

## **The Protection of Women (Criminal Laws Amendment) Act, 2006 – A Challenge to the ‘Divine Sanction’ in Pakistan?<sup>17</sup>**

Rubya Mehdi,<sup>18</sup>

Postscriptum: *Abdul Aziz Khan Niazi*<sup>19</sup>

### **Introduction**

The theme of this article is the process of creation of the Protection of Women’s Act (PWA) 2006, a legal instrument which is at the forefront of some positive indications regarding legislation on women’s rights in Pakistan. Despite the generally conservative social and legal environment for human rights in general, and women’s rights in particular, the reforms of 2006 show that Islamic legal processes are sites of negotiation of social orders. While laws may be contradictory, reflecting multiple interests and institutions, or even ineffective in protecting women, the process of reform demands serious analysis.

It is important to situate these reforms in the broader context of Islamic legal processes worldwide. As Law has been a major instrument used by Islamists for contesting the legitimacy of the secular state and society and for reconstructing the society according to their vision.

Moreover, this point not only to the liberal or conservative tussle discussed later in this article but also to contradictions within the state itself, where on one hand it claims to work for the protection of women and on the other hand takes away the protection through this or other similar clauses. The PWA 2006 is not the only example of the passing of “compromising” laws regarding women in Pakistan as there is a more recent example in the form of the Prevention of Domestic Violence Bill 2009. Prior to this domestic violence Bill, a woman abuse and harassment case was not legally recognised in Pakistan. In August 2009 the Domestic Violence Bill was set to become law<sup>20</sup>, a welcomed step to strengthen women’s human rights. However, the bill passed is far from satisfactory for the women and civil society of Pakistan. The following is the most objectionable section of the proposed bill: “Penalty for filing a false complaint: Whoever gives an application to the court containing information the commission of domestic violence which he knows “or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to fifty thousand rupees or with both” (section 25 Domestic Violence (Prevention and Protection) Act, 2009). The civil society in Pakistan fears that practically no aggrieved party, victim or complainant will ever file a case of violence against women for the fear of reactionary punishment or that they will be accused as under the *zina* ordinance.

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<sup>18</sup> HEC Visiting Professor, Gillani Law College Bahauddin Zakariya University Multan, Pakistan/ Senior Research Associate, University of Copenhagen.

<sup>19</sup> Advocate Supreme Court of Pakistan/Visiting Faculty Member, , Gillani Law College, Bahauddin Zakariya University Multan.

<sup>20</sup> Domestic violence, hidden in nature and considered as a private matter involves physical, sexual, emotional, social, economic and physical, sexual, emotional, social, economic and physiological abuse committed by a person. There is a need to provide legal mechanism for protection of victims of domestic violence inline with the provision of the Constitution of the Islamic Republic of Pakistan. To address this alarming issue a proposed Domestic Violence against Women and Children (Prevention and Protection) Bill, 2007 was being forwarded to the Cabinet for approval that was passed and has become an Act now in 2010.

Since 1972, seven countries Libya, Pakistan, Iran, Sudan, Northern Nigeria, United Arab Emirates and Kelantan (one of the federal states of Malaysia) have enacted legislation to re-introduce Islamic criminal law; Indonesia is in the process of passing similar laws on adultery, fornication and rape.<sup>21</sup> Saudi Arabia is the unique example of a Muslim country where application of Islamic criminal law has been in place without interruption by western influences.

In this context, recent developments in Pakistan require critical study, for it is the only country where steps were taken to reverse the controversial Islamization of the criminal laws dealing with adultery, fornication, rape, and the false accusation of these crimes. The need to study these reforms becomes even more important when considered from the perspective of reversing the enactment of Islamization of laws. While illustrating the process of reforming the above mentioned laws in Pakistan, this article argues that the reforms are half-hearted, feeble and full of lacunas.

### ***Hudud* Ordinances, Human Rights and Women**

Before the implementation of the *hudud* Ordinances in 1979, most of the laws, since 1947 in Pakistan, continued from the British period. Prior to promulgation of Ordinance, adultery was an offence under which if a man had intercourse with the wife of another person without his permission, within the meaning of Pakistan Penal Code such a person was required to be punished for adultery. Punishment for such adultery was imprisonment for a term which may extent to five years or with fine or with both as per section 497 of the Pakistan Penal Code, 1860. Women were not punishable for this form of adultery i.e. the offence of adultery did not prescribe any punishment for the female co-accused. The offense of adultery was "...only applicable to married men who had engaged in extra-marital sex with a married woman without the direct permission of her husband. Only the victim – the husband whose permission had not been sought - could file a complaint of adultery. Women could not file complaints against their husbands nor could they themselves be charged with adultery" (Chadbourne 2001: 12). Moreover adultery was a matter for private complaint and did not leave the police free to take action. It was a bail-able offence and the complainant could withdraw the allegations. As far as the fornication was concerned it was not regarded as crime at all. Both these acts were made crimes and made punishable under *zina* ordinance 1979. These are again made punishable under Pakistan Penal Code by way of Criminal Law Amendment (Protection of Women) Act 2006.

