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**THE HUDOOD LAWS OF PAKISTAN:  
A SOCIAL AND LEGAL MISFIT IN TODAY'S SOCIETY**

AARIJ S. WASTI†

**ABSTRACT**

*This article questions the application of religion in Pakistan, specifically in the legal context. For over two decades now, Pakistan has had on the books a number of statutory laws, which are collectively known as the Hudood Laws. These laws are purported to inject Qu'ranic doctrine into Pakistan's criminal legal structure. Unfortunately, a number of shortcomings have been identified with the change since its beginnings. Among these faults are a lack of religious knowledge and understanding by the judiciary, police force, and population; misuse and abuse of the laws by the nation's ruling elite, men, and the police; lacking legal and social infrastructure in support of the laws; and most devastatingly, imprecise and many times incorrect interpretation of Islam and its legal teachings. Out of respect for the divine law, an appeal is made first to suspend the Hudood laws, if not to cease their resulting injustices. It is subsequently recommended that a committee of legally and theologically trained experts be formed, that they re-examine Islam's legal teachings, and finally that they explore a just and appropriate manner in which to introduce correct principles to current Pakistani society and its primarily common law system.*

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**Author's Note:**

It is important for the reader to understand the perspective from which the following paper is written. I believe that the *Qur'an* is a divine book, one which I see as *the* guidebook to living life. Law, in both practice and theory, is a large part of life. *Shari'ah* translates as “the path to follow; a name given to the sacred law of Islam that governs all aspects of a Muslim’s life.”<sup>1</sup> One of the fundamental principles of Islam and of its *Shari'ah* is the seeking of truth. This paper is not an attempt at bringing into question Islam or *Shari'ah* or any of its teachings, including the principles of *Hadd* as laid out in the *Qur'an* itself; for that would be bringing in to doubt the very faith I hold so dear. What this work is, however, is a study and critical analysis of the application of Islamic law in Pakistan. It is an unfortunate reality that even such pursuit of knowledge and the truth is perceived by many as apostasy, due to the prevalence of what I term as an ‘illiterate culture’ – nevertheless, the reality is that such analysis and critique is desperately necessary. Justice, the process of development, and a hope for a better tomorrow demand it. Indeed, it is precisely this lack of commentary and academic debate about such topics which has kept the entire Muslim world’s identity crisis aflame, and left its people deprived of their dreams and true potential.

*In the name of God (Allah): The most gracious, the most merciful.*

## I. INTRODUCTION

In 1978, entering into the second year of their most recent of (Pakistan’s frequent) periods of martial law, the people of that nation had largely adapted to the changes brought about by the displacement of democracy. For the majority of the population, these changes were, in practice, minimal; as inhabitants of a still-developing country, the focus of the people had remained on daily sustenance and the fulfilling of their other

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<sup>1</sup> M. Lippman, S. McConville & M. Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction* (New York: Pruger, 1988) at 25 [Lippman, McConville & Yerushalmi].

basic needs. This changed the following year, however, as Pakistan's military dictator, President General Zia-ul-Haq, introduced the *Hudood Ordinances and Rules* to Pakistan's criminal branch of its legal system. These were the first set of 'Islamic' statutes to be incorporated into a previously mixed legal system of British common law and Muslim personal law. An already adulterated legal system had become ever more mixed, and because of inherent weaknesses within that system, the people of Pakistan would now be judged ever more harshly, unfairly, and incorrectly.

The following is a basic survey of the nature and effects of the *Hudood Ordinances* of Pakistan. It aims to examine the scope of the laws, their legitimacy, and finally examples of their application. It will be argued that Islamic law, while valid in its own right and on its own merit, was not suited for introduction to Pakistan, given the socio-economic conditions of the time. The following sets out to show that an in-depth knowledge of Islam, with an emphasis on its legal aspects, is both indispensable and decisively lacking in the Pakistani legal system, from its police officers to its lawyers to the justices of its courts. This fact, in tandem with the social realities of Pakistan, makes the just interpretation of any law not merely improbable; as will be shown, it makes the just interpretation of Islamic law *impossible*.

This paper begins by laying out the historical background to the legal events that took place in 1979 and afterwards, and the impact that they have had on Pakistan since. This is followed by a short introduction to Islamic law, including its definition, sources, and a brief overview of its historical evolution. The most relevant concepts of Islamic law to the *Hudood Ordinances* are then discussed, including *Hadd* and *Ta'azir*. These terms are defined and the entailing offences, punishments, purposes, evidentiary requirements, and underlying values are examined. A brief examination of the specific Pakistani context is followed by an in-depth analysis of Pakistan's *Hudood* laws, which begins with a brief look at Pakistan's legal history and ends with a critique of the laws' application and legitimacy. This analysis includes an examination of the statutes themselves, procedural aspects of implementation, and the Islamic laws' evolutionary effect on Pakistan's legal system. In turn, each of the ordinances is examined separately. Attention is given to the rules as legislated, their exceptions, limitations or pre-conditions, if any, and criticisms against their legitimacy. Finally, this analysis will expand on

the conclusion that Pakistan's *Hudood* laws be suspended immediately and indefinitely, until such time that Pakistan is deemed socioeconomically, culturally, and religiously ready to properly implement divine law.

## 1. History & Background

At midnight on August 14, 1947, the Islamic Republic of Pakistan was carved out of British India, the product of decades of both political and legislative wrangling from London to Bombay.<sup>2</sup> The five provinces to comprise the new nation were inhabited by vastly different peoples with a divergent assortment of languages and cultures. Arguably the only thread linking these various groups was their common religion, namely that of Islam.<sup>3</sup> Today, somewhat reduced in size by the loss in 1971 of the province of East Pakistan (now the independent nation of Bangladesh), Pakistan's population of nearly 150 million is approximately ninety seven percent Muslim.<sup>4</sup>

For a variety of socio-economic reasons, Pakistan since the late 1970s has been struggling through a period of Islamization.<sup>5</sup> This has meant, *inter alia*, greater awareness of Islam and its applicability to daily life among Pakistan's populace.<sup>6</sup> It has also meant the emergence of religious extremism and increased use of religion as a political tool. It was the combination of these two factors that lead to the proclamation on February 10, 1979, of the *Hudood* Ordinances by the then military dictator of Pakistan, President General Zia-ul-Haq.<sup>7</sup>

The Islamization of Pakistan had already begun earlier that year, however, with the introduction of the *Shari'ah*, or Islamic, Courts.<sup>8</sup>

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<sup>2</sup> S. Wolpert, *Jinnah of Pakistan* (Karachi: Oxford University Press, 1999) at 340.

<sup>3</sup> L. Ziring, *Pakistan: The Enigma of Political Development* (Kent: Dawson Westview, 1980) at 26.

<sup>4</sup> United States, Central Intelligence Agency, *The World Factbook* (1999), online: Central Intelligence Agency <<http://www.cia.gov/cia/publications/factbook/geos/pk.html#People>>.

<sup>5</sup> L. Ziring, *Pakistan in the Twentieth Century: A Political History* (Karachi: Oxford University Press, 1999) at 462 [Ziring].

<sup>6</sup> Pakistan, *Introduction of Hudood Laws in Pakistan* (Islamabad: Pakistan Publications, 1985) at 4 [Pakistan].

<sup>7</sup> *Ibid.* at 11.

<sup>8</sup> Ziring, *supra* note 5 at 465.

While it was argued at the time that the religious courts were meant to supplement the existing conventional court structure rather than replace it, great controversy was nonetheless aroused by its inception. Such was the case with many of Zia's "high priority" reform agenda items.<sup>9</sup> His justification was simply that the establishment of such courts would enable the proper implementation of 'Islamic justice,' the very thing, he argued, that Pakistan had been created for in the first place. The function of the new court, located in the capital city of Islamabad, would be to determine whether existing laws were in violation of Islamic principles and injunctions.<sup>10</sup>

With both the Federal *Shar'iah* Court and the *Hudood* Ordinances in place, a vigorous new campaign from the government called for mass conformity to "Islamic codes of behaviour." From that point forward, drinking alcohol, attending bawdy houses, and gambling (among other offences) were all deemed to be crimes against Islam – the first such crimes in Pakistan's legal history. Zia called on the nation to fulfill their recreational needs through prayer, family activity, and constructive social acts, and threatened that the new laws would deal harshly with any violation of the new code. From the beginning, this threat was carried out with vigour. Public lashings, for example, took place on numerous occasions immediately following the enactment of the new laws. However, more brutal punishments common to other countries practicing *Shar'iah*, including the removal of limbs, were initially discouraged.<sup>11</sup>

It is important to note that since Pakistan's inception, its legal system had been a ramshackle and clumsy machine. Prior to the introduction of the *Hudood* Ordinances, Pakistan's legal system had been composed of an uneasy mix of colonial legislation, Koran-derived laws of inheritance, and Muslim personal laws, the latter dealing mostly with family matters.<sup>12</sup> Islamic "public" law was the most recent addition to an already complicated and unwieldy system. It was argued at the time that the Islamization of Pakistan's law was imperative, because Islamic law was perceived as the sum and substance of Islam itself. The purpose of

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<sup>9</sup> Ziring, *supra* note 5 at 466.

