

Brooklyn Journal of International Law

Volume 32 | Issue 1

Article 3

2006

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CASES AND CONTROVERSIES: PREGNANCY AS PROOF OF GUILT UNDER PAKISTAN'S *HUDOOD* LAWS

*Moeen H. Cheema**

ABSTRACT

Pakistan's *Hudood* (Islamic criminal) laws have been a source of controversy since their promulgation by the military regime of General Muhammad Zia-ul-Haq in 1979. For their supporters, these laws are a welcome step towards the enforcement of *shari'ah* (Islamic law) and, as such, represent a logical and inevitable progression of those historic processes that had led to the creation of the Islamic Republic of Pakistan. To their opponents, these laws represent gross violations of fundamental human rights and constitutional norms designed to uphold democratic participation in lawmaking and the equality of citizens irrespective of their religion or gender. However, despite the protests at home and the notoriety generated in the international media, these laws continue to exist on the statute books and are enforced in the courts of law.

This paper will survey the contours of the controversies surrounding the Hudood laws, and seek to broaden the horizons of the debate surrounding these laws by incorporating an "Islamic critique" of these laws that has generally been lacking in the discourse. More importantly, the paper seeks to analyze the role that the Federal Shariat Court has played in substantively shaping the law, through a chronological analysis of the Court's decisions on the most contentious aspects of the Hudood laws: the conviction of rape victims for *zina* (consensual adultery/fornication) regarding as proof the pregnancy caused by the rape. This analysis will indicate the strengths of the Islamic critique and propose reforms that may offer a viable avenue for alleviating the hardships perpetrated in the application of the Hudood laws.

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I. INTRODUCTION

The military regime of General Muhammad Zia-ul-Haq promulgated the controversial *Hudood* laws¹ in its early years in power,

1. The Hudood laws were enacted through four Presidential Ordinances and one Presidential Order. See Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979), reprinted in 31 P.L.D. 1979 Central Statutes 51 (1979) [hereinafter Offence of Zina Ordinance]; Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (VIII of 1979), reprinted in 31 P.L.D. 1979 Central Statutes 56 (1979) [hereinafter Offence of Qazf Ordinance]; Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (VI of 1979), reprinted in 31 P.L.D. 1979 Central Statutes 44 (1979) [hereinafter Offences Against Property Ordinance]; Execution of the Punishment of Whipping Ordinance, 1979 (IX of 1979), reprinted in 31 P.L.D. 1979 Central Statutes 60 (1979) [hereinafter Execution of the Punishment of Whipping Ordinance]; Prohibition (Enforcement of Hadd) Order, 1979 (IV of 1979), reprinted in 31 P.L.D. 1979 Central Statutes 33 (1979) [hereinafter Prohibition Ordinance]. Article 89 of Pakistan's Constitution empowers the President to create laws via ordinances when the National Assembly is not in session and "circumstances exist which render it necessary to take immediate action." PAK. CONST. art. 89, cl. 1, available at http://www.nrb.gov.pk/constitutional_and_legal/constitution. This provision enables the President to deal with any circumstances that require legisla-

ostensibly to further the process of “Islamization” in Pakistan.² Grafted onto the country’s common law system, a remnant of British colonial

tive action when the Parliament is not in session, for example, in the transitory period between elections. Such ordinances were envisaged as temporary measures that would lapse after four months unless adopted by the Parliament. However, having taken over power in a military coup in July 1977, General Zia-ul-Haq dissolved the elected Parliament and replaced it with a nominated assembly called the *Majlis-e-Shoora*. In the absence of Parliament, General Zia-ul-Haq used these law-making powers extensively, especially to further the process of “Islamization” of laws in Pakistan. See Ann Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1042–47 (1991). In 1985, parliamentary elections were held on a non-party basis and the newly elected Parliament passed the notorious Eighth Amendment to Pakistan’s Constitution. Article 270A of the Constitution was thereby amended to state that all ordinances, orders, and other laws made between July 5, 1977, and the date on which the Eighth Amendment came into force (thereby including the Hudood laws) were “affirmed, adopted and declared, notwithstanding any judgment of any court, to have been validly made by competent authority” PAK. CONST. art. 270A, cl. 2. Thereafter, the Hudood Ordinances were accorded the force equivalent to an Act of Parliament, and became entrenched in Pakistani law.

2. Many critics have questioned General Zia’s intentions as regards his Islamization program, or *Nizam-e-Mustapha* as he preferred to call it. See, e.g., ASMA JAHANGIR & HINA JILANI, *THE HUDOOD ORDINANCES: A DIVINE SANCTION?* 18 (1990). They allege that Zia, who had dismissed the government of Zulfikar Ali Bhutto in a *coup d’etat*, needed a political constituency in order to sustain his military rule and cunningly used the slogan of Islamization for this purpose. *Id.* Charles Kennedy contends that, despite sustained rhetoric, the Zia administration deliberately maintained a slow pace for Islamization. Charles H. Kennedy, *Islamization and Legal Reform in Pakistan, 1979-1989*, 63 PAC. AFF. 62 (1990) [hereinafter Kennedy, *Islamization and Legal Reform in Pakistan*]. In support of this argument, Kennedy provides the following evidence: (a) the Federal Shariat Court was created with significant restrictions on its jurisdiction under Article 203B of the Constitution, including a lack of jurisdiction in matters pertaining to Muslim personal law, fiscal laws, taxation, banking, and insurance; (b) Zia appointed a number of “Islamic moderates” to the Shariat courts, so that many of the judges who were responsible for interpreting the Islamic reforms were not the reforms’ most zealous advocates; (c) reform of the law of evidence (*Qanoon-i-Shahadat*) represented a much watered-down version of the obscurantist manifesto since it implemented only one of the amendments—arguably the one with least practical impact—recommended by the Council of Islamic Ideology; and (d) two weeks after dismissing the government of Prime Minister Junejo on the grounds that it had failed to hasten the process of Islamization, Zia nevertheless entrusted jurisdiction of the Enforcement of Shariah Ordinance to the Pakistani High Courts instead of the Shariat courts. *Id.* at 64–71. Anita Weiss suggests another agenda behind Islamization: that one primary objective of Islamization, rather than a mere side effect, was the systematic reduction in the power and participation of women in the public sphere. See Anita M. Weiss, *Women’s Position in Pakistan: Sociocultural Effects of Islamization*, 25 ASIAN SURV. 863, 876–77 (1985) (“Traditional Islamic law as applied in the South Asian context has favored the maintenance of extended patrilineal kinship networks and the control of women.”).

rule, the laws sought to criminalize extra-marital sexual relations³ and the consumption of alcohol,⁴ as well as to bring into conformity with Islamic injunctions rules relating to certain offenses against property.⁵ The laws also introduced punishments of *rajm* (stoning to death)⁶ and public whipping into the criminal laws of Pakistan.⁷ Concurrent with the promulgation of the Hudood laws, General Zia's regime introduced a parallel judicial system consisting of the Federal Shariat Court (FSC) and the Shariat Appellate Bench of the Supreme Court⁸ empowered to review and declare invalid any law found to be inconsistent with *shari'ah* (Islamic law) injunctions.⁹

3. See Offence of Zina Ordinance § 4, *supra* note 1, at 52.

4. See Prohibition Ordinance §§ 3–16, *supra* note 1, at 34–37.

5. See Offences Against Property Ordinance pmbl., *supra* note 1, at 44.

6. See Offence of Zina Ordinance §§ 5–6, 17, *supra* note 1, at 52, 55.

7. See Execution of the Punishment of Whipping Ordinance, *supra* note 1, at 60–62.

In fact, while *rajm* was indeed a novel introduction to Pakistan's penal system, it may not be accurate to describe whipping as either a new or an exclusively "Islamic" form of punishment. Whipping was an available punishment prior to the Hudood laws under the Whipping Act, 1909. See Whipping Act, 1909 (IV of 1909), available at <http://www.pakistanlawyers.org> (follow "Statutes and Rules" hyperlink). For example, in *Farzand Ali v. State*, 1971 S.C.M.R. 715 (Sup. Ct. 1971), a case predating the Hudood Ordinances, the Supreme Court upheld a sentence for rape and kidnapping offenses, which included a penalty of twenty lashes. This case is rare, however, and except for whippings carried out in jails for disciplinary reasons, whipping was rarely employed as a punishment under the general criminal laws prior to the Hudood laws' enactment.

8. Initially, the shariat courts constituted part of the Pakistani High Courts. These courts were given judicial independence on May 26, 1980, after the insertion of Article 203C to Pakistan's Constitution. See PAK. CONST. art. 203C. The FSC consists of eight Muslim judges, three of whom are *ulema* (religious scholars). *Id.* cls. 2, 3A. The remaining judges are appointed from amongst those who are qualified to be judges of the High Courts. *Id.* cl. 3A. The Chief Justice must be serving on the High Courts, or should be qualified to be a judge of the Supreme Court of Pakistan. *Id.* cl. 3. Any judge of the High Courts who refuses appointment to the FSC faces automatic retirement. *Id.* cl. 5. The FSC has the power to review any and all Pakistani laws to determine whether they are repugnant to the injunctions of Islam. *Id.* art. 203D, cl. 1. FSC decisions are supreme, binding the High Courts and all lower courts. *Id.* art. 203GG. As regards the Hudood laws, the FSC acts as a court of appeals. *Id.* art. 203DD. Appeals from judgments of the FSC lie before the Shariat Appellate Bench of the Supreme Court. *Id.* art. 203F, cl. 1. The Shariat Appellate Bench consists of three Muslim judges of the Supreme Court as well as two ad hoc *ulema* judges appointed by the President. *Id.* cl. 3. These two appointed *ulema* judges are picked either from the FSC, or from a panel of *ulema* nominated by the President in consultation with the Chief Justice of the Supreme Court. *Id.* cl. 3(b).

9. Commenting on the significance of this event, Dr. Nasim Hasan Shah, retired Chief Justice of Pakistan, stated:

The conferment of such a power of judicial review, with a view to Islamising the existing laws, has no parallel in judicial history. No such power was con-

The promulgation of the Hudood laws received robust support from a small segment of Pakistani society: religious political parties and their most ardent followers.¹⁰ For these supporters, the laws were a welcome step towards the enforcement of shari'ah, and, as such, represented a logical and inevitable progression of those historic processes that had led to the creation of the "Islamic Republic of Pakistan."¹¹ The Hudood laws

ferred on Courts during the Muslim Rule when Islamic Fiqh was the governing law This indeed was a most awesome and far-reaching power, without any parallel in the history of the Islamic world and also a very potent instrument for accomplishing the process of Islamisation of laws within the shortest possible period. This power was, in fact, availed of fully both by the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court for bringing about the Islamisation of existing laws. Indeed as a result of the decisions of these Courts and the consequential steps taken to implement them, a silent revolution has come about in the legal field.

Nasim Hasan Shah, *Islamisation of Law in Pakistan*, 47 P.L.D. 1995 Journal 37, 41–42 (1995).

10. Religious political parties have historically failed to garner significant support in general elections. See Hassan Abbas, *Pakistan Through the Lens of the "Triple A" Theory*, 30 FLETCHER F. WORLD AFF. 181, 186 (2006). However, such parties have, at various times, enjoyed considerable power by virtue of their presence in governing coalitions. For example, the "MMA" (*Mutahida Majlis-e-Amal*), a coalition of six religious political parties, achieved unprecedented success in the latest general elections held in October 2002, and currently commands a majority in the provincial legislature of the North West Frontier Province. B. Muralidhar Reddy, *Pakistan's Religious Parties Losing Ground?*, THE HINDU, Sept. 2, 2005, at 2.

