

DNA as an Evidence in Islamic Jurisprudence

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Abstract

Islam support science, although Qur'ān is not a book of science yet 750 verses of Holy Qur'ān discussed nature and natural phenomena including the chemical and biological creation of man. The discovery of DNA has been proved as a milestone in history of science. A single strand of DNA stores complete information of a person and this information is now used in chemical investigation by forensic DNA analysis. DNA analysis helps in investigation of a huge number of crime cases. Advanced countries used this technique widely and developed DNA data base for alleviation of crime. Only single cell of a body is required to extract DNA that is needed for DNA analysis and it can be done through various techniques. DNA test is also used successfully in resolving of rape crimes. Rape is a serious social crime, because a rapist not only violates rights of Allah but also violate right of people that's why most Muslim scholars place act of rape in hirabah and differentiate it from zina. As rape is different from zina so criteria for punishment of zina will not be the same where four witnesses are required for proof. In rape cases circumstantial evidences supposed to be the primary evidence. Holy Prophet SAW and Muslim judges used circumstantial evidences throughout the history. DNA is strong, conclusive circumstantial evidence for proof of rape sexual offence. Possibility of error is always present in every human act. Even testimony of witness is also false and may affected by dellusions and illusions. Possibilities of errors in DNA test are eliminated if proper procedures are developed for detection, collection and preservation of samples. Justice is the main virtue of Islam. Allah Almighty proposed rule in Holy Qur'ān and Sunnah to provide justice equally to all. This study suggest that DNA test helps the Muslim judges to provide justice and alleviate rape crime from society.

Key words: DNA, Qur'ān , Sunnah, science, Biological

Introduction:

Deoxyribonucleic acid or DNA is the hereditary material in humans and almost all other organisms. Nearly every cell in a person's body has similar DNA molecule, while it is mainly located in the cell nucleus. The discovery that DNA is the prime genetic molecule, carrying all hereditary information within chromosomes, immediately focused attention on its structure. It was hoped that knowledge of the structure would reveal that DNA carries the genetic messages, which are replicated when chromosomes divide to produce two identical copies of themselves. DNA molecule is a double helix, with two strands held together by base-pairing. Genetics is the study of heredity and variation. Heredity is the process in which both parents inherit genes into their child which in turn express specific traits, for example hair, eye and skin colour etc. Genetic information is present in each gene. Human genome is made by DNA in the cell. This DNA when left on a crime scene in form of blood or hair etc. is used by the investigators to identify criminal by matching it with the suspect's DNA or with the DNA in database through DNA testing. This test is also used in paternity determination.

DNA evidence is used in resolving a large number of criminal cases and especially in rape cases. Today out of every ten cases, at least four are solved with help of DNA evidence. Solving crimes and punished the suspected person through forensic DNA analysis now becoming common in west but in east especially in Islamic countries this technology is still unused, and if used, its usage is very rare, because of lack of resources. Another issue that makes the usage of DNA printing difficult is its controversial state among Islamic religious scholars. Allah Almighty gives the rules of punishment of some big crimes like robbery, adultery, rape and homicide. These rules were further clarified by Sunnah and later on by Fiqh.

Justice in Islam

First virtue of social institution is justice. If unjust laws and institution are made, they should rectify no matter how effective they are.¹Justice is also consider a main virtue in the Holy Qur'ān . Justice stands next after belief in Tawheed and Risaalat.²

Justice

To understand justice, we should know the term:- Originally the word Justice is derived from Latin word "Justitia" it means "the exercise of authority in the maintenance of right".³

¹John Rawls, A theory of Justice, page # 3

²Charles Le Gai Eaton, The concept of Justice in Islam

³The Australian Oxford Dictionary, page # 718

“Justice is the principle and the process by which each man is assured the things that belongs to him.”⁴

Importance of Justice

Justice has great importance in Islam, as all Islamic Studies are refer to social justice which is a main branch of great science.⁵Code of laws and regulations are given to the followers by Islam for the entire way of life.⁶Allah Almighty commands the judges to perform their duties without any discrimination.

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا

“Verily! Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice. Verily, how excellent is the teaching which He (Allah) gives you! Truly, Allah is Ever AllHearer, AllSeer.”⁷

The basic principle of justice is Islam is adhesion of the people to the law, and the law must be according to the law of Almighty Allah and his commands and the advocate, the judge and the executer must subject themselves to the law of God and his command.

وَمَا كَانَ لِمُؤْمِنٍ وَلَا لِمُؤْمِنَةٍ إِذَا قَضَىٰ اللَّهُ وَرَسُولُهُ أَمْرًا أَنْ يَكُونَ لَهُمُ الْخِيَرَةُ مِنْ أَمْرِهِمْ وَمَنْ يَعْصِ اللَّهَ وَرَسُولَهُ فَقَدْ ضَلَّ ضَلًّا مُّبِينًا

“It is not for a believer, man or woman, when Allah and His Messenger have decreed a matter that they should have any option in their decision. And whoever disobeys Allah and His Messenger, he has indeedstrayed in a plain error.”⁸

All the rulers of the Muslim world are commanded that nobody is superior to law.^{9,10}

Equality and Fairness

The main element of justice is equality that means a common person should has all basic rights in case any of exploitation, he has the authority to enter into the forms of government for justice and this principle will call justice as fairness.¹¹

⁴The World Book Dictionary, page # 1142

⁵Asyraf H.A.R, Wan Ibrahim, Nooraihan, Islamic Concept of Social Justice, Page # 1424

⁶M. Zafarullah Khan, The Concept Of Justice in Islam, page # 7

⁷ Al-Quran, An-Nisa, 4:58

⁸Al-Quran, Al-Ahzab, 33:36

⁹Asyraf H.A.R, Wan Ibrahim, Nooraihan, Islamic Concept of Social Justice, Page # 1425

¹⁰Sami-ul-Hassan, Islamic Concept of Social Justice, Page # 178

¹¹John Rawls, A Theory of Justice, Page # 10

Islam unites all mankind and provides absolute justice inspite of color, race and religious differences.¹² Allah says in Qur'ān that all human being are created from one being.

يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَاءً ۗ

“O mankind! Be dutiful to your Lord, Who created you from a single person (Adam), and from him (Adam) He created his wife (Hawwa (Eve)), and from them both He created many men and women.”¹³

Islam commands equality and justice in rights and punishment for everybody, for the poor, the weak, the women, the elite and the children.^{14, 15}

Islamic punishments

Islam is the religion of peace. Islam does not tolerate crime and criminal behavior. Islam commands to establish social justice and to protect rights and interest of individual to achieve peace, to abolish crime and criminal behavior Islam proposes punishments for the offenders and violators to prevent new crimes.^{16, 17}

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ

“O you who believe! Fulfill (your) obligations.”¹⁸

Qur'ān and Sunnah is the main source of Islamic law, and after these two different school of thoughts molds the law according to the need of society but these are also based on different interpretations of the Qur'ān and sunnah.^{19, 20}

Classifications of Islamic Criminal law

The objective of Islamic law discussed by Muslim jurist is to protect the following values.

- 1- Protection of life
- 2- Protection of property
- 3- Protection of reputation
- 4- Protection of intellect
- 5- Protection of religion

¹²Asyraf H.A.R, Wan Ibrahim, Nooraihan, Islamic Concept of Social Justice, Page # 1424

¹³ Al-Quran, An-Nisa, 4:1

¹⁴Tufail Ahmed Qureshi, Justice in Islam, Page # 37-40

¹⁵Sami-ul-Hassan, Islamic Concept of Social Justice, Page # 178

¹⁶Ibid Page #168

¹⁷Dr.Etim, Hudood Punishments in Islamic Criminal Law, Page # 227

¹⁸Al-Quran, Al-Maida, 5:1

¹⁹Farrukh B. Hakeem, The Concept of Punishment under Shariah, Page # 7-8

²⁰Rima Yerenatovna, Marlen, Sholpan, The Concept and Sign of Punishment in Islamic Law, Page # 734

All Islamic obligation and prohibitions are made to protect these five basic aspects of life. Regarding these aspects Islamic criminal law are divided into three main categories.

- 1- Hudood(fixed punishments)
- 2- Qisas(retribution)
- 3- Taazir(Chastisement)^{21, 22, 23, 24, 25, 26}

Hudood

The word “Hadd” is used in several different meanings in Arabic language i.e. is border, edge, brim, to limit, restrict, confine. While “Hudood Allah” means the bounds and restrictions that God has placed on man’s freedom of action. Primary meaning of Hadd is not punishment.²⁷Hudood are certain fixed punishments that have been clearly defined in Qur’ān and Sunnah. These are the punishments fixed by God himself.²⁸

Purpose of Hudood

Hudood are the rights of Allah because it is a crime against Allah or against the justice of public or community. In the implementations of the hudood; Islamic courts nor other government bodies have discretionary power, When once it is reported to law agencies. Hudood keep the people having criminal nature away from the violation of limits set by the God for the peace of society that’s the reason Hudood are set as extreme punishments because these extreme suffering should prevent further commission of crimes. It is retributions on the criminal and is only applied to the guilty persons.^{29, 30}

Classification of Hudood

Most of the muslim jurist classified hudood into six categories.

- 1- Zina (illicit sexual relations)
- 2- Qadhf (wrong accusation of un chastity)
- 3- Sariqa (theft)
- 4- Hiraba (Armed Robbery)
- 5- Shurub al Khamr (Alcohol drinking)
- 6- Ridda (apostasy)

²¹Farrukh B. Hakeem, The Concept of Punishment under Shariah, Page # 9-12

²²Rima Yerenatovna, Marlen, Sholpan, The Concept and Sign of Punishment in Islamic Law, Page # 734

²³Dr.TufailHashimi, Hudood Ordinance, in Light of Quran and Sunnah, page # 11

²⁴Farhat J. Ziadeh, Criminal Law.

²⁵NIK Rahim NikWajis, The Crime of Hirabah in Islamic Law, Page # 32

²⁶Dr.Etim, Hudood Punishments in Islamic Criminal Law, Page # 12

²⁷ Hens Wehr Dictionary, page #159

²⁸ Dr. M. Khalid Masud, Hudood Ordinance, Page # 136-137

²⁹ Farrukh B. Hakeem, The Concept of Punishment under Shariah, Page # 13

³⁰ Rima Yerenatovna, Marlen, Sholpan, The Concept and Sign of Punishment in Islamic Law, Page # 735

Some jurist classified Hudood into five catagories they did not mention Apostasy in Hudood crimes.^{31, 32, 33, 34}

1- Adultery (Zina)

Adultery is an illicit sexual relation between male and female. The punishment prescribed for them in the Holy Qur'an .

الرَّائِيَةُ وَالرَّائِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ
وَلَيْسَ عَلَيْكُمْ جُنَاحٌ عَلَيْهِمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ

“The woman and the man guilty of adultery or fornication,- flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment.”³⁵

And the other punishment prescribed by Prophet Muhammad(S.A.W) is stoning these people to death in marital case. As it is our main topic of discussion,so we discuss it in detail later on..

