

**The Rights of the Accused in *Zina* cases in Islamic and Pakistani Law  
with Special Reference to Apex Courts Judgments: A Comparative  
Study**

A thesis submitted in partial fulfilment of the requirements of the degree of  
**LLM (SHARIAH AND LAW)**



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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

## **DEDICATED TO**

I dedicated this thesis to my beloved parents, for their endless love, without their unwavering support, patience, understanding and most of all love and encouragement, the completion of the work would not have been possible.

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**Approval Sheet**

We hereby confirm that we have examined the dissertation titled “**The rights of the accused in *Zina* cases in Islamic and Pakistani Law with special reference to Apex Courts judgments: A Comparative Study**”, submitted by Numra Maryyam, Reg. no.59/FSL/LLMSL/F21 as part of the requirements for the LLM in Shariah and Law, has been reviewed and assessed by us. The thesis demonstrates that it fulfills the core and quality standards necessary to qualify for the degree.

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## DECLARATION

I, **Numra Maryyam**, solemnly declare that this dissertation is my own original creation and has never been submitted elsewhere for any degree. I, Moreover, confirm that all external sources used in this work has been properly referenced.

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Date:                              \_\_\_\_\_

## **ACRONYMS**

**CLC** Civil Law Cases

**Cr.PC** Criminal Procedure Code, 1898

**HZO** Hudood (Zina) Ordinance

**MLD** Monthly Law Reports

**NCSW** National Commission on the Status of Women

**PCr.LJ** Pakistan Criminal Law Journal

**PLD** Pakistan Legal Decisions

**PPC** Pakistan Penal Code, 1860

**QO** Qazf Ordinance

**QSO** Qanoon-e-Shahadat Order, 1984

**SCMR** Supreme Court Monthly Review

**WPA** Women Protection Act

**YLR** Yearly Law Reports

## **ACKNOWLEDGMENTS**

Praise belongs to Allah alone, the Sustainer of all creation, the Source of Mercy and Compassion, the Most Merciful, and may His infinite blessings and peace be upon Muhammad, the final Messenger and seal of the Prophets.

Completing this thesis has been a challenging yet enriching journey, and my heartfelt thanks go out to all those who supported me during this challenging journey.

My foremost thanks go to my supervisor, Dr Hamidullah Rizwan, Assistant Professor of Law at IIUI, for their wise counsel, constructive feedback, and tireless inspiration. Their profound knowledge and enduring patience were pivotal in guiding this study, for which I am eternally grateful.

It is indeed my pleasure to thank Prof. Dr. Muhammad Zia ul Haq, Director General of the Islamic Research Institute (IRI) at the International Islamic University, Islamabad (IIUI). He also serves as a dean of faculty of Shariah and Law. And also thank to other faculty members of the department from whom I have benefited in one or the other way.

In addition, most importantly, I owe an immeasurable debt of gratitude to my Parents and Siblings for their endless support, sacrifices, and prayers, which have been a key factor in my achievements. Their love and encouragement have been my greatest strength.

My sincere thanks to Dr. Muhammad Akbar Khan for their valuable guidance, encouragement and moral support and was also proving beacon for me whenever I found myself stuck into darkness of ignorance.

I owe the successful completion of this research only through the combined efforts of my dedicated teachers and constant encouragement from my family.

May Allah bless them. Ameen.



## Abstract

Despite the severe nature of *zina* offenses in *Islamic* jurisprudence, existing Pakistani legal frameworks reveal critical gaps in safeguarding the rights of the accused. While classical *Islamic* law mandates rigorous evidentiary standards and incorporates the doctrine of *shubhah* (doubt) to prevent unjust convictions, the implementation of these protections in Pakistan has been inconsistent. The 1979 *Hudood Ordinance*, introduced under General Zia ul Haq, criminalized all extramarital relations without initially distinguishing between rape (*zina bil jabr*) and consensual adultery, leading to gross miscarriages of justice, particularly against women. Although the Women Protection Act of 2006 made significant amendments, including shifting rape cases to the Pakistan Penal Code, issues surrounding evidentiary requirements, judicial discretion, and legislative clarity continue to compromise due process. This research identifies the pressing need to examine the disjunction between *Islamic* legal principles and Pakistan's hybrid legal system, particularly in the context of protecting accused individuals in *zina* cases. This study adopts a qualitative, doctrinal legal research approach, combining comparative legal analysis with interpretative methods from *Islamic* jurisprudence. Primary sources include classical *fiqh* texts from all major *Sunni* schools of thought, alongside statutory instruments such as the *Hudood Ordinances*, Pakistan Penal Code, and the Women Protection Act of 2006. Case law analysis is conducted to evaluate judicial behavior and application of the doctrine of *shubhah*. The study also assesses secondary data, including legal commentaries, scholarly works, and human rights reports, to contextualize the implications of procedural shortcomings. By juxtaposing *Islamic* legal theory with the Pakistani judicial system, the research aims to evaluate whether the rights of Rights of the Accused in *Zina* Cases: An *Islamic* and Pakistani Legal Perspective the accused are adequately protected under both paradigms. The findings indicate a clear tension between *Islamic* legal protections-such as the presumption of innocence, high evidentiary thresholds, and the concept of *shubhah* and the way *zina* laws are practiced in Pakistan. Judicial inconsistency, disregard for doubt, and failure to incorporate forensic methods contribute to wrongful prosecutions and convictions. The study concludes that reforms are urgently needed to bridge the gap between theory and practice. Key recommendations include: enforcing stricter evidentiary standards through forensic tools like DNA, mandating judicial training in classical *Islamic*

jurisprudence, and revising Hudood laws to ensure greater legislative clarity and alignment with Quranic injunctions. The practice of granting bail in zina cases-though permissible in Pakistani law-should be re-evaluated in light of Shariah principles, particularly in light of precedent cases like that of Maiz. The research ultimately advocates for a more balanced legal structure that preserves justice, protects the accused, and aligns with both Islamic values and modern human rights standards. Still in Pakistan, bail is granted to accused person in *zina* cases.

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## 1. Thesis Statement:

The Constitution of Pakistan, 1973 guarantees that no law shall be made repugnant to the injunctions of *Quran* and *Sunnah*, as well as the interpretation of the courts, Pakistani law related to accused in *zina* cases is debatable in the context of doubt (*Shubha*) and the Apex courts judgments related to the issue as mentioned earlier are questionable in the context of compatibility and non-compatibility with Islamic Law, so there is an immense need to analyses.

## 2. Introduction:

The term “*Hadd*” comes from Arabic language, the plural of which is “*Hudood*”, which means “to fixed” or “to limited”. Technically *Hadd* is a punishment of a specific acts which have been forbidden or sanctioned by the punishment of the *Quran* and have become a crime against religion. Literal meaning of *hudood* is “limits”, *Hudood* ALLAH: “the limits of Allah”: In other words, the limits of behavior as determined by Allah.

In nature, the existence of human society and crime are linked with each other. *Islam* emphasizes to live a peaceful life and has encourage and commanded human beings to stay away from oppression and crime. Peace and security are the fundamental tools of *Islam*, as the word *Islam* itself. But it is also an indisputable fact that evil cannot be eradicated, though it is certainly possible to suppress evil and block the means by which it spreads. *Islam* prescribes severe punishments for specific crime which are known as *hudood*. The purpose of this concept of punishments is to prevent crime and maintain peace in society.

In Islamic criminal law, the word *tazir* is also used along with *hadd*. The literal meaning of *tazir* is to stop or forbid. In jurisprudential terms, this means the imposition of punishment by the ruler or the judge on a crime, the punishment of which has not been prescribed by the *Shariah*. The punishments for the crimes prescribed by Allah Himself are limited, while the list of the crimes is very long. Therefore, the punishments prescribed by the court or the government for the crimes other than *hudood*, are called *Tazirat* (singular; *Tazir*). Professor Abdul Hafeez writes: "Because *tazir* (to stop; to forbid) helps a criminal to stop committing a crime; therefore, it is called *tazir*. *Hadd* is that which is imposed according to the punishment prescribed by Allah after fulfilling its conditions. If the judge does not

meet the conditions of *Islamic* evidences i.e. either confession of the accused or eye witnesses, for a certain crime, however circumstantial evidence proves that the man has done that specific crime then *tazir* will be imposed on him instead of *hadd*".

The general rights of the accused given by *Islamic* law are following: The Right to a Defense, The Accused's Seeking Legal Defense from a Lawyer, The Accused's Right to Remain Silent and to be Heard, Statements Made under Duress, Confessions Obtained by Deceit, The Accused's Free Admission of Guilt and Right to Retract etc.

The specific rights of the rights of accused in *zina* cases are an element of doubt (*Shubuhah*) in *Qazf* and *Li'an* (exceptional case).

The jurists agree on the point that if the reason for the *hadd* is repeated before the *hadd* is imposed, then a single *hadd* will be sufficient. Once *hadd* has been imposed and the person commits the same offence again, *hadd* will be imposed again. The reason for this is that *Abu Huraira* reported that Allah's Messenger was asked about the slave-woman who committed adultery and was not protected (married). He said: If she commits adultery, then flog her, and if she commits adultery again, then flog her and then sell her even for a rope.<sup>1</sup>

There are two kinds of *zina*, committed with an unmarried person and with a married a person. The first will be punished with a hundred stripes, which is expressly based on the Quran, while the latter will be stoned to death, which is expressly based on the Sunnah. At the beginning of *Surah Noor*, the law of *hadd-i-zina* was revealed. The *Quran* says: "Flog the adulteress and the adulterer, each one of them, with a hundred stripes."<sup>2</sup> The rights of the accused in cases of *zina* belong to the most intimate sphere of an individual's life. So, *Qazf*: false accusation is one the rights of the accused in *zina* cases.

False accusation of *zina* (*Qazf*): The term of *Qazf* literally means to throw anything and it is normally used in the sense of throwing stones at someone. Technically it is known as: "Accusation of adultery against a person is liable to *Hadd*". In *Islamic Criminal Law*, *Qazf* is defined as "whoever by words, either spoken or intended to be read, or by signs, or by

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<sup>1</sup> Translation of Sahih Muslim, Book 17: The Book Pertaining to Punishments Prescribed by Islam (kitab ul Hudud), (International Islamic University Malaysia), Hadiths Number 4221.

<sup>2</sup> *Quran* 24:2.



visible representations, make or publishes an imputation of *zina* concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation, or hurt the feelings of such person, is said to commit slander (*Qazf*)".<sup>3</sup>

The general rights of the accused in *zina* cases are: Right to have the benefit of the presumption of innocence till it is proved, right to have due notice of the charges, right to test the Evidence by cross-examination, right to produce defence witnesses, right to a fair and speedy investigation in trial, etc.

I elect this topic, because the reasoning behind it “Rights of the accused in cases of *Zina*” is that it is interest of all the community. This thesis discloses that fact, the innocent should not be punished and must not be faced any objection in life. It is important to recognize that interpretations and applications of *Islamic law* can vary, and legal systems in *Muslim-majority* countries may incorporate additional safeguards and procedures based on their own legal traditions and cultural contexts. General rights of the accused are discussed in Pakistani law such as presumption of innocence, right to fair trail etc. and some rights are present in Criminal procedural code of Pakistan. Here, most important element is that Article 227 of the constitution of requires that laws in Pakistan must be *Islamic* in nature.

### **3. Significance of Research:**

In both Pakistani and *Islamic* criminal laws, the rights of the accused hold significant importance, and there are specific principles and safeguards to ensure fair and just proceedings. However, it is essential to recognize that while Pakistani law may draw inspiration from Islamic principles, it's also influenced by various legal traditions, including British common law. Like many legal systems, it upholds the presumption of innocence until proven guilty. Accused individuals are considered innocent until the prosecution provides evidence to establish guilt beyond a reasonable doubt. However, in Islamic law, there is no evidence against the accused; the case will be dismissed. Both Pakistani and Islamic criminal laws recognize the rights of the accused; however,

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<sup>3</sup> Mian Muhammad Siddique Kamana, *Islamic Hudood Laws in Pakistan*. Lahore: Eastern Law Book House. 2008,43.

differences exist in the evidentiary standards and procedural aspects. A comprehensive understanding requires consideration of legal, cultural, and historical contexts.

Additionally, adherence to human rights principles is crucial for a fair and just legal system.

#### **4. Literature Review:**

Several significant studies have been conducted on the rights of the accused in cases of *zina*, which will be discussed in this research.

An article “**The Rights of the Accused**” in Islam by Taha J. al- ‘Alwani stated that under all situation’s justice is an *Islamic* model and he enumerates right of the accused in *Islam*, it would have been necessary to review all of the legal procedures, conditions, and etiquette designed to protect the accused’s person and dignity. In criminal cases scholars divide the accused in three categories: a) someone who is famous for his uprightness, making suspect in the crime against him seem implausible. b) someone who is reputable for his crime, and therefore he is far from innocent in his accusation. c) someone whose condition is ambiguous, so no conclusions can be drawn for his guilt in the alleged crime. Legal principles in Islamic law for protecting an accused person’s right.

The Authority of the Investigator, the authority enjoyed by the investigator concerning whom there is doubt is limited and, if it encroaches on some of the rights of the accused, it certainly does not extend to any of their other fundamental rights. It was for this reason that the Prophet called such a person a “prisoner”. This also establishes that the accused will be maintained at the state's expense.

The Authority for Sentencing Someone to Prison, Jurists have differed over who has the right to sentence someone to prison. *Al-Mawardi thought that an investigator’s authority varies according to their position*. For example, suppose the investigator is an official or a judge, and someone accused of theft or adultery is brought before them. In that case, they cannot imprison the accused until they learn more about the individual, for mere accusation is not sufficient grounds for imprisonment. In conclusion, although *zina* jurisprudence may erect formidable barriers for rape victims seeking justice, a *ta’zir* crime designed for instances where *zina* legal thresholds are not met would likely reduce the risk and hardship of rape victims who come forward and share their stories.

Put simply, *zina* jurisprudence is not designed to protect rape victims; the problem with addressing rape through *zina* jurisprudence exists, to a large extent, because Islamic scholars did not construct the *zina* prohibition with rape victims in mind, but rather, with Allah in mind. From that theoretical basis, followed substance, evidence, and procedure that burdened rape victims to avoid punishing rapists for committing a severe crime against God. Nonetheless, since the instances where a *zina* conviction can be carried out are so narrow, Islamic judges can fill this legal void with a *ta'zir* crime that is better suited to protect women who have experienced sexual violence. Contrary to what some feminists may posit, classical *Islamic jurisprudence* does have some legal instruments to shift sexual assault jurisprudence so that it is more favourable to victims.

Described throughout this paper are several *Qu'ranic* passages that affirm and uphold the rights of women. The Period of Imprisonment: Scholars also differed over how long a person can be confined. Investigating the Accused's Person, Residence, and Conversations: *Allah* has protected and honoured humanity and prohibited the touching of an individual's person, skin, or honour. Questioning the Accused, the investigator may question the accused on any topic that will help to reveal the truth and may confront the accused with the accusation.

The rights of the accused given by *Islamic law* are as follows: The Right to a Defence, the Accused's Seeking Legal Defence from a Lawyer, The Accused's Right to Remain Silent and to be Heard, Statements Made under Duress, Confessions Obtained by Deceit, The Accused's Free Admission of Guilt and Right to Retract, The Accused's Free Admission of Guilt and Right to Retract, etc.<sup>4</sup>

In this Article, **“The Application of The Rule of 'Avoiding *Hudud* due to *Shubhah*' as a Mechanism for Ensuring Justice in the Determination of Punishments in Islamic Criminal Law”** by Nasimah Hussin and Majdah Zawawi, The avoidance of infliction of punishment of hudud where there exists a situation called *shubhah* (doubt) is based on Imam Abu Hanifa ruled that if a woman's accusation of rape could not be assisted and there

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<sup>4</sup> Tāhā Jābir al-‘Alwānī, “The Rights of the Accused in Islam,” *American Journal of Islam and Society* 11, no. 3 (1994): 348–364.

was no way to verify the claim or to prove zina, then it was better to release her based on the prophetic principles of dismiss the Hudood punishment if there is an element of doubt (Shubuhah). His reasonings reflected that Imam Abu Hanifa valued the fact that a victim of rape could not be expected to recall or identify her assailant with accuracy or name him thereafter.

Imam Abu Hanifah's legal reasonings made by the Caliph's particularly during Caliph Umar's leadership. A significant case occurred after Umar dismissed charges against an unmarried pregnant woman based on her claim that she was raped. Umar (R.A) instituted a policy and issued a decree to all his governors ordering them not to execute anyone without his approval. The core objective of this principle seeks to maintain justice and defend the rights of the accused.<sup>5</sup> In this research, I examine the non-compatibilities between non-compatibilities between the Law of Pakistan and *Islamic law* regarding the rights of the accused in *zina* cases.

An article **“Due Process in Islamic Criminal Law”** by **Sadiq Reza** stated that the reason for identifying the essential of Criminal Law due process in *Islam*. He elaborates on four rules of principles that result from inquiry, as both illustrative examples and preliminary findings, and discusses the observations on these findings, as well as the inquiry generally. The four principles that process chronologically and conceptually are: investigations, prosecution, adjudication and imprisonment.<sup>6</sup> This research elaborates on the key observations and findings, specifically in cases of zina, within Islamic law.

In an article **“Sexual assault, Forensic Investigation and Legal System in Pakistan: A Review by Raza MS, Ahad A, Nawazr, Ahmad M, Hassan JU, Mehmood U** explains that sexual assaults are horrific crimes, which is violation of human rights with prevalence of modern scientific technologies and trends in the world, and contemporary and improved

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<sup>5</sup> Nasimah Hussin and Majdah Zawawi, "The Application of the Rule of 'Avoiding Hudud Due to Shubhah' as a Mechanism for Ensuring Justice in the Determination of Punishments in Islamic Criminal Law," *ISLAC* (2013): 7.

<sup>6</sup> Sadiq Reza, "Due Process in Islamic Criminal Law," *The George Washington International Law Review* 46, no. 1 (2013): 21.

technologies and technique like DNA testing and DNA profiling are being used in Pakistan also, even with the limited availability of forensic labs. This research finds that a forensic test is sufficient to improve a person's alleged status, though a false allegation in a medical report just to hurt one's dignity.<sup>7</sup>

In an article, **A Comparative Study between Hudood Ordinance and relevant crimes under Pakistan Penal Code** by Basharat Ullah, Adnan Ullah Khattak, Nadar Shah, Muhammad Salis, Shehnaz Bibi, stated that Article 227 of the constitution of Pakistan<sup>8</sup> requires that laws in Pakistan must be Islamic in Nature. *Hadd* is that which is imposed according to the Punishment fixed by *Allah*. Therefore, *Hudood laws* were established to fulfil these constitutional obligations. They compare the Pakistan Penal Laws with the *Shariah Laws*, such as the former law of *zina* (Adultery) and the *Zina Ordinance*, Laws of rape, a comparative study of *Qazf* and the law of Defamation, etc. Some organizations in Pakistan stated that *the Hudood law* in Pakistan is grossly unjust and should be abolished; instead, the punishment prescribed earlier under the Penal Code of Pakistan should be retained. For this purpose, they must compare *Hudood* and Penal laws in Pakistan. However, in my research, I examine the rights of the accused in *Zina cases* under *Islamic Law* as well as the PPC. Because under section 18 of the *Qazf Ordinance*, a judge must be a *Muslim*. However, there is no such provision in the Pakistan Penal Code. Under *Zina Ordinance* rape can be committed on both men and women, while under PPC force adultery, only with a woman is considered as rape. Section 496C of the PPC deals with *Qazf* liable to *tazir*, under which anyone who falsely accuses a person of adultery is liable to up to five years' detention and a penalty of fine up to five thousand rupees.<sup>9</sup> The law of

*Qazf* is purely an *Islamic Law*, the ruling of which is contained in *Surah Al-Noor* of the *Holy Quran*.<sup>10</sup>

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<sup>7</sup> Raza, M.S., Ahad, A., Nawaz, R., Ahmad, M., Hassan, J.U., Mehmood, U. (2023). A systematic review: on sexual assaults, forensic investigation and legal system in Pakistan. Biol. Clin. Sci. Res. J., 2023: 465. doi: <https://doi.org/10.54112/bcsrj.v2023i1.465>.

<sup>8</sup> Article 227, Constitution of Pakistan 1973.

<sup>9</sup> *Pakistan Penal Code, 1860* (Act XLV of 1860), sec. 496.

<sup>10</sup> Basharat Ullah, Adnan Ullah Khattak, Nadar Shah, Muhammad Salis, and Shehnaz Bibi, "A Comparative Study between Hudood Ordinance and Relevant Crimes under Pakistan Penal Code," *Russian Law Journal* 11, no. 4 (2023): 831-40.

In the Article **“Rights of Accused in Criminal Investigation in Pakistan by Saqiba Saleem, Muhammad Ashraf** stated that the rights of citizens are drafted all over the world, where they can enjoy and protect the rights that have been conferred upon them. In a society like Pakistan, law enforcement agencies infringe the rights of citizens in the name of security risks and also use third-degree illegal detention, worsening the situation. The essence of criminal investigation was to provide relief to the victim by collecting evidence against the accused. Still, the accused person has been terrified by being held in illegal detention and by being subjected to physical torture. In my research, I aim to explore the rights of the accused in *Zina* cases specifically.<sup>11</sup>

In this Thesis, **the RIGHTS OF THE ACCUSED UNDER INTERNATIONAL HUMAN RIGHTS, ISLAM AND DOMESTIC LEGISLATION OF PAKISTAN. According to Muhammad Tariq Mahmood, as stated in his thesis**, the Criminal Procedure Code of 1898 is the most comprehensive code applicable in Pakistan. Not only does it define the procedure of a criminal trial, but it also encompasses a wide range of provisions that deal with police arrest and investigation, bail, warrants, the disposal of property, and many other matters. It is not only our constitution that guarantees fundamental rights, but the Cr.P.C. 1898 also has provisions dealing with accused rights. All rights are provided by the Constitution of Pakistan, 1973, and the Criminal Procedure Code, 1898.<sup>12</sup>

**Case Study: Ghulam Sarwar v. The State 1997 PCr.LJ 89**, In this case, the petitioner, Ghulam Sarwar, filed a petition under section 497 Cr.PC.<sup>13</sup> for seeking post-arrest bail on the allegation by Ijaz Ahmed, son of Allah Ditta, on 15\_3\_1995 in case F.I.R No. 98/95, dated 6\_2\_1995 under section 7 of the offence of *Qazf* Ordinance 1997, registered with Police Station Saddar, Jhang.

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<sup>11</sup> Saqiba Saleem, Muhammad Ashfaq, and Sajid Saleem Ashraf, "Rights of Accused in Criminal Investigation in Pakistan," *Journal of Policy Research* 9, no. 1 (2023): 252.

<sup>12</sup> Mahmood, Muhammad Tariq. "Rights of Accused Under International Human Rights, Islam and Domestic Legislation of Pakistan." *Unpublished doctoral dissertation*. Selinus University (2021).

<sup>13</sup> *Code of Criminal Procedure, 1898* (Act V of 1898), sec. 497.

