HER HONOUR: AN ISLAMIC CRITIQUE OF THE RAPE PROVISIONS IN PAKISTAN'S ORDINANCE ON ZINA

ASIFA QURAISHI*

INTRODUCTION

When the Western world encounters Islamic law, it tends to misunderstand and misrepresent it, often drawing conclusions which belittle the *Shar’ah*. These misrepresentations constitute a disservice to Islam and its rich legal heritage. It is far worse, however, when because of these misrepresentations or because of any other reasons Muslims themselves tend to misunderstand or misapply their own Islamic law. This, unfortunately, seems to have occurred in Pakistan in the case of "The Offence of Zina (Enforcement of Hudood) Ordinance, No.VII of 1979" (hereinafter referred to as the Ordinance on Zina) and its application to rape cases.

It is well known that the Qur’ān declares extramarital sex, *zinā*, both a sin and a criminal offence. It is also well known that the Qur’ān's requirements to prove *zinā* are extremely stringent: four eyewitnesses to the act are required and any number less than four are punished for slander. The Ordinance on *Zina* of 1979 follows this *Shar’ah* guidance, setting forth *zina* as a prosecutable crime upon proof of four eyewitnesses. But it also includes "*zina-bil-jabr*" ("*zina* by force") or rape, under the same statute, thus also requiring four eyewitnesses to prove a rape assault. Is this the *Shar’ah* law on rape? As this article will demonstrate, a careful examination of Islamic law indicates that Pakistan may have unwittingly

---

*Asifa Quraishi, LL.M., Columbia University (Comparative Constitutional Law and Philosophy) (1998); J.D., University of California, Davis, CA (1992); Member, California Bar; presently Acting Coordinator of Special Academic Projects, Islamic Legal Studies Program, Law School, Harvard University, Cambridge, MA, USA.*
misapplied Islamic law in its own Ordinance on Zina, ironically leading to injustices which the Sharī'ah seeks to avoid.

Rape was never treated as a subcategory of zinā in the traditional Sharī'ah texts. Where it does appear is in two completely separate legal categories: the laws of ĥirābah (violent taking) and jirāh (wounds). Thus, the violent nature of rape, which is quite different from the act of zinā committed by the consent of the two parties, is recognized in the Sharī'ah as the crime of a different category. This is evident from the fact that rape is considered one of the violent acts which fall under the category of ĥirābah. As a consequence, the crime of rape as ĥirābah is prosecuted according to normal evidentiary rules and four eyewitnesses are not required. Moreover, the Sharī'ah goes even further. Recognizing the physical harm resulting from rape, it provides a civil remedy to the victim in the form of financial compensation for jirāh.

Pakistan's 1979 Ordinance on Zina, however, does not draw from this Islamic legal heritage of ĥirābah and jirāh. Instead, it subsumes rape as a type of zina ("zina-bil-jabr"), resulting in a misapplication of the stringent Islamic evidentiary rules for zinā to a category of crime never meant to be included under it. Moreover, the above Ordinance's section on rape reads more like the old British common law than the Sharī'ah from which it is supposed to be derived. The language of the "zina-bil-jabr" section is virtually identical to the British common law rape statute, the criminal law in Pakistan before the promulgation of the Hudood Ordinances. This is an unfortunate backward step in legal evolution. As legal scholars in the West have recently realized, Western treatment of the crime of rape is built on the ancient notions of women as property rather than perceived as violent assault which it is. Even now, legal reformers in places like the United States are struggling to update the law of rape to fit with the current notions of decency and personal autonomy. The Sharī'ah, on the other hand, recognized rape centuries ago not as a taking of male property but rather as a seriously violent act of ĥirābah, and thus attached grave punitive consequences upon its conviction. Moreover, the Sharī'ah provisions of jirāh provide rape survivors with a civil remedy for their ordeal, reflecting the personal hurt caused by rape in addition to the fact that it is regarded as a criminal offence to the state.

This article critiques the Pakistan Ordinance on Zina in light of the traditional Sharī'ah treatment of zinā, with special attention to the crime of rape. It concludes with a suggestion as to how Pakistan might amend its Hudood Ordinances to reflect the true Islamic law rather than inappropriately importing inferior common law provisions in place of the Sharī'ah laws on rape based on justice. With the suggested amendments, Pakistan's law of rape could stand as a positive example of Islamic law in
the modern world, a law which — contrary to popular Western perceptions — firmly seeks to affirm and protect the autonomy of women.

CRITIQUE OF THE ORDINANCE ON ZINA

A. The Ordinance on Zina and its Application in Pakistan

In 1977, under President Zia-ul-Haq, Pakistan enacted the "Hudood" Ordinances, ostensibly to bring the laws of Pakistan into "conformity with the injunctions of Islam". These Ordinances, setting provisions for crimes such as theft, adultery, slander, and alcohol consumption, became effective in February 1979. The "Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979" criminalizes "zina", or extramarital sexual relations. The Ordinance states:

A man and a woman are said to commit 'zina' if they wilfully have sexual intercourse without being validly married to each other.

Zina is liable to hadd [punishment] if

(a) it is committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be married; or

(b) it is committed by a woman who is an adult and is not insane with a man to whom she is not, and does not suspect herself to be married.4

Under its heading of zina, the Ordinance includes the category "zina-bil-jabr" ("zina by force") which lays out the definition and punishment for sexual intercourse against the will or without the consent of one of the parties. The section pertaining to the crime of rape, as zina-bil-jabr, states:

A person is said to commit zina-bil-jabr if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely:-

a) against the will of the victim;

b) without the consent of the victim;

c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt; or
d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

*Explanation.* — Penetration is sufficient to constitute the sexual intercourse necessary to the offence of *zina-bil-jabr*.

*zina-bil-jabr* is liable to *hadd* if it is committed in the circumstances specified [above].

Finally, the Ordinance lays down the evidence required to prove both *zina* and *zina-bil-jabr*:

Proof of *zina* or *zina-bil-jabr* liable to *hadd* shall be in one of the following forms, namely:

a) the accused makes before a court of competent jurisdiction a confession of the commission of the offence; or

b) at least four Muslim adult male witnesses, about whom the court is satisfied, having regard to the requirements of *tazkiyah al-shuhood* [credibility of witnesses], that they are truthful persons and abstain from major sins (*kabair*), give evidence as eyewitnesses of the act of penetration necessary to the offence.

The placement of rape as a subcategory of *zina* in the Ordinance has raised questions about the justice of the Islamic law as embodied in the provisions of this Ordinance. That is, cases have arisen in which a woman's charge of *zinā bi'l-jabr* fails for lack of four witnesses; moreover, when force is not proven, sometimes it is concluded (especially if a pregnancy results), that the intercourse was, therefore, committed with the consent of the parties. Since pregnancy clearly indicates that sexual intercourse took place, and for sure the pregnant woman was certainly one party in the act, the woman who was, in fact, the victim of the brutal offence of rape is charged with *zinā*.

