fake Postman," Executed, Iran Human Rights*, Iran Human Rights (Apr 30, 2018), https://iranhr.net/fa/articles/3306/.

122 *Id.*

123 *Id.*

124 *Id.*

125 *Execution of Rasstgouyi Kandlaj, Tehran Women's Harasser*, Fararu (Dec. 19, 2024), http://fararu.com/fa/news/810757/راستگویی-کندلجآزارگر-زنان-تهرانی.

126 *Id.*

127 *Id.*

its corresponding punishment. If the theory put forth in this article had been adopted, such a criminal classification would not have been incorporated into the legal code, and consequently, these individuals would not have received death sentences. Notably, the majority of ḥudūd-based executions in Iran are carried out under this very charge. Therefore, the elimination of this criminal classification would result in a significant reduction in the country's annual execution rates.

Case Four: The fourth case, still ongoing at the time of writing and surrounded by considerable controversy, concerns a rap singer named Amirhossein Maqsoodlou (known as Tataloo). In his case, a death sentence was issued on the charge of insulting the Prophet's daughter (*sabb al-nabī*), which has been finalized and is on the verge of implementation (though, at the time of writing, it has not yet been carried out).[128] However, according to the theory adopted in this article, the appropriate sentence would not be death but, at most, five years of imprisonment. This is because, in the case of *sabb al-nabī*, the inclusion of the Prophet's daughter under the same legal category as the Prophet himself is a matter of dispute among Shīʿī jurists. Some do not consider insulting her to warrant the death penalty.[129]

In addition to preserving the lives of a significant number of individuals, another outcome of implementing this theory is the establishment of a unified and consistent foundation across all *ḥadd* punishments. This would eliminate the current disorder and confusion prevalent in the laws.

Conclusion

Since the 1979 Islamic Revolution, Iranian legislators have been constitutionally mandated to draft all laws in accordance with *sharīʿa*, specifically Twelver Shīʿa jurisprudence. Among the laws influenced by *sharīʿa*, those concerning *ḥadd* crimes and

128 *Can Tataloo Avoid Execution for Blasphemy? This Is Not His Only Crime*, ʿAṣr-i Īrān (May 27, 2025), https://www.asriran.com/fa/news/1059475.

129 Khomeini, *supra* note 12, at 921.

punishments hold particular significance. At the same time, in recent years, Iran has consistently ranked among the countries with the highest execution rates worldwide. This has led to the perception that the high number of executions is a direct consequence of *sharīʿa*-based legislation. The assumption follows that since Iranian laws are grounded in Islamic jurisprudence, a high execution rate is an inevitable outcome.

Some argue that reducing executions in Iran requires moving beyond the existing jurisprudential framework and have sought justifications for such an approach. This group, which may be referred to as deconstructionists, has proposed various strategies for transitioning from the current jurisprudence to an idealized one. Their methods include distinguishing between foundational and endorsed rulings, prioritizing justice and rationality, emphasizing ethics, and invoking the objectives of *sharīʿa* (*maqāṣid al-sharīʿa*). Their argument is that through these four approaches, one can conclude that traditional punishments in Islamic law are no longer applicable in the modern era, necessitating a shift away from the explicit rulings of religious texts towards alternative forms of punishment.

However, such efforts do not align with the realities of Iranian society, which remains deeply religious, nor with the prevailing standards of Islamic jurisprudence (*fiqh*). (The discussion on intellectual perspectives on *fiqh* is a separate matter.) First, these views lack jurisprudential authority. Second, their proponents do not hold positions of influence within society. Third, their conclusions ultimately call for the elimination of significant aspects of *sharīʿa*, a prospect that the majority of Iranian Muslims find unacceptable. Historical precedent has demonstrated that Iranian authorities have never acted upon the views of deconstructionists. The most effective path for legal and social impact lies in a reformist and conciliatory approach rather than in a confrontational or radically deconstructive stance.

The authors propose an alternative solution that significantly reduces executions while remaining entirely within the framework of *sharīʿa*. This approach acknowledges that, under the Constitution, all laws in Iran must be based on Shīʿa

jurisprudential principles. The primary source for accessing these principles is the body of juristic texts written by Shīʿī scholars. An examination of these texts reveals that on many legal issues, differing opinions exist. This raises a crucial question: among the range of juristic opinions, which should be incorporated into law?

Our response to the question, "Which *fatwā*?" is that in cases of jurisprudential disagreement—where one opinion mandates capital punishment and another does not—the legislator must adopt the opinion that does not prescribe capital punishment. This approach, too, holds authoritative legitimacy before God. It is also supported by multiple jurisprudential principles in *sharīʿa*, including the preference for erring in clemency over punishment, the principle of avoiding *ḥudūd* in cases of doubt (*qāʿidat al-darʾ*), the principle of precaution in matters of life, the sanctity of human life (*ḥaqn al-dimāʾ*), the prohibition against recklessness in capital cases, the principle that *ḥudūd* should be applied with leniency, the principle of non-punishment as a jurisprudential preference, and the overarching principles of ease and leniency in Islamic law.

Implementing this theory has several critical advantages. First, it upholds the right to life, which is the most sacred gift from God. Second, it significantly reduces the number of capital punishments in Iranian law, decreasing the number of legal provisions mandating execution from 72 to 12, thereby removing Iran from the ranks of the world's highest executioners. Third, rather than retreating from *sharīʿa*, this approach further strengthens its jurisprudential foundations. Most importantly, it is entirely practical and can be implemented within Iran's current legal and political framework without requiring fundamental structural changes to the legislative system or political order.

God's Law, King's Court: *Ḥudūd* Jurisprudence under Saudi Monarchical Decrees

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Abstract

This article examines two significant developments in Saudi criminal law during 2018 and 2019 respectively: the abolition of al-ḥukm bi-l-shubha *(criminal convictions based on doubt) and the abolition of* al-taʿzīr bi-l-jald *(discretionary flogging punishments). The King undertook these developments as part of a broader plan to overhaul the Saudi justice system. Considering their grounding in* fiqh*, analyzing these abolished practices yields key insights: the intricate elements of* ḥudūd *enforcement; the susceptibility of* ḥudūd *jurisprudence to interpretive variances that yield unpredictable judicial outcomes; the inadequacy of* ḥudūd *as a capping threshold for* taʿzīr *offenses; and the possibility of implementing broad measures to guide the enforcement of* ḥudūd*, which may eventually evolve or find parallels in other jurisdictions.*

Introduction*

Saudi Arabia stands out in the Muslim world for its formal legal system which has continuously evolved from medieval models.[1] This is particularly evident in the criminal domain. While significant statutes have been enacted in other areas of law,[2] Saudi criminal law remains minimally codified, especially in areas of *ḥudūd* (paramount prescribed punishments), *taʿzīr* (discretionary punishments), and *qiṣāṣ* (criminal retributive justice).[3] This indicates that Saudi judges have consistently wielded considerable discretion in applying Islamic criminal rules and precedents, reflecting a continuation of classical *sharīʿa* judgeship. Taking into account the monarchy's interest in upholding *sharīʿa*, an examination of recent royal edicts regarding *ḥudūd* provides an invaluable opportunity to analyze the jurisprudence of *ḥudūd* within both an authentic setting and a contemporary context.

Recent developments revolve around Royal Edict No. 56485 (2018), which abolished the precedent widely called

* I thank Adam Druckman, Bahman Khodadadi, and Cem Tecimer for their editorial assistance, and the anonymous reviewers for their valuable suggestions.

1 Frank E. Vogel, *The Rule of Law in Saudi Arabia: Exploring Contradictions and Traditions*, *in* The Rule of Law in the Middle East and the Islamic World 135 (Eugene Cotran & Mai Yamani eds., 2000).

2 The Saudi government recently enacted three major statutes: (1) Statute of Evidence (2021), (2) Statute of Personal Status (2022), and (3) Statute of Civil Transactions (2023). These statutes, along with others cited in this article, are available—primarily in Arabic—on the official Saudi government websites of the Bureau of Experts at the Council of Ministers and the National Center for Archives and Records.

3 There are reports about a forthcoming criminal code in Saudi Arabia. *See HRH Crown Prince Announces 4 New Laws to Reform the Kingdom's Judicial Institutions*, Saudi Press Agency (Feb. 8, 2021) https://www.spa.gov.sa/en/c706708f22. Anecdotal reports suggest that the penal code's enactment is foreseeable. Although a draft was reportedly leaked in July 2022, the government maintains that the alleged draft is inaccurate and that the code remains under review. *See Saudi Arabia: Repressive Draft Penal Code Shatters Illusions of Progress and Reform*, Amnesty International (Mar. 20, 2024), https://www.amnesty.org/en/latest/news/2024/03/saudi-arabia-repressive-draft-penal-code-shatters-illusions-of-progress-and-reform/; *Senior Official at Saudi Ministry of Media: Alleged Draft of Penal Measures Recently Shared on Social Media Incorrect, Actual Draft Currently Undergoing Legislative Review*, Saudi Press Agency (Mar. 18, 2024), https://www.spa.gov.sa/2372150.

al-ḥukm bi-l-shubha (convictions based on doubt),[4] and Royal Edict No. 25634 (2019), which abolished *al-taʿzīr bi-l-jald* (discretionary flogging punishments).[5] The precedent of *al-ḥukm bi-l-shubha* allowed judges to issue problematic convictions in cases lacking evidentiary certainty, while the precedent of *al-taʿzīr bi-l-jald* sanctioned corporal punishment at judicial discretion without clear, standardized guidelines. Such powerful edicts are not unusual for the assertive Saudi monarchy, where the monarch rules and reigns simultaneously.[6] However, even by Saudi standards, these edicts stand out as direct royal commands to the judiciary to change some of its established *ḥudūd* precedents.

These commands highlight embedded tensions in the application of *ḥudūd*, particularly its treatment of doubt and its boundary-setting relationship with *taʿzīr* offenses. Furthermore, these changes signal a deliberate shift in the Saudi legal system's approach to the application of *ḥudūd*, reflecting an evolving relationship between the monarchy and the judiciary. They also raise questions about the extent to which Islamic legal principles remain flexible under monarchical authority. Given that *ḥudūd* are traditionally seen as divinely mandated limits, royal intervention in their application introduces a theologically sensitive layer. These edicts offer a lens through which to explore how human authority exercises agency in relation to what are understood as God's fixed commands. As such, these edicts illuminate the broader dynamics of Islamic law's evolution, highlighting how classical Islamic legal doctrines are being adjusted within contemporary structures of political authority and through direct involvement in judicial practice.

Considering these royal edicts' concise, conclusive nature, I contextualize them using relevant rules and precedents applied in Saudi courts. I then analyze them in light of their proceedings and impacts, in relation to their contexts. Ultimately, this analysis is guided by two notions: First, Saudi monarchical decrees are open to public scrutiny and bound by public interest, as they are part of the *res publica* sphere because collective

4 Royal Edict No. 56485 (5/11/1439) corresp. July 18, 2018.
5 Royal Edict No. 25634 (20/4/1441) corresp. Dec. 18, 2019.
6 Basic Law of Governance (1992), arts. 55–58.

efforts are made to enact and implement them,[7] and second, monarchical decrees are interventions in contexts, not the context itself, and thus they ought to have significant impacts (presumably positive), otherwise, they would be unwarranted.[8]

An Overview of the Saudi Legal System

Two forms of rules apply in Saudi Arabia: *sharīʿa* rules and statutory rules. This duality of legislation is upheld across all levels, beginning with the Basic Law which states that: "Courts shall apply to cases brought before them the provisions of *sharīʿa*, as indicated by the Qurʾān and Sunna, as well as the statutes issued by *walī al-amr* [i.e., the monarch] that do not contradict the teachings of the Qurʾān and Sunna."[9] The same principle is

7 *Res publica* is the counterpart of *res privata*, with both terms denoting the idea of two spheres—public and private—where different sets of affairs exist simultaneously in a political order. *See* Antoni Z. Kaminski, *Res Publica, Res Privata*, 12 Int'l Pol. Sci. Rev. 337–51 (1991); John Ehrenberg, Civil Society: The Critical History of an Idea 30–39 (2017). It is undisputed that Saudi monarchical decrees are within the public sphere (*manākh ʿāmm*) and pertain to public affairs (*shaʾn ʿāmm*).

8 *See* Michal Tamuz & Eleanor T. Lewis, *Facing the Threat of Disaster: Decision Making When the Stakes are High*, *in* The Oxford Handbook of Organizational Decision Making 156–73 (Gerard P. Hodgkinson & William H. Starbuck eds., 2008); Karen M. Hult & Charles E. Walcott, *Influences on Presidential Decision Making*, *in* The Oxford Handbook of The American Presidency 529–48 (George C. Edwards III & William G. Howell eds., 2009); Bénédicte Vidaillet, *When "Decision Outcomes" are Not the Outcomes of Decisions*, *in* The Oxford Handbook of Organizational Decision Making 419–36 (Gerard P. Hodgkinson & William H. Starbuck eds., 2008); George Wright & Paul Goodwin, *Structuring the Decision Process: An Evaluation of Methods*, *in* The Oxford Handbook of Organizational Decision Making 535–51 (Gerard P. Hodgkinson & William H. Starbuck eds., 2008); Emily Hoole & Jennifer Martineau, *Evaluation Methods*, *in* The Oxford Handbook of Leadership and Organizations 168–96 (David V. Day ed., 2014); Sharon K. Parker & Chiahuei Wu, *Leading for Proactivity: How Leaders Cultivate Staff Who Make Things Happen*, *in* The Oxford Handbook of Leadership and Organizations 381–404 (David V. Day ed., 2014); Geoffrey Brennan & Michael Brooks, *Rational Choice Approaches to Leadership*, *in* The Oxford Handbook of Political Leadership 162–75 (R. A. W. Rhodes & Paul't Hart eds., 2014); David Brulé, Alex Mintz & Karl DeRouen, *Decision Analysis*, *in* The Oxford Handbook of Political Leadership 226–39 (R. A. W. Rhodes & Paul't Hart eds., 2014); W. Warner Burke, *Organizational Change*, *in* The Oxford Handbook of Organizational Climate and Culture 458–83 (Benjamin Schneider & Karen M. Barbera eds., 2014).

9 Basic Law of Governance (1992), art. 48.

affirmed in the Judiciary Statute,[10] Statute of Procedures Before *Sharīʿa* Courts,[11] Statute of Procedures Before the Board of Grievances,[12] and Statute of Criminal Procedures.[13]

These provisions guide the Saudi judiciary's application of *sharīʿa* rules. Primarily, Saudi courts apply conclusive *sharīʿa* rulings (*aḥkām qaṭʿiyya*) which are provided by the conclusive texts of the original sources of *sharīʿa*, the Qurʾān and Sunna (*nuṣūṣ/adilla qaṭʿiyya*).[14] It is conventionally held that for a text to be deemed conclusive, it needs clarity and certainty in authenticity and indication (*qaṭʿī al-thubūt wa-l-dalāla*).[15] Texts and sources that do not satisfy the criteria are considered probable, speculative indicators of legal rulings (*adilla ẓanniyya*), which provide deductive, probable rulings (*aḥkām ẓanniyya/ijtihādiyya*).[16] The corpus of determinations and precedents that

10 Statute of the Judiciary (2007), art. 1.

11 Statute of Procedures Before *Sharīʿa* Courts (2013), art. 1.

12 Statute of Procedures Before the Board of Grievances (2013), art. 1.

13 Statute of Criminal Procedures (2013), art. 1.

14 For literature that discusses *adilla qaṭʿiyya/ẓanniyya* and their respective *aḥkām*, see Abū Ḥāmid al-Ghazālī, 2 al-Mustaṣfā min ʿilm al-uṣūl 390, 411–14, 472–74 (Muḥammad Sulaymān al-Ashqar ed., 1997); Najm al-Dīn al-Ṭūfī, 3 Sharḥ Mukhtaṣar al-Rawḍa 9, 616, 675–79 (ʿAbdallāh b. ʿAbd al-Muḥsin al-Turkī ed., 1987); Badr al-Dīn al-Zarkashī, Tashnīf al-masāmiʿ bi-Jamʿ al-jawāmiʿ 1:327–28, 3:475–76 (Sayyid ʿAbd al-ʿAzīz and ʿAbdallāh Rabīʿ eds.,1998); ʿAbd al-Wahhāb Khallāf, ʿIlm uṣūl al-fiqh 31, 380–83 (Muḥammad Adīb al-Ṣāliḥ ed., 2010); ʿAbd al-Karīm b. ʿAlī al-Namla, al-Muhadhdhab fī ʿilm uṣūl al-fiqh al-muqāran 2:471–72, 5:2424–27 (1999); Muḥammad Muṣṭafā al-Zuḥaylī, 2 al-Wajīz fī uṣūl al-fiqh al-islāmī 311–15 (2006); Wahba al-Zuḥaylī, 2 Uṣūl al-fiqh al-islāmī 1052–54 (1986); Muḥammad Zakariyyā al-Bardīsī, Uṣūl al-fiqh 434–35 (1987); Wael B. Hallaq, A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh 38–40, 218–19 (1997); Wael B. Hallaq, The Origins and Evolution of Islamic Law 130–31 (2005); Wael B. Hallaq, Sharīʿa: Theory, Practice, Transformations 81–82, 83 (2009); Khaled Abou El Fadl, Speaking in God's Name: Islamic Law, Authority, and Woman 33–35 (2001); Mohammad Hashim Kamali, Principles of Islamic Jurisprudence 11–15, 470–71 (2003); Baber Johansen, *Dissent and Uncertainty in the Process of Legal Norms Construction in Muslim Sunnī Law*, *in* Law and Tradition in Classical Islamic Thought 133–37 (Michael Cook et al. eds., 2013).

15 ʿAlāʾ al-Dīn al-Bukhārī, 1 Kashf al-asrār ʿan uṣūl Fakhr al-Islām al-Bazdawī 84 (n.p.: Maṭbaʿat al-Sharika al-Ṣaḥāfiyya al-ʿUthmaniyya, n.d.); Muḥammad al-Zuḥaylī, *supra* note 14, at 311–12. The concept is also known as *qaṭʿī al-dalāla wa-l-riwāya*. Hallaq, A History of Islamic Legal Theories, *supra* note 14, at 218.

16 *See generally supra* note 14.

emerge as a result of the jurists' legal reasoning (*ijtihād*) and their disagreement (*ikhtilāf*) in deducting rules from texts and other sources of *sharīʿa* is known as *fiqh*.[17] The dynamics of *ijtihād* and *fiqh* are also influenced by the time-honored structures of Islamic legal schools or guilds (pl. *madhāhib*; sing. *madhhab*), most relevant of them to Saudi courts are the four Sunnī *madhāhib*: Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī.[18] It is the overwhelming feature in *sharīʿa* that an area of law contains both conclusive and deductive aspects. For example, in *ḥudūd*, there are certain conclusive rules; however, they do not represent the whole doctrine as *ḥudūd* jurisprudence is chiefly comprised of deductive rules derived from speculative indicators, as outlined in *fiqh* treatises.

The Saudi judiciary's approach falls within these lines—conclusive texts and rulings bind the judiciary, and in areas of *ijtihād*, the judiciary generally gives deference to the Ḥanbalī opinion.[19] The preference of the Ḥanbalī *madhhab* was initially prescribed in 1928 by the Judicial Supervision Commission Resolution No. 3, which obliged judges to adjudicate cases according to the Ḥanbalī *madhhab* only.[20] The Commission's rationale was that the Ḥanbalī *madhhab* is more accessible, and Ḥanbalī jurists are more dedicated to supporting their rulings with evidence.[21] The Commission provided a vague caveat that whenever a Ḥanbalī precedent would cause hardship (*mashaqqa*), other

17 Ṣubḥī Maḥmaṣānī, Falsafat al-tashrīʿ fī al-Islām (The Philosophy of Jurisprudence in Islam) 8–9 (Farhat Ziadeh trans., 2000).

18 On the development of *madhāhib*, see Maḥmaṣānī, *supra* note 17, at 19–32; Hallaq, The Origins and Evolution of Islamic Law, *supra* note 14, at 150–67; Hallaq, Sharīʿa: Theory, Practice Transformations, *supra* note 14, at 60–66; Labeeb Ahmed Bsoul, *The Emergence of the Major Schools of Islamic Law/Madhhabs*, *in* Routledge Handbook of Islamic Law 141–52 (Khaled Abou El Fadl, Ahmad Atif Ahmad & Said Fares Hassan eds., 2019).

19 Maḥmaṣānī, *supra* note 17, at 32; Noel J. Coulson, History of Islamic Law 102 (1964); Frank E. Vogel, Islamic Law and Legal System: Studies of Saudi Arabia 72–81, 125–27 (2000); ʿAbd al-Raḥmān b. Zayd al-Zinaydī, Taṭbīq al-sharīʿa al-islāmiyya fī al-Mamlaka al-ʿArabiyya al-Suʿūdiyya 222–24 (1999).

20 Resolution of the Judicial Supervision Commission No. 3 (7/1/1347) corresp. June 25, 1928, royally endorsed (*taṣdīq ʿālī*) in 24/3/1347 corresp. Sept. 9, 1928, published in Majlis al-Shūrā, Majmūʿat al-nuẓum: Qism al-Qaḍāʾ al-Sharʿī min 1345–1357, at 14 (1357[1938]).

21 Resolution of the Judicial Supervision Commission No. 3 (1928), art. 1.

precedents may be applied after deep consideration.[22] Shortly thereafter, the judiciary's chairmanship included the specification of the Ḥanbalī *madhhab* in one of Saudi Arabia's earliest judicial statutes, the Statute of Unifying the Responsibilities of *Sharīʿa* Judiciary, particularly in notarial areas, such as certifying contracts, deeds, and affidavits.[23]

However, I would argue that adherence to the Ḥanbalī *madhhab* was not strict as there were multiple decrees instructing the judiciary to apply the *madhhab* of the city in certain disputes.[24] In fact, recent scholarship in Saudi Arabia has begun to focus on the judiciary's application of other *madhāhib*, concluding that not only does the Saudi judiciary apply precedents from all of the four *madhāhib* and beyond them, but also that the judiciary tends to favor the Mālikī *madhhab* and Ibn Taymiyya's (d. 728/1328) views over standard Ḥanbalī precedents.[25] From a statutory perspective, some judges argue that Resolution No. 3 has been repealed by Article 1 of the Statute of Procedures Before *Sharīʿa*[26] and, thus, judges are permitted to practice unrestricted *ijtihād* without adherence to the Ḥanbalī *madhhab*.[27]

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22 Resolution of the Judicial Supervision Commission No. 3 (1928), art. 3. On this point, it is worth noting that exclusive adherence to the Ḥanbalī *madhhab* was not characteristic of the early Wahhābī tradition, which was critical of rigid *taqlīd* and encouraged *ijtihād* beyond the boundaries of the *madhāhib*. *See* Natana J. Delong-Bas, Wahhabi Islam: From Revival and Reform to Global Jihad 94, 110–13 (2004).

23 Statute of Unifying the Responsibilities of Sharīʿa Judiciary (1938), art. 203. (The same rule exists in the 1952 updated version of the statute, art. 179.)

24 Monarchical Decrees (*irāda saniyya*) No. 5/9/2 (13/7/1353) corresp. Oct. 22, 1934, and No. 5/9/4, (26/7/1353) corresp. Nov. 4, 1934, published in Majlis al-Shūrā, *supra* note 20, at 46 (regarding sharecropping, farming, and inheritance disputes).

25 Faiṣal b. Ibrāhīm al-Nāṣir, Mā jarā ʿalīh al-ʿamal fī maḥākim al-tamyyīz ʿalā khilāf al-madhhab al-Ḥanbalī 1135 (2020). *See also* ʿĀṣim b. ʿAbdallāh al-Muṭawwaʿ, al-ʿUdūl ʿan al-qawl al-rājiḥ fī al-futyā wa-l-qaḍāʾ (2018).

26 Statute of Procedures Before *Sharīʿa* Courts (2013), art. 1. ("Courts shall apply to cases brought before them the provisions of *sharīʿa*, as indicated by the Qurʾān and Sunna, as well as the statutes issued by *walī al-amr* [i.e., the monarch] that do not contradict the teachings of the Qurʾān and Sunna. Proceedings before such courts shall comply with the provisions of this statute.")

27 Al-Nāṣir, *supra* note 25, at 147.

With respect to the statutory rules applied in Saudi Arabia, the Fundamental Laws (*al-Anẓima al-Asāsiyya*) are supreme, which have significant constitutional value and comprise of the Basic Law of Governance, Ministers Council Statute, Shura Council Statute, Allegiance Council Statute, and the Statute of Provinces.[28] In turn, the ordinary laws (*anẓima ʿādiyya*) follow, which are the common statutes typically issued with the agreement of the executive (Ministers Council) and the legislative assembly (Shura Council) and enacted by royal decrees.[29] Finally, the regulations (*lawāʾiḥ*) apply, which are rules issued by cabinet ministers, either individually or collectively.[30]

Another form of Saudi statutory rules are monarchical decrees (*irādāt malakiyya*), which are proclamations and instructions issued by Saudi monarchs.[31] There are four types of monarchical decrees: royal decree (*marsūm malakī*), royal edict (*amr malakī*), noble edict (*amr sāmī*), and royal/noble directive (*tawjīh malakī/sāmī*). There is an existing jurisprudence that discusses the different forms and functions of these decrees;[32] however, as this article discusses royal edicts (*amr malakī*), it is sufficient to

28 Khālid ʿAbd al-ʿAzīz al-Ruways & Rizq Maqbūl al-Rayyis, al-Madkhal li-dirāsat al-ʿulūm al-qānūniyya 101 (2012); Muḥammad b. ʿAbdallāh al-Marzūqī, al-Sulṭa al-tanẓīmiyya fī al-Mamlaka al-ʿArabiyya al-Suʿūdiyya 83–85 (2018); Nāṣir b. Muḥammad al-Ghāmidī, al-Madkhal li-dirāsat al-siyāsa al-sharʿiyya wa-l-anẓima al-marʿiyya 402–406 (2019).

29 Al-Ruways & al-Rayyis, *supra* note 28, at 101–103; al-Marzūqī, *supra* note 28, at 85–87; al-Ghāmidī, *supra* note 28, at 407.

30 In some cases, with the participation of the Shura Council. Al-Ruways & al-Rayyis, *supra* note 28, at 109–11; al-Marzūqī, *supra* note 28, at 88–94; al-Ghāmidī, *supra* note 28, at 407–11. On the development of Saudi statutory law, see generally Bryant W. Seaman, *Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development*, 18 Columbia J. Transnat'l L. 413–81 (1980); Jeanne Asherman, *Doing Business in Saudi Arabia: The Contemporary Application of Islamic Law*, 16 Int'l Lawyer (ABA) 321–38 (1982); Maren Hanson, *The Influence of French Law on the Legal Development of Saudi Arabia*, 2 Arab L.Q. 272–91 (1987); Hossein Esmaeili, *On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabia Legal System*, 26 Arizona J. Int'l & Comp. L. 1–48 (2009); Anna Rogowska, *English Law in Saudi Arabia*, 27 Arab L.Q. 271–80 (2013); Chibli Mallat, The Normalization of Saudi Law 19–26 (2022).

31 All monarchical decrees possess the same statutory validity, despite variations in form and function.

32 Al-Marzūqī, *supra* note 28, at 379–409; Muḥammad Nasīb Arzaqī, Muḥammad b. ʿAbd al-ʿAzīz al-Jarbāʾ & ʿIṣām b. Saʿad Bin Saʾīd, al-Qānūn al-dustūrī al-Suʿūdī 479–81 (2011).

explain this type only. A royal edict is the fitting translation for *amr malakī*, often translated as "royal order/command." Saudi legal scholars regard this type of decrees as the strongest;[33] the phrase royal edict better captures its associated wide jurisdiction and distinctive power. Considering the constitutional and governmental utilization of a royal edict, it is best defined as a formal and official document issued by the monarch of Saudi Arabia in his kingship capacity (i.e., in his role as the head of state), serving as his primary instrument of governance.[34] However, while royal edicts are formally issued by the monarch, they are rarely the product of his efforts alone; heirs and advisors play a central role in shaping and implementing them. In this context, although the edicts examined in this article were issued in the name of King Salman, the influential position of Crown Prince Muhammad b. Salman should not be overlooked.[35]

The Saudi royal prerogative to enact positive laws through decrees derives from the classical doctrine of *siyāsa sharʿiyya* (governance per *sharīʿa*).[36] This doctrine emerged in classical Islamic constitutional jurisprudence when jurists recognized that rulers often needed to establish rules beyond the frameworks of *fiqh* and *ijtihād*. Nevertheless, most jurists agreed that actions undertaken under the statehood prerogative (*taṣarruf bi-l-imāma*) must align with *sharīʿa* and promote the public interest (*maṣlaḥa ʿāmma*), which are the key stipulations

33 ʿĀṣim b. Suʿūd al-Siyāṭ, al-Qānūn al-dustūrī al-Suʿūdī 435 (2023).

34 Arzaqī et al., *supra* note 32, at 479; al-Marzūqī, *supra* note 28, at 383; al-Siyāṭ, *supra* note 33, at 435.

35 Crown Prince Muhammad bin Salman was appointed second heir to the throne (*walī walī al-ʿahd*) in 2015, first heir (*walī al-ʿahd*) in 2017, and Prime Minister of Saudi Arabia in 2022. *See* Royal Edict No. A/160 (10/7/1436) corresp. Apr. 29, 2015; Royal Edict No. A/255 (26/9/1438) corresp. June 21, 2017; Royal Edict No. A/61 (1/3/1444) corresp. Sept. 27, 2022. For a detailed profile of the Crown Prince, see Ben Hubbard, MBS: The Rise to Power of Mohammed bin Salman (2020); Graeme Wood, *Absolute Power*, The Atlantic (Mar. 3, 2022), https://www.theatlantic.com/magazine/archive/2022/04/mohammed-bin-salman-saudi-arabia-palace-interview/622822/.

36 Al-Ghāmidī, *supra* note 28, at 344–51; Vogel, *supra* note 19, at 173–75, 341–43; Muhammad Al-Atawneh, Wahhabi Islam Facing The Challenges of Modernity: Dar al-Ifta in The Modern Saudi State 39–41 (2010). For an insightful discussion on *siyāsa sharʿiyya* and the modern state, see Omar Gebril, *Recasting Al-Siyāsa al-Sharʿiyya in 1920s Egypt: Formulating a Theory of an Islamic Modern State*, 1 J. Islamic L. 106–40 (2024).

of *siyāsa sharʿiyya*.[37] Accordingly, under this doctrine, statutory rules are deemed legitimate and enforceable as long as they do not contravene *sharīʿa* and serve the public interest.

The Saudi Basic Law references the doctrine of *siyāsa sharʿiyya*, directly linking it to the King's powers and duties. Article 55 states: "The monarch shall undertake the governing of the nation in accordance with *siyāsa sharʿiyya* and the dictates of Islam. He shall supervise the implementation of Islamic *sharīʿa*, the laws, the general policy of the state, and the protection and defense of the country."[38] Regarding public interest (*maṣlaḥa ʿāmma*), the Basic Law reflects the understanding embedded in *siyāsa sharʿiyya* insofar that state agents may act only when pursuing a public interest (*jalb maṣlaḥa*) or avoiding public harm (*darʾ mafsada*).[39] Article 67 specifies: "The legislative authority shall have the power to promulgate statutes and regulations conducive to the realization of public interest or the prevention of harm in state affairs, in accordance with the principles of Islamic *sharīʿa*."[40]

In regard to the judiciary's relationship with the monarch, Saudi statutes emphatically proclaim judicial independence. Article 46 of the Basic Law states: "The judiciary shall

37 *See* Intisar A. Rabb, *Governance* (al-Siyāsa al-Sharʿiyya), *in* The Princeton Encyclopedia of Islamic Political Thought 198 (Gerhard Böwering et al. eds., 2013); Clark B. Lombardi, State Law As Islamic Law In Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 49–54 (2006); Mohamad Hashim Kamali, *Siyasah Shar'iyah or the Policies of Islamic Government*, 6 Am. J. Islam & Soc'y 61 (1989); Aḥmad b. ʿAbd al-Ḥalīm Ibn Taymiyya, al-Siyāsa al-sharʿiyya fī iṣlāḥ al-rāʿī wa-l-raʿīyya 5, 193, 240 (ʿAlī al-ʿUmrān ed., 1429[2008–2009]); Muḥammad b. Abī Bakr Ibn Qayyim al-Jawziyya, Iʿlām al-muwaqqiʿīn ʿan Rabb al-ʿĀlamīn 2:16, 6:513 (Mashhūr Āl Salmān ed., 1423[2002–2003]); Aḥmad b. Idrīs al-Qarāfī, al-Iḥkām fī tamyīz al-fatāwā ʿan al-aḥkām wa-taṣarrufāt al-qāḍī wa-l-imām 56 (ʿAbd al-Fattāh Abū Ghudda ed., 1995); Ibrāhīm b. ʿAlī Ibn Farḥūn, 2 Tabṣirat al-ḥukkām fī uṣūl al-aqḍiya wa-l-aḥkām 137 (1986); Zayn al-Dīn b. Ibrāhīm Ibn Nujaym, 5 al-Baḥr al-rāʾiq sharḥ Kanz al-daqāʾiq 118 (Zakariyya ʿUmayrāt ed., 1997); Ibn Nujaym, al-Ashbāh wa-l-naẓāʾir 123 (1983); Jalāl al-Dīn ʿAbd al-Raḥmān al-Suyūṭī, al-Ashbāh wa-l-naẓāʾir fī qawāʿid wa-furūʿ al-Shāfiʿiyya 121 (1983).

38 Basic Law of Governance (1992), art. 55.

39 *See* al-Qarāfī, 4 al-Furūq 39 (2010); al-Munajjā b. ʿUthmān Ibn al-Munajjā al-Ḥanbalī, 3 al-Mumtiʿ fī sharḥ al-Muqniʿ 111 (ʿAbd al-Malik Bin Duhaysh ed., 2003).

40 Basic Law of Governance (1992), art. 67.

be an independent authority. There shall be no power over judges in their judicial function other than the power of the Islamic *sharīʿa*."[41] The Basic Law also states that the courts shall have jurisdiction to adjudicate all disputes and crimes, without prejudice to the jurisdiction of the Board of Grievances over disputes between the state and private parties,[42] and the same principles are affirmed in the Statute of the Judiciary.[43] Appointments and dismissals of judges are carried out by royal edicts at the recommendation of the Supreme Judicial Council,[44] and Saudi judges do not enjoy life tenure, with the retirement age set at seventy years old.[45] In addition to reaching the retirement age, a judge's service can be terminated by death, resignation, an early retirement request, or an inability to perform judicial duties due to poor health.[46]

Ethical and professional reasons for judicial dismissal include proven unfit performance during the trial period; multiple below-average marks (three) in adequacy reports; and disciplinary reasons, which are determined in a disciplinary trial by a committee formed by the Supreme Judicial Council.[47] All judicial administrative tasks and disciplinary actions are regulated and enforced by the Supreme Judicial Council, which also regulates circuits' jurisdictions.[48] Courts' administrative responsibilities and annual budgets are managed by the Ministry of Justice, and the Chairman of the Supreme Judicial Council and Minister of Justice are two separate positions often held by different individuals; however, since 2012, the Minister of Justice has acted as the Chairman of the Supreme Judicial Council. These statutory provisions theoretically establish the independence of the Saudi judiciary,[49] taking into account that the system does not perceive monarchical decrees on judicial issues as a violation of judicial

41 *Id.* art. 46.
42 *Id.* art. 49.
43 Statute of the Judiciary (2007), arts. 1, 25, 58.
44 *Id.* art. 47.
45 *Id.* art. 69.
46 *Id.*
47 *Id.* arts. 44, 59, 66, 69.
48 *Id.* art. 6.
49 For more information on judicial independence in Saudi Arabia, see Ahmed A. Al-Ghadyan, *The Judiciary in Saudi Arabia*, 13 Arab L.Q. 235–51 (1998);

independence. Monarchical decrees in the judicial domain are not discreet but are publicly announced and typically addressed directly to the judiciary through the Chairman of the Supreme Judicial Council or the Chief Justice of the Supreme Court.

Royal Edict No. 56485 (2018) on *al-Ḥukm bi-l-Shubha*

1. Discussion of the Precedent

Saudi statutory rules have fully adopted the principle of innocent until proven guilty, prohibiting any criminal liability without a judicial conviction following a trial, in accordance with *sharīʿa* provisions.[50] The Statute of Criminal Procedures stipulates that no criminal punishment shall be inflicted upon any person without a proven conviction,[51] and that judicial rulings may result in either conviction or acquittal.[52] Conviction is generally understood by Saudi lawyers to require proof beyond a reasonable doubt,[53] with the notable exception of those who uphold *al-ḥukm bi-l-shubha*. Moreover, Saudi statutes have incorporated exclusionary rules that bar the use of evidence obtained in violation of procedural regulations.[54] Saudi law also limits the executive authority's power to detain individuals, setting a maximum of 180 days for criminal offenses and 12 months for terrorism-related cases, with any extension beyond these periods requiring judicial approval.[55] If these limits are violated, wrongfully detained individuals may

Ayoub M. Al-Jarbou, *Judicial Independence: Case Study of Saudi Arabia*, 19 Arab L.Q. 5–54 (2004).

50 Statute of Criminal Procedures (2013), arts. 3, 186, 207, 213; Basic Law of Governance (1992), arts. 38, 26.

51 Statute of Criminal Procedures (2013), art 3. (The same rule exists in the 2001 version of the statute.)

52 *Id.* art. 186 (The same rule exists in the 2001 version of the statute.)

53 *See* Jalāl Hāshim Saḥlūl, *Miʿyār al-shakk al-maʿqūl wa-l-miʿyār al-muqābil lahu fī al-niẓām al-jazāʾī al-Suʿūdī*, 37 al-Majalla al-ʿArabiyya li-l-Dirāsāt al-Amniyya wa-l-Tadrīb 1, 107–11 (2021).

54 Statute of Criminal Procedures (2013), arts. 187–191. (The same rules exist in the 2001 version of the statute.)

55 *Id.* art 114; Statute of Combating Terrorism Crimes and Financing (2017), art. 19.

seek compensation through the courts in standard criminal cases.[56] For terrorism-related offenses, compensation claims must first be reviewed by a specialized committee, which must render a decision within 90 days, after which the individual may then pursue legal action in court if not satisfied.[57]

These rules are statutory translations of well-known juristic maxims (*qawāʿid fiqhiyya*) in *sharīʿa*, first of which is the presumption of innocence or non-liability (*al-aṣl barāʾat al-dhimma*).[58] In criminal law this means that no one is required to prove their innocence, as they are presumed innocent until the judiciary rules otherwise. This maxim is rooted in one of *fiqh*'s universal canons (*qawāʿid kulliyya*), the more expansive maxim that certainty is not superseded by doubt (*al-yaqīn lā yazūl bi-l-shakk*), establishing the primacy of certainty in all aspects of Islamic law.[59] Hence, *sharīʿa* places the burden of proof on the plaintiff (as he is the one claiming to the contrary of the original presumption), while the defendant takes an oath of denial (*al-bayyina ʿalā al-muddaʿī wa-l-yamīn ʿalā man ankar*).[60] The

56 Statute of Criminal Procedures (2013), art. 215.

57 Statute of Combating Terrorism Crimes and Financing (2017), art. 16. It is important to note that while the consistent enforcement of these statutory safeguards remains a subject of debate, their legal design reflects a formal commitment to the presumption of innocence. A more detailed discussion of detention practices falls outside the scope of this article, which focuses on the judicial application of *ḥudūd* penalties.

58 Al-Suyūṭī, *supra* note 37, at 53; Ibn Nujaym, *supra* note 37, at 59; The Ottoman Majalla (1877), art. 8; Aḥmad al-Zarqā, Sharḥ al-Qawāʿid al-fiqhiyya 105 (Muṣṭafa al-Zarqā ed., 1989); ʿAlī Aḥmad al-Nadawī, al-Qawāʿid al-fiqhiyya 356 (1994); Muḥammad ʿUthmān Shubayr, al-Qawāʿid al-kulliyya wa-l-ḍawābiṭ fiqhiyya 146–47 (2015); Luqman Zakariyah, Legal Maxims in Islamic Criminal Law: Theory and Applications 85–86 (2015); Mohammad Hashim Kamali, *Legal Maxims and Other Genres of Literature in Islamic Jurisprudence*, 20 Arab L.Q. 84 (2006).

59 Al-Suyūṭī, *supra* note 37, at 50–51; Ibn Nujaym, *supra* note 37, at 56–57; The Ottoman Majalla (1877), art. 4; al-Zarqā, *supra* note 58, at 79–82; al-Nadawī, *supra* note 58, at 316–31; Shubayr, *supra* note 58, at 127–31; Zakariyah, *supra* note 58, at 80–84; Kamali, *supra* note 58, at 83; Intisar A. Rabb, *Islamic Law Through Legal Canons*, *in* Routledge Handbook of Islamic Law, *supra* note 18, at 229; Intisar A. Rabb, Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law 353 (2014).

60 Al-Suyūṭī, *supra* note 37, at 508–509; Ibn Nujaym, *supra* note 37, at 59; The Ottoman Majalla (1877), art 76; al-Zarqā, *supra* note 58, at 369; al-Nadawī, *supra* note 58, at 400; Shubayr, *supra* note 58, at 339; Hallaq, Sharīʿa:

original innocence presumption (*al-barāʾa al-aṣliyya*) is also linked to the established maxim of avoiding the imposition of *ḥudūd* penalties in cases of doubt or ambiguity (*idraʾū al-ḥudūd bi-l-shubahāt*).[61] Because innocence is presumed, doubt should favor the accused, as the opposing party has failed to satisfy the burden of proof. The maxim *idraʾū al-ḥudūd bi-l-shubahāt* centers on the term *shubha* (doubt or ambiguity). This word is key to the now-abolished Saudi precedent of *al-ḥukm bi-l-shubha* (conviction based on doubt).

The different *madhāhib* of *fiqh* have diverse evaluations of *shubha* and its corresponding impact.[62] The principal developmental accounts of *shubha* in *fiqh* by the Ḥanafī and the Shāfiʿī schools divide *shubha* into *shubha fī al-fiʿl* (legal doubt/mistake of law), *shubha fī al-maḥall* (factual doubt/mistake of fact), *shubha fī al-ʿaqd* (contractual doubt) or *shubha fī al-fāʿil* (mistake of law), *shubha fī al-maḥall* (mistake of fact), and *shubha fī al-jiha/al-ṭarīq* (ambiguity due to juristic difference).[63] However, the precedent of *al-ḥukm bi-l-shubha* concern a type of *shubha* that, albeit known in *fiqh*, is not always explicitly stated, which is *shubha fī al-ithbāt/al-dalīl*, doubt on evidentiary and procedural rules of proving *ḥudūd*.[64] Failure to meet the evidentiary burdens of *ḥudūd* create a measure of uncertainty about whether the criminal elements have been established,[65] and thus,

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Theory, Practice, Transformations, *supra* note 14, at 345; Zakariyah, *supra* note 58, at 105; Rabb, *supra* note 59, at 234–35.

61 Al-Suyūṭī, *supra* note 37, at 122; Ibn Nujaym, *supra* note 37, at 127; al-Nadawī, *supra* note 58, at 278–79; Hallaq, Sharīʿa: Theory, Practice, Transformations, *supra* note 14, at 311; Zakariyah, *supra* note 58, at 98–102; Rabb, *supra* note 59, at 49–59, 323–30.

62 *See generally* Zakariyah, *supra* note 58, at 103–104; Rabb, *supra* note 59, at 135–315.

63 Al-Suyūṭī, *supra* note 37, at 123–24; Ibn Nujaym, *supra* note 37, at 127–29; ʿAbd al-Qādir ʿAwda, 1 al-Tashrīʿ al-jināʾī al-islāmī 212–14 (1968); ʿAbdallāh al-ʿAlī al-Rukbān, Darʾ al-ḥudūd bi-l-shubahāt 28–30 (1978); Rabb, *supra* note 59, at 185–203, 204–23.

64 Muḥammad b. ʿAlī al-Shawkānī, 7 Nayl al-Awṭār 270–71 (1973); Muḥammad Abū Zahra, al-Jarīma wa-l-ʿuqūba fī al-fiqh al-islāmī – al-ʿUqūba 196–97 (Cairo: Dār al-Fikr al-ʿArabī, n.d.); al-Rukbān, *supra* note 63, at 32; Rabb, *supra* note 59, at 180–84.

