

RESEARCH NOTE

Shariat petition No 9/I/2004

Shariat petition No 1/I/2007

Shariat petition No 3/I/2007

Shariat petition No 1/I/2010

1- The following petitioners under article 203-D of the constitution of Islamic Republic of Pakistan 1973 have challenged various sections of Pakistan Penal Code (Act XLV of 1986) hereinafter called PPC, the Offence of Zina (Enforcement of Hudood) Ordinance 1979 hereinafter called O Z E H O and the protection of woman Act 2006 (Criminal Law Amendment Act 2006 (VI of 2006) hereinafter called (PWA) being repugnant to the injunctions of Islam

- (a) Shahid Orakzai in Shariat petition No 9/I/2004 has challenged Section 5-A and 8 of Hudood Ordinance. The petitioner has also challenged section 5,6,7,8,9 and 12-A of the PWA being repugnant to the injunctions of Islam.
- (b) Mian Abdur Razzaq Amer in Shariat petition 1/I/2007 has challenged sections 376, 496-B and 496-C of the PPC as inserted by the PWA. The Court dismissed this shariat petition vide Court order dated 25-3-2008 due to non prosecution but was restored vide order dated 29/3/2010 in shariat petition No 1/I/2010
- (c) Mr Abdur Rahman Siddiqui Advocate has challenged provisions of section 5, 6, and 7 of the PWA in shariat petition 3/I/2007
- (d) Mr Abdur Latif Sufi Advocate has challenged section 5,6 and 7 of the PWA in Shariat petition 1/I/2010

2- The Crux of these entire Shariat petitions is that various sections of protection of women Act 2006 have added, repealed or amended important sections of O Z E H O and various sections of PPC have been revived. The impugned sections of PWA are as under

- a- **Section 5** Through this section, sections 375 and 376 have been inserted in PPC. These sections are as under

[375. Rape: --- a man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions -

- (i) Against her will
- (ii) Without her consent.
- (iii) With her consent when the consent has been obtained by putting her in fear of death or of hurt
- (iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or
- (v) With or without her consent when she is under sixteen years of age

Explanation. - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.]

Section 376. Punishment for Rape

[376. Punishment for rape --- (1) Whoever commits rape shall be punished with death or imprisonment for either description for a term which shall not be less than ten years or more than twenty-five years and shall also be liable to fine

(2) When rape is committed by two or more persons in furtherance of common intention, each of such persons shall be punished with death or imprisonment for life.]

- b- By Section 6 to the PWA a section 493-A have been inserted in P.P.C which is as under

[493-A. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.

Every man who deceitfully caused any woman, who is not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief, shall be punished with rigorous imprisonment for a term which may extend to twenty-five years and shall also be liable to fine]

- c- Section 7 of the P W A inserted Section 496-A, B and C in PPC
- [496-A. Enticing or taking away or detaining with criminal intent a woman** - Whoever takes or entices away any woman with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any woman, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine]
- [496-B. Fornication:-** (1) A man and a woman not married to each other are said to commit fornication if they willfully have sexual intercourse with one another
- (2) Whoever commits fornication shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees]
- [496-C Punishment for false accusation of fornication:-**
- (1) Whoever brings or levels or gives evidence of false charge of fornication against any person shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees
- Provided that a Presiding Officer of a Court dismissing a complaint under section 203-C of the Code of Criminal Procedure 1898 and after providing the accused an opportunity to show cause if satisfied that an offence under this section has been committed shall not require any further proof and shall forthwith proceed to pass the sentence]
- d- Section 8 inserted section 203-A, 203- B and 203-C in Act V of 1879 (Cr P C) These sections are as under
- 203A. complaint in case of Zina**—(1) No court shall take cognizance of an offence under Section 5 of the Offence of zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979) except on a complaint lodged in a Court of competent jurisdiction
- (2) The Presiding officer of a Court taking cognizance of an offence on a complaint shall at once examine the complainant and at least four adult eye-witnesses, about whom the Court is satisfied having regard to the requirement of tazkiyah-al-shahood, that they are truthful persons and abstain from major sins (kabair) of the act of penetration necessary to the offence
- Provided that, if the accused is a non-Muslim, the eye-witnesses may be non-Muslim.
- Explanation - In this section "tazkiyah-al shahood" means the mode of inquiry adopted by a Court to satisfy itself as to the credibility of a witness
- (3) The substance of the examination of the complainant and the eye-witnesses shall be reduced to writing and shall be signed by the complainant and the eye-witnesses as the case may be, and also by the Presiding Officer of the Court
- (4) If in the opinion of the Presiding Officer of a Court, there is sufficient ground for proceeding the Court shall issue a summons for the personal attendance of the accused
- (5) The Presiding officer of a Court before whom a complaint is made or to whom it has been transferred may dismiss the complaint if, after considering the statements on oath of the complainant and the four or more eye-witnesses there is, in his judgment, no sufficient

ground for proceeding and such case he shall record his reasons for so doing

203B. Complaint in case of Qazf. ---(1) Subject to sub-section (2) of section 6 of the Offence of Qazf (Enforcement of Hadd) ordinance 1979 (VIII of 1979) no court shall take cognizance of an offence under Section 7 of the said Ordinance except on a complaint lodged in a Court of competent jurisdiction

(2) The Presiding Officer of a Court taking cognizance of an offence on a complaint shall at once examine on oath the complainant and the witnesses as mentioned in Section 6 of the offence of Qazf (Enforcement of Hadd) Ordinance 1979 (VIII of 1979) of the act of Qazf necessary to the offence

(3) The substance of the examination of the complainant and the witnesses shall be reduced to writing and shall be signed by the complainant, and the witnesses as the case may be, and also by the Presiding Officer of the Court

(4) If in the opinion of the Presiding Officer of a Court there is sufficient ground for proceeding the Court shall issue summons for the personal attendance of the accused

(5) The presiding Officer of a Court before whom a complaint is made or to whom it has been transferred may dismiss the complaint, if after considering the statements on oath of the complainant and the witnesses there is, in his judgment, no sufficient ground for proceeding and in such case he shall record his reasons for so doing

203C. Complaint in case of fornication.---(1) No Court shall take cognizance of an offence under Section 496B of the Pakistan Penal Code except on a complaint lodged in a Court of competent jurisdiction

(2) The Presiding Officer of a Court taking cognizance of an offence shall at once examine on oath the complainant and at least two eye-witnesses to the act of fornication

(3) The substance of the examination of the complainant and the eye-witnesses shall be reduced to writing and shall be signed by the complainant and the witnesses as the case may be, and also by the presiding officer of the Court

(4) If in the opinion of the Presiding Officer of a Court there is sufficient ground for proceeding the Court shall issue a summons for the personal attendance of the accused

Provided that the Presiding Officer of a Court shall not require the accused to furnish any security except a personal bond, without sureties to ensure attendance before the Court in further proceedings

(5) The Presiding Officer of a Court before whom a complaint is made or to whom it has been transferred may dismiss the complaint, if after considering the statement, on oath of the complainant and the witnesses there is, in his judgment, no sufficient ground for proceeding and in such case he shall record his reasons for so doing

(6) Notwithstanding the foregoing provisions or anything contained in any other law for the time being in force no complaint under this section shall be entertained against any person who is accused of zina under section 5 of the Offence of zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance No VII of 1979) and against whom a complaint under Section 203 A of this Code is pending or has been dismissed or who has been acquitted or against any person who is a complainant or a victim in a case of rape, under any circumstances whatsoever.

e- Section 12-A inserted section 5-A in Offence of Zina enforcement of Hudood Ordinance VII of 1979 These sections are as under

12A Insertion of new section in Ordinance VII of 1979—In the Offence of Zina (Enforcement of Hudood) Ordinance 1979 (Ordinance No VII of 1979) after section 5 the following new section shall be inserted namely

“5A. No case to be converted, lodged or registered under certain Provision.

