

The law on Honour Killing: A British Innovation in the Criminal Law of the Indian Subcontinent and its Subsequent Metamorphosis under Pakistan Penal Code

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Introduction

Nowadays, Honour killings are a highly charged, emotive and a rather notorious issue that is commonly understood or portrayed as a sheer violence against the women only; as it mischievously ignores the killings of paramours who are also murdered under this rage. In this context, such killings relate to a practice in which women are murdered by their male relatives to restore the honour they lose when 'their' women defile it¹. Women may injure men's honour in a myriad of ways - since it is 'their' honour and their understanding of 'honour' men enjoy the right of declaring any act dishonourable² - but generally, it is held that women severely injure their men's honour when they fail to guard their virginity and chastity³. Such a construction of honour is based on the studies conducted in contemporary Muslim societies (Campbell, 1964: 268-69; Lazenby, 2001). The issue of honour killings in this era is being projected and studied widely as a vice that Muslim societies are plagued with (www.secularism.org/women/liberation.htm). Modern scholarship very intelligently and rather cleverly has made finer distinctions between the killings in the name of honour and the killings under passion (Abu-Odeh, 1997: 287). In fact France recognizes and has a law known as "Crime Passionate". Therefore, non-Muslim countries such as Britain, Norway, Italy, Brazil, Peru and Venezuela which are also infected with this disease (www1.umn.edu/humanrts/biolog/honour.html) do not draw that much media and scholar's attention as much the Middle Eastern and South Asian Countries, contaminated with the scourge of honour killings. Among South Asian Countries, the cases of honour killings in Pakistan are often presented and quoted as an archetype of the problem of honour killings by a number of authors and NGOs⁴. The paper shows that not only the cases of honour killings in Pakistan are typical of the problem cutting across all Muslim countries but that also the treatment of

the offence and the offenders reflects to a certain extent, the various currents of thoughts flowing in the minds of Muslim intellectuals.

Most of the reports on the honour killings in Pakistan depict the issue as a social and cultural problem that the Government has failed to manage in accordance with the standards of the Universal Declaration of Human Rights. Along with the Islamic laws that concern with the punishment of *zina*⁵ and murder, the executive and the judiciary have also been criticised for dealing with the perpetrators of honour killings with leniency (<http://www.amnestyusa.org/women/document.do?id=1DF2FA05A016701B8025690000693498> retrieved on 25 July 2007). This chapter examines the treatment of the issue of Honour killings under the law of homicide and murder in Pakistan, before and after the introduction of that matter 'transplantation' of the new law⁶ of murder and homicide in 1990, in the Pakistan Penal Code. It reviews a vast number of case laws from 1890 to 2003 wherein the accused committed the murder, or at least defended the killing the deceased due to an injury to their honour. It is argued here that a century old legal tradition laid down by the British, during their rule over the subcontinent, which somehow accommodated such killings with leniency, not only structured, strengthened and cemented this cultural and social norm but also transformed this cultural norm into a legal defence. This social norm was dealt with leniency under the plea of grave and sudden provocation under exception I of the section 300 of the Penal Code 1860⁷.

The plea of grave and sudden provocation, as such, was not available to an accused under the Islamic criminal law of India – prior to the enactment of the Indian Penal Code in 1860⁸. The chapter explores the treatment of the issue of honour killings in the classical as well as the modern literature of Islam and argues that the identification of the concept of sin with the legal concept of offence⁹ and the implication of the commission of sin with the consequences of the committing of offence has caused a lot of confusion among the judges of Pakistani courts and the intellectuals of the Muslim world. In Islam, fornication and adultery are sins as well as offences. However, these wrongs remain as sins unless, someone proves the committing of these wrongs against the accused in the court of law. Once these wrongs/sins are proved in the court they become offences and the offenders are liable to be punished for their offences. Thus, it is the availability and acceptance of the required evidence¹⁰ that converts wrongs/sins¹¹ of fornication and adultery into offences. Islamic criminal law deals with the offence of *zina*¹² (http://www.Kamramah.org/articles_quraishi.htm) in a quite distinguishable manner than it deals with other offences. Under Islamic law, if one complains that someone has committed fornication or adultery and later on fails to provide the required evidence¹³ in the court to substantiate his/her statement, the complainant is charged under the offence of *qazf*¹⁴ - another Islamic offence. The complainant is made liable to the offence not because she/he told a lie but because she/he failed to support his/her allegation in the courts. He might have seen the commission of the offence in actual, but since a solitary evidence is insufficient to

prove the wrong – sin - in the court that makes the wrong to remain a sin and not an offence, therefore she/he should either remain silent or face the charge of the offence of *qazf*¹⁵. The only exception to this rule is a husband who sees his wife committing adultery but is unable to provide the required evidence of her wrong in the court of law. Such a husband would not be charged for *qazf*. Rather, such an allegation against his wife supported with special oaths would enable the court to separate the pair under the doctrine of *lian*¹⁶.

This research sheds light as to how Pakistani courts mixed up these simple and straightforward legal issues of Islamic law while interpreting the new law of homicide and murder - *qisas* and *diyat* law. It also attempts to show that it were some of the common law trained judges who actually incorporated the social, cultural and legal norms of the repealed law in the new law. The study points out that how the higher courts of Pakistan just after three years of the promulgation of the *Qisas* and *Diyat* law declared that the old notion of grave and sudden provocation should be presumed to be included in the new law of homicide and murder. This was a clear appropriation of the new law by the judges trained in the Western legal tradition to bring in their personal understanding of Islamic criminal law, old western legal notions and self-structured concepts of *ghairat*¹⁷ and honour in the new law of murder and homicide promulgated in the country. The review of Pakistani case laws also accentuates a division within the judiciary that did not give any credence to the unsupported defence pleas of the accused that the killing took place when they lost their self-control due to an injury on their honour by the deceased. The accused had advanced these grounds to earn an acquittal or get away with lighter sentences. Interestingly, both of these segments of the judiciary endeavour to draw support for their verdicts from the injunctions of the *Quran* and *Sunnah*.

Firstly, the history of the appreciation of the issue of honour killings as it drafted by the Indian Penal Code in 1835 is looked into.

Indian Penal Code and the Issue of Honour killings

While drafting the penal law for India, during 1835 -1837, the members of the first law commission, constituted by the British Government, had also dwelt upon the issue of honour killings. They considered the issue carefully; carefully and favourably under the provision of the grave and sudden provocation¹⁸. Without going much into the details and definitions of honour, they sympathised with the men whose honour was violated if someone had sex with his wife or sister. Therefore, they suggested that if a man finds someone having sexual intercourse with his wife, daughter or sister and kills the man, or woman or both, such killing should not be termed as murder, but should be reduced to manslaughter only¹⁹.

For the framers of the Indian Penal Code, honour killing was not a cultural issue related to the Indian subcontinent, nor a socio-religious matter that belonged

to a particular community or communities living in a particular geographical area but, a universally practiced phenomenon wherein men kill the men who commit adultery with their wives. According to their understanding of the issue, this illicit love causes such a great provocation in the heart of men, *in charge of women*, that if under the influence of such an outrage of their honour or under such sudden heat of passion they kill the woman, or her paramour or the both, they deserve the indulgence of the law. They justified their indulgence in the treatment of the offence, committed in the vindication of honour, not because of showing respect to the law operating in the region earlier, neither in the consideration of the local culture but showed their respect to the universally accepted norms. They wrote:

We think that to treat a person guilty of such homicide as we should treat a murderer would be a highly inexpedient course, -
- a course which would shock the universal feeling of mankind and would engage the public sympathy on the side of the delinquent against the law²⁰.

Nevertheless, they were in favour of punishing such men whose “honour” was injured in order to teach them *to entertain a peculiar respect for human life; it ought to be punished in order to give men a motive for accustoming them selves to govern their passions*²¹. The Indian Penal Code (IPC) went further than the English or the French law, as was in currency under that time. The IPC showed indulgence to homicide, which is even the effect of anger, excited by words alone. Explaining the rationale behind this law they wrote:

One outrage which wounds only the honour and the affections is admitted by Mr. Livingstone to be an adequate provocation “A discovery of wife of the accused in the act of adultery with the person killed is an adequate cause.”...[W]e conceive that there are many cases in which as much indulgence is due to the excited feelings of a father or a brother as to those of a husband. That a worthless, unfaithful and tyrannical husband should be guilty only of manslaughter for killing the paramour of his wife, and the affectionate and high-spirited brother should be guilty of murder for killing, in paroxysm or rage, the seducer of his sister, appears to us inconsistent and unreasonable.

Thus, honour for the framers of the IPC could equally be injured by words and taking indecent liberties with modest female in the presence of her father, brother and lover. Therefore, such a violation of honour may stir up suddenly such a great passion in the hearts of the men that may kill the one who by words or actions committed such indecencies....²² For them such an assault may produce Sicilian vespers and call forth the blow of Wat Tyler.²³ One who deprive a highborn Rajpoot (a cast regarded high in the Indian subcontinent) of his cast or rudely thrust his head into the covered palanquin or a women rank may also enrage men to such an extent that the violator may be killed. Thus, such homicide

cannot be equated with murder and the perpetrator deserves to be dealt with leniency.

Although it is difficult to envisage with certainty as to what definition or criteria of honour was in the mind of the framers of the Indian Penal Code but it appears to be very similar to the one given by Jon Elster, according to which:

Honour is an attribute of free, independent men, not of women, slaves, servants or other “small men.” (The later can however, as we shall see, be very much concerned with honour.) It is achieved or maintained by victories over equals or superiors, where “victory” can mean anything from getting away with an insulting look to raping a man’s wife or killing him (Elster, 1990: 862-885).

Once the social value was accepted, acknowledged and turned it into a legal norm by giving it a statutory recognition, the law strengthened and cemented the sanctity of this honour and encouraged people to follow what is socially accepted, recommended and appreciated. Rather than quelling or subduing their emotions, which became a sign of a dishonourable person and an attribute that is looked down by the members of society, they overstated their feelings when ever they find themselves in such a situation. Thus it blew it out of all proportions.

It is not the case that the British were unmindful of the fact that law ultimately serves the purpose of setting up new and positive norms in society and exhorts people to tune their passions in obedience to law. Perhaps, it was a matter of priorities. What answer we have for the question that the same provision of grave and sudden provocation did not give concession to a person who killed a public servant on duty though his act might have caused equally grave provocation. For instance, a male official doing a body search on the females of a Rajpoot family is bound to provoke the same feelings that a stranger may stir up when he takes indecent liberties with the womenfolk of that Rajpoot family. The clear reason, perhaps the only, could be that the public must teach themselves to keep their emotions in control when they deal with the servants of the Crown. However in other cases, if she/he losses his/her self-control that is quite understandable and she/he will be punished under the charge of the manslaughter and not for murder.

Killing the one who commits adultery with someone’s wife is something, to which Mohammadan Law was also indulgent (Ibid: 144), wrote the authors of the Indian Penal Code. Their understanding of the Mohammadan law was, perhaps, based on the fact that under the Islamic Criminal law as practiced in India prior to the promulgation of the new regulations or the Indian Penal Code, a person was not liable to *qisas* if he kills someone who is found committing adultery. Taking support from a provision of religious law for the enactment of a secular or for that matter a neutral Code, was not only inept but a misconception of the tenets of Islamic Criminal law. Under the Islamic Criminal law adultery is an offence punishable with death as *hud*²⁴. Therefore, all the Muslim schools of thought agree that a *hud* can neither be delayed nor remitted. The killing of a married adulterer is

obligatory as well as indispensable for eliminating evil and enforcement of the laws laid down by Allah (Shaheed, 1987: 262). Anderson has also written that a father, or brother who surprises his wife, daughter, or sister in adultery is exempted from all the penalty if he kills her, her paramour, or both (Anderson, 1951: 811-828). We shall discuss the legality of the issue of adultery in Islam at a later stage, but suffice it to say here that killing the one who is found committing adultery under the Mohammadan law was not an act to restore the honour injured by the adulterer as any one may kill such an adulterer, not necessarily a definite person, e.g., husband, father or brother, to the exclusion of others. The killing is done in discharge of the duty bestowed upon him as a Muslim. However, there is a dispute amongst jurists whether such a person would be liable for *tazir* on the ground of encroaching on the powers of competent authority or not (Ibid).

Though the first draft of the code was examined by many lawyers, judges and committees and also reviewed by the second Law commission which brought in many amendments in the first draft, the provision of grave and sudden provocation found its way in the final draft of the IPC promulgated in 1860. In this enactment, the word manslaughter was omitted and the provision was inserted as an exception 1 to the definition of murder, culpable homicide, under section 300 IPC. Soon after the promulgation of IPC the defence increasingly raised the plea of grave and sudden provocation to reduce the charge of murder to culpable homicide and to get a mitigated sentence.

Applying the exception I of the section 300 IPC and mitigating the punishment, the judges never mentioned or alluded to the religious bonds of the offenders. Rather, they always made a reference to the social, tribal or cultural mores of the offenders. They awarded shorter as well as longer sentences to the accused, in almost similar facts of cases, taking in to account the mores of the offenders. Religion did not become a point of reference to these judges of the Crown, unlike the drafters of the Indian Penal Code.

In *Said Ali v. The Empress* (1890: 15), the division bench surveyed all the case laws of India since the promulgation of Indian penal Code in 1860, wherein various High Courts reduced the charge of murder to culpable homicide by reason of proof of exception I to section 300. These were the case wherein the accused had killed the paramour, or wife, or both. They had been awarded sentences varying from only 8 months to 10 years (Ibid: 18). The bench complained that in none of the cases a principal was laid down explaining the reason of awarding varying sentences.

Besides this, the Bench referred to some unreported interesting judgements wherein sentences were delivered taking to account the tribal values of the accused. Among them is one, whereby by a sessions judge had awarded 10 years punishment to an accused who had killed the deceased on being only found in accused' house. According to accused' version the deceased had come there to visit a woman of his immediate family. The appellate court reducing the imprisonment to two years wrote:

It is hard to say that any excess, where the provocation received is of the grave and sudden character disclosed in this case, an entry in night into the house of the accused, must bring severe retribution. A Pathan²⁵ with his blood justly roused could hardly be expected to show much moderation²⁶.

The court also referred another case wherein the accused killed a woman who had lived with him as wife. The accused had abducted her from her husband, and was not married to her. He said to the court that he had found her in the act of adultery and therefore killed her. Finding him on a less favourable footing than a husband the Sessions Judge sentenced him seven years imprisonment. The High Court did not reduce his sentence.

The bench also referred to two other judgements of the Peshawar Appellant Court wherein the judges found two years imprisonment adequate if the accused had lost his self control finding his wife in merely objectionable position with deceased – lying together in the same bed. The court quoted the following paragraph from a judgement delivered by the Additional Sessions Judge Peshawar, for a similar offence:

I think myself that when the defence is accepted that a man has justifiably lost self-control and acted in accordance with the natural dictates of human nature when not under the control of reason, severe punishment is not called for: and this is especially true when the offender belongs to one of these frontier races and in taught from his cradle that dishonour to his women-folk calls for immediate and bloody revenge. Though the act done is not by law justifiable, as the offender may have supposed, it is held by the law to some extent excusable; and I think that to a man who in his own estimation is not morally culpable and whose view is shared by most, if not all his neighbours, a sentence of two years rigorous imprisonment is substantial punishment for an offence committed under circumstances which the law regards as an excuse. ...

