

Statutes and Comments

Protection of Women (Criminal Laws Amendment) Act, 2006 December 1, 2006

A BILL further to amend the Pakistan Penal Code, the Code of Criminal Procedure and other laws

WHEREAS it is necessary to provide relief and protection to women against misuse and abuse of law and to prevent their exploitation;

AND WHEREAS Article 14 of the Constitution ensures that dignity of man and, subject to law, the privacy of home, shall be inviolable;

AND WHEREAS Article 25 of the Constitution guarantees that there shall be no discrimination on the basis of sex alone and that the State shall make provisions for the protection of women;

AND WHEREAS Article 37 of the Constitution encourages promotion of social justice and eradication of social evils;

AND WHEREAS the objective of this Bill is to bring in particular the laws relating to zina and qazf in conformity with the stated objectives of the Constitution and the injunctions of Islam,

AND WHEREAS it is expedient for the aforesaid objectives further to amend the Pakistan Penal Code (Act XLV of 1860), the Code of Criminal Procedure, 1898 (Act V of 1898, the Dissolution of Muslim Marriages Act, 1939 (VIII of 1939), the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979), and the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (VIII of 1979) and for the purposes hereinafter appearing,

It is hereby enacted as follows:

1. Short title and commencement

(1) This Act may be called the Protection of Women (Criminal Laws Amendment) Act, 2006.

(2) It shall come into force at once.

2. Insertion of new section, Act XLV of 1860.

In the Pakistan Penal Code (Act XLV or 1860), hereinafter referred to as the said "Code", after section 365A, the following new section shall be inserted, namely:-

365B. Kidnapping, abducting or inducing woman to compel for marriage etc.-

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced, or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment for life, and shall also be liable to fine; and whoever by means of criminal intimidation as defined in this Code, or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid."

3. Insertion of new section, Act XLV of 1860:

In the said Code, after section 367, the following new section shall be inserted, namely:

"367A. Kidnapping or abducting in order to subject person to unnatural lust:

Whoever kidnaps, or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with death or rigorous imprisonment for a term which may extend to twenty-five years, and shall also be liable to fine."

4. Insertion of new sections, Act XLV of 1860:

In the said Code, after section 371, the following new sections shall be inserted, namely:

"371A. Selling person for purposes of prostitution, etc.

Whoever sells, lets to hire, or otherwise disposes of any person with intent that such a person shall at any time be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person shall at any time be employed or used for any such, purpose, shall be punished with imprisonment which may extend to twenty-five years, and shall also be liable to fine.

Explanations:- (a) When a female is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

(b) For the purposes of this section and section 371B, "illicit intercourse" means sexual intercourse between persons not united by marriage.

371B. Buying person for purposes of prostitution, etc.

Whoever buys, hires or otherwise obtains possession of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, shall be punished with imprisonment which may extend to twenty-five years, and shall also be liable to fine.

Explanation: Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution."

5. Insertion of new sections, Act XLV of 1860:

In the said Code, after section 374, the following new sections 375 and 376 under sub-heading "Rape", shall be inserted, namely:

"375. Rape:-

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

following descriptions,

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

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

376. Punishment for rape

- (1) Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than ten years or more, than twenty-five years and shall also be liable to fine.
- (2) When rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life."

6. Insertion of new section, Act XLV of 1860.

In the said Code, in Chapter XX, the following new section shall be inserted, namely:-

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

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

7. Insertion of new sections, Act XLV of 1860.

In the said Code, after section 496, the following new sections shall be inserted, namely:

"496A. Enticing or taking away or detaining with criminal intent a woman.

Whoever takes or entices away any woman with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any woman, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

496B. Fornication:

- (1) A man and a woman not married to each other are said to commit fornication if they willfully have sexual intercourse with one another.
- (2) Whoever commits fornication shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees.

496C. Punishment for false accusation of fornication.

Whoever brings or levels or gives evidence of false charge of fornication against any person, shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees.

Provided that a Presiding Officer of a Court dismissing a complaint under section 203C of the Code of Criminal Procedure, 1898 and after providing the accused an opportunity to show cause if satisfied that an offence under this section has been committed shall not require any further proof and shall forthwith proceed to pass the sentence."

8. Insertion of new sections, Act V of 1898:-

In the Code of Criminal Procedure, 1898 (Act V of 1898), after section 203, the following new sections shall be inserted, namely:

"203A. Complaint in case of Zina.-

- (1) No court shall take cognizance of an offence under section 5 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979), except on a complaint lodged in a Court of competent jurisdiction.