Some significant cases were widely reported in the Western press. For example, in 1982, fifteen-year-old Jehan Mina became pregnant as a result of a reported rape. Lacking the testimony of four eyewitnesses that the intercourse was in fact rape, Jehan was convicted of *zina* on the evidence of her illegitimate pregnancy. Later, a similar case caused public outcry and drew public attention to the new law. In 1985, Safia Bibi, a sixteen-year-old nearly blind domestic servant reported that she was repeatedly raped by her landlord/employer.
and his son, and became pregnant as a result. When she charged the men with rape, the case was dismissed for lack of evidence, as she was the only witness against them. Safia, however, being unmarried and pregnant, was charged with *zina* and convicted on this evidence. Short of conviction, women have also been held for extended lengths of time on charges of *zina* when they alleged rape. For example, in July 1992, Shamim, a twenty-one-year-old mother of two complained that she was kidnapped and raped by three men in Karachi. When a rape complaint was lodged against the perpetrators, the police arrested Shamim instead, and charged her with *zina*, and the perception is that this was done because the family of the victim did not or could not bribe those who mattered. The police held her in custody for six days, during which she reports that she was repeatedly raped by two police officers and a third unnamed person. There have been numerous reports of such custodial rapes.

Police action and inaction in rape cases in Pakistan have in fact been widely reported as an instrumental element to injustice. There is evidence that police have deliberately failed to file charges against men accused of rape, often using the threat of converting the rape charge into a *zina* prosecution against the female complainant to discourage women from reporting. Whenever the perpetrator of this offence is a police officer himself, the chances of pursuing a case against him are nearly non-existent. Shahida Parveen faced this very situation when she reported that in July 1994 two police officers broke into her house and locked her children in a room while they raped her at gunpoint. A medical examination confirmed that she was raped by more than one person, but the police refused to register her complaint.

Cases such as these resulting from the unfortunate misapplication of the Ordinance on *Zina* are widely reported in the Western media. The issue is now a primary topic in global women's and human rights discussions, and is a primary argument in accusations that Islam and its *Sharī'ah* lead to oppression of women. The resulting global debate and propaganda surrounding it, however, rarely addresses the central question: What is the Islamic law of rape? Any real substantive analysis of the *zinā* *bil-jabr* law and its application must first approach it from this framework — the same framework upon which the law is supposed to be based. This article will, therefore, ask the critical question: Does Pakistan's Ordinance on *Zina* accurately articulate the Islamic law of rape?

**B. Law of God: The Qur'ān on Zinā**

As pointed out earlier, the Pakistani Ordinance on *Zina* subsumes rape — as *zina-bil-jabr* — under the general law of unlawful sexual relations. To analyze the appropriateness of this categorization, we must
first analyze the Islamic law regarding zinā. The preamble of the Pakistan Ordinance on Zina states that it is enacted "to modify the existing law relating to zina so as to bring it in conformity with the Injunctions of the Holy Qur'ān and Sunnah". Indeed, the term zinā itself appears in the Qur'ān. Sounding a general warning against the dangers of adultery, the Qur'ān states: "And do not go [even] near fornication (zinā) as it is immoral and an evil" (17:32) Elsewhere, the Qur'ān more specifically sets out actual legal prescriptions criminalizing illegal sexual relations:

The adulteress and adulterer should be flogged a hundred lashes each, and no pity for them should deter you from the law of God if you believe in God and the last day; and the punishment should be witnessed by a body of believers (24:2).

Following this definition of the offence are extremely strict evidentiary rules for the proof of such a crime:

Those who defame chaste women and do not bring four witnesses should be punished with eighty lashes, and their testimony should not be accepted afterwards, for they are profligates (24:4)

Thus, after criminalizing extramarital sexual relations, the Qur'ān simultaneously attaches to the prosecution of this crime nearly insurmountable evidentiary restrictions: four eyewitnesses are required to prove a charge of unlawful intercourse.

Islamic jurisprudence further interprets the evidentiary rules laid down by the Qur'ān to establish the charge of zinā — quadruple testimony affirming the actual act of sexual intercourse, and nothing less. This interpretation is based on a ḥadīth of the Prophet Muḥammad (peace be on him). According to this ḥadīth, after a man persisted in confessing to adultery, the Prophet (having turned him away to avoid hearing the information several times before), asked several specific questions to confirm that the act had truly been performed. Moreover, the Islamic law of evidence requires the witnesses to be mature, sane, and of upright character. Furthermore, if any eyewitness testimony was obtained by violating a defendant's privacy, it is inadmissible. And lastly, according to The Hedaya, a key reference work of Hanafi jurisprudence and a prominent legal work which has been the major source of Muslim law in India, even a statute of limitations is set for charging someone with zinā.

Why should there be so many evidentiary restrictions on a criminal offence prescribed by God? Muslim scholars posit that it is precisely to minimize worldly punishment for this sin. That is, it is clear from
the Qur'ānic prohibition of *zinā* that extramarital sex is a serious transgression against the law of God, but the evidentiary hurdles dictate that the role of the state in prosecuting this crime in the worldly realm should be quite limited. Conviction is limited to only those cases where four individuals actually saw the sexual act to have taken place. In essence, the crime will realistically be punished only if the two parties are committing the act in public and are naked. That is, even if four witnesses saw a couple having intercourse, but, for example, under a cover, this testimony would not only fail to support a *zinā* charge, but these witnesses would also be liable for slander. Thus, while the Qur'ān clearly condemns extramarital sex as an evil, it authorizes the Muslim legal system to prosecute someone for committing this crime only when it is performed so openly that four people can see the culprits without invading their privacy. As a result, *zinā* is prosecutable by the state only when it is a public act of indecency. As Cherif Bassiouni puts it, "the requirement of proof and its exigencies lead to the conclusion that the policy of the harsh penalty is to deter public aspects of this form of sexual practice".

This analysis is consistent with the tone of the Qur'ānic verses which immediately follow the verses on *zinā* quoted above. After the verses establishing the crime and the attendant standards of proof, the Qur'ān states:

> Those who spread lies were a clique among you. Do not think it was bad for you: In fact it has been good for you. Each of them will pay for the sin he has committed, and he who had greater share (of guilt) will suffer grievous punishment.

> Why did the faithful men and women not think well of their people when they heard this, and (say) "This is a clear lie"?

> Why did they not bring four witnesses (in support of their charge)? And since they did not bring the four witnesses, they are themselves liars in the sight of God.

> Were it not for the grace of God and His mercy upon you in this world and the next, you would have suffered a great affliction for the false accusation.

> When you talked about it and said what you did not know, and took it lightly — though in the sight of God it was serious —

> Why did you not say when you heard it: "It is not for us to speak of it? God preserve us, it is a great calumny!"

> God counsels you not to do a thing like this, if you are believers (24:11-17).
The Qur‘ān's call to respond to charges of sexual misconduct with "it is not for us to speak of" echoes the ḥadīth in which the Prophet Muḥammad (peace be on him) was reluctant to take even a man's confession of adultery. The Qur‘ān contemplates a society in which one does not engage in publicizing others' sexual indiscretions.

Placing these Qur‘ānic verses into context will further emphasize the importance of this concept in Islamic law, and in particular, its close connection to the dignity of women. The verses setting forth the crime of zinā and the accompanying verses denouncing public discussion of the matter were revealed just after the famous "Affair of the Necklace", in which the Prophet Muḥammad's wife, `Ā'ishah, was mistakenly left behind a caravan in the desert when she went looking for a lost necklace. She returned with a young single man who saw her and gave her a ride back to the camp. Rumours of `Ā'ishah's time alone with this man spread quickly throughout the small town of Madīnah, until the above verses finally ended the gossip. Thus, the very revelation of these verses was prompted by an incident involving attacks on a woman's dignity — `Ā'ishah's honour. Indeed, the verse setting forth severe punishment for slander is directed specifically against charges impugning a woman's chastity. It says: "Those who defame chaste women, and do not bring four witnesses, should be punished with eighty lashes, and their testimony should not be accepted afterwards ...." (24:4. Emphasis added).

