

Abortion and Rape Laws in Pakistan: A *Shari'ah*-Based Analysis

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Abstract

Rape is the most heinous act that can be committed against women and their families, often resulting in both short- and long-term complications. Abortion in the case of rape is an issue of social justice, human autonomy, and women's health. Pakistani laws do not provide freedom for women to choose abortion for themselves in normal circumstances nor do they cover the issue of rape-related pregnancies. This article deals with the analysis, explanation, and discussion of rape and abortion. The issue of pregnancy as a consequence of rape has also been highlighted with reference to abortion laws. Moreover, the legal rights and shelters offered to victims and their children have been critically examined. The article looks at the rulings on rape and abortion in both classical Islamic law and Pakistan's legal system, highlighting basic, substantive, and procedural gaps in the legal framework.

Keywords

rape, sexual violence, *zinā*, abortion, pregnancy, Pakistani law, *fatwā*.

Introduction

Rape is a widespread form of sexual assault against women. Statistics of rape-related pregnancies are various, but are of little comfort as the experience itself can be a terrifying and isolating thing to confront. Pregnancy occurring as a result of rape leads to grave consequences for the woman concerned. The decision related to pregnancy resulting from rape is a very personal one in which the victim should have the choice

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between a full range of options without judgment or coercion from others. In Pakistan, the choice of abortion is circumscribed in the framework of Islamic philosophies and patterns, with comprehensible gaps between ideals and reality.¹ Rape victims often become pregnant, but the law does not allow the termination of these pregnancies, nor does it help in effecting the resolution of numerous problems faced by these victims. The World Health Organization (WHO) estimated that twenty-five million unsafe abortions take place around the world annually.² If safe abortion services were available, the backdoor abortion centres would no longer be necessary. Abortion laws in Pakistan ignore the issue of rape-related pregnancies. They do not give the option of abortion to the victim nor do they provide such women with any adequate remedies. A resolution must be offered to this problem by indicating the procedure to be adopted in such position. This article analyzes these issues and suggests reforms to the current rape and abortion laws.

Rape (*Zinā bi 'l-Jabr*) in the *Sharī'ah*

Forcible adultery or rape (*zinā bi 'l-jabr*) is among the gravest crimes in the *sharī'ah*. The crux of the offence of rape is that the forcible sexual connection takes place without the approval of the woman or by placing her under the fear of injury.³ Non-consent is, therefore, the substance of the offence. In the *sharī'ah*, no legal punishment can be applied for one who has been coerced. Rape was mentioned in a *ḥadīth* narrated by Ibn Mājah, “A woman was coerced (i.e., raped) during the time of the Messenger of Allāh. He waived the legal punishment for her and carried it out on the one who had attacked her.”⁴ In another instance, a report on rape during the time of the Prophet (peace be on him) describes a woman who was attacked on her way to the mosque. After she was raped, the woman shouted for help and a group of passers-by heard her and caught the perpetrator, who was confirmed by the woman as her rapist. The man was taken to the Prophet (peace be on him) who

¹ Karim Ullah Sraw, “Abortion Law of Pakistan: Reforms Needed?” *Human Rights Review* 2, no. 6 (2018), https://uclhumanrightsreview.wordpress.com/volume-ii-student/abortion-law-of-pakistan-reform-needed/#_ftn17.

² News Release, Geneva: World Health Organization, 2017, For more details, visit <http://www.who.int/news-room/detail/28-09-2017-worldwide-an-estimated-25-million-un-safe-abortions-occur-each-year>.

³ Zafar Hussain Chaudhary, *Islamic Law of Hudood and Tazir* (Lahore: Urdu Bazar, 1983), 44.

⁴ Muḥammad b. Yazīd b. Mājah, *Sunan*, Kitāb al-ḥudūd, Bāb al-mustakrah.

commanded to execute him by stoning (*rajm*). Later, another man showed up and confessed that he was the real perpetrator. The Prophet (peace be on him) then ordered the first man to be released and the second to be stoned. No punishment was imposed on the woman.⁵

These statements confirm that women who are coerced are not liable for the punishment of adultery. Intimidation of violence or captivity or the actual application of force can be considered as coercion. Classical jurists took into account the responsibility of the coercer towards the person compelled and any third person who may have been affected by the act. In one instance narrated by Abū Suhayl Nāfi' b. 'Abd al-Raḥmān, a slave was appointed to look after the slaves and their girls. He raped one of them. The Caliph 'Umar b. al-Khaṭṭāb (r. 13/634-23/644) had him whipped and then dismissed. He did not order that the girl be whipped because she had surrendered under coercion.⁶ According to Abū Ḥanīfah (d. 150/767) and Zufar (d. 158/775), if two witnesses testified that a person was coerced into having intercourse with a person while another two testified that she submitted willingly, the proscribed punishment (*ḥadd*) is to be waived for both. All the classical jurists agreed on this point.⁷ According to Mālik b. Anas (d. 179/795), a bride-price (*mahr*) must be paid by the man who rapes a free female, regardless of whether she was a virgin or not. In case the victim is a slave girl, the offender should recompense what he has discredited of her value. The *ḥadd* punishment is only for the rapist and not for the victim.⁸ Both the Ḥanafī and Mālikī schools agree that adult male offenders should receive the *ḥadd* penalty for an act of rape, but that the female will be held innocent and relieved of the punishment. In the view of the Mālikī jurists, an act of rape includes both fornication and usurpation of sexual property. Accordingly, not only God's rights (*ḥuqūq Allāh*) are violated, but also the interpersonal rights (*ḥuqūq ādamiyyah*) of the ravished female herself, so her rights also have to be recompensed. They argue that an offender should not only receive the *ḥadd* punishment in fulfilment of God's right, but he should also compensate the victim by the amount which she would customarily receive on the marriage, that

⁵ Abū Dāwūd Sulaymān b. al-Ash'ath, *Sunan*, Kitāb al-ḥudūd, Bāb fī ṣāhib al-ḥadd yajī' fayaqir. Also see Hajar Azari, "Protection of Women Victim of Rape: Islamic and International Legal Perspectives" (PhD diss., Tilburg University, 2014), 57–60.

