Research Note

Sh.P.No.1/I of 2006.Dr.Aslam Khaki VS Federation of Pakistan

Dr.Aslam Khaki has filed amended Shariat petition wherein he has challenged section 2 (a) 2(d) and 5(2) of the Zina Ordinance for being repugnant to the injunctions of Islam .According to the petitioner, the definition of the word Muhsan under section 2(d) of the ordinance is not agreed upon nor provided in the holy Quran and Sunnah of the holy Prophet. A person who was married but due to separation, divorce or death of the wife who is living according to him without wife is not considered as Muhsan.

2. Rajm as provided under sub Section 5(2) is disputed among the Muslim and not in line with the Quran and Sunnah.

3. Discrimination has been made in ages of male and female for the purpose of criminal liabilities and it is not proved from the holy Quran and Sunnah.

4. This Ordinance lacks some important issues from which the accused may take benefit like, repentance, retraction from confession, absence of witnesses, and observation of the act of Zina deeply.

The issues raised by the petitioner have already been discussed and settled by six Hon judges of this Court including three Alim judges by reviewing its previous judgment on the subject. Detailed discussion in the light of Islamic injunctions, covering various areas of this punishment has been made.(PLD 1983 FSC-255 Huzoor Bakhsh VS Federation of Pakistan)At present,this judgment holds the field.

It is pertinent to reproduce herein below the background of these two judgments:-

Shariat Petition No 59/L of 1979 and 62/L of 1979 had been filed seeking declaration to the effect that the sentence of Rajm as Hadd under section 5 and 6 of the Offence of Zina(Enforcement of Hudood 1979) is repugnant to the injunctions of Islam. On 21th of March,1981 this Court by majority of four to one accepted Shariat Petition No 59/L 1979 and 62/L of 1979 and declared that the provisions of sentence of Rajm as Hadd in Section 5 and 6 of the Offence of Zina(Enforcement of Hudood) Ordinance 1979,are repugnant to the injunctions of Islam and that the only Hadd is one hundred stripes both for Mohsan and Ghair Mohsan.A direction was given for the amendment of the above noted sections in the light of this declaration. The then chairman and two other Hon.members of the bench were of the view that Rajm was not a sentence for the offence of adultery. Justice Aftab Hussain was of the view that Rajm was not a Hadd Punishment for the Offence of adultery but it can be added in the ordinance as a Tazir sentence since the Holy Prophet and after him his companions had been passing the sentence upon married persons committing adultery. One of the Hon.member Justice Karimullah Durani declared the punishment of Rajm as a Hadd(.PLD 1981 FSC 145)

The Federal government filed an appeal before the august Supreme Court and the Court was pleased to stay the operational part of the said order.Lator on, through Constitutional amendment, sub article 9 was added in Article 203-E of the Constitution by which the power of review of its decisions was conferred upon the Federal Shariat Court.It was added in the constitution that: "The Court shall have power to review any decision given or order made by it" This provision became effective with effect from 13th of April,1981.The Federation filed review

petition before the Federal Shariat Court on 14th of July,1981 to challenge the said judgment notwithstanding the pendency of the appeal before the Supreme Court.As the Supreme Court had no objection to the hearing and disposal of review petition. In fact, the Supreme Court was pleased to adjourn the appeal and give its implied consent to hear the review petition by this Court.

The issue raised by the petitioner has been discussed bythe Federal Shariat Court at page 181 PLD 1981 FSC 145. The Court held that: "Before proceeding further I may clarify this definition of Mohsan so far as it concern this case.Mohsan for whom the punishment of stoning is prescribed by Hadeth is defined in Fiqh as a person who has once married lagally and validly retired with the spouse.If he separates from the spouse or becomes a widower or had no opportunity to meet her for several years,he would still be a mohsan (married)liable to the punishment Rajm"

The Court has reproduced the view point of Allama Rashid Raza,Ayatullah Shariat Madar with refrence to Tausihul Masail page 468 and the view point of Mulla Fathullah Kasani.According to them:-
Once a woman is separated, she cannot be called Mohsina in the same manner as she cannot be called Mutazawijah(married) or as a traveler who has returned from his journey can no more be called a traveller or again a patient who regains his health can no more be known as patient. They are of the view that in these circumstances a divorcee lady or a widow should not be administered the punishment of a person whose marriage subsists. In respect of punishment, she is like unmarried person. Mohsana means a person who is properly married and who is in a position to enjoy the company of the spouse.Shia

Imamia also does not recognize a person as a Mohan whose spouse is not with her.The above mentioned views were considered as reasonable by this Court but this judgment was set aside by reviewing it,as mentioned earlier.

When we go through the definition of Mohsan and Mohsan as appeared in Zina Ordinance,the following conditions become evident.I firstly reproduce the relevant definition.