The enactment of the *zina* ordinance all Pakistan Penal Code sections which dealt with adultery and rape, replacing it with the new law prescribed in the ordinance itself. Despite its failings as legal instrument, the great significance of the Protection of Women Act (PWA) of 2006 is that ironically it has shattered the myth of the infallibility of *hudud* ordinances by initiating an amendment. The "myth of infallibility" has its roots in the whole doctrine of *hudud* (singular: *hadd* meaning limit) which points towards specific offences like drinking of alcohol, theft and unlawful sexual intercourse, etc. for which

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<sup>21</sup> Indonesia's province of Aceh has passed a new law that imposes severe sentences for adultery, rape, homosexuality, alcohol consumption and gambling. The legislation was passed unanimously by Aceh's regional legislature. The law will be effective in 30 days with or without the approval of Aceh's governor. However, the latest news is that the national government of Indonesia may review this new law.

limits and fixed punishments have been defined in the Quran and tradition of the Prophet. Another element has been added to this definition is that *hadd* crime is a violation of a public interest (deterrence from acts that are harmful to humanity) which is differentiated from claims of men like homicide and wounding which requires retaliation. Sentences for *hadd* crimes are regarded as fixed by God and therefore considered to be immutable and infallible.

The Muslim jurists have claimed that the corporal strict punishments are not meant to be implemented but exist only as a warning or rhetorical device while people should not be punished with fixed but discretionary punishments (*tazir*). The fact that *hadd* punishments are not meant to be implemented is reflected in the difficult standard to obtain a conviction under *hadd*. This is achieved by 1) the strict rules of evidence for proving these crimes 2) the extensive opportunities to use the notion of uncertainty as a defence; and 3) defining the crime very strictly, so that many similar acts fall outside the definition and cannot be punished with fixed penalties, but only at the *qadi's* discretion (*tazir*) (Peters 2005: 54-55).

On the other hand the *hudud* laws were enacted in the form of "ordinances" in Pakistan by the military regime of General Zia ul-Haque, with the wider message that these laws were immutable as they are given by God and God's laws can not be changed. The salient feature of the law of *hadd* crimes was completely overlooked in Pakistan that they are there not for implementation but for deterrent purpose and a very high standard was to be met before its implementation. In Pakistan as well as some other Muslim countries the corporal punishments are widely employed for transgressions of norms of personal conduct and honesty with regard to sex, alcohol and property. They have been controversial because of the corporal nature, unequal application especially with regard to women, and their reliance on accusation by another person that is not always verifiable. Since its implementation in some Muslim countries where it has made women victim of these laws it has not only become controversial within the Muslim countries but also it has become a symbol of Islam as a repressive religion.

In Pakistan the various regimes have been reluctant and resistant to redress legal injustice created by the *hudud* ordinances. Even the so called 'democratic' governments (Pakistan Peoples Party and Pakistan Muslim League – Nawaz group) took no steps to remove these laws from the statute books because of the fear of right wing parties. This was the reason that in spite of serious concern for women the *zina* Ordinance has been the law in Pakistan for 27 years. *Zina* is the offence of illicit sexual relations i.e. sexual intercourse between persons who are not married to each other. This term includes adultery, fornication, prostitution and homosexuality.

PWA 2006 was initiated under the military regime of Pervaiz Mushraf promulgated in order to redress the legal injustices that were created by the *zina* Ordinances. It took almost a full year for the Women Protection Act 2006 to pass. It was not an easy process to draft and propose the PWA 2006. During the process, many compromises were made with the conservative viewpoints, and therefore, the PWA 2006 has been able to address only some aspects of the glaring injustice and discrimination meted out to women. Many other reforms are left out in the process of compromises.