⁶ *Muwatta Imam Malik*, trans. Muhammad Rahimuddin (Lahore: Sh. Muhammad Ashraf, 1980), 354.

⁷ Burhān al-Dīn al-Farghānī al-Marghīnānī, *al-Hidāyah: The Guidance*, trans. Imran Ahsan Khan Nyazee (Rawalpindi: Federal Law House, 2015), 2:1257–65.

⁸ *Muwatta Malik*, <https://quranx.com/Hadith/Malik/USC-MSA/Book-36/Hadith-14>.

is, a fair amount of dower (*ṣadāq al-mithl*).⁹ For Ḥanafī scholars, however, the *ḥadd* punishment and the dower compensation cannot be applied simultaneously, explaining that the divine right has to take precedence where a transgression against God and an infringement against a human being occur. Ḥanafī jurists also argue that the cohabitation in the context of rape is not to be compared with cohabitation in the context of marriage. Mālikī jurists, on the other hand, conceived that the rights of God (*ḥuqūq Allāh*) and the rights of man (*ḥuqūq ādamiyyah*) do not exist in a hierarchy. Rather, they are on par.¹⁰ According to the Ḥanbalī jurist Ibn Qudāmah (d. 620/1223), the penalty of illicit sex involves only the right of God. He further argues that it does not invoke any private interests, instead maintains the common good.¹¹

From the Ḥanafī perspective, rape consists of only adultery (*zinā*) and it is the responsibility of the court to decide whether *zinā* has taken place or not and then whether the female participant consented or resisted. If the court cannot categorically find that *zinā* has occurred, then the charges will be dismissed and the *ḥadd* punishment averted from the accused. Muslim legal authorities have not proposed any lesser discretionary punishment in cases of inadequate evidence for *zinā*. According to Mālikī jurisprudence, however, rape is a crime that equally consists of an action of *zinā* and usurpation of sexual property, or *ighṭiṣāb*, with the court charged with making an independent determination about both. If the criteria for *zinā* punishment are fulfilled, the perpetrator will have to take the *ḥadd* punishment. Likewise, if the criteria for *ighṭiṣāb* are met, he will have to pay damages to the victim.¹²

Some jurists also classified rape as a distinct criminal offence under unlawful warfare. In their view, sexual independence and pleasure is an essential right of both men and women. Therefore, taking this right by force is a form of warfare, another fixed punishment in the Qur'ān.¹³ For example, Ibn Ḥazm (d. 456/1064), a leading scholar of the Zāhirī school,

⁹ Temel Ücücü, "Law Making in Islam" (master's thesis, McGill University, Canada, 2016), 59.

¹⁰ Hina Azam, *Sexual Violation in Islamic law: Substance, Evidence, and a Procedure* (New York: Cambridge University press, 2015), 142–334.

¹¹ 'Abd Allāh b. Aḥmad b. Qudāmah, *al-Mughnī* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.), 8:284–85. Also see Anver M. Emon, "Ḥuqūq Allāh and Ḥuqūq al-'Ibād: A Legal Heuristic for a Natural Rights Regime," *Islamic Law and Society* 13, no. 3 (2006): 343–44.

¹² Marie. A Failingier, Elizabeth R. Schiltz, and Susan J. Stabile, *Feminism, Law, and Religion* (Farnham: Ashgate Publishing, 2013), 335–36.

¹³ Uzma Mazhar, "Rape and Incest," *Samudera Tinta*, August 1, 2008, <http://samuderatinta.blogspot.com/2008/08/rape-and-incest-rogol-bukan-zina.html>.

includes rape in his definition of *ḥirābah*. Four witnesses are not necessary in the case of *ḥirābah* to verify the offence, unlike *zinā*. Moreover, circumstantial evidence, expert testimony, and all other forms of evidence are used to establish such crimes.¹⁴ According to a Mālikī jurist Muḥammad b. Aḥmad al-Dusūqī (d. 1815), if a woman is forced by any person to commit sex, the action of such person would be taken as committing *ḥirābah*. Another Mālikī judge Abū Bakr b. al-‘Arabī (d. 543/1148) narrated a story in which a woman was raped as part of a larger conflict. There were arguments that *ḥirābah* cannot be established in this case as no weapons were used and no money was taken. In his response, the judge angrily stated that *ḥirābah* committed with private parts was worse than *ḥirābah* committed with taking money.¹⁵

Since many victims of rape happen to be pregnant, it is pertinent to discuss *sharīah* injunctions relating to the status of aborting a pregnancy resulted from rape.

Sharīah Rulings Related to Abortion

The literal meaning of abortion is the intentional attempt to terminate a human pregnancy and eliminate a fetus from the womb before birth. Scholars of jurisprudence (*fiqh*) use several terms to refer to this concept such as *al-inzāl*, *al-ikhrāj*, *al-isqāṭ*, *al-ilqā’*, and *al-istihād*.

