Sacred Texts and Profane Realities: Islamic Criminal Laws (*Ḥudūd*) and Children's Rights in Pakistan

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Abstract

*This article examines the impact of Islamic criminal laws (*ḥudūd*), particularly the Zina Ordinance, on children's rights in Pakistan. By analyzing the judgments of the Federal Shariat Court (FSC) and the Shariat Appellate Bench (SAB) of the Supreme Court, the study identified three key trends in case law. First, ambiguity in defining adulthood—whether based on statutory age limits or biological puberty—has resulted in inconsistent judicial decisions. Second, the judicial approach on minors' consent in sexual offenses evolved over time, shifting from accepting consent to rejecting it, aligning with the principle of statutory rape. Third, while leniency in sentencing underage offenders reflects an emphasis on rehabilitation, it raises questions about deterrence and consistency. The findings of this research underscore the critical role of procedural laws and legal certainty in safeguarding children's rights within a mixed legal framework of Islamic laws and common law tradition.*

Introduction*

The implementation of Islamic criminal laws (*ḥudūd*) in Pakistan, particularly the Offense of Zina (Enforcement of Hudood) Ordinance, 1979 (Zina Ordinance), profoundly impacted the legal status of children, both as victims and as accused in sexual offense cases. The Ordinance, introduced as part of General Zia-ul-Haq's Islamization program, sought to align Pakistan's criminal laws with *sharīʿa*.[1] However, its integration into the existing common law-based legal system created several inconsistencies, particularly in defining adulthood, determining the validity of minors' consent in sexual offenses, and sentencing juvenile offenders.

This article examines the impact of Islamic criminal laws (*ḥudūd*), particularly the Offense of Zina (Enforcement of Hudood) Ordinance, 1979 (Zina Ordinance), on children's rights in Pakistan. It highlights how the Zina Ordinance shaped legal interpretations and judicial outcomes for minors as both victims and offenders of sexual offenses. To explore this issue, the study analyzes reported judgments of the Federal Shariat Court (FSC) and the Shariat Appellate Bench (SAB) of the Supreme Court, spanning four and half decades from 1980 to 2024. It combines

* This article forms part of a broader study examining the judgments of the Federal Shariat Court and the Shariat Appellate Bench, Supreme Court to assess the impact of judicial Islamization of laws in Pakistan. I am grateful to Dr. Khalid Masud, Professor Muhammad Munir, Professor Martin Lau, Professor Shahbaz Ahmad Cheema, Professor Asifa Quraishi-Landes, and Dr. Mushtaq Ahmad for their valuable feedback on various drafts of this article. I also thank Noor Zafar and Simra Sohail for their excellent research assistance, and gratefully acknowledge their contribution. Finally, I am indebted to the anonymous reviewers for their insightful comments and constructive suggestions.

1 General Zia-ul-Haq, the Army Chief who overthrew Prime Minister Zulfikar Bhutto in July 1977, ruled as President until his death in a plane crash in August 1988. Many scholars argue that he used the Islamization of laws to legitimize his unconstitutional military rule. *See* Markus Daechsel, *Military Islamisation in Pakistan and the Spectre of Colonial Perceptions*, 6 Contemporary South Asia 141 (1997). *See also* Sadia Saeed, Politics of Desecularization: Law and the Minority Question in Pakistan 150 (2017); Osama Siddique, Pakistan's Experience with Formal Law: An Alien Justice 231 (2013); Mary Flora Hunter, Contextualising Zia-ul-Haq's Islamisation of Pakistan (1977–88) and Its Impact on 'Non-Muslims' in the Thought of Maududi and British Colonialism 12–56 (2024) (Ph.D. dissertation, University of St. Andrews).

doctrinal analysis of case law with a historical overview of legislative changes to understand the evolving judicial interpretations and their implications for children's rights.

The findings highlight key trends in the case law. A key issue arising from the implementation of the Zina Ordinance was the ambiguity in defining adulthood. Unlike the Pakistan Penal Code, 1860 (PPC), which defined adulthood based on statutory age, the Zina Ordinance considered both age and biological puberty. This dual standard led to inconsistent judicial decisions, with some courts classified minors as adults based solely on physical development rather than age. For male offenders, puberty was assessed using a range of factors, including medical examinations and external appearances, while for females, menstruation was taken as definitive proof of adulthood. This approach resulted in gender disparities, as minor girls were more frequently classified as adults than boys, subjecting them to harsher legal consequences in sexual offense cases. Another critical issue was the treatment of minors' consent in sexual offense cases. Before the Zina Ordinance, the Pakistan Penal Code, 1860 (PPC) recognized the principle of statutory rape, rendering a minor's consent legally irrelevant in rape cases. However, the Zina Ordinance removed this safeguard, creating a legal loophole that defendants initially exploited by claiming minors' consent as a defense in rape trials. Case law from the early 1980s shows that courts frequently downgraded rape (*zinā bi-l-jabr*) charges to consensual extra-marital sex (*zinā*), leading to miscarriages of justice and the prosecution of young victims as willing participants. Over time, judicial attitudes shifted, and by the mid-to-late 1980s, courts reinstated the principle of statutory rape in practice, despite its absence in the law. This shift reflects an evolving recognition of children's vulnerabilities and the need to protect them from sexual exploitation.

The sentencing of underage offenders under the Zina Ordinance was inconsistent. While the Ordinance prescribed severe punishments, courts generally showed leniency toward child offenders, often reducing sentences based on the offender's age and perceived capacity for rehabilitation. In some cases, courts imposed only nominal fines or significantly reduced

prison sentences, citing the offender's young age. However, this leniency raised concerns about deterrence and judicial inconsistency, as similar cases resulted in drastically different punishments. Additionally, procedural safeguards in bail cases played a crucial role in mitigating the harsh effects of the Zina Ordinance. Unlike in sentencing, courts refused to grant the Zina Ordinance overriding effect in bail matters. Instead, they applied the Code of Criminal Procedure, 1898 (CrPC), which allowed bail for minors (under 16 years of age) regardless of the offense. This judicial approach provided relief in many cases, ensuring that accused minors were not unjustly incarcerated while awaiting trial.

The central argument of this article is that the implementation of the Zina Ordinance created significant legal challenges for children, both as victims and as accused, due to ambiguities in defining adulthood, inconsistencies in recognizing minors' consent in sexual offenses, and the discretionary sentencing of juvenile offenders. While judicial interpretations evolved over time—particularly in rejecting minors' consent as a valid defense in rape cases—legal uncertainties continued to expose children, especially girls, to unfair treatment until the legal reform in 2006. This article highlights the crucial role of procedural safeguards and legal certainty in protecting children's rights and argues that the lack of clear legal protections under the Zina Ordinance led to inconsistent rulings, gender disparities, and increased vulnerability for minors within Pakistan's mixed legal system.

The article is divided in two sections. The first section provides an overview of the Hudood Ordinances and their historical context within Pakistan's mixed legal system. The second section explores the ambiguities in defining adulthood, the evolving judicial treatment of minors' consent in sexual offenses, and the leniency afforded to juvenile offenders. The conclusion highlights key findings and emphasizes the importance of procedural laws and legal certainty in upholding justice and protecting the rights of women and children.