"Under section 2(d) Mohsan means:1. "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 married to him and was not insane or

Under section 2(d) Mohsan means:1."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 intercouirse with her was married to him and was not insane or

2:"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"

In the light of this definition, the conditions of Ihsan are as under:-In order to be a Mohsan a person should be Muslim should be married and the marriage has been consummated. The person should be free not slave and has reached to the age of majority. These conditions have been endorsed by the Ulema of Sunni Schools of thought. There is unanimity of views among the Sunni Schools of thought and the followers of Fiqh Jafia on the legality of the punishment of Rajm.Only Khwarij oppose the legality of this punishment. So the contention of the petitioner that the punishment of Rajm is disputed amongst the Muslim,

is not correct.The Sunnah of the Holy Prophet is the second source of Islami law.This punishment is proved by the acts of the Holy Prophet and his guided Caliphs.The Sunnah has not abrogated the Quranic commandments regarding one hundred stripes for Zani but has made Ikhtisas in this commandment by prescribing the punishment of stoning to death for Zani Mohsan and Mohsana.The Holy Prophet as a law giver was competent to do so.

The third issue raised by the petitioner is regarding age limit prescribed both for male and female and their criminal liability.

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the marriage has been consummated. The person should be free not slave and has reached to the age of majority. These conditions have been endorsed by the Ulema of Sunni Schools of thought. There is unanimity of views among the Sunni Schools of thought and the followers of Fiqh Jafia on the legality of the punishment of Rajm.Only Khwarij oppose the legality of this punishment. So the contention of the petitioner that the punishment of Rajm is disputed amongst the Muslim, is not correct.The Sunnah of the Holy Prophet is the second source of Islami law.This punishment is proved by the acts of the Holy Prophet and his guided Caliphs.The Sunnah has not abrogated the Quranic commandments regarding one hundred stripes for Zani but has made Ikhtisas in this commandment by prescribing the punishment of stoning to death for Zani Mohsan and Mohsana.The Holy Prophet as a law giver was competent to do so.

The third issue raised by the petitioner is regarding age limit prescribed both for male and female and their criminal liability.

Criminal liability of child not attained puberty.

When a person attains the age of majority? There is divergence of opinion amongst the jurists. Bulugh is determined firstly by physical change in male and female. A male can attain the age of majority when he can discharge semen while a female can attain the age of majority when she has monthly courses. In case, the age of majority is not determined by physical changes than the jurists have fixed certain period, on completion of that period, age of majority can be ascertained. According to Imam Abu Hanifa, a male can attain the age of majority after completion of 18 year while the female can attain this age after

completion of 17 years. Imam Malik has fixed 18 years both for male and female while according to jumhoor, age of majority can be attained after completion of 15 years. **Under Islamic law** ,a child before attaining puberty,if commits any crime,he/she will not be liable for that,however, he/she will not be exenorated from civil or financial liablity arising out of that act.In this respect,it is pertinent to refer herein below the well-known tradition of the holy Prophet,that:رفع القلم عن ثلاث عن النائم حتى يستيقض وعن المجنون حتى يفيق و عن الصبى حتى يحتلم "Three persons are not liable for their acts done them. firstly, a sleeping person, till he wakes up, secondly an unsound mind person, till he recovers and thirdly a child, till he attains the age of majority." According to jurists of Islam,a child from birth till the age of 7 years,is treated as a person having no understanding. .From 7 to 15years,a person is treated having week understanding and on completion of 15 or 18 years,a person becomes mature and attains puberty.Before attaining puberty, if he commits any criminal act,he will not be liable for that.In this respect,Abdul Qadir Awdah,a prominent Egyptian scholar writes in his celebarated book,Tashri-ul-Jinai that:"If a child has not attained the age of seven,he will be treated as indiscret,even if he outgrows the consciousness of seven years old children;for an injunction is applicable to the majority and not to exceptional individual.The relevent injunction is that a child under seven years old will be treated as indiscret.Therefore,if a child under seven years commits any offence,he will neither be punished on criminal grounds nor as a disciplinary or reformatory measure.Thus if he commits a Hadd offence like theft,he will not be subjected to the Hadd and if he kills and wounds any one,he will neither be subject to injunctions enjoining Qisas nor will be liable to penal

punishment.Nevertheless,the exemption of child from criminal accountability does not warrant its exemption from civil liability as well.It will have to compensate the loss in life or property caused by him out of his own possassions.A child from 7 to15 years will not immediately be accountable on criminal grounds and will not be subject to Hadd punishment for committing theft and adultery and nor will be amenable to Qisas for homocide and injury.Diciplinary action is also a punishment for a crime in itself but it is not criminal punishment.The effect of criminal and disciplinary punishment would be that the child will not be treated as a habitual offender,and will as such be liable to only those penal punishment that aim at at warning and admonition.