It is significant that men have not been directly and specifically mentioned here, which shows the importance given to protecting the honour and good reputation of women. (This, however, does not detract from the fact that in Islamic law defaming men is also a sin and calls for the same punishment.)

Why, one might ask, is the focus on women? Looking at the issue from a cultural perspective, this focus is not surprising. In nearly every culture of the world, women's sexual morality appears to be a particularly common subject for slander, gossip, and insult. The tendency of patriarchal societies, in fact, is to view a woman's chastity as central to the honour of her family, especially of the men in her family. For example, under the British common law (the law in Pakistan before the Hudood Ordinance), rape was a crime punishable against men, to be lodged by the husband of the woman, against the man who violated her. The woman's place in the common law of rape was apparently on the sidelines of a prosecution by her husband against her rapist. Similarly, personal revenge against women suspected of some sort of infidelity or some other social embarrassment manifested in such acts as "honour killings" or "bride
burnings" also depicts an attitude that women's honour is the dispensable property of others.

The Qur'an, however, has harsh words for such attitudes towards women's autonomy and violent action against them based solely on suspicion without due judicial process or proof. As if anticipating the suspicious tendencies of society, the Qur'an first establishes that there is to be no speculation about a woman's sexual conduct. No one may cast any doubt upon the character of a woman except by formal charges, with very specific, secure evidence (i.e. four eyewitnesses to actual intercourse) that the woman is disrupting public decency with her behaviour. If such direct proof does not come by, then anyone engaging in such a charge is subject to physical punishment for slander. For even if the information is true, any witness who is not accompanied by another three will be punished for slander. As for the public at large, they must leave her alone, regardless of the outcome. Where the public refuses to perpetuate rumours of zinā, responding instead that: "it is not for us to speak of" (Qur'an, 24:16-17), the tendency to suspect the honour of women without proof loses force. In the face of any hint of a woman's sexual impropriety, the Qur'anic response is: Walk away. Leave her alone. Leave her dignity intact. The honour of a woman is not someone else's property; it is her fundamental right.

Pregnancy as Proof of Zinā?

Given the Qur'an's strict standard of proof for a zinā case, one might now wonder whether the conviction of women like Jehan Mina and Safia Bibi for zinā on the evidence of their pregnancy alone could be justified by Islamic law. As it turns out, in traditional Islamic jurisprudence, the majority opinion — including that of the Ḥanafi and Shāfi`i schools of law — is that pregnancy is not sufficient evidence alone to prove zinā, based on the fact that the Qur'an specifies nothing less than four eyewitnesses, and the fundamental principle of Islamic criminal procedure that the benefit of doubt lies with the accused.

A minority of Muslim scholars have held that pregnancy does amount to the proof of illegal sexual relations if the woman is unmarried and has not claimed rape. Mālik, and reportedly also Aḥmad ibn Ḥanbal, for example, considered unmarried pregnancy prima facie a sufficient evidence of zinā. This opinion is based in large part on the reported positions of the three famous caliphs, `Umar ibn al-Khaṭṭāb, `Uthmān ibn `Affā, and `Alī ibn Abī Ṭālib, that "adultery is public when pregnancy appears or confession is made". The difference of opinion is also due to differing interpretations of the role of circumstantial evidence in hudūd cases. The rationale that "adultery is public with pregnancy" causes some
practical problems which the majority view (viz. that pregnancy alone does not prove zinā), avoids. For example, it does not take into account the modern medical advancements such as artificial insemination, which might be an alternative explanation for pregnancy, not to mention pure force. More substantively, it unfairly places the burden of proof upon women — especially raped women — who were unlucky enough to have become pregnant. Forced to prove that the intercourse was nonconsensual in order to avoid a zinā prosecution, a woman is automatically put in the position of defending her honour against accusations which do not meet the Qur’ānic four-witness requirement. This unfairness does not seem to be supported by the spirit of the Qur’ānic verses which discourage presumptions about a woman’s sexual activity by insisting that no presumptions be made about women’s sexual activity without four witnesses to the actual act.43 When the pregnancy resulted from rape rather than adultery, the injustice resulting from the view that pregnancy alone proves zinā becomes even more patent: pregnant rape victim is forced to defend herself against a zinā prosecution, whereas her rapist escapes suspicion and criminal prosecution altogether.

Pregnancy is something which only applies to women. If pregnancy alone constitutes sufficient evidence of zinā, the result seems to ignore that the very purpose of the verses on zinā is to protect women’s honour. As discussed earlier, women tend to be more vulnerable to suspicion and accusation, and the Qur’ān addresses this susceptibility directly by enjoining any charges against women without solid proof.44 If pregnancy is allowed as sufficient proof of zinā, a pregnant adulteress or rape victim might be convicted without any testimonial proof, while her adulterous partner or rapist escapes punishment with his reputation intact. The woman-affirming spirit of the verses on zinā is lost.

C. Drafting Mistakes in the Ordinance on Zina

1. Rape as a Type of Zinā

As we have seen, the Qur’ānic verses regarding zinā do not address the concept of nonconsensual sex. This omission is a logical one. The verses on zinā establish a crime of public sexual indecency. Rape, on the other hand, is a very different crime. It is a reprehensible act which the society has an interest in preventing whether or not it is committed in public. Therefore, rape does not logically belong as a subset of the public indecency to the crime of zinā. Unfortunately, however, the Ordinance on Zina seems to run exactly counter to this Qur’ānic omission and it includes zina-bil-jabr (zina by force) as a subcategory of the crime of zinā.45
Where did the zina-bil-jabr section in the Ordinance come from, then, if it is not part of the Qur'anic law on zinā? We will see later that in Islamic jurisprudence addressing zinā, there is significant discussion of whether there is liability for zinā under duress.46 But the language of the zina-bil-jabr section in the Pakistani Ordinance does not appear to be drawn from these discussions. That is, it is not presented as an exception to zinā in the case of duress. Rather, the language of the zina-bil-jabr section is nearly identical to the language of the old common law of rape in Pakistan, the borrowed British criminal law in force in Pakistan before the Hudood Ordinance. Specifically, the old common law rape statute in Pakistan reads:

A man is said to commit "rape" who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

First – Against her will.

Secondly – Without her consent.

Thirdly – With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly – With her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly – With or without her consent, when she is under [fourteen] years of age.