<sup>10</sup> Ziring, *supra* note 5 at 465.

<sup>11</sup> Ziring, *supra* note 5 at 466.

<sup>12</sup> A. Jahangir & H. Jilani, *A Divine Sanction? The Hudood Ordinances* (Lahore: Rhotas Books, 1990) at 17 [Jahangir & Jilani].

law, it was stated, is to “bend earthly life to the purposes of God.”<sup>13</sup> To do so would signify Pakistan’s allegiance to the *Qur’an*, both in abstract and as a concrete legal code – necessary, it was argued, since in Islam the state is conceived of as a moral institution charged with enforcing stipulations as set forth in the *Shar’iah*, including the *Sunnah*, or teachings and traditions of the Prophet Mohammad (peace be upon him). It can neither add, alter, nor abrogate it.<sup>14</sup> Islamic law is nothing but Allah’s message of what a man must do and what a man must avoid doing. Specifically, the ‘resurgence’ of Islam in Pakistan was seen widely as the responsibility of the Muslims themselves, without further divine guidance.<sup>15</sup> A step towards Islamization was urged to be seen as a “transition from indifference to self-directing determination,” part of which would lead to, it was hoped, the foundation of a new phase of legal dynamism in the nation.<sup>16</sup> It was argued from the outset that “Islamisation of laws and jurisprudence in Pakistan is an effort to bring all temporal laws in conformity with the will of the divine enshrined in the *Shari’ah*.”<sup>17</sup>

Zia’s Islamization of Pakistan included numerous other acts of reform, all limited in success, the totality of which eventually led to his government’s admission of its inability to “counter the demagogic manipulation of controversial issues.”<sup>18</sup> In fact, time and again, the fallout from the program would prove to be an embarrassment to his government, both through the identification of flaws and the realization of the basic inapplicability of such reform to Pakistan’s already volatile society. While Islamization was seen to be *prima facie* a desirable objective of a nation that was at the time ninety five percent Muslim, it had proven from the beginning to be a dangerous and precarious job.<sup>19</sup> This was due to the increasing volatility in the social fabric as a result of the changes, the heightened questioning of not only Zia’s reforms, but his leadership itself, and the confusion being caused by a sudden and rapid development in an otherwise stable, albeit ineffective, legal sys-

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<sup>13</sup> Pakistan, *supra* note 6 at 3.

<sup>14</sup> Pakistan, *supra* note 6 at 5.

<sup>15</sup> Pakistan, *supra* note 6 at 5.

<sup>16</sup> Pakistan, *supra* note 6 at 4.

<sup>17</sup> Pakistan, *supra* note 6 at 6.

<sup>18</sup> Ziring, *supra* note 5 at 467.

<sup>19</sup> Ziring, *supra* note 5 at 467.

tem. Plagued by a continuing lack of success, and under political pressure both at home and abroad, Zia finally slowed the process, though the overall campaign continued. Unfortunately, this change of pace, coupled with Zia's mounting frustration, transformed the process from a morally idealistic initiative to little more than a political tool. The government began removing allegedly "anti-Islamic" reading materials from schools and libraries and banning films and books it judged to be hedonistic, immoral, or contrary to Islamic principles. Provincial governments were given the authority to police sermons during Friday prayers. The government even issued an ordinance making it a violation of the law to preach hatred against other beliefs, or against the ruling government. It appeared that Zia's government had claimed spiritual legitimacy for all its actions. Nonetheless, by and large, the program of Islamization existed more in theory than in practice.<sup>20</sup>

There were also personnel problems with Zia's political movement. Expansion of the *Shari'ah* Courts required far more scholars of the *Shari'ah* itself and *fiqh* law, or legal theology, than were readily available. Zia had predicted that this void would be filled from within the *madrasahs*, or religious welfare schools. However, reality dictated that the courts would still be shorthanded.<sup>21</sup> The staff available to the *Shari'ah* Courts was inadequate in both their numbers and their qualifications, despite the intentions of Zia's Constitutional amendments.<sup>22</sup> This problem was particularly acute at the district level. While it was planned to include at least two learned scholars of Islamic jurisprudence in each jurisdiction, filling the gap with truly competent Pakistanis proved to be impossible. The importation of judges from other Muslim nations was tabled as a possible solution, but was not implemented due to yet another fundamental dilemma; namely, that the foreign justices would not have possessed the required understanding of Pakistan's society to justly apply the law – theoretically, the purpose of the reform in the first place. Towards the end of Zia's rule, it had become painfully clear that the ambitions of the Islamization program had far exceeded Pakistan's limited available human resources.<sup>23</sup> This was yet another

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<sup>20</sup> Ziring, *supra* note 5 at 467.

<sup>21</sup> Ziring, *supra* note 5 at 469.

<sup>22</sup> M.A. Khan, ed., *The Constitution of the Islamic Republic of Pakistan, 1973* (Karachi: Pakistan Law House, 1996.)

<sup>23</sup> Ziring, *supra* note 5 at 469.



factor that contributed to the slowing of the reforms. It had, moreover, become clear that the Islamic state which Zia's regime was trying to create was being impeded by chronic and widespread underdevelopment. The problem lay not in the idea, but in its time and place of application. Pakistan, it seemed, was attempting too much, too soon. Over and above this, it appeared that the proponents of a more religious order in Pakistan themselves disagreed on too many of the required fundamentals of an Islamic state, the establishment of which being a necessary prerequisite to the just application of Islamic law.<sup>24</sup>

In the end, to salvage at least a partial success, Zia sought grassroots support by portraying the Islamization campaign as an attempt to improve the lives of Pakistan's impoverished masses, especially in the villages with their limited access to conventional legal remedies. This was not mere propaganda; he was apparently sincere in his belief that religious courts were the best (perhaps the only) method of bringing justice to the peasant populace of Pakistan.<sup>25</sup>

Professor Lawrence Ziring comments on Zia in his book "Pakistan in the Twentieth Century: A Political History":

The common folk, he would opine, could not be expected to bring their everyday grievances to courts dispensing Anglo-Saxon justice. The rural people, though ignorant of their rights in the Common Law, nevertheless had legitimate grievances that could only be addressed within the cultural context of their religious lives.<sup>26</sup>

While critics of the time conceded that justice for all of the country's citizens would involve different approaches, the point nonetheless remained that Zia's initiative – the introduction of an Islamic legal system to a predominantly secular one – was a decidedly inadequate solution.

While proponents of a purely Islamic legal system today still support an active and organized lobby in Pakistan, they lack large-scale popular support.<sup>27</sup> This is evidenced by the traditionally poor performance of the religious political parties in Pakistani elections,<sup>28</sup> though this may, judging by the results of Pakistan's October 2002 general

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<sup>24</sup> Jahangir & Jilani, *supra* note 12 at 17.

<sup>25</sup> Ziring, *supra* note 5 at 469.

<sup>26</sup> Ziring, *supra* note 5 at 469.

<sup>27</sup> Jahangir & Jilani, *supra* note 12 at 17.

<sup>28</sup> Jahangir & Jilani, *supra* note 12 at 17.

elections, be changing. While this traditional lack of support does not mean that the masses' legal needs could not be better served by Islamic law, it may very well indicate a lack of understanding of that law, or worse, an indication of the inherent flaws in the post-reform justice system as a whole. The problem may lie deeper than the specific legal system that the courts adjudicate under. Nonetheless, the religious elements in Pakistani society do maintain substantial political clout, and have repeatedly hijacked reforms seen as inconsistent with their view of Islam and Islamization. Indeed, even Benazir Bhutto's left-of-centre government did not revoke, suspend, or amend the *Hudood* laws, despite her two terms in office. It appears that the laws were kept intact in an effort to hold together often precarious coalition governments, in which the religious parties were a critical pillar. This hijacking of reform is normally carried out in the name of religion, a potent tool with the power to inflame the masses, incite civil unrest, and even destabilize the government itself. This consequently can sabotage the basic intentions of the reformists, thus bringing the process full circle. It is possible that Bhutto's government was threatened with such action if any attempt to 'de-reform' the legal system was made. In this dynamic, the mass ignorance of the masses towards their own religion cannot be overstated in its significance; indeed, the same can be said of the majority of the current proponents of continued Islamization. In both these cases, ignorance truly is bliss, and is used to its full political advantage.

