Islamization to Modernization of State Apparatus: A Case Study of Islamic Republic of Pakistan

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TAXILA INSTITUTE OF ASIAN CIVILIZATIONS
QUAID-I-AZAM UNIVERSITY ISLAMABAD

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THESIS AND DEFENCE APPROVAL FORM

The undersigned certify that they have read the following thesis, examined the defence, are satisfied with the overall exam performance, and recommend the thesis to Taxila Institute of Asian Civilizations for acceptance in partial fulfillment of the requirements for the award of PhD Degree in Asian Studies.

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submitted by me in partial fulfillment of PhD degree, is my original work, and has not been submitted or published earlier. I also solemnly declare that it shall not, in future, be submitted by me for obtaining any other degree from this or any other university or institution.

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ABSTRACT

Thesis Title: Islamization to Modernization of State Apparatus: A Case Study of Islamic Republic of Pakistan

This study explored the need, procedure and delivery of Islamization process in Pakistan. Islamization in the Sub-continent (Bangladesh, India and Pakistan) was started with arrival merchants, delegations and finally with the first Muslim victory in Sindh. In the first phase of Islamization under the Sultans there was no developed judicial system. A full fledge Islamic Judicial System was in vogue during the Mughal reign. Islamic Judicial System was replaced with Anglicized Laws to facilitate British Rule in India. Muslims were subject to a joint venture of exploitation in the hands of British and Hindus. Pakistan was made in the name Islam, the 'raison d'etre'. Every state carries out her business through state apparatus. State apparatus functions in line with ideology of the state. State business of Pakistan was expected to run on the basis of the religious laws. After independence Anglicized laws were to be Islamized to meet this end. In these pages the process of the Islamization of laws is elaborated in detail. The study focused: How did the Islamization of the Laws take place? Are the Hudood Ordinances (1979) divine laws or human efforts? Could the laws serve their purpose? What sort of relief the modernized law provides to the weaker wing of the society? Bannerman (1988) analyzed process of Islamization by tracing many common factors in legal reformation and revival of Islamic Laws in different Muslim countries. He is of opinion that pressure of Islamization during Zia's regime came from government i.e. Islamization through government fiat. His analysis provided for the theoretical framework being unbiased and non-defensive. Findings reveal that mere Islamization of Legal state Apparatus (LSA), without Islamizing individual mindset, society and all organs of state, could not serve its purpose despite ordeal of 27 years. Hudood Ordinances were result of human interpretation of divine Injunctions which might be reconsidered. Amendments were aimed at women emancipation under The Women Protection Act 2006 which is again a human effort. At the end the study suggested some ways and measure for real emancipation of women and the Islamization of the society.

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I feel tremendous pleasure to dedicate my effort to those who never left me alone in all spheres of my life:

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INTRODUCTION

Muslims of India, even after losing power at the hands of British, made a considerable faction of Indian society as well as Imperial subjects. Muslim rulers of India were treated with contempt by British. They were reduced to the lowest strata of Indian population. British rule was blight upon them. They were totally exterminated through attachments, confiscations and seizures. Their identity was not even recognized by the colonizers. Public and private assets were taken away. Separate identity and national integrity, an icon of Muslim society, was undermined. British infused the very sense of nation among Hindus owing to their policy of divide and rule. Entire non-Muslim population was Hindu under the aim of converting Muslims into minority. Moreover Indian Nationalism was aroused to suppress Muslims in the Sub-Continent. Muslims' identity and heritage were threatened by the British and Hindu joint venture. Colonial power worked under the garb of making hundreds of tribes of India a "nation". This state of affairs made Muslims to realize the threat to their existence.

Muslims of India got an earnest faith that their deliverance and salvation lies in religion. Only establishment of a state of their own on the basis of Islam could provide the place and prestige they were deprived of. Their determination coupled with hectic struggle at various fora was tinged with religious fervour and spiritual aspiration. The same was upheld by Quaid-i-Azam on 14th January, 1948 at Sibi: "It is my belief that our salvation lies in following the golden rules of conduct set by our great law giver, the prophet of Islam. Let us, therefore, lay the foundation of our own democracy on the basis of truly Islamic ideas and principles". In February, 1948 he added: "Brotherhood; equality and fraternity of man--these and all the basic points of our religion, culture and civilization. And we fought for Pakistan because there was a danger of denial of these human rights in this Subcontinent".

On first of July, 1948 founder of Pakistan observed that "Islam is our guide and a complete code of life for us". Rahman (1983) is of opinion that the *grundnorm* is Islam, without which the very emergence of Pakistan on the globe is meaningless. It was not Pakistan which

resulted in a nation but it is Muslim people who gave geographical boundaries to Pakistan. It is, therefore, plausible that Islam is the only binding force in Pakistani nation on the one hand and same can serve the purposes of integrity and solidarity of the state on the other.

1.1 Significance of the Study

Revolutions, upheavals and catastrophic changes in systems are transitory in nature. Occupants of a territory want a strong hold on the subjects, which is exercised through reorganization of state structure and refabrication of state apparatuses. Realization of sovereignty over attachments is carried out through legal means validated by the sovereign. The change of legal system in the Subcontinent under British facilitated their rule at its best. This study aims to identify legal state apparatus in the early Islamic state, their nature in medieval India, process of change under colonial rule, and process of Islamization in Pakistan. Special focus of the study is on Islamization in Zia ul Haq regime (1977-1988). It discusses the process of Islamization and also highlights its outcome summarily. Circumstances which led to the very need of enlightenment and moderation in Pervez Musharraf's reformative move are given a critical consideration in this research. In this connection office and responsibilities of the Council of Islamic Ideology updated the researcher about the process of Islamization and its pace along with discharge of its functions since its inception. This study provides for the resolution of so called rigidity of Islamic law in theory by having an insight into the particle of movement in practice. It also dwells on two spheres of authority i.e. fixed in texts as well as the general principles which empower the state to make laws.

Islamic law cannot be studied without in depth understanding of Islamic jurisprudence. Islamic jurisprudence enables the readers to know the ever dynamic nature of Muslim Law. A qualitative analysis of the Islamization informs the direction followed during the course. This evaluative work has examined merits and shortcomings in the process. Performance of institutions commissioned for the purpose show the pace and spirit of the Islamization. Obstacles in the way of change are also pointed out. Impact of these impediments on society, state and system are also highlighted. In the light of findings study recommends obligatory measures for

future to purge the state of wants and deficiencies to build a stronger state apparatus in modern age. Discussion on law, *inter alia*, is part and parcel of Islam. Modernism is "torch bearer" to purge the tradition. Debates on the issues like tradition and modernity, revelation and reason, liberalism and orthodoxy require deeper explication. Enlightenment of views which draw a line between tradition and modernity, nevertheless, needs a reflection and serious reconsideration. Tradition must be understood as a contributory base for modernity. Tradition allows adaptation, reform and dynamism. Islamization is not going to change what is customary and alien to Islam but it tries to revive the system i.e. state apparatuses which were in vogue for 700 years in the Subcontinent. However, the focus this study is restricted only to legal state apparatus (LSA). Furthermore, the study is delimited to analysis, examination, and working of Hudood Ordinances 1979. Protection of Women Act 2006; the modernized law is also part of the study. Main interest of the research remained to know the circumstances which led to, in the first place, the Islamization and then to Modernization. Relevance of these developments to the citizens of Pakistan makes the study significant.

1.2 Context of the Study

Pakistan came into being in the name of Islam. Newborn state on the basis of religion was to provide an ideal atmosphere to people to lead their lives according to the injunctions of Islam. It is, however, the sole pedestal upon which it can survive. Gibb (1953) holds that it is a complete way of life; a religion, an ethnic and a legal system all in one. Shariah permeates all spheres of life and it is an "epitome of true Islamic spirit, the most decisive expression of Islamic thought, and the essential kernel of Islam". In these pages the researcher tries to explore relevance of religion in matters of state control. In doing so the course of Islamization requires indepth study that how did the Islamization of the laws take place. As the end product of the Islamization process is the Hudood Ordinances, it is mendatory to know whether the Hudood Ordinances are divine laws or human efforts. All laws are made to serve certain purpose in administration of state business. The scholar tries to know that to what extent the laws served their purpose. In modern theory of state development laws guard citizens against maltreatment of the rulers. They

provide relief to people in a welfare state. At this point readers will expect that what sort of relief do the Islamized Laws provide to the weaker wing of the society (women). After working with these laws for 26 years why the need for amendments in these laws was indespensible and to what extent the modernized law served its purpose.

The Council of Islamic Ideology worked on the Islamization project with full religious fervour for more than a year. It forwarded five drafts of recommendations on: "*saraqah*" (theft) and "*harabah*"(dacoity); *zina* (adultery and fornication); "*qazf*" (false accusation of *zina*); '*khamr*" (drinking of alcohol) and punishment of flogging. Crimes which were constituted on account of above mentioned acts under Pakistan Panel Code 1860 were placed under the Hudood Laws to decide the cases according to Shariah (sayings, doings and approvals of Prophet paece be upon him). Punishments of these crimes were changed in accordance with Qur'an and Sunnah of Prophet (pbuh). CMLA was pleased to promulgate Islamic punishment for these crimes on 10th Feb 1979. The Hudood Ordinances are:

(i) Offences against Property (Enforcement of Hudood Ordinance) 1979

(ii) Prohibition (Enforcement of Hadd Ordinance) 1979

(iii) The offence of Qazf (Enforcement of Hudood Ordinance) 1979

(iv) Offences of Zina (Enforcement of Hudood Ordinance) 1979

(v) Punishment of Flogging Ordinance 1979

There was a hue and cry in house and abroad alike on promulgation of these Ordinances. Liberal factions of the society and women activists were of opinion that these laws are against women rights – women folks are subjected to male advances under legal cover. Much of the criticism owes to the procedural system in Pakistan. There are instances of maltreatment of women under police investigation. Mishandlings of the cases were due to the system of investigation in the country. Another factor was exemption of procedural laws from jurisdiction of the Federal Shariat Court. Flaws in procedural laws result in delays during trial of the cases. Inefficiency of proceedings in also counted as inefficacy of the Hadood Laws. One example of procedural flaws which was cause of harsh criticism on the Hadood Laws is death by stonning.

This punishment was awarded to awoman on contracting second and third marriages after divorce. This punishment was awarded to her on complaint of her first husband. Facts were: the first husband pronounced *talaq* verbally. After divorce she contracted second marriage. But the divorce was not registered in the Unioin Council's register maintained for this purpose under MFLO 1961. Now this flaw of procedure was fixed to the Hadood Laws declaring them brutal, harsh, and inhuman. The liberals called the laws a total faiurel in providing relief to already oppressed women victims.

Hudood Ordinances are human efforts in legal history of Pakistan. Their base is on divine guidance. There are some crimes which do not fall under *Hudood*. Crimes belonging to *Hudood* have some inconsistencies in their framing. There is no harm if the Islamized Laws are reconsidered for redrafting on the points highlighted at various levels, which are not in clash with the injunctions viz. Qur'an and Sunnah, by The Federal Shariat Court, the National Assembly, The Commission of Inquiry for Women, The Council of Islamic Ideology, Commission for Status of Women, and NGOs and freelance writers.

The researcher came across various intriguing questions: Is it possible to administer a modern state in 21st century according to age old doctrine of Islam? Is the Islamization a panacea to all ills of Pakistan? When we evaluate past efforts of seven decades do we find that the Islamization could provide relief to common citizens or could deliver as expected?

1.3 Background of the Study

Social well being has been the goal of every social order in the world. Reformers did well to expunge mutilations and contaminations out of their value systems. Rectification of norms has been aim of all religions of the world. Human history is full of such reformative moves. These moves were under either divine guidance or human contemplation or both. Such revelations from the divine source of laws got its culminating shape in the 7th century CE aacording to Muslim faith.

Islam caught foot hold in Madinah after the migration (*hijra*) of Muslims from *Makkah*. Theoretical canons were complete till that time and were ready for implementation. *Madinah* provided a fertile soil for this purpose. A progressive state was founded in the light of the Divine injunctions i.e. Qur'an and Sunnah of the Prophet of Islam. The Prophet (peace be upon him), being the recipient of the law canons for Allah (Muslim God), made, interpreted, and implemented Islamic laws in the territorial jurisdiction of state of *Madinah*. State matters and civil matters were dealt according to the laws made through democratic process basing on the divine instruction in the Holy Qur'an (*amruhum shura bainahum*: 42:25). There was no hard and fast bifurcation of criminal and civil matters as it is found in modern day state theory. All matters pertaining to economy, justice, and politics were being dealt according to the will of people in the light of the divine guidance. There were new considerations for provision of basic needs and social wellbeing of people. State functions were not segregated in early Islamic State (under Propher (pbuh) and Caliphs (Alah be pleased with them); however, they existed in spirit if not in letter. Concept of separation of powers was in vogue even if many offices were in the person of the Prophet (peace be upon him). Islamic state prospered under the rightly guided Caliphs of the Prophet (peace be upon him). There was a system, though very simple, of the state to adjudicate ever emerging cases in the polity. Umar and Ali (Allah be pleased with them) are well known for their decisions as judges of early Islamic courts in the state of *Madinah*. They decided cases according to laws enshrined in Qura'n and Sunnah. They also followed precedents of the Prophet's court along with application of their juristic minds. The living doctrine of *ijtihad* was truly in practice during the Caliphate.

Continents were in contact before proclamation of Islam in Arabian Peninsula. There were trade ties between the two regions i.e. the Subcontinent and Arabian Peninsula. The subcontinent was being governed under Vedic Laws (divine laws according to Hindu belief). A brief account of these Vedic laws, in force in the Subcontinent at the time Muslim occupation, along with their sources is given chapter two of this study. It was necessary to know the state of legal apparatus in ancient and medieval India before Muslim occupation to prepare a base for further take over (the first step Islamization) by the Islamic Laws as discussed in chapter three.

The ray of light crossed the boundaries of *Hijaz* with the traders. Changes in behaviours and practices of foreigners were not unnoticed. Locals were attracted towards new life patterns and beliefs underneath very earnestly. Process was supplemented by conquest of Makran Coast in the hands of Muhammad bin Qasim in 712 AD. The people of the Subcontinent embraced Islam and gave birth to a new nation (being one part of the *Ummah* which permeates the concept of regional boundaries for a nation) in the territorial limits of India. Religion of ruler ever prospers in conquered lands. But it was an otherwise prerogative of Islam which infused sense of self respect, equality, and liberty in the class ridden society of India.

1.4 Islamic Law in Medieval India

Muslim Indian dominion was established under Imad-ud-Din (Muhammad bin Qasim) in 712 AD in India. Mahmud of Ghazna and Muhammad Ghori invaded many parts of India later on. Muslims and locals were in close contact with each other. There were in different mini states ruled by locals irrespective of their religion. Up to the 12th century AD there were no established institutions under the rulers of the states. Territories under Muslim rulers were under Islamic System to some extent but Islamic System could not get foothold in true sense writes Ahmad (1992).

Qutub-ud-Din Aibik was the first Sultan who laid the foundation of Muslim Administrative System in 1206 AD. He introduced Islamic Laws in northern India after conquest. It was start of the Islamization of laws in India. There was a judicial machinery and judicial system under Sultans. Nonetheless, this was a slow and gradual movement which is termed as reflexive transition of social and legal norms. A great work on law, *Fatawa-e-Alamgiri*, was written in reign of Aurangzeb (1597). It contains laws enforced at that time. Mughals introduced legal system in the Subcontinent in real sense (the culminating point of the first phase of the Islamization of the laws). Administration of justice was the first and foremost duty of Muslim rulers. They accompanied renowned jurists to newly conquered areas. Emperor used to appoint judges in the regions under his rule. Lower courts disposed of the matters pertaining to civil and criminal issues. Appeals against the decisions of the subordinate courts were filed in the court of

appeal under the emperor. The Emperors instituted separate courts for Hindus and Muslims in the Mughals reign to deal with matter falling under their personal laws.

Much of the procedures in Company's (East India Company) Courts of Justice have been derived from it (Muslim Law); and through this means, and also through the subordinate officers and pleaders of the Courts--who, with a very few exceptions, were Moohammudans or Hindus trained to the same methods and have derived any knowledge or jurisprudence they possess from that source--it exercises a powerful though unseen influence on the administration of justice even by English judges (Ahmad, 1992 p.31). There are numerous references in medieval history of India to judicial system, courts, *qazis,* appeals, punishments and royal prerogatives etc.

1.5 Change of the System

Muslim Laws were in practice till 1772 AD. British laws took hold later on under East India Company's Administration in different phases. There were successive efforts on abolition of Islamic Laws. In the first assault in 1790 AD on the basis of minutes by Lord of Cornwall the right of next of kin to claim *Qisas* (killing of the murderer) was taken away. Law imposing restriction on mutilation punishments was enacted in 1791 AD in the second episode. Claims for *Qisas* were not enforced and even when the *Diyat* (blood money) was not even paid according the regulations under British administration. Regulation VIII of 1799 declared homicide subject to capital punishment (death penalty). In 1801 accidental homicide was distinguished from willful homicide (Ahmad 1992). In this way Islamic Laws of the land were Anglicized. Codification of Indian Penal Code and Code of Procedures are later developments as elaborated in Jain (1982). The detailed account of mutilation of Islamic Judicial System along with the Islamic Laws, enforced at the time of occupation, by British rulers, to have a strong control on their subjects, is furnished in chapter three of the this study.

1.6 Situation after the Independence

British left India in 1947 AD. Pakistan emerged as new Islamic state (stae with Muslim majority). It is unique in its basis as Islam is its "*raison d'etre*". At the time of independence it was decided that country will adapt Government of India Act 1935 until new constitution is made. Pakistan's Constitution was made on the scaffolding of the very Act. Despite languished efforts of the Constitution making for nine years, judicial system was left as it was under the British rule. Most of the laws are still in vogue are made by the colonizers to serve their purpose. Whole host of laws in Pakistan are alien, in nature, to the state founded on the basis of Islam. It is time span of seventy years which has elapsed but there is no considerable progress on the vital issue of the Islamization of the state apparatuses under home rule. Steps have been taken in this direction to materialize the purpose of liberating the nation from the laws made by the colonizers to conrol their subjects and provide a status of citizens of a modern Islamic state. A detailed critical record is furnished in chapter three of this study on developments on the issue of the Islamization of state apparatuses since independence. This log starts from the acceptance of the Objectives Resolution through Islamic Provisions in the Constitutions of 1956, 1962, and 1973 to the revival of Constitution Order 1985. It also updates on institution of different statutory bodies for expeditious and smooth transition from English State Apparatuses to Islamic State Apparatuses viz. the Advisory Council of Islamic Ideology, the Law Commission, International Islamic University, Islamic Research Institute and the Council of Islamic Ideology (CII) and the Federal Shariat Court etc. Special attention is part of this study with reference to the mandate and working and contribution of the council of Islamic Ideology and the Federal Shariat Court (FSC). The Constitutional mandate of the FSC under Article 203 of the Constitution of 1973 is unique having no such powers of Judicial Review of the laws in the constitutions of countries across the globe.

1.7 State Apparatuses

The supreme public power within a sovereign political entity is known as state. State is the strongest abstraction of law. It is formed by individual through voluntary submission of their rights, collectively; in a separate non human entity for providing security and safeguards to their rights. It is the prime civil power within a given polity. Political body which constitutes a nation, especially, is called state. Tools with which state discharges its functions are known as state apparatuses. It is way in which a lot of people are organized to work together to do a job or control a country. The phrase was used by Louis Pierre Althussar, a Marxist thinker of France, in 1971. To him ideological state apparatuses (ISA) include religious institutions, educational institutions, the family, political parties, and the media etc. State apparatuses are agencies of state whose primary function is to secure cooperation of subordinate class and their submission to the ruling dominant class. The other type of state apparatuses is known as repressive state apparatuses (RSA). These include police, army, judiciary, etc. Operation of second type of apparatuses is sought when ideological apparatuses fail to yield. It is also called hegemony of the ruling class through force. This study is delimited to legal machinery of the Islamic Republic of Pakistan i.e. Legal State Apparatus of Pakistan. Laws and judicial system of Pakistan have been subject of many discussions; political and academic alike. In this study criminal laws after the Islamization move by Zia-ul-Haq are, analyzed, discussed and appraised with reference to their implementation and working in the courts.

1.8 Islamization

Islamization is a process of conversion to the religion of Islam. It also denotes promulgation of Islamic injunctions in a society in an otherwise different background of community or state. Islamic tenets replace prevalent rules, customs, practices which are not in consonance with those tenets. It is also a symbolic manifestation of social organization based on or in the light of the divine instructions. Islamization in first phase was corollary to occupation of the Indian lands by Muslim rulers in different periods of history. It was a reflexive and

spontaneous development which was a more gradual transition which resulted in application Islamic Laws in place of customary and Hindu Laws discussed in the second chapter of this study. Islamization in this research is primarily the Islamization of the criminal laws codified in Pakistan Penal Code (PPC) which was raised on the scaffolding of Indian Penal Code made by Hastings and Macaulay replacing Islamic Criminal Justice System in India. Islamization of State Apparatus means changing of English Criminal laws of the PPC, which are under Hudood laws in Islamic Justice System, to Hudood Laws through Hudood Ordinances 1979.

1.9 Modernization

Modernization is to adopt modern ways, ideas, and styles. Islamization is a traditional approach towards replacement of customary and alien laws in Pakistani background. In contrast to Islamization the term modernization is used to depict process of reflection / reversion towards more modern views on legal issues. It is a gradual process rather than a sudden change. This process takes its course according fixed rules. Modernization of laws means to consider suggestions and reforms in the existing *corpus juris* in the light of Islamic injunctions to cater for the interests of subjects. In this study the Modernization of laws is restricted to the Huddod Ordinances. Chapter four of this study documents in depth critique on make-up and working of the Hudood Ordinances for 27 years in the courts. These had been subject of debate at home and abroad alike. There were long standing demands of their repeal and abrogation from the left wing, NGOs and women activists. There were even voices of their rectifications through amendments from a group of modern religious scholars. Owing to these demand, as against the traditional wing of religious scholars, process of amendment was under taken by the Government in 2006. It was done after hard reflection and independent debates as well incorporating suggestions of the courts, the National Assembly, the Council of Islamic Ideology, the Women Commission, and decisions of the Federal Shariat Court and the Honourable Supreme Court of Pakistan. The culmination of this modernization coup resulted in the Women Protection Act 2006.

1.10 Objectives

(i) To investigate the process of Islamization

(ii) To analyze the Islamized laws in the light of Islamic Injunctions

(iii) To explore working of the Islamized laws

(iV) To determine *vires* of modernization of the Islamized laws

1.11 Research Questions

(i) How did the Islamization of the laws take place?

(ii) Are the Hudood Ordinances divine laws or human efforts?

(iii) Could the laws serve their purpose?

(iv) What sort of relief does the modernized Law provide to the weaker wing of the society (women)?

1.12 Theoretical Framework

Bannerman (1988) analyzes the process of Islamization. There are many common factors in legal reformation and revival process in different countries. Diversity of interpretations might not obliterate common factors in this process of revival in various parts of the world. Difference of opinion on issues of Islamic Law, its derivation, and promulgation poses multifarious problems. Islamization took place in different parts of the world in the 20th century. There are more than one approache towards the goal. He categorizes efforts of Islamization under four heads:

(i) There are many parts of the world where the Islamization was done. In some of the cases some organization has got power e.g. Iran. Islamization was triggered over there by the government of the state. In the same way in Pakistan after sacking

democratic government the usurper headed with the Islamization coup. To many it was under guise to search legitimacy for the *"coup d'etate*". Pressure of Islamization during Zia's regime came from government in Pakistan. The writer terms it the Islamization through government fiat.

(ii) There are some pressure (militant) groups of Islamists in significant number which oppose Muslim governments and non-Muslim governments alike i.e. Mujahidin in Afghanistan. Such groups have been mushroomed in various part parts of the world since the book was written by Bannerman. Islamic Third World countries provide fertile soil for their outcrop. *Islamic State* in Syria, *Hizbullah* in Lebanon and *al-Qaida* and *Daish* has been a perpetual broad based proponents of Islamic rule in different regions of the world.

(iii) Smaller organized groups which think people against their views are unbelievers as *al-jihad* in Egypt. They have their clandestine activities to work as pressure groups. They target only Muslim government. Taliban in Pakistan serve a better example in present circumstances. Since the authorship of the work there have many new entries in this head with different names. It is neither scope of this study to name those new entrants nor wise any way.

(iv) Small groups like *al-jihad* in Lebanon having manners to internationalize the issues to eliminate Israelis, Americans, Christians and pro-western Muslim Arabs. These small scale organizations are operating at different fora: intellectual, virtual, national and transnational linked through different means of communication in present day modern world.

Our concern remains with group (i) of Bannerman. Group (i) shares well articulated ideological framework of other three categories as well. Power is main decisive factor in this case. In Iran power was sign of harmony and unanimity (though not exhaustive). Thus, the writer holds that "the process of Islamization in Pakistan, claimed to be in response to the wishes and

aspirations of the Pakistani people, has caused more conflict, questioning and opposition than unity and harmony".

There is a controversy in political elements in Islamic Republic of Pakistan on process of the Islamization under government fiat. The questions: Whether the use of Islam was to gain legitimacy for the military *coup d'etate*? Or was it a tool to postpone and cancel promised general elections? Or was it a guise, to outlaw the political parties, to impose Islamic taxes and punishments and ban certain forms of entertainments? These questions have caused many to ask: Whose Islam? (as no consensus was developed before the Islamization move); What does the state Islamism mean? What the purpose is it going to serve? etc. The writer thinks Islamization of Iran and Pakistan dissimilar but questions posed to both of the governments fiats are same. Method employed in the Islamizations is, however, questioned. Evidence is brought from Zia's Referendum and very low polling therein. Furthermore, Zia's counterpart Jamat-i-Islami was not able to win considerable seats in the National Assembly as well as in the Provincial Assemblies in the elections after the Referendum for the "Islamization". It tells about waning of support claimed during days of extreme power. The support for the military usurped rule was from traditional right wing of people in the initial days of the takeover. It was acquired through coercion and illetimate force. The islamization process was carried out in hustle without developing consensus among all religious groups. That is why outcrop of the Islamization happened to be a mirage. The emotional attachment of the Right Wing proved transitory and short lived.

Why Bannerman's approach is the most suitable? And why it is to be followed to take insights from? He divides analysts of Islam in two groups i.e. Western and Muslims. First group he rejects being oblivious of the fact what Islam is. Their approach is lacking in itself with reference to five misconceptions:

First misconception is that Islam is monolithic and ignorant of diversity in the Muslim World.

(i) Islam is read in particular contexts.

(ii) Revival is thought socio-economic phenomena providing base for beliefs.

(iii) Assessments are made on what Muslims say and too little on what they do.

(iv) Historical, social and cultural environment is too often ignored.

On the other hand he finds Muslim scholarship orthodox. It is striving to prove everything enunciated from their forefathers obstinately. In his conclusion he finds most of them short of foresight without knowing philosophy of Islam as a living doctrine of civility. Their stance is rather restricted and devoid of required insights for an objective study of Islam. To him they are apologetic and over defensive while addressing the questions of modernity and challenges posed by it. He then proposes his methodology to see, analyze, examine, weigh and criticize available evidence both in theory and practice rationally and on qualitative basis devoid of hostility and emotional attachment. He describes views of Muhammad Qutub:

(i) Islam comprehends every aspect of human soul irrespective of race, colour, language, location, intellect, culture etc.

(ii) It knows to fulfill all requirements of past, present and future till the last day i.e. Doomsday.

Maududi's views are also given in the work to state standpoint of Muslim scholars. Theory and practice is also examined in detail. The writer claims that on the charge of fundamentalism Islamic revival can't be ignored. Assessment to him must rest on logical comprehension of the history and revival of Islamic thought. Sound understanding of Islamic doctrine and ways developed by it are of cardinal importance while analyzing the process adopted in state Islamization. Works of earlier Muslim and non-Muslim scholars are studied to highlight the modern world challenges. Their views, writer finds, in some respects, unsatisfactory in consideration of significance of Islam today. World is changed since they wrote, now sources are added, research oriented studies have changed old perceptions. They viewed theory at large and neglected the practice. Islamic doctrine is dynamic rather than static. Keeping in view the approach offered by Bannerman Islamization of criminal laws of Pakistan, especially Hudood Ordinances 1979 is studied critically in these pages. It informed about the process of Islamization and its effect on Anglo-Muslim Laws on the one hand and its relevance to the citizens of Pakistan

on the other. Furthermore, the modernized law in the name of Protection of Women Act (PWA) 2006 is also explicated for its pros and cons by comparing it with the laws it amends.

1.13 Chapter Breakdown

Introduction: It discusses significance of the study, context in which study is carried out, background, working of Islamic laws in medieval India, change of laws into Anglicized laws, situation at the time of independence, State Apparatuses, delimitation of the study to Legal State Apparatus (LSA) especially to Hudood Ordinaces under Islamization, Modernization, objectives, research questions and theoretical framework along with its rationale.

1. Metholoy and Theoretical Framework: It informs about the methods employed to conduct this study. Information on data for the study, sources, procurement of the data, and modes of analysis are provided in this part. Main points are: How did the researcher do it? What comprises of data of the study? What procedure for analysis is adopted? What is position of the research scholar? How the question of subjectivity is dealt with? Second part explains theories of state development. It starts with definition of a state, considers question of sovereignty and locates place of citizens in a state. It further highlights pre-state conditions, discusses centre of authority, informs about state laws and introduces the concept of rule of law. Discussion on concept of modern state and place of religion in a modern nation-state along with religion in the state business makes the core part of this segment of the study. Terms like Islamization, Modernization, and State Apparatus are defined in these pages to get started on the task of application of Islamic principles to Anglicized laws and further enlightenment of the laws by incorporating modernized approach in the Islamized laws.It further elaborates sovereignty, rule of law, pre-state conditions of Arabs, concept of Islamic state, authority in an Islamic State, place of religion in the state business, state apparatuses and legal System, Islamization of the legal state apparatus, concept of Modernization, Modernization of laws, history of Anglo-Islamic laws, matters of authority in the process of Islamization inform the theoretical foundation of the study.

2. Legal System in Ancient and Medieval India: It offers a detailed account on basis of Indian legal system (Vedic Sources), Cataclysmic concept of the world creation, enactment of laws by Brahma (creator of universe according to Hindu belief), make-up of the Vedic society, glimpse of the Vedic Laws,caste system and its legal implications, legal literature, commentaries onlaws, administration of justice, civil laws, criminal laws, civil procedures , criminal procedure, concept of Dharma, different heads crimes, different punishments and modes of the punishments, administration of justice under Sultans of Delhi, structure of courts and their working under the Sultans, administration of justice under Mughals, court structure and their working under Mughals, switching over to the British System, various efforts to Anglicize the Islamic Laws, the Law Commissions etc.

3. Efforts on the Islamization of Laws (Legal State Apparatus): This segment of the thesis describes Islamic provisions in the Constitutions of Pakistan, role of the Council of Islamic Ideology, promulgation of Hudood Ordinces (the culmination of the process of Islamizaion), institution of the Federal Shariat Court along with its mandate and working, Islamic Economic Council, different convetions on Islamization, different forums of Islamization, Islamic Provision in all Constitutions of Pakistan, Revival of Costitutional Order etc.

4. Discussion and Interpretation: This is main part of the study. It discusses: Laws at the time of independence, process of Islamization of laws and Constitutional position, role of the Federal Shariat Court in Isalmization, some of the leading decisions of the Courts, methodology for knowing the Islamic relevance of the laws, working of the Council of Islamic Ideology since its inception, Islamization of the criminal laws under Hudood Ordinances, Islamic punishments, analysis of Hudood Laws, previous laws dealing with the crimes placed in Hudood Ordinances, critical evaluation of the Hudood Laws, appraisal on working Hudood Laws, women rights, CII's proposals of amendments in the Hudood laws basing on debates and proposals of statutory and legislative bodies of the country, reference cases decided by the Federal Shariat Court and the Honourale Supreme Court of Pakistan to show outcome of Hudood Ordinances, critical analysis of Hudood Ordinances, Modernized Protection of Women Act, critical analysis of the PWA etc.

Findings, Conclusions and Recommendatins: It summarizes all chapters of the study. It notes findings in summary form. The conclusions are drawn in this section basing on the finding. Furthermore, it also puts forward some suggestions for total Islamization society and the State Apparatuses as only Islamization of Legal State Apparatus (LSA) makes a part of the whole and hence, is insufficient to purge the ills of society as well the state. Islamization is the only panacea to all ills provided it is done holistically basing consensus among all the stake holders.

CHAPTER 1

METHODOLOGY AND THEORETICAL FRAMEWORK

This section of the thesis is divided in two parts. First part deals with procedural matters. It informs about the methods employed to conduct this study. Information on data for the study, sources, procurement of the data, and modes of analysis are provided in this part. Main points are: How did the researcher do it? What comprises of data of the study? What procedure for analysis is adopted? What is position of the research scholar? How the question of subjectivity is dealt with? Second part explains theories of state development. It starts with definition of a state, considers question of sovereignty and locates place of citizens in a state. It further highlights pre-state conditions, discusses centre of authority, informs about state laws and introduces the concept of rule of law. Discussion on the concept of the modern state and place of religion in a modern nation-state along with religion in state business make the core part of this segment of the study. Terms like Islamization, Modernization, and State Apparatus are defined in these pages to get started on the task of application of Islamic principles to anglicized laws and further enlightenment of the laws by incorporating modernized approach in the Islamized laws. Last section of this chapter relates the work of Feminist Movement regarding women emancipation from Muslim countries: Morocco, Tunisia, Iran, and Turkey.

1.1 Methodology

This part informs about the procedure adopted to conduct the study. It bases historical records of legal systems: State Apparatuses. Historical records include ancient legal logs found in Muller's compendium of ancient legal practice in India, laws which replaced Vedic Laws under Mughal empire: Islamized laws of India, Anglicized Mohammadon Laws during colonial rule, Islamized Laws by Martial Law administrator General Muhammad Zia-ul-Haq (Hudood Laws) and modernized version of the laws: The Protection of Women Act 2006 during another Martial Law administration of General Pervaiz Musharraf. However, main focus of the study remains

explication and working of the Hudood Laws. These records are data for conduct of the study. To support the study decisions of The Federal Shariat Court and The Honourable Supreme Court of Pakistan are also discussed to substantiate the stance taken while interpretations and conclusions. The sources of the data are given below.

1.1.1 Data Collection

As this study deals with conversion of an existing system to solve crimes at various stages of history the researcher introduces ancient system of administration of justice in this study. The details about the ancient laws enforced in ancient India are taken from Muller's series of books. Nature and source of the laws are discussed in summary form. Different categories of crimes were dealt with differently under civil and criminal modes of dissemination of justice. The decisions were based on trials in the light of evidence. Remedies, restitutions and punishments are discussed to foreground the process of conversion of the laws. The second part of the historical accounts is on working of the legal state apparatus under Mughal rule. Discussions rest on the accounts of administration of justice system in medieval India as furnished by Ahmad (1992). Glimpses of the legal state apparatus under Sultans and Mughal administration borrows from Jain (1982). First part of the discussion mainly deals with the legal system of the Sultanate and Mughal periods whereas second part highlights the transitions and its modes under colonial rule. The process of Anglicization makes the core part of the section which provides base line for the Islamization Process after inception of an ideological state. The literature on the Islamization comes from the Council of Islamic Ideology which was instituted under the constitutional force. The very literature offers an exhaustive log of all efforts made in this regard so far. This record is published by the Council of Islamic Ideology in form of reports. The reports are issued on annual basis. The reports were accessible to the researcher with due permission by the secretary to the council. Nonetheless, debates on various fora both on the Islamization and the Modernization illuminated the researcher on nuances of discussion in these matters. The efforts of modernization remained under close watch of the academia for feasibility and legitimacy. The Protection of

women Act 2006 and appraisal on it evaluation and potential implications also make part of the data and its analysis.

1.1.2 Analysis of the Data

This is a historical study which tries to evaluate the working the Hudood Laws made under the constitutional cover by The Chief Martial Law administrator. Analysis of such documents heavily brings forth qualitative discussions but these discussions are given an objective touch by furnishing details of Hudood cases by referring to the '*ratio decidendi*' and the 'obiter *dicta'*. These details are cumbersome to some extent and seem an overdoing but at the same time offer factual, unbiased and objective orientation to the qualitative narrative study. Methodology of this research is qual-quant blend though quantitative facet does not offer a balance but supports it. The analysis of four Hudood Ordinances: Offences against property (Enforcement of Hudood Ordinance (VI of 1979), Offence of Qazf (Enforcement of Hadd) Ordinance Order (VIII of 1979), Offences of Zina (Enforcement of Had) Ordinance Order (VII of 1979), Prohibition (Enforcement of Hadd) Order (IV of 1979) and Protection of Women Act 2006 is done in summary form. After highlighting the main ingredients of the laws the analysis of the Hudood cases decided by the Federal Shariat Court and the Honourable Supreme Court of Pakistan is made part of the study.

1.1.3 Scholar's Orientation

As this study is about state control and legal state apparatus, being a powerful mode of the control, which is limited to the criminal laws: Hudood Ordinances, a human interpretation, of Islamic injunction in the light of the provisions of the Constitution of Islamic Republic of Pakistan. Context and setting of the study are quite clear and don't need any further explanation. It is important to clear the position of the mind that embarks on such a task as evaluation, analysis and interpretation of the laws which had brought forth the debates at home and abroad from all walks of life and thought. The researcher is a Muslim by faith and follows Hanafi School of thought which is the major Sunni School.

The researcher brings inherent inclination towards religion. This very idea finds support in the slogan ever cherished by Muslims of Pakistan, though there was a difference of opinion on the separate Muslim state, that Islam is "*raison d'etre*" of Pakistan. In the given situation objectivity becomes more out of reach for a scholar born and bred in a religious environment when he had been an apprentice at a seminary for quite a sometime. On the other hand objectivity in any qualitative study most often becomes "a wild goose chase". Having admitted the potential danger of inherent bias in the forthcoming discussion efforts are made to let not this preconception overdo and help the scholar present tolerably mild nuances of this limitation.

1.1.4 Procedural Approach

Though it is impossible to totally do away with the question of subjectivity it can, however, be made comparatively placid by following research ethics which are in vogue in the academic world. Bannerman (1988) provides insight to take an unconventional, nonconformist and unbiased stand while carrying out a study on Islam and its social dimensions across continents.

He analyzes process of Islamization. There are many common factors in legal reformation and revival process in different countries. Diversity of interpretations might not obliterate common factors in this process of revival in various parts of the world. Difference in opinion on issues of Islamic Law, its derivation, and promulgation poses multifarious problems. Islamization took place in different parts of the world in the 20th century. There are more than one approache towards the goal. He categorizes efforts of Islamization under four heads:

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Why Bannerman's approach is the most suitable? And why it is to be followed to take insights from? He divides analysts of Islam in two groups i.e. Western and Muslims. First group he rejects being oblivious of the fact what Islam is. Their approach is lacking in itself with reference to five misconceptions:

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(i) Islam comprehends every aspect of human soul irrespective of race, colour, language, location, intellect, culture etc.

(ii) It knows to fulfill all requirements of past, present and future till the last day i.e. Doomsday.

1.2 Theoretical Framework

This part of the study puts forward the theoretical foundation to help form a holistic view of the developments in matter of state: definition, elements, authority, legitimacy of the authority, state apparatuses etc. It further reviews theory of modern nation-state. A brief history of Muslim state at Madina also makes a part to provide base line to the discussion of application of religious laws to an existing state. Examples of state control within the Islamic world are furnished to compare the efforts of Islamization in Pakistan in the next chapter.

1.2.1 Concept of State

Ahmad (1979) writes that there is no consensus on social contract and evolution of state of nature. To some it is unhistorical and to others a phantom of imagination. It is intellectual debate of thinkers and without basis in history. Kant (1991) counts it as mere idea based on reason fit for philosophical discussion rather than actual *ovo* of the state. Politics was introduced as a subject of human inquiry with Greece. Rudiments of contract theory are in discussion of conventions of the society with reference to common ends. An antithesis was offered to nature and conventions. First proponent of agreement with state laws was Socrates. Laws were sacred to

him. He did not escape from prison and withstood the laws. Laws were true, they fostered the individuals. He did not defy the laws.

Plato and Aristotle opine that man, moved by fear of the strong on weak, made a contract, to do justice among them, and accepted that contract as binding which defined remedies against the wrongs done to them. To *stoics* men were guided by universal laws of nature and their association came into being as a conventional state of nature. Roman were against conventions and laws of natures. Like Cicero iterated natural equality and natural evolution of social institutions. Hobbes (1968) is of the views that the people were under small governments of families and their concord took place under natural lust (of power). He expects that there were some common power to be feared of to maintain order in the society. Suppose if one negates presence of such power the ultimate result would have been civil war. Continuation of civil society and its collective control to maintain order of affairs was result of natural developments of primitive state to Locke. This unification among members of the society was neither superiority nor subjection of the one over the other. Existence of polity and society was resulted voluntary union and agreement at will by free men. They were free to decide the forms of their small governments and their caretakers. People created a common-wealth in this state of nature.

Roseau gives an account of natural development in man's living style from simplest to complex through intervening stages. Savages turned to civilized living passing through different stages of developments of smaller and larger spans of time. They developed classes and inequalities after advent of agriculture, grabbing of land, enslavement of felloe men, and occupation of territories (a power show). On the other hand writers like Vaegon are of opinion that state of nature without government or society settled one not nomadic is abstract phantom of reason without historical foundation. Concept of the state of nature is borrowed from natural law. It produces room for state of nature as:

(i) It proposes continuity of the state of nature.

(ii) It makes possible the contract between members.

(iii) It provides positive law to judge the behaviour of the members and of refining of the law.

Ahmad (Ibid) furnishes a well-known example of contract between people in the boat "May Flower" on their way to America from Britain in 1620. They were agreed upon in presence of the omnipresent God to combine themselves under a covenant in a civil political body for maintenance of order and preservation. Hence no mention of territory in which they united as they were in a boat.

Kant (Ibid) emphasizes on civil state instead of state of nature. To Hobbes (1651) state of nature is a "state of war". Natural state regards men equal as well as born free as described by Rousseau. Lock's theory bases on equality and freedom of individuals. To Kant it is not a peaceful co-existence but it had inherent threat of war *ab initio* which placed individual at the mercy of neighoure enemies. It might be such at some level of development of civic polity as condition prior to the existence of human society. Though state of nature had been applauded by the contraterion theorists but there had never been consensus on it. Amer (2016) terms the idea "hypothetical" to purge the primitive society of savagery. It was "war of all against all" holds Hobbes (1651): a state of no rule, no law, no government, and no justice. Everyone could invade against everyone and he was at the mercy of all others simultaneously. Inception of state as political entity was to maintain civility otherwise in state of nature one could deprive the others of the security of life and freedom as men in the state of nature were not subject to any law. Laws and constitutions make individuals not only good men but also good citizens as against moral codes (Kant, Ibid).

State is an entity of human polity which is result of natural cum social milieu. It is an admitted fact that humans existed earlier than the state. State came into being as a result of human settlement under some administration. It kept on developing through different eras in human civility. It is undeniable fact that societies existed before state stamp emerged to regulate human affairs and conduct. As of reality it happens to a contingent element in human progress. Presence of state as apex and authoritative abstraction is easy to see than to define. State exerts itself to

organize, regulate and facilitate desired social behaviour. There are many definitions of state which focus quite divergent areas. A few of them are presented in the following lines.

Hawkins and Zimring (1988:20) quote a remark of a judge while deciding a case of pornography "I know it when I see it". The same seems true when it comes to definition of state. Generally, word state has multifarious manifestations: name of a country, flag, military force, government, political system, institutions, administration, educational institutions, hospitals, services, taxes among others. A layman can easily recognize state when it functions and pervasively shows its presence on every step of social life.

This abstract nature of state to Foucualt (1994) is mythicizing abstractions (government and its legitimacy of exerting power). Mythicizing of collective effect of power, institutions and center of power in a geological space is given a name of state- an advanced and supreme entity in the modern world. State has travelled long to turn into modern state but these elements were present in crude, medieval states as well. Particulars of a state in all stages of its development were: Persons- a group of people; place- area where people lived; center- center of power (sovereignty); institutions- organizations to safeguard interests of different groups of people as subjects of the state. This organization and administration of collective human interests yielded state. State is a composition of humans, institutions, power, center of power, geological space, and the force to exert power etc. Every state primitive, medieval or modern embodies all of these elements in any form crude to sophisticated. There are stages of this development through the annals of human history- crowd of people, a bit organized group, and coalition of smaller groups to consolidate the collective will power of people. State institutional development didn't take place in a planned and linear way rather state emerged as result of gradual process.

1.2.2 State: A Matter of Definition

MacIVER, (1982) in "The Modern State" discusses this complex matter, which was dealt in more simple terms, in historical as well as modern perspective. State is defined in various ways with respect to society, organization, domination and subordination in class structure of a given

society. There are different groups of scholars. One regards state as an organization of a dominating class in a group of people to materialize their control over other factions and classes. The other is of the view that it is a total sum of community which transcends the nation of class domination and organizational control over the other classes. Some of the political scientists hold it is a power system whereas others interpret it as a welfare system which binds people together for a common good. The very nature of a state and its evolution gives rise to these varying interpretations. It seems easy to define a particular state in question but it becomes hard to reach consensus for defining "state" in general. This can only by looking at the common features found in all of the states. The states and society go hand in hand in Political Science. Society is a real container of an abstraction of supreme body i.e. state. State doesn't have a form which corresponds to the actual society. Existence of the state is only possible within a society but state doesn't form a society. State is recognized through its functions and not by its form.

State is a system in which different institutions work together. People live in communities and they make organizations to get their short term or long term common objective and purposes. These organizations are called associations. To realize and regulates these activities institutions are made with in society. In this way associates are organized to get common ends to show will of the members. Institutions direct and systemize activities of members. Examples of communities are tribes, villages, towns, cities, countries, etc. These are known as integrated associations; family, party, class, business, partners, churches, welfare associations, etc. These are partial unities. There are different means and modes through which communities and associations dispose of their functions; political parties, markets, trusts, education, etc.

State evolved out of a continuous and perpetual process of delineating usage, customs, and traditions of the community through primitive society. In developmental stages state has limited control over all spheres of life. Ground of state effectiveness rested in organization of the society i.e. communal life. People had their associations to get their limited ends. It is however, a fact that all organization of society is not materialized as state organization. It is corollary of the fact that ends which these organizations want to achieve are not fully full under the sphere of

state operations. The ways which a state uses to achieve common objectives are not exhaustive in nature. These are some of the ways which society uses or strives for to gain their common goals.

We may say that there were some organizations and institutions before emergence of state itself in any form. As soon as state came into being community and associations developed into their consolidated form in pursuance in their common will and institutions were formed. This will is imposed on subjects not completely by means of dominant will which is very foundation of modern state. Dominant will is materialized through different institutions working under a government. These institutions are also known as state apparatuses. These institutions are created under the common will but their functions are promulgated by dominant will. This very concept works as "*gerund norm*" for modern democratic state.

1.2.3 Elements of a State

Pierson (2004: 48) enumerates the essential elements of a modern polity in his book "The Modern State". A state consists of:

(i) Persons- a group of people

(ii) Place- area where people live

(iii) Centre- centre of power- sovereignty

(iv) Institutions- organizational units to safeguard interest of different groups of people

State came into being as a result of human settlement under some crude administration. It kept on developing through different eras of human civility. It is a fact that societies existed before state emerged to regulate human affairs and conduct. State happens to be a contingent element in human progress. Presence of state is a way to organize human social behaviour.

Max Weber (1970a: 77-78), a German sociologist, establishes parameters of statehood. He defines state in respect of its means and not in terms of its functions and ends. The state cannot be defined in terms of its end. There is scarcely any task that some political association

has not taken in hands and there is no task that one could say has always been exclusive and peculiar to those associations which are designed as political ones…. Ultimately, one can define the modern state in terms of the specific means peculiar to it, as to every political association, namely, the physical force.

State is a political association of individuals. The association becomes an organization when this organization uses or claims to use, through its administrative organs, physical force legitimately to maintain its order is called state. State holds power to make laws and promulgate them. Laws take effect in hands of staff. Staff is controlled by regulations. The laws are enforced on subjects in the area of jurisdiction of the state. State powers are asserted in territorial limits through its functionaries. Symbol of perpetuate operation of the state is its authority to use force over its subjects residing in its area of jurisdiction. Definition of state by Weber can be analyzed as under:

(i) Force- control and use by political organization

(ii) Geographical area- territory under jurisdiction of organization

(iii) Right to rule- government / sovereignty

(iv) Right to make constitution and laws under the constitution

(v) Powers vested in political organization by citizens / subjects

(vi) Public administration- bureaucracy

(vii) Legitimate authority to use force (as bestowed by the will of people)

(viii) Subjects to rule on- who submits to state- citizenship

(ix) Powers to levy taxes on subject {added by Pierson (Ibid) to the list of important features extracted from Weber)}

State is "[A] human community that claims the monopoly of legitimate use of physical force within a given territory" (Weber 1970a: 78). State emerged out of necessity. It was need of individuals under an organization to escape from civil war and chaos to establish over them a common power showing collective will. This would keep them in awe and would bring them common benefits. This common power once created and trusted in one man was not revocable

and would be equally operative against all at home and abroad. Hobbes calls this public authority 'publique sword" (1968: 231). State conducts its operation through, use of violence i.e. force, will of people. This has done to serve from all against all situations which would turn man's life "solitary, poor, nasty, brutish and short" (Hobbes 1968: 186). Notwithstanding the common will and benefit of use of actual force must be sought as lost resort when all other measures have failed to yield the designed objectives reiterates Weber (Ibid).

State happens to be geological, geographical and geopolitical entity. It has defined place / space on which it applies its force in terms of authority / power / sovereignty. It is mark of distinction between pre-modern empires and the modern states. Empires were loosely united entities exercising their power (not absolute) by means of collection of shares in produce only. There were as tributary alliances rather than tightly administrative units of the empires. Emperors would give autonomy to such extensions to the limits as they would please. Such autonomy lasted till the satisfaction of the emperor. Wars on valueless land tracts remind us importance of territorial frontiers in statehood. Nation state has emerged with strict sense of occupation of area. Nation to Gidden (1985: 116) is a collective function of human residing within a clearly defined frontiers / boundaries which submit it to a unified administration i.e. unique sovereign people in words of Greenfeld (1992:8).

1.2.4 Sovereignty and State

Generally absolute and final authority in any community which is organized under political discipline is known as sovereignty. Hinsley (1968: 1, 26) adds a proviso to sense of having absolute and final authority that no "absolute and final authority exists elsewhere". Sovereignty rests in people. They out of their own motion, place it over them. Constitutions for example start; We, the people of… (Constitution of Pakistan and Constitution of USA). Sovereignty is also placed in different organs of the state in a modern state. Idea of separation of power is working well while putting executive, legislature and judiciary by not letting any of them dominate the others. In this case abstraction of constitution becomes sovereign which bestows power to collaborating organs of the state viz the President, the Congress and the

Supreme Court. This was rested in democratic elite to Bentham and Mill in the 19th century. There are some restraints on modern state sovereigns imposed by the constitution. These restraints are operated by *de facto* sovereign i.e. people / public over *de jure* sovereign i.e. government.

State controls subjects with authority and power. Authority is abstract in nature but the same is also seen in what a state does. Political control is gained and exercised by sovereignty. Political power originated out of reference to tribal heads. It brought obedience in subjects. Command got its legitimacy in total submission to communal/tribal heads in primitive societies. It also changed into monarchism. This personal reverence took legal shelter and became prerogative of the chief. Authority was a legal right of the monarch. Transformations through annals of history shifted it from persons to incarnation (state); king became crown. Sovereign (a monarch or group of people) determined the policy to achieve common objective. It is in shape of sovereign will / sovereign body (electorate). Policies are made by people who are from members of society. They represent general will of the people. They form dominant will / sovereign will accepted by majority as it is possible to know what is the common will of all members of society but it is difficult to decide unanimously will and consensus of all members of a particular society. The very means to achieve that common will is sovereignty. Sovereign (person or body) derives power from "general will" under a distinct head of "dominant will". State makes it possible to uphold customs, interest, and welfare of members of the society and in turn it receives obedience and loyalty. Sovereign is a power which is authorized to chalk out direction of the state i.e. policy which regulates all of the functions of the state. This power seeks its legitimacy in public opinion (elections in democratic states). Electorate forms governments to watch and ward the ends of the society which it represents. Sovereign is government which is authorized to use force in maintaining law and order in the society. Government also has executive and judicial functions as well.

1.2.5 Constitution and the Rule of Law

Constitutions are supreme documents in this modern world to regulate affairs of state. Constitution secures the existence of state itself. In this document ways of arrangements and management of state affairs are given. Constitution tells how laws should be made in a state. It also differentiates between powers of the different organs of the state. It also demands loyalty from subject of the state. Rights, duties, liberties are given place in constitution so it becomes an important feature of statehood.

Rule of law is characteristic feature of modern state theory. Dyson (1980:7) quotes Kant (1724:187) while defining a state. To him it is an entity which represents union of men collectively under rightful laws. Relationship of organizations and subjects are regulated under laws. Public authorities are governed by public laws. Subjects are dealt with under private laws. Rule of law means not rule of "elite" or "best of men" but rule of public will. Office bearers use powers conferred by laws temporarily being temporary occupier of the offices.

Business of state is carried out through division of administrative matters in different departments and further subdivisions under departments. Public officials run those departments and subdivisions under inflexible arrangements. Peirson (2004:16) enlists four characteristic features of bureaucracy.

(i) Fixed rules govern conduct of official apparatus to dispose of state affairs. There is hierarchy of officials corresponding to their responsibilities.

(ii) Public offices in bureaucracy are open to all subjects owing to special knowledge and expertise. Posts are filled based on examinations meant for these appointments especially.

(iii) Office bearers manage affairs based on written documents. They apply rules to particular cases impartially.

(iv) Public office bearers or civil servants act but not in their personal capacity. They hold office on behalf of general public.

It is mandatory for a state to exist long to apply force justly. No state can survive on coercion, duress and oppression. A general rule is that for most of the times most of people should accept writ of government and submit to the rule of the state. Writ of government is its legitimacy in use of force when the authority is challenged. Authority and its use demands legitimacy. Legitimacy springs from sense of pride and acceptability on the part of subjects who submit themselves to the authority and act as desired by the state. This legitimacy is often sought by states through impartial use of legal authorities in the hands of judicial apparatus of the state. An inverse criteria is given by Held (1989a: 101) for legitimacy of state authority majority of people do not actively consider existing government illegitimate and do not react to the government on this account. Agreement of large majority of people may be out of coercion, apathy, tradition, pragmatic approach, consent, conditional agreement, normative agreement or ideal traditional cum normative agreement.

1.2.6 Citizens

Individuals who are entitled to participate in community business at some level are called citizens. There is log of rights and corresponding duties in the constitution for citizens. They have equal rights, they have duties, and they are subjective to restraints and responsibilities. They also enjoy liberties and powers in their community.

Rousseau (1968: 61-62) opines that state is a public entity. In its passive role it is called state, when it is in active role the state it is called sovereign and when it is compared to others of its kind it is power. Those who are associated in it take collectively the name of people and call themselves individually citizens, in so far as they share in sovereign power, and subjects, in so far as they put themselves under the laws of state.

State survives owing to taxes levied to citizen under different heads. State generates revenue by levying taxes on private property. Taxes are being levied by state under various heads. In pre- modern state church received one tenth of the income of the parshioners. Taxes were also collected by states to meet emergency requirements. Income tax in any financial year in Europe is

considered an icon of good governing policies. It is, however, if unjust can be resisted as in case of Tax Revolt or Peasant Revolt (1381).

1.2.7 State and Laws

Laws of association base on common will of member to get benefits of membership of an association. If someone defies then he or she will lose privileges and benefits. For example club is an association. Non observance of the laws of the club would make the member liable to fine. If a member doesn't pay the fine he will give the advantages and will lose membership because he chooses for him membership voluntarily. This metaphor may not be applied to show relationship between state and law. The law of the state is coercive in nature. It is also known as positive law. Subjects are supposed to follow the law necessarily. They can't deny them. They remain under laws of one state or the other in modern day society. Law and state relationship is universal in nature. Laws of state are of three kinds: constitutional law, general laws and special laws. Constitutions are supreme laws under which governments make arrangements for business of the state. They also sanction general laws regulating conduct of subjects and legalizing actions of the state and special laws; dealing with special individuals groups, situations and issues etc.

MAcIVER (2004: 272) defines state as "the state is an association which, acting through law as promulgated by government endowed to this end with coercive power, maintains within a community territorially demarcated the universal external conditions of social order". He further says "The state is the child and parent of law". Government confines itself while using its sovereign powers to the constitution. It determines legality of the government. Government works according to public opinion. They can pass laws against constitutional conventions depending upon public opinion; even parliament can amend the constitution itself. The only bar on parliament or government in matters of law making in a sovereign democratic state is public opinion. This is the way how government limits itself and provides liberties to its subjects.

However, there is a difference between state and government with reference to constitution. State controls itself through self-determining constitutional law. Constitutional law

is binding on government which looks after the writ of state. Legislator is bound to observe the constitution while making of laws. Ultimate sovereign is in shape of government which permits legislator to legislate and which also promulgates the laws made by the legislator. In this very sense state is a kind of "trust" and government happens to be a trustee and not the master. Conditions of this trust are formulated in form of constitutional law. If government violates constitution it destroys the base at which it rests. Government authority is taken on lease depending upon the greater will; will of the people. Will of the people is the supreme which is secured in the form of constitutional law the same is in fact a supreme sanction. It is public opinion which makes and overthrows governments. Government can impose those laws to which people (governed) willed to obey. It means it is collective will of the government which establishes general/ordinary laws. In the same way it also establishes the constitutional law which government obeys. The base of constitutional and ordinary law is same which at on hand binds the governed and on the other it also binds the government. In a state there can be no superior will to the will of majority of its subjects / members. The relationship between people and government is a relation of many to few.

1.2.8 Pre-State Conditions in Arabian Peninsula

Social life with Arabs was conspicuous from other part of a contemporary world. They remained armed all the time against each other; in the words of Gibbons (Ahmad: 1992) "against mankind". Strives turned into wars based on rapines, murder and revenge. They were ready to take lives of each other in the name of honor and fame. Dr Hell in Ahmad (Ibid) points out that unity of tribe was devoid of subordination. They showed regard and respect to the chief of the tribe but the chief was not their commander and they were not supposed to obey him. To Wellhausen Arab community was lacking in executive power and supreme authority of one over the other. Position of elders was as of "peacemakers" and "mediators". Long feuds were routine matter aroused by injuries and murders. Anarchy prevailed in terms of: individual *versus* individuals, tribe *versus* tribe and clan *versus* clan. Muir in Ahmad (Ibid) says independence was defining feature of Arab society. They united themselves without a permanent bond in between

them. There was no sovereign in a tribe. Functions of social rather tribal life were disposed of equally by all members without any majestically authority over there. Tribe can't be called a community in modern sense of the term which prevailed in Arab territories before the advent of Islam. It was an aggregate human being who looked after the matters. Everyone contributed voluntarily in the hour of need but he was not subject to the orders of the chief. Chiefs were given honour posts only without total submission in their favour. This state of affairs showed the mutilated social condition and foregrounded the picture of complete anarchy. Arabian conditions before the advent of Islam were "unfavorable to religious reform as to political union or natural regeneration" maintains Muir. Confusion; the wild confusion prevailed in Arabia of 6th century opines Weil. In these circumstances social and legal reforms were carried out by Mohammad (peace be upon him) to make a community and lay foundation of Islamic state.

1.2.9 Islamic State

Law regulates affairs of humans. It is taken in two senses, one; law of nature—what happens to inanimate objects of nature or it is done to them by other inanimate agents of nature under certain conditions and circumstances. Second; Moral norms which humans observe and think them commandments of good conscious of men or injunctions issued by God. (Islam connects both of these senses into one). *salaam*—submission of inanimate objects and animate objects including man. All follow the course set forth by the Supreme Being (*Allah*). Man is given reason (shaur) and autonomy of will (ikhtiar) ensuing from reason (shaur). He reveals physical laws and moral laws are yoked together in Islam. Qur'an in 3:30 and 3:82 enshrines facts regarding humans, their creation, nature and submission of heavenly bodies to the command of the Supreme Being i.e. God (Allah) respectively.

State of Madinah under ultimate sovereign Allah Almighty was established by his messenger Muhammad (pbuh). Ruler of Madinah enforced the command of the sovereign at one hand. He was authorized by injunctions of the ultimate sovereign to make laws on the other. The state of Madinah was a civil state as total sum of community, association, and institution (in their rudimentary forms) created by people of Madinah. People of Madinah were also sovereign in

making their decisions using their prerogative under the ultimate sovereign (Allah Almighty), they choose Prophet (pbuh) their sovereign (head of government). Prophet (pbuh) had two very conspicuous offices consolidated into one; vicegerent of Allah and elected sovereign of people of Madinah.

State of Madinah was result of threat to the very existence of Muslims. They came to the contract to rid of the fear. Their common end was peace. This feature of Muslim state of Madinah resembles to Lock's state of nature. Muslim individuals united themselves (social contract). This contract was twofold contract; their covenant to Allah and an agreement between fellow beings. Muslim community was created by men on their free will. This feature of Muslim state is in opposition to natural emergence of the society/community.

Sovereignty belongs to creator of men: Allah Almighty, to whom all Muslims submit, in Islam Allah is the Supreme Power and omnipotent. This collective power corresponds to total submission of bondmen / slaves of the creator. Individuals who submit to Allah used their free will to choose Prophet (peace be upon him) their ruler. As sovereignty belongs to Allah which is realized in individuals was bestowed by Allah upon Apostle and subsequently ratified by whole community of Muslims as well as Non-Muslim elements of the community. When people of Madinah elected their sovereign they also pledged to protect him through alliance and obedience. This total obedience was not in exchange of something from their chosen sovereign which resembles Hobbes absolute obedience. This is how sate of Madinah, having no rebellion, resulted peace and solidarity of the community. This covenant was in stark difference will norms of ignorance in Arabs.

People of Madinah were to pay ransom money collectively (between refugees and Madinate believers). Rebellion and sedition would be fought against collectively whether perpetrator is relative of a man like son or brother. No unbeliever was to be helped against a Muslim. Jews who were party to Muslims were given aid and protected against their enemies. Non-believers who were party to covenant were not to provide help to non-believer of *Makkah*. The help was not only restricted to fighting force but it was extended to sharing of information.

Muslims were one against killing of a Muslim. Peace and war were common to all individuals of the state. Defence of *Madinah* was collective responsibility of Muslims and Jews. Nation was composed of tribes *Awf, Najar, Harth, Jashim, Ans*, Thalba and all other tribes who resided in *Madinah* along with Muslims. No prohibition was placed on the followers of different religions. They were free to profess and practice their religions. Jurisdiction of Madinah was a sacred trust for the inhabitants. Crime, disorder and injustice were abhorrent for all citizens of *Madinah*. No secret understanding was permitted with hostile party i.e. Pagans of *Makkah*. Threat to *Madinah* was considered threat to the nation as a whole. Dispute and controversies among parties to the covenant were presented before Prophet (peace be upon him) to have them decided and to know the decision of the Sovereign through his *naib*. Prophet (pbuh) brought different people to a common point and promulgated law to maintain order and to bring peace. Prophet (peace be upon him) had all magisterial powers in the state by virtue of his mission. His statesmanship could make it possible to unite people of different disposition on a common point acceptable to all. The height of craftsmanship is evident from Prophet's (peace be upon him) success in becoming sole leader of people who were not accustomed to obey any superior through ages. It was Prophet's (peace be upon him) personality who could compose unity of tribes by keeping them independent at one hand and making them subject to him at the other. Tribes were made to a community at hands of their chosen leader. Political obedience here, as against Hobbes and Bentham was not out of fear but out of free will. Main features of transformations were:

(i) Basis of submission to the leader was reason (common objective).

(ii) It had are of jurisdiction (*Madinah*).

(iii) It had a sovereign {Prophet (peace be upon him)}.

This submission was perfect and absolute obedience to prophet. This is submission of particular (individuals) for greater cause which is of universal character (society). In religious melieu of statecraft there are concepts of meaning and function. Religion regulates society with reference to relationship of these elements. Function and meaning relationship is different in different religions. In Buddhism there is opposition between meaning and function. In

Christianity meaning is turned into function. In Islam function and meaning are interrelated. Islam prefers unity of meaning and function. It is fear and hope which realizes unification of meaning and function. Reorientation of relationship between religion and society changed a tribal habitat into a community. This transformation was led from particular individuals towards general and universal character of society. There emerged legal, political and universal institution of civil society (An-Na'im, 2008).

1.2.10 Religion in the State Business

Exercise of power is one arm of religion. It is way to seek a place near to the Supreme power. In Muslim state religious and political functions became one consolidated whole. Law is will of Allah which is exercised through the chosen sovereign of people. This will of Allah is exercised through enjoining of right, justice and virtue and forbidding of injustice, vice and evil. This function of Islamic state cannot be discharged without authority and power. To discharge this very duty the chosen sovereign uses consolidated power conferred by God and people simultaneously. Features of an Islamic state according to Askari (1979) can be summarized as under:

(i) Final power to direct matters in an Islamic state. This power is real as well as legal. Will of the ultimate sovereign is known as Shariah. Shariah bestows Muslims self-determination. They exercise this authority and elect their sovereign which is vice-regent of God (Allah).

(ii) Consensus of opinion is a strong pillar of an Islamic state. All decisions in an Islamic state should be made unanimously after deliberation at different levels. Leaders and governments are chosen through majority of votes. It makes opinion of people relevant in the business of the state. This consensus is not consensus as in classical terms in Islamic theory but consent of majority of participant is the process of decision making. In modern sense it can be taken as election. In elections we elect representatives and in turn they elect sovereign i.e. head of the state and head of the government.

(iii) Human rights against state- Concept of fundamental rights is Islamic concept. An individual is provided safety of person and security of property. A person is given freedom of speech and freedom of association. Rule of law ensures equal treatment in the courts of law. Freedom to practice one's religion is ascertained in injunctions of Islam. Privacy is sacred under Islamic norms of society. Provision of necessities of life is responsibility of Islamic state. Responsibilities of state are rights of members of the state.

(iv) Rights of state against citizens- Citizens of an Islamic state are supposed to submit to the authority of the state. Economic regulatory legislation is prerogative of the state. Imposition of duties can be made to carry out and discharge duties of the state. Citizens are bound to show allegiance only if state follows injunctions of Shariah; otherwise they can withdraw their allegiance to the state.

(v) Difference of opinion in an Islamic state is a sign of growth. Points of difference between people authorized to discuss matters of national importance are decided by majority of the people. These are also accepted by the dissenting minority.

(vi) Minority rights- All civil rights are equally given to non-Muslims and Muslims. As executive authority is to command the good and check the evil the same can only be done by a Muslim so non-Muslim are not raised to administrative key posts because they can't interpret and implement Shariah (according to traditional view). They can be appointed as assistants in administrative matters. They are provided cultural and religious freedom.

1.2.11 Islamic state and Legitimacy of Authority

Religion is not mere a relationship between man and God but it is relationship between man and society. *Din* puts together morality and affairs of the state. It is a regulatory system under an ideology. Though it is often criticized for being conservative, backward and inflexible but particle of movement in Islamic Jurisprudence provides enough space to accommodate

humanistic, universal and modern concepts of justice and measures to be taken thereof. Restatement of religious doctrine in universal terms may pacify the gulf between conservatism and modernism. It is, however, necessary to synchronize ideas of modernistic developments and reinterpretation of theory of justice. As it is clear in any modern society charity and compassion can never obstruct the line of justice. Sympathy with victims cannot heal their wounds; rather infliction of wounds and wrong doings of perpetrator are required to be prevented. It is necessary to help the poor but it cannot be the elimination of poverty in a modern state.

Under the influence of western concept of state, law, government, administration of justice, etc.Muslim everywhere seemed prone to show reverence to their religion; on the other hand they think religion no antidote to their problems. They seek resolution of their political and social problem other than Islamic justice system. It is due to western bent of mind which sought power of state superior to individuals and even their collective conscience. They grade religion as an ascetic sphere of individual life. Conflict between church and state depicts this tussle in Christian world during pre-modern state.

Question of state emerged with advent of Islam itself. Islam created a society and state simultaneously. Material and spiritual spheres of life are correlated making an integrated social and political entity. Justice in an Islamic state is an inward flow from outward world toward inward converging unity of state and its functionaries. It creates harmony between man and society. Out of this unity springs relationship between man and world, concept of physical and spiritual attachment. It inculcates sincerity to creator and sincerity to one's work. Justice is a comprehensive term encompassing, civil, economic, criminal, contractual and moral particles; a unification of several particulars into one absolute and universal.

Relationship of Islam and state business has been subject of much debate throughout history. There remained a constant tension between religious leaders and state administration. State as of its nature is political. Islamization of state apparatus is question based of Muslim belief that Islam is complete code of life; individual and communal in private capacity and as well as in public domain. It is necessary to consider the nature of authority to regulate affairs of the

state which is more political rather than religious. Political authority rests somewhere away from religious leadership which insists on complete observance of ideals of religion in conduct of state business. Religious faction falls short of power to maintain peace and to regulate several economic affairs of the community. For magisterial management control over territory and population is maintained through coercive power. Pragmatically coercive power is exercised by political leaders in modern state rather than religious leaders (An-Na'im 2008).

Function of the state are to control individuals, territories and promulgate laws and to maintain law and order. To discharge these functions managerial and magisterial skills are required rather than personal piety according to Ibn e Taymiyah. Selection, to him, for public offices depends on ability, skill and mastery of a person to comply with ethics and professional code which is required for the assigned duties and not religious and spiritual piety of the man. Well known appointment of Khalid Bin Waleed (Allah be pleased with him) by Prophet (peace be upon him) is sufficient example of this fact whose behaviour according to religious point was not satisfactory for Prophet (peace be upon him). To Taymiyah, Prophet (peace be upon him) appointed a man of pragmatic abilities in presence of better people in the matters of faith and knowledge. He further argues that it is intelligence, aptitude and practical wisdom which serve foundation for government or rule. Misunderstanding of Shariah and its essence and relationship between Shariah and practical ruling experience resulted in wrong interpretation and application of Shariah to statecraft. It is clear from account of Taymiyah that individual religious bent and piety are separate from practical potential and role of that individual in disposal of state matters. These responsibilities are entrusted to people of practical wisdom from *ab initio* in a Muslim state. This view is also supported al-Ghazali in An-Na'im (2008).

Moreover, religious piety of anyone is not open to all specially in large state "dawla". There are few religious leaders in every area with small or no interaction with masses whereas public management requires ability on more objective levels to implement laws with help of coercive power in execution of administrative functions of the state. The difference between two types of authority; religious and political, is difference between coercive political powers vested

in political leadership over people living in area of their jurisdiction and moral authority of religious leader being exercised in abstract terms of veneration over a large number of masses of the follower living across far flung areas.

According to An-Na'im (Ibid) political leaders need Islamic legitimacy to sustain their reign. Their political authority over Muslims was maintained through religious authority in past. They used it as a ruling tactic rather than making them superior Muslim rulers. Such claims neither made them superior to other Muslim rulers nor their state was recognized as an Islamic state. To claim piety is also abhorrent according to Islamic perspective. At times rulers needed endorsement of their rule by religious scholars. They gave autonomy to those scholars but at the same time they also created a balance between their autonomy and state control so that they could not undermine political coercive authority of the state. Islamic history presents enough evidence regarding relationship between religious and political authority. At times both of them converged and at times there was a relationship of conflation. Founder of the state of Madinah Prophet (peace be upon him) had political, military and religious authority vested in him. It was highly centralized prototype situation of state control in which society looked toward Prophet (peace be upon him) in whom everything was combined. The other model mostly in practice in Muslim states was of complete separation between the two authorities; though it is never openly acknowledged on purpose as rulers wanted to enjoy religious legitimacy. However, most of reigns in Muslim history were in middle way, neither they were converged in the model of Prophet (peace be upon him) nor they were totally conflated into separation. Notwithstanding they claimed to be closer to convergence pole than to its separation pole.

Prophet (peace be upon him) was embodiment of consolidated authority; religious and political. He was sole legislator, commander, judge in one. This unique experience could not be replicated as none of the caliphs could command with especially religious authority of Prophet (peace be upon him). They were not prophets. Prophet (peace be upon him) worked with the divine authority whereas caliphs were human beings. They faced opposition; matter of payment of *zakat* to state in caliphate of Abu Bakker (Allah be pleased with him) was not unanimous

between Abu Bakar and Umar (Allah be pleased with them). This fight would not have taken place had Umar (Allah be pleased with him) been caliph at that time. Submission to Prophet (peace be upon him) is submission to Allah. Submission to ruler is submission to their political authority not religious authority, not submission to religious views of the ruler. Above instance from the Caliphate period is of political nature and not of religious nature. In the light of this discussion this is necessary to reorient the relationship between Islam and state. It is becomes obligatory to carry out fresh reading of Muslim history for guidance of on matter of Islamization of society and statecraft in a modern Muslin state (An-Na'im, 2008).