11. The demands for Islamization of laws are as old as Pakistan itself. According to Maulana Abul A'la Maudoodi, a renowned religious scholar, political activist, and the founder of the *Jamaat'i Islami* religious-political party: "The Pakistan movement was an expression of Muslim India's firm desire to establish an Islamic State. The movement was inspired by the ideology of Islam and the country was carved into existence solely to demonstrate the efficacy of the Islamic way of life." MAULANA ABUL A'LA MAUOODI, THE ISLAMIC LAW AND CONSTITUTION 10 (Khurshid Ahmad trans., Islamic Publications 4th ed. 1969) (1955). Dr. Nasim Hassan Shah has expressed similar sentiments: "The main reason why the Muslims of undivided India demanded Pakistan was that they wished to have a State where they could live according to their own cultural values, traditions and Laws." Shah, *supra* note 9, at 37. However, despite expressing an aspiration of Islamization in the Objectives Resolution, 1949, the first Constituent Assembly of Pakistan, as well as later framers of the three Constitutions of Pakistan, failed to give more than a lip service to the agenda of Islamization of laws. See Tayyab Mahmud, *Freedom of Religion & Religious Minorities in Pakistan: A Study of Judicial Practice*, 19 FORDHAM INT'L L.J. 40, 63 (1995). All three Constitutions, adopted in 1956, 1962, and 1973, included "Islamic provisions" which sought the Islamization of laws through legislation upon the advice of advisory councils composed of religious scholars. However, the process of Islamization did not take hold until the emergence of General Zia on the political scene, who gave the power of Islamization to the shariat courts. See William L. Richter, *The Political Dynamics of Islamic Resurgence in Pakistan*, 19 ASIAN SURV. 547 (1979),

immediately generated vehement protests and criticism from an equally partial sector of the society:¹² urban, "liberal," and "Westernized" members of human rights and women's rights organizations who subscribed to the notion of "separation of church and state."¹³ To these opponents, the laws represented gross violations of fundamental human rights, constitutional norms designed to uphold democratic participation in lawmaking, and the equality of citizens irrespective of their religion or gender.¹⁴ However, despite the protests, the majority of Pakistani citizens, ignorant

for a multi-faceted explanation of Islamic resurgence in Pakistan during the Zia regime in addition to Zia's personal interest in raising the banner of Islamization. Richter attributes the revival to a number of socio-political factors: the search for a national identity after the Bangladesh debacle; increased ties and enhanced proximity with the Middle East; increase in the geo-political rise of the Middle East on account of oil wealth; broader Islamic revival in the region; and disillusionment with the failures of capitalism and socialism in Pakistan. *Id.* at 549-57.

12. For a pictorial presentation of the protests held in opposition to the Hudood laws and their violent suppression by the military regime, see JAHANGIR & JILANI, *supra* note 2, at 34-45.

13. *See id.* at 18, 21. According to these authors, one can group people into four categories based on their opinions of Hudood laws. First, there are the unrelenting obscurantists who fully support the laws. *See id.* at 18. Second, there are those amongst the fundamentalists who realize that these laws are defective but "do not ask for their repeal or amendment because they think it would generally undermine the process of Islamization of laws." *Id.* at 21. Third, there are the patchworkers: "Theirs is the mission of peace making. They do not advocate any radical positions. They neither support the law in full nor seek its repeal. They want to appease both factions through amendments here and there." *Id.* Fourth, and last, there are the secularist opponents who "reject religion as a basis or source of law." *Id.*

14. Kennedy, *Islamization and Legal Reform in Pakistan*, *supra* note 2, at 74. Kennedy catalogues the criticisms leveled against the Hudood laws and Pakistan's Islamization program as follows:

(a) *The human rights argument.* The punishments specified in the *hudood* ordinances (stoning to death, amputation, whipping) constitute cruel and unusual punishments, and border on barbarism. (b) *The reactionary argument.* Nizam-i-Mustapha is characterized as an attempt to set Pakistan back fourteen hundred years to the time of Rightly-Guided Caliphs. (c) *The undemocratic argument.* Zia's Islamization program was designed to lend support to an unpopular military regime. His policies had the effect of banning political parties and silencing political opposition. (d) *The anti-minority argument.* The Nizam-i-Mustapha discriminates against non-Muslims, particularly the Ahmadiyya, and Christians. A corollary of this argument is that Nizam-i-Mustapha is dominated by the Sunni Hanafi *fiqh*, that is, it is anti-Shia. (e) *The misogyny argument.* Nizam-i-Mustapha discriminates against the rights of women. And (f) the *anti-rational argument.* Nizam-i-Mustapha is opposed to modernity and Westernization; and it is obscurantist.

Id.

of the laws' questionable Islamic credentials, weak doctrinal foundations, and numerous procedural defects, were swayed by the misleading label and remained approvingly silent.¹⁵

Although the Hudood laws have been mired in controversy since their inception, limited meaningful public deliberation has occurred during the last two decades. The argumentation over the Hudood laws, as well as the process of Islamization, has been mostly journalistic and occasionally academic.¹⁶ This has served only to harden the two extreme positions, with the two sides talking at each other, rarely listening, and hardly changing any minds.

Every democratically elected government constituted after the demise of General Zia, representing both sides of the political divide, has refrained from tinkering with the Hudood laws.¹⁷ This suggests an appreciation on the part of the country's lawmakers that the ideology of Islamization, if not the Hudood laws themselves, has continued to command the allegiance of a substantial majority of the citizens.¹⁸ Significantly, the

15. JAHANGIR & JILANI, *supra* note 2, at 22.

16. Whereas Pakistan's print media has historically betrayed a sensationalist bent, Western news media have exhibited a distinct bias against Islamic reforms. See Naz K. Modirzadeh, *Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds*, 19 HARV. HUM. RTS. J. 191, 191-94 (2006). The portrayals of Hudood laws in both domestic and international media have also been particularly affected by the complexity of these laws, resulting in perpetual repetition of inaccurate assertions. Unfortunately, many of these inaccuracies have even filtered into academic discourse. See *infra* note 113 and accompanying text.

17. For example, Benazir Bhutto's fierce opposition to Zia's Islamization program formed the centerpiece of the Pakistan People's Party's (PPP) election campaign in 1988. However, upon forming her government, Bhutto let the issues over Islamization fade from the public debate. As a result, the Hudood laws remained intact during the PPP governments of 1988-1990 and 1993-1996. See Saeed Shafqat, *Pakistan Under Benazir Bhutto*, 36 ASIAN SURV. 655, 657-58 (1996).

18. The "undemocratic" critiques of General Zia's Islamization program implicitly concede this point. See JAHANGIR & JILANI, *supra* note 2, at 22. However, Richard Kurin questions the assumption of widespread support for the Islamization process amongst Pakistan's mostly rural population. Richard Kurin, *Islamization in Pakistan: A View from the Countryside*, 25 ASIAN SURV. 852 (1985). His personal observations from a village in Central Punjab, recorded during 1978 and 1983, indicated only a limited influence of state-sponsored Islamization upon the daily lives of the villagers. *Id.* at 861. Kurin remarks that the villagers continued to exclude religious teachers from public decision-making, play cards, listen to loud music, refrain from praying and fasting, and condone adulterous affairs long after the enforcement of shari'ah laws in Pakistan. *Id.* at 854-61. However, it hardly needs saying that one village in Central Punjab is not a representative sample. *But cf.* JAHANGIR & JILANI, *supra* note 2, at 18 (arguing that Islamization has taken hold in Pakistan "despite the lack of overall popular support" because "the Islamic

Hudood laws have come to symbolize to many Western observers the perceived retrogressive and discriminatory nature of Islam and Islamic laws. In the present geo-political environment characterized by the “Clash of Civilizations” and the “War on Terror,” the Hudood laws appear to highlight the dangers associated with the rise of Islamic fundamentalism.¹⁹

A major reason for the failure of anti-Hudood activists to win widespread public support has been an inability, or perhaps a conscious decision on their part, to effectively and credibly challenge the fidelity of these laws to their Islamic doctrinal foundations.²⁰ Further, a bulk of the critique has focused on the language and the structure of the Hudood Ordinances and their misapplication in the trial courts.²¹ Inadequate attention has been paid thus far to the evolving jurisprudence of the Shariat appellate courts, which, compelled by the logic of traditional *fiqh* (Is-

political parties carry a group of dedicated followers, with enough strength, organisation and clout to keep all governments from implementing a progressive secular policy”).

19. See, e.g., CHERYL BENARD, CIVIL DEMOCRATIC ISLAM: PARTNERS, RESOURCES, AND STRATEGIES 17–20 (2003) (discussing the harsh criminal punishments in fundamentalist Islamic justice); Joan Fitzpatrick & Alice Miller, *International Standards on the Death Penalty: Shifting Discourse*, 19 BROOK. J. INT'L L. 273, 358–60 (1993) (contending that the prevalence of capital punishment in Pakistan is owed to the influence of Islamic fundamentalism).

20. In 2002, the National Commission on the Status of Women (“NCSW”) formed a fifteen-member Special Committee to review the Hudood Ordinances. The Committee held five meetings and recommended, by a sizable majority, that the Ordinances be repealed. NAT'L COMM'N ON THE STATUS OF WOMEN, REPORT ON HUDOOD ORDINANCES 1979 13–14 (2003) [hereinafter NCSW Report]. The NCSW Report, while refreshing the controversy, has added very little to the academic debate. It merely summarizes the diverse opinions expressed at the meetings, which, for the most part, are regurgitations of standard arguments. The superficiality of the analysis conducted in the NCSW Report is reflected most clearly in its discussions on the question of rajm, which the Report acknowledged required detailed study, yet with little hesitation recommended its repeal. See *id.* at 13–14, 36–38. Thus far, no action has been taken in pursuance of the NCSW Report. Like earlier efforts from the Commission of Inquiry for Women, the NCSW Report is likely to be ignored. See THE COMM'N OF INQUIRY FOR WOMEN, REPORT OF THE COMM'N OF INQUIRY FOR WOMEN (Aug. 1997) [hereinafter CIW Report]. In 1997, that commission had also recommended repeal of the Hudood laws after finding, without a thorough investigation, the laws to be “not in conformity with injunctions of Islam.” *Id.* at 75. However, this report had done a much better job than the NCSW Report as far as documenting the problems associated with the enforcement of the Hudood laws.

21. See JAHANGIR & JILANI, *supra* note 2, at 85–130, for a work representative of this approach. Jahangir and Jilani's book contains extensive analysis of trial cases in which the Sessions courts have made glaring errors. Problem decisions handed down by the FSC have also been highlighted. However, the book makes only passing references to those FSC cases overturning Sessions courts' decisions or overruling problematic FSC decisions, and it offers no analysis whatsoever of the FSC's jurisprudence.

lamic jurisprudence) doctrines, have managed to shape the substantive laws in a manner that appears to alleviate many of the criticisms directed against these laws.²² This lack of attention towards the role of the Shariat courts in shaping the Hudood laws may be attributable to a general perception amongst the critics that the Shariat courts espouse an essentially conservative ideology in consonance with the proponents of the Hudood laws. This perception, which is rooted in the political origins and the early history of the Shariat courts,²³ does not fully accord with the recent practice or the present jurisprudential approach of the Shariat courts in Pakistan.²⁴

22. Amira Sonbol contends that inattention to the practice of shari'ah courts in general is pervasive in Western scholarship of Islamic law. Amira Sonbol, *Women in Shari'ah Courts: A Historical and Methodological Discussion*, 27 *FORDHAM INT'L L.J.* 225 (2003). Studying the practice of pre-modern shari'ah courts in Egypt, Sonbol discovers that the legal precedents of these courts protected the rights of women to a greater extent than many of the religious and secular codes in force today. *Id.* at 252. She concludes that "ideological presumptions," along with a lack of research, has led to the almost total disregard for the "legal practices accumulated over the centuries which had constituted a common law" in Islamic societies. *Id.*

23. The establishment of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court generated substantial criticism on various constitutional grounds. *See generally* Kennedy, *Islamization and Legal Reform in Pakistan*, *supra* note 2, at 66–67. First, in establishing these "Islamic" courts, the President amended Pakistan's Constitution in the absence of Parliament. Second, the President's power of appointment of ulema judges to the judiciary gave rise to the concern that the Shariat courts would adopt the orthodox positions on interpretations of Islamic law espoused by a segment of the society that formed a numerically insignificant portion of the electorate. Having the power to overrule any legislation enacted by future democratically elected Parliaments, the Shariat courts, it was feared, would impose the views of this minority over those of the majority. Third, the creation of the Shariat courts appeared to undermine further the idea that the judiciary was an independent branch of Pakistani government.

