



The Laws of Honour Killing and Rape in Pakistan

Current Status and Future Prospects

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Glossary

Diyat	Blood money payable to the heirs of a murder victim
Fisad-fil-arz	Corruption on earth
Ghairat	Honour
Hadd (pl. Hudood)	Boundary; fixed penalties prescribed in the Quran and Sunnah for specific crimes
Hiraba	Brigandage; highway robbery; a hadd offence, which some argue should be extended to cover the offence of rape
Jirah	Wounds; the law of wounds; a possible avenue for civil redress/compensation for a rape survivor under Islamic law
Karo Kari	Honour killing; also called siyah kari; killing a family member in the name of honour
Masum-ud-dam	Innocent; one whose blood is protected
Qatl-e-Amad	Intentional murder
Qanun-e-Sahahdat	Law of evidence
Qazf	Allegation of <i>zina</i> , i.e. extra-marital sex
Qisas	Retaliation; retribution
Tazir	Criminal penalties prescribed by the State
Tazkiya-ul-shahood	Screening of witnesses to establish their credibility
Wali	Legal guardian entitled to claim <i>qisas</i>
Zina	Extra-marital sex
Zina-bil-jabr	Rape

Cases, Statutes, and Conventions

Cases

Mohammed Saleh v. The State, PLD 1965 SC 446
Asma Jilani v. Government of the Punjab, PLD 1972 SC 139
State v. Zia-ur-Rehman, PLD 1973 SC 4
Gul Hassan Khan v. the Government of Pakistan, PLD 1980 Peshawar 1
Jehan Mina versus the State, PLD 1983 FSC 183
Safia Bibi v The State, PLD 1985 FSC 120
Federation of Pakistan v. Gul Hasan Khan, PLD 1989 SC 633
Hakim Khan v. Government of Pakistan, PLD 1992 SC 595
The State v. Mohammad Hanif , 1992 SCMR 2047
Ali Muhammad v. Ali Muhammad, 1993 PCrLJ 557
Ghulam Yasin v. The State, PLD 1994 Lahore 392
Shehla Zia v. WAPDA PLD 1994 SC 693
Sardar Mohammad v. The State, 1997 MLD 3045
Abdul Haque v. The State, PLD 1996 SC 1
Muhammad Ameer v. The State, 2006 PLD 283
Muhammad Arshad v. The State, 2006 SCMR 89
Muhammad Ameer v. The State, PLD 2006 SC 283
Abdul Jabbar v. The State, 2007 SCMR 1496
Sindh High Court Bar Association v. Federation of Pakistan, PLD 2009 SC 879
Muhammad Akhtar v. The State 2009 YLR 1092
Mukhtar Ahmad Sheikh v Government of Pakistan, PLD 2009 FSC 65
Sher Ahmed v. Khuda-e-Rahim, 2012 MLD 158

Khadim Hussain and another v. The State, PLD 2012 Quetta 179

Salman Akram Raja v the Government of Punjab through Chief Secretary and Others, 2013 SCMR 203