Explanation – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.47

With the exception of the statutory rape section (under "Fifthly"), the language specifying what constitutes rape is almost identical to the zina-bil-jabr language under the Hudood Ordinance. Even the explanation that penetration is sufficient to constitute the necessary intercourse is the same. This apparent intention to retain rape as a crime under the new Islamization of Pakistan's laws is a laudable one. But the reenactment of the old secular law of rape under the Muslim heading of zinā (as zinā by force), along with the four-witness evidentiary rule unique to zinā, results in an inaccurate application of Islamic criminal law, with devastating consequences to victims of rape as well as to the integrity of the Sharī'ah.
2. Suspicion and Zinā Adjudication

Laws on rape in the West have long reflected cultural patriarchal assumptions about female sexuality and consent. A frequent casualty in rape trials is the rape victim's reputation as the court attempts to sort out the issue of consent. This problem is exacerbated in Pakistan because the convoluted placement of rape as part of the Ordinance on Zina encourages the use of a woman's unsuccessful claim of rape as some sort of default evidence of zinā. Thus, there is a strong tendency to suspect any charge of rape to be a "loose woman's" attempt to escape the punishment for zinā. This bias also manifests itself in conclusions that a given sexual encounter must have been consensual if there is no physical evidence of resistance by the woman (another issue familiar to rape law reformers in the West). Many Pakistani judgements of rape have been converted into zina cases because there is no evidence of such resistance. This stereotypical concept of women presumes that if a woman does not struggle against a sexual assault, then she must be a sexually loose woman — justifying a conversion of the charge to zinā. This attitude unfairly generalizes human reaction to force and the threat of violence. It also works to the detriment of women who have been subjected to a rapist's attack and survived only by submitting without putting up any physical resistance.

Ironically, this is exactly the type of speculation regarding women's sexual activity which the Qur'ān explicitly condemns in the very verses establishing the crime of zinā (24:11-17). Judicial and social speculation about women's sexual looseness clearly does not comply with the Qur'ānic admonition that "it is not for us to speak of". The intertwining of rape with zina in the Pakistani Ordinance, however, encourages such speculation. Rather than constituting a separate violent crime against women, rape — under the title of zina-bil-jabr — is perceived more as a woman's expected defence to a zinā charge and thus subject to judicial speculation.

3. Zinā as Taʿzīr

Islamic criminal law acknowledges two categories of crime and punishment. The first, known as hudūd, encompasses crimes, the punishment whereof is specifically articulated by God in the Qur'ān and through the Ḥadīth. Islamic jurisprudence acknowledges, however, that society may legislate additional crimes and punishments as needed. These societally legislated crimes and punishments are called "taʿzīr". Taʿzīr crimes can sometimes carry much lighter evidentiary or sentencing schemes than the hudūd crimes. In Pakistan, when the strict quadruple
witness standard of proof is difficult to meet, it has become increasingly common for zinā cases to be prosecuted as taʾzīr crimes as opposed to hudūd crimes. The Ordinance on Zina includes a clause providing for taʾzīr prosecutions of zina where there is insufficient evidence:

*Zina or zina-bil-jabr liable to taʾzīr.*

... Whoever commits *zina* or *zina-bil-jabr* which is not liable to *hadd*, or for which proof in either of the forms mentioned ... [i.e. confession or four witnesses] is not available and the punishment of *qazf* (slander) liable to hadd has not been awarded to the complainant, or for which *hadd* may not be enforced under this Ordinance, shall be liable to taʾzīr.54

With the creation of *zina* as a *taʾzīr* crime, women charging rape who cannot prove *zinā bi'l-jabr* with four eyewitnesses find themselves open to the possibility of prosecution for *zinā* under the relaxed *taʾzīr* evidentiary rules (which do not require four eyewitnesses). Thus, the relaxed evidentiary rules of *taʾzīr* (corresponding to its lesser punishment) open the law on *zina* to further manipulation by the authorities, who may threaten a woman with prosecution for *zina* under *taʾzīr* evidence if there is not enough proof to convict under hudood.

Yet this phenomenon is exactly contemplated — and prohibited — by the Qurʾān. The verse on *zinā* which began our discussion states:

> Those who defame chaste women, and do not bring four witnesses, should be punished with eighty lashes, and their testimony should not be accepted afterwards, for they are profligates (24:4).

As we saw earlier, this verse contemplates the possibility of adultery charges being brought against women upon less evidence than four witnesses, and condemns it as a grievous slander. By allowing prosecution for *zina* as a *taʾzīr* punishment, and thereby loosening the evidentiary rules, the Pakistani Ordinance on Zina has ironically succeeded in contravening the very Qurʾānic verse upon which it is based. In fact, *zinā* is the only *hadd* crime for which the Qurʾān sets out a specific punishment for not meeting its strict evidentiary rules. The Qurʾān thus appears to indicate that, as in other *hadd* crimes, there should be no *taʾzīr* crime of *zinā*. That is, for this one crime, if four eyewitnesses are not produced, the state and society must walk away and not speak of it again.58

The Ordinance on Zina goes even further in missing the Qurʾānic injunction of all-or-nothing proof of *zinā*. It includes a provision for "attempt" of *zina*, setting for the punishment of imprisonment, whipping, and a fine. Again, this directly contradicts the spirit of the Islamic law.
on $zin\ddot{a}$. Both the Qur'\~anic verses quoted above and the had\~\textit{\textstyle{\hat{h}}} of the Prophet Muhammad (peace be on him) establish that unless the act was actually committed, it is not punishable at all by the state.\textsuperscript{60} There is thus a compelling Qur'\~anic spirit against either a $ta'\,z\ddot{a}r$ or an attempt version of $zin\ddot{a}$. Unfortunately, the Pakistani Ordinance on $Zina$ has lost sight of the unique status of $zin\ddot{a}$ as a hadd crime of public indecency and expanded it to areas which inevitably result in injustice and discrimination against women — the focus of the Qur'\~anic verses on the subject in the first place.

RAPE IN ISLAMIC JURISPRUDENCE

In this critique of the Pakistani Ordinance on $Zina$ we have seen that the crime of $zin\ddot{a}$ set forth in the Qur'\~an is primarily a social crime of public indecency, and for that reason strict evidentiary standards of proof are attached to its prosecution. We have also seen that some of the application of the Qur'\~anic evidentiary standard for $zin\ddot{a}$ has been skewed to the detriment of women. The subcategorization of rape under $zin\ddot{a}$ and the creation of a $ta'\,z\ddot{a}r$ version of $zin\ddot{a}$ are examples of aspects of Pakistan's law on $zina$ which misapplies the crime of $zin\ddot{a}$ as conceived in the Qur'\~an and results in dishonouring and failing to protect women.

So far, we have seen that the rationale for the strict evidentiary requirements for $zin\ddot{a}$ is the protection of privacy and especially women's honour: unlawful sexual intercourse will be prosecuted by the state only when it is publicly indecent. No gossip or suspicion without concrete proof is allowed. Within the privacy of one's home, the immorality of the act is something left between the individual and God. The same rationale would not, however, apply to the crime of rape. In rape, public display is not the crucial element to the criminality of the act. Rather, the attack itself is a crime of violence whether committed in public or in private. Rape is not consensual sexual intercourse. It is a violent assault against a victim, man or woman, boy or girl, where the perpetrator uses sex as a weapon. Consistent with our analysis thus far, the Qur'\~an does not include any direct mention of rape under the general crime of $zin\ddot{a}$. How, then, has the Sh\textit{\textstyle{\hat{a}}}h addressed the crime of rape?

A. Duress: Rape as a Negation of Intent for $Zin\ddot{a}$

In their chapters on $zin\ddot{a}$, Islamic legal scholars have acknowledged that where one or more parties engaged in $zin\ddot{a}$ under duress, they are not liable for $zin\ddot{a}$\textsuperscript{61} A had\~\textit{\textstyle{\hat{h}}} of the Prophet Muhammad (peace be on him) establishes this principle: upon a woman's reporting to the Prophet (peace be on him) that she was forced to have sex, he did not punish her, but he did punish the perpetrator.\textsuperscript{62} Similar rulings by the Caliph `Umar ibn al-
Khattāb and Mašīk further reinforce this principle in Islamic law. Islamic jurisprudence, in fact, devotes much attention to the concept of duress as a negation of intent generally, thus eliminating liability for an offence. The application of this field of law to zinā results in a thorough analysis of liability in possible permutations of forced zinā. Thus, the Hedaya devotes several paragraphs to resolving conflicting stories regarding a sexual encounter where one party claims it to be consensual, and the other claims it to be otherwise. Matters become more complicated where the witnesses to the encounter are of different genders. There is also discussion and difference of opinion as to whether a man can be forced to commit zinā and thus not be liable for hadd punishment.