24. *See* Julie Dror Chadbourne, *Never Wear Your Shoes After Midnight: Legal Trends Under the Pakistan Zina Ordinance*, 17 *WIS. INT'L L.J.* 179, 181 (1999) ("[W]hile the body of law relating to the Zina Ordinance is varied, the Pakistani judiciary is developing case law that may assist future advocates . . . in their efforts on behalf of their clients."). In fact, it has been argued that the FSC has always played less of a demonic role than has been attributed to it by its critics. *See* Charles H. Kennedy, *Islamization in Pakistan: Implementation of the Hudood Ordinances*, 28 *ASIAN SURV.* 307 (1988) [hereinafter Kennedy, *Islamization in Pakistan*]. In a statistical review of the jurisprudence of the FSC from 1980 to 1984, Charles Kennedy found that the FSC "accepts or partially accepts an extraordinarily high percentage of the appeals before it . . . [and] that the FSC 'upheld fully' only 19% of the convictions brought before it and that it acquitted 52% of the appellates." *Id.* at 309. Kennedy also found that over ninety percent of the cases overturned by the FSC were reversed "because of misappreciation of facts, not misinterpretation of law, . . . [and that] even in cases in which it upheld the conviction of the sessions judge, the FSC was more lenient in its sentencing." *Id.* at 309–10. Accordingly, Kennedy concluded that the "the net effect of FSC decisions . . . has been to moderate substantially

This paper will survey the contours of the controversies surrounding the Hudood laws and seek to identify the extent to which the divergent perceptions accord with the reality. The aim is to broaden the horizons of the debate surrounding the Hudood laws by incorporating an “Islamic critique,” something that has generally been lacking in the discourse. More importantly, the paper seeks to analyze the role that the FSC has played in substantively shaping the law, indicating thereby that Islamic critiques may offer a viable avenue for alleviating the hardships perpetrated in the application of the Hudood laws. Whereas, it may not be practical to undertake a holistic analysis of the FSC’s entire jurisprudence at this stage, this paper will put forward a chronological analysis of the Court’s decisions on one—arguably the most contentious—aspect of the Hudood laws: the conviction of rape victims for *zina* (consensual adultery/fornication) where the pregnancy caused by the rape is regarded as proof of the crime. Criticisms of this scenario have been repeated persistently in both international and domestic news media, and have even become cliché in most academic critiques of the Hudood laws.²⁵ Most such critiques, however, offer little or no analysis of the relevant jurisprudence of the Shariat courts.

Part II of the paper will provide an overview of the provisions of the “Offence of Zina (Enforcement of Hudood) Ordinance, 1979” (Zina Ordinance), and outline the circumstances in which some trial courts have considered pregnancy as proof of *zina* in cases prosecuted under the Ordinance. Part III of the paper shall present a review of the jurisprudence of the FSC, indicating the extent to which the Court has addressed the criticisms engendered by the consideration of pregnancy as proof of *zina*.²⁶ Part IV will then highlight the principal arguments presented by both the proponents and opponents of the Hudood laws, and analyze the major disagreements in their approaches. Furthermore, it will be argued that this debate has reached a stalemate primarily because it fails to incorporate a vital dimension: a thorough and credible Islamic critique,

the zeal of the sessions judges in enforcing the Hudood statutes.” *Id.* at 310. Kennedy attributes this moderation to the typical composition of the Shariat courts and the background of the judges. Kennedy, *Islamization and Legal Reform in Pakistan*, *supra* note 2, at 65–66. Whereas the critics complain about the presence of ulema judges on the bench, Kennedy points out that eighteen of the twenty-three judges appointed to serve on the FSC between 1980 and 1989 were former High Court judges, and that twenty possessed Western-style law degrees. *Id.* at 66.

25. See, e.g., JAHANGIR & JILANI, *supra* note 2, at 86–87; Weiss, *supra* note 2, at 870.

26. This part of the paper will incorporate detailed excerpts from the relevant judgments, many of which have been written in grammatically or stylistically deficient English. No attempt has been made to revise the language since it is important to let the judges, under scrutiny, speak for themselves.

evaluating the extent to which the Hudood laws, as presently enforced in Pakistan, accord with the traditional fiqh doctrines upon which they are supposedly founded. The paper shall also advance the argument that the positive developments in the jurisprudence of the FSC are not merely attributable to the political pressures generated by the opponents of the Hudood laws or to international media attention. Rather, it will be shown that the categorical imperatives embedded in the Islamic fiqh doctrines at the foundations of the Hudood laws necessitate many of the positions taken by the Court. Proposals for reform and a conclusion will follow.

II. THE ZINA ORDINANCE

A. Overview

It is said that the Zina Ordinance introduced the sexual offenses of zina and *zina-bil-jabr* (rape) into Pakistan's criminal laws.²⁷ Whereas zina was a previously unknown offense,²⁸ the zina-bil-jabr provisions of the Ordinance replaced pre-existing rape provisions in the Pakistan Penal Code.²⁹ However, the FSC has held that the Ordinance represents a

27. See Offence of Zina Ordinance §§ 4, 6, *supra* note 1, at 52. Additionally, the Zina Ordinance transferred some offenses from the general criminal laws of the Pakistan Penal Code to the Hudood laws, or created new offenses similar to those already existing. See, e.g., *id.* § 12, at 54 (prohibiting “[k]idnapping or abducting in order to subject person to unnatural lust”); *id.* § 14, at 54 (prohibiting “[b]uying person for purposes of prostitution”); *id.* § 15, at 55 (prohibiting “[c]ohabitation caused by a man deceitfully inducing a belief of marriage”); *id.* § 16, at 55 (prohibiting “[e]nticing or taking away or detaining with criminal intent a woman”).

28. While zina was a previously unknown offense, adultery was already punishable under the Pakistan Penal Code. The penal code provided:

Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

PAK. PEN. CODE ch. 20, § 497 (1860) (repealed by Zina Ordinance). Adultery, prior to the Zina Ordinance, was thus an offense that could only be committed by a man. Fornication, or consensual sexual intercourse between unmarried persons, was not an offense prior to the enforcement of the Zina Ordinance.

29. See PAK. PEN. CODE ch. 16-A, §§ 375–376 (1860), *repealed by* Offence of Zina Ordinance § 3, *supra* note 1, at 52.

“complete departure” from the previous law.³⁰ Accordingly, “no offence by the name of rape exists in the *corpus juris* of Pakistan” any longer.³¹

Section 4 of the Ordinance defines the offense of zina as willful sexual intercourse between a man and a woman who are not validly married to each other.³² Zina is liable to the punishment of *hadd* (punishment ordained by the Qur’an)³³ if the following proof is presented to the Sessions Court (the trial court): the accused confesses to the commission of zina before the court, or the prosecution presents four credible adult male Muslim eyewitnesses who have seen the very act of penetration.³⁴ The

30. Muhammad Asghar v. State, 37 P.L.D. 1985 F.S.C. 1, 5 (1984).

31. Muhammad Hayat v. Superintendent, Central Jail, Faisalabad, 2002 Y.L.R. 23, 24 (Lahore High Ct. 2001).

32. Section 4 of the Zina Ordinance provides:

4. *Zina*.—A man and a woman are said to commit ‘zina’ if they willfully have sexual intercourse without being validly married to each other.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of zina.

Offence of Zina Ordinance § 4, *supra* note 1, at 52.

33. Hudood are generally defined as those crimes for which punishment has been fixed by divine commandment. Though this definition is uniformly adhered to by the ulema, the catalogue of the Hudood crimes in fact varies. As such, some consider only those crimes to be Hudood which have been mentioned in the Qur’an and for which the punishment has been explicitly prescribed therein. Others include those crimes that, though mentioned in the Qur’an, punishment is not explicitly provided. For example, the consumption of alcohol is forbidden by the Qur’an, but it provides no punishment. Yet, a majority of the ulema consider this to be a hadd offense and derive its punishment from the Sunnah. A third category of ulema point out that there is no distinction between hadd and tazir in the Sunnah, and consider all those crimes which are referenced in the Qur’an or the Sunnah to be hadd crimes. There are only four crimes that have been explicitly mentioned in the Qur’an: zina, *haraabah* (variously defined as highway robbery, forcible taking of property, or waging war against the state); *shurb al-khamr* (consumption of wine); and qazf (unwarranted accusation of zina). Of these, the punishment for *shurb al-khamr* is not mentioned in the Qur’an. Verse 5:33 of the Qur’an, which deals with *haraabah*, mentions four possible punishments for this category of crimes: *taqteel* (execution), *tasleeb* (crucifixion), amputation of a hand and the opposite foot, or exile. As regards zina, although the Qur’an expressly mentions the punishment of one hundred lashes in verse 24:02, a majority of the ulema have relied on certain *ahadith* (narrations on what the Prophet Muhammad approved) to establish rajm as the appropriate hadd punishment. See Hazoor Bakhsh v. Federation of Pakistan, 33 P.L.D. 1981 F.S.C. 145, 153 (1981) (Durrani, J., dissenting) (“No doubt the punishment for a married woman . . . is stoning to death as against [an] unmarried one who is to be given 100 lashes.”).

34. Section 8 of the Zina Ordinance, which establishes the proof requirements, provides:

8. *Proof of zina or zina-bil-jabr liable to hadd*.—Proof of Zina or zina-bil-jabr, liable to hadd shall be in one of the following forms, namely:—

hadd punishment for zina committed by a man or woman who is, or has previously been, married and has had sexual intercourse in the course of that marriage is rajm.³⁵ The hadd punishment for zina committed by a

(a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence; or

(b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of tazkiyah al-shuhood, that they are truthful persons and abstain from major sins (kabair), give evidence as eye-witnesses of the act of penetration necessary to the offence. Provided that, if the accused is a non-Muslim, the eye-witnesses may be non-Muslims.

Explanation. In this section “tazkiyah al-shuhood” means the mode of inquiry adopted by a Court to satisfy itself as to the credibility of a witness.

Offence of Zina Ordinance § 8, *supra* note 1, at 53. The FSC has consistently interpreted the confession requirement of subsection (a) to mean confessions freely given before the Sessions Court on four different occasions. Confessions made to the police or to a Magistrate in pre-trial proceedings do not fulfill this requirement. *See, e.g., Zafran Bibi v. State*, 54 P.L.D. 2002 F.S.C. 1, 14 (2002). The requirement of four Muslim adult male witnesses has been derived from the following Qur’anic injunction:

If any of your women Are guilty of lewdness, Take the evidence of four (reliable) witnesses from amongst you Against them; and if they testify, Confine them to houses until Death do claim them, Or God ordain for them Some (other) way.

Qur’an 4:15 (Abdullah Yusuf Ali trans., The Islamic Center 3d ed. 1938).

35. Offence of Zina Ordinance § 5(2)(a), *supra* note 1, at 52. The distinction between adultery and fornication has proven to be one of the most debated aspects of the Zina Ordinance. The Qur’anic injunction in verse 4:15 has been widely understood to antedate verse 24:2, the only prescription in the Qur’an of a specific punishment for adultery and fornication:

The woman and the man Guilty of adultery or fornication, Flog each of them With a hundred stripes: Let not compassion move you In their case, in a matter Prescribed by God, if ye believe In God and the Last Day: And let a party Of the Believers Witness their punishment.

Qur’an 4:15 (Abdullah Yusuf Ali trans., The Islamic Center 3d ed. 1938). Verse 24:2 betrays no distinction between adultery and fornication and prescribes only one punishment for both offenses, one-hundred lashes in public. A majority of the Justices sitting on the FSC panel in *Hazoor Bakhsh* seized upon this verse to declare rajm un-Islamic. *See Hazoor Bakhsh*, 33 P.L.D. 1981 F.S.C. at 147 (Ali Hyder, J., concurring) (“[S]toning to death . . . is repugnant to the Injunctions of Islam.”). This decision resulted in significant embarrassment to the military regime of General Zia, which immediately amended the Constitution to grant the FSC the power to review its own judgments. JAHANGIR & JILANI, *supra* note 2, at 29. In 1982, the review petition was heard by a wholly reconstituted FSC: the three judges who had formed the *Hazoor Bakhsh* majority had since been removed, and the one dissenting judge, who had opined that rajm is a valid Islamic hadd

man or woman who is neither married, nor previously been married, is public whipping of one-hundred lashes.³⁶ A sentence of hadd may only be executed if the FSC has confirmed it after a hearing, regardless of whether or not the defendant has filed an appeal.³⁷

Section 6 of the Ordinance defines zina-bil-jabr as the act of having non-consensual sexual intercourse with a man or woman with whom the accused is not validly married.³⁸ Zina-bil-jabr is committed when the accused has had intercourse either: (a) against the victim's will; (b) without the victim's consent; (c) after obtaining the victim's consent by duress; or (d) after obtaining the victim's consent by inducing a fraudulent belief of a valid marriage.³⁹ Zina-bil-jabr is liable to hadd punishment if proof according to Section 8 of the Ordinance is presented before the Court.⁴⁰ The hadd punishment for zina-bil-jabr committed by a man who is, or has previously been, married and has had sexual intercourse in the course of that marriage is rajm.⁴¹ The hadd punishment for zina-bil-jabr committed by a man who is not, and has never previously been, married is public whipping of one-hundred lashes, as well as any other punishment, including a death sentence, that the court may consider appropriate

punishment, had died by the time the review petition was heard. This reconstituted FSC unanimously held that rajm was not repugnant to Islam. *Id.* at 29–30.