### **A Brief Introduction to *hudoon* Ordinances**

The *hudoon* ordinances were introduced in 1979 by General Zia ul Haq during his drive for Islamization in Pakistan. On 9<sup>th</sup> February 1979, five presidential decrees were enacted that included Offences against Property (Enforcement of *hadd*) Ordinance, 1979; Offences of *Zina* (Enforcement of *hadd*) Ordinance, 1979; Offences of *Qazf* (Enforcement of *hadd*) Ordinance, 1979; Prohibition (Enforcement of *hadd*) Ordinance, 1979. The last ordinance marks the execution of the Punishment of Whipping Ordinance, 1979, that set out the procedure for public lashing. This was repealed in 1996 by the Abolition of Whipping Act, that abolished whipping for all offences except those mentioned in the 1979 *Hudoon* Ordinances (Peters 2005: 156). These laws were drafted under the guidance of Ma'ruf al-Dawalibi who was adviser to the king of Saudi Arabia (Interview Justice Majida Rizvi July 2008).

It should be noted that previous to Islamization of laws, inherited pieces of legislations (Pakistan Penal Code of 1860, The Criminal Procedure Code of 1989 and the Evidence Act of 1872) from the British colonial rule have been the statutory basis of the criminal law of Pakistan. In the civil law side, the Muslim Family Laws Ordinance 1961 was a progressive piece of legislation. This legislation reaffirmed the reforms made during the British rule in India and made further reforms. The Muslim Family Laws Ordinance before and after its enactment has been challenged by the Islamists and during the Islamization of 1979, it again became a point of opposition. The civil society and progressive women consider the period of Islamization as two steps backward for women's rights in Pakistan (Mumtaz, Khawar and Farida Shaheed 1987).

Immediately after Islamization in Pakistan, judicial institutions were set up to support/implement the new legal framework. In 1980 a Federal Shariat (Shari'a) Court (FSC) was established to hear appeals in *hudud* cases. Later a Shariat (Shari'a) Court was also granted the jurisdiction to strike down laws found to be repugnant to Islam and to lay down guidelines for Islamizing the law under review.

The offences of *zina* (Enforcement of *hadd*) ordinance, 1979, and offences of *qazf* (false accusation of *zina*) (Enforcement of *hadd*) ordinance, 1979, were the two ordinances which dealt with sexual crimes. All sex outside of marriage was made a serious penal offence punishable with heinous punishments under the *zina* ordinance, while false accusations of *zina* (sex outside of marriage) were made punishable under the *qazf* ordinance. The important impact of PWA in 2006 reforms and amendments was made in offences of *zina* (Enforcement of *hadd*) ordinance, 1979, and in offences of *qazf* (Enforcement of *hadd*) ordinance, 1979. All the other ordinances remain un-amended. Now the question is: What made it possible to amend these two ordinances? Or what was the problem with the *zina* (Enforcement of *hadd*) ordinance 1979 and *qazf* (Enforcement of *hadd*) ordinance, 1979?

*Zina* ordinance is an extremely important law, both for those who favour its implementation and opponents because:

- 1) The worst thing in the *zina* Ordinance was that if a woman reported a case of rape she was prosecuted for adultery.
- 2) Pregnancy as a basis for conversion of rape claims against women
- 3) Stigma of being charged with *zina* leaves no place for a woman to live in a Pakistani society, especially rural

- 4) 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

There were various problems in the substantive as well as the procedural parts of *zina* ordinance. In their practical application, in Pakistan as elsewhere, these laws have been used in fact to deny women access to justice, further victimize them and exert extreme gendered inequalities in the social regulation of sexuality.

The offence of rape provided by the pre-*zina* ordinance under PPC (Pakistan Penal Code) was identical to *zina-bil-jabr* under the *hudoood* ordinance<sup>22</sup>. The old law of rape was given in section 375 of the Pakistan Penal Code. It read as: "A man is said to commit rape that, except in the cases hereinafter accepted, has sexual intercourse with a women under circumstances falling under any of the following description. First, against her will. Secondly, without her consent and thirdly, with her consent when her consent has been obtained by putting her in fear of death, or of hurt. Fourthly, with her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly, with or without her consent, when she is under (fourteen) years of age. Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Exception: Sexual intercourse by a man with his own wife, the wife not being under (thirteen) years of age is not rape." As is said before that it was fairly similar to *zina* ordinance law with three exceptions. The *zina* ordinance did not have a marital rape provision which was provided under the PPC as forced intercourse, even when it was said to have occurred within the context of a valid marriage. Under the PPC sex consensual or non-consensual, even within marriage with girls under the age of fourteen was considered as rape which was not the same under *zina* ordinance. Lastly only the men could be charged for rape under the PPC while *zina* ordinance permits accusation of rape against both men and women.

