Is Zina bil jabr a Hadd, Taz‘ir or Siyasa Offence?: A Reappraisal of the Protection of Women Act 2006 in Pakistan”

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Is Zina bil-Jabr a Hadd, Ta’zir or Syasa Offence?
A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan

Muhammad Munir*

Repeal the *hudud* punishments from Muslims as far as you can, so if there is a way out, leave him alone, for it is better for a ruler to make a mistake in forgiving someone rather than in punishing him.

Prophet Muhammad (pbuh)¹

1 INTRODUCTION

The Parliament of Pakistan passed The Protection of Women (Criminal Laws Amendment) Act, 2006² (hereafter PWA) amid protests by one group, jubilation by a second and disappointment by yet another group. Its promulgation sparked an intense debate, mostly emotional rather than legal, in the electronic and print media, mainly between two groups—the *ʿulama* and the women rights/activists groups. The former wanted the *Hudood* Ordinances, especially The Offence of Zina (Enforcement of Hudood) Ordinance, 1979, and The Offence of Qazaf (Enforcement of Hadd) Ordinance, 1979 to remain largely unchanged whereas the latter wanted the above *Hudood* Ordinances, especially the Zina Ordinance to be abolished completely. Caught between these two extremes, the PWA seems

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² The full name of the Act is the Protection of Women (Criminal Laws Amendment) Act No. VI of 2006.
to be slightly tilted towards the position of the women rights groups thus pro-
voking an enraged reaction from the ‘ulama. This article briefly discusses the
various laws passed by the regime of President Musharraf (1999–2008) to relieve
the plight of helpless Pakistani women and analyses the PWA from a legal, rather
than a political, perspective. It scrutinizes the criticism of leading ‘ulama, such
as Justice (r) Taqi Usmani, Mufti Muneebur Rahman, Moulana Abdul Malik,
and Hasan Madani; considers the position of women rights groups about the
PWA; discusses the claim of the government that the Act is compatible with
the Holy Qur’an and the Sunnah and discusses the changes introduced by the
PWA. It also discusses various lacunas that are left unaddressed by the Act and
many legal questions that might crop up in the course of its implementation and
interpretation by the courts.

2 THE BACKGROUND OF THE PROTECTION OF
WOMEN ACT 2006

The protection of women has been high on the agenda of President Musharraf’s
government since the enactment of the Criminal Law (Amendment) Act, 2004³
(hereafter CLA, 2004) which prohibits the giving of a female “in marriage or
otherwise in badal-i-sulh”⁴ by amending section 310 of the Pakistan Penal Code,
1860 (hereafter, PPC).⁵ The CLA, 2004 makes the giving of females in marriage
in such compromises punishable by three to ten years rigorous imprisonment
by inserting a new section 310A in the PPC.

Another important change in the law regarding the protection of women was
promulgated by section 13 of the CLA, 2004 which inserts section 156B in the
Code of Criminal Procedure (Cr. P. C.), 1898. Under the new law, a police offi-
cer of the rank of Superintendent of Police or above shall investigate the case if
a woman is accused of zina under the Offence of Zina (Enforcement of Hudood)
Ordinance, 1979. In practice, however, only adultery (described as zina liable to
hadd after the PWA), remains under the old Ordinance.⁶ This is discussed fur-
ther below. According to the information the author received from the respon-
sible police officials, Superintendents do not investigate such cases and instead
Inspectors or Sub-inspectors have to do it. Superintendents only supervise the
investigation.⁷

³ The President of the Islamic Republic of Pakistan assented to it on the 4th of January, 2005,
and was notified by the Senate Secretariat, Islamabad on the 10th of January, 2005. It was
published in the Gazette of Pakistan, Extraordinary, Part 1, Islamabad on the 11th of Janu-
ary, 2005, at pp. 1–6.
⁴ It is defined in the explanation to section 310 (5) as “the mutually agreed compensation
according to Shari‘ah to be paid or given by the offender to a wali in case or in kind or in
the form of moveable or immovable property”.
⁵ Section 6 of the Criminal Law (Amendment Act), 2004 (Act No. 1 of 2005) which amended
section 310 (1) of PPC.
⁶ See, section 5 of The Offence of Zina Ordinance, 1979 as amended by the PWA in 2006.
⁷ This amendment also provides that such an accused cannot be arrested without the permis-
sion of the court. The explanation of ‘zina’ to section 156B did not include ‘zina-bil-jabr’ or
rape. Another amendment was made regarding blasphemy law. Under section 156A of the
In another important move, the government passed The Criminal Procedure (Second Amendment) Ordinance, 2006, section 2 of which amends section 497 of the Code of Criminal Procedure, 1898 and adds important provisos to its sub-section (1). The new amendment provides that a woman accused of a non-bailable offence “[S]hall be released on bail, as if the offence is bailable, notwithstanding anything contained in Schedule-II of the Code of Criminal Procedure, 1898 or any other law for the time being in force.” Exceptions are made in cases where there exist reasonable grounds for believing that the woman accused is “[G]uilty of an offence relating to terrorism, financial corruption and murder and such offence is punishable with death or imprisonment for life or imprisonment for ten years.” All is not lost for such a woman as “[S]he shall be released on bail if she has been detained for a continuous period of six months and whose trial for such offence has not been concluded.” As a result of this amendment, hundreds of women detained for committing various offences were released on bail when the above ordinance came into force.

The Hudood Ordinance on Zina, 1979 has been subjected to scathing criticism by modernists and women rights groups, yet it has been in force for 27 years. The government of the Pakistan Peoples Party, during its previous tenure, unsuccessfully tried twice to amend these provisions. In 2003, the Mutahida Majlis-i-Amal (MMA—a coalition of religious parties) controlling Provincial Assembly of NWFP, passed a resolution declaring the Zina Ordinance, 1979 to be in conformity with the injunctions of Islam.
2.1 Some Lacunas in the Zina Ordinance 1979

The PWA has a lengthy ‘Statement of Objects and Reasons’ which contains well-reasoned critique of the Hudood Ordinances. It states that the objective of PWA is “[T]o bring in particular the laws relating to zina and qadhf in conformity with the stated objectives of the [1973] Constitution and the injunctions of Islam.” In particular, the preamble refers to Article 14 of the Constitution, guaranteeing the inviolability of the dignity of man, Article 25, guaranteeing equality before the law and non-discrimination on the basis of sex, race, etc., and Article 37, which encourages the state to promote social justice and to eradicate social evils. Its opening statement, therefore, establishes that in Pakistan, all laws have to be in accordance with Islam and that the Protection of Women (Criminal Laws Amendment) Act, 2006 is a measure to achieve just this.