Thus, the discussions of forced sex in jurisprudential writings on zinā exhaustively discuss nonconsensual sex as a negation of the requisite mental state for zinā. But does Islamic law address rape as an independent crime? As it turns out, contrary to what the Ordinance on Zina suggests, Islamic jurisprudence has in fact not only categorized rape as a separate criminal offence (under hirābah), but has also allowed civil compensation to rape survivors (under jirāh). These two remedies are addressed in turn.

B. Hirābah: Rape as a Violent Taking

Hirābah is a hadd defined in the Qur’ān. It is variously translated as "forcible taking", "highway robbery", "terrorism", or "waging war against the state". The crime of hirābah is based on the following Qur’ānic verse:

The punishment for those who wage war [yuhūribūna] against God and His Prophet, and perpetrate disorders in the land is: kill or hang them, or have a hand on one side and a foot on the other cut off or banish them from the land (5:133).

Islamic legal scholars have interpreted this crime to be any type of forcible assault upon a person involving some sort of taking. It differs from ordinary theft in that the Qur’ānic crime of theft (sariqah) is a taking by stealth whereas hirābah is a taking by force. (Thus, the popular translation of the latter is "armed robbery"). Although it is generally assumed to be violent public harassment, many scholars have held that it is not limited to acts committed in public places.

It is in the discussions of the crime of hirābah where the crime of rape appears. A brief review of the Sharī'ah descriptions of hirābah reveals that rape is specifically included among the acts constituting hirābah. For example, Sayyid Sābiq in his Fiqh al-Sunnah, a modern
summary of the major traditional schools of thought on Islamic law, describes *hirābah* as: a single person or group of people causing public disruption, killing, forcibly taking property or money, attacking or raping women [*"hatk al-`ird"]", killing cattle, or disrupting agriculture.\(^\text{72}\) Reports about the opinions of individual scholars on the subject further confirm the *hirābah* classification of rape.\(^\text{73}\) For example, al-Dasūqī, a Mālikī jurist, held that forcing a woman to have sex amounts to a commission of *hirābah*.\(^\text{74}\) In addition, the Mālikī jurist Ibn `Arabī relates a story in which a group was attacked and a woman in their party raped. Responding to the argument that the crime did not constitute *hirābah* because no money was taken and no weapons were used, Ibn `Arabī replied indignantly that "*hirābah* with the private parts" is much worse than *hirābah* involving the taking of money, and that anyone would rather be subjected to the latter than the former.\(^\text{75}\) Finally, the famous Spanish Muslim jurist, Ibn Hazm, a follower of the Zāhirī school, reportedly had the widest definition of *hirābah*. He defined a *hirābah* offender as: "One who puts people in fear on the road, whether or not with a weapon, at night or day, in urban areas or in open spaces, in the palace of a caliph or a mosque, with or without accomplices, in the desert or in the village, in a large or small city, with one or more people … making people fear that they will be killed, or have money taken, or be raped (*"hatk al-`ird") … whether the attackers are one or many".\(^\text{76}\)

Thus, this cursory review of traditional Islamic *Sharī'ah* shows that the crime of rape is classified not as a subcategory of *zinā*, but rather as a separate crime of violence under *hirābah*. This classification is logical because the "taking" is of the victim’s property (the rape victim's sexual autonomy) by force. In Islam, sexual autonomy and pleasure is a fundamental right of both women and men.\(^\text{77}\) It is logical, then, that Islamic law would classify the taking by force of someone’s right to control the sexual activity of one's body as a form of *hirābah*.\(^\text{78}\) Moreover, *hirābah* does not require four witnesses to prove the offence, unlike *zinā*. Circumstantial evidence and expert testimony, then, presumably form the evidence used to prosecute such crimes. In addition to using eyewitness testimony, medical data and expert testimony, a modern *hirābah* prosecution of rape would likely take advantage of modern technological advances such as forensic and DNA testing. Finally, the classification of rape as *hirābah* promotes the principle of honouring women's dignity established in the Qur'ānic verses on *zinā*. Rape as *hirābah* is a separate violent crime which uses sexual intercourse as a weapon. The focus in a *hirābah* prosecution would be the accused rapist and his intent and physical actions, rather than just guessing the consent of the rape victim,
which, as we have seen, is likely to happen if rape is classified as a type of zinā.  

C.  Jirāh: Rape as Bodily Harm

Islamic legal responses to rape are not limited to criminal hirābah prosecution. The Sharī'ah also creates an avenue for civil redress for a rape survivor in its law of "jirāh" (wounds). Islamic law designates ownership rights to each part of one's body, and a right to corresponding financial compensation for any harm done unlawfully to any of those parts. In the Sharī'ah, this is called the law of jirāh. Harm to a sexual organ, therefore, entitles the person harmed to specific financial compensation under classical Islamic jirāh jurisprudence. Thus, each school of Islamic law has held that where a woman is harmed through brutal sexual intercourse, she is entitled to financial compensation for the harm. Further where this intercourse was without the consent of the woman, the perpetrator must pay the woman both the basic compensation for the harm, as well as an additional amount based on diyah (financial compensation for murder).

Since rape could occur even without a clear threat of physical force (i.e. thus perhaps not constituting hirābah, but nonetheless constituting sex without consent), the categorization of rape under the Islamic law of jirāh makes logical sense. This categorization would provide financial compensation to every victim of rape for any harm done to his/her body as a result of the attack. Taking the analysis further, because the right to control one's own sexual activity is a fundamental Islamic and human right, it could be argued that foreign invasion of one's sexual organs against one's will constitutes a jirāh harm, even where there is no physical bruising or tearing. Modern Islamic jurisprudence and legislation might, therefore, consider to provide that either instead of or in addition to hirābah punishment against the rapist, a woman might also claim compensation for her ordeal under the law of jirāh. Such financial compensation not only symbolically emphasizes the personal nature of the harm caused by rape, but also provides a rape survivor with the means to seek professional counseling to work through the psychological harm which accompanies an attack of rape.

Interestingly, Western legal discourse has only recently begun to re-evaluate the crime of rape, and is still struggling to overcome its patriarchal articulation of the crime. But Islamic jurisprudence offers a unique escape from these mistakes. In addition to its hirābah treatment of rape as a violent act, Islamic law has the unique resource of a jirāh system of established law of compensation for bodily harm to give a civil remedy directly to rape survivors. In Western history, ancient Roman law also
recognized compensation as a means of responding to rape, but it took a patriarchal approach: it found that the father (or other male authority) of the rape victim was entitled to damages because the rape implied his inability to protect the woman. Islamic law, with its liberating introduction of a woman's right to own property and its affirmation of sexual autonomy as her fundamental right, already employs an unbiased attitude in this area of law. In fact, there is a hadīth specifically directed to transforming the early Muslim population out of this patriarchal attitude of being paid exclusively to the males in case the honour of women for whom they were responsible was subjected to violent transgression. During the time of the Prophet Muhammad (peace be on him), a young man committed zinā with his employer's wife. The father of the young man gave one hundred goats and a maid as compensation to the employer, who accepted it. When the case was reported to the Prophet (peace be on him), he ordered the return of the goats and the maid to the young man's father and prosecuted the adulterer for zinā. Early Islam thus established that there should be no tolerance of the attitude that a woman's sexual activity is something to be bartered, pawned, gossiped about, or owned by the men in her life. Personal responsibility of every human being for his or her own actions is a fundamental principle in Islamic thought.