No complaint of zina under section 5 read with section 203A of the Code of Criminal Procedure, 1898 and no case where an allegation of rape is made shall at any stage be converted into a complaint of fornication under section 496B of the Pakistan Penal Code (Act XLV of 1860) and no complaint of fornication shall at any stage be converted into a complaint of zina under section 5 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 (Ordinance No VII of 1979) or an offence of similar nature under any other law for the time being enforce

3 Before examining these sections it is pertinent to discuss Jurisdictions of the federal shariat court whether this court has the power to examine the abovementioned provisions of the Protection of Women Act 2006 in the touch stone of Islamic injunctions, report of various institutions on Hudood laws and briefly discuss the Historical aspects of this crime in the light of various social systems and religions and differentiate between the laws which were enforce before the promulgation of the Act, new changes in Hudood Laws, role of doubts, uncertainty, power and limitation of legislature in enacting laws relating to Hudoods

4. Jurisdictions of the Federal Shariat Court:

Federal shariat court has been established in 1979 under chapter 3A of the Constitution of Pakistan 1973 Article 203D described the Jurisdictions of the court which is as under **Article 203-D (1):** The Court may, (either of its own motion or) on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam

(1A) where the Court takes up the examination of any law or provision of law under clause (1) and such law or provision of law appears to it to be repugnant to the Injunctions of Islam the Court shall cause to be given to the Federal Government in the case of law with respect to a matter in the Federal Legislative List or to the Provincial Government in the case of law with respect to a matter not enumerated in the either of those Lists, a notice specifying the particular provisions that appear to it to be so repugnant and afford to such Government adequate opportunity to have its point of view placed before the Court

(2) If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, it shall set out in its decision -

- (a) the reasons for its holding that opinion, and
- (b) the extent to which such law or provision is so repugnant

And specify the day on which the decision shall take effect.

Provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal therefrom may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal

(3) If any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam -

- (a) the President in the case of law with respect to a Matter in the Federal Legislative List or the Governor in the case of law with respect to a matter not enumerated in either of those Lists shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam; and
- (b) such law or provision shall, to the extent to which it is Held to be so repugnant, cease to have effect on the day on Which the decision of the Court takes effect.

5 In the light of above mentioned article Federal Shariat Court has The power to examine any “law” and the word “law” has been defined in Article 203B (c) that “Law” includes any custom usage having the force of law but does not include

the Constitution Muslim personal law, any law relating to the procedure of any court or tribunal or, until the expiration of "[ten] years from the commencement of this chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure

The FSC has examined PPC Cr P C and Hudood Ordinance and declared various sections repugnant to the Injunctions of Islam

A question was raised about Cr P C whether it falls under the exempted law in article 203 B(C) 'Procedure of any Court' or not this issue was discussed in Gul Hasan Khan Vs Government of Pakistan PLD 1980.Pesh 1 and also in SSM No 370 of 1984 and was held that section 401, 402-A, 402-B are repugnant to the injunctions of Islam as these were not procedural at all. This Court has the power to examine the substantive provision of Cr P C

There are petitioners who challenged various provision of PPC other then the present petitioners pending before the Court. The Court has also started Suo Moto examination of the whole PPC vide Court order dated 8-5-2010. The above laws fall under the definition of law. Therefore this Court has jurisdiction to examine these laws

6 The Federal Shariat Court under Article 203DD also 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 or 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

The above mentioned article clearly states that all the case relating to Hudood must be heard by this Court in appeal or reference or the Court can examine its record on its own motion. Therefore the laws made violative to this provision of the constitution needs to be amended in the light of the constitution

7 As the Hudood laws were criticized by different people in different ways therefore the government constituted commissions required them to submit their reports. Therefore the following institutions made proposals for amendments in Hudood laws

- 1 The Commission of Inquiry for Women, 1997
- 2 The Council of Islamic Ideology in 2002
- 3 National Commission for the Status of Women, 2003
- 4 The Special Committee to Review the Offence of Zina (Enforcement of Hudood) Ordinances, 1979
- 5 Women Aid Trust 2003
- 6 The Awrat Foundation 2004

8 The important proposals of the commission of inquiry for women, 1997, national commission for the status of women 2003 and proposal of council of Islamic ideology in 2002 are as under

a) AMENDMENTS PROPOSED BY THE COMMISSION OF INQUIRY FOR WOMEN, AUGUST 1997.

The Commission made the following recommendations about the Hudood Ordinance. The Commission is convinced that all the Hudood laws were conceived and drafted in haste. They are not in conformity with the injunctions of Islam

Secondly, these laws have come into direct conflict both with the country's Constitution (such as Article 25) and its international commitments (as made at the World Conference at Beijing and under the UN Convention on the Elimination of All Forms of Discrimination Against Women).

Thirdly, in practical terms too, these laws have demonstrably failed to serve their purpose. They have not been any deterrent against crimes. And they have only led to proliferation of complaints in the courts, which, as it happens, have mostly been false or unjustified and have caused undue hardship.

It is necessary therefore that

- 1 The Hudood laws are repealed
- 2 The repealed provisions of the Pakistan Penal Code 1860, are reenacted with an amendment to make marital rape a penal offence and to impose a severer punishment for rape on a minor wife
- 3 If the Parliament considers it necessary to make any further laws in this area, it should do so after serious debate and by reaching a consensus that the proposed laws are in accordance with the injunctions of Islam (Report Of The Commission Of Inquiry For Women, August 1997, p 75)

(b) **AMENDMENTS PROPOSED BY THE COUNCIL OF ISLAMIC IDEOLOGY IN 2002.**

The Council in its 147th meeting held on 5-6 June 2002, observed that the Council is preparing a detailed report on Hudood Ordinances based on section by section review. The meeting recommended the following amendments in Zina (Enforcement of Hudood Ordinance 1979

- 1 In the title (1), the word Hudood be amended to read Hadd, because the Ordinance relates to only one Hadd (punishment)
- 2 Under definitions (2) (a) be amended as follows " (a) "adult" means a person who has attained puberty, or the age of eighteen years being a male, or the age of sixteen years being a female"
- 3 The Urdu version of 2(b) about the definition of Hadd needs to be amended to convey the meaning that Hadd is a punishment the quantity of which has been fixed in the Qur'an and Sunna
- 4 2 (c) the Urdu translation of marriage may be amended to read "shadi" instead of "nikah"
- 5 The definition of 'Tazir' needs to be amended to convey the following meanings (1) Tazir is not a fixed punishment (2) The minimum of Tazir is also not fixed (3) If Tazir consists of the same punishment as ruled in Had, its quantity must be less than that prescribed in Hadd
- 6 Definition of Zina (4) must be amended as given in Fiqh books "Zina means a person's willfully committed illicit act of entering into the vagina of a living and desirable woman with whom he is neither married nor is there a shibh-i-nikah"
- 7 6 (1) (d) be amended as follows " (d) with the consent of the victim when the offender knows that the offender is not validly married to the victim and the consent is given because the victim believes that the offender is the person to whom the victim is or believes herself or himself to be validly married"
- 8 6(2) must be deleted to remove the confusion between zina bil-raza and zina — bil-jabr
- 9 8 (a) the clause may be amended as follows " (a) the accused makes before a court of competent jurisdiction at four different times a confession of the commission of the offence or"
- 10 The following proviso be added to 8 (b) "Provided that where the crime is committed in a place which excludes the presence of male witnesses the offender be awarded a sentence "
- 11 The Council recommended that the schedule for Tazkiyat alshuhud as recommended by the Council in its Draft for the "Muswadda Qanun Shahadat" be appended as a schedule to this Ordinance
- 12 9 (5) be amended as follows "In the case mentioned in sub-section (2), the court may award the sentence of qazf to the resiling witness as well as the other witnesses "
- 13 Section 10 be deleted
- 14 Section 12, the words "rigorous imprisonment" be amended as "ten years rigorous imprisonment".
- 15 Section 377 of the Pakistan Penal Code be inserted as sub-section (1) of this Section so that the penalty for the offence of unnatural sexual act is imprisonment for 25 years or death.

