

Chapter 4 Part IX

Sections of the CILS Harmonised Sharia Penal Code Omitted in the Penal Code of 1960

1. Summary. The CILS Harmonised Sharia Penal Code (HSPC) is divided into 414 sections. Of these, 36 are omitted from the Penal Code (PC) outright (i.e., they do not seem to be covered, even impliedly, by other PC sections), and 10 more are left out by virtue of the collapsing of distinctions made in HSPC but not in PC. By this calculation 368 out of 414, or 89% of HSPC sections are included in the PC.

2. HSPC sections omitted outright from PC.

A. Definitions.

40. The word “genital” includes the vagina and the rectum.
41. The word “*zina*” includes adultery and fornication.
42. The word “married” means having ever consummated a valid marriage, such consummation not being done whilst in a state of fasting or seclusion thereof (*i'tikaf*), or in a state of ritual consecration of pilgrimage (*ihram*), or in a state of menstruation.
43. The words “*sadaq al-mithli*” denote the dower due to brides within the same social, educational and family background.
44. The word “*rajm*” means the penalty of stoning or pelting to death of a Muslim convicted for the offence of “*zina*”, rape, incest or sodomy.
45. The word “*hirz*” denotes any location, place or means that is customarily understood to represent safe keeping or custody or protection.
46. The word “*nisab*” denotes the minimum amount of property, or its value not below a quarter of a *dinar* or three *dirhams* which, if stolen, shall attract *hadd* punishment.
47. The word “*taklif*” denotes the age of attaining legal and religious responsibilities.
48. The word “*mukallaq*” denotes a person possessed of full legal and religious capacity.
49. The words “*waliyy al-damm*” include male agnatic heirs, daughters, full sisters, paternal aunts and consanguine sisters.
50. The words “*qatl al gheelah*” denote the act of luring a person to a secluded place and killing him to take away his property.
51. The word “*wa'aq*” denotes admonishing a person who has committed an offence.
52. The word “*tashbeer*” denotes public disclosure of a person convicted of an offence.
53. The word “*bajar*” denotes social boycott of the offender by the public.
54. The word “*al-musadarah*” denotes confiscation of property owned by the offender.
55. The word “*ghurrah*” denotes compensation which is paid in respect of causing miscarriage of fetus.
56. The word “*ta'azir*” denotes any punishment applied or fixed by the State for an offence the punishment of which is not specified by way of *hadd* or *qisas*.
57. The word “*hudud*” denotes offences or punishments that are fixed under the Sharia and includes offences or punishments as provided under sections 125, 126, 127, 128, 129, 130, 131, 132, 138, 139, 143, 144, 148, 150, 151, 152 and 341 of this law.
58. The word “*qisas*” includes punishments inflicted upon offenders by way of retaliation for causing death/injuries to a person.
59. The word “*tawbikb*” denotes a severe rebuke or reprimand for misdemeanours.

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60. The word “*diyyah*” denotes a fixed amount of money paid to a victim of bodily hurt or to the deceased's legal heirs in homicide cases.
61. The word “*hukumab*” denotes the amount of compensation short of *arsb* payable to a victim of bodily injuries of unspecified quantum, based on the discretion of the court.
- B. Basic criminal responsibility.
64. (1) There shall be no criminal responsibility except upon a *mukallaf*.
(2) There shall be no criminal responsibility unless an unlawful act or omission is done intentionally or negligently.⁷²⁸
- C. Non-voluntary act; act of necessity.
80. No act is an offence which is done by a person involuntarily and without the ability of controlling his act by reason of act of God or sudden illness which makes him incapable of avoiding that act.
81. It shall not be an offence if an act is done by a person who is compelled by necessity to protect his person, property or honour, or person, property or honour of another from imminent grave danger which he has not wilfully caused or wilfully exposed himself or other persons to and which he or that other person is not capable of avoiding.
- D. Presumption of right of *diyyah*, damages etc.
83. Nothing contained in the provisions of sections 66–81 shall prejudice the right of *diyyah* or damages in appropriate cases.
- E. Punishment for misdemeanours; closure of premises.
101. A sentence of reprimand (*tawbikib*), or warning (*tabdid*), exhortation (*wa'az*) or boycott (*hajar*) may be passed by any court whether trying the case summarily or otherwise on any offender in lieu of, or in addition to any other punishment to which he might be sentenced for any offence not punishable with death, or offences falling under *hudud* or *qisas*.
103. The court may order the closure of any premises used in conducting in any way any business in contravention of the provisions of this law for a period of not less than one month and not exceeding one year.
- F. False accusation of *zina* (*qadhif*)
138. Whoever by words either spoken or reproduced by mechanical or electronic means or intended to be read or by signs or by visible representations makes or publishes any false imputation of *zina* or sodomy concerning a chaste person or contests the paternity of such person even where such person is dead, is said to commit the offence of *qadhif*.