65 Rabb, *supra* note 59, at 181.

shubha fī al-ithbāt is conventionally held as sufficient grounds for acquittal.[66]

The now-abolished precedent *al-ḥukm bi-l-shubha*, developed by the Saudi judiciary, allowed imposing criminal sanctions upon charged persons without meeting the prescribed evidence threshold. For example, a person may be charged with an offense, often a *ḥudūd* offense, and if the public prosecutor fails to prove the case beyond a reasonable doubt in court, this should be enough for an acquittal. However, according to Saudi precedent, some judges may consider the prosecutor's evidence to constitute a *shubha* (doubt) or *tuhma qawiyya* (strong accusation), which the judiciary believes justifies a criminal penalty.[67] In other words, the prosecutor's efforts would have raised enough *shubha* against the accused to justify a non-acquittal; however, as the court cannot impose the penalty for the charged offense, it imposes a discretionary penalty under *taʿzīr*. Hence, this precedent became known as *al-ḥukm bi-l-shubha* (ruling based on doubt), as judges used doubt—ordinarily the grounds for acquittal—as the foundation for criminal liability.

State-edited collections of judgments offer numerous examples of *al-ḥukm bi-l-shubha*. Cases involving alcohol and drug use illustrate how the public prosecutor may fail to prove their case, yet the defendant is still sentenced. For example, one defendant was charged with using hashish and possessing 170 amphetamine tablets intended for sale.[68] He confessed to hashish use and received 80 lashes, but he claimed the amphetamines were for his personal use only, a point the prosecutor could not refute.[69] Despite acknowledging that the prosecutor failed to prove intent to sell, the judge held that the accusation (*tuhma/shubha*)[70]

66 ʿAwda, *supra* note 63, at 215; al-Rukbān, *supra* note 63, at 32; ʿAbdallāh al-ʿAlī al-Rukbān, 1 al-Naẓariyya al-ʿāmma li-ithbāt mūjibāt al-ḥudūd 227–28 (1981); Abū Zahra, *supra* note 64, at 196–98.

67 ʿAbdallāh b. Muḥammad Āl Khunayn, Sulṭat al-qāḍī fī taqdīr al-ʿuqūba al-taʿzīriyya 117–18 (2013).

68 Judgment No. 34170615 (24/3/1434) corresp. Feb. 5, 2013, in Wizārat al-ʿAdl, Majmūʿat al-aḥkām al-qaḍāʾiyya 1434, at 21:36–37 (1436[2015]).

69 Judgment No. 34170615, in Wizārat al-ʿAdl, *supra* note 68, at 21:38.

70 Although I do not equate the two terms, they are used interchangeably in Saudi judicial decisions; hence, the royal edict mentions both. In this case, both

was strong enough to impose a one-year prison sentence and 150 lashes penalty on the defendant.[71] A review of judgment collections reveals that the inability or failure to prove drug possession for trade has not deterred many courts from imposing penalties based on *shubha* and *tuhma*.[72] In another case, a man was charged with alcohol consumption based solely on a written statement from a member of the Committee for the Promotion of Virtue and Prevention of Vice,[73] who claimed that the defendant smelled of alcohol.[74] The defendant contested this throughout the investigation and trial.[75] While the judge noted that the provided evidence did not meet the threshold for a *ḥudūd* offense, the *tuhma* allowed for a sentence of 70 lashes.[76]

Similarly, the precedent of *al-ḥukm bi-l-shubha* had presence in the domain of sexual offenses.[77] In one instance, a male foreign national was charged with "imitating women" for allegedly wearing tight clothing and presenting a more feminine look, along with personal photos found on his phone.[78] Despite his dispute of the charges and claims of duress in his confessions,[79] the judge ruled that "*shubha* surrounded the defendant," resulting in a 30-lash sentence.[80] In another case, a foreign national defendant faced sexual harassment charges for allegedly asking a female customer to let him touch her hand and uncover

terms were mentioned: Judgment No. 34170615, in Wizārat al-ʿAdl, *supra* note 68, at 21:36, 21:39.

71 Judgment No. 34170615, in Wizārat al-ʿAdl, *supra* note 68, at 21:38–39.

72 Judgment No. 34198765 (27/4/1434) corresp. Mar. 9, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 21:131–35; Judgment No. 34293242 (9/8/1434) corresp. June 18, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 21:243–58.

73 Commonly referred to as the religious police.

74 Judgment No. 3443649 (23/2/1434) corresp. Jan. 5, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 16:299–304.

75 Judgment No. 3443649, in Wizārat al-ʿAdl, *supra* note 68, at 16:302–3.

76 Judgment No. 3443649, in Wizārat al-ʿAdl, *supra* note 68, at 16:304.

77 Judgment No. 34288327 (8/5/1434) corresp. Mar. 20, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 14:260–68; Judgment No. 33300169 (16/6/1434) corresp. Apr. 26, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 14:191–211.

78 Judgment No. 3452447 (1/3/1434) corresp. Apr. 26, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 15:6.

79 Judgment No. 3452447, in Wizārat al-ʿAdl, *supra* note 68, at 15:6–7.

80 Judgment No. 3452447, in Wizārat al-ʿAdl, *supra* note 68, at 15:7.

her face.[81] He denied all claims, arguing that earlier confessions, the sole evidence, were coerced.[82] The judge recognized the lack of proof and acknowledged that the defendant had no criminal record; nevertheless, he deemed the *tuhma* sufficient for a one-month prison sentence and 50 lashes.[83] These cases illustrate how the Saudi judiciary came close at one point in exceeding the limits of *sharīʿa* by imposing penalties based on suspicion and wrongful convictions.

Judicial decisions that followed the precedent of *al-ḥukm bi-l-shubha* frequently cited Ibn Nujaym al-Ḥanafī (d. 970/1563) and Ibn Taymiyya, noting that the two jurists permitted imposing punishments on the basis of substantial doubt or accusation.[84] With respect to Ibn Nujaym, many judges took the following excerpt as a rationale for *al-ḥukm bi-l-shubha*: "*Taʿzīr* may be established despite *shubha*; thus, they [jurists] have stated: [*Taʿzīr*] may be proven with that which is sufficient to prove financial transactions. Further, swearing an oath or abstaining from it are considered valid proofs in its proceedings."[85]

According to settled Saudi practice before the royal abolition, a *ḥudūd* offense may be avoided due to *shubha*, albeit the same *shubha* is sufficient for imposing a *taʿzīr* penalty.[86] The flaw in this analysis is that *shubha* in the context of *al-ḥukm bi-l-shubha* pertains to proving the criminal elements of the offense, particularly in adherence to the specified evidentiary rules. Thus, if *shubha* prevents the establishment of the offense—whether it is *ḥudūd* or *taʿzīr*—acquittal is the proper outcome.

Ibn Nujaym's cited position is in another context that does not support *al-ḥukm bi-l-shubha*. Ibn Nujaym clarified that *shubha* does not prevent conviction in *taʿzīr* offenses as it does

81 Judgment No. 34188141 (25/4/1434) corresp. Mar. 7, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 15:100.

82 Judgment No. 34188141, in Wizārat al-ʿAdl, *supra* note 68, at 15:101.

83 *Id.*

84 *See, e.g.*, Judgment No. 3443649, in Wizārat al-ʿAdl, *supra* note 68, at 16:303; Judgment No. 3459573 (12/11/1434) corresp. Sept. 18, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 25:185.

85 Ibn Nujaym, *supra* note 37, at 130.

86 Āl Khunayn, *supra* note 67, at 118; ʿAbdallāh b. Muḥammad Āl Khunayn, 2 Tawṣīf al-aqḍiya fī al-sharīʿa al-islāmiyya 356 (2003).

with the avoidance of imposing *ḥudūd*.[87] To support his argument, he mentioned that some Ḥanafī jurists have analogized the evidentiary standards for *taʿzīr* to those of financial disputes, stating that *shubha* does not affect the proof needed for either.[88] This analogy shows that the higher evidentiary threshold of *ḥudūd* should not apply to *taʿzīr* offenses.[89] Therefore, Ibn Nujaym never suggested that a judge could base a ruling on *shubha* or *tuhma* in either *ḥudūd* or *taʿzīr*.

With regard to Ibn Taymiyya, although he did not fully distinguish between *shubha* and *tuhma*, some Saudi scholars believe that the two are connected and involved in supporting *al-ḥukm bi-l-shubha*. As some scholars have noted, both *shubha* and *tuhma* involve ambiguity, but in *tuhma*, the doubt concerns the person accused, while in *shubha*, it relates to the offense itself or the circumstances, including uncertainty about other actors.[90] Because *tuhma* raises serious doubt about whether the accused committed the offense, it can be seen as a type of *shubha* that falls under the maxim of *ḥudūd* avoidance.[91] From this standpoint, if *tuhma* is regarded as a type of *shubha* with the same effect in *ḥudūd* avoidance, it can likewise serve as a basis for conviction, as *shubha* does in the precedent of *al-ḥukm bi-l-shubha*.

Another aspect to this rationale is Ibn Taymiyya's position on *ahl al-tuhma* (suspicious people). Ibn Taymiyya divided those charged with criminal offenses into three categories[92]:

87 Ibn Nujaym, *supra* note 37, at 130.

88 *Id.*

89 Ibn Nujaym's position does not diminish the fact that Muslim jurists widely invoked the maxim *idraʾū al-ḥudūd bi-l-shubahāt*, applying it not only to *ḥudūd* but also to *taʿzīr* and *qiṣāṣ*. *See* Rabb, *supra* note 59, at 38. Concerning the use of civil evidentiary means and standards in *taʿzīr*, such as refusal to take oaths (*nukūl*), Ibn Qudāma (d. 620/1223) firmly stated that such means cannot be considered proof in cases involving criminal punishments. *See* Muwaffaq al-Dīn Ibn Qudāma, 11 al-Mughnī 189 (ʿAbdallāh b. ʿAbd al-Muḥsin al-Turkī & ʿAbd al-Fattāḥ Muḥammad al-Ḥulw eds., 1997).

90 Ṣāliḥ b. ʿAlī al-ʿAql, al-Tuhma wa-atharuhā fī al-aḥkām al-fiqhiyya 40–41 (2010).

91 *Id.* at 40–41.

92 Ibn Taymiyya, 35 Majmūʿ al-fatāwā 396–98, 400–401 (ʿAbd al-Raḥman b. Muḥammad Ibn Qāsim ed., 2004); Ibn Taymiyya, 7 Jāmiʿ al-masāʾil 205–209 (ʿAlī b. Muḥammad al-ʿUmrān ed., 2018).

1. Those with an honorable reputation, unlikely to have committed the offense, should not be punished until the crime is judicially proven.
2. Those with a blemished record, likely to have committed the offense (*ahl al-tuhma*), may be imprisoned and subjected to light punishment, as leniency could allow them to escape justice.[93]
3. Those with an unknown reputation should be detained until their status is clarified or innocence is proven.

This suggests that while Ibn Taymiyya endorsed the controversial practice of striking detainees under investigation, he did not alter the fundamental principle that a fully proven conviction is required to impose a criminal penalty. His stance specifically centered on how to handle *ahl al-tuhma* during the accusation phase. Ibn Qayyim al-Jawziyya (d. 751/1350), a disciple of Ibn Taymiyya, supported his teacher's view and cited caliphal precedents, such as ʿUmar b. al-Khaṭṭāb (d. 23/644) burning a wine shop.[94] However, his examples show that those punished were proven to have committed offenses, as in the case of the wine shop as ʿUmar did not burn the shop due to hearsay or mere accusation; it was a well-known wine shop.[95]

In other contexts, however, Ibn Qayyim al-Jawziyya was explicit in opposing the imposition of punishments based on *shubha*. For instance, when investigating willful defaulters, he argued that they should not be imprisoned, as imprisonment constitutes a form of punishment that is only legitimate when its cause is clearly verified.[96] He framed the issue within the bound-

93 Ibn Taymiyya's reasoning depended on a Prophetic narration; however, the cited narration only mentions that the Prophet detained a person who was accused of an offense and then set free. Nothing in the narration supports either pounding or the classification of *ahl al-tuhma*. *See* Ibn Taymiyya, Majmūʿ al-fatāwā, *supra* note 92, at 397.

94 Ibn Qayyim al-Jawziyya, *supra* note 37, at 6:513–14.

95 Abū Zayd ʿUmar Ibn Shabba al-Numayrī, 1 Tārīkh al-Madīna al-Munawwara 250 (Fahīm Muḥammad Shaltūt ed., 1399[1979]); Aḥmad b. ʿAlī Ibn Ḥajar al-ʿAsqalānī, 2 al-Iṣāba fī tamyīz al-ṣaḥāba 416 (ʿAlī Muʿawwaḍ & ʿĀdil ʿAbd al-Mawjūd eds., 1995).

96 Ibn Qayyim al-Jawziyya, al-Ṭuruq al-ḥukmiyya fī al-siyāsa al-sharʿiyya 57 (Bashīr Muḥammad ʿUyūn ed., 1989).

aries of *ḥudūd*, which should not be enforced in cases of *shubha*; instead, he contended, a judge should exercise restraint.[97] He further likened imprisonment to flogging, noting that both punishments are permissible only when the cause is certain.[98] In cases of *shubha*, he asserted, refraining from punishment aligns more closely with *sharīʿa* principles than imposing it based on doubt.[99] Therefore, in essence, both Ibn Taymiyya and Ibn Qayyim al-Jawziyya aimed to close loopholes in criminal proceedings related to *tuhma* and *shubha*, not to permit the utilization of doubt as a basis for criminal liability.[100]

In light of this, in *al-ḥukm bi-l-shubha*, judges recognized that the threshold for evidence was not satisfied but chose to sanction the accused individuals nonetheless, due to the strong doubts surrounding them or allegations made against them. Consequently, this precedent not only conflicts with Islamic criminal rules but also undermines the tenets of justice. Once an individual is charged with an offense, they are regarded as a member of *ahl al-tuhma*, and any evidence presented against them is considered sufficient *shubha*, thereby warranting punishment.

2. Analysis of Royal Edict No. 56485 (2018) on al-Ḥukm bi-l-Shubha

The edict's timeline shows that in 2014, the Minister of Interior called for reforming the judicial precedent due to execution challenges faced by his Ministry. He sent a telegram requesting a resolution on the matter,[101] which was then forwarded to the Chairman of the Supreme Judicial Council, who referred the matter to the Supreme Court.[102] The General Assembly of the Supreme Court reviewed the matter, issuing a unanimous decision in 2015 that:

97 *Id.*

98 *Id.* at 59.

99 *Id.*

100 To address the problematic point about striking *ahl al-tuhma*, I refer to al-Ghazālī, *supra* note 14, at 1:422.

101 Telegram No. 76223 (28/6/1435) corresp. Apr. 29, 2014.

102 Letter No. 16296 (27/7/1435) corresp. May 26, 2014.

> The criminal penalty that requires a proven conviction is one for which the punishment is prescribed by *sharīʿa* or statute. Beyond that, a proven conviction is not required, and it is sufficient to impose a punishment based on considerable evidence and indicators for issuing a discretionary punishment (*taʿzīr*) according to the judge's discretion.[103]

The decision seems crafted to let judges maintain the problematic precedent while maintaining the appearance of resolving the issue. Hence, the decision was considered unsatisfactory and another telegram was sent by the Minister.[104] The Royal Court received the telegram and issued a noble edict tasking a government committee with reviewing the issue.[105] The committee was led by the Bureau of Experts at the Council of Ministers and included representatives from the Ministry of Justice, the Supreme Judicial Council, the Board of Grievances, and others deemed necessary. After review, the committee recommended that the Supreme Court revise its aforementioned decision (No. M/21, 2015).[106] The Royal Court agreed and referred the matter back to the Supreme Court,[107] which reexamined it in 2017 and decided by a majority that:

> When imposing a criminal penalty for committing a prohibited act, it is necessary to state the proof of the defendant's conviction for the offense that warrants this penalty. If the judge does not have full evidence but a credible indication arises that convinces him of the necessity to impose a discretionary punishment (*taʿzīr*), it is required to state the conviction of the defendant for this punishment.[108]

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103 Resolution of the General Assembly of the Supreme Court No. M/21 (28/4/1436) corresp. Feb. 18, 2015.

104 Telegram No. 186705 (21/10/1436) corresp. Aug. 7, 2015.

105 Noble Edict. No. 20589 (27/4/1437) corresp. Feb. 7, 2016.

106 Memorandum No. 654 (5/7/1437) corresp. Apr. 12, 2016.

107 Royal Edict No. 38946 (11/8/1437) corresp. May 19, 2016.

108 Resolution of the General Assembly of the Supreme Court No. 32 (14/8/1438) corresp. May 11, 2017.

This second decision, like the first, seems to have failed to address the problematic precedent. As in the first decision, the Court did not discuss the juristic maxims or statutory rules that the precedent violated and assumed judges would not abuse their discretionary power, showing no concern for this in its holding. Furthermore, the Court argued in other parts of the decision that not punishing defendants without a full conviction would allow criminals to evade justice.[109] The Court's decision was delivered to the Royal Court in 2017.[110] Subsequently, the Bureau of Experts received instructions from the Royal Court regarding the matter and issued a memorandum deeming the Court's decision unsatisfactory,[111] leading to the issuance of the following edict[112]:

> In the Name of God, the Most Gracious, the Most Merciful
>
> No. 56485
>
> Date: 5/11/1439 [corresp. July 18, 2018]
>
> The Honorable Acting Chairman of the Supreme Judicial Council:
>
> Peace be upon you, as well as the mercy of God and His blessings:
>
> We have reviewed the letter of the Honorable Chief Justice of the Supreme Court No. 3164771, dated 22/8/1438 [May 18, 2017];
>
> And the telegram of His Excellency the President of the Bureau of Experts at the Council of Ministers No. 1830, dated 29/5/1439 [Feb. 15, 2018];
>
> Concerning what has been observed in some judicial rulings, where a strong accusation (*tuhma*) or suspicion (*shubha*) is directed against the defendants and a criminal penalty is imposed on them without stipulating proof of conviction for committing the [prohibited] act;

109 *Id.*
110 Letter No. 3164771 (22/8/1438) corresp. May 19, 2017.
111 Memorandum No. 673 (29/5/1439) corresp. Feb. 15, 2018.
112 Royal Edict No. 56485 (5/11/1439) corresp. July 18, 2018.

> And the issuance of Resolution No. 32 by the General Assembly of the Supreme Court by majority vote, dated 14/8/1438 [May 10, 2017], on this issue;
>
> And considering what was recommended by the attendees at the Bureau of Experts, according to memorandum No. 673, dated 29/5/1439 [Feb. 15, 2018];
>
> And whereas Article Three of the Statute of Criminal Procedures states that no criminal penalty may be imposed on any person except after establishing their conviction for a *sharīʿa* or statutorily prohibited act, following a trial conducted in accordance with *sharīʿa* provisions;
>
> Therefore, behold that the Supreme Judicial Council shall effectuate whatever measures it deems appropriate regarding the judges' adherence to the aforementioned Article Three of the Statute of Criminal Procedures.
>
> Thus, fulfill what is necessary pursuant to it.
>
> [Signature]
>
> Salman b. Abdulaziz Al Saud

The edict starts with a set of citations that provides a timeline for the sequence of events. It instructs the Acting Chairman of the Supreme Judicial Council—who is also the Minister of Justice—to take necessary measures to abolish *al-ḥukm bi-l-shubha*. It does not address the Supreme Court or seek its approval and remains unclear as to whether the Supreme Judicial Council ranks higher than the Supreme Court. The Council is an administrative body without jurisdiction over judicial rulings, while the Supreme Court reviews decisions and issues binding rulings for lower courts.[113] Judges follow the Council for administrative guidelines, but it is uncertain whether they view its resolutions on judicial precedents as fully authoritative. Despite the hierarchy, the edict suggests that the King believed the Council had the authority to instruct the Supreme Court to issue the proclaimed rules. Royal advisors may have felt it more

113 Statute of the Judiciary (2007), arts. 6–14.

appropriate for the monarch to address the Council, given the Supreme Court's lack of willingness to change its position on two previous occasions.

The edict cited only Article 3 as its rationale, as the Supreme Court had deliberately overlooked it in its decisions. Article 3 of the Statute of Criminal Procedures explicitly forbids judges from imposing criminal liability without a fully proven conviction. This rule is not only legitimate and precise but also consistent with *sharīʿa*, leaving no room for opposition. Consequently, the edict refrained from invoking broader doctrines like *siyāsa sharʿiyya* or *maṣlaḥa*, as the statutory rule itself sufficed. The edict's sole provision reiterates this rule and mandates judicial adherence to it, with the Supreme Judicial Council tasked with ensuring its implementation in light of the Supreme Court's stance.

Approximately five months after the edict, the Supreme Judicial Council issued Resolution No. 40/11/4411 (2018), stating that courts cannot impose criminal penalties based on *tuhma* or *shubha* and must establish full conviction of the indicted person before determining criminal liability.[114] However, the resolution could potentially undermine the edict's aim to protect individual rights and uphold the presumption of innocence.

First, the resolution invokes irrelevant rules like Article 158 of the Statute of Criminal Procedures, which states that courts are not bound by the offense characterization provided by the public prosecutor.[115] In other words, if the court finds the prosecutor's classification incorrect, it has the authority to reclassify the offense, in coordination with the parties involved. While this article may raise its own concerns, it is irrelevant to the issue at hand; the edict and previous memorandums do not address the reclassification of offenses by judges. Thus, by citing this article, the resolution implicitly suggests that judges might consider reclassifying the offense to fit the available evidence, which could conflict with the edict's goal of preventing convictions based on insufficient evidence.

114 Supreme Judicial Council Resolution No. 40/11/4411 (16/4/1440) corresp. Dec. 25, 2018.

115 Statute of Criminal Procedures (2013), art. 158.

Second, the resolution states that courts can base convictions on any type of proof, whether the offense is statutory or not.[116] This broad statement is problematic—while it includes a caveat for *ḥudūd* offenses, it overlooks the fact that courts are bound by specific evidentiary and procedural rules across all offenses, as outlined in *fiqh* and statutes. The statement risks misinforming judges and shifts the focus toward using all available evidence, even if its credibility is questionable. Therefore, the statement is unwarranted, as it overemphasizes using all types of evidence instead of focusing on upholding the presumption of innocence and maintaining proper evidence thresholds.

Third, the resolution fails to address the Supreme Court's responsibility to review and remand rulings based on *al-ḥukm bi-l-shubha*. Instead, it tasks the General Secretary of the Council and the Judicial Inspection Administration with ensuring courts followed the stipulated rules and directed appellate courts to report judgments that violated those rules. However, the Supreme Judicial Council lacks the authority to overrule judicial decisions, as it is not a court of law. This omission overlooks the key issue: the Supreme Court's resistance to ending *al-ḥukm bi-l-shubha* in two prior decisions.

These three points illustrate how the Supreme Judicial Council's resolution could undermine the edict's mission. However, based on personal observations and anecdotal evidence, the edict appears to have effectively abolished *al-ḥukm bi-l-shubha*, especially after support from the civil and legal community. Analyses of future collections of Saudi judicial rulings will determine the validity of this assessment.

Royal Edict No. 25634 (2019) on *al-Taʿzīr bi-l-Jald*

1. Discussion of the Precedent

Three *ḥudūd* offenses are punishable by flogging: illicit sexual intercourse by individuals who have never been married (100 lashes),[117] slanderous accusations of sexual impropriety (80

116 Supreme Judicial Council Resolution No. 40/11/4411, *supra* note 114.
117 Qurʾān 24:2.

lashes),[118] and intoxicants consumption (either 40 or 80 lashes).[119] In addition to these prescribed punishments, jurists are in agreement that imposing flogging in *taʿzīr* punishments is permitted under *sharīʿa*.[120] However, there is no textual basis in the original sources of *sharīʿa* (the Qurʾān and Sunna) that obliges the state to utilize flogging in *taʿzīr* or prevents it from choosing not to use flogging for offenses other than *ḥudūd*.

There is a disagreement in *fiqh* concerning the extent of flogging in *taʿzīr* offenses. To synthesize a complex debate, juristic positions can be categorized into two major and minority groups.[121] The first minority group argued that flogging in *taʿzīr* should not exceed 10 lashes in any case, while the second minority contended that the number of lashes is unlimited and left to the judge's discretion. The first majority group maintained that flogging in *taʿzīr* should not exceed the minimum amount specified for *ḥudūd* offenses, which is either 40 or 80 lashes, depending on the *madhhab*. In a similar yet more nuanced approach, the second majority group determined that the number of lashes for a *taʿzīr* offense should not surpass the fixed number established for a *ḥudūd* offense when both offenses fall under the same category. For example, a judge may punish illicit sexual activities between unmarried individuals, short of intercourse, as a *taʿzīr* offense, but the punishment cannot equal or exceed the 100 lashes prescribed for full illicit intercourse under *ḥudūd*, as both fall under the same category.

118 Qurʾān 24:4.

119 Muḥammad b. Ismāʿīl al-Bukhārī, Ṣaḥīḥ al-Bukhārī 1079 (Rāʾid b. Ṣabrī Ibn Abī ʿAlfa ed., 2015) (Ḥadīth No. 6773, Ḥadīth No. 6779). For discussions, see Ibn Qudāma, *supra* note 89, at 12:498–99.

120 *See* Al-Bukhārī, *supra* note 119, at 1089 (Ḥadīth No. 6848); Muḥammad b. Idrīs al-Shāfiʿī, al-Umm 7:431–32, 8:363 (Rifʿat Fawzī ʿAbd al-Muṭṭalib ed., 2001); Yaḥyā b. Sharaf al-Dīn al-Nawawī, 11 al-Minhāj sharḥ Ṣaḥīḥ Muslim ibn al-Ḥajjāj 221 (1392[1972–73]); Ibn Qudāma, *supra* note 89, at 12:524; ʿAwda, *supra* note 63, at 1:689–90; ʿAbd al-ʿAzīz ʿĀmir, al-Taʿzīr fī al-sharīʿa al-islāmiyya 307–12 (2015).

121 ʿAlāʾ al-Dīn Abū Bakr al-Kāsānī, 9 Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾiʿ 271–72 (ʿAlī Muʿawwaḍ & ʿĀdil ʿAbd al-Mawjūd eds., 2003); Ibn Farḥūn, *supra* note 37, at 294–97; al-Nawawī, *supra* note 120, at 221–22; Ibn Qudāma, *supra* note 89, at 12:523–26; ʿAwda, *supra* note 63, at 1:690–93; ʿĀmir, *supra* note 120, at 312–20; Wahba al-Zuḥaylī, 6 al-Fiqh al-islāmī wa-adillatuhu 206–207 (1989).

Similarly, lashes for drug use (a *taʿzīr* offense) must not exceed those for wine drinking (a *ḥudūd* offense), as both offenses are in the same class. The literature of Islamic state governance (*aḥkām sulṭāniyya*) largely supports the majority positions, with influential scholars such as the Shāfiʿī jurist al-Juwaynī (d. 478/1085) extensively discussing how Mālikī jurists allowed rulers to impose harsh punishments by permitting *taʿzīr* penalties to exceed *ḥudūd* limits.[122]

The recognized Ḥanbalī references, relied upon by Saudi courts, conclude that it is not permissible to exceed 10 lashes in *taʿzīr* punishments, except in cases where someone consumes an intoxicant during the daytime in Ramadan or engages in intercourse with the slave woman of his wife or partner, based on some Prophetic narrations on these exceptions.[123]

The Saudi legislature has limited the scope of flogging, avoiding its broad application across criminal law. Only a few statutory provisions explicitly prescribe flogging as a punishment, with the maximum set at 50 lashes.[124] The majority of criminal statutes favor financial penalties and imprisonment. Flogging is mainly reserved for *ḥudūd* and uncodified *taʿzīr* offenses, reflecting the legislature's intent to restrict its use. However, the judiciary has taken a different stance, embracing flogging, particularly in uncodified *taʿzīr* where judges have wide discretion. Closer scrutiny reveals that Saudi judges frequently went beyond the majority of jurists' opinions as they imposed a greater number of lashes then generally supported in *fiqh*.

To illustrate, in Saudi courts, *taʿzīr* punishments often exceeded the fixed limits of *ḥudūd* offenses, even when both

122 Al-Qāḍī Abū Yūsuf, Kitāb al-Kharāj 167 (1979); ʿAlī b. Muḥammad b. Ḥabīb al-Māwardī, al-Aḥkām al-sulṭāniyya wa-l-wilāyāt al-dīniyya 311–12 (Aḥmad Mubārak al-Baghdādī ed., 1989); ʿAbd al-Malik b. ʿAbdallāh al-Juwaynī, al-Ghiyāthī: Ghiyāth al-umam fī iltiyāth al-ẓulam 351–58 (ʿAbd al-ʿAẓīm Maḥmūd al-Dīb ed., 2011).

123 Manṣūr b. Yūnis al-Buhūtī, 6 Kashshāf al-qināʿ ʿan matn al-iqnāʿ 122–24 (Hilāl Miṣaylḥī ed., 1983); al-Buhūtī, 6 Sharḥ Muntahā al-irādāt 226–27 (ʿAbdallāh b. ʿAbd al-Muḥsin al-Turkī ed., 2000); Ibn al-Najjār al-Futūḥī, 10 Maʿūnat ulī al-nuhā sharḥ al-Muntahā 468–69 (ʿAbd al-Malik Bin Dihīsh ed., 2008).

124 *See, e.g.*, Statute of Combating Narcotics and Psychotropic Substances (2005), arts. 37–40.

offenses fell within the same category. For example, a young, unmarried man received a sentence of four months in prison and 140 lashes for meeting a girl in a café for a romantic date and possessing a phone with "pornographic images."[125] This decision exceeded the *ḥudūd* mandate, which prescribes 100 lashes for fornication, as both dating and illicit sex fall under the same category of sexual offenses. If this adult had been caught fornicating in the café, he would have received no more than 100 lashes; instead, he was punished with 140 lashes, in addition to imprisonment, for a date and inappropriate pictures. The judge justified this excess by stating that the offense occurred in Medina, Islam's second holiest city, prompting him to increase the lashes.[126] This reasoning is fundamentally flawed, as even in *ḥudūd* cases, judges cannot exceed the prescribed limits regardless of location. In fact, the *ḥudūd* mandate was established in Medina, where the number of lashes was fixed, not increased because of the city's sanctity.

In another case, a man was charged with causing a young woman's disappearance and engaging in prohibited seclusion (*khalwa muḥarrama*) after sheltering her for a day.[127] The defendant stated that the young woman approached him at the restaurant where he worked at 3:00 a.m. to use his phone to call her family.[128] When she called, no one answered.[129] Afterward, she requested a ride, which he agreed to provide.[130] He took her to a house she specified, but when no one answered the door, she asked for a place to sleep.[131] Hesitantly, he brought her to his cousin's empty rest house, gave her a phone, and left.[132] Later that day, she contacted him for a ride to the market, which he provided.[133]

125 Judgment No. 34209377 (8/5/1434) corresp. Mar. 20, 2013, in Wizārat al-ʿAdl, *supra* note 68, at 14:342–51.

126 *Id.* at 14:347.

127 Judgment No. 3447032 (1434/2012–13), in Wizārat al-ʿAdl, 11 Majmūʿat al-Aḥkām al-Qaḍāʾiyya 1435, at 144–45 (1438[2017]).

128 *Id.* at 11:145.

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.* at 11:145–46.

Although the prosecutor did not dispute any of these facts, he accused the defendant of being alone with the young woman and contributing to her absence from her family, seeking a discretionary penalty.[134] The defendant expressed regret, stating that he would not have helped her had he known the consequences; he insisted that he acted with good intentions, did not stay with her at the rest house, and that nothing inappropriate occurred.[135] Nonetheless, he was sentenced to 11 months in prison and 90 lashes.[136] After reviewing the ruling, the appellate court's majority opinion observed that the punishment was excessive, especially given the absence of prior offenses by the defendant.[137] They recommended that the judge verify the defendant's good character and reconsider the case accordingly; however, the judge reaffirmed his judgment, which the appellate court eventually upheld.[138]

The inconsistencies in lash counts for *taʿzīr* offenses reveal troubling discrepancies that question the fairness of the penalties imposed. Notably, there are concerning cases where much more severe actions have received less harsh penalties in comparison to previous cases. For instance, for similar offenses of child molestation, one man received 70 lashes and one month in prison,[139] and another received 180 lashes and three months' imprisonment.[140] Viewing these cases alongside past cases highlights a sharp contrast in determining the appropriate count of lashes. Furthermore, the unusual types of *taʿzīr* offenses that arise in Saudi courts contributed to the troubling discrepancies within Saudi jurisprudence. For instance, a butcher received 10 lashes and 10 days in prison for repeatedly keeping his shop open during prayer times,[141] while another man was given only 10

134 *Id.* at 11:145.

135 *Id.* at 11:146.

136 *Id.*

137 *Id.*

138 *Id.* at 11:146–47.

139 Judgment No. 358940 (1435/2013–14), in Wizārat al-ʿAdl, *supra* note 127, at 11:92–94.

140 Judgment No. 3521563 (1435/2013–14), in Wizārat al-ʿAdl, *supra* note 127, at 11:95–98.

141 Judgment No. 3520058 (1435/2013–14), in Wizārat al-ʿAdl, *supra* note 127, at 12:564–66. Note that keeping shops open during prayer times is no lon-

lashes for publicly breaking his fast during Ramadan without a valid excuse.[142] While acknowledging the unique circumstances of each case discussed, these examples underscore systemic issues that extend beyond isolated judicial opinions.

In the absence of clear guidelines or sentencing tables, it became standard practice in the Saudi legal system for judges to determine the number of lashes as they saw fit. As a result, penalties of hundreds or even thousands of lashes became commonplace,[143] prompting criticism from notable clerics.[144] Moreover, albeit still unresolved, the acceptance of capital punishment for *taʿzīr* offenses further complicates the legal landscape.[145] Therefore, the widespread imposition of arbitrary lash sentences revealed significant inconsistencies within the judicial system, highlighting the urgent need for royal intervention to effectively address the precedent of *al-taʿzīr bi-l-jald*.

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ger a punishable offense in Saudi Arabia. *See* N.P. Krishna Kumar, *Shops in Saudi Arabia can remain open during prayer times: Saudi Chambers*, Al Arabiya English (July 11, 2021), https://english.alarabiya.net/News/gulf/2021/07/16/Shops-in-Saudi-Arabia-can-remain-open-during-prayer-times-Saudi-Chambers.

142 Judgment No. 34511495 (1434/2012–13), in Wizārat al-ʿAdl, *supra* note 127, at 12:572–74.

143 A preliminary survey of *Majmūʿat al-aḥkām al-qaḍāʾiyya 1434 AH* reveals that flogging was prescribed in 177 cases as a *ḥadd* punishment and in 591 cases as a *taʿzīr* punishment. Among the *taʿzīr* punishments, 290 rulings prescribed between 100 and 500 lashes, while 105 rulings prescribed more than 500 lashes. Notably, over twenty rulings exceeded 1,000 lashes, and one case reached an extreme of 4,000 lashes. *See* ʿAbd al-ʿAzīz b. Sulaymān al-Ghaslān, *al-Iktifāʾ ʿan ʿuqūbat al-jald al-taʿzīriyya bi-ʿuqūbāt ukhrā fiqh wa-niẓām*, 31 Majallat Qaḍāʾ 427 n.1 (2023).

144 See, for example, statements by Shaykh Saʾd al-Kathlan, a former member of the state-backed Council of Senior Scholars (*Hayʾat Kibār al-ʿUlamāʾ*), in Saʿd b. Turkī al-Khathlān, 8 al-Salsabīl fī sharḥ al-Dalīl 192–93 (2021). *See also* Khaled Abou El Fadl, Reasoning with God: Reclaiming Shariʾah in the Modern Age 58–59 (2014).

145 Capital punishment for *taʿzīr* offenses is sometimes referred to as *al-qatlu siyāsatan*. *See* al-Ghazālī, *supra* note 14, at 1:423; al-Zuḥaylī, *supra* note 121 at 200–201. For a Saudi discussion about this issue, see Ḥāzim b. Ḥāmid al-Nimarī, Mashāriʿ al-taqnīn: Mubāḥathāt manhajiyya fī taqnīn al-fiqh al-islāmī 57–58 (2022).

2. Analysis of Royal Edict No. 25634 (2019) on al-Taʿzīr bi-l-Jald

It is uncertain how the issue of *al-taʿzīr bi-l-jald* came to the King's attention. It may have arisen from direct appeals by citizens reporting judicial abuses of flogging in *taʿzīr* offenses or through national and international human rights reports.[146] However, the channel that raised this issue to the Royal Court seems to have conveyed genuine concern, prompting the issuance of the following edict[147]:

> In reference to the Royal Edict No. 25634, Dated: 20/4/1441 [corresp. Dec. 18, 2019], stipulating that the General Assembly of the Supreme Court shall issue a judicial principle that abolishes the punishment of flogging in discretionary punishments of *taʿzīr*, deeming other penalties as satisfactory, and imposing this principle on courts to apply it without deviation under any circumstances.

In the edict, the King instructs the Chief Justice of the Supreme Court to issue a judicial principle via the General Assembly of the Supreme Court. The Statute of the Judiciary grants the General Assembly the authority to establish judicial principles concerning judicial matters.[148] Although the statute does not explicitly outline the functions of these principles or their binding nature, conventional legal practices in Saudi Arabia regard these principles as legally binding, provided royal edicts endorse them.[149]

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146 *See, e.g.*, United Nations Office of the High Commissioner for Human Rights, *Committee against Torture reviews report of Saudi Arabia*, U.N. Off. High Comm'r (Apr. 25, 2016), https://www.ohchr.org/en/press-releases/2016/04/committee-against-torture-reviews-report-saudi-arabia; Stephanie Nebehay, *U.N. Torture Watchdog Urges Saudi to Halt Flogging, Amputations*, Reuters (Apr. 22, 2016), https://www.reuters.com/article/world/un-torture-watchdog-urges-saudi-to-halt-flogging-amputations-idUSKCN0XJ231/.

147 Royal Edict No. 25634 (20/4/1441) corresp. Dec. 18, 2019.

148 Statute of the Judiciary (2007), art. 13.

149 For more on Saudi judicial principles, see Wizārat al-ʿAdl, al-Mabādiʾ wa-l-qarārāt al-ṣādira min al-hayʾa al-qaḍāʾiyya al-ʿulyā wa-l-hayʾa

While the King granted the Supreme Court the authority to issue the judicial principle, the royal edict did not allow for any discretion, as the Court was directly ordered to implement the royal commands. The instructions explicitly tasked the Supreme Court to issue the principle as directed and distribute it to the lower courts. Furthermore, the royal edict lacked detailed definitions of *taʿzīr* offenses, suggesting that the judiciary and the Royal Court share the same understanding of the issue's juristic terms.

The case was different regarding the edict's lack of sufficient reasoning and rationale, which risked potential pushback and inconsistencies in application, as various courts and officials relied on their interpretations rather than a unified understanding of the edict's intent. This ambiguity generated skepticism among members of the General Assembly of the Supreme Court, as a debate emerged within the Supreme Court regarding the King's edict. Ultimately, the General Assembly of the Supreme Court did not reach a unanimous decision affirming the royal edict. The issued judicial principle was endorsed by a majority of nine out of thirteen judges, with four dissenting.[150] The majority opinion rested on three key arguments: (a) flogging in *taʿzīr* offenses carries negative implications (although these were not specified); (b) punishments for *taʿzīr* offenses may vary according to the context of time and place; and (c) *walī al-amr* (i.e., the monarch) retains the authority to determine appropriate punishments for *taʿzīr* offenses.[151] The resolution did not address or include the perspectives of the minority; nevertheless, the resolution was enforced and all courts suspended *al-taʿzīr bi-l-jald*. With regard to the flogging prescribed in statutes, while the rules remain in place, anecdotal reports suggest that they will be abrogated soon.

Concerns persist that the inconsistencies observed in *al-taʿzīr bi-l-jald* may occur with the extensive use of incarceration

al-dāʾima wa-l-ʿāmma bi-majlis al-qaḍāʾ al-aʿlā wa-l-maḥkama al-ʿulyā 1391–1437 (2017); Nabīl b. ʿAbd al-Raḥmān al-Jibrīn, 1 al-Tawḍīḥāt al-marʿiyya li-niẓām al-nurāfaʿāt al-sharʿiyya 43, 46 (2018).

150 Resolution of the General Assembly of the Supreme Court No. M/40 (24/6/1441) corresp. Feb. 18, 2020.

151 *Id.*

and monetary fines. In response, the government has revitalized its draft statutory guidelines for alternative sanctions, which encompass community service, home confinement, vocational training, and enrollment in treatment or therapy programs, among other measures.[152] While these guidelines are publicly available, they remain under refinement and are anticipated to be incorporated in the upcoming criminal code, which is expected to establish clear standards for determining appropriate sentences, whether they involve fines or imprisonment.

Conclusion

This analysis of Saudi royal edicts regarding the application of *ḥudūd* in the courts of Saudi Arabia highlights several challenges that arise when traditional approaches to *ḥudūd* enforcement are adapted to contemporary Muslim states. Despite the high level of *sharīʿa* training among Saudi judges, the edicts reveal that expertise alone does not ensure the proper, equitable, or beneficial implementation of *ḥudūd*. Saudi judicial collections, despite the judges' rigorous training, exhibit significant unresolved issues that point to deeper complexities within *ḥudūd* jurisprudence.

This highlights a crucial point: the assumption that *ḥudūd* rules and precedents are so delineated and immutable that they require no external oversight is becoming increasingly untenable. While Saudi judges adhered to authentic Islamic legal methodologies, the edicts demonstrated the presence of numerous gray areas that necessitate both jurisprudential refinement and royal intervention. The monarchy's involvement, rather than undermining judicial authority or the validity of *ḥudūd* rules, has shown that non-judicial oversight can help address problematic precedents and foster a more precise implementation of *sharīʿa*.

152 Statute of Alternative Penalties (draft), art. 4. This law was initially part of King Abdullah's (r. 2005–15) judicial reform project, overseen by Shaykh Mohammed Al-Issa, then Minister of Justice and current Secretary-General of the Muslim World League. *See* Muhammad Al-Sulami, *Alternative Punishments Option Open, Says Al-Eisa*, Arab News (Oct. 16, 2011), https://www.arabnews.com/node/394902.

Moreover, the edicts underscore the limitations of relying on *shubha* as a protective measure against the misapplication of *ḥudūd*. The juristic maxim of *idraʾū al-ḥudūd bi-l-shubahāt* on its face is no longer a sufficient safeguard against flawed rulings. Judicial aspects of *shubha* remain in need of further regulation, and, as seen in cases of *al-ḥukm bi-l-shubha*, even this maxim can create confusion in legal standards, thereby contributing to unpredictable outcomes. Furthermore, the royal edicts prompt a reassessment of the role of *ḥudūd* in curbing the expansion of discretionary *taʿzīr* punishments. *Fiqh* has not fully resolved this issue, and the leeway granted to Saudi judges to adopt minority opinions has led to the expansion of *taʿzīr* punishments beyond the boundaries of *ḥudūd* penalties. Therefore, it is no longer sufficient to claim that the application of *ḥudūd* alone serves as a bulwark against the overreach of *taʿzīr*.

In conclusion, the Saudi royal edicts reflect a nuanced, evolving approach to *ḥudūd* jurisprudence that recognizes the need for both judicial and royal interventions to achieve a more just and balanced application of Islamic law in modern contexts. This approach may also provide a model for other Muslim-majority states facing similar challenges. The royal edicts signal an emerging recognition that applying classical methodologies and precedents may yield unexpected outcomes, which, in turn, require special treatment. Further developments in the Saudi legal system are anticipated, particularly as the government drafts its comprehensive criminal code, drawing upon expertise from diverse legal traditions. In this regard, Saudi Arabia's experience suggests that engaging in thoughtful examination of traditional practices and their applicability to contemporary contexts can foster an authentically informed and contextually grounded application of Islamic law, offering insights that may resonate beyond the Saudi context and contribute to broader jurisprudential discussions in the Muslim world.

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

* I would like to thank Muhammad Qasim Zaman for his support of my dissertation research and for his advice to consult *madrasa* journals in the library of the International Islamic University, Islamabad; Farida Shaheed and the staff of Shirkat Gah Women's Resource Centre in Lahore for their generosity in sharing a digital archive of newspaper articles on Islamic lawmaking, and for the opportunity to do a summer internship in 2000, which gave me firsthand experience of working in a western-funded women's rights NGO in Pakistan; Roxanne Euben for her class on Modern Western and Islamist Political Thought at Wellesley College, which inspired my interest in this topic; Andrew Nathan, my dissertation sponsor and a former member of the Advisory Committee of Human Rights Watch, Asia, for his kindness and for giving me the freedom to choose a question, method, and argument according to my own intellectual integrity, regardless of the dominant paradigms of American Political Science or his own political values; Kamaluddin Ahmed at the Lahore University of Management Sciences (LUMS) for allowing me to audit his class on Islamic Jurisprudence; Kamran Asdar Ali for hiring me as a Post-doctoral Fellow at LUMS to teach a class on Islamism and Liberalism in Pakistan; Frances Pritchett for her guidance over the last two decades, and for modeling a life of intellectual commitment and service; and the editors of the *Journal of Islamic Law* at Harvard Law School for their incredible effort in preparing this article for publication. Finally, I would like to thank José Antonio Cervera and Amaury García, the current and former Director of the Centro de Estudios de Asia y África (CEAA) at El Colegio de México respectively, for creating an environment conducive to research, which allowed me to complete this project.