16 Sections 11 to 16 may be deleted or they may be placed in the Pakistan Penal Code where they are suitable they do not directly belong to this offence

The Council questioned the Section 17 (Mode of Execution of Punishment of Stoning to Death) whether the mode of punishment suggested in this section is in accordance with the Shari'a

(c) AMENDMENTS PROPOSED BY NATIONAL COMMISSION FOR THE STATUS OF WOMEN, 2003

The Offence of Zina (Enforcement of Hudood) Ordinance, 1979

- 1 The name of "Offence of Zina (Enforcement of Hudood) Ordinance" requires to be changed to "The Offence of Zina (Enforcement of Hadd) Ordinance"
- 2 In the definition of the term "marriage" [S 2©], the use of the term "void" has led to anomaly
- 3 S 2 (a) the definition of the term "adult" was discriminatory between men and women when there was no basis for it
- 4 The fact that S 3 empowers this Ordinance to override other laws leads to anomaly
- 5 S 4 the definition of the term "Zina" is inadequate and defective
- 6 S 5 (1) (a) was found to be ambiguous as sexual intercourse with a minor girl would also be Zina when it should be Zina-bil-Jabr
- 7 S 5 (2) (a) and 6 (3) (a) was found to be ambiguous. A number of participants had great objection to the punishment of Rajam as there is no mention of it in the Quran and reference to it in Sunnah is open to controversy and debate
- 8 S 7 is ambiguous
- 9 In S 8, qualification of a witness should not be religious faith but his/her credibility
- 10 S 8 (b) was found to be defective because of the provision for of only male witnesses eligible to testify
- 11 A number of participants felt that this Ordinance should not be applicable to non-Muslims

Offence of Qazf (Enforcement of Hadd) Ordinance 1979

- 1 The term "Mohsan" and "Mohsana" need to be defined clearly while taking each and every aspect and perspective into account, which also includes the possibility of non-Muslim minorities being able to benefit from this law
- 2 The definition of Qazf as given in Section 3 of the Ordinance was found to be defective
- 3 The conditionality of "two male Muslim witnesses" as given in S 6(C) was found to be discriminatory. It was felt that the evaluation of witness under stringent conditionalities of "Tazkiyah —ul-Shahood" was uncalled for and illogical
- 4 Taking away the right to appear as a witness and give evidence for those accused and punished for the offence of Qazf as provided in S 7 (2) of the Ordinance, needs a careful review and re-drafting
- 5 Section 8 was found to be ambiguous
- 6 Section 9 was found to lead to injustice as it protects a person from being charged with the offence of Qazf liable to hadd if the person commits the offence against his/her descendent
- 7 The Ordinance on Qazf was not necessarily required to be independent of the Zina Ordinance
(NCSW, *Report on Hudood Ordinances 1979* (2003).

Taking all these debates into consideration the Government of Pakistan amended in 2006 the Ordinances about Zina and Qazf in the Hudood Ordinance 1979

This enactment further amended the relevant laws in the Pakistan Penal Code, Code of Criminal Procedure and other laws.

9. Historical Aspects of the Crime:

There has been complete unanimity of views among all social systems from the earliest times to this day that the act is morally wicked, religiously sinful and socially evil and objectionable, and there has been no dissenting voice except from those who have subordinated their moral sense to their lust, or who in their misguided notions, try to be 'original' and 'philosophical' in their approach.

10 Though adultery or fornication has always been accepted as an evil, opinions of the followers of various religions have differed as to whether it is legally a punishable offence or not and this is where Islam differs from other religions and systems of law. Social systems which have been near to human nature have always considered illegal intercourse between man and woman a serious crime and prescribed severe punishments for it. But with deterioration in moral standards, this morality grew weaker and weaker and the attitude towards this crime became more and more tolerant. The first common lapse in this connection was caused by distinction between fornication and adultery. The former was taken to be an ordinary offence while the latter only was held as a punishable crime.

11 Zina, as defined under various laws, means sexual intercourse between a man (whether married or a bachelor) and a woman who is not married. This definition takes into account the position of the woman rather than of the man. If a woman is without a husband, the illicit intercourse with her amounts to fornication, irrespective of whether the man is married or not. The ancient laws of Egypt, Babylon, Assyria and India provided very light punishments for it, and the same were adopted by the Greeks and the Romans, which finally influenced the Jewish attitude. According to the Bible, only monetary compensation is payable for such an offence. Under the Jewish law, if a Priest's daughter acts immorally, she is to be sentenced to burning and the man with whom she is alleged to have acted immorally is to suffer strangulation. This law very much resembles the Hindu law.

12 Under all these laws, illicit intercourse with a married woman only was the real and major crimes. The deciding factor for treating it as a crime was not the illicit relationship between the man and the woman but the likelihood of an awkward situation under which a child might have to be reared by a man (the real husband of the woman) who was not its father. It was therefore not the act of zina itself, but the danger of the mixing up of progenies and the problem of rearing somebody else's child at the expense of another and a possibility of its inheriting his property, that was the real basis of treating it as a crime and holding both the man and the woman as criminal. Under the Egyptian law, the man was to receive a severe beating with sticks and the nose of the woman was to be cut off. Similar punishment existed in Babylon, Assyria and Iran. According to the Hindus, the woman was to be thrown to the dogs to be torn apart and the man was to be put on a hot iron bed with fire all around him to burn him alive. At first, the Greek and Roman laws gave a man the right to kill his wife if he found her involved in adultery. He has also the option to demand monetary compensation.

13 Under the Jewish law, the punishment for illicit intercourse with a married woman is death. However, long before the advent of Christ, the Jewish jurists and scholars, the rich and the poor, had practically ceased to observe these laws. Though it was written in the Old Testament (Torah), and it was considered as a Divine Commandment, nobody was inclined to apply it practically. In the whole of Jewish history, there is not a single instance where this Commandment was ever enforced.

14 The Christians formed an utterly erroneous conception about the crime of zina because of the incident of the Jews asking Jesus to pronounce judgment on a case of adultery and his reply to them: "He that is without sin among you, let him first cast a stone at her" (John 8:1-11). According to them, illicit intercourse between an unmarried man and an unmarried woman is a sin, but not a punishable offence. But if either of them (or both) is married, it is adultery and is treated as a crime. It is so not because of the illicit intercourse as such but because of the vow of fidelity taken by each of them before the priest at the altar. Nevertheless, there is no punishment even for this, except

that the wife has the right to sue her adulteress husband and claim separation for his having violated the vow of fidelity. On the other hand, the husband of the adulteress woman can also sue his wife for separation and can also claim compensation from the man who had illicit intercourse with his wife (Muhammad (SAWS) Encyclopedia of seerah Vol II, Page 772 and 773)

15 Pakistan penal code 1860 is the codified law which dealt the penal law of India and became the law of Pakistan after independence. This was promulgated by the British Govt. Sections 375, 376 deals with cases relating to Rape, etc. As these laws were not in conformity with the injunctions of Islam, therefore were repealed through Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979). Now sections of PPC relating to Rape, are mutatis mutandis revived through PWA 2006. These sections have now been challenged by the abovementioned petitioners claiming that these are repugnant and derogatory to the injunctions of Islam as enunciated in the Holy Qur'an and Sunnah of the Holy Prophet (SAWS)

16 Section 5 and 6 of O.Z.E.H.O were challenged before the FSC by Hazoor Bakhsh. The Court by majority of four to one allowed these petitions and declared that the provision of sentence of *Rajm* as *hadd* in section 5 and 6 of the O.Z.E.H.O, 1979 repugnant to the injunction of Islam (Hazoor Bakhsh V Federation of Pakistan, PLD 1981 FS C 145)

17 The Federal Government filed an appeal against this judgment before the Supreme Court and operation of the said order was stayed. Later on by article 3 of the president's Order V of 1981 known as the Constitution (Amendment) Order 1981 sub-article (9) was added to Article 203-E of the Constitution by which the power of review of its decision was conferred upon this Court. This provision was become effective with effect from April 13, 1981.

18 The Federation of Pakistan filed review petition No 13/I of 1981 on 14th July 1981 to challenge the said judgment and order notwithstanding the pendency of the appeal before the Supreme Court. This review petition was admitted and accepted. Federal Shariat Court held, I have no doubt that for a married person who has committed zina, stoning to death is the shar'i punishment. It is abiding for all times. According to Shariah, no judge, ruler or legislature is authorized to change it. Thus sections 5, sub-section 2 A and Section 6, subsection 3 A of the Offence of zina (Enforcement to Hadd) Ordinance, 1979 are not contrary to the Qur'an and Sunna. The judgment of 21 March is withdrawn (Federation of Pakistan V Hazoor Bakhsh, PLD 1983 FSC 255 P 479, 480)

In Rashida Patel Vs federation of Pakistan, the Federal Shariat Court examined different sections of Hudood Ordinance and directed the president of Pakistan amendments in section 8 and 9(4) Offence of Zina (Enforcement of Hudood) Ordinance 1979 and Section 6(b) of Qazaf Ordinance (PLD 89 FSC 95)

19 Appeal against this judgment is pending before the Supreme Court of Pakistan.

20 Section 5 of the PWA added section 375 and 376 in PPC. Section 375 defined Rape and discussed its various ingredients while section 376 prescribed punishment for this crime.