Islamic Criminal Laws (*Ḥudūd*) in Pakistan

In 1979, President Zia ul-Haq introduced Islamic criminal laws (*ḥudūd*) in Pakistan. The Hudood Ordinances covered several offenses including extra-marital sex (*zinā*),[2] false accusations of extra-marital sex (Arabic, *qadhf*; Urdu, *qazf*), theft (*sariqa*), and the consumption of intoxicants (*shurb al-khamr*).[3] The Ordinances were central to Zia's Islamization program, aimed at replacing English law-based colonial regulations with *sharīʿa*-based Islamic laws. However, these Ordinances did not repeal Pakistan's secular Penal Code, enacted by the British in 1860. Instead, the Ordinances implanted Islamic criminal offenses (*ḥudūd*) in the existing criminal justice system that was based on common law tradition. Therefore, despite their name, the Hudood Ordinances encompassed not only *ḥudūd* offenses—those with fixed punishments prescribed in the Qurʾān and Sunna—but also *taʿzīr* offenses, which are punishable at the discretion of the state.[4] Many *taʿzīr* offenses in the Hudood Ordinances were directly copied from the Pakistan Penal Code, 1860 (PPC). A few changes to the wording of the substantive sections were made to "Islamize" them while most of the procedural and evidential laws remained the same.[5]

Rather than removing the adverse aspects of colonial laws, Islamization of criminal laws reinforced them. The

2 The Arabic term *zinā* refers to various sexual offenses, including fornication, adultery, and rape. Scholars have translated *zinā* as "unlawful sexual intercourse," "extra-marital sex," or "illicit sexual relations." I use the term "extra-marital sex" to describe *zinā* in this article. *See generally* Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century (2005); Intisar A. Rabb, Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law (2015).

3 The Fifth Ordinance, the Execution of the Punishment of Whipping Ordinance 1979 (repealed under the Abolition of Whipping Act 1996, which abolished whipping for all offenses except those provided for in the four Hudood Ordinances 1979).

4 Dr. Hashmi observed that, although the Hudood Ordinances were framed as divine injunctions based on the Qurʾān and Sunna, only 18 of their 101 provisions addressed *ḥadd* offenses, underscoring their human and political dimensions. Muhammad Tufail Hashmi, *Hudood Ordinance: Qurʾān aur Sunnah ki Roshnī Mein*, 4 Al-Sharīʿa 16, 16–29 (2005).

5 Asma Jahangir & Hina Jilani, The Hudood Ordinances: A Divine Sanction? 23–24 (1990).

example of the "Islamized" evidence law accurately reflects this phenomenon. The colonial law provided that in rape trials, the accused may question the moral character of the victim in his defense.[6] The Qanun-e-Shahadat Order, 1984 which replaced the colonial era Evidence Act, 1872 retained this legal provision in Article 151(4) without making any change.[7] Judges relied on this legal provision to discredit the testimony of female complainants of rape when they were found to be "women of easy virtue."[8] It was not until 2009 that the Federal Shariat Court (FSC) declared this legal provision discriminatory, as it undermined the principle of gender equality enshrined in the Qurʾān by questioning only the character of women.[9] The legislature omitted this sub-article in 2016.[10] Until then, the lack of virtue of the complainant could help the accused receive the benefit of doubt. As the discussion in the next section of this article shows, this defense was raised even in cases in which the victims of rape were minor girls.[11]

6 "When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character." The Evidence Act, 1872, § 155(4).

7 Carroll argues the Qanun-e-Shahadat Order, 1984 did not meaningfully Islamize evidence law. Despite its framing as an Islamic reform, the Order largely retained pre-existing evidentiary rules and limited the incorporation of Islamic principles. She contends that this was an "anti-Islamization coup," allowing Zia's regime to maintain the status quo while presenting the legal changes as part of his broader Islamization agenda. *See Lucy Carroll, Pakistan's Evidence Order ("Qanun-i-Shahdat"), 1984: General Zia's Anti-Islamization Coup*, *in* Dispensing Justice in Islam: Qadis and Their Judgments 517, 517–41 (M.K. Masud, R. Peters & D.S. Powers eds., 2006).

8 Such reference is made to female complainants in several reported judgments. In *Muhammad Ashraf v. Muhammad Irshad*, (2000) PCr.LJ 1756, the court noted that the victim was not a virgin before the alleged rape. In *Muhammad Siddique v. State*, (1987) PCr.LJ FSC 118 and *Tanvir Ahmed v. State*, (1996) SCMR 1549, the court observed that the female victim of alleged rape was accustomed to sexual intercourse.

9 Capt. (retd.) Mukhtar Ahmad Shaikh v. Government of Pakistan, (2009) PLD (FSC) 65.

10 The Criminal law (Amendment) (Offences Relating to Rape) Act, 2016, § 16.

11 In Nazar Hussain v. State, (1988) PCr.LJ (FSC) 1970, the defense attorney described a minor girl of 13 to 14 years as a person of "a loose character" who was a "habitual case" and already had "sexual intercourse with the appellant or with some other persons."

Before the promulgation of the Hudood Ordinances in 1979, the Pakistan Penal Code, 1860 (PPC) dealt with the offenses of adultery and rape, including marital rape. To prove these offenses, the standard of proof was beyond reasonable doubt. The punishment for rape was imprisonment for life or up to 10 years and fine; and for marital rape, the punishment was up to two years imprisonment. Adultery was punishable by imprisonment up to five years. Only a husband could be prosecuted for adultery, and a wife was exempt from prosecution for adultery even as an abettor.[12] The Zina Ordinance, however, introduced several crucial changes, which included the following.

First, the Zina Ordinance introduced a new offence of fornication and criminalized adultery for both spouses. This change in law exposed women to prosecution under the Zina Ordinance as the offense of *zinā* was difficult to hide for women who became pregnant. Belated filing of rape charges after pregnancy shifted the burden of proof to the complainant of rape.[13] The judges of the lower courts did not follow the judicial precedents of the FSC and SAB which laid down the principle that a woman could not be guilty of *zinā* if she complained of rape at any stage, no matter how belatedly; and that mere pregnancy was not sufficient to convict a woman for *zinā* especially if she claimed that the pregnancy was caused due to rape.[14]

Second, the Zina Ordinance created two new offenses of consensual extra-marital sex: *zinā* liable to *ḥadd* and *zinā* liable to *taʿzīr*. The Zina Ordinance defined *zinā* as "[a] man and a woman are said to commit '*zina*' if they willfully have sexual intercourse without being validly married to each other."[15] *Zinā* was punishable with the *ḥadd* penalty (stoning to death for *muḥṣan* and 100 lashes for non-*muḥṣan*),[16] based on either

12 *Id.* at 87.

13 Mustafa Abdul Rahman & Moeen Cheema, *From the Hudood Ordinances to the Protection of Women Act: Islamic Critiques of the Hudood Laws of Pakistan*, 17 UCLA J. Near E. & Islamic L. 17 (2008).

14 Moeen H. Cheema, *Cases and Controversies: Pregnancy as Proof of Guilt under Pakistan's Hudood Laws*, 32 Brook. J. Int'l L. 121 (2006).

15 The Offence of Zina (Enforcement of Hudood) Ordinance, 1979, § 4.

16 Section 2(d) of the Zina Ordinance defined *muḥṣan* as: "Muhsan means . . . (i) a Muslim adult man who is not insane and has had sexual intercourse with a Muslim adult woman who, at the time he had sexual intercourse with her, was

a confession before the trial court or eyewitness testimony to the act of four adult Muslim male witnesses who satisfy the Islamic test of probity (*tazkīyat al-shuhūd*). *Zinā* was punishable with *taʿzīr* (imprisonment up to 10 years) if the standard of proof for *ḥadd* was not available, but the offense was proved beyond reasonable doubt.[17] The evidentiary standards for proving rape (*zinā bi-l-jabr*) closely mirrored those for *zinā*. Rape was punishable either with *ḥadd* or *taʿzīr*, depending upon the evidence. The punishment for rape (*zinā bi-l-jabr*) liable to *ḥadd* was the same as for consensual extra-marital sex (*zinā*) liable to *ḥadd* (stoning to death or 100 lashes).[18] The *taʿzīr* punishment for rape (*zinā bi-l-jabr*) was a minimum of four and a maximum of 24 years imprisonment, and if it was committed by two or more persons (gang rape), the mandatory punishment was death.[19]

Third, the Zina Ordinance removed legal protections available to children under the Pakistan Penal Code, 1860 (PPC) which included "statutory rape" by presuming that sex with a child under the age of fourteen was a rape and treated sex with under thirteen-year-old wife as "marital rape."[20] Both these changes exposed children to sexual exploitation by grown-up men as is discussed below with reference to the facts in the relevant case law. To make things worse, the Zina Ordinance had an overriding effect on the provisions of other statutes including the Pakistan Penal Code, 1860 (PPC) which provided several protections to children. Under Section 82 of the PPC, a child below the age of seven was exempt from criminal responsibility and under Section 83, children between the ages of seven and twelve could only be punished if they were mature enough to understand the nature of the offense. These provisions aligned with the concept of *rushd* (mature

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

17 *Id.* § 10(2).