36. Offence of Zina Ordinance § 5(2)(b), *supra* note 1, at 52.

37. *Id.* § 5(3).

38. *Id.* § 6. Section 6(1) of the Zina Ordinance makes it clear that a woman can be accused of committing zina-bil-jabr against a man, or possibly even a woman. Contrast this with the repealed rape provisions of the Pakistan Penal Code, which defined rape as the commission of sexual intercourse “with a woman . . . [a]gainst her will . . . [or w]ithout her consent.” PAK. PEN. CODE ch. 16-A, § 375 (1860) (repealed by Zina Ordinance). Other than the gender-neutrality of its language, section 6 of the Zina Ordinance mimics the repealed rape provisions. This gender-neutrality is somewhat perplexing since penetration is a requirement for criminal liability. *See* Offence of Zina Ordinance §4, *supra* note 1, at 52 (“Penetration is sufficient to constitute the sexual intercourse necessary to the offence of ‘zina-bil-Jabr.’”). It is, therefore, hard to conceive of a situation in which a woman may commit zina-bil-jabr with a man or another woman. Additionally, note that the section 6 definition of zina-bil-jabr excludes marital rape from its prohibition. *See id.* §6(1) (providing that the zina-bil-jabr prohibition applies only to those persons “not validly married”). This is a point of divergence between the Zina Ordinance and the repealed Pakistan Penal Code provisions, which provided for a punishment of up to two years imprisonment. PAK. PEN. CODE ch. 16-A, § 376 (1860) (repealed by Zina Ordinance).

39. Offence of Zina Ordinance § 6(1), *supra* note 1, at 52.

40. *See supra* note 34 and accompanying text.

41. Offence of Zina Ordinance § 6(3)(a), *supra* note 1, at 53.

having regard to the circumstances of the case.⁴² As with sentences of hadd for convictions of zina, sentences of hadd for convictions of zina-bil-jabr cannot be executed unless they are confirmed by the FSC.⁴³

If the proof required for hadd punishment is not available, a court may still convict the accused of either zina or zina-bil-jabr liable to *tazir* (discretionary punishment under the Zina Ordinance) where other direct or circumstantial evidence of the commission of the offense is available.⁴⁴ The maximum *tazir* punishment for zina is rigorous imprisonment of ten years.⁴⁵ The *tazir* punishment for zina-bil-jabr is rigorous imprisonment of four to twenty-five years.⁴⁶ In cases of zina-bil-jabr committed by a

42. *Id.* § 6(3)(b). Note that this is the same punishment that the Qu'ran prescribes for zina in verse 24:2. *See supra* note 35. The Qu'ran does not explicitly take cognizance of, or prescribe punishment for, rape.

43. Offence of Zina Ordinance § 6(4), *supra* note 1, at 53.

44. As opposed to hadd punishments, *tazir* punishments are not statutorily fixed and may be left to the discretion of the judge. *Compare id.* § 5(2), at 52 (detailing punishment for zina liable to hadd), *and id.* § 6(3), at 53 (detailing punishment for zina-bil-jabr liable to hadd), *with id.* §§ 10(2), 10(3), at 54 (detailing punishments for zina and zina-bil-jabr liable to *tazir*).

45. *Id.* § 10(2), at 54. Asifa Quraishi has questioned the very logic of awarding *tazir* punishments for zina. Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman Sensitive Perspective*, 18 MICH. J. INT'L L. 287, 313 (1997). She points out that punishment for zina as hadd requires the eyewitness testimony of four individuals, because the crime is prosecutable by the state only when it is a public act of indecency. *Id.* at 311–13. At the same time, the Qu'ran strictly forbids *qazf*, or unsubstantiated accusations of zina. When an allegation of zina is made and four eyewitnesses are not forthcoming, the Qu'ran declares:

And those who launch A charge against chaste women,
And produce not four witnesses (to support their allegations), —
Flog them with eighty stripes; And reject their evidence
Ever after: for such men Are wicked transgressors; —
Unless they repent thereafter And mend (their conduct);
For God is Oft-Forgiving, Most Merciful.

Qu'ran 24:4. Therefore, Quraishi argues, the Qu'ran forbids prosecution for zina as *tazir*, since such charges are invariably brought only when four eyewitnesses are not available. Quraishi, *supra*, at 312. In such circumstances, she continues, the only offense that should be prosecuted is the *qazf* committed by the complainant. *See id.* at 299.

46. Offence of Zina Ordinance § 10(3), *supra* note 1, at 54. Sections 10(2) and 10(3) of the Zina Ordinance had prescribed a sentence of whipping of up to thirty lashes in addition to imprisonment for *tazir* offenses. However, the Abolition of the Punishment of Whipping Act, 1996 (VII of 1996) eliminated whipping as a punishment for all offenses, including *tazir*, other than those “where the punishment of whipping is provided for as hadd.” *See, e.g.,* Abdul Razzaque v. State, 2003 P.Cr.L.J. 1256 (Lahore High Ct. 2002) (setting aside the whipping portion of the petitioner’s sentence for zina-bil-jabr liable to *tazir*).

gang of two or more people, the tazir punishment is a mandatory death sentence.⁴⁷

B. Pregnancy as Proof of Guilt

One of the primary criticisms leveled against the Zina Ordinance is that it results in the equation of rape with consensual adultery/fornication such that when a victim of rape is unable to prove that she had been subjected to non-consensual intercourse, she herself stands accused of having committed zina and is convicted and punished for that offense. This criticism is indeed founded in the stark reality of the Pakistani criminal justice system. There have been many cases where women allege the commission of zina-bil-jabr against them, but the police, taking into consideration the pregnancy caused by the alleged rape and the delay in bringing the complaint, treat their case as one of zina instead.⁴⁸ In a few of these cases, the Sessions Courts acquitted the accused rapists for lack of sufficient evidence against them, yet nonetheless convicted the female victims for the offense of zina, regarding as proof the pregnancy caused by the alleged rape. The circular argument adopted by the Sessions Courts in these cases is that extra-marital pregnancy amounts to proof that an act of sexual intercourse occurred, and since the woman has failed to prove the rape, through the absence of consent or otherwise, the sexual intercourse is therefore consensual and amounts to zina.⁴⁹ Even

47. Offence of Zina (Enforcement of Hudood) (Amendment) Act (VI of 1997) (amending the Zina Ordinance to provide this punishment through the addition of a new section, § 10(4)).

48. The role of the police in rape cases has been subject to severe criticism. The police in Pakistan are notorious for ill-treatment of rape victims and in many cases refuse to file charges. Police officials have also been accused of committing rape on women in their custody. *See generally* HUMAN RIGHTS WATCH, CRIME OR CUSTOM?: VIOLENCE AGAINST WOMEN IN PAKISTAN 45–47, 52–64 (2001). For recommendations on reform of police practice and rules, see *id.* at 10–11.

49. This represents a misunderstanding of the burden of proof in criminal cases. In order to convict an accused, the prosecution has to prove “beyond a reasonable doubt” that the accused committed the crime. *See, e.g.*, 32A C.J.S. *Evidence* § 1308 (2006). In contrast, in order to win a civil case, a party has to prove that it is more likely than not that its claim is true. *See, e.g.*, 32A C.J.S. *Evidence* § 1311 (2006). Therefore, one might legitimately say that in order to win a civil case a party has to bring sufficient evidence to show that the probability of its version of the events being true is more than fifty percent. On the other hand, it is not possible to assign a numerical value to the burden of proof in criminal cases. For example, when a trial judge in the United States instructed a jury that the standard of proof could be viewed as “seven and a half, if you had to put it on a scale” of ten, the Nevada Supreme Court reversed on appeal stating: “The concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution’s burden of proof.” *McCullough v. State*, 657 P.2d 1157, 1159 (Nev. 1983).

those rape victims who ultimately escape conviction for zina end up suffering significant imprisonment prior to and during trial, and are subjected to unnecessary stigma, humiliation, and pain.⁵⁰

In most jurisdictions, rape and other sexual crimes are usually exceedingly hard to prove. For example, these crimes are often committed in private, so invariably the victim's word is pitted against that of the accused.⁵¹ Given that conviction for a crime, especially one as serious as rape, requires proof beyond a reasonable doubt, courts require the prosecution to adduce significant medical or other circumstantial evidence in corroboration of the victim's testimony.⁵² In Pakistan, the possibility of credible medical evidence being available to a criminal court is minimal. When a victim alleges rape, the normal practice is to present the victim for a medical examination at a government hospital. In most cases, the medical examination reveals only limited evidence: (a) whether sexual intercourse has recently taken place as indicated by the presence of semen in the vagina; (b) whether the victim has been having sexual intercourse in the past; and (c) whether the victim has become pregnant.⁵³ Medical techniques which may identify the perpetrator, such as DNA testing of semen or paternity testing, have become widely available to the police and prosecution in most Western jurisdictions, but still remain unavailable in Pakistan except in the most high profile cases.⁵⁴

Nonetheless, should the prosecution fail to secure a conviction because it only managed to prove that its version of the facts was seventy-five percent probable, it may still be possible to hold that it is more likely than not that the prosecution is telling the truth. For example, whereas O.J. Simpson was found not guilty of murder at his criminal trial, he was, nonetheless, found liable at the subsequent civil trial. *See* *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492, 497 (Cal. Ct. App. 2001). By the same logic, if a victim brings a charge of zina-bil-jabr but fails to prove it beyond a reasonable doubt, she may still be telling the truth. As such, there is no reason to assume if she fails to prove zina-bil-jabr, then she must have committed zina. Treating zina and zina-bil-jabr as either/or offenses represents a logical fallacy.

50. *See* Chadbourne, *supra* note 24, at 217–29.

51. *See* Tiffany Bohn, *Yes, Then No, Means No: Current Issues, Trends, and Problems in Post-Penetration Rape*, 25 N. ILL. U. L. REV. 151, 173–75 (2004) (noting that a problem of proof in rape cases is conflicting testimony of the victim and the accused).

52. JAHANGIR & JILANI, *supra* note 2, at 13. *But see* 75 C.J.S. *Rape* § 94 (2006) (“Corroboration of a victim’s testimony in sexual offense cases is triggered only by contradictions in the victim’s trial testimony.”).

53. *See* Chadbourne, *supra* note 24, at 235–60 (describing the uses and limits of medical evidence in Zina Ordinance cases).

54. *See* HUMAN RIGHTS WATCH, *supra* note 48, at 47–49, 64–95 (detailing the lack of “medicolegal” capabilities and facilities in Pakistan). For recommendations on reform of Pakistan’s medicolegal system, see *id.* at 11–14.

Given Pakistan's conservative social environment, with its stigma attachments and concerns regarding family honor such that "honor killing" is even a possibility, victims in most rape cases do not lodge complaints with the police.⁵⁵ In cases where a complaint is filed, it is usually after long and careful deliberation by the family of the accused. In many cases, the rape is only reported after the victim becomes aware of her pregnancy and realizes that she has no choice but to complain. In such situations, the rudimentary medical examinations conducted are not likely to produce any helpful evidence. In fact, the medical evidence in most cases makes the victim's position even more precarious, since it is assumed that she is making an accusation of rape only to excuse her illicit conduct. Thus, in choosing between reporting and silence, rape victims often find themselves in a lose-lose situation.

