

An Essential Review of Intisara A. Rabb's Book, "Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law"

Md Maruf Hasan¹, Sayful Islam²

¹ PhD Candidate, Department of Uṣūl al-Dīn and Comparative Religion, AbdulHamid AbuSulayman Kulliyah of Islamic Revealed Knowledge and Human Sciences (AHAS KIRKHS), International Islamic University Malaysia.

^{1,2} Post-graduate Researcher, Department of Qur'an and Sunnah, AbdulHamid AbuSulayman Kulliyah of Islamic Revealed Knowledge and Human Sciences (AHAS KIRKHS), International Islamic University Malaysia., Kuala Lumpur, Malaysia.

DOI: <https://doi.org/10.5281/zenodo.14005781>

Published Date: 29-October-2024

Abstract: Intisara A. Rabb wrote a book entitled, "Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law". This review essay will try to critically analyze Intisara A. Rabb's book. After the 9/11 attack, Islam, as a religion, is under scrutiny. The Hudud laws in Islam are considered outdated and brutal for modern society by many Western scholars. Intisara A. Rabb's book provides new insights into the legal maxims of Islam to remove prejudice regarding Islamic jurisprudence. Rabb shows how doubt canon indirectly was used in Islamic history for the proper and justified implementation of Islamic Laws. Intisara A. Rabb depicts some past events to show how Hudud Laws in Islam can be excused in the case of doubt. This article shows how Rabb's book has relevance in the context of the 21st century when Muslim societies are evolving and subscribing to modern lifestyles. How can Islamic laws be still relevant in contemporary Muslim societies? Intisara A. Rabb tried to show some positive aspects of Islamic jurisprudence by providing a historical genealogy of Islamic legal maxims.

Keywords: Intisara A. Rabb, Maqasid of Shari'ah, Ijtihad, Islamic Law, Doubt Canon, Islamophobia.

I. INTRODUCTION

Islamophobia after 9/11 attack was very serious concern in the West. Earlier, there was conspiracy theory against Islam by Bernard Lewis, British-American historian and Samuel P. Huntington. Huntington's "The Clash of Civilizations" was serious attempt to create some sort of polarization. Intisara A. Rabb's book, "Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law" was to understand Islamic laws in comprehensive way for the western world. The book consists of 414 pages, and it was first published by Cambridge University Press

The Main Contents of this Book are as follows: part one discusses on Islamic institutional structures and doubt, first/seventh–tenth/sixteenth centuries Then, part two focuses on morality and social context, first/ seventh–fifth/eleventh centuries. After that, part three depicts the jurisprudence of doubt, second/ eighth–tenth/sixteenth centuries. Moreover, part four discusses interpretive authority, the second/ eighth–tenth/sixteenth centuries. Then in conclusion, Rabb shows how the Doubt canon can be utilized in Comparative and Contemporary Contexts. In Appendices, Rabb also depicts the Rise of Islamic Legal Maxims: A Prehistory of Doubt. This research uses qualitative methodology to analyze Rabb's book. The content analysis has been adopted for comprehensive understanding of Rabb's thought.

II. BACKGROUND OF INTISAR A. RABB

Intisar A. Rabb is Professor of Law at Harvard Law School.[1] She is African American and Muslim. She is a director of its Islamic Legal Studies Program. She also holds an appointment as a professor of history (affiliated) and as Susan S. and Kenneth L. Wallach Professor at the Radcliffe Institute for Advanced Study at Harvard University.

In 1999, Rabb completed her bachelor in Government & Arabic, Georgetown University. Then, in 2005, she did her master in Near Eastern Studies Princeton University. Then, in 2009, she completed her Ph.D. in Islamic Law Princeton University.

Intisar A. Rabb has contributed the following works:

1. Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law (Cambridge Univ. Press 2015).
2. The Least Religious Branch? The New Islamic Constitutionalism after the Arab Spring, 17 UCLA J. Int'l L. & Foreign Aff. 75 (2013).
3. The Islamic Rule of Lenity, 44 Vand. J. Transnat'l L. 1299 (2011).
4. We the Jurists': Islamic Constitutionalism in Iraq, 10 U. Pa. J. Const. L. 527 (2008).
5. Legal Canons—In the Classroom and in the Courtroom or, Comparative Perspective on the Origins of Islamic Legal Canons, 1265–1519, 66 Vill. L. Rev. 831 (2021).

III. METHODOLOGY OF INTISAR A. RABB

In this book, Rabb did a content analysis of historical data of Islamic jurisprudence by using primary and secondary sources. The research is mostly qualitative in nature, and she uses historical data primary sources as it is given in appendix related verdict of some judges during medieval Islamic period.

