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Sexualization of *Sharīʿa*: Application of Islamic Criminal Laws (*Ḥudūd*) in Pakistan

Abstract

In 1979, General Zia ul-Haq promulgated the Hudood Ordinances to provide Islamic punishments for several offenses, but the prosecution for extra-marital sex (*zinā*) has been disproportionately higher. Based on the analysis of reported judgments, I argue that the higher rate of prosecutions for *zinā* was a direct result of new laws. Despite carrying the name "Hudood", these Ordinances specified several *taʿzīr* offenses with the objective of ensuring prosecutions. By incorporating *ḥadd* and *taʿzīr* offenses for *zinā*, the Zina Ordinance blurred the distinction between consensual sex and rape, and thus exposed victim women, who reported rape, to prosecution for consensual sex. The Qazf Ordinance, which might have curbed the filing of false accusations of *zinā*, encouraged them by providing the complainants the defense of good faith. The number of *zinā* cases has decreased after the reform of the Zina Ordinance and the Qazf Ordinance under the Protection of Women Act, 2006.

Key words: sexualization of Islamic criminal law (*ḥudūd*), consensual sex and rape, patriarchy, faith-based application of Islamic law

Introduction

In 1979, General Zia ul-Haq introduced Islamic criminal laws (*ḥudūd*) in Pakistan by promulgating the Hudood Ordinances, which covered extra-marital sex (*zinā*),[1] false accusation of extra-marital sex (Ar. *qadhf*, Urdu "*qazf*"), theft (*sariqa*), and the consumption of intoxicants (*shurb al-khamr*).[2] The Hudood Ordinances were part of a process of Islamization that sought to replace English law-based colonial laws with *sharīʿa*-based Islamic laws.[3] However, the Hudood Ordinances did not repeal Pakistan's secular Penal Code, which the British had enacted in 1860 and was later adopted in Pakistan after independence in 1947. Rather the Hudood Ordinances supplemented Islamic criminal offenses (*ḥudūd*) to existing penal laws. Contrary to their name, the Hudood Ordinances did not include only the "*ḥudūd*" offenses, for which the Qurʾān and Sunnah prescribe fixed punishments, but they also specified several *taʿzīr* offenses, which are based on the discretion of the ruler/state. The *taʿzīr* offenses in the Hudood Ordinances were mainly replicated from the Pakistan Penal Code, 1860.[4]

The application of the Offense of Zina (Enforcement of Hudood) Ordinance, 1979 (Zina Ordinance) has been disproportionately higher than that of any other Hudood Ordinance. While analyzing the reported judgments of the Federal Shariat Court (FSC) under the Hudood Ordinances, I found that a majority of judgments are related to extra-marital sex (*zinā*).[5] Likewise, a large number of criminal convictions handed down by the Shariat Appellate Bench, Supreme Court (SAB) are related to *zinā*.[6] The data on sexual offenses from 1947 to 2004 also shows a sharp increase in the number of *zinā* cases after the promulgation of the Zina Ordinance in 1979.[7]

Similarly, the Council of Islamic Ideology observed that the number of cases registered under the Zina Ordinance continued to increase between 2001 and 2004.[8] In fact, the Zina Ordinance was invoked so frequently that it came to signify Hudood Ordinances in Pakistan. I describe this phenomenon as the "sexualization of *sharīʿa*".

Paradoxically, though the number of registered cases under the Zina Ordinance was high, the rate of conviction was low. Analysis of data from 1980 to 1987 shows an acquittal rate of 70% in *zinā* cases appealed to the FSC.[9] My database of judgments between 1980 and 2018 shows an acquittal rate of 55% in *zinā* cases appealed to the FSC and a rate of 34% at the SAB. The law criminalizing false accusations of *zinā* under the Offense of Qazf (Enforcement of Hadd) Ordinance, 1979 (Qazf Ordinance), should have deterred the filing of false charges of extra-marital sex (*zinā*). However, this has not been the case. The reported judgments also show that the number of *qazf* cases is negligible at both the FSC and the SAB, despite the fact that the rate of conviction for *zinā* is very low. This anomaly raises the question: why are the number of reported judgments relating to *zinā* disproportionately higher than other offenses under the Hudood Ordinances? It is this question that I explore in this article.

Based on my analysis of the judgments reported under the Hudood Ordinances, I argue that the higher rate of prosecutions for *zinā* cannot be attributed solely to procedural abuses or socio-economic conditions. Rather, it was a direct result of the substance of the Zina Ordinance and the Qazf Ordinance, both of which included features that were open to exploitation, leading to an increase in the number of prosecutions. These features are the following: First, notwithstanding its name, the Zina Ordinance included a number of *taʿzīr* offenses that were initially included in the

Pakistan Penal Code, 1860. Under this Ordinance, if the standard of proof for *ḥadd* is not met, the accused might still be punished under *taʿzīr*. Second, this Ordinance equated consensual sex (*zinā*) and rape (*zinā bi-l-jabr*), with the result that whenever an incident of extra-marital sex was reported, one of the parties was sure to be prosecuted for either consensual sex or rape.[10] Third, the Qazf Ordinance, which should have deterred the filing of false accusations of *zinā*, in fact encouraged their filing by providing the complainants with the defense of "good faith" and "public good". This defense, which does not have any basis under classical Islamic law, is based on common law as codified under section 499 of the Pakistan Penal Code, 1860; it diluted the deterrent force of the Qazf Ordinance by providing the accused with a convenient means to avoid culpability. These features of the Zina Ordinance and the Qazf Ordinance not only increased *zinā* prosecutions, but also exposed the entire legal process to exploitation, making the law an effective tool for the patriarchal control of women.

To develop this argument, I divide this article into three parts. In Part I, I situate the inquiry in the context of scholarship on the Zina Ordinance, arguing that scholars have attributed the disproportionate and discriminatory application of this Ordinance to causes that are external to the law, e.g., discriminatory social attitudes against women, patriarchal tendencies, systematic corruption, widespread illiteracy and poverty, and the abuse of executive power. As a result, the Zina Ordinance and its doctrinal development have escaped rigorous scrutiny, and its contents have been absolved of all blame for its adverse impact upon women. This focus provided supporters of the Zina Ordinance with a convenient excuse to pin the blame for its adverse consequences on external factors. Indeed, when the critics of the Zina Ordinance confront its proponents with its high and disproportionate application, the latter point to problems with

enforcement rather than the content of the Ordinance. In Part II, I focus on the internal structure of the Zina Ordinance and its application in courts. I argue that there were inherent problems with the content of the Zina Ordinance and the Qazf Ordinance, which, when coupled with external factors, resulted in a higher rate of prosecutions for *zinā* that adversely affected women. In Part III, I highlight the legal changes brought into the Zina Ordinance and the Qazf Ordinance under the Protection of Women (Criminal Laws Amendment) Act, 2006. As a result of these changes, the number of *zinā* prosecutions has decreased.