III. THE CASES

There have been at least eight reported cases in which the FSC has explicitly dealt with the question of whether pregnancy can be considered sufficient proof of zina in the absence of any other evidence. A chronological analysis of these cases, revealing the progressive development of the Court's views on this narrow issue, as well as the laws pertaining to zina and zina-bil-jabr generally, is as follows:

A. *Sakina v. State (1981)*⁵⁶

Sakina and Wali Dad were married to each other at the time of their arrest for commission of zina. The prosecution, based on the First Information Report (F.I.R.)⁵⁷ lodged by Sakina's brother, alleged that Sakina and Wali Dad had had an illicit relationship prior to their marriage. At the time of her arrest, Sakina, according to the medical examiner, had been pregnant for thirty-two weeks even though less than eighteen weeks had elapsed since her marriage to Wali Dad. Sakina's explanation for her premarital pregnancy was that it might have been the result of sexual acts she had been forced to engage in with certain visitors by her family. The Sessions Court disbelieved her, convicted both she and Wali Dad for zina

55. See Manar Waheed, Note, *Domestic Violence in Pakistan: The Tension Between Intervention & Sovereign Autonomy in Human Rights Law*, 29 BROOK. J. INT'L L. 937, 944-46 (2004) (describing the practice of honor killing in Pakistan).

56. 33 P.L.D. 1981 F.S.C. 320 (1981).

57. The F.I.R. is the formal complaint of an offense lodged with the police. The F.I.R. is the pivotal document in Pakistani criminal prosecutions. Judges, both trial and appellate, frequently test the veracity of the prosecution's evidence by comparing it to the version of the events alleged in the F.I.R.

liable to tazir, and sentenced them each to four years of rigorous imprisonment and thirty-three lashes.⁵⁸

In a brief judgment, a full bench of the FSC overturned both convictions. As regards Wali Dad, the Court found no credible evidence against him.⁵⁹ In Sakina's case, the Court stated:

In these circumstances we have no material on record to enable us to hold that Mst. Sakina had been committing sexual intercourse with others willingly. In the absence of proof of her consent she cannot be held to have committed the offence of Zina.⁶⁰

As such, the Court affirmed a cardinal principle of criminal law, that the burden of proving all the elements of the crime beyond a reasonable doubt is on the prosecution.⁶¹ Until the prosecution satisfies that burden, the accused has no case to answer.

A woman's consent is an essential element for any conviction for the crime of zina.⁶² This element has to be categorically proven by the prosecution, and cannot merely be inferred from the accused's pregnancy or other surrounding circumstances. Here, the Sessions Court had treated the question of consent as if the absence of consent is a defense that the accused has to establish to the court's satisfaction. This shifted the burden of proof to the accused. The FSC rightly corrected that error.

*B. Jehan Mina v. State (1983)*⁶³

Jehan Mina was hardly sixteen at the time of her arrest. She was approximately five to six months pregnant, and claimed that her uncle and cousin had raped her while she was visiting their home to look after a sick aunt.⁶⁴ At the time of the discovery of her pregnancy, Jehan Mina was living with another uncle, Noor Said. Allegedly, Jehan Mina's grandfather, her legal guardian, demanded that Noor Said hand Jehan Mina over to his custody so that he might kill her in order to preserve the family's honor. Noor Said refused his family's pressure, and lodged an F.I.R. with the police. Instead of initiating an investigation of zina-bil-jabr, the police made Jehan Mina a co-accused in a case of zina. The Sessions Court trying the case acquitted both of the accused males on the

58. *Sakina*, 33 P.L.D. 1981 F.S.C. at 321.

59. *Id.* at 322.

60. *Id.* at 323.

61. *See supra* note 49.

62. *See* Offence of Zina Ordinance § 4, *supra* note 1, at 52 (requiring persons to "willfully have sexual intercourse" for conviction).

63. 35 P.L.D. 1983 F.S.C. 183 (1983).

64. *Id.* at 184.

grounds that they could not be convicted merely on the basis of Jehan Mina's statement.⁶⁵ However, the court convicted Jehan Mina for zina liable to hadd, and imposed a punishment of one hundred lashes.

The FSC upheld Jehan Mina's conviction on appeal, but reduced her offense from zina liable to hadd to zina liable to tazir. Taking into consideration her "tender age" and the fact that she had been deprived of the "benefit of paternal affection," the Court reduced her sentence to three years rigorous imprisonment and ten lashes.⁶⁶ The Court provided the following rationale in justification of its decision: "[T]he basis of the conviction is her unexplained pregnancy coupled with the fact that she is not a married girl."⁶⁷ The Court added that since Jehan Mina had kept quiet for over five months, it was "difficult to believe her statement that zina-bil-jabr had been committed with her."⁶⁸ The Court also found it important that "she had the opportunity of complaining to her grandfather but . . . never did so."⁶⁹

Given that her grandfather had expressed a serious intent to kill her in order to preserve the family honor, how valid was the Court's reasoning? This case has been widely criticized and cited as a representative example of the gross injustices perpetrated under the Hudood laws.⁷⁰ According to one women's rights campaigner:

Apart from the injustice that Jehan Mina suffered from society and the system of justice, the case had serious future implications for victims of rape resulting in pregnancy. While rapists would have to be proved guilty, victims would be presumed guilty and the burden would be on them to prove their innocence.⁷¹

The legal reasoning employed by the FSC in this judgment clearly conflicted with that in *Sakina*. The Court in *Jehan Mina* appeared to have forgotten the fundamental principles of criminal liability outlined in its own precedent. Further, the purpose of the creation of an independent FSC with three ulema on its bench was to decide cases according to the Islamic injunctions laid down in the Qu'ran and Sunnah.⁷² In this case, the Court based its decision exclusively on misapplied common law

65. *Id.* at 186.

66. *Id.* at 188.

67. *Id.* at 187.

68. *Id.*

69. *Id.*

70. See, e.g., SHAHLA ZIA, VIOLENCE AGAINST WOMEN & THEIR QUEST FOR JUSTICE 81 (2002).

71. *Id.* But see HUMAN RIGHTS WATCH, *supra* note 48, at 40 ("Such cases are far less frequent in the late 1990s than they were in the 1980s.")

72. See *supra* note 8.

principles of criminal liability and evidence, without even once referring to Islamic principles of liability.

*C. Siani v. State (1984)*⁷³

The *Siani* case arose from the discovery of a stillborn fetus in a residential area. The prosecution alleged that Siani, wife of Pahalwan, had engaged in unlawful sexual intercourse with her co-accused, Ghulam Najaf, prior to her marriage, and that this relationship resulted in her pregnancy. The prosecution further charged that in order to conceal her zina and the resulting pregnancy, Siani had caused herself to miscarry and had disposed of the aborted fetus.⁷⁴ The Sessions Court acquitted her male co-accused, finding no evidence against him. The only evidence against Siani was the report of the medical examiner, who had opined that Siani showed signs of recent pregnancy and had probably miscarried around the time of the discovery of the dead fetus.⁷⁵ This was sufficient proof for the Sessions Court, which convicted Siani of the offense of zina liable to tazir under Section 10 of the Zina Ordinance and sentenced her to five years rigorous imprisonment and thirty lashes.

A single bench of the FSC, composed solely of Justice Muhammad Siddiq, overturned Siani's conviction on appeal, holding that medical evidence of pregnancy alone cannot form the basis of a criminal conviction.⁷⁶ The Court, affirming the stance adopted in *Sakina*, and without referring to *Jehan Mina*, made the following comment:

This Court has already said in several cases that a mere pregnancy/abortion or birth of an illegal child of an unmarried girl/widow or a married woman whose husband has no access to her during the relevant period, could not be sufficient to prove her guilty under section 10 of the Ordinance unless it is further proved by the prosecution that she was a consenting party for the said Zina resulting in her conception and then in abortion.⁷⁷

Unlike the accused in *Sakina*, Siani had not alleged that she had been subjected to zina-bil-jabr. In fact, she completely denied that she had ever had sexual intercourse prior to her marriage, or that she had miscarried. In this regard, *Siani* better illustrates the principle already stated: that the burden is squarely upon the prosecution to prove all of the elements of the offense, consent of the woman being the most essential.

73. 36 P.L.D. 1984 F.S.C. 121 (1984).

74. *Id.* at 123.

75. *Id.* at 123–24.

76. *Id.* at 126.

77. *Id.*

The Court in *Siani* considered the status of medical evidence in the following terms:

In the instant case it is an admitted fact that there is no other direct or positive evidence produced by the prosecution to substantiate the charge . . . against Mst. Siani appellant. In addition to the medical evidence the prosecution should have produced some other direct or circumstantial evidence to connect the appellant with the offence charged.⁷⁸

This pronouncement makes clear that in order to secure a conviction, the prosecution has to prove all the elements of the offense through credible direct or circumstantial evidence, including the fact that the accused “was a consenting party for the commission of sexual intercourse.”⁷⁹ Medical evidence of pregnancy, and by logical extension, pregnancy itself, can only provide “a piece of independent corroboration.”⁸⁰ Thus, the Court unambiguously declared that pregnancy, by itself, cannot form the basis for a conviction.⁸¹

*D. Razaqat Bibi v. State (1984)*⁸²

Razaqat Bibi filed a complaint of zina-bil-jabr against Muhammad Suleman. However, when the medical examiner found her to be eight months pregnant, the police instead charged both of them with zina. The Sessions Court convicted Razaqat Bibi for zina liable to tazir, and sentenced her to five years rigorous imprisonment and five lashes. The court, however, acquitted Suleman.⁸³

A single bench of the FSC overturned the conviction. The Court stated that though Razaqat Bibi was in the ninth month of her pregnancy at the time of the examination:

[T]he aforesaid evidence cannot be considered sufficient to convict the appellant for commission of offence of zina which has been defined in section 4 of the Ordinance, and *inter alia* involves willfully having sexual intercourse. In the instant case according to the appellant there was no willful participation in the sexual intercourse by her as Muhammad Suleman committed zina-bil-jabr with her.⁸⁴

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. N.L.R. 1984 S.D. 165 (F.S.C. 1984).

83. *Id.* at 166.

84. *Id.*

The Court considered relevant the fact that Rifaqat Bibi had filed an F.I.R. of her own volition, “wherein she had expressly stated that she had been made to submit forcibly to sexual intercourse.”⁸⁵ The Court did not refer to Rifaqat Bibi’s eight-month delay in filing the F.I.R., as if that fact were immaterial.

The Court also dealt with the extent to which an accused’s statement may be treated as a partial confession of the fact that sexual intercourse took place and answered it in the negative. An affirmative answer to this question forms the first vital limb of the irrational reasoning of the erring trial courts.⁸⁶ Citing *Safia Bibi v. State* with approval,⁸⁷ the Court said that the “[c]onfession should be read as a whole and exculpatory portions therein cannot be excluded from consideration unless there is evidence on record to prove those portions incorrect.”⁸⁸

*E. Safia Bibi v. State (decided in 1983, reported in 1985)*⁸⁹

This case resulted in widespread notoriety of the Hudood laws in the national as well as international media.⁹⁰ Safia Bibi, a twenty-year-old girl suffering from acute myopia such that she was nearly blind, was engaged in domestic service at the household of Maqsood Ahmad. She alleged that on one occasion, while she was working, Ahmad subjected her to zina-bil-jabr.⁹¹ According to her testimony, Maqsood Ahmad’s father had also raped her on a different occasion, but he was not charged with any offense. Succumbing to social and family pressures, Safia Bibi did not file a complaint with the police until she could no longer hide her pregnancy. The police arrested Safia Bibi and implicated her in a case of zina along with Maqsood Ahmad, after her medical examination revealed that she had been pregnant and had given birth. At the ensuing trial, the Sessions Court acquitted Maqsood Ahmad, but convicted Safia Bibi of zina and sentenced her to three years rigorous imprisonment and fifteen stripes.

On appeal, a single bench of the FSC reversed Safia Bibi’s conviction for zina. However, the Court affirmed that there was no evidence to convict Maqsood Ahmad of zina-bil-jabr, stating that “[i]t is clear from this

85. *Id.*

86. *See supra* text accompanying note 49.

87. Interestingly, the FSC’s decision in *Safia Bibi* had not yet been reported at this time. For a treatment of the case, see *infra* Part II.E.

88. *Rifaqat Bibi*, N.L.R. 1984 S.D. at 166.

89. 37 P.L.D. 1985 F.S.C. 120 (1983).

90. *Id.* at 121 (“This is an unfortunate case which received considerable publicity in the national and International Press”).