The Zina Ordinance 1979 blurred the distinction between zina and rape. Both were defined as “sexual intercourse without being validly married.” The only difference between the two offences was that rape occurred without the victim’s consent. Moreover, if a woman could not prove that the sexual act occurred without her consent, the sexual act itself became a crime against society, and, therefore, the woman became liable for the hadd of zina. As a result of this approach, the Ordinance effectively resulted in conviction of raped women for reporting crimes against themselves and their families. Jehan Mena v. The State and Safia Bibi v. The State, are examples of this. In both these cases, the complainants (women) were convicted by the lower courts in spite of being victims themselves, although they were finally acquitted by the Federal Shariat Court.

Another problem with the Zina Ordinance 1979 was that it considered extramarital pregnancy as a proof of zina. In the scheme of Islamic law, there is a consensus that force or coercion nullifies criminal liability. In case of zina bil jabr, force nullifies liability of the victim, even if pregnancy exists. The opinions of jurists, however, differed on this point.

According to the majority of Muslim jurists, extramarital pregnancy alone is not a sufficient evidence to prove zina. Imam Abu Hanifah (d. 180 AH) was firm in rejecting the use of extramarital pregnancy as an evidence of zina. In his view, the judge has to ask the woman under trial for such accusation to defend herself. This position of Abu Hanifah is in conformity with the decision of ʿUmar ibn al-Khattab (d. 23/644)—the 2nd successor of the Prophet peace be upon him), who tried an unmarried woman for zina. ʿUmar accepted her defence

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10 PLD 1983 FSC 183.
11 PLD 1985 FSC 120.
13 According to Abu Hanifah, if a woman claims that she was raped, or forced into a sexual relationship, or that she had intercourse with a man to whom she thought she was married to, she would not be liable for hadd. He defines the element of doubt concerning the existence of marriage contract and argues that if a man pays a woman to perform some work for him and then has sex with her, or if he even pays her to have sex with him, there is a suspicion of marriage as the money given to the woman could be analogized to the mahr. Other jurists reject this position. See, Dawud ibn Hazm al-Zahiri, al-Muhalla, Dar al-Kutub al-ʿArabi, Beirut, 1988, Vol. 12, pp. 195–198; Ibn Qudamah, al-Mughni, vol. 10, pp. 194–95.
when she said: “I am a heavy sleeper, and a man raped me while I was asleep and then he left. I could not recognize him thereafter.” Umar acquitted her. The Zina Ordinance 1979 had departed from the Hanafi School in this regard. Imam Malik ibn Anus (d. 179/795) is of the opinion that pregnancy does amount to the proof of illegal sexual relations. However, his view finds overwhelming support in many traditions of the Prophet (pbuh). The Zina Ordinance seemed to have adopted the view of Imam Malik.

In 1989, the Federal Shariat Court ruled that charges of *zina bil jabr* liable to *taʿzir* should not be designated as *zina* because, if so designated, failure to convict the accused could result in countercharges of *qadhf* against the complainant. The Court asked the President to change these sections of the Ordinance or they be deemed to be struck off from the statute book.

In addition to the above, women have also been held for extended lengths of time on charges of *zina* where they alleged rape. Numerous incidents of custodial rape have also been reported.

The above were some of the problems related to the Zina Ordinance 1979. This increased the suffering of victims of rape instead of protecting them. In contrast to the Zina Ordinance, if one looks at the rich jurisprudence of Islamic law related to the matter, one can easily conclude that the Muslim jurists were very cautious not to convict an innocent person on insufficient proof. They went so far as to state that it is better to let a guilty person get away with his/her crime than to punish an innocent person. The famous tradition of the Prophet (pbuh)

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17 According to Imam Malik, if a woman accuses a man of rape who is known for his piety and righteousness, without providing witnesses or physical evidence, she is liable for punishment of *qadhf*. But if the accused is known for his bad character or *fiq*, then the assessment of the veracity of the woman’s claim is left to the judge. If he believes the woman, the judge may inflict corporal punishment onto the presumed assailant, imprison him, and make him pay the woman a *mahr*, or a larger sum equivalent of *qadhf*.
18 Section 10 of the old Zina Ordinance, 1979 provided for ‘*zina bil jabr* liable to *ta’zir*. This was a crime unknown in shari’ah.
20 Since the sections in question are omitted by the PWA, the appeal has no relevance.
Muhammad Munir

is worth quoting: “Repeal the hudud punishments from Muslims as far as you can, so if there is a way out, leave him alone, for it is better for a ruler to make a mistake in forgiving someone rather than in punishing him.” The requirement of four adult, male witnesses constitutes a protective measure that makes it relatively difficult to prove zina liable to hadd. After all, in Muslim societies, it is women [not men] who have more facility and liberty to enter and access others’ private apartments.

The debate about the Zina Ordinance, 1979 in the media has been laden with emotional content as the reformist scholars and the orthodox 'ulama have been the principal parties to the debate. Geo, a pro-establishment private television channel, arranged live debates between the modernists and the orthodox 'ulama and the widely circulated pro-establishment Urdu daily newspaper, Jang, carried out a very aggressive campaign against the Zina Ordinance, 1979. The Ordinance was tabled for review in the National Assembly on 21st August, 2006 and was given to a select committee of 15 members that proposed eight amendments to it. Interestingly, at the same time, the government requested a group of 11 leading 'ulama to recommend changes in the proposed Bill. The government promised these 'ulama that their recommendations would be incorporated in the Bill before it was passed. It is, however, clear from the final Act that their recommendations were not considered by the government. As expected, the 'ulama were completely disappointed by the Act and protested against its provisions.

Some of the 'ulama such as Taqi Usmani, Muneebur Rahman, Abdul Malik, Professor Khurshid Ahmad, and Hasan Madani poured scathing attacks on the PWA.

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22 Imam Tirmidhi, *Sunnan*, supra n. 1.

23 The English daily *Dawn* reported on the 4th December, 2006 that the 'ulama's team objected to six clauses of the PWA. See, pp. 1, 3. At the same time the MQM (the Muahijir Qaumi Moment), a coalition partner in the then ruling PML Q, objected to the same because it did not abolish the 'zina' provisions completely. See, ibid., p. 12.

24 See, his "Hudud Qawaneen min Tarmeem: Tahafuzz Huquq-i-Naswa Bill Kia Hai"? [Amendment in Hudud Laws: What is the Protection of Women Bill?], *Jang*, Karachi, 22–23 November, 2006. The same was published by Institute of Policy Studies, Islamabad, in November, 2006, in Urdu as well as English under the above title. In our study, we will make references to the Urdu edition of the Institute. The last time it was published as "Hudud Tarmimi Bill Kia Hae?" [What is the Amendment in Hudud Bill?] in *Hudud Ordinance min Tarmim: Tahafuzz Huqeq-i-Naswan Bill*, [Amendment in Hudud Ordinance: The Protection of Women Bill], M. Zahid Iqbal ed., Kitab Dost publications, Lahore, 2006, pp. 196–210. He is a leading Deobandi scholar.


