

Why the Hudood Ordinances must be repealed



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Why the Hudood Ordinances (1979) must be Repealed?

Promulgated by the military regime of General Zia ul Haq on 22nd February 1979, the Hudood Ordinances consist of five laws:

- Offence Against Property (Enforcement of Hadd) Ordinance 1979
- Offence of Zina (Enforcement of Hadd) Ordinance 1979
- Offence of Qazf (Enforcement of Hadd) Ordinance 1979
- Prohibition (Enforcement of Hadd) Ordinance 1979
- Execution of Punishment of Whipping Ordinance 1979

Why are the Hudood Ordinances problematic?

Because they:

- Discriminate in the text of the law
- Have been used unjustly for 25 years to victimize people, especially women
- Hinder citizens' basic rights

Controversial & Criticised from the start

These infamous 'black laws' of a military regime have been criticised from the start and demands voiced for their repeal - especially the laws of zina and qazf for their discrimination against women and non-Muslims.

Demands for repeal have been made by:

- Women and human rights organisations
- Lawyers
- The Commission of Inquiry on Women (1994-1997) headed by a serving Supreme Court Justice

- The National Commission on the Status of Women (a permanent body established in 2000) (see end for recommendations of both Commissions)
- The Secretary of the Pakistan Law Commission, Dr Faqir Hussain

Federal Shariat Court concerned about reckless misuse of the laws

Consistent injustice resulting from the zina sections of the Hudood Ordinances (1979) led the Federal Shariat Court to state:

“We are constrained to make observations that such reckless allegations are being brought so frequently that something should be done to stop this unhealthy practice. The prosecution agencies before putting people on trail for offences of zina on flimsy allegations should be mindful of injunctions of the Holy Qur’an and the message conveyed through the decisions from the early period of pious Caliphs.” [1991 PCr.LJ 568 FSC]

The reckless misuse of this law is evident from the fact that superior courts have acquitted 95% of all women accused in all Hudood cases.

The Zina (Enforcement of hadd) Ordinance

This law covers *zina* (fornication and adultery), rape, kidnapping, abducting or inducing a woman to illicit sex or compelling her to marriage against her will, enticement or detaining a woman with criminal intent, selling or buying a person for purposes of prostitution.

Criminal liability for adults differs by gender:

- a. A girl is considered adult at 16 or on attaining puberty
- b. A boy is considered adult at 18 or when pubert

The law provides *hadd* and *tazir* punishments.

Hadd punishment is fixed and has very stringent rules of evidence.

1. It requires the evidence of four adult male Muslim witnesses (who are truthful persons and abstain from major sins)
2. Non-Muslim males can only be witnesses when the accused is a non-Muslim

OR

3. A confession of the accused before a competent court. If before the execution of sentence the accused retracts this confession, *hadd* cannot be imposed

Evidentiary requirements for *hadd* punishment discriminate against women and non-Muslims.

What was the law before the Hudood Ordinances?

1. Previously extramarital sex was a crime only in the case of adultery, carrying a punishment of five years imprisonment or a fine or both. The crime was compoundable and bailable
2. Complaints of adultery could only be made by the husband of a woman or, in his absence, by some person who had care of such woman on his behalf
3. Women could not be punished
4. If the complainant chose to drop the charges, or not to prosecute the offender, criminal proceedings against the accused were stopped

Today

- The Hudood laws have converted zina from an offence against an individual to an offence against the state. As a result anyone can make a complaint against anybody else (whether related to them or not) to the police that is authorized to register a criminal case.
- Those accused are considered guilty until proven innocent, sending many innocent people to jail.
- The new law on zina makes women liable to punishment.
- Under the new law, allegations of *zina* run into thousands.

Clearly as long as only the husband could register a case and only the male accused could be punished for adultery, there was a reluctance to prosecute.

- The Hudood laws are a tool in the hands of those wishing to victimize women.