Asghar Hussain v. The State, 2014 PCrLJ 361

Safdar Ali alias Soni v. The State, 2014 PCrLJ 361

Foreign Courts

Australia

Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293

India

Mangal Ganda vs. Emperor A.I.R. 1925 Nagpur 37

Emperor vs. Dinbandhu A.I.R 1930 Calcutta 199

Delhi Commission for Women v Delhi Police, W.P (CRL) 696/2008

United Kingdom

R v R [1991] 3 WLR 767, House of Lords

Domestic Statutes

The Protection of Women (Criminal Laws Amendment) Act, 2006

The Criminal Law (Amendment) Act, 2004

The Qisas and Diyat, Act 1997

The Suppression of Terrorist Activities (Special Courts) Act, 1975

The Criminal Law (Second Amendment Ordinance), 1990

The Law of Evidence (Qanun-e-Shahdat), 1984

Offence of Zina (Enforcement of Hadd) Ordinance, 1979

Offence of Qazf (Enforcement of Hadd) Ordinance, 1979

The Dissolution of Marriages Act, 1939

Qanun-e-Shahadat Order, 1984

The Code of Criminal Procedure, 1898

The Pakistan Penal Code, 1860

Foreign Statutes

India

The Indian Penal Code, 1860

The Criminal Law (Amendment) Act, 2013

United Kingdom

Sexual Offences (Amendment) Act 1976

Coroners and Justice Act, 2009

International Conventions

International Covenant on Civil and Political Rights, 1967

Convention on the Elimination of All Forms of Discrimination against Women, 1979

Convention on the Rights of the Child, 1984

European Convention on Human Rights and Fundamental Freedoms, 1950

Executive Summary

The movement for women's rights in Pakistan registered consecutive victories, albeit partial ones, in the years 2004 and 2006, with the enactment of legislation bringing amendments to the laws of honour killing and rape. The Criminal Law (Amendment) Act, 2004 inserted a new offence of "honour killing" in the Pakistan Penal Code (PPC). It barred the accused from acting as *wali* or legal guardian and benefitting from the Islamic provisions of 'pardon' and 'blood money' as provided under the Qisas and Diyat Ordinance, 1990. The Protection of Women (Criminal Laws Amendment) Act, 2006 was passed by the Parliament amid unprecedented – and often virulent – attacks mounted by religious political parties, then part of the opposition. The law, besides other measures, separated the offences of *zina* (extra-marital consensual sex; fornication if the parties are unmarried and adultery when one of the parties is married) and rape, a long-standing demand of the women's movement in Pakistan.

Both pieces of legislation had involved a good deal of compromise and dilution of the original demands of women's rights activists. Critics, for example, expressed dissatisfaction with the Criminal Law (Amendment) Act, 2004 as it failed to do away with the possibility of 'compounding' the offence of honour killing. The legal heirs of the victim other than the accused still retained the right to enter into a compromise with or without the payment of compensation. Similarly, some took issue with the failure of the Protection of Women Act, 2006 to address the issue of 'consent' and corroborative evidence as it applies to rape trials.

This report takes up the strengths and weakness of the two pieces of legislation as well as their judicial interpretation in detail. The key conclusion that comes out of our analysis is that the multiple normative frameworks – tribal and customary values, Islamic law, and colonial judicial tradition – that inform criminal law in Pakistan result in any advantage offered to women by one law being cancelled out by another. In much the same way, a positive substantive provision can be eroded in effect by an unfavourable evidentiary rule and vice versa.

To illustrate the point in the context of the law on honour killing, Section 311 of the Pakistan Penal Code, as amended by the Criminal Law (Amendment) Act, 2004, authorises the courts to punish in honour killing cases an offender against whom the right of *qisas* (retaliation) has been waived or compounded with, on the basis of *fisad-fil-arz* (aggravating circumstances). However, the analysis of the case law reveals that any benefit that could have come about in terms of stricter penalties for honour killing is cancelled out by the defence strategy of provoking a

plea of ‘grave and sudden provocation’, a concept inherited from the colonial system which continues to enjoy an abiding patronage by the judiciary in honour killing cases.

The Protection of Women Act (Criminal Laws Amendment) Act, 2006 was nothing short of a milestone in that it finally separated the offences of *zina* (extra-marital sex) and rape. The law brought changes in the Offence of Zina (Enforcement of Hadd) Ordinance, 1979, precluding the possibility of the charge of ‘rape’ being converted into one of *zina*, an obnoxious legacy of General Zia ul Haq’s Islamisation campaign. Despite representing a major advance on the law of rape in Pakistan, the 2006 Act has some lacuna. One of the most important ones, in our analysis, is the evidentiary rule in the Qanun-e-Shahdat Ordinance, 1984 (The Law of Evidence), which allows the defence to present evidence regarding a woman’s past conduct and relationship history to establish that the complainant is generally of ‘immoral character’. Evidence concerning a woman’s attire and social standing is routinely presented in courts and her behaviour put on trial during cross-examination to discredit the complainant. This, despite a 2009 ruling by the Federal Shariat Court declaring the said evidentiary rule (Section 151, Sub-Section 4 of the Qanun-e-Shahdat Ordinance, 1984) to be repugnant to the teachings of the Quran and Sunnah and incompatible with Article 25 of the Constitution (gender equality). The government never followed through on the judgment to amend the Law of Evidence accordingly.