Another fact of the case is that the same allegation was registered with F.I.R. No. 119 on the same date under Section 10/16 of the Zina Ordinance 1979 against Hakim Ali, Nawaz Ahmad, Mubarik, and Maulvi Abdul Haque. Following an investigation by the police, it was determined that the case was fabricated and the accused persons had been falsely implicated. The S.H.O. prepared a report for the cancellation of the case, based on the investigation officer's recommendation, which was presented before the *Allaqa Magistrate* and obtained the necessary orders. And thereafter, the present case was registered against the petitioner, and the petitioner was thus arrested. Learned Counsel of the petitioner argued that the case was not legally registered, given the provision contained in para (a) and (c) of the Second Exception to section 3 of the *Qazf* Ordinance, 1979.<sup>14</sup> The relevant paragraphs of the Second Exception to section 3 read as follows: -

(a) A complaint makes an accusation of *Zina* against another person in a Court, but fails to produce four witnesses in support thereof before the Court. (c) According to the court's findings, the complainant has made a false accusation of *Zina-bil-Jabr*. According to the study of the above sections, it was clear that a case can only be registered if a false accusation of *Zina-bil-Jabr* is made in court and the Court finds that the witness has given false evidence of commission. In this view of the matter, the Court granted ad interim bail to the petitioner vide its order dated June 7, 1995, which is confirmed.<sup>15</sup>

**INAYAT KHAN v. ZAHID AND OTHERS 2011 Y L R 761:** In this case, the petitioner here seeks the cancellation of bail granted to the accused under the ordinance, 1979 (offence of *zina* enforcement of *hudood*). The learned counsel for the petitioner requested adjournment on several occasions and was unable to provide substantial grounds for the cancellation of the bail granted to the accused. For these reasons, this bail cancellation application is dismissed.<sup>16</sup>

**AZIZ UR REHMAN v. THE STATE Cr. B.A No 13344 of 2021:** In this case, the petitioner, through this petition filed under section 498, Cr.P.C, seeks pre-arrest bail in the

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<sup>14</sup> section 3 of offence of *Qazf* Ordinance, 1979.

<sup>15</sup> Ghulam Sarwar v. The State 1997 PCr.LJ 89.

<sup>16</sup> INAYAT KHAN v. ZAHID AND OTHERS 2011 Y L R 761.

pending trial registered against him under sections 452, 376 and 506-B PPC. In this case, ad-interim bail was granted to the applicant before arrest, subject to his providing a solvent surety in the sum of Rs. 50,000.00 and a P.R. bond for the same amount, to the satisfaction of the *Nazir* of this court. After one month, the aforementioned learned Additional Sectional Judge dismissed the bail application filed by the applicant.<sup>17</sup>

**Mohib ullah V. THE STATE Cr.B.A.No. S-1256 of 2013:** In this case, the bail application has been filed in the trial court against the order passed by the Session Judge, Tandu Muhammad Khan. The trial court granted bail on two grounds. Firstly, the investigation officer had recovered one mobile phone from the applicant. The investigating officer had failed to prove the act of sodomy committed by the applicant with the help of mobile phone data before the honourable court. Secondly, ambiguity was found in the initial and final reports of the senior medical officer, Dr. Rajesh Kumar. The medical report did not agree with the laboratory examination report. Therefore, based on these grounds, the court granted bail to the applicant/accused. Since at this stage of the case, it cannot be determined exclusively as to whether the applicant would be punished for maximum punishment provided for under this Section, therefore, at the bail granting stage, the Court is obliged to take into consideration the lesser of the two punishments and hence prohibitory clause as referred in this case is also not applicable. Given hereinabove, the court was convinced that the applicant / accused had made out a case for admission to bail and using a short order, the court had granted bail to the applicant / accused on furnishing surety of Rs.100,000/- (One lac) with P.R. Bond in the like amount before the trial Court.<sup>18</sup> So, in my research, I discuss how the consideration for granting bail and cancelling bail altogether differ and are not compatible with Islamic Law in terms of the rights of the accused in *zina* cases.

## 5. Questions of Research:

1. What are the rights of the accused in *zina* cases in Islamic Law?

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<sup>17</sup> AZIZ UR REHMAN v. THE STATE Cr.B.A No 13344 of 2021.

<sup>18</sup> Mohib ullah v. The State Cr.B.A.No. S- 1256 of 2013.



2. What are the rights of the accused in *zina* cases in the law of Pakistan?
3. Are the rights of the accused in the law of Pakistan compatible with *Islamic Law* or not?
4. Are the Judgments of the Apex Courts related to the *zina* cases compatible with *Islamic Law*?

**5. Objectives of the Research:**

1. To discuss the rights of the accused in *zina* cases in *Islamic Law*.
2. To elaborate on the rights of the accused in *zina* cases in the law of Pakistan.
3. To compare the rights of the accused in the law of Pakistan with Islamic Law.
4. To discuss the Judgments of the Apex Courts related to the *zina* cases compatible with Islamic law.

**6. Research methodology:**

This study primarily relies on the examination and analysis of scholarly publications, statutory instruments, and judicial precedents. It gathers data on the rights of the accused in *zina* cases under both Pakistani statutory law and Islamic criminal jurisprudence, emphasizing their humanitarian implications.

The research compares two distinct legal perspectives on the rights of the accused in *zina* cases, drawing from Pakistani legal journals and the dominant opinions of classical Muslim jurists. To address methodological diversity, the study adopts qualitative research techniques, including textual and visual analysis of books, articles, and case studies. These sources reveal critical disparities between Pakistani law and Islamic legal principles regarding the accused's rights in *zina* allegations.

The data collection framework follows a case-study approach, enabling a detailed exploration of legal gaps and their societal impact.

## 7. **Outline of Research Paper:**

The research paper comprises an introduction, three chapters, conclusions, and recommendations and is outlined as follows:

Introduction

Chapter 1: Rights of the accused in cases of *Zina* from the perspective of *Islamic law*

Chapter 2: Rights of the accused in cases of *Zina* from the perspective of Pakistani law

Chapter 3: Comparative Analysis and Judgment of Apex courts related to an accused in *Zina* cases

The introduction provides an overview of the research, including its background and significance, the thesis statement, research questions, objectives, and adopted research methodology, to offer a clear understanding of the research work. The preliminary chapter of the study emphasises understanding the concept of rights of an accused in *zina* cases from a *Shari'ah* viewpoint. The subsequent chapter proposes to elucidate the recently updated concept of *zina* in the Pakistan Penal Code (PPC) and the Criminal Procedure Code (CrPC). Finally, the last chapter provides a critical analysis, highlighting any potential shortcomings. Based on the findings, appropriate recommendations are provided.

## CHAPTER 1

### RIGHTS OF THE ACCUSED IN CASES OF *ZINA* IN PERSPECTIVE OF ISLAMIC LAW

#### 1.1. Introduction:

*Zina* is an odious crime according to *Islam*. And it is considered one of the most major immoral acts and crimes. All other religious and legal systems also prohibit it. For the protection of society from such kinds of sinful acts, *Islam* imposed severe punishments on perpetrators. Presently, scholars and academics have been debating the rights of the accused in *zina* cases. Therefore, studying different legal protections under *Shariah laws* and determining the Islamic viewpoint on the accused's rights in *zina* cases is a highly challenging task.

In *Islamic* criminal law, the rights of the accused are a debatable subject, in which there is no concept of bail for the accused person in *zina* cases. The principle of legality should not be imposed on an accused person. In instances of *zina*, the accused person has the right to a defence, especially under the doctrine of *Shubha* (Doubt). To prevent injustice within the *Islamic* Criminal Justice System, *Muslim* scholars carefully examined all available information.

This chapter will provide a detailed study/concept of *zina* crime under *Islamic* perspective, like understanding of *zina*, kinds of *zina* such as consensual and non-consensual, distinction between *zina* and rape and other such crimes. In this chapter, we will discuss doubts in the *zina* case and briefly discuss the decisions or judgments in such cases in *Islam* (in the light of the *Quran and Sunnah*).

The topic of an accused person is a crucial aspect covered in this chapter, as well as the rights granted by *Islamic* law to an accused individual. In *Islamic* criminal law discussion about bail in *zina* cases, if there is no bail granted in *zina* cases under *Islamic* perspective than what should be decision in place of bail.

## 1.2. *Zina* in the light of *Islamic Criminal law*:

- (a) In *Hanifi* School of thought, according to *Hashia ibn Abidin*, the meaning of *zina* linguistically and in the light of *Sharaiḥ* are same. *Zina* is limited to a single act, yet it has a wide range that makes it subject to harsh penalties. For all intents and purposes in this regard *zina* is termed as;

“The vaginal intercourse between a man and a woman without an ownership or quasiownership”<sup>19</sup>

- (b) In *Shafi* School of thought,

أما عند الشافعية فقد وردت لفقهاءهم تعاريف لا تخلو من بعض التباين، حيث عرفه النووي بأنه : ( إيلاج الذكر بفرج محرم بعينه خال من الشبهة مشتهى طبعاً )

“As for the *Shafi'i* school, their jurists have provided definitions that are not without some variation. *Al-Nawawi* defined it as: 'The insertion of the penis into a vagina that is prohibited specifically, free from doubt, and naturally desirable.’”<sup>20</sup>

وعرفه الباجوري بقوله : ( هو إيلاج المكلف الواضح حشفته الأصلية أو قدرها عند فقدانها في فرج واضح محرم لعينه في نفس الأمر مشتهى طبعاً مع الخلو عن الشبهة )

- (c) In *Hanabli* School of thought,

أما فقهاء الحنابلة: فإنهم قد اتفقوا في الغالب على تعريف الزني بصيغة متقاربة حيث قالوا: ( فهو فعل الفاحشة في قبل أو دبر )

“As for the *Hanbali* jurists, they generally agreed on a definition of adultery in a similar form, where they said: 'It is the committing of indecency in the vagina or anus.’”<sup>21</sup>

- (d) In *Malaki* School of thought,

ما المالكية فقد وردت أيضاً تعاريف مختلفة للزني عن فقهاءهم، منها قول خليل : ( الزنا هو وطء مكلف مسلم فرج آدمي لملك له فيه باتفاق تعمداً )

<sup>19</sup> Muhammad Amin Ibn Abidin Al-Shami, *Radd al-Muhtar 'ala al-Durr al-Mukhtar*, Vol. 4. (Beirut: Dar Al-Fikar, 1992), 4

<sup>20</sup> Jalal al-Din Abd al-Rahman al-Suyuti, *Al-Ashbah wa al-Naza'ir* (Egypt: Al-Halabi Press, 1959), 7:2, 4.

<sup>21</sup> 'Abd al-Rahman ibn Qasim al-Najdi, *Hashiyat al-Rawḍ al-Murabba 'Sharḥ Zad al-Mustaqni* (Riyadh: al-Maṭabi al-Ahliyyah lil-Offset, n.d.), 7:312.

“As for the *Maliki* school, there are also various definitions of adultery provided by their jurists, including the statement of Khalil: Adultery is the intentional intercourse of a legally accountable Muslim with a human vagina that he does not own, by agreement.”<sup>22</sup>

### 1.3. Kinds of *zina*:

There are two kinds of *zina*, *Muhsan* and *Ghair Muhsan*. Both parties must be *Muhsan*, and this is one of the basic conditions for *zina* to be liable to *hadd*. The literal meaning of *Ihsan* (احسان) is fortress, protection, inaccessibility and technically, this term means that sexual intercourse of a sane adult man with a sane woman having/during a valid marriage.

It refers to the married person (and marriage has been consummated).

According to Jurists, the term has four meanings;

#### 1. *Iffah*:

وَمَنْ لَّمْ يَسْتَطِعْ مِنْكُمْ طَوْلًا أَنْ يَنْكَحَ الْمُحْصَنَاتِ الْمُؤْمِنَاتِ فَمِنْ مَا مَلَكَتْ أَيْمَانُكُمْ مِنَ فَتَيَاتِكُمُ الْمُؤْمِنَاتِ وَاللَّهُ أَعْلَمُ  
بِإِيمَانِكُمْ بَعْضُكُمْ مِنْ بَعْضٍ فَانْكِحُوهُنَّ بِإِذْنِ أَهْلِهِنَّ وَءَاتُوهُنَّ أَجُورَهُنَّ بِالْمَعْرُوفِ مُحْصَنَاتٍ غَيْرَ مُسَفِحَاتٍ وَلَا  
مُتَّخِذَاتِ أَخْدَانٍ فَإِذَا أَحْصَيْنَ فَإِنَّ أَتَيْنَ بِفَلْحِشَةٍ فَعَلَيْهِنَّ نِصْفُ مَا عَلَى الْمُحْصَنَاتِ مِنَ الْعَذَابِ ذَلِكَ لِمَنْ خَشِيَ الْعَنَتَ  
مِنْكُمْ وَأَنْ تَصْبِرُوا خَيْرٌ لَكُمْ وَاللَّهُ غَفُورٌ رَحِيمٌ ٢٥

“But if any of you cannot afford to marry a free believing woman, then ‘let him marry’ a believing bondwoman possessed by one of you. Allah knows best ‘the state of’ your faith ‘and theirs’. You are from one another. So, marry them with the permission of their owners, giving them their dowry in fairness, if they are chaste, neither promiscuous nor having secret affairs. If they commit indecency after marriage, they receive half the punishment of free women. This is for those of you who fear falling into sin. But if you are patient, it is better for you. And Allah is All-Forgiving, Most Merciful.”<sup>23</sup>

#### 2. *Tazwwj*:

<sup>22</sup> Salih ibn Abd al-Sami al-Azhari, *Jawahir al-Ikleel: Sharh Mukhtasar Khalil*, Vol. 2, p. 283, 2nd edition, Mustafa Al-Halabi Press, Egypt, 1366 AH.

<sup>23</sup> Quran 4:25

وَالْمُحْصَنَاتُ مِنَ النِّسَاءِ إِلَّا مَا مَلَكَتْ أَيْمَانُكُمْ كَتَبَ اللَّهُ عَلَيْكُمْ وَأَجَلَ لَكُمْ مَا وَرَاءَ ذَلِكَ أَنْ تَبْتَغُوا بِأَمْوَالِكُمْ مُحْصَنِينَ  
غَيْرَ مُسْلَحِينَ ۖ فَمَا اسْتَمْتَعْتُمْ بِهِ مِنْهُنَّ فَآتُوهُنَّ أُجُورَهُنَّ فَرِيضَةً ۚ وَلَا جُنَاحَ عَلَيْكُمْ فِي مَا تَرْضَيْتُمْ بِهِ مِنْ بَعْدِ الْفَرِيضَةِ ۚ  
إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا ۚ ٢٤

*“Also, ‘forbidden are’ married women—except ‘female’ captives in your possession. This is Allah’s commandment to you. Lawful to you are all beyond these, as long as you seek them with your Wealth in a legal marriage, not in fornication. Give those you have consummated marriage with their due dowries. It is permissible to be mutually gracious regarding the set dowry. Surely Allah is All-Knowing, All-Wise.”<sup>24</sup>*

3. *Islam and Hurriyah*: Above both points, *Islam and Hurriyah* elaborate that permission to marry a believing bondwoman if unable to marry a free believing woman, believers are from one another, emphasising equality in faith, for marriage procedure permission from the owner and a fair dowry. Bondwoman must be chaste and morally upright, and punishment for offensiveness- half that of a free woman, and this is for practice patience if fearing sin, and Allah is all forgiving and is most merciful.

### **1.3.1. Muhsan:**

*Muhsan* is defined in the offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979, as

- i. A *Muslim* adult man who is not insane and has had sexual intercourse with a *Muslim* adult woman who, at the time he had sexual intercourse with her, was married to him and was not insane; or
- ii. A *Muslim* adult woman who is not insane and has had sexual intercourse with a *Muslim* adult man who, at the time she had sexual intercourse with him, was married to her and was not insane.<sup>25</sup>

*Holy Quran:*

*“The fornicatress and the fornicator, flog each of them with a hundred stripes”<sup>26</sup>*

<sup>24</sup> Quran 4:24

<sup>25</sup> The Offense of *Zina* (Enforcement of *Hudood*) Ordinance, 1979 (Ordinance No. VII of 1979), S. 2(d), promulgated February 9, 1979.

<sup>26</sup> Quran 24:2

According to all Muslim school of law, one hundred stripes of punishment is prescribed for a person who is not *muhsan* by *Quran*. However, if the individual is not *muhsan*, then he should be exiled for a year is mentioned by the *Hadees*.

Narrated Zaid bin Khalid (R.A):

*“Allah's Messenger (SAW) ordered that an unmarried man who committed illegal sexual intercourse be scourged one hundred lashes and sent into exile for one year.”*<sup>27</sup>

*Hanafi* School of law says that an extra exile of punishment is considered discretionary *ta'zir* not amendatory part of had punishment. On the other hand, *Imam Malik*, *Imam Shafi'i*, and *Imam Ahmad* believe that it is also a part of *hadd* punishment.<sup>28</sup>

If the offender is *Muhsan*, *Zina* will be punished by being stoned to death. The *Quran* makes no reference of stoning as a form of punishment.

#### **Conditions for Punishment of Muhsan:**

1. *Hurriyah*: Slaves (male or female) cannot be subjected to stoning as their punishment is half that of freemen and stoning to death cannot be halved.<sup>29</sup>
2. Puberty and Sanity: If a minor or insane person cannot be stoned for committing adultery (*Zina*), as they are *non-Muhsan*.<sup>30</sup>
3. Valid Marriage contract with consummation: Since *Ihsan* cannot be established inside an irregular or invalid marriage contract, the marriage contract must be legitimate.<sup>31</sup>
4. *Islam*: There is a difference of opinion between jurists on *Islam* being a condition for punishment on *Muhsan*. According to the majority of jurists, *Islam* is not a

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<sup>27</sup> Muḥammad ibn Ismā'īl al-Bukhārī, *al-Jāmi' al-Ṣaḥīḥ al-Bukhārī*, Ḥadīth no. 2649, vol. 2, p. 547 (Maktabat al-Bushrā, 1441 AH/2020 CE).

<sup>28</sup> Abd al-Qadir Awdah, *Al-Tashri al-Jina'i al-Islami Muqaranan bi-l-Qanun al-Waḍ'i*, 2 vols. (Beirut: Dar al-Kitab al-Arabi, n.d.), 1:380.

<sup>29</sup> Abdullah ibn Ahmad ibn Qudamah, *Al-Mughni* (The Enricher) (Beirut: Dar al-Kitab al-Arabi, 1392 AH), 9:39.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

condition in *Ihsan* hence, a *non-Muslim* can be subjected to stoning if he has committed *zina*).<sup>32</sup>

However, in the opinion of the *Malikiyah* and *Hanafiyyah*, Islam is a condition in *Ihsan* hence a *non-Muslim* cannot be subjected to stoning.<sup>33</sup>

The opinion of majority of jurist is preferable.

#### **1.3.1.1.Punishment of *Muhsan*:**

For punishment of non-muslim offender:

Stoning till death.<sup>34</sup>

*Hadees* narrated by Ibn Abbas (R.A):

*“Allah sent Muhammad (peace be upon him) with the truth and revealed to him the Book. Among what was revealed to him was the verse of stoning. We recited it, memorized it, and understood it. The Messenger of Allah (peace be upon him) carried out the stoning punishment, and we did so after him. I fear that with the passage of time, someone will say, 'We do not find the verse of stoning in the Book of Allah,' and thus they will go astray by neglecting an obligation that Allah revealed in His Book. Indeed, stoning in the Book of Allah is a rightful punishment for the adulterer—whether a man or a woman—if they are married (muhsan), provided there is clear evidence, or pregnancy or confession.”*<sup>35</sup>

The Messenger of Allah (peace be upon him) said:

*“Take from me (learn from me): Allah has made a way for them. The virgin who fornicates with a virgin: one hundred lashes and exile for a year. The married person who commits zina with a married person: one hundred lashes and stoning.”*<sup>36</sup>

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<sup>32</sup> Abdullah ibn Ahmad ibn Qudamah, *Al-Mughni* (The Enricher) (Beirut: Dar al-Kitab al-Arabi, 1392 AH), 9:40-41.

<sup>33</sup> Ibid.

<sup>34</sup> Abdullah ibn Ahmad ibn Qudamah, *Al-Mughni* (The Enricher) (Beirut: Dar al-Kitab al-Arabi, 1392 AH), 9:36

<sup>35</sup> Abu Abdullah Muhammad bin Ismail al-Bukhari, *Sahih al-Bukhari*, ed. Mustafa Adib al-Baqa (Beirut/Damascus: Dar al-Qalam, 1401 AH), 4:146.

<sup>36</sup> Muslim bin al-Hajjaj al-Nisaburi, *Sahih Muslim* (Cairo: Dar Ihya al-Kutub al-Arabiyya, n.d.), 3:1316.



For punishment of *non-Muslim* offender:

*Hadees*, it was narrated from Ibn 'Umar (may Allah be pleased with them both) that:

*"The Jews came to the Messenger of Allah (peace be upon him) and mentioned to him that a man and a woman among them had committed zina (fornication). The Messenger of Allah (peace be upon him) asked them, 'What do you find in the Torah regarding one who commits zina?'*

*They replied, 'We blacken their faces, parade them around on donkeys with their faces opposite each other, and publicly shame them.'*

*He said, 'Bring the Torah if you are truthful.'*

*So, they brought it and read it. When they reached the verse of stoning, the young man reading it placed his hand over the verse of stoning and read what came before and after it.*

*The Messenger of Allah (peace be upon him) said, 'Lift your hand.' And when he did, the verse of stoning was underneath.*

*The Messenger of Allah (peace be upon him) then ordered that they be stoned.*

(i) 'Abdullah ibn Umar said:

*"I was among those who stoned them, and I saw the man shielding the woman from the stones with his own body"<sup>37</sup>*

(ii) *Hadees narrated by Ibn Abbas (may Allah be pleased with them both) said:*

*"When Ma'iz ibn Malik came to the Prophet (peace be upon him), he asked him: 'Perhaps you only kissed her, or touched her, or looked at her?' Ma'iz said: 'No, O Messenger of Allah. The Prophet (peace be upon him) asked: 'Did you have intercourse with her?' —*

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<sup>37</sup> Ibid.

and he did not use a euphemism. Ma'iz replied: 'Yes.' At that point, the Prophet (peace be upon him) ordered that he be stoned."<sup>38</sup>

### 1.3.2. *Ghair – Muhsan* (غير محصن):

*Ghair-Muhsan* refers to the person in whom any of the conditions of *muhsan* are missing. If the offence of *zina* is proved, the punishment for *Ghair-Muhsan* is 100 lashes (*Hadd punishment*).

#### 1.3.2.1. Conditions for the Punishment of *Ghair-Muhsan*:

There is a consensus among jurists on this punishment.

1. Allah Almighty says:

*"The woman and the man guilty of fornication — flog each one of them with a hundred lashes..."*<sup>39</sup>

*Hadiths:*

*"Abu Huraira and Zayd ibn Khalid (may Allah be pleased with them both) said: We were with the Prophet (peace be upon him) when a man stood up and said: 'I adjure you by Allah, judge between us according to the Book of Allah.' His opponent—who was more knowledgeable—stood up and said: 'Judge between us according to the Book of Allah, and permit me to speak.'"*

*He said: 'My son was a servant to this man and he committed fornication with his wife. I ransomed him with one hundred sheep and a servant. Then I asked some scholars, and they told me that my son should receive one hundred lashes and exile for a year, and the wife of this man should be stoned.'*

*The Prophet (peace be upon him) said:*

*'By Him in whose hand is my soul, I will judge between you according to the Book of Allah: The hundred sheep and the servant must be returned. Your son is to receive one*

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<sup>38</sup> Abu Abdullah Muhammad bin Ismail al-Bukhari, *Sahih al-Bukhari*, ed. Mustafa Adib al-Baqa (Beirut/Damascus: Dar al-Qalam, 1401 AH), 4:164

<sup>39</sup> Quran 24:2

*hundred lashes and be exiled for a year.*  
*And you, Anis, go to the wife of this man. If she confesses, stone her.'*  
*Anis went to her, and when she confessed, he stoned her.*<sup>40</sup>

There is a difference of opinion between jurists on the question of combining the punishments of stoning and exile for a *Ghair-Muhsan* offender of *zina*, as to whether exile is part of *hadd* or part of *tazir*.

