



Research article

In defense of the codification of the Islamic law of *Hudud* into the law of Pakistan

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Abstract

Islamic law has three types of punishments for criminal offences: fixed punishment, which is called *Hudud*, retaliation, which is called *Qisas*, and discretionary punishment, which is called *Tazir*. *Hudud*, fixed punishments, are predetermined by Allah the Almighty and his last Prophet Muhammad ﷺ in the Holy Quran and in the *Sunnah* of Prophet Muhammad ﷺ. *Hudud* punishments are used mainly for five crimes: adultery, false accusation of adultery, theft, drinking liquor, and apostasy. The fifth President of Pakistan, General Muhammad Zia-ul-haq, introduced *Hudud* codified laws in Pakistan in 1979 for four of the criminal offences: *Zina* (adultery), false accusation of adultery, drinking *Khamr* (alcohol), and theft. No law was promulgated for the offence of apostasy; rather, one ordinance was introduced on the regulation of whipping, which was later repealed by the Pakistani parliament in 1996.

Secular groups advocate for the complete abrogation of *Hudud* law from the judicial system of Pakistan in the name of the protection of women, but the basic purpose of these groups is to spread licentious behavior in a Muslim society. *Hudud* law actually protects men and women from false accusations of adultery, it also protects them from unlawful fornication and from drinking *Khamr*; which leads to adultery and other harmful offences. During the rule of the tenth President Pervez Musharraf, in 2006, the Pakistani government repealed many provisions of the *Zina* and *Qazf* Ordinances through the Protection of Women Act. But the Government of Pakistan did not change

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anything in the theft and drinking *Khamr* Ordinances, which is a clear-cut indication that the amendments to the *Zina* and *Qazf* Ordinances were made to portray a liberal image of Pakistan while opening the door for adultery and related acts in Pakistan. The changes in the *Hudud* laws are discussed in detail in this article.

It is true that the law of *Hudud* needs procedural changes. But that does not mean that we should abrogate the whole law of *Hudud* and its punishments, fixed by Allah the Almighty and his last Prophet Muhammad ﷺ from the judicial system of Pakistan. The author recommends that rather than making different ordinances of *Hudud*, a *Hudud* chapter should be added to the existing Pakistan Penal Code of 1860 to get rid of the procedural difficulties. If a survey were to be conducted today in Pakistan, the majority would vote in favor of implementing *Hudud* Law in the Islamic Republic of Pakistan. Law is made to control the behavior of a society. If the majority of the population is happy with a law, one group of people cannot be given the right to snatch the voice of the general public and impose their verdict on the majority of the people.

Keywords: Islamic Law, *Hudud* Ordinances of Pakistan, *zina*, *qazf*, *sariqah*, *shurb khamr*

1. Introduction

This article begins by introducing Islamic Law generally. Then it explains the *Hudud* punishments under Islamic criminal law and their underlying support in the Holy Quran and in the *Sunnah* of Prophet Muhammad ﷺ. Then it analyzes the 1979 *Hudud* Ordinances of Pakistan one by one, as well as the Protection of Women Act of 2006, and concludes with some recommendations.

Had literally means in Arabic a boundary, a border line, or a red line that cannot be crossed. *Hudud* punishments are fixed criminal punishments determined under Islamic Law. The *Hudud* punishments of Islamic Law and the *Hudud* Ordinances of the Islamic Republic of Pakistan are analyzed and examined in a positive manner and in light of both the verses of the Holy Quran and the traditions of the Holy Prophet Muhammad ﷺ. This examination establishes that the *Hudud* punishments do indeed protect men and women against unlawful fornication and false accusations of adultery. They also block activities that lead to adultery and other offences that spread licentious behavior in a society.

1.1. Islamic law and punishments

Law in Islam means a rule (*Hukm*). It is defined by Islamic jurists as a rule of human conduct, established by the communication of Allah the Almighty to the Prophet Muhammad ﷺ, either of demand or a mere declaration, for the betterment of human beings in this world and in the hereafter. Rules are classified into two types: primary (*Taklifi*) and declaratory (*Wazi*). A primary rule is defined by Islamic jurists as a law that requires commission or omission of an act, or which allows for discretion as to the commission or omission of a particular act. Primary rules are divided into five types: imperative act (*Wajib*), forbidden act (*Haram*), acceptable act (*Mandoob*), permissible act (*Mubah*), and the discouraged act (*Makrooh*). A declaratory rule is defined by Islamic jurists as a law that declares anything to be the reason for, or the condition of or hindrance to, any particular act. Declaratory rules are divided into three types: Valid, Voidable and Void acts (*Sahi, Fasid, Batil*), Cause, Condition and Obstacle (*Sabab, Shart, Mane*) and a general rule and its exception (*Azema wa Rukhsa*).²

²For detailed explanations of Islamic law, see generally IMRAN NYAZEE, OUTLINES OF ISLAMIC JURISPRUDENCE (4th ed. 2011).

Islamic law is comprised of four elements: The Lawgiver (*Hakim*), legal rules (*Hukm*), the object of the law (*Mahkum Fih*) and the subject of the law (*Mahkum Alaihi*). The lawgiver is Allah the Almighty. He is an entity whose existence must be believed in, complete in all good attributes and pure from all defects. Prophet Muhammad ﷺ is the last messenger of Allah the Almighty and there is no messenger after him. The basic sources of Islamic law are the Holy Quran and the *Sunnah* of Prophet Muhammad ﷺ. Allah the Almighty says in the Holy Quran that “*O you who believe! Obey Allah and obey the Messenger (Prophet Muhammad ﷺ) and those of you (Muslims), who are in authority, and if you differ in anything amongst yourselves, refer it to Allah and his Messenger (Prophet Muhammad ﷺ), if you believe in Allah and in the Last Day, that is better and more suitable for final determination.*”³

Whoever violates the law of Allah the Almighty in an Islamic state will be punished by the Islamic government through the rulings of a court of law. Crime is defined by Islamic jurists as an unlawful act for which punishments, such as fixed or discretionary ones, have been provided by Allah the Almighty and his last messenger Prophet Muhammad ﷺ. Crime is either commission of any prohibited act or omission of any obligatory act. Allah the Almighty says in the Holy Quran that Say (O Prophet Muhammad ﷺ to these polytheists, pagans, etc.) “*you will not be asked about our sins, nor shall we be asked of what you do.*”⁴

In the Islamic criminal justice system, various penalties are imposed, depending on the rights involved. For example, where the right of Allah the Almighty is involved, either completely or in part, a fixed punishment (*Had*) and retaliation (*Qisas*) can be imposed. Where the right of an individual is involved, reparation and compensation penalties may be imposed, and when the right of the state is involved, discretionary punishment (*Tazir*) will be imposed.

In an Islamic State, criminal law is part of public law. A public law is applicable to all citizens of the state. Public law is comprised of constitutional law, administrative law, and criminal law. Personal law, in contrast, is discretionary law that can be adopted by non-Muslims as their own law, but criminal law is for all, whether they are Muslims and non-Muslims. Criminal law applies to all citizens of an Islamic State because the rights violated under criminal law are rights *in rem*, which are rights against the whole world, whether believers or non-believers. Personal law is discretionary because it is a right *in personam*, a right between two persons, and it does not harm the community at large.

As discussed above, Islamic criminal punishments are classified into three main types: fixed punishments (*Hudud*), retaliation punishments (*Qisas*), and discretionary punishments (*Tazir*). Fixed punishments, laid down by Allah the Almighty in the Holy Quran and his Prophet Muhammad ﷺ in his *Sunnah*, are imposed on those persons who have been convicted; before a court of law; of the following five main criminal offences: adultery (*Zina*), false accusation of adultery (*Qazf*), theft (*Sariqah*), drinking alcohol (*Shurb Khamr*), and apostasy (*Irtidad*). The *Hudud* Ordinances of Pakistan were promulgated for four of these fixed punishments in 1979. No law or amendment to a law has been introduced in Pakistan to cover punishment for apostasy.

A retaliation punishment (*Qisas*) is a punishment by which a murderer, or any trespasser to the human body, will be retaliated against in the same fashion if authorized by a court of law. If the family or heir of

³The Holy Quran 4:59. The English translations of the verses of *The Holy Quran* used in this article are based on those of Muhammad Muhsin Khan in *The Quranic Arabic Corpus*, <http://corpus.quran.com/translation.jsp>, with occasional adaptations by the author for clarity.