In addition to the substantive outcomes in the cases of honour killing and rape, the report also brings the legal discourse under scrutiny in terms of how it reproduces certain gendered notions of shame, female chastity and respectability, and male honour. It is important to take stock of this gendering process because the law, in our view, also plays an educative role by prescribing appropriate gender roles, norms, and values for the society.

Leaving aside the substantive gaps, there are a number of practical hindrances to the effective implementation of the Criminal Law (Amendment) Act, 2004 and the Protection of Women (Criminal Laws Amendment) Act, 2006. Prominent among these is the low number of women police officers (currently less than one per cent of the total police force), which serves as a major disincentive for women to file a complaint in the first place. The lack of sympathy encountered by survivors of rape and the tendency among police officers to encourage out-of-court settlements in cases of honour killing seem to have survived the legal amendments.

Drawing on international best practices, in this report we recommend the introduction of a statutory exception, excluding the partial defence of ‘grave and sudden provocation’ where a person commits murder in the name of honour. A similar change was introduced in England and Wales where killing of a woman on grounds of

adultery historically allowed a husband to raise the defence of sudden provocation. This defence was abolished by the Coroners and Justice Act, 2009. We also recommend that the State act as *wali* (legal guardian) in all such cases to prevent the murder of women in the name of honour being effectively turned into a private wrong rather than a crime against the State. With regard to the law of rape, we call upon the government to follow through on the Supreme Court's far-reaching directives in a 2013 constitutional petition (*Salman Raja v the Government of Punjab*), especially in terms of making the DNA evidence mandatory and facilitating legal aid and counselling services for victims of rape.

Finally, in line with its international obligation to act with due diligence in cases involving violence against women, the government ought to provide protection to women (and men) at risk of being targeted in the name of honour, and take measures to prevent the re-victimisation of rape victims at the hands of insensitive police officials, medico-legal officers, and other actors.

This report, it is hoped, will provide a springboard for more intensive research on various aspects of the laws of honour killing and rape in Pakistan, and facilitate advocacy and lobbying for an improved legal framework and more robust implementation of the existing laws.

The Laws of Honour Killing and Rape in Pakistan: Current Status and Future Prospect¹

Introduction

Building on a previous report by the AAWAZ Voice & Accountability Programme that took stock of the entire corpus of laws related to women introduced during the previous decade, this paper seeks to look afresh at the Criminal Law (Amendment) Act, 2004 and the Protection of Women (Criminal Laws Amendment) Act, 2006 with a specific focus on the provisions dealing with honour killing and rape.² The paper casts a critical look at the current status of the implementation of the relevant provisions in the light of administrative practices as well as relevant case law. The analysis presented here delineates not only the correspondence between the law on paper and the law in action, with the benefit of hindsight, it also points to some important substantive gaps in the two pieces of legislation under review. Even as the focus is on selected amendments concerning the offences of rape and honour killing, this paper takes on board certain broad aspects of the criminal justice system and the constitutional framework in Pakistan which the said amendments are inextricably bound up with.

The study is based entirely on secondary data and published material, including: academic work on rape and honour killing, both theoretical and empirical; relevant domestic legislation and parliamentary debates; NGO reports on sexual and gender-based violence, women's rights, and access to justice issues; international jurisprudence such as the relevant opinions of the CEDAW Committee under the individual complaints mechanism; selected reported judgments of the superior courts in Pakistan; and, where appropriate, judgments of some foreign courts.