- (2) The Presiding Officer of a Court taking cognizance of an offence on a complaint shall at once examine, on oath, the complainant and at least four Muslim, adult male eye-witnesses, about whom the Court is satisfied having regard to the requirement of tazkiyah-al-shahood, that, they are truthful persons and abstain from major sins (kabair), of the act of penetration necessary to the offence

Provided that, if the accused is a non-Muslim, the eye-witnesses may be non-Muslims.

Explanation: In this section "tazkiyah-al-shahood" means the mode of inquiry adopted by a Court to satisfy itself as to the credibility of a witness.

- (3) The substance of the examination of the complainant and the eye-witnesses shall be reduced to writing and shall be signed by the complainant and the eye-witnesses, as the case may be, and also by the Presiding Officer of the Court.
- (4) If in the opinion of the Presiding Officer of a Court, there is sufficient ground for proceeding, the Court shall issue summons for the personal attendance of the accused.
- (5) The Presiding Officer of a Court before whom a complaint is made or to whom it has been transferred may dismiss the complaint, if, after considering the statements on oath of the complainant and the four or more eye-witnesses there is, in his judgment, no sufficient ground for proceeding and in such case he shall record his reasons for so doing.

203C. Complaint in case of fornication.

- (1) No court shall take cognizance of an offence under section 496A of the Pakistan Penal Code, except on a complaint lodged in a Court of competent Jurisdiction.
- (2) The Presiding Officer of a Court taking cognizance of an offence shall at once examine on oath the complainant and at least two eyewitnesses to the act of fornication.
- (3) The substance of the examination of the complainant and the eye-witnesses shall be reduced to writing and shall be signed by the complainant and the witnesses, as the case may be,

and also by the Presiding Officer of the Court.

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

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

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

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

9. Amendment of Schedule II, Act V of 1898.-

In the Code of Criminal Procedure, 1898 (Act V of 1898), in Schedule II,

- (i) after section 365A in column 1 and entries relating thereto in columns 2 to 8, the following shall be inserted, namely:

1	2	3	4	5	6	7	8
365B	Kidnapping, abducting or inducing woman to compel for marriage etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment for life and fine.	Ditto;

- (ii) After section 367 in column 1 and entries relating thereto in columns 2 to 8, the following shall be inserted, namely:

1	2	3	4	5	6	7	8
367A	Kidnapping or abducting in order to subject person to unnatural list.	Ditto	Ditto	Ditto	Ditto	Death or rigorous imprisonment which may extend to twenty-five years and fine.	Ditto;

- (iii) after section 371 In column 1 and entries relating thereto in columns 2 to 8, the following shall be inserted, namely:-

1	2	3	4	5	6	7	8
371A	Selling person for purposes of prostitution, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment which may extend to twenty-five years and fine.	Ditto;
371B	Buying person for purposes of prostitution, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment which may extend to twenty-five years and fine.	Ditto;

- (iv) after section 374 the sub-heading "of Rape" shall be inserted;
 (v) for the existing entries relating to section 376 in columns 1 to 8, the following shall be substituted, namely :-

1	2	3	4	5	6	7	8
376	Rape	May arrest without warrant	Warrant	Not bailable	Not compoundable	Death or imprisonment not less than ten years or more than twenty-five years and fine. Death or imprisonment for life, if the offence committed by two or more persons in furtherance of common intention.	Court of Sessions;

- (vi) after section 493 in column 1 and entries relating thereto in columns 2 to 8, the following shall be inserted, namely:-

1	2	3	4	5	6	7	8
493A	Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.	May arrest without warrant	Warrant	Not bailable.	Not compoundable	Rigorous imprisonment which may extend to twenty-five years and fine.	Ditto;

- (vii) in section 494 in column 1, in column 3, for the word "Ditto", the words "Shall not arrest without warrant" shall be substituted;
 (viii) after section 496 in column 1 and entries relating thereto in columns 2 to 8, the following shall be inserted, namely :-

