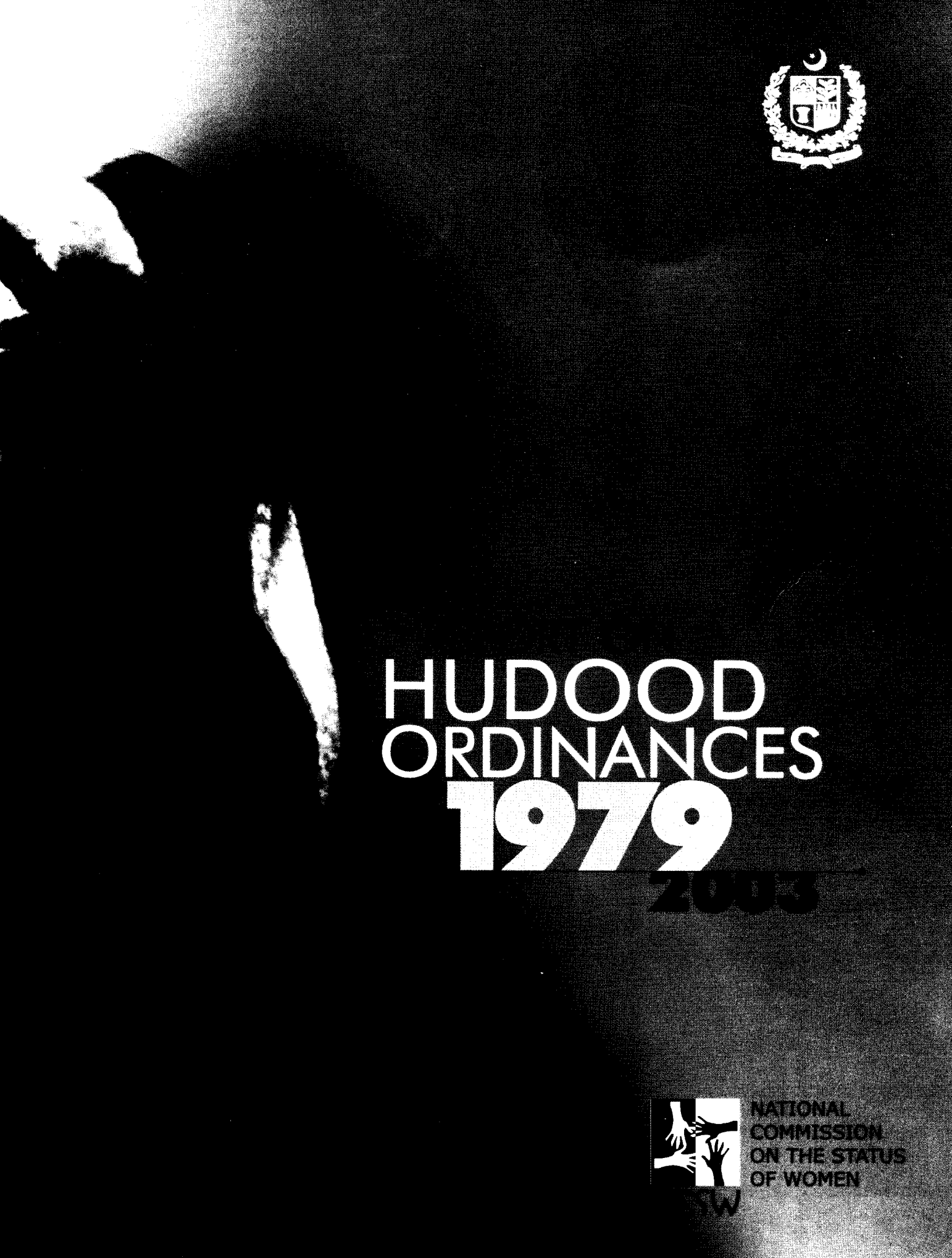

HUDOOD ORDINANCES 1979

2003

NATIONAL COMMISSION ON THE STATUS OF WOMEN

REPORT ON
HUDOOD ORDINANCES
1979
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NATIONAL
COMMISSION
ON THE STATUS
OF WOMEN

NCSW

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FOREWORD

The National Commission on the Status of Women (NCSW) was established in the year 2000 by virtue of Ordinance XXVI of 2000. It is a statutory body comprising a Chairperson, other members including scholars, 2 members from each province and one member each from minorities, AJ&K, FATA, FANA and Islamabad Capital Territory. In addition, there are three *Ex-officio* members, who are Secretaries from Ministry of Finance, Interior and Law, Justice and Human Rights. The Secretary of the Commission is the Additional Secretary of Ministry of Women Development, Social Welfare & Special Education.

The objectives of the Commission, as stated in the Ordinance, are the emancipation of women, equalization of opportunities and socio-economic conditions amongst women and men, and elimination of all forms of discrimination against women.

The NCSW being a statutory institution responsible, *inter alia*, for review and reform of laws, rules and regulations affecting the status and rights of women with a view to recommend to the Government appropriate reform thereof. The Commission is mandated to examine the unjust,' discriminatory laws which negatively affect the status and rights of women with a view to establishing gender equality in the society. The purpose is to facilitate the women to acquire and avail their legal and constitutional rights with a view to enable/empower them to join the mainstream and play a full and effective role in the development of the society.

Keeping in view the above role, the Commission in its meeting held in April, 2002, took up the review of the Hudood Ordinances 1979 on priority basis. To take up an in depth study of these Ordinances the Commission set up a Special Committee comprising prominent (retired) judges, eminent lawyers, scholars, representative of minorities and members of the Commission, having legal background. This Committee held five meetings in Karachi, Islamabad and Quetta and discussed all the four Ordinances, clause by clause referring to Quran and Ahdith and the prevalent law. The concluding session of the Committee was held on 16th August, 2003 at Karachi to finalize the draft report, based on the deliberations of the Committee. Out of 15 members of the Special Committee who had actively participated throughout the deliberations on Hudood Ordinances, 12 members recommended that the Hudood Ordinances should be repealed, while 2 members recommended that these should be amended with a view to removing its defects. These recommendations along with the opinions of the members of the Committee were put up before the Commission in its meeting held on 29th and 30th August, 2003. The Commission after deliberations unanimously approved the recommendations of the Special Committee that the Hudood Ordinances should be repealed as recommended by the majority members of the Special Committee.

The Report of the Special Committee, duly approved by the NCSW, is being published. This Report comprises the conclusions arrived at by the Special Committee in its concluding sessions and all the discussions/deliberations, spread over a period of one year. The T.O.R., notification of the Special Committee and the minutes of the five meetings of the Committee are also included.

I am thankful to all the members of the Special Committee who took time out of their busy schedule of professional work and endeavoured to reach a just decision with out any pre-notions, biases or political inclinations.

JUSTICE ® MAJIDA RAZVI
CHAIRPERSON

NATIONAL COMMISSION ON THE STATUS OF WOMEN

Draft Report On The Meetings of the Special Committee To Review The (Enforcement Of Hudood) Ordinances, 1979

INTRODUCTION

In 1979 the following four Hudood Ordinances were enforced:

1. The Offence of Zina (Enforcement of Hudood) Ordinance, 1979
2. Offence of Qazf (Enforcement of Hadd) Ordinance, 1979
3. Offence Against Property (Enforcement of Hudood) Ordinance, 1979
4. The Prohibition (Enforcement of Hadd) Order, 1979

Without going into the motives of the Zia-ul-Haq Government at the time for the enforcement of these Ordinances, which essentially lie in the political domain, it is obvious that these Ordinances were hurriedly drafted and equally hurriedly enforced. In fact, it would appear that a number of sections from the Pakistan Penal Code ("PPC") relating to the offences described in the Ordinances were lifted from the (PPC) and incorporated in the Hudood Ordinances along with additional provisions, which were supposed to be in accordance with the injunctions of the Quran and Sunnah. The introduction of these Ordinances was meant to give an Islamic appearance to the State.

However, after the introduction of these Ordinances, in particular the Ordinance relating to the offence of Zina and Qazf, coupled with the subsequent enforcement of Qisas and Diyat Ordinance, it was found that instead of remedying social ills, these Ordinances led to an increase in injustice against women and, in fact, became an instrument of oppression against women. There were hundreds of incidents where a woman subjected to rape, or even gang rape, was eventually accused of Zina and thereby subjected to wrong and unjust persecution and great ordeal. In this connection the lacunae in the law were greatly exploited by unscrupulous elements to perpetrate great cruelty on women and children, particularly minor females. The strict requirements regarding four witnesses were mostly ignored or sidelined by relying on illogical surmises. As a result of strong and sustained pressure from women's rights groups in civil society, no woman was subjected to the punishment of flogging (lashes), or for that matter "Rajam", but nevertheless, the threat remained and that in itself caused great distress to the women who even otherwise remain the most exploited individuals in our society.

Various women's NGOs and human rights organizations repeatedly protested against the injustice and ill effects of the enforcement of these Ordinances but the protests were in vain. More and more women were subjected to torment because of these laws and the incidents of rape increased as time went by and the jails began to be filled with women on trial under the Zina Ordinance. Even though the Qazf Ordinance was meant to eliminate incidents of false accusation against women, it brought no relief to the women, because often their tormentors were powerful individuals and any attempt by the victim to seek redress under this law resulted in further misery for them. Apart from Zina and Qazf Ordinances, the Ordinance regarding property too, was of no avail in curbing incidents of theft and robbery, while the Ordinance regarding

Prohibition failed to control the spread of narcotics and illegal spirits in the country. It was thus obvious that these Ordinances had failed in fulfilling their stated objectives. Islam essentially is a religion that promotes justice, but when in the name of Islam, injustice is perpetrated then it becomes necessary to examine the laws introduced in the name of Islam to determine what went wrong.

Starting in 1983, with the Zari Sarfraz Commission, a number of Commissions and Review Committees had examined and critiqued these laws. The Commission of Inquiry on Women, headed by Justice Nasir Aslam Zahid, had recommended the repeal of the Hudood Ordinances in 1997. No action was taken on any recommendation. In 2002, the National Commission on the Status of Women constituted a Committee, consisting of the following members[1], to re-examine these laws with a view to (1) determine whether or not these Ordinances ought to be repealed; and (2) determine whether or not these Ordinances could be improved through amendments.

1.	Justice (Retd.) Majida Rizvi	(Chairperson)
2.	Dr. Farida Ahmad	
3.	Ms. Rahila Durrani	
4.	Ms. Nahida Mahboob Elahi	
5.	Syed Afzal Haider	
6.	Ms. Charmaine Hidayatullah	
7.	Dr. Faqir Hussain	
8.	Ms. Hina Jilani	
9.	Dr. M. Farooq Khan.	
10.	Professor Rafiullah Shahab	(subsequently passed away)
11.	Noor Muhammad Shahtaj	
12.	Ch. Naeem Shakir	
13.	Allama Aqil Turabi	
14.	Justice(Retd.) M.Shaiq Usmani	
15.	Justice (Retd.) Taqi Usmani	(declined)
16.	Justice (Retd) Nasir Aslam Zahid	
17.	Dr. S.M. Zaman	
18.	Ms. Shahla Zia	

The Committee thereupon held its first meeting in Karachi on 27-28th May 2002 and subsequently five other meetings. From the very beginning the Committee agreed that it would be necessary to examine various Ordinances section by section, and as the meetings progressed, each section was dealt with in detail and all the members often with differing opinions, were able to express their opinions with force and conviction. At the conclusion of the meetings detailed Minutes were compiled, which were transcribed from various tapes made at the time of the meetings and were then distributed amongst all the members of the Committee, requesting their comments and/or recommendations, keeping in view the terms of reference of the Committee.

Before dealing with the recommendations of the various members, it may be appropriate to briefly dwell upon the findings of the Committee on various sections of the four Ordinances as derived from the detailed Minutes. These are also enclosed with this Draft Report, in order to

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[1] Notification on page 109.

highlight the trend of the discussion during the meetings, and the views expressed by various members.

The Offence of Zina (Enforcement of Hudood) Ordinance, 1979

The first three meetings were dedicated to the most complicated of all ordinances, i.e. the Zina Ordinance. Short of conviction, women have been held for extended periods of time on charges of Zina when they reported rape. Today, 80% of the women languishing in our jails are there as a result of the ambiguous legislation of the Zina Ordinance. Therefore, the Special Committee decided to review the Zina Ordinance as priority number one.

Key issues as identified by the Special Committee:

As a result of deliberations held during the first meeting, the Committee identified the following as the key issues in the Zina Ordinance:

1. Is the law under discussion delivering justice'? If not, then should it remain as part of the statute books?

2. Whether the existing Hudood provisions in the Hudood Ordinances 1979, are in accordance with the Islamic injunctions, particularly with reference to the Federal Shariat Court's judgment in Hazoor Bux case, wherein two different Benches gave conflicting judgements: one holding that Rajam is not according to the Islamic injunctions (PLD 198 FSC 145), and the other stating that it was so (PLD) 1983 FSC 225)?

3. Whether Section 8, which deals with the production of evidence for Zina and Zina-bil-Jabr is confusing and should the required evidence for each of the two be different and distinctive: because under the existing law, the victim in Zina-bil- Jabr becomes an accused, which is unjust and against the spirit of the Islamic legal system and encourages rape?

4. Definition of "Marriage" as provided in the Ordinance in the context of offence of Zina.

5. Whether the definition of "pregnancy" has any bearing with rape or adultery?

6. Should not the attainment of puberty be de-linked from adulthood? How can a girl at the age of 10 years or a boy of the age of 15 years, if she/he attained puberty, have enough understanding to know the implications of Zina or Zina-bil-,Jabr after being enticed away and abused?

7. Whether the punishment for Zina-bil-Jabr can be the same as for Zina, as described in the Quran (Surah Noor 24:2 Surah) (Zina-bil-Jabr is not mentioned in the Quran and hence is a Tazeer issue).

8. Is the provision of only "male witnesses" a correct interpretation of the Quranic verse as the literal translation differs on this point? And whether by providing for only Muslim

male witnesses does the law not attach leniency towards the perverse elements who, despite their involvement in such heinous crime, are likely to go totally free or just be penalized with mitigated punishments?

9. Whether the punishment of Rajam comes under Hadd or Tazeer? And under what conditions should it be awarded, particularly with reference to the verses of Sura Noor?

10. The rationale of including other offences not related to the Hudood, e.g. "enticing women", "cohabiting with women" and "selling and using women prostitutes" etc?

11. Is it just that a law is made applicable to non-Muslims but they are debarred from being represented by a non-Muslim counsel? Is it fair, equitable and in the spirit of Islamic injunctions as regards testimony, that a non-Muslim witness cannot be judged under the Rule of Tazkiyatul-Shahood, and as such the evidence becomes a secondary evidence. Is Non-Muslim witness discriminated against Muslim witness as no weight is given to the testimony of a non-Muslim?

12. In view of exclusion of non-Muslims as witnesses and presiding officers of the Court, what is the rationale of application of this law to non-Muslims?

13. Whether Tazeer punishments could, in particular reference to the Zina offences, be awarded under the Hudood Laws? (Whether Tazeer is permissible as an alternative punishment)?

14. Whether the entire Ordinance is repugnant to Islamic injunctions and requires to be repealed and drafted afresh, or could it be modified through some amendments and brought in conformity with Islamic injunctions?

The participants carried out brainstorming sessions on the above listed issues. In the following section of the report, all issues raised while reviewing the Zina Ordinance have been reported section-wise. The issues/questions with particular reference to the offence of Zina, as discussed and identified by the Special Committee as "Key Issue" (listed above), have also been reported in this section. Other issues pertaining to the overall impact of all the Ordinances have been reported in the Final Conclusion of the Report given at the end.

Nomenclature

The issue of renaming the "Hudood Ordinances" was raised and discussed. Syed Afzal Haider pointed out that the nomenclature "Zina Ordinance" was not correct on the basis that in the Quran, the, term "Hadd" had been used and not "Hudood". The Committee observed that there was inconsistency in the nomenclatures of the Ordinances. While the two Ordinances [Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 and The Prohibition (Enforcement of Hadd) Order, 1979] in the Hudood Ordinances used the term "Hadd", the Zina Ordinance and the Offences Against Property (Enforcement of Hudood) Ordinance 1979, used the term "Hudood".

Consensus was reached to change the title of the "The Offence of Zina (Enforcement of Hudood) Ordinance", to "The Offence of Zina (Enforcement of Hadd) Ordinance", and of "Offences Against Property (Enforcement of Hudood) Ordinance 1979" to "Offences against Property (Enforcement of Hadd) Ordinance 1979".

Definition of Marriage

In Section 2 (c), the use of the term "void" as provided in the definition of "Marriage" was examined by the Committee. Justice (R) Shaiq Usmani proposed that the term "void" be replaced with the word "valid", while Ms. Hina Jilani suggested that if the term "void" was to be replaced as proposed, it should be replaced by adding "valid in accordance with Law". Justice (R) Majida Razvi advised that if the term "valid" is to be used, it must be considered that it is valid under the Personal Law and not under any other law.

The definition of the term "Marriage" itself was also discussed. It was pointed out that it needs to be clearly defined in order to enforce Hadd and to exclude non-Muslims from the liability of Hadd.

In the absence of any specific definition of "Marriage" in the Muslim Family Laws, the Committee, in addition to having a general consensus on re-phrasing S. 2 (c), also recommended the insertion of a specific and clear definition of the term "Marriage".

Ordinance overrides other laws

S.3 that empowers this Ordinance to override other laws was raised and discussed by Mr. Naeem Shakir. He was of the view that such provisions in the law are in violation of the rights of non-Muslim minorities because they also override the laws related to the minorities. Syed Afzal Haider endorsed the apprehensions of Mr. Naeem Shakir and said that this was also in violation of Article 227 of the Constitution. Mr. Naeem Shakir further added that this provision was also in violation of the Shariat Act, which clearly exempts non-Muslim Pakistanis from being subject to the Sharia Laws.

The Committee agreed in principle that S. 3 should be deleted.

Definition of Zina

The definition of Zina as given in Section 4 of the Ordinance was reviewed and discussed. The definition reads as follows: A man and a woman are said to commit "Zina" if they willfully have sexual intercourse without being validly married to each other.

Justice (R) Shaiq Usmani was of the view that the use of the word "willfully" needs to be replaced by the word "consensually". His contention was based on the fact that the women in our society, particularly in the rural and tribal areas, are so much subjugated to the male domination that they may act "willingly" but not "consensually". Thus, a willful act may not necessarily be consensual. Most members of the Committee endorsed the viewpoint of Justice Usmani. Syed Afzal Haider pointed out that the law defines the term "voluntary" and not the word "willful". The sexual act, therefore, is said to be performed as a voluntary act where the two people are

governed by desire.

Dr. Farida Ahmad and Mr. Noor Muhammad Shahtaj were, however, of the view that the basic consideration in this whole issue was not of desire but the committing of this act. Dr. S.M. Zaman was of the view that the word "willful" covered the connotation of the word "consent" and, hence, there was no need to alter it.

The Committee was generally of the view that the Section needs to be re-drafted in order to give a clearer definition of the term Zina.

Distinction between Zina and Zina-bil-Jabr

On examining Sections 5 & 6 of the Zina Ordinance, the Committee approved of making a clear distinction between Zina and Zina-bil-Jabr, as defined in the two sections.

One issue, however, as raised in the Committee was that in S. 5 (1) (a), while reference has been made to an "adult" man, the reference to woman is without any such adjective. S. 5 (1)(a) reads: "Zina is Zina 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".

Justice Shaiq Usmani was of the view that as the term "adult" had been used for a man, it should also have been used for a woman. Ms. Hina Jilani while endorsing the point raised by Justice Usmani stated that the consent of the woman was of prime importance and unless she was an "adult", how could her consent be admissible under the law? Dr. Farooq Khan and Allama Aqil Turabi also strongly supported both these views. The majority of the Committee members observed that the absence of the term "adult" with the word "woman" would mean that if a sexual act is committed with a minor woman it would be termed as Zina and not Zina-bil-Jabr, which would not be just and fair.

Dr. S.M. Zaman was of the view that there was nothing wrong in this Section and therefore, it should remain the way it was. Dr. Farida Ahmad was of the view that whether this act is done with an adult woman or a minor, it would remain an act of Zina.

She, however, suggested that the word "puberty" may be included in this Section so that the act of Zina could only be considered with a woman who has attained puberty.

A general consensus amongst the Committee members was, however, developed that addition of the term "adult" before the word "woman" was necessary and that sexual intercourse committed with a minor must go under Zina-bil-Jabr. Subsequently, it was agreed by the majority of the Committee members that S.5 (1) (a) needs to be re- drafted.

"Rajam" - a punishment under Hadd or Tazeer?

The Committee reviewed and discussed the punishment of "Rajam" as prescribed in the Offence of Zina Ordinance. This punishment is mentioned in Sections 5 (2) (a), and 6 (3) (a) of the Ordinance that defines and prescribes Zina liable to Hadd for Mohsin and Mohsina, and

Zina-bil-Jabr along with the prescribed punishments for both. The discussion was held in the context of inclusion of Rajam as a punishment under Hadd. It was discussed and agreed that Hadd is not a punishment as prescribed in the Holy Quran. The subject of debate on this issue was raised over the fact that the punishment of Rajam is not derived from the Quran but is in fact a punishment implemented through Sunnah as a customary punishment of those times for such offences. It was agreed that for the Offence of Zina the prescribed punishment in the Quran is 100 stripes as given in Sura Noor verse 2. In addition to the Quranic prescribed punishment of 100 lashes/stripes, however, the Prophet (Peace be upon him) also inflicted the punishment of stoning, though selectively, in a case where a married person committed the offence of adultery. Nevertheless, there were instances where even a married person was not awarded Rajam. Hence, the punishment of Rajam was awarded in some cases and it was waived in others.

Mr. Noor Muhammad Shahtaj and Dr. S.M. Zaman were of the view that the Sunnah is an equally significant source of legal interpretation of laws and, hence, its value must not be undermined even in cases of Hadd. Dr. Farida Ahmed supported this view and stated that the mere fact that the Holy Prophet (PBUH) had awarded the punishment of Rajam in case of Zina (Hadd), Rajam should be considered as a Hadd punishment and not as Tazeer. Ms. Rahila Durrani also supported the view that the Sunnah cannot be differentiated from the Quran for the purposes of interpretation for the offence of Zina.

The argument raised in this context was that Rajam; (a) could not be considered as a Hadd within the accepted meaning of that term because Hadd is a fixed penalty for a fixed crime under fixed conditions, and therefore, cannot be remitted or dropped, and (b) it is not a prescribed punishment in the Quran. The verse of Surah Noor mentioning the punishment for the offence of Zina is general and does not even distinguish between the married and the unmarried adulterers. Rajam was carried out as an additional extra-Quranic punishment in view of the aggravated situation arising from the marital status of the adulterer, and was therefore Tazeer.

Syed Afzal Haider suggested that this issue needs further research and study in which; (a) the timing of the revelation of Surah Noor and the carrying out of Rajam be determined in order to find out the underlying principle applied in this punishment, and (b) the number and exact circumstances in which the Holy Prophet (PBUH) had awarded Rajam be determined in order to verify whether it was inflicted as an exception or as a rule.

The Committee agreed that these points required detailed study and needed to be discussed further.

Puberty and Criminal Responsibility

S.7 that deals with determining the punishment for the offence of Zina and Zina-bil-Jabr, where the convicted person is not an adult was discussed in detail by the Committee. The definition of 'adult' (S.2 a), specifies that the "adult male" means attainment of 18 years of age or puberty, and for females the age of sixteen or attainment of puberty, whichever is earlier. The Committee discussed S. 7 at length.

Most of the members felt the need to review the penalty on minors (non-adults) on the

basis of criminal responsibility and not sexuality, by invoking Ijtehad.

The Committee acknowledged that the offences of Zina or Zina-bil-Jabr have direct physical implications and that the attainment of puberty has a significant bearing in the offence of Zina. But the majority of the Committee members felt the need to de-link the attainment of puberty from "adulthood".

Dr. S.M. Zaman pointed out that it might be pertinent to see whether the person concerned has the legal capacity, and quoting from the Quran, he drew an analogy that in the matter of ownership of property, it is the "legal capacity" which is taken into consideration and not the "puberty". Syed Afzal Haider supported the view of Dr. S.M. Zaman. This point was, however, debated upon on the basis of literal Quranic text.

Justice Shaiq Usmani observed that since the issue in question deals with a sexual offence and pertains to the sexuality of the individuals, hence the mention of the term "Puberty" for both the male and female in the Ordinance. There should not be inconsistency or discrimination between the basic determining factors of a girl and a boy in age, i.e. if age was determined for boys at 18 years it should be the same for girls.

It was agreed by most Committee members that the legal capacity/criminal responsibility should be the determining factor for the responsibility of Zina, and the possibility to amend this would require a detailed study of Shariah.

Dr. Fareeda Ahmad and Mr. Noor Mohammed Shahtaj, however, disagreed with the above as according to them, puberty has been linked with adulthood under Shariah laws and hence it should remain the way it is.

Proof of Zina or Zina-bil-Jabr liable to Hadd

Section 8 that seeks identical proof for the two offences, i.e. Zina & Zina-bil-jabr was discussed at length by the Committee. The Committee was generally of the view that this Section has created confusion, misunderstanding and misconception about the distinct nature of the two offences, and has subsequently even led to the passage of confused judgements and ambiguous implementations.

The Committee observed that the offence of Zina-bil-Jabr has been derived from Sunnah, considered as Haraba,[2] and categorized with the Zina offences. The majority of the Committee members were, therefore, of the view that since the offence of Zina-bil- Jabr is not categorically mentioned in the Quran, therefore, the quoted verses of the Surah Al-Maida[3] should also not be applicable to the offence of Zina-bil-Jabr.

Surah Al-Maida reads:

> "The punishment of those who wage war against God and His Apostle, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile

[2] Ibid Surah-Al-Maida Verses 33 & 34.
[3] Ibid Surah-Al-Maida Verses 33 & 34.

from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter : "{33:5}

"Except for those who repent before they fall into your power: in that case, know that God is oft-forgiving most Merciful" {34:5}

Syed Afzal Haider pointed out that these verses of Surah Al-Maida refer to people who create/spread "Shar' (evil), and therefore, in his opinion offences like Haraba, Zina-bil- Jabr and sedition etc, could be covered within the ambit of these verses of the Quran.

While the majority of the Committee members agreed with the arguments of Syed Afzal Haider, Dr. Fareeda Ahmad, and Mr. Shahtaj disagreed and were of the view that Surah Noor, verse 2 covers both offences of Zina and Zina-bil-Jabr along with the pre -requisite criterion of four witnesses to prove these offences.

Surah Noor[4] *reads:*

"the adulterer and the adulteress - scourge them, both with a hundred stripes. And let not compassion prevent you from executing the decree of Allah and let a number of believers be witness of their punishment"

Dr. Fareeda Ahmad, Mr. Noor Muhammad Shahtaj and Dr. S.M. Zaman held that the provisions of the Ordinance on the offence of Zina-bill-Jabr, as reflected in Section 8, were in accordance with the Shariah.

The majority of the members of the Committee were, however, of the view that the possibility of reviewing and revising the conditionality of producing evidence of four male witnesses in proving Zina-bil-Jabr should be explored under Ijtehad, because punishment for Zina-bil-Jabr is not a Quranic provision.

While there was no difference of opinion on the number of four witnesses required for making Zina liable for Hadd, the issue of shortage/absence of the required number of male witnesses in the case of Zina-bil-Jabr as provided under S.8 (b) was an issue raised and discussed by the Committee. The basic concern is that where the victim is unable to produce the required number of witnesses, she is often booked under the offence of Zina, and her complaint is erroneously and negatively viewed and determined as sexual intercourse that was consensual. Hence, despite being a victim of rape, she is charged with the offence of Zina.

The members also discussed that the criteria of four witnesses should be their credibility and not their religion.

In addition, the majority of the Committee members also proposed an amendment for Section 8, which includes deletion of the word "male" in S.8 (b). The Committee discussed the issue in detail with particular reference to situations whereby the existence of men may not be possible at the place of crime, for instance, the Committee took into account situations where the occurrence of the crime is in a women's hostel, or within a household with no male members

[4] Al-Quran Surah Noor Verse 2.

present etc. A general consensus within the Committee was to consider the literal meaning of the Quranic verse that does not refer to any particular gender. This, most members of the Committee felt, would facilitate access to justice and also remove the discriminatory aspect/element in the law.

The majority of the members strongly recommended that all offences not specified clearly in the Quran, must be separated from the Hadd laws and placed under Tazeer and PPC. This would not mean though, that these offences would be dealt with any leniency. In fact, Dr. Farooq Khan observed that while Section 10 of the Ordinance prescribes 100 stripes for the offence of Zina, there is a punishment of rigorous imprisonment to the maximum term of 10 years with 30 stripes and a fine prescribed for the offence of' Zina-bil-Jabr. This, as he pointed out, was a heavier punishment due to the fact that while the Hadd Punishment of 100 stripes (for Zina) was a matter of maximum 10-15 minutes and had to be inflicted in a manner that it did not cause physical hurt to the person, the punishment for Zina-bil-Jabr (Zina liable to Tazeer) as prescribed in the Ordinance is harsher as compared to the Hadd.

Another suggestion in S.8 was regarding the amendment in the proviso. The Committee recommended that the proviso should be replaced by unequivocal wording specifying the exception of non-Muslims to the jurisdiction of this law. The existing proviso states that in case of a non-Muslim accused, the witnesses may also be non-Muslims as guaranteed under the Constitution and the Shariat Act.

The majority of the Committee members, however, observed that since non-Muslims should be dealt with under their own personal laws, as strongly recommended by the Committee, it was pertinent to amend and re-phrase the proviso.

Some members proposed that the proviso should state that "Provided that a non-Muslim shall not be liable to punishment under Hadd and shall be tried under Tazeer".

Non-Muslims and Islamic Hudood Laws

The issue of application of Hudood to non-Muslims was another issue raised in the Committee meetings. The Committee underlined the need to ensure that the non-Muslims, who are not liable to Islamic laws, should be dealt with in accordance with their own personal laws; with an exception in cases where the offence is committed between a non-Muslim and a Muslim. Section 1, sub-section (2), dealing with the jurisdiction of the Zina Ordinance, was discussed in the Committee in the context of minorities. As the sub-section states that the Ordinance extends to the whole of Pakistan, it was queried whether it also included the minorities. The Committee observed that generally criminal laws all over the world are applicable to all the citizens of' a country without exception. In this case, the difficulty had arisen due to the inclusion of Hudood laws as part of the Criminal Law.

Another issue raised and discussed in this regard was the religion of the Presiding Officer. It was discussed that the law provides that in case of the accused being a non-Muslim the Presiding Officer may be a non-Muslim, but it is not clear what the case would be if the victim is a non-Muslim. The Committee observed that this was a loose end in the existing law

that needs to be tied up by redrafting the concerned provision.

Mr. Naeem Shakir clarified that since Constitutional guarantees as provided in Article 227 (3) of the Constitution of the Islamic Republic of Pakistan 1973, and Section 2 of the Shariat Act clearly mention that the Shariat Laws would not be applicable to the minorities, therefore, this Ordinance would not be applicable to the minorities. Under the same principle, there was a general consensus in the Committee that the proviso in Section 8 be replaced with wording that exempts non-Muslims from being tried under Hudood laws except in case where one of the two parties involved is a Muslim.

Conclusion

While reviewing the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, many pertinent issues were raised and discussed in detail and it was felt that a number of sections of this Ordinance were defective and led to injustice against women. The main defects pointed out were as follows:

1. The name of "The Offence of Zina (Enforcement of Hudood) Ordinance" requires to be changed to "The Offence of Zina (Enforcement of Hadd) Ordinance".

2. In the definition of the term "marriage" [S. 2 (c)], the use of the term "void" has led to anomaly.

3 S.2 (a), the definition of the term "adult" was discriminatory between men and women when there was no basis for it.

4. The fact that S.3 empowers this Ordinance to override other laws leads to anomaly.

5. S. 4 the definition of the term "Zina" is inadequate and defective.

6. S. 5 (1) (a) was found to be ambiguous as sexual intercourse with a minor girl would also be Zina when it should in fact be Zina-bil-Jabr.

7. S.5 (2)(a) and 6 (3)(a) was found to be ambiguous. A number of participants had great objection to the punishment of Rajam as there is no mention of it in the Quran and reference to it in Sunnah is open to controversy and debate.

8. S. 7 is ambiguous.

9. In S. 8, qualification of a witness should not be religious faith but his/her credibility.

10. S. 8 (b) was found to be defective because of the provision for of only male witnesses eligible to testify.

11. A number of participants felt that this Ordinance should not be applicable to non-Muslims.

Offence of Qazf (Enforcement of Hadd) Ordinance, 1979

After critically reviewing the Zina Ordinance and listing recommendations to amend/improve the law, the Special Committee went ahead and selected the offence of Qazf (Enforcement of Hadd) Ordinance, 1979 for deliberations. Qazf is imputing Zina against a woman. The offence of Zina in the Quran is simultaneously mentioned with the offence of Qazf and is known to be an antidote for such allegations of Zina.

It is stated in the Holy Quran, Surah Noor[5],:

> "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 evidence ever after: for such men are wicked transgressors"

The cited verse clearly indicates that Islam takes serious note of those who put scandalous/slanderous allegations on honourable women about their character and chastity without bringing forward any adequate evidence to support these allegations. To prove the allegation four witnesses are required and the punishment for failing to meet the pre-requisite (four witnesses), is eighty stripes and striking off any future chances of appearing as a witness in any case.