Now let us look at the problems that occurred under the *zina* ordinance. First, the rape or sex without consent (*zina bil jabr*), and adultery or sex with consent (*zina bil raza*), were placed on the same footing subjecting both to the same kind of proof and punishment. This invariably has facilitated abuse where a woman who failed to prove the crime of rape was often prosecuted for *zina*. The requirement of proof for the maximum punishment of rape (*zina bil jabr*) being the same as that for sex with consent (*zina bil raza*). The victim of rape had to produce four pious, honest, upright (who meet the requirements of *tazkiya ash-shahud*) and adult male Muslim witnesses to prove the offence; in reality it was impossible for a victim of rape to prove her case against the perpetrators. As no rapist would commit the crime in front of four male witnesses, moreover men rarely speak out against other male members of a community.

The major issue for judicial process is verification of a woman's rape accusation. Other issues include ambiguity in what is allowed, and in the definition of marriage.

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<sup>22</sup> Asifa Quraishi has strongly criticised the identical element of PPC and *zina* ordinance regarding the law of rape, She says: "Did the Pakistani legislators, in writing the *zina-bil-jabr* law, simply relabel the old secular law of rape under the Muslim heading *zina* (as *zina* by force-*jabr*), and re-enact it as part of the *hudoood* Islamization of Pakistan's laws-right along with the four-witness evidentiary rule unique to *zina*? If so, this cut-and-paste job, albeit a well-intentioned effort to retain rape as a crime in Pakistan's new *hudoood* criminal code, reveals a limited view of Islamic criminal law which, as illustrated, ultimately harms women" (Quraishi 1997: 303)

Where a case of rape against a man had failed for dearth of required proof but sexual activity was confirmed by medical examination or on account of pregnancy or otherwise, the woman was punished for *zina* her complaint, at times, was deemed a confession. As a result, in a vast number of cases victims of rape were imprisoned and punished under accusations of *zina*. In other cases the women were punished for *zina* not as *hadd* - four pious male eye witnesses were not made available by the victim of rape- but as punishment of *ta'zir*. *Ta'zir* is the discretionary power of a Muslim judge which he can use for offences where *hadd* or fixed punishment does not apply. In some cases, her complaint, at times, was deemed a confession. As a result, there were a vast number of cases where victims of rape were imprisoned and punished under accusations of *zina*. After the promulgation of this ordinance women had become more reluctant than before to bring a case of rape into court. View the following example of two famous cases that illustrates the nature of the problems faced by women victims of sexual abuse.

In 1982, fifteen-year old Jehan Mina became pregnant as a result of a reported rape. Lacking the testimony of four eyewitnesses that the intercourse was in fact rape, Jehan was convicted of *zina* on the evidence of her illegitimate pregnancy.<sup>23</sup>

A similar case came later in 1982. Safia Bibi was a blind girl who became pregnant as the result of a rape. Her father registered a case of rape against her employer and employer's son. The two men were acquitted due to lack of evidence while Safia was found guilty of illegal sexual relations on account of her pregnancy. Her bringing the case to the court was taken as a confession of Safia's crime. She was sentenced to three years imprisonment, fifteen lashes in public, and a fine of 1,000 rupees. Safia was sentenced while she was pregnant; later, her child died in jail soon after birth.<sup>24</sup> An other similar type of case is that of Zafran Bibi who was sentenced to be stoned to death. She accused a person for raping her as the result of which she became pregnant. She herself was married however her husband was in prison. The accused was acquitted for want of evidence while the trial court found her pregnancy a conclusive proof of her guilt. However on appeal, the Federal Shariat Court acquitted Zafran Bibi also because of the fact that legitimacy of the child was accepted by her husband.<sup>25</sup>

It should be noted that there are a number of cases where a subordinate court convicted a woman who came with a case of rape on the basis of her pregnancy; however, such convictions were often set aside by the superior judiciary. Moeen H. Cheema, a professor of law says: "Repeated errors by the trial courts are due in part to the continuing inability of the Federal Shariat Court (FSC) to harmonise its jurisprudence. The FSC has continuously failed to refer to its own previous judgements, indicating that the relevant precedents have not been widely publicised, studied and brought to the court's attention by advocates" (Cheema 2006).

<sup>23</sup> Jehan Mina v. The State, PLD 1983 Fed. Shariat Ct. 183

<sup>24</sup> Safia Bibi v The State PLD 1985 FSC 120, Safia Bibi v The State PLD 1986 SC 132.

<sup>25</sup> Mst. Zafran Bibi v The State PLD 2002 FSC 1.

