

# Twenty-Five Years of Hudood Ordinances— A Review

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## *Abstract*

*Shortly after coming into power in 1979, General Zia ul-Haq began to Islamize the Pakistan legal system. One measure used to convert Pakistan into an Islamic state was the introduction of hadd offenses—those offenses for which the Qur'an prescribed fixed punishments—into the criminal law. This Article specifically examines the impact of one of these provisions, the Offense of Zina (Enforcement of Hudood) Ordinance, on sexual offenses under the Pakistan Penal Code. This statute criminalized all forms of adultery and fornication outside of a legally valid marriage, including instances of rape where the burden of proof had not been met. In 2006, in response to pressure from women's rights groups to repeal or amend this Ordinance, the Pakistani National Assembly passed the Protection of Women (Criminal Laws Amendment) Act. Designed to weaken the inequities of the Zina Ordinance while maintaining conformity with Islamic law, this Act introduced significant reforms to the laws as they relate to women. This Article discusses the importance of this Act and the continual need for additional reform.*

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### I. Introduction

In 1979, General Zia ul-Haq promulgated a series of ordinances which were to revolutionize the legal system of Pakistan.<sup>1</sup> Zia had come to power two years earlier, in the summer of 1977, in a coup d'état, which had toppled the government of Prime Minister Zulfikar Bhutto.<sup>2</sup> He initially called himself "Chief Martial Law Administrator,"<sup>3</sup> but assumed the title of President a year later.<sup>4</sup> In 1984, Zia had himself confirmed as President of Pakistan by a referendum, which also gave him a mandate to Islamize the legal system of Pakistan.<sup>5</sup> The ordinances introduced into the legal system of Pakistan were ostensibly Islamic criminal laws.<sup>6</sup> As a result, theft, consumption of intoxicants including alcohol, extra-marital sex including rape, and making false allegations of adultery were all governed by Islamic criminal law.<sup>7</sup> Until 1979 these offenses had been governed by the purely secular Pakistan Penal Code—legislation enacted in 1860 by the British colonial government and later adopted by Pakistan at the time of independence in 1947.<sup>8</sup> Adultery and fornication had not been criminal offenses at all.<sup>9</sup>

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1. See SHAHID JAVED BURKI ET AL., PAKISTAN UNDER THE MILITARY: ELEVEN YEARS OF ZIA UL-HAQ 36–38 (describing Zia ul-Haq's Islamic revisions to Pakistani law).

2. *Id.* at 30.

3. *Id.* at 9.

4. *Id.* at 32.

5. *Id.* at 172.

6. See *id.* at 36–37 (noting that the Zia regime based these new criminal offenses and punishments on Islamic principles).

7. See Offences Against Property (Enforcement of Hudood) Ordinance (1979) (Pak.) (prohibiting theft); Prohibition (Enforcement of Hadd) Order (1979) (Pak.) (prohibiting the consumption of intoxicants); Offence of Zina (Enforcement of Hudood) Ordinance (1979) (Pak.) (prohibiting adultery and fornication); Offence of Qazf (Enforcement of Hadd) Ordinance (1979) (Pak.) (prohibiting false allegations of adultery). For these Ordinances, see Punjab Police, Laws and Rules, <http://www.punjabpolice.gov.pk/page.asp?id=420> (last visited Nov. 14, 2007).

8. See PAK. PENAL CODE §§ 191, 211, 378, 497 (1860), available at [http://www.punjabpolice.gov.pk/user\\_files/File/pakistan\\_penal\\_code\\_xlv\\_of\\_1860.pdf](http://www.punjabpolice.gov.pk/user_files/File/pakistan_penal_code_xlv_of_1860.pdf) (punishing adultery, theft, the giving of false evidence, and the making of a false charge with the intent to injure).

9. See *id.* §§ 1–511 (listing criminal offenses under Pakistani law without reference to fornication).

Zia's attempt to make the legal system of Pakistan more Islamic was based largely on political motives.<sup>10</sup> The country had come into existence following the dissolution of colonial British India in 1947.<sup>11</sup> The decades leading up to the withdrawal of the British colonial rulers had been marked by the division of the Indian independence movement along religious lines, with the Muslim minority being represented by the Muslim League.<sup>12</sup> The Hindu majority, who outnumbered Muslims four-to-one, was represented by the Indian National Congress—a party which, at least in terms of its constitution, was open to all religious communities.<sup>13</sup> The Muslim League's demand for the creation of an independent homeland for Muslims in the event of dissolution of British India was based on the fear that, in a united independent India, Muslims would be oppressed by the Hindu majority.<sup>14</sup> Communal tensions and riots in the 1940s reached such threatening proportion that the colonial rulers eventually agreed to the demand of the Muslim League.<sup>15</sup> On August 15, 1947, British India was divided into the dominions of India and Pakistan, the latter consisting of a western and an eastern part separated by more than a thousand miles.<sup>16</sup> Arguably, a ship sailing from Karachi in West Pakistan could reach Marseille more quickly than it could reach East Pakistan.

It was Pakistan's failure to turn itself into an Islamic state which provided Zia with the justification for his coup d'état.<sup>17</sup> The first nine years of independence were marked by tensions between the country's western and eastern blocs.<sup>18</sup> The first Constitution of Pakistan, adopted in 1956, made

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10. See AYESHA JALAL, *THE STATE OF MARTIAL RULE: THE ORIGINS OF PAKISTAN'S POLITICAL ECONOMY OF DEFENCE* 323–24 (1990) (describing Zia's use of Islamic laws for political gains).

11. LAWRENCE ZIRING, *PAKISTAN: AT THE CROSSCURRENT OF HISTORY* 39 (2003).

12. See *id.* at 1–39 (describing religious divisions within the independence movement).

13. See IAN TALBOT, *PAKISTAN: A MODERN HISTORY* 5 (1998) (noting the "Hindu majority"); ZIRING, *supra* note 11, at 18 (describing the Muslim defeat to the Indian National Congress Party in the 1937 elections).

14. *PAKISTAN IN PERSPECTIVE 1947–1997* xiii (Rafi Raza ed., 1997); see also ZIRING, *supra* note 11, at 13–14 (discussing the origins of the movement for an independent Muslim state in Pakistan).

15. See ZIRING, *supra* note 11, at 37–38 (discussing the prevalence of riots and street mobs demanding an independent Muslim state).

16. LAWRENCE KAELETER ROSINGER ET AL., *THE STATE OF ASIA: A CONTEMPORARY SURVEY* 489 (1971); ZIRING, *supra* note 11, at 39.

17. See ZIRING, *supra* note 11, at 157–60 (noting the Islamist parties' anger towards Zia's predecessor, Prime Minister Zulfikar Ali Bhutto, for his perceived undermining of Islamic practices).

18. See TALBOT, *supra* note 13, at 100–01, 140 (describing the tensions between East and West Pakistan).

Pakistan an Islamic republic, but it did not change the essentially secular character of the legal system.<sup>19</sup> The same applied to the Constitution of 1962.<sup>20</sup> An uprising against West Pakistani rule led to the cessation of East Pakistan in 1972, which now called itself Bangladesh.<sup>21</sup> Pakistan was now reduced to the provinces of Punjab, Sindh, the North Western Province, and Baluchistan—all geographically contiguous. Pakistan's population was now overwhelmingly Muslim.<sup>22</sup> A provision in the 1973 Constitution provided that all laws should be in accordance with Islam, but crucially, this article could not be enforced in a court.<sup>23</sup>

Zia's campaign to turn Pakistan into an Islamic state consisted of two measures. The first one, already mentioned above, consisted of the introduction of *hadd* offenses into the system of criminal laws. The *hadd* offenses are those offenses for which the Qur'an specifies fixed punishments as long as certain conditions, such as the rules of evidence governing a particular *hadd* offense, have been fulfilled.<sup>24</sup> The second measure consisted of creating an entirely new court with exclusive jurisdiction to examine whether or not a law is in accordance with the injunctions of Islam. The Federal Shariat Court came into existence in 1983, and in addition to having the power to review laws on the

19. *Id.* at 143 (explaining that the "new Islamic Republic of Pakistan" came into existence after approval of the 1956 Constitution); *see also* ZIRING, *supra* note 11, at 75 (stating that the 1956 Constitution "accepted the sovereignty of God, but temporal issues, in particular who should govern, were left to the ministrations of fallible men").