Jurisdiction of the Ordinance and definition of the term "Mohsan" and "Mohsana"

The Committee began the review of the Ordinance from Section 1. Once again the prime issue under discussion was the jurisdiction of this Ordinance to apply to the whole of Pakistan and whether that included or should not include the non-Muslims. Ms. Naheeda M. Elahi raised the issue that while S.1 (2) extends the jurisdiction of this law to the whole of Pakistan, the explanation 2 as provided in S.5 of the Qazf Ordinance defines the term "Mohsan" within the ambit of an adult Muslim. This, as she pointed out, contradicts the provisions in S.1 (2). The issues under debate were: (a) whether non-Muslims were included or excluded from this Ordinance, and (b) whether definition of the term "Mohsan" is the same as given in S. 5 of this Ordinance, because the term used in the given verse referred to the female gender, "Mohsana" - the literal translation of which is "honourable women" and does not make any references to their religion or their marital status. The term, therefore, as observed by the Committee, was defined differently than the one given in the Zina Ordinance, and perhaps with the view that even unmarried women and non-Muslims could also benefit from this.

Another issue raised that ensues from the definition of Mohsan/Mohsana was concerning situations where, for example, a man / woman already accused and convicted of Zina in the past is once again accused of committing the same offence later, but this time the allegation is false. In such case, the accused would not be Mohsan/Mohsana (honourable man/woman), on account of his/her previous misconduct, but would he/she then be able to benefit from this law or would have to resort to Tazeer?

Similarly, the question whether or not the definition of Mohsana should include a minor girl was discussed; because if it does not, then the definition overlooks the repercussions of the

[5] Surah Noor Verse 4.

false imputation on her entire life while the accuser has nothing to lose.

The Ordinance is silent on the above issues and, therefore, needs to provide for them. 'The Committee was of the view that such issues need to be taken into account and evaluated before drafting such a piece of legislation.

Hence, given the contradictory text of the above two mentioned sections and vague definitions, the Committee felt the need to re-draft the section.

Definition of Qazf

The definition of Qazf as given in S.3 was critically reviewed and discussed. Most Committee members felt that the definition of Qazf as given in S. 3 was too 'mild' and did not seem to serve the purpose the offence of Qazf. The wording "intention to harm" as used in this section were deliberated upon in detail and it was observed by the Committee that such wording negates access to justice because proving the "intention to harm" was bound to prolong and complicate the issue and was also likely to give relief to the accused rather than to the victim.

> "Whoever by words either spoken or intended to be read, or by signs or by visible representation, makes 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, except in the cases hereinafter excepted, to commit Qazf."

In addition to the reservations on the above-mentioned wording (in italics), the Committee members also observed that in the Second Exception of S.3 there was yet another unexplained term that made the definition of Qazf even further ambiguous. The Second Exception in S. 3 reads:

> "Second Exception (Accusation preferred in good faith to authorized person). —Save in the cases hereinafter mentioned, it is not Qazf to prefer in good faith an accusation of Zina against any person to **any of those who have lawful authority over that person** with respect to the subject-matter of accusation."

The main issue of discussion that arose out of this Exception was the definition of the "lawful authority". The Committee discussed and deliberated on this at length, and found that the Exception created more ambiguity than facilitating the accused. It was questioned as to what authority in front of which if Qazf is claimed, it will not be regarded as Qazf. The answer to this question was discussed in detail and it was evidently based on presumptions, which was indicative of the fact that the Section was badly drafted.

Most Committee members, including Justice Shaiq Usmani and Dr. Farooq Khan, observed that such provisions have watered down the offence of Qazf and hence to prove this offence is complicated and almost impossible.

The Committee was of the view that Section 3 needs to be re-drafted.

Witnesses

While discussing S.6 of the Ordinance that deals with the "Proof of Qazf liable to Hadd". two issues were raised and deliberated upon in the Committee. The first issue was regarding the conditionality of "at least two Muslim adult male witnesses" as provided in clause (c) of this section and the second issue, from the same clause, pertained to the conditionality of "Tazkiyah-ul-Shahood".

The issue of two adult Muslim males as witnesses was seen as being in violation of Article 25 of the Constitution, which guarantees equal rights for all. Mr. Naeem Shakir was of the view that (the two words "Muslim" and "male" were unnecessary in this section, and recommended that it should only provide for two adult witnesses. Allama Aqil Turrabi disagreed on the basis that it was so in Shariah law and had to be followed accordingly.

The Committee was generally of the view that this provision in law may be reviewed and re-drafted.

The second issue in question was the conditionality of "Tazkiyah-ul-Shahood". It was discussed that not many people can fulfill the criteria of a witness under the provisions of "Tazkiyah-ul-Shahood", and therefore, this conditionality should be removed. Dr. Farooq Khan observed that there is no mention in the Quran that the witness must fulfill the requirements of Tazkiyah-ul-Shahood. Dr. Faqir Hussain was of the view that it is normally the Courts that decide the credibility of the witnesses. Therefore, the requirement of Tazkiyah-ul-Shahood may not be necessary. Mr. Murtaza for Dr. S.M. Zaman quoted from the tradition of Hazrat Umar in which he stated "...the evidence of all Muslims is acceptable except for the one who has been sentenced to Hadd punishment and the other who is known to give false evidence"[6]

It was generally agreed in the Committee that the witness may not be required to fulfill the 'stringent' conditionalties of a witness as provided for in the Tazkiyah-ul-Shahood as to find someone as credible as required under the "Tazkiyah-ul-Shahood" would not he possible in the existing socio-economic milieu of our society.

Similarly, while reviewing S. 7 of the Ordinance that deals with punishment of' Qazf liable to Hadd, Justice Shaiq Usmani observed that sub-clause (2) of this section that takes away the right to appear as witness in a court of law from those convicted for the offence of Qazf, needs to be critically reviewed and studied because it could have negative repercussions. He was of the view that once someone loses his/her credibility under this section and is struck off from appearing as a witness in any court of law, then such a person could be vulnerable and could easily be used as an accomplice or an informer for a criminal or any other offence without being in danger of being produced as a witness in the court of law.

The Committee was of the view that these two Sections (6 & 7) need to be re-drafted.

Who can file a complaint?

S. 8 provides for the criteria for those who are eligible to file a complaint of Qazf. It was

[6] Surah Noor Verse 24.4.

observed by the Committee that clause (a) of this Section has been poorly drafted. While the offence of Qazf was generally made to protect honourable women against slanderous allegations, the law as provided in S.8 clause (a) seems to have overlooked this and strangely refers only to men.

S.8 (a) reads; "...If the person in respect of whom the 'Qazf' has been committed be alive, that person, or any person authorized by him; or..." It is obvious from the wording used in this clause that the drafters of this law overlooked and completely ignored women in this case. Justice Usmani observed that the exclusion of the term "her" means that it is only a man against whom Qazf is committed is eligible to file a compliant. The Chairperson, Justice Majida Razvi reiterated her earlier suggestion that in cases where Zina is not proved in the court of Law, then immediately at that time, the person who was accusing or had filed the complaint of Zina against someone should be liable for Qazf. Dr. Fareeda Ahmad agreed with this point of view.

The Committee developed a consensus that the Zina Ordinance and Qazf Ordinance be joined and merged together into one Ordinance.

Cases in which Hadd shall not be imposed

Section 9 of the Ordinance deals with the cases where Hadd would not be imposed. The Committee took notice of the provisions of the sub-section 1, clause (a) of this section that bars a person from Hadd if he/she commits Qazf against any of his/her descendents. The Committee observed that in our society there are innumerable incidents where fathers themselves accuse their daughters of Zina when the daughters marry against the will of their fathers.

Hence, the committee was of the view that this sub-clause needs to be deleted or re-drafted with the aim of protecting women who would like to marry a man of their own choice.

Conclusion

While reviewing the Offence of Qazf (Enforcement of Hudood) Ordinance. 1979, many pertinent issues were raised and discussed in detail. However, there were also sections in the Ordinance that did not require discussion. As a result the following defects in the Ordinance were enumerated:

1. The terms "Mohsan" and "Mohsana" need to be defined clearly while taking each and every aspect and perspective into account, which also includes the possibility of non-Muslim minorities being able to benefit from this law,

2. The definition of Qazf, as given in Section 3 of the Ordinance was found to be defective.

3. The conditionality of "two male Muslim witnesses" as given in S. 6 (c) was found to be discriminatory. It was felt that the evaluation of witnesses under stringent conditionalities of "Tazkiyah-ul- Shahood" was uncalled for and illogical.

4. Taking away the right to appear as a witness and give evidence for those accused and punished for the offence of Qazf, as provided in S. 7 (2) of the Ordinance, needs a careful review and re-drafting.

5. Section 8 was found to be ambiguous.

6. Section 9 was found to lead to injustice as it protects a person from being charged with the offence of Qazf liable to Hadd if that person commits the offence against his/her descendent.

7. The Ordinance on Qazf was not necessarily required to be independent of the Zina Ordinance.

Offences Against Property (Enforcement of Hudood) Ordinance, 1979

The Offences Against Property Ordinance is another Ordinance that falls within the category of Hudood laws. The Quran says:

> "As to the thief, male or female, cut off his or her hands: a punishment by way of example, from Allah, for their crime: and indeed Allah is Mighty and Wise"[7]

Like other offences falling within the Hudood Law, the crime of theft too has strict conditionalities that need to be fulfilled before becoming liable to Hadd. The Committee reviewed and deliberated upon the Ordinance section-wise and offered recommendations. Given the complexities in this Ordinance, the committee discussed the issues at length.

Puberty and Criminal Responsibility

The discussion on the Offences Against Property started with a discussion on the definition of "Adult" as given in S. 2 (a), which reads: "adult" means a person who has attained the age of eighteen years or puberty. This was an issue that was also discussed earlier during the review of the Zina Ordinance. Majority of the Committee members were of the view, as before, that puberty must be de-linked from "adulthood". Justice Shaiq Usmani reiterated his earlier observation that in criminal matters it is necessary to think about the criminal liability rather than puberty, which has no relation with this offence of theft.

Dr. S.M.Zaman pointed out that if a person can contract marriage after puberty and can thus enter into other contracts, then similarly he/she could be responsible for other liabilities too. However, Dr. Zaman also added that in case the Committee still wants to bring an amendment to this clause, then it could do so under Ijtehad, although personally he was of the view that the term "puberty" must remain.

All except two members of the Committee were eventually of' the view that the word "puberty" should be deleted from this sub-clause and adult must be defined as someone of the age of eighteen.

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[7] Surah Al-Maida Verse 38.

Dr. Fareeda Ahmad and Mr. Shahtaj were of the view that it was in conformity with the injunctions of Islamic Sharia and hence must be retained.

Definition of Theft

It was observed by the Committee that while S. 5 of the Ordinance talks about theft liable to Hadd, there is no given definition of theft in this section or the ordinance. The Committee was of the view that S.5(c) was inadequately drafted and needed to be re-drafted.

Nisab

Nisab is the minimum amount prescribed in Shariah law to determine the liability of various issues like Zakat (alms), and theft liable to Hadd, etc. In the "Offences Against Property Ordinance" {S.6], the Nisab for theft liable to Hadd has been determined as four decimal four five seven grams of gold, i.e. (4.457 gms) or an equivalent rate.

The Committee observed that the Nisab as determined in S. 6 was too low an amount in the existing times to make theft liable to Hadd. The issue was discussed in detail and it was pointed out that Nisab had been determined by the State from time to time in Islamic history. Dr. Farooq Khan informed the Committee that Hazrat Umar had even suspended the punishment of Hadd during a time when famine prevailed, not because theft was no longer an offence but because the situation was such that the definition of theft could not be met. However, he also made a caveat that while discussing this issue, it must be taken into account that people should not take advantage of a lower Nisab and people should also not be punished unnecessarily. Dr. Zaman was of the view that whatever Nisab had been determined by the Holy Prophet (PBUH) was the right measure, although it could be reviewed from time to time. Syed Afzal Haider suggested that in order to review the Nisab under the existing circumstances, the State could resort to Qiyas.

It was generally agreed that the figure of 4.457 gms of gold was too low to determine theft liable to Hadd. The Committee was also of the view that there must be a nexus between this amount and what the Holy Prophet (PBUH) prescribed, and the state could then re-draft the law on this point.

Witnesses

On reviewing S. 7 of the Ordinance that deals with the evidence of witnesses, most members of the Committee felt that since it had already been discussed in the previous Ordinance, there was no further need to discuss it. They were of the view that the recommendations given in the earlier deliberations should be followed through, i.e., there was no need for the witnesses to be Muslims or males, and what was required basically was that the offence of theft should be proved to the satisfaction of the Court of Law.

Issue of non-Muslims

From the above discussion, another issue of applicability of this law to the non-Muslims ensued. Mr. Naeem Shakir raised the issue and was of the view that this law must not be applied

to non-Muslims as the Hudood laws are meant only for Muslims. Dr. S. M. Zaman, Justice Shaiq Usmani and some others were, however, of the view that theft was a crime that was considered as a crime in all religions and that it also generally comes under the category of public law. Hence the exclusion of non-Muslims from this offence should not be permissible. Moreover, Justice Usmani further observed that if separate criminal laws were to be drafted for different people following different creeds, then the criminal gangs were likely to further thrive as they would start hiring/employing non-Muslims for doing the criminal acts for them. Dr. M. Farooq Khan added that the offence against property was different from the offence of Zina, because the level of morality was different amongst different people.

The Committee developed a consensus that whatever measure a State takes to enforce law and order has to be consistent and the same for everyone across the board. It was generally agreed that the offence against property/theft was a crime and is enforced as general law in every religion and hence should be applicable to all citizens.

Commission of offence of Theft liable to Hadd by more than one person

Section 8 of the Ordinance, that deals with the commission of theft by more than one person, was reviewed critically and it was observed that the law was defective in terms of pinning down the gangsters in theft.

The law in this section provides that the offence of theft committed by more than one person would be liable to Hadd when the "aggregate value of the stolen property is such that, if the property is divided equally amongst each of them as having entered 'hirz' and each one of them gets a share which amounts to, or exceeds, the Nisab."

Dr. Faqir Hussain pointed out that the given formula for Nisab in this section to make the offence liable to Hadd for the members of the gang was ambiguous and illogical, as it went in favour of the gangsters rather than acting as a deterrent. Dr. Farooq Khan endorsed the observations of Dr. Faqir Hussain, and added that if a gang committed a theft, then each member of the gang should be held liable for the whole amount that they stole.

The Committee agreed in general that this section needs to be re-drafted.

Punishment for Theft liable to Hadd

The Committee discussed the punishment liable to Hadd, as provided in S.9 of the Ordinance in greatest detail. It is a complex provision and hence involved a great deal of brainstorming and deliberation.

The first three sub-sections of S. 9 give the prescribed punishment for theft liable to Hadd when a person commits the offence for the first time, the second time and the third time. The penalty for each time is different. Sub S. 1 provides for the amputation of the right hand from the joint of the wrist when the crime has been committed for the first time. Sub. S 2 provides for amputation of the left foot up to the ankle if the crime has been committed by the same person for the second time, and whoever commits theft liable to Hadd for the third time or any

subsequent times thereto shall be punished with imprisonment for life. Sub S. 5 of the S. 9, however, talks about the convict of the crime sentenced to imprisonment, and provides that if the Appellate Court is satisfied that the person so convicted for life has sincerely repented, the Court can set him/her free on such terms and conditions that the Court may deem fit to impose.

The Committee carefully reviewed the Section. Syed Afzal Haider observed that the provision of repentance as given in the sub-section 5 was meant only for those who were convicted for committing the crime three times, which seems to be a modification in Hadd, and really not fair to those committing the crime once or twice. Dr. Farooq Khan pointed out that while awarding these punishments the prevailing circumstances in the country should be taken into account as was done in the time of Hazrat Umar. He further added that for those committing the crime for the first time should not given a severe punishment, i.e. severity should increase with the number of times the crime is committed. He further observed that while there was no doubt about amputation of hand as given in the Quran[9], the other penalties like cutting of the left foot or imprisonment for life did not have any basis in the Quran, and neither does the provision of penitence exist in the Quran for this crime. Dr. Farida Ahmad, however, quoted Hadith from "Jama-e-Rasool" where the Holy Prophet (PBUH) prescribed the cutting of hand and foot. Syed Afzal Haider observed that verses 33 & 34.10, 38 & 39, 40, 41 & 42:10 of Sura AI-Maida deal with the offences of theft and Haraba and in the light of these verses, it was clear that S. 9 was not in conformity with the injunctions of the Holy Quran. He pointed out that the Quran clearly has kept the door open for penitence, and if a person repents sincerely and commits "Toba", then he/she should be put under surveillance to confirm his/her sincerity towards his/her repentance and see whether he/she commits the offence again or not. Most members observed that Toba or repentance should be kept open for any stage of conviction so as to give the criminal a chance to take up the right path, and there existed verses in the Quran along with a number of traditions in the Ahadith in which Toba was accepted before the infliction of a punishment and the penalty was waived. The relevant verses in the Quran are the ones that talk about repentance of the thieves in the same Sura where the punishment for theft has been prescribed.

Sura Al Maida states:

> "But if the thief repents after his crime, and amends his conduct, God turneth to him in forgiveness; for God is Oft-forgiving, Most Merciful", {5:39}
>
> "Knowest thou not that to God (alone,) belongeth the dominion of the heavens and the earth? He punisheth whom He pleaseth, and He forgiveth whom He pleaseth: and God hath power over all things". [5:40]

Dr. Farooq Khan was, however, of the view that Toba was only meant for the hereafter and not otherwise. Dr. S.M. Zaman and Dr. Farida Ahmad were of the view that S.9 was in conformity with the Shariah. The Chairperson, Justice Majida Rizvi observed that from the discussions it was obvious that S. 9 was a badly drafted piece of legislation which needed to he carefully reviewed and re-drafted.

The Committee eventually was of the view that the provisions regarding sentencing in

Section 9 of this Ordinance need to be reviewed in the light of verses 39 & 40 of Sura AlMaida and the traditions in the Sunnah.

Exemptions from inflicting Hadd

Section 10 of the Ordinance gives a list of cases where Hadd will not be imposed. Most members of' the Committee gave their reservations on different points. For instance, exempting a guest or a servant in the household from the liability of Hadd was viewed as illogical. They were of the view that how can a guest who, while visiting you and enjoying your hospitality, simultaneously breaks your confidence and attempts to rob you of your valuables be allowed exemption from Hadd? Similarly, in the case of' a servant, who breaches the confidence of his/her employer, be given exemption from Hadd. Logically as observed by most Committee members, giving exemption from Hadd to servants would mean giving a chance to criminals to seek jobs in a household and then steal from there without any fear of a severe punishment.

Dr. Farooq Khan, Allama Aqil Turabi and Syed Afzal Haider agreed that while there is no basis of these exemptions in the Quran and Sunnah, these were the opinions of Muslim Jurists/Fuqaha and could, therefore, be taken as optional. Dr. S.M. Zaman disagreed and was of the view that whatever is said by the Jurists cannot be rejected outrightly and can be only possible through the given procedures for Ijtehad.

The majority of the committee members were of the view that the exemptions, as listed in S. 10 do not have any basis in the Quran and hence ought to be reviewed in the light of the Quran and Sunnah.

The definition of "Iztirar" as given in the Explanation (ii) of S. 10 was taken up and discussed in the Committee. This definition has been given in the Explanation of S. 10 in the context of S 10 (g), which exempts Hadd from the offender in a situation where "he has committed theft under "Ikrah " or "Iztirar ". "Ikrah" according to the given definition reads: "putting any person in fear of injury to the person, property or honour of that or any other person;" And, the term "lztirar" is defined as " . . .a situation in which a person is in apprehension of death due to extreme hunger or thirst;"

Justice Nasir Aslam Zahid observed that the definition of Iztirar is rather restricted. He was of the view that the phrase being placed in "apprehension of death" was something which could happen in any situation, therefore, it should be reviewed. Dr. Farooq Khan added that a person living in poverty does not have to die in order to come within the purview of "Iztirar". Hence, it was suggested that the term Iztirar needs to be redefined in order to broaden its sphere.

Dr. S.M. Zaman, however, was of the view that the terms 'Ikrah' and 'Iztirar' were already described in the Quran and that there was no further need to describe these in this Section. Justice Zahid explained his viewpoint that it was significantly important that the Courts

are given some guidelines about these terms. Justice Majida Razvi, while endorsing the view of Justice Zahid, added that setting up basic parameters should not be undermined, because leaving it entirely up to the Court's discretion to define/interpret may not be appropriate.

The Committee generally agreed that the given Exemption List was variable according to the prevailing circumstances in a society and hence should be modified accordingly from time to time.

The majority of the Committee members were of the view that the term 'Iztirar' should be redefined and broadened to include cases of extreme poverty.

Dr. S. M. Zaman, however, reiterated his stance that the term 'Iztirar' need not be defined in this section and that it should be left up to the judge, to define it according to his/her discretion and understanding of the situation.

Cases in which Hadd shall not be imposed

Section 11 lists out Exceptions in which those convicted for theft liable to Hadd are to be exempted from Hadd and are instead provided with an alternative.

The list for exemption from the punishment of Hadd for the offence of theft as given in S. 11 sub-section 1, includes situations where, for instance, the theft is proved only by the confession but the person so charged and convicted retracts from his/her confession; where theft is proved by testimony but before execution of Hadd, any one of the witnesses resiles from his/her testimony; when the victim withdraws his/her allegation of' theft, or states that the confession so made by the convicted or that the testimony of one of the witnesses was deposed falsely; and if the left hand or the left thumb or at least two fingers of the left hand or the right foot of the offender are either missing entirely or unserviceable.

S. 11(2) gives alternatives in the given situations where Hadd will not be inflicted. For the situation where the conviction is based on confession and the convicted retracts from his/her confession, then the Court may order a re-trial. In other mentioned situations, the Court may award a "Tazeer" punishment on the basis of the evidence on record.

During the discussions on S. 11, Dr. S.M. Zaman inquired as to what would happen if someone retracts from his/her confession. Justice Usmani answered that in such a case, the person so retracting would be guilty of perjury and, therefore, it would be up to the Court to prescribe an appropriate punishment. Many members of' the Committee. including Justice Nasir Aslam Zahid and Syed Afzal Haider observed that there was a lot ambiguity in S. 11, particularly, sub-section 1 clause (d) was critically discussed. It was pointed out by Justice Nasir Aslam Zahid that clause (d) was illogical and absurd because if someone committed a theft worth millions of Rupees and his thumb in the left hand was already amputated, or at least two fingers of the left hand or the right foot are either missing or entirely unserviceable then he would be exempted from Hadd, whereas someone committing a theft of worth only Rs. 5000/- with no such deformities, would be punished by getting his/her hand cut off under Hadd.

Most of the Committee members felt that this was a poorly drafted piece of legislation and contained provisions that were against the principles of justice. The Committee was of the view that these Exemptions, as listed in S. 11, appeared to entail issues which did not seem to have been taken into account while drafting this law and, hence, there is a need to review and revise this Section.

Return of the Stolen Property

S. 12 deals with the return of the stolen property. While Sub-section 1 of S. 12 states that the stolen property recovered in any form or shape would be returned to the victim/rightful owner, sub-section 2 states that in case the stolen property is lost or consumed while in the offender's possession, and he is inflicted with Hadd, then the offender will not be liable to pay any compensation.

The Committee on examining S.12 (I) agreed with the provisions of this sub-section. However, sub-section (2) was discussed critically on the issue of compensation. Two opinions emerged from the discussion on the issue of compensation. One opinion agreed with the provisions of sub-section (2) and held that in case of infliction of Hadd on the culprit and in the absence/complete loss of the property, the convicted thief should not be liable to pay compensation. Syed Afzal Haider was of the view that there should be no compensation because the thief is already inflicted with Hadd punishment, and the stolen property also does not exist anymore. Moreover, he also held that it was not a case of compensation but that of theft; and, therefore, if someone wanted to claim compensation, he/she would have to file a separate case for it as is also the given procedure under the Penal Code.

Justice ® Majida Razvi, Dr. Farooq Khan and Dr. S.M. Zaman were of the view that compensation must be given to the victim because: (a) this was an offence against the property and the thief must compensate the victim for the loss, (b) In case the stolen property has been consumed the thief should either pay the compensation or return the property, and (c) in the presence of this provision in the law, all thieves would look forward to consume the stolen property as quickly as possible.

The Committee was of the opinion that sub-section 2 of S. 12 needs to be reviewed and re-drafted to give relief to the victims of thefts and robberies.

Theft liable to Tazeer

While reviewing S. 13 of the Ordinance that defines theft liable to Tazeer, Dr. Farooq Khan was of the opinion that the given circumstances in S. 13 of the Ordinance were also liable to Hadd. S. 13 defines Theft liable to Hadd as: 'Whoever commits theft which is not liable to Hadd or for which proof in either of the forms mentioned in S. 7 is not available, or for which "Hadd" may not he imposed or enforced under this Ordinance shall be liable to Tazeer".

The Committee, however, was of the opinion that the given definition of theft liable to Hadd was agreeable and accepted as it is.

Section 14, dealing with Punishments for Theft liable to Tazeer was reviewed and accepted as given without any discussion.

Definition of 'Haraabah'

Haraabah is defined in S. 15 of the Ordinance which reads as: "When any one or more persons whether equipped with arms or not make show of force for the purpose of taking away the property of another and attack him or cause wrongful restraint or put him in fear of death or hurt such person or persons, are said to commit 'Harabah'.

The definition was reviewed critically by the Committee. Syed Afzal Haider observed that the term "Haraabah" means to wage war against the Almighty and its connotation is in a much broader sense than in which it seems to have been used in S. 15. He was of the view that the given definition not only restricts its meaning but also tends to protect the vested interests of the affluent classes. He further observed that according to the given definition it was most unfortunate that while a person committing theft of smaller amount is liable to get his/her hand and feet cut, but a person committing an act of Haraabah will not be punished that severely. Hence, according to him, the definition of Haraabah should include all aspects mentioned in Surah Al-Maida'[2].

Dr. Farooq Khan was of the view that the definition of Haraabah should include all situations. By limiting it to the offence of 'robbery/dacoity' alone, the definition has curtailed the definition as given in Surah Al-Maiyda.

Dr. S.M. Zaman, however, disagreed with the contentions of Syed Afzal Haider and Dr. Farooq Khan, and was of the view that the given definition of Haraabah in the Ordinance is reasonable and the Section need not be changed or amended.

The Committee, while generally agreeing to the observations of Syed Afzal Haider and Dr. Farooq Khan, was of the view that the definition of the word Haraabah seemed to protect the vested interests of a certain rich class of people who indulge in white collar crimes and corruption, and therefore, needs to be redefined in the light of the quoted verse of Surah Al-Mayda in the Quran.

Proof of Haraabah

S. 16 while addressing the proof of Haraabah states that the "Proof for Haraabah" would be the same as for "Proof for Theft liable to Hadd" as given in S. 7 of this Ordinance.

The Chairperson, Justice ® Majida Razvi pointed out that since the proof for Haraabah is the same as for S. 7, i.e. Proof of Theft liable to Hadd, therefore, the discussion and viewpoint of the Committee as in the case of S. 7 is the same, i.e. there was no need for the witnesses to be Muslims or males, and what was required basically was that the offence of Haraabah should be proved to the satisfaction of the Court of Law.

Dr. Farooq Khan added that, in his opinion, there was no reason to limit the number of

witnesses to two, nor was there any need to confine the evidence only to witnesses. He was of the opinion that the evidence of even one witness should be admissible and any other method of proving the crime should also be admissible.

Syed Afzal Haider was of the opinion that this provision appears to be rather unfair because if a person was to commit Haraabah and in that he was to harass the inmates of a group of houses in a village, but did not take away any property, then he/she would only be punished with 30 stripes.

Dr. Zaman disagreed and said that the evidence should be restricted to only two Muslim male witnesses, as prescribed in the Ordinance.

The Committee concluded its review of Section 16, by holding that all the discussion as held during the discussions on S. 7 would be applicable to this section. Even for witnesses, the same arguments will be applicable.

Punishment for Haraabah:

Section 17 of the Ordinance lists out punishments for Haraabah in different situations that it is committed.

Dr. Farooq Khan pointed out that the Quran lays down specific punishment for the offence of Haraabah in which no variation should be brought. Dr. Fareeda Ahmad was, however of the view that there exist Ahadith in which the Holy Prophet (PBUH) had inflicted different punishments for Haraabah.

Syed Afzal Haider pointed out that it was not justifiable to reduce the punishment of a person who forcibly enters a place to commit theft but does not succeed. He was of the opinion that reduction in the punishment was not in accordance with the spirit of the Quran. He held that in such cases the punishments in the Quran would be exile, which in modern terms would entail life imprisonment. Dr. Faqir Hussain, however. disagreed with
this opinion and said that the definition of exile as being life imprisonment did not appear to be logical.

Dr. Farooq Khan explained that the meaning of exile in Quran meant dislocation from one's home permanently. He, however, observed that the Holy Prophet (PBUH) did give concessions and hence it meant that the state could vary the punishments in accordance with the given circumstances.

The Chairperson, Justice ® Majida Razvi pointed out that while carrying out this discussion, it must be kept in mind that the term Haraabah as under discussion was the one as given in S. 15, which had a limited and restricted interpretation, and was not the one as given and described in Surah Al-Maida.

Dr. S.M. Zaman was of the opinion that the punishments mentioned in this section need to be reviewed in the light of Surah Al-Maida.

The Committee was generally of the view that the punishments as listed in S. 17 should be reviewed in the light of recommendations of the Committee as given in S. 15 of this Ordinance with regard to the definition of Haraabah.

Cases in which the punishment of amputation or death for Haraabah shall not be imposed or enforced

Section 18 lists the cases in which the punishment of amputation or death for Haraabah shall not be imposed or enforced. The deliberations on this section, were identical to the ones that took place while reviewing S.10 and 11 of the Ordinance, dealing with issues of Exemptions from inflicting Hadd and Cases in which Hadd shall not be imposed respectively. The Committee was generally of the view that (a) the issue should be reviewed in the light of the Quran and Sunnah, and (b) it was a badly drafted piece of legislation that did not seem to have taken the prevailing situation into account and, hence, needed to be re-drafted accordingly.

Return of property taken away during Haraabah

Section 19 deals with the return of property taken away during Haraabah. The Committee was of the view that this Section of the Ordinance did not need any discussion.

Punishment for Haraabah liable to Tazeer

Section 20 of the Ordinance deals with the punishments for Haraabah liable to Tazeer. The Section prescribes the punishments for Haraabah liable to Tazeer as the same punishments as have been prescribed for the offences of dacoity, or extortion, as the case may be, under the PPC (Act XLV of 1860).

The Committee, while examining this section, discussed and recommended the possibility of prescribing fine/compensation as punishment for Haraabah liable to Tazeer.

Punishment for 'Rassagiri' or 'Patharidari'

Section 21 of the Ordinance deals with a different nature of theft, i.e. regarding the theft of cattle etc. The section provides that:

(1) "Whoever extends patronage, protection or assistance in any form to, or harbours, any person or group of persons engaged in the theft of cattle, on the understanding that he shall receive one or more of the cattle in respect of which the offence is committed, or a share in the proceeds thereof, is said to commit 'Rassagiri' or 'Patharidari'.

(2) Whoever commits "Rassagiri" or "Patharidari" shall be punished with rigorous imprisonment for a term which may extend to fourteen years, or with whipping not exceeding seventy stripes, and with confiscation of all his immovable property and with fine."

While examining Section 21, Syed Afzal Haider observed that the words "on the understanding that he shall receive one or more of the cattle", as given in the sub -Section (1) would be difficult to prove in the court of law and, hence, this sentence should be removed. Justice ® Majida Razvi, however, observed that no one would protect a thief unless he has any vested interest in doing so.

Dr. Faqir Hussain was of the view that there would be no justification for inflicting such a heavy punishment unless the person concerned had a share in the stolen goods, and therefore, the removal of the word "understanding" may not be appropriate. Justice Razvi suggested that if the word "understanding" is to be removed, then the prescribed punishment must also be reduced proportionately.

The Committee members endorsed Justice ® Majida Razvi's suggestion.

There was a consensus in the Committee that the punishment, as mentioned in the sub-section, should be reduced from 14 years to 5 years rigorous imprisonment and the number of stripes be reduced from 70 stripes to 30 stripes.

Dr. Faqir Hussain also discussed a situation where somebody receives a thief whom he/she knows to be a thief and yet gives him/her protection but does not have any share in the loot. Dr. Faqir asked what should happen in such a situation i.e. whether he/she shall fall within the purview of this Section or not? Dr. S. M. Zaman said that in his view the punishment of a person protecting a thief must not exceed the punishment of the thief, secondly he said that if someone gives protection to a thief without knowing that he/she has committed the offence then the law should also design some mechanism to verify and protect him/her.

Syed Afzal Haider pointed out that the punishment of a cattle thief in the PPC is three years imprisonment.

The Committee unanimously agreed to recommend that the words "on the understanding that he shall receive one or more cattle"; may be deleted from section 21 sub-section (1); and the punishments as mentioned in sub-clause (2), be reduced from 14 years rigorous imprisonment to 5 years, while the number of stripes be reduced to 30. The Committee agreed that the remaining parts of the sub-section should remain as they are.