However another writer has articulated the matter more forcibly: “But what is more unsatisfactory is that despite the consistent pattern of reversals and admonishment by the appellate courts, the trend continues unabated as does the human suffering it entails. Complete disregard for basic human rights and social implications for the accused is the repetitive trend emerging from this research.<sup>26</sup> The constant stream of appeal cases where women’s reputation are tarnished forever for being implicated in *zina* is made all the more stark where the male co-accused is acquitted for want of evidence while the woman is convicted for her pregnancy” (Ali, 2007: 398).

There are also examples of cases such as *Sakina v The State*<sup>27</sup> the court reversed the conviction for *zina* because in the absence of proof of her consent, she could not be held to have committed the offence of *zina*. These examples illustrate, among other things, that a penal statute must be clear and unambiguous. The object of enforcing an Act is to protect the unwary and unsuspecting citizens from unwittingly falling foul of penal laws. Instead of marking the boundaries between the permitted and the prohibited with clarity, the *zina* (Enforcement of *hadd*) ordinance, 1979, was ambiguous.

Another problem with the *zina* Ordinance was that it defined "marriage" only as a registered marriage while in most rural areas in Pakistan, both *nikahs* and divorces may not be registered. This makes it difficult for a person charged with *zina* to establish "valid marriage" as a defence. Non-registration has its civil consequences that are sufficient; and, failure to register a *nikah* or a divorce should not entail penal consequences. Similar issues are faced by women where a triple divorce or *talaq* was verbally pronounced. In such cases, the woman was made to return to her parental home. She went through her period of *idda* the standard period of time, which is usually three months, during which a woman should not remarry after divorce or death of her husband. The family arranged another match; and, the woman was to be re-married. Often at this point, the ex-husband came forward to claim that she was still his wife. Here, the local authorities do not confirm the divorce providing grounds for the ex-husband to launch a *zina* prosecution.

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 had made it an instrument of oppression in the hands of vengeful former husbands and other members of society.

One of the procedural problems with the *zina* ordinance was that arrest warrants were issued when a complaint was filed with the police. This is why a large number of women complainants were imprisoned without any proof of their guilt. Many were accused by their annoyed husbands, fathers or brothers on account of the woman’s desire to marry according to her own choice. In one case, for example, an FIR (First Information

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<sup>26</sup> Rashid Ahmed v The State 1996 PCrLJ 612; Asghar Ali v The State 1996 PCrLJ 1678; Lala v The State PLD 1987 SC 414 (Shariat Appellate Bench); Abdul Majeed v Ghulam Yaseen 1997 PCrLJ 896 (Federal Shariat Court); Ayoob and 8 Others v The State 1996 PCrLJ 642 (Federal Shariat Court); Major Nasir Mehmood and another vs State and 9 Others 2002 PCrLJ Lah 408.

<sup>27</sup> *Skina v The State* FSC

Report) was registered by the father against his daughter and her husband for the crime of *zina* to punish his daughter who had married a man of her own choice.<sup>28</sup>

The offence of *qazf* Ordinance, passed together with *zina* ordinance which was promulgated by general Zia ul Haque as a safety valve which punishes against the false accusation of *zina* was weak and ineffective.

Comparative overview of *zina* (adultery & fornication) and rape in The offence of *zina* (Enforcement of *hadd*) Ordinance 1979

Division of offender into <i>Muhsan</i> (married) and non- <i>Muhsan</i> (unmarried)	Proof for <i>zina</i> and rape liable to <i>hadd</i> (Punishment for offences fixed by God)	Punishment for <i>zina</i> and rape liable to <i>hadd</i>	Proof for <i>zina</i> and rape liable to <i>tazir</i> (Punishment of offences not fixed by God)	Punishment for <i>zina</i> and rape liable to <i>tazir</i>
<b><i>Zina</i> (Consensual sex)</b>				
<i>Muhsan</i> Married offender (adultery)	Proof for <i>zina-hadd</i> a) Confession of the crime b) Four truthful adult male Muslim eye-witnesses	Punishment for <i>zina-hadd</i> Stoning to death at a public place	Proof for <i>zina-tazir</i> No standard of proof is provided; at the discretion of the judge	Punishment of <i>zina-tazir</i> ; A maximum of 10 years imprisonment, 30 lashes & a fine
Non- <i>muhsan</i> Unmarried offender (fornication)	Proof for <i>zina-hadd</i> a) Confession of the crime b) Four truthful adult male Muslim eye-witnesses	Punishment for <i>zina-hadd</i> One hundred lashes at a public place	Proof for <i>zina-tazir</i> ; No standard of proof is provided; at the discretion of the judge	Punishment of <i>zina-tazir</i> ; A maximum of 10 years imprisonment, 30 lashes & a fine
<b><i>Zina bil jabr</i> (rape)</b>				
<i>Muhsan</i> Married rapist	Proof for Rape- <i>hadd</i> a) Confession of the crime b) Four truthful adult male Muslim eye-witnesses.	Punishment for Rape- <i>hadd</i> Stoning to death at a public place	Proof for Rape- <i>tazir</i> : No standard of proof is provided; at the discretion of the judge.	Punishment of Rape- <i>tazir</i> imprisonment for not less than 4 & not more than 25 years & 30 lashes