I. The Application of the Zina Ordinance

The disproportionate and discriminatory impact of the Zina Ordinance on women, particularly lower-class women, is well-documented. On this subject, scholarship falls into four categories: (i) scholars who focus solely on the social, political, and cultural context in which the law emerged and was enforced; (ii) scholars who rely exclusively on the empirical analysis of rates of prosecution and conviction, without paying much attention to the law and its doctrinal development; (iii) scholars who combine the first two approaches and analyze the law in the political, economic, and cultural contexts that enabled its abuse, particularly against impoverished women; and (iv) In addition, Pakistan's religiously trained scholars defend the Zina Ordinance along with other Hudood Ordinances as divine injunctions. For them, the imposition of *ḥudūd* is a matter of faith. Because of their emphasis on faith, their justificatory discourse in favor of the Hudood Ordinances is distinct from the first three categories of scholarship. In the following sections, I engage with these four categories to argue that, with the exception of a few publications from the third category, the general discourse, both critical and appreciative, focuses primarily on factors external to the law in order to explain its impact, rather than on its internal structure and

content. This understanding has shifted the focus of scholarly analysis away from the law itself, absolving it of any blame for the consequences that have resulted from its application.

i. *Critical Discourse: Limitations of Theoretical and Contextual Analyses*

The first category of scholarship includes publications by Aarij S Wasti, Shahnaz Khan and Afshan Jafar, who focus primarily on the contexts in which the Zina Ordinance emerged and was enforced. Wasti explains the adverse consequences of the law with reference to widespread cultural practices, including discrimination against women, systemic corruption, and endemic illiteracy.[11] Similarly, Jafar studies the impact of these laws on women in the cultural, historical and political context of Pakistan.[12] She argues that the Islamization of laws was a political gimmick adopted by General Zia ul-Haq to legitimize and prolong his military regime.[13] In her view, these legislative interventions were informed by a specific cultural construction of womanhood that regards women's sexuality as passive yet destructive and views women as repositories of family honor and as the property of male family members. Jafar emphasizes that the Zina Ordinance reinforces these patriarchal constructs, resulting in rampant abuse of women within the family and the criminal justice system.[14]

In her analysis, Shahnaz Khan includes not only the contingent politics of Zia's regime, but also the imperatives of the nation-state and the exploitative logic of capitalism.[15] She argues that a legal regime that regulates *zinā* in Pakistan ultimately serves capitalists and the patriarchal interests of family and nation. According to her, families used the Zina Ordinance to regulate the sexual behavior of young women within the household, and employers exploited this law to transform young females into docile workers. Understood this way, she contends, the disproportionate and

discriminatory effects of these laws are sustained not merely by regressive religious forces, as is often argued, but also by the needs of capitalism, patriarchy, and the nation-state. In Pakistan, she adds, the regulation of the sexual behavior of women by this law serves to deflect attention from larger structural issues such as inequality and corruption of the ruling elites, as indicated by the fact that women from rich and resourceful families are released from jail early. By contrast, lower-class women are incarcerated without any hope for release or rehabilitation. Thus, Shahnaz Khan contends that the Pakistani legal regime regarding *zinā* serves the interests of patriarchal families, the nation-state, and capitalists – all at the expense of lower-class women.[16]

None of these scholars questions the conceptual framework of the law, its doctrinal implications, or the standards that have been employed in its formulation. Indeed, despite exposing the factors at work *behind* the law, these scholars do not discuss those features of the Zina Ordinance that, in my view, enabled its discriminatory application in the first place. This gap is addressed in the second category i.e., scholars who focus on the case law under the Hudood Ordinances. In this regard, Charles Kennedy's research is particularly significant, primarily because he was the first person to conduct an empirical analysis based on court decisions. Kennedy finds that 88% of cases heard on appeal by the FSC under these Ordinances relate to the offense of *zinā*.[17] However, to explain this disproportionate statistic, Kennedy, like the scholars in the first category, turns to social attitudes, without paying much attention to the content of the law. He argues that the Zina Ordinance serves as a tool for parents, guardians, and husbands to exercise control over their children, especially recalcitrant daughters and wives, by levelling false accusations of *zinā*. He concludes that this disproportionate impact is not the fault of either the law or the courts but is rather "reflective of the in-egalitarian structure of Pakistani society."[18] Kennedy bases his

conclusions exclusively on the results of statistical analysis. He does not analyze either conceptual flaws in the law or their relationship to the complicated political and cultural context in which it emerged. This methodology leads him to conclude that the courts did not apply the Zina Ordinance in a manner that discriminated against women.[19]

The third category of scholarship contradicts Kennedy's findings. Based on fieldwork, Asma Jehangir and Hina Jillani have analyzed the gendered formulation of the law and highlight its adverse impact on the status of women.[20] They argue that the Zina Ordinance is poorly drafted and discriminates against women who face prosecution for consensual sex when they report rape.[21] They point out that by rejecting the testimony of women in *ḥadd* cases, the Hudood Ordinances jeopardize women's rights and adversely affect their status.[22] Jehangir and Jillani are able to provide this comprehensive view only by moving away from the narrow statistical focus adopted by Kennedy and by situating their analysis of legal doctrine in its socio-economic, cultural, and political contexts. Their analysis later formed the basis of legal reforms in the law, culminating in the Protection of Women Act, 2006, which limits the Zina Ordinance to the offense of *zinā* liable to *ḥadd*.

The scholarship in the first two categories focuses on the context of the law more than the law itself.[23] While it is important to understand the socio-political context that facilitates the exploitation of law, scholars must also document aspects of the law that enable its exploitation. The scholarly focus on context alone provides defenders of the law with an excuse to attribute its disproportionate and discriminatory application to external factors, such as corruption, incompetence, and the unwillingness of authorities to properly apply the law. In other words, the

absence of a sustained critique of the content of the law provides its defenders with space to argue in its favor. It complements their argument that a solution to its adverse consequences is not to be found in reform or repeal of the law, but rather in its more forceful application. In the following sections, I engage with this latter argument in order to: (i) document how the defenders of the Zina Ordinance and the Qazf Ordinance perceive them and justify their existence; (ii) compare the arguments of the defenders of these Ordinances with the aforementioned critical discourse; and (iii) conduct an analysis of pertinent cases to identify factors internal to the law that enabled its disproportionate and discriminatory application.

ii. *Faith-Based Discourse: Absolving the Law of All Blame*

The faith-based discourse has two – albeit interdependent – characteristics: (i) Its proponents consider the Zina Ordinance to be the embodiment of unalterable, divinely ordained rules, thereby foreclosing any possibility of critique or reform; and (ii) since the *ḥudūd* law is divinely ordained, the social consequences of its enforcement, adverse or favorable, are of no significance. According to these scholars, the Zina Ordinance must be enforced regardless of its implications on power relationships in society.

One of the most vocal proponents of the Hudood Ordinances in Pakistan is Mufti Muhammad Taqi Usmani, who participated in the implementation of Islamic law in Pakistan in several capacities: as an activist, as a member of the Council of Islamic Ideology and, later, as a judge of the FSC and the SAB.[24] For Usmani, the promulgation of the Zina Ordinance is a matter of faith, and its substance is an embodiment of divine injunctions. In fact, when the critics of the Zina Ordinance confronted him by informing him about its adverse consequences, he vehemently

opposed its rectification through the Protection of Women Act, 2006 on the grounds that the application of the Hudood Ordinances will bring "invisible yet not totally imperceptible benefits, though the chain of cause and effect remains beyond human discernment".[25] He further argued that not accepting a woman's testimony in *ḥadd* cases and regarding her testimony as half that of a man is "essentially a matter of faith".[26] He defended the Zina Ordinance by asserting that it prevents vigilantism and should therefore not be scrapped:

> While no one can condone killing in the name of honor, the current situation in our society is that when a man finds his wife, sister or daughter in a "compromising relationship" with someone, he himself kills her along with the paramour. At times, the methods employed for the murder of the wrongdoers are even more drastic and severe than stoning to death. So the punishment of stoning to death is a pragmatic realization of the actual situation and a measure to rectify it, along with providing a better system for the elimination of crimes.[27]

Numerous religious scholars in Pakistan have adopted a similar position. They attribute the unjust consequences of the Zina Ordinance to procedural abuses and insincere implementation of the Hudood Ordinances, without considering that the formulation of these laws may be problematic. They argue that the cure for the problems arising out of the implementation of the Zina Ordinance is an even more rigorous implementation of the Hudood Ordinances, rather than their repeal or reform.[28] For instance, Maulana Zahid-al-Rashidi defends the Hudood Ordinances on the grounds that the current judicial system, with its complex procedural laws, is the main cause of miscarriages of justice in Pakistan.[29]

It appears the religious scholars who defend the Hudood Ordinances are motivated primarily by their faith in the divine nature of these laws. They continue to defend these laws even when their application leads to manifestly unjust consequences.[30] The exclusive reliance on faith restricts the understanding of *ḥudūd* laws and hides their inherent limitations. Proponents of these laws fail to see their imperfections. Even if they do see them, they find the solution in more forceful application of these laws. In an interesting parallel to the critical discourse on the Zina Ordinance, the disproportionate and discriminatory application of this law is blamed on context, e.g., cumbersome procedures, procedural abuse, and misapplication of the law. Supporters of the Hudood Ordinances never critically examine the contents of the Zina Ordinance. In Part II, I explain the disproportionate application of the Zina Ordinance by analyzing its history, contents, and application in courts.