## 2. Islamic Law

Islamic law, commonly referred to as the *Shari'ah*, stems from four sources:<sup>29</sup> these include the *Qur'an*; the *Sunnah* as defined above; reasoning through analogy; and consensus among *Ulema*, Muslim scholars and the guardians of Islamic legal and religious traditions.<sup>30</sup> While this might suggest very little codification or rigidity within the legal structure, by the early tenth century the opposite had become the case. The scholarly consensus at the time asserted that the door of *ijtihad*, or the use of individual judgement to interpret existing law and establish legal

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<sup>29</sup> N.J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh U. Press, 1978) [Coulson].

<sup>30</sup> Lippman, McConville & Yerushalmi, *supra* note 1.

decisions, was closed.<sup>31</sup> The consensus for this decision, or the *ijma*, set the final seal upon the gradually increasing rigidity of Islamic law.<sup>32</sup> In essence, Islamic jurisprudence had resigned itself to nothing more than self-imposed terms of reference.<sup>33</sup> Regardless of whether this should ever have occurred, a limited number of laws were to remain codified and unchangeable. These are the laws of *Hadd* (pl. *Hudood*), or the only offences proscribed by God Himself and punishable by the penalties set forth in the *Qur'an*.<sup>34</sup> Accompanying these specific provisos are strict evidentiary or proof requirements, the failure of which allow secondary or discretionary punishment of the offending behaviour, otherwise known as *Ta'azir* punishments.<sup>35</sup> Additionally, there are *Ta'azir* offences, independent in their own right from offences of *Hadd*. Both categories of offence are discussed below.

### 3. Hadd

*Hadd*, when translated, reads: “measure, limit or obstruction.”<sup>36</sup> The *Qur'an* and the *Sunnah* explicitly set out all the *Hadd* offences and their corresponding punishments, which can thus neither be altered nor modified.<sup>37</sup> The explicit mention of a small number of heinous offences aims to expunge them from Islamic society, ensuring the preservation of Islamic values of the dignity of human society and the purification of the human soul.<sup>38</sup> It is important to note that in all *Hadd* crimes, punishment is to be directly proportionate to the magnitude of the crime committed. These punishments are intended to deter people from causing harm and mischief,<sup>39</sup> to humiliate the offender,<sup>40</sup> and to educate the public.<sup>41</sup> In

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<sup>31</sup> Jahangir & Jilani, *supra* note 28.

<sup>32</sup> Coulson, *supra* note 29.

<sup>33</sup> Jahangir & Jilani, *supra* note 28.

<sup>34</sup> Coulson, *supra* note 29.

<sup>35</sup> Coulson, *supra* note 29.

<sup>36</sup> Pakistan, *supra* note 6 at 7.

<sup>37</sup> Pakistan, *supra* note 6 at 7.

<sup>38</sup> Pakistan, *supra* note 6 at 6.

<sup>39</sup> Pakistan, *supra* note 6 at 7.

<sup>40</sup> Pakistan, *supra* note 6 at 8.

<sup>41</sup> Pakistan, *supra* note 6 at 9.

addition, one or more of the *Hadd* penal laws may have reformation and prevention as additional goals.<sup>42</sup>

Crimes falling under the category of *Hadd* include: *Zina* (adultery or fornication); the use of intoxicants (including alcohol and drugs); theft of property; robbery of travellers; *Qazf* (false accusations of adultery); and apostasy. These offences can be established either by a voluntary confession made before the court, or by the testimony of a specific number of eyewitnesses – four in the case of *Zina*, two for all other *Hadd* offences. These evidentiary requirements are further clarified. In cases of *Zina*, for example, actual vaginal penetration needs to be witnessed in order for the testimony to be deemed admissible for consideration. In all *Hadd* cases, the witnesses must be sane, adult, male Muslims of piety. They must never have been convicted of *Qazf* or other slander, and the court must be satisfied that they are truthful, abstain from major sins and maintain the inclination not to indulge in minor ones.<sup>43</sup> Courts are required to carry out an investigation on prosecution witnesses called “purgation.” Unfortunately, neither the courts nor the law have established a uniform method for purgation; in practice, each judge follows his own methods, ranging from cross-examination of witnesses to inquiries among their community regarding their characters. Yet some judges have failed to carry out purgation due to lack of knowledge of the law or simple carelessness.<sup>44</sup> This can often work against the accused, a problem that is compounded when competent counsel is unavailable to request purgation, or due process.<sup>45</sup>

Prior to any discussion of the severe punishments of *Hadd*, it is imperative to note some of the values underlying the Islamic law, which acts as its foundation. First, such punitive measures are only to be administered if the offences are proved conclusively and beyond any chance that an innocent person will suffer undeserved punishment. Second, where the rights of an individual are concerned, every attempt must be made to ensure that they are not violated.<sup>46</sup> Third, in cases where liability for the crime cannot be attributed to any one individual, the people of the locality at large must compensate the victim. Finally,

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<sup>42</sup> Pakistan, *supra* note 6 at 9.

<sup>43</sup> Pakistan, *supra* note 6 at 7.

<sup>44</sup> Jahangir & Jilani, *supra* note 12 at 62.

<sup>45</sup> Jail Criminal Appeal 267/I of 1985 Khuda Baksh.

<sup>46</sup> Pakistan, *supra* note 6 at 10.

Islamic jurisprudence does not traditionally encourage or approve of long-term imprisonment.<sup>47</sup> These four principles, in theory, underpin any application of punishment.

#### 4. Ta'azir

The word *Ta'azir* translates as “punish.”<sup>48</sup> In cases where the strict requirements of proof for *Hadd* offences are not met, *Ta'azir* punishments or discretionary punishments for non-*Hadd* offences may be applied. In fact, the vast majority of violations under the category of *Hudood* are punished as *Ta'azir* offences, rather than *Hadd*.<sup>49</sup> This enables the continuity of the *Hadd*'s deterrent factor, while at the same time maintaining just proportionality amongst proven offences.<sup>50</sup>

*Ta'azir* punishments include: slapping, lashing or flogging (at most thirty-nine times in total); exile; imprisonment for the purposes of producing repentance; public proclamation of the convict on a donkey's back; admonition or reprimand (involving slapping and beating); abandonment; compensation payable to the victim in cases of displaced property; monetary compensation for injury; and suspension or dismissal from one's workplace. It is important to note that *Hadd* punishments are seen as the exception rather than the rule, since it is so difficult to establish the required burden of proof. *Ta'azir* punishments are thus far more frequently invoked, and thus an in-depth discussion of them is warranted in any analysis of *Hudood* laws.

In Pakistan, with the promulgation of the *Hudood* Ordinances and Rules, a number of legal changes have taken place through the introduction of *Ta'azir* punishments. For example, prior to the *Hudood* laws, children under the age of seven bore no criminal liability, and children under the age of twelve were punishable only if they understood the nature and consequences of their acts. While the *Hudood* Ordinances exempt children from *Hadd* punishments, this is not so with *Ta'azir* punishments. For example, the *Ta'azir* punishment for *Zina* committed

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<sup>47</sup> Pakistan, *supra* note 6 at 11.

<sup>48</sup> Jahangir & Jilani, *supra* note 12 at 24.

<sup>49</sup> Jahangir & Jilani, *supra* note 12 at 31.

<sup>50</sup> Jahangir & Jilani, *supra* note 12 at 9.

by children, though lighter than that for adults, is nonetheless a five-year sentence and thirty discretionary stripes. For all other *Ta'azir* offences, children are tried and punished as adults. In one notorious case, a child was awarded two years rigorous imprisonment – a more severe sentence that usually denotes a term of hard labour for the convicted criminal – for stealing the equivalent of eight Canadian dollars.<sup>51</sup> On the other hand, *Ta'azir* punishments for theft and armed robbery are the same today as they were under the old penal code of 1860. The maximum duration of imprisonment permissible for theft, for instance, remains three years.<sup>52</sup> The rules of evidence for *Ta'azir* offences are the same as those for all other so-called regular crimes.

As mentioned earlier, *Hadd* punishments are only awarded to adults. Adulthood is defined in terms of age and sexual maturity – offences of theft and drinking, for example, require the accused either to have experienced puberty or reached the age of eighteen. For *Zina* and *Qazf*, the same standard applies for boys; for girls, either puberty or the age of sixteen must have been reached. This definitional standard, equating mental development with sexual maturity,<sup>53</sup> has been criticized both on practical and realistic grounds. While puberty is defined by menstruation for women, and “signs of puberty” and the capability of reproducing for men, there is little definite correlation between this standard and concepts of mental development and capacity. Additionally, holding women accountable from the beginning of their transitory period and men towards the end is further evidence of the discriminatory nature and effect of the laws in Pakistan.