IV. EXPLORATION OF RABB'S BOOK "DOUBT IN ISLAMIC LAW: A HISTORY OF LEGAL MAXIMS, INTERPRETATION, AND ISLAMIC CRIMINAL LAW"

1.1 Book Summary for a Glance:

The main argument for this book is to show how Islamic law is not static rather it is dynamic.

The author uses the canon of doubt and show how Muslim scholars using doubt canon avoided punishment of Hudud (Islamic criminal laws) .[2] The jurists, in fact, used prophetic tradition to claim their stance to avoid criminal punishment in terms of doubtful cases. [3]

Next, the author mentions one famous criminal case of a butcher who was caught by patrol team during the Ruling of Ali (Ra). Patrol found out that butcher standing with knife in front of dead body. Ali (Ra) gave the verdict to kill this butcher, however, another man came and said he actually killed that man due to money concern. The butcher in fact finished his task in the market and coming in that way while holding the knife and when the real criminal killed and hid himself, the butcher and patrol team came in that particular place.

The verdict of Ali (ra) was changed due to this event and the person was released. The author tries to give the hint about canon of doubt here.

In part 1 of the book, especially chapter 1, author mentions about the case of Mai'z and give the basic outlines of Islamic criminal law. This example would work as milestone for later generation in different madhabs. Chapter 2 gives general overview on how Muslim jurists uses text and generalize doubt to give the verdicts.

Then, in part 2 we can see that from 7th to 11th centuries how doubt canon was used in social and moral context. E.g. in Chapter 3 author investigate about abuse of doubt canon by elite class under Islamic criminal law. In chapter 4, author shows how Muslim jurists implemented God's law by using doubt canon despite their discomfort for capital punishment.

Moreover, in Part 3 , author delves into concerns related "jurisprudence doubt" . E.g. Medieval Muslim jurists had to address issues that were not found in foundational texts like Quran and Hadith. In chapter 5 , author shows how from 8th till 10centuries legal treatises were used and how Muslim scholars used doubt canon case by case for criminal liability. In chapter 6, treaties of legal maxims were discussed as new addition and how doubt canon became dominant guiding principle in Islamic criminal law from 11th century.

Part 4 is to discuss about opposition of doubt canon. This part is mainly to analyze and compare between textualism and doubt according to Sunni and Shi'a. Authors talk about minority scholars who challenged the majority of Muslim scholars who promoted interpretative strategy for discretion and doubt. In chapter 7, author depicts how Sunni textualists either accepted or rejected doubt canon but never try to remove doubt in interpretative process in Islamic law. In chapter 8, it is apparent that Shia textualists also rejected doubt canon as an expansive canon in Islamic Criminal law but despite doubt continued.

Overall, This book portrays that Islamic legal interpretation was led by various factors for the formation of main institutional structures.

1.2 Important Issues Throughout the Book:

1. Case of Mai'z

A man in Median named Maiz who wished to confess about his sin of adultery. Prophet returned him for 3 times each time he came to prophet. Prophet found him guilty but did not punish him and he did not say anything about punishment. The townspeople themselves decided to implement the Hudud on Maiz by stoning and they did it. They informed Prophet afterwards and Prophet replied, "hould have let Mai'z go" and he also said, " God surely would have accepted his repentance."

The author established doubt canon based on this prophetic story over the chapters.

2. What is Hudud Laws?

Hudud refers to major crimes and their associated punishments in Islamic criminal law. God himself decided these laws that we found in texts like Quran and Sunnah of Prophet. [4]These Hudud laws coming from God and humans were barred from exercising any influence over these laws. [5]

There are 3 types of criminal offences 1. Hudud (e.g. Fixed crimes and punishments like Adultery after marriage and stoning to death as a consequences) 2. Qisas (e.g. Laws of retaliation and financial compensation for personal injury) 3. Taqzir (penalties for offences that are not mentioned in texts) [6]

Author mentions 7 acts that can fall under Hudud category [7]

1. Illicit sexual relations
2. Defamation
3. Theft
4. Wine drinking
5. Highway robbery
6. Apostasy
7. Blasphemy

3. Prophet's (peace be upon him) example of Fatima (Ra) and approach of literalists:

Author depicts Imam Dawud(d.270/883) as the literalist who brought example of Maiz first stating that Prophet and Townspeople are obliged to implement the Hudud on Maiz and not even prophet can escape from the rule of requiring punishment. [8] The case of Makhzum has been also mentioned to cite an example where prophet order to cut off the hand despite the girl was the daughter of aristocrat family stating even Fatima would be guilty of theft, prophet would give the verdict of cutting hand.