2.2 Analysis of the Position of Orthodox 'Ulama on the PWA

Orthodox 'ulama have poured scornful attacks on the PWA but are such attacks justifiable? Do the legal arguments from the Qur'an and the Sunnah support the stance of the 'ulama? The most important criticism leveled by Mufti Taqi Usmani, Mufti Muneebur Rahman, Moulana Abdul Malik and Hasan Madani is that no government is allowed to replace 'Zina bi-l-jabr liable to hadd (rape) in the old Zina Ordinance, 1979) with a taʿzir offence. According to the 'ulama, rape or Zina bi-l-jabr is exclusively a hadd offence and cannot be a taʿzir offence (if all the conditions for hadd are found). Hassan Madani of the radical Ahl-i Hadith school of thought criticizes the Hanafi scholars and argues that the term 'zina bi-l-jabr' (rape) is not found in the Qur'an and the Sunnah and is something invented by the fuqaha (Muslim jurists). He argues that 'zina bi-l-jabr' is nothing but 'zina' (adultery or fornication) found in the Qur'an.

Taqi Usmani quotes the following hadith to prove that rape carries a hadd punishment:

It is reported by Wile ibn Hujr (May Allah be pleased with him) that at the time of the Prophet (Peace be upon him) a woman came out of her house to pray [in the mosque], when someone raped her on her way. The man ran away when she raised hue and cry. Later on, that man confessed to raping her. Upon this the Prophet (Peace be upon him) awarded hadd punishment to that man and did not award hadd punishment to [that] woman.

However, this is just one version of the reported rape case. Below we quote the other version:

At the time of the Prophet (Peace be upon him) a woman got out of her house for [the purpose of] prayer. A man forced her and had sex with her. He ran away as she raised her voice and another man came over. She said that that man had [sex] with her. Some Muhajir (those who migrated from Makka to Madina) came over to whom the woman told that this man had [sex] with her. They apprehended that man who was accused by the woman to have raped her. She said [about that man] that he is the one. They brought him to the Prophet (Peace be upon him). But when he [the Prophet] ordered him to be stoned to death; there stood the [real] man who did rape her, and said, “O! Prophet of God (PBUH) I had raped her.” He [the Prophet] told the woman to go away ‘Allah has pardoned your mistake’ and he spoke nicely with the first [accused] man, then he ordered that the rapist be stoned to death and said about him [the second accused] that he has regretted in such a way that his repentance would suffice all the Madanites if they would render it.

29 Taqi, Hudood Qawaneen op. cit., pp. 5–6; Mufti Muneeb, op. cit., pp. 219–221; Abdul Malik, op. cit., 212–213; and Hasan, op. cit., p. 5.
30 These are a minority in Pakistan and because of their attitude towards juristic reasoning are called Ahl-i Hadith, or ‘supporters of Traditions.’ This group opposes the legal method of both the Hanafi and Maliki schools and maintains that the use of juristic reasoning in any form is both illegitimate and unnecessary. Outside the Qur’an, they regard the Sunnah of the Prophet as the source of Islamic law. For them it was the job of the jurists to discover this Sunnah, through the hadith.
31 Hasan, Huqooq, supra, p. 9.
32 Imam Tarmizi, Sunan al-Tarmizi, Kitab al-hudood, hadith no. 1453 and 1454. Taqi Usmani comments that Imam Tarmizi has mentioned this hadith with two [different] narrators and considered the second chain as acceptable. See, Taqi, Hudood, pp. 6–7.
33 Sunan al-Tirmizi, Kitab al-hudood, hadith no. 1373; and Sunan Abi Dawood, Kitab al-hudood, hadith no. 3806.
2.3 The Way Out

After reading the above, the most pressing question that arises, is whether there is a way out of this debate. I suggest that if we thoroughly discuss the two traditions about the same incidence, various points are clear: that the victim of rape was a woman and that the accused perpetrator eventually confessed to his crime. However, as is mentioned in the second hadith, the first accused was given hadd punishment without either confession or four competent witnesses. If that hadith is authentic, then he was given punishment of hadd not according to the evidentiary criteria for hadd—confession or four competent witnesses—but according to the notion of ‘syasa’ (available to the ruler of a Muslim State).34

According to Professor Nyazee, ‘zina bil jabr’ has not been defined by the texts, and has been created on the basis of analogy in Islamic law.35 He argues that this is wrong because this will permit the creation of ex-post facto offences by the qadi. He asserts:

Those who claim that this offence has been created through the implication of the text (dalatal al-nass) should realize that the attribute of sex has been given priority over bodily harm. This goes against the maqasid al-shari‘ah [the objectives of shari‘ah]. Interpretation is undertaken according to the purposes of the shari‘ah (maqasid), and the maqasid maintain that priority must always be accorded to bodily harm over matters of sex. Accordingly, rape, which is an attack on the physical person of the victim (including mental agony), cannot be included in the offence of zina. It is an offence that falls in the category of hifz ‘ala ‘nafs.36

He, therefore, recommended to the government to bring ‘zina bil jabr’ under the syasa offence. The government accepted this recommendation and put the offence on a statutory footing in the PPC. As a matter of fact, many authors mention hadd, ta‘zir, and qisas while mentioning the types of punishments available in Islamic law without referring to syasa.37 This is, however, not appropriate as

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34 ‘Syasa’ means, literally, ‘policy’ and it comprises the whole of administrative justice which is dispensed by the sovereign and by his political agents, in contrast with the ideal system of the Shari‘ah which is administered by the qadi. The mazalim courts and the institution of muhtasib are examples of ‘syasa’ in the early justice system of Abbasid.
35 Imran A.K. Nyazee, a former Professor at the Faculty of Shari‘ah & Law, International Islamic University, Islamabad, who was consultant in the Ministry of Law, Justice and Human Rights, submitted a report titled, “Report on Hudood Law Reform” on July 28, 2006. The Report is unpublished. I am very thankful to him for providing me a copy of the same. The report has an introduction, a clause by clause comparison, suggestions and a draft of what came to be known as the Protection of Women Act 2006. However, as we shall discuss later in this study, many of his recommendations were not incorporated by the Government. The most important recommendation that was made part of the law by the Government of Pakistan is to remove ‘zina bil jabr’ from hadd and put it under ‘syasa’ [ta‘zir]. See, Nyazee, Hudood, p. 5.
36 Ibid.
throughout Islamic legal history the head of the Muslim state always had discretionary powers under ‘syasa’. There are many examples in which the head of the Muslim state used to exercise this role as is explained below.