Bifurcation between religious and political authority took place in early Islamic state after death of Prophet (pbuh). Everyone submitted through "*bait*" to the political authority of the ruler but not to religious authority. Abu Bakkar (ra) could implement his religious view due to political authority despite opposition of Umar (ra) and Ali (ra). Muawiyah (ra) was able raise a dynasty due his political authority whereas Ali (Allah be pleased with him) claimed the religious authority of the Prophet (pbuh). Dynastic rulers coined great title of vice regent of God (*zilullah alal arz*). This title was recited in Friday sermons. Nonetheless religious authority of these reigns was never accepted unanimously and unquestionably. Lepidus (1996) in An-Na'im (2008) opines that Abbasids who challenged Ummayyads on lack of religious legitimacy were founder of another dynasty. There was no difference between Sasanian and Byzantine models of monarchy other than adaptation to local setting wilt a tinge of mock religious fiats.

"Command the good and forbid the evil" is Qur'anic injunction (2: 17,26; 3: 50, 104, 110; 6: 122; 7: 40, 58, 194; 11: 24; 16: 26, 60, 74,75,92; 17: 48; 22: 41; 31: 17) but is always promulgated with political force. In the absence of coercive political authority indictments fell on proponents of these injunctions throughout the history. In Baghdad in reign of Mamun, Sehl Ibn-Salema al-Ansari was executed by the caliph on account defying the authority of caliph. He worked according to well-known maxim of Shariah; there is no submission to obedience to human against obedience to Allah, the creator. Commanding good and forbidding evil was duty of caliph prior to incident of Sehl in 833 C.E. Ahmad bin Humbal (ra) did not submit to the caliph

and his claims for religious authority. He was imprisoned where he breathed his last. These examples make it evident that separation between political and religious authority was in practice in Muslim reigns if not recognized in celebrated Islamist discourse. This separation we see though an indirect and implied manner, in al-Mawardi D 1058, al-Baqlani 1013, and Taymiyah etc. Their theories can be summed up in words Lepidus that expression of Islam was not in form of state. State was a political entity which was secular institution with duty to uphold injunction of Islam. The pious Muslim scholars in a community carried on the legacy of Prophet (pbuh) in daily life of society.

1.2.12 State Apparatuses and Legal System

The state apparatus include a large number of institutions viz judiciary, administration, finance, the laws, law enforcement agencies, health. Special focus in this study is on the laws and law of Islamic Republic of Pakistan which translate working of the state. These laws had different phases in their making – indigenous cum religious laws of ancient India, Islamic sultanates and their administration of justice and related laws, Muslim India and its laws, Colonial India and its laws, laws of Pakistan based on colonial laws, Islamization of colonial laws, and in the last phase modernization of Islamized laws etc.

Niaz (2008) discusses exercise of power in medieval empires. Power and sovereignty were synonyms. Sovereignty of the rulers was exercised through servants of the empires in different expansions and extensions of the rule. Portfolios and nomenclature of this servant class were differed in different empires by retaining essential features. He presents a log of ancient empires viz. Sumerian, Chinese and Medieval Religious Empires. To him prime feature of an empire was servant class which derived their power from the center i.e. seat of the sovereign / person of sovereign. In 2500 BC Egypt a class of scribes was recruited to dispose of affairs of the empires. He enumerates benefits of being in King's service. This was a luxury and prestige simultaneously. In China educated lot was tested on competitive exams in law, ethics and classical knowledge to qualify for administrative posts. Final interview was conducted by the Emperor himself.

Ruler assessed these servants keeping in view their performance in management and administration of the affairs of the empire. Everything was in hands of the sovereign master who ingrained attitude of servility in servant class. All empire was personal estate of the ruler and servants were also considered as slaves of the ruler. This arbitrary state of powers over servants provides enough insight about the control of monarch over land, people and administrators. In this way primitive state controlled the society.

Rule of monarch also had authority and power from religious faction the state. Rulers were having divine authority as they were "reflection of divinity" (*zilullah alal-arz*). Ruler appointed priests to have religious support of masses. These priests held their positions subject to pleasure of the ruler. They were given duty to pronounce for subjects of state that action of the ruler was infallible manifestation of divine authority and the same is will of the Supreme Power. In this state of affairs a ruler and a deity became unified in the person of the ruler. In modern times this despotic authority and totalitarian use of power was challenged by notion of modern state. This process of reorientation of statecraft from primitive to modern was known as modernization. Spirit of modernization found hurdles in realization its notions and eradication of arbitrary powers of despots and monarchs. By virtue of their unlimited power they treated state as their personal estate and state servants as their personal servants. This very approach shaped the state apparatuses and their working.

Niaz (Ibid) discusses justice system of Pakistan under heading "Guardians". He reviews how Pakistani state apparatuses could work to procure peace, rule of law and provision of justice in Pakistani society. Justice came with the myth of *Theseus* who was great lover of justice. He punished the wicked of his time. He inflicted violence upon the icons of evil as they inflicted upon others. His model of justice was based on injustice of the offenders. *Solon* was of the view that greed and exploitation of his fellow beings could only be restricted with the help of written laws. These laws were to be made in public interest through debates among them to know pros and cons of proposed laws. He was reminded by his fellow sages that proposed laws might prove "spider web" strong to punish the weak and weak to hold the powerful into bounds. He thought

laws were obeyed owing to inherent good in man. They were only measure to control feuds of men. He prepared a constitution for Athens that was supposed sovereign for the people. Pastorates, Solon's cousin, claimed to provide more justice to the oppressed people. His successors converted Athens into a monarchy. In 514 BC Cleisthenes reformed legal system of state of Athens. He introduced new tribe systems by abolishing kinship, economic status, place of residence etc. He made a committee consisting of fifty representatives from each of the ten tribes which met after every ten days. It voted on the matters of taxation, legislation and defense of the state. Romans in 450 BC wrote laws by imitating Athenian model of legislation. Romans and Greece were working for rule of justice and rule of law. To Niaz (ibid) rule of justice is optimistic for dispensation of justice. It harbours higher notions of goodness, ideology and faith inspired by metaphysical motives. Under this motivation people act justly. It is promoted through higher standard of morality of individual who make society. On the other hand rule of law is pessimistic in nature. It criticizes arbitrary power and its ills. Power becomes more destructive when it is strengthened by ideological or religious notions. It became a fusion of arrogance of piety. Nonetheless, rule of law is, not altogether perfect, a device which guarantees social prosperity and stability. It controls human according to norms and ethics vital for social integrity. Laws and rules are made by the legislature and administered by the powerful executive which in turn seek recognition from powerful judiciary in the modern cocept of state.

In the Subcontinent tradition of providing justice is linked to absolute power and authority. Judiciary enjoys the same status in other parts of the world. Centralization in Ottoman Empire was thought to be an antidote to civil chaos in the 14th century. Sultan exercised his proprietorship by decrees of income and privileges. These decrees were enforced through administrators. Subjects and lands belonged to the Sultans. This single principle of rule let the rule prevailed. In the same way administration staff and army were in ownership of the ruler. In the reign of Suleman (1520-1566), the law giver, writ of government was materialized through intelligent and able servants of the ruler. There was a system of training of these servants. People were inducted into administration, military and judicial posts after knowing their aptitude. The

intelligent and practical candidates were attached to the Sultan's court. Sultan ensured dissemination of justice to masses to justify his rule.

In the Subcontinent monarch used to dispense justice as it was there supreme duty. They were omnipotent and omniscient which could have been possible through their governors. To them absolute justice could only be provided by an absolute ruler. Akbar used to promulgate doctrine of match of crime and punishment. There was a chain of justice on door of peace of Jahangir to inform him regarding complaints of injustice by the judges of his empire.Unjust judges were thrown in front of poisonous snakes. Ranjit Singh used to punish the poor by mutilation and the rich would get off the handcuffs by paying fine. This arbitrary element in dissemination of justice could not let off the responsibility of state under the Sultans and theEmperors.

British colonizers brought a significant change in the justice system of their colony i.e. the Subcontinent. They codified the laws (as discussed in Chapter 2in detail). Judges were initiated by testing for the aptitude and intelligence required for the post. They were trained for their proposed jobs thoroughly. Alongside codifying the laws they also harmonized procedures of executions of the decrees of the courts. They introduced the golden principle of autonomy of judiciary from intervention of executive.

1.2.13 Islamization

Rahman (1983) enlists various tenets of ideology of Islam. In this work a link is established between Islam and Pakistan therein. He compares views of the founding fathers with moves of the dictators. A log of limitations and measures to address them are presented to conduct the state business according to its ideology. Modern theory of nation state, in vogue in the world, poses numerous problems and asks for adaptations which are addressed in the work. Writer is of the view that Islam meets also challenges of modernity. Every system requires refabrication of its tenets to fit them in the milieu other trends in the modern world of nations. Judicial system of any country verily translates its ideology. Changing and ever growing concept

of nation state prompt reconstruction of ideological credential of the state apparatuses. Concepts of state, justice, social welfare, economic order, national and international security and peace through religion need to be elaborated in interrelated terms. These views are relevant to the process of Islamization in Pakistan. Ideology is realized through legislation and laws operate through administration (state apparatus). Writer is of the view that prevalent discussions do not cater for the burning question of psychology of modern mind and its mental capacity to comprehend religious "grammar". Emphasis is added on relevance of religion to the modern world.

Shah (1992) laments dearth of authentic literature on current issue of the Islamization process of the laws. To him lack of research on the topic embarks many fold ambiguities in the minds of friends and foes. Actors in the world scenario require humanistic appeals of the process. He considers acquisition of a separate territory in the Subcontinent to make an ideological state was to enable the inhabitants to lead their lives according to the Islamic Injunctions. It offers a snapshot of efforts towards the goal starting from the Objective Resolution in March, 1949. However, it got impetus after 1977. Establishment of the Advisory Council under the Constitution of 1962 (Art 6(I)) worked little in the direction to look into the existing laws. The Constitution of 1973 (Art 227) contemplates that translation of the advice by the Council into laws rests with the legislature. Existing laws were required to be Islamized according to Qur'an and Sunnah in the light of recommendations of the Council of Islamic Ideology (CII) and enforcement of the advice was to be ensured by judiciary. This was the very point of time in the history when the process of Islamization started in Pakistan. Hudood Ordinances caused a discussion in the world academia on account of their being old fashioned, brutal, harsh and inhuman etc. Evidence Act (1762) was changed into Qanoon-e-Shahdat and the same was equally criticized. In March 1979 Shariat Benches were established in each High Court of the provinces. They were empowered to strike down "existing as well as future laws" if found in repugnance to Qur'an and Sunnah. Nevertheless, their jurisdiction was restricted.

Federal Shariat Court (FSC) was made on 27th May, 1980 at the capital of Pakistan. *suo moto* powers were conferred to FSC in March, 1982. Now court could examine / question any laws without any petition filed before it (Art 203-D). It could also enhance the sentence passed by courts dealing with enforcement of Hudood Laws. Writer describes the methodology employed in discovering laws in consonance or in repugnance to the Injunctions of Islam. There are different case laws for practical understanding of the very examinations by the FSC. Writer quotes from Qur'an and Sunnah to elaborate each case in hand. Through this process the writer claims that laws are harmonized with the spirit of Islam. The same was the cause of creation of Pakistan. To him the goal is nearly achieved. These views are celebrated equally in judiciary, legal professionals, and general public but these are not all welcomed and endorsed. The very outcome of this process is prone to examination, analysis, criticism and rectifications.

Nyazee (1994) grades *usul-al-fiqh* as sublime Islamic science. It had been sphere of application of mind to legal questions in the light of the Book, Traditions and subordinate sources. He expounds numerous questions viz Islamic law, structure of legal system, methodology of application of substantive law to ever emerging issues, process of validation of Islamic law in modern age, scope of theories developed over the time, fundamental rights, office of Muslim jurist, legislative and judicial functions of modern Muslim state etc. This work aims at making of modern theory pertaining to Islamic Law. It also elaborates the strategies which could define and interpret the framework of the Islamization. Author is hopeful of application of theories according to the need of the hour. To him it will serve basis for developing required modern system of legislation cum adjudication. Rigidity of Islamic legal system is also addressed parallel to practical situation with varying degree of lenience. Fixity of law and state authority to devise procedures are shown in harmony according to the point of view of the writer. In depth study of Islamic jurisprudence is thought to be a prerequisite for understanding of Islamic judicial system. At the same time Nyazee opines:

There is no reason to believe that the last and final word on Islamic law was said several centuries ago and legal doctrine developed by the earlier jurists have to be critically maintained,

in toto, by the present generation of Muslims. Every generation, notwithstanding its reverence for its ancestors, has to carry its own cross; has to fall back on its own brain power to solve its problems.

Brown (1996) in "Rethinking Tradition in Modern Islamic Thought" tells how modernity poses challenges to religious tradition and how these are countered by the defenders of the faith. Paradigm developed by western scholarship is praised to review the struggle between the "tradition and modernity, revelation and reason, liberalism and reaction". Such dichotomous approaches cannot be accepted in the face of enlightenment *per se* but these deserve reexamination. Tradition is not "fixity" it allows adaptation, reform and revolutions. It is held that it is rather "a beam of light which is refracted by the prism of modernity. In this way modern scholars can grasp the relationship between tradition and modernity. Furthermore, it provides for reconciliation between the traditions and modernity.

Amin (1984 and 1988) addresses basic question of importance relevant to the discussion of Islamization in the country. Nature and scope of legislation is explained in part one of the works. It sheds light how the same can be implemented in a contemporary Islamic state. Efforts prior to the takeover of 1977 regarding Islamization are logged in detail. These are analyzed qualitatively to reach the establishment of strong / powerful institutions for Islamization. Arrangements made for the said purpose are examined. Review counts role of different actors in this process. It also points out discrepancies and lack of harmony in the working of different participants in the process. These efforts on the part of government in office are declared "Renaissance of Islam with particular emphasis on Pakistan" by Dr Justice Tanzil-ur-Rahman in foreword of the work. Precious is the work but it bases on the view of Muslim (devout) scholarship. An impartial analysis and reexamination would serve the purpose of research in hand.

Piscatori (1986) looks at Islamic revival and its political implications. Question of "supernatural unity" of *ummah* in present scenario of nation state is tried to be realized in pragmatic terms. Compatibility of Islamic legal theory with modern concept of nation state is

explicated. This work focuses on both theory and practice. An outline of broader international relation / cooperation, in theory as well as in practice, is presented. This work informs western scholars about Islamic tenets. They are required to be mindful of the radical challenges posed by Islam to western interests. Interpretation of scripture and difference of opinion on its meaning and also on interpretation of Sunnah provide basis for development of ideas presented in the work. Flexibility, inherent in Islam, is found in practice of Prophet and his descendents, was based on necessity and public interest. Office of *ijtihad* is much celebrated as it has no finality among the believers. It also provides room for political adjustments. Diversity is permitted in Islamic legal theory and is graded a "sign of bounty of God" for the people of an Islamic state. Door of *ijtihad* is far more open now than ever it was in earlier times. Muslim scholarship defends itself against west to make it relevant to the requirements of modern world.

Anderson (2011) quotes Gibbon to show importance and relevance of study of "Islamic Law in the Modern World". Muslim Jurists have elaborated a structure of the laws that is from the point of view of logical perfection -"one of the most brilliant essays of human reasoning". Muslims plead closest ties in religion and law. Islam is not only a religion but unlike other religions it is a way of life complete in itself. It is a religion, a system of ethics and morality and also a well founded legal system. It deals with every aspect of social life. Muslims all over the world think Shariah as "Living law" till doomsday.

Past haunts when we talk of our judicial systems says writer of "Islamic Law and Judiciary" (Islam: 2000). Our judiciary is British legacy. Muslim rulers of the Subcontinent ensured security of life, property, and liberty for more than seven hundred years. It can't be said it was crime free zone then but crimes did not go unpunished. After independence of Pakistan it could not adhere to Qur'an as source of law and Muslim Family Laws Ordinance (MFLO) was introduced in 1961. Qur'anic Law was also changed by the government of Bangladesh to rid of women repression. But in fact, if neutrally examined, its application gives result in comparison with instances from other Muslim countries; it will be evident that Qur'anic Law is far better than any law prevailing throughout the world. Writer is of opinion if Shariah law is implemented

offences will annihilate and citizens will be law abiding as desired by Shariah. He stresses that services of Ulema and Fuqaha would be helpful subject to sincerity on the part of government. Islamic Law was enforced in all Indian under the Muslim rulers. In 17th century in the reign of Aurangzeb Alamgir "Fatawa-i-Alamgiri" was compiled. It was promulgated throughout the India. English rulers, on purpose, created controversy on the points of Islamic Law and justice. Islamic law is based on *adl* aiming to provide justice to people. They changed the laws of the land keeping personal laws intact. Legal crises of states are not due to the dearth of laws but due to non existence of the rule of law. Criminals go unpunished and it enhances crime rate. There are flaws in laws and procedures of implementation of the laws. So, state apparatuses are inactive. Law takes its course through morality. Islamic law is dynamic and can adapt to changing circumstances. Legal crises can only be overcome through application of Islamic Laws in letter and spirit but it is a hard task demanding an untiring effort.

The same question is addressed in "Implementation of Islamic Ideology" (Khan, 1979). Establishment of social practice or social order based on principles given in the primary sources could solve the legal crises of the state. Welfare state requires measures inconsonance with ideology and demands of the modern world. This would be attained through education of people. Complete infrastructure of state apparatus i.e. laws and law enforcement agencies and their practice are to be tuned to fit in modern day state practice. It focuses on provision of basic needs to the people, security of fundamental rights and peaceful coexistence in the society are sureties for good law order situation in any country.

Usmani (2006) criticizes "Women Protection Bill" 2006 on account of being against provisions of Qur'an. He addresses misconception regarding Islamic punishments on the subject. In his opinion Qur'an exempts women who are coerced to the heinous crime (33:24). He also lists the Traditions and case laws from the life of Prophet (pbuh) to substantiate his stance. He presents 27 years history of case laws where women of even suspected characters were pardoned and men were punished. Usmani adds the weight of view of Charles Cannedy in "The Status of

Women in Pakistan in Islamization of Laws" (P-74). He concludes "The woman is exonerated of any wrong doing due to reasonable doubt rule" and male is punished.

Rahman (1983) recounts the causes which resulted in a strong urge for separate homeland for Muslims. It was faith in Islam. He thinks that the only factor which can sustain the state was declared by Quaid-i-Azam; "Golden rules" given by "Great law giver, the Prophet (pbuh) of Islam". Constitutional provisions throughout the constitutional history of Pakistan are critically examined. Dismemberment of Pakistan to him was due to non observance of the principles of Islamic justice, human equality and brotherhood. These golden rules still hold good for the solidarity of Pakistan.

Tahir (1996a) analyzes criminal laws in Islam and compares them with Hudood Laws. Many questions are raised therein to establish the position of the said laws. Man made laws are never exhaustive in nature. Moreover, different interpretations on questions of criminal law in Islam pose serious challenges to reach a consensus. He also recommends some rectifications in the laws to make them more in line with the divine legal spirit.

Ghazi (2003) outlines the process of Islamization of laws in Pakistan. Summary of past effort is provided to help out the new readers on the subject. The work highlights all steps towards the goal in brief and concise manner. It is not only helpful to understand the process of Islamization but it also points out the obstacles in the journey towards Islamization. An insight can be taken to explore the reasons of non achievement of required ends in this regards.

All these scholarly debates leave the question unanswered why efforts of 35 years could not yield. What were the circumstances which led to current modernization of laws? To analyze the works of western critics and scholars, to examine contribution of Muslim intellectuals and to expose the causes underneath all these developments this study embarked a hard effort to log these debates, to assess the evidence and conclude the results. It will be helpful to rectify the present flaws in the laws and lacunae in procedural practices. Study will also open up new discussion as per demand of modern day issues unlike orthodox religious beliefs.

1.2.14 Modernization

Eisenstaedt (1996) defines modernization as a historical process of change in political, social and economic beliefs in different societies. This process is based on European experiments through the 17th century to the 19th century. It spread from Europe to North America and further towards Asia, Africa and South America. In Europe modernization started from feudal system, absolutist state, autocratic state etc. It also followed inspiration offered by colonization, immigration and religious motivation. However, most of the part, it was status oriented- equality in social status and economic independence. Despite being variant in base or approach there are, however, some core characteristics of modernization of societies around the globe.

Modern means democratic, concerned with masses, based on equality, dynamic with leave for development, economically strong and advanced and above all sovereign and influential. Modern state is devoid of fear while bringing about any change in social mechanism of its functionaries. It has adaptable scheme to new situations according to the demands of time, people and global environment. Dynamic character of higher political entity is hall mark of its modernization process of change which remained prevalent throughout social history of man. The same reflected in higher sovereign formation from primitive through medieval to modern state and its different organs (i.e. state apparatuses). Change and tendency of adaptability distinguishes between modernist and conservative societies and states. Processes of modernization of state and state apparatus were initiated by rulers, political leaders or religious reformists. Modernity entails transformation of current systems on demand of change from people or from globally changing trends as to bring the systems in line with the concept of modern welfare state. This change or demand of change may be reformatory as far as matter of existing institution is concerned or it may aim at total transformation of existing system.

Dunn (1977: 63) elaborates that modernization and modernity indicate society: a progressive slope from agrarian society to industrialization of the state. Wave of modernity equipped man with knowledge to get maximum use of natural resources. It is an urge in social mind of people to enhance their sources to provide better potential and dynamism for

improvement in living standard of people. This potential does not only contain material and technological uplift of man and to gain more riches but it also adds to intellectual recesses and cultural values of a given society. In modern world when one talks of modernization he is prone to accept the structure of modernization as followed by Europe while controlling authority and exploitation of church. Hence lesson of modernization is planned on western lines. It revolves around the history of state sovereignty against monopoly of the church in the business of state. It started from the placement of the church under *Tsar's* direct control by virtue of the Spiritual Regulation of 1672. He kept the church under his control through the Holy Synod. He ordered the Synod to take over charge of responsibilities of all churches: Roman, Calvinist and Lutherian located in boundaries of Russia. All appointments of clergy in these churches were made by Synod. At the end of this process administration of the church was under Holy Synod. It created a secular office to maintain religious affairs through out the empire. This was done under the cover of modernized legislation on face of it amidst numerous problems.

Anderson (1976) observes Muslim Law is generally understood divine law providing log of duties for Muslims i.e. Shariah Law. This law was applied in *qazi* courts in medieval Islamic state until couple of centuries ago. It has been reformed to a large extent under western models in countries where statutory laws are introduced during British occupation. This process of reforms provides an insight into medieval and modern as well indigenous and alien amalgam of laws. Hence it also manifests inherent tension in other legal concepts and their modernized forms affecting way of live in different Muslim countries. Pakistan is one of the countries where this tussle of Islamization is at galore since Islamization process of 1979, especially. Islamization process culminates on introduction of the Hudood Ordinances and hence insertion of difference sections in PPC, CrpC and complete overhaul of evidence Act 1752. The new law on evidence was named as Qanun-e-Shahadat Ordinance 1984. In reign of General Pervaiz Musharraf, a *coup d'état*, some steps toward revitalization of Islamized laws are taken i.e. Protection of Women Act 2006.

Shariah enumerates five categories of human behavior: commands, recommendations, leftovers / legally indifferent, reprobation and prohibitions. All of these can never be applied by human courts. Courts could implement only commands and Prohibitions. Other three fall in the domain of personal piety rather than legal inquisitiveness. Courts could never encroach into the domain of personal morality of an individual. Business of courts in all over the Islamic world remained restricted to limited number of crimes (against man and against God). Five or six *Hudood* were tried in the *qazi* courts. If standards of justice were not meted out with reference to *nisab* (of Property or witness) *Hadd* would not be inflicted. Matters were supposed to be decided by discretion of the court i.e. *qazi*. This discretion was problematic issue. In want of uniformity reforms were thought expedient in Muslim the Law across continents during different phases of history. It was mere a coincidence that these reforms were being done simultaneously in different regions of the Muslim world under different rulers and according to variant demands of people or their rulers.

Reforms under aegis of the Ottomans Empires in middle of the 19th century were not from below i.e. on demand of masses but from the above i.e. by ruling elite. Reforms were imposed by government under title of *Tanzimat Reforms*. It was perhaps done to wipe away western criticism of Islamic Law: brutal, savage, incoherent or crude. Penal code, commercial code, code of maritime commerce and code of commercial procedure were introduced to save the interference by European legal reformists. Shariah was put aside as far as matter of reforms in criminal law was concerned. Procedures codified for criminal trials were on foundation based on totally alien inspiration. The whole system was based on secular system of courts called "*Nizamiyah*". *Nizamiyah* courts operated under modern procedures of evidence and rules of business. However, the codification of the code of obligation (contract and procedures) was formulated on the basis of Shariah principles as against French model. It is pertinent to be noted that it was as first instance of enactment of laws under state authority based on principles of Shariah. Nearly same course was being followed in Egypt. It got juridical independent with in the Ottoman Empire in 1874. In the process of reform capitulation model was followed. Principles of Shariah were progressively replaced by codes made under western inspiration. Nonetheless, one

can find some traces of Shariah principles in Egyptian criminal court system e.g. Muslim could only be executed if there were a supporting *fatwa* by a religious scholar (*mufti*) to impose death penalty passed by the court under the criminal code. Civil codes and their promulgation in the courts were in stark difference with Shariah principles but it was a wholesale adoption of the Code Napoleon. Egyptian concept of mixed court to decide cases in which litigants were other than Egyptian nationals required well versed judges in principles of general justices and rules of equity. This requirement was emerged to guard the interest of foreigners or locals and foreigners when they are parties to a case under trial. Courts administered by judges of high erudition and judicial minds from variety of nationalities raised the standard of judicial independence and dissemination of unbiased and unprejudiced justice. These reforms, in a way, paved the way for rule of law in Egypt. It is worthy to be mentioned here that this rule of law and its observance was not according to principles of Shariah but it was in terms of statute laws governing the business of the mixed courts. Statute laws sought their course in India in the same way.

1.2.15 Modernization of the Laws

Reforms in Muslim law in Indian the Subcontinent are of main interest in this research. As Muslims, despite being minority as compared to Hindus, were rulers, Islamic Criminal Law prevailed everywhere (Jain, 1982). It was later under Mughals in some areas Hindus could administer their justice system with the *Pundits* acting as judges in the courts in their reign. British took over from Muslim Emperor and made amendments in the laws to facilitate their rule. Three presidency towns—Madras, Bombay and Calcutta courts under authority of East India Company were established in 1726. These courts were known as Mayor's Courts. In true terms these were not courts of company but courts of English Crown as they observed the law of England. Mughal Emperor granted permission (*Diwan*) on financial matters and judicial proceedings in Bangal in 1765. Parallel to these developments the company could get grant of criminal justice management (*Nizamat)*. It was Warren Hasting who declared that matters of Hindus and Muslims were to be decided according to their own laws under Articl 27, Regulatio II of 1772. In 1781 Elijah Impey pleased to declare that in matters of hybrid nature courts were to

act in the light of principles of equity, justice and good conscience. Law of defendant would be followed if parties differed in matters of their respective laws. In the presidency towns the laws of England were being followed and in other areas under company's administration national law of justice, equity and good conscience prevailed. Macaulay claimed in charter Act 1833 the principle is uniformity of law in their dominion. Anderson (1976:22) notes the claim of Macaulay "we do not mean that all the people of India should live under the same law; far from it…. We know it is unobtainable. Our principle is simply this—uniformity where you can have it; diversity where must have it – but in all cases certainty…. A code is almost the only blessing---perhaps it is the only blessing…."

In 1970 implementation and administration of the Islamic Criminal Law was taken over by the company. A *mufti* would write a *fatwa* at the bottom of the record which was to be considered by company's judge carefully. If company's judge found it in consonance with Islamic Law and principles of natural justice he passed judgment accordingly. If the legal opinion of the *mufti* i.e. f*atwa* seemed contrary either to principles of natural justice or principles of Shariah, judge would have sent the case to the court of appeal. He was to append his objection with the trial and order sheet of the case. The court of appeal would examine if the *fatwa* was according to the Islamic Law but against principles of natural justice and would accept if decision were in favor of the accused but court would recommend acquittal or decrease in punishment if *fatwa* was against the accused.

These step by step modifications in Shariah Laws took place under company's management. In 1790 the right of heirs of blood to pardon was abolished if he was guilty to deliberate homicide. Test of "deliberate" was changed from mere weapon used to involvement of guilty intention on the part of killer. In 1791 mutilation of limbs was abolished in cases of highway robbery. *Muftis* were directed to give their *fatwas* to support the court on assumptions, viz. they were asked to give their opinion that heir of the blood had demanded death penalty despite their grant of pardon or refusal toprosecutethe murderer. If witness/es was / were non-Muslim/s *fatwa* was supposed to be delivered on the assumption that witness/es was / were

Muslim/s. As *nisab* was a bar on the infliction of sentence and *muftis* were instructed to pass their opinion on assumption that evidence was sufficient / or somewhat different.

In 1811 further assaults were made on Shariah law i.e. sale of slaves declared as criminal offence. In 1832 non-Muslims were given right of trial under their own law. They could claim exemption from trial under the Islamic Law. Indian Penal Code was being prepared from 1837 under Lord Macaulay. It was ultimately promulgated in 1860. It was mere a coincidence that codification of the Penal Code of the Ottoman Empire took place parallel to it.

A new development in this process of reforms was—that *muftis* were to add at the end of their *fatwas* that rulers had power to mitigate or alter the sentence. However, intention of the uniformity seekers was to change the existing laws a little keeping their base intact. Furthermore, they wanted the change must not overlook the principles of justice, equity and good conscience at the same time. These were reforms under colonizers in India. Expediency of this wave of reforms had its course in free and independent Muslim countries as well. For example in Iran civil code of 1937 is a comprehensive enactment. It was more elaborate than *Tamzimat* of Ottoman Empire. Notwithstanding, it was an amalgam of Shariah (*Shia* School) and French Law.

Mehdi (1994) opines that Islamization of laws in Pakistan can only be studied in all-encompassing milieu of economics, political and social developments in the country. It starts with arrival of Muhammad in India. It seemed that the writer could not approach the sources describing the systematic development of Muslim Laws during medieval period since inception of Muslim rule in India.

1.2.16 Feminism across Continents and Modernization of the Muslim Family Laws

A conference: Islamic Feminism and Beyond: The New Frontiers, was conducted at Woodrow Wilson International Centre in 2010. It highlighted the work of Muslim feminist organizations to reform the religious family laws in different countries of the Islamic world. The

main focus of the feminist organizations has been demand of equal rights for women. The key issues on the agenda were: Modern society's laws, equality of men and women, secular and religious interface, equality of citizens, gender based discrimination, etc. Speakers from Muslim world: Turkey, Morocco, Tunisia, Iran participated in the conference. They talked on the innovative topics to negotiate Islamic Feminist stand point especially on Islam, democracy, and their relationship in a modern society and modern nation state.

Badron (2010) blames patriarchal family setup in the Muslim countries which considers women incapable to lead their life independently. She advocates egalitarianism as projected in two exceptions to her general premise i.e. Turkey and Morocco which have reformed and modernized their laws: The Civil Code of Turkey 2001 and Moroccan Family Laws of 2004. These laws are the result of efforts of Muslim Feminism activism. There are two networks of feminism which operate against inequality of citizens in Muslim Family Laws in different countries. One is secular with Muslim and non-Muslim members like Women Living under Muslim Laws (WLUML) in Turkey where Muslim and Christian women work together. The other is Muslim movement like *Musawwah* which was started in Kuala Lampur in 2009. Inequality in Muslim states seeks legitimacy, in contrast to their constitutions, in the name of religion e.g. Egypt and Arab countries. Feminist organizations are trying to remodel the patriarchal laws and bring them in equal favour of women folk. Egypt has made considerable advances in this matter in last decades of the twentieth century as compared to other Islamic states. It is because of Egyptian Feminism that challenged the so called consonance between the patriarchal Muslim Family Laws and nature. They are promoting the global equality aiming at change in Muslim Penal Status Code. They are of the view that global equality of citizens is missing in *Musawwah* because it is based on exclusivity. It must go beyond its religious divides. Secular Egyptian Feminists on the other hand aim at an interface and balance between theory of religion and political rights of the people in a modern nation state; the balance between ideology and practicality.

Toprak (2010) presents relevance of feminist movement (NGO's) on reforms and amendments of civil and criminal law codes of Turkey. It is because of the highest ratio of women academics: 35 %. Three hundred and fifty NGO's took part in this path-breaking movement. Owing to feminist campaign Turkey signed the Convention to Eliminate All Forms of Discretion against Women (CEDAW) in 1985. The law which required husband's consent for wife's employment is annulled. Reduction of 1/3 punishment to the offender of rape when the victim was a sex worker has been abolished. Now the culprit shall be served with full punishment of the crime. A new law against domestic violence has been passed giving right to women to file a complaint for production orders through a public prosecutor. Abortion is also legalized. Husband is no more head of family. Spouses have equal decision making powers. Permission from husband to travel and to retain her surname is not covered under the new Code. Joint property rights on the property acquired after marriage has also been amended. A working woman is independent in financial matters. She can purchase, hold and manage private property independetly. Forced marriages of girls are on their option. The can file an annulment suit. There were different ages for girls (15) and boys (18) to marry legally in the old Code. The new age i.e.18 years is fixed for both girls and boys. Registration of a civil marriage is not necessary now. Women can seek a legal separation for three years which can be a ground for divorce later on. Concepts like 'shame', 'honour', 'chastity', 'decency', 'morality', are no more part of the Criminal Code. Patriarchal orientation of the Code has been abolished. Rape now includes oral penetration. Coercion and harassment of a co-worker are crimes of sexual assault. Sexual assault by a relative, teacher, in-laws, and employer is subject to higher sentence on account of aggravated sexual assault. Difference between girl and a woman in cases of adultery finds no recognition in the new Code. Honour killing is also not admitted as an excuse for the crime rather it has been declared aggravated homicide and is subject to higher punishment. Sexual abuse of a child is punishable even if the abuse is done with the consent of the child. Child abuse by teacher, relatives, and parents becomes aggravated offence.

Eddouda (2010) discusses the Muslim identity as articulated in Moroccan Family Code 1956. It links legal system with religious beliefs. Equality between genders has been sought by

the feminist activists. In 2003 the law was amended to achieve equality of genders and to promote human dignity as enunciated in the principles of Islam. President of Morocco called it an effort to rely on '*ijtihad'* to bring the Laws in conformity of modern day demands while remaining in the bounds of the religion. The new Law broke with the guardianship of man over woman. This is too classical an interpretation in modern day political theory when women excel in every field of life. The concept of '*qawam'* needed a rereading. The very definition of family: for procreation under head's (man) leadership, in the old Law, has also been changed declaring marriage a partnership between two equal citizens. Writer opines that the amendment in the Family Laws are due to unending and path-breaking activism of feminist movement in the country. Due to their efforts abortion has been declared legal and it called for change in the Penal Code of the country. Feminisst call for the need of considering women issues in a wider temporal and progressive context rather than placing them in traditional settings. The issues of polygamy, divorce, and violence are, to them, more social than religious ones. However, there is an unending tussle between Islamists and the Feminists. The Islamists object the amendments in the Islamic Family Laws (2004) which give rights to women as autonomous citizens: who are working and drawing salary ignoring individualism, access to education, and human autonomy, etc. The autonomy in economy reduces the discrimination and promotes egalitarianism of the new Law concludes Eddouda.

Iran's case is discussed by Tohidi (2010) thoroughly. She starts with the role of the Feminist Movement in getting right to vote for women in Iran. It was a joint venture of secular and Islamic Feminist organizations. Feminist Movement in the Islamic world upheld the tradition and socio-economic patriarchal value system. Right to vote is a byproduct of modernity and democracy says the writer. It is with the introduction of the Feminist Movement an egalitarian society based on equality of men and women could get familiarity in the social milieu of the country. Under this campaign minorities also feel safe from exploitation. Women issues are not only existing in the Muslim states but all Semitic religions place restrictions on women; Christianity and Judaism follow the same tenets as for as matter of women individualism is concerned. The scholar explores the genealogy of suffrage in Iran through the annals of history.

There were many organizations: Women of Iran (*zanan-e-Iran*), Women Party (*hizb-e-zanan*) Federation of Islamic Women's Organization (FOLWO), etc. All these parties were brought under umbrella of the High Council of Women's Organization in 1961. Presidents of the organization were two sisters of Raza Shah Pahlvi (Ruler of Iran before Khomini). This organization caused the 'White Revolution'. Shah gave six point agenda of modernization move including right of vote to women. The same was opposed by clergy. Khomini also opposed these reforms and especially participation of women in the elections saying it contrary to Islam. Nonetheless, strong nerved women who were present, in large number, in the Revolution of 1978-79, stood against Khomini and forced him to submit at least to the participation of women in the elections but he suspended the Family Protection Law (1967/75). He was again pressed to reverse his decision by the workers of the Organization.

African countries of Muslim majority show same picture on rights of women. Labidi (2010), a Tunisian feminist scholar and human right activist, magnifies the situation of identity of women in Tunisia. The Personal Status Code (PSC) of 1956 guarantees rights to the citizens. Focus of Labaidi's research is on culture of celibate women in the country. It highlights how this group has used their activities and outlook as a means of self awareness and individual recognition. Their way of life: wearng of *hijab*, observing fasting, arranging recitation of Qur'an, is suggestive of a movement to defend their sexuality with in ethics and the Code. The struggle which started with taking off veil in 1924 and 1929 by two feminist activists: Manubia and Habiba respectively, culminated in the Personal Status Code. It bestowed rights to women viz. abolition of polygamy, divorce through judicial process, equal pay, age of marriage, punishment for both adulterators, etc. Wearing of veil is over conformity, to the writer, entrenched in traditional concept of security both physical and emotional. It also challenges, ironically, unchanged traditional role of women. Through *hijab* they rid of the pressures of cultural expectation. It adds to their (celebate women's) mobility and gives them identity without marrying which was previously associated with male links of a woman i.e. father, husband or son. This group of 'women mystics' has made their bodies their power as against traditional vulnerability of female body to sex and harassment. They are the true defenders of the modernity

and freedom as enshrined in the PSC. They broke up with the traditional views of chastity and spiritual life and opted for the worldly material life. They have invented a new emancipating nature which is inclusive of feministic principles and personal individuality as a person setting forth a new trend in religious cum political milieu.

Jamal (2010) evaluates the reform programme on the religious family laws in Arab world. The main issues of the Arab countries, from feminist approach, are illiteracy, inequality, less representation in parliament, less representation in public sector jobs, etc. The stance is supported with help of statistics in each case e.g. Arab world has 9.5% representation of women in parliament as against 18.8 % in sub-Saharan countries. Focus of the papers remains Moroccan Family Code 2004. She finds the provisions of the Code inactive in want of their enforcement. Rule of law in Arab countries has no place as it breaks with the patriarchal cultural, social, and political setup. *Mudawwana* Laws on husband's leadership of the family say permission from husband is necessary to work or travel. Acc0rding to this very law male guardianship, institution of polygamy, oral divorce, etc. are threat to women advancement. Personal Status Code 2004 guaranteed many rights to women even then there is lack of rule of law, institutionalization, democratic principles and implementation of reformed laws. These changes were opposed by the radicals form the start. Justice and Development Party (PJD) and Justice and Charity Party were the main opponents of the reform project. But the king on 10 October, 2003 announced his plan for modernization the Family Laws through practical exercise of consensus of opinion *'ijtihad'*. He also requested support from the opposing parties. Ultimately he got it when Nadya Yasine showed her willingness to endorse the reform project by declaring *Mudawwana* laws no sacred texts and could be replaced with a more logically coherent legislation. This development opened the democratic gates of modernity in morocco and allowed the understanding of social side of the reformative move. The previous laws not only placed women in male ownership promoting patriarchal culture but it also denied their equal rights. Improvements in the laws, governance, and expansion of democratic process are worthy achievements but without addressing the issue of jurisprudence in a meaningful way the situation is difficult to improve. Present system viz. social, cultural, legal is in direct opposition to the Holy Qur'an which recognizes equality of genders in

its text at many places in multiple contexts. Existing reformed and modernized laws are neither sufficient nor yielding amidst politics of discrimination which upholds *status co* and denies everything which challenges it.

1.2.17 History of Anglo-Islamic Laws

Jain (1903), translated by Anwarul Yaqeen (1982), is a seminal contribution on the subject i.e. "Legal History of India". Scope of Islamic Law could not regulate all India as its implementation had gone hand in hand with Muslim rule in different principalities, presidencies and their suburbs. An examination of developments of criminal justice system in medieval period can never be done with the 21st century spectacles. Islamic justice system did not declare everything null and void which existed in India but it permitted all practices observes Jain.

Islamic justice system sprang from the needs of the society everywhere. It was not imposed from the above by the rulers. One sided view can be taken to criticize accommodating facet of the Islamic system of adjudication in the Subcontinent. Islamic criminal justice system allowed institutions of local administration as far as they were in vogue for other strata of public. How could a new system obliterate old system in one go? It was a gradual process which took place side by side old local *panchayats* system: local courts at village level consisting of five elders of the society. However, Glemer (1968) in Yaqeen (1982) rightly quotes flexibility of Islamic law permitting customary law to work in local courts (*panchayats*). So much so Muslim kings were tolerant to Hindu Laws and their application in courts. Ahmad (1992) mentions numerous examples of trial by ordeal according to Hindu Laws. It is however matter of centralization which one sees in modern state lacked in medieval India. The centralization of all systems including judicature of the state dawned with the modern day concept of state. It was British rule which brought centralizing measures to administration of justice in the Subcontinent. Colonizers tried to get into the local legal system. They sought sprcialist advice from all faction of laity. They got the laws translated into English. Law in India became an amalgam of local laws, alien customs, traditions and the Common Law. Alien elements remained more conspicuous in the make-up of new laws under anglo-Muhammadan Law. This was the solution of the

foremost problem of the control over diverse subjects. As laws provide for the state control over subjects they are main state apparatus for every government. Law and legal institutions under colonial control best served this purpose. Islamic Criminal Justice System was replaced by English criminal system in second half of the 18th century. Hindu and Muslim laws were operating side by side English system as personal laws of the followers of the two faiths. Uniformity and centrality were the aims of change of judicial system. But the same was flawed due to arm-chair approach based on mere translations of Islamic law. Applications of the translated laws through English procedural practices added to the problem because the two systems were out crop of two different value systems. Legal reforms could not take expected hold in India. Locals thought the new system was not adequate to settle their dispute. They gave a cold shoulder to British system and remain adherent to their local system in one way or the other. Unbiased critique on legal developments informs that legal pluralistic situation was the result of the replacement of Islamic system by English system. This legal pluralism had its reflection in India and Pakistan at the time of their independence. New Islamic state adapted Anglo-Muhammadan laws to run its business during its early days. Efforts were started with the First Constituent Assembly to make an Islamic constitution for the state. It took very long way to reach a constitution. Nonetheless, after two years of independence in 1949, Objective Resolution provided main contours of the Constitution.

1.3 Conclusion

This chapter has addressed questions of methodology and theory. Methodology adopted in this study is discussed with special focus on the element subjectivity. It tells about data, sources of the data and procedure of analysis. Most important question related to subjectivity is also elaborated in these lines. Complete objectivity in a qualitative research is seldom achieved. That is why researcher's position is mentioned to facilitate examiners and research scholars. Theoretical framework for the study has also been discussed in detail. It covers views on state development: what is a state? What is the relationship among the citizens of a state? What is the relationship between citizens and state? Why are laws necessary in state control? How do laws

serve the government? How do laws reflect intentions of the rulers? Do the laws show citizen's needs? What is role various movements for human rights? How did Feminism in Muslim countries make the rulers tame radicals and change the Islamic Family Laws? Change of existing laws is discussed in detail. Anglo-Islamic Laws, Islamization of the Laws and Modernization of the Laws are also elaborated in this section to provide theoretical basis to the study.

CHAPTER 2

LEGAL SYSTEM IN ANCIENT AND MEDIEVAL INDIA

This segment of the study has explored genealogy of law in acient Idia. First part of this chapter started from oral accounts of Vedic society (1700 BCE-500BCE). Going through different phases of narrations and transcription it has digged out the Hindu Law from authentic sources. In the secont part early accounts administration of justice in Medieval India 712 AD-1500 AD) under Muslim Sultans is described. Third part of the chapter elaborated Muslim administarton of justice in Post Medieval India (1526 AD-1857AD) under Mughals. Change system from Muslim to English is touched upon in the fourth part of the chapter. Puprpose this chapter is understand the modes of administration of ancient and medieval state (India). It unveils the nature, working and authority of religion in ancient and medieval phases of the state. These discussions would provide bachground in which medieval state tried to replace one religious code with the other. Also readers may compare and contrast the laws and their working in different phases of state development. In this backdrop the theoretical questions on religious hegemony in matters of state control, change of legal system under followers of another faith and change of ruler and change state religion, medieval *modus oprundi* in these matters may help differentiate medieval and modern practice.

2.1 Administration of Justice in Ancient India (500 BCE-550 AD) and Related Concepts

> May we break open the mountain and illuminate the reality. Just as our ancient and supreme Fathers. Oh sacred Fire! Seeking the truth, following the clear insight, sustaining the chant, broke through Heaven and Earth and revealed the radiant Spirit. Rig Veda IV.2.15-16

History is always written in the light of ideology. People like to write history according to their own image. Every generation of human race thinks itself more modern than its predecessors. This arrogance had regarded the previous generations as out of date. We live in the 21st century with all of its technological advances and scientific truths. Our obsession of achievements makes us think of old eras as medieval and crude. While we have gone beyond the bias of older interpretations of history, we may have created a bias of another sort (Frawley 1995). Science and technology have had a more destructive effect upon our world than enlightenment. Machines manipulate outer world and neglect the inner world of mind. Social order and satisfaction of transcendental needs has been mandate of religions from *ab initio* long before advent of science. In this respect myths and ancient Scriptures had tried to dwell on the inner world. This very area falls under the domain of our souls. Religion tries to manipulate outer world by inner perception, control and direction. Despite its limitations regarding outer realities it is closer to the truth ever since.

As civilization has come out to be the total sum of cultures of people of a particular region and era, it can never be devoid of civility (rights and duties and their enforcement). Ancient India has provided us with an extensive literary record, the largest of the ancient the world, in the form of Vedic texts. On the basis of Vedas we can explore the civilization of the world.

2.1.1 Cataclysmic Concept of World Creation

Time is regularly punctuated by a great cataclysm. The material world is destroyed. Brahma, the creator, also perishes along with the other deities, wise men, demons, humans, animals and rest of the natural world. Each Brahma lives for 100 years, but each day of Brahma represents 4320 million years on the earth. It is known as *kalpa*; a complete cycle is beyond human imagination. After 100 years of chaos a new Brahma arises and cycle beings anew. At the beginning of each *kalpa* Brahma awakes and three worlds are created. He is asleep at the end of the *kalpa*, worlds are again reduced to chaos and all beings who has not attained liberation through their devotion or exemplary actions must prepare for rebirth according their *karma.*

Brahma wakes up for next *kalpa*. *Kalpas* are divided into 1000 *mahayugas* (Great Ages) which are again subdivided into four ages: The *karitayuga, tretayuga, dwaparayuga and kaliyuga*.

Karitayuga lasts for 1728000 years. *Dharma* the god of justice walks on four legs. During this golden age people are contented and virtuous. The *tretayuga* lasting 1296000 years is less happy. *Dharma* walks on three legs. Most of the people are dutiful in this age but there start stifles and people become selfish by and by. In 864000 years of *dwaparayuga* virtue and vice are balanced. *Dharma* walks on two legs for discontent, lying and quarrels are wide spread however, some people still do their duties properly. God of justice *Dharma* has but one leg. The god of justice is helpless in this age. During *kaliyuga* spanning 432000 years people are wicked, poor, and unlucky because that is what they deserve. They live in cities full of thieves and eat voraciously. They are oppressed by the rulers, ravaged by natural disasters, famines, and wars. The men are dominated by lecherous women. *Kaliyuga* ends only with utter destruction to make way for new *mahayuga* (Ion 199:178). According to Sri Yukteswar dates that correspond to four Vedic World Ages are as follows:

satyayuga / Golden Age	11,501 BC	-	6701 BC
sandish / Transitional Era	7101 BC	-	6401 BC
tretayuga / Silver Age	6701 BC	-	3101 BC
sandish / Transition Era	3401 BC	-	901 BC
dwaparayuga / Bronze Age	3101 BC	-	701 BC
sandish / Transition Era	901 BC	-	601 BC
kaliyuga / Iron Age	701 BC	-	499 AD
sandish / Transitional Era	399 AD	-	599 AD
kaliyuga / Iron Age	499 AD	-	1699 AD
sandish / Transition Era	1599 AD	-	1899 AD

dwaparayuga / Bronze Age	1699 AD	-	4099 AD

Frawley (Ibid) is of opinion that we live in third age and not in *kaliyuga.*

2.1.2 Brahma Enacted the Laws

Sanskrit word *dharma* corresponds to Pali word *dhamma* translated as religion or law. The latter is accepted by the legal historians. Root of *dharma* is "*dhari*" which means to hold. *Dharma* holds men together in a society. The object of law (*dharma*) is maintenance of peace and justice according to *manava* code. The law led to the everlasting truth. Vedic conception of law is of truth: "by the law they came to truth". Law and truth were regarded as two sides of one reality. *Atharaveda* declares law is above the gods "the home and life of gods". *Dharma* is created to put a stop to the harm done by the harmful natured men. It sounds like modern concept of imperative law; the law is command of sovereign in words of Sevigne.

Puranic concept of law is that *dharma* should be according to the nature of men. This realistic approach to law informs that the laws must address wrongs. By that time society had also developed with diverse and varying needs. Their interests could only be guarded with the help of different laws. At this stage of legal development, a law student cannot ignore the marked difference between Common Law and *dharma*. King punished the criminals according to the Common Law and he also punished the sinners under *dharma* Law. In the Brahmanical period law was not distinguished form the rules of religion. Kautilya tells us about four legs of law: dharma, evidence, history and edicts of the king. Violation of dharma was considered as destruction of justice. In *Smriti* literature law was regarded all powerful and above the king which means rule of law in modern sense.

According to Bhatia *dharma shastra* (Institutes of Manu) is the oldest law compendium of ancient India. He writes that the divine sages approached Manu when he was in contemplation of God. They requested him to tell them about the sacred (sruti) laws. Manu opens the secret that Barhma after making all the creatures and him enacted the code of law: "He having enacted this code himself, taught it fully to me in the beginning; afterwards I taught it to Marichin and he to

the holy sages". This "Bhirgu (one of the ten sages) will repeat the divine code to you without intermission; for that sage learned from me to recite the whole of it" (Sen: 1992). Agreement of men and religion were twin roots of law for early *Aryans*. There were two councils (*samiti* and *sabha*) having the authority to declare laws in the Vedic period. We see the state itself as the child of law. *Prohitas* were law makers (parliamentarians) and judiciary had authority and prestige.

2.1.3 Glimpse of the Vedic Society (1700 BC-500 BC)

During the period 2000 BC-1400 BC when Vedas were composed we do not see class discrimination apart from two groups i.e. Aryans as *varna* and Aborigines as *dasa*. The word *varna* distinguishes the Aryans from no-Aryans (III, 34-9). *Kashatrias* was used as an adjective for strong normally for gods. *Brahmana* was used in hundred places for composer of hymns. There are different trades of people mentioned in Rig Veda namely king, warrior, priest and bard etc. Doctors are also mentioned along with craftsmen, particularly chariot makers. Weavers and spinners of wool are described along looms (X-130). Favourite sport of Aryans was chariot racing. Gambling is also mentioned a few times (X-34).

Cast system did not exit at the time of composition and even at the time of writing of Vedas. We have not a single passage to show that the community was cut up into hereditary castes. Vedas have no single allusion in ten thousand verses in this regard. There is a word "*varna*"; which means caste, is used in Rig Veda to distinguish the Aryans from non-Aryans. There is no indication of the separate sections in the Aryan community (III, 34, 9). Word *khshatriya* denoted strong. It was used for gods. Brahma was a composer of hymns and nothing else. The same is admitted by a *Rishi* in IX, 112, 3. It reads: "Behold, I am a composer of hymns; my father is a physician, and my mother grinds corn on stone. We are all engaged in different occupations. As cow wanders in pasture fields (in different directions for food) so are we in various occupations".

Every father of the family was his own priest and his house was a temple. There is neither mention of idols in Rig Veda nor of temples (I; 131, 3 and V; 43, 15). As it is mentioned earlier

that *Rishis* composed hymns, fought wars, ploughed fields but were not either of *brahmans*, *khshatriyas* and *vaisyas*. In *karita* Age there were not castes and subsequently *Brahma* established division among men according to their work (*Vayu Purana*). A later hymn of Rig Veda the Purusha Shukta describes that when gods divided the *prusha* (the primeval giant) *Brahma* was in his mouth, the *Rajayana* was in his arms, the being (called) the *vaisyas*, he was in his thighs; the *sudra* sprang up from his feet", it seems an addition to maintain social order, perhaps.

Those of them who were suited for command and were prone to deeds of violence, he appointed them to be *khshatriyas*, from their protecting others, those disinterested men who attended upon them, spoke truth, and declared *Vedas* alright, were *Brahmans*. Those of them who were formerly feeble, engaged in the work of husbandmen, tiller of the earth, were *vaisyas*, cultivators and providers of subsistence. Those who were cleaners and ran after services and had little vigour were called *sudras*. *Brahmana* were to study, attend sacrifices and receive chairity / gifts. Duties of *khshatriyas* were to protect all creatures, rule righteously, support Brahmans, support non-Brahmans in distress, and prepare for war, levy taxes, stand firm till death in the battle and support ascetics / public servants. *vaisyas* were supposed to rear cattle, perform trade, and cultivate lands. Functions of *sudras* in the class ridden post Vedic society were: practice truthfulness and humility, performance of funeral rites, supporting family, menial services on wages, self restraint etc. (Sen: 1992).

The Vedic social order appears to have been monogamous and patriarchal. Polygamy was however accepted in kings and nobles (X, 145 X, 149). Women appear to have had a better status in Vedic times than in later India: "Many a woman is better and richer than man who is ungodly and selfish" (V.61.6). The worship and high place of mother is found in hymns. Women could go to assemblies and choose their husbands out of many lovers. No mention of *sati* or widow burning is found in Rig Veda. Child marriage was unknown in the Vedic society. Dowry at marriage was usual. Abundance of sons was constantly prayed for as the son could only perform funeral rites for father and inherit the property.

As the concept of right and wrong is the very essence of law the same was the core of customary law of the Vedic Age. Justice was based on the philosophy of public and national good. Girls were free to choose their husbands in early Vedic society. "Many a women is attracted by wealth of him who seeks her. But the woman of gentle nature and graceful form selects, among many her own lover, one as her husband: (X, 27, 12). It was duty of gods to unite girls to their husbands "Go to some other maiden who is still in her father's house and had signs of marriage". Brahma instructs gods for match making "O Visvavasu! Go to an unmarried maiden whose person is well developed make her a wife and unite her to a husband". Marriage of a widow is also recommended and emphasized (X 18, 18).

A father, who has no son, honours his son in law capable of getting sons and property goes to son of his daughter. A son does not give any of his father's property to a sister. He gives her away to be wife of a husband. Son engages in duties of father and daughter receives honour (III, 31). Hindu Law of inheritance makes the son not the daughter inheritor of father. Hindu law of adoption seems to have roots in religious tenets. "A son begotten of another may yield happiness" (VII, 4, 7, 8).

Administration of justice and punishment of criminals are the foundations on which all civilized societies are built. We find true appreciation of laws in some passages of *Brahmana* literature "Law is the *Kshatra* (power) of *Khshatria*, therefore there is nothing higher than the law. Thenceforth even a weak man may rule a stronger with the help of the law as with the help of a king. Thus this is what is called true. If a man declares what is true, they say he declares a law and if he declares law, they say he declares what is true; the both are same (*Brihadaranyaka* I, 4, 14).

Judicial procedure was however crude and as among other ancient nations criminals were often tried by the ordeal of fire. "They bring a man hither whom they have taken by the hand, and they say: He has taken something, he has committed the theft, then he is killed, but he did not commit then he grasps the heated hatchet, he is not burnt, and he is delivered" (*Chhandogya* VI,

16). Murder, theft, drunkenness and adultery were considered the most heinous crimes in the early Vedic society.

2.1.4 Legal Literature

Dharmasutras belonging to the Vedic Schools are the oldest books on law. These are not mere compendiums of law but have much broader connotations. The same cover religion, duties, customs, good conduct and all that comes within right. These are instructions to do right deeds and perform religious duties. These are not for practical application in the courts. Though the justice remained subject of these *sutras* but as a part of the scheme. *Apastamba dharma sutras* address the very subject in only one – Seventeenth part of the whole work. These date from 800 BC to 300 BC. Sir William Jones attributed code of Manu or *Manu-smriti* to thirteenth century BC, and A.W.V Schelgel to not later than 1000 BC. (Bhatia1992). *Dharmasutras* of *Gautama* belong to the *Samaveda* schools, *Vasistha* belong to North Indian School of the Rig Veda, *Baudhayana* represented South Indian school of Black *Yajurveda* and *Apastamba* bases on Black *Yajurveda*. These legal authorities are assigned to the period 600-300 BC. *Dharmasutras* were later versified into *Dhamasastars* which must have come into being about 200 BC to 200 AD. There are numerous *Dharmasastras* and *smritis* which are from later period. These are in fragments and mostly quote and borrow from the old works.

Most of the points are in agreement according to opinions of these writers but there are considerable differences at some points e.g. there are eight kinds of marriages in *Gautama* but six are given in *Baudhayana* and larger share in inheritance is allowed in *Baudhayana*, which not sanctioned in *Apastamba* etc. Traditionally *Dharmasashtra* are divided into three major topics.

2.1.4.1 *Acara*

In the category of *Acara* are comprised rules governing obligations and proper conduct for all the "*varnas* and "*asramas*," closely related to *Mimamsa* Laws of proper ritual conduct. It also had the broader meaning of conventions, of practices, though still carrying the moral

connotation of "right practice" i.e. the authorized practices of good people passed down over the generations. The rules of the class- based social system, such as the specific duties given to each class and the rules for intermarriage are deliberated in this heading along with life-cycle, rites and rituals that mark important occasions in a person's life such as birth, marriage, and *Upanayanam*, the tying of the sacred thread etc.

"*Asramas*" the four stages of life (the student, the householder, the forest dweller, and the denouncer) and the duties expected during each are given therein. There is a list of the great sacrifices in *Acaras*– daily sacrifices by Brahman householders, to the Vedas (through teaching), to the ancestors (through libations), to the gods (through fire offerings), to the beings (through bali offerings) and to the guests (through hospitality), etc. *Manu* 3, 69-70. Class-based regulations on what to eat and how to obtain are given in detail. Guidelines regarding religious gifts (*dana*) are given with details on the caste breakdown: who is to accept and who is to give gifts. The *Vedas* are followed when performing sacrifices or giving gifts since consequences for improper gift giving and receiving can be severe. Funeral and ancestral rites: under this topic fall rules regarding proper rituals, surrounding (area) of the cremation of the deceased as well as fulfilling the obligations to his deceased ancestors through the performance of the rituals.

2.1.4.2 *Vyavahara*

Vyavahara is an important work on Hindu Law denoting legal procedures. Kane in "History of *Dharamasastra*" (Vol. III. 247) describes that right conduct that is called dharma. It can be established with efforts of various kinds such as truthful speech etc. Whenever such a conduct is violated result is a dispute in a court between the parties. It requires proof in the court. Proof of such nature in the court is said to be *vyavahara*. The king's personal *dharma* is inextricably linked to legal proceedings and his *dharma* is determined the by the merits and demerits of his subjects therefore, it is crucial he brings about justice to injustice. This is why, it is stressed in the *dharmasastras* that how important it is for the king to be fair and righteous. He appoints learned Brahmans to counsel and help him in the legal matters. Though this topic covers duties and obligations of the king "*rajadharma*" and thus would seem to fall under the heading of

"*Acara*". Tthe office of the king was so closely interwoven with punishment and legal procedures that even from the time of the "*Apastamba Dharmasutra*" duties of the king are described along with rules of legal procedures. Legal procedures according to the *dharmasashtras* include: court, listening to and assessing witnesses and their testimony, deciding and enforcing punishment, and the pursuit of justice in the face of injustice. Eighteen Hindu Titles of Law make up the grounds for litigation and the performance of the legal process.

2.1.4.3 Prayascitta

Prayascittas are seen as means of removing sin as they are undertaken to atone for not doing what is ordained or doing something which has been forbidden writes Kane in "History of *Dharmasastras* Vol. IV: 58. There are categories of sins. The classification of different sins depends on gravity of the sin and means of reducing it. Expiations and penances are means of reducing the sins. One mode is pilgrimage-- journey to the holy places in order obtain the merit and expiate the sins. Religious vows and rites can also be used to reduce sins. Festivals and religious celebrations are recommended and admitted source of expatiation.

2.1.4.4 Commentaries on the Laws

(a) Commentaries on *Manu-Smriti*

Bharuci (600CE) is the oldest known commentator on the *Manu Smrti* and talks mostly about the duties of the king. *Medhatithi* (820CE-1050CE) is the most extensive commentary on Manu that we have today. *Manvartha-muktavali* by *Kulluka* (1200CE-1300CE) is the most famous commentary on Manu and is very concise and to the point. Among others are *Govindaraja, Narayana, Raghavananda* and *Nandana.*

(b) Commentaries on the *Yajnavalkya-Smriti*

Balakrida by *Visvarupa* (750CE-1000CE) is very voluminous and compares to the *Mitaksara* and the author quotes profusely form Vedic works. *Mitaksara* by *Vijnanesvara* (150CE-1126CE) is a legal commentary best known for its discussion on "inheritance by birth",

and for its popularity within the British Law courts in all India with the exception of Bengal and Assam. *Apararka's* (1100CE-1200CE) commentary is really in the nature of a digest and is much more voluminous than the *Mitaksara*. *Dipakalika* by *Sulapani* (1365CE-1460CE) and *Viramitrodaya* by *Mitramisra* are famous works.

(c) Other Commentaries

Asahaya (500CE-750CE) commented on the *Narada-Smriti* but much of his commentary was added to or revised by *kalyanbhatta*. On *Narada-Smriti* is *Vaijayanti* by *Nandapandita* is well researched work.

(d) Digests

Krtyakalpatara (1104-1154 A.D.) had significant influence until the 16th century. It is one of the largest digests second only to the *Viramitrodaya*. *Smrticandrika* by *Devanna-bhattan* (1200 A.D.) gained large influence throughout North and South India. It is divided into three parts: entitled "*ahnika*", "*vyavahara*" and "*sraddhu*". The text includes numerous citations and quotations. Digests on litigation and judicial procedure are: *Vivada-ratnakara* by *Candesvara* (Early 14th century) which describes the 18 titles of litigation. *Vivada- tandava* by *Kamalakara-bhatta* (1612) is also notable work in this field. *Vyavahara-mayukha* by *Nilakantha* (Early 17th century) is the most known text on the subject. *Bhagavanta-bhaskara* the last work which was translated into English in 1827 and the same was later translated by Kane.

(e) Legislation

Though the law remains the sole province of the king since inception of civilization, this royal prerogative was shared by the monarch with local administration in most of the cases. Kind's of authority to legislate were vested in two assemblies called *Sabha* and *Samiti*. *Sabha* consisted of a selected body of men perhaps specialists in different fields. *Samiti* was a comprehensive house including common people, learned Brahmans and rich businessmen. The later presided over by the king and mainly dealt with political business. Exchange of opinions during the meetings was remarkable; the common ideal sought was to secure concord not only

between the king and assembly but among the members as well. Different communities and groups were authorized to legislate for themselves. Local laws were peculiar to the region and its needs. Laws were made by castes, clans, guilds and industrial corporations (Sen: 1992).

2.1.5 Administration of Justice

The king also performed duties of the judge. He was a court of final appeal in civil justice while in criminal justice he exercised a wide jurisdiction. Theft, burglary, robbery, cheating, gambling and cattle lifting were the principal crimes. The usual form of punishment was to tie the criminal to a wooden shaft. The system of monetary compensation to relatives of deceased was probably in vogue. The price of blood of one person was one hundred coins or cows (Bhatia: 1992).

Gautama declares that "Administration of justice shall be regulated by the Vedas, the *Dhramasturas*, the *Vadangas*, the Purranas, and the *Upevadas*." *Dhrmasutras* normally deal with the law with special emphasis on taxation aiming at to support business of the state and the king. The king could take a prescribed share out of produce and other holdings depending on needs of the state at some point of time. Later law books: *Manu*, *Yajnavalka* and *Narada* are in verse form and the *Vishnu* is in prose. The most authoritative, eloquent and elaborate out of these is *Manu-smriti*. It gives us an account of four regions of Aryan culture, their customs, social set up and legal administration thereof. Period of its compilation falls between 200 BC and 200 AD. The *Yajnavalkya* (c. 100 BC to c. 300 AD) is more systematic and concise. It introduces subjects of medical and anatomy. *Vishnu-Smriti* is based on Manu and is larger than it. Abhorrent custom of *sati* is given in it. It gives us information about yellow robbed ascetics (probably Buddhist) and *Sudra* ascetics. *Narada-Smriti* introduces several new subjects i.e. it lays rules for apprenticeship and partnership. Desertion from a good master was subject to confinement and corporal punishment. It gives us basis rules of industrial business in ancient India and paves the way for exquisite qualities. Industry was carried on partnership. It is more elaborately discussed in this work than *Manu*. Eighteen titles of law we see in *Narada* with 132 subordinate divisions of cases. *Bhraspati Smriti* starts from *dicta* of *Manu*. It supplements and extends them. It deals with legal

documents and shows more advanced stage of development. There are numerous other *Dharmasastras* which are in fragments only and are mainly commentaries to these earlier works. They do not deal with the whole of Dharma. Comparatively old is the *Parasara Smriti* of the 14th century. Important law books are *Dharma Nibandhas* which are systematic and extensive works on treatises on *Dharma*. *Smriti Kalpataru, Catuvarta-citamani, Dharma ranta, Dayabhaga,* etc. are later authorities on law.

These institutes have given us criminal and civil laws at a great length. They also provided us some insight into the mode of administration of justice. There was a court commonly called Court of Brahma with a chief judge and three assessors. Chief Judge was to be appointed out of *Brahmans* compulsorily and from *Sudras* not at all. Trial tools were placed in an open court. Witnesses were examined in the presence of the parties.

Arthasashtra a famous work by *Kautilya* a minister of *Chanargupta Mauriya* was written about 300 BC. Two books of this work deal with secular matters. It is divorced from all sorts of religious and sacred elements. *Dharmasthia* deals mainly with civil matters whereas *kanatakaso dharam* deals with criminal offences primarily. Based on this bifurcation of laws we can assume separate courts dealing civil and criminal matters under *Mauryians*.

2.1.6 Classification of the Substantive Laws

In ancient texts substantive law is subdivided into a number of topics. Exact number varies slightly and sometime reaches to twenty two. Division in most of the authorities is limited to 18 classes according to *Mnava dharmasashtras*. The classes are:

(i) Nonpayment of debts or recovery of debts

(ii) Law of Deposits

(iii) Sale by a person who is not owner of the thing sold

(iv) Resumption of gift

(v) Resumption of gift Sale

(vi) Nonpayment of wages

(vii) Breach of contract

(viii) Rescission of sale and purchase

(ix) Disputes concerning the owner and the guardian of cattle

(x) Boundary disputes

(xi) Insult

(xii) Assault

(xiii) Theft

(xiv) Sahas

(xv) Adultery

(xvi) Duties of husband of wife

(xvii) Partition and inheritance

(xviii) Gambling and betting

The same division is given in *Kautilya'*s *Arthasashtra*.

2.1.7 Penal Laws

Rule of law is a modern buzz word. Law used to takeits course according to the status of criminals. Application of laws on commission of same crime was not same. Punishments for upper classes were diluted. Even for the same crime there was one law for *Brahmans* and the other for *Sudras*. The former were treated with undue leniency and the later with excessive severity. If a *Brahman* committed one of the four heinous crimes: slew a *Brahman*, violated his *guru's* bed, stole the gold of a *Brahman* and drank intoxicating liquor they branded him on the forehead with heated iron and banished him from the realm of the king. If a man of a lower caste slew a *Brahman* capital punishment was awarded to him along with confiscation of his property. If such a man slew a man of equal rank other suitable punishments were meted out to him on the discretion of authorized representative of the king / judge (*Baudhayana* I, 10, 18 and 19).

Adultery was a criminal offence in ancient India. Punishment for this offence was also inflicted according to the caste of the offender. A man of first three castes who committed adultery with a *Sudra* woman was banished but a *Sudra* on committing adultery with a woman of first three castes suffered capital punishment (*Apastamba* II, 10, 27.)

Speaking evil of a virtuous person of first three castes by a *Sudra* resulted in cutting of his tongue. Speaking evil of an equal position holder within the three castes was liable to flogging (*Apsdtamba*, II, 10, 27).

A person of a lower caste in case of assaulting an upper class person lost the limb with which he has assaulted. If he has listened *Vedas* his ears should be stopped with molten led or tin and he recited the *Vedas* his tongue was cut if he remembered *Vedic* texts his body was split in two parts (Gautama, XII).

A *Kshatriya* on abusing a *Brahman* paid 100 *karashapanas.* Fine for *Kshatriya* on beating a *Brahman* was 200 *karashapanas*. A *Vaisya* abusing a *Brahman* would pay 150 *karashapanas* and perhaps 300 *karashapanas* for beating a *Brahman.* But a *Brahman* paid only 50 *karashapanas* for abusing a *Kshatriya*, 25 *karashapnas* for abusing a *Vaisya* and for abusing a *Sudra* nothing (Gautama, XII, 8-13). Theft would amount to death punishment and if pardoned by the king it would fall upon the king himself says Gautama (XII, 45).

Giving false evidence concerning small cattle a witness committed a sin of killing ten men. By false testimony concerning cows, horses, and men, he committed the sin of killing hundred, thousand and ten thousand men respectively. False evidence concerning land one committed a sin of killing the whole mankind: “Hell is the punishment for theft of land” (Gautama, XIII, 14-17).

2.1.8 Civil Laws

Civil law is more complicated than criminal law. It may be looked upon for convenience under five heads: Law of Agriculture, Law of Property, Usury Laws, Law of Inheritance and Law of Partition.

If a person who has taken a lease of a land does not exert himself and hence the land bears no crop he shall be if he be a rich made to pay the value of the crop that ought to have been grown. A servant who abandons his work shall be flogged. The same punishment is for a herdsman who leaves his work. If a herdsman has taken a flock under his care and loses them or allows them to perish he shall replace them to the owner (*Apastamba*, II, 11, 28). If damage is done by the cattle the responsibility falls on the owner. But if the cattle were attended by a herdsman it falls on the later. If damage is done in an unclosed field near the road the responsibility falls on the herdsman and owner of the field (*Gautama*, XII).

Vasistha notes three ways of proving the title of property: documents, witnesses and possession. The owner may recover property which formerly belonged to him by proving his title. Right of way from the fields is ascertained that a space sufficient for a cart and its turning must be spared. Three feet wide passage is necessary near buildings. In a dispute about a house or a field reliance must be placed on the deposition of neighbours. If the statements of neighbours disagree documents may be taken as proof. If conflicting documents are produced reliance must be placed on aged inhabitants of the village and those of guilds and corporations of artisans or traders (*Vasistha*, XVI).

Property is divided into eight classes namely: Property inherited from father, a thing bought, a pledge, property given to a wife after marriage by the family of a husband, a gift, property obtained for performing a sacrifice, property of reunited co-partners and wages. Whatever belongs to these eight kinds of property has been enjoyed for ten years continuously is lost to its owner. Property given up by its owner goes to the king. Animal, land, and females (salves) are not lost to owner by another's possession (*Gautama*, XII). Minor's property is vested

in the king until he comes of age and shall restore to him thereupon (*Vasistha*, XVII). Usury or legal interest for the money lent is at the rate of five mashas a month for twenty (*Karashpanas*). It is equivalent to 1.25 per cent per month 15 per cent per annum (*Hara Datta*).

According to *Gautama* when principal is doubled the interest ceases and when the object of pledged property is an object used by the creditor the money lent bears no interest at all (XII, 31 and 32). Other articles might be lent at a much higher percentage of interest when no security is given. Gold may be lent taking double of its value and grain on trebling its value. The interest on products like wool, produce of field and on the beasts of burden shall not increase more than five folds the value on repayment. *Gautama* binds heirs to pay debts of deceased. At this very point we are brought to most important law of inheritance.

To leave a male heir was considered a religious duty in ancient Hindus. In case of no legitimate son there were other kinds of sons recognized under the law for the purposes of inheritance. There are total twelve kinds of sons: Six of them are heirs and other six though not heirs may inherit if so permitted. (Dutt: 1992). Legal heirs are bound to pay off debts of the deceased according to their share in the property inherited. Legal heirs are: A legitimate son, a son begotten on the wife, an adopted son, a son made, a son born secretly and a son abandoned inherit the estate. Family members are: The son of an unmarried damsel, a son of a twice married woman, the son of a pregnant bride, the son of an appointed daughter and a son self given (*Gautama*, XXVIII).

According to *Vasistha* heirs are: Son begotten by a man on his legally married wife, a son begotten on a wife or widow duly authorized thereto on the failure of first kind (category) of sons, an appointed daughter, the son of an unmarried damsel and a male born secretly in a house. Family members are: A son received with a pregnant bride, an adopted son, the son bought, the son self given, the son cast of and a son of a woman of *Sudra* caste.

The law of partition of property among brother tells us that law of *primogeniture* was never recognized in ancient India. But so long joint family system remained in vogue: property of

a father was inherited by the eldest son, who supported the rest family as a father. It seems this joint family system was not in vogue throughout all India. The eldest son got an additional share--a twentieth part of the property along with some animals and a carriage. The middle most son was given some poor (weak) animal and the youngest took sheep, grain, utensils, a house, a cart, and some animals (*Gautama*, XXVIII, 5-17).

