Applying Islamic Criminal Justice in Plural Legal Systems: Exploring Gender-Sensitive Judicial Responses to Hudood laws in Pakistan.**

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Introduction.
The last quarter of the 20th century witnessed codification of the religious text in Islam relating to crime and punishment, and its application in some Muslim jurisdictions. This raised a number of socio-legal issues, most prominently the adverse impact on women and minority communities residing within these countries. The purpose of this article is three-fold: first, it attempts to provide a comparative perspective of Islamic criminal justice relating to zina (sexual intercourse outside of marriage) as enunciated in the Quran and its codified version on the statute books in Pakistan. Further, based on a critical analysis of selected case law on the subject from the superior judiciary in Pakistan, it highlights some of the consequences of application of this law and emerging jurisprudential trends. It advances the argument that judges are increasingly employing plural legal frameworks, including international human rights law, to overcome the rigours of the laws adopted in the name of Islam. Absence of a contextual, grounded and holistic approach to Quranic verses and other sources of Islamic law results in a fractured image of its substantive provisions and serious miscarriage of justice in the name of religion. The third objective of this paper is to present a brief overview of the increasingly robust challenge being mounted against the Hudood Ordinance and state and judicial responses to these initiatives.

Introducing Islamic Criminal Law: Hadd, Qisas and Tazir Punishments

A critical analysis of Islamic Criminal law necessitates a brief overview of the sources and accompanying juristic techniques of the Islamic legal tradition, namely, the Quran and Hadith as primary sources and Ijma, Qiyas and Ijtihad as subsidiary...
sources, complementing the former. The Quran\(^1\) believed by Muslims to be the word of God is the first and definitive source of Islamic law followed by the Hadith i.e., custom or usage of the Prophet Muhammad known as Sunna (his words and deeds).\(^2\) Hadith collections were not compiled under state supervision and have more than one chain of narrators. Hadith is surrounded by controversies, in particular over the question of its authenticity and the view by some scholars that numerous Ahadith were generated to reinforce societal norms and political expediency (Mernissi 1991, 46). Ijma or consensus of opinion is defined as agreement among Muslim jurists in a particular age on a question of law (Rahim 1995, 97). Ijma as a source of law draws its validity from the Quran and Hadith. Quranic verses supporting ijma include: “Today we have completed your religion”; “Obey God and obey the Prophet and those amongst you who have authority”; “If you yourself do not know, then question those who do”. Hadith favouring ijma include: “My followers will never agree upon what is wrong”; “It is incumbent upon you to follow the most numerous body.”

Qiyas translated as analogical deduction is the fourth source of Islamic law and comes into operation in matters not been covered by a clear text of the Quran or Hadith nor determined by Ijma (Ibid, 117). The law thus arrived at is based upon a rule laid down in the other three sources of law (Quran, Hadith and Ijma). Qiyas evolved as a jurisprudential method during the early Abbasid period (about 750 A.D.), replacing gradually the principle of arbitrary (independent) opinion known as ra-ay. Its objective was to develop systematic reasoning in the interest of consistency and coherence. Simultaneously, it opened up spaces for the practice of interpretations of the religious text that would be more relevant and applicable in contemporary societies (Coulson 1964, 39-41).

Two other concepts need some explanation here; Sharia and fiqh. Sharia stems from the Arabic root word shar which means “the road to the watering place, the clear road to be followed, as a technical term, the canon law of Islam”(Schacht 1961, 524) It follows from these definitions that Sharia, or principles of Islamic law have an in-built dynamism and mobility in its very meaning and is an evolving and responsive process.\(^3\) (Ali 2000, 23-24) Fiqh is the science of jurisprudence based on the Sharia and evolved over centuries by Muslim jurists of the various schools of thought. Islamic law and positions adopted by various schools of juristic thought are not uniform; this lack of a unified position on the interpretation and application of injunctions of the Quran and Hadith as well as the secondary sources, account for the difficulty that modern day legislators confront. One such example is the codification of Islamic Criminal law in some Muslim jurisdictions.

\(^1\) The Quran is in the Arabic language and was revealed piecemeal to the Prophet Muhammad over a period of 22 years, 2 months and 22 days. It has 6666 verses divided into 114 chapters and 30 sections.

\(^2\) Technically speaking, a Hadith consists of 2 essential parts: the text or matn of the tradition (hadith) and the chain of transmitters or isnad “over whose lips it (Hadith) had passed.” But hadith is surrounded by controversies in particular due to questions of their authenticity.

\(^3\) It means a watering place, a flowing stream where both animals and humans come to drink water. Stagnant or standing water is not Sharia.
El-Fadl (2003) in his incisive treatise makes a highly pertinent observation in this regard and highlights the difficulty of taking on the task of transforming the divine text into human legislation:

“One characteristic of the Islamic legal experience is its irrepressible pluralism. In the first centuries of Islam, there was a proliferation of legal schools of thought, each one named after its symbolic founder. By the fourth/tenth century, for reasons that are not entirely clear, a large number of these schools became extinct leaving less than ten in the Sunni sect and less than five in the Shii sect. Nonetheless there continued to be a remarkable diversity in legal opinions and trends even within each of the surviving schools. The broad range of diversity, was such that it was fairly difficult to ascertain the predominant view within a particular legal guild, let alone being able to establish a predominant view in Islamic juristic thought as a whole.”(El-Fadl, 2003:)