18 *Id.* § 5.

19 *Id.* § 10(4).

20 Pak. Penal Code, 1860, § 375.

understanding), which is an essential requirement for criminal responsibility under Islamic criminal law.[21]

Finally, in addition to the offense of rape, the Zina Ordinance categorized fornication and adultery into cognizable, non-bailable, and non-compoundable offences. Under the pre-1979 law, as stipulated in the Pakistan Penal Code, 1860 (PPC), only the husband of a married woman could file a complaint of adultery.[22] Since *zinā* was a non-compoundable offense—meaning the parties could not settle the matter privately—the complainant or aggrieved party could not withdraw the charges. Consequently, even if the accused were ultimately acquitted, they often endured prolonged detention in Pakistan's overcrowded jails. These trials were frequently plagued by excessive delays.[23]

The analysis of reported case law shows that the Zina Ordinance was applied far more frequently than any other Hudood Ordinance. We collected all the reported judgments of the Federal Shariat Court (FSC) and Shariat Appellate Bench (SAB), Supreme Court under the Hudood Ordinances from 1980 to 2024 and categorized them under each of the Ordinance. The chart below shows the number of reported judgments of the FSC under the four Hudood Ordinances.

The chart in Figure 1 (overleaf) shows that a disproportionately higher number of cases were reported under the Zina Ordinance. Charles Kennedy, who conducted an empirical study on the case law under the Hudood Ordinances in 1980s, found that 88% of the reported cases under the Ordinances were related to *zinā*.[24] The primary reason for this, according to him, was because the Zina Ordinance provided a tool to parents, guardians, and husbands to exercise control over their children, specifically disobedient daughters, and wives by bringing false accusations

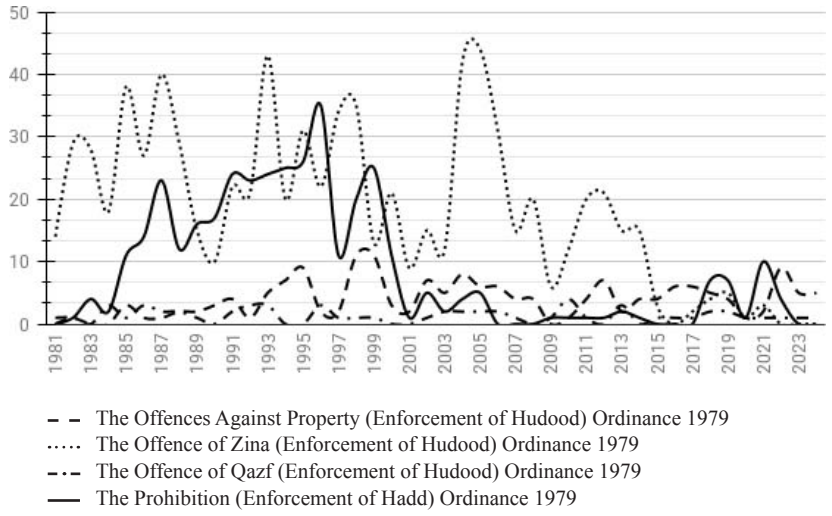
21 The Islamic Criminal Justice System 192–93 (M.C. Bassiouni ed., 1982).

22 Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf, (1963) PLD (SC) 51 (convicting the respondent for enticing and taking away the complainant's lawfully wedded wife, though the wife was not prosecuted).

23 Jahangir & Jilani, *supra* note 5, at 134.

24 Charles Kennedy, *The Implementation of Hudood Ordinances in Pakistan*, 26 Islamic Stud. 307 (1987).

Figure 1: FSC Judgments under the Hudood Ordinances (1980–2024)



of *zinā*.[25] These findings are corroborated by Jahangir and Jilani who note that 70% of the appeals filed before the FSC were related to *zinā* and 46% of all women prisoners in the jails of the province of Punjab were imprisoned on charges of *zinā*.[26] Paradoxically, while the number of cases under the Zina Ordinance was the highest, the conviction rate remained notably low. Data from 1980 to 1987 reveals an acquittal rate of 70% in *zinā* cases appealed to the Federal Shariat Court (FSC).[27] Similarly, an analysis of judgments between 1980 and 2018 shows a 55% acquittal rate in *zinā* cases at the FSC and a 34% acquittal rate at the Shariat Appellate Bench (SAB), Supreme Court.[28]

The data on sexual offenses from 1947 to 2004 shows a sharp increase in the number of *zinā* cases after the promulgation of the Zina Ordinance in 1979.[29] The Zina Ordinance is

25 *Id.*

26 Jahangir & Jilani, *supra* note 5, at 70, 134.

27 Charles Kennedy, *Islamization in Pakistan: Implementation of the Hudood Ordinances*, 28 Asian Surv. 307, 309 (1988).

28 M. Z. Abbasi, *Sexualization of Sharīʿa: Application of Islamic Criminal (Ḥudūd) Laws in Pakistan*, 29 Islamic L. & Soc'y 319, 319–42 (2022).

29 Ministry of Interior, Bureau of Police Research and Development, Government of Pakistan, Crime in Pakistan 51 (1981); National Police Bu-

one of those curious pieces of legislation which seemingly led to a disproportionate increase in the number of cases related to the very offenses it was designed to curb. The Council of Islamic Ideology also noted a steady rise in *zinā* cases. In 2006, the Council reported that the number of cases registered under the Zina Ordinance kept on increasing during 2001 and 2004 from 3,291 to 3,522 to 3,641 to 3,817.[30] Over time, the Zina Ordinance became so prominently invoked that it symbolized the Hudood Ordinances—a trend that is described as the "sexualization of *sharīʿa*."[31]

The high rate of *zinā* prosecutions was not merely a result of procedural abuses or socio-economic conditions as is often argued,[32] rather it stemmed directly from the Zina and Qazf Ordinances, which were designed to ensure maximum prosecution. First, the Zina Ordinance incorporated several *taʿzīr* offences from the Pakistan Penal Code, 1860 (PPC), allowing prosecution under *taʿzīr* if the strict *ḥadd* standard was not met.[33] Second, by equating consensual sex (*zinā*) with rape (*zinā bi-l-jabr*), the Ordinance ensured that any report of extra-marital sex resulted in prosecution of at least one party.[34] Third, the Qazf Ordinance, rather than deterring false accusations, incentivized them by

reau, Interior Division, Government of Pakistan, Letter No. F. No. 8/5/2003-SRO, dated May 10, 2005, as reported in Pakistan mein Hudood Qawaneen 88, 108–12 (Shahzad Iqbal Shaam ed., 2006).

30 Muhammad Khalid Masud, Hudood Ordinance 1979: Final Report 3 (2006), *available at* http://cii.gov.pk/publications/h.report.pdf.