According to the opinion of *Imam Abu Hanifa* exile is not a requirement or a component of the *Hadd Punishment*, *Hanifa*. Nonetheless, the judge has the authority to impose *Tazir*, or banishment, as punishment. This view is supported by the fact that the *Ayah*, which imposes the *hadd punishment* (100 lashes) and the punishment of *zina*, makes no mention of banishment.

#### **1.3.2.2. Punishment of *Ghair-Muhsan*:**

According to the majority of the jurists, exile must accompany the punishment of lashes as it is part of the *Hadd Punishment* for *Ghair-Muhsan*.

The scholars/Jurists have differed in opinion on the question of punishment of exile for males and females. The difference of opinion is as follow:

1. According to the Shafi school of thought, a *Ghair Muhsan Zina* offender will be exiled irrespective of being a male or female or being a free man/free woman or a slave.
2. According to *Hanabilah* school of thought, only a free-man and a free-woman can be subjected to exile but not a male or female slave.
3. According to *Malikiyah* school of thought, a male can be subjected to exile but not the female or the slave.

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<sup>40</sup> Abu Abdullah Muhammad bin Ismail al-Bukhari, *Sahih al-Bukhari*, ed. Mustafa Adib al-Baqa (Beirut/Damascus: Dar al-Qalam, 1401 AH),4:146.

In opinion of the one of the scholars among *Malikiyah*, if the woman does not have any *wali*, or a group of men women to travel with, then she cannot be exiled but can be confined in her place.

The preferable opinion according to *Ibn –Qudamah* is that of *Malikiyah*.<sup>41</sup>

Similarly, the scholars have different in opinion on the question that whether punishment of stoning and lashes can be combined or not. Following are the opinions:

1. *Hanabilah* claims that regardless of the age of the perpetrator, lashing and stoning will be mixed for *Muhsan*, with lashes coming first and stoning coming last.<sup>42</sup>
2. Some scholars, like *Abi-bin-Kab*, *Qatadah*, and *Masrooq*, believe that if the *zina* perpetrator is young, just stoning will be used as a punishment; if he is elderly, he will have both lashes and stoning.<sup>43</sup>
3. The majority of jurists believe that *Muhsan* cannot get both stoning and lashes as punishment. Additionally, this viewpoint is better since stoning (for *Muhsan*) is enough to reprimand him.<sup>44</sup>

By preserving the equilibrium between the prosecution and defence, the defence rights guarantee equality in the legal system. Because it ensures that offenders are held appropriately accountable and shields the innocent from needless punishment, procedural equity is essential for maintaining public confidence in the legal system.

#### **1.4. Definition of the Accused:**

The accused, in both linguistic and technical terms, refers to an individual suspected of an offence and subjected to judicial scrutiny. *Islamic* jurisprudence differentiates between the

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<sup>41</sup> Abdullah ibn Ahmad ibn Qudamah, *Al-Mughni wa Sharaah al Kabir* (The Enricher) (Beirut: Dar al-Kitab al-Arabi, 1392 AH), 10:135.

<sup>42</sup> Abdullah ibn Ahmad ibn Qudamah, *Al-Mughni wa Sharaah al Kabir* (The Enricher) (Beirut: Dar al-Kitab al-Arabi, 1392 AH), 9:37.

<sup>43</sup> Abu Muhammad Ali bin Ahmad Ibn Hazm, *Al-Muhalla* (The Adorned) (Cairo: Maktabat al-Jumhuriyyah al-Muttahidah, 1377 AH), 8:284.

<sup>44</sup> Abdullah ibn Ahmad ibn Qudamah, *Al-Mughni wa Sharaah al Kabir* (The Enricher) (Beirut: Dar al-Kitab al-Arabi, 1392 AH), 9:37.

accused and the offender. The former is presumed innocent, whereas the latter has been adjudicated guilty.

#### **1.4.1. Classification of Accused:**

This distinction underscores the comprehensive nature of *Islamic* law, which accommodates various classifications of accused individuals:

1. **The Innocent Accused:** Known for righteousness, they are safeguarded from unjust punishment.
2. **The Unfamiliar Accused:** Individuals of unknown character are detained until clarity is established.
3. **The Accused with Known Immorality:** Individuals with prior records of misconduct are scrutinised more rigorously.<sup>45</sup>

#### **1.4.2. Methods of Establishing Guilt:**

*Islamic* law places a strong emphasis on establishing guilt to preserve justice and safeguard the innocent.

1. **Testimony:** Considered the most substantial evidence, subject to stringent validation.
2. **Confession:** Recognized only when voluntarily made without coercion.
3. **Circumstantial Evidence:** Limited to cases with strong corroborative factors, often requiring supplementary evidence like *Qasamah* (oath-taking).<sup>46</sup>

#### **1.4.3. General Rights of the Accused in Islamic Criminal Law:**

*Islamic* law guarantees key due process rights: (1) Right to be Present – judges must hear the accused, though some schools permit absentia trials; (2) Equality Before the Law – impartial treatment regardless of status; (3) Right to Defense – voluntary confessions only,

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<sup>45</sup> Husni, Ahmad Bin Muhammad, Amin Bin Muhammad Husni, and Mohd Sabree Nasri. "Rights of the accused in the Islamic legislation: A comparative and analytical study." *Scholars International Journal of Law, Crime and Justice* 2, no. 7 (2019), 214.

<sup>46</sup> Abu Muhammad Ali bin Ahmad Ibn Hazm, *Al-Muhalla* (The Adorned) (Cairo: Maktabat al-Jumhuriyyah al-Muttahidah, 1377 AH), 8:284.

with coerced statements invalidated; (4) Presumption of Innocence – a foundational principle; and (5) Freedom in Defense Strategy – no forced confessions, with retractions allowed pre-punishment. These safeguards ensure fairness and judicial integrity.

*Hadiths:*

*“Avert the prescribed punishment by rejecting doubtful evidence.”<sup>47</sup>*

Three kinds are distinguished by scholars of the procedural systems employed in criminal cases: Accusation (direct court disputes between equal parties, judged without prior investigation); Investigation (state-led pre-trial inquiries, similar to modern police/DA processes); and Hybrid (combining pre-trial probes with courtroom accusations) are the three systems used in *Islamic* criminal procedure. Rights during an investigation are based on *tuhmah* (doubt); suspicion must be warranted rather than capricious, reflecting the term's original meaning of "well-founded misgiving." To maintain a balance between state authority and individual rights, the accused may challenge the admissibility of evidence.<sup>48</sup>

The following are how jurists interpret this: a) *Abu Hanifah's* followers define a claim as a notification of one's right to something over another that is present in court; b) *Imam Malik's* followers define it as a statement that, if believed, will grant the maker of the claim a right; c) *Shafi's* followers define it as a notification of one's right to something over another before a judge; and d) *Hanabali* school scholars define it as a person attributing to themselves an entitlement to something in the possession or custody of another.<sup>49</sup>

According to *Islamic* law, those who are accused are divided into three categories: (1) *Majhul* (unknown)—neutral examination necessary; (2) *Fasiq* (notorious)—deemed probably guilty based on prior wrongdoing; and (3) *Ma'rouf* (reputable)—presumed innocent due to piety. In criminal trials, this tripartite distinction strikes a compromise between evidentiary rigour and moral reputation.

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<sup>47</sup>Ibn Hajar al-‘Asqalānī, *Bulugh al-Maram min adillat al-ahkam*, Book 10, Hadith 17, nd, see also: <https://sunnah.com/bulugh/10/17>.

<sup>48</sup>Taha J. al-'Alwani, "The Rights of the Accused in Islam," *American Journal of Islam and Society* 11, no. 3 (1994): 355(348-364).

<sup>49</sup>Taha J. al-'Alwani, "The Rights of the Accused in Islam," *American Journal of Islam and Society* 11, no. 3 (1994): 356-357(348-364).

### 1.5. The Authority of the Investigator:

*Islamic* jurists only allow incarceration under particular circumstances. (1) Authority: According to *al-Mawardi's* generally held opinion, judges and rulers have the power to detain based on substantial evidence; however, lower officials cannot imprison someone solely on an accusation. (2) Duration: Debated (e.g., one-month limit vs. flexible terms set by the Imam/court); (3) Necessity: Detention necessitates a clear justification (e.g., flight risk, public safety) and adherence to procedural safeguards. Release is required due to unfounded allegations. Examining the accused's identity, place of residence, and conversations. Allah forbade touching someone's person, skin, or honour to safeguard and honour humanity.

*Holy Quran:*

*"O you who have faith! Please do not enter the homes of others without first seeking permission, and then wishing peace upon their inhabitants. That is better for you, so that you may remember. If you do not find anyone at home, do not enter until permission is given to you. If it is said to you, 'Go back,' then go back, for that will be purer for you"*<sup>50</sup> and *"O you who have faith! Avoid being overly suspicious; for suspicion in some cases is wrong, and spy not on one another."*<sup>51</sup>

Asking the Accused questions. The examiner may scrutinise the accused on any point that will assist in uncovering the truth and may confront the accused with the evidence. The denounced, nonetheless, doesn't need to answer those questions, as will be found in the spin-off of this article, which will show up in a future issue of the diary.

### 1.6. Doubt (*Shubah*) in *Islamic Criminal Law*:

"Doubt" and "uncertainty" are the meanings of the terms *tuhmah* and *tuhamah*. "Accuse" literally means "to suspect somebody and accuse them of committing a crime."<sup>52</sup>

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<sup>50</sup> Quran 24:27-8

<sup>51</sup> Quran 49:12

<sup>52</sup> Ahmad Bin Muhammad Husni et al.; *Law Crime Justice*, July 2019; 2(7): 213-218. See also: [https://saudi-journals.com/media/articles/SIJLCJ\\_27\\_213-218\\_c.pdf](https://saudi-journals.com/media/articles/SIJLCJ_27_213-218_c.pdf)

“The meaning of the accused from the *Shariah* point of view indicates that it is linked to all crimes, whether or not it requires *hudud or qisas or tazir*, and is not only to offence that requires *hudud* and *qisas*, and not only to offences of killing and injury. And there is an important difference; that is, the offender has already been found guilty for committing the offence, but the accused is not yet found guilty for the crime he has been accused of.”<sup>53</sup>

The principle of "reasonable doubt" in *Islamic* law forbids severe penalties. *Islamic* law is based on the *Sunna* and the *Quran*. Due to their need to interpret divine law, early jurists (*fuqaha*) and judges (*Qazis*) developed the doctrine of *ijtihad*, which is often referred to as the doctrine of doubt. This doctrine prioritises mercy and forbearance over punishment in situations when it is unclear. It went through three phases of evolution: Firstly canonization, judges exercised mercy in dark/ambiguous cases. Secondly textualization, Prophet Muhammad (SAW) was credited with codifying the doctrine. Thirdly generalization, the idea was used in situations other than capital cases. To avoid severe penalties and strike a compromise between justice and human rights standards, the doctrine of doubt was applied. Its historical evolution provides insightful information for contemporary *Islamic* legal systems.<sup>54</sup>

Jurists initially viewed it as a declaration of judicial practice rather than a prophetic statement. However, by the tenth and eleventh centuries, most *Muslim* jurists had come to attribute the query to the Prophet, therefore giving it canon prophetic status. This modification enabled jurists to clearly articulate the divine legislative aim, providing a strong basis for avoiding punishment in uncertain circumstances. In order to establish a normative standard that could prevent drastic political actions and to show their authority, jurists employed the textualization of doubt.<sup>55</sup>

### **1.7. Fundamental Principles related to *Islamic* Criminal Justice:**

Four fundamental principles related to criminal justice that are derived from the *Quran*, *Sunnah*, and classical jurisprudence are described in this section: (1) investigation, (2)

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<sup>53</sup> Ibid.

<sup>54</sup> Intisar A. Rabb, "Reasonable Doubt in Islamic Law," *Yale Journal of International Law* 40, no. 1 (2015): 41.

<sup>55</sup> Ibid.



prosecution, (3) adjudication, and (4) punitive and pretrial imprisonment. When combined, they balance the authority of the state and the rights of individuals in criminal procedures while assuring justice, accountability, and procedural integrity.

#### **1.7.1. Investigation:**

*Islamic* law requires that privacy be respected during criminal investigations, as outlined in the *Quran*, *Sunnah*, and traditional jurisprudence. To maintain due process and balance between justice and individual rights, this principle limits both governmental and private actors and forbids unnecessary interference during suspicious investigations.

The *Quranic* rules are straightforward:

*“Enter not houses other than your own, until you have asked permission and saluted those in them, “and” spy not on each other.”*<sup>56</sup>

#### **1.7.2. Prosecution:**

Even when there is clear proof, the *Sunnah* desires discretion to protect offenders from harsh penalties and makes it evident that it prefers not to prosecute *hudood* offences. The Prophet's continuous refusal to accept *Ma'iz's* confession of adultery, which gave him opportunities to withdraw from or reframe his acts (e.g., suggesting simply kissing or touching), is a notable example. Punishment was only meted out after *Ma'iz* repeatedly persisted, which satisfied the rigorous evidentiary requirement. Those who brought *Ma'iz* forward were later chastised by the Prophet, who said that it would have been preferable to "cover him with a garment"—that is, to hide the sin rather than reveal it. This highlights a larger *Islamic* ethic: to maintain dignity and promote repentance, private settlement and mercy are valued more highly than strict enforcement, particularly in *hudud* instances.<sup>57</sup>

#### **1.7.3. Adjudication:**

In any situation, the normal process of sending responders to prison and assigning similar punishments is disrupted when another legal code prosecutes *hudud* violations.<sup>31</sup> At the

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<sup>56</sup> Quran 24:27, 49:12

<sup>57</sup> Sadiq Reza, "Due Process in Islamic Criminal Law," *George Washington International Law Review* 46 (2013): 19–21.

early stages of *Islam*, legal scholars have accredited the Prophet's words, "avoid (the *hudud* punishments) in an environment of dispute or ambiguity." <sup>32</sup>

In addition to resonating with the recommendation to avoid *hadd* prosecutions, this instruction outlines and imposes several procedural obstacles—such as legal presumptions, standards of evidence, testimonial hurdles, and others—that must be overcome to secure guilty judgments in some instances. For example, this principle states that the judge (*qadi*) must check the case for any factual or legal "question" (*shubhah*) regarding the defendant's guilt while deciding on a *hadd* offence to "seek a pretext to prevent punishment." <sup>31</sup>

Even while discretionary and minor *tazir* punishments may still be appropriate, any dissatisfaction with the elements or evidence of wrongdoing bars the *hadd* conviction and discipline. *Islamic* law puts a premium on doubt (*shubha*) over punishment, making it challenging to implement *hudud* punishments due to the strict evidentiary requirements for proving *zina* (adultery). The main barriers are as follows: (1) Vaginal sex must be demonstrated (apart from other acts), since *Quranic* evidence demands the possibility of procreation; (2) erroneous belief in the validity of marriage negates guilt; (3) delayed accusations damage witness credibility (*adalah*); and (4) inconsistent testimony (e.g., location or partner details) invalidates the four-witness requirement, subjecting witnesses to *qazf* (false accusation) penalties if their accounts conflict; and (5) Denial of a confession nullifies the penalty; confessions must be made four times. These protections ensure that *hudud* can only be applied when guilt is undeniable, reflecting *Islam's* inclination for mercy and procedural rigour.<sup>58</sup>

Therefore, *Muslim* legal experts have spent most of the time of fourteen hundred years persuading *qadis* (judges) and *imams* (pioneers) to look for reasons not to convict and reject those who are alleged to be guilty of the most serious violations of God's law.

#### **1.7.4. Punitive and Pretrial Imprisonment:**

In traditional *Islamic* criminal law, detention is a discretionary (*tazir*) remedy used for pre-trial detention or when *hadd* standards are not met, rather than a *hadd* penalty. As a

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<sup>58</sup> Sadiq Reza, "Due Process in Islamic Criminal Law," *George Washington International Law Review* 46 (2013): 21–23.

reflection of *Islam's* emphasis on responsibility and justice even in penal institutions, jurists such as *Hanafi* scholar *al-Khassaf* highlighted precautions, requiring judges to record convicts' details, examine the reasons for imprisonment, and avoid arbitrary confinement.<sup>59</sup>

## **1.8. Fundamental Guarantees in Islamic Criminal Law:**

### **1.8.1. Presumption of Innocence:**

The principle, “Innocent until proven guilty”, is foundational in *Islamic* criminal law.

*Hudud* punishments (fixed penalties) are invalid if there is any doubt or suspicion. High evidentiary standards make *Hudud* convictions rare (e.g., four eyewitnesses for *zina*). Confessions may be revoked, especially if the accused flees (implying retraction). Doubt, mercy, and procedural safeguards are emphasized over hasty punishment.

### **1.8.2. Right to Life, Liberty, and Property:**

The Prophet (SAW) is reported to have said in his last *Hajj sermon* to the large gathering of his Companions on the mount ‘*Arafat*,

*“O People, just as you regard this month, this day, this city as Sacred, so regard the life and property of every Muslim as a sacred trust.”*<sup>60</sup>

These are the qualities of God. Allah bestowed knowledge upon humanity and demonstrated to the angels that knowledge makes man superior to them.

*The Qur'an* says,

*“Indeed, we honoured the progeny of Adam, and bore them across land and sea and provided them with good things for their sustenance, and exalted them above many of our creatures.”*<sup>61</sup>

Beating or torturing someone is equivalent to forcing them to confess, and *Islamic* law forbids coercive confessions.

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<sup>59</sup> Imam Khassaf, *Adab al-Qadi (Rules for the Judge)*, trans. Munir Ahmad Mughal (New Delhi: Adam Publishers & Distributors, 2005), 128–39.

<sup>60</sup> <https://www.iium.edu.my/deed/articles/thelastsermon.html>

<sup>61</sup> Quran 17:70.

*The Qur'an says,*

*"Except for those who were forced to engage in infidelity to Allah after believing while their hearts remained firmly convinced of their belief."*<sup>62</sup>

### **1.9. Right to Due Process for the accused person:**

Covers four main stages:

#### **i. Investigation:**

Must respect privacy; unlawful entry or surveillance is prohibited. Investigators must act lawfully; even state agents cannot violate private space.

*The Qur'an says,*

*"Believers! Enter not houses other than your own houses until you have obtained the permission of the inmates of those houses and have greeted them with peace. This is better for you. It is expected that you will observe this. Then, if you find no one in them, do not enter until you have been permitted to enter. And if you are told to go back, then do go back. This is a purer way for you. Allah knows all that you do."*<sup>63</sup>

#### **ii. Prosecution:**

As proven by the case of *Ma'iz ibn Malik*, who confessed to adultery, the Prophet (PBUH) strongly preferred to conceal faults rather than impose *Hudud* punishments. At first, the Prophet (PBUH) sought to ignore his confession, admonished those who brought *Ma'iz* forward, and even apologized after punishing him. The punishment was only applied after *Ma'iz* insisted on confessing four times. This episode highlights a fundamental tenet of *Islamic* law: rather than pursuing punishment, the focus is on private repentance and avoiding public exposure of transgressions. To preserve dignity and promote rehabilitation, jurists believe that crimes, particularly *Hudud* violations, should be disguised if feasible.<sup>64</sup>

*Abu Hurairah (R.A) said:*

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<sup>62</sup> Quran 16:106.

<sup>63</sup> Qur'an 24:27–28

<sup>64</sup> Muhammad Munir, "Fundamental Guarantees of the Rights of the Accused in Islamic Criminal Justice System," *Hamdard Islamicus* 40 (2017): 54–55(45–65).

*“The Aslami man came to the Prophet (SAW) and bore witness against himself four times, that he had had illicit intercourse with a woman, and each time the Prophet (SAW) turned away from him. The fifth time, he turned to him and said: ‘Did you have intercourse with her?’ He said: ‘Yes.’ He said: ‘Until that part of yours disappeared into that part of hers?’ He said: ‘Yes.’ He said: ‘As the kohl stick disappears into its holder, and the rope disappears into its well?’ He said: ‘Yes.’ He said: ‘Do you know what Zina is?’ He said: ‘Yes. I have done unlawfully that which a man does lawfully with his wife.’ He said: ‘What do you want by saying this?’ He said: ‘I want you to purify me.’ So he ordered that he be stoned.”<sup>65</sup>*

### **iii. Adjudication:**

For *zina*, four eyewitnesses are required, and Confessions must be voluntary and may be retracted. Judges must apply prudence and mercy. False accusation leads to *qazf* (punishment for slander).

### **iv. Punishment:**

*Ta'zir* (discretionary) punishments allow review and are less severe. Judges must visit jails and verify reasons for imprisonment.

#### **1.9.1. Right to a Fair and Public Trial Before an Impartial Judge:**

“Any discussion of this topic would be incomplete without reproducing the letter of ‘Umar ibn. Al-Khattab to Abu Musa al-Ash’ari (R.A.), which is very comprehensive and self-explanatory:

“Henceforth, the right to adjudication is an absolute duty and one that the Sunnah follows. Investigate any case you suspect, for Right without execution (or remedy) is futile. Equalise (or be equal) between the parties before you (or let equality be manifest) in your expression (or demeanour) and your judgment. Your judgment should not be the basis for the noble (or powerful) to hope in your favour, and for the poor (or the weak) to despair of your justice.

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<sup>65</sup> Munir, Muhammad. "Fundamental guarantees of the rights of the accused in Islamic criminal justice system." *Hamdard Islamicus* 40 (2017): 54(45-65).

The burden of proof is on the whoever(accused) makes a claim, and he who(defendant) negates should be asked to take the oath. Reconciliation is desirable among Muslims, except where there is an agreement on something that legitimizes what is prohibited or prohibits what is legitimate. He who claims even a doubtful right and proves it, accord him the right, but if he cannot provide it, then rule against him:’ for (in both cases) it is the best that you can do. If you discern that a past decision was unfair, correct it without delay unless irreversible by time. Correcting flawed decisions is nobler than to sustain unfairness. The Muslims are witnesses unto one another except those who are well known for being liars and those who have been condemned for a *Hadd*, or those who are close to authority (meaning the excludability of those in authority). Only Almighty God knows the intention of each one of us, and we therefore can only judge (and condemn) based on proof. Suppose a case is presented to you, and you cannot find an applicable rule clearly stated in the Holy Quran or the Sunnah. In that case, you can reason the solution, contemplate (or deliberate judiciously), try to find an analogy, and study the work of the wise and then render your judgement accordingly. Beware of anger, anxiety, monotony, disgust, and do not be biased against or for anyone, even if he be your ally (or friend). God rewards just judgment, and people appreciate good judgment. If one is devoted (or pious) to God and adheres to the Right, even when it is against one’s interest, then God will save him. He who pretends that God will punish him. God accepts from the believers only the Good. Remember God rewards with riches and compassion (or forgiveness). Peace and blessings be on you.”<sup>66</sup>

Ultimately, having a fair trial in front of an impartial judge is the best assurance for an accused person. All the components of the fundamental protections of the accused's rights are present in the letter of 'Umar.'