21 Before entering into the substantive discussion on the subject we should first discuss the definition of the crime and its punishment described by the Holy Quran and Sunnah of the Holy prophet (SAWS) then examine these provisions in the light of injunctions as laid down in the Holy Quran and Sunnah of the Holy Prophet (SAWS)

22 Definition: The common meaning of zina is:

"هو الوطء الحرام في قبل المراد الحبة المتشبهة في حاله الاحتمار في دار العدل، ممن النرم احكام الاسلام، الحالي عن حبيبته الملك، وحققه النكاح، وعن تشبهه الملك، وعن تشبهه النكاح، وعن تشبهه الامتناع في موضع الامتناع في الملك والنكاح جمعاً" (بداية الصانع في ترتيب الترتيب، الكاساني، علاء الدين ابو بكر بن مسعود، جلد ٧، صفحه ٢٢)

Zina means a person willfully committed illicit act of entering his penis into the vagina of a living and desirable woman with whom he is neither married nor is there any doubts of Nikah.

23 The Islamic Law holds zina as a punishable crime and its committal by a married person enhances the legal guilt all the more. This is not so because of the violation of the oath of fidelity taken by the man or the woman, nor because of the

encroachment on the conjugal rights of the other but because the criminal resorts to an unlawful method when there exists a lawful method for satisfying his desires. The Islamic law views zina as an act which if allowed to be indulged in freely, would strike at the roots of both the human race and human civilization. In the interests of the preservation of the human race and the stability of human civilization, it is imperative that relationships between man and woman should be regulated by lawful and reliable means. And it is not possible to restrain this relationship if opportunities for free mixing of the sexes are allowed to exist, for it cannot be expected that a man or a woman will be prepared to bear the onerous responsibilities of family life if he or she has the opportunity for the gratification of their sex desires without this.

24 Islam does not rely on punitive law alone for saving humanity from the menace of zina. It employs both reformatory and prohibitory measures on a large scale. It has provided legal punishment only as a last resort. Islam does not want the people to go on committing this crime and getting flogged day and night. Its real aim is that the people should not commit this crime at all and there should be no occasion to resort to the extreme punishment. For this purpose, Islam first of all punishes man; it imbues him with the fear of an All-powerful and All-Knowing Allah; it inculcates in him the sense of accountability for his actions in the Hereafter from which even death cannot release him. It fills him with an obligation of obedience to Divine Law which is sure to follow Faith. Then it repeatedly warns him that zina and unchastely is heinous crimes for which Allah will call him to account with severe reckoning. Moreover, Islam provides all possible facilities for a man to marry. If he is not satisfied with one wife, he is allowed to take up to four. If the husband and the wife cannot pull together amicably, there are provisions for separation. In cases of a dispute between the two, provision exists for reconciliation through the intervention of the members of the family and, failing that, through the judicial courts so that they should either reconcile or separate and then remarry whenever they like. It is not considered good and right to remain unmarried. (Syed Qutab - *Fi Zilal al Quran* Dar Ihya'a al Tuath al Arabi Beirut 1391/1971 Vol. 13322)

25 Then Islam puts to an end to all those factors which provide occasions for zina. Women are commanded to cover themselves with their garments (33:59) and the wives of the Prophet were given instructions to stay in their houses and not to display their adornment (33:33). Likewise, the free mixing of men and women was prohibited from going out in their adornments and make-up (24:31). Men and women were also enjoined to restrain their gaze so that unrestricted feasting of the eyes should not lead to illicit love (24:30, 31). Only after all these and other similar measures had been taken was zina declared to be a punishable offence, and the spreading of indecency in any way was also prohibited.

26 Zina is considered social crime against the institution of the family and a punishable offence. The injunctions on adultery were revealed gradually. In so many verses Allah Almighty prohibited the believers from committing zina and prescribed its effects on the society. Allah said:

وَلَا تَقْرَبُوا الزَّوْجَةَ إِذَا كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا

(Do not even go close to fornication. It is indeed a shameful act, and an evil way to follow.) (17:32)

The punishment moved on from a lighter punishment to a more severe one. The very first injunction on adultery is verses 15 and 16 of Surah Al-Nisa, which is:

- وَالَّتِي يَأْتِيَنَّكَ مِنَ الْفَاحِشَةِ مِنْ نِسَائِكَ فَاسْتَشْهِدُوا عَلَيْهِنَّ أَرْبَعَةً مِنْكُمْ فَإِنْ شَهِدُوا فَامْسِكُوهُنَّ فِي النَّوَابِتِ حَتَّى يَتَوَفَّى لَهُنَّ الْمَوْتُ أَوْ يَحْكُمَ اللَّهُ لَهُنَّ سَبِيلًا وَالَّذِينَ يَأْتِيَنَّكُمْ فَادَّبُوهُمَا فَإِنْ تَابَا وَأَصْلَحَا فَأَعْرَضُوا عَنْهُمَا إِنَّ اللَّهَ كَانَ نَوَّارًا رَحِيمًا -

And those of your women who commit the shameful act then have four witnesses against them from among you. So if they do testify, then confine those women to their homes until death overcomes them or Allah prescribes a way for them. And those two of you who commit it, torture them both. But if they repent and amend, turn away from them. Surely, Allah is Most-Relenting, Very-Merciful (4:15,16)

27 The preliminary stage of the punishment of fornication was to confine the offender in house. In these verses the proof for establishing adultery is described with a specific

condition of having four male witnesses. Secondly, punishment for the women is prescribed as to confine her in the home and for both of them inflicting of harm. At the same time it is also hinted that this was not the final injunction on adultery and that some more directives will follow. This is the meaning of the verse *أَوْ يَجْعَلِ اللَّهُ لَهُمْ سَبِيلًا* or Allah prescribes a way for them (4:15)

28 In the above referred punishment confinement of the women within the homes was regarded sufficient at that time, and causing harm to both as enough punishment. But the limit, the magnitude and the form of harm to be inflicted was not defined. Rather the wordings of the Qur'an suggest that the initial punishment of adultery was only punitive, of which the quantum was not fixed by the Shariah; it was a *ta'zir* punishment left to the discretion of a judge or the ruler. That is why the ambiguous phrase of inflicting harm or torture was adopted. But at the same time it was hinted that probably some other form of punishment for the culprits of the crime will be introduced later. (See Ibn Kathir: Abu al-Fida Isma'il bin Kathir: Dar al-Ma'arif Beirut 1980, Vol. I P. 462)

29 When Verse no. 4 of Surah Al-Nur revealed, Sayyidna, Abdullah Ibn Abbas said that what was promised in Surah al-Nisa through the words *أَوْ يَجْعَلِ اللَّهُ لَهُمْ سَبِيلًا* "or Allah prescribes a way for them" so now this verse of Surah al-Nur has prescribed the way, that is flogging both man and woman with a hundred stripes. And then Abdullah Ibn Abbas made the punishment of hundred stripes exclusive to fornication, that is when the crime is committed by unmarried man and woman, and said

It is prescribed that if the married man and woman commit this crime then they be stoned to death and the punishment for unmarried culprit is a hundred stripes.

30 In the verse of Surah an-Nur under reference punishment for adultery is hundred stripes without qualification. So, it is obvious that he must have found from some other authentic Hadith that the punishment for adultery is stoning to death and for fornication a hundred stripes, and that Hadith has been related by famous books of hadith on the authority of Sayyidna, Ubadah Ibn Samit that the Holy Prophet said

عن عبادَةَ بن الصَّامِتِ قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ خُذُوا عَنِّي خُذُوا عَنِّي قَدْ جَعَلَ اللَّهُ لَهُنَّ سَبِيلًا الشَّيْبَ بِالشَّيْبِ حِلْدَ مِائَةٍ وَرَمَى بِالحِجَارَةِ وَالبِكْرُ بِالبِكْرِ جِلْدَ مِائَةٍ وَنَفَى سَنَةً (سنن أبي داود: جلد سوم: حديث نمبر ۱۰۰۸ - حديث متواتر حديث مرفوع)

Have knowledge from me, have knowledge from me that Allah Taala has prescribed now the way for women (that He had promised before) which is that for married man and woman it is a hundred stripes and stoning and for unmarried man and woman is a hundred stripes and exile for one year.