Vasistha allows the eldest son to take double share and a little of kind and some horses. The youngest son could get goats, sheep, and a house. Middle son had right in utensils and furniture etc. If a *Brahman* had sons by *Brahman*, *Kshatriya*, and *Vaisya* wives; the first got three shares, the second got two shares and the third got only one share (XVII, 42-50).

Baudhayana permits the male children to take equal shares, or the eldest can take one tenth in excess (II, 2, 3, 2-10). *Apastamba* protests and objects his predecessors on account of unequal division of property. He examines all the authorities regarding an excessive share and declares them over and above the rules. He says preference to the eldest son should be checked. However, he gives merit to personal piety while distribution of the estate.

2.1.9 Judicial System in Ancient India

Although minute details are noticed about the administration justice in above mentioned law books, they do not, however, present a clear picture of a working criminal court. There were some rules of business of the court i.e. procedures of law enforcement and recording of evidence in ancient India which are briefly discussed in these lines. There was a king's court which was highest court of appeal. Apart from the king's court there were several courts of subordinate jurisdiction. According to *Ram Raj* these *Sahbas* (assemblies) are divided into four kinds namely: temporary, permanent, confirmed and constitutional. The first deals with all assemblies occasionally convened for deciding cases referred to them, the second included all the established villages / town courts, the third constituted and convened by the chief judge and in the last the presence of the king in person made the court. In *Smriti Chandrika* fifteen kinds of *Sahbas* or assemblies or courts are given. They are: An assembly of foresters, guild of merchants, council of

soldiers, mediators chosen by the parties, an assembly composed of villagers, strangers and military men, a village court, a town or city court, and assembly composed of all the four classes indiscriminately, an assembly of working classes, council of learned persons in all the four strata, an assembly of irreligious men, meeting of same family members, meeting of relatives of plaintiff and defendant, a court held by deputy or chief judge with assessors and the king's court. The first three courts are called unsettled and last two are permanent. An appeal was filed from the lower to the superior courts.

2.1.9.1 Civil Procedures

Civil judicial proceedings were instituted by filling a plaint in a court of competent jurisdiction. According to the procedural provisions a plaint must be brief, unambiguous, free from confusion, without improper arguments and capable of meeting opposite arguments. Content of the plaint was to tell about place, situation, name of the filer, etc. A written statement was to be filed by the defendant in reply to the plaint. Reply must meet all the points of the plaint being elaborate and should not be self contradictory. Every plaint was decided based on the testimony. Witnesses could be summoned by the court of trial. According to *Arthasastra* "The parties shall themselves produce witnesses who are not far removed either by time or place. Witnesses who are far away or who are not stirring out shall be made to present by the order of the judge". Failure to file a reply within 45 days meant a loss of suit by the defendant. Decision of the plaint was made on available evidence: documents, witnesses and possession. In absence these human proofs divine proof i.e. oaths / ordeals supplied the deficiency. A decision was rendered after recording of evidence on the basis of certain recognized principles including logical inference, usage of the country, oaths and ordeals along with the edicts of the king. The successful was entitled to a document of success. After judgment there were several modes of execution including imprisonment, sale, fine, restitution and demand for additional security, etc. The doctrine of res *judicata* (already decided matter were not entertained by the courts anew) was well known and applied to the justice system of ancient India. (Bhatia: 1992).

2.1.9.2 Criminal Procedures

Adultery, abusive words, assault, theft and violence were criminal offences. There was a further classification according to gravity and nature of the crime. For example theft was of three kinds according to the value of thing stolen i.e. trifling, middling and grave. There was a classification of thieves as well: open or patent thieves and secret thieves. Open thieves were: traders who employed false weights and measures, person giving bribes, person who manufactured banned articles, quacks, etc. Concealed thieves were: who broke into the house with tools without being observed. These were again dived into nine categories. "King shall punish on suspicion" (*Apashmba* II, 5, 11, 2). Criminal court worked on presumption of innocence. Witnesses were evaluated according to the rules in vogue. Stages of trial were not very different from modern day trial. Forgery and perjury were dealt severely under the criminal laws. Punishments included reprimand, fine, imprisonment, torture, banishment and death. While award of punishment previous record of the offender was given importance. The time and place of the offence and knowledge of the offender were also fully taken into account. Law of compensation to victim or heirs was in practice. *Manu* says that if a limb is injured, a wound inflicted, or blood is spilt the offender would be made to pay to the sufferer the expenses of cure or the whole (including unusual expenses of treatment / cure) fine to the king. He adds that who damages property or goods of another, intentionally or unintentionally, shall give compensation to the owner. He shall also be liable to pay to the king an amount equivalent to the damage as fine.

2.1.9.3 Buddhist Era and the Concept of *Dhamma*

Bhandarkar compares *Asoka* with Alexandar, Caesar, and Napoleon. It seems an exaggeration at first when he places him at the head of world's reformers. He substantiates his stance that *Asoka* and *Buddhism* are synonyms. He ruled from 273 BC to 232 BC. He converted in ninth year of his reign. According to Dutt (1992) period between 320 BC and 500 AD is *Buddhist* Epoch. King Asoka was a devout *Buddhist*. He thought *Dhamma* (religion or law) a

panacea to all social ills. He is well known in history for his ideal brotherhood for all living beings. He maintained "there is no higher duty than welfare". Welfare to him was universal extended to to all living things of the whole world. Officers of his state would say according to Rock Edict IV "The king (Asoka) is unto us as even a father; he loves us as he even loves himself; we are to king as even his children". Bhandarkar places him above Emperor Akbar, Saint Constantine and next to *Buddha*. Buddhism actually flourished across India in his reign. His contribution to civilization is manifested in *Dhamma*. His visionary Rock Edicts are embodiments of law, religion and morality. *Dhamma* was his own creation being practical and moral. He wanted to transmute *Buddhism* from purely religious philosophy to a great social and intellectual force.

In fourteen Rock Edicts which are scattered throughout the *Gandhara* region he added seven Pillar Edicts in 27th year of his rule. Rock Edict II mentions certain measures for welfare of men and animals. It covers subjects of medical treatment, construction of roads, digging of wells, and plantation of trees along road-side and in the parks. Rock Edict IV deals with improvements in general condition of people and their moral advancement. It tells us that his age was a period of prosperity and righteousness. Rock Edict V is about spiritual and temporal needs of people. He had instructed his officers to cater for the needs of the laity. Relationship between king and subjects is regulated in Rock Edict VI. Tolerance and harmony among all sects is advocated in Rock Edict VII. As all religious movements control outer world via inner recesses of mind, morality is emphasized in Rock Edict XI. It emphasizes on respect for elders, charity, friendship, look after of slaves and servants. Principles for concord among sects are extolled and enumerated in Rock Edict XII. Secret of rule is compromised in Rock Edict XIII by declaring that king should rule with love, affection and care not with aggression and violence. To Asoka propagation of *Dhamma* and observance of its orders in true letter and spirit throughout the Empire was the cure to all social evils. He devised concept of *Dhamma* as a way of life based on harmonious blending of social ethics, moral virtues and civic responsibility.

Nath Puri says that Buddhist literature of first two centuries of Christian era presents valuable information relating to administration. Though there is no certain evidence of particular reference to *Koshanas* in these fragmentary writings. It is, however, inferred that state machinery of different parts had resemblance throughout the Empire. Whole country was divided into villages, towns and provinces for the purposes of administration and control. King was center of power. He was assisted by 102 officers in business of the Empire. Four of them were most important: commander in chief, prime minister, chief judge and high treasurer. We find a detailed account of administration of justice in various organs of the Empire. There were civil and criminal courts to decide matters falling in their ambit of working (Bhatia: 1992). Smaller law courts of village decided according to their jurisdiction. An appeal would lie in the court of the chief judge. King's court was apex court of appeal. Property of an issueless man went to the king. Security of debts and pledges were regulated in accordance with procedural laws. Sons were pledged by fathers under debt as security. Major crimes: adultery, theft, larceny, etc. were punished with capital sentence. An insane or mad man who committed above-mentioned crimes would be beaten only and set free. Many a time robbers' eyes were plucked. They were normally hanged. Prisons were places of physical torture. Apart from death penalty there were other punishments according to gravity of crime including cutting of hands and feet, flogging, tortures of various kinds, casting into bonds, threatening with sticks, beating with whips, hitting with weapons, etc. Criminals were rearrested on suspicions only. Punishments were strict and exemplary. It was believed that the harsher punishments necessarily helped raising the morale of the people. This is a brief glimpse of crimes and punishments in medieval India.

2.1.9.4 Customs and Legal Maxims

Max Muller observed that "As to the customs of the countries and villages, there can be no doubt that in many cases they were not only founded upon *Brahmanic* authority, but frequently decided against it. The *Brahmanic* law however, is obliged to recognize and allow these customs, with the general reservation that they must not be in open opposition to the law". Tamils and Telugus followed their own usages and customs. Marco Polo says of them "Man and

woman, they are all black and go naked, all save a fine cloth worn about the middle. They look no sin of flesh as a sin. They marry their cousin's germane, and a man takes wife of his brother after his brother's death; and all the people of India have this custom."

J. H. Nelson states some legal maxims with reference to Father Bouchet: Few of them are discussed here. First is about inheritance, when there are several children the males alone inherit and girls have no claim to inheritance. It is most unjust but "nation had agreed to it" according to Bouchet. Father provides for girls and gives them in marriage in good families, so it is not unjust according to Hindu point of view. Seventh maxim in Bouchet is that father is obliged to pay all the debts which his children had contracted. Reverse of it is also true according to the maxim i.e. children are also liable to pay all debts of their father. These maxims are based on customs and have authority of law. Courts equally recognized, justified and decided cases in the light of these maxims. These are followed by the court in the course of administration of justice. There are other laws particular to the caste system of India. Justice was administered by the head of the village regarding crimes and civil suits by recording causes of action arising in territorial limits of his jurisdiction with the help of three or four experienced villagers (origin of cultural *punchayat* system). Party dissatisfied with the decision might file an appeal to the Chief Judge of a group of villages. He would hear the appeal in the presence of three assessors. Form judgment of the Chief Judge an appeal would lie to "the immediate officers of the king" whose verdict was final.

2.1.9.5 Trials by Ordeal

During trials of criminal cases contradictory evidence created difficulties in ascertaining the truth. In such a case divine justice was resorted a s a last option. This sort of provenance of innocence or guilt was in vogue in all ancient nations of the world. Trial by ordeal is still prevalent in nations where enlightenment could not get hold yet. In past, nearly all over the world, monks held the offices to administer the course of the trials by ordeal. In ancient India this practice was found comparatively to greater extent having various modes. Editor of Calcutta Review (1848) mentions two instances in the year 1783 at Benares. Warren Hasting received a paper for 'Asiatic Researchers' describing nine sorts of these trials by Ali Ibrahim Khan, then

Chief Magistrate of Benares. It stated that different modes of the trials were: trial by balance, by hot iron, by water, by poison, by *kosha* (a kind of water in which an idol has been washed), by rice, by taking ring / piece of gold out of boiling *ghi* (oil), by fire and images of *Dharma* etc. The trial by ordeal was optional with either party even when there were other ways of establishing the truth and deciding the issue. There was no concept of appeal to it at all. The ordeal by fire, poison, water and balance were never used when there was no prosecutor except the king (Calcutta Review, 1848).

In ordeal by balance, the accused was weighed with a substance then he called gods "If I am innocent rise me up," who may make him lighter than the substance to prove his acquittal. Then a leaf containing names of gods was tied round his neck. A slow music was played during the conduct of the proposed ordeal. Sacred fire was burnt and smoke rose toward the sky. In the presence of judge everybody sang "O *Dharma*". This process was never more than half a minute. If at the end of the prescribed time accused was found lighter than the substance his innocence could not be questioned. If he was equal or heavier than the substance then the guilt was proved.

In ordeal by hot iron nine circles were drawn on the ground. First circle was of *Agni* in which accused was made to stand. His palms were covered with seven leaves and seven blades of grass. The *Paribak* stood near the fire and made ball of iron hot and red. He made it cool in a basin of water. This process was performed twice and on third time the hot ball was placed on the hand of accused by the *Paribak* while reciting a *Mantra* to *Agni*, "If accused were innocent let him free". Accused also praised *Agni* and walked on next seven circles holding the red hot ball in his hand and dropped it on the ninth. His palms were then examined for burns (burning injuries), if found burnt; he was guilty and vice versa. If the ball was dropped before the ninth circle the trial started anew.

A person accused of a crime was tried in calm water of a lake or a river without fish or reptiles. Flowers were offered to *Varuna* the god of water. A man holding a staff of a certain height in his hand stood in the water up to the middle of his body. The accused was made to descend lower and touched the knees of the man. Two arrows were then discharged in succession

by a person on land amid the shouts of spectators. As soon as the third shaft was hurled through the air, a reputed runner for fastness followed it as accused dived into the waves. If accused rose before the shaft was brought back, he was considered guilty.

A *Brahman* was never tried by poison. It was the least frequently used ordeal. Accused addressed to the poison and prayed his innocence. Poison was mixed in *ghi* thirty times heavier than the poison. It was swallowed; five hundred clapping of hand of a stander by were counted. If no change in health, appearance or bad occurrence during this time was observed, he was discharged of guilt as innocent and a fine was levied to the adversary party.

Image of the wrathful god was worshiped and washed in a basin. The accused was made to drink it thrice facing the sun. If within next fifteen days no evil came to him, he was acquitted being innocent.

In case of theft a certain weight of white rice was soaked in water then exposed to direct sun rays for a whole day. Blamed person made to munch (eat) a mouthful of it. If his jaws showed any sign of pain or his body showed weakness or his spit was mixed with blood when he spat on *pipul* leaf, he was considered to be guilty.

A cup, sixteen fingers in length and four fingers in width, made of gold, silver, copper or clay was filled with *ghi* and placed over a strong fire. On boiling temperature a ring or a piece of gold was thrown into it. The accused then prayed to *ghi,* "If I am guilty not fail to burn me". If his fingers trembled while taking the ring out or there was a slightest mark of scald (injury or blister) oh his fingers, his guilt was proved.

In ordeal by fire accused was to walk barefooted through a trench filled with burning wood. If he escaped unburned, he was pronounced guiltless.

2.1.10 Concluding the Overview

Ahmad (1992) writes that Hindu's administration entailed the basic units of their polity i.e. village. There were officers of the king to run business of the village. Villages were grouped

into larger administrative units like districts. Districts were combined under divisions and divisions made provinces. This was hierarchy following from the king in the capital having last unit at base, a village. The king was the chief of judiciary. He was entrusted to assign as many judges to run the business of his courts as were needed. The king was divine ruler according (*Manu* Ch. 4 pp, 1-13). The king used to take 5 percent of all debt suits admitted by the defendant and 10 percent non-admitted and proved claims (*Manu* Ch. 8 p, 139). Before start of proceedings the king was to warn the parties regarding seriousness of the false evidence and its implications along with punishment to be borne by the offenders in future ages. The legislation was sacred duty of the king. People looked towards the king for welfare and security of life, property and honour. They were thankful to him for maintaining law and order and for an efficient state administration.

Going through the annals of history we see that the legislation has democratic roots in the form of *sabhas* and *Samitis* long before the *Magna Carta*. Dr Buddha Parkash opines the most civilized part since the *Achaemenian* Empire was its Indian part (Gandhara region) ; the organization introduced in the 7th satrapy of the Empire became the prototype of the regime according to Parkash. He is of opinion that simnilarities between Achaememian administration and *Kautiliyan* polity are self evident. Taxila as a centre of education attracted scholars from Greece and all over the world. Student came to Taxila to complete their education in three Vedas on the one hand and in the 18 *sippas* or crafts on the other. Taxila thus offered highest education in humanities, science, arts and crafts. It has special schools of law, medicine and military science.

Ancient India was equally modern according to the requirements of the hour during medieval period of human history. *Brahmanic* precedence and hereditary castes could hold only in later times perhaps to achieve political motives. It is fact that rule of law was never practiced in true spirit all over the world and Ancient India was no exception. A marvelous system of peaceful co- existence introduced by *Asoka* was of universal appeal. Differentiation between civil and criminal laws and courts thereof nearly corresponds to modern day judicial system. Though

working of the law was crude in form, it catered for the needs of the time. In short despite human idiosyncrasies, caprices and whims along with political contaminations Ancient India was under Vedic light and was not lawless at all.

Ahmad's (Ibid) comparison between Hindu and Muslim systems is pertinent to be placed side by side to know how gradual and smooth switch over from Hindu system of administration to Muslim justice system could have been made possible. He draws on number of similarities between the two systems. Both of the systems were founded on divine guidance that is books revealed, as believed by their follower's, or inspired by the Supreme Being. Hindus think *Vedas* as divine source of enlightenment. Similarly, Muslims adhere to Qur'an as word of God providing guidance in every sphere of individual as well as collective life. Laws given in *Vedas* are found in commentaries like *Manu, yajanvalka, Bhirahaspati* and *Narada*, etc. The well-known commentaries on rules of conduct found in Qur'an or in six books of tradition of Prophet (Peace be upon him) namely *Sahih Bukhari, Sahi Muslim, Jamia Tirmizi, Sunan Nisai, Sunan Abu-Daud, Sunan Ibn-e-Maja*. In both of the systems the ruler (king in Hindu system and caliph in Muslim system) is responsible to decide cases after trial in his court. As ultimate duty to maintain and provide justice in both of the systems is vested in the ruler, he is to appoint judges from men of erudition and good character. Judge made law had no significance in both of the systems as against British system. Despite scattered references in Muslim system for up keep of some of the records there was no material evidence and no regular system of recording of proceedings of the courts in both the systems as is prevalent in modern justice systems of the world. Based on these conspicuous similarities Ahmad (1992) is of the view that it might be the reason of unnoticed replacement of Hindu judicial system by administration of justice system by Muslim gradually, through Sultanate periods towards Mughal Empire. People of India in all areas to which Muslims rules was extended did not see any substantial change in the new system as they were used to a system of similar nature from the times immemorial.

2.2 Administration of Justice under the Sultans (1206 AD- 1526 AD)

It is oft repeated and accepted view that the British brought development in state structure of India. Institutional development took place during the British management. They consolidated laws and legal system to exercise full and viable control over the Subcontinent. Ahmad (1992) presents an argument in favour of Muslim rule ant its good administration of justice. To investigate factual situation he observes that every student of law and history is curious to know that how so exalted system of administration of justice in medieval India under Muslim rulers was established and implemented. Next to it the British rule uses same structure and framework to raise their judicial system.

Muslims occupied Indian areas as early as 712 CE but they left the system of the government as it was. They didn't fiddle with structure of administration in first place. Muslim institutions of state apparatus sought their way into the corridors of power and governance with *Aibek* (1206). Before him Islamic system of government had not any foot hold in India in proper form. He laid foundation of Muslim administration system. This is the point of time in history of India when it was acquainted with Muslim Law and judicial setup and its permanent institutions, writes Ross in Ahmed (Ibid). Most of the Muslim rulers were named as Sultans. They built their administrative structure on the model of caliphs of Abbasid dynasty in Baghdad. Foundation of legal system for Muslims was raised on "*usul-ul usul*" means Qur'an and Sunnah. At times consensus of opinion was followed but the "law" was not altered at all. Judges used their discretion but sparingly. Case laws or precedents were not bindings on other judges. As there was no importance of the cause of the laws or judge made law one find scattered references to judicial system and laws throughout 1200 A.D. to 1857A.D. A scholar of history does not find any reference to administration of courts and legal machinery in even Oxford history of India, other historical references and modern books. Sarkar (1935) suggests "main defect" of Mughal Emperors that there was no hierarchy of courts that is from the highest to the lowest. Also there was no proper distribution of courts and demarcation of proportionate area of jurisdiction for different courts to work in. On the on the hand Baili (1850) states that East India Company's

judicial system had borrowed a lot from Muslim Laws. To him administration is owed to Muslims officers and pleaders who were adept in Muslim system of adjudication. In this way an unseen but powerful influence of Islamic law and Muslim justice system exists on English administration of justice.

Justice and its administration was a duty for Muslim rulers and commanders of army. Muslim armies accompanied renowned jurists with them to newly conquered areas. They stayed in the new Muslim cities known as camp cities notes Macdonald in Ahmad (Ibid). Hamilton (1870) writes that hundreds of years ago Muslim conquerors established foothold of religion, foundation of Muslims government and "practice of their courts of justice". Since then Muslim Code has been the standard of judicial administration within the areas occupied by Muslim armies. He further negates the prejudiced view of European writers' generalization about administration as "invariable principle" of rigidity having strict adherence to own law. He also removes blotch of coercion on the part of the Muslims towards local subjects. Dow (1772) in Ahmad (1992) writes in his reports submitted to Hasting "the courts of justice run through the same gradations which the general reason of mankind seems to have established in all countries subject to regular governments". Civil and criminal matters were disposed of by judges. There was a Supreme Court to hear appeals headed by the viceroy (representative of the king) in person. There were hearings of appeals from the lowest courts to the highest one. He mentions French travellers who maintained that rulers of Asia had made marvelous written contribution on law and administration justice in form of *Fiqah-e-Feroz Shahi*, *Kitabul-ul-Ikhtiar*, *Shara-e-Viqayeh* and *Fatawa-e-Alamgiri;* some to mention among others. It was Aurangzeb (1658) who ordered preservation of judicial decisions and made possible their circulation for *Qazis.* Appeals used to be preferred to higher courts even before Aurangzeb's time. But it is difficult to say that record of the cases and appeal was maintained in the manner as is saved in British India. However, it is noted that by Ahmed (1992) in an order by Aurangzeb's court in *Dewan's* office in *Nizam's* government instructing a file to be kept in the office safely (p,34).

2.2.1 Muslim Administration of Justice under Mughals (1526 AD- 1857 AD)

The ruler in Islam is not the master of the subjects but he holds to office in trust for Allah Almighty. Abu-Yousuf (pp, 3-5) writes that the sovereignty is the right of Allah. Kennedy as mentioned in Ahmed (1992) quotes Akbar's (1556) advice, to one of his advisors on law, "The decree is God's decree and of Him alone is sovereignty". Aurangzeb (1658) wrote to Shah Jahan (1627) in his refusal to give possession of crown jewels to him that he (Aurangzeb) was holding them as trust being God's chosen caretaker and custodian. Trustee of God's money allows his people as beneficiaries to get benefit from God's property. Sher Shah (1540) considered the administration of justice as the most excellent and exalted of the rituals. After ascending to throne Shah Jahan (1627) regarded reason of mainstay of his government. It was maintenance of justice. To Jahangir (1605) administration of justice in public was most sacred duty. All kings, as they thought, were chosen representative, as they thought, of God. They thought them answerable to the omnipresent origin of the power i.e Allah. Aurangzeb (1658) once reprimanded Khan-e-Jahan (one of his famous lieutenants) on account of forgetting his responsibility to Allah Almighty while reviewing an order made by him.

The Muslim king held many offices viz legislator, administrator, dispenser of justice, responsible for rule of law, etc. Famous examples are: Prophet (peace be upon him) and rightly guided Caliphs (Allah be pleased with them). They used to hear cases themselves. Rulers were not above the law. Caliphs submitted to decisions and decrees passed against them (Fitzgerald pp, 11, 32) in Ahmed (Ibid). It is the equality before the law according to Shariah which did not recognize any immunity to the state officers from the rigours of the law. Ali (P, 279) in Ahmad (Ibid) observes Umar (Allah be pleased with him) did not allow any privileges to the state officers on accountability before law. In medieval India sultans and kings followed this precedence. In Islamic Criminal Law there is no difference between a subject and a ruler. Crown and the subject could be sued in the same court but Elliston (1857:420) observes otherwise that the courts where state was defendant or plaintiff were separate from ordinary courts. Ahmed holds it without

evidence. He notes with reference to Khafi Khan (II, 728) the trials of the political cases of grave nature in ordinary courts and there was no special court or tribunal to try cases of even treason. Akbar (1556) encouraged his subjects to bring complaints against public servants through various proclamations says Dow (III p, xxv). Aurangzeb (1658) once reprimanded one of his *Qazis* and also dismissed him on account of partial decision on one occasion (Dow , III pp, 334-35). Son in law of (Ahmed Shah) the king of Gujarat committed a murder. *Qazi* of the trial court passed order for *Qisas* but the king revised the verdict and enhanced the sentence to capital punishment i.e death penalty (Mirat, I p,49) in Ahmed (1992).

2.2.2 Sultans and Judicial System (1206-1526)

Sultans of Delhi controlled main parts of India and made Delhi as their headquarters. Although they ascended to throne, in many cases, through military precedence but they tried to observe tenets of Islam in their private as well as in public life. Perhaps it was done under public pressure; demand of the subjects or due to their own free will. Their public support came out of their redressing the wrongs and compensating the wronged. Aibek (1206) got a fame that his dominion was governed under the best laws says Ibn-e-Batuta (p, 112). His successor Altutmish (1211) introduced a new way of his concern in administration of justice; he had a chain of justice in front of his palace. He went through the streets of Delhi to know the true state of affairs with reference to maintenance of justice. His famous order for wearing coloured dress for people wronged by others was an iconic development says Eliphston (1905:368). All sultans from Mehmood (1246) to Sikandar (1489) maintained high level of law and order in their reign throughout the areas of jurisdiction. They thought this office as a supreme form of worship of God, “no amount of worship can equal act of justice” (*Tarekh-e-Sher Shahi*). In the matter of codification of the laws first attempts, as mentioned in Ahmad (1992), were introduced with Feroz Taghluq (1351-1358) to make his subjects aware with correct laws and to demand strict adherence to laws with no violation.

A governor “*Faujdar*” was responsible for maintenance of favourable situation of law and order in the Sultanate. "*Faujdar*" was assisted by the district commanding officer- in charge

of the troops. In a "*Subah"* under the commanding officers were "*kotwals*". In cities and in villages were *Shiqadars*. Governor looked after the department of justice "*Mahakam-e-Qaza*". Tthere were Chief *Qazis* in all provinces. Responsibility of dispensation of justice was given to the *Qazis* in all towns and all cities writes Ali (p, 422) in Ahmed (Ibid). There was a ministry of ecclesiastical (religious affairs) to assist the Sultans in the matters of religion and administration of justice. *Sardar-e-Jahan* was the chief of the department of this ministry. He used to act as Chief Justice in absence of the Sultan (Badaoni) in Ahmad (1992). Sultan presided over the Criminal Appellate Court (*Mazalim*) and court of appeals in civil cases i.e. (*Risalat*). There were as many Qazis as the Sultan was pleased to appoint in each *Subah* according to the populace. They were selected from educated people in law and divinity writes Eliphston (1857:421) in Ahmad (Ibid). There was two-fold court system i.e. central courts and provincial courts. Central courts were:

S.No	Name of Court	Matters Discussed	Presided by
1	Diwan-e-Mazalim (Court of criminal appeals)	The highest court for criminal appeal.	Sardar-e-Jahan
2	Diwan-e-Risalat (Court of Civil appeal)	The highest court for civil appeals	Sardar-e-Jahan
3	King's Court	Cases of all kind	Sultan
4	Court of Chief Justice	Cases of all kind	Qazi-ul-qaza
5	Sardar-e-Jahan's Court	Ecclesiastical cases	Sardar-e-Jahan

Another court in the name of *Dewan-e-Siyasat* was temporarily instituted by Muhammad Tughlaq in1345 C.E. He used to sanction criminal prosecution and presided over the court

himself. It was remained in operation for seven hours. Court 1 and 2 were, normally, presided over by the Sultan. He used to hear cases in the king's court as trial court and as an appellate court simultaneously. Actually this was the highest court in the realm of the Sultan. A *mufti* was present in the king's court to assist him though the Sultan signed the order himself. Next to king was *Sardar-e-Jahan* or *Sardar-e-Kul*. He was superior to *Qazi-ul-Qaza*. The position was first held by *Minhaj Siraj*, the chief justice of Naseer-ud-Deen in 1248. He was also appointed as the president of the court of criminal appeals. Duties of the *Sardar-e-Jahan* are enumerated in Ahmed (Ibid) with reference to the *tabqat-e- Nasiri*:

(i) Decision of cases as court of appeal

(ii) Grant of exalted titles to distinguished people (*khitabat*).

(iii) Leading of congregational prayers in the central mosque (*imamat*).

(iv) Responsible for accountability (ihtisab-intesab-e-kulli fil amur-e shahi).

(v) Supervision of the religious matters and censorship of immorality.

Chief Justice (*Qazi-ul-Qaza*) used to dispose of most of the cases as the head of the judiciary. He was assisted by one or two *qazis* selected from the judiciary to deal with all appeals filed for hearing of *Sardar-e-Jahan*. *Qazi-ul-Qaza*, a person of erudition in law and also in various related matters, could possess the office till pleasure of the Sultan. He admitted an oath of being faithful to the Sultan. He had powers to hear all appeals from the court of a *Subah*. The Chief Justice was paid next to the Sultan and *Sardar-e-Jahan*. His staff consisted of a *mufti* (lawyer) responsible to expound law on the issues presented in the court of Chief Justice. *Mufti* was selected by the Chief Justice and he was appointed by the Sultan. His view on the point of law was binding on the Chief Justice. In case of difference of opinion or dissent by the Chief Justice the same was referred to the court of the King or the Sultan. Cases falling under Hindu Personal Law required Brahman lawyer in the court. A *pundit* was also appointed as *mufti* with equal status. *Iltutmish* (1211) appointed *pundits* for trial of personal matters of Hindus. Another assistant of the Chief Justice was *mohtasib* (ombudsman). He was in charge of the social and

moral affairs. This development was also sanctioned by *Iltutmish* (1211). Ombudsman was a watchman on moral conduct of the masses.

2.2.3 Provincial Courts

The chief of *Qaza* was *Qazi-e-Subah*. This office was like modern Chief Justice of High Courts in units of a federation i.e. provinces in the Sultanate. He had powers to hear all cases and appeals from districts. There was a chief officer of the ecclesiastical matters (*Sardar-e-Subah*). He was not a judicial officer like the *Sardar-e-Jahan* in strict sense but he was entrusted with office of *Qaza* in settlements and disposal of criminal and civil appeals filed by the *Qazis* of the *Subahs*. He only represented *Sardar-e-Jahan* in the *Subah*. Matters of grant of stipends and lands were in his jurisdiction. Educational matters and religious matters were excluded from jurisdiction of *Qazis*. These were also looked after by *Sardar-e-Subah*. *Subah* was comprised of many districts. In each district there was following courts:

(i) *Qazi* courts used to try all civil and criminal cases. These courts were courts of appeals from *parganah qazis*, *kotwals* and village courts i.e. *punchayats*.

(ii) *Dadbaks* courts or *Mir Adl* courts dealt with the civil appellate cases. Appeals against decisions of *Mir Adl* courts were preferred before *Qazi-e-Subah.*

(iii) *Faujdars* used to deal with small criminal cases. Appeals against their decisions were filed to the government and the *Nizam-e-Subah.*

(iv) *Sadr* used to grant registration of property certificates and matters of grants of land were also in *sadr's* ambit of working.

(v) *Amils* disposed of revenue cases; especially land revenue was collected by them. Appeals against decisions of the *Amils* were filed with *Dewan-e-Subah*.

(vi) The lowest rank in the courts was of *kotwal* courts. It is a police establishment and office. It did not try cases in real sense. However it disposed of petty crimes.

Qazi-e-Parganah had power similar to the *Qazi-e-Zila or Qazi-e- Sarkar* but to a limited level. *Parganah* headquarters had courts:

(i) *Qazi-e-parganah* tried all civil and criminal cases in his area of jurisdiction.

(ii) Kotwal dealt with the petty criminal cases

Apart from these denominations there were village *punchayats* as a *parganh* had many village groups. A *panchayat,* a body of five men who led their group in political and civil matters, was a local court. This had a chairman titled *sarpanch*. He was appointed by the *Faujdar* or *Nizam*. Jurisdiction of a punchayat was restricted to civil and criminal matters of local character (misdemeanor or less serious wrongs or crimes). Military coups were matter of routine in Medieval India. Many of the Sultans claimed throne owing to their military success. Matters of army were regulated in courts named as *Qazi-e-Askar or Qazi-e-Urdu*. Every army settlement near civil towns had its own *Qazi*. Boundaries of his jurisdiction were limited to the station of army personnel.

There were judicial posts of *Qazi-e-Zila*. He used to hear all cases. He had a seal. He was assisted by a *mufti*. He could pass death sentence. His seal was sufficient proof of genuineness. He registered marriages, looked after trusts, tried the cases of minors, lunatics and missing persons. In addition to a *mufti*, a *pundit*, a *Mohtasib*, and a *dadbak* were to assist him. Staff of the District Court was:

(i) *Faqih* i.e. writer of *fatwas*

(ii) *Nazir* i.e. an in charge of court management

(iii) Clerks

(iv) *Muhafiz* (guards)

(v) A news writer was also attached to the District Court

A distinguished feature of the sultanate courts was that a party could file its case either with *Qazi-e-parganah, sarkar, subah*, governor (Nizam), Chief Justice or even with the Sultan. In first place the courts practiced original and appellate jurisdiction. Powers of *qazis* were limited according to the prescribed limit of financial matters or nature of criminal cases. Institutions of sultanate period were in close resemblance with Abbasside caliphate writes Ahmad (1992) and

village *punchayat* of locals kept working in the same manner. *Feroz Tughlaq* (1351) introduced his code of law with modifications on the model of Abbasside's. Removal of judges on misconduct was introduced by Feroz Tughlaq.

2.3 Administration of Justice under Mughals (1526 AD- 1857 AD)

Mughal reign started in India in 1526 A.D. with Baber after death of last Lodi Sultan Ibrahim (1517-1526). Akbar (1526) issued a proclamation to reduce the power of *Sadr*. He placed control of judiciary under *Qazi-ul-Qaza* but *Sadr* had the some powers like endorsement on the appointments of *Qazi-e-Subah, Qazi-e-Sarkar, monhasibs,* prayer leader (*imams*) and care takers of trusts. *Ihtisab* department was under the *Sadr*. *Wazir-e-Mutlaq or Dastur-e-Mutlaq* was a new post under Mughal administration. This post was similar to the Prime Minister of modern state administration with no judicial powers. He was only executive head under the Emperor. Judicial matters were under control of Chief Justice. In provinces Governor or *Subedar* represented the emperor. Next to Governor was *Qazi-e-Subah* i.e. Chief Justice of a province. There was also a chief revenue officer known titied as *Diwan*. He was entrusted with the responsibilities to supervise district *Sadur* and ombudsmen i.e *Mohtasibs*. In every district there was a *Qazi* who was responsible of administration of justice in the district. Faujdar maintained law and order in the territorial division of the *Subah*. Under a district the subordinate unit was *parganah*. A Qazi was in charge of the judicial matters in *parganah*. *Shiqahdar* or *Faujdar* maintained law and order in the *parganah*. *Kotwal* looked after the matters of law and order in absence of the *Faujdar* during non-availability of any *Shiqahdar*. *Panchayat* was assigned the task of administration of justice at subordinate level. President of the assembly of five was known as *choudhary* or *moqadam* (headman). He was responsible for law and order at village level.

The King was the fountain of justice. He used to try criminal and civil cases originally and also heard appeals. He was president of the bench of the *chief justice* and his *Qazis*. Staff of the king's court consisted of: *mufti*, *darogah*, *mir-e-adl* and *mohtasib*. After the king the responsibility of maintenance of justice was of *Qazi-ul-Qaza* (Chief Justice). He administered the oath of accession to throne by the king and delivered a sermon "*khutba*" to the congregants before

juma prayer in the central mosque to validate the accession. Shaikh-ul-Islam was title for the Chief Justice. The Chief Justice was appointed by the King. He had powers to try all disputes and to hear appeals from provincial courts. *Qazi-e-Delhi* would be appointed by the king in the capital of the Empire and he enjoyed equal status of other provincial *Qazis.* Similar post in the *subah* was of *Qazi-e-Subah*. He was the highest court in the *subah* with original (original) jurisdiction in criminal and civil matters. *Qazi-e-subah* administered oath of governor's office. In district *Qazi* was chief judicial officer. He worked under *Qazi-e-Subah* unlike under sultanate period where the court was under *Sadr-e-Subah*.

The *Qazi* was in charge of the criminal and civil justice system in the district. He disposed of appeals from the lower courts. He also looked after *Bait-ul-mal* and distribution of clothing amongst the poor in his district of appointment. Treasurer was also under his control. He distributed the subsistance allowance among the poor after recommendation from *Sadr*. *Mughals* invested the *Qazi* with more powers and responsibilities. *Qazi* of the districts courts ordered enquires to know the veracity of the cases under trial. They used to visit jails within their jurisdiction. *Qazi* was empowered to change the sentence of prisoners. Release of the prisoner on bail was a matter of routine. The same is still in vogue. Aurangzeb (1658) gave additional staff to *Qazis* to collect *zakat* and *jizyah*. Management of the Mosque System was also under *Qazi*. Friday prayer and *Eid* prayers were led by the *Qazis* in central mosque of the district towns. *Qazis* used to solemnize marriages. Office of the Justice of Peace does the same in Europe which might have been borrowed from Muslim practice in India under Mughal rule says Fryer in Ahmad (1992). *Qazi* was an epitome of moral code of Islam. They were in service to humanity. Seal of Aurangzeb for appointment of *Qazis* bore instructions with regard to honesty, impartiality and dedication. They were instructed not to accept presents from the people of the area of their jurisdiction. They were also ordered not to attend parties and dinners from anyone. The famous principle of Islam *"al faqro fakhri"* "poverty is my glory" was slogan of the *Qazis* in the Mughal Empire. *Shariatpanah* was the title of *Qazi-e- zila*. He was the seniour most lieutenant of the king in the district. Official staff of the *Qazi* courts in the district consisted of: A *peshkar* (modern day reader of a court in Pakistan) or *sarishtadar* was an assistant to *Qazi*. There was a writer of the

court known as *katib*. This duty is being performed by reader of the court nowadays. Deposition reader was a person who read the settlement of the witness/es for *Qazi*. He was a person other than the writer of the statements. Name of the reader of the witness was *sahib-ul-majlis* (Baili, 776). A commissioner in the cases was *ameen* according to Hidaya (p, 336). Cleanliness and upkeep of the building of the court was duty of *nazir*. He was in charge of sweepers i.e. *khakrob*, attendants and peons etc. *Daftri* (clerk) managed stationary and books and got them bounded. *Ardlies* (orderlies) were four or five in number in every court who assisted its officer during the routine job. *Mir dhasis* were in addition to the (orderlies) *ardlies* as process servers. Court collected bonds from witnesses and parties or criminals to ensure their attendance on the hearings of the cases. *Machalka navis* maitained records of these bonds in respect of the cases in the court in a chronological order. Ahmad(1992) after enumerating ministerial staff of the *Qazi* court remarks that most of the staff was borrowed by the British Justice system from the Mughal courts specially: reader, *katib, nazir*, orderlies and commissioner i.e. *sahb-ul-majlis*.

2.3.1 Court Structure of the Mughal Empire

Court structure during Mughal reign was different in early and later period of their reign. Ahmed divides courts structure into two periods: Court order from 1526 A.D. to 1750 A.D. and court structure from 1751 A.D. to 1857 A.D. In first category five types of courts operated in the Mughal Empire. Details are as under:

(i) *Panchayat* court operated in villages (*dehat*). Its presiding officer was village headman (*choudhry*) of the village. It decided petty criminal issues normally to which appeals did not lie. Appeal if any would be preferred to the district *Qazi*.

(ii) *Parganah ki adalatein* or Town courts were empowered to hear criminal and civil cases as their original jurisdiction. The cases on family matters and settlement of lands were in jurisdiction of of *adalat-e-parganah*. It was presided over by *Qazi-e-parganah*. In the town there were police stations having limited judicial powers. *Kotwali* was led by the *Kotwal-e-Parganah*. He dealt with nuisance cases which might cause disruption in normal course of law and order

situation in the area. *Kachehri of Qanungoe* dealt with revenue matters. It was presided by the *Ameen*. Appeals against criminal courts' decisions were filed to district *Qazi*. Appeals against *kotwali* decision were presented to *amalguzar* and appeals against *Qamungoe's* decisions were heard by *Qazi-e-Subah*.

(iii) *Sarkar ki adaltein* or district courts: There were four kinds of courts in a district. The chief criminal and civil courts dealt with all sort of civil and criminal cases. They were presided over by by *Qazi-e-sarkar*. *Faujdari adalat* was presided over by a *Faujdar*. It tried criminal cases which affected collective life. The cases of similar nature in British India fell under Section 107,109 and 110 of CrPC 1908. Appeal would lead to the governor of the province. *Kotwal-e-shehr* led *kotwali* courts in the district. *Alamguzar kacheri* listened revenue cases and appeals against *kachehri* decisions from towns and *parganah*. Provincial *dewan* heard appelas against decision of *amalguzars*.

(iv) There were two courts in fourth categories i.e. Governor's Court and Governor's Bench or *Adalat-e-nazim-e- subah*. Both of them were presided over by the Governor himself. Governor's court tried originally where as in *nazim-e-subah* courts revisions and appeals were dealt with. In cases of appeals and revisions decided by The Governor's Bench appeals lay to the Emperor and against decisions by the Governor's Court appeals lay to the Chief Justice. At *subah* level there was Chief Revenue Court. It heard appeals from district *Amalguzar* and also tried cases as original jurisdiction. Appeal against decisions by Chief Revenue Court lay to imperial *Dewan*.

(v) The highest court was The Emperor's court. Emperor was head and president of this court. It dealt with cases of original jurisdiction as well as appeal cases from provinces. There was a supreme court in the name of *Diwan-e-Mazalim* under The Emperor. It listened appeals and revisions along with cases as original jurisdiction. In this court there was Chief Court Revenue which did work under

Qazi-ul-Qaza. In the same way a Chief Court Revenue did work at capital to decide appeals from provincial revenue courts.

Courts during reign of the later Mughals (1751-1857) were as under:

(i) District courts: Four grades of judicial officers ran the business of administration of justice in a district i.e. *Faujdar*, *Zimendar*, *Qazi* and *Kotwal*. This order was in criminal cases. In matters of civil litigation *Qazi*, *Zimendar* and Qanungo were responsible.

(ii) Provincial Headquarters courts: *Nazim-e-Subah* i.e. Governor managed and decided the cases on appeals from district courts, revision from districts and references from districts in the cases where *mufti* and *Qazi* differed. Also all murder cases were decided by the Governor. *Darogah-e-Adalat* and *Dewan* heard land suits and appeals relating to property. *Dewan* had powers to hear all matters pertaining to revenue. *Darogah-e-Adalat Alia* worked for and on behalf of *Dewan* and disposed of all revenue matters. Emperors found no case in the courts as enhanced powers of the Governor made them final authority at least practically if not *de jure*.

During the later period of Mughals common law courts tried only cases which did not involve capital sentence. All criminal cases other than involving death penalty were in their jurisdiction. *Faujdar* and *Zimendar* presided over the courts. They were given executive authority also in their area of jurisdiction. *Qazis* were trying murder crimes and civil cases. Their orders on criminal cases required Nizam's sanction for enforcement and execution. Police did not fiddle with murder cases. They sent all murder cases to *Qazis* directly. *Qazis* started hearing and trial of the cases without any reference by the subordinate courts.

At this point it is pertinent to state the summary of the procedures followed by the courts in criminal and civil matters. Ahmad (1992) with reference to *Fatwa-e-Alamgiri* writes that a plaitiff filed a case to claim his right. It was not necessary that plaintiff must present himself the case to the court. His representative was equally authorized to bring the suit before the court.

Court would examine the case for its maintainability on legal grounds. After preliminary examination the court would inform concerned parties i.e. plaintiff and defendants officially. Defending party was supposed to defend or deny the claim in the suit. On denial of the defendant court would frame issues and would ask plaintiff to present evidence. Plaintiff might demand "oath" or "*qasam*" by the defendant instead of presenting evidence. On refusal of *qasam* by the defendant the plaintiff could get a decree from the court in his favour. This was known as summary disposal of the case. If plaintiff produced the required evidence on the issue the defendant was asked for rebuttal of plaintiff's supporting evidence with counter evidence. New issues might be framed if court considered it necessary.

Court delivered its judgment after examination of whole evidence on record. No decision was passed in absence of the defendant without hearing him and taking his stance into account. Measures were taken to send a case to the judge in whose jurisdiction the defendant lived to get his views. After getting defendant's statement from the area judge the case was decided. On death of plaintiff the suit was discharged according to one of the decisions of Aurangzeb as reported by (Sarkar III p, 353) in Ahmad (1992).

In criminal cases simple course was followed in the courts. If the victim was unable to visit the court, the complaint might be presented through a representative. *Mohtasibs* or *Kotwals* were given prosecution powers. They had powers to decide as to whether the case should be tried directly or evidence against the accused should be presented by the complainant. At times *Mohtasib* called the accused directly on receipt of the complaint against him. Trial courts used to pronounce sentence in open court. In case of absentee accused the court could hear the witnesses but they were again called on arrest of the accused. In the absence of the complainant the accused was to be released in cases with no evidence except a complaint. All judgments were pronounced in the presence of parties or their counsels. Courts were capable of making extra-judiciall inquires directly or through an agent who was called *muzzaki*. Akbar (1526) used to instate such type of enquires. Aurangzeb (1638) postponed the trial of Moqarab Khan and showed resolve to make an enquiry personally. During his reign he was able to acquire / procure true evidence by mingling in

common people at night time. He was found of moving freely in common people. He fell in conversation with the people in the streets. That was why his subjects felt free while sharing with him. This familiar openness was his exclusive asset writes Dow (III p, 102) in Ahmad (1992).

In the presence of much details regarding administration of justice under Sultanate it seems an over generalized statement that "there is a little record of administration of justice" as Mehdi would remark (1994: 2). In Mughals rule (1526-1857) there were fully developed judicial system throughout the length and breadth of India with extensive machinery. Justice was disseminated by institutions some of which bore local names and composition. Local courts like *panchayats* were invested with powers to decide cases of minor crimes. Islamic law is not rigid. Being flexible and adaptable within the Shariah framework it had got universality. It absorbed working structures of local justice system which did not confront the basic structure of Shariah. Details in previous pages may pacify the charge of "nominally administrated" justice during the Mughal rule (Mehdi 1994: p, 3).

One may evaluate administration of justice in medieval India but not with spectacle of the 21st century. Limitations of the system in the Sultanate period and during Mughals were due different factors. Local and personal factors were dominating the decision regarding dispensation of justice. In autocracies and dictatorships everything goes off the scene with the ruler. Temporary nature of the efforts in maintenance of law and order created doubts in the minds of the modern readers / scholars. Ahmad rightly observes "machinery functioning in the reign of one monarch was not necessarily the same in the reign of others" (1992: p, 273). This is why modern scholars who evaluate the judicial system of medieval India with yardstick of modern day legal state apparatus do not find medieval India under uniform and smooth running legal management.

An unbiased critique on administration of justice throughout India in different phases of Muslim rule i.e. Sultanate period (1205-1526) and Mughal Empire (1526-1857), makes it evident that institutions of justice were established and maitained. They were working successfully. Though there were variations in the form and functions of judiciary in different phases but the rulers were mindful of dispensation of justice to subjects as an icon of their rule and also cause its

sustenance. To them dissemination of justice provided strength to their rule. This was why British rule adapted the existing institution and judicial machinery to run their government. They changed laws only as a strategy to get strong hold of their subjects in India. Islamic criminal laws remained in vogue for a long time and fulfilled the legal needs of the subjects.

2.4 Switching over to British System (1818 AD-1947 AD)

British established their foothold in India under guise of factory settlements. East India Company was set up according to order of 1600 by the King of the United Kingdom. Employees of the company were British people. They started their business in India with permission of the Emperor. At the time of establishment of East India Company India had a government and system of laws under the very laws the Emperor permitted British to establish and run their factories and industries in the country. As a rule British were subject to the laws of the new country of their settlement. At the same time they were subject to the laws of the United Kingdom being a citizen (Jain: 1982).

Principally when English went to new lands where there was no population prior to their step in they were to settle their matters and disputes according to the laws of their own country of origin i.e. English Law. They followed the proposition that wherever the English people go, they take with them the laws and sovereignty of their mother land. Other people who join them in that new land are to obey English Laws. This was a general principal of colonization says Jain (1982: p, 768). On the other hands settled lands which were occupied by British armies were run according to laws of victor. India was neither a new land nor an area occupied by the military coup. It comes under the third proposition of English Law that no British national could hold any foreign land or acquire it in his own right. Any area such acquired or occupied would be part of British area out of boundaries of United Kingdom would fall under the British sovereign. The King would exercise his sovereignty over annexed lands. In this way Indian Industrial Estate might fall under jurisdiction of English Law and Constitution.

In the later case according to the rule laws of the areas granted to the King were not abolished with the grant itself. Laws of the land remained in vogue until the King brought new laws in place of the local laws. Till the replacement of the laws through due process the British Nationals were subject to the law of land opines Jain (Ibid: p, 769). In the light of this principle British people came to India must have been under Indian Laws since their arrival throughout their stay in India. British people never objected sovereignty of the Emperor rather they applied for immunity from legal restrictions during the stay in India. But they got powers to govern their matters under their own laws and got exemption from Indian Law from the Emperor. This exemption was neither conferred subject to any international law in vogue in those days nor was it bestowed by the King of the United Kingdom. It was bestowed by the Emperor of India. This is how inhabitants of colony of *Surat* Factory managed its right of government on them under their own laws i.e. English Laws. In this document British people i.e. management of the factory was only conferred with the right of application of the British Laws to their own matters only. They were not authorized to apply those laws on local people of India. The plea taken for grant of exemption from local laws of India was that laws of India were ingrained in religious system so were not suitable for English subjects. English people were subjected to English law through orders of the King (Order of 1661, 1753, and 1774). Placement of Indian areas under British Laws was justified in Mayors of Liens vs. East India Company. On question of status Calcutta the Privy Council opined in a detailed statement that the Emperor was duly empowered to grant pardon to areas of British establishment of colonies and British industrial areas of India. These exemptions were sought by the British people in various phases. They were granted right to cordon of their living places and apply their laws to those colonies. In this way the East India Company got valid occupation of the lands. As the Company was subject to the English Kingdom in England it paid taxes to the British Government. It was also given official capacity under the British Government in some spheres and the Company was just like an officer working for the Government of the King. In this way the King of England exercised sovereignty in India for a long period. This is how direct orders from the King of England were justified for India. In order of 1753 it was said that the Mayor Courts of 1726 were not empowered to try any personal

matters of locals until it was brought to them with mutual consent of parties for decision of their case in the English courts. This order permitted Muslim and Hindu Personal Laws in presidencies i.e. Bombay, Calcutta and Madras. The King of England was empowered to issue direct orders and make laws for colonies without due course of law making through parliament. So he issued orders to promulgate the English Laws in Indian attached areas. Local government of the presidency towns i.e. Madras and Bombay was not empowered to legislate. Only the Legislative Council of Calcutta could make laws and the other two presidencies could put forward drafts of laws to the Governor General in Council. He was to forward report to the "Legislative Council for perusal of the drafts" so presented to him.

2.4.1 Law Commissions

Charter Act of 1833 was sanctioned by the King on 28 Aug, 1933. It was promulgated on 22 April, 1934. Lord Macaulay was appointed as law member of the British Government of India. According to this Act structure of government was changed to large extent. James Mill was entrusted to consolidate the code of laws for India after recommendations of Macaulay to rectify ambiguities and lacunas in the legal system and laws of India. To him there were many Indian laws, viz. Hindu Law, Muslim Law, *Parsi* Law and English Law, etc. creating administration problems. For example; a case was registered according to one law and was decided according to some other law as laws were overlapping. This type of overlapping was due to particular nature of the texture of the Indian society. Often a dispute which arose according to the English Law was decided according to the Hindu Law. Macaulay also referred to William Jones who was satisfied with interpretations given by the Hindu *Pundits*. Macaulay further referred to the Thomas Strange that erudition and honesty of the interpreters are not questionable and doubtful even then the belief and tenet they followed were to be consolidated and substantiated to rely on their opinion on the questions of the Law. He further criticized Hindu Law for its vagueness. He emphasized that it was high time to make the judges know according to which law they must decide the case in hand. Moreover, people must also know that they were subject to which law. It would help out the government which purported to serve public in this matter being modern in its disposition. He

also emphasized a political approach in this regard that Principles of the Law should be consolidated for all subjects of the Crown. This was the area in which such measures were possible leaving the other Personal Laws of the different peoples of India intact as they were earlier. The English judicial mind thought it necessary to run their government according to principles of justice, equity and good conscious.

To make a uniform system of adjudication and Police Chartered Act of 1833 provided for a Law Commission under Section 53. The Section reads that leaving aside the administration of local character the Departments of Police and judicial matters should be established in a way which would be suitable for every resident of British India; that keeping in view rights and sentiments of the peoples and their special ways of life. Such laws should be made which would apply to people of every stratum uniformly. Jane (1998) regarded this legal development with reference to Rankin (p, 906) as a food of life in the constitutional history of India i.e. "*aab-e-hayat*". The responsibility given to the First Law Commission was to codify and consolidate the Criminal Law for India. In persuasion to the entrusted task it presented draft of Indian Penal Code in 1837. This was an onerous altogether but the Commission could not deliver remarkably.

Under the Charter Act of 1853 a new Commission was instituted to give legal effects to the reports/draft presented by the First Law Commission. It was to work on hierarchy of Indian courts, procedures to be followed in the courts and other administrative issues in the structure of Indian adjudicator. The Second Law Commission was to present its report to the Government within three years. Head office of the Commission this time was in England as against in India in case of First Law Commission. The date of inception of the commission was 19 November, 1853.

It worked for three years and presented four reports. The Commission was given task to merge the Sadar courts, the Civil Courts, the Sadar-e-Nizamat Courts and the Supreme Court working in the Presidencies. In the first report the Commission forwarded its recommendations regarding consolidation of the courts. These recommendations required merger of all of the courts in Bengal. Moreover, the Commission made a plan for uniform Civil Procedures and Criminal Procedures separately. Matters of rules of business of the High Courts and matters of their

jurisdiction were also considered by the Commission. Furthermore, the Commission also suggested that the Bengal experiment might be applied to the other Presidencies in the fourth report. Keeping in view the recommendations of the Commission All India Legislative Council enacted the Civil Procedure Code 1859 and the Criminal Procedure code 1861 respectively. But the Commission did not recommend codification of the Islamic Law and the Hindu Law at all. It was done on two reasons first danger of *contra varies* among the followers and second English Legislature could not legislate for religious matters of Muslims and Hindus.

In 1858 East India Company was established and government of India went directly under the king of England. On 2nd December, 1861 the Third Law Commission was instituted to make the Civil Code for India. English Law was to be used for draft of Indian Civil Code according to the instructions of the Government to the Commission. Successfully working the third Commission prepared six drafts on various laws in nine years. Members of the Commission were making continuous complaints against slow performance of the Legislature on the drafts. Ultimately members of the Commission resigned in 1870. Unfavourable atmosphere of legislation was soon changed. British government of India took up the task on codification again. In 1882 the Forth Law Commission was made under instructions of Lord Salibury. The Commission was assigned the task of preparing drafts of laws on the leftover areas of civil affairs. Owing to the seriousness of the personal matters of subjects i.e. Muslims and Hindus especially, no substantial work could lead towards the required codification. It needed help and assistance of the local scholars adept in law and divinity. Albert, one of the members of the Fourth Commission, was of opinion that major legal issues were addressed by the Penal Code and the Criminal Procedures and Civil Procedures. Personal laws of Indians were to be left as it is for quite a sometime as the time was not suitable to invite criticism from all quarters of locals. Any change in the personal law of the people would have negative implications. In Indian Presidencies of British Government English Laws were in vogue which were alien to the locals. They required a change. Laws enforced in suburbs of the Presidencies were also not according to the local needs. Both of the laws were not suitable for Indian populace. For a long time Islamic Criminal Laws remained in vogue in Bengal and Madras says Jain (1980:969). Laws were equally

applicable to Hindus and Muslims he adds. This is the point which strengthens the thesis of changing of Muslim Laws with English Law in British India. He also criticizes Islamic Criminal Law as it was in its making phases ad was not able to meet the demands of a modern and progressive society. This practice of compulsory subjection of non-Muslim to Muslim Criminal Law in India was abolished in 1928. Efforts were also started to apply Hindu Criminal Law to Hindus and Muslim Criminal Law to Muslims. Composition of Indian Penal Code was aimed at to change old law in accordance with requirements of modern and progressive society and also incorporating the British ideology of justice in the existing laws of India. The First Law Commission eloquently opined in its report that any of the local criminal laws was useless to them. Muslim laws of India represented the personal matters engraved in religious ideology of Islam and these laws were promulgated by the victors. The same were against the local make-up of the society. In many areas which were under the administration of the East India Company the Hindus Criminal Laws were replaced by Muslim Criminal Laws long ago says Lord Auckland in one of his letters while presenting the draft of the Indian Penal Code to the Governor General. Amidst these claims the draft of Indian Penal Code was prepared by the First Law Commission in 1837and it kept moving from India to England and back time and again, was passed into the Law by Indian Legislative Council in 1860. It was promulgated on 01 January, 1862. This was duly vetted by Drink Wire Bethon and Sir Barns Peacock.

Most of the provisions in the Penal Code were from English Law. This legislation was based on English Law without technical discussion on local ideas and long discussions on the belief systems. The Code was simple, compact and concise and in understandable form writes Whitely Stocks in Jain (1980:974). A very sarcastic praise of the Code comes from Rankin in Jain (Ibid) that in this Code the complexities of English Common Law are so expunged that its merits take it away from all niceties of English Customary Law as well it is also taken away from the divergent opinions of Abu Hanifa and his disciples. Having all of these merits the Code had its origin and source in the English Law he adds. Sir Fitz James exalted the Code that through continues revisions the Code had been made so that it presents the soul of English Law in concise, compact and beautiful way. Though the English law was over rated it was full of

technicalities alien to the local legal system. It was full of ifs and buts nevertheless the vision presented in the Code was crux of English Common Law. It was a marvelous master piece of intellect of Macaulay with manifestation of extra ordinary intelligence of its promoter and originator. It was destined to be the model for even English Criminal Law in Englan, exclaimed sir Henryman in Jain (Ibid). After giving these remarks by the experts on law the patron scholar of the Code grades this legislation exclusive on account of being simple, in understandable language and describing all of the crimes briefly defined. Notwithstanding, the merit of Indian Penal Code originated from English Law could suddenly serve the purpose of locals. Does it not amount to the same critique that Islamic Laws were implemented by victors against will of aboriginals? It was the matter of facilitation for the government and a source of new issue for the subjects of India. Justifications for the drastic change in laws of India were on purpose to get strong control over the ruled.

Warren Hastings recommended appointments of *muftis* and *pundits* in the courts to assist British judges in matters of local customs and ways of life. The judges were unable to consult the religious books (original texts) of Muslims and Hindus. Laws of Hindus and Muslims were in two alien languages i.e. Sanskrit and Arabic. There were few British people who could articulate and interpret these languages. Public utility and worldly benefits of these languages were limited. So the judges were not aroused to learn these languages. Learning a new language was also a difficult coup for the foreigner judges. Moreover, books of Hindu and Muslim Laws were not purely legal handbooks. They were treatises on morals, principles of behaviour and general precepts of good life. The Muslim and Hindu Laws were developed over a long period of time and had long list of their sources; at times it would reach to unlimited stalk of the books and commentaries. Also the laws were not codified in terms of modern terms. Keeping in view these limitations of the dispensers of justice were provided *pundits* and *muftis* in the courts to run the business of dissemination of justice. British judges accepted it as last option and they were not satisfied with this temporary solution. This administrative requirement also added to the need of uniform codification of the laws.

There were also objection on erudition of the *qazis* and *pandits*. Actually they were not law practitioners. Their expertise was in theology rather than in legal matters. As was pointed out by many judges, they were having very little knowledge about their laws. There were also possibilities of their indulgence in misappropriations while holding sensitive office in courts. Laws left to their interpretation would open to number of meanings. They used to take excerpts from the law books or religious books and interpreted it in another way than it was given in the particular context in that very book. Jones, as quoted in Jain (1998), criticizes that the interpretation of laws of Hindus and Muslims were so vague that one could not accept them because there were chances of being led astray in the hands of local court officers. Taking honesty and integrity of the local law officers granted one could not follow the scattered sources of laws giving ambiguous answers to a particular question of law. Time and again references of cases to local law experts were causing unnecessary delays in dissemination of justice. At times there were opposite verdicts by different courts on the same question of law and fact: It created an atmosphere of mistrust on local legal system. The courts, while deciding the cases relying on the advice given by *muftis* and *pundits*, used to pronounce only the decisions of local court officer. In this way English judges did not decide on their own understanding but they decided what was dictated to them. To tackle the prevailing state of affair Hindu Laws and Islamic Laws were translated. After getting the laws translated in English by extinguished English scholars in 1864 the British Government decided not to consult Hindu and Muslim law experts while deciding cases in the courts. Till this point of time Indian Penal Code was also made ready and it was promulgated. The courts started deciding cases according to new laws based on their own understanding.

2.5 Conclusion

This chapter discusses four phases in the development of legal system in India. In the first phase local laws of the region based on Vedic teachings are discussed. Brahma, the creator of universe expounded all laws. Social order is rests in obedience to the laws. Non-adherence to the laws causes disruption in smooth progress of the world. Divine Laws were means of adjudication

both in civil and criminal matters separately. Substantive laws and procedural laws were elaborated in the light of religious sources. Legal literature from men of erudition in law offered a detailed account of working of the laws. Administration of justice was responsibility of god of justice *dharma*. He gave *dhama* i.e. laws to be followed. Court procedures and also matters of appeals both in civil and criminal cases are logged in *arthasahtra*. In the second part administration of justice under Muslim Sultans is discussed. The process started formally with *Aibek* (1206). The judicial structure was built on Abbasid model. This is what termed as first phase of Islamization of laws which culminated in Mughal rule. Muslim Sultans thought administration of justice as the supreme form of worship. Their rule sought legitimacy in maintenance of law and order. Sultans started codification of laws (Feroz Taghluq 1351-1358). Complete court system in judicial hierarchy existed in medieval India. Third segments informs about justice system in Mughal reign. Court structure at different levels with court staff and documentation found during Mughal period was fully developed. Modern day English court system has many traces of Mughal remnants. Ahmad (1992) quotes Baillie who holds that there is powerful influence of Muslim Law and its working on English administration of justice. The last part of this chapter updates the researcher as to how the English system of adjudication stepped in. In 1600 the East India Company started its business in India with permission of the Emperor of India. The factories of English people were their colonies. The factory areas were permitted to be governed according to British laws with prior permission by the Emperor. The Orders (1661, 1753 and 1774) of the King of England made the employees of the company English subjects in India. They assumed power slowly and annexed areas to the factory settlements. Madras, Calcutta and Bombay were presidencies which were under British control before introduction of the Charter Act of 1933. This Act provided for institution of a Law Commission to Anglicize the local laws. There were successive Commissions which worked on the project and made the Indian Penal Code and Indian Code of Criminal Procedures after approval by the Indian Legislative Council and abrogated of the Islamic Laws in different phases. The reversal this Anglicization is Islamization of laws which is discussed in the chapter three and the chapter four.

CHAPTER 3

EFFORTS ON ISLAMIZATION (1947 AD-1979 AD)

This chapter reviews Islamization of criminal laws in Pakistan. This part of the thesis highlihts different efforts to Islamize the Criminal Laws starting from inception of Pakistan through various governments with special focus on the tenure of the dictatorship. It also informs different patterns of Islamization. Islamization through state fiat is the main area of discussion in this segment of the research. Furthermore, a critical evaluation of Islamization in relation to public utility provides basis for further appraisal of the Islamization of laws. Criminal cases are discussed to show the relevance of the Laws to citizenry and justice system in Pakistan. This part of the study provides an indepth understanding of the circumstances which prompted the Modernization process culminated in The Women Protection Act 2006. All these scholarly debates leave the question unanswered why efforts of 35 years could not yield. Furtheremore, it looks into the circumstances which led to the modernization of laws. To analyze the works of western critics and scholars, to examine contribution of Muslim intellectuals and to expose the causes underneath all these developments this study embarked a hard effort to log these debates, to assess the evidence and conclude the results. It will be helpful to rectify the present flaws in Laws and lacunae in procedural practices. Study will also open up new discussion as per demand of modern day issues unlike traditional religious beliefs.

3.1 Efforts on Islamization (1947 AD-1979 AD)

Pakistan with its inception faced issues regarding state structure. In modern world any type of state other than a republic was out of question. Problems in respect of the business of the state were twofold: One about religion as *gerund norm* and the other controversy about traditional or modern interpretation of religion as well as laws and their place in matters of the newborn state. There had been two groups since beginning of the debate. Secular democratic view gave in owing to limited pleading and public support whereas question of modernism verses

traditionalism involved public at both of the poles. As Islam can be interpreted in many ways this was why all segments having religious bent of mind thought them true and self-righteous. Nonetheless, people regarded Islam as means of equality, justice and brotherhood.

Traditionalists think religion as complete code of life. Shariah provides guidance in all matters of individual as well as collective social life. Social life is regulated by laws of Shariah: civil laws, criminal laws, family laws, laws on contractual obligations, laws on inheritance, laws on civil remedies, procedures on punishments, fines and retaliation along with manners of their execution, etc. Islamic Law (Shariah), being complete in all respects, is immutable. State could be run on the model of early state of Madinah according to traditional interpretation of Islam and its institutions (State Apparatuses). To them true representative of the Islamic doctrine are religious scholar. They can decide how Pakistan should be governed. Different organs of the state must function according to the advice of the scholars. On the other hand modernist approach to religion and state provides for existence and working of political party system. Elections are the only way to know will of the people. Human will is the only way to know how shoul Pakistan conduct her state business. Traditionalists were in three groups. Adherent to absolute divine bases of state or government, conservative with bent towards modernistic view and co-existence of religion and progressive notions. Proponents of these ideas were Muhammad Asad, Ghulam Ahmed Perveiz and Abdul Hakeem respectively. On modernistic side totally modern views were pleaded by Javied Iqbal. Secularism provides place to divine rules was supported by S.M. Zafar. Muhammad Munir was in favour of totally secular structure of the state. It is an over simplified version of state of affairs regarding difference of opinion on the issue of Islamic state in Pakistan according to Mehdi (1994). Prevailing diversity affected and delayed the process of constitution making for nine years. These contradictory positions had repercussions in the fabrication of subsequent constitutions as well. Constitution and amendments therein showed a compromise between the Islamist and the Modernistic factions of the people. The former would accept constitution for presence of Islamic provision whereas modernistic sought satisfaction in the parliamentary form of the government.

Process of Islamization was taken as an icon of "*grundnorm*" of Pakistan since beginning of the constitution making process (PLD 1972 SC 139). First attempt form the government side was documented in shape of invitation to "*rasikhuna fil ilm"* i.e. people of knowledge from the country and abroad. This invitation prompted the renowned religious scholar Suleman Nadvi stationed in India to visit Pakistan. Locals were namely: Dr Hameed Ullah, Muhammad Shafi, Zafar Ahmed, Jaffer Hussain, Professor Abdul Khaliq, etc. These people constituted a board named as "*Board of Taleemat-e-Islamia*". Government also instructed the "Committee on Basic Principle" to prepare a draft of the constitution for the motherland keeping in view recommendations of the board. It was not mere an instruction to give a good ear to the recommendations the board but to make the draft of the constitution in accordance with the recommendations. The report of the committee on the constitution was in total neglect of the recommendations of the board. The draft of the constitution was in dire contrast to the Objectives Resolution. Objectives Resolution enumerates:

(a) Sovereignty rests in Allah Alone.

(b) People of Pakistan shall exercise, their power, within the prescribed limits by the supreme sovereign (Allah Almighty), having delegated powers.

(c) Business of the state would be run in the light of Islamic principles (as given in Qur'an and Sunnah) of social justice, freedom, equality, co-existence and democracy.

(d) People through an assembly will make a constitution for the state of Pakistan.

(e) Delegated authority to the state shall be exercised through the chosen members of the Pakistani society.

(f) Under the delegated authority they shall safeguard fundamental rights. Equal opportunity, equality of status, rule of law, economic justice, political identity, freedom of speech, freedom of thought, freedom of association, and freedom of following any faith, belief and worship shall be provided him by the state. Nonetheless, the state may grant all of the above mentioned rights subject to the regulatory laws and notions of public morality.

(g) In making judicial decisions judiciary shall be given full independence.

(h) Muslim subjects of the state shall be provided circumstances to regulate their lives according to Islamic teachings as are enshrined in the divine sources (Qur'an and Sunnah).

(j) Minorities living in territorial jurisdiction of the state shall be enabled to observe, practice and profess their religions. They shall be permitted to promote their culture and continue their customs.

This is an optimum of rights of the subjects of the state of Pakistan which assures prosperity and prestigious place as a nation in the family of nations across the globe to play their effective role towards global peace, prosperity and wellbeing of humanity at large. This very resolution was adopted on 09 March, 1949. It was prepared in the light of advice preferred by renowned scholars of the time: Shabbir Ahmed Usmani, Abul Ala Modudi, Ishtiaq Hussain Qureshi, Raghib Ahsan, Abdul Hameed, Dr. Umer Hayat among others. The advice was presented to the Constituent Assembly to frame it in legal language. It was passed by the Constituent Assembly in the name of the "Objectives Resolution".

As the report by the committee was in stark difference to recommendations of the board it harboured harsh criticism from all sections of religious scholars. The only point upheld in the report was compulsory Qur'anic teaching. The Constituent Assembly took serious view of the prevailing state of affairs and adjourned further deliberation on the report in the house. Furthermore, the Constituent Assembly sought public opinion on the matter. Hot debates ensued on the issue all over the country. Delay in finalization of the Constitution caused desperation in masses. It was neither of any good for right wing i.e. the radicals nor it provided for modern wing of the people. Religious scholars took serious view of the report on account of skepticism of the government on the Constitution on one hand and also objections reflected on differences among them on the other. They wanted to remove the stigma of sectarian differences among scholar of different schools of thought in the religious matters. They sat to resolve the difference of opinion.

A forum comprising 33 members reached a manifesto. This manifesto was prepared unanimously by scholars of different schools of thought.

The very "Twenty-two Point Formula" was finalized and signed in 1951 at Karachi. Salient features of the Formula were:

i. No law shall be made in contrast to the Holly Qur'an and Sunnah of Prophet (pbuh).

ii. All existing laws shall be brought in consonance with the Islamic injunctions.

iii. There shall be no discrimination on the basis of race claims, geographic or provincial biases.

iii. It shall be mandatory for the state to "enjoin good and forbid wrong". To propagate same the state shall manage the system of Islamic education for the Muslim subjects.

iv. The state shall promote national solidarity and shall maintain moral values and moral standards.

v. Keeping in view "The Doctrine of Separation of Power" the state shall keep separate the judiciary from the influence of the executive.

vi. All citizen of the state shall be given rights and privileges as sanctioned by Shariah.

vii. All citizens of the state are equal and they shall be considered equal by the laws.

viii. Different schools of thought of Muslims shall be given religious freedom subject to law.

ix. Personal laws of each school of thought shall govern disputes among the followers of the school.

x. Minorities shall be given religious freedom in the matter of places of worship, custom, culture, etc.

Some of the points were incorporated by the framers of the First Constitution but some were not taken into consideration. The most kernel principle was agreed upon and was included in the constitution: No law shall be made in repugnance to the Holy Qur'an and Sunnah and if

such laws were passed the same shall be challenged and declared null and void following a prescribed course. This was a success which prevailed in all subsequent Constitutions.

3.1.1 Authority in Matters of Islamization of the Laws

Who should be given authority to declare any law in consonance with or in repugnance to Islam? Majority of the people of Pakistan wanted and favoured promulgation of Islamic laws. This demand was in respect of both for existing laws and future legislation alike. But there was a controversy as to whom the authority, to declare the law in accordance with or in repugnance to the Islamic Injunctions, should be given. There were many proposals. One option was that a board of scholars may decide about any bill brought to the house for discussion. This option was objected by both political leaders and religious scholars. Political leaders did not want to place parliament subordinate to any board of individuals of whatever religious caliber they might be. This would amount to place will of masses subordinate to some selected individuals who can abrogate parliamentary decisions. The very concept was also against democratic principles in vogue across the modern world. The same option was also neglected by the religious community headed by renowned scholars of the time. They were of opinion if the power were given to the government to appoint members of the board; the government will choose from the "Scholar on Sale" and will enforce their will as Shariah with the endorsement by the board. However, there was a suggestion in the draft of Khawaja Nizam ud Din to establish a board of scholars in each province and in the federal capital. President was to appoint scholars in the capital and Governors of the provinces were to appoint the boards for their provinces. In those days Abul Ala Modudi commented on the recommendations that losers in the elections such as *molvies* will run after the governors and the president to look for an appointment in the board and the government will exercise its wish as Islamic will getting endorsement by the stooges in the board. Moreover, scholar/s in one province might have opinion against the scholar/s of other provinces. In this same thing might be good and bad simultaneously.