2- False Accusation (Qazf)

It is false accusation of charges of Zina an innocent woman. It is punishable because it threatens the legitimacy of child of woman. The Qur'an prescribed its Punishments as Follows:

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ
الْفَاسِقُونَ

“And those who launch a charge against chaste women, and produce not four witnesses [to support their allegations], flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors.”³⁶

3- Theft (Sariqa)

Stealing of someone's property is theft. The punishment for theft is described in Qur'an as follows:

³¹ Dr. M. Khalid Masud, Hudood Ordinance, Page # 151

³² Farrukh B. Hakeem, The Concept of Punishment under Shariah, Page # 14

³³ Dr. Tufail Hashimi, Hudood Ordinance, in Light of Quran and Sunnah, page # 5

³⁴ NIK Rahim NikWajis, The Crime of Hirabah in Islamic Law, Page # 33

³⁵ Al-Quran, An-Noor 24:2

³⁶ Al-Quran, An-Noor 24:4

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جَزَاءً بِمَا كَسَبَا نَكَالًا مِّنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ

“As to the thief. Male or female, cut off his or her hands: A punishment by way of example, from Allah, for their crime: And Allah is Exalted in Power.”³⁷

حَدَّثَنَا إِسْمَاعِيلُ بْنُ أَبِي أُوَيْسٍ، عَنِ ابْنِ وَهْبٍ، عَنْ يُونُسَ، عَنِ ابْنِ شِهَابٍ، عَنْ عُرْوَةَ بْنِ الزُّبَيْرِ، وَعَمْرَةَ، عَنْ عَائِشَةَ، عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، قَالَ: «تُقَطَّعُ يَدُ السَّارِقِ فِي رُبْعِ دِينَارٍ

Aisha may Allah be pleased with her narrated, the prophet (S.A.W) said

“The hand of a thief should be cut off for stealing a quarter of a dinar.”³⁸

Further condition for this punishment is given in Hadith. In Islamic criminal law minimum value for the stolen good is at least Quarter of a Dinar. Stealing was done by a mature person or the stolen property must be kept in a secured place is the criteria for Sariqa.

4- Disruption in Earth (Hiraba)

It is a crime of large scale. Hiraba is further classified into different forms by muslim jurists. There are the crimes which destroy harmony and peace of society and state on a large scale. The punishment for hiraba in the holy Qur'an is as follows:

إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِّنْ جِلْدٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ذَلِكَ لَهُمْ خِزْيٌ فِي الدُّنْيَا وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ -

“The punishment of those who wage war against Allah and His Apostle, and strive with might and main for mischief through the land is: Execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: That is their disgrace in this world, and a heavy punishment is theirs in the Hereafter.”³⁹

5- Drinking of alcohol (Shurb al khamr)

Drinking of alcohol is the mother of all vices. It is stated in the Holy Qur'an :

يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رَجْسٌ مِّنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ

“O ye who believe! Intoxicants and gambling, (dedication of) stones, and (divination by) arrows, are an abomination, --of Satan's handiwork: Eschew such (abomination), that ye may prosper.”⁴⁰

³⁷ Al-Quran, Al-Maida 5:38

³⁸ Imam Bukhari, Sahih Al-Bukhari, Book: Punishment Laws, Hadith No. 6790

³⁹ Al-Quran, Al-Maida, 5:33

⁴⁰ Al-Quran, Al-Maida, 5:90

حَدَّثَنَا حَفْصُ بْنُ عُمَرَ، حَدَّثَنَا هِشَامٌ، عَنْ قَتَادَةَ، عَنْ أَنَسٍ، أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ حَدَّثَنَا أَدَمُ بْنُ أَبِي إِبْرَاهِيمَ، حَدَّثَنَا شُعْبَةُ، حَدَّثَنَا قَتَادَةُ، عَنْ أَنَسِ بْنِ مَالِكٍ رَضِيَ اللَّهُ عَنْهُ أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ «ضَرَبَ فِي الْخَمْرِ بِالْجَرِيدِ وَالنِّعَالِ، وَجَلَدَ أَبُو بَكْرٍ أَرْبَعِينَ

Anas Bin Malik (May Allah Be Pleased with Him) Narrated:

“The Prophet (S.A.W) beat a drunk with Palm-leaf stalks and Shoes, and Abu Bakr gave forty lashes.”⁴¹

Later on Caliph Umar fixed the punishment to 80 lashes.

6- Rejection of Islam (Apostasy)

Rejection of Islam is a serious crime in Islamic law system because it discourage people from converting into Islam. It may raise internal revolution against Islam with treachery and blasphemy and make internal rebellions for Islamic state. That’s why its punishment is death.^{42, 43, 44}

حَدَّثَنَا أَبُو النُّعْمَانِ مُحَمَّدُ بْنُ الْفَضْلِ، حَدَّثَنَا حَمَادُ بْنُ زَيْدٍ، عَنْ أَيُّوبَ، عَنْ عِكْرَمَةَ، قَالَ: أَتَيْتُ عَلِيَّ رَضِيَ اللَّهُ عَنْهُ، بِرِئَاقَةٍ فَأَحْرَقَهُمْ، فَبَلَغَ ذَلِكَ ابْنَ عَبَّاسٍ، فَقَالَ: لَوْ كُنْتُ أَنَا لَمْ أَحْرِقْهُمْ، لِتَنْهَى رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «لَا تُعَذِّبُوا بِعَذَابِ اللَّهِ» وَلَقَتَلْتُهُمْ، لِقَوْلِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «مَنْ بَدَّلَ دِينَهُ فَاقْتُلُوهُ».

Narrated Ikrima: some zandiqah were brought to Ali and he burnt them. The news of this event reached Ibn Abbas who said: if I had been in his place, I would not have burnt them, as Allah’s Apostle (S.A.W) forbade it, saying: “Do not punish any body with Allah’s Punishment” I would have killed them according to the statement of Allah’s Apostle(S.A.W): “Whoever changed his Islamic religion, then kill him.”⁴⁵

Qisas

Life of every human being is very sacred near Almighty Allah. The infliction of injury, wounds, homicide or killing, all are include in Qisas. In Islamic law Qisas can be divided into two categories, it is Qisas and Diah.

Qisas is blood for blood or injury for injury while Diah is excepting money for blood.

As it is stated in the Holy Qur’an :

يَا أَيُّهَا الَّذِينَ ءَامَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ ۖ الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ ۖ وَالْأُنثَىٰ بِالْأُنثَىٰ ۚ فَمَنْ عُفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتِّبَاعٌ بِالْمَعْرُوفِ ۖ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ ۗ ذَٰلِكَ تَخْوِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ مِّنْ أَعْتَدْتُمْ بَعْدَ ذَٰلِكَ فَلَهُ عَذَابٌ أَلِيمٌ وَلَكُمْ فِي الْقِصَاصِ حَيٰوةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ.

⁴¹ Imam Bukhari, Sahih Al-Bukhari, Book: Punishment Laws, Hadith No. 6773

⁴² Dr. M. Khalid Masud, Hudood Ordinance, Page # 140-142

⁴³ Dr. Etim, Hudood Punishments in Islamic Criminal Law, Page # 229-234

⁴⁴ Naseem Ahmed Siddiqui, Islami hudood aur tazerat, Page # 9-13

⁴⁵ Imam Bukhari, Sahih Al-Bukhari, Book: Punishment Laws, Hadith No. 6922

“O ye who believe! the law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty. In the Law of Equality there is [saving of] Life to you, o ye men of understanding; that ye may restrain yourselves.”⁴⁶

It is also stated in Holy Qur’ān :

وَكُنْتُمْ عَلَيَّمْ فِيهَا أَنْ النَّفْسَ بِالنَّفْسِ وَالْعَيْنَ بِالْعَيْنِ وَالْأَنْفَ بِالْأَنْفِ وَالْأَذْنَ بِالْأَذْنِ وَاللِّسَانَ بِاللِّسَانِ وَالْجُرُوحَ قِصَاصًا فَمَنْ تَصَدَّقَ بِهِ فَهُوَ كَفَّارَةٌ لَهُ وَمَنْ لَمْ يَحْكَمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الظَّالِمُونَ

We ordained therein for them: "Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal." But if any one remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed,⁴⁷

The punishment of Qisas is decided by the agreement of victim or next of his kin or by the legal heirs either to take blood, money or to forgive the murderer.^{48, 49, 50, 51}

Taazir

The word Taazir is derived from “azar” means to censure, rebuke, restrain to refuse to have anything to do with so. The word Taazir is used for punishment by which criminals are restrained from the crimes by punishments.⁵² Taazir are the punishments not define by Holy Qur’ān and sunnah. In Taazir judges have the authority to decide the punishment according to the nature of crime. The crimes or acts prohibited in Qur’ān and sunnah comes under Taazir.⁵³ Taazir may include crimes like fales testimony, bribery, embezzlement, usury, spying for enemy homosexuality, heresies or many social crimes of such types. Taazir are not applied to hudood crimes or Qisas except in the case if crimes do not meet strict criteria of Hudood or Qisas crimes as mentioned in the Holy Qur’ān and Hadith.

⁴⁶ Al-Quran, Al-Baqarah, 2:178-179

⁴⁷ Al-Quran, Al-Maida, 5:45

⁴⁸ Dr.Etim, Hudood Punishments in Islamic Criminal Law, Page # 232-233

⁴⁹ Farrukh B. Hakeem, The Concept of Punishment under Shariah, Page # 14-15

⁵⁰ NIK Rahim NikWajis, The Crime of Hirabah in Islamic Law, Page # 34

⁵¹ Naveed Hussain, Concept of Punishment in Islam, Page # 10

⁵² Hens Wehr Dictionary, page # 610

⁵³ Dr.Tufail Hashimi, Hudood Ordinance, in Light of Quran and Sunnah, page # 51

The punishment in Taazir must be given according to sharia. The Punishment should be according to the nature and severity of crimes. The punishment may be threat, boycott, public disclosure, fines, imprisonment, flogging or death penalty.^{54, 55,56, 57}

Zina and its Hadd in Shariah

Introduction

Now we are going to discuss difference between adultery and rape, before going to topic of the DNA Evidence in rape cases. First of all we make it clear that either zina and rape are same type of crimes or different because the nature of any crime decides its punishment. Then we consult Qur'ān and Sunnah to look at the type of punishments given to adulterer and to rapist in Islamic law and what conditions are applied to both.

Zina

Allah Almighty created man and woman and place attraction and love in their hearts towards opposite sex. He makes sexual relationship between man and women to fulfill their sexual desire and to increase the number of human by giving birth to children. Islam is religion of nature. Islam loves piety and does not like free sexual relationship between man and woman. Islam protects the parentage of every child. For this reason Islam makes a social contract of Nikah or marriage. In Islam marriage is not only a thing of fulfilling sexual desire, but through the contract of marriage, man take the responsibility of women that he will give love, care, clothes, shelter and food to her and fulfill all her needs. Allah Almighty stated in the Holy Qur'ān :

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ

“ And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your [hearts]: verily in that are Signs for those who reflect.”⁵⁸

Islam protects the honour and chastity of everyone either man or woman and discourage the illicit sexual relationship. It is stated in the Holy Qur'ān :

وَلَا تَقْرَبُوا الزَّوْجَ إِتْنَاهُ كَانَ فاحِشَةً وَسَاءَ سَبِيلًا

“Nor come nigh to adultery: for it is a shameful [deed] and an evil, opening the road [to other evils].”⁵⁹

⁵⁴ Dr.Etim, Hudood Punishments in Islamic Criminal Law, Page # 228-229

⁵⁵ Farrukh B. Hakeem, The Concept of Punishment under Shariah, Page # 16-19

⁵⁶ NIK Rahim NikWajis, The Crime of Hirabah in Islamic Law, Page # 37-38

⁵⁷ Dr. M. Khalid Masud, Hudood Ordinance, Page # 148

⁵⁸ Al-Quran, Rum, 30:21

⁵⁹ Al-Quran, Bani Israel, 17:32

وَالَّذِينَ هُمْ لِأُفْجَاهِهِمْ حَافِظُونَ إِلَّا عَلَىٰ أَزْوَاجِهِمْ أَوْ مَا مَلَكَتْ أَيْمَانُهُمْ فَإِنَّهُمْ غَيْرُ مَلُومِينَ

“Who abstain from sex, Except with those joined to them in the marriage bond, or [the captives] whom their right hands possess,- for [in their case] they are free from blame.”⁶⁰

وَلَا تَقْرَبُوا أَلْفَاؤَاحِشَ مَا ظَهَرَ مِنْهَا وَمَا بَطَّنَ

“come not nigh to shameful deeds, Whether open or secret.”⁶¹

For the protection of human chastity, Islamic law fixed punishments for such people.^{62, 63}

What is Zina?