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 *ʿulamāʾ* worked out this proposal. They had demanded a "transitional arrangement" through which *ʿulamāʾ* 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 *ʿulamāʾ*).

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 ijlāson men Maulānā Ḥusain Aḥmad Madnī ke sālānah khuṭbāt: 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.

Regulating Crimes under Muslim Law and European Civil Law Framework in Indonesia: Lottery Gambling as a Case Study

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Abstract

Indonesia's penal code, derived from Dutch colonial law, defines gambling as speculative betting on luck—a vague formulation that leaves room for ambiguity. Because Indonesia incorporates Islamic law into its legal system, clarifying the definition of gambling becomes especially crucial. However, divergent and often contradictory interpretations among Islamic jurists, particularly regarding whether gambling falls within the scope of punitive criminal law, complicate this task within Indonesia's framework of legal pluralism. This study traces the evolving interaction among Islamic law, customary law (adat), and state laws in Indonesia, using the controversy over the Porkas/SDSB lotteries of the 1980s and 1990s as a case study. The central argument is that, although fiqh *remains largely marginalized in the Indonesian Penal Code, adjudicators occasionally draw on Muslim legal sources—particularly adat laws—to define criminal offenses. Even in the SDSB case, however, European civil law exerted more influence over the criminalization of gambling than Islamic law. While muftis continue to play a limited role in penal legislation, despite having lesser political influence, their views often influence public opinion or institutionalized norms, further sidelining fiqh in defining the legal contours of gambling.*

Introduction*

In 1991, the Indonesian *Ulama* Council (*Majelis Ulama Indonesia*, or MUI), issued a *fatwā* (juristic opinion) prohibiting the government-run national lottery, *SDSB*[1] (*Sumbangan Dana Sosial Berhadiah)*.[2] The *fatwā* was the product of years of public debate and mounting pressure from conservative-populist Muslim constituencies, including factions within the MUI itself. While a majority of MUI members regarded *SDSB* as *maysir*—the Arabic legal term for gambling—Ibrahim Hosen (d. 2001), the head of the *fatwā* commission, initially disagreed. He did not consider SDSB to fall within the concept of *maysir*,[3] and thus resisted issuing a ban until it was unambiguously categorized as gambling under *sharīʿa*.[4] Hosen's reasoning rested on two legal principles: first, the "the original legal status of all things is permissible, until a relevant *dalīl* [evidence][5] prohibits them," which he applied to the permissibility of lotteries under *fiqh*;[6] and second, that "the rule of the *ḥakīm*[7] repeals disagreement," a maxim that allowed the *fatwā* to override prior claims that the lottery was a public good and thus permissible.

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* I would like to sincerely thank Ghada Amer for her excellent editorial assistance, and Khairul Badri for his crucial assistance in analyzing the classical *fiqh* literature.

1 SDSB is a national program run by Soeharto's government, which preceded by similar failed program *Porkas*. The further description of this program is delivered in the section three of this article, but concisely speaking, this program is government-run lottery for increasing public revenue.

2 *Hari-hari akhir SDSB akhir mimpi indah*, Tempo (1993), https://www.tempo.co/politik/hari-hari-akhir-sdsb-akhir-mimpi-indah-1032690 (last visited Mar. 14, 2024).

3 Ibrahim Hosen, Apakah Judi Itu? 30 (1987).

4 Moch. Nur Ichwan, *ʿUlamāʾ, State and Politics: Majelis Ulama Indonesia After Suharto*, 12 Islamic L. & Soc'y 45, 60 (2005).

5 In Islamic jurisprudence, *dalīl* serves as the basis for all legal opinion. A *dalīl* mainly comes from the Qurʾān and *ḥadīth*, but can also be derived from analogy (*qiyās*), consensus (*ijmāʿ*), custom (*ʿurf*), and notions of public benefit (*maṣlaḥa*).

6 *Fiqh* is the term for Islamic jurisprudence and legal sciences. This term should not be mistaken as *sharīʿa*, as *fiqh* mainly deals with jurists' interpretation of *sharīʿa*, thus more specific and not necessarily sacred.

7 The word *ḥakīm* here may imply both the chief judge and the government.

Gambling is a contested issue in the *fiqh* tradition, particularly in the Shāfiʿī school of law– the dominant *madhhab* in Indonesia. The Qurʾān explicitly prohibits gambling, describing it as among the devil's favored acts. As a result, there is very limited scope for legalizing *maysir*—or its more frequently used synonym, *qimār*—under Qurʾānic injunctions.[8] Nonetheless, Shāfiʿī jurists have never reached a consensus on the permissibility of games involving gambling or gambling-like mechanisms.[9] For example, some jurists permitted wagers between players in horse or camel racing. Classical scholars categorized such betting under *munāḍala* (reward for competitions),which allowed for its permissibility. In support, some *fuqahāʾ* (jurists) cited specific *ḥadīth*s that exempted archery, horse racing, and camel racing from the general prohibition, thereby justifying these practices.[10]

Labelling this permissive view as *gharīb* (uncommon) is far from warranted. Yaḥyā b. Sharaf al-Nawawī, a prominent medieval Shāfiʿī jurist (d. 676/1277) renowned for reconciling divergent opinions in the Shāfiʿī tradition through works such as *Rawḍat al-ṭālibīn* and *Minhāj al-ṭālibīn*, acknowledged with permissibility of betting in horse racing.[11] Indeed, many classical[12] Shāfiʿī jurists addressed *qimār* not under criminal prohibitions, but within the context of *sabaq* or *munāḍala*, as well as *shahāda* (the rights to give witness testimony).[13] Unlike adultery or theft, gambling does not carry a divinely prescribed punishment (*ḥadd*). In the formative and classical periods of Islamic

8 Qurʾān 5:90.

9 Franz Rosenthal, Gambling in Islam 1–3 (1975).

10 Abū ʿĪsā al-Tirmidhī, 3 al-Jāmiʿ al-kabīr (Sunan al-Tirmidhī) 318 (Bashār Maʿrūf ed., 1996); Abū al-Hasan al-Māwardī, 15 al-Ḥāwī al-kabīr fī fiqh fadhhab al-Imām al-Shāfiʿī 183 (1994); Ibn Ḥajar al-Haytamī, 9 Tuḥfat al-muḥtāj fī sharḥ al-Minhāj wa-ḥawāshī al-sharwānī wa-l-ʿabbādī 398 (1984).

11 *See* Yaḥyā b. Sharaf al-Nawawī, Minhāj al-ṭālibīn 328 (2005); Yaḥyā b. Sharaf al-Nawawī, 10 Rawḍat al-ṭālibīn wa-ʿumda al-muftīn (1990). Al-Nawawī does not seem to problematize the issue of rewarding on those particular games.

12 Classical here constitutes a range of jurists before al-Nawawī. This limitation stands on the fact that al-Nawawī is considered as the compilator of Shāfiʿī diversity, before the glossal (*ḥashiya*) tradition began.

13 Al-Nawawī, Rawḍat al-ṭālibīn, *supra* note 11, at 351–54; al-Māwardī, *supra* note 10, at 182–83.

law, *jināyāt* (crimes) typically referred to serious offenses with prescribed punishments in the Qurʾān or *ḥadīth*—including homicide, adultery, theft, robbery, slander, public intoxication, and *ridda* (apostasy, though the punishment for this remains contested). Moreover, enforcement of a *ḥadd* punishment requires satisfaction of specific preconditions. For instance, cutting off a thief's hand is conditioned on the stolen property's value meeting a threshold of at least two dinars.[14]

All violations outside the major offenses listed above also fall under discretionary punishment, which depends either on the judge's assessment or, in civil law systems, on the application of codified statutes. Even when a judge deems gambling a criminal offense, its penalty remains discretionary. The classification of *qimār* as a secondary issue within the *fiqh* subjects of *sabaq*, *munāḍala*, and *shahāda* suggests that gambling may be prohibited and punished through judicial discretion rather than fixed legal mandate. This treatment arguably reflects an understanding of gambling more as a moral transgression than as a punishable criminal violation.

Ibrahim Hosen arguably adopted a traditional religious-legal approach, shaped by his education in a classical *madrasa* and his intensive engagement with *fiqh* literature.[15] He appears to have permitted SDSB's operations prior to the issuance of the *fatwā* because, based on his reading of Shāfiʿī texts, he believed that certain conditions had to be met for an activity to constitute prohibited *qimār*, and SDSB did not, in his view, meet those conditions. Nevertheless, conservative Muslims rejected this interpretation, prompting the MUI *fatwā* commission—then still under Hosen's leadership—to ultimately declare the national lottery unlawful in response to growing public opposition. Importantly, the *fatwā* addressed only the specific case of SDSB and did not establish a precedent for contemporary lottery schemes or online gambling. The tension between Hosen's position and conservative critiques reflects the indeterminacy within *fiqh* regarding the definition of gambling. Thus, applying *qiyās*

14 Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century 7 (2006).

15 Bakri Hasbullah & Tim Pengarang, Prof. K.H. Ibrahim Hosen Dan Pembaharuan Hukum Islam Di Indonesia 24 (1990).

(analogical reasoning) to emerging gambling models is complicated by the ambiguity surrounding the relevant *ʿilla* (legal rationale). Moreover, as a civil law jurisdiction, Indonesia requires that all crimes be codified by statute. Criminalizing gambling thus demands consensus across Islamic law, *adat*, and civil legal codes, which must then be legislated. In this way, elements of *sharīʿa* may become codified into positive law.[16]

Indonesia's legal system is rooted in Dutch colonial law, specifically the *Wetboek van Srafwet Nederlandsch Indie*, which was based on the Napoleonic Code.[17] Since its incorporation into the modern Indonesian legal system, the criminal code has undergone relatively few substantive changes,[18] aside from limited updates—such as revisions relating to rape and sexual harassment. Gambling is criminalized under Article 303 of the *Kitab Undang-Undang Hukum Pidana* (KUHP), but this provision is located within the chapter on "immorality/decency" (*pelanggaran asusila*).[19] Its definition—"betting on chance-based games"—is also vague and requires judicial interpretation, particularly when evaluating whether modern forms of gambling fall within its scope.[20] The rise of online gambling has further complicated enforcement. Such platforms may more easily evade criminalization because their games are not purely chance-based; outcomes can be influenced by manipulable algorithms, thereby obscuring whether they qualify as prohibited under existing legal definitions.[21]

Formulating a comprehensive law that criminalizes all forms of gambling in modern Indonesia is challenging due to the country's system of legal pluralism. Indonesia formally recognizes Islamic law—categorically limited to the Shāfiʿī tradition—as a source of law alongside the Dutch legal code and *adat*

16 Rudolph Peters, *From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified*, 7 Mediterranean Pol. 82, 88 (2002).

17 Simon Butt & Timothy Lindsey, Indonesian Law 185 (2018).

18 Daniel S. Lev, *Colonial Law and the Genesis of the Indonesian State*, 40 Indonesia 57, 70–72 (1985).

19 KUHP [Kitab Undang-Undang Hukum Pidana], art. 303.

20 *Id.*

21 Michael Auer & Mark D. Griffiths, *Using Artificial Intelligence Algorithms to Predict Self-Reported Problem Gambling with Account-Based Player Data in an Online Casino Setting*, 39 J Gambl. Stud. 1273, 1273–94 (2022).

(customary) law. However, Islamic law plays a limited role in the development of Indonesian criminal law.[22] Even if granted greater authority, Islamic law would likely have little impact on the criminalization of contemporary gambling, as *fiqh* literature lacks a clear, operative definition of *qimār* sufficient to classify modern gambling models.

These premises give rise to two central questions explored in this article. First, to what extent do Islamic law and civil law traditions interact in the formation of criminal law, both generally and in the Indonesian context? Second, if neither Islamic nor European legal traditions clearly define gambling as a punishable offense, why—and how—does Indonesian law treat it as such? This article argues that although *fiqh* remains marginalized in the Indonesian Penal Code, judges and legislators occasionally invoke Muslim legal concepts when defining criminal offenses. This influence is evident in the evolving regulation of gambling in Indonesia, which has shifted from a colonial-era focus on unlicensed betting houses to a broader prohibition driven by the dominant Muslim public sentiment shaped by *adat* and *fiqh*-based reasoning.[23]

For clarification, the term "Muslim law" is not entirely synonymous with Islamic law. Muslim law refers to the hybrid legal norms that emerge from the integration of Islamic legal principles, *adat* practices, and the public and political interests of the Muslim majority. The concept of Muslim law is not novel; it resonates with the classical notion of *taṣarruf bi-l-imāma* (acts of state), which encompasses matters unaddressed by *sharīʿa* but governed by the ruler's discretionary actions grounded in public policy and social welfare—often reflected in custom and public opinion.[24] Because the locus of regulatory authority shifts from scriptural sources to human decision-making, this integrated framework is more aptly termed Muslim law rather than Islamic law.

22 Robert Cribb, *Legal Pluralism and Criminal Law in the Dutch Colonial Order*, 90 Indonesia 47, 65–66 (2010).

23 Iza R. Hussin, The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State 70 (2016).

24 Mohammad Fadel, *Islamic Politics and Secular Politics: Can They Co-exist?*, 25 J. L. & Relig., 187–204, 114 (2009).

This study re-examines criminal law in Indonesia through a pluralistic legal lens that incorporates both secular and religious elements, focusing on the criminalization of gambling. It challenges two opposing assumptions: first, that Islamic law could fully supplant the civil code; and second, that Islamic law is entirely marginalized within Indonesia's penal framework. In doing so, the article contributes to broader debates on punishment in legal systems that accommodate both religious and secular sources, and explores how Islamic law operates within a secular context through what might be called a Muslim law channel. The Shāfiʿī scholarly debate over gambling highlights the need for a comprehensive reassessment of the classical legal tradition beyond the Shāfiʿī school, offering insights into how Islamic criminal law, particularly *ḥudūd* and *taʿzīr*, might be reintroduced and adapted within a secular legal setting. Notably, *taʿzīr* provides judges with flexibility to impose minimal penalties for certain violations, refer to secular statutes, or even waive punishment altogether. This discretionary space is especially salient for gambling models that do not clearly fall within the classical definition of *qimār*.

This discussion begins with an examination of Shāfiʿī jurisprudential sources—given its status as the predominant *madhhab* in Indonesia—on gambling and on cases that have historically escaped criminalization in both the Shāfiʿī tradition and post-independence Indonesian law, namely the SDSB lottery. The regulation of gambling in this context reveals that public and political interests, eventually codified as *adat* norms, often outweigh *fiqh*-based prohibitions, particularly where doctrinal ambiguities exist. In practice, the criminalization of gambling has proceeded primarily through the civil law framework rather than through Islamic or customary legal sources, underscoring the dominant role of civil law in this area.

To be sure, the SDSB represents only one form of lottery among many types of gambling in Indonesia. Nevertheless, this article focuses on SDSB due to the controversy it provoked among state authorities, the public, and Islamic jurists—a controversy that illustrates the dynamic interplay among these actors. This interplay suggests that where gaps exist in both secular

and Islamic legal frameworks, and where state interests do not mandate intervention, criminalization may nonetheless emerge from *adat* or broader social pressure.

A Challenge: Marginalization of Islamic Law Theory

The arrival of Islam in the ancient Indonesian archipelago did not displace the existing *Srivijaya*[25] and Hindic legal systems. Early Muslim rulers did not introduce *fiqh* as an independent legal system; rather, they integrated it with prevailing local customs and Sanskrit-based legal traditions.[26] Popular proverbs in most Sumatran civilizations, such as the Acehnese proverb—*Adat dan Syariʿat lagee sifeut ngon dzat* (custom and *sharīʿa* are like contingent and essence)—reflects this deep integration of Islamic law with local custom.[27] The Dutch scholar Christiaan Snouck Hurgronje's[28] later efforts to distinguish between *adat* and Islamic law suggest that the intertwined nature of these systems was not perceived as problematic until the late nineteenth century.[29]

The Dutch East India Company (*Vereenigde Oostindische Compagnie*, or VOC) recognized this integration of *fiqh* and *adat*, and accordingly incorporated local Islamic-customary

25 Srivijaya or Sriwijaya was a Buddhist Kingdom that ruled most of Sumatra Island and Malay Peninsula from the seventh until the eleventh century.

26 Tom Hoogervorst, *Legal Diglossia, Lexical Borrowing and Mixed Juridical Systems in Early Islamic Java and Sumatra*, *in* Islamic Law in the Indian Ocean World: Texts, Ideas and Practices 39, 45 (Mahmood Kooria & Sanne Ravensbergen eds., 2021).

27 Arfiansyah Arfnor, *The Interplay of Two Sharīʿa Penal Codes: A Case from Gayo Society, Indonesia*, *in* Islamic Law in the Indian Ocean World, *supra* note 26, at 151.

28 Christiaan Snouck Hurgronje (d. 1936) was a prominent early anthropologist and Dutch Islamicist renowned for his studies of Indonesian Muslim societies, particularly in Aceh. Notably, he gained unique insights by spending time in Mecca (1884–1885), where he cultivated the impression of being an Islamic scholar under the name "Haji Abdul Ghaffar," an identity that made him integrated with Acehnese religious society easily.

29 *See* Stijn Cornelis van Huis, *Debates About the Place of Islamic Law in Society: Snouck Hurgronje and Van Den Berg Revisited*, Business Law (Aug. 2019), https://business-law.binus.ac.id/2019/08/23/debates-about-the-place-of-islamic-law-in-society-snouck-hurgronje-and-van-den-berg-revisited/ (last visited June 12, 2025).

law into their activities with locals. Likewise, the subsequent Dutch colonial administration continued this approach of accommodating local laws in their own regulations, appointing *penghulu* (a judge for Islamic affairs) to arbitrate matters in accordance with Islamic principles.[30] Over time, however, the colonial government codified a legal system modelled on European civil law, which Indonesia formally inherited upon gaining independence in 1945. While this legal system recognizes plural sources—European, *adat*, and Islamic law—the roles of *adat* and Islamic law have been largely confined to commercial and private law domains, with European law serving as the principal foundation for criminal law.[31]

Since the introduction of the civil law system by the Dutch in the eighteenth century, Indonesian law has operated through five core legal codes: the *Kitab Undang-Undang Hukum Pidana* (KUHP), governing criminal law; the *Kitab Undang-Undang Hukum Perdata* (KUHPerdata), governing commercial law; the *Undang-Undang Peradilan Agama,* regulating matters of private and family law; the *Undang-Undang Peradilan Tata Usaha Negara,* governing administrative law; and the *Undang-Undang Mahkamah Konstitusi*, governing constitutional law.[32] Some modern Muslim legal scholars—particularly those from conservative-populist circles—argue that the marginalization of Islamic law is a colonial legacy intended to detach Muslims from their divinely revealed legal tradition. However, as previously noted, even under Islamic dynasties between the thirteenth and mid-twentieth centuries, Islamic law did not stand as an independent legal system unless integrated with local law. For example, the Ottoman Empire developed *yasaq* (secular legal codes) to support the implementation of Islamic law, beginning with the reign of Sulaymān al-Qanūnī.[33]

At first glance, Islamic law appears marginalized in Indonesia's Dutch colonial legal framework, particularly in the

30 Hoogervorst, *supra* note 26, at 46.

31 Lev, *supra* note 18, at 72.

32 Butt & Lindsey, *supra* note 17, at 185–87.

33 Leonard Wood, *Legislation as an Instrument of Islamic Law*, *in* The Oxford Handbook of Islamic Law 550, 554 (Anver M. Emon & Rumee Ahmed eds., 2018).

area of criminal law. Yet, as David Powers has argued, the Dutch colonial government—likely unfamiliar with the structure of criminal offenses in *fiqh*—may not have been the principal agent of its exclusion from penal codification.[34] Instead, colonial authorities may have prioritized the marginalization of Islamic commercial law, which regulates contracts, companies, labor, and taxation, because it directly affected core colonial economic interests.[35]

Nevertheless, the conclusion may change if Islamic law is approached through a different conceptual lens. Broadly speaking, there are two primary understandings of what constitutes Islamic law. The first one centers on divine enunciation, and the other on human interpretation of God's message. The first posits that Islamic law is directly prescribed—either wholly or in part—by the *shāriʿa*,[36] and thus can be delineated with clear boundaries. The second views Islamic law as the product of human efforts to understand divine revelation, implying that it is inherently interpretive and therefore subject to contextual factors such as relativism and public interest.[37] From this latter perspective, anything that Muslims broadly perceive as Islamic, regardless of its textual origin or prevalence in classical practice, may be treated as part of Islamic law. This line of reasoning aligns with the concept of Muslim law previously discussed: a new, more relevant term for *fiqh*.

If Islamic law is equated with Muslim law in this sense, then it could be argued that Islamic law has never been truly marginalized in Indonesia. Under this view, Islamic law here is expressed through societal norms that often resemble *adat*, and is thus represented by the notion of "living law."[38] The recently revised *Kitab Undang-Undang Hukum Pidana* (KUHP)

34 David S. Powers, *Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India*, 31 Comp. Stud. in Soc'y & Hist. 535 (1989).

35 *Id.*

36 *Shāriʿ* is mostly used for God in *fiqh* and *kalām* literatures. Its literal meaning is road maker, but the metaphorical meaning is "the ruler" or one who makes the *sharīʿa*.

37 Routledge Handbook of Islamic Law 29–30 (Khaled Abou El Fadl, Ahmad Atif Ahmad & Said Fares Hassan eds., 2019).

38 Butt & Lindsey, *supra* note 17, at 201.

reflects this by allowing offenses to be prosecuted under "living law" when not explicitly covered by statutory provisions. For instance, Islamic law may justify prosecution for public alcohol consumption, even though such conduct is not directly regulated under the KUHP. This framework takes on a different salience in the context of the Aceh region, where *sharīʿa* is formally incorporated into the regional criminal penal code under a constitutionally recognized system of legal dualism.[39] Nonetheless, this interpretive, society-centered conception of Islamic law finds less precedent in classical *fiqh* literature.

Indonesian criminal law encompasses most offenses that are also recognized as crimes under *sharīʿa*. Of the seven crimes prescribed by *sharīʿa*, the KUHP excludes only *ridda* (apostasy), primarily due to the secular nature of the civil law system. Homicide is addressed in Article 338, theft in Article 362, adultery in Article 411, robbery in Article 365, and the sale of alcohol in Article 424. Although slander under Islamic law is tied specifically to false accusations of adultery, a broader former of defamation is regulated under Article 311 of the KUHP. The exclusion of *ridda* is consistent with Indonesia's status as a secular state that constitutionally guarantees protects freedom of religion, and is further justified by the fact that the criminalization of *ridda* is itself contested within the Islamic legal tradition.[40] Beyond these offenses, the KUHP also criminalizes gambling, public humiliation, counterfeiting, and the unauthorized disclosure of secrets—offenses that, within Shāfiʿī jurisprudence, are subject to debate as to whether they constitute criminal acts or merely moral violations.

Gambling in Classical Shāfiʿī Literature

This study is limited to the legal literature of the Shāfiʿī *madhhab*, as Indonesian Muslims have historically adhered predominantly to the Shāfiʿī school.[41] Accordingly, references to "Islamic law" in this section should be understood primarily as referring

39 *Id.* at 205.
40 Peters, *supra* note 14, at 7.
41 C. Snouck Hurgronje, The Achehnese: Volume 1, at 80 (1906).

to Shāfiʿī *fiqh*, unless otherwise specified. While contemporary *fatwā* rulings in Indonesia increasingly draw upon inter-*madhhab* approaches,[42] Shāfiʿī *fiqh* continues to hold a dominant and influential position relative to other schools.

The internal diversity of the Shāfiʿī school forms the focus of this analysis. The classification of gambling has long been a contested issue within Shāfiʿī legal thought—particularly in cases involving indirect or non-player betting, such as wagers on sword-fighting matches.[43] This study examines how the definitional boundaries of *maysir* and *qimār*—the Arabic terms for gambling—evolved during the formative and classical periods, with particular attention to the shifting legal treatment of such activities. This analysis proceeds through a historical-chronological method, beginning with early juristic treatments and culminating in the authoritative views of al-Nawawī, the most prominent commentator on medieval Shāfiʿī debates.[44] Select post-Nawawī perspectives are also considered, including those of Ibn Ḥajar al-Haytamī (d. 909/1503), a leading fifteenth-century Shāfiʿī scholar.

Although gambling is referred to as *maysir* in the Qur'ān, Shāfiʿī *fiqh* literature rarely employs this term, for two primary reasons. First, early juristic texts seldom treat *maysir* as an independent topic of discussion. Second, these texts generally address gambling under secondary topics such as *musābaqa*, *munāḍala*, and *shahāda*. The framing of *maysir* as a standalone issue in substantive criminal law appears primarily in modern *fiqh* literature, likely in response to the influence of the modern state on Islamic legal thought. As Wael Hallaq argues, the modern state has significantly reshaped how Muslims conceptualize *sharīʿa*, transforming it from a non-political moral-legal system into a tool of state governance.[45] Following the codifi-

42 Siti Hanna et al., *Woman and Fatwa: An Analytical study of MUI's Fatwa on Women's Health and Beauty*, 24 Ahkam: Jurnal Ilmu Syariah, 171–84 (2024).

43 Ibn Ḥajar al-Haytamī, 4 al-Fatāwā al-kubrā al-fiqhiyya 262 (n.d.).

44 Akram Yūsuf al-Qawāsimī, al-Madkhal ilā al-madhhab al-Shāfiʿī 238 (2003).

45 Wael B. Hallaq, Sharīʿa: Theory, Practice, Transformations 308 (2009).

cation movement that began in the sixteenth century—marked by Sulaymān al-Qānūnī's (d. 974/1566) promulgation of the *Qānūnnāme*,[46] Muslim scholars increasingly treated moral infractions, including gambling, as matters of formal legal regulation. Guy Burak characterizes this shift as part of the second formation of Islamic law.[47]

Arguably, classical scholars' reluctance to treat gambling as a primary legal topic reflects its non-penal character. Gambling was understood as a moral-ethical issue that was secondary to greater concerns such as witness testimony or financial contracts.[48] Even within the *fiqh* tradition, the preferred term for "gambling" is *qimār*, not *maysir*, which is thought to be more precise. Both terms were in circulation before the Qurʾānic revelation, and thus the *ṣaḥāba* (companions of the Prophet Muḥammad) would have been familiar with their meanings. *Maysir* appears in a pre-Islamic poem by ʿUbayd b. ʿAbd ʿUzzā al-Sālimī al-ʿAzādī, where it denotes "betting on games."[49] This aligns with its Qurʾānic usage, in which *maysir* is condemned alongside satanic acts such as intoxicants, divinatory arrows, and idol worship (Qurʾān 5:90). Likewise, *qimār* appears in a pre-Islamic poem by al-Aʿshā al-Kabīr (d. 7/629), bearing the meaning of "betting."[50] Although *qimār* does not appear in the Qurʾān, several *ḥadīth*s employ the term, making it central to later juristic debates on gambling.[51]

Early Shāfiʿī and Irāqī-Khurāsānī Views on Gambling

Early Shāfiʿī jurists treated *qimār* and *maysir* as secondary issues, typically addressed under broader legal topics such as *sabaq* (racing), *shahāda* (witness testimony), and *shataranj*

46 *Qānūnnāme Misr* is a codified regulation, edicted by Sulaymān al-Qānūnī for Ottoman Egypt.

47 Guy Burak, The Second Formation of Islamic Law: The Ḥanafī School in the Early Modern Ottoman Empire 17 (2015).

48 Hallaq, *supra* note 45, at 309–10.

49 Ibn Maymūn al-Baghdādī, 8 Muntahā al-ṭalab min ashʿār al-ʿarab 293 (1999).

50 Maymūn b. Qays, 1 Dīwān al-Aʾshā al-Kabīr 186 (2010).

51 *See, e.g.*, Abū Dāwūd al-Sijistānī, 3 Sunan Abī Dāwūd 30 (Muḥammad Muḥyī al-Dīn ʿAbd al-Ḥamīd ed., 1951) (*ḥadīth* no. 2579).

(chess). In his *Mukhtaṣar*, Abū Ibrāhīm al-Muzanī (d. 264/878) reports that Imām Muḥammad b. Idrīs al-Shāfiʿī reluctantly permitted the playing of chess, provided it did not involve gambling (*qimār*).[52] If a man engaged in gambling through chess, his eligibility to testify as a witness would be denied due to the resulting loss of trust and moral credibility.[53] Beyond this account, neither *qimār* nor *maysir* feature prominently in al-Muzanī's work. This omission may be attributed either to the absence of significant gambling-related disputes in his time, or to the possibility that *qimār* was treated as *ʿumūm al-balwā* (axiomatic knowledge). As such, neither al-Shāfiʿī (d. 214/820) nor al-Muzanī appear to have considered it necessary to provide a formal legal definition of gambling.

The legal significance of betting becomes more pronounced in the context of *sabaq*, which concerns rewards in competitive games, whether those rewards are contributed by the competitors themselves or by third parties. Because Shāfiʿī jurisprudence is grounded in textual evidence (*dalīl naṣṣī*) before analogical reasoning, al-Shāfiʿī occasionally invoked a *ḥadīth* permitting financial prizes for only three forms of competition: horse racing, camel racing, and archery.[54] He reasoned that these exceptions[55] were justified by their military utility.[56] Based on this, al-Shāfiʿī held[57] betting between competitors in other forms of games was impermissible—unless a third party, known as a *muḥallil*, was involved.[58] In later Shāfiʿī jurisprudence, the role of the *muḥallil* became a point of doctrinal controversy, especially as scholars sought to apply this concept to modern forms of gambling.

The prominent eleventh-century Shāfiʿī scholar Abū al-Isḥāq al-Shīrāzī (d. 476/1083) expressed views on *qimār* that closely followed those of earlier authorities. The approximately

52 Abū Ibrāhīm al-Muzanī, 8 Mukhtaṣar al-Muzanī maʿa al-Umm 420 (1983).

53 *Id.*

54 Muhammad b. Idrīs al-Shāfiʿī, 4 al-Umm 243 (1983).

55 *See, e.g.*, al-Tirmidhī, *supra* note 10, at 318.

56 Al-Shāfiʿī, *supra* note 54, at 244.

57 *Id.*

58 *Muḥallil* literally means "one who makes it permissible."

two-hundred-year gap between al-Shīrāzī and al-Muzanī (d. 264/878) merits attention, as Shāfiʿī jurists during this intervening period did not produce legal writings with the same structural organization found in the works of al-Shīrāzī and his successors. Jurists of this era were often more concerned with the authentication of existing *fiqh* discourses than with their rationalization. Additionally, legal thought at the time was shaped by a casuistic rather than codified approach: jurists typically issued opinions only when questioned or appearing in public.[59] This feature was common across all *madhāhib*, with the exception of the Ḥanafī school, which permitted *fatwā* on hypothetical or foreseeable cases (*iftirāḍī*).[60]

Accordingly, the lack of sustained public concern over the definition of *qimār*—likely due to the absence of novel gambling practices—meant that most jurists saw no need to define it. By the time of al-Shirāzī, however, gambling had become more common, prompting a shift in legal treatment. In his *al-Muhaddhab*,[61] al-Shirāzī retained the general position of al-Shāfiʿī but went further by offering a concrete definition of *qimār*.[62] He identified three essential elements: (1) the winner takes all, and the loser forfeits everything; (2) both parties are physically present in the same session; and (3) the stakes are paid from the participants' own funds.[63] If a bet failed to meet these criteria, it was not considered *qimār*, and thus also not *maysir*.[64] For instance, if two individuals competed in a race, and only one wagered money—keeping it upon winning, but forfeiting it if he lost[65]—this scenario involved betting but did not constitute *qimār*.[66] In this case, the second condition (same-session occurrence) appears

59 Hallaq, *supra* note 45, at 177–78.

60 Abdullāh Mabrūk Al-Najjār, *The Jurisprudential Assumption of Imam Abū Ḥanīfa*, 30 Majallat Al-Buḥūth al-Fiqhiyya al-Muʿāṣira 13, 15 (2019).

61 Abū Ishāq al-Shīrāzī, 3 al-Muhadhdhab fī fiqh al-Imām al-Shāfiʿī 438 (1955).

62 *Id.*

63 *Id.* at 439.

64 *Id.*

65 *Id.*

66 *Id.*

less central, yet this aspect may have influenced Ibrahim Hosen's opinion on SDSB, as discussed in the following section.

The first notable challenge to the prevailing conception of gambling came from Abū al-Ḥasan al-Māwardī (d. 448/1058), who served as the chief judge of the Shāfiʿī school during the Abbasid period. In his *al-Ḥāwī al-Kabīr*, al-Māwardī problematized the dominant juristic understanding of *qimār* among *fuqahāʾ*, arguing that it is not present in all forms of racing (*sabaq*), since races are not necessarily limited to two competitors.[67] The inclusion of a third, non-betting participant who serves as *muḥallil*—as also recognized by al-Shāfiʿī—renders the contest outside legally permissible, removing it from the category of unlawful *qimār*.[68] Al-Māwardī conceded that betting without a *muḥallil* still constitutes prohibited *qimār*,[69] but he departed from earlier jurists, particularly Mālik b. Anas (d. 179/795), founder of the Mālikī school,[70] in rejecting the wholesale prohibition of all forms of betting. Al-Māwardī even contended that *qimār* and *sabaq* should be treated as distinct legal categories with independent *sharʿī* (textual) justifications.[71] In his view, it is logically inconsistent to declare *sabaq*—a permissible activity—unlawful merely because it may resemble *qimār*, a prohibited one; if such analogical reasoning were accepted, he argued, it would be equally plausible to render *qimār* permissible by aligning it with *sabaq*—a conclusion he rejected as fallacious.[72] Al-Māwardī's position not only identified a legal loophole whereby certain gambling practices may escape classification as unlawful *qimār*, but also cast doubt on the rational basis for prohibiting non-*qimār* betting altogether.

Nawawī and Post-Nawawī Views on Gambling

In the later classical period, Yaḥyā b. Sharaf al-Nawawī (d. 676/1277), in his *Rawḍat al- Ṭalibīn,* offers concrete

67 Al-Māwardī, *supra* note 10, at 183–84.
68 *Id.* at 183.
69 *Id.*
70 *Id.* at 183–84.
71 *Id.* at 183–84.
72 *Id.* at 184.

illustrations of how the *muḥallil* functions within the context of competition.[73] He presents the example of a race involving one hundred participants, with only one designated person serving as a *muḥallil*—a non-betting participant: if one of the 99 bettors wins the race, thereby claiming the pooled reward, the arrangement is considered legally permissible due to the inclusion of the *muḥallil*.[74] Al-Nawawī notes that only Ibn Khairān (d. 320/932) opposed this ruling, while al-Shāfiʿī endorsed it—indicating that dissenting from its permissibility represents a *gharīb* (uncommon) view.[75]

Nonetheless, al-Nawawī adds an important condition: the *muḥallil* must possess a skill level comparable to the other competitors; if the *muḥallil* is so weak that their loss is virtually assured, the arrangement would no longer be valid.[76] Al-Nawawī also cites Abū al-Maʿālī al-Jūwaynī (d. 478/1085) in affirming the importance of two elements previously emphasized by al-Shirāzi:[77] "*Al-Imām* [al-Jūwaynī] said if one of them [two competitors] put some fund, then the opponent wins, he gains the fund and otherwise returns it to the owner of that fund [meaning that the opponent owes nothing]. . . . This interaction has two views; the strongest one is its permissibility."[78] Among the later Shāfiʿīs, however, only Abū Ḥāmid al-Ghazālī (d. 505/1111) maintained that all forms of rewards derived from betting are impermissible, asserting that only the *Sulṭān* is entitled to issue prizes for competitions.[79] Yet even al-Ghazālī did not reject the role of the *muḥallil* in legitimating betting arrangements in contests.[80]

The foregoing discussion reveals a shared framework among Shāfiʿī scholars on *qimār*, while also illustrating a gradual evolution toward more concrete and systematic definitions. Yet beneath this convergence lie significant differences, particularly

73 Al-Nawawī, Rawḍat al-ṭālibīn, *supra* note 11, at 355–56 (1991).
74 *Id.* at 355–56.
75 *Id.* at 354.
76 *Id.*
77 Al-Shīrāzī, *supra* note 61, at 438–39.
78 Al-Nawawī, Rawḍat al-ṭālibīn, *supra* note 11, at 356.
79 Abū Ḥāmid al-Ghazālī, 7 al-Wasīṭ fī al-madhhab 178–79 (1996).
80 *Id.* at 179.

in how these jurists approached *qimār* within their broader legal and intellectual contexts. As noted earlier, references to *qimār* in Shāfiʿī texts commonly appear under the topics of *musabaqa*, *munāḍala*, or *shahāda*. However, this is not the case for al-Ghazālī, who treated *qimār* and *sabaq* under the law of contracts (*ʿuqūd*),[81] suggesting that he viewed gambling as primarily a contractual issue rather than a criminal one. Al-Māwardī's perspective, by contract, may have been shaped by his role as *qāḍi al-quḍāt* (chief judge), prompting him to soften the connection between *maysir* and competition, perhaps to accommodate the interests of the political elite. Such accommodation is not unprecedented: Abū Yūsuf al-Ḥanafī (d. 182/798), a predecessor in the office of chief judge, similarly tempered legal positions to align with state priorities.[82]

Moreover, internal divisions within the Shāfiʿī school help explain the divergence in methodological emphasis. Prior to the synthesis efforts of ʿAbd al-Karīm al-Rāfiʿī (d. 623/1226) and al-Nawawī, the school was broadly divided between the Irāqī group, led by Abū Ḥāmid al-Isfraʿyīnī al-Shāfiʿī (d. 384/1027), and the Khurāsānī group, led by al-Qaffāl al-Ṣaghīr al-Shāfiʿī (d. 383/1026).[83] Al-Nawawī observed that the Irāqīs were more committed to preserving the verbatim views of al-Shāfiʿī, while the Khurāsānīs prioritized systematic legal reasoning.[84] Al-Māwardī himself, a direct disciple of Abū Ḥāmid al-Isfraʿyīnī, belonged to the Irāqī group and criticized al-Muzanī's *Mukhtaṣar* for erasing (*ḥadhf*) key aspects of al-Shāfiʿī's rulings on chess and *qimār*.[85] By contrast, al-Shirāzī, al-Juwaynī, and al-Ghazālī—all affiliated with the Khurāsānī group—tended toward rationalizing *fiqh*, which likely explains al-Shirāzī's pioneering attempt to define *qimār* in detail.

Al-Māwardī further made possible the permissibility of prizes for chess competitions, citing a lack of juristic consensus among Shāfiʿī scholars, though he maintained that prizes for races were unequivocally lawful. In his view, the permissibility

81 *Id.* at 177–80 (condition for a contract validity).
82 Hallaq, *supra* note 45, at 160–61.
83 Al-Qawāsimī, *supra* note 44, at 244–46.
84 *Id.* at 243.
85 Al-Māwardī, *supra* note 10, at 185.

of a prize (ʿ*iwaḍ*) did not depend on whether it came from a third party or the competitors themselves—provided a *muḥallil* was present.[86] This view, however, was not adopted by most Khurāsānī or post-Nawawī jurists, who generally held that *qimār* occur in competitions unless the prize is funded solely by a non-participant.

In sum, the contributions of al-Shirāzī and al-Māwardī were critical to shaping later juristic discourse on *qimār*. Three elements emerged as defining features of prohibited *qimār* or *maysir*: (1) the risk of total loss due to the wager; (2) the participants' presence in the same session; and (3) the absence of a *muḥallil*. Betting was generally deemed impermissible in games other than those allowed by *ḥadīth*—horse racing, camel racing, and archery—when the winner was determined by reaching a clear milestone. Thus, if two fighters wagered on the outcome of a match without a *muḥallil*, and one party lost the full amount of the stake while both were present in the same session, this constituted unlawful *qimār*. By contrast, the presence a *muḥallil* or a unilateral wager (where only one party risks funds) would remove the arrangement from the definition of *qimār*, and therefore from the category of prohibited gambling.

One issue that remains to be clarified, however, is whether classical Shāfiʿī jurists treated *qimār* or *maysir* as criminal offenses or merely as ethical violations. While there is broad consensus among these scholars on the prohibition of gambling, none—from the early period through the time of al-Nawawī, or even in the generations that followed—classified *qimār* or *maysir* under *jināyāt* (criminal offense) or *ḥudūd* (prescribed punishments). This suggests that gambling was understood primarily as a moral transgression, albeit one potentially subject to judicial sanction under *taʿzīr* (discretionary punishment).[87] Nonetheless, evidence of actual punishment for gambling in Shāfiʿī sources is rare—if not altogether absent. Moreover, under *taʿzīr*, a *qāḍī* retains broad discretion and may choose not to impose any penalty at all. This further underscores the marginal punitive status of gambling within the Shāfiʿī tradition.

86 *Id.* at 183.

87 Peters, *supra* note 14, at 65–66.

Post-Nawawī jurists continued to grapple with the boundaries of *qimār*, most notably Ibn Ḥajar al-Haytamī (d. 909/1566). In response to a question concerning sword-fighting competitions in Malabar, which often involved gambling to intensify the contest, al-Haytamī issued a permissive ruling.[88] He reasoned that such fights were beneficial for military conscription and, accordingly, that prizes—even if funded through gambling—were permissible as motivational tools.[89] This opinion diverges sharply from the earlier consensus, which limited prizing to only three types of contests: horse racing, camel racing, and archery. Rather than criminalize the practice of sword-fighting, al-Haytamī legitimized it, marking a significant doctrinal departure.

As will be discussed further in relation to Ibrahim Hosen, al-Haytamī's leniency reflects an interpretive stance that departs from classical restrictions, but somehow aligns with Hosen's. While al-Haytamī was not a judge, his role as a mufti is nonetheless significant.[90] In practice, *qāḍī*s often rely on the legal opinions of muftis in reaching their rulings. Thus, if a jurist of al-Haytamī's statute permitted gambling-like practices in a context well outside the traditionally accepted *sabaq*, a judge might reasonably decline to criminalize such conduct or prohibit its associated rewards.

To clarify the progression of the debate, Table 1 (overleaf) summarizes how key Shāfiʿī jurists have conceptualized *qimār* across different periods and how each contributed to or departed from earlier views.

As previously discussed, the criminalization of gambling emerged relatively late, largely coinciding with the codification of law under the modern state. Notably, the formal prohibition of gambling has occurred primarily in countries with strong Islamic religiosity such as Malaysia, Brunei, and Saudi Arabia. By contrast, many secular states uphold the moral disapproval of gambling without imposing full criminal sanctions. Some, like

88 Al-Haytamī, *supra* note 43, at 262.
89 *Id.* at 262–63.
90 Hallaq, *supra* note 45, at 161–63.

Table 1

Scholar	***Kitāb* (Major Work)**	**Core view on *Qimār*/*Maysir***	**What Changes from Predecessors**
Imām Muḥammad b. Idrīs al-Shāfiʿī (d. 214/820)	*al-Umm*	– Limits permissibility of prize-based competitions to horse racing, camel racing, and archery (based on *ḥadīth*). – Introduces the *muḥallil* to distinguish permissible rewards from unlawful gambling.	–First to ground scope of gambling in explicit *ḥadīth*. – Introduces *muḥallil* as technical mechanism.
Abū Ibrāhīm al-Muzanī (d. 264/878)	*Mukhtaṣar*	– Permits chess until it involves gambling; loss of credibility affects witness eligibility. – Offers no standalone definition of *qimār*.	– Rare, casuistic mention of *qimār* under *ʿumūm al-balwā* (axiomatic). – Mirrors al-Shāfiʿī's stance without formal definition.
Abū al-Isḥāq al-Shīrāzī (d. 476/1083)	*al-Muhaddhab*	– Defines *qimār* by three conditions: (1) winner takes all; (2) same session; (3) self-funded stakes. Absence of any disqualifies it as *qimār*.	– First systematic definition of gambling in Shāfiʿī tradition. – Codifies conditions for what constitutes gambling.
Abū al-Ḥasan al-Māwardī (d. 448/1058)	*al-Ḥāwī al-kabīr*	– Argues races (*sabaq*) are not inherently *qimār* (even without *muḥallil*) – Keeps *qimār*/pursuit of prize separate from racing. – Allows third-party prizes regardless of betting.	– Challenges al-Shīrāzī's and predecessors' conflation of *qimār* and *sabaq*. – Insists on analytical separation: prizing is not necessarily gambling. – Softens prohibition, opening door to more permissive rulings.