Let us explain Professor Nyazee’s solution further. It seems a very plausible and attractive interpretation than the one that says that rape should be put under ‘harabah’. The most outspoken advocates of this argument are the modernist scholars such as Javed Ahmad Ghamidi, Tufail Hashmi, Asifa Quraishi and many others. They argue that once rape comes under harabah, then conviction is possible on the basis of circumstantial evidence only because harabah does not require four witnesses to prove the offence, unlike zina. Muhammad Mushtaq argues that this argument is flawed because even if rape is put under ‘harabah’ it shall be subjected to all the characteristics of hadd and will still require two witnesses to prove it.

However, despite the above quoted hadith, it is said that the Prophet (peace be upon him) had never sentenced anyone convicted of robbery, abduction etc., to stoning to death. This was given either to an adulterer or a rapist. Professor Nyazee’s argument finds a lot of support from the conduct of the Prophet (peace be upon him). There are many instances where the Prophet (peace be upon him) had punished heinous, habitual or hardened criminals by way of ‘syasa’ rather than by way of normal punishment. One of the most important examples is mentioned in the Qur’an itself. Allah describes the punishments of endangering the peace of land or ‘harabah’ in the following verse:

38 Its full name is ‘syasa shar’iya and can be translated as ‘the administration of justice according to the shari’ah’. Muslim jurists expounded the sphere of the Islamic legal system that was fixed and left the part that was flexible—changing with the times, according to the needs of the Muslim community, to the Imam (the head of the Islamic state). It is this function that the ruler carried out through a policy called the ‘syasa shar’iya’. For some interesting discussion of syasah, see, Imran A. Nyazee, Theories of Islamic Law, IIIIT & IRI, Islamabad, 1995, 2nd reprint 2005, pp. 111–2. Unfortunately, very few books are written specifically on syasa. See, Ibn Taymiyya, Syasa Al-Shar’iya, Dar al-Kutub Al-‘Arabiya, Beirut, 1386 A.H., trans. Omar A. Farrukh, Ibn Taimiya on Public and Private Law in Islam, Khayats, Beirut, 1966, and Ibn Al-Qaim, Al-Turuq al-Hukmiya fi Al-Syasa Al-Shari’ya, Matba’a Al-Sunnah Al-Muhamaddiya, n. d.

39 Literally it means ‘forcible taking’, ‘highway robbery’, ‘terrorism’ or ‘waging war against the state’. It is based on verse 5: 133 of the Holy Qur’an.


43 See, Asifa, Her Honour, supra, p. 419.

44 Muhammad Mushtaq Ahmad, Hudood Qawaneen, Idara Esha’at, Mardan, 2006, p. 85.
Those that make war against Allah and His Apostle and spread disorders in the land shall be put to death or crucified or have their hands and feet cut off on alternate sides, or be banished from the land. They shall be held in shame in this world and sternly punished in the next: except for those who (having fled away and then) came back with repentance before they fall into your power; in that case, know that Allah is Oft-Forgiving, Most Merciful.45

According to one interpretation,46 these verses were revealed after a group of people known as ‘Irni’een’, who were sick, were sent by the Prophet (peace be upon him) outside Madina to drink milk from the ‘camels of charity’ to recover. Unfortunately, they killed the herdsmen, tore out their eyes, reverted to Jahillyia (the pre-Islamic faith), and even took away all the camels. The Prophet (peace be upon him) had his men chase them, brought them back, cut off their hands and feet on alternate sides, tore off their eyes, and left them in a desert without giving them any medical assistance (which is normal for someone convicted of a hadd punishment) till they died.47 Moreover, they were not provided water although water is provided to the person who has been found guilty and is sentenced to be executed. Therefore, the ‘Irni’yyn’ were not given hadd punishment nor was this retribution.48 Moreover, mutilation of bodies is not a prescribed hadd punishment in Islam. The safe conclusion is that they were punished by way of ‘syasa’.

Similarly, Imam Abu Bakr Muhammad ibn Ahmad al-Sarkhasi (d. 483/1089) of the Hanafi school of law, while commenting on the execution of a person by crushing his head between two stones, because he had killed a handmaid in exactly the same way, argues that the Prophet (peace be upon him) punished him by way of ‘syasa’ and there was no mutilation because he had endangered the peace of land and was a habitual criminal.49 Similar is the explanation when the Prophet (pbuh) executed a habitual thief who was previously given hadd punishment but who deserved to be given a harsher punishment.50 This was possible only by way of ‘syasa’. Bringing rape under ‘syasa’ was never mentioned by any scholar, modernist or orthodox, during the entire media debate on ‘zina bil jabr’. If it were to be brought under ‘syasa’, then its definition, required evidence and its punishment would be left to the government to determine. This is the simplest of all the solutions that never came to the minds of the outspoken and media—savvy scholars. But if this is the solution to the problem, then why did the Doctors of Islamic law include ‘zina bil jabr’ in the offence of ‘zina’?

Let us now go back to Professor Nyazee’s argument of the order of maqasid al-shari’ah. First of all, it is necessary to mention that the shari’ah attempts to preserve and protect three main objectives (maqasid). The foremost objectives

45 Qur’an 5:33, 34.
48 See, M. Ibn Ismail al-Bukhari, al-Jami al-Sahih, hadith no. 6306.
50 Abdur Rahman al-Nasai, Sunnan al-Nasai, Maktabh Dar-ul-uloom, Lahore, hadith no. 4892.
are *al-maqasid al-daruriyah* (the most necessary and fundamental objectives). These basic goals are such that the lives of people depend on them and life will be impossible without them. These basic goals are: the protection of faith (*Din*), life (*nafs*), family (*nasl*), intellect (*aqal*), and property (*mal*). What Professor Nyazee means is that the protection of *din* has preference over the preservation and protection of life; life has preference over family; family is prior to *aqal*; and *aqal* is preferred over *mal*. However, when a Muslim is given a choice between death and denouncing Islam, he is allowed to choose the latter to save his life. It means that the order is changed. In the case of rape, we should look at two competing interests: the interest of the victim (the woman) and the interest of the accused (the man). The interest of the woman is to punish the rapist and if the stringent criterion of four witnesses fails to be met, he will walk away scot-free. The interest of the accused is to avoid punishment by invoking *qadhf* which serves as a defensive shield.