Islamic Criminal law draws support from and based on the sources of law described above. Offences are categorised according to the punishments for each offence, which are, broadly speaking three in number: (1) Hadd (2) Qisas (3) Tazir. Hadd (plural hudood) offences are against God or interests of society as a whole. Punishments for hadd offences are mandatory in accordance with clear injunctions laid down in the Quran and Sunna (Hussein 2003, 37); Zahur-ud-din 2003, 5-11; Rahim 1995, 304-306). Hussein (Ibid), adds that “Hudood crimes once proven before the judge are not and cannot be subject to forgiveness or pardon; punishment must be imposed upon criminals who are committing such crimes.” Offences attracting hadd punishments include theft, dacoity or highway robbery, sexual intercourse outside of marriage known as zina (adultery and fornication), consumption of alcohol, and apostasy (Hussein, Ibid; Rahim, Ibid)). Punishments prescribed for hadd offences, being very serious in nature have a level of proof that far exceeds ordinary evidentiary requirements. (See discussion below) In Qisas (retaliation) the next of kin can demand life for life whereas in diyat (compensation) form of punishment, the next-of-kin of the deceased may demand and accept blood-money. Tazir punishment is applied to offences for which no fixed punishments are prescribed and lie at the discretion of the judge. Offences attracting tazir punishments include charging interest, slander, bribery, adulteration of food products, false testimony, breach of public trust etc., (Sherif 2003, 6) Where evidence falls short of a hadd offence, tazir may be applied. Punishment ranges from ‘a disapproving look’ to admonition reprimand, threat, boycott, public disclosures, fines and seizure of property (Schacht 1964, 175; El-Awa 1993, 101-106). This paper focuses on one of the hudood offences i.e., sexual intercourse outside of marriage (zina) which includes fornication and adultery and it is to this theme that we now turn our attention.

The Historical (Con)text of the offence and punishment for zina: The Quranic Text

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4 Incorporation of Qisas and diyat into the Penal laws of Pakistan has meant that where women are killed in the name of honour by their male relatives (who are also their next-of-kin), these laws are invariably utilised as a way of evading punishment. Theoretically, the court has the authority to punish the offender, even though, at a private level, she/he has been forgiven and the case settled because these do fall under tazir punishments. In practice, it is not common for courts to do so.
I begin by sharing the genesis of Islamic Criminal law on extramarital sexual relationships (zina), its definition, evidentiary rule and punishment. The term zina denotes unlawful sexual intercourse between a man and a woman outside marriage, regardless of their marital status. The Quran criminalizes extramarital sexual relations starting from declaring it to be a transgression and punishable as tazir to making it a hadd offence (El-Awa 1993, 15). Verse 17:32 of the Quran prescribes thus: “And do not go near fornication (zina) as it is immoral and an evil way”. No particular punishment was prescribed at this stage.

Chapter four of the Quran entitled An-Nisa (Women) declares that,

“If any of your women Are guilty of lewdness,\(^5\) Take the evidence of four (Reliable) witnesses from amongst you Against them; and if they testify, Confine them to houses until Death do claim them, Or Allah ordain them Some (other) way. (The Quran 4:15)

If two men among you Are guilty of lewdness, Punish them both. If they repent and amend, Leave them alone; for Allah Is Oft-Returning, Most Merciful.(The Quran 4:16)

Some writers on Islamic Criminal law have read the above verses as applicable to zina (i.e., illegal sexual intercourse between a man and a woman) and as a precursor to the more strict hadd punishment. Abdullah Yusaf Ali in his commentary of the Quran however makes the point that verses 4:15 and 4:16 address homosexuality and not zina. While I tend to agree with this view as the verses appear to refer to women as a group (“your women”) and men as a group (“If two men among you”), there is a difference in the two statements. Thus “if any of your women are guilty of lewdness” may be distinguished from “If two men among you are guilty of lewdness” in that in the reference to women, acts of lewdness have not been specifically identified as a lesbian relationship, while with reference to men ‘two men’ clearly denotes a homosexual relationship. Punishment for both acts is imprisonment but, as in other verses of the Quran, there is a space for atonement and forgiveness.

Chapter 24 of the Quran goes on to create the hadd offence of zina and prescribe punishment as follows:

“The woman and the man Guilty of adultery or fornication, - Flog each of them With a hundred stripes; Let not compassion move you In their case, in a matter Prescribed by Allah and the Last Day: And let a party Of the Believers Witness their punishment.(The Quran 24:2)

Let no man guilty of Adultery or fornication marry Any but a woman Similarly guilty, or an Unbeliever, Nor let any but such a man Or an unbeliever Marry such a woman: To the Believers such a thing Is forbidden.” (The Quran 24:3)

Contrary to the punishment of stoning to death presently on the statute books of Pakistan, Saudi Arabia, Iran, Nigeria (only some states) and Sudan (and enforced by

\(^5\) In the Quranic verses below on sexual intercourse outside of marriage and hence illegal under Islamic criminal justice, clear reference to heterosexual relationship is made. ‘Lewdness’ or ‘lewd’ behaviour is being employed in these verses to indicate sexual impropriety amongst women.
the Taliban in Afghanistan), flogging is the Quranic punishment for the offence of zina. Stoning to death is said to be prescribed under the Sunna. This extremely harsh penalty is subject to equally stringent and, it is submitted, virtually impossible evidentiary rules for establishing the offence of ‘zina’ and inflicting the above punishment. (Hussein 2003, 38) The establishment of guilt must be proved beyond any doubt (not simply reasonable doubt). Guilt of the offence of zina is also established if the accused makes a confession, willingly and without coercion in the presence of a judge. Four male, adult, trustworthy Muslim witnesses must testify that they saw the two persons committing the act of adultery and that the man’s organ was inside the woman. Nothing less than committing a public act of sexual intercourse such that four men would be standing close enough to confirm the actual act, will constitute the offence of zina and attract the penalty mentioned above (El Fadl, 2003, 111-113).

Commenting on the context of implementation of this law, Hussein states: “The presentation of this form of proof has not once occurred in the history of the application of the Sharia.” (Hussein 2003, 38) Standard of proof for all hudood offences under Islamic law is very arduous which must be proved beyond any atom of doubt. This is based upon the tradition of the Prophet Muhammad which stated: “Avert the hudood punishment in case of doubt . . . for error in clemency is better than error in imposing punishment” (Baderin 2003, 80). Baderin also cites the Islamic scholar Shalabi who pointed out that “the proof required makes the punishment for zina applicable only to those who committed the offence openly without any consideration for public morality at all, and in a manner that is almost impossible and intolerable in any civilised society.” (Ibid)

Rahim (1995, 305) while stating some of the important limitations and conditions under which Islamic law permits infliction of hadd punishment, emphasises the fact that “any doubt would be sufficient to prevent the imposition of hadd.” He further explains that in cases of zina

“some jurists go so far as to recommend to a man who has seen it committed not to give information or evidence. . . I may mention that the policy of law in connexion with this offence is to punish only those offenders who defy public decency and openly flaunt their vices.”