In this hadith reference is made to the following verses of the Holy Quran

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ حَلَّةٍ ۚ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ۚ وَلَتَشْهَدَ عَدَاؤُهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ -

"The adulterer and the adulteress, scourge each of them with a hundred stripes. And let no pity for the twain withhold you from obedience to Allah, if ye believe in Allah and the Last day. And let a party of believers witness their punishment." (24:2)

الزَّانِي لَآ يَنْكِحُ الزَّانِيَةَ أَوْ الْمُسْرِكَةَ ۖ وَالزَّانِيَةَ لَآ يَنْكِحُهَا الزَّانِي أَوْ الْمُشْرِكَةَ ۚ وَحَرَّمَ ذَٰلِكَ عَلَى الْمُؤْمِنِينَ

A man who is fornicator does not (like to) marry but a woman who is a fornicator or a polytheist and a woman who is a fornicator does not (like to) marry but a man who is a fornicator or a polytheist. And this (i.e. preferring to marry such spouses) has been prohibited for the believers (24:3-4)

31 In these verses along with the punishment of a hundred stripes for the unmarried man and woman an additional punishment is prescribed in the Hadith to send the adulterer man in exile for one year. On this there is a difference of opinion among jurists, that is whether the punishment of exile to male adulterer is compulsory or it is at the discretion of the judge that is if he deems it necessary only to send the criminal in exile also for one year. In the opinion of Imam Abu Hanifa the last referred position is correct, that is it remains at the discretion of the ruler or judge. Secondly, according to this Hadith there is the punishment of a hundred stripes also for the married man and woman before the stoning. But it is established that these two punishments are not to be combined according to the sunnah of the Holy Prophet and the first four Caliphs that

Married persons are to be awarded the punishment of stoning only (Ibn Kathir Vol 3,P 261 Qurtubi Al Jamil 'l' Ahkam alQuran Dar Ihy al Turath al Arabi Beirut 1965 Vol 5, Pages 87, 88) The main point is that the Holy Prophet explained here the verse of Surah Al-Nisa (*وَيَجْعَلُ اللَّهُ لَكُمْ سِيْلًا*) and while explaining he had added some more points beside flogging a hundred stripes as stated in Surah al-Nur These points are

- 1 Punishment of hundred stripes is exclusive to unmarried man and woman
- 2 An-addition of one year exile
- 3 Rajm or stoning to death of married man and woman

32 The Holy Prophet himself had executed the punishment of stoning to married adulterer in the presence of his companions. He awarded the punishment of stoning to Ma'iz and Ghamidiyyah which is recorded in all the books of traditions with authentic authorities. See for reference Abudawood Hadith No 1013. Additionally, an incident is reported in Hadith books on the authority of Abu Huyraiah(R A) and Zaid Ibn Khalid Juhani(R A)

قالا جاى اعرابي فقال يا رسول الله افض بيننا بكتاب الله فقام خصمه فقال صدق افض بيننا بكتاب الله فقال الاعرابي ان اني كان عسيفا على هذا فرزني بامرأته فقالوا لي على ابنك الرجم ففديت اني منه بمائة من الغنم ووليدة ثم سالت اهل العلم فقالوا انما على ابنك جلد مائة وتغريب عام فقال النبي صلى الله عليه وسلم لا قضين بينكما بكتاب الله اما الوليدة والغنم فرد عليك وعلى ابنك جلد مائة وتغريب عام واما انت يا انيس لرجل فاخذ على امرأة هذا فارجمها فغدا عليها انيس فرجمها (صحيح بحارى: جلد اول: حديث نمبر ٢٥١٧)

They said that a Bedouin came to the Prophet and said 'O Messenger of God, pass judgment on me according to the God's Book.' And his opponent said 'Yes pass judgment between us and he said 'My son worked as a labourer for this man and then he fornicated with his wife. I was told that my son deserved to be stoned to death, so I ransomed him for one hundred sheep and a female slave. I then asked the people of knowledge and they informed me that my son deserved one hundred lashes and banishment for one year. The Prophet answered 'By the One Who holds my soul in His hand, I shall certainly pass judgment between you in accordance with God's Book. As for the female slave and the sheep, they must be returned to you. Your son deserves one hundred lashes and banishment for a year. Go. Unsays to this man's wife and if she confesses, stone her to death.' Thereupon Unays went to the woman and she confessed. Then the Prophet ordered her to be stoned.

33 According to above traditions, the Holy Prophet awarded the punishment of hundred stripes to one criminal and of stoning to the other and described them both as the judgment by the Book of Allah, although the punishment of hundred stripes, not the stoning, is indicated in Surah Al-Nur. The reason is the same that Allah Almighty had revealed to the Holy Prophet the complete explanation and details of the injunction which all fall within the purview of the Book of Allah although some of it is not included and mentioned in the Surah an-Nur expressly. Bukhari and Muslim have recorded an address of Umar(R A) on the authority of Ibn Abbas (R A) the wordings of which are

ان الله قد بعث محمدا صلى الله عليه وسلم بالحق وانزل عليه الكتاب فكان مما انزل عليه آية الرجم قرأناها ووعيناها وعقلناها فرجم رسول الله صلى الله عليه وسلم ورجمنا بعده فأخشي ان طال بالناس زمان أن يقول قائل ما نجد الرجم في كتاب الله فيضلوا بترك فريضة أنزلها الله وان الرجم في كتاب الله حق على من زنى اذا أحص من الرجال والنساء اذا قامت البينة أو كان الحبل أو الاعترافاً صحيح مسلم: جلد دوم: حديث نمبر ١٩٢٤

Allah sent Muhammad with the Truth and sent down the book to him and the verse of the stoning was included in what Allah Most High sent down. Allah's Messenger had people stoned to death and we have done it also since his death. Stoning is a duty laid down in Allah's Book for married men and women who commit fornication, when proof is established, or, when there is pregnancy or a confession.

34 The same version is narrated in Sahih of al-Bukhari also with greater detail (Bukhari 1009 vol 2) and in Nasai' it is narrated in the following words

We have no choice to avoid the punishment of stoning (rajm), because it is one of the punishment from the punishments prescribed by Allah. Be very clear in your mind that the Holy Prophet himself had awarded stoning and we too have awarded stoning after him. If there was no risk of people saying that Umar has added something on his own in the Book of Allah, I would have written this in a

corner of the Qur'an. And Umar Ibn Khattab is witness. Abdurrahman is witness and so and so companions are witnesses that the Holy Prophet had awarded stoning (Ibn Kathir Vol 3 P 261)

This is apparently proved by the address of Sayyidna Umar that there is a specific verse on injunction of stoning which is in addition to the verse under reference of Surah an-Nur. But Sayyidna Umar did not tell the wordings of that verse, nor did he tell that if there is a separate verse beside the verse of Surah an-Nur why it is not included in the involved that people would put blame on him of making addition in the Book of Allah, he would have written this verse on a corner of the Quran.

36 What needs careful consideration in this narration is that, if it is a verse of the Quran and its recitation is mandatory like other verses, then why Sayyidna Umar left it out just because of the fear of people's calumny, when he is well known for his vehemence about Allah's injunction. The other point to be noted is that he did not say that he would have included this verse in the Qur'an but all he said was he would have written it on the margin of the Qur'an (Ibn Kathir, Vol 3, P 261)

37 All these things support the inference that the explanation of this verse that Sayyidna Umar heard from the Holy Prophet in which he specified the punishment of hundred stripes for unmarried man and woman and stoning for the married persons. He treated it as a verse of the Book of Allah because of the words of the Holy Prophet and his consistent practice. Sayyidna Umar understood fully well that the Holy Prophet's explanation was in line with the command of Allah's Book and not actually the verse of the Book, otherwise no power on earth would have stopped him to write down the verse in its place if it was missed out. His comment about writing it on the margin of Qur'an is further proof that the verse was not a part of Qur'an but only the explanation of the verse of Surah an-Nur. Some narrations have carried the actual wordings of the injunction on the subject, but they fall short of proof and authenticity to merit inclusion in the Quran. The gist of the matter is that the punishment of hundred stripes described in Surah an-Nur for adulterer man and woman is exclusive to unmarried man and woman as per detailed explanation and elucidation of the Holy Prophet, and punishment for the married persons is rajm (stoning). Although this elucidation is not given in the wordings of the verse but the exalted person to whom this verse was revealed has himself elaborated the subject without the slightest doubt of any confusion. It is not that the Holy Prophet explained this only through his words, but he also executed this punishment several times in the presence of many companions, and the proof of this has reached us with unbroken authentic chain of narrators. Therefore the punishment of stoning for married man and woman is in fact an injunction of the Book of Allah itself, in the sense that it is as certain as any other injunction of the Qur'an. This fact may be mentioned either by saying that rajm is a provision of the Quran itself, or by saying that it is established by the unbroken chain of traditions. Sayyidna Ali has also said the same thing that the verdict of stoning is established by the tradition of the Holy Prophet (Qurtubi al-Jami' Li Akhbar al-Quran, Vol 3, P 78)