Conceptually, this write-up is anchored to critical legal studies and 'sociology of law' approaches; it seeks to situate the laws of rape and honour killing within a social and political context. At the heart of this conceptual orientation is an understanding that the law interacts in complex ways with culture, society, and political economy, and cannot be seen as an isolated, autonomous entity. Nor is it tenable to view law as a neutral domain. Rather, it is

¹ The views expressed in this paper are solely those of the author and do not necessarily represent the views of AAWAZ.

² Safiya Aftab and Arif Taj, *Tracking the Implementation of Women Friendly Legislation*. (AAWAZ, Islamabad 2015).

a site of contestation, a battleground of ideas, as we learn from feminist engagements with law across nations and over time.³

Following this introductory chapter, the next section of this study seeks to ground our findings and arguments in a conceptual and historical frame of reference. The following two chapters look in depth at the laws of honour killing and rape, their current status, including stumbling blocks facing the full implementation of the 2004 and 2006 amendments, and key substantive and procedural gaps in the legal framework. Finally, the concluding chapter draws the argumentative threads together and puts forward recommendations for plugging in legal gaps and improving the implementation of existing provisions.

³ David Kairys (ed.), *The Politics of Law. A Progressive Critique* (Basic Books, New York 1998).

Violence against Women and the Law in Pakistan: Conceptual and Historical Background

This chapter builds a case for situating rape and honour killing within a continuum of violence against women rather than aberrations outside the pale of everyday lived realities of women in Pakistan. An attempt is being made to mark out the limitations and the transformative potential of the law within the particular historical, social, and legal context that forms the backdrop to the implementation of the Criminal Law (Amendment) Act, 2004 and the Protection of Women Act, 2006.

The Continuum of Violence

According to the Human Rights Commission of Pakistan (HRCP), during the year 2014, 597 women and girls were gang-raped, 828 raped, and 923 women and 82 minor girls fell victim to honour killings in the country.⁴ These statistics account only for reported cases, and as such, are just a tip of the iceberg. Chilling as these extreme acts of violence are, it would be misleading to see them as isolated incidents that arise unexpectedly.

In her third thematic report submitted to the Human Rights Council in 2012, the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences, argued that rather than a new form of violence, gender-related killings were the extreme manifestation of existing forms of violence against women.⁵ These various forms of violence – from psychological and physical abuse at home to harassment at the workplace – through the approach suggested by the Special Rapporteur, are best seen on a continuum, with honour killings representing its extreme end. The same can be said of rape in all its settings. The ground for these crimes is prepared incrementally through particular forms of gender socialisation, glorification of masculine violence, nurturing of gender inequality, tolerance of discrimination between the sexes, and so on.

The discrimination and violence manifested in these extreme acts need to be understood as “multiple concentric circles, each intersecting with the other.”⁶ These circles represent (a) structural factors such as social, economic, and political systems; (b) institutional factors, including formal and informal legal institutions; (c) more micro-level interpersonal factors, for example, relationships between partners, the place of women in the family

⁴ Human Rights Commission of Pakistan, *The State of Human Rights in Pakistan-2014*. (HRCP, Lahore 2015).

⁵ UN Doc, A/HRC/26/38: Report of the Special Rapporteur on Violence Against Women (2014), para 5.

⁶ *Ibid*, para 17.

and the community; and finally, (d) individual factors that include personal resources and capacities to resist and respond to violence.

Conceptualising these particular forms of violence on a continuum, and in relationship with a series of interlocking factors, alerts us to the background conditions that facilitate and help justify such crimes. This conceptualisation also takes us some distance towards understanding the limits and potential of the law in providing appropriate responses to rape and honour killings.