<sup>28</sup> Mst Humaira Mehmood v. The State (PLD 1999 Lah 494). Also see Lubna and others v. Government of Punjab (PLD 1997 Lah 180) and Qaiser Mehmood v. M Shafi and another (PLD 1998 Lah 72).



Non- <i>muhsan</i> Unmarried rapist	Proof for Rape- <i>hadd</i> a) Confession of the crime b) Four truthful adult male Muslim eye- witnesses.	Punishment for Rape- <i>hadd</i> One hundred lashes at a public place and other punishments including death sentence	Proof for Rape- <i>tazir</i> : No standard of proof is provided; at the discretion of the judge.	Punishment of Rape- <i>tazir</i> imprisonment for 25 years and 30 lashes
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### Reforms Implemented Prior to the Promulgation of Women Protection Act 2006

President Prevaiz Mushraf promulgated the Code of Criminal Procedure (Amendment) Ordinance 2006, followed by the passing of PWA 2006. An amendment to section 497 of the Code of Criminal Procedure entitled a bail in non-bailable cases with the exception of some offences. As a result, 1, 200 women were released from prisons across the country following a Presidential Order. On 8<sup>th</sup> of July 2006 the ordinance amended the Criminal Procedure Code so that a bail became the right of a woman accused of any crime except that involvement in terrorism, financial corruption and murder or a crime punishable with death or a minimum of 10-year imprisonment. A famous human rights jurist, Asma Jahangir says: “Both the government and the right – wing religious parties have expediently seized upon the PWA to lend weight to their populist agendas. The government has finally shown a plausible accomplishment to justify its claim of pursuing an agenda of ‘enlightened moderation’ (Jahangir 2006:6).

The fact is that the government used this event for political purposes rather than making it beneficial for women prisoners. It was a dramatic event where ceremonies were held in prisons for women who were to be released; and they were presented with clothes, bangles and sweets yet they received pittance for money in the name of allowance to begin new lives. Moreover, and more dangerously, families and the larger society were not sensitized to the needs and safety of the released prisoners. However, this was a good political strategy for Mushraf and his regime trying to win popularity by showing concern for thousands of women sitting in prisons some with their small children and awaiting justice. Since the *zina* ordinance was passed, the injustice it created was taken up by civil society, human rights activist, lawyers, and artist and writers. It has been the theme of many theatre plays and films but no change has been brought. Suddenly this act of Mushraf also shocked many that how to give credit to a military dictator for at least “partially reversing” the affects of *zina* ordinance.

In most cases, the released women refused to go back to their homes because of the fear of retribution, death or other difficulties that they were likely to face in a society that had earlier rejected them or was incapable of protecting them. A majority of such women were eventually handed over to the women crisis centres (*Darul Aman*: house of protection) as the stigma of being charged with *zina* leaves no place for a woman to live in Pakistani society, especially rural. It must be noted that a large majority of cases that were filed under the original *hudood* laws were filed by the close relatives of women that included parents against whose will the women had chosen to marry or husbands who wanted to get rid of their existing wives to re-marry. Such parents or husbands are known

never to visit imprisoned women, so it was highly unsafe for women to return to their families, and the larger society that had punished them with their own rules of ‘honour’ and revenge. Indeed there are examples where women were murdered by their families upon their return from the prison.<sup>29</sup>

### What has the PWA 2006 done?

As is mentioned above, the Protection of Women Act 2006 has amended only two ordinances of *zina* and *qazf* while the remaining ordinances are still practiced in their original form. The worst thing in the *zina* ordinance was that if a woman reported a case of rape she was prosecuted for adultery. This has been stopped by the PWA 2006 through clear differentiation between *tazir* and *hadd* in the *zina* ordinance. All the clauses from section 11 to section 16, and some others dealing with kidnapping, abduction, prostitution, and buying/selling of women were omitted or taken away and added to the Pakistan Penal Code (PPC). These sections were a part of the PPC prior to 1979, and they have been restored back to the PPC.