1	2	3	4	5	6	7	8
496A	Enticing or taking away or detaining with criminal intent a woman	May arrest without warrant	Ditto	Not bailable	Ditto	Imprisonment of either description which may extend to seven years and fine	Court of Sessions or Magistrate of the first class;
496B	Fornication	Shall not	Summons	Bailable	Not compo	Imprisonment	Magistrate of the first class;

		arrest without warrant			undable	which may extend to five years and fine not exceeding ten thousand rupees	
496C	False accusation of Fornication	Shall not arrest without warrant	Summons	Bailable	Not compoundable	Imprisonment which may extend to five years and fine not exceeding ten thousand rupees.	Magistrate of the first class;

- (ix) under the heading, "OFFENCES AGAINST OTHER LAWS" after the last entry in column 1 and entries relating thereto in columns 2 to 8, the following shall be inserted, namely:

1	2	3	4	5	6	7	8
Section 5 of Ord. VII of 1979	Zina	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Stoning to death in case of Muhsan and if not Muhsan whipping not exceeding one hundred stripes	Court of Sessions;
Section 7 of Ord. VIII or 1979	Qazf	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Whipping numbering eighty stripes.	Court of Sessions;

10. Amendment of section 2, Ordinance VII of 1979.-

In the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance No. VII of 1979), in section 2:

- (i) after clause (a), the following new clause (aa) shall be inserted, namely:

"(aa) "confession" means, notwithstanding any judgement 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 (Act V of 1898)."; and

- (ii) clauses (c) and (e) shall be omitted.

11. Omission of section 3, Ordinance VII of 1979.-

In the Offence of Zina (Enforcement of Hudood) Ordinance 1979 (Ordinance No. VII of 1979), section 3 shall be omitted.

12. Amendment of section 4, Ordinance VII of 1979.-

In the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance No VII of 1979), in section 4, the word "validly" and the explanation at the end of the section shall be omitted.

12A. Insertion of new, section, Ordinance VII of 1979.-

In the Offence of Zina (Enforcement of Hudood Ordinance, 1979 (Ordinance No. VII of 1979), after section 5, the following new section shall be inserted, namely:-

"5A. No case to be converted, lodged or registered under certain provisions:-

No complaint of zina under section 5 read with section 203A of the Code of Criminal Procedure, 1989 and no case where an allegation of rape is made shall at any stage be converted into a complaint of fornication under section 496A of the Pakistan Penal Code (Act XLV of 1860) and no complaint of fornication shall at any stage be converted into a complaint of zina under section 5 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 (Ordinance No. VII of 1979) or an offence of similar nature under any other law for the time being in force."

13. Omission of sections 6 and 7, Ordinance VII of 1979:

In the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance No. VII of 1979), sections 6 and 7 shall be omitted.

14. Amendment of section 8, Ordinance VII of 1979:

In the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance No. VII of 1979), in section 8,

(i) the words and comma "or zina-bil-jabr" shall be omitted; and

(ii) in the marginal note, the words "or zina-bil-jabr" shall be omitted.

- 15. Amendment of section 9, Ordinance VII of 1979:-**
In the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance No. VII of 1979), in section 9,
- (i) the words "or zina-bil-jabr" shall be omitted;
 - (ii) in sub-section (2) the words "or zina-bil-jabr" shall be omitted;
and
 - (iii) sub-sections (3) and (4) shall be omitted.
- 16. Omission of sections 10 to 16, 18 and 19, Ordinance VII of 1979:**
In the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance No. VII of 1979), sections 10 to 16 and 18 and 19 shall be omitted.
- 17. Amendment of section 17, Ordinance VII of 1979:-**
In the Offence of Zina (Enforcement of Hooded) Ordinance, 1979 (Ordinance No. VII of 1979), in section 17, the words and figure "or section 6" shall be omitted.
- 18. Amendment of section 20, Ordinance VII of 1979.-**
In the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance No. VII of 1979), in section 20,-
- (i) in sub-section (1), the first proviso shall be omitted and in the second proviso, the word "further" shall be omitted;
 - (ii) sub-section (3) shall be omitted; and
 - (iii) sub-section (5) shall be omitted.
- 19. Amendment of section 2, Ordinance VIII of 1979.-**
In the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (Ordinance No. VIII of 1979), for clause (a) the following shall be substituted, namely:-
- "(a) "adult", "hadd" and "zina" have the same meaning as in the Offence of Zina (Enforcement of Hudood) Ordinance, 1979; and".

20. Amendment of section 4, Ordinance VIII of 1979:-

In the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (Ordinance No. VIII of 1979), section 4 shall be omitted.