31 Abbasi, *supra* note 28.

32 Muhammad Taqi Usmani, *The Islamization of Laws in Pakistan: The Case of Hudud Ordinances*, 96 Muslim World 287, 287–304 (2006). Aarij S. Wasti, *The Hudood Laws of Pakistan: A Social and Legal Misfit in Today's Society*, 12 Dalhousie J. Legal Stud. 63, 63–95 (2003).

33 Asifa Quraishi, *Her Honour: An Islamic Critique of the Rape Provisions in Pakistan's Ordinance on Zina*, 38 Islamic Stud. 403, 403–31 (1999).

34 In Rashida Patel v. Federation of Pakistan, (1989) PLD (FSC) 95, the Federal Shariat Court (FSC) ruled that rape (*zinā bi-l-jabr*) is distinct from extra-marital sex (*zinā*), categorizing it as *fasād fī al-arḍ* (corruption on earth) and *ḥirāba* (highway robbery). The FSC directed the government to amend Sections 8 and 9(4) of the Zina Ordinance to reduce the evidentiary requirement for rape from four to two Muslim male adult eyewitnesses. It also clarified that if a complainant fails to prove *zinā* with the testimony of four Muslim male adult eyewitnesses, they will be punished with eighty lashes without the need for additional evidence. An appeal against this ruling has remained pending before the Shariat Appellate Bench (SAB), Supreme Court since 1989.

allowing complainants to claim a defense of "good faith" and "public good," concepts rooted in common law rather than Islamic principles.[35] These features of the Hudood Ordinances escalated *zinā* prosecutions of not only men but also of women and children including minor girls as shown in the next section.

From 1979 to 2006, the Zina Ordinance was the special statute governing sexual offences. Despite its flaws, the Zina Ordinance remained unchanged for 25 years, supported by religious scholars, Islamist political parties, and conservative segments of Pakistani society.[36] In contrast, human rights activists argued that it disproportionately affected women, children, and non-Muslim minorities, calling for its repeal or reform.[37] Shahnaz Khan, based on interviews with women imprisoned for *zinā* in Lahore and Karachi, argued that laws on extra-marital sex serve the interests of patriarchal families, the nation-state, and capitalists, disadvantaging lower-class women in Pakistan.[38] Afshan Jafar examined the impact of Islamization within Pakistan's cultural, historical, and political context, contending that General Zia-ul-Haq's so-called Islamic legal reforms were a political strategy to legitimize and extend his military rule.[39] She argued that these reforms were shaped by a cultural construction of womanhood that viewed women as passive yet dangerous, tying their sexuality to family honor and male ownership. Jafar emphasized that the Zina Ordinance legally reinforced patriarchal norms, leading to widespread abuse of women within both the family and the criminal justice system.[40]

After extensive public debate, the Protection of Women Act, 2006, introduced significant reforms to the Zina and Qazf Ordinances. First, the Act limited the Zina Ordinance to cases punishable by *ḥadd* and required the testimony of four adult, Muslim male eyewitnesses before a trial could start. Similarly,

35 Abbasi, *supra* note 28.

36 Usmani, *supra* note 32.

37 Jahangir & Jilani, *supra* note 5, at 32–33.

38 Shahnaz Khan, *"Zina" and the Moral Regulation of Pakistani Women*, 75 Feminist Rev. 75, 75–100 (2003).

39 Afshan Jafar, *Women, Islam and the State in Pakistan*, 22 Gender Issues 35, 35–55 (2005).

40 *See, e.g.*, *id.* at 40.

the Act confined the Qazf Ordinance to *qazf* punishable by *ḥadd* and removed *qazf* punishable by *taʿzīr*. Second, it reinstated other sexual offenses to the Pakistan Penal Code, 1860 (PPC), as was the case before 1979.[41] Third, it prohibited reclassifying rape or fornication complaints as *zinā* offenses, made *zinā* a bailable offense, and restricted police powers by barring arrests based solely on accusations. Fourth, the Act reintroduced "statutory rape" by declaring the consent of under 16 years of age for sex as invalid despite criticism from a group of religious scholars who argued that "adulthood" is based on puberty under Islamic law.[42] These reforms significantly reduced the number of *zinā* cases, especially against women.[43] Most of the judgments reported after 2006 pertain to incidents that occurred prior to that year.[44]

Impact of the Zina Ordinance on Children's Rights

Defining Adult: Age of Majority v. Puberty

The Zina Ordinance defined an adult as "a person who has attained, being a male, the age of eighteen years or, being a female, the age of sixteen years, or has attained puberty."[45] This means that if a person, whether male of female, who has attained

41 Martin Lau, *Twenty-Five Years of Hudood Ordinances — A Review*, 64 Wash. & Lee L. Rev. 1291, 1308–13 (2007).

42 The members of this group included a retired judge of the Federal Shariat Court and the Shariat Appellate Bench, Supreme Court, Maulana Taqi Usmani, who vehemently opposed most of the proposed legal amendments. Maulana Zahid Al-Rashidi, *Hudood Ordinances aūr iss par Aʿtarazāt*, 17 Al-Sharīʿa 2, 2–9 (2006).

43 Sohail Akbar Warraich, Access to Justice for Survivors of Sexual Assault 7–9 (2015), *available at* https://af.org.pk/gep/images/publications/Research%20Studies%20(Gender%20Based%20Violence)/Access%20to%20Justice%20for%20Survivors%20of%20Sexual%20Assault%20final%20with%20branding.pdf; National Commission on the Status of Women, Study to Assess Implementation Status of Women Protection Act 2006, at 7–11 (2011).

44 For example, see Moula Bux v. State, (2021) YLR 1911 (concerning the rape and murder of a seven-year-old girl in 2004); Qaisar Mehmood v. State, (2021) SCMR 662 (involving the rape and murder of a three-and-a-half-year-old girl in 2003); Muhammad Usman v. State, (2020) PCr.LJ 799 (regarding the alleged rape by a 17-year-old boy in 2004); Imran v. State, (2024) SCMR 1811 (pertaining to an incident of extra-marital sex in 2003).

45 The Offence of Zina (Enforcement of Hudood) Ordinance, 1979, § 2(a).

the statutory age or puberty, would be considered an adult. This categorization is important for two reasons: first, for the validity of the "consent" of victims, which is vital to distinguish between consensual extra-marital sex (*zinā*) and rape (*zinā bi-l-jabr*); and second, to determine the benefit of lenient punishment for underage offenders under Section 7 of the Zina Ordinance.[46] The definition of "adult" based on the age of 18 for males and 16 for females or "puberty" gives rise to several legal problems. As the law did not provide a definition of "puberty," judges determined it based on the specific circumstances of each case.

Judges considered multiple factors to determine the age of minors. A review of cases reveals three primary criteria for establishing "adulthood": age, signs of puberty, and the individual's conduct at the time of the offense. Beyond statutory age, judges also assessed physical development to determine puberty. In some instances, they relied solely on an individual's demeanor at the time of the offense to infer their age. For instance, in *Muhammad Razaq v. State*, an 11-year-old boy was accused of raping a 10-year-old girl.[47] The trial court sentenced him under the Zina Ordinance. In appeal before the Federal Shariat Court (FSC), the primary question before the court was whether the appellant, 11-year-old boy, was entitled to lenient punishment under Section 7 of the Zina Ordinance, given the findings of a medical doctor that the boy could commit sexual intercourse. The judge referred to Section 2(a) of the Ordinance under which a person is deemed to be adult if he is eighteen years of age or has attained puberty.[48] The judge acknowledged that the law did not define when a person is deemed to have attained puberty and observed that boys were likely to become sexually potent and

46 *Id.* § 7 reads: "A person guilty of *zina* or *zina-bil-jabr* shall, if he is not an adult, be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both, and may also be awarded the punishment of whipping not exceeding thirty stripes: Provided that, in the case of *zina-bil-jabr*, if the offender is not under the age of fifteen years, the punishment of whipping shall be awarded with or without any other punishment."