CONCLUSION: AMEND THE HUDOOD ORDINANCE AND FOLLOW THE SHARĪ‘AH LAW OF RAPE

We have seen that categorization of rape as a form of zinā in the Ordinance on Zina is a misapplication of the actual treatment of rape in traditional Shari‘ah. The brief discussion here also reveals that it would not be difficult to amend the statutes in Pakistan to accurately reflect the Shari‘ah and eliminate the injustice which the existing Ordinance represents. Traditional Islamic jurisprudence includes two very appropriate avenues to justly respond to the crime of rape, its seriousness, and its effect on women in particular. Modern Pakistani legislators should take the Shari‘ah provisions on hirābah and jirāh to promulgate a comprehensive law of rape which does not counteract the positive honouring of women which is inherent in the Qur’ānic legal verses on zinā. Thus, the section entitled "zina-bil-jabr" should be deleted from the Ordinance. Instead, rape should be specified as a form of hirābah in the hirābah section of the Hudood Ordinance, thus identifying it as a violent
It would be interesting to mention that a judgment of the Federal Shariat Court of Pakistan has expressed the same view as that of the author of the present article, viz. that the offence of rape should be treated under the Islamic law of *hirābah*. See PLD (1989), FSC 127, 128 and 134.

Legislation might also be enacted to treat rape as a case of *jirāh*, thus creating grounds for rape victims to receive some compensation for the physical and psychological harm caused by rape.

These amendments would help transform the Pakistani laws into a positive example of the sophistication with which the *Sharī'ah* deals with crime and punishment. Islamic law offers an advanced, respectful treatment of the nature of the crimes of *zinā* and rape and their special impact on women. By adding new provisions in its legal codes in consonance with this spirit, Islamic law could become, as it once was, the legal example from which the Western world could learn a great deal. Such examples are critically important to Muslim scholars, especially those living in the West, who might perhaps be in a better position to respond to Western criticisms which portray Islamic law as outdated or inferior. As a nation which claims to be an Islamic state, Pakistan is continuously looked upon as an example of Islamic law in the modern world.

It might be pertinent to clarify that the purpose of this paper is not to belittle the attempts made in Pakistan to operationalize Islamic law. Far from that, we wish to contribute, in a positive manner, to the work that has been done so far, and to point out whatever mistakes might have been made in this regard. If we suggest any amendment to remove this mistake it is precisely because of our recognition of the important role that Pakistan plays in the world as one of the few countries who wish to bring their laws in conformity with Islamic Law. The more faithful Pakistan is to the true *Sharī'ah*, the more it will be possible for Muslim scholars in the West to defend attacks on Islam and Islamic law. As we have seen, the traditional Islamic laws on rape represent one of the most sophisticated and advanced treatments of that crime in the world to date. Moreover, the *Qur'ānic* verses on *zinā* are good examples of the basic purpose of some of the legal prescriptions of Islam – to protect the honour of women. With an appropriate reflection of these laws in Pakistan's legal codes, Muslims around the world will have a valuable tool to use in their effort to highlight the justice and other benevolent ends that Islamic law is geared to achieve.
The word *hudood* (ُهُدُود) is the plural of *hadd* a term denoting the Islamic legal categorization of crimes for which the definition and punishment is set by the Lawgiver. Abdur Rahman I. Doi, *Shariah: The Islamic Law* (London: Ta Ha Publishers, 1984), 221.


3See The Offence of Zina (Enforcement of Hudood) Ordinance, Sec.1 (stating commencement date); PLD 1979 Cent. Statutes, 51; Bokhary, *Law Relating to Hudood Cases*, 164.

4The Offence of Zina (Enforcement of Hudood) Ordinance, Sec.4,5; PLD 1979 Cent. Statutes, 52; Bokhary, *Law Relating to Hudood Cases*, 176 (with comment and annotations).

5The Offence of Zina (Enforcement of Hudood) Ordinance, Sec.6; PLD 1979 Cent. Statutes, 52; Bokhary, *Law Relating to Hudood Cases*, 182 (with comment and annotations).

6The Offence of Zina (Enforcement of Hudood) Ordinance, Sec.8; PLD 1979 Cent. Statutes, 53; Bokhary, *Law Relating to Hudood Cases*, 182 (with comment and annotations). I have not included the punishments specified for each crime, as that is not within the focus of this article. Here, I am primarily concerned with the definition and categorization of each of these offences. Briefly, however, the *hadd* punishment prescribed in the Ordinance for a *zina* offence is either public stoning or whipping. For a "*zina-bil-jabr*" conviction, it prescribes imprisonment and/or public whipping. See the Ordinance, Sec. 6.

7Jehan Mina v. The State, 1983, PLD Federal Shariat Court 183 (Pak).


12See Asia Watch, *Double Jeopardy; Patel, Socio-Economic Political Status …*, 36; Mehdi, "The Offence of Rape …", 27 (citing report by attorney
Asma Jehangir of fifteen incidents of police rape of women in detention in 1988/1989); Seminar, "Adultery and Fornication in Islamic Jurisprudence: Dimensions and Perspectives", *Islamic and Comparative Law Quarterly*, vol.2, 1982, pp.267, 286-87 (convenor Tahir Mahmoud noting "cases of rape … in private (including those committed by policemen) are alarmingly on an increase in the [Indo-Pakistani] subcontinent").


Another verse generally urging against fornication states:

Devotees of Rahmān [The Merciful] are those ... who do not invoke any god apart from God; who do not take a life which God has forbidden except for a cause that is just, and do not fornicate [zīnā] and anyone who does so will be punished for the crime (25:63, 68).


The verse goes on to specify a relaxed evidentiary standard between the spouses, understandable given the personal nature such an accusation would have on the marital relationship:

Those who accuse their wives and do not have any witnesses except themselves, should swear four times in the name of God, the testimony of each such person being that he is speaking the truth.

And (swear) a fifth time that if he tell a lie, the curse of God be on him.

The woman's punishment can be averted if she swears four times by God as testimony that her husband is a liar.

Her fifth oath being that the curse of God be on her if her husband should be speaking the truth (24:6-9).


See Doi, Shariah, 236-40 (summarizing crime of zīnā); Mohamed S. El-Awa, Punishment in Islamic Law (Indianapolis: American Trust Publications, 1982), 13-15 (general discussion of the law on the offence of zīnā as laid down in Qur'ānic verses). The "proof of zīnā" section of the Offence of Zīna Ordinance, which also requires four witnesses, comes to mind. Thus, in setting zīnā as a crime in Pakistani law, and requiring four witnesses as necessary proof of such a crime, the Ordinance does in fact appear to be based, at least in structure, on
Islamic Studies 38:3 (1999)

Islamic law. However, as discussed in the following sections, the details of the Ordinance and especially its subcategorization of rape as a type of zina is not an accurate implementation of Islamic law.

