



RAPE LAWS IN PAKISTAN: WILL WE LEARN FROM OUR MISTAKES?

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Abstract

The objective of this research is to explore and establish the position of zina-bil-jabr in the Islamic legal system while comparing it with the previous and current laws regarding rape in Pakistan, and to see whether its punishment amounts to hadd or siyasah under the Islamic criminal law and how this classification can be incorporated in the Pakistani legal system.

The article begins by explaining what zina-bil-jabr is under Islamic law and how it was integrated in the Pakistani legal system under the name of Hudood Laws in 1979, continuing to explain how this law was abused in the past. The Protection of Women Act 2006 was meant to bring the Hudood Laws in agreement with the injunctions of Islam, but ended up creating more anomalies in the legal system. Finally, the concept of siyasah is discussed where, if such a crime was to be brought under this banner, it solves the problem of the nature of the crime, its evidentiary requirements and its punishments. If the offence of zina-bil-jabr was to be renamed and redefined, it will not only exclude this crime from the operation of the stringent rules of zina but also the law will be able to cover a large number of sexual offences with their own requirements of evidence and the penalties may differ according to the gravity of the assault on the victim. Also, such a law would be gender-neutral for it would cover sexual assaults on both women and men. These changes can only be made if the offence is governed under the doctrine of siyasah.

Key words: Zina-bil-jabr, Siyasah Shariah, Hudood Ordinance, 1979, Protection of Women Act, Sexual assault

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Introduction

The offence of *zina-bil-jabr* or rape and the laws in Pakistan proclaiming it have been a subject of heated debates and a source of a number of controversies. With the rising popularity of the concept of Human Rights in the country, the *Hudood* Ordinances, 1979 met with much criticism. The *hadd* punishments are an essential part of Islamic Criminal law and the *Hudood* Ordinances, 1979 had been promulgated in an attempt to bring the criminal laws in Pakistan in compliance with the rulings specified in Islam. Unfortunately, the laws relating to sexual offences against women were discriminatory and instead of protecting the victims and the accused focused more on penalizing them. The laws that were meant to protect its subjects became a tool of oppression.

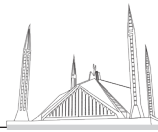
This article aims to highlight the rape laws in Pakistan throughout history comparing them with the Islamic laws and it aims to point out the differences as well as the positive and negative aspects of the old and new Pakistani rape laws; whether or not either of the two laws have protected the rights of its subjects and whether we have available to us a satisfactory solution.

Rape under Islamic Law

Rape, under Islamic law, is dealt with under the same rules that apply to any situation regarding coercion and duress. Let us briefly look at how coercion is treated under the umbrella of Islam.

Coercion under Islamic law

The Arabic term "*ikrah*" is commonly used to define coercion. In general, it refers to the commission of an illegal act by one upon another which is injurious or harmful to him, without his consent or that such deed was forced upon. This also includes the act of threatening another to coerce him into committing an illegal act against his will. *Ikrah* has been divided into two sub-categories; *Ikrah ta'am* refers to a situation where one has neither given consent nor is he in any position to refuse the aggressor, for example, fear of one's life if one is to refuse. This is unconditional *ikrah* or absolute coercion. The other category is that of *ikrah naqis* or imperfect coercion where the one coerced upon does not consent to the act but



the consequences of refusal are not so dire. For example, one is threatened with minor injury in case of refusal or that the one being coerced knows that the other is unable to carry out the threat.¹

According to the Prophetic traditions, the Messenger of Allah (P.B.U.H) has said, “Allah has pardoned, for me, my *Ummah*: (Their) mistakes, (their) forgetfulness, and what they have done under duress.”²

According to the four major schools of thought, i.e. Hanafi, Maliki, Sha’fi and Hanbali, the situation of *ikrah* initiates the moment the one coerced to do the illegal act is inflicted with fear. After that moment, he is to be dealt with under the rules of *ikrah* and not as a regular offender, as long as the threat is physically possible.³

There are certain conditions that apply in any situation of *ikrah*; without these conditions the matter of whether the situation is to be dealt with under *ikrah* becomes questionable. Firstly, the one being coerced must experience fear of death or severe injury in case of refusal; second, the threat must be immediate. In other words, the coerced person has no or very little opportunity to protect themselves. And lastly, the person being intimidated believes that the threat will be carried out. Whether the threat is actually able to be carried out or not is irrelevant. As long as the victim believes it will be, the situation of *ikrah* exists, unless he is being threatened with something that is impossible.⁴

Once the situation of *ikrah* has been determined, the victim of coercion is not liable to any kind of punishment for his actions were not his own. However, if it is an easily avoidable situation, yet the victim still believes himself to be a *mukrih* (one who is coerced) he may still be held liable for he had the opportunity to avoid it. Such a situation will be judged according to his mental capacity.⁵

1 Au’dah, Abdul Qadir, “*At-Tashree’ Al-Jinai Al-Islami*” (Beirut: Musawwamat ur Risalah, 1997), 1:563-564.

2 Ibn Maajah and al-Bayhaqee. < <http://hadithaday.org/40-hadith-an-nawawi/pardoning-of-mistakes/> > (accessed: July 26, 2014).

3 Au’dah, “*At-Tashree’ Al-Jinai Al-Islami*”, 1:564.

4 Ibid, 565-566.

5 Ibid, 568.

There is a consensus among all major schools of thought that all crimes are acceptable under the condition of *ikrah* except for murder. One is not allowed to take another's life even under coercion.⁶

Rape under Islamic Law

Islamic law treats rape under the same category of the general law of *zina*. It is interpreted as a sub-category and the general term used to describe it is *zina bil jabr* or *al-watt bil ikrah* (forced penetration). This understanding of rape is due to the fact that the Quran does not directly deal with the offense of coercive sexual relationship and only mentions the rules and penalties for consensual sexual intercourse. Therefore, decrees relating to rape are based on analogy or other forms of legal analysis.

Muslim scholars have based their arguments regarding rape on the previously mentioned Prophetic tradition that says "Allah has pardoned, for me, my *Ummah*: (Their) mistakes, (their) forgetfulness, and what they have done under duress."⁷ There is a general consensus among the majority of Islamic scholars that any person, man or woman, forced into an illegal sexual relation, is not to be subjected to punishment.⁸ This consensus is also based upon the Quranic verse "... But he who is driven by necessity, being neither disobedient nor exceeding the limit, it shall be no sin for him. Surely, Allah is Most Forgiving, Merciful."⁹, that he who did not have a choice bears no sin.

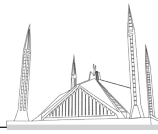
Other instances in our history have also proved that any woman who asserted to have been raped was not punished. For instance, during the Prophet's (P.B.U.H) time a woman claimed to have been subjected to rape, the Prophet (P.B.U.H)

6 Ibid, 569.

7 Ibn Maajah and al-Bayhaqee. < <http://hadithaday.org/40-hadith-an-nawawi/pardoning-of-mistakes/> > (accessed: July 26, 2014).

8 Au'dah, "*At-Tashree' Al-Jinai Al-Islami*", 1:573, and Charles Hamilton, "*The Hedaya*" (Lahore: Premier Book House, 1987), 187, and *Karamah: Muslim Women Lawyers For Human Rights*, "Zina, Rape, and Islamic Law- An Islamic Legal Analysis of the Rape Laws in Pakistan". <<http://karamah.org/wp-content/uploads/2011/10/Zina-Rape-and-Islamic-Law-An-Islamic-Legal-Analysis-of-the-Rape-Laws-in-Pakistan1.pdf>> (accessed: July 27, 2014)

9 Al-Quran, Chapter II, verse 174.



did not charge her of any crime, but appointed *hadd of rajm* on the man who had attacked her.¹⁰ Another incident occurred during the time of Caliph Omar when some female slaves were sexually assaulted by some male slaves. The female slaves were cleared of any misconduct and Caliph Omar ordered for the male slaves to be flogged.¹¹

Another occurrence took place when a lady, who had allegedly committed adultery, was brought before the Caliph Omar where she argued that she was a heavy sleeper and a man came unto her during her sleep. Caliph Omar had her released, even though she was unable to identify her assailant. When asked about his decision he replied that a *hadd* punishment is waived in case of even the slightest doubt. According to the statement of Caliph Ali and Ibn Abbas quoted here, if there is an “if” or a “maybe” in a *hadd* case, it cannot be applied.¹² There is a general consensus among all major schools of thought that in a situation of doubt, the *hadd* punishment is not to be carried out. This consensus is based on the Prophetic tradition that doubt negates *hadd* punishment.¹³

Moreover, the definition of coercion adopted by the jurists is in no way a narrow one for it extends to include meanings other than that of physical force as well. In other words, simple threat to hurt or kill the woman, or denying her food or water, in order to subjugate her into giving consent, is also covered under the umbrella of coercion. This was seen in the case where a woman, who was brought before Caliph Omar charged with *zina*, claimed that she was thirsty and asked a shepherd for some water. The shepherd, however, refused unless she agreed to have sexual intercourse with him. This did not leave the woman with any other option but to agree to his demand. Caliph Omar consulted Ali in the matter and they concluded that such a woman bears no sin for she did not have any choice

10 “*Jami Tirmidhi*”, Book of Hudood, Chapter 22, Hadith 1458. (Place of Publication and publisher ?)