The legal meaning of Zina according to majority of Muslim scholars is “the voluntary sexual intercourse outside of marriage when the male sexual organ is inserted inside the female sexual organ, regardless of the number of times. The main thing in act of zina is that, the two partners are not married to one another and the most important thing is that the act is committed voluntarily and the consent of both partners included in this act. Adultery (illicit sexual relationship of the persons of marital status) and fornication (i.e. illicit sexual intercourse of unmarried person) both are termed as Zina.”^{64, 65}

Punishment for Zina in Islam

The punishment of zina is given in two stages in Qur’ān .

100 Lashes

The first punishment was given in (3 hijri) in Sura Nisa.

وَالَّتِي يَأْتِيَنَّ الْفُلْجِشَةَ مِنْ نِسَائِكُمْ فَاسْتَشْهِدُوا عَلَيْهِنَّ أَرْبَعَةً مِّنْكُمْ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّىٰ يَتَوَقَّأَهُنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا

“If any of your women are guilty of lewdness, Take the evidence of four [Reliable] witnesses from amongst you against them; and if they testify, confine them to houses until death do claim them, or Allah ordain for them some [other] way.”⁶⁶

At this time the punishment was related to family laws that the person involved in zina should be imprisoned in their houses till their death. The way mentioned in this verse is revealed in (5 hijri) in Surah Noor.

⁶⁰ Al-Quran, Al-muminun, 23:5-6

⁶¹ Al-Quran, Al-Anaam, 6:151

⁶² Dr.Tufail Hashimi, Hudood Ordinance, in Light of Quran and Sunnah, page # 67-68

⁶³ Anwer Ali, Quran the Fundamental law of Human Life, volume # 10, Page # 12-13

⁶⁴ Ibid, Page # 12

⁶⁵ Ibrahim B. Syed, Zina and Rajm.

⁶⁶ Al-Quran, An-Nisa, 4:15

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ
وَلَيْسَ لَهُمَا عَذَابٌ ظَافٍ مِّنَ الْمُؤْمِنِينَ

“The woman and the man guilty of adultery or fornication,- flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment.”⁶⁷

In Surah Noor permanent law of zina has been given. Now Islamic state should punish the zani according to this law. ^{68, 69, 70} According to this verse of Surah Noor the punishment of fornication and adultery is 100 lashes. Qur’ān does not discriminate both nor any other verse is found where separate punishment has commanded for adultery^{71, 72} but if we look into Sunnah we also found another punishment for adultery and that is stoning to death.

Rajm: Stoning to death

If we look into Sunnah we found many traditions about the fact that many people were stoned to death by Prophet S.A.W and after him by the four worthy Caliphs.⁷³

Now look into Bible what was the punishment of fornication and adultery in Bible.

“And the father shall say: I gave my daughter unto this man to wife: and because he hateth her, He layeth to her charge a very ill name, so as to say: I found not thy daughter a virgin: and behold these are the tokens of my daughter's virginity. And they shall spread the cloth before the ancients of the city: And the ancients of that city shall take that man, and beat him, Condemning him besides in a hundred sides of silver, which he shall give to the damsel's father, because he hath defamed by a very ill name a virgin of Israel: and he shall have her to wife, and may not put her away all the days of his life. But if what he charged her with be true, and virginity be not found in the damsel: They shall cast her out of the doors of her father's house, and the men of the city shall stone her to death, and she shall die: because she hath done a wicked thing in Israel, to play the whore in her father's house: and thou shalt take away the evil out of the midst of thee.”⁷⁴

This was the punishment of fornication, another commandment was given for adultery:

“If a man lie with another man's wife, they shall both die, that is to say, the adulterer and the adulteress: and thou shalt take away the evil out of Israel.”⁷⁵

⁶⁷ Al-Quran, Noor, 24:2

⁶⁸ Anwer Ali, Quran the Fundamental law of Human Life, volume # 10, Page #

⁶⁹ Dr. M. Aslam Siddique, Rooh-ul-Quran, Volume 8, Page # 116-117

⁷⁰Abul Ala Modudi, Tafhim-ul-Quran, Volume 3, Page # 325

⁷¹ Dr.Tufail Hashimi, Hudood Ordinance, in Light of Quran and Sunnah, page # 119-121

⁷² M. Ammar Khan Nasir, Hudood-o-Tazirat, Page # 123,136

⁷³ Anwer Ali, Quran the Fundamental law of Human Life, volume # 10, Page # 17

⁷⁴ The Holy Bible, Deuteronomy, 22:16-21

⁷⁵ Ibid, 22:22

So before the revelation of Surah Noor, Holy Prophet SAW has stoned the zani to death according to Bible but after the revelation of Surah Noor, Holy Prophet SAW rajm people in some cases.

حَدَّثَنِي إِسْحَاقُ، حَدَّثَنَا خَالِدٌ، عَنِ الشَّيْبَانِيِّ: سَأَلْتُ عَبْدَ اللَّهِ بْنَ أَبِي أَوْفَى: " هَلْ رَجَمَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ؟ قَالَ: نَعَمْ، قُلْتُ: قَبْلَ سُورَةِ النُّورِ أَمْ بَعْدُ؟ قَالَ: لَا أَدْرِي "

As-Shaibani narrated: I asked Abdullah bin Abi Aufa: "Did Allah's Apostle (S.A.W) carry out the stoning penalty?" He said: "yes". I said: "Before the revelation of Sura Noor or after it?" He replied: "I don't know."^{76, 77}

(1695) وَحَدَّثَنَا أَبُو بَكْرِ بْنُ أَبِي شَيْبَةَ، حَدَّثَنَا عَبْدُ اللَّهِ بْنُ نُمَيْرٍ، ح وَحَدَّثَنَا مُحَمَّدُ بْنُ عَبْدِ اللَّهِ بْنِ نُمَيْرٍ، وَتَقَارَبَا فِي لَفْظِ الْحَدِيثِ، حَدَّثَنَا أَبِي، حَدَّثَنَا بَشِيرُ بْنُ الْمُهَاجِرِ، حَدَّثَنَا عَبْدُ اللَّهِ بْنُ بُرَيْدَةَ، عَنْ أَبِيهِ، أَنَّ مَاعِزَ بْنَ مَالِكٍ الْأَسْلَمِيَّ، أَتَى رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَقَالَ: يَا رَسُولَ اللَّهِ، إِنِّي قَدْ ظَلَمْتُ نَفْسِي، وَزَنَيْتُ، وَإِنِّي أُرِيدُ أَنْ تُطَهِّرَنِي، فَرَدَّهُ، فَلَمَّا كَانَ مِنَ الْعَدَاةِ، فَقَالَ: يَا رَسُولَ اللَّهِ، إِنِّي قَدْ زَنَيْتُ، فَرَدَّهُ الثَّانِيَةَ، فَأَرْسَلَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ إِلَى قَوْمِهِ، فَقَالَ: «أَتَعْلَمُونَ بِعَقْلِهِ بَأْسًا، تُنْكِرُونَ مِنْهُ شَيْئًا؟» فَقَالُوا: مَا نَعْلَمُهُ إِلَّا وَفِي الْعَقْلِ مِنْ صَالِحِينَ فِيمَا نَرَى، فَأَتَاهُ الثَّالِثَةَ، فَأَرْسَلَ إِلَيْهِمْ أَيْضًا فَسَأَلَ عَنْهُ، فَأَخْبَرُوهُ أَنَّهُ لَا بَأْسَ بِهِ، وَلَا بِعَقْلِهِ، فَلَمَّا كَانَ الرَّابِعَةَ حَفَرَ لَهُ حُفْرَةً، ثُمَّ أَمَرَ بِهِ فُرْجَمَ، قَالَ، فَجَاءَتِ الْعَامِدِيَّةُ، فَقَالَتْ: يَا رَسُولَ اللَّهِ، إِنِّي قَدْ زَنَيْتُ فَطَهِّرْنِي، وَإِنَّهُ رَدَّهَا، فَلَمَّا كَانَ الْعَدَاةِ، قَالَتْ: يَا رَسُولَ اللَّهِ، لِمَ تَرُدُّنِي؟ لَعَلَّكَ أَنْ تَرُدَّنِي كَمَا رَدَدْتَ مَاعِزًا، فَوَاللَّهِ إِنِّي لِحُبْلَى، قَالَ: «إِنَّمَا لَا فَادْهَبِي حَتَّى تَلِدِي»، فَلَمَّا وَلَدَتْ أَنَّتَهُ بِالصَّبِيِّ فِي حِرْقَةٍ، قَالَتْ: هَذَا قَدْ وَلَدْتُهُ، قَالَ: «أَدْهَبِي فَارْضِعِيهِ حَتَّى تَطْمِئِنِّي»، فَلَمَّا فَطَمَتْهُ أَنَّتَهُ بِالصَّبِيِّ فِي يَدِهِ كِسْرَةَ خُبْزٍ، فَقَالَتْ: هَذَا يَا نَبِيَّ اللَّهِ قَدْ فَطَمْتُهُ، وَقَدْ أَكَلَ الطَّعَامَ، فَدَفَعَ الصَّبِيَّ إِلَى رَجُلٍ مِنَ الْمُسْلِمِينَ، ثُمَّ أَمَرَ بِهَا فَحُفِرَ لَهَا إِلَى صَدْرِهَا، وَأَمَرَ النَّاسَ فَرَجَمُوهَا، فَيُقْبِلُ خَالِدُ بْنُ الْوَلِيدِ بِحِجْرٍ، فَرَمَى رَأْسَهَا فَتَنَصَّحَ الدَّمُ عَلَى وَجْهِ خَالِدٍ فَسَنَّتْهَا، فَسَمِعَ نَبِيُّ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ سَبَّهُ إِيَّاهَا، فَقَالَ: «مَهْلًا يَا خَالِدُ، فَوَالَّذِي نَفْسِي بِيَدِهِ لَقَدْ تَابَتْ تَوْبَةً لَوْ تَابَهَا صَاحِبُ مَكِّي لَعُفِرَ لَهُ»، ثُمَّ أَمَرَ بِهَا فَصَلَّى عَلَيْهَا، وَدُفِنَتْ

'Abdullah b. Buraida reported on the authority of his father that Ma'iz b. Malik al-Aslami came to Allah's Messenger (ﷺ) and said:

Allah's Messenger, I have wronged myself; I have committed adultery and I earnestly desire that you should purify me. He turned him away. On the following day, he (Ma'iz) again came to him and said: Allah's Messenger, I have committed adultery. Allah's Messenger (ﷺ) turned him away for the second time, and sent him to his people saying: Do you know if there is anything wrong with his mind. They denied of any such thing in him and said: We do not know him but as a wise good man among us, so far as we can judge. He (Ma'iz) came for the third time, and he (the Holy Prophet) sent him as he had done before. He asked about him and they informed him that there was nothing wrong with him or with his mind. When it was the fourth time, a ditch was dug for him and he (the Holy Prophet) pronounced judgment about him and he was stoned. He (the narrator) said: There came to him (the Holy Prophet) a woman from Ghamid and said: Allah's Messenger, I have committed adultery, so purify me. He (the Holy Prophet) turned her away. On the following day she said: Allah's Messenger, Why do you turn me away? Perhaps, you turn me away as you turned away Ma'iz. By Allah, I have become pregnant. He said: Well, if you insist upon it, then go away until you give birth to (the child). When she was delivered she came with the child (wrapped) in a rag and said: Here is the child whom I have given birth to. He said: Go away and suckle him until you wean him. When she had weaned him, she