21See Doi, Women, 122; Muhammad Iqbal Siddiqi, The Penal Law of Islam (Lahore: Kazi Publications, 2d ed., 1985), 69; M. Cherif Bassiouni, "Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System", The Islamic Criminal Justice System (London: Oceana Publications, Inc., 1982) (citing the rule of thumb that hypothetical thread must not have been able to pass through the two bodies).

22See al-Bukhārī, Sahih al-Bukhārī, tr. Muhammad Muhsin Khan, vol.8, Book 82, nos. 806, 810, 812-814, pp.528-35 (Beirut: Dar al-Arabia, 1985); Abū Dhū‘ud, Sunan Abī Dā‘ūd (tr. Ahmad Hasan), vol.3, Nos. 4413-14 (New Delhi, Lahoti Fina Art Press, 2d ed., 1990). It is interesting to note that although the man was punished based on his confession, the woman was apparently never prosecuted or even investigated. The significance of this point will be apparent later, in the discussion of the context of the Qur’ānic verses on zinā, and their impact on women’s privacy.

23See Ma'amoun M. Salama, "General Principles of Criminal Evidence in Islamic Jurisprudence" in Bassiouni, Criminal Justice System, 109, 116-20. See also El-Awa, Punishment in Islamic Law, 126-27; Siddiqi, The Penal Law of Islam, 43-49.

24See Osman Abd-el-Malek al-Saleh, "The Right of the Individual to Personal Security in Islam" in Bassiouni, Criminal Justice System, 55, 69-70 (citing incident where Caliph ‘Umar ibn al-Khaṭṭāb and a companion passed by a party in which, behind locked doors, individuals were drinking alcohol; because of Islamic injunctions against spying, the two disregarded the private party and returned home). See also Siddiqi, The Penal Law of Islam, 19-20 (citing requirement to knock before entering a residence, even of one’s family). But see The Hidayah or Guide: A Commentary on the Mussulman Laws, tr. Charles Hamilton (Delhi: Islamic Book Trust, 1982), Book VII, Ch.III, p.194 (allowing evidence unlawfully obtained).


26Hidayah, Book VII, 188. This statute of limitations, significantly, does not apply to a charge of slander. In addition to the above restrictions, where a zinā conviction is a result of confession rather than testimony, the confession may be retracted at any time (including during execution of the sentence). See Salama "General Principles of Criminal Evidence in Islam", 120.

See Salama, "General Principles of Criminal Evidence in Islam", 118, n.* ("the nature of such rigorous proof makes it a crime of public indecency rather than adultery").

Bassiouni, Criminal Justice System, 6. See also El-Awa, Punishment in Islamic Law, 17 ("The desire to protect public morality and to safeguard it against corruption by publicizing the offense, is the reason for limiting the methods of proof", p.29). ("This punishment is prescribed in fact for those who committed the crime openly … with no consideration for the law or for the feeling of the community", quoting Muhammad Mustafã Shalabi, al-Fiqh al-Islãmî bayn al-Mithalâyâh wa`l-Wâqî`iyyah, 1960, 201.)

See supra text-accompanying note 22.

See al-Tabarsi, Jâmi` al-Bayân `an Ta`wîl al-Qur`ân (1910), 18:86-101, cited in D.A. Spellberg, Politics, Gender, and the Islamic Past: The Legacy of `Aisha Bint Abi Bakr (New York: Columbia University Press, 1994), 82; Akram Diya al `Umari, Madinan Society at the Time of the Prophet, tr. Huda Khattab (Herndon Virginia: International Institute of Islamic Thought, 1991), 2:82-84. Note that this is primarily a Sunní account of the context of these verses. Many Shi`î scholars do not attribute these verses to the "Affair of the Necklace" incident. See Spellberg, Politics, Gender, and the Islamic Past, 81-82 (citing the Shi`î author al-Qummî, but also noting Shi`î author al-Tabarsi, who took the Sunní position).

See, e.g., Dale Spender, Man Made Language (London, Boston: Routledge & Kegan Paul, 1980) (discussing the asymmetry of language and insults that tend to be based on women's sexuality).

See Matthew Hale, History of the Pleas of the Crown (London: Assigns of Richard Atkins & Edward Atkins, Esq., 1778), 637-39. See also Rubya Mezdi, The Islamization of the Law in Pakistan (London: Curzon Press, 1994), 116, Sec. 3.3.1 (stating that before the Hudood Ordinances, the penal law of Pakistan included adultery as an offence, but defined it as intercourse by a man with the wife of another without his permission; women were not punished even as abettors); Afifa Shehrbano Zia, Sex Crime in the Islamic Context: Rape, Class and Gender in Pakistan (Lahore: Asr Publications, 1994), 25-26 (stating that under the pre-Hudood criminal legal system inherited from the British, a complaint of adultery could only be lodged by the husband); Donald A. Dripps, "Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent", Columbia Law Review, vol.92, 1992, p.1782 ("Until the twentieth century, … female sexual autonomy had little to do with the law of rape. The law instead struck a balance between the interests of males-in-possession and their predatory counterparts"). The Pakistani Penal Code prior to 1979 borrowed from this English common law of rape. See Pakistan Penal Code, 1869 Sec. 375 (repealed 1979), reprinted in R.A. Nelson, The Pakistan Penal Code, 1975, 2109-10 (legislating and elaborating on rape defined as "the ravishment of a woman without her consent, by force, fear, or fraud", citing English common law precedent).


See supra nn. 26-29 and Qur`ân; 26:11-17 and accompanying text.
See Qur‘ān, 24:2.

For more information and background on the five schools of Islamic law, see Mahmaṣānī, Falsafat al-Tashrīf fi'l-Islām, 15-39.

See ibn Qudāmah Muhammad al-Maqdisī, al-Mughnī ala-Mukhtasar al-Kharaqī (Cairo: Dār al-Kutub al-‘Ilmiyyah, 1994), 8:129, 145 (stating that Ḥanafī and Shāfi‘ī schools of thought hold that pregnancy alone does not constitute sufficient evidence for punishment of zinā, but noting that the Mālikī school of thought presumes punishment unless there are signs of coercion); Siddiqi, The Penal Law of Islam, 71 (but citing Ḫūr’s reported position that pregnancy furnishes sufficient proof of zinā against an unmarried woman); Seminar, “Adultery and Fornication …”, 271 (stating that majority of jurists hold that pregnancy is not prima facie evidence of zinā).

See Mālik, al-Muwatta’, tr. ʿA’ishah ‘Abd ar-Rahman at-Tarjumana and Ya’qub Johnson (Norwich, England: Diwan Press, 1982), Section 41:4, p.392 (stating that an unmarried pregnant woman who claims that she was forced to have sex is liable for punishment unless she can prove her claim); Salama "General Principles of Criminal Evidence …", 121. See also El-Awa, Punishment in Islamic Law, 130-31 ("The offence of zina may be proved against an unmarried woman if she is pregnant", citing Mālikī jurists who considered circumstantial evidence important and admissible as proof).

Salama, "General Principles of Criminal Evidence", 121. See also Abū Dālūd, Sunan, vol.3, no.4404 (quoting Ḫūr’s statement that fornication exists "when proof is established or if there is pregnancy, or a confession"). See also al-Bukhārī, Sahīh, vol.8, Book 82, no. 816, 536–37.