Scholar	*Kitāb* (Major Work)	Core view on *Qimār*/*Maysir*	What Changes from Predecessors
Yaḥyā b. Sharaf al-Nawawī (d. 676/1277)	*Rawḍat al-ṭālibīn*	– Elaborates *muḥallil* function (e.g., 1:99 race example). – Adds requirement that *muḥallil* be of equal skill (not predictable defeat). – Endorses al-Shīrāzī's two-condition model (stakes, meeting).	– Tightens *muḥallil* conditions by adding skill-parity. – Codifies al-Juwaynī's two-aspect model into applied doctrine. – Moves discussion further into practical casuistry.
Abū al-Maʿālī al-Juwaynī (d. 478/1085)	*Nihāyat al-maṭlab*	– Identifies two conditions for *qimār*: mutual stakes and same-session betting. Absence of either invalidates *qimār*.	– Moves toward partial rationalization, but stops short of al-Shīrāzī's full three-part definition.
Abū Ḥāmid al-Ghazālī (d. 505/1111)	*Iḥyāʾ ʿulūm al-dīn*	– Prohibits all betting-based rewards; prizes only valid if awarded by the sultan. – Keeps *muḥallil* device, but relocates discussion to contract law (*ʿaqd* section).	– Shifts focus from moral/criminal sphere to contractual framework. – Frames gambling as invalid contract rather than simply an ethical lapse.
Ibn Ḥajar al-Haytamī (d. 909/1566)	*al-Fatāwā al-fiqhiyya al-kubrā*	– Permits prizing in sword fights (with gambling) as military-training incentive. – Extends permissible gambling beyond traditional "three game" limit to include martial contests.	– Breaks traditional strict "three-game" limit. – Aligns with utilitarian conscription rationale. – Illustrates how post-codification muftis could further relax earlier restrictions.

Singapore[91] and Indonesia, implement partial restrictions while permitting certain forms of regulated gambling. The following section explores how specific gambling practices evade criminalization in such jurisdictions, highlighting the tension between moral norms, legal pluralism, and state enforcement.

Escaping Criminalization: Revisiting the SDSB Controversy

Chapter XIV, Article 303 of KUHP sets forth the principal provision criminalizing gambling in Indonesia, outlining its definition, conditions, and applicable penalties. The article defines gambling as follows:

> So-called gambling is any game based on speculation, which mostly relies on luck, and where the possibility to win increases due to the adeptness and expertise of a player. Gambling also encompasses any betting on the result of a competition or other games, which is conducted by the non-players of that game, as well as other types of betting.[92]

This definition captures all forms of betting by non-players on a competition and identifies two key elements: speculation and reliance on luck. However, the definition becomes problematic where it concedes that skill and proficiency may increase a player's chances of winning, even as it emphasizes luck as the primary criterion. As a result, many games that combine both skill and chance—but remain largely unpredictable—may still fall within the scope of "gambling" under this definition.

Yet this ambiguity also creates a loophole: games that are technically predictable, even if practically uncertain, may evade the statute's application. For example, sports competitions such as football, basketball, or motor racing inherently

91 Joan C. Henderson, *Developing and Regulating Casinos: The Case of Singapore*, 12 Tourism & Hospitality Rsch. 139 (2012).

92 The original text is in Bahasa Indonesian, no official translation can be referred, and this quotation is the author's own translation.

involve speculation and elements of luck, yet are also deeply dependent on strategic skill. Similarly, many modern digital arcade games and gambling platforms are designed with algorithmic predictability—allowing them to appear as skill-based competitions, even when they functionally operate as gambling.[93] Under Article 303's formulation, such games might fall outside the legal definition, despite clearly embodying the practical characteristics of gambling.

The definitional ambiguity of gambling also extends to tournaments and competitions in which the winner receives a prize funded by the participants themselves—a widespread practice in Indonesia, particularly at the grassroots level.[94] As previously discussed, Shāfiʿī *fiqh*—the dominant *madhhab* in Indonesia—permits certain forms of betting provided that specific conditions are met, such as the presence of a *muḥallil* (a third party non-bettor) and the requirement that the betting occurs in a single session. Some Shāfiʿī scholars even encouraged betting in specific competitions, such as sword fighting.[95] This position creates a clear tension between Islamic law and the Indonesian Criminal Code (KUHP) with respect to the scope and treatment of gambling. For instance, the KUHP arguably criminalizes betting between participants in a sword fight, while Shāfiʿī *fiqh* permits it under the concept of *munāḍala* (competitive games). The KUHP adopts a broad, inclusive definition of gambling, though it contains interpretive loopholes, whereas the Shāfiʿī tradition applies a more narrow, doctrinally constrained conception. Moreover, Shāfiʿī *fiqh* generally treats gambling not as a grave criminal offense but rather as a moral infraction, punishable at most through *taʿzīr* (discretionary sanction), rather than as a *ḥadd* offense.

This divergence helps explain Ibrahim Hosen's initial reluctance to issue a *fatwā* against SDSB. His position drew upon Shāfiʿī jurisprudence, particularly the reasoning of al-Haytamī, and reflected a view that SDSB resembled a one-sided bet rather

93 Auer & Griffiths, *supra* note 21, at 1275.

94 *Taruhan untuk Seru-seruan dengan Teman, Bagaimana Islam Memandangnya?*, Republika Online (Aug. 4, 2023), https://republika.co.id/share/ryv2oo425.

95 Al-Haytamī, *supra* note 43, at 262.

than a bilateral, face-to-face gambling scenario.[96] In SDSB and similar state-run lottery programs, individuals purchased coupons with the hope of winning a prize funded in part by the collective pool of coupon sales: in the 1990s, one coupon cost 1000 rupiah—roughly the price of two kilograms of rice at the time.[97] From a jurisprudential perspective, the bettor was wagering against the state, which did not risk any financial loss and thus functioned as a de facto *muḥallil*. Furthermore, the outcome was not determined at the time of purchase, violating the condition that the betting occur within a single session. And finally, SDSB's design diverted a substantial portion of the proceeds to public infrastructure, which further complicated its classification as impermissible gambling. The program's official name—*Sumbangan Dana Sosial Berhadiah* (social donation fund with prize)—underscored this dual purpose.

When examined through the conditional criteria of the Shāfiʿī school, the structure of SDSB likely places it outside the legal definition of *maysir*. Although Ibrahim Hosen did not explicitly frame his reasoning in this way, his emphasis on the absence of face-to-face betting aligns with al-Shirāzī's definition—referenced indirectly through Hosen's citation of al-Shawkānī (d. 1250/1854) in *Naylul Awtar*.[98] Hosen further argued that even if SDSB were impermissible (*ḥarām*), its prohibition would be a matter of compliance with state authority, rather than an instead essential or intrinsic prohibition (*ḥarām li-dhātihi*).[99] Indeed, this distinction proved difficult for many Indonesian Muslims—particularly those without legal training—to accept. As noted, Hosen faced significant public criticism, ridicule, and resistance for his position. Yet his interpretive approach was grounded not in reformist ideology or in efforts to decriminalize gambling, but in engagement with *turāth* (Islamic legal heritage). His reliance on traditional sources underscores his commitment to a jurisprudential rather than political or utilitarian analysis. Moreover, the fact that SDSB generated revenue for the state further complicated any move to prohibit it. Just

96 Hosen, *supra* note 3, at 20–21.
97 *Hari-hari akhir SDSB akhir mimpi indah*, *supra* note 2.
98 Hosen, *supra* note 3, at 35–36.
99 *Id.* at 30.

as al-Haytamī permitted betting in sword-fighting competitions for their military utility, Hosen's reasoning implicitly extended *qiyās* (analogical reasoning) to SDSB on the basis of its fiscal benefit to national development.

While Article 303 of the KUHP could potentially support the criminalization of SDSB, in practice the program was shielded by another crucial provision: the article's opening clause distinguishes between lawful and unlawful gambling based on state authorization. Thus, if a gambling program is permitted by the state, it is not considered a criminal offense or a violation of the Code. In the case of SDSB, the program was not only authorized but actively sponsored by the Indonesian government.[100] It formed part of a broader national strategy to raise public funds beyond the tax base—particularly under President Soeharto's (1967–1998) *Repelita* (*Rencana Pembangunan Lima Tahun*, or Five-Year Development Plan), which required substantial public expenditure for large-scale development.[101] As such, the state had little incentive to criminalize SDSB, given its dual status as a government-backed initiative and a macroeconomic revenue stream.

A historical review of gambling legislation in Indonesia further contextualizes SDSB's legal standing. It was not until 1974 that an amendment to the KUHP repealed the original Dutch colonial law on gambling.[102] Prior to that, gambling had a bifurcated legal status: it could be either a punishable offense or a non-punishable violation, depending on whether the activity was licensed.[103] The revised Article 303 replaced the earlier Article 542 and formally consolidated unlicensed gambling as a punishable crime.[104] The repealed colonial-era statute, *Staatsblad* 1912 no. 230, had regulated *Hazardspellen* (games of

100 *Hari-hari akhir SDSB akhir mimpi indah*, *supra* note 2.

101 Thee Kian Wie, *Policies Affecting Indonesia's Industrial Technology Development*, 23 Asean Economic Bulletin 341 (2006).

102 This amendment revoked Staatsblad 1912 No. 230 and Staatsblad 1935 No. 526, which regulated punishment for unlicensed gambling houses. By this amendment, gambling became a criminal act instead of merely a violation.

103 Wahyu Lumaksono & Anik Andayani, *Legaslisasi Porkas Dan Dampaknya Terhadap Masyarakat Pada Tahun 1985–1987*, 2 Avatar: Journal Pendidikan Sejarah 540, 544 (2014).

104 Butt & Lindsey, *supra* note 17, at 186.

chance),[105] which were popular in Java at the time, and viewed by the colonial authorities as legitimate economic enterprises. From this context, we can infer that gambling was not regarded as inherently criminal under Indonesian law until the 1974 amendment—and even then, legality hinged on state licensing. Programs such as SDSB, which operated with official sanction, remained legally permissible under the new framework.

The Role of *Adat* Law in the Criminalization of Gambling

The position of *adat*—customary law and social norms—on games of chance and gambling is similarly complex. Both Malay elites and grassroots communities have historically engaged in various gambling practices, including cockfighting, card and dice games, and animal racing; these activities where often encouraged under colonial rule, as they generated economic revenue.[106] Even within more formalized conceptions of *adat* as regulated customary norms, there is little evidence that such practices were historically treated as criminal offenses. As noted by Snouck Hurgronje, opposition to these practices came almost exclusively from religious authorities; only after the post-war period did their views gain broader traction, likely due to the increasing social influence of the *ʿulamāʾ* (Islamic scholars) over the aristocracy.[107] That opposition appears to have stemmed from two concerns: first, that such games constituted gambling; and second, that they lacked military or utilitarian value and should therefore be prohibited.

Notably, two foundational Malay legal texts from the seventeenth and eighteenth centuries—*Mirʾāt al-Ṭullāb* by ʿAbd

105 This law was written in Dutch and entitled "Nadere Wijziging En Aanvulling Van De Bepalingen Betreffende Het Varleenen Van Licentien Tot Het Houden Of Doen Houden Van Hazrdspelen In Voor Het Publiek Opengestelde Lokalen (Staatsblad 1912 No. 230)," which roughly translates as "Further Amendment and Supplement to the Provisions Concerning the Granting of Licenses for Holding or Causing to be Held Games of Chance in Premises Open to the Public (Staatsblad 1912 No. 230)."

106 C. Snouck Hurgronje, The Achehnese: Volume 2, at 208 (1906); M C. Ricklefs, A History of Modern Indonesia since c. 1300, at 183 (2d ed. 1993).

107 Hurgronje, *supra* note 106, at 210.

al-Raʾūf al-Sinkīlī (d. 1105/1693) and *Safīnat al-Ḥukkām* by Jalāl al-Dīn al-Tārūsānī (d. ca. 1194/1780)—acknowledge the sinful nature of gambling (*betaruh* or *berjudi*), yet impose no legal punishment.[108] For these *ʿulamāʾ*, gambling was viewed primarily as a moral failing rather than as a justiciable offense. It was not until the mid-nineteenth century that calls for regulating gambling as a criminal matter became more pronounced. Abdullāh al-Munshī (d. 1271/1854), writing in Temasek (present-day Singapore), was among the first to question the absence of legal mechanisms for addressing gambling.[109] Taken together, the plural legal traditions that inform Indonesian law—Shāfiʿī Islamic law, customary law, and European law—did not historically criminalize all forms of gambling, especially when such practices did not involve games of chance. This raises a key question: what led Indonesian legislators in 1974 to redefine gambling as a criminal offense and later expand its scope to include "all types of betting by non-players on game outcomes"?

The most plausible explanation is the rising influence of Muslim law—a composite normative framework shaped by *fiqh* (Islamic jurisprudence), *adat* (local customs and norms), and public-political interests (*maṣlaḥa wa-taṣarruf bi-l-imāma*). The latter category encompasses state actions grounded in perceived public interest or necessity. In the case of the SDSB, although Ibrahim Hosen argued that the lottery program did not qualify as *maysir* under Shāfiʿī doctrine, the majority of Indonesian Muslims viewed SDSB as religiously impermissible, regardless of its economic utility. This reflects the dynamic role of Muslim law, which can elevate social perception and political interest to the level of enforceable legal norms—even where traditional jurisprudence may not support such a conclusion.

108 *Safīnat al-Ḥukkām* mentions *berjudi* and *sabung* (two terms close in meaning to traditional gambling) under the subject of *Dausa Besar* (major sins) and *Dausa Kecil* (minor sins), and gambling is absent from the *Jinayat* section. The same situation also applies to *Mirʾāt al-Ṭullāb*. *See* Jalāluddīn At-Tārūsānī, Safīnat Al-Ḥukkām Fī Talkhīṣ Ahl al-Khaṣṣām (Muliadi Kurdi & Jamaluddin Thaib eds., 2015) and Abd al-Raʾuf al-Sinkilī, Mirʾāt al-Ṭullāb fī Taʾṣīl Maʿrifat al-Aḥkām al-Sharʿiyya li-l-Mālik al-Wahhāb (2d ed. 2015).

109 Noor Aisha Abdul Rahman, Colonial Image of Malay Adat Laws: A Critical Appraisal of Studies on Adat Laws in the Malay Peninsula during the Colonial Era and Some Continuities 132 (2006).

Importantly, SDSB became controversial in the 1980s and 1990s, more than a decade after the 1974 amendment to the KUHP that consolidated the criminalization of unlicensed gambling. This suggests that the eventual prohibition of SDSB was not simply a result of legal reform, but also a response to shifting political dynamics. During the final decade of Soeharto's rule, the regime increasingly sought to accommodate conservative Muslim constituencies. These efforts included policy changes—such as permitting the wearing of the *jilbāb* (outer garment) in public schools—that symbolized a broader political strategy to appease Islamic factions both among political elites and at the grassroots level.[110] In this context, the move against SDSB can be understood as part of a larger realignment in the state's approach to Islamic norms, as the regime worked to preserve its legitimacy amid growing religious pressures.

As Merle Ricklefs has noted, President Soeharto's decision to permit the formation of *Ikatan Cendekiawan Muslim Indonesia* (ICMI, Indonesian Association of Muslim Intellectuals) marked a turning point in the relationship between the state and modern Muslim populists.[111] Although Abdurrahman Wahid, a *Nahdhatul Ulama* scholar who later became the fourth president, criticized ICMI as an elitist institution, its establishment symbolized a broader shift in state sympathies toward devout Muslim communities.[112] In this context, opposition to the SDSB lottery—already dominant in public discourse—emerged as the prevailing view. Mohammad Nur Ichwan further emphasizes that Ibram Hosen's eventual disapproval of SDSB was influenced by the evolving alignment between Muslim populists and the state.[113] Some may question why a trained jurist like Hosen initially adopted a neutral, if not cautiously favorable, stance toward SDSB, while lay Muslims without formal legal education led the opposition. This dynamic suggests that political and public sentiment, rather than scholarly legal engagement and reconsideration, ultimately drove the lottery's prohibition.

110 Ricklefs, *supra* note 106, at 400.
111 *Id.* at 393.
112 *Id.*
113 Ichwan, *supra* note 4, at 60–61.

Beyond jurisprudential debates, SDSB gave rise to tangible social problems at the grassroots level. During the 1990s, Indonesia was undergoing significant economic stain, culminating in the 1997 financial crisis.[114] Amid growing desperation, many turned to the lottery as a perceived path to quick wealth. Cultural factors, particularly Indonesia's enduring ties to mysticism and occult belief systems, also shaped popular engagement with SDSB.[115] Participants often brought lottery tickets to shamans or sacred graves in search of supernatural intervention; in more extreme cases, individuals gathered at the scenes of traffic accidents to record license plate numbers, believing these might contain "magical" winning combinations.[116] This kind of "wild behavior" reinforced perceptions—among both religious leaders (*ʿulamāʾ*) and secular observers—that SDSB was socially harmful. Historically, classical Malay jurists had cited precisely this kind of conduct among gamblers as a justification for prohibiting all games of chance, even when such activities did not clearly violate the formal requirements for *qimār*.[117]

Public interest is not conceptually distinct from the framework of *adat*; indeed, one may argue that *adat* functions as a vehicle through which Islamic law shapes the modern Indonesian Penal Code. In this way, *adat* serves as a conduit for the legislative and judicial invocation of "living law" when the codified civil law does not address a specific case. Theoretically, *al-ʿādah*—often translated as customary practice—does not require formal institutionalization within a society's normative order to attain legal recognition in Islamic jurisprudence. Rather, as long as a practice is widely observed or a viewpoint is broadly accepted, it constitutes *ʿādah* or *ʿurf* in and may be legally operative as an expression of public interest.[118] The role of political interest in Islamic legal discourse, however, is undeniable.

114 Reiny Iriana & Fredrik Sjöholm, *Indonesia's Economic Crisis: Contagion and Fundamentals*, 40 The Developing Economies 135 (2002).

115 Lumaksono & Andayani, *supra* note 103, at 546.

116 Bima Bagaskara, *Nostalgia SDSB, Judi Legal Era Soeharto yang Bikin Warga Tergila-gila*, Detikjabar (Apr. 9, 2023), https://www.detik.com/jabar/berita/d-6663297/nostalgia-sdsb-judi-legal-era-soeharto-yang-bikin-warga-tergila-gila.

117 Hurgronje, *supra* note 106, at 210.

118 Ayman Shabana, Custom in Islamic Law and Legal theory 50 (2010).

Al-Māwardī's more permissive stance on gambling, for instance, illustrates how juristic opinion can be shaped by the imperatives of royal authority. In this regard, *adat* mediates between Islamic legal norms and state criminal law, undermining claims that Islamic law is wholly marginalized from Indonesia's penal code. Still, it is more accurate to speak here of Muslim law—a term that captures the interplay of *fiqh*, *adat*, and public-political considerations—than to rely exclusively on the frameworks of either "Islamic law" or "customary law."

That said, Indonesia's post-independence adoption of a secular civil law system means that Muslim law alone could not technically prohibit all forms of gambling without formal legislative action—specifically, the 1974 amendment to the KUHP. In fact, Muslim law may itself be framed as a form of secular law in a broader sense: a normative structure that draws on Islamic sources but functions within a legal system responsive to public interest rather than strictly theological doctrine. This orientation sometimes leads to interpretations that diverge from classical *fiqh* stipulations. In the case of gambling, for example, traditional Shāfiʿī *fiqh* may permit certain forms of betting when a *muḥallil* is present. Yet under Indonesian Muslim law, such distinctions are collapsed, and gambling is broadly prohibited. This explains why gambling criminalization in Indonesia could not have emerged solely through Islamic legal reasoning; it required a secular legislative mechanism. Yet, as the SDSB controversy illustrates, the substantive justification for criminalization was deeply informed by Islamic and *adat*-based moral reasoning. In that case, opposing the Muslim majority's demand to prohibit SDSB would have risked provoking widespread unrest—an outcome undesirable for Soeharto's already precarious regime.

In Indonesia's contemporary context, current efforts toward legal decolonialization may benefit from embracing the framework of Muslim law. Such an approach allows for the creation of legislation that is simultaneously Islamic and secular—rooted in the cultural and moral values of the population without requiring direct reliance on contested points of *fiqh*. In contrast to a strict jurisprudential approach, which may lead to

doctrinal fragmentation or legal dead ends, as the gambling debate demonstrates, the lens of Muslim law offers a more flexible, socially responsive foundation. This framework also holds particular promise in addressing emerging legal issues such as online gambling, which might otherwise evade regulation under narrow interpretations of classical Islamic law.

Conclusion

The prohibition of the SDSB (national lottery) in Indonesian law reflects an intersection of Islamic and secular legal considerations. It illustrates a shift in Shāfiʿī legal interpretation, where juristic understanding has come to take precedence over strict textual literalism. Advocacy for prohibiting the SDSB thus represents a form of Muslim law interpretation, informed by historical practice and culture, rather than direct scriptural mandates from sacred texts or early jurists.

This study has shown that the Shāfiʿī legal tradition offers no definitive guidance on what constitutes *qimār* (gambling or betting), resulting in significant debates among jurists over its scope and meaning. Terms such as gambling, competition rewards, and non-prohibited betting (in the presence of a *muḥallil*) complicate these discussions, especially since the punishment for gambling traditionally falls under *taʿzīr* (discretionary punishment). While this interpretive vagueness has permitted certain forms of wagering to be deemed legitimate, the 1974 amendment to Indonesia's Criminal Code (KUHP) adopted a broader and more rigid definition of gambling. The KUHP frames gambling primarily as games of speculation and chance, criminalizing all forms of betting by non-players regardless of the moral or contextual justifications provided in *fiqh*, and despite Shāfiʿī jurisprudence allowing for certain exceptions. Nonetheless, the KUHP's definition is not without ambiguity, particularly in distinguishing between games of chance and those competitions that involve a significance element of skill, creating potential legal loopholes. Meanwhile, Shāfiʿī *fiqh*, as the dominant Islamic legal tradition in Indonesia, adopts a more conditional and

context-sensitive approach, often treating gambling as a moral violation rather than a criminal offense.

It is within this convergence of Muslim law (based on *adat* and *fiqh*) and public-political interests that Indonesia's modern gambling regulations have taken shape, leading to the 1974 criminalization of unlicensed gambling, including lotteries like SDSB. While *adat* itself does not explicitly criminalize gambling, its alignment with public interest has enabled it to serve as a channel for the incorporations of Islamic norms into the Indonesian criminal code. Its responsive and flexible nature, grounded in common practices accepted by the majority, allow it to guide legal reasoning in a way that is less restrictive than direct reliance on *fiqh* scriptures. This dynamic interaction between *adat* and Islamic law, which has existed since the arrival of Islam to the Southeast Asian archipelago, has been further shaped by evolving political conditions. In this way, Muslim law has become a conceptual bridge, facilitating the integration of Islamic and customary norms into the Indonesian secular legal system—particularly within the realm of criminal law.

Ultimately, this interaction undermines the notion that Islamic law is wholly marginalized within Indonesia's legal framework. Instead, Muslim law—as an adaptive, pluralistic legal concept—enables Islamic principles and *adat* values to influence national legislation. Its role may be especially significant in redefining the understanding of *ḥudūd* in modern pluralist states, where religious and secular laws coexist.

A Decolonial Critique of the *Maqāṣid*-Based Approach to *Sharīʿa*: The Call for a Moratorium on the *Ḥudūd*

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Abstract

A polarizing symbol, the ḥudūd punishments have come to be conflated with the very essence of the sharīʿa *by advocates and detractors alike. This article applies a decolonial critique to reform projects that call for the suspension of the* ḥudūd*, particularly those appealing to* maqāṣid al-sharīʿa *for internal legitimacy. Focusing on one such prominent call, I argue that the fixation on ḥudūd as divinely mandated punishments, in lieu of political punishment (*taʿzīr*) or the law of talion (*qiṣāṣ*), reflects a misplaced critique, revealing a colonial lens and the enduring coloniality of power. By analyzing* ḥudūd *enforcement in Saudi Arabia and Iran, I show their statistical rarity, theoretical inapplicability, and ethical dissonance with liberal sensibilities. I incorporate perspectives from contemporary and premodern scholars—including Ali Gomaa, ʿIzz al-Dīn b. ʿAbd al-Salām, and Abū al-Qāsim al-Burzulī—highlighting historical critiques and alternatives to* ḥudūd*. Additionally, I examine the broader implications of reform, particularly its implicit reliance on the carceral system, which remains unchallenged by reformist discourse. Engagement with critical theorists Michel Foucault, Angela Davis, and Michelle Alexander reveals the reformist concern with regulating the visibility of violence, rather than its elimination, as a hegemonic function of human rights discourse in defining the boundaries of legitimate debate.*

يَمِيـنِي أَمِـيرَ ٱلْمُؤْمِنِـينَ أُعِيـذُهَا بِعَفْوِكَ أَنْ تَلْقَى مَكَانًا يَشِينُهَـا
يَدَيَّ كَانَتِ ٱلْحُسْنَاءُ لَوْ تَمَّ سَبْرُهَا وَلَنْ تَعْدَمَ ٱلْحُسْنَاءُ عَابًا يَشِينُهَـا
فَلَا خَيْرَ فِي ٱلدُّنْيَا وَكَانَتْ حَبِيبَةً إِذَا مَا شِمَـالِي فَارَقَتْهَا يَمِينُهَـا

I entrust my right hand, O Commander of the Faithful, to your pardon,
lest it meet a fate that would disgrace it.
My hands had been fair and beautiful, had they been fully examined,
but even the fairest beauty is not free from a flaw that mars it.
There is no good left in this world, even if it were once beloved,
if my right hand must part ways from my left.

So pleaded the last thief facing amputation before the caliph Muʿāwiya. Moved, the caliph remarked, "What am I to do with you, when I have already severed your companions?" The thief's mother intervened, imploring, "O Commander of the Faithful, make it one of the sins from which you repent." Muʿāwiya, struck by the humanity of the moment, relented and the thief was released, an act remembered as the first deliberate abandonment of a prescribed ḥadd.

Introduction

Scenes such as this, recorded in the early Islamic legal tradition, disrupt modern portrayals of the *ḥudūd*[1] as unthinking relics of brutality.[2] They reflect a historical legal culture where divine penalties operated within a broader ethical framework, attuned to repentance, mercy, and the complexities of human character. Yet, contemporary interlocutors often erase this textured reality. A polarizing symbol, the *ḥudūd* punishments have come to be conflated with the very essence of the *sharīʿa* by advocates and detractors alike. On one hand, they command popular support among Muslims who often perceive them as emblematic of

1 The *ḥudūd* (sing. *ḥadd*) are offences or prohibitions whose punishments are prescribed in the Qurʾān and the Sunna. *See* Wael B. Hallaq, An Introduction to Islamic Law 155–56 (2009).

2 The poem and narrative are reported in Abū al-Ḥasan ʿAlī al-Māwardī, al-Ḥāwī al-kabīr 13:269 (ʿAlī Muʿawwaḍ & ʿĀdil ʿAbd al-Mawjūd eds., 1999).

an authentically Islamic society. On the other, they have become a focal point for Islamophobes and for criticism from human rights organizations. In response, contemporary Muslim reformers, who are worried about the tradition's public perception, as well as finding its application to affect women and the poor disproportionately, call for a moratorium on the *ḥudūd* in Muslim majority countries. What makes such proposals ever the more contentious, is the belief that the *ḥudūd* are divinely ordained, derived from definitive texts and therefore immutable.

This article applies a decolonial critique to contemporary calls for the suspension of the *ḥudūd*, specifically, reform projects that appeal to *maqāṣid al-sharīʿa* (the objectives of Islamic law) for internal legitimacy.[3] In examining one such prominent call, I argue that a fixation on *ḥudūd* as divinely mandated punishments, in lieu of political punishment (*taʿzīr*) or the law of talion (*qiṣāṣ*), is not only a misplaced critique (a misreading of the context so vital to modern reform projects) but indicative of the coloniality of power at play and ultimately undertaken with a colonial lens. By analyzing the application of *ḥudūd* in Saudi Arabia and Iran, I show them to be statistically negligible, theoretically well-nigh impossible to implement and their role in ethical-subject formation to often be at odds with liberal sensibilities.

Furthermore, I bring both contemporary and pre-modern traditional scholarship into the conversation. Ali Gomaa (b. 1952), Grand Mufti emeritus of Egypt, as well as ʿIzz al-Dīn ibn ʿAbd al-Salām (d. 660/1262), one of the foundational contributors to *maqāṣid* theory, both engage the *ḥudūd* via *maqāṣid*. Abū al-Qāsim al-Burzulī (d. 844/1440) is a notable pre-modern scholar who advocated for whole-sale replacement of *ḥudūd* with property-based penalties. Ultimately, I find the *maqāṣid*-based approach as utilized by progressives tends to bypass the procedure or methodological rigor of Islamic law, even if coming to the same substantive conclusions as that of the traditionalists. This suggests that the opposition to *ḥudūd* reform is rooted primarily in procedural concerns, and represents a resistance towards attempts to hegemonize Eurocentric modes of reasoning as normative or superior.

3 Hereafter, I will refer to *maqāṣid al-sharīʿa* simply as the *maqāṣid*.

Finally, among the broader implications of a moratorium would be a turn to the carceral system, for which there is lack of consideration or critique from the reformist project. By engaging the context surrounding the birth of the modern prison, Michel Foucault concludes that prison reformers were not moved by humanitarian ideals, but by a desire to optimize power and economize punishment.[4] Critical scholarship such as that of Angela Davis and Michelle Alexander further critique what they term the prison-industrial complex built upon mass-incarceration and institutionalized racism.[5] This reveals the *ḥudūd* reform project to be more concerned with the public visibility of violence, i.e., the regulation, rather than elimination of violence. I argue this diversion of the gaze is a hegemonic function of human rights discourse in defining the parameters of legitimate debate.

Decoloniality: A New Framework for *Ḥudūd* Analysis

This article seeks to begin a conversation on the inattentiveness to decolonial concerns because the discourse on *ḥudūd* remains entangled in colonial epistemologies that have shaped both the critiques and defenses of Islamic penal law. By foregrounding decolonial thought, this study seeks to interrogate the ways in which coloniality has influenced the framing of *ḥudūd*, challenging the hegemony of Eurocentric legal and moral paradigms and opening space for alternative epistemic possibilities rooted in indigenous and Islamic traditions and, therefore, an introduction to this framework is due.

Decoloniality is an epistemic-political project aimed at resisting, undermining and eventually replacing the contemporary Eurocentric world order.[6] Quijano describes the Eurocentric world order as: "The idea that the history of human civilization has been a trajectory that departed from nature and

4 Michel Foucault, Discipline and Punish: The Birth of the Prison 7 (1995).

5 Angela Davis, Are Prisons Obsolete? (2003); Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2012).

6 Syed Ali, *Further Towards an Islamic Decoloniality*, Academia.edu (Dec. 23–24, 2015), https://www.academia.edu/23133969/Further_Towards_an_Islamic_Decoloniality.

culminated in Europe, also that differences between Europe and non-Europe are due to biological differences between races, not to histories of power."[7]

While independence movements circa 1960 saw the end of the boots on the ground approach of the Western colonizers, their legacy would continue to be manifest in the use of economic, political and cultural pressures to exert control over former colonies.[8] This is encompassed in what has been termed the coloniality of power, the concept describing the structures and hierarchal orders of power imposed and that have lived beyond European colonialism.[9] According to Quijano, coloniality of power is premised on the "calculated" creation of race, in which inferiority and superiority was deemed, by the colonialists, to be biological and attributed by skin pigmentation and phenotypical differences. He adds that this not only reinforced European domination but held economic value, as a division of labor was formed around these hierarchies.[10] Secondly, coloniality of power was also manifest in the assigning of knowledge production exclusively to Europeans while repressing indigenous and traditional forms of knowledge production. This Eurocentric system of knowledge had the added effect of fossilizing race as the "naturalization of colonial relations between Europeans and non-Europeans."[11] Finally, the third form of the coloniality of power was in the creation of a hegemonic cultural system revolving around and enforcing Eurocentric economic and knowledge productions based on the fiction of race.[12]

Delinking from the colonial matrix of power mentioned above is precisely the purview of the decolonial project.[13] This

7 Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 Nepantla: Views from South 542 (2000).

8 Ramón Grosfoguel, *Decolonizing Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Coloniality*, 1 Transmodernity: J. Peripheral Cultural Production of the Luso-Hispanic World (2011).

9 Walter Mignolo, The Darker Side of Western Modernity: Global Futures, Decolonial Options 153 (2011); Quijano, *supra* note 7, at 540.

10 Quijano, *supra* note 7, at 168.

11 *Id.* at 534–35.

12 *Id.* at 540–50.

13 Mignolo, *supra* note 9, at 5.

requires attention to the twin decolonial concerns of external co-option and epistemic delinking. External co-option being the concern of appropriation by dominant ideologies and epistemic delinking being the decentering of Western knowledge and ways of thinking as superior or the standard. It is the delinking from liberalism and post-colonialism. While post-colonialism affirms pluralism within the academy, decoloniality goes further, insisting that thinking must come from the global South and that they have a right to overthrow the hegemonic order.[14] Decolonial scholars reject what they see as the tyrannical abstract universal, an all-encompassing concept.[15] Instead, decolonial scholarship proposes pluriversalism, a conception of the world in which there isn't "one sole epistemic tradition to draw from" and which has space for "multiple and diverse ethico-political projects."[16] Ramón Grosfoguel and Eric Mielants clarify that the decolonial project opposes third-world fundamentalism and the idea that Truth can only be derived from one epistemological tradition. Therefore, while decoloniality privileges the global South and by extension the Islamic epistemic tradition; this would be considered *a* viable epistemic tradition to draw from, not the *only* one to draw from. This pluriversal nature of decoloniality differentiates it from third-world fundamentalism which draws from one epistemic tradition, believing it to be the *only* viable one.[17] Additionally, decoloniality foregrounds the issue of race as essential to its project, conscience of both geo-politics and body-politics.[18] This is antithetical to liberalism, as pointed out by Alexander, which hides behind color neutral

14 Post-colonial pluralism maintains and privileges thinking from the global North. It merely gives space for the introduction of non-White epistemologies and academics, without a process of delinking or deconstructing hegemonic Eurocentric epistemology.

15 Ali, *supra* note 6.

16 Ramón Grosfoguel & Eric Mielants, *The Long-Durée Entanglement between Islamophobia and Racism in the Modern/Colonial Capitalist/Patriarchal World-System: An Introduction*, 5 Human Architecture: Journal of the Sociology of Self-Knowledge 28 (2006).

17 *Id.* at 28. By this same definition, they classify Eurocentrism as a type of fundamentalism.

18 Ali, *supra* note 6. Geo-politics accounts for the geographical location of the subject, whether from the global North or South, Westerner, non-Westerner and the power implications associated with that position. Similarly, body-politics identi-

language.[19] Finally, a point to note, decoloniality is not a rejection of the Western epistemic tradition, as it is often reductively understood. Armed with critical awareness of the coloniality of power and the potentiality of external co-option, the decolonial project instrumentalizes border thinking, an epistemic response wherein concepts such as citizenship, democracy, economics, human rights and the emancipatory rhetoric of modernity are subsumed, redefined beyond definitions imposed by Europeans, and informed by subaltern epistemologies.[20]

Rethinking the *Maqāṣid*: Reform and the Modern Impulse

Decolonial thought challenges the ways in which Islamic legal discourse has been shaped by coloniality. This is particularly relevant to contemporary discussions on *ḥudūd*, where reformist approaches often operate within frameworks that remain embedded in colonial epistemologies. As debates over *ḥudūd* unfold, reform efforts take shape in divergent ways, reflecting different assumptions about the role of Islamic law in modernity. Reformers who adopt a human rights framework tend to view *ḥudūd* punishments as inherently problematic, advocating for their complete abolition. They argue that such severe penalties are fundamentally inhumane and incompatible with contemporary human rights standards.[21] Others, including Amnesty International, extend this critique beyond the severity of punishments to question the legitimacy of criminalizing certain behaviors altogether. They contend that laws prohibiting same-sex relations, extramarital intimacy, and alcohol consumption unjustly penalize peaceful activities and rights that should never be criminalized.[22]

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fies the positionality of the speaker—their socio-economic background, gender, race, etc., in accounting for power.

19 Alexander, *supra* note 5, at 48–49.

20 Grosfoguel & Mielants, *supra* note 16, at 28.

21 World Organization Against Torture (OMCT), *OMCT's Position on Flogging, Stoning and Amputation*, OMCT (Aug. 20, 2002), https://www.omct.org/en/resources/statements/omcts-position-on-flogging-stoning-and-amputation.

22 Amnesty International, *Iran: Wave of floggings, amputations and other vicious punishments*, Amnesty Int'l (Jan. 18, 2017), https://www.amnesty.org/en/latest/press-release/2017/01/iran-wave-of-floggings-amputations-and-other-vicious-punishments/.

While some reform efforts stem from external discourses, others emerge from within Islamic legal traditions. In the context of Iranian *ḥudūd* reform, Bahman Khodadadi observes that certain Shīʿa jurists justify the suspension of *ḥudūd* in response to perceived reputational harm, framing it as a necessary measure to safeguard the theocratic state and, by extension, Islam itself.[23] These jurists argue that suspending such punishments alleviates external scrutiny and internal dissent, which might otherwise erode public support for the regime. Khodadadi further identifies a group he describes as Shīʿa apologists, who, despite dismissing Western critiques as politically motivated, nonetheless invoke the same rationale—protecting Islam's image—as grounds for suspending *ḥudūd*.[24]

Moving beyond state-centered reforms driven by reputational concerns, progressive Muslim scholars, mindful of Eurocentric hegemony, situate their reform efforts internally.[25] At the same time, their contemporary reform project is marked by the imperative and urgency to contextualize Islam. One of the most in-vogue avenues for accomplishing these goals in the legal domain has been *maqāṣid al-sharīʿa*, the locale of *ḥudūd* reform efforts this article examines.

As a precedent, reformers often reference the legislative actions of the second caliph, ʿUmar ibn al-Khaṭṭāb (d. 23/644). During a famine that plagued Medina amidst his reign, he suspended (*asqaṭa*) the *ḥadd* for theft. However, the Qurʾān maintains that, "As for male and female thieves, cut off their hands for what they have done—a deterrent from Allah. And Allah is Almighty and All-Wise."[26] ʿUmar argued that the *ḥadd* in this instance, despite the clear Qurʾānic injunction, would have been an unfair castigation of the underprivileged, whose basic instinct for survival during a famine, would have driven them to

23 Bahman Khodadadi, On Theocratic Criminal Law: The Rule of Religion and Punishment in Iran 123 (2024).

24 *Id.*

25 Tariq Ramadan, Radical Reform: Islamic Ethics and Liberation 81 (2008).

26 Qurʾān 5:38.

theft.[27] Progressive reformers read this incident as ʿUmar taking recourse to the overarching objectives (*maqāṣid*) of the law, in essence suggesting that there can be a dissonance between the letter of the law and the objective of the law in certain situations. In this particular case, while the amputation of the hands (the *ḥadd*) would have been a literal application of the law, it would not have served the ends of justice, which is purportedly the objective of the *ḥudūd*. This field of inquiring into the objectives of the law is known as *maqāṣid al-sharīʿa*.

The *maqāṣid* are the objectives, goals or intents underlying Islamic prescriptions and prohibitions.[28] Jasser Auda equates the *maqāṣid* with the question "why," i.e., the inquiry into the wisdom behind rulings.[29] Both the Qurʾān and the Sunna have been described as characteristically goal-oriented due to the extent that they are expressive of the rationale and benefits of their laws, both the ones pertaining to devotional matters (*ʿibādāt*) and civil matters (*muʿāmalāt*). Scholars have agreed that the underlying theme in all Islamic injunctions (*aḥkām*) is the realization of benefit (*maṣlaḥa*, pl. *maṣāliḥ*).[30] This principle is closely tied to *maqāṣid*, as a *maṣlaḥa* is any measure that upholds these objectives by either advancing their realization or preventing what threatens them.[31] Scholars such as Shihāb al-Dīn al-Qarāfī (d. 684/1285) and ibn ʿAbd al-Salām linked the two by conditioning the validity of *maqāṣid* on their fulfillment of a benefit (*maṣlaḥa*) or the avoidance of a harm (*mafsada*).[32] The belief that Islamic law is in and for the interest of humanity can therefore be said to lie at the crux of the *maqāṣid* theory.

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27 Muḥammad Bultājī, Manhaj ʿUmar ibn al-Khaṭṭāb fī al-tashrīʿ 190 (2002).

28 Ibrāhīm al-Shāṭibī, Taḥthīb Kitāb al-Muwāfaqāt 147 (Aḥmad al-Ṭayyār ed., 2017).

29 Jasser Auda, Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach 2 (2008).

30 Mohammad H. Kamali, Maqāṣid al-Sharīʿah Made Simple 2–3 (2008).

31 Abū Ḥāmid al-Ghazālī, 1 al-Muṣtaṣfā min ʿilm al-uṣūl 416 (Muḥammad al-Ashqar ed., 2012).

32 ʿIzz al-Dīn Ibn ʿAbd al-Salām, 2 al-Qawāʿid al-kubrā al-mawsūm bī-Qawāʿid al-aḥkām fī iṣlāḥ al-anām 314 (Nazīh Ḥammād & ʿUthmān Ḍumayriyya eds., 2000); Jasser Auda, Maqāṣid al-Sharīʿah: A Beginner's Guide 4 (2008).

Islamic legal theorists developed distinct models for integrating *maṣlaḥa* into legal reasoning, reflecting varying degrees of flexibility in adapting Islamic law. Abū Ḥāmid al-Ghazālī (d. 505/1111) and Fakhr al-Dīn al-Rāzī (d. 606/1209) confined *maṣlaḥa* within the framework of legal analogy (*qiyās*), permitting its use only when it aligned with the core objectives of Islamic law.[33] Al-Qarāfī expanded this approach by incorporating *maṣlaḥa* into legal maxims (*qawāʿid*), allowing it to influence broader jurisprudential principles beyond analogy, thereby enhancing legal adaptability. Najm al-Dīn al-Ṭūfī (d. 716/1316) took a more radical stance, asserting that *maṣlaḥa* should take precedence over scriptural rulings in all matters except devotional acts (*ʿibādāt*), positioning *maṣlaḥa* as the highest legal determinant. Abū Isḥāq al-Shāṭibī (d. 790/1388), while also emphasizing *maṣlaḥa*, framed it within a structured system where universal principles (drawn from Meccan chapters of the Qurʾān) could override particular scriptural injunctions (Medinan chapters and the Sunna) if they conflicted with the broader aims of Islamic law.[34] Felicitas Opwis argues that these four models illustrate a continuing debate, wherein the model employed determines the extent to which *maṣlaḥa* can be utilized to broaden and adjust the law in response to evolving circumstances.[35]

The extent to which *maṣlaḥa* can shape legal rulings also depends on whether a given issue falls within the domain of civil matters or devotional ones. Scholars echo Al-Shāṭibī's assertion that, "literal compliance is the default methodology in the areas of *ʿibādāt*, while the consideration of purposes is the default methodology in the area of *muʿāmalāt.*"[36] As a result of this

33 Felicitas Opwis, *Islamic Law and Legal Change: The Concept of Maṣlaḥa in Classical and Contemporary Islamic Legal Theory*, *in* Shari'a: Islamic Law in the Contemporary Context 67 (Abbas Amanat & Frank Griffel eds., 2007).

34 *Id.* at 68–70.

35 Felicitas Opwis, *Maṣlaḥa in Contemporary Islamic Legal Theory*, 12 Islamic L. & Soc'y 197 (2005).

36 Al-Shāṭibī, *supra* note 28, at 6. The distinction between ritual and civil acts is reflected in the Caliph ʿUmar's explanation of *ramal* during pilgrimage: though its original purpose (circumambulating the Kaaba at a brisk pace to display strength to a pagan Mecca) was no longer relevant, ʿUmar maintained its practice, thus establishing the modus operandi regarding *ʿibādāt*. *See* Muḥammad al-Bukhārī, Ṣaḥīḥ al-Bukhārī 1605 (2002).

distinction, scholars only discuss the purported wisdom (*ḥikma*) behind rituals and are careful not speak of their *maqāṣid*. However, there is a fine line between what constitutes a devotional or ritual act and what constitutes a civil or social act, a grey area that has been cause for debate.[37]

Another point of juristic divergence centers on the identification of the *maqāṣid*, raising concerns of potential arbitrariness. Mohammad Kamali explains that scholars were well aware that deducing the *maqāṣid* would involve speculative reasoning and were cognizant of the "elements of projection and prognostication that such an exercise was likely to involve."[38] It is for this reason that scholars such al-Ghazālī refrained from granting the *maqāṣid* independent authority, i.e., the capacity to derive rulings directly from them.[39]

Al-Ghazālī demarcates five necessities or overarching objectives of the *sharīʿa* as the preservation of one's religion (*dīn*), soul (*nafs*), intellect (*ʿaql*), progeny (*nasl*), and property (*amwāl*).[40] Jurists such as al-Qarāfī and al-Ṭūfī added preservation of honor (*ʿirḍ*) as the sixth objective.[41] These five or six have come to be generally agreed upon.[42] Kamali explains that these were deduced from the *ḥudūd*, noting that, "the value

37 Adīb Fāyiz al-Ḍamūr, *Taqsīm Mawḍūʿāt al-Fiqh wa-Tartībihā fī Kutub al-Madhāhib al-Fiqhiyya al-Arbaʿa [The Division and Arrangement of Jurisprudential Subjects in the Books of the Four Schools of Law]*, 5 Majallat al-ʿUlūm al-Sharʿiyya wa-l-Lugha al-ʿArabiyya bi-Jāmiʿat al-Amīr Saṭṭām ibn ʿAbd al-ʿAzīz 183–84 (2018).