4. Avoiding Hudud Punishment in cases of doubt

Author gave example of Abu Yusuf who was the student of Abu Hanifa. Durin Abbasid caliph Harun al-Rashid asked for opinion regarding witnessed who saw committing zina. And ask about the punishment. Abu Yusuf summersing the caliph must be referring to one of his family members answered, "No". Harun prostrated in joy. [9]

To discuss about moral egalitarianism and social hierarchy, author quoted the important hadith:

“Surely, those who came before you were destroyed because [it was their practice that], when a person of high status (sharīf) stole, they would let him go; but when a commoner (dāqīf) stole, they would impose the hadd punishment on him. I swear by God that even if Faṭīma [my own daughter] had stolen, I would cut off her hand.”

5. Safwan Case:

This is also important story from Prophet time that Author brought into attention. One companion of Safwan stop for rest in mosque and when he woke up and he found a man stole his clock. Safwan caught the thief and brought him to Prophet and Prophet gave the verdict for hand amputation. Upon hearing this Safwan changed his mind stating I will give the clock as gift. Prophet rejected by responding “if only you had done so before you came to me” [10]

6. Drunken Orphan Case

This case is with Companion of Prophet, Ibn Masud in Kufa. He was the governor there. A man came with his drunken nephew and Ibn Masud asked to punish him and the nephew protested asking his uncle, “You neither disciplined me and teach me right from wrong nor covered my sin”. Ibn Masud Referred Makhzum case saying anyone violating laws should be punished. [11]

7. Rape Case (Woman forgiven from Hudud)

An woman was brought for adultery case and she said:

“I have not taken a lover or become intimate with any male companion since I converted to Islam. However, at some point, when I was sleeping in the privacy of my own home – by God – I woke up to find a man atop me, leaving in me a fire. I looked at him to identify him [but] was left with no idea as to who he was from among all of God’s creatures!”

Umar asked Abu Musa to bring some witnesses about the character of this woman and when the people came they came positive feedback about the woman. Upon hearing this Umar instructed people to treat her well and took responsibility of feeding and clothing. [12]

8. Case of Pregnant Woman

A soldier came after year and found her wife pregnant and accused her for adultery. Umar (Ra) asked for Hudud but Ali (Ra) rushed and stopped him for longing and after the some period of time the soldier came and claim that this is his son. The Hudud punishment was avoided and later justified as doctrine of doubt. [13]

9. Blasphemy Issue

Imam Abu Hanifa deemed it blasphemous for a person to doubt his faith but then say, “I am a believer, God willing,” or to say, “I am bored of Islam,” 28 or “I am Satan,” even if joking. [14]The Hudud has to be implemented and though it is known that if the person says I withdraw my wordings then he can be freed. However, unlike other prominent jurists of their time, early Hanafi’s generally maintained that repentance did not cancel hudud liability once a final judgment had been rendered. [15]

10.No Hudud for Prostitution according to Hanifi Madhab and A Response from Ibn Hazm

Author refers defective contract for Prostitution and mentioned no hudud law will be implemented and she mentions,

“Abu Hanifa’s privileging of contract law led him to espouse a general rule of hudud avoidance in criminal cases involving contracts, even if known to be defective. He thus expanded the meaning of “doubt” to cover contracts for sex that other jurists would have considered prostitution.⁸⁰ Further, he extended this rule to cover cases in which marriages that were valid in non-Hanafi schools provided a semblance of a contract that, although invalid in Hanafi law, was a sufficient basis for Hanafi jurists to identify doubt that would caution avoidance of hudud sanctions. In all of these cases, Abu Hanifa directed judges to avoid hudud punishments on the basis of contract law” [16]

However, towards the end of the book Author gave the example of Ibn Hazm who refuted this point,