Second option was to give the authority to parliament. This was a counter version of the first proposal. People will choose the members of the parliament. They will exercise their power

to declare any proposed law in contrast to the Islamic injunction. Moreover they will also change all existing laws in accordance with Qur'an and Sunnah. Furthermore, they will exercise their power to declare, any proposed law, in contrast to the Islamic injunctions and also abrogate existing un-Islamic laws. The members of the parliament will also change the existing laws in the light of the Injunctions. This proposal was also suggested by Allama Muhammad Iqbal in his article "*ijtehad fil Islam*" or Juristic Opinion, in Islam. He would suggest it with certain reservations and guarantees especially for the chosen ones. He was of opinion to include religious scholars in political arena of Pakistan. The very proposal was strongly opposed by the religious scholars. To them it might bring "*Ijtehad*" similar to Akbar's *Deen-e-Ilaahi* rather than Shariah laws and Parliamentarian would not have emerged different from *Faizi* and *Abu-al-Fazal*; the courtiers of Akbar. Such type of reconstruction of religious values and willful interpretation of the injunctions will never be accepted by the Muslims of the state.

Meanwhile the third proposal, a balanced proposal, came to surface. The same was included in 22 Point Formula presented by the religious scholars. According to the third option the judiciary was the most suitable forum to exercise this authority. It was decided that the higher judiciary shall interpret any proposed law for its Islamic credentials before its drafting as a law of the land. It was decided that Supreme Court of Pakistan will be given the authority to declare the proposed legislation in accordance with Quran and Sunnah. This proposal was acceptable for liberal politician as it was being done by US Supreme Court. Prime Minster Muhammad Ali Bogra accepted this proposal and made it substantive part of the proposed Constitution of 1954 under Article 4. Here one may compare this step towards Islamization will contemporary Islamic system in sister countries. For example in Islamic Republic of Iran the right to decide Islamic relevance of the laws is given to religious scholars under *Khumaini.* The same is also provided in the Constitution of 1906 of Islamic Republic of Iran. In Kingdom of Saudia Arabia (KSA) this power is vested in a body of senior religious scholar " *haiyat kabar al ulema*". These contemporary institutions of Islamization didn't have people trained in modern jurisprudence on their roll. In Pakistan the authority was given to senior judges ingrained and trained in English jurisprudence as well as Anglo Muhammadan Laws who were inveterate scholars of modern

judicial norms and presidents. This was a great achievement but judiciary was not given power for weigh fiscal laws. This exception was sought to provide the government ample time to decide alternate economic monitory system to replace the current usury based system. All of these developments sank to the depth of the sea after desolation of the Constituent Assembly on 24 Oct 1954.

3.1.2 Islamic Law Commission under the Constitution of 1956

There was again a hot debate on the issue of authority to validate the proposed laws according to Islamic touchstone. Constitutional authority was given to the National Assembly. An Advisory Commission under constitutional cover was given power to advise the National Assembly and the Provincial Assemblies. Members of the Commission were to be adept in religious knowledge. Laws under reading in the house were to be sent on point of objection to the Law Commission for advice. The Law Commission was to be established within one year of promulgation of the Constitution of 1956. The Commission was to arrange and edit Islamic laws, to examine existing laws and to advise on references by the Assembly. Report of the Commission was to be presented to the Assembly for further legal modalities to make the laws final. Advice of the Commission was of advisory nature and there was nothing in the constitution to make it binding. Notwithstanding the nature of the Law Commission it was never instituted throughout the period of promulgation of the Constitution. However, the Objectives Resolution was made part of the constitution as preamble. Most of the points of 22 Point Formulae were incorporated in to the Constitution under principles of policy. It was asserted that no law will be made against Qur'an and Sunnah and all existing laws will be made in consonance with the Islamic Injunctions. An institution was to be established for Islamic research and study but the same was never established till the abrogation of the Constitution in October, 1958.

3.1.3 Muslim Family Laws Ordinance (MFLO) 1961

Martial Law of 1958 abrogated The Constitution of 1956. Prior to the Muslim Family Laws Ordinance (MFLO) there was a brief law on marriages of Muslim couples. This was passed

in 1949. According to the law the couple was to submit in writing to the court that they want to resolve their issues in the light of Islamic Law rather than any customary law. The court was bound to decide their disputes in the light of Islamic Laws on the subject. In 1961the Martial Law administrator passed MFLO contemplating matters on inheritance, gifts, trust, marriage, divorce and guardianship. It was a hasty decision that required homework on Islamic Laws and their codification. In 1962 there was a further development in family matters. A law was made in West Pakistan declaring that if a party wants the case decided according to Shariah it will be binding on the other party. However, subjects following faiths other than Islam and higher management of the state will file their matters for decisions according to English Laws. Title holder and feudal lords kept on observing the rule of *primogeniture* even after independence. MFLO was criticized widely by religious scholar on various grounds: A men could not contact a second marriage without permission in writing by his first wife and the same was not registered under this ordinance in want of the permission; procedure of pronouncement of *talaq* and its procedure was un-Islamic; share of *propositus* before the opening of succession etc. There was a debate which still persists. It got approval of westernized liberals whereas it was declared against accepted interpretation of the Qur'an and Sunnah by the traditional scholars simultaneous.

3.1.4 The Constitution of 1962

Till this time chief Martial Law administrator had got legalized his office as the President of Islamic Republic of Pakistan. New Constitution is known as one man's constitution. As far as matter of Islamic provisions was concerned it followed the predecessor Constitution of 1956. So much so there was no mention of 'Islamic' as prefix with the name of the country. Name of the country happened to be "Islamic Republic of Pakistan" through the first amendment in the Constitution. Binding nature of all Articles on Islamic provisions was changed to discretionary position. There was no remarkable development towards Islamizatoin of the state apparatuses especially in original form of the Constitution. However, a milestone in the way of Islamization was laid down under the Constitution. It was idea of an advisory body on Islamic ideology and doctrine. This statutory body was established in 1963. First president of the Advisory Council of

Islamic Ideology was justice retired Muhammad Akram. Council did examine various laws time to time. Being advisory nature of jurisdiction of the recommendations of the Council the government did not take them seriously nor were the reporst discussed in the National Assembly till 1974. Prohibition of Prostitution Ordinance 1962 by the Government and Governor of West Pakistan can be counted in Islamization of state apparatuses which declared prostitution illegal. Prostitution was declared a criminal offence. People involved in prostitution were liable to criminal punishment. This effort had been welcomed note from the religious factions in West Pakistan. In East Pakistan prostitution was under legal cover at that time.

Abrogation of The Constitution of 1962 by General Yahya Khan took place in March 1969. He issued a proclamation permitting continuation of the state institution's working under the abrogated Constitution. Advisory Council on Islamic Ideology remained working but its reports were never taken seriously. Reports of the Council were of lesser use otherwise as advisory status couldn't bind the government. Their advice was only to console demands of people in a tactful deal.

3.1.5 The Council of Islamic Ideology

The Advisory Council was given new name: Council of Islamic Ideology (CII) in the Constitution of 1973. Its founding chairman was Justice retired Hamood-ur-Rahman. The Council started on the Islamization project with an aim of bringing the laws in line with Islamic doctrine of adjudication and management. The Council started review of Pakistan Penal Code 1860 and completed one third of the job in three years. There were several recommendations on various social ills, customs and laws. Most of them remained unattended whereas some of them were enforced by the sitting government viz prohibition of drinking, closure of night clubs, horse races for bet and proclamation of holiday on Friday etc.

Empowerment of higher judiciary to review the laws was a landmark contribution of CII. Institution of Shariah Appellate benches in all of the four High Courts and the Supreme Court of Pakistan gave impetus to the process of Islamization. Chief Martial Law Administrator (CMLA)

was authorized to amend the Constitution under "Doctrine of Necessity" in famous case – Nusrat Bhutto vs State 1977 on 10th Feb 1979 PLD. The Appellate Benches were empowered to examine any law on application of any citizen of Pakistan. The Benches were also empowered to declare the laws null and void on account of their clash with Islamic Shariah. There was not all well with this empowerment move by the government. CMLA exempted five areas form the authority of the Court examination: the Constitution, Personal Laws, Procedural Laws and Martial Laws enjoyed permanent immunity from the review of the Courts for their Islamicity or otherwise. Fifth was the exemption for fiscal and monitory laws for 3 years. The Courts stared their work on the examination of the laws which were in their jurisdiction according to the Constitution.

3.1.6 The Hudood Ordinances (1979)

The Council of Islamic Ideology worked on the Islamization project with full religious fervour for more than a year. It forwarded five drafts of recommendations on: "*saraqah*" (theft) and "*harabah*"(dacoity); *zina* (adultery and fornication); "*qazf*" (false accusation of *zina*); '*khamr*" (drinking of alcohol) and punishment of flogging. Crimes which were constituted in account of above mentioned acts under Pakistan Penel Code 1860 were placed under the Hudood Laws to decide the cases according to Shariah. Punishments of these crimes were changed in accordance with Qur'an and Sunnah of Prophet (pbuh). CMLA was pleased to promulgate Islamic punishments for these crimes on 10th Feb, 1979. The Hudood Ordinances are:

(i) Offences against Property (Enforcement of Hudood Ordinance) 1979

(ii) Prohibition (Enforcement of Hadd Ordinance) 1979

(iii) The Offence of Qazf (Enforcement of Hudood Ordinance) 1979

(iv) Offences of Zina (Enforcement of Hudood Ordinance) 1979

(v) Punishment of Flogging Ordinance 1979

There was a hue and cry in house and abroad alike on promulgation of these Ordinances. Liberal factions of society and women activists were of opinion that these laws are against women rights – women folks are subjected to male advances under legal cover. Much of the

criticism owes to the system in Pakistan. There are instances of maltreatment of women under police investigation. Mishandling of the cases was due to the system of investigation in the country. Another factor was exemption of the Procedural Laws from jurisdiction of the Federal Shariat Court. Flaws in the Procedural Laws result in delays during trial of the cases. Inefficiency of proceedings in also counted as inefficacy of Hudood Laws. One example of the flaw in the Procedural Laws was cause of harsh criticism on Hudood Laws. Death by stoning was awarded to a woman on contracting second and third marriages after divorces. This punishment was awarded to her on complaint of her first husband. Facts were that the first husband pronounced *talaq* verbally. After divorce she contracted second marriage. But the divorce was not registered in the union Council register maintained for this purpose under the MFLO 1961. Flaw of the procedure was fixed to the Hudood Laws declaring them brutal, harsh, and inhuman and fail in providing relief to already oppressed women victims.

3.1.7 The Federal Shariat Court (FSC)

Joining of all of the four High Court Shariah Appellate Benches consolidated under one administration. It was done to address management cum legal issues. There were cases of similar nature with conflicting decisions from the High Court Benches. One such case was on the "*right of preemption"*. Complainant was a worker on the fields of the land lord. He objected sale of the land and wanted his first right to purchase the property. Lahore High Court's Shariat Bench held that such a complainant must be given the right of preemption otherwise would be against Shariah and the Section of the Preemption Act giving such right is valid. In a case of similar nature the Peshawar High Court Shariah Bench held that such a right of the tenant is void and section of the Act is invalid. To resolve this type of controversies in future the High Court Shariah Appellate Benches were abolished. There was another cause of delay in hearing of Shariah cases in those Benches because judges in the Benches were also hearing other litigations as matter of routine. Both factor created a space for a permanent court. Hence on 25 March 1980 the Federal Shariat Court was established in Islamabad. A judge of the Supreme Court and four judges from the High Courts made roll of the court. This is a five judges' court. A case of *zina*

was decided by the Court and the Court awarded stoning to death "*rajm*" punishment. It was criticized by a section of people who don't admit Sunnah of Prophet (peace be upon him) as a source of Islamic Law. They objected that "*rajm"* punishment is not found in the Holy Qur'an. Sitting Judges of the Court were not well versed in Shariah Law and could't apply judicial mind. The Court reversed the decision and opined that "*rajm*" punishment was against Islam. They gave their decision (3/5) without listening the majority of the scholars. Majority of Muslim scholars believe "*rajm*" as unanimously accepted and valid "*hadd*" punishment according to valid reports of Prophet (peace be upon him). Due to this decision the Hudood Laws were criticized widely in Pakistan and at international level and CMLA (General Zia ul Haq) took a serious view of it. He enhanced number of judges in federal Shariah court by raising three religious scholars to the office of judges. This was made possible through another amendment in the Constitution. The three scholars were Malik Gulam Ali, M Taqi Usman and Peer Muhammad Karam Shah. At this time the court was given another authority to take *suo moto* action for review of any law of Pakistan in the jurisdiction of the Court without any application from a complainant. In 1982 Shariah Appellate Bench of the Supreme Court was given more memberships. Number of judges was raised to 5 including 2 religious scholars. Since its inception the Federal Shariah Court has reviewed a large number of laws of the land. A log of the reviewed laws will be presented under a separate caption. There are many laws which are changed and brought under umbrella of Islamic Shariah.

3.1.8 The Zakat and Ushr Ordinace 1980

It was 25th June, 1980 when this ordinance was promulgated. For the first year voluntary deposit of z*akat* (poor due) was recommended. Compulsory deductions were started in June 1981. No doubt there is need in improvement in the Law but it is was a good law to begin with. Under this Ordinance a sitting judge of the Supreme Court looks after matters of distribution of 40000 *Zakat* Committees more than one hundred Districts Z*akat* Committees and approximately 400 Tehsil Committees. There are four Provincial Z*akat* Councils working under the cover of this Ordinance. Receipt and distribution in case of *ushr* (one tenth of irrigated agricultural produce

and one twentieth of non irrigated agricultural produce) are comparatively very low despite observations by the Federal Shariah Court and some religious scholars. Business of the Z*akat* collection and distribution is being conducted smoothly. However, after 35 years' experience the system still needs improvement.

3.1.9 *Ulema* Conventions of 1980 and 1984 and Ansari Commission

This was matter of concern for the President of Islamic Republic of Pakistan that public opinion must be given weightage while continuation of Islamization process. In August 1980 he convened an *ulema* convention at Islamabad in which more than 100 scholars from different schools participated. Focus of the convention was to suggest ways to Islamization of society and life style of the people of the Pakistan. The President was pleased to attend the Convention himself and ordered six committees to look onto the matters in the convention. Major points were: Islamization of system of education, publication of reports of CII, abolition of interest and slow pace of work on the process of Islamization. These committees did not make any remarkable development in the process of Islamization. In December 1982 the President of Pakistan was pleased to call for a conference on the process of Islamization to which all organs of Islamization bodies participated. It was decided that reports of CII should be made public and they must be acted upon. The President marked cases of Islamization to relevant ministers there and then.

Another convention of religious scholars was called in January 1984 at Islamabad. It was also presided over by the President. Hurdles in process of Islamization were deliberated over. Suggestions from the participants were also invited to remove the obstacles. However, the aims and objectives of the convention were never materialized. These developments created an atmosphere of favourable public opinion in the country. People of Pakistan showed their interest after being aware with ground realities and concern of the government.

In persuasion to the Islamization process in the country there were many discussions conducted during Zia regime. One of the best forums was Ansari Commission on 10th of the July 1983. Zafar Ansari was president of the commission. Task given to the Commission was to look

for a framework for an exemplary Islamic and democratic political and constitutional state apparatus. Membership of the Commission consisted of religious scholars, retired judges from higher judiciary and renowned writers. The Commission had a look on the work of foregone committees on Islamization. After hard reflection the commission presented its report to the President. The report contained recommendations on the subject. It was eloquent report on constitutional experiments in the country enumerating causes of their failure. It thoroughly analyzed the ground realities and ideal notions, hurdles and obstacles amidst available opportunities. The report concluded with new suggestions and ways of addressing the issues. The President could only consider some of the recommendations. He after deep reflection made the Objective Resolution as a substantive part of the Constitution under Article 2A. It provided the subsection as bases for the enforcement through courts which had been impossible when it was part of the constitution as permeable.

3.1.10 Other Fora of Islamization

Private Shariah Bill of 1985 was presented in the Senate of Pakistan. It brought a hot debate on the issue of Islamization in the Senate. There were discussions on the subject at varius levels in the country. This was not a bill of constitutional amendment even then it jogged legal brain of the country on the matter of Islamization. A spark of interest floated in the messes through this bill. Because of the debates on the Private Shariah Bill there came the 9th Amendment in the Constitution directing the Holy Qur'an and Sunnah of Prophet (pbuh) as the Supreme Law of the land. It was vowed that laws enshrined in the primary sources will be enforced through the Parliament and the Provincial Assemblies of the country. In the same bill there was increase in power of the Federal Shariah Court. It was to consult with financial expert to prepare consolidated recommendation on fiscal matters. The bill was still in the corridor of the Senate for approval and it was yet to be read in the National Assembly but on 29 May, 1985 the President dissolved the Assembly and sacked the government of M Ali Junejo. The charges leveled by the President on the government included its failure on matters Islamization of state apparatus.

On 15 June, 1988 the President signed an Ordinance of significance as far as matter of Islamization was concerned. These Ordinances, conferences, committees, commissions are direct manifestation of the inclination of head of the state toward Islamization of the State Apparatus. Enforcement of Shairah Ordinance was prepared by a committee headed by, Dr Abdul Wahid J. Hally Pota, the chairman of the Council of Islamic Ideology. Salient features of the Ordinance are:

i. Shariah is the supreme source of the state laws.
ii. State policy must be prepared according to Shariah.
iii. Question regarding validity of any law according to Shariah could be referred to the Federal Shariat Court.
iv. Matters which fall out of the jurisdiction of the Court must be referred to the High Courts.
v. Religious specialist on the subject (*muftis*) will be appointed in the High Courts. *Muftis* can practice law in the High Courts.
vi. Sitting judiciary will be given training on religious matters in *fiqh* / Shariah.
vii. President will appoint two commissions on Islamization within one month of signing of the Ordinance. The commissions will present their reports to the President on the progress on Islamization of the state apparatuses and laws within a year. After demise of Zia ul Haq the care taker President Ghulam Ishaqe Khan issued an amendment for next one year. In the following year the Ordinance was neither extended nor presented to the National Assembly for approval.

General elections were held in 1990. Stepping government had included the Shariah Bill in their election campaign and criticized former government for lack of interest on Islamization process initiated during Zia regime. At last a bill was passed by the parliament in the name of "Enforcement of Shariah Act" of 1991. This bill could not translate the aims and objectives set while commitment. It only reflected a half-hearted effort on part of government to satisfy right wing allies of the government. Process of Islamization under aegis of the Council of Islamic

Ideology did not stop. In 1980 in a decision by the Federal Shariat Court i.e. some of the Sections of Pakistan Penall Code (PPC) were declared against the spirit of Shariah. These Sections did not provide in cases of murder for *qisas, diyat* or compounding. Murder was non compoundable crime and was liable to capital punishment or imprisonment for life in PPC. The same was the case with "*juruh*" i.e. cases of hurt. The decision created an uproar in liberal sections of society. Government was not willing to change these Sections. The government filed an appeal against the decision in the Shariat Appellate Bench of the Supreme Court. The Shariat Appellate Bench upheld the verdict by the Federal Shariat court after 10 years in June 1990. Shariat Appellate Bench also declared 55 sections of Pakistan Penall Code of 1860 void and repugnant to Islamic Shariah. To fill the lacunae in the PPC government of Pakistan passed an Ordinance in 1990 with consultation of Islamic Ideology. This very Ordinance is known as Qissas and Diyat Ordinance 1990.

Islamization of fiscal matter of the country was an agenda since the inception of the Advisory Council of Islamic Ideology 1964. Council constituted a panel in 1970 comprising experts from religious scholars and economists i.e. bankers, businessmen, etc. It was given responsibility for restructuring of economic and fiscal policy of the country. This panel presented its report in 1980. The same was forwarded with some amendments by the Council to the government. The report explained in depth the detailed procedure for interest free economy for the state. Government of Pakistan decided to enforce recommendations of the report after much reflection. It was a great success that The State Bank of Pakistan issued instructions to all banks working under its license to stop their usury based business. The State Bank of Pakistan also circulated an administrative order on 20 June 1984 providing 13 alternative ways to usury based bank business. These alternative procedures were the same as were recommended by the Council of Islamic Ideology. This very order was never implemented in the bank till to date.

Principally, the exemption of fiscal matters from review by higher judiciary i.e. FSC/ Shariat Appellate Bench of the Supreme Court was to give the government sufficient time to switch over to the interest free monitory system. Three years' exemption was divided in three

phases to provide required facilitation to the fiscal departments. In 1981 the government announced that report on the interest free banking had been adopted but a three year more time may be required for in house modalities. On expiry of next three years' term further four years' time was given under exemption through an amendment in the Constitution. Next year another amendment elongated the period of exemption to five years' period. A subsequent amendment was made in the Constitution to enhance the period of immunity to seven years. Here came the year of referendum on the process of Islamization which was linked, very cleverly, to continuation of presidency. The first step for "the Islamization" was to enhance the exemption period to ten years. In barred the matter of jurisdiction of the Federal Shariat Court till 26 June 1990. On the very next day there were 113 petitions challenging 24 laws on basis of contrast to "*riba*" laws in Shariah. The Federal Shariat Court decided on 16 November, 1991 that some of the laws were void *ab initio* and others required changes being partially in contrast with Shariah. The decision by the Federal Shariat Court was to take effect on 20 May 1992. The government filed an appeal against the decision of the Federal Shariat Court in 1992. It was kept pending till 1998. At last on 23 December, 1999 the Shariat Appellate Bench upheld the decision of the Federal Shariat Court but gave one and half year's time to the government to switch over to the interest free monitory mechanism. Before expiry of the time given by the Supreme Court's Shariat Appellate Bench United Bank Limited filed a review petition for suspension of the orders the same was not accepted by the Bench. Government of Pakistan also sought waiver till 2005 but the Bench only gave time till 14th June, 2001 and then in a further request till 13 Jun, 2002.

3.1.11 Constitutions of Pakistan and Islamic Provisions

The Objectives Resolutions is the first document on state policy and provides direction to the state apparatuses. This seminal document (and the constitutional requirement) enshrines the national intent to be followed in framing of future Constitutions. It outlines the main contours of the Constitutions. Every Constitution of Pakistan opens with the Objective Resolution as preamble. It was presented in the first Constituent Assembly by the Prime Minister on 7 March, 1949. Since its acceptance with two third majority of the house there is no change in its structure

and place in the constitutions. There were objections on the texture of the Resolution from non-Muslim members – B.K Datta and SC Chattopad etc. They argued that non-Muslims were reduced to lower status than Muslim subjects. Further they pleaded that sovereignty must be given to people and religion and politics must be kept separate otherwise Pakistan can never be a modern democratic state. Their objections were addressed by assurance from the Muslims. For example the Prime Minister introduced this Resolution that Pakistan sees no place for theocracy and priesthood as these motions are alien to Islam. He emphasized the authority of people of Pakistan through chosen representatives: a democratic process. Mian Iftikhar ud Din eloquently set aside the objection by non-Muslims by saying that in modern world constitutions open in the same way. Ultimate super power is God in the Constitution of Ireland. Moreover, Allah in Islam is not less beneficent and merciful than the concept of Supreme Being and Almighty in other religions.

Iqbal (1984) remarked in a constitutional petition that the Objective Resolution contemplates Islam the "*gerund norm*" of Islamic Republic of Pakistan. It assumes that the Muslims of Pakistan will be provided social, political and legal settings to order their individual and collective lives in the light of Islamic Injunctions and Shariah. All military and civil regimes going through many upheavals in constitutional history of Pakistan neither dared to fiddle with it nor ignored the principles stated in the Objective Resolution. How could any oppressor think of the abrogation of these principles stated in the Objective Resolution? That's why in various abrogations of the Constitutions the Martial Law administrations adhered to the tenets (content) as well as form (language) of the Objective Resolution and placed at its former place in their proposed constitutions as preamble (1984:65).

Zaman says that the Objective Resolution is a document providing a compromise between the traditionalists and the modernists. It yoked the right wing and left wing politicians. It presupposes harmony between two opposite approaches: right wing thinking politics must be guarded by Shariah and the left wing seeking separation between state and religion. He adds that neither of the groups could be satisfied in the true sense. Westernized intellectuals complain

against overwhelming and lavish mixture of the state and the religion. Traditionalists speak ill of western character and style of institutions being run by western minded lawyers and politicians who showed little respect for traditionalists and radical view of Shariah (1967:86).

Rehman (1974) sees the Resolution as a compromise between these two factions. The radical were satisfied that supremacy of Allah Almighty in the state business showed government's commitment to adhere the principles of Islamic Shariah on one hand and modernists are satisfied with parliamentary form of government on the other. Traditionalists grade this development as a victory over the westernized ruling elite opines Ahmed (1980:28). Modern wing showed content due to emphasis put on people, exercise of the delegated powers through chosen representatives of people and there was no mention of the Shariah in the Resolution itself. As it was general document outlining the future course of action in framing of the constitution it was interpreted differently by both sides. However, concept of Islamic state was presented throughout the Resolution (Rehman, 1982:8). The same persists till to date; practicality of the Resolution is manifested in the subsequent Constitutions and their make-ups. It has a strong hold and adherence in majority of people of Pakistan. Its religiosity and founding nature permeates throughout the legal history of Pakistan. Ground facts provides against the remarks of Mehdi on the Objective Resolution that "the Objectives Resolution did not have any practical affect" (1994:79)

3.1.11.1 Islamic Provisions in The Constitution of 1956

Constitution opens with the Objective Resolution which is all Islamic in character. It discusses the road map for the state as well as the Constitution. Substantive provisions of the Constitution start from part I Article 1 which declares Pakistan as an Islamic Republic. Nomenclature of the state is very Islamic in nature and the effect would have been very different if the name were "Federal Republic of Pakistan". This is the first step towards making Islam as religion of the state of Pakistan. It is also iconic to name the country embodying religion in its name. Article 13 (part II) enshrines measures on the part of the state to safeguard the religious institutions. This Article aims on preparing a social conscience in the masses. It is basic need of

the society to stick to its ideology which can be ascertained through the institutions of religious education. Article 13 and 14 guarantee the access to public places and opportunities to public services without any prejudice to religion. This atmosphere of non-discrimination is an icon of Islamic society and state. Article 17 provides for freedom to choose and profess any religion. People following any faith are authorized to establish and manage institutions of their religious education and worship. In Article 18 there is a bar on taxing for a particular religion to promote and support its tenets throughout the state.

Principles of policy are general in nature and non-enforceable through courts- providing guiding principles for the state operations. There are several articles declaring Islamic façade of the state. Article 24 emphasizes on Muslim brotherhood. It highlights the need of unity among all Muslim states. Muslims of Pakistan are to be provided facilities to order their lives, individually and collectively, in accordance with the Injunctions of Islam. It is responsibility of the state to provide and facilitate Islamic philosophy to strengthen their moral beings according to the teaching of Qur'an and Sunnah, contemplates Article 25 (a) (b) and(c). Article 25 (d) emphasizes proper organization and management of institutions of *zakat, auqaf* and mosque. Minorities are assured of their representation in federal and provincial services without discriminating them on the basis of religion says article 27. Unethical practices of gambling, prostitution and taking drugs are also promised to be banned. Their prevention is aimed at in Article 28(e). However in Article 28(f) prohibition of alcoholic medicine and alcoholic use by non-Muslims is waived of. Menace of usury (*riba*) in economic business of the state should be eliminated as soon as possible says Article 29 (f).

The most important and symbolic in character as far as Islamic identity of the state is concerned is Article 32(2) of the Constitution of 1956 which is in part IV. It stipulates that president (head of the country) must be Muslim. It seems wise to have a Muslim president for the state emerged on the globe in the name of Islam. Choudry (1974:104) holds Pakistan was founded on the basis of Islamic philosophy and it was therefore to call that "the president as symbolic head could be amongst those believing in that philosophy". "Islamic Provisions" is the title after

main title “General Provisions” of part XII of the constitution of 1956. In this part the President is made responsible to establish a high level organization of advanced studies and research in Islamic teaching and way of life. It would assist in making of Muslim society according to Islamic morality says Article 197(1). This was a landmark provision to strengthen Islamic ideology from the grass root level. It is the duty of the government to make and implement Islamic laws in the country and also government will bring all existing laws in conformity with Qur’an and Sunnah. “No law can be inculcated repugnant to Holy Quran and Sunnah” says Article 198. President should appoint a commission to prefer its advice on enactment of Islamic laws for the country. The advice will be presented in National Assembly which will enact the laws thereafter say Article 198(3), (a) and (b). Status of non-Muslims is assured as it is in Article 198(4). These provisions sound good towards Islamicity of the state but they were never followed in the constitutional history of Pakistan; to follow them was “running wild on Islam” in words of President Sikandar Mirza which was not possible writes Choudhary (Ibid p.105).

Islamization means to change existing state of affairs i.e. state apparatus to Islamic system. It looks absurd to say that framers borrowed from western political system to make the Constitution. The Constitution embarks modern concept of democracy and incorporates Islamic spirit in them. This reconciliation is an experiment and a forward step leaving traditionalism towards modernity of the state apparatus. The Constitution of 1956 presented a successful effort in making an appreciable synthesis between modern concepts of democracy and modern state along with its requirements and the doctrine of Islamic Shariah which is thought medieval in nature. It could be maintained that the Constitution exemplifies an eclectic patch work from both secular and modern states through several provisions of Islamic Shariah remarks Esposito (1940:143).

Mehdi concludes the debate on Islamic provisions in the Constitution of 1956 that it is a modern document having Islamic provision of symbolic type. But one can differ with her general remarks “the Islamic Provisions were a compromise and therefore vague” (1994:87). It was first effort and it must be seen with realistic spectacle. Amidst Colonial Laws, westernized ruling elite,

untrained framers in Shariah and pressure from non-Muslims world as well as from leftist Muslims contributed to the ineffectiveness of the Islamic Provisions. This was why one sees no practical influence of the provisions enumerating Islamic doctrine. It was nonetheless a marvelous effort in prevailing state of affairs.

3.1.11.2 Islamic Provisions in The Constitution of 1962

A single sighted constitution- showing the President in each and every Part and Article- was framed keeping in view the modernistic and secular approach. President Ayub aimed at diverting the Muslims of this country from dogmatic aspect of the religion to moderate ones and equipping them with Islam which is progressive and modern and doesn't seek its "*bona fides*" in past centuries. He also remarked on buzz of communism and realistic view of materialism; both to him were in a tussle. Materialism could not hold its feet in front of communism. According to the President Islamic doctrine was only elixir to provide life to the soul of humanity and save it from destruction. His vision of Islam was blending of the secular notions and religious prospects in one. He wanted to purge the religious stagnation and introduce dynamism of scientific knowledge. His resolve was to implement "*rule of law*"; "judiciary must be independent" he would say for progress and prosperity of any society. Aiming on these "*prima facie*" noble notions he tried his best to change traditional views on interpretation of Islamic tenets. As an example: His modification in the Objective Resolution in elimination of the phrase "within the limits prescribed by Him" after sovereignty clause in the Resolution. He also changed a phrase after facilitation clause for Muslims to "order their lives individually and collectively according to the teachings of Islam and the requirements as set out in Holy Qur'an and Sunnah" with "Islam". This was his modernistic view of Islam he did not bother to give an Islamic name to the state in the Constitution. In words of Rehman with passage of time he could recognize and became convinced with importance of Islam as basis of solidarity of Pakistani nation (1976:84). His Constitution was full of his mind which he could only change after public pressure. In these lines only amended constitution would be discussed with reference to its Islamic provisions.

In Part I Article 1 gives name – Islamic Republic of Pakistan –to the country. It manifests the sanity of the President which approached his mind after agitation from the people of Pakistan. Two parts of the Constitution of 1956 were merged together – part II and part III in part II of the constitution of 1962. New name for part II was "Principle of Lawmaking and Policy". Article 1 in part I; first Principle is "No law should be repugnant to Islam" in former constitution this phrase had reference to Qur'an and Sunnah. This sentence was omitted in the original Constitution however the reference to Qur'an and Sunnah was added through first amendment in 1963 which took effect in 1964. Rehman (1976:286) thinks this anomaly is suspicious of eliminating Sunnah from the divine source of Shariah. Article 7(a) says that there will be no law in the country showing discrimination between Muslims and non-Muslims. Furthermore, there shall be no enactment preventing any religious community from practicing, professing and propagating their religion describes Article 7(a). According to Article 7 (c) no law would force any person to follow religious services or practices which are other than his or her own religion. All religious institutions will be given equal exemption from financial liabilities and grant from government will be given without any prejudice and discrimination of faith of the congregants of the institutions maintains Article 7(d). Public money would not be authorized for expenditures of any particular religion, denomination or community other than the amount raised for a particular purpose binds Article 7(e). Teaching of *Islamiat* was also made compulsory in the directive principles of the state policy. Consumption of alcohol would be discouraged. Source of unity of the nation and practice of moral Islamic standards would be promoted and organization of mosque, *ushr* and *zakat* would be maintained says Article (14). Relation with Muslim countries would be strengthened according to Article 21 of Part II.

Article 10 in part III of the Constitution lays down the qualification of being Muslim for the head of the state (President). Though provision was criticized by liberal democrats, secular and western minded factions of the society but it stood as substantive part of the Constitution. In Part X the vow to establish the Islamic Research Institute shows marked difference as compared to the Constitution of 1956. Two institutions were to be established: One "The Advisory Council of Islamic Ideology" and the other "Islamic Research Institute" {Article 99 and 207(1)}. Details

for appointment of office, terms and other departmental modalities are given in Article 200-204. Functions and ambit of working of the Islamic Research Institute are given in Article 207(2). It would promote reconstruction of a true Islamic society through research and instructions on the basis of Islamic teachings. The resolve of bringing the existing laws in conformity of the Holy Qur'an and Sunnah was shown but through amendments. Practical step towards this ambition was establishment of the Advisory Council for Islamic Ideology. Though advice of the council was advisory in nature even then it could put forward its opinion on the reference from "the National Assembly or the Provincial Assemblies". Rehman (1970) compares the two Constitutions that the amended constitution of 1962 (1964) happens to be more eloquent and consistent as far as the matter of Islamic vocation is concerned. Construction of 1956 only emphasizes ordering of lives of Muslim individually and collectively without any practical measures on the other hand the constitution of 1962 (amended) in Part XII assures establishment of two institutions for practical implementation of the noble cause towards Islamization of society and state apparatus. In the Constitution of 1956 the two institutions: Research Institute and The Law Commission have nothing to do with practical implementation of Islamic values (286). Iqbal (1986) sees the state of Pakistan in the Constitution of 1962 as an ideological state marked with more liberal interpretation of Islam while fabrication of the Constitution. Islam to him is dynamic character and can move with time this practical flexibility and movement makes it a universal religion (81). It is a balanced constitution, neither the secular nor the theocratic as it has Islamic provisions at the same time it is not being governed by religious parties holds Sahara (1968:196). One thing becomes evident that vast majority of masses in Pakistan does not tolerate liberalism devoid of Islamic tenets. This is why Ayub being powerful and bold enough reversed his course of liberalism in stark opposition of accepted interpretation of Islam in the matter of the Constitution and state affairs. Religious orientation is necessary for sustaining the society, promoting solidarity and nationhood in Pakistan.

3.1.11.3 Islamic Provisions in The Constitution of 1973

Zulfiqar Ali Bhutto is notable for three reasons: firstly his position was a political position as against dictators. He was the chosen one for the job. This political precedence over the predecessor places him in favourable and conducive position to undertake the task of the Constitution making. Secondly, he was backed by the Muslim World as it had shown confidence in him through participation in the Islamic Summit in February, 1974. Participation of 36 Muslim states was really a great achievement. In March 1976 Pakistan hosted International *Seerat* Conference in which 100 Muslim scholars including Imam-e-Ka'ba were speakers and audience. Lastly, nationalization of private sector industries and peasant reforms put Mr. Bhutto in a privileged position. Bhutto happens to be a modernist as Ayub but his modernistic approach was more inclined towards Secularism. He, very wisely, did not name the country as "Socialist Republic of Pakistan" but retained 'Islamic' as prefix to the Republic of Pakistan. Owing to his ardent desire to introduce Islamic Socialism in Pakistan, which he presented as his election slogan, he made a wise adjustment. In this way he sought a best fit between modernists and traditionalists. Shah (1992) opines that the Constitution of 1973 presents a combination of Islamic and Socialist approach toward the state business but still its name happens to be Islamic Republic of Pakistan. It is often pointed out that Bhutto's Islamization is on purpose as designe to pacify as rightists who remained in a perceptual danger to his rule and finally proved fatal.

In preamble of the Constitution of 1973 keeping the previous content intact an addition, to give the Constitution a socialist facade, was made: "We, (Chosen representatives of), the people of Pakistan; cognizant of responsibility before Almighty Allah and men." They show their dedication for abolition of opposition and tyranny and preservance of democracy. They also show their resolve to create an egalitarian social setup and a new order. Modernists were very happy with the insertion in the Objectives Resolution thinking it an antidote to the intensity of Islamic reading of the preamble.

Name of the state remains as it was in the earlier Constitutions-"Islamic Republic of Pakistan" (Article 1). An addition in the new Constitution of Article 2 states Islam as the state

religion. This made the basis of the state more clear. Freedom to choose and profess any religion and maintain, establish and manage religious institutions is given in Article 20. No tax can be imposed to support any religion other than one's own is ascertained in Article 21 of the Constitution. In Article 22 safeguard for religious education and institutions is offered. Access to public places is ensured according to Article 26. Right to enter into the services of Pakistan is furnished in Article 27. The Constitution also offers freedom of expression i.e. press, subject to the security of the state and glory of Islam. Qur'an and Sunnah are the basic source of Islamic Shariah. No law shall be made against these Injunctions says Article 29. Similar to the Constitution of 1962 there is a principle of state policy aiming at enabling Muslims to order their lives according to basic principles of Shariah but an additional element here is that they will be facilitated and encouraged in learning of Arabic language. There shall be measures to preserve and secure the correct Arabic language of Holy Qur'an and its printing and publishing will be in correct language declares Article 31. Article 37 says that the government will create humane working atmosphere in public services. Vocation must be run by people who are suitable for the services. Women and children will not be employed in vocations unsuitable for their sex and age. Furthermore, the government will provide maternity facilities and benefits to the women serving in public domain. Bond with the sister Muslim states would be strengthened according to Article 40. It also emphasizes international peace, fraternal relations and Islamic unity. International peace, good will and security are also pleaded in this Article arousing on support of people of Africa, Asia and Latin America. Settlement of international disputes is also advised through peaceful means. These measures would be taken by the state and government whose titular head is the President.

Article 41 (2) specifies qualification for the President of Islamic Republic of Pakistan. Apart from other qualification the President must be a Muslim by faith. This provision is kernel to all Islamic provisions. It brought criticism from abroad as well as from within the country alike. A new addition of similar nature is in Article 91(2). It says that the National Assembly shall elect one of its Muslim members as Prime Minister of the state. This provision is added through an order of the President in 1985. The Order is known in the name "Presidential Oder 14 of 1985:

Revival of Constitution 1973". To modernists this addition is an encroachment on sovereignty of the Parliament. It restricts the supreme body to act freely Iqbal (1986:89). On the other hand same is welcomed by the rightists or traditionalists as it upholds the Ideology of Pakistan. An Islamic country must be headed by a Muslim leader. This bold step set aside policy of tolerance and liberal views on the state policy and conduct of its business through its apparatus comments Khan (1984:52).

Article 227 of the Constitution provides guidelines on state policy regarding making of new laws. It asserts that no laws shall be made repugnant to supreme sources of divine guidance i.e. Qur'an and Sunnah. All existing laws will be brought in line with Shariah. For this purpose the constitution has set up an institution in the name of "Council of the Islamic Ideology (CII)" under Article no 228. A very controversial second amendment dated 17 September, 1974 was made in the Constitution. It bought harsh and pungent criticism from secular elements in the country. Modern wing took very serious view of the amendment and conveyed their dire grievances to the sitting government. It was article 260(3) (a) declaring people non-Muslim who don't believe in unqualified and absolute finality of Prophet (pbuh) of Muslims. This sub-Article eloquently excommunicates a person who claims to be a prophet. It further adds that any person who admits the claimant as prophet or a reformer in matter of religion is not Muslim. Neither will he be admitted as Muslim according to the Constitution nor according any law of the land. The sub-Article reads (a) " Muslim means a person who believes in unity and oneness of Almighty Allah and in the absolute and unqualified finality of Prophethood of Muhammad (peace be upon him) the last of the Prophets and or does not believe in or recognize as a Prophet or religious reformer to be a Prophet in any sense of words or any description whatsoever after Muhammad (peace be upon him) and (b) non-Muslim means a person who is not a Muslim and includes a person belonging to Christian, Hindu, Sikh, Buddhist and Parsi community, a person of Quadiani group or Lahori group who call themselves Ahmadis or any other name or a Bahai and a person belonging to any of the schedule castes.

Article 260(3) (a) and (b) were substituted by the Third Amendment in the Constitution ordered according to "Constitution Order 1983" P.O No 24 of 1985 Section 6 with effect from 19 March, 1985. The new sub-Article reads "A person who does not believe in the absolute and unqualified finality of Prophethood of Muhammad (peace be upon him) the last of the Prophets or claims to be a prophet in any sense of words or any description whatsoever after Muhammad (peace be upon him) or recognizes such a claimant as a prophet or a religious reformer is not a Muslim for the purposes of the Constitution or the law". This amendment was done after consolidated debates in the National Assembly with high level deliberations and consideration in the Supreme Court of Pakistan. Despite rigorous criticism and critique from abroad as well as secular and modern factions of the country it upheld the traditional views and interpretations of Islam and Islamic state.

3.1.11.4 The Revival of the Constitution Order 1985

Islamic provisions got strong hold during in the revival of the Constitution in 1985. This addition to the Constitution of Islamic Republic of Pakistan gave more nuances of the inclination of the President Zia-ul-Haq. The President issued Order No 14 in 1985 to revive the Constitution along with amendments in the Constitution through the Order. The Order was notified on 10 March, 1985. This Order was issued in Martial Law regime. Some Articles of the Constitution remained in abeyance: Article 6, 8-28, clause 2 and 2A of Article 101, Article 199, Article 213-216 and Article 270A. These Articles were revived through a subsequent Substitution Order which is known as Withdrawl of the Martial Law Order. The proclamation of the Withdrawl was issued on 20-12-1985.

Doctrine of necessity worked in legitimization of usurped rule. The very necessity being the process of Islamization of state apparatus purportedly provided the *vires* for Zia regime. Its enforcement is reflected in the ever biggest amendment in the constitution i.e. Revival of Constitution Order 1985. Having "validly assumed power", paradoxically, "through an extra constitutional step" the Martial Law Administrator was given powers "to amend" the constitution "in the wide interest of the state" and, for worldly and as well as eternal as was self-righteously

presumed, for the "welfare" of the inhabitants of the state speaks the verdict on Begum Nusrat Bhutto vs. Federation of Pakistan; PLD 1977 SC 657. Moreover the CMLA was entitled to take all legislative measures having judicial cover of the decision within the "scope" of the doctrine of necessity. The decision could impose a feeble supervisory authority of the court's jurisdiction while use of the doctrine. This supervisory jurisdiction was rejected by the CLMA's Order in 1981. President and CLMA "shall be deemed to always have had" such power to change and amend the constitution says Article 16 of the Provisional Constitution Order of 1981. Fine example of the application of the doctrine of necessity was Referendum of 1984. In December 1984 the multi-purpose Referendum was held to provide basis for Islamization as well as legitimacy to Zia's rule according to the "will" of the people of Pakistan. People endorsed the process of Islamization i.e. bringing the laws of land in conformity with Islamic Shariah i.e. Qur'an and Sunnah. They also wanted preservation of Ideology of their mother land. The process of Islamization must continue 'they decided' in the Referendum. Yes to this a closed ended question meant for more five years of the President's office. This was the "collage" of the legitimization which was prepared under the guise of Islamization with the stick of power in the hand of politician and by the pen of judiciary says Bashir (1985). Zia assured his people that he thinks amendments in the Constitution indispensible owing to at least two reasons: to bring the Constitution as near as possible to Islam and to save the country from apprehended instability instability in the future. Modern wing in the country graded revivalism as "modified Martial Law" says Mehdi (1994) with reference to Hassan Mir and Changges 1985.

The revival changes and holds the word "Parliament" simultaneously: substitution being *Majlis-e-Shoora* and presents in brackets the word parliament e.g. *Majlis-e-Shura* [Parliament]. Composition of the institution of the Parliament remains intact i.e. President, the the Senate and the National Assembly. The Order of the revival makes the Objective Resolution as the substantive part of the Constitution under Article 2A. President of Pakistan worked on the agenda of Islamization for eight consecutive years with all of his arms and armoury but his government was not an Islamic or a *Shoorai* government as he admitted in a speech after insertion of the Objective Resolution in the Constitution. It was part of the efforts towards making Pakistan a

citadel of Islam. The Objectives Resolution according to the president of Pakistan assures the Muslims of their religious rights. He also initiated a debate of Islamic and secular rights with no end. However it caused a wide range jurisdiction of the Federal Shariat Court.

Article 5 of the Constitution reserves seats in the National Assembly for minority groups. In this Article Ahmadis are also given a reserved seat though they still call them Muslims. Allocation of the seat to Ahmadis has intra constitutional validity i.e. the Second Amendment of 1974 Articles 106 and 260. A new institution of Islamic revenue (*ushr*) is added to Article 31 along with already given *auqaf* and *zakat*. Article 62 specifies qualifications for the members of the Parliament. He must be of good character having an adequate level of knowledge of Islamic way of life. A member must fulfill his duties as prescribed by Islam. A representative should be one who abstains from major sins and crimes. His moral being must be sound. He is not convicted by any court. Crimes of moral turpitude i.e. fraud embezzlement, misappropriation of public money, giving false evidence can be a bar to the candidature for the membership of the Parliament. A person cannot be selected as a member of Parliament who speaks ill of Pakistan and its ideology. Sub-Articles of the Article 62 i.e. (d)-(h) enshrine qualification of Islamic denomination for the member of the parliament. Most important virtues of righteousness, honesty, sagacity, trustfulness as enumerated by article 62 (f) form the core of the requirements for a person going to "enjoin good and forbid wrong". Article 62 is an inclusive in nature that such qualifications are not part of the any other constitution of the world. Writer like Ahmad (1989:28) call these qualifications abstract, highly personal and subjective and hence "unenforceable" if not unexceptional but difficult and improbable. Article 113 duplicates above mentioned qualifications for the member of the Provincial Assemblies.

Annexure to the process of Islamization starts in 1977 going through enforcement of *Hudood* Ordinances is the Eighth Amendment. It empowers the President to topple the government if it did not work, in estimation of the President, for Islamization of the state apparatus. The "judicious" use of the Article 58 (2) (b) empowering the President to dissolve the National Assembly took place causing an end to the government of Muhammad Khan Junejo in

1988. Debates on the power of the head of the state and the power of public remained in circles of academia for no purpose. Radicals thought enhancement of presidential powers fully consistent with the Islamic form of government to promote good and forbid wrong practices i.e. Islamization.

Shah (1986) opens up with interrelatedness of religion and state. To him experiment of an ideological state having religion its *raison d,etre* is open to questions and predictions. He hypothesizes performance of the state apparatus according to the teachings and principles of Islam will show the capability of the religion to sustain as basis of the state. Legal state of affairs raises questions about the potential of the faith on which foundation of the state and its system rests. Process of Islamization got impetus during Zina regime with a resolve to deliver the system from its ills. Divesting the Anglo-Indian system of non-Islamic elements by legal elixir could work little until social Islamization he furthers. Psychological dimensions of the process of Islamization focus on thought processing and ideological base line. Collective sense of social integration and change can provide better soil to the bud the crops of reconstruction of state apparatus in line with the ideological framework of the society (Ahmad: 2009).

These types of social reforms were also purposed in in January, 1985. Committees were made for looking into the matters of Islamic jurisprudence, social reforms, education system, public welfare and appraisal on measures of Islamization by the government. On 26-27 November, 1985, at International Seerat Conference, held in Islamabad, president of Pakistan reiterated implementation of Shariah throughout the Islamic world. Resolutions, conventions, conferences and seminars had little effect laments Shah (ibid). Islamization of policies, state apparatus, and society all exist but in books, speeches and protocoles. Islamization of society, social order, Islamization of our nation is to go long way in the process initiaed by state. Corruption, smuggling, hoarding, black marketing and misappropriation are at galore. Amidst evil practices, immorality and obscenity issues are rather increasing day by day. Individuals contribute to these ills and society becomes prone to new challenges prior to having earlier ones addressed. Government cannot enforce policies as it makes rules and can direct physical

behaviour but not mental recesses of people. Social change can only be aroused and initiaed by government which can be materialized through reorganization of individual priorities and channelization of social decorum. Common man must be the center of concern for the framers of national policies. Until values of the economy are not Islamized other effort can work a little and fling the process of Islamization into suspicians. This is how common man in our society has become suspicious and cautioned. Suspicious of the people exploit common man and do not let him enjoy the liberties given to him by religion i.e. he is prone to fall prey to fundamentalism and suspicion as he receives no security from the society and the state in these matters of on psychological front.

Effort on Islamization by the government fiat is one half of the circle. The other happens to be the people i.e. society. Until Islamic economic and social reforms bring tangible and material benefits for the poor people disillusionment is likely to recur. This is important because no attempt on Islamization can get strong foothold unless people feel beneficial effects of such a fundamental social reformation on their daily lives, writes Shah (ibid). This how social amelioration is interlinked with working of state policies. It is an integrated coup to reorient individual as well as collective concerns to go hand in hand with modern challenges being posed to our state. Discovery of real basis of nation needs to address multifarious challenges viz brotherhood, equality, dissemination of justice, rule of law, elimination of poverty , uniform system of education, basic needs of common man, equal distribution of wealth, eradication of corruption, abolition of nepotism, extinction of prerogatives, and treatment of man as man are some to mention. State has made policies, promulgated laws and given a direction to the people of Pakistan to examine and implement these laws to their individual ambit of working. Islamization of Pakistan is not mere the task of Islamization of state apparatus generally and Islamic laws in particular but it is a conglomerate of determination, courage and will to live in modern world according to the principles of prosperous and ever growing life as enunciated in the Injunctions of Islam.

Ali (2000) considers Islam as unifying force for Pakistan. Zia's pledge for Islamization had led the controversies into hatred in the modernistic wing. Conflict created by the process of Islamization in politics has multifaceted implications; one of them can be stronger demands of secularization. Secular and modern minds sought refuge in loop holes in the Islamized English Laws. They argue practicality of the Islamized laws depict very low performance as compared to working of English Laws. Iqbal remarks in Ali (Ibid) that hundreds of thefts, robberies, dacoities took place since promulgation of Hudood Laws. It is every day practice in police stations that cases of theft are being registered but no one has been imputed since then on account of S*araqah* and *Harabah*. *Ta'zir* punishments are being awarded by the courts as usual. This fact questions either practicality or implementation of Hudood Laws. Despite having these arguments Islamization process from 1979 to 1988 has raised Muslim consciousness in the country to a considerable level. The very Islamization got public support maintains Ali (ibid). Reforms were introduced on Pakistan National Alliance's (PNA) slogan as "Nizam-e-Mustafa" in the state is indispensable. Zia after usurping initiated the process out of necessity he adds. Islamization anyhow supported his rule and prolonged it any way. He chose a way in which unifying character of religion while enforcement becomes divisive in the nature.

As there are several interpretations of the texts of the Injunctions of Islam are possible legislation based on one and leaving the other was obvious. It became more objectionable when it happened in hands of a userper. Elected government is never that much authoritative and assertive as dictators are. Nonetheless the effort on Islamization might have brought good results if consensus on legislation and cooperation from all religious schools and factions of society, to which laws are directed, were part of the process. Strong opposition emerged from women of literate circle of the society. They created Women Action Forum (WAF) to resist the apprehended injustice to women folk by the Hudood Laws. They claimed that their status is diminished as human beings. Islamization in this way caused feminist movement in Pakistan. Through this contribution it caused also a social change in Pakistan.

Emergence of religious pressure groups is another upshot of the process of Islamization. Government supported the traditional groups of Islamists and provided patronage to their institutions. As organization of mosque and *madaris* is out of the control of state apparatus and are autonomous to run their business. When government and religious groups came hand in hand on the discourse on religio-political matters went through a shift. In this way religious groups became more confident in restructuring and reorganizing themselves. Dedicated and emotional workers were asset of the religious groups. Whenever government needed their support they showed power play. In this way the rightist occupied ranks and files of power corridors. This convert of paradigm in religious groups and political world of Pakistan converted the religious groups into pressure groups.

Another result of Islamization of Zia is violent sectarian bias and prejudice among schools of thought. They thought their views as true Islam. In response to this approach rigidity and intolerance were promoted in followers of different schools. This exploitation in the name of religion turned into enmity between proponents of different schools in Islamic doctrine. Islam, the true unifying force for the nation and basis of Islamic state, would have worked for equality, tolerance, and economic justice, accountability before law, social tranquility, political freedom, peaceful co-existence and above all national integration had the consensus of the political and religious nature been at the back of the Islamization. On the other hand modernists who were less in number and also have limited interest in Pakistan could not propagate modern consciousness in the masses. People of Pakistan are only aware of blind adoption and lavish following of westernized life style. They think it is the only modernism. They are not informed that modernism is a critical approach to life and its challenges. It is not only state structure on lines of western theory of state but it is a movement for political, religious, social, economic, discussion and reflection on modern days issues. It creates such type of environment where thinking and reason lead towards solution of ever emerging issues in all spheres of collective, political and national life. This intellectual environment is a modern approach which must be pleaded and propagated in the society. This is the only solution to pacify the controversy on Islamization on one hand and provide true direction to the process of Islamization by providing a modern

framework of state apparatus on the other. The very framework can only emerge from the beneficiaries of modern ideological state i.e. people of Pakistan. This means a modern, democratic, progressive Islamic state working under the universal laws of Islamic Shariah. This potential is inherent in Islamic philosophy which is to be recognized in every age. This particle of movement is sole prerogative of Islamic principles owing to their applicability to each new situation says Iqbal in "Reconstruction of Religions Thought in Islam".

3.2 Conclusion

This chapter provides an account of efforts on Islamization of Anglicized laws in Pkistan since inception of the country. The segment of the study is a bit detailed list of events with reference to the Islamization process. The process was started with the Objectives Resolution in 1949. The impasse in the constitution making was due to duel between the Traditionalist and the Modernists. Particularly, on the way to the Islamization there were also three groups. Question of authority in matters of the Islamization made a point of controversy. One wing wanted it for *ulema* whereas the other thought it sole sphere of the chosen representative of the people. In the Constitution of 1956 provisions for Islamic Research Institute and Islamic Commission, though not materialized, are part of the records. Twenty two points of *ulema*,MFLO 1961, Advisory Council of Islamic Ideology of 1962, Prohibition of Prostitution Act 1962, Council of Islamic Ideology 1973, Hudood Ordinances 1979, Shariat Benches of High Courts, the Zakat and Ushr Ordinance, Federal Shariat Court 1980, *suo moto* power of FSC 1982, Ansari Commission 1983, Ulema Conventions, Private Shariat Bill 1980, Enforcement of Shariat Act 1991, Revival of the Constutution Order 1985 and Islamic Provision in the Constitutions of Pakistan provide an insight into the process of Islamization of the State in general and the Islamization of Laws in particular. This elaborated account provides basis for analytical review of the Hudood Ordinance in the next chapter and creates a space to consider them in relation to their impact on citizens.

CHAPTER 4

DISCUSSION AND INTERPRETATION

Islamization is a matter of public concern. Masses are the ones who have to submit them for observance of Islamic ethical, moral and legal system. People are to suspend and forgo their worldly benefits in favour of divine laws. Individual interest needs to be set aside in favour of collective betterment. It is only possible to achieve the goals of Islamization when people will be ready to cooperate with government. Religious fervour in people will arouse them not to draw amounts form banks to escape from compulsory *zakat* deductions, not to take loans on interest and not to take alcoholic medicines. This is how Islamization process can only be materialized on one hand. On the other every government wants to sustain its economy, maitain their vote bank and develop good relations with other countries. Governments show reluctance while implementation of Islamic laws. Legal state apparatus in Pakistan supports rich people who do not want to leave their perks. There is a perpetual pressure on governments from other countries on issue of Islamization. Also there is a sorry state of affairs with reference to differences among different schools of thought (*masalik*) in Pakistan. They give rise to secteriansm on account of difference of opinion. Followers of a sect ignore the greater interest of national integrity and solidarity to vouchsafe petty (egoistic) interests. It is required that scholarship in multifarious fields of modern life must invest them in the business of state craft. This in turn emphasizes need to establish institutes of religious education to foster the required modicum to Islamize all stairs of state business. The scholarship must commit to rectify of existing state apparatus in the country. They are to build up the required religious aptitude both in the masses and state officials. It is however necessary to make the learned lot in Islamic legal doctrine part of stae machinery to prepare the base for the islamization process. This chapter examines the procees of Islamization of legal state apparatus. It also analyzes the efforts and their results to examplify that how did it work. In doing so a link is established with the modernization of the Islamized legal state

apparatus. Based on this discussion ground is prepared to draw conclusions for state Islamicity and Modernity.

4.1 Laws at the Time of Independence of Pakistan

On inception of Pakistan Government of India Act of 1935 was adapted to fulfill legal requirements of the country. Only some parts of the Act were changed and the country started its business under the colonial law. All laws for the time being enforced were adapted with changes of nomenclature only. Criminal law of Pakistan happened to be the Indian Penal Code. New name given to the Code was Pakistan Penal Code. Pakistan tried to sustain its judicial system under the borrowed laws. It needed a constitution in the first place. The same could not be made for nine years owing to controversies on place of religion in the state business. But the basic parameters of the new born state were sketched out in the Objective Resolution in 1949. Differences between the right wing and the left wing prolonged more than expected. As a result of compromise between the traditionalist and the modernists the Constitution of 1956 was made. It remained operative for three years only. First Martial Law deprived the nation of the hard earned Constitution.. In these circumstances other laws could not be amended or re-enacted in accordance with the slogans of independence and true spirit of freedom. The wave of Islamization arose with the Commission of 1956. It got attention in the Constitution of 1962 by establishing an Advisory Council of Islamic Ideology. The same body was renamed in 1979 as Cuncil of Islamic Ideology. Institution of the Federal Shariat Court created an atmosphere of awareness regarding Islamization of the state. Through long and hectic work of the Council the task of Islamization started getting roots in the country under state power under the patronage of the Third Martial Law regime. Criminal laws which were made by the colonizers to facilitate their rule and promote their control over the locals were put to change according to the promises throughout the freedom movement. This sea change in the Criminal Laws of Pakistan brought no minor change in the state apparatuses. Criminal cases are being dealt in accordance with Pakistan Penal Code (XLV of 1860) and Criminal Procedure Code (XLIV Of 1898). These Laws are implemented in courts in company of the Evidence Act 1872. At the time of independence of Pakistan these laws were

adapted to run the system of administration of justice in the country. These laws were prepared to control subjects of a colony of British Empire. They were also prepared in prejudice to the existing Muslim laws at the time British occupation. Major justification for enactment of these laws was to relieve the English judges from the local officer of the courts i.e. *muftis* in case of Muslim Laws and *pandits* in case of Hindu Laws. It was purported that consultation with the local court officers was a hinderance which caused unnecessary delays in propagation of justice. The English Judges could neither act according to their own conscience nor could they evade their ears from the advice by the *muftis* and *pandits*. To do away with this situation they made uniform laws for their India subjects.

Pakistan needed Islamic laws to govern judicial system and disseminate justice to the people. The laws promulgated at the time of independence through adaptation of Anglicized Laws could not serve this purpose. These are being Islamized following a due course since independence of Pakistan. An account of Islamic Criminal Laws is presented here for understanding of their nature as well as contribution to provide relief to the people of Pakistan.

4.2 Process of Islamization and Constitutional Position

Islamization process as enunciated in Article 2A of the Constitution of Pakistan 1973 declares that the state is to provide atmosphere to Muslims to order their individual and collective lives in the light of the teachings of Holy Qur'an and Sunnah of Prophet (Peace be upon him). Article 2 informs about the place of religion in matters of state business. Islam stands state religion to chalk out structure as well as working of the state organizations. The process is explained in article 227 of the Constitution of 1973. All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah. In this part the concern is repeated that according to the the Injunctions of Islam, no law shall be enacted in repugnance to Qur'an and Sunnah (the basic sourcse of Shariah). All laws shall also be based on these two basic sources of Islam Law. The Objectives Resolution has got constitutional force as substative part of the constitution. Enforceability of the Objectives Resolution, through the courts, being part of the Constitution, is ensured. It can be enforced on this *locus standi* in courts of the

state as against its previous status as preamble. It is validated in the Constitution that if any state functionary or organization acts beyond the spirit of the Objectives Resolution it can be questioned in the court of law. Such acts shall be declared void.This is how this document becomes touchstone of lawfullness as per requirement of the Islamic Injunctions. Keeping in view this thumb rule courts are bound to ignore laws which are protected under Material Laws and other laws and over step such provisions that they are in confrontation and contrast with the supreme law of Allah Almighty (1990 CLC 1683). The powers of legislature are not unlimited. It can not pass laws relating to taxes. These laws are un-Islamic. The command of the Article 227 is for legislation in all fields of state affairs. Tax authorities have no powers to lay down un-Islamic rules. Niether legislature can enanct laws against the Injunctions of Islam nor any functionary or authority can make rules thereunder (PLD 1989 SC 6131).

The Constitution itself provides the mechanism to carry out the process of Islamization. The way of Islamic life as urged by the Muslims of paksitan at the time of independence started towards its materialization with the foundation of the Council of Islamic Ideology. Members of this Council were setected on the basis of their knowledge of philosophy of Islam according to the Islamic Injunctions. According to the criteria for the selection one must have understanding of political, legal and economic issues of Pakistan. They are being taken from all schools of thought in Pakistan. At least two members are judges of the Supreme Court or the High Court. At least four members must have been engaged previously in Islamic research and teaching of Islamic values i.e. religion or law not less than 15 years. Representation of women is also made compulsory by the Article i.e. one woman must be taken as member of the Council (Art 228).

Parliament, the President, Governors of the provinces or at least forty percent member of the National Assembly, Senate or any Provisional Assembly may refer any proposed law to the Council for advice. The Council shall furnish its advice whether the proposed law is or is not repugnant to Qur’an and Sunnah i.e. Injunctions of Islam. This provision is stated in Article 229. The council forwards its recommendations to the Parliament or Provincial Assembly for enabling and arousing the Muslims of Pakistan to follow Islamic way of life. The council makes

recommendations for bringing the existing laws in accordance with the Injunctions of Islam. It also informs about measures required to do this job by furnishing stages of the process. Along with providing advice to the Parliament, the President, Governors or The Provintional Assemblies on Islamicity of the purposed law it is also responsible to provide guidelines to the Parliament and Provincial Assemblies to legislate on injunctions of Islam followings a possible course of action. It is to provide laws as drafts compiled in required legal form and format. On matter referred to the council 15 days' time is given to inform the referring agency about the period in which the advice sought would be ready and furnished. If any purposed law which is enacted before the pending advice the same shall be reconsidered by legislating house upon receipt of council's advice if found repugnant to Islamic Shariah i.e. Qur'an and Sunnah. Council was also given task of reviewing all existing laws with in seven year of its inception. The Council's performance in this has been very slow, owing to different reasons and circumstances. However a detailed section will provide an appraisal on the working of the council in a forthcoming section of this chapter.

As previous constitutions provided for enactment of the laws in line with Shariah and all laws repugnant to the Injunctions shall be brought in conformity with the Injunctions e.g. Article 198 of the Constitution of 1956; the Constitution of 1962 also provided for establishment of an Advisory Council of Islamic Ideology to examine all existing laws to bring them in conformity with the Islamic Shariah. The responsibility according to article 6 (1) regarding decision on any proposed law is or is not in violation of Qur'an and Sunnah was of legislature. Neither of the constitution provided for binding nature of these provisions through courts. In the same way the Constitution of 1973 also provided for establishment, composition, procedures and functions of the Council of Islamic Ideology under Article 227-31 but without having binding nature of its recommendations through courts. Military regime after *coup d,etat* of Jul, 1977 took concrete measures for Islamization of all existing laws and sanctioned their enforceability through courts. Zia-ul-Haq announced soon after his take over that courts will be given powers to strike down laws which are against Qur'an and Sunnah by declaring them null and void. For this purpose an order was enforced on December 2, 1978 namely "Supreme Court Shariah Bench Order". It took effect from 10-02-1979 (12 *rabi-ui-awal* 1399 A.H). Four Shariah Benches were established in

four High Courts and fifth Shariah Appellate Bench was established in the Supreme Court of Pakistan. They were conferred powers to write off all existing laws and future laws which happen to be in contrast with Qur'an and Sunnah. The exceptions to the powers of such nature were: Constitution, Procedural Laws, Family laws, Fiscal Laws on working of tribunal and or collection of taxes or insurance procedures for three years and this period was extendable to 10 years. Recommendations of these courts to reshape the laws to be inconsonance with Shariah and expunge their inconsistency were binding on government for implementation (APLD 1995:41). Till May 26, 1980 the Shariah Benches of High Courts worked in their areas of jurisdiction but on 27 May, 1980 Federal Shariah Court with head office in Islamabad Capital Territory replaced them.

4.3 The Federal Shariat Court (FSC) and Process of Islamization

At the time of its institution total 8 members with 5:3 ratio i.e. five judges and three traditional ulema formed the Court. The *ulema* were to be well conversant in Islamic Theology, Jurisprudence, and Laws. From May, 1982 onward, Federal Shariat Court was given powers to take *suo moto* action to examine any law of the land. Prior to March 1982 the Federal Shariat Court could start only investigation on application of any citizen regarding Islamicity of any law. The enhanced powers enabled the Court to suggest the Parliament amendments in the laws. Such judicial review of the laws was first example of its kind in the Muslim world. No such example is found in the Islamic history under the Muslim rule. One reason of non existence of such reviewing power under Muslim rule can be the laws were made by the people of high calibre in matters of Islamic Jurisprudence (*fiqh*) and in the sources of the Islamic Laws simultaneously. In case of a new situation where explicit instructions were not found in Qur'an and Sunnah they applied their judicial mind to decide the cases in the light of rules enshrined in the continuously propagated sources. They preferred their opinions (*fatawa*) which were considered precedents for future cases. Power of judicial review under the Constitution of 1973 is a very important tool, a potent instrument and obligatory aid for rapid process of Islamization of the state apparatus. This is termed as silent revolution in Pakistani legal system to change the Anglo-Muhammadan Laws

into full fledge system of an ideological Islamic state; the *raison d'etre* of Pakistan--citadel of Islam in the modern world of the 21st century. Decisions of the Federal Shariat Court and Shariah Appellate Bench have brought an upheaval in judicial history of Pakistan. Instances of the some of the leading cases informed about the land mark and seminal impact on future process of ajudication. In May 1980 Fedral Shariat Court was established by consolidation four Shariah Benches of High Courts. Article 203A was inserted with a new chapter of the Constitution – Chapter 3A. Article 203A overrides all other Articles of the Constitutions. In Article 203C composition of the Court is given. Court consisted of 8 member judges, all of them being Muslim by faith says Article 203C (2). Chief justice of the court is a judge who has been permanent judge of a High Court or has been a judge of the Supreme Court or so qualified, contemplates Article 203C (3). Three member judges are *ulema* who are adept in Islamic Jurisprudence (*fiqh*) and Islamic law. Four judges of court are the one who has been judge or serving judges or qualified to be a judge of High Court. Shah (1992) writes on establishment of the Federal Shariat Court that the High Courts worked with piles of cases awaiting hearings. Judges of the High Courts appointed in Shariat Benches used to dispose matters in the High Courts as well. In these circumstances four of the Shariat Benches were replaced with the Federal Shariat Court through an amendment in the Constitution. The court was to decide whether a law or any provision of the law is repugnant to the Islamic Injunctions or not along with the decisions about the validity and conformity question. The court was also to hear appeals and revisions against the decisions by criminal courts and the High Courts in *Hudood* cases. Decisions of the Federal Shariat Benches were binding on the High Court and all subordinate courts. There was a forum where decisions of the Federal Shariat Court could be questioned i.e. Supreme Court of Pakistan (Shariat Appelate Bench). The court kept on working with its jurisdictions as usual on the petitions of the citizens of Pakistan, Federal Government or Provincial Governments according to the Article 203(DD).

On 22 March 1982 through and an amendment in the Constitution the Federal Shariat Court was given *suo moto* powers: "The court may either on its own motion or on the petition…" start investigation in respect of any law. The Court after examination of laws if found against Qur'an and Sunnah would inform the Federal Government or the Provincial Government and

would give sufficient time to furnish their stancee on the issue.When the court decides that some law is against Shariah i.e. Qur'an and Sunnah it will write the reasons of its being so. The court will also notify the extent to which the law or any provision of the law is repugnant to Islamic Injunctions. Court will also give the date of taking effect of the decision. In this way the law and the provision of any law declared in opposition to the Islamic Injunctions will cease to have effect from the date of effectiveness of the decision. President or Governor is bound to take steps to amend such law to bring it in consonance with the Injunctions of Islam.

Apart from the petitions from the citizen, the President or Governor, *suo moto* authority, appeals against decisions of criminal courts in *Hudood* cases and revisional powers in *Hudood* cases tried in trial courts the Federal Shariat Court is conferred powers to *suo moto* revisional powers regarding cases tried or under trial in trial courts related to *Hudood* matters. The court is empowered to call the court under it to suspend proceedings of any case and call record of the case. The Federal Shariat Court may suspend execution of any sentence or order of release of the acccused from confinement on bail. The Court calls for record to satisfy itself, to know, examine it regarding its "correctness, legality and propriety of the findings or sentence". The Court in the cases so called, may enhance the sentence. But the Court has not power to convert any acquittal into to conviction. The court also provides the accused opportunity to defend him in Hudood cases in which order of the sentence of two years or more are passed as *Haddd* or *Ta'zir* and the cases are appealable before the Court.

Juditional review of this nature is i.e. *suo moto* notice of any law and its examination and analysis with reference to its conformity with Islam is "extra ordinary jurisdiction which has been conferred here is unheard of in the history of justiciability and is very powerful means of accomplishing the process of Islamization of law with in shortest period" writes Shah (1992: pp 6-7).

Here are some of the leading cases:

(a) Customary Laws cannot impose Restriction

In Punjab ancestral agriculture land was subject to customary laws and could not be disposed of freely. One could only appropriate self-acquired land without restriction. The ancestral agriculture lands were restricted as hereditary ancesstoral property. Rights in ancestral agricultural land were restricted. The Court declared that distinction between ancestral property and personal property or non-ancestral land was detestable according to the spirit of Islamic principle s of inheritance. So it could not be sustained (PLD1983 SC 273) Federation of Pakistan vs. Muhammad Ishaq.

(b) Inconsistancy of Pre-emption Acts of Punjab and NWFP

In Government of NWFP vs. Said Kama Shah (PLD 1986 SC 360) it was held that Islamic spirit of adjudication is now being governed by Islamic principles. Provisions of Punjab Pre-emption Act 1913 and North-West Frontier Province Pre-emption Act 1960 were based on customary laws which were not in accordance with the Islamic Shariah Law. Both of the enactments had caused a big deal of litigation in both the Provinces. The provisions have also been declared against Islamic Injunctions by the Federal Shariat Court.

(c) Doctrine of *Caveat Emptor* declared un-Islamic

Shariat Appelate Bench of the Supreme Court of Pakistan has given ruling in a pubic interest petition in Public at large vs. Federation of Pakistan (1988 SCMR 2041) that there is nothing like *Caveat Emptor* in Islamic Law. The seller is bound to disclose to the purchaser all of the defects in the property under sale without any special enquiries by the purchaser regarding the subject of the sale.

(d) Right of Appeal against Decisions of the Court Martial

Defence Forces of Pakistan are being governed by their own laws: Pakistan Air force Act 1953, Army Act 1952, Navy Ordinance 1961. Section 162 of PAF Act, Section

133 of Army Act and Section 140 of Navy Ordinance bar convicted person to prefer an appeal against his conviction by a Court Martial which is inconsistent with the tenets of justice. These sections are also against the sense of complete and thorough justice in Islam. Discipline of the forces would be affected by giving this fundamental right is hardly a justification not to grant the right of appeal as this right can be granted even in *Hudood* cases. So, denial of the right of appeal under sections: 162,133, and 140 of PAF Act 1953, Army Act 1952 and Navy Ordinance 1961respectively is found repugnant to the Injunctions of Islam. It is therefore necessary to carry out amendments in the provision of the above mentioned sections of the laws to grant right of appeal to the aggrieved person against decision of the Court Martial in the three sister forces except on *Hudood* cases (Federation of Pakistan through Defence Secretary vs. General Public PLD 1998 SC 8).

(e) Murder is Compoundable in Islamic Shariah

In a leading case: Gul Hassan Khan vs. Ministry of Law (Secretary), the decision had the greatest effect in justice system of Pakistan. In the consolidated judgment, by the Federal Shariah Court, the Shariat Appelate Bench of the Supreme Court of Pakistan held unanimously as under:

i. Offences against human body are compoundable. The Section 229-338 of Pakistan Penal Code (PPC) 1860 are in contrast to the Islamic Shariah as they do not provide for *qisas* (retaliation) for willful and deliberate murder (*qatl-e-amd*), deliberately causing hurts (*juruh-ul-amd*) as given in the Holy Qur'an and Sunnah.

ii. These Sections do not permit compensation (*diyat*) in case of *qatl* and *juruh* which fall under murder similar to willful murder (*qtal-e shub-e-amd*) and Hurts similar to willful hurt (*juruh-e- shubh-e amd*) as prescribed by the Holy Qur'an and Sunnah of Prophet (peace be upon him).

iii. These Sections also do not provide for grant of pardon to the offender by the victim in cases of hurt and by the legal heirs in cases of murder in which sentence of imprisonment in Ta'zir does not extend to life imprisonment.

iv. These Sections do not exempt lunatics, people of unsound mind, insane and non-pubert offenders from death sentence in case of murder.

v. These Sections do not define different kinds of murders and hurts as are described in the Islamic Injunctions.

vi. Section 109 of PPC 1860 is also against Islamic injunctions as enshrined in the Holy Qur'an and Sunnah. It specifies the same punishment for the offenders and abetters in case of murder and hurt to human body. It does not take into consideration various degree of the abetment.

vii. Section 54 PPC 1860 and Section 401, 402 and 402A of Code of Criminal Procedure (CrPC) 1898 are repugnant to the Islamic Injunctions as they empower Federal Government to commute the sentence in cases pertaining to the rights of people (*haqooq-ul-ibad*).

viii. Sections 337-339A of CrPC are in contrast to the Islamic Injunctions for permitting pardon tender to the offender without mention of or without permission of the victim in hurt cases and without mention of the heirs of the deceased in case of murder.

ix. Section 381 of CrPC is in opposition to the Injunctions of Islam as it does not provide for pardon by legal heirs of the deceased or to enter in compromise at the last moment before the execution of the offender/s.

x. Cut of date for operation of these sections was 23 March, 1990.