It has to be noted, however, that we do not take a deterministic view of law as simply reflecting broader structural factors of culture and political economy. Rather, we shall argue in the light of drafting of laws and jurisprudence on the subject of rape and honour killings that the law also has a symbolic and communicative role. The legal discourse is not only shaped by external factors, it also shapes them by prescribing appropriate gender roles, norms, and values. It legitimises certain forms of thinking and ideologies and de-legitimises others. To cite Carol Smart, one of the most prominent feminist thinkers in contemporary legal studies, law is “an instrument of truth” and site of gender construction as well as gender renegotiation.⁷

The Evolution of Law in Pakistan: One Step Forward, Two Steps Back

Typical for a postcolonial State superimposed on culturally disparate communities, the development of law and the legal system in Pakistan has been marked with multiple normative frameworks and the complicated business of nation building. In many areas, including criminal law, trade, and agriculture, the rulers of the country found it convenient to continue with the arrangements that had been devised by the colonial State.⁸

In his study of law in postcolonial societies, M. B. Hooker explains, “Because Pakistan is a part of the twentieth century nation-state complex, its laws and institutions must equip the State for the existence of such a complex. This leads to the existence of institutions for which there is either no Quranic authority or on which the Quran is negative or uncertain.”⁹ For instance, in the area of interest on capital – which is expressly forbidden in the Quran – even the self-professed Islamic regime of General Zia ul Haq could not help but ignore the demands of religion. To right-wing religious politicians however, “there was consolation in the knowledge that the real strength of the Islamic social order lay in the continued stability of the family unit, and more specifically the social

⁷ Carol Smart, *Law's body, the Sexed Body, and Feminist Discourse*, (1990) No. 11 Vol. 17, *Journal of Law and Sociology* 194.

⁸ Shaheen Sardar Ali (2000). Using Law for Women in Pakistan in Stewart, Ann (ed.) *Gender, law and Social Justice*. London: Blackstone Press. 139-159.

⁹ M. B Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon, Oxford 1975), 104.

control of women.”¹⁰ They could hope to preserve Islamic identity through the continuation of Muslim personal laws and discriminatory provisions against women even as they made accommodations to emerging capitalism on the other hand.

Almost through half its existence, Pakistan has been under military or quasi-democratic rule. Its constitution has been abrogated, fundamental rights suspended, and constitutional amendments introduced undemocratically time and again. Military dictators have tended to interfere with the independence and smooth functioning of the judiciary. At the same time, they have had their coups legitimised by the superior courts. The Supreme Court has upheld Martial Law thrice using the controversial doctrine of necessity. Some scholars who think highly of the “creative use of Islam” by the superior courts in Pakistan, have pointed out that in two cases where they refused to uphold Martial Law, the courts relied on Islam¹¹ to challenge dictatorial authority.¹² However, there has to be a reservation added to this argument: in cases where the judiciary declared Martial Law invalid on the basis of Islamic law, the dictator had already been removed from the office by the time the judgment was handed down.

The 1973 Constitution currently in force is a curious mix of Islam, democratic and human rights principles, and socialist rhetoric of the government that oversaw its passage. Chapter 1, Part II, guarantees fundamental rights such as right to life and liberty, equality before law, freedom of expression, association, and religion.¹³ The same Chapter also provides that any law inconsistent with these rights, “shall, to the extent of such inconsistency, be void” and that the “State shall make no law which takes away these rights.”¹⁴

Article 2 declares Islam to be the State religion. The Objectives Resolution of the preamble to the Constitution was made a part of its substantive provisions by the insertion of Article 2A in 1985, thereby requiring all laws to be brought into consonance with the Quran and the Prophet’s *Sunnah*.¹⁵ There have been conflicting judgments by the courts regarding whether the superiority of Islamic law as enshrined in the Objectives Resolution

¹⁰ Ayesha Jalal, *The Convenience of Subservience: Women and the State of Pakistan*, in Kandiyoti, Deniz (ed.) *Women, Islam and the State*. (Macmillan, London 1991). 77-114. 88-9.

¹¹ *Asma Jilani v Government of the Punjab*, PLD 1972 SC 139 and *State v Zia-ur-Rehman* PLD 1973 SC 4

¹² Martin Lau, *Islam and Constitutional Development in Pakistan*, in Ian Edge (ed.) *Comparative Law in a Global Perspective* (Transnational Publishers, Ardsley 2000).

