

PAKISTAN LAW COMMISSION

NINTH REPORT

**REFERENCE RECEIVED FROM THE FEDERAL
GOVERNMENT ABOUT THE PROPOSED ORDINANCE
RELATING TO QANUN-E-SHAHADAT.**

**REFERENCE RECEIVED FROM THE FEDERAL
GOVERNMENT ABOUT THE PROPOSED ORDINANCE
RELATING TO QANUN-E-SHAHADAT.**

The Government of Pakistan, Ministry of Law, vide their letter No F.12(2)/83-Legis dated the 19th December 1983, forwarded a Report of the Committee on the Draft Evidence Ordinance 1983, and requested that comments of the Pakistan Law Commission on the said Report may be made available to the Government by the 29th December, 1983.

2. The Law Commission held a special Session for this purpose in Rawalpindi on the 21st and the 22nd December 1983, on which dates the Report of the Committee was examined in detail. Two Members of the Commission, namely, Mr S.Sharifuddin Pirzada, Minister for Law and Parliamentary Affairs and Mr Justice C.A.Rahman, Secretary to the Government of Pakistan, Ministry of Law and Parliamentary Affairs attended the meeting on the first day but did not participate in the discussions.

3. The Report of the Committee is enclosed as Annex.'A' and the proposed Qanun-e-Shahadat Ordinance 1983, as Annex. 'B'.

4. The Commission's unanimous recommendations in this regard are as follows: -

A. SECTION 2

In view of its observations in connection with Section 163, the Commission does not recommend substitution of the word "Oath" by the word "Yameen" as the later is

capable of being interpreted in more than one meanings while the word "Oath" is more commonly used and understood. The Commission recommends that Oath may be administered to Muslim witnesses in the following terms: -

"I swear by Allah Almighty that I will give true evidence and if I give false evidence, I would thereby invoke curse and wrath of Allah upon me".

The non-Muslim will, however, continue to be governed by the provisions of the Oaths Act 1873, in this respect. The proposed form of Oath should form part of the Ordinance itself, in the form of a schedule, if necessary.

B. SECTION 3

The Committee is not unanimous in its recommendations in respect of Section 3. Mr Justice Maulana Muhammad Taqi Usmani and Mr.Justice Dr.Tanzilur Rahman recommend that the second proviso to this section should suitably be amended, by deleting its portion authorising the Court to take evidence of other witnesses who may be available in case the witnesses qualified according to Shariah are not available. Alternatively, they suggest that the word "permissible in Shariah" may be added at the end of the second proviso. Mr.Justice Aftab Hussain and Mr.Justice Pir Karam Shah, do not agree with this proposal and suggest that the second proviso to this section may be split up in two parts, the first part authorising the Court to determine the competence of witnesses according to Shariah, and the other authorising the Court to take evidence of witnesses who may be available in the absence of witnesses qualified according to Shariah to testify.

The Commission does not support the amendments proposed by the Committee. The term 'Shariah' is likely to create confusion, as it includes Fiqh also and might, according to different schools of thought, lead to conflicting interpretations of legal provisions. The Commission, therefore, recommends: -

i) that the word "Shariah" occurring in this section may be substituted by the words "the Injunctions of Islam as laid down in the Holy Quran and Sunnah",

and

ii) after the first proviso regarding incompetence of a perjurer to testify, the following new proviso may be added, namely: -

"Provided further that the provisions contained in the preceding proviso shall not apply to the person about whom the Court is satisfied that he has repented thereafter and mend his ways."

The above amendment has been recommended in the light of the provisions of the Holy Quran in Surah Al-Nur (24:4,5) which read as follows: -

TRANSLATION:

"And those who launch a charge against chaste women, and produce not four witnesses, (To support their allegation), --flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors; Unless they repent thereafter and mend (their conduct): for Allah is Oft-Forgiving, Most Merciful,"(Abdullah Yousaf Ali).