The Supreme Court of Pakistan made a wave of wake in power corridores of presidency. President of Pakistan promulgated Criminal Law (Amendment) Ordinance 1990 substituting the Sections of PPC1860 and CrPC 1898. They were brought in conformity to the Injunctions of Islam. These amendments are known as Qisas and Diyat Laws. These laws define various kinds of murders and hurts. All cases on account of offences to

human body are declared compoundable in this legislation. Different punishments are prescribed for different hurts and murders. It also provides for monetary compensation to the victims or the heir of the deceased in the light of Islamic principles of justice.

(f) Retirement without Show-Cause Notice

Civil Servants Act 1973 says a civil servant who has completed 25 years of service can be retired without prior show-cause notice. Majority of Shariah Appellate Bench of the Supreme Court of Pakistan opined that retirement related provisions of the Act without issuance of prior notice are unfair and are against the concept of justice in Islam. Qur'an emphasizes on undiluted justice i.e. *qist*, *adl* and *ihsan*; the components of full justice. These tenets provide protection against unfair treatment of men (PLD 1987 SC 304 Pakistan and Others vs. Public at Large).

(g) Freedom of Press (PLD 1988 SC 202)

Advancements on the freedom of speech has been mentioned in this case. The court observed that provisions of Press and Publication Ordinance 1963 are against the Islamic Injunctions as enunciated in the Holy Qur'an and Sunnah. No restriction can be placed on the practical activity in which people strive for their betterment. In Islam every person has a right to maintain himself through effort and labour. Islam favours and holds esteem for every kind of work. No unreasonable and undue pressure, impediment and interference can restrict a person's desire to run a printing press or print a journal or any newspaper. Impediments of this nature found in the Ordinance 1963 are un-Islamic and have no legal implications and have no effect.

(h) Restriction on Holding over and above the Maximum Ceiling

Shariat Appellate Bench of the Supreme Court of Pakistan ruled on 10 August, 1989 that provisions regarding maximum holding of land by an individual owner given in law reforms regulation 1972 and Land Reforms of 1977, replacing bar on holding in excess to

ceiling given therein were un-Islamic. They were struck down on account of these restrictions against Islamic Injunctions (Qazlibash Wakf vs. Chief Land Commission, PLD 1990 SC 199).

(J) Interest and Mark-up (Profit)

All statutory laws on fiscal bargains permitting interest (*riba*) are found invalid and null and void by the Federal Shariat Court {Mehmood ur Rehman Faisal vs Ministry of Law (Secretary) PLD 1992 FSC1}. Following satatutes contained provisions permiting interest (*riba*): Interest Act 1939, Government Saving Bank Act 1873, Negotiable Intermurauisition Act 1881, Land Acquiion Act 1894, Code of Civil Procedure 1908, Cooperative Societies Act 1925, Insurance Act 1938, State Bank of Pakistan Act 1856, West Pakistan Money Lender's Ordinance 1960, Agriculture Development Bank Rules 1961, Banking Companies Odinance 1962, Banking Companies Rules 1963, Banks Payment of Compensation Rules 1974, Banking Companies (Recovery of Loan Ordinance 1979). All of these statutes were struck down by this decision. It was held that payments in excess as interest were repugnant to the Islamic Injunctions. Also the new system of Mark-up (Sections 79 and 80 of the Negotiable Instrument Act 1881) permitting amount payable in excess to the principal amount violates the Islamic Shariah and it is similar to interest, hence it was also struck down. The court also ordered deletion of word "interest" where ever found in the satatutes. It was to be deleted till 30-6-1992.

4.4 Methodology of the Court to Examine the Islamicity of the Laws

The Federal Shariat Court follows the following course to ascertain about a provision of a law; whether is it in consonance with Qur'an and Sunnah or is in contrast with them.

i. In the first place the Court tries to find a verse in the Holy Qur'an on the issue.

ii. On not finding any explicite verse in Qur'an the Court searches a relevant Report of Prophet (peace be upon him).

iii. When a verse or Haddith is not available the Court tries to discover the hidden (intended) meaning of Qur'an on the subject from tradition in similar circumstances and similar situation.

iv. Next step in case of non-availability of all above requsites the Court is to find out opinion of jurists in previous centuries as well as in modern era.

v. The Court analyzes all of the opinions adopted and tries to synthesize with the modern day needs. It applies such opinion and harmonizes it with present question in current settings. In doing so the Court follows the opinion of majority of the jurists.

vi. Incase no synthesis of this kind is feasible the Court then attempts to discover an option which is not according to the opinion of earlier jurists that seems consistent with Qur'an and Sunnah.

To explain with more lucidity Shah (1992) refers to PLD 1986 SC 240 (Shariat Appellate Bench of Supreme Court vs. Public at Large). Superficially while clarifying Islamic Injunctions one may notice possibility of divergence. It is a very hard exercise in fact. No interpretation can be acceptable from the plain text of Qur'an and Sunnah with its "*khamir*" and "*zamir*". While expounding the Qur'an and Sunnah the court remains under obligation "in case of need during a new approach or to meet a new situation". The Court is always mindful of its duty and keeps in foreground:

i. The relaxation of rule can only be given when survival and progress of the society is impossible without the relaxation sought. Depending on the given circumstances very limited relaxation can be exercised.

ii. Before performing oe giving a relaxation accepted rules must be born in mind: *ijma, ijtihad, urf,* zarar, *tawil* along with methods like *isthehsan, masaleh, istehsan,* etc.

iii. The principle/s being followed must have support in Qur'an and Sunnah.

iv. Need may be compared with the similar needs in the past. A close examination is necessary as to how the earlier qualified people dealt with that need and what the results were. This comparison may be extended to other countries.

v. Look for the precedents in the works of good repute. Precedents can be followed with the good intentions from abroad as well. Local precedents which are binding the courts do follow them. Non-binding precedents may be consulted for help. If foreign precedents can be consulted why not to consider precedents from *Sahabah* and *Imams* of different schools of ulema of erudition.

vi. While interpretation of Qur'an and Sunnah view of Four Caliphs, Companions and the people who followed them are of importance. A middle way is needed to evade criticism of *taqleed* and *tajdeed* to pave way for gradual elimination of sectarianism.

vii. While resolving a new issue at hand it is necessary to know what Islamic way of safeguarding the interest of *umah* is. It must go hand in hand with collective conscience of *umah*.

viii. Keeping in mind the above exercise and following the steps according to the situation answer to the question must be sought through spiritual and mental faculties.

ix. In a totally new matter and unoccupied field the tradition reported by Muaz (Allah shall be pleased with him) is a guiding principle to be applied with full judicial consciousness.

4.5 The Council of Islamic Ideology (CII)

Under Article 228 of the Constitution of Pakistan the Council of Islamic Ideology was established to examine Islamicity of all existing laws for the time being enforced in Islamic Republic of Pakistan. Notification of the establishment of the Council was issued in Gazette of Pakistan 1974 Pt. II page 165. The Council was not more an advisory body like its predecessor "Advisory Council of Islamic Ideology" instituted under the Constitution of 1962. Work of the

Council has been analyzed and criticized at various fora and levels. Work of the Council is multidimensional in nature. It is entrusted with the of Islamization process in all spheres of individual as well as collective life of masses of Pakistan. Ahmed (2009) says that the Council of Islamic Ideology disposes of its duties with reference to micro Islamization perspective. Ambit of working of the Council is within the boundaries of Islamic Republic of Pakistan. It is known as domestic Islamization. In this way the Council is entrusted to propagate, strengthen and uphold Islamic Ideology. Islamic value system is all encompassing in its character including social, economic and traditional facets. It is responsibility of the Council to safeguard the Islamic value system. In doing so it operates at three levels: Physiological level, social and economical level and political level. Efforts are made to promote the moral values in society. This task is directed to individuals as well as community. The ethical system of Islam binds its followers to follow the modest way of life. The Council tries to train and shape the individual and collective character of the followers of Islam according to the ideas enumerated in Qur'an and Sunnah. This is aimed at developing aptitude of Muslims with firm roots in their personality. True Islamization springs from the psyche and thought process of an individual Muslim. The Council works at this front as it is obligatory to strengthen philosophical dimensions of religious life to translate Islamic ideology postulates into individual and collective life of followers of the religion.

Social sphere of life of Muslim community is main actor in the process of Islamization. Societies rely on their economic system for survival. In every society social and economic issues have mutual relationship. The Council keeps an eye on the socio-economic structure of society in the country. It focuses on basic principle of Islamic economy--wealth should not accumulate in few hands but it should circulate among the people. Exploitation of poor at hands of wealthy people must be checked for this purpose. Islam bans interest in any of its kind/forms. According to Islamic Economic Policy every member of the community can invest his wealth in any lawful business. The Council tries to promote egalitarian society free from expliotation and corruption.

Islamic system is based on progressive principles. It has particles of movement in it which assimilates new political dimensions. Islamic society is founded on principles of justice,

equality, tolerance, mutual harmony and survival. Political order of the Muslim society resolves political, social and economic issues in the light of Qur'anic prescription which is interpreted in line with the Sunnah of Prophet (peace be upon him). Chosen people dispose of matters of the state on behalf of the Supreme Authority. They are answerable to the omnipotent and omnipresent power at one hand and to the people of Islamic state on the other. Representatives of people work as trustees to safeguard rights of the beneficiaries. The Islamization process at political level is under the Council of Islamic Ideology cultivates sense of responsibility among elements of the society. It inculcates concept of service to humanity while being in public office.

Article 228 of the Constitution provides for the composition of this Islamic institution. In Article 228(2) it is specified that the President of Pakistan shall appoint the members "not less than eight". It also restricts number of members to maximum 15. In the wave of Islamization president of Pakistan (then Chief Martial Law Administrator CMLA) while suspending the Constitution of 1973 not only left operative the Council but also enhanced number of its members from 15 to 20. This enhancement in the number of membership was made through the Fourth Amendment {under Presidential Order (PO) 16 of 1980} and it took effect on 30 November, 1980. Increase in number of members was done to accelerate the process of Islamization under supervision of the Council. As it is stated earlier that job of the Council is to advise the President, Governor, the National Assembly and the Provincial Assemblies as to how Muslim residents of Pakistan can mould their lives individually and collectively according to the principles of Islamic doctrine as enunciated in the Holy Qur'an and Sunnah of Prophet (peace be upon him). Upon a reference from the President or Governors the Council is also entrusted to decide after analysis of any proposed law whether it conforms to the Islamic injunctions or not. Furthermore, the Council is given responsibility to inform the government as to how all laws for the time being enforced in Pakistan can be brought in line with Islamic Injunctions. Alongside giving manyfold advice to various institutions of state administration the Council presents rules of Shariah in draft form to give it effect of law after necessary process and readings in the National Assembly. Amin (1989) sums up all efforts by the Council of Islamic Ideology under four headings:

i. Making / Bringing all existing laws in consonance with the Injunction of Islam (Qur'an and Sunnah)

ii. Advising the legislature/s for new legislation in accordane with the Injunctions.

iii. Restructuring the Constitution of Pakistan in the light of the Injunctions.

iv. Making effort to Islamize society and to take all legal and missionary steps and counseling measures in this regard.

A brief detail under every head is presented here as given by Amin (Ibid) for making a base for discussion on next segments of the study.The Council started its work from analysis and examination of the Pakistan Code in 1981. It completed examination of 8 volumes of the Pakistan Code by reading 227 laws out of which partial changes were suggested in the 67 laws. The Council recommended abolition of the 11 laws altogether. Only two laws were recommended for restructuring according to Qur'an and Sunnah. This progress was till 1989 according to Amin (Ibid). As task of examination of remaining volumes of the Pakistan Code was taken up by the Federal Shariat Court established in 1982 the Council restricted to the areas which were out of the jurisdiction of the Federal Shariah Court. The Council then started work on Fiscal Laws, Family Laws and Insurance Laws. Under these and many other headings the work of the Council was completed till 1973 but a consolidated report on all laws could not be presented in the National Assembly with in the seven years of inception of the Council of Islamic Ideology i.e. 1980. However, it kept on presenting annual reports before the House as per Article 230(4). The Council also presented four of its reports for the perusal of the National Assembly in 1981-1982. Apart from these reports the Council finalized three reports on Educational System of Pakistan, Means of Communication and Social System of Pakistan (Annual Report on Islamization 2009 p.7). In pursuance of Article 230(4) and the Order of the President of Pakistan the Council presented draft of laws on *Qisas* and *Diyat*, *Qanoon-e-Shahada*t, *Hudood Laws*, the *Zakat-o-Ushr* Ordinance, Maintenance, Interest Free Banking among others as mentioned in the Annual Report of 1982-83. The Final Report on the Pakistan Code was presented in 1996. After presenting the Final Report as per the constitutional obligation the Council was not answerable for yearly reports but it continued its job and presented a report in continuation of the process in 1998. The Council

was able to publish 93 of its publications till 2009. This number includes the Annual Reports on Islamization and other reports on various topics. Twenty seven reports are the Annual Reports on Islamization, 37 reports are on Islamization of laws and eight reports are on the Islamization of economy, four reports are on social reforms, two reports deal with the questions of common importance, two reports deals with terrorism and Hudood Ordinance 1979 and one report is on Education System of Pakistan. The Council also publishes a journal in the name of "*Ijtihad*" after every three months. List of the publications given in annual report of 2009, shows 86 publications. This is a remarkable contribution towards Islamization of not only laws but whole state apparatuses. One cannot blame the Council of Islamic Ideology for not making the laws in accordance with the Islamic Injunctions as it is out of its jurisdiction. It presented numerous drafts on new laws but a few of them could be made laws by the Parliament.

General Muhammad Zia-ul-Haq showed his resolve to change western form of the state apparatuses (especially Laws) declaring them un-Islamic. He sought the advice of the Council on change of the system of the government in the country. The recommendations on the issue were presented to the President. His Excellency did not find the recommendations according to his satisfaction to fulfill the purpose. He returned the report on recommendations on the change of the system of government and ordered further detailed report on the issue. The Council kept on reflecting in several of its meetings at last it represented the required report to the President on 06 June, 1983. Dr. Tanzil-ur-Rehman then, Chairperson of the Council opened the report with themes of an Islamic society made on the basis of Qur'an and Sunnah, which has a specific atmosphere of coexistence without discrimination on account, colour, race and faith. Every citizen including a common man to the President of the country, directly or indirectly, participates in the administration of the government. They cultivate the values: sense of responsibilitity and accountability, rule of law, administration of justice, sincerity and observance of principles of Islamic way of life, single-mindedness to enforce the golden principles of the Holy Qur'an and Sunnah to establish administration of government. The same is depicted in the constitution for the state made by such a people. Chapter one of the Report tells guiding principles and in the second chapter basis of Islamic state, its functions and form of government are discussed. Constitutional

elements of an Islamic state are described in chapter three. Last chapter i.e. Ch 4 informs about as to how the government of the state will be made. Details of the system seem out of scope of this study. Nonetheless, this valuable effort was forwarded to the Commission (Ansari Commission 1983) by the President. It went into oblivion of the power like many of the other recommendations of the Council.

There are some positive steps taken by the government to enforce recommendations of the Council. For example institution of the Shariat Appelate Benches of the High Courts, in the first place, was done on the recommendation of the Council. The same were replaced with the Federal Shariat Court on recommendation of the Council. The Council recommended for isntitution of a permanent Law Commission which was to be headed by the Chief Justice of Pakistan. Legal education in Urdu medium was also started in the country to facilitate students of law. A university in the name of International Islamic University was established in Islamabad Capital Territory in response to the Council's views on Islamization of Education system as well as life of the educated people. The Council also furnished reports on: Islamization of the Society, Islamic System of Economy, Islamic *nizam-e-adl*, Social Reforms, Family Planning, Promotion of Islamic Society, Mass Communication, Islamic Beema,*taleemi sifarshat, Islam aur dheshatgardi, azadi-e-niswan ahd-e-risalat main, Islam or intha pasandi*, Elimination of *riba*, Jail Reforms 2009,*Muslim aili qwaneen*, draft of Law of Pre-emption, etc.

Despite these efforts the Council is often criticized for non deliverance. Performance of the Council cannot be materialized until the recommendations are not made laws by the legislature of the country. Drafts prepared by the Council were being changed continuously by the government officials for one reason or the other. The plea being the status of the Council as it is not a legislative body whose recommendations cannot be changed. Had the President Zia-ul-Haq shown concern he would have made changes to this effect. The Council does not have direct approach to the President or the Cabinet. Had the Council been given status of ministry so that it would have presented its recommendations directly for legislation. The delay in the materialization of the recommendations would have been reduced in this way. Amin (Ibid) grades

the Council of Islamic Ideology as a better forum of discussion and consolidation of the efforts with reference to the Islamization coup. On this platform renowned scholars from various schools put in themselves to assist the government for better Islamic understanding and perusal. Keeping in view the log of the recommendations amid limitations and criticism the Council cannot be reprimanded on account of sluggish approach towards Islamization process. Institution of the Council caused awareness of Islamic principles in every sphere of life generally and in business of the state particularly. Ahmad (2009) considers its unfortunate of the nation that recommendations of the Council could not be implemented. The pick and choose from the recommendations depicts half -hearted effort as regard to Islamization on part of the successive governments. While dwelling on the aftermath of the Islamization wave in Pakistan Ahmad (Ibid) draws on not very sound arguments that it widened the gap between the traditionalist and the modernists. However, suggestion as to the joint venture of all of religious groups could have been a better option. Power drew on Islamization as legitimacy tool for usurped power has been put forward by many including Ahmad (Ibid). Nonetheless, performance of the Council of Islamic Ideology leaves no room for gernalized statement like "it justified the power coup and legitimized Zia's regime as a catalyst in the process".

4.6 Islamization of Criminal Laws

In the changed circumstances Muslims of Pakistan, at least the right wing, demanded Islamic system of adjudication. The concern remained one of the policy points for all governments. The process of Islamization was documented in the shape of The Objectives Resolution. Several efforts in this direction were made since institution of the First Constituent Assymbly of Pakistan through the Constitutions of 1956, 1962 and 1973. There was strong air of dislike among orthodox and radical Islamist wing (the right wing) regarding legislation in the country. The military regime under Zia-ul-Haq took serious view of the prevailing situation in the country. He showed resolve to Islamize the criminal laws of Pakistan in 1979. In this way un-Islamic Laws: Pakistan Penal Code (XLV of 1860), Code of Criminal Procedure (Act of 1898) and Evidance Act of 1872 undergone change in various phases. In first attempt CMLA passed

five criminal laws in the light of Islamic Injunctions i.e. Qur'an and Sunnah. These legislations were given name of the Hudood Ordinances.

i. Offences against Property (Enforcement of Hudood Ordinance (VI of 1979)

ii. Prohibition (Enforcement of Hadd) Ordinance Order (IV of 1979)

iii. Offence of Qazf (Enforcement of Hadd) Ordinance Order (VIII of 1979)

iv. Offences of Zina (Enforcement of Hadd) Ordinance Order (VII of 1979)

v. Execution of Punishment of Whipping Ordinance (IX of 1979)

These laws were promulgated on, 10 February, 1979 (12 Rabi-ul-Awal 1399). Mehdi (2004:109) grades these legislations as "beginning of the implementation of classical Islamic Criminal Law". These Ordinances address crimes: Theft / illegal deprivation of property (*saraqah*), drinking of intoxicating liquor (*khamar*), blaming a pious lady of extra marital gratification of sexual desire (*Qazf*), adultery / fornication / extra marital gratification of sexual desire (*zina*). The punishments given for these offences are either *Hadd* or *Ta'zir*. This division is given in the book of Islamic Jurisprudence known as *ilm-ul-fiqh*. Modernists think of punishments harsh and brutal. Sentences likely to be imposed through these Ordinances are: Flogging, amputation of body parts, stonning to death and death against crimes of intoxication, defamation, theft / robbery and adultery respectively.

4.7 Grounds of Islamic Punishments

It has been declared in the Objectives Resolution that no law will be made against the Holy Qur'an and the Sunnah of (peace be upon him). Sources of Islamic laws provide punishment in respect of these crimes. Punishments in Islamic Criminal Justice System are of two kinds i.e. *Hudood* (fixed punishments given in Qur'an or Sunnah) and *Ta'zirat* (punishments left to the discretion of the court). *Hadd* is the right of Allah and enjoined in the Holy Qur'an. Hudood Ordinances define *Hadd* as punishment which is ordained in Qur'an and Sunnah of Prophet of Islam (peace be upon him). *Ta'zir* is a punishment which is not prescribed as for as the quantum of the punishment is concerned like *Hadd*. It is discretaionary punishment left to the *qazi*

depending on the case and evidence in hand. In definition clause i.e. Section 2 of the Ordinance on Offences against Property *Ta'zir* is defined that any punishment given in PPC is considered as *Ta'zir*. Other terms which are not defined in Ordinance, they have same meanings as in PPC and CrPC. Punishment of theft is given in Qur'an Surah: 5, Verse number 38. Translation of Holy Qur'an by Pickthal reads, "As for the theif, both male and female, cuto-ff their hands. It is the reward of their own deeds, an exemplary punishment from Allah. Allah is Mighty Wise." (The Glorious Qur'an p. 105). This is the punishment of theft for people who steal movable property of someone else from his / her safe custody (*hirz*) without permission and property is of denomination (one *nisab* or more) which is necessary for imposition of *Hadd* punishment. Punishment for robbery is given in the same Surah number 5 and Verse number 33. The translation from Pickthal (Ibid) reads: "The only reward of those who make war upon Allah and His messenger and strive after corruption in the land will be that they will be killed or crucified or have their hands and feet on alternate side cut-off, or will be expelled out of the land. Such will be their degradation in the world and in the Hereafter their's will be an awful doom" (p. 104). There are two more authorities from traditions of Prophet (peace be upon him) on punishment of theft. A famous report given in both the books i.e. *Sahih Bukhari and Sahih Muslim*; in which a women was brought in the court of Prophet (peace be upon him) on charge of theft. She was imputed of her hand. In another report of Prophet (peace be upon him) sentenced a thief amputation of hand who had committed theft for amount of ¼ of a *dinar* (currency of Kuwait nowadays) or more than it. These punishments are unanimously accepted in Muslim scholarship since the Prophet's time till now. As this punishment is continuously transmitted and accepted it has got consensus or jurisstice consensus (*Ijma*).

In case of *Zina* punishments are also ordained in the Holy Qur'an. Surah number 4, Verse number 15 says "As for those of your women, who are guilty of lewdness, call to the witness four of you against them. And if they testify (to the truth of allegation) then confine them to the houses until death take them or until Allah appoint for them a way (through new legislation)". This new legislation by the Almighty Allah is given in Surah number 24, Verses 2-10 (Pickthal Ibid). Verse number 2 of Surah 24 reads "the adulterer and the adulteress, scourge ye each one of them

with a hundred stripes. And let not pity for the twain withheld you from obedience to Allah, if ye belive in Allah and the Last Day, and a party of believers witness their punishment (Pickthal Ibid p.338)". It is reported in *Bukhari* and *Muslim;* that once upon a time a boy was brought to Prophet (peace be upon him) who commited adultery with his employer's wife. He was sentenced to 100 (one hundred) lashes as he was unmarried and he was also send to exile. A women from Ghamdiya tribe was brought to Prophet (peace be upon him) who committed *Zina*. She was releaved till her delivery of what was in her womb. After giving birth to a child she was again brought to the court of Prophet (peace be upon him) for imposition of *Hadd* punishment. She was stonned to death (*Rajm*) as she was married. Her sentence was passed on her in presence of a party of men. It was public imposition of *Rajm.*

The Counsil of Islamic Idealogy states that there is consensus of opinion on punishment of *Rajam* throughout Islamic world since Prophet (peace be upon him) time except people who rebelled against Ali (Allah be pleased with him) the Fourth rightly guided Caliph (*Khawarij*) denied validityof *Rajm* (Report on Hudood Laws p.16). Qur'an explicitly describes punishment of false allegation of *Zina* on a pious woman. Surah 24 of the Holy Qur'an, Verse number 4 contemplates: "And those who accused honourable women but bring not four witness, scourge them (with) eighty stripes and never (afterwards) accept their testimony- they indeed are evil doers-" (Pickthal Ibid p.338). This is safeguard provided by Almighty to expunge evil elements of the society. The social order of an Islamic society should observe the universal tenets of sanctity of mutual respect. It is state of mind which corrupts a man and he starts transgressing the limits of expected behaviour as enshrined in the Islamic Injunctions. That is why Islamic Shariah not only guides a Muslim how to protect his self respect but also instructs him to protect his intellect. Qur'an in Surah number 5 and verse numbers 90-91 enjoins upon Muslims "O ye who believe! Intoxicants and gambling (dedication of) stones and (divination by) arrows, are an abominate,- of satan's hand work: eschew such (abomination) that ye may prosper (translation as given in Report on Hudood Laws p.161). Surah 5 Verse numbers 90 and 91 are translated by Pickthal (Ibid pp.112-113) as: "O ye who believe strong drinks and games of chance and idols and divining arrows are only an infamy of satan's handwork. Leave it aside that ye may succeed. Satan seekth

only cast among you enmity and hatred by means of strong drinks and games of chance and to return you from remembrance of Allah and from (His) worship. Will ye have done?" *Hudood* laws are based on the the explicit instructions of texts of the Holy Qur'an and Sunnah (*nasus*). Before having a close critical reading of these laws it is better to note views of scholars, politician, Non Govermental Organizations (NGO's) and media regarding these laws.

4.8 An Explication of Views on the Hudood Laws

As Hudood Laws are sensitive matter none can take them lightly. Acomprehansive study was carried out by the Council of Islamic Ideology in 2004. The Council took following steps to deal with the issue efficiently:

i. The Council organized a platform for consultation of experts on Islamic Law. It arranged an International Workshop in May 2005 in this regard.

ii. An in house commmittee comprising legal experts and experts in Islamic Law was made in the month of March 2005. This committee forworded its report on Hudood Ordicances with recommendations in June 2006.

iii. Members of the Council visited other Muslim countries to consult Islamic scholars and experts in Shariah Laws. They were to collect relevant material on the subject from those countries.

The International Workshop was organized on 26 to 28 May 2005 at Islamabad. President of Islamic Republic of Pakistan General Pervaiz Musharaf pleased to inaugurate the conference. Objecticve of the conference was to know how to face the challenge of modern day requirements and erase of criticism on the Islamic Laws. Muslim Law was reduced to personal law by colonial rulers in many Muslim states they occupied. Revival of Islamic Laws in total as the law of the land poses a challange at one hand and the global move of modernity and notion of a democratic nation state raises numerous questions on the other. Human rights wave of activism adds to the issue. In this senario the debates on place of Hudood Ordinances in a modern democratic state has become a critical issue. The objective of the conference was to address these issues. The Council

also wanted to know the contribution of Hudood Ordinances in Pakistani society since their implementation. One of the major concerns of the Council was to counter biased and maligned criticism on the Shariah Laws. Conclusions drawn in the conference will be discussed in the closing segment on apparatus of the Hudood Laws.

The Council also constituted a legal committee to review the exiting laws. The committee under justice (R) Haziq-ul-Khairi was assigned the task of reviewing the laws between 5 August 1977 and 31 December, 1987. The committee discussed Hudoood Ordinances on 21 to 23 January, 2006 at Karachi. According to the findings of the committee the Hudood Ordinances had caused serious issues regarding their make-up and validity. They observed that revision of Hudood Laws through National Assembley was the only viable solution. The convenor of the committee suggested in 161st session of the Council at Islamabad, with approval of all members, that Hudood Laws must be reconsidered according to the true concept of punishment for crimes fixed in Qur'an and Sunnah and be stream lined with the principles of Shariah. The Laws may be made part of Pakistan Penal Code as it is working in respect of other crimes according to the Code of Criminal Procedure of Pakistan.

In local consultation by the Chairman of the Council with; human right representatives, women right groups, lawyers, journalists and ulema in June, 2006 following recommendations were made:

i. Recodification of Hudood Laws
ii. Element *afw* (pardon) must be included
iii. Payment of *Diyat* by *Bait-ul-Mal* where person is destitute
iv. Rectification of investigation process
v. Investigation by ASP rank officer
vi. Investigation from female litigants by female police officers
vii. Distinction between *Zina* and *Zina-bil-jabr*
viii. Elimination of discrimination against women in *Qazf* cases

Going through these developments with regard to Islamization process and its icon Hudood Laws an examination and understanding of the Laws become binding. In the following lines an introduction and analysis of Hudood Ordinances is given.

4.9 Analysis of the Hudood Ordinaces (1979)

Hudood Ordinaces are widely discussed at home and abroad equally. In the following lines a close study of these laws is presented to inform about their pros and cons.

4.9.1 Prohibition (Enforcement of Hadd) Order: On Use of Strong Drink (*khamar*)

Strong drinking is regulated through Prohibition (Enforcement of Hadd) Order 1979 (IV of 1979). It declares imposition of *Hadd* on taking intoxicatig liquor. According to this Ordinance intoxicating liquors are: beer, sprite of wine and all liquors containing alcohol which is used for intoxication. On taking such liquors which are declared intoxicants by the Provincial Government *Hadd* is to be imposed. *Hadd* is the punishment prescribed in the Holy Qur'an and Sunnah. Section three of the Ordinance prohibits import and export of intoxicants. Under this Section the wrong doer will be punished with imprisonment which may exceed to five years and along with flogging not exceeding 30 stripes and also with fine. Opium, Cola and their derivatives are intoxicants of severe nature. Exporter, importer, manufacturer and financer of these intoxicants are liable to life imprisonment but not less than two years along with stripes not exceeding 30 and also fine. The possession of the intoxicants is also a punishable to a term of imprisonment which may exceed to two years, whipping not more than 30 stripes and also fine. Non-Muslims can possess, foreigner and Pakistanis alike, intoxicating liquors for religious ceremonies only. The quantities should not be in access to the prescribed limit in the Section four of the Order. Section six of the Order defiines drinking as taking of an intoxicant without being forced (*ikarah*) and without being in fear of death (*iztirar*) by any means is guilty of drinking. In *ikarah* is included fear of injuery to the person, honour and property of the person himself or any othter person, extreme hunger with the fear of death comes under *iztirar*. Section seven of the Order

differentiates between drinking liable to *Hadd* and drinking punishable with *Ta'zir*. Section eight furthers with drinking liable to *Hadd.* An adult Muslim who takes the liquor by mouth is punishable with eighty stripes as *Hadd* on conviction by the court of appeal. Section nine enumerates the way of proving intoxicantion as confession in the court of competent jurisdiction or two male witnesses fulfilling the requirement of *tazkiah-e-shahood* (truthfulness, honesty and piety). On fulfillment any of the above conditions the accused is liable to *Hadd* punishment. *Hadd* will not be imposed on accused if he / she retracts the confession or any witness resiles from the testimony. The case will then be dealt with the provisions of CrPC. Section 11 deals with drinking punishable with *Ta'zir*. Under section 11 any drinking not falling under drinking liable to *Hadd* is liable to *Ta'zir*. For example any non-Muslim guilty of drinking at public place except as a part of their religious ceremony shall be punished with the imprisonment which may extend to three years or with not more than thirty lashes or with both. Prior to the enforcement of Hadd Order for drinking the Prohibition Act of 1977 was the law against drinking. And all provinces had their own Prohibtition Ordinances promulgated in 1978. All of them stood repealed on introduction of Prohabition Order 1979.

Critical analysis of the Hudood Laws informs about their status and relevance to public life of Muslims of Pakistan. Muslims were instructed to abstain from use of alcoholic drink in Islamic state in 1949, first time, through section 4 of the West Pakistan Act XX of 1949. In 1977 under immense public stress Zulfiqar Ali Bhotto took serious view of consumption of alcoholic drinks by Muslim subjects of Pakistan. He passed a law regarding drinking of alcohol which was extended to whole Pakistan. The law was known as Prohibition Act of 1977 (XXIV of 1977). This legislation placed a Muslim consuming alcohol under imprisonment. In all the four provinces of Pakistan there were Ordinances on Prohibition of consumption of alcohol passed in 1978. These Ordinances were repealed by the prohibition Order 1979.

Mehdi (1994) writes that enforcement of Hudood Order prohibiting use of alcohol by Muslims of Pakistan was an effort for further Islamization of the country. It permits use of alcohol as medicine. Danger of death is *iztirar* which includes the fear of death due to hunger,

thirst or serious illness. The Holy Qur'an permits carian eating to save human life under condition of dire necessity. In the same way a male doctor is permitted to treat a woman when a female doctor is not available to save her life. The concealed parts of the body of a woman can be seen or operated by the male doctor. On these pleas a petition objecting medicinal use was rejected by upholding use of alcohol for curing the illness (PLD 1938 FSC 55). There is a criterian to prove crime liable to *Hadd* viz taking of the "liquor by mouth". In a case of smoking *hashish* knowingly the conviction was passed by the trial court in 1980. The decision was revoked on the plea that convict did not take liquor by mouth. He only had the smoke into the stomach. So, case did not fall under *Hadd*. The decision of the trial court could not be maintained and was revoked (PLD 1982 FSC 239). Other criteriia are two male Muslim witnesses of sound character fulfilling "*tazkia-e-shahood*" or confession of the accused. The *Hadd* punishment can not be imposed if the offender retracts his confession before the imposition of *Hadd*. *Hadd* also cannot be materialized where one or both of the witnesses resile from their testimony. In cases of drinking liable to *Ta'zir* are cases of non-Muslims. They are not allowed to use the intoxicants publically. Violation of the immunity given for religious ceremonies is punishable with *Ta'zir* punishment not exceeding thirty lashes. A Muslim accused against whom above-mentioned criteria are not fulfilled is punishable with *Ta'zir* punishment. In a case of objecting restriction on non-Muslim's right to use liquor at only religious ceremonies it was held that in any Islamic state none can be allowed to do evil and propagate it. Concession given to non-Muslims must be observed strictly. They cannot take and use intoxicants at public places. They can not be allowed to ignore and violate public laws and law of prohibition is a matter of public concern. So, they can use the exemption in their defencee but not publically or openly (PLD 1981 FSC 245).

Despite the stringent punishment the people are becoming more addicts to opium and its by products. Production of narcotics after enforcement of Prohibition Order has been increased tremendously maintains Mehdi (1994 p.145). There are counter argument on this issue; one being the lack of interest on the part of law and enforcement agencies increased quest for intoxicants and addiction. Everyday Anti-Narcotics Force captures tons of opium and other intoxticants

related to it. The Prohibition Order coupled with Dangerous Drug Act of 1983 yielded a little to control the menace.

4.9.2 Offences against Property (Enforcement of Hudood) Ordinance

The Ordinance opens with vow to bring the laws against property in conformity to the Injunctions of Islam. It modifies the laws relating to the property according to Qur'an and Sunnah. In definition clause "Adult is a person who has attained the age of eighteen years". In theft the constituent of the crime is to take away the property from safe custody "*hirz*"- the arrangements which are made to make the property safe and secure. Things placed in a house, cupboard or box are in a *hirz.* A thing placed with a person on watch of it, paid or unpaid, is also in *hirz*. Families residing in a house constitute portion under use of each family a separate *hirz*. Another new term is of *nisab*. It means the minimum quantity, weight or price of the thing/s, theft of which will be liable to *Hadd* punishment. Section three of the Ordinance contemplates that this Ordinance overrides all existing laws on offences against property. Section number four defines two things:

i. Theft liable to *Hadd*

ii. Theft liable to *Ta'zir*

Definition of the *Hadd* is given in Section five of the Ordinance "whoever being an adult, surreptitiously commits from any '*hirz'*, theft of the property of the value of the *nisab* or more not being stolen property, knowing that it is or likely to be of the value of the *nisab* or more, is subject to the provision of this Ordinance, said to commit the theft liable to *Hadd*." According to the convulsed statement of the definition phrase stolen property cannot be properly possessed as of right. Moreover, the property which is acquired through misappropriation does not include in stolen property. One may get property by unlawful means the property such taken is also property of the possessor or owner with wrong title for example; property taken through criminal breach of trust is not a stolen property. Very important rather kernel term to constitute the crime of theft is "surreptitiously". It means that the offender believes that the person whose property he is stealing

does not know that his property is being taken away. This surreptitiouness is to be continued till completion of the crime of theft. During day time which also includes two hours after sun set and one hour before sunrise this surreptitious removal should be a continues process till the offence is completed. Night time theft does not include this strict continuance of surreptitiousness till completion of the offence but the offence amounts to crime since its start. Commencement of a surreptitious removal of the property from *hirz* will amount theft during night time. *Nisab* is also an important term which provides the required criteria for imposition of *Hadd*. It is minimum amount of property i.e. gold or its value to make the theft liable to *Hadd*. If the stolen property is gold it must be 4.457 grams or more. In case of any other type of property the value of the subject of the theft should be equal to the value of 4.457 grams of gold. Estimate of the price of gold will be admissible which was the price of gold at the time of the theft. This minimum amount of property is known one *nisab*. One transaction of theft from a *hirz* will make the theft liable for *Hadd* if the stolen property is equal to or more than *nisab*. Theft in more than one transaction from a *hirz* does not amount to theft liable to *Hadd*. In the same way theft committed from more than one *hirz* in more than one transactions is excluded from the imposition of *Hadd* punishment provided that the value of property stolen in each transaction is less than *nisab* no matter the sum total comes out to be more than one *nisab*. This very lucid description of the *nisab* is given in the Section six of the Ordinance. Proof of the crime of theft liable to *Hadd* must fulfill one of the following criteria:

i. Confession of accused before a competent court

ii. Testimony of the two adult male witnesses fulfilling the *tazkia-e- shahood*

In case of a Muslim accused witness must be Muslim but if the accused is non-Muslim the witness may be non-Muslim. Testimony must satisfy the court and it must be after recording the statement of the victim of the offence as theft may be committed by one person or more than one person and they enter into a *hirz*, equal to or more than one *nisab*,the all offenders shall be subject to imposition of *Hadd* punishment. It is immaterial that some of the entrants into the *hirz* did not move the property or any part of it. Joint venture of commission of theft will make every

accomplice to the crime accountable just on entry into the house and shall make them liable to punishment of *Hadd;* declares section eight of the Ordinance. Punishment, procedure and process of imposition / execution of *Hadd* is given in the Section number nine of the Ordinance. First commission of theft by an offender if it becomes liable to *Hadd* as per criteria for deciding about the type of the theft, the right hand of the offender from the wrist joint will be amputed. An offender punishable with *Hadd* second time shall be punished with amputation of left foot up to ankle. Subsequent commission, of theft i.e. third time, by an offender who has gone through first two punishments and theft is again liable to *Hadd*; the offender will be sentenced to life imprisonment. Execution of the punishments of cutting right hand in first case and left foot in second case shall be made after confirmation of the sentence form the court of appeal. The intervening period shall be of simple imprisonment. If an offender is detained under imprisonment of life on commission third theft liable to *Hadd* and he feels truly sorry for his wrong doing, the appellate court may set him free after deciding suitable terms and conditions. Medical officer who is authorized for his job will carry out the amputation. If the medical officer is of opinion of the execution of *Hadd* i.e. amputation of limb can cause death of the person convicted; enforcement of *Hadd* shall be delayed till the ceasure of such apprehension. It is not necessary in all cases of theft where all criteria mentioned above is fulfilled that *Hadd* shall be imposed. There are several exceptions to the general rules stated above.

i. Hadd should not be imposed when the offender and the victim are :
ii. Spouses
iii. Ascendants maternal or paternal
iv. Descendants maternal or paternal
v. Brothers or sisters of mother or father
vi. Brothers or sisters or then children
vii. When the theft is committed from the house of host by the guest
viii. When an employee commits a theft from a *hirz* of his employer and he is allowed to enter that *hirz*

ix. *Hadd* shall not be imposed if the subject matter of the theft is fish, bird, pig, dog, intoxicants, musical instruments,wild grass and food stuff which is of perishable nature and cannot be preserved.

x. When an *ikrah* or *iztirar* is the cause of commission of the theft;

ikrah here means fear of injury to a person, property or honour of anybody or somebody else. A person is in apprehension of death because he is extremely thirsty or hungry. He is a person under *iztirar*.

xi. If a person steals a shared property in which the property stolen is less than *nisab* after deduction of his share, *Hadd* shall not be imposed.

xii. If a debter's property is stolen by a creditor and the amount left after the deduction of the credit money is less than nisab, *Hadd* shall not be imposed.

xiii. *Hadd* shall also not be imposed where to offender before his arrest repents and returns the stolen property to the owner / victim of theft and presents himself to the court.

These all exemptions and exceptions are given in Section 10 of the Ordinance. There are also some circumstances when *Hadd* imposed by the court validly will not be enforced. Cases of such nature are enumerated in Section 11 of the Ordinance.

i. When the only proof of the theft is confession and the offender retracts his statement before execution of *Hadd* punishment, the punishment shall not be enforced.

ii. *Hadd* will not be enforced when the offence was proved by testimony of two male witnesses and any of the witnesses withdraws his testimony / statement and the number of witnesses becomes less than *nisab* i.e two males before the execution of *Hadd*.

iii. It is possible that the victim of the theft withdraws his allegations before execution of *Hadd* and states that the convict has made false confession in front of the court. In this case *Hadd* shall not be enforced.

iv. If the accused is with the defect in the left hand i.e. at least two fingers or thumb finger are unserviceable. Or right foot of the convict is either missing or unserviceable, *Hadd* shall not be enforced.

Section 11 of the Ordinance states these circumstances which restrict enforcement of *Hadd* after its pronouncement by the court.

Matter of the return of the stolen property is discussed in Section 12 of the Ordinance. It says that if property stolen by the offender is in identifiable / original form or in exchanged form the same shall be returned or in form to which it has been converted it will be refunded to the victim of the theft. It may be in possession of the offender or in possession of some other person. In case the property stolen is consumed and lost while it was in the offender's possession and he was punished with *Hadd* the offender shall not pay the compensation to the victim of the property.

Second type of theft is liable to *Ta'zir* punishment. It is defined in Section 13. Any person who commits theft which is not liable to *Hadd* as described in section five or any person against whom the requisite proof is not available as mentioned in Section seven of the Ordinance or any person against whom *Hadd* cannot be either imposed or enforced according to the provisions of the Ordinance in Sections 10 and 11 respectively; shall be punished with *Ta'zir*. Punishment of *Ta'zir* which will be awarded to the offender is same as is given in Pakistan Penal Code 1860; Section 379 of PPC provides punishment for theft i.e. imprisonment of either description extendable to three years or fine, or both (fine and imprisonment) according to the decision of the court. After giving detailed description of the crime of theft the Ordinance introduces aggravated form of the offenses against property which is known as "*Harabah*" in Islamic Injunctions and is discussed in Surah 5, Verse 33. Miscreants who are violent in their illegal pursuits to snatch holdings / belongings of the people by putting them in state of fear of hurt or death are called "*Harabi*". This term in Arabic is used for a person who is in state of war with Muslim state. As *Hudood* are the rights of Almighty Allah to whom all original authority and power belongs, such people wage war against Allah. Qur'an terms this state of affairs as

"*yuhariboon Allah*" they are in war against Allah. Section 15 deals with the people who create an atmosphere of fear, loot and plunder and cause severe disruption in law and order in a Muslim state. When someone for the purpose of depriving another person or for taking away propert wrongfully shows force, whether armed or not, attacks him or causes restraint on his liberty or puts him in fear of hurt or death the person commit *Harabah*. Proof of the crime is the same as in given in case of theft in Section 7 of the Ordinance i.e. confession of the offender himself in a court of competent jurisdiction or two male Muslim satisfying the court or non-Muslim witnesses in the case the offender is non-Muslim. Punishment of the *Harabah* is given in Section 17 of the Ordicnace. In case of *Harabah* in which none is killed, no property is taken away and the offender is an adult; the offender will be punished by whipping not exceeding 30 lashes with rigorous imprisonment (RI) till satisfaction of the court about his penitence. This sentence of RI shall not be less than three years according to Section 17. Sub-Section two of Section 17 provides punishment for an offender who commits "*Harabah*" but without taking any property with causing hurt to the victim shall be punished for causing hurt in addition to sentence given in 17(a) under the law dealing with such cases. In sub-Section three punishments for an offender who commits the offence and value of the property is equal to one *nisab* or more but no murder is committed during the commission of *Harabah*, will be punished with the cutting of right hand from wrist joint and left foot from ankle. In case *Harabah* committed by more than one person punishment in sub-Section three will only be applicable if the property taken away is equal to or more than one *nisab* for each of the offenders. Where left hand or left foot of the convict is already missing or unserviceable the punishment on opposite hand or foot shall not be applicable, but the criminal will be punished with RI extendable to 14 years. He will also be scourged not more than 30 lashes. More severe punishment is given for the offender who commits murder during *Harabah*. He will be punished with death penalty as *Hadd*. Execution of the punishment of cutting of right hand and left foot of the offender in case of *Harabah* without causing death of any person and punishment of death to the convict shall only be enforced after confirmation of the sentence by the court of appeal in such cases. During these procedural modalities the convict will be treated as prisoner convicted with simple imprisonment. Appeals against the decision of

the trial court will lie before the Federal Shariat Court if the accused is punished under Section nine or Section 17 of the Ordinance of 1979 (2009 PCrLJ 747). Section 20 of the Ordinance describes punishment of *Harabah* under *Ta'zir*. According to this Section *Harabah* which is not punishable with either of the punishments given in the Section 17 of the Ordinance or in which proof lacks under Section 7 of the Ordinance or in which neither amputation of limbs nor death punishment may be imposed will be dealt with *Ta'zir* punishment. The punishments in such cases are given in PPC under offences of robbery, dacoity or extortion. Attempt towards the commission of offences falling under the Ordinance and causing someone attempt such crimes for which no express punishment is available in the Ordinance are punishable with imprisonment of either description not exceeding 10 years according to Section 22 of the Ordinance. Patronage, assistance and protection of offenders of *Harabah* with understanding of taking share is punishable with RI extendable to 14 years or with whipping not more than 70 lashes. His all movable property shall also be confiscated and he shall be fined as declared in Section 21 of the Ordinance. Section 23(2) deals with the abetment of the offence of *Harabah* punishable with *Hadd*. The Abettor is liable to Ta'zir punishment for such abetment. Section 24 describes that Court of Session shall try cases under the Ordinance and magistrates having powers under Section 30 of CrPC shall not try these cases. Appeals against conviction having sentence more than two years of imprisonment shall lie to the Federal Shariat Court. Federal Shariah Appellate Bench of the Supreme Court, in principal, grants leave to appeal for reexamination of the evidence if it thinks fit. Grant of leave to appeal in (NLR 1987 SD 377) Umar Badshah vs. State was approved. In this case sentence was awarded by the Court of Session. The same was upheld by the Federal Shariat Court. Petitioners objected their conviction and court ordered for re-examination of the evidence to know the vires of the conviction. Implementation of the Ordinance through court is being done by taking aids from PPC. Grant of bails on delayed trials on account of lack of proofs is being done according to PPC. Procedural matters are also being looked after under CrPC while confirmation of the death sentence. However, the Ordinance declares that provisions of CrPC regarding suspension, remission and commutation etc. given in chapter XXIX are not applicable with regard to punishments under Sections 9 and 17 of this

Ordinance. Furthermore, provisions of the sub-Section three of the Section 391 and section 393 are also not applicable to the punishments of whipping awarded under this Ordinance.

4.9.3 Offence of *Zina* (Enforcement of Hudood) Ordinance

The Zina Ordinance of 1979 modifies the laws on the offences to bring them in conformity to the Islamic Injunctions as enunciated in the Holy Qur'an and Sunnah of Prophet (peace be upon him). Laws in an Islamic state, the one which is got in the name of Islam, must be according to the ideology of Shariah; with no inclination to interpret the divine source text on law against their clear readings. Basic principle of Shariah as reiterated in PLD 1985 FSC 8 that someone who resorts "*taweel*" (search of meaning against explicit instructions) of a Verse of Qur'an, which is clear enough, to falsify it is as good as one who denies the Verse. So, it is obligatory to make laws of an Islamic state according to the instructions and teaching of Islam.

Definition clause gives additional element of puberty i.e. a male of eighteen years of age and female of 16 years of age or has attained puberty is an adult. Both male and female can attain adulthood before age of 18 and 16 respectively. The only proof of adulthood is puberty (PLD 1982 FSC 252 and PLJ 2005 Lah 1). This provision overrides the conditions and definition of majority (PLD 2005 Lah 316). In the light of this decision majority is linked with puberty but not with the age. Marriage of the women who has attained puberty is valid. *Muhsan* is a new term in this Ordinance. It is applicable to both male and female who are sane and adult. To be a *muhsan* a person should have had sexual intercourse with his / her legal spouse. Male or female who contracts sexual intercourse with someone to whom he or she is not married is not *muhsan* (PLD 1991 FSC 323). Section four of the Ordinance says that willful sexual intercourse by a man and a woman who are not married to each other amounts to the offence of *Zina*. Constituents of the offence of *Zina* are:

i. Man and woman

ii. Who are not validly married

iii. Who commit sexual intercourse with their free will

iv. Penetration should take place (PLD 1986 FSC 1296)

In Section five *Zina* liable to *Hadd* punishment is elaborated. It is punishable with *Hadd* if an adult and sane person commits sexual intercourse with a woman to whom he does not suspect himself validly married is a guilty of *Zina*. A women being and adult and sane if commits sexual intercourse willingly with a man to whom she does not suspect herself to be married is guilty of offence of *Zina*. Sub-Section two of Section five provides punishment for the offence of *Zina*. Punishment is with reference to the status of the offender. A *muhsan* will be stonned to death (*rajam* punishment) publically. Accused who is not *muhsan* will be punished with one hundred lashes at a public place. Punishment should be executed after confirmation by a court to which appeal lies. As case shall be tried by the Court of Session the court of appeal will be the Federal Shariat Court. During the period through which such confirmation would be sought the convict will remain imprisoned as he was awarded simple imprisonment. The court distinguishes between Zina and *zina-bil-jabr* on the basis of will. Sexual intercourse against the will is *Zina-bil-jabr* (PLJ 1997 FSC 33). There was a debate on stonning to death as *Hadd* punishment. The Federal Shariat Court observed that *rajam* is *Hadd* and it is not against Islamic Injunctions (PLD1983 FSC 255). The courts rely on the evidence of four essential witnesses and none can be punished on suspicion. So, husband could not be given free hand to slaughter his wife out of mere suspicion about her character (1997 PCr LJ 263). If a couple resides together without being validly married it is abhorrent according to the morality norms of an Islamic society. At the same time there must be sufficient evidence on record for conviction of someone. The courts cannot convict a male and a female living with each other in the same room which causes suspicion. The same was insufficient for conviction. Section six of the Ordinance defines *Zina-bil-jabr* (rape) as a person who commits sexual intercourse with a man and woman to whom he or she is not validly married against his or her consent or without the consent and with consent taken by putting him or her in the fear of hurt or death or with consent of victim when a victim believes to be married to the offender and the offender knows of not being married to the victim and a victim believes that offender is another person to whom she is validly married. *Zina-bil-jabr* is liable to *Hadd*. *Muhsan* offender will be stonned to death in the presence of a public party. Non-Muslim offender

will be punished with 100 lashes at a public place. A person who is not *muhsan* is liable to punishment in addition to 100 lashes as courts thinks fit including death penalty. The punishment is subject to the confirmation by the court of appeal. This Section six has been repealed and omitted from the text by the Protection of Women Act (The PWA) 2006. Section seven of the Ordinance deals with the offenders of *Zina* or *Zina-bil-jabr* who are not adult. The punishment of *Zina* or *Zina-bil-jabr* by a non-adult or minor person is imprisonment extendable to five years or with fine or fine and imprisonment both. The offender may be awarded whipping sentence by the court which should not exceed 30 lashes to an under 15 offender in case of *Zina-bil-jabr*, but the offender above 15 in case of *Zina-bil-jabr* shall be awarded whipping punishment. Other punishment may be awarded to the over 15 offender in *Zina-bil-jabr* at the discretion of the court. This section has also been omitted by the PWA 2006. Section eight of the Ordinance still makes a substantive part of the Ordinance with only omitting of the phrase *Zina-bil-jabr* by the PWA 2006. It deals with the proof of the offence viz confession by the accused in the court of competent jurisdiction or testimony by at least four male and Muslim witnesses fulfilling the *tazkia-e-shahood* to the satisfaction of the court. However, in case of a non-Muslim accused, non-Muslim ocular witnesses can be valid witnesses.

If any person is compelled and forced to commit *Zina* the person after being subject to *Zina* is neither liable to *Hadd* nor *Ta'zir*(PLD 2002 FSC 1). Mere pregnancy does not constitute the offence of *Zina* on the part of the victim. There should be certain base for award of punishment with court either confession before court of competent jurisdiction or ocular evidence by four Muslim male witnesses who are adult and also satisfy the court regarding their veracity on *tazkia-e-shahood* (PLD 2002 FSC 1).

Regarding character of a witness the court opined in a leading case that people should not hunt the sinner and then take pride of becoming a witness. This type of behavior is against Islamic Injunctions. Such violators do not satisfy the court as for as the matter of *tazkia-e-shahood* is concerned. It is compulsory for the evidence not only in *Hudood* cases but also in *Ta'zir* cases where proof in case of *Zina* is testimony of four male Muslim witnesses (2010 PCrLJ

231). Credibility of a person, on whose statement the court basis its decision, shall be thoroughly examined. People of good character from the same stratum of life living in the same locality can be source of this examination. This is an open or confidential inquiry from the people of the same walk of life. Student's character can be ascertained from the headmaster of the school and a soldier's character can be known from the headquarters of the unit. Veracity of the character of a clerk can be asked from his office or department. Business persons deal with factories, firms and retailers, they are to be verified of their character from the factory people who are reliable source of court's information regarding *tazkia-e-shahood* of a witness (PLD 1991 FSC 186). In cases where the criteria set by the Ordinance is not fulfilled for imposition of *Hadd* punishment the cases will be dealt according to *Ta'zir*. At times when *Hadd* punishment is awarded in case of *Zina* it cannot be enforced due certain circumstances. Section nine of the Ordinance gives guidance on such matters. In a case where *Hadd* is imposed only on confession of the accused and the convict disagrees his confession or retracts it at any time before the execution of *Hadd*. Disavowal of the convict, before enforcement of *Hadd* or its pant, bars enforcement of *Hadd* totally of any remaining part thereof. Cases where *Hadd* punishment was awarded to the convict on testimony of four male Muslim witnesses, if some of the witnesses withdraws his evidence and his such resilience is before execution of *Hadd* or any part of it. The *Hadd* or any remaining part shall not be enforced says Sub-Section two of Section nine of the Ordinance. There are instances in the trials where the witnesses took their words back and resiled from their testimony. The case was asked for retrial upon withdrawal of the witness statement (PLD 1986 FSC 101). Extra judicial confession before layman and not before a competent court is of no value. There were grudges on part of complainant on account of accused carrying on with his wife. So, no incriminating thing recovered (2010 PCrLJ 1750). Only blaming statement of the girl against a co-accused and confession of one co-accused against the other co-accused was declared insufficient for conviction (PLD 1958 FSC 120). In the light of the decision of the Federal Shariat Court the only confessional statements can be the basis for award of *Hadd* punishment. Confession by a girl in a case of *Zina* may result a victim for her but cannot be used for the male accused until corroborated and supported by the other evidence on record. Sections

10,11,12,13,14,15,16 are omitted by the PWA 2006. Summary of these Sections is of vital importance to this study which is given in the following lines.

Themes of omitted Sections are discussed in section 10 of the Ordinance. Cases of *Zina* or *Zina-bil-jabr* in which *Hadd* is not imposed or which lack proof according to Section eight and also punishment to the complainant on account of *Qazf* is not awarded or the cases in which *Hadd* cannot be enforced due to reason given in Section nine, the *Zina* or *Zina-bil-jabr* will be liable to *Ta'zir*. An accused of *Zina* liable to *Ta'zir* shall be awarded punishment of RI for a term of 10 years. This sentence had gone through a change i.e. "not less than four years or not more than 10 years". The accused will also undergo whipping of thirty lashes and will be liable to fine also says 10 (2). In third sub-Section the punishment for an offender of *Zina-bil-jabr* liable to *Ta'zir* is given under the Ordinance. He shall be punished with imprisonment which is extendable to 25 years along with whipping thirty stripes. Section 11 of the Ordinance deals with kidnapping and abducting of a girl and inducing her for marriage. A girl who is kidnapped and compelled by a person to marry a person against her will or forced to have an illicit sexual intercourse or having knowledge to this effectt. The kidnapper and the abductor will be punished with life imprisonment along with thirty stripes scouraging and also with fine. The same punishment is given in this Section for a person who intimates and abuses authority, induces and compels a women to go from anywhere with intention of illicit intercourse with her or with another knowingly to this effect shall also be punished with imprisonment for life, whipping 30 lashes and fine. Section 12 of the Ordinance is about abduction and kidnapping for un-natural lust. The person who commits the offence under this Section is punishable with RI extendable to twenty five years, whipping thirty stripes and with fine. Prostitution is menace prevalent in the society. It is checked in section 13 of the Ordinance. Hiring, sale and otherwise disposal a person (girl / women for any immoral and unlawful purpose i.e. intercourse / prostitution) has punishment of imprisonment for life, with whipping not less than 30 and also with fine. Buying of a person for prostitution is dealt in Section number 14 of the Ordinance. The same punishment is valid as is given in the case of selling and hiring in section 13 i.e. imprisonment for life, with whipping not less than thirty and with fine also.

Section 14 also provides imprisonment for life with whipping not less than 30 and fine for buying, hiring girls for prostitution. Managing of a brothel, taking possession of a woman through purchase or on contract (understanding on the payment) shall be deemed that possession of the woman is for the prostitution until the contrasting circumstances are proved. Section 15 of the Ordinance provides punishment for a person deceiving a woman that she is lawfully married to an offender whereas she is not so married. Through deceit he cohabits with her, he shall be sentenced to imprisonment extendable for life, whipping not more than 30 lashes and fine. Section 16 which have been omitted by the PWA 2006 describes punishment for enticing, concealing and detaining of a woman with intent to have sexual intercourse with her. Such a person shall be punished with imprisonment extendable to 7 years. He shall also be punished with thirty lashes or less along with fine. Section 17 which is still part of the Hudood Ordinance on *Zina* prescribes mode of stoning to death a person who has been awarded with *Hadd* punishment of *rajam*. This punishment is awarded under section five of the Ordinance. It was also present in Section six of the Ordinance which has been omitted. Witnesses against the convict who are available start shooting stones on the convict. During the continuance of stonning he may be shot dead. On his death stonning shall be stopped. Section 18 of the Ordinance fixes half of the longest term of the offence in case of attempt to commit the offence. It means attempt to commit any offence in this Ordinance, which is not materialized is punishable with half of the maximum possible punishment for the offence for which the attempt was made. The offender may be punished with 30 stripes. Imprisonment and stripes up to 30 may be awarded to the offender jointly. He may be fined equal to the fine of the offence. He may be awarded all of the punishment under discretion of the court keeping in view the severtiy of case in hand. This Section is also omitted by the PWA 2006 (VI of 2006). Section 19 of the Ordinance is also omitted. It discussed application of the Sections 34-38 and 63-72 and Chapter V and VA of PPC to all offences under this Ordinance. Abettor of the offences is liable to *Hadd* shall be punished with same punishment as *Ta'zir* says Section (19(2)). Section 19 (3) declares that Sections 366,372,373,375 and 376, 493,497,498 of PPC are repealed through this Ordinance. Application of the procedures described in Code of Criminal Procedure (Act V of 1898) is covered in Section

20 of the Ordinance. It further specifies that *Hudood* cases on *Zina* shall be tried by the Session Judge in the Tehsil Courts where the offence was allegedly committed. Appeal against the punishments under Sections 9 and 17 shall lie to the Federal Shariaht Court. Moreover, Section 20 exempts the Ordinance from the application of sub-Section 3 of Sections 391 and Section 393 CrPC. Sub-Section 6 of Section 20 of the Ordinance repealed Section 561 of CrPC. Second last Section i.e. Section 21 of the Ordinance contemplates presiding officer trying *Zina* or *Zina-bil-jabr* must be Muslim. In case of non-Muslim accused non-Muslim presiding officer may try the case.

4.9.4 Offence of *Qazf* (Enforcement of Hadd) Ordinance: False Accusation of Zina

As there are mixed questions law and fact in English Jurisprudence in the same way there are some cases which fall under the rights of man and rights of Allah simultaneously. Nayazee (2007) writes that renowned jurists like *al-Sarkhsi* places *Hudood* punishment in category of Allah's rights except *Qazf*. It is the mixture of the right of an individual and the right of Allah. But the right of Allah dominates the right of an individual (p.128). One of them is related to right of individual i.e. *haqooq-ul-ibad*. It means that complainants who are aggrieved can waive of their right and can forgive the offender. The same point was discussed in a case of *Hudood* that complainant being aggrieved can forgive at any stage of proceeding of case in the court (2009 PCrLJ 462). The law opens with a resolve to bring the law on *Qazf* for the time being enforced in conformity to the Holy Qur'an and Sunnah of Prophet (peace be upon him); the Injunctions of Islam. Definition clause i.e. Section two says that definition of *Hadd, Zina,* adult are the same for the purpose of Ordinance as are in the The Zina Ordinance. All other legal terms have the same meanings as are given in PPC and CrPC. The offence of *Qazf* is defined in Section three of the Ordinance that it may be committed through word of mouth or orthographic representation of spoken words or signs which are made or published with intention to impute a person of *Zina*. The intention to harm the person against whom the imputation is leveled or knowledge or reason to believe that such an imputation is harmful to his or her reputation or harmful for his or her

feelings is necessary element to constitute crime of *Qazf*. *Qazf* can impute reputation of a dead person as it would harm reputation of a living person and it will be presumed that if he is a living person. Furthermore, it is also harmful for the feelings of the family of the deceased and other near relatives. Words which are not direct but they mean otherwise may amount to *Qazf*. The intent is culpable in imputation of the allegation. An alternate form of imputation or imputation which is expressed ironically may amount to Qazf. There are few exceptions to this general rule.

Act of imputing *Zina* does not amount to the crime of *Qazf* if such imputation is true and is made in public good or published in public good. To know whether the believed public good is in fact a public good or not is a question of fact in terms of the Ordinance. Another exception is that the allegation or imputation is leveled by someone having lawful authority over the person to whom the imputation is leveled. But a complainant who makes a false accusation of *Zina* in a court and fails to prove the same by bringing four witnesses, a witnesses who profess false testimony in the court regarding commission of *Zina* according to the findings of the court and a complainantt according to the findings of the court, who accused a person of offence of *Zina* or *Zina-bil-jabr* are not covered under exception two of Section three of the Ordinance. All individuals are innocent in the eye of law until proved guilty is a general rule of justice (PLD 1984 FSC 69). In a case of *Qazf* the accused was a liar. He had fabricated false accusation against the complainant of committing *Zina*. He also alleged the complainant of having an illegitimate daughter as procreation of *Zina*. He could not support the allegation with four witnesses as per requirements of the Section three of the Ordinance (Enforcement of Hadd Ordinance 1979). The accused was found guilty of committing the crime of *Qazf*. He was convicted by the trial court on the basis of above findings (2013 PCrLJ 849 (FSC)). Section four of the ordinance has been omitted by the PWA.

Types of *Qazf* are given in Section four--Qazf liable to *Hadd* punishment and *Qazf* liable to *Ta'zir* punishment. In Section five of the Ordinance describes the punishment of *Qazf* liable to *Hadd*. Any person who is an adult and knowingly and intentionally imputes *Zina* on a particular person which is *Zina* liable to *Hadd*, and person who is subject of such imputation is a *muhsan*

and is capable of having sexual intercourse, commits *Qazf* liable to *Hadd*. *Muhsan*, as explained in the Section, is a person who is an adult, sane and Muslim who either had not sexual intercourse at all or had it with his lawful spouse only. If a person says that another person is illigimate child or he refuses that person to be legitimate child he commits *Qazf* against the mother of the child. This commission of *Qazf* is liable to *Hadd* according to the Section five of the Ordinance. Criteria for the proof of the offence are given in Section six of the Ordinance. Confession by the accused before a competent court regarding the commission of the offence is valid proof of *Qazf* liable to *Hadd*. In second case the accused commits this offence in the court. Third way to prove *Qazf* is testimony of two witnesses and this fact must be ascertained by the court for its satisfaction in accordance with *tazkia shahood*. In case of a non-Muslim accused the witnesses may be non-Muslim. It is further requirement of the statement of complainant or his representative must be recorded prior to recording of statement of witnesses. Sub-Section two which is added by the PWA says that presiding officer who dismisses a complaint made to him under Section 203-A CrPC or getting the accused under Section seven of the offences of The Zina Ordinance if finds himself satisfied that offence of *Qazf* has been committed by the accused shall pass the sentence under Section seven of this Ordinance without requiring any further proof. When husband and wife were separated after execution of divorce they were only a man and woman they were no more spouses. Petitioner was found by the court as an accused of offence of *Qazf*. He has written in three of his statements before his brother and also before village *punchayat* allegedly making imputation of *Zina* against his wife and alleged that all of the three children were not legitimate. Held that the action of the petitioner attracted Section six and seven of the Ordinance of *Qazf* (2010 SCMR 681).

Abhorrent is such imputation to harm a person and prestige of a man or a woman in an Islamic society. Islamic state is bound to protect and preserve prestige and honour of its subjects. Though there is an element of right of individual whose reputation is put at stake through levelling of blame of *Zina*. This also falls under rights of society as a whole. The right of the state is also infringed that is why state takes steps to check and discourage such incidents. Punishment for the offence of *Qazf* is given in Section seven of the Ordinance. Offender is punishable with

whipping of 80 lashes. Also after conviction on account of *Qazf* his or her evidence shall not be accepted in the court of law as he / she has been declared a liar by the court. This punishment shall only be executed after confirmation by the court to which appeal lies. During the period in which such confirmation is sought the convict shall be dealt in accordance with the provisions of CrPC. He will be placed under simple imprisonment during period of confirmation of the sentence from the court of appeal. Complaint of *Qazf* can filed by the victim of the offence of *Qazf* or by his or her representative authorized to do so. If a person against whom *Qazf* is committed is dead any close relation of the deceased "ascendent or decendent" can file a complaint in a court which is competent to try the case. This complaint was authorized to be made previously in a police station before omitting of the phrase "a report made to police" by the PWA 2006.

It is very serious issue that someone imputes another person with *Zina* and claims that the procreated person, as a result of *Zina*, is bastered. It was not provided that the deceased father of the complainant had not entered into a valid marriage contract with his mother. It was not provided that he was born as a result of *Zina*. It amounts to hurt the feelings of the complainant when his mother was lawfully married to his father. The accuser intended to harm the reputation of the complainant. He had reasons to believe that such imputation can cause hurt to the feelings of victim of *Qazf*. Such people deserve strict punishment. Surah *Bani Israeel* upholds human dignity without discrimination of cast, creed and colour in very clear terms. This dignity is bestowed to every human by Allah Almighty. No one can fiddle with this right of man. It is fundamental right of higher degree which is not dependent on human legislation. Conviction was upheld (PCrLJ 1824 FSC). Punishment of *Hadd* on offence of *Qazf* shall not be imposed, says Section nine on a person who imputes *Zina* to any of his or her descendants. It is also not imposed on a person who is under trial in a court and the victim of the *Qazf* dies during the case is *sub judice* i.e. is under trial in the court. *Hadd* shall not be imposed where the imputation of *Zina* has been substantiated with evidence or proved to be true. Sub-Section two is added to Section nine of the Ordinance which provides another case when *Hadd* shall not be enforced. It says that where a complainant withdraws his / her complaint or one of the witnesses resiles from testimony

and witnesses fall less than two, the *Hadd* shall not be imposed / enforced. This insertion was made by the PWA 2006. Next four Sections i.e.10, 11, 12 and 13 are also omitted. Section 10 dealt with *Qazf* liable to *Ta'zir*. Imputation of *Qazf*, which is not liable to *Hadd* under Section six or incase where *Hadd* cannot be imposed under Section nine of the Ordinances is, called *Qazf* liable to *Ta'zir*. Punishment of *Qazf* liable to *Ta'zir* is given in Section 11. The accused will be punished with imprisonment for a term extendable to two years or whipping not more than 40 lashes or with fine or with any two or with all punishments under Section 12. In Section 13 sale of the printed or engraved material amounting to *Qazf* as defined in Section three of the Ordinance is declared punishable with imprisonment extendable to two years or with not more than 30 stripes or with fine. These punishments may be combined as any two or all of three for such an offender. Surah *Nu:r* (Light), Surah number 24, Verses 6-10, prescribes a procedure for separation of spouses when they cannot lead conjugal life owing to involvement of a wife in *Zina*. Under Section five of the The Zina Ordinance, it is known as "*lian*" in Holy Qur'an. Its procedure is given in Surah *Nu:r*. This accusation must be before a court of competent jurisdiction. The husband and the wife shall take turns the husband shall swear before the court upon Oath "I swear by the Allah, the Almighty and say I am surely truthful in my accusation of *Zina* against my wife 'Name of the wife' and he shall repeat this statement four times afterwards (fifth time) he shall say "Allah's curse be upon me if I am a lair in accusation of *Zina* against my wife (name of the wife)". In response to the accusation of husband wife shall deny thereby the accusation and shall say in front of the court on oath "I swear by Allah the Almighty that my husband is surely a lair in his accusation of *Zina* against me". She shall repeat this statement four times and having said the foregone four times the wife shall say (fifth time) "Allah's wrath is upon me if he is truthful in his accusation of *Zina* against me". Sub-Sections two of the Section 14 authorizes the court to pass the decree of dissolution of marriage between the spouses and there shall lie no appeal against the decision. Since so serious is the allegation *Zina* leveled against wife. This was also repeated before the court. In medical report of the wife it was written that she had given birth to a child. Then it was beyond doubt that the husband imputed Zina against his wife. There will be no alternative except to follow proceeding of *lian*. It would make the husband and wife undergo the

oath prescribed in Surah *Nu:r* of Qur'an. Marriage shall stand dissolved by an order of the court the same will operate as a decree of dissolution of marriage. No appeal shall lie against the decree of dissolution of marriage between the spouses (2005 PCrLJ FSC). Sub-Section three and four are omitted by the PWA 2006. Sub-Section three described the procedure if the spouses are reluctant to undergo the procedure of *lian* in the prescribed form/manner. The husband and wife shall be imprisoned till the time the husband agrees to go through *lian* and in case of wife till she agrees to take oath in prescribed manner or accepts the accusation of *Zina* as leveled by her husband. Sub-Section four of the Section 14 provides punishment for the wife who accepts accusation of *Zina* against her by her husband. She shall be punished in accordance with Offences of Zina (Enforcement of Hudood) Ordinance 1979. It is pertinent to give here authentic translation by Pickthal describing the procedure of *lian*:

As for those who accuse their wives but have no witness except themselves; let the testimony of one of them be four testimonies (swearing) by Allah that he is of those who speak the truth; And yet a fifth invoking the curse of Allah on him if he is of those who lie. And it averts the punishment from her if she bears witness before Allah four times that the thing he said is indeed false, And a fifth time wrath of Allah be upon her if he speaks truth (p.381).

Section 15 and 16 are also omitted by the PWA. Attempt to commit the offences punishable under *The Qazf Ordinance* or causing such an attempt to commit such offences and while attempting such whosoever does an act towards the commission of the offence shall be imprisoned for a term half of the longest term for the offence so attempted of which was made or punished with whipping which is provided for the offence or with fine liable for the crime or with any two out of the three punishments or with all of the three punishments. Section 16 provides punishment for the abettor of the *Qazf* under the Ordinance. An abettor shall be punished when proved guilty of abetment of the offence liable to *Hadd* punishment with the punishment of such offence under *Ta'zir*. Section 17 of the Ordinance discusses courts competent to try crime of Qazf under the Ordinance and court of appeal.Session Judge can try a case of *Qazf* and appeal shall lie to the Federal Shariat Court (FSC). These proceedings shall be conducted in Tehsil Headquarters

where the offence is allegedly committed. Further exemption of the punishments under this Ordinance from application of Sub-Section three of Section 391 and Section 393 of CrPC in respect of punishment of scourging and whipping is given in this Section. Moreover, Sub-Section four restricts application of rules commutation, suspension and revision of the sentence passed under the Ordinance. Section 18 of the Ordinace describes that presiding officers of the trial court and the court of appeal shall be Muslim. Last Section of the Ordinance maintains precedence of the Ordinance over all other laws of the countery for the time being enforced.