### 3 AN ANALYSIS OF THE PWA 2006

The Protection of Women Act, 2006 brought about three major changes. Firstly, the Act took some of the offences from the *Zina* Ordinance as well as *Qazaf* Ordinance and put them in the Pakistan Penal Code. Secondly, the PWA reformulated and re-defined the offence of fornication and false accusation of fornication. Finally, the Act created new procedures for the prosecution of adultery, fornication, false accusation of fornication and false accusation of adultery.

Below we will further analyze these changes.

#### 3.1 ‘Zina bil jabr’ Becomes a Ta’zir Offence

The government ignored the advice of pro-establishment scholars, the various women rights groups and made rape or ‘*zina bil jabr*’ a ‘*ta’zir*’ offence by inserting sections 375 and 376 in the PPC. It is important to note that in Pakistan the difference between *ta’zir* offences and *syasa* is ignored as both are considered under *ta’zir*. The greatest adverse impact of the offence of rape, which is now section 375 PPC, is that if a woman accuses a man of having sex with her without her will, then she does not have to bring four witnesses to prove her case. The accused (man) has no remedy in case the accusation is false. *Qadhf* cannot be invoked because rape is made a *ta’zir* offence under the PWA.

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punishment under *qadhf* serves as a shield against false accusations of *zina* or *zina bil jabr*. A woman may have consensual sex with a man and yet, later, accuse him of doing so against her will. In such a case, the man cannot confess because of the fear of *hadd* punishment. The woman is not afraid of *qadhf* punishment. In other words, the man in this case has no defence. Thus, the reason why Muslim jurists put it under *zina* is clear. It is to invoke *qadhf* and provide the accused protection against false accusations.  

The new section 375 is identical to the old common law offence of rape with one minor change. It reads:

A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,—

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

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

The difference between the old common law statute and the restored section 375 of the PPC is only in clause (v). Previously the age in this clause was under 14 years whereas in the new section it is under 16 years.

Martin Lau rightly argues that “[T]he offence of rape is defined in such a manner that marital rape, if defined as the sexual intercourse with a woman against her will or without her consent, is an offence under Pakistani law.” Rape is returned to the PPC, where it had been prior to 1979. Similarly, the offences of kidnapping or abducting a woman in order to compel her to marry a person against her will or to force her to illicit intercourse, of kidnapping or abducting a person in order to subject him to “unnatural lust”, and of selling a person for the purposes of prostitution, and related crimes, have all been returned to the PPC. Section 365B offence—abducting a woman in order to compel her to marry a person against her will, will have other repercussions in cases of, what is known in Pakistan, ‘court marriages’. As a matter of fact, before the PWA, the parents of a woman, who had married a husband against the will of her parents, would lodge a first information report (FIR) against their daughter under the *Zina* Ordinance alleging, *inter alia*, that she has been abducted by the unwanted son-in-law. The newly wed couple would be arrested and the parents

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54 But we must not forget the situation when he is doing it forcibly and then smiles at the victim saying bring four witnesses?
55 Martin Lau, “Pakistan”, p. 453.
56 Section 365B of the PPC.
57 Ibid., section 367A.
58 Ibid., section 371A.
Is Zina bil-Jabr a Hadd, Ta’zir or Syasa Offence?

would try their utmost to convince her to change her statement and testify that she was abducted so that she would be freed but her husband would be charged for abduction. Conviction would almost be certain if such a woman would give in to the pressure of her parents. It is true that after the promulgation of the PWA a woman cannot be arrested for a court marriage but her husband could be arrested. Moreover, if she is pressurized by the parents to testify against the man [her husband] and she gives in, he would be given from 10 years to life imprisonment. The drafters seem to be unaware of this pitfall of the PWA.

Nevertheless, various women rights groups in Pakistan\(^60\) have welcomed the PWA. They expressed their views in a seminar arranged by the Karachi Women’s Peace Committee (KWPC) on 28th December, 2006 to celebrate their support for the Protection of Women Act.

The PWA provides protection to the victim (woman) but not to the accused (man). At the time of writing this article, there are no reported cases under the PWA. However, the first case was registered in Islamabad in which a woman accused her tenant of raping her.\(^61\) According to the First Information Report (FIR), the complainant alleged that the accused started sexual advances towards her when she asked him to vacate the upper portion of the house which she had let to him. She further alleges that on 6th December 2006 when she complained to his employer about the accused’s behavior, he broke into her house the same night and raped her.

The most crucial evidence for the prosecution in such cases is the medical evidence and testimony of the victim herself. The police sent the samples of alleged stains of the accused to the government’s chemical examiner. Moreover, high vaginal and rectal swabs obtained from the rape victim were sent for DNA analysis to a specialized laboratory where DNA extracted from the swabs was compared with that obtained from the blood sample of the accused. Both reports were negative.\(^62\) Thus there was a clash between the medical evidence and the statement of the victim.\(^63\)

Since the case is sub-judice we have to explain a hypothetical situation here. Suppose that in such a case the reports of the chemical examiner as well as that of the DNA expert are negative.\(^64\) Would this prove that the accused will

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60 They include the Karachi Women’s Peace Committee (KWPC); Orangi Pilot Project on Health; the Working Women’s Organisation; Aurat Foundation; All Pakistan Women Association (APWA); and Pakistan Women Lawyers’ Association (PAWLA). Even a member of the National Commission on the Status of Women (NCSW)—a government body endorsed the new change. See, "A Ray of Hope," The Review Dawn, 14–12 December, 2006, pp. 14–15.

61 FIR no. 266, dated 06 December, 2006, Sabzi Mandi Police Station, Islamabad. All the information about the case is available with the author in a file.

62 I have copies of both the reports. I am very thankful to Muhammad Ishaq—the then Government prosecutor in Sessions Court for providing me photocopies. I obtained another copy from the I-10 Police Station for which I am thankful to the Police Inspector handling the case.

63 According to top criminal lawyers and prosecutors, the reports of the chemical examiners and the DNA experts can be obtained as desired and that influential people manipulate the results in their favour. By the time of drafting of this article the case was still pending and we cannot comment on it.

64 No semen found in this case.
be acquitted? Our answer is ‘No’! There is an explanation to Section 375 which says that ‘penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape’. This means that mere penetration would make him guilty as ejaculation is not necessary to constitute the crime of rape. In other words, the negative reports of the chemical examiner as well as the DNA expert may not save someone accused of rape. The PWA, therefore, protects women but exposes men to new dangers.