20. *See* ZIRING, *supra* note 11, at 96 (recognizing President Mohammad Ayub Khan's "intention to emphasize Pakistan as a secular state" in promulgating the Constitution of 1962).

21. *Id.* at 114–26.

22. Despite the partition of the British Indian province of Bengal along religious lines at the time of independence, East Pakistan retained a substantial Hindu minority. The minority has steadily declined from about 28% in 1941, to 18.5% in 1961, and to 13.5% in 1974. The number of non-Muslims was and remains much smaller in West Pakistan. The loss of East Pakistan, therefore, also meant for West Pakistan the loss of religious diversity. In 2007, the non-Muslim religious minorities in Pakistan constituted just 2% of the population; whereas in Bangladesh, about 10% of the population is Hindu. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2007, <http://www.state.gov/drl/rls/irf/2007/90226.htm> (last visited Jan. 24, 2008) (on file with the Washington and Lee Law Review).

23. CONST. OF THE ISLAMIC REPUBLIC OF PAK. art. 227, §§ 1–2, *available at* <http://www.pakistani.org/pakistan/constitution/part9.html> (last visited Oct. 27, 2007) (on file with the Washington and Lee Law Review); *see also* Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT'L L. 759, 768–69 (2004) (noting that the enforcement of Article 227 is relegated to the Council of Islamic Ideology, whose power is "only of an advisory and recommendatory nature").

24. *See* Offence of Zina (Enforcement of Hudood) Ordinance § 2(b) (1979) (Pak.) (defining "*hadd*"); *see, e.g., id.* § 8 (establishing the rules of evidence for the "Offence of Zina").

basis of Islam, it also acted as a court of appeal for all cases involving the Hudood Ordinances.<sup>25</sup>

Part II of this Review discusses the impact of the Offence of Zina (Enforcement of Hudood) Ordinance on sexual offenses under the Pakistan Penal Code. Part III discusses the staying power of the Ordinance and the pressure from women's rights groups to repeal or amend the Ordinance. This pressure culminated in the passage of the Protection of Women (Criminal Laws Amendment) Act in 2006. Part IV explores the features of the Protection of Women (Criminal Laws Amendment) Act. Finally, Part V concludes that while reform of laws relating to women is still necessary, the Protection of Women (Criminal Laws Amendment) Act was a very important step towards additional reform.

## II. *The Offence of Zina (Enforcement of Hudood) Ordinance, 1979*

The Offence of Zina (Enforcement of Hudood) Ordinance (Zina Ordinance) repealed almost all sections of the Pakistan Penal Code, which had governed sexual offenses including rape, and replaced them with its own ostensibly Islamic provisions.<sup>26</sup> In a nutshell, the Zina Ordinance made all sexual intercourse outside a legally valid marriage a criminal offense.<sup>27</sup> The punishment for breach of the Ordinance depended on the nature of the offense, the marital status of the offender, and the nature of the evidence.<sup>28</sup> The act of adultery by a married person, for instance, if witnessed by four male Muslims of good character, could be punished by stoning to death.<sup>29</sup>

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25. *Id.*; *see, e.g., id.* § 20(1) (granting the Federal Shariat Court jurisdiction to hear appeals arising from Zina cases).

26. *See id.* § 3 ("The provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force."); *id.* at pmbl. (stating the necessity of modification of the law relating to Zina to bring it into conformity with Islam).

27. *See id.* §§ 1–22 (outlawing specific types of extramarital sexual intercourse).

28. *See* DOROTHY Q. THOMAS, HUMAN RIGHTS WATCH, DOUBLE JEOPARDY: POLICE ABUSE OF WOMEN IN PAKISTAN 49 (1992) ("Once convicted of adultery, fornication or rape a person can be sentenced in one of two ways, depending on the religion and marital status of the accused, the witnesses and the evidence on which the conviction rests."); *see, e.g.,* Offence of Zina (Enforcement of Hudood) Ordinance §§ 7–8 (providing that nonadults guilty of fornication are punishable by imprisonment or whipping); *id.* § 9(1) (providing that if fornication is proven only by the confession of a convict, "hadd, or such of it as is yet to be enforced, shall not be enforced if the convict retracts his confession before hadd or such part is enforced").

29. *See* Offence of Zina (Enforcement of Hudood) Ordinance §§ 4, 5(1), 5(2)(a), 8(b) (1979) (Pak.) (punishing the offense of adultery).

Promulgated in the name of Islam, the Zina Ordinance created not only the entirely new criminal offenses of adultery and fornication, behavior that had not been treated as criminal under the provisions of the Pakistan Penal Code, but also the new punishments of whipping and stoning to death.<sup>30</sup> From its inception, the Zina Ordinance was opposed by Pakistani nongovernmental organizations (NGOs) and human rights advocates.<sup>31</sup> The protests attacked several aspects of the Zina Ordinance. As a law, it was badly drafted because many of its provisions were vague and ill-defined.<sup>32</sup> In its application it had a disproportional effect on women, who found themselves increasingly imprisoned as a result of accusations of adultery, frequently made by their husbands.<sup>33</sup> While it was easy to file a case against a woman accusing her of adultery, the Zina Ordinance made it very difficult for a woman to obtain bail pending trial.<sup>34</sup> Worse, in actual practice, the vast majority of accused women were found guilty by the trial court only to be acquitted on appeal to the Federal Shariat Court.<sup>35</sup> By then they had spent many years in jail, were ostracized by their families, and had become social outcasts.<sup>36</sup>

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30. See Whipping Act, §§ 1–8 (1909), available at <http://punjablaws.gov.pk/laws/21.html> (last visited Nov. 14, 2007) (adding whipping to Pakistan's list of permissible punishments for certain crimes) (on file with the Washington and Lee Law Review). The administration of the punishment of whipping was regulated by the Execution of Whipping Ordinance, 1979. Evan Gottesman, *The Reemergence of Qisas and Diyat in Pakistan*, 23 COLUM. HUM. RTS. L. REV. 433, 436 n.11 (1992). It had been a punishment under colonial rule, but following independence it had been retained as punishment only for the armed forces. With respect to the punishment of stoning to death, Section 17 of the Zina Ordinance provides:

The punishment of stoning to death awarded under Section 5 or Section 6 shall be executed in the following manner; namely:

Such of the witnesses who deposed against the convict as may be available shall start stoning, and while stoning is being carried on, he may be shot dead, whereupon stoning and shooting shall be stopped.

Offence of Zina (Enforcement of Hudood) Ordinance § 17.

31. See Julie Dror Chadbourne, *Never Wear Your Shoes After Midnight: Legal Trends Under the Pakistan Zina Ordinance*, 17 WIS. INT'L L.J. 179, 185 (1999) (discussing the "revolt" against the Zina Ordinance sparked by human rights organizations, activists, and women's groups).

32. See *id.* at 263 (suggesting that the Zina Ordinance contains a "vague and simplistic definition of rape").

33. See *id.* at 217–27 (noting the use of the Zina Ordinance by husbands in harassing their wives and daughters).

34. See THOMAS, *supra* note 28, at 68 (noting that "approximately 33 percent of rape and adultery charges are overturned"); see also *id.* at 220 (describing a couple's nine-month stay in jail awaiting bail on a charge under the Zina Ordinance stemming from a previous husband's failure to properly register a divorce).