## II. PAKISTAN'S HUDOOD LAWS

Prior to the enactment of the *Hudood* laws, Pakistan's criminal legal system was based *in toto* on the principles of British common law. The country's penal code, criminal procedure code, evidence act, and even the court structure were all acquired from its former British rulers. This

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<sup>51</sup> 1980 P.Cr.L.J. 1955 Jamil Ahmed.

<sup>52</sup> Jahangir & Jilani, *supra* note 12 at 74.

<sup>53</sup> Jahangir & Jilani, *supra* note 12 at 53.

Anglo-Saxon system was applied to Pakistan in its entirety, with the exception of the tribal areas, where customary law prevails to this day. The changes that were made in 1979 to the legal status quo took the procedures and punishments for some offences out of the conventional structure and placed them under the new branch of Islamic law.<sup>54</sup>

There are five ordinances and orders that make up Pakistan's *Hudood* laws: *The Offences Against Property (Enforcement of Hudood) Ordinance, 1979*; *The Offence of Zina (Enforcement of Hudood) Ordinance, 1979*; *The Offence of Qazf (Enforcement of Hadd) Ordinance, 1979*; *The Execution of the Punishment of Whipping Ordinance, 1979*; and *The Prohibition (Enforcement of Hadd) Order, 1979*. Rape, adultery, theft, armed robbery, and drinking alcohol were all offences in Pakistan prior to the enactment of the *Hudood* laws. The new laws introduced only two new crimes, that of *Qazf* and that of fornication. It is important to note here that the *Hudood* laws apply equally to all Pakistanis, Muslim and non-Muslim.<sup>55</sup>

The rules of evidence for each *Hadd* offence are laid down in the provisions of the *Hudood* Ordinances themselves. The evidentiary rules for *Ta'azir* punishments, in contrast, are found in the *Qanoon-e-Shahadat*, or the law of evidence, which is applied to all of Pakistan's laws. Pakistan's evidence act of 1872, based on British common law, was repealed in 1984 and replaced by the *Qanoon-e-Shahadat* in an effort to bring the law of evidence in conformity with Islamic injunctions. Remarkably, the *Qanoon-e-Shahadat*, with the exception of nine sections, is exactly the same as 1872's evidence act. The differences include a greater focus on the evidentiary principles of Islamic law, including explicit rules regarding the required number of eyewitnesses, their character and their competence.

Regarding the number of witnesses, one section of the *Qanoon-e-Shahadat* states that the exact number shall be determined in accordance with the injunctions of Islam. It specifies that "evidence in matters pertaining to financial or future obligations, if reduced to writing shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly."<sup>56</sup>

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<sup>54</sup> Jahangir & Jilani, *supra* note 12 at 23.

<sup>55</sup> Jahangir & Jilani, *supra* note 12 at 24.

<sup>56</sup> Jahangir & Jilani, *supra* note 12 at 30.

Regarding competence, the *Qanoon-e-Shahadat* states:

[The] Court shall determine the competence of a witness in accordance with the qualifications prescribed by the injunctions of Islam as laid down in the Holy Qu'ran and Sunnah for a witness, and where such witness is not forthcoming, the Court may take the evidence of a witness who may be available.<sup>57</sup>

Both these differences between the *Qanoon-e-Shahadat* and the evidence act of 1872 have made little *de facto* difference to legal practices, due in part to their vagueness,<sup>58</sup> though it is worthy of note that the acceptability of evidence varies from one crime to another under Islamic law. However, they have had one significant impact with regard to confession and its impact on the prosecution's task. Since it is now mandatory to enforce *Hadd* punishments if the required burden of proof is met, an attained confession today effectively eliminates plea-bargaining as an available option for the prosecution during a complex investigation, as they have no discretion to offer a lighter sentence or immunity.<sup>59</sup>

A number of observations have begged the question: what have the *Hudood* Ordinances really changed in Pakistan? Critics note that *Ta'azir* punishments are more frequently applied in contrast to *Hadd* punishments, evidentiary requirements with regards to *Ta'azir* offences are very similar to that of the pre-*Hudood* law in Pakistan, and 'regular' subordinate criminal courts are used for 'Islamic law' cases. The general answer to the above query is a limited change, but with nonetheless rather severe ramifications. Part of the answer lies in *Ta'azir* punishment for *Zina*, which in both theory and practice has had an adverse impact on women. This creates a fallout effect on *Qazf* laws, which too have had discriminatory effects against women. The rest of the answer, albeit a smaller part, lies in the introduction of public whippings to Pakistan's penal system.<sup>60</sup> Each of these variables are discussed below, under the headings of the corresponding legislation.

Procedurally at the level of first instance, offences of *Hadd* are tried by the regular criminal courts. However, presiding justices must now be

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<sup>57</sup> Jahangir & Jilani, *supra* note 12 at 30.

<sup>58</sup> Jahangir & Jilani, *supra* note 12 at 31.

<sup>59</sup> Jahangir & Jilani, *supra* note 12 at 49.

<sup>60</sup> Jahangir & Jilani, *supra* note 12 at 32.



Muslim, unless the case involves a non-Muslim accused. Moreover, *Hadd* punishments can only be executed after the Federal Shari'ah Court, an appellate court, has heard the case. Non-Muslim lawyers may not appear before this religious court, regardless of their client's religion. The eight justices on the Bench are ideally to be Islamic scholars with formal legal training, though judges with both these qualifications remain rare. The tenure of justices is three years, extendable by the appointing authority, the President of Pakistan. Additionally, these judges can be transferred within the country at any time.<sup>61</sup>

Critics of the Islamic branch of Pakistan's legal system have pointed to the lack of both security of tenure and formal legal training as reasons for waning confidence and respect towards the Shari'ah Courts. One clear example of this distrust can be found in the 1981 *Hazoor Baksh* case, where the punishment of stoning to death was challenged as being un-Islamic.<sup>62</sup> Of the five judges presiding, three allowed the appeal, one dissented in part, declaring stoning to death as a *Ta'azir* offence rather than one of *Hadd*, and one dissented in full. The majority cited passages from the *Qur'an*, Islam's holy text, and from *Hadith*, or "tradition," which includes reported sayings or actions of the Prophet Mohammad (peace be upon him) and is one of the sources of Islamic law.<sup>63</sup> These judges rejected other *Hadith* as inauthentic, and used judicial tools such as logic of omission and analogy to support their position. Upon issuance of the verdict, religious hardliners protested in the streets and called for a review of the judgment. Under pressure, the President of Pakistan passed a constitutional amendment granting the Federal Shari'ah Court the power to review its own judgements.<sup>64</sup> Less than a month after the challenged verdict, the Federal Shari'ah Court bench was reconstituted, retaining only one justice. Five judges, one of whom had already given his opinion as *amicus curae* during the original hearing, were appointed to the religious court. The *amicus curae*, not surprisingly, had supported stoning to death as a valid Islamic punishment. Shortly thereafter, the State of Pakistan filed a review petition,

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<sup>61</sup> Jahangir & Jilani, *supra* note 12 at 24.

<sup>62</sup> PLD 1981 FSC 145 Hazoor Baksh.

<sup>63</sup> Coulson, *supra* note 29.

<sup>64</sup> Constitutional (Amendment) Order 1981 (P.O. No.5 of 1981) Section 3 (w.e.f. April 13, 1981).

pursuant to which the newly reconstituted court ruled that the Federal Shari'ah Court lacked jurisdiction to examine the Islamic character of the *Hudood* Ordinances. They also allowed the appeal, in favour of stoning to death as a valid punishment. Only one judge ruled partly in dissent, holding that stoning to death is a *Ta'azir* punishment. One of the justices, writing in majority, concluded his judgement by stating that "[T]his is a pure matter of belief and faith as followers of the Holy Prophet (peace be upon him) and his Caliphs which requires no reasoning or arguments." It appeared that this judge had based his decision on religious belief, without reasoning. This brings into question whether judges should be allowed to do this, or if instead they should be expected to apply and interpret the law after hearing both sides of an issue with an open mind.