¹³ See Article 9 (life and liberty), 25 (equality before law), 19 (expression), 17 (association), and 20 (religion) of the Constitution, Chapter 1, Part II.

¹⁴ Article 8 (1) & (2).

¹⁵ *Sunnah* refers to all that is narrated from the Prophet, his acts, his sayings, and whatever he tacitly approved, in addition to all the reports which describe his physical attributes and character.

was a supra-constitutional provision. In a 1992 case, the Supreme Court held that it did not control other provisions of the constitution.¹⁶ The judgment led some serious scholars into the misplaced optimism that the argument that Article 2A could trump other constitutional provisions had been put to rest.¹⁷

As it turned out, on August 4, 2015, the Supreme Court while dismissing petitions challenging the validity of the 18th and 21st amendments to the Constitution, resurrected the ‘basic structure doctrine’ which would circumscribe the Parliament’s constitutional powers within the confines of the so-called ‘fundamental features’ of the constitution, including the Objectives Resolution. Positively, the judgment also seems to have closed the doors on the judicial approval of military take-overs by declaring democratic rule to be a part of the basic structure of the Constitution.¹⁸ That said, the idea of the ‘basic structure doctrine’ has a Janus-faced character. It can plausibly be seen as a Damocles sword that might just as well be used to strike down progressive constitutional changes if they fall foul of what judges perceive to be the fundamental features of the Constitution.

Pakistan’s criminal law underwent radical changes towards the end of the 1970s when General Zia ul Haq introduced the infamous Hudood Ordinances under which theft, consumption of alcohol, extra-marital sex, rape, and making false allegations of adultery, would all be governed by Islamic teachings as interpreted by the regime. Under Zia’s directions, the Council of Islamic Ideology (CII) came up with the Islamic Law of Evidence Ordinance, 1982 to bring the Evidence Act, 1872 into conformity with Islam. The law was eventually passed as the Qanun-e-Shahadat Order, 1984. Zia’s regime formally introduced a parallel court system initially in the form of Shariat benches, and later, a full-fledged Federal Shariat Court established through the Presidential Order No. 1 of 1980 incorporated into the 1973 Constitution under Chapter 3A. The court was given the power to review laws on the basis of Islam. It would act as a court of appeal for all cases involving the Hudood Ordinances. Zia’s Islamisation campaign, it is largely believed, had the political motive of legitimising and consolidating military rule in the country.¹⁹ It is also important to note, as a matter of historical record, that the United States provided full support

¹⁶ *Hakim Khan v Government of Pakistan*, PLD 1992 SC 595

¹⁷ See, for example: Osama Siddique, *Pakistan’s Experience with Formal Law: An Alien Justice* (Cambridge University Press, New York 2013).

¹⁸ Constitutional Petition 10 of 2010, Available online at:

http://www.supremecourt.gov.pk/web/user_files/File/Const.P.12of2010.pdf. Earlier in 2010, the Supreme Court headed by Chief Justice Iftikhar Chaudry had declared the Proclamation of Emergency by General Pervez Musharraf unconstitutional and void ab initio. See *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 2009 SC 879.

¹⁹ Martin Lau, *Twenty-five Years of Hudood Ordinances - A Review*. 64 *Washington & Lee Law Review* 1291, 2007. 1302-4. 1293; see also Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice* (Brill, Leiden 2009).

to the military regime “in helping create the toxic cocktail of militarized Islam which was to permeate Pakistani society” in the years to come.²⁰

An interesting aspect of the story of Islamisation in Pakistan is the genesis of the laws of *Qisas* (retaliation) and *Diyat* (blood money). Unlike the Hudood Ordinances, it was the superior judiciary, and not Zia ul Haq’s administration, that led the process towards the incorporation of the provisions of *qisas* and *diyat* in the Pakistan Penal Code. In a judgment delivered on October 1, 1979, the Peshawar High Court declared the penalties prescribed in Chapter VI of the Penal Code, 1860, in respect of offences against the human body, including culpable homicide and murder, to be repugnant to the injunctions of Islam since such penalties under Islam could be condoned by pardon or on the payment of blood money.²¹