The procedural changes introduced relate mainly to the procedure of filing a complaint for *zina* in order to discourage false accusation. Previously when a complaint was filed with the police, arrest warrants were issued. Now summons are issued so that, unless and until the crime is proved, no one is sent to the prison. Now through section 203(a) (b) and (c), the jurisdiction of the police has been taken away; and any complaint regarding *zina* or *qazf* has to go to the District or Session judge along with the statement of the four witnesses. If the judge finds that the complaint is genuine, only then the application is accepted, and summons are issued for arrest. This is a great relief for women, as previously any women could be accused of *zina* and put into prison until the case came to the court. Now women can no longer be arrested and imprisoned on mere accusations. As a result, false accusations of *zina* against women have dropped dramatically.

By contrast, the *qazf* ordinance has been amended in a slipshod manner and effectiveness of change is yet to be tested (Jahangir 2006a: 10).

Comparative Overview of reforms introduced by the Women Protection Act 2006

Ordinance	Crime	Hadd: Proof & Punishment	Tazir: Proof & Punishment	Protection of Women Act Impact
The Offence of <i>Zina</i> (Enforcement of <i>Hadd</i> Ordinance 1979)	1) <i>Zina</i>	<i>Zina-Hadd</i> ; Proof: a) confession b) four truthful adult male Muslim	<i>Zina-Tazir</i> ; Proof: No standard of proof is provided; at the discretion of the judge. Punishment: 10	1) All offences except <i>hadd</i> punishment for <i>zina</i> moved to PPC 2) Made punishment for <i>zina</i> liable to <i>Tazir</i> punishable up to 5 years and made it bailable

<sup>29</sup> This amendment to the Code of Criminal Procedure invites another criticism where it is feared that the drug mafias are now using more women for drug peddling because a woman can get a bail within days of her arrest.

		eye-witnesses. Punishment: 100 lashes for minors & stoning to death for adult married people	years imprisonment, 30 lashes	
	2) <i>Zina bil jabr</i> (rape)	<i>Zina bil jabr</i> (rape) Same as above	<i>Zina bil jabr</i> (rape) Imprisonment for not less than 4 & not more than 25 years & 30 lashes	1) <i>Hadd</i> punishment for rape repealed 2) All sexual act of penetration against females under 16 years to be considered rape 3) Marital rape becomes an offence 4) complaints of rape cannot be converted into charges of <i>zina</i>
	3) Kidnapping, abducting or inducing women to compel for marriage		Life & 30 lashes	Removed under Pakistan Penal Code
	4) Kidnapping or abducting in order to subject person to unnatural lust		25 years & fine	Removed under Pakistan Penal Code
	Selling person for the purposes of prostitution		Life and 30 lashes	Removed under Pakistan Penal Code
	Buying person for the purposes of prostitution		Life and 30 lashes	Removed under Pakistan Penal Code
	Cohabitation caused by a man deceitfully inducing a belief of lawful marriage		Imprisonment of 25 years & 30 lashes	Removed under Pakistan Penal Code
	Enticing or taking away or detaining with criminal		Imprisonment of 7 years & 30 lashes	Removed under Pakistan Penal Code

	intent a woman			
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### **Is PWA 2006, A Step Forward to Strengthen Women's Human Rights in Pakistan?**

The question that occupies my mind is as follows: Is there, or can there be, any step forward on the path to strengthen women's human rights while the country is ravaged by terrorism and Islamism on one hand, and is tormented by the worst form of economic crisis on the other. Amid this chaos, there seems to be steps taken for women in a positive dimension. This section presents an evaluation of these reforms.

The PWA 2006 is an important step in minimizing the damage done by General Zia's Islamization drive. However, the Act retains the overall frame work introduced by Zia. This is an unsatisfactory situation as women's rights activist have advocated that the ordinances should be totally repealed. Justice Majida Rizvi, who is known as pro-women's rights, points to the following three major shortcomings in the Protection of Women's Act of 2006 (Justice Majida Rizvi 2008).

Firstly, the definition of "adult" is the same as it was in the *zina* ordinance where a female adult is either 16 years of age or has "attained puberty". This is in contradiction with other prevalent laws of the country, for example, the age of majority under the family laws is 16 for females and 18 for males whereas the Majority Act prescribes the age of majority for males and females as 18 years. Moreover, The Act also does not distinguish between juvenile and adult offenders under its definition of "fornication".

Secondly, Women Protection Act 2006 retains legal discrimination against religious minorities whose status as witnesses under the *hudoood* ordinances has been retained and cases of *hudoood* offences cannot be heard by non-Muslim judges. In other words, the Protection of Women Act continues to discriminate against minority population groups who are not treated as equal citizens.