38 In Islamic law if the punishment of a crime is severe the conditions of proving it are also tough.

As described above, the punishment of adultery in Islam is most severe compared to punishments of all other crimes. Along with that the conditions to prove this crime are equally tough in Islamic law. If there is the slightest doubt or uncertainty, then the maximum punishment, known as had, is remitted and only a punishment by way of ta'zir may be awarded which should be commensurate with the extent of crime. In all other cases testimony of two men or one man and two women is required for the proof of a particular event. However, for the maximum punishment of fornication the evidence, of four male eye-witnesses is necessary who must testify without a slightest doubt or confusion. Another severe circumstance that aggravates the severity of an evidence of fornication is that if the evidence of a witness in a case of adultery is rejected then the witness himself may suffer badly because in that case, he may be charged for false accusation of adultery and may be awarded the punishment of eighty

41 Shi'a's definition of *muhsan* is different from the sunni jurists. They say that *muhsan* is an adult free Muslim who is in a position to have legal sexual intercourse and whose partner is actually available and not imprisoned or absent on a journey (Muhammad bin al Hasan al Hurr al Aamili Wasail al Shiah, Dar al turath al Arabi Libnan Vol18,p353 and Abd al Husain Muhammad 'Ali Shara' al Islam Vol 4, P 150, also see Sharh al Azhar by Abu al Hasan Abdullah bin Miftah Der Ihya' al Turatu al Arabi Beirut Vol 4 P 343)

42 All Sunni jurists agree that the essential element for the *hadd* crime of unlawful intercourse is actual penetration by the man into the vagina of a female

43 The Hanbali and Shi'as, however, include anal intercourse in the definition ('Abd al Husain Muhammad 'Ali Shara' al Islam vol 4 p149 Sharh al Azhar by Abu al Hasan Abdullah bin Miftah Der Ihya' al Turatu al Arabi Beirut Vol 4, P 336)

For the latter, in addition, sexual acts without penetration (petting) are also regarded as *hadd* offences to be punished with 100 lashes. For the Sunnis such acts are not *hadd* offences but can be punished as *ta'zeer*

44 Homosexual intercourse is equated to unlawful heterosexual intercourse by most schools. However, there is a difference of opinion about the punishment. The Malikis, the Shi'as and some Shafis and Hanbalis are of the opinion that the penalty is death, either by stoning (Malikis), the sword (some Shafis and Hanbalis) or, at the discretion of the court, by killing the culprit in the usual manner with a sword, stoning him, throwing him from a (high) wall or burning him (Shi'as). Among the Shafis and Hanbalis there are also scholars who hold that the death penalty by stoning applies only to the active partner or to those who are *muhsan*, and that otherwise the punishment is flogging in combination with banishment. The Hanafites finally do not put homosexual intercourse at par with the *hadd* crime of unlawful intercourse. They hold that homosexual intercourse must be punished as *ta'zeer* (Sharh al Azhar by Abu al Hasan Abdullah bin Miftah, Der Ihya' al Turatu al Arabi Beirut Vol 4 P 336, Ibn Shahab al Ramal, Nihayat al Muhtaj ila sharhal Manhaj Vol 7, Page 404)

45 There are numerous circumstances that can be put forward as a defense of uncertainty (*shubha*) against the charge of unlawful intercourse and that prevent the application of the fixed punishment. Especially with regard to intercourse with female slaves we find many examples of such circumstances, e.g. the fact that one is a co-owner, that one has obtained the owner's consent or that the woman is the property of one's son. In the case of intercourse with free women there is uncertainty, e.g. if both partners are married to each other but the marriage contract is null and void, if the woman is hired for the purpose, or if the man is blind and thinks erroneously that the woman is his wife or slave (Kasani, ala al Dim bin abi Bakr bin mas'udi Bady' al sana'a li Tarteeb al Shariy' Saeed Academy Karachi, Vol 7 P 36-37)

46 However, it is necessary to establish evidence before punishing those who are guilty of this offence. Surah Nisa clearly states that in all such cases, the evidence of four persons is required. The Holy Quran says

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاحْتَدُوهُنَّ بِسَبِّ حَلْدَةٍ وَلَا يَقْبَلُوا لَهُمْ شَهَادَةً ابْدَانًا وَأُولَئِكَ هُمُ
الْفَاسِقُونَ

Those who accuse the chaste women (of fornication) but they do not produce four witnesses, flog them with eighty stripes and do not accept their any evidence any more. They are the sinners. (24:4)

47 Allah's Messenger made it absolutely clear that once an offence had been committed and brought to his notice, punishment would be carried out. Therefore, he admonished people not to look for people's offences and try to overlook and forgive. It is reported that the Prophet said

عَنْ عَبْدِ اللَّهِ بْنِ عَمْرٍو بْنِ الْعَاصِ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ تَعَاَفُوا الْحُدُودَ فِيمَا بَيْنَكُمْ فَمَا بَلَغَنِي
مِنْ حَدٍّ فَقَدْ وَحِب (سنن ابوداود، جلد سوم، حديث نمبر ۹۷۰)

"Forgive the infliction of prescribed penalties among yourselves, for any prescribed penalty of which I hear must be carried out."

48 Section 6 of the Offence of Zina (Enforcement of Hudood) ordinance defined Zina bil Jabat as

- (1) A person is said to commit zina-bil-jabr if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, if any of the following circumstances namely
- Against the consent of the victim
 - without the consent of victim
 - with the consent of the victim when the consent has been obtained by putting the victim in fear of death or of hurt or
 - 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 offence of zina-bil-jabr

- (2) Zina-bil-jabr is zina-bil-jabr liable to hadd if it is committed in the circumstances specified in sub-section (1) of section 5
- (3) Whoever is guilty of zina-bil-jabr liable to hadd shall be subject to provisions of this Ordinance
- if he or she is a 'muhsan' be stoned to death at a public place or
 - if he or she is not a 'muhsan' be punished with whipping numbering one hundred stripes, at a public place, and with such other punishment, including the sentence of death, as the Court may deem fit having regard to the circumstances of the case
- (4) No punishment under sub-section (3) shall be executed until it has been confirmed by the Court to which an appeal from the order of conviction lies, and if the punishment be of whipping, until it is confirmed and executed, the convict shall be dealt with in the same manner as if sentenced to simple imprisonment

49 The main difference between section 6 Offence of Zina (Enforcement of Hudood) ordinance and section (375 PPC) 5 of P W A is that

In section 6 of Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979) the word "Person" was used which includes man and woman while in section 5 of P W A Or section 375 PPC, the word used "man" The Impact of the changes is that according to the Ordinance man and woman both can be subjected on commission of rape and can be punished for that while word used in the Act limits the attribution of the crime to man only and that if the same act is committed by a woman the Act is silent she can not be punished for that

A comprehensive dissuasion has been made on these tradition of the Holy Prophet (SAWS) in the judgment of the Federal Shariat Court in Federation of Pakistan Vs Hazoor Bakhsh (PLD 1983 FSC Page 255)

50 It is clear from the above discussion that the word appeared in the text of the Holy Quran 'man' and women both are attributed the crime of Zina Therefore attribution of this crime to man only is repugnant to the injunctions of Islam

51 The punishment prescribed for the offence of Zina / Rape is Rajm stoning to death for Muhsin or Mushina and Hundred strips for a unmarried / virgin woman and male committed the crime of zina (PLD 1983 P 255)

52 Section 6 of the P W A prescribed punishment for the crime of cohabitation caused by a man deceitfully inducing a belief of a lawful marriage This falls under Ta'zeer crimes due to doubts or uncertainty and this is a general rule accepted by all jurists except Zahmah that Doubts Invalidate Hudood The jurists have discussed various kinds of uncertainty or shubhat which impact Hadd crimes Therefore it is pertinent to highlight its role on implementing *hadd* punishments

Doubts prevent Hudood

53 A general principle of the Islamic Shariah is that hadds are suspended by doubts This theory is based on the tradition of the Holy Prophet (SAWS).