II. Reasons for the Disproportionate Application of the Zina Ordinance

To understand the application of the Hudood Ordinances in Pakistan, it will be helpful to review the legal regime under the Zina Ordinance and contrast it with the previous legal regime governing similar offenses. This Ordinance purported to introduce Islamic criminal law relating to sexual offenses into the criminal justice system of Pakistan. Prior to the promulgation of this Ordinance, the Pakistan Penal Code, 1860 dealt with adultery and rape, including marital rape. For these offenses, the standard of proof was "beyond a reasonable doubt". Under this regime, the punishment for rape was life imprisonment or a maximum of ten years imprisonment and a fine; and for marital rape, a maximum of two years' imprisonment. Adultery was punishable by a maximum imprisonment of five years. Only a man could be convicted of adultery. A woman could

never be convicted of adultery.[31]

The Zina Ordinance introduced a number of important changes in this legal regime. First, it created a new offense of fornication and criminalized adultery. As mentioned, under the pre-1979 law, a wife could not be prosecuted for adultery. That changed when the Zina Ordinance introduced the punishment of stoning (*rajm*) for a married person (*muḥṣan*).[32] This change exposed women to prosecution under the Zina Ordinance because *zinā* is difficult to hide when a woman becomes pregnant.[33]

Second, the Zina Ordinance created two new offenses relating to consensual extra-marital sexual intercourse: *zinā* liable to *ḥadd* and *zinā* liable to *taʿzīr*. The Zina Ordinance defined *zinā* as "A man and a woman are said to commit '*zina*' if they willfully have sexual intercourse without being validly married to each other."[34] *Zinā* was punishable with the *ḥadd* penalty (stoning to death for a *muḥṣan* and 100 lashes for non-*muḥṣan*), based on either a confession before the trial court or the eyewitness testimony to the act of four adult Muslim males who satisfy the Islamic test of probity (*tazkīyat al-shuhūd*). *Zinā* was punishable with *taʿzīr* (imprisonment up to ten years) if the available evidence did not reach the high standard of proof for *ḥadd* but the offense was established beyond reasonable doubt.[35] The evidentiary requirements for establishing rape (*zinā bi-l-jabr*) were similar to those for *zinā*. Rape could be punishable either with *ḥadd* or *taʿzīr*, depending upon the evidence. The punishment for rape liable to *ḥadd* was the same as for *zinā* liable to *ḥadd* (stoning to death or 100 lashes). The *taʿzīr* punishment for *zinā bi-l-jabr* was imprisonment for a minimum of four and a maximum of twenty-four years. If the crime was committed by two or more persons (gang rape), the mandatory punishment was death.

Third, in addition to the offense of rape, the Zina Ordinance also categorized fornication and adultery as cognizable, non-bailable, and non-compoundable offenses. Under the pre-1979 law, as stipulated in the Pakistan Penal Code, 1860, only the husband of a married woman may file a complaint of adultery against his wife's paramour.[36] From a procedural perspective, by making fornication and adultery cognizable and non-bailable offenses, the new law gave the police the power to arrest and detain accused persons on the cognizance of the police themselves or upon the complaint of any person. The complainant or the aggrieved party could not drop the charge, because *zinā* is non-compoundable (a category of offense that the parties cannot settle on their own through compromise or waiver). Thus, even if the accused were ultimately acquitted, s/he languished in Pakistan's overcrowded jails before and during the trial, which was often marked by prolonged delays.[37]

As is evident, several features of the Zina Ordinance exposed women to increased prosecutions. It created numerous *ta'zīr* offenses, removed protections afforded to women under the previous legal regime, gave police greater discretion to regulate moral behavior, and blurred the definitions of several offenses that were later interpreted in a discriminatory manner against women. In addition, the likelihood of *zinā* prosecutions against women also increased due to the ineffectiveness of the Qazf Ordinance, which is designed to protect people from abuses of the Zina Ordinance. The Qazf Ordinance criminalizes false accusations of *zinā* in order to deter them. At the same time, however, the Qazf Ordinance exempts a person from criminal prosecution if s/he makes such an accusation while acting in "good faith" and for the "public good". This defense,

which is frequently utilized, dilutes the deterrent force of the Qazf Ordinance, making *zinā* the most prosecuted offense under the new legal regime.

I will now discuss three legal features of the Zina Ordinance and the Qazf Ordinance in order to illustrate how they increased the likelihood of *zinā* prosecutions: (i) the introduction of numerous *taʿzīr* offenses in the Zina Ordinance; (ii) the vague distinction between rape and consensual sex in the Zina Ordinance; and (iii) the ineffectiveness of the Qazf Ordinance.

i. Taʿzīr Offenses under the Zina Ordinance

The Zina Ordinance specifies only one *ḥadd* offense for *zinā.*[38] Virtually all other sexual offenses in the Zina Ordinance are *taʿzīr* offenses that are directly replicated from the Pakistan Penal Code, 1860. Therefore, *zinā* liable to *ḥadd* is reported only in a few judgments.[39] In fact, no one has ever been convicted for *zinā* liable to *ḥadd*. Only once did the SAB come close to convicting a person and applying the *ḥadd* punishment.[40] In all other cases, the prosecutions were related to *taʿzīr* offenses. Therefore, if the Zina Ordinance had been limited to the *ḥadd* offense for *zinā*, the number of prosecutions and convictions for *zinā* would have been negligible.

ii. Vague Distinction between Rape and Consensual Sex

Similarly, the vague distinction between rape (*zinā bi-l-jabr*) and consensual extra-marital sex (*zinā*) under the Zina Ordinance made it possible to treat rape as consensual sex. This means that if a woman files a rape complaint, she may be prosecuted for consensual sex if she is unable to prove rape with either the testimony of four male Muslim eyewitnesses or circumstantial evidence beyond a reasonable doubt. The lower judiciary did not follow the judicial precedents of the

FSC and SAB, which established the principles that a woman can never be guilty of consensual sex if she complains of rape at any stage, no matter how belatedly; and that mere pregnancy is not sufficient to convict a woman for consensual sex, especially if she claims that the pregnancy was a result of rape.[41]

Table 1 compares the definition of rape under the Pakistan Penal Code, 1860, before its amendment in 1979, and the definition of '*zinā bi-l-jabr*' under the Zina Ordinance. The differences in the definitions are underlined.

Table 1

Rape under s. 376 of the Pakistan Penal Code, 1860 (pre-1979)	***Zinā bi-l-jabr* under s. 6 of the Zina Ordinance**
A <u>man</u> is said to commit "rape" who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following <u>descriptions</u>: First. Against her will. Secondly. Without her consent. Thirdly. With her consent, when her consent has been obtained by putting her in fear of death, or of hurt. Fourthly. With her consent when the man knows that he is not her husband, and that her	A <u>person</u> is said to commit *zinā bil-jabr* <u>if he or she has</u> sexual intercourse with a woman <u>or man, as the case may be, to whom he or she is not validly married</u>, in any of the following <u>circumstances</u>, namely: (a) against the will of the victim; (b) without the consent of the victim; (c) with the consent of the victim, when the consent has been obtained by putting the

consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly. With or without her consent, when she is under [fourteen] years of age. Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offense of rape. Exception. Sexual intercourse by a man with his own wife, the wife not being under [thirteen] years of age, is not rape.	victim in fear of death or of hurt; or (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married. Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offense of *zinā-bil-jabr*.