Kusha echoes similar views stating that:

“The Quran is absolutely against surveillance for the detection of unlawful activities in which one may engage in one’s private residence (e.g., drinking, illicit sex or use of drugs). In fact the Quran advises believers, including spouses, to safeguard each other’s secrets.” (Kusha 2002, 160)

As well as stringent evidentiary rules, enforcement of hudood punishments is also subject to the pre-requisite that there must exist an ideal Islamic society. If the defence can make a case that the offender was a product of sociological problems of society, hudood punishment may be mitigated. Therefore, despite the rigid and unquestionable prescription of hudood punishment, its application by the State is subject to sociological factors existing within the state (Baderin 2003, 83).
A further important sequence of producing evidence to substantiate the offence of zina is the hadd offence of qadfh or wrongful allegation/testimony implicating a person for zina. The Quran, 24:4-5 states that: “And those who launch A charge against chaste women, And produce not four witnesses, (To support their allegation), - Flog them with eighty stripes; And reject their evidence Ever after: for such men Are wicked transgressors;- Unless they repent thereafter And mend (their conduct): For Allah is Oft- Forgiving, Most Merciful.”

“Those who slander chaste, indiscreet but believing women, are cursed in this life and in the hereafter: For them is grievous penalty. On the Day when their tongues, their hands, and their feet will bear witness against them as to their actions, on that day God will pay them back (all) their just dues, and they will realise that God is the (very) Truth, that makes all things manifest.” (The Quran 24:23-25)

A contextual analysis of the Quranic text raises the question of what brought about the harsh statement towards extramarital sexual activity and more so to allegations and insinuations thereof? The above verses were revealed following the famous ‘Affair of the Necklace’, in which the Prophet Mohammad’s wife Aisha, was inadvertently left behind by a caravan in the desert as she went searching for her necklace that had gone missing. She was spotted by one of the young, single men in the Prophet’s entourage and brought back to Medina leading to widespread rumours about her time alone with this man. The subsequent weeks turned into a nightmare for Aisha as her honour and dignity had come under question, and she was suspected of inappropriate behavior. The verse therefore in no uncertain language and tone, silenced rumours against not only Aisha but for future generations of women and proceeded to prescribe a very harsh punishment for a person or persons who attempt to slander a woman’s good name.6

Read together and in light of the context in which the verses were revealed, it is evident that the focus of the pronouncements was to safeguard women’s reputation and good name and not flag up in the public gaze, extramarital relationships of people. In fact, the Quranic advice is to walk away from a place where rumour mongering or impropriety (of behaviour) is rife.(See the Quran 24:16-17)

Few writers on Islamic Criminal justice have made the above-mentioned crucial connections. They ‘read’ the Quranic verses declaring zina as an offence and its punishment as one autonomous concept, as in the case of the Pakistan hudood laws, and false accusation of zina (qadfh) and punishment for this falsehood, as a separate offence. Their individual worldview of crime and punishment, victim and wrongdoer informs ‘reading’ of the Quranic text on zina. In other words, the ‘written word’ of the Quran has over the centuries become ‘overwritten’ by interpretations informed by plural legal systems and varied perspectives.

6 See the Quran 24:13-19. Why did they not bring Four witnesses to prove it? When they have not brought The witnesses, such men, In sight of Allah, (Stand forth) themselves as liars! Were it not for the grace And mercy of Allah on you, In this world and the Hereafter, A grievous penalty would have Seized you in that ye rushed Glibly into this affair. Behold, ye received it On your tongues, And said out your mouths Things of which he had No knowledge; and ye thought It to be a light matter, While it was most serious In the sight of Allah. And why did ye not, When ye heard it, say- “It is not right of us To speak of this: Glory to Allah! This is A most serious slander!” Those who love (to see) Scandal published broadcast Among the Believers, will have A grievous Penalty in this life And in Hereafter: Allah Knows, and ye know not.
The Quranic verses on zina must therefore be read together with the verses on qadfh and not as separate laws. Asifa Qureshi (1997) is one of the very few writers who ‘see’ the connection in her ‘reading’ (interpretation) of the Quranic text on zina. She believes that zina and qadfh verses of the Quran cannot be read but as a composite whole; hence a legal formulation that separates the two sets of verses into two different statutes is unacceptable and a corruption of the religious text. She states that the main purpose of the Quranic verses on zina and its punishment are to protect the privacy of people and public morality. Secondly, that this is linked with the strict evidentiary threshold as well as protecting women’s honour. But, Hussein and Baderin in their work do not appear to include or read this interpretation in their reflections on the Quranic text on zina.

In contemporary state practice of Muslim jurisdictions, literalist and out-of-context transformation of the Quran into codified law has led to serious consequences for human rights especially of women’s human rights. Saudi Arabia, Sudan, Iran, Nigeria and Pakistan are some of the Muslim countries that have codified elements of the Islamic Criminal Justice system and met with extreme criticism due to the lack of contextual thought and effort into the rationale and objective of the Quranic pronouncements on the subject. For instance, in 1979, General Zia ul haq promulgated a set of ‘Islamic’ laws the preambles of which stated as the objective of these legislative pronouncements bringing existing laws into ‘conformity with the injunctions of Islam as set out in the Holy Quran and Sunnah’. But in so doing, he introduced a law devoid of context and spirit attempting to codify essentially uncodifiable religious text the Quran, which in addition to punishments also contains injunctions of justice, equity, morality, ethics, mercy, goodwill as alternative and complementary concepts. Under the codified law on zina in Pakistan, criminal culpability for parties accused of zina starts at puberty which for women could be as low as eight or nine years whereas for a man it is likely to be much higher. This vulnerability of young girl children runs counter to the Islamic principles of justice. Further, the Islamic legal tradition lays emphasis on protecting the good name of women; the law on paternity provides that a child born within 6 months of marriage, is ascribed to the father. Likewise a child born up to 2 years (or even longer depending on the school of juristic thought) after the death of the father or dissolution of the parents’ marriage is considered born within wedlock and ascribed to the father. Surely stretching the period of gestation to such an extent implies extending benefit of the doubt to men and women who may not fall within the limits of permissible sexual relations and speaks volumes for the protective aspect of the Islamic legal tradition (Pearl, D & Menski, W 1998, 399-401).