With puberty the age of descretion begins.i.e when the child according to the opinion generally held by the jurists,attains the age of fifteen and according to Imam Abu Hanifa or well known view of Malikites he is 18years old.At this stage,man criminally accountable for any kind of offence committed by him.Thus he will be liable to Hadd in case of Zina and larcency,Qisas in the case of homocide and injury. (Al-Tashru-ul-Jinai vol 1-Section-430)

A prominent jurist,Abu Zahra has also discussed this issue in detail.There is unanimity of views between Abdul Qadir Awda and Abu Zahra.(الجريمه و العقوبه دفعه ٤٧٢----٤٧٩).In Shariah Bulugh and sense are preconditions to incriminate any individual under Hudood and Qisas.As mentioned earlier that a child before attaining puberty if commits any crime,he is not exenorated from financial liability.If a child is exenorated from Hadd and punishment under Qisas,whether it is permissible to award him under Tazir.The answer is in posative.In this respect Dr. Wahba Zuhaili writes that:

"يشترط العقل فقط لوجوب التعزير بارتكاب جنايته ليس لها حد مقدر فى الشرع، فيعزر كل عاقل ، ذكراً أو أنثى مسلما او كا فرا بالغا او صبيا عاقلا–لان هولاء غير الصبى من اهل العقوبه–اما الصبى فيعزر تاديبا لا عقوبةً–"To award a punishment under Tazir, for committing an offence,where shariah has not prescribed any punishment under Hadd, the only condition under Islamic law is that the person,committing a crime, must be a sane and sound mind .A person who is a sane,whether male or female,Muslim or non-Muslim,whether attained puberty or not, will be awarded punishment under Tazir,because all of them except a child,are liable to Tazir punishment.As far as the child is concerned,he will be awarded punishment under Tazir for reformative and corrective purposes not by way of mere punishment."(الفقه الاسلامى و ادلته ج ٦ ص٢٠٥)

Under the existing law,a child of tender age if commits an offence,he is dealt with under the provisions of Juvenile justice system Ordinance 2000.The aim of this piece of law is protection of children involved in criminal cases,their reformation and rehabilitation in the society.Under the said law,Juvenile Court shall be established to try the cases in which child is accused of of commission of an offence.Accused less then 18 years at the time of commission of crime shall be tried by the Juvenile courts.Where the question of age of the accused arises,the Juvenile court shall have an authority to determine the age through medical test in the absent of other decumentry evidence.A child accused of bailable offence,if not released under 496 of CR.PC,be released by Juvenile court..A child shall not be kept in a prisons alongwith other prisoners but they can be confined in a Brustal houses,established for this purpose.A child accused of an offence can be released on probation.No child shall be awarded death punishment,nor be forced on labour during their confinement in brustal houses.While in custody,the

child will not be awarded corporal punishment,nor put in fitters.In short,under the law,a child is not totally

exenorated from all kind of criminal liability but treated differently while awarding penal punishment keeping in mind their rehabilitation and reformation.It is pertinent to mention here that the Shariat bench of Peshawar high Court has discussed this issue in detail in a case titled as Gul Hassan Vs State (PLD 1980 Pesh-page-1)It was held that:again it is concluded by authority that Qisas cannot be exacted from a murderer if he has not attained the age of puberty.In this respect the court also pleased to refere a tradition,as mentioned above.The Court has mentioned another principle with reference to Fatawa-i-Alamgiri,that is: عمد الصبی و خطاء سواء"Intentional action of non Pubert and his accidental action are equal"Because,in both the cases Diyat is payable.

As far as the question that this Ordinance lacks some important issues from which the accused may take benefit like, repentance, retraction from confession, absence of witnesses, and observation of the act of Zina deeply,is concerned,the perusal of Section 8(B) of the Zina Ordinance (Enforcement of Hudood1979)it becomes evident that these issues have been incorporated while drafting this ordinance.It has been provided in the said ordinance that:-"At least four Muslim adult male witnesses,about whom the court is satisfied,having regard to the requirements of Tazkiyatushuhud that they are truthful persons and abstain from major sins(Kabair) give evidence as eye witnesses of the act of penetration necessary to the offence" Most of the objections raised by the petitioner are covered by this definition.the issue of deep observation of the act of zina is covered by the last line of the definition.It has also been provided under section 5 of the said

ordinance and the superior courts have also held that:- "doubts" or Shubha have been duly recognized in section 5 of the ordinance VII of 1979 that ,on the basis of which punishment of Hadd can be avoide.Thirdly,Hadd punishment shall not be executed untill it has been concirmed by the court to which an appeal from the order of conviction lies.The satisfaction of the court and judges has been made a condition in this definition.The Federal Shariat has so far set aside 3 judgments of the lower Courts where Hadd punishment under section 5 of the said ordinance had been awarded.There is no chance of mis-carriage of justice.

In the light of above,this law seems to be not repugnant to the injunctions of Islam.

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