⁴*Id.* 34:25.

the victim forgive the murderer, then blood money (*Diyah*) is delivered to the family or heir by the murderer or by his relatives. Retaliation punishment is mentioned in the Holy Quran: Allah the Almighty says that:

*O' Believers, Al-Qisas (the Law of Equality in punishment) is prescribed for you in case of murder, the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother (or the relatives, etc.) of the killed against blood money, then adhering to it with fairness and payment of the blood money, to the heir should be made in fairness. This is an alleviation and a mercy from your Lord. So after this whoever transgresses the limits (i.e. kills the killer after taking the blood money), he shall have a painful torment. O People of understanding, the law of the death penalty as retaliation grants life to you, so that perhaps you will have fear of Allah the Almighty.*⁵

In another place, Allah the Almighty says that “*And We ordained for them: “Life is for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal, but if anyone remits the retaliation by way of charity, it shall be for him an expiation.”*⁶ In another verse of the Holy Quran, Allah the Almighty says that “*And do not kill anyone which Allah has forbidden, except for a just cause.*”⁷ The Holy Prophet Muhammad ﷺ is reported to have said that “The blood of a Muslim who confesses that none has the right to be worshipped but Allah (Tawheed) and that I (Prophet Muhammad ﷺ) am His Apostle, cannot be shed, except in three cases: In Qisas for murder, a married person who commits illegal sexual intercourse and the one who reverts from Islam (apostates) and leaves the Muslims.”⁸ If before the verdict of an Islamic court, family/heirs of the murdered forgive the murderer, the Islamic court will not give the murderer capital punishment, and the murderer will have to give some money to the family/heir of the victim. As mentioned in the Holy Quran, Allah the Almighty says that “*if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude.*”⁹

Discretionary punishments (*Tazir*) are those punishments that are not predetermined and are not fixed in the Holy Quran nor in the *Sunnah* of Prophet Muhammad ﷺ. Jurisdiction over such punishments is in the hands of an Islamic state or an Islamic court and its judges.

The scope of this article is limited to the discussion of fixed punishments in Islamic law and their codification into the Law of Pakistan. Therefore, this article will not go into detail description about retaliation and discretionary punishments.

The fifth president of Pakistan, General Muhammad Zia-ul-Haq, passed five *Hudud* Ordinances in 1979 to implement the Islamic *Hudud* punishments in the Islamic Republic of Pakistan. Four of these ordinances are still applicable following major amendments made during the term of the tenth president, Pervez Musharraf, in 2006: those prohibiting fornication, false accusation of adultery, alcohol consumption, and theft.

⁵The Holy Quran, *supra* note 3, 2:178-79.

⁶*Id.* 5:45.

⁷*Id.* 17:33.

⁸Tradition 6878, Ismail, M. b., *Sahi Bukhari*. English translations of the *hadith* compiled in the *Sahi Bukhari (Sahih al-Bukhari)* can be found at <http://sunnah.com/bukhari>. The translations used in this article are based on translations found on the website, with occasional adaptations by the author for clarity.

⁹The Holy Quran, *supra* note 3, 2:178.

Secular groups talk about repealing all of Pakistan's *Hudud* Ordinances in the name of the protection of women and independence. But if these ordinances are applied as they are supposed to be, and within the spirit of the Islamic criminal justice system, they protect men and women's integrity and honor. Men and women are protected from illegal fornication and false accusation of adultery, and the prohibition of alcohol consumption protects them from illicit behavior with and from the opposite sex.

The *Hudud* Ordinance dealing with the protection of men and women's honor states that if a person accuses a man or a woman of adultery, the accuser must bring four males, adult, sane, and pious witnesses, who have never committed a big sin and never insisted on it, before a court of law, and those witnesses must have themselves directly witnessed the act of adultery. The offence must be proved beyond a reasonable doubt, without any ambiguity. If an accuser does not produce four pious witnesses to support the accusation, the accuser will receive eighty lashes as the punishment of false accusation of adultery (*Qazf*) by the court of law, in order to protect the honor and integrity of the accused.

1.2. Fixed punishments (Hudud)

Concerning fixed rules, Allah the Almighty says in the Holy Quran that *"These are the limits (set) by Allah the Almighty, so approach them not. Thus does Allah make clear His Ayat (proofs, evidences, signs etc.) to mankind that they may become Al-Muttaqun (the pious)"*¹⁰ In another verse Allah the Almighty says that *"These are the limits (set) by Allah the Almighty, so do not approach them. And whoever transgresses the limits ordained by Allah, then such are the Zalimun (wrong-doers, etc.)"*¹¹ This section of the article first of all provides an overview of fixed punishments and then specifically discusses their basis in the Holy Quran and in the traditions of Prophet Muhammad ﷺ.

Illegal fornication is a very serious sin in Islamic law; thus, Islamic law blocks all means that lead to adultery. Allah the Almighty says that *"And come not near to the unlawful sexual intercourse. Verily, it is a Fahishah [i.e. anything that transgresses its limits (a great sin)], and an evil way (that leads one to Hell unless Allah forgives him)."*¹² If adultery is proved beyond a reasonable doubt before a court of law, and the offenders are not married, both the man and the woman will receive one hundred lashes each. If one of them is unmarried and the other one is married, the unmarried one will receive one hundred lashes according to the verse of the Holy Quran and the married one will be stoned to death according to the tradition of Prophet Muhammad ﷺ. Allah the Almighty says that *"The woman and the man guilty of illegal sexual intercourse, flog each of them with a hundred stripes. Let not pity withhold you in their case, in a punishment prescribed by Allah, if you believe in Allah and the Last Day. And let a party of the believers witness their punishment."*¹³

The person who accuses any woman or man of adultery and does not produce four witnesses will be considered to have committed the offence of *Qazf*, the false accusation of adultery, and will be required to produce four males, adult, sane and pious persons as witnesses. If someone puts the blame of adultery on a pious woman or a man, and does not produce the required four witnesses, he or she will be given punishment of eighty lashes by an Islamic Court of Law and the accuser's evidence will not be accepted in future. Almighty Allah says that *"And those who accuse chaste women, and produce not four witnesses,*

¹⁰*Id.* 2:187.

¹¹*Id.* 2:229.

¹²*Id.* 17:32.

¹³*Id.* 24:2.

flog them with eighty stripes, and reject their testimony forever, they indeed are the *Fasiqun* (liars, rebellious, disobedient to Allah).¹⁴ Allah the Almighty further states that “Except those who repent thereafter and do righteous deeds, (for such) verily, Allah is Oft-Forgiving, Most Merciful.”¹⁵

Islamic criminal law gives strong punishments to thieves in order to protect the lawful wealth of the people. Whoever commits theft for the first time shall be punished with amputation of his right hand from the joint of the wrist, and whoever commits theft for the second time shall be punished with amputation of his left foot up to the ankle, and whoever commits theft for the third time or any subsequent time shall be punished with imprisonment for life. The theft which is liable to *Had* is that for which the value of the stolen property is more than four Dinars, and the stolen property must have been taken from a locked place (*Hirz*). Almighty Allah says that “Cut off (from the wrist joint) the (right) hand, male or a female, as a recompense for that which they committed, a punishment by way of example, from Allah, for their crime: and Allah is All Powerful, All Wise.”¹⁶

Drinking liquor is also prohibited in Islamic law. Prophet Muhammad ﷺ decreed the punishment of beating with palm branches and shoes in various cases of drinking *Khamr*, and *Abu Bakr* (RA) used to decree forty lashes, which was later extended to eighty lashes in the reign of *Hazrat Umar* (RA).¹⁷

The nature of the proof required for theft and drinking liquor is different from that for offenses of adultery. As noted above, in cases of adultery and false accusation of adultery, four males, adult, sane, and pious witnesses who have never committed a big sin and never insisted on it, are required to prove the case beyond a reasonable doubt. For theft and drinking liquor, the offense can be proved by two males, adult, sane witnesses who have never committed a big sin and never insisted on it.

1.2.1. Adultery

Allah the Almighty says that “Do not even approach adultery. It is indecent and an evil act.”¹⁸ Prophet Muhammad ﷺ said that:

Seven (people) will be shaded by Allah by His Shade on the Day of Resurrection when there will be no shade except His Shade. (They will be) a just ruler, a young man who is brought up in the worship of Allah, a man who remembers Allah in seclusion and his eyes are then flooded with tears, a man whose heart is attached to mosques (offers his compulsory congregational prayers in the mosque), two men who love each other for Allah's sake, a man who is called by a charming lady of noble birth to commit illegal sexual intercourse with her, and he says, “I am afraid of Allah”, and (finally), a man who gives in charity so secretly that his left hand does not know what his right hand has given.¹⁹

Initially, in Islamic law, the punishment for adultery to a woman was imprisonment for life at the home of the husband if four male witnesses give testimony against the woman. Allah the Almighty says in the

¹⁴*Id.* 24:4.

¹⁵*Id.* 24:5.

¹⁶*Id.* 5:38.

¹⁷Tradition 4481, *Al-Sijistani, S. b. A., Sunan Abu Dawood*. English translations of the *hadith* compiled in the *Sunan Abu Dawood (Sunan Abi Dawud)* can be found at <http://sunnah.com/abudawud>. The translations used in this article are based on translations found on the website, with occasional adaptations by the author for clarity.

¹⁸*The Holy Quran, supra* note 3, 17: 32.

¹⁹Tradition 6806, *Sahi Bukhari, supra* note 8.

Holy Quran that “*And those of your woman who commit illegal sexual intercourse, take the evidence of four witnesses from among you, and if they testify, confine them (i.e. women) to houses until death comes to them or Allah ordains for them some other way.*”²⁰

This verse of the Holy Quran clearly states that there should be four male witnesses to prove the offence of adultery. This rule is very clear and exhaustive because it was set by Allah the Almighty and is therefore a divine law that cannot be changed by the people. There is no room for interpretation when the verse of the Holy Quran is definitive by way of transmission (chains) and definitive with respect to meaning (*Qati-Dalala and Qati-Subut*).