11 Au’dah, “*At-Tashree’ Al-Jinai Al-Islami*”, 1:573, and *Karamah* “Zina, Rape, and Islamic Law- An Islamic Legal Analysis of the Rape Laws in Pakistan”.

12 *Karamah: Muslim Women Lawyers For Human Rights*, “Zina, Rape, and Islamic Law- An Islamic Legal Analysis of the Rape Laws in Pakistan”, 10-11.

13 Au’dah, “*At-Tashree’ Al-Jinai Al-Islami*”, 2:365 and *ibid*.

in the matter. Therefore, the case was dropped against her and she was even provided with some monetary compensation.¹⁴

While there is a general consensus among all schools of thought regarding the waiver of punishment for a woman forced into sexual relationship, such is not the case where the victim is a man. Jurists have considered the possibility of a man being coerced into having an illicit sexual relationship and their opinions differ slightly from one another.

Imam Abu Hanifa originally believed that a man cannot be forced to have sex as he is an active partner in the process, unlike a woman who plays a passive role; and that distension of the male organ is an indication of desire and consent. Therefore, according to his prior opinion, compulsion cannot be proved with respect to him. Later on, he changed his opinion and said that compulsion upon a man can be proved if his life is threatened at the time of the intercourse and so he cannot be blamed for his actions. He also argued that the physical reaction from a man, i.e. distension of the organ, is no positive proof of desire and consent but rather of his masculinity since it may sometimes occur independent of his mind's activity, in his sleep, for instance. Imam Abu Hanifa further divided the situation into the two types of coercion, namely absolute and imperfect. He said that in case of absolute coercion or *ikrah ta'am*, which he believed occurs only by the order of the sovereign, is not liable to the *hadd* punishment. But if any other person other than the sovereign should compel a man to commit *zina*, then that man has to take on the responsibility for his actions. His two disciples, Abu Yusuf and Muhammad, differed in this matter. They said that a man subjected to absolute coercion to commit *zina* by any person is not liable to *hadd*. In the Hanafi school of thought, regarding the matter of coerced sexual intercourse upon a man, the opinion of the two disciples is preferred over the opinion of Imam Abu Hanifa. However, in case of imperfect coercion or *ikrah naqis*, both Imam Abu Hanifa and his disciples share a consensus that a man subjected to imperfect coercion is liable to *hadd* punishment, for he has the opportunity to avoid his oppressor's intimidation. It may be concluded that according to the Hanafi school of thought, a man does not incur punishment if subjected to absolute coercion and is liable to

14 Ibid 1:573



hadd punishment in a situation of imperfect coercion.¹⁵

Contrary to the Hanafi school of thought, the Hanbali School believes that since a man holds the active role, he is liable to *hadd* regardless of whether the coercion he is faced with is absolute or imperfect. They believe that *zina* is not possible without the distension of the male organ and, according to them, distension is not possible if he is terror-stricken. Therefore, if distension occurs then that is proof of desire and that, in turn, makes him liable to punishment.¹⁶

The Maliki school of thought is in slight agreement with the Hanbali School. They believe that anyone coerced into having an illicit sexual relationship, whether it be a man or a woman, is liable to *hadd* punishment as this is a matter of Right of God. However, there is a second opinion among the Maliki School where they believe that if a person is threatened to be killed only in that case a coerced illicit relationship is permitted. If one were to commit the act of *zina* under any other intimidation other than that of one's fear of life, he incurs upon himself the *hadd* punishment.¹⁷

The Sha'fi school of thought is the most lenient in the matter of a man being coerced into an illegal sexual relationship. According to them, any person faced with a situation of coercion, whether absolute or imperfect, is not liable to the *hadd* punishment. Their reason being that coercion, whichever kind, gives the one coerced the benefit of doubt in the situation; since doubt negates the *hadd* punishment such a penalty cannot be carried out on this person.¹⁸

Case of Unmarried Pregnant Woman Claiming Rape

There is a wide disagreement among the Muslim scholars regarding how to deal with a situation of an unmarried pregnant woman who claims rape. The women lawyers at Karamah have compiled these opinions by jurists, quoted many of them and have provided with the most appropriate one.

15 Au'dah "*At-Tashree' Al-Jinai Al-Islami*", 1:573, Charles, "*The Hedaya*", 187 and Wahbat-uz-Zuhaili, "*Al-Fiqh Al-Islami Wa Adallatubu*" (Damascus: *Dar al Fakr*, 1985), 2nd edition, 5:401.

16 Wahbat-uz- Zuhaili, "*Al-Fiqh Al-Islami Wa Adallatubu*", 5:401.

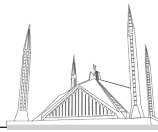
17 Ibid, 402.

18 Ibid, 401.

They quote and agree with Imam Abu Hanifa that if a woman claims rape, she is not required to prove it nor is it necessary for her to identify or name her attacker. They quote that according to him if there is a situation where it cannot be proved that the woman has committed *zina* nor is it possible to verify her claim of rape, it is best to drop the case against her owing to the Prophetic tradition telling us to dismiss the *hadd* punishment if there is an element of doubt. Clearly, Imam Abu Hanifa sympathized with the rape victim and believed that any woman subjected to such brutality could not be expected to remember the identity or name of her assailant. This opinion of Imam Abu Hanifa is mostly based on such occurrences during the time of the Prophet's (P.B.U.H) Companions where they dismissed apparent cases of *zina* where the victim claimed rape.¹⁹

However, Imam Malik and some other jurists shared different views regarding the matter. They argued that *zina* is proven in a situation where the woman is pregnant, unless the woman proves rape or marriage. This statement is based on Caliph Ali's statement where he categorizes *zina* into two forms, first is private *zina* that can only be proved through the testimony of four male eyewitnesses and second is public *zina* in a case where there is pregnancy or a confession. In spite of this, Caliph Ali provided with certain requisites for dealing with a situation of extramarital pregnancy. For one, he always gave the pregnant woman the opportunity to defend herself by claiming either that she had been raped or that she was already married. He also seemed to be quite willing to dismiss the charges based on doubt. The women lawyers at Karamah have interpreted the statement of Caliph Ali a bit differently, where they say that an illegal sexual relation leaves its private sphere when pregnancy of an unmarried woman occurs, which in turn affects the upholding of the public morality in the society. The society has the right to protect its moral values under Islamic jurisprudence; thus it becomes important that the alleged woman justify her pregnancy either by claiming rape or marriage. If she is unable to do as such, and if there is no other doubt in the matter, only then will her pregnancy be considered as proof of *zina*.

19 *Karamah: Muslim Women Lawyers For Human Rights*, "Zina, Rape, and Islamic Law- An Islamic Legal Analysis of the Rape Laws in Pakistan", 10-11.