4.10 Old Laws Dealing with Crimes which now Fall under the Hudood Ordinances

The land mark decision, of the Shariat Appellate Bench of the Supreme Court of Pakistan, which brought impetus in the on-going process of Islamization of laws of Pakistan, is PLD 1989 SC 633. Prior to this decision courts subordinate to the apex court used to decide cases regarding culpable hurt to human body under Section 229 to 338 PPC. These Sections were declared against the Injunctions of Islam in the decision of Shariah Appellate Bench of the Supreme Court of Pakistan. It was also declared that some of the Sections of the Pakistan Penal Code 1860 viz: 109, 54, 401, 402, 402 A and some of the Section of Code of Criminal Procedure viz: 345, 381, 337 to 339A along with Section 133 of Evidence Act 1872, which stands repealed by Qanoon-e- Shahadatt 1984, were in contrast to the Islamic Injunctions regulating crimes against human body and life. Before going through the texts of these laws which caused promulgation Criminal Law (Amendment) Ordinance 1990, it seems pertinent to go through laws previously dealing with crimes of Theft and Dacoity, Adultery and Fornication , Defamation and Drinking of wine which are now covered under the Hudood Ordinances.

4.10.1 Theft, Extortion, Robbery and Dacoity

Chapter number 17 of Pakistan Penal Code of 1860 (XLV of 1860) deals with offences against property. Section 378 defines theft that a person who takes away any movable property dishonestly from possession of any other person against consent of the possessor and moves it

away. In this Section as explained severance of thing from earth is moving and also separating a thing from the other thing and removing an obstacle which prevents movement of the object and moving of animal from one place to an other, all are moving the things away from the possession of the person in whose possession is it. Consent for the purposes of this Section may be express or implied. Removal of cash and gold ornaments by a daughter from house jointly occupied by the family members does not amount to moving out of possession. Theft charge is not applicable (2009 PCrLJ 160). Crops grown by tenants with permission of the land lord become movable property when they are born and cut. Produce remains in joint possession of tenants and the land lord. If any such property is taken away without consent of the land lord by the tenants it doesn't fall under taking away without consent (2009 PCrLJ 751). Section number 379 prescribes punishment for the offence of theft. A person who commits theft shall be punished with imprisonment which is extendable to three years or he shall be punished with fine. Or the offender shall be punished with both of the punishments. This Section deals with theft out of possession. Theft out of residence and dwelling place is defined along with punishment in Section 380 PPC. Theft from dwelling place is a theft form any building and tent or vessel which is used for custody of the property and living of people. Theft from living places is punishable with imprisonment not exceeding seven years along with fine. Section 381 PPC prescribes maximum seven years punishment along with fine to a servant who steals from master's house. Section 381A deals with theft of motor operated vehicles. Anyone who commits vehicle theft shall be punished with maximum seven years of imprisonment with fine not exceeding the price of the vehicle at the time of the theft. This Section was added through an amendment in theft laws through Amendment Act of 1996. Preplanned theft which causes death of a person, keeping a person under restraint, hurting or keeping any person under fear of death, hurt or restrains has punishment of rigorous imprisonment RI extendable to ten years with fine.

Robbery and Dacoity are severe forms of depriving someone of his property which may involve other crimes along with theft. When in theft element of harm to body of a human being or freedom of a human being is added it becomes robbery. Section 390 PPC includes theft or extortion (putting a person or another person in fear of injury) under Sections 379 and 383

respectively as constituent element of robbery. Theft becomes robbery while during commission of theft there occurs death of a person or hurt to the body of a person or there is restraint which is wrongful or fear of all these. Extortion changes into robbery if the offender puts the person subject of extortion; subject to fear of instant death, hurt or wrongful restraint or some other person and induces there by the person under extortion to deliver the things extorted to the offender. Section 391 PPC says that robbery committed by five or more persons or an attempt to commit robbery by five or more persons it is a Dacoity. Five or more number of persons includes present and aiding the robbery or attempt to the robbery. Persons such committing, attempting or aiding are said to commit robbery. Punishment of robbery is given in Section 392 PPC. The offender shall be punished with RI not less than three years or more than ten years which was amended by Ordinance III of 1980, Promulgated on 03 February, 1980. The offender shall also be liable to fine. If robbery is committed on the highway the RI is extendable to fourteen years. In Section 393 PPC attempt to commit robbery is punishable with RI not exceeding seven years with fine. Section 394 PPC deals with grievous nature of robbery which entails bodily hurt to any person. Voluntary causing of hurt to a person during committing robbery or during attempt to commit robbery is punishable with life imprisonment or RI which should not be less than four years and also should not exceed ten years with fine. Punishment for Dacoity is provided in Section 395 PPC. Life imprisonment or RI not less than four years and not exceeding ten years with fine is fixed for dacoits. Dacoity in which murder is committed is dealt in the Section 396 PPC. Where five or more persons while committing Dacoity commit murder, punishment of each of them shall be death or life imprisonment or RI which is not less than four years and not more than ten years. The offender shall also be punished with fine. Use of deadly weapons or causing grievous hurt or attempting to cause death while commission of robbery or Dacoity is liable to be punished with imprisonment which shall not less than seven years says Section 397 PPC. Being armed with deadly weapons and attempting to robbery is covered in Section 398. The offender/s so armed shall be punished for imprisonment of at least seven years. Preparation to make Dacoity is punishable with life imprisonment and or with RI extendable to ten years with fine under Section 399. Habitual people making a group of dacoits are brought subject to punishment of life

imprisonment and or with rigorous imprisonment extendable to ten years with fine. An offender who is a part of the gang of thieves or dacoits is punishable to rigorous imprisonment extendable to seven years with fine under Section 401 PPC. Difference between the Sections 400 and 401 is that of purpose of association of persons. Persons associated with the purpose of Dacoity only are dealt with in Section 400 and group of persons for purpose of theft and robbery is covered under Section 401 PPC. Assembly for Dacoity is also unlawful under PPC's Section 402 PPC. Five or more persons assembled to commit Dacoity are placed under liability of rigorous imprisonment which is extendable to seven years and the offender shall also be fined.

4.10.2 Fornication, Adultry and Rape

Prior to the promulgation of Offences of Zina (Enforcement of Hudood) Ordinance 1979 adultery was covered under Section 497 PPC. Section 366 of PPC is also important in matters of fornication which deals with kidnapping, abducting of a girl / woman and inducing her for marriage or illicit sexual intercourse. It is better to read this Section in verbatim of PPC "whoever kidnaps or abducts any woman with an intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person, against her will or in order that she may be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other methods of compulsion, induces a woman to go from any place with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid." Section 372 PPC is repealed by the Protection of Women Act 2006 (VI of 2006). Selling of a person who is minor for prostitution or selling of a minor girl for prostitution is also an offence. Prostitution, illicit intercourse, any unlawful and any immoral purpose are included as purpose of the sale or sale with intent or knowledge that under 18 years girl will be employed or used for these purposes. This act is punishable with imprisonment which may extend to ten years with fine. Purchase of less than 18 years girl for above said purposes is punishable under Section 373 PPC. The same punishment is fixed as is for

sale of a minor. Sodomy or unnatural intercourse is dealt with in Section 377 PPC. A man who commits carnal intercourse with any man or woman or animal is punishable with life imprisonment or is punishable with imprisonment not less than two or not more than 10 years with fine. In The Zina Ordinance second punishment was of ten years but it was changed to not less than two years and not more than ten years by the Ordinance III of 1980.

Adultery is covered in Section 497 PPC as this Section is widely criticized since inception of Pakistan as it does not cover the prohibition of illicit intercourse fully an enumerated in the Injunctions of Islam. It resists a person having illicit intercourse with wife of another man without the consent of that man. Whoever is involved in such an intercourse without taking consent / permission from the husband of the woman, but which is not done with use of force or against the will of the woman, which does not amount to offence of rape is punishable with imprisonment which is extendable to five years or with fine as declared by the court or with both of the punishments. Wife under this Section is not punishable at all as an abettor of the intercourse. Section 498 PPC deals with the taking away, enticing or detaining a married woman with criminal intent to have her intercourse with any person. Offence of taking a married woman from her husband or care-taker of the women and enticing her for illicit intercourse or detaining her with such intention is punishable with imprisonment which may extend to two years, with fine or with both of the punishments.

Section 365B is inserted in PPC which reproduces the omitted Section 366 of PPC. But the punishment of the offence is increased from ten years of imprisonment and fine to imprisonment for life with fine. Section 367A is added to cover kidnapping a person or abducting a person to put the person subject to unnatural intercourse or carnal intercourse. Abduction or kidnapping for such purpose is liable to capital punishment or rigorous imprisonment which may be extendable to twenty five years along with fine. Selling and letting to hire a person for prostitution or sexual intercourse, illegal or immoral purpose by any person is to be punished with imprisonment extenable to twenty five years and also with fine. Purchase of a person for the purpose which is given in Section 371A and which is also repeated in 371B is punishable with the

same punishment as is given for the sale of the person for prostitution i.e. imprisonment which may be extendable to twenty five years along with fine.

Rape is dealt in Section 375 of PPC which is substituted with old Section 375 of PPC. Any man who does sexual intercourse with a girl or the woman against her will, without consent of the women, with her consent by taking her consent by putting her in fear of hurt or death or with consent of the woman when man believes that he is not married to woman and he knows that consent given by the woman is because she believes that the man another male to whom she is married or with consent or without the consent of the girl when she is under 16 years age. The difference between this Section and repealed Section is of exception viz. penetration being sufficient proof of rape and sexual intercourse by a man with a woman who is lawfully wedded to him and the wife is not less than 13 years of age is not rape. The age of the women given in fifth condition of definition of rape is enhanced in new section to 16 year from 14 years in previous text of this Section. Punishment of the offence of rape is given in Section 376 which is substituted with the previous the Section. Capital punishment is fixed for a person who commits rape or imprisonment which is not less than 10 years or more than 25 years with fine when the offender commits rape singly. When the offenders are two or more than two persons and commit rape in furtherance of their common intent each of them shall be punished with death or life imprisonment.

4.10.3 Defamation

Defamation is dealt in Chapter XXI of PPC. Sections 499 to 502 provide safeguards to honour and dignity of a person. Definition of defamation is given in Section 499. Words written or spoken, signs or symbols (visible representation) made or published imputing any person intending harm and having reason to believe that the imputation will harm the reputation of the person to whom these are directed, give rise to the act of defamation. It is culpable to fiddle with honours and integrity of any person. Spoken or written material which is harmful for any body's reputation is penalized under Section 500 of PPC. Nonetheless, there are as many as ten exceptions to the general rule of safety of prestige and reputation in estimation of general public

or people in which the person resides. Defamation can be directed to a dead person, a company, an association, etc. Also defamation can be directed ironically or in an alternative way of expression. Yard stick to measure is “harm to reputation is that it lowers a person intellectually, morally or on account of caste or some bodily loathsome or disgraceful state”.

Exceptions through one to tene are briefly discussed to know the scope of defamation under this Section.

i. Publication of truthful imputation for public good does not amount to defamation. It, however, remains a question of fact that whether it is for the public good or not.

ii. Character of a public servant and discharge of duties by a public servant if expressed in good faith do not fall in defamation but it should not be more than that appears from the character and conduct of the public servant says the second exception.

iii. Exception number three is about any opinion about the conduct of any person who deals with the matters of general public and about his character which is manifested in that conduct is not defamation.

iv. A report on court proceeding and its publication which is substantially true or any report on a court decision or of a court decision is not defamation undrer fourth exception to Section 499 of PPC.

v. Discussion and opinion in good faith on merit of a criminal or civil case which has been decided by the court or any opinion in good faith about conduct and character of any party, person, agent or witness in the case as far as they appear from their conduct in the court without exaggeration is not defamation according to the fifth exception.

vi. Opinion on public performance of any author, speaker or singer and merits of his / her performance as it appears in such performance does not fall under defamation in the light of exception number six.

vii. Condemning a person about his misconduct in good faith and using authority over such person as conferred by the law or contract is not defamation. For example if a judge censures conduct of an officer of the court or witness etc. it is not defamation as exempts exemption seven to Section 449 PPC.

viii. Eighth exceptions provides immunity to a complaint against any person by accusing him in front of any other person who has authority over the person so accused, in good faith is out of the preview of defamation. For example X is child of Y, a complaint by Z to Y regarding X's conduct, who is child of Y, is not defamation.

ix. Imputation of a person made in good faith, for benefit or protection of the person making it for security of interest of another person or for general public good is not defamation declares ninth exception.

x. Last exception to Section 499 PPC says that it does not amount to defamation to make someone cautioned against another person in good faith and for good and benefit of the person to whom the caution is conveyed or for benefit of another person in whom the person so informed or cautioned is interested or for good of general public.

Punishment of defamation is described in Section 500 of the PPC. Offences of defamation are punishable with simple imprisonment which may be extendable to two years or punishable with fine or with both of the punishments. Under proviso the originator of the statement which is of defamatory nature is placed under more strict punishment i.e. punishment of either description which is extendable to five years or fine not less than Rs 10,000 or both; imprisonment and fine in combination. Section 501 provides punishment for printing and engraving defamatory matter i.e. simple imprisonment which may be extendable to two years or fine or both. Sale of printed and engraved matrial does also have the same punishment as is prescribed for the printing and engraving of such substance under Section 502 of PPC.

4.11 Critical Evaluation

Muslims scholarship has addressed numerous challenges regarding their religio-political ideals during the 19th century. The wide spread re-examination, adaptation and redefining of legal tenets of Islamic philosophy and doctrine amidst challenges of modernity and concept of modern nation state are of vital importance. Changed conditions jog the inherent principle of Islamic philosophy-- "particle of movement". Keeping in view this universal element impartial examination is logged in these pages to reach a viable solution and conclusion. This re-examination is related to the judicial system i.e. laws under which the state conducts it business. Legal state apparatus (LSA) bestows control over masses as well as ensures their welfare. The LSA in Pakistan has been a burning question since its inception.

Majority of people has been demanding for structure of the state on the basis of *raison d'etre* of the country i.e. according to the Injunctions of Islam. In this connection Islamization process, which started with acceptance of the Objectives Resolution got impetus during military regime of Zia i.e.1977-1988, is discussed. Main focus remains here on Hudood Laws and their implications in social as well as legal venues of Pakistan.

General legal culture of Pakistan remains unchanged despite promulgation of Hudood Laws in the courts of Pakistan since 1979 opines Maheshwari (1995). Impact of the Laws have been marginal as for as implementation is concerned. Pakistani Criminal Justice System works alike against apprehensions in scholarship of the western world t and the modernist wing in Pakistan that there will be wide spread amputations and stonning to death after enforcement of the Hudood Laws. It has not been a common place practice at all to have a *Hadd* punishment as against punishment in the Anglicized Law i.e. PPC. He further elaborates his point with statistics till Feb, 1988 after enforcement of Hudood Ordinances for nine years there have been no amputation of limbs at all. There was only couple of convictions upheld by the Federal Shariat Court. Supreme Court of Pakistan overturned both of the convictions later on. There is no adverse effect of the laws on status of women in Pakistan as was predictedd. It is being erroneously alleged by NGO's like WAF that women have been reduced to a lower staus. To him the

relationship between institutions--political and judicial is on the same footing. So much so the judicial procedures established by English rulers remain intact till this point of time. He holds that process of adjudication under the Hudood Laws is quite speedy as compared to English Laws. High Courts of Pakistan are overburdened with huge log of cases awaiting disposal. Proceedings of the Federal Shariat Court are much stream lined. It also can be argued, although the evidence of such an argument is difficult if not impossible to gather, that the threat of *Hadd* punishment has served as a deterrent to the commission of the crimes. After giving merits follows the negative side of enforcement of the laws as they provide an additional platform for solution of conflicts. Many of the appeals were being overturned that they pose a design to access social control. This exertion of social control by parents, guardians and husbands against children and wives has been enhanced with promulgation of the Hudood Laws. Children and wives are prone to face criminal charges at the hands of parents and husbands as there is an implied threat for them in shape of the Hudood Laws. The Hudood cases are normally registered against lower starta of the society. There are very few examples of charges according to Hudood Laws against upper / middle class or rich people. In this way these laws are inappropriate in their application. Laws and courts cannot be blamed for the non-delivery. They reflect class ridden structure of Pakistani society. Courts and laws work on the basis of general social ethics of any society. Mehdi (1994) notes regarding law on theft as is given in the Offences against Property (Enforcement of Hudood Ordinance 1979) that "enforcement of Hudood has not brought any noticeable change" (p.113). Same punishments are being awarded by the courts which were thought to be un-Islamic. No amputation has been inflicted but thousands of cases are registered in the police stations since promulgation of the Law. This ground facts manifests that Islamization did not affect law on theft already implemented in the country. Trial under the Hudood Laws is mere and intellectual exercise devoid of practicality. Crime rate is not decreased using deterrence of the Hudood Laws on theft and robbery. Ministry of Interior's (Burearu of Police Department) figures on incidents of theft in the country does not have substantial difference says Auolakh (1986 pp. 50-51, 220). It means that the Law did not have a positive impact on fall of crime rate. Jahangir and Jilani (1990) grade the legislation disproportionate as

for as crimes and proposed punishments are concerned. Sarcastically, a man will be amputated of his hand having seen by two Muslim adult witnesses while committing theft but a man cannot be convicted despite of stealing millions of dollars caught in the sight of several adult Muslim women or non-Muslims. To them the Qazf Ordinance also could not serve its purpose. It was to restrict misuse of The Zina Ordinance under the Hudood Laws. Mehdi (Ibid) objects law enforcement and delays in trial of the cases under The Zina Ordinance. People involved in *Zina* cases get bad names and develop bad reputation during the lengthy court proceedings that it becomes too late to seek redress of grievances under the Qazf Ordinance. This fact is endorsed by Auolakh (Ibid) through statistics presented for year 1983-84. There were 1638 cases of *Zina* registered in different police stations of Pakistan. In 1984 figure was enhanced to 1843 throughout the country. But only 18 cases of *Qazf* were registered in1983 and by reducing one case 17 cases were registered in 1984. There are numerous stories of misuse of the Ordinance circulating in print and electronic media in house or abroad alike without any mention of conviction and punishment of the complainants or witnesses on levelliing false accusation of *Zina*. Moreover, the effect of Islamization in rural areas is seldom seen. Women are prone to maltreatement as laws do not recognize them as full free human beings. Nonetheless, a wave of women rights in response to the criminal laws under the Hudood Ordinances got an organization and recognition throughout the country.

Pakistan people's Party (PPP) and Pakistan National Allience (PNA) conducted a dialogue amidst agitation could not save the country from the military takeover.Victor came to save the country on 5 July, 1977, through proclamantion of Martial Law, from anarchy and civil war. Distribution of arms to curb agitation against the government and elimination of *Nizam-e-Mustafa* supporters charged the country with chaos. CMLA with his lieutenants under flag of patriotism assumed power and responsibility to implement ideology through Islamization. Islamization has been aspiration of all other Muslim countries which remained colonies under British. Government faced a little resistance at that time masses were suffering from ill wills of their rulers. State structure was deteriorated, people were being exploited in hands of fellow lords, politicians, pedagogues, police and patwari system. Complete overhaul of the system required

reshapping of socio-ecnomic, legal, political and administrative system. Small minority 10-20 percent people were against enforcement of Ideology with respect to Shariah. The selfish element of the society opposed this process of Islamization but their voices fizzled out in the air. Finger pointing was done by anti-Ideological elements "the modernists" to safeguard their interest which still persists with more vigour. Islamization aimed by military rule includes reshuffling of inherited economic, educational, health, legal and administrative structure- state apparatuses in the country. The same was indispensable to create an egalitarian social order in Pakistan. The total shift was thought to be the way which could deliver the nation from the "abyss of socio-economic, legal, administrative and political psychosis" and to lead the country to the safe road to a modern welfare state holds Khan (1979 p. 9). This was a *jihad* both at physical and intellectual level to achive the goal of survival and prosperity in modern world he adds.

4.12 Rights of Women

Article 25 of the Constitution of Pakistan provides "equality of citizens". It also guarentees equal treatment of both the sexes before law. In third clause of the Article special efforts for the protection of the women are permitted and emphasized. In Pakistan these provisions are being fully enforced through the courts. Under Islamization process all customary laws denying rights of inheritance in agricultural property are repealed. Shariah has fixed right of male and female with mention of their shares. Females are given absolute property rights in inherited property and they can dispose of their property freely. In a leading case PLD 1990 SC 1 (Sardar Ali vs. Gulam Sarwar) it was held that being protectors and maintainers, brothers are required to protect property of their sister and her property rights as well if they take possession of property of their sister. "One who is enjoined with protection of other's property can not lay claim adverse to the intersts and right of that other who owns it". Now brothers can not usurp share of their sister on plea that she has relinquished it their favour or they have become the owner of the property by virtue of the adverse possession.

Wives were entitled to claim dissolution of marriage on treatment with cruelty by their husbands i.e. sepration after *talaq* on account of maltreatment by their husbands. In Islam the

right of *Khula* is always open for a wife who doesnot like her husband and life becomes difficult for both of them. She can seek *Khula* according to Shariah. Court is empowered to decree separation by *Khula* even disagreement of husband held in Abdur-Rahim vs. Shahida Khan (PLD 1984 SC 329). A *sui juris* wife cannot be forced to live with husband. As declared by the courts she can live separately as per her entitlement in law held in Shahi Bibi vs. Khalid Hussain (1973 SCMR 577). Right of the wife to see her parents is also established. A husband, refusing her wife to visit her parents, locked her in the house. Her mother bought a petition of *habeas corpus* to obtain her release by the order of the High Court. Execution of the order was resisted by the husband. Bailiff took custody of the wife with help of police. Husband forcibly snatched child aged 2/3 years from arms of her wife. She was produced before court and on her statement regarding her confinement by her husband and she was set at liberity. She was allowed to go with her mother. This is how court enforced that a wife is free human and she can only live with her husband according to her free will. Moreover, in the same case the child was also recovered and court gave the custody of minor to the mother. On the principle of *patria protesta* over the minor the court of record was empowered to give control of the minor boy to her mother where the boy was snatched form her (Sakinas Bibi vs. M. Aslam: 1987 PCrLJ 377). Courts even go beyond this in showing sympathy towards women folk. The same is manifested in Ghazala Yamin vs. M. Yameen (1987 MLD 2940) where spouses were separated. Wife agreed to give custody of the minor to the husband. Later on she instituted proceeding for the custody of the minor. Reliance upon the agreement by the husband was not regarded by the High Court of Sindh and ordered that such an agreement cannot disentitle the mother from caliming custody because the guardian judge must pass the appropriate orders notwithstanding such an agreement; which are keeping in view the welfare of the minor. It was in the welfare of the minor girl to remain with her mother.

A major woman, as there is no provision to force her, is not to be detained in *dar-ul-aman* against her will. Parents and brothers were in favour of keeping her in *dar-ul-aman* as there was apprehention that she may go to her paramour after serving sentence and release from jail on account of *Zina* (Noor Hussain vs. Spdt *dar-ul-aman*: PLD 1988 Lah 333). There is a conflict between provisions of the Muslim Family Laws Ordinance (MFLO) 1961 and the Hudood

Ordinance on *Zina*. Courts try to provide relief and soften and mitigate the rigoures of the Hudood Laws. Husbands do not get divorce registered in the Union Council as per requirements of the MFLO. Women being ignorant of the law contract second marriages believing that they are divorced but their first marriage remain intact legally. A woman cannot contract second marriage while being in wedlock of the first marriage. They start living with their second husbands. First husbands who divorced them take advantage of this legal lacuna against ex-wives. Ex-wife and her second husband were arrested in many such cases. Courts considered *Talaq nama* as sufficient proof for divorce whether or not registered in the Union Council. First marriage stands dissolved in reading of the court to prevent the women form injustice on basis of legal lacuna. In such cases neither second marriage nor living with second husband amount to *Zina* (M Hussain vs. Bashiran: PLD 1988 SC 186). In matters of testimony by women and its admissibility there has been criticism by women activists and NGO's as they cannot be witness in the matter of Hudood and Qisas. They have provided remedy by the Federal Shariat Court in a famous judgment (PLD 1985 FSC 95: Rashida Patel vs. Federation of Pakistan). It was held that women can be witness in cases where *Ta'zir* punishments are to be imposed and their evidence is definitely admissible as reported by Shah (1995).

Esposito (p.98) grades Pakistani courts in bolder position upholding principles of justice and equality. Pakistani courts in theory apply *Hanafi* Law while deciding matters generally. Lahore High Court showed departure form *Hanafi* Law in 1964 in Khurshid Jan vs. Fazal Dad. Can court dffer from juristic opinion of the *imam*? Courts can apply Juristice Opinion of any *imam* and from the other authoritative texts written by the learned men in law on grounds of good conscience, equality, justice and public good. The Court reflected upon the matter in depth as exhaustive study was undertaken to respond such a serious issue. The Court presented its views that if there was no clear rule in Qur'an and Sunnah a court may use its reasoning be guided by the rules of good conscience, justice and equality. *Imam*s of different schools in Islamic scholarship and earlier jurists are entitled to high prestige. Their views are an asset of Muslim legal history. They cannot be disturbed at all. But in present day scenario and challenges of the modern world courts do have right to differ from their views. The Lahore High Court, in another

case of family matters i.e. Zohra Begum vs. Latif Ahmed, said that the court's power, to conduct *ijtihad* and to exercise it, is necessary to dispense justice in true sense. While exercise of vested powers of *ijtihad* the Court departed from the established rule for the matter of custody of a minor. Lower court's decision of giving custody of a minor to father after a prescribed age limit was reversed. Normally after gaining a specific age in the law on guardianship (Gurdian and Ward Act) children are to be given to their fathers. The decisions are being given according to good conscience of the courts keeping in view the welfare of the minor (Ibid). The writer while appreciating the departure from *Taqlid* and showing the resort to *ijtihad* also criticizes that steps have not been taken by the Government of Pakistan in matter of the reforms of the laws. To her it is a sort of patch work and an *ad hoc* and incomplete policy.

In a leading discussion of the Supreme Court of Pakistan i.e. PLD 1999 SC 25, a land lady wanted to live separately as her tense and strained relations with her sister-in-law made the joint family environment uncomfortable for her. Leave to appeal to the Supreme Court was granted. The court considered that a grown up land lady who is unmarried and desires to live independently which is not prohibited in tenets of Islam. Keeping in view equal treatment before law without discrimination on account of sex according to Article 25 of the Constitution of Pakistan courts should not withhold from a female what may not be denied in case of a male in such circumstances. In another decision it is declared violative of the Article 25 of the Constitution to show discrimination against women on basis of sex. It is reported in Yearly Review of 2002 (2002 YLR 3393).

The Supreme Court of Pakistan holds the principle of no discrimination on the basis of sex alone. Reasonable classification can be done for example reservation of separate institutions for males and females. The institutions where co-education is permitted don't fall under such reservations for one sex alone. Any fixation of seats on ground of sex of the candidate will be against Article 25(2). The court further observed, however, it can be done under protective measures for women and children as guaranteed by Article 25(3). It is reported with reference to PLD 1990 SC 295. This is how courts provide protection to the women folk. In an oft quoted case

of refusal of admission to female students on ground of sex in medical colleges the Lahore High Court observed and emphasized categorical and unambiguous guarantee of equality devoid of any consideration on account of sex in the light of Article 25 of the Constitution. State may make proactive laws for women but not against them as per clear instruction of Article 25(3). The court asked a question that how the girls are treated equaly when they are denied to be admitted to an educational institute despite getting about 100 more marks more than boys. Consider that if they were boys they would have got admission. They are not being given their due right. Where are the laws of protection of women? Names of the girls who got competitive marks be put on the notice board with in seven days was directed by the Court (PLD 1987 Lah 178).

There are different legislations to protect women from exploitation. Criminal Laws (Amendments) Act of 2004 (I of 2005) is a special legislation to recognize and safeguard women's rights. It is enforced from 04 January, 2005. Evils of *karo kari* and *siah kari* are declared against fundamental rights of women. There are abhorrent customs making women prone to exploitation. A concession for women is guaranteed through an Ordinance in 2006 – Code of Criminal Procedures (Amendment) Ordinance 2006 and Second Amendment Ordinance (Ordinance XXXV) provide right of bail to female sex. This right of bail is subject to exception viz. cases of terrorism, murder, corruption and offences punishable with capital punishment or imprisonment for ten years. There are several laws which provide safeguard to women rights viz. Suppression of Prostitution Ordinance of 1961 and Child Marriage Restraint Act of 1929, Protection against Harassment of Women at Workplaces Act of 2010, Muslim Family Laws Ordinance etc.

Our judicial system is a British legacy. Prior to colonization of India the law of the land was Muslim Law. In the 17th century *Ftawa-e-Alamgiri* was given the status of the State Law under Aurangzeb Aalmgir. British made Islamic Laws controversial on purpose. They knew very well that the laws which worke very well for twelve centuries in Africa, Asia and Europe alike were not in any way inferior to their laws but they wanted firm control over their subjects. These laws were cause of tremendous progress in the world. People of all colours and creeds were

benefiting out of developments under Islamic Laws. English Law served well the purpose of colonization. These laws were not need of Muslim population of the country after the independence holds Fatima (2000). Mehmood opined that the Hudood Laws are prepared on the pattern of 150 years old Pakistan Penal Code. This technique gives a sense of duplication of the same legislation. Drafting of the Hudood laws is also questionable. After quoting Maheswari (1995) Mehmood concludes the discussion on critical evaluation of the Hudood Laws and their working. It is better for elected government to institute a critical study on the Hudood Laws at least. Mehdi (1994) reproduces modrenists' question whether the process of Islamization in progress is compatible with needs of modern and progressive society. They ask for codification of Islamic Laws keeping in view the modern legal approach. Islamic Criminal Laws have to face the challenges of modernity and progressive society. Turning to past can only bring criticism and may not yield as the Hudood Laws' case is an experience without gain. There is very marginal impact of Islamization move in Pakistan. There are inconsistencies in the Laws. Cases are being registered under PPC and the Hudood Laws. Police decides that under which a case is to be registered. *Ta'zir* punishments are being awarded by the courts the same was the case before the implementation of the Hudood Laws. Government is under a lot of pressure to reconsider and amend the Hudood Laws. The Hudood Laws have caused schism and opposition between factions of society as there were different possible interpretations of Shariah. Modernist groups along with women activists and NGO's exert immense pressure on government to amend these laws. Pressure of human rights organization from abroad adds weight to modernist's demands. Ansari (1994) and Niazee (1994) say Islamic theory of criminal law can be interpreted keeping in view the modern challenges. There is no final word except Qur'an and Sunnah. Legal experts of past and their treatises are valueable asset. Their importance cannot be undermined. At the same time Islamic Criminal Laws can be interpreted anew to suit to the challenges of the modern world. There is no reason to believe that the ideas of early jurist are last words on Islamic doctrine. They cannot be maintained totally at this hour. Present generation of Muslims faces numerous challenges and giant of modernity is one of them. New generation is to set its own way to see things and address the ever emerging issues. Adherence to the past and reverence for learned men

in previous centuries is a good thing. But new generation has to carry their own cross. It is obligatory for them to rely on there own reason and brain power to solve their problems. In this pretext the Council of Islamic Ideology has examined the Hudood Laws critically. Shah (1986), under supervision of a renowned modern scholar Dr. Mahmood Ahmed Gazi, Director Dawa Acadmy, grades Islamization process a half-hearted effort. Conventions, conferences, resolutions, speeches and seminars are all lip service. In law we see Islamization but corruption is rampant in every department of the stae. No relief is offered to common man as there is no socio-economic equality. Poverty is still to be eradicated.These measures of Islamization will only succeed if Islamic economic and social reforms provide substantial relief to poor. Islamic system proposes an egliterian society devoid of exploitation. Social amelioration is an integrated program to deliver the depressed and rehabilitate them but it is in theory as for as state of affairs in Pakistan is concerned. Notwithstanding the sincerity on part of exponent of Islamization we are far from the goal of real islamization. Shah (1992) shows dissatisfaction on factual position regarding Islamization process. Laws are made in consonance with injunctions of Islam. In doing so an Islamic policy is established theoretically. Only thing which is left to search our souls and find out will to live by the laws of Shariah. It is conduct of people which will translate laws in to actions. This is an uphill tasks; easier to say and difficult to do. We lack resolve to mend our conduct in accordance with Islamic precepts. He ends up with a couplet of Iqbal: In quite a night time the believer in robust zeal could construct a mosque they could not prostrate and submit to Allah even in years as they were not with pure hearts.

4.13 CII's Proposal for the Amendments in the Hudood Laws

As previous section on appraisal suggested amendments in Hudood Laws; the Council of Islamic Ideology was entrusted to re-examine the Hudood Ordinances. It is mandate of the Council of Islamic Ideology to analyze the laws for the time being enforced or future legislation to declare their *vires* in the light of the Injunctions of Islam. In the matter of Hudood Ordinances the Council showed rather a serious resolve as these laws were framed by the Council in 1978. These were farwarded to the CMLA of Pakistan with robust support of members of PNA which

were promulgated after approval of the CMLA on 09 February, 1979 (12 *rabi-ul-awal* 1413). In the following lines sitting membership of the Council in 2006 conducted a study and made it public in the name of Hudood Ordinance Report (number 94). In second part of the report discourse on the Hudood Ordinances in Pakistan, since 1980-2006, is given. This is in form of summary of views of people from different walks of life. This controversial debate prepared ground for further working on the Hudood Laws. List of literature presenting comments of both exponent of right and left wings as well as pleaders of status quo is presented at the start of the section.

Yusuf *Ludhyanvi* puts forward claims of consensus of majority of Muslim scholarship following all of the Muslim schools of thought on *rajam* punishment (stoning to death). He opines that only small minority named *khawrij* in Muslim history, Lahori / Qadyani and a group of people who don't consider Hadith of Prophet (eace be upon him) as the basic source of law-*Munkarin-e-Hadith* deny the authority of this punishment as a *Hadd* punishment. Logical progression of the stance leads to a convincing conclusion. Shahbaz (1998) in his book on history of enforcement of Hudood (*tehrik-e-ninfaz-e-Hudood*) writes down developments during past 19 years on the subject. He prefers his agreement for the defence of laws by rebuttal of the indicting critique on Hudood Laws. Chaudhri (1988) gives grounds to refuse Islahi's stance on *Hadd-e-rajam* not being a Qur'anic punishment. Defence provides the log of authorities from traditions of Prophet (peace be upon him) and their unanimously accepted interpretations among Muslim scholarship through the period of *ijtihad* to total submissionin days of *taqlid* alike. A similar work, which the researcher could access, but not mentioned in the Council's literature, is of Sohail (2005). It is in the name of "*inkar-e-rajam aik fikri gumrahi*". Sunnah is the basic source of Islamic Law maintains the writer. Qur'an acknowledges that Prophet (peace be upon him) propagates the "*hikmat*" which is Sunnah according to *ibn-e-kasir* in the interpretation of Verse number 129 of Surah number 2 (*al-baqarah*) of the Holy Qur'an. "*hikmat"* in Surah 3, Verse 113, is also Sunnah as interpreted by *al-Shafi* in his famous treatise on science of Islamic law i.e. *al-risala*: *usul-ul-fiqh*. In Sunan Abi Dawood, Haddith number 7604, it is narrated that Prophet of Islam (peace be upon him) said that he was given the holy Qur'an and a similar thing to the Holy

Qur'an. The writer then rejects all pleas of Islahi and Subhani (Muhahammad Anayatullah Subhani) in a very eloquent way. He ends up his arguments with opinions of renowned scholars to strengthen the view on validity of *rajam* as *Hadd* punishement. In *haqiqat-e-rajam* subhani contends the difference of married and unmarried in Islam for the purposes of punishment on account of *Zina*. He does not think stoning to death as punishment of *Zina*. To him the only punishment for both married and unmarried offenders is hundred stripes.

"*islami hudood aor un ka faisla*" by Matin Hashmi published in 1999 explains merits of the Hudood Laws. It tries to clear misconceptions about the Laws. Also the work provides the advantages of enforcement of the Hudood Laws in the country. "*nifaz-e-hudood main shubhat kay āsār"* by Anwar Mahmood Yousaf discussed implementation of *Hudood* punishments. *Hudoods* are not enforced in presence of doubt. Islamic Criminal Justice System does not only fix the punishments but also explains the rules that how the punishments will be enforced or implemented. Justice (R) Tanzeel-ur-Rehman in "*islami qwaneen hudood, qisas, diyat aor ta'zirat*" has decribed various schools of thought on the laws and their punishments. He has also compared the rules of different jursits on the subject. Khursheed Nadeem has written a book on doctrine of Islamic Justice System-"*isalm ka taswur-e jurm-o-saza*" published by International Islamic Research Institute in 1997. The book by Nadeem is a compendium of business of dessimination of justice in an Islamic state. It provides list of crimes in the first volume. Procedures for implementation of punishments are given in the second volume of the book with divergent views of scholars. In the third and fourth volumes the writer concludes that Muslim scholars unanimously favour the implementation of *Hudood* punishments to curb the crimes as well as to check the criminals following the theory of deterrence. The book also discussed three views on punishment of *rajam*. A group of scholars does not consider *rajam* as an Islamic punishment. Second view is that *rajam* is an Islamic punishment but not for *Zina* but for people who fight against state and are outlaws of community rogues, rascals, scoundrels, vagabonds, etc. Punishment of Zina to them is only 100 strips careless of the offender marital status. This view is presented by Amin Ahsan Islahi and held up by Javed Ahmed Gamdi and Umer Ahmed Usmani.

The third view is that the *rajam* is Islamic punishment for Zina and will be enforced to the offenders who are married.

Very strong stance in favour of repeal of the Hudood Ordinance comes from the Aurat Foundation Peshawar wing. Farooq khan highlights serious flaws in the Hudood Laws in his book "*hudood e qisas-o-diyat ka tanqeedi jaeza Qur'an or Sunnat ki roshni mein*". This book is published at Peshawar in 2004. An edited book in the name of "*hudood ordinance ki mansookhi kyun zaroore hey*" enlists causes of repeal of the Hudood Laws. A similar position is taken in a publication of the Aourat Foundation Lahore chapter. This book is written by justice (R) Javed Iqbal with title "*qanoone zina par aik nazar*". Another publication of Aourat Foundation is written by Dr. M. Tufail Hashmi. The name of the book is "*hudood ordinance kitab o sunnat ki roshni mein*". It is detailed analytical review of the Hudood Laws. It enumerates long list of conclusions arguing that Hudood Laws are not based on the sources of Islamic Law i.e. Qur'an and Sunnah. Conclusions of the book are noted in the report of council of Islamic ideology on Hudood Ordinance viz. punishments of theft as given in Offences against Property are for habitual offenders. Non habitual accused may be awarded less punishment. Hudood crimes list may be revised by omitting items on which there is lack of consensus among Muslim scholarship, non-Muslim can not be subject of *Hudood* punishments, Age of majority to some jurists is 19 years; it must be fixed, repentance must be given place in the laws; the one who repents should not be punished, insane needs to be redefined according to the injunctions of Islam, definition of *Zina* must be revised in light of Qur'an and Sunnah and interpretation of jurists, etc. Punishment for married and unmarried who commit *Zina* is same in Qur'an. *Rajam* is punishment for offenders who wage a war against the state regardless committing Zina. It can only be awarded to those who commit rape. Testimony of women is disregarded in Hudood Ordinance which is not supported by Qur'an and Sunnah. State must punish accused of *Zina* without waiting for complaint from the party who is wronged. Case of Zina must be reported to court as police is causing hudles and impediments in speedy administration of justice. It must be eliminated. Some sections of the Ordinance of Zina should be omitted i.e. Section 9 of The Zina Ordinance, Sections 1-8 of the Qazf Ordinance, Section 8 of the Ordinance on offences related to property,

etc. *Zina* and *Qazf* should be combined. Muslim male witness for theft is not according to Qur'an and Sunnah. Drugs and intoxicants do not fall under *Hadd* they must be placed under *Ta'zir* are suggested conclusions by Hashmi (ibid).

Dr. Fariha Siddiqui grades the Hudood Laws as making of the laws is for the protection of the society and elimination of the evil. Benefits of the laws could not reach the beneficiaries due to some flaws in the laws and their administration. Procedures adopted for implementation are troublesome for women folk. Suffering women can be relieved through amendments in the Laws says the author and denounces demand for repeal of the Laws which are based Qur'an and Sunnah.

The report has critically examined current discourse on the Hudood Laws in print and electronic media. The controversy on the subject prevails since promulgation of the Laws. There are three main groups of people in this regard:

i. People in favour of the Hudood Laws with no change.

ii. People who say reforms can / should be done.

iii. People who want total abolition and repeal of the Hudood Laws.

In the first group are: Dr. S.M. Zaman former Chaiman of the Council of Islamic Ideology, Saeed Ahmed Jalal Puri, Dr. Mahmood Ahmad Ghazi, Qazi Hussain Ahmed *inter alias*. Second group includes Fareed Ahmed and Javed Ahmed Gamdi. Third group is dominated by NGO's, liberals / modernists, freelance coloumnists: Parveen Pervaiz, Rafiullah Shahab, Dr. Fazal ur Rehman, Human Right Commission, etc. An on air debate telecasted by GEO group "*zara sochiay*" invited people to ponder upon the question "Is the Hudood Ordinance Islamic?" Its starts "No debate on Hudood of Allah but man made interpretations can be questioned" In this debate the offences included in The Zina Ordinance are mostly criticized. The criticism not only hailed form NGO's and human right activists but also form the religious scholars, who think the Laws are wrong interpretations of Qur'an and Sunnah. These scholars are of the view that discripancies in the Hudood Ordinances may be corrected and rectified through *ijtihad*. Position

adopted by the religious scholars from different schools varies on *locus standi* of the law but they seem to agree on some amendments in the Laws. These changes are to be under taken by opening doors of *ijtihad* in the following matters:

i. On non-fulfillment of requirement of four witnesses *Zina* is doubtful. In case of doubt when crime is not proved why accused suffers long imprisonment. Reverting to the *Ta'zir* when four witnesses are not available is against Islamic conception of *adl*.

ii. Condition of the crime and circumstances in which the crime is committed by the offender are immaterial. Careless of the conditions punishment shall be enforced if the crime is established.

iii. Victim's state must not be regarded as confession of the crime of *Zina*. Victim cannot be accused according to principles of Islamic justice.

iv. Difference between evidence of *Zina* and *Zina-bil-jabr* must be made to punish the rapists. Scientific / medical evidence must be used to identify the criminals. *Hadd* can also be imposed on the basis medical evidence.

v. Difference of punishment of *Zina* and *Zina-bil-jabr* must be maintained. *Zina-bil-jabr* is more heinous, atrocious and monstrous crime and needs more deterrent and punitive punishment. Adultery and rape are two separate crimes. They need to be dealt in the law separately through *ijtihad*.

vi. The Hudood Laws are made applicable to non-Muslim; it is coercion on them they must be tried according to their personal religious laws or PPC. Hudood Laws need an amendment to this effect.

vii. Criteria for witness in the Hudood Laws which excludes women are not based on Qur'anic concept. While crimes are committed victims don't have choice of witnesses. Qur'an does not discriminate either against women or against non-Muslims.

It is not only media debates in which people demanded amendments in the Hudood Laws there are other mandated forums viz. courts, Enquiry Commission for (the rights of) Women, Aug 1997, National Assembly Debates 1980, the Council of Islamic Ideology and the National Commission for Status of Women proposed amendments in the Hudood Laws are discussed in these lines briefly. In case of Rashida Patel, president of Women Action Forum (WAF), the Federal Shariat Court recommended:

i. Section 8 of The Zina Ordinance be amended as "two adult Muslim males" for rape cases instead of "four adult Muslim males".

ii. In Section 9(4) words "for offence i.e. lewdness etc., other than *Zina*" may be added.

iii. Ambiguity in Section 6 (b) may be removed by replacing it as "*Qazf* has been established as is mentioned in clauses (a),(b),(c), of the second exception to Section three and demand for punishment has been duly made by the victim of *Qazf* (Begum Rashida Patel vs. Federation of Pakistan).

Federal Shariat Court also declared Section seven of the Prohibition Order 1979 is repugnant to the Holy Qur'an and Sunnah of Prophet (peace be upon him) in a famous case – Nosher Rustam Sidhwa vs. The Federation of Pakistan 1981.

On 01 February, 2006 the Chief Justice of Federal Shariat Court, Justice Yousaf Choudhary suggested that when an accused is charged of *Zina-bil-jabr* with a female, she should not be charged under 10(2) of The Zina Ordinance for *Zina-bil-raza*. Delay, pregnancy or any other reasons should not be taken as fault on the part of victim unless any material evidence is available.

In 1997 the National Assembly of Pakistan suggested that sub-Section four of Section 10 of The Zina Ordinance should be added as : "when *Zina-bil-jabr* liable to *Ta'zir* is committed by two or more persons in furtherance of common intention of all such, each of them shall be punished with death" the same Section was purposed to be amended in 2003 in a cabinet meeting

in following words "when *Zina-bil-jabr* is liable to *Ta'zir* is committed by two or more persons in furtherance of common intention each of them shall be punished with death or for life imprisonment or for a specific period which may extend to 25 years, but not less than ten years, they will aslo be subject to fine not exceeding 1,00,000 rupees. This amount will be paid to the victim of the offence". This amendment was sent to the Council of Islamic Ideology for examination. This Council recommended the some changes i.e. deletion of common intention and fixation of minimum punishment for 10 years.

The Enquiry Commission for Women forwarded recommendations for amendments as the Hudood Laws were hasty effort without needed reflection and consensus. They do not conform to the Injunctions of Islam. These Laws are discriminatory and are against Article 25 of the Constitution of Pakistan. The laws have no deterrence for criminals. They have failed to serve the purpose for they were made to provide justice and check the crimes. They have increased litigations on account of false accusation and have caused hardships for people. These laws should be repealed, Sections of PPC which are repealed due to the Hudood Ordinances be re-enacted to include marital rape as an offence with exemplary punishment when the wife is minor. A serious dialogue must be conducted before making further laws to reach consensus in the light of Qur'an and Sunnah.

The Council of Islamic Ideology recommended a long list of amendments in the Hudood Ordinances in 147th meeting held in June 2002. The Hudood Ordinance on *Zina* should be amended as:

i. The title word *Hudood* be amended as *Hadd* as the Ordinance deals with only one punishment.

ii. Definition of adult in the Ordinance may be amended as "adult means a person who has attained puberty or age of 18 years being a male, or age of 16 years being a female". This amendment is to be made 2(a) of the Ordinance.

iii. Definition of Hadd in section 2(b) be amended in Urdu version, *Hadd* is a punishment the quantity of which is fixed in Qur'an and Sunnah.

iv. Urdu translation of word marriage is to be amended from "*nikah*" to "*shadi*" 2(c).

v. Definition of *Ta'zir* be amended to convey: (a) *Ta'zir* is not fixed punishment (b) also minimum punishment is not fixed. (c) Punishment under *Ta'zir* is same as is in *Hadd*; *Ta'zir* must be less in quantity than prescribed quantity in *Hadd*.

vi. *Zina* must be redefined as in the books of Fiqh: "*Zina*" means a person willfully committed illicit act of entering into the vagina of a living and desireable women with whom he is neither married nor is there *shubh-e- nikah* (Section 4).

vii. Section 6 (1) (d) of The Zina Ordinance may be amended: "with the consent of the victim, when the offender knows he not validly married to victim and consent is given because the victim believes that the offender is the person to whom the victim is or believes herself or himself to be valuidly married."

viii. Section 6 (2) confuses *Zina* and *Zina-bil-jabr;* it must be deleted.

ix. Section 8(a) should be amended "accused makes before a court of competent jurisdiction at four different times a confession of the commission of the offence".

x. Section 8(b) may be added a proviso "provided that where the crime is committed in a place which excludes the presence of male witnesses the offender be awarded punishment".

xi. Section 10 of the Ordinance be deleted

xii. Section 9/5 be amended "in case mentioned in Sub-Section (2), the court may award the sentence of *Qazf* to the resiling witness as well as the other witnesses".

xiii. In section 12 word "rigorous punishment" beamended as "ten years rigorous imprisonment".

xiv. Section 337 of PPC be inserted as Sub-Section (1) of this Section that penalty of unnatural intercourse is imprisonment for 25 years or death.

xv. Schedule of Qanoon-e-Shahadat be annexed to this Ordinance.

xvi. Sections 11-16 do not relate to *Zina*. They can be placed in PPC wherever are suitable or they may be deleted.

xvii. Section 17 of the Ordinance is questionable whether punishment of *rajam* is according to Shariah.

National Commission for the Status of Women 2003 also proposed many amendments in Hudood Ordinances on *Zina, Qazf,* and Theft, etc. Some of the proposed amendments in The Zina Ordinance are:

i. In Section 2(a) definition of adult is discriminatory.

ii. Definition of *Zina* in Section 4 is defective and inadequate.

iii. Sexual intercourse in Section 5(1) is *Zina* it should be *Zina-bil-jabr*.

iv. Sentence of *rajam* as in 6(3) and 5(2) is not Qur'anic punishment.

v. Section 8 has qualification of religion for witnesses which should be their credibility.

vi. Section 8 (b) is discriminatory as only males are permitted to give testimony.

vii. The Ordinance should not be applied to non-Muslims.

Proposed amendments in The Qazf Ordinance are:

i. Clear definition of *muhsan* and *muhsana* may be beneficial and applicable to non-Muslims.

ii. Definition of the offence of *Qazf* is defective

iii. Careful redrafting of Section 7(2) is necessary which takes away the right of evidence.

iv. Section 9 promotes injustice by protecting an accuser of descendent.

v. The the Qazf Ordinance is not required it may be added to The Zina Ordinance.

Amendments proposed by the Commission in Ordinance on Offences against Property are:

i. In Section (2) redefine and redraft definition of theft.

ii. *Nisab* in section 6 liable to *Hadd* is very low.

iii. Religion as qualification of the witnesses be abolished.

iv. Review of punishment in Section 9 according to Surah 5, Verses 39-40 and Sunnah.

v. Definition of *iztirar* be restructured including extreme poverty.

vi. Redrafting of Sections 11 and 12 to include victims of theft and robbery.

vii. Redefine *Harabah* in section 15.

viii. Redrafting of Sections 17 and 18.

Amendments proposed by the Commission in Prohibition Ordinance are as:

i. Revision and redrafting of definition of intoxicating liquor.

ii. Offences come under *Ta'zir* not *Hadd*.

iii. Section 3 needs to be reviewed or deleted.

iv. Section 4 is redundant like Section 3; it is also covered in Control of Narcotics Act 1997, hence be removed.

v. Male witness is unnecessrry and should be revised.

vi. It is unnecessary condition to have a judge based on faith.

There were special committees to review the Hudood Laws. The committees met on five meetings. Out of 15 members, who participated in the meetings, 12 recommended that Hudood Laws / Ordinance shall be repealed whereas 2 members recommended amendments rather than repeal.

There are many proposals from NGO's: Women Aid Trust and Aurat Foundation. Proposal by Women Aid Trust contained the following main points:

i. Seminars on public awareness are needed.

ii. Separate courts for trial of *Zina* cases under the Federal Shariat Court need to be establish

iii. Case registeration in the police station may be withdrawn and cases should be directly registered in the courts.

iv. *Zina-bil-jabr* needs *Hadd-e-Harabah* rather than *Hadd-e- Zina*.

v. Whipping be made primary punishment and imprisonment as secondary.

vi Cruel forms of marriage- to vindicate enmities should be brought under *Ta'zir*.

Main points in the proposal of Aourat Foundation are:

i. Hudood for theft and *Zina* are for habitual offenders. Non habitual offenders should be punished less.

ii. Application of Hudood Ordinance to non-Muslim is not justified.

iii. Repentant should not be punished by giving repentance legal validity.

iv. *Rajam* is not punishment for *Zina* but of waging war against the state.

v. Court should indict false accuser of *Qazf* without waiting complaints.

vi. Role of police in cases of *Zina* should be eliminated.

vii. Section 5 of *Qazf* is contrary to Qur'an as there is no discrimination of non-Muslim, hence be repealed.

viii. Sections 1-8 of *Qazf* are contrary to Qur'an and Sunnah.

Dr. Javed Iqbal Chief Justice of High Court observed about The Zina Ordinance in his private critique as:

i. It is a law which is not discussed in parliament.

ii. There record on consultation with jurists before making of the law.

iii. According to *autrefois acquit* where there is no valid proof the court is bound to acquit the accused but Hudood Laws provide dual standard of evidence which is against this principle.

iv. In Islamic system *Qazi* investigates and decides cases accord to the inquisitorial system but in Pakistan adversary system is in vogue which is contrary to Islamic system.

v. No mention of *Zina-bil-jabr* in Qur'an, medical evidence and statement of the victim are sufficient proofs to award punishment.

vi. Witness qualifications are unacceptable.

vii. Adult girl is not considered valid witness in *Hadd* case although she is victim of rape.

viii. Incompatibility of The Zina Ordinance with MFLO 1961 creates problems for women.

Amendment suggested in GEO debate:

i. In cases of *Zina* First Information Report (FIR) should not be necessary in a police station as a routine complaint. Complainants should bring four witnesses at the police station who will testify and verify the accusation in presence of a police officer of higher rank. It will protect the complainant and the witnesses on one hand and will check the abuse of the Law on the other.

ii. Women accused of *Zina* shall not sent to judicial remand in the jail. Their trial will be conducted in the court and shall be awarded *Hadd* punishment on proof of guilt.

iii. When a man or a woman accused of *Zina* is not found guilty after trial the court will on its own motion will start proceeding of false accusation on innocent person. They will be punished with *Hadd* punishment of *Qazf*.

iv. A women who is pregnant being victim of rape can't be charged of commission of *Zina*. Pregnancy stands no sufficient proof of Zina on the part of pregnant women. The Federal Shariat Court in Zafrah Bibi case ruled that pregnancy cannot be evidence that adultery or Zina has been committed. It may be the case of *Zina-bil-jabr*.

This state of affairs prevailed at different forums. In foreign setting remarks by Dr. Fareedah are worth reproducing, as in the Council's report on Hudood, that the Hudood Laws are prepared by the people who were convinced that these Laws will protect society, property and

honour. Process of making of the laws under *Hudood* as given in the Injunctions of Islam was initiated on recommendation of the Council of Islamic Ideology. These Laws, as was hoped, were to purge society of its evils. The writer shows disappointment that it is unfortunate that the society, despite of all merits of the Hudood Ordinances, could not benefit from the Laws due to "administrative flaws" therein. These flaws make people suffer, especially women, due to erroneous procedure and implementations which can be made good through amendments.

Amendments in Hudood Laws required hard efforts and reflection on the part of intelectuals, scholars and legal fraternity. Zafar Ansari in Nayazee (1994) emphasizes true and in depth understanding of Islamic Jurisprudence. He is of opinion that a better understanding is necessary to make Islamic Laws compatible to modern day requirements of state administration and to transform laws into a legal system of contemporary relevance. Muslim scholars can never ignore glorious heritage of global doctrine left by the jurists of past at one hand, on the other hand, he iterates that, their opinions are not final because they livid their era, they said and wrote in their times which can not be uncritically maintained by the present generation. "Every generation, notwithstanding its reverence for the ancestors, has to carry its own cross; had to fall back into their own brain power to solve its problems". After 27 years, taking the foregone debates, controversies, demand and recommendations into consideration the government of Pakistan amended Hudood Ordinance of *Zina* and *Qazf* to bring the Laws in consonance with true spirit of Shariah at one hand and in line with the modern concept of justice on the other. This is what is termed in this research "Modernization of State Apparatus" i.e. criminal laws under Hudood Ordinances. The process which is initiated by the Human Right Activists, Women Action Forum, Women Aid Commission, and Commission for Women etc. is translated in to Women Protection Laws as are given in the Protection of Women Act {PWA(VI of 2006)}.

4.14 Reference Cases Decided by the Federal Shariat Court (FSC) and The Supreme Court of Pakistan

4.14.1 Cases on Prohibition of Intoxicants

Zulfiqar Ali Bhotto, Prime Minister of Pakistan, took some measures to calm down agitation, against his government, by PNA and members of right wing as well as proponents of traditional schools of Islam. In May, 1977 an Act on manufacture and consumption of intoxicating liquor was passed by the National Assembly. It was signed by the President of Pakistan on 17 May, 1977. This was first ever attempt to control intoxication. Prior to this some restrictions were imposed by theWest Pakistan Act 1949. But these attempts were in some parts of the country i.e. Punjab and North West Frontier Province (NWFP). The Act of 1977 was extended to the whole of the country. Section three of the Act regarded import / export, manufacture and transportation, bottling and sale, etc. of intoxicating liquor as crime. The punishment for these crimes was imprisonment extendable to two years or fine amount of which may be upto Rs 10,000.00. The both of the punishments might be awarded to the offenders. There was exemption for diplomatic agents for import of intoxicating liquor. Section 4 of the Act prohibited the Muslim citizens of Pakistan from consuming intoxicating liquor. This crime was punishable with a term of imprisonment which was extendable to six months or fine not more than Rs 5000.00 or with both of the punishments. This Act does not authorize any police officer to arrest on mere suspicion but after notice he can accompany the suspect for medical examination and after examination when certified by a medical practitioner. It permitted the use of such liquor for medical purposes or other scientific and industrial purpose under Section 11. Licences were issued to persons both natural legal and violations of which were penalized under Section 15. Prohibitition Ordinance was also promulgated in all provinces of Pakistan in 1978. For example: Prohibitation Ordinance enforced by the government of Punjab on 15 March, 1978, VI of 1978. Similar Ordinances were implemented in other provinces. Section three of the Ordinance dealt with the import, export, processing, transportation, botteling of such liquor. The offender was punishable with imprisonment which might be extended to two years and with fine extendable to Rs 10,000.00 or both of the punishments would be awarded to the offender. This Section provided allowance to diplomatic agents for import of intoxicating liquor. Section four

of the Ordinance is also a copy of Section four of the Prohibitation Act of 1977. It made the offender liable for, imprisonment for a term which might be extended to six months or fine which might be extended to Rs 5000.00. There was also a provision for awarding both of the punishments to the offender.

Prohibitition (Enforcement of Hadd) Order 1979 defines drinking in Section six. This Order permits use of intoxicating liquor for the medical purpose. Illness is one of the *iztirar* held by the Federal Shariat Court on a petetion of total Prohibitition of *khamar* including medicinal use. The petitioner relied on the traditions in which Prophet (peace be upon him) prohibited even the medicinal use of the intoxicating liquor (*kulo muskrin haramum kala ao kasur*) all intoxicants are prohibited whether in small quantity or in large quantity. Court quoted verses of Qur'an permitting prohibited things under necessity. Medical treatment of a woman by male doctor when no female doctor is availiable is permitted. No man can see the hidden portion of body of woman but a male doctor can even examine her concealed body parts when she is suffering from pain or other diseases. Use of the liquor was upheld and the petition was dismissed; Gulam Nabi vs The State, PLD 1983 FSC 55.

Restriction on use of intoxicating liquor on non-Muslim other than religious ceremonies was challenged in a famous case PLD 1981 FSC 245. It was held that exemption given to non-Muslim is a garuantee that they can live according to their own belief in this Islamic State. The concession must be in strict sense to the extent it is permitted. Taking intoxicants at public place and violation of the Law is not covered in the concession. It was decided that they can not use intoxicating liquor openly and publically; Nosher Rustem vs The State.

In Taskeen vs The State the appellant, sentenced under the Order Section 22, was already in custody of police. Police brought the appellant on his disclosure of having heroin in his room at mid night. Police took appellant to his room and found 50 grams of heroin wrapped in polythene bag placed under the carpet. All the five witnesses of the prosecution were police officials. None of the neighbours or chokiwdar was present at the time of recovery. Only a volunteer chokiwdar was present. There were sufficient contradictions in the story of police. No search warrants were

taken from the court to visit the house at midnight. Disclosure was made during investigation and violation of Section 103 of CrPC was done due to paucity of time and circumstances at the midnight that two witnesses could not be found from the locality. There was contradiction between the statement of Investigation Officer (IO), Prosecution Witness (PW) 4 and PW 2. IO said that neither anyone of the *mohalladars* (neighbours) nor the *chokiwdar* (watchman) was present where as PW 2 said that no *mohalladar* was present but a volunteer *chokiwdar* was present. Police could not gather people at the place of incident as the appellant was already in their custody. Contradiction in the statement is more than sufficient to make the case a doubtful recording recovery. It is well observed that police witnesses are as good as other witnesses until enmity between parties is proved. But court could not apply the rule to the case in hand i.e. PLJ 1975Cr Lah 102. Appeal was accepted conviction and sentence were set aside (PLJ 1996 FSC 268).

Appellant was sentenced to two years RI and fine of Rs 5000.00 under Section four of the Hadd Order 1979. Fifty grams of heroin was recovered but neither presented in the trial court nor a certificate by magistrate regarding its distruction was presented. No case property was available it made the recovery doubtful. Recovery made by the police in a busy chowk by not associating public adds to the doubts. Chemical report was taken after five days of the recovery and no explanation of delay was found on record making the report doubtful and unreliable. No association from the public was considered as people don't come forward to escape ordeals of long investigations. Police witnesses are as good as any other. Appeal accepted and giving benefit of doubt as prosecution couldn't prove the case beyond reasonable doubts. The appellant's conviction and sentence were set aside; Mst Iqbal vs The State, 2000 PCrLJ 1812.

Recovery of quantity 400 bottle from possession of accused made a strong case against him. Such a huge quantity can not be planted by police. Case was tried under Section three of the Order. Sentenced passed by the trial court: Four years rigorous imprisonment to each (Gulam Sabir and Waheed Khan) and fine amount of Rs. 2000.00 each. They were to undergo six months of simple imprisonment in case of default under Section three of the order they were also to suffer

two years rigorous imprisonment under Section four along with fine rupees 1000.00 each and further three month simple imprisonment for default. Appellant pleaded enmity on the part of police on account of abduction case on instance of Waheed, a rickshaw driver. No witnesses from the public were associated at the time of raid. Police witnesses are as good as any other unless malafide is evident. But court could not extend suspicion in presence a huge recovery. It was not found on record that the case property was meant to be sold. Record of conviction under different Sections was also against the scheme. Sentence under Section 4 i.e. two year rigorous imprisonment was set aside and conviction and sentence under Section 3 of the order was upheld i.e. four years of rigorous imprisonment each and fine of Rs 20000.00 each and in case of default an additional simple imprisonment of six months each; Gulam Sabir and Waheed Khan vs The State, 2004 SD 625.

Appeal was dismissed from the Federal Shariat Court by keeping sentence under Section 4 intact except setting aside the sentence of whipping. Session Judge of Chitral passed sentence of five years rigorous imprisonment and fine rupees 10000.00. The convict was to undergo rigorous imprisonment of one year in case of default. Leave for appeal was granted on the plea by the petitioner that Section 103 CrPC was not complied with. Only one witness could be associated while making search. Counsel for the State submitted that the search was made under Section 22 of the Order and not under Section 103 CrPC and recovery was proved beyond any shadow of doubt. Witenesses were gone through lengthy cross examination. In presence of no animosity false implication was not conceivable. Nothing substantial in favour of the appellant could be elicited for the advantage of the appellant. Alleged enmity with the Head Constable and his intimacy with the Suprintindent of Police and use of his jeep have no nexus with commission of the alleged crime and overwhelming incriminatory material could not be ignored. Hostile witness can be considered if corroborated. It would be seen in light of the other available material which is incriminatory in nature. Recovery was established which provided the required corroboration to the statement of hostile witness.

Lapse of minor nature on account of noncompliance of provision of the Section 103 of CrPC could be ignored as general public was reluctant to become witness against such a drug mafia. Certificate of destruction and positive chemical report were duly presented to the court. Presence of all opium and heroin in the court according to Section 516A CrPC hence was weightless. Procecution established its case forthright and with credible evidence. The Federal Shariat Court reached well based conlusion with no leave to interfere with.The appeal did not warrant merit and dismissed; Safraz Gul vs The State, PLD 2004 SC 334.

Any police officer can not take cognizance of an offence, which is cognizable, by violating privacy of citizens. Entry into the house without giving notice to ladies of the house to take cognizance of the offence and recovery is violation of Section 103 CrPC. Seventy grams of heroin was found in possession of the accused. Charged under Section 3/4 of the Order he was tried and sentenced two years rigorous imprisonment and fine rupees 10000.00. Appeal was considered non-maintainable by the Federal Shariat Court. Appeal was sent to the Aappellate Bench of the Supreme Court of Pakistan. Provision of the Section 103 CrPC were not followed Section 22 of the Order requires search warrants which were never sought. Case did not come under Section 16 of the Order. Entry of police was illegal and violation against the privacy of the appellant. No respectable witness of the village was associated. Whereas Section 103 CrPC needs two of them. Entry and recovery without authority was misuse of power and was an insult and injustice to the appellant. Appeal was accepted and sentence was set aside along with impugned conviction; Mr Aqil vs The State, 1996 PCrLJ 345.

Recovery of heroin from the accuseds was made on his apprehension from a populated area. No witness was available other than three police officials. Though police officials are good witness but their evidence must be examined. They assessed the weight equal to five grams but they could not explain how they could know the weight. In these circumstances their evidence and recovery might be a show of efficiency which was difficult to rule out. The evidence was taken with skepticism and created doubts regarding recovery the accuseds were convicted and were sentenced two years and one month RI each along with fine Rs 500.00 each and one month

simple imprisonment in case of default. In the same case an appellant was sentenced to two years and three months rigorous imprisonment with rupees 500.00 fine and one month simple imprisonment in case of default. Appeals were accepted, convictions and sentences were set aside. Bail bond of one accused discharged and an accused in jail was set at liberty; Abid Hussain etc vs The State, 2005 Pcr LJ 746.

Under Section four of the Order sentence of life imprisonment was passed to the accuseds; with rupees 125000.00 fines to Wahab Ali and two month simple imprisonment (S.I) in case of default; whereas in case of Bashir Ahmed fine of the rupees 50000.00 and four months additional simple imprisonment in case of default, by the trial court. The sample was dispatched for chemical examination after three days with no justified reason. Report showed them identical to heroine powder. Delay was fatal to the case of prosecution. PW also admitted to be the servant of brother of excise inspector who accompanied police party on raid. This relationship was not disclosed to the trial court. The court was deceived by the PW by making the court believe him stranger to the excise officer. Evidence of the PW was unreliable. Discrepancies in the evidence created doubts regarding recovery. Appeal was accepted, conviction and sentences were set aside; Wahab Ali and another vs The State, PLJ 2009 FSC 154.

In a revision application by a Hindu who was in possession of small quantity of local wine (*desi shrab)* for his personal use. Under Punjab, NWFP and Baluchistan Prohibition rules 1979 and under the Prohibition Order he could have obtained permit for his personal consumption of the wine. But the accused was resident of Sindh. Thereby he could only obtain intoxicating (*shrab*) liquor for a religious ceremony. Desi sharab was in small quantity and was not for sale / commercial purposes. The accused was sentenced to one year rigorous imprisonment and fine amounting 1000.00 by the learned trial court under Section four of the Order. Counsel for the applicant prayed reduction in the sentence under Section four of the Order. He took plea that the convict was non-Muslim and the quantity of *desi shrab* was also very small to be considered for commercial or sale purposes. The *shrab* recovered was for applicant's personal consumption. Counsel for the State admitted the stance taken by the learned counsel for the applicant. It could

not be understood that why Sindh Government made different rules than other provinces. However, rules are subservient to status and parent law under which they are made. The court accepted consideration of the sentence till 06 Aug, 2008. The accused suffered imprisonment since accused was on bail. He was directed to pay the fine of rupees 1000.00 to get the bail bond discharged in the case of default simple imprisonment for a week was to be suffered; 2009 PCrLJ 357 FSC.

A leading and oft quoted case on offences related to prohibition Order 1979 is of Said Muhammmad vs The State. Convict was sentenced to imprisonment for life one hundred thousand fine in default of which he was to undergo four yearr rigorous imprisonment in addition to imprisonment for life. He was sentenced to bear 30 lashes of whipping according to the judgment of Additional Session Judge under Section 4 of the Ordinance. Appellant filed an appeal against the order of the Additional Session Judge to the Federal Shariat Court. The same was dismissed. He applied for leave to appeal from the Supreme Court of Pakistan. He was granted the leave.The appellant was caught by the Anti-Narcotics Force party on raid when he was taking a sack of clothes on his shoulder towards Gulistan Crossing of the Muhajir Camp Quetta. On search the official found 5 kilograms heroin in the sack. Report of the chemical examiner was positive. All the three witnesses examined by the prosecution were government servants from Anti-Narcotics department. Appellant had said that there was no enmity between him and officials deposing against him. Appellant also brought a witness in his defence before the trial court. There was contradiction in the statement of witnesses. The court observed that statement of all of the witnesses should support each other. Their deposition must unanimously verify the central point of the case. If they differ on the centeral issue of case their evidence should not be accepted. However, their version may be different with reference to ancillary matters to the case. In the later case their testimony will be securitized as to what effect it casts on the main issue. It may be rejected if it disturbs main question in the case. Public servants do not fall under “adversaries” if there is not any proof of old enmity. Even in presence of enmity the evidence of public servant is permissible but it will not be relied on. But the appellant had stated in trial court that there was no enmity between them. Court did not give weight to the contention

of appellant that Anti-Narcotics did all to show their efficiency for promotion and reward. It would have disqualified all public servants after all they work for their department and in turn for the State and they had to show their performance and efficiency. This was no disqualification in *fiqh* for public servants. Evidence by public servant can be both true and false. Where there is no witness from general public testimony of public servants needed rigorous sifting. It was court's jurisdiction to convict the accused based on evidence of the public servants of Anti-Narcotics Force in this case. The Supreme Court did not interfere in the matters of conviction and sentences as there were sufficient proofs on record regarding recovery, chemical examination and witnesses. Nonetheless, the question of ownership of the intoxicant in that huge quantitiy needed re-reading. If it were established the convict was only porter not the owner of the property his sentence would have been decreased because a transporter of intoxicant cannot be equally punished. If highest punishment for the owner was life imprisonment the punishment for transporter would have been less than him. Appellant on this ground might not be punished as being owner of the heroine. Businessman if punished under Section four of the Prohibition (Dangerous Drug) Order with imprisonment for life, the transporter might undergo a less punishment. There were chances of reduction in sentence if the ownership of the case property is established in any other person. The Honorable Supreme Court of Pakistan granted the leave for appeal to consider the matter of reduction in punishment of the appellant; Said Muhammad vs The State PLD 1990 SC 1176.

An Anti-Narcotics official (field investigation officer) received spy information that the appellant was selling intoxicants in his house. The appellant was also an absconder in a criminal case as was reported. The official associated some witness from inhabitant of the area and raided the place. On taking cognizance of the accused raiding party recovered 50 packets of heroin from right side packet of the accused. The weight of the heroine was 25 grams. In another room the party found 40 kilograms of *chars* and two kilograms of heroine. The party also arrested a woman holding a black cotton bag in which there was two kilogram *chars*. Samples from the two stocks i.e. the packets and unpacked quantity were sealed and were sent to the chemical examiner. Chemical report from National Institute of Medical Sciences was presented in that court. The

appellant contended the conviction on two points: congninizance of the intoxicants from house, his private place which did not fall under Section three or four of the ordinance as the requirement of Section 103 CrPC were not fulfilled. The appellant was convicted by the trial court of Karachi Garbi. He was sentenced to ten years rigorous imprisonment and rupees 50,000.00 and whipping 15 lashes. The Honorable Supreme Court of Pakistan on perusal of the record that it was evident that points which were raised in the appeal were also raised in the subordinate courts. The lower courts had satisfactorily answered and addressed the questions. This was why appeal was dismissed by the Federal Shariat Court. It was further noted that the recovery was not made from any public point according to Section three or four of the Order but it was made from the house of appellant. The court observed that Section 16 (1) of the Order provides that act of holding intoxicants and their sale is corgenizeable in all cases. Further, on objection of nonfulfillment of the requirement of the Section 103 CrPC The Court highlighted the facts already present on record that the raiding official wanted to associate two witnesses at the time of raid but one of them refused to be witness and other became witness but never turned up in the court. It was also highlighted that people generally avoid to be witness in such cases. The appellant had stated in the trial court that there was no enmity between him and witnesses (government officials). The crime against the appellant was proved through three witnesses. Contradiction in the statements of the accused that he was arrested from bazar not from house was never discussed. Counsel for the accused suggested that witnesses took away the television and an amount of rupees 30000.00 from the house of the accused provide sufficient proof of that the recovery was made from the house. Application for grant of leave for appeal was not approved; Abdullah vs The State, PLD 1190 SC 1186.

4.14.2 Cases on Illicite Sexual Intercouse

In the case under Section 10 (Offences of Zina liable to *Ta'zir*), Section 13 (selling, giving or hiring or disposing of a person with knowledge of being the use for prostitution or illicit discourse etc.) and Section 14 (buying / hiring for above purposes) FIR was registered against accused. A constitutional petition under Article 14 of the Constitution of Pakistan was filed for

quashing of false FIR. Section 165 CrPC says search must be necessary otherwise apprehension of the undue delay through other ways of getting into investigation exists. Grounds to justify the belief of necessity must be recorded, before the serch, by the police officer. At the same time search of the thing is covered under section 165 CrPC and not arrest of a person. Privacy of home was desecrated. Abovementioned Section of Offences of The Zina Ordinance and Section 165 CrPC do not visualize search of a person in a house. The entry into the house was also against the section 103 CrPC which demands for search warrants. Moreover, such advances are against the injunctions of Holy Qur'an and Sunnah. The Holy Qur'an prohibits such an action in Surah *Nu:r* Verses 27 and 28. Reference to PLD 1968 Lah 1425 was made (Ashiq Din with others vs The State), police made search of the house of accused without recording grounds in The Daily Diary (*Roznamcha*) for such search. It was held that such search was without jurisdiction and against the law. In aother case; Mrs Riaz vs. SHO Lahore Police, 1998 PLJ Lah 35 there is no provision of issuance of an order for searching a house on information which is incognito that in the house the *Zina* is being committed. FIR was declared to be illegal, malafide and tainted with ulterior objectives and was quashed by using Constitutional Jurisdiction; M Murad and Others vs SP Dera Ghazi Khan, PLD 1999 Lah 297. It is evident that unfair use of law on part of parties and police creates problems for people. Malfunctions of the procedures further add to the problem. Administration has paralyzed the system having blotched the validity and practicality of the Laws.