The punishment of confinement was, however, repealed by Allah the Almighty when the other way was opened by him, which is one hundred lashes for unmarried men and women and stoning to death for married men and women, and a separate concept of *Lian* was introduced for a husband and wife. Allah the Almighty says that “*the adulteress and the adulterer, lash each of them with a hundred lashes, and let not pity withhold you in their case, in a punishment prescribed by Allah, if you believe in Allah and the Last Day. And let a group of believers witness their punishment.*”²¹

An area of disagreement concerns the use of stoning as punishment. There is no doubt that the punishment of one hundred lashes for the adulteress and the adulterer is mentioned in the Holy Quran. It is a fixed punishment (*Had*) that cannot be denied by any Muslim if he believes in the Holy Book of Al-Quran and is a compulsory requirement to be a Muslim. But some so-called jurists do not believe in the punishment of stoning to death (*Rajm*) and they say that this type of punishment is not mentioned in the Holy Quran. These people do not believe in the traditions of Prophet Muhammad ﷺ in their true sense and make cheap arguments and excuses, which are baseless and unauthentic. The purpose of this article is not to discuss their points of view in general, but it will refute their point of view in this specific case, as follows:

There are six authentic books of the traditions of Prophet Muhammad ﷺ namely: *Sahi Bukhari, Sahi Muslim, Sunan Abu Daud, Sunan Ibn Maja, Sunan Nisai* and *Jame Tirmizi*. It is to be noted here that these books do not contain points of view of the authors; rather, they contain traditions of Prophet Muhammad ﷺ with authentic chains. The first two books of traditions are completely authentic, and there is no weak tradition in these two. Muslim Jurists have held a consensus upon this view for centuries.

There is an authentic tradition of Prophet Muhammad ﷺ in *Sahi Bukhari* which states that Maiz Bin Malik Al-Aslami, who was a married man, came to Prophet Muhammad ﷺ and said that he had committed adultery. Prophet Muhammad ﷺ asked him four times and he confessed in front of Prophet Muhammad ﷺ four times that he had committed adultery. Thereafter, Prophet Muhammad ﷺ issued an order to stone him to death.²²

There is another tradition of Prophet Muhammad ﷺ in which it is reported that Prophet Muhammad ﷺ sent Unais Al-Aslami to an adulterous married woman and said that if she admits adultery, she should be given the punishment of stoning to death. Unais Al-Aslami went to the woman and asked her; she admitted the adultery and was given the punishment of stoning to death.²³ There was another

²⁰*The Holy Quran, supra* note 3, 4:15.

²¹*Id.* 24:2.

²²Traditions 6816 & 6820, *Sahi Bukhari, supra* note 8; Tradition 1691 c, Al-Qusheri, M. b. H., *Sahi Muslim*. English translations of the *hadith* compiled in the *Sahi Muslim (Sahih Muslim)* can be found at <http://sunnah.com/muslim>. The translations used in this article are based on translations found on the website, with occasional adaptations by the author for clarity.

²³Traditions 6859 & 6860, *Sahi Bukhari, supra* note 8.

married woman in Medina, who committed adultery and came to Prophet Muhammad ﷺ. Prophet Muhammad ﷺ asked her first to give birth to a child and then come back after the delivery. She went away and came with the baby after the delivery. Prophet Muhammad ﷺ again asked her to go away and come back when the baby was able to eat and drink. When she came back later on, Prophet Muhammad ﷺ issued orders for stoning her to death. At the time of the punishment of stoning to death, a drop of the blood from her body flew on Hazrat Ali's clothing and, in one tradition, on the face of Hazrat Khalid (RA). They did not like the blood of the deceased on their clothes and someone mentioned this thing before Prophet Muhammad ﷺ. Prophet Muhammad ﷺ said that the deceased girl who had been stoned to death had thereby repented to Almighty Allah in a way that if I distribute her pardon to seventy people of Medina (and in one tradition the whole people of Medina), it will be enough for them for their success in the hereafter.²⁴

Under Islamic law, there is no distinction between Muslim and non-Muslim offenders in an Islamic state for the punishment of adultery. Prophet Muhammad ﷺ awarded the same *Had* punishment to a Muslim and a non-Muslim while he was the ruler of the Islamic State of Medina.²⁵ It is pertinent to repeat here that the message of Islam is for all human beings and not only for Muslims. Almighty Allah says that *"In Gardens (Paradise) they will ask one another, about Al-Mujrimun (polytheists, criminals, disbelievers etc.), (And they will say to them): "What has caused you to enter Hell?" They will say, "We were not of those who prayed; nor did we used to feed the poor."*²⁶ In another verse Almighty Allah says that *"And Hajj (pilgrimage to Makkah) to the House (Ka'bah) is a duty that mankind owes to Allah."*²⁷ Another verse says, *"O Children of Adam, take your adornment (by wearing your clean clothes) at every place of worship."*²⁸ These verses make it very clear that the message of Almighty Allah, which was rightly and justly delivered by his Messenger Prophet Muhammad ﷺ, is for all of mankind, whether they are Muslims or non-Muslims.

1.2.2. False accusation of adultery

Allah the Almighty says in the Holy Quran that *"indeed, those who accuse chaste believing women are cursed in this world and the Hereafter, and for them is a great torment."*²⁹ Prophet Muhammad ﷺ said "Avoid the seven destructive sins." They (the people) asked, "O Allah's Apostle ﷺ, what are they?" He said:

To join partners in worship with Allah; to practice sorcery; to kill the life which Allah has forbidden except for a just cause (according to Islamic law); to eat up usury (*Riba*); to eat up the property of an orphan; to give one's back to the enemy and fleeing from the battle-field at the time of fighting and to accuse chaste women who never even think of anything touching their chastity and are good believers.³⁰

If a person; whether a man or a woman; accuses a man or a woman of adultery, the accuser must bring four pious witnesses to support the accusation; qualified as noted above; otherwise, the accuser will

²⁴Traditions 1695 a & 1695 b, *Sahi Muslim*, *supra* note 22.

²⁵*Id.* Tradition 1699 a.

²⁶*The Holy Quran*, *supra* note 3, 74:40-44.

²⁷*Id.* 3:97.

²⁸*Id.* 7:31.

²⁹*Id.* 24:23.

³⁰Tradition 6857, *Sahi Bukhari*, *supra* note 8.

be punished with eighty lashes. Allah the Almighty says that *“And those who accuse chaste women of committing adultery and do not produce four witnesses, flog them with eighty stripes, and reject their testimony forever, they indeed are the transgressors.”*³¹ Thereafter Allah the Almighty further states that *“Except for those who repent afterwards and do good deeds, verily Allah is Oft-Forgiving, Most Merciful.”*³² The punishment for the accusation will take place whether the offender repents or not. But if the offender repents, he or she will not be considered disobedient, and the offender’s testimony will be taken in other proceedings afterwards.

When a husband accuses his wife of adultery but does not have four witnesses, it is called *Lian* in Islamic Law. The punishment of eighty stripes cannot be awarded in this situation. When he brings this matter before a court of law, the court of law will ask the man to say four times that his accusation is right, and say the fifth time that if his accusation is wrong, the curse of Allah the Almighty will be upon him.

After that, the court of law will ask the woman to say four times that the accusation of her husband is wrong, and say the fifth time that the curse of Allah the Almighty be upon her if she is wrong. The court will dissolve the marriage bond thereafter. Allah the Almighty says that *“And for those people who accuse their wives, but have no witnesses except themselves, let their testimony of one of them be four testimonies (i.e. testifies four times), (swearing) by Allah that he is one of those who speak the truth. And the fifth (testimony) (should be) the invoking of the Curse of Allah on him if he be of those who tell a lie (against her).”*³³ Allah the Almighty further states that *“But it shall avert the punishment (of stoning to death) from her, if she bears witness four times by Allah, that he (her husband) is telling a lie. And the fifth (testimony) should be that the Wrath of Allah be upon her if he (her husband) speaks the truth.”*³⁴

During the time of Prophet Muhammad ﷺ, there were two occasions in which a husband accused his wife of adultery. *Hilal Bin Umaiaa* and *Uwaimer Ijlani* accused their wives of adultery and came to Prophet Muhammad ﷺ and said that their wives had been seen with other persons. Prophet Muhammad ﷺ asked them to bring their wives. Thereafter Prophet Muhammad ﷺ asked the accuser to say four times that his claim was right, and say the fifth time that the curse of Allah the Almighty be upon him if he was telling a lie. Thereafter, Prophet Muhammad ﷺ asked the woman to say four times that the claim of her husband was wrong, and say the fifth time that the curse of Allah the Almighty be upon her if she was wrong. The accuser gave a divorce to his wife thereafter and the marriage bond was then terminated forever.

1.2.3. Theft

Taking and “eating” the wealth of others is prohibited in Islamic Law. All transactions are allowed in Islamic Law except those transactions which are expressly prohibited. The prohibited ones are mainly usury (*Riba*), uncertainty (*Gharar*), and gambling (*Maysir*). Usury (*Riba*) means any increase; over and above; the principle amount payable in any contractual transaction which is not covered by a corresponding labor, expertise, risk or a commodity. In another words it is an excess that has no corresponding consideration in an exchange of property for property. Uncertainty (*Gharar*) is an uncertainty and a lack of knowledge about the ultimate outcome of a contract; like a fish in the water, a bird in the

³¹The Holy Quran, *supra* note 3, 24:4.