In the case where a pregnant woman was brought before him, he even went as far as asking questions like: “maybe you were raped in your sleep?” or “perhaps you were forced to have sex?” suggesting to the pregnant woman, ways to justify herself. Therefore, according to Karamah lawyers, jurists who take up Caliph Ali’s statement regarding pregnancy as proof of *zina* take it out of context which goes against the spirit of the rulings that protect such women.²⁰

The seriousness of the matter of imposition of *hadd* punishment is clearly visible where even the most rigid of jurists, e.g. Imam Malik, have accepted physical evidence as proof of rape. The statement of a single witness who happened to hear the victim’s cries for help was considered sufficient proof by Caliph Omar and he ordered the woman to be released. Concluding the matter of an unmarried pregnant woman who claims rape, we can ascertain that a woman who is raped is not under the obligation to identify her assailant under the less rigid schools of thought, like the Hanafi school. Even under the rigid schools of thought, like that of the Maliki school, while she has to prove rape, she is not bound to point out the aggressor.²¹

Now, the matter of an unmarried pregnant woman claiming rape and identifying an individual, accusing him of raping her is a different matter. Muslim jurists have expressed different opinions regarding this matter especially where the woman is unable to fully establish her claim.

According to the Maliki school of thought, if the person accused of rape is one known for his piety then the woman is liable to *hadd of qadhif*²² if she is unable to produce any witnesses or physical evidence. However, in a situation where the accused is known for his misconduct, it is left up to the judge to decide whether to believe the woman’s claim or not. In the event that the judge finds the accused individual guilty, he may inflict corporal punishment upon him, imprison him and

20 Ibid, 11.

21 Ibid, 11-12.

22 *Hadd of qadhif* refers to the punishment of 80 lashes for accusing the chastity of a pious person. While the Quranic verse specifically talks about falsely accusing chaste women, Muslim scholars have applied this rule to anyone accusing the chastity of any other individual, man or woman.

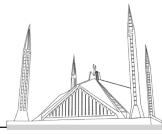
pay the woman an amount equivalent to mahr.²³ According to Omar bin Abdul Aziz, if the alleged lady is able to produce even one witness who heard her calling for help, then she can escape the punishment for *qadhf*. However, according to the Maliki school of thought, this evidence is not sufficient enough to establish the guilt of the accused. To do so would be unfair to the alleged rapist. The lawyers at Karamah believe that the opinion of the Maliki school of thought is greatly flawed and inconsistent with the Quranic injunctions. Instead they quote Ibn Hazm, a famous jurist who fiercely disagrees with Imam Malik and has provided with an alternate solution to the problem of unmarried pregnant woman identifying her assailant.

Ibn Hazm developed a new mechanism on how to deal with this situation and keep the damage to a minimum. He is of the opinion that when a woman approaches the court accusing an individual of forcing himself on her, rather than perceiving it as a false accusation, she should be looked upon as a plaintiff seeking justice. This would remove her from the liability of *qadhf* therefore relieving her of any fear from approaching the law. As a plaintiff, there are two courses of action: (1) She should be asked to produce clear evidence to prove her claim, and if produced the accused be punished accordingly; (2) if she fails to produce sufficient evidence, then the man would be asked to take an oath asserting that he did not assault her nor did he compel her to do anything against her will. However, he cannot be made to swear that he did not commit *zina* for such an oath would be too inflexible. Once the oath is conducted, both parties would be allowed to leave and neither would be liable for any form of punishment whatsoever.²⁴

This article describes Ibn Hazm's opinion of the matter as "balanced, just and

23 The paying of *mahr* to the victim by the assailant does not mean that he is to marry her, as most believe. The payment is actually a form of compensation for the damage he has caused to the woman. I believe that the "amount equivalent to *mahr*" is the scale set out by the Maliki school of thought as to the amount of compensation that the victim is to receive. The Sha'fi school of thought agrees with the Maliki school in saying that the rapist is liable to *hadd* punishment for *zina* and the victim should be provided with monetary compensation. Other scholars disagree with this approach saying that it imposes double jeopardy on the accused and it would therefore be unfair for the accused and inconsistent with the spirit of Islam.

24 *Karamah: Muslim Women Lawyers For Human Rights*, "Zina, Rape, and Islamic Law- An Islamic Legal Analysis of the Rape Laws in Pakistan", 13-14.



compassionate” and unbiased. It tells the Muslim judge to lean towards side of caution to avoid victimizing anyone. Ibn Hazm notably distinguishes between the act of reporting an injustice and falsely accusing someone, for without such distinction the divine law that is meant to protect women becomes an instrument of victimization and exploitation. This opinion embodies the idea of justice and equity in such a way that rights of both parties are protected.²⁵

Summarizing the discussion, it is agreed by almost all schools of Islamic Law that rape is a crime where the victim is not liable to any form of punishment, the only matter where they disagreed is on how to prove rape.

Rape under Hudood Ordinance 1979

During President Zia ul Haq’s regime, Pakistan enacted a set of ordinances under the title of “Hudood Ordinances” in an attempt to bring the laws in “conformity with the injunctions of Islam”. The crimes of theft, adultery, slander and alcohol consumption were the main subjects of the Ordinances as they became effective in February 1979.²⁶ The offence of zina was to be dealt with under “The Offence of Zina (Enforcement of Hudood) Ordinance 1979”. Another offence that was to be dealt with under this Ordinance was the offence of rape or *zina bil jabr*. Section 6 of the Ordinance defined *zina bil jabr* and its punishment as:

- 1) “A person is said to commit *zina-bil-jabr* if he or she has sexual inter-course 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 who the victim is or

25 Ibid, 14.

26 The Offence of *Zina* (Enforcement of *Hudood*) Ordinance 1979, preamble. See also Izzud-Din Pal, “Women and Islam in Pakistan”, *Middle Eastern Studies*, 26:4 (1990), 459-460.

believes herself or himself to be validly married.”

“**Explanation:** Penetration is sufficient to constitute the sexual inter-course necessary to the offence of *zina-bil-jabr*...”²⁷

The lawmakers classified the same punishment for both crimes of *zina* and rape. Next the Ordinance went on to state the nature of evidence required to prove *zina* and *zina bil jabr* in section 8 where it stated:

“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-shubhood*, that they are truthful persons and abstain from major sins (*kabair*), give evidence as eye-witnesses of the act of penetration necessary to the offence:

Provided that, if the accused is a non-Muslim, the eye-witnesses may be non-Muslims.”²⁸

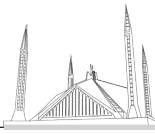
When this provision of section 8 was enacted, it raised a serious question; why is there no distinction between the evidentiary process of the offence of *zina* and that of *zina bil jabr*? The law makers blurred the legal line between rape and *zina*. In other words, whenever a *zina bil jabr* case failed to provide with the prescribed evidentiary requirements, i.e. of four male witnesses, the courts had the authority to decide that the intercourse was consensual, and thus the rape victims would be charged as *zina* offenders.²⁹ This has happened more than once during the twenty-seven years *zina bil jabr* has been a part of “The Offence of Zina (Enforcement of Hudood) Ordinance 1979”.

According to the research conducted by the Human Rights Commission in

27 The Offence of *Zina* (Enforcement of *Hudood*) Ordinance 1979, section 6.

28 The Offence of *Zina* (Enforcement of *Hudood*) Ordinance 1979, section 8.

29 Shahnaz Khan, “Locating the Feminist Voice: The Debate on the Zina Ordinance”, ed. Sadaf Ahmed, *Pakistani Women: Multiple Locations and Competing Narratives* (Karachi: Oxford University Press, 2010), 147.



Pakistan, a woman is raped every 2 hours and every eight hours a woman is subjected to gang rape. With one woman in every 12,500 being a rape victim, this law used to give them the treatment of “guilty until proven innocent” which is much too cruel.³⁰ The fact that no distinction had been made between *zina* and *zina bil jabr*, resulted in it becoming an instrument of exploitation and oppression.³¹

Evidence for *hadd* punishment has been fixed. Only two forms of proof are recognized; either the accused confesses to committing the offence or four pious adult sane male witnesses give testimony. These requirements have been laid out in the Quran and the Sunnah.³² However, to apply these to a case of *zina bil jabr* as well is too harsh. Shifting the onus of proof on the victim and not accepting any form of expert opinion, medical evidence or documentary proof has been a great injustice practiced by the Pakistani legal system for almost three decades.³³

Such injustices are quite clear in cases like that of Jehan Mena in 1982 and Safia Bibi in the year 1985. Zafran Bibi, a pregnant lady, was another victim of this law. The source of the poor lady’s pregnancy was never even asked and it was assumed that since her husband was in jail, the unborn child was illegitimate. Rape may

30 Ibid, 5 and Amnesty International in Asia & the Pacific, “Hudood Ordinances- The Crime And Punishment For Zina” <http://asiapacific.amnesty.org/apro/aproweb.nsf/pages/svaw_hudoo> (accessed: April 12, 2012) and “Women Rights Situation in Pakistan”, *Online Women In Politics.org*. <<http://www.onlinewomeninpolitics.org/womensit/paks.pdf>> (accessed: April 26, 2012).