35. See *id.* at 220 (noting that many Zina convictions are reversed on appeal).

36. See *id.* at 61 ("[O]ften husbands file Zina cases against their wives or former

By creating the new offenses of adultery and fornication, the Zina Ordinance caught women who had suffered rape in an insidious legal trap. A rape victim who pressed charges risked prosecution for extra-marital sex.<sup>37</sup> This transformation from victim to criminal took place whenever a woman complained of rape—thereby "confessing" to having been subjected to sexual intercourse—and her accusation did not lead to a conviction of the rapist.<sup>38</sup> In this scenario, there was only her admission of sexual intercourse, but no proof that this intercourse had been against her will.<sup>39</sup> Described as "double jeopardy," the criminalization of any sexual intercourse outside a valid marriage, irrespective of consent, turned the offense of rape on its head by exposing the victim to the risk of punishment for adultery.<sup>40</sup>

While the Zina Ordinance is only one of many laws which openly discriminate against women in the name of Islam, it has been by far the most controversial.<sup>41</sup> Its notoriety is reflected in the fact that several government-appointed commissions have recommended its repeal.<sup>42</sup> The most recent

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wives . . . simply to humiliate them.'" (quoting ASMA JAHANGIR & HINA JILANI, *THE HUDOOD ORDINANCES: A DIVINE SANCTION?* 134–36 (1990)).

37. *See id.* at 53 ("[T]he criminalization of adultery and fornication in Pakistan, when coupled with the discrimination against women in law and in practice in Pakistan's criminal justice system, has created an extremely adverse and precarious situation for women, and in particular for women victims of rape.").

38. *See id.* at 54 n.139 ("[U]nder Hudood, consent will amount to Zina and lead to punishment of the victim." (quoting JAHANGIR & JILANI, *supra* note 36, at 88)).

39. *See id.* at 53–54 ("[A]bsent a showing of extreme resistance or severe bodily injury, the courts are prone to disbelieve the woman's testimony that the sexual act was non-consensual and are even likely to presume consent, which makes her liable to prosecution for adultery or fornication.").

40. *See id.* (describing the legal risks rape victims face under the Zina Ordinance).

41. *See* IHSAN YILMAZ, *MUSLIM LAWS, POLITICS AND SOCIETY IN MODERN NATIONAL STATES: DYNAMIC LEGAL PLURALISMS IN ENGLAND, TURKEY AND PAKISTAN* 128 (2005) (describing Pakistan's family law system as a system of personal law where the religious principles of the parties involved govern the proceedings, such that Hindus and Muslims have differing principles of family law). Muslim family law openly discriminates against women in many areas of family law, including the right to divorce, custody of children, and inheritance. *See* Johan D. van der Vyver, *The Contours of Religious Liberty in South Africa*, 21 *EMORY INT'L L. REV.* 77, 85–86 (2007) (discussing the discrimination against women found in Islamic family law). It is worth pointing out that the system of personal laws also discriminates between different religious communities; men and women are governed by an entirely different set of family laws under Hindu, Christian, Jewish, and Parsee laws. *Id.* The position of women under the non-Muslim personal laws has not received any attention in Pakistan, probably owing to the rarity of such laws, but is frequently inferior to the position accorded to women under Muslim personal law. *Id.*

42. *See* MUHAMMAD KHALID MASUD, *HUDOOD ORDINANCE 1979 (PAKISTAN): AN INTERIM BRIEF REPORT* 126–66 (2006) available at <http://www.cii.gov.pk/publication/h.report.pdf> (last visited Nov. 19, 2007) (discussing the findings of commissions and organizations that have

demand was made by the National Commission for the Status of Women in 2003, following an investigation conducted by the Commission's Special Committee to Review the Hudood Ordinances, 1979.<sup>43</sup>

### III. Reforming the Zina Ordinance

The threat of large-scale demonstrations against any government willing to contemplate the repeal of the Zina Ordinance, however, is not the only reason for its continued application. After all, Islamic parties command only a small share of total votes, and even their more recent successes in two of Pakistan's four provinces are gradually being reversed.<sup>44</sup> An additional, powerful reason behind the resilience of the Zina Ordinance is rooted in the nature and legitimacy of the state of Pakistan itself. A complete repeal of the Zina Ordinance would be tantamount to the removal of an Islamic law from the legal system, thus violating the constitutional duty to enable all Muslims to order their lives individually and collectively in accordance with Islam.<sup>45</sup> It might be argued that such a reason is no reason at all, given that the Constitution also guarantees fundamental rights<sup>46</sup> and that Pakistan is signatory to a number of

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reviewed the Zina Ordinance and recommended reform or repeal) (on file with the Washington and Lee Law Review); *see also* Moeen H. Cheema, *Cases and Controversies: Pregnancy as Proof of Guilt Under Pakistan's Hudood Laws*, 32 BROOK. J. INT'L L. 121, 128 n.20 (2006) (discussing the commissions that have recommended the repeal of the Hudood Ordinances).

43. *See* MASUD, *supra* note 42, at 128–34 (summarizing the findings of the National Commission for the Status of Women and the Committee to Review the Hudood Ordinances, 1979).

44. *See* ZIRING, *supra* note 11, at 364–65 (noting the election results for Pakistan's 2002 election); *id.* at 362, 368 (suggesting that the Muttahida Majlis-i-Amal, a coalition of Islamic parties that gained power in Pakistan's North West Frontier Province in 2002, may be losing support as a result of their rumored connection with Al-Qaeda); Kanwar Muhammad Dilshad, *Statistical Data: Election Commission of Pakistan*, 26–27 (2002), <http://www.ecp.gov.pk/content/docs/STATS.pdf> (collecting voting distributions in Pakistan's 2002 election by political party).

45. *See* CONST. OF THE ISLAMIC REPUBLIC OF PAK. arts. 227–31, <http://www.pakistani.org/pakistan/constitution/part9.html> (last visited Oct. 27, 2007) (enumerating the Islamic Provisions of the 1973 Constitution) (on file with the Washington and Lee Law Review); ZIRING, *supra* note 11, at 143–44 (discussing the Islamic provisions in the 1973 Constitution of Pakistan).

46. *See* CONST. OF THE ISLAMIC REPUBLIC OF PAK. arts. 8–28, <http://www.pakistani.org/pakistan/constitution/part2.ch1.html> (last visited Oct. 27, 2007) (providing that "[l]aws inconsistent with or in derogation of fundamental rights [are] to be void," and enumerating certain fundamental rights such as personal security, protection against retroactive punishment and freedom of assembly) (on file with the Washington and Lee Law Review).

international human rights treaties—including CEDAW<sup>47</sup>—which could be cited in support of a repeal.<sup>48</sup> Why should Islam prevail in a clash of constitutional provisions?

The answer to this question leads directly to the identity and *raison d'être* of Pakistan. The officially endorsed history of the genesis of Pakistan is firmly founded on the claim that Pakistan is an ideological state, created in the name of Islam.<sup>49</sup> Any decisive reversal of laws introduced under the banner of Islamization would negate the reason for the creation of Pakistan, and would thus undermine the justification for the existence of Pakistan. Given that Pakistan came into existence almost sixty years ago, it is perhaps surprising that its early history would continue to dictate legal policy, the shape of its legal system, and the interpretation of its Constitution. There are several reasons for the continued relevance of historical narratives of the genesis of Pakistan. The ethnic diversity and regional fragmentation require a unifying bond—a common ideology and purpose.<sup>50</sup> A construction of national identity based on Islam is capable of providing such a bond. Conversely, an express departure from Islamization as an officially endorsed policy is likely to rob from Pakistani society a sense of purpose and legitimacy. After all, if Pakistan was not created in the name of Islam, why should it exist as a unified state at all?<sup>51</sup>

Opponents and critics of the Zina Ordinance have therefore found themselves addressing questions which are much wider than the issue of rape or violence against women. The fate of the Zina Ordinance is not only a question of women's rights, but is inextricably linked to questions of national identity and the state's legitimacy, and ultimately the role of Islam in the legal system of Pakistan. As a result, both proponents and opponents of the Hudood Ordinances draw on historical narratives and discourses in support of their

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47. Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (last visited Oct. 27, 2007) (defining "discrimination against women" and condemning it for all signatories to [the] United Nations treaty) (on file with the Washington and Lee Law Review).