Thirdly, the PWA 2006 retains the corporal *hadd* punishment of stoning to death. Though stoning to death is never executed in Pakistan and the only punishment which in fact has been practised is lashing, but the fact that corporal punishment is in the statute books is a matter of grave concern. In the words of Asma Jahangir "Their endorsement justifies Zia's Islamization process and more importantly leaves the temptation for the orthodoxy to agitate for their implementation at an appropriate moment in time (Jahangir, 2006a and 2006b:9).

The steps taken by the PWA 2006 for improving the situation of women are very feeble. The laws passed are full of loopholes and lacunas. The enactment of the PWA 2006 gives rights with one hand and takes them back with another. Still in the PWA 2006 efforts are at least made to improve the situation of women. The main reasons for creating and instituting such feeble laws may lie in the strong tussle between the liberals pushing for reforms, and the conservatives bidding to block those reforms. There are various additional categories that have contributed to the liberal forces in this process but are not represented in the mainstream politics of the country; among them are the

secularists who demanded an outright repeal of the *hudood* Ordinances (Bari 2004, 2006). This resulted in half hearted reforms with compromises.

It should be noted that the civil society demanded the complete repeal of the ordinance. There were also clashes between the government and *Muttahida Majlis-i-Amal* (MMA) “United Front for Action”, - a coalition of religio-political parties representing the conservatives and the clerics -, who opposed it, that began when the government gave indications of considering to repeal the laws; and, ended with efforts to create a ‘consensus’ on amendments. The Pakistan Peoples Party, The Awami National Party and the *Muttahida Qaumi Movement* (MQM) “United National Movement”, - a middle of the road political party representing middle class based in urban areas of Sindh province – were all in favour of the original draft of the amendments (Criminal Law Amendment (Protection of Women) Bill 2006) proposed by the Select Committee. It should be remembered however, that after the draft bill was finalised by the Select Committee appointed by the Parliament, the government agreed to go for another round of negotiations and amendments through an extra-parliamentary forum.

This is the main reason why the ‘civil society’ of Pakistan blames the government for giving such liberty and license to the conservative viewpoint represented by right wing parties to meddle with the parliament-approved proposed amendments. It should also be remembered that NGO’s supporting right wing parties also built pressure through protests and demonstrations against the passing of PWA 2006 Bill. Their protests contributed in creating a situation of uncertainty among the general public. The right wing though, not represent the popular opinion especially on the PWA Bill 2006 but the right wing parties were to a certain degree successful in hijacking the process of consultation.

This points not only to the liberal/conservative tussle discussed earlier but to contradictions within the state itself, where on the one hand it claims to work for the protection of women and on the other takes away the protection through this or another similar clause.

### **Postscriptum:**

This article was finalised in 2008. Following are some comments of a practicing advocate, Abdul Aziz Khan Niazi, regarding the working of laws on rape, adultery and fornication since the years PWA 2006 was passed.

Though in newly created/amended law (PWA), almost litigation regarding Offences of *zina* has become a closed chapter but still as far as abuse of newly created law is concerned, practically police institution still has the heavy hand and as far as concerned judicial officers are concerned, there is likelihood that numerous cases be ended not in the manner providing the same protection to the women which has been claimed through change in law and reason for the same shall be the ambiguity which is merged in stepping stone of said law.

The law for the time being in force regarding rape, fornication and adultery is confused one. The demarcation in between these offences is so thin in practice that when a woman comes into court with a case of rape there is every likelihood firstly that she shall be humiliated within the people of vicinity as well as in the society as a whole and

secondly she might herself be convicted of fornication or adultery because of lack of evidence. The onus of providing the proof in case of rape finally rest with a woman herself. The presence of injury on the outer and inner side of the body of the victim i.e. female is a condition precedent to admit her deposition trustworthy and in this regard she is medically examined and in case medical officer do not observe any injury on thighs, legs, back and her buttocks she has no proof that she was raped by male as she was bound to sustain injuries like bruises, contusions, scratches or abrasions on different parts of her body as she was supposed to put up resistance. Her torn clothes and other injuries are also an important element in a case of rape. Therefore, actual physical violence is considered a proof by legal practitioner as well as the trial courts otherwise a rape victims fails to prove that she was raped and had gone through sexual intercourse to which she was not a consenting party.<sup>30</sup> “This stereotypical concept of women supposes that if a woman does not struggle against a sexual assault, then she must be a sexually loose woman – justifying a conversion of the charge to *zina*. This attitude unfairly generalizes human reaction to force and the threat of violence. And, this generalization works to the detriment of women who have been subjected to a rapist’s attack and survived only by submitting without physical resistance” (Quraishi 1997: 304).

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