38 Kamali, *supra* note 30, at 10.

39 Al-Ghazālī, *supra* note 31, at 1:414–32. Al-Ghazālī does not recognize *maṣlaḥa* as a definitive source of law. He rejects legislation based solely on *maṣlaḥa*, as it constitutes an unlawful usurpation of divine authority and amounts to legislating independently of God (*man istaṣlaḥa fa-qad sharraʿ*). For legislation in the public interest (*maṣlaḥa*) to be valid, those interests must be subordinated to the *maqāṣid*, which al-Ghazālī distinguishes into tiers. If a ruling aligns with the *ḍarūrāt* (necessary tier), it is accepted even without explicit textual backing, since this tier is reflective of the Qurʾān and Sunna (definitive sources). However, legislating based on the lower two tiers, the *ḥājāt* (needs) and *taḥsīnāt* (enhancements), is unlawful unless corroborated by an established primary source, in which case the ruling is rooted in *qiyās* (analogical reasoning), rather than the *maqāṣid* as an independent source.

40 *Id.* at 1:417.

41 Tariq Ramadan, What I Believe 63 (2009).

42 Ahmad Al-Raysuni, Imam al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law 3 (2005).

that each of these penalties sought to vindicate and defend was consequently identified as an essential value."[43] While a full exploration of this issue lies beyond the decolonial lens of this article, it raises a critical question: How rational is it to employ a framework (*maqāṣid*) derived inversely from the *ḥudūd* to justify a moratorium on the *ḥudūd*? If the source (*ḥudūd*) is negated, does this not also undermine the legitimacy of the tool (*maqāṣid*) derived from it?

Whereas conventionally the *maqāṣid* were a fixed amount, Taqī al-Dīn ibn Taymiyya (d. 728/1328) set a precedent by splitting from this convention, and expanding its scope considerably by suggesting an open-ended list.[44] This is also the approach recognized by modern commentators who have surveyed the original sources coming up with new *maqāṣid*. Rashid Rida (d. 1935) suggested the addition of reason, critical thinking, knowledge, wisdom, rational inquiry, conscientiousness, independence, empathy, social reform, political reform and women's rights.[45] Muḥammad ibn ʿĀshūr (d. 1973) advocated for unity, equality, freedom, moderation, ensuring rights, and tolerance to be added.[46] Kamali proposes the addition of economic development, strengthening of research and development and, one of the more recent propositions, the protection of biodiversity (*al-bīʾa*).[47] Auda has called for the addition of liberty, justice and the protection of human rights as part of these necessities.[48]

Accordingly, the concern about projection that al-Ghazālī was wary about, still remains a pertinent critique. To take one example, a review of Auda's work, a contemporary *maqāṣid* scholar, reveals a tendency in his analysis to anachronistically project Western constructs onto pre-modern Islamic frameworks. For instance, he affirms al-Shāṭibī's 14th century tri-leveled hierarchy of *maqāṣid* with 20th century American psychologist Abraham Maslow's (d. 1970) hierarchy of needs.

43 Kamali, *supra* note 30, at 11.

44 *Id.* at 12.

45 Rashid Rida, al-Waḥy al-Muḥammadī 191–361 (1985).

46 Muḥammad ibn ʿĀshūr, Uṣūl al-niẓām al-ijtimāʿī fī al-Islām 103 (1985).

47 Kamali, *supra* note 30, at 12.

48 Auda, *supra* note 29, at 248.

Similarly, Auda describes *maqāṣid* as representing "the link between Islamic law and today's notions of human rights, development, and civility."[49] Unpacked decolonially, this framing overlooks the power relationship between "today's notions" and the hegemonic American dominated culture which sets those norms.[50] Auda's adoption of these terms and concepts appears to presuppose the neutrality of universalism, without critically considering its power implications. Ultimately, his reference to *maqāṣid* as a "link" risks privileging the Western epistemic tradition as the gold standard, while reducing the Islamic tradition to a mere tool for validating what Western discourse has normalized.[51] This observation is not intended as a dismissal of Auda's work. Rather, it as an invitation to begin a conversation on the implications of epistemic dominance in shaping subjectivity and consequently analysis, as it pertains to contemporary *maqāṣid* based reform efforts.

The Case for a Moratorium: Controversy and Debate

The article now turns to a case study of one of the most prominent attempts at *ḥudūd* reform in recent history, an argument constructed on the concept of *maqaṣid*. In 2003, the Swiss academic Tariq Ramadan, who was then one of the world's most prominent Islamic scholars, featured in a series of debates with soon to be French president Nicolas Sarkozy.[52] Sarkozy demanded that Ramadan renounce *rajm* (stoning adulterers), a punishment prescribed under the *ḥudūd*.[53] Ramadan maintained that a moratorium on corporal punishment would be more conducive to reform because it would open the issue to dialogue amongst Islamic scholars in Muslim majority countries. Merely condemning issues derived from sacred sources or imposing

49 *Id.* at 3–6.

50 Quijano, *supra* note 7, at 178.

51 Walter Mignolo, The Darker Side of Western Modernity: Global Futures, Decolonial Options, 450 (2011).

52 While Ramadan has been a source of public and legal controversy in recent years, this article limits its scope to his proposal as an attempt at internal reform, which sparked wide scholarly debate and generated relevant discourse.

53 Ramadan, *supra* note 25, at 354.

them upon Muslims, Ramadan argued, would be fruitless and result in opposition. Ramadan espoused that change must come from within Muslim ranks, and as a result of engagement and contextualization by Muslim scholars themselves.

Two years after his debate with Sarkozy, in April of 2005 Ramadan published an official call for a moratorium (henceforth *The Call*) on the *ḥudūd* in Muslim majority countries.[54] *The Call* evoked widespread comment and controversy throughout the Muslim world. For Ramadan, the question of implementing the penalties (*ḥudūd*) found in the Islamic penal code is essentially a question of how to be faithful to scripture in the contemporary era.[55] Context (*al-wāqiʿ*), which holds an important role in Ramadan's methodology, was, he asserts, central to the development of *The Call*. Ramadan argued that, "[w]hile serious debate is virtually non-existent, while positions remain vague and even nebulous, and consensus among Muslims is lacking—women and men are being subjected to the application of these penalties."[56] He also highlights the disproportionate targeting of women and the poor whom he refers to as the "doubly victimized."[57] Additionally, he points to the practically non-existent defense counsel for those accused, which he claims is demonstrative of how Muslim-majority countries, in general, do not guarantee just treatment before the law.[58]

Conversely, Ramadan also problematizes the international community which is quick to denounce poor African and Asian nations who implement the *ḥudūd*, but is silent when it comes to "petro-monarchies" which are a source of geostrategic and economic interests.[59] In locating *The Call* within a traditional Islamic legal framework Ramadan privileges the *maqāṣid* methodology which he summarizes as "how, at a given time and/or in a given context, one can remain faithful to the objectives of scriptural

54 Tariq Ramadan, *An International Call for Moratorium on Corporal Punishment, Stoning and the Death Penalty in the Islamic World*, TariqRamadan.com (Apr. 5, 2005), https://tariqramadan.com/an-international-call-for-moratorium-on-corporal-punishment-stoning-and-the-death-penalty-in-the-islamic-world/.

55 Ramadan, *supra* note 41, at 274–75.

56 Ramadan, *supra* note 54.

57 *Id.*

58 *Id.*

59 *Id.*

sources when implementing legal rulings (*fiqh*) in the field of social affairs and interpersonal relations (*muʿāmalāt*)."[60] Specifically, he appeals to the *maqāṣid* of "protection of integrity of the person (*ḥifḍ al-nafs*) and the promotion of justice (*al-ʿadl*)."[61]

Moreover, Ramadan argues that Muslim majority countries are in a state of "legal chaos."[62] He observes that opinions of Muslim scholars and jurists are far from unanimous on the applicability of these penalties in current society. Ramadan mentions that though many scholars from Morocco and Mauritania agree with his stance behind closed doors, they feel unable to maintain such a stance publicly.[63] He decries this lack of courage on the part of scholars as appeasing to populism.[64] The *ḥudūd* retain popular support, according to Ramadan, because in a closed and repressive political system, their harshness represents a fidelity to the Qurʾān in the public psyche.[65] He also attributes their popularity to a rationale in which Western disapproval of the *ḥudūd* is proof of their authenticity.[66] Ramadan criticizes the response of the scholars (*ʿulamāʾ*):

> Faced with this passion, many *ʿulamāʾ* remain prudent for the fear of losing their credibility with the masses. One can observe a psychological pressure exercised by this popular sentiment towards the judicial process of the *ʿulamāʾ*, which normally should be independent so as to educate the population and propose alternatives. Today, an inverse phenomenon is revealing itself. The majority of the *ʿulamāʾ* are afraid to confront these popular and simplistic claims which lack knowledge, are passionate and binary, for fear of losing their status and being defined as having compromised too much, not being strict enough, too westernized or not Islamic enough.[67]

60 Ramadan, *supra* note 41, at 63.
61 Ramadan, *supra* note 54.
62 *Id.*
63 *Id.*
64 *See id.*
65 *See id.*
66 *See id.*
67 *Id.*

Given the context described above, Ramadan asserts that silence on the part of the scholars makes them accomplices to those killed via the *hudūd* laws.[68] He does not spare Western Muslims either, criticizing their silence because, as a minority, they consider themselves exempt from the *ḥudūd* and conversations about it.[69] *The Call* is therefore an effort to bring the question of *ḥudūd* to the fore.

Ramadan's proposal was twofold: 1) an immediate moratorium, during which religious leadership would work to reach a consensus on a course of action, and 2) deliberation during that moratorium between three different positions regarding the long-term status of *ḥudūd*. These three positions, which constitute the focus of the second component of Ramadan's proposal, are as follows. The first position advocates an "immediate and strict" application of the *ḥudūd*.[70] The second contends that *ḥudūd* application should be conditional on the "state of the society."[71] The third position concedes that while the *ḥudūd* may have been appropriate during the Prophet Muḥammad's era, they are now obsolete in the contemporary era.[72] Aligning with the second position, Ramadan argues for an indefinite moratorium, emphasizing that efforts should instead be directed toward achieving social justice and creating a society that meets the "ideal" standard necessary for the implementation of *ḥudūd*. According to Ramadan, if such a society were to materialize, the reinstatement of *ḥudūd* would be justifiable.[73] Based on an initial review of scholarly opinion, Ramadan expressed optimism that serious deliberation during the temporary moratorium would ultimately result in its indefinite continuation.[74]

The Call was met with waves of criticism from intellectuals and institutions alike, and while disdain was expected from "puritanical Salafi" orientations, it was the dismissiveness from

68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 Ramadan, *supra* note 41, at 276.

well-known moderates such as Taha Jabir al-ʿAlwani[75] (d. 2016) which was surprising.[76] Muzammil H. Siddiqi[77] responded, "When this call comes from a respectable scholar like Dr. Tariq Ramadan, it may encourage others to disrespect the laws of Allah."[78] Tariq al-Bishri[79] described *The Call* as "juristically baseless."[80] Mustafa al-Shukʿa[81] and his committee rejoined that whoever requests that *ḥudūd* be suspended or canceled "despite indisputable evidence" has forsaken an element forming the basis of the religion. Khalid Abou El Fadl found that the majority of negative responses to *The Call* hinged on one of two concerns. The first, championed by the likes of Gomaa, claimed that this was not the opportune time for such a moratorium because it is hardly applied and would be a cause of confusion and divisiveness. The second concern was the unlawfulness of calling for a suspension of the *ḥudūd*, a move which was seen to be an appeasement to the West.[82]

Gomaa penned a response to Ramadan, defining the *ḥudūd* as "[a code which] by its very nature necessitates its application in a restrictive manner," therefore a moratorium is not needed.[83] In a reply back to Gomaa, Ramadan broadens the scope of his argument by asserting that, although only 2 out of 56 predominantly Muslim countries retain the *ḥudūd*, 50 of these nations apply the death penalty:

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75 Al-ʿAlwani was the founder of the Fiqh Council of North America. The idea of *fiqh al-aqalliyyāt* (minority jurisprudence) is widely attributed to him. *See* International Institute of Islamic Thought, *Dr. Taha Jabir Alalwani*, https://iiit.org/en/dr-taha-jabir-alalwani/ (last accessed June 1, 2025).

76 Khaled Abou El Fadl, Reasoning with God: Reclaiming Shari'ah in the Modern Age 292 (2014).

77 Siddiqi is chairman of the Fiqh Council of North America and previous head of the Islamic Society of North America (ISNA).

78 Eric B. Brown, *After the Ramadan Affair: New Trends in Islamism in the West*, Hudson Institute (May 2, 2025), https://www.hudson.org/human-rights/after-the-ramadan-affair-new-trends-in-islamism-in-the-west.

79 Al-Bishri is a judge, past leader of Egypt's State Legislative Body and considered one of the country's top legal minds.

80 Abou El Fadl, *supra* note 76, at 291.

81 Shukʿa is the head of al-Azhar's Legal Research Committee.

82 Abou El Fadl, *supra* note 76, at 291.

83 Tariq Ramadan, *A Response to Shaykh Dr. Ali Jum'a, Mufti of Egypt*, TariqRamadan.com (May 2005), https://tariqramadan.com/arabic/2005/05/10/a-response-to-shaykh-dr-ali-juma-mufti-of-egypt/.

> If the absence of conditions for the application of a penalty [*ḥadd*] is to be considered "a transgression of the *sharīʿa*," it must be accepted that this same principle applies to the death penalty in Muslim countries, whether or not such penalties are instituted, directly or indirectly, in the name of Islam.[84]

In response to allegations that he was advocating a Western Islam or that this cannot be considered an internal change if an external agent is advocating it, Ramadan argued that it was the responsibility of Muslims living in states protecting freedom of expression to speak up and force their governments into taking a stance against the petro-monarchies. He also suggested that a similar stance must be taken by Muslim Americans in relation to the death penalty as it is affecting Black Americans disproportionately in the United States:

> In the United States, where an African-American is six or seven times more 'likely' to be executed than a White, opposition to the death penalty appears to me to be the only position in conformity with the message of Islam.[85]

Ramadan emphasized that he is not questioning the status of *ḥudūd* as an essential component of the faith. Instead, he positions his argument within traditional Islamic legal frameworks, challenging what he acknowledges as a *qatʿī* (definitive) source through the lens of the *maqāṣid*. He draws on the precedent of ʿUmar, who sets aside a direct Qurʾānic injunction to uphold the broader objectives of the *sharīʿa*. In this way, Ramadan views *The Call* as remaining loyal to the text.[86]

Abou El Fadl concludes that there is no substantive disagreement as all parties concur on both the legitimacy of *ḥudūd* and their prerequisite conditions.[87] Moreover, nearly all who condemned Ramadan acknowledged that the *ḥudūd* have remained

84 *Id.*
85 *Id.*
86 Ramadan, *supra* note 54.
87 Abou El Fadl, *supra* note 76, at 293.

largely unenforced in the majority of Muslim countries due to these conditions being "near utopian" and practically impossible to implement. Abou El Fadl characterizes these responses as representative of "schizophrenic attitudes."[88] This prompts the question: why, then, the significant controversy?

While Ramadan's observation about the role of scholarly appeasement to popular sentiment carries some merit, and Abou El Fadl's perplexity regarding what he accurately identifies as substantive agreement is understandable, I contend that their analyses overlook a critical decolonial dimension. Incorporating this perspective, I argue, provides a more comprehensive explanation for the resistance to *The Call*. To introduce this dimension, it is essential to first situate the *ḥudūd* within the Islamic penal code, explore their function in subject-formation, and examine their historical application.

The Role of *Ḥudūd*: Historical Application and Global Parallels

The *ḥudūd* are only one of three categories of punishment that fall under the umbrella of the Islamic penal code (*fiqh al-ʿuqūbāt*).[89] The other two are *qiṣāṣ*, crimes mentioned in the Qurʾān and Sunna which are punishable by equal retaliation, and *taʿzīr*, which pertains to the reprimanding of sins for which no fixed penalty (*ḥudūd*, *qiṣāṣ*, *or kaffāra*) has been prescribed,[90] thus leaving the punishment to the discretion of the judge.[91] This dis-

88 *Id.* at 292.

89 The crimes classified as *ḥudūd* offenses are listed at six by most Islamic legal schools: theft (*sariqa*), banditry (*qaṭʿ al-ṭarīq/ḥirāba*), illicit sex (*zinā*), false accusation of fornication (*qadhf*), consumption of alcohol (*shurb al-khamr*) and apostasy (*ridda*). Apostasy, though, is not considered a *ḥadd* offense in Ḥanafī and Shīʿa jurisprudence. *See* Rudolph Peters, Crime and Punishment in Islamic Law 65 (2005). Consumption of alcohol is similarly debated. *See* Aḥmad Ibn Ḥajar al-ʿAsqalānī, Fatḥ al-Bārī sharḥ Ṣaḥīḥ al-Bukhārī 88 (2000) (*Kitāb al-Ḥudūd*, *bāb* 4).

90 A *kaffāra* is a compensation made as an expiation for a sin, usually by feeding meals to the poor or fasting.

91 Peters, *supra* note 89, at 7; ʿAlī al-Māwardī, al-Aḥkām al-ṣulṭāniyya 344 (2006). Technically, acts deemed in violation of public order that have no basis in *sharīʿa* are known as *siyāsa*, but are usually grouped with *taʿzīr* when discussed. *See* Peters, *supra* note 89, at 68.

tinction is significant: whereas the *ḥudūd* are divinely prescribed in relation to specific crimes and punishments, *taʿzīr* crimes and penalties are primarily politically mandated.

One of the defining factors of *ḥudūd* is that they are rights pertaining to God (*ḥuqūq Allāh*) and therefore their prosecution contrasts greatly with rights pertaining to humans. The Prophet Muḥammad is attributed to have said:

> Avoid these filthy acts which Allah has forbidden. Whoever falls into them should conceal themselves with Allah's veil, and should turn to Allah in repentance. For if anyone uncovers their hidden sins to us, we shall inflict upon them the punishment prescribed by Allah.[92]

An ethos of prosecution has been derived from this such that Islamic law prohibits surveillance and investigation aimed at scrutinizing individuals' private lives.[93] In fact, eyewitnesses are not required to come forward. When they do, they have to be very specific in their wording by mentioning "*zinā*" and "*sariqa*" and not any other words that imply sex or taking away of an item.[94] Other strict requirements mandate that only in-court confessions are accepted, where the judge (*qāḍī*) must ascertain that the confessor is of sound mind and under no coercion. Additionally, circumstantial evidence is not admitted in trial (Ḥanafī jurists exclude pregnancy as proof in *zinā* cases). In one illustrative incident, al-Nuʿmān Abū Ḥanīfa (d. 699/767), eponym of the Ḥanafī school of jurisprudence, dismissed a crowd seeking to punish a man for wine-drinking by wryly observing that if mere possession of incriminating objects sufficed as proof, the man should equally be stoned for *zinā*, as he also possessed the "instrument" of fornication. The crowd, grasping the jurist's *reductio ad absurdum*, dispersed without executing the *ḥadd*.[95] Such traditions underscore that the *ḥudūd* were nev-

92 Aḥmad Ibn Ḥajar al-ʿAsqalānī, Bulūgh al-marām min adillat al-aḥkām 461 (Māhir al-Faḥl ed., 2014) (*Kitāb al-Ḥudūd*, *bāb ḥadd al-zinā*) (author's translation).

93 Ramadan, *supra* note 54.

94 Peters, *supra* note 89, at 14.

95 *Id.* at 8.

er intended to be maximally executed; rather, they set a moral horizon which the law deliberately makes difficult to reach in practice.

To exemplify the stringent burden of proof requirements, I will briefly survey the *ḥadd* crime of burglary (*sariqa*) which jurists distinguish from other forms of theft.[96] To have the term *sariqa* applied, the act must have been surreptitious, i.e., stealing something in broad daylight or in plain sight would not qualify.[97] The *ḥadd* cannot be applied if the stolen items were not secured or guarded adequately (*ḥirz*). Furthermore, the item stolen must also meet a minimum value (*niṣāb*) to qualify. In addition, the item cannot be partially owned or have been entrusted to the perpetrator. For example, a person stealing from the state treasury (*bayt al-māl*) is stealing from money that technically belongs to everyone in the state, including one's self, and therefore is not punishable under *sariqa*. This rule is so lenient that stealing from an immediate relative such as one's kids, spouse or even debtor cannot be prosecuted under this *ḥadd*.[98] The same applies for stealing items forbidden to Muslims to own such as pigs and wine or stealing perishable food items. Finally, the victim can demand either the return of the items or amputation, but not both.[99] Of course, just because a thief cannot be prosecuted for the *ḥadd* crime of *sariqa*, they can still be prosecuted under *taʿzīr*, which requires a lower burden of proof.[100]

96 Islamic legal discourse distinguishes theft by method and gravity. *Ikhtilās* is stealthy and opportunistic theft (pickpocketing); *nahb* is open grabbing of unsecured property (snatch theft); *khiyāna* is deceitful taking (fraud or embezzlement); *ghasb* is taking by coercion (extortion). *See* al-Māwardī, *supra* note 2, at 13:280.

97 Peters, *supra* note 89, at 56.

98 Jurists agree that if one spouse steals from property not guarded from the other spouse, no *ḥadd* applies. However, they differ when the property is safeguarded (*muḥraz*). The Ḥanafīs and the authoritative (*muʿtamad*) view among Ḥanbalīs hold that the *ḥadd* does not apply, citing the presence of doubt (*shubha*) due to shared access, inheritance rights, and customary use. Mālik, by contrast, holds that the *ḥadd* is enforceable if the property is fully guarded and owned. Al-Shāfiʿī reports a third opinion: that the husband is liable to *ḥadd* for stealing from his wife, as he has no legal claim to her property, but the wife is exempt due to her right to maintenance. *See* ʿAbd Allāh Ibn Qudāma, 14 al-Mughnī 408–9 (Yūsuf al-Sharʿabī ed., 2020).

99 Peters, *supra* note 89, at 56–57.

100 *Id.* at 16.

Counterintuitively, instead of asking questions that may demonstrate guilt, the judge in an Islamic court has the active role of warding off the *ḥudūd* as much as possible, including counselling defendants that their confession can be retracted up until the moment of execution.[101] A key method for achieving this is through *shubha* (doubt), which Intisar Rabb defines as a legal term covering a range of potentially mitigating circumstances.[102] This is derived from the Prophetic maxim, "Ward of the fixed punishments (*ḥudūd*) in cases of doubt (*shubha*).[103] Ignorance of essential laws (stealing, drinking, fornication, etc.) are excused if the perpetrator converted recently or just arrived from distant lands. However, in cases involving obscure (very generously defined) laws, ignorance is recognized as a valid defense even for those who are Muslim by birth. Another form of defense is duress (*ikrāh*), in which an offender is not liable if they acted under threat of death, severe injury, or even threats against their children or parents. Included under the category of duress are illegal commands stemming from any state official, such as a military general, even if without threats.[104] A defense not traditionally addressed in Western theories of criminal law, is repentance (*tawba*). Because, in the case of the *ḥudūd*, the offense infringes upon the rights of God, not another individual, repentance is accepted as evidence of the perpetrator's reformation, and absolves them of punishment entirely.[105]

This examination of the stringent requirements of the *ḥudūd*, their near utopian burden of proof, and the mandate that these punishments are carried out publicly, underscores the primary role of the *ḥudūd* as a deterrent (*zajr*).[106] Qurʾān 5:38 reemphasizes this, describing the *ḥudūd* as an exemplary punishment (*nakāl*). Gomaa further elucidates this point:

101 *Id.* at 14.

102 Intisar A. Rabb, Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law 4 (2015).

103 Ibn Ḥajar, *supra* note 92 (*Kitāb al-Ḥudūd*, *bāb ḥadd al-zinā*) (author's translation).

104 Peters, *supra* note 89, at 22–23.

105 *Id.* at 27.

106 Abou El Fadl, *supra* note 76, at 292; Peters, *supra* note 89, at 30.

> In this regard, the *ḥadd* stands to buttress social control, itself a product of the surrounding culture, to reinforce the gravity of such sins, relegating to the margins [of society] him or her who commits them in public or boasts of having committed them.[107]

Ramadan affirms this objective of *ḥudūd* "to stir the conscience of the believer to the gravity of an action warranting such a punishment."[108] Consequently, the *ḥudūd* can be understood as a mechanism of subject-formation, aiming to establish moral normativity by using the rhetorical-legal device of equating the severity of the punishment with the seriousness of the moral transgression. If, however, their unenforceability is an intentional aspect of their application, and their *telos* is subject formation, then suspending them substantially undermines this moral function. While the *ḥudūd*'s normative power is not entirely erased by their suspension or abolishment—as Muslims still encounter these penalties in scripture—their public utility is diminished. It is the real threat of enforcement for public crimes that actualizes their social and moral significance. Without this, *ḥudūd* lose their deterrent force in shaping public conduct and fail to maintain the distinction between tolerable private lapse and dangerous public transgression.

I turn now to an examination of the historical and contemporary application of the *ḥudūd* to assess whether their theoretical unenforceability aligns with real-life practices. In the entire history of the Ottoman Empire (c. 1299–1923), there is only one record of stoning.[109] Similarly, no instances of stoning are documented during Muslim rule of Syria, and Gomaa notes that none of the *ḥudūd* have been applied in Egypt for over 1000 years.[110] Since *The Call* references petro-monarchies, a not-so-subtle nod to Saudi Arabia, I give particular attention to the application of *ḥudūd* in that context.

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107 Ramadan, *supra* note 83.

108 Ramadan, *supra* note 54.

109 Sadakat Kadri, Heaven on Earth: A Journey through Shariʿa Law from the Deserts of Ancient Arabia to the Streets of the Modern Muslim World 217 (2012).

110 Ramadan, *supra* note 83.

Statistics released by the Saudi Ministry of Justice show that between 1982 and 1983, 4,925 people were tried for theft, but only 2 cases met the requirements for the *ḥadd* punishment.[111] In the same period, of the 659 individuals tried for *zinā*, none received the *ḥadd* punishment.[112] Frank Vogel, who had special access to Saudi court records, documented that over an eleven-year span, between 1981 and 1992, the *ḥadd* punishment was applied 49 times, only 4 cases of which (for *zinā*) resulted in executions.[113] Vogel notes that, "only an extremely small proportion of all criminal cases meet the onerous requirements for *ḥadd* conviction; most are dealt with under the category of *taʿzīr*," an observation that has remained consistent over the years.[114]

More recently, in 2023, out of 172 total executions, *taʿzīr* accounted for 54 (31%), *qiṣāṣ* for 66 (38%) and *ḥudūd* for 50 (29%) of them.[115] In 2024, the total executions rose to 345, with *taʿzīr* accounting for 180 (52%), *qiṣāṣ* for 128 (37%) and *ḥudūd* for only 37 (11%).[116] While *qiṣāṣ* constitutes a sizable portion of the executions, it differs from *ḥudūd* as it is not a crime prosecuted by the state, but a civil claim wherein claimants may forgo retaliation for monetary compensation (*diya*) or even choose to forgive the offender. The most striking observation is that the overwhelming majority of executions, both historically and currently, fall under *taʿzīr*. These are not divinely ordained but rather politically regulated, primarily involving terrorism and drug-related charges.[117] This data underscores that *ḥudūd* punishments have always been statistically rare.

Given the examination of *ḥudūd* and *taʿzīr* implementation in Saudi Arabia, it is also instructive to consider Iran, where notably high rates of corporal and capital punishment provide further insight into broader patterns of punitive enforcement in

111 Frank Vogel, Islamic Law and Legal System: Studies of Saudi Arabia 246–47 (2000).

112 *Id.* at 246–47.

113 *Id.* at 246–47.

114 *Id.* at 246–47.

115 European Saudi Organization for Human Rights, *Blood Era: A Historic Record of Executions in Saudi Arabia 2024*, ESOHR (Jan. 5, 2025), https://www.esohr.org/en/عهد-الدم-رقم-تاريخي-للإعدام-في-السعودي/.

116 *Id.*

117 *Id.*

contemporary Muslim states. In 2023, during which 834 individuals were executed, *taʿzīr* punishments accounted for 56% of cases, primarily for drug-related offenses, while 34% involved *qiṣāṣ* for homicide.[118] The remaining 10% represent the application of *ḥudūd*, with only one execution recorded for *zinā*.[119] The majority of the remaining cases involved 39 executions for security and dissent-related offenses (*muḥāraba* or *ifsād fī al-arḍ*), while 20 were for rape and two for blasphemy—likely classified as *ḥadd* offenses, though I was unable to verify.[120] A critical point for this article's argument is that *ḥudūd* punishments are explicitly required to be carried out publicly as a means of deterrence (*nakāl*).[121] However, the *taʿzīr* executions in Iran were conducted under the jurisdiction of the Revolutionary Courts, which handle state security offenses and were purportedly created to guard against potential counter revolution in the post-shah era. Notably, these trials are held in secrecy, and executions are typically not publicized. This lack of transparency indicates that such executions fail to meet the stringent evidentiary and procedural requirements of *ḥudūd* punishments, and are not tried as such. Furthermore, there is a correlation between the number of executions and political events, with executions increasing following protests, while decreasing prior to elections.[122] Commenting on these figures, Mahmood Amiry-Moghaddam, director of Iran Human Rights, has suggested that the high number of executions is politically motivated.[123] These trends parallel those observed in Saudi Arabia, illustrating that the vast majority of state-sanctioned bloodshed is carried out under *taʿzīr* rather than *ḥudūd*. A decolonial critique urges us to ask why *ḥudūd* punishments draw so much attention, in lieu of the *taʿzīr* punishments that modern states regularly deploy.

118 Iran Human Rights, *Annual Report on the Death Penalty in Iran 2023*, Ensemble contre la peine de mort, https://www.ecpm.org/app/uploads/2024/03/Full-Report-The-death-penalty-in-Iran-2023.pdf (last visited June 12, 2025).

119 *See id.* at 11.

120 *See id.*

121 Qurʾān 5:38; 24:2.

122 Iran Human Rights, *supra* note 118, at 17.

123 *Id.* at 12.

While much of the debate on *ḥudūd* focuses on capital punishment, corporal punishment, particularly flogging, is also a significant concern. Obtaining precise statistics on flogging in Saudi Arabia is challenging; however, between 2013 and 2014, 16 cases of flogging were recorded. Of these, 15 were administered as *taʿzīr* punishments, while only one was classified as a *ḥadd* punishment (for a drug-related offense).[124] This distribution suggests that flogging has been primarily employed under *taʿzīr*, frequently targeting activists, bloggers, and outspoken scholars under broadly defined offenses such as "disturb[ing] public order" and "destabiliz[ing] . . . the state."[125] However, as of 2020, Saudi Arabia abolished flogging as a punishment for all *taʿzīr* crimes while retaining it for *ḥadd* offenses, including fornication, slander, and alcohol consumption.[126] This development aligns with the argument advanced in this article: Islamic law, engaged on its own terms, proves more amenable to reform, as evidenced by the relatively uncontroversial elimination of flogging within the *taʿzīr* framework, even among more conservative circles. Of course, this shift does not signify unqualified progress, as the interpretation of *ḥudūd* has been expanded to encompass floggable drug-related offenses.[127]

Moreover, the distinction between a focus on visible manifestations of violence and a commitment to addressing its systemic causes becomes evident in the context of *taʿzīr* reform. The overwhelming majority of floggings in Saudi Arabia were *taʿzīr*-based, and with the 2020 reform, these punishments were effectively abolished. High-profile cases, such as that of Raif Badawi, illustrate this shift—his sentence of 1,000 lashes was effectively nullified, sparing him from the remaining 950 lashes.[128] Although flogging sentences in Saudi Arabia are not

124 Hind Sebar & Shahrul Mizan Ismail, *The Use of Flogging as a Punishment in Saudi Arabia from the Perspective of International Human Rights Law* 29 IIUM L.J. 98–99 (2021).

125 Amnesty International, Manifesto for Repression 16 (2024), *available at* https://www.amnesty.org/en/wp-content/uploads/2024/03/MDE2377832024ENGLISH.pdf.

126 *Id.* at 29.

127 *Id.*

128 Reporters Without Borders, *Raif Badawi Spared 950 Lashes after Saudi Decision to Abolish Flogging*, RSF (Apr. 29, 2020), https://rsf.org/en/raif-bada-

exceedingly common, the scale of *taʿzīr* lashings has, at times, reached extreme levels, ranging from 10,000 to 40,000 lashes in certain cases. This disparity has sparked internal debate, particularly regarding why *taʿzīr* punishments have exceeded the maximum of 100 lashes prescribed for *ḥadd* offenses.[129] In sum, the reform of *taʿzīr* in Saudi Arabia has effectively removed flogging as a punishment, leaving it only within the four remaining *ḥadd* offenses, where it remains strictly capped at 100 lashes due to the rigid evidentiary and procedural constraints governing *ḥudūd*.

Similarly, in Iran, available statistics indicate that of the 149 offenses punishable by flogging, approximately 90–95% fall under *taʿzīr*, whereas only 5–10% are classified as *ḥudūd*.[130] The implementation of flogging is estimated to affect between 100 and 200 individuals annually.[131] Flogging is primarily imposed for charges such as "disturbing public order" and "publishing falsehoods with the intent of disrupting public opinion."[132] These penalties are frequently directed at political dissidents, be they activists, journalists, or bloggers, with their occurrence significantly increasing during periods of political unrest, such as the Mahsa Amini protests.[133] These patterns underscore the central argument of this article: that

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wi-spared-950-lashes-after-saudi-decision-abolish-flogging.

129 Sebar & Ismail, *supra* note 124, at 96.

130 Abdorrahman Boroumand Center, *The Use of Flogging in Iranian Law: A List of Offenses*, Abdorrahman Boroumand Ctr. (Nov. 18, 2019), https://www.iranrights.org/library/document/3643.

131 *Id. See also* Abdorrahman Boroumand Center, *Flogging*, Abdorrahman Boroumand Ctr. (Nov. 18, 2019), https://www.iranrights.org/projects/flogging (last accessed June 1, 2025). The recorded number of flogging sentences in Iran reflects sentencing figures rather than actual implementations, as not all issued punishments are ultimately carried out. In some cases, flogging sentences are substituted with fines, waived entirely, or retained as a conditional threat, with the possibility of enforcement at a later stage. Alternatively, there are cases where flogging is carried out but remains unreported, contributing to gaps in statistical documentation.

132 Iran International, *Iran Sharply Increases Lashing Against Activists*, Iran Int'l (Aug. 5, 2023), https://www.iranintl.com/en/202308056500.

133 Amnesty International, *supra* note 22; Iran International, *supra* note 132; Stephanie Nebehay, *U.N. Rights Investigator Decries Iran Clampdown, Torture, Floggings*, Reuters (Mar. 5, 2018), https://www.reuters.com/article/us-iran-rights-un/un-rights-investigator-decries-iran-clampdown-torture-floggings-idUSKBN1GH2CA/.

state-sanctioned violence is primarily enacted through *taʿzīr* for political offenses, rather than the *ḥudūd* system that reformist discourse so often fixates upon.

To provide more perspective, placing the implementation of *ḥudūd* alongside global capital punishment statistics further contextualizes its relative infrequency, challenging perceptions of its centrality in Islamic criminal justice. Currently, 70% of nations worldwide have abolished capital punishment, while 55 countries still retain it.[134] In December 2024, the United Nations General Assembly adopted a resolution advocating a global moratorium on the death penalty, which garnered support from 130 countries. However, the United States and China voted against it.[135] China leads the world in executions, and while the number is considered a state secret, it is estimated to be in the thousands annually.[136] In the United States, 27 states still retain the death penalty, primarily using lethal injection.[137] This practice has faced challenges due to the European Union's ban on the sale of drugs used in executions to the United States, leading some states to rely on unregulated compounding pharmacies to produce lethal chemicals.[138] Alternative methods such as hanging, firing squads, gas chambers and electrocution remain legal in several states. Between 1981 and 1992, whereas Saudi Arabia executed only 4 individuals via *ḥadd* punishment, the United States executed 185 individuals.[139] More comparably, in 2024, Saudi Arabia executed 37 people for *ḥadd* infractions, whereas

134 Amnesty International, Global Report: Death Sentences and Executions 2023 (2024), *available at* https://www.amnesty.org/en/wp-content/uploads/2024/05/ACT5079522024ENGLISH.pdf.

135 United Nations Digital Library, *Moratorium on the use of the death penalty*, U.N. Digital Lib. (2024), https://digitallibrary.un.org/record/4069732?ln=en.

136 Amnesty International, *supra* note 134.

137 Death Penalty Information Center, *States with and without the Death Penalty – 2025*, Death Penalty Info., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last accessed June 1, 2025).

138 Death Penalty Information Center, *Some Medical Supply Manufacturers Ban Use of IV Equipment in Lethal Injection Executions*, Death Penalty Info (Sept. 15, 2023, updated Mar 14, 2025), https://deathpenaltyinfo.org/some-medical-supply-manufacturers-ban-use-of-iv-equipment-in-lethal-injection-executions.

139 Death Penalty Information Center, *Facts about the Death Penalty*, Death Penalty Info (updated May 21, 2025), https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf?dm=1736463595.

the United States executed 25.[140] This comparison highlights that, contrary to perceptions of the frequent and severe enforcement of *ḥudūd* punishments in Islamic law, their application has historically been significantly more limited than capital punishment practices in countries like the United States and China, raising questions about how justice is prioritized and perceived globally. Does the impetus for reform come from indigenous ethical commitments or from the need to satisfy the liberal gaze? This question is central to a decolonial critique. In both the Saudi and Iranian contexts, it was noted that reformist rhetoric tends to be surface level, focusing on *ḥudūd* punishments (which have been shown to be near non-occurrent), while extensive use of *taʿzīr* executions continues unabated. This imbalance in reform priorities which targets the "Islamic" aspect of law (i.e., the *ḥudūd*) but ignores the authoritarian apparatus (*taʿzīr*) may achieve cosmetic change but leaves underlying injustices untouched.

From Punishment to Control: The Birth of the Modern Prison

The debate surrounding *ḥudūd* reform intersects with a larger question about the nature of punishment itself, particularly the assumed superiority of incarceration over corporal penalties. Opponents of *ḥudūd* often assume that eliminating flogging, amputations, and stoning is *ipso facto* a move toward a more humane, just system—which presumably would rely on incarceration or other non-corporeal penalties. But a decolonial critique problematizes the notion that the modern carceral state is a benign

140 *Id.* The 2024 execution figures are included not to confirm a thesis but to engage potentially complicating data. In light of historical trends, however, the comparison still supports the argument: the United States has long far outpaced Saudi Arabia in executions, and while that gap has narrowed, the current figures remain broadly comparable—even with Saudi Arabia slightly ahead. This does not represent a reversal, particularly given the rarity of *ḥudūd*-based executions in Saudi Arabia. This also informs my decision not to use population-adjusted metrics. My use of statistics is descriptive, not prescriptive. While proportional analysis has its uses, it can obscure what is morally at stake—the absolute number of lives lost. If Nauru executed 3 people (0.03%) and China 200,000 (0.01%), the sheer loss of life in the latter would remain the more pressing moral concern. In this light, population ratio is not always the most meaningful measure of justice.

or preferable default. Indeed, the modern prison-industrial complex and systemic racism in criminal justice are phenomena as real and urgent as any *ḥadd* punishment. The United States imprisons around two million people, disproportionately Black, in a carceral system born from a history of slavery and economic exploitation.[141] Many scholars (e.g., Alexander, Davis) have argued that this system functions as a form of social control and economic profiteering—a "New Jim Crow" or a continuation of colonial domination by other means.[142] This invites deeper examination of the carceral system and, accordingly, in this section I consider the history of the modern prison. Particularly, I analyze the underlying ideological and economic philosophies through which it developed, which will inform the decolonial critique of *The Call*.

Foucault's seminal work *Discipline and Punish* provides a starting point for this inquiry. He traces how in Europe the locus of punishment shifted from the body to the "soul" (or mind) between the 18th and 19th centuries.[143] Public spectacles of torture and execution were gradually replaced by the regimented, hidden world of prisons. At face value, this was celebrated as progress, punishment was now purportedly more rational, proportionate, and rehabilitative rather than vengeful and barbaric. However, Foucault argues that this transformation was not purely driven by humanitarian concern: instead, it was motivated by a need to make power function more efficiently and subtly in society.[144]

Historically, premodern prisons served merely as temporary holding facilities, allowing for social interactions and economic activity.[145] In contrast, the modern prison, influenced by Jeremy Bentham's (d. 1832) panopticon, is designed for constant surveillance and internalized discipline, shaping inmates into docile bodies suited for industrial labor.[146] Foucault highlights

141 The Sentencing Project, *50 Years and a Wake Up*, The Sentencing Project, https://www.sentencingproject.org/advocacy/50-years-and-a-wake-up-ending-the-mass-incarceration-crisis-in-america/ (last accessed June 1, 2025).

142 Alexander, *supra* note 5.

143 Foucault, *supra* note 4.

144 *Id.*

145 Guy Geltner, The Medieval Prison 106 (2008).

146 William Sweet, *Jeremy Bentham (1748–832)*, Internet Encyclopedia of Philosophy, http://www.iep.utm.edu/bentham/ (last accessed June 1, 2025). Ben-

two key "advantages" the modern prison had from the state's perspective: 1) it moved punishment out of sight, into the shadowy realm where the public would no longer directly witness the violence of the sovereign, thereby making power appear more humane; and 2) it allowed punishment to be an ongoing process (years of imprisonment, parole, criminal records) rather than a finite physical event like a flogging.[147] Physical punishment may have been reduced, but it was replaced by an arguably more potent form of coercion, a subtle but pervasive disciplinary power, what Bentham describes as "a new mode of obtaining power of mind over mind, in a quantity hitherto without example."[148] Charles Dickens (d. 1870), during a visit to a penitentiary depicts its condition:

> In its intention I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of prison discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony that this dreadful punishment, prolonged for years, inflicts upon the sufferers [. . .] I am only the more convinced that there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow-creature. I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.[149]

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tham was a philosopher credited with the theory of utilitarianism. His work around the philosophy of law culminated in the architectural design of the Panopticon.

147 Foucault, *supra* note 4.

148 Jeremy Bentham, The Panopticon Writings 39 (Miran Božovic ed., 1995).

149 Charles Dickens, American Notes for General Circulation 119–20 (Cambridge Uni. Press 2009) (1842).

Furthermore, Bentham claimed that such internalization would lead to productive labor habits.[150] Building on this, scholars like Davis and Alexander extend Foucault's critique by examining how these ostensibly modern, rational systems of punishment have been co-constructed with racism, economic exploitation, and colonial domination.[151]

Davis contextualizes these developments by anchoring them in the historical developments of that period. She illustrates the utility in terms of labor that this new form of punishment provides, and how the penitentiary's goal of discipline achieved through internalization of surveillance was directly implicated by that era's needs for a self-disciplined working-class labor force to fuel an emergent capitalist system.[152] The modern prison's inextricable ties with profit and creation of laborers was the perfect work around for the abolition of slavery. In the United States, after the formal abolition of slavery, prisons (through convict leasing, chain gangs, etc.) became a way to perpetuate the subjugation of Black Americans—what Alexander calls the "New Jim Crow."[153] Prisoners were sold and loaned to the highest bidder, be it plantations or corporations.[154] Convicts were legally slaves of the state:

> For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State. He is *civiliter mortus*; and his estate, if he has any, is administered like that of a dead man.[155]

150 Scott Christianson, With Liberty for Some 115 (1998).

151 Alexander, *supra* note 5, at 26.

152 Davis, *supra* note 5, at 46.

153 One such vagrancy law stated that "all free Negros and mulattoes over the age of eighteen must have written proof of a job at the beginning of every year. Those found with no lawful employment will be deemed vagrants and convicted." Alexander, *supra* note 5, at 26.

154 *Id.* at 31.