After examination of the *Hazoor Baksh* case, it should be of no surprise that there is a lack of knowledge of the basic workings of the Islamic legal branch of the system on the part of the judiciary itself. In fact, a large number of trial court decisions reveal a total lack of comprehension regarding the *Hudood* criminal legal scheme. Trained judges of the trial court have been known to make gross errors at law when dealing with both Islamic and non-Islamic legal principles, and are continually being reprimanded for doing so by superior courts (though this is not to say that those higher courts themselves have not been guilty of gross errors).<sup>65</sup> One frightening example of such incompetence comes from a case in Azad Jammu and Kashmir where both a *Qazi* (a member of the *Ulema* acting as a judge) and a sessions judge were presiding over cases involving charges of *Zina*. In that case, the judgements of the *Qazi* were not decided on fact. The High Court later observed that, since the *Qazis* generally cannot read medical reports or reports of "chemical examiners" or pathologists, they often base their decisions on guess work. The High Court commented that unless medical reports were all translated to Urdu or, alternatively, the *Qazis* were assigned only to tasks not requiring knowledge of English, the people would continue to be deprived of justice.<sup>66</sup> Yet another problem with the Federal Shari'ah Court has been that of using non-existent facts and un-

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<sup>65</sup> NLR 1984 SD 46 Naseer Hussain; PLD 1981 FSC 115 Muhammad Rafiq; PLD 1981 FSC 224 Ghulam Ali.

<sup>66</sup> NLR 1987 SD 201 Abdul Qadus.

pleaded arguments in justifying their often inconsistent positions. This took place in the *Masood Aziz* case,<sup>67</sup> where the bench was convinced without apparent reason that the commission of incest is not possible. There was no mention in the decision as to why a punishment for incest nevertheless exists in Pakistani law.

The religious courts have also been inconsistent in their findings, reasoning and precedent. For example, *attempt* to rape is punishable with half the sentence prescribed for rape and *preparation* of rape is punishable with a maximum of two years under *Hadd* law.<sup>68</sup> Unfortunately, the courts have not been consistent in interpreting these two legal concepts.<sup>69</sup> In one case, the co-accused were convicted on charges of attempted *Zina*, and the Federal Shari'ah Court interpreted attempt to commit *Zina* as an act that would have been performed if not interrupted by outside intervention. By contrast, under similar circumstances in a matter of rape, the courts found a highly similar fact situation which amounted to preparation.<sup>70</sup>

An incompetent bench only compounds the effects of an already inept bar. One blatant example of the compounded problem can be found in the *Saleem* case. In that case, the incompetence of the lawyers was met by the insensitivity and arrogance of the judges. The defence attorney, who had been paid in advance, failed to show up at trial court, and thus no cross-examination of the prosecution's witnesses took place. Not only was Mr. Saleem sentenced to a *Hadd* punishment, there was no mention, even on appeal, of the incident.<sup>71</sup>

Despite such inadequacies, the Federal Shari'ah Court now also has jurisdiction to declare any law in Pakistan repugnant to Islam, with the exception of constitutional provisions, Muslim personal law, fiscal law, and procedures of the court. Upon declaration of repugnancy, the invalid provisions cease to have force and effect and the government has a set period of time to amend the offensive legislation.<sup>72</sup> Appeals from the Federal Shari'ah Court are heard by the Supreme Court – Shariah

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<sup>67</sup> Criminal Appeal No. 288/L of 1988, *Masood Aziz*.

<sup>68</sup> *Jahangir & Jilani*, *supra* note 12 at 99, 115.

<sup>69</sup> PLD 1982 FSC 179 *Shaukat*; PLD1983 FSC 53 *Yaseen*; NLR 1987 SD 143 *Ibrahim*.

<sup>70</sup> PLD 1983 FSC 105 *Pak Muhammad & another*.

<sup>71</sup> *Jail Criminal Appeal No.42/I of 1985 Saleem*.

<sup>72</sup> *Jahangir & Jilani*, *supra* note 12 at 25.

Bench, a bench consisting of five justices. Again, finding *Ulema*, or Islamic scholars, to occupy seats on this bench has been a great challenge.

Sadly, all of these problems are adversely compounded by the fact that the police force in Pakistan is corrupt, inefficient, excessively large, and lacking the supervisory safeguards necessary for the proper care and safety of female inmates.<sup>73</sup> This has caused many problems for the accused who, from arrest to verdict, witness a considerably protracted process afflicted by the legal and systemic incompetence mentioned above.

Regarding the *Hudood* laws themselves, much criticism has been levelled regarding gender discrimination.<sup>74</sup> While the purpose of this paper is not to criticize Islamic injunctions themselves, one question which may be asked is, does the Pakistani justice system benefit by having evidentiary laws that discriminate on the basis of sex? It has been argued above that Pakistan is neither a truly Islamic state, whatever the definition, nor one applying a perfect set of Islamic laws. Given these facts, alongside the *caveat* from Islam itself that *Hadd* offences are to be treated most cautiously and are only to be punished accordingly, and given the meeting of the strictest burdens of proof, one questions whether Pakistan does in fact house a society that warrants a simplistic or codified usage of religious law. Pakistan today is a society in which men and women freely intermingle, both in the business world and in their personal lives. This itself is contrary to the basic concepts of *mehrum* or *purdah*, or the societal separation of males and females in the utopic Islamic social structure. To apply Islamic gender-dependent laws in such an 'un-Islamic' state is difficult to justify. For example, in a society where women for the most part remained outside of the business world, the requirement that only men can bear witnesses would pose a far less severe a practical problem. However, in a society such as Pakistan, which sees large-scale participation of women in the workplace, it seems unjust that a woman who witnesses a crime is disallowed to testify, especially when the absence of that testimony could wrongfully acquit an accused.

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<sup>73</sup> Jahangir & Jilani, *supra* note 12 at 120.

<sup>74</sup> Jahangir & Jilani, *supra* note 12 at 22.

To espouse such laws, as valid as they may be in a hypothetical context, as catalysts of Islamization, such as Pakistan is doing, is nothing more than wishful thinking. Change in society, especially with regards to the proper practice of a religion, requires education and understanding of underlying principles and the consequences of their adherence, not the implementation of misunderstood and ill-suited laws which do nothing more than deter justice and promote disrespect for sacred concepts. As it is Pakistan's national sport, an analogy to cricket would be apropos: Pakistan needs to field a trained team first, and only afterwards begin issuing penalties and warnings. To penalize players first in the hope that it will improve their performance and correct their mistakes is inherently backwards, inefficient, and ultimately unfair to the players, to the game, and to the rules themselves.

Gender based discrimination can also be cited on a more general level. Men and women are routinely treated inequitably with regards to character issues. In one case, a woman was criticized for being of "bad character;" there was no mention of the man's abandonment of his wife for over ten years.<sup>75</sup> Other odious examples exist, such as the granting of favour to men in cases of rape or *Zina* where the woman has been found to be of "easy virtue" or "loose character."<sup>76</sup> Favour has also been granted to the accused when the victim, usually female, is seen as "habitual."<sup>77</sup> Men too are discriminated against by the system, albeit in fundamentally different ways. The major problem that has plagued men is one of favouritism by the courts on the basis of appearance; courts have been more likely to show leniency to individuals who present a more religious appearance.<sup>78</sup>

The issue of admissibility of evidence and its related problems has been mentioned above. These problems exist with regards to non-Muslim evidence as well and have been used to criticize Islamic law in Pakistan. Pakistan continues to struggle with both its definition of Islam and the criteria by which different sects are judged to be Muslim or not. It was thus that the Pakistani government excommunicated the *Quadiani* sect and their members outright; other groups such as the *Aga Khanis*, could suffer the same fate at any time. Until such distinctions

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<sup>75</sup> Cr. Appeal No. 137/I, or 1986 Mst. Gul Nisa and Fazal Dad.

<sup>76</sup> PLD 192 FSC 240 Falek Sher; 1982 P.Cr.L.J. (Lah) Muhammad Abbas.

<sup>77</sup> 1983 P.Cr.L.J. 2014 (Lah) Shabbir Ahmed Watto.

<sup>78</sup> 1982 P.Cr.L.J. 1202 Zahoor Ahmed.

can be made objectively and apolitically, however, it seems both unfair and arbitrary to attempt to impose them in the witness stand.

It is generally agreed that Pakistan's *Hudood* laws are imperfect even when viewed from a purely religious standpoint, and many people in Pakistan are asking that they be totally repealed, or at least suspended. It seems clear that Pakistan must wait to impose true Islamic law until it has the resources and the wherewithal to develop the fully trained team of our analogy that such an implementation would require.<sup>79</sup>

## 1. Offences Against Property (Enforcement of Hudood) Ordinance

*The Offences Against Property (Enforcement of Hudood) Ordinance* deals with theft and highway robbery. If theft is proven to the standard required by *Hadd* law, the right hand of a first time offender is to be amputated. For a second offence the left foot is to be amputated. Imprisonment for life is the ordained penalty for committing theft a third time.

There are exceptions to these rules, however.<sup>80</sup> If one of the hands of the offender has already been lost or the left hand or the left thumb or at least two fingers of the left hand are missing or totally unusable by whatever cause, in the case of a first offence his remaining hand is not to be amputated. Similarly, a second offence would not result in an amputation where there is only one usable foot or there are only three or fewer remaining toes on that foot. For a third offence, if it is proven to the satisfaction of the Federal Shari'ah Court that the convict has become sincerely penitent, they may set the offender free on terms and conditions at their discretion. There are additional exceptions, depending on the relationship between the complainant and the offender, for various minor categories of theft. The general *Ta'azir* punishment for theft is rigorous imprisonment for up to three years.