There were no discussions on section 22 and 23 that deal with "Punishment for Attempts to Commit Offence Punishable by this Ordinance. ", and "Application of Certain Provisions of Pakistan Penal code (Act XLV of 1860,)" respectively, and were accepted by the Committee as given in the Ordinance.

Similarly, section 24 dealing with "Application of Code /Criminal Procedure 1898 (Act V of 1898,)" was also not discussed because it relates to the procedure and therefore, no discussion was warranted.

Presiding Officer of Court to be a Muslim

Section 25 dealing with the condition of Presiding Officer being a Muslim to try cases of

Hadd, was not discussed by the Committee on the basis that similar discussion had already been held in earlier offences. The Committee was of the opinion that this section may also be treated with the same recommendation of the Committee as the one suggested earlier.

Conclusion

The Special Committee after reviewing the "Offences Against Property (Enforcement of Hudood) Ordinance, 1979" arrived at the following recommendations:

1. Section 2(a) is discriminatory against women.
2. The term "Theft" should be defined and Section 5(c) needs to be re-drafted.
3. The Nisab Figure of 4.457 grms of gold in section 6 was too low to determine theft liable to Hadd, therefore, it should be revised. The Committee was also of the view that there must be a nexus between this amount and what the Holy Prophet (PBUH) prescribed.
4. There was no need for the witnesses to be Muslims or males, and what was required basically was that the offence of theft should be proved to the satisfaction of the Court of Law.
5. The offence against property/theft was a crime and is enforced as general law in every religion and hence should be applicable to all citizens.
6. Section 8 dealing with commission of offence of theft liable to Hadd by more than one person should be re-drafted.
7. In Section 9 the provisions regarding the punishments need to be reviewed in the light of Surah Al-Maida, Verses 39 & 40, and the tradition in Sunnah.
8. The list of exemptions in Section 10 was variable according to the prevailing circumstances in a society and hence should be modified in the light of the Quran and Sunnah.
9. The term Iztirar as given in Section 10 should be redefined and broadened to include cases of extreme poverty.
10. The majority of the Committee was of the view that Section 11 was poorly drafted and needed to be revised.
11. Section 12(2) dealing with the return of the stolen property needs to be reviewed and re-drafted in order to accommodate the victims of thefts and robberies.
12. The definition of the word "Haraabah" as given in Section 15 needs to be redefined in the light of the quoted verse of Sura Al-Maida.
13. The punishments as listed in Section 17 should be reviewed in the light of recommendations of the Committee as given in Section 15 of this Ordinance with regard to the definition of Haraabah.
14. Section 18 dealing with cases in which the punishment of amputation or death for Haraabah shall not be imposed or enforced, needs to he reviewed in the light of the Quran and Sunnah and re-drafted while taking into account all related perspectives.

15. The possibility of prescribing fine/compensation should be explored to be implemented as a punishment for Haraabah liable to Tazeer (Section 20).
16. In Section 21 the words "on the understanding that he shall receive one or more cattle" should be deleted and the punishments should also be reduced to 5 years rigorous imprisonment and 30 stripes.

The Prohibition (Enforcement of Hadd) Order 1979

The Prohibition (Enforcement of Hadd) Order 1979 was discussed as the last of the Hadd Ordinances by the Special Committee.

Short Title, Extent & Commencement

The first Section discussed was Section 1(2) which dealt with the extent of this Ordinance to the whole of Pakistan, and it was unanimously held by the Committee that it should be the same as discussed in the earlier Ordinances.

Section 2(a) Definitions

Section 2(a) referring to the definition of "adult" was also held by the Committee as discussed earlier.

Section 2(c) defining "bottle" or "bottling" was discussed by the Committee. Syed Afzal Haider pointed out if the contents of the bottle are not for sale then technically speaking it was not a bottle under the definition.

The definition of "bottle" as given in Section 2(c) reads "bottle" or "bottling" means to transfer intoxicating liquor from a cask or other vessel to a bottle, jar, flask, pot or similar receptacle for the purpose of sale, whether any process of manufacture be employed or not, and includes rebottling.

The Committee was also of the opinion that the definition of the "bottle" needs to be reviewed and revised.

Sub-clause (b) giving the definition of "intoxicating liquor" was discussed. The Chairperson, Justice Majida Razvi pointed out that the definition of "intoxicating liquor" excludes solid intoxicants, which was illogical. Ms Naheeda M. Elahi said that these definitions should be available and therefore, should be compared with the existing Narcotics Law to examine any disparities.

Given the points raised in the discussions on Section 2(b), the Committee was of the opinion that the definition of "intoxicating liquor" should be reviewed and revised.

Prohibition of Manufacture, etc, of Intoxicants

Section 3 of the Ordinance deals with transaction, processing, and manufacturing

of'intoxicants and liable punishment for such acts. Section 3 reads as:

Whosoever:

(a) imports, exports, transports, manufactures or processes any intoxicant; or
(b) bottles any intoxicant, or
(c) sells or serves any intoxicant; or
(d) allows any of the acts aforesaid upon premises owned by him, or his immediate possession;

shall be punishable with imprisonment of either description for a term which may extend to five years and whipping not exceeding thirty stripes, and shall also be liable to fine.

In the Committee Dr. Faqir Hussain observed that there were a number of existing laws overlapping with this Ordinance, namely the Customs Laws & Narcotics Laws, which have had such implications that people allegedly involved in this crime were let off on the grounds of double jeopardy. Section 3,4 & 5 of this Ordinance were also covered under the Customs Laws. It was, therefore, suggested that this Ordinance should be compared with other such existing laws so as to a remove any redundancies.

Syed Afzal Haider suggested that Section 3 which deals with prohibition and penalties, & 4 that deals with owning or possessing intoxicants should be removed from the Ordinance and concentration should only be on the consumption of the intoxicants.

Syed Afzal Haider was of the view that while the consumption of intoxicants was punishable under Hadd but as far as its sale, manufacture and possession is concerned it should be dealt with under a different law.

Dr. Farida Ahmad was, however, of the view that anybody who indulges in the manufacture, sale or possession of intoxicants would be equally liable under Hadd.

Dr. Faqir Hussain enquired whether narcotics are included in intoxicants and whether their usage would also be charged under this Ordinance. Syed Afzal Haider responded that under the principle of Qiyas intoxicants are included in narcotics. Justice Usmani was of the view that drugs like opium, etc. are also intoxicants because Section 3(1) deals with intoxicants and Article 3(2) deals with drugs such as opium, etc. Justice Usmani further added that the Hadd punishments are basically for intoxicants rather than for drugs.

Ms. Naheeda M. Elahi was, however, of the view that even drugs come under intoxicants.

Justice Razvi was of the view that Section 3(1) was to be retained because it dealt with intoxicants. Justice Usmani was, however, of the view that when we talk of intoxicants it means talking of drinks which are derived from a process of fermentation but as far as narcotic drugs are concerned these do not undergo any process of fermentation.

Justice Razvi observed that Section 3(2) definitely overlaps and was redundant to other legislation. She was also of the view that Section 3(2) cannot be part of Hadd Law. Ms. Naheeda M. Elahi was of the view that the punishments as prescribed in Section 3(2) are at times lesser than those prescribed under the narcotics Law, therefore, it can be dealt with under Tazeer and has no connection with HADD. Dr. S. M. Zaman agreed with this proposition.

The Committee was generally of the view that the punishments prescribed in this Ordinance were rather in the nature of Tazeer than of Hadd and, hence, they should come under Tazeer and not Hadd.

The Committee also observed that Section 3 had overlapping elements with the Control of Narcotics Substance Act 1997. Therefore, Section 3 needs to be reviewed and perhaps deleted.

Owning or Possessing Intoxicants

Section 4 deals with owning or possessing intoxicants. When the Committee reviewed the Section, Mr. Naeem Shakir stated that there was no provision in the Christian Law whereby intoxicating liquor is to be used for religious ceremonies.

Justice Usmani pointed out that the onus of claiming exemptions for religious ceremonies was to be on the person claiming such exemptions to prove that use of the intoxicants is a part of his/her religious ceremony, therefore, there is no problem to retain the proviso.

With regard to the second proviso in Section 4, the Committee observed that it had already been discussed that the proviso regarding drugs should not be there as it is part of Tazeer.

Dr. S. M. Zaman raised the issue as to why the quantity of drugs is mentioned here Justice Majida Razvi said that the second proviso covered under the Narcotics Act.

It was observed by the Committee that the proviso in Section 4 already exists in the Control of Narcotics Substance Act 1997, and therefore, the duplication needs to be removed by deleting this Section.

There was no discussion on Section 5 as the Committee was of the view that there was no need to.

Definition of Drinking

Drinking as defined in S. 6 states that: "whoever intentionally and without "Ikrah" or "iztirar" takes an intoxicant by any means whatsoever, whether such taking causes intoxication or not, shall be guilty of drinking,

Syed Afzal Haider observed that the reason why mere taking of the drink whether it causes intoxication or not was because there are people who could consume a great deal of alcoholic drink and yet not get intoxicated.

Justice Usmani added that in Shariah, the very act of drinking alcohol is forbidden

regardless of whether it leads to intoxication or not.

Tile Committee agreed with the definition of 'Drinking' as given in S.6 of the Ordinance.

Drinking liable to Hadd

In the Ordinance, S. 7 provides for two types of drinking, i.e. 'Drinking liable to Hadd' (S.8), and 'Drinking liable to Tazeer' (S.11).

The Committee examined S. 8, describing 'Drinking liable to Hadd'. Justice Usmani raised the question whether the punishment for Drinking liable to Hadd was a Quranic punishment or had been derived from Sunnah. It was observed that the punishment for drinking was neither prescribed in the Quran nor was it prescribed in the Sunnah. Dr. Faqir Hussain said that in the time of the Holy Prophet (PBUH) there was no prescribed punishment for drinking as such, and in fact if a person was found drunk, he at the maximum was slapped or confined to his home. He further added that the first time the punishment of Hadd for drinking was prescribed was in the time of Hazrat Umar. Syed Afzal Haider said that it was derived from Ijmaa.

Dr. S.M. Zaman stated that the punishment of Hadd for drinking was initially adopted by the Sahaha-e-Karaam and therefore it could be viewed as a punishment from Sunnah.

Justice Usmani was of the view that since the punishment for drinking liable to Hadd was neither derived from the Quran nor from the Sunnah, it should be placed under Tazeer and prescribe any appropriate punishment accordingly. He was of the view that the punishment for drinking could be made as severe as the state may find appropriate but how can Hadd be inflicted when it was not available in the Quran or Sunnah? He accepted and endorsed that drinking was a social evil in almost every society in the world and a punishment should be prescribed for this offence. The Chairperson, Justice ® Majida Razvi agreed with Justice Usmani and endorsed his views that it should be placed under Tazeer.

Dr. Fareeda Ahmad disagreed and said that as far as she could recall, there were Ahadith regarding the Hadd punishment for drinking which she could not remember. She said that the Holy Prophet (PBUH) had administered punishment for drinking by hitting a drunken person with a branch from a date tree. Dr. S.M. Zaman endorsed the views of Dr. Fareeda Ahmad and said that as far as he remembered it was part of the Sunnah, and felt that more research was required to be done in order to determine the exact source of the Hadd punishment for drinking.

The majority of the members of the Committee agreed that the prescribed punishment for drinking was not a part of the Quran or Sunnah, and therefore, the punishment of 80 stripes as prescribed should be revised and put under Tazeer.

Proof of Drinking

S. 9 provides that the proof for drinking liable to Hadd is to be through confession or by evidence of at least two Muslim adult male witnesses about whom the Court is satisfied that they fulfill the Tazkiya-ul-Shahood criteria that they are truthful and abstain from major sins (Kabair).

As in earlier discussions, held on similar topics, some members of the Committee felt that the provision of "'Male Muslim" witnesses was discriminatory and baseless. Justice ® Majida Razvi and Ms. Naheeda M. Elahi were of the opinion that in our society, the act of drinking was usually carried on in the company of non-Muslims from whom the Muslims get access to the drinks. Therefore, it may not be appropriate to exclude non-Muslims from giving evidence as it would also exclude a large number of potential witnesses. Dr. S.M. Zaman also agreed with this argument.

Justice Majida Razvi said that as far as the issue of Tazkiya-tul-Shahood was concerned, the same arguments would apply as in earlier discussions on the same issue.

The Committee was of the view that the issue of "male Muslim" witnesses should be reviewed and revised in the light of the discussion.

Cases in which Hadd shall not be enforced

S. 10 of the Ordinance that prevents the enforcement of Hadd on a convict is almost identical to what other Hadd Ordinances hold to waive Hadd, i.e. retraction from confession and retraction of evidence by one of the witnesses which reduces the required number of witnesses. Where the convict retracts from his/her confession, the Court is to hold a re-trail under the Cr. PC.

Dr. Faqir Hussain pointed out that there is no indication in this section whether the confession by the convicted should be made once or requires to be done four times.

Justice Nasir Aslam Zahid observed that in S. 10(l)(b), it was not clear if the witness resiles from his/her evidence, then would that mean that the accused would be acquitted, because there is no provision of retrial in this case. Justice Usmani, however, pointed out that the case of retrial is applicable to both sub-sections, i.e. S 10(1) (a) & (h).

Dr. Faqir Hussain observed that in case a confession is retracted or a witness resiles from his/her evidence, the re-trial would be held under Tazeer. He further observed that in case of a retrial under Tazeer there could be a possibility that, if proven guilty, the accused could be prescribed a Hadd punishment. Justice Usmani pointed out that a plain reading of this Section was indicative that once a witness resiles then Hadd would not be awarded because it can only be qualified if there are two witnesses. Hence, in his view, the retrial would only be under Tazeer and the punishment if awarded would also be under Tazeer and not Hadd.

It was further queried whether new witnesses would be allowed to appear in case of a retrial under Tazeer. Justice Nasir Aslam Zahid was of the opinion that normally the Courts do not permit new witnesses to be examined even though under S. (54) of the Cr.P.C. new witnesses could be examined; but, it was all up to the discretion of the Court.

The Committee observed that the provisions of S. 10 were obscure and did not address many issues regarding the retrial. It was suggested that Section 10 (2) needs to be revised and re-drafted in order to address all basic issues concerned with the issue of retrial.

Drinking liable to Tazeer

S. 11 deals with the situation where drinking is liable to Tazeer.

4. S.20. Penalty for the breach of Conditions of License
5. S.21. Appointment of Officer
6. S.22. Issue of Search Warrants
7. S.23. Powers of Prohibition Officer.
8. S.24. Enhanced punishment for certain offences after previous conviction
9. S.25. Punishment for attempt to commit offence punishable under this Order
10. S.26. Application of certain provisions of the Pakistan Penal Code (Act XLV of 1860).
11. S.27. Application of the code of Criminal Procedure (Act V of' 1898)
12. S.28. Indemnity

Order to override other Laws

The Chairperson, Justice ® Majida Razvi pointed out that there are many other laws which are overlapping with this Ordinance, which cause a lot of problems. The Committee agreed that there was a need to undergo a comparative study of' the Narcotics and Customs Laws with this Ordinance so as to identify the overlapping sections and subsequently appropriate amendments should be brought in these laws.

Presiding Officer of the Court to be a Muslim

S.30, which provides that the Presiding Officer of the court should be a Muslim, was discussed by the Committee. The Committee was of the view that, as also discussed in earlier meetings, it was not necessary that the Judge of the Court should be a Muslim.

Dr. Fareeda Ahmad was, however, of the view that it was important that those Courts trying Hadd cases should have Muslim Judges.

Again, there was no discussion on Sections 31, 32 & 33. The Committee was of the view that these sections should go under Tazeer.

Conclusion

The Committee reached the following recommendations after discussing the Prohibition (Enforcement of Hadd) Order:

1. The definition of "intoxicating liquor" as given in S.2(h), should be revised and re-drafted.
2. This Ordinance comes under Tazeer and not Hadd, hence the possibility of putting it under Tazeer should be considered.
3. Section 3 had overlapping elements with the Control of Narcotics Substance Act 1997, therefore, it needs to be reviewed and perhaps deleted.
4. The proviso in S. 4 was redundant and already exists in the Control of' Narcotics Substance Act 1997, therefore, this duplication needs to be removed.
5. The prescribed punishment for drinking, as given in this Ordinance, was not a part of

the Quran or Sunnah, and therefore, the punishment of 80 stripes as prescribed should be revised and put under Tazeer. (S.7)

6. The provision of "Muslim male" witness as given in S. 9 was unnecessary, hence it should be revised.

7. S.10 (2) needs to be revised and re-drafted in order to address all issues concerning a re-trial.

8. Drinking liable to Tazeer S. 11 (b) & (c), should go under Tazeer and be dealt with accordingly as there seemed no reason to bring it under Hadd laws, since these two sub-sections dealt with non-Muslims.

9. The Committee agreed that either S. 16 should go under Tazeer in its entirety or else S.16 (2) (a) be deleted.

10. Sections 17 to 28 should go under Tazeer.

11. There is a need to review the Narcotics and Customs Laws in comparison with the Prohibition Ordinance so as to remove redundancies.

12. It is unnecessary to have a Muslim judge to try cases of Drinking.

FINAL CONCLUSION

At the end of the meetings there was general consensus amongst the members that the Hudood Ordinances, as drafted, are defective, that there are many lacunae, and also that the major part of these Ordinances consists of sections that were lifted from the Pakistan Penal Code. Generally, it was felt that considerable confusion arose because of certain sections of PPC being lifted and included as part of the Ordinances, rather than adding to the Pakistan Penal Code additional sections that have been introduced in the Ordinances. After receiving written comments from some of the Committee members, a final meeting was held in Karachi on 16.8.2003, where the members present gave their opinions in person and also authorized Justice (R) Majida Razvi and Justice (R) M. Shaiq Usmani to draft the Report and the Recommendations of the Committee. The opinions given in person and send in writing by the members are presented below.

1. **Justice (retd.) Majida Razvi** said that her opinion is on record that Hudood Laws are full of lacunae and are badly drafted. In her opinion these do not reflect the correct principles of Islamic criminal law and are not in accordance with Islamic injunctions. These have caused great misery to women and ought to be repealed and the original laws be restored. (The opinion was given at the end).

2. **Justice (retd.) M. Shaiq Usmani** said that due to numerous defects and lacunae in the Hudood Ordinances a number of anomalies have been created which have led to injustice, particularly to women, in the implementation of Zina and Qazf Ordinances. The defects in the Ordinances are so basic that amending these would serve no useful purpose and may bring about more injustice. The experience of the last 24 years has shown that these Ordinances have been counter-productive and have added to the misery of the people in general and the women in particular. Thus he was of the view that the Hudood Ordinances ought to be repealed.

3. **Ms. Hina Jilani** said that the Committee's terms of reference were either to recommend repeal of the Hudood Ordinances or to amend them. The Committee should not go beyond the terms of reference. Moreover, the Committee cannot recommend effect preservation of the present law or to introduce fresh law as it would also be beyond its terms of reference. She also said that the tenor of the Committee's report was such that it would appear that it sees no problem with the concept of the Hudood Ordinances being in accord with the Quran and Sunnah. This too, she said was beyond the terms of reference of the Committee and was never a part of discussion, and hence, should not form part of the report of the Committee. She recommended the repealing of Hudood Ordinances.

4. **Dr. M. Farooq Khan** said that the manner in which the Hudood Ordinances have been promulgated has no basis in the Quran and Sunnah. He was in agreement with others to the effect that there are a number of loopholes and lacunae in the Hudood Ordinances and as such he was of the opinion that any amendment would serve no purpose at all and thus the Ordinances ought to be repealed.

Similarly, he was also concerned about the requirements for the witnesses for offences under the Hudood Ordinances being Muslims and saw no justification for it. In so far as the Ordinances themselves are concerned, as a lawyer he felt that there are far too many lacunae in the law and that these were very defective. Consequently, he recommended that the Hudood Ordinances should be repealed.

12. **Justice (retd.) Nasir Aslam Zahid** gave his opinion in writing and was of the view that the Hudood Ordinances, in particular the Zina Ordinance, have been used as an instrument of injustice mostly against women and helpless persons in the country. Consequently, he was of the view that these Ordinances ought to be repealed.

13. **Dr. S.M. Zaman** gave his opinion in writing and was of the view that while there were a number of flaws in the Hudood Ordinances, he felt that these did not justify repeal of the Ordinances. He was of the view that these Ordinances ought to be maintained although they could be reviewed and amended with a view to removing possible injustice and discrimination.

14. **Ms. Rahila Durrani** gave her opinion in writing and was of the opinion that the Zina Ordinance in particular has inherent flaws and is discriminatory towards women and has resulted in oppression of women inasmuch as a number of women are languishing in jails. She, therefore, recommended that the Hudood Ordinances should be repealed.

15. Justice (Retd.) Taqi Usmani, Allama Aqil Turabi and Noor Muhammad Shahtaj did not provide comments in writing, or their opinion with regard to the Hudood Ordinances even though Allama Aqil Turabi and Noor Muhammad Shahtaj did participated in most of the meetings. Justice (retd.) Taqi Usmani was nominated but declined to participate.

RECOMMENDATIONS OF THE SPECIAL COMMITTEE TO REVIEW THE (ENFORCEMENT OF HUDOOD) ORDINANCES, 1979

An examination of the Minutes of all five meetings which have been summarized in this report, as well as the considered opinion of the members of the Committee, including the Chairperson, would reveal that out of fifteen (15) members, who have actively participated in the deliberations regarding the Hudood Ordinances and have given their views in person and in writing, twelve (12) members have recommended that the Hudood Ordinances should be repealed, while only two (2) members have recommended that these should not be repealed but amended with a view to removing lacunae and defective parts of it, and one (1) member has stated that the recommendations of the Committee should be given effect to.

This Special Committee, therefore, wishes to record that the participating Members of the Committee are unanimous in arriving at the conclusion that the Hudood Ordinances as enforced are full of lacunae and anomalies and the enforcement of these has brought about injustice rather than justice, which should be the main purpose of the enforcement of Islamic law. Consequently, by a majority, this Special Committee recommends that all four Hudood Ordinances, 1979 should be repealed and the original laws with regard to the offences mentioned in these Ordinances be restored. However, in order to give due consideration to those members in minority (2) who have recommended amendment to the Ordinances rather than their repeal, the Special Committee suggests that if, after repealing as recommended by the Committee, Hudood laws are required to be enforced, the draft Bill should be first widely circulated with a view to seeking the opinions of various sections of civil society in general, and women's rights groups in particular, and subsequently it should be placed before the Parliament for a full-fledged debate.

JUSTICE (R) MAJIDA RAZVI
CHAIRPERSON
SPECIAL COMMITTEE TO REVIEW
THE (ENFORCEMENT OF HUDOOD)
ORDINANCES, 1979

Annex-I

MEETING OF SUB-COMMITTEE TO REVIEW OFFENCE OF ZINA (ENFORCEMENT OF HUDOOD) ORDINANCE, 1979 HELD ON 27th – 28th MAY 2002 AT KARACHI

The following Members attend the meeting:

1.	Justice (Retd.) Majida Rizvi	(Chairperson)
2.	Justice(Retd.) M.Shaiq Usmani	
3.	Ms. Hina Jilani	
4.	Dr. M. Farooq Khan.	
5.	Ms. Nahida Mahboob Elahi	
6.	Dr. Farida Ahmad	
7.	Mr. Syed Afzal Haider	
8.	Dr. Faqir Hussain	
9.	Ms. Shahla Zia	
10.	Ms. Charmaine Hidayatullah	
11.	Ch. Naeem Shakir	
12.	Justice (Retd) Nasir Aslam Zahid	
13.	Justice (Retd.) Taqi Usmani	(declined)
14.	Professor Rafiullah Shahab	(subsequently passed away)
15.	Allama Aqil Turabi	
16.	Dr. S.M. Zaman	
17.	Ms. Rahila Durrani	
18.	Mr. Noor Muhammad Shahtaj	

The Committee decided to take up Zina Ordinance on Priority.

Key issues as identified by the Special Committee:

As a result of deliberations held during the meeting, the following main issues were identified by the Committee Members as the key issues in the Zina Ordinance:

1. Is the law under discussion delivering justice'? If not, then should it remain as part of the statute books?

2. Whether the existing Hudood provisions in the Hudood Ordinances 1979, are in accordance with the Islamic injunctions, particularly with reference to the Federal Shariat Court's judgment in Hazoor Bux case, wherein two different Benches gave conflicting judgements; one holding that Rajam is not according to the Islamic injunctions PLD 1981 FSC 145 and the other stating that it was so PLD 1983 FSC 255)?

3. Whether Section 8, which deals with the production of evidence for Zina and Zina-bil-Jabr is confusing and should the required evidence for each of the two be different and distinctive; because under the existing law, the victim in Zina-bil- Jabr becomes an accused, which is against the spirit of the Islamic legal system and encourages rape?

4. Definition of "Marriage" as provided in the Ordinance in the context of offence of Zina.

5. Whether the definition of "pregnancy" has any bearing with rape or Zina?

6. Should not the attainment of puberty be de-linked from adulthood? How can a girl at the age of 11 years or a boy of the age of 15 years, if attained puberty, have enough understanding to know the implications of Zina or Zina-bil-,Jabr being enticed away and abused?

7. Whether the punishment for Zina-bil-Jabr can be covered by Zina, as described in the Al-Quran (Surah Noor 24:2)? (Zina-bil-Jabr is not mentioned in the Quran and hence is a Tazeer issue).

8. Is the provision of only "male witnesses" a correct interpretation of the Quranic verse as the literal translation differs on the point? And whether by providing for only Muslim male witnesses does the law not attach leniency with the perverse elements who, despite their involvement in such heinous crime, are likely to go scot free or just be penalized with mitigated punishments?

9. Whether the punishment of Rajam comes under Hadd or Tazeer? And under what conditions should it be awarded in, particularly with reference to the verses of Sura Noor?

10. The rationale of including other offences not related to the Hudood, e.g. "enticing women", "cohabiting with women" and "selling and using women prostitutes" etc?

11. Is it just that a law is made applicable to non-Muslims but they are debarred from being represented by a non-Muslim counsel? Is it fair, equitable and in the spirit of Islamic injunctions as regards testimony, a non-Muslim witness cannot be judged under the Rule of Tazkiyatul-Shahood, and as such his evidence becomes a secondary evidence. Is Non-Muslim witness is discriminated as against Muslim witness as no weight is given to the testimony of a non-Muslim?

12. In view of exclusion of non-Muslims as witnesses and presiding officers of the Court, the rationale of application of this law to non-Muslims?

13. Whether Tazeer punishments could, in particular reference to the Zina offences, be awarded under the Hudood Laws? (Whether Tazeer is permissible as an alternative punishment)?

14. Whether the entire Ordinance is repugnant to the Islamic injunctions and requires to be repealed and drafted afresh, or could it be modified through some amendments and brought in conformity with the Islamic injunctions?

The participants carried out brainstorming sessions on the above listed issues. It was decided that each Ordinance will be discussed section by section to have an in-depth study of the law..

Annex-II

MEETING OF SUB-COMMITTEE TO REVIEW OFFENCE OF ZINA (ENFORCEMENT OF HUDOOD) ORDINANCE, 1979 HELD ON 13th and 14th June, 2002 AT AVARI, LAHORE

PARTICIPANTS:

NAME	INITIALS
Justice ® Majida Rizvi (Chairperson)	M.R
Justice ® M.Shaiq Usmani	MSU
Professor Rafiullah Sahab	RS
Ms. Hina Jilani	HJ
Dr. S.M. Zaman	SMZ
Mr. Syed Afzal Haider	SAH
Dr. Farida Ahmad	FA
Ms Rahila Durrani	RD
Mr. Ch. Naeem Shakir	CNS
Ms. Nahida Mahboob Elahi	NME
Mr. Noor Muhammad Shahtaj	NMS

INTRODUCTION

M.R said that the best way to discuss the problems before us was to first debate the issues that had been framed in the Karachi meeting on 27th – 28th May, 2002. She therefore, read out the issues framed which were as under:

MR. JUSTICE ® SHAIQ USMANI & MS. SHEHLA ZIA

ISSUES - 1

Mr. Shaiq Usmani and Ms. Shehal Zia pointed out that we have to see the impact of this law on the society whether the law could to justice and if not, then this should not be on the Statute Book.

ISSUES - 2

Is it just that a law is made applicable to non-muslims but they are debarred from being represented by a non-muslim Counsel? Is it fair, equitable and in the spirit of Islamic injunctions as regards testimony, a non-muslim witness can not be a witness under the Rule of Tazkiatul-Shahood and as such his evidence becomes a secondary evidence. Non- muslim witness is discriminated as against muslim witness as no weight is given to the testimony of a non-muslim.

MS. CHARMAINE HIDAYATULLAH

ISSUES - 3

Whether Sections 5&6, which deal with Zina and Zina-bil-Jabar are confusing and should be made more distinctive; as under the law the victim becomes an accused and it is against the spirit of Islam.

The confusion between two sections is encouraging rape in an Islamic Country like ours.

MR. JUSTICE ® SHAIQ USMANI

In the pre-Islamic days they used to arrange orgy where in, such situation could arise that more than four witnesses can be found otherwise it is impossible.

DR. FAQIR HUSSAIN

ISSUES – 4

Dr. Faqir Hussain stated that we need the opinion of expert in Islamic Law as to whether Hudood Laws in the present form are according to Islamic injunctions with reference to the Federal Shariat Court Judgments in HAZOOR BUX wherein two different Benches have given opposite judgment, one holding (PLD 1981 FSC 145) that "Rijam" is not according to Islamic injunctions and the other (PLD 1983 FSC 255) that it is so.

ISSUES – 5

Whether Tazir punishments can be awarded under Hudood Laws? Reference to Offences of Zina.

ISSUES – 6

The wisdom / rationale of including other offences, not related to Hudood e.g. "enticing a women" "cohabiting with a women" and "selling and using women as prostitute" etc.

ISSUES – 7

In view of exclusion of non-muslims as witness and presiding officer of the Court, the rationale of application of this law to the non-muslims.

MS. RAHILA

ISSUES – 8

Is the whole Ordinance is un-Islamic and be repealed and new Hudood Laws be drafted or there is a possibility of amending the present Ordinance.

Dr. FARIDA

ISSUES – 9

If we repeal Zina Ordinance, it would cast very bad effect on the society.

ISSUES – 10

Whether the definition of "pregnancy" has any bearing with rape or Zina? Can a girl child at the age of 11 years or boy at the age of 15 years, if attains puberty, have enough understanding to know the implications of Zina or Zina-bil-Jabr being enticed away and abused.

ISSUES – 11

Tazir:Is it permissible in Islam as an alternate punishment? (Difference of opinion)

ISSUES – 12

Whether Zina-bil-Jabr can be covered by Zina as described in Quran Sura Noor 24:2?
Whether it is the correct interpretation that the witnesses under Hadd should only be muslim male? By providing only muslim male witnesses if not the law, giving freedom to those perverse elements who will be involved in such heinous crime and still not punished under Hudood Laws?

DR. FARIDA

ISSUES – 13

Is it just, fair & equitable that due to such apprehensions such laws, which have caused injustice to so many women should remain on the Statute Books?
However, there was a general consensus that it would be best if the entire Ordinance is examined section by section. The committee accordingly proceeded to do so.

TITLE

At the outset SAH raised the point that the very name of the Ordinance is not correct inasmuch as it says "Enforcement of Hudood" when it should be, infact, "Enforcement of Hadd" as the word used in the Holy Quran is Hadd and not Hudood. A number of participants agreed with this proposition of SAH. However, NMS stated that there should be no need to change the word "Hudood" to "Hadd" because there is no logical explanation for disagreement of the participants. However, when it was explained to him that the Holy Quran only mentions Hadd consequently there is no need to make it into a plural, he too agreed.

CONCLUSION

It was agreed to change the name of the Ordinance from 'Enforcement of Hudood' to 'Enforcement of Hadd'.

Section 1 Subsection (2).

CNS stated that since this subsection extends the Ordinance to the whole of Pakistan this also covers the minorities residing in Pakistan. The number of participants disagreed with this contention and were of the view that the purpose behind this subsection is not to "enforce Hadd" on religious minorities but to only show that the law is applicable to whole of the country. CNS stated that since the Shariat Ordinance mentions clearly that the Shariat Laws would not be applicable to the minorities this ordinance should not be extended to the whole of the country.

CONCLUSION

It was generally agreed that there is no need to alter this subsection.

SECTION 2 (a).