31 Omar Farooq, “Rape and Hudood Ordinance: Perversions of Justice in the Name of Islam”, *Islamicity*, 3. <http://www.globalwebpost.com/farooqm/writings/gender/rape_fiqh.html> (accessed: July 27, 2014)), Lutz Oette ed., *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (UK: MPG Books Group, 2011), 251 and Anita M. Weiss, “Women’s Position in Pakistan: Sociocultural Effects of Islamization”, *Asian Survey*, 25:8 (1985), 870.

32 The Quran mentions in Chapter xxiv, verse 13 that, “Why did the slanderers not bring four witnesses (to prove their charge)? Now that they have not brought witnesses, they themselves are liars in the sight of Allah.” This verse clearly states that anything less than four witnesses is not acceptable for proving *zina*. The *hadith* proving confession as another form proof are mentioned in notes 72 and 73.

33 See also “*Encyclopedia of Women and Islamic Cultures*” (The Netherlands: Brill Academic Publishers, 2005), 2:395.

have been the only crime in Pakistan where the alleged rapist had to be proved guilty by the prosecution.³⁴

There seem to be two major problems with the implementation of this law. First is the rationale that adultery becomes public with pregnancy. Such reasoning makes the pregnant woman guilty before she even approaches the law. This is clearly discriminatory treatment towards the woman. She is a presumed adulteress before she gets any chance to defend herself. And where she takes up the defense of rape, the other party (if any) either refuses to acknowledge the woman or argues consent. This is quite normal in any case where the woman claims rape, however, in a situation where she is already looked upon as the guilty party, it is difficult to attain justice.

Second is the question raised in every rape case i.e. the character of the woman claiming rape. It is not for anyone to judge the character of a woman. However, the Pakistani courts have laid down the rule that if it is proved that the victim is one of easy virtue, her credibility is lost and no reliance can be placed on her testimony.³⁵ A victim remains a victim regardless of their character. To completely disregard a woman's claim based on something like character is unfair to one who was raped for real. And to make matters worse, this clichéd idea assumes that if there is no struggle from the woman's side against a sexual assault, then she must be a sexually loose woman—thus, validating the conversion of the charge of rape to *zina*. This generalization of human reaction to force and threat of violence is extremely unfair and unreasonable. And, it works to the detriment of those women who have been sexually assaulted and were able to survive only by submitting to the rapist.³⁶

It is unfair for the courts to disregard rape over what “might have happened”. A woman's claim of rape was converted to *zina* because according to the opinion of the court it was more “plausible” that she “must have consented to the commission

34 PLD 1983 FSC 183, *Mst. Jehan Mina vs. State*

35 SCMR 1995 SC 1403, *Muhammad Sadiq vs. State* and SCMR 1996 SC 1897, *Muhammad Yaqub vs. State*

36 Asifa Quraishi, “Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective”, *Islamic Studies*, 38:3 (1999), 11.



of *zina*...” Also, the biased opinion of the judges becomes visible when they make a statement saying, “We ourselves have noticed her as very clever girl, unlikely to be threatened for *zina-bil-jabr*.”³⁷ It is not the place of a judge to give a personal comment about anyone’s character. Not only that, they refuse to believe that a girl of loose character can be threatened for rape. So, use of weaponry to force the victim to consent, as was asserted in this case, has zero credibility in our courts. On the other hand, an alleged rapist was granted bail by the court because he had a “white beard and looked innocent”.³⁸ Such biased conduct needs to be avoided in order to induce justice.

There are many cases where the conviction was converted from rape to *zina* over the defense of “possible consent” of the victim. Nighat Sultana’s claim that she had been abducted and raped was disbelieved and instead it was converted into as case of elopement and consensual *zina*.³⁹ It is unfair of the Pakistani courts to disregard the possibility of forced consent, for in any case of alleged rape, if the medical reports did not show that “absolute resistance” was made, the conviction was converted to *zina*. The definition of “absolute resistance” has yet to be produced.

Supreme Court’s discriminatory policy towards women became evident when it took an exception to the observation made by a High Court Bench where they stated that in this country, no woman, especially if she is an unmarried girl, would risk her reputation, character and future by making such an allegation unless it were true and she had been a victim of such “animal lust”. Such comments were declared to be “uncalled for” and “improper” by the Supreme Court.⁴⁰ Comments defending the victimized girl are rendered improper and personal opinions criticizing the girl’s character⁴¹ are never even questioned.

Ever since the introduction of the Hudood Ordinance in the Pakistan Penal

37 PCr.LJ 1997FSC 1639, *Muhammad Khalil alias Kach vs. State*

38 1982 PCr.LJ 1202, *Zahoor Ahmed vs. State*

39 PCr.LJ 1980 LHC 1037, *Ihsan Ahmed alias Nanna vs. State*

40 PLD 1979 SC 377, *Sabir Ali vs. State*

41 PCr.LJ 1997 FSC 1639, *Muhammad Khalil alias Kach vs. State*

system, the idea of what rape is and how it should be handled, took a turn for the worse. The accusation of rape is difficult to prove no matter where the case may occur, but in case of failure to prove rape, both parties are set free. This, however, has not been the case in Pakistan. For almost three decades, women claiming rape watched their alleged assailants walk away, as free men, while they themselves got convicted for *zina*.⁴² Seventy percent of the appeals filed from the Hudood Ordinance were against *zina* and rape convictions. The records of rape and *zina* are not maintained separately by the Federal Shariat Court as both offences and their punishments were prescribed under the same law.⁴³ While it is unjust to place rape and *zina* under the same umbrella, the provision that was more damaging was the one of *tazi'r*. It is the *tazi'r* punishment for *zina* and *zina bil jabr* that has created more victims.

Rape as *Tazi'r* under Pakistani Legal System

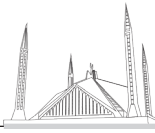
The criminal legal system that existed before the introduction of the Hudood Ordinance may not have been an ideal system; however, it did provide a certain amount of protection to women. This changed during General Zia's regime and women, as well as children, became victims of an unjust law. Women could be charged for rape. Consent of a minor was submitted as a defense by the accused assailant and, in any case where consent was established, the offence would be converted from rape to *zina*; like in the case of Naimat Ali where possibility of consent of the minor girl converted the case of rape to *zina*.⁴⁴ Therefore, victims of rape faced the possibility of being convicted of *zina* as a co-accused if they did not bring forth a watertight case against the assailant. And in case a victim became pregnant, she would be plagued with the fear of being looked upon as the guilty party.

Even though the *hadd* punishments for *zina* and *zina bil jabr* were made a part

42 U.S Department of State, Bureau of Democracy, Human Rights, and Labor, "Pakistan: Country Reports on Human Rights Practices" (2006). <<http://www.state.gov/j/drl/rls/hrrpt/2002/18314.htm>> (accessed: July 27, 2014).

43 Asma Jahangir and Hina Jilani, "*The Hudood Ordinances: A Divine Sanction?*" (Lahore: Sang-e-Meel Publications, 2003), 70.

44 PLD 1982 FSC 220, *Naimat Ali vs. State*



of Pakistani statute law, they have never been executed. Instead, the courts have relied on *tazi'r* punishments for the said offences. The Pakistani Higher Courts have gone out of their way to convert *hadd* punishments, awarded by the trial courts, into those of *tazi'r*.⁴⁵ While under Islamic Law, where there is *hadd* punishment prescribed by God, *tazi'r* cannot be applied. *Hadd* is the right of God and it has been laid out in black and white. There is no grey in *hadd*. The grey area is covered under *tazi'r*. So the problem brought about in the Pakistani legal system was that a *hadd* crime was brought under the category of *tazi'r*.

Consequently, the situation became something like this; a victim of rape would appear before the court. She would be unable to prove rape due to the strict evidentiary rules of *zina* being applied to rape as well. Her case would be converted to that of *zina*. Evidentiary rules would not permit the court to convict her of *zina* liable to *hadd*, so instead she would be convicted under a *tazi'r* punishment, which could include imprisonment, whipping and/or fine.