The vast majority of *zina* allegations are either false or based on suspicion as evident in the high number of cases acquitted by the Federal Shariat Court (1980-87).

Indicating a misuse of the law, the former Chief Justice of Pakistan, Justice Mohammad Afzal Zullah, said 95% of all Hudood cases in the superior courts had been decided in favour of women. (*The Muslim*, Islamabad, March 9, 1993).

- The law is a tool of exploitation in the hands of law enforcing agencies and ‘family members’ of women who are perceived to defy ‘norms’ of society by exercising their legal rights

Most FIRs are filed either

- by the parents because their daughter has married someone of her own choice or
- by former husbands on the remarriage of their previous wives

The Commission of Inquiry’s review of 60 cases reported in the Pakistan Annual Law Digest of 1995 found that:

- 15 pertained to people who had married against the wishes of their families
- One woman was accused of *zina* despite possessing and producing records of the Family Court and the High Court proving she had been legally divorced before she remarried
- Police officials collude with families and those seeking to abuse women through the law to the extent that they have registered cases and started investigations on the basis of allegations of *zina* received by post

Arrested & Tried for No Crime Under the Law

On 18th March 1987 the Federal Shariat Court acquitted a man and a woman arrested by the police from their home on 3 May 1980, registering a case of 'attempted zina' which is no crime even under the Hudood laws. Yet, after the couple spent seven years in prison, the Additional Session Judge South Karachi sentenced both to 5 years rigorous imprisonment and 10 lashes in January 1987. (Pakistan Criminal Law Journal 2321)

When the Constitution guarantees life and liberty for all citizens (save in accordance with law), and that every citizen has the right to a good reputation, **who is to be held accountable for the seven years of imprisonment, indignities and humiliation suffered by this man and woman?**

Injustice for survivors of rape – the victim becomes the criminal

The new laws put rape victims in an impossible situation: if a woman reports she has been raped but there is insufficient evidence to prove the case against the accused, she herself may be accused of *zina* either because her testimony itself acknowledges that intercourse did take place, or because she has become pregnant as a result of rape.

Several such cases have come to light in the past. In some, women were sentenced and punished, in others people were freed but only after years of struggle and hardship.

Zafran Bibi

Sentenced to be stoned to death by a Sessions Court in Kohat in 2002, Zafran Bibi went to the police to register a case of rape after discovering she was pregnant. Instead the police registered a case of *zina* (adultery). Zafran Bibi was lucky, an appeal was filed and she was acquitted by the FSC. But for weeks she was kept in a death cell shackled and isolated from people.

Why worry? Surely any law can be grossly misused and false cases will end in acquittal?

The answer of the Commission of Inquiry, headed by a serving Justice of Pakistan's Supreme Court, is that:

“The argument that every law can be misused may be correct to some extent. But, thus stated, it addresses the wrong question. The relevant test is not whether a piece of legislation can ever be misused but rather whether it is worth enacting at all given the potential for its abuse and the results which its enforcement would produce. This Commission is strongly of the opinion that the *zina* Ordinance fails this test. Abundant data testifies that the result of this law has been the victimisation rather than the protection of people, and that the law has had a particularly adverse effect on the least privileged members of society.” (COI Report 1997 page 70)

The offence of *zina* is a cognisable offence. This means that state agencies are empowered to arrest and prosecute people. The accused suffer arrest and often imprisonment during the period of trial, sometimes for years.

The stigma of such accusations and arrests is by itself a heavy penalty, especially for women. Many female prisoners are unable to provide surety or to get legal assistance, particularly when they have been imprisoned at the instigation of their own families. Despite this, courts nevertheless sometimes require women to bring surety of family members who are the complainant party.

At what price an acquittal?

We have to ask ourselves the human cost of these laws in terms of suffering, humiliation, and sheer injustice.

