

**Amendment of Section 11, 13 and 14 of the Offence of Zina
(Enforcement of Hudood) Ordinance, 1979.**

Report No.75

Subject: **Amendment of Section 11, 13 and 14 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.**

Few sections of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 prescribe only one type of punishment i.e. "imprisonment for life," with no other alternative sentence. Such sections are:

Section 11.-

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit inter-course, or knowing it to be likely that she will be forced or seduced to illicit inter-course, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes, and shall also be liable to fine and whoever by means of criminal intimidation as defined in the Pakistan Penal Code, or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit inter-course with another person shall also be punishable as aforesaid.

Section 13.-

Whoever sells, lets to hire, or otherwise disposes of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit inter-course with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes, and shall also be liable to fine.

Section 14.-

Whoever buys, hires or otherwise obtains possession of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit inter-course with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such

purpose, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes, and shall also be liable to fine.

From the above text of these sections, the offender found guilty for the offence shall be punished with imprisonment for life. The languages employed in these sections do not empower the court to award less punishment than life imprisonment as it is the duty of the court to expound the law as it stands. In many cases this question was arose whether the court could pass sentence less than the imprisonment of life. In a case, *Mohammad Sharif v State*¹, the Shariat Appellate Bench of Supreme Court while examining the issue whether the court can award less punishment than prescribed under section 11, observed as follows:-

“As a present worded section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979) does not admit of any possibility of award of the sentence of imprisonment which might be less than the imprisonment for life. The words used are “Whoever kidnaps or abducts any woman with intent.... Shall be punished with imprisonment for life and with..... “does not admit of any other interpretation. The reference to section 10, 12 and 13 of the Ordinance which also provided for long sentence of 25 years’ rigorous imprisonment and imprisonment for life, does not support the contention that the imprisonment under section 11 can be lesser than that of imprisonment for life. Argument that read in the context of section 10,12 and 13 the provision in section 11 for award of only one punishment and that also of imprisonment for life, does not stand to reason, might have some force; but, so long as the language in the relevant section is clear and there is no material for holding that the intention was otherwise, the Court would not change or even interpret the word “shall” as used in section 11 into “may”, Further, the argument, that the Legislature might not have intended to use the word “shall” and that it might, in the context of the other provisions have been used on account of drafting mistake is also without force. The assertion regarding “mistake of drafting”, can be examined in its detail only if there is some material available before Court. Mere statement in this behalf is not enough to come to

¹ PLD 1985 SC 319.

a definite conclusion that it was in reality a mistake. It is for the Legislature to examine the question with a view to find out whether keeping in view the other provisions and punishment in section 10, 12 and 13, it was not printing or draftsman's mistake to prescribe only one punishment of "imprisonment for life" without leaving any scope for imprisonment of any lesser period (may be, by fixing the minimum as done in subsection (3) of section 10, at a certain higher level than the ordinary). It would also be for the Legislature to examine whether the experience of acquittals under section 11 at the trial level as also conversions from section 10(3) to section 10(2) when there is also a charge of section 11 might not have been indirectly, subconsciously, influenced by the fact that in case of conviction, imprisonment for life is in any case to be awarded under section 11. The other aspect that for the complainant side, when the honour and future life of young girls is involved the finding of consent (which undoubtedly mars the future of young girl in our society) if at all it is influenced by extreme penalty only, as awardable under section 11, is also for the Legislature to examine. For that reason alone, Supreme Court is not competent to read section 11 in such a manner as to make it possible for the Courts to award any sentence of imprisonment which might be less than for life, but this is a matter for the Legislature to clarify."

In another case Hashim Khan v State², the Trial Court convicted Hashim and sentenced him to life imprisonment under section 11, the decision was up held by the Federal Shariat Court. On appeal from the judgment of the Federal Shariat Court, the Shariat Appellate Bench of Supreme Court, taking the lenient view, reduced the sentence from life imprisonment awarded by the trial court, to a term of 10 years rigorous imprisonment, while interpreting section 11 of the offence of Zina (Enforcement of Hudood) Ordinance 1979 and observed that probably the legislature's intent was to insert in section 11, the words "may be extended to life" instead of "shall be the imprisonment for life" and while raising the presumption of such intention of law makers, substituted the words "may be extended to life imprisonment" for the words "shall be life

² PLD 1991 SC 567 (dissented).

imprisonment” in the judgement, and reduced the sentence from life imprisonment to a term of 10 years.