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<sup>66</sup> M. Cherif Bassiouni, “Crimes and the Criminal Process,” *Arab Law Quarterly* 12, no. 3 (1997): 269–86, translation available at 275–76.

### **1.9.2. Right of the Defendant to Defend Himself:**

The accused may be treated equitably. Challenge witnesses and present counterproof. Judges must test witness credibility, even after verdicts. Judgments can be overturned if false testimony is discovered.

### **1.9.3. Right to Legal Representation:**

Legal counsel is encouraged due to the general lack of legal knowledge among defendants.

According to the Quran,

*"Let his guardian dictate equitably if the debtor is weak, feeble-minded, or incapable of dictating."<sup>67</sup>*

### **1.9.4. Right to Prompt Judicial Determination:**

Awrangzeb had grown concerned over legal delays in the adjudication of criminal cases. He ordered that if after the first date of hearing, the case was not heard on its scheduled date, the kotwal (police officer) was compelled to produce defendants daily until judgement was delivered.<sup>68</sup>

### **1.9.5. Right of Appeal:**

*"The classical Islamic law allows the right of appeal to the accused against a decision. It is reported that a woman who was accused of adultery was arrested and presented before 'Umar ibn. Al-Khattab (R.A) – the second Caliph. It was alleged that since she had committed adultery because she had delivered a child after only six months' pregnancy, Umar (R.A) ordered that she be stoned to death. As people were taking her towards the location for punishment, she kept on pleading that she was innocent, but no one would listen to her. It is reported that her sister came to 'Ali ibn Abi Talib (R.A) – the fourth Caliph and told him that 'Umar (R.A) had sentenced her sister to be stoned to death, but she is innocent. 'Ali (R.A) was asked by 'Umar (R.A) about it, and he told him that she cannot be*

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<sup>67</sup> Quran 2:282.

<sup>68</sup> Munir, Muhammad, The Administration of Justice in the Reign of Akbar and Aurangzeb: An Overview (March 22, 2011). Journal of Social Sciences, Vol. 5, No. 1 (August 2012), pp. 1-19., Available at SSRN: <https://ssrn.com/abstract=1792411> or <http://dx.doi.org/10.2139/ssrn.1792411>.

*guilty of adultery because a woman can give birth to a child after six months of pregnancy.”*<sup>69</sup>

As evidenced by the overturning of a lower court's decision by Caliph ‘*Ali ibn Abi Talib (R.A.)*, Islamic jurisprudence acknowledges the idea of legal review. The emergence of hierarchical courts in the expanding Muslim state established procedures for legal reconsideration, even though there was no official appeal system in place during the time of the Prophet (PBUH). This development implies that, despite not being expressly stated in early Islamic law, the ability to appeal court verdicts is consistent with Islamic legal norms of justice and procedural equity, providing defendants with a way to contest decisions.

#### **1.10. Mechanism of avoiding *Hudood* due to *shubah*:**

Suspects are not meant to be punished instantly under Islamic penal law. Before someone can be convicted in a court of law, strict requirements for proof must be fulfilled. The specified punishment cannot be applied if there is even the smallest question or "*Shubhah*" about the nature of the offence.<sup>70</sup>

This is based on the *Hadith* of the Holy Prophet (SAW), which states:

*“Set aside the execution of hudud punishments in cases of doubt (shubhah)”*<sup>71</sup>

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<sup>69</sup> Munir, Muhammad. "Fundamental guarantees of the rights of the accused in Islamic criminal justice system." *Hamdard Islamicus* 40 (2017): 61(45-65).

<sup>70</sup> In Islam, crime and punishment may be classified into three types, i.e. hadd, qisas and ta'zir. Hadd (plural: hudud), is a crime punishable with a fixed punishment imposed as the right of public, or known as the right of Allah. Hudud crimes and their punishments are mentioned clearly in the text of the Quran and the Sunnah. The crimes of hudud in Islamic criminal law are zina (adultery or fornication), qazf (false accusation of zina), theft, robbery, drinking intoxicants, apostasy and rebellion. When a crime of hadd is established, the prescribed punishment must be imposed. It cannot be reduced nor pardoned. Qisas & Diyat is a crime punishable with a fixed punishment imposed as the right of individual. Qisas & Diyat crimes and their punishments are mentioned clearly in the text of the Quran and the Sunnah. The crimes include homicide and causing bodily harm to others. Since these crimes involve the right of an individual, the victim has the right to choose, whether to demand the infliction of punishment on the offender or to pardon him. Ta'zir is a crime punishable with penalties that are discretionary, i.e. it is left to the discretion of the judge to determine the suitable punishment to be imposed on the offender. It consists of all kinds of transgression where no specific and fixed punishment is prescribed. (see: Awdah n.d.)

<sup>71</sup> Abd al-Qadir ‘Awdah, *al-Tashri al-Jina'i al-Islami*, vol. 1 (Cairo: Dar al-Turath, n.d.)



The stringent requirements for proving an Islamic illicit activity amply reflect this. For instance, there are strict guidelines on the quantity of witnesses, their credentials, and the information they must provide.

In the framework of Islamic penal law, *shubhah*, which translates to "doubt," refers to something unclear or extremely near to certainty but not quite. Another instance of *shubhah* pertains to the ambiguity of the evidence. An example would be someone who confesses to committing a *heinous offence without providing any further proof of the crime*, just his confession. Given his admission, he ought to get the *hadd* sentence in this instance. However, the penalty ought to be sent back if he changes his statement. This is because retracting a confession raises the possibility that it is untrue, or *shubhah*. If witnesses in a case that depends entirely on their testimony withdraw, the same rule applies.<sup>72</sup>

#### **1.11. In Cases of *Shubah* Avoiding *Hudud* Punishment:**

When *shubah* is present in a particular offence, there are two possible outcomes: either the accused is completely exonerated of the charge, or the *hadd* punishment is waived and substituted with a *ta'zir* punishment. (*Awdah, n.d.*) Three situations can result in a complete acquittal: first, whether the *shubhah* is present in the components of the crime. For instance, a man who enjoyed sexual activity with a woman under the false belief that she was his wife. Since there is no mental component in this case, no punishment at all may be meted out. Second, whether *shubhah* is present when the *Qur'anic* prohibitions or the Prophet's *Hadith* are applied, a prime example of this is when a marriage takes place without a witness or guardian present. While some legal scholars consider it legitimate, others do not. Therefore, neither *ta'zir* punishment nor *hadd* is possible. Third, whether *shubhah* is present in the commission of the crime. In the case of *Zina*, for instance, the evidence of the witnesses falls short of the necessary four male Muslim "*adil*" witnesses. There can be no punishment in such a situation.<sup>73</sup>

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<sup>72</sup> Muḥammad ibn Aḥmad ibn Muḥammad ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtaṣid*, 2nd ed., vol. 2 (Cairo: Dar al-Kutub al-Islamiyyah, 1983), nd.

<sup>73</sup> Nasima Hussain and Majdah Zawawi, *The Application of the Rule of "Avoiding Hudud Due to Shubhah" as a Mechanism for Ensuring Justice in the Determination of Punishments in Islamic Criminal Law* (International Islamic University Malaysia, 2013), 7.

*Zina* is regarded in Islam as a grave sin and an abhorrent practice. In certain places, the *Qur'an* controls *zina*. We begin by outlining the general rule of the *Qur'an* that forbids Muslims from engaging in *zina*:

*“Nor come nigh to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils).”*<sup>74</sup>

*Surah an-Nur* (the Light) contains the majority of the norms related to adultery, illegal sex (*zina*), and false allegations made by locals against clean females or by a partner against his significant other. The surah starts by outlining rules for *zina*'s discipline:

*“The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment.”*<sup>75</sup>

Then, at that point, it diverts to bogus indictments from individuals from the Muslim community to pure, honest ladies:

*“And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their testimony ever after: for such men are wicked transgressors; Unless they repent thereafter and mend (their conduct); for Allah is Oft-Forgiving, Most Merciful.”*<sup>76</sup>

Muslim jurists developed extremely stringent standards for establishing *zina* based on the Holy Prophet's *sunnah*. Jurists universally accept only two methods to accomplish this: the perpetrator of the act of *zina* must make a clear, voluntary, and free confession. The testimony of four trustworthy Muslim male eyewitnesses, all of whom must have witnessed the actual intercourse at the same time, is an alternative. If that person retracts their confession, however, they are not subject to punishment (unless witnesses are present, as mentioned below). This is because there would be no further evidence of the occurrence of the prohibited act.

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<sup>74</sup> Quran 17:32

<sup>75</sup> Quran 24:2

<sup>76</sup> Quran 24:4-5

It is essential to note that when a confession is made, the court should disregard the first three iterations of the confession. Until the confession is freely made four times, it is not legally binding.

*Abu Hurayrah* narrated:

*“A man from the tribe of Aslam came to the Messenger -peace be upon him- while he was in the mosque and said to him: ‘O Messenger of God, I have committed adultery.’ The Messenger turned away from him. The man, then, stepped in front of the Messenger and said: ‘I committed adultery.’ The Messenger again looked away. The man did the same thing four times. When he confessed four times, the Messenger called upon him and asked him: ‘Are you insane?’ The man said: ‘No!’ The Messenger then asked him: ‘Were you married (muhsan) when you committed this act?’ to which he said: ‘Yes!’ Only then did the Prophet order that the man be punished for zina.”<sup>77</sup>*

(Ibn Abbas reported that the Prophet – peace be upon him- said to *Ma’iz*:

*“Maybe you just kissed, maybe you touched her, or looked...” and the man said: “No!” He (the Messenger) said, “So, did you penetrate<sup>78</sup> her? (Using no metaphors), And the man said: “Yes!” The Prophet then ordered his punishment. In another version of the same hadith, the Prophet asked the man: “Till that of yours disappeared in that of hers?” The man said, “Yes” The Prophet asked, “Like a stick disappears in a kohl canister and a rope in a well?” The man said, “Yes!” He then asked him, “Do you know the meaning of zina?” The man said, “Yes! I did with her illegally what a husband does with his wife legally.”<sup>79</sup>*

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<sup>77</sup> Reported by al-Bukhari and Muslim. Muwaffaq al-Din Ibn Qudamah, *al-Mughni*, vol. 10 (Beirut: Dar al-Kitab al ‘Arabi, n.d.), 166.

<sup>78</sup> The Arabic word used by the Prophet in this hadith means the actual intercourse, leaving no possible confusion.

<sup>79</sup> KARAMAH: Muslim Women Lawyers for Human Rights, *Zina, Rape, and Islamic Law: An Islamic Legal Analysis of the Rape Laws in Pakistan* (Position Paper, KARAMAH, 2020), 1-15 <https://karamah.org/wp-content/uploads/2020/04/Zina-Rape-and-Islamic-Law-An-Islamic-Legal-Analysis-of-the-Rape-Laws-in-Pakistan.pdf>.

The Prophet established this fact in the subsequent incident. After confessing to *zina* multiple times, a woman was ultimately disciplined. Someone who was there at the time treated her with disdain.

*"She repented such a repentance that if shared amongst seventy people of Madina, it would suffice them," the Prophet told the man, clearly upset.*

*In most cases, the testimony of two men is sufficient to prove a criminal offence in Islamic law. However, the law of Zina needs four witnesses. This idea is consistent with the hadith, which says:*

*"God will cover a Muslim's flaws both now and in the future, if someone covers his shortcomings ('awrah)." <sup>80</sup>*

From the Prophet's example, scholars have deduced that it is better for the judge or imam to advise the confessor to withdraw their confession and for the witnesses to abstain from testifying.

#### **1.12. The Case of Claim of Rape by an Unmarried Pregnant Woman:**

*Imam Abu Hanifah* argued that if there were no way to verify the woman's claim or to prove *zina*, then it would be better to release her according to the *hadith* "dismiss the *hudud* if there is an element of doubt (*shubha*)."<sup>80</sup> *Imam Abu Hanifah* also based his opinion on numerous incidents where the Prophet's Companions, notably the *Khulafa' ar-Raashidun*, dismissed apparent cases of *zina* when women claimed rape. Some of these cases, which took place during *Omar's* tenure, have already been discussed. *Omar* ordered all of his governors to refrain from carrying out executions without first consulting him after dismissing an apparent *zina* case against an unmarried pregnant woman who claimed to have been raped. In cases involving alleged *zina*, this decree is of utmost importance. Additionally, *Khalifah Ali* and his well-known colleague *Ibn Abbas* said:

*"If there is an 'if' or a 'maybe' in the case of hadd, it cannot be applied."*<sup>81</sup>

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<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

Other jurists, like as *Imam Malik*, disagreed, contending that unless marriage or rape are proven, pregnancy is adequate evidence of *zina*. The following quote from *Imam Ali* served as the foundation for their opinion:

*“O People, zina has two forms; it can be secret or public. As to secret zina, only the testimony of witnesses can prove it...whereas public zina is when there is a pregnancy or a confession...”*<sup>82</sup>

It appears that the scholars who quote *Imam Ali* overlook the fact that he established specific standards for unwed pregnancy. In these situations, he always gave the expectant mother the chance to defend herself by alleging rape or an unreported marital relationship. In the event of *shubhah* (doubt, chance of innocence), he was likewise likely to drop the charges.

### **1.13. Conclusion:**

Requirement of Four Eyewitnesses in Islamic Legal Principle, *The Quran* (24:4) and *Hadith* mandate four straight male eyewitnesses who directly saw penetration "like a stick entering a *kohl jar*". *Hadd* punishment cannot be applied on purely circumstantial proof, such as pregnancy, rumours, or forced statements. For defence strategy, if the prosecution cannot produce four pious, trustworthy, and consistent eyewitnesses, the case may then continue under *Tazir* (discretionary punishment), which has lower standards for evidence but fewer penalties. Otherwise, it is impossible to apply the *Hadd* sentence, which consists of lashing or stoning. Since the prosecution has not met the *Quranic* requirement of four eyewitnesses, the accused cannot be subjected to *Hadd* punishment, and the case must be dismissed or downgraded to *Tazir*. Secondly, Retraction of Confession in Islamic Legal Principle, a confession to *Zina* must be made voluntarily, four times, and in front of a court to prevent making false admissions under pressure. The *Hanafi*, *Maliki*, and *Shafi'i* schools all hold that the accused has the right to change their confession at any time. For the defence approach, a confession made by an accused individual under pressure by psychological compulsion, torture, or threats is worthless, according to *Shariah*. Even if the accused has already confessed, they have the right to withdraw it before it is executed. Now the

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<sup>82</sup> Ibid.

confession was forced and the accused has now denied it, the *Hadd* punishment is null and invalid, and no Islamic penalty may be administered.

Doubt (*Shubah*) as a Barrier to *Hadd* in Islamic Legal Principle: Avoid *Hudud* (imposed punishments) by doubts; *Hadd* is prevented by any ambiguity (such as incorrect identification, a possibility of marriage, or lack of purpose). For defence approaches, in the claim of marriage, *Hadd* does not apply if the accused thought they were married, even if the marriage was not a legal mistake, if the accused did not know the deed was illegal (for example, a non-Muslim who did not know Islamic law). Therefore, the case must be rejected or reconsidered under *Tazir*, as the severe *Hadd* punishment cannot be applied due to the existence of doubt (*Shubah*). False Accusation and Punishment for Slander in an Islamic Legal Principle, The *Quran* (24:4) prescribes 80 lashes for false accusations of *Zina* (*Qazf*), unless the accused has four witnesses. If *the prosecution cannot prove Zina*, the accuser may be held accountable. For a Defensive approach, if the complainant lacks proof, you can either demand their punishment under *Sharia law* or file a counter case under Pakistan's *Qazf* Ordinance, 1979. Therefore, the case against the accused must be dropped, as the accuser is accountable for *Qazf* (false allegation) because they did not provide four witnesses. Legal Technicalities in Islamic Legal Principles is that classical scholars (except few Hanbalis) do not accept pregnancy as proof because a woman may have been raped or secretly married. No *Hadd* for Non-Muslims, some jurists claim that non-Muslims are excused from *Hadd* for *Zina* if it is permissible in their faith. Therefore, a defence strategy is to make the case for dismissal if the accused is not a Muslim or if there is another reason for the pregnancy. Hence, no eyewitnesses were shown, and pregnancy alone does not establish *Zina*; the *Hadd* punishment is inapplicable by traditional Islamic doctrine.

## CHAPTER 2

### RIGHTS OF THE ACCUSED IN CASES OF *ZINA* IN PERSPECTIVE OF PAKISTANI LAWS

#### 2.1. Introduction:

In 1979, significant changes occurred in Pakistan when the military government expanded the application of *Fiqh* to criminal law by introducing the *Hudood* Ordinance. In criminal offences under Pakistani law, *zina* refers to adultery or fornication. It involves consensual sexual intercourse between a man and a woman and is concerned with marital status. *Zina* is intended to prohibit extramarital sex and is based on Islamic principles. The law against rape was included into an ordinance known as The Offense of *Zina* (Enforcement of *Hudood*) Ordinance, VII of 1979. The law also addresses the offences of fornication and adultery, which were not considered crimes in Pakistan until 1979. The application of criminal law guarantees the preservation of social harmony. It protects citizens' rights to life, honour, liberty, and property—all of which are essential for all citizens. It reinforces the rule of law in a nation state and provides citizens with a legitimate sense of security and protection. Establishing the rule of law and upholding the "social contract" between the people and the government are regarded as crucial elements of a civilised nation. Determining the accused's guilt or innocence is the primary goal of a criminal trial.

“*Zina* is defined as sexual intercourse between a man and woman outside a valid marriage (*Nikah*), the semblance (*Shubha*) of marriage, or lawful ownership of a slave woman (milk yamin).”<sup>83</sup>

Following the adaptation of the definition of *zina* in Muslim states, a similar trend was also observed in Pakistan. As a result, Pakistan introduced “The offence of *Zina* (Enforcement of *Hudood*) Ordinance 1979, which elaborates the definition of *zina* in section 4 or 2 of the *Zina* Ordinance, 1979 to cover various forms of consensual acts of sexual violence. Additionally, Section 222 of the Pakistan Penal Code, 1860, and Section 4 of the Criminal

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<sup>83</sup> Ziba Mir-Hosseini, “Criminalizing Sexuality: *Zina* Laws as Violence Against Women in Muslim Contexts,” *SUR—International Journal on Human Rights* 8 (2011): 7.

Procedure Code, 1898, also define the accused. In this Chapter, we will discuss the updated legal interpretation of zina, focusing on the rights of the accused and the concept of *shubha* (doubt) in Pakistani law.

Pakistani law affords the accused person various rights, including constitutional rights, procedural rights, rights under the Zina Ordinance, 1979, rights under the Qanun-e-Shahadat Order, 1984, and rights under the Pakistan Penal Code, 1860.

## **2.2. Historical Background:**

### **2.2.1. Pre-Hudood Ordinance Era: Hudood Ordinance 1979:**

General Zia ul-Haq revolutionizes Pakistan's legal System in 1979 by introducing Islamic criminal laws. (These laws, part of Zia's broader "*Islamization*" policies, replaced parts of the British-era Pakistan Penal Code with punishments like whipping, amputation, and stoning to death for extra-marital sex, and false adultery allegations.

The 1973 Constitution's provision for Islamic law could not be enforced in court, as Islam served as the appellate court for all cases involving the *Hudood* Ordinances.

### **2.2.2. Enactment of Hudood Ordinance 1979:**

The *Zina* Ordinance, introduced in 1979, replaced the Pakistan Penal Code's provisions on sexual offences, criminalising all intercourse outside a legally valid marriage. It imposed severe penalties for adultery and sexual misconduct, including whipping and stoning, and poorly written provisions disproportionately hurt women, many of whom were imprisoned on bogus charges before being exonerated but socially shunned. Even worse, rape victims were subject to "double risk," as if they reported an assault, they might be charged with illicit sexual activity if they were unable to provide evidence of coercion. The law continued to exist despite repeated calls for its abolition by government agencies and rights organizations such as the National Commission for the Status of Women (2003), which exemplified deliberate bias against women under the guise of Islamic jurisprudence.

The *Zina* Ordinance is still in effect in Pakistan despite opposition, because its complete removal would conflict with constitutional obligations to maintain Islamic principles, despite Pakistan being bound to international human rights treaties. After lobbying for



years by women's rights organizations such as the Women's Action Forum and Shirkat Gah, which campaigned for a Commission of Inquiry that criticised the Ordinance, General Pervez Musharraf became the first leader to alter the law. Under Musharraf's influence, the Council of Islamic Ideology (CII), which had initially assisted in drafting Zia-ul-Haq's *Hudood Ordinances* (1979), later reviewed the law. Musharraf was protected from charges of secularization in 2002 when the CII made adjustments but refrained from executing significant reforms. Following its reorganization in 2004 under Chairman Khalid Masud, the CII discussed *Shari'ah* but postponed making any substantial reforms. The *Zina* Ordinance was finally changed by the Protection of Women Act, 2006, which established more significant penalties for rape (25 years to death), separated rape (*zina-bil-jabr*) from adultery/fornication, and added protections against false charges (*qazf*). The reform addressed historical injustices while negotiating political and religious restrictions by aligning laws with Islamic beliefs and constitutional liberties (Articles 14, 25).<sup>84</sup>

The Protection of Women (Criminal Laws Amendment) Act, 2006, reforms Pakistan's laws on *zina* (adultery/fornication) and *qazf* (false accusation) to avoid police abuse and exploitation while adhering to Islamic teachings. It shifts rape cases from the *Zina* Ordinance back to the Pakistan Penal Code (PPC), imposing severe penalties (25 years to death, with life imprisonment for gang rape). The Act reinterprets *zina*, establishing a distinction between fornication (added to the PPC as consensual sex between unmarried individuals, punishable by up to five years and a fine) and adultery (retained under the *Zina* Ordinance). Similar punishments are being applied for false *allegations of zina*. The convictions are uncommon because of the law's stricter conditions for prosecution—adultery prosecutions must involve either a confession or four faithful male witnesses. Furthermore, the *Qazf* Ordinance penalizes false criminals, and the Criminal Procedure Code prohibits rape reports from being converted into fornication accusations. These

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<sup>84</sup> Martin Lau, "Twenty-Five Years of Hudood Ordinances—A Review," *Washington and Lee Law Review* 64, no. 3 (2007): 1295–98(1291-1314).

changes aim to protect women, reduce abuse of the law, and clarify the definitions of rape, adultery, and fornication.<sup>85</sup>

**2. Definitions.** In this Ordinance, unless there is anything repugnant in the subject or context, (a) “adult” means a person who has attained, being a male, the age of eighteen years or, being a female, the age of sixteen years, or has attained puberty;

**3. [(“aa) “confession”** means, notwithstanding any judgement of any court to the contrary, an oral statement, explicitly admitting the commission of the offence of *zina*, voluntarily made by the accused before a court of sessions having jurisdiction in the matter or on receipt of a summons under section 203A of the Code of Criminal Procedure, 1898 (Act V of 1898)”; And

(b) *hadd*” means punishment ordained by the *Holy Quran* or *Sunnah*; 1

(d) “*Muhsan*” means

(i) A Muslim adult man is not insane and has had sexual intercourse with a Muslim adult woman who, at the time he had sexual intercourse with her, was married to him and was not insane; Or

(ii) A Muslim adult woman who is not insane and has had sexual intercourse with a Muslim adult man who, at the time she had sexual intercourse with him, was married to her and was not insane; And

**4. Zina.** A man and a woman are said to commit ‘*zina*’ if they willfully have sexual intercourse without being married to each other.