How many people have been caught up in the law, especially women? If they were acquitted in the end we have to ask ourselves: At what cost? Some were forced to leave their homes, even their cities, because the social condemnation, disgrace and humiliations of such a serious accusation could not be erased by a court acquittal.

Shahida Perveen

Shahida Perveen was sentenced to be stoned to death by a lower court on a complaint registered by her ex-husband after she re-married. She was finally acquitted after the FSC ordered a retrial in which the validity of her earlier divorce and subsequent marriage to Ghulam Sarwar was upheld. But the social problems Shahida and her husband faced were so severe that they were forced to cut all ties with their past and restart life elsewhere.

There was also Safia Bibi, Siani, Sukhan Rani... There are innumerable examples where people only got back their freedom after a protracted struggle supported by women and human rights organizations and legal assistance.

Doesn't the law of *qazf* operate as a check on false accusations of zina?

The law of *qazf* (bearing false witness) does not act as any deterrent. It is a weak law. It does not apply automatically and a separate case has to be instituted.

- The offence allows bail, and it is non-cognisable
- To register a case of *qazf* requires that the court finds that there is ground for such a case. (According Section 3 Second exception)
- Few women have the resources to initiate *qazf* proceedings

- The courts have ruled that during subsistence of the marriage, a husband cannot be punished on allegations of *qazf*

Unsurprisingly therefore, **prosecution for *qazf* is virtually nil - less than 1% of the number of *zina* cases despite the 95% rate of acquittal in charges of *zina*.**

We need to ask ourselves:

Were any of those who made a false accusation or registered a false case ever punished?

Did those women (and men) who spent several years in jail before eventually being acquitted by the courts receive any compensation?

The only solution is a repeal of these laws as recommended by the Commission of Inquiry in its 1997 report and in 2003 by the Special Committee of the National Commission on the Status Women.

The Commission of Inquiry for Women (1997) recommended repeal

“The Commission is convinced that all the Hudood laws were conceived and drafted in haste. They are not in conformity with the injunctions of Islam.

Secondly, these laws have come into direct conflict both with the country’s Constitution (such as of Article 25) and its international commitments (as made at the Fourth World Conference on Women at Beijing and under the UN Convention on the Elimination of All Forms of Discrimination Against Women).

Thirdly, in practical terms too, these laws have demonstrably failed to serve their purpose. They have not been any deterrent against crimes. And they have only led to proliferation of complaints in the courts, which, as it happens, have mostly been false or unjustified and have caused undue hardship.

It is necessary therefore that:

1. The Hudood laws are repealed

2. The repealed provisions of the Pakistan Penal Code, 1860, are re-enacted with an amendment to make marital rape a penal offence and to impose a severer punishment for rape on a minor wife
3. If the Parliament considers it necessary to make any further laws in this area, it should do so after serious debate and by reaching a consensus that the proposed laws are in accordance with the injunctions of Islam”

The National Commission on the Status of Women recommends repeal

The permanent National Commission on the Status of Women (NCSW) was established in 2000 to review all laws and policies affecting women and to make recommendations to eliminate discrimination. The NCSW appointed a 15-member Special Committee to review the Hudood Ordinances (1979). The Special Committee, that included ex-judges of the Supreme Court, High Courts, and Federal Shariat Court, religious scholars, representatives of the religious minorities, women and men lawyers and the Chairman of the Council of Islamic Ideology, reviewed each legal provision of the Hudood Ordinances clause by clause and concluded:

“This Special Committee, therefore, wishes to record that the Members of the Committee are unanimous in arriving at the conclusion that the Hudood Laws as enforced are full of lacunas and anomalies and the enforcement of these has brought about injustice rather than justice, which is the main purpose of enforcement of Islamic law. Consequently, by a majority this Special Committee recommends that all four Hudood Ordinances, 1979 should be repealed and the original law with regard to offences mentioned in these Ordinances be restored.” (Report on Hudood Ordinances 1979, 2003: Government of Pakistan, NCSW)

It is time to act to repeal these laws