“In reaction, Ibn Hazm framed Abu Hanifa’s position on contractual doubt as advocating an immorality that starkly contradicted Islamic mores. In fact, he called it “one of the most anomalous opinions” that he had ever seen playing with sharia.....To avoid hudud punishments for a paltry dowry but to not allow people to get married except with a sizable one “was providing an incentive to commit zina”. The policy encouraged fornicators to have sex openly by simply paying a woman some paltry sum, such as a single silver coin, while requiring people who wanted to get married legitimately to

pay a minimum of ten silver coins. In other words, Abu Hanifa's policy meant legalizing prohibited sex-by-prostitution and placing obstacles in the way of legitimate sex-by-marriage. If anything, for Ibn Hazm, both parties involved in prostitution agreements deserved punishment. Moreover, he considered their crime to be more serious than simple fornication: with the addition of money into the equation, the two parties added the sin of concluding an illegitimate financial transaction in an attempt to justify their crime of zina. Thus, to follow Abu Hanifa's position on contractual doubt, he concluded, was clearly to violate the texts of the Qur'an and the Sunna." [17]

11. Incest Sex and Contractual Doubt: No Hudud Laws?

This is another subtle point that was needed to be addressed regarding contractual doubt. This is so subtle sophisticated argument that was raised by Imam Abu Hanifa's Students Abu Yusuf and Shayba Nianifa. Author wrote:

"The prohibition against incest means that any agreement purporting to create a marriage contract between close relatives is not legally cognizable and hudud punishments for zina must be enforced. To say otherwise would amount to "playing with the law" and playing with Muslim scripture itself, according to one scholar." [18]

12. Another Subtle Issue Related Rape Case and Imam Malik:

This is kind of ambiguous to me, Author perhaps depicts for the rape case, according to Imam Malik, there must be some circumstantial evidence like indications that women had been crying or had called for help during the act. For Imam Malik, pregnancy is to provide unambiguous circumstantial evidence of sex, and she has to prove in order to avoid criminal liability for illicit sex. [19]

The point is as we saw the women who got raped during Umar's (Ra) time and Umar (Ra) used different strategy. Imam Malik also here refers some strategy by which the girl needs to prove for not having illicit sex and not to use tactic to bypass the Islamic law.

13. Imam Malik and Elemental Doubt for Hudud Implementation

If a person gathered things but could not steal yet or A person open sip but could not drink alcohol or a person taking position for sex but did not start having sex, all of these 3 categories are not liable for Hudud according to Imam Malik.

Author states, "For Malik, any deficiency in the elements necessary to complete a crime (that is, "elemental doubt") voided criminal liability. Thus, he held that there was no hudud liability for mere attempts. For example, no hudud liability would apply to a thief who gathered materials with the clear intention to take someone else's property but did not remove them from a secure location (that is, mere attempt); to a man found with an alcoholic drink in his hands who was not actually observed sipping the beverage; or to a couple discovered alone in a compromising position who did not actually have sex. [20]

There is another important point which is mentioned regarding witnesses and avoiding Hudud. E.g.

"if two witnesses testified against a man accused of theft, but two other witnesses then testified that someone else was the culprit, this created a doubt by which the judge should avoid the hudud punishment." [21]

Unlike Muaz case in Kufa, according to Maliki Madhab if a person is ignorant about law, hudud would not be implemented. Author mentioned, "Judges were also to investigate whether an alleged criminal offender was generally ignorant about the law – in which case punishment was to be avoided. For instance, if a man gave permission to a friend to have sex with his slave woman, not knowing that it was illegal to grant such permission, judges were to avoid enforcing the hadd punishment against the slave owner because of the "doubt" about culpability created by his ignorance about the law. They were also to avoid punishing the friend who had sex with the slave woman regardless of whether he believed it was legal" [22]

14. No Hudud for Few Sexual Circumstances according to Imam Quduri

There are some scenarios and no hudud would be implemented for these circumstances.

Rabb pointed:

These scenarios concerned the questions of whether a man would be Hudud liable for (1) third-party coerced rape: coercing another man to commit zina or to rape a woman; (2) mistaken sexual relations with an illicit partner: having sex with a woman on the erroneous belief that he had a legal relationship with her; (3) legally barred sexual relations: having

sex with a woman with whom he could not legally enter into a marriage contract; (4) prostitution: paying a woman for sex; (5) male sodomy; and (6) bestiality. Quduri was certain that almost all of these scenarios were matters in which hudud punishment was to be avoided. In arguing against Shafiqi's positions to the contrary, Quduri relied heavily on the doubt canon. On the question of prostitution, Quduri took Abu Hanifa's line that "contractual doubt" (shubhat al-qaqd) sufficed to require hudud avoidance. [23]

She further mentions, "His list of model scenarios that triggered the doubt canon built on the lists that Quduri and previous scholars had devised, and it included (1) a man having sex with the slave woman of a relative within the household on the mistaken belief that doing so was legal;³¹ (2) sex between a Muslim and a non-Muslim; and (3) a man having sex with a slave woman belonging to a free woman on the claim or mistaken belief that he had bought her." [24]