Relying generally on the judgements from all over the India and especially on the verdicts of the Peshawar Appellate Court, the court awarded two years rigorous imprisonment to Said Ali who had killed his wife committing adultery with Asa Ram, a Hindu.

Said Ali's case was an ideal situation wherein the judges could have alluded to religious sentiments as well, which might actually have an additional factor of committing such a crime. The accused had killed the both – his wife and Asa Ram with repeated blows of *Kahi* (spade). It was the brutality shown by Said Ali in perpetrating the murders that had forced the Sessions court to pass a sentence of ten years rigorous imprisonment. Yet, no reference was made to his religious sentiments but all the emphasis was put on playing up the honour issues generally

in India and especially in Pathan cast. The judgement of the Sessions Judge, which was quoted by the Appellate Court had mentioned to the natural dictates of the human nature in cases of losing self-control seeing wife in an objectionable position with someone else.

In *Fazal Dad Khan v. the King-Emperor* (1904: 12) the court sentenced one year imprisonment to the accused who had killed the deceased striking him on his head with a stick while he was committing adultery with his married sister. The court held that the accused undoubtedly acted under grave and sudden provocation.

The practice of awarding lenient sentences in cases of honour killings became very popular among lawyers and the accused. The accused did not feel any dishonour even in bringing their wives and sisters in the witness boxes to admit before the court that she had an affair or relationship with the deceased; or for that matter, she was committing sexual intercourse with the deceased when man in charge of her killed him. The courts did not show any surprise over the honourable accused' who brought in their honours to courts to testify and reveal about the dishonourable act they were indulged in so that they may get away with lesser punishments.

In *Mohammad Yar and another v. the Crown* (1924: 24), the accused produced his sister, Mst²⁷ Sabihan, in the court to testify that she was being dragged by the deceased in order to abduct her, when her brother killed him. However, the court did not believe Mst Sabihan as there were no marks of struggle on her clothes or body. The mere presence of a person who wanted to marry the accused' sister in their mother's home was held enough to enrage a person who had not given approval to such a relationship. 'His loss of self-control was understandable', held the court. Hence, disbelieving the story of the defence, the court accepted the plea of grave and sudden provocation raised by the accused and supported by the fact that the deceased was found in his mother's house at an early night; the Appellate Court awarded Mohammad Yar, accused only, five years rigorous imprisonment.

In 1932, another accused produced his wife before the police and the court. She asserted that her husband along with two other persons killed the deceased when he was actually having sexual intercourse with her. The husband, Mohammad Zaman was charged under section 304-1 of the IPC²⁸, while two other persons, Muhammad Khan and Rasula were charged for murder under 302/149, IPC. Accepting the statement of Mst Musahib the wife of the accused, with some hesitation, the trial court acquitted the co-accused - Mohammad Khan and Rasula. However, Mohammad Zaman, the main accused, was sentenced to the transportation for life, the maximum a judge could have given under section 304, IPC. Aggrieved by this sentence, Muhammad Zaman filed an appeal against this decision of the trial court which was heard by the division bench of the Lahore High Court comprised of Justice Harrison and Justice Dalip Singh. Justice Dalip Singh wrote for the bench whereby the bench although upheld the conviction of

Mohammad Zaman, accused/appellant but reduced the sentence to the imprisonment he had already undergone – hardly 14 months (Mohammad Zaman v. Empror, 1933).

In case of *Abdul Hamid v. Emperor* (1933: 38), Abdul Hamid had killed his village fellow, Nurshah and his wife Mt. Bibihawa on finding them committing adultery. Abdul Hamid could not prove the act of adultery, as his wife's body was found fully clad. Trial court accepting the plea of sudden and grave provocation to the extent of Nurshah deceased awarded him three years imprisonment on that count; but the court did not believe his story about the killing of his wife, Mt. Bibihawa. She was put to death by cutting her throat from ear to ear. The appellate court, a division bench comprised of Justice Fraser and Justice Saaduddin, though was not sure whether Nurshah and Bibihawa were actually indulged in committing adultery or not, but was certain that Mst. Bibihawa did leave her house and met Nurshah outside. Assuming, that they must have been doing something which enraged Abdul Hamid and caused him such a grave and sudden provocation that he brutally attacked them and killed both of them. Abdul Hamid had attacked Nurshah with an axe and had slaughtered his wife with a knife. The appellate court reduced the sentence to five years imprisonment.

In Bahadur's case (*Bahadur v. Emperor*, 1935: 78), the deceased used to sing a provocative song which would allude to his sexual relations with Bahadur's wife. On the fateful day when the deceased sang the song it gave a grave and sudden provocation to the accused and he killed the deceased with an unlicensed gun immediately. The trial court punished the accused with transportation of life. Appreciating his emotions and accepting his plea of grave and sudden provocation the High Court of India reduced his sentence to six years imprisonment.

In *Saraj Din v. Empror* (1934: 600), the deceased had abused the accused to the effect that his daughter would be abducted. Hearing this, he lost his self-control and killed the abuser with hatchet that he had in his hand. However, the Appellate Court accepted his plea of grave and sudden provocation and sentenced him to five years rigorous imprisonment.

In another case (*Hussain v. Emperor*, 1939: 472), the accused Hussain saw Murad deceased sleeping with his wife with the intention of committing adultery, he killed him instantaneously with merciless beating. Murad has been committing adultery with his wife while Hussain was in jail, and in consequence thereof Hussain's wife had also become pregnant. Hussain was quite aware of this relationship. He has been exercising greatest self-control until he saw them both in the same bed, the court observed. Declaring the provocation sudden and the gravest nature the court convicted him for three months imprisonment only.

Thus, we see how the courts of British India laid down a tradition of treating the accused of honour killings differently and sympathetically to the accused of murder. Furthermore, the allowance was not given to only those accused who had seen the deceased committing adultery but it was extended to all those who were

abused, or even had indirectly said something, sung a song, which they felt had violated their honour.

After the partition of the subcontinent in 1947, Pakistan adopted almost all the laws of the British India²⁹. Therefore, the Indian Penal Code in Pakistan became the Pakistan Penal Code and the case laws decided under the Indian penal Code continued to provide the necessary guidance to the judiciary of Pakistan. In a case reported in 1950 (*Aziz-ul-Rehman v. Crown*, 1950) the Peshawar High Court again referred to a cultural characteristic or a cultural norm of a particular place in appreciating the loss of self-control of person in a particular society. The court observed,

[I]n that part of the country where a mere casual talk by a woman with a stranger is looked upon by the relations and that in particular the husband of the woman as well as the society with great disapproval and resentment, the actual act of the adultery must excite feelings incapable of being explained in words.

Therefore, the court sentenced accused for less than three months imprisonment. In the same year, 1950, the Lahore High Court passed a three years imprisonment sentence against a husband, Rahmat Ullah Kahn, a police constable. Khan killed the one who allegedly outraged the modesty of his wife (*Rehman Ullah Khan v. Crown*: 109). The wife had gone to her husband naked while he was on duty at about 20 yards away from her house and told him that someone broke in the house and outraged her modesty. She had locked the man up in her house and ran to Khan, on duty. The constable did not choose to inform his in charge police-office or involve any other official of the police force which could have done very conveniently. Rather, he rushed to his home, lost the self-control, and fired three shots at diseased who died immediately.

In 1958, a division bench of the West Pakistan (Lahore) High Court heard an appeal preferred by an accused from prison against the judgement of the Sessions Judge of Dera Ghazi Khan. The accused was sentenced to death under section 302, for murdering Mst Durnaz, wife of his brother (*Mewa v. The State*, 1958: 468). He had merely seen the deceased sitting with Dahu in a cluster of kikar (a kind of wild trees) trees. Only seeing her in the company of a stranger in cluster of trees enraged him to such an extent that he killed her with the hatchet he had handy. According to his confessional statement he said, "I saw Dahu, son of Dheengan, sitting with Mst. Durnaz in circumstances which suggested that they had committed adultery" (*Ibid*: 469). The appellate court accepted his plea of grave and sudden provocation and reduced the charge of murder to culpable homicide sentencing him three years rigorous imprisonment.

In 1961, Justice Anwarul Huq, once again, in the case of *The State v. Akbar* (1961: 24) pointed out the significance of moral values such as honour in its particular social and cultural context. The court observed:

Considering the moral values and notions of honour and chastity, as well as the social customs, which prevail in our society, particularly among the respectable families in the rural areas, it must be regarded as a provocation of the gravest kind for a man actually witness the degrading spectacle of a woman of his family being subjected to illicit sexual intercourse. If he loses self-control under the impact of such grave and sudden provocation and assaults the person responsible for bringing disgrace to his family, his act is clearly such as requires to be viewed in a light different from that in which ordinary criminal acts are regarded.

The High Court dismissed the State appeal to enhance the sentence of Akbar the accused, whereby he was sentenced to imprisonment till the rising of the court for killing of Mohammad, while he was committing fornication with his unmarried sister, Mst Fateh. There was no other evidence available on record to show what actually had happened on the scene. The court relied on the confessional statement of accused. According to the accused, he lost all his self-control on seeing them in the act of fornication and killed the deceased. The High Court upheld the sentence passed by the trial court – punishment till the rising of the court.

In Mohammad Sadiq's case (*Muhammad sadiq v. The State*, 1966: 104), we find for the first time that the High Court made reference to the Muslim Society while considering the plea of grave and sudden provocation. Accused Muhammad Sadiq had seen his maternal uncle's wife and step-mother of Shaukat Ali, deceased, making love with Shaukat. Finding them copulating, he lost his self-control and killed Shaukat under grave and sudden provocation. The Sessions court dismissed his plea of grave and sudden provocation and sentenced him under the charge of murder. The Appellate Court however reversed the findings of the trial court. The court altered the charge from murder to culpable homicide and sentenced him three years rigorous imprisonment. Accepting the plea of grave and sudden provocation in the backdrop of the Muslim Society the court observed:

On the other hand, we cannot be oblivious to the fact that the deceased was caught while engaged in an act which was revolting to all senses of decency and morality, known to society particular to Muslim society. He was engaged in love making with no other woman than his own step mother who being the wife of his father according to the Quranic injunction was within the prohibited degree....[I]t is true that there is no evidence that the deceased was actually engaged in sexual intercourse with Mst. Hamidan when the appellant surprised them, yet considering the moral values and standard of chastity and social behaviour precluded for Muslim society, the act in which the deceased was engaged was no less obnoxious to and in principle it should not make any difference whether the

victim of crime is actually engaged in love making preparatory to fornication or in the actually engaged in love making preparatory to fornication or in the actual act of fornication.

Reference to Muslim society and the *Quranic* injunctions not only appear uncalled for but arbitrary as well. It seems that the references were given to make judgment popular which ultimately set up a new point of reference that had no legal sanctity by that time. There was hardly any civil society that approves such relationship with step mother. Thus, this was not special to the Muslim society. The court sought support only from those *Quranic* injunctions that declares the relation of a son and stepmother within the prohibited degree. No reference was given to those verses which forbade people to act on mere suspicions and doubts³⁰ or for that matter the verses of the *Quran* that require a particular quantity and quality of evidence to accept the assertions of the complainant so that the culprit may be punished with particular punishment.

In 1968, the Karachi High court, in Kalu's case (Kalu Alias Kalandar Bux v. The State, 1968: 545), accepted the plea of the accused/appellate, that he killed the deceased to vindicate his honour. The deceased had enticed away the accused' sister which damaged his honour severely. Despite the fact that submitting to the enormous pressure put upon him, the deceased had returned her back to her family yet he was endeavouring to get her back through legal means. On searching his dead body, the police recovered an application addressed to the Deputy Superintendent of Police wherein it was stated therein that his wife, Mst. Rehmat, had been snatched by her father and brothers. It was prayed therein that his wife should be restored to him. The fact of the marriage was not considered enough by the father and brothers which had made the deceased a member of their family. The judges also did not pay any attention to this preposition. They relied on the judgements given by the courts under the provision of grave and sudden provocation and gave it benefit to accused. Interestingly, they reduced the sentence from death to the transportation of life without altering the charge from murder to culpable homicide. The judges did not make any reference to Muslim society, the sanctity of marriage in Islam, or the right of a husband to keep his wife with him. This was a significant turn in the legal history of the punishments for honour killings wherein the court without amending the charge of murder to culpable homicide, grave and sudden provocation, passed an alternative sentence of transportation for life, provided under section 302 of the Pakistan (Indian) Penal Code 1860 as the accused had murdered the deceased to vindicate his family honour.

In *Shoukat Ali v. State* (1977: 690), again the appellate court judges without amending the charge of murder to culpable homicide altered the death sentence, passed by Sessions Judge, to life imprisonment. The accused, appellant had killed his cousin, uncle's daughter, while she was going with her friend, a boy. According to him, he tried hard to dissuade her from bringing dishonour to the family but all went in vain. He got out of control and tried to stop her by force. On

this, both of them attacked him, he alleged, and at the end, he killed her. Surprisingly, the mother of the deceased girl was also accompanying the pair at that time. The High Court observed:

The appellant, presumably, thought that Mst Noor Jehan, would not mend her ways, and was bringing bad name the family. He decided to wipe off this insult to the family in his own misguided way.

The judges coined this assumption, as they could not find any evidence on record showing the motive for her murder. Neither, the judges could acquit accused of the charge of murder, as he was caught red handed by the police, nor in the circumstances of the case, they could accept the plea of grave and sudden provocation to reduce the punishment. However, they gave credence to the unsupported assumption of their own, to wipe off the insult that she was bringing on to the family, and altered the sentence to life imprisonment.

These were the judgements that introduced a new element of mitigation in the sentences passed under the charge of murder. This was quite extraordinary as how the judges began to assume something in favour of the accused who had brought forward the defence of family honour in killing the accused.

Another interesting judgement in this regard is of *Mohammad Rafique v. The State* (1985: 79). In this case, the accused, Mohammad Rafique, had killed his wife Mst Nasim Akhtar and his infant son (aged 7/8 months), Mohammad Faisal at 3 am on 24 November 1977. The Sessions Judge sentenced him to death on both the counts. Hearing the murder references and appeals filed by the accused/appellant the High court observed:

[I]t is proved that the appellant suspected Mst. Nasim Akhtar deceased of loose character. Therefore a possibility can not be ruled out that when the appellant returned from Qatar and while he was in bed with the deceased, he might have asked the lady relating to her immorality and it is not known what answer she gave or what talk took place between between them. May be the deceased either admitted of immorality against her or said something which provoked the appellant at the moment to such an extent that he lost all control and senses and caused injuries with toka which might be present in the home.