The definitions of rape under the Pakistan Penal Code, 1860 and '*zinā bi-l-jabr*' under the Zina Ordinance were similar, with three important exceptions. First, under the Zina Ordinance, a woman might be liable for rape, which was not the case under the Pakistan Penal Code, 1860. Second, marital rape of a female under the age of thirteen ceased to be an offense under the Zina Ordinance. Third, the definition of rape (*zinā bi-l-jabr*) under the Zina Ordinance removed the fifth exception in the definition of rape under the Pakistan Penal Code, 1860. This exception provided that the consent of a female under the age of fourteen was legally invalid, as in common law 'statutory rape'. The rationale behind this rule was to protect underage girls from sexual exploitation. The Zina Ordinance, however, removed this exception.

With these three changes, the Zina Ordinance blurred the distinction between consensual sex and rape. Under the Zina Ordinance, rape was included within the definition of *zinā*. This meant that whenever someone filed a report about extra-marital sex (*zinā*), either one or both of the parties would be prosecuted for either consensual sex or rape. If the standard of proof for *zinā* liable to *ḥadd* was not satisfied, the accused might be prosecuted for *zinā* liable to *taʿzīr* based on circumstantial evidence.

As a result, it was easy to convert a case that was initially filed as rape to a case about consensual sex (*zinā* liable to *taʿzīr*). The possibility that the complainant in a rape case might have engaged in consensual sexual relations with the accused led the courts to convert rape cases to consensual sex cases to give the benefit of doubt to the accused.[42] The application of the benefit of doubt on the basis of consent entailed a contradiction. A man accused of rape was not exempted from punishment for consensual sex, though such punishment was relatively lower than the one for rape; yet a woman whom the court treated as a consenting party, but acquitted, faced immense social stigma. This contradiction may be observed in the case of Mst. Fateh Khatoon, an eighteen-year-old deaf-mute girl who allegedly was raped by her neighbor. During the trial, the court declared that Fateh was not a competent witness because her hand gestures could not be understood by the judge. Although the trial court convicted the accused of rape, the FSC converted the sentence to consensual sex conviction because it could not exclude the possibility that Fateh consented to sex.[43]

Similarly, Mst. Mulko, an eleven-year-old girl, was gagged and dragged to a maize field before being raped.[44] While the trial court convicted the accused of rape, the FSC concluded that Mst. Mulko might have consented to sexual intercourse and it therefore reduced the sentence by classifying the offense as consensual sex (*zinā* liable to *taʿzīr*). In another case, Perveen, who was fifteen-year-old, and her two young friends, one of them only nine-year-old, were accosted by two men.[45] The nine-year-old was slapped and threatened while the two other girls were dragged away and raped. The trial court convicted the accused of rape but the FSC held that Perveen had consented and converted the conviction for rape into a conviction for consensual sex. Although the SAB observed that there was no "cogent reason" for this change in the conviction, it nevertheless upheld the conviction for consensual sex since Perveen had not filed an appeal.[46]

The courts also considered factors such as the "virtue" of the complainant when changing a rape conviction into a conviction for consensual sex. In rape cases, the accused had the right to show that the claimant was immoral. This principle was codified in subsection 4 of section 155 of the Evidence Act 1872, which reads, "When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character." In 1984, the government promulgated the Qanun-e-Shahadat Order to Islamize the law of evidence.[47] Article 151(4) of the Qanun-e-Shahadat Order 1984 is identical to subsection (4) of section 155 of the Evidence Act 1872. Like sex offenses in the Pakistan Penal Code, 1860 that were replicated in the Zina Ordinance, this provision was also based on the colonial law of evidence. The courts relied on this legal provision to discredit the testimony of female complainants whom the courts found to be "women of easy virtue".[48] It was only in 2009 that the FSC ruled that this sub-article was discriminatory because it

violated the concept of "gender equality" as enshrined in the Qur'an by impeaching only the character of women.[49] The legislature omitted this sub-article in 2016.[50]

Until 2016, the courts held that a complainant's "bad character" or "lack of virtue" is sufficient to give the accused the benefit of doubt by changing a rape conviction into a conviction for consensual sex but not sufficient for an acquittal. Paradoxically, the courts classified the complainant as a consenting party but did not charge her with consensual sex. In *Muhammad Sabir v Abdul Qayyum*,[51] Majida, the complainant, alleged that a bus driver frequently made sexual overtures towards her. One night the accused and two men picked her up, drove her to several sites and raped her. The trial court examined the medical evidence, which showed that the complainant had been sexually active. Based on this evidence, the court observed that Majida "was a person of easy virtue and convenient conscience" and gave the benefit of doubt to the accused by ruling that it was a case of consensual sex rather than rape. Subsequently, the SAB acquitted the accused for lack of evidence. In rape cases, the courts referred to a complainant's "easy virtue" to reduce the higher punishment for rape into the lesser punishment for consensual sex.[52]

The absence of a distinction between rape and consensual sex led to contradictory judgments in cases in which a woman became pregnant. The failure to distinguish rape from consensual sex also meant that many pregnant women who were unable to prove rape were convicted by lower courts for consensual sex (their pregnancy was treated as proof of *zinā*). Even when the appellate courts later remonstrated with the trial court's conduct and announced acquittal in cases in which pregnancy was relied upon to prove *zinā*, the victim had to spend many years in jail waiting for

the appeal to be heard.[53] In *Mst. Gul Hamida v The State,*[54] Gul claimed that she was raped by the defendants, who frequently visited her house. Fearful and ashamed, she did not inform her family, friends or the police. To her dismay, she became pregnant. Eight months after the rape had taken place, her father lodged a complaint with the police. The trial court treated the delay in reporting the matter to the police and Gul's pregnancy as evidence that she had engaged in consensual sex. The court acquitted the defendants on the grounds that Gul was guilty and that her testimony was unreliable. On appeal, while setting aside Gul's conviction, the FSC characterized the trial judge's presumption that the pregnancy of an unmarried girl is conclusive proof of consensual sex as "highly unjust and cruel" and described the acquittal of two defendants as "paradoxical".[55]

iii. Diluted Legal Deterrence in the Qazf Ordinance

The frequency of *zinā* prosecutions is also related to the absence of any effective deterrence against a false accusation. Under Islamic law, punishment for *qadhf* or false accusation of *zinā* serves as a deterrent against the filing of unsubstantiated *zinā* charges. The Qazf Ordinance specifies a punishment of eighty lashes for false accusation of *zinā*. This deterrent, however, is ineffective because the Qazf Ordinance provides the defense of "good faith" and "public good" against *qazf*. This "novel" rule is not based on classical Islamic law (*fiqh*).[56] This shows that the designers of the Zina Ordinance did not want to discourage the filing of the *zinā* charges.[57]

To weaken the force of the deterrent against filing *zinā* charges, the Qazf Ordinance declares *qazf* to be a non-cognizable and bailable offense, unlike *zinā*, which is cognizable and non-bailable.[58] Furthermore, acquittal in a *zinā* case does not automatically lead to a prosecution for *qazf*. Rather, a *qazf* charge must be filed by the victim, or in the event of his/her death, by descendants of the

victim.[59] This means that a new trial must be conducted to disprove the charges of *zinā*. The complainant must prove that *zinā* charges were filed with a bad intention to harm the victim's reputation.[60]

The deterrent is even weaker in instances in which a husband files a false charge of *zinā* against his wife. In one case, the husband, Mr. Maqbool, accused his wife, Ms. Bushra, of committing *zinā*.[61] The trial court convicted her despite the fact that Mr. Maqbool did not produce four Muslim, adult male eyewitnesses or any other evidence. On appeal, the FSC acquitted her. Mr. Maqbool appealed against the acquittal. The SAB stated that the FSC should have informed Ms. Bushra about the option of mutual imprecation (*liʿān*) instead of prosecuting her for *zinā*. Under section 14 of the Qazf Ordinance, through the process of mutual imprecation, each spouse swears on an oath that they are telling the truth and the other party is lying. The procedure ends in dissolution of marriage.[62] The process of mutual imprecation may be initiated only by the wife, whose only alternative is to go on trial for *zinā*, which is a non-bailable offense. In this manner, the Qazf Ordinance ensures that a husband who falsely accuses his wife of *zinā* would, at worst, have his marriage dissolved, because the wife is likely to choose the option of mutual imprecation rather than undergoing a full trial for *zinā*.