**5. Zina is liable to hadd.**(1) *Zina* is liable to *hadd* if:

(a) It is committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be, married; Or

(b) It is committed by a woman who is an adult and is not insane with a man to whom she is not, and does not suspect herself to be, married.

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<sup>85</sup> Lau, Martin. "Twenty-five years of Hudood Ordinances-A review." *Wash. & Lee L. Rev.* 64 (2007):1308(1291-1341).

(2) Whoever is guilty of *zina* is liable to *hadd* shall, subject to the provisions of this Ordinance, (a) if he or she is a '*muhsan*', be stoned to death at a public place; Or

(b) If they are not a '*muhsan*', be punished, at a public place, with whipping numbering one hundred stripes.

(3) No punishment under subsection (2) shall be executed until the Court to which an appeal from the order of conviction lies has confirmed it: and if the punishment were of whipping, until it is confirmed and executed, the convict shall be dealt with in the same manner as if sentenced to simple imprisonment.

### **2.3. Legal Framework Governing *Zina*: *Zina* in Pakistani law: Classification of *zina* in Pakistani law with punishments.**

#### **“(a) *zina* liable to *hadd*”**

**Section 8.** Proof of *zina* liable to *hadd*. Proof of *Zina* liable to *hadd* shall be in one of the following forms, namely: (a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence; or,

(b) at least four Muslim adult male witnesses about whom the Court is satisfied having regard to the requirements of *tazkiyah al\_shuhood* that they are truthful persons and abstain from major sins (*kabir*) give evidence as eyewitnesses of the act of penetration necessary to offence;

Provided that, if the accused is a non-Muslim the eyewitnesses may be non-Muslim.

Explanation. In this section, “*tazkiyah al\_shuhood*” means the mode of inquiry adopted by a Court to satisfy itself as to the credibility of a witness.

#### **(b) *Zina* is liable to *tazir***

#### **Section 10. *Zina* or *zina-bil-jabr* is liable to *tazir*.**

(1) Subject to the provisions of section 7, whoever commits *zina* or *zina-bil-jabr* which is not liable to *hadd*, or for which proof in either of the forms mentioned in section 8 is not available and the punishment of *qazf* liable

*to hadd* has not been awarded to the complainant, or for which *hadd* may not be enforced under this Ordinance, shall be liable to *tazir*.

- (2) Whoever commits *zina* liable to *tazir* shall be punished with rigorous imprisonment for a term, which may extend to ten years and with whipping numbering thirty stripes, and shall be liable to a fine.
- (3) Whoever commits *zina-bil-jabr* liable to *tazir* shall be punished with imprisonment for a term which [shall not be less than four years nor more than] twenty-five years and shall also be awarded the punishment of whipping numbering thirty stripes.

When *zina-bil-jabr* liable to *tazir* is committed by two or more persons

- (4) in furtherance of the common intention of all, each of such persons shall be punished with death.]”<sup>86</sup>

### **2.3.1. Women Protection (Criminal Laws Amendment) Act, 2006:**

The Women Protection Act addressed the criticism and challenges of the Hudood Ordinance and transferred certain offences from the Hudood Ordinance to the Pakistan Penal Code.

“The Protection of Women (Criminal Laws Amendment) Act, 2006, is structured around three elements. The first element returns the number of offences from the Zina Ordinance to the Pakistan Penal Code, as they existed before 1979. The second element reformulates and redefines the offences of *zina* and *qazf*, the wrongful accusation of *zina*. The third element creates an entirely new set of procedures governing the prosecution of the offences of adultery and fornication.”<sup>87</sup>

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<sup>86</sup> *Offence of Zina (Enforcement of Hudood) Ordinance, 1979* (Pakistan), ss 8, 10.

<sup>87</sup> Lau, Martin. "Twenty-five years of Hudood Ordinances-A review." *Wash. & Lee L. Rev.* 64 (2007): 1291(1291-1341).

## **2.4. General rights of the accused in Pakistani law:**

The presumption of innocence demands protecting the accused matters because society often presumes guilt, the law must distinguish suspicion from guilt.<sup>88</sup>

### **Accused in the Pakistani Legal System and the Difference between Accused and Offender:**

The term 'accused' refers to an individual formally charged with a criminal offense and is now being tried in court. The key distinction between an Accused and an Offender is that an accused denotes an individual against whom criminal charges are pending adjudication, whereas an Offender is someone legally found guilty of committing the crime. An accused refers to an individual formally charged with a criminal offense or is facing trial for a criminal allegation. By this definition, the accused and offender are distinct legal statuses: an accused person, being only a suspect in an ongoing inquiry and just under investigation until proven otherwise in court. In contrast, the term 'offender' applies when a court officially finds them guilty of a crime after proper judicial proceedings.<sup>89</sup>

#### **2.4.1. Pre-trial Rights**

##### **(a) P1314. Protection from Arbitrary Searches, Detentions, and Arrests**

The accused person has the right to be secure from unlawful searches, imprisonment, and arrests. Sections 60 and 61 of the Criminal Procedure Code (CrPC) prevent unlawful detention, while Section 491 empowers the High Court to order the release of a wrongfully detained person. Police cannot arrest or search without a warrant (Section 51 CrPC), and searches require a warrant and the presence of respectable witnesses (Sections 100 & 103 CrPC). A writ of habeas corpus can challenge illegal detention, compelling authorities to justify custody before a court.<sup>90</sup>

##### **(b) Presentation before a Magistrate**

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<sup>88</sup> Mariam Sherwani, "Rights of the Accused in the Legal System of Pakistan: A Legal Analysis," *Islamabad Law Review* 3, no. 3&4 (2019): 100-101(100-111).

<sup>89</sup> Ibid.

<sup>90</sup> *Code of Criminal Procedure, 1898* (Pakistan), ss 51, 60, 61, 100, 103, 491.

According to Article 10(2) of the Constitution and Section 61 of the CrPC, police custody cannot exceed 24 hours without judicial approval. To avoid prolonged custody, a magistrate may grant remand for a maximum of 15 days (Sections 344 & 167 CrPC).<sup>91</sup>

#### (c) Protection against Ex Post Facto Laws

Ex post facto rules, which penalize actions that were previously legitimate, are prohibited under Article 12 of the Constitution<sup>92</sup>, following the principle "nulla poena sine lege"<sup>93</sup> (no punishment without law). These laws impose penalties retrospectively, which is a violation of fundamental rights.

#### (d) Right to be Informed of Arrest Reasons

Article 10(1) of the Constitution and Sections 50, 55, and 75 of the CrPC require authorities to immediately inform the accused of the grounds for their arrest, enabling them to prepare a defence.<sup>94</sup>

#### (e) Right to a Fair Trial

Article 10A guarantees a fair trial before an impartial court, conducted publicly by the due process of law.<sup>95</sup>

#### (f) Right to Privacy

Personal dignity and home privacy are protected by Article 14(1), which permits incursions only when they are justified by law.<sup>96</sup>

### 2.4.2. During trial Rights:

Article 14(2) of the Constitution, which prohibits any kind of harsh, inhuman, or degrading treatment to obtain evidence, protects the accused from torture. To prevent someone from

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<sup>91</sup> *Constitution of Pakistan, 1973*, art. 10(2); *Code of Criminal Procedure, 1898* (Pakistan), ss 61, 167, 344.

<sup>92</sup> *Constitution of Pakistan, 1973*, art. 12.

<sup>93</sup> *The Heritage Guide to the Constitution*, s.v. "Ex Post Facto," accessed May 27, 2017, <http://www.heritage.org/constitution/articles/1/essays/63/ex-post-facto>.

<sup>94</sup> *Constitution of the Islamic Republic of Pakistan, 1973*, art. 10(1); *Code of Criminal Procedure, 1898* (Pakistan), ss 50, 55, 75.

<sup>95</sup> *Constitution of the Islamic Republic of Pakistan, 1973*, art. 10A.

<sup>96</sup> *Constitution of the Islamic Republic of Pakistan, 1973*, art. 14(1).

being tried twice for the same offence (the *nemo debet bis vexari*), Article 13(a) and Section 403 CrPC protect against double jeopardy.<sup>97</sup>

Under Section 50 CrPC, appropriate detention is essential to avoid needless constraint. Article 10A guarantees due process, ensuring that trials are conducted by the law. Article 25 ensures equality before the law, whereas the right to choose legal counsel is granted under Article 22(1) and Section 353 CrPC.<sup>98</sup>

The defendant is entitled to obtain free copies of FIRs, police reports, and witness testimonies (Section 265-C CrPC) within seven days, and they have the right to remain silent (Article 13(b)). Section 353 CrPC requires witnesses to testify in front of the defendant, while Sections 364, 360, and 361 CrPC require that the questions be asked in a language that is understandable to the defendant, who is accused. The accused can cross-examine witnesses (Sections 133-134 QSO, Section 505 CrPC) and clarify statements (Section 364 CrPC). An independent judiciary (Article 175), ensuring impartiality and fairness must conduct trials.<sup>99</sup>

#### **2.4.3. Post-trial Rights:**

For bailable offences, the accused has the right to bail under Section 496 CrPC. If convicted, they may appeal the decision as per Sections 408, 410, and 411-A of the CrPC and Articles 185, 203-F, and 212 of the Constitution of Pakistan. The right to a free copy of the judgment, including a translated version if the accused fails to understand the court's language, is also guaranteed under Section 371 CrPC.<sup>100</sup>

#### **2.4.4. Exceptional Rights:**

Special protections are in place for vulnerable individuals who are accused. If found mentally ill, Lunatics may be released on bail under Sections 464 & 497 CrPC, even in circumstances where bail is not applicable. Section 52 CrPC protects women who are

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<sup>97</sup> *Constitution of the Islamic Republic of Pakistan, 1973*, art. 13(a), art. 14(2); *Code of Criminal Procedure, 1898* (Pakistan), s 403.

<sup>98</sup> *Constitution of the Islamic Republic of Pakistan, 1973*, art. 10A, art. 25; *Code of Criminal Procedure, 1898* (Pakistan), ss 50, 353.

<sup>99</sup> *Constitution of the Islamic Republic of Pakistan, 1973*, art. 13(b), art. 175; *Code of Criminal Procedure, 1898* (Pakistan), ss 265-C, 353, 364, 360, 361, 505, *Qanun-e-Shahadat Order, 1984*, ss 133, 134.

<sup>100</sup> *Constitution of the Islamic Republic of Pakistan 1973*, art. 185, 203-F, 212; *Code of Criminal Procedure, 1898* (Pakistan), ss 371, 408, 410, and 411-A.

suspected of crimes by requiring that decency-abiding female police carry out searches. Considering their youthful status, Minors (those under 16) may be granted bail under Section 497 CrPC.<sup>101</sup>

## **2.5. In Pakistan, Criminal Investigation Protecting the Rights of the Accused:**

By incorporating Islamic legal concepts into Pakistan's criminal justice system, the *Hudood Ordinances*, which were implemented by the military leadership in 1979 and came into effect in 1980, were a significant Step toward Islamization. The laws made a difference between two kinds of punishments: *Tazir*, which were applied when the *Hadd* criteria were not fulfilled, and *Hadd*, which were fixed penalties based on Islamic jurisprudence (such as stoning for married Muslims found guilty of rape or adultery and 100 lashes for unmarried Muslims and non-Muslims). The ordinances were criticized for their severe penalties and probable abuse, especially in situations involving false allegations or the absence of the substantial proof needed for Hadd penalties, even if their goal was to bring Pakistan's legal system into line with Islamic beliefs.

According to Pakistan *Shariah law*, the *Zina Hudood Ordinance* is described as follows in the *Hudood Ordinance* of 1979:

- 1) *Zina*, defined as extramarital sex, including adultery and fornication, is illegal under the *Hudood Ordinance*.
- 2) *Zina-bil-jabr*, or rape outside of a legally recognized marriage, is also made a crime.
- 3) Based on the designated criminal penalty, the *Hudood Ordinance* provides further definitions for *Zina* and *Zina bil jabar*.
- 4) As a result, *Zina* and *Zina-bil-jabr* are subject to *Hadd*, which is a punishment, that the Holy Quran or Sunnah purportedly mandates:
- 5) In addition, *Zina* and *Zina-bil-jabr* are subject to *tazir*, or any penalty other than *Hadd*. *Zina's tazir* punishment is up to ten years in prison and whipping, which includes up to

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<sup>101</sup> *Code of Criminal Procedure, 1898* (Pakistan), ss 52, 464, 497.



thirty lashes and/or a fine. *Hadd's* punishment is stoning to death. *Zina-bil-jabr* faces a *tazir* sentence of up to 25 years in prison and up to 30 lashes of whipping.<sup>102</sup>

*The Holy Quran says:*

*“Men are in charge of women, because Allah hath made the one of them to excel the other, and because they spend of their property (for the support of women). So good women are the obedient, guarding in secret that which Allah hath guarded. As for those [women], from whom ye fear rebellion, admonish them and banish them to beds apart; and scourge [beat] them. Then, if they obey you, seek not a way against them. Lo! Allah is ever High Exalted, Great.”*<sup>103</sup>

A rape victim who does not present the required number of witnesses (usually four) risks the possibility of being charged with adultery (*zina*) instead, which carries jail time or corporal punishment under Pakistan's Islamic Law of Evidence (1984). This legal system, which was put in place under General Zia-ul-Haq, has come under criticism for encouraging gender inequity and permitting false convictions. In Pakistan, the *Hudood Ordinance* and Law of Evidence (1984) created a harshly biased legal system against women, especially those who have been raped. Essential concerns include avoiding being prosecuted with *zina* (adultery/fornication) and subject to *Tazir laws*; a rape victim must provide evidence of assault with four male witnesses. In *many* instances, women's testimony has no legal weight, making it practically impossible for them to pursue justice. Due to stringent evidentiary requirements, men accused of rape frequently escape punishment, while women are wrongfully convicted. Under the guise of Islamic jurisprudence, these rules expose women to systematic discrimination by promoting male dominance. The system has received considerable criticism for allegedly supporting injustice rather than enforcing the law.

In response to criticism from international adversaries and women's rights organizations, General Pervez Musharraf established the National Commission on the Status of Women

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<sup>102</sup> Imran Rahat, "Legal Injustices: The Zina Hudood Ordinance of Pakistan and Its Implications for Women," *Journal of International Women's Studies* 7, no. 2 (2005): 87(78-100).

<sup>103</sup> Quran 4.34

(NCSW) in 2000 to examine Pakistan's contentious *Zina Hudood laws*. The 20-member commission, led by Justice *Majida Rizvi*, the country's first female High Court judge, had a majority (18 out of 20) in support of the total replacement of the Hudood Ordinances due to their discriminatory nature. Only two members—representing religious bodies—supported reform instead of abolition, acknowledging the laws' flaws but opposing full repeal. Justice Rizvi emphasized that partial reforms would be insufficient, urging the government to abolish the laws entirely if it was serious about achieving gender justice. The NCSW advocated for systemic change to defend women's rights, but the findings showed significant differences between conservative and progressive sections.<sup>104</sup>

Older techniques in Pakistan's criminal investigation system cause the accused to be subjected to rights violations such as coercion, torture, and unlawful detention. Due to the misconduct of police and the public's ignorance of their legal rights, the implementation of the constitution and international guarantees for a fair trial and dignity remains insufficient, with systemic problems, such as illegal arrest of family members and third-degree torture. As a result, people lose faith in the legal system, which calls for immediate changes to bring it into compliance with human rights norms and modern crime-fighting techniques.

## **2.6. Reforms and Their Impact (Protection of Women Act, 2006, Judicial Interpretation):**

"Cognizance" is defined as "a term of art suggesting application of mind to facts of a case to figure out whether facts listed constituted an offense capable of being tried solely by the Court of Sessions, in which case the Magistrate is obligated to send the case to the Court of Sessions for trial."<sup>105</sup>

Determining whether someone is innocent or guilty through a fair and unbiased legal procedure is the primary goal of a criminal trial in Pakistan. The following are guaranteed as fundamental rights:

- a) Cognisance & Jurisdiction: Only Magistrates (or specialised courts like Anti-Terrorism Courts) can initially take cognisance of a case. Sessions Courts

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<sup>104</sup> Imran, Rahat. "Legal injustices: The Zina Hudood Ordinance of Pakistan and its implications for women." *Journal of International Women's Studies* 7, no. 2 (2005): p.89-90 (78-100).

<sup>105</sup> *Aijaz Ali v the State*, 2020 PLD 491.

cannot directly take cognisance (per Section 193 Cr.P.C.); cases must be referred to them by Magistrates.

- b) Legal Principles: There are no common-law crimes because all offences are legal under the principles of “*nullum crimen sine lege* (no crime without a law) and *nulla poena sine lege* (no punishment without a law)”<sup>106</sup>. There are two types of crimes: cognizable (for which the police can make an arrest or conduct an investigation without a warrant) and non-cognizable (for which a warrant is necessary).
- c) Court Structure: District-level courts include Magistrates, Sessions Courts, and Special Courts. Provincial oversight consists of the High Court’s supervising lower courts. The challenge is that the implementation of fair trials frequently fails, despite legal safeguards, due to systemic delays, partiality, or procedural defects.

The criminal justice system operates through Sessions Courts and Magistrates Courts (classified into first, second, and third class) in Pakistan. Trials are classified as either regular (for major indictable offences) or minor. The legal processes are divided into judicial (pre-trial and trial) and administrative (investigation and prosecution review) phases. A magistrate's cognisance of the case marks the start of the judicial phase, which is followed by a formal charge under Section 242 Cr.P.C., in which the defendant is given detailed information about the offence. If the defendant enters a plea of not guilty, the trial proceeds with the prosecution and defence presenting their evidence, ultimately leading to either an acquittal or a conviction. The accused's right to remain silent and the court's power to recall or re-interview witnesses if it believes their testimony is necessary for a fair verdict are essential protections. A key role is played by public prosecutors (PPs), who have the authority to drop charges before or after framing and supervise trials initiated by law enforcement reports (under Section 173 Cr.P.C.). Bail rules differ for offences that are subject to mandatory bail and those that are not (discretionary, unless there are exceptional

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<sup>106</sup> Wex Definitions Team, “*nullum crimen sine lege*,” *Legal Information Institute*, Cornell Law School, last reviewed August 2023, accessed march 02, 2025, [https://www.law.cornell.edu/wex/nullum\\_crimen\\_sine\\_lege](https://www.law.cornell.edu/wex/nullum_crimen_sine_lege).

circumstances, such as charges involving the death penalty). Punishment takes into account the seriousness of the offence, the offender's intent, and their prior behaviour. In cases of unclear information, judges are required to favour the accused's liberty ("benefit of the doubt"). Despite established protocols, difficulties persist in ensuring prompt trials and fair enforcement, particularly when striking a balance between the strictness of the law and fundamental rights.<sup>107</sup>

## **2.7. Sexual Assault:**

Sexual assault is a common worldwide problem that affects men, women, children, and transgender people, as well as violating their human rights. According to WHO statistics, 1 in 5 women globally are sexually assaulted. Even though assault on the street is common, it is largely ignored by activists and organizations that focus on harassment in institutions, workplaces, and public areas. Prioritizing this overlooked facet of gender-based violence requires collective efforts.

“If a person has intercourse with a woman or man, as the case may be, to whom they are not legally married under any of the following circumstances, it is considered *zina-bil-Jabr*. a) against their will; b) without their consent; c) with their consent, but only after causing them to fear harm or death; or d) if the victim gives their consent and the offender knows that the relationship is void because the victim believes the offender is someone else to whom they are legally married.

Subject to *hadd*, proof of *Zina or Zina bil Jabr* must be presented in one of the following formats: The accused must either a) confess to the crime in front of a court with the proper jurisdiction, or b) at least four Muslim adult male witnesses who are truthful and refrain from grave sins (*kabair*) and who testify as eyewitnesses to the penetration act necessary

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<sup>107</sup> Muhammad Munir, *Judicial Proceedings in Criminal Cases in Pakistan* (SSRN working paper, December 1, 2021), 12, <https://ssrn.com/abstract=3975427>.

for the crime: As long as the accused is not a Muslim, the eyewitnesses may not be Muslims.”<sup>108</sup>

Data collection and evidence interpretation are essential steps in an efficient criminal investigation. To solve this puzzle, forensic science plays a crucial role. By guaranteeing methodical data collection, evidence interpretation, and crime scene preservation—all of which are essential for resolving cases, especially sexual assaults—forensic science plays a vital role in criminal investigations. However, insufficient resources, a lack of a national DNA database, and a lack of forensic skills hinder the effectiveness of investigations in Pakistan. Skilled experts, advanced forensic techniques (such as DNA profiling), and carefully stored biological evidence can all significantly enhance the accuracy of connecting suspects to crime scenes. Governments need to invest in forensic infrastructure, establish DNA databases, and improve police training to bridge current gaps, increase conviction rates, and ensure justice in complex criminal cases.

Although they offer an essential framework, Pakistan's execution of the Standard Operating Procedures (SOPs) for medico-legal exams of women victims of abuse is still unsatisfactory. Inexperienced paramedics often undertake these tests, even though only certified Medico-Legal Officers (MLOs) or Chief Medical Officers (CMOs) are legally permitted to do so. This results in inconsistent documentation and inconsistencies between police records and medical reports. Although forensic evidence—especially DNA analysis—is essential for identifying criminals, Pakistan does not have a specific legal framework for DNA evidence. Currently, courts rely on Articles 59 and 164 of the Qanun-e-Shahadat (QSO), which acknowledge expert scientific testimony but treat DNA evidence as equivalent to medical evidence. This limited interpretation ignores DNA's exceptional accuracy in identifying offenders. There is also a legal ambiguity because courts have not provided clear direction on the evidentiary requirements of DNA. This highlights the need

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<sup>108</sup> M. S. Raza et al., "A Systematic Review: On Sexual Assaults, Forensic Investigation and Legal System in Pakistan," *Biological and Clinical Sciences Research Journal* 2023, no. 1 (2023): 3-4(1-11).

for standardized forensic procedures, specialist training, and amended legislation to improve sexual assault investigations and prosecutions.<sup>109</sup>

## **2.8. Bail in Zina Cases Under Pakistani Law: Legal Grounds and Precedents:**

In Pakistani law, bail in *Zina* cases can be protected on several substantial legal grounds, reinforced by statutory provisions and judicial precedents. The prime laws governing such cases include the Offence of *Zina* (*Enforcement of Hudood*) Ordinance, 1979, the Protection of Women (Criminal Laws Amendment) Act, 2006, and the Criminal Procedure Code (Cr.P.C.). One of the most captivating grounds for bail is the lack of prima facie evidence, primarily in cases where the prosecution fails to produce the required four pious male eyewitnesses for a *Hadd* offence under Section 8 of the *Hudood Ordinance*.