Quite surprisingly, the accused did not raise the plea of grave and sudden provocation in his defence at any stage of the case – neither before police nor before the court - rather he denied his mere presence in the event. The High Court took upon itself to find out the motive of such an atrocity. Firstly, they themselves created an assumption and then they gave it credence. The High Court amended the charge of murder to culpable homicide and sentenced him imprisonment for life on both counts. The necessary ingredients of the first exception of the section 300- grave and sudden provocation- were never brought on the record of the case.

However, the plea was given acceptance and the sentence was awarded under section part I of the section 304.

The message these judgements were giving to society can be judged from a judgement of the Supreme Court given in 1985. In Mohib Ali's case (Mohib Ali v. The State, 1985: 2055) the Supreme Court ultimately took notice of the overmuch use of the plea of grave and sudden provocation by the accused and their councils without bringing on record reliable supportive evidence. In contrast with Mohammad Rafique's aforementioned case, Mohib Ali had advanced the plea of grave and sudden provocation at the preliminary stage of the case. He himself had gone to police station and got recorded a confessional statement before the competent authority. He confessed therein that he had fired on the deceased, Haji, on seeing him in compromising position with his wife. This is the first case wherein the accused/appellant had used the words of *GHAIRAT* (indignation, shame also is used in the meanings of honour) and said that he lost his self-control on seeing them committing adultery and killed the deceased while his wife succeeded in escaping from the scene.

The Supreme Court upheld the judgement of the High Court whereby it had rejected the plea of grave and sudden provocation by the accused, appellant and held:

A mere allegation of moral laxity without any unimpeachable evidence to substantiate would not constitute grave and sudden provocation. If such pleas, without any evidence, are accepted, it would give a licence to people to kill innocent people (Ibid: 2057).

Conversely, in another case (Muhammad v. The State, 1989: 758) a single judge of Lahore High Court, without adverting to the judgement given in Mohib Ali' case by the Supreme Court, accepted the uncorroborated plea of grave and sudden provocation advanced by Muhammad Hayat Khan, accused, appellant. In an unseen occurrence he had killed his wife and raised the plea that he killed her as she denied him sexual inter course and spate on his face. She used abusive language and said that she would have sex with any one of her choice. This provoked him and he killed her at mid night. He did not produce an iota evidence to support this plea. Following the judgement given in Mohammad Rafique's case reported in 1989 MLD 758, the single judge at appellate court, presumed the possibility of killing the accused to his wife as a result of grave and sudden provocation and therefore amended the charge from murder to culpable homicide. Consequently, the Appellate Court sentenced Mohammad Hayat Khan accused/appellant for a period of ten years.

In Ahmad v. The State (1989: 1063) the High Court again accepted the unsubstantiated plea of the accused, Ahmed, that he killed the deceased, Zafar Hayat, as he was molesting his niece Mst Naseem Akhtar. Even she was not produced before the police or the court. The High Court accepted this motive of the occurrence put forward by the accused and granted him the benefit of the

exception I of the section 300 Pakistan (Indian) Penal Code 1860. His conviction under the charge of murder, section 302, was therefore amended and he was punished with seven years rigorous imprisonment under section 304 part one.

While in Muhammad Younus's case (Muhammad Younus v. The State, 1989), although the High Court did not accept the un-corroborative plea of grave and sudden provocation but accepted the plea of his council that there might be some circumstance under which he committed the murders (Ibid: 2919). The culprit was caught on the spot when he killed his wife, daughter (aged 15 years), and his toddler son. His defence plea was interesting: I am innocent; my wife was on illicit terms with one Shari. I had seen them in compromising position prior to this occurrence as well. I asked my wife and my mother-in-law to mend their ways. On the day of incident when I entered my house, my children informed me that my wife was in the room with Shari. I went and brought Holy Quran to my wife. Meanwhile, Shari put on his clothes and ran away. I asked my wife not to do such act in future at the name of the holy Quran but she kicked the Holy Quran. I took some weapons which were lying near, started giving blows out of my senses to my wife. I do not know when my daughter and son came in-between me and my wife and how I killed them. According to the *Quran* the person who insults the holy Quran is liable to be killed. I have obtained such paper (fatwa) from Mufti Wali Hassan of Jamia-Al-Uloom Alama Banori Masjid....

His death sentence was converted into life imprisonment for reasons best known to the judge alone. Apparently, the playing up of the reverence of the *Quran* by the accused effected the minds of Muslim judges. They could not stifle the temptation of the manifestation of their personal respect to the holy book, even in an irrelevant and unsupported plea; that might have affected the rights of the complainant to see the accused punished with the normal penalty of murder. The Supreme Court of Pakistan has had held that the normal sentence in cases of murder is death and that must be passed in such cases (PLD, 1976: 452). Even the case law before the partition suggests that the onus lies heavy on the accused to prove the circumstances that may mitigate the charge of the offence of murder or to prove that his offence is not punishable with capital sentence (AIR, 1941: 113-121). There is plethora of case laws wherein it was held that unless other circumstances can be found a murder must be sentenced to death (PLD, 1981: 16; PLD, 1951: 322; PLD, 1963: 1042). The case epitomises the frantic and blatant attempts by the accused, (and their lawyers), to bring their atrocities and cases in the scope of the exception I of the section 300, PPC – under grave and sudden provocation. The accused was not contented with putting forward the case of injury to his honour in terms of adultery with his wife but tried to play up with the other religious sentiments of the court as well, alleging that she hit the Quran; and it worked well.

In January 1988, the Shariat Appellate Bench of the Supreme Court of Pakistan took up the eleven Shariat Appeals³¹ together for hearing. These were reported in 1989. Among them, were the two appeals preferred by the Federal

Government of Pakistan against the judgements of the Federal Shariat Court. The other nine were filed by the individuals against the judgements of the Shariat Benches of the High Courts and the Federal Shariat Court. In six petitions, section 299 to 338 the Pakistan(Indian) Penal Code 1860 were challenged on the ground of their repugnancy to the Quran and Sunnah. Therefore, section 300 of the Pakistan Penal Code 1860, which exempts certain culpable homicides³² from being murder also came under attack. The Supreme Court declared sections 299 to 338, which dealt with offences against human body repugnant to the injunctions of Islam for the reasons (Federation of Pakistan v. Gul Hasan Khan, 1989: 633). Justice Pir Mohammad Karam Shah authored the judgment to which all the members of the Bench agreed. However, Justice Taqi Usmani and Justice Shafiur Rahman appended their separate notes to the main judgement. Justice Pir Karam Shah did not deal with the issue of grave and sudden provocation or honour killing in detail; though, he briefly touched upon the punishments of homicides committed by mistake. Since the judgement of the Supreme Court had to go a long way in the formulation and the interpretation of the future law of homicide and murder of the State, Justice Taqi Usmani took upon himself to explain the culpability of a homicide committed under grave and sudden provocation. The Judgement of Justice Shah as well as the additional note of Justice Muhammad Taqi Usmani were put down in Urdu. The paragraphs of Justice Taqi Usmani's judgement that deal with the issue of grave and sudden provocation and honour killings are worth quoting; therefore, their translation is produced here:

There are certain exceptions under section 300 of the PPC that grants, according to another notion, complete exemption to a category of intentional homicide from being an offence of murder. That notion is incorrect according to the injunctions of Islam. For instance, exception I of the section 300 concerns itself with a situation when the murdered had caused by any of his action such a grave and sudden provocation that the accused lost his self-control, and committed the murder under such provocation.

However, according to the Islamic injunctions merely a provocation no matter how grave or sudden in its nature can mitigate the gravity of an offence. Instead of this, the point that will be considered and examined will be, whether the victim was doing anything for which he could have been punished with death under the injunctions of Islam. For instance if a person sees his wife committing *Zina* (illicit intercourse), in this situation if any person commits the murder of his wife or her paramour and then proves under the requirements of Islamic law of evidence that their *zina* was the reason behind his commission of murder, then he will be exempted from the punishment of *Qisas*. However, since he

should have resorted to other available legal recourses rather than taking law into his own hands. Therefore, he committed an offence against the State and may be punished with any kind of *tazir* punishment³³.

Exemption I, of the Section 300 does take care of such situations and the murderer husbands is exempted from the punishment of murder only for the reason that such act excites grave and sudden provocation. However, under Islamic law the exemption from the punishment of murder is not based on the reason that the action enrages a grave kind of provocation but, is owing to fact that he found his wife committing such an act that could have been punished with death penalty. Therefore, if grave and sudden provocation arises from an act that is not liable to be punished with death in Islam and such provocation is also not an act of self-defence then the person cannot be exempted from the punishment of *qisas*. Since, under the philosophy of Islam taking life of someone who is *masoom-ud-dam*, (whose blood is protected by law) is a very grave offence and entails the punishment of *Qisas*. The gravity of provocation does not mitigate the severity of this offence and does not call for the reduction in the punishment. Every human being is made responsible to an extent that he should not take the life of another human being, whose blood is protected in Islam by losing self-control under grave and sudden provocation. Therefore, under Islamic injunctions it is not enough to show, to escape from *Qisas*, that the murdered did something provocative. Rather, he should show and prove that murdered was doing something which was punishable by death under Islam. Only in this situation, he may get away from the *qisas*. (Still he may be held liable for *tazir* punishment because he took law in his own hands.

Interestingly, Justice Pir Karam Shah, the author of the main judgement, and Justice Taqi Usmani, who wrote additional note on the issue of grave and sudden provocation and honour killing, were also involved in the process of drafting the *Qisas* and *Diyat* law for the country. The Government departments, responsible for drafting the new law of homicide and murder, had formally invited the judges to give their opinions on the draft of the new law. They had read all the drafts of the law prepared by Council of Islamic Ideology (CII). They were also aware of the reservations different Ministries of the State had expressed on crucial issues, i.e., killing under grave and sudden provocation³⁴. Both knew that, there was a segment in the Government as well as in society which insisted on the incorporation of the concepts of grave and sudden provocation or of diminished responsibility in the new draft of the law (Report of the, 1984). Chaudhary Altaf

Hussain, a prominent criminal lawyer and the Chairman, Select Committee on the draft Ordinance relating to the Law of *Qisas* and *Diyat*, had voiced of his criticism in the Parliament (Majlis-i-Shoora) on 30 March 1984 while presenting the report of the committee on the law. His criticism of the draft of the law was sharp and had its origins in the modern criminal jurisprudence of the West (Ibid: 17). In his report, He wrote:

The draft law is also deficient in several important aspects of criminal justice. It does not make any provision of grave and sudden provocation; malice....There is no recognition of new trends, such as irresistible impulse, automatism, and diminished responsibility, existing in the criminal jurisprudence of the advanced countries (Ibid).

Therefore, Justice Taqi Usmani used his official position to settling down the issue of grave and sudden provocation in terms of the verdict of the Supreme Court of Pakistan that would be difficult to ignore while enacting the new law for the country. Additionally the authority would be a binding precedent of the Supreme Court for the lower courts of the country.

The precedent worked well for the purposes of the draft of the new law ordained in September 1990 (Criminal Law Ordinance), as no provision to that effect was included in the new law; but the lower judiciary showed their resistance in accepting this Islamic but against their notions of honour statement of Islam. They completely ignored it in many cases, we would see.

The new law, i.e., Islamic law of homicide and murder, titled as Criminal Law (Second Amendment) Ordinance VII of 1990, came into effect in 1990 which substituted section 299 to 338 of the PPC. In 1992, Abdul Wahid's case (The State v. Abdul Wahid, 1992: 1596) was placed before the Supreme Appellate Court³⁵ which was comprised of two High Court and one Supreme Court Judge. The Chairman of the full bench was Justice Nasim Hasan Shah, who had earlier sat as a member of the Shariat Appellate bench of the Supreme Court that heard the Gul Hasan Case³⁶. This was the first case reported under the new law decided by such a higher bench of the country.

In this case, the accused Abdul Wahid was charged with murder, under section 302 of the PPC (new law), of Shaukat Nizami, deceased as he suspected that Nizami had illicit relations with his sister. Wahid confessed the commission of murdering Nizami but forwarded the plea of grave and sudden provocation. He said he killed him because he had seen him committing sexual intercourse with his sister in a nearby graveyard. He alleged that he had actually fired at his sister but the deceased came in between. The cartridge was stuck in the gun so he could not fire the second shot and her sister fled from the scene. Wahid himself went to the Police Station and produced the gun as well. The trial court admitted his plea and awarded him punishment of seven years rigorous imprisonment under clause (C) of the section 302 the PPC. While awarding the sentence to the accused the trial court had relied on the judgement of the Supreme Court in Gul Hasan's case.

The Appellate Court, however, did not agree with the trial court's conclusions. Which observed that under the new law the accused had committed *qatl-i-amd* (intentional murder). The Appellate Court criticised the trial court for its reliance on the dictum of Gul Hasan's case without adverting to the note of Justice Taqi Usamani pertaining to the cases of grave and sudden provocation when read in conjunction with article 121 of the *Qanun-i-Shatdat Order*³⁷. Therefore, the court set aside the judgement of the trial court and punished Abdul Wahid, under section 302, PPC for *qatl-i-amd* - death as *Qisas*³⁸. This case was decided on 10 April 1992. The case was a complete U-turn from the case law we reviewed so far. It should have augured well for the cases arising thereafter. However, it did not.

In the same year, 1992, before the same court, the Supreme Appellate Court of Pakistan, on the same point of contention, killing under grave and sudden provocation, in deciding Mohammad Hanif's (The State v. Muhammad Hanif and 5 others, 1992: 2047) case the court decided the issue quite conversely as was decided in Abdul Wahid's case. This time Justice Shafiur Rehman was the chairman of the court who authored the judgement of this case. He was also a member of the *Shariat* Bench of the Supreme Court that had heard Gul Hasan's case³⁹. Mohammad Hanif and his two brothers were charged under section 302 of the PPC (intentional murder) for killing Muhammad Ashraf. Ashraf had allegedly killed the brother of Khurshid therefore Hanif and his party killed Ashraf in revenge, according to the prosecution story. All the accused denied the charges except Muhammad Hanif who took refuge in the plea of grave and sudden provocation. He did not confess the crime but put forward his version of the events in his defence. He alleged that he killed Ashraf because Ashraf had disgraced and dragged his wife on the day of occurrence. The trial court dismissed the ocular account of the case and disbelieved the prosecution case as it was set up before the court. Then it adverted to the plea of grave and sudden provocation put forward by Mohammad Hanif. In principle, the trial court could not have gone outside the principles laid down in Abdul Wahid's case⁴⁰. However, citing at length the Abdul Wahid's case and admitting that the exception I of the old section 300 PPC is no more the law of land and the plea of grave and sudden provocation is no any more available to the accused, the trial court created an exception within that proposition. It declared that somehow the plea of grave and sudden provocation can be considered as an extenuating circumstance, which goes in the favour of accused. Therefore, the court sentenced Mohammad Hanif with ten years imprisonment and 25000 Rupees Arsh (a sort a fine) payable to the heirs of the deceased. State had preferred appeal against the judgement as it was clearly against the dictum laid down in Abdul Wahid's case.