An-Naim’s interpretation of Islamic Criminal law as advanced in his Towards an Islamic Reformation (1990) displays a clear confidence in the Islamic tradition as a system capable of delivering justice in the contemporary world. He believes that any project of introducing Islamic law must take into account ‘westernized’ legal systems operating in contemporary Muslim jurisdictions and international human rights law. If

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7 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 Prohibition (Enforcement of Hadd) Order 1979.
we take Pakistan as an example of a Muslim jurisdiction where ‘westernized’ legal systems operate, it is evident that (‘western’) colonisation placed a common law legal system in place resulting in codification of law, court system and institutions of governance akin to a ‘western’ jurisdiction. Two major consequences (among others) emerged; first that despite serious efforts, colonial project of codifying religious law, mostly in the field of family law, failed.

The second factor now a reality, is the irreversible governmental and court structures as well as post-colonial constitutional documents the tenor of which is clearly ‘western’. A number of factors may be cited here as evidence of this position. For instance, the Iranian revolution despite its massive shift to a theocratic state, maintained the legislative, executive and judicial triumvirate of state structure. Likewise, the Muttahida Majlis Amal (MMA) an alliance of religious parties who are now in government in the north west frontier province of Pakistan, have continued with all governmental structures, institutions and procedures. They are engaging with all international organisations and enthusiastically invite collaboration the UN agencies, the World Bank, Asian Development Bank, and others to advance their governmental and political agenda. At an international level, acceptance and accession of Muslim states to the plethora of treaties is further evidence that those espousing an Islamic form of government are quite amenable to the existing post-Westphalian formulation of nation states. Finally, looking at the Charter of the Organisation of Islamic Conference (OIC) an organisation of 57 Muslim countries, makes reference to the UN and has registered it under article 102 of the UN Charter on February 1, 1974. (For details on the OIC see www.oic-oci.org.)

Criminal laws of the Indo-Pakistan sub continent during colonial rule were secular in formulation and not based on religious doctrine. Any project of islamisation is therefore akin to planting a religious seed in a secular soil. The need to confront the gigantic and hugely complex task of converting the Quranic text into contemporary criminal legislation is imminent in light of the increasing number of Muslim countries (Pakistan, Sudan, Iran, Saudi Arabia and some states of Nigeria) adopting Islamic criminal law as part of their legal systems.

As discussed in the section below, juxtaposition of the religious text with legislative formulation as undertaken by General Zia in Pakistan reflects the dangers of the transformative processes of law as process and outcome, particularly when laws are transplanted from one normative ‘soil’ in this case, religious text, to a totally different ‘terrain’ i.e., a secular, postcolonial legislative framework, interpreted through the patriarchal lens of customary norms. A brief snap shot of the outcome is evident from the following examples:

Safia Bibi was a poor 18 year old near-blind girl who alleged rape by her employer and his son. She became pregnant, and a child was born who later died. Safia’s father registered a First Information Report (FIR) for rape after the death of the baby. The alleged rapists were acquitted due to lack of evidence while Safia was found guilty of illegal sexual relations (zina) on account of her pregnancy which was considered a ‘confession’. She was sentenced to 3 years imprisonment, 15 lashes and a fine of rupees 1000. A huge public outrage ensued resulting in the Federal Shariat Court (FSC) taking suo moto notice of the case directing the subordinate court to transfer it to the FSC for review. Safia Bibi’s conviction was set aside.
Zafran Bibi was convicted of zina on the basis of her pregnancy and sentenced to stoning to death. Her husband had been imprisoned for 9 years in a murder case; hence the pregnancy was considered a ‘confession’ of adultery. She alleged rape but due to contradictions in her statement, the accused was acquitted while she was found guilty. On appeal the Federal Shariat Court set aside the conviction.

Safia Bibi, Zafran Bibi and others are only the tip of the iceberg in the vast array of cases that came to the fore after promulgation of Islamic Criminal law in Muslim jurisdictions most of which resulted in conviction and imprisonment of women and even children. In Pakistan the number of women in prison increased manifold after the hudood laws were set in motion in 1979 under General Zia ul Haq. In contrast to the figure of 70 women convicts in the whole of Pakistan in 1982, the figure rose to 7000 in 2002/2003. The National Commission on the Status of Women report states that 88 percent of women prisoners in Pakistan were charged under the law relating to zina. At the same time, more than 90 per cent of persons charged with zina are acquitted on appeal. Surely there is a huge problem here. How do we account for the large numbers of zina cases filed after the promulgation of the hudood laws? If it is assumed that the prosecution has a case, how does one explain conviction at trial court and the almost complete reversal on appeal? In order to address these questions it is important to present the substantive and procedural content of the hudood law on zina as it stands on the statute book in Pakistan.

Transcribing Qur'anic text to black letter law in Contemporary Muslim jurisdictions: Codifying the Uncodifiable?

The Offence of Zina (Enforcement of Hudood) Ordinance 1979 of Pakistan criminalizes ‘zina’ or sexual relations outside of marriage. It consists of a preamble and 22 sections and defines zina as follows:

“A man and a woman are said to commit ‘zina’ if they wilfully have sexual intercourse without being validly married to each other.”

Section 5 of the said Ordinance states that (1) Zina is zina is liable to hadd punishment if –

a. it is committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be married, or
b. it is committed by a woman who is an adult and is not insane with a man to whom she is not, and does not suspect herself to be married.

(2) Whoever is guilty of zina liable to hadd shall, subject to the provisions of this ordinance, --

a. if he or she is a muhsan, be stoned to death at a public place; or
b. if he or she is not a muhsan, be punished, at a public place with whipping numbering one hundred stripes.

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8 Section 4, The Offence of Zina (Enforcement of Hudood) Ordinance 1979
9 Muhsan means a married person
The Zina Ordinance also incorporates under section 6, the offence of rape translated as ‘zina-bil-jabr’: (1) A person is said to commit zina-bil-jabr if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely;

a. against the will of the victim;
b. without the consent of the victim;
c. with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt; or
d. with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself to be validly married.