91. *Id.* at 122.

evidence that no offence was proved against Maqsood Ahmad as the bare statement of his co-accused [Safia Bibi] was not sufficient for his conviction.”⁹² In its judgment, the Court analyzed the relevant principles of Islamic jurisprudence in some detail and summarized the positions of the different schools of fiqh:

If an unmarried woman delivering a child pleads that the birth was the result of commission of the offence of rape on her, she cannot be punished. This is the view of the Hanafis and the Shafis. But Imam Malik said she shall be subjected to Hadd punishment unless she manifested the want of consent on her part by raising alarm or by complaining against it later.⁹³

The Court went on to elaborate:

There is little difference between the view of Imam Malik and others on the point of law that rape with a woman absolves her of criminal liability. The only difference is on the point of the evidentiary value of the self-exculpatory statement. Imam Malik places the burden of proving the self-exculpatory evidence on the woman, and this burden can be discharged by her by proving that she raised alarm or complained against it. She can discharge her burden by production of circumstantial evidence The others, however, consider her statement including the self-exculpatory portion thereof as sufficient for absolving her of the charge.⁹⁴

So, as opposed to the view of Imam Malik, who places the burden of disproving consent on the woman, the opinion of the Hanafis and the Shafis is that the woman’s statement is sufficient in itself to absolve her of all charges. This view is preferable according to the FSC, since it “is in conformity with the modern law.”⁹⁵

*F. Rani v. State (1996)*⁹⁶

Rani was seven months pregnant when she lodged a complaint of zina-bil-jabr against her two male co-accused. She claimed that she had refrained from filing a complaint because of threats made against her and her family by these men until her pregnancy became impossible to hide. The Sessions Court acquitted both males because there was no evidence against them “except the word and accusations” of Rani. The court, however, convicted Rani after taking into account her pregnancy and the de-

92. *Id.*

93. *Id.* at 124.

94. *Id.*

95. *Id.* at 125.

96. 35 K.L.R. 1996 Sh.C. 150 (F.S.C. 1996).

lay in lodging the F.I.R. She was sentenced to two years rigorous imprisonment and seven lashes.⁹⁷

The appeal before the FSC raised all the issues that had arisen in the previous cases. In an incisive and articulate judgment, Justice Ghous Muhammad reviewed the Court's earlier case law on the subject. First, the Court criticized the decision in *Jehan Mina* and recommended that it be "confined to the annals of legal history." That judgment, the Court found, was in conflict with established FSC jurisprudence.⁹⁸ As regards the issue of pregnancy being considered as proof of guilt, the Court then concluded:

(i) mere pregnancy is not sufficient to convict a woman for *Zina*, especially where she claims the pregnancy to have been caused due to her rape/*Zina-bil-jabr* by man/men who later stand acquitted on any ground;

(ii) to convict a woman for *Zina*, the prosecution would have to discharge the heavy onus of proof by bringing forth positive and independent evidence that the woman actually and in fact had committed *Zina* with her own free will and consent with another man to whom she was not lawfully married to. In this regard it may also be stated that mere proof of pregnancy or some form of medical testimony/report on its own could be of no consequence as the latter would at best only serve to be corroborative in nature⁹⁹

Next, on the matter of delay in registering a complaint of *zina-bil-jabr*, usually considered a detriment to the victim's case, the Court opined:

On the contrary, this point would fall in favour of the female accused i.e. the appellant since she could well forward the plea that the inordinate delay by the prosecution in detecting her pregnancy would entitle her to an acquittal on the general principle that any delay in lodging the FIR/complaint weakens the case of the prosecution/complainant.¹⁰⁰

Finally, Justice Muhammad stated that:

[B]y its very nature '*Zina*' is a joint offence requiring positive identification of a man and a woman, distinctly, consenting [to] an unlawful sexual intercourse . . . In case any one of them fails to be so identified, as has been in the present case, no offence of '*Zina*' can be made out by the prosecution.¹⁰¹

97. *Id.* at 151.

98. *Id.* at 157.

99. *Id.*

100. *Id.* at 157–58.

101. *Id.* at 159.

Though interesting and persuasive, these arguments are, nonetheless, only dicta and as such are not binding on the Court in future cases.

*G. Zafran Bibi v. State (2002)*¹⁰²

Despite such clear pronouncements of the FSC, history unfortunately repeated itself in the case of Zafran Bibi. The case brought to the fore, once again, many of the problems associated with the Hudood laws and reignited the criticisms.

On March 26, 2001, Zabta Khan, accompanied by his daughter-in-law Zafran Bibi, went to the police station to lodge an F.I.R. Zabta Khan did the talking, while Zafran Bibi stood quietly to the side. He claimed that about two weeks earlier, while Zafran Bibi had gone to a nearby hill to cut fodder, Akmal Khan had assaulted her and committed zina-bil-jabr against her. At the time of the incident, Zabta Khan had been away visiting his son, Zafran Bibi's husband, who was serving a sentence in jail for murder. Because Zabta Khan was away, Zafran Bibi took the advice of her mother-in-law to wait for his return before deciding whether to report to the police.¹⁰³

Upon his return, and having heard about the incident, Zabta Khan decided to lodge the F.I.R. At least, this is what he claimed. The police directed Zafran Bibi, as well as Zabta Khan, to thumb-mark the F.I.R., and then sent her for a medical examination. The examination revealed that she was approximately seven to eight months pregnant.¹⁰⁴ Based on the discrepancy between the alleged date of the incident and the estimated date of conception, the police arraigned Zafran Bibi as a co-accused along with Akmal Khan for the offense of zina liable to tazir.

The trial did not begin until a year later. By then, Zafran Bibi had given birth to a baby girl. In a statement recorded before the Magistrate, she claimed that Akmal Khan had repeatedly raped her and that she was willing to take an oath on the Qu'ran that no one except Akmal Khan had committed zina-bil-jabr with her. As the trial proceeded, Zafran Bibi changed her stance, contending that, since she was illiterate, she may have thumb-marked an incorrect account of the incident to the police at the time of lodging the F.I.R. She then made the following statement on oath before the trial court:

Zabta Khan is my father-in-law. I was residing in the house of my husband along with his father. One day he took me to the Police Station

102. 54 P.L.D. 2002 F.S.C. 1 (2002).

103. *Id.* at 8.

104. *Id.* at 9.

. . . where he lodged the report. I have not given any statement in police station nor lodged any report to the police In fact Jamal son of Zabta Khan has committed Zina forcibly with me and my father-in-law to save his son Jamal involved accused in the case in hand. Accused Akmal has not committed Zina with me. He is innocent.¹⁰⁵

On April 17, 2002, the Sessions Court announced the verdict. Akmal Khan was acquitted of the offenses charged for lack of evidence. However, Zafran Bibi was found guilty of the offense of zina liable to hadd, and the court imposed the punishment of rajm. No action was directed against Jamal, Zafran Bibi's brother-in-law, as he had neither been named in the F.I.R. nor charged with any offense.

Since a hadd punishment cannot be executed unless confirmed by the FSC,¹⁰⁶ Zafran Bibi's conviction and sentence were appealed. Delivering the judgment of the Court, Justice Fida Muhammad Khan held:

[M]ere pregnancy, by itself when there is no other evidence at all, of a married lady, having no access to her husband, or even of an unmarried girl is no ground for imposition of Hadd punishment if she comes out with the defence that that was the result of commission of rape with her.¹⁰⁷

On the burden of proving consent, the Court reiterated that "the cardinal principle of Islamic Criminal Law that conviction of someone for commission of unlawful sexual intercourse, it is not only necessary to make certain that he/she committed that act, but it is also to be ensured that he/she committed that of his/her own free-will."¹⁰⁸ Finally, as regards the requirements for confessions to form the basis for a conviction, the Court emphatically stated:

It is pertinent to mention that the confession to be effective in the context of the Ordinance, firstly must be voluntary, with free consent without any coercion or inducement, secondly must be explicit as to the commission of the actual offence of Zina with free-will, thirdly must be four times in four different meetings as held in a number of cases by Federal Shariat Court and Shariat Appellate Bench and, fourthly, must

105. *Id.* at 10.

106. *See supra* text accompanying note 37.

107. *Zafran Bibi*, 54 P.L.D. 2002 F.S.C. at 15.

108. *Id.* at 17. Nonetheless, despite these forceful pronouncements, the Court managed to muddy the waters and negate the freshness of approach evidenced in *Rani*. On the one hand the Court insisted that the element of consent has to be proven by the prosecution, while on the other it kept referring to consent as a defense shown by the accused. *Id.* at 14.

be recorded by the Court who has competent jurisdiction to try the offence under the law.¹⁰⁹

In some measure of consonance with the dicta of *Rani*, the Court stated that though delay in lodging a F.I.R. normally weighs negatively against an accused, that is not a hard and fast rule. In cases of zina, which invariably concern family honor, “mere delay per se is no ground for drawing [an] adverse inference.”¹¹⁰ Accordingly, the Court overturned Zafran Bibi’s conviction.

*H. Gul Hamida v. State (2004)*¹¹¹

Yet another appeal from a conviction where pregnancy was used as proof of zina reached the FSC in 2004. Gul Hamida had been pregnant for approximately eight months at the time she lodged the F.I.R. She alleged that her pregnancy was the result of a rape committed by two men. The Sessions Court convicted her of zina, but acquitted the accused rapists.¹¹² The court inferred Gul Hamida’s guilt from two circumstances: (i) her pregnancy, and (ii) her failure to disclose the rape for close to eight months.

The FSC overturned Gul Hamida’s conviction, noting that she had voluntarily lodged the F.I.R. and had adequately explained her delay:

It is a known fact that in our society the girls are ordinarily hesitant to disclose such an unfortunate incident out of fear or infamy. There is always a lurking fear in the mind of the victim that she may herself be held an accused of the sin or the offence. The same apparently has happened in case of the appellant.¹¹³

On the issue of the evidentiary value of pregnancy, the FSC held:

In the absence of any positive evidence merely on the basis of pregnancy it cannot be presumed that the victim girl was a willing partner. To record conviction under the Hudood Ordinance, evidence of an unimpeachable character is required.¹¹⁴

109. *Id.*

110. *Id.* at 16.

111. 2005 P.Cr.L.J. 167 (F.S.C. 2004).

112. This was the result of an error by the police and prosecution. They framed the crime as falling under section 10(2) of the Zina Ordinance, which covers only consensual extramarital sexual relations. The charge should have been brought under sections 10(3) or 10(4), which deal with rape and gang rape respectively.

113. *Gul Hamida*, 2005 P.Cr.L.J. at 171.

114. *Id.*

I. Summation

With the exception of *Jehan Mina*, the FSC cases reviewed have clearly and consistently laid down the following rules regarding the use of the evidence of pregnancy in framing charges of zina against a woman:

1. Consent is a vital element of the offense of zina. It must be proven beyond a reasonable doubt through direct eyewitness testimony, and medical as well as other circumstantial evidence. Evidence of an unexplained pregnancy, in and of itself, is not conclusive proof of consent.¹¹⁵

2. When a woman alleges rape, she cannot be implicated in a case of zina. If a woman is charged with zina on account of her pregnancy and, in her defense, she alleges that she had been raped, then she must be acquitted regardless of whether or not she complained at the time of the rape. Any delay in lodging an F.I.R., or even an outright failure to do so, is irrelevant when rape is alleged.¹¹⁶

IV. THE CONTROVERSIES

The jurisprudence of the Federal Shariat Court analyzed in this paper provides valuable insight into the nature of the debate between the proponents and the opponents of the Hudood laws. The following are some of the main arguments and counterarguments advanced by both sides:

A. The Standard Critique

The opponents of the Hudood laws have argued all along that the Zina Ordinance is blatantly discriminatory on its face as well as in its consequences.¹¹⁷ For instance, they argue that the Zina Ordinance discrimi-

115. This rule might only be applicable in cases where a female is accused of zina. In a recent case, the Shariat Appellate Bench of the Supreme Court considered a woman's pregnancy as evidence against a male accused. *Muhammad Sharif v. State*, 2006 S.C.M.R. 1170 (2005). Charges of enticing and zina were brought against the defendant after his sister-in-law died while undergoing an abortion. *Id.* at 1171. The defendant's conviction was upheld based upon evidence that the deceased had resided with him prior to her death, presumably to hide her pregnancy. *Id.* at 1173.