Justice Shafiur Rehman speaking for the bench wrote that according to the injunctions of Islam, *qatal-i-amd* liable to *Qisas* takes place only when the person murdered is not liable to be murdered or is '*Masoom-ud-Dam*'. Building this

argument Justice Rehamn quoted a paragraph in Urdu from a book written by Justice Tanzilur Rehaman, which goes:

The punishment of *Qisas* is general in its application. However, one is liable to *Qisas* only when one kills someone who is not liable to be killed, meaning thereby she/he is *Masum-ud-dam* and that he is killed intentionally. It means that *Qisas* is liable only in case of intentional murder...⁴¹

The court further held:

If we go by the strict injunctions of Islam, we find that punishment of death is permissible where under Hudd the offence already committed or sought to be committed by the person is one liable to Hadd of death. If this strict view of the injunctions of Islam is kept in view, then if an unmarried person commits *Zina-bil-jabr* by or *Zina* by itself by an unmarried man is not punishable with death. The other requirement of the law that the person who is done to death must be 'Maasoom-ud-Dam' is stronger repugnance.

The court said that Abdul Wahid's case is distinguishable and Justice Taqi Usamani's note in Gul Hasan' case support its view that the murder should not have taken place in the exercise of the right of self-protection. Quoting three Ahadith (sayings of the prophet) from a collection of Ahadith (Robson, 1975) the court advanced a new theory. It held that the amplitude of the right of self-defence under Injunctions of Islam is far wider than is available under the Pakistan Penal Code.

The three sayings quoted in the judgement which shall also come under discussion while we shall explore the meanings of, *Masoom-ud-dam*, and honour killing in Islam at a later stage, are:

- (i) Abu Hurrira said that he heard God's messenger saying, "if any one were to look into your house without receiving your permission and you were to throw a pebble at him and put out his eye, you would be guilty of no offence (Bukhari and Muslim).
- (ii) Sahl B Sa'd said that a man looked through a hole in God's messenger's door when God's messenger had a spike with which he was scratching his head, so he said, "if I knew that you were seeing me I would poke it in your eyes, for asking permission has been appointed only on account of what people may see" (Bukhari and Muslim).
- (iii) Abu Dhar reported God's messenger as saying, "If any one removes a curtain and looks into a house before receiving permission and sees anything in those with in which it should not be seen, he has committed an offence which it is not lawful for him to commit. If a man confronted him when he looked in and put out his eyes, I would not blame him; but a man passes a door which has no curtain and is not shut and look in, he

has committed no sin, for the sin pertains only to the people inside.”
Tirmidhi⁴² translated it saying this is a *gharib* [weak] tradition.”

Consequently, the court dismissed the State Appeal and upheld the judgement of the trial court considering the evidence on record with the injunctions of Islam.

On the basis of three sayings, chosen erratically from the plethora of the *Ahadith* material, and without legally defining the term *Massum-ud-dam* the common law trained lawyer and judge, Justice Shafiur Rehman propounded a new notion in the legal history the new law of Pakistan. It declared that the right of self defence in Islam is wider than available under the Pakistan Penal Code. Unmindful to the fact that he was comparing a codified law, interpreted and constructed with in the finely defined lines of the judicial principles of interpretation, with the widely scattered material of Islamic law available in various versions and open to a myriad number of independent interpretations to which his own use of *ahadith* was the best and practical example. Without discussing the veracity, authenticity of the *Ahadiths* and applying the tests laid down by the jurists of Islam before using a Hadith for the deduction of a law, the court applied them randomly in the judgement and opened up a new line of action that was profusely followed afterwards.

Then came the judgement of Lahore High Court which raised an edifice on the foundations laid down in Muhammad Hanif’s case⁴³. Sitting singly, hearing the appeal *Ali Muhammad v. The State (1993: 557)*, Justice Ausaf Ali further structured and widened the theory of the right of self-defence in Islam, propounded by Justice Shafiur Rehman. In Islam, the right to defend the honour is included in the right of self-defence he explained. He interpreted, though too broadly, a clause of Section 100 of the PPC that extends a woman’s right of private defence to the extent of causing death in case she is assaulted with the intention of committing rape. The judge immoderately, rather loosely, interpreted this provision and wrote:

Right to defend the honour to the extent of even killing the aggressor, if need be there, is not only available to the aggressed lady but also to her husband, *Mahram* (to with marriage is precluded because of relation) or the person in whose lawful custody she is residing (Ibid).

In this case, Ali Muhammad along with others accused killed one Ramzan as he had suspected him of having illicit relations with his wife. Ramzan was belaboured with sticks and then strangled to death. Ali Mohammad took up the plea of grave and sudden provocation as he had found the deceased in compromising position with his wife in the dead of night. On the examination of the evidence, the trial court accepted the plea of the accused and punished him under the defunct provision of exception I of the section 300, PPC; oblivious of the fact that the new law, Islamic Law of homicide and murder, had come into force. The Appellate Court found that the misapplication of law did not cause any

injustice to the appellant and the sentence could be construed as had been passed under clause (C) of the section 302 PPC (new law).

So far as the point of law grave and sudden provocation is concerned, the court construed his pleas under the right of self-defence available to him under Islam. The judge heavily relied on Mohammad Hanif's case to hold that the accused killed the deceased in exercise of his right of self-defence. In elaboration of the right of self-defence in Islam and interpreting it in the reference of the new law, the judge brought on record his efforts that he made to prove this new point. He cited three instances from a book of *Kitab-ul-Ikhtiar* translated by Moulana Salamat Ali Khan:

- (i) If a person has seen another committing *zina* with wife of any person, then the latter can kill him if he does not desist from the act after a call or shout:
- (ii) If a person sees the another committing *zina*, with his wife, then it is desired for him to kill him.
- (iii) If a person sees the other committing sodomy with a child or *zina* with his woman, then his murder is not liable to *Qisas*.

After citing the above three axioms from *Kitab-ul-Ikhtiar*, Justice Ausaf turned towards the Quran and quoted the following verses of the Quran to substantiate his contention:

- (i) Men are in charge of women.(4:43)
- (ii) And slay not the life which Allah has forbidden save with right (17:33)
- (iii) Help not one another unto sin and transgression (5:2)
- (iv) But he who is driven by necessity, neither craving nor transgressing it, is no sin for him (2:173).

This means, he argues, in weak moments of provocation or anything otherwise forbidden may be done with impunity. And then he finally referred to the PPC and held:

Even our law as contained in section 97, PPC recognizes right of private defence of the body and property. The right under section 100, P.P.C. extends to voluntary causing of death or of another harm to the assailant if the assault is with the intention of committing rape. Although the consequences of arising out of exercise of the right of defence to the extent of causing the death have not been incorporated in sections 300 and 302, P.P.C. as amended by the Criminal Law (Second Amendment) Ordinance 1990, but still the courts have to be guided by the injunctions of Islam as laid down in Holy *Quran* and *Sunnah*. Section 338-F, P.P.C. the expressly permits the court to assess the culpability of the guilt of the accused not only under the statutory provisions of law but also under the injunctions of *Quran* and *Sunnah*.

Following the above line of reasoning the appellate court acquitted the accused. The first case under the new law of murder and homicide wherein an accused won a clean acquittal as he had taken the plea of grave and sudden provocation; which was interpreted as an act exercised in the right of self-defence and honour. Since according to the version of the accused the deceased was allegedly found committing *zina* with the accused' wife. The accused, according to the judgement was not even liable under *Tazir* punishment.

A closer examination of these two judgements show how selectively these judges used the *Quran* and *Hadith* endeavouring hard to make their own notions the law of the land. They used some legal words like *Masoom-ud-dam* and *Ghair Masoom-ud-dam*, verses of the Quran and sayings of the Prophet very loosely without adverting to the other relevant *quranic* verses and sayings and the practices of the prophet that contradicts their constructions of the selective material. We shall deal with the Islamic interpretation of the issue later. Here we would only mention that these judges used the *Quran* and *Sunnah* to justify the action of the accused. They did not mention the principles lay down in the *Quran* and *Sunnah* that deal with the law of the acceptance of an accused' assertions. They did not look into the material that explains the legal requirements of accepting the accused' plea in defence of his crime. In both judgements, the courts relied on a principle derived from the English common law that the prosecution is bound to prove its case beyond the shadow of doubt; and if the prosecution's evidence is disbelieved in its totality then the statement of the accused has to be accepted in totality and without scrutiny. Interestingly, in both the cases which paved the way for bringing in old notions into the new law, the accused had accepted the commission of murders only at the end of the trials. They had the plenty of opportunity to lead the evidence that could prove the contents of their story. It is amazing, how both the courts did not consider it just to examine the principles of accepting the accused' version of events in the light of the *Quran* and *Sunnah*. Both the judgements did not even honour the law laid down in *Mohib Ali v. The State*⁴⁴, that a mere allegation by the accused without any unimpeachable evidence to substantiate the defence plea cannot be considered for the purpose of the acceptance his plea. If such pleas, without any evidence are accepted, it would give a licence to people to kill innocent people. They rather referred to an earlier judgement of the Supreme Court pronounced in *Faiz and others v. the state* (1983: 76) wherein it was held that if the prosecution version stands rejected in totality, the accused' version should be accepted in totality. The judgement in *Faiz's* case, which was also authored by Justice Shafiur Rehman, the author of the judgement in *Mohammad Hanif's* case, was with regard to a dispute about water and land issue. Without going into the details of the reasons and rationality of this principal, it is astonishing that the courts did not choose to follow the dictum of the Supreme Court which was passed later in time, in 1985, held in a case of grave and sudden provocation, and relied on another judgement that followed a rule of criminal law rooted in an un-Islamic or at least in non-Islamic Jurisprudence.

The issue was further complicated by the Judgement of Lahore High Court given by Justice Khalil-ur-Rehamn Ramday in the case of *Ghulam Yaseen v. The State* (1994: 392). Justice Ramday is quite famous for his out spoken demeanour, legal acumen, and mastery over criminal law. Son of a High Court judge, brought up in the elite culture of the country, trained in English common law, ritualistically religious to some extent, but essentially a typical Punjabi person admitted the plea of *ghairat* in defence of a murder committed defending *ghairat*. Justice Ramday, in Ghulam Yasin's case neither tried to read in the new law what was not written therein nor did he mince his words, but admitted clearly and loudly that there is a lapse in the present law that does not distinguish between murders committed to save the honour and others that are not. His judgement originated in a case wherein the Sessions Court had punished Ghulam Yasin, Mohammad Azeem and their nephew Bashir for the murder of one Ghulam Akbar Khan. All of them were sentenced for 25 years rigorous imprisonment under section 302 PPC, new law.

The three accused, according to the prosecution belaboured to death Ghulam Akbar and Mst *Bakho*. Mst *Bakhho* was unmarried sister of Bahsir, the accused, appellant. The prosecution alleged that the accused suspected the deceased – murdered-Ghulam Akabar and Mst *Bakho* - were having illicit relationship. On the fateful night when Mst *Bakho* entered the room of Ghulam Akbar, the three accused attacked and killed them mercilessly.

The accused put a defence that that Mst *Bakho* at the time of occurrence, had gone out of her house to answer the call of nature when Ghulam Akbar deceased caught hold of her. On her hue and cry some passer by reached the spot and inflicted injuries to both of them. As a result Ghulam Akabr died on the spot. They alleged that the occurrence was unseen and they were implicated as a result of their relationship with the Mst *Bakho*.

Justice Ramday, admitted that there is no allowance available under the new law of homicide and murder for the killing committed under *ghairat*. However, since the section 338-F(of the new law) of the PPC provides that in the interpretation of the Chapter XVI of the PPC the court should take guidance from the *Quran* and *Sunnah*, therefore the courts were bound to apply the provisions of the law with the injunctions of Islam. It means, that the courts require a legislative authority, a legal text that may allow them to interpret a certain law in accordance with the injunctions of Islam. Thus the court cited following five *Ahadith* from *Sahih Bokhari*

1. Sa'd bin Ubada said, "If I found a man with my wife, I would kill him with the sharp side of my sword." When the Prophet heard this he said, "Do you wonder at Sa'd's sense of *ghira* (self-respect) verily, I have more sense of *ghaira* than Sa'd, and Allah has more sense of *ghira* than I."
2. Allah's Apostle said, "None has more sense of *ghaira* than Allah, and for this He has forbidden shameful sins whether committed openly or secretly, and none loves to be praised more than Allah does, and this is why He Praises Himself."

3. The Prophet when said, "O followers of Muhammad! By Allah! There is none who has more *ghaira* (self-respect) than Allah as He has forbidden that His slaves, male or female commit adultery (illegal sexual intercourse). O followers of Muhammad! By Allah! If you knew that which I know you would laugh little and weep much.
4. 'Abdullah (bin Mas'ud) said, "None has more sense of *ghaira* than Allah therefore - He prohibits shameful sins (illegal sexual intercourse, etc.) whether committed openly or secretly. And none loves to be praised more than Allah does, and for this reason He praises Himself." I asked Abu Wali, "Did you hear it from Abdullah?" He said, "Yes," I said, "Did Abdullah ascribe it to Allah's Apostle?" He said, "Yes."
5. Narrated Abu Huraira, "Allah has *ghaira* and Allah's *ghaira* is that a faithful commits a forbidden act.

In view of these sayings of the prophet the court held:

[T]he conviction of the three appellants was converted to one only under section 302 C/34 of the Pakistan Penal Code. Under the old law, such-like culpable homicides were termed as homicide committed under grave and sudden provocation and no such convict was ever punished with twenty-five years' R.I. this being so the sentence of five years R.I. awarded to each one of the appellant is reduced to a term of five years' R.I....in view of the fact that the deceased had lost his life on account of his unlawful and moral act, the present is not a case where the convicts could be directed to pay compensation to his heirs.

The use of *hadith* literature even in this case again seems very erratic. The judge did not compare these sayings with the other that deal with the rules of procedure of trial and evidence in cases of homicide and murder. No effort was made to explore the authenticity of the material cited before the court. The court did not ask the accused to prove his plea according to the injunctions of Islam.

In another case (Muhammad Siddique v. State, 1994: 129) the same judge granted bail to the accused who had killed Shaukat, who had developed illicit relations with the accused' daughter, Mst Yasmin. In the early hours of the day he found his daughter missing from his house. On searching he found her coming out of a sugarcane field. It was on discovering them in this condition that he killed the deceased. The accused took this plea in the course of the investigation of the case. The prosecution, however, had said that the parents of both the deceased earlier had agreed on marriage which was later denied by the boy's father. On this grievance, they killed the accused Shaukat.

After quoting the same sayings of the prophet mentioned in Ghulam Yaseen's case the court granted bail to the accused, Mohammad Siddique, who claimed to have acted under *Ghairat*; his plea, based on the prophet's saying is not. Therefore, the court allowed the bail.

It is very unusual to entertain such a plea at the bail stage of a case as it may affect the trial of the case. Justice Abbassi, in *Bashir Ahmad v. The State* (1994: 423) refused to entertain such a plea at the bail stage. Further the court pointed out

that according to the court such plea was not available to the accused under the new law of Homicide and murder.