47 (1985) PLD (FSC) 298.

48 *Id.*

hence attain puberty when they are fourteen or fifteen years of age.[49] He relied on Modi's *Medical Jurisprudence*[50] to rule:

> *When examining an individual for sexual capacity the medical jurist should depend more on physical development than on age alone*. Capacity to commit sexual intercourse alone would not be sufficient to hold a male to be a pubert. *In order to establish puberty, it must be shown to secrete semen or the capacity to impregnate a female, that the public and axillary hair are sufficiently grown*. It would further appear that larynx should be sufficient in size so as to lead deepening of the pitch of the voice. Unless these signs are present it would be difficult to say that he has attained puberty.[51]

Based on the above reasoning, the judge held that the physical development of the appellant, who was 11-year-old, showed that he was not an "adult" under Section 2(a) of the Zina Ordinance.[52] Therefore, the boy was entitled to lenient punishment under the Ordinance.

In contrast to the judgment in the above case, a judge in another case held that a boy of 14 years of age, was an "adult" under Section 2(a) of the Zina Ordinance.[53] The judge distinguished the facts in the above case on grounds of the age of the appellant and medical evidence of the victim. He observed that the appellant in the above case was only 11 years old, and no semen was found on the body or clothes of the victim.[54] In contrast, the appellant in the instant case was a 14-year-old, and semen was found on the body of the victim.[55] In this case, the judge assessed puberty based on the overall circumstances rather

49 *Id.*

50 N. J. Modi, Modi's Textbook of Medical Jurisprudence and Toxicology (1982).

51 Muhammad Razaq v. State, (1985) PLD (FSC) 298, 303–304 (emphasis added).

52 *Id.* at 303–304.

53 Muhammad Ashraf alias Guddoo v. State, (1987) PLD (FSC) 33.

54 *Id.* at 38.

55 *Id.*

than the boy's age, ultimately concluding that the 14-year-old was an "adult" under the Zina Ordinance.[56]

The judgments in the above two cases illustrate the broad discretionary powers of judges in determining the puberty of child offenders. For male offenders, puberty was not solely based on biological age; judges considered multiple factors which included physical development and the specific circumstances of each case. In contrast, court rulings regarding female children showed less ambiguity in determining puberty. A female was considered to have reached puberty under Section 2(a) of the Zina Ordinance, if she has begun menstruating.[57] However, this criterion was reinterpreted in some cases, where judges prioritized physical appearance over medical evidence in determining a female's "adulthood." For instance, in *Lal v. State*, the appellant was accused of raping a girl approximately 13 or 14 years old.[58] The accused contended that he was legally married to the alleged victim.[59] The primary question before the court was whether the marriage contract between the appellant and the underage girl was valid.[60] The court held that there were doubts regarding the age of the girl. The medical evidence did not mention anything pertaining to the age of the girl. However, *the physical features that were mentioned in the report showed that the girl was adult* at the time of the contract of marriage.[61]

Despite the lack of conclusive medical evidence regarding menstruation, the judge based his decision on the girl's external physical appearance, assuming she had reached the age of majority. Consequently, he dismissed the rape allegation and ruled that the marriage was valid.[62]

56 *Id.*
57 Mansib Ali v. State, (1986) PCr.LJ 150.
58 Lal v. State, (1988) PLD (FSC) 15.
59 *Id.* at 18–19.
60 *Id.* at 19.
61 *Id.* at 19–20 (emphasis added) (author's translation).
62 *Id.* at 21.

Validity of the Consent of Minors and Statutory Rape

The classification of an individual as an "adult" is significant not only for determining lenient sentencing under Section 7 of the Zina Ordinance but also for distinguishing between consensual extra-marital sex (*zinā*) and rape (*zinā bi-l-jabr*). Before the enactment of the Zina Ordinance, rape was defined under Section 375 of the Pakistan Penal Code (PPC) of 1860. The Zina Ordinance later redefined it as *zinā bi-l-jabr*. However, in 2006, the offense of rape was reinstated into the PPC.

Table 1 overleaf outlines the key differences in the amended definitions of rape.

The comparison above reveals that while the three definitions of "rape" were largely similar, they differed in three key aspects. First, under the Zina Ordinance, a woman could also be charged with rape (*zinā bi-l-jabr*), which was not the case under the secular Pakistan Penal Code, 1860 (PPC). Second, the Zina Ordinance eliminated marital rape as an offense when the wife was under the age of 13. Third, the Zina Ordinance removed the fifth exception of "statutory rape," which previously held that the consent of a girl under 14 for sex was legally invalid. This exception was originally intended to protect underage girls from sexual exploitation. However, the Zina Ordinance eliminated this safeguard. When the definition of rape was reinstated in the PPC under the Protection of Women (Criminal Laws Amendment) Act, 2006, it reintroduced "statutory rape" but raised the age of consent from 14 to 16. Notably, the new definition did not reinstate the provision criminalizing marital rape of a girl under 13.[63]

Despite the statutory changes introduced by the Zina Ordinance in 1979, courts in several cases continued to apply pre-1979 law, rejecting "consent" as a valid defense in rape trials and holding that the consent of a child under fourteen was legally invalid. Case law in the 1980s reflects a mixed approach

63 The Protection of Women (Criminal Laws Amendment) Act, 2006, § 5. Following the amendment to Section 375 of the PPC under the Criminal Law (Amendment) Act 2021, the section now explicitly includes non-consensual anal and oral intercourse.

Table 1

Rape under s. 375 of the Pakistan Penal Code, 1860 (pre-1979)	***Zinā bi-l-jabr* under s. 6 of the Zina Ordinance**	**S. 375. Rape inserted in the Pakistan Penal Code, 1860 under s. 5 of the Protection of Women (Criminal Laws Amendment) Act, 2006**
A man is said to commit "rape" who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions: First. Against her will. Secondly. Without her consent. Thirdly. With her consent, when her consent has been obtained by putting her in fear of death, or of hurt. Fourthly. With her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly. With or without her consent, when she is under [fourteen] years of age. Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offense of rape. Exception. Sexual intercourse by a man with his own wife, the wife not being under [thirteen] years of age, is not rape.	A person is said to commit *zinā bil-jabr* if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely: (a) against the will of the victim; (b) without the consent of the victim; (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt; or (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married. Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offense of *zinā-bil-jabr*.	A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions, (i) against her will; (ii) without her consent; (iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt; (iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or (v) with or without her consent when she is under sixteen years of age. Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

to this rule. In some instances, judges ruled in favor of underage victims by disregarding the removal of "statutory rape" under section 375 of the PPC through the Zina Ordinance. In other cases, they did not consider "consent" a material issue. Judicial interpretations of "consent" in rape cases involving minors can be categorized into three chronological phases: pre-1979, early 1980s, and the late 1980s onward.

Under the pre-1979 rape law, as outlined in section 375 of the Pakistan Penal Code, 1860 (PPC), a minor's consent was deemed legally invalid. For instance, in *Zahoor v. State*, Mst. Saban, a minor girl around 8 or 9 years old, was raped.[64] During the trial, the victim's mother did not support the prosecution's case, and the prosecution did not call the victim as a witness.[65] Given these circumstances, the court ruled:

> Non-production of Mst. Saban, at its best, could help the accused in raising an argument that she was a consenting party, but *the consent of 8 or 9 old girl has no legal consequence to the advantage of the petitioner*. . . . Witnesses other than Mst. Fattan, the mother has not supported the case for the prosecution, which could raise a possibility of the girl being a consenting party, though at this age she would hardly know what they were up to.[66]

As noted earlier, the Zina Ordinance removed the principle of "statutory rape" previously established under Section 375 of the Pakistan Penal Code, 1860 (PPC). In the early 1980s, judges began inferring "consent" from underage victims in cases involving extra-marital sex (*zinā*). A striking example is the case of Jehan Mina, a 15-year-old girl who became pregnant after being raped.[67] However, during the trial, she was unable to provide evidence proving that her pregnancy resulted from rape.[68] As a

64 (1978) PLD (Lah.) 962.