The judgment put Zia ul Haq in a rather uneasy spot because he had the country’s last democratically elected Prime Minister, Zulfikar Ali Bhutto, convicted and executed just a few months previously under the very same Penal Code provisions which the Peshawar High Court now held to be un-Islamic.²² Consequently, the military government kept dragging its feet on amending the criminal law in the light of the judgment. It was in 1989 that the Shariat Appellate Bench of the Supreme Court, in a review petition filed by the government, confirmed that Sections 299 to 338 of the Pakistan Penal Code, 1860 were indeed repugnant to Islam since they did not “provide for *qisas* in cases of *qatl-al-amd* (deliberate murder) and *jurooh-al-amd* (deliberately causing hurt),” did not provide for *diyat* in cases of murder, and did not provide for compromise between the parties on agreed compensation or the pardoning of the offender by the victim. The court further declared Section 345 of the Code of Criminal Procedure, 1898 as repugnant to the teachings of Islam since it did not list certain offences against the human body as “compoundable.”²³

The *Qisas* and *Diyat* law was finally promulgated as The Criminal Law (Second Amendment) Ordinance, 1990, by the caretaker government formally headed by Prime Minister Ghulam Mustafa Jatoi but effectively in control of President Ghulam Ishaq Khan, who, some believe, had entered into a compromise with the judiciary to

²⁰ Sadia Toor, The Political Economy of Moral Regulation in Pakistan: Religion, Gender and Class in a Postcolonial Society, in Leela Fernandes (ed) *Routledge Handbook of Gender in South Asia* (Routledge, Abingon Oxon 2014) 129-142. 132.

²¹ *Gul Hassan Khan v. the Government of Pakistan*, PLD 1980 Peshawar 1.

²² Tahir Wasti (n 19) 19.

²³ *Federation of Pakistan v. Gul Hasan Khan*, PLD 1989, SC 633, at paras 1, 2 and 3. Compoundable offences are those that allow for a compromise between a victim and an offender. Upon compromise, the accused is acquitted without trial.

introduce the law in bargain for the courts to not reinstate the deposed government of Prime Minister Benazir Bhutto.²⁴

The impact of these legal changes on the laws of rape and honour killings, the incongruities they imported into Pakistan's criminal justice system, and the way they affected women's lives as well as the prevailing conceptions of gender relations, is something we discuss in detail in due course in this study.

Pakistan, it must be noted at this point, is a signatory to a number of international conventions that have a bearing on women's rights and all forms of sexual and gender-based violence, most relevant being the Convention against the Elimination of All Form of Discrimination against Women (CEDAW).²⁵ International treaties do not become part of domestic law in Pakistan unless incorporated through legislation since it follows the so-called dualist model inherited from the English legal system. International law has historically had very limited persuasive role in case law although the courts routinely draw on foreign law, especially from neighbouring India. In some landmark public interest litigation cases during the 1990s, the Supreme Court of Pakistan did refer to the country's international obligations, a trend that has failed to develop over the years and is conspicuously absent in cases involving women's rights.²⁶

Sometimes, the connection between international law and domestic constitutional law is relatively straightforward. The Constitution of South Africa, for example, directs the courts to "consider" international law.²⁷ In other nations, interpretative practices lead courts to do the same without express authorisation from the constitutional text. The United Kingdom's Human Rights Act, 1998 makes domestically applicable many of the rights protected in the European Convention on Human Rights.²⁸ In a landmark case in 1995, the High Court of Australia held that the ratification of the Convention on the Rights of the Child (CRC) had created a legitimate expectation that the Australian government intended to abide by its provisions even though the CRC had not yet been incorporated into domestic legislation.²⁹ The judgment illustrates the possibilities of the judiciary transcending traditional limits imposed by the dualist model to import international law into domestic law. It has also been persuasively argued that the international responsibility of a State is triggered by the "acts and decisions of the judiciary" when it fails to comply with international obligations including those incurred on account of

²⁴ Tahir Wasti (n 19) 284.