48. *See id.* art. 15, § 1 ("States Parties shall accord to women equality with men before the law.").

49. Chadbourne, *supra* note 31, at 182 (stating that "Pakistan was borne out of a promise to Islamize"); ZIRING, *supra* note 11, at 130 (stating that in creating an independent Pakistan, attention was focused on "constructing a Pakistan that was more akin to Islamist doctrine and precept"); *see also supra* notes 10–16 and accompanying text (discussing the creation of an independent Pakistan).

50. *See* ZIRING, *supra* note 11, at 162 (mapping Pakistan's ethnic and regional fragmentation).

51. *See supra* notes 10–16 and accompanying text (discussing Pakistan's creation due to the need for an Islamic state).

respective positions—debating the Zina Ordinance means debating the very foundations of Pakistan's legal system.<sup>52</sup>

The first serious attempt to reform, though not abolish, the Zina Ordinance was initiated by General Pervez Musharraf, the President of Pakistan and the Chief of Staff of its armed forces. He had come to power as a result of a coup d'état in 1999, when he toppled the democratically elected government of Nawaz Sherif, the country's Prime Minister and leader of the Pakistan Muslim League.<sup>53</sup> Unlike Zia, who had used Islam to legitimize his usurpation of power, Musharraf has portrayed himself as an enlightened, benign, and progressive ruler whose main objectives are the fight against corruption and the "cleaning up" of Pakistani politics.<sup>54</sup> An open admirer of Kemal Ataturk, the founder of secular Turkey, Musharraf has been the first Pakistani leader who has tried to reform the Zina Ordinance.<sup>55</sup> At the end of 2006, he signed into law the Protection of Women (Criminal Laws Amendment) Act.<sup>56</sup>

Several events had prepared the ground for the passing of the Protection of Women (Criminal Laws Amendment) Act. After many years of agitation and protests, the Pakistan women's rights movement, consisting of internationally known NGOs like the Women's Action Forum and Shirkat Gah, succeeded in convincing the government to appoint a Commission of Inquiry for Women.<sup>57</sup> Its report, released in 1997, roundly condemned the Zina Ordinance, stating that it was not in accordance with Islam, clashed with several of the human rights guaranteed by the Constitution, and violated Pakistan's international

52. See, e.g., Cheema, *supra* note 42, at 153 (discussing the need for an "Islamic critique" of the Hudood Ordinances).

53. See ZIRING, *supra* note 11, at 244–57 (discussing Sherif's administration and his arrest following Musharraf's seizure of power).

54. See *id.* at 267 (discussing Musharraf's belief in the removal of corruption from Pakistan's government).

55. See A.Z. HILALI, U.S.-PAKISTAN RELATIONSHIP: SOVIET INVASION OF AFGHANISTAN 259 (2005) ("Mohammad Ali Jinnah and Kemal Ataturk, as custodians of a secular and Islamic democracy, appealed [sic] to [Musharraf]."); see also Protection of Women (Criminal Laws Amendment) Act, 2006 (Pak.), <http://www.pakistani.org/pakistan/legislation/2006/wpb.html> (last visited Oct. 27, 2007) (noting that this law's purpose is to "bring . . . the laws relating to zina and qazf in conformity with the stated objectives of the Constitution and the Injunctions of Islam") (on file with the Washington and Lee Law Review).

56. Protection of Women (Criminal Laws Amendment) Act (2006) (Pak.).

57. See SAMYA BURNEY, CRIME OR CUSTOM?: VIOLENCE AGAINST WOMEN IN PAKISTAN 15–16 (Regan E. Ralph & Cynthia Brown eds., 1999) (discussing the creation of the Commission of Inquiry for Women); *id.* at 21 (discussing the Women's Action Forum's protests and campaigns against the Hudood Ordinances); Rachel A. Ruane, Comment, *Murder in the Name of Honor: Violence Against Women in Jordan and Pakistan*, 14 EMORY INT'L L. REV. 1523, 1545 (2000) (describing the creation and role of the Commission of Inquiry for Women).

obligations.<sup>58</sup> The 1997 report was followed by a report prepared by the National Commission for the Status of Women.<sup>59</sup> This report included an in-depth analysis and critique of all five Hudood Ordinances and recommended drastic changes to all of them.<sup>60</sup> Indeed, twelve of its fifteen members recommended the complete repeal of the Hudood Ordinances.<sup>61</sup>

The women's movement's criticism of the Hudood Ordinances found support from an unlikely quarter, namely the Council of Islamic Ideology. This Council had been set up under the 1962 Constitution.<sup>62</sup> Initially called the "Islamic Advisory Council," it became the Council of Islamic Ideology under Article 228 of the 1973 Constitution.<sup>63</sup> Article 230 defines the functions of the Islamic Council as follows: To make recommendations to the National Parliament and the Provincial Assemblies "as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Quran and Sunnah," to advise the legislature and the executive on the Islamic vires of any proposed legislation, to make recommendations as to the measure for bringing existing laws into conformity with Islam, and finally to "compile in a suitable form, for the guidance of [Parliament] and the Provincial Assemblies, such Injunctions of Islam as can be given legislative effect."<sup>64</sup> Through the early 1970s the Council of Islamic Ideology had been largely dormant, but its fortunes changed under Zia's dictatorship when it became his most important source of inspiration for his program of Islamization.<sup>65</sup> Zia reconstituted the Council in 1977,

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58. See MASUD, *supra* note 42, at 126–27 (noting that the Hudood laws "are not in conformity with the injunctions of Islam . . . [and] come into direct conflict both with the country's Constitution . . . and its international commitments").

59. See *id.* at 128–34 (summarizing the National Commission for the Status of Women's analysis of the Hudood Ordinances).

60. See, e.g., *id.* at 128 (analyzing the Zina Ordinance and concluding that the "definition of the term 'adult' was discriminatory between men and women").

61. See *id.* at 134 ("[O]ut of fifteen (15) members, who have actively participated in the deliberations regarding the Hudood Ordinances and have given their views in person and in writing, twelve (12) members have recommended that the Hudood Ordinances should be repealed.").

62. See ISLAM OUTSIDE THE ARAB WORLD 228 (David Westerlund & Ingvar Savanberg eds., 1999) (discussing the creation of the Islamic Advisory Council).

63. See CONST. OF THE ISLAMIC REPUBLIC OF PAK. art. 228, <http://www.pakistani.org/pakistan/constitution/part9.html> (last visited Nov. 19, 2007) ("There shall be constituted within a period of ninety days . . . a Council of Islamic Ideology.") (on file with the Washington and Lee Law Review).

64. *Id.* art. 230.

65. See MUHAMMAD QASIMI ZAMAN, THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIANS

appointing a total of seventeen members, of whom "11 were reputed religious scholars from different schools of thought in Pakistan."<sup>66</sup> It was the Council of Islamic Ideology who had prepared the drafts of the four Hudood Ordinances initially in Arabic, and only later translated into Urdu and English.<sup>67</sup> On February 10, 1979—a symbolically significant date because the birthday of the Prophet Muhammad—Zia promulgated the Hudood Ordinances as proposed by Council of Islamic Ideology.<sup>68</sup> In 2002 the Council of Islamic Ideology took up the issue of the Hudood Ordinances again.<sup>69</sup> Ostensibly, it did so as part of a larger review of the Islamic credentials of all laws enacted since 1977, but there can be little doubt that it was Musharraf's government that had urged the Council to re-examine them.