⁷⁶ Imam Bukhari, Sahih Al-Bukhari, Book: Punishment Laws, Hadith No. 6813

⁷⁷ This Hadith is also narrated in: Imam Muslim, Sahih Muslim, Book: Punishment Laws, Hadith No. 1702

came to him (the Holy Prophet) with the child who was holding a piece of bread in his hand. She said: Allah's Apostle, here is he as I have weaned him and he eats food. He (the Holy Prophet) entrusted the child to one of the Muslims and then pronounced punishment. And she was put in a ditch up to her chest and he commanded people and they stoned her. Khalid b Walid came forward with a stone which he flung at her head and there spurted blood on the face of Khalid and so he abused her. Allah's Apostle (ﷺ) heard his (Khalid's) curse that he had huried upon her. Thereupon he (the Holy Prophet) said: Khalid, be gentle. By Him in Whose Hand is my life, she has made such a repentance that even if a wrongful tax-collector were to repent, he would have been forgiven. Then giving command regarding her, he prayed over her and she was buried.⁷⁸

حَدَّثَنِي مُحَمَّدُ بْنُ الْمُثَنَّى، حَدَّثَنِي عَبْدُ الْأَعْلَى، حَدَّثَنَا دَاوُدُ، عَنْ أَبِي نَضْرَةَ، عَنْ أَبِي سَعِيدٍ، أَنَّ رَجُلًا مِنْ أَسْلَمَ، يُقَالُ لَهُ مَا عَزُ بْنُ مَالِكٍ، أَتَى رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَقَالَ: إِنِّي أَصَبْتُ فَاحِشَةً، فَأَقَمَهُ عَلَيَّ، فَرَدَّهُ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ مَرَارًا، قَالَ: ثُمَّ سَأَلَ قَوْمَهُ، فَقَالُوا: مَا نَعْلَمُ بِهِ بَأْسًا إِلَّا أَنَّهُ أَصَابَ شَيْئًا يَرَى أَنَّهُ لَا يُخْرِجُهُ مِنْهُ إِلَّا أَنْ يُقَامَ فِيهِ الْحَدُّ، قَالَ: فَرَجَعَ إِلَى النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَأَمَرَنَا أَنْ نَرْجُمَهُ، قَالَ: فَأَنْطَلَقْنَا بِهِ إِلَى بَقِيعِ الْعَرْقَدِ، قَالَ: فَمَا أَوْثَقْنَا، وَلَا حَفَرْنَا لَهُ، قَالَ: فَرَمَيْنَاهُ بِالْعَظْمِ، وَالْمَدْرِ، وَالْحَرْفِ، قَالَ: فَاشْتَدَّ، وَاشْتَدَّدْنَا خَلْفَهُ حَتَّى أَتَى عَرْضَ الْحَرَّةِ، فَأَنْتَصَبَ لَنَا فَرَمِينَاهُ بِجَلَامِيدِ الْحَرَّةِ - يَعْنِي الْحِجَارَةَ - حَتَّى سَكَتَ، قَالَ: ثُمَّ قَامَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ خَطِيْبًا مِنَ الْعَشِيِّ، فَقَالَ: «أَوْ كَلَّمَا أَنْطَلَقْنَا غُرَاةً فِي سَبِيلِ اللَّهِ تَخَلَّفَ رَجُلٌ فِي عِيَالِنَا، لَهُ نَيْبٌ كَنَيْبِ النَّبِيِّ، عَلَيَّ أَنْ لَا أُوتَى بِرَجُلٍ فَعَلَ ذَلِكَ إِلَّا تَكَلَّمْتُ بِهِ»، قَالَ: فَمَا اسْتَعْفَرَ لَهُ وَلَا سَبَّهُ،

Abu Sa'id reported that a person belonging to the clan of Aslam, who was called

Ma, iz b. Malik, came to Allah's Messenger (ﷺ) and said:

I have committed immorality (adultery), so inflict punishment upon me. Allah's Apostle (ﷺ) turned him away again and again. He then asked his people (about the state of his mind). They said: We do not know of any ailment of his except that he has committed something about which he thinks that he would not be able to relieve himself of its burden but with the Hadd being imposed upon him. He (Ma'iz) came back to Allah's Apostle (ﷺ) and he commanded us to stone him. We took him to the Baqi' al-Gharqad (the graveyard of Medina). We neither tied him nor dug any ditch for him. We attacked him with bones, with clods and pebbles. He ran away and we ran after him until he came upon the ston ground (al-Harra) and stopped there and we stoned him with heavy stones of the Harra until he became motionless (lie died). He (the Holy Prophet) then addressed (us) in the evening saying Whenever we set forth on an expedition in the cause of Allah, some one of those connected with us shrieked (under the pressure of sexual lust) as the bleating of a male goat. It is essential that if a person having committed such a deed is brought to me, I should punish him. He neither begged forgiveness for him nor cursed him.⁷⁹

This Hadith shows character of Ma,iz b. Malik.

حَدَّثَنَا عَلِيُّ بْنُ مُحَمَّدٍ قَالَ: حَدَّثَنَا أَبُو مُعَاوِيَةَ، عَنِ الْأَعْمَشِ، عَنْ عَبْدِ اللَّهِ بْنِ مَرَّةَ، عَنِ الْبَرَاءِ بْنِ عَازِبٍ قَالَ: مَرَّ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ بِيَهُودِيٍّ مُحْجُوْدٍ. فَدَعَاهُمْ فَقَالَ: «هَكَذَا تَجِدُونَ فِي كِتَابِكُمْ حَدَّ الرَّانِي؟» قَالُوا: نَعَمْ. فَدَعَا رَجُلًا مِنْ عُلَمَائِهِمْ فَقَالَ: «أَنْشُدْكَ بِاللَّهِ الَّذِي أَنْزَلَ التَّوْرَةَ عَلَى مُوسَى، أَهَكَذَا تَجِدُونَ حَدَّ الرَّانِي؟» قَالَ: لَا. وَلَوْلَا أَنَّكَ تَشَدِّتَنِي لَمْ أُخْبِرْكَ. نَجِدُ حَدَّ الرَّانِي فِي كِتَابِنَا الرَّجْمِ، وَلَكِنَّهُ كَثُرَ فِي أَسْرَانَا. فَكُنَّا إِذَا أَحَدْنَا الشَّرِيفَ تَرَكْنَاهُ، وَكُنَّا إِذَا أَحَدْنَا الضَّعِيفَ

⁷⁸ Imam Muslim, Sahih Muslim, book: Punishment Laws, Hadith No. 1695

⁷⁹ Imam Muslim, Sahih Muslim, Book: Punishment Laws, Hadith No. 1694

أَقَمْنَا عَلَيْهِ الْحَدَّ. فَقُلْنَا: تَعَالَوْا فَلْنَجْتَمِعْ عَلَى شَيْءٍ نُقِيمُهُ عَلَى الشَّرِيفِ وَالْوَضِيعِ، فَاجْتَمَعْنَا عَلَى التَّحْمِيمِ وَالْجَلْدِ مَكَانَ الرَّجْمِ. فَقَالَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «اللَّهُمَّ إِنِّي أَوَّلُ مَنْ أَحْيَا أَمْرَكَ، إِذْ أَمَاتُوهُ». وَأَمَرَ بِهِ فَرَجِمَ

It was narrated that Bara' bin Azib said:

“The Messenger of Allah (ﷺ) passed by a Jew with a blackened face who had been flogged. He called them and said: 'Is this the punishment for the adulterer that you find in your Book?' They said: 'Yes.' Then he called one of their scholars and said: 'I adjure you by Allah (SWT) Who sent down the Tawrah (Torah) to Musa! Is this the punishment for the adulterer that you find in your Book?' He said: 'No; if you had not adjured me by Allah (SWT), I would not have told you. The punishment for the adulterer that we find in our Book is stoning, but many of our nobles were being stoned (because of the prevalence of adultery among them), so if we caught one of our nobles (committing adultery), we would let him go; but if we caught one of the weak among us, we would carry out the punishment on him. We said: “Come, let us agree upon something that we may impose on both noble and weak alike.” So we agreed to blacken the face and whip them, instead of stoning.' The Prophet (ﷺ) 'O Allah (SWT), I am the first of those who revive your command which they had killed off,' and he issued orders that (the man) be stoned.”⁸⁰

According to all these traditions, many Muslim scholars have the opinion that punishment of rajm was there in Prophet era but it was not only for adultery but all these cases show that the person involved in the act of doing mischief in a Muslim land i.e “fasad-fil-arz” were stoned to death and in many cases the person involved in rape were stoned to death.^{81, 82, 83}

Aspects for the Proof of Zina

In Islamic law of punishment some aspects are given for the proof of zina. According to majority of Muslim scholars following aspects will proof zina as mentioned in Qur’ān and Sunnah.

1. Witness (Shahadah)
2. Confession
3. Circumstantial evidence

1Witness (Shahadah)

In Islamic law witness is the first source for crime proof. Literally witness means “a person who saw something happen, eye witness, or a person who takes an oath to tell the truth in a court of law.”⁸⁴ A witness is someone who provides testimonial evidence either oral or written. The Holy Qur’ān give great importance to witness.

يَا أَيُّهَا الَّذِينَ ءَامَنُوا كُونُوا قَوَّامِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلَىٰ ءَلَّا تَعْدِلُوا ؕ ءَدِلُوا هُوَ أَقْرَبُ لِلتَّقْوَىٰ وَاتَّقُوا اللَّهَ

⁸⁰ Imam Ibn-e-Maja, Sunan Ibn-e-Maja, Book: Punishment Laws, Hadith No. 2558

⁸¹Dr.Tufail Hashimi, Hudood Ordinance, in Light of Quran and Sunnah, page # 127-135

⁸² M. Ammar Khan Nasir, Hudood-o-Tazirat, Page # 137

⁸³ Ameen Ahsan Islahi, Tadabbur-e-Quran, volume # 5, Page # 365-372

⁸⁴ The World Book Dictionary, Page # 2401

“O ye who believe! Stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: That is next to Piety: And fear Allah.”⁸⁵

It is a great sin to hide testimony.

وَلَا تَكْتُمُوا الشَّهَادَةَ وَمَنْ يَكْتُمْهَا فَإِنَّهُ آثِمٌ قَلْبُهُ وَاللَّهُ بِمَا تَعْمَلُونَ عَلِيمٌ

Conceal not evidence; for whoever conceals it, His heart is tainted with sin. And Allah Knoweth all that ye do.⁸⁶

Number of Witness for Proof of Zina

All Muslim scholars agreed on this that zina will be prove only in presence of four witness. According to the command of Allah Almighty.

وَالَّتِي يَأْتِيَنَّ الْفَاحِشَةَ مِنْ نِسَائِكُمْ فَاسْتَشْهِدُوا عَلَيْهِنَّ أَرْبَعَةً مِنْكُمْ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّى يَتَوَقَّعَهُنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا

“If any of your women are guilty of lewdness, Take the evidence of four [Reliable] witnesses from amongst you against them; and if they testify, confine them to houses until death do claim them, or Allah ordain for them some [other] way.”⁸⁷

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ۗ وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِنَ الْمُؤْمِنِينَ

“The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment.”⁸⁸

Conditions for Witness in Zina Case

In Islamic law system no punishment will be impose to the zani until it is proved by four eye witnesses as mention in the Holy Qur’ān . No punishment can be imposed in case of doubts because it is a matter of one’s dignity and honor that’s the reason Islamic Shariah proposed strict conditions for witness.