Then came a judgement from Karachi High Court on the issue of *Karo Kari*⁴⁵ involving the issues of honour killing and under provocation. It is interesting to note that Justice Shafi Mohammadi also took up a bail application, *Sohrab v. The State* (1994: 431), to pen down his point of view on the issue of honour killing. The accused party was charged under section 302 PPC for the killing of Khair Mohammad and Mst Zubeda, who were allegedly declared *karo* and *kari* – male and female involved in sexual relationship outside the marital ties. The applicant, the real brother of the main accused who had fired shots at both the deceased, Khair Mohammad and his wife Mst Zubaida, moved his bail applications *inter alia* on two main grounds: the accused was shown empty handed in the police report with the only allegation that he was holding one of the deceased when his brother Khair Muhammad gave fatal injuries to Khair Mohammad deceased. Secondly, the deceased were involved in an immoral offence of *karo kari* which is always intolerable in ‘our society’. Justice Shafi Mohammadi took exception to the second plea and availed this opportunity to put forward his point of view on such a crucial issue which was being reshaped after the promulgation of the new of homicide and murder.

Justice Shafi Mohammadi appreciated the fact that person who suspected his wife, may lose his temper but normally would not approve of such killing. He said that Islam has its own laws and rules to meet such situations which ought to be adhered to by every believer. The court emphasized that Islam does not support effervescence or vengeance by taking the lives of other persons at their own but promotes patience and tolerance. In such situations when a man accuses his wife of adultery before a court the Islamic law prescribes that the procedure of *lian*⁴⁶ should be adopted.

Justice Mohammadi quoted the famous instance of Hillal Bin Ummayyah, a prophet’s companion when he confronted his wife before the prophet and accused her of adultery with Shirric-Bin-Samhas. This historical incident was quoted in the reported judgement of *Ghulam Bhik v. Mst Hussain Begum* (1957: 998). On hearing this charge the prophet demanded that he should bring forth witnesses failing he would receive eighty lashes on his back. This puzzled Hillal who had no witnesses but was certain of the veracity of his allegation. He was so sure of his assertion that he predicted that Allah will quickly send down an order making his position clear and save him from being flogged. So it happened. Allah revealed following verses of the Quran:

And for those who launch a charge against their spouses, and have (in support) no evidence but their own,- their solitary evidence (can be received) if they bear witness four times (with an oath) by Allah that they are solemnly telling the truth; And the fifth (oath) (should be) that they solemnly invoke the curse of Allah on themselves if they tell a lie.

But it would avert the punishment from the wife, if she bears witness four times (with an oath) By Allah, that (her husband) is telling a lie;
And the fifth (oath) should be that she solemnly invokes the wrath of Allah on herself if (her accuser) is telling the truth.

Interestingly, both Hillal as well as his wife took the oath prescribed in the *Quran*. Hillal in support whereas his wife in denial of the allegation. On this the prophet decreed separation between the spouses. On conclusion the prophet further said, “See the woman, if she brings a child with eyes the colour of antimony, large buttocks, and fleshy legs, it is for Shirric-Bin-Samhas (because he was of this description). Then the woman brought forth such a child and the prophet said, “Verily had there not been an order about it in the book of God, I would have done with the woman what I would have done”⁴⁷ (Ibid: 1003).

In this backdrop, Justice Mohammadi criticised the judgement rendered by Justice Ramday in Mohammad Siddiq’s case⁴⁸ on three main grounds:

Firstly, none of the *Hadith* contains any decisions of the holy prophet (peace be upon him) about the cases of the prophet. Secondly, the words of Saad-Bin_Abadah, that I shall kill a person with sword if I see him with my wife on the basis of envy(*ghairat* in as used in the judgement) do not give a certificate to the husbands to kill their wives and paramours because such an interpretation would provide a pretext to the husbands of immoral characters to kill their innocent wives by levelling such allegations. Thirdly, the views expressed in the judgement are not in conformity of the Holy Quran and Hadith of the Holy Prophet (peace be upon him) referred with reference of Li’an in the above paragraph.

Justice Shafi Mohammadi admitted that it was on account of this dissension in opinion which forced me to elaborate my views, to some extent, in detail.

In this judgement though some new, relevant as well as very important points were laid down by Justice Mohammadi, but he did not write a single word about the preposition of grave and sudden provocation. He distinguished this case from the case wherein the accused killed the wife or paramour in the spell of provocation. Either he did not choose to open up too many fronts for him in one judgement or was himself convinced that in a case when a husband sees his wife committing adultery with someone, the killing is justified.

After Peshawar(*Gul Hasan v State*, 1980: 1), Lahore⁴⁹, Karachi⁵⁰, came the Judgement from the fourth High Court of Pakistan, in *Quetta*, in the case of *Abdul Haque and Others v. The State and Others* (1995: 83). The judgement was a majority verdict of the full bench of the Quetta High Court. Abdul Haq and his brother Abdul Haleem had killed Mohammad Shafique, who was in police custody under the charge of murdering Abdul Haleem, the father of one of the accused. Abdul Haque was brought by the police to appear before the trial court on the

fateful day. The incident occurred inside the court room. Abdul Haque accused confessed the charge of murdering Mohammad Shafique and made the following statement:

I plead guilty to the charge but this offence was committed by me on sudden provocation as the deceased threatened me that he would fuck my wife and whole tribe, if he is acquitted (Ibid).

Majority of the judges relied on the opinion of Justice Taqi Usmani given in the case of *Federation of Pakistan v. Gul Hassan ad others*⁵¹. The judgement says that the dictum given in that case provides sufficient legal strength to hold that commission of the offence of murder due to provocation would be liable to ordinary punishment. However, the courts would not punish the accused under *Qisas* if the accused killed some one who was not *Masoom-ud-dam* and found committing an act which was punishable with death under the Criminal law of Islam. Relying on the case of Mohammad Hanif⁵² the court held that in the case of killing even a *Ghair Masoom-ud-dam* (whose blood is not protected under the law) the punishment of *Tazir* and payment of compensation as *diyat* can be awarded. The court also referred to the article 17 of the Qanun-i-shahadat, 1984 whereby the accused is under the legal obligation, once he has taken a special plea, to produce other corroborative evidence in order to prove his plea⁵³. Consequently the court dismissed the appeal of Abdul Haque and ordered him to be hanged till death as *Tazir* under section 302(B) PPC.

However, Justice Amir-ul-Mulk Mengal did not completely agree with the majority judgement and wrote a dissenting note. Justice Mengal dissented on two points with the majority: firstly, relying on the case of Mohammad Hanif⁵⁴ the circumstances of the case do not warrant a death sentence even under the new law; secondly that the deceased was facing the charge of murder of the accused' father, therefore was not *Masoom-ud-Dam*. For these reasons the punishment of death can not be awarded to the deceased⁵⁵.

Abdul Haq impugned the split judgement of Quetta High Court before the Supreme Court of Pakistan. The bench of the Supreme Court who initially heard the appeal requested the Chief Justice of Pakistan to constitute a larger bench which may consider the important issue raised in the appeal. The issue outlined in the request was:

The plea of diminished liability in respect of offences relating to human body committed under grave and sudden provocation has been well-recognized in the sub-Continent for more than a hundred years. There is good reason for that: a person who commits culpable homicide can not in the matter of punishment be placed on the same footing as a cold-blooded murderer or a hired assassin. A serious question for consideration arises whether the criminal law(Second Amendment) Ordinance, 1990, was intended to do away with the preferential treatment that had always been accorded to a

person who took another persons' life under circumstances where had he lost the self-control.....

The full bench, (five judges) of the Supreme Court of Pakistan after dealing with the matter in detail (PLD, 1996: 1) accepted the plea of sudden and grave provocation raised by Abdul Haq and held:

[P]lea of grave and sudden provocation, even on account of abusive language, can be treated as mitigating circumstance in awarding a sentence under *Tazir* even if this plea as such not available and does not get any protection in the new amended law(Ibid: 34).

Interestingly the Supreme Court referred the paragraphs of the judgement given Gul Hasan's case written by Justice Taqi Usmani and approved there sanctity. However, they said that murder in grave and sudden provocation can not be treated as mitigating circumstance if the punishment is being awarded as *Qisas*. If the punishment is being awarded as *Tazir* provocation can be considered as a mitigating circumstance (Ibid).

Justice Ajmal Mian who appended a separate note in the judgement made things more clear, by saying:

[I]t can be said that notwithstanding the omission to incorporate the above exception I of section 300, P.P.C. grave and sudden provocation remains a relevant factor for deciding the question of sentence under clause (b) of the amended section 302, P.P.C. but it has no relevance under clause (a) thereof (Ibid: 39).

Three months later, another full Bench of the Supreme Court, comprised three judges, was once more confronted with the plea of grave and sudden provocation in case of *Ali Muhammad v. Ali Muhammad (1996: 274)*. In this case the accused, according to his version had seen his wife and the deceases lying on the same bed in an objectionable position. He put the deceased's *chaddar* (a kind of sheet that is worn around the lower part of the body) around his neck and pulled him. In this process he was strangled. The trial court wrongly sentenced the accused under section 304, Part I with the seven years Rigours Imprisonment and fine. Whereas, the High Court, on appeal, relying heavily on Mohammad Hanif's case⁵⁶ acquitted the accused. The High Court relying on the sayings of the Prophet quoted in the Mohammad Hanif's Judgement that "if peep of a trespasser into privacy justifies even throwing a pebble at him which may put out his eye, as in the cited *Hadith*, they why murder of a trespasser who also commits *zina* with the wife of a owner of a house would not immune him from *Tazir*. The High Court in stressing the significance of such a virtuous act - defending the person, property and honour - put forward the Hadith: "He who lays down his life while defending his person or property is a *Shaheed*" (martyred).

The Supreme Court took exception to such treatment of the offence by the High Court. Admitting, that the plea of grave and sudden provocation can now, after the judgement by the Supreme Court in Abdul Haque's case is available to the accused, the Supreme Court did not fully agree with the conclusion of the High

Court that Ali Muhammad did not commit any offence in the eye of law. No doubt he exercised his right of self-defence as has been extended in the case of Mohammad Hanif in the light of the well known sayings of the prophet. Admitting, that the accused rather did a salutary act of saving his honour Justice Fazal Karim quoted extensively from the principles of English criminal law and cases decided there under. Thereafter, he brought in another subtle point in the theory of self-defence in Islam as it was structured by the Pakistani Courts. He held that the right of self-defence has its limits, boundaries and conditions. In this case, the accused exceeded that right of self-defence. Since he had overpowered the accused by putting *chadar* around his neck there was no excuse to press it so hard as to strangle him to death. The court therefore punished him under section under section 302(c) for the sentence he had already undergone – about two years.

Riaz Ahmad v. State (1996: 43) is another important case on the issue of grave and sudden provocation, related to honour killings, decided by the Division Bench of the Lahore High Court. In this case Justice Allah Nawaz, who wrote the judgement, did not accept the uncorroborated plea of grave of sudden provocation from the accused. The accused had alleged that he killed the deceased when he tried to outrage the modesty of his wife. The court examined all the case law cited by the parties in the case, discussed herein before, and concluded that the plea of sudden and grave provocation could not be accepted by the accused on its face value. Therefore the court convicted him with death under the new law.

This judgement of Lahore High Court though distinctive in its argument but could not win the mind of other judges in the judicial set-up of Pakistan. In case of *Khan Muhammad v. The State* (1999: 579), the accused admitted killing his wife and her paramour on finding them together in a room. He was only sentenced for 7 years rigorous imprisonment. In *Aish Muhammad v. State*(1999: 2734) Aish Mohammad accused found his unmarried daughter and her friend committing *zina* (illicit intercourse) against the *Hudood* (limits) of Allah and lost his self-control. On such a grave and sudden provocation he killed both of them. Relying on the judgement⁵⁷ of the Lahore High Court wherein the issue of *Ghairat* was introduced for the first time under the new law, and ignoring the law laid down in 1996 PCrLJ 43 by Justice Allah Nawaz , the High Court punished Aish Mohammad, on two counts, with the imprisonment he had already served – eighteen months.

In *Nazir and another v. The State* (1999: 518), the accused was given six and half years by the high court accepting his plea of sudden and grave provocation, as he found the accused on the bed of his sister. The plea was again uncorroborated even though; no proof of *zina* was produced by the accused in the court.

The supreme Court of Pakistan once more constituted a full bench comprised seven judges this time, larger than the Bench constituted in Abdul Haque's case (five judges) to appraise the evidence in the *Abdul Zahir's case* (*Abdul Zahir v. The State*, 2000: 406) and to examine as to what sentence was justified in the case

on the basis of the evidence of provocation available on the record in case. Another issue was, whether the accused be sentenced under section 30 (b) or 302(c)? Under section 302 (b) a person may be sentenced to death as *tazir* or imprisonment for life as *tazir*. Whereas, under section 302 (C) the accused can only be sentenced for rigorous or simple imprisonment, up to 25 years. Writing the judgement of this case the full bench adverted to the issue of grave and sudden provocation as it is raised in the cases of honour killing. It was just before parting with the judgement the Supreme Court uttered following obiter dictum.

Before, parting I may add that by and large all the cases or grave and sudden provocation would not ipso facto fall within the preview of section 302 (C) particularly those of *Qatal-i-Amd* of wife, sister of other very close female relatives at the hands of males on the allegation of ‘*Siahkari*’.

The court quoted extensively from an article written by Professor Rafi Ullah Shehab (*The Daily Nation*, 1990, August 20), a famous Islamic scholar of Pakistan. In this article the professor had declared that there was no concept of so-called honour killing in Islam. Relying on the judgements of the prophet wherein he separated the spouses who had sworn that their partner had an illicit affair, the court quoted:

[K]illing accused woman is not Islamic by any standard; the believers are not even allowed to divorce them without establishing their accusation. We profess our love for Islam and demand its enforcement in the country, but ignore clear *Quranic* injunction about the rights of women. Dozens of innocent Muslim woman are slaughtered in the name of honour in our society. Almighty Allah eliminated the evil of the *Jahlliah* period, and thus, no case of honour killing was reported in the early period of Islam (Ibid: 11).

Quoting the above before concluding the judgement in a case where the issue of honour killing was not under scrutiny at all shows the concern of the new chief justice, Justice Saeeduzzaman Siddiqui, and his colleagues in the manner the courts were dealing with the issue. Justice Siddiqui who comes from an urban background, did not seem happy with the way the issue of honour killing was being appreciated by the judiciary. He found it appropriate to take up this issue, though it was irrelevant to the case, to lay down a law with the force of a full bench of seven judges and provide a guide line as well signalling to the subordinate judiciary the change of the Supreme court’s view in the matter of honour killings.

The message was well received by the Lahore High Court. In the case of *Ashiq Hussain v. State*⁵⁸. Abid Hussain a boy of aged 16/17 and Mst Hafizan Bibi, aged 15/16 years were shot in the cotton field by the accused, Ashiq Hussain. According to the prosecution story they were in the cotton fields along with other family members picking cotton crop when the accused fired at them, as he was

harbouring a suspicion that both were having an illicit intimacy. At the final stage of trial, made a statement that he fired the shot at the couple with his licensed gun as he found them lying in the cotton field in an objectionable condition. He alleged he lost his self-control and under the impulse of sudden and grave provocation fired at the deceased pair.