155 Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

The Civil Rights Act of 1964 dismantled Jim Crow laws, but integration threatened White economic and social dominance. In response, a new racial hierarchy emerged through the race-neutral rhetoric of "law and order," which criminalized the Civil Rights movement and laid the foundation for modern police brutality against Black Americans.[156] Echoing the frustration of Whites in race neutral and color-blind rhetoric, Ronald Reagan's (d. 2004) War on Drugs, launched amid declining drug use, disproportionately targeted people of color, causing incarceration rates to surge.[157] Despite studies showing higher drug crime participation among Whites, nearly half of the incarcerated population is Black.[158] Harsh policies like the 1994 three-strikes law led to life sentences for repeat drug offenses, as a result of which, the majority of inmates incarcerated today are for drug related offenses.[159] After release, in addition to voting disenfranchisement, employers, banks and landlords are legally allowed to discriminate against felons.[160] In effect, their sentence seems to continue long after they are done serving their time, resulting in the United States having the highest recidivism rates globally—66% of persons released from prison were re-arrested within three years, and 82% rearrested within ten years.[161]

While the United States makes up approximately 4% of the world's population, it holds 16% of the world's prison population, the highest incarceration rate in the world.[162] Another way to frame this is that, while China has over one billion more people than the United States, the United States prison

156 Alexander, *supra* note 5, at 40–42.

157 *Id.* at 49. Alexander describes Reagan's rhetoric as "not-so-subtle code for lazy, greedy, black ghetto mother."

158 *Id.* at 6–7.

159 *Id.* at 56; John McWhorter, *How the War on Drugs is Destroying Black America*, 9 Cato's Letter 1, 1–5 (2011).

160 Alexander, *supra* note 5, at 53.

161 U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008–2018)*, Dep't Justice (Sept. 2021), https://bjs.ojp.gov/BJS_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs.

162 Vera, *Ending Mass Incarceration*, Vera.org, https://www.vera.org/ending-mass-incarceration (last accessed June 1, 2025).

population (1.8 million) is still greater than China's.[163] Davis refers to this phenomenon not simply as mass incarceration, but as the "prison-industrial complex," a term that challenges the prevalent belief that crime is the primary driver of the mounting prison population and prison infrastructure.[164] The prison-industrial complex denotes a system wherein political, economic, and institutional interests converge to incentivize carceral expansion through policy trends, discretionary enforcement, and institutional investments.[165] At the heart of this dynamic is the profit motive of private prison corporations, whose financial viability depends on maintaining and increasing prison occupancy.[166] This system is further entrenched by the exploitation of prison labor by private corporations who benefit from the carceral economy as a source of profit or cost-saving—which Davis identifies as a contemporary form of convict leasing whose primary subjects are people of color.[167]

The boom in prison construction, the privatization thereof and the ensuing drive to fill them is motivated by ideologies of profit and racism. Davis notes that this is "reminiscent of the historical efforts to create a profitable punishment industry based on the new supply of free black male laborers."[168] Criminologist Nils Christie (d. 2015) formulates this into an equation in which the prison market has a demand for raw material (prisoners) and the industry guarantees a steady supply achieved by adjusting criminal justice policies.[169] The scale and

163 Helen Fair & Roy Walmsley, *World Prison Population List*, World Prison Brief, https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_14th_edition.pdf (last accessed June 1, 2025).

164 Davis, *supra* note 5, at 12.

165 In certain cases, there has been explicit collusion between judicial actors and private prison interests, as exemplified by the "Kids for Cash" scandal. *See* William Ecenbarger, Kids for Cash: Two Judges, Thousands of Children, and a $2.8 Million Kickback Scheme (2012).

166 Justice Policy Institute, Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies 2–3, 12, 30 (2011), available at https://justicepolicy.org/wp-content/uploads/2022/02/gaming_the_system.pdf.

167 Davis, *supra* note 5, at 85.

168 *Id.* at 85–94. Various industries, such as catering, cleaning, security, etc., rely on a growing prison economy.

169 Nils Christie, quoted in Steve Danziger, The Real War on Crime: Report of the National Criminal Justice Commission 87 (1996). For examples

structure of the United States' $81 billion prison industry lends empirical support to his formulation.[170] Of that, the for-profit carceral sector generates approximately $7.4 billion annually through contracts with federal and state agencies.[171] A recent notable growth area has been immigration detention under Immigration and Customs Enforcement (ICE), which alone has accounted for as much as 30–40% of total private prison revenue.[172] These arrangements often include occupancy guarantees, ensuring that a minimum number of detainees are supplied to fulfill contractual thresholds.[173] The prison-industrial complex is bolstered through its symbiotic relationship with the military-industrial complex through arms and technology sales from the military to the prison industry.[174]

Beyond the American context, the world prison economy is undeniably influenced by the U.S., which serves as the model in this sector, and therefore practices of mass incarceration and institutionalized racism are exported along with it. Davis describes the globalization of the United States prison economy:

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of private prison corporations influencing or drafting punitive legislation—such as "three-strikes" laws, "truth-in-sentencing" provisions, and Arizona's SB 1070—see Justice Policy Institute, *supra* note 166, at 3, 30.

170 Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, Prison Pol'y Initiative (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html.

171 Michaela Ross, Madi Alexander & Paul Murphy, *Immigration Spending Surges as White House Calls for More Funds*, Bloomberg Gov't (Jan. 25, 2019), https://about.bgov.com/insights/news/immigration-spending-surges/.

172 Meg Anderson, *Trump's Challenge: Where to House Millions of Immigrant Detainees*, NPR (Jan. 16, 2025), https://www.npr.org/2025/01/16/nx-s1-5218641/immigrant-detention-trump-deportation-plans.

173 *How Lockup Quotas and "Low-Crime Taxes" Guarantee Profits for Private Prison Corporations*, In the Public Interest (Sept. 2013), https://www.documentcloud.org/documents/798018-in-the-public-interest-report-on-private-prison/.

174 The following excerpt from a *Wall Street Journal* article is one such testament to the relationship between the two industries: "Parts of the defense establishment are cashing in, too, sensing a logical new line of business to help them offset military cutbacks. Westinghouse Electric Corp., Minnesota Mining and Manufacturing Co, GDE Systems (a division of the old General Dynamics) and Alliant Techsystems Inc., for instance, are pushing crime fighting equipment and have created special divisions to retool their defense technology for America's streets." Paulette Thomas, *Making Crime Pay: Triangle of Interests Creates Infrastructure to Fight Lawlessness*, Wall Street J. (May 12, 1994), https://www.proquest.com/newspapers/making-crime-pay-triangle-interests-creates/docview/398388330/se-2.

> This economy not only consists of the products, services, and ideas that are directly marketed to other governments, but it also exercises an enormous influence over the development of the style of state punishment throughout the world.[175]

Racialization and the prison-industrial complex are not unique to the United States. Due to the global market of these multinational corporations, their profits are tied to prison systems worldwide, which can be seen via the racialization of the prison populations across Europe, South America and Australia.[176] Turkey and South Africa underscore this trend. Turkey has left behind its communal style prisons for the American "supermax" prison model which places inmates in permanent solitary confinement, more conducive to torture and maltreatment.[177] Immediately after the post-apartheid abolishment of the death penalty, Davis points to the relative effortlessness with which the most oppressive form of the United States prison (the supermax) was adopted in South Africa.[178] More recently, the United States has entered into a contract with El Salvador's CECOT mega-prison under President Nayib Bukele, paying $20,000 per inmate—totaling $6 million annually.[179] This arrangement reflects an expansion of cross-border carceral outsourcing and signals the global economic traction of this industry. Bukele's *Plan Cero Ocio* (Zero Leisure Plan) mandates inmate labor to offset operational costs, compelling prisoners to work across agricultural, manufacturing, and construction sectors.[180]

175 Davis, *supra* note 5, at 100.

176 *Id.* at 85.

177 *Id.* at 101.

178 *Id.* at 101–102.

179 James FitzGerald, *El Salvador's Leader Will Not Return Man Deported from the US in Error*, BBC News (Apr. 14, 2025), https://www.bbc.com/news/articles/c9vedkm7w2do.

180 *The Zero Leisure Plan Promotes Self-Sustainability in Prisons*, El Salvador in English (Aug. 17, 2022), https://elsalvadorinenglish.com/2022/08/17/the-zero-leisure-plan-promotes-self-sustainability-in-prisons; *Zero Leisure Plan Leaves 96 Schools, 84 Police Headquarters and 162 Health Centers Renovated by Inmates*, El Salvador in English (Dec. 20, 2021), https://elsalvadorinenglish.com/2021/12/20/zero-leisure-plan-leaves-96-schools-84-police-headquarters-and-162-health-centers-renovated-by-inmates.

In China, where all prisons are state-run, the economic function of incarceration is no less entrenched. Penal institutions often operate under dual identities, simultaneously functioning as detention centers and commercial enterprises under separate names. Inmates are required to labor in agricultural and manufacturing sectors, and prisons are encouraged to generate revenue and achieve fiscal self-sufficiency through inmate labor.[181] The commodification of incarcerated people, whether in explicitly privatized markets or state-run systems, thus reflects the extent to which incarceration has become structurally embedded in modern political economies.

In sum, the prison is hardly a neutral or necessarily humane institution; it can be an instrument of immense cruelty and social destruction which *ḥudūd*-reformists do not account for. Thus far, this article has demonstrated that capital punishment has historically been deployed at significantly higher rates in the judicial systems of both the United States and China, two global powers, than *ḥudūd* punishments within Islamic law. Even as the gap has narrowed in recent decades—at least in the United States—the rates remain sufficiently comparable to challenge the presumption that Islamic legal systems are uniquely severe in their use of capital punishment.[182] Building on this, as well as the preceding exploration of *ḥudūd*, and the critique of the carceral system, the final section employs these insights to unpack *The Call* decolonially.

Decolonizing *The Call*: Power, Epistemology and Reform

Turning now to *The Call*, from a decolonial perspective, the gaze being focused on Muslim majority countries must be questioned. China, as was illustrated previously, dwarfs Muslim majority

181 John Dotson & Teresa Vanfleet, *Prison Labor Exports from China and Implications for U.S. Policy*, U.S.-China Econ. & Sec. Rev. Comm'n (July 9, 2014), https://www.uscc.gov/sites/default/files/Research/Staff%20Report_Prison%20Labor%20Exports%20from%20China_Final%20Report%20070914.pdf.

182 This comparison excludes capital punishment in Muslim-majority countries by way of *taʿzīr* because both external and internal reform efforts, including *The Call*, are fixated on the *ḥudūd*.

countries in its execution of thousands of people yearly.[183] The United States has executed on average 35 people yearly for the past 20 years while allowing for multiple execution methods.[184] Ramadan rejoins that he has focused on Muslim majority countries because they carry out the *ḥadd* punishments in the name of Islam and *sharīʿa*, and as both a scholar of Islam and a practicing Muslim, he is obliged to direct his attention to this internal matter.[185] However, Ramadan himself acknowledges that both historically and contemporarily, those convicted of *ḥadd* crimes are few; most corporal punishment and death penalties are handed down in the form of *taʿzīr*.[186] Moreover, most death sentences in Muslim majority countries prosecuted under *taʿzīr* were doled out to political dissidents and drug-related charges, not for *ḥadd* infractions.[187] *The Call*—and similar reformist appeals—by focusing on the *ḥudūd* which are designed to be nearly impossible to enforce and moral in nature, instead of problematizing *taʿzīr*, are guilty of misplaced critique. Interestingly, in Muslim majority countries where Islamic law wasn't altogether abolished through colonization, it was *taʿzīr* that bore the full force of reformation and codification more akin to Western standards of law.[188]

Gomaa sums up *The Call* as substantively correct but procedurally wrong. He begins by problematizing the idea of a utopian implementation of *sharīʿa*:

> One cannot justifiably affirm that the *sharīʿa* is not being applied in a given environment merely because the lived daily reality does not conform to some of its prescriptions. Such differences, after all, have been observed in varying degrees and types throughout Islamic history and in all Muslim lands and countries without a single Muslim scholar ever arguing that these lands are outside

183 Amnesty International, *supra* note 134.

184 Death Penalty Information Center, *Facts about the Death Penalty*, Death Penalty Info (updated May 21, 2025), https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf?dm=1736463595.

185 Ramadan, *supra* note 83.

186 *Id.*

187 European Saudi Organization for Human Rights, *supra* note 115; Vogel, *supra* note 111, at 246–47.

188 Peters, *supra* note 89, at 104–105.

> the purview of Islam as a result, or that they do not apply the *sharīʿa*. Indeed, it would not be an exaggeration to argue that the expression "application of *sharīʿa*" is a recent coinage.[189]

Gomaa then proceeds to agree with *The Call* that the role of *ḥudūd* is socio-moral in ensuring that sins, due to their association with certain penalties, are repulsed by the human psyche. He then focuses the majority of his response on the conditions of *ḥudūd* implementation, stating categorically that application of the *ḥudūd* without the requisite conditions is a transgression of *sharīʿa*.[190]

Examining the requirements for *ḥudūd* application through a *maqāṣid* lens, Gomaa cites context (*al-wāqiʿ*) as vital in determining whether their objectives are being fulfilled.[191] He then references al-Qarāfī's four criteria for understanding context: 1) time 2) space 3) persons 4) situations.[192] The consideration of these allows the jurist to classify the circumstances as those of necessity (*ḍarūra*), ambiguity (*shubha*), civil disorder (*fitna*) or ignorance (*jahāla*). In turn these circumstances, if established, can permit what is forbidden or allow for suspension of sanctions. Gomaa alludes to Egypt as an example where the *ḥudūd* haven't been applied in over one thousand years, not due to a blanket suspension of the *ḥudūd*, but on the contrary, because of their implementation, i.e., their procedural design of evading prosecution is fulfilling its objective (*maqṣid*).[193] Thus, substantively, both Gomaa and Ramadan agree that the *ḥudūd* should not be applied, but procedurally they come to their conclusions differently, with Gomaa allowing the *maqāṣid* methodology to inform his assessment of the conditions required for *ḥadd* implementation. Revisiting the account of ʿUmar during the year of famine, reformers often interpret his actions as a suspension of the *ḥadd* for theft via recourse to the *maqāṣid*. However, many jurists, whose reasoning Gomaa is following, contend that ʿUmar did not suspend or halt the *ḥudūd*. Instead, he applied the doctrine

189 Ramadan, *supra* note 83.
190 *Id.*
191 *Id.*
192 *Id.*
193 *Id.*

of doubt (*shubha*) inherent in the *ḥudūd*, determining that the requisite conditions for their enforcement could not be met due to the exceptional circumstances, thus rendering the punishment inapplicable.[194] Accordingly, Gomaa's approach can be seen as an epistemic one, in which he foregrounds the Islamic legal framework. In light of this, the resistance to the moratorium on *ḥudūd*, analyzed from a decolonial angle, is resistance to a top-down approach that forgoes procedure, insinuated by the very word "moratorium," which suggests that the institute of *ḥudūd* must be frozen or rendered idle by those in power.

From a decolonial angle, this substantive versus procedural argument is implicated by the coloniality of power in reshaping religion, "the form it takes, the subjectivities it endorses, and the epistemological claims it makes."[195] Saba Mahmood (d. 2018) is wary of the U.S. State Department's identification of indigenous allies, i.e., the decolonial concern for external co-option.[196] Particularly troubling is the confluence of U.S. imperial interests with certain reformist approaches to scriptural hermeneutics.[197] Mahmood argues that this has resulted in theological prescriptions by the State Department on particular interpretations, and a peculiar amount of effort by think tanks such as the National Security Research Division of the Rand Corporation (Rand) in analyzing theological flaws and what they believe to be interpretive errors.[198] The report argues that, "it is not so much the substantive positions of the traditionalists that are intolerable as their beliefs, attitudes, and modes of reasoning."[199] It then criticizes traditional Muslims opposing polygyny, not on substantive grounds, but because they come to their conclusion by

194 Bultājī, *supra* note 27, at 190. Stealing due to hunger, as is the case during a famine, is a *shubha* that drops the *ḥadd* charge of theft.

195 Saba Mahmood, *Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation*, 18 Public Culture 323, 326–27 (2006).

196 *Id.* at 323.

197 *Id.* at 329.

198 The Rand report points to three beliefs of traditional Islam which are "intolerable" and therefore make it dangerous: 1) the belief that the Qurʾān is divine as opposed to a historical document 2) the failure to recognize that Muhammad was embedded in his time and therefore holds minimal practicable value to the realities of modernity 3) the failure to censure the traditional jurisprudence for its deficiency and practicality. *See id.* at 334.

199 *Id.*

engaging with traditional Islamic legal frameworks and juristic positions.[200] Their position is faulted on procedural grounds for not rejecting canonical sources outright due to their "incompatibility with modern liberal values."[201] Pertaining more directly to *maqāṣid*-based reform, in 2017, the U.S. Helsinki Commission which promotes "human rights, military security and economic cooperation" reported on the "Moroccan Approach" to countering violent extremism (CVE) which consisted of:

> Promoting maqasid in scriptural explication, an approach that emphasizes the spiritual, moral, ethical, and social goals of religious belief and practice above literalist interpretation and formalistic piety. The delegation visited the Muhammad VI Institute for the Training of Imams where hundreds of Imams and male and female religious guides—murshidin and murshidat—from across Morocco and Western and sub-Saharan Africa are brought on full-scholarship to deepen their understanding of this interpretation of the Islamic faith.[202]

Mahmood therefore situates the aversion to "Western values,, a euphemism for U.S geo-political strategic interests, within this broader context of the United States' theological campaign to discipline Muslims.[203] This perspective underscores the pertinence of al-Ghazālī's hesitation and qualification of the *maqāṣid* as an uncertain source of law, refusing to give them independent authority. Such a conscious approach could prove fruitful by allowing the *maqāṣid* to serve as a standard, encapsulating

200 *Id.* at 334 n.27.

201 *Id.* at 334.

202 U.S. Helsinki Commission, *OSCE Parliamentary Delegation to Rabat Examines Morocco's Strategy to Counter Violent Extremism*, CSCE (Nov. 6, 2017), https://www.csce.gov/articles/osce-parliamentary-delegation-rabat-examines-morocco-s-strategy-counter-violent/.

203 The Muslim World Outreach program has a 1.3-billion-dollar budget allocated towards "transforming Islam from within" which amounts to training preachers, establishing seminaries, and shaping religious debate within existing media forums. Furthermore, the International Religious Freedom Act (IRFA) passed by the U.S. Congress allots them unprecedented powers in regulating religious life globally under the guise of safeguarding religious freedom. *See* Mahmood, *supra* note 195, at 328–31.

the *élan* or thrust of *sharīʿa*, against which laws can be measured and ultimately inviting re-evaluation. At the same time, the re-evaluation itself, i.e., the legislation or reformulation of laws, would remain subservient to the procedural framework of Islamic law, through which usage of the *maqāṣid* is qualified. This internal system of checks and balances, at once allows for critical reconsideration, while frustrating imperialism and protecting against external co-option.

Additionally, while Ramadan advocates for internal reform, geo-politically speaking, not only is he a self-avowed Westerner, but his research and work comes from the global North, a positionality that is not without implication.[204] If the reader recalls, *The Call* was sparked during a debate in which former French President Sarkozy insisted that Ramadan renounce the *ḥadd* punishment of stoning adulterers. Jonathan Brown mentions that it is not so much the corporal punishment aspect of *ḥudūd* that disturbs modern liberal sensibilities, but more so that acts like fornication and drinking are deemed immoral in the first place.[205] The suspicious fixation on the rarely applied *ḥudūd* crimes, at the expense of *taʿzīr* executions for the more frequent but familiar crimes of treason and drug trafficking, lends credence to Brown's argument. This is spelled out in the Rand Report's reference to canonical Islamic texts as being incompatible with modern liberal sensibilities.[206] This is especially pertinent if the *telos* of *ḥudūd* is understood to be ethical subject formation. This angle is generally absent from reformist discourse surrounding *ḥudūd*, and is problematic from a decolonial critique calling for pluriversalism to replace universalism, a term used to obscure the hegemony of Western values.

A second consequential oversight concerns the failure to engage the carceral system as the global default punishment. *The Call*, which centers context (*al-wāqiʿ*) in its *ḥudūd* reform project, lacks a critique of the carceral system, which

204 Ramadan, *supra* note 54.

205 Jonathan Brown, *Stoning and Hand Cutting—Understanding the Hudud and the Shariah in Islam*, Yaqeen Institute (Jan. 12, 2017, updated July 22, 2024), https://yaqeeninstitute.org/read/paper/stoning-and-hand-cutting-understanding-the-hudud-and-the-shariah-in-islam.

206 *See* Mahmood, *supra* note 195, at 334 n.27.

would be the most likely alternative given its global prevalence and growth rate. It is useful here to engage Foucault as scholar who similarly engages context surrounding the transition from corporal punishment to the birth of the modern prison. He concludes that reformers were not moved by altruistic ideals, but by a desire to optimize power and economize punishment.[207] As a result, the modern prison does not simply punish through confinement, it imposes strict regimentation and surveillance measures that ensure inmates internalize authority, i.e., it seeks to reformulate its subjects in a quest for docile bodies to constitute a working-class labor force.[208] This transformation was achieved through the invisibilization of punishment, transitioning its locus from the body to the soul.[209] This alleviated political complications caused by the visibility and corporality of state violence.[210] Notably, this aspect of the public utility of *ḥudūd* is absent from contemporary discussions. If *The Call* were to be fully realized—leading to a moratorium not only on the *ḥudūd* but, for argument's sake, on *taʿzīr* as well—Muslim-majority countries would end up with the hegemonic carceral model in the United States.[211] This, in turn, risks evolving into the kind of industrial complex described by Davis and Alexander, wherein authoritarian governments benefit from a penal system concealed from public scrutiny, and consequently, punishment of body, would transfer to punishment of soul.

By virtue of calling for a moratorium in which the carceral system would, in practice, serve as a locum for *ḥudūd*, *The Call* is concerned primarily with the public visibility of violence. Evaluated decolonially, this is indicative of a desire to regulate rather than eliminate violence. *The Call*'s passive privileging of the Eurocentric theory of criminal justice as more humane is representative of the coloniality of power at work. This

207 Foucault, *supra* note 4, at 7.

208 *Id.* at 135. The timetable was a method of regulating the prisoner's activities to eliminate time waste, which was viewed as economic dishonesty

209 *Id.* at 42, 249.

210 *Id.* at 59–61.

211 Previously, the examples of Turkey, South Africa and Australia illustrated how the U.S. supermax prison models are being adopted globally and run by U.S. companies.

runs against the grain of trenchant critiques by Foucault, Davis, and Alexander vis-à-vis the carceral system. The Islamic legal system, inclusive of *ḥudūd*, *qiṣāṣ*, and *taʿzīr*, by virtue of being public and not monetized, lends itself more to reform. Without Eurocentric penology's systemic hurdles, the Islamic epistemic tradition has the breadth to tackle the problematic implementation of *taʿzīr*, which is impeded by visible authoritarian power, rather than hidden power.[212] In trying to come to terms with the failure of the carceral system, and find alternatives, Moskos proposes a return to corporal punishment in which the guilty party is offered the choice between flogging and prison time.[213] More thoroughly, Davis demands the overhaul of the entire system, in which adjudication of the most heinous crimes would come back to the victims or their family, who could choose to pardon the transgressor.[214] This idea finds arable land in the Islamic epistemic tradition, which has the theoretical scope to take it on via *qiṣāṣ* where, for example, in Iran in 2023, 857 or 75% of the individuals convicted for homicide were forgiven by the families of the deceased.[215]

Finally, in light of epistemic delinking, I highlight two examples of pre-modern Islamic jurists of repute, who engage the *ḥudūd*. The first, Ibn ʿAbd al-Salām, an Imam of the Umayyad Mosque, rose to such prominence that despite banishment from Damascus, he was named chief judge upon emigrating to Cairo.[216] He is also one the foundational contributor to the development of *maqāṣid*. A section of his book, *Qawāʿid al-aḥkām* (The Basis of Rulings), is dedicated to reviewing the objectives and purposes of various *ḥudūd* in relation to their crime.[217] What is of inter-

212 As Abou El Fadl observed, even those scholars who vehemently opposed Ramadan's *Call*, find Saudi Arabia's and Iran's implementation of *taʿzīr* problematic. *See* Abou El Fadl, *supra* note 76, at 291–93.

213 Peter Moskos, In Defense of Flogging 100 (2011).

214 Davis, *supra* note 5, at 114–15.

215 Iran Human Rights, *supra* note 118, at 67–68.

216 Sherman Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi 9–10 (1996). Ibn ʿAbd al-Salām, renowned by the honorifics Sultan of Scholars and Shaykh al-Islām, was jailed and subsequently exiled from Damascus for the pulpit condemnation of then ruler al-Sāliḥ Ismāʿīl for making concessions to the crusaders.

217 Ibn ʿAbd al-Salām, *supra* note 32, at 1:291.

est is Ibn Abd al-Salām's use of internal logic in his application of *maqāṣid*. After establishing that the purpose of the *ḥudūd* is deterrence, he analyzes the *ḥadd* of theft (*sariqa*).[218] He finds that the amputation of the arm is a commensurate penalty since it is directly related to what the culprit used to commit the crime.[219] He then poses the hypothetical question of why someone guilty of stealing a small amount and someone guilty of stealing a large amount receive the same penalty.[220] Ibn ʿAbd al-Salām replies to this question drawing, ontologically, on a time-space continuum in which life does not end with earthly death, but continues on eternally into the hereafter.[221] Therefore, he answers this question by stating that the *ḥadd* in these instances serves as an expiation (*kaffāra*) of sins, but that the expiation is not limitless.[222] Whatever sins are left over will be dealt with in the court of God, citing Qurʾān 99:7.[223] He then goes on to examine *zinā*, which he states is penalized due to the "harms of mixing fluids resulting in the uncertainty of lineage."[224] However, after explaining why *zinā* is a crime worthy of punishment and accepting flogging as a commensurate punishment for an act in which the entire body feels pleasure, he remarks, "I have not come across the harm warranting the stoning of a widowed fornicator, and what has been postulated about it does not convince me."[225] This represents a notably bold, bottom-up approach to *maqāṣid* in which Ibn ʿAbd al-Salām does not question the *ḥudūd* in principle, but raises doubts about what he perceives as a punishment disproportionate to its crime—a *ḥadd* which fails vis-à-vis its own purported objective of commensurability. Of particular interest is that Ibn ʿAbd al-Salām lived during a historical period (1181–1262) in which there is no recorded implementation of the *ḥudūd* in either Syria or Egypt, and what would appear to be no external pressure

218 *Id.* at 23.
219 *Id.* at 291.
220 *Id.* at 56.
221 *Id.*
222 *Id.*
223 *Id.* at 56–57.
224 *Id.* at 291.
225 *Id.* at 292. To be eligible for stoning, a person must be *muḥṣan*, i.e., someone who has at one point enjoyed sexual relations in a licit relationship. Thus, both a widower and widow fall under this category. *See* Peters, *supra* note 89, at 61.

to reevaluate the *ḥudūd*.[226] Ultimately, he concedes, "this *ḥadd* . . . is problematic; may Allah facilitate its resolution."[227] While ostensibly accepting the punishment of stoning, he applies logic intrinsic to the *maqāṣid* tradition to critically question it.[228] Procedurally, Ibn ʿAbd al-Salām's critique emerges from an uncolonized epistemic space, employing a framework entirely internal to the Islamic legal tradition. This stands in contrast to *The Call*, which, although explicitly framing itself as an internal reform effort, remains insufficiently attentive to the coloniality of power shaping its assumptions. These assumptions are not problematic in their foreignness, but in the influence, they exert in directing the reformer's gaze and privileging the Western canon of thought.

I end with one of the leading Mālikī jurists of his era, Abū al-Qāsim al-Burzulī (d. 844/1440), who ruled that *ḥudūd* punishments could be replaced by the taking of property (*al-ʿuqūba bi-l-māl*):

> Al-Burzulī issued a *fatwā* that was supported by Ibn Khajū and Ibn ʿUqda. He sent it to the Sultan Mawlāy Muḥammad bin Muḥammad al-Sharīf al-Sūsī while he was stationed at Sebou Valley before his conquest of Fez. He [the Sultan] spoke at length, ultimately expressing agreement with al-Burzulī's *fatwā*. It was mentioned that al-Burzulī engaged in a debate with a contemporary scholar in the presence of the Emir of his time. Their argument grew lengthy until the scholar debating him said, "If you follow this errant individual, your fate will be the same as his—in the abode of ruin," or words to that effect. The Emir acted on his [al-Burzulī's interlocuter] advice and began implementing corporal punishments (*ḥudūd*). However, this led to an outcry among the

226 Kadri, *supra* note 109, at 217; Ramadan, *supra* note 83.

227 Ibn ʿAbd al-Salām, *supra* note 32, at 1:57.

228 Ibn ʿAbd al-Salām states that one of the aims of his book is to identify the objectives behind prohibitions. In doing so, he distinguishes between the means (*al-wasīla*) and the ends (*maqāṣid*). The principal of proportionality (*al-muwāzana*), in the case of *ḥudūd*, necessitates commensurability between the punishment and the harm caused, so that the means (*ḥadd* punishment) achieves its end. *See id*. at 36–39.

> people, as shock and disorder increased. Consequently, the Emir reverted to al-Burzulī's opinion.[229]

Fellow North African scholars Abū al-Qāsim ibn Khajjū (d. 956/1549) and Mūsā ibn al-ʿUqda (d. 911/1504) also aligned with al-Burzulī's position. Notably, more than the concern for immutability of the *ḥudūd*, the discourse surrounding this issue predominantly focused on the inviolability of property and the legitimacy of its confiscation, particularly in cases where the property bore no direct relation to the crime.[230] I present these examples to demonstrate how premodern scholars, uncoerced by foreign hegemonic epistemic traditions, critically engaged with and, in one case, had the *ḥudūd* replaced. This illustrates the viability of significant reform undertaken in a non-Western epistemic space.

The breadth of Islamic law is accounted for by what has been described as jurists' strategic negotiation of multiple normative discourses.[231] The latitude afforded in this negotiation, while firmly anchored in legal procedures and interpretive mechanisms that safeguard against external co-option and ensure epistemic independence, is the key to the interpretive possibilities and the liberative potential of the Islamic legal tradition. Moreover, these examples complicate reductive binaries between progressive reform and traditionalist resistance. As demonstrated, the *ḥudūd* were not only problematized but, in some cases, reformed by premodern scholars often labeled as traditionalists. Conversely, some progressives—broadly applied, as in the case of this decolonial critique—can resist *ḥudūd* reform, revealing a more complex and dynamic landscape of legal thought.

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229 Abū ʿĪsā al-Wazzānī, 10 al-Nawāzil al-jadīda al-kubrā 210 (Muḥammad al-Sayyid ʿUthmān ed., 2014).

230 *Id.* at 206–29.

231 Juliane Hammer, American Muslim Women, Religious Authority, and Activism: More Than a Prayer 77 (2012); Marion Holmes Katz, Wives and Work: Islamic Law and Ethics Before Modernity 14 (2022).

Conclusion

I recognize the impulse of *The Call* to stand with the marginalized and affirm the justice goals of reform initiatives, a commitment that is both necessary and commendable. Beyond this, *The Call* also holds the important merit of fostering intra-Muslim dialogue, encouraging critical engagement with Islamic legal traditions. In line with this, the argument presented in this article does not dispute the moral urgency of alleviating suffering but rather seeks to question the assumptions underlying certain reform approaches. By introducing a decolonial critique to calls for *ḥudūd* suspension, the aim has been to reframe the terms of debate and tease out the broader structure at play viz., the legacy of colonial epistemology in defining what is objectionable about Islamic law and directing the gaze toward the *ḥudūd*.

Several key insights emerge from this article's attempted decolonial analysis. First, it was demonstrated, both theoretically and historically, that enforcement of *ḥudūd* punishments was not the main engine of social order. In essence, the *ḥudūd* functioned as symbolic archetypes of justice and moral transgression. Their primary impact was to shape attitudes and behaviors (e.g., emphasizing the sanctity of marriage and property, the seriousness of slander, the gravity of intoxication), what anthropologist Talal Asad might describe as part of the Islamicate ritual and disciplinary practices that form the Muslim subject.[232] Crucially, the *ḥudūd* are not designed to police the private sphere. They are inherently public in orientation.[233] While Western liberal legal systems center individual autonomy and often draw sharp lines between public law and private morality, Islamic law prioritizes communal harmony and moral ecology.[234]

232 Talal Asad, Formations of the Secular: Christianity, Islam, Modernity (2003).

233 All four agreed-upon *ḥudūd* crimes possess inherent public dimensions: *zinā* deters public sexual immorality; *qadhf* safeguards reputational trust; *sariqa* addresses socially destabilizing thefts rather than petty or recoverable offenses; and *ḥirāba* protects public safety from violent disruption.

234 The liberal legal tradition attempts to maintain a clear, rational boundary between public law and private morality—often framed through the ideal of the "separation of church and state." Yet, this boundary is less a neutral demarcation than a normative judgment about what constitutes legitimate public concern. The very act

Second, in many Muslim contexts, the primary mechanism of oppression was identified as the misuse of *taʿzīr* powers. State violence, from Iran's gallows to Saudi Arabia's discretionary executions, often operate outside the *ḥudūd* framework. Any reform that ignores this will have limited impact. It is telling that even if tomorrow every *ḥadd* punishment were formally repealed, the prisons in the Muslim world would remain filled, and the executioners busy.

Third, this article examined the modern prison as the presumed "humane" alternative to corporal punishment. Drawing on the insights of Foucault, the rise of the carceral system in Europe was revealed to be motivated not by pure humanitarian concern, but by a shift in the technologies of power, a move to discipline the soul and regulate populations more efficiently, rather than simply brutalize the body. Thinkers like Davis and Alexander further reveal how the modern penitentiary system is driven by profit and has perpetuated systemic racism and new forms of social death. Placed in this light, calls to replace *ḥudūd* with Western-style incarceration risk swapping one modality of violence for another. This article has sought to foreground the vital distinction between regulating violence and eliminating it.

In sum, from a decolonial perspective, however well-intentioned, current *maqāṣid*-based reform approaches to the *ḥudūd* raise significant concerns. This article argues that the exclusive focus on *ḥudūd* penalties, and the assumption that they are the core problem needing "fixing" or suspension, reveals a form of epistemological capture by colonial narratives of Islamic law. In other words, calls for reform, despite being framed in Islamic terms, implicitly center a Western gaze that has long sensationalized *ḥudūd* while obscuring far more pervasive forms of violence in Muslim societies. These reform efforts inadvertently adopt a colonial lens by accepting the modern nation-state's terms of debate and its punitive logic. In doing so, they miss the deeper critique: that Islamic criminal justice, once situated in a very different societal and ethical

of designating a domain as "private" is itself a moral and political decision, shaped by the epistemology it claims to transcend.

matrix, has been distorted under the modern state's logic. This critique reframes *ḥudūd* not as outdated laws to be temporarily halted or modernized to appease liberal sensibilities, but as part of a legal-ethical canon whose operation and purpose (*telos*) historically centered on ethical subject formation rather than routine implementation. By contrast, it is the modern state's *taʿzīr* apparatus—expansive discretionary criminal codes, prisons, and police powers often inherited from colonial regimes—that functions as the primary site of systematic violence and repression in today's Muslim-majority contexts. In short, what needs urgent scrutiny and reform are not *ḥudūd* as isolated divine laws, but the modern political economy of punishment that has co-opted *taʿzīr* to perpetuate injustice.

Yet, my argument extends beyond the observation that the majority of state violence is enacted through *taʿzīr*, making the focus on *ḥudūd* an inefficient reform priority. While this is true, my critique is more fundamental: why the fixation on *ḥudūd* in the first place? Some readers may find this analysis unsettling, particularly those for whom corporal punishment is assumed to be inherently immoral. My argument challenges this epistemic certainty. The moral rejection of physical punishment is often presented not as a culturally contingent stance, but as an epistemic truth. Yet this view is undergirded by a liberal-secular moral epistemology, one that remains largely unacknowledged by its own adherents. It privileges a particular understanding of violence—one that assumes the primacy of bodily integrity in this world and sees little value in metaphysical accountability beyond it.[235]

Islamic law, by contrast, proceeds from fundamentally different ontological and epistemic premises. It does not treat earthly life as the ultimate horizon of meaning, but rather views it as part of a larger eschatological arc. In this framework, the preservation of public morality is not a form of authoritarian intrusion but a means of safeguarding the eternal well-being of individuals and communities. Public immorality—such as brazen

235 *See* Talal Asad, Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam 83 (1993), who notes the modern severance of bodily suffering from spiritual truth, a shift I extend to explain liberalism's restriction of violence to immediate bodily harm.

acts of *zinā* or intoxication—is thus not a morally neutral matter of private freedom; it is a form of violence, a potential site of spiritual and social destruction. Therefore, it is not a tolerated deviation but an impending soteriological harm whose full consequences, while potentially deferred to the hereafter, will take on a corporal and enduring form and the Islamic legal response to it is framed as a public ethical duty.

This leads to an important clarification, the *telos* of *ḥudūd* is not merely punitive but formational: they structure the moral grammar of the community by drawing sharp, sacred lines between tolerated private failing and corrosive public harm. Their application is intentionally rigorous and procedurally difficult, which creates a space for repentance and concealment of sin in the private sphere, while still preserving the law's disciplinary capacity when immorality becomes public, normalized, or defiant. The critique that *ḥudūd* are rendered toothless because they are structured with evidentiary thresholds that render their actual implementation exceedingly rare misses this point.

The *ḥudūd* reflect a principled and theologically coherent vision of law—one that sees public moral life as a site of ethical subject formation and communal responsibility. To critique them without accounting for their ontological and eschatological underpinnings is to misunderstand both their function and their philosophical foundations. Thus, the persistent emphasis on *ḥudūd* reveals an underlying frustration with the ethical framework they cultivate within the Muslim subject. Consequently, if the concern is humanitarian, then *ḥudūd* reform is pragmatically flawed. Structurally, this article demonstrates how current *ḥudūd* reform operates within a broader colonial logic, one that imposes modern liberal hegemonic values onto Muslim societies. These reformist projects are discursively framed through registers of progress, human rights, and modernity, positioning themselves as emancipatory while nonetheless reproducing the epistemic assumptions of neoliberal legality. In doing so, they participate in the production of a "good Muslim" subject—one aligned with neoliberal legal paradigms conducive to global capital, and governed through accountability to the modern nation-state rather than the divine.

Reassessing *Baghy* in Islamic *Fiqh*: Legislative Discrepancies and Normative Alternatives

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Abstract

The 2013 Islamic Penal Code of Iran marked a notable shift by categorizing baghy (armed rebellion) as a ḥadd crime for the first time, imposing the death penalty for acts perceived as undermining the Islamic Republic's foundation. Nonetheless, this legislation presents considerable legal ambiguities and strays from well-established Shīʿa fiqh *principles. The existence of conflicting* fiqhī *interpretations regarding similar actions has exacerbated the difficulties in legal understanding. This essay utilizes a normative approach rooted in ethical and* fiqhī *principles—such as exercising caution regarding life and property (*iḥtiyāṭ-i dar dimāʾ*) and safeguarding human dignity (*karāmat-i insānī*)—to advocate for reforms. It posits that baghy should no longer be classified as a ḥadd crime and calls for alternative strategies focused on negotiation, reconciliation, and leniency. By aligning the penal code with* sharīʿa *and human rights standards, these proposed reforms seek to address the legal and ethical dilemmas posed by the current laws.*

Introduction*

The concept of *baghy*,[1] referring to armed rebellion against the Islamic ruler,[2] has a long-standing tradition in Shīʿa *fiqh*. Although foreign legal scholars have primarily concentrated on practices like stoning within Iranian criminal law,[3] it is both valuable and essential to examine the crime of *baghy*. This offense, classified as a *ḥadd* (Islamic fixed penalties) crime against the state in the 2013 Islamic Penal Code, warrants a thorough and critical exploration of its legal and Islamic jurisprudential underpinnings. Scholars within the Shīʿa tradition have developed this concept by examining various Qurʾānic verses and narrations (*riwāyāt*) attributed to the Shīʿa Imams, particularly through the lens of Imam Ali's confrontations with his internal opponents in Islamic lands. Though the concept of *baghy* historically has been present in Shīʿa legal discussion, it was only formally integrated into the penal laws of the Islamic Republic in 2013. After the formation of the Islamic Republic of Iran, a new set of criminal laws was introduced, significantly replacing earlier statutes. This legislative process commenced in 1982 with the enactment of the "Law on Islamic Punishments." In the same year, complementary legislations were enacted, notably the "Law on *Ḥudūd* and *Qiṣāṣ*" and the "Law on *Diyat*." Following this, in 1983, lawmakers approved the "Law on the *Taʿzīrāt* and Deterrent Punishments." In 1991, the legislator unified the "Law on Islamic Punishments," the "Law on *Ḥudūd* and *Qiṣāṣ*," and the "Law on *Diyat*" into a cohesive legal structure known as the "Islamic Penal Code," which was organized into four distinct volumes.[4] Ultimately, in 2013, a revised edition of the "Islamic Penal Code" was enacted, preserving the original

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1 In this essay, the term "*baghy*" is used to specifically describe the offense, while "*baghī*" refers the individual committing the act of *baghy*.

2 Ibn Idrīs al-Ḥillī, 2 al-Sarāʾir al-ḥāwī li-taḥrīr al-fatāwī 15 (1989).

3 Antonia F. Fujinaga, *Islamic Law in Post-Revolutionary Iran*, *in* The Oxford Handbook of Islamic Law 630 (Anver Emon & Rumee Ahmed eds., 2018).

4 Bahman Khodadadi, On Theocratic Criminal Law: The Rule of Religion and Punishment in Iran 91 (2024).

four volumes—General Provisions, *Diyat*, *Ḥudūd*, and *Qiṣāṣ*—while significantly expanding its content, increasing the number of articles from 497 to 728.

Prior to the enactment of the Islamic Penal Code on Sunday, April 21, 2013, the legislator of the Islamic Republic often blurred the lines between the terms *baghy* and *muḥāraba* (waging war against God and His Messenger) in various sections of the legislation. While Articles 287 and 288 of the 2013 Islamic Penal Code explicitly categorize *baghy* as a separate crime, numerous activities that ought to be classified in this way are still prosecuted as offenses associated with *muḥāraba* under the 1996 Book Five of the Islamic Penal Code (*Taʿzīrāt* and Deterrent Punishments). This illustrates a prevailing inclination to classify certain criminal actions under the category of *muḥāraba* despite their distinct legal nature. For example, the provision in Article 675 of Book Five of the Islamic Penal Code, which was enacted on May 22, 1996, stipulates that committing arson with the intention of opposing the Islamic government is deemed punishable as *muḥāraba*. Likewise, Article 22 of the 2003 Law on the Punishment of Armed Forces Offenses operates on the premise that there is no difference between *muḥāraba* and *baghy*, declaring: "Any military personnel who engages in armed actions against the Islamic Republic of Iran shall be classified as *muḥārib* (the perpetrator of the crime of *muḥāraba*)."

The Islamic Penal Code mandates the death penalty for those who commit *baghy*. However, it is important to note that Shīʿa *fiqh* typically does not categorize *baghy* as a *ḥadd*, which refers to fixed religious punishments.[5] This distinction holds great importance because in Shīʿa thought, *ḥadd* punishments are viewed as divine mandates. As such, their definitions and implementations cannot be modified by any authority.[6] Nevertheless,

5 Abolfazl Chehreʾi, Mafhūm-i fiqhī va ḥuqūqī-yi jarāʾim-i ḥaddī ʿalayh-i amniyyat va ḥākimiyyat (muḥāraba, ifsād fī al-arḍ, va baghī) 238 (2020).

6 Since the adoption of the initial penal code after the Islamic Revolution—the Law on Islamic Punishments, approved on October 13, 1982—until the approval of the Islamic Penal Code on April 21, 2013, the legislators of the Islamic Republic have maintained a consistent definition of *ḥadd* punishments. These punishments are classified as offenses with their definitions, designated penalties, and meth-

certain *fatāwā* (religious opinions) in Shīʿa *fiqh* liken *baghy* to the offense of *muḥāraba*, reinforcing the idea that *baghy* might be considered among the *ḥudūd* punishments.[7] It is evident that both before and after the enactment of the Islamic Penal Code in 2013, the Islamic legislator adopted the most stringent interpretations of *baghy*. In some instances, the lawmaker has even broadened the definition of *baghy* beyond the limits set by *fiqh*, applying it to actions that, by the standards of Shīʿa tradition, do not fundamentally qualify as *baghy*.

The 2013 Islamic Penal Code takes a more varied approach to *ḥudūd* compared to its 1991 predecessor. Notably, the list of specified *ḥudūd* offenses has expanded from eight to twelve.[8] Additionally, Article 220 in the 2013 Penal Code clearly asserts for the first time that the offenses listed are not exhaustive; judges must refer to *sharīʿa* for any other *ḥudūd* offenses recognized within Islamic law: "Regarding the *ḥadd* punishments that are not mentioned in this law, Article 167 of the Islamic Republic of Iran's Constitution shall be applicable." For instance, although the 2013 Islamic Penal Code does not classify apostasy (*irtidād*) as a criminal offense, Article 220 refers the courts to *sharīʿa* for guidance. As Bahman Khodadadi notes in *On Theocratic Criminal Law*, this provision has not only generated theoretical tensions with certain constitutional principles but has also introduced practical complications in criminal procedures.[9]

It is worth noting that Shīʿa *fiqh* does not provide a uniform definition of apostasy, and the religious opinions of jurists

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ods of enforcement strictly outlined in *sharīʿa*, offering no flexibility for modification by legislative bodies.