65 *Id.* at 964.

66 *Id.* (emphasis added). *See also* Mohd. Rafiq v. State, (1978) PCr.LJ 730; Haji Ahmad v. State, (1975) SCMR 69; Bashir Ahmad v. State, (1979) PLJ (Cr.C.) (Kar.) 14.

67 (1983) PLD (FSC) 183.

68 *Id.* at 187.

result, the judge concluded that she must have engaged in sexual intercourse voluntarily, with consent and free will:

> [Mst. Jehan Mina] did not take the position that the *zina* had been committed with her at a secluded place in a jungle where she could not cry for help. [Furthermore], she has not even explained as to what force or threat was used against her when she was subjected to *zina-bil-jabr* [rape] and she has also not explained as to what induced her to keep quiet for such a long time in spite of having had the full and complete opportunity of complaining to her nearest relations. . . . In these circumstances, we are of the view that Mst. Jehan Mina has had intercourse with someone out of her own free will and she has, therefore, committed an offence punishable under section 10(2) of Ordinance.[69]

The judgment in the *Jehan Mina* case was not an isolated instance. In the early 1980s, courts in several cases attributed "consent" to minors in rape trials. For example, in *Muhammad Aslam v. State*, the petitioner was convicted under the Zina Ordinance for raping a 12- or 13-year-old girl.[70] On appeal, the Federal Shariat Court (FSC) held that a minor girl of 12 to 13 years consented to sexual intercourse and reduced the punishment of the offender from rape to consensual sex.[71] On final appeal, the Shariat Appellate Bench (SAB), Supreme Court upheld the FSC's judgment.[72] Similarly, in *Muhammad Azeem v. State*, Mst. Mulko was barely 11 years old when she was gagged, dragged to a maize field, and raped.[73] The trial court convicted the accused of rape.[74] On appeal, however, the judges of the FSC ruled that the 11-year-old girl had consented to sexual intercourse.[75]

69 *Id.*
70 (1983) SCMR 866.
71 *Id.* at 866.
72 *Id.*
73 (1983) SCMR 1119; *see also* Ghulam Mustafa v. State, (2006) PCr.LJ 464 (holding that a 12-year-old might have consented to sexual intercourse, thereby reducing the sentence).
74 Muhammad Azeem v. State, (1983) SCMR 1119.
75 *Id.* at 1120.

Consequently, they converted the conviction from rape to consensual sex.[76] In another case, a 15-year-old Perveen and her two young friends, one barely 9 years old, were accosted by two men.[77] The youngest was slapped and threatened while the other two girls were raped.[78] The trial court sentenced the accused for rape, but the Federal Shariat Court (FSC) ruled that 15-year-old Perveen had consented to sexual intercourse and accordingly converted the sentence from rape to consensual sex (*zinā*).[79] On appeal, the judges of the Shariat Appellate Bench of the Supreme Court (SAB) disagreed with the FSC's decision to reclassify the conviction.[80] However, they upheld the sentence since no appeal was filed on behalf of the minor girl, Perveen.[81]

The above judgments demonstrate that the removal of "statutory rape" left children vulnerable to sexual exploitation. Recognizing this risk, judges began rejecting the validity of "consent" for underage girls in rape trials from the mid-1980s onward. For instance, in *Ishtiaq Ahmad v. State*, a minor girl, approximately 13 years old, was abducted and raped.[82] The trial court convicted the accused of rape.[83] On appeal, his counsel argued that the girl had consented to sex.[84] However, a full bench of the Shariat Appellate Bench (SAB), Supreme Court rejected this argument.[85] Justice Afzal Zullah ruled:

> Some argument was addressed to show that the abductee was a willing party because she did not raise a hue and cry when she was made to travel on a bus for some distance. The age difference between her and the accused (when she was hardly 13 years of age) was in the

76 *Id.* at 1126.
77 Ghulam Sarwar v. State, (1984) PLD (SC) 218.
78 *Id.* at 220.
79 *Id.*
80 *Id.* at 221.
81 *Id.*; *see also* Muhammad Nawaz v. State, (1986) SCMR 1812; Muhammad Amin v. State, (1985) SCMR 398; Muhammad Asghar v. State, (1985) SCMR 998; Khushi Muhammad v. State, (1986) PLD (SC) 12.
82 (1984) PLD (SC) 380.
83 *Id.* at 381.
84 *Id.* at 382.
85 *Id.* at 383.

> circumstances of the case enough to convince her that it will be futile; particularly when she had already been subjected to brute force and further that the accused had a weapon of offence.[86]

This judicial tendency to apply the principle of "statutory rape" even after its repeal is evident in the judgment of Justice Muhammad Taqi Usmani, a prominent religious scholar who served as a judge of the Federal Shariat Court (FSC) and the Shariat Appellate Bench of the Supreme Court (SAB) for nearly two decades.[87] In *Farrukh Ikram v. State*, a stepfather raped his 12-year-old stepdaughter.[88] The trial court convicted him under the Zina Ordinance.[89] He appealed the conviction before the FSC, arguing that his stepdaughter had consented to sexual intercourse.[90] In response to this plea, Justice Usmani ruled:

> However, this plea by the learned counsel for appellant does not have any force because the age of the victim, at the time of occurrence, was stated to be 12 years. This means that she was not adult at that time. Therefore, even if the victim had been a consenting party to the offence, the consent would have been legally invalid.[91]

Notably, Justice Usmani did not raise the issue of "puberty" to determine the "adulthood" of the girl. This judgment in the above case however was not an exception as Justice Usmani applied the principle of "statutory rape" in another case, stating that the consent of a minor girl 12 years of age was "legally invalid."[92] Justice Usmani decided both cases as a judge of the Shariat Appellate Bench of the Supreme Court. Therefore, his judgments

86 *Id.* Other members of the bench included Nasim Hasan Shah, Shafiur Rahman, Pir Muhammad Karam Shah, and Maulana Muhammad Taqi Usmani.

87 Kelly Pemberton, *An Islamic Discursive Tradition on Reform as Seen in the Writing of Deoband's Mufti Muhammad Taqi Usmani*, 99 Muslim World 452 (2009).

88 (1987) PLD (SC) 5.

89 *Id.* at 6–7.

90 *Id.* at 10.

91 *Id.* at 10–11 (author's translation).