The trial court following the case law laid down in case of Mohammad Hanif's⁵⁹ and Abdul Haq's case⁶⁰ convicted the accused under section 302(c) of the PPC and sentenced him to seven years rigorous imprisonment on each count to run concurrently. The Criminal Revision was filed to challenge the propriety of this sentence passed by Justice Tassaduq Jillani. authored the judgement. The High Court now reading again the note of Justice Taqi Usmani provided in Gul Hasan's case⁶¹ along with the guide lines issued in the recent judgement of the full bench of the Supreme Court in Abdul Zahir's case⁶² held:

No court and no civilized human being can sanctify murders in the name of tradition, family, honour and religion. Both the deceased were teens and a passing through passionate period of adolescence. Little did the appellant realize that he too passed through that period and that the murders he had committed had neither the sanction of law nor religion.

The High Court in strict obedience of the Supreme Court altered the punishment from 302 (C) to 302 (B) and sentenced him to death as *Tazir*. He was further burdened with compensation amounting to Rs 1, 00,000 on each count. Earlier, we have seen the courts were even hesitant to order for the compensation of the deceased if they were found, (according to the version of the complainant), committing an 'immoral act'. The High Court found the case in hand an ideal one to lay down the foundation for open-mindedness and criticise the notions which were made law by Judges of High Court sitting alone. The bench held:

The proposition that if an accused sets up a defence plea to bring his case with in any of the general exception in the Pakistan Penal Code, he has to prove these circumstances were not only a mandate of law but also a desirable to rein in the chauvinistic element in a man who at times is driven by prejudices of cast, tradition, compulsions of a conceited and hurt ego or some other ulterior motive to murder a man or woman. The so-called evangelistic spirit demonstrated in such case is merely a façade and courts can not act as gullible arbiters to sanctify these acts in the name of "*Ghairat*" or religion.⁶³

The court showed its concern over the killing in the name of honour or *Karo-Kari*. The judgement authored by Justice Jillani, according to the author of this research, was the first elaborated judgement which did not only deal with the issue as a legal matter but also as a social problem.

In 2001, appeared the distinguishing judgement of the Quetta High Court, in case of *Pehlwan v. the State* (2001: 88), on the issue of honour killings. *Pehlwan* was booked for murdering his wife Mst Gul Hira and Kandra, the brother of his son in law. The accused admitted the killing but alleged that he killed them under grave and sudden provocation since he had found them committing *zina*. The trial court did not accept the plea and sentenced Pehlwan with death sentence under section 302 (a) PPC. Hearing the murder reference sent by the trial court and the appeal filed by the accused together the division bench encountered the argument, based upon the case discussed above, that honour killing has been well appreciated by the religion, society and the law and therefore the accused be acquitted from any charge. Countering these arguments Justice Tariq Mahmood deplored as follows:

...‘Honour Killing’ as learned counsel for appellant having tread, a few lines from the Holy book, proudly and with great vehemence argued that act of appellant has not only the sanction of Islam and the law but also on account Customary ‘*Ghariat*’, as well. The thinking is not only misfortunate but also demonstrates lack of knowledge.

What kind of world is it we live in where, horrifying crimes such as ‘Honour Killing’ are not merely given cover under law and custom or in the name of religion, but also perpetrated. One step forward has been followed by several steps back. Victims of violence by male family members, sold or exchanged in marriage, killed in the name of honour for the crime of exercising control over their own lives and all this is being done in the name of Islam, custom and law (Ibid: 95).

The judge further showed his scholarship in these words:

Before Islam, women were treated as a commodity but Islam granted them equal status. But even in 2001, the men in our society enjoys a special status. However, instead of making term generous, this preferential treatment serves a deep-rooted contempt for the female sex. Take the example of this case. Allegations are that deceased Kandra Khan was committing *zina* at about noon with mother-in-law of his brother. Even if it is believed, the question is whether the lady was involved in the same dirty business. But just imagine the helplessness of a judge that in this case he can not think or consider, whether the version is probable or not., it accompanied with his brother and had come all the way to meet appellant, could so instantly and easily develop an illicit relationship with a woman who is none but the mother of his *bhabi*⁶⁴. Whether it would not encourage cold-blooded murder ‘Double Murder’ in the grab of “Honour Killing” and violence against the women, despite

the fact that in the most of cases the act has been misused to gain property, demanding the hand of a woman of choice, settling the old scores and personal vendetta. Also whether leniency shown by the courts have not substantially increased the killing in the grab of ‘*Ghairat*’. Whether the life can be taken away in Islam or law, on the basis of mere accusations or rumours or speculations. Whether *Siah Kari* or *karokari* has nothing to do with the teaching of Islam. What the idea behind strict evidential prerequisite for punishing adultery in Islam. Why the society gives honour to the offender in such cases and disgraces the victim’s family. . whether it is novel way to get away the tribal enmity. Why the police and the Investigation Agency treats the matter as formality, in that, truth can be discovered, as a result of proper investigation. Whether the F.S.L. can play its part to falsify the accusation. What our internal obligations are. Whether the so-called customs should be given preference over basic human rights of women to live with dignity and without fear. But since the society is not treating it as an offence, therefore, no body tried to discover the truth. We have no option but to believe it because there is no other evidence to contradict part of this statement, may be due to the in competency and inefficiency of the investigation officer or people do not come forward to depose the truth and may be for justified reason but the law is that in the absence of any other evidence, statement of the accused should be accepted in totality and without scrutiny. We should not bother in such cases why our society is not giving due rights to women. And whether prevailing social interaction and codes of conduct in Pakistan can be described as by a term as elevated as “society”. Whether a mere allegation of moral laxity without any unimpeachable evidence to substantiate would not constitute grave and sudden provocation.

In support of his sentence of the accused on partly accepting the admission of his guilt the court held that under the present Constitutional and judicial set-up in Pakistan the old notion of so-called entitlement of an accused person to tell a lie and divert the court in wrong channels of enquiry can not be accepted. The court further held that while expecting all benefits from the court to follow the presumption of innocence till proved guilty, the accused cannot be absolved of his duty to help the court to discover the truth if need be by appearing as a witness of himself and divulging the truth.

However, applying the law laid down in Abdul Zahir’s case the High Court accepted the statement of accused in entirety and sentenced him to twenty-five years rigorous imprisonment under section 302(c). The accused was also directed

to pay *diyat* amount of 2,84, 859 Rs to the legal heirs of Mst Gul Hira as well. On the second count the accused was awarded fourteen years rigorous imprisonment as *Tazir* under section 308 of PPC.

In spite of the above-discussed judgement and the radical views expressed therein, a division bench of the Lahore High Court in case of *Mohammad Iqbal v The State* (2002: 752) again gave concession to the accused of triple murder in the matter of killing of his wife. The court said as to what prompted the accused to kill his wife could not be fully established therefore, the accused deserved to be dealt with leniency. His sentence of death awarded to him by the trial court for killing of his wife was converted into life sentence. However he was awarded death sentence on two counts for killing other two deceased, merely on suspicion of illicit relations with his wife.

After *Abdul Zahir v. State* the trend of the courts certainly changed remarkably. In case of *Muhammad Farooq v. The State* (2002: 1214) the Supreme Court refused to grant leave to appeal against a judgement of the Lahore High Court where in the High Court upheld the judgement of the trial court where by the accused was awarded life imprisonment under section 302 (b). The accused had killed Mst Salamat Bibi, his grand mother on the suspicion that she had illicit relations with one Ashiq Ali. This was the accused' plea taken only at the end of trial. On the other hand the prosecution case was that the accused' father used to ask for the complainant's (the daughter of the deceased) hand for the marriage of his son. The deceased persistently refused the offer on which the accused party killed her mother.

In *Muhammad Rafique v The State*(2003: 2252) case the Lahore High Court though again reiterating the principle that if the conviction is to be based on the accused' plea alone, the plea has to be accepted in toto refused to reduce the punishment of the accused awarded by the trial court accepting his ground of sudden and grave provocation. The accused was brother in law of the deceased, Mst Shamim Mai, who had seen her lying in a room in objectionable position with Zahoor Ahmad. The trial court convicted the accused under section 302 (c) and awarded him imprisonment to the tune of twenty-five years. The Lahore High Court in the light of the judgement given in Abdul Zahir's case maintained the judgement of the trial court.

In 2003, Karachi High Court passed another split judgement of the full-bench wherein again the treatment of provocation in the law of land was examined. In *Khan Mohammad and another v. The State* (2003: 1619) the accused had brutally put to death one, Ismail, with blows of hatchet. They suspected that he was having illicit affairs with Mst Lal Khatoon wife of one of killers. Justice Muhammad Afzal Sumro considering the facts and circumstances of the case opined that the case is not of capital punishment. Whereas the other two Judges, Justice S. Ahmad Sarwana and Justice Muhammad Mujeebullah Siddiqui confirmed the death of the accused as according to them mere suspicion of having illicit relations does not justify murder of another human being. Justice Sarwana affirmed that the practice

of raising the plea of suspicion of illicit relations to avoid death sentence is *mala fide*, unjustified, and inhumane and must be strongly depreciated and rejected out rightly (Ibid: 1623).

Interestingly in this case, the State, which was represented by the Additional Advocate General of Sindh who also recommended the court that the lesser punishment be awarded to the accused as this is a case of “*Ghairat*”. The deceased was on illicit terms with the wife of accused Khan Muhammad. It appears that the State was keen to accept mere statement of accused with any corroborative material on the record that the deceased was having such relationship. So was the plea of the counsel of the accused. The majority in the full bench rejected the pleas of the counsel of the accused as well as the State and affirmed the sentence of the trial court.

However, in *Fazalay Muhammad v. The State* (2003: 2945), the Peshawar High Court sentenced the accused Fazalay Muhammad for only 10 years of rigorous imprisonment on two counts i.e., killing of his wife and Muhammad Akbar Khan a boy of 14/15 years. Both were found, according to accused, having sexual intercourse. The court held that the provocation was grave as such the accused deserved a lesser punishment under section 302 (c) PPC. The court also awarded compensation to the legal heirs of Ghulam Akbar Khan.

The venture of Pakistan’s higher judiciary to deliver an Islamic ruling in their judgement on the issue of honour killings under the guidance of *the injunctions of Islam as laid down in the Quran and Sunnah*⁶⁵ still goes on. However, it makes, at least, one point abundantly clear: the injunctions provided in the primary sources of Islamic law are availed by both the groups: the proponents, who justify killing for the sake of ‘honour’ and the opponents, who argue that there is no room for such killings under the criminal law of Islam. Besides, looking into the contradictory interpretations of uniform commandments and historical incidents reported in the *hadith* material, which also serve as binding precedents in Islamic law, one can also argue that Pakistani judges are unqualified to make use of the material available in these sources. For such objectors⁶⁶ the incompetence of these judges stems from the fact that they are not well versed in Arabic and *fiqh*, (Islamic law). If this is the case, then one wonders why there is a conflict, contradiction and discord among the *fuqaha*, (pl. of *faqih*, i.e., an expert in Islamic jurisprudence) on almost every detail of all the major issues of Islam.

Interestingly, the judiciary of Pakistan irrespective of its competence, power, and sometimes even jurisdiction, has always tried to fall back on Islam and its sources to justify their reasoning in their judgements (Lau, 2002). Even more interestingly, the judges’ point of departure has always been his own interpretation of rather than that the *Quran* and *Sunnah*, by the different schools of thoughts.

The high number of honour killings, 5000 per year⁶⁷ (The Guardian, 2003, October 3), in Islamic societies also underline a need to look afresh to this complex socio-legal issue. The gravity of issue calls for a scientific, coherent, methodical and systematic approach to comprehend as well to pronounce the

statement of Islam in the light of the material available in the primary and other sources of Islam. Some of the basic material available in the *Quran* and *Sunnah* on the issue of honour killings is examined below and followed by the analysis of the issue of the various practices, interpretations and utilisation of this material by various schools of thoughts from earlier times to date.

The *Quran* and honour Killings

The *Quran* itself does not deal with the issue of honour killings directly as it deals with other kinds of killings: e.g., intentional homicide (*Quran*, 2: 148-179) and accidental homicide (*Quran*, 4: 92-93). On two other occasions when it condemns killings generally, it makes one exception – killing for the just cause⁶⁸. Killing for the just cause, homicide under the commands of the sovereign and under the doctrine of self-defence, perhaps, is not disputable in any of the existing legal traditions. However, the expositions and limits of the authority of a sovereign and the doctrine of self-defence, just cause, may be debatable on various grounds. Importantly, none of the well-known commentators of the *Quran* have so far declared that honour killings fall under these two verses of the *Quran*.

The *Quran* however, has dealt with the issue of the accusation of *zina*⁶⁹ generally (which is known as *Qazf*) and the issue of the accusation of *zina* (adultery) by husband to his wife⁷⁰, particularly, with considerable clarity. It is under the headings of *zina*, *Qazf* and *lian* that various commentators and jurists of Islam dealt with the issue of honour killings. The distinction that the *Quran* makes between the two kinds of the accusations of *zina*: firstly, by inter-spouse accusation and second by the general public, can certainly be understood in more than one ways. One reason may be that Allah acknowledges the sensitive nature of the relationship of husband and wife and gives credence to partner's reluctance (due to shame/embarrassment and other factors) to call other people to witnesses such a wrong. Therefore, in such cases of accusations, the *Quran* only requires spouses to take oaths to prove or disprove their allegations. In all the other cases of accusations of *zina* including to one's daughter, sister, and mother or *vice versa* come in the first general category.

At *prima facie*, the study of the law of *qazf*⁷¹, from the *Quran*, appears to punish the one who advances an allegation of *zina* against the other without having the required evidence to prove his or her assertion in the court of law. This is irrespective of the complainant's personal trustworthiness, knowledge, or relation with the woman. It is the lack of the essential quantity and quality of the evidence that makes one liable for the punishment of *Qazf* and not the falsehood of the allegation. One is only allowed to speak publicly about the accusation of *zina* if she/he can prove his/her allegation in the court of law; otherwise she/he makes himself liable for the punishment of *Qazf*.