The right to life is guaranteed in all legal systems, whether religious, national, or international. The Universal Declaration of Human Rights says that everyone has the right to life, liberty, and security of person.¹⁶ The International Covenant on Civil and Political Rights states that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.¹⁷ The right to life is also guaranteed by the Constitution of Islamic Republic of Pakistan.¹⁸ Islam also acknowledges the inviolability of human life, as the Qur’ān

¹⁴ See Iftikhar Murshed, “The Hudood Ordinances of Pakistan and the Denial of Justice,” *Criterion Quarterly* 5, no. 1 (2012), <https://criterion-quarterly.com/the-hudood-ordinances-of-pakistan-and-the-denial-of-justice/>.

¹⁵ Sharif Khan, “Rape: The Islamic View,” in *Love and Sex in Islam: Collection of Fatwas and Articles*, ed. Abdullah R. Muhametov and Laila-Olga But (Bloomington: Booktango, 2013), 313–16; Muhammad Zahid, “Justice System of Islam in the Form of Qisas, Diyat and Harabah for the Protection of Human Dignity,” *International Research Journal on Islamic Studies* 1, no. 1 (2019): 13.

¹⁶ “The United Nations General Assembly,” third session, December 10, 1948, article 3.

¹⁷ A multilateral treaty by the United Nations General Assembly with resolution 2200A (XXI) on 16 December 1966, and effective from March 23, 1976 in line with article 49 of the covenant. See article 6.1.

¹⁸ “The Constitution of Islamic Republic of Pakistan,” chapter 1, article 9.

says, “We have honoured the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours above a great part of Our creation.”¹⁹

Is abortion, which constitutes a disruption of pregnancy, a violation of the right to life? To resolve this query, we have to answer when life begins or when the existence of a soul begins. In Islam, the Qur’ān and *sunnah* include elements related to the establishment of the human fetus (*janīn*). There are five different phases of embryonic growth mentioned in the Qur’ān:

Man We did create from a quintessence (of clay). Then We placed him as (a drop of) sperm in a place of rest, firmly fixed; then We made the sperm into a clot of congealed blood; then of that clot We made a (foetus) lump; then We made out of that lump bones and clothed the bones with flesh; then We developed out of it another creature. So blessed be Allah, the best to create.²⁰

At the conclusion of the third stage (*mudḡhah*), or after approximately four months, Muslims believe that the soul (*rūḥ*) enters the body. This is based on two Prophetic traditions. The first reads as follows:

The created forms of one of you are gathered in your mother’s belly for forty days; he is then like congealed blood (*‘alaqah*-clot) like the first; after that he is a lump (flesh) like the previous. Allah then sends His angel to him with four words (decisions). The angel writes down his livelihood, his death, his deeds, his fortune and misfortune. He then breathes the Spirit into him.²¹

The second tradition is reported by Ḥudhayfah b. Asīd al-Ghifārī who states,

I heard the Messenger of Allah (pbuh) saying: When forty-two nights pass over the fetus, Allah sends an angel to it, who gives it form creating his faculties of hearing and sight, his skin, his flesh, and his bones. He then says: My Lord, will it be a male or a female? Your Lord decrees as He desires, which the angel records. The angel then says: My Lord, his duration? Your Lord decides as He likes, which the angel records. He then says: My Lord, his sustenance? Your Lord decrees as he likes, and the angel

¹⁹ Qur’ān 17: 70. The translation is of ‘Abdullah Yūsuf ‘Alī, *The Meaning of the Holy Qur’ān* (Beltsville, MD: Amana Publications, 2004), 694.

²⁰ Qur’ān, 23:12–14. The translation is of ‘Alī, *Meaning of the Holy Qur’ān*, 845–46.

²¹ Imran A. Nyazee, “The Rules of Causing Abortion and Causing Miscarriage: Isqāt-i-Haml and Isqāt-i-Janin in the Pakistan Penal Code,” 12, March 9, 2014, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406992.

records it. The angel then leaves with the scroll in his hand without adding to or omitting anything from what was commanded.²²

According to the first tradition, the soul enters the body after 120 days. The second tradition indicates forty-two nights, but does not give any reference to the soul or the breathing of the spirit.²³ At this stage, the fetus is considered as a separate creation and abortion is unquestionably prohibited except if the life of the mother is endangered by the continuation of pregnancy.²⁴

The question then arises as to whether abortion can be performed prior to this point. Most classical jurists considered it to be prohibited. This is the position of the four main Sunni schools as well as the Ibādī and Zāhirī schools. Some Sunni scholars permit abortion before ensoulment if both the parents consent.²⁵ Some jurists, including the Mālikī jurist ‘Alī b. Muḥammad al-Qayrawānī al-Lakhmī (d. 478/1085) and the Shāfi‘ī jurist Ibrāhīm b. Aḥmad b. Ishaq al-Marwazī (d. 340/951) permitted abortion before forty days, but outlawed it after that. Some Ḥanafī jurists also permitted abortion before the ensoulment due to some lawful reason.²⁶ Some classical jurists adopt an even stricter position regarding voluntary abortion and disallow it from the moment of conception. According to Abū Ḥāmid al-Ghazālī (d. 505/1111), life originates at the discharge of sperm into the womb. Nevertheless, abortion becomes more serious offence with the development of pregnancy. If the ejected sperm is attacked it prevents the formation of the human being.²⁷

²² Ibid., 13.