For highway robbery, the elements of which include the threat of force and the intention of robbing someone, punishment varies proportionally to the nature of the offence, based on factors such as whether

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<sup>79</sup> Jahangir & Jilani, *supra* note 12 at 18.

<sup>80</sup> Pakistan, *supra* note 6 at 11.

property has been displaced and whether injury or murder has been committed. Punishment varies, from rigorous imprisonment for three years in addition to thirty stripes, to the amputation of the right hand and left foot, to capital punishment (but only if the value of the property stolen exceeds *nisab*).<sup>81</sup> Death is only to be imposed in cases of theft which result in murder.<sup>82</sup> If the victim is injured during the robbery, additional punishment is prescribed as per the *Penal Code*. Parallel exceptions exist in situations of highway robbery.<sup>83</sup> However, where a left hand or right foot are missing or totally unserviceable, a maximum of fourteen years of rigorous imprisonment and thirty stripes are prescribed as an alternative to amputation for highway theft.<sup>84</sup>

There are other limitations and also preconditions for awarding *Hadd* punishments for theft and (highway) robbery. In order to qualify for a *Hadd* punishment, the value of the stolen property must be in excess of the value of 4.457 grams of gold (approximately U.S.\$100). This value is called *nisab*. The value of the stolen property is to be divided by the number of thieves, and if the amount is greater than or equal to *nisab* per person, the *Hadd* punishment is to be awarded. However, *Hadd* is not to be imposed if the offender and the victim are closely related to each other, applying towards one's spouse, ascendants or descendants, siblings, parents, or aunts or uncles. Such is also the case if guests steal from the houses of their hosts, or where servants steal from their employers. Further, the theft of wild grass, fish, birds, dogs, pigs, intoxicants, musical instruments, or perishable foodstuffs is exempt from *Hadd* punishment. Additionally, if a creditor steals from his debtor's property, the value of the debt owed is deducted from the total amount, and if the net amount falls below *nisab*, *Hadd* is not to be awarded. Finally, if any theft is committed under duress or of apprehension of death owing to extreme hunger or thirst, *Hadd* is not to be invoked.<sup>85</sup>

One severe criticism of Pakistani *Hudood* laws with regard to theft, is the exclusion of embezzlement of public funds of any amount from its definitional ambit. This is cited as a blatant example of the system's

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<sup>81</sup> *Nisab* is defined below.

<sup>82</sup> Pakistan, *supra* note 6 at 12.

<sup>83</sup> Jahangir & Jilani, *supra* note 12 at 13.

<sup>84</sup> Jahangir & Jilani, *supra* note 12 at 52.

<sup>85</sup> Jahangir & Jilani, *supra* note 12 at 51.

complete disregard for the notion of proportionality, both between crimes and their corresponding punishments, and between penalties for various crimes themselves.<sup>86</sup> This is further evidence of the discriminatory nature of Pakistan's laws and its legal system. Surely the common man, a man or woman of the masses, cannot be expected to have access to public funds; rather, only members of the ruling elite can. These individuals, some themselves lawmakers, appear to have exempted themselves in any meaningful sense from the reach of the *Hudood* laws, at least in the context of theft, since the very public funds that they would be most likely to steal are paradoxically incapable of being stolen under the law. This has given credibility to the argument that a system has been constructed in Pakistan in which the elite are in fact above the law. Law, in order to render justice, needs to be applied across the land, regardless of wealth, class, or any other socio-economic characteristics, without exception.

*Hadd* laws in Pakistan also contribute in other ways to the overall disproportional nature of the law in Pakistan. For example, if someone is seen by two adult male Muslims to be stealing objects worth a total of U.S.\$100 from an enclosed place, he or she can be punished with the removal of one of their hands (in the case of a first or second offence). On the other hand, someone in the sight of several women and/or non-Muslims can steal much more money and be punished under the category of *Ta'azir*, not *Hadd*, with far less severe penalties. The same individuals could also steal a car and escape *Hadd* punishment, as long as the car is not in an enclosed room from where it was wrongfully taken. Again, while these apparent inconsistencies may be easily reconciled in our hypothetical utopia, Pakistan is far from being such a place, and is hardly the ideal jurisdiction for the implementation of such laws.

Another indicator that the masses are the socio-economic group most adversely affected by *Hudood* laws is the fact that a large number of appeals from *Hadd* sentences are made by the convicted, not directly to counsel, but through jail authorities for *pro bono* assistance.<sup>87</sup> Such legal aid in Pakistan, when available at all, is largely provided by under-trained and incompetent representation. This problem is compounded

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<sup>86</sup> Jahangir & Jilani, *supra* note 12 at 21.

<sup>87</sup> Jahangir & Jilani, *supra* note 12 at 48.



by the fact that the vast majority of *Hadd* punishments are imposed upon the poor and relatively voiceless sections of Pakistani society.<sup>88</sup>

## 2. Offence of *Zina* (Enforcement of Hudood) Ordinance

*The Offence of Zina (Enforcement of Hudood) Ordinance* deals with the crimes of rape, abduction, adultery, and fornication. The word *Zina* literally translates as “consensual sexual relations outside of a lawful marriage, including adultery and fornication.” Penetration is sufficient to constitute either offence.<sup>89</sup> Islam holds both the man and woman equally guilty for committing fornication, with the exception of rape, in which case the man is held solely responsible. The commission of *Zina* by a married person is considered more serious than when it is committed by a non-married individual; correspondingly, the punishment is much more severe. Punishment for *Zina* can be as harsh as being stoned to death, for married adult Muslims, or as lenient as 100 stripes, for non-Muslim adults and single adult Muslims. For a *muhsan*, an adult Muslim who is sane and either a widow, widower, divorced, or married, who has had sexual intercourse with another sane Muslim who is married, the punishment is stoning to death. Stoning to death must result in death, though that need not be by the stoning itself; the law in Pakistan states that “such of the witnesses who deposed against the convict as may be available shall start stoning him and, while stoning is being carried on, he may be shot dead, where upon stoning and shooting shall be stopped.”<sup>90</sup>

Stoning to death awarded upon confession will of course involve no witnesses. The law is silent as to who shall then cast the first stone. Despite these specific penalties, the courts are given much discretion in sentencing an individual under the *Zina* laws. Punishment for cases that do not meet the *Hadd* standards of proof ranges from rigorous imprisonment of ten years up to twenty-five years plus thirty stripes.

This ordinance also encompasses the various other offences, which include: kidnapping; abducting or inducing a woman to compel her to

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<sup>88</sup> Jahangir & Jilani, *supra* note 12 at 67

<sup>89</sup> Jahangir & Jilani, *supra* note 12 at 23.

<sup>90</sup> Section 17 Offence of *Zina* (Enforcement of *Hudood*) Ordinance 1979.

marriage against her will; subjecting a kidnapped person to illicit sexual intercourse or to unnatural lust; the buying or selling of persons for the purposes of prostitution; and co-habitation caused by a man deceitfully inducing, taking away, or detaining a woman in belief of lawful marriage, with criminal intent.<sup>91</sup>

The *Hudood* laws in Pakistan have of course changed certain concepts legally with regard to rape and *Zina* from the pre-*Hudood* law period. Women, unlike prior to the *Hudood* laws, can now be charged with the offence of rape. Wives can no longer be considered raped. Children can now, regardless of age, be convicted of *Zina* or rape. Consent of a child can today be put forward as a defence by the accused. Punishment for rape under the pre-*Hudood* criminal legal system was banishment for life or imprisonment extending up to ten years plus a monetary penalty<sup>92</sup> and the rape of a wife over the age of twelve was punishable with imprisonment of up to two years. Under the *Hudood* laws, the *Ta'azir* sentence for adults accused of rape is a maximum of twenty-five years and a minimum of four years. Minors can receive up to a five-year sentence plus a maximum of thirty stripes or lashes.<sup>93</sup>

Additionally, under the old penal code of Pakistan, adultery was a crime, whereas sex between unmarried consenting adults was not. The punishment for adultery was imprisonment for five years and/or a fine. Further, only the husband of the alleged adulteress could make complaints of adultery. If the complainant dropped charges, criminal proceedings against his wife would automatically be dropped. The adulteress could subsequently not be punished for adultery. Currently, any individual can bring charges which cannot be dropped, under any circumstances.<sup>94</sup>

Rape as mentioned above is an exceptional crime within the *Zina* category and is worthy of further elaboration. Rape is universally one of the most difficult crimes to prove, since witnesses are generally unavailable. Therefore, as long as the burden of proof with regard to the guilt of the accused lies with the prosecution, courts cannot convict persons accused of rape solely on the testimony of the victim. This principle is

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<sup>91</sup> Pakistan, *supra* note 6 at 13.