Jehan Mena was sentenced to three years rigorous imprisonment plus ten stripes.⁴⁶ Safia Bibi, the blind girl who was raped by her employer and his son, was found guilty of *zina* and sentenced to three years rigorous imprisonment, fifteen lashes and a fine of rupees one thousand. The accused were acquitted for lack of evidence.⁴⁷ Farakh Naza was awarded *hadd* punishment of whipping numbering hundred stripes, on appeal she retracted her confession on the basis that she was forced into it. Due to this retraction, the court changed her *hadd* sentence to that of *tazi'r*.⁴⁸ In any case of retraction of confession, under Islamic law, the accused are free to leave. However, that was not the case under Pakistani law. The victim still had to face *tazi'r* punishment which was, sometimes, more damaging.

While converting the conviction of rape into that of *zina* is damaging enough, the Supreme Court has even gone as far as accepting compromise between the parties where the alleged accused was convicted. The accused had been awarded *tazi'r*

45 Jahangir and Jilani, "*The Hudood Ordinances: A Divine Sanction?*", 67.

46 PLD 1983 FSC 183, *Mst. Jehan Mina vs. State*

47 PLD 1985 FSC 120, *Mst. Safia Bibi vs. State*

48 MLD 1998 FSC 344, *Shabbaz vs. State*

punishment by the Federal Shariat Court which was reduced by the Supreme Court, Shariat Bench owing to the statement made by the victim saying that she had forgiven the accused and that a compromise had been reached between him and her family and asked the court to reduce the sentence “if it cannot be remitted altogether”.⁴⁹ While compromise does make for an easy solution, it could be used as a precedent by a guilty party to reach a compromise by force, resulting in more agony for the victim. Treating a victim of rape as a co-accused in a *zina* crime is extremely cruel and unjust. The police did not register cases of rape and *zina* separately. Similarly, records of rape and *zina* cases are kept side by side. In their opinion, they both fall under the same category.⁵⁰ This approach towards rape cases has brought about much suffering to the victims and one wonders whether the law was created to torment the victims rather than protect them.

Rape as *Harabah*

From the seven major *hadd* crimes under Islamic law, *harabah* is believed to be the fourth on the list. It has been translated as “highway crimes” or “forcible taking” and is believed to be a crime greater than theft, for in a case of *harabah*, the victim not only faces loss of property, but is also subjected to fear and mental agony.⁵¹ The crime of *harabah* is based on the Quranic verse:

“Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment.”⁵²

Most Islamic legal scholars have interpreted it as any form of forcible assault upon an individual or group of individuals that may or may not cause loss of property.⁵³

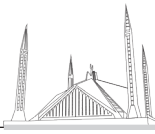
49 SCMR 1988 SC 1489, *Allah Ditta vs. State*

50 Jahangir and Jilani, “*The Hudood Ordinances: A Divine Sanction?*”, 101 and 115.

51 Wahbat-uz- Zuhaili, “*Al-Fiqh Al-Islami Wa Adallatuhu*”, 2nd edition, 6:128.

52 Al-Quran, Chapter v, verse 33.

53 Wahbat-uz- Zuhaili, “*Al-Fiqh Al-Islami Wa Adallatuhu*”, 2nd edition, 6:128.



The basic factors that distinguish *harabah* from theft are that the latter is taking by stealth and the former is taking by force. Also, infliction of fear upon the victim is a major element in the crime of *harabah*. When discussing the offence of *harabah*, there are those jurists who have included the offence of rape under it as well, classifying it as a “*harabah* with the private parts”. Therefore, a person’s honour may be taken as their property and rape becomes the forceful taking of one’s honour. This is applicable to both genders and thus includes any man subjected to rape as well.⁵⁴

In her article, Asifa Quraishi believes that this categorization of rape under *harabah* advocates the principle that a woman’s sexual dignity established by the Quran in the verses related to *zina* must be honored. Furthermore, circumstantial evidence, medical data and expert opinions would be accepted and encouraged if rape was treated as *harabah* by the Pakistani legal system.⁵⁵

In Pakistan, *harabah* is not treated as a separate *hadd* crime; rather it is placed under theft as a sub-category. “The Offences Against Property (Enforcement of Hudood) Ordinance 1979” defines *harabah* in section 15 as: “When any one or more persons, whether equipped with arms or not, make show of force for the purpose of taking away the property of another and attack him or cause wrongful restraint or put him in fear of death or hurt such person or persons, are said to commit ‘haraabah’.”⁵⁶ Punishment of *harabah* has been provided under section 17 where the offender can be awarded with a penalty of “whipping not exceeding thirty stripes and rigorous imprisonment not less than three years”. In case the property seized by the offender exceeds the *nisab*⁵⁷ then his punishment is “amputation of right hand from wrist and left foot from ankle”. And in case of

54 Asifa Quraishi, “Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective”, *Islamic Studies*, 38:3 (1999), 11, Au’dah, “*At-Tashree’ Al-Jinai Al-Islami*”, 2:638-639 and Huhammad Tufail Hashmi, “*Tahaffuz-e-Niswan Act Kita’b aur Sunnat ke Tanazr Mein*”, *Monthly Al-Shariah*, 18:1 (2007). < <http://www.alsharia.org/mujalla/2007/jan/tahaffuz-niswan-dr-tufail-hashmi> > (accessed: July 26, 2014).

55 Ibid.

56 The Offences Against Property (Enforcement of Hudood) Ordinance 1979, section 15.

57 4.457 grams of gold.

murder, the penalty is death imposed as hadd.⁵⁸

Proving *harabah*, under Pakistani legal system, is not as easy as one might think. Since *harabah* is treated as a sub-category of theft, therefore, the evidentiary requirements for proving *harabah* are the same as that of theft. The only two methods of proving *harabah* are: first, the accused confesses to the commission of the offence, and second, two adult male Muslim witnesses, other than the victim himself, give evidence as eyewitnesses of the occurrence. These witnesses must fulfill the requirements of “*tazkiyah-al-shubhood*”; that they are honest people and that they do not indulge in major sins.⁵⁹

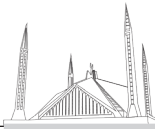
Regarding theft and armed robbery, the evidentiary requirements, aside from the fact that women witnesses have been excluded, seem fair enough. Since the *hadd* punishment is extremely severe, the conditions for proving *hadd* are just as strict. On the other hand, if we were to apply this rule to a situation of rape, I believe we will be back to square one.

Rape was never categorized under *harabah* in the Pakistani legal system, however, there has been a serious discussion regarding this in the Federal Shariat Court. In 1989, a number of women’s rights activists challenged certain provisions of the Hudood Ordinances as being “repugnant” to Islam. One of them was the treatment of *zina* and rape as one and the same. The Court accepted and examined these provisions and it was hoped that a clear distinction would be made between the two. Consequently, the judges were of the opinion that rape should be removed from the category of *hadd* and placed under *harabah*. According to them, this would lessen the strict evidentiary requirements of four male witnesses to two male witnesses. They felt this would differentiate between *zina* and rape and that it would also ease the burden of the victim in proving rape. As a safeguard for false accusation of *zina*, the Federal Shariat Court recommended *hadd* punishment for *qadhf* may be awarded if the complainant is unable to bring forth four eye-witnesses.⁶⁰ In other words, if the court concludes that the complainant made a

58 The Offences Against Property (Enforcement of Hudood) Ordinance 1979, section 17.

59 Ibid, section 16.

60 PLD 1989 FSC 59, *Begum Rashida Patel vs. State*



false accusation of rape, that complainant would then be awarded the punishment of *qadhif*. However, the Court failed to consider the consequences of regarding “honor” as property. For one, if honor is that property that does not have any cost then how can it be brought under the banner of *harabah*? And if honor does have a price, how will it be determined? The question will arise on how different people have a different price of their honor and how much honor was “looted” at the time of the offence? All of these questions were conveniently ignored by the Court.⁶¹

This judgment failed to come up with any favorable solution for protecting the rights of a rape victim. Though this judgment was never codified as a statute by the Parliament in the Pakistani legal system, even if it had, it would not have made much difference for a rape victim. Rape is a crime that is extremely difficult to prove all over the world. It is nearly impossible for the victim to come up with even one testimony who was a witness to the act of penetration, let alone four, or even two. Also, if a pious Muslim was to encounter such brutality anywhere, his first instinct should be to save the victim, rather than wait and watch for the penetration to occur to be able to become an eye-witness.