³²*Id.* 24:5.

³³*Id.* 24:6-7.

³⁴*Id.* 24:8-9.

sky and a fetus in the womb of an animal; which may lead to a dispute and litigation. Gambling (*Maysir*) is an unlawful game that gives the gambler profit without striving and working for it.³⁵

Almighty Allah says in the Holy Quran, “*And eat up not one another’s wealth unjustly (in any illegal way e.g. stealing, robbing, deceiving, etc.), nor give bribery to the rulers that you may knowingly eat up a part of the property of others sinfully.*”³⁶ Allah the Almighty says in another verse of the Holy Quran that “*O you who believe, do not consume one another’s wealth unjustly, except it be a trade of mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you.*”³⁷

The punishment for a thief is cutting off his hand. Allah the Almighty says in the Holy Quran that “*And the thief, male and female: cut off the hands of both, as a recompense for that which they committed, an exemplary punishment from Allah. And Allah is All-mighty, All-wise.*”³⁸ Prophet Muhammad ﷺ said not to cut the hand of the thief unless he has stolen a thing worth more than four *Dinars*.³⁹ The accuser can forgive the accused in the case of theft, unless the judge has already sentenced the thief to have his or her hands cut off, then the punishment cannot be taken back on the request of the accuser.⁴⁰

At the time of Prophet Muhammad ﷺ a woman called *Makhzumia* was ordered to have her hand cut off. One of the companions of Prophet Muhammad ﷺ Usama came and asked for the cancellation of the sentence. Prophet Muhammad ﷺ said, “The nations prior to you were destroyed because if a noble amongst them stole, they used to excuse him, and if a poor person amongst them stole, they would apply (Allah’s) Legal Punishment to him. By Him in Whose Hand Muhammad’s soul is, if *Fatima*, the daughter of Muhammad ﷺ steals, I would cut her hand.”⁴¹

1.2.4. Drinking Khamr

Initially, drinking *Khamr* was not prohibited under Islamic law. The first verse related to it was revealed in Medina, in which Allah the Almighty says that “*They ask you (O Muhammad SAW) concerning alcoholic drink and gambling. Say: “In them is a great sin, and (some) benefit for men, but the sin of them is greater than their benefit.*”⁴²

This verse did not categorically prohibit alcohol, but later on the above-mentioned verse was repealed by verses in which Allah the Almighty says that:

O you who believe, intoxicants (all kinds of alcoholic drinks) gambling, the idols and divining arrows (for seeking luck or decision), are an abomination of Satan’s handiwork. So avoid (strictly all) that (abomination) in order that you be successful. Satan wants only to excite enmity and hatred between you with intoxicants and gambling, and hinder you from the remembrance of Allah and the prayer. So, will you not then abstain?⁴³

³⁵For detailed explanations of Islamic transactions, see generally M. T. MANSURI, ISLAMIC LAW OF CONTRACTS AND BUSINESS TRANSACTIONS (2006).

³⁶*The Holy Quran*, supra note 3, 2:188.

³⁷*Id.* 4:29.

³⁸*Id.* 5:38.

³⁹Traditions 6789, 6790 & 6791, *Sahi Bukhari*, supra note 8.

⁴⁰Traditions 4878 & 4879, Shoaib, A. b., *Sunan Al-Nisai*. English translations of the *hadith* compiled in the *Sunan Al-Nisai* (*Sunan an-Nisa’i*) can be found at <http://sunnah.com/nasai>. The translations used in this article are based on translations found on the website, with occasional adaptations by the author for clarity.

⁴¹Tradition 4304, *Sahi Bukhari*, supra note 8.

⁴²*The Holy Quran*, supra note 3, 2:219.

⁴³*Id.* 5:90-91.

Allah the Almighty further states that “*And obey Allah and the Messenger (Muhammad ﷺ) and beware (of evil) and fear Allah. Then if you turn away, you should know that it is Our Messenger’s duty to convey (the Message) in the clearest way.*”⁴⁴

At the time of Prophet Muhammad ﷺ and in the reign of *Hazrat Abu Bakar (RA)* and in the beginning of the reign of *Hazrat Umar (RA)*, the punishment for drinking *Khamr* was beating. Later on, the punishment for drinking liquor was changed from a beating to forty lashes and then increased to eighty lashes.⁴⁵

1.2.5. Apostasy

Another fixed punishment is the punishment for apostasy, which is not currently included in the codified *Hudud* punishments in Pakistan. Therefore, this article does not address it in detail. Muslim jurists are in agreement that the punishment for a person who changes his religion from Islam to any other religion is capital punishment. The point on which jurists disagree concerns whether there is any possibility of avoiding capital punishment. Some jurists say that the accused person should be given a chance through imprisonment, allowing the accused the opportunity to repent and come back to the religion of Islam. If there is no repentance, the punishment is to cut the throat with a sword. Prophet Muhammad ﷺ said that If somebody (a Muslim) discards his religion, kill him.⁴⁶

2. Hudud Ordinances of Pakistan

The basic purpose for the implementation of the *Hudud* Ordinances by the Islamic Republic of Pakistan is to bring the punishments of adultery, false accusation, theft, and drinking *Khamr* into conformity with the injunctions of Islam as stated in the Holy Quran and in the *Sunnah* of Prophet Muhammad ﷺ. All the *Hudud* Ordinances discussed in this article were promulgated on the twelfth day of the Islamic month *Rabia-ul-Awal* 1399 (AH), which was February 10, 1979 (AD).

All offences under the *Hudud* Ordinances shall be laid before a Sessions Judge and the appeal from the decision of the Sessions Judge shall lie before the Federal *Shariat* Court. The presiding officer of the court of law must be a Muslim, except that when the accused is a non-Muslim the presiding officer may be a non-Muslim. It is mentioned in the Penal Code that the court of law is to be guided by the injunctions of Islam as laid down in the Holy Quran and the *Sunnah* of Prophet Muhammad ﷺ when interpreting and implementing the provisions.⁴⁷

2.1. The Offence of Zina (Enforcement of Hudud) Ordinance

The Offence of *Zina* Ordinance of 1979⁴⁸ [hereinafter “*Zina* Ordinance”] addresses the offence of adultery. The ordinance initially had 22 sections, but it was reduced to 11 sections through the Protection of Women (Criminal Laws Amendment) Act of 2006⁴⁹ [hereinafter “Protection Act”], which was enacted because of the pressure of secular groups. This reduction has made the *Zina* Ordinance ineffective and was done to

⁴⁴*Id.* 5:92.

⁴⁵Tradition 6779, *Sahi Bukhari*, *supra* note 8.

⁴⁶*Id.* Tradition 3017.

⁴⁷PAK. PENAL CODE, § 338-F, <http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html>.

⁴⁸http://www.pakistani.org/pakistan/legislation/zia_po_1979/ord7_1979.html.

⁴⁹<http://www.pakistani.org/pakistan/legislation/2006/wpb.html>.

protect and promote secular ideas and culture within the Muslim society of the Islamic Republic of Pakistan.

Section 1 of the *Zina* Ordinance includes the short title, the geographical extent of its coverage (all of Pakistan), and the date the ordinance came into force; Section 2 covers definitions.⁵⁰ “Adult” means a person who has attained the age of 18 years (for males) and the age of 16 years or the age puberty is reached (for females).⁵¹ The definition of “confession” was added by the Protection Act, and it states that “confession” means a statement before a sessions judge which is not contrary to any legal decision.⁵² A confession is the recognition of another person’s right against the confessor. It has nothing to do with any previous legal decision, and the judge has to decide the case on the stated facts while setting aside the facts of other cases which have nothing to do with the facts of the new case.

Had is a punishment which is determined in the Holy Quran and in the *Sunnah* of Prophet Muhammad ﷺ. The *Zina* Ordinance definition of “marriage”⁵³ willfully erased from the *Zina* Ordinance by the Protection Act,⁵⁴ said that the marriage is a legal civil contract between the wife and a husband and which is not void according to the personal law of the parties. A sane married man who has committed adultery with a woman is called *Muhsan* and a sane married woman who has committed adultery with a man is called *Muhsana*. A *Tazir* punishment is any punishment of a crime other than a *Had* punishment. The *Zina* Ordinance is a special law on the topic of *Zina*; thus, in case of any contradiction between a general law and a special law, the special law will prevail. This is not the case now after the implementation of the Protection Act because it erased the provision from the *Zina* Ordinance that made the Ordinance a special law about the offence of *Zina*.⁵⁵

Zina is the act where a man and a woman willfully commit adultery with sufficient penetration and without a marriage.⁵⁶ After the removal of the definition of marriage, the Protection Act also erased the word “validly” before the word “married” from the *Zina* Ordinance, which makes it easy to understand the purpose of the secular groups to manipulate the law in their favor to promote licentious behavior in society.⁵⁷ *Zina* is liable to *Had* if a man has sexual intercourse with a woman and there is no marriage contract between them, or a woman has sexual intercourse with a man and there is no marriage contract between them.⁵⁸ Whoever commits adultery and is married shall be stoned to death at a public place, or if not married shall be punished with one hundred lashes. The punishment under the *Zina* Ordinance cannot be implemented unless the court of appeal gives its approval in a decision.⁵⁹

Because the definition of marriage was erased and the word “validly” before the word “married” was also erased, it is very easy now to prove before a court of law through a false statement that the accused couple has actually done no offence because they are married. No proof of valid marriage is required to prove the couple innocent; just the mere statement of marriage, whether valid or not, is required. The

⁵⁰*Zina* Ordinance, *supra* note 48.