- I. Witness must be adult, witness of impuber is not accepted in hudood cases.
- II. Witness must be sane, witness of insane is not admissible until he recovers.
- III. Witness must have good memory.

⁸⁵ Al-Quran, Al-Maida, 5:8

⁸⁶ Al-Quran, Al-Baqara, 2:283

⁸⁷ Al-Quran, An-Nisa, 4:15

⁸⁸ Al-Quran, Noor, 24:2

- IV. Witness must be Adil. According to many jurists the person who is reliable in society, who resists capital sins, who follows Islamic Shariah, who does not insist on minor sins, who is respectable in society.
- V. Witness must have speaking power. Witness of mute is not admissible according to most jurists but some jurists accept written witness of mute.
- VI. Witness should be clear sighted. Witness of blind is not admissible.
- VII. A witness must be a Muslim. Witness of Non-Muslims will not be accepted against Muslims except in rare cases.
- VIII. Witness should not have any type of enmity with the accuser.
- IX. Witness of family members is not admissible according to majority of Muslim jurists. But if they are adil then there evidence should be check by the judge the witness of family members is acceptable in rare cases and is left on judge to decide that the testimony is relation based or is based on justice.
- X. According to majority of the jurists, witness of woman is not admissible in hudood cases but in Qur'ān and Sunnah we did not find any rejection of women's witness. So it may be admissible in rare cases.
- XI. Witness of a person who is punished with had-e-qadhf is not admissible according to majority of the jurists.^{89, 90, 91, 92, 93, 94, 95, 96}

Conditions for the Evidence of Witness

- I. The evidence should be make in front of judge in the court.
- II. According to majority of the jurists all witness must be present at the same legal session and must make their testimony in same legal session in case of zina. In case of conflicts and contradiction in testimony of witness hadd will be precludes.
- III. The evidence must be clear and conclusive. The witness have to mention in their evidence that they have seen with their eyes that the accused commit zina and have intercourse and they have seen them in that condition of making intercourse and the male sexual part penetrates into the female sexual part. If the witness have not seen them making sexual intercourse, hadd will be degraded but the accuser will be punished with taazir.
- IV. All witnesses mention same place, time and nominate same man and woman for the act of zina any ambiguity prelude the hadd.

⁸⁹Anwer Ali, Quran the Fundamental law of Human Life, volume # 10, Page # 20

⁹⁰ Dr.Tufail Hashimi, Hudood Ordinance, in Light of Quran and Sunnah, page # 165-167

⁹¹ Dr. M. Aslam Siddique, Rooh-ul-Quran, Volume 8, Page # 120

⁹² Abul Ala Modudi, Tafhim-ul-Quran, Volume 3, Page # 240

⁹³ Dr. Anwarullah, The Islamic Law of Evidence, Page # 6-17

⁹⁴ M. Mateen Hashimi, The Islamic Law of Evidence, Page # 240

⁹⁵ M. Mateen Hashimi, Islami Hudood, Page # 61-64

⁹⁶ Tufail Ahmed Qureshi, islami Hudood o Tazirat, Page # 125-132

- V. If the witness present false evidence then they are subjected to hadd-e-qadhif because false testimony has been declared a crime as stated in Holy Qur'an .

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ
الْفَاسِقُونَ

“And those who launch a charge against chaste women, and produce not four witnesses [to support their allegations], flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors.”⁹⁷

- VI. If one or two of the witness retracted from their testimony they are subjected to hadd-e-qadhif.^{98, 99, 100, 101}

Confession

In Islamic law of punishment other source for the proof of zina is confession of the culprit. Confession is one's own general admission of a fault.¹⁰²

Some principles are proposed by the Muslim jurists in acceptance of confession.

- I. The confession must be made before a judge in the court. Confession outside the court will not be admissible.
- II. Single confession is not enough for hadd. The confession must be made at least four times in four different intervals.
- III. The culprits clearly confess his/her offence.
- IV. If the culprit retract from his/her confession before or during the punishment hadd will be preclude.
- V. If the culprit run away after confession hadd will be preclude.
- VI. If the name of the offender involved with him/her in act of zina and the other offender rejects the claim, only the culprit who confess his/her crime will be punished not the second one.

حَدَّثَنَا الْحَسَنُ بْنُ عَلِيٍّ، حَدَّثَنَا عَبْدُ الرَّزَّاقِ، عَنِ ابْنِ جُرَيْجٍ، قَالَ: أَخْبَرَنِي أَبُو الزُّبَيْرِ، أَنَّ عَبْدَ الرَّحْمَنِ بْنَ الصَّامِتِ، ابْنَ عَمِّ أَبِي هُرَيْرَةَ، أَخْبَرَهُ، أَنَّهُ سَمِعَ أَبَا هُرَيْرَةَ، يَقُولُ: جَاءَ الْأَسْلَمِيُّ نَبِيَّ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَشَهِدَ عَلَى نَفْسِهِ أَنَّهُ أَصَابَ امْرَأَةً حَرَامًا أَرْبَعَ مَرَّاتٍ، كُلُّ ذَلِكَ يُعْرَضُ عَنْهُ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَأَقْبَلَ فِي الْخَامِسَةِ، فَقَالَ: «أَبَيْتُهَا؟» قَالَ: نَعَمْ، قَالَ: «حَتَّى غَابَ ذَلِكَ مِنْكَ فِي ذَلِكَ مِنْهَا؟» قَالَ: نَعَمْ، قَالَ: «كَمَا يَغِيبُ الْمِرْوَدُ فِي الْمُكْحَلَةِ، وَالرِّشَاءُ فِي الْبَيْرِ؟» قَالَ: نَعَمْ، قَالَ: «فَهَلْ تُنْذِرِي مَا الزَّانَا؟» قَالَ: نَعَمْ، أَنْتَبْتُ مِنْهَا حَرَامًا مَا يَأْتِي الرَّجُلُ مِنْ امْرَأَتِهِ حَلَالًا، قَالَ: «فَمَا تُرِيدُ بِهِذَا الْقَوْلِ؟» قَالَ: أُرِيدُ أَنْ تُطَهِّرَنِي، فَأَمَرَ بِهِ فَرُجِمَ، فَسَمِعَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ رَجُلَيْنِ مِنْ أَصْحَابِهِ يَقُولُ أَحَدُهُمَا لِصَاحِبِهِ: انظُرْ إِلَى هَذَا الَّذِي سَتَرَ اللَّهُ عَلَيْهِ، فَلَمْ تَدْعُهُ نَفْسُهُ حَتَّى رُجِمَ الْكَلْبِ، فَسَكَتَ عَنْهُمَا، ثُمَّ سَارَ سَاعَةً حَتَّى مَرَّ

⁹⁷ Al-Quran, An-Noor 24:4

⁹⁸ Abul Ala Modudi, Tafhim-ul-Quran, Volume 3, Page # 334

⁹⁹ Dr. Anwarullah, The Islamic Law of Evidence, Page # 27-37

¹⁰⁰ M. Mateen Hashimi, The Islamic Law of Evidence, Page # 241-243

¹⁰¹ Tufail Ahmed Qureshi, islami Hudood o Tazirat, Page # 127

¹⁰² Australian Oxford Dictionary, Page # 279

بِحَيْفَةِ جَمَارِ شَائِلِ بَرَجْلِهِ، فَقَالَ: «أَيُّنَ فُلَانٌ وَفُلَانٌ؟» فَقَالَا: نَحْنُ ذَانِ يَا رَسُولَ اللَّهِ، قَالَ: «أَنْزَلَا فُكْلًا مِنْ حَيْفَةِ هَذَا الْجَمَارِ»، فَقَالَ: يَا نَبِيَّ اللَّهِ، مَنْ يَأْكُلُ مِنْ هَذَا؟ قَالَ: «فَمَا نَلْتُمَا مِنْ عَرِضِ أَحْيِكُمَا آتِفًا أَسَدُ مِنْ أَكْلِ مِنْهُ، وَالَّذِي نَفْسِي بِيَدِهِ، إِنَّهُ الْآنَ لَفِي أَنْهَارِ الْجَنَّةِ يَنْقَمِسُ فِيهَا»

A man of the tribe of Aslam came to the Prophet (ﷺ) and testified four times against himself that he had had illicit intercourse with a woman, while all the time the Prophet (ﷺ) was turning away from him.

Then when he confessed a fifth time, he turned round and asked: Did you have intercourse with her? He replied: Yes. He asked: Have you done it so that your sexual organ penetrated hers? He replied: Yes. He asked: Have you done it like a collyrium stick when enclosed in its case and a rope in a well? He replied: Yes. He asked: Do you know what fornication is? He replied: Yes. I have done with her unlawfully what a man may lawfully do with his wife.

He then asked: What do you want from what you have said? He said: I want you to purify me. So he gave orders regarding him and he was stoned to death. Then the Prophet (ﷺ) heard one of his companions saying to another: Look at this man whose fault was concealed by Allah but who would not leave the matter alone, so that he was stoned like a dog. He said nothing to them but walked on for a time till he came to the corpse of an ass with its legs in the air.

He asked: Where are so and so? They said: Here we are, Messenger of Allah (ﷺ)! He said: Go down and eat some of this ass's corpse. They replied: Messenger of Allah! Who can eat any of this? He said: The dishonour you have just shown to your brother is more serious than eating some of it. By Him in Whose hand my soul is, he is now among the rivers of Paradise and plunging into them.¹⁰³

حَدَّثَنَا عُثْمَانُ بْنُ أَبِي شَيْبَةَ، حَدَّثَنَا طَلْقُ بْنُ عَنَّامٍ، حَدَّثَنَا عَبْدُ السَّلَامِ بْنُ حَفْصٍ، حَدَّثَنَا أَبُو حَازِمٍ، عَنْ سَهْلِ بْنِ سَعْدٍ، عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «أَنَّ رَجُلًا أَتَاهُ فَاقْرَأَ عِنْدَهُ أَنَّهُ رَأَى بِامْرَأَةٍ سَمَاءَهَا لَهُ، فَبَعَثَ رَسُولُ اللَّهِ صَلَّى [ص:151] اللَّهُ عَلَيْهِ وَسَلَّمَ إِلَى الْمَرْأَةِ، فَسَأَلَهَا عَنْ ذَلِكَ فَأَنْكَرَتْ أَنْ تَكُونَ رَنْتٌ، فَجَلَدَهُ الْخَدَّ وَتَرَكَهَا.

Narrated Sahl ibn Sa'd:

A man came to the Prophet (ﷺ) and confessed before him that he had committed fornication with a woman whom he named. The Messenger of Allah (ﷺ) sent for the woman and asked her about it. But she denied that she had committed fornication. So he inflicted the prescribed punishment of flogging on him, and let her go.¹⁰⁴

- VII. The judge make it sure that the confession is not under any threat or coercion or that the person is not insane.^{105, 106, 107, 108, 109}

¹⁰³ Imam Abu Dawood, Sunan Abi Dawood, Book: Punishment Laws, Hadith No. 4428

¹⁰⁴ Imam Abu Dawood, Sunan Abi Dawood, Book: Punishment Laws, Hadith No. 4437

¹⁰⁵ Anwer Ali, Quran the Fundamental law of Human Life, volume # 10, Page # 22-23

¹⁰⁶ Dr. Anwarullah, The Islamic Law of Evidence, Page # 43

¹⁰⁷ Abul Ala Modudi, Tafhim-ul-Quran, Volume 3, Page # 335-337

¹⁰⁸ Tufail Ahmed Qureshi, islami Hudood o Tazirat, Page # 133-135

¹⁰⁹ M. Mateen Hashimi, Islami Hudood, Page # 68-70

3. Circumstantial Evidence

Circumstantial evidence is the next source of proof of a crime or zina. Pregnancy is the common proof of zina accepted by majority of Muslim jurists. If a woman become pregnant and she was unmarried or was accused of zina, her pregnancy will prove the offence.¹¹⁰ Circumstantial evidence is the most important proof of crime that we will discuss it later in the “zina Bil-Jabr” section.