Convicts were not "adult" and could not be tried under Section 7 of the Ordinance. They were tried under Section 10(4) coupled with Section 7 of Anti-Terrorism Act 1997. They were charged with *Zina-bil-jabr* with a minor girl of 9 years old. Trial court sentenced both of them to death with fine rupees 50000.00 each; in case of default they were to suffer 7 years RI. Plea of Section 7 of the Ordinance was taken which provides for five years imprisonment which is extendable to five but can be less than five years. It can be either RI or SI with fine or both of the punishments can be awarded jointly along with whipping up to 30 lashes. Case of prosecution was fully supported by two eye witnesses and medical examination report. Giving benefit of Section 7(B) of Anti-Terrorism Act 1997 as no death took place during the commission of crime

death sentence was changed to life imprisonment with 50000.00 fine, each. In case of default the convicts were to suffer two years rigorous imprisonment. Half of the fined amount was to be given to parents of victim; 2001MLD 310 Lahore (Gulam Dastagir vs The State).

After abduction rape was committed with the victim for two months. Delay in registration of the case was no ground for grant of bail in the case under Sections 10 and 11 of the Ordinance. People avoid registration cases of abduction of females. The fear of being put to shame and "*beyizati*" in the society causes delays. After trying their hard for recovery it came to registration of the case for the recovery of the abductee as last resort. Petition was filed for cancellation of bail granted by the Additional Sessional Judge. Accused persons abducted a girl of 12 / 13 years and stolen 7 tola golden jewelry along with an amount of rupees 30,000.00 . Bail neither could be granted on the ground of probe of further inquiry nor on delay in registration of the case. Reference was made to the judgments of the Honorable Supreme Court of Pakistan:

i. Arbab Ali vs Khamiso and Others 1985 SCMR 195

ii. Mst Resham Jan vs Abdur Rehman 1991 SCMR 1849

iii. Najeeb Gul vs khalid Khan and another 1989 SC 899

iv. Asmatullah Khan vs Abdur Rehman and others PLJ 1988 SCMR 298, etc.

The petition for cancellation of bail was accepted by setting aside the order for grant of bail by the learned Aditional Session Judge; Qurban Ali vs M Sabir and others 2002 SD 255.

Convicts filed an appeal to the Federal Shariat Court against sentences passed by the Session Judge. Three of them convicted to different punishments. Main accused was sentenced to 15 years rigorous imprisonment (RI) under Section 10(3) of the Ordinance along with fine of rupees 10000.00; in case of default he was to undergo further one year rigorous imprisonment (RI). Others were sentenced to 4 and 5 years rigorous imprisonment respectively along with fine rupees 2000.00 and 5000.00 respectively. Complainant and the abductee gave truthful and trustworthy statements inspiring confidence and could be relied on. Medical and chemical report of the abductee's swab corroborated her statement regarding her subjection to forced illicit sexual

intercourse. She implicated the the co-accuseds as member of the party doing rape. Oral and documentary proof of *nikah* of main accused with abductee did not inspire confidence being manipulated and maneuvered. Appeal was dismissed and convictions and sentences of accuseds were upheld with slight changes in the sentence of main accused. However, sentence of whipping stood remitted due to non-availability of the punishment after abolition of the Whipping Act in 1996. Sentence of the main accused was reduced to 10 years rigorous imprisonment and fine amounting to 10000.00; 2001 PCrLJ 1210, M. Aslam and two thers vs The State.

In a famous judgment according to the Hudood Ordinance of Zina, husband was jailed in a murder case for nine years. Wife went to cut fodder to nearly hill. Accused overpowered her and committed *Zina-bil-jabr*. But the report of the medical examination officer declared her pregnant for 7/8 weeks. Police arraigned her with the accused to face the trial as her complaint and medical report were varied. They were challaned under Section 10(2) of the Ordinance. The victim also admitted birth of the female baby apart from presence pregnancy and child was alive in her custody. Victim was convicted to stonning to death by the Additional Session Judge Kohat under Section 5 of the Ordinance. The court also sent a criminal reference to the Federal Shariat Court for confirmation of the sentence. Zafran Bibi wife of Naimat Khan also filed appeal against her conviction. The both were heard at once. Convict produced an affidavit from her husband claiming the parentage of the minor Mst Shabnam out of their wedlock. She also stated that she was pregnant due to *Zina* to which she was coerced without her consent. The Court referred to the number of Reports of the Prophet (peace be upon him) after statating that a person coerced to commit *Zina* and after subjection to *Zina* that person neither liable to *Ta'zir* nor the *Hadd*. The person who cuases such a coercion shall be punishable depending upon the available evidence and circumstances of the case with either *Hadd* or *Ta'zir*. Conviction in cases of *Zina* should not only be based on commission of the offence but also with free will to commit the offence. Such act performed under compulsion did make the doer neither guilty nor liable to the conviction. *Hadd* is a svere punishment so; every possible precaution must be adopted to save the innocent. The learned Judge coated "avoid enforcing *Hudood* as much as you can (*Ibn-e-Maja*)" and also reference to a famous Report of *Tirmidhi* was made : "keep *Hudood* away from Muslims as much

as possible, if there is any way to spare people from punishment, let them go. It is much better that a judge should err in acquiting someone rather than he should err in punishing a person who not guilty." Appeal was allowed and conviction and the sentence were set aside the reference made for conformity of the punishment which was awarded to the appellant was not conferred and was answered in negative; Zafran Bibi vs The State, PLD 2002 FSC 1.

Convicts were tried under Section 10(3) of the Ordinance. Their sentences were converted into Section 10(4) and were enhanced from 25 year of imprisonment to death punishment by the Lahore High Court in exercise of *suo moto* powers. An appeal was filed in the Supreme Court under Article 185(2) of the Constitution of Islamic Republic of Pakistan against order of the Lahore High Court. Question of the *suo moto* action of the Lahore High Court was not discussed. Only one convict committed *Zina*. Evidence on record, delay in lodging FIR (for seven days), old enmity between the parties, cut both ends. Owing to the pervious involvement in the murder case main accused might have reared grudges to balance his false involvement and might have molested the daughter of the adverse party to take revenge. On the other hand it could not be over ruled that prosecutrix and the complainant party might have blamed the accused falsely as they were inimical towards the accused. Appeal was admitted by the setting aside the impugned orders of the Lahore High Court. They were acquitted from the charges levelled by the High Court under Section 10(4) of the Ordinance. Sentence passed by the Anti-terrorist court under Section 10(3) of the Ordinance was also amended as applicant Munir Masih was convicted under 10(2) of the Ordinance and was sentenced to 10 years rigorous imprisonment (RI) with 30 stripes along with fine of rupees 50,000.00 or in case of default he was to suffer further two and a half years simple imprisonment. Appellant M. Abbas was acquitted of all charges and set at liberty; PLD 2003 SC 863, Muhammad Abbas and another vs The State.

Leave to appeal was refused by dismissing a petition under Article 185(3) of the Constitution. On offence of abduction the complainant was not eye witness of the incident. Both of the PWs stated that they did not know the accused before the incident. They informed the complainant about the incident. The Federal Shariat Court acquitted the accused rightly based on

the proper evidence. The State filed a petition to leave the appeal to Shariat Appellate Bench of the Supreme Court of Pakistan. From the trial court Khuda Dad was convicted and sentenced where as Khalid Javed was acquitted. Khuda Dad filed an appeal to the Federal Shariat Court to challenge his conviction and sentence. Complainant Amanat Ali filed an application for revision against acquiltal of Khalid Javed and for enhancement in the sentence of Khuda Dad. The Federal Shariat Court dismissed the criminal revision. Appeal was partially allowed by setting aside conviction and scentence of Khuda Dad under section 13 and 11of the Ordinance. The court however maintained the sentence of under Section 16 of the Ordinance. Section 11 did not attract to the appellant because on complainant's statement the appellant had developed illicit relations with her sister prior to the incident. This was the only cause of conviction under Section 16 of the Ordinance. The court observed that the appeal against acquittal is judged on quite a different crietaria than an appeal against conviction. An acquittal can not be interfered if not found *prima facie* speculative, perverse and capricious. There was no such disqualification in the impunged judgment at all. Hence, petition was dismissed as devoid of the force and leave to appeal was refused; The State vs Khuda Dad and others, 2004 SCMR 425.

Highhandedness of the police was evident though the allegations against officials could not be admitted in the court. Discretionery powers of police drew the initiation of the proceedings to three years. The case was fully distorted. Learned Saeed ur Rehman Farrukh rightly remarked that the case had a "chequered history". Police managed to get first FIR as false through the Court. Case was tried under Sections 10 (3) and 16 of the Ordinance after going through *Qazf* proceedings which were adjoined with complainant of the FIR filed an application to Anti-Terrorist Court (ATC). Then ATC conducted an inquiry through a Majistrerate and reached conclusion that an FIR must be registered and the case must be tried a fresh. This was start of the case which took very long to reach this stage. Witnesses, victim, and medical reports provide sufficient grounds for conviction of appellants and five were given benefit of doubt and were acquitted. The complainantt filed a criminal appeal and a criminal revision in the Federal Shariat Court. In the revision the impugned order of the acquittal of 5 persons was assailed and in criminal appeal he challenged the impugned judgement as quantum of punishments / sentences

awarded to the accused was not comensurate with the seriuosness and gravity of threir crime. Shabbir *alias* and Kukku and two others were sentenced to 7 years rigirous imprisonment each under Section 10 (3) and 16 of the Ordinace and they were also sentenced to two years rigorous imprisonment under section 343 of PPC in Shabbir urf Kukku vs. The State. Procecution was successful in proving the appellants guilty. Their conviction under section 10 / 3 and 16 of the Ordinance sounded merit but the sentence awarded to them seemed a bit on higher side. Their sentence under the Ordinance was reduced to four years rigorous imprisonment. Sentence passed to them under Section 343 PPC remained intact. Criminal appeal by the complainant for enhancement in the sentence of the appellant was dismissed. In case of criminal revision the court observed that the complainant and the victim may have been maltreated by the police during investigation of the case but it was difficult to believe that they could subject the victim to rape in such a public place as a police station is. Moreover, victim's statement of levelling the allegation appears an indulgence into exaggeration. Case of prosecution in this regard could not be proved without reasonable doubt. Five persons who were acquitted by the trial court were rightly given benefit of doubt. The court did not find any force in the appeal so, it stood dismissed; 2004 PCrLJ 1039.

A complaint was lodged by father that his daughter was missing but as a last resort when return of the girl could not be made through other available options. The trial court sentenced the main accused under Section 10 / 3 for five years rigorous imprisonment (RI) and also sentenced him under Section 11 for impressment for life along with 5000.00 rupees fine; in case of default one month imprisonment was also awarded. It was not likely to the opinion of the Court hearing the appeal that a person would abduct a girl to commit *Zina-bil-jabr* with her and lead the girl to report to Edhi Center. It was suggestive of presence of victim's free will in seeking refugee at Edhi Center with the accused. Report of chemical examiner was not presented in the court, had it been produced it would have shown no incriminating findings. Vagina admitted two fingers and hymn torn were suggestive of previous experience of the victim of going through intercourse and also doubting story of *Zina-bil-jabr*. It would be perverse to convict for *Zina-bil-jabr* when there was no evidence to support abduction and commission of *Zina-bil-jabr*. Guilt of *Zina-bil-jabr*

would have been proved had the vaginal slide been strained and semen of the accused been sent to serologist for comparison and the report being positive. Adding doubt to the case of prosecution was non examination of the witnesses. If witness was produced in the court he would not have supported version of prosecution. Appeal was accepted conviction and the sentence were set aside and the appellant was set at liberty; 2009 SD 145, Shahzad Masih vs The State.

Convicts were sentenced to death for committing gang rape under Section 10A of the Ordinance.They were also sentenced to imprisonment of life under Section 11 and levied with fine rupees 5000.00 each. In case of default they had to suffer three month simple imprisonment. The court of appeal thoroughly examined statement of the victim and matched it with the statements of the witnesses. Charge of abduction was sufficiently proved. Accuseds committed *Zina-bil-jabr* turn by turn with the victim was supported by medical evidence. Victim deposed against the accuseds which can not be errased of on accused's claim of performance of *nikah* of someone else. Abduction of the victim was established in light of the evidence on record as victim was recovered by the police after quite a month after the abduction but appellants were able to run away and victim stated unequivocally that she was subjected to *Zina-bil-jabr* by the appellants. Eye witnesses, medical evidence and circumstantial evidence were sufficient to uphold the sentence of the appellant but the death sentence was converted into imprisonment for life; 2009 SD 204, M. Nazir and M. Jahangir vs The State.

Contradiction in statement of victim necessitated further inquiery into the matter. In an early settlement that she was never abducted rather she contracted Islamic marriage with the accused on her free will. In subsequent statement under Section 16A CrPC she deposed that she was subjected to *Zina-bil-jabr* by the accused. This was the case demanding further inquiry. Bail according to the Section 497(2) of CrPC was granted to the accused; 2002 SD 86, Nawaz *alias* Bhatta and another vs The State.

In the leading case under the Ordinance; The State vs. Khushal Khan *alais* Baju, convicts committed robbery, rape and murder. Testimony of minor girl was objected by defence in the Court of appeal. The Court observed that it was court's competence to djuge the capability of

minor / child witness. Manner of furnishing of the evidence matters a lot in such cases. A child who could understand questions and answer them provided reliability of testimony of a child witness. Guilt of *Zina* was established satisfactorily by confession of the accused, evidence by procecution witness and medical evidence (autopsy report) along with recoveries: blood stained cloths of the accuseds, blood plus semens stained cloths of the deceased, etc. Confession statements were reliable as there was no legal flaw according to the requirement of CrPC. Confession of accused in presence of other corroborative evidence established guilt on the part of the accsueds. Conviction by the trial court i.e. death sentence for both of the appellants was upheld and confirmed by the Shariat Court of Azad Jamu and Kashmir. Appeal anginst impugned orders by the appellants was dismissed; 2002 SD 112.

2002 SD 118 introduces a case of brutal and fiendish nature. In the trial court four people were produced by the police on account of robbery under section 395 PPC and commission of *Zina* under Section 10/4 of the Ordinance. Their conviction from the trial court put them under death sentence under Section 10 Sub-Section 4 of the Ordinance. They were also awarded imprisonment for life under Section 395 PPC. Convicts filed an appeal against their conviction in the High Court of Sindh. They were given relief under PPC their conviction was converted from Section 395 PPC to Section 392 PPC by reducing life imprisonment to five years rigorous imprisonment. Their conviction under Section 10/4 of the Ordinance was maintained by the High Court. However, a co-accused was fully accommodated, on account of benefit the doubt, for both sentences. His both of the sentences were set aside and conviction was over turned. After admission of the leave to appeal from the Supreme Court of Pakistan the appellants filed an appeal against impugned judgment. The court carefully considered the arguments of the prosecution and defence. It assisted the court in reaching the decision that prosecution proved its case successfully beyond doubt. The Honorable Supreme of Pakistan referred to Mst Naseem vs Fayyaz khan, PLD 1991SC 412 where it was held that sole testimony of the victim was enough for conviction if it was truthful, trustworthy and confidence aspiring. In this case there was plenty of eye witnesses from the family. The Honorable Supreme Court referred to a paragraph from the impugned judgment for brushing aside the objections of appellants. The Honorable Supreme

Court remarked that courts below them had analyzed, weighed and considered the evidence on record properly. Furthermore, there was no misreading or non reading of the available evidence on the record. Appellants cannot inspire any leniency on part of the Court. The appeal had no force and hence dismissed; Rana Shahbaz Ahmed vs. The State.

There are numerous examples of remand for retrial. A similar case is: Mst Nasreen vs Hussain Mehdi. The court of appeal considered requirement of Sections 265 CrPC Cand 255D CrPC in detail. They authorized the acourt to call any witness for ascertaining the truth in any case in hand. At the same time Sections 201 and 202 of CrPC provide full cover to the complainant to be given opportunity to bring all proofs in the court to substantiate the allegation. The Federal Shariat Court found flaws of misreading of Sections quoted above. Court witnesses might be called but after examining the witnesses of the complainant. There are certain requirements for calling court witnesses. The trial court in case of *Zina* under Section 10/3 dismissed a private complaint by giving preference to the court witnesses (CW) over witnesses of complainant in the annexed list with the complaint. The court could only call CW's when it could not have clear mind after consideration complainat's evidence.The Federal Shariat Court did not consider the dismissal of a private complaint without providing opportunity to examine complainant's evidence and putting undue reliance on court witness. The Court accepted appeal and remanded the case for trial afresh, 2003 SD 667.

4.14.3 Cases on Offences against Property

Three words in the Ordinance viz. surreptitiously, *hirz* and *nisab* are elaborated in The State vs Gulam Ali, PLD 1982 FSC 259. This is a leading case in judicial history of Pakistan and as well as history of the Hudood Laws. In this case first ever person was awarded *Hadd* punishment. He was convicted with amputation of hand (right) on a charge of theft committed in a mosque. Wall clock of the mosque was stolen by the convict. This sentence was confirmed by the Federal Shariat Court. Surreptitiously was discussed in appeal to the Supreme Court of Pakistan. In the same case it was observed that criminal's believe that the victim of the theft is unaware of the action of the theft by him is necessary element for imposition of *Hadd*

punishment. When the theft was committed in the mosque there was no victim if *khadim* was the victim then then it was not surreptitious as it was committed in his presence and he had knowledge of the incident. On basis of these arguments the accused got acquitted. Hanafi view is that mosque is not *hirz* but Maliki view holds a mosque as a *hirz*. Mosque is *hirz* as it was not discussed in appeal to Shariah Appellate Bench of the Supreme Court of Pakistan and aquittal was granted on above mentioned grounds. It should be noted that value of the property being stolen must be equal or more than one *nisab*. The Court did not accept that the accused has knowledge that price of the clock was equal to one or more than one *nisab* when it was not worth more than 500 rupees. These deliberations took place in the appeal preferred to the Supreme Court of Pkistan (PLD 1986 SC 741).

Regarding witnesses Section seven of the Ordinance says two adult male Muslims should give testimony to prove crime of theft. The other way to prove theft is confession of the accused in front of a competent court; in this way there must be three witnesses i.e. two eye witnesses and the victim. In above mentioned case of Gulam Ali there were only two witnesses (if *khadim* was victim not witness) and one other was required. Prerequisite for imposition of *Hadd* was lacking. Appellant was awarded three years imprisonment when he was entitled to acqittal. How lethargic and non-eficient is the procedural system that the appellant was in jail for six years since start of the the trial; Gulam Ali vs The State, PLD 1986 SC 741. Criteria of two male adult Muslim was not fulfilled in many other cases e.g. Sehera vs The State ,NLR 1984 SD 219 and Janat Gul vs Mulki Zama, NLR 1984 SD 260. Procedure adopted for examination of witnesses by the trial court is also important in the trial of the cases. The Supreme Court of Pakistan also criticized the mode of knowing piety and truthfulness of the witness followed by the trial court in case of Gulam Ali (Ibid). Witnesses' own statement about their good character was insufficient to establish their piety. The court was supposed to make a secret inquiry. A refree of the court must have ascertained about the charater of the witnesses. Nonetheless, the courts are adopting liberal interpretation of *tazkia-e-shahood*.

In a case of *Harabah* convicts were sentenced to death by the Session Judge. They filed a petition for leave to appeal in the Federal Shariat Court. Leave was granted for re-examination of evidence to know the veracity of the witnesses and to know whether the conviction was rightly passed on petitioners; Umar Badshah vs The State reported in NLR 1987 SD 373. Some of the cases in which amputation imposed on account of commission of *Harabah* liable to *Hadd* the convictions were set aside by FSC on lack of proof viz. Suleman vs. The State, NLR 1984 SD 241; Shahid Ahmed vs The State, NLR 1984 SD 296; Ali Ahmed vs The State, NLR 1985 SD 12, etc.

Federal Shariat Court clearly observed that the confession is material evidence to decide *Hudood* cases. It must be recorded by the court which is competent to decide *Hudood* cases. The Court declared that confession recorded by a magistrate had no legal affects as "it would not be a confession"; Muhammad Naseer vs The State, PLD 1988 FSC 58. Petitioner was charged with dacoity having snatched Rs 350000, prize bond, etc. and recovery made was under Section 17(3) of the Offences against Property Ordinance. The trial court dismissed application of release of the accused on bail. The FSC did not admit confession of co-accused recoded by a magistrate after five days of the incident. However, the recovery of cash and sale of snatched prize bond and commission of crime at 10:00 a.m in a busy area provided sufficient reasonable grounds for believing the accused guilty of the offence which was punishable with imprisonment for 14 years and whipping. Release on the bail refused, petition dismissed and prosecution was directed to present challan with in shortest possible period to the trial court; M Ayuob vs Husnain Kayani, 2001 SD 273. In a similar case of robbery the statement of co-accused before trial court was not considered by the Federal Shariat Court. Police presented challan but investigation officer as was directed to clarify the basis on which it was done. Basis of the charge sheet was demanded from the investigation officer but he neither appeared nor presented the same. Circumstances needed further inquiry, hence, bail was granted; Israr Ali vs The State, 2001 SD 613.

Other leading cases as mentioned in "Hudood Ordinance 1979: A critical report (2007)" by the Council of Islamic Ideology are : Atta Ullah Khan vs Tthe State, 2002 SD 66; Abdul Ali vs

Haji Bismillah, 2002 SD 169, Amjad Pervaiz vs The State, 2004 SD 1026 from the Federal Shariat Court. A leading case under the Ordinance is from the Supreme Court of Pakistan (Shariat Appellate Bench) Rehmat Ali vs Mushtaq Ahmed, 1989 PLD 593.

As the Court has remarked in different cases viz a viz decision on the cases registered under the Ordinance most of the cases are decided according to pre-Islamization laws. Punishments which were awarded after the promulgation of the Ordinance were same un-Islamic punishments which were to be abolished through this Ordinance. *Ta'zir* punishment is imposed in all of the cases. Since 10 Feb, 1979 no hand is imputed so far. It is repeatedly pointed out that there are thousands of robberies, dacoitiess, and thefts every year but the cases are being decided according to the old laws. Litigation process in the trial courts has been made more complicated without any material relief to victims of highhanded of criminals. No detterrance of the Ordinance could be seen as for as the matter of crime rate is concerned. Exaggerated claims coupled with emotional charge are fizzeled out in the air on account of non translation of the theory in to practice. The problem is added by the flaws in the Laws and defective procedures adopted for the implementation. Mehdi (1994 p.115) dosen't seem exaggerating the situation that "the trial of cases under *Hadd* has been nothing but an intellectual exercise, while the PPC still applies for practical purposes.

Under Section 17 of the Offences against Property (Enforcement of Hudood Ordinance) 1979 the accused took possession of a bus on installments. On failing to pay installments the applicant took possession of the bus back from the accused and blaiming the accused for forging documents and getting the bus registrerd in his name. Accused along with six others snatched the bus from the appellant's driver and conductor. Appellant got registered a case of "*Harabah*" under the Ordinance. Trial court acquitted the accused according to the provisions of 265k of CrPC as he was acquitted in the case of forgery. Application was filed for leave to appeal against the impugned orders of acquittal of the accused in the Federal Shariat Court. The Court focused on the definition of "*Harabah*" and averred that taking possession of one's own property did not fall under "*Harabah*" as the appellant has validly sold the bus and his claim was only restricted to

remaining installments. Application did not have force and was dismissed considering judgement of the trial court as well worked under the law (Rehmat Ali vs Mustaq Ahmed, etc.; PLD 1989 SC 593.

The Baluchistan High Court on an appeal against acquittal of the appellant from trial set aside the acquittal and convicted the appellant with life imprisonment. The appellant filed an appeal under Article 185 (2) of the Consttution of Pakistan. The appellant questioned the jurisdiction of the Baluchistan High Court in disposal of the case. The complainant also filed a petition for enhancement of the sentence from life imprisonment to death sentence as this was the case under 302 B PPC. Counsel for the appellant argued that charge should have been framed under Section 17 of the Ordinance and High Court did not have jurisdiction to decide a case falling under Hudood Laws. Introduction of Section 17 (4) would have been raised in the trial court or High Court but it could not be raised in the Supreme Court. Objection regarding jurisdiction should be raised in earlier stages of the trial not in the Supreme Court. Jurisdiction of Baluchistan High Court could not be objected in the Supreme Court according to principle of *estopple* which operated against the appelant due to his silence. The Honourable Supreme Court of Pakistan did not find any subtance in the petition of the appellant regarding the jurisdiction and merits of the case. The petition was dismissed. On the other hand criminal pitetion for increase in sentence from life imprisonment to death penalty was also dismissed. Discretion of the Blouchistan High Court was not presented arbitrariness in the given circumstances of the case. However, the Honourable Supreme Court of Pakistan directed the appellant to pay rupees 100,000.00 as compensation to the heir's of the deceased which should have been awarded by the Baluchistan High Court. In case of default the convict is to suffer six months rigorous imprisonment; 2009 SD 169, Abdul Ali vs. Haji Bismillah.

Harabah, committed in the open market in day time in Juna Market Karachi, was trialed under Section 17 of the Ordinance. Accused was sentenced to death by the trial court. Appeal was filed against the impungned judgement to the Fedral Shariat Court. A reference for confirmation of death sentence was also forwarded by the trial court to the Federal Shariat Court. Prosecution

examined seven witnesses whereas the requirements of the Section seven of the Ordinance are for two only. Counsel for appellant urged that witnesses were not tested and ascertained through *tazika-e-shahood*. As *tazika-e-shahood* was mandatory for infliction of *Hadd* punishment, irrespective of any objection on witnesses by the accused, courts are bound to conduct *tazkiah-e-shahood* either secretly or openly. Witnesses must be scrutinized through the supporting witnesses who are trustworthy from the walk of life of the witnesses of the cases in hand. There is no prescribed procedure for *muzaki* (who attests trustworthiness of the witnesses) to carry out his work. At least one *muzzaki* was required for verification of the character of each witness. Only one *muzzaki* for all of the witnesses was not sufficient. Trial court could not follow the valid mode for *tazkiah-e-shahood*. The Federal Shariat Court reying on the famous report of Prophet (peace be upon him) "ward of *Hadd* punishment as for as it is possible"; if there is any chance to do it. Evidence presented on the record by the prosecution fell short of the criteria for imposition of *Hadd*. The FSC was left with only option to set aside the *Hadd* punishment. Conviction was converted to Section 397 of PPC and the appellant was to undergo rigorous imprisonment for ten years conviction and the sentence were changed; Amjad Pervaiz vs the State, 2004 SD 324.

Court of appeal was empowered to notify the conviction and the sentence based on non-observance of *tazikah-e-shshood* at trial. A case of Highway robbery took place in Dera Murad Jamali; three motorists snatched money and motor bike from the complainant and injured them. Trial court convicted the main accused. He was sentenced to amputation of hand from the wrist joint and left foot from the ankle. The trial court sent a reference to the Federal Shariat Court for confirmation of the punishment. Convict went in appeal against the impugned judgment in the Federal Shariat Court. The court observed that *Hadd* punishment had prerequisites to be imposed. The *tazkia-e-shahood* as contemplated in Section seven of the Ordinance is mandatory in the case of highway robbery. Simple robbery doesn't fall under Section 17 Sub-Section three of the Ordinance but under Section 392 Pakistan Penal Code. *Ta'zir* punishment might be awarded if witnesses against the accused were able to inspire confidence of the court. On the plea of serious omission at trial stage the Court of appeal modified the conviction from section 17 / 3 of the Ordinance to Section 392 PPC. Consecutive sentence of amputation of right hand and left foot

were not applicable. The accused was sentenced to five years rigorous imprisonment taking into consideration even view of the age of the accused; Gulbahar vs The State, 2004 SD 1026.

4.14.4 Cases on False Accusation of *Zina*

During flipping through the Shariah decisions little cases of *Qazf* were found. It seems evident that fatigue of long investigations coupled with the sense of shame in society wrongly accused person of offenses of *Zina* do not come to courts again to initiate *Qazf* proceeding a new. Paradoxical is the stance taken in the Ordinance- the State declares that wrong accusation of *Zina* as crime having *Hadd* punishment but at the same it shift onus of complaint on the person wrongly accused. A few cases of *Qazf* from Shariah decision are noted in the following lines.

In case of Muhammad Riaz vs The State; the accused, an Assisstant Sub Inspector (ASI) of police, was charged of the offence of *Qazf* by Mst Sania Bibi and Muhammad Saleem. The ASI raided a house along with a lady Constable and two male Constables and arrested above-mention man and woman committing *Zina* with each other. On trial lady constable and two male constables did not support case of prosecution. Resultantly the accused were discharged from the offence. Father of the accused in case of *Zina* from which she was discharged brought a complaint of *Qazf* against the ASI who registered the case of *Zina* against his daughter. The accused in *Qazf* filed an application for bail before arrest. The court observed that the only person who was wrongly accused of *Zina* could make a complaint to move the State machinery to trial the case i.e. accused according to the provisions of The Qazf Ordinance. Father of the woman was neither the person who was falsely accused of *Zina* nor he was authorized by his daughter to make the complaint on her behalf. As a general rule any one can inform the court about the commission of crime but the matter of *Qazf* is special one. Though victim of *Qazf* gave her statement under Section 161 CrPC before police in which she supported her father for registration of FIR. That was an implied support in opinion of the court. The court further observed that such a case which was registered under Section 10 of The Zina Ordinance was covered under section 11 of the The the Qazf Ordinance. Punishment for this type of case is not *Hadd* punishment but they were also punishable with *Ta'zir*. The case under discussion was punishable with

imprisonment of either description extendable to two years and fine and whipping not more than 40 lashes. Further to this point the court referred to Second Schedule of CrPC. It shows that offences punishable with imprisonment less than three years or whipping less than forty lashes with imprisonment or only whipping less than forty in number are not cognizable and are bailable. Therefore Section 11 of The Qazf Ordinance read with the Second Schedule of CrPC is not only bailable and also non-cognizable. The petition was entitled to the grant of bail as of right. Bail was granted and the accused was directed to appear before the trial court and furnish bail bond as the trial court directs; Muhammad Riaz vs The State, 2002 SD 552.

In a criminal revision the petition of the victim of *Qazf* for cancellation of bail of the accused the Federal Shariat Court observed that withholding concession of bail from an accused facing trial under Section seven of the Qazf Ordinance would be harsh. In case of *Qazf* if the accused will be convicted he would be punished with stripes not with imprisonment under Section seven, the court added. The Additional Session Judge might release the accused on bail. The bail granted as of right according to law. The grant of bail was upheld and the criminal revision for cancellation of the bail was dismissed. The court gave benefit to the accused as the matter of attraction of Section 11 was still pending. Petitioner's prayer for early disposal was materialized in instruction to the trial court for expeditious disposal; Mst Nasreen Akhtar vs The State, 2002 SD 739.

No departure or any deviation from prescribed manner is persimissible. It is settled rule that if law prescribes doing of an act in aspecific manner the act must be done in that particular manner. A private complaint was filed by the petitioner against respondent under the Ordinance's Section seven. The same was rejected by the Additional Session Judge. The complainant filed a criminal revision petition under Article 203 of the Constitution. The remedy available to the complainant against impugned order was to present a petition for special leave to appeal before the competent court. Section 417 sub-Section two provides a petition for leave to appeal against acquittal orders in a complaint case. The Federal Shariat Court observed that the accused in the case had levelled allegations of illicit relations with his bhabhi in a civil suit for her maintenance

and maintenance of minor child before a family court would not constitute the crime of *Qazf*. The petitioner would have cross-examined the accused in the civil court. Moreover, the court examined the statement of the accused again and the court did not agree with the counsel of the petitioner on its constituting the offence of *Qazf*. The complaint, as the circumstance of the case showed was filed to intimidate and pressurizes the accused so that she could not puruse the case with the civil court for available remedies in the civil court. Hence, the acquittal of the accused and here responded number 1 of charge of *Qazf* from the Additional Session judge was on merit. The judgment was unquestionable. The Federal Shariat Court upheld the acquittal of the respondent and dismissed the criminal revision petition on two grounds: Non-mainatlability and as well as on its merits; 2004 SD 218, M. Munawar vs Mst Kousar Parveen and The State.

A couple lived married life and agreed on one issue (male child). Husband pronounced *talaq*. He also levelled allegation of *Zina* on his wife and also of having born a male child as procreation of *Zina*. The wife filed a complaint under Sections seven and 11 of the The Qazf Ordinance against the appellant. During the trial of the case under Sections seven and 11 before Addition Session Judge the appellant moved an application for implementation of procedure of *Lian* against the victim of *Qazf*. Application for *Lian* was accepted by the court. Respondent as she was aggrieved she filed a criminal revision against the judgement of the trail court which was allowed. Petitioner sought leave to appeal against impunged order. The same was granted to consider question whether Section 14 of the Ordinance attracted in the particular case or not. There was a second issue; whether the husband could be trated as husband after divorce. The Supreme Court of Pakistan after an extensive study of the Ordinance, the holy Qur'an on *Lian* and the authorities on *Fiqh* came to conclusion that after dissolution of marriage husband's application was not appreciable and was with no legal force. *Lian* against the wife or husband emerge out of wedlock which did not exist between two parties in the instant case. "*Dure Mukhtar*" makes it clear for charges of unchasstity against spouses there should be relation between them; the relation of husband and wife. Acceptance of revision petition the wife by the Federal Shariat Court was right. Setting aside the judgment for institution of *Lian* proceedings by trial court was upheld by The Supreme Court of Pakistan. Appeal of husband was dismissed;

(2005 SD 242), Safdar and M Hafeez vs. Mst Asia and The State.The Court observesd that impungned judgment was based on reason and was in consonance the law laid down by the Shariah and this Court. There was neither any non-reading nor misreading of either the facts or the law.The appeal was declared devoid of force and merit.

Purpose of enlisting these much cases is to examine the contribution of the Hudood Laws, practically, in dissemination of justice. It would provide for basis fo opinion regarding the Laws and their efficiency more objectively with concrete irrefutable evidence in the cases decided by the FSC and The Honourable Supreme Court of Pakistan.

4.15 Critical Analysis and Discussion

4.15.1 Property

In cases under the Hadood Ordinances long trials are often criticized. There are such incidences where convictions took place so late that the convict had suffered double imprisonment on the date of decision. The oft quoted case is Gulam Ali vs The State in this regard. Laps on account of non-observance of rules of business in the trial courts provide easy escape to the criminals e.g. Amad Pervez vs The State. Many a time convictions under *Hudood* crimes are challenged for re-examination of the evidence which caused problems for the victims. A leading case for reexamination of evidence is Umar Bashir vs The State, in which three persons were sentenced to death being guilty of *Harabah*. The Ordinance on offence related to property is a mix of Islamilized law and English law. Punishment for theft which was being awarded under Sections 379 and 380 of Pakistan Penal Code is valid for theft laible to *Ta'zir* under Section 14 of the Ordinance. Implementations of punishments under the Hudood Laws are being questioned on practicability of the laws. Thefts, robberiess, dacoitiess are matter of routine in Pakistan. Cases on these accounts show alarming statistics since the promulgation of the Ordinance no amputation of hand took place since then. In nearly all of the cases convictions were made under *Ta'zir*. Even in *Ta'zir* conviction rate is very low. For example during the year 2005 number of total cases registered under theft was 4110 and convictions in that year (though these convitions were from

previous cases i.e. registered earlier) were 523, total rgistered cases under *Harabah* in 2005 were 2691 and convictions were only 47. These statistics are According to summary prepared by the Council of Islamic Ideology (2007) and statistics are from Punjab and Islamabad only. In the consolidated summary at page number 173 of the Repot (2007) the total convictions are 286 out of 25227 decided cases. Efficiency of the Laws invites skepticism on the partt students, scholars, legal fraternity as well as common man. Claims of deterrence of the laws had sunk down to depths. Crime rate did not fall considerably since the introduction of the Ordinance aimed to safeguard of the property of people. Cases for *Harabah* from Punjab and Islamabad are 3374, 3698, 4032, and 4066 during the years 2001, 2002, 2003, 2004 respectively. For theft figures are 5415 in 2001, 5537 in 2002, 5607 in 2003 and 5513 in 2004. These statistics force to agree with Mehdi (1994) that there is no notable impact of the Ordinance on crime rate. Expectation that *Hudood* punishments would be deterrent in nature and would cause decrease in offences against property seems a miraj. There is neither a change in working of laws of theft in Pakistan nor there is any decrease in the crime rate. Moreover, the law is often criticized on account of exaggerated punishments on little value of stolen things. Harsh critique is brought on its criteria for proof i.e. two males and Muslim witnesses who does not attract reason at all. It means theft sighted by women and non-Muslims is not theft at all.

4.15.2 False Accusation of *Zina*

Ordinance on *Qazf* is though inactive *ab initio,* it has caused uproar in the legal fraternity. Male inclusive nature of Section three was objected in petition filed to the Fedral Shariat Court in 1982. It was contended that there is no mention of males in Sura *Nu:r* (24), Verse number 4. Only accusers of women are punishable under the Verse. But Section three of the Ordinance makes imputation against males as well as deceased persons. Chief justice of the Federal Shariat Court referred to other Verses in Qur'an: which refer to the both male and females who are so imputed of *Zina*. The particular Verse refers to women only because it was revealed at specific time and addressed a particular issue. The instruction in it is of general nature.

It was held that punishment should be same in case of male or deceased. The petition was dismissed; Zeheer Ahmed vs The State, PLD 1982 FSC 244.

Qazf involves *mens rea* on the part of accuser, court has interpreted it as "intension to harm" in many cases. As a general rule, a crime is one which is punishable under PPC (4k). If *Qazf* is a crime it must be punished by the State without waiting a complaint from the person accused of *Zina* , but as of its make-up offence of *Qazf* is a bricollage of *right in personum* (person's right / *haqooq- ul-ibad*) and *right in rem* (right of society / *haqooq Ullah*) Muslim jurists think the *right in rem* dominates the *right in personum* that is why accused person cannot pardon abuse of his right but according Section three of the Ordinance the victim of *Qazf* is to get registered a compliment and then is to prove the intention to harm on the part of the accuser. Mere failure to establish offence of *Zina* against a victim does not amount to offence of *Qazf* automatically. Witnesses and Complainants in case of *Zina* must have the guilty mind to harm the victim while giving testimony; if such intention to harm is absent or could not be proved there would not be any offence of *Qazf*. This principle was established in M Abdullah vs The State, NLR 1987 SD 551. Sentence of 80 lashes was awarded to the accused in a similar case Bashir Ahmed vs The State. The sentence was set aside because the complainants could not prove the intention to harm the reputation of the complainant on the part of the accused, NLR 1986 SD in Mehdi (1994). It is also necessary that imputation of *Zina* should be in clear words. In a complaint of *Qazf* respondent used words: "*muda alaih key bhoaj se talqat they*" which were not clear allegation of *Zina*. Moreover, such averments in civil suits do not form substantative evidence as was observed by the Division Bench of Federal Shariat Court; 2004 SD 218, M Munawar vs Kousar Parveen. A similar case is mentioned by Mehdi (Ibid) in which there was allegation in documents that the victim had obducted a woman then kept her as "*Zoga*". The same document was made basis of the complaint of *Qazf*. The word could be interpreted as he kept the woman as his wife or he kept the woman as women or mistress. The court preferred the one which was favourable for the accused as there was no mention of adultery or *Zina* commited by the petitioner in the document. The petitionn was dismissed; Mian Abdul Qadoos vs Sahib Ali and other, NLR 1984 SD 20.

Question was also raised regarding the definition of *muhsan* in case of Zaheer Ahmed (Ibid) but it was not answered. The definition was also objected by the human right activists. They demanded the redefinition of *muhsan* to include the non-Muslims in it. It would widen scope of *ihsan.* Under Section 14 *Lian* needs relation between the parties, a relation of husband and wife. Proceedings of *Lian* can only be started in a court when there is a bond of marriage and they are husband and wife. After pronouncing of *talaq* the institution of *Lian* proceedings were set aside and the petitioner's appeal was allowed; 2005 SD 721, (The Supreme court of Pakistan Shariat Appellate Bench Jurisdiction). In another case question was raised whether Section seven of *the Qazf Ordinance* allows husband putting allegation of *Zina* to his wife. Section 7 does not apply when such allegation comes from marital tie. Such a husband should show four witnesses to support his allegation. If witnesses are not available then he can only escape *Qazf* proceedings through *Lian*. Proceedings of *Lian* are to be conducted before the court. If *Qazf* is not levelled in presence of the court it will be in the court for the conduct of proceedings as per the Injunctions of Qur'an and Section 14 of the Qazf Ordinance. If question of accusation of *Zina* on wife arises and there had been a *talaq* between the spouses then the question would be decided whether the accusation was levelled before *talaq* or after *talaq* in Mehdi (ibid); PLD 1986 FSC 187, Haji Said Bakhtiar Muhammad vs. Durr-e-Shewar. In case of proceedings of *Lian* when husband follows prescribed course in acusing his wife and wife rebuts his allegation in the prescribed manner. The court dissolves their marriage which is irrevokable. This is the way to defer the matter of allegation of *Zina* between the accused and Allah Almighty without a final decision. After that neither wife would be called adultress nor will the husband be called accuser of *Zina*; PLD 1990 SC 656.

The question whether the couple could live as husband and wife was decided by the court that it would be against human nature to live happy life after such a serious incident between them. However, the wife is considered to be absolved of the allegation of adultery; Nek Bukht vs The State, PLD 1986 FSC 174.

The ordinance provides the procedure of *Lian*, when a husband accusses his wife of adultery or fornication or *Zina*. If a wife accuses her husband of *Zina* there is no procedure for her to escape from proceedings of *Qazf* or proof in shape of four male witnesses and she will not be considered as witness herself in the matter. Jahangir (1990) writes that the Ordinance could not meet its objectives (pp.60 and 78-83). It seems that purpose of the Ordinance is not materialized. introduction. Introduction of the Qazf Ordinance was aimed to check misuse of the elder twin Ordinance i.e. The Zina Ordinance. It was hoped that people would reflect upon it consequences before bringing complaints of *Zina*. It is malfunctioning of the state administrative machinery which had brieved the Ordinance of its merits and positive results. Long time trials in the courts bring abhorrent reputation to the people involved in *Zina* proceedings. It makes it too late to knock once again gate of justice of the court for *Qazf* proceeding to find refuge in the Qazf Ordinance. Very low rate of registration of *Qazf* cases endorses this view according to the statistics issued by the Council of Islamic Ideology. There were 21 registered cases of *Qazf*, in Punjab and Islamabad, in 2001, 26 in 2002, 30 in 2003, 29 in 2004 and 21 in 2005. Thses statistics are from Hudood Ordinace 1979: A Critical Report 2007. In the corresponding periods there were 2073, 817, 2404, 2341, and 1313 cases of *Zina* respectively.

Old statistics as furnished by Mehdi (Ibid) with reference to Aoulakh (1986) disclose past performance of Ordinance in 80's. There were total registered cases of *Zina* in police stations of Pakistan 1638 and 1843 in 1983 and 1984 respectively. The number of registered cases of *Qazf* during these years was 18 and 17 respectively. This state of affairs depicts gross inefficacy of Ordinance.

4.15.3 Prohibition

Most of the cases falling under the Ordinace are dealt with Dangerous Drug Act an amendment in Prohibition Ordinance of 1979. Rashida Patel, a women right activist, writes in her book that addiction to the intoxicants especially dangerous narcotics has increased greatly since promulgation of the Hadd Order. Production and trafficking of narcotics has touched the heighest figures in the mid 80's. She is of the view that in reaction to the Hadood Ordinances which

caused this much escalation in this black business. She holds that this tremendous increase in the number of addicts in the country provided a quest for black business of narcotics in the people. There are people who say this hike in narcotics business is due to non-implementation of the Order. They are of the view that the Order has not been enforced as it should have been in true sense. The second version was also endorsed and considered by the government. This is why punishments were made more stringent by increasing sentences under each crime under the narcotics prevention laws. Views of patel are reproduced in Mehdi (ibid) she maintains that laws yielded little benifit. According to the survery counducted by the journalists at uburbs of Karachi, Sohrab Goth, showed alarming figures of narcotics business viz a viz their consumption. Ten to twenty tons of opium and its by-products were being received after every forth day in the *Goth* in 1985 as she writes for both local consumptions and for onward shipment to other areas of the the country [and also to other countries].

Satistics provided in the Critical Report on the Hudood Laws by the Council of Islamic Ideology in respect of narcotics and alcohol consumption are: Number of total registered cases under the Hudood Laws on prohibition of intoxication, sale, purchase, transportation, botteling, etc. in 2001 was 55546, in 2002 it was raised to 56654, in 2003 the figure was 53157 and in 2004 the number of registered cases was 53651. The figures show no substantial decline in the crimes due to the Order and its harsh punishments. One can question efficiency of the Order. Whatever could be the reasons it, however, could not serve its purpose.

4.15.4 Illicite Sexual Intercourse

Mehdi (ibid) notes with reference of Rashida Patel that matter of the evidence of women in Hudood cases was challenged through a petition. The same to her was *lis pendency*. It was held in the famous case of Rashida Patel vs The Federation of Pakistan that in special circumstances evidence of women can be recorded even in Hudood and *Qisas* cases. But it is difficult to impose *Hadd* punishments based on evidence of women. The honourable Supreme Court of Pakistan referred to a Report of Prophet (peace be upon him) which bears evidence of women in cases of Hudood and Qisas. Dr Nasim Hassan’s observation in his article on women rights that objection

on women evidence in Hudood cases has been pacified by admitting their evidence in these cases for purposes of *Ta'zir* punishments (PLD 1989 SC 95).

Question of *rajam* as *Hadd* punishment had been controversial since promulgation of The Zina Ordinance. As it is noted under current debates on *the Hudood* Laws, there are two groups with different views on these punishments. One group admits this punishment but not for *Zina* but for the *muharebeen* (people who wage war against the State). This view is held by Amin Ahsan Islahi, Anayatullah Subhani and Javed Ahmad Gamdi. Majority thinks that it is a valid *Hadd* punishment for *Zina* committed by a married person. There is a decision of the Federal Shariat Court which upheld the former views and that it is not *Hadd* punishment for *Zina* but the same was reversed afterward; Hazoor Bux vs The State 1981 and The State vs Hazoor Bux 1983 (1983 PLD FSC 255).

Courts are hasitent to apply strict punishments. Perhaps they want to avoid *Hadd* punishment as it is reported in *Ibn-e-Maja* and *Tirmidhi* and is quoted in PLD 2002 FSC 1, Zafran Bibi vs. The State. In a case where all four witnesses were available the trial court did not impose *Hadd* punishment. The same was critized by the High Court. The senctence was not reversed, as Mehdi would say, for technical reasons; Nazir Ahmed vs The State, PLD 1986 SC 132. A well documented case depicting the incosistencies of the Law is of a blind girl. She was pregrant in result of sexual act of a man. The Law was interpreted with reference to this case particularly that women who conceives even due to subjection of *Zina* were punished under *Ta'zir*. Males were often acquitted due to non-availibility of sufficient proof against them. They were given release giving the benefit of doubt. There was no doubt in commission of *Zina* by the female because she had pregnancy as undeniable proof against her. Women can not deny of *Zina* being pregnant due to their subjection to *Zina*. It was a sufficient proof of criminal activity of a female. The case brought severe criticism from within the country and from abroad. There was a protest against this type of discriminatory dispensation of justice in the national and international press alike. The blind girl was sentenced to three years imprisonment and fifteen stripes at a public place. A fine of rupees 1000.00 was levied to her. The court awarding the sentence to the

blind girl gave benefit of doubt to male accused but not to the victim. In the case of fornication with consent the benefit of doubt should have extended to both of parties. After protest and critisim the illegal sentenced was reversed by the Federal Shariat Court.; Safia Bibi vs The State, PLD 1985 FSC 120. The protest of women rights activists was not baseless. They provided sufficient reason to object working of the courts in those days. Discrimination against women was a day's business in the courts trying criminal cases. Another women was sentenced to death and seven years rigorous imprisonment along with fifteen stripes and she was fined rupees 2000.00. She gave birth to an illegitimate child. After going through labour she worked out how to conseal her guilt, resultantly, she killed the baby to escape the shame of having born a child being unmarried. Pregnancy and birth of the child were sufficient proofs for the court to award her sentence of death, rigorous imprisonment and fine of rupees 2000.00. In the same case his male counterpart in the commission of crime of *Zina* was released as there was no sufficient proof. He was acquitted for lack of proofs against him; Shabbir Ahmed vs The State, PLD 1983 FSC 110.

The law also took cognizance of non-compliance of provision of Muslim Family Laws Ordinance (MFLO). Notice of the divorce must be served to the Chairman of the Union Council as per requirement of the MFLO. As it is noted earlier that courts did not consider this type of lapse cause of conviction of female who contracts second marriage after having believed that she was divorced by her previous husband. This was not the case in the early days of promulgation of the Ordinance. The court was of opinion in a case where husband divorced a woman and she contracted second marriage and couple was booked under the charge of adultery. Divorce was made inefficient, in estimate of the trialcourt, due to non compliance of section 7 of the MFLO. The court went further and held if the divorce can be taken as effective one even the accused had been involved in crime of *Zina* for quite some period of time. They were sentenced two years rigrious imprisonment and thirty strokes of whipping each in a public place; PLD 1982 FSC 229, Shera vs The State. A husband did not serve notice of divorce to the Union Council. This was taken as retraction of divorce. *Talaq* was not notified with either the Union Council or the Chairman that was ineffective. It did not extinct the relationship between the husband and the

wife. In second marriage the female and her second husband were committing fornication. The cases with these elaborations are given in Mehdi (1994).

A renowned retrial is reported in NLR 1988 SC 188. Second marriage of a female was declared as illagle by the trial court. The woman and her second husband were living together in an illicit relationship. These charges were confirmed because the divorce from the previous husband of the woman was not registered according to the requirements of the MFLO. When divorce from the first husband was not effective the second marriage of the accused was declared illegal. The woman and her second husband were convicted and they were awarded death sentence by stoning (*rajam*). They were given right of of appeal by the court. They went to the Federal Shariat Court and filed the appeal. The appeal was granted and the case was remanded for retrial. Both of the accused were acquitted on retrial; Mst Shahida Perveen vs The State. Despite these inconsistencies in the Law as well as in its implementation, stance of Mehdi (1994 with reference to Kurin (1985 pp.120-121) can not be maintained on account of "uncontrollable" and natural instincts to have sexual relation beyond wedlock. Theses arguments are neither appreciated by reason no by any standard of morality. Never in this world the laws had premited these "natural" and "uncontrollable" urges of sex what to talk of Chakpur (the village where the study by Kurin was conducted). Nonetheless, mixing of facts and fancy can warrant space for anything. It is obscenity and insanity if sexual topics offered for relating stories and cracks jokes in a locality.

Intensive critique, on the Ordinance, is found on the topic of rape. Rape is a crime in which use of force or threat to body / life of a person subjected to sexual intercourse, without consent and against will of the victim, or where consent is taken with deception. This crime requires the same proof as is given for *Zina* with consent of parties. It really provides a gray area to critics of the Ordinance. One can not go beyond the bounds of ideology and reason while appreciating Carrol in Mehdi (ibid) i.e. *Hudood* punishment as "academic". This is strict standard of proof which distinguishes Islamic Criminal System on its doctrine: a judge should err in saving a criminal and rather he should err in punishing an innocent. Furthermore, the purpose of *Hudood*

is not to punish people severely. *Hudood*, as ordained, are icons of psychological dimentions of justice and its observance in a Muslim society. As it is hard to prove the crime why are the critics at home and abroad alike protesting against the severity of *Hudood* punishments. On question of rape arguments do have merits. Firstly, *nisab* of evidence i.e. four adult, Muslim, one who fulfill the standard of *tazkiah-e-shahood* is not understandable. Secondly, if their availability, co-incedently, is possible would not it amount to abetment of the crime as pointed out by Carrol (1983 pp. 68-69) in Mehdi (Ibid). Rape is never commited in presence of people. Rapists need seclusion and isolation where no one can see them. As it is held that in cases of rape solitary statement of the victim / prosecutrix, when corroborated by medical and circumstantial evidence being truthful and confidence inspiring, is sufficient; 2004 PCrLJ 1039, Shabbir Khan *alias* Kukku and other vs The State. Shehab (1984a) in Mehdi (Ibid) observes that it would be crime promoting if the evidence of the victim of rape is rejected for want of qauntum of witnesses as it is required for fornication with consent of the victim and the accused. The Shariat Court of Azad Jammun and Kashmir (AJ&K) did not demand four witnesses to prove the rape. Sole evidence of a minor girl who could understand questions and could answer them was admissible when supported by circumtantial evidence, medical report, recoveries of blood stained and semen stained clothes of deceased and autopsy report, etc. The court of appeal did not reject testimony of a child witness. The court relied on evidence of 13 years girl who was competent to understand and answer the questions in the court; 2003 SD 112, The State vs Khushal *alias* Baju, etc.

What should be the standard of distinction between fornication/ consensual (with mutual cosent of the offenders i.e. a male anad a female) *Zina* and rape is termed as “real resistance” i.e. whether the victim tried her hard to escape from subjection to rape. Lady doctor observed in her medical report that the victim did not have injuries on her body i.e thighies, buttocks, knees, elbows, legs etc in case of Bahadar Shah vs The State. It was made base for her consent in commiting *Zina*. Case of rape was converted to case of *Zina* under 10(2). Conviction and sentence of the offender were amended. Piety and morality of avictim of rape should never be questioned in the court. Mehdi (Ibid) mentions instance of escape of offenders on account of being the victums of easy virtue and not pardanasheen lady. In the opinion of court as is discussed

by the scholar the victim was of loose character. She was used to enjoying intercourse in past. In reading of the court the victim has enjoyed the intercourse habitually. So, it was difficult to punish the accused for rape; Abid Hussain vs The State, PLD 1983 FSC 2000. But as against this view of the court, in above quoted case of Shabbir Kukku (2004 PCrLJ 1039) question of being easy virtue was not substastiated on record. There was not any reason to put her honour and respect of family at stake by levelling false allegation of rape on the accused. Abduction under Section 11 of the Zina Ordinance deals with kidnaping and abduction for *Zina*. The same was governed by Section 366 Pakistan Penal Code. The only difference between the two is of the degree of punishment under the Section 11 of the Zina Ordinance punishment is enhanced to imprisonment for life from imprisonment of 10 years. Moreover, punishment of whipping i.e 30 stripes is also added. Section 10(3) deals with *Zina bil jabr*. Both of the Sections were applied in case of *Zina*; Muhammad Nazir vs The State. Evidence of abductee and evidence of complainant and eyewitness led to conviction and dismissal of appeal from the Federal Shariat Court. The statement of abductee was termed as unequivocal by the Court of appeal under Section 164 PPC that she was forced and subjected to gang rape turn by turn. Medical evidence supported statement of the victim as there were injuries on her body. Imprisonment for life was awarded to the offender by the Federal Shariat Court and not death sentence due to mitigating circumstances, 2009 SD 204.

4.16 An Appraisal on the Hudood Laws

Usmani (2006) presents case of the Hadood Ordinances eloquently. He had first hand experience being the judge of the Federal Shariat Court. His long services in the Shariat Appellate Appelate Bench of the Supreme Court of Pakistan add to his euridition specialy in the matters of pragmatic position of enforcement of the Hadood Laws. To him outcry against the Hadood Ordinances on *Zina* and *Qazf* is not more than propaganda. He seems brieved of any bais while progression of his point of view. Kenedy (1996) is oft quoted reference in his writings on the subject. The writer comes forward with factual position of his case study about court decisions during 1984-1986. He opines that women do not file their complaints under Section 10 sub-

Section 2 of the Zina Ordinance. They fear to be indicted and convicted. To escape their apprehended indictment and conviction charges are brought by them against their alleged abusers under Section 10 subs-Section three. During trial there are convictions which require confirmation from the court of appeal i.e. the Federal Shariat Court. The Court of appeal convicts males under Section 10(2) as it finds no circumstantial evidence on record to punish the offenders under Section 10(3). However, the women are given the benifit of doubt and are exonerated of their part in commission of the crimes. There are numerous cases to support the view: PLD 1983 FSC 200, PLD 1982 FSC 240, PLD 1987 FSC 11, etc. This state of affairs presents an inverted view of what Mehdi (1994) contends that in the cases of rape women were of easy virtue in opinion of the court so, offenders escaped conviction. It is pointed out that they could not show reasonable resistance while being subjected to rape. The things are being maniuplated to fit to the stand point of the writer based on the play back ideology. The Kennedy's version seems plausible and practical as it attracts support from the log of cases decided under the Hadood Laws in these pages.

It may be, as admitted by the writer, considered that there might be some exploitation of the Laws by "highhanded" police of the country. He further lemants booking of complainants of rape under fornication. This is authority of police which corrupts the system. It is not due to inherent flaws in the Hudood Ordinances. It is normal for police to collude with influential criminals in all cases and cases falling under *Hudood* are no exception. Eradication of crimes is primry duty of police which is seldom taken care of. It subverts victims especially from lower stratum of the society. False indulgance of people in matter of narcotics has become routine in the hands of police. The prevalent state of affairs can not be used to justify claims for abolition of the Narcotics Laws. That is why the Federal Shariat Court had averred in the judgement that the laws should be enacted to provide safeguard to the victim of rape from apprehension who bring complaint to police for *Zina-bil-jabr*, until final verdict of the case. The same should fix exemplary punishment for officials arresting the unfortunate victim / complainants.

There are three group of people who participated in debate on validity of the Hudood Laws viz. people who think the Hudood Laws can not be changed or amended as they are enjoined by the Allah Almighty, on one extreme, the other wing pleads total abolition of the Hudood Laws, the other extreme, the third group thinks that the laws may be reviewed and amended as translation of the Injunctions of Islam is human effort which needs continuous review to be in consonance with modern challenges. As middle way is the best way according to a famous report of Prophet (peace be upon him) "*khair ul umuri ausatuha*" this is high time to review and integrate the Hudood Laws as given in the Hudood Ordinances with local settings in which they operate as well as challenges of the modern world. Extreme position yielded in nothingness since enforcement of the Ordinances. The Hudood Ordinances are not static and strict. Theyare implemented through courts. It is court to decide a case in the particular context with reference to the particular condition of the accused. This is why no amputation could take place till this point of time. This merit of laws may be taken (as it is often taken) as inefficiency of the Hudood Ordinances by their critics. Drafting of the laws is human effort. The Injunctions of Islam are eternal and universal but their codification in shape of the Hudood Ordinances is human effort. Human had limited intelegence, foresight and vision. They cannot predict and visualize all possible situations in advance. There remains possibility of error, as it is human nature, of judgement. The Hudood Laws were made by the people who were adept and well conversant with the Islamic Injunctions and process of extraction of laws from them. In this context the Hudood Ordinances are human efforts and are no exception. It dosent entails changing of commands of Shariah by this exercise of implementation of divine princiles of justice. This process of improvement and adaptation according to changing circumstances is the "particle of movement" the prerogative of Islamic principles. The change and improvement of implementation of the Islamic Law based on the Injunctions is actually an exclusive icon of Islamic doctrine of justice. Apart from the flaws in the Hudood Ordinances the effort of integration of Islamic Laws with modern challenges is very concept of moderniziation this study is aimed at.

There are other areas of criminal justice which do not belong to *Hudood* as ordained in Holy Qur'an. The Hudood Ordinances so legislate for crimes which do not fall under *Hudood*. Punishments of these unrelated areas are also harsh and lengthy. Previously these crimes were covered by the Pakistan Penal Code 1860. Framers of of the Hudood Ordinances included them in the Hudood Ordinances and enhanced their punishments. Purpose of Shariah is to relieve people from suffering and not to subject them to suffering by putting them in jails and making them go through lengthy trials and make their families suffer in their absence. Main areas needing reconsideration and well worked review according to proponent of the right wing are:

i. *Zina* according to Holy Qur'an and Sunnah of the Holy Prophet (peace be upon him) is either liable to *Hadd* punishment or it can not be said *Zina* at all. When *Zina* is not proved according to the standards given in Qur'an it can not be labeled as *Zina* liable to *Ta'zir*. State can term it a lesser crime but not *Zina*. There is no justification for punishing an accused who escapes *Hadd* punishment with less punishment for the same crime. The flaw must be rectified instantly after required reflection. Most of the cases discussed in pervious section fall under *Zina* liable to *Ta'zir* according to contemplation of the Zina Ordinance. e.g. 2001 PCrLJ 1210, PLD 2003 SC 863, 2009 SD 145, etc.

ii. In cases of *Zina* when allegation of *Zina* proves to be false, it becomes duty of the court to ascertain falsehood of the accusation. After having established that imputation was false then the court should pass conviction order against false accusers. They must be awarded punishment of *Qazf* without waiting a new complaint from the person who got discharged of false accusation of *Zina*. If the courts would wait for the complaints from the individuals wronged on account of false accusation it would amount to paralysis of the Qazf Ordinance. That is why few cases are registered every year. Figures given in Mehdi (1994) with reference to Auolakh 1986 are 18 and 17 for year 1983 and 1984 respectively. Furthermore, courts must prescribe punishment for presenting false cases in the court which not only indict innocents but also wastes the time of the courts. This

is how misuse of the Ordinance of Zina for the purpose of harrassement may be checked. For example: acquittal of Muhammad Abbas in Muhammad Abbas vs. The State PLD 2003 SC 863 i.e. on false accusation due to old enmity between the parties.

iii. There is no prescribed mode of ascertaining truthfulness of the witnesses. *tazkia-e-shahood* is standard for award of all punishment in the Ordinances. There used to be an instuition in the past to conduct *tazkia-e-shahood* through the court *muzakis*. But in these days it is difficult to manage as corruption in all state apparatuses is at galore. The mode should be made clear. There is no procedure in the Ordinance in this regard. There is a suggession from the Council of Islamic Ideology that mode of *tazkiah* which is appended as annexture to Qanoon-e-Shahadat may be appended to the Hudood Ordinances. In many judgements of the Federal Shariat Court it had emphasized on secret or open *tazkiah*. It was also criticized that only one person could not acertain truthfulness of the all witnesses. Sentence of *Hadd* punishment was set aside and was changed into *Ta'zir* in acase of Pervaiz vs The State 2004 SD 324.

iv. Testimony of women in Hudood cases is often criticized as is in section 8(2) of the Zina Ordinance and also in other Hadood Ordinances; there are technical doubts about interpretation of Surah *Baqrah*, *Ayat-e-Mudaynat*, and Verse number 282. There are also different opinions regarding women witnesses in all matters generally and in *Hudood* cases particularly. As Usmani (ibid) notes opinion of a *Tabi* group of Muslim scholars who say evidence of women can be accepted in *Hudood* cases. It is matter requiring *ijtihad*. Extensive debate and research can resolve this matter. It is incumbent on the jurists of the present time to ponder on the issue more critically as the nature of the issue demands.

v. Procedures are prescribed in the Ordinances. The old procedures are not even in the jurisdiction of the Federal Shariat Court. It can not suggest any thing regarding procedures as it is discussed in the mandate of the Court. Procedures,

according to Section 20 of the Ordinance of Zina, are laid down in the in CrPC 1898. Powers vested in police are not only unlimited but are also arbitrary. Police deals with cases in its own style. Their inefficiency as well as maltreatent of the complainantts and victims under *Hudood* crimes add to the criticism of the Ordinances. Some leading cases on the issues are: 2002 Sd 552 (M. Riaz vs The State), 2003 SD 667 (Nasreen Akhtar vs Hasnain Mehdi), 2004 PCrLJ 1039 (Shabbir vs The State), PLD 1999 Lah 297 (Bilal vs SP DI Khan), etc.

4.17 Modernized Protection of Women Act (PWA) 2006

Islamization process started as *raisen d'etre* of the country is not all which one sees in the Hudood Ordinances. It is an element of the process of Islamizing society. There is large number of state apparatuses which are part and parcel of the state business. Process of Islamization is a comprehensive reform system encompassing all sphere of life in the country. Islamization of Legal State Apparatus (LSA) is one element in the whole system. General Muhammad Zia-ul Haq and his lieutenants thought Islamizing laws as Islamization of society as a corollary outcome and aim in its culmination. It means that Islamization of laws is one stage in the holistic Islamization. A well coordinated reform system is indespenseable in all sector viz. education, economic system, justice system, proceeding of courts, police system, civil administration at all levels are few among others. None says that do away with police it is inefficient and strict laws of Anti Narcotics are not yielding they must be abolished. All talk about the reforms in these areas. The Hudood Ordinances may be reformed with reforms in the whole system of proceedures in the light of the rational advice and well worked suggestions. The task of reformation in the laws was under taken to make the laws more humanitarian, reformative, non-discriminating and ready to face challenges of modern times. This very aspect is termed as modernization of the State apparatus in this study. As this Study is delimited to Islamized Laws in Pakistan i.e. the Hudood Ordinances; it only focuses on reforms in the laws included these Ordinances. These reforms took place after an explication of the laws and their practical aspects throughout 26 years since their enforcement. Islamization was done by the usurper and also Modernization took its course under

aegis of another dictator. In the pretext of explication of working of the Hudood Laws Modernization process is also restricted to the project of reforms under taken by Musharaf government in 2006. The outcome of the Modernization process comes out to be in the form of Protection of Women Act 2006. In the following lines the examination of the Act is presented. This section opens with the steps which are taken to address the flaws in the Hudood Ordinances. It omits some of the objectionable Sections of the Ordinances. Some of the crimes are again placed under PPC. As this is also a human effort and it may have its limitations and liabilities which are also discussed in this section.

The aim of the PWA is given in the foot notes. It is to translate the "avowed" principles of the State Policy to meet constuitional objectives of the State. Islam is *raison d'eter* of Islamic Republic of Pakistan. It is to provide an atmosphere to its inhabitants where they can order their lives individually and collectively in accordance with the Injunctions of the Islam i.e. Qur'an and Sunnah. Pursuant to the Constitutional Objectives the Constitution itself declares that no law shall be made repugnant to the Holy Qur'an and Sunnah and all existing laws shall be brought in conformity to the Holy Qur'an and Sunnah of the Prophet (peace be upon him). The statement of this objective gives reasons of making the PWA. It aims to bring the laws relating to *Zina* and *Qazf* in conformity to the objectives of the State Policy. As there are instances of misuse of these laws against women, this law would provide protection and relief to women against such type (many are discussed in the foregone section) of misuse and would save the women form abuse.

As it is highlighted in discourses on the Hudood Ordinances that there are other crimes, which are not related to *Hudood* but are included in these Ordinances. As it is also recommended by Usmani (2006) that separation of fornication from the *Hudood* is a welcome change as there is no concept of *Zina* liable to *Ta'zir*in Islam. The crimes which do not fall under *Hudood* as ordained in Holy Qur'an and Sunnah are placed under Pakistan Penal Code as they were prior to the promulgation of the Ordinances. *Hudood* punishments are given in Qur'an and Sunnah and are immutable whereas *Ta'zir* punishments are left for the working of the state legislation. Offences which are neither mentioned in two basic source of Islamic Law nor their punishment

are described therein they become area of the State operation. By applying its jurisdiction to define the crime and fix their punishments the state discharges itself one of her obligations. Exercise of the athourity is in accordance with the Islamic theory of statehood. Under the same authority of the State offences unrelated to *Hudood* are removed from the Hudood Ordinances and are placed under the Pakistan Penal Code.

Zina and *Zina-bil-jabar* are segregated. Proof of the crime for both was same under the Hudood Ordinance. It made impossible to provide sufficient testimony to prove rape on one hand it also facilitated misuse or abuse of the Law on the other. A complainant who could not prove the crime with four eye witnesses her pregnancy and medical report was a proof of *Zina*. Then there were chances to indicte her under *Ta'zir*. Such are example cases Safia Bibi vs The State is oft quoted among others: (NLR1985 SD 145), 2005 SD 721, 2002 SD 552, PLD 2003 SC 863, 2005 SD 242 are few to mention. In the PWA separate criteria for proof of rape are given.

Question of validity of marriage according to the law of the land creates a troublesome situation for divorced women whose husbands do not intimate the Union Council abou the divorce under the MFLO 1961 or failure to register *nikah* in the Union Council amounted to penalization of ignorant women folk. To save women from penal consequences on account of these lapses the word "valid" is omitted from the Ordincance. There are numerous examples of the misuse of the law by husbands. Examples are: Ali Nawaz vs The State, PLD 1963 SC 51; Sehra vs The State, PLD 1986 FSC 229; Muhammad Siddique vs The State, PLD 1983 FSC 173; Shahida Perveen vs The State, NLR 1988 SC 188, etc. Patel (1991) sees the Ordinance as a tool to blackmail women at the hands of dishonest men. They bring complaints against their ex-wives to settle there account of vengeance. This change is according to the Islamic theory of justice.

Mehdi (1994) touches issue of definition of rape in a mild tone being inquisitive about how a male can be victim of rape. The definition of *Zina* in Section 6 of the Ordinance implies that the victim can be a male or female. Choudhry (2007) discusses that rape or *Zina-bil-jabr* has no *Hadd* punishment. It is why it is removed from the Zina Ordinance and is placed in PPC. Definition of rape is also amended to describe that rape is committed by a male against a female.

Moreover, consent taken from an under sixteen girl would not absolve the offender of the guilt of rape. This step is taken to protect the weak wing of the society. Cases of *Zina-bil-jabr* were being decided in favour of the offender some how owing to flaws in the Law. Famous cases in this respect are: Zafran Bibi vs The State, PLD 2002 FSC 1, 2004 PCrLJ 1039, 2003 SD 667, Nasreen Akhtar vs Hussain Mehdi. Death penalty is only punishment for rape. At times cicumstances do not permit the court to impose death punishment writes Choudhry (Ibid). The court finds no lesser punishment and it results in acquittal of the offender. As an alternate punishment of imprisonment for life is also added.

As regard to *Qazf* the offence could not lead to prosecution at its own on failure of *Zina* proceedings. Baseless accusation is always discouraged in Islamic teachings. For safeguard of sanctity of social life failure of *Zina* blame results in punishment of *Qazf*. The complainants and the witnesses must be conscious of the seriousness of the allegation that if found false they will face conviction on account of *Qazf*. To save, women from the prosecution, to ensure fundamental freedom and to eliminate pursuit of settelement of vendetta, CrPC is amended as far as registration of the cases of *Zina* and *Qazf* are concerned. The case are now only registered in the Court of Session and police authority is curtailed in these matters. It was long standing demand by women right activists, women organizations and law fraternity as discussed in section on discoussion of the Hudood Laws. It is pertinent to mentions that *ulema* and the Council of Islamic Ideology were also in favour of abolition of police authority which often distorts the cases and fixes blame on the Hudood Laws. These offences are also made bailable. In this way the PWA aims at ensuring and egalitation society in the country sums up Choudhry (Ibid). The Act also places Section 11(*Lian*) of the Qazf Ordinance under Dissolution of Marriage Act 1989. The offences which were covered under Section 11 to 16 of the Zina Ordinance are offences falling under *Ta'zir*. All of these offences are covered in new section of PPC as 365B, 367A, 371B, 493A and 496A. Section 12 and Section 13 of the Qazf Ordinance are omitted. Article 14 of the Constitution on dignity of man and privacy of personal dewelling, Article 25 on equal treatment of sexes and surety of protection of women along with special measures for promotion of justice in the society are referred in promulagation of the Act. The Act has 29 Section in total.

Section 1 is related to nomenclature and and enforcement, Section two inserts a new Section 365B in the PPC. It is the same Section 11 which was part of the Zina Ordinance. Section three of the Act adds a new Section 367A to the PPC. It was Section 12 in the Zina Ordinance. Both of these Sections do not relate to *Hudood* therefore are placed in PPC. This is a sort of reversal. As these crimes were dealt under PPC prior to the promulgation of the Hudood Ordincance so they are placed in the PPC.

Selling and buying of a person is taken out from the Zina Ordinance. Selling was under Section 13 whereas buying was placed under Section 14 of the Ordinance. New place for these Sections in the PPC happens to be after Section 371. In the PWA selling is under Section 371 A and buying is placed under Section 372B. Section four of the Act introduces two new sections after Section 374 i.e. 375 and 376 PPC. Setion 375 which is same Section five of the Zina Ordinance but it has an additional clause (v). It places sexual intercourse with an under sixteen girl with or without her consent under rape and section 376 which specifies punishment for the crime. Section 376 is with addition of imprisonment for life as punishment along with death penalty. Previously this was covered under section 6 (3) of the Ordinance.