116. This is in conformity with Hanafi and Shafi fiqh. *See supra* text accompanying notes 93–95.

117. *See, e.g.*, NCSW Report, *supra* note 20, at 14; Quraishi, *supra* note 45, at 309. However, Charles Kennedy points out that the overwhelming number—eighty-two percent—of defendants in Hudood cases are men, and that “84% of those convicted in district and sessions courts . . . and 90% of those whose convictions are upheld by the FSC are men.” Kennedy, *Islamization in Pakistan*, *supra* note 24, at 312. Even as regards cases of zina, a facially gender-neutral offense, the study found that “56% of those convicted of this crime by district and sessions courts, and 70% of those convicted by the FSC were men.” *Id.* Therefore, Kennedy argues, “[o]ne may have legitimate quarrels

nates against women through its evidentiary rules requiring four Muslim male witnesses to impose hadd punishment in zina-bil-jabr cases.¹¹⁸ Since it is highly unlikely that a rape will be committed in the presence of, or be passively witnessed by, four men of a good character, it is almost inconceivable how a hadd conviction for zina-bil-jabr could ever materialize. Furthermore, if a rape is witnessed by four women instead of four men, hadd punishment cannot be awarded. As a result, this requirement deters rape victims from complaining, and indirectly encourages the incidence of rape.

An even more serious consequence of the promulgation of the Zina Ordinance has been the equation of rape with zina. This equation is not merely nominal, but substantive and substantial in that the Ordinance is regularly misused to convert complaints of zina-bil-jabr, or rape, into those of zina when the accuser fails to bring sufficient evidence to prove rape.¹¹⁹ This is invariably the case in a criminal justice system character-

with the implementation of the Hudood Ordinances, but gender bias against women is not one of them.” *Id.* at 313. For an explicit rebuttal of Kennedy’s argument, see JAHANGIR & JILANI, *supra* note 2, at 137–38. They contend that the figures are misleading since a number of cases are converted from rape to zina. *Id.* However, it is difficult to understand how this makes any difference, since both offenses are prosecuted under the Ordinance. If their point is meant to suggest that more men are convicted under the Ordinance because more men are charged with rape, then it becomes easier to understand the argument. This though would then suggest that at least some men who are guilty of rape, if not all, are charged with zina-bil-jabr and convicted of that offense, and that number far exceeds the number of women prosecuted for and convicted of zina. See Kennedy, *Islamization in Pakistan*, *supra* note 24, at 312–13.

118. As Salman Akram Raja has noted, this is not a fully informed argument:

The popular perception of the Zina Ordinance, largely based on the image carried in the press, is that a raped woman must produce four male witnesses against the accused for a conviction. The legal position that a conviction leading to a tazir punishment can be maintained on the basis of other evidence, including that of the woman herself, is generally absent in the popular understanding of the Zina Ordinance.

Salman Akram Raja, *Islamisation of Laws in Pakistan*, 2 S. ASIAN J. 94 (2003), available at http://www.southasianmedia.net/Magazine/Journal/islamisation_laws.htm.

119. It has been recommended that until the Zina Ordinance is repealed, the offenses of zina and zina-bil-jabr should be separated out into separate sections of the statute. This is recommended because:

The police frequently register rape complaints simply under Section 10 of the Zina Ordinance, without specifying the applicable subsection. The ensuing ambiguity as to the type of crime in question not only mars the police investigation but also leads to additional trauma for the rape victim because of the potential created for a wrongful prosecution for adultery.

ized by inadequate investigative and evidentiary mechanisms. The victim's situation is made worse should she become pregnant, in which case many trial courts are quick to assume that she is only alleging rape to cover up the illegitimate pregnancy. Thus, women, who are already relegated to a lesser status in various social, political, and economic settings in Pakistan, are unable and justifiably unwilling to complain when their physical sanctity is violated.

The Zina Ordinance has also provided disgruntled parents, brothers, and former spouses with an opportunity to malign young women in order to deter them from rebelling against the predominantly patriarchal family structures by asserting the rights of free choice in marriage and divorce, or sometimes even the right to live a financially independent life.¹²⁰ A majority of zina cases, it is argued, are malicious prosecutions that have the net effect of reinforcing the socio-economic subservience of women to the entrenched patriarchal norms.¹²¹ These facets of the Hudood laws and their implementation support the discriminatory milieu of Pakistani society. So, even if such cases ultimately end in acquittal, the women who are subjected to the humiliations of trial have already suffered irreparable injustice.

B. A Staunch Defense

The above criticism is usually answered with the assertion that hadd punishments are fixed maximum punishments that are to be administered in the clearest of cases only: when the accused has freely confessed or evidence is available which proves the crime beyond all doubt.¹²² Since such proof is not usually forthcoming, hadd punishments act as a deterrent only, serving the vital function of laying down fundamental moral principles. In fact, there have been no cases in Pakistan in which hadd punishments have been executed for either zina or zina-bil-jabr.¹²³ The majority of cases under the Hudood laws are cases of tazir offenses,

HUMAN RIGHTS WATCH, *supra* note 48, at 8.

120. See Kennedy, *Islamization in Pakistan*, *supra* note 24, at 316 ("Added to the normal social control mechanisms available to them, parents, husbands, and guardians have been empowered by the introduction of the Hudood Ordinances with the real or implicit threat of bringing criminal charges against their children or wives.").

121. See Chadbourne, *supra* note 24, at 217–29.

122. For example, Chief Justice Fazal Ilahi Khan, in *Zafran Bibi*, stated that "it is much better that an Imam (i.e. Judge) should err in acquitting someone rather than he should err in punishing someone (who is not guilty)." *Zafran Bibi*, 54 P.L.D. 2002 F.S.C. at 17.

123. See, e.g., JAHANGIR & JILANI, *supra* note 2, at 47. Though acknowledging that a hadd punishment has never been executed, Jahangir and Jilani nevertheless argue that its existence and potential for misuse require its abolition. *Id.*

where convictions are based on the same evidentiary standards that are applicable in normal criminal trials.

It is also argued that though miscarriages of justice do occur during the trial stage of some Hudood laws cases, just as miscarriages occur in trials for all offenses in Pakistan's defective criminal justice system, those errors are corrected by the appellate courts in all but a few cases.¹²⁴ Thus, the Hudood laws' supporters argue that there are no problems inherent in the substantive rules laid down by the Zina Ordinance, as the injustices and controversies result from their misapplication. Such sentiments were expressed by the FSC in *Zafran Bibi*:

On account of disinformation, misunderstanding, lack of knowledge of the facts and circumstances of the case, some organizations resorted even to take out processions and demand repeal of the Hudood Laws itself without realizing that it was not the laws of Hudood (i.e. fixed sentence prescribed by Holy Qur'an and Sunnah) but its misapplication that resulted in miscarriage of justice . . . Like other laws, the prosecuting or other components of law-enforcing machinery may err in its application in respect to various facts and circumstances, however, the ideal nature of these laws . . . is admittedly far-superior to the man-made laws on account of its highly balanced approach to individual and public interest.¹²⁵

Therefore, in defense of the Hudood laws, their proponents ultimately argue that the laws themselves are not problematic. Rather, it is their misapplication and misuse by the police and trial courts that results in the miscarriage of justice.¹²⁶

C. Resolution of the Political Impasse

It is precisely at this juncture that the debate has come to an impasse; both sides believe that they have a sufficient basis for their respective positions, and a satisfactory resolution appears to be presently out of

124. As Charles Kennedy points out, "[b]ecause the percentage of acquittals on appeal is so high it is doubly important to note the speed with which cases are disposed by the courts." Kennedy, *Islamization in Pakistan*, *supra* note 24, at 311. Kennedy's study found that the average time taken by the FSC in disposing of cases was reduced from eleven months in 1981 to four months in 1987. The sessions courts, on the other hand, lagged behind, taking an average of eighteen months to decide cases after the F.I.R. was filed. *Id.*

125. *Zafran Bibi*, 54 P.L.D. 2002 F.S.C. at 12.

126. See Kennedy, *Islamization in Pakistan*, *supra* note 24, at 311–15 (describing how the problems affiliated with the implementation of the Hudood Ordinances are precisely those which plague the entire criminal justice system in Pakistan).

reach. Further, the controversies have become politicized to such an extent that it is impossible for either side to retrench.

The opposition to the Hudood laws has thus far focused on campaigning for an outright repeal of these laws.¹²⁷ This approach is unlikely to succeed so long as the vast majority of Pakistani citizens continue to believe that the Hudood laws correctly reflect the shari'ah, a conviction based on the fact that the Qu'ran expressly proscribes zina and assigns punishment for it.¹²⁸ However, few are cognizant of the reality that the Hudood laws misrepresent the shari'ah in certain vital respects, and that there are glaring defects in the legislation, such as the provision for punishment of zina as tazir.

In such a situation, it is not only unfair to decry the shari'ah for the failings of the Hudood laws, which are only a cheap imitation, but it is also impractical to argue for their outright repeal. The only viable option is to advocate for such amendments to the Hudood laws that would obviate the injustices perpetrated in the name of the shari'ah. However, such amendments are not likely to be made until a convincing critique is generated, which questions the Hudood laws' doctrinal foundations and highlights the discrepancies between the shari'ah doctrines and its counterfeit version presently in force. The possibility of such an "Islamic" critique has already been demonstrated.¹²⁹

Such a possibility can be seen in the jurisprudence of the FSC, which implicitly demonstrates the strength of such a critique. Consider again *Zafran Bibi*, where the Court, prior to reaffirming the principle that pregnancy by itself may not be used to prove the commission of zina, appeared to suggest the existence of some circumstances in which pregnancy will become sufficient corroborating evidence:

There is nothing on record to even presume that she was a woman of easy virtue. There is also no iota of evidence to show even that she was having any illicit liaison with any male person. The available record is also completely silent about her having been seen in the company of any accused, nominated by her in her statements.¹³⁰

Likewise, in *Gul Hamida*, the FSC noted that conviction for zina may be based on circumstantial evidence, presumably including evidence of pregnancy:

127. See, e.g., HUMAN RIGHTS WATCH, *supra* note 48, at 7; see also *supra* note 20.

128. See Qur'an 4:15 and 24:2.

129. See Quraishi, *supra* note 45, at 313 (arguing that the Quranic requirements for the punishment of zina do not leave room for it to be tried as a tazir offense).

130. *Zafran Bibi*, 54 P.L.D. 2002 F.S.C. at 14.

No doubt conviction can be based on the strength of circumstantial evidence but the circumstances should be of such a nature which are unexceptionable and which lead to no other inference or hypothesis except the guilt of the accused and commission of the offence.¹³¹

This language is reminiscent to that found in *Safia Bibi*, where the Court stated that consent could not be established “in the absence of any evidence . . . that [Safia Bibi] and Maqsood Ahmad had any sentimental attachment for and were on intimate terms with one another.”¹³² Likewise, in *Rafaqat Bibi*, the Court held that “in absence of any evidence to establish sentimental attachment for co-accused it could not be said that sexual intercourse was indulged into willfully.”¹³³

However, refer to the FSC’s mechanically precise statement of the elements of the offense of zina in *Rani*:

- i. there should be a man and a woman;
- ii. such man and a woman are not validly married to each other;
- iii. such man and woman should have committed sexual intercourse with each other;
- iv. such man and woman should have committed sexual intercourse willfully;
- v. there ought to be a penetration.¹³⁴

Important here is that consent has to coincide with the act of sexual intercourse, or penetration. Even if the accused is reputed to be a woman of “easy virtue,” the prosecution still has to prove beyond a reasonable doubt that at the time of the alleged incident she willfully had had sexual intercourse. The same holds true if a woman had had a prior “illicit liaison” with her male co-accused, or if there was sentimental attachment. More than talking, holding hands, kissing, touching, or even fondling is required to secure a conviction. Also note that in *Sakina* there was credible evidence that prior to elopement the accused had had an intimate relationship characterized by “sentimental involvement.”¹³⁵ Similarly, in *Rani* there were allegations that the accused was reputed to be a woman of “easy virtue.”¹³⁶ In fact, the defense in *Rani* was that the accused’s family had forced her into prostitution. Yet, in neither case was the extra-

131. *Gul Hamida*, 2005 P.Cr.L.J. at 171.

132. *Safia Bibi*, 37 P.L.D. 1985 F.S.C. at 123.

133. *Rafaqat Bibi*, N.L.R. 1984 S.D. at 167.

134. *Rani*, 35 K.L.R. 1996 Sh.C. at 156 (citing *Sukhan v. State*, 1985 P.Cr.L.J. 110, 118–19 (F.S.C. 1984)).

135. *Sakina*, 33 P.L.D. 1981 F.S.C. at 321.

136. *Rani*, 35 K.L.R. 1996 Sh.C. at 152.

marital pregnancy corroborated by such other evidence found sufficient to secure a conviction for zina.