⁵¹*Id.*

⁵²Protection Act, *supra* note 49, § 10(i).

⁵³*Zina* Ordinance, *supra* note 548, § 2(c).

⁵⁴Protection Act, *supra* note 49, § 10(ii).

⁵⁵*Id.* § 11 (eliminating § 3 of the *Zina* Ordinance).

⁵⁶*Zina* Ordinance, *supra* note 48, § 4.

⁵⁷Protection Act, *supra* note 49, § 12 (eliminating the word “validly” from § 4 of the *Zina* Ordinance).

⁵⁸*Zina* Ordinance, *supra* note 48, § 5.

⁵⁹*Id.*

Protection Act has opened a way to spread licentious behavior in society and it will produce a negative impact on the Muslim society that should be discouraged.

The concept of forced adultery, or *zina bil jabbar*, which is equivalent to rape, has been repealed from the *Zina* Ordinance by the so-called Protection Act. The Protection Act added it to the Pakistan Penal Code-XLV of 1860 [hereinafter “Penal Code”] with some manipulated changes to make adultery easy and took away the punishment of *Hudud*.⁶⁰ President Pervez Musharraf did it to present the image of Pakistan as a liberal country where women are free to exercise activities that are permitted in liberal countries. In the *Zina* Ordinance it was stated that forced *Zina* is an act of adultery by a man if he does so without the will and consent of the woman and by a woman if she does so without the will and consent of the man. The will and consent must be given legally and without any force of death or hurt. If the adulterer is not an adult, the punishment is five years’ imprisonment, or a fine, or both, or certain lashes. If the adulterer is an adult and married, the adulterer will be stoned to death, and if not married, punished with one hundred lashes and such other punishment as the court deems fit.⁶¹ Adultery is only punishable if the offender confesses the offence in front of a court of law, or if four males, adult, sane, and pious witnesses who have never committed a big sin and never insisted on it, give testimony against the offender. Furthermore, if the accused is a non-Muslim, the eyewitnesses can be non-Muslims.⁶²

Sections 10 to 16 of the *Zina* Ordinance, also repealed by the Protection Act, provided for the following procedures and punishments. If the offence was proved through a confession, the court will restart the trial. If the offence was proved through the testimony of a witness, the court will give a discretionary punishment, which could be ten years’ rigorous imprisonment and thirty lashes with a fine. In the case of adultery without consent, the punishment could be imprisonment from four to twenty-five years and thirty lashes. If the adultery occurred without consent and was committed by two or more persons, all persons will be given capital punishment. Kidnapping a woman with the intent to force her into marriage or to perform intercourse forcibly or to compel her to commit adultery is an offence, and the offender shall receive life imprisonment, a fine, and thirty lashes. Kidnapping to force unnatural intercourse is punishable by death or by life imprisonment with thirty lashes and a fine. Selling and hiring a person for the purpose of prostitution is punishable by life imprisonment with fine and thirty lashes. The same punishment applies for that man who deceitfully sleeps with a woman and tells her that he is her legal husband when that is not actually the fact. Whoever entices, conceals, or detains any woman with the intent to perform illegal intercourse is punishable by seven years’ imprisonment with fine and thirty lashes.⁶³

These sections of the *Zina* Ordinance are now inserted in the Penal Code, as was done with the forced adultery provisions. Thus, almost 99 per cent of the *Zina Hudud* Ordinance has been paralyzed because it has been made an inferior law under the Penal Code, while taking away its overruling effect by erasing important provisions from it. Instead, it would be better for the *Hudud* punishments to be fully added into the Penal Code because retaliation and *Tazir* both already come under the ambit of that Code. So it would make sense to put the *Hudud* in it and make it a comprehensive law.

Section 17 of the *Zina* Ordinance, which remains in the ordinance, provides that the punishment of stoning to death should be started with the witnesses throwing the stones. The person punished may then

⁶⁰Protection Act, *supra* note 49, § 13 (eliminating § 6 of the *Zina* Ordinance).

⁶¹*Zina* Ordinance, *supra* note 48, §§ 6 & 7 (repealed).

⁶²*Id.* §§ 8 & 9.

⁶³*Zina* Ordinance, *supra* note 48, §§ 10-16.

be shot dead by gunfire, and at that point, the stoning shall be stopped immediately.⁶⁴ If a person has attempted to do any offence mentioned in the *Zina* Ordinance and some part of the offence has occurred but some is remaining, the offender shall be given one half of the total punishment for the offence or thirty lashes or a fine.⁶⁵ This section was deleted from the *Zina* Ordinance by the Protection Act of 2006.

All other related offences that are not mentioned in the *Zina* Ordinance are punished according to the provisions of the Penal Code.⁶⁶ The presiding officer of the *Hudud* cases shall be a Muslim but if the accused is a non-Muslim, the presiding officer may be a non-Muslim. Provisions of the *Zina* Ordinance shall not apply to *Hudud* cases before the commencement of the *Zina* Ordinance or to offences committed before the implementation of the *Zina* Ordinance.⁶⁷

A positive development under the Protection Act is that now if adultery has occurred, the accuser is required to submit a complaint and present four witnesses before the concerned Sessions Judge. The judge will inquire into it and record the statement of the accused and decide the matter on the merits of the case. The initial investigation by the police has been quashed in *Hudud* cases, which to a certain extent is a good idea due to abuse of the law by the police. But the executive must change the actual police system, too, because abuse of the law by the police happens not only in *Hudud* cases, but also in other cases as well. One case that demonstrates the abuse of the power of the police in *Hudud* cases is when the police filed a First Information Report on the application of the father of Sumaira for adultery with her husband Muhammad Aqeel. Both of the accused filed a writ petition before the Sindh High Court against the First Information Report of the Sindh Police. The Court found the case was contrary to the facts. The two accused had, in fact, willingly married, and there was no case of adultery. The judge ordered the First Information Report against the accused to be quashed from the register of the police.⁶⁸ Now there is no need to file the First Information Report any more after the promulgation of the Protection Act.

Zina must be proved beyond a reasonable doubt and a *Hudud* punishment cannot be granted in case of doubt. For example, there are certain cases in which the accuser is wrong and does not produce the required four witnesses before the court of law, as in one case in which a lady accused a police officer of an attempt to commit an offence under Section 18 of the *Zina* Ordinance which was not proved neither before the trial court nor before the court of appeal. Hence the allegation was dismissed.⁶⁹ Further, if in some cases there are a number of people who are accused of adultery, some may be proved adulterers and others should be acquitted. One case that demonstrates this situation is a case in Federal *Shariat* Court where Muhammad Javed was accused of an abduction and related matters for the purpose of an adultery under Sections 10 and 11 of the *Zina* Ordinance, along with Saifullah, Akhtar Abbas, Faiz, Naseem Maj and Manzooran. Only Javed was convicted and all the others accused were acquitted. Muhammad Javed filed an appeal before the Federal *Shariat* Court, where the decision of the trial court was upheld by the Court of Appeal.⁷⁰

⁶⁴*Id.* § 17.

⁶⁵*Zina* Ordinance, *supra* note 48, § 18 (repealed).

⁶⁶*Id.* §§ 18 & 19 (repealed).

⁶⁷*Id.* §§ 21 & 22.

⁶⁸*Mst. Sumaira v. Province of Sindh, through its Home Secretary, Sindh Secretariat, Sindh*, (2014) Sindh Law Journal 21 (Sindh High Court).

⁶⁹*Mst. Parveen v. State*, (2014) Shariat Law Reports 154 (FSC).

⁷⁰*Javed v. State*, (2014) Shariat Law Reports 64 (FSC).

2.2. The Offence of Qazf (Enforcement of Hadd) Ordinance

The Offence of *Qazf* (Prohibition of *Hadd*) Ordinance of 1979⁷¹ [hereinafter “*Qazf* Ordinance”] concerns the protection of the honor of women. It originally had 20 provisions in 1979, but was later reduced to 12 provisions through the Protection Act. As with the *Zina* Ordinance. Section 1 includes the short title, the geographical extent of its coverage (all of Pakistan), and the date the ordinance came into force; Section 2 covers definitions.⁷² Also as with the *Zina* Ordinance, “adult” means a person who has attained the age of 18 years (for males) and the age of 16 years or the age puberty is reached (for females). Under the *Qazf* Ordinance, any person who, by writing, speaking, or sign makes or publishes a false imputation of adultery about any person where such imputation harms the reputation of that person is considered an offender. Such an imputation about a deceased person is also an offence if that imputation is harmful for the deceased’s family. Publishing the true facts about any person’s character, however, which is a right for the public to know so the people will abstain from any future deceits, is not an offence. If a witness testifies against an accused before a court of law in good faith, it is not an offence under the *Qazf* Ordinance.⁷³

Previously, the offence of a false accusation of adultery was governed either by *Had*/fixed punishment or by *Tazir*/discretionary punishment under Section 4 of the *Qazf* Ordinance. But that section has been repealed, and now there is only one type of punishment for a false accusation of adultery, which is the *Had*/fixed punishment of eighty lashes. The case against the offender can be proved by the offender’s own confession before a competent authority, or by the offender expressing the imputation in the presence of a judge before a court of law, or by two adult, male Muslims other than the victim testifying against the offender in a court of law. One more sub-provision, added through the Protection Act, states that if the presiding officer feels that the offence of *Qazf* has been committed, either by the complaint of *Zina* not being decided in favor of the complainant or by an acquittal order being issued after a trial under Section 5 of the *Zina* Ordinance, the officer is not required to ask for any other proof before ordering the punishment of eighty lashes directed by the *Qazf* Ordinance.