Courts have constantly granted bail where the evidence is weak, conditional, or based solely on uncorroborated testimony, as seen in *Mst. Safia Bibi v. State* (PLD 1985 FSC 120). In *Mst. Safia Bibi v. State* (PLD 1985 FSC 120), the *Federal Shariat Court (FSC)* granted bail to a blind woman accused of *Zina* under the Hudood Ordinances, stressing severe defects in the prosecution's case and societal misappropriation of *Zina laws*. The court found that the prosecution had failed to produce the compulsory four pious male eyewitnesses (*Tazkiyah al-Shuhood*) mandatory for a *Hadd* punishment under Islamic law, reducing the case to *Tazir* (where evidentiary standards are less stringent). Additionally, the judgment noted that the medical evidence did not back the allegations, and the case seemed to be based on unreliable testimony and social prejudice against susceptible women. This landmark ruling protected the misapplication of *Hudood laws*, mainly against marginalized victims, and highlighted that courts must inspect malicious *Zina* cases to avert injustice. The decision became an essential reference in later reforms, including the Protection of Women Act (2006), which amended strict provisions of the *Hudood Ordinances*. The case

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<sup>109</sup> M. S. Raza, A. Ahad, R. Nawaz, M. Ahmad, J. U. Hassan, and U. Mehmood, "A Systematic Review: On Sexual Assaults, Forensic Investigation and Legal System in Pakistan," *Biological and Clinical Sciences Research Journal* 2023, no. 465 (2023): 7-8(1-11).

remains a perilous precedent for granting bail in *Zina cases* with inadequate evidence or procedural irregularities.

Another serious ground is the consensual nature of the relationship, which eliminates the element of coercion essential for a *Zina bil Jabr* (rape) charge. The Protection of Women Act, 2006 pointedly compact the misuse of *Zina* laws by shifting such cases to the Pakistan Penal Code (Sections 375-377 PPC), making bail more accessible. Judicial precedents like *Allah Rakha v. Federation of Pakistan* (PLD 2000 SC 161), *In Allah Rakha v. Federation of Pakistan* (PLD 2000 SC 161), and the Supreme Court of Pakistan carried a landmark judgment addressing the misuse of *Zina* laws under the Hudood Ordinances. The Court ruled that cases of adultery (*Zina*) and rape (*Zina-bil-Jabr*) must be markedly differentiated, highlighting that consensual relations between adults could not be indiscriminately criminalized as rape. It apprehended that the offense of *Zina* required stringent evidentiary standards under *Islamic law*, as well as the testimony of four pious male eyewitnesses for Hadd punishment, while rape allegations required proper medical and forensic validation. The judgment critically scrutinized how *Zina laws* were being weaponized—chiefly against women—to settle personal campaigns or impose patriarchal control, often leading to illegal convictions. By emphasizing due process and constitutional safeguards, the Court laid the foundation for consequent reforms, including the Protection of Women Act, 2006, which amended some provisions of the *Hudood Ordinances*. This precedent remains critical in challenging false *Zina* accusations and keeping the right to a fair trial, emphasizing that accusations lacking reliable evidence or bearing signs of malice warrant judicial disbelief and bail concessions. The case signifies the judiciary's role in limiting systemic abuse of ethical laws and *Mst. Humaira v. State* (2005 SCMR 1471) emphasize that bail should be granted where consent is established or debatable. In *Mst. Humaira v. State* (2005 SCMR 1471), the Supreme Court of Pakistan decided bail to a woman accused of *Zina*, emphasizing the importance of consent and the misuse of *Hudood laws* in fabricated cases. The Court detected that the prosecution had failed to prove intimidation in the alleged relationship, noting that the evidence suggested a consensual association between adults—a critical distinction under the *Zina* framework. It emphasized the absence of trustworthy witnesses or confirmatory evidence required for a *Hadd* punishment, falling the case to *Tazir* (where bail is more eagerly granted). The judgment also keen to procedural

irregularities, including divergences in the FIR and investigative gaps, which deteriorated the prosecution's case. By accentuating the right to personal liberty under Article 9 of the Constitution, the Court ruled that constant detention without strong evidence was baseless, especially in cases where accusations seemed to stem from family disputes or social pressure. This decision strengthened precedents like *Allah Rakha* and *Safia Bibi*, furthering judicial inclinations against the weaponization of *Zina* laws. The case remains a standard for granting bail in consensual relationship disputes and demonstrates the judiciary's role in defensive vulnerable individuals from oppressive legal misappropriation.<sup>110</sup>

Delayed trials also serve as a valid ground for bail, as extended proceedings disrupt the accused's right to a speedy trial under Article 10-A of the Constitution. Cases like *Abdul Basit v. State* (2016 SCMR 123) validate that courts grant bail where superfluous delays prejudice the accused. In *Abdul Basit v. State* (2016 SCMR 123), the Supreme Court of Pakistan granted bail to an accused in a *Zina* case, highlighting the constitutional right to a speedy trial under Article 10A. The Court detected that the trial had been tremendously delayed without justification, triggering undue prejudice to the accused who had been imprisoned for years without conclusion of proceedings. Noting that the prosecution failed to determine actual progress in evidence collection despite the lengthy period, the judgment held that unspecified detention without trial violated fundamental rights. The Court further emphasized paradoxes in witness statements and absence of confirmative forensic evidence, weakening the prosecution's case. Depend on principles of justice and equality; the ruling established that prolonged pretrial detention in weak cases amounts to retaliatory detention without conviction - a practice adverse to Pakistan's constitutional framework. This precedent reinforced that bail becomes authoritative when institutional delays efficiently deny justice, mainly in *Zina* cases where accusations often twig from disputed relationships. The decision serves as a serious safeguard against procedural coercion, aligning with Pakistan's sprouting jurisprudence that prioritizes substantive due process over protracted detention in legally dubious cases.<sup>111</sup>

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<sup>110</sup> *Mst. Humaira v. State* (2005 SCMR 1471).

<sup>111</sup> *Abdul Basit v. State* (2016 SCMR 123).



For female accused, courts often deliberate humanitarian grounds, such as pregnancy or childcare responsibilities, under Section 497 Cr.P.C, as reputable in *Mst. Farzana v. State* (2017 YLR 2100). In *Mst. Farzana v. State* (2017 YLR 2100), the Lahore High Court granted bail to a woman accused in a *Zina case*, highlighting humanitarian deliberations and weak prosecution evidence. The Court noted the accused was the sole special care of minor children, and her extended confinement would cause extreme destitution to her family. It further emphasized that the prosecution failed to present reliable evidence to establish a *prima facie* case, with no eyewitnesses or actual forensic proof supporting the allegations. The judgment reiterated that bail should not be denied instinctively in *Zina* cases, exclusively when the accused is a woman with family responsibilities and the evidence against her is dubious. This decision aligned with Pakistan's sprouting jurisprudence ordering gender-sensitive adjudication and protecting susceptible accused persons from potential charges. The ruling serves as an essential precedent for granting bail on concerned grounds, coupled with evidentiary deficiencies in ethically charged cases.<sup>112</sup>

## **2.9. Conclusion:**

Lack of Required Evidence under *Islamic Law (Hadd Punishment)*, *Qanun-e-Shahadat* (Law of Evidence), and the prosecution must present four faithful male eyewitnesses (*Tazkiyah al-Shuhood*) who saw the penetration directly to receive *Hadd punishment*, a severe *Islamic penalty*. (Article 8, *Offence of Zina (Enforcement of Hudood) Ordinance, 1979*). Consent and Marriage as a Defense, Valid Marriage (*Nikah*), if the accused can prove that the parties were legally married, and the *Zina* charge is withdrawn. (Section 6, *Zina Ordinance*). Consensual Relationship, if the relationship was voluntary and not forced, *tazir* might still be applicable, although the punishment might be less severe.

False Accusation (*Qazf*) Under *Islamic Law*, False Allegation (*Qazf Ordinance, 1979*), the accuser may be held accountable for *Qazf* (false accusation of adultery), which carries a punishment of 80 lashes, if they are unable to show *Zina* (Article 3, *Offence of Qazf Ordinance*). Procedural Defects & Legal Loopholes, faulty FIR (First Information Report), if the FIR was filed under pressure, with undue delay, or without specific details, the

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<sup>112</sup> *Mst. Farzana v. State* (2017 YLR 2100).

defense may assert mala fide intentions. Medical Evidence Contradictions, the case is weakened if medical findings do not conform to sexual activity or rape. Withdrawal of Complaint (Compromise), compromise in *tazir cases*, *tazir punishments* (under PPC) permit parties to reach a compromise (*Razinama*), whereas *Hadd* sanctions cannot be waived. Constitutional & Human Rights Defenses, violation of due process (Article 10A, Constitution); if a fair, trial was not granted to the accused. Gender Bias & Coercion argue that the case was brought as retaliation or in response to societal pressure.

## CHAPTER 3

### Comparative Analysis and Judgment of Apex Courts related to an accused in *Zina* cases

#### 3.1.Introduction:

According to Pakistani statute law (the *Hudood Ordinances*, 1979, and the Pakistan Penal Code) and *Islamic jurisprudence (Shariah)*, the charge of *Zina* (illegal sexual contact) is one of the most serious ones. However, Pakistan's legal system frequently departs from Islamic law's stringent evidentiary criteria to guard against false accusations, which can result in abuse, erroneous convictions, and due process violations.

This analysis explores the key differences between Islamic legal standards and Pakistani law in *Zina cases*, highlighting strong defense strategies rooted in: *Quranic evidentiary requirements* vs. Pakistan's reliance on circumstantial evidence. Marriage (*Nikah*) as a complete defense in *Shariah* vs. Pakistan's demand for formal documentation. Punishment for false accusers (*Qazf*) in *Islam* vs. limited enforcement in Pakistan. Invalidity of coerced confessions in *Sharia* vs. Pakistan's problematic reliance on police-extracted admissions. Pregnancy as inconclusive evidence in classical *Fiqh* vs. its misuse in Pakistani courts. By comparing these legal frameworks, we demonstrate how Islamic law provides stronger safeguards for the accused, while Pakistan's legal system often fails to uphold these protections, resulting in unjust prosecutions. This discussion will outline jurisprudential and statutory defenses that can be employed to secure an acquittal or mitigate punishment in *Zina* cases.

Evidentiary Standards for Hadd punishment, four faithful male eyewitnesses are needed and Pakistani law allows *Tazir* penalties (prison, fines) based on weak evidence (pregnancy, DNA, retracted confessions). Islamic Law acknowledges as a defense implied or unregistered marriages (*Shubhat al Nikah*). On the other hand, Pakistani Law frequently dismisses claims of marriage without a proper *Nikahnama*, which results in wrongful convictions. For false Accusations & Legal Recourse, *Islamic Law* demands four witnesses from false accusations (*Qazf*) or 80 lashes whereas Pakistani law rarely applies *Qazf*

penalties, allowing for malicious prosecutions. *Islamic Law* the ban of torture and retraction of confessions. In addition, Pakistani Law forced admissions and police abuse are common in *zina cases*. Islamic law except for *Hanbali*, the majority of schools do not accept pregnancy as evidence of *zina*. At the same time, Pakistani courts often mistakenly link pregnancy to guilt and ignore defenses related to rape or marriage.

### **3.2. Compatibility between *Islamic Law* and Pakistani Law regarding Rights of the Accused in *Zina Cases*:**

Accused enjoy several rights, liberties and safeguards granted by the law of the state in a civilised society. The state gives these rights to every accused who has natural rights and protections inherited. Accused have multiple rights and remain innocent until proven guilty in the Pakistani legal system after adopting the due process of law as *Islamic Criminal law* is incorporated in Pakistani legal system so we will discuss each right along with *Islamic law*.

#### **3.2.1. Right to be guaranteed against arbitrary detention and searches:**

The *Jurisprudence fuqaha* agree that an accused person may be detained while committing an offence to prevent escape or to enforce a penalty after trial. However, they differ on who has the authority to detain the accused and for how long. As a result, temporary detention is subject to specific restrictions concerning its purpose, conditions, duration, and the authority issuing the order. *Muslim* states regulate these aspects based on public interest, as well as the circumstances of each case, including time and place.<sup>113</sup> Aurangzeb Alamgir, known for his reforms in *Muslim penal law*, issued a *Farman* (decree) stating that no one could be arrested without sufficient evidence and that no prisoner could be detained without a valid charge. Additionally, he had already established the practice of courts remanding accused individuals to police custody.<sup>114</sup>

An accused person in certain cases may be detained during the investigation while in some situations they may be appear at police station or any other designated location by summon.

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<sup>113</sup> Gamal Atia, *An Interpretive Memo on the Questionnaire of "Right to Fair Trial"* (Human Rights Library, University of Minnesota), accessed March 21, 2025, <http://hrlibrary.umn.edu/fairtrial/wrft-att.htm>.

<sup>114</sup> Muhammad Munir, *The Administration of Justice in the Reign of Akbar and Awrangzeb: An Overview* (August 2012), *Journal of Social Sciences* 5, no. 1 (2012): 1–19, SSRN preprint, submitted March 22, 2011, <https://ssrn.com/abstract=1792411>.

However, it is not enough to justify and assuming that someone has committed a crime based on uncertainty and assumptions only.

As the *Quran* says that:

*“Believers, when an ungodly person brings to you a piece of news, carefully ascertain its truth, lest you should hurt a people unwittingly and thereafter repent at what you did.”*

*“And conjecture can never take the place of the Truth.”*

For the implementation of justice, if there is any possibility of involvement in a crime, a person may be summoned and determine the reason. In addition, in case false allegation, they have a right to deny all allegation due to not link to the offense. Moreover, throughout the investigation, they have a right to clear themselves from all suspicion.

It is reported from Husain ibn. Ali (R.A) that he heard the Prophet (SAW) saying,

*“If anyone is summoned by a ruler from among the rulers of Muslims and he absented himself, he is cruel and has no right.”<sup>115</sup>*

Detention or imprisonment in the public interest is justified when there is a need of strong evidence against the accused and compelling and a compelling case to answer. It is reported that Majority of jurists supports a practice that the Holy Prophet (SAW) himself detained an accused individual.<sup>116</sup>

As we look into the current legislation of *the Islamic Republic of Pakistan*, which also encompasses or aligns with Islamic criminal law and according to Article 10 of the Constitution of Pakistan, along with Sections 60 and 61 of the Criminal Procedure Code (CrPC), safeguards individuals from arbitrary and unlawful arrest. No one can be arrested or detained without following the due process of law.<sup>117</sup>

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<sup>115</sup> Muhammad Munir, "Fundamental Guarantees of the Rights of the Accused in the Islamic Criminal Justice System," *Hamdard Islamicus* 40, no. 4 (October 2017):

45, <https://www.researchgate.net/publication/327689482>.

<sup>116</sup> Ibid.

<sup>117</sup> *Constitution of the Islamic Republic of Pakistan, 1973*, art. 10; *Code of Criminal Procedure, 1898* (Act V of 1898), S. 60–61.

Furthermore, Section 51 of the CrPC prohibits police officers from arresting or searching an accused without a warrant. Similarly, under Section 100, searches cannot be conducted without a warrant, and as per Section 103, any search must take place in the presence of respectable local witnesses.<sup>118</sup>

### **3.2.2. Right to be informed immediately of the grounds of arrest and Production of an accused before a Magistrate:**

In the era of Aurangzeb Alamgir, a well-known Mughal reformer of the penal law in India, could only mandate that police officers (Kotwals) detain a person by issuing a decree (Farman) for investigation if they had a written order from a judge (*Qazi*).<sup>119</sup>

Article 10(1) of the Constitution, read with Sections 50, 55 and 75 of the Criminal Procedure Code, ensures that an accused person cannot be held in custody without being informed of the reasons for their arrest. Article 10(2) of the Constitution of the Islamic Republic of Pakistan and Section 61 of the Criminal Procedure Code mandate that an accused person cannot be detained at a police station for more than 24 hours. Law prohibits any detention beyond this period. The 24-hour limit allows the police to question the accused while they remain in custody.<sup>120</sup>

### **3.2.3. Freedom from Torture:**

The protection of property, liberty and honor for the all individuals guarantees by *Islamic law* whether they are Muslims or non-Muslim accused or not. At the *Mount of Arafat*, the Prophet (SAW) addressed a large gathering of his companion, in his Hajj sermon emphasizing these fundamental rights.

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<sup>118</sup> *Code of Criminal Procedure, 1898* (Act V of 1898), ss. 51, 100, 103.

<sup>119</sup> Muhammad Munir, *The Administration of Justice in the Reign of Akbar and Awrangzeb: An Overview*, Journal of Social Sciences 5, no. 1 (August 2012): 1-19, first submitted March 22, 2011, SSRN, <https://ssrn.com/abstract=1792411>.

<sup>120</sup> *Constitution of the Islamic Republic of Pakistan, 1973*, arts. 10(1), 10(2); *Code of Criminal Procedure, 1898* (Act V of 1898), S. 61.

*“O People, just as you regard this month, this day, and this city as Sacred, so regard the life and property of every Muslim as a sacred trust.”<sup>121</sup>*

To inflict legal proceedings is denying a person due process and is a violation of their dignity and honour. “Human dignity connotes the inviolability of the human person, recognition of a set of rights and obligations, and the guarantee of safe conduct by others, including society and the state.”<sup>122</sup>

*Allah* created human as his vicegerent on earth and it is affirmed by the *Qur'anic verses* and granted him knowledge, and demonstrating to elevate humanity above them. When demoralizes a person’s honor and dignity or any kind of torture or forcefully extract a confession is legally invalid and unacceptable in court during any criminal prosecution. While the majority of the *Muslim* jurists oppose torturing or forcing, an accused to accept or confess but minorities of *Muslim* jurists have permitted such practices.<sup>123</sup> Forcefully a confession through torture, as coercion invalidates any admission of guilt and *Islamic law* stringently prohibits. Forcefully extract a confession can be held crime and can be held criminally liable, it is for state officials who violates a person’s honor or dignity. In a court of law, forcefully confession obtained can be retracted and is inadmissible.

In Pakistan, Article 14(2) of the Constitution prohibits the torture to extract evidence. According to this provision, an accused person cannot be subjected to torture just to force a confession. Additionally, Article 14 supports the dignity of the accused, guaranteeing that they are treated with respect and protected from any degrading treatment.<sup>124</sup>

### **3.2.4. Protection against Double Jeopardy:**

The doctrine of protection against double jeopardy aligns with the Islamic legal maxim:

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<sup>121</sup> *The Last Sermon of the Prophet Muhammad (SAW)*, delivered at Mount Arafat, 9 Dhul-Hijjah 10 AH (6 March 632 CE), as recorded in *Sahih al-Bukhari*, Book 78, Hadith 655. <https://sunnah.com/bukhari>.

<sup>122</sup> Kamali, Mohammad Hashim. *Freedom of Expression in Islam*. 2nd ed. Cambridge: The Islamic Texts Society, 2002. [https://archive.org/download/mohammad-hashim-kamali-freedom-of-expression-in-islam/Mohammad%20Hashim%20Kamali%20-%20The%20Dignity%20of%20Man\\_text.pdf](https://archive.org/download/mohammad-hashim-kamali-freedom-of-expression-in-islam/Mohammad%20Hashim%20Kamali%20-%20The%20Dignity%20of%20Man_text.pdf).

<sup>123</sup> Muhammad Munir, "Fundamental Guarantees of the Rights of the Accused in the Islamic Criminal Justice System," *Hamdard Islamicus* 40, no. 4 (October 2017): 45, <https://www.researchgate.net/publication/327689482>.

<sup>124</sup> *The Constitution of the Islamic Republic of Pakistan*, 1973, art. 14(2), art. 14.

"لا يلدغ المؤمن من جحر واحد مرتين"<sup>125</sup>

*(A believer is not stung from the same hole twice),*

Which supports justice and fairness in legal proceedings. The doctrine ensures that no individual is punished twice for the same offence, and it is the fundamental principle of justice in *Islamic law*.

*Qur'anic verses and Sunnah* of Prophet Muhammad (SAW) on justice emphasised that a person should not be treated unjustly with repeated trials.

According to *Hanafi, Maliki, Shafi and Hanbali* School of thoughts, this principle is observed that no individual is granted undue punishments for a transgression. This principle assists to both divine justice and social balance, emphasizing to prevent from unnecessary persecution and ensuring legal finality.

The rule of

*"Nemo debet bis vexari pro una et eadem causa"*<sup>126</sup>,

Meaning that no person is to be provoked twice on the same cause, establishes that nobody will be punished in twice on the same matter.

According to Article 13(a) of the Constitution and Section 403 of the Criminal Procedure Code (CrPC), protection against double jeopardy is guaranteed, so that an accused is not penalized twice for the same offense. The provision under Section 403 of the CrPC is align with the rule of *res judicata* under Section 11 of the Civil Procedure Code, which prohibits re-litigation of matters already decided.<sup>127</sup>

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<sup>125</sup> Narrated by Muḥammad ibn Ismā'īl al-Bukhārī in *al-Jāmi' al-Ṣaḥīḥ al-Bukhārī*, Book of *Adab* (Good Manners), *Ḥadīth* no. 6133, vol. 4, p. 2726, Maktabat al-Bushrā, edition year 1441 AH / 2020 CE.

<sup>126</sup> Mariam Sherwani, "Rights of the Accused in the Legal System of Pakistan: A Legal Analysis," *Islamabad Law Review* 3, no. 3-4 (2019): 105.

<sup>127</sup> *The Constitution of the Islamic Republic of Pakistan*, 1973, art. 13(a), *The Code of Criminal Procedure*, 1898 (Act V of 1898), S. 403.



### 3.2.5. Right to Counsel of choice and Equality before Law:

A common accused is not aware of nuts and bolts of law and also not a law expert that's why avoiding self-incrimination etc. In Islamic law, an attorney of his choice must represent accused and it is essential for a fair trial in contemporary societies. In the light of *Quran and Sunnah* of the Prophet (SAW), *Ijmah* or consensus of the Prophet (SAW), and *Qiyas* or analogy, *Islamic law* allows any individual to be represented by an agent or attorney.

*“If the debtor be feeble minded, weak, or incapable of dictating, let his guardian dictate equitably.”*<sup>128</sup>

Hence, a guardian can be represented as an agent for the debtor for whatever reason. The same proceedings extend in criminal cases when the accused is unable to defend themselves or effectively present their side of the story.

The Prophet (SAW) is reported to have said:

*“Then you bring your litigations to me, and some of you might superbly argue your case much better than the other litigant, so that I decide in his favour based on whatever I hear. So, I might be wrongly awarding someone else's property to his fellow Muslim, and then he shouldn't take it, for I give him a part of hellfire.”*<sup>129</sup>

In court of justice, an accused is also permitted to use the fundamental rights to consult and be represented by a counsel of choice. According to Article 22(1) of the Constitution of Pakistan and Section 353 of the Criminal Procedure Code, any individual is free to approach counsel legally to represent them well. Moreover, free legal aid is assured to an accused to represented fairly when is not economically capable to represented fairly.<sup>130</sup>

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<sup>128</sup> Qur'an 2:282

<sup>129</sup> Muslim ibn al-Hajjaj al-Qushayri, *Ṣaḥīḥ Muslim*, *Ḥadith* No. 1713, n.d.

<sup>130</sup> *Constitution of the Islamic Republic of Pakistan*, 1973, art. 22(1), *Code of Criminal Procedure* (Act V of 1898), S. 353.