7 Al-Sayyid al-Sharīf al-Murtaḍā, 1 al-Intiṣār fī infirādāt al-Imāmiyya 478 (1994).

8 The evolution of Iran's Islamic Penal Code between 1991 and 2013 reveals a notable reorganization of specific *ḥadd* offenses. This is particularly evident in the separation of previously combined crimes like *muḥāraba*, *baghy*, and *ifsād fī al-arḍ*. Additionally, the Code formally acknowledges new offenses such as *tafkīdh* and *sabb al-nabī* as distinct categories with clearly defined penalties. This shift reflects a wider movement toward increased codification and legal clarity within Islamic criminal law.

9 Khodadadi, *supra* note 4, at 59–66. For further critical discussion on Article 167 of the Iranian Constitution, see Bahman Khodadadi, *Nowhere but Everywhere: The Principle of Legality and the Complexities of Judicial Discretion in Iran*, 57 Iranian Stud. 651 (2024).

on this matter vary considerably. Article 167 of the Constitution of Iran addresses the judicial process and identifies the legal sources judges must consult when issuing their rulings. It mandates that judges ground their decisions in established codified laws. When specific legislation is absent, they must refer to authoritative Islamic sources (*sharīʿa*) and valid *fatāwā*. This provision affirms the central role of Islamic law as a key component of the legal framework in Iran. The ruling discussed in this essay has encountered considerable criticism, primarily due to its conflict with the principle of legality concerning crimes and punishments. While some interpretations suggest that Article 167 ought to be excluded from discussions of criminal matters, particularly regarding crimes and their corresponding penalties, as supported by Article 36 of the Constitution, Article 220 of the Islamic Penal Code of 2013 has clarified this ambiguity by invoking Article 167.[10] Article 220 appears to subtly suggest a policy that permits the sentencing of individuals for all Islamic *ḥudūd* as described in Islamic jurisprudential authorities, yet it does not explicitly list them all. This omission likely stems from various considerations, the most significant of which are the concerns related to socio-political issues and human rights at both the national and international scales.

This essay recognizes the variety of *fatāwā* and the numerous schools of thought within the *fiqhī* system. The goal is to demonstrate that by acknowledging the equal religious significance of various *fatāwā*, it becomes possible to highlight how certain *fiqhī* perspectives can justify the prioritization of some *fatāwā* over others, particularly in the context of criminal law and human rights, all while remaining faithful to the traditional *fiqhī* framework. Unlike the conventional approach, the notion of "end-oriented Islam" emphasizes the importance of contextualizing religious rulings by taking into account the specific time and place in which they are applied.[11] This approach, despite lacking *fiqhī* authority, advocates for a broad methodological revolution in Islamic legal thought. Conversely, this essay aims to illustrate how it is possible to stay true to the fundamental

10 Khodadadi, *supra* note 9, at 660–61.

11 Mohsen Kadivar, Human Rights and Reformist Islam 11 (2008).

interpretations of *fiqh* while navigating the selection of various *fatwā*s—an inherently non-*fiqhī* decision. It emphasizes the importance of prioritizing those *fatwā*s that align with human rights all while maintaining harmony within political and religious frameworks. The process of selecting from a variety of *fatāwā* is fundamentally a matter of broader policy and governance rather than a simply religious endeavor.[12] Nonetheless, this approach should not be perceived as entirely secular or devoid of religious context. In the absence of Imam Mahdi, a functioning Islamic government must navigate various *fatāwā*, which can occasionally contain conflicting principles and regulations. Consequently, the prioritization of certain principles and rules to guide the selection of *fatwā* is not only permissible (*mubāḥ*) under *sharīʿa* but is also beneficial, as it fosters the structural coherence and predictability that are vital for a well-functioning legal system. Thus, it seems that if lawmakers were to adopt principles like caution in Muslim property matters, moderation in the use of bloodshed (*iḥtiyāṭ-i dar dimāʾ*),[13] and respect for human dignity (*karāmat-i insānī*),[14] while choosing *fiqhī* opinions, there would be considerable potential for reform in Islamic criminal law, especially concerning *ḥadd* offenses.

The discussion begins with an exploration of the legal notion of *baghy* as defined by the 2013 Islamic Penal Code. It delves into the key components of this concept while addressing any legal and *fiqhī* uncertainties that arise. The aim is to evaluate the implementation of judicial practices and, in cases where ambiguities or legislative voids are identified, to reference established religious views for added clarity. Subsequently, the essay

12 Mathias Rohe, in referencing Imam Tareq Oubrou, interprets that Muslim jurists in the West must adhere to a specific policy when issuing *fatāwā*, such as the idea that "the application of the *fatwā* has to fit into the ruling legal framework." Mathias Rohe, *On the Applicability of Islamic Rules in Germany and Europe*, 3 Eur. Y.B. of Minority Issues Online 193 (2003).

13 For an analysis of the impact of this principle on the reduction of capital punishments, see Mohsen Borhani & Mohammadamin Radmand, *Taḥlīlgarāʾī nisbat ba mujāzat-hā-yi sālib-i ḥayāt dar ḥuqūq-i kayfarī-yi Īrān*, 26 Faslnāma-yi ʿIlmī-yi Rahbard 308–28 (2017).

14 For an article that examines the concept of human dignity in *fiqh* and the Constitution of the Islamic Republic of Iran, see Hamidreza Asimi, *Human Dignity in the Islamic Republic of Iran: An Analysis from a Constitutional and Fiqhi Perspective*, 27 Quaderni di Diritto e Politica Ecclesiastica (Speciale) 131–46 (2024).

places *baghy* within the context of traditional Islamic *fiqh*, highlighting how carefully selected *fatāwā* from this tradition can be integrated into Iran's Islamic Penal Code.

Baghy in the 2013 Islamic Penal Code

In the 2013 Islamic Penal Code, the legislator of the Islamic Republic addresses the offense of *baghy* along with its corresponding penalties in Articles 287 and 288. Article 287 stipulates: "A group that engages in armed rebellion against the foundation of the Islamic Republic of Iran is considered *baghī*, and if they use a weapon, the individuals involved shall face the death penalty." In the meantime, Article 288 states that If individuals belonging to a *baghī* group are captured before they begin to combat and utilize weapons, they will face a *third-degree taʿzīrī* imprisonment, provided that the group's structure and leadership are still active. Conversely, if the organization and its leadership have been dismantled, they will receive a *fifth-degree taʿzīrī* imprisonment. Although Article 288 concerns an attempted crime, its inclusion under the discussion of *baghy* and within the chapter on *ḥudūd* necessitates an examination of both provisions here.

1. The Elements of the Crime of Baghy *in the 2013 Islamic Penal Code*

The actus reus of the crime outlined in Article 287 is a positive act. Therefore, omissions, such as a refusal to pledge loyalty to the Islamic government or the ruler (*bayʿa)*, cannot constitute *baghy*. This offense is characterized by armed rebellion carried out by a group, targeting the governmental system of the Islamic Republic of Iran. Additionally, *baghy* is a conduct crime, meaning that it does not require a particular result for it to occur. While the statute does not explicitly mention the required specific intent, it appears that it is to overthrow the ruler or the Islamic government, regardless of any particular motive. While Article 287 is regarded as ambiguous in several ways, Article 288—dealing with the non-*ḥadd* and *taʿzīrī* elements of

baghy—presents even greater uncertainty. This essay addresses the circumstances in which members of a rebel group are apprehended prior to any combat or weapon usage. It distinguishes between two specific scenarios: a) when the group's leadership and structure have been dismantled, and b) when the leadership and organization remain unbroken. Following this analysis, the essay recommends appropriate *taʿzīrī* punishments based on these differing situations.

Alongside the conduct of rebellion, certain conditions must be fulfilled regarding the circumstances of the actus reus. These circumstances, however, may appear somewhat ambiguous and open to varying interpretations. Firstly, it must be committed by a "group," secondly, the rebellion must be "armed," and lastly, the armed rebellion of the group must be against the "foundation of the Islamic Republic of Iran." Additionally, phrases such as "before engaging in combat and using weapons" also lack clarity. To address these ambiguities and offer more clarified interpretations, it is essential to consult other Articles of the Penal Code as well as Shīʿa *fiqh*.

2. Legal Ambiguities

The first ambiguity pertains to the requirement of "group armed rebellion," indicating that the crime of *baghy* cannot be committed by an individual acting alone. Nevertheless, the legislator does not specify the minimum number of participants necessary to constitute the offense of *baghy* within this provision. To clarify this issue, one can look to other legal statutes for guidance. Specifically, Article 130 of the 2013 Islamic Penal Code, Article 498 of the 1996 Book Five of the Islamic Penal Code (*Taʿzīrāt* and Deterrent Punishments), and Article 19 of the 2003 Law on Punishments for Armed Forces Personnel all establish that a minimum of three individuals is required to form a criminal group. Consequently, one can conclude that, according to Article 287 of the 2013 Islamic Penal Code, the crime of *baghy* requires a minimum of three individuals who collectively intend to participate in an armed rebellion against the foundation of the Islamic Republic of Iran. Even though, in Articles 610 and

611 of the 1996 Book Five of the Islamic Penal Code, the law stipulates that the involvement of two individuals is adequate to establish a conspiracy. Additionally, in a related context, if the actions of these individuals do not fulfill the requirements for *muḥāraba*, their offenses are categorized as *taʿzīrī*, subject to discretionary punishment.[15]

Another area of ambiguity relates to the phrase "the foundation of the Islamic Republic." Within the framework of *fiqh*, alternative terms like "armed rebellion against a just (*ʿādil*) Imam" are frequently employed. As a result, some scholars have interpreted "the foundation" of the system to signify the protected position of the guardianship of clergy (*wilāyat-i faqīh*) in this Article. Notably, this interpretation—restricting the definition of the crime of *baghy* to armed insurrection specifically against the guardianship of clergy—appears consistent not only with *fiqh* but also with Article 5 of the Constitution. This essay assigns governance during the absence of Imam Mahdi to a just *faqīh*. Furthermore, this viewpoint effectively excludes a range of actions, such as armed rebellion against other branches of government—like the executive—or threats to the nation's territorial integrity from being subject to the death penalty associated with the crime of *baghy*.

The following ambiguity relates to the necessity for the rebellion to be deemed "armed." For the offense of *baghy* to occur, it must include the use of a weapon. Nevertheless, the precise meaning of "weapon" within this context remains uncertain. The legislator has not provided a broad or comprehensive definition of a weapon applicable across all laws and articles, either in the Islamic Penal Code or in special laws. For example, in the 2008 amendment to Article 651 of the 1996 Book Five of the Islamic Penal Code (*Taʿzīrāt* and Deterrent Punishments) regarding theft, the legislator defines "weapon," but restricts its application solely to "this clause." Moreover, the definition of a weapon outlined in this clause is quite expansive, covering a diverse array of tools, including "knives" to "firearms crafted specifically

15 In a less widely recognized *fatwā* by Shahīd-i Thānī, the presence of even a single individual is considered sufficient to constitute *baghy*. *See* Al-Ameli Shahīd Thānī, Zayn al-Dīn b. ʿAlī, 2 al-Rawḍa al-bahiyya fī sharḥ al-Lumʿa al-Dimashqiyya 407 (1989).

for tranquilizing animals" and guns designed for hunting aquatic creatures. Similarly, Article 2 of the 2011 Law on the Punishment for Trafficking of Arms and Ammunition, as well as the Possession of Unauthorized Arms and Ammunition, confines the definition of "weapon" specifically to the scope of that law. However, the majority of legal scholars in Iran tend to favor a broad interpretation of what constitutes a weapon, as outlined in the note to Article 651 of Book Five of the 1996 Islamic Penal Code (*Taʿzīrāt* and Deterrent Punishments). In addition to the conventional understanding of a weapon, which includes items such as knives and swords, their rationale is also supported by *fiqhī* texts that make specific mention of swords. Nevertheless, if we postulate that there exists a logical connection between "armed rebellion" and the capacity to jeopardize or topple a government, it is challenging to comprehend how a revolt led by merely three individuals equipped only with swords could feasibly pose a threat to the stability of the government. Alternatively, some legal scholars, focusing primarily on the intent to overthrow the Islamic Republic, interpret the "armed" aspect of *baghy* in a broader, figurative sense. They argue that by referencing instances from various Eastern European nations and the concept of "color revolutions," even a "soft overthrow (*barāndāzī-yi narm*)"—which refers to a cultural and ideological challenge aimed at undermining the fundamental principles and values of the system—might fulfill the requirements of *baghy*, as long as it is executed with the intentional goal of overthrowing the government.[16]

The forthcoming challenge revolves around defining what qualifies as "armed rebellion." Does a group need to be actively involved in military operations for it to be governed by Article 287 of the 2013 Islamic Penal Code, or is simply declaring an armed conflict or openly expressing an intention to engage in such actions adequate, provided the group is organized? Regarding this matter, some lawyers contend that direct participation in military action is not an essential requirement for the classification of armed rebellion. They maintain that

16 Mohammadsadegh Iran-Aghideh, Alireza Saberian & Seyyed Ali-Jabbar Golbaghi-e Masule, *Imkān-sanji-yi jurm-angāri-yi barāndāzī-yi narm-i niẓām-i Islāmī ba ruykard ba mahfhūm-i baghī*, 69 Faslnāma-yi pajūhash-hā-yi fiqh va ḥuqūq-i Islāmī 29–51 (2022).

simply declaring a war or expressing opposition with armed intentions is adequate to satisfy the standards for being considered as *baghy*.[17] Therefore, even if these individuals are apprehended before any actual conflict, they would still be considered *baghī*; however, their punishment would differ from those who have actively participated in armed confrontations. The opposing view maintains that the use of weapons and direct confrontation with government forces is crucial for defining the crime of *baghy*.[18] This perspective aligns with the dominant view in Shīʿa *fiqh*, as most Shīʿī jurists hold that the Islamic state should not initiate hostilities against rebels and does not have the right to engage with them until they have actively taken up arms.[19]

An additional point of uncertainty could emerge concerning the classification of a group if certain individuals resort to the use of weapons. Specifically, the question arises as to whether all members of the group should be labeled as *baghī* and face the death penalty. If we interpret "armed rebellion" as a defining trait of the entire group rather than attributing it solely to individual participants, we must acknowledge that, under these circumstances, every member of the group would be deemed *baghī* and could be subjected to the death penalty. Conversely, another viewpoint, which relies on *fiqhī* texts and appears to diverge from a strict interpretation of the law, posits that according to *fiqh*, there is a consensus (*ijmāʿ*) among Islamic jurists that only those individuals who are actively engaged in combat on the battlefield and are armed should be classified as *baghī*. This perspective has occasionally been endorsed by judges in Iran. For instance, during a judicial assembly convened by the Kamyaran judiciary in Kurdistan Province on December 5, 2019, the High Judicial Council stated that the *ḥadd* penalty of execution would apply exclusively to those who have engaged in the use of weapons.[20] This

17 Mohammad Mosaddegh, Sharḥ-i qānūn-i mujāzāt-i Islāmī ḥudūd 405 (2018).

18 Hossein Mir-Mohammad-Sadeghi, 2 Ḥuqūq-i jazā-yi ikhtiṣāṣī (3): jarāʾim ʿalayh-i maṣlaḥat-i ʿumūmī-yi kishvar 163 (2020).

19 Hasan b. Yusef Allame Helli, 1 Tadhkirat al-fuqahāʾ 452 (1993).

20 The statement can be accessed at https://neshast.eadl.ir/Home/GetPublicJSessionTranscript/cbdcc9a4-2962-4d79-ce65-08d7b819ef72 (last visited May 29, 2025).

stance was reaffirmed by the High Judicial Council at a gathering of judges in Anzali, Gilan Province, on August 11, 2020.[21] As a result, it seems that judicial trends are increasingly favoring the imposition of the death penalty solely for individuals who have directly engaged in the use of weapons.[22]

The implications of this interpretation raise uncertainties about how the law addresses the leader of a *baghī* group. If we assert that only individuals who take part in armed conflict are subject to the death penalty, then the leader would only be liable for this punishment if they directly engaged in the fighting. Conversely, Article 130 of the 2013 Islamic Penal Code does allow for the potential imposition of *ḥadd* punishment on the leader of a criminal organization. It states:

> Any individual who takes on a leadership role within a criminal organization will face the maximum penalties associated with the most serious offenses committed by the group's members in pursuit of their goals. This is applicable unless the offense in question warrants a *ḥadd*, *qiṣāṣ*, or *diya*, in which case the leader will receive the maximum sentence designated for accomplices in that crime. Furthermore, in instances of *muḥāraba* or *ifsād fī al-arḍ* (corruption on earth), if the leader is labeled as a *muḥārib* (one who wages war against God and His Messenger) or *mufsid fī al-arḍ* (a perpetrator of widespread corruption on earth), they will be subjected to the appropriate penalties associated with those titles.

21 The affirmation can be accessed at https://neshast.eadl.ir/Home/GetPublicJSessionTranscript/f7b6197d-17a0-4430-9ae0-08d853a62b1d (last visited May 29, 2025).

22 The questions are first directed to the judges within the respective county. The responses gathered are then categorized into majority and minority opinions before being forwarded to the Central Secretariat in Tehran. In judicial meetings, the term "High Judicial Council" refers to a group of senior judges, who work within the Judicial Training Center. This Council is responsible for reviewing the decisions from judicial meetings across the country and issuing final opinions on them. In both cases mentioned in this section, the High Judicial Council embraced the minority opinion of the judges to be correct. However, while these opinions are influential, they do not create binding obligations for judges to follow.

Before 2013, the legislation of the Islamic Republic adopted a more expansive interpretation of *baghī* in the context of *muḥārib* and *mufsid fī al-arḍ*. In certain instances, it also outlined specific punishments for those who led criminal organizations. For example, Article 198 of the 1982 Law on *ḥudūd* and *qiṣāṣ* pertains to those who take part in armed insurrection against the Islamic government. It specifies that "any individuals and their supporters who are aware of the activities of such a group or organization and actively assist in achieving its objectives, even if they are not involved in its military operations, are classified as *muḥārib*." According to this provision, the group's leader would also face the death penalty. Furthermore, Article 200 of the same law states that anyone who puts themselves forward for a significant role in a conspiracy to topple the Islamic government, and whose actions contribute in any way to the success of the coup, will be sentenced to death.[23] From a straightforward interpretation of existing laws, it seems that if the actions of a leader in a *baghī* group do not fulfill the material elements for the crime of *baghy*, they cannot be subjected to the death penalty, even if their subordinates are sentenced to execution. Additionally, by a similar line of reasoning, supporting members and, broadly speaking, anyone who has not engaged directly in combat but is still associated with the *baghī* group would also be spared from the death penalty. However, the prevailing opinion holds that, at the very least, all participants in an armed conflict, regardless of whether they directly engaged with a weapon, could face the death penalty. Some legal scholars, moving away from conventional *fiqhī* texts and leaning toward a discourse centered on national security that targets enemies, have sought to redefine *baghy* as an action that excludes an individual from the sphere of citizenship.[24]

23 The 1991 Islamic Penal Code reiterated the above two articles in Articles 186 and 188. The key distinction in this updated code was the clarification that *ḥadd* punishment would be enforced only if the core organization of the group remained cohesive.

24 Mahdi Rajaei & Abbas Kaʿbī, *Māhiyyat-i fiqhī-yi jarāʾim-i amniyyatī va sāzmānyāfta va nisbat-i ān bā aṣl-i barāʾat-i kayfarī*, 16 Faslnāma-yi muṭālaʿāt-i fiqh va ḥuqūq-i Islāmī 80 (2024).

According to Article 288 of the 2013 Islamic Penal Code, the penalties for individuals belonging to a *baghī* group—who are not subjected to the death penalty—vary based on the group's organizational integrity. In cases where the group's structure and leadership continue to exist, the members face third-degree *taʿzīrī* imprisonment, which may extend from over ten years to a maximum of fifteen years. Conversely, if both the organization and its leadership have disbanded, the punishment is mitigated to fifth-degree *taʿzīrī* imprisonment, with a duration of more than two years but not exceeding five years.[25] The difference in sentencing related to the status of a *baghī* group's structure and leadership finds its roots in Shīʿa *fiqh*. Nonetheless, in this case, the lawmaker seems to move beyond the *fiqhī* framework, imposing a higher level of liability on the members of the group. The expansive wording of the statute encompasses situations in which individuals may not have participated in any form of armed conflict. *Fiqhī* sources indicate that once the central organization and backing of such a group have been dismantled, there is no justification for pursuing or punishing those who desert the battlefield, effectively eliminating any reasons for their punishment.[26] Jurists often highlight Imam Ali's approach during the Battle of Jamal,[27] where rather than chasing down those who had retreated, he prioritized the safety of Aisha, the Prophet's wife, and a key opposition leader, ensuring their protection from retribution.

25 According to Advisory Opinion of the Judiciary No. 7/95/2364–2016/12/13, simply expressing ideological support or aligning oneself with such groups, without engaging in any tangible actions, does not amount to a crime.

26 For example, after Imam Ali's battle with *khawārij-i baghī* group and the subsequent disbanding of their group, he remarked: "Refrain from combating the *khawārij* in my absence (do not kill them), for the one who earnestly pursues the truth but fails to find it is not to be equated with someone who chases after falsehood and succeeds." The report can be accessed at https://www.hadithlib.com/hadithtxts/view/301581 (last visited May 29, 2025). The *khawārij* were a group that, after initially accepting the leadership of Imam Ali, eventually took up arms against him for various reasons.

27 For an account of this battle, refer to *Battle of the Camel*, Encyclopaedia Britannica, https://perma.cc/3H99-EURN.

Referring to Minimalist *Fatāwā* in *Fiqh*

Had the Islamic legislator adopted the approach advocated in this essay—emphasizing caution in handling Muslim property, moderation in bloodshed, human dignity, and human rights values to limit the scope of criminalization and, notably, to avoid capital punishment—diverse *fiqhī* alternatives would have emerged. These alternatives could encompass a complete decriminalization of *baghy* in the Penal Code or significant alterations to the criteria that define *baghy* and its related penalties.

1. Complete Ḥadd *Decriminalization*

The classification of *baghy* as a crime within the *ḥudūd* provisions of the 2013 Islamic Penal Code seems to be largely influenced by a minority *fatwā* issued by certain notable scholars. Shahīd-i Thānī (d. 965/1557), who upheld a stringent interpretation of *baghy*, argued that even the mere presence of one person could be enough to define the act of *baghy*. He advocated for the death penalty for those found guilty, particularly in the context of warfare.[28] The majority opinion among Shīʿī jurists does not consider *baghy* to be a *ḥadd* offense. This leads to the argument that there is not only a lack of persuasive reasons for classifying *baghy* as a *ḥadd* crime, but also several grounds for either decriminalizing it or reclassifying it under *taʿzīrāt*.[29] Seyyed al-Murtaḍā (d. 436/1044), another prominent Shīʿī scholar, examines the concepts of *baghy* and *muḥāraba* alongside each other, aiming to soften the intensity of confrontation with a *baghī* group by citing narrations from the Prophet of Islam. For instance, he notes that the Prophet instructed his followers to take up wooden swords when dealing with *baghī* groups. In another example, he recounts a narration from a companion of the Prophet, in which the Prophet recommended crafting a sword from the branch of a date palm for use in times of discord among Muslims.[30] Alternatively, one might view *baghy* and its regulations not as elements

28 Thānī, *supra* note 15, at 407.
29 Al-Ḥillī, *supra* note 2, at 15.
30 Al-Murtaḍa, *supra* note 7, at 478.

of penal law, but as issues concerning behavior in the context of internal strife or civil war between a group of Muslims and the ruling authority.

The general framework governing Shīʿa *fiqh* further reinforces the notion that the dominant *fiqhī* view does not seek to define *bagy* as a *ḥadd* offense. For instance, while *ḥudūd* punishments are typically viewed as non-negotiable, with *fuqahāʾ* often emphasizing the *ḥudūd* obligatory nature based on sacred texts without assigning additional rationale, the approach to *baghy* is markedly different. In situations involving a *baghī* group, jurists highlight the importance of dialogue and addressing the uncertainties expressed by the rebellious group. The main aim is to eliminate division (*rafʿ-i fitna*) within the Muslim community, with the use of force considered a measure of last resort. Sheikh Ṭūsī (d. 460/1067) distinctly states that confronting a *baghī* group is intended to prevent harm rather than to exact punishment.[31] This viewpoint resonates more strongly with the Qurʾānic foundation for *baghy* found in verse 9 of Sūrat al-Ḥujurāt. In this verse, engaging in warfare against a rebellious armed faction is considered necessary and justifiable, but only as long as that faction continues its hostilities.[32] After the end of hostilities, the Qurʾān calls for peace and the pursuit of justice. For this reason, certain Shīʿī scholars have explicitly opposed the use of heavy weaponry, such as catapults and fire, arguing that the objective of engaging with rebels is not their annihilation but rather the restoration of order.[33] Allameh Helli, elsewhere, prohibits launching surprise night raids against *baghī* groups and forbids the involvement of non-Muslim soldiers in the Islamic ruler's army, reasoning that they might kill retreating members of the *baghī* group and act mercilessly toward them.[34]

31 Abū Jaʿfar al-Ṭūsī, 7 al-Mabsūṭ fī fiqh al-Imāmiyya 274 (2008). Sheikh al-Ṭūsī subsequently draws a parallel between combating a *baghī* group and the principle of legitimate self-defense. *Id.* at 279.

32 Verse 9 reads: "If two groups of believers find themselves in conflict, strive to mediate and bring about peace between them. However, if one group is unjustly harming the other, then take a stand against the oppressor until they adhere to the commands of Allah. If they do return to righteousness, then reconcile between them fairly and with justice. Truly, Allah cherishes those who uphold fairness and justice."

33 Helli, *supra* note 19, at 455.

34 *Id.* at 457.

This perspective clearly suggests that individuals belonging to a *baghī* group are not subject to *ḥudūd* crimes and their corresponding penalties. The *fatāwā* in question clearly weaken the enforcement of Article 288 of the 2013 Islamic Penal Code, which outlines the punishments for individuals who are detained prior to any armed conflict.

According to Shīʿa *fiqh* sources, the crime of *baghy* is mainly associated with events that occur on the battlefield. Notably, Imam Ali consistently sought to engage in discussions with rebels prior to resorting to warfare. Specifically, in situations where Imam Ali initiated negotiations, the rebels were already prepared for conflict. This raises an important point: if their mere readiness for battle was considered a violation of religious law or deserving of punishment (*ḥadd or taʿzīr*), then an Islamic ruler's initiative to negotiate and advocate for peace would appear to be contradictory. Therefore, the prevailing *fatwā* maintains that the actions of a *baghī* group do not fall under the category of *ḥadd* punishment. Additionally, it implies that if members of the *baghī* group refrain from participating in combat for any reason, they would be exempt from criminal liability.

2. Additional Religious Conditions for the Realization of Baghy

The majority of Islamic jurists perceive *baghy* as an act of resistance against a just ruler. This perspective differs from certain *fatāwā* that limit the concept of *baghy* to situations involving an infallible (*maʿṣūm*) Imam or an individual designated by him.[35] As a result, an armed uprising against an oppressive leader would not fall under the category of *baghy*.[36] However, when compared to the Islamic Penal Code of the Islamic Republic of Iran, Shīʿī jurists have stipulated further requirements for an act to be considered *baghy*. Essentially, three additional *fiqh*-related conditions can be identified that differentiate

35 The embrace of this viewpoint by Shīʿī jurists during the time of Imam Mahdi's occultation indicates that the enforcement of *sharīʿa* punishments in his absence is considered forbidden.

36 Helli, *supra* note 19, at 451.

the concept of *baghy* from the criteria established in the 2013 Islamic Penal Code:

(a) Having adequate strength to present a threat to the Muslim ruler: Numerous Islamic scholars assert that the *baghī* faction must have a substantial number of supporters and resources, to the extent that the danger they represent can only be addressed through warfare and significant expense.[37] Thus, if the *baghī* group is small in number or lacks sufficient resources to challenge a just Muslim ruler, they cannot be classified under *baghy* regulations. This situation directly influences the criteria that determine what constitutes armed rebellion and the use of weapons in the context of *baghy*. As a result, the definition of a criminal group outlined in the 2013 Islamic Penal Code seems to diverge from the religious criteria related to the ability to instigate an overthrow. The *baghī* group must possess a substantial size that poses a credible threat to the stability of the government through armed insurrection. Moreover, the concept of "armed rebellion" cannot be applied to all types of weaponry; it is unrealistic to think that one could successfully overthrow a modern state using outdated weapons like swords or even basic firearms such as pistols.

(b) Physical departure from the domain of government authority: Certain jurists, upon examining the historical interactions of Imam Ali with rebellious factions, have reasoned that an armed group must initially detach itself from the authority of the ruler. This involves moving to a location that lies beyond the government's influence, where they can organize and prepare their forces for an attack aimed at usurping power from the ruler.[38] In fact, each of Imam Ali's battles with *baghī* groups—namely, the Battle of Ṣiffīn[39], the confrontation with the *khawārij*,

37 Al-Ḥillī, *supra* note 2, at 15.

38 Helli, *supra* note 19, at 452.

39 *See Battle of Siffin*, Encyclopaedia Britannica, https://perma.cc/9MFA-YBT6.

and the Battle of the Jamal—took place outside the Islamic capital, at a point when these adversaries had actively gathered their armies with the intent to march on and seize the center of the caliphate.[40]

(c) Requirement of negotiation and the Muslim ruler's obligation to address doubts: Certain jurists have posited that the rationale behind a *baghī* group's armed rebellion lies in their religious interpretations or justifications. Imam Ali, when speaking about the *baghī* group, characterized them as those who, in their quest for righteousness and truth, ultimately strayed from the right path. Considering Imam Ali's actions, certain jurists have argued that before launching an offensive against a rebellious group, it is essential to engage in dialogue with them and address their misconceptions.[41] Furthermore, if any of their rights have been wrongfully violated, their concerns must be addressed.[42] This viewpoint likely explains why jurists have also forbidden ambushes against these groups.[43]

3. Handling of Captives and Those Who Flee

The established *fatāwā* within Shīʿa *fiqh* outline specific guidelines for managing individuals who desert a battle and those who are detained. The prevailing view is that, in general terms, if the support system, leadership, and organizational framework of a rebellious group are dismantled, no member of that group should be executed. Alongside the consensus of prominent Shīʿī jurists, Allame Helli issued a *fatwā* stating that, upon the defeat of a *baghī* group, captives must be released even if they refuse to pledge allegiance to the Islamic ruler. Additionally, many Islamic jurists believe that, aside from *qiṣāṣ*, no further liability rests upon members of a *baghī* group. However, some jurists,

40 Sheikh Ṭūsī refers to a narration where a man, standing outside the mosque and insulting Imam Ali while he was delivering a sermon, held a sword. Imam Ali addressed those present, saying that the individual's life was safe and his share from the public treasury remained secure. *See* Ṭūsī, *supra* note 31, at 264.

41 Helli, *supra* note 19, at 455.

42 Ṭūsī, *supra* note 31, at 264.

43 Helli, *supra* note 19, at 457.

referencing Imam Ali's conduct, have expressed doubts on this matter, considering the end of hostilities as the conclusion of all enmities, thereby ruling out any further punishment for members of the *baghī* group.[44] However, if support remains or there is leadership capable of reorganizing them, the captives are to be executed, and those who flee are to be pursued and killed.[45] Despite the latter opinion, there are *fatāwā* in *fiqh* that advocate for a more lenient approach towards captives taken while the war is still ongoing or while the leadership and support structure of the rebellious group remain intact, which will be discussed in greater detail below.

a) Absolute Prohibition on Executing Women, Children, and the Elderly

There is consensus among jurists regarding the prohibition of executing women, children, and the elderly. The main point of contention lies in whether it is permissible to imprison them. In his work *al-Khilāf*, Sheikh Ṭūsī cites a narration from the Prophet of Islam stating that imprisoning these individuals is not allowed, even if they have actively participated in combat.[46] Moreover, Allame Helli issues a *fatwā* stating that the capacity to fight is a determining factor, and anyone who, if released, would lack the ability to fight must be set free in all cases.[47]

b) Prohibition of Execution and Killing of Captives

Sheikh Ṭūsī, in his work *al-Mabsūṭ*, asserts that individuals captured from a rebellious group should be freed if they discontinue their armed resistance against the government,[48] a view similarly

44 *Id.*

45 In *Riyāḍ al-Masāʾil*, Seyyed ʿAlī al-Ṭabāṭabāʾī (d. 1231/1815) acknowledges that the narrations supporting this *fatwā* are historically weak in terms of authenticity but argues that the longstanding endorsement of these narrations by Islamic jurists compensates for their weak chains of transmission. Sayyid ʿAlī al-Ṭabāṭabāʾī, 7 Riyāḍ al-masāʾil fī bayān aḥkām al-sharʿ bi-l-dalāʾil 461 (1991).

46 Abū Jaʿfar al-Ṭūsī, 5 al-Khilāf fī al-aḥkām 341 (1963).

47 Helli, *supra* note 19, at 456.

48 Ṭūsī, *supra* note 31, at 271.

held by Allame Helli.[49] Sheikh Ṭūsī further issues a *fatwā* that if the captives do not agree to disarm and the Islamic ruler has not yet secured victory over the rebels, they are to remain in prison until the war comes to an end. Nevertheless, once the ruler prevails, these individuals must be released, irrespective of their affiliations.[50] Furthermore, in his works *al-Mabsūṭ*[51] and *al-Khilāf*,[52] Sheikh Ṭūsī states that individuals who have fled from the *baghī* faction should not be pursued if they do not plan to return to their support network. He further argues that an Islamic ruler should refrain from including soldiers in his forces who are inclined to harm these escaping rebels.[53]

The multiplicity of jurists' *fatāwā* regarding the execution or non-execution of captives in situations where the outcome of the war remains uncertain likely arise from differing interpretations of religious texts. Consequently, Seyyed Abū al-Qāsim al-Khoei (d. 1992) has stated that there is no conclusive evidence in *sharīʿa* that dictates whether captives should be killed or spared. Ultimately, he argues that the authority to make such decisions lies with the Muslim ruler.[54] This viewpoint implies a permissibility and authorization for the Islamic government to issue a death sentence, which conflicts with the *sharīʿa* principle that cases warranting capital punishment must be explicitly stipulated (*manṣūṣ*) in *sharīʿa*. Furthermore, it contradicts the principle that the Islamic state has no guardianship over its subjects.[55]

49 Helli, *supra* note 19, at 455.

50 It should be noted that sometimes Islamic jurists have issued conflicting *fatāwā* across their various writings. This divergence may arise from factors such as shifts in belief or the influence of political motivations. Nonetheless, when it comes to their religious opinions, their authority holds equal weight for an outside observer. For instance, Sheikh Ṭūsī, in *al-Nihāya fi mujarrad al-fiqh wa-l-fatāwā*, aligns with the predominant view among Shīʿī jurists, advocating for the death penalty for captives if the support network of the *baghī* group remains intact. Abū Jaʿfar al-Ṭūsī, 1 al-Nihāya fī mujarrad al-fiqh wa-l-fatāwā 269 (1979).

51 Ṭūsī, *supra* note 31, at 262.

52 Abū Jaʿfar al-Ṭūsī, 1 al-Khilāf fī al-aḥkām 269 (1963).

53 Ṭūsī, *supra* note 31, at 274.

54 Seyyed Abū al-Qāsim al-Khoei, Minhāj al-Ṣāliḥīn 389 (1989).

55 It appears that imposing the death penalty constitutes the highest form of authority exercised by the state over its subjects. Thus, it is evident that delegating the discretion to administer capital punishment to the ruler not only risks arbitrary

It seems that the 2013 Islamic Penal Code is potentially subject to various amendments. On one side, certain *fatāwā* entirely oppose the enforcement of the death penalty for prisoners who participate in armed rebellions against the Islamic government. Moreover, the majority of jurists hold that even when weapons have been used, under certain conditions—such as when the individual detainee agrees to lay down arms or in the event of the *baghī* group's defeat—those convicted of *baghī* against the Islamic government should be released.

Conclusion

The Islamic Penal Code 2013 adopts a stricter approach in the realm of offenses related to national security or ideological dissent. It adds new crimes to the list of *ḥudūd*, such as *sabb al-nabī* (insulting the prophet), *baghy*, and the novel concept of acts of *ifsād fī al-arḍ*. Previously, the offenses of *muḥāraba* and *ifsād fī al-arḍ* were considered under a single classification. Concerning the rationale behind the expansion of *ḥadd* punishments in the 2013 Islamic Penal Code, particularly those related to national security offenses, no official justification has been provided by governmental authorities. Furthermore, there is a lack of specific scholarly research on this matter, and no clear correlation can be established between the increase in capital punishment and the introduction of new *ḥadd* offenses. However, the two decades of legislative experience since the enactment of the last *ḥadd*-related law may be regarded as a foundational basis upon which efforts have been made to further Islamize the relevant legal provisions to the greatest extent possible.

In addition, the differentiated or selective criminal policy adopted in the 2013 Islamic Penal Code may provide an explanation for the broadening scope of *ḥadd* punishments. On the one hand, the legislator has sought to establish a principle of leniency, tolerance, and forbearance about moral *ḥadd* offenses, to the extent that any investigation or prosecution of such offenses has been expressly limited. On the other hand, a more stringent

treatment of citizens but also conflicts with the human dignity and the spirit of *sharīʿa*. Asimi, *supra* note 14, at 136.

approach has been pursued by expanding *ḥadd* offenses against national security, thereby rejecting a conciliatory stance in favor of a coercive enforcement model. Furthermore, given that each *ḥadd* offense related to national security possesses its own unique structural and substantive framework, this expansion serves to prevent judges from arbitrarily applying Islamic *fiqhī* principles at their discretion. Instead, each *ḥadd* offense is to be examined based on its specific material and mental elements. For instance, in the offense of *baghy*, the continued existence of the armed group at the time of the defendant's arrest constitutes a fundamental element in determining the appropriate punishment. In contrast, no such requirement exists in the offense of *muḥāraba*. Furthermore, while repentance (*tawba*)[56] for a *muḥārib* is subject to certain restrictions, no such limitations have been imposed in the case of *baghy*.

The legislative authority of the Islamic Republic of Iran is obliged, under various provisions of the Constitution, to refrain from enacting laws that are inconsistent with *sharīʿa*. Nonetheless, Islamic scholars have issued a range of differing, and sometimes conflicting *fatāwā* on comparable issues. Hence, while some jurists have permitted the death penalty for individuals affiliated with *baghī* groups, others have strongly condemned the use of capital punishment in such cases. Consequently, the Islamic legislator is unable to merge all these divergent *fatāwā* into one unified law and must carefully choose from the various available interpretations. In practice, it would be both forbidden (*ḥarām*) to dismiss all existing *fatāwā*, and equally impractical to embrace every one of them. To ensure a more coherent legislative approach and to better resonate with human rights standards, we can emphasize particular *sharīʿa* principles—or even non-religious ones—within a broader policy-making framework.

56 The institution of repentance is an innovation introduced in the 2013 Islamic Penal Code, which, according to some scholars, reflects the Islamic Republic's human rights concerns by promoting a reduced reliance on corporal punishment and a greater emphasis on rehabilitation. Hussein Gholami & Bahman Khodadadi, *Criminal Policy as a Product of Political and Economic Conditions: Analyzing the Developments in Iran Since 1979*, 128 Zeitschrift für die Gesamte Strafrechtswissenschaft 624 (2016).

The inclusion of *baghy* as a *ḥadd* offense in the 2013 Islamic Penal Code marks a significant departure from the conventional Shīʿa *fiqhī* perspective, which prioritizes negotiation and caution in matters concerning life and property rather than focusing on punitive measures. To align Iran's penal code with Islamic law and contemporary human rights principles, this essay proposes a range of reforms. A central recommendation is to decriminalize *baghy* as a *ḥadd* crime, alongside advocating for non-punitive approaches such as negotiation and reconciliation. This method not only honors the principles of Shīʿa *fiqh* but also enhances the equity and compassion inherent in the legal framework. By connecting traditional *fiqh* with contemporary legal requirements and necessities, these reforms facilitate a more just and consistent application of Islamic law.

Contemporary Mechanisms to Reform Islamic Criminal Law: Between Legal Doctrine and Positive Law

The Case of Morocco

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Abstract

This essay analyzes the contemporary evolution of Islamic criminal law, focusing primarily on the case of Morocco. It investigates the hermeneutical strategies employed by Islamic scholars and modern Muslim states to avoid the implementation of certain punishments drawn from ḥudūd*,* qiṣāṣ*, and* taʿzīr*. The essay highlights, for instance, the role of "contextual and eclectic ijtihād" in adapting Islamic criminal law to modern contexts, and emphasizes the shift from* ḥudūd *to* taʿzīr *punishments across many Muslim countries. By focusing on the evolution of criminal law in Morocco and its connection to Islamic law, the essay explores the influence of Western legal systems and internal reform efforts, showing how traditional Islamic terminology and penalties have been mainly secularized while keeping the "Islamic" offenses. It sheds light on the dynamic interplay between tradition and modernity. The essay also addresses ongoing debates surrounding the death penalty in Morocco and its link to Islamic criminal law, particularly in light of the Kingdom's recent vote in favor of a universal moratorium at the United Nations. Through this case study, the essay also highlights the role of modern Muslim states in balancing Islamic legal heritage with contemporary human rights standards, as well as the strategies used to "Islamize" the secularization of Islamic criminal law.*

Introduction*

In the context of what we called "State *ijtihād*,"[1] many modern Muslim states have used different strategies, such as contextual[2] and eclectic *ijtihād*, or switching from *ḥudūd* to *taʿzīr*,[3] in order to justify the non-application of Islamic criminal law.

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* The author wishes to thank Ghada Amer for her excellent editorial assistance.

1 "State *ijtihād*" refers to a contemporary phenomenon in the Islamic world whereby the modern nation-state integrates elements of Islamic law into the framework of positive law. As a result, the state and its institutions have become practically part of the Islamic law-making process, especially with regard to family law. The phenomenon reflects how the state has become an actor in *ijtihād*, integrating Islamic scholars in the process only as one actor among others. Thus, Islamic scholars have lost the monopoly over historical hermeneutical authority in Islamic law. *See* Yannis Mahil, L'ijtihâd Collectif: L'Évolution du Droit Musulman 88–97 (2024).

2 A hermeneutical method that has become very common in contemporary times is what we call "contextual *ijtihād*" (*ijtihād siyāqī*). Some scholars instead refer to it as "*ijtihād* in the context" (*ijtihād fī-l-wāqiʿ*). It consists of reinterpreting the Qurʾān and Sunna or certain rules of *fiqh* in light of the context in which they were "revealed" and/or produced, as well as the new circumstances of application, to produce new rulings. This practice of accounting for the context of the revelation of a Qurʾānic verse or the enunciation of a *ḥadīth* in the lawmaking process can be found from the earliest Islamic sciences, notably in *asbāb al-nuzūl* (circumstances of revelation) for the Qurʾān and *ʿilm asbāb wurūd al-ḥadīth* (the science of the circumstances of the enunciation of the *ḥadīth*) for the prophetic traditions. *See* Yannis Mahil, Les Mécanismes Herméneutiques Contemporains de Réforme du Droit Musulman 42 (2021) (Ph.D. dissertation, University of Strasbourg).