²³ Ibid., 12–13.

²⁴ Kamyar Hedayat, Peiman Shooshtarizadeh, and Mohammad Raza, “Therapeutic Abortion in Islam: Contemporary Views of Muslim Shiite Scholars and Effect of Recent Iranian Legislation,” *Journal Med Ethics* 32 (2006): 653, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2563289/pdf/652.pdf>.

²⁵ Abdulrahman Al-Matary and Jaffar Ali, “Controversies and Considerations regarding the Termination of Pregnancy for Foetal Anomalies in Islam,” *BMC Med Ethics* 15, no. 10 (2014), <https://bmcmethics.biomedcentral.com/track/pdf/10.1186/1472-6939-15-10.pdf>. Some jurists of the Ḥanafī, Ḥanbalī, and Shāfi‘ī schools also permit abortion with minor restrictions. Mohammed A. Albar, “Induced Abortion from an Islamic Perspective: Is It Criminal or Just Elective?” *Journal Family Community Med* 8, no. 3 (2001): 25–35.

²⁶ ‘Alī Muḥyī ’l-Dīn al-Qarahdāghī and ‘Alī Yūsuf al-Muḥammadī, *Fiqh al-Qaḍāyā al-Ṭibbiyyah al-Mu’āṣirah* (Beirut: Dār al-Bashā’ir al-Islāmiyyah, 2005), 3–8.

²⁷ Fazal-ul-Karim, trans., *Revival of Religious Learnings: Imam Ghazzali’s Ihya Ulum-id-Din* (Karachi: Darul-Ishaat, 1993), 2:38–40.

If a woman is raped, the case is different and most jurists allow abortion. Such a woman is allowed to keep the child, but if she prefers termination of pregnancy, then it must be done within 120 days from conception. After this period, she is bound to keep the fetus until birth and the Muslim community should support her in raising her child. According to a contemporary Syrian jurist Muḥammad Ramaḍān al-Būṭī (d. 2013), for example, abortion can be done within forty or 120 days, and the principle of necessity can be invoked beyond this limit.²⁸

More recently, several contemporary religious edicts (*fatwās*) have supported exceptions to allow abortion in cases of rape. In 1998, the former Egyptian Grand Imam of al-Azhar, Muḥammad Sayyid Ṭantāwī (d. 2010) stated in a *fatwā* that unmarried women who were raped should be allowed to have an abortion. He also issued legislation in 2004, which allowed abortion in case of rape even after 120 days, on condition that the victim was of good character, uncorrupted, and pure.²⁹ Additionally, Egypt's former Grand Mufti, Naṣr Farīd Wāṣil (b. 1937), argued that rape victims ought to have right to abortions and surgery to repair the hymen to preserve female virginity and marriageability.³⁰

The Dialogue Fatwa Committee of the National Council for Islamic Religious Affairs in Malaysia delivered a *fatwā* in 2002 on the legitimacy of abortion for rape victims. However, they considered it unlawful if the fetus were older than 120 days, arguing that at this point the soul had entered the fetus. They also warned that unlawful sexual affairs should not be used as an excuse for abortion.³¹ The Jordanian Society for Islamic Medical Sciences also took up the issue in a series of seminars attended by Muslim jurists and experts in medical sciences in 1995. These discussions concluded that medical actions to avoid pregnancy, including emergency contraception, the morning after pill, and menstrual extraction should be allowed in case where victim presents immediately after the rape. If there is a positive pregnancy test representing establishment of the embryo in the womb, then termination is not permitted. However, some jurists argued in favour of termination of pregnancy prior to ensoulment at forty days and

²⁸ Sami A. Aldeeb Abu-Sahlieh, *Abortion in Islamic and Arab Law* (Ochettaz: Center of Arab and Islamic Law, 1994), 5.

²⁹ Kiarash Aramesh, "Abortion: An Islamic Ethical View," *Iran Journal of Allergy Asthma and Immunol* 6, no. 5 (2007): 32.

³⁰ Aramesh, "A Shiite Perspective toward Abortion," *DARU Journal of Pharmaceutical Sciences* no. 1 (2006): 39.

³¹ Umi Adzlin S. et al., "Termination of Pregnancy for a Muslim Rape Victim and Dilemma in Malaysian Setting: A Case Report," *Malaysian Journal of Psychiatric* 21, no. 1 (2012).

specified that the state of rape was a strong excuse, in view of its social and psychological ramifications.³²

Finally, a Syrian scholar Muḥammad Ṣāliḥ al-Munajjid, who is residing in Saudi Arabia and recognized for establishing the website IslamQA.info, which offers replies to queries consistent with Salafi Islamic teachings and is the first person to introduce a website signifying Islam in Saudi Arabia, declares that if pregnancy is a consequence of rape, then a woman has the option to have the child or go for abortion. However, she must do so within four months of conception.³³ Moreover, it is the obligation of the community to nurture the child.³⁴

After discussing certain aspects of the offence of rape and injunctions related to abortion resulting from rape, according to the *sharīah*, it is pertinent to examine existing Pakistani laws relating to these issues.