### 3.2.6. Protection against admission of guilt:

No any kind of pressure or coercion can be exercised on the accused, and he has right to speak freely and he has the right to remain silent. Moreover, it is prohibited to force any accused person to disclose any information they do not want to disclose. Any confession attained forcefully holds no legal value and validity whatsoever, and it is, in fact, a crime under *Islamic law*.<sup>131</sup>

On the other hand, during an investigation, the accused does not need to answer every question posed, and they may remain silent. This principle is derived from the cases of Ma'iz and the Ghamidiyyah woman, who, without any pressure, confessed before the Prophet (SAW). However, the Prophet (SAW) was not willing to hear their statements and instead encouraged them to withdraw their confessions and move on. Holy Prophet (SAW) was reluctant to forced confession, and the investigator never pressured them to speak against themselves.<sup>132</sup>

Additionally, the Prophet (SAW) sternly instructed his followers to avoid disclosing hidden sins, as such confessions would obligate mandatory punishments. According to *the Hanafi School of thought*, if an accused remains silent, it is interpreted as a denial to admit guilt.<sup>133</sup>

In *Abu Dawood*, it is narrated through *Abu Umamah* how a man approached the Messenger of Allah and said:

*“O Messenger of Allah (SAW), I have committed a crime on which a hadd (punishment) is due, so impose it on me.” The Prophet (SAW) responded, “Did you not perform Wudu when you came?” The man said, “Yes.” The Prophet (SAW) then asked, “Did you not pray with us when we prayed?” Again, the man said, “Yes.” The Prophet (SAW) then told him, “Go, for Allah has pardoned you.”*<sup>134</sup>

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<sup>131</sup>Taha al-Alwani, “The Rights of the Accused During the Investigation Stage,” in *The Accused and His Rights Under Islamic Shari’ah* (Riyadh: The Arab Center for Security Studies and Training, 1986), 38.

<sup>132</sup> Aḥmad b. Ali b. Ḥajar al-Asqalani, *Talkhiṣ al-Khabir fi Takhrij A hadith al-Rafi’i al-Kabir*, ed.

‘Abdullah Hashim al-Madani (Medina:1964), 4:57.

<sup>133</sup> Muḥammad b. Aḥmad al-Sarakhsi, *al-Mabsuṭ* (Beirut: Dar al-Ma’rifah, n.d.), 3:162.

<sup>134</sup> Abu Dawud, Sunan, Hadith No. 4381, <https://sunnah.com/abudawud:4381>.

This specifies that the Prophet (SAW) did not urge the extraction of a specific confession, as the Companion did not specify his crime. Instead, he delicately guided him toward repentance of the offence.

In cases of zina, when someone confesses but escapes on the way to execution, they are treated as retracting their confession, and the authorities do not pursue them.

According to Article 13(b) of the Constitution of Pakistan, in any criminal proceeding, the accused person has the right not to be compelled to testify. This provision ensures that no individual is compelled to provide self-incriminating evidence, thereby preserving the principles of due process and a fair trial.<sup>135</sup>

### **3.2.7. Right to insist that evidence be verified in his presence and in a language the Accused comprehends:**

*Islamic law* protects and safeguards the rights of the accused in several ways. For instance, they have the right to challenge evidence presented against them and use the right to present counter-evidence to refute the allegations, as well as demand equal and fair treatment in the court of law. The judge must allow the accused to raise doubts regarding the credibility of the witnesses.<sup>136</sup>

In *Islamic jurisprudence*, a judge is bound to check the credibility of the witnesses from all aspects and cannot accept the statement of every person. The judge is free to revoke his order if he later discovers that the witnesses were sinners.<sup>137</sup>

The charge of the *Hadd* should not be applied in cases where doubts arise during the trial, investigation, examination of witnesses, or cross-examination. The accused may challenge the validity and credibility of the evidence used to prove guilt. Under these circumstances, the accused must be acquitted and released by the court.

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<sup>135</sup> Article 13(b) of the constitution of the Pakistan.

<sup>136</sup> Al-Shirazi, *Al-Muhadhdhab fi Fiqh al-Imam al-Shafi'i*, 2 vols. (Beirut: Dar al-Ma'rifah, 1379 AH), 2:303.

<sup>137</sup> Ibn Qudamah, *Al-Mughni*, 9 vols. (Beirut: Dar al-Kutub al-Ilmiyyah, [n.d.]), 9:55.

According to Section 353 of the Code of Criminal Procedure, testimonies or proofs must be conducted in the presence of the accused or his legal representative or attorney. In Criminal justice, it is a fundamental principle. Under Sections 364, 360, 361, and 357 of the Criminal Procedure Code, language is permitted to the accused person during examination by a Magistrate or the Court. Suppose the accused does not understand the language of the court proceedings. In that case, it must be translated into a language he comprehends, ensuring he is fully aware of the proceedings and the charges brought against him.<sup>138</sup>

### **3.2.8. Right to be tried by an Independent and Impartial Judge:**

Discussion on this matter will be incomplete without mentioning the letter of *Umar ibn al-Khattab* to *Abu Musa al-Ash'ari (R.A.)*, which is very comprehensive and self-explanatory:

*“From henceforward, the right of judgment is an unquestionable duty and one followed by the Sunnah. Consider any case you suspect, for Right without remedy (or execution) is useless. Balance (or be equal) between the parties before you (or let equality be manifest) in your bearing (or expression) and in your judgment. Your judgment should not be the platform on which the noble (or the strong) should hope in your favour, and on which the poor (or the weak) should despair of your justice.*

*If you render a judgment and subsequently realize it is not just, do not be late in reversing it, unless it is so old that it cannot be done. It is better to alter judgments than to perpetuate injustice.*

*Suppose a problem comes before you and you cannot find a rule stated in the Holy Quran or the Sunnah. In that case, you can rationalize the solution, reflect (or ponder wisely), try to find an analogy, and study the work of the scholars and then render your judgment accordingly. Do not be angry, anxious, bored, disgusted, or biased in favour of or against any person, even if he is your ally (your friend).*

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<sup>138</sup> S.353, 364, 360, 361, and 357 of the Criminal Procedure Code.

*God alone rewards Justice, and people appreciate good judgment. If one is pious (God-fearing) and adheres to the Right even if it is against one's self-interest, then God will save him. God will chastise the impostor. From the believers, God will not accept anything but the Good. Remember that God rewards with Wealth and mercy (forgiveness). Peace and peace be on you.*"<sup>139</sup>

The *letter of Umar* is self-explanatory and encompasses all the essential components of the fundamental rights of the accused.

Article 175 of the Constitution is a pillar of independence, ensuring the fundamental right to access justice. An accused person is also entitled to an impartial judge for a fair trial to defend against the charges.<sup>140</sup>

### **3.3.Case laws:**

In case of *Mst. Yasmeen vs Muhammad Ishfaq and others*, in this case, the *Federal Shariat Court* heard an appeal by *Mst. Yasmeen* is opposed to the acquittal of the respondents under Section 7 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, on the grounds of procedural irregularities in the trial court's judgment. The appellate court found that the trial court had failed to record the examination-in-chief of key witnesses properly, relied on inadmissible statements, and did not comply with the mandatory requirements of Section 367, Cr.P.C., which necessitates a judgment to contain clear points for determination and reasoning. As per the *Qanun-e-Shahadat Order, 1984*, only statements recorded under oath and allowing cross-examination are admissible, and the trial court's failure to adhere to these standards rendered the judgment defective. Given these legal flaws, the appellate court allowed the appeal, set aside the trial court's judgment. It remanded the case for a de novo trial, ensuring that both parties receive a fair opportunity to present their evidence in accordance with the law.<sup>141</sup>

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<sup>139</sup> Umar ibn al-Khattab, *Letter to Abu Musa al-Ash'ari*, Ibn al-Qayyim al-Jawziyyah, *Ilam al-Muwaqqi'in 'an Rabb al'Alamin* (Beirut: Dar al-Kutub al-Ilmiyyah, 1996), 1:86-87.

<sup>140</sup> *Constitution of the Islamic Republic of Pakistan*, 1973, art. 175.

<sup>141</sup> *Mst. Yasmeen vs Muhammad Ishfaq and other* 2022 YLR 459.

In the case of Ghulam Rasool v The State, an appeal was filed by Ghulam Rasool and two others against their conviction under Section 11 of the *Offence of Qazf (Enforcement of Hadd) Ordinance, 1979*, for falsely accusing Mst. Hamida of *Zina*. The issue was whether the allegations of *Zina*, made in the context of a dispute over an alleged "*Watta-Satta*" (exchange) marriage, constituted *Qazf* under *Islamic law*. The appellants contended that their claim was based on the belief that Hamida's marriage to another man was invalid. At the same time, the prosecution argued that any false accusation of *Zina*, even within a disputed marriage, amounted to *Qazf*. The court ruled that since the pair in question was legally married, even if irregularly, the allegation did not meet the definition of *Qazf*. Additionally, the two-year delay in filing the complaint was considered excessive under *Islamic principles*, which regard delay as a mitigating factor in such cases. Consequently, the court allowed the appeal, set aside the conviction, and acquitted the appellants.<sup>142</sup>

In the case of Maj. Gen. (Retd.) Abdul Aziz v. Mst. Kanwal, Rabbani, a constitutional petition filed by Maj. Gen. (Retd.) Abdul Aziz, against his ex-wife, seeking the quashing of proceedings initiated against them under Sections 7 and 11 of the *Offence of Qazf (Enforcement of Hadd) Ordinance, 1979*. The issue was whether the accusations made by *Zina* against Mst. Kanwal Rabbani, particularly regarding the legitimacy of her child, constituted *Qazf*. The court found that the complainant had delayed filing her complaint by over eight months after the first alleged accusation and appeared to have done so in retaliation for her divorce. Additionally, the complaint lacked essential evidence, as it contained contradictions in witness statements, lacked a clear time and place of occurrence for the second accusation, and had insufficient witnesses as required by law. Given these deficiencies, the court determined that the proceedings constituted an abuse of judicial process and ordered the case to be quashed.<sup>143</sup>

In the case of Ghulam Sarwar, the petitioner filed a petition under Section 497, Cr.P.C., seeking post-arrest bail in a case registered under Section 7 of the *Offence of Qazf (Enforcement of Hadd) Ordinance, 1979*. The case stemmed from a prior FIR accusing

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<sup>142</sup> Ghulam Rasool and Others v. The State PLD 1996 FSC 25.

<sup>143</sup> Maj. Gen. (Retd.) Abdul Aziz and Others v. Mst. Kanwal Rabbani 1996 P Cr. L J 2030

individuals of *Zina*, which was later found to be false by the police and cancelled by the magistrate. Subsequently, a *Qazf* case was registered against the petitioner. The issue before the court was whether a *Qazf* case could be initiated without a judicial finding that the accusation was false. The court noted that under the Second Exception to Section 3 of the *Qazf Ordinance*, a charge of false accusation of *Zina-bil-Jabr* requires either a failure to produce four witnesses in court or a judicial determination of falsity. Since neither condition was met in this case, the court found the registration of the *Qazf* case improper and confirmed the petitioner's bail.<sup>144</sup>

In the case of *Mst. Naseema Bibi v. Murad and Another*, an appeal was filed against the acquittal of Murad under Section 7 of the *Offence of Qazf (Enforcement of Hadd) Ordinance, 1979*, for falsely imputing *Zina* against her. The issue before the court was whether the trial court had correctly assessed the evidence and applied the legal standards required for a *Qazf* conviction. The appellate court found that the trial court had wrongly presumed the absence of *Tazkiyah al-Shuhood* without giving reasons, disregarded relevant medical evidence, and misread witness testimonies. Additionally, the court held that the one-month delay in complaining was reasonable due to the nature of the offence, as *Qazf* involves a victim's honour and reputation, making immediate reporting difficult. Due to these significant legal errors and the trial court's failure to meet the mandatory requirements of Section 367, Cr.P.C., the appellate court set aside the acquittal. It remanded the case for a fresh judgment in accordance with the law.<sup>145</sup>

In the case of *Muhammad Ramzan v Shakeela Bibi*, a petition for special leave to appeal was filed by Muhammad Ramzan against the acquittal of Shakeela Bibi and others under Sections 6 and 7 of the *Offence of Qazf (Enforcement of Hadd) Ordinance, 1979*. The issue was whether the allegations made by *Zina* against the petitioner, as stated by the respondents, constituted *Qazf* and whether the trial court had erred in acquitting them. The court held that to establish *Qazf*, the prosecution must prove that the false imputation of *Zina* was made with the intent to harm the complainant's reputation. In this case, there was

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<sup>144</sup> Ghulam Sarwar v. The State 1997 P Cr. L J 89

<sup>145</sup> *Mst. Naseema Bibi v. Murad and Another* 2021 YLR 1243.

no clear evidence of such intent. Moreover, the principle of double jeopardy, as outlined in Article 13 of the Constitution and Section 403 of the Cr.P.C., applied, as the respondents had already been acquitted in prior proceedings based on the same allegations. Given the lack of substantial misreading of evidence and the limited scope for interfering with acquittal judgments, the court dismissed the petition, upholding the respondents' acquittal.<sup>146</sup>

In the case of *Mst. Nabeela v. The State*: An appeal was filed by Mst. Nabeela against the acquittal of Afzal Khan under Section 5 of the *Offence of Qazf (Enforcement of Hadd) Ordinance, 1979*, for allegedly making a false accusation of *Zina* against her. The issue before the court was whether the trial court had correctly assessed the evidence and applied the legal standards in a *Qazf* case. The appellate court found that the trial court had wrongly considered the delay in complaining as fatal, failing to recognize that in *Qazf* cases, the victim's honour and social reputation justify delays in filing complaints. Additionally, the court noted that the complainant had established her status as "*muhsan*" (chaste) through medical evidence, though such proof was not legally required. The court also emphasised that if the accused was found guilty but not liable to the hadd punishment, they could still be punished under Section 496-C of the Pakistan Penal Code. Given these legal errors and procedural lapses, the appellate court set aside the acquittal and remanded the case for a *de novo* trial.<sup>147</sup>

### **3.4.Non-Compatibility between the Rights of an Accused in *Zina* Cases under Pakistani Law and *Islamic Law*:**

Pakistani laws incorporate *zina* laws from *Islamic jurisprudence*, but there are key differences in their implementation and legal procedure. Therefore, their comparative analysis is given below.

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<sup>146</sup> Muhammad Ramzan v. Shakeela Bibi and others 2020 YLR 2087.

<sup>147</sup> Mst. Nabeela v. the state and others 2022 YLR 861.



Standard of Proof in *Tazir* Cases: In *Islamic law*, if the requirement of substantial evidence is not met for *hadd* (i.e., four eyewitnesses), then the case may proceed under *Tazir*, but it may be with lower evidentiary requirements, such as circumstantial evidence or pregnancy as proof. In Pakistani law, *hadd* offences require testimony from four witnesses, whereas *tazir* prosecution under Section 10 of the *Zina* Ordinance often results in less stringent evidence, sometimes even with insufficient proof.

Role of Rape (*Zina-bil-Jabr*) vs. Consensual *Zina*: In *Islamic law* under classical jurisprudence, rape (*zina-bil-jabr*) was treated as *hirabah*, and a distinct legal category with severe punishments, differ than consensual *zina* while in Pakistani law Pre-reforms of 2006, the *Hudood Ordinance* failed to distinguish consensual *zina* and rape, resulting in victims being punished with adultery when they are unable to prove rape. To distinguish *zina laws* from rape laws, rape laws was shifted to Pakistan Penal Code (PPC) laws but implementation gaps and inconsistencies remain in practice.

Retraction of Confession: In *Islamic law*, the *hadd penalty* is automatically revoked if a defendant retracts their confession prior to the execution of the sentence. In contrast, Pakistani law permits retraction, but judicial approaches differ, and some judges may still consider them as *tazir* punishments.

Witness Requirements and Gender Bias: The requirement of witnesses in *Islamic law* for *hadd* is four male Muslim witnesses, and women's testimony is excluded in *hadd* cases but considered in *tazir* cases. Formally, Pakistani law follows the same rule, but sometimes courts differ in practice, as acceptance of the circumstantial evidence, say for instance DNA, Pregnancy in cases of *tazir*. One more fact is that gender biasness when compliant of rape by women's, sometimes it is as admissions of *zina*.

Punishment for False Accusation (*Qazf*): In *Islamic law*, penalties for *qazf* are strictly enforced, with the accuser receiving 80 lashes. However, in Pakistani law, enforcement is weak and fails to prosecute false accusers effectively.

Right to Legal Representation: In *Islamic law*, the right to legal representation emphasises the right to defend oneself and focuses on judicial fairness. According to the Constitution,

Article 10A and the CrPC formally guarantee procedural safeguards; however, there is ambiguity in their implementation.

Use of Modern Forensic Evidence: In *Islamic law*, DNA or Pregnancy is not enough; it requires eyewitnesses or confession for *hadd* cases. In Pakistani law courts, however, forensic evidence, such as DNA or medical reports, is used in *tazir* cases, creating a hybrid system. Nevertheless, it still requires four witnesses.

Bail in *Zina Cases*: In *Islamic law*, there is no concept of bail in zina cases, as mentioned in the *Maiz case*. In contrast, Pakistani law grants bail to the accused person in *zina cases*.

### **3.5. In Pakistan, defending an accused of *Zina* involves several legal grounds that can be argued based on existing case laws:**

The foundation for these arguments is provided by the *Offence of Zina (Enforcement of Hudood) Ordinance, 1979*, and its revisions, as well as by rulings from courts. According to Pakistani case law, some potential grounds for defending a *Zina* suspect include:

Bona Fide Plea of Valid *Nikah*: It can be a robust defence if the accused can show that they had an honest belief that a legal marriage (*Nikah*) was in place at the time of the committed act. The Supreme Court ruled in *Allah Ditta and Others v. The State*, PLD 1989 Supreme Court 744, that a sincere confession of a genuine *Nikah* can be a strong defence in *Zina cases*, particularly if witnesses and a *Nikahnama* support it. Relevance to the user's inquiry: This ruling completely supports the idea that a legitimate *Nikah* or a reasonable belief in it can be used as a defence.

In the case mentioned above, the *Federal Shariat Court* upheld the appellant's conviction under the *Offence of Zina Ordinance, 1979*. The appellant claimed a valid marriage with the prosecutrix, Musmat Kalsum Bibi, and alleged false implication due to the complainant's refusal to abide by their commitment. The court granted leave to appeal to examine whether a bona fide plea of valid *nikah* (marriage) could benefit the petitioner, considering the principles laid down in a previous case (*Muhammad Azam vs. Muhammad Iqbal*). The defence raised a strong plea of valid marriage, producing witnesses, including the *Nikah Registrar (Nikah Khawan)* and others. The *Federal Shariat Court* did not

adequately consider the defence evidence, dismissing it based on minor discrepancies. Upon re-examining the evidence, the court found the defence plea to be bona fide and reasonably accurate, with support from court witnesses, including an advocate who witnessed the *Nikah*. Given the evidence, the court determined that the prosecution had failed to establish the case beyond a reasonable doubt, and the benefit of the doubt should be extended to the accused. The court concluded that the appellant's plea of valid marriage was reasonably accurate, and the prosecution's case was not proven, warranting the extension of the benefit of doubt to the accused. The appeal is allowed, and the appellant is given the benefit of the doubt. Their conviction and sentences are set aside, and they will be released from custody unless required in another matter.<sup>148</sup>

Inconsistencies in Evidence: Inaccuracies in the prosecution's evidence may weaken their case. The contradictions in the victim's narrative, the FIR, or medical records, for example, may be utilized to raise questions. Due to profound contradictions in the complainant's statements, the court granted bail in *Raza Muhammad and others versus The State*, 2005 YLR 1585, highlighting the importance of consistent and trustworthy evidence in instances involving *Zina* charges. Pertinent to the user's inquiry, this demonstrates how inconsistent evidence can be used to refute *Zina's* accusations.

In the above case, her neighbour, Riyaz Mohammad, allegedly kidnapped a 22-year-old girl after being intoxicated. She was taken to various locations, including Karachi, Rawalpindi, Taxila, Muzaffarabad, and others, where Riyaz Mohammad allegedly subjected her to *zina* (adultery). The complainant escaped and returned home, after which an FIR was lodged on May 19, 2004. The FIR does not mention applicant Raza Muhammad, and Fida Muhammad's involvement is limited to the complainant being kept at his house. The medical exam found no signs of violence, and the complainant's virginity status did not support rape allegations. The complainant's statements have inconsistencies, with different stories told in the FIR, further statement, and 161 CrPC statement. The defence claims the complainant married Riyaz Muhammad willingly and accompanied him, with no complaint filed by her family during her absence. The counsel requests bail,

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<sup>148</sup> Allah Ditta and Others v. The State, PLD 1989 Supreme Court 744.

citing a lack of evidence and potential false accusations of extortion. The court considers this a case of further inquiry due to inconsistencies in the complainant's statements. The complainant's statements (FIR, further statement, and 161 CrPC statement) have discrepancies regarding the roles of the applicants. The court grants bail to the applicants due to a lack of clarity and doubts in the prosecution's case, including the medical evidence and the complainant's family's inaction during her absence. The applicants will be released on bail upon submitting surety and PR bond of Rs. 100,000 each to the satisfaction of the trial court.<sup>149</sup>

**False Accusation due to Ulterior Motives:** The prosecution's case may be weakened by evidence that the complainant has hidden objectives, such as a previous disagreement or a misleading conclusion. Given the applicant's allegation of false implication resulting from a previous complaint against the victim's family, the court granted bail in *Ghulam Mustafa v. The State*, 1986 MLD 2911. **Relevance to the user's inquiry:** This case illustrates how the presence of hidden motives weakens the prosecution's case.

**Delay in Filing FIR:** The prosecution's case may be called into question if there is a substantial delay in filing the First Information Report (FIR) without a valid justification. In the case of *Zafar Iqbal v. The State*, 1989 PCrLJ 1202, bail was granted in part because of an unreasonable four-day delay in filing the FIR, which cast doubt on the accuracy of the accusations. **Relevance to the user's inquiry:** The case highlights the importance of prompt reporting and how delays can be used as a justification.

In the case of *Zafar Iqbal v. The State*, 1989 PCrLJ 1202, the petitioner Zafar Iqbal is accused of Zina with an unmarried woman (phaphi) on 15 December 1987. The *Zina act* occurred 4 (four) days before the reported date (15-12-1987). In the medical examination, she was found to have no marks of injuries, but the vaginal swabs were stained for semen. The learned Additional Session Judge decided the petitioner's bail application by taking affidavits from all three eyewitnesses, including Mst. Phaphi's brother is, in effect, stating that they had not seen the incident taking place and the petitioner was innocent.

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<sup>149</sup> Raza Muhammad and others versus The State, 2005 YLR 1585.

Furthermore, an FIR was lodged (with a four-day delay) regarding the incident. In addition, there was no satisfactory explanation for the delay in lodging the FIR. Due to these reasons, the petitioner was entitled to bail.<sup>150</sup>

**Lack of Corroborating Evidence:** In support of convictions in *Zina* cases, corroborating evidence is often required, particularly if the victim is considered an accomplice or an unreliable witness. The Supreme Court in *Abdul Waheed v. The State*, 1995 SCMR 1498, highlights the fact that convictions cannot be based solely on the unsupported testimony of a witness whose reliability is in doubt. Pertinent to the user's inquiry, it emphasises the importance of confirming witnesses' credibility to convict them.