In another case, a doctor in Lahore was accused of raping a teenage girl in his clinic where she had been taken by her mother for a check up. The accused was sentenced to 10 years rigorous imprisonment under the PWA. 65

3.2 Re-formulation of Fornication and False Accusation of Fornication

Section 7 of the PWA creates a new offence, ‘fornication’ by inserting section 496B in PPC. Section 496B (1) of the PPC defines it as “A man and a woman not married to each other are said to commit fornication if they willfully have sexual intercourse with one another.” 66 This is, however, a reproduction of section 4 of the Zina Ordinance 1979. Interestingly, the punishment of fornication in section 7 of the PWA is imprisonment of five years and a fine not exceeding 10,000 Rupees. The punishment for the same crime under section 5 (2) (b) of the Zina Ordinance 1979 is, 100 stripes in a public place. It means that the offence of fornication is placed in two different statutes under two different titles with two different procedures and two altogether different punishments.

It is now known that initially the heading of Section 7 of the PWA was “lewdness” but it was replaced with “fornication” in the final draft. 67 Apparently, the man or the woman involved in fornication will not be complaining, the reason being that the sex was consensual. But should the woman complain, it will turn the crime into rape. 68 The new law has created one more flaw. The offence of fornication is accompanied by a safeguard against abuse. The PWA has inserted section 496C in PPC and makes false accusation of fornication punishable with five years imprisonment and a fine not exceeding 10,000 Rupees. The new section 496C is given as, “Whoever brings or levels or gives evidence of false charge of fornication against any person, shall be punished with imprisonment for a term which may extend to five years and shall also be liable to a fine not exceeding ten thousand rupees.”

But any student of Islamic law knows that this is qadhf which is a hadd punishment. On the plus side, once the prosecution of a charge of fornication has

65 See, Dawn, 9/12/2006 at p. 01.
66 Martin Lau argues that “the creation of a new offence of fornication was a concession to conservative sections of Pakistani society.” Lau, supra, p. 454. However, as discussed in this work, the conservative ‘ulama have severely criticized this change.
67 The ‘ulama committee recommended to the Government to make ‘lewdness’ punishable, which the Government accepted initially. See, Moulana Abdul Malik, supra, p. 214. Mufti Taqi Usmani, another member of the ‘ulama committee, welcomes this change. He seems to have read the Urdu version of the Act where the Urdu word ‘siya kari’ is used, which in English means ‘lewdness’. See, his, Hudood Qawaneen, supra n. 24, p. 11.
68 The complainant in the case of fornication has to bring two eye witnesses to the court of Magistrate Ist Class and the person cannot be arrested without a warrant.
resulted in an acquittal, the trial judge can try and sentence the unsuccessful complainant in the very same proceedings for false accusation of fornication. This will result in sharp reductions in the number of cases of false accusations of fornication.

As a matter of fact, Section 3 of the Qazaf Ordinance 1979 was not based on Islamic law. In Islamic law, the offence of qadhf does not require a proof of mens rea or the occurrence of actual harm. The harm is done by the mere utterance of the words that constitute qadhf. The words of the Qur’an regarding qadhf are unqualified and absolute. Accordingly the words “intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation, or hurt the feelings, of such a person,” used in the Qazaf Ordinance, were not needed. Again, the words “be true and made or published for the public good” are not in accordance with Islamic law. Similarly, the words “good faith” are, in this context, not considered necessary in Islamic law.

The offence of adultery still remains in the Zina Ordinance. However, it is accompanied by the offence of making false accusations of adultery. There is, however, one significant change regarding the offence of adultery in the Zina Ordinance. In Section 2, which deals with definitions, a new definition of “confession” has been added. It says that:

“Confession” means, notwithstanding any judgment of any court to the contrary, an oral statement, explicitly admitting the commission of the offence of zina, voluntarily made by the accused before a court of sessions having jurisdiction in the matter or on receipt of a summons under section 203A of the Code of Criminal Procedure, 1898.

This definition is intended to remove any confusion between the offences of rape and adultery. As discussed above, the biggest problem with the Zina Ordinance was that failed accusations of rape by women were converted into adultery charges, on the basis that the woman had confessed to sexual intercourse when she complained of rape. Under the new section 5A, no complaint of zina and no allegation of rape “shall at any stage be converted into a complaint of fornication” and “no complaint of fornication shall at any stage be converted into a complaint of zina under section 5.”

Another controversial change is that section 19 of the Qazaf Ordinance 1979 has been omitted by section 28 of the PWA. That section gave provisions of the Qazaf Ordinance 1979 overriding effect over other laws. This has angered the ‘ulama. To add to their anguish, section 18 of the PWA amends section 20 of the Zina Ordinance 1979, and specifically omits clause (iii) from section 20. The change is important because under the new law, a Provincial Government can reduce the punishment given to a person under the Zina Ordinance 1979. This new amendment is against Islamic law. Once a person is found guilty of hadd then there is no pardon or mercy on him at all. The PWA, therefore, not

69 Section 19 of the Qazaf Ordinance 1979 read as: “The provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force.”

70 In Islamic Law hudood crimes involve the right of God and the state cannot pardon a person if the allegation is proven.
only protects women but also creates the possibility of protecting the crime of ‘zina’.

Another abuse of the notorious Zina Ordinance happened at the hands of vengeful husbands\(^{71}\) and parents\(^{72}\) to punish their wives and daughters for disobedience. The definition of what amounted to a valid marriage given in the Zina Ordinance\(^ {73}\) is repealed by the PWA.\(^ {74}\) This change was very much needed because from 1963 to 1993, judges in Pakistan believed that if a husband had not complied with the requirements of section 7(1) of the Muslim Family Law Ordinance 1961 [under which a Muslim husband must give notice of talaq to the Chairman of the Union Council upon the pronouncement of talaq], the husband was considered to have revoked the divorce. The Pakistani Supreme Court had ruled in Syed Ali Nawaz Gardezi v. Muhammad Yusuf that failure to give notice of talaq amounts to revocation of the talaq.\(^ {75}\) However, in Mst. Kaneez Fatima v. Wali Muhammad, the Supreme Court overruled the famous Gardezi case and ruled that “failure to send notice of talaq to the Chairman of the Union Council does not by itself lead to the conclusion that talaq has been revoked. It may only be ineffective but not revoked.”\(^ {76}\) However, many women, believing themselves to be divorced, re-married, only to face their previous husbands in court on a charge of adultery. This happened in many cases but the courts had to develop exceptions to the rule in Gardezi case.\(^ {77}\) However, one wonders why cases in which a husband would fail to give notice of talaq would become cases of adultery. It is a pity that a husband who would abstain from giving notice of talaq to the Chairman of Union Council as required under section 7(1) of the MFLO would go to the court to benefit from his own failure. This was against the legal principle namely ‘no one shall benefit from his own wrong’. Once again, it can be said that it will not be possible for parents or ex-husbands to bring

\(^ {71}\) This mostly happened when a woman would be divorced by her husband without giving a notice of the same to the Chairman of the Union Council under section 7(1) of the MFLO 1961. The divorced woman would, after her iddat period, marry another man and start a fresh life. However, the ex-husband or someone from his family, in order to harass his ex-wife, would lodge a complaint to the effect that she was not divorced by him and she was committing zina with another man [the new husband].