C. SECTION 4:

Three Members of the Committee viz; Mr.Justice Maulana Muhammad Taqi Usmani, Mr.Justice Tanzilur Rahman and Mr.Justice Pir Muhammad Karam Shah recommend that the provisions of this section making the testimony of a dumb witness admissible, should not apply to the trial of cases under the laws relating to enforcement of Hudood, while Mr.Justice Aftab Hussain holds the contrary view. The Commission is, however, in agreement with the opinion expressed by the above named three Members as it is based on the principle followed by the Holy Prophet (PBUH), which is and recommends that a suitable proviso to that effect may be added to Section 4.

D. SECTIONS 6,10,11,12 AND 13:

According to Mr.Justice Maulana Muhammad Taqi Usmani and Mr.Justice Tanzilur Rahman, the later part of Section 6, preventing the disclosure of communication made during marriage without the consent of the party concerned amounts to encouraging concealment of evidence and should, therefore, be omitted. On the same ground they recommend the omission of Sections 10 and 13. The Commission, however, agrees with the views of Mr.Justice Pir Karam Shah and Mr.Justice Aftab

Hussain that Section 6 does not require any change and Sections 10 to 13, being based on public policy for the good of the Ummah, should be retained as they are.

E. SECTION 16:

Mr. Justice Maulana Muhammad Taqi Usmani and Mr. Justice Dr. Tanzilur Rahman suggest that the proviso to this section protecting the witnesses from arrest or prosecution in consequence of the answers which they may be compelled by the Court to give, should be omitted. Mr. Justice Pir Muhammad Karam Shah and Mr. Justice Aftab Hussain disagree with this view and suggest that this proviso should not be omitted. Since withdrawal of protection from the witnesses who are compelled by the Court to answer the questions put to them, will discourage them from giving true evidence, the Commission recommends that this section should remain as it is.

F. SECTION 17 AND ILLUSTRATION (b) OF SECTION 129

Mr Justice Maulana Muhammad Taqi Usmani and Mr Justice Dr Tanzilur Rehman suggest that Section 17 may be amended so as to make the corroborated testimony of an accomplice admissible against an accused person in cases liable to Tazir and recommend that illustration (b) to Section 129 may be omitted as being unnecessary on account of their proposed amendment to Section 17. Mr Justice Aftab Hussain, suggests that proviso to Section 17 as well as illustration (b) to Section 129 should be maintained subject to a clarification that they will apply to cases liable to Tazir only. The Commission does not agree with the proposed amendment of Section 17 or omission of illustration (b) to Section 129. It is, however, in agreement with the opinion of Dr Justice Tanzilur Rahman that provisions of Section 17 should not apply to Hudood cases. The

Commission, accordingly, recommends that after the word "person" occurring in Section 17, the words "except in Hudood cases" be inserted. The revised Section 17 should, therefore, read as follows: -

"17. Accomplice. - An accomplice shall be a competent witness against an accused person, except in Hudood cases; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice".

G. SECTION 18

The provisions of Section 18 along with the amendments proposed by the Committee were examined in detail. It appears that the text of Section 18 as mentioned in the Draft Ordinance is different from that reproduced in the summary passed by the Majlis-e-Shoora. The Committee recommends that Section 18 in the Ordinance be substituted by the same Section, as mentioned in the summary of the Majlis-e-Shoora, subject to certain amendments proposed by the Committee. The Commission, however, finds that Section 18 as contained in the Draft Ordinance is more comprehensive and should be retained with suitable amendment in Sub-section (2) thereof so as to bring it in line with the provisions of the Holy Quran contained in Surah Al-Baqar (2:282) which reads as follows:

TRANSLATION

"And get two witnesses, out of your own men, and if there are not two men; then a man and two women, such as ye choose for witnesses, so that if one of them errs, the other can remind her". (Abdullah Yousuf Ali).