HJ stated that there is no reason to distinguish between a male and a female in the definition of adult and if the age of the male is to be 18 the age of the female should also be 18. The question of Puberty of the female is of *no consequences* here since what is in issue is the criminal responsibility of the person concerned and not the sexuality. S.M.Z. stated that what is necessary to see is whether the person concerned has the legal capacity and quoting from the Holy Quran be drew an analogy with the law relating to the legal capacity for ownership of property of a person and said that perhaps the solution would lie in considering to legal capacity of the individual rather than Puberty. SAH agreed with this suggestion of S.M.Z. However, MSU stated that what is in issue is the sexuality of an individual because this Ordinance deals with a sexual offense and hence the use of Puberty with reference to a female in the Ordinance. Thus the same consideration should be applied to a male as even a male becomes sexually active at the age of 12 or 13. Consequently, it the age of the male for criminal responsibility is taken to be 18 years the age of the female should also be 18, thus the mention of the word Puberty is not necessary and it is only the age of criminal responsibility that should be considered. Looking at it in this vein there is no basis in distinguishing between male and female in so far as the age is concerned. NMS disagreed with the proposition to use the concept of legal capacity for ownership of property in so far as the Hudood Ordinance is concerned. He maintained that the Holy Quran has distinguished between age for enforcement of Hadd for zina and the age for marriage and also the age for legal capacity for ownership of property. The Holy Quran has chosen the right word for right occasion. He stated that when the question of zina arises it is necessary to see whether the person concerned has attained Puberty and he quoted from a Hadith (Musanif Ibne Ali Shahiba) and stated that at that occasion the Holy Prophet (PBUH) particularly directed that the offender's puberty be ascertained rather than has legal capacity. Consequently, in his view there is no need to make any change in this section. He further stated that since the word Puberty has been used in the Holy Quran and if it is proposed now to make a change we have to see whether, such change would be in accordance with the Quranic Verse in the opinion of the Jurists, if so, the change could be made then if not, it could not be now. FA agreed with the opinion of NMS and emphasized that it is Puberty, which has to be considered for the offence of zina and not the legal capacity to own property. NME was of the view that while discussing this matter it is necessary to see whether the person concerned is capable of performing the act e.g. to say whether he or she is potent or not, mere attainment of Puberty is of

no consequences. She stated what has to be seen is what is written in the Holy Quran. In so far as the Hadith is concerned, obviously, it has great relevance but first it is necessary to see the words used in the Holy Quran. MSU said that there is no need to get involved in hair splitting. In so far as this Committee is concerned it is necessary to see whether this law being examined is a good law or a bad law or not such a bad law. If the conclusion is reached that it is a good law then it should be retained. If it is found to be technically a bad law then it should be repealed, and if it is discovered that it is not such a bad law then it should be amended. SMZ did not agree with this and according to him there was no question of examining whether it is a good law or a bad law. According to SMZ, only that law can be a bad law in Pakistan which is repugnant to the Islamic Injunctions and if the law is in accordance with the Injunctions of Islam then it would be considered to be a good law. RS said that first it is to be seen whether this law is in accordance with the Injunctions of Islam or not. SMZ stated that it is for the Islamic ideology Council to give advice whether a law is in accordance with the Injunction of Islam or it is repugnant to the Islamic injunctions. MR. Said that a purpose here is to examine the law and them make recommendations and that the Committee has no intention of challenging the authority of Islamic Ideology Council.

Reverting to sub section being discussed she stated that, infact, what was being said by SMZ and SAH was the same as being said by HJ, MSU and RD, that is to say that it is the legal capacity / criminal responsibility that should be the determining factor to determine the responsibility for zina.

CONCLUSION

THIS SUBSECTION REQUIRE FURTHER DISCUSSION.

Section 2(b).

RS stated that all the Jurists of Islam are agreed that Hadd means the punishment e.g. prescribed in the Holy Quran. This raised a controversy and a number of participants in particular NMS and also SMZ opined that Sunnah cannot be excluded when determining what punishments are prescribed as Hadd. RS went on to say that considering there is no mention of 'Rajm' in the Holy Quran a number of Jurists feel that it should be placed under Tazir and not under Hadd and that 'Rajm' punishment should be prescribed only for hardened criminals. MSU stated that everybody is agreed that in the Holy Quran the punishment is specifically prescribed for Zina and that being the ultimate or the limit there is no basis for introducing any other punishment. There is no denying the fact that the Sunnah is source of law in Islam but since the Holy Quran has specifically and emphatically prescribed a certain punishment one should not go beyond that. SAH stated that since the Holy Quran specially provides that the directions of the Prophet (P.B.U.H) are binding one cannot ignore the practice followed by the Prophet (P.B.U.H). Consequently, the Prophet (P.B.U.H) could also direct as to which punishment should be given. However, whether such punishment can be regarded as HADD or TAZIR is a different matter. SMZ then referred to the Federal Shariat Court's judgment (PLD 1981 FSC 323) wherein the Court held that 'Rajm' could not be awarded as HADD but this judgment was subsequently, reversed by another Bench of the Federal Shariat Court (PLD 1983 FSC 145) where it was held that the punishment of 'Rajm' could be awarded as HADD. On this MSU stated that, infact, the second judgment was only a review of the First judgment and in a review the same judges sit on

the bench but in this particular case there were different judges to those sitting in the judgment that decided that 'Rajm' could not be awarded as HADD. FA quoted from Hadith and stated that since the Prophet (P.B.U.H) had awarded the punishment of Rajm this would form part of HADD. NME stated that one could not regard the punishment prescribed as a result of Sunnah as HADD but it could be part of Tazir. SAH then stated that some research should be done to find out whether the punishment of Rajm awarded by the Prophet (P.B.U.H) came after the revelation of the Verse regarding Hadd. RD also stated that one could not differentiate between the Holy Quran and the Sunnah when considering the punishment for Zina. However, this point requires further discussion and research. NMS stated that as per the Verse from the Holy Quran cited by SAH even the Prophet Muhammad (P.B.U.H) had the authority to make law. MSU stated that there is only one incident in history where the Prophet Muhammad (P.B.U.H) had awarded the punishment of 'Rajm'.

CONCLUSION

All agreed that the contents of this section requires further discussion and research to determine as to at what point of time the punishment of Rajm was prescribed by the Holy Prophet Muhammad (P.B.U.H) in relation to the relevant revelation in the Holy Quran.

Section 2(e)

MSU stated that perhaps the word "valid" would be better than the word "Void". SMZ stated that as far as he was concerned it did not matter as to which word is used in his opinion and it was irrelevant. HJ. said there is no definition in the Muslim Family Laws as to what is the definition of Marriage and it is left to the discretion of Judge. Consequently, it may be better to use the word valid rather than void. HJ said that even if the word valid is used it will not remove injustice to which women are being subjected to. She stated that if the word valid is to be used it should also be mentioned validity in accordance with, which law. CNS said that if the world valid is used it should be considered that it is valid under the Statute law and not under any other law. SAH stated that if there are marriages across sects then it has to be seen as to which law has to be applied to determine validity. MSU said that the same problem arises if a Ahl-e-Katab woman marries a Muslim Man. SMZ stated that Hadd can be enforced if there is marriage and thus even a resemblance of marriage (Shibeh Nikah) would be acceptable for purposes of enforcing Hadd. CNS said that under the Christian Law if the word void is used it would be prejudicial to the Christian. HJ said that if this law is applied to the Non-Muslims then one will be run into great difficulties because of the definition of valid marriage varies in different religions. MSU stated that if the word void is used it is too broad and covers all situations whereas valid narrows it down and hence is more suitable. SMZ agreed and stated that there is definite need to re-word this subsection. NMS said that the word void should be specially defined.

CONCLUSION

All the participants agreed that this sub-section requires to be re-drafted.

Section 2(d)

There was no disagreement about his sub-clause. In general it was acceptable to everybody. SMZ specially emphasized that Muhsan is being used only for Muslim man and

woman. He also stated that a non-Muslim cannot be punished with Rajm but can be subjected to Tazir.

CONCLUSION

NO CHANGE WAS REQUIRED

Section 2(e)

SAH said that since this law relates to Hdd, the question of Tazir does not arise and hence the definition of Tazir is irrelevant. If the requisite number of witnesses as per Hadd Law are not available then the offence should be dealt with under normal law i.e. PPC. Almost everybody agreed with the statement of SAH. However, SMZ said that Tazir cannot completely be separated from Hadd. There could be a situation where Hadd punishment cannot be given then some punishment would have to be given and hence it is necessary to include Tazir in this law. MR said that only if there are four witnesses available then the offence should be registered under the Hudood Ordinance otherwise it should be registered under the normal law. SAH said that as far as Council of Islamic Ideology is concerned, they also want that the Tazir should be transferred to normal law i.e. PPC.

CONCLUSION

It was decided not to discuss this point further and to revert to it subsequently, if necessary after discussing section regarding Tazir.

Section 3.

CNS stated that this provision is violative of the rights of minorities because it overrides the laws relating to minorities. SAH said that this provision should not be there because it is agreed that Hudood Laws do not apply to non-Muslims. CNS said it is opposed to Shariat Act according to which that law is not applicable to non-Muslims. SAH then referred to Article 227 of the Constitution according to which this provision appears to be violative of the Constitution. MSU then said that thus it would mean that this provision is not law at all.

CONCLUSION

It was generally agreed that this provision should be removed.

Section 4:

MSU stated that perhaps the word "wilfully" should be replaced by word 'consent'. He stated that since we live in a tribal society where women are generally subjugated it is possible that a woman may perform the sexual act wilfully as she has no choice but nevertheless without consent. Thus an act could be wilful yet not consensual. NME agreed with this statement of MSU. SAH said that the word voluntary has been defined in law but the word wilful has not. MR also agreed with the suggestion of MSU. MSU said that the Ordinance refers to a sexual act

that is performed voluntarily where the two are driven by desire. NMS and FA stated that the question of enjoyment of the sexual act was not of consideration. What is relevant was the sexual act itself. RD stated that in a tribal society it often happens that a woman carries out sexual act wilfully but without consent. SMZ stated that the word wilful covers consent and hence there is no need to alter it. SAH stated that in this section the element of consent is not present. There is obviously a drafting error.

CONCLUSION

This section needs to be redrafted.

Section 5(1)

SMZ said that there is nothing wrong with this section and it should be retained as it is. MSU said that while it refers to an adult man but does not talk of an adult woman and he further stated that in his view the word adult should be used for woman also. SMZ said that if this was to be done then it would mean that if sexual act is committed with a minor woman then it would not be Zina. SMZ further stated that this would mean that a number of people who commit sexual act will not be punished under Zina. MSU said that our aim is not to have as many people as possible included under the Ordinance instead our aim is to correct the law and it is apparent that the law is very badly drafted. SMZ stated that one is concerned with this law only because of the desire to save innocent people. HJ said that it is obviously a very badly drafted law and said bad drafting always leads to mis-application of law. SMZ said that no difficulty arises because of not having the word adult before 'woman'. Hence what is the purpose of inserting the word "adult". HJ stated that what is of primary importance is consent of the female to sexual act and if it is not an adult woman then there could not be a consent. The same point was expressed by NME. HJ said that the absence of the word adult means that if a sexual act is committed with a minor woman it would fall in the category of rape and not Zina. NMS said that in his view there is no need to make any change in this section. SAH said that he agrees that the word adult should be before 'woman'. SMZ said that if adding the word adult brings about justice then he would support that. NMS and FA were of the view that whether this act is done with a minor woman or an adult woman it nevertheless remains Zina. FA further stated that the Word 'Puberty' should be included in this section so that zina can only be with a woman who has attained Puberty.

CONCLUSION

It was generally agreed that this matter should be looked into and discussed further.

Section 5(2)

NME stated that what has to be determined is at what point of time did the prophet Hazrat Muhammad (PBUH) carried out the punishment of Raja. Till we determine that it would appear that Rajm would be under Tazir and not under Hadd. SAH also said that it would appear to be so. MR. said that she asked for the opinion of some other people on this point and I was awaiting their response. NME said that the punishment of Rajm was given to a few for the offence committed against Jewess. Justice Majida Rizvi said what has to be seen is whether the punishment of Rajm was carried out after the revelation of Surah Noor or before. MSU said that

Hadd means limit and if the Holy Quran has prescribed certain punishments then it should not be exceeded. If as is the case, Prophet Hazrat Muhammad (PBUH) had given punishment which is not prescribed in the Holy Quran then it would appear that it was as an exception not as a rule. SAH said that according to the prophet Hazrat Muhammad (PBUH) if unmarried persons commit the offence of Zina then they should be punished with whipping but if married persons do that they should be punished with Rajm. SMZ said that Hadd does not mean limit as it is translated in Urdu. In Arabic it means to determine. Hadd is, thus, a punishment that is defined. SAH said that prophet Hazrat Muhammad (PBUH) has only further clarified the revelation in Surah Noor whereby fornication is punishable by stripes but adultery is punishable by 'Rajm'. SAH further said there is a possibility of Ijtehad in this. MSU said that the punishment of Rajm was given by the Prophet Hazrat Muhammad (PBUH) only once. Had it been given more than once it could have been said that it was the rule but since it was given only once the presumption would be that it was an exception and not a rule. SAH disagreed with this proposition put forward by MSU and said that it was not an exception but a rule. SMZ further clarified that the reason why the Prophet Hazrat Muhammad (PBUH) prescribed he punishment of Rajm was because it was the Prophet Hazrat Muhammad (PBUH) who was a witness and if the Prophet Hazrat Muhammad (PBUH) becomes a witness then there is no further evidence required. FA stated that Surah Noor was revealed in about 6^{th} to 7^{th} Hijri whereas the punishment of Rajm was carried out in 8^{th} or 9^{th} Hijri. She emphasized that Rajm was carried out after revelation of Surah Noor. She stated hat the dictionary meaning of Hadd is to stop or prevent. SMZ said that there were two questions now; one whether the punishment of Rajm came after revelation of Surah Noor and the other whether the punishment of Rajm was as an exception or a rule. This could only be determined by Sahaba-I-kram who were witness to the events and here is evidence to the effect that the punishment of Rajm was carried out by Khulpha-i-Rashdeen. On this, MSU said that Hazrat Umar at one time punished his son Abi Shamama (Ubaid) with stripes for committing Zina. SMZ said that this punishment was carried for drinking and not for Zina. To prove his point MSU read out excerpts from a book "....." according to which the punishment of 100 stripes was carried out on Hazrat Umar's son for drinking as well as Zina carried out by him on a woman who was asleep. SAH said that the condition for conviction of a person of Zina is four witnesses and unless there are four witnesses Hdd cannot be enforced. MSU said that unless one is absolutely dead sure punishment of Hadd cannot be given SAH agreed with this observation of MSU.

CONCLUSION

It was agreed by everyone that unless the requirements prescribed for Hadd are fully met, Hadd cannot be awarded.

Section 6

SAH said that Zina bill Jabr is not a case of Hadd. It can be anything else. It can be Tazir but not Hadd and he further said that the punishment of Tazir could even exceed Hadd. MSU said that the Quranic verse in Surah Noor does not mention Zina bil Jabr and only mentions Zina. He referred to the discussions in Karachi when FA was of the opinion that Zina bil Jabr is included in Zina. SAH agreed that Zina is with consent and forcible Zina cannot be under Hadd. SMZ said that there is no doubt that the offence of Zina is committed only when

there is consent. Now, according to him, there were two options. If the same punishment is to be given for Zina bil Jabr as for Zina then it was important to amend section 6 subsection (1) Sub-Clause (d) where the word "another" should be replaced by the word "the". SMZ said that the second option is that since there is no mention of Zina bil Jabr in Surah Noor nor anywhere else in the Holy Quran this offence should fall under 'Harab'. SMZ was of the view that in Tazir one cannot give a punishment exceeding Hadd. SHA disagreed with this and he said that there is no such provision in the Holy Quran or Hadith. SMZ and FA both stated that even though Zina bil Jabr is not mentioned in the Holy Quran nevertheless the offence is that of Zina. MSU said that there is difference between the offence of Zina and Zina bil Jabr. Whereas Zina is an offence against God because God desires that society should be run in a manner where there is no disturbance, Zina bil Jabr is an offence against a person, which can be regarded as 'Zulam'..... it is true that it is also a sexual act but the implications of the two acts are entirely different. Whereas there is consent in Zina, in Zina bil Jabr there is 'Zulam'. One cannot equate 'Zulam' with consent. SMZ said that in 'harba'only two witnesses are required. Hence, if Zina bil Jabr is regarded as a "Haraba" then it would be easier to convict the person. MR stated that if Zina bil Jabr is regarded as 'Haraba' it would create further complications. It is better to bring Zina bil Jabr under Tazir. SMZ said that his worry was that if Zina bil Jabr is brought under Tazir the punishment may be lesser. SAH said that the punishment for Zina bil Jabr should be death. MSU suggested that one should just re-introduce the offence of rape under the earlier provisions of PPC. FA said that the offence of Zina and Zina bil Jabr is the same and drew the analogy of the offence of theft and said whatever kind of theft it may be it would be regarded as theft. SAH said that Zina bil Jabr definitely does not fall under Hadd. However FA and NMS disagreed with that and were of the opinion that it does fall under Hadd and FA relied on an Hadith of Tirmzi Sharif, according to which bil jabr if the offence of Zina is proved as per rules of evidence laid down for Zina then the punishment should be Hadd. If not then the punishment could be as per Tazir. SAH said that if you equate the offence of Zina and Zina bil Jabr then you would give license for rape, as a rapist could think that all he would get is 100 stripes and he can continue to indulge in rape with impunity. MR said that Zina is covered by a Surah in the Holy Quran but Zina bil Jabr is not. Consequently Zina bil Jabr would go under Tazir and the punishment for that will be suggested. SAH stated there is tradition of Imam Abu Hanifa according to which pregnancy is not regarded as a proof of Zina. FA stated that if a woman brings four witnesses for Zina bil Jabr, then, would not that be Zina, thus, liable to Hadd. SAH said that yes, Zina Bil Jabr would also be Zina but this would mean that the woman is to be punished also. On this FA said that the woman is not to be punished. SAH then said if the punishment of Hadd is given for Zina bil Jabr then other punishments that are required to be given to a 'ZANI' should also be given to him i.e., his evidence will not be acceptable and also that he should then marry only a "zania ".

CONCLUSION

Majority of the participants agreed that the offence of Zina bil Jabr should go under Tazir. However, Dr. Farida and NMS disagreed.

Section 6(2)

MSU said that since it is generally agreed that Zina bil Jabr should go under Tazir, there is no need for this provision. MR agreed with that. SMZ said that there is no harm in retaining

this provision but MR said that this must go under Tazir. SMZ said that what will happen in a situation where the offence of Zina bil Jabr is committed to a minor or by a minor. In that event, the minor could not be punished with Hadd but then what about the other party. SMZ stated that he did not have any definite opinion on this point. However he stated that if Zina bil Jabr has to go under Tazir then this provision too will go under Tazir. NMS said that in his opinion Zina would always be Zina whether it is with consent or by force. If it had been committed by a minor then it would go under Tazir. If not then it would be under Hadd. Consequently, it is important that this provision should remain because otherwise the person committing Zina would not get the punishment of Hadd.

CONCLUSION

Majority agreed that this provision should not be there in this Ordinance and that Zina bil Jabr should go under Tazir and this provision too should go under Tazir.

Section 8

SAH said that as far as section 8 (a) is concerned, if the offence is proved by confession then confession must be made four times and this is the considered opinion of the Islamic ideology Council. SMZ agreed with this proposition. SAH said that this four time confession must not be at the same time but with gaps. This is so because the person confessing should have time to think. He also said that it is necessary for the witnesses to observe the act who, it is generally said must be four males. However, was of the opinion that instead of four males there could be four persons, that is to say that evidence of a woman should also be accepted. NME said that the word "confession' must also be defined and that it should not be at the same time but at different times. SAH further said that the Hadith also talks in terms of four confessions. NMS said that so far as the Hadith is concerned, the Prophet Hazrat Muhammad (PBUH) accepted the four confession at the same time. He said that if the Prophet Hazrat Muhammad (PBUH) had wanted confessions at different times, he would have asked the convict to come for confession at four different times but he did not do so. NME said that as for as the Hadith is concerned, the Prophet Hazrat Muhammad (PBUH) turned his head so that the offender should come again. She further said that in Courts this does not happen. After making confession one cannot come back. MR said that as far as Tazkiyah-al-Shuhood is concerned, how many people would fulfill the condition of being a witness. She further said that if the conditions were strictly imposed then one would not get even one witness. NMS agreed that confession must be four times but he was of the opinion that it could be at the same time and did not necessarily have to be at different times. NME said that one does not have to be rigid about this i.e., whether the four confessions should be at the same time or with gaps. One can adopt according to the situation. SAH quoting from Surah Noor said that he was of the view that the mention in the Surah was in respect of four women as witnesses. Infact if this verse is read in conjunction with other verse it would appear that reference was being made to a case of homo-sexuality. For such an offence by men only evidence of two men is required. He stated that the word "Fahashi" in the verse would mean that Zina will be included as well. His conclusion was reading the two verse of Sura Noor would mean that the evidence of women could also be admitted for the offence of Zina, even though in this Ayat the Arabic word for male has been used but it does not mean that women are excluded. The interpretation that only male witnesses

are allowed exists because of this verse. NMS said that the interpretation of SAH is his own interpretation but as far as the other jurists and the Khulpha-i-Rashideen are concerned none of them have interpreted it in that manner. According to him are agreed that there should be four male witnesses. MSU said that perhaps this has been provided for because it is practically impossible to have four male witnesses, who fulfill all the conditions of a witness. The aim being that nobody should be punished with Hadd and that Hadd punishment should only remain a deterrent. MSU stated that this strict requirement of four male witnesses was introduced to prevent things like orgies. He then read out from a book the report of a delegation, which consisted of Saudi Ulemas and a group from Europe which supported MSU's contention. CNS said that this provision sidelines the non-Muslims because they will not pass the test laid down for Tazkiya-al-Shouhood. A question was posed by SAH and SMZ that if an offence of rape is committed in a place where there are only women, and thus, only women witnesses are available then what will be the situation. To this NMS answered that for this one should obtain the opinion of the Ulemas. He further stated that to his knowledge he cannot recall any incident of this kind in history and hence no opinion on this point exists. SMZ said that there are opinion of jurists according to which the evidence of females is acceptable but it could be said that instead of man if there are female witnesses available then for each man there should be two women. To this MSU and NME said that provision of there being two female witnesses applies to only financial mattes. SAH said that the result of the discussion in the Islamic Ideology council was that there is not enough material to deduce that if a situation arises when there are no male witnesses available then evidence of female witnesses is acceptable. Consequently the Islamic Ideology Council has suggested a proviso to this section whereby it says that if four male witnesses are not available the punishment may be awarded. MR pointed out that this suggestion does not indicate that evidence of a woman is acceptable to which SAH said that this is not a decision, It only a recommendation of Islamic Ideology Council which is unanimous. NMS suggested that this question regarding the evidence of females and non-Muslims should be sent by the Committee to the Islamic Ideology Council for consideration since they are already in the process of doing so.

CONCLUSION

Majority of the participants were of the view that the evidence of women should be acceptable. However, some participants felt this matter requires further consideration and the opinion of the Ulemas and/or of the Council of Islamic Ideology should be sought.

Section 9.

SAH said that the difficulty in this provision is that once a person has confessed in the court he would be sentenced and would go to jail. How, will he then retract the confession. The only thing the convict could do if he wanted to retract that was to write to the authorities regarding this. Besides he said that there is no provision for review in criminal law and thus the question arises how will he retract and when will he retract. SAH further said that the solution could be that before the punishment is awarded the Magistrate should ask the convict whether he still abides by his confession or not. NME said that since the Cr.P.C. applies and since under Cr.P.C. when crime is proved by confession there is no opportunity provided for retraction how can such retraction be done in this case. SAH said that since after giving a judgment the Court

becomes functus officio then how will the convict resile. MSU said that a convict can resile only if there are four confessions permitted otherwise he cannot. SMZ said that the convict should be given an opportunity before the execution of punishment to resile if he wants to do so. SAH and SMZ said that the Magistrate should go to the convict and given an opportunity him to resile and obtain a certificate to this effect from him. MSU added that such certificate must be before witnesses. MR said that in this provision Zina and Zina bil Jabr should not have been equated. NME said that the confession should be confession of fact and it must be corroborated by independent evidence. She said further that the conviction should not be only on the basis of confession. SAH said that the confession should be voluntary. He further said that courts normally always satisfy themselves that the confession or any compromise is voluntary. MR said that if a person confesses to a crime of Zina then he should suffer. SAH said that according to Hadith the confession is to made for having committed the offence and not on any other account. NME said that it is necessary that the confession should be general and voluntary. SMZ said that this provision appears to be alright except for the equation of Zina with Zina bil Jabr. If zina bil Jabr goes under Tazir then that will solve the problem. He further said that since there is mention of the witness also in this provision then it should be provided that if a witness resiles then he becomes subject to Qazf. To this NMS agreed.

CONCLUSION

There was general agreement that the convict should have permission to resile even before the punishment is executed. There was also agreement to the fact that the resiling witness should be subjected to Qazf.

Section 10

SAH said that it is the recommendation of Islamic Ideology Council that Section 10 should be repealed. RD said that since Zina bil Jabr does not come under Hadd and comes under Tazir in any case it should be deleted. MSU agreed that Section 10 should be deleted so did MR. HJ said that subsections (3) and (4) should remain offences and should be reflected somewhere else. SAH said that it would go under Tazir. MSU said that FA appears to have different views and believes Zina Bil Jabr also comes under Tazir, let her views be heard. FA said that Zina Bil Jabr is also liable to Hadd because it is Zina inasmuch as if for instance four witnesses are available then how will the person who commits Zina be punished and the punishment of Rajm can only be given to the rapist if Zina bil jabr also comes under Hadd. However, it is clear that the girl who is subjected to rape will not be punished. She supported her views through a Hadith of Tarmizi Sharif according to which if four witnesses are not available then the punishment to the rapist will be under Tazir. HJ said that we should take out Zina bil Jabr from this legislation because it is not an offence of Hadd and it is not mentioned in Quran where Hadd is mentioned. SAH agreed and said that this is the recommendation of Islamic Ideology Council also. NME said that even if an offence of Zina Bil Jabr is committed, there is a possibility of repentance. MR said that either Zina bil Jabr is Hadd or it is not, if it is not then it should not be part of this legislation and should go under Tazir. NMS said that Zina bil Jabr has been defined by Prophet Muhammad (P.B.U.H) and Prophet Muhammad (P.B.U.H) also had given punishment for it, consequently it is incumbent upon us to include Zina bil Jabr as part of Hadd and, hence it should not be taken out of Hudood Ordinance. He further said that just

because something is not mentioned in Quran, does not mean that it should not be done. He drew the analogy of the Namaz-e-Eid and Namaz-e-Janaza and said that these are not described in the Quran and yet whenever we lay down the rules for prayers we do mention Namaz-e-Eid and Namaz-e-Janaza. Similarly he said that since Prophet Muhammad (P.B.U.H) has included Zina bil Jabr in Hadd it should continue to be part of the Hudood Ordinance. However, if the Hadd is not proved as per the rules of evidence then obviously the rapist would be punished under Tazir. NME said that not always the punishment of Rajm has been given for Zina bil Jabr which would mean that Zina bil Jabr is not Hadd. MSU said that if you maintain Zina bil Jabr in this Ordinance then it is the woman who suffers because even though she is subjected to rape she ends up as being accused of having committed the offence of Zina and is punished, so the continuation of this provision in this Ordinance results in injustice to woman.

CONCLUSION

Large majority of participants agreed that Zina bil jabr should go under Tazil and must not form part of this Ordinance.

Sections 11 to 16.

SAH said that the Islamic Ideology Council has recommended that Sections 11 to 16 should be deleted.

CONCLUSION

All agreed with the recommendation of Islamic Ideology Council.

Section 17.

SAH said that the provision for shooting a person to death during the stoning appears to be very strange and the Islamic Ideology Council has given considerable thought to it but has not been able to come to a decision. SAH said that this provision regarding shooting is strange because the tradition is that Prophet Muhammad (P.B.U.H) has even permitted a person to escape while being stoned. It is obvious that if a person is sentenced to stoning, as he would be in jail in our society, thus he would not have a chance to escape. The rules for execution of the punishment of Rajm as per traditional are that the person who is being subjected to stoning is not to be surrounded instead people who stone him have to form rows akin to rows for saying prayers so it is obvious that while the person is being stoned he will have the opportunity to escape. MSU said that it is obviously strange because either one can be stoned to death or be shot he cannot be subjected to both. SMZ said that people who introduced shooting in this provision perhaps did so for humanitarian consideration that is they did not want to prolong the misery inherent in stoning a person to death. SAH said that it would mean that it is accepted that the stoning is not a humane punishment. MSU said that since confession has to be four times as has already been discussed, before a person can be convicted of Zina it is obvious that four confessions have to be allowed so that a person could have time to retract his confession. If a person is shot while he is being stoned then he would be deprived of the opportunity to retract his confession, hence it will not be correct to permit shooting while stoning is being carried out.

SMZ and SAH stated that this aspect was also considered by the Islamic Ideology Council when they were discussing the question of shooting while the punishment of stoning was being carried out. They further said that Islamic Ideology Council has not been able to reach a conclusion whether shooting a person to death would be in accordance with Islam or not and, hence it was decide to leave it for further consideration. SAH further said that it is significant to note that in the days of Prophet Muhammad (P.B.U.H) there were other weapons which could be used for killing a person instantly like a spear, sword or arrow etc. but none of these weapons were prescribed and only stoning has been prescribed by the Prophet Muhammad (P.B.U.H), consequently it can be presumed that the Prophet Muhammad (P.B.U.H) had no intention that person being subjected to Rajm be killed instantly. HJ said that since it has been said that while a person is being stoned he could escape would mean that it was not intended to kill a person by stoning, consequently there was no reason to stone a person to death. SAH said that if a person who is being subjected to stoning wants to be punished so that he can escape punishment in the next world then obviously he would withstand the punishment and would prefer to stoned to death but traditions are that while a person was being stoned he had the option to escape and when he attempted it he was not prevented. NME posed a question that if any of the four witnesses of the offence who are supposed to start stoning the person subjected to Rajm resiles from his evidence then can the punishment continue? To this SAH answered and the others i.e. FA and NMS agreed wit the answer that in that case the punishment would have to be stopped as the requirement of four witnesses continuing to abide by their evidence was no longer met. MSU posed a question that is it anywhere prescribed as to how big a stone it should be that is thrown at the convict because one could throw a massive stone at the convict and he could be killed instantly. SAH said in response that it had to be pebbles that were to be thrown. SMZ said that this does not appear to be prescribed at least not that he know of but he was sure that it must have been prescribed somewhere and if required one could find out as to what size stone it should be. MSU said that reason why he asked this question regarding the size of stone was that since this section provides for shooting so that the convict can be released from his misery of being stoned perhaps the same objective could be achieved by throwing a big size stone at him and thus he could die instantly. SMZ said that he did not know the answer but he was of the view that it could be found in the books of Fiqah. However, he said there are some people who think that shooting really serve the purpose of stoning because in effect shooting entails throwing something at the convict but with greater speed and thus it is the same as stoning. Thus some liberal elements feel that perhaps shooting could be a substitute for stoning. SAH said that the rules for stoning are very clear from Hadiths. Firstly, the Prophet Muhammad (P.B.U.H) is reported to have said when a person was being stoned and he ran away and was prevented from doing so, that why did the people prevent him from running away, which indicated that a person could run away, if it was possible for him to do so. Secondly, that the person being stoned was not to be encircled and, thirdly, that four witnesses were to start stoning first and even if one witness refused to stone then the punishment of stoning was to be stayed immediately. He further said that there is no Hadith to say that a person is to be stoned to death akin to the provision regarding hanging punishment where a person is to be hanged till he is dead. He further said that it is necessary that every Section in Hudood Ordinance should be in accordance with the Quran and Sunnah but this particular Section does not appear to be so. MSU posed a question that what happens if one of the four witnesses is missed or is absent, not that he refuses to stone, but he is just absent, can then the punishment of Rajm be carried out. To this SAH answered 'no'! the punishment would not be carried out. MSU then said that it would mean that provisions of this

Section are defective inasmuch as this Section makes it possible to commence stoning even if all four witnesses are not available. He said this is an obvious defect in law because it is not in accord with Sunnah. NMS said that there are 86 Hadiths regarding Rajm and all these Hadiths clearly state that Rajm is to be carried out till death. MSU again emphasized that the provisions of this Section clearly state that even if all four witnesses are not available the punishment of stoning can be commenced, which as has been discussed, would be contrary to the principle of Sunnah. SAH agreed with what was stated by MSU and said that the provisions of this Section are not in accordance with Sunnah and thus it is defective. SMZ, SAH and generally everybody agreed with this statement.

CONCLUSION

It was agreed that the provisions of this Section are not in accordance with Sunnah.

Section 18.

At the very start MSU questioned the basis of this provisions. SAH replied that in so far as the Islamic Ideology Council is concerned, they were of the view that this provision should be retained. A person who abets the crime of Zina can hardly be given half the punishment of Rajm. There cannot be half a Rajm, there could be half of 100 stripes, so on the face of it this provision appears to be anomalous. MSU said that it is obvious that this provision has nothing to do with Hadd if anything it would come under Tazir. Considering that the Islamic Ideology Council has already recommended that offences other than those which are liable to Hadd should be taken out of Hadd and put under Tazir, it would mean that even this provision would go under Tazir. SAH quoted from Ameen Ahmed Islahi and stated that Rajm would come under Tazir and not under Hadd. FA disagreed with that, however, SAH insisted that his earlier observations were in accordance with Fiqha. MJ said that this provision should go under Tazir.

CONCLUSION

All agreed that this provision should go under Tazir.

Section 19.

It was generally agreed that there is no need to discuss this Section because it is procedural, if there is change in law, about shifting certain sections under Tazir, this will automatically change.

Section 20.