\(^ {72}\) This always happened in cases in which a girl would marry a husband of her choice without the permission of her parents. Such parents would always complain, inter alia, that their daughter in question was committing zina with the unwanted son-in-law.

\(^ {73}\) Section 2(c) of the same had defined marriage as “which is not void according to the personal law of the parties.”

\(^ {74}\) See, section 10(ii) of the PWA has repealed section 2 (c) of the Zina Ordinance.


\(^ {76}\) Mst. Kaneez Fatima v. Wali Muhammad, PLD 1993 SC 901 at page 916.

\(^ {77}\) Examples are Noor Khan v. Haq Nawaz, PLD 1982 FSC 265; Chuhar v. Ghulam Fatima, PLD 1984 Lahore 234; Mst. Parveen Chaudhry v. 6th Senior Civil Judge, Karachi, PLD 1976 Karachi 416; and the Bangladeshi case of Sirajul Islam v. Helana Begum, 48 DLR 1996, 48. It should be noted that the MFLO 1961 is also applicable in Bangladesh.
malicious cases against their daughters or ex-wives. This change is very much welcomed.

### 3.3 The Offence of Qadhf

The changes in the offence of qadhf are partly explained above. It is absolutely necessary to study the offences of zina and qadhf together in order to avoid problems, as the two offences are intertwined. The Holy Qur’an requires a person who accuses a chaste woman to produce four male witnesses who have witnessed the act of penetration. The Qur’an states:

> And those who launch a charge against the muhsanat, and produce not four witnesses (to support their allegations), flog them with eighty stripes, and reject their evidence ever after, and such men are wicked transgressors;—except those who repent thereafter and mend (their conduct); for Allah is Oft-Forgiving, Most Merciful. 78

Thus, if the accused fails to bring four witnesses he will be given 80 stripes. This shows that the primary purpose behind the production of four male witnesses appears to be ‘the protection of the innocent. This is why, the jurists have indicated that *the idea is to conceal the crime and not to publicize it*.79 Thus, it is in the public interest not to talk about this offence in public, unless the stringent condition of producing four witnesses is met. The logic behind the strict punishment appears to be deterrence. In the Hudood (Zina) Ordinance 1979, the focus was shifted to the punishment of the offence rather than the protection of the accused. It had attempted to trap the accused in every possible way and to punish him. The focus should have been on the protection of the accused. The Qazaf Ordinance, which was supposed to protect the accused, incorporated a diluted form of the law of qadhf. It had borrowed phrases and provisions from the law of defamation in the PPC (section 499).

It was expected of the legislature that improvement will be made to the existing law and to bring it in harmony with Islamic law. However, it is very disappointing that even people who participated in the initial draft of the bill were taken by surprise when they found the new section 496B and 496C inserted in the PPC. Eventually, there are two offences of qadhf on two different statutes relating to one and the same offence (false accusation of fornication), with two different punishments [80 stripes under the old Qazaf Ordinance and five years jail and fine under the PWA], and two different procedures. The new Act has indeed created another anomaly. Can this be called improvement? The new Act deletes section 10 of the Qazaf Ordinance 1979 which created the offence of Qadhf liable to ta’zir. This is a good change as Section 10 was not based on Islamic law.

### 3.4 Removal of Zina Liable to Ta’zir

The provision in the Zina Ordinance 1979 defining the offence of ‘zina liable to ta’zir’ was against Islamic law and was rightly removed from the statute book by the PWA. It was a creation of the Hudood Ordinance 1979; the fuqaha never

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78 Qur’an 24: 4–5.
79 Al-Sarkhsi, al-Mabsut, supra, vol. 9, p. 46.
Muhammad Munir

upheld the definition or punishment of such an offence. Under the provisions of the old law, if evidence fell short of the required four witnesses in the offence of ‘zina liable to hadd’, the offence was converted to ‘zina liable to ta’zir. This was wrong because merely mentioning the word ‘zina’ invokes the provisions of qadhf as the accused is still facing the allegation of zina.

The PWA has removed ‘zina liable to ta’zir’ and ‘zina bil jabr’ from the statute books. As mentioned above, the Federal Shariat Court had ruled in 1989 that ‘zina liable to ta’zir’ be omitted. This has made the Hudood Ordinances 1979 much closer to Islamic law than they were before. Only ‘zina’ (adultery) remains on the statute book [Zina Ordinance] now.

3.5 New Procedure for the Prosecution of Adultery and Fornication

Under section 203C of the Criminal Procedure Code, a complaint of fornication can only be lodged directly in the court of a magistrate first class. The court shall examine on oath the complainant and two eye witnesses before issuing a summons for the personal attendance of the accused. However, he [the accused] could be released on bail on the execution of personal bond. No sureties are needed for this purpose. As explained above, once the prosecution of a charge of fornication has failed because of evidence, the trial court (Magistrate First Class) can try and sentence the unsuccessful complainant in the very same proceedings. It should be noted that the strict evidentiary criteria for witnesses in hudud cases does not apply to witnesses in cases of fornication. Moreover, unlike testifying in the case of adultery, the two witnesses in case of fornication are not required to have witnessed the actual act of penetration. This is surprising given the definition of fornication in section 496B of PPC discussed above. Section 203C of the Code of Criminal Procedure does not mention that the two witnesses have to be male. It would mean that they could be either male or female or both. This seems a gray area which may have to be clarified by the courts, as and when a relevant case arises.