Rape Laws in Pakistan

The origins of the present Pakistani law on sexual violence can be traced to the Indian Penal Code 1860 (renamed in Pakistan as the Pakistan Penal Code or PPC) sections 375 and 376 of which dealt with the crime of rape. Later, these sections were repealed by the provisions of the Offence of Zina (Enforcement of Hudood) Ordinance 1979, which made the punishment either that proscribed in Islamic law (*ḥadd*) or discretionary (*ta'zīr*). In *Rashida Patel v. The Federation of Pakistan*,³⁵ the Federal Shariat Court concluded that rape was a form of *ḥirābah*, not *zinā*, but the law could not be changed because the appeal was preferred against this decision to the Shariat Appellate Bench of the Supreme Court.

The Offence of Zina (Enforcement of Hudood) Ordinance, 1979

In 1977, the regime of General Zia-ul-Haq enacted the Hudood Ordinance, which introduced Islamic punishments for crimes including assault, adultery, and prostitution.³⁶ The Offence of Zina Ordinance had

³² Hossam E. Fadel et al., "Terminology of Pregnancy (TOP)," in *FIMA Year Book 2013: Encyclopedia of Islamic Medical Ethics-PART I*, ed. Hossam E. Fadel et al. (Amman: Jordan Society for Islamic Medical Sciences, 2014), 48-49.

³³ "Abortion of Pregnancy Resulting from Rape," <https://islamqa.info/en/answers/13317/abortion-of-pregnancy-resulting-from-rape>.

³⁴ Muhammad Saed Abdul-Rahman, *Jurisprudence and Islamic Rulings: Transactions-Part 5* (London: MSA Publications, 2007), 274.

³⁵ *Rashida Patel v. the Federation of Pakistan*, PLD 1989 FSC 95.

³⁶ Asma Jahangir and Hina Jilani, *The Hudood Ordinances: A Divine Sanction?* (Lahore: Sang-e-Meel Publications, 2003), 1-3.

adverse effects on those who were victim to its unjust application and misuse.³⁷ The sections of the Pakistan Penal Code which administered sexual crimes were more or less rescinded by the Offence of Zina (Enforcement of Hudood) Ordinance. Under this Ordinance, sexual intercourse other than under a valid marriage was declared a criminal offence. The women and men caught committing *zinā* were to be whipped a hundred times each if unmarried and stoned to death if married on the condition that their act was witnessed by four male Muslims of respectable character. The testimony of a woman was unacceptable in *hudūd* crimes, so in rape cases, the victims were at times suspected of adultery and imprisoned. Hence, their rapists were freed as it was not particularly possible for the women to meet the Islamic requirements of providing four sound male Muslims to prove the crime.³⁸

This ordinance also put an end to Pakistan's statutory rape law so young girls were also sometimes detained and put on trial for having extra-marital sex. Many of its provisions were ambiguous, ill-specified, and poorly drafted.³⁹ It was, therefore, not difficult at all to file a case of adultery against a woman, and the Offence of Zina Ordinance made it particularly difficult for a woman to get bail pending trial.⁴⁰ Subsequently, the Pakistani women's rights movement, consisting of internationally known NGOs like the Women's Action Forum and Shirkat Gah, after many years of struggle were able to convince the government to form a Commission of Inquiry for Women. The report of the commission, presented in 1997, rejected the Offence of Zina Ordinance and maintained that it was not in conformity with Islam, conflicted with many human rights assured by the constitution, and dishonoured Pakistan's international obligations. It recommended drastic changes to the ordinance.⁴¹

Under the Pakistani legal system, rape was never regarded as *hīrābah*. However, in the Federal Shariat Court, there has been a serious

³⁷ Martin Lau, "Twenty-Five Years of Hudood Ordinances: A Review," *Washington and Lee Law Review* 64, no. 4 (2007): 1291–1314, <https://scholarlycommons.law.wlu.edu/wlulr/vol64/iss4/2>.

³⁸ Rahat Imran, "Legal Injustices: The Zina Hudood Ordinance of Pakistan and Its Implications for Women," *Journal of International Women's Studies* 7, no. 2 (2005): 88–87.

³⁹ Vikram Parekh, *Prison Bound: The Denial of Juvenile Justice in Pakistan* (New York: Human Rights Watch, 1999), 18.

⁴⁰ Shahnaz Shoro, *Honour Killing in the Second Decade of the 21st Century* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2017), 8.

⁴¹ Mumtaz Khawar and Mitha Yameema, *Pakistan: Tradition and Change*, rev. ed. (Oxford: Oxfam Publishing, 2003), 46.

dialogue regarding this. In 1989, it was claimed by women's rights activists that several provisions of the Hudood Ordinance were abhorrent to Islam. One of them was the provision dealing with *zinā* and rape. These provisions were studied by the court and it was expected that a strong difference between the *zinā* and rape would be established. The judges confirmed this by stating that rape should be placed under *ḥirābah* and be removed from the category of *ḥudūd*. According to them, this would reduce the harsh necessity of evidence of four male witnesses to two male witnesses.⁴² This finding was never codified as a statute, although the law concerning rape was finally reviewed in 2006.⁴³

Protection of Women Act, 2006

The leading effort to modify the Offence of Zina Ordinance of 1979 was taken by General Pervez Musharraf (in office 1999-2008) when he signed the Protection of Women (Criminal Laws Amendment) Act at the end of 2006. This began with the report of the "Commission of Inquiry for Women" in 1997. National Commission for the Status of Women analyzed all five Hudood Ordinances and recommended modifications in 2003. The Legal Committee of the Council of Islamic Ideology then initiated a detailed examination of the Hudood Ordinances in 2006 and on June 27, 2006 suggested that they must be re-written.⁴⁴ The Protection of Women Act was the result of this process and passed by the National Assembly of Pakistan in December 2006. This act was for the protection of women charged under Hudood Ordinance 1979 and provided relief to women against ill-treatment and prevented them from victimization.