I. Rape (Zina Bil-Jabr) in Islam

In previous section, zina have been discussed in detail no ambiguity may left in one’s mind about act of zina and its punishments in Islamic law. Now in this section we will discuss “rape” (Zinabil-Jabr) in detail and also its punishment mentioned in Holy Qur’ān and Sunnah. The reason is that even our greatest scholrs did not make any difference between zina and zinabil-jabr and select same punishment for both act. In this section it will be made clear that either both act is same or there is any difference, and it will be decided that what punishment will be given to the offenders of both.

What is Rape?

Rape is the act of forcing a person especially a women or girl to have sexual intercourse against his /her will or without consent.¹¹¹ It is the act of seizing and carrying off by force. It is any violent seizure or hostile action against a weaker opponent.¹¹² In Arabic, Rape is translated as “ightisab” and it means illegal seizure, forcible, coercion, compulsion and rape of a woman to take away by force.¹¹³

The act may be carried out by physical force, coercion, abuse of authority or against a person who is incapable of giving valid consent, such as one who is unconscious, incapacitated, has an intellectual disability or is below the legal age of consent. Rape is also termed as a form of sexual assault.¹¹⁴

In the definition of rape, the key is the lack of consent. Consent is basically the use of force, fear of death or fear of injury to the victim of to her family members. It makes the rape different from adultery and fornication where consent is present.¹¹⁵

Rape in Islam

Rape is serious crime in Islam and is strictly forbidden in Islamic law. Adultery and fornication is clearly forbidden in Qur’ān and clear rules are commanded for them in

¹¹⁰ Dr. Anwarullah, The Islamic Law of Evidence, Page # 66

¹¹¹ Australian Oxford Dictionary, Page # 1115

¹¹² The World Book Dictionary, Page # 1729

¹¹³ Hens Wehr Dictionary, Page # 675

¹¹⁴ Sexual Violence, WHO

¹¹⁵ NIK Rahim Nik Wajis, The Crime of Hirabah in Islamic Law, Page # 173

Surah Noor but rape is not discussed clearly in Qur'ān but we find commands in Sunnah and through interpretations done by Muslim scholars.

- Zina involves only the rights of Allah while rape involves the right of Allah and the right of people.
- The act of rape is occur through force, threat, coercion and the rapist become dangerous for the security and peace of society.
- Due to the use of force, threat and torture, some Muslim jurists mentioned rape as Hirabah.^{116, 117}

Rape as Hirabah

Hirabah is the war against Allah and His messenger SAW. If any person or a group destroy law and order and violate the law set by Qur'ān and Sunnah or the law set by Islamic state, spread fear in people through weapons or through other activities. Develop fear in people and people feel that they will be killed or their money will be taken or be raped. Hirabah is termed as 'Fasad-Fil-Arz' (spreading disorder in the land).

All crimes of theft, robbery and killing where force, threat, coercion is used, they are termed as Hirabah although Hadd-e-Sariqa and Qisas are mentioned for the crime of theft and killing but when the intensity of these crimes increases Allah Almighty also increase the intensity of punishment and that is Hirabah.^{118, 119} Most of the Muslim jurists termed hirabah as robbery or terrorism but it is not mention clearly in the verse of hirabah.

أَنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِّنْ خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ذَلِكَ لَهُمْ جَزَاءُ فِي الدُّنْيَا وَ لَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ^{١٢٠}

“The recompense of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed or crucified or their hands and their feet be cut off on the opposite sides, or be exiled from the land. That is their disgrace in this world, and a great torment is theirs in the Hereafter.”¹²⁰

Rape is also hirabah because taking of honour is more serious than taking of property. As the act of rape is more damaging and distressing than the act of robbery. In robbery only property is lost, but if one is raped, the victim suffer throughout his/her life and future of victim is destroy. Even sometimes the victim is not able to start a family.¹²¹

¹¹⁶ Dr.Tufail Hashimi, Hudood Ordinance, in Light of Quran and Sunnah, page # 144-145

¹¹⁷ Dr. Azman M. Noor, Punishment for Rape in Islamic Law, Page # 3-4

¹¹⁸ Ameen Ahsan Islahi, Tadabbur-e-Quran, Volume # 2, Page # 505

¹¹⁹ M. Ammar Khan nasir, Hudood-o-Tazirat, Page # 192-193

¹²⁰ Al-Quran, Al-Maida, 5:33

¹²¹ NIK Rahim Nik Wajis, The Crime of Hirabah in Islamic Law, Page # 190

Qurtubi writes in his book in this verse:

“Mujahid said : “Adultery and robbery is muharibah in this verse.” But it is not correct... as if it means sexual assault through force or coercion than it is the worst kind of hirabah because it is more worse than taking of property by force and coercion. As Allah Almighty said *وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا* zinabil-jabr is also include in it.”¹²²

According to AllamaIbn-e-hazm:

“The one who fight with the passengers violently, spread terror through killing of people, do robbery, inflict people or disgrace women through sexual assault. He is Muharib whether the attackers are ne or many. All are punished through the verse of Hirabah because Allah Almighty does not restrict the verse to any specific crime rather this verse includes many types of crimes.^{123, 124}

Ibn Al Arabi was quoted as saying “once a woman was kidnapped and was raped, when this was brought to trail, people said that Hirabah only involve property so it will not be considered as Hirabah. Ibn Al Arabi asked, is the rape worst that robbery? He says that if the lives of the people are in danger they will not fight for the protection of their property, but if the modesty of their wives or daughters are being indignant and are going to be raped then they will fight in that same situation.¹²⁵

Punishment for the Rapist

As from above discussion it makes clear that many of our Muslim jurists include rape into hirabah. So when we talked about punishment of the rapist it will not the punishment of 100 lashes.¹²⁶ Nor the criteria of Hadd-e-zina is required for the punishment because rape is a different kind of crime. Let’s look into the punishment of Hirabah. Qur’ān commands strict punishment in Surah Maida for those who did fasad-fil-arz (spread disorder in the land). It is stated in the Holy Qur’ān .

﴿ إِنَّمَا جَزَاؤُا الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِّنْ خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ذَلِكَ لَهُمْ جَزَاءُ فِي الدُّنْيَا وَ لَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ ٧

“The recompense of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed or crucified or their hands and their

¹²² Qurtubi, Al-Jamial Ehkam Al-Quran, Volume # 6, Page # 156

¹²³ Ibn-e-Hazam, Al-Muhalla, Volume # 11, Page # 308

¹²⁴ Dr.Tufail Hashimi, Hudood Ordinance, in Light of Quran and Sunnah, page # 147-148

¹²⁵ Ibn-ul-Arabi, Ehkam-ul-Quran, Volume # 2, Page # 247

¹²⁶ As mentioned in Sura Noor : 2“The woman and the man guilty of adultery or fornication,- flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment.”

feet be cut off on the opposite sides, or be exiled from the land. That is their disgrace in this world, and a great torment is theirs in the Hereafter.”¹²⁷

The punishment for those who spread disorders in the land in this verse is:

1. Taqtil (execution) execute the muharib with the worse form, except those forbidden in Islam that is serves as a severe warning for others it might be hanging, shooting or stoning.....
2. Taslib: Crucifixion or hanging till death.
3. Amputation of limbs from opposite side.
4. Exile; Exile from the land of the Muslims or banished them from one city or one country to other.

According to the crime and condition of criminal, any of the above punishment will be given. The decision is left for judge that he will decide the related punishment but the judge is not allowed to give any other punishment for the crime of Hirabah except those that are mentioned in the Holy Qur'an . As rape is also considered as Hirabah, so any of the above four punishments is given to the rapist and it will be decided by the judge. ^{128, 129, 130}

The Punishment of Rapist in the Holy Bible

Punishment for the rapist in the Holy Bible is death penalty:

“But if a man find a damsel that is betrothed, in the field, and taking hold of her, lie with her, he alone shall die: The damsel shall suffer nothing, neither is she guilty of death: for as a robber riseth against his brother, and taketh away his life, so also did the damsel suffer: She was alone in the field: she cried, and there was no man to help her.”¹³¹

Punishment of rapist in Sunnah

حَدَّثَنَا مُحَمَّدُ بْنُ يَحْيَى بْنِ فَارِسٍ، حَدَّثَنَا الْفَرَيَابِيُّ، حَدَّثَنَا إِسْرَائِيلُ، حَدَّثَنَا سِمَاكُ بْنُ حَرْبٍ، عَنْ عَقْمَةَ بْنِ وَايِلٍ، عَنْ أَبِيهِ، أَنَّ امْرَأَةً حَرَجَتْ عَلَى عَهْدِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ تُرِيدُ الصَّلَاةَ، فَتَلْقَاهَا رَجُلٌ، فَتَجَلَّهَا، فَفَضَى حَاجَتَهُ مِنْهَا، فَصَاحَتْ، وَانْطَلَقَ، فَمَرَّ عَلَيْهَا رَجُلٌ، فَقَالَتْ: إِنَّ ذَلِكَ فَعَلَ بِي كَذَا وَكَذَا، وَمَرَّتْ عِصَابَةً مِنَ الْمُهَاجِرِينَ، فَقَالَتْ: إِنَّ ذَلِكَ الرَّجُلَ فَعَلَ بِي كَذَا وَكَذَا، فَانْطَلَقُوا، فَأَخَذُوا الرَّجُلَ الَّذِي ظَنَنْتُ أَنَّهُ وَقَعَ عَلَيْهَا، فَاتَّوَّهَا بِهِ، فَقَالَتْ: نَعَمْ هُوَ هَذَا، فَاتَّوَّأَ بِهِ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَلَمَّا أَمَرَ بِهِ قَامَ صَاحِبُهَا الَّذِي وَقَعَ عَلَيْهَا، فَقَالَ: يَا رَسُولَ اللَّهِ، أَنَا صَاحِبُهَا، فَقَالَ لَهَا «أَذْهَبِي فَقَدْ غَفَرَ اللَّهُ لَكَ وَقَالَ لِلرَّجُلِ قَوْلًا حَسَنًا»، قَالَ أَبُو دَاوُدَ: «يَعْنِي الرَّجُلَ الْمَأْخُودَ»، وَقَالَ لِلرَّجُلِ الَّذِي وَقَعَ عَلَيْهَا: «ارْجُمُوهُ»، فَقَالَ: «لَقَدْ تَابَ تَوْبَةً لَوْ تَابَهَا أَهْلُ الْمَدِينَةِ لَقُبِلَ مِنْهُمْ»

When a woman went out in the time of the Prophet (ﷺ) for prayer, a man attacked her and overpowered (raped) her. She shouted and he went off, and when a man came by, she said:

¹²⁷ Al-Quran, Al-Maida, 5:33

¹²⁸ Ameen Ahsan Islahi, Tadabbur-e-Quran, Volume # 2, Page # 505-507

¹²⁹ NIK Rahim Nik Wajis, The Crime of Hirabah in Islamic Law, Page # 84-89

¹³⁰ Dr.Tufail Hashimi, Hudood Ordinance, in Light of Quran and Sunnah, page #151-152

¹³¹ The Holy Bible, Deuteronomy, 22:25-27

That (man) did such and such to me. And when a company of the Emigrants came by, she said: That man did such and such to me. They went and seized the man whom they thought had had intercourse with her and brought him to her.