The involvement of the Council of Islamic Ideology in the review of the Hudood Ordinances was to enable Musharraf and his government to attack its provisions on the basis of Islam. If the very body which had proposed and drafted the Ordinances in the name of Islam was to abandon them as un-Islamic, then even the Islamic quarters would find it difficult to accuse him of trying to secularize Pakistan. The suspicion that the review of the Hudood Ordinances was done at the instigation of Musharraf is confirmed by the fact that the Council focused on the most controversial of the four ordinances, namely the Zina Ordinance, when it presented its report in 2002.<sup>70</sup> The report recommend various amendments to the Zina Ordinance, including a new definition of zina itself, stating that "Zina means a person's willfully committed illicit act of entering into the vagina of a living and desirable woman with whom he is neither married nor is there a shibh-i-nikah."<sup>71</sup> Overall its recommendations did nothing to deal with the numerous inequities contained in the Zina Ordinance.<sup>72</sup>

In 2004 Musharraf reconstituted the Council of Islamic Ideology and appointed as its new Chairman Professor Khalid Masud—an internationally well-known scholar of Islamic jurisprudence and a professor from Leiden University—who until then had headed the International Institute for the Study

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OF CHANGE 88–89 (2002) (describing the shift of the Council of Islamic Ideology under Zia from an advisory role to a legislative role).

66. MASUD, *supra* note 42, at 15–16.

67. *Id.* at 16–17.

68. *Id.* at 18.

69. *Id.* at 147–49.

70. MASUD, *supra* note 42, at 147–49.

71. *Id.* at 147–48.

72. *See id.* at 147–49 (discussing the recommendations of the Council of Islamic Ideology, which did not address the inequities of the Zina Ordinance).

of Islam in the Modern World in the Netherlands.<sup>73</sup> Reminiscent in background and style of the late Fazlur Rehman—who had instilled a liberal and humane vision of Islam into the Council when it was first formed in 1962—Masud has assembled around him a group of seven scholars with backgrounds in Islamic law.<sup>74</sup> Masud embarked on the second attempt of the Council of Islamic Ideology to review the Hudood Ordinances, this time with far more preparation and consultation.<sup>75</sup> In May 2005, the Council organized an international conference whose purpose it was to, *inter alia*, "place the spotlight on Pakistan's legislative experience and address contemporary debates about the role of Shari'a in [a] globalising world" and "focus on issues relating to Islamic criminal laws . . . but address these questions in the light of the variety of Islamic human rights debates."<sup>76</sup> The workshop concluded with significant observations, reflecting a fundamental shift from orthodoxy to liberalism in its approach to Islamic law and jurisprudence. The statement of concluding points begins by observing that the process of globalization is as much a challenge as an opportunity for Muslims, in that it provides Muslim intellectuals the opportunity "to come together and think collectively how to present Islamic perspective on globalism."<sup>77</sup> This dialogue had to include non-Muslims, so that issues could be analyzed from all possible perspectives.<sup>78</sup> Importantly, the statement stressed the "need for the reconstruction of Ijtihad and Islamic legal methodology."<sup>79</sup> With respect to the Hudood ordinances, however, the workshop failed to come to any conclusions, observing merely

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73. *See id.* at 150 (noting that the Council of Islamic Ideology was constituted in its present form on June 16, 2004); THE GLOBALIZATION OF ETHICS: RELIGIOUS AND SECULAR PERSPECTIVES, at x (William Sullivan & Will Kymlicka eds., 2007) (noting the appointment of Muhammad Khalid Masud as the chair of the Council of Islamic Ideology).

74. *See* Council of Islamic Ideology, Members' Profiles, <http://www.cii.gov.pk/about/members.asp> (last visited Oct. 27, 2007) (describing the backgrounds of the members of the Council of Islamic Ideology) (on file with the Washington and Lee Law Review).

75. *See* MASUD, *supra* note 42, at 135–59 (noting the findings of the Council of Islamic Ideology's review of the Hudood Ordinances).

76. *Id.* at 151–53. Masud succeeded in attracting an impressive group of internationally well-known academics to the workshop, including Professor Ruud Peters of Amsterdam University and Professor Tahir Mahmud from India. *Id.* at 155–56.

77. *Id.* at 157.

78. *See id.* ("[N]on-Muslim intellectuals must also be invited to participat [sic] in these discussions in order that the issues could be discussed and analyzed [sic] from all possible perspectives.").

79. *Id.* at 158. The term "*ijtihad*" denotes the process of finding law through a process of independent interpretation of the sources of Islamic law by an Islamic scholar. *See generally* WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW (2005) (providing an accessible and recent exposition of the principals of Islamic jurisprudence, including *ijtihad*).

that no agreement could be reached and that they "viewed the issue of codification of Islamic law, especially Islamic criminal laws including Hudud, Qisas and Diyat and their enforcement [as] a highly complicated process and [one that] requires serious academic and scientific studies."<sup>80</sup> The Consultative Workshop was followed by the creation of an International Consultative Network in June 2005, the setting up of a legal committee of the Council, and study tours by members of the Council to several Muslim majority countries in the summer of 2006.<sup>81</sup> The Legal Committee of the Council of Islamic Ideology began to review the Hudood Ordinances in early 2006, and on June 27, unanimously recommended that "[t]he [Hudood Ordinances] must be rewritten based on the concepts of punishments/Hudud fixed by the Qur'an, Sunna and the immaculate Shari'a and they may be included as part thereof in the Pakistan Penal Code and the Code of Criminal Procedure Code accordingly."<sup>82</sup> A few days later, Musharraf ordered that all female prisoners, detained on remand and awaiting trial for minor offenses, including charges of adultery, could be released on bail.<sup>83</sup> About 1,300 women were expected to find the money to post bail and be released.<sup>84</sup>

The deliberations of the National Commission on the Status of Women and of the Council of Islamic Ideology had not made any attempt to involve ordinary citizens. This gap was filled by a Geo, a popular private television channel, which started a televised debate conducted over several weeks in the course of 2006 under the question "No debate on Hudood Allah (Allah's laws as prescribed in Quran and Sunnah)—is the Hudood Ordinance (Man's interpretation of Allah's law) Islamic?"<sup>85</sup> The formulation of the topic was meant to assure viewers that the program was not debating the merits of the laws given by Allah—an activity which could be viewed at worse as blasphemous and at best as disrespectful—but instead debating human interpretation of these laws. What was to be discussed were the Hudood Ordinances, and not Islamic law per se. To draw such a distinction might seem

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80. MASUD, *supra* note 42, at 158.

81. *See id.* at 158–63 (discussing the activities of the International Consultative Network, the Council Legal Committee, and the Council delegation visits to Islamic Countries).

82. *Id.* at 161.

83. *See Appeasing the Mullahs: Protection of Women (Criminal Laws Amendment) Bill 2006 of Pakistan*, ASIAN CENTRE HUM. RTS. WKLY. REV., Sept. 13, 2006, <http://www.achrweb.org/Review/2006/132-06.htm> [hereinafter *Appeasing the Mullahs*] (last visited Oct. 27, 2007) (noting Musharraf's decision to release women prisoners on July 7, 2006) (on file with the Washington and Lee Law Review).

84. *See id.* ("As many as 1,300 women prisoners out of the total 6,500 languishing in jails were expected to have been released.").