For these reasons, only a few *qazf* cases were filed despite the high acquittal rate in *zinā* cases. When *qazf* offenses were prosecuted, the conviction rate was extremely low (12%).[63] Thus, the Qazf Ordinance did not provide an effective deterrent against false accusations of *zinā*.

III. The Protection of Women Act, 2006 and its Impact on *zinā* cases

Despite its imperfections, the Zina Ordinance remained unchanged for a quarter of a century. Most religious scholars, Islamist political parties, and conservative sections of Pakistani society supported the Zina Ordinance along with other Hudood Ordinances. By contrast, human rights activists demanded the repeal or reform of these Ordinances, arguing that they adversely affect the rights of women, children, and non-Muslim minorities. After much public debate and lobbying by human rights activists, the Parliament introduced a number of reforms in the Zina Ordinance and the Qazf Ordinance under the Protection of Women Act, 2006. This Act limits the scope of the Zina Ordinance to *zinā* liable to *ḥadd* and establishes procedural safeguards for its prosecution before the court, which must ensure that the testimony of four Muslim, adult male eyewitnesses is available before starting a trial. The Act also prohibits the conversion of a complaint of rape or fornication into the offense of *zinā* liable to *ḥadd*. More importantly, the Act declares that the police do not have the power to arrest a person who has been accused of committing *zinā*, and makes *zinā* a bailable offense. Similarly, the Act limits the Qazf Ordinance to *qazf* liable to *ḥadd* and removes the offence of qazf liable to *ta'zīr*.[64] After the promulgation of the Act, the number of *zinā* cases and false accusations of extra-marital sex against women declined significantly.[65] The positive impact of limiting the Zina Ordinance and the Qazf Ordinance to *ḥadd* offenses is reflected in the following observation of the FSC in a judgment published in 2013:

> Since after promulgation of Women Protection Act 2006, Qazf liable to Ta'azir is no more existing on the statute … , the only punishment that could be awarded is Hadd punishment. In absence of the required proof, however, … there is a strong circumstance to extend benefit of doubt to the respondents. It will be appreciated to note that one of the basic guiding principles of Islamic law, as emphasized upon by the Holy Prophet (S.A.W)

> is that an accused, in case of Hadd punishment is granted benefit of doubt as far as possible. ... The obvious reason is that infliction of Hadd punishment is very severe punishment and, therefore, it is necessary that it must be established beyond any reasonable doubt either by confession of the accused before a Court of competent jurisdiction or other reliable and credible witnesses through testimony that the offense was actually committed.[66]

While providing much-needed relief to vulnerable women, the Act inadvertently deprives the FSC of its largest source of appeal cases – sex offenses under the Zina Ordinance. Unsurprisingly, when the FSC examined the provisions of the Act, it held that not only *zinā* offenses but also offenses related to narcotics, terrorism, homicide and injuries (*qiṣāṣ* and *dīyah*), and human trafficking fall within its jurisdiction. In this way, the FSC judges tried to expand their jurisdiction beyond the constitutional mandate.[67] The FSC, however, found most of the sections of the Act to be in conformity with the injunctions of Islam.[68] It is highly unlikely that the Zina Ordinance will be revived in its original form when the SAB decides the appeal that has been pending against the FSC judgment for the past decade.[69]

Conclusion

A lot of scholarly ink has been spilt on discussing the application of the Hudood Ordinances in Pakistan. Most of this scholarship focuses on the abuse of the Hudood Ordinances in Pakistan's legal system. The popular discourse implies that in the absence of external factors, the application of the Hudood Ordinances would not have resulted in adverse consequences for women, including underage girls. In this article, I have attempted to outline the shortcomings of this

understanding by arguing that the very contents of the Hudood Ordinances created, cemented, and consolidated discriminatory social attitudes against women.

Based on the analysis of approximately one thousand judgments of the FSC and SAB under the Hudood Ordinances, I found that the *ḥadd* punishment was not imposed in a single case under the Zina Ordinance. Paradoxically, the number of reported cases under this Ordinance is the highest of all the Hudood Ordinances. This means that if the lawmakers had not included *taʿzīr* offenses in the Zina Ordinance, there would have been minimal prosecution for *zinā* liable to *ḥadd*. Despite the claims that the Hudood Ordinances are "authentically Islamic" and "*sharīʿa*-based",[70] they specify several *taʿzīr* offenses that previously were included in the Pakistan Penal Code, 1860, with the objective of ensuring maximum prosecution under the "Islamized" criminal laws.

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* This article is part of a large study that examines the judgments of the Federal Shariat Court and Shariat Appellate Bench, Supreme Court to evaluate the impact of judicial Islamization in Pakistan. It is based on a paper presented at a workshop titled, "Governance and Violence in Islamic Law" held at the Institute of Arab and Islamic Studies, University of Exeter **on** 14 November 2017. I am grateful to Professor Robert Gleave, Dr Omar Anchassi, Professor Knut Vikør and other participants of the workshop for their valuable comments. I thank Dr Khalid Masud, Professor Muhammad Munir, Professor Martin Lau, Professor Shahbaz Ahmad Cheema, Professor Asifa Quraish-Landes, and Dr Mushtaq Ahmad for their feedback on various drafts of this article. Asad Ullah Khan, Mariam Noor, Abdul Wahab Niaz, Muhmmad Faisal Sattar, and Orubah Sattar Ahmed provided excellent research assistance. I acknowledge their contribution. Finally, I thank David S. Powers for his editing of the final draft.

[1] The Arabic term *zinā* refers to several sexual offenses, including fornication, adultery, and rape. Scholars have translated *zinā* as "unlawful sexual intercourse", "extra-marital sex" or "illicit sexual relation". *EI*[2], s.v. Zinā (R. Peters);

Hina Azam, *Sexual Violence in Islamic Law* (Cambridge: Cambridge University Press, 2015); and Intisar A. Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (Cambridge: Cambridge University Press, 2015). Under classical Islamic law, sex is lawful not only between a husband and his wife but also between a slaveowner and his female slave. I use the term "extra-marital sex" for *zinā* in this article because slavery was abolished in the nineteenth century. Jonathan A. C. Brown, *Slavery and Islam* (London: Oneworld Academic, 2019), 60.

[2] The Fifth Ordinance, the Execution of the Punishment of Whipping Ordinance 1979, provided for the punishment of whipping. This Ordinance was repealed under the Abolition of Whipping Act 1996, which abolished whipping for all offenses except those mentioned in the four Hudood Ordinances 1979.

[3] Scholarship on the "Islamicity" of legislation and codification in Muslim-majority states focuses on the question whether it is the content or the procedure that makes legislation "Islamic". A number of Muslim-majority states claim legitimacy by declaring themselves "Islamic" through the enactment of *sharīʿa*-based criminal codes. See Frank Vogel, "A Case Comparison: Islamic Law and the Saudi and Iranian Legal Systems," in *The New Cambridge History of Islam*, ed. R Hefner (Cambridge: Cambridge University Press, 2010), 296-313. Abdullahi An-Naʿim argues that only a democratic or consultative process can produce *sharīʿa*-compliant legislation. Abdullahi An-Naʿim, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1990), 134-35. Similarly, Noah Feldman contends that a legitimate state is indispensable for the promulgation of laws that the public will regard as Islamic. Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton: Princeton University Press, 2008), 119-121.