She said: Yes, this is he. Then they brought him to the Messenger of Allah (ﷺ).

When he (the Prophet) was about to pass sentence, the man who (actually) had assaulted her stood up and said: Messenger of Allah, I am the man who did it to her.

He (the Prophet) said to her: Go away, for Allah has forgiven you. But he told the man some good words (AbuDawud said: meaning the man who was seized), and of the man who had had intercourse with her, he said: Stone him to death.

He also said: He has repented to such an extent that if the people of Medina had repented similarly, it would have been accepted from them.¹³²

حَدَّثَنَا مُحَمَّدُ بْنُ يَحْيَى النَّيْسَابُورِيُّ قَالَ: حَدَّثَنَا مُحَمَّدُ بْنُ يُوسُفَ، عَنْ إِسْرَائِيلَ قَالَ: حَدَّثَنَا سِمَاكُ بْنُ حَرْبٍ، عَنْ عَلْقَمَةَ بْنِ وَايِلِ الْكِنْدِيِّ، عَنْ أَبِيهِ، أَنَّ امْرَأَةً خَرَجَتْ عَلَى عَهْدِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ تُرِيدُ الصَّلَاةَ، فَتَلَقَّاهَا رَجُلٌ فَتَجَلَّلَهَا، فَفَضَى حَاجَتَهُ مِنْهَا، فَصَاحَتْ، فَانْطَلَقَ، وَمَرَّ عَلَيْهَا رَجُلٌ، فَقَالَتْ: إِنَّ ذَلِكَ الرَّجُلَ فَعَلَ بِي كَذَا وَكَذَا، وَمَرَّتْ بِعِصَابَةٍ مِنَ الْمُهَاجِرِينَ، فَقَالَتْ: إِنَّ ذَلِكَ الرَّجُلَ فَعَلَ بِي كَذَا وَكَذَا، فَانْطَلَقُوا، فَأَخَذُوا الرَّجُلَ الَّذِي ظَنَنْتُ أَنَّهُ وَقَعَ عَلَيْهَا وَأَتَوْهَا، فَقَالَتْ: نَعَمْ هُوَ هَذَا، فَأَتَوْا بِهِ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَلَمَّا أَمَرَ بِهِ لِيُرْجَمَ قَامَ صَاحِبُهَا الَّذِي وَقَعَ عَلَيْهَا، فَقَالَ: يَا رَسُولَ اللَّهِ، أَنَا صَاحِبُهَا، فَقَالَ لَهَا: «أَذْهَبِي فَقَدْ غَفَرَ اللَّهُ لَكَ»، وَقَالَ لِلرَّجُلِ قَوْلًا حَسَنًا، وَقَالَ لِلرَّجُلِ الَّذِي وَقَعَ عَلَيْهَا: «ارْجُمُوهُ»، وَقَالَ: «لَقَدْ تَابَ تَوْبَةً لَوْ تَابَهَا أَهْلُ الْمَدِينَةِ لُقِيَ مِنْهُمْ

Narrated 'Alqamah bin Wa'il Al-Kindi:

From his father: "A women went out during the time of the Prophet (ﷺ) to go to Salat, but she was caught by a man and he had relations with her, so she screamed and he left. Then a man came across her and she said: 'That man has done this and that to me', then she came across a group of Emigrants (Muhajirin) and she said: 'That man did this and that to me.' They went to get the man she thought had relations with her, and they brought him to her. She said: 'Yes, that's him.' So they brought him to the Messenger of Allah (ﷺ), and when he ordered that he be stoned, the man who had relations with her, said: 'O Messenger of Allah, I am the one who had relations with her.' So he said to her: 'Go, for Allah has forgiven you.' Then he said some nice words to the man (who was brought). And he said to the man who had relations with her: 'Stone him.' Then he said: 'He has repented a repentance that, if the inhabitants of Al-Madinah had repented with, it would have been accepted from them.'¹³³

From the above traditions it is clear that the rapist were stoned to death by the Prophet S.A.W.

The Hypocrites of Madinah teased the Muslim ladies and tried to outraged their modesty. For this reason Allah Almighty command punishment for them in Surah Ahzab.

لَبِنَ لَمْ يَنْتَه الْمُنْفِقُونَ وَ الَّذِينَ فِي قُلُوبِهِمْ مَرَضٌ وَالْمَرْجُفُونَ فِي الْمَدِينَةِ لَنْعَرِيكَ بِهِمْ ثُمَّ لَا يُجَاوِرُونَكَ فِيهَا إِلَّا قَلِيلًا
مَلْعُونِينَ ۖ إِنَّمَا تُفْقَرُوا أُخْدُوا وَقْتَلُوا تَقْتِيلًا

¹³² Imam Abu Dawood, Sunan Abi Dawood, Book: Punishment Laws, Hadith No. 4379

¹³³ Imam Tirmizi, Sunan Tirmizi, Book: Legal Punishments, Hadith No. 1454

“If the hypocrites, and those in whose hearts is a disease, and the alarmists in the city do not cease, We verily shall urge thee on against them, then they will be your neighbours in it but a little while. Accursed, they will be seized wherever found and slain with a (fierce) slaughter.”¹³⁴

Ibn-Jawzi write about this verse:

“This verse is revealed about those adulterers who wander in the streets of Madinah, when women come out for lavatory, they pursue them if they saw any lady they abuse them.”¹³⁵

According to this verse punishment for the rapist is death penalty and the worst form of death is stonning.^{136, 137}

Elements for Proof of Rape

The elements which proof the act of rape according to the definition of rape is following:

1. Sexual Intercourse

According to the definition of rape sexual intercourse is necessary for the proof of rape. Sexual intercourse meant penetration of male sex organ into the female sex organ, ejaculation is not necessary for the rape, only penetration is enough for the proof of rape. If any other sexual act has made except sexual intercourse, the accused person will not be charge under the offence of rape nor hadd will be implemented instead discretionary punishment of attempted rape will be penalized on the accused person.

2. Lack of Consent of Victim

The second main element for the proof of rape crime is lack of consent of the woman in sexual intercourse or use of force and this make rape crime different from the act of zina. As sexual intercourse is a common act in rape and zina but in rape this act is against the consent of woman. Physical resistance is a common act in rape crime and it result injuries. Force is another main element in non-consensual sexual intercourse. Use of force, threat of coercion, such as fear of violence, psychological oppression, durance, detainment, abuse of power in a coercive environment person takes its advantage is all examples of force. If the evidence of resistance is not found due to use of alcohol or drugs should make a blood test because the accused is still charged to be a rapist.^{138, 139, 140}

¹³⁴ Al-Quran, Al-Ahzab, 33:60-61

¹³⁵ Ibn-ul-Jawzi, Zad-ul-maaser, Volume # 6, Page # 461

¹³⁶ Dr.Tufail Hashimi, Hudood Ordinance, in Light of Quran and Sunnah, page # 129-131

¹³⁷ M. Ammar Khan nasir, Hudood-o-Tazirat, Page # 204

¹³⁸ NIK Rahim Nik Wajis, The Crime of Hirabah in Islamic Law, Page # 175-178

¹³⁹ Lack of consent as the Constituent element of Rape. 102-104

¹⁴⁰ Mattew R. Lyon, Withdrawl of Consent, Page # 286-287

Aspects of Proof in Rape Cases

The punishment of rape cases according to the verse of Hirabah is very severe although no criteria of proof has given in the verse but Muslim jurists proposed procedure for the implementation of punishment of the accused. If the procedure will not be follow anyone can accuse any person for sexual assault in enmity therefore it is duty of the judge to ensure that the evidence is of absolute certainty.¹⁴¹

Testimony (Shahada)

Testimony or witness has discussed in detail in the previous section “zina”. Condition for the witness has also discussed in the same section. The difference in the witness of zina and rape is that of numbers as in Hadd-e-zina four witnesses are required while in rape cases, as discussion clarify that it is a different crime. So the number of witness also differs in this case. As if we look into the Qur’ān general rule for the witness are given as follows.

وَاسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رَجَالِكُمْ فَإِنْ لَمْ يَكُونَا رَجُلَيْنِ فَرَجُلٌ وَامْرَأَتَيْنِ مِمَّنْ تَرْضَوْنَ مِنَ الشُّهَدَاءِ أَنْ تَضِلَّ إِحْدَاهُمَا فَتُذَكِّرَ إِحْدَاهُمَا الْأُخْرَىٰ وَلَا يَأْبَ الشُّهَدَاءُ إِذَا مَا دُعُوا

“And call to witness, from among your men, two witnesses. And if two men be not (at hand) then a man and two women, of such as ye approve as witnesses, so that if one of the two erreth (through forgetfulness) the one of them will remind. And the witnesses must not refuse when they are summone.”¹⁴²

يَا أَيُّهَا الَّذِينَ آمَنُوا شَهَادَةُ بَيْنِكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ حِينَ الْوَصِيَّةِ اثْنَن ذَوَا عَدْلٍ مِّنكُمْ أَوْ أُخْرَانِ مِنْ غَيْرِكُمْ
“O ye who believe! Let there be witnesses between you when death draweth nigh unto one of you, at the time of bequest - two witnesses, just men from among you, or two others from another tribe,”¹⁴³

It is argued that these verses are not for criminal matters but it is for business and property matters. But a student or scholar of Qur’ān knows that Qur’ān only gives general comprehensive rules and in these verses Qur’ān gives the rule of Shahadah. As criminal matters are more sensitive and important than property matters so these verses are specified generally because no criteria are mentioned clearly in verse of Hirabah.

So according to these verses testimony of two men is sufficient and in absence of one man witness of two women is required.

According to Ibn-ne-Hazam, the qisas amputation and hadd will be implemented on the criminals of murder or sariqa or hirabah or drinking alcohol or qadhaf. If two trustworthy

¹⁴¹ NIK Rahim Nik Wajis, The Crime of Hirabah in Islamic Law, Page # 100

¹⁴² Al-Quran, Al-Baqarah, 2:282

¹⁴³ Al-Quran, Al-Maida, 5:106

men give testimony against them, if the testimony is give against one thousand or more people they will be charges by punishment.¹⁴⁴

All Muslim jurists agreed on two testimony in all hudood cases except Hadd-e-Zina.^{145, 146}

عَبْدُ الرَّزَّاقِ قَالَ: أَخْبَرَنَا الْأَسْلَمِيُّ، عَنْ سُهَيْلِ بْنِ أَبِي صَالِحٍ، عَنْ أَبِيهِ: أَنَّ امْرَأَةً مُسْلِمَةً اسْتَأْجَرَتْ يَهُودِيًّا أَوْ نَصْرَانِيًّا فَانْطَلَقَ مَعَهَا، فَلَمَّا أَتَيْتَا أَكْمَةً تَوَارَى بِهَا ثُمَّ غَشِيَهَا، قَالَ أَبُو صَالِحٍ: وَقَدْ كُنْتُ رَمَقْتُهَا حِينَ غَشِيَهَا فَضَرَبْتُهُ، فَلَمْ أَتْرِكْهُ حَتَّى رَأَيْتُهُ أَنْ قَدْ قَتَلْتُهُ قَالَ: فَانْطَلَقَ إِلَى أَبِي هُرَيْرَةَ، فَأَخْبَرَهُ، فَدَعَانِي، فَأَخْبَرْتُهُ، فَأَرْسَلَ إِلَى الْمَرْأَةِ، فَوَافَقْتَنِي عَلَى الْخَبْرِ، فَقَالَ أَبُو هُرَيْرَةَ: «مَا عَلَى هَذَا أَعْطَيْنَاكُمْ الْعَهْدَ فَأَمَرَ بِهِ فُقْتِلَ».