If the above analysis is correct, in what circumstances may an accused be convicted for an offense of zina liable to tazir? Apparently, the only circumstances where a conviction can properly be secured is when there are eyewitnesses, but numbering less than four, or, hypothetically, when there is other conclusive evidence such as a video-recording. If there are less than four witnesses, initiating a prosecution for zina is tantamount to *qazf* (unwarranted accusation of zina) under recognized shari'ah principles.¹³⁷

In *Muhammad Masood v. Abdullah*,¹³⁸ Justice Maulana Muhammad Taqi Usmani, an *alim* (religious scholar) member, delivered the judgment of the Shariat Appellate Bench of the Supreme Court holding that someone who bears false witness in a case of zina will not be guilty of *qazf* until the Court formally declares that such a witness has lied.¹³⁹ However, the complainant in a case of zina will only avoid liability under the Qazf Ordinance if he or she can bring four eyewitnesses. In the absence of four eyewitnesses, the complainant will automatically be deemed guilty of *qazf* whether or not a court declares that he or she has lied. Further, the Court expressly overruled an earlier FSC decision which had held that a complainant of zina who fails to produce four eyewitnesses may only be liable for *qazf* if the accusation of zina had been made in bad faith.¹⁴⁰

It is very difficult to reconcile *Muhammad Masood* with Section 10 of the Zina Ordinance. When a case of zina is prosecuted in the absence of four eyewitnesses, which is practically all zina cases since most are tazir cases, will the court convict the accused for zina while simultaneously convicting the complainant of *qazf*? Following this line of reasoning, it is extremely difficult to conceive of many circumstances in which a prosecution for zina liable to tazir may be initiated. Unfortunately, however, this contradiction in the FSC's jurisprudence has not been pressed upon the Shariat courts or the Pakistani legislature.

137. The law of *qazf* is derived from verse 24:4 of the Qur'an. *See supra* note 45. In practice, zina prosecutions have overwhelmingly outnumbered *qazf* cases. *See* CIW Report, *supra* note 20, at 70 (documenting that only forty-three *qazf* cases were filed in the FSC between 1980 and 1987, as compared to 3,399 zina cases).

138. 1992 S.C.M.R. 638 (1992).

139. *Id.*

140. *Id.* (overruling *Muhammad Bashir v. State*, 37 P.L.D. 1985 F.S.C. 384, 394 (1985)).

D. Reformation of the Hudood laws

Reform, pursuant to an Islamic critique, rather than repeal, represents the only hope for resolving the intractable argumentation over the Hudood laws. Preferably, such reform should be implemented through appropriate amendments to the Hudood Ordinances. However, until such amendments become politically feasible, it is advisable to press for the reformation of Hudood laws before the Shariat courts. After all, the Shariat courts have the power to review legislation for compatibility with shari'ah principles.

At the least, the Shariat courts should be asked to harmonize their own jurisprudence so that their precedents may be widely known, followed where applicable, or critiqued if they represent a perversion of Islamic injunctions. Until now, the FSC has failed to regularly refer to its own previous judgments, or rationalize them. For example, in the cases reviewed, only *Rani* discussed prior FSC precedent.¹⁴¹ In *Zafran Bibi*, the Court failed to refer to any of its own precedents, including *Safia Bibi*, which followed a similar reasoning. A harmonization of the law will enable lawyers to cite the appropriate cases before the trial courts, ensuring that errors of law are reduced. In order to achieve this, academics, human rights activists, and women's rights campaigners should give greater attention to researching and analyzing the jurisprudence of the Shariat courts in Pakistan.¹⁴² This will enable them to disseminate relevant and

141. See *Rani*, 35 K.L.R. 1996 Sh.C. at 151–59 (using the holdings of *Sakina*, *Safia Bibi*, and *Siani* to disagree with the holding of *Jehan Mina*).

142. The critics of the Hudood laws have thus far focused primarily on those decisions of the Sessions courts embodying miscarriages of justice and case studies of police brutality. Further, the critics have shown such a distrust of the FSC that they have failed to carefully analyze its decisions. See *supra* note 21 and accompanying text. As Julie Dror Chadbourne notes, this approach is not only incomplete, but it is also fundamentally unhelpful:

Despite the social, legal and political impact of the Zina Ordinance in Pakistan, there is still little or no analysis of the substantive law relating to the Offence of Zina. . . . Instead, Pakistani practitioners as well as the Western media have focused their energies on publicizing a few “shocking” cases and on expressing their beliefs that the Ordinance is wrong and must be repealed. While it is true that there are problems with the Ordinance and that it has the capacity to support a social system which is highly biased against women, it is crucial that activists stop the debate on these points long enough to understand how the Ordinance actually affects the lives of women and girls in Pakistan. Until they do, they will remain denuded in their advocacy efforts because they will see neither the true impact the Zina Ordinance has on people living in Pakistan nor will they see that in the eye of the storm the judiciary is their greatest ally in ameliorating the practical impact of the Zina Ordinance.

correct information to all concerned parties, including the public. Such efforts will also facilitate more effective representation of the innocent victims.

The second range of options that ought to be pursued is to advocate the adoption of enhanced procedural safeguards. For instance, Parliament passed the Criminal Law (Amendment) Act, 2004,¹⁴³ which mandates that only a senior police officer of the rank of superintendent may conduct an investigation in a case of zina, and an arrest may be made only with the permission of the court.¹⁴⁴ These provisions do not apply to cases of zina-bil-jabr. Other procedural safeguards may include the appointment of specialist and more qualified judges for Hudood trials in the Sessions Courts. Alternatively, the FSC may be decreed the trial court in Hudood laws cases. The FSC is arguably more competent to try such cases, and has demonstrated a much more refined approach towards the enforcement of Hudood laws than the Sessions Courts. Further, it may be made mandatory for adequate medical tests to be performed in cases of zina before any prosecutions are initiated. Though this would require significant expenditure for the necessary facilities and infrastructure, the development of adequate forensic investigation mechanisms is a pressing need and such an effort is feasible as well as easily justified.¹⁴⁵

Chadbourne, *supra* note 24, at 180.

143. Criminal Law (Amendment) Act, 2004 (Act I of 2005), *reprinted in* 57 P.L.D. 2005 Federal Statutes 77 (2005).

144. Section 13 of the Act, which amends Section 156 of the Criminal Procedure Code, reads:

13. Amendment in Chapter XIV, Act V of 1898. —In the Code, of Criminal Procedure, 1898 (Act V of 1898), hereinafter referred to as the Code, after section 156, the following new sections shall be inserted, namely:—

.....

156B. Investigation against a woman accused of the offence of Zina. Notwithstanding anything contained in this Code, where a person is accused of offence of Zina under Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979), no police officer below the rank of a Superintendent of Police shall investigate such offence nor shall such accused be arrested without permission of the Court.

Explanation. —In this section 'Zina' does not include 'Zina-bil-Jabr'.
Id. at 79–80.

145. See generally HUMAN RIGHTS WATCH, *supra* note 48, at 10–16 (suggesting recommended reforms for police practice and the medicolegal system).

V. CONCLUSION

This paper has attempted to expand the debate concerning the Hudood laws and their enforcement in Pakistan. It has done so through examination of the FSC's precedents on the controversial issue of pregnancy as proof of zina. Admittedly, sufficient evidence has not been adduced to conclusively prove that the Shariat courts have developed an approach that has rebutted the criticisms of the skeptics.¹⁴⁶ In fact, it has not even been argued that the Shariat courts are capable, by themselves, of resolving all the difficulties. This is because many of the current problems are rooted in the investigative, prosecutorial, and procedural deficiencies of Pakistan's criminal justice system, and are therefore beyond remediation through reform of substantive laws.

Nonetheless, it has been argued that the debate concerning the Hudood laws in Pakistan has been both misleading and unproductive, because not all of the relevant aspects and nuances of the issues have been explored. First, the role of the Shariat courts in shaping the law through the implementation of coherent and just Islamic doctrines of criminal liability has been overlooked. Second, the possibility of obviating some of the procedural defects in the criminal justice system, not only in the context of the Hudood laws but also other "secular" criminal laws, has also been underestimated. If a more nuanced perspective on the Hudood laws is adopted—incorporating the possibility of substantive reform in accordance with an Islamic critique implemented preferably through statutory amendments, coherent case law, enhanced procedural safeguards, and a general reform of the criminal justice system—this may lead to a resolution of these controversies. The alternative is a continuation of an ideological struggle in which the politicians win but the victims lose out.

VI. POSTSCRIPT

As of the date of publication, the processes of reform advocated in this paper have begun to materialize. For the first time since the enactment of the Hudood Ordinances, mainstream news media organizations in Pakistan have started a dialogue on the laws and their conformity to Islamic injunctions.¹⁴⁷ Additionally, on November 15, 2006, the "Protec-

146. *But see* Kennedy, *Islamization in Pakistan*, *supra* note 24, at 309–11 (arguing that the statistical data on the disposition of Hudood Ordinances appeals shows that the FSC has played a significant role in moderating the zealotry and remedying the incompetence of sessions court judges).

147. This public debate began when Geo Television, a leading Urdu-language Pakistani television network, launched a series of programs entitled *Zara Sochieye*. *Zara Sochieye*, <http://www.geo.tv/zs>. In these programs, notable religious scholars, lawyers, for-

tion of Women (Criminal Laws Amendment) Bill”¹⁴⁸ was passed by the National Assembly after receiving support from both the government and several opposition parties.¹⁴⁹ The bill proposes several major changes to the Zina Ordinance:

1. Abolition of the offense of zina-bil-jabr liable to hadd;
2. Abolition of the offense of zina-bil-jabr liable to tazir and reinstatement of the pre-Hudood rape provisions in the Pakistan Penal Code, including the removal of the marital rape exemption;
3. Abolition of the offense of zina liable to tazir;
4. Introduction of the offense of public lewdness in the Pakistan Penal Code;
5. Abolition of the penalty of rajm for zina liable to hadd;
6. Abolition of the mandatory death sentence for the offense of gang rape, and replacing in its stead a discretionary sentence of either death or life imprisonment;
7. Criminalization of the publication of a case of zina or rape;
8. Zina shall be cognizable only by a court of competent jurisdiction upon the presentation of four witnesses; and
9. Qazf proceedings may automatically be instituted by a court where a complaint of zina has been made but four witnesses are not presented.

The bill has been passed amidst steadfast claims by the government that the proposed amendments conform to Islamic injunctions.¹⁵⁰ As noted in the bill’s statement of objects and reasons: “The primary object of all these amendments is to make zina and qazf punishable only in accordance with the injunctions of Islam as laid down in the Holy Qur’an and Sunnah, to prevent exploitation, curb abuse of police powers and

mer judges, and other intellectuals questioned whether the Hudood Ordinances completely conform to the injunctions of the Qu’ran and Sunnah.

148. A copy of the bill, as originally presented in the National Assembly, is available at <http://www.dawn.com/2006/08/24/nat3.htm>. The version passed by the National Assembly, however, includes certain amendments to the original version.

149. Ifran Ghauri, *NA Passes Women’s Protection Bill*, DAILY TIMES (Pak.), Nov. 16, 2006, available at http://www.dailytimes.com.pk/default.asp?page=2006%5C11%5C16%5Cstory_16-11-2006_pg1_3. Before the bill becomes law, it must now be approved by the Pakistani Senate.

150. See, e.g., *Prove It Un-Islamic and I’ll Resign: Shujaat*, DAILY TIMES (Pak.), Nov. 16, 2006, available at http://216.122.144.99/default.asp?page=2006\11\16\story_16-11-2006_pg1_5.

create a just and egalitarian society.”¹⁵¹ Opponents of the bill from the religious right, however, have criticized it as being “un-Islamic.”¹⁵²

Some civil society and human rights organizations have also been vocal in their criticism of the bill. They believe the bill does not go far enough, and insist that the Hudood Ordinances be repealed outright.¹⁵³ Nevertheless, most Pakistani commentators perceive the bill as being a step in the right direction.

151. Raja Asghar, *Pakistan: Opposition Up in Arms over Women's Rights Bill*, MUSLIM NEWS (U.K.), Aug. 22, 2006, available at <http://www.muslimnews.co.uk/news/news.php?article=11594>.

152. *Id.*

153. *WPB: A Step Forward or a Step in the Wrong Direction*, DAILY NEWS (Pak.), Nov. 16, 2006, available at http://www.dailytimes.com.pk/default.asp?page=2006\11\16\story_16-11-2006_pg7_18.