[4] The Zia regime did not establish separate Islamic Courts for the application of Hudood Ordinances. Initially, Shariat Benches were established at each of the four provincial High Courts to hear appeals under the Hudood Ordinances. These Benches were also empowered to declare as invalid any law, with the exception of the Constitution, Muslim personal law, and the procedural law of any court or tribunal, if it were found to be repugnant to the injunctions of Islam. In 1980, the Federal Shariat Court (FSC) replaced the Shariat Benches to centralize the process of judicial Islamization. Appeals against the decisions of the FSC may be filed before the Shariat Appellate Bench (SAB) of the Supreme Court of Pakistan.

[5] The number of reported FSC judgments between 1981 and 2018 was: *zinā* (661), *qazf* (49), theft (98), and consumption of alcohol (251). The reported judgments represent only a fraction of the actual cases. One report suggests that between 1980 and 1987, the FSC heard 3,399 appeals in *zinā* cases. Asma Jahangir, "What the Protection of Women Act Does and What is Left Undone", in *State of Human Rights in 2006* (Lahore: Human Rights Commission of Pakistan, 2006), 11.

[6] The number of reported SAB judgments between 1981 and 2018 was: *zinā* (251), *qazf* (10), theft (33), and consumption of alcohol (82). According to Jahangir and Jilani, 70% of the appeals filed before the FSC were related to *zinā* and rape offenses. By contrast, only 0.8% of appeals were related to *qazf* (false accusation of *zinā*). Asma Jahangir and Hina Jilani, *The Hudood Ordinances: A Divine Sanction?* (Lahore: Rhotas Books, 1990), 70.

[7] "Crime in Pakistan", Ministry of Interior, Bureau of Police Research and Development, Government of Pakistan, 1981, 51; and National Police Bureau, Interior Division, Government of Pakistan, Letter No. F. No. 8/5/2003-SRO, dated 10 May 2005. This data is reported in *Pakistan mein hudood qawaneen,* ed. Shahzad Iqbal Shaam (Islamabad: Sharī'a Academy, 2006), 88, 108-12.

[8] Between 2001 and 2004, the number increased each year, from 3291 to 3522 to 3641 to 3817. Muhammad Khalid Masud, "Hudood Ordinance 1979: Final Report" (Council of Islamic Ideology, 2006) 3. Available at <http://cii.gov.pk/publications/h.report.pdf> (accessed 16 January 2019).

[9] Charles Kennedy, "The Implementation of Hudood Ordinances in Pakistan," *Islamic Studies* 26:4 (1987): 307-19, at 317; idem, "Islamization in Pakistan: Implementation of the Hudood Ordinances," *Asian Survey* 28:3 (1988): 307-16, at 314.

[10] In *Rashida Patel v Federation of Pakistan* PLD 1989 FSC 95, the FSC declared that rape (*zinā bi-l-jabr*) is different from extra-marital sex (*zinā*) because it falls under the category of *fasād fī al-arḍ* (corruption on earth) and *ḥirāba* (highway robbery). The FSC directed the government to amend sections 8 and 9(4) of the Zina Ordinance to provide that for rape, the required witnesses should be two Muslim male adult eyewitnesses instead of four Muslim male adult eyewitnesses. It also clarified that if the complainant fails to establish *zinā* with the testimony of four Muslim male adult eyewitnesses, he or she will be punished with eighty lashes, without the requirement of any further evidence. An appeal against this judgment has been pending before the SAB since 1989.

[11] Aarij S. Wasti, "The Hudood Laws of Pakistan: A Social and Legal Misfit in Today's Society," *Dalhousie Journal of Legal Studies* 12 (2003): 63-95, at 94-95.

[12] Afshan Jafar, "Women, Islam and the State in Pakistan," *Gender Issues* 22 (2005): 35-55.

[13] See also Ayesha Jalal, *The State of Martial Rule: The Origins of Pakistan's Political Economy of Defence* (Cambridge: Cambridge University Press, 1990), 323-24.

[14] Jafar, "Women, Islam and the State in Pakistan," 43.

[15] Shahnaz Khan, "'Zinā' and the Moral Regulation of Pakistani Women," *Feminist Review* 75 (2003): 75-100.

[16] Ibid.

[17] Kennedy, "Islamization in Pakistan," 309. For an earlier version of this article, see Idem, "The Implementation of Hudood Ordinances in Pakistan," *Islamic Studies* 26:4 (1987): 307-19.

[18] Idem, "Islamization in Pakistan," 316.

[19] Idem, "Islamic Legal Reform and the Status of Women in Pakistan," *Journal of Islamic Studies* 2:1 (1991): 45-55. Kennedy rejected the arguments of female scholars and women's rights activists who criticized the Hudood Ordinances for adversely affecting women. See Rashida Patel, *Islamisation of Laws in Pakistan?* (Karachi: Faiza Publications, 1986); Anita Weiss (ed.), *Islamic Reassertion in Pakistan* (Syracuse: Syracuse University Press, 1986); and Khawar Mumtaz and Farida Shaheed (eds.), *Women of Pakistan: Two Steps Forward and One Step Back* (London: Zed Press, 1987).

[20] Jahangir and Jilani, *The Hudood Ordinances: A Divine Sanction?*

[21] In a highly publicized case, *Jehan Mena v The State* PLD 1983 FSC 183, a fifteen-year-old girl accused two men of raping her. The trial court acquitted the defendants but took the girl's pregnancy and a delay of six months in reporting the matter as evidence that she engaged in consensual sex.

[22] Jahangir and Jilani, *The Hudood Ordinances: A Divine Sanction?*, 30-32.

[23] A few exceptions include: Asifa Quraishi, "Her Honour: An Islamic Critique of the Rape Provisions in Pakistan's Ordinance on Zina," *Islamic Studies* 38:3 (1999): 403-31 (includes a critique of the Zina Ordinance from the classical Islamic law perspective) and Julie Dror Chadbourne, "Never wear your shoes after midnight: Legal Trends under the Pakistan Zina Ordinance," *Wisconsin International Law Journal* 17:2 (1999): 179-280 (analyzes general trends in judicial precedents under the Zina Ordinance until 1997 and highlights discrepancies in the Hudood Ordinances).

[24] Shoaib Ghias, "Defining Shari'a: The Politics of Islamic Judicial Review" (PhD Diss, University of California at Berkeley, 2015), 122.

[25] Muhammad Taqi Usmani, "The Islamization of Laws in Pakistan: The Case of Hudud Ordinances," *The Muslim World* 96 (2006): 287-304, at 299-300.

[26] Ibid.

[27] Ibid., 291.

[28] Hassan Madni, "Hudood Ordinance kā media trial aūr mughāltay," *Moḥaddis* 38:6 (2006): 2-12, at 5-6.

[29] Maulana Zahid Al-Rashidi, "Hudood Ordinances aūr iss par A'tarazāt," *Al-Sharī'a* 17:7 (2006): 2-9.

[30] The faith-based but consequence-blind approach to the application of Islamic criminal law does not find much support in classical Islamic law. In the classical period, Muslim jurists did not conceptualize *ḥudūd* offenses as divinely ordained. Rather, they debated the purposes and wisdom behind these laws and attempted to rationalize them systematically. Muslim jurists presented three main justifications for *ḥudūd* offenses: (1) that these offenses are ordained by Allah and should therefore be observed; (2) that these offenses deter undesirable and harmful behavior in society; and (3) that these offenses make the offender atone for his sins and purify him. These justifications represent the diverse and plural nature of *sharī'a* itself. Though Muslim jurists never questioned the efficacy of *ḥadd* punishments in fulfilling these objectives, they developed a number of caveats and exceptions to balance the social interest of stability with the individual interest of personal dignity. See Rana H. Alsoufi, "Strategies of the Justification of Hudood Allah and their Punishments in the Islamic Tradition" (PhD Diss., University of Edinburgh, 2012-13).