عن عائشة قالت قال رسول الله صلى الله عليه وسلم ادربوا الحدود عن المسلمين ما استطعتم فان كان له مخرج فخلوا سبيله فان الامام ان يخطى في العقوبة خير من ان يخطى في العقوبة.

*Aisha (R.A) narrated that prophet (SAWS) said. Repeal the hudud punishments from Muslims as far as you can, so there is a way out, leave him alone, for it is better for a ruler to make a mistake in forgiving someone rather than in punishing him. (Muhammad ibn Easa al-Tirmidhi, Sunnan al-Tirmidhi, Dar al-Fikr, Beirut, 1974, Vol.2, PP.438-39.)

In another place the Holy Prophet (SAWS) has said

"ادربوا الحدود بالتشبهات" "In case of doubts set aside hud'"
(Nihayat al Muhtaj Vol 7 P 404)

54 These tradition were generally accepted by the Ummah and the jurists adopted the principle under consideration on the basis thereof. The Prophet's Companions acted on this general principle after the demise of the Prophet. Hazrat Umar for instance says, "لان اعطى الحدود بالتشبهات احب الى من ان اقيم بالتشبهات" "In case of doubt I would rather hold huds in abeyance rather than execute them" (Kamal al Din Muhammad bin Abdul Wahid Fath al Qadir Ma'a al Kifayah al Maktabah al Rasheediyah Quetta Vol 5, P 32)

55 Hazrat Mu az bin Jabl Hazrat Abdullah Ibn Mas'ud and Hazrat Aqaba bin Aamr are reported to have said "اذا اسننه عليك الحد فادراه" "that if a hadd is doubtful it should be set aside" (Ibid P 32)

Doubt or uncertainty means "التشبهة هي ما يشبه الثابت وليس بثابت" anything which appears to be like something proven although it is not proven. Proof does not mean only the proof of an act but proof in its general sense including both the proof of an act and the proof of an injunction) "اوهى وعود المبيع صورة مع اعدام حكمه او حقيقته" "In reality or anything legitimate that may concretely present itself although no provision exists for it and which does not in itself exist in reality" (Ibn Qudama, Al-Mughni, vol 10 P 152)

56 For example where the witnesses back out from their evidence on a crime of had and there is no way to prove the offence other than the evidence of the witness. The Hadd will be suspended. Suppose a man marries a woman forbidden for him. Imam Abu Hanifa holds that the hadd prescribed for adultery will not be implemented in such a case because of the suspicion arising out of the wedlock. But Imam Abu Yusuf and Imam Muhammad differ with him on this issue. They rather agree with Imam Shafi'ee and Imam Ahmed in this respect who are of the view that as long as the offender is aware that the woman he marries is forbidden for him, the hadd prescribed will not be nullified by the suspicion involved in the wedlock (a Sharh-ul-Zurqani Ala Muwatta Malik, Vol 8, P 78, b Asna-ul-Matalib vol 4, P 126 C Ibn Qudama, AL Mughni vol 10 P 154)

57 Similarly in all the other cases of marriage declared invalid by the general consensus of the jurists the hadd prescribed will not be implemented according to Imam Abu Hanifa. These cases include having a fifth wife, marriage with a married woman or with one in her period of waiting after divorce or with one who has been divorced by pronouncing the word talaq (Divorce) three times. In all these cases the offender is conscious of the prohibition of marriage. In spite of this Imam Abu Hanifa holds that the hadd is nullified because marriage according to him constitutes doubt and doubt invalidates the hadd (Sharh Fath-ul Qadeer Vol 5 p 18-13) On the contrary Imam Malik, Imam Shafi'ee and Imam Ahmad believe in the validity of the hadd as wedlock in such cases does not give rise to suspicion at all (a Shath-ul-Zurqani vol 8 P 76, 77 & 80 Ansa-ul-Matalib vol 4, P 126 AL Mughni vol 10 P 154)

CATEGORIES OF DOUBT

58 The Shafi'ee and Hanafi schools of jurisprudence have taken great care in the classification of doubt. But the Hamblies and the Malikies have discussed it generally.

The Shafites classify doubt into three categories

(i) Doubt regarding place "تشبهة في المحر"

The example of this doubt is intercourse with his wife in menstruating or when she is fasting or anal intercourse with her. Here doubt is caused to the place where that act was forbidden for the reason that that specific part of wife is considered as husbands private property and he has legal right to sexual

intercourse with her although he is not allowed to exercise this right while she is fasting or undergoing menstrual course, nevertheless the husband enjoys proprietary right to the part or place of her body, which gives rise to doubt in implementing hadd punishment for violation of the law of shairat. Such a doubt in its turn requires suspension of the prescribed hadd, whether or not the accused is convinced of the legitimacy or illegitimacy of his act in as much as the doubt is not grounded in the belief of the accused but owes its origin to the place subject to the impact of his act which he is legally entitled to (Dr Wahbah al zuhaili: al Fiqh al Islami addillathu Vol 6 P 33)

Doubt caused by the accused. "تسببه في الداعل"

59 Example of such a doubt is provided by the sexual intercourse of a man with a woman sent to the bed of bridegroom on his wedding night. Later it is found that the woman is not his bride (See Fath al Qadeer Vol 4 P 142) This gives rise to a doubt grounded in the accused belief that he is not committing an unlawful act. In short, the accused act causes doubt which in its turn invalidates the hadd laid down for adultery. But if he commits such an act willingly, He will then be guilty of adultery (Kasani Bady 'al Sana'a Vol 7, P 27)

Formal Doubt "تسببه في الحمة"

60 Doubt as to the legitimacy or illegitimacy of an act springing from disagreement among the jurists. This will arise where the jurists differ on the legitimacy or otherwise of anything and consequently the relevant hadd will not be implemented (Ibn qudama al Mughni, Vol 8 P 184) For instance, according to Imam Abu Hanifa marriage without the consent of guardian is valid. Likewise, Imam Malik does not consider witnesses essential for the legitimacy of marriage. Again Ibn Abbas treats Muta (provisional marriage) as lawful. Hence the hadd for adultery will not be awarded upon sexual intercourse in all such cases of marriage treating it as fornication. Although the accused may himself be convinced of the legitimacy of his act, yet his conviction will be of no consequence in the presence of the difference of opinion among the Ulema (Asna al Matalib Vol 4, P 126)

Kinds of doubts/Uncertainty according to Hanafi Jurists.

61 The Hanafi jurists classify doubt into two categories which are as follows

(i) **Doubt Involved in Act** "السببه في الفعل ، تسببه استنباء ، تسببه مسانبه"

A doubt wherein the accused is uncertain about its legitimacy or illegitimacy. He justifies for some reason of legal grounds, which however, does not constitute legally the proof for its legitimacy. For instance, a man enters into sexual inter-course with his three time divorced wife during her waiting period iddah (Sharh Fathul Qadeer vol 4 PP 140-141)

62 The condition of uncertainty in the act is the non-existence of the legal ruling prohibiting the act and the accused believes its permissibility. But if there does exist the proof of its unlawfulness or the accused was aware that the act is prohibited then no uncertainty is involved

Doubt Involved in Place "السببه الحكمنه او تسببه الملك ، التسببه في المحل"

Injunction or proprietary rights.

63 The condition of such a doubt is that it arises out of an injunction of the Shariah for instance, theft is unlawful according to the Quranic injunction. But the Prophet (S A W) observes ' You and your property both belong to your father. According to the first injunction theft is unlawful and punishable by the amputation of hand. But the second declares that the son as well as his belongings is the father's property. If the father steals anything belonging to his son he does not according to the injunction of the Shariah be charged for theft

64 Imam Abu Hanifa identifies a third category of doubt. According to him, doubt also arises when a contract is executed, even if such a contract relates to an unlawful act and the offender is alive to the illegitimacy thereof. But his companion and the other four Imams do not acknowledge double involved in an act as long as the culprit does believe in its legitimacy (Dr Wahabah al zuhaili al Fiqh al Islami wa addillatuh vol 6 P 37)

65 In short according to Imam Abu Hanifa there are three kinds of doubt

(a) Doubt inherent in the act

- (b) Doubt inherent in the place
- (c) Doubt inherent in the contract

Effects of Invalidation of Hadd in case of Doubts

66 A number of effects follows from the implementation of the principle that doubts prevent the implementation of hadd. Sometimes the operation of this principle does not only nullify the hadd but leads also to the acquittal of the offender of the charge leveled against him. Sometimes it happens that the operations thereof prevent hadd, but it is replaced by a penal punishment (Ta'zeer).