85. MASUD, *supra* note 42, at 84.

artificial, were it not for the sensitive nature of these laws, coupled with the fact that the only penalties for the offense of blasphemy are death and life imprisonment.<sup>86</sup>

The Geo television debate was perhaps the most important step leading to the passing of the Protection of Women (Criminal Laws Amendment) Act,<sup>87</sup> because it aired and publicized the legal reality behind the Zina Ordinance. Until then, those opposing a change of the law had been able to argue that, despite having been on Pakistan's statutory books for many years, no one had actually been executed by stoning and not a single hand or foot had been amputated.<sup>88</sup> Indeed, even Western academics had ignored the suffering endured by Pakistani women as a result of the Zina Ordinance. Writing in 2005, Rudolph Peters concludes a chapter on Pakistan's Islamic criminal laws as follows:

[T]he Pakistani way of enforcing Islamic criminal law has been careful and controlled, except with regard to the blasphemy laws directed against the Ahmadiyya sect. Mutilating punishments and death by stoning have not been inflicted; only flogging was frequently practised. . . . We must conclude [t]hat in Pakistan, as in Lybia, the introduction of the *huddud* had a highly symbolic character and did not result in a drastic change of the penal system.<sup>89</sup>

The Geo debate identified several issues that were particularly problematic. The first one concerned the crimes of adultery and fornication. If the Qur'an specified that this crime must be witnessed by at least four male, pious Muslims, why was it possible to convict a woman for it when this evidentiary condition was not met? The Geo debate recommended that, unless the evidentiary requirement of four witnesses was met, no case of adultery should be registered by the police, let alone go to trial.<sup>90</sup> Secondly, the Geo

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86. See PAK. PENAL CODE § 295(C), available at [http://www.punjabpolice.gov.pk/user\\_files/File/pakistan\\_penal\\_code\\_xlv\\_of\\_1860.pdf](http://www.punjabpolice.gov.pk/user_files/File/pakistan_penal_code_xlv_of_1860.pdf) (last visited Nov. 14, 2007) (providing life imprisonment or death as the only possible punishments for making a derogatory remark about the Holy Prophet) (on file with the Washington and Lee Law Review).

87. Protection of Women (Criminal Laws Amendment) Act, 2006 (Pak.), <http://www.pakistani.org/pakistan/legislation/2006/wpb.html> (last visited Oct. 27, 2007) (on file with the Washington and Lee Law Review).

88. See MASUD, *supra* note 42, at 88 ("No rapist has . . . ever been given a Hudd punishment.").

89. RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY 160 (2005).

90. See MASUD, *supra* note 42, at 85 (finding neither Allah's maximum punishment (*Hudd*) nor man's lesser punishment (*Tazeer*) legitimate unless four witnesses testify to the crime of Zina).

Debate exposed the issue of double jeopardy faced by women who press charges for rape:

A woman who claims to have been raped, then cannot provide sufficient evidence as required by the Hudood Ordinance, can be accused of having accepted committing the act of Zina and, therefore, astonishingly, a victim of rape crime can be treated as a Zina offender. In the name of an Islamic law, such flagrant injustice is totally unacceptable.<sup>91</sup>

Finally, the Geo Debate recommended stiffer punishments for rape, and equality before the law for men and women, in particular in respect of the laws of evidence.<sup>92</sup>

The ground was therefore prepared when the government presented its Protection of Women (Criminal Laws Amendment) Bill, 2006, to the National Assembly on August 21, 2006.<sup>93</sup> The religious Muttahida Majlis-i-Amal (MMA) immediately accused the government of following a Western agenda to secularize Pakistan and rejected the bill.<sup>94</sup> Both the MMA and the Pakistan Muslim League (Nawaz) refused to participate in the special committee set up to review the bill.<sup>95</sup> The bill was approved by the special parliamentary committee on September 4, 2006, and presented to the National Assembly.<sup>96</sup> The MMA then threatened to quit the National Assembly and the provincial governments unless the government withdrew the bill.<sup>97</sup> A few days later, the government obliged and withdrew the bill, promising the MMA a thorough review of the bill.<sup>98</sup>

#### *IV. The Protection of Women (Criminal Laws Amendment) Act, 2006*

In December 2006, Pakistan's National Assembly finally passed the Protection of Women (Criminal Laws Amendment) Act, 2006.<sup>99</sup> The Act does

91. *Id.* at 87.

92. *See id.* at 89 (recommending a stiffer punishment for rape than for adultery); *id.* at 91 ("[T]he qualities demanded of a witness are not determined by gender . . .").

93. *Appeasing the Mullahs*, *supra* note 83.

94. *Id.* (noting group opposition to the bill).

95. *See id.* ("[T]he MMA and Pakistan Muslim League (Nawaz) boycotted the [special] committee [for review and evolving consensus].").

96. *Id.*

97. *Id.*

98. *See id.* (describing the government's agreement made on September 11, 2006, to review and revise the bill).

99. *See President Signs Women Protection Bill*, FRONTIER STAR (Pak.), Dec. 1, 2006, available at 2006 WLNR 21128068 (noting the passage of the bill).

not repeal the Zina Ordinance, and therefore falls short of the demands of the human rights community, who had consistently campaigned for a total repeal, but does much to address the many injustices and hardships caused by the old Zina Ordinance. The objective of the Protection of Women (Criminal Laws Amendment) Act, 2006, 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."<sup>100</sup> The Act's preamble refers to Article 14 of the 1973 Constitution, guaranteeing the inviolability of the dignity of man; Article 25, guaranteeing equality before the law and nondiscrimination on the basis of sex, race, etc.; and Article 37, encouraging the state to promote social justice and to eradicate social evils.<sup>101</sup> Unusual for a piece of Pakistani legislation, the Act was appended with a lengthy "Statement of Objects and Reasons."<sup>102</sup> This appendix takes the form of a short essay on the Hudood Ordinances and can be regarded as an attempt to deflect criticism of the measure, especially from conservative Islamic quarters. Its opening statement, therefore, establishes that, in Pakistan, all laws must be in accordance with Islam and that the Protection of Women (Criminal Laws Amendment) Act, 2006, is a measure to achieve just this, namely "to bring the laws relating to zina and qazf, in particular, in conformity with the stated objectives of the Islamic Republic of Pakistan."<sup>103</sup> From the perspective of Islamic law, only two offenses, namely zina and qazf, are mentioned in the Qur'an.<sup>104</sup> It follows that by including other offenses within its ambit, such as rape, the Zina Ordinances had exceeded Islamic law.<sup>105</sup> Unprecedented for a Pakistani statute, the appendix also acknowledges the criticism of the old law:

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

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100. Protection of Women (Criminal Laws Amendment) Act, 2006 pmb1. (Pak.), <http://www.pakistani.org/pakistan/legislation/2006/wpb.html> (last visited Oct. 27, 2007) (on file with the Washington and Lee Law Review).

101. *Id.* at pmb1.

102. *Id.* at Statement of Objects and Reasons.

103. *Id.*

104. *See id.* (noting that the Qur'an includes only *zina* and *qazf*).

105. *See id.* (criticizing the Zina and Qazf Ordinances for including crimes not mentioned in the Qur'an).

is often prosecuted for zina. . . . Her complaint is, at times, deemed a confession.<sup>106</sup>

The appendix concludes by stating that "[t]he 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 Quran and Sunnah, to prevent exploitation, curb abuse of police powers and create a just and egalitarian society."<sup>107</sup>

The Protection of Women (Criminal Laws Amendment) Act, 2006, is structured around three elements. The first element returns a number of offenses from the Zina Ordinance to the Pakistan Penal Code, where they had been prior to 1979. The second element reformulates and redefines the offenses of zina and qazf, the wrongful accusation of zina. The third element creates an entirely new set of procedures governing the prosecution of the offenses of adultery and fornication.

In pursuance of the first element, the following offenses have all been reinserted into the Pakistan Penal Code, 1860: kidnapping or abducting a woman in order to compel her to marry a person against her will or to force her to have illicit intercourse; kidnapping or abducting a person in order to subject him to "unnatural lust;"<sup>108</sup> and selling a person for the purposes of prostitution and related crimes.<sup>109</sup> Significantly, the offense of rape has been removed from the Zina Ordinance and returned to the Pakistan Penal Code in the form of Section 375.<sup>110</sup> The offense of rape is defined in such a manner that marital rape, if defined as the sexual intercourse with a woman against her will or without her consent, is an offense under Pakistani law.<sup>111</sup> Any sexual intercourse with a woman under the age of sixteen is defined as rape, irrespective of consent.<sup>112</sup> The punishment for rape ranges from death to a minimum of ten and a maximum of twenty-five years of imprisonment.<sup>113</sup> The punishment for gang rape used to be death, but now includes the possibility of life imprisonment.<sup>114</sup> The Statement of Objects and Reasons explains why the lesser sentence of life imprisonment was added:

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106. *Id.*

107. *Id.*

108. *Id.* § 3.