NME pointed out that there is certain amount of conflict in the rules for confession in the Cr.P.C. and the rules prescribed in Quran and Sunnah. SAH agreed with that and stated that under Quran and Sunnah a confession could be retracted, whereas perhaps the rules for retraction under Cr.P.C. may be different. MJ then said that perhaps the best solution would be to take this Section out altogether and then make provision in the law for making rules for the punishment to be carried out and for various other things that may be required for the purpose of enforcement

of the Ordinance. SAH said that it is necessary to introduce in the law those provisions which are required to stop the punishment of Hadd while it is in progress i.e. if you wish to bring it in accord with the provisions of Sunnah. MJ and MSU said that perhaps there is no need to discuss this Section. HJ said that in fact there was need for maintaining this Section because it provides for various things, which are necessary such as procedure for appeal and the procedure for application of Tazir punishment in the event the person is not convicted of Zina punishable by Hadd. She further explained that if a person is charged with an offence liable to Hadd but if four witnesses are not available then it does not remain liable to be Hadd and then it has to be charged to Tazir and thus this Section should continue. MJ proposed that each proviso in this Section should be looked into. While discussing the first proviso MSU said that why should discretion be given to the trial Judge to try the person concerned for some other offence if the offence that he was being tried for is not proved. According to him, what should happen is that if the Jude finds that the offence he is charged with is not proved then he could be straightaway acquitted and then a new charge should be framed. The danger, according to him, was that the Judge may merely out of pique start trying the person again for another offence if he finds that he cannot convict him under the offence for which he is charged. SMZ had the contrary view and stated that this discretion should be available to the trial Judge that is if he finds that the offence is not made out which is liable to Hadd then he should be able to straightaway try him for the other offence. FA said that one could take the example of a case of Zina bil Jabr, where the Zina bil Jabr is found not to be liable for Hadd then it should be open to the Judge to punish the person concerned under Tazir otherwise what will be the poor girl do. MSU replied it is not the question of what the poor girl would do, it is the offence which was being tried and if the offence after trial is found to be not liable to Hadd then the person should be acquitted. The person then should be freshly charged under Tazir because that is the way the law normally works. HJ said that the purpose behind this proviso is that if the offence is not proved and the Judge is competent to try the person concerned for another offence then he can immediately try him and she agreed with MSU that the discretion should not be given to a Judge that if he finds that the offence liable to Hadd is not proved then he could immediately shift and try the person concerned under Tazir this would not be right. CNS agreed with MSU's opinion and gave reference of a case before the Shariat Court on blasphemy and said that it was clearly stated in that case that either the offence is liable to Hadd or it is not. There is no ambiguity in this NMS said that to his knowledge, in the Islamic history the Qazi could, if he found that the punishment of Hadd could not be given, could award punishment of Tazir and since we wish to make our laws in consonance with the Quran and Sunnah then we should follow the same principles. HJ said that whatever NMS said may be correct but the point is that you cannot draw analogy from those times because we live in a different society here. Some of our Judges have a different way of looking at things and are merely interested in exercising their powers and thus it is possible that they may overreach themselves and thus when they are confronted with a situation where they feel that they cannot convict a person they might decide to punish the person nonetheless for a different offence. SAH pointed out that one should look into the situation where a person committing Zina does not know any of the languages that are spoken in Pakistan how is to be dealt with. It was felt that there was no need to discuss the rest of the provisions of this Section as these are related to procedure.

Section 21

MSU said that why cannot a non-Muslim preside over a Court trying a person for offence

under Hudood Ordinance. What Judges have to do is to interpret the law and their being Muslim or non-Muslim should be of no consequence. SAH pointed out that it is ironical that most leading works on Islamic law such as Hidaya and others are by non-Muslims. It is true that it would be logical to have a Muslim Judge because a Muslim would be in a better position to interpret Quran and Sunnah. However, the fact remains that this law is in English and, consequently, it is the interpretation of this law that is required. SMZ said that it is significant to note that this Section provides for the Presiding Officer to be a non-Muslim if the accused is non-Muslim. However, it is not mentioned as to what will happen if the victim of Zina is a non-Muslim. HJ said that it appears most illogical that, a provision should be made for specifically a Muslim to try the offence. What difference would it make whether a person is Muslim or non-Muslim particularly when the law is in English. SAH said that under the Constitution, if a law has to be tested on a touchstone of Islam then only a Muslim should interpret the law. MSU responded to the question of SMZ regarding the anomaly in having a non-Muslim Judge try the accused but making no provision when the victim is a non-Muslim, by saying that it is the accused who is being tired and not the victim and, consequently the provision has been made for a Judge who is trying the accused. CNS said that since under Section 4 of the Shariat Ordinance all laws have to be interpreted in accordance with the injunctions of Quran and Sunnah so what difference does it make whether the Judge is Muslim or non-Muslim. He is bound to interpret the law under the injunctions of Quran and Sunnah. SAH agreed that this provision restricting the appointing of a Muslim Judge for trial of an offence under Hudood for Muslim has no basis.

CONCLUSION

There was general agreement that this Section ought to be repealed.

Section 22.

It was agreed that there was no need to discuss this Section as it was procedural in nature.

RD asked the question that her native Balochistan women are often sold and also some refugee women from Afghanistan and from Bangladesh are also bought and used as kept women, what will be the situation with regard to these women. SAH was of the view that all such acts committed on women (Bandi) like these would fall under the category of rape. In so far as the question of slave women is concerned, that is no more valid because no free woman under Islamic law can be made a slave.

MEETING OF SUB-COMMITTEE TO REVIEW OFFENCE OF ZINA (ENFORCEMENT OF HUDOOD) ORDINANCE, 1979 HELD ON 9TH AUGUST, 2002 AT SERENA HOTEL, QUETTA

PARTICIPANTS:

1.	Justice{R} Majida Rizvi (Chairperson)	-	Majida
2.	Dr. Farida Ahmad	-	Farida
3.	Ms. Rahila Durrani	-	Rahila
4.	Dr. Faqir Hussain	-	Faqir
5.	Allama Aqil Turabi	-	Turabi
6.	Ms. Charmaine Hidayatullah	-	Charmaine
7.	Mr. Ch. Naeem Shakir	-	Shakir
8.	Ms. Nahida Mahboob Elahi	-	Nahida
9.	Mr. Noor Muhammad Shahtaj	-	Shahtaj
10.	Dr. M. Farooq Khan	-	Farooq

REGRETS:

1. Justice (R) Nasir Aslam Zahid
2. Justice {R} M. Shaiq Usmani
3. Justice{R} Taqi Usmani
4. Ms. Shehla Zia
5. Professor Rafiullah Sahab
6. Ms. Hina Jilani
7. Dr. S.M. Zaman
8. Mr. Syed Afzal Haider

INTRODUCTION:

At the very outset Majida said that the first two pages of the minutes placed before the committee contain the issues considered during first meeting at Karachi while the rest of the pages contain minutes of the meeting at LAHORE on 14th June, 2002. Majida decided to re-start discussion on ZINA Ordinance sectionwise from the very beginning.

SECTION 1(2)

Majida said that on the face of it this Section applies only to Muslims. Shakir said it would not possibly apply to Non-Muslims. This is a territorial section and it should be regarded as such. Majida then posed the question whether Hudood laws are applicable to the minorities or not. Faqir said that this law is not applicable to the Non-Muslims and it must be stated so. Nahida said there should be some mention that it is applicable only to Muslims.

CONCLUSION

It should be clarified whether this law was applicable to the minorities, otherwise there was no change to conclusion arrived at in Lahore meeting.

SECTION 2(a)

Majida read out the minutes of the meeting at Lahore. Farooq said that words "and has attained puberty" should be added instead of the word "or". He stated that there is a difference between rights of ownership of property and criminal responsibility under the law. Nahida described the punishment awarded to Hazrat Maz and stated that all the factors were considered before the punishment was awarded. Farooq said that those women who are not normal and they are married their punishment is the same as that of a normal women in case they are guilty of lewdness. He further said that all factors have to be considered in the back ground of mental status. Turrabi said the aim of punishments is to end evil things from the society. Farida said that punishments have been prescribed as a deterrent to prevent things like gang rape.

CONCLUSION

It was agreed that this section should be applicable to a person only if he or she has attained puberty and thus necessary changes should be made to it.

SECTION 2(b)

Majida read out the last meeting's minutes. Farooq said that Hadd punishments are only those that are prescribed in Quran. Prophet (PBUH) had indeed given other punishments but he had done so in accordance with Quran using his own discretion. Farooq said that word Sunnat relied upon here may not be correct because Sunnat is actually a consensus that has been arrived at over a period of 1400 years and with which all Muslim today agree. Looking at the case of Rabia to whom the punishment of Rijam was awarded, it is not known whether she was married or not. In Surah Al-Maidah, Allah has prescribed punishment for "Fasad" in the world and the punishment of Rijam was awarded because it met those prerequisite mentioned in the said Sura. Farooq further stated that the punishments prescribed in the Quran for Fasad are four i.e. killing the person, cutting his hands and feet putting him behind bars or to exile him. This is the opinion of many jurists. He further stated that it must also be remembered that before this punishment of Rijam was awarded, it was also enjoined that the person should be forgiven. Consequently, it would be right to say that the punishment of Rijam could only be awarded for crimes such as gang rape or extreme lewdness where a person is beyond all redemption. In such cases State is entitled to give any or all those four punishments. It can be thus be said that punishments of Rijam is derived from Surah Al-Maidah and hence from the Quran. Tazir is a punishment which the State inflicts. Farida disagreed with Farooq and said that it is not correct to say that Sunnat is something which is generally accepted. According to her Sunnat is what was actually practiced by Prophet (PBUH). Turrabi said that it is necessary to remember that the word Hadd is not an innovation in the Quran and in fact it was being used even before the inception of Islam. Hadd was a punishment to be given only when the evidence as prescribed in the Quran is available but where such evidence was not available on occasions, the Prophet Muhammad (PBUH) would prescribe some lesser punishment and that is regarded as Tazir. One who is not liable to Hadd is liable to Tazir. Faqir said that here it may be appropriate to consider why two different judgments were given by the Shariat Court regarding Rijam. In response Farooq said that in so far as two Shariat Court judgments are concerned obviously the second judgment appears to have been procured by General Zia because of the criticism that followed the first judgment. In order

to achieve his objective General Zia changed the rules of the Shariat Court and also changed the judges even though in case of review, it is always the same judges who hear the Review Application. Then turning to Hadd punishment for theft, Farooq said that words used in the Quran are specific. He said in the Quran the word "theft" is not used but the "thief " is used. The Prophet Muhammad (PBUH) has described what a thief would be and consequently during the time of Hazrat Umar he suspended the punishment of Hadd for theft because the description of thief could not be met as laid down by Prophet Muhammad (PBUH). Faqir swelled on the entire judgment of Shariat Court where it was held that Rijam was not a punishment in accordance with Shariat. He also described the dissenting opinion of various judges. Farida said that if a woman is raped then the first reaction is that the rapist should be killed but what is to be seen is what punishment has been prescribed by the Quran. It is an accepted fact that the Prophet had actually given the punishment of Rijam and this has been proved by Sunnat. To say that the punishment of Rijam was given during the period before the inception of Islam and that there is no basis for it in the period after Islam is not correct because according to Sunnat this is wrong. Farooq repeated his earlier argument that punishment of Rijam could be awarded under the injunction of Islam in Surah Al-Maidah, which relates to Fasad-Bil-Arz. Infact under this provision the State can give any exemplary punishment including Rijam. Turrabi said that Farooq's view that the punishment of Rijam is even more severe than the punishment of Hadd is not quite correct because when Rijam is being inflicted the person can be allowed to escape which means it is not that severe and the aim is only to disgrace the person. Shahtaj said that there are incidents from the time of Hazrat Umar and Hazrat Ali where they actually inflicted the punishment of Rijam on women who were convicted of Zina. In the presence of such evidence how can we accept the opinion of Maulana Islahi and others who says that the punishment of Rijam was not prescribed by the Quran and Sunnah. Farooq intervened here and said that what ever has been stated by Shahtaj is not in the Quran. With this Shahtaj agreed and said, true it is not in the Quran but is derived from Quran and Sunnah. Farooq repeated his earlier arguments that the punishment of Rijam can only be justified if it is regarded to be punishment prescribed in Surah Al-Maidah.

CONCLUSION

It was generally agreed that Quran (Sura Noor) does not prescribe the punishment of Rajam. It is to be investigated whether it is permissible under Sura Al-Maidah.

SECTION 2(c)

Farooq posed a question that if a couple is separated but has children, the children would be entitled to inheritance, consequently, it is clear that in Sharia the couple would be regarded as married. Faqir said that even before the introduction of Hudood Ordinance there was a distinction between fornication and adultery, consequently the distinction has to continue. However there is considerable logic in what Farooq says because it has to be seen as to who is to be regarded as married under the law. Posing a question he said that if a couple is separated for a very long period would they be regarded as married? Faqir further said that just like there are various kind of murders such as intentional, unintentional or with provocation similarly there have to be categories of Zina also. Raheela then said that there may be a situation where woman and a man are compelled to indulge in sexual act and if in such a situation they are regarded as married it would not be right.

CONCLUSION

All agreed that this sub-section needs to be re-drafted.

SECTION 2 (d)

Faqir said that Mohsin should not be defined to include only a married woman. Farooq said that to maintain this definition of Mohsin would not be correct because according to the Quran if a slave woman is married and then she commits Zina then her punishment is half of a free woman. If this definition of Mohsin in the Hudood Ordinance is maintained it would mean that this concession given in the Quran will stand withdrawn. Shahtaj then said that one could provide for a slave woman separately in the Ordinance. However, since there are no longer any slave women hence there would be no need for it. Farooq further stated that it is not just the question of slave woman but the punishment is reduced in case of any under privileged person such as insane woman or mentally in-capacitated person. To this Majida stated that insane person cannot be punished under Hadd in any case. Nahida then said that one could make provisions for all these various eventualities by adding to this section various explanations or exceptions. Farida said that Mohsin does not have only one meaning in Arabic language. There could be many other meanings of a certain word and thus Mohsin could also have other meanings. Shahtaj then said that when one talks of a married person then one has to consider that whether the person is married in the true sense of the word or not, that is to say whether there is any sexual inter-course between the couple or not. Dr. Farooq said that in fact here there is no need to mention marriage at all because Quran does not make any distinction between married and un-married in verses relating to Hadd. If definition of marriage is retained it can create lot of difficulties. For instance whether Rukhsati has taken place or not, whether the couple are capable of cohabiting, whether the couple while being separated for a long period for various reasons, should still be regarded as married? Turrabi stated that while what Farooq says about a couple being separated for a long time and being regarded as unmarried stands to logic but the question here is not what is logical but whether such a couple can be regarded as married as per Sharia. There can be more discussion on it. Shahtaj then said humorously that there is a saying that one who is married to an Egyptian woman is not to be regarded as married. Perhaps this too can be included in the examples given by Farooq. Farooq said that once a couple is married as per Sharia, they will be regarded as married till they are divorced. Farooq then said that he was in favour of deleting this subsection because of the implication of being married under Hudood Ordinance, that is to say that if the couple is regarded as married then the punishment will be Rajam otherwise it will be 100 stripes. Farida here stated that her views were not correctly reflected in the minutes. She then read out a statement, which according to her were her correct views.

CONCLUSION

There was a general agreement that this section needs to be re-drafted.

SECTION 3

Shahtaj posed a question to Turrabi that can Sharia laws in any Islamic state be enforced on non Muslim minority? To this Turrabi replied that according to Fiqah non Muslims have to be

governed under their own personal law. Farooq said that this is not a correct statement because the law of a State is applicable to every body living in that country like for instance whatever be the laws in America for theft, these would be applicable to every body. Similarly laws of Pakistan should be applicable to every body living in Pakistan. However since the conditions in Pakistan are not perfect and the society is not properly governed and regulated, it is possible to exempt the non-Muslim from the application of certain laws for a temporary period but as soon as the conditions become regulated and perfect then the Pakistani law must become applicable to even the non Muslims. Farida agreed with this statement of Farooq and said that while the public law in the country must be applicable to every body the personal law of the relevant minority should be applicable to them. Farooq said that in Islam there are certain laws which are only meant for Muslims and not for non-Muslims for instance laws regarding prohibition of drinking are applicable only to Muslims and it is a historical fact that during the time of Khulafae-Rashideen non Muslim used to drink openly whereas Muslims did not. Similarly if a Muslim does not for instance, fast or does not perform Hajj when he is capable of doing so he cannot be punished by the State but he remains answerable to Allah. Shahtaj said that there is no evidence that the Quran has anywhere exempted non Muslim from the application of the Hudood laws consequently how they can be exempted under this Ordinance. Farooq said that what he wanted to say was that one has to be expedient when enforcing a law, thus the enforcement of law on the Muslims should follow the Principle of expediency and should be done not hastily but gradually but in case of non Muslim it should be done even more gradually. Nahida said that the question here is whether this particular law is a good law or not. If it is violative of constitution it should be struck of and in her view Hudood law must be regarded as personal law and not public law because this law does not exist amongst the non-Muslims. Farooq then said that if we were to enforce Islamic Law in accordance with Quran then in his view the non Muslim would welcome the introduction of Islamic Laws, for instance if a non Muslim was asked what punishment of Zina would he accept, 100 stripes or five years imprisonment, he would immediately opt for 100 stripes. Consequently whatever is done to enforce Islamic Law in accordance with the Quran would be acceptable to all citizen of Pakistan. Shakir said that in his view Pakistan is not an Islamic society but a Muslim society and that is what the founder of the country envisaged, consequently it will not be correct to impose the Islamic laws on all citizen of Pakistan. Giving an example he said that in case of Christian and even Parsis adultery is one of the grounds for divorce and the adulterer is a co-respondent in those proceedings. In such cases if the Islamic law for adultery is applied to them it would be most un-just. Faqir said that if you want to follow the secular laws that are enforced in other countries and are applicable to every body then it is a different thing altogether because in so far as Quran is concerned it protects the rights of the minority and has exempted them from the application of so many laws, consequently what ever be the principle of exception if these are mentioned in the Quran then they must be enforced in Pakistan in so far as minorities are concerned. Farooq agreed with this preposition and said that in the current situation it is necessary that the rights of the minorities must be protected and what ever you like to add to make that possible should be add in the law. To this Rahila said that then the minority must also respect the laws of the majority and in the Islamic law this should be mentioned. Then there was a little discussion about Muslim marriages being recognized in America. Majida said that Muslim marriages are now being recognized in these countries.

CONCLUSION

It was agreed that rights of minorities must be protected and pursuant thereto necessary changes should be made in this section as it is not drafted correctly.

SECTION 4

No discussion.

SECTION 5(1)

Farooq said that the addition of word adult before woman in the section was necessary and he further said that committing of sexual inter-course act with a minor should go under the head of Zina Bil-Jabr and the punishment for that must be much more. Turrabi also agreed that the word adult must be there before the word woman.

CONCLUSION

It was agreed that this section should be redrafted to include adult before "woman".

SECTION 5(2)

Farooq said that in Surah Noor no distinction is made between a married and un-married person in so far as the offence of Zina is concerned nor is any mention made of the punishment of Rajam, only 100 stripes is mentioned. He repeated his earlier argument that the punishment of Rijam actually is derived from Surah Al-Maidah which talks of Fasad-Bil-Ardh which would include gang rape and general lewdness. He further stated that whipping in public places which is mentioned in this section is not in accordance with Quran. The Quran does not say that punishment should be carried out in public places, it only says that it should be carried out before a group of people so that others are conscious of punishment being carried out. Consequently, carrying out this punishment in public places would be contrary to spirit of Islam because there could be children present and there could be other woman present and many other peoples who should normally not witness such punishment. He further stated that the statement of Syed Afzal Haider that the punishment of Rijam was ordered in the case of MAZ because Prophet Muhammad (PBUH) was a witness is not quite correct because the Prophet (PBUH) can never be a witness. He always acted as a judge. Consequently according to Farooq the punishment for Zina must be as per Surah Noor and must be inflicted on a Mohsin as per Quran. He also stated that it is irrelevant as to whether the punishment of Rijam was inflicted before revelation of Surah Noor or after. Farida said that the question about the punishment of Rijam being inflicted after the revelation of Surah Noor or before arose because it is generally said that initially there was punishment of Rijam for Zina but then it was repealed by Surah Noor and was changed to 100 stripes. But the fact is that Surah Noor was revealed in 6/7 Hijri whereas punishment of Rijam was carried out in 8/9th Hijri that is to say that the punishment of Rijam was carried out even after the revelation of Surah Noor. Farooq said that there is no need to discuss this point because the punishment of Rijam was carried out in accordance with Surah Al-Maidah and not Surah Noor. However, Farida disagreed with his contention of Farooq. Turrabi agreed with Farida that Surah Noor was revealed before the punishment of Rijam and even though Surah

Noor was applicable at that time. Farooq then repeated his earlier contention that the punishment of Rijam was inflicted under Surah Al-Maidah and for other heinous crimes like Zina Bil-Jabr, gang rape etc. Under the Hudood Ordinance the main effect is that such heinous crimes like Zina-bil-Jabar, gang rape etc. are considered to be of lesser degree than Zina. Shahtaj then posed a question to Farooq that if this argument is accepted that a prior injunction is to be followed rather than the subsequent injunction then the injunction regarding not going near prayers when being in a state of intoxication being a prior injunction should be followed and subsequent injunction where drinking was declared "Haram" need not be followed. This in his opinion would be anomalous. Turrabi said that it is not correct to say that only the Quranic versus should be relied upon because at times it is not possible to understand the true meanings of the Quranic versus till such time reliance is placed on the actions of the prophet and the Sihaba-e-Karam. In this connection he gave the example of Prayers (Salat). Farooq said that when discussing a religious principle, it can only be proved through Quranic versus and Sunnah. One can take assistance from history and Hadees for further clarification but all these would not be binding. Farooq, in reply to a question from Rahila that, how does he say that Hadees and history is not binding, said that the case of drinking is an example. He said that during the time of Prophet (P.B.U.H) and also Abu-Bakar Siddique there was no punishment for drinking and in such cases minor punishments were administered such as a slap or fines but it was during the time of Hazrat Umar when proper punishment was administered. It would that mean that there was no binding rule and that is why any punishment can be given for the offence of drinking.

CONCLUSION

There was disagreement between participants about whether Rajam should be permitted or not. No definite conclusion arrived at.

SECTION 6

Majida said that this was already reflected in the previous minutes. Farooq then said that it is necessary to understand that Zina Bil-Jabr is much greater offence than Zina and consequently the punishment of Zina Bil-Jabr must not be less than Hadd punishment for Zina. In fact it is a heinous crime and it is the Hadd derived from Surah Al-Maidah, which should be enforced for an offence like Zina Bil-Jabr. Surah Al-Maidah talks of offences, which are so heinous that they disrupt the state and society and thus the State can make laws to enforce punishments to protect the state and the citizen. Shahtaj posed a question to Farooq whether he regards Zina bil-Jabr as Zina or not to which Farooq said that it is not only Zina but worse form of Zina that is, it is an act of terror and the punishment for it ought to be more than what is prescribed for Zina and that it will go under Haraba. Turrabi further explained what Farooq and Farida had said that is, Zina will be punished as Zina but when it is Zina bil-Jabr then there will be a punishment, more severe than that for Zina. Farida said, that would mean there will be two punishments for Zina Bil-Jabr. Farooq said that a person who commits Zina bil-Jabr will be punished under Surah Noor and then he will be punished under relevant verses of Surah Al-Maidah for committing Zina bil-Jabr. Nahida said Farooq had said earlier that State can prescribe punishment for Zina bil-Jabr which would mean that there is an element of flexibility allowed to the State but now he is saying something different. Farooq answered that Quran has prescribed four punishments for acts that are described in Al-Maidah, first is death, second is life imprisonment, third is cutting hands and feet and fourth is exile and since these are the only punishment prescribed, only these

punishments can be awarded. There is thus no question of Tazir. Nahida said that since there are four options given to the State it is left to its discretion, thus these punishments cannot be called Hadd because Hadd is a punishment, which is determined. Shahtaj said that as far as Surah Al-Maidah is concerned in it there is use of the word Haraba. However, Farooq was of the opinion that this is Hadd. Turrabi said that Surah Al-Maidah talks of Fasad Bil-Ardh and an incident such as Zina-bil-jabar can be regarded as Fasad-Bil-Ardh.

CONCLUSION

Some were of the opinion that Zina bil Jabar must remain under Hadd but the majority was of the view that it should go under Tazir.

MEETING OF SUB-COMMITTEE TO REVIEW OFFENCE OF QAZF (ENFORCEMENT OF HUDOOD) ORDINANCE, 1979 HELD ON 26TH - 27TH SEPTEMBER, 2002 AT HOTEL ENVOY CONTINENTAL, ISLAMABAD

PARTICIPANTS:

1.	Justice{R} Majida Rizvi (Chairperson)	-	Majida
2.	Justice {R} M. Shaiq Usmani	-	Usmani
3.	Ms. Shehla Zia	-	Shehla
4.	Ms. Rahila Durrani	-	Rahila
5.	Dr. Faqir Hussain	-	Faqir
6.	Allama Aqil Turabi	-	Turabi
7.	Ch. Naeem Shakir	-	Shakir
8.	Ms. Nahida Mahboob Elahi	-	Nahida
9.	Mr. Murtaza (Dr. Zaman)	-	Murtaza
10.	Dr. M. Farooq Khan	-	Farooq
11.	Justice {R} Nasir Aslam Zahid	-	Nasir

REGRETS:

1. Justice{R} Taqi Usmani
2. Dr. Farida Ahmad
3. Ms. Charmaine Hidayatullah
4. Professor Rafiullah Sahab
5. Ms. Hina Jilani
6. Dr. S.M. Zaman
7. Mr. Syed Afzal Haider

INTRODUCTION:

The discussion section by section of the Ordinance continued.

SECTION 1

Nahida said that as per this Section the law extends to whole of Pakistan. This would mean that it also extends to the non-Muslim population of Pakistan. However, the definition of Muhsan in the Zina Ordinance talks of only a Muslim male or female, consequently, it would appear that this Ordinance is applicable to only Muslims. However, Farooq said that as he had earlier stated, Islamic law is divided into private and public law and the public law would be applicable to the entire population of the country. Farooq said that the word "Muhsina" has been used for a woman in the Quran in connection with Hudood and all it means is a woman of good character. There is no mention of the woman being only a Muslim. Murtaza said that according to Islam the definition of "Muhsan" and "Muhsana" for the purposes of this Ordinance would be that, person concerned should be of good character. The definition would not be the same as in

Zina Ordinance. Usmani said that Muhsan and Muhsana are not defined in this Ordinance and there is no particular reason why the definition given in Zina Ordinance should be adopted. Nahida said that it appears that what Farooq says appears logical because it is not necessary that a woman who complains of Qazf should be a married woman even an unmarried woman could seek the protection under the Qazf law. Farooq said that taking a hypothetical case, where a woman is convicted of Zina and punished then later she is accused of Zina falsely by somebody even though she is then not a Muhsana because she has committed Zina earlier, she would still be entitled to lodge a complaint under the Qazf Ordinance. Usmani said that what we have to decide is whether according to the wordings of this Section it is applicable to non-Muslims or not. Murtaza said that if a non-Muslim falsely accuses a Muslim of Zina, can that non-Muslim be punished under this Ordinance? Nahida said that if this law is made applicable to the non-Muslims, it will be highly unjust.

CONCLUSION

It was decided to leave the discussion on this section because it was inconclusive. Perhaps the section requires to be re-drafted.

SECTION 2

No discussion.

SECTION 3

Usmani said that the definition of Qazf in this Section is very mild and as such the whole purpose of Qazf is lost because the intention was to have Qazf as an antidote for Zina but if one gets involved in such legal niceties as intention to harm etc. then it will be impossible to prove Qazf. Farooq said that it is necessary to remember that the law regarding Zina and Qazf has appeared in the same Ayat in the Quran. With regard to Second Exception to the Section he asked a question what is that authority in front of which if Qazf is claimed, it will not be regarded as Qazf? Usmani said that this definition has watered down the offence of Qazf and consequently, it will be impossible to prove this offence in any circumstance. He further said that it is a defective law and needs to be examined carefully. A lot of discussion was held about the lawful authority before which if accusation of Zina is made it will not amount to Qazf. At this Usmani quoted from some precedents where a Family Court was not regarded as such a lawful authority. Usmani further gave example of a Family Court where the tempers are very frayed and invariably parties start accusing each other of bad character and even accuse the other of Zina. In such cases would it be logical to regard the Family Court as a lawful authority. Farooq said that as far as the Quran is concerned, the injunction regarding Qazf is meant only to protect the female, by including man also in this Ordinance, the whole purpose of Qazf is lost. Murtaza said that the only interpretation of this would be that if the information regarding false imputation of Zina is given confidentially then the Qazf law will not be applicable. Usmani said that it is by now well established that as in Civil Court when parties say all sorts of things and make many accusations against the other party, a party cannot be prosecuted for that, it would appear that reference in this Section to a lawful authority is infact reference to Court or a judicial body. Nahida said that one should compare this with the provisions of Section 499 of P.P.C. and examine the exemptions there. In so far as Section 499 P.P.C. is concerned, the lawful authority

could also be a master or a parent. Usmani then said that it is obvious that this law is not properly and clearly worded. Zahid said that as per the Definition clause of this Ordinance, the definitions given in P.P.C. and Cr.P.C. will be applicable to this Ordinance but since lawful authority is not defined in P.P.C., the explanation given under Section 499 PPC will not be a substitute for definition of 'lawful authority' in this Ordinance. He further stated that what should have happened is that the Qazf should have been part of the Zina Ordinance but the two have been separated. Consequently, while there are number of cases under the Zina Ordinance, there are hardly any under the Qazf Ordinance because to prove Qazf is exceedingly difficult and the procedure is very complicated. In his opinion the Qazf Ordinance has been a total failure. Nahida said that he agreed with Zahid and this is also provided for in Cr.P.C. that the moment Court finds that a complaint is false, vexatious or frivolous then immediately the person concerned can be punished by the same Court. Something similar should have happened here i.e. the person who is found to have made a false accusation, he should be convicted under Qazf straight away. Zahid said that it should have been actually a Zina and Qazf Ordinance and there should not have been two separate Ordinances. Zahid further said that it is ridiculous because to lodge a complaint of Qazf first of all the person has to spend money to lodge a complaint and then the procedure is such that the day the complainant is not present the complaint is dismissed by the Magistrate.

CONCLUSION

It was generally agreed that this section was badly drafted, in particular the definition of lawful authority was not clear.

SECTION 4

No discussion.

SECTION 5

Farooq said that the definition of Muhsana in this section is defective because it does not include a minor girl. If false imputation is made in respect of such girl this will destroy her entire life and yet that person cannot be punished for Qazf. Usmani said that such offence can come under Tazir. Farooq said that as far as Islam is concerned, whether the false imputation is in respect of a minor or a major, it is one and the same thing. Murtaza said that since the word Muhsan is mentioned in the Quran, one may change the definition of Muhsan but the word Muhsan cannot be removed from here. He further said that Islamic Ideology Council had raised two objections to it, one that if false imputation is in respect of a minor female then the Hadd will not be applicable and secondly, if it is in respect of a non-Muslim again Hadd will not be applicable. According to Fiqah, if the false imputation is in respect of a major then it will be liable to Hadd and if it is in respect of a minor then it will be liable to Tazir. Zahid then said that this is rather strange because if one's minor daughter is accused of Zina would the gravity be lesse?. It is necessary, according to him, to always put oneself in that position and then decide whether what one is saying is right or wrong. Farooq said that this quotation on which Murtaza bases his arguments relates to the incident of Hazrat Aisha and that is why the word 'Mominat' is mentioned there but the actual injunction of Qazf is described in another Ayat where there is no mention of capacity of a person. As far as the Quran is concerned, there is no distinction between

a minor or a major female or a Muslim or non-Muslim female in respect of offence of Qazf. Farooq said that the word Muhsan is not a terminology which should import any specific connotation, it is just a word of Arabic language and as such it should not be given such a lot of importance.

CONCLUSION

The definition of "Muhsan" to be looked into. Generally it was agreed that it is a defective piece of legislation.

SECTION 6

Large portion of the discussion was unintelligible due to poor quality of tape from which these minutes were being transcribed. However, what could be made out was that there was a general discussion about the requirements of Tazkiya-al-Shahood for witnesses. Generally it was felt that it is not logical because there is hardly anybody who could claim to have abstained from major sins and would fit the category of witness mentioned in this provisions regarding Tazkiya-al-Shahood. According to Farooq, there is no mention in the Quran that the witness must fulfill the requirements of Tazkiya-al-Shahood. Faqeer said that it is the Court, which decides whether the person concerned is a credible witness or not and there is no need to mention this requirement of Tazkiya-al-Shahood here. Murtaza said that as per Quranic injunctions the requirements of Tazkiya-al-Shahood are not as stringent as mentioned in the law regarding Tazkiya-al-Shahood. Zahid said that it should be left to the Court to determine whether a witness is reliable or credible. What happens now in Courts is that the Judge just asks few questions whether the person says his prayers, whether he fasts and then the Judge accepts his evidence but the fact remains that this does not mean that the person has fulfilled the requirements of Tazkiya-al-Shahood. Murtaza then quoted from Hazrat Umar saying that the evidence of all Muslims is acceptable except for one who has been sentenced to Hadd punishment and one who is known to give false evidence. Zahid quoted from Section 3 of the Qanun-e-Shahadat, according to which the competence of a witness should be as described in the Quran and Sunnah but if such a witness is not available then any other witness can be acceptable. Shakir asked a question that considering this section provides for at least two Muslim, adult male witnesses, would this not be violation of Article 25 of the Constitution? Farooq said that both these words i.e. Muslim and male are unnecessary in this section, it should only say two adult witnesses. Turrabi disagreed with this and said that while logic may demand what Farooq has said, but as far as the Fiqah is concerned it is necessary that there must be male witnesses.