<sup>92</sup> Jahangir & Jilani, *supra* note 12 at 85.

<sup>93</sup> Jahangir & Jilani, *supra* note 12 at 86.

<sup>94</sup> Jahangir & Jilani, *supra* note 12 at 86.

not based on the ground that the evidence of the victim is unreliable, but is a rule of prudence recognizing that at times women may give false evidence, just as males may. The consequence of this rule is that rape can be proved on the evidence of the victim, but provided it is corroborated. This includes medical evidence corroboration. However in Pakistan's social climate, with the great stigma that is attached to rape, very few women have themselves medically examined promptly following a violation,<sup>95</sup> and for the same reason delay filing criminal complaints.<sup>96</sup> Because of this, most prosecutions of rape are dismissed. This obviously does not imply false testimony by the victim, barring a contradictory finding by the court. Unfortunately for Pakistani women, when a prosecution for rape fails, police go on to prosecute the victim for adultery under the *Hudood* laws, knowing well that the penalty for such a crime can be as severe as stoning to death. This approach of the police seems to be based on two assumptions: firstly, the allegation of the rape is false because the accused was acquitted (it is explained above why this is in fact not the case); secondly, the allegation of rape is an admission of sexual intercourse, therefore the dismissal of the prosecution's case amounts to an implied confession of adultery. This conclusion flies against all common sense, since a confession is an admission of guilt, while an allegation of rape is a repudiation of guilt. The Supreme Court of Pakistan in the *Rehmani* decision has stated clearly that only a statement that is a clear admission of guilt, or fact constituting guilt, is a confession.<sup>97</sup> It was added in that decision that a statement cannot be treated as a confession by relying on only inculpatory evidence, excluding anything exculpatory.

Additionally, it appears that a victim of rape now runs the risk of being punished under *Zina* whether she files a complaint or not. If a woman does, she must prove absence of consent. If she does not, the alleged offence can be changed from that of rape to *Zina* and the victim herself then becomes a co-accused. Having not filed a complaint, if she subsequently becomes pregnant, she can be charged with *Zina* as well. There have been numerous cases where the alleged rapist has been acquitted for lack of conclusive evidence, whereas the victim went on to

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<sup>95</sup> PLD 1983 FSC 110 Shabbir Ahmed.

<sup>96</sup> Jahangir & Jilani, *supra* note 12 at 13.

<sup>97</sup> PLD 1978 SC 200.

be punished for not having conclusive evidence to show that the unexplained pregnancy was because of rape. One such case was that of *Safia Bibi*.<sup>98</sup> Although the decision of the lower court was later overturned on appeal, the underlying problem – that of the burden of proof shifting to the victim of rape to explain her pregnancy – was not addressed. Thus, it appears that while the accused rapist is deemed innocent until proven guilty, his female victim is presumed to be guilty until she proves herself innocent. Males, too, are unfairly treated in this respect by the system at times. A major problem has been that of courts converting charges of rape to those of *Zina* when there is insufficient evidence to prove the former.<sup>99</sup> Principles of criminal law would call for the accused to be acquitted.

Yet it is not only the state prosecution that is to blame for misapplying the law as set out by the Supreme Court. Despite provisions in the law as mentioned above with the requirement of either an un-retracted confession or of consistent evidence from four honest and reliable male witnesses, trial court judges in Pakistan have convicted women of adultery solely on the basis of pregnancy. Pregnancy was treated by these judges as either circumstantial evidence or as some sort of implied confession. However, circumstantial evidence is barred under the *Hudood* laws and the view that an allegation of rape not proved amounts to a confession is contrary to the law declared by the Supreme Court.<sup>100</sup> These judges, despite sitting on a religious bench, are under a duty to uphold the law of the land.

The aforementioned problem of illiteracy has had resounding negative effects in the area of *Zina* specifically, and generally on all *Hudood* crimes with regards to confession evidence. Ignorance of the law, compounded by the lack of public access to legal information and advice, has led to the accused themselves inadvertently sabotaging their own cases. One case in which this occurred is *Mushtaq Ahmed* in which the co-accused, under a misconception of the law and its underlying concepts, incorrectly confessed to having committed *Zina*. Evidence to

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<sup>98</sup> NLR 1985 SD 145 Safia Bibi.

<sup>99</sup> NLR 1986 SD 5 Sultan Maqsood Vs. the State; 1980 P.Cr.L.J. 1037 Ihsan Ahmed alias Nana; PLD 1982 FSC 220 Niamat Ali; PLD 1983 FSC 541 Sohail Iqbal; PLD 1986 SC 12 Khushi Muhammad alias Bogi; NLR 1987 SD 185 Bahadur Shah; PLD 1983 FSC 117 Ubaidullah.

<sup>100</sup> Jahangir & Jilani, *supra* note 12 at 14.

the contrary later established his mistake and cleared the accused of *Hudood* charges.<sup>101</sup>

In addition to the above problems inherent in the system, there are two specific kinds of cases that are indicative of the society in which these laws are being applied: false prosecutions filed by possessive fathers and by ex-husbands. Social values in Pakistan are rapidly changing. For example, divorced women are now remarrying and young women are marrying against the wishes of their fathers. Even when such marriages are in accordance with Muslim law however, fathers have filed cases of adultery against their own daughters and ex-husbands have maliciously filed cases against their ex-wives under the *Hudood* laws, on allegations that the women are guilty of fornication. While the accused need only show a marriage certificate or orally testify to marriage to obtain an acquittal, the agony inflicted on such women in contesting these generally false charges is unwarranted, especially given the stigma of such allegations in the society at large. More problematic, however, is the fact that there are a large number of wrongful convictions due simply to the fact that appeals are a luxury not available to most of the poor.

Another example of inherent flaws in Pakistan's legal system can be cited from the *Mohammad Sarwar* and *Shahida Parveen* case. In that case Shahida was married to a Khushi Muhammad, but claimed that she had divorced him prior to marrying the man who was her co-accused in *Zina*. Mr. Muhammad denied the divorce. A divorce deed was placed on record by the defence, allegedly bearing Mr. Muhammad's signature. Under Pakistan's family laws, all Muslim divorces have to be registered. Doing so after oral pronouncement upon the wife by the ex-husband as failure to do so is an offence. There is no time limit on the registration however, and the offence is thus pragmatically ineffective. This allows men to effectively disallow their ex-wives from re-marrying, without her knowing. This in turn means that the ex-husband can threaten allegations of *Zina* at any time, which is inherently unfair to the woman and can easily be used against her in the most severe way, considering the potential consequences of penalty. In Shahida's case, the law worked against her as the divorce deed was not registered.<sup>102</sup>

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<sup>101</sup> Criminal Appeal No. 15/1 of 1984 Mushtaq Ahmed and another.

<sup>102</sup> NLR 1988 (SD) FSC 188 Mohammad Sarwar & Shahida Parveen.

Other tragic situations have stemmed from marriages ultimately held to be void. Evidence of couples having lived together, despite being under the impression of valid matrimony, has been taken to constitute confession to *Zina*.<sup>103</sup> Uniquely and fortunately, this confession may be officially retracted, sending the case for re-trial to the regular, more secular courts.<sup>104</sup>

### 3. Offence of *Qazf* (Enforcement of Hadd) Ordinance

*The Offence of Qazf (Enforcement of Hadd) Ordinance* relates mostly to false allegations of *Zina* and is punishable with eighty stripes. However, for successful prosecution, it must be proven that the allegations are made intentionally and clearly imputing *Zina*. Insinuation is not enough, and in fact, it appears that the allegations must be made maliciously.<sup>105</sup>

While the evidentiary requirements for *Qazf* are the same as those for theft and the other non-*Zina Hadd* offences, an exception is made for charges of adultery made by a husband against his wife. In such cases, the husband must first swear by Allah four times that his allegation is true and then a fifth time, saying that the curse of Allah may be upon him if he is lying. The wife can then rebut his allegation by similarly swearing a total of five times that the allegation is false and that if she is lying that the curse of Allah may be upon her. Not only is the allegation of the husband then rebutted, the marriage is automatically dissolved. This process is known as *Lian*.

Another exception to the general law is that *Qazf* made against a descendant does not attract *Hadd* punishment, but that of *Ta'azir*; the *Ta'azir* punishment for *Qazf* being a maximum of two years imprisonment plus forty stripes. Additionally, the victim of *Qazf* must be a *muhsan*, hence *Qazf* committed against persons who are not capable of sexual intercourse will not attract *Hadd*. Consequently as well, *Hadd* will also not be awarded if false allegations are made against non-Muslims, unmarried minors or old people who are no longer capable of intercourse.