109. *See id.* §§ 2–4 (amending the Pakistan Code of Criminal Procedure).

110. *Id.* § 5 (inserting § 375, which criminalizes rape, into the Code of Criminal Procedure).

111. *See id.* (declining to exclude marital intercourse from the definition of rape).

112. *See id.* (inserting § 375(v), defining rape, into the Code of Criminal Procedure).

113. *See id.* (inserting § 376(1), punishing rape, into the Code of Criminal Procedure).

114. *See id.* (inserting § 376(2), punishing gang rape, into the Code of Criminal

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 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.<sup>115</sup>

Rape is therefore no longer governed by the Zina Ordinance or by any other Islamic criminal law.

The second element restructures the offenses of zina (i.e. consensual extra marital sexual intercourse, either as adultery, if one of the parties is married, or as fornication, if they are not). The Protection of Women (Criminal Laws Amendment) Act, 2006, inserts into the Pakistan Penal Code of 1860 a new criminal offense of fornication, defined as "[a] man and a woman not married to each other [who] wilfully have sexual intercourse with one another."<sup>116</sup> This crime is punishable by imprisonment of up to five years and a fine not exceeding 10,000 rupees.<sup>117</sup> It is likely that the creation of a new offense of fornication was a concession to conservative sections of Pakistani society. The offense of fornication is, however, accompanied by a safeguard against abuse. Section 496C of the Pakistan Penal Code creates the new offense of 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."<sup>118</sup> Significantly, once the prosecution of a charge of fornication has resulted in an acquittal, the trial judge can try to sentence the unsuccessful complainant in the very same proceedings.<sup>119</sup> It follows that any person who accuses someone else of fornication risks a lengthy prison sentence if his complaint does not result in a conviction. While there has been as yet no reported case law on this provision, it is nevertheless reasonable to assume that the number of accusations of zina in the form of fornication will drop sharply.

Adultery is the only offense which has been retained in the Zina Ordinance.<sup>120</sup> It is now accompanied by the offense of making a false

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Procedure).

115. *Id.* at Statement of Objects and Reasons.

116. *Id.* § 7.

117. *See id.* (inserting § 496B(2), punishing fornication, into the Code of Criminal Procedure).

118. *Id.*

119. *Id.* (stating that judge may proceed to pass sentence on the accuser following dismissal of a fornication complaint).

120. *See id.* §§ 13, 16 (removing all offenses other than adultery from the Offence of Zina (Enforcement of Hudood) Ordinance (1979) (Pak.)).

accusation of adultery, similar to the pattern established in relation to the new offense of fornication in the Pakistan Penal Code.<sup>121</sup> However, even in respect of the offense of adultery, there have been significant amendments to the Zina Ordinance. In the definitions section, a new definition of "confessions" has been added:

"Confessions" 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.<sup>122</sup>

The new definition is designed to prevent the overlap between the offenses of rape and adultery, where failed accusations of rape were converted into adultery charges on the basis that the woman had "confessed" to sexual intercourse when she complained of rape. Under the new law, neither statements made in other proceedings nor conduct can be treated as a confession to adultery.<sup>123</sup> Additionally, the definition of zina no longer mandates that a man and woman having sexual intercourse be "validly" married to each other.<sup>124</sup> The prior definition, which excluded only sexual intercourse occurring in valid marriages, had caused much confusion, as well as hardship, to women who had remarried after being divorced by their husbands. If the first husband had not complied with the procedural requirements of a Muslim divorce imposed by Section 7 of the Muslim Family Laws Ordinance,<sup>125</sup> the divorce was not effective and the marriage bond not dissolved. The woman, believing herself to be divorced, remarried, only to face her first husband in court on a charge of adultery. The Act itself explains the scenario as follows:

A triple talaq<sup>126</sup> is pronounced. The woman returns to her parental home. She goes through her period of iddat.<sup>127</sup> After a while the family arranges

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121. *Id.* at Statement of Objects and Reasons ("[F]ailure to prove zina entails punishment for qazf (false accusation of zina).").

122. *Id.* § 10(i).

123. *See id.* (requiring that a valid confession consist of an explicit oral statement voluntarily made during the *zina* proceeding).

124. *See id.* § 12 (deleting the word "validly" from the Zina Ordinance).

125. *See* Muslim Family Laws Ordinance § 7 (1961) (Pak.), *reprinted in* CIVIL MAJOR ACTS 154–55 (Junjua 2006) (describing the procedural requirements for a valid divorce).

126. A husband pronounces three times the word "*talaq*", which means "repudiation," and thereby divorces his wife irrevocably. Under Pakistani law such a divorce is not legally valid. *Id.* § 7.

127. "*Iddat*" is the period of three menstrual cycles following a divorce during which the divorced wife is not permitted to remarry. Islamic Sharia Council, What is Iddat?, <http://www.islamic-sharia.org/divorce-talaq/what-is-iddat.html> (last visited Jan. 16, 2008) (on

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 [of a valid marriage] to shut this door.<sup>128</sup>

A new Section 5A aims to put an end to the overlap of cases of rape, adultery, and fornication, by providing that no complaint of adultery or rape can be converted into one of fornication and no complaint of fornication can be converted into one of adultery.<sup>129</sup> The Protection of Women (Criminal Laws Amendment) Act, 2006, also removes all references to discretionary punishments, called *tazir*.<sup>130</sup> As a result, the Zina Ordinance only deals with the offense of adultery if this offense is witnessed by four pious, male Muslims or if the accused confesses to the offense. The only punishment for a Muslim who commits adultery is death by stoning.<sup>131</sup>

The third element of reforms effected by the Protection of Women (Criminal Laws Amendment) Act relates to the procedure governing sexual offenses under both the amended Zina Ordinance and the Pakistan Penal Code. The procedure governing accusations of adultery makes the prospect of any prosecutions, let alone convictions, unlikely. A complaint of adultery has to be lodged directly in a court of sessions, thereby circumventing potentially corrupt police officers altogether.<sup>132</sup> The judge hearing the complaint has to place under oath not only the complainant, but also at least four adult, male eyewitnesses, who have on examination satisfied the court that they are "truthful persons and abstain from major sins."<sup>133</sup> These four witnesses have to testify under oath that they witnessed the act of penetration.<sup>134</sup> Only then can

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file with the Washington and Lee Law Review).

128. Protection of Women (Criminal Laws Amendment) Act, 2006, at Statement of Objects and Reasons (Pak.), <http://www.pakistani.org/pakistan/legislation/2006/wpb.html> (last visited Oct. 27, 2007) (on file with the Washington and Lee Law Review).

129. *Id.* § 12A (amending section 5A of the Offence of Zina (Enforcement of Hudood) Ordinance to prohibit the conversion of *zina*, rape, and fornication charges into complaints for other violations).

130. *See id.* § 15(iii) (repealing Sections 9(3) and 9(4) of the Offence of Zina (Enforcement of Hudood) Ordinance).

131. *See* Offence of Zina (Enforcement of Hudood) Ordinance § 5(2) (1979) (amended 2007) (Pak.) (providing public stoning as a punishment for Muslims guilty of *zina* liable to *hadd*, and providing public whipping numbering 100 stripes as punishment for non-Muslims guilty of *zina* liable to *hadd*).

132. *See* Protection of Women (Criminal Laws Amendment) Act, 2006, § 8 (amending the Pakistan Code of Criminal Procedure § 203A to require that a *zina* complaint be lodged in a court of competent jurisdiction) (on file with the Washington and Lee Law Review).