For instance, the offence of rape was removed from the Hudood Ordinances and inserted in the penal code with sections 365B, 367A, 371A, and 371B.⁴⁵ The sections 375 and 376 were also inserted in the Pakistan penal code under the sub-heading of rape. Rape victims were no longer under an obligation to provide four virtuous Muslim male witnesses to support their claim. Circumstantial evidence is sufficient to

⁴² Begum Rashida Patel v. State, Federal Shariat Court, PLD 1989, S.P. Nos. 10, 11, 12 and 13-K of 1983, <https://www.scribd.com/doc/88327494/Decided-Shariat-Cases>, accessed on June 27, 2018.

⁴³ Ruba Saboor, "Rape Laws in Pakistan: Will We Learn from Our Mistakes," *Islamabad Law Review* 1, no. 1 (2016): 84–86.

⁴⁴ *A Critical Report* (Islamabad: Council of Islamic Ideology, 2007).

⁴⁵ Munir Ahmad Mughal, ed., *Protection of Women along with the Protection of Women: Criminal Law Amendment Act, 2006 [VI of 2006]*, 2nd. ed (Lahore: Muneeb Book House, 2007), 35–37.

consider cases and victims of rape will no longer face charges of *zinā*.⁴⁶ The 2006 Act also made amendments to the Qazf Ordinance of 1979, removing subsections (3) and (4) of section 14 (which deal with the procedure of *li'ān*) and section 15.⁴⁷

Criminal Law (Amendment) (Offences Relating to Rape) Act, 2016

This act further amended the Pakistan Penal Code (PPC), 1860, the Code of Criminal Procedure (CrPC), 1898 and the Law of Evidence, 1984 in order to make stringent laws regarding the crime of rape. This act amended section 55 of PPC and declared offences associated with rape as non-commutable. The section 376 of the PPC was also revised and prescribed life imprisonment or the death penalty in cases of the rape of a minor and mentally or physically disabled individual. It further specified that if the rapist is a public servant, he shall also be penalized with the same penalties and fines. This amendment also prohibited revealing the identity of rape victims. The new section 53A was introduced in CrPC after section 53, and it described that it would be legal for a registered medical officer to examine a person alleged of rape, unnatural offence or sexual abuse or attempt to commit rape, unnatural offence or sexual abuse under section 376, 377 or section 377B of the PPC.⁴⁸

Under the new amendment made in section 154 of the Code of Criminal Procedure, it is mandated that female police officers or any other female relative of the victim be present when the investigating officer records the declaration of the victim. Similarly, the presence of a female police officer is likewise necessary to record FIR of such offences. Under the new section 161A inserted in CrPC, the police officer is required to inform the victim of her right to legal representation and provide him or her with a list of lawyers maintained by the Provincial Bar Council for free legal aid. Furthermore, the new section 164A describes where the crime of rape, unnatural offence or sexual abuse or

⁴⁶ Mahmud Khalid Rahman, *Manual of Protection of Women Laws* (Lahore: National Law Book House, n.d.), 7–22.

⁴⁷ The section 15 covers the following crimes: Punishment for attempt to commit offence punishable under this Ordinance: Whoever attempts to commit an offence punishable under this Ordinance, or to cause such an attempt to be committed, and in such attempt does any act towards the commission of the offence, shall be punished with imprisonment for a term which may extend to one-half of the longest term provided for the offence, or with such whipping or fine as is provided for the offence, or with any two of, or all, the punishments.

⁴⁸ *The Gazette of Pakistan, Extra* (Karachi: Deputy Controller, Stationery and Forms, 2016), 791–92.

attempt to commit rape, unnatural offence or sexual abuse under section 376, 377 or section 378 respectively, of the Pakistan Penal Code, is under investigation, the female victim shall be examined by a registered female physician instantly after the declaration of such crime.⁴⁹ If these provisions are implemented correctly, this will increase reporting of such crimes as women will have support and will not feel alone. It will also eliminate the reluctance, which some women may have in dealing with a male officer. The presence of a female police officer or an examiner will reduce the shame and embarrassment along with apprehension of the judgement that accompanies sexual crimes.

Perhaps the most groundbreaking provision is the new section 164B in the CrPC, under which the DNA test is mandatory, but with the approval of the victim or her legal heirs, and it is the obligation of the investigating officer to send the samples of DNA to laboratory as early as possible. This provision will make sure that solid evidence will exist in a rape case to exonerate or condemn a defendant beyond a reasonable doubt while at the same time ensuring that the victim gets justice. It further provides that such evidence can only be obtained when there are judicious grounds to consider that medical testing will lead to evidence. The objective of this law is not to compromise the individual's right to privacy.

The new act also deals with an issue of misconduct by public officials by recommending a sentence of up to three years to those who fail to investigate the cases diligently under section 166 (2) of the Pakistan Penal Code. Furthermore, section 186 supplements this by providing the punishment of three months to a year, along with a fine to those who obstruct an official from carrying out an investigation or hampering an inquiry.⁵⁰ After section 344, a new section 344A was introduced, which bounded the courts to conclude the rape trials within three months.