Salama, "General Principles of Criminal Evidence", 120-21 (summarizing the role of qarāʾin, presumptions, or circumstantial evidence, in ḥadd jurisprudence).

See supra Part I.B.

See Qur‘ān, 24:2.

See supra nn. 4-5 and accompanying text.

See infra Part II A.

Pakistan Penal Code, 1860, Sec.375 (repealed 1979), reprinted in Nelson, pp.2109-10. For comparison, the zina-bil-jabr section reads:

A person is said to commit zina-bil-jabr if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely: –

a) against the will of the victim,

b) without the consent of the victim,

c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt, or

d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is
given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of zina-bil-jabr.

The Offence of Zina (Enforcement of Hudood) Ordinance, Sec.6; PLD 1979 Cent. Statutes, 52; Bokhary, Law Relating to Hudood Cases, 182 (with comment and annotation); Major Acts, 11-12.

See, e.g., Dripps, "Beyond Rape …"

For example, on appeal of one rape conviction, the Pakistani Federal Shariat Court stated:

Wherever resort to courts in unavoidable for any reason, a general possibility that even though the girl was a willing party to the occurrence, it would hardly be admitted or conceded. In fact it is not uncommon that a woman, who was a willing party, acts as a ravished woman, if she is surprised when in amorous courtship, love-making or in the embrace of a man she has not repulsed.

See Zia, Sex Crime in the Islamic Context, 29 (quoting Federal Shariat Court); Naushine Ahmed, "The Other Viewpoint", Dawn, Karachi, Pakistan, November 14-20, 1995, p.8 (weekly Tuesday Review Supplement) (citing case of alleged rape of fifteen-year-old girl where defendant was acquitted and court described the victim as a girl of "loose character" who "has a habitual case of enjoying sexual intercourse", reported at PLD 1982 Federal Shariat Court 241 (Pak.).


See Jilani, "Whose Laws? …", 71 ("The offence of rape (zina-bil-jabr) is also dealt with by the same law [of zina]. The effect of this is that rape has become more of a defense against prosecution for adultery or fornication, rather than being considered as an independent crime").

For further explanation and distinction between hadd and ta’zir crimes in Islamic law, see El-Awa, Punishment in Islamic Law, 1-2; Siddiqi, The Penal Law of Islam, 158; Mohammed S. El-Awa, "Ta’zir in the Islamic Penal System", Journal of Islamic and Comparative Law, vol.6, 1975, p.41.

For additional report on human rights conditions in Pakistan, see U.S. Department of State, Country Reports on Human Rights, 1372 ("in contrast to past years, women are now frequently granted bail for Hudood offenses, and convictions have been markedly reduced"); Double Jeopardy, 50-52; Mehdi, "The Offence of Rape", 23 (stating that under working law of rape, almost all cases are tried under ta’zir); Anika Rahman, "A View Towards Women's Reproductive Rights Perspective on Selected Laws and Policies in Pakistan", Whittier L. Review, vol.15, 1994, pp.981, 999-1000 ("Because of the difficulty of obtaining four male Muslim witnesses, men accused of zina-bil-jabr have in reality, become exempted from the maximum punishment. Although maximum Hadd punishments have been imposed, none have ever been carried out. The majority of zina or zina-bil-jabr cases are thus heard at the lesser Ta’zir
punishment level").

54 The Offence of Zina (Enforcement of Hudood) Ordinance, Sec.10; PLD 1979 Cent. Statutes, 53. The section goes on to prescribe the punishment for zina of imprisonment for ten years, thirty lashes, and a fine, and for zina-hil-jabr twenty-five years imprisonment and thirty lashes.

55 See Anika Rahman "A View Towards Women's Rights …", 1000.

56 See also Patel, Socio-Economic Political Status …, 30-31 (making same argument that there can be no ta‘zir punishment for zina). This argument, in fact, was the basis of a challenge to the ta‘zir punishment implemented in zina cases in Pakistan, ibid (citing 1983 petition challenging 9(a) and 10 of the above Ordinance on this ground).

57 See al-Shafi‘i, al-Risalah, 247 ("only the witnesses in the case of adultery should be scourged").

58 See supra Part I.B.

59 See The Offence of Zina (Enforcement of Hudood) Ordinance, Sec.18; PLD 1979 Cent. Statutes, 55.

60 See supra nn. 19-26 and accompanying text.

61 See Hedaya, Book VII, Ch. II, p.187 (defining compulsion generally); al-Mughni, 8:129, 145 (including discussion of exemption from zina liability for male forced to commit zina); Seminar, "Adultery and Fornication …", 269 ("it is an agreed position that females subjected to rape against their consent and without their will would be exonerated from any liability under Islamic law").


63 See Malik, Muwatta', Sec.41:3, p.392 (citing case where Caliph 'Umar prosecuted the rapist of a slave girl and did not prosecute her); al-Mughni, 8:129 (citing case where Caliph 'Umar released a woman who asserted rape).

64 See Malik, Muwatta', Sec.41:3, p.392.


66 Hedaya, Books VII, XXI, pp.189-95, 353-54.

67 Ibid.

68 Ibid., 187; see also al-Mughni, 8:129.

69 See El-Awa, Punishment in Islamic Law, 7-10; 'Abd al-Rahmān al-Jazā‘īrī, Kitāb al-Fiqh `ala' l-Madhāb `Abā‘ah (Cairo: Dār al-Kutub al-Misriyyah, 1986), 5:409-11; Sayyid Sābiq, Fiqh al-Sunnah, 10th ed. (Makkah: Bāb al-Loq, 1993), 2:446 (chapter on ‘īdāh, describing ‘īrābah); Siddiqi, The Penal Law of Islam, 139-44. See also Doi, Shariah, 250 (explaining the context of this revelation: some people came to Prophet Muhammad under the auspices of being new converts, complained that the weather in Madinah was disagreeable to them, and the Prophet sent them to live outside the city with cattle belonging to the state; they subsequently killed the cattle keeper and stole the cattle and this verse was revealed shortly thereafter.

70 See Doi, Shariah, 250, 254; El-Awa, Punishment in Islamic Law, 7.

71 Sābiq, Fiqh al-Sunnah, 2:447.

72 Ibid., 450.
Jazā‘irī, Fiqh al-Madhāhib, 410-11 (summarizing Mālikī school definition of hirābah offender as someone who "obstructs the road, even without intending to take money, intending to harm someone, or intending to rape a woman").

Doi, Shariah, 253.

Sābiq, Fiqh al-Sunnah, 2:450.

Ibid.


Note that this principle could also be applied to expand the Islamic law of rape to include the rape of men as another instance of the violent taking of an individual's sexual autonomy.

See supra Part I.C.2.

See Ibn Qudāmah, al-Mugna‘, 8:3 (introduction; describing law of jirāḥ, classification of injuries, etc.).

Ibid. Note that the law of jirāḥ (in addition to other principles of Islamic law) providing for compensation for physical harm even between spouses would support legislation against domestic violence.

Ibid. (discussing varying applications of jirāḥ under four Sunnī schools of thought); Bokhary, Law Relating to Hudood Cases, 219 (stating where someone is forced to commit zina, she is not punished for zina, but rather entitled to compensation).

See nn.75, 76 above.

This analysis would also provide for male rape victims.

See Dripps, "Beyond Rape …" 1780-81.


See Major Acts, 7.