21. Amendment of section 6, Ordinance VIII of 1979:-

In the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (VIII of 1979), section 6, shall be renumbered as sub-section (1) thereof and after sub-section (1) renumbered as aforesaid, the following new sub-section (2) shall be added, namely:

"(2) The Presiding Officer of a Court dismissing a complaint under section 203A of the Code of Criminal Procedure, 1898 or acquitting an accused under section 5 of the Offense of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance VII of 1979), If satisfied that the offence of qazf liable to hadd has been committed, shall not require any proof of qazf and shall proceed to pass sentence under section 7."

22. Amendment of section 8, Ordinance VIII of 1979.-

In the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (Ordinance No. VIII of 1979), in section 8, the words, "a report made to the police or" shall be omitted.

23. Amendment of section 9, Ordinance VIII of 1979:-

In the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (Ordinance No. VIII of 1979), in section 9, for sub-section (2), the following shall be substituted, namely:

"(2) In a case which, before the execution of hadd, the complainant withdraws his allegation of qazf, or states that the accused had made a false confession or that any of the witnesses had deposed falsely, hadd shall not be enforced."

24. Amendment of sections 10 to 13 and 15, Ordinance VIII of 1979:-

In the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (Ordinance No. VIII of 1979), sections 10 to 13 and 15 shall be omitted.

25. Amendment of section 14, Ordinance VIII of 1979.-

In the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (Ordinance No. VIII of 1979), in section 14, subsections (3) and (4) shall be omitted.

26. Omission of section 16, Ordinance VIII of 1979:

In the Offence of Qazf (Enforcement of Hand) Ordinance, 1979 (Ordinance No. VIII of 1979), section 16 shall be omitted.

27. Amendment of section 17, Ordinance VIII of 1979.-

In the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (Ordinance No. VIII of 1979), in section 17,

(i) the first proviso shall be omitted;

(ii) for the second proviso, the following shall be substituted, namely:

Provided that an offence punishable under section 7 shall be triable by a Court of Sessions and not by or before a Magistrate authorized under section 30 of the said Code and an appeal from an order of the Court of Sessions shall lie to the Federal Shariat Court.

28. Omission of section 19, Ordinance VIII of 1979:-

In the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (Ordinance No. VIII of 1979), section 19 shall be omitted.

29. Insertion of new section, Dissolution of Muslim Marriages Act, 1939 (VIII of 1939):-

In the Dissolution of Muslim Marriages Act, 1939 (VIII of 1939), in section 2, after clause (vii), the following new clause shall be inserted, namely:-

(viiia) Lian

Explanation: Lian means where the husband has accused his wife of zina and the wife does not accept the accusation as true".

STATEMENT OF OBJECTS AND REASONS

One of the avowed constitutional objectives of the Islamic Republic of Pakistan is to enable Muslims to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as laid down in the Holy Qur'an and Sunnah.

The Constitution, accordingly, mandates that all existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah.

The object of this Bill is to bring the laws relating to zina and qazf, in particular, in conformity with the stated objectives of The Islamic Republic of Pakistan and the constitutional mandate and in particular to provide relief and protection to women against misuse and abuse of law.

The offences of zina and qazf are mentioned in the Qur'an. The two ordinances relating to zina and qazf, however, make a number of other acts punishable in spite of the fact that the Qur'an and Sunnah neither define these offences nor has any punishment for them been prescribed. On no principle of qiyas can the punishments for zina and qazf or the procedure identified for their proof be extended to these offences.

Any offence not mentioned in the Qur'an and Sunnah or for which punishment is not stated therein is Ta'zir which is a subject of State legislation. It is for the State both to define such offences and to fix punishments for these. The exercise of such authority by the State is in consonance with Islamic norms which the State is authorized to both define and punish. Accordingly, all these offences have been removed from the two Hudood Ordinances and inserted in their proper places in the Pakistan Penal Code, 1860 (Act XLV of 1860) hereinafter "PPC".

The offences listed in sections 11 to 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979) hereinafter "Zina Ordinance" are Ta'zir offences. All these are being inserted as sections 365B, 367A, 371A, 371B, 493A and 496A of the Pakistan Penal Code, 1860 (Act XLV of 1860). Sections 12 and 13 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 hereinafter 'Qazf Ordinance' are being omitted. This is being done as the definition of qazf in section 3 of that Ordinance is wide enough to cover the qazf committed by printing or engraving or sale of printed and engraved material.