67 There are three conditions in which an offender is exculpated.

- (i) In case if any element of the offence imputed to him is doubtful. For instance a woman other than bride comes into the bedroom and bridegroom mistaking her as his wife and has sexual intercourse with her. In this case the man is neither liable to the hadd for adultery nor to penal punishment. He will be acquitted because of the absence of the intention to commit the offence on his part which constitutes an essential element of an offence. When there is doubt in the application of the provision forbidding the act imputed to the accused for example in the case of nuptials without witnesses and without the consent of guardian or provisional marriage (muta'). For acts like these neither the hadd for adultery nor penal punishment will operate inasmuch as jurists disagree in such cases of marriage i.e. some of them declare these cases lawful while others treat them as unlawful. The difference among the jurists imply that in the above acts the application of provision enjoining the hadd for adultery involves doubt which necessitates the acquittal of the accused.
- (ii) When the proof of charge is doubtful. For instance, two witnesses testify to the accused being guilty of drinking liquor. But the witnesses later back out while there is no evidence to prove the charge. An element of doubt thus creeps into the case because of the possibility of the witnesses telling the truth in deviating from their original deposition. Consequently the hadd for Zina' (adultery) is invalid. Take another example.

68 Apart from the above three possibilities, in all the other circumstances wherein the general principle under consideration is applicable, penal punishment will be awarded along with the annulment of the relevant hadd, regardless of the kind of the cases of doubt.

69 A man contracts a tabooed woman into marriage or hire a woman for adultery. According to Imam Abu Hanifa relevant hadd in such cases will be prevented but the accused will be punished as Ta'zeer (Al Fiqh al Islami wa Addillatuhu Vol 6 P 31).

70 A person confesses that he has committed one of the hadd crimes but there is no proof other than his own confession such a person will be sentenced to hadd. But if he retracts from his confession this creates doubt into the case, thereby invalidating the hadd. However, he would be liable to penal punishment. The difference between the backing out of an offender and a witness is that the former will get penal punishment for retracting from his confession whereas the witness will incur no punishment for the subsequent denial of his own statement. This difference springs from the fact that no man as a rule would confess a crime which he has never committed while it is easy to accuse a man of an offence that he is not guilty of. However, if it is established that the accused has been forced or threatened to make confession, it will be incumbent on the court to acquit him, because a confession made under duress is invalid. Hazrath Ibn-e-Umar (R A A) narrates the following Tradition of the Prophet (S A W) in this context.

'No man is responsible for his own self when he is starved, frightened and bound up.'

71 So far as penal offences are concerned the principle in question will, however, apply in those three cases wherein the offender will be acquitted owing to the application thereof. It will not be extended to cases wherein penal punishment is substituted for a hadd in as much as penal punishments are not pre-determined but depend on the discretion and the individual judgment of the judge. On the contrary,

punishments for hadd offences are invariably determined requiring strict and rigorous execution. The Court has no powers to put off the operation of hududs or substitute them for other punishments, except in case the hadd is invalidated by doubt.

72. In the light of above discussion that person deceitfully caused any woman who is not lawfully married to him cohabit with her shall not fall under the punishment of Hudood but he should be awarded Ta'zeer punishment. The caliph ruler or legislature have the right to regulate laws in this respect. Keeping in view the general principles of 'Adl and the spirit of Islam. Therefore section 67 of the PWA 2006 and subsequently section 493 A 496 B of PPC are not repugnant to the injunctions of Islam.

73. Section 496 (2) in the light of verses of the Holy Quran and Sunnah of the Holy Prophet (SAWS) as mentioned above seems to me repugnant to the injunctions of Islam. Fornication, adultery, Rape prostitution etc are crime fall under zina in Hadd punishment.

False accusation

74. Section 496 (C) PPC as inserted by section 7 of PWA prescribed punishment for fall accusation of fornication.

75. Allah almighty has clearly prescribed punishment for those people who falsely launch a charge against chaste women. Allah says

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاحْتَدُوا لَهُمْ نَمِيمٌ جُنْدَةٌ وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَدَاءً وَأُولَئِكَ هُمُ الْفَاسِقُونَ -

(Those who accuse the chaste women (of fornication), but they do not produce four witnesses, flog them with eighty stripes and do not accept their any evidence any more. They are the sinners.) (24:5)

76. Adultery is the most damaging and heinous of all crimes for society, as such its punishment is also most severe under Islamic law, compared to all other crimes. Hence it was the requirement of justice and fairness that the special care be attached to prove this act. Without having prescribed evidence under Islamic law, no one should dare accused any man or woman of adultery. Therefore the Islamic law has made it mandatory to produce four honest equitable just men as witnesses to the crime, without which the accusation of adultery is declared a big crime by itself, for which the prescribed punishment is eighty stripes. In view of this mandatory provision one would dare making the accusation of adultery only when he is absolutely sure of watching the crime happening himself. Not only that, at the same time he should be sure that along with him another three honest men have also seen the crime happening, for which they will give the evidence. Because, if there are no other witnesses or the total number is less than four or there is doubt if the witnesses will give the evidence, then only one man would never like to venture evidence alone and be punished with eighty stripes.

77. All acts which have nexus to adultery are also liable for punishment under Islamic penal law, for which punishment of stripes is awarded at the discretion of the judge or the ruler in accordance with the extent of the crime, but not the maximum punishment of hadd. Therefore someone who has seen the act of adultery, but has no other witnesses need not give evidence of adultery, but can testify for having seen the accused persons in compromising position, and the judge or ruler can award the punishment after establishing the crime (Multi Muhammad Shafi Ma'arif a Quran (English translation Vol 6 P 360)

78. The word Mushanat is derived from the word "احصن" In the Islamic jurisprudence there are two types of "احصن" One that has been acknowledge for the punishment of adultery. The jurist have discussed in detail the conditions that the person against whom adultery is established. Briefly these conditions are

- a) sane,
- b) adult,
- c) a free Muslim, and
- d) who is validly married to a Muslim woman and has also copulated with her
- e) He/ she is a known person

In that case the punishment of stoning will be awarded to him. If he has committed the crime (Al-Fiqh al-Islami wa addilatuhu Vol 6 P 79). The second type is that which has been acknowledged for the punishment of "دفع" that is

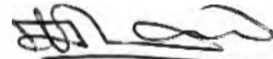
punishment for accusation of adultery. It means that the person against whom the charge of adultery is leveled is

- a) sane
- b) adult,
- c) a free Muslim and
- d) chaste,
- e) that is he has not been proved and adulterer before (النسريع الحناني الاسلامي ج ٢ ص ٤٧٢)
- f) In the Qur'anic verse either because of general practice or because of the incident for which the verse was revealed, the accusation of adultery and related punishment is described in a way that the accusers are men and the accused is a chaste lady. But the injunction applies to all situations because of the common ground applicable to all persons. If a woman levels a charge of adultery against another woman or a man or a man accuses another man, but the required legal evidence is lacking, then in either case the accuser will be liable to the punishment of eighty stripes (النسريع الحناني الاسلامي ج ٢ ص ٤٧٥)

79 The punishment of eighty stripes as hadd is exclusive to false accusation of adultery and does not apply to accusation of any other crime. However, other punishments of ta'zir can be awarded on false accusations of other crimes. Although it is not specifically mentioned in the Qur'an that this punishment is exclusive to false accusation of adultery but the condition of four witnesses is the proof of its exclusiveness, because the condition of four witnesses is only in the case of adultery. (Mufti Muhammad Shafi 'Ma'arif al-Quran (English translation Vol 6 P 360)

80 The punishment prescribed for qazf (false accusation of adultery) relates to the right of the person against whom the charge of adultery is leveled. As such the punishment against this crime will be executed only when the person demands the execution of the punishment, otherwise it will be annulled. This is unlike the punishment of adultery, which is purely a right of Allah. Therefore, it has to be executed, even though no person has ever demanded for it.

81 As section 496 (c) of PPC prescribed punishment of imprisonment for false accusation of fornication while text of the Holy Quran and Sunnah of the Holy Prophet (SAWS) has prescribed hadd punishment of eighty stripes, therefore this section is clearly violative to the injunctions of Islam.



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