It is, consequently, proposed that in sub-section (2) of Section 18, after the word "two women" the words "so that one may remind the other, if necessary, or one man" be inserted. The revised sub-section should read as under: -

"(2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law, the Court may accept, or act on the testimony of two men, or one man and two women, so that one may remind the other, if necessary, or one man, or one woman, or such other evidence as the circumstances of the case may warrant."

H. SECTION 43:

The Committee has recommended that in the proviso to Section 43, the words "under the laws relating to the enforcement of Hudood" be substituted by the words "liable to Hadd punishment". The Commission is, however, of the view that the expression "under the laws relating to enforcement of Hudood" is more comprehensive than the expression "liable to Hadd punishment". Moreover, the expression "Enforcement of Hudood" is calculated to express the real intention of the proposed statutory provision. The Commission consequently recommends that Section 43 may remain as it is.

I. SECTION 71:

The Committee has recommended that the words "and Qisas" may be added at the end of the section after the word "Hudood". Since the law of Qisas has not yet come into force, the proposed amendment appears to be premature and should be considered only after the Law of Qisas has been promulgated.

J. SECTION 128:

The Commission does not agree with the recommendation of the Committee as to the addition of a proviso to this section relating to lian. The procedure of `lian' as laid down in Surah Al-Nur, is to be followed only where either of the spouses accuses the other of "zina". Since specific provisions in this respect already exist in the Offence of Qazaf (Enforcement of Hadd) Ordinance, 1979, it need not be repeated in the proposed Ordinance, as it relates to substantive law.

Although the Commission is not at this stage required to examine the existing provisions of Section 128, yet the Members are unanimously of the view that the provision relating to legitimacy of a child within two years after dissolution of his parent's marriage, the mother remaining unmarried, is neither based on the Holy Quran or Sunnah nor on any physical possibility. Continuity of a pregnancy for two years is physically and medically impossible and the provision, at present included in the proposed Ordinance, will certainly encourage immorality and create serious complications in the matters of inheritance.

K. SECTION 130:

The Commission is of the view that no amendment is necessary in Section 130. It has further suggested that a provision may be made in the Law of Qisas, that at the time of trial the statement of claimant for Qisas should be recorded first. The Commission agrees with the opinion of the Committee that Section 130 does not require any amendment. The Committee's recommendation relating to Law of Qisas should, however, be considered when the law relating to Qisas and Diyat is promulgated.

L. SECTION 151:

The Committee has recommended that after Clause 4, in Section 151, allowing a person, accused of rape of attempt to ravish, to show that the prosecutrix was of generally immoral character, a proviso may be added to the effect that this right would be subject to the provisions of Offence of Qazaf (Enforcement of Hadd) Ordinance, 1979. The Commission considers that in view of the provisions contained in the above mentioned Law of Qazaf the addition of a proviso to Section 151, as proposed by the Committee, is not called for, as the remedy is available to the aggrieved party under substantive law.

M. SECTION 163:

The Committee has suggested: -

- i) that the word "Oath" used in Section 163
be substituted by the word "Yameen",
and

ii) in the proviso to sub-section (1), the words "in any law relating to the enforcement of Hudood" may be substituted by the words "punishable by Hadd".

In view of the observations already made by the Commission while discussing Sections 2 and 43 the proposed amendments do not appear to be desirable.

N. ADDITION OF A NEW SECTION RELATING TO INTERPRETATION:

Mr Justice Maulana Muhammad Taqi Usmani and Mr. Justice Dr.Tanzilur Rahman suggest that a new section may be added to the Ordinance, the Court shall be guided by the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet (PBUH). This suggestion is, however, opposed by Mr.Justice Pir Muhammad Karam Shah and Mr.Justice Aftab Hussain on the ground that, firstly the Ordinance does not deal with the principles of interpretation; and secondly that the Ordinance, which is exhaustive in nature, has already been made in accordance with the Injunctions of Islam as laid down in the Holy Quran and Sunnah. The Commission finds itself in agreement with the view of Mr.Justice Pir Karam Shah and Mr.Justice Aftab Hussain, that addition of a new section is not called for.