No change is being made in the language of the statutory definition of any of these Ta'zir offences or the punishment provided for these, save one. The

punishment of whipping is being deleted (or these Ta'zir offences. As the Qur'an and Sunnah do not provide for any punishment with regard to these offences the State is authorized to make this change in conformity with the Islamic concept of justice. This is in accordance with the scheme of the PPC and the evolving standards of decency which mark the progress of a maturing society.

The Zina and Qazf Ordinances have been a subject of trenchant criticism by citizens in general and scholars of Islam and women in particular. The criticisms are many. These include the lumping of the offence of zina with zina-bil-jabr (rape) and subjecting both to the same kind of proof and punishment. This has facilitated abuse. A woman who fails to prove rape is often prosecuted for zina. The requirement of proof for the maximum punishment of zina-bil-jabr (rape) being the same as that for zina, it has made absolutely impossible to prove the former.

Where a prosecution for rape against a man fails but sexual activity is confirmed by medical examination or on account of pregnancy or otherwise the woman is punished for zina not as Hadd - four eye witnesses not being available - but as Ta'zir. Her complaint is, at times, deemed a confession.

A penal statute must be clear and unambiguous. It must mark the boundaries between the permitted and the prohibited with clarity. The citizens are, thus, put to notice. They can order their life and conduct by following these bright guidelines and steer clear of trouble. The vague definitions in thane and related laws are, therefore, either being clarified and wherever that is not possible, omitted. The object is to protect the unwary and unsuspecting citizens from unwittingly falling foul of penal laws.

The Zina Ordinance also defines "marriage" as a valid marriage. In rural areas, in particular, nikahs generally and divorces particularly are not registered. It becomes difficult for a person charged with zina to establish "valid marriage" as a defence. Non-registration has its civil consequences. These are sufficient. failure to register a nikah or have a divorce confirmed should not entail penal consequences. This is in consonance with the Islamic norm that Hadd should not be imposed whenever there is any doubt about the commission of the offence. The misuse of the law in such cases has made it an instrument of oppression in the hands of vengeful former husbands and other members of society.

A triple talaq is pronounced. The woman returns to her parental home. She goes through her period of iddat. After a while the family arranges another match and she gets married. The husband then claims that sans the confirmation of divorce by the local authorities the marriage is not over and

launches a zina prosecution. It is necessary to delete this definition to shut this door.

There is no hadd for the offence of zina-bil-jabr (rape). It is a Ta'zir offence. The definition and punishment of rape is, therefore, being incorporated in the PPC in sections 375 and 376 respectively. The gender neutral definition is being amended to clearly provide that rape IS an offence committed by a man against a woman. As consent of the woman is a defence to the charge of rape it is being provided that such consent would not be a defence if the woman is less than 16 years of age. This accords both with the need to protect the weak, which the Qur'an repeatedly emphasizes, and the norms of international legal obligations.

The punishment for gang rape is death. No lesser punishment is provided. The courts hearing such cases have observed that in many situations they are of the opinion that a person cannot be acquitted while at the same time imposing the death penalty is not warranted in the facts and circumstances of the case. The result is that they feel obliged to acquit the accused in such cases. To address this concern, the lesser sentence of life imprisonment is being added as an alternative to the death penalty.

The procedure for the prosecution of Ta'zir offences of zina-bil-jabr (rape) and gang rape, like that for all other Ta'zir offences under the PPC, is to be regulated by the Code of Criminal Procedure, 1898 (Act V of 1898) hereinafter "Cr. P.C."

Lian is a form of dissolution of marriage. A woman who is accused of adultery by her husband and denies the charge can seek dissolution of her marriage. Section 14 of the Qazf Ordinance refers to lian and also provides a procedure for it. A form of dissolution of marriage has no place in a penal statute. Accordingly, lian has been introduced as a ground for divorce under the Dissolution of Muslim Marriages Act, 1939 (VIII of 1939).

The definition of zina and qazf remain the same as in the Zina and Qazf Ordinances. For both zina and qazf the same punishments have been retained, as well.