The Supreme Court in a case Muhammad Abdullah Yousaf Vs Nadia Ayub³ observed- “The observation made in Hasham Khan v. State, supra, was based on the assumption that law makers intended to insert the words “may extend to life” instead of “shall be life imprisonment” and the inadvertent omission could be supplied in law. We find that the Shariat Appellate Bench of the Court in the above judgment neither declared the sentence of life imprisonment provided under section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 repugnant to the Injunctions of Islam nor recommended the Government to amend the said section in the light of its observations and the Government, also has not taken any step for the amendment in the above provision, therefore, even if legislature had such an intention, the Shariat Appellate Bench of this Court without examining the vires of the above provision of law in the light of Injunctions of Islam, could not competently change the words of the existing provision. We, therefore, approve the earlier view taken by Shariat Appellate Bench of this Court in Muhammad Sharif v. State (PLD 1985 SC 319) and Ishtiaq Ahmed v. State (PLD 1984 SC 380) and hold that the Courts cannot pass and sentence of lesser imprisonment than the life imprisonment under section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 in departure to the statutory provisions. The Federal Shariat Court and Shariat Appellate Bench of this Court in exercise of the powers under Article 203-D, can examine the vires of a law or a provision of law on the touchstone of Injunctions of Islam and can also declare a law or a provision of law, repugnant to the Injunctions of Islam and direct the Government for necessary amendment by a certain date. The amendment so proposed if is not made by the date fixed by the Court, it becomes the law of the country but the Federal Shariat Court or Shariat Appellate Bench of this Court, in exercise of this power, cannot substitute the words of a provision with the consideration that legislature intended to legislate the law in that manner, without declaring such provision repugnant to the Injunctions of Islam

³ PLD 2005 SC 252.

wholly or partially. The Shariat Appellate Bench of this Court in the above case, changed the words of Section 11 *ibid*, as under:-

“11. Kidnapping, abducting or inducing woman to compel for marriage etc. -- Whoever kidnaps or abducts any woman with intent that she may be compelled or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced to seduced to illicit intercourse, shall be punished with imprisonment which may extend to life and with whipping not exceeding thirty stripes, and shall also be liable to fine; and whoever by means of criminal intimidation as defined in the Pakistan Penal Code (Act XLV of 1860), or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be or, knowing that it is likely that she will be forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.”

(Underlined words are ours, in place of the words “for life” presently appearing in section 11).

We may observe that Shariat Appellate Bench in its criminal jurisdiction, was not supposed to award a sentence as Tazir punishment which is not provided under the law. The duty of the Court is to expound the law as it stands and should not read into section of an Act words which are not used by the legislature. The Court has only to interpret the law and read the intention of legislation from the language used by the legislature. There is a strong presumption that Parliament does not make mistakes and if ambiguity is found in legislation, it must be corrected by legislature and is not the function of the Court to repair it. It was held by Mr. Justice Walsh in the case of *Attorney-General v. Bihari re-Australian Factors Ltd.* (1966), 67 SR N.S.W) 150;

“It is not function to repair the blunders that are to be found in the legislation. They must be corrected by the legislature.”

The Courts have no power to treat an Act of Parliament as being altered in such a way to agree with the Judge's idea of what is right or reasonable. In nutshell unless the words "may be extended to life" are substituted for the words "shall be imprisonment for life" in section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, in accordance with the requirement of provisions of Article 203-D of the Constitution or by the legislature, in exercise of its legislative powers, the Courts cannot, on the basis of an observation of Shariat Appellate Bench, award imprisonment for a term lesser than imprisonment for life provided in law. The Government may examine the above provisions of law and make necessary amendment, as proposed."

"The laws are enacted through the process of legislation by the Parliament and the function of the Courts is to apply and interpret the laws in the spirit in which same are enacted. This is not the function of the Courts to add or omit any word from a provision of law or to re-write or re-enact any law or change its language, through the method of interpretation of laws. The Shariat Appellate Bench of this Court, in exercise of its powers under Article 203-F read with Article 203-D of the Constitution of Islamic Republic of Pakistan 1973, can declare any law repugnant to the Injunctions of Islam and direct the Government for enactment of law in accordance with the Injunctions of Islam but while interpreting a provision of law, it is not supposed to change the words of an existing provision of law without declaring it repugnant to the Injunctions of Islam."

From the above observations of the Courts, it is deduced that the trial courts has to follow the enacted provisions of the law and no authority to go beyond it. In these sections, punishment with imprisonment for life have been prescribed, the court is bound to award punishment for life. However it is observed that the punishment for life is a harsh punishment can be awarded on strong and concrete evidence thus, the court should have some discretion to award lesser punishment if the circumstances of the case warrant so. Similar situation is confronted by the courts when the sole punishment of death is prescribed for the offence of gang rape under sub-section 10 of the offence of Zina (Enforcement of Hudood) Ordinance, 1979. The courts has no other choice except to award death penalty or acquit the offenders. The Law and Justice

Commission of Pakistan has recommended to make amendment in section 10(4) by providing an alternate punishment of imprisonment which may extend to 25 years but shall not be less than 10 years in case the death penalty cannot be imposed due to lack of sufficient evidence.

It is pertinent to mention that the offences under sections 11, 13 and 14 of the offence of Zina (Enforcement of Hudood) Ordinance, 1979 were engrossed from previous offences under sections 366, 372 and 373 (now repealed) of the Pakistan Penal Code 1860, wherein the punishments prescribed for these offences were “with imprisonment of either description for a term which may extend to 10 years and also be liable to fine”. It is clear that the punishment under sections 11, 13 and 14 have substantially been increased from extend to 10 years to life imprisonment.