The only exception to the above said general rule, as stated earlier is that of a husband who may lodge a complaint of adultery against his wife in a court without having the requisite evidence to prove such an allegation. The husband in such cases is only required, under the commands of the *Quran*, to take a specific oath in support of his accusation against his wife. Since a husband is granted an exception to the general rule – to prove the allegation of adultery with the support of four eye witnesses, the wife is also allowed to rebut her husband's accusation in the same manner, taking almost the same oath. Interestingly, if both of them take the oath, the conclusion of such a proceeding which is legally called *lian* does not bring any corporal or other punishment to any party, but it ends in a civil action, generally disowning their marriage. Unlike the trial for the allegation of *zina* wherein either the person who commits *zina* or the one who advances such allegation is punished, no one is even chastised here. No one is declared an unreliable person whereas in case of *Qazf* the person who fails to prove his allegation in the court is declared untrustworthy and his/her evidence is not admitted in the court thenceforward⁷². It may be clarified here that even a husband who slanders his wife and does not take the prescribed oaths of *lian* makes himself liable for punishment of *qazf*. He is also liable to be punished for *qazf* if he is otherwise incompetent to take the oath of *lian*.⁷³

Hadith Literature and the Issue

Most of the *ahadith* relevant to the topic have been quoted in the first part of this chapter while citing the judgments of the High courts⁷⁴. However, it would be advantageous to quote a particular *hadith* wherein the prophet was specifically asked about killing of a person who is found committing sexual intercourse with one's wife. The narration is cited in one of the most authoritative books of the Sunni Islam, *Sahih Bukhari* and has also been reported in Shia sources as well with slight difference⁷⁵:

'Uwaimir Al-Ajlani came to 'Asim bin Ad Al-Ansari and said to him, "O 'Asim! Suppose a man saw another man with his wife, would he kill him whereupon you would kill him; or what should he do? Please, O 'Asim, ask about this on my behalf." 'Asim asked Allah's Apostle about it. Allah's Apostle, disliked that question and considered it disgraceful. What 'Asim heard from Allah's Apostle was hard on him. When 'Asim returned to his family, 'Uwaimir came to him and said, "O 'Asim! What did Allah's apostle say to you?" 'Asim said to 'Uwaimir, "You never bring me any good. Allah's Apostle disliked the problem which I asked him about." 'Uwaimir said, "By Allah, I will not give up this matter until I ask the Prophet about it." So 'Uwaimir proceeded till he came to Allah's Apostle in the midst of people, and said, "O Allah's Apostle! If a man sees another man with his wife, would he kill him, whereupon you would kill him, or what should he do?" Allah's Apostle said, "Allah has revealed some decree as regards you and

your wives case. Go and bring her." So they carried out the process of *Lian* while I was present among the people with Allah's Apostle. When they had finished their *Lian*, 'Uwaimir said, "O Allah's Apostle! If I should now keep her with me as a wife, then I have told a lie." So he divorced her thrice before Allah's Apostle ordered him. (Ibn Shihab said: So divorce was the tradition for all those who were involved in a case of *Lian*) (Bukhari, 1962: 342).

Another interesting incident has also been reported in *Sahih Bokhari* wherein after the prophet effected the *lian* proceedings between spouses the wife, charged with adultery by her husband delivered a baby who took after the one with whom she was indicted for committing adultery. The punishment of death despite this much proof was not carried out either by the prophet or by any of his companions. (Bukhari, 1962) It means that the proof was deemed sufficient for the purposes of a civil action of *lian* and not for the purposes of proving a criminal offence - adultery.

So far as the general accusation of *zina* is concerned the traditions have been reported with references to the verses of the offence of *Qazf* in *hadith* literature.

Almost all the commentators of the *Quran*⁷⁶ agree that the verses pertaining to the punishment of *qazf*⁷⁷ were revealed when the prophet's wife, Aisha, was imputed of adultery by some of his travel companions.

It is reported that once when the prophet was returning from an expedition Aisha was inadvertently left behind when Muslims struck camp from the last stop. A companion of the prophet later found her and led her to the next halting place.⁷⁸ If we examine this well-accepted incident in juxtaposition with the sayings of the prophet quoted by the Lahore High Court⁷⁹ to excuse the killing owing to *Ghairat*, we find that the practice of the prophet was quite opposite to the sayings of the prophet quoted in those judgements. The prophet's approach to that event was based on good conscious, and without malice. He didn't kill the one who remained with his wife for some time, while she was being brought back, what to say about the killing of someone that may only have been found standing close to one's wife. However, the incident tells us that there were such people in the company of the prophet who immediately maligned the prophet's wife. The prophet himself did not cast any suspicion on his wife that she deliberately stayed behind. Neither did he raise suspicion against the one who accompanied her during her journey. Therefore, quoting the sayings of the prophet that it is *Ghairat* to kill some one who is even found standing near to ones' wife is not in conformity with the prophet's own practice, hence can not be relied upon to set a norm on the basis of the *Quran* and *Sunnah*.

It is recorded from Aisha (<http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/048.sbt.html#003.048.829>) that when her exoneration was revealed⁸⁰ the prophet took his stand and read out the revelation. After this proclamation, he passed sentences against the two men and one woman⁸¹, who had slurred the lady, in the light of the verses

of the *Quran* (Daud, 1978: 137). Because they publicly advanced a serious allegation against her without having any supporting evidence of it in hand.

It is said that that the honour killings was widespread among Arabs before the advent of Islam (<http://www.tv.cbc.ca/witness/honour/culture.html>). However, surprisingly, as Prof. Rafi Ullah Shahab asserts that there is not a single incident reported in the voluminous *hadith* literature wherein a companion of the prophet actually came to the prophet after killing his wife or her paramour on discovering that were committing adultery. Rather they adopted a very civil recourse. They reported the matter to the authority and asked for its decision on the matter. Neither do we find any evidence in the history that the prophet reprimanded someone for not killing the adulterous pair immediately on finding them committing adultery.⁸²

However, there are two events available in the early history of Islam wherein Umar (d.703), the second caliph of Islam, overlooked two such killings. One incident is quoted by Ibn Qudama (d.1150) in *al-Mughni*(Qudamad, 1984: 165-166) that on one occasion when Muslims were going to war a Muslim requested to one of his colleagues to look after his family. That Muslim was later informed during war that the caretaker actually committed adultery with his wife. He kept calm but on his return from war, killed the 'carer'. When this matter was reported to Caliph Umar, he declared the killing as the justified one. The other incident has been quoted by Oudah wherein a person killed both, his wife and the person who was lying *between the legs of his wife* (Oudah, n.d.: 263). Omar upheld these killings as well.⁸³

The aforementioned two incidents, legally speaking and strictly construed, represent two different situations: one where the husband did not see anything and killed the caretaker merely on hearsay; and the other wherein the killer actually found his wife and her paramour in the act of adultery. If we accept these two narrations to be authentic and the verdicts of Umar, the second caliph, valid then most of the present day defence of honour killings can be justified. These verdicts, if taken on their face value, provide a lot of justification to take law in one's own hands, killing of anyone on the basis of hearsay makes the law and procedure of *lian* redundant.

In medieval period when the Islamic legal structure or the Islamic Jurisprudence was being formulated by various jurists of Islam, who were later named as founder of their schools of thought, it appears they also got influenced with Umar's point of view. For instance, Imam Malik (d.179), Abu Hanifa (d.767), And Ahmad bin Hanbal (d.855) agreed that the killer of married adulterer is not liable to *Qisas* and *diyat*; since an adulterer is liable to be killed. According to them, adultery is an offence that falls with in the category of *hadd* and the punishment of *hadd* is obligatory as well as indispensable in order to enforce Allah's law and to eliminate the evil (Ibid). Majority of *Shafie*, followers of Imam Shafie (d. 819), also subscribe to the above mentioned majority viewpoint (Ibid). However, there is a group among *Shafites* who disagree with the majority's point

of view and insist that the killer of a married adulterer would be liable to death penalty.

Abdul Qadir Oudah (d. 1883) a nineteenth century Islamic Scholar who compared Islamic Criminal Law with the Modern Criminal Laws of West in general and with Egyptian laws in particular also seems to have sympathy for the justification of such killings on the grounds of personal rights of individuals (Ibid: 261-265).

Oudah maintains that some jurists of Islam attribute the killing in case of adultery owing to the wounded sense of honour. In such killings the killer is carried away by emotions and therefore he commits homicide in compulsion. However, Oudah makes a distinction between the killer who is related or known to the woman (subjected to the adultery) and the one who was stranger to her (Ibid). They say if the woman is related or known to the killer then homicide is justifiable as it stirs up stronger emotions in the heart of killer. The position of a stranger who kills the pair committing unlawful intercourse or any one of them would not be the same. However, the majority of jurists hold that the homicide of an adulterer is justifiable not because one fails to control his emotions and but due to the duty which obliges a Muslim to eliminate the evil (Ibid).

After going over such a vast Islamic literature gathered and written on each and every issue in the medieval period of Islam and examining the incongruous interpretations of the Quran and Sunnah by Muslim jurists on a matter and their conflicting interpretations in the later centuries that enrich the subject of Islamic law in the Muslim world, one is left in sheer confusion and bewilderment over the final opinion on the details of a single issue.

During the last two centuries, people have become accustomed to see law and legal provisions in the shape of legal codes which clearly define the meanings of the words used in the statute along with the extent of their applications. For them, a particular law is to be found in the relevant statutes whereas the legal philosophy is to be understood through the legal jurisprudences. Generally speaking, people are not supposed to know law by reading the jurisprudence of law. Rather, they are required to read and understand statutes or their relevant provisions. The courts also exercise their powers to interpret a law in line with the spirit of the statute following the well-settled and defined principles of the interpretation of statutes in a legal system.

When one is presented with a plethora of legal material – sources of law, disputed principles of utilising the sources of law to draft a provision of a law - and asked to deduce and apply a particular law fitting to the facts of a case, the judge is bound to be confused. This might have been the understanding of Islamic law by an English court commenting in *Metropolitan Properties Company Limited v. Purdy* (1940: 188), while criticising a piece of English legislation:

...[T]he court, be it the master or the judge, is really put very much in the position of a Cadi under the palm tree. There are no principles on which he is directed to act. He has to do the

best he can in the circumstances, having no rules of law to guide him, and very often with no dispute as to the facts.

The comments underline the modern Western lawyers' understanding of Islamic law. Such Western lawyers, judges and scholars do not compare the concepts and definitions of the law given and developed by Muslim legists in medieval period with their own concepts and laws prevalent at that time in their part of world. Rather, they contrast with their developed modern laws with a law that could not be developed by its fervent follower, for various reasons, in the way the West developed their laws after the Industrial revolution. Of course there are certain definite rules and principles which a jurist of Islam is obliged to follow but the rules and principles differ in various schools of thought. They agree on some points and disagree on others. The certainty and clarity, which is the hallmark of modern Western statutes/codes is not available in the complex and loosely written treatises of Islamic law, written for general understanding of Islamic values. We must understand that Islamic law is not a set of statutes written about a particular social or legal problem but it is a mixture of definitions, principles and provisions formulated for general guidance of the people to understand the teachings of Islam. Yet the statutes of various laws can be enacted in the light of the principles laid down in these jurisprudential books.

Modern Trends

Islam does not condone Honour killings in any way, shape, or form, argues the leader of the Muslim Council of Briton (http://www.mcb.org.uk/honour_killings.pdf). Javed Ahmed Ghamed, a contemporary Sunni Muslim scholar of Pakistan who is of the opinion that no one is allowed in Islam, to take the life of another soul on the ground of honour killings⁸⁴. Allama Hamadani, a Shia scholar of Pakistan argues that a lot of dishonourable acts are being committed in the name of honour in Pakistan. Islamic law strictly prohibits taking the life of another person on any ground except under the clear commands of the State. Any person who the murders another human being should be sentenced to *Qisas* punishment under the criminal law of Islam. There is no defence available to such a murder in the name of honour under Islamic penal law.⁸⁵

However, unfortunately the penal statutes of the modern Muslim world do provide concessions in sentence to the killers who take up the plea of honour in their defence. For instance article 340 of the Jordanian Penal Code says, "A husband or a close blood relative who kills a woman caught in a situation highly suspicious of adultery will be totally exempt from sentencing." While article 98⁸⁶ guarantees a lighter sentence for the killers who acted under impulse seeing some thing unlawful being committed by the deceased. Various attempts to amend article 340 of the Jordanian Penal code were foiled by the Assembly (The Jordan

Times, 2000, January 27). Similar concessions are provided in Egyptian⁸⁷, Tunisian⁸⁸, Libyan⁸⁹ and Kuwaiti Penal codes⁹⁰. Most of the modern penal legislation operating in Muslim Countries originate from colonial penal codes – the Spanish Penal Code, the French Penal Code, and the Indian Penal Code. In the most of the Middle Eastern countries the penal law is inspired by Ottoman Penal Code⁹¹. Algerian Penal Code also reduces the sentence for a husband who kills his adulterous wife⁹². It may be made clear here that she is not declared adulterous by the court after which the aggrieved husband kills his wife but the husband himself declares her adulterous and then kills her. For such an offence, he is not punished for the punishment of intentional unlawful homicide but is receives reduced penalty.

There are only two countries in the Modern Muslim world, Iran and Pakistan, whose penal statutes, at least theoretically, do not consider the plea of a husband for killing his wife to vindicate his honour as a mitigating factor. In post revolutionary Iran the *Qisas* law empowered men to kill anyone who, ‘violates their *harem*’. Therefore⁹³, those who murdered their wives, sisters and mothers on the charge of adultery were immune to punishment (The Daily Nation, 2000, August 3).

In Pakistan as we have discussed above, the new law of *Qisas* and *diyat* does not provide any concession to the husband or male agnates who take the plea of honour killings as well as grave and sudden provocation in the court of law.

Conclusion

Analysis of reported and unreported judgements alongside the examination of the *Qisas* and *diyat* law shows that Pakistani judges made excessive use of section 338-F⁹⁴ (interpretation clause) of the PPC to incorporate their personal views in construction of the new law of homicide and murder. Though, the substantial law itself does not provide any room for taking into consideration any sort of mitigating factor while delivering a judgement in murder cases, but judges trained in the British legal tradition could not visualize a law of murder and homicide that does not recognise any mitigating circumstance. Therefore, they took advantage of the interpretation clause and improvised mitigating factors in the new law which could be taken into account while sentencing the accused.

In doing so, if they could not get support from the key source of Islamic law, the *Quran*, they underpinned their arguments with the help of the second source of Islamic law, the *Sunnah*. However, their method of selecting *ahadith* was erratic, superficial and unscientific, inasmuch as while singling out and relying on some *ahadith* they completely ignored the other sayings which were also germane to the issue. They also did not endeavour to examine the authenticity of the sayings of the prophet before formulating their opinion and pronouncing judgements on basis of their interpretation.

Another important feature that emerges from the review of the above examined case-law is that the lower judiciary in Pakistan (including High Courts) well understood, followed, and rather toed the line and inclination of the Supreme Court of Pakistan while deciding the cases of honour killings. They might have accepted the Supreme Court's point of view because of the constitutional provision - article 189, which declares the decision of the Supreme Court binding on the lower judiciary - yet, one wonders when the constitutional requirement conflicted with the dictates of their faith, how the judges reconciled between these two aspects, directly opposing each other sometime. Under section 338-F of the PPC judges are required to take guidance from the injunctions of the *Quran* and *Sunnah* while deciding cases under *Qisas* and *Diyat* law, on the other hand the constitution obliges them to accept the decisions of the Supreme Court as binding on them. It should have been, in my opinion, for the legislature to take guidance from the injunctions of Islam as laid down in the *Quran* and *Sunnah* whilst the judiciary should only be asked to follow the law legislated by the *Shura* – legislative Assembly. Whereas, the section 338-F of the PPC enables the judiciary, from top to bottom, to introduce their personal version of Islam in the law, which gives rise to confusion and uncertainty into the meaning and application of the law.