One of the major problems of the victims of sexual crimes is the publicity it brings. To combat this, section 352 of CrPC now provides that hearings are to be held privately and not in open and public court, where access will be available only by application to the presiding officer. A privacy screen can also be provided to victims and witnesses to protect their identity. However, it would be more appropriate to have an open and public trial where the judge has the discretion to refuse entrance of

⁴⁹ Ibid., 792–94.

⁵⁰ Ayesha Yezdani, "Understanding the Anti-Rape Law," *The News International*, November 13, 2016, <https://www.thenews.com.pk/print/164496-Understanding-the-anti-rape-law>.

people based on an analysis of the safety and security for the victim or at her request.⁵¹

Rape and the Need for Legal Reforms

It is appropriate to discuss two foremost prejudiced provisions in the Law of Evidence related to sexual crimes. According to section 151 (4), when legal action has taken against a man for the rape or attempted rape and if it is proven that the prosecutrix was of normally indecent character, then on the basis of this provision accused person can take advantage by showing that she has a history of indecent conduct. Furthermore, section 21 (j) makes relevant the situation and conditions in which the complaint of rape was made.⁵² This leads courts to deduce negative presumption from deferral in reporting by litigants and let the defense to challenge the previous sexual history of the plaintiff, to point out or put such questions related to sexual history of the rape victim to prove consent. The intentions of survivors are often brought into question in cases of delays in reporting and sometimes as a scheme to wrongfully accuse the defendant.⁵³

In addition to these inequitable provisions, there are also some forms of sexual assault for which little legislation exists. Cases of penetration with objects, for example, are explicitly excluded by the law on rape even yet there have been reported cases of non-penile rapes across the country. Although the definition of rape has been extended around the world, in Pakistani law the emphasis is on penetration of a penis into the vagina or anus. In some jurisdictions of the United States, sexual violence statutes now include deliberate touching, through the clothing of the private parts of any other individual who has not reached to the age of sixteen with the intention to molest, disgrace, tease, and stimulate the sexual desire of any individual.⁵⁴

Another issue in rape cases is out-of-court settlements. Rape is a non-compoundable offence, but the parties often end to settlements outside of the courts due to gender-biased social practices and related pressures. In case of such compromises and settlements, witnesses either withdraw or a lack of convincing evidence leads to the accused being

⁵¹ Ibid.

⁵² Muhammad Mahmood, *The Major Acts: Revised and Enlarged with Much More Case Law 2016* (Lahore: Al-Qanoon Publishers, 2106), 1257, 1331.

⁵³ Ayesha Khan and Sarah Zaman, *The Criminal Justice System and Rape* (Karachi: War Against Rape, 2007), 9–10.

⁵⁴ Maliha Zia Lari and Sarah Zaman, *Sexual Violence and the Law in Pakistan* (Karachi: WAR's Legal Education Program, 2011), 68.

discharged or their sentence decreased. In *Manzoor Chachar v. the State*, on the ground of an out-of-court settlement, the Sindh High Court decreased the punishment of an offender of rape from life imprisonment to ten years.⁵⁵ Such compromises enhance the perpetuation of violence against women and generate frightening surroundings for survivors.⁵⁶

The case of Salman Akram Raja is perhaps the most important call for changes to the Pakistani laws regarding rape.⁵⁷ In this case, six recommendations were put forward by the petitioner that needed to be enforced for all matters of rape in Pakistan. The rape victims have injuries, both psychologically and emotionally so they stand on a higher pedestal than other victims do. The situation is worse if the girl turns out to be pregnant as a result of it. The setting up of special courts where woman judges will try rape cases can bring a new dimension to the whole legal system. With the setting up of special courts, a very humane system could be expected. Only a woman understands what another woman suffers. The conviction rate, which is very low, can be improved if we have women judges.⁵⁸

Rape, Pregnancy, and Abortion

Under Pakistani law, abortion offences are divided into two categories. According to section 338 of PPC, abortion is characterized as that act in which a woman causes a death of such a child in her womb whose limbs have not formed yet, thus, causing its death before its birth. If abortion has been done to save the life of the woman and it becomes necessary to do such an act during her medical treatment, then, it is not illegal. On the other hand, if an abortion is performed without any reasonable cause, then the same would amount to a crime. If the woman causes herself to miscarry, then it would also be considered a crime. Abortions that are performed before the formation of the organs of unborn child are known as *isqāt-i ḥaml*. The offender shall be subjected to discretionary punishment, which is imprisonment for up to three years

⁵⁵ *Manzoor Chachar v. the State*, Sindh High Court, 2015 PCrLJ 690.

⁵⁶ Sohail Akbar Warraich, *Access to Justice for Survivors of Sexual Assault: A Pilot Study*, 26–28, [http://af.org.pk/gep/images/publications/Research%20Studies%20\(Gender%20Based%20Violence\)/Access%20to%20Justice%20for%20Survivors%20of%20Sexual%20Assault%20final%20with%20branding.pdf](http://af.org.pk/gep/images/publications/Research%20Studies%20(Gender%20Based%20Violence)/Access%20to%20Justice%20for%20Survivors%20of%20Sexual%20Assault%20final%20with%20branding.pdf)

⁵⁷ *Salman Akram Raja and another Petitioners v. Government of Punjab through Chief Secretary, Civil Secretariat, Lahore and others—Respondents*, PLJ 2013 SC 107 (Original Jurisdiction), Constitutional Petition No. 38 of 2012, pgil.pk/wp-content/uploads/2014/07/DNA-SC-Judgement.doc, accessed on June 28, 2018.