92 Shaukat Masih v. State, (1987) SCMR 1308.

set the binding precedent for the Federal Shariat Court (FSC) as well as other courts. The FSC followed these judgments in *Nazar Hussain v. State*, wherein the accused was alleged to have raped Mst. Fazlan Bibi, a minor aged 13 or 14 years.[93] The trial court convicted the accused for rape under the Zina Ordinance.[94] On appeal before the Federal Shariat Court (FSC), the counsel for the appellant raised defense of "consent" while relying upon the medical report.[95] The FSC rejected the defense and held:

> It is further suggested that according to the medical evidence the prosecutrix was a habitual case and therefore, must already have sexual intercourse with the appellant or with some other persons. It is not necessary to express any positive opinion regarding this plea because in the circumstances of the case this will not help the appellant as Mst. Fazalan Bibi prosecutrix was minor at the relevant time.[96]

In the 1990s, courts continued to follow a similar approach, as demonstrated in the judgment of *Yousuf Masih alias Bagga Masih v. State*.[97] In this case, the accused, Yousuf Masih and Younus Masih, abducted a minor girl of 12 years of age, Razia, and raped her.[98] On appeal, the counsel for the accused raised the defense of "consent" of the victim.[99] However, Justice Usmani rejected this defense and held that "being a minor, her consent cannot be taken into account."[100]

A review of judicial rulings on the "consent" of minors in rape cases under the Zina Ordinance reveals a clear shift in approach over time. Despite the removal of the legal provision for "statutory rape," judges ultimately rejected the defense of

93 (1988) PCr.LJ 1970 (FSC).
94 *Id.* at 1970.
95 *Id.* at 1972.
96 *Id.*
97 (1994) SCMR 2102.
98 *Id.* at 2104.
99 *Id.* at 2106.
100 *Id.*

minors' consent.[101] In the early 1980s, courts often considered the "consent" of minors as a valid defense in rape cases, frequently reclassifying charges of rape (*zinā bi-l-jabr*) as consensual sex (*zinā*). However, by the mid-1980s, this approach began to change. Judges increasingly invoked the principle of statutory rape as provided in pre-1979 repealed law and ruled that minors' consent was legally invalid, effectively reinstating this principle in practice. The judgments of Justice Usmani played a pivotal role in driving this doctrinal change.

Judicial Attitude towards Underage Offenders

The examination of cases involving offenses committed by minors reveals that courts have generally adopted a standard of leniency in sentencing child offenders, taking into account the nature of the offense and the specific circumstances of each case. For instance, in *Zawwar Husain v. State*, the appellant, described as being of tender age (though the judgment does not specify his exact age), was convicted of consensual extra-marital sex (*zinā*) under Section 10(2) of the Zina Ordinance.[102] The trial court sentenced him to five years of rigorous imprisonment, thirty stripes, and a fine of 5,000 rupees.[103] On appeal before the Shariat Appellate Bench (SAB), Supreme Court, the key issue was whether the offender's sentence could be reduced due to his tender age under section 10(3) of the Zina Ordinance.[104] The court ruled in favor of the accused and held:

> Indeed, the nature of offence may permit to sentence the petitioner for more than 5 years of R.I [Rigorous Imprisonment]. However, the lower courts have remained satisfied with this sentence by reason of the tender age of the petitioner. Therefore, we also believe the same . . . and find no need to enhance the sentence of the petitioner.[105]

101 *See* Julie Dror Chadbourne, *Never Wear Your Shoes After Midnight: Legal Trends Under the Pakistan Zina Ordinance*, 17 Wis. Int'l L.J. 179 (1999).

102 (1985) SCMR 1629.

103 *Id.* at 1630.

104 *Id.* at 1631.

105 *Id.* at 1633.

Similarly, in *Muhammad Ashraf alias Guddoo v. State*, the appellant was fourteen years at the time of the offense.[106] The trial court found him guilty of raping a seven-year-old girl and sentenced him to 20 years of rigorous imprisonment.[107] On appeal, the Federal Shariat Court (FSC) reduced the sentence to 7 years of imprisonment and held: "Keeping in view the very young age of the appellant, we feel that the sentence awarded is too harsh in the circumstances. Accordingly, while maintaining the conviction, we reduce the substantive sentence of imprisonment of the appellant to seven years."[108]

Likewise, in *Khalid Hussain alias Khalid Pervaiz v. State*, the accused, described as a person of very young age (though the judgment does not specify his exact age), was charged with raping an 11-year-old girl.[109] The trial court sentenced him to 16 years of rigorous imprisonment. On appeal, the Federal Shariat Court (FSC) reduced his sentence to 10 years by "[k]eeping in view the very young age of the appellant."[110] In *Phalla Masih v. State*, a boy aged 13 years was prosecuted for raping a seven-year-old girl.[111] The boy was convicted and sentenced to 14 years of imprisonment.[112] Keeping in view the tender age of the boy, the Federal Shariat Court (FSC) reduced the sentence to two and a half years under Section 7 of the Zina Ordinance, which provides a lesser punishment for underage convicts.[113] In this case, the court refrained from awarding the maximum punishment. Rather, it relied on the circumstantial evidence related to the age of the offender and ruled in favor of reducing the sentence.

This lenient approach of the courts undoubtedly favors minors, but it may reduce deterrence. In *Muhammad Hussain v. Muhammad Ramzan*, Zahida Perveen, a girl of approximately 6 years of age, was raped by a boy of around 12 to 14 years of age.[114] The trial court convicted the accused and sentenced him

106 (1987) PLD (FSC) 33.
107 *Id.* at 34.
108 *Id.* at 38.
109 (1987) PCr.LJ 1979.
110 *Id.* at 1985.
111 (1989) PLD (FSC) 72.
112 *Id.* at 73.
113 *Id.* at 75.
114 (1982) PLD (FSC) 11.

to pay a fine of 500 rupees.[115] The father of the victim filed an appeal for the enhancement of sentence.[116] The primary issue before the appellate court was whether the sentence awarded to the young offender, about 12 to 14 years old, was adequate given the victim was about 6 years old.[117] The appellate court enhanced the sentence from the fine of 500 rupees to 8,000, and held:

> [T]he accused was rightly found guilty under section 7 of the [Zina] Ordinance. However, in the circumstances of the case, we find that the sentence awarded to Muhammad Ramzan, accused is grossly inadequate and amounts to a miscarriage of justice. It is proved on record that the accused committed *zina-bil-jabr* [rape] with Mst. Zahida Perveen a girl of 6 years of age. We are also conscious of the tender age of the accused and therefore are not inclined to send him to the prison. Keeping in view the facts and circumstances of the case we feel that the ends of justice will be met by enhancing the fine from Rs. 500 to Rs. 8,000 or in default to undergo rigorous imprisonment for two years plus 30 stripes.[118]

In this case, the court refrained from sentencing the underage offender to imprisonment and instead imposed only a nominal fine. While this compassionate approach may benefit offenders in some cases, it also weakens deterrence and fails to rehabilitate juvenile offenders, thereby increasing the likelihood of re-offending. In a similar situation, the Supreme Court dismissed a plea for sentence reduction and observed:

> We may point out that the purpose of sentence is prevention of crime and to discourage the others to turn to crime. It is generally agreed that leniency in the matter of sentence in serious offences is against the object and wisdom of law whereas the rationale behind the deterrent

115 *Id.* at 12.
116 *Id.*
117 *Id.*
118 *Id.* at 18.