CONCLUSION

It was generally agreed that the witness need not fulfill the requirement of Tazkiyaul Shahood.

SECTION 7

Usmani said that in so far as sub-clause (2) of this section is concerned, it may be advantageous for criminals because a person whose evidence is not acceptable may be used as an accomplice or informer without the danger of his being produced as a witness in a criminal trial.

CONCLUSION

This section needs to be re-drafted.

SECTION 8

Usmani pointed out that in sub-clause (a) of this section it talks of a person authorized by "him" to the exclusion of "her". This would mean it is only a man against whom Qazf is committed will be able to lodge a complaint. Farooq said that the basic thing is that Qazf and the Zina must form part of same Ordinance. At this Majida said that we have already recommended in earlier discussion that if Zina is not proved in the Court then immediately at that time the person who was accusing somebody of Zina should become liable for Qazf.

CONCLUSION

It was agreed that Qazf and Zina should form part of same Ordinance.

SECTION 9

Usmani pointed out that in sub-clause (a) it says that a person who commits Qazf against any of his dependants is exempted from Hadd. He posed a question why should it be so, because in our culture there are many incidents where fathers themselves accuse their daughters of Zina because she happens to marry of her own wishes. Majida agreed with that and said that perhaps this sub-clause should be deleted. Farooq said that this section has become necessary only because there are requirements of two male adult witnesses. If it is accepted that there is no need for two Muslim male witnesses then there is no need for this particular section or punishment under Tazir. Farooq said that the Quran through this injunction regarding Qazf protects women but historically it has been seen and there are incidents from history during the time of Holy Prophet (PBUH) where Qazf was imposed for even accusing falsely a decent man of Zina. Faqeer said that does it mean that the inclusion of man in this Ordinance is not truly Islamic. Farooq said that it is the discretion of the State whether it wants to include men in this or not. Usmani asked Farooq to say definitely whether Qazf is only for women and not for men or is it for men as well? Farooq said that as per strict interpretation of Quranic Verse Qazf is to be restricted to only women. Turrabi said that Ijtehad can be used to include men also though Quran is very clear that it only meant for women. Faqeer said that on one hand Farooq says that the punishment of Rajam is not mentioned in the Quran for Zina and consequently, it should not be regarded as punishment for Zina but at the same time Farooq says that Qazf is applicable to men by virtue of traditions from Holy Prophet (PBUH). There is an obvious contradiction here, because by the same logic it can be said that since there are traditions that Rajam was awarded by the Holy Prophet (PBUH) that too should be accepted.

CONCLUSION

It was generally agreed that as per Quran Qazf is restricted only to women and not men.

SECTION 10

No discussion.

SECTION 11

No discussion.

SECTION 12

No discussion.

SECTION 13

No discussion.

SECTION 14

Majida posed a question that what would happen the husband and wife, though married, have not had their marriage consummated. Technically they would still be husband and wife and, hence this law will be applicable to them, however, the fact that the word Muhsan has been used here, would mean that when the marriage is not consummated then this law will not be applicable to them? Usmani raised a point that why is Li' an part of the Qazf Ordinance when the two concepts are entirely different and there is no punishment prescribed at all in this section. Usmani further said that in our cultural scenario a situation can arise where in a quarrel between a married couple the man may accuse his wife of adultery but later repents but then under the law they will have to go through the procedure laid down in this section. This seems rather inappropriate. There should therefore be a provision for the couple to retract the earlier accusation against each other. Farooq in response said that it is true that there is no need for including Li'an in the Qazf Ordinance. Farooq then suggested that there should be provisions here in the law to the effect that the person who accuses his wife of Zina may retract his charge. In so far as sub-section (4) of this section is concerned, Farooq said that this provision regarding the women being punished under Zina Ordinance, would mean that she could be subjected to Rajam, which will be against the injunction in Surah Noor. The maximum that should happen is that she should be punished with stripes and nothing else.

CONCLUSION

It was agreed that there is no need to include the provision regarding 'Li'an' in Qazf Ordinance.

SECTION 15

No discussion.

SECTION 16

No discussion.

SECTION 17

No discussion.

SECTION 18

As before, generally the participants were concerned about the Presiding Officer in the Court and in the Appellate Court being only a Muslim. This had been discussed earlier.

SECTION 19

No discussion.

SECTION 20

No discussion.

MEETING OF SUB-COMMITTEE TO REVIEW OFFENCE OF ZINA (ENFORCEMENT OF HUDOOD) ORDINANCE, 1979 HELD ON 26TH - 27TH SEPTEMBER, 2002 AT HOTEL ENVOY CONTINENTAL, ISLAMABAD

PARTICIPANTS:

1. Justice{R} Majida Rizvi (Chairperson)	-	Majida
2. Justice {R} M. Shaiq Usmani	-	Usmani
3. Ms. Shehla Zia	-	Shehla
4. Ms. Rahila Durrani	-	Rahila
5. Dr. Faqir Hussain	-	Faqir
6. Mr. Allama Aqil Turabi	-	Turabi
7. Mr. Ch. Naeem Shakir	-	Shakir
8. Ms. Nahida Mahboob Elahi	-	Nahida
9. Mr. Murtaza	-	Murtaza
10. Dr. M. Farooq Khan	-	Farooq

REGRETS:

1. Justice {R} Nasir Aslam Zahid
2. Justice{R} Taqi Usmani
3. Dr. Farida Ahmad
4. Ms. Charmaine Hidayatullah
5. Professor Rafiullah Shahab
6. Ms. Hina Jilani
7. Dr. S.M. Zaman
8. Syed Afzal Haider

INTRODUCTION:

The discussion section by section of the Ordinance continued.

SECTION 7

No discussion

SECTION 8

Farooq said that there is no need to have four male witnesses. There can also be female witnesses and the only consideration should be the creditability of witnesses. According to him, in the light of Quran and Sunnah there is no justification for the view expressed earlier. In his opinion there is not mention in religion that the witnesses must be absolutely pious. According to him, if such a condition is imposed then nobody could be a witnesses. Usmani said that may be such strict requirements have been prescribed for a witness so that nobody should come forth to

give evidence. Zahid said Art. 17 of the Qanun-e-Shahadat talks of Tazkiya-al-Shahood. Zahid said that let it be clear that in Islam there is no requirement for the witness to be absolutely pious and that the only requirement is that the witness should be reliable. Farooq agreed with what Zahid said. Farooq quoted relevant Surah from the Quran, according to which from amongst Muslims four witnesses are required. It does not say that witness as should be male or female and as to what should be the quality of witnesses. He quoted from another Ayat from Surah Baqarah, according to which, four witnesses are required and that is all. Turrabi said that what Farooq has said is logical but according to Fiqah Jaferia it is necessary that the witnesses must be male in matters of Zina otherwise their evidence will not be acceptable. According to Farooq the Quranic spirit is that if the person giving evidence does not know much about the subject on which he is giving evidence then there should have be two witnesses. Consequently, the Quran says that in financial matters there should be two female witnesses instead of one because in those days women did not come anywhere close to financial matters. Usmani said that this would mean that the relevant Ayat is not relevant in today's world to which Farooq agreed. Turrabi repeated that in his Fiqah it is only the evidence of a man which is accepted and not of a woman. Turrabi said that whatever Frooq has said is right and appears logical, however, Fiqah Jaferia and Fiqah Hanfia is clear that it is the evidence of only a man which is acceptable. Consequently, whatever is being said here today would be a kind of Ijtehad and if Ijtehad has to be resorted to then it will be necessary to support the innovative contentions with the viewpoint of some leading Islamic Jurists or from some Hadiths or from the statements of some Sahaba Karams. He further stated that if Ijtehad is to be resorted to, it is necessary to obtain the opinion of Islamic Jurists from the Islamic countries as a whole because this is a matter which is of importance to the whole of Islamic world and not just Pakistan. Majida said that it is normally said that since the word for gender used in the Quran is meant for male that is why it is normally said that there should be four male witnesses. But then the questions arises that this is so also the case with Zakat and Namaz but then Zakat and Namaz have been made Farz even for females. Why should the same principle then not be applied in case of witnesses also? Turrabi said that he agreed with what Majida has said but he was bound by the Rules of Fiqah. However, he added that it is obvious that where male witnesses are not available at all then even woman's evidence can be accepted. Farooq then quoted example of an incident during the time of Holy Prophet (PBUH) when somebody threw a stone at a little girl and before she died she was questioned as to who had thrown the stone and based on the evidence of this little girl the person who was guilty of committing the crime was punished. He also gave another example from Islamic history that Hazrat Usman was murdered by some people and Hazrat Naila, his wife, was the sole witness and yet her evidence was accepted and based on it punishment was later awarded to the murderers and there was no opposition to it from any of the Sahaba Karam. From these examples he drew the conclusion that even a single woman's evidence can be accepted in the matters of Hudood as per the Islamic provisions. Murtaza said that what Farooq is saying may be correct but the fact remains that the Muslim Jurists say that woman's evidence cannot be accepted thus it is necessary that we must also consider the opinion of the Muslim Jurists. Nahida said that Farooq has explained things clearly but it is necessary to note that in Qisas and Diyat the requirement of only male witnesses is not there while in case of Zina there is a requirement of male witnesses. There should be some explanation for that. Murtaza said that it is necessary that we should obtain opinion of Jurists. Zahid then said that in fact the opinion of Dr. Zaman of the Islamic Ideology Council is already on record and Turrabi has also explained in great detail that while he agrees with what Farooq is saying and he believes that there is requirement for woman

to be accepted as witness in the matter of Zina and Rape nevertheless according to him just because one person is saying so, it cannot be done. What is required is that a proper procedure for Ijtehad must be carried out and then necessary amendment should be made. Farooq further explained that as far as the Muslim Jurists are concerned they are agreed that woman's evidence is unacceptable but he added that he has already quoted incidents from Sunnah to show that woman's evidence has been accepted. He further said that the only difference between the evidence in case of Zina and the other crimes is that while in other crimes even one person can give evidence, in cases of Zina four witnesses are required but it is not necessary that all these witnesses should be male. He further said that distinction must be drawn between Zina and Zina-bil-Jabar. While four witnesses are necessary in case of Zina-bil-Jabar it is not necessary to have four witnesses for Zina-bil-Jabar which can be proved by evidence of any kind. Turrabi said that it is necessary to explain that the incident narrated by Farooq about the acceptance of evidence of one girl when an attempt was made to kill her by throwing stone at her, has to be viewed in a different perspective because this will be the evidence of that person herself and it stands on a different footing altogether. He quoted example from Islamic history where the Muslim Jurists agreed that in matters where only a woman can be witnesses and only she can say what actually happened then only a woman's evidence must be accepted. Farooq said that in his view Zina-bil-Jabar also comes under Hudood but the evidence required to prove the crime does not have to be the same as for Zina. It can be any evidence as for any other crime. Murtaza said that it is necessary to ascertain as to what are the views of Muslim Jurists about the acceptance of evidence. The reason why Muslim Jurists say that there must be four male witnesses is that there should be absolutely no doubt whatsoever before a Hadd punishment is given and according to him if evidence of a female is accepted then there is always a doubt, about which indication has been given in the Quran when it says that when you can't find two male witnesses then you should accept evidence of one male and two female witnesses, so that one woman reminds the other. Thus it would appear that there is some sort of weakness in the evidence of a woman. He further said that there is a hadith to the effect that in matters of Zina and Qisas the evidence of a woman should not be accepted. Faqeer posed a question to Murtaza, whether he himself believed that in the light of the Quran the evidence of a woman is considered to be weaker than that of a man? Murtaza answered by saying that so far as the Islamic Ideology Council is concerned, it has not agreed to the suggestion that woman's evidence should be accepted in matters of Zina. Faqeer then asked a question from Farooq, why is it that the evidence of non-Muslim is not accepted in matters of Hudood? This, according to him, was relevant because in the villages in Pakistan there are places where there is a mixture of population and there are people who do not practice the faith of Islam. Farooq answered that there is nothing in the Quran to prevent the evidence of a non-Muslim from being taken as long as non-Muslim is a person whose evidence can be accepted. He further said that it can be derived from the Quranic Verses that the witness must be from amongst a particular group which in the present day scenario would mean citizen of a country. Consequently, the State of Pakistan can make laws to the effect that the evidence of non-Muslims will also be accepted. Nahida said that the word "Muhsan" has been defined in the definition clauses as an adult Muslim male, consequently, the law is applicable only to Muslims. She further said that what she recalled from the previous discussion was that the requirement of four witnesses was prescribed because the aim was to prevent such an act being committed in public. The aim was not to prevent the act if carried out in privacy. Shakir then asked a question, if the victim of the offence is a non-Muslim, can the evidence of a non-Muslim be accepted? Everybody answered 'Yes', the evidence of non-Muslim will be accepted in that case. Zahid

asked Murtaza to say whether the Islamic Ideology Council has considered the situation where only female witnesses will be available, for instance, if a rape is committed in a Girls' Hostel. Murtaza answered that this matter has been considered by the Islamic Ideology Council but no decision has been taken yet.

CONCLUSION

Same as in Lahore meeting i.e. majority of the participants were of the view that the evidence of women should be acceptable. However, some participants felt this matter requires further consideration and the opinion of the Ulemas and/or of the Council of Islamic Ideology should be sought.

SECTION 9

Farooq said that he agrees with the conclusion arrived at in the earlier meeting and quoted various incidents from the Islamic history particularly relating to the period of Holy Prophet (PBUH) according to which it was clear that witness could resile from his evidence even at the very last moment. Faqeer said that from reading of Section 9 subsection (3) it is not clear as to how can there be a re-trial when a witness who resiles is to charged with Qazf. Faqeer further said that either Hadd is proved or not proved, what is the meaning of retrial. Nahida explained that under this section the re-trial will take place only where the person who confesses to the crime retracts but where the witness retracts that will come under subsection (4) and then the Court may award Tazir.

CONCLUSION

Same as in Lahore meeting i.e. there was general agreement that the convict should have permission to resile even before the punishment is executed. There was also agreement to the fact that the resiling witness should be subjected to Qazf.

SECTION 10

Farooq said that while Zina is mentioned in Surah Noor, Zina-bil-Jabar falls under Surah Al-Maidah. The difference between the two is that whereas for Zina four witnesses are compulsory, for Zina-bil-Jabar four witnesses are not compulsory. In so far as this Section is concerned, while it talks of 100 stripes for Zina, it talks of maximum 10 years and 30 stripes for Zina-bil-Jabar (Zina liable to Tazir). This is highly incongruous because the Islamic stripes are such that they can be inflicted within 10 minutes and these do not have to be administered in a manner to hurt the person concerned, whereas under Tazir what is envisaged is to give more punishment than for Zina. This would mean that the punishment for Zina is less than the punishment for Zina-bil-Jabar. In so far as Zina-bil-Jabar is concerned, the punishment prescribed is death punishment, exile or confinement for life. Majida then enquired from Farooq whether he agrees that Zina-bil-Jabar should go under Tazir or not, to which Farooq replied that he did not agree and according to him Zina-bil-Jabar is part of Hadd, however, there is no requirement for any particular number of witnesses in Zina-bil-Jabar. Usmani then said to Farooq that whatever punishment is written in the Quran for Zina cannot be changed and it will remain

as it is but if it is said that different punishment can be given for Zina-bil-Jabar then the best solution is that Zina-bil-Jabar should be placed under Tazir and then any punishment can be given for it. Farooq then said that Zina-bil-Jabar comes under Surah Al-Maidah Verses 33 and 34, which deal with spreading disorder and waging war against Allah and his Holy Prophet (PBUH). Zahid then said that there is not mention in the Quranic Verses that rape or Zina-bil-Jabar comes under Surah Al-Maidah, it is just a general provision which deals with complete disorder. Faqeer said that we should get our concept clear. According to the Quran, Hadd means those punishments which are specifically prescribed in the Quran for certain offences like Zina, Qazf, theft etc. He further said that if you include things that were mentioned in Surah Al-Maidah under Hadd then that means in fact the entire PPC can come under Hadd. Zahid said that what Farooq is saying would mean that even the Hadd punishment can be varied by the State which will be rather odd. Faqeer said that the normal concept that Hadd is prescribed in the Quran is not quite correct because for instance in the case of drinking wine there is nothing prescribed in the Quran and the punishments now regarded as Hadd was in fact promulgated during the time of Khulpha-i-Rashideen. Even the punishment of Rajam is not mentioned in the Quran and in fact it is a historical fact that various kinds of milder punishments were inflicted on people who drank. Consequently, there is a lot of weight in what Farooq says that Zina-bil-Jabar can be considered under Hadd if it is required but the punishment for that can be taken to have been mentioned in Surah Al-Maidah by treating Zina-bil-Jabar as Haraba or Fisad-fil-Ardh. Turrabi disagreed with Farooq's interpretation of Surah Al-Maidah Verses 33 and 34, and according to him these Verses have no connection with Hadd whatsoever. Farooq said that we all know that the Holy Prophet (PBUH) had given the punishment of Rajam for Zina but it is also a fact that there is not mention of Rajam in Surah Noor so the question arises how did the Holy Prophet (PBUH) give the punishment of Rajam for Zina. In his opinion he did so under Surah Al-Maidah. Nahida said that there are various incidents in the early Islamic history where the Holy Prophet (PBUH) was quite flexible in the matter of punishment for Zina at various times. Now it is a fact that Hadd means a definite punishment and if there are variations and flexibilities shown it does not remain Hadd and it becomes Tazir. Farooq said that the concept that Hadd is not flexible is incorrect. In fact it is flexible and there are incidents in history like for instance when Hazrat Umar suspended the punishment of Hadd, which means the punishments under Hadd are flexible. Nahida said that as far as this law before us is concerned, there is no flexibility shown and Zahid also said the same. Farooq said that in the Quran it is mentioned that if adultery is committed with a slave girl the punishment will be half of that prescribed in the Quran for adultery by a free woman. This in itself shows that there can be flexibility in Hadd. To this Nahida replied that a slave girl is not free and we are talking of adultery between free individuals. Farooq said that according to him the punishment of Zina-bil-Jabar must be more severe than the punishment for Zina and that is why he is relying on Surah Al-Maidah for punishment for Zina-bil-Jabar. However, if you feel that more punishment can be given under Tazir then let it be under Tazir. Murtaza then pointed out that the minutes of Lahore meeting that were read out earlier showed that Syed Afzal Haider had agreed with the suggestion that this should be placed under Tazir but according to Murtaza this was his personal opinion and it has not been finally recommended by Islamic Ideology Council. Majida then said that at the time when Afzal Haider said this Dr. Zaman was also present and did not object. In any case Dr. Zaman has said that he will give his comments in writing so we should await that. Generally it appears that the recommendations made earlier at Lahore have been accepted by everybody

CONCLUSION

Same as in Lahore meeting i.e. large majority of participants agreed that Zina bil Jabr should go under Tazir and must not form part of this Ordinance.

SECTIONS 11 to 16

Usmani read out from the minutes of the last meeting at Lahore, according to which Afzal Haider had said that it was the recommendation of the Islamic Ideology Council that Sections 11 to 16 should be deleted. To this Murtaza said that Islamic Ideology Council did not say that it should be deleted rather it should be placed under Tazir.

SECTION 17

Faqeer said that perhaps it is the time to discuss whether Rajam is a Islamic punishment or not and if it is then it has to be decided whether it is a punishment for Zina or Zina-bil-Jabar. He further said that the punishment of 100 stripes for Zina came about gradually according to earlier Surahs, punishment for Zina earlier was lesser. However, it is significant to note that there is not mention of Zina-bil-Jabar in Surah Noor. Faqeer said that there are four incidents from the time of Holy Prophet (PBUH) where the punishment for Zina was given and Rajam was ordered and these Hadiths are accepted by everybody. Besides, there are 51 other Hadiths which justify the punishment of Rajam. All these punishments were given after the revelation of Surah Noor. He then suggested that the two Aalims here should give a thought to it. He then posed a question that whether there was any basis for Rajam in Islam and whether there is any distinction between Zina and Zina-bil-Jabar. Turrabi said that the first question is whether Rajam is an Islamic punishment or not. The answer is 'Yes', it is Islamic punishment but the extent of punishment may be varied according to the discretion of the Qazi deciding the matter by use of Ijtehad. However, as far as Hudood is concerned, where it is described in the Quran no discretion has been given to vary the extent of the punishment and a definite punishment has been prescribed. As far as Zina-bil-Jabar is concerned, there is not mention in the Quran of Zina-bil-Jabar and only Zina is mentioned. There are many things which are not described in the Quran. Now as far as Rajam is concerned, the Hadith regarding punishment prescribed by the Holy Prophet (PBUH) is there and it is clear from it, that these punishments are tampered by humanitarian considerations. If these Hadiths are dated after Surah Noor then they are obligatory if they are before the revelation of Surah Noor then these are not obligatory. Faqeer then said that it is true that Rajam is not mentioned in Surah Noor and it is only derived from Hadiths but then there is difference between the Quran and Hadiths. Quranic injunction are of course immutable but Hadiths are of various degrees, some are considered to be more authentic than others. Turrabi answered by saying that there are many things in Quran which cannot be understood without the explanation given by Hadiths. Sometime in the Quran there is just a pointer or a hint which is to be understood through Tafseer and thus it is not a question of Fiqah at all. Faqeer then said that these four Hadiths from which the punishment of Rajam is derived are not considered to be absolutely authentic and these are regarded as "Ahad Hadiths" and these cannot repeal the Quranic injunctions. To this Turrabi answered that the Jurists have accepted these to be authentic. Usmani then said that the question is, can Hadith repeal a Quranic injunction? Turrabi answered by saying that one may consider it to be a contradiction but actually there is no

contradiction. Zahid then said that this committee cannot go into all those matters, these can be discussed in the Islamic Ideology Council. As far as he was concerned, he would recommend that the Hudood Ordinance, as it is, should be repealed and this matter should be referred to the Islamic Ideology Council who should then recommend draft of a proper law. He further stated that it is not possible for this committee to decide whether the punishment of Rajam is Islamic or not. All that the committee can do is we have to see whether the Hudood Ordinance is in accordance with the Injunction of Islam or not. There are lot of differences of opinions about this and there are a number of points on which the Islamic Ideology Council has not taken a definite stand. Faqeer then said that according to him it is possible for this committee to come to a conclusion that Rajam is not a punishment in accordance with the Quran and it can give this recommendation. Majida then said that according to our terms of Reference we are only supposed to see whether the Ordinance should be repealed or it should be amended. Farooq said that when Maz was brought before the Holy Prophet (PBUH) he was known to be a habitual fornicator and that is why Holy Prophet (PBUH) ordered the punishment of Rajam under the Surah Al-Maidah. The fact that Maz ran away when the punishment was being inflicted and the Holy Prophet (PBUH) asked why was he prevented from running away, was also in accordance with the Surah al-Maidah because according to Surah Al-Maidah such a person can be exiled. If you look at this incident in the light of Surah Al-Maidah you would see that this is not a punishment for Zina but punishment to a habitual fornicator. Farooq then recounted various incidents from the times of Holy Prophet (PBUH) where the punishment of Rajam was administered and explained that there are lot of misconceptions about that and then he said that these punishments were actually given under Surah Al-Maidah, according to which a person could be given exemplary punishment and could also be exiled and also could be confined for life. He then said that this Section has no basis in the Quran or Islam at all. To say that four witnesses should start stoning is completely unacceptable because during the time of Holy Prophet (PBUH) no punishment was ever given on the basis of evidence of four witnesses. The question arises where did this come from? Zahid finally concluded the discussion by saying that what appears to be the general opinion is that Rajam is not a punishment for Zina according to Islam but Rajam can be a punishment under Surah Al-Maidah for Fasad-fil-Ardh.

CONCLUSION

Same as in Lahore meeting i.e. it was agreed that the provisions of this Section are not in accordance with Sunnah. The addition being that Rajam can be a punishment under Surah Al-Maidah.

SECTION 18

No discussion.

SECTION 19

No discussion.

SECTION 20

No discussion.

SECTION 21

Zahid said that since according to Farooq a person guilty of offence relating to Zina-bil-Jabar can be tried under Surah Al-Maidah and for various other offences related to sex then what is the logic in having only a Muslim Judge to try these offences. Faqeer said that if the Hudood Laws are Islamic, can this law be made applicable to non-Muslims? Zahid said that this is a general law and hence it applied to whole of Pakistan and to everybody. Faqeer then said that if it is a general law then it should be applied to everybody but if it is Islamic Law then it should not be applied to non-Muslims. Farooq said that to be a Muslim and to be an expert in Islamic law are two different things, even a non-Muslim could be expert in Islamic law. When a Judge decides a matter he does not decide on the basis of his own faith but in accordance with the law. Consequently, it would not make any difference as to whether a Judge is Muslim or non-Muslim in the matter of Hudood. According to him, the witness, the Judge or the victim could be Muslim or non-Muslim, it does not matter. Turrabi said that what Farooq is saying carries a lot of weight, however, in Fiqah Jaferia it is necessary that the Ruler should be a Muslim, the Qazi be a Muslim and the person who slaughters animals be a Muslim. He further said that according to Fiqah Jaferia, the Islamic law cannot be enforced on the non-Muslims and non-Muslims will be governed by their own laws. Shakir said that he has reservation about the Islamic law being applicable to non-Muslims since the Constitution does not permit that. He said that under Divorce Act the Petitioner has to implead the adulterer or the adulterous as a party and consequently, if such declaration is made then the adulterer or the adulterous would immediately be liable to Hadd under Hudood Laws. Consequently, Sharia must not be applied to non-Muslims. This law does say that if the accused is non-Muslim the Presiding Officer may be a non-Muslim but it does not say what happen if the victim is non-Muslim. Farooq said that just as in the rest of the world the law of the country is applicable to everybody similarly the law in Pakistan will be applicable to everybody, that is to say, the Hudood laws would then be applicable even to non-Muslims. However, Personal laws, like for instance for drinking etc. do not permit Muslims to indulge in it but there is no restriction on non-Muslims. Faqeer said that since the traditions are that Islamic laws were not applicable to non-Muslims, it is necessary that any law which is enforced in Pakistan on the basis of Islam must not be applicable to non-Muslims. Usmani then said that it cannot be said that a non-Muslim cannot be a Judge because it is a question of knowledge of law and not the faith of a Judge. Murtaza said that in so far as the question of adultery is concerned, Christian cannot object to it because it is also an offence in Christianity.

Note: Dr. Fareeda's letter is to be incorporated.

CONCLUSION

Same as in Lahore meeting i.e. there was general agreement that this Section ought to be repealed

SECTION 22

No discussion.

MEETING OF SUB-COMMITTEE TO REVIEW OFFENCES AGAINST PROPERTY (ENFORCEMENT OF HUDOOD) ORDINANCE, 1979 HELD ON 25TH OCTOBER, 2002 AT AVARI HOTEL, KARACHI

PARTICIPANTS:

1. Justice{R} Majida Rizvi (Chairperson)	-	Majida
2. Justice Nasir Aslam Zahid	-	Nasir
3. Justice {R} M. Shaiq Usmani	-	Usmani
4. Dr. Faqir Hussain	-	Faqir
5. Allama Aqil Turabi	-	Turabi
6. Mr. Ch. Naeem Shakir	-	Shakir
7. Dr. M. Farooq Khan	-	Farooq
8. Dr. S.M. Zaman	-	Zaman
9. Mrs. Syed Afzal Haider	-	Haider
10. Dr. Farida Ahmad	-	Farida

REGRETS:

1. Justice{R} Taqi Usmani
2. Ms. Shehla Zia
3. Professor Rafiullah Shahab
4. Ms. Hina Jilani
5. Ms. Nahida Mahboob Elahi

SECTION 1

No discussion.

SECTION 2 (a)

Majida said that the discussion rested on definition of adult. Majida said that the definition as given in this Section is for both man and a woman and it talks in terms of 18 years of age and puberty. It is possible for a man to attain puberty earlier then 18 years old but would it mean that he will have criminal liability? This was discussed earlier also. Haider said that what you have to consider is the legal capacity of a person i.e. can he become "Rashid" and "Aaqil" once he attains puberty or does he have to attain a certain age. Consequently, for a person to be saddled with criminal liability he or she must be more than being just a pubert. Usmani said that a girl normally becomes a pubert at the age of 10 or 11 years and even earlier and if she too happens to commit theft can she be punished with Hadd. He was of the opinion that the word puberty should not be there. Haider said that the word puberty in Islam is linked to marriage that is to say that man becomes pubert when he is able to contract marriage and marriage in Islam is not merely a question of proposal and acceptance, it also entails exercising once ability to decide

his affairs according to his own way of thinking. Thus what is really intended is that the person should be conscious enough to make a decision. Consequently, in criminal matters it is necessary to think about criminal liability rather than of puberty. Zaman said that this matter has been discussed at great length during the discussion about Zina Ordinance, consequently, three is no need to discuss it again. Majida said the question arises is that if a person is not conscious enough to realize what he or she is doing can he or she be held responsible for an offence under this Ordinance? Farooq said that the Quran has not laid down any particular age for criminal liability and consequently, we are free to determine any age that we want and hence, it is necessary that the word puberty must be removed and the age of 18 years should be accepted as the age for criminal liability. Usmani said that the word puberty is relatable to sex, consequently in matters of theft how can that be relevant. Haider agreed with that. He further said that the Quranic concept is that everything is permitted unless it is prohibited. Farooq agreed with that and said unless a thing is forbidden, it is permitted in Quran. Zaman said that if a person can contract marriage after puberty and thus enter into a contract then consequently that person can also be responsible for other liabilities. However, the consensus amongst jurists is that puberty is also determining factor for liability under this Ordinance, consequently if you wish to change this, then we have to exercise Ijtehad. Majida then posed a question that under Quranic Injunctions is it necessary for puberty to be included here or can it be de-linked. Zaman said that he is in favour of retaining the word puberty with the definition of adult. Faqeer said that it appears that the age of 18 years has been kept as in the definition of adult because if a person is liable to Hadd below that age he will be punished with Tazir. Haider said that he sees no reason why adult should be defined, it should be in accordance with the general law. He suggested that we should drop the definition of adult and should accept whatever is prescribed in the general law because the Quran does not prescribe the age at all and leaves it to the discretion of the State. Haider said that Quran does not lay down any particular definition in these matters as to what is Nisab and what is the criminal liability. These are the matters which have to be determined by the State and thus the interpretation of law should not be equated with the law itself. They are two different things. Since the Islamic Ideology Council has already come to a conclusion that the things given in the general exceptions are in accordance with the Islamic law one see no reason why this matter should be debated all over again. Faqeer said that Qisas and Diyat are part of PPC and, hence the definition of general exceptions would apply but it happens to a special law. Usmani said that all we require just to remove the word 'puberty' and that would be sufficient. Farida said she agrees with the opinion of Zaman. Turabi said that the decision whether a person has the criminal liability or not can be decided according to the circumstances and according to the capacity of the person and mere enunciation in law would not be decisive factor. If you decide that puberty is at the age of 18 years then the word puberty should stay but if one has to consider whether a child has become pubert or not then there is no need to have 'puberty' and just the age should be mentioned.

CONCLUSION

Everybody agreed that in the definition of "adult" the word puberty should be dropped.

SECTION 2(b)

No discussion.

SECTION 2(c)

Zaman said that it is now an accepted principle that the Islamic law is contained in the Holy Quran and Sunnah and only a small minority disagrees with that. Farooq said that this is true but as far as Hadd is concerned, which is defined in Section 2(c), it only refers to six things that are mentioned in the Holy Quran and which were actually enforced by the Holy Prophet (PBUH). For instance the Quran clearly stated as to what is the punishment of Zina but has not stated as to what is the punishment for homosexuality and thus the State can make any law regarding that. Zaman said that almost all jurists agree that Hadd is a punishment as mentioned in the Holy Quran and Sunnah and, hence there is no need to discuss this matter further.

SECTION 2(d)

No discussion.

SECTION 2(e)

No discussion.

SECTION 2(f)

No discussion.

SECTION 2(g)

No discussion.

SECTION 3

No discussion.

SECTION 4

No discussion.

SECTION 5

Haider said that in Section 5 there is mention of theft of property twice but the word theft has not been defined. Majida said that entails removal of property from the house. Haider said one should look at the definition of Section 378 of PPC to see as to what is the definition of theft but here the definition of theft is not given. Majida said it would appear that this section is badly drafted. Haider said that guidance should be taken from Section 378 of PPC. Majida said that it would appear that all this should go under Tazir. Zaman said that it will be appropriate if the Hadd provisions should replace any relevant provisions that may be in PPC and hence the corresponding provisions in PPC must be removed. Zahid agreed with that and added that the impression that is being given is that perhaps only these are the Islamic laws and rest are all

secular laws, which is absolutely wrong. There may be some provisions which may be un-Islamic but it does not mean that all provisions are un-Islamic and if you make separate provisions in the name of Islam that does not mean that those are the only Islamic laws. The question arises whether ordinary laws in PPC are un-Islamic laws. Farooq also agreed with that and said there is no distinction between the two laws. Turabi also agreed with that. Haider said that this is particularly true because Article 227 of the Constitution has not said that PPC is un-Islamic. Faqeer said that it is unfortunate that a lot of definitions in PPC have been reproduced under the Hudood laws verbatim. Zahid asked Zaman whether any other Muslim country has introduced separate Hudood laws in the manner that we have done or have they amended their existing laws. Zaman said that there is a difference between the situations in other Islamic countries and in Pakistan because here there is a break of 200 years because of the intervening English period but in the other Muslim countries Turkish law "Al-Mujallah" was in force, and hence there is continuity in those countries. Haider pointed out that for the use of the words theft of the property in this section it is necessary to describe as to what theft entails. It should be brought in line with Section 378 of Pakistan Penal Code (PPC). The existence of separate laws regarding theft in the Hudood Ordinance gives an indication that perhaps these are the only Islamic laws and all other laws in the PPC are un-Islamic but that is not so. There may be portion of the PPC which may not be exactly in accordance with the Islamic law but certainly the whole law cannot be said to suffer from this deficiency. Haider said that it must also be noted that the Islamic Ideology Council has not said that under Article 227 of the Constitution the PPC is un-Islamic.