[31] Certain areas of Pakistan close to the Afghanistan border were regulated under the Frontier Crimes Regulation, 1901 (FCR). Under section 30 of the FCR, a woman could be prosecuted for adultery, which was punishable with maximum of five years of imprisonment or with a fine, or both. In *Abid Ali Bangsh v Government of Pakistan* PLD 2017 FSC 39, the FSC declared this section repugnant to the injunctions of Islam.

[32] Section 2(d) of the Zina Ordinance defines *muḥṣan* as "(i) a Muslim adult man [who] is not insane and has had sexual intercourse with a Muslim adult woman who at the time he had sexual intercourse with her, was married to him and was not insane; or (ii) a Muslim adult woman who is not insane and has had sexual intercourse with a Muslim adult man who, at the time she had sexual intercourse with him, was married to her and was not insane."

[33] Moeen H. Cheema, "Cases and Controversies: Pregnancy as Proof of Guilt under Pakistan's Hudood Laws," *Brooklyn Journal of International Law* 32:1 (2006): 121-60; Abdul Rahman Mustafa, and Moeen Cheema, "From the Hudood Ordinances to the Protection of Women Act: Islamic Critiques of the Hudood Laws of Pakistan," *UCLA Journal of Near Eastern and Islamic Law* (2008): 1-48.

[34] Section 4, The Offense of Zina (Enforcement of Hudood) Ordinance, 1979.

[35] Ibid., section 10(2).

[36] In *Syed Ali Nawaz Gardezi v Lt. Col. Muhammad Yusuf* PLD 1963 SC 51, the Supreme Court convicted the respondent for enticing and taking away a lawfully wedded wife of the complainant. The wife had developed personal relationships with the respondent. She was not prosecuted.

[37] According to Jahangir and Jilani, 46% of all women prisoners in jails in Punjab were imprisoned on charges of *zinā*. Jahangir and Jilani, *The Hudood Ordinances: A Divine Sanction?*, 134.

[38] In 2002 the Council of Islamic Ideology proposed that the word 'Hudood' should be replaced with 'Ḥadd' in the title of the Offense of Zina (Enforcement of Hudood) Ordinance 1979, because it includes only one *ḥadd* offense.

[39] In *Janoo alias Jan Muhammad v The State* PLD 1982 FSC 87, the FSC observed that the trial court should have sentenced the defendant to *ḥadd* punishment for rape because four Muslim male adult eyewitnesses testified. The FSC did not have the power to convert *ta'zīr* punishment to *ḥadd* punishment. In *Allah Bux v The State* PLD 182 FSC 101, the *ḥadd* punishment for *zinā* was not imposed because the accused retracted his confession. In *Mushtaq Ahmed v The State* PLD 1984 FSC 135, the court awarded *ḥadd* punishment but the accused subsequently retracted his confession. In *Gul Munir v The State* 1990 PCrLJ 1878, the court observed that a judicial confession made voluntarily but subsequently retracted may be used as circumstantial evidence, but not to impose *ḥadd* punishment for *zinā*.

[40] *Nazir Ahmad v State* PLD 1986 SC 132. Justice Muhammad Taqi Usmani, who heard the appeal at the SAB, found it surprising that, despite fulfilling all the conditions of *zinā* liable to *ḥadd*, neither the police nor the trial court judges nor the FSC prosecuted the offender for this offense.

[41] Mustafa and Cheema, "From the Hudood Ordinances to the Protection of Women Act," 17; Cheema, "Cases and Controversies," 121.

[42] In several judgments, courts declared that women were consenting parties in sexual offenses because there were no marks of violence on their bodies. *Sohail Iqbal v The State* PLD 1983 FSC 514; *Munsib Ali v The State* 1986 PCrLJ 150; *Fayyaz v The State* 2004 PCrLJ 1674; *Hameed Masih v The State* 2005 PCrLJ 359; and *Zakir Hussain v The State* 2006 PCrLJ 619. In *Muhammad Nawaz v The State* 1986 SCMR 1812, the FSC held that the marks of violence on the bodies of the women alleging rape were so severe that they must have been inflicted by their husbands rather than by the men they were accusing of rape. The SAB, however, dismissed the appeal on the grounds that the conversion of rape conviction into consensual sex conviction on the basis of the FSC's evaluation of the evidence was incorrect.

[43] *Mehr Khan v The State* 1984 SCMR 1103. The petitioner filed an appeal before the Supreme Court against the conviction, but it was dismissed.

[44] The expression "Mussamat" and its abbreviation "Mst" is used for "Ms" in Pakistan. *Muhammad Azeem v The State* 1983 SCMR 1119.

[45] *Ghulam Sarwar v The State* PLD 1984 SC 218.

[46] Ibid. Also see *Ghulam Mustafa v The State* 2006 PCrLJ 464 where the court held that a twelve-year-old girl may have consented to sexual intercourse, and it therefore reduced the sentence for rape to a sentence for consensual sex.

[47] Lucy Carrol has characterized the promulgation of the Qanun-e-Shahadat Order 1984 as 'anti-Islamization' of laws because it replaced the uncodified principles of Islamic law, partially accepted under the Evidence Act 1872 since 1938, by declaring that this Order supersedes all other laws. Lucy Carroll, "Pakistan's Evidence Order ("Qanun-i- Shahdat"), 1984: General Zia's Anti Islamization Coup," in *Dispensing Justice in Islam: Qadis and their Judgments*, ed. MK Masud, R Peters and DS Powers (Leiden: Brill, 2006), 517-41.

[48] In a number of judgments, courts characterized female complainants as "women of easy virtue". See *Mst. Zubeda Begum v The State* 1986 FSC 268; *Muhammad Aslam v The State* 1994 SCMR 1218; *Muhammad Sadiq v The State* 1995 SCMR 1403; *Muhammad Yaqub v The State* 1996 SCMR 1897; *Muhammad Yousaf v The State* 2015 PCrLJ 53; *Abdul Khaliq v The State* 1995 SCMR 1412. The FSC observed that the victim was not a virgin before the alleged rape. *Muhammad Ashraf v Muhammad Irshad* 2000 PCrLJ 1756; and *Muhammad Siddique v The State* 1987 PCrLJ FSC 118. The FSC found the female complainant had regular sexual intercourse. *Tanvir Ahmed v The State* 1996 SCMR 1549; and *Intizar Hussain v The State* 1997 PCrLJ 1374. Alternatively, if the victim was a virgin before she was raped, courts leaned towards believing her testimony. *Muhammad Hanif v The State* 1993 PCrLJ 651.

[49] *Capt.* (*retd.*) *Mukhtar Ahmad Shaikh v Government of Pakistan* PLD 2009 FSC 65.

[50] The Criminal law (Amendment) (Offenses Relating to Rape) Act, 2016, s. 16. Recently, the Lahore High Court banned the virginity test, commonly known as the "two fingers test" in rape trials. *Sadaf Aziz v Federation of Pakistan* WP 13537 of 2020. For details see Hassan A. Niazi, "Human Dignity and Rights of Women in Pakistan: The Problem of Virginity Testing," *Pakistan Law Review* 10 (2019): 89-112.

[51] 1986 SCMR 125.

[52] In *Muhammad Mumtaz Khan v The State* 1988 SCMR 2039, the FSC changed the conviction from rape to consensual sex and the SAB maintained this conviction, in part because the woman had had sexual relationships in the past. Similarly, in *Muhammad Akhter v The State* PCrLJ 2006 FSC 705, the FSC did not rely on the testimony of an "unchaste girl" who lost her virginity despite being unmarried at the age of sixteen years. The Court changed the conviction from rape to consensual sex.