⁵⁸ V. Mohini Giri, *Deprived Devis: Women's Unequal Status in Society* (New Dehli: Gyan Publishing, 2006), 18, 50–53.

if the woman consented and if she did not consent then up to ten years. If, as a consequence of such abortion, any injury is inflicted to the woman or she dies, the offender shall also be legally responsible for the penalty provided for such hurt or death as the case may be.⁵⁹

If abortion is carried out at the stage when some of the organs have been formed, it is known as *isqāt-i janīn* under section 338-B of PPC and is prohibited except for the first of the above reasons. The offender shall be required to pay blood money (*diyat*) to the heirs of the victim. If the child is born dead blood, money will be one twentieth and if born alive, but dies as a consequence of an action of the offender, a full blood money is payable as well as imprisonment up to seven years.⁶⁰

In Pakistan, many abortions are carried out clandestinely, and even though the law does not sanction abortions, the Population Council of Pakistan has revealed that about 890,000 abortions are taking place nationwide. These are just the reported cases, more than half of which are being done by unofficial doctors. About 696,000 women visit health facilities yearly with post-abortion complications.⁶¹

The first step towards the reformation of abortion laws was taken by the government of Pakistan. In 1989, the Supreme Court of Pakistan declared void the portion of the Pakistan Penal Code related to the offences against the human body on the ground that it was inconsistent with the rulings of Islam. Many provisions were reformed and revised to comply with Islamic legal principles. From 1990 onwards, the amended law was tentatively applicable and became permanent law in 1997.⁶² An exception for abortion was made under the new law. Abortion was allowed before the development of fetal organs only as a required treatment to save a woman's life or her health. After the development of organs, abortions were only allowed if they were to protect the mother's life. In 1996, under a presidential order, it was declared that those who perform abortions have to pay blood money in case the fetus has developed.

⁵⁹ Sajad Anwar Khan and Hassan Mehmood Butt, *The Pakistan Penal Code 1860 XLV of 1860 with New Islamic Laws 1979* (Lahore: Eastern Law Book House, 2016), 128.

⁶⁰ Muhammad Abdul Basit, *The Pakistan Penal Code: Act No. XLV of 1860 (Bare Act)* (Lahore: Federal Law House, 2017), 130.

⁶¹ Shakir Lakhani, "Options for Rape Victims in Pakistan: Stay Silent, Get an Abortion or Set Yourself on Fire," *The Express Tribune*, March 17, 2014, <https://tribune.com.pk/article/21475/options-for-rape-victims-in-pakistan-stay-silent-get-an-abortion-or-set-yourself-on-fire>.

⁶² Sraw, "Abortion Law of Pakistan."

Despite the amendments to the law, the biggest problem is the restraint on providing a woman with the choice to terminate pregnancy. A number of recommendations concerning women's health and rights were suggested by the Commission of Inquiry for Women appointed by the government of Pakistan. The commission was headed by Justice Nasir Aslam Zahid. In August 1997, the commission proposed that within the first 120 days of pregnancy the women's right to take an abortion by their own consent be unequivocally supported. It was further suggested that beyond the 120-day period, abortion should be made permissible in the circumstance of rape, seriously disabled girls, threat to the life or health of the mother, and in the case of any exposure to disease or other hazards, which may result in abnormalities of the child.⁶³ These recommendations are yet to be enshrined into law. The legal system of Pakistan should give women the authority over what is such a significant decision. A rape survivor who becomes pregnant has no choice of terminating the fetus even in the course of the initial weeks, but if she wants to terminate, her options include illegal abortion or a suicide in extreme cases.

Additionally, there is no strong distinction of the two stages of pregnancy and clear definition of what constitutes "necessary treatment." Thus, the law is somewhat ambiguous. It reflects insensitivity to women, it does not exempt rape victims, and the society has no place for illegitimate child at the social and legal levels.⁶⁴

Conclusion

The *sharīah* views the offence of rape as a coercive adultery (*zinā*) and warrants a proscribed punishment (*ḥadd*). Despite revolutionary modifications in Pakistani law, access to justice for rape victims has not significantly improved. There is a pressing need to broaden the definition of rape to accommodate different methods of commission. Pregnancy is another issue associated with the crime of rape. In the *sharīah*, abortion is considered fundamentally forbidden (*ḥarām*). However, some jurists believe that abortion can be conducted within the initial forty days of gestation, while others extend the period to 120 days if there is a valid reason.

⁶³ Shahida Zaidi et al., *Unsafe Abortions in Pakistan: A Situation Analysis* (Karachi: National Committee for Maternal and Neonatal Health, 2010), 11.

⁶⁴ Sangh Mittra and Bachchan Kumar, *Encyclopedia of Women in South Asia: Pakistan* (New Delhi: Kalpaz Publications, 2004), 2:48.

Abortion is illegal in Pakistan, even in case of pregnancies that occur as a result of rape. This has created a situation where many children are born out of wedlock or clandestinely murdered each year. Abortion is only endorsed if a (married) mother's life is in danger. This is despite the fact that Pakistan primarily follows the Ḥanafī school, which allows abortion within 120 days of gestation due to some valid reasons. In circumstances of rape, Muslim scholars around the world conditionally endorse undergoing an abortion. Rape is not the only issue, but there are several other problems associated with it, such as pregnancy, illegal abortion, and children born as a result of rape.

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