(2) Zina-bil-jabr is zina-bil-jabr liable to hadd if it is committed in the circumstances specified in sub-section (2) of section 5.

(3) Whoever is guilty of zina-bil-jabr liable to hadd shall subject to the provisions of this Ordinance, --

a. if he or she is not muhsan, be stoned to death at a public place; or
b. if he or she is not muhsan, be punished with whipping numbering one hundred, at a public place, and with such punishment including the sentence of death, as the court may deem fit having regard to the circumstances of the case.

The Quranic verse outlining rules of evidence in case of zina is translated and applied to both the offence of zina and zina-bil-jabr thus:

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

a. the accused makes before a court of competent jurisdiction a confession of the commission of the offence; or
b. at least four Muslim adult male witnesses, about whom the court is satisfied, having regard to the requirements of tazkiah-al-shuhood,\(^{10}\) that they are truthful persons and abstain from major sins giving evidence as eye-witnesses of the act of penetration necessary to the offence;
c. Provided that, if the accused is a non-Muslim, the eye-witnesses may be non-Muslims.

This translation of the Quranic text into contemporary legislation immediately raises a number of issues. First and foremost, the law on zina fails to incorporate a warning against false accusations and the dire consequences of allegations of zina against women. This detracts from the very objective of the Quranic verses directed at protecting women rather than leaving them vulnerable to conviction. The high evidentiary limits are meant to deter frivolous allegations.

\(^{10}\) The term means mode of inquiry adopted by the court to satisfy itself as to credibility of a witness.
Secondly, the *Quranic* verses on *zina* do not mention the offence or punishment for rape, neither does the evidentiary rule apply. Yet by placing the same evidentiary ceiling as for consensual sexual relations, a violated woman finds herself vulnerable to become an accused as soon as she fails to produce the requisite witnesses. Provisions of section 6 of the Ordinance is a cut and paste job of the provisions on rape in the colonial Indian Penal Code, later known as the Pakistan Penal Code.

A discussion of the comparative overview of the *Quranic* construction of the offence of *zina* and the Pakistan law throws into relief the inconsistencies arising from attempting to capture the *Quranic* text into black letter law. Thus, the relationship between the standard of proof required and the severity of the punishment/stigma attached to the crime is displayed in *Quranic* verses but not appreciated in its application by courts. Where the case is proved to a lower standard, courts avail the possibility of a lower standard of punishment (*tazir*). The *Quranic* demand of four witness rule to attract *hadd* was meant as a mitigating effect and may be compared to the legal fiction of benefit of clergy and various techniques of “criminal equity” which have mitigated the formal severity of English criminal law in the past. On the other hand, the reverse effect of the high burden of proof for rape in the Zina Ordinance is to be noted, which tends to condemn the woman who complains of rape (because she must inevitably ‘admit’ that intercourse took place). This is of particular significance where ‘respectability’, religious convictions and gender qualifications of witnesses are a pre-requisite to testify in these serious cases. Finally, this discussion shows the confidence in confessions by Islamic legal principles of evidence.

To what extent, can statutory formulation be a faithful representation of the ‘original’ text? Further, and more importantly for our present discussion, how have courts in Pakistan responded to the challenge of this interpretation, with particular reference to the *hudood* laws on *zina*? What are the dominant themes and trends emerging from a review of decisions in *hudood* cases where *zina* is alleged?

**Trends and Issues in Application of Islamic Criminal law in Pakistan: Some lessons from the field.**

In plural legal systems such as Pakistan, laws derived from religious text operate alongside constitutional provisions, secular civil and criminal law, customary practices and more recently, international human rights law. Since the promulgation of the Hudood Ordinances in Pakistan in 1979, a number of studies have referred to the indiscriminate use of this law for implicating women and men and confine them to long prison sentences as well as life long social stigma. (Jehangir & Jilani 1990; Mehdi 1994; Government of Pakistan 1997; National Commission on the Status of Women 2003) These studies have highlighted personal vengeance, socio-economic compulsions or simply social control of women as reasons for increased cases under the *zina* laws. Patriarchal and misogynistic trends reflected in the judgments have also been the subject of discussion. Absent from the discourse, was a review of *hudood* cases where an interpretative strategy had been employed by the court using a combination of constitutional rights, Islamic law and international human rights with a view to advance women’s rights.

The present research collected judgments of the superior judiciary (including the High Courts of Peshawar, Lahore, Sind, Baluchistan, Azad Jammu & Kashmir, the
Supreme Court of Pakistan, the Federal Shariat Court and its Appellate bench.) in zina cases between 1980 to 2003. The sample was narrowed down to cases where the court had used its interpretation of plural legal norms to challenge a monolithic and narrow reading of the religious text in Islam as well as the zina laws adopted in the name of religion. A further factor in the choice of sample was cases where judges had applied human rights law (including the United Nations Charter, Universal Declaration of Human Rights, The UN Convention on the Elimination of All Forms of Discrimination Against Women)

This review suggests that the superior judiciary in Pakistan appears to be in the process of redefining its social role and even transforming the classic Anglo-Saxon conception of judicial activism. In some cases, judges proclaim that their role is one of a mujtahid\textsuperscript{11} and that therefore they are entitled to deduce new Islamic law by logical induction from Quran and Sunna, which previously was considered only a prerogative of theological figures like fiqaha (legal scholar, singular faqih), aaima (leader, singular imam) and muftis (a legal scholar competent to deliver fatwa (edict). Superior courts, especially the Federal Shariat Court are engaged in a serious discourse to bring centuries old Islamic jurisprudence in conformity with modern social reality. In some cases, interpretative strategies employed by superior judiciary are an amalgam of traditional, Islamic, modern and common law trends. The work of female Muslim scholars needs mention here, especially for their role in evolving interpretative strategies based on the Quran and other sources of Islamic law.\textsuperscript{12} These, in turn are providing a basis for Muslim women to argue for rights and entitlements from within their religious tradition which men and governments find difficult to denounce. Discomfort of the self-appointed ‘clergy’\textsuperscript{13} at seeing an increasing number of women engaged in scholarly research and interpretation of the religious text, is apparent as the power of religious discourse appears to be slipping out of their domain. At the same time, it is also the case that the voices of some ‘enlightened’ male clergy are joining the debate on women’s rights within the Islamic tradition.