The statement of the victim shall be recorded before recording the testimony of witnesses. If the accused is a non-Muslim, the witnesses can be non-Muslims. A complaint of an offence under the *Qazf* Ordinance may be filed by the victim or the victim’s agent if the victim is alive, or by the antecedents or descendants of the victim if the victim is dead. If a person has committed an imputation against that person’s own descendant, or if the complainant; against whom the imputation was made; dies, or if the imputation has been declared untrue, or if the complainant has withdrawn the complaint of imputation, punishment for the imputation cannot be executed in the form of *Had*.⁷⁴

The offence of *Qazf* must be proved beyond a reasonable doubt. One case that demonstrates this point is when some respondents were acquitted on the allegation of *Qazf* made by the petitioner through a complaint. The petitioner filed an appeal before the Federal *Shariat* Court. The Court stated that the offence of *Qazf* was not liable to *Had* punishment because the complaint was not proved beyond a reasonable doubt.⁷⁵

⁷¹http://www.pakistani.org/pakistan/legislation/zia_po_1979/ord8_1979.html.

⁷²*Qazf* Ordinance, *supra* note 71.

⁷³*Id.* §§ 1-3.

⁷⁴*Id.* §§ 5-9.

⁷⁵*Nasrullah v. State*, (2016) *Shariat Law Reports* 1 (FSC).

As with the offence of *Zina*, a complaint of *Qazf* now can be made directly before the concerned Sessions Judge through the Protection Act to avoid the abuse of power by the police. An example of the type of matter that raised this concern happened where Zafar Hussain Shah and Riaz Hussain Shah lodged a First Information Report against Muhammad Siddique, Muhammad Hanif, and Sardaran Bibi at the police station for the offence of *Zina* under the *Zina* Ordinance. The trial court acquitted all of them. An appeal was lodged but later on taken back and the court of law took a *suo moto* for the trial of the offence under the *Qazf* Ordinance. Riaz Hussain Shah died, and the court held that according to Section 8 of the *Qazf* Ordinance, a trial could not be held in this case; thus, the criminal *suo moto* notice was withdrawn.⁷⁶

Previously, the printing of a writing which gave an indication that it comes under the definition of *Qazf* was an offence liable to *Tazir* but the Protection Act has erased this section from the *Qazf* Ordinance.⁷⁷

The *Qazf* Ordinance contains a provision concerning *Lian*, which is the situation where a husband makes an allegation of adultery against his legal wife. In such a case, the court of law will bring the couple before the court of law and ask the husband first, to make a statement four times that he swears to Allah the Almighty that he is truthful in his accusation of adultery and then, for the fifth statement, to say that the curse of Allah the Almighty be upon him if he is telling a lie. Thereafter the wife will be called upon and she will utter four times that she swears upon Allah the Almighty that she is right and the allegation of her husband is wrong and then, for the fifth time, will say that the curse of Allah the Almighty be upon her if she is lying. Thereafter the judge will dissolve the marriage bond between them and they cannot marry with each other again. No appeal can be made from this decision of the court of law.⁷⁸

One of the cases of *Lian* took place before the court of law in 2012. Muhammad Islam was the husband and took an oath on the Holy Quran and stated four times the allegation of adultery between his wife Najma Bibi and Aurangzeb, and he said the fifth time that the curse of Allah the Almighty will be upon him if he was telling a lie. Najma Bibi then said that she had not committed adultery with anyone because she had contracted a valid marriage with Aurangzeb after the dissolution of her marriage with Muhammad Islam. She stated that Muhammad Islam had already divorced her.⁷⁹ As has already been mentioned, the word “valid” before the word “marriage” was erased by the Protection Act to open the way for adultery. Now it is very difficult to prove that the couple committed adultery after marriage and there is no need to prove a valid marriage.

The Protection Act has taken away the overriding effects of the *Hudud* Ordinances of *Zina* and *Qazf* by making them a part of a general law. Now the Penal Code contains the provisions for *Zina bil Jabr* and correlated offences like kidnapping, abduction, inducing women for adultery or a person for unnatural lust, and selling or buying persons for prostitution. But it does not contain provisions for other offences that were removed from the *Qazf* Ordinance—printing, engraving, and selling material containing imputations of *Zina*—which should be added in the Penal Code.

⁷⁶*Shah v. State*, (2014) Shariat Law Reports 150 (FSC).

⁷⁷Protection Act, *supra* note 49, § 24.

⁷⁸*Qazf* Ordinance, *supra* note 71, § 14.

⁷⁹*Islam v. Aurangzeb*, (2012) Shariat Law Reports 585 (FSC).

2.3. The offence against Property (prohibition of Hudud) Ordinance

The offence against Property (prohibition of *Hudud*) Ordinance of 1979⁸⁰ [hereinafter “Property Ordinance”] concerns the offence of theft. It is consisted of twenty-six sections. As with the *Zina* and *Qazf* ordinances previously discussed, Section 1 deals with the title, geographic coverage, and effective date, and Section 2 deals with definitions. Unlike the ordinances of *Zina* and *Qazf*, however, in the Property Ordinance, “adult” simply means a person, whether male or a female, who has attained the age of 18 years. A “medical officer” is a person who is appointed by the government for the purpose of conducting examinations under the relevant provisions of the Property Ordinance.

Hirz means an arrangement which is made for the protection of property. Generally, imprisonment for life means imprisonment for twenty-five years. This is the meaning under the Pakistan Penal Code XLV of 1860. But in the Property Ordinance, imprisonment for life means imprisonment until death. The Property Ordinance is a special law on the offence of theft; thus, it has priority over the general law on the offence of theft, which is the Penal Code. The offence of theft is liable to either fixed punishment (*Had*) or discretionary punishment (*Tazir*).⁸¹

Theft liable to fixed punishment is an offence which is done by an adult person concerning a property whose value is more than a *Nisab* (4.457 decimal grams of gold) that was taken from a locked place where that property was put by the lawful owner of that property. The proof of the theft can be either from the offender if he pleads guilty during the trial or from the testimony of two male adult witnesses who have never committed a big sin and who are truthful persons. If more than one person participated in a theft liable to fixed punishment, all of them will be given the fixed punishment as set out in the Holy Quran and the *Sunnah* of Prophet Muhammad ﷺ.⁸²

The offender who has committed a theft subject to a fixed punishment for the first time will be punished by the amputation of his right hand, and for the second time, by the amputation of his left foot. For the third or subsequent times, the punishment is imprisonment for life, which is an imprisonment until death. A medical officer shall be appointed by the government for the execution of the punishment of amputation. If the medical officer believes that the offender will die if the amputation punishment proceeds, the officer will postpone the punishment until such time when the apprehension of death ceases. A fixed punishment cannot be executed if the thief and the victim are spouses; ascendants or descendants, whether paternal or maternal; brothers or sisters of the father or mother; or brothers or sisters or their children. Nor can it be executed in a variety of other circumstances: if a guest has committed a theft at the house of the host; or an employee or servant steals a thing at the premises of the employer where he has access to; or the stolen property is wild grass, fish, a bird, a dog, a pig, an intoxicant, a musical instrument or a perishable food stuff; or when the offender has a share in the stolen property less than a *Nisab*; or when a creditor steals debtor’s property whose value is less than the amount liable to fixed punishment; or when the offender has committed a theft under *Ikrah* or *Iztrar*; or when the offender puts back the property in its place before the victim knows about the theft.⁸³

⁸⁰<http://www.refworld.org/pdfid/4dd10152.pdf>. The Ordinance is not currently available on the www.pakistani.org website, which is under construction.

⁸¹*Id.* §§ 1-4.

⁸²*Id.* §§ 5-8.

⁸³*Id.* §§ 9-12. *Ikrah* means subjecting any person to injury to person, property, or honor, and *Iztrar* means a situation where a person is under apprehension of death due to thirst or hunger.

A fixed punishment cannot be executed if the offender retreats from his confession, the witnesses take back their allegations, the victim takes back the theft allegation, or the right hand or the left foot of the offender is missing or unserviceable. If the offender takes back his statement of confession, in some cases the court will order a retrial and in other cases the court will order a discretionary punishment. If the stolen property is found in good shape and is identifiable, the property will be given back to the victim. But if the stolen property is not found before the fixed punishment has been executed, the offender is not required to return the stolen property. Any offence of theft which is not liable to the fixed punishment shall be dealt in accordance with the definitions and punishments for theft mentioned in the Penal Code.