The Hudood Ordinance has created more victims rather than protect the ones already existing. The foundation of law is to shelter those under it and in case of failure, to bring the ones responsible to justice. Providing justice to victims is the first and foremost purpose of law. Any law that fails to protect its citizens is a failed law and unfortunately, the rape laws under the Hudood Ordinance not only failed, but also victimized the victims themselves. For twenty-seven years, these laws prevailed, inflicting fear and pain in the hearts of those seeking justice. Though the law regarding rape was finally revised in 2006, the harm that has been inflicted upon the victims for almost three decades cannot be undone.

Background of the Protection of Women Act, 2006

The bill officially became a statute in December 2006 under the name “Protection of Women Act (Criminal Laws Amendment), 2006”. Its promulgation sparked an intense debate in the media, mostly emotional rather than legal, between

61 VSC-J-1, *A vs. Z*. Virtual Sharia’h Court < http://vcourt.org/index.php/en/cases/decided-cases/doc_download/6-rape-pakistani-law-and-shariah > (accessed: 4th January, 2015)

two major groups; the *ulema* and the women rights activists. “The Protection of Women Act, 2006” was met with protests by the *ulema* faction and disappointment by the women rights activists. Nevertheless, the amended law was considered a step forward towards enhancing legal protection for the Pakistani women.⁶²

“The Protection of Women Act, 2006” brought about three major changes. First, some of the offences from “The Offence of Zina (Enforcement of Hudood) Ordinance 1979” and “The Offence of *Qadhf* (Enforcement of *Hudood*) Ordinance 1979” were brought under the “Pakistan Penal Code”; secondly, the offences of fornication and false accusation of fornication were specified and re-defined; and lastly, new procedures for the prosecution of these offences as well as adultery and rape were formulated.

Rape under Protection of Women Act, 2006

One of the major changes brought about by the “Protection of Women Act, 2006”, that won full support from the human rights groups, was that rape or *zina-bil-jabr* was removed from the *Hudood* Ordinance 1979 and inserted in the “Pakistan Penal Code” as a *tazi’r* offence.⁶³ The definition of rape in section 375 of “Pakistan Penal Code” is the same as the old common law definition with the exception of clause (v) where the age of the victim was changed from fourteen years to sixteen years. Marital rape has also been included in the said definition.⁶⁴ This change was welcomed by the Women rights activists for this meant the removal of the requirement of four male pious witnesses. If the testimony of the victim corroborates with the medical evidence, it is enough to convict the accused. As rape was now a *tazi’r* offence, the *hadd* punishment for it was repealed and it is now punishable with 10 to 25 years of imprisonment and death or life

62 Ibid, and Muhammad Munir, “Is Zina bil-Jabr a Hadd, Ta’zir or Syasa Offence? A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan”, *Yearbook of Islamic and Middle Eastern Law*, 14 (2008-2009), 95-96, and NCSW, “Study to Assess Implementation Status of Women Protection Act 2006”, *National Commission on the Status of Women Islamabad*, 5 and 7. <http://www.ncsw.gov.pk/prod_images/pub/StudyonWomenProtectionAct2006.pdf> (accessed: July 27, 2014).

63 Ibid, 105, and Ibid, 7.

64 Protection of Women (Criminal Laws Amendment) Act, 2006, section 5.



imprisonment in case of gang-rape.⁶⁵ Furthermore, in the event that rape could not be proved, the complaint will not be converted into *zina*. This was a relief provided to the victims of the offence so that they may seek justice without fear of being prosecuted instead.⁶⁶

While it is true that the new law protects the rights of women, the lawmakers seem to have neglected the rights of men. There seems to be no remedy for the men in the event that the accusation is false. The problem with rape being a *tazi'r* offence is that where the allegation is false, *qadhif* cannot be invoked. The *qadhif* punishment serves as a shield against false accusations of *zina* or *zina-bil-jabr*. It is quite possible that a woman has consensual intercourse with a man and then, later, accuses him of forcing himself upon her. In such a case the man cannot mention that she was a willing party for fear of *hadd* punishment while the woman is not afraid of being punished at all. Therefore, the new law does a very good job of protecting the women, it has left the men with absolutely no defense.⁶⁷

“The Protection of Women Act, 2006” not only shifted the offence of *zina-bil-jabr* back to the “Pakistan Penal Code”, but also other offences related to rape were removed from the Offence of *Zina* Ordinance and inserted in the Penal Code as *tazi'r* offences. These include those dealing with “kidnapping or abducting a woman to compel her for marriage; kidnapping or abducting someone in order to subject him or her to unnatural lust; selling or buying persons for the purposes of prostitution; cohabitation caused by a man deceitfully inducing a belief of lawful marriage and; enticing or taking away or detaining a woman with criminal intent”.⁶⁸ This was also considered a positive change by the human rights groups.

While the women rights activists rejoiced over the said amendments, there is one particular law that needs attention. Section 365-B, a new provision inserted by the

65 Pakistan Penal Code, section 376.

66 “Study to Assess Implementation Status of Women Protection Act 2006”, *National Commission on the Status of Women Islamabad*, 7. <http://www.ncsw.gov.pk/prod_images/pub/StudyonWomenProtectionAct2006.pdf> (accessed: July 27, 2014).

67 Munir, “Is Zina bil-Jabr a Hadd, Ta'zir or Syasa Offence? A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan”, 105-106.

68 Protection of Women (Criminal Laws Amendment) Act, 2006, sections 2-4, 6-7.

“Protection of Women Act, 2006”⁶⁹, makes abducting a woman and compelling her into marriage an offence punishable with imprisonment for life and fine. Although the intentions of the law-makers seem noble, this new clause will have other repercussions in cases of, what are known as, “court marriages”. It has been a common phenomenon in Pakistan that if a girl were to marry someone against the wishes of her parents, they would lodge a first information report (FIR) against her and her husband, alleging that she had been abducted and forced into marriage. According to the new law, the girl cannot be arrested in this case but her husband could be arrested for abduction. Not only that, but if the girl were to give in to her parents pressure, conviction of the man would become certain. Even the least amount of penalty he could receive would be ten years imprisonment.⁷⁰ The man is completely defenseless in this situation.

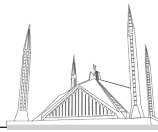
A positive change that was welcomed in the “Offence of *Zina* Ordinance, 1979” was the insertion of a clear definition of “confession”. Many cases of *zina-bil-jabr* have been converted into *zina* when the complainant was unable to prove rape, on the ground that the victim had confessed to committing the offense when the complaint was made. The insertion made by section 10 of the “Protection of Women Act, 2006” defines confession as “... an oral statement, explicitly admitting the commission of the offence of *zina*, voluntarily made by the accused before a court of sessions having jurisdiction in the matter or on receipt of a summons under section 203A of the Code of Criminal Procedure, 1898.”⁷¹ This definition aims to remove any confusion between rape and *zina*, safeguarding the victims from fear of *hadd* punishment.

It is true that the “Protection of Women Act, 2006” brought about quite a few positive changes in our legal system, but it seems they were not good enough. It is the duty of the law to protect all its citizens. If the previous law failed to protect the rights of women, then this new law is neglecting the rights of men.

69 Ibid, section 2.

70 Munir, “Is *Zina bil-Jabr* a *Hadd*, *Ta'zir* or *Syasa* Offence? A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan”, 107-108.

71 The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979, section 2 (aa).



Rape: A *Siyasah* Offense?