<sup>103</sup> Jahangir & Jilani, *supra* note 12 at 55.

<sup>104</sup> PLD 1982 FSC 101 Allah Bux and Mst. Fehmida.

<sup>105</sup> Criminal Appeal No.75/L of 1983 Jiwan Khan; Criminal Appeal No.128/L of 1984 Muhammad Bashir.

Procedurally, charges of *Qazf*, unlike in cases of *Zina*, can be dropped by the complainant with finality.<sup>106</sup> Also, the police cannot make an arrest of *Qazf* without a warrant.<sup>107</sup> This however has not rendered Pakistan's law of *Qazf* immune from criticism and misapplication. Examples of such have been cited above under the heading of *Zina* laws.

#### 4. Prohibition (Enforcement of *Hadd*) Order

Prohibition was first imposed in Pakistan in the year 1977 by the government of Prime Minister Zulfikar Ali Bhutto with the promulgation of the *Prohibition Act of 1977*. The *Prohibition (Enforcement of Hadd) Order*, enacted two years later made certain alterations to its predecessor, including the current prohibition against drinking alcohol, which applies to all Muslims in Pakistan. The Order initially exempted the use of drugs from punishment, a seeming inconsistency better understood from a sociological perspective than a theological one. Narcotics were rarely used in Pakistan prior to the Soviet invasion of Afghanistan and the ensuing refugee crisis during the 1970s. Drugs were therefore not a major concern to Pakistani lawmakers of the time, though use has steadily been growing and drugs are now a widely sought substitute to legally unavailable alcohol. The use, traffic, and sale of narcotics have thus subsequently been added to the *Hudood* laws.

As with each of the *Hudood* laws, exceptions have been legislated for the use of alcohol in Pakistan. Non-Muslim Pakistanis may be issued permits to use liquor, but only for religious ceremonies.<sup>108</sup> Additionally, an exception exists for non-Muslim foreigners who may be issued permits for drinking liquor of a "reasonable amount." It appears that this 'reasonable amount' is discretionary. What is unclear is whose discretion it is up to, other than a judge at trial. The condition, for both these exceptions, is that drinking is not to take place at any public place including hotels, motels, and clubs, excluding private rooms occupied by the permit holder. In addition, the licence holder may not enter a public place in a drunken state.

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<sup>106</sup> Jahangir & Jilani, *supra* note 12 at 52.

<sup>107</sup> Jahangir & Jilani, *supra* note 12 at 83.

<sup>108</sup> Pakistan, *supra* note 6 at 14.

The *Hadd* punishment of drinking for Muslims is eighty stripes, and for cases that do not fall in the category of drinking liable to *Hadd* (including illegal drinking by non-Muslims) rigorous imprisonment for up to three years or a maximum of thirty stripes, or both. Additionally, punishments are provided for the illegal import, export, transport, manufacture, possession, packing, sale, or service of any intoxicant, including alcohol.

Evidentiary laws for drinking liable to *Hadd* require proof of two witnesses, Muslim males of piety. But there is one qualifier: they need not be eyewitnesses. These witnesses may be from the medical profession or be laypersons that have only smelled liquor from the mouth or vomit of the offender. One exception to this exception is that the prosecution needs to establish that the drink was not taken or owing to extreme hunger or thirst.<sup>109</sup>

Procedurally, Pakistan's prohibition laws state that arrest can only be made after a medical test has been carried out on the accused. Police cannot arrest those drinking privately without a warrant. If a police officer arrests someone solely on the suspicion of drinking, they can themselves be imprisoned for up to six months, in addition to being financially penalized. Not surprisingly, most people who have been charged under this Order have been from the lower economic strata of society.<sup>110</sup> This is yet another indicator of the inherent and systemic bias of Pakistan's legal system against its poor masses. Alcohol, being illegal and mostly imported, is obviously sold in Pakistan at a premium; likely a premium the poor cannot afford. Thus, while the ruling and moneyed elite are the most likely in Pakistan's society to indulge in the purchase and use of alcohol, they are effectively exempt from punishment. Further, the fact that this is the only *Hudood* law in Pakistan to carry a possible penalty for mistakes made by police officers is yet more evidence of the lawmakers protecting themselves from what they would most likely find themselves guilty of. The police, after all, are unlikely to risk imprisonment over a single arrest.

Finally, while trial courts have been generally incompetent in awarding *Hadd* punishment as a result of the many exclusionary provisions in the law,<sup>111</sup> appellate courts have been quick in converting them

<sup>109</sup> PLD 1983 FSC 55 Ghulam Nabi Awan.

<sup>110</sup> Jahangir & Jilani, *supra* note 12 at 75.

<sup>111</sup> Jahangir & Jilani, *supra* note 12 at 67.



to those of a *Ta'azir* level,<sup>112</sup> except in cases of drinking offences.<sup>113</sup> This, too, may be seen as another example of the bench protecting the interests of the elite in Pakistani society.

### III. CONCLUSION

*Surah 5, Al Ma'idah, Ayat 40* translates to: "Knowest thou not that to Allah (alone) belongeth the dominion of the heavens and the earth? He punisheth whom He pleaseth, and He forgiveth whom He pleaseth: and Allah hath power over all things."<sup>114</sup> In a further clarification, the first line, "Knowest thou not" is footnoted:

Punishment really does not belong to mortals, but to Allah alone. Only, in order to keep civil society together, and protect innocent people from crime, certain principles are laid down on which people can build up their criminal law. But we must always remember that Allah not only punishes but forgives, *and forgiveness is the attribute which is most prominently placed before us*. It is not our wisdom that can readily define the bounds of forgiveness or punishment, but His will or Plan, which is the true standard of righteousness and justice.<sup>115</sup>

It is precisely this principle that those manning the Pakistani legal system are missing. If the citizens, police, and justices were to truly follow Islam by showing and practicing mercy, the effects of the *Hudood* laws would be far closer to what they are meant to be: just. However, if such were the case, it would mean that Pakistan understands its predominant religion and is following it as an Islamic state. As seen above, such is not the case. In this widely illiterate nation, the religion, as practiced, is based on what could be described as an "Islam for Dummies" approach, while Islam in its full complexity goes essentially

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<sup>112</sup> Criminal Appeal No. K-12 of 1980 Ashfaq Ahmad; PLD 1981 FSC 108 Latif and Ghulamullah; PLD 1981 FSC 132 Lal Bux; Criminal Appeal No.24/k of 1980 Hassan; 1982 P.Cr.L.J. 476 (Kar) Majoo Shah; 1981 P.Cr.L.J. 248 (Kar) Yakub.

<sup>113</sup> Criminal Appeal No.222/I of 1985 Muhammad Anwar; Criminal Appeal No.225/L of 1985 Asghar Ali.

<sup>114</sup> The Holy Qur'an- English translation of the meanings and Commentary, King Fahd Holy Qur'an Printing Complex, Al-Madinah Al-Munawarah, 1410 H.

<sup>115</sup> *Ibid.* [emphasis added].

unstudied. Added to this are widespread cultural ailments including mass discrimination against women, systemic corruption, endemic illiteracy, incompetent members of the bar and judiciary, and all the other chronic ills of a developing nation, prominent among them a poor institutional infrastructure. These problems all lead to only one conclusion; that the *Hudood* laws in Pakistan must be suspended immediately and indefinitely, until such time that the nation is deemed socioeconomically, culturally, and religiously prepared to implement Islamic law, as per its divine precepts. Failure to do so will allow the current injustice and mockery of Islamic law to continue, the effects of which will throw the masses into further feelings of helplessness, despair, and inequality with regards to the ruling elite. This has the potential to create acute instability at the grassroots level, which in turn could lead to rebellions by various groups against the union of Pakistan, or even a full-scale revolution directed against the current law makers and ruling class. It has been noted repeatedly in this essay that the lawmakers have tilted the legal system in their favour. To keep these laws in place may ultimately prove to do just the opposite.

In the meantime, Pakistan needs to develop a knowledgeable group of scholars of the *Shari'ah* and of *fiqh* law and needs to recognize that all sources of Islamic law must be used in the development of an Islamic legal 'code,' including proper analogy and consensus of a credible and revered *Ulema*. Additionally, it needs to incorporate the general principles of the religion in its laws and implementing system, including the re-opening of the door of *ijtihad* and emphasizing the principle of mercy, as referred to above, from the *Qur'an*. Procedurally, Pakistan needs to reassess its legal infrastructure, including the duality of its courts and plurality of its legal doctrine. Only after these issues are examined and implemented with credibility can a more fundamental and permanent change be considered.