The Supreme Court's judgement in the case of *Abdul Zahir v. The State*⁹⁵ has certainly curbed the practice of the higher judiciary to acquit the accused of honour killings or to sentence them leniently. Still there is a long way to go. As Sultan Ahmad suggests: 'the way to stop honour killings is not go through courts of law' (The Daily Dawn, 2004, April 18). The researcher agrees with Shaheen Sardar Ali, chairperson of the National Commission on Status of women, that the practice would not go away until men stop thinking of women as their property (Ibid). The author contends that in a patriarchal society like Pakistan, the attitude and thinking of men towards the women needs to undergo a vast change and only then it will be reflected in the decisions of the courts. New legislation may help, but will not eradicate in a few years norms that are centuries old and are integrated part of the thinking process of men in the society.

Notes

1. For instance see, UN GA *res 55/66*, Working towards the elimination of crimes against women committed in the name of honour, Dec. 2000, UN doc. A/RES/55/66; UN GA *res 57/179*, Working towards the elimination of crimes against women committed in the names of honour, 18 Dec. A/RES/57/179
2. For instance see, Dr Bhaskar Das Gupta, 'With a grain of Salt: No honour in honour Killings' London; Yasmeen Hassan, 'The Fate of Pakistani Women' *International Herald Tribune*, 25 May, 1999; *Amnesty International, Pakistan*, 'Violence against women in the name of honour', retrieved on 25 July 2007. <http://www.amnestyusa.org/regions/asia/document.do?id=1DF2FA05A016701B8025690000693498>
3. Edna Yaghu, 'Honour Killings'

4. See Dr Das Gupta, Yasmeen Hassan, *supra* note 2
5. *Zina* means illegal sexual intercourse and embraces both fornication and adultery, though each entails different punishment. If a married person is proved to have committed zina she/he is punished with stoning to death and one who is unmarried is punished with whipping with 100 numbering 100 stripes.
6. Throughout this article the term 'new law' means the law of *qisas* and *diyat* that replaced the old law of homicide and murder in the Pakistan Penal Code (hereinafter PPC) in 1990 by the Criminal Law (second Amendment) Ordinance, 1990 (VII of 1990), PLD 1990 CS 110.
7. Exception 1 of the section 300 Penal Code of 1860 says, "Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident." In the first draft this provision was dealt under section 297.
8. See, Jorg Fisch, *Cheap Lives and Dear Limbs. The British Transformation of the Bengal criminal law, 1769-1819*, Wiesbaden 1983, pp. 102-103.
9. Generally, the word offence is construed as something that outrages the moral or physical senses, but in legal sense it is defined anything done in violation of any statute and triable by a court of law established by the State. Section 40 of the Pakistan Penal Code (PPC) also defines offence as anything done punishable by the code.
10. The legal requirement to prove an offence in the court of law under Islamic law differs from offence to offence. For details see, El-alwa, 'Confession and other material of Evidence in Islamic procedural Jurisprudence' ed., Muhammad Abdel Haleem *et al*, *Criminal Justice in Islam: Judicial procedure in Sharia*, London, 2003, p. 97.
11. I have used the word sin in its common meanings, i.e., a violation of the command of God but not necessarily punishable under the law of the State.
12. Zina under the Islamic Criminal Law is liable to Hud punishment only. However, the Offence of Zina (Enforcement Of Hudoood) Ordinance, 1979, innovatively defines, two kinds of *zina*: one under section 5, i.e., *zina* liable to *Hud* where evidence under the standards of the Islamic Criminal law (section 8 of the Ordinance) is available and other under section 10, i.e., *zina* liable to *tazir* wherein ordinary evidence is acceptable. The punishment under the first kind of *zina* is harsher than it is under the second, for details see the Ordinance, PLD 1979 CS 52. See also, Asifa Quraishi, "Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective" at http://www.karamah.org/articles_quraishi.htm, viewed on 3 May 2005.
13. Under the Quranic injunctions, chapter 4 verse 15, the requirements regarding the obligatory number of witnesses to prove the case of adultery are four Muslim witnesses.
14. Unproved allegation that an individual has committed zina (unlawful sexual intercourse). Chapter 24 verse 13 of the Quran deals with the punishment of *Qazf*. It reads: those who cast serious aspersions against married women and are unable to provide four witnesses, then their recompense is eighty lashes and their testimony can never be accepted; indeed they are deprived.
15. Qazaf means an accusation of zina which cannot be proved by four witnesses. This is offence under Islamic hudud laws. The Quranic injunction against *qazaf* is to prohibit the accusation of chaste women of zina (illicit intercourse). "And those who accuse chaste women, and produce not four witnesses, flog them with eighty stripes, and reject their testimony forever," Chapter 24 verse 4. the Quran.
16. Lian is a sort of divorce in which a husband charges his wife with adultery and alleges that he has had seen his wife committing adultery, but has no proof of it. The court administer oath on him and asks his wife to deny the allegation on oath. On

- her denial the court terminates the marriage contract. For details see, Neil B E. Baillie, Baillie, Neil B. E. *A Digest of Moohummudan Law*, Vol. 2, 2d ed. London, 1875, p. 152; David Pearl and Werner Menski, *Muslim Family Law*, 3rd ed. London, 285.
17. Gharat is an Arabic word which means honour, shame, modesty and indignation. The word is also used in Urdu and Punjabi as well in all of these meanings but in an exaggerated form. For the sake of clarity, throughout this article, we shall use the word in its meaning of honour and shame only.
 18. Section 297, The First Draft of the Penal Code By the Indian law Commissioners and Published under the Commands of the Governor general of India in Council, Hertford 1851. This provision was later introduced as exception 1 of the section 300 IPC. See foot n. 6.
 19. Section 295 of the original draft of the Indian Penal Code drafted in 1837.
 20. *Ibid.*, at p.144
 21. *Ibid.*
 22. *Ibid.*
 23. *Ibid.*
 24. Hud is an Islamic legal term which means: "Specified punishment imposed by Sharia (Islamic Law) as an obligation to be implemented in order to carry out the right of Allah." Its plural is Hudud.
 25. The name applied throughout India to the Afghans, especially to those permanently settled in the country and to those dwelling on the borderland. The Pathans of the Indian borderland inhabit the mountainous country on the Punjab frontier, stretching northwards from a line drawn roughly across the southern border of the Dera Ismail Khan district. The Pathans include all the strongest and most warlike tribes of the North-West frontier of India, such as the Afridis, Orakzais, Waziris, Mohmands, Swatis and many other clans. Those in the settled districts of the North-West Frontier Province (in 1901) numbered 883,779, or more than two-fifths of the population. For details visit, http://11.1911encyclopedia.org/P/PA/PATHAN_PEOPLE_.htm
 26. *Supra* note 35.
 27. Mst is an abbreviation of *Mussammatt*, which is a title prefixed to the names of females in India.
 28. Section 304 of the IPC deals with the punishment for the offence of the culpable homicide. Under this section a person charged with this offence could be punished for transportation of life or with an imprisonment of either description which could extend to 10 years.
 29. See, *Adaptation of Existing Laws Order, 1947; The Adaptation of Central Acts and Ordinances Order, 1949.*
 30. (O you who believe! Avoid suspicion as much [as possible]: for suspicion in some cases is a sin . . .) (Qur'an 49:12).
 31. All appeals were heard together and reported under the main heading of *Federation of Pakistan v. Gul Hasan Khan*, PLD 1989 SC p.633.
 32. Exception I, II, III and IV provided in section 300 of the PPC.
 33. To find out the details about these situations in Sunnah please read, *Sahih, Muslim, Kitab-al-lian and Takmilat fateh al ilm*, volume 1, page, 257.
 34. Minutes of the Cabinet meeting held on 20 January, 1986, prepared by Ch. Shaukat Ali, Additional Secretary, In charge, Cabinet Division.
 35. This high-powered appellate Bench was constituted under section 13 of the Special Courts for Speedy Trials Act 1992. The Appellate Court was comprised of one judge of the Supreme Court, being its chairman, and two judges of the High Court - the members. To view the statute see, PLD 1992 CS 229.
 36. *Supra* note 43.

37. Article 121 of *Qanun-i-Shahadat* Order 1984 (The new law of evidence) reads: When a person is accused of an offence, the burden of proving the existence of circumstances the case with any of General Exceptions in the Pakistan Penal Code or with any special exception or proviso contained in any other part of the same Code or any law defending the offence is upon him and the Court shall presume the absence of such circumstances.”
38. *Supra* note 49.
39. *Supra* note 51.
40. *Cf.* Article 201, Constitution of the Islamic Republic of Pakistan, 1973.
41. My translation of the Urdu paragraph quoted in the judgement at 2053.
42. *al-Jami` ut-Tirmidhi* is a collection of ahadith by Imam Tirmidhi (209 - 279 H).
43. *Ibid.*
44. *Supra* note 59.
45. Karo generally means a male accused of having illicit relationship with a female while Kari means a female accused of having illicit relationship with a male.
46. See, Ali ibn Abi Bakr Marghinani, *Hedaya*, trans., Charles Hamilton, vol.2, London, 1791, pp. 123-24; Neil Benjamin Edmonstone Baillie, *Digest of Moohummudan law on the subjects to which it is usually applied by British courts of justice in India / compiled and translated from authorities in the original Arabic, with an introduction and explanatory notes by Neil B. E. Baillie*, London 1875, pp. 335-339; David Pearl and Werner Menski, *MuslimFamily Law*, 3rd ed., London, 1998, p 236.
47. For further detail of the fact see:
48. *Supra* note 64.
49. *Supra* note 91.
50. *Supra* Note 67.
51. *Supra* note 41.
52. *Supra* note 54.
53. *Supra* note 75, p.96.
54. *Supra* note 54.
55. *Supra* note 75, p. 101.
56. *Supra* note 54.
57. *Supra* note 63.
58. Criminal Revision No. 197 of 1999, decided on 26 September 2001.
59. *Supra* note 54.
60. *Supra* note 82.
61. *Supra* note 43.
62. *Supra* note 93.
63. *Supra* note 96. p.14.
64. Title given to brother’s wife by the sisters and brothers of the husband.
65. See, section 338 F of the PPC
66. Maulana Maududi (d.1979), See, E. Adamson Hoebel, ‘Fundamental Cultural Postulates and judicial Lawmaking in Pakistan, *American Anthropologist*, Vol. 67, No. 6, Part 2, The Ethnography of Law, Dec., 1965, USA, p. 43-56.
67. Cited a report of the United Nations according to which at least 13 women are killed a day for the vindication of honour in Muslim societies.
68. Chapter 6, Verse 151 reads: take not life, which Allah hath made sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom; and Chapter 17, verse 33, Nor take life - which Allah has made sacred - except for just cause. And if anyone is slain wrongfully, we have given his heir authority (to demand qisas or to forgive): but let him not exceed bounds in the matter of taking life; for he is helped (by the Law).
69. Chapter 24, verse 4 reads: “And as for those who accuse chaste women [of adultery], and are unable to produce four witnesses [in support of their accusation],

- flog with eighty stripes; and ever after refuse to accept from them any testimony—since it is they, they are truly depraved! – (5) expecting [from this interdiction] only those who afterwards repent and made their amends]. Also see verse 11 and 13.
70. And for those who accuse their wives [of adultery], but have no witnesses except themselves, let each of these [accusers] call God for times of witnesses that he is indeed telling the truth, (7) and the fifth time, that God's curse be upon him if he is telling a lie. (8) But for the wife all chastisement shall be averted from her by calling God four times to witness that he is indeed telling a lie, (9) and the fifth [time] that God's curse be upon him if he is telling the truth. Other verses of the *Quran* that deal with the allegation of *zina* are: Chapter 4, verse 114; Chapter 24, verse 23; Chapter 33, verse 58.
 71. See, El-Awa, *Punishment in Islamic Law*, Indianapolis, 1982, p. 20; Oudah, *criminal Law of Islam*, vol., III, Karachi, 1987, p. 43; Mohammad Iqbal Siddiqi, *The penal Law of Islam*, Lahore, 1985, p. 87.
 72. For details of the procedure of *lian* see, Neil B.E. Bailie, *Digest of Moohummudan Law*, London, 1869.
 73. Only a person is competent to take the *lian* if he is competent to be a witness. See, Baillie, 1879, Part 1, pp. 336-337; Part 2 pp. 157-159.
 74. *Supra* notes 81 and 92.
 75. See, Al-Allama As-Sayyid Mohammad Hosain Al-Tabatabai, *Al Mizan Fi Tafsir al-Koran*, Lebanon, 1983, p. 87.
 76. For instance see, Asad, The ; Aullah Yousaf Ali, Moududi, Ibn Kathir.
 77. *Supra* note, 4.
 78. See Asad, *The Message of The Quran: Translated and Explained by M Asad*, 1980, Dar al- Andlus, p. 534; Abdullah Yousaf Ali, *The Meaning of the Holy Quran*, USA, 2000, p. 866.
 79. *Supra* note 92.
 80. The verses cited in *Supra* note 4.
 81. *Ibid.*, in the next tradition it said that the men were Hassan ibn Thabit, Mistah ibn Uthathah and the woman was - Hammah daughter of Jahsh.
 82. Shahab, *Supra* note.
 83. See, Taqi al-Din Ali ib Abd al Kafi al Subki, *Takmilat al Majmu*, vol., 4, Cario, ?
 84. My correspondence with Mr Ghamdi, between April and May 2004, wherein he also referred to his website, <http://www.renaissance.com.pk/septfeart2y2.html>.
 85. My correspondence with Allama Hamadani, between April and May, 2004.
 86. "He who commits a crime in a fit of fury caused by an unrightful and dangerous act on the part of the victim benefits from a reduction of penalty." Jordanian Penal Code.
 87. Article 237 and 17 of the Egyptian Penal code.
 88. Article 207 of the Tunisian Penal Code.
 89. Article 375 of the Libyan Penal Code.
 90. Article 153 of the Kuwaiti penalCode.
 91. Oudah, *Supra* note 32.
 92. Article 279 of the Algerian Penal Code.
 93. See article 418-424, Iran Penal Code prior to revolution in 1979.
 94. Section 338-F reads: 'Interpretation. ---In the interpretation and application of the provisions of this chapter, and in respect of matters ancillary or akin thereto, the court shall be guided by the injunctions of Islam as laid down in the Holy Quran and Sunnah.'
 95. *Supra* note 122.

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That law, Section 140 of the criminal code, was also a British colonial inheritance, though in 1990 legislators had strengthened it, raising the highest penalty to life imprisonment. The government used the revised law to harass both individuals and activists who were lesbian or gay, censoring their speech, threatening them with prison, raiding their homes. It concentrates on the British experience because of the breadth and endurance of its impact. Nor does this report try to look at the career of "sodomy" and law in all the British colonies. For clarity, it focuses on the descendants of India's Section 377. The draft Indian Penal Code, the first experiment in producing a criminal code anywhere in the Empire, was a test of how systematizing law would work.