The debate between the *ulema* and human rights groups continues on the question of whether making *zina-bil-jabr* a *tazi'r* offence was the right thing to do or not. While the latter are satisfied with the change, the former have made cynical attacks on the Protection of Women Act, 2006 insisting that the change contradicts with Islamic law. They firmly believe that *zina-bil-jabr* is specifically a *hadd* crime and that it cannot, under any circumstances, be a *tazi'r* offence.⁷² Taqi Usmani, a former judge of the Supreme Court of Pakistan, narrated the following Prophetic tradition to prove his stance that rape carries a *hadd* punishment:

“It is reported by Wile ibn Hujr (May Allah be pleased with him) that at the time of the Prophet (P.B.U.H) a woman came out of her house to pray [in the mosque], when someone raped her on her way. The man ran away when she raised hue and cry. Later on, that man confessed to raping her. Upon this the Prophet (P.B.U.H) awarded *hadd* punishment to that man and did not award *hadd* punishment to [that] woman.”⁷³

However, another version of the same *hadith* has been reported as such:

At the time of the Prophet (P.B.U.H) a woman got out of her house for [the purpose of] prayer. A man forced her and had sex with her. He ran away as she raised her voice and another man came over. She said that that man had this [sex] with her. Some Muhajir (those who migrated from Makka to Madina) came over to whom the woman told that this man had [sex] with her. They apprehended that man who was accused by the woman to have raped her. She said [about that man] that he is the one. They brought him to the Prophet (P.B.U.H). But when he (the Prophet) ordered him to be stoned to death; there stood the [real] man who did rape her, and said, “O! Prophet of God (P.B.U.H) I had raped her.” He [the Prophet] told the woman to go away ‘Allah has pardoned your mistake’ and he spoke nicely with the first [accused] man, then he ordered that the rapist be stoned to death and said about him [the second accused] that he has regretted

72 Muhammad Taqi Usmani, “*Amendment in Hudood Laws The Protection of Women’s Rights Bill An Appraisal*” (Islamabad: Institute of Policy Studies, 2006), 9-10 and 16.

73 *Jami’e Imam Tirmizi, Kitab al-Hudood*, Chapter 22, *hadith* 1458 and 1459.

in such a way that his repentance would suffice all the people of Madina if they would render it.⁷⁴

To put it simply, the man who was awarded the *hadd* punishment was the one who had confessed to his crime.

Now the more important question that arises is that whether there is a way out of this debate. Problems exist when rape is classified under *hadd* offences and problems exist when it is brought under *tazi'r*; does a solution to this dilemma exist? Obviously, as it has been observed, the answer does not lie in *hudood* laws nor can it be found under *tazi'r* offences; what is best suited to administer justice and protect the rights of all is the notion of *siyasah*.⁷⁵

Siyasah Shariah

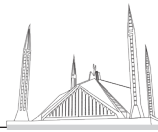
'*Siyasah*' literally translates as "policy" and it encircles the entire administrative justice system which is dispensed by the head of state and by his political representatives. This is in contrast with the system of *Sharia'h* which is administered by the *qadhi*. In simple terms, the public law lacked a comprehensive form and loopholes in the law would deter the complete administration of justice. Thus additional jurisdiction was needed in the sphere of Islamic public law; the legal doctrine of "*Siyasah Sharia'h*" evolved to fill in the cavities.⁷⁶

The term "*siyasah shariah*" can be roughly interpreted as "the administration of justice according to *shariah*". Throughout history, Muslim jurists have made much effort to illustrate that part of Islamic legal system that has been fixed and did not focus much on that area which is flexible. This part of the legal system adapts with the changes in time, in accordance with the necessities of the Muslim community,

74 Sunan Abu Darwood, *Kitab al-Hudood*, Book 33, *hadith* 4366.

75 Muhammad Mushtaq Ahmed, "*Tabaffuz-e-Niswan* Bill 2006 – *Aik Tanqeedi Jaiza*", *Monthly Al-Shariah*, 17:10 (2006). < <http://www.alsharia.org/mujalla/2006/oct/huqooq-e-niswan-mushtaq-ahmed> > (accessed: July 27, 2014).

76 Imran Ahsan Khan Nyazee, "*Theories of Islamic Law*" (Islamabad: Islamic Research Institute, 1995), 111-112; Munir, "Is Zina bil-Jabr a Hadd, Ta'zir or Syasa Offence? A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan", 102 and Suhrab Aslam Khan, "*Islamic Legal System for An Ascendant Social Order: Methodology of Reorganization*" (Lahore: Ferozsons (Pvt) Ltd., 1996), 65-66.



headed by the *Imam* (head of Islamic state). The power to carry out such functions is granted to the ruler by the doctrine of *siyasah shariah*, though the head of an Islamic state must bear in mind not to make any laws repugnant to the Quran and the *Sunnah*.⁷⁷ It is therefore safe to say that any offense that cannot be classified as a *hadd* crime and placing it under *tazi'r* hinders absolute administration of justice, needs to be dealt with under *siyasah*, where the head of state has the authority to award a strict penalty for a heinous act.

Rape as *Siyasah*

From what we have learnt from our history, it seems to be quite clear that there are bound to be complications whether rape is classified under *zina* or under *tazi'r*. The *hadd* punishment brings with itself the strict evidentiary criterion which is nearly impossible to satisfy and the *tazi'r* punishment, which cannot exceed the *hadd* punishment, seems too low for such a heinous crime. Not only that but in Pakistani law, rape under “The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979”, was unjust towards women and now that the crime is covered under the Pakistan Penal Code, it leaves the men completely defenseless. So, where the path towards justice cannot be achieved through *shariah*, I believe the answer can be found under the doctrine of *siyasah*.

The author, Mushtaq Ahmed, quotes Imran Niyazee where he proves that *zina-bil-jabr* cannot be classified as a *hadd* offence. Niyazee explains that according to doctrine of *maqasid al-shariah* (purposes of Islamic law), matters related to bodily harm are given priority over matters of sex. Rape is an attack on the physical and mental person of the victim and is an offence that is categorized under *hifz ala nafs* (protection of life or protection of self) and, therefore, cannot be included under the offence of *zina*, which is classified under *hifz an nasl* (protection of future generations).⁷⁸

As regards *siyasah*, it seems that it is ignored by most authors writing on different

77 Ibid, 103 and Ahmed, “*Tabaffuz-e-Niswan Bill 2006 – Aik Tanqeedi Jaiza*”, *Monthly Al-Shariah*, 17:10 (2006). < <http://www.alsharia.org/mujalla/2006/oct/huqooq-e-niswan-mushtaq-ahmed> > (accessed: July 27, 2014).

78 Ibid, 102.

types of punishments under Islamic law. Even so, the existence of *siyasah* can be traced back to the time of the Prophet (P.B.U.H), where he awarded harsh punishments to various offenders. One has already been mentioned before, where a woman was raped and the alleged rapist was awarded *hadd* punishment. Even though the actual rapist later confessed and was awarded the punishment of being stoned to death, the first accused was given the *hadd* punishment without a confession or the presence of four male pious witnesses. In other words, the punishment awarded to the first accused was not according to the evidentiary criteria for *zina*, but rather it was according to the notion of *siyasah*.⁷⁹

Another event that occurred during the Prophet's (P.B.U.H) lifetime was when some people from the tribe of *Ukl* or *Uraina* became sick and were sent by the Prophet (P.B.U.H) outside Madina to drink milk from the camels of charity in order to recover. Once they had regained their health, they killed the shepherds, drove off the camels and turned apostates. The Prophet (P.B.U.H) had them brought back, had their hands and feet cut off from alternate sides, tore off their eyes and left them in the desert until they died.⁸⁰ In another narration, it is mentioned that they were not even provided with any water even though water was even provided to the person who was sentenced to be executed.⁸¹ These people were not punished under *harabah*, for mutilation of bodies is not a prescribed *hadd* punishment under Islam. Therefore, the safe conclusion is that they were punished under the principle of *siyasah*.⁸²

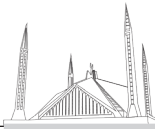
When debating about the Hudood Ordinances, 1979 and the "Protection of Women Act, 2006" on the media, bringing rape under *siyasah* was never mentioned by any scholar, whether modernist or orthodox. If rape were to be brought under *siyasah*, its definition, evidentiary requirement and punishment would be left to the government to determine. It is distressing to think that such an easy solution of the problem exists, yet it never even occurred to the minds of

79 Ibid.

80 *Sabi'h Muslim*, Book 16, Chapter 2, *hadith* 4130 and 4131.

81 Ibid, *hadith* 4132.

82 Munir, "Is Zina bil-Jabr a Hadd, Ta'zir or Syasa Offence? A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan", 104.



Pakistani scholars.⁸³

Is there a solution?