⁷²⁸ See also HSPC §72: “No act is an offence which is done: (a) by a child under seven years; or (b) in cases of *hudud* and *qisas*, by a child below the age of *taklif*.” Compare PC §50: “No act is an offence which is done: (a) by a child under seven years of age; or (b) by a child above seven years of age but under twelve years of age who has not attained sufficient maturity of understanding to judge the nature and consequence of such act.”

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Provided that a person is deemed to be chaste who has not been convicted of the offence of *zina* or sodomy.

139. Whoever commits the offence of *qadhf* shall be punished with caning of eighty lashes.
140. The offence of *qadhf* shall be remitted in any of the following cases:
- (a) where the complainant (*maqdbuf*) pardons the accuser (*qadhf*)
 - (b) where a husband accuses his wife of *zina* and undertakes the process of mutual imprecation (*li'an*);
 - (c) where the complainant (*maqdbuf*) is a descendant of the accuser (*qadhf*).

G. Punishment for dealing in alcoholic drinks.

149. Whoever prepares alcohol by either manufacturing, pressing, extracting or tapping whether for himself or for another; or transports, carries or loads alcohol whether for himself or for another; or trades in alcohol by buying or selling or supplying premises by either leasing or storing or leasing out premises for the storing or preserving or consumption or otherwise dealing or handling in any way alcoholic drinks or any other intoxicant shall be punished with caning which may extend to forty lashes or with imprisonment for a term which may extend to six months or with both.

H. Punishment for unintentionally causing grievous hurt.

220. Whoever unintentionally causes grievous hurt to any person shall be punished with the payment of *diyyah* under schedule B of this law.

I. Invasion of privacy

371. Whoever invades the privacy of any person by prying into his house without his permission or without lawful justification, to eavesdrop on him or read his letters or discover his secrets, shall be punished with imprisonment for a term which may extend to one year or with fine and in either case with caning which may extend to twenty lashes.

J. Power to order forfeiture of lottery equipment, proceeds, etc.

398. On conviction of an offence under section 396 or section 397 the court may in addition to any other penalty, make an order for the forfeiture of all equipment, instruments, money or money's worth and proceeds obtained and used in furtherance of the offences mentioned in sections 395 to 397 of this law.

K. Blasphemous acts, utterances, etc.

406. (1) Whoever by any means whatsoever intentionally abuses, insults, derogates, humiliates or seeks to incite contempt of the holy Prophet Muhammad (S.A.W.) or his prophethood or any other prophet of Allah recognised by the religion of Islam shall be punished with death.
- (2) Whoever destroys, damages or defiles the Holy Qur'an in whatever form or manner with the intention, thereby, of insulting, humiliating, derogating or disrespecting the Holy Qur'an or the religion of Islam or with the knowledge that Muslims are likely to consider such utterances or acts as insulting, abusive, derogatory to the Holy Qur'an or the religion of Islam, shall be punished with death.

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3. HSPC sections omitted from PC by virtue of collapsing of distinctions made in HSPC but not PC. In sum: same ground covered, but in fewer sections.

A. Sodomy, lesbianism, and bestiality. HSPC has 6 sections, the ground of which is covered in 1 in PC:

HSPC:

- 129 Sodomy defined
- 130 Punishment for sodomy
- 133 Lesbianism defined
- 134 Punishment for lesbianism
- 135 Bestiality defined
- 136 Punishment for bestiality

PC:

- 284 Unnatural offences

B. Definition of theft. HSPC has 3 sections, the ground of which is covered in 1 in PC:

HSPC:

- 143 Theft punishable with *hadd* defined
- 145 Theft not punishable with *hadd* defined
- 146 Remittance of the *hadd* for theft

PC:

- 286 Theft defined

C. Punishment for homicide. HSPC has 2 special sections making distinctions among homicides that are not included in PC:

HSPC:

- 202 *Walīyy al-damm* causing death of suspect:

“Whoever being a *walīyy al-damm* of a deceased person causes the death of the suspect alleged to have killed the deceased shall be punished:

- (a) with imprisonment for a term of six months and shall also be liable to caning which may extend to fifty lashes, if it was proved that the person killed was the one who caused the death of the deceased; or
- (b) where it was not proved that the suspect was the one who caused the death of the deceased, or it was proved that the death of the deceased was caused by the suspect but with legal justification the *walīyy al-damm* shall be deemed to have committed intentional homicide punishable under section 199.”

- 411 Causing death by witchcraft of juju:

“Whoever with intent does any act of witchcraft or juju which causes the death of a human being shall be punished with death.”

D. Punishments for kidnapping and abduction: HSPC has 2 sections, the ground of which is covered in 1 by PC:

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HSPC:

231 Punishment for kidnapping

232 Punishment for abduction

PC:

273 Punishment for kidnapping (also covering abduction)

Note: HSPC apparently splits the sections because in its section on punishment for kidnapping, it varies the punishment depending on the age of the person kidnapped: if the person is under seven years of age, the kidnapper is “punished under section 144 for the offence of theft punishable with *badd*.”