Zina is a heinous crime that corrupts public morals and destroys the sense of modesty. The Qur'an regards zina an offence against public morality. The requirement of four eyewitnesses is not solely an evidentiary burden of extra-ordinary weight. It is also an assertion that if contrary to the hadith, "Allah loves those who hide their sins", one commits an act in so blatant a fashion that four people see it, the harm to society must be serious indeed. At the same time, the Qur'an protects privacy, prohibits baseless

assumptions and inquisition and forbids interference in the life of others. It is for this reason that a failure to prove zina entails punishment for qazf (false accusation of zina). The Qur'an requires the complainant to bring four eye-witnesses to prove the accusation of zina. The complainant and the witnesses must be conscious of the seriousness of this offence and must know that if they make a false accusation or cannot prove the charge beyond doubt they will be punished for qazf. The conviction will follow the failure of the zina prosecution and will not be contingent on the initiation of fresh legal proceedings.

The Zina Ordinance has been abused to persecute women, to settle vendettas and to deny basic human rights and fundamental freedoms. To check such abuse both in the case of zina and qazf the Cr. P.C. is being amended to provide that only the Court of Sessions, on a complaint, may take cognizance of such cases. The offence has been made bailable so that the accused do not languish in jail during trial. The police will have no authority to arrest any one in such cases unless so directed by the Court of Sessions and such directions cannot be issued except either to compel attendance in court or in the event of a conviction.

The primary object of all these amendments is to make zina and qazf punishable only in accordance with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, to prevent exploitation, curb abuse of police powers and create a just and egalitarian society.

Editor's Comment on Protection of Women Act, 2006

The Protection of Women Act (hereafter referred to as PWA) was promulgated in 2006 to amend and defang the controversial Zina Ordinance of 1979. The general impression that PWA has amended the entire Hudood Laws is an incorrect understanding of the law. The PWA has only affected two ordinances of 1979: Offence of Zina Ordinance (OZO) and Offence of Qazf Ordinance, leaving remaining statutes of 1979's Hudood Laws intact. In this context, the amendments brought in by PWA require analysis.

As a statute, PWA has introduced amendments that are of substantive and procedural nature. Further, some alterations and insertions have been made to the Pakistan Penal Code (PPC) and Criminal Procedure Code (Cr.PC) along with Zina and Qazf Ordinances.

Firstly, I shall examine the substantive law amendments. Sections 2 to 7 of PWA have made additions to the Pakistan Penal Code. However, interestingly, no new offences, but for the offence of fornication, have been created through these sections. Most of the sections now incorporated into the PPC by PWA, were originally lifted from PPC and were inserted in the OZO when it was first enforced in 1979. The 1979's OZO contained many *tazir* offences such as section 11 (*Kidnapping, abducting or inducing woman to compel for marriage*) which in fact, was section 366 of the then PPC. This conversion and reversion of offences within PPC and OZO has displayed a confusion regarding the categorization of offences. The amendments introduced in 1979 brought together all the offences having sexual intercourse as one of its element and all other offence against women. Therefore, the offences now mentioned in sections 2-7 of PWA were initially, categorized in OZO in 1979 on the basis that all of those offences dealt with illicit intercourse or its possibility in one or other form, whether belonging to *hadd* or *tazir* genre. The latest classification in PWA has been made strictly in terms of the distinction in *tazir* and *hadd*. Since offences mentioned in sections 2-7 of PWA are *tazir* offences by virtue of their respective definitions, their corresponding sentences and their required proof criteria, therefore, they have been restored to PPC which is the general criminal law embodying all *tazir* offences. In short, in terms of substantive law, no particular new offence has been created under this law.

Furthermore, in 1979 when OZO was enforced, the offence of rape (as was provided in the then PPC) was repealed and was instead replaced by the

infamous '*zina-bil-jabr*' provision of OZO. This offence has now been replaced with the offence of 'rape.' Prior to 1979, the offence of rape was included in *tazir* offences, whereas the OZO made *zina-bil-jabr* a *hadd* offence with the same standard of evidence and punishment as was applicable for the offence of *zina*. It was very strongly argued on behalf of the critics of this law that the insertion of *zina-bil-jabr* as a *hadd* offence made it impossible for the prosecutrix to establish her case on required evidence standards. However, this was a result of a misreading of the statute. Like other ordinances of 1979, the OZO also provided for a parallel legal system where *tazir* offences and punishments operated as a safety mechanism. Cases where there was a sufficient amount of circumstantial and medical evidence available, the punishment in the form of *tazir* could still be given. Therefore, the presumption that *zina-bil-jabr* was only provable by the testimony of four adult male Muslims, was primarily a misnomer, which was only a qualification where *hadd* punishment was to be applied, not in the case of *tazir* sentence. In context of this, it is worrying to see that PWA has not touched upon the issues of evidence leaving a valid presumption that it will be dealt under the standards and modes of proof of Qanoon-e-Shahadat Order of 1984.