After analyzing rape laws of the United States of America and Britain as well as the amended laws in India, I have compiled a brief overview on how Pakistani rape laws may be amended in an attempt to offer a better system of justice. It is my personal opinion that in order to bring the existing Pakistani law in conformity with the rules of *Sharia'h*, what needs to be done is to expand the scope of the offence, which is to say that all forms of sexual violence should be covered under the same banner i.e. non-consensual offences.⁸⁴

As the offence of rape is removed from the offence of *hadd*, a much broader view of the offence can be taken. The offence of rape will always carry within itself the element of penetration; however it should include penetration of not only the vagina, but the rectum and mouth as well. Under rape, penetration will always be from the male genitalia. In a situation where the act of penetration is carried out from a body part other than the penis (e.g. fingers), the title of the crime should change to “assault by penetration”. This would constitute a separate felony and the intensity of the offense would be slightly lesser than rape, also this title would not include penetration of the mouth. This title could further be spread out to include penetration by anything other than one’s body parts as well (e.g. bottle or stick), or this could be made into a separate offence.⁸⁵ Another option could be to couple the offence of “assault by penetration” with that of “hurt”. For example, if the act of penetration has left the penetrated portion of the victim slightly injured, such an offence would be a on a higher scale compared to when the penetration leaves no injuries. The scale of the injury would determine the intensity of the offence. This would also mean that in an event there is a case of “rape and murder”, it

83 Ibid, 104.

84 VSC-J-1, *A vs. Z* and “Report of the Committee on Amendments to Criminal Law”, Justice J.S. Verma, Justice Leila Seth and Gopal Subramaniam, (January 23rd, 2013), 63-65.

85 Rape and Sexual Offences: Chapter 2: Sexual Offences Act 2003 - Principal Offences, and Sexual Offences Act 1956 - Most commonly charged offences. <http://www.cps.gov.uk/legal/p_r/rape_and_sexual_offences/soa_2003_and_soa_1956/#a08> (accessed: July 27, 2014)

would be dealt with the harshest of punishments. These offences would be gender neutral thus eliminating the issue of “discriminatory law”. Sodomy may, or may not, be categorized as a separate crime, for I do believe that the above mentioned definition of rape includes the said offence.

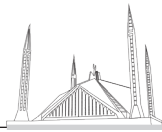
Furthermore, while we are expanding the scope of sexual crimes, we should also add molestation under the banner. The definition could include anything from intentional touching (sexual in nature) to even kissing. A narrow definition would include touching without or from under one’s clothes, while the wider definition would not have such a barrier and the nature of touching could be ascertained from the circumstances surrounding the incident.⁸⁶ This offence would also be gender neutral and all the above mentioned crimes would accept any and all forms of evidence available, including medical reports, circumstantial evidence, forensic as well as testimony of women and non-Muslims. Procedure and punishments would be decided depending on the nature and intensity of the offence and, in extreme cases, the legislation may even approve the maximum punishment they deem fit, e.g. life imprisonment or capital punishment.

Another crime that is mentioned in the British law which I believe should be incorporated in Pakistani law as well is that of “causing sexual activity without consent”. This would be the final step to covering the entirety of sexual crimes, for this would cover everything not previously mentioned. For example it could include any sexual act that the victim is forced to commit on oneself (e.g. masturbation); or, if the victim is forced to commit such an act on a, willing or non-willing, third party (this would also cover the issue of forced prostitution); and/or, if the victim is forced to engage in a sexual act with the offender (e.g. “a women forcing a man to penetrate her”). The idea behind this offence is to expand the range of sexual offences as much as possible as well as to produce a female counterpart of the offence of rape, which would carry the same level of punishment.⁸⁷

In order to resolve the issue of age of the victim and age of the offender, we can either make a separate category of “sexual offences against children” or we may

86 Ibid.

87 Ibid.



take notes from the rape laws in the United States of America, where most states define rape by categorizing it into 1st, 2nd, 3rd and so on degree rape. Each degree of rape would be determined by the age of the victim e.g. 1st degree rape would be if the sexual act was performed upon someone less than 12 years of age, while for 2nd degree rape the victim has to be between the age of 13 and 16, etc. This could include the age of the offender as well or the age of the offender could be categorized under a separate heading. The method of dealing with the offence as well as the intensity of the punishment would, along with other things, depend on the age of both the victim as well as the offender. This could also include the mental capacity of the victim so as to cover a wider range of the victims of the crime.⁸⁸ To enlarge the scope even further, the offence of “gang rape” would be properly defined wherein to include the intensity of the crime depending on the number of offenders as well as the amount of injury received by the victim.

One final issue that I believe needs to be resolved is that of a legal definition of “consent”. The definition would take into account one’s ability to make a free choice regarding any kind of sexual act; in other words, the issue of consent would be irrelevant if the victim were to be a minor and/or mentally unsound. It would include one’s free choice and their ability and freedom to make such a choice. Therefore, if consent to the crime is given due to any kind of fear or intoxication through drugs, such consent would be considered invalid by the courts.⁸⁹ The said definition would be such as to eradicate the notion brought about by some of our judges in a few previous cases of “possible consent” as well as the claim that the victim did not put up “absolute resistance”.⁹⁰ This would also mean that any evidence offered in an attempt to prove the victim’s previous sexual conduct would be rendered inadmissible;⁹¹ the idea behind this is, primarily, that while adultery

88 “Statutory Rape Laws by State”, Sandra Norman-Eady, Christopher Reinhart and Peter Martino (April 14th, 2003 OLR Research Report). <<http://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-r-0376.htm>> (accessed: July 27, 2014) and Rape Law & Legal Definition. <<http://definitions.uslegal.com/r/rape/>> (accessed: July 27, 2014)

89 Rape and Sexual Offences: Chapter 3: Consent. <http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/consent/#a03> (accessed: July 27, 2014)

90 PCr.LJ 1997FSC 1639, 1982 PCr.LJ 1202 and PCr.LJ 1980 LHC 1037.

91 Rape Law & Legal Definition. <<http://definitions.uslegal.com/r/rape/>> (accessed: July 27,

is a sin, it still does not justify such bestiality by the offender nor does it lessen any trauma or pain that the victim suffers.

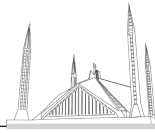
Lastly, as a safeguard against false accusations of rape the law of *qadhif* can be linked with this law as well. However, the current definition of *qadhif* in Pakistani law is not the same as the definition provided to us by Islam. That is to say, that the removal of the exceptions of “good faith” and “public good” are a necessity in order to effectively provide justice and follow the path set down by Islamic law.⁹² Since these aforementioned suggestions talk about bringing “rape” under the banner of *siyasah*, it would be reasonable to believe that the laws regarding “false accusation of rape” should also be covered under the same heading.

Conclusion

Our history has proved to us that we have failed to protect the victims of one of the most heinous crimes in the world. Rape is an offence which is difficult to prove everywhere in the world. In Pakistan, due to the constant clash of Pakistan’s *ulema* faction with the women rights activists, people are left with questions regarding whether or not Islam really provides justice. This has, in turn, given the impression to the international community that Islam is a barbaric and brutal religion. In an attempt to force rape under the banner of *hadd*, we have lost our face as a proud Muslim nation, and bringing rape under *ta’zir* or the Pakistan Penal Code, we have brought down such a beastlike act to the same level as an ordinary crime. The notion of *siyasah* exists to deal with such offences that are too brutal to be handled under *ta’zir* and where *hadd* has remained silent. The legislators need to change their outlook on the crime. Instead of focusing on passing out punishments, we need to protect the girl’s honor. The moment any girl is called to the court for anything, especially if it is relating to a case that is sexual in nature, her honor is destroyed. Afterwards, even if the court declares her innocent or uninvolved, it is too late for her honor has already been trampled upon. Islamic law insists over and over again that these laws are made to protect one’s honor and if we make any law that plays with one’s honor so easily, such law has to be removed or

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92 VSC-J-1, *A vs. Z.*



amended for this law goes against the spirit of Islamic law. Pakistan is a declared Muslim country, we all believe that the laws provided to us by Allah and His Prophet (P.B.U.H) are the epitome of justice, and while countries like the United States have incorporated Rape Shield laws in their system in an attempt protect the already traumatized victims from the emotional distress of being questioned about their sexual history while on the witness stand, us Muslims have not only failed to provide basic justice to victims, but we have led the world to believe that Islam is another name for barbarianism.