133. *Id.*

134. *See id.* (creating the Code of Criminal Procedure § 203A(2), which requires sworn

the court issue a summons for the appearance of the accused.<sup>135</sup> Even at this stage, it is within the judge's discretion to dismiss the case if he finds that there are not sufficient grounds for proceeding.<sup>136</sup>

Amendments to the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979,<sup>137</sup> now expose any complainant who makes a false accusation of adultery to the very real risk of punishment. If the prosecution fails, punishment for *qazf* is close to automatic: A new Section 6(2) provides that a judge dismissing a complaint of adultery or acquitting an accused of a charge of adultery, "if satisfied that the offence of qazf liable to hadd has been committed, shall not require proof of qazf and shall proceed to pass sentence under section 7."<sup>138</sup> The punishment for *qazf* consists of a "whipping numbering eighty stripes."<sup>139</sup> In addition, the evidence of someone convicted of *qazf* becomes inadmissible in any future court proceedings.<sup>140</sup>

The procedure relating to allegations of fornication is similarly restrictive as the one adopted for adultery. A complaint of fornication can only be lodged directly in a court.<sup>141</sup> The court is required to examine under oath both the complainant and at least two eye-witnesses.<sup>142</sup> Only then can the judge 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."<sup>143</sup> As an additional safeguard, the Code of

testimony of the four virtuous eyewitnesses).

135. *See id.* (creating the Code of Criminal Procedure § 203A(4), which allows a summons to issue upon the signatures of four eyewitnesses to complaint, followed by a judicial determination of sufficient grounds for proceeding).

136. *See id.* (creating the Code of Criminal Procedure § 203A(5), which states the authority of a judge to dismiss complaints on grounds of insufficient evidence).

137. *See* Offence of Qazf (Enforcement of Hadd) Ordinance (1979) (Pak.) (defining the offense of *qazf* as the false imputation of *zina* with malicious intent).

138. Offence of Qazf (Enforcement of Hadd) Ordinance § 6(2) (1979) (amended 2006) (Pak.).

139. *Id.* § 7(1).

140. *See id.* § 7(2) (rendering evidence of a person convicted of *qazf* liable to *hadd* inadmissible in any court of law).

141. *See* Protection of Women (Criminal Laws Amendment) Act, 2006, § 8 (Pak.), <http://www.pakistani.org/pakistan/legislation/2006/wpb.html> (last visited Oct. 27, 2007) (amending the Pakistan Code of Criminal Procedure § 203C(1) to require fornication complaints to be lodged in a court of competent jurisdiction) (on file with the Washington and Lee Law Review).

142. *See id.* (amending the Code of Criminal Procedure § 203C(2) to require two eyewitnesses to testify regarding fornication).

143. *Id.*

Criminal Procedure provides that under no circumstances whatsoever can a complaint of rape be converted into a charge of fornication.<sup>144</sup> As already stated, the amended Penal Code, 1860 now makes a false accusation of fornication a criminal offense as well.<sup>145</sup>

### V. Conclusion

For twenty-five years Pakistan's women have suffered under the Zina Ordinance. No precise statistics for the whole period are available, but Khalid Masud's report gives numbers for the past four years: the number of accusations rose from 3,291 in the year 2001 to 3,817 in the year 2004.<sup>146</sup> The majority of charges ended in an acquittal.<sup>147</sup> Promulgated in the name of Islam, the Zina Ordinance became a tool of oppression at the hands of vengeful husbands and parents intent on punishing their wives or daughters for disobedience. Roundly condemned both domestically and internationally by human rights groups and women's NGO, successive governments had failed to repeal or amend the law. Whenever even small changes were proposed, religious groups and political parties staged large scale demonstrations in Pakistan: there is little doubt that most Pakistani politicians lacked the stomach to face the religious fundamentalists.

In the context of contemporary Pakistan, where both the legal system as well as politics are infused with appeals to Islam, the Protection of Women (Criminal Laws Amendment) Act must be regarded as very progressive piece of legislation. The ground for its enactment had been carefully prepared, with the Council of Islamic Ideology playing an important role in recommending drastic changes to the existing law. The involvement of the Council was important, because the changes could only succeed if it could be shown that they were in accordance with Islam. The Council was able to provide this assurance. To what extent the orthodox religious establishment is prepared to follow the pronouncements of the Council on Islamic law remains to be seen: After all, it

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144. *See id.* § 12A (prohibiting, under the Code of Criminal Procedure § 203A, the conversion of rape and other charges into fornication complaints); *see also* Offense of Zina (Enforcement of Hudood) Ordinance, § 5A (1979) (amended 2007) (Pak.) (incorporating the Protection of Women Act's prohibition of converting rape and other charges into fornication within the Zina Ordinance).

145. *See id.* § 7 (inserting new § 496C, which criminalizes false accusations of fornication, into the Pakistani Penal Code).

146. *See* MASUD, *supra* note 42, at 4 (providing statistics about Hudood Ordinance cases).

147. *See id.* 174–74 (detailing Hudood case data).

had been the same institution which had prepared the very laws now under review.

The Protection of Women (Criminal Laws Amendment) Act does not repeal the Zina Ordinance. A repeal might have been seen as one step too far, exposing Musharraf's government to a serious backlash. Instead, the Zina Ordinance has been hollowed out to its barest essentials. It only deals with one offense, namely adultery liable to a *hadd* punishment.<sup>148</sup> The likelihood of such a prosecution succeeding is remote indeed. Fornication remains an offense, but is now governed by the Pakistan Penal Code.<sup>149</sup> Procedural and evidential requirements are such that a prosecution is unlikely to succeed. The offense of rape has also been removed from the ambit of the Zina Ordinance, and is now governed solely by the Pakistan Penal Code.<sup>150</sup> Changes to the Code of Criminal Procedure make it impossible to convert an unsuccessful complaint of rape into a charge of adultery or fornication.<sup>151</sup>

The strengthening of the offense of *qazf*, the making of false accusations of adultery, means that anyone who makes an accusation of adultery faces a very real risk of punishment if his complaint does not result in a conviction. Incidentally, it remains punishable by eighty lashes of the whip.<sup>152</sup>

There is little doubt that much needs to be done in order to make Pakistani law responsive to the needs of women. Nevertheless, the Protection of Women (Criminal Laws Amendment) Act cannot be dismissed as a mere window dressing undertaken to satisfy a Western audience. The Zina Ordinance has now been reduced to a largely symbolic measure, unlikely to wreak havoc with women's lives. Removing this last vestige of Islamic law from the area of sexual offenses would be difficult: Only a new constitution could free Pakistan from the obligation to have a legal system which is in accordance with the injunctions of Islam.<sup>153</sup>

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148. See *supra* note 120 and accompanying text (discussing removal of all crimes other than *zina* liable to *hadd* from the Offence of Zina (Enforcement of Hadd) Ordinance (1979) (Pak.)).

149. See Protection of Women (Criminal Laws Amendment) Act, 2006, § 7 (Pak.), <http://www.pakistani.org/pakistan/legislation/2006/wp.html> (last visited Oct. 27, 2007) (inserting new § 496B, criminalizing fornication, into the Pakistani Penal Code) (on file with the Washington and Lee Law Review).

150. See *id.* § 13 (removing the crime of rape from Zina Ordinance); see also PAK. PENAL CODE §§ 375–76 (criminalizing rape).

151. See Protection of Women (Criminal Laws Amendment) Act, 2006, § 12A (prohibiting conversion of rape charges into other complaints); see also Offence of Zina (Enforcement of Hadd) Ordinance § 5A (1979) (Pak.).

152. See *supra* note 138 and accompanying text (defining punishment for the false accusations of adultery).

153. See CONST. OF THE ISLAMIC REPUBLIC OF PAK. art. 2 ("Islam shall be the state religion of Pakistan.").