There is an offence mentioned in the Property Ordinance whose name is *Haraabah*, which refers to property theft that is executed through a person or persons' show of force, attack or wrongful restraint, or putting the victim under fear of death. *Haraabah* is an offence and punishable under the Property Ordinance. Whoever commits the offence of *Haraabah* but does not murder the victim or steal the victim's property shall be punished with thirty lashes and imprisonment for a length of time deemed appropriate by the court, but in no case shall the imprisonment be less than three years. Whoever in the course of the act of *Haraabah* injures a person but does not take any property shall be punished under the Penal Code. But whoever in the course of the act of *Haraabah* steals property whose limit exceeds the value of a *Nisab* shall be liable to fixed punishment. Whoever in the course of *Haraabah* kills a person shall be killed in response, by the rule of law. An offence under the Property Ordinance that is not liable to fixed punishment shall be liable to discretionary punishment and may be treated as *Dacoity*, robbery and extortion under the provisions of the Penal Code.⁸⁴

One case that demonstrates the offence of *Haraabah* occurred when Muhammad Imtiaz Hussein filed a complaint for the offence of *Haraabah* against five persons under Section 17 of the Property Ordinance. The complaint was decided in favor of the complainant. The respondents filed a revision before the Lahore High Court which was decided in favor of the respondents, and the High Court directed the magistrate to reconsider the complaint, which was later on decided in favor of the respondents. The complainant then filed a revision before the Lahore High Court which was transferred to the Federal *Shariat* Court. The Federal *Shariat* Court held that the revision filed was barred under Section 5 of the Limitation Act of 1908 because it had been filed after 41-day delay, and there was no showing of a sufficient cause of delay that was beyond the control of the complainant. Thus, the revision petition of the complainant was dismissed, and the decision of the magistrate against the complaint was left to stand in favor of the respondents.⁸⁵

There is another offence in the Ordinance which is called *Rassagiri* or *Patharidari*. Whoever helps an offender in return for receiving a sum of money and harbors the offender shall be treated as an offender. That act is called *Rassagiri* or *Patharidari*, and such an offender shall be given fourteen years' rigorous imprisonment with seventy lashes, or confiscation of all of his immovable property, or a fine.

Any offence of a similar nature committed by any person under the Property Ordinance whose punishment is not given in the ordinance shall be punishment of ten years' imprisonment.⁸⁶

⁸⁴*Id.* §§ 13-20.

⁸⁵*Hussain v. State*, (2009) 216 *Shariat Law Reports* (FSC).

⁸⁶Property Ordinance, *supra* note 80, §§ 21 & 22.

2.4. *The Prohibition (Enforcement of Hadd) Order*⁸⁷

The Prohibition (Enforcement of *Hadd*) Order of 1979 [hereinafter “Prohibition Order”] concerns punishment for the offence of drinking *Khamr*; the order consists of 33 sections. As with the other *Hudud* Ordinances discussed in this article, Section 1 deals with the title, geographic coverage, and effective date, and Section 2 deals with definitions. “Adult” means a person who has attained the age of eighteen years or puberty. A “medical officer” is an authorized officer designated by the provincial government. “Bottling” means the sale and purchase of an intoxicating liquor and “buying” includes a gift as well. “Intoxicating liquor” is a liquid which has been declared an intoxicant by the provincial government in the Official Gazette. Intoxicating liquor does not, however, include a solid intoxicant. “Manufacturing” includes the process of producing, preparing, blending, and re-distilling intoxicating liquor and every process of certification of intoxicating liquor. A “prohibition officer” is a collector or any other officer appointed by the government. A “public place” is a place where the public has free access. “Transport” means moving from one place to another.

Importing, exporting, manufacturing, and processing of any intoxicating liquor, as well as the bottling, selling, buying or serving of the same is an offence under the Prohibition Order and is punishable; by a court of law; for a term of five years’ imprisonment, a fine, and thirty lashes. Selling and buying of opium, coca leaf, and coca derivatives is punishable; by a court of law; for a two-year imprisonment, a fine, and thirty lashes. Whoever owns, possesses, or keeps an intoxicating liquor shall be subject to two years’ imprisonment, with thirty lashes and a fine. This last punishment, however, does not apply to non-Muslims in Pakistan. This is not understandable. All aspects of the Prohibition Order should be applicable to all the citizens of the state, without any discrimination based on religion, because it is a public law of Pakistan and the rights protected under a public law are rights *in rem* which are enforceable against all persons without discrimination.

Under the Prohibition Order, whoever drinks an intoxicating liquor without resulting in *Ikrah* and *Iztrar*, whether that liquor intoxicates or not, shall be treated as a drinker and shall be subject to fixed punishment or discretionary punishment. The fixed punishment for an adult Muslim drinker is eighty lashes; discretionary punishment is for a non-Muslim who has imbibed an intoxicating liquor at a public place or who has taken an intoxicating liquor beyond their religious belief. That punishment is three years’ imprisonment and thirty lashes. A fixed punishment cannot be enforced if the drinker retreats from his confession or if two male Muslims; who offered testimony; have taken back their allegations against the drinker.⁸⁸

Any person suspected of imbibing an intoxicant may be asked to go to the medical officer to be checked. The suspect may accept or reject the offer, but whoever refuses to go to the medical officer shall be given six months’ punishment or a five hundred rupees fine or both. Any officer who has detained an offender or seized an intoxicating material under the Prohibition Order, but does not produce them before the authorized authority within a reasonable time, shall be subjected to a one thousand rupees fine. If, once arrested, the accused still drinks in front of the police, the bottle in question and any other intoxicating material shall be confiscated and produced before the authorized officer within a reasonable time.⁸⁹

⁸⁷http://www.pakistani.org/pakistan/legislation/zia_po_1979/po4_1979.html.

⁸⁸*Id.* §§ 6-11.

⁸⁹*Id.* §§ 12-16.

Upon the payment of a prescribed fee, the authorized collector may award a license to any organization to possess intoxicating liquor for medical, scientific or industrial purposes if it is to be consumed by a non-Muslim or a foreigner. The collector may cancel any issued license if the terms and conditions are not fulfilled. The material in question shall be seized and disposed of by the authorized officer and the accused shall be given not less than two years' imprisonment punishment with a fine.⁹⁰

3. The Protection of Women Act of 2006 (Protection Act)

The Protection Act was passed by the National Assembly of Pakistan on November 15, 2006. The purposes of the Protection Act, stated in the preamble of the Act, were to provide relief to women, to protect them against the misuse and abuse of law, to prevent exploitation, and to bring the laws of *Zina* and *Qazf* in conformity with the provisions of the 1973 Constitution of Pakistan and the injunctions of Islam. The Protection Act added new provisions to the Penal Code and the Code of Criminal Procedure for offences against women.⁹¹ Kidnapping, abduction, and inducement of women for the purpose of marriage and intercourse are punishable by imprisonment for life and fine.⁹² Kidnapping and abduction for the purpose of unnatural lust were also added; the punishment is death or twenty-five years of rigorous imprisonment and a fine.⁹³ Selling and buying human beings for the purpose of prostitution was also added; its punishment is twenty-five years imprisonment with a fine.⁹⁴

All the above-mentioned offences were in the *Zina* Ordinance enacted in 1979 but were taken out of it and added to the Penal Code by the Protection Act. The Protection Act also enacted a new definition of rape, which was added in Section 375 of the Penal Code after taking the concept of *Zina bil Jabr* out of the *Zina* Ordinance.

Under the Penal Code, as revised by the Protection Act, rape is now defined as intercourse which is performed with a woman against her will and consent, if she is an adult, and with or without her consent if she is a minor. The punishment for rape is the death penalty or ten to twenty-five years' imprisonment.⁹⁵ There is no distinction made between the married and unmarried rapist in the Protection Act. In Islamic law, in contrast, if a married man commits a rape, his punishment is stoning to death, and if an unmarried man commits a rape, his punishment is one hundred lashes and such other punishments as are provided under the *Tazir*. Furthermore, the Protection Act added a clause to the Penal Code which states that if a man deceitfully cohabits with a woman as her husband, his punishment is rigorous imprisonment for twenty-five years and a fine. In addition, under the act, whoever entices, takes away, or detains a woman for intercourse has committed an offence that is punishable for up to seven years' imprisonment with fine. Willful intercourse is described in the act as fornication and whoever fornicates shall be punished with five years' imprisonment and a ten thousand rupees fine. The same punishment applies for the offence of false accusation of fornication as well.⁹⁶

⁹⁰*Id.* §§ 17-20.

⁹¹PAK. PENAL CODE, *supra* note 51; PAK. CODE CRIM. PROC. The original 1898 Code of Criminal Procedure and its subsequent amendments can be found at <http://pakistancode.gov.pk/english/UY2Fqalw1-apaUY2Fqa-apea-sg-ijijijijijijij#1999F>.

⁹²*Id.* § 356B.

⁹³*Id.* § 367A.

⁹⁴*Id.* §§ 371A & 371B.

⁹⁵*Id.* §§ 375 & 376.

⁹⁶Protection Act, *supra* note 49, §§ 1-9.