1. (Ab)Use of Islamic Criminal Law of hudood as an Instrument of Personal Vengeance.

The single most startling ‘revelation’ of this research has been the fact that the vast majority of cases registered under hudood laws of zina and zina bil jabr, are based on personal and ulterior motives of near relatives. First Investigation Reports (FIRs) are usually fabricated and meant to achieve personal objectives. In most cases, evidence is doctored and constructed, in collaboration with investigation agencies (in this case, invariably local police). These cases are indicative of laws’ violence in the hands of individuals and groups who appropriate and employ them in playing out ‘battles’ of often ‘localised’ power relations. Case law is reflective of how the religious text is abused and misused without any qualms of conscience. The distinction between

\textsuperscript{11}Jurist

\textsuperscript{12}F Mernissi, Z Mir Husseini, H Afshar, A. Al-Hibri, L. Ahmed, M Yamani, N Hamadeh, S. Haeri, R. Hassan, S. S. Ali, A Wadud to name a few.

\textsuperscript{13}Islam has no clergy in the sense that other religious traditions subscribe to. Two clear avenues are offered to Muslims in the fulfilment of their religious obligations: either endeavour to arrive at an independent position and adopt that particular path or, if one does not feel confident to do so, follow the opinion of a learned person. This following of a learned person’s opinion is called taqlid.
employing ‘secular’ laws and religious law is completely blurred. Some examples of this approach are presented below:

_Mst. Humaira Mehmood vs. The State_ PLD 1999 Lah 494, is a case of alleged _zina_ and abduction registered by a father against the husband of his daughter as she had married a man of her own choice. The father knew, at the time of his complaint, that his daughter and the accused are lawfully married but went ahead and filed a case of _zina_ implicating his daughter and her husband as a result of which they had to flee their home to avoid being arrested. Details are as follows: Humaira, a 30 year old woman married Mehmood Butt, against the wishes of her parents. Her father was a sitting member of the Provincial Legislature. The couple, apprehensive of their lives and safety, fled to Karachi and sought refuge in Edhi Centre. The brother chased them and filed a first information report (FIR) to the effect that his sister had had a row with her mother and left home and he may be given her ‘possession’. There was no mention of an existing marriage of Humaira to another man or her alleged abduction by her husband Mehmood. The family, on ‘recovering’ Humaira went through a ‘false’ marriage ceremony which they documented on video film and later produced in court as testimony of a prior marriage to a person of the family’s choice. The case, through the support of human rights activists made it to the High Court of Lahore invoking the writ jurisdiction under constitution of Pakistan (Article 199). The judgment by the Honourable Justice Jillani is a landmark decision and important in more ways than one. It draws strength from a combination of Islamic law, the constitution of Pakistan and international human rights instruments emanating both from the UN human rights regime and comparable documents from Islamic forums. What is also crucial in developing a women-friendly and indeed human friendly interpretative strategy for securing human rights is the complementary manner in which these three different legal frameworks are used. (Pages 512 –513 of the judgment sum up this argument and approach rather well.)

His Lordship emphasises the duty of the state institutions in respecting, protecting and promoting fundamental rights of everyone. He States that:

“Coming to the role of the State functionaries in this case I find that the police officials who handled this case passed orders and acted in a manner which betrayed total disregard of law and the land and mandate of their calling. Articles 4 and 25 of the Constitution of the Islamic Republic of Pakistan guarantees that everybody shall be treated strictly in accordance with law. Article 35 of the Constitution provides that the State shall protect the marriage, the family, the mother and the child. As Member of the international Comity of Nations we must respect the International Instruments of Human Rights to which we are a party.”

His Lordship reminds the parties that Pakistan is a Member of United Nations and is signatory to the Convention of the Elimination of all Forms of Discrimination Against Women. He especially draws attention to article 16 which enjoins all member states to

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14 The Edhi Trust is a national welfare organization. Abdus Sattar Edhi established his first welfare centre and then the Edhi Trust with a mere Rs. 5000 (less than 50 pounds sterling). What started as a one-man show operating from a single room in Karachi is now the Edhi Foundation, the largest welfare organisation in Pakistan. The foundation has over 300 centres across the country, in big cities, small towns and remote rural areas, providing medical aid, family planning and emergency assistance. They own air ambulances, providing quick access to far-flung areas.
respect rights of women to family life on a basis of equality with men. Justice Jillani also refers to article 5 of the Cairo Declaration on Human Rights in Islam to reinforce his argument of women’s human rights within an Islamic framework. He condemned in no uncertain language the ‘alliance’ of state, society and family to undermine women’s human rights by stating that:

“The police officials are guardians of the lives, liberties and the honour of the citizens. They owe their place in society to the taxes which are paid by citizens. If these guards become poachers then no society and no State can have even a semblance of human rights and rule of law.”

Likewise, in Rashid Ahmad vs. The State, the father of a girl registered a case of zina-bil-jabr and abduction against the accused. This was done primarily to hide the ‘shame’ of the family as the girl had wilfully left home with one of the accused and subsequently returned. Similar cases lodged by fathers against daughters who had married of their own volition include Mst. Bakhtawar Mai vs. SHO PS Khairpur Saadat, Distt. Muzaffargarh and others and M Sharif and 8 others vs. The State

Personal vengeance against a real or perceived wrong-doing also motivated plaintiffs to use the religious law of hudood and bring disrepute to the adversary. Asghar Ali vs. The State, Lala vs. The State, Muzammil Khan vs. Fateh Khan and others and Abdul Majeed vs. Ghulam Yaseen are some examples of this approach.