CONCLUSION

This section is badly drafted and ought to be re-drafted.

SECTION 6

Usmani asked what is the basis of determining 4.457 grams of gold as the Nisab. Farooq said that in Quran the word theft has not been mentioned but only the word thief has been mentioned. In Islam it is always the definition of a thief which is considered and it was determined that the punishment of Hadd can only be given for the theft of something which is equivalent to the value of a shield since at the time everybody did not possessed a shield. Only some did, consequently, it would mean that in today's world State will be fully entitled to determine Nisab. During the time of Hazrat Umar when there was a famine the punishment of Hadd was suspended not because the theft was no longer an offence but because the situation was such that the definition of theft could not be met, consequently there is no restriction on what Nisab ought to be and the State could determine it. Haider agreed with this proposition. Usmani asked would a bulletproof vest be equivalent to a shield these days. Zahid said that what Farooq is saying is that the shield was a valuable thing at that time and that is why it was the Nisab. Majida said that perhaps at the time not more than 5% to 10% would have had these things including a shield in their houses. Zaman said that it is very difficult to determine that. For instance Hazrat Ali when he got married with Hazrat Fatima he sold his shield to provide for the expenses of marriage. It means that it did fetch considerable amount of money, which proves that a shield was an expensive item at the time. So it has to be seen as to what is the criteria for determining Nisab in the present circumstances. There may something to-day that may relate to

the price of the shield at that time. Consequently, some research has to be done to determine as to what will be equivalent to a shield at the present time. Zahid said that 4.457 grams of gold will be valued at about Rs.3,000/- in the present time. Zaman said one does not know how has this figure of 4.457 grams of gold been arrived at. Majida said that perhaps this should be left to the State to determine as to what should be the Nisab. Zaman said that what you have to see is the market value of shield as compared to other important things in the modern time. Haider was of the view that all this was irrelevant because the State has already indulged in Ijtehad to determine as to what will be equivalent to the value of a shield at the time of Holy Prophet (PBUH). Consequently, State could determine as to what would be Nisab at any relevant time. Haider said that there are examples from the Islamic history which show that the measure of Nisab has to be left to the State. Zahid said that what Haider is saying means that the determination of Nisab may not have nexus with the value of a shield and any value can be determined by the State. In principle this may be right, however, it can be said that there has to be some nexus and some basis to determine Nisab. Zaman said the reason why 4.457 grams of gold was fixed was because there was nexus between this and what was determined to be Nisab during the time of Holy Prophet (PBUH) so it is wrong to say that any amount can be fixed by the State and if Ijtehad has to be indulged in, it has to be based on the same premise. Farooq said that indeed we can take guidance from the research done during the time of Holy Prophet (PBUH) to determine as to what the value of shield at the time but it is not binding upon us to relate Nisab to the value of a shield. We can indeed take guidance from it but it is not binding particularly when we know that Hazrat Umar had suspended the punishment of Hadd during his time. We have to see that people should not take advantage of a lower Nisab and the people should also not unnecessarily be punished. Turabi said that according to the information available the value of shield which was sold by Hazrat Ali was about 360 Darhams and if you compare that with the present time then you can determine as to what was equivalent to that in the modern time. Zahid said that what Farooq is saying is that indeed there should be a nexus but it is not necessary to relate it to the value of a shield. Majida said that if we consider 360 Darhams as Nisab then obviously it was a very high amount and if we say 4.457 grams of gold then it is a very low figure. Turabi suggested that why can't Nisab not be one month's pay of an individual. Majida said it is impractical because the wages vary. Zahid said there is nothing wrong in keeping it one month's pay if one accepts Farooq's opinion. Faqeer said that you have to see why was this figure arrived at and if it was a deterrent then obviously it is a too low a figure. Farooq said this is a maximum Hadd punishment and theft of any amount below Nisab is subject to Tazir. Majida said that it appears that all agree that this figure can be reviewed. Zaman said that the measure determined by the Holy Prophet (PBUH) was the right measure, however, we can derive as to what should be the Nisab keeping in view the decision of Holy Prophet (PBUH) and it can be reviewed from time to time. Haider said that if you want to interpret the law in the existing situation, under the Islamic jurisprudence you can resort to Qias.

CONCLUSION

It is generally agreed that the figure of 4.457 grams of gold is too low which should be altered. However, there must be nexus between this amount and what was prescribed by Holy Prophet (PBUH) and the State could legislate on this point.

SECTION 7

Usmani said that the requirement of Tazkiyaul Shuhood were dealt with at great length in the Islamabad meeting. Farooq also said the same and said that there is no need for the witnesses to be either Muslims or males, they could be non-Muslims and females also. What is required is that the theft should be proved to the satisfaction of the Court. Shakir said that since Hudood laws are meant for Muslim citizens of Pakistan, they should not be applicable to the non-Muslims and if these are applied to non-Muslims then it will entail discrimination. Zaman said that all laws in Pakistan have to be in accordance with the Quran and Sunnah and will thus be applicable to everybody. Shakir said that under the Constitution non-Muslims are entitled to practice their creed. Usmani said that what the Constitutional provisions lay down is the principle and not the application of laws. Farooq said that public law should be applicable to all citizens otherwise number of complications will be created, for instance, what will happen if a Muslim commits theft from the home of a non-Muslim or a non-Muslim commits theft from the home of a Muslim. Faqir said that in his opinion Hudood laws are as much a Personal Law as the law of Inheritance and thus it definitely discriminates against the non-Muslims. Zahid said that in his opinion criminal law or anything being done to establish law and order would come under the category of public law. Shakir said that it may be so because if you amputate hands for theft in so far as a Muslim is concerned he would accept it because it is a part of his creed but as regards a non-Muslim why should his hands be amputated when it is not a punishment prescribed his creed. Usmani said that if you were to have different laws for people following different creeds then a criminal gang may employ non-Muslims knowing that if they are caught, then their hands will not be cut. Anything which a State enforces to bring about law and order has to be the same for everybody otherwise it will lead to lot of complications. Farooq said that one could give a concession in case of Zina because the level of morality may be different amongst different people but in case of theft which is a recognized offence in every country and in every creed, it will not be possible to have separate laws. Faqir said that if you want to make religion as a basis of laws then it will be necessary to have different laws for people following different religions.

CONCLUSION

Generally everybody agreed that since theft is a crime and is enforced a general law in every religion, it should be applicable to all citizens.

SECTION 8

Faqir raised the point that the absence of distribution of the quantity of Nisab amongst many thieves is not logical at all because it would mean that a gang of thieves can get away from Hadd punishment. Farooq said that there is no justification for this legislation in Quran and Sunnah. This is a matter which a State itself can decide and he agreed with the contention of Faqir and said that in fact what should be done is that if a gang commits a theft then each member of the gang should be liable for the whole amount that has been stolen.

CONCLUSION

This section should be re-drafted.

SECTION 9

Haider said that it would appear that penitence is relevant only after the person has been punished for the third time. He further said that this appears to be a case of modification of Hadd. It is not in the Quran that the penitence can be resorted to only after the offence had been committed for the third time. He further said that the word used in Quran is "QATAA" which means to render the part of the body ineffective. Zaman said that the word amputation or "QATAA" means to cut. Farooq said that while awarding these punishments one has to view the circumstances prevailing in the country as was done by Hazrat Umar, consequently, he would say that the punishment for the first time must not be that severe but for the second offence it should be more severe and for the third offence even more. Farooq further said that there is no ambiguity in the Quran that the amputation has to be done, however, the way it has been described in this Section i.e. at one time one hand is to be cut and then one foot is to be cut has no basis in the Quran. Similarly the question of penitence and imprisonment which has been prescribed in this section also has no basis in the Quran or Sharia and thus it can be kept as a part of PPC. Farida quoted Hadith from "JAMA-E-RASOOL" where the cutting of hands and the foot were prescribed by the Holy Prophet (PBUH). She quoted various other Hadiths. Haider said that verses 36, 41 and 42 of Surah Maidah deal with theft and 'Hiraabah'. He further said that in the light of these verses it is clear that this particular section is not in accordance with the Quran. Quran has kept the door open for penitence and if a person repents and does 'Toba' then he can be watched to see whether he refrains from committing the offence. Farooq disagreed with this contention of Haider and said that 'Toba' comes after punishment and not before, that is to say, if a person commits an offence and is punished and then repents sincerely then he can be pardoned. If this was not so then one could also be pardoned in case of Qazf. Zahid asked a question that the Quran says that one should do 'Toba' before being overpowered, what does that mean in the modern day and age? Farooq answered that to explain this we could take the example of a situation where the State has declared a general amnesty and then if somebody commits an offence punishable under the laws of Hiraabah then the person concerned can say that he cannot be overpowered and, hence he cannot be punished. Usmani said that what needs to be discussed here is the punishment for theft and not other irrelevant matters. Zaman said that the punishment prescribed cannot be forgiven. 'Toba' is only meant for the hereafter, that is to say, that the person concerned would not be punished after his death but the punishment prescribed by law has to be enforced. Farooq said that the Hadith quoted by Farida is a weak Hadith and you can deduce anything from it. Faqir said that he does not agree with the interpretation that 'Toba' is meant only for hereafter because there are Hadiths available according to which the Holy Prophet (PBUH) did accept 'Toba' even before infliction of the punishment. Zahid said that one has to understand that the retraction cannot only apply to confession because once the confession is retracted then there is no evidence. Faqir said that under the Irani law this is so but the difference between the Irani law and Pakistani law is that under the Pakistani law even if a person retracts from his confession he can be punished but under the Irani law he can be pardoned completely. Farooq then said that he has suggested earlier that in his opinion best solution is that on the commission of the first offence of theft the punishment should be less on the second offence should be more and on the third offence more severe. However, Majida said that we can do nothing if the Quranic injunctions say something different. Majida said subsections (3), (4) and (5) should actually go under Tazir. Zaman supported the sections and said that they should remain part of this Ordinance. Zahid said that it would mean that Toba

would be for this world and not for the hereafter. Faqir said that this appears logical because if a person has committed theft and you amputate his hands then what can be done to him in the hereafter. Indeed if punishment is also to be given in the hereafter, it would be a case of double jeopardy. However, Farooq insisted that in his view 'Toba' is meant for hereafter. Faqir said that when a person does 'Toba', it is necessary to watch his performance subsequently to see whether 'Toba' was genuine or not. Majida said that it is obvious that this is a badly drafted legislation and it has to be determined as to how is 'Toba' to be resorted to and in what manner and what will be the consequences of it. Usmani agreed with what was suggested by Majida. Farida read out the opinions of various Islamic jurists of different school of thoughts according to which the hands and the feet were to be cut in different fashions. Farooq said that the views of the various jurists are different and sometime opposed to each other. These have no basis in the Quran and Sunnah and these are the personal opinions of the jurists. Usmani said that these are just the opinions of the jurists and hence cannot be equated with the injunctions of Quran and Sunnah.

CONCLUSION

It was generally agreed that the provisions regarding sentences in this Section need to be reviewed in the light of Verses 36, 41 and 42 of Surah Al-Maidah. It appears from the draft of this section that this is defective and it should be redrafted in the light of the provisions of Quran and Sunnah.

SECTION 10

Shakir said that he did not understand why a guest would escape Hadd. Majida said that the same could be said for subsection (c) regarding a servant. Zahid asked a question, is there anything mentioned in the Quran and Sunnah regarding these exemptions and if one cannot find this in Quran and Sunnah then it should be amended. Farooq said that there is no basis for all these exceptions in the Quran and Sunnah. This has been deduced from the writings of Fuqhas or jurists and it is for us to accept these or not to accept these. Turabi agreed with the contention of Farooq. Haider said that it is not in accordance with Quran and Sunnah and the contents of this are based on the opinions of various jurists. It is quite illogical to say that a person who is a guest and then he violates your confidence should not be subjected to Hadd. Similarly an employee of a Baitul Maal should not be punished with Hadd just because he has a share in the Baitul Maal even though the concept of Baitul Maal is finished. In these cases we should only restrict ourselves to Quran and Sunnah and should not go by the opinions of the jurists. Zaman said that one should not reject anything which has been said by the jurists. The only way the opinions of the jurists can be changed is through Ijtehad and that too through the procedure laid down and it is to be done by people who are not capable of doing that. Zahid said that one has to look into the definition of "Iztirar" because it entails being placed in apprehension of death. Such a situation could occur even if there is no apprehension of death. Farooq said that if a person is in poor circumstances then he does not have to die to come within the purview of "Iz tirar. Zaman suggested that since these words i.e. "Ikrah" and "Iztirar" have been described in the Quran there is no need to be defined these in this Section. Zahid said that it may not be appropriate because the Court has to be given some guidance as to what these words mean. Majida agreed that basic parameters have to be established otherwise the matter will be left entirely to the discretion of the Judge which may not be a very good situation to be in.

CONCLUSION

Generally it is agreed that the list can be varied according to the circumstances. The definition of "Iztirar" should be widened to include cases of extreme poverty. Zaman said that the word Iztirar need not to be defined in it and its interpretation should be left to the Judge.

SECTION 11

Zaman asked what happens to a witness if he resiles from his earlier statement? Usmani answered by saying that he will be guilty of perjury and so did Zahid. Usmani said that it is up to the Court as to what punishment should be given to the person who commits perjury. Zahid said that subsection (d) does not make much sense. Haider said that there is lot of ambiguity here particularly in the use of the word "serviceable". It is obvious that this subsection (d) is a product of interpretation and consequently, it can be altered by the State. Zahid said that it is most illogical that if a person has committed theft of millions of rupees and his thumb has been amputated then his hand will not be cut but if a person has stolen 5000 rupees then his hand will be cut. Majida said it is obvious that this is a badly drafted section and ought to be redrafted. Farooq said that all these exceptions are based on the opinions of jurists and it is for us to see whether they should be maintained in the present circumstances or not. Zahid said that merely saying that the law should be redrafted will serve no purpose. Either we should say this law is to be scrapped altogether and then the matter be referred to the experts who should then draft a new law, merely saying that the law should be amended or redrafted will achieve nothing.

CONCLUSION

Subsection (d) of this section appears to have no justification and needs to be deleted. In fact the whole section needs to be re-drafted.

SECTION 12

All agreed that subsection (1) is acceptable in its present form. Majida asked in so far as section 12(2) is concerned, how will the victim be compensated. Haider said that there will be no need for compensation because the person has been punished and the property does not exist anymore. Haider said that this happens to be a law of theft and not of compensation. Farooq said that there should be compensation. Majida said that it will be very unfair that on the one hand one has suffered and has also been demoralized by the theft and yet for compensation one has to initiate legal proceedings which would mean one would incur costs and expenses. Zaman said this would mean that the best thing for a thief is to immediately consume what he has stolen. Haider said that the same is the procedure under the Penal Code. Zaman said that if the stolen property has been consumed then the thief must return either the property or compensate the victim. Farooq said that since this is an offence against the property then the compensation must be paid by the thief.

CONCLUSION

There are two opinions. First that if the property is lost or consumed there should be no compensation and the person who is affected will take action according to law. Second, that the person who is the victim must receive compensation under this very law.

SECTION 13

Majida said that there is no need for any discussion on this Section. However, Zaman said that it is necessary to look into this little closely. Farooq said that in his view theft in circumstances mentioned in Section 13 would also be liable for Hadd and he qualified this by saying that this was his personal view. No further discussion was held.

CONCLUSION

Accepted as it is. However, Farooq said that his personal opinion is that if the Court is satisfied that the conditions so allow Hadd should be imposed.

SECTION 14

No discussion.

SECTION 15

Haider said that in so far as Quran is concerned, the word Haraabah means to wage war against God and here we have given away restrictive meaning to this word. He further said that in his view this definition has been given only to protect the vested interest of the affluent classes. He further said that it is ironical that whereas a person who commits theft of a small amount, his hands or feet will be cut but a person who commits an act of Haraabah as defined will not be punished that severely. Haider said that in the definition of Haraabah it should also include other things as mentioned in Surah Maidah, whereas Zaman did not agree with that, according to him, the definition was reasonable. Farooq said that Haraabah definition should be an all encompassing definition. Farooq suggested that perhaps he could define dacoity rather than Haraabah here. What in fact has been done is that the definition mentioned in Surah Maidah has been curtailed.

CONCLUSION

The correct word is "Hiraabah" and not "Haraabah". The definition of the word has been limited with vested interest to safeguard the interest of the rich, which should be defined in reference to Verse of Haarabah. It is a very wide definition of the word Haraabah.

SECTION 16

Majida said that whatever has been discussed under Section 7 applies here as well. Majida said that the witnesses in this case also could be either male or female or Muslim or Non-Muslim and there is no justification as discussed earlier for prescribing only Muslim male witnesses for this purpose. Farooq said that he was even opposed to limiting the number of witnesses to two. According to him there could be even one witness and any other method of proof of the crime could be resorted to. However, Zaman said that according to him the evidence should be restricted to only Muslim male and to two witnesses as laid down. Haider said that this provision appears to be rather ironical. From this it would appear that if a person was to commit

Hiraabah and in that he was to harass inmates of group of houses in a village but does not take away any property then he would only be punished with 30 stripes.

CONCLUSION

· Arguments as in the discussion on Section 7 of this Ordinance, shall be applicable here also. Even for witnesses the same arguments will be applicable.

SECTION 17

Farooq said that the Quran is very specific about the punishment for Hiraabah and no variation is possible. Farida said that there are Hadiths to the effect that the Holy Prophet (PBUH) had given punishments for Hiraabah. Haider said that if somebody enters forcibly into some one's house to commit theft but is not successful then there is no justification for his punishment to be reduced because he has committed the act and any reduction in the punishment will not be in accordance with the spirit of Quran. In fact in such cases the punishments under Quran would be exile, which in the modern term would entail life imprisonment. Faqir said that the definition of exile as being life imprisonment does not appear logical. Farooq said, as far as Quran is concerned, exile means dislocation from one's home permanently. However, he stated that during the time of the Holy Prophet (PBUH) he also gave concession, which would mean that a State can in accordance with the circumstances vary punishment if so required. Majida said we must not forget that we are here to discuss Hiraabah in limited sense and not the Hiraabah as described in Surah Maidah. Zaman said that in his view the punishments mentioned in this section should be reviewed in the light of surah Maidah.

CONCLUSION

The punishments may be reviewed in reference to the suggestions given in Section 15 of this Ordinance in regard to the definition of Hiraabah.

SECTION 18

Same arguments as under Section 10 and 11 of this Ordinance.

SECTION 19

No discussion.

SECTION 20

Faqir said that " fine" here could it be paid as compensation or will it be treated like fine and the proceeds will go to the Government. In response Haider said that this will be normal fine under the law and be treated accordingly. Shakir said that he agreed with the suggestion regarding compensation but the philosophy of criminal law is that once a person is punished and he completes his sentence he stands exonerated and hence there is no possibility of compensation.

CONCLUSION

Possibility of paying compensation should be examined.

SECTION 21

Haider said that the only suggestion he has is that the sentence starting with the words "on the understanding that he shall receive one or more of the cattle" should be removed because there is no sense in keeping this and it will be difficult to prove in a Court of law. Majida said that nobody would protect a thief unless he has a vested interest in it. Faqir said that there would be no justification for giving such heavy punishment unless the person concerned has a share in the stolen goods and consequently the removal of word "understanding" may not be appropriate. Majida said that if the word "understanding" is to be removed then the punishment prescribed must also be reduced to which suggestion most people agreed. Everybody agreed that the punishment must be reduced from 14 years to 5 years and the number of stripes be reduced to about 30. Faqir said that what will happen if somebody receives a thief whom he knows to be a thief and thus gives protection to him but has no share in the loot, what will happen then, whether he shall fall in the purview of this Section? Zaman said that in his view the punishment of a person who protects a thief must not exceed that of a thief, secondly, he said that if someone gives protection to a thief without knowing that he has committed an offence then there must be some way of not implicating him. Haider said that in PPC theft of cattle would bring about imprisonment of 3 years.

CONCLUSION

Unanimously it is recommended that the words "on the understanding that he shall receive one or more of the cattle" may be deleted from the said subsection. And the punishment may be reduced from 14 years to 5 years and the number of stripes to be reduced to about 30. Remaining part of subsection is to be remain as it is.

SECTION 22

No discussion. Accepted by everybody.

SECTION 23

No discussion.

SECTION 24

Since this section relates to the procedure, no discussion is warranted.

SECTION 25

Since similar Section has been discussed in detail under the other Ordinances, there is no need to discuss it further and the conclusion arrived at after the previous discussion would apply to this Section as well.

SECTION 26

No discussion.

MEETING OF SUB-COMMITTEE TO REVIEW OFFENCE OF PROHIBITION (ENFORCEMENT OF HADD) ORDER, 1979 HELD ON 26TH OCTOBER, 2002 AT AVARI HOTEL, KARACHI

PARTICIPANTS:

1.	J ustice{R} Majida Rizvi (Chairperson)	-	Majida
2.	Justice Nasir Aslam Zahid	-	Nasir
3.	Justice {R} M. Shaiq Usmani	-	Usmani
4.	Dr. Faqir Hussain	-	Faqir
5.	Ch. Naeem Shakir	-	Shakir
6.	Nahida Mahboob Elahi	-	Nahida
7.	Dr. S.M. Zaman	-	Zaman
8.	Syed Afzal Haider	-	Haider
9.	Dr. Farida Ahmad	-	Farida

REGRETS:

1. Justice{R} Taqi Usmani
2. Allama Aqil Turabi
3. Dr. M. Farooq Khan
4. Ms. Shehla Zia
5. Professor Rafiullah Shahab
6. Ms. Hina Jilani

ARTICLE 1 (2)

The participants' views were similar in this regard as in other Ordinances.

ARTICLE 2(a)

As discussed earlier in the other Ordinances with reference to puberty.

ARTICLE 2(b)

No discussion.

ARTICLE 2(c)

Haider pointed out that if the contents of the bottle are not for sale then technically speaking it will not be a bottle.

ARTICLE 2(d)

No discussion.

ARTICLE 2(e)

No discussion.

ARTICLE 2(f)

No discussion.

ARTICLE 2(g)

No discussion.

ARTICLE 2(h)

Someone enquired about the definition of the word "toddy". Majida said that this means a drink made out of spirit, sugar and water. Majida said that there appears to be no explanation why a solid intoxicant even if liquefied is excluded from the definition of intoxicated liquor. Nahida pointed out that some of these definitions are present in Narcotic Laws and consequently one has to see whether there is overlapping of the definitions between the two legislations.

CONCLUSION

ARTICLE 2(i)

Zaman questioned as to what 'rectification' of intoxicating liquor means. Majida said that this means purification of liquor.

ARTICLE 2(j)

No discussion.

ARTICLE 2(k)

No discussion.

ARTICLE 2(l)

No discussion.

ARTICLE 2(m)

No discussion.

ARTICLE 2(n)

No discussion.

ARTICLE 2(o)

No discussion.

ARTICLE 2(p)

No discussion.

ARTICLE 3

Faqir said that a number of laws are overlapping in this case namely, the Customs Law and Narcotics Law and hence, there have been incidences where people have been let off on the ground of double jeopardy. Haider suggested that the best thing would be to delete Articles 3 and 4 and concentrate on the consumption of intoxicants. Faqir asked a question whether narcotics are included in intoxicants and can one using narcotics be also charged under the Ordinance. Haider said that under the principle of Qias now intoxicants are included in narcotics. Haider further said that one can understand that consumption of intoxicants should be punishable under Hadd but as far as its sale, manufacture and possession is concerned, that should be dealt with under a different law. Farida said that she does not agree and in her view anybody who indulges in manufacture, sale or possession would be equally liable under Hadd. Zaman asked a question then what is the punishment for people who violate Articles 3, 4 and 5 to which Nahida said that all these are covered under the Customs laws. Usmani said that it is not correct to say that the drugs like opium etc. are also regarded as intoxicants because Article 3(1) deals with intoxicants and Article 3(2) deals with the drugs such as opium etc. Usmani further said that Hadd punishments are basically for intoxicants rather than for drugs. Nahida, however, did not agree and said that even the drugs would come under intoxicants. Majida said that Article 3(1) ought to be retained because it deals with intoxicants. Usmani further said that when one talks of intoxicant one talks of drink, which is derived from a process of fomentation but as far as the drugs are concerned, these do not undergo the process of fomentation. Majida said that Article 3(2) definitely overlaps with other legislations. Majida further said that Article 3(2) cannot be part of Hadd law. Nahida said that the punishments prescribed in Article 3(2) are at time lesser than those prescribed under the Narcotics law. It is clear that these matters can be dealt with under Tazir and have no connection with Hadd. Zaman also agreed with this proposition.

CONCLUSION

It appears that the punishments described here are more in the nature of Tazir than Hadd and it should come under Tazir and not under Hadd. This Article overlaps with the Control of Narcotics Substance Act, 1997.

ARTICLE 4

Shakir said that there is no provision in the Christian law whereby intoxicating liquor is used for any religious ceremony. Usmani said that the onus would be on the person claiming the exemption of religious ceremony to show that using of intoxicant is part of the religious ceremony hence, there is no problem in maintaining this provision. As regards second proviso of

Article 4, it has already been discussed that the proviso with regard to drugs should not be there as it is more a part of Tazir. However, Zaman raised a question why is it that the quantities of the drugs are mentioned here. Majida said that the second proviso is already covered under the narcotics.

CONCLUSION

The second proviso of Article 4 has already been provided for in the Control of Narcotics Substance Act, 1997 and, hence it is duplication and should be removed.

ARTICLE 5

No discussion.

ARTICLE 6

Haider said that why is this Article made applicable whether the taking of the drink causes intoxication or not, because there are people who could consume a great deal and yet do not get intoxicated. Usmani said that the law is that the very act of drinking is forbidden regardless of whether it leads to intoxication or not.

CONCLUSION

There were no disagreements regarding the definition in this Article.

ARTICLE 7

No Discussion.

ARTICLE 8

Usmani asked a question whether the punishment for drinking has been prescribed in Quran? Everybody answered "no". He then asked whether it is prescribed in Sunnah? To which the answer was again "no" and then Haider said that this punishment has been derived from Ijma. Usmani then said that in an earlier discussion Faqir had said that during the time of Holy Prophet (PBUH) there was no particular punishment prescribed for drinking and in fact if a person was found drinking he was slapped around a bit or was confined to his home. Faqir then answered it is true that first time the punishment of drinking was prescribed was during the time of Hazrat Umar. Zaman said that it can be said historically that it is the Sahaba Karams who opted for Hadd punishment for drinking and consequently it could be said it was part of Sunnah. To this Majida and others disagreed and said that the traditions of the Sahaba Karams cannot be regarded as Sunnah. Usmani said that under the circumstances what one should do is to put drinking under Tazir and then give whatever punishment one wants even to the extent of beheading the person who drinks but apparently there is no justification to have Hadd punishment for drinking. Farida said that as far as she remembers the Holy Prophet (PBUH) did give Hadd punishment for drinking but she could not quote any Hadith. Zaman seemed to agree

with Farida, however, Faqir insisted that no punishment was fixed in Quran and Sunnah for drinking though there were other punishments given for drinking. Usmani said that if a person is found drinking he could be killed or given other severest punishment possible but how can he be punished with Hadd when it is not prescribed in Quran and Sunnah. Majida also agreed with this and said that it could be placed under Tazir. Zaman said that as far as he was concerned, the punishment of Hadd for drinking was part of Sunnah but he could not particularly quote any incidence or Hadith but for this more research is required to be done. Farida said that there are incidences from the history during the time of the Holy Prophet (PBUH) when the Holy Prophet (PBUH) had administered punishments of hitting a drunk person by a branch from a date palm. Usmani said that there is no doubt that drinking is a social evil which is recognized all over the world and that some punishment ought to be prescribed to control drinking or to stop it but the question that arises here is why is it part of Hadd, why can't the punishment be administered under Tazir. Haider said that if we assume for a moment that the punishment for drinking falls under Hadd how can enhanced punishment be given such as imprisonment etc. Zaman said that one has to remember that the Sahaba Karams were aware of what Holy Prophet (PBUH) had done and if the Sahaba Karams had added something to it, it would not mean the amendment of the punishment, it will be a mere endorsement of it. Haider said that what one has to realize is that this particular law being discussed in this forum has not been given to us by Quran or Islam but by a Martial Law Administrator i.e. Zia-ul-Haq. Majida said that if the punishment has been prescribed by the Islamic law of say 80 stripes then nobody can add to it and thus it should stay only 80 stripes and nothing more. Farida said that a ruler at a particular time can make amendments in the punishment depending on the circumstances.

CONCLUSION

The majority of the participants agreed that punishment prescribed for drinking is not part of Quran and Sunnah.

ARTICLE 9

Majida posed a question why only male witnesses are mentioned here, why not females? Nahida also agreed with this and found no justification for limiting the witness to only Muslim witnesses, particularly because everybody agreed that the act of drinking is normally carried out mostly in company of non-Muslims and thus to exclude non-Muslims would mean that you are excluding a large number of potential witnesses. Zaman also agreed with what Nahida were saying. Most people agreed that this provision regarding Muslim witnesses was discriminatory. Majida said that as regards Tazkiyah-al-Shuhood presumably the same arguments would apply as have been advanced earlier.

CONCLUSION

Provisions regarding two Muslim witnesses needs to be looked into. Similarly exclusion of female witnesses also does not appear logical.

ARTICLE 10

Nahida posed a question that if a person retracts his confession could he do it before the punishment being imposed or after. Faqir said that all it means is that if a person confesses

before Hadd then that person will have to be re-tried. Faqir raised a point whether confession has to be four times or only once. Zahid also raised a point that as far as Article 10(1)(b) is concerned, if a witness resiles then that would mean that the accused would be acquitted because there is no provision for retrial as it is in case of Article 10(1)(a). Usmani pointed out that the provision for retrial applies to both occasions i.e. a confession as well as resiling of a witness as provided for in Article 10(2). Faqir said that this would mean that if there is a confession or resiling of witness then the matter can be tried under Tazir. Faqir said that it would appear that if there is a retrial, there is a possibility that there could be a punishment under Hadd. Zahid said that in normal circumstances the Court would not permit new witnesses to be examined and the same witnesses as in the previous trial would be examined even though Section 540 of Cr.P.C. does provide for new witness to be examined but that is at the discretion of the Court. Usmani that a plain reading of this Article would indicate that once one witness resiles then Hadd cannot be given because it can only be given when there are two witnesses, consequently the retrial would only bring about a punishment under Tazir and not under Hadd. Majida said that considering that Article 10(2) mentions Cr.P.C. it would mean that the retrial would be under Tazir. Faqir then posed a question that suppose in a case there are witnesses available and yet there is a confession and if the confession is retracted, then is it possible for the Court to proceed with retrial with the two witnesses available and if so will the Court not be able to give punishment of Hadd? Zahid said that normal procedure is that the stage of confession comes only after the prosecution has closed its side and has examined all the witnesses. Nahida said that it may not be quite right because the confession can also be done after framing of charge. Zahid further said that in serious cases like murder, zina or cases liable to Hadd, the Court will definitely record evidence and even if the person confesses, the evidence will still to be recorded and the Judge has to decide whether he should accept the confession or not and whether there is sufficient evidence to convict the accused. In all serious cases the evidence is recorded despite confession. In the circumstances that prevail in Pakistan the confession can always be retracted and hence, the Courts normally would not rely on confession. Nahida said that in such cases the Court is not obliged to record evidence if the accused confesses and consequently when law talks of retrial it is logical. Faqir said that the pattern here appears to be different to other Hudood Ordinances where if the witnesses resile then the accused is punished under Tazir whereas in this case there is a provision for retrial. Usmani said that whereas in other offences where Hadd is applicable there is a requirement of witnesses because the crime cannot be proved otherwise but in case of drinking there is no need for witnesses as the act of drinking can be proved by other means such as breathliser test, blood test etc. consequently, if the two witnesses as the law provides are not available because one resiles or otherwise, then the only alternative is to punish the accused under Tazir. Usmani further said that the retrial is necessary because once one witness goes then the person cannot be tried under Hadd so a trial becomes necessary because then the offence will have to be proved through other means of evidence. Usmani emphasized that Hadd can only be imposed through eye witnesses, a witness merely producing medical record would not fall in such a category of eye witness. Zaman agreed with what Usmani said. Faqir said that if you read Article 9(b) then you would see that there is really no requirement of eye witnesses.