Under the Protection Act, the procedure for lodging a complaint of *Zina* and *Qazf* under the 1979 ordinances and a complaint of fornication under the Penal Code was changed. The complaint is now required to be filed before a court of competent jurisdiction, which is the Sessions Court, and the inquiry on the complaint is to be conducted according to the provisions of law. The decision on the merits of the case will be announced by the Sessions Court. Rape and fornication have been made bailable offences, and bail has been made the right of an accused in the cases of rape and fornication. In addition, the police cannot arrest the accused without a warrant from a court of competent jurisdiction. It is pertinent to mention here that under the 1973 Constitution of Pakistan, the Federal *Shariat* Court can review the *Hudud* Cases pending or decided in the subordinate courts and can make bail available to, or acquit, the accused in such cases, but it cannot punish a person in a *Hudud* case who has been acquitted by the trial court.⁹⁷

The Protection Act deleted the definition of marriage from the *Zina* Ordinance. The difference between a valid and invalid marriage has been deleted by removing the word “validly” before “married” from Section 4 of the *Zina* Ordinance. The reason given for the change was that whether marriage is or is not construed to be legal according to the specific provisions of law cannot have any implication on the act of *Zina*. This change is a serious matter, because the adultery of a married man and the adultery of an unmarried person have different implications in Islamic law. The definition of *Tazir* was also deleted, with the reason given that none of the *Tazir* offences and their punishments have anything to do with *Hudud* law. Section 3 of the *Zina* Ordinance, which gave the *Zina* Ordinance priority over the Penal Code, was removed by the Protection Act to make the *Zina* Ordinance inoperative, and that is a clear-cut contradiction of the basic norms of jurisprudence, which state that a special law has priority over a general law. By removing Section 3 from the *Zina* Ordinance, Parliament has given superiority to the Penal Code over the *Zina* Ordinance, which means that fornication and rape shall be dealt in accordance with the provisions of the Penal Code. As such, it is better to make the *Hudud* punishments a chapter in the Penal Code than to make them inoperative.

The Protection Act added a new provision to the *Zina* Ordinance to make it more inoperative by declaring that no complaint of *Zina* under any other law can be converted into an offence under the *Zina* Ordinance, and vice versa. This change provides strong support to the argument in this article that, to avoid ambiguity and placing the same offence in two different statutes, it is better to put the law in one place by putting all the *Hudud* punishments and correlated offences in one chapter of the Penal Code. In addition, the definition of *Zina Bil Jabr* and its punishment were removed from the *Zina* Ordinance; the reason given was that this crime comes under *Tazir* and not under *Had*. This change resulted in two manipulated sections being inserted in the Penal Code, Section 375 for rape and Section 496B for willful intercourse, and the concept of *Zina Bil Jabr* being taken away from the *Zina* Ordinance. Under the original *Zina* Ordinance, *Zina bil Jabr* is equivalent to rape, but a rapist is liable to two types of punishment: *Had* punishment first, and later the *Tazir* punishment, because he has broken two rights, the right of Allah the Almighty and the right of the people. For breaking the right of Allah, the *Had* punishment will be imposed on him, and for breaking the right of the people, the *Tazir* punishment will be imposed on him. But this approach is not the case anymore because the Protection Act has made *Zina Bil Jabr* a pure *Tazir* offense and taken it out of the ambit of *Had*. This result is serious and shows that the Protection Act was actually

⁹⁷PAKISTAN CONST. art. 203DD. The original 1973 Constitution and its subsequent amendments can be found at <http://www.pakistani.org/pakistan/constitution/>.

enacted to protect rapists and to promote sexual abuse in the society, which can now be seen and will have negative effects in the future as well.⁹⁸

Just as the concept of *Tazir* was removed from the *Zina* Ordinance, the concept of *Tazir* has also been removed from the *Qazf* Ordinance. But the offences removed from the *Qazf* Ordinance in the name of *Tazir* have not been added to the Penal Code. Printing, engraving, and selling material which wrongly accuse a man and a woman of adultery was an offence and punishable as *Tazir* under the *Qazf* Ordinance. But the relevant provisions were removed by the Protection Act. It was a *Tazir* punishment in the *Qazf* Ordinance that in case of *Lian*, if the husband and wife do not agree to undergo the procedure ordained by Allah the Almighty in the Holy Quran, they will be imprisoned unless they agree to follow the *Lian* procedure as specified in the Holy Quran. But this provision has been removed from the *Qazf* Ordinance by the Protection Act, with the reason given that *Tazir* is a separate thing and it does not come under the ambit of *Hudud* law. While it was said that the provision should be moved from the *Hudud* law into the Penal Code, it has not been done in this case. Finally, the overriding effect of the *Qazf* Ordinance has also been eliminated by removing the overriding clause from the *Qazf* Ordinance.

One provision was added by the Protection Act to the Dissolution of Muslim Marriages Act of 1939 [hereinafter “Marriages Act”]. It states that when a husband accuses his wife of adultery and does not produce the required four witnesses, the wife can dissolve the marriage bond through a court of law. But there is no procedure for *Lian* mentioned in the Marriages Act, and only one line was inserted that says that *Lian* means when a husband accuses his wife of *Zina* and the wife does not accept the accusation.⁹⁹

It is pertinent to mention here that the Federal *Shariat* Court of Pakistan has declared Sections 11 and 28 of the Protection Act, as well as the omissions of clauses of Section 14 of the *Qazf* Ordinance and the insertion of the *Lian* provision in the Marriages Act without adopting a proper procedure as per the verses of the Holy Quran, to be in violation of the Constitution of Pakistan. The decision of the Federal *Shariat* Court cannot be implemented, however, unless a final order is issued on it by the *Shariat* Appellate Bench. Most of the decisions of the Federal *Shariat* Court are pending before the *Shariat* Appellate Bench and are yet to be announced and enforced.¹⁰⁰

4. Conclusion and recommendations

The punishments for criminal offences in the Islamic criminal justice system are *Hudud*, *Qisas* and *Tazir*. *Hudud* punishments are fixed punishments directed by Allah the Almighty in the Holy Quran and by his Prophet Muhammad ﷺ in his traditions. No one has the authority to change the fixed rules of Islamic law, and there is no ground for further interpretation of the fixed and unequivocal rules mentioned in the Holy Quran and in the *Sunnah* of Prophet Muhammad ﷺ. They are definitive by way of transmission and definitive with respect to their meaning (*Qati-Dalala* and *Qati-Subut*). Islam is a complete religion and it provides rules for all the major fields of life.

The *Hudud* Ordinances of Pakistan were promulgated in 1979 in the term of the fifth President of Pakistan, General Muhammad Zia ul Haq. After the description of the Islamic Law of *Hudud* and analyses

⁹⁸Protection Act, *supra* note 549, §§ 10-19.

⁹⁹The Dissolution of Muslim Marriages Act, Islamic Republic of Pakistan § 2 (vii)(a) (1939). The original text can be found at <http://www.refworld.org/docid/4c3f1c632.html>.

¹⁰⁰(2010) *Shariat* Petition, Federal *Shariat* Court. The original text can be found at http://www.pakistan.org/pakistan/judgments/2010/fsc_wpb.pdf.

of the *Hudud* Ordinances of Pakistan with the adaptation of the Protection Act, the analysis of the *Hudud* Ordinances finds them to be orphans: everybody talks about the abrogation of the *Hudud* Ordinances, and the secular groups of society, in particular, want to completely abolish the *Hudud* Ordinances to spread licentious behavior in Muslim society. The liberal government of the tenth President Pervez Musharraf asserted that the *Zina Hudud* Ordinance did not discriminate between willful adultery and forced adultery, which is equal to rape. This was a wrong hypothesis: consensual adultery, proved by four eyewitnesses, was liable to *Had*, and rape, which is adultery without consent, is liable to *Tazir*. Both were mentioned in the original *Zina* Ordinance in 1979.

Recent developments in Pakistani law are contrary to the injunctions of Islam. In 2006, the Protection Act deleted the punishment of forced adultery from the *Zina* Ordinance and inserted a provision covering rape in the Penal Code, as well as a provision for fornication covering the punishment for willful adultery. The current *Zina* Ordinance only deals with willful adultery, which is liable to *Had*. The Protection Act has made the *Zina* and *Qazf* Ordinances inoperative by repealing the overriding effect provisions from them. In addition, the Federal *Shariat* Court stated in 2010 that various aspects of the Protection Act were made in violation of the provisions of the 1973 Constitution of Pakistan.

The author of this article recommends that there should be a chapter added to the existing Penal Code of 1860 which will cover all the offences of *Hudud* and the punishments of *Hudud*. Also, there should be sub-headings in this proposed *Hudud* chapter which will address the definitions of, and punishments for, *Zina*, *Qazf*, *Sariqah*, *Shurb Khamr*, and *Irtidad*. Then there should not be the need for separate ordinances to implement the definitions and punishments for the *Hudud* offences. The author also recommends that the *Hudud* punishments should be applicable to non-Muslims as well as Muslims. Adding the proposed *Hudud* chapter to the Penal Code would end the discrimination between Muslims and non-Muslims because the Penal Code is a public law that applies to all citizens of Pakistan. The author also recommends that there should be a provision in the Penal Code to implement a punishment for apostasy because this is also a crime and there is no provision that deals with this offence. Finally, the author recommends that more Islamic scholars should be added in the judicial system of Pakistan to study the current criminal system of Pakistan and to examine the current Penal Code and point out its deficiencies and to suggest changes in the current Penal Code in light of the Holy Quran and *Sunnah* of Prophet Muhammad ﷺ.