Mst. Zafran Bibi vs. The State, is another landmark case where the Federal Shariat Court took suo moto notice of a stoning to death sentence of a married woman Mst Zafran Bibi. During the course of examination of the convicted woman (who was originally a complainant) and her husband, it transpired that she had been pressurised to accuse a person of zina bil jabr to protect the younger brother of her husband (who according to her statement used to commit zina bil jabr with her). Zafran Bibi, who was sentenced to stoning to death by the trial court, was acquitted by Federal Shariat Court for erroneous reasoning of the trial judge. This case which initiated in the Kohat region of the north west frontier province of Pakistan hit the headlines when Zafran Bibi was sentenced by the court of first instance. The public outrage and wide support for her resulted in the superior courts hearing the appeal and acquitting her of the offence of zina.

2. Divergence Between Trial Court Decisions and Appellate/Superior Courts: Substantive or Procedural Conflict?

Another finding from a review of the sample revealed the fact that there appeared a huge divergence between the approach, reasoning and decisions of the subordinate courts and the superior judiciary in hudood cases. Registration of cases under hudood offences, especially zina and zina bil jabr, subsequent investigation and trial in subordinate courts appear to have been conducted arbitrarily. The cursory manner in which legal and Islamic law knowledge is applied is painfully apparent in almost all such cases. This results in acquittals and quashing of conviction orders of subordinate courts by the superior judiciary. What is most unsatisfactory is the fact that despite consistent pattern of reversals and admonishment by the appellate courts, the trend continues unabated as does the human suffering it entails. Complete disregard for the basic human rights and social implications for the accused is the repetitive trend
emerging from this research. The constant stream of appeal cases where women’s reputation are tarnished forever for being implicated in *zina* is made all the more stark where the male co accused is acquitted for want of evidence while the woman is convicted for her pregnancy. In the case of Zafran Bibi cited above, the Additional Sessions Judge sentenced Zafran Bibi to be stoned to death. She was a married woman, who had accused a person of *zina bil jabr*. She was found to be pregnant, and despite her pregnancy antedating the alleged offence, the trial court found her pregnancy a conclusive proof of her guilt (her husband was in jail at the time of occurrence). The accused was however, acquitted for want of evidence. Upon appeal, the Federal Shariat Court found the reasoning of trial judge erroneous and held that pregnancy of a complainant cannot be proof of her guilt, especially so in instant case where it was antedated and legitimacy of child was accepted by her husband. Zafran Bibi was acquitted by the Federal Shariat Court.

Two judgments however stand out from the sample reviewed. In *Lubna and others vs. Government of Punjab* and *Qaiser Mehmood vs M Shafi and another*, the Lahore High Court refused to quash an FIR registered against the (allegedly) legally wedded husband and wife. The girl had left home with a person and then married him. The court held that such runaway couples are not entitled to a relief either in equity or in extraordinary writ jurisdiction of the court. The court advised them to seek other official / administrative remedies for quashing the FIR and rejected the petition.


As a cross cutting issue and following on from (1) and (2) above, a further common element in judgments of superior courts was the specific reference to substantive and procedural inadequacies and the partisan nature of investigation officers and incompetence of trial judges. It is pertinent to make the point here that despite these almost persistent lapses in the cases reviewed, it was only in one instance that a superior court specifically took to task ‘delinquent’ investigation officers. In *Muhammad Siddique vs. The State*, the court notes that the police and subordinate courts did not act in lawful and timely manner that may have prevented a triple-murder in the name of honour. Likewise, in *Abdul Zahir and other vs The State*, the court found that records were tampered with, and false succession documents were prepared by the accused to obstruct rights of a woman (wife of deceased) even by her close relatives. In the Zafran Bibi case, the court observed that “the controversy around the applicability of hudood laws in Pakistan is related more to the erroneous application of these laws in the country, rather than the laws *per se*.”

*Zarina Bibi vs. The State* however presents an instance of one of the strongest judicial comments on mis-application of *hudood* laws by investigation officers and lower courts. The court finds that the application of *hudood* is, by and large, arbitrary and that the lower courts seem to be every-ready to convict, which their Lordships declared to be against Islamic principles. The court criticized the conduct of trial judge as he failed to perform his obligations. In the same case the court was critical of the police, which, considers “the poor and the minorities their fief” and that the collection of evidence and investigation was partisan and arbitrary.

Historically sections of the Pakistan Penal Code (PPC) have been employed to evolve a case for ‘mitigating circumstances’ where an accused has murdered under ‘grave and sudden provocation’. These cases included (but not exclusively so) instances where a woman and/or her spouse were killed as a result of their defiance of ‘custom’ and marrying of their own choice. The defence would convince the court for a lower sentence since the accused was supposedly acting impulsively to protect his ‘honour’; a line that was quite commonly accepted by courts, both subordinate and superior. The law was thus manipulated and advanced the sanctity of male honour and legitimating control over women.

This perception of superior courts vis-à-vis honour killings of women by their male relatives (brothers, fathers, uncles or husbands) has changed somewhat in recent years. In most judgments under review, judges make it a point to distance themselves from condoning killing in the name of honour and admonish such social trends. Superior courts are now increasingly rejecting the old excuse of being ‘provoked by sight of a female relative in compromising position’ for murders. In certain cases, courts have refused to give any benefit whatsoever to the accused of honour killing on the pretext of his ‘ghairat’ (honour). In Muhammad Siddique vs. The State court upheld the conviction of a father who had murdered his daughter, her husband and their infant child to teach his daughter a lesson for marrying of her own free choice. The court severely criticizes such tendencies and social trends. Justice Jilani in his judgment states thus:

“These killings are carried out in an evangelistic spirit. Little do these zealots know that there is nothing religious about it and nothing honourable either. It is male chauvinism and gender bias at their worst. These prejudices are not country specific, region specific or people specific. The roots are rather old and violence against women has been a recurrent phenomenon in human history…… Notwithstanding the Quranic commandments and the penal law of the land, the incidents of violence against women remain unabated. . . . This is a typical example of misuse and misapplication of the Hudood laws in the country. . . A murder in the name of honour is not merely the physical elimination of a man or woman. It is at a social-political plane a blow to the concept of a free dynamic and egalitarian society. In great majority of cases, behind it at play, is a certain mental outlook, and a creed which seeks to deprive equal rights to women i.e., inter alia, the right to marry or the right to divorce which are recognized not only by our religion but have been protected in law and enshrined in our constitution.”