Another interesting observation regarding section 375 of PPC (inserted by section 5 of PWA) is that it does not differentiate between rape and marital rape. The minimum punishment for rape under section 376 is ten years. Furthermore, section 375 is almost a replica of section 375 of Indian Penal Code. However, the section 375 of Indian Penal Code provides an exception which states that, "Sexual intercourse by a man with his own wife, the wife not being under 'fifteen' years of age, is not rape." Interestingly, this exception has been noticeably omitted from section 375 of PPC (inserted by PWA). Consequently, it can be suggested that now the Pakistani law does not discriminate between rape and marital rape and the punishment shall be same for both since section 376 of PPC (inserted by PWA) provides for a minimum of ten years imprisonment. It must further be noted that section 376 of the Indian Penal Code provides that if a man rapes his wife whose age is between twelve to fifteen years, the punishment may extend to two years imprisonment or fine or both. Section 376 of Indian Penal Code is followed by section 376-A that concerns situations where a husband rapes his wife who is living separately from him under a decree of separation. The punishment for such rape may extend to two years imprisonment and a mandatory fine. This brings us back to section 376 of PPC (inserted by section 5 of PWA). The punishment provided here is either

death or imprisonment ranging between ten and twenty-five years and mandatory fine. The display of these provisions leaves a real question. Are we ready in societal as well as in legal context, to deal with the issue of marital rape on the same footing as that of rape? The answer is not simple since it requires an analysis of far larger concepts ranging from basic mens rea theory to blameworthiness, stigmatization and social compliance as the basis of legal norms.

Apart from the above provisions, in the context of substantive law insertions, the PWA has introduced an offence of 'fornication' under section 496-B in PPC and which in terms of its subject will continue to be a subspecies of *zina* offences. However, fornication as an offence will be in the domain of *tazir* offences. The contrast and comparison of fornication in PWA and *zina* in OZO can be constructed upon at least three grounds: substantive nature of offence i.e. elemental requirements, standard of proof and respective punishment. As far as the substantive elements are concerned, it is interesting to note that fornication as an offence does not differentiate between a married and un-married accused. The only requirement of the section is the proof of 'willful sexual intercourse' which covers both, *actus reus* and *mens rea* of the offence. On the other hand, the offence of *zina* remains intact in OZO and it provides for the accused to be at least an 'adult' for the commission of this crime. This requirement however is missing from the new fornication offence. Reading section 496-B (fornication) with section 375 (rape) will lead to an interesting moot question. What if the man and woman charged of fornication are below the age of sixteen? In such case, would the female under clause (v) of section 375 automatically become a victim of statutory rape instead? However, no such concession will be available for the male involved in the fornication. One wonders if it could be constructed as a discriminatory operation of law. Furthermore, since the standard of proof for establishing fornication will be that of Qanoon-e-Shahadat, admitting any circumstantial and medical evidence, it will further obscure the future of *zina* liable to *tazir*.

The standard of proof required for the offence of fornication is that of Qanoon-e-Shahadat and not of *hadd* offences. Further, there is a visible difference between the punishment for fornication and *zina*. The punishment for *zina* liable to *hadd* in OZO has been *rijm* that is stoning death. However, more relevant is the punishment of *zina* liable to *tazir*. According to section 10 clause (2) the punishment for *zina* liable to *tazir* shall be rigorous imprisonment ranging from four to ten years, thirty stripes and a mandatory fine. Therefore, the minimum sentence for this offence will be four years

rigorous imprisonment, thirty stripes and fine. In contrast to this, the punishment for fornication under section 496-C of PPC (inserted by section 7 of PWA) may extend up to five years imprisonment and a fine up to ten thousands rupees. Hence, the difference between the two sections and their ordinal placement are not difficult to assess.

Finally, it is also important to mention the changes which PWA has brought to the Criminal Procedure of the country. Previously, the offences in the *hudood* ordinance were made cognizable by the police. A cognizable offence is one where the police can make an arrest without the approval of a magistrate. According to PWA, *zina* as in OZO, *qazf* and fornication, are all presently complaint-based offences. No police officer can take cognizance of these matters. Rather only a presiding officer of a court can take cognizance and that too when a complaint has been lodged.