Abu Salih narrated: One Muslim lady fixed work on wages with any Jewish or Christian and walk with him. In the way when they cross near a hill the man take her forcely behind the hills and raped her. Abu Salih said that I saw this and I beat him badly. That man carried the trial to Abu Hurairah RA and complained against me. Abu Hurairah summoned me I came and place the situation in front of him. Abu Hurairah summoned that lady, she affirmed me. So Abu Hurairah RA said to that Jewish or Christian that we did not make agreement on it with your community, he was penalized to death.¹⁴⁷

This incident shows that in the presence of only one witness the rapist was punished.

Circumstantial Evidence

Circumstantial evidence is another source for the proof of a crime. Circumstantial means a condition that accompanies an act or event.¹⁴⁸ Circumstantial evidence is Qarinah in Arabic.

Qarinah mean presumptions, it is the act of presuming a thing to be true.¹⁴⁹

Presumptions or circumstantial evidence are accepted as evidence depending on its nature sometimes it in conclusive or strong, sometimes might weak or probative but if strong it is accepted worldwide in courts.

In diverse situation Islamic Shariah accepted it as an evidence. From the Holy Qur'ān we found that it in Surah Yusuf.

وَإِنْ كَانَ قَمِيصُهُ قُدًّا مِنْ دُبُرٍ فَكَذَبَتْ وَهُوَ مِنَ الصَّادِقِينَ فَلَمَّا رَأَى قَمِيصَهُ قُدًّا مِنْ دُبُرٍ قَالَ إِنَّهُ مِنْ كَيْدِكُنَّ إِنَّ كَيْدَكُنَّ عَظِيمٌ

¹⁴⁴ Ibn-e-Hazam, Al-Muhalla, Volume # 11, Page # 143

¹⁴⁵ NIK Rahim Nik Wajis, The Crime of Hirabah in Islamic Law, Page # 105-107

¹⁴⁶ M. Mushtaq Ahmed, Tahaffuz-e-Huqeque Niswa Bill

¹⁴⁷ Abū Bakar Abdul Razzaq bin Hamam, Musanif Abdul Razzaq, 10168

¹⁴⁸ World Book Dictionary, Page # 374

¹⁴⁹ Australian Oxford Dictionary, Page # 1068

“And if his shirt is torn from behind, then she hath lied and he is of the truthful. So when he saw his shirt torn from behind, he said: Lo! this is of the guile of you women. Lo! the guile of you is very great.”¹⁵⁰

The other evidence was discussed in previous section. From many traditions discussed earlier it is proved that if circumstantial evidence along with the statement of victim is found whether it be witness or not the accused should be punished. All Muslim jurists agreed upon the acceptance of circumstantial evidence in tazirat but in case of hudood we found different views of Muslim jurists.

Some jurists rejects its use in hudood and qisas while some permit its use in hudood, for example pregnancy of unmarried woman proved adultery according to Hazrat Umar, smell of alcohol proves drinking, bloody knife or sword proves murder.

According to Ibn Qayyim if the Qazi did not punish the accused in presence of circumstantial evidence. He did an act of unjustisness because Islam wants to prevail justice.¹⁵¹

DNA as an Evidence in Rape Cases

DNA fingerprinting is a great discovery of modern science. Its structure and its forensic application has discussed in chapter three in detail. Along with many circumstantial evidence like razor, spear, recovery of a gun or other weapon, dying statement, DNA is the most conclusive and strong evidence. It was discussed that how it is helpful in rape cases. It was argue by today’s Muslim scholars that DNA cannot became a primary evidence in rape cases and they require the same criteria which was for zina, witness and confession.

It has been clearly discussed that rape is not a kind of zina, however it is Hirabah. In Hirabah circumstantial evidence has same importance like testimony. It was argues that DNA test is susceptible of doubt, and that DNA test is uncertain. This arguments are very illogical and unscientific. First we should make it clear that human error is present in every work even testimony of witness is also uncertain because it is more susceptible to errors, lies and illusions and in present time not a single testimony meets the criteria of Tazkiat-ushahood condition proposed for the witness by Muslim jurists. Practically now a days DNA test is more valid than testimony of witness. Throughout the Islamic history, Muslim judges have relied upon the circumstantial evidence and if DNA testing present at that time they might consider it for justice. The criteria for the proof of zina is tough as it is a personal crime belongs only with right of Allāh, while rape is a crime involving rights of both Allah and mankind. It is act of cruelty, it is necessary to punish the rapist to save our children and woman.

¹⁵⁰ Al-Quran, Yusuf, 12:27,28

¹⁵¹ Ibn-e-Qayyam, At-turkul Hikmea, Page # 7-9

It is impossible to get justice in Pakistan. Victim remains victim due to judiciary system because rape case also fall under the same category of zina. The accuser if belong to feudal or elite family then they are released with honour while the victim is charge under the act of zina because victim is unable to produce four witness that's why court order police to take this type of cases seriously and protect all forensic sample and consider DNA test along with oaths of the victim and the accused and take all circumstantial evidence in notice and make justice easy for all.

Who will be punished in Rape Cases

In adultery/fornication both male and female are punished if proof but in rape case only the rapist will be punish. Victim will not be punished according to Islamic law of punishment and all Muslim jurists agreed upon this.

حَدَّثَنَا مُحَمَّدُ بْنُ يَحْيَى بْنِ فَارِسٍ، حَدَّثَنَا الْفَرِيَابِيُّ، حَدَّثَنَا إِسْرَائِيلُ، حَدَّثَنَا سِمَاكُ بْنُ حَرْبٍ، عَنْ عَلْقَمَةَ بْنِ وَائِلٍ، عَنْ أَبِيهِ، أَنَّ امْرَأَةً خَرَجَتْ عَلَى عَهْدِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ تُرِيدُ الصَّلَاةَ، فَتَلَقَاهَا رَجُلٌ، فَتَجَلَّلَهَا، فَقَضَى حَاجَتَهُ مِنْهَا، فَصَاحَتْ، وَأَنْطَلَقَ، فَمَرَّ عَلَيْهَا رَجُلٌ، فَقَالَتْ: إِنَّ ذَلِكَ فَعَلَ بِي كَذَا وَكَذَا، وَمَرَّتْ عِصَابَةَ مِنَ الْمُهَاجِرِينَ، فَقَالَتْ: إِنَّ ذَلِكَ الرَّجُلُ فَعَلَ بِي كَذَا وَكَذَا، فَأَنْطَلَقُوا، فَأَخَذُوا الرَّجُلَ الَّذِي ظَنَنْتُ أَنَّهُ وَقَعَ عَلَيْهَا، فَأَتَوْهَا بِهِ، فَقَالَتْ: نَعَمْ هُوَ هَذَا، فَأَتَوْا بِهِ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَلَمَّا أَمَرَ بِهِ قَامَ صَاحِبُهَا الَّذِي وَقَعَ عَلَيْهَا، فَقَالَ: يَا رَسُولَ اللَّهِ، أَنَا صَاحِبُهَا، فَقَالَ لَهَا: «أَذْهَبِي فَقَدْ غَفَرَ اللَّهُ لَكَ وَقَالَ لِلرَّجُلِ قَوْلًا حَسَنًا»، قَالَ أَبُو دَاوُدَ: «يَعْنِي الرَّجُلَ الْمَأْخُودَ»، وَقَالَ لِلرَّجُلِ الَّذِي وَقَعَ عَلَيْهَا: «ارْجُمُوهُ»، فَقَالَ: «لَقَدْ تَابَ تَوْبَةً لَوْ تَابَهَا أَهْلُ الْمَدِينَةِ لُقِبَ مِنْهُمْ»

When a woman went out in the time of the Prophet (ﷺ) for prayer, a man attacked her and overpowered (raped) her.

She shouted and he went off, and when a man came by, she said: That (man) did such and such to me. And when a company of the Emigrants came by, she said: That man did such and such to me. They went and seized the man whom they thought had had intercourse with her and brought him to her.

She said: Yes, this is he. Then they brought him to the Messenger of Allah (ﷺ).

When he (the Prophet) was about to pass sentence, the man who (actually) had assaulted her stood up and said: Messenger of Allah, I am the man who did it to her.

He (the Prophet) said to her: Go away, for Allah has forgiven you. But he told the man some good words (Abū Dawud said: meaning the man who was seized), and of the man who had had intercourse with her, he said: Stone him to death.

He also said: He has repented to such an extent that if the people of Medina had repented similarly, it would have been accepted from them.¹⁵²

Conclusion

Islam cannot live in past. The progress made by mankind is not ignoring by Islam. Islam is a versatile religion and adopts all new progress of mankind according to its teaching. In many verses The Qur'ān ask mankind to study nature and encourage them for scientific inquiry. Every human is developed from DNA and this DNA have complete copy of his characteristics. DNA coded secret of one's life and many criminals put to their end with

¹⁵² Imam Abu Dawood, Sunan Abi Dawood, Book: Punishment Laws, Hadith No. 4379

the help of DNA fingerprinting. DNA technology is a powerful investigative tool and is use worldwide in solving crimes.

For the investigations of crimes many advanced countries developed DNA database. DNA is a powerful investigative tool in sexual offences. DNA test must carried out with great care and attention. Evidence from the crime scene, from victim's body and clothes must collected carefully and in time because evidence may be lost, contaminated or destroyed with the passage of time, along with it evidence must also preserved carefully this will eliminate the possibility of errors and the victim may get fairness and justice.

Courts should accept DNA report as a primary evidence along with other evidence like witness and oaths because throughout the Islamic history Muslim judges rely upon circumstantial evidences because the main aim of Islam is to provide justice equally to all. It can only be possible if Muslim scholars place rape in a separate category of crime like hirabah and differ rape from zina offence, only then the rate of sexual offence may alleviate in the country like Pakistan.

Recommendations

DNA analysis is a tremendous invention in the history of science and technology. It is powerful investigative tool and play a key role in criminal investigation. To get benefit from DNA analysis in Pakistani courts the present study has following important recommendations.

1. Propose a separate law for sexual offence in Pakistani constitution.
2. Put rape or sexual offences in crime of hirabah and Muslim scholars should make it differ from zina offence.
3. Courts should accept DNA test as primary evidence along with other evidences.
4. The rape victim must report to police soon after the assault because only those cases will be investigated for DNA evidence properly, which are reported on time.
5. Police officers and investigators must train specially for DNA evidence collection in sexual assault investigations.
6. Police and investigators should collect and preserve samples carefully from the crime scene.
7. The government must hire trained SANE's and FNE's in forensic labs that will make the collection of evidence from victim's and suspect easier.
8. Police and forensic examiner developed a rape kit submitted the evidence to the crime laboratory for analysis.
9. The government should establish quality standards forensic laboratories with latest technology and highly qualified staff.
10. The forensic laboratories should perform and interpret DNA test of high quality, and submit the results and report honestly with accuracy.
11. Computerized tracking system should be established.

12. Law enforcement agencies and forensic laboratories must have good communication.
13. Trial courts should order to produce the DNA report within time.
14. If favorable results are attained and no other testimony exists, the court should consider DNA test and oath of the victim including other circumstantial evidences.

Islam is a religion of peace and justice and wants to provide justice and fairness equally. Islamic courts must work for justice keeping these suggestions in view. Pakistan and other Muslim countries may took control over sexual offence and increasing rate of sexual offence may alleviate to great extent and the dignity of our children and daughters and women might be saved.