In case of fornication as well as in case of rape, attention will now be focused on medical evidence which has been used in the past, for the now repealed offence of zina liable to ta’zir as well as sodomy. Under section 10 of the old Zina Ordinance 1979, medical evidence plus the testimony of the victim were always accepted to convict the accused. There are plenty of reported cases in which the courts have accepted the testimony of the victim to convict the accused. In Abdul Ghaffar v. State, the Shariat Appellate Bench of the Supreme Court accepted the statement of the victim against the accused man. Her statement was confirmed by the medical evidence. The Court held that:

An interested witness is undoubtedly a competent witness under the Evidence Act. The proposition that his testimony should be corroborated by independent evidence is how-

81 203C of the Code of Criminal Procedure Code read with the amended section 496B of the same.
82 See, section 496C of the Code of Criminal Procedure.
83 Section 377 of PPC. The offence is called ‘unnatural lust’ in the PPC.
84 PLD 2007 SC 467.
ever not of universal application. The question of his reliability must depend upon the circumstances of each case and quality of his evidence. If his testimony is found reliable the Court may accept it without any corroboration.85

In the sodomy case of Saleem Khan v. State,86 the Federal Shariat Court ruled that the “[S]ole testimony of the victim would be sufficient to base conviction thereon if it inspires confidence.”87 In Nasar Iqbal v. State,88 the Karachi High Court established that the “[T]he only evidence of victim girl, if found truthful [sic] is sufficient to bring home… guilt of [the] accused beyond any doubt.”89

These cases are mentioned as examples of what is going to happen under the changes brought about by the PWA. The focus will now be shifted from the strict evidentiary criteria to the sole testimony of the victim as well as medical evidence in case of rape and fornication.

Under section 203A read with section 376 of the Code of Criminal Procedure, a complaint of adultery [zina under section 5 of Zina Ordinance] can be lodged in a court of sessions. The court must examine, on oath, the complainant and at least four adult male eye-witnesses, who should satisfy the court that they are truthful persons and abstain from major sins. They must testify that they have seen the act of penetration.90 It is only after this testimony that the court will issue a summons for the personal attendance of the accused. The offence of zina (adultery) under 203A is also bailable. A person making false accusation of adultery exposes himself/herself to the very high risk of punishment. Under the new section 6 (2) of Qazaf Ordinance, if a judge dismissing a complaint of adultery or acquitting an accused of a charge of adultery, is “satisfied that the offence of qadhf liable to hadd has been committed, he shall not require proof of qadhf and shall proceed to pass sentence under section 7 [of the Ordinance].” The punishment for qadhf is “whipping numbering eighty stripes.” It seems that no person ever would accuse a woman of committing adultery. This change was absolutely necessary because in the past 27 years when the Hudood Ordinances remained in force there has not been a single conviction in the superior courts but the accused were always convicted by the trial courts. Such accused would languish in jails before they would be eventually acquitted by the appellate courts. I think that all such accused should be provided some sort of remedy by the state for being subjected to the notorious laws of the state.

4 CONCLUSION

To sum up, the Protection of Women Act 2006 has neither completely pleased the women groups nor the orthodox ʿulama. The former wanted the Hudood Ordinances 1979 to be totally abolished while the latter wanted some of its provisions to be removed because they were un-Islamic. The finding of this work

85 At pp. 470–471. Per Justice Javed Iqbal. See also, Sohni v. Bahaduri, PLD 1965 SC 111.
86 PLJ 2001 FSC 46.
87 At 54. Per Ch. Ijaz Yousaf C. J. (as he then was).
88 PLJ 2000 Cr. (K) 1319.
89 At page 1323 per Muhammad Ashraf Leghari, J.
90 See, 203A (2).
is that *zina bil jabr* is neither a separate *hadd* offence nor does it come under *harabah*, but is rather a *syasa* offence. The *Zina* Ordinances were universally condemned, both domestically and internationally. Although these were promulgated in the name of Islam, they were used as tools of oppression and harassment by malicious parents and husbands to punish their daughters or wives for mere disobedience.\(^91\) The PWA has provided the much needed protection to women but it seems to have exposed men to new dangers. Consequently, no one could think of accusing a woman in Pakistan of *zina* (adultery) as proving it would be next to impossible plus the witnesses may never meet the required strict criteria of testifying in such a case. Failure to prove the accusation would automatically result in the commission of the crime of *qadaf*. A woman, however, could easily accuse a man of raping her because, in this case, there is no requirement of witnesses and strict evidentiary criteria for conviction. Moreover, if a woman involved in fornication [willful sexual intercourse between a man and a woman when they are not married to each other] complains that it was against her will, the charge will be one of rape [section 375] and not fornication. The accused [man] could get a jail term of 10–25 years.\(^92\) It seems that the Act has protected women at the expense of men. Nevertheless, the PWA will be regarded as a great achievement of women rights groups who have been campaigning against the flawed *Zina* as well as *Qazaf* Ordinances. The PWA has created more flaws regarding sexual offences against women. The good thing is that the *Hudood* Ordinances are now more Islamized than they were before. The PWA has only partially achieved one of its stated objectives: bringing the laws of *zina* and *qadhf* in conformity with the Injunctions of Islam because the flip side is that some of the new laws that are created have no basis in Islamic law. The PWA has already been challenged in the Federal Shariat Court,\(^93\) which will now review its conformity with Islam.\(^94\) This may take years and will be definitely followed by an appeal to the Shariat Appellate Bench of the Supreme Court, which can revise such a decision.\(^95\) The Shariat Appellate Bench of the Supreme Court will have the final say in the matter. Meanwhile, we will see how the Act is received by the lower judiciary as cases will be decided by the trial courts.

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\(^91\) See, Lau, *supra*, p. 471.

\(^92\) Under section 376 of the PPC the maximum sentence for rape by an individual man is death and the minimum is 10–25 years in jail.

\(^93\) Two petitions have been registered in the Federal Shariat Court after the promulgation of the PWA. These are S. P. No. 1/I/2007 and is filed as *Mian Abdur Razaq Aamir v. the Federal Government of Pakistan* and S. P. No. 3/I/2007 by *Mr. Abdur Rahman Siddique v. The Federation of Pakistan*.

\(^94\) Under Article 203D of the Constitution of Pakistan the Federal Shariat “Court may, [either of its own motion or] on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam.”

\(^95\) Under Article 203F of the Constitution appeal against the decision of the Federal Shariat Court is made to the Shariat Appellate Bench of the Supreme Court.
GLOSSARY

**Hadd:** [plural *hudud*], fixed penalties prescribed in the Qur’an and the *Sunnah*.

**Hadith:** Saying. Technically it is record of the *Sunnah* of the Prophet. A *hadith* may report a saying, act, or approval of the Prophet.

**Hajj:** Pilgrimage to Makka.

**Harabah:** robbery through the force of arms [*qatʿ al-tariq*].

**Qadhf:** false accusation of unlawful sexual intercourse.

**Sunnah:** The precedents laid down by the Prophet to be followed as binding law. These may be through statements, acts, or approvals.

**Syasa sharʿiya:** the administration of justice by the state beyond the explicit law of the *shariʿah*.

**Taʿzir:** lit. ‘deterrence’. The power of the *qadi* to award discretionary and variable punishment.

**Wali:** guardian; authorized person.

**Zina:** unlawful sexual intercourse.

**Zina bil jabr:** rape.