Section six of the PWA replaces Section 15 of the Ordinance in the PPC as Section 493A (cohabitation by a man with a woman). Section ordinance is placed after section 496 of PPC in the PWA. Section seven of the PWA adds after Section 496 PPC three subsections i.e. 496A, 496B, and 496C. 496A deals with detaining, enticing and taking away of a woman with criminal intention. 496B deals with willful sexual intercourse in the name of fornication. 496C prescribes punishment for false accusation of fornication. Usmani (2007) welcome this change as *Zina* is only liable to *Hadd*, otherwise it is not *Zina*. It is new name for the offence of *Zina* which was defined under Section 4 of the Zina Ordinance. The only change is ommission of word “validly”. It created nemurous hardship for women so it is omitted in the PWA. Section 8 of the PWA discusses new instruction in the CrPC. Three Sub-Sections are added to Section 203 of CrPC i.e. 203A makes the offences of *Zina* under Section five of the Zina Ordinance non-cognizable by police and also bailable. The complaint under this Section is supposed to be lodged not to a police

officer but to a Session Judge. It changes further procedure for institution of crimeinal proceedings against the accused. The Session Judge after being satisfied regarding witnesses (at least four) according to the requirement of the *tazkiah-e-shahood* will take cognizance of the offence after examining the witnesses and the complainant on oath. The witnesses should be Muslim in case of a Muslim offender. Withnesses may be non-Muslim in case of a non-Muslim offender. Subsection 203B places *Qazf* complaint under the PPC. It specifies that a complaint of *Qazf* in a court of competent jurisdiction would start proceedings of *Qazf*. The Session Judge will examine the complaint and the witnesses on oath before taking cognizance of the offence. The substance and examination of version of the complainant and the witnesses will be reduced to writing by the Session Judge.The same will be signed by the complainant, witnesses, and by the Session Judge. Section 203C tells procedure for a complaint of fornication i.e. sexual intercourse with consent of parties to the offence. Cognizance of the offence is only possible on a complaint to a court of competent jurisdiction. Examination of the complainant and the witnesses (atleast two) on oath will be made by the presiding officer of the court. The matter will be written down and will be signed by the complainant, witnesses and the presiding officer. On satisfaction about the commission of the crime the presiding officer shall summon the accused in person. The presiding officer may reject the complaint if not satisfied after examination by writing reasons of the rejection. The complaint of fornication cannot be entertained against a person who is accused of the offence of *Zina* under the Section five of the Zina Ordinance. The complaint against him is pending under 203A before a court or such complaint against him has been dismissed or who has been discharged / acquitted of the charge. The complaint under 203C can not be entertained against a victim or a complainant of rape.

Secion nine of the Act amends following Sections of CrPC by inserting: 365B, 367A, 371A, 379B, 376, 493A, 496A, 496 B, 496C. I t also amends Section 5 Ord VII of 1979 and Section seven of Ord VIII. Section 10 of the PWA amends Section two of the Zina Ordinance by inserting a clause (aa) after clause (a) giving procedure of confession of the commission of crime of *Zina*. This Section also omits clauses (c) and (e). Twelfth Section of the PWA amends Section four of the Zina Ordinance by omitting word “validly” from definition of marriage. Section

number 11 is regarding omission of Section three of the the Zina Ordinance. Section 12A inserts a new Secition after Section five on *Zina* liable to *Hadd*. This Section provides that no complaint of *Zina* under Section five and no case of rape shall be convereted into a case or complaint under 496B PPC i.e. fornication and no complaint under 496B shall be convererted, at any stage, into case / complaint of *Zina*.

Omission of Sections from the Zina Ordinance starts with Section 13 of the PWA. This Section omits Sections six and seven of the Zina Ordinance. In Section six *Zina-bil-jabr* was defined with explanation and sentence whereas Section seven was about punishment for minor offenders. These Sections are placed in the PPC i.e. Section 375 and 376 PPC. PWA's Section 14 omits words *Zina-bil-jabr* from Section eight of the Zina Ordinance and from its marginal notes. Section 15 of the PWA amends Section 9 of the Zina Ordinance with omission of *Zina-bil-jabr* with clause (1), clause (2) and with total omission of sub-Section 3 and 4 of the Section 9 of the Zina Ordinance. Sixteenth Section of the PWA omits Sections 10-16 of the Zina Ordinance and those are placed in the PPC under Sections: 365B, 367A, 371A, 371B, 493A, 496A. In Section 17 of the PWA word and the figure; "Section 6" are omitted from Section 17 of the Zina Ordinance. Section 18 of the PWA changes Section 20 of the Zina Ordinance by omitting first proviso in first sub-Section and word "further" in the second proviso of Sub-Section 3 and sub-Section 5. Section two (definitions) of the Qazf Ordinance is amended by Section 19 of the PWA by susituting of clauses (a) of the Qazf Ordinance. To omit the word *Ta'zir* and *Zina-bil-jabr* from the clauses (a) of the Qazf Ordinance, the amendment in the Qazf Ordinance is made by Section 20 of the PWA by omitting Section four of the Qazf Ordinance which was on kinds of *Qazf* liable to *Hadd* and *Ta'zir*. Another amendment in the Qazf Ordinance is made by Section 21 of the PWA it deals with renumbering of the Section 6 of the Qazf Ordinance. An additional sub-Section 2 is added to the Section 6 after Sub-Section 1. This new sub-Section prescribes procedure of complaint of *Qazf* under Section 203A CrPC. Section eight of the Qazf Ordinance is amended by Section 22 of the PWA, the words "a report made to the police or" are omitted in Section 22 of the PWA. Amendment of the Section nine of the Ordinance of Qazf is done in Section 23 of the PWA. This Amendment changes sub-Section 2 of the Section nine of the Qazf

Ordinance with some additions in it. Five Sections of the Qazf Ordinance namely: Section 10,11,12,13 and 15 are omitted in Section 24 of the PWA. These Sections dealt with *Qazf* liable to *Ta'zir*, punishment for *Qazf* liable to *Ta'zir*, printing of matter and its sale, etc and punishment for attempts to commit thses crimes under the Ordinance on Qazf respectively. *Lian* given in section 14 of the Qazf Ordinance is amended in section 25 of the PWA. This Section is breived of sub-Sections 3 and 4. These sub-Sections are palced in the Dissolution of Muslim Marriage Act 1939. Section 26 of the PWA omits Section 16 of the Qazf Ordinance. This Section of the Qazf Ordinance made application of Pakistan Penal Code possible wherever needed with specificity of Sections and Chapter of the PPC. In the same way there was a mode of application of CrPC in Section 17 of the Qazf Ordinance, the same has been amended in Section 27 of the PWA. Section 27 of the PWA makes omission of the first proviso of Section 17 of the Qazf Ordinace. The second proviso of the Section 17 of the the Qazf Ordinance is changed and substituted which places the offence in jurisdiction of the Session Judge and not of the Megisterate with powers under Section 30 of CrPC. Appeal to the decisions of the Session court shall lie to the FSC as provided by Section 27 of the PWA and second proviso.

The Ordinance of Qazf used to override other laws under Section 19. This Section is omitted by Section 28 of the PWA. Last section of the PWA introduces and inserts a new section in the Dissolution of the Muslim Marriage Act 1939. This insertion takes place after clauses (vii) in Section 2 of the Act. This is how according to Articles: 14, 25 and 37 of Constitution of Islamic Republic of Pakistan, women are relieved of exploitation and provided protection in the Protection of Women Act (2006). This modern approach has its pros and cons which are discussed in the following lines.

Usmani (2007) criticizes amendments in punishment *of Zina-bil-jabr*. He says that high-handedness of police is evident in all criminal cases. They collude with influential perpetrators. There are instances of booking complainants of *Zina-bil-jabr* under *Zina-bil- raza* when they are unable to prove the allegation. Such violations of the law are routine business of the police. The Federal Shariat Court has given judgements showing its resentment on maltreatment of victims of

the *Zina-bil-jabr*. He says that risk of exploitation of victim of rape may be avoided by enacting a law to prevent police from arresting female complainants of *Zina-bil-jabr* till final decision. Moreover, a law should be enacted under which investigation of *Zina* case may be made by a senior police officier of Surintindent of Police (SP) rank. It would eliminate risk of maltreatment of victims by the police. It is unfortunate to make *Zina* a non cognizable offence which is strengthing offenders and placing the victims to more adverse position. Shariah *hadd* has been dispensed with instead of making system of investigation and procedural matters justice ensuring. He further says that this change is against Qur'an and Sunnah.

Punishment under *Ta'zir* has also been decreased. Rigor of the punishment is diluted as *Zina* under *Ta'zir* had punishment up to 10 years imprisonment which is reduced to five years. It is not against Shariah as Government is competent to change Ta'zir punishment but it is also in favour of offenders.Inspite protectecting women the Act protects offenders but it is given an ironic name as the Protection of the Women Act, he furthers.

Making the offence of *Zina* non-cognizable creates problems for victims. Victims can only be women according to the Act. They have been placed in unfavourable position. They are to bring two eye witnesses for filing a complaint. They all are to be examined on oath by the Session Judge. In the PWA male offenders are protected as they are to provide personal undertaking only and not a surety. Victims are placed under hard burden of bringing witnesses and examination on oath and culprits are fully facilitated to go scot-free.

As the name of the offence is changed from *Zina* to fornication this is a welcome change. To Usmani (Ibid) *Zina* is *Zina* when it is proved according to the proof required in Qur'an. Any offence which is less than the required standard can not be called *Zina.* Where the crime cannot be proved with four eye witnesses, the crime will become of different nature. This is also suggested by *ulema* in their recommendations.

Demand of four eye witnesses from complainant of *Zina* for *Hadd* and two witnesses for Ta'zir case is not less than cruelty in the court with hapless victims. It means no complaint is

good for registration of a case where there are no witnesses. In Pakistan circumstantial evidence is considered sufficient in absence of eye-witnesses. Also *Ta'zir* punishment in Pakistani Justice System as well as in Shariah can be proved on basis of single witness. For example, child testimony was admitted to punish the offenders when it was corroborated by Medical and circumstantial evidence; The State vs Khushal Khan, 2002 SD 112. Condition of bringing two witnesses prior to registration of a case is tantamount to provide protection to offenders and not to women.

In case of minor offences courts may bail out accused either on personal undertaking or on providing guarantee of others. This varies case to case. Courts decide keeping in view the nature of the crime and case. This power under Section 496 CrPC is not available to courts only in *Zina* cases in the "Protection of Women Act". Furthermore, court is authorized to dismiss in absence of valid grounds. The same was already available in CrPC under Section 203. It is mere repetition which is superfluous.

One more protection to culprits is offered in the Act that is no accused of *Zina* liable to *Hadd* can be punished under *Ta'zir*. In the Hudood Ordince on *Zina* in absence of proof for imposition of *Hadd* punishment under Section five and six of the Zina Ordinance the accused was punishable under Section 10 (3) of the Ordinance under *Ta'zir*. In the Protection of Women Act accused under 203C (6) when not proved guilty of the offence of *Zina* liable to *Hadd* cannot be punished with *Ta'zir*. It means being guilty of formication. He is never guilty of any offence. This is how the Act happens to be the "savior" of women.

Surah 33, Verse 36 enshrines that final verdict is of Allah the Almighty and His messenger. The same is proved in a famous report from the messenger of Allah. Full description of the incident is given by Albukhari in Kitab-ul-Hudood; Hadith number 6788 in Chapter number 12. Translation of the verse of the Holy Qur'an: "And it becometh not a believing man or a believing a women, when Allah and His messenger have decided an affair (for them), that they should (after that) claim any say in their affair; and who so is rebellious to Allah and His messenger, he verily goes astray in error manifest (Pickthal: 414). Translation of the Hadith of the

Holy Prophet (peace be upon him); when Usama Ibn-e-Zaid interceded for a women of Quresh who was sentenced to amputation of hand on committing theft; the Prophet (peace be upon him) declared in very clear words: "Allah be the witness! Even if Fatima daughter of Muhammad is proven guilty of committing theft, I would implement Hadd by amputing her hand". Keeping in view these authorities in the Islamic Injunctions no one can commute or reduce punishments of *Hudood* from a court of Law. This was translated in Section 20 sub-Section 5 of the Zina Ordinance. It provided that Presidents powers to reduce, commute, or condon were not applicable regarding punishments under Section five and Section six of the Ordinance of *Zina*. The Act empowers the President to exercise these powers which is against Shariah. It was also decided by the full Bench of the Lahore High Court on exercise of powers under Article 45 of the Constitution by the President of Pakistan on 7-12-1988. It was not according to the spirit of Islamic Justic. He commutted death punishments from all courts of the country to imprisonment for life. This order was challenged and The Lahore High Court based the decision on the Objectives Resolution. It was held that in the matter of *Hadd* punishments and *Qisas* the President of Pakistan had no powers to commute punishments. Only heir of decreased could grant pardon in murder cases as court observed. President could not remit or pardon sentences according to the Islamic Injunctions. However, in cases of *Ta'zir* punishments President could exercise his powers under Article 45 of the Constitution, to grant pardon that "too in public good"; Mst Sakina Bibi vs Federation of Pakistan recorded on 14 January 1992. Empowering the president/government to commute or pardon the sentences is totally un-Islamic.

The Ordinance of Zina Section three made the Ordinance (Islamic Laws) Supreme. They superceded all other laws. This supremacy was of the Islamic Injunctions i.e. Qur'an and Sunnah over the man made laws. The Act has taken the overriding nature of the Hudood Ordinances back. For example, the MFLO 1961 considers divorce ineffective until it is not registered with the Chairman of the Union Council or in the Union Council. It further considers second marriage of a woman illegal prior to such registration. These laws are against Islamic teachings. Husbands exploit these laws and settle vendetta against woman. There are examples where courts decided on account of non compliance of Section 7 of the MFLO. The second marriage was illegal and

there was illicit relationship between the spouses, where the woman was divorced by her former husband and *Talaq* was not registered in the Union Council. They were committing *Zina* as the *Talaq* was not effective; Shera vs The State, PLD1982 FSC 229. In a similar case, as court observed notice of divorce was not served to the Chairman or to the Union Council which was amounted to retraction of the divorce. When divorce was not effective the relation of the woman with her previous husband was intact and was not ended. So she was committing *Zina* with her second husband; Ali Nawaz vs Muhammad Yousuf (PLD 1963 SC 51). This was why the Hudood Ordinances were given superior status to provide relief to women but in the Protection of Woman Act the position is reversed, the *ulema* Committee to which the draft of the Act was referred for perusal and recommendations suggested to place the Ordinance effective not withstanding anything contained in other laws as it is according to the Injunctions of Islam i.e. Qur'an and Sunnah; the Supreme Law of the State. This change was agreed upon by government but it is missing in the Act.

Under Section 14 of the Qazf Ordinance procedure of *Lian* was a protection for women. No doubt it resulted in dissolution marriage and it relates to dissolution of marriage issues but it was a safeguard for a wife who has been falsely implicated for committing *Zina* by her husband. In the PWA it has been omitted. There is no compulsion on husband to take part in proceedings of *Lian*. In earlier situation under the Qazf Ordinance he was to be detained as long as he didn't agree to take part in proceedings of *Lian*. With this omission the wife so implicated is left with no option either to prove her innocence or get annulment of marriage by the court. She has been made a perpetual subject of torture and by giving license to husband in this regard.

Under Section 20 (1) first proviso of the Ordinance of Zina the offender who committed an offence punishable under any other law to the satisfaction of court the court could punish him. This provision was source of simplification of the procedures. In the PWA this provision is taken away. All offences liable to Ta'zir punishment are shifted to PPC in the PWA. A person who is accused of *Zina* liable to *Hadd* under the Ordinance of *Zina*, if found guilty of rape or abduction, and the court has sufficient proofs on record but he cannot be convicted for rape or abduction.

The result of this amendment can be in letting the culprit go without punishment. The complainant is to lodge a fresh complaint against him under PPC. It will be continuous torture for the victim of the offence of rape or abduction. In this way the PWA which is made under influence of personal biases and duress exerted by propaganda which is both negative and hostile. It compels courts to follow long trials without any output. Cases are supposed to be shifting from one court to another which is denial of justice by delaying it as well as detrimental to the victims holds Usmani (Ibid).

The Federal Shariat Court examined the PWA. The court is of opinion that there are gross violations of the Constitution of Pakistan. Declaration issued by the Court places Sections 11, 25, 28 and 29 of the PWA violatary to Article 203 DD of the Constitution. The declaration of the court on petitions 1/1, 3/1 of 2007 and 1/2010 is summarized in these lines. Dawn's report on the decision falls short of one section mentioning three sections only. The court declared the above mentioned Sections of the PWA un-Islamic and un-Constitutional. The report only focused the overriding effect of offences of the Zina Ordinance 1979. Section 25 is missed out in the report as it shows Section 11, 28, and 29 of the Ordinance in violation of Constitutional provisions of Section 203 DD. According to Dawn the court urged the government to amend the PWA and bring it in conformity with Qur'an and Sunnah. The report has mixed the issue of Section 25 of the PWA with Section 25of the Anti-Terrorism Act 1997. Both of them are declared against Article 203 DD of the Constitution.

The verdict of three members Bench headed by Agha Rafiq Ahmed Chief Justice of the Federal Shariat Court, Justice Shahzado Sheikh and Justice Afzaal Haider placed all offences related to the punishments prescribed in Qur'an and Sunnah under *Hudood*. The verdict counts ten offences: *Zina*, *luwatat*, *Qazf*, *Shurb*, *Sarqah*, *Harabah*, *Irtidad*, *Baghawat*, *Qisas*, and Human Trafficking. In all these matters grant or refusal of Bail is covered by the word "proceedings". It is under exclusive jurisdiction of the Federal Shariat Court. Any case in this regard can only be filed on these matters on the only valid form i.e. the FSC says the verdict. The verdict also declared Section 25 of the Anti-terrorism Act 1997 against Qur'an and Sunnah as in cases related

to *Hudood* it does not provide for filing of appeal according to Section 203 DD before the Federal Shariat Court. The verdict specifies recification of the omissions before due date i.e. 22 June 2011. In trials of *Hudood* cases under special courts The High Courts are empowered to transfer the cases. In the verdict of the Federal Shariat Court this falls under exclusive jurisdiction of the Federal Shariat Court and not the High Courts. It must be changed with Federal Shariah Court in Section 11 and 28 of the PWA. The overriding powers of the Hudood Ordinances are curtailed which is in contrast to Constitutional mandate of the Hudood Ordinance of *Zina*. Section 25 of the PWA is declared violative of the Article 203 DD as it omits procedure of *Lian* under Section 3 and 4 of the Qazf Ordinance which adversely effects the operation of Qura'nic procedure of absolving women of the charge of *Zina*. Next Section of the PWA which places *Lian* under the Dissolution of Marriage Act 1939 is also declared against Islamic Injunctions.

The cut-off date for the operation of the Sections declared voilative of the Constitutional mandate of the Federal Shariat Court was 22nd June 2011. The judgment gave time to The Federal Government to amend the three laws in the light of this verdict. The government did not have any legislative control on the matter of *Hudood*. These laws are void *ab initio* as no other court is empowered to hear appeals, revise the judgements of the Session Courts or the Additional Session Courts or to respond to references from these courts except the Federal Shariat Court as stipulated in the Constitution of Pakistan.

The protection of women amendment bill was discussed at different forums. There were debates on media (print and electronic alike). The Council of Islamic Ideology had kept record of these discussions on merits and limitations of the bill. Different association approached the Council in this regard. One of the NGO's; Women Aid Trust wrote a letter to the Council regarding the Criminal Law Amendment Act 2006. It opined that the bill was prepared in hurry without proper home work and consultation with the people of erudition and stake holders. The bill lost its worth as it was floated as a political issue rather than a matter of common interest to be discussed on the competent forum i.e. the National Assembly. Women Aid Trust emphasized

that the bill must be handed over to renowned legal experts and men of religious erudition and knowledge i.e. *ulema* to redraft it as they think fit.

The president of Pakistan was pleased to convene an immediate meeting on the PWA with the Chairman of the Council of Islamic Ideology and its members on 30th November 2006. Dr. M. Khalid Masood led seven other members to Presidential Camp office. The proposed Bill on Woman Protection was discussed in this meeting. After due deliberations the Chairman and members of the Council concluded that there was nothing against Islamic injunctions i.e. Qur'an and Sunnah in the Bill. They declared it a forward step to correct and rectify the existing lacunae in the Hudood Ordinances and protect women from exploitation. The Council showed its resolve to examine existing laws and to forward suggestions to the National Assembly for betterment of women in the light of the proposed Bill. Furthermore, the Council was determined to protect the weaker wing i.e. women of the society. The Council unanimously put forward suggestion of exclusion of women from prisons. Details of the meeting were published in the Newspapers of national circulation on 1st of December 2006. Formally, the deliberations of the meeting with the President of Pakistan on the Women Protection Bill were adopted in 163rd meeting of the Council. There was a note of dissent by Javed Ahmed Ghamdi on the Bill. He opined that there were several Sections of the Protection of Women Bill, in his reading, against Qur'an and Sunnah as well as good reason. He also mentioned his off and on views on the issue. He reported that he presented his observations and reservation on the Bill very eloquently in presence of the President of Pakistan in the 1st meeting after his regintration from the roll of the Council. He reiterated his stance by saying that "words like fully supported" and "none of its sections is against the Qur'an and Sunnah" are not correct at least according to his reading and understanding of the Bill. He requested the panel of the Council to include his note of dissent on the issue in the report. The same is duly added and all deliberations can be seen in the Annual Report 2006-2007 of the Council of Islamic Ideology.

Usmani (2007) criticizes amendments in punishment *of Zina-bil-jabr*. He says that high-handed ness of police is evident in all criminal cases. They collude with influential perpetrators.

There are instances of booking complainants of *Zina-bil-jabr* under *Zina-bil- raza* when they are unable to prove the allegation. Such violations of the law are routine business of the police. The Federal Shariat Court has given judgements showing its resentment on maltreatment of victims of the *Zina-bil-jabr*. He says that risk of exploitation of victim of rape may be avoided by enacting a law to prevent police from arresting female complainants of *Zina-bil-jabr* till final decision. Moreover, a law should be enacted under which investigation of *Zina* case may be made by a senior police officier of Surintindent of Police (SP) rank. It would eliminate risk of maltreatment of victims by the police. It is unfortunate to make *Zina* a non cognizable offence which is strengthing offenders and placing the victims to more adverse position. Shariah *hadd* has been dispensed with instead of making system of investigation and procedural matter justice ensuring. He further says that this change is against Qur'an and Sunnah.

Punishment under *Ta'zir* has also been decreased. Severity of the punishment is diluted as *Zina* under *Ta'zir* had punishment up to 10 years imprisonment which is reduced to five years. It is not against Shariah as Government is competent to change Ta'zir punishment but it is also in favour of offenders.In spite of protectecting women the Act protects offenders but it is given an ironic name as the Protection of the Women Act.

Making the offence of *Zina* non-cognizable creates problems for victims. Victims can only be women according to Act. They have been placed in unfavourable position. They are to bring two eye witnesses for filing a complaint. They all are to be examined on oath by the Session Judge. In the PWA male offenders are protected as they are to provide personal undertaking only and not a surety. Victims are placed under hard burden of bringing witnesses and examination on oath and culprits are fully facilitated to go scot-free.

As the name of the offence is changed from *Zina* to fornication this is a welcome change. To Usmani (Ibid) *Zina* is *Zina* when it is proved according to the proof required in Qur'an. Any offence which is less than the required standard can not be called *Zina*. Where the crime cannot be proved with four eye witnesses, the crime will become of different nature. This is also suggested by *ulema* in their recommendations.

Demand of four eye witnesses from complainant of *Zina* for *Hadd* and two witnesses for *Ta'zir* case is not less than cruelty in the court with hapless victims. It means no complaint is good for registration of a case where there are no witnesses. In Pakistan circumstantial evidence is considered sufficient in absence of eye-witnesses. Also *Ta'zir* punishment in Pakistani Justice System as well as in Shariah can be imposed on basis of single witness. For example, child testimony was admitted to punish the offenders when it was corroborated by medical and circumstantial evidence; The State vs Khushal Khan, 2002 SD 112. Condition of bringing two witnesses prior to registration of a case is tantamount to provide protection to offenders and not to women.

In case of minor offences courts may bail out accused either on personal undertaking or on providing guarantee of others. This varies case to case. Courts decide keeping in view the nature of the crime and case. This power under Section 496 CrPC is not available to courts only in *Zina* cases in the "Protection of Women Act". Furthermore, court is authorized to dismiss the complaint in absence of valid grounds. The same was already available in CrPC under Section 203. It is mere repetition which is superfluous.

One more protection to culprits is offered in the Act is that no accused of *Zina* liable to *Hadd* can be punished under *Ta'zir*. In the Hudood Ordince on *Zina* in absence of proof for imposition of *Hadd* punishment under Sections five and six of the Zina Ordinance the accused was punishable under Section 10 (3) of the Ordinance under *Ta'zir*. In the Protection of Women Act accused can not be punished under 203C (6) when not proved guilty of the offence of *Zina* liable to *Hadd* cannot be punished with *Ta'zir*. It means being guilty of formication is equivalent to innocence. He is never guilty of any offence. This is how the Act happens to be the "saviour" of women.

Surah 33, Verse 36 enshrines that final verdict is of Allah the Almighty and His messenger. The same is proved in a famous report from the messenger of Allah. Full description of the incident is given by Albukhari in *Kitab-ul-Hudood*; Hadith number 6788 in Chapter number 12. Translation of the verse of the Holy Qur'an: "And it becometh not a believing man or

a believing a women, when Allah and His messenger have decided an affair (for them), that they should (after that) claim any say in their affair; and who so is rebellious to Allah and His messenger, he verily goes astray in error manifest (Pickthal 414). Translation of the Hadith of the Holy Prophet (peace be upon him); when Usama Ibn-e-Zaid interceded for a women of Quresh who was sentenced to amputation of hand on committing theft; the Prophet (peace be upon him) declared in very clear words: "Allah be the witness! Even if Fatima daughter of Muhammad is proven guilty of committing theft, I would implement *Hadd* by amputing her hand". Keeping in view these authorities in the Islamic Injunctions no one can commute or reduce punishments of *Hudood* from a court of law. This was translated in Sect 20 Sub-Section 5 of the Zina Ordinance. It provided that President's powers to reduce, commute, or condone were not applicable regarding punishments under Section 5 and Section 6 of the Ordinance of *Zina*. The Act empowers the President to exercise these powers which is against Shariah. It was also decided by the full Bench of the Lahore High Court on exercise of powers under Article 45 of the Constitution by the President of Pakistan on 7-12-1988. It was not according to the spirit of Islamic Justic. He commutted death punishments from all courts of the country to imprisonment for life. This order was challenged and The Lahore High Court based the decision on the Objectives Resolution. It was held that in the matter of *Hadd* punishments and *Qisas* the President of Pakistan had no powers to commute the punishments. Only heir of decreased could grant pardon in murder cases as court observed. President could not remit or pardon sentences according to Islamic Injunctions. However, in cases of *Ta'zir* punishments President could exercise his powers under Article 45 of the Constitution, to grant pardon that "too in public good"; Mst Sakina Bibi vs Federation of Pakistan recorded on 14 January 1992. Empowering government to commute, which results in free pardon, the sentences, is totally un-Islamic.

In the Ordinance of Zina Section 3 made the Ordinance (Islamic Laws) Supreme. They superceded all other laws. This supremacy was of Islamic Injunctions i.e. Qur'an and Sunnah over man made laws. The Act has taken the overriding nature of the Hudood Ordinance back. For example, the MFLO 1961 considers divorce ineffective until it is not registered with Chairman of the Union Council or in the Union Council. It further considers second marriage of a woman

illegal prior to such registration. These laws are against Islamic teachings. Husbands exploit these laws and settle vendetta against woman. There are examples where courts decided on account of non compliance of Section 7 of the MFLO. The second marriage was illegal and there was illicit relationship between the parties (spouses), where the woman was divorced by her former husband and *Talaq* was not registered in the Union Council. They were committing *Zina* as the *Talaq* was not effective; Shera vs The State, PLD1982 FSC 229. In a similar case, as court observed notice of divorce was not served to the Chairman or to the Union Council which amounted to retraction of the divorce. When divorce was not effective the relation of the woman with her previous husband was intact and was not ended. So she was committing *Zina* with her second husband; Ali Nawaz vs Muhammad Yousuf (PLD 1963 SC 51). This was why the Hudood Ordinances were given superior status to provide relief to women but in the Protection of Woman Act the position is reversed, the *ulema* Committee to which the draft of the Act was referred for perusal and recommendations suggested to place the Ordinance effective not withstanding anything contained in other laws as it is according to the Injunctions of Islam i.e. Qur'an and Sunnah; the Supreme Law of the State. This change was agreed upon by the government but it is missing in the Act.

Under Section 14 of the Qazf Ordinance procedure of *Lian* was a protection for women. No doubt it resulted in dissolution marriage and it relates to dissolution of marriage issues but it was a safeguard for a wife who has been falsely implicated for committing *Zina* by her husband. In the PWA it has been omitted. There is no compulsion on husband to take part in proceedings of *Lian*. In earlier situation under the Qazf Ordinance he was to be detained as long as he didn't agree to take part in the proceedings of *Lian*. With this omission the wife so implicated is left with no option either to prove her innocence or get annulment of marriage by the court. She has been made a perpetual subject of torture and by giving license to husband in this regard.

Under Section 20 (1) first proviso of the Ordinance of Zina the offender who committed an offence punishable under any other law to the satisfaction of court the court could punish him. This provision was source of simplification of procedures. In the PWA this provision is taken away. All offences liable to Ta'zir punishment are shifted to PPC in the PWA. A person who is

accused of *Zina* liable to *Hadd* under the Ordinance of *Zina*, if found guilty of rape or abduction, and the court has sufficient proofs on record but he cannot be convicted for rape or abduction. The result of this amendment can be in letting the culprit go without punishment. The complainant is to lodge a fresh complaint against him under PPC. It will be a continuous torture for the victim of the offence of rape or abduction. In this way the PWA which is made under influence of personal biases and duress exerted by the propaganda which is both negative and hostile. It compels the courts to follow long trials without any output. Cases are supposed to be shifted from one court to another which is denial of justice by delaying it as well as detrimental to the victims holds Usman (Ibid).

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filed on these matters in the only valid forum i.e. the FSC says the verdict. The verdict also declared Section 25 of the Anti-terrorism Act 1997 against Qur'an and Sunnah as in cases related to Hudood it does not provide for filing of appeal according to Section 203 DD before the Federal Shariat Court. The verdict specifies recification of the omissions before due date i.e. 22 June 2011. In trials of *Hudood* cases under special courts The High Courts are empowered to transfer the cases. In the verdict of the Federal Shariat Court this falls under exclusive jurisdiction of the Federal Shariat Court and not the High Courts. It must be changed with Federal Shariah Court in Section 11 and 28 of the PWA. The overriding powers of the Hudood Ordinances are curtailed which is in contrast to Constitutional mandate of the Hudood Ordinance of *Zina*. Section 25 of the PWA is declared violative of the Article 203 DD as it omits procedure of *Lian* under Section 3 and 4 of the Qazf Ordinance which adversely effects the operation of Qura'nic procedure of absolving women of the charge of *Zina*. Next Section of the PWA which places *Lian* under the Dissolution of Marriage Act 1939 is also declared against Islamic Injunctions.

State of affairs of dissemination of Justice to victims in Pakistan has never been commendable. In the modern world of the 21st Century people of Pakistan are unable to access corridors of Justice. Law is available to be implemented and enforced but only for rich people. All laws are implemented by the State impartially according to the famous doctrine of "rule of Law". NekoKara laments State of affairs in Pakistan in this regard with reference to a study in which 98 percent of the respondents did not knock the doors of courts under the State System of adjucation. Forty three percent of the respondents felt that women do not have access to the Justice System of Pakistan. According to 25 percent of the respondents, labour class and peasantry of the land lords were unable to approach the law courts. There can be many causes of these defects but for the purposes of the study in hand the picture of protection of women after amendment of the "Exploitative" Ordinances has not been improved considerably reports Dawn on 12 December,2016.

4.18 *Jirga* 'Justice' and Women Rights

'Jirga' (assembly of elders), similar to 'panchayat' (assembly of five elders), is a local court which disposes of cases of all nature. These types of judicial fora are declared '*ultra vires*' in many decisions. Higher courts keep on averring time and again on illegality on this practice on account of being violative of law as well as human rights. Women folk are prone to exploitation in jirga 'justice', writes DAWN, May 31, 2017. As it is iterated that legislations are by no means surety of women rights and dispensation of justice indiscriminately until the very mind set is not changed. Sind High Court has declared jigras null and void. The Court has been banned since 2004. There are numerous instances from different area of Pakistan where women are suffering of the menace. Most of the cases are noted from southern Punjab, Khyber Pakhtun Khawa and rural Sindh. The paper has reported a rape case from Kandhkot, Sindh, decided by local council. It is an unprecedented incident that a landowner is arrested on disposing of a gang rape case by compensating the victim, a 12 year old girl, and her family. The real accused was to pay Rs 1.8 million to the family. After deciding the case the landowner stated to a news conference that it w s due to his intervention the victim family could get 'justice'. The paper counts the arrest as a mile stone achievement. These illegal jirgas flout law and pass decisions based on tenets of 'ignorance and prejudice'. Women are also being humiliated and exploited on account of 'vani', 'sawara' (marriage in compensation) and 'karo kari' etc. Honour killings and relief to the criminals has added the issue. Chief Justice of Pakistan compelled the law enforcement to act according to law on the issue. However, the paper maintained that victims do approach jirga arbitration due to weak, slow and flawed state justice system. It is only possible to stop jirga 'justice' through application of rule of law. Nonetheless, these examples provide an ample support to focus on Islamization of mindset rather than only make laws without their acceptance and enforcement as reported by daily DAWN, May 15, 2017.

4.19 Islamization for Legitimacy and Solidarity

According to An-Na'im (2008) political leaders need Islamic legitimacy to sustain their reign. They maintained political authority through religious authority. They used it as a ruling tactic rather than making them superior Muslim rulers. Such claims neither made them superior to others Muslim ruler nor their state was recognized as an Islamic state. To claim piety is also abhorrent according to Islamic perspective. At time rulers needed endorsement of their rule by religious scholars. They gave autonomy to those scholars but at the same time they also created a balance between their autonomy and state control so that they could not undermine political coercive authority of the state. Islamic history presents enough evidence regarding relationship between religious and political authority. At times both of them converged and at times there was a relationship of conflation. Founder of the state of Madinah Prophet (peace be upon him) had political, military and religious authority vested in him. It was highly centralized prototype situation of state control in which society looked toward Prophet (peace be upon him) in whom everything was combined. The other model mostly in practice in Muslim states was of complete separation between the two authorities; though it is never openly acknowledged on purpose as rulers wanted to enjoy religious legitimacy. However most reins in Muslim history were in middle way, neither they were converged in the model of Prophet (peace be upon him) nor they were totally conflated into separation. Notwithstanding, they claimed to be closer to convergence pole than to its separation pole.

Bifurcation between religious and political authority took place in early Islamic state after death of Prophet (pbuh). Everyone submitted through "*bait*" to the political authority of the ruler but not to religious authority. Abu Bakkar (ra) could implement his religious view due to political authority despite opposition of Umar (ra) and Ali (ra). Muawiyah (ra) was able raise a dynasty due his political authority whereas Ali (ra) claimed the religious of Prophet. Dynastic rulers coined great title of vice regent of God (*zilullah ala larz*). This title was recited in Friday sermons. Nonetheless religious authority of these reins was never accepted unanimously and unquestionably. Lepidus (1996) in An-Na'im (2008) opines that Abbasids who challenged

Ummayyad on lack of religious legitimacy were founder of another dynasty. There was no difference between Sasanian and Byzantine models of monarchy other than adaptation to local setting wilt ah tinge mock religious fiats.

"Command the good and forbid the evil" is Qur'anic injunction (2: 17,26; 3: 50, 104, 110; 6: 122; 7: 40, 58, 194; 11: 24; 16: 26, 60, 74,75,92; 17: 48; 22: 41; 31: 17) but is always promulgated with political force.

Ahmed (2009) considers its unfortunate of the nation that recommendations of the Council could not be implemented. The pick and choose from the recommendation depicts half hearted effort as regard to Islamization on part of the successive governments. While dwelling on the aftermath of the Islamization wave in Pakistan Ahmed (Ibid) draws on not very sound arguments that it widened the gap between the traditionalist and modernists. However, suggestion as to the joint venture of all of religious groups could have been a better option. Power drew on Islamization as legitimacy tool for usurped power has been put forward by many including Ahmad (Ibid). Nonetheless, performance of the Council of Islamic Ideology leaves no room for generalized statement like "it justified the power coup and legitimized Zia's regime as a catalyst in the process".

To many it was under guise to search for legitimacy. Pressure of Islamization during Zia's regime came from government in Pakistan. The writer terms it the Islamization through government fiat, says Bannerman (1988). There is a controversy in political elements in Islamic Republic of Pakistan on process of the Islamization under government fiat. The questions: whether the use of Islam was to gain legitimacy for the military *coup d'etate*? Or was it a tool to postpone and cancel promised general elections? Or was it a guise, to outlaw the political parties, to impose Islamic taxes and punishments and ban certain forms of entertainments?

There were many motivations to pursue with the Islamization move in Pakistan. It was a political matter on which seeking consensus is a 'wild goose chase'. In a country of diverse populace agreement on political matters is very difficult. The Islamization agenda might have

sprung from personal piety of the CMLA. His personal piety was only material relationship with in his personal ambit of life. In collective political issue people don't recognize decision made by the ruler based on their good intentions. They always appreciate legal credential for such decisions. The same he didn't possess as many hold. One of the inspirations of the move was to gain more political support by the allies from the Muslim world. As the victor was successful in 'coup d'etat' he was also in search of supporters of his government. This campaign was approved by Saudi Arabia and other countries in her camp. He became popular both in the Muslim world and on the score card of the United States of America for backing Afghan War. A plea for the case was to fulfill the 'raison d'etre' of Pakistan. It carried weight 'prima facie' but was prone to suspicions on various accounts. Proponents of the Islamization process very eloquently used to emphasize national integration in those days. They were of opinion that The Islamization process was cause of national cohesion. After dismemberment of the country in 1971national integration was truly needed. The same aroused support for the rule and its project. There are various counter arguments which do not fall under the scope this study. However, theme of national cohesion due to Islamization remained disputed ever since. It was provided means for strengthening and the lengthening Zia regime. It is true the Islamization process procured favours for the process and its captain from home and abroad alike though the favours were often criticized by many on account of legitimacy hunt for the usurped rule.

4.20 Women's Right of Inheritance: Laws and Practices

In pre-Islamic Arab society women were oppressed and deprived of property rights. They were not given their share in the property of their deceased relatives (blood and bond). Islamic Law on inheritance as enunciated in Qur'an Surah Nisa (4), Verse number 7. Verses, 10, 11, 12, and 13 further elaborate the general principle given in the Verse 7. Women are entitled to receive due share in the property left by their deceased relatives. Quantum of the share becomes immaterial as Qur'an stipulate "be it little or mush" it shall go to women. Al-Qurtubi, a renowned jurist, writes in the interpretation of 4/7 (Surah/Verse) that it was revealed to Prophet (pbuh) on the death of Aous bi thabit (ra). He left a widow and three daughters. His cousins captured the

property of the deseased without giving anything to the bereaved family. Action of the cousins (Ajraf and Suwaid) was in accordance customary practice in vogue in the *jahli* society. Children and women were not entitled to inherit according the custom. Only male children who were old enough to ride on the horse back, fight enemies, and earn living were given share in the property left by the decedent. The widow (Ume Kaha) brought the complaint in this regard to the court of Prophet (pbuh) who asked Suwaid and Ajraf to return the property to the widow and her daughters. They replied that her children do not ride horse, can not earn living and are unable fight so they are not entitled to the property. Prophet (pbuh) neither specified the shares of the widow and the daughter nor replied but waited for the command of Allah on the issue. It was then the above mentioned verses of the Holy Qur'an came to specify women's share in the left over property of their decedent relatives (Al-Qurtubi Vol 3, pp 278-279). Moreover, it warned with the hard tidings to transgressors as the fill their bellies with the fire of Hell. These are clear injunctions of binding nature. Practice in the Muslim world is not in consonance with Islamic Law of inheritance though laws of different Muslim countries do recognize women rights in inheritance. In the following lines a brief account of actual practice, in the Hashmite Kingdom of Jordan and Islamic Republic of Pakistan, is given for perusal and evaluation.

Customary law still pervades despite clear instructions of Qur'an and Sunnah and their translation in the constitution and other related laws of the land. For example article 3 of the International Covenant of Economic, Social and Cultural Right, the Constitution of Hashmite Kingdom of Jordan Articles: 6, 7, 11, 12, and 23; Article 189 of Jordan Personal Status Law 2010 etc recognize status of women but women are being given their due share. This is an extract from the Policy Report on Women's Right to Inheritance: Realities and Proposed Policies 2012. Amoosh (2010) in the same report terms this denial of women's rights in inheritance as 'new jahliya' (worst than the pre-Islamic customs). The proposed policy is based on a survey research which notes that women are deprived of their rights through different tactics to evade the laws: decedents solemnize a deed of his entire property in favour of sons leaving nothing for wife/ wives and daughter/s; male heir use deception, appeasement, wooing to make women surrender their rights; pressurizing, threatening, coercing and forcing to seemingly voluntary surrender the

rights. Sometimes they are given a small piece of land or a nominal amount of money to renounce their inheritance rights which happens to be far less than their actual share. The major cause of surrender of the rights, as the study notes, universally acknowledged in the Muslim world, is fear of being abandoned by the brothers. Also demand of the due share brings a bad name for the claimant lady in the society and makes her butt of social blockade by the parents and near relatives. Above all lack on the part of women folk and apathy on the part of brothers or male heirs add to the menace which has deep roots in custom as well as mindset. A student of law and politics is induced that inefficiency of state mechanism on the subject must provide guarantee to women for inheritance transfer through coordination of all concerned department on its own motion.

Pakistan's case is explicated by the National Commission on Status of Women (2012). The foreword sums up the whole situation as 'rights are not denied to women'. But 'they do not get what is their right'. The commission enlists 47 cases to substantiate its stance. It enumerates the causes: Patriarchal supremacy, customary practices, and inefficiency in implementation of the laws safeguarding inheritance rights of women. Main issues discussed are share of daughters in the property of decedent, share of widow and children of pre-deceased son (prepositus) etc. The foreword to the Contents admit that situation on the issues is better to quite an extent in Turkey, Sudan, Kuwait and Egypt. Pakistan may initiate the similar process to emancipate women. In Pakistan there are many laws on inheritance for Muslims: The Succession Act 1925, Muslim Family Laws Ordinance 1961, the West Pakistan Land Revenue Act 1967 etc. But there is no uniform mechanism to dispense the due rights of inheritance to women. A student of law comes across *de facto* and *de jure* lacunae in the practices and the laws. The laws also evaded through non-coordination between relevant departments i.e. Revenue Department, Registration authorities (marriages, births and deaths), National Database and Registration Authority. These supplement the patriarchal mindsets and customs of society which are prescriptive in, nature. This state of affairs makes women more vulnerable and prone to exploitation. The finds based on their survey, that women are not being given their due share in inheritance. They are coerced to withdraw seemingly voluntarily. A widow is also deprived of her right in deceased husband's property if

she contracts second marriage. De facto customary practices and de jure lacunae in the laws on the subject add to the problem.

It might be influence of Hindu traditional school in Pakistan on customary practices related to women's right in inheritance. Hindu law of inheritance makes the son not the daughter inheritor of father. To leave a male heir was considered a religious duty in ancient Hindus. In case of no legitimate son there were other kinds of sons recognized under the law for the purposes of inheritance. There are total twelve kinds of sons six of them are heir and other six though not heirs may inherit if so permitted. (Dutt: 1992). Legal heirs are bound to pay off debts of the deceased according to their share in the property inherited. Hindu law of adoption seems to have roots in religious tenets. "A son begotten of another may yield happiness" (VII, 4, 7, 8).

J. H. Nelson states some legal maxims with reference to Father Bouchet, few of them are discussed here. First is about inheritance, when there are several children the male alone inherit. Girls have no claim to inheritance. It is most unjust but "nation had agreed to it" according to Bouchet. Father provides for girls and married them in good families, so it is not unjust according to Hindu point of view. Seventh maxim in Bouchet is that father is obliged to pay all the debts which his children were contracted. Reverse of it also true according to the maxim i.e. children are also liable to pay all debts of their father.

In Hinduism, as it is noted in the chapter, in this modern era echoing human rights, women liberation from shackles of slavery and recognition of equal status women, women are still deprived of their share in inheritance on various ground: Unchasitity, remarriage of widow, married girls in presence of unmarried girls, rich married girl in absence of unmarried girl/s and presence of a poor married girl/s etc. however, Hindu Widows Remarriage Act 1956 secures the right of a widow in the property left by her deceased husband. There are more similar improvements in Hindu Personal (on inheritance) but customary practice has paralyzed all the laws.

In Pakistan there are several decisions of the Higher courts on the matters of women's share in inheritance. For example: In Punjab ancestral agriculture land was subject customary laws and could not be disposed of freely. One can only appropriate self-acquired land without restriction. The ancestral agriculture lands were restricted as hereditary ancesstoral property. Rights in ancestral agricultural land were restricted. The Court declared that distinction between ancestral property and personal property or non-ancestral land was detestable according to the spirit of Islamic principle s of inheritance. So it could not be sustained (PLD1983 SC 273) Federation of Pakistan vs. Muhammad Ishaq.

Article 25 of the Constitution of Pakistan provides "equality of citizens". It also guarentees equal treatment of both the sexes before law. In third clause of the Article special efforts for the protection of the women are permitted and emphasized. In Pakistan these provisions are being fully enforced through courts. Under Islamization process all customary laws denying rights of inheritance in agricultural property are repealed. Shariah has fixed right of male and female with mention of their shares. Females are given absolute property rights in inherited property and they can dispose of their property freely. In a leading case PLD 1990 SC 1 (Sardar Ali vs. Gulam Sarwar) it was held that being protectors and maintainers brothers are required to protect property of their sister and her property rights as well if they take possession of property of their sister. "One who is enjoined with protection of other's property can not lay claim adverse to the intersts and right of that other who owns it". Now brothers can not usurp share of their sister on plea that she has relinquished it their favour or they have become the owner of the property by virtue of the adverse possession.

In the light of above discussion customary practice, patriarchal supremacy, social traditions make the case of women's inheritance more vulnerable. As this menace is present all over the Muslim world the leaves little room to aver that women are deprived of inheritance right due to Hindu influence. It may have a part in the prescriptive customary tradition nonetheless causes are more of local, social, general nature. The Commission has proposed a policy mechanism to implement Islamic Laws on inheritance: Amendment in the MFLO, establishment

of district monitoring centers for inheritance, compulsory registrations (marriage, birth, and death), amendment the Land Revenue Act 1967, amendment in the Succession Act 1925, and formulation of rules of coordination among related departments i.e. Land revenue Department, Registration Authorities and Local Government. This is a roadmap toward emancipation of women, making them economically independent and sound and protecting them from exploitation—the real protection of women in Pakistan.

4.21 Conclusion

Pakistan adopted English laws to run the business of the new-born state. Indian Penal Code was made Pakistan Penal Code to administer Criminal Justice System in Pakistan. Islamization of Anglicised Laws was started under aiges of the Constitutional mandate and decisions of the courts. The Federal Shariat Court and the Shariat Bench of the Honourable Supreme Court of Pakistan had given their rulings on the kernel national issue of Islamization of laws in many cases. The culminating point of the Islamization coup was enforcement of Hudood Ordinances 1979. The promulgation of the Islamic Laws was done under religious zeal and emotional fervour. Practicality of the Laws has been under debate since their enforcement. There were three groups in this regard having stance: Hudood ordinances are final word of God and can not be changed, they are oppressive, harsh and brutal and must be repealed and Hudood Laws are human interpretations of Divine injunction which can be amended. Owing to the third, viable, practical and modern, view made the government to initiate a process of the desired amendment basing on the decisions of the courts, Women Commission, Proposals of the National Assebly, proposals by general public, women rights activists, and proposals of the statutory body on for the purposes of Islamization of The Constitution and the Laws in Pakistan. This study includes reasonable number of cases which are decided by the Federal shariat Court and the Honourable Supereme Court of Pakistan which support the amendments in the Hudood Laws. The cases which do not belong to Hudood are placed under PPC again, where they were earlier, as proposed by even some of the rightists. Some *ulema* termed it as welcome change despite criticizing the PWA on various other accounts. A comparison between Hudood Laws and the Modern

legislation, The PWA informs about merits and flaws of the both. This is how a critical evaluation of Islamization of the State Appratus to the Modernization of State Apparatus is carried out in this chapter by restricting the study only to the Legal State Apparatus (LSA) of the Islamic Republic of Pakistan.

FINDINGS, CONCLUSIONS AND SOLUTIONS

This part of the study sums up all four chapters. In the first place it discusses the question raised in the introduction. Local Indian laws are discussed in the second chapter. A brief log of the Vedic laws is presented to prepare the ground for first phase Islamization in segment of the study. Those religious cum customary laws were replaced by Islamic laws in different phases. In the first phase of Islamization under the Sultans there was no developed judicial system. A full fledge Islamic Judicial System was in vogue during the Mughal reign. The detailed discussion is given in chapter three. It is also discussed that why and how the judicial system was changed by British rulers. Chapter four focused on delimited area of study with reference to Islamization of English Criminal Laws which fall under Hudood as given the Injunctions of Islam i.e. Qur'an and Sunnah. Process of the Islamization is elaborated in detail along with working of different organizations of the state. Analysis and working of the Hudood Laws is explicated considerably to build up the case of Modernization of the Islamized laws. This done with help of concrete evidence of decided cases according Hudood Laws by the Federal Shariat Court and the Honourable Supreme Court of Pakistan. Questions raised in the first chapter find their answers in the fourth chapter impliedly. Modernized law aiming at women emancipation is discussed analyzed and compared with Hudood Ordinances. Pros and cons of the Women Protection Act are also highlighted in chapter four. In the last segment of the study summary of all chapters is presented. This chapter also enlists findings of the study. There are some recommendations for the Islamization of society and collective life as well as other State Apparatusses apart from the Legal State Apparatuss.

Issues, Discussions and Resolutions

The change of legal system in the Subcontinent under British facilitated their rule at its best. This study aimed to identify legal state apparatus in the early Islamic state, their nature in medieval India, process of change under colonial rule, and process of Islamization in Pakistan during Zia regime. Special focus of the study remained on Islamization in Zia-ul-Haq regime

(1977-1988). It has discussed the process of Islamization and has also highlighted its outcome summarily. Circumstances which led to the very need of enlightenment and moderation in Pervez Musharraf's (1999-2008) reformative move are given a critical consideration in this research. A brief note on feminism across continents especially in the Muslim world and its interface with the amendments, changes, and reforms in the Personal Staus Codes of the citizens presents a wider picture of modernization.

Keeping in view the background the researcher came across various intriguing questions: Is it possible to administer a modern state in 21st century according to age old doctrine of Islam? Is the Islamization a panacea to all ills of Pakistan? When we evaluate past efforts of seven decades do we find that the Islamization could provide relief to common citizens or could deliver as expected?

First chapter deals with methodology: How the researcher did do this study? What data is used in the study? How the data is collected? How the question of subjectivity in interpretation of the Divine laws is dealth with? The second part is on theory and provides theoretical foundation and framework for the study. It is divided into different parts viz. Modern concepts of state, definition, elements, sovereignty, citizens, relationship between state and laws are discussed in the first part of the chapter. A comparison of modern state theory with Islamic concept of state and other related of ideas makes a part of the first chapter. The second part defines state Apparatus and informs about place of Legal State Apparatus in the working of the state. Different views on Islamization of the State Apparatuses are written in the third part of this chapter. Ijtihad is a prerogative of the Islamic legal system which allows rereading of the laws according to the need of the hour. Sincerity on the part of the government is often criticized in this regard. The fourth part of the chapter defines concept of Modernization and the Modernization of Laws is elaborated in sixth place.

Second chapter discussed four phases in the development of legal system in India. In the first phase local laws of the region based on Vedic teaching are discussed. Brahma, the creator of universe expounded all laws. Social order rested in obedience to the laws. Non-adherence to the

laws caused disruption in the smooth progress of the world. Separate laws provided justice in civil and criminal matters. Substantive laws and procedural laws are elaborated in the light of religious sources. Legal literature from men of erudition in law offers a detailed account of working of the laws. Administration of justice was responsibility of god of justice *dharma.* He gave *dhama* i.e. laws to be followed. Court procedures and also matters of appeals both in civil and criminal cases are logged in *arthasahtra.* In the second part administration of justice under Muslim sultan is discussed. The process started formally with *Aibek* (1206). The judicial structure was built on *Abbasid* model. This is what termed as first phase of Islamization of laws which culminates in Mughal rule. Muslim Sultans thought administration of justice as the supreme form of worship. Their rule sought legitimacy in maintenance of law and order. Sultans started codification of laws (Feroz Taghluq 1351-1358). Complete court system along with judicial hierarchy existed in medieval India. Third segments informs about justice system in the Mughal reign. Fully developed court structure at different levels with court staff and documentation was working during the Mughal period was a fully developed. Modern day English court system has many traces of Mughal remnants. Ahmad (1992) quotes Baillie who holds that there is powerful influence of Muslim Law and its working on English administration of justice. The last part of this chapter updates the researcher as to how the English system of adjudication stepped in. In 1600 the East India Company started its business in India with permission of the Emperor of India. The factories of English people were their colonies. The factory areas were permitted to be governed according to British laws with prior permission by the emperor. The Orders (1661, 1753 and 1774) of the King of England made the employees of the company English subjects in India. They assumed power slowly and annexed areas to the factory settlements. Madras, Calcutta and Bombay were presidencies which were under British control before introduction of the Charter Act of 1933. This Act provided for institution of a Law Commission to Anglicize the local laws. There were successive Commissions which worked on the project and made the Indian Penal Code and Indian Code of Criminal Procedures after approval by the Indian Legislative Council and abrogated the Islamic Laws in different phases. The reversal this Anglicization is Islamization of laws which is discussed in chapter three and four.

Third chapter provides an account of efforts on of Islamization of the Anglicized laws in Pkistan since inception of the country. The last segment of this chapter has a bit detailed list of events with reference to the Islamization process. The process was started with the Objectives Resolution in 1949. The impasse in the constitution making was due to duel between the Traditionalist and the Moderns. Particularly, on the way to the Islamization there were also three groups. Question of authority in matters of the Islamization made a point of controversy. One wing wanted it for *ulema* whereas the other thought it sole sphere the chosen representative of the people. In 1956 provisions for Islamic Research Institute and Islamic Commission, though not materialized, awere made part of the Constitution. Twenty two points of *ulema,* the MFLO 1961, Advisory Council of Islamic Ideology 1962, Prohibition of Prostitution Act 1962, Council of Islamic Ideology 1973, Hudood Ordinances 1979, Shariat Benches of High Courts, Zakat and Ushr Ordinance, Federal Shariat Court 1980, *Suo moto* powers of the FSC 1982, Ansari Commission 1983, Ulema Conventions, Private Shariat Bill 1980, Enforcement of Shariat Act 1991, Revival of the Constitution Order 1985 and Islamic Provisions in the Constitutions of Pakistan provides an insight into the process of Islamization of the State in general and the Islamization of Laws in particular. This elaborated account provide basis for analytical review of the Hudood Ordinances in the next chapter and creates a space to consider them in relation to their impact on citizens.

The central segment of the research discussed addressed question raised in the Introduction. Evidence present here prepared the base for conclusions. Pakistan adopted English laws to run the business of the new-born state. Indian Penal Code was made Pakistan Penal Code to administer Criminal Justice System in Pakistan. Islamization of Anglicized Laws was started under aiges of the Constitutional mandate and decisions of the courts. The Federal Shariat Court and the Shariat Bench of the Honourable Supreme Court of Pakistan had given their rulings on the kernel national issue of Islamization of laws in many cases. The culminating point of the Islamization coup was enforcement of Hudood Ordinances 1979. The promulgation of the Islamic Laws was done under religious zeal and emotional fervour. Practicality of the Laws has been under debate since their enforcement. There were three groups in this regard having quite

different stance: Hudood Ordinances are final word of God and cannot be changed, they are oppressive, harsh and brutal and must be repealed and Hudood Laws are human interpretations of Divine injunctions which can be amended. Owing to the third, viable, practical and modern, view moved the government to initiate a process of the desired amendment basing on the decisions of the courts, findings of the Women Commission, Proposals of the National Assembly, proposals by general public, proposals by women rights activists, and proposals of the statutory body on for the purposes of Islamization of The Constitution and the Laws in Pakistan. This study includes reasonable number of cases which are decided by the Federal Shariat Court and the Honourable Supreme Court of Pakistan which support the amendments in the Hudood Laws. The cases which do not belong to Hudood are placed under PPC again, where they were earlier, as proposed by even some of the rightists. Some *ulema* termed it as welcome change despite criticizing the PWA on various other grounds. A comparison between Hudood Laws and the Modern legislation, The PWA inform merits and flaws of the both. This is how a critical evaluation of Islamization of the State Apparatus to the Modernization of State Apparatus is carried out in this chapter by restricting the study only to the Legal State Apparatus (LSA) of the Islamic Republic of Pakistan.

Problems Areas highlighted in the Study

Hudood Ordinances are human efforts in legal history of Pakistan. Their base is on Divine guidance. There are some crimes which do not fall under *Hudood*. Crimes belonging to *Hudood* have some inconsistencies in their framing. There is no harm if the Islamized Laws are reconsidered for redrafting on the points highlighted, which are not in clash with the injunctions i.e. Qur'an and Sunnah, by The Federal Shariat Court, the National Assembly, The Commission of Inquiry for Women, The Council of Islamic Ideology, Commission for Status of Women, and NGOs and freelance writers. In this connection the study finds that:

i. As it is evident from the cases decided under the Hudood Ordinances that there are no amputations since the promulgation of the Ordinances.

ii. Conviction rate is very low. Deterrent character of the laws did not work to reduce the crimes.

iii. Punishments in all the cases were *Ta'zirs* rather than *Hudood*.

iv. Procedures of the trials under Hudood Laws and PPC are same.

v. There are many lacunae in the laws which create problems for women.

vi. Mismatch between MFLO and Huddod Ordinances resulted in indictment of women.

vii. Definition of rape is male inclusive. It is impossible for a woman to rape a man.

viii. Crimes are culpable and no complaint is necessary for institution of criminal proceedings but the *Qazf* Ordinance requires a new complaint on fail of *Zina* trial.

ix. Evidence required in case of theft was also criticized, which sounds sense, on excluding non-Muslims as witness.

x. Addition of Sub-section 4 to section 10 of the Zina Ordinace by the National assembly was a valid addition.

xi. Further debate and reenactment of Islamic Laws was stressed by the Inquiry Commission for Women 1997.

xii. Amendment of the title was suggested by the CII as the Ordinance dealt with only one *Hadd*.

xiii. Where males were restricted, any how, to enter, the evidence of women must be considered sufficient for punishment (Section 8). An amendment was proposed by The CII.

xiv. The CII also recommended deletion of Sections and their inclusion in PPC.

xv. FIR should not be a requirement for *zina* cases as suggested in the media discussions.

xvi. Automatic trial of accusers was also suggested in the media debates.

xvii. Pregnancy of a victim should not be proof of *Zina* for her.

xviii. Segregation of *Zina* and fornication was necessary as *Zina* is only liable to *Hadd* as was proposed by the CII. Placing of fornication under PPC was also appreciated by Usmani (2007).

xix. Evidence required for proof of *zina* and *zina-bi-jabr* was same (Section 8 of Zina Ordinance). It is amended in the PWA as "two adult males" for *zina-bil-jabr* instead of "four".

xx. Amendment of the Hudood Ordinances does not amount to changing of the Divine Law.

xxi. Islamic teachings are universal and transcend time and place. A state can restructure is apparatus following doctrine of *ijtihad.*

xxii. Islam provides an ample scope of reconstruction of meaning of theoretical tenets and their practical implementation. This is how challenges of modernity can be addressed by Islamic theory of state and government.

xxiii. Pakistan was made on basis of Islamic ideology. It can only serve as a consolidating and binding force if it is translated into the state business. It has full potential to prove itself as a panacea to the social, legal and economic ills.

xxiv. Women can only be given protection from exploitation by makiking them economically independent and sound.

xxv. Main hurdles in giving women rights in iheritatnce are: Patriachal supremacy, customary practice, and fear on part of women of being abadonded by their brothers and criticized by society.

xxvi. Right of inheritance for women is being evaded through different tactics despite clear provisions in the Qur'an and the Islamic Laws and the other relevant laws of the land.

xxvii. Share in inheritance is a global problem of women across the Muslim world, although Hindu element may have influence in Pakistan.

xxviii. *Jirgas* are illegal. State Criminal Justice System must take cognizance of these unlawful assemblies.

xxix. It is up to State administration to arrange for awareness of rights and duties and devise a mechanism to protect women for different modes of exploitation.

These are the only findings which were supported by the rightists also. This is how the amendments were made in the Hudood Ordinances. It is clear that the question rose in the first chapter has negative answer. The Hudood Laws couldn't deliver as was expected. Citizens could not benefit from the laws owing to ambiguities and flaws in the laws on one hand and due to procedural incongruities on the other.

Relief for Women in the PWA 2006

The Protection of Women Act 2006 tries to address the issues found in the Hudood Ordinances.

i. *Zina-bil-jabr* was impossible to prove according to requirements of *zina* Ordinance. It facilitated women abuse. The same has been eliminated.

ii. There was a possibility, on failure of prosecution to establish commission of rape by man due to lack of evidence, of indictment of woman on account of Medical evidence or pregnancy. It is also done away with in the PWA.

iii. Failure to register *nikah* or divorce resulted in penalty for woman. The law was being misused by men as it is pointed out with reference to case laws. Door of this type of exploitation is closed forever in the new law.

iv. Rape is a *Ta'zir* offence. It is placed in the PPC under sections 375-376.

v. Rape is a crime committed by a man against a woman without her consent or with even consent when she is less than 16 years of age.

vi. Maximum punishment of gang rape is death. But at time court could neither acquit nor award death penalty in a case of gang rape. As no lesser punishment was provided the court felt obliged to acquit the criminal. This situation is addressed in the PWA and sentence of life imprisonment is added in the punishment.

vii. According to the provisions of the PWA on failing to prove complaint of *Zina* the complainant and witnesses will be punished for *Qazf*. The court will not wait for

a complaint by the victim of imputation to start proceedings against the accuser and witnesses.

viii. The PWA restricts involvement of the police in the *Hudood* cases to prevent abuse of the victims on account of highhandedness of the police.

ix. *Hudood* cases are to be directly registered with the Court of Session. Cases are made bailable. The police has no authority to arrest in such cases without directions of the court.

x. The PWA makes *Zina* and *Qazf* only punishable with punishments given in the injunctions of Islam.

xi. In this way the PWA tries to emancipate women and to create an egalitarian society.

Current Scenario of Judicial System in Pakistan

The Constitution awards the fundamental right to access to Justice in Article 4 and right to fair trial is also guaranteed in the Article 10 of the Constitution. Destitute people can't avail these blessings as they can't pay heavy fees of lawyers and can't afford the long trials. Owing to socio-economic status of majority of the subjects of Pakistan face grave issues of affordability and accessibility of the high cost justice in Pakistan in words of Nekokara. The writer mentions The World Justice Project's report of 2016. This report publishes "Rule of Law Index" in Criminal Justice for 113 countries. It places Pakistan on 81st position. In the Civil matters the rank of Pakistan is more deplorable i.e. 106 out 113. States in the region have better position: Sri Lank has 96, Bangladesh 103 and India 103. People of Pakistan (majority) are excluded from legal system. There is emergent need of Legal Aid System for isolated and destitute factions of the country. He supports his argument by preferring examples from Bangladesh, India and Sri Lanka. Present System of Legal Aid in Pakistan in the form of Law and Justice Commission of Pakistan and District Legal Empowerment Committees could work better if the objectives of these institutions were given a serious reading. This divide of social strata speaks of total overhaul of

legal framework in the country. Deprived Segments of the society especially women folk can be included in the periphery of Justice System through reforms.

In matters of institutional and legal reforms there are two approaches reactive and proactive says Musofer in Dawn 13th December 2013. On the part of State administration a proactive approach can improve collective life of people. It is up to the state to analyze the situation and go ahead with solutions to the challenges of modern time. On the other hand reactive strategies work amidst crises and rely on blame game. The situation in Pakistan has never been Proactive but the most conditions of reactive approach have become icon of all policy issues including dissemination of Justice. First Islamic State had the rulers following proactive approach. There are various Examples in Qur'an to this effect for example strategy of storage of food stuff for forthcoming famine by Prophet Joseph in Egypt is the best example to quote. A cursory look on Pakistan reveals that most of the times a reactive approach is manifested on current challenges. This approach tests resilience of the nation time and again without long term solutions. The only solution to the wholesome problems of Pakistani nation is education. We need education which arouses reflection and critique rather than submission and acceptance. A proactive planning would absolve the system of present ills. Action-based learning and its application to on ground issues provides solution to the challenges. This feature of Islamic code of collective life places it at the head of other systems. All institutions of education and media must promote a proactive reflection on the potential challenges along with prevailing problems. This proactive thinking is known as *ijtihad* in the Islamic State Craft.

The reinterpretation of authentic texts (injunctions) is the need of the hour maintains Jaffer in Dawn 23rd August 2013. He arouses modern day religious scholars to invest themselves in the activity of *ijtihad*. *Ijtihad* is, however, distinguished from conceptual distraction and meditative bewilderment. Every notion of people who doesn't know the process of *ijtihad,* carries no weight. It is a subtle and exalted process of extraction of laws out of texts (*nasu:s*) through hard and untiring reflection. In modern world numerous challenges are being faced by Islamic States. These multifarious issues are not covered by the *fiqh*. Therefore, need of *ijtihad* becomes

incumbent upon modern Muslim scholarship to cope with the prevailing situation. This responsibility requires an urge to search the laws and make them in conformity to the primary sources and also a resolve to follow the laws such derived. The office of a *mujtahid* requires wisdom and intelligence in a Muslim scholar. Proficiency in the language of the *nasu:s* is basic need for conduct of *ijtihad*. Issues under reflection must have no explicit guidance in Qur'an and Sunnah. To support the question under investigation the person procures evidence from *nasu*:s or from reason. The former is known as *dalil-e-shari* and latter is known *dalil-e-aqli*. The solution of the issue is still not final word and can be reinterpreted and reexamined. This activity has long been abandoned in schools of religious education. This office must be occupied and resumed by modern scholars with prior equipping themselves with all traits which are compulsory for the most serious and sensitive institution of Islamic collective life.

Recommended Solutions

Islamic Society can only be expunged of its ills by reforming family life. Family life is basic unit of collective national life. To defend this vulnerable defining line of the national life is to safeguard national solidarity and integrity. A special report of the Council of Islamic Ideology on Social betterment "*muasharti islahaat*" grades education of women as a panacea to their exploitation (1993 p. 33). Focus in this regard remains on religious education and moral training however, it provides room for modern education and training equally if interpreted liberally. The report emphasizes the adaptation of all available kind of women publication or publication for women for the moral training via weekly editions of newspapers, text books, and television programmes on women education. An educated woman is a protected woman. There are some suggestions in 4th chapter of the report to provide the protection to women against exploitation. Print media may issue awareness of rights and duties of women. Seminar and conferences on women rights and duties may add to the knowledge of neglected wing of the society. Newspapers, Journals and magazines committing into women uplift must be patronized by the government. Government may facilitate these sources of public awareness by providing them special funds, providing paper at lower cost and giving them package of government

advertisements. Publishers of books on women concerns and issues can be given subsidy on various accounts e.g. lower rate of electricity tariff or reduced tax rates etc. Separate television channels may be instituted to cater to the social and educational needs of women. This can be taken as a source of informal education. Furthermore, the report suggests a separate wing of ministry of religious affairs for women. This wing would work for emancipation of women.

Women exploitation can be curbed by providing them their full rights as stated in the injunctions of Islam viz. inheritance, dower, maintenance etc. According to Islamic doctrine laws of land must provide for the binding nature of these instructions keeping in view women's welfare and also implement them. In matters of inheritance government must take action on its own (*suo moto* action through courts) in favour of women. Their share in inheritance must be mutated and transferred without their claim. Every family is registered with the National Database Registration Authority (NADRA). Government must initiate action keeping in view NADRA records and should transfer property of the deceased according to shares of the successors in the light of Qur'anic instructions. Minimum limit of dower may be fixed to provide economic security to women. In most of the cases the dower is settled on the wish of bridegroom or his family. Normally, people call it "*sharai*" dower which is nominal (in most of the cases Rs: 32.00 as is customary in Punjab). Usually, people fix it at Rs. 500.00 or Rs. 1000.00. It is against the Islamic spirit of the notions of marriage. God forbid if bride is divorced on the first day of her marriage she will not be able to reach her parents' home by even public transport with this meager dower money in her hand. In the same way government must make a system for maintenance of wives under wedlock and children. It is unfortunate that women are being tortured in court galleries for maintenance claims. It is state's responsibility to make such protective laws under the Article 25 of the Constitution to emancipate women

Women are being treated cruelly by their husbands. Spouses should be taught how to live a good life and to maintain comforting household. Party violating limits must be punished by the state authorities. In agrarian remote areas women work in the fields and provide livelihood for whole family. They are often subjected to physical and mental abuse. It can be addressed through

education. Gross violation must be culpable by the police and culprits must be brought to the book. In case of separation of spouses after "*talaq*" wives are thrown out of home. This practice is against teachings of Qur'an and Sunnah. State must make it necessary that wife must be provided shelter and maintenance by the husband during "*iddat*" period.

Concept of mobile family courts is also presented in the suggestions. MLFO was thought a ray of hope for women but they are never given full shelter of Ordinance. No doubt there are many incongruities in the MLFO which may be rectified and more laws can be made to institute mobile courts to resolve family issues. This forum can be used to find out the solutions prior to *talaq* or *khula* which is according to the Qura'nic teachings. Pronouncement of three *talaqs* must be made culpable under the law. It is advisable that the government must publish a monograph on *talaq* which must be delivered to spouses at the time of *nikah*. In case of difference between the parties the wrong doer must be punished by the state. This is how actual emancipation of women can be realized.

Restrictions imposed by Dowry Act 1976 must be implemented in letter and spirit. Instead of dowry women must be given their due share in inheritance. People overriding law of inheritance despite explicit instructions would be penalized by the state authories. As dowry is not consideration for inheritance, women must be given what is ordained in Qur'an. This is how women will be delivered of exploitation and maltreatment. These ends can only be achieved in a society which is egalitarian and has been raised according to the principles of Islamic social life.

An Islamic society observes principles of equality, brotherhood and folly feelings for its units. This sort of society existed in early days of Islamic history. Everyone was equal before law and state never offered any prerogative even to the rulers. If this type of deference was extended to the rulers at times they themselves didn't accept it. Such a society may be made in the light of a special report of the Council of Islamic Ideology on Islamic Social Order 1962-1993. This report guides on multifarious social issues viz. uniform education, prohibition of sectarian tendencies, prohibition of alcohol, checking of obscenity, promotion of Islamic way of life, prohibition of dance parties, use of women in commercials, restriction of obscene literature and

its import from other countries, elimination of bribery are some to mention. On page number 17 of the report there are numerous suggestions for reconstruction of an Islamic society in Pakistan. Some of the points are iterated on page 47 of the report. On 11th April 1979 woman member of the Council Dr. Sadia Khawar Khan highlighted persistent demands from women organizations for the uplift of women in remote areas of the country. The Council decided in the light of the demands preferred by Dr. Sadia that women in countryside of Pakistan are illiterate and poor. They should be provided nearby family courts and civil / criminal courts. They should be exempted from court fees. They should be permitted to present their cases directly to the courts without involving lawyers as they cannot afford their fees. Their cases must be heard expeditiously on priority basis.

In recommendations of the Council on page number 88 of the report on "Social Order" there are some guiding principles which provide indemnity to women from self imposed responsibilities. Islam offers lot of immunities and exceptions to women and charge men with responsibilities of boarding and feeding of women. Ambit of working of women is enshrined in *Surah al-Nisa* (Women), Verses 32 and 34 *Surah, Ahzab* (Parties), Verses 33 and 159, *Surah Nu:r* (Light) verses 30-31. In these injunctions women are exempted from many difficult situations. Allah has enjoined upon man not to harm their wives *Surah al-Baqara* (The Cow) Verse 39. In unavoidable circumstances there is a procedure for their correction in Qur'an and men are warned not to transgress under pretention *Surah al-Nisa*, Verse 6. Allah has ordained that husbands must treat wives in good and befitting way. When it becomes impossible they must separate them with respect and dignity *al-Baqara*, Verse 229. Prior to *Talaq* or *Khula* husband and wife are to refer the matter to arbitration council comprising members from both of the families: *al-Nisa*, Verse 6. On even separation women are provided safety. Husband and wife are to live together in the same house so that they may return to each other (*Talaq*-1). Women are to be provided maintenance during period of *iddat* says *al-Baqara*, Verse 41. Women will not be deprived of whatever is gifted to them by husbands during the wedlock *al-Baqara*, Verse 229. If any woman feels her survival impossible with her husband she may return the benefits to her husband and demand *Khula* as a last resort.

There are several reports from Holy Prophet (peace be upon him) providing insights into his own life. He proclaimed that the best amongst people is the one who is good in his behaviour to his wife and "I am the best husband for my wives" he claimed *al-Tirmidhi*. It is noted that Holy Prophet (peace be upon him) reported to say in *Muslim* in Chapter of Permission for *nikah*, that women should not given in marriage without their permission. Holy Prophet (peace be upon him) also declared the most detestable among the permitted things is divorce "*talaq*". These are the real safeguards for emancipation of women. Government of Pakistan must translate these injunctions into laws and implement them and enforce them with state powers.

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