In Pehlwan and other vs The State and Abdul Zahir and other vs. The State, too, the court has refused to accept the notion of honour killing. The judge traces at length the history of oppressive treatment meted out to women from pre-Islamic times to modern time and bases its conclusion on Quranic prescription. The court calls for jihad

The term jihad comes from the Arab verb ‘jahada’, meaning to struggle or exert. The Prophet Muhammad is believed to have stated that the exertion of force in battle is a minor jihad, while “self-exertion in peaceful and personal compliance with the dictates of Islam (constitutes) the major or superior jihad.” The Prophet is also reported to have said that the “best form of jihad is to speak the truth in the face of an oppressive ruler.” Jihad has also been defined as “exertion of one's power to the utmost of one's capacity.” Al-Kasaniy presents a particularly succinct definition of Jihad wide enough to include all aspects of the doctrine, stating thus: "Jihad in the technology of law is used for expending
against honour killing. Further, it is interesting to observe that whereas in pre-Islamic times, female infanticides and honour killings were matters of routine, we do not find any incident of honour killing of women in early years of Islamic caliphate.

The courts have also taken the view that customary practices supporting honour killings are unacceptable. In *Rasool Bux vs The State*, the court specifically refuses to ‘condone a murder’ on the ‘ground of *siahkari*’, and holds that such murder is to be punished with death. In *M Akram Khan vs The State*, the court adopted a stern position on the issue of honour killing and declares it to be violative of fundamental rights as guaranteed in Constitution. The court, thus, refuses to mitigate the circumstances and maintains that the death penalty be awarded in a case of honour killing.

5. Element of *qadfh* ignored.

Our review invoking Islamic Criminal laws on *hudood*, on *zina* and *zina bil jabr*, suggests that courts have failed to take the *Quranic* law to its logical conclusion, i.e., implement the law on *qadfh* which requires persons giving false evidence and bringing false cases implicating women of illegal sexual relations, to be whipped and their evidence forever disregarded. There could be two possible ways to ensure effective enforcement of *qadfh* law: *Suo moto* powers of courts – The Federal Shariat Court believes that legislature must amend the *qadfh* ordinance to empower courts to take people to task for falsely implicating people in offences of *zina* etc. This, the court holds, would undermine the tendencies of achieving personal ends and ulterior motives through false cases of *hudood* against enemies or ‘runaway’ females of family. The superior judiciary might wish to consider circulating clearly worded instructions to the subordinate judiciary in this regard. Meanwhile, since *qadfh* proceedings can only be initiated when a complaint is made by the one who was alleged of *zina*, an active campaign for awareness of the legal profession and members of the public at large is imperative. Courts can be more proactive by making victims of such ‘motivated’ trials aware of their rights and procedures for initiating *qadfh* proceedings.

Last, but not least, this review also indicates that while the country is still debating changes in the *hudood* laws, some simple but crucial procedural modifications would be useful to consider. It is evident that criteria for registration of *hudood* offences has to be different from other offences. From this review, it seems that, in most of the cases, routine application of Criminal Procedure Code for registration of *hudood* offences results in injustice and undue duress to the victims (accused). This is evident from the fact that most of the cases registered under the *hudood* (especially *zina*) have an ulterior motive, are fabricated and fallacious and end up in acquittals. Victims, the vast majority of whom are women, even after acquittals, are left with a lifelong social stigma. Courts have also found faults with application of *hudood* laws. Thus, criminal procedure designed for common law crimes should not be *mutatis mutandis* used for initiation, investigation and trials of *hudood* laws and special filtering procedures must be put in place to screen out the frivolous and malafide allegations.

ability and power in fighting in the path of God by means of life, property, tongue and other (emphasis added) than these."
Is the *hudood* law on *zina* essentially a faulty piece of legislation and the ‘positive’ inclinations of the appeal courts a damage-containment exercise? Or is it the fact that judges of the superior courts have had more exposure to progressive, liberal interpretation of law and religion and also aware of international human rights laws and willing to use them in their judgments? Is it a faithful reflection of the Divine Will as expressed in the *Quran*? If not, why has it found such ready acceptance in its use? Why and how does one explain the disparity between the judgments of the trial and superior courts?


This review of case law, as illustrated above, reflects the fact that contemporary international discourse on human rights is increasingly being adopted, accepted and acknowledged by the superior courts. The superior judiciary does not determine questions of human rights in isolation, and at times, is seen invoking international human rights law in conjunction with constitutional rights and rights accorded to women in the Islamic legal tradition. It is important to make the point though that despite an introduction to and use of international human rights law by the superior judiciary in Pakistan, there is no uniformity of approach in this regard and there is a wide range of judicial reasoning in the reviewed judgments. A clear-cut judicial consensus or approach is yet to develop and is only discernible in its rudimentary and fledgling form.

Some Concluding Remarks.

This article set out to highlight problems associated with importing Islamic law based on religious tests into a system with westernised procedures and institutions. It made the argument that poverty of contextual scholarship relating to the religious texts and lack of modern emphasis on traditional Islamic values such as protection of the vulnerable and denunciation of wrongful accusers has led to an unjust law. Courts in Pakistan are confronted with an unjust law and its instrumental use for personal objectives and for the social control of women especially in view of the poverty of lower court decision-making. The present review of case law also suggests a changing role of judges of the superior judiciary in Pakistan moving beyond the application of statute law through an increasing impact of international human rights instruments and a women’s rights-friendly interpretation of Islamic law on court decisions.

As a response to the consistent challenge, the Government of Pakistan is considering an amendment to the Hudood Ordinance comprising both substantive and procedural modification. Since no official draft has been circulated to date, it is not possible to discuss its excerpts appearing in the national newspapers. A word of caution here: Any amendment to a so-called religious law requires courage and wisdom. It requires a thorough investigation into, not simply the operative provisions of the law but more importantly, the effects of that law. A ‘patchwork’ job of amending a fundamentally unjust law will not do. The review of case law in this paper makes a strong case for repealing a law the pre-requisites of which are not likely to be met within the present justice system of Pakistan, in particular, the subordinate judiciary and police.

Bibliography