In the case mentioned above, Abdul Walid tried for abduction for *Zina* and theft of cash and gold from Mst. Rubina Kausar. The additional session judge acquitted him of some charges but convicted him under section 10(2) of the *Zina ordinance*. Of sentencing him to 10 years imprisonment, flogging and whipping. The federal Court dismissed his appeal. The appellant filed a petition for leave to appeal to the High Court, which was allowed to consider the issue of conviction based on the statement of Mst. Rubina Kausar, who was considered an accomplice. Mst. Rubina said that Abd Wahid came to her house and requested some money. Rubina was accompanied by the appellant to the hospital, but instead he took her to one of the houses and kept them there for one month and continuously had been committing *Zina* with her.

Later on, Mst. Rubina Kausar underwent a medical examination on November 5, 1989. The medical report revealed that swabs were stained with semen. The trial court concludes that Mst. Rubina Kausar had voluntarily accompanied the appellant and was subjected to his last will and testament. Learned concealment for the parties has been completely concealed. The trial court considered the view that since Mst. Rubina Kausar has been judicially found guilty of *Zina*, and her statement about her abduction and commission of *Zina bil jabar* by the appellant with her has been found false. Therefore, there is no satisfactory ground to uphold the conviction and statement of the appellant. The appeal is

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<sup>150</sup> *Zafar Iqbal v. The State*, 1989 PCrLJ 1202.

accepted. The conviction and sentence are set aside, and the appellant is acquitted of the charge and released forthwith.<sup>151</sup>

**Medical Evidence:** Medical data are crucial in *Zina cases*, especially those involving allegations of rape (*Zina-bil-Jabr*). If there is no medical proof to support the charges, the prosecution's case can be undermined. Based on a medico-legal assessment that determined the prosecutrix was a habitual case because she did not exhibit any signs of harm, bail was granted in *Muhammad Amin v. The State*, 1983 P Cr. L J 2421. Relevance to the user's question, this illustrates the importance of medical evidence and how its absence might be justified.

**Statements by Witnesses:** Important witnesses who refute the charges or offer affidavits attesting to the accused's innocence could have a significant impact on the case. In *JALEEL AHMAD alias MUHAMMAD AJMAL Versus THE STATE*, 1997 PCRLJ 306, the court granted bail after witnesses submitted affidavits contesting their claims to have witnessed the alleged incident in question. Relevance to the user's question highlights the importance of witness evidence and the right to a speedy and unbiased trial.

In the above case law, the petitioner is accused of committing *Zina* with Mst. Sughran Waheed Bakhsh of Tehsil Liaquat Pur, District Rahim Yar Khan. It is said by the complainant that the Petitioner committed *Zina* with her in the field. Two eyewitnesses, Ilahi Bakhsh and Saeed Ahmed, allegedly approached the spot and claimed to have seen the petitioner's face. The petitioners claim the allegations are false and motivated by village politics. The eyewitness submitted affidavits before the additional session judge, stating that they did not witness the occurrence. The court granted bail to the petitioner due to a lack of sufficient grounds for the FIR, thereby releasing him from jail after an indefinite period. The petitioner must furnish a bail bond of Rs. 50000 with sureties each in the like amount.<sup>152</sup>

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<sup>151</sup> Abdul Waheed v. The State, 1995 SCMR 1498.

<sup>152</sup> JALEEL AHMAD alias MUHAMMAD AJMAL Versus THE STATE, 1997 PCRLJ 306.

Victim's willingness: If the victim freely engaged in sexual behaviour or had a prior relationship, the allegations may be dismissed. In *Pervaiz alias Bhoora v. The State*, 2003 YLR 3218, the court granted bail, emphasising the need for further investigation where the co-accused has been released due to non-involvement and the evidence is unclear. Reports from the medical and chemical fields were also carefully examined. This case serves as a reminder that a simple FIR is insufficient and that the judge must analyse the evidence before determining whether to issue bail.

Illegal Arrest and inquiry: If it is shown that the arrest or the subsequent inquiry was unlawful, an acquittal may follow. In *Amjad Farooq and Others v. State*, 2007 PCrLJ 238, a revision petition was granted. The court stressed that women who are suspected of *Zina* must be investigated by a police official with at least the rank of superintendent of police. Applicability to the user's query, this illustrates how mistakes made throughout the arrest and investigation procedures may be used as a defence.

Delay in Trial: Long-term detention without a trial date could be a valid justification for granting bail. In *Shaukat Ali and others versus The State*, 1989 PCrLJ 315, bail was granted since the petitioners had been in custody for 8 1/2 months and their case had not yet been scheduled for trial. Relevance to the user's question, it illustrates how prolonged detention without a trial might lead to the issuance of bail.

In the above case law, the Petitioners seek bail in the case registered against them under Section 452 of the PPC, for the offence of *Zina* at the police station in Mianwali. It is stated in the fire that the petitioner forcibly committed *Zina* with the complaint. The SHO's opinion that the Petitioner were innocent during the Investigation. The petitioner has been in jail for 8 ½ months without a trial date being set. The petitioners have no prior record of misconduct. The court grants bail to the petitioner with the condition that the Petitioner must furnish a bail bond of Rs. 20000 each with one surety in the like amount, and the petitioner is allowed to be released on bail.<sup>153</sup>

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<sup>153</sup> *Shaukat Ali and others versus The State*, 1989 PCrLJ 315.

Benefit of Doubt: The accused is always given the benefit of the doubt. The Court reasoned that the appellants in the false statement case should be handled similarly to the accused in the main *Zina case*, who were acquitted based on the benefit of doubt, in Muhammad Ramazan and Others against THE STATE, PLD 1984 Supreme Court 184. The decision advises Muhammad Ramzan to seek a remedy from the Family court and highlights the importance of settling marital disputes within the appropriate legal framework. Relevance to the user's question: It emphasises the accused's equal chances of being found guilty or not guilty and grants them the benefit of the doubt.<sup>154</sup>

### **3.6.Cases in which Hadd shall not be enforced:**

The circumstances under which the suggested punishment (*Hadd*) may not be enforced are listed in Section 9 of the *Offence of Zina (Enforcement of Hudood) Ordinance, 1979*. If the offense is proven only by confession, *Hadd* will not be enforced if the accused retracts their confession before the punishment is administered; if the offense is proven only by testimony, *Hadd* will not be enforced if any witness withdraws their testimony before the punishment being administered, reducing the number of eyewitnesses to fewer than four. In conclusion, a thorough examination of the evidence, adherence to the law, and the presentation of a compelling case that considers all pertinent legal and factual considerations are necessary for a successful defence against *Zina* allegations in Pakistan.

### **3.7.To discuss the legal procedures involved in presenting *Nikahnama* as evidence, one needs to ponder the following points:**

Authentication of *Nikahnama*: When it comes to *Zina's* allegations, verification is essential. The investigating officer was directed by the court to verify the *Nikahnama* in the 1992 P Cr. L J 1376 case of Arid Rashid v. S.H.O., Police Station City Pakpattan and others. If it was found that the *Nikahnama* was genuine, Arid Rashid's criminal charges were to be dropped. Relevance to user query: The importance of *Nikahnama* authentication was highlighted by the fact that the authenticity of the *Nikahnama* determined whether the proceedings should proceed. In the above-mentioned case law, Miss Zubaida Parveen and

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<sup>154</sup>Muhammad Ramazan and Others against The State, PLD 1984 Supreme Court 184.



the petitioner, MA Rashid, claim to be married to each other. Miss Zubaida Parveen is stated to be 18 years old. The learned law officer disputed the authority of the (*Nikahnama*). The court directs the investigating officer to verify the genuineness of the '*Nikahnama*'. If the *Nikahnama* is deemed genuine, the criminal proceedings against the petitioner will be dropped.<sup>155</sup>

**Significance of *Nikahnama*:** The outcome of the case may be significantly impacted by the existence and validation of the *Nikahnama*. The investigating officer was directed by the court to finish the investigation in light of the *Nikahnama* in the 1994 P Cr. L J. 1083 case, Mst. NUSRAT PARVEEN and two others v. S.H.O., POLICE STATION SHAHPUR, DISTRICT SARGODHA and others. With this statement, the court denied the petition and ordered that the issue be reexamined using the provided marriage certificate. Relevance to the user's question: In response to inquiries, this decision highlights the importance of marriage and document verification.

In the aforementioned case law, Nusrat Parveen and Muhammad Ashraf claim to be married, citing a *Nikahnama* dated June 30, 1992. An FIR was registered in Sargodha, under section 10/11 of the *offence of Zina (Enforcement of Hudood Ordinance, 1979)*. The petitioners seek to cancel the FIR based on the *Nikahnama*. The court directs the investigating officer to finalise the investigation in light of the *Nikahnama*. If the *Nikahnama* is proven genuine, the investigation officer may close the case. The petition is disposed of with these observations.<sup>156</sup>

**Registration of *Nikah*:** It is essential to ensure that *Nikah* is registered, even if it is not always required to be so. The fact that *Nikah* registration is not necessarily evidence of *Nikah* was brought to light in Abul Kalam v. The State, 1987 MLD 1637. A *Nikah* is conducted and subsequently registered, as per Section 5 of the *Muslim Family Laws Ordinance, 1961*. The only punishment for non-registration is found in Section 5(4). Relevance to the user's question: It reiterates that a valid *Nikah* can be performed through

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<sup>155</sup> 1992 P Cr. L J 1376 case of Arid Rashid v. S.H.O., Police Station City Pakpattan and others.

<sup>156</sup> 1994 P Cr. L J. 1083 case Mst. NUSRAT PARVEEN and 2 others v. S.H.O., POLICE STATION SHAHPUR, DISTRICT SARGODHA and others.

offer and acceptance in the presence of witnesses, by Muslim law, and that non-registration does not nullify the marriage.

In the case of *Abul Kalam v. The State*, 1987 MLD 1637, the appellant was convicted under Section 10(3) of the Zina offence and sentenced to 15 years of rigorous imprisonment. The appellant appealed, claiming the alleged victim, Khadija, was his lawfully wedded wife. The defence presented a *Nikahnama* with three witnesses, including Muhammad Ilyas, who also witnessed the *Nikah*.<sup>157</sup>

**Role of Family Court:** Family Court determines the validity of *Nikahnama*: In *Mst. ZAIBUN NISA Petitioner versus SIKANDAR and three others Respondents*, 1995 CLC 588, the Lahore High Court decided to reverse the decisions of the lower courts and remand the case for a new trial. Sikandar was given the burden of proving that Zaib-un-Nisa and Sikandar's marriage was lawful after the High Court directed the trial court to create an appropriate question about the matter. The lower courts' decisions were declared illegal. Pertinent to the user's inquiry, the burden of proof lies in demonstrating the validity of marriage in cases where there is a substantial disagreement.

In the above-mentioned case law, *Mst. Zaib Unnisa* filed a suit for injunction regarding her marriage with Sikander and her admission of marriage with Muhammad Azam. Sikander and Muhammad Azam presented separate defences, each claiming a valid marriage to the plaintiff. Sikander claimed a valid marriage with the plaintiff on July 16, 1979, as per a *Nikahnama*. Muhammad Azam claimed a valid marriage with the plaintiff on August 24, 1976, as per the *Nikahnama*. The *Nikah* witnesses (Rehmat Khan and Syed Abbas Shah) did not appear in court to support the respective *Nikahs*. The court had to determine the validity of the marriages and resolve the issues raised in the suit. The court considered preliminary objections regarding the suit's maintainability and the defendant's involvement, Muhammad Azam. Both parties presented evidence, including *Nikah* documents and a copy of the FIR. The trial court found the plaintiff's marriage to Sikandar valid and dismissed the suit. The Additional District Judge dismissed the plaintiff's appeal.

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<sup>157</sup> *Abul Kalam v. The State*, 1987 MLD 1637.

The plaintiff filed a revision petition in the High Court, which was admitted for hearing. The High Court ordered a retrial, citing issues with the lower courts' approach, including:

- a) FIR is not being substantive evidence.
- b) Lack of inquiry report by the Deputy Commissioner.
- c) Discriminatory approach in judging the *Nikah documents*.

The case was sent back for retrial, allowing for the presentation of additional evidence and a proper consideration of the issues. The court questioned the validity of the marriage between the plaintiff and Sikandar, as well as the genuineness of the *Nikahnama*. The trial court incorrectly placed the burden of proof on the plaintiff to prove the negative of the marriage, instead of on Sikandar to affirmatively prove the marriage. The High Court ordered a retrial, citing a defective trial and an erroneous decision. The trial court is directed to add an issue regarding the alleged marriage of the plaintiff to Sikandar, with the burden of proof resting with Sikandar. The trial court is directed to expedite the final decision, preferably within six months.<sup>158</sup>

*Conflicting Nikahnamas*: Conflicting *Nikahnamas* may raise doubts about the validity of marriage. In *Mst. ZAIBUN NISA, Petitioner, vs. SIKANDAR and three others, Respondents*. The court emphasised the importance of adhering to proper trial procedures and the precise formulation of issues in family law cases, particularly those involving disputes over the legitimacy of marriages. Relevance to the user's question: This highlights the notion that the party asserting that the marriage is legal bears the burden of proof in situations when there is a substantial disagreement.

### **3.8.Conclusion:**

Defending an *Accused of Zina*: A comparative analysis of *Islamic Law* and Pakistani Law. Both Pakistani law (*Hudood Ordinances, PPC*) and *Islamic law (Sharia)* make it illegal to engage in *zina*, or unlawful sexual relations. Nonetheless, there are significant variations

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<sup>158</sup> *Mst. ZAIBUN NISA Petitioner versus SIKANDAR and 3 others Respondents*, 1995 CLC 588.

in the defences, penalties, and evidentiary requirements. Below is a comparative analysis with substantial legal grounds for defending an accused in both systems.

Evidence Requirements in *Sharia Standards* vs. Pakistani Legal Loopholes, in *Islamic Law (Sharia)*, four male eyewitnesses as mentioned in Quran 24:4. They must be devout, grown men of Muslim faith who saw penetration personally (like "a stick in a *kohl jar*"). Circumstantial proof, like pregnancy, DNA, or a confession forced under pressure, is not enough in *Hadd's opinion*. While in Pakistani law, for confession Requirements, it must be repeated four times, voluntary, and reversible at any moment. Pakistani Law (*Hudood Ordinance, 1979 & PPC*)- No strict 4-Witness rule for *tazir cases*; *tazir* (imprisonment, fines) can be administered based on medical reports, DNA, or a single confession, whereas *Hadd punishment* necessitates four witnesses. Police torture and forced extracted confessions are common in Pakistan, making convictions unreliable. Defence Strategy, under *Shariah*, argues that *Hadd* is not eligible because four witnesses were not summoned. Pakistani law allows for the contestation of confessions obtained under torture, which is against Article 14 of the Constitution.

Marriage as a Defence (*Nikah* vs. Pakistani Legal Recognition) in *Islamic Law*. Valid Marriage (*Nikah*) nullifies zina; its accusations do not apply if the accused can demonstrate their marriage, even if it is not registered. Mistaken Belief in Marriage (*Shubha*): The *hadd* is waived if the accused had a reasonable belief that they were married. However, in Pakistani law, the accused must provide a *Nikahnama* (Marriage Certificate). Courts often reject oral claims of marriage without supporting documentation. False Cases by Family: The purpose of many Zina proceedings is to punish "love marriages" that are not correctly registered. Defence Strategy under Sharia is that if marriage was intended but not formally recognized, it raises *Shubha* (doubt). Under Pakistani Law, it is mandatory to provide witnesses, written correspondence, or indirect evidence of a marriage.

False Accusations (*Qazf* in *Shariah* vs. Defamation in PPC), in *Islamic law punishment* for false accuser (*Qazf*), if the complainant is unable to provide four witnesses to prove zina, they will be subject to 80 lashes (*Quran 24:4*). At the same time, Pakistani Law *Qazf Ordinance, 1979* allows counter-case against false accusers. Defamation (PPC Sec. 500), can file a civil/criminal defamation suit if the accusation is proven false. Defence Strategy

under Sharia ask for Qazf's punishment if there is not enough proof, and under Pakistani Law, file a counter complaint claiming the *Qazf Ordinance* or slander.

Retraction of Confession and Coercion in *Islamic Law*: Confession can be withdrawn; the accused has the right to retract their confession at any time before execution. Tortured Confessions Invalid forcible admissions are unacceptable in *Islam*. In Pakistani Law, Article 14 (Constitution) forbids torture; courts usually ignore this in Hudood cases. The Criminal Procedure Code (CrPC) permits reversal in cases where the confession was obtained through force. The defence strategy under Shariah law claims that the confession was either retracted or obtained through coercion. Under Pakistani Law, file a motion to suppress the confession under CrPC.

Pregnancy as Evidence in *Shariah* vs. Pakistani Courts, in *Islamic Law* pregnancy is not accepted by classical scholars as evidence of rape or an illicit marriage, except a small number of Hanbali's whereas in Pakistani law Courts often treat pregnancy as proof, many judges wrongfully assume pregnancy is equal to *zina*, ignoring rape or marriage defenses. Defense Strategy under *Shariah*, mention the traditional *Hanafi/Maliki* decisions that pregnancy is not enough under Pakistani law, to disprove presumptions, raise the possibilities of rape or marriage.

## CONCLUSION AND RECOMMENDATIONS

### Conclusion:

There are significant conflicts between traditional legal doctrines and modern law enforcement when the rights of the accused in *zina* instances are compared between *Islamic* and Pakistani legal systems. *Pakistan's Hudood Ordinances*, especially the *Offence of Zina (Enforcement of Hudood) Ordinance, 1979*, have frequently gone away from *Islamic jurisprudence's* strict evidentiary standards, procedural safeguards, and strong presumption of innocence, resulting in systemic injustices, particularly against women and minorities.

Evidentiary standards in Islamic Law vs. Pakistani Practice, in Classical Islamic law, require four pious male eyewitnesses (*tazkiyah al-shuhood*) or an unambiguous, repeated confession for *zina* convictions, due to the high burden of proof required to carry out *hadd* punishments. While Pakistani courts have frequently employed pregnancy, forced confessions, or circumstantial evidence as presumptive proof of *zina*, in contrast to the Islamic doctrine of doubt (*shubhah*). The Protection of Women Act (2006) reduced certain abuses; however, it was not clear what the evidentiary standards were.

Procedural Safeguards and Their Erosion, in *Islamic law* places a high priority on the rights of the accused, including the prohibition of torture, the ability to recant confessions, and protection from unjust imprisonment (*Quran* 49:6). The Prophet (PBUH) demonstrated kindness over punitive harshness by dismissing *hudood* instances due to slight uncertainties. However, these protections have frequently been violated by Pakistan's legal system. Systemic flaws and procedural problems were revealed by police abuse of the *Hudood* legislation, especially in situations when rape victims were tried for *zina* because of gaps in the evidence.

Judicial Interpretations and Reforms in the top courts of Pakistan have occasionally taken a pro-Islamic stance by rejecting cases for procedural reasons or demanding strict evidence for *hadd* penalties. For instance, courts have exonerated accused parties in situations when *Nikahnama* (marriage certificates) raised a reasonable doubt. However, divergent court viewpoints and delays in implementing reforms (such as forensic evidence procedures) sustain inequities. The 2006 amendments were progressive, but they did not strike a

sufficiently balanced approach between *Islamic evidentiary standards* and constitutional due process.

The conflict between Islamic legal principles and Pakistani facts highlights two significant issues are Firstly, women were unfairly singled out by the *Hudood Ordinances*, which permitted false convictions and confused rape with consenting *zina*. The regular disregard for the dependence of Islamic law on the credibility and intent of witnesses compromises justice. Secondly, Pakistan's attempt to reconcile Shari'ah mandates with modern human rights norms through legal pluralism exposes tensions in post-colonial legal systems. The *shubhah* idea, if properly used, could bridge this gap by prioritising exoneration in ambiguous situations.

To reconcile *Islamic* values with modern justice, Pakistan has to codify classical safeguards to make sure that criminal procedure explicitly incorporates the (*shubhah*) doubt doctrine, which requires that *zina cases* with ambiguous evidence be dismissed. In addition to preventing injustices and meeting *Islamic standards of proof*, bolster forensic infrastructure by creating DNA databases and skilled medico-legal teams. Judicial Training is mandatory to prevent the abuse of severe punishments and to educate judges about the traditional differences in Fiqh between *hadd* and *tazir* violations.

Islamic law's fundamental commitment to justice (*Adl*) and mercy (*Rahmah*) makes it a solid basis for defending the accused. However, the symbolic *Islamization* of Pakistan's legal system needs to give way to meaningful reforms that align with these principles. By confirming the accused's rights, which are founded on *Quranic* commandments and prophetic precedents, the state can uphold both divine law and human dignity.

## **Recommendations:**

This study's examination of Islamic legal principles and Pakistan's current jurisprudence on zina cases reveals critical discrepancies between theoretical rights and actual implementation. The following changes are desperately needed to bring Pakistan's legal system into compliance with both *Islamic justice* and contemporary human rights standards:

Institutionalising the Doctrine of Doubt (*Shubhah*), Pakistani statutes must explicitly incorporate the Islamic idea of *shubhah*, which mandates that courts dismiss cases if there is any reasonable question regarding the accused's guilt. This *Quranic protection* stems from the Prophet's warning to "avoid *hudud* Punishments in times of doubt" and should supersede circumstantial evidence unless there are four credible eyewitnesses or an unqualified confession. Legislative Changes should specifically forbid convictions based only on pregnancy or delayed reporting, as these practices have unfairly singled out women.

For forensic and evidentiary reforms, the government must establish specialised forensic units with DNA analysis capabilities, supervised by committees of scientists and jurists, to ensure that the evidence meets both Islamic and scientific requirements. Police training programs should stress the *Islamic prohibition* on coerced confessions (*Quran 2:256*), and cases where confessions are retracted must be automatically rejected. The four-witness rule must be strictly applied when *hadd standards* are not met to prevent the misuse of *ta'zir penalties*.

For judicial restructuring, judges in specialised hudud courts who have received training in both contemporary criminal procedure and traditional fiqh should be appointed. The Supreme Court ought to establish legally enforceable rules that require: (a) thorough verification of witness reliability (*tazkiyah al-shuhood*); (b) evaluation of other possible explanations for circumstantial evidence; and (c) dismissal of instances in which there are legitimate nikah claims. The Council of Islamic Ideology should collaborate with legal professionals to develop uniform jury instructions that incorporate both constitutional and Islamic protections.



For victim and Accused Protections expanding the Protection of Women Act (2006) is necessary to: (a) make it illegal to prosecute rape victims for adultery; (b) establish programs to safeguard witnesses; and (c) do away with *ta'zir* punishments where *Hadd* proof is insufficient. Gender-sensitive measures, like female judicial monitoring in women's cases and specialist legal assistance clinics, would uphold the prophetic heritage of seeking explanations for the guilty.

For systemic accountability, a national register of unfair hudud convictions should serve as a basis for policy. The National Commission on Human Rights is responsible for ensuring that Islamic due process is adhered to. Public awareness initiatives led by religious experts, which emphasise Islam's respect for privacy and the presumption of innocence, can aid in combating cultural stigmas. These changes will restore the traditional *Islamic balance* between punishment and mercy, as exemplified by Imam Abu Hanifa's rigorous evidentiary standards and *Caliph Umar's* suspension of hudud during famines. By laying a foundation in Pakistan's constitutional obligations and legal heritage, the rights of the accused can be converted from idealistic notions to legally enforceable protections.

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