In view of the above position, it is suggested that in sections 11, 13 and 14, the words “punished with imprisonment for life” shall be substituted by the words “punished with imprisonment for a term which may extend to 25 years” as the life imprisonment is equal to imprisonment for 25 years as mentioned in section 57 of the Pakistan Penal Code.

Section 53 of the Pakistan Penal Code prescribes that the imprisonment is of two descriptions, namely:-

- i. Rigorous i.e. with hard labour:
- ii. Simple:

Section 60 of the Pakistan Penal Code says that in every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

Therefore, in each section of the criminal law the punishment is prescribed whether it should be rigorous, simple, fine or of either description. Wherever the words “of either description” are mentioned in the section, the court is to exercise his discretion to award

rigorous or simple imprisonment as the case may be, keeping in view the gravity of the offence. It is observed that in sections 11, 13, 14, the description of the imprisonment whether it should be rigorous or simple has not been mentioned. It is, therefore also proposed that the specification of the punishment may also be mentioned in these sections to avoid any confusion in respect of awarding punishment by the courts for the offences under these sections.

Existing Punishment	Proposed Amendments
<p>Section 11.- Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit inter-course, or knowing it to be likely that she will be forced or seduced to illicit inter-course, <u>shall be punished with imprisonment for life</u> and with whipping not exceeding thirty stripes, and shall also be liable to fine and whoever by means of criminal intimidation as defined in the Pakistan Penal Code, or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit inter-course with another person shall also be punishable as aforesaid.</p>	<p>Section 11.- Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit inter-course, or knowing it to be likely that she will be forced or seduced to illicit inter-course, <u>shall be punished with imprisonment of either description for a term which may extend to 25 years</u> and with whipping not exceeding thirty stripes, and shall also be liable to fine and whoever by means of criminal intimidation as defined in the Pakistan Penal Code, or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit inter-course with another person shall also be punishable as aforesaid.</p>
<p>Section 13.- Whoever sells, lets to hire, or otherwise disposes of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit inter-course with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, <u>shall be punished with imprisonment for</u></p>	<p>Section 13.- Whoever sells, lets to hire, or otherwise disposes of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit inter-course with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, <u>shall be punished with imprisonment of</u></p>

<p>life and with whipping not exceeding thirty stripes, and shall also be liable to fine.</p>	<p><u>either description for a term which may extend to 25 years</u> and with whipping not exceeding thirty stripes, and shall also be liable to fine.</p>
<p>Section 14.- Whoever buys, hires or otherwise obtains possession of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit inter-course with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, <u>shall be punished with imprisonment for life</u> and with whipping not exceeding thirty stripes, and shall also be liable to fine.</p>	<p>Section 14.- Whoever buys, hires or otherwise obtains possession of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit inter-course with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, shall be punished with imprisonment <u>of either description for a term which may extend to 25 years</u> and with whipping not exceeding thirty stripes, and shall also be liable to fine.</p>

A
Bill

further to amend the Offence of Zina (Enforcement of Hudood) Ordinance, 1979

WHEREAS it is expedient further to amend the Offence of Zina (Enforcement of Hudood) Ordinance 1979 for the purposes hereinafter mentioned;

It is hereby enacted as follows:

1. **Short title and commencement.**- (1) This Act may be called the Offence of Zina (Enforcement of Hudood) (Amendment) Act, 2005.
(2). It shall come into force at once.

2. **Amendment of section 11, Ordinance VII of 1979.**- In the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 hereinafter referred to as the said Ordinance, in section 11, for the words “for life” the words “of either description for a term which may extend to 25 years” shall be substituted.

3. **Amendment of section 13, Ordinance VII of 1979.**- In the said Ordinance, in section 13, for the words “for life” the words “of either description for a term which may extend to 25 years” shall be substituted.

4. **Amendment of section 14, Ordinance VII of 1979.**- In the said Ordinance, in section 13, for the words “for life” the words “of either description for a term which may extend to 25 years” shall be substituted.

Commission's deliberation on 20.8.2005.

The above working paper was considered by the Commission in its meeting held on 20.8.2005 and the following are the deliberations :-

It was explained to the Commission that Sections 11, 13 and 14 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 provide fixed punishment of imprisonment for life to the accused of the offences falling under these sections which leave no discretion with the courts to award a lesser punishment where circumstances of the case and the extent of involvement of the accused in the offence so warrant and the conscious of the court is not satisfied to award punishment of imprisonment of life to an accused. Therefore, the courts, having no alternate enabling provision to award the accused lesser punishment, only acquit the accused in such cases. The Commission therefore, observed that the aforesaid sections 11, 13 and 14 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 may suitably be amended to provide some alternate punishment so that in appropriate cases lesser punishment can be awarded to the accused as per facts of the case and the degree of his participation in the crime. The Commission recommended that the punishment of imprisonment of life provided in the aforesaid sections may be substituted with the words "imprisonment of either description for a term which may be extended to 25 years".