> punishment is to eliminate the crime or at least to reduce and discourage the crime in the interest of peaceful atmosphere in the Society. The ultimate purpose of deterrence or the lenient view in the matter of sentence directly or indirectly is the reformation of an individual as well as the Society. The concept of lenient view in the punishment is to bring down an offender to reform himself and restrain from repeating the crime whereas the goal of deterrence in the sentence is reduction in crime in the Society due to fear of law.[119]

In a similar case, the Sindh High Court rejected a plea for leniency in a sodomy conviction based on the Sindh Children Act, 1955.[120] Section 68 of the Act prohibited the death penalty, transportation, or imprisonment for juvenile offenders, and instead allowed the court to place the child in safe custody while referring the case to the Provincial Government for further orders. In this case, two individuals were prosecuted under Section 12 of the Zina Ordinance for committing sodomy.[121] One of the accused, Muhammad Yakoob, was a 16-year-old boy, while the other, Sajid Mehmood, was an adult.[122] The trial court ruled that Yakoob's case should be tried separately under the Sindh Children Act, 1955.[123] However, an appeal was filed against this decision.[124] The key issue before the appellate court was whether the Sindh Children Act, 1955 applied when one of the accused was a minor.[125] The Sindh High Court held that the Act was not applicable in this case, as the Zina Ordinance had an overriding effect over other statutory laws.[126]

Although not explicitly addressed in the judgment, this case highlights a significant issue concerning children's rights—the inconsistent definitions of "adult" and "child" across various

119 Muhammad Aslam v. State, (2006) PLD (SC) 465, 471–72.
120 Niaz Muhammad v. State, (1985) PCr.LJ 1030.
121 *Id.* at 1031.
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.* at 1039.

statutes. The Sindh Children Act, 1955 defined an "adult" as someone who is not a "child," with Section 5 specifying that the Act applied to children under 16 years of age. Meanwhile, the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 defined an "adult" under Section 2(a) as someone who has either reached eighteen years of age or attained puberty. In contrast, the Zina Ordinance (Section 2(a)) defined "adult" differently: as a male who has reached 18 years or a female who has reached 18 years, or as someone who has attained puberty. These discrepancies created legal uncertainty, particularly in cases involving juvenile offenders, as the applicable definition of adulthood can significantly impact judicial decisions regarding sentencing and culpability.[127] Due to the overriding effect of the Zina Ordinance, such children are deprived of the protections provided by statutory laws like the Sindh Children Act, 1955, which are specifically designed to safeguard minors. Moreover, the Hudood Ordinances' emphasis on puberty as the defining criterion for adulthood excludes the fundamental element of *rushd* (mature understanding), which is a key consideration in determining adulthood under Islamic law. This results in gender discrimination, particularly against female minors, who are more likely to be classified as adults based solely on biological changes rather than cognitive or emotional maturity.[128] By prioritizing physical puberty over a more holistic understanding of adulthood and maturity based on age, the Hudood Ordinances exposed children—especially girls—to risks, stripping them of the protections available under juvenile justice laws.[129]

In bail cases, however, courts refused to give the Zina Ordinance overriding effect. Section 497 of the Code of Criminal Procedure, 1898 (CrPC) allows bail for non-bailable offenses unless there are reasonable grounds to believe the accused is guilty of an offense punishable by death, life imprisonment, or a 10-year sentence. A proviso to this section permits bail for individuals under 16, regardless of the offense. Case law shows

127 M. Ilyas Khan, Laws Relating to Children With Juvenile Justice System Ordinance, 2000 and Juvenile Justice Rules, 2001, at 12–13 (2004).

128 Bassiouni, *supra* note 21, at 192–93.

129 Asma Jahangir & Mark Doucet, Children of a Lesser God: Child Prisoners of Pakistan 4 (1993).

that judges granted bail in sexual offense cases by applying these procedural protections, despite the Zina Ordinance defining adulthood based on both puberty and statutory age. For example, in *Abdul Mannan v. State*, a boy aged 15 years was alleged to have committed sodomy with a boy who was around 6 to 7 years of age.[130] The trial court denied bail based on a medical report confirming his puberty, classifying him as an "adult" under the Zina Ordinance.[131] It held that he was ineligible for bail under Section 12 of the Ordinance, which prescribes rigorous imprisonment for up to 25 years.[132] However, the Lahore High Court overturned this decision, ruling that bail matters should be decided under the CrPC rather than the Zina Ordinance.[133] The judgment established two key principles: first, the Zina Ordinance does not override the CrPC in bail cases; second, courts retain discretion to grant bail to individuals under sixteen years of age.

An analysis of case law shows that courts often granted bail when there was any doubt regarding the accused's age or the need for further inquiry, exercising their discretion in favor of minors. In most cases, the benefit of the doubt was extended to underage accused, regardless of the victim's age or the nature of the alleged offense. For example, in *Muhammad Hayat v. State*, the petitioner was accused of abducting and raping a 15 to 16-year-old girl.[134] In light of the victim's inconsistent statements and doubts regarding her consent, the court ruled that the case required further investigation and granted bail to the accused.[135] Similarly, in *Wazir v. State*, the petitioner was accused of enticing and abducting a girl under 16.[136] The court accepted the alleged victim's consent to her marriage with the accused and granted bail.[137] Similarly, in *Tariq Masih v. State*, the petitioner was accused of abduction and consensual

130 (1984) PCr.LJ 1615.
131 *Id.* at 1616.
132 *Id.*
133 *Id.* at 1618.
134 (1983) PCr.LJ 1359.
135 *Id.* at 1360.
136 (1984) PCr.LJ 1890.
137 *Id.* at 1890.

extra-marital sex (*zinā*) with a minor girl.[138] While the prosecution claimed she was 13 to 14 years old, a medical report estimated her age to be 17.[139] In view of the medical report, the court granted bail.[140]

Conclusion

This article has examined the judgments under the Zina Ordinance involving children. It has highlighted three primary trends in the case law: (1) the ambiguities in defining the legal category of "adult" and determining "puberty" of minors; (2) the legal validity of the "consent" of children; and (3) the lenient sentencing of minor offenders. The most prominent issue is the ambiguity surrounding the definition of adult, which hinges on either a statutory age limit or the attainment of puberty. Courts have often exercised broad discretion in interpreting puberty, relying on physical development, medical evidence, and even the conduct of individuals at the time of the offense. Due to lack of any conclusive relation between the age and puberty, and the absence of any legal definition of puberty, there remained an ambiguity in declaring a person adult under Section 2(a) of the Zina Ordinance. The courts filled this vacuum by frequently relying upon the secondary sources (such as the books on medical jurisprudence and *fiqh* textbooks) and the medical evidence. This lack of clarity has resulted in inconsistent rulings, leaving children vulnerable to varying standards of justice.

Another critical trend in case law is the evolving judicial treatment of minors' consent in cases of sexual offenses. Before the promulgation of the Zina Ordinance, under Section 375 of the Pakistan Penal Code, 1860 (PPC), the consent of minors in rape cases was legally invalid under a proviso to this section. However, the definition of rape (*zinā bi-l-jabr*) under the Zina Ordinance did not incorporate this proviso. Early rulings frequently considered the "consent" of minors as a valid defense in rape trials, leading to the reclassification of rape (*zinā bi-l-jabr*) as

138 (1983) PCr.LJ 325.
139 *Id.*
140 *Id.*

consensual extra-marital sex (*zinā*). Over time, however, judges began to shift towards rejecting the notion that minors could legally consent to extra-marital sex, effectively reinstating the principle of statutory rape, even though it was removed from the relevant statute. This legal change reflected an increasing recognition of the need to protect children from sexual exploitation.

Finally, judges generally showed leniency in sentencing underage offenders, often reducing penalties to account for their age and potential for rehabilitation. While this approach provided relief to minors and emphasized the importance of second chances, it occasionally raised concerns about its effectiveness in deterring reoffending. Procedural safeguards, such as granting bail to minors, have further highlighted the courts' willingness to protect the rights of children.

Overall, Pakistan's experience with the implementation of Islamic criminal laws (*ḥudūd*) underscores the importance of procedural safeguards and legal certainty to protect the rights and interests of vulnerable groups including women and children, from the potential misuse of politically motivated enforcement of *sharīʿa*-inspired criminal sanctions. To address these challenges, in 2006, Pakistan's parliament removed *taʿzīr* offenses from the Hudood Ordinances and implemented procedural safeguards to prevent false prosecutions carried out under the pretext of enforcing divine law—*sharīʿa*. By clearly specifying that the Hudood Ordinances apply only to *ḥudūd* offences, these reforms led to a marked decline in false prosecutions for *zinā*. Paradoxically, it was the "Islamization" of the Hudood Ordinances, through their doctrinal alignment with classical Islamic legal categories, that ultimately addressed the problems arising from their political exploitation.