3 "Eclectic *ijtihād*" refers to the different hermeneutic tools used by Islamic scholars and then modern Muslim states to modulate Islamic law through a form of eclecticism. It is close to what Ahmed Fekry Ibrahim calls "pragmatic eclecticism." In Western Islamic studies scholarships and among Islamic scholars, it has been called *talfīq* or *takhayyur*. In the pre-modern era, the focus was on *tatabuʿ al-rukhāṣ* or *tarjīḥ*, whereas in the contemporary era, mechanisms of *takhayyur* and *talfīq* have emerged. Some Islamic scholars viewed *talfīq* negatively, such as al-Būṭī, while others, like Mawlawī, legitimized it by establishing a framework for its application. Furthermore, some Islamic scholars proposed alternatives intended to be more "legitimate Islamically" such as "selective *ijtihād*" (*al-ijtihād al-intiqāʾī*). For our part, considering that they are first of all hermeneutic methods, we classify them as forms of *ijtihād*, although debate persists as to whether eclecticism falls under *ijtihād* or *taqlīd*, with Malcolm Kerr, for example, referring to it as limited *ijtihād*. The main idea behind "eclectic *ijtihād*" is the selection of a specific legal opinion better suited to some modern needs and reflects legal pluralism, not being limited to a single Islamic law school. *See* Mahil, *supra* note 2, at 246–92; *see also* Ahmed Fekry Ibrahim, Pragmatism in Islamic Law: A Social and Intellectual History (2015); Norman Anderson, Law Reform in the Muslim World 42–82 (1976); Wael B. Hal-

For example, the King of Morocco, through his traditional and constitutional status as *amīr al-muʾminīn*,[4] is endowed with the status of *mujtahid*.[5] From this position, Hassan II[6] advanced a kind of *ijtihād*, using original arguments to justify the non-application of the *ḥudūd* in matters of theft. He stated that, due to a change in context and a practical reality that would lead to more negative elements by implementing these rules, in particular, the social costs for the state of creating "materially destitute and manually incapable people," these penalties should not be applied.[7]

In the same vein, in Malaysia, Mahathir Mohamad[8] also opposed the application of the *ḥudūd* punishments, especially those promoted by the Malaysian Islamic Party (PAS).[9] The Malaysian case is particularly tied to the 1993 adoption of a criminal law implementing *ḥudūd* in the state of Kelantan, in the framework of their federalism. This issue generated many controversies.[10] Mahathir affirmed that the primary penal objective in Islam is justice. However, in his view, applying classical Islamic criminal law in the Malaysian context, namely, a multicultural country with a significant non-Muslim population,

laq, *Talfīḳ*, Encyclopedia of Islam (2015); Wahba Zuḥeylī, *al-Ijtihād fī ʿaṣrinā hadha min ḥaythu al-naẓariyya wa-l-taṭbīq*, 4 Kyoto Bulletin of Islamic Area Stud. 1–9 (Mar. 2011); Syed Moinuddin Qadri, *Tradition of Taqlīd and Talfīq*, 57 Islamic Culture 2 (1986).

4 Currently set forth in art. 41 of the Moroccan Constitution, the King serves as *Amīr al-Muʾminīn* ("Commander of the Faithful"). This role confers religious legitimacy alongside political authority within the Moroccan legal and traditional framework. *See* Baudouin Dupret, Jean-Noël Ferrié & Kenza Omary, Maroc: Des Réformes Substantielles et Conservatrices 41–45 (2012).

5 Hassan II & Éric Laurent, Le Génie de la Modération: Réflexions sur les Vérités de L'islam 68 (2000).

6 Hassan II (1929–1999), Former King of Morocco.

7 Caravane de Nuit, *Interview by Frédéric Mitterand*, Antenne 2, at 18:00 (Mar. 3, 1994), https://www.youtube.com/watch?v=md_WPr9gyaE.

8 Mahathir Mohamad served as Prime Minister of Malaysia from 1981 to 2003 and from 2018 to 2020. He is considered to be the "Father of Modern Malaysia."

9 The Malaysian Islamic Party (PAS) is often described as fundamentalist and governs several regions in Malaysia, such as Kelantan, where it has implemented some of the ḥudūd punishments.

10 Mohammad Hashim Kamali, *Punishment in Islamic Law: A Critique of the Hudūd Bill of Kelantan (Malaysia)*, 13 Arab L.Q. 203, 203–34 (1998).

would be unjust and contrary to the teachings of Islam.[11] He criticized PAS and its Penal Code, arguing that it created legal inequity whereby Muslims would have very harsh sentences,[12] while non-Muslim criminals would be given light penalties for serious crimes.[13] Thus, Mahathir considered that this penal law was "contrary to the teachings of Islam" and that PAS was using this law on *ḥudūd* only for political purposes. As Prime Minister, he even sought to block the penal law, which he viewed as contrary to the Malaysian Federal Constitution and the spirit of justice in Islam.[14]

This kind of argument and method can be considered as a "contextual *ijtihād*"[15] which has been applied in contemporary times to the case of *ḥudūd*. Indeed, many Islamic scholars have cited the case of ʿUmar Ibn al-Khaṭṭāb,[16] who suspended the Qurʾānic punishment for theft during a time of scarcity.[17] Even though *ḥudūd* are, in theory, not open to *ijtihād*, we observe that, through subtle mechanisms, a form of "*de facto ijtihād*"[18] has been employed to legitimize their cessation.

Today, scholars such as ʿAlī Jumʿa,[19] have stated that, as we currently live in a period of "necessity" (*ḍarūra*), *sharīʿa* does not require the application of *ḥudūd*.[20] Muṣṭafā Zarqā similarly argued that, due to contemporary circumstances, it is

11 *See* Astro Awani, *Dr. Mahathir Stands Firm in His Statement on Hudud*, Awani International, Apr. 26, 2014; *see also* Rashvinjeet S. Bedi, *Dr Mahathir: PAS Implementing Un-Islamic Hudūd for Political Gain*, Asia One, Apr. 16, 2015.

12 Such as cutting off the hand for theft.

13 Such as a short prison sentence or a monetary fine.

14 Kamali, *supra* note 10, at 207–08.

15 *See* Mahil, *supra* note 2.

16 Mark A. Gabriel, *Reforming Hudud Ordinances to Reconcile Islamic Criminal Law with International Human Rights Law* 169 (2016) (Ph.D. dissertation, University of Cape Town).

17 Raghīb Serjānī, *Taṭbīq al-sharīʿa: al-hudūd fī al-islām*, Islam Story (June 12, 2011), https://islamstory.com/ar/artical/386/تطبيق-الشريعة.

18 I use the term "*de facto ijtihād*" to describe different interpretive methods or processes that have a practical impact on Islamic legal rulings or implementations, even if they are not considered formal *ijtihād* methodologies in classical *uṣūl al-fiqh*. *See* Mahil, *supra* note 2.

19 ʿAlī Jumʿa was the Grand Mufti of Egypt from 2003 to 2013.

20 ʿAlī Jumʿa, Uqūbāt al-ḥudūd bayna al-taʿlīq wa al-aṭbīq (2011), cited in Gabriel, *supra* note 16, at 168.

necessary to substitute *ḥudūd* with other penalties more appropriate to context.[21] Mohammad Hashim Kamali has also maintained that *ḥudūd* should not be considered as fixed penalties, and that judges should be able to set them aside in favor of other sanctions according to practical circumstances of each case.[22] ʿAbd Allāh bin Bayyah has likewise put forward contextual arguments to justify suspending *ḥudūd*, stating in particular that their application could create greater harm.[23] Many other scholars of Islamic law, including Sayyid Abū al-Aʿlā Mawdūdī,[24] Muḥammad al-Ghazālī,[25] and Salīm al-ʿAwā,[26] have supported the view that *ḥudūd* are not truly applicable in the absence of social justice and equity in society.[27] Even in the United States, voices such as Azizah Y. al-Hibri[28] and the Fiqh Council of North America[29] have called for a moratorium on the death penalty, based upon similar arguments, particularly emphasizing the racial and social inequalities in the judicial system.

In this essay, we examine how the arguments of Islamic scholars for suspending *ḥudūd* have contributed to the secularization of criminal law while maintaining a framework grounded in Islamic principles. We focus on the case of Morocco and the evolution of its criminal law in interaction with Islamic legal traditions. For instance, we explore how the punishments prescribed by classical Islamic criminal law have been secularized and their terminology removed while retaining Islamic offenses as crimes. We then analyze the issue of the death penalty in

21 Muṣṭafā Zarqā, al-Madkhal al-fiqhī al-ʿāmm 51 (2004).

22 Mohammad Hashim Kamali, *Principles and Philosophy of Punishment in Islamic Law with Special Reference to Malaysia*, 10 Islamic Civ. Rev. 18, 18–19 (2019).

23 ʿAbd Allāh b. Bayyah, Tanbīh al-wāqiʿ ʿalā taʾṣīl fiqh al-wāqiʿ 82–99 (2014).

24 Sayyid Abūl Aʿla Maududi, The Islamic State and Constitution 8 (1983).

25 Muḥammad al-Ghazālī, Min hunā naʿlam (1948).

26 Mohamed Salīm al-ʿAwā, Punishment in Islamic Law (1982).

27 Mohammad Hashim Kamali, Crime and Punishment in Islamic Law: A Fresh Interpretation 231–39 (2019).

28 Azizah Y. al-Hibri, Capital Punishment in the United States: An Islamic Perspective (2001).

29 Mohamed Nimer, The North American Muslim Resource Guide 160 (2002).

Morocco, highlighting the balance between theoretical law and its practical application. Finally, we consider Morocco's December 2025 vote in favor of a global moratorium on the death penalty at the United Nations and its implications in the country, particularly in relation to Islamic legal references.

Shift from *Ḥudūd* to *Taʿzīr*: An "Islamic Secularization" of Criminal Law

Most modern Muslim states in the late 19th and throughout the 20th century secularized substantial parts of their criminal law,[30] removing many elements of *ḥudūd*. Scholars such as Noel Coulson have explained this historical evolution not only as a trend of Westernization,[31] but also as a result of the fact that classical Islamic legal doctrine had not established a criminal law system in the technical sense of modern legal codes.[32]

In this context, many Islamic Scholars, along with modern Muslim states, sought to find a middle path between Islamic law and the secularization of criminal law. Here started the phenomenon that we call "shift from *ḥudūd* to *taʿzīr*." A key historical example is the reform of the Ottoman Penal Code of 1858, which effectively replaced nearly all *ḥudūd* punishments with alternative penalties falling under *taʿzīr*.[33] While some scholars, such as Coulson[34] and Baer, interpret this reform as a Westernization or secularization, others like Ozcan[35] and Akgündüz[36] emphasize its "Islamic" character, framing it as an extension of *taʿzīr* prerogative in the form of modern law. Under Islamic law, the authority has flexibility to administer *taʿzīr* punishments. This allowed modern Muslim states, following the example of the Ottoman Empire, to enact positive laws which integrated

30 Noel Coulson, A History of Islamic Law 152–57 (1964).

31 *Id.* at 149.

32 *Id.* at 124.

33 Mehmet Özkan, *Tanzimat Sonrasi Osmanli Ceza Hukuku Düzenlemeleri*, 15 Balikesir İlahiyat Dergisi 241–77 (2022).

34 *See* Coulson, *supra* note 30, at 151; *see also* Gabriel Baer, *The Transition from Traditional to Western Criminal Law in Turkey and Egypt*, 45 Studia Islamica 140 (1977).

35 Özkan, *supra* note 33, at 241–77.

36 *Id.*

more conventional penalties such as imprisonment, thereby setting aside corporal punishments. Some contemporary Islamic scholars, directly or indirectly, have advocated for a shift from *ḥudūd* to *taʿzīr*, a move that has enabled modern Muslim states to partly "secularize" Islamic criminal law.

We can observe a similar trend in the evolution of Islamic criminal law in Morocco. According to Coulson, Morocco's traditional Islamic system has been more preserved, notably due to a French colonial presence which took the form of a protectorate. Marshal Lyautey promoted the policy of maintaining local customs and legal traditions. It was only in 1954 (two years before its independence) that Morocco adopted a penal code influenced by French law.[37] Allal al-Fassi, who played a key role in Morocco's post-independent lawmaking process,[38] concluded that *ḥudūd* could be replaced by discretionary penalties (*taʿzīr*), without formally ruling out the *ḥudūd*.[39] He developed on the prerogatives granted under *taʿzīr* to the imam,[40] noting that the imam may choose punishments (*taʿāzīr*) based on the public interest (*maṣlaḥa*) for each crime.[41]

Ultimately, with the exception of the death penalty inspired by *qiṣāṣ*,[42] *ḥudūd* punishments were largely replaced by prison sentences and fines in Morocco, as in many other Islamic countries. Replacing *ḥudūd* with *taʿzīr* was a first step in secularizing the penalties of classical Islamic criminal law while keeping the offenses as crimes. These *taʿzīr* punishments, left

37 Coulson, *supra* note 30, at 156–57.

38 Allal al-Fassi (d. 1974) was both an Islamic scholar and a key political leader in Morocco, known for his struggle against French colonialism as head of the Istiqlal Party. A close advisor to Kings Mohammad V and Hassan II, he played a major role in shaping the lawmaking process of the new independent Moroccan state in the late 1950's and early 1960's, particularly when it came to the "positivization" of Islamic law. He also served as Minister of Islamic Affairs.

39 Allal al-Fassi, Difāʿ ʿan al-sharīʿa 268 (2010).

40 In this context, "imam" refers to a political leader or a judge.

41 Al-Fassi, *supra* note 39, at 268.

42 In this regard, al-Fassi mentions the death penalty for voluntary homicide reflects "*qiṣāṣ*" which represents a universal norm found in nearly all legal systems, however, Islamic law has provided possible exemptions, such as *diya* (financial compensation) if the victim's family accepts. He further argues that the political authority (*walī al-amr*) may impose an alternative punishment under *taʿzīr*, or grant a pardon to the guilty according to the requirements of *maṣlaḥa*. He concluded by saying that concerning this crime, this is not really a problem. *See id*. at 264–65.

to the discretion of judges or political leaders, allowed case-by-case adjudication depending on the circumstances.

In trying to reconcile Islamic criminal law with the requirements of a modern legal system to validate codification from an Islamic point of view, al-Fassi paved the way for a "secularization of penalties" in Morocco.[43] We used the term "Islamic secularization" in the sense that, for many actors, the changes were done in the frame of Islam, only switching from one category to another. Even acknowledging the influence of European laws in these reforms, the use of theoretical arguments and subtle doctrinal shifts helped preserve Islamic legitimacy.

1. Islamic Law in Morocco

Beyond being the religion of the state and the majority of the population, Islam is a foundational element of national and historical identity in Morocco. It also underpins the monarchy and its legitimacy. The connection to Islamic law, therefore, extends beyond formal legislation to identity, culture and political legitimacy. Islamic law is an integral part of the pre-colonial and post-colonial Moroccan legal system. Even if the law has been partly secularized since the advent of a modern state after independence in 1956, and this process has been strengthened over time, the reference to Islamic law remains a source of legislation in several areas. Moreover, on the symbolic level, the references to *sharīʿa* and its concepts are instrumental in the foundations of power and its communication. As Tozy and Hibou observe, modern Morocco is structured around three poles in its legal culture: customary law, Islamic law, and positive law.[44] The current Moroccan state is, in its roots, inherited from the traditional Islamic caliphate system.[45] Hassan II stated explicitly that his

43 *Id.*

44 Béatrice Hibou & Mohamed Tozy, *Une lecture d'anthropologie politique de la corruption au Maroc: Fondement historique d'une prise de liberté avec le droit*, 161 Rev. Tiers Monde 23, 23–47 (2000).

45 *See, e.g.*, Abū al-Ḥasan al-Māwardī, Al-Aḥkām al-Sulṭāniyya: The Laws of Islamic Governance (1996); *see also* Mohamed Tozy, Monarchie et Islam Politique au Maroc 27–35 (1999).

status as *amīr al-muʾminīn* was rooted in a caliphate doctrine.[46] As a result, another element of Islamic law that remains central in the Moroccan political-social system is the *bayʿa* (pledge of allegiance). The *bayʿa* between *ʿulamāʾ* and notables and the King, modeled on the pledge given to the Prophet by his companions, is one of the foundations of the monarchy and Morocco's socio-political contract.[47]

Moreover, some parts of positive law are still based upon *fiqh*, such as family law,[48] the Code of Real Rights,[49] and even criminal law to a certain extent, as demonstrated in this essay. Official political speeches in Morocco consistently reference Islamic symbols and principles, especially when it comes to reforms related to Islamic law. These arguments are usually general, referring to *ijtihād*[50] and *sharīʿa*'s ability to adaptation,[51] to some *qawāʿid fiqhiyya*, and to concepts such as *maṣlaḥa*,[52] or to the oft-quoted notion by Mohammed VI that one cannot permit what is *ḥarām* or to ban what is *ḥalāl*.[53]

This centrality of Islam, through the institution of *Imārat al-Muʾminīn*, has served to reform positive Islamic law in a rather liberal direction. For example, during the 2004 reform of the *mudawwana* (family code), the preamble of the law explicitly referred to an *ijtihād* aimed at "development and progress,"

46 Hassan II & Éric Laurent, Mémoire d'un Roi 98 (1993).

47 Ahmed Toufiq, *The "Commandership of the Faithful" Institution in Morocco: Pertinent Points for the debate on the Caliphate (the Khilāfah)*, 57 Hespéris-Tamuda 175, 175–94 (2022); *see also* Tozy, *supra* note 45, at 27–29; and Hassan II & Laurent, *supra* note 46, at 93–94.

48 *See* Mahil, *supra* note 2, at 116–23.

49 *See* Hajar Fanadi, *al-Marjaʿiyya al-tashrīʿiyya li-mudawanat al-ḥuqūq al-ʿayniyya*, 2 Al-Fawz J. 90, 91–106 (2024).

50 Hassan II & Laurent, *supra* note 5, at 68.

51 Hassan II & Laurent, *supra* note 46, at 96.

52 For instance, in a recent message to the nation urging citizens not to perform the *ʿīd al-aḍḥā* sacrifice ritual in 2025, King Mohammed VI invoked his religious legitimacy as holder of the supreme *imāma* (*al-imāma al-ʿuẓmā*), based upon the *bayʿa*, and cited Islamic legal maxims such as "to remove inconvenience and prejudice and to promote facilitation," along with the principles of *maṣlaḥa* (public interest) and *ḍarūra* (necessity). *See Amīr al-Muʾminīn: Risāla sāmiyya ilā shaʿbihi al-wafī*, Kingdom of Morocco (Feb. 26, 2025), https://www.cg.gov.ma/ar/node/12213.

53 Mohammed VI is the current King of Morocco. *See, e.g.*, HM King Mohammed VI, *Speech to the Nation* (July 30, 2022), https://diplomatie.ma/en/hm-king-delivers-speech-nation-throne-day.

and grounded in a "tolerant Islam" that promotes "justice" and "equality."[54] But this institution also requires maintaining a balance with certain rules and traditions, not only because of the traditional foundations of power and competition with other Islamic movements in society, but also because of the different sensitivities in public opinion.[55] Under the general supervision of the Commandery of the Faithful, the regulation of Islam is carried out through various official institutions such as the Ministry of Habous and Islamic Affairs, or through scholarly bodies such as *al-Rābiṭa al-Muḥamidiyya li-l-ʿUlamāʾ* and *al-Majlis al-ʿIlmī al-Aʿlā*.[56]

2. Changing the Punishment while Maintaining the "Crime/Offense": The Case of Morocco

Offenses from Islamic criminal law have often been maintained in the penal systems of modern Muslim states. On the other hand, the penalties prescribed under *ḥudūd* have been removed or have fallen into disuse. For example, in countries such as Morocco or Egypt, fornication and adultery remain criminalized and are punishable by imprisonment or fines, but corporal punishment is no longer mentioned in the law. In the same vein, theft is still considered as a crime, depending on its degree, but it is not punished by the prescribed *ḥudūd* penalty. In general, these punishments are no longer referenced in legal texts. The death penalty is often an exception and remains part of many criminal law systems in the Muslim world. However, it has been abolished in the successor state to the Ottoman Empire, Turkey. Moreover, in countries such as Morocco, it is almost never applied, although it remains part of the law. This phenomenon can be understood as a practical application of what we called previously the shift from *ḥudūd* to *taʿzīr*.

54 Moroccan Family Code, Bull. Offi. No. 5358, 667 (Oct. 6, 2005), pmbl.

55 *See, e.g.*, Mohamed Mouaqit, *Modernisation de l'Etat, modernization de la société civile, réforme de la Moudawwana*, L'Année du Maghreb 11–21 (2005–2006); Tozy, *supra* note 45.

56 *See* Meriem El Haitami, *Religious Diversity at the Contours of Moroccan Islam*, 28 J. N. Afr. Stud. 1265, 1265–81 (2021); *see also* Toufiq, *supra* note 47.

2.1 "Secularization" of the Punishment of "Sin" and Modification of Islamic Terminology

With regard to acts historically addressed under Islamic criminal law, there is no direct reference to religion in the current Moroccan Penal Code, even though it is obviously the source of many legal prohibitions. The legal terminology used to define criminal offenses has even been "secularized" in the sense that traditional Islamic terms have been replaced. For example, the term *zinā*, which classically refers to relations outside marriage, is no longer used, just as it is no longer used for adultery. Similarly, *qiṣāṣ* and *diya* have been modified stepwise. In this way, legal prohibition rooted in Islam has undergone a form of "secularization of punishment." Thus, the crime or offense, considered as sins on the religious level, remain legally prohibited, but the penalties provided for by classical Islamic law have been modified by more conventional penalties in modern legal systems.

The Moroccan Penal Code of 1953 ("1953 Code") had already undergone a significant "secularization" of Islamic terminology, but the term *zinā* had been maintained in the law to designate extramarital relations and adultery. Indeed, the Code prescribed a prison sentence ranging from one month to one year for the commission of "*murtakib al-zinā*" (the perpetrator of fornication).[57] The 1953 Code also broadened the possibility of condemning fornication committed in other circumstances not specified in earlier articles (*fī ghayri al-aḥwāl al-manṣūṣ aʿlayhā fī al-fuṣūl al-sābiqa*). The expression used to describe the perpetrator of this sexual "crime" was *fāʿil al-fāḥisha*.[58] Thus, taking up another Islamic term, *fāḥisha*, which is also found in the Qurʾān to describe *zinā*,[59] has often been used in *fiqh* to denote illicit sexual acts under the *sharīʿa*, notably between persons of the same sex.[60] The Code prescribed a prison sentence

57 Al-Qānūn al-Jināʾī al-Maghribī [Moroccan Penal Code], Off. J. No. 2142, art. 258, at 3832 (Nov. 19, 1953) [hereinafter Moroccan Penal Code of 1953].

58 *Id.*

59 *See* Qurʾān 17:32.

60 *See* Qurʾān 7:80.

of six months to three years,[61] which is higher than the previous article condemning *zinā*. The 1953 Code also referred more specifically to the person guilty of adultery by using the classical Islamic legal expression of *zinā al-muhsanāt*. Indeed, it prescribed a sentence of one to five years in prison for a person found to be guilty of adultery, if the spouse filed a complaint.[62] In these three cases, we can observe that the punishments prescribed by *ḥudūd* were replaced by prison sentences and are not even mentioned in the law. In other words, they have been "secularized," though the offenses drawn from Islamic law are still recognized as crimes. While Coulson suggests that the Moroccan Penal Code of 1953, under the influence of French law, largely discarded Islamic criminal law, with the exception of *zinā*, "which incidentally retained the Islamic offence of *zinā* (fornication)."[63] There were in fact other references to classical Islamic criminal law. For example, the 1953 Code continued to use the term *diya* to designate the compensation to be given in the event of involuntary manslaughter.[64]

Then, the process of the "secularization" of Islamic criminal law terminology and punishments deepened with the 1962 Penal Code. Crimes and offenses, considered as sins on a religious level, remained legally prohibited, but the penalties provided for by classical Islamic law were replaced with penalties more compatible with modern legal systems. Indeed, the current Moroccan Penal Code, which is still the one of 1962,[65] criminalizes sexual relations between persons of different sexes who are not married using the expression *jarīmat al-fasād* (crime of debauchery).[66] The punishment is from one month to one year of

61 Moroccan Penal Code of 1953, *supra* note 57, at 3832.

62 *Id.*

63 Coulson, *supra* note 30, at 157.

64 Art. 234: *wa-yajibu dā'iman ada' al-diya ʿan al-qatl bi-ghayri ʿamd* (there is a constant obligation to give compensation (*diya*) in the event of involuntary manslaughter). *See* Moroccan Penal Code of 1953, *supra* note 57, at 3829.

65 The Moroccan Penal Code of 1962, which came into effect in 1963, remains the country's current criminal code, although it has been amended by subsequent laws.

66 Al-Qānūn al-Jinā'ī al-Maghribī [Moroccan Penal Code], Off. J. No. 2640, art. 490, at 1297–98 (June 5, 1963) [hereinafter Moroccan Penal Code of 1962].

prison.[67] Similarly, Article 491 addresses adultery under the label of *jarīmat al-khiyāna al-zawjiya* (crime of marital betrayal), prescribing a prison sentence of one to two years.[68] No mention of the term *zinā* appears in Moroccan legal texts, nor of *zinā al-muhsanāt*, as in the 1953 Code. We cannot know the exact intention of the legislator behind this modification, but we see a "terminological secularization" that softens the religious dimension of the offense, although it maintains its criminal status. As we have seen, both fornication and adultery are sanctioned by prison sentences, and there is no mention of the penalties prescribed by Islamic criminal law.[69] The same is true for theft, which is punished with imprisonment or fines, according to the severity of the offense.[70]

Even though *ḥudūd* penalties are totally absent from the law, it is obvious, as Khamlishi[71] has argued, that the offenses themselves remain rooted in *sharīʿa*. "There is no doubt that this falls within the framework of Islamic *sharīʿa* through *zinā*."[72] He reminds us that the term *zinā* in Islamic law encompasses all illicit extramarital relationships set out in the Moroccan Code as *jarāʾim al-fasād*, *ightiṣāb*, *khiyāna al-zawjiya wahatk al-ʿirḍ* (crimes of debauchery, rape, adultery, and attacks on honor).[73]

Thus, the punishments do not correspond to classical *ḥudūd*, even if the "sin" is still prohibited by positive law. The offense derived from Islamic law is therefore maintained, but the penalties have been secularized. Despite the "secularization" of sentences and terminology, particularly regarding the harsh penalties prescribed by *fiqh* in this area, the criminalization of

67 *Id.* at 1298.

68 *Id.*

69 With the exception of the death penalty, addressed *infra*.

70 *See, e.g.*, Code Pénal [Moroccan Penal Code], *Ministère de la Justice, Direction de la Législation et des Études*, consolidated version, arts. 505–607, at 201–37 (Apr. 20, 2023).

71 Ahmad Khamlishi is a prominent Moroccan jurist and scholar of both Moroccan and Islamic Law. He serves as the director of *Dār al-Ḥadīth al-Ḥasaniya*, a leading institute for Islamic studies.

72 Ahmad Khamlishi, al-Qānūn al-jināʾī al-khās al-Maghribī 229 (1986).

73 *Id.*

some behaviors related to morality is still debated in the context of the interaction between national and international law, but also because of evolving ideological trends within society. In this view, Khamlishi noted that, although some may see these prohibitions as infringements on individual freedom, the issue can also be seen from another perspective, namely, the preservation of the family, children, and society, which are also values enshrined in international agreements.[74] He stated in particular that "[t]he preservation of the family system . . . requires the criminalization of everything that threatens its structure."[75] However, some civil society bodies and international NGOs, such as the National Council for Human Rights in Morocco[76] and the Office of the UN High Commissioner for Human Rights (UNHCHR),[77] are now calling for abrogating the laws banning extramarital sex and adultery.

In addition to the penalties themselves, criminal procedure in matters of evidence in cases of *zinā* also differs significantly from classical Islamic law.[78] The Penal Code refers explicitly to Islam in several provisions, although not directly for *ḥudūd* offenses, except for one that may be seen as partly related to *ridda* (apostasy). Indeed, Article 267-5 states that "[a]nyone who attacks the Islamic religion shall be punished by imprisonment of six months to two years and a fine of 20,000 to 200,000 dirhams or one of these two penalties only."[79] Similarly, Article 220 punishes any person seeking by some means deemed unfair to "shake the faith of a Muslim" or "convert him to another religion." The sentence for this offence is six months to three years of imprisonment and a fine of between 200 and 500 dirhams.[80]

74 *Id.* at 230.

75 *Id.*

76 Youssef Ait Akdim, *Maroc: Fini les peines d'amour?*, Jeune Afrique (June 28, 2012), https://www.jeuneafrique.com/140955/societe/maroc-fini-les-peines-d-amour/.

77 Mandate of the Working Group on the Issue of Discrimination Against Women in Law and in Practice, *Letter from Alda Facio to Mr. Boukili*, Office of the U.N. High Comm'r for Hum. Rts. (Nov. 14, 2017), https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/Communications/32/OL-MAR-14-11-17.pdf.

78 Khamlishi, *supra* note 72, at 236–48.

79 Moroccan Penal Code of 1962, *supra* note 66, art. 267-5.

80 *Id.* art. 220.

While *ridda* is not explicitly mentioned, these offenses may be interpreted as addressing attempts to promote apostasy. Moreover, the Penal Code criminalizes eating in public during Ramadan, with an explicit reference to Islam: "Anyone who, notoriously known for his belonging to the Islamic religion, ostentatiously breaks the fast in a public place during Ramadan, without a reason accepted by this religion, is punished by imprisonment of one to six months and a fine of 200 to 500 dirhams."[81]

2.2 The Issue of the Death Penalty

The death penalty remains part of Moroccan criminal law for certain crimes and continues to be applied by courts.[82] In his commentary on Moroccan criminal law, Khamlishi introduces the issue of murder by referencing the principles of *sharīʿa* and the Qurʾānic verses on the subject that prescribe *qiṣāṣ*. He also notes that nearly all the religious and positive legal systems throughout history have punished murder with the death penalty, although, for different reasons, some modern positive legislations have also prescribed temporary or life imprisonment.[83] He further explains that Muslim jurists were among the first to conduct a *dirāsa fiqhiyya* (legal study) of this crime, distinguishing between *qatl al-ghīla* (treacherous murder), *qatl al-ʿamd* (intentional homicide), *qatl shibh al-ʿamd* (semi-intentional homicide), and *qatl al-khaṭāʾ* (involuntary manslaughter). Abū Ḥanīfa also added *qatl bi-l-tasabub* (causative killing) as a fifth category. Muslim jurists have thus determined specific penalties for each of these five categories of homicide.[84] By contrast, Moroccan criminal law has reduced these categories by taking only two of them: *qatl al-ʿamd* (intentional homicide) and *qatl al-khaṭāʾ* (involuntary manslaughter). In presenting this distinction Khamlishi demonstrates the affiliation of current

81 *Id.* art. 222.

82 Moroccan Penal Code of 1962, *supra* note 66; Ensemble Contre la Peine de Mort (ECPM), Trente and de Moratoire: Une Attente Interminable (2024), *available at* https://www.ecpm.org/wp-content/uploads/Trente-and-de-moratoire.pdf.

83 Khamlishi, *supra* note 72, at 14.

84 *Id.*

criminal law with *fiqh*.[85] The retention of the death penalty in the current Moroccan Penal Code is therefore a direct legacy of the Islamic laws of *qiṣāṣ*, even if some continue to argue that criminal law in Morocco, unlike family law, has nothing to do with religion.[86]

2.3 Morocco and a Global Moratorium on the Death Penalty

Morocco has observed a *de facto* moratorium on the death penalty for 31 years. Indeed, although the death penalty remains present in the law and applied by courts, its application has been constantly set aside through different mechanisms.[87] As of March 2023, the Moroccan Penal Code still lists 48 legal provisions punishable by capital punishment, and approximately 83 individuals were in prison under a death sentence. However, through different legal mechanisms, such as the royal pardon, these sentences are routinely commuted to prison sentences.[88] Royal pardon is a prerogative given to the King by the Moroccan Constitution.[89] It is automatically requested by the Attorney General and managed by a procedure defined by law involving many actors, notably within the framework of the *lajnat al-ʿafū* (pardon committee), acting at different procedural stages. Through a royal pardon, the King may commute a death sentence to life imprisonment or even exempt the person from punishment altogether.[90] So, even if courts continue to impose the death penalty, it has been systematically commuted by royal pardons since 1993.

85 *Id.* at 15.

86 *See, e.g.*, *Death Penalty Has No Relation to Sharīʿa, It Is a Political Choice*, YouTube (Apr. 3, 2022), http://www.youtube.com/watch?v=HIPnHc0HTMg (statement of Abderrahim El Jamai, former chairman of the Moroccan bar and prominent advocate for abolition of the death penalty).

87 *See* ECPM, *supra* note 82.

88 *Id.*

89 *See* Constitution du Royaume du Maroc [Constitution of the Kingdom of Morocco], art. 58, Bull. Off. No. 5964, at 1912 (July 30, 2011).

90 Ḥātim Nahrī & Lubnā Drāz, ʿUqūbat al-iʿdām bayn al-tashrīʿ wa al-ʿaml al-qaḍāʾī 73–77 (2011).

The royal pardon, often used to resolve social crises or appease society, is also used by the Moroccan state to maintain a subtle balance between international human rights standards and the theoretical references of criminal law inherited from Islamic law. This is not only limited to the death penalty but also concerns the prohibition by Moroccan criminal law of offenses such as adultery and extramarital relationships. The use of the pardon is also a way of taking into account the different ideological forces present in society, from the most liberal to the most conservative.[91]

Royal pardon has roots in classical Islamic law through the doctrine of *ʿafū al-ḥākim*, though traditionally this mechanism has applied only to *taʿzīr* and not to *ḥudūd*,[92] except in limited cases such as *qadhf* if the offense involves the head of state himself, or when forgiveness is granted by the victim's family in matters of *qiṣāṣ*.[93] Once again, about the royal pardon, the modern shift from *ḥudūd* to *taʿzīr* has thus widened the scope for *ʿafū al-ḥākim* to avoid the application of traditional punishments from Islamic law.

Nevertheless, some voices in Morocco argue that royal pardon is insufficient and that society should move toward full abolition of the death penalty. Various Moroccan and international organizations are calling on the country to take the step of abolition.[94] On the political and social level, conservative forces generally want to retain the death penalty in the law, even if they accept its non-application in practice, on the grounds that it derives from the Qurʾān and is therefore irremovable. Others, more liberal, while welcoming this *de facto* moratorium, want Morocco to go further by completely abolishing the death penalty.[95] Interestingly, some supporters of abolition invoke

91 *See, e.g.*, Ismael Eluassi, *La monarchie marocaine et ses mécanismes d'adaptation à des situations de crise* 336–37 (2020) (Ph.D. dissertation, Université Clermont Auvergne).

92 30 al-Mawsūʿa al-Fiqhiyya al-Kuwaitiyya, 183–86 (1990).

93 Mohammad Būlūz, *Mawqif al-sharʿ min ʿafū al-ḥākim fī dhuwī al-ʿuqūbāt*, Hesspress (Aug. 2, 2013), https://www.hespress.com/136504-موقف-الشرع-من-عفو-الحاكم-على-ذوي-العقوب.html/amp.

94 *Id.*

95 Nahrī & Drāz, *supra* note 90, at 12–23; ECPM, *supra* note 82, at 15–17.

religious arguments as well, citing life as a *niʿma min Allāh* (gift from Allah) and underscoring the importance of *tawba* (repentance) in Islamic law.[96]

Thus, in 2013, a legislative proposal to abolish the death penalty was supported by many groups in Parliament but was ultimately rejected by a majority led by the Justice and Development Party (PJD),[97] a party grounded in Islamic references.[98] Islam has often been at the heart of debates on the death penalty in the country for decades. For instance, Khadija Rouissi[99] justified the necessity of abolition by arguing that, in the past, slavery was also practiced because it was not prohibited by Islam, but it was finally abolished. In the same spirit, many abolitionists argue that the death penalty should be abolished in order to move from "the era of barbarism to that of human rights."[100] Morocco's National Human Rights Council (NCHR) has also included Islamic scholars and religious authorities in its consultations. For example, during a 2008 seminar organized in Rabat, the Council invited Ahmed Abbadi.[101] On that occasion, Abbadi affirmed that abolishing the death penalty was not contrary to Islam: "Abolishing the death penalty is not contrary to the principles of Islam. . . . Capital punishment is

96 ECPM, *supra* note 82, at 17–18.

97 The Justice and Development Party (PJD) is currently the leading political party in Morocco with Islamic references. It traces its roots to a preaching movement known as the MUR, which was one Islamic actor among others in Morocco. The integration of the PJD into political life was not without difficulty, particularly regarding its relationship with its foundational matrix, the MUR. Over time, a functional division took place between those involved in religious education and those involved in politics. This transition to political action began in 1996 with the MPDC, which would later become the PJD in 1998. The PJD governed Morocco from 2011 to 2021, which is an exceptional tenure in the Moroccan political context. *See* Youssef Belal, *L'islam Politique au Maroc*, 145 Pouvoirs 71, 75–77 (2013); Tozy, *supra* note 45, 227–56.

98 Sara Ibriz, *Peine de mort. Le vote pout un moratoire: un pas symbolique, pas encore décisif*, Medias 24 (Dec. 10, 2024), https://medias24.com/2024/12/10/peine-de-mort-le-vote-pour-le-moratoire-un-pas-symbolique-pas-encore-decisif/.

99 Rouissi was the former coordinator of the network of Moroccan parliamentarians against the death penalty.

100 Khadija Rouissi, *Actes du séminaire parlementaire sur la peine de mort dans la région Afrique du Nord et Moyen-Orient*, ECPM (Oct. 9, 2013); ECMP, *supra* note 82, at 15.

101 Ahmed Abbadi was the General Secretary of *Al-Rābiṭa al-Muḥammadiyya li-l-ʿulamāʾ*.

limited to very specific cases, such as apostasy, premeditated murder or high treason. Islam always leaves the choice to the empowered imam."[102]

The country recently reached a milestone by voting in favor of a universal moratorium on the death penalty at the United Nations on December 15, 2024, after abstaining for 17 years.[103] This decision has once again sparked debates about different visions of human rights as well as the role of Islamic law within Moroccan positive law. The Minister of Justice, representing the liberal National Rally of Independents (RNI), characterized the vote as a historic step forward for Morocco's human rights culture. Similarly, the NHRC sees it as historic progress.[104] By contrast, the PJD, without totally opposing the vote in favor of the moratorium at the UN, reiterated its firm opposition to the abolition of the death penalty in the Moroccan Penal Code.[105] Indeed, the PJD, in addition to considering the death penalty as an integral part of Islamic law, believes that it is necessary to bring justice to victims of crimes.[106] The vote, although seen as a possible first step to the full abolition of death penalty in Moroccan criminal law, has created some controversies in public opinion with both positive and negative reactions.[107] For instance, unlike various actors in Moroccan civil society and even in the current government, the PJD refuses to consider this vote

102 Ahmed Abbadi, *Séminaire de Réflexion sur la Peine de Mort à Rabat*, at 22–28 (Oct. 11, 2008), https://www.cndh.ma/sites/default/files/2024-01/actes_maroc_2008-frdef.pdf; ECPM, *supra* note 82, at 17.

103 Adil Faouzi, *Morocco Votes in Favor of UN Death Penalty Moratorium After 17 Years of Abstention*, Morocco World News (Dec. 18, 2024), https://www.moroccoworldnews.com/2024/12/367056/morocco-votes-in-favor-of-un-death-penalty-moratorium-after-17-years-of-abstention.

104 *Morocco's Historic Vote In Favour Of The Universal Death Penalty Moratorium*, CNDH (Dec. 17, 2024), https://cndh.ma/en/moroccos-historic-vote-favour-universal-death-penalty-moratorium.

105 PJD, *Official Statement of the Moroccan Party of Justice and Development* (Dec. 12, 2024), https://www.pjd.ma/208426-حزب-العدالة-والتنمية-يجدد-تأكيده-على-م.html.

106 Safaa Kasraoui, *PJD: To Serve Justice, Serious Crimes Deserve Death Penalty*, Morocco World News (Dec. 11, 2024), https://www.moroccoworldnews.com/2024/12/366928/pjd-to-serve-justice-serious-crimes-deserve-death-penalty.

107 ʿĀbid ʿAbd Al-Munʿim, *Ilghāʾ ʿUqūbat Al-Iʿdām fī al-Maghrib wa-Ḥaqq al-Qaṣāṣ li-l-Maẓlūmīn*, Howiyapress (Dec. 15, 2024), https://howiyapress.com/إلغاء-عقوبة-الإعدام-في-المغرب-وحق-القص/.

at the UN as a step towards the abolition of the death penalty in Moroccan law. According to them, this vote is only carrying on Morocco's existing *de facto* moratorium in place since 1993.[108] The party emphasized its traditional position of maintaining the death penalty for the most serious crimes linked to intentional homicide and attacks on human life as established by the Qurʾān through *qiṣāṣ*. Trying to present their position as balanced, the party pointed to its 2013 support for a penal reform that reduced the number of cases of death penalty by military courts from 16 to 5, aiming to curb excesses while respecting the *qiṣāṣ* from the Qurʾān.[109] Liberal critics such as ʿAbd al-Raḥmān al-Jāmiʿī challenged the PJD's position on the vote, urging the party to acknowledge it as a step toward full abolition.[110]

For decades, it appears that Morocco has been trying to strike a balance between maintaining the death penalty in the criminal system, in order to remain faithful to a legal legacy, and suspending its practical application in order to satisfy certain international and national human rights requirements. The additional step taken in favor of the universal moratorium on the death penalty has put back on the agenda debates about abolition of the death penalty from the Moroccan Penal Code. For now, despite calls from some NGOs and political actors to formally abolish capital punishment, the Kingdom of Morocco appears reluctant to take that step, particularly because of the symbolic importance given to Islamic law and its connection to the roots of the monarchy based upon the Islamic legal and political principle of *bayʿa*.[111] As Hassan II once said, "Islamic law sticks to

108 Although it maintains its own agenda, the PJD, like most Moroccan political parties, generally accepts the main directives set by the monarchy. This dynamic often tempers its positions on issues linked directly or indirectly to religion. *See* Mohamed Tozy, *Islamists, Technocrats, and the Palace*, 19 J. Democracy 38, 38–39 (2008).

109 PJD, *supra* note 105.

110 Yusef Yakubi, *al-Jāmiʿī Yunāqiš Bin Kīrān Ḥawl al-Iʿdām*, Hespress (Dec. 19, 2024), https://www.hespress.com/1483698-الجامعي-يناقش-بنكيران-حول-الإعدام.html.

111 Idrīs Khalīfa, *ʿAqd al-bayʿa min khilāl al-sīra al-nabawiya wa-aḥkām al-fiqh*, 336 Majallat Daʿwat al-Ḥaqq (Wizarat al-Awqāf wa-Shuʾūn al-Islāmiya 1998).

our skin, whether we like it or not, both in terms of public law and private law."[112]

Conclusion

The dynamic evolution of Islamic criminal law and its interaction with modern legal systems and social change highlights the significant interpretive challenges faced by both Islamic scholars and modern Muslim states. Through diverse and subtle hermeneutical strategies, such as contextual and eclectic *ijtihād*, Islamic scholars and modern lawmakers in the Muslim world are moving away from rigid legal formalism towards more nuanced and context-sensitive interpretations. These approaches allow for the integration of Islamic legal principles into contemporary frameworks, making them more compliant with certain human rights standards and societal expectations. The shift from *ḥudūd* to *taʿzīr* was a way to practically secularize Islamic criminal law while trying to keep it within an Islamic framework, using legal and symbolic strategies to reconcile tradition and modernity. In this respect, the case of Morocco is particularly illustrative. Key scholars of Islamic law, alongside the monarchy, promoted an *ijtihād* to legitimate the cessation of *ḥudūd*, leading to the secularization of those punishments and its terminology while keeping the "Islamic" offenses. We referred to this process as "Islamic secularization." Indeed, some can argue that this secularization process, while diverging from classical Islamic law, is not necessarily un-Islamic. As Sherman Jackson has argued, this can be considered as "Islamic secularization" since "secular," even if falling outside the framework of Islamic law, can still be Islamic.[113]

Morocco's recent vote at the UN for a global moratorium on the death penalty revived domestic debates on its abolition, even though it has practically not been applied since 1993 due to various legal tools, particularly the royal pardon. Those

112 Jacques Bensimon, *Interview of Hassan II in Carnets du Maroc – Au sujet du roi* (Nat'l Film Bd. of Can. 1987), https://www.youtube.com/watch?v=cq9jgohJD90.

113 *See* Sherman A. Jackson, The Islamic Secular (2024).

who seek to keep the death penalty in the law defend its Islamic roots in the Qurʾān, through *qiṣāṣ*, while opponents argue that it is only a political and legal issue in an attempt to secularize the discussion. Morocco's experience reflects a broader trend in many countries of the Muslim world. Indeed, the secularization of Islamic criminal law was originally an attempt, by different means, to be faithful to Islamic law (at least theoretically). Moreover, most of the *ḥudūd* punishments, with the exception of the death penalty, have been abolished in practice across most of the Muslim world. Theoretically, however, many scholars of Islamic law justify this practical non-application by invoking contextual arguments to advocate for a kind of "endless temporary" suspension. This gap between legal theory and practice reveals a need for renewed legal, religious, and intellectual answers. In this regard, collective *ijtihād* and its global institutions[114] could play a key role in solving those issues. With a strong global Islamic legitimacy, it can aim to offer a kind of contemporary *ijmāʿ* while being connected to the different states and societies of the Islamic world. By fostering collaboration among scholars, jurists, and policymakers, such institutions could make a significant contribution in addressing modern legal challenges facing the Muslim world today.[115]

114 *See* Mahil, *supra* note 1, at 107–26 (discussing the role of the International Islamic Fiqh Academy in Jeddah, which is affiliated with the Organization of Islamic Cooperation and gathers scholars from across the Muslim world).

115 *Id.*

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Journal of Islamic Law
Volume 5, Special Issue, 2025

ISSN 2475-7985 (print)
ISSN 2475-7977 (online)

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Harvard Law School
Cambridge, MA 02138