[53] The FSC held that pregnancy alone is not sufficient proof of rape or consensual sex. *Juma Gul v The State* 1997 PCrLJ 1291; *Mst. Zafran Bibi v The State* PLD 2002 FSC 1; *Noor Zaman v The State* 1998 PCrLJ 476. *Mst. Sakina v The State* PLD 1981 FSC 320; *Iqbal Hussain v The State* PLD 1981 FSC 329. In *Nemat Bibi v The State* PLD 1984 FSC 17, the FSC held that birth during marriage is conclusive proof of legitimacy, especially if it has been established that the father was cohabiting with the mother when she became pregnant.

[54] 2005 PCrLJ 167.

[55] Ibid, para [15].

[56] Section 3 of the Qazf Ordinance, which defines 'qazf', provides the following two exceptions:

"*First Exception* (*imputation of truth which public good requires to be made or published*. It is not '*qazf*' to impute '*zinā*' to any person if the imputation be true and made or published for the public good. Whether or not it is for the public good is a question of fact. *Second Exception* (*Accusation preferred in good faith to authorised person*). Save in the cases hereinafter mentioned, it is not *qazf* to prefer in good faith an accusation of *zinā* against any person to any of those who have lawful authority over that person with respect to the subject matter of accusation: (a) A complainant makes an accusation of *zinā* against another person in a Court, but fails to produce four witnesses in support thereof before the Court. (b) According to the finding of the Court, a witness has given false evidence of the commission of *zinā* or *zinā-bil-jabr*. (c) according to the finding of the Court, a complainant has made a false accusation of *zinā-bil-jabr*." This

is a novel rule which is not mentioned in *fiqh* books. See Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge: Cambridge University Press, 2005), 157.

[57] In *Zulfiqar Ali v The State* 1998 SCMR 1016, counsel for appellants who were accused of *qazf* contended that "if such statement made before the law-enforcing agencies is held to be Qazf punishable under the Ordinance, no one can come forward to report an offense of Zinā before these authorities." Justice Taqi Usmani accepted this argument and acquitted the four appellants on the grounds of the defense of good faith. The defendants had levelled *zinā* charges against a retired female schoolteacher in affidavits submitted to the police.

[58] If an offense is cognizable, police can arrest the accused person without a warrant from a judicial magistrate and if the offense is bailable, the accused person is entitled to be released from police custody on bail.

[59] Ibid, 54, 63-64. According to Ḥanafī jurists, the prosecution of *qadhf* starts only when the victim files a complaint. See Recep Çigdem, "Crimes against Honour in Islamic/Ottomon Law: A Study of *Qadhf*/Slander in Comparative Perspective," *Selcuk Universitesi Hakuk Facultesi Dergisi* 16 (2008): 45-63, at 48-49.

[60] In *Muhammad Bashir v The State* PLD 1985 FSC 384, the FSC acquitted the defendant of *qazf* charges and held that the fact that the prosecution's case failed before the trial court does not mean that the complainant should be convicted for *qazf*. In *Bakht Ali v The State* PCrLJ 1993 FSC 1872, the court acquitted the defendant on the basis of good faith defense in prosecution for *qadhf* offense. The female complainant had alleged rape and the defendant appeared as a witness to accuse her of consensual sex. The FSC observed that the defendant did not make the accusation of *zinā* in bad faith because the trial court did not explicitly state that the allegations were false. In *Muhammad Humayun v The State* PLD 1997 FSC 5, the defendant was convicted of *qazf* after he appeared in a dissolution of marriage case and accused a woman of *zinā*. He had made the statement before the Family Court in unambiguous terms, and the three other witnesses he brought forward did not testify about the actual commission of *zinā*. The court held that his statements were made in bad faith. In *Ali Haider Jafari v Shabnaz Naz* 2002 PCrLJ 934, the court observed that merely using the word 'paramour' in a reply filed by the defendant in a guardianship case against his former wife is not *qazf*.

[61] *Maqbool Ahmed v Shaikh Muhammad Anwar* 1999 SCMR 935.

[62] *Haji Bakhtawar Said Muhammad v Mst. Dur-e-Shahwar Begum* 2010 SCMR 681; *Muhammad Safdar Satti and another v Mst. Aasia Khatoon* 2005 SCMR 507; *Muhammad Nawaz v Muhammad Aslam* 1993 SCMR 160; *Zahid Saeed v The State* 2005 PCrLJ 1467.

[63] Jahangir and Jilani, *The Hudood Ordinances: A Divine Sanction?*, 79-80. Courts issued only a few convictions in cases in which husbands accused their wives of adultery or denied the paternity of children. In *Abdul Rashid v Mst. Safia* PLD 1986 FSC 10, the husband disowned the child because it was a female but he could not prove *zinā*. In *Muhammad Ramzan v Thae State* 2013 PCrLJ 849, the husband accused his wife of giving birth to an illegitimate child. In *Bashir Ahmad v Maqsood Ahmad* 2010 PCrLJ 1824, the defendant claimed that the complainant was illegitimate and not entitled to share in property. In only one case did the SAB impose *ḥadd* punishment of eighty stripes for *qazf*, based on its conclusion that the complainant, who reported the *zinā* offense to the police and also appeared as a prosecution witness, lied before the court. Justice Taqi Usmani wrote the judgment. *Muhammad Masud v Abdullah and others* 1992 SCMR 638.

[64] The Protection of Women Act, 2006 introduces two main changes in the Hudood Ordinances: (i) It limits the Zina Ordinance to one offense, extra-marital sex (*zinā* liable to *ḥadd*), and reinstates other offenses to the Pakistan Penal Code, 1860, as was the case before 1979; and (ii) it establishes new procedures for the prosecution of *zinā* liable to *ḥadd*. Martin Lau, "Twenty-Five Years of Hudood Ordinances — A Review," *Washington and Lee Law Review* 64:4 (2007): 1291-1314, at 1308-13.

[65] Sohail Akbar Warraich, "Access to Justice for Survivors of Sexual Assault," National Commission on the Status of Women, Pilot Study (December 14, 2015), 7-9. National Commission on the Status of Women, "Study to Assess Implementation Status of Women Protection Act 2006," National Commission on the Status of Women (2011), 7-11.

[66] *Mst. Gulzar Begum v Mst. Sajida Yaqoob* 2013 PCrLJ 1508, at 1512.

[67] Article 203DD (1) of the Constitution of Islamic Republic of Pakistan provides: "The Court [Federal Shariat Court] may call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of *Hudood* for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to the regularity of any proceedings of, such court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."

[68] The FSC declared sections 11, 25, 28 and 29 of the Act as repugnant to the injunctions of Islam. Section 11 of the Act annulled the overriding effect of the Zina Ordinance; section 28 required the application of certain provisions of the

Pakistan Penal Code, 1860 to the Zina Ordinance; section 25 omitted mutual imprecation (*liʿān*) from the Qazf Ordinance; and section 29 inserted *liʿān* into the Dissolution of Muslim Marriages Act 1939. *Mian Abdur Razzaq Aamir v Federal Government of Islamic Republic of Pakistan* PLD 2011 FSC 1.

[69] Approximately thirty appeals have been pending before the SAB in which laws have been challenged on the ground that such they are repugnant to the injunctions of Islam. One appeal in *Begum Rashida Patel v Government of Pakistan* PLD 1989 FSC 95 has been pending since 1990. In this judgment, the FSC had asked the government to amend the Zina Ordinance and the Qazf Ordinance.

[70] In preparing drafts of the Hudood Ordinances, the Council of Islamic Ideology was assisted by Dr. Maʿruf al-Dawalibi, formerly Prime Minister of Syria and advisor to Saudi King Khalid b. Abd al-Walid. The drafts were first prepared in Arabic and later translated into English and Urdu. A special committee was appointed to edit the drafts "in modern language and to make necessary amendments." Masud, *Hudood Ordinance 1979: Final Report*, 13. It appears that the editors of these drafts relied heavily on the provisions of the Pakistan Penal Code, 1860.