CONCLUSION

It is not clear here whether in the event a case falls under Article 10(1)(a) and 10(1)(b) after the retrial would it be under Tazir or Hadd.

ARTICLE 11

Usmani posed a question why there is a distinction between a non-Muslim citizen of Pakistan and a non-Muslim, not a citizen of Pakistan? Haider said that the reason for this is that whereas a non-Muslim, not a citizen of Pakistan will be liable for punishment if he drinks at a public place, whereas a non-Muslim citizen of Pakistan will be liable for punishment if he drinks anywhere except as part of ceremony prescribed by the religion. Usmani said that this provision regarding non-Muslim not being a citizen of Pakistan is anomalous because how does a non-Muslim, not citizen of Pakistan come in possession of drinks in a public place because under the laws in Pakistan no one can bring in any alcoholic drinks into the country except through bond which is meant for the non-Muslim citizens of Pakistan. Zahid supported Usmani and read out Article 3 of this Ordinance which clearly says that nobody is allowed to import any alcoholic drinks. Haider then pointed out that under Article 5 the drinks could be available to people under a licence or under an order or notification.

CONCLUSION

It should go under Tazir.

ARTICLE 12

No discussion. It was agreed that it should go under Tazir.

ARTICLE 13

No discussion. It was agreed that it should go under Tazir.

ARTICLE 14

No discussion. It was agreed that it should go under Tazir.

ARTICLE 15

No discussion. It was agreed that it should go under Tazir.

ARTICLE 16

Haider said that under Article 16(2)(a) you are depriving an ordinary citizen of Pakistan from lodging a complaint under Article 12 or 13 and are giving this privilege only to Government officials. Zahid said that even if a person's wife or child wants to lodge a complaint, he or she would not be able to do it. Zahid suggested that the best solution is that we delete Article 16(2)(a) and retain 16(2)(b).

CONCLUSION

It was agreed that it should go under Tazir.

ARTICLE 28

No discussion. It was agreed that it should go under Tazir.

ARTICLE 29

Majida pointed out that there are so many other laws which are overlapping with this Ordinance and consequently, this provision can create problems. Zahid suggested that you should make an observation that the provisions in the Narcotics Laws which are overlapping with these laws should be suitably amended so that there is no overlapping.

CONCLUSION

It has been suggested that the laws regarding narcotics must be suitably amended so that there is no overlapping.

ARTICLE 30

Zahid said that there would be problems if the appeal comes before a non-Muslim Judge. Generally every body agreed that it should not be necessary for the Judge to be a Muslim. However, Farida said that it is better to have a Muslim Judge because Muslim should be more familiar with the Islamic laws.

CONCLUSION

Everybody agreed that Judge need not necessarily be a Muslim. However, Farida did not agree with this and maintained that this Article as it is, is correct.

ARTICLE 31

No discussion. It was agreed that it should go under Tazir.

ARTICLE 32

No discussion. It was agreed that it should go under Tazir.

ARTICLE 33

No discussion. It was agreed that it should go under Tazir.

ARTICLE 34

This Article is overlapping by the Control of Narcotics Substance Act, 1997.

THE SCHEDULE

No discussion.

Annex-VI

MEETING OF SUB-COMMITTEE TO REVIEW OFFENCE OF ZINA (ENFORCEMENT OF HUDOOD) ORDINANCE, 1979 HELD ON 16TH AUGUST, 2003 AT KARACHI

Minutes of the Meeting of the Special Committee to Review the Hudood Ordinances, 1979.

The following members attended the meeting:

1. Justice ® Majida Razvi
2. Justice® M. Shaiq Usmani,
3. Ms. Hina Jilani,
4. Dr. M. Farooq Khan,
5. Mrs. Nahida Mahboob Elahi,
6. Dr. Farida Ahmed,
7. Syed Afzal Haider,
8. Dr. Faqir Hussain,
9. Mr. Suhail Safdar, Secretary,

The Chairperson apprised the Members that in a meeting dated 6th & 7th June, 2003, held at Hunza, the Draft Report of the Committee which was circulated earlier was put up before the Commission for discussions. The Members commented that the recommendations should be clear according to the terms of reference whether the Hudood Ordinances are to be repealed or be amended and requested the chairperson to call another meeting for this purpose.

In the above circumstances letter dated 23.8.2003 was issued to call the meeting and members were request that in case they cannot attend the meeting they should send written comments.

Ms Shehla Zia, Charmaine Hidayatullah, Ch. Naeem Shakir, Justice ® Nasir Aslam Zahid, Dr. S.M. Zaman and Ms. Rahila Durrani, has sent their comments in writing and could not attended the meeting due to other commitments. The members present gave their opinion personally which are as follows.

1. **Justice (Retd.) Majida Razvi** said that the drafting of Hudood Ordinances is very defective due to which there are numerous lacunas and anomalies which could not be removed by amendments. In her opinion these laws are not in accordance with the Islamic injunctions. Since the introduction of the Hudood Ordinances the women of the country have suffered and put in j ails for no fault of theirs. Laws are meant to do justice and if it does not serve the purpose there is no justification for these laws to remain in the statute book and should be repealed and the original laws be restored.

2. **Justice (Retd.) M. Shaiq Usmani** said that due to numerous defects and lacunas in the Hudood Ordinances number of anomalies have been created which have led to

injustice particularly to women in the implementation ofZina and Qazf Ordinances. The defects in the Ordinances are so basic that amending these would serve no useful purpose and may bring about more injustice. The experience of the last 24 years has shown that these Ordinances have been counter productive and have added to the misery of the people in general and the women in particular. Thus he felt that Hudood Ordinances ought to be repealed.

3. **Ms. Hina Jilani** said that the Committee's terms of references were either to recommend repealing of the Hudood Ordinances or to amend them. The Committee should not go beyond the terms of reference. Moreover, the Committee cannot recommend effect preservation of the present law or to introduce fresh law as it would also be beyond its terms of reference. She also said that the tenor of Committee's report was such that it would appear that it sees no problem with the concept of Hudood Ordinances being in accord with Quran and Sunnah. This too, according to her was beyond the terms of reference of the Committee and was never a part of discussion and hence should not form part of the report of the Committee. She recommended the repealing of Hudood Ordinance.

4. **Dr. M. Farooq Khan** said that the Hudood Ordinances the way these have been enforced, have no basis in the Quran and Sunnah. He was in agreement with others to the effect that there are a number of loopholes and the lacunas in Hudood Laws and as such he was of the opinion that any amendment would serve no purpose at all and thus the Ordinances ought to be repealed.

5. **Mrs. Nahida Mahboob Elahi** said that she sees no purpose in giving these Hudood Laws cover of PPC because that was not part of the terms and reference of the Committee. She was of the view that the Hudood Ordinances should be repealed and the original law be reinstated.

6. **Dr. Farida Ahmed** said that she did not agree with the statement that these Ordinances have no basis in Quran and Sunnah. According to her, these laws are based on Quran and Sunnah. However, she felt that there might be some loopholes and lacunas in the ordinances, which can be corrected through amendment rather than repealing.

7. **Mr. Syed Afzal Haider** said that there is no doubt that after the enforcement of these Hudood Laws incidents of gang rape have increased and he felt that there are many defects and loopholes in the Hudood Laws and was of the view that the Ordinances ought to be repealed and the original laws be reinstated.

8. **Dr. Faqir Hussain** said that recommending the mere repeal of the Offence of Zina (Enforcement of Hudood) Ordinance, without an alternative reformative framework, is not appropriate, as it would cause void/gap in legislation, which is undesirable. As such, the Special Committee may assist the Government/Parliament by stating in the Report the grounds/reasons for its repeal and the principles of alternative legislation. As regards the said Ordinance, his conclusion was that the ordinance is not in

has resulted in oppression of women inasmuch as a number of women are languishing in jails. She, therefore, recommended that Hudood Ordinances should be repealed.

15. Justice (Retd.) Taqi Usmani, Allama Aqil Turabi and Noor Muhammad Shahtaj did not give any comments or opinion with regard to the Hudood Ordinances even though Allama Aqil Turabi and Noor Muhammad Shahtaj did participate in most of the meetings. Justice (Retd.) Taqi U small did not participate in any of the meetings as he had declined to participate.

RECOMMENDATIONS OF THE SPECIAL COMMITTEE

An examination of the Minutes of all five meetings which have been summarized in this report and the consideration of opinion of the members of Committee, including the Chairperson, would reveal that out of fifteen (15) members, who have actively participated in the deliberations regarding Hudood Ordinances and have given their views in person and in writing, twelve (12) members have recommended that Hudood Ordinances should be repealed while only two (2) have recommended that these should be retreated but amended with a view to removing defective parts of its and one (1) member has chosen not to express any definite opinion but has maintained that recommendations of Committee should be given effect to.

This Special Committee, therefore, wishes to record that the Members of the Committee are unanimous in arriving at the conclusion that the Hudood Laws as enforced are full of lacunas and anomalies and the enforcement of these has brought about injustice rather than justice, which is the main purpose of enforcement of Islamic law. Consequently, by a majority this Special Committee recommends that all four Hudood Ordinances, 1979 should be repealed and the original law with regard to offences mentioned in these Ordinances be restored. However, in order to give due consideration to those members in minority who have recommended amendment to the Ordinances rather than repealing of it, the Special Committee suggested that if after repealing as recommended by the Committee, Hudood laws are required to be enforced, the draft of it should be first widely circulated with a view to seeking opinions of various sections of population and then these should be placed before the Parliament for a full fludged debate.

(JUSTICE (R) MAJIDA RIZVI)
Chairperson
Special Committee.

No. 1-2/2000/C(NCSW)
GOVERNMENT OF PAKISTAN
NATIONAL COMMISSION ON THE STATUS OF WOMEN
State Life Building No. V, Jinnah Avenue,
Tele No. 9202435, 9210563, Fax 9203132 (PP)

Islamabad, the 9th May, 2002.

NOTIFICATION

SUBJECT :- *Establishment of A Special Committee to Review The Offence of Zina (Enforcement of Hudood) Ordinance,* 1979

In order to review the subject Ordinance, a Special Committee with the following composition is hereby set up by the National Commission on the Status of Women to deliberate upon the contents of the Ordinance and give recommendations whether the Ordinance is to be repealed or if the same can be made just fair and equitable with amendments.

1.	Justice (R) Majida Rizvi	Chairperson
2.	Justice (R) Nasir Aslam Zahid	Member
3.	Prof. Rafi Ullah Shahab	Member
4.	Justice (R) Taqi Usmani	Member
5.	Ms. Shehla Zia	Member
6.	Ms. Hina Jillani	Member
7.	Justice (R) Shaiq Usmani	Member
8.	Allama Talib Jauhri	Member
9.	Dr. Faqir Hussain	Member
10.	Dr. S.M. Zaman	Member
11.	Dr. Farida Ahmad	Member
12.	Ms. Rahila Durrani	Member
13.	Ms. Charmaine Hidayatullah	Member

The Special Committee will submit its Report to the NCSW Sectt within six weeks of issuance of this Notification.

Sd/
(SHAUKAT N. TAHIR)
Member Secretary

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GOVERNMENT OF PAKISTAN
NATIONAL COMMISSION ON THE STATUS OF WOMEN

No. F. 1-31/2000 (C) NCSW. *Islamabad, the 22nd May 2002.*

Subject :- ***Meeting of a Special Committee to Review the Offence ofZina (Enforcement of Hudood) Ordinance, 1979.***

Reference Notification No. 1-2/2000 (C) NCSW, dated 9th May 2002.

2. The Chairperson, National Commission on the Status of Women is pleased to call the Special Committee meeting on the subject on 27th-28th May, 2002 at 10.00 a.m. At Hotel Avari Tower, Karachi to deliberate upon the contents of the Ordinance and give recommendations whether the Ordinance is to be repealed or if the same can be made just fair and equitable with amendments.

3. Members of the Special Committee are requested to attend the meeting.

4. Air travelling by economy class, hotel accommodation and Daily Allowance will be provided to the Members of the Committee, who will be travelling to Karachi from out station, to attend the meeting.

Sd/
(NAIMUDDIN ANWAR)
Staff Officer to Chairperson

Enclosure: Copy of Zina
(Enforcement of Hudood) Ordinance 1979).

Distribution:

1. Justice (R) Nasir AslamZahid, Member
2. Prof. Raft Ullah Shahab, Member
3. Justice (R) Taqi Usmani, Member
4. Ms. Shehla Zia, Member
5. Ms. HinaJillani, Member
6. Justice (R) Shaiq Usmani, Member
7. Allama Talib Jauhri, Member
8. Dr. Faqir Hussain, Member
9. Dr. S.M. Zaman, Member
10. Dr. Farida Ahmad, Member
11. Ms. Rahila Durrani, Member
12. Ms. Charmaine Hidayatullah, Member

c.c.

1. Member Secretary, NCSW.
2. RO. NCSW.
3. D.D.O.
4. SSP. Security, Sindh Police Karachi.

State Life Building No. V, Jinnah Avenue, SectorF-6/4, Islamabad. Tel: 051-9202435, 9201563,Fax: 051-9203132

GOVERNMENT OF PAKISTAN
NATIONAL COMMISSION ON THE STATUS OF WOMEN
State Life Building No. V, Jinnah Avenue, Sector F -6/4,
Ph: 051-9202435,9210563, Fax: 051-9203132 (PP)

The Commission in its 10th meeting held on 26th, 28th April 2003 at Karachi resolved to set up a Committee comprising of members, retired Judges, Jurists, Scholars, Lawyers from human rights and from minorities. It consisted of the following members as notified:

1. Justice (R) Majida Razvi
2. Justice (R) Nasir Aslam Zahid
3. Justice (R) M. Shaiq Usmani
4. Justice (R) Taqi Usmani
5. Allama Talib Jauhri
6. Dr. Faqir Hussain
7. Ms. Rahila Durrani
8. Dr. Rafiullah Shahab
9. Dr.S.M.Zaman
10. Dr. Farida Ahmed
11. Ms. Charmaine Hidayatullah
12. Ms.Hina Jillani
13. Ms. Shehla Zia

Justice Taqi Usmani & Allama Talib Jauhri indicated their inability to participate.

Mr. Rafiullah Shahab having problems gave his opinion in writing and afterwards did not attend the meeting.

The following members were added to the Committee:

1. Allama Aqil Turrabi
2. Ch. Naeem Shakir
3. Mr. Afzal Haider
4. Mr. Noor Muhammad Shah Taz
5. Ms.Naheeda Mehboob Ellahi

Initially the time given to the Committee was six weeks and then further extended as the task of reviewing four Ordinances word to word & clause to clause was found impossible to be completed in six weeks. The proceedings were taped & video taped and the arduous task of transcribing these tapes was taken by Justice Shaiq Usmani.

Although after every meeting minutes were provided to all the members of the Committee. Yet at the end of last meeting floppies of five meetings of the Committee were prepared and sent to all members for their recommendations in view of the TOR of the Committees *i. e.* Whether the Hudood Laws should be repealed or if there is a possibility of amending these laws in accordance with the Islamic Injunctions.

While discussions were going on, a general consensus was build up that all these sections of Hudood Law which pertain to Tazir should again be included in PPC.

There was also consensus that these laws are badly drafted and there is a great necessity of improvement specially sections dealing with Zina & Zina-bil-J abr. My own opinion in this regard is on record that these laws have caused so much misery and untold tortures and excess that these must be repealed forthwith. There is no reason that Tazir part should remain part of these law. The same should form part of the Penal Code.

If the Government is sincere in bringing Hudood Laws, without first setting up an Islamic Society, then after consulting Islamic Jurists fresh law should be drafted in conformity with Islamic injunctions, circulate the same in public for opinion and only then finalize the same. These laws can also be incorporated in the PPC on the pattern of Qisas & Diyat Laws.

Sd/
(JUSTICE (R) MAJIDA RAZVI)

GOVERNMENT OF PAKISTAN
NATIONAL COMMISSION ON THE STATUS OF WOMEN
State Life Building No. V, Jinnah Avenue, Sector F -6/4,
Ph: 051-9202435,9210563, Fax: 051-9203132 (PP)

May 29, 2003

To,

All the Members of the
Special Committee on Hudood Ordinances.

I am forwarding herewith the draft report of the minutes of the Special Hudood Committee. Kindly send your comments immediately within a week from the date hereof so that the report can be finalized incorporating your comments, if any.

Sd/
(JUSTICE (R) MAJIDA RAZVI)
Chairperson

GOVERNMENT OF PAKISTAN
NATIONAL COMMISSION ON THE STATUS OF WOMEN

No. I-l/2000/©/19 NCSW

Islamabad, the 23rd August, 2003

SUBJECT :- ***19th Meeting o/the National Commission on the Status o/Women, scheduled/or 29th-30th August 2003 at the Commission s Secretariat.***

This is in continuation of our letter No. I-l/2000/©19 NCSW dated 20th August 2003, on the caption subject.

Kindly note, that the tentative arrangement for the accommodation of the out-station Members of the Commission has been made at Envoy Continental Hotel, Islamabad.

Further, reimbursement of the air traveling by economy class and daily allowance will be paid to the Members of the Commission, who will be traveling to Islamabad from out station, to attend the meeting.

All the Members are requested to kindly intimate to us their participation at their earliest convenience. In case, of any unavoidable pre-occupation, comments for the final approval of the reports in the forthcoming meeting may please be sent to us.

Sincerely,

Sd/-
(SYEDA VIQUAR-UN-NISA HASHMI)
Consultant/Coordinator

Distribution:

All Members of the National Commission on the Status of Women.

c.c.

1. Member Secretary.
2. D.D.O.

H. 59, St. 36, Sector F-6/4, Islamabad. Tel: 051-9224875, Fax 051-9224877

Allama Aqeel Turabi
Justice Ret Majida Rizvi sahiba
Chairperson
National Commission on the Status of Women

Justice Sahiba,

I must firstly apologize for my absence in the last meetings of the commission due to my ill health and personal commitments. However I feel that I must clarify my position to you in regard to the decision taken by the commission.

I have found through my research that the present Hudood ordinances have been carelessly formulated in most aspects without proper research and with criminal negligence in some cases, resulting in extremely biased laws, which have caused immeasurable anguish to countless people. These ordinances have also in many cases painted Islam in an extremely bad light and helped some international and national bodies to malign Pakistan for their own vested interests.

The decision taken to recommend the complete re-enactment of the laws is in my opinion extremely appropriate and I stand with the majority in this regard.

With respect and regards

Sd/-
ALLAMA AQEEL TURABI
I 9-9-2003

AURAT PUBLICATION AND INFORMATION SERVICE FOUNDATION

Apisf:

15 August 2003

Justice (Retd.) Majida Rizvi
Chairperson
National Commission on the Status of Women,
Islamabad

Dear Justice (Retd.) Majida Rizvi,

On behalf of Shahla Zia, I would like to convey the following message to you

Shahla Zia's message:

"I have been through the report on the Hudood Ordinances.
I hold to my position that the Hudood Ordinances must be repealed."

Message ends.

Looking forward to continuous cooperation with the NCSW.

Thank you and warm regards.

Yours Sincerely,

Sd/-
NAEEM MIRZA
Director Legislative Watch Programme

Head Office : 9/E Rizwan Plaza, First Floor, Blue Area, Islamabad.
Karachi Office : 238-B, Block 2, F.E.C.H.S., Karachi.
Phone # : 021-4549784
Fax # : 021-4549784
E-mail : charmaine@cyber.net.pk

NATIONAL COMMISSION ON THE STATUS OF WOMEN

Charmaine H. Hidayatullah
LL.B. LL.M.
Member of National Commission
on the Status of Women

Dated: August 12, 2003

Justice (R) Majida Razvi
Chairperson
National Commission on the Status of Women
Islamabad.

Dear Madam,

This is to inform you that I shall not be able to attend the special meeting on Hudood because I shall be leaving for U.K. for a period of one month. However I have gone through the draft report and the recommendations given therein these recommendations of the Special Committee may be passed as soon as possible.

Best Regards,

Sd/-
CHARMAINE HIDAYATULLAH
Member,
National Commission on the Status of Women.

To,

Honorable
Retired Justice Mrs. Majida Rizvi,
Chairperson, NCSW,.
Islamabad.

Dear Madam,

In response to your letter No. nil dated 8-01-2003 my comments are as under.

1. The zina law as it currently stands has inherent flaws that are domaging & discriminatory for women, This law is also not in the spirit of Islam as reflected in the Quran. In fact some sections of the Zina Ordinance are not according to Islamic laws.

2. It may also be noted that to date not a single case of zina has been proved or the punishment implemented. However large numbers of women and some men also are languishing in jails as a result of incorrect applications and abuse of the law.

3. As such I would recommend that the discriminatory aspects of the Hadood ordinance should be repealed or amend.

Yours Sincerely,

RAHILA DURRANI
Member
National Commission on the Status of Women.

Dated: 31st Jan. 2003

NATIONAL COMMISSION ON THE STATUS OF WOMEN

Dr. Mira Phailbus
Convener, Committee on Education

KINNAIRD COLLEGE FOR WOMEN

Prof. Dr. Mira Phaibus
Principal
93-Jail Road,
Lahore-54000
Pakistan.
Tel:92-42-7569532-5
FAX: 92-42-7587018
E-mail: kcw@wol.net.pk

29th August 2003
KC/NCSW/132a

Fax - 051-9224877

Justice (Retd.) Majida Rizvi
Chairperson
National Commission on the Status of Women
Islamabad.

Dear Justice Majida,

This to kindly inform you that I have read the draft report of the NCSW Annual Report as well as studied the report submitted by the Hadood Ordinance Committee and found them both very satisfactory and informative.

As the Minority Representative on the Commission, I was very pleased to note the concern expressed by the members on the Hadood Ordinance Committee who have specifically expressed there concern for the minorities and clearly stated that the Hadood Ordinance should not apply to the Minority Communities in Pakistan.

I would also like to take this opportunity to congratulate you for undertaking this mammoth responsibility and for having compiled a very comprehensive report on the workings and achievements of the NCSW.

With regards and best wishes,

Sincerely,

Sd/-
DR. MIRA PHAILBUS
Convener.

Justice Majida Rizvi (Rt.)
The Chairperson
National Commission on the Status of Women Pakistan
Islamabad

Ref Letter dated 08-01-2003

Dear Chairperson,

During deliberations in half a dozen meetings of the members of the Committee to Review the Hudood Laws, I tried to contribute as a jurist member in general and as representative of religious minorities in particular. Since final opinion has again been asked for from the members of the Committee, I may state as under:

The Hudood Laws were promulgated by Gen. Zia-ul-Haq to introduce punishments of Hadd in criminal law of the country in order to bring it in conformity with the Injunctions of Islam as set out in the Holy Quran and Sunnah. These laws included,

I. The Offence of Zina (Enforcement of Hudood) Ordinance 1979.
II. The Offences against Property (Enforcement of Hudood) Ordinance, 1979.
III. Prohibition Enforcement of Hadd Order IV 1979.
IV. The Offence of Qazf (Enforcement of Hudood) Ordinance 1979.
V. The Execution of the Punishment of Whipping Ordinance 1979.

1. In each of four penal laws, with the exception of a couple of provisions about Hadd punishment, the rest of the provisions in the form of 'tazir' are practically the same as those existed in the Pakistan Penal Code. If the objective was to provide Hadd punishments to certain offences, those could have been introduced in the Pakistan Penal Code which was abundantly amended for introducing Arabic names of already mentioned offences in the said Code. Thus the very promulgation of these laws is misconceived.

2. These laws were supposedly made to Islamise the Pakistan society, which function the military ruler had taken upon himself. He wanted to provide Muslim citizens an Islamic way of life. And in the process of Islamisation, he adopted administrative and legislative measures in an arbitrary, undemocratic anti sectarian level. Ironically enough these provisions and the Islamic punishments were also made applicable to non-Muslim citizens of the country. This is extremely-unjust. The minorities have been consistently raising, their voice .against the application of a Shariah to which they do not belong.

   The argument advanced in favour of application' of these laws to non-Muslim citizens, is that these provisions, since are public law, therefore are supposed to be applicable to all citizens irrespective of creeds or religion. This argument is fallacious and untenable as the declared base and foundation of this law is religiously sectarian. Application of Hudood laws on non-Muslim citizens of Pakistan tantamount to Section No .8 Drinking liable to hadd. Whosoever being an adult Muslim takes intoxicating liquor by mouth is guilty of drinking liable to hadd and shall be punished with whipping numbering eighty

stripes: Provided that punishment shall not be executed unless it is confirmed by the Court to which an appeal from the order of conviction lies; and, until the provisions of the Code of Criminal Procedure, 1898, relating to the grant of bail or suspension of sentence, be dealt with in the same manner as if sentenced to simple imprisonment.

3. The Offences of Qazf (Enforcement of Hudood) Ordinance, 1979.

Section 6. Proof of qazf liable to hadd shall be in one of the following forms namely:

(a) the accused makes before Court of competent jurisdiction a confession of the commission of the offence;

(b) the accused commits qazf in the presence of the Court; and

(c) at least two Muslim adult male witnesses, other than the victim of the qazf, about whom the Court is satisfied, having regard to the requirements of *tazkiyah al-shudood,* that they are truthful persons, and abstain from major sins *(knbair),* give direct evidence of the commission of qazf:

Provided that, if the accused is a non-Muslim, the witnesses may, be non-Muslim:
Provided further that the statement of the complainant or the person authorized by him shall be recorded before the statements of the witnesses are recorded.

The aforementioned provisions are not only highly discriminatory against women and minorities but are simply outrageous, opposed to fundamental rights and in flagrant violation of International Declaration of Human Rights which has been ratified by our State.

Since these Ordinances are based on Islamic Shariah, the framers of the laws were particular about maintaining the Islamic character of the Courts which would be vested with the jurisdiction to adjudicate such matters as are covered by the Ordinances.

However, this objective to maintain the Islamic character of Courts has seriously prejudiced the status of Non-Muslim citizens. This would be evidenced by the reproduced provisions of these Ordinances.

4. The Offences of Zina (Enforcement of Hudood) Ordinance 1979.

Section 21. Presiding Officer of Court to be Muslim. The Presiding Officer of the Court by which case is tried, or an appeal is heard, under this Ordinance shall be a Muslim:

Provided that, if the accused is a non-Muslim, the Presiding Officer may be a non-Muslim. The theoretic approach, that is totally opposed to the concept of the founder of the State of Pakistan.

The provisions of these Laws are highly discriminatory against women and minorities of this country. The standard of evidence required for the proof of offences as laid down in the

provisions of these Ordinances has been especially provided, in the form of 'Tazkiya AI-Shuhood which mean the mode of inquiry adopted by a court to satisfy itself as to the credibility of a witness. The text of the relevant provisions of these Ordinances is given hereunder which would eloquently speak of being unjust, discriminatory on the basis of gender and religion.

The Offences of Zina (Enforcement of Hudood) Ordinance 1979.

"Section 8. Proof of Zina or Zina-bil-Jabr liable to Hadd. Proof of zina-bil-jabr liable to hadd shall be in one of the following forms, namely;

(a) the accused makes before Court of competent jurisdiction a confession 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 (kabair), give evidence as eye-witnesses of the act of penetration necessary to the offence:

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

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

5. The Offences Against Property (Enforcement of Hudood) Ordinance, 1979.

"Section 7 Proof of theft liable to hadd. The proof of theft liable to hadd shall be in one of the following forms, namely;

(a) the accused pleads guilty of the commission of theft liable to hadd, and

(b) at least two Muslim adult male witnesses, other than the victim of the theft, about whom the Court is satisfied, having regard to the requirements of tazkiyah al-shahood, that they are truthful persons and abstain from major sins (kabair), give evidence as eye witnesses of the occurrence:

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

Provided further that the statement of the victim of the theft or the person authorised by him shall be recorded before the statements of the eye witnesses are recorded.

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

Section 25. Presiding Officer of the Court to be a Muslim: 'the Presiding Officer of the Court by which the case is tried, or an appeal is heard, under this Ordinance shall be a Muslim:

Provided that, if the accused is a non-Muslim, the' Presiding Officer mat be a non-Muslim.

The Prohibition (Enforcement of Hudood) Ordinance, 1979.

Section 30. Presiding Officer of Court to be a Muslim: The Presiding Officer of the Court by which a case is tried, or an appeal is heard, under this. Order shall be a Muslim:

Provided that, if the accused is a non-Muslim; the Presiding Officer may be a non-Muslim.

The Offences of Qazf (Enforcement of Hudood) Ordinance, 1979.

Section 18. Presiding Officer of Court be a Muslim. The Presiding Officer; of the Court by which a case is tried, or an appeal is heard, under this Ordinance shall be a Muslim.

It would not be out of place to mention here that Non-Muslim citizens are targeted in a discriminatory way up to the appellate level in this Shariat dispensation.

The sentences passed by these Courts are appealed against in the Federal Shariat Court (which too was constituted by the military ruler). The non-Muslim lawyers are ousted professionally and as citizens before the Federal Shariat Courts as would be best evidenced by the legislative provisions reproduced hereunder:

The Federal Shariat Court (Procedure) Rules 1981 Section 1 (e) "Counsel" means a legal practitioner who is a Muslim and has been enrolled as an Advocate of a High Court for a period of not less than five years or as an Advocate of the Supreme Court; Provided that in cases often than Shariat Petitions under Article 203D, in which any of the parties is non-Muslim, an advocate who is not a Muslim may appear as counsel for the non-Muslim party.

6. The provisions of these laws do not provide a just situation during trail of cases for such offences.

   The Ordinances do mention that if an accused is a non-Muslim, witness could be non-Muslim. But no provision has been framed about the accused belonging to different religions and victims also belonging to different religions. The non-Muslim citizens are victims of double jeopardy as at one hand their testimony is second rated and punishments opposed to their own Shariah (creed) are applicable to them in an arbitrary manner on the other.

7. The provisions of these laws are unjust, discriminatory and pressive against non-Muslim citizens of country. These laws particularly The Offence of Zina (Enforcement of Hudood) Ordinance 1979 are a serious invasion, against the Personal Law s of non-Muslim citizens of Pakistan.

Ours is a feudal society. Though numerically, they form thin minority the feudal lords possess 60% of the total agriculture land of the country. The majority of the population is subjected to feudal oppression. According to the report, of the Human Rights Commission of Pakistan, a woman is raped every two hours in Pakistan. Our daily papers in English, Urdu and regional languages provide authentic record (though not complete because of unreported cases) about occurrences wherein women belonging to marginalized sections of the society were subjected to rape and gang rape.

Needless to emphasis that Hindus in Sindh and Christians in Punjab particularly are the poorest victims of the application of Islamic Shariah and these Ordinances. The incidents of abduction of Hindu and Christian women the a common feature. The perpetrators of the heinous crime in order to wriggle out of the provisions of the Offence of Zina (Enforcement of Hudood) Ordinance 1979, in a very mechanical manner manages the arrangement of conversion to Islam of the abductee and her Islamic nikah (marriage) through a hired Muslim cleric. The Christian or Hindu woman is forcibly converted to Islam and married under Islamic Law. If she were married to Hindu or Christian, her previous marriage with Hindu/Christian husband would practically stand dissolved. Why because per force, they are supposedly Muslim now and a Muslim woman cannot have a non-Muslim husband. This situation also creates problem in inheritance. Why because after the so called conversion to Islam, the abductee would be governed by Islamic law. The abductee shall not be governed by the law under which she was married or her personal law for succession or inheritance as the Islamic Shariah shall prevail to which the abductee has been freshly subjected to. This situation has rendered the institution of Christian marriage a fragile thing. The perpetrators of such heinous crimes can easily avoid the rigors of these Ordinances merely on the plea that the accused is a Muslim.

Each Ordinance provides an overriding clause that has caused serious repercussions for the non-Muslim citizens. Section 3 of The Offences of Zina (Enforcement of Hudood) Ordinance, 1979, provides as under;

3. Ordinance to override other Laws. The provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force."

And in the like manner other Hudood Laws contain such provisions. It may be stated that this overriding clause invades the Personal Laws of non-Muslims. For example section 11. of the Divorce Act of 1869, which is applicable to Christian, citizens of Pakistan provides as under;

"Adulterer to be co-respondent. Upon any such petition resented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless he is excused from so doing on one of the following grounds, to be allowed by the Court:-

(1) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed;

(2) that the name of the alleged adulterer is unknown to the petitioner although he has made due efforts to discover it;

(3) that the alleged adulterer is dead."

And such like other provisions of law are now difficult to comply with because of the law on Zina under Hudood. This is not only an oppressive situation for non-Muslim citizens but it violates the fundamental right as enshrined in Article 227 of the Constitution of Pakistan which is reproduced as under;

"227. *Provisions relating to the Holy Quran and Sunnah:.-(I)* All existing laws shall be brought in conformity with the Injunctions of lslam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.

[Explanation.-In the application of this clause to the personal law of any Muslim sect, the expression "Quran and Sunnah" shall mean the Quran and Sunnah as interpreted by that sect]

(2) Effect shall be given to the provisions of clause (1) only in the manner provided in this Part.

(3) Nothing in this Part shall affect the personal laws of non-Muslim citizens or their status as citizens."

The aforementioned provisions of law, *inter alia* are points of serious concern for the non-Muslim citizens as the Hudood laws have had a prejudicial effect on them.

I agree with the majority of the members of the Committee on the points raised on the subject during our deliberations as recorded in the minutes. I therefore would like to recommend repeal of the Hudood Laws.

Sd/-
CH. NAEEM SHAKIR
Advocate Lahore 22-01-03