15. Strange Definition of Zina by a Syrian Scholar: Anal Sex with Woman is not Zina?

Author gave one interesting definition of Zina from Abu Bakr b. Masqud al-Kasani (d. 587/1191). She stated, "The Syrian scholar Abu Bakr b. Masqud al-Kasani (d. 587/1191) – whose family had immigrated to Aleppo from Central Asia – expanded the scope of doubt jurisprudence even further, making the absence of doubt a core material element of the very definition of the crime of zina. He defined zina as voluntary non-anal sexual relations between a man and a woman [living] in Muslim territory, provided they are subject to [the jurisdiction of] Islamic law, and in the absence of the existence of an actual or a semblance of a master-slave or marital relationship, and in the absence of doubt or mistake in areas of legitimate confusion about either."

16. Last Important Issue: Rejecting Doubt Canon by Zahiri

Ibn Hazm and Imam Dawud are considered as Zahiri and these people are stricter than Hanbali textualists. They rejected doubt canon and think as if doubt canon is to avoid Hudud intentionally.

Author says, "Going even further than Hanbali textualists, Zahiri's unequivocally rejected the doubt canon and any tendency toward hudud avoidance. Dawud "the Literalist" established the school of strict textualism in the ninth century, with little to say about doubt. It was his famously sharp tongued and acerbic successor Ibn Hazm in the eleventh century who levied the most direct and hard-hitting attack on doubt." [25]

V. CONCISE ANALYSIS FOR REFLECTIONS FROM RABB'S BOOK

a. Some Strong Points to Consider:

1. Author successfully portrayed how doubt canon was used by various Muslim scholars to establish justice.
2. Author also shows both stances for contractual doubt by referring Abu Hanifa and Ibn Hazm related sexual issues. It helps readers to understand the different views among scholars related sensitive topics.
3. Example of Zahiri scholars like Ibn Hazm and Imam Dawud also helps us understand about literalists positions.
4. Early references from Prophet's (peace be upon him) decision also helped us to understand why particular imams taking different position depending on their current context. For example, we see Imam Abu Hanifa took certain decisions depending on the context during his time but his approach may have been misused by later generations and we see that's why his students are differing from Abu Hanifa to save Muslim Ummah from diversion.

b. Some Weak Points to Consider

1. Author seems not to include some other historical figure related Islamic Jurisprudence like Imam Shatibi.
2. In terms of Legal maxims, she did not explain much related those topics like Shatibi.
3. The American context that she tried to include makes ambiguous comparison that makes less sense to me.

VI. CRITICISM

It seems Rabb did not use Islamic terms rather the doubt canon terms was used as western methodology. It is also clear that she confessed herself as to mention that the term 'doubt canon' was not used rather Hudud avoidance was referred in Islamic Books. This is like western sceptic methods, and it was put into practice in Islamic jurisprudence by the author.

VII. ADDITIONS

1. It seems it was necessary to explain literalists and their approach.
2. We need more comprehensive ways to deal with doubt canons because it is rather ambiguous way of approaching to try and adapt.

VIII. CONCLUSION

It can be concluded that Islamic Jurisprudence is not static rather dynamic, and Islamic laws can be adapted in contemporary time based on Ijtihadic approach time for the benefits of Muslim ummah as well as whole of humanity. The doubt canon (western methodology) and *ijtihadic* approach may help the Muslim community to adopt Islamic Laws withing modern Muslim societies.

REFERENCES

- [1] Intisar A. Rabb. Harvard Law School. (2023, January 11). Retrieved January 11, 2023, from <https://hls.harvard.edu/faculty/intisar-a-rabb/>
- [2] A. Rabb Intisar(2015), Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law .Cambridge Univ. Press, p. 32
- [3] Ibid,p.32
- [4] Ibid p, 13
- [5] Ibid P, 15
- [6] Ibid p, 46
- [7] Ibid p, 48
- [8] Ibid p, 41
- [9] Ibid p.105
- [10] Ibid p , 106
- [11] Ibid p, 108
- [12] Ibid p, 106
- [13] Ibid p, 119
- [14] Ibid p, 142
- [15] Ibid p, 143
- [16] Ibid p.153
- [17] Ibid p.253
- [18] Ibid p. 155
- [19] Ibid p.159
- [20] Ibid p.162
- [21] Ibid p. 163
- [22] Ibid p.164
- [23] Ibid p.191
- [24] Ibid p.193
- [25] Ibid p.243