²⁵ Ratified by Pakistan in 1996.

²⁶ See, for example, *Shehla Zia v. WAPDA* PLD 1994 SC 693.

²⁷ Article 39 (1) (b) and 39 (1) (c).

²⁸ Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law*. (Edward Elgar, Cheltenham 2014). 4-5.

²⁹ *Minister of State for Immigration & Ethnic Affairs v. Ah Hin. Teoh* [1995] HCA 20.

ratification of international human rights treaties.³⁰ We take up in due course some specific examples where substantive law and interpretative practices in our country need to be informed by international human rights law.

No overview of the legal system and its evolution in Pakistan can be complete without taking into account the issue of access to justice. Surveys have revealed a general lack of faith in the judiciary and very low levels of contact with the courts, especially on the part of female respondents. Access to lawyers is as low as 2.5 per 100,000 people in Punjab and Balochistan, 2.75 in Sindh, and 5 in Khyber Pakhtukhwa, and varies in direct proportion to proximity to towns and cities.³¹ Delays in disposal of cases, especially in lower courts, is a long-standing problem that, in addition to amounting to a denial of justice in William E. Gladstone's famous formulation, also puts litigants off the idea of approaching courts. Problems of case management in formal courts provide succour to informal justice institutions, known locally as *jirgas* or *panchayats*, which take pride in delivering speedy 'justice'.

One issue that potentially affects women's willingness to file complaints is the virtual absence of female judges in the country. Some scholars believe that the presence of female judges on a bench may significantly affect the outcome of cases involving women, as they are likely to be in a position to empathise with women and bring a different voice to the process of judging.³² The same problem besets Pakistan's police stations, the first point of contact for a victim of a crime. According to a recent report by the Commonwealth Human Rights Initiative (CHRI), women police officers make up less than one per cent of the total police force in Pakistan.³³ The lack of sympathy encountered by survivors of rape and the tendency among police officers to encourage out-of-court settlements seem to have survived despite the Criminal Law (Amendment) Act, 2004 and the Protection of Women (Criminal Laws Amendment) Act, 2006.

Women's Experience with Law: Negotiating the Boundaries of Justice

In Pakistan, some of the earliest engagements by social movements with law emanated from women's movement over inheritance rights. This was one of the rare cases where Muslim women had something to gain by switching from local customary law to Islamic law. Under Islamic law, women's right to inherit property, including agricultural land, was restricted to half that of their male siblings. But under customary law prevalent in rural

³⁰ Rosalyn Higgins QC, *The Relationship Between International and Regional Human Rights Norms and Domestic Law*, Commonwealth Law Bulletin, October 1992. 1268 – 1275.

³¹ Osama Siddique, (n 17) 21-2.

³² Rosemary Hunter, Clare McGlynn and Erika Rackley, Introduction, in Hunter (et. al) (eds) *Feminist Judgments: From Theory to Practice*. (Hart Publishing, Oxford 2010) 1-29. 6.

³³ Commonwealth Human Rights Initiative, *Rough Roads to Equality. Women Police in South Asia*. (New Delhi, CHRI 2015).

areas at the time of independence, women were denied all rights of inheritance. By articulating their position from within Islam, women's groups did manage to get the Inheritance Act through the legislative assemblies though they had to confront powerful resistance from the feudal elite.³⁴

Although symbolically important, this breakthrough did not translate into social change given the entrenched nature of patriarchy in significant parts of the country. Limitations also inhered in grounding women's rights within the dominant religious framework. For instance, whenever a woman has approached the courts for protection of her right to inherit she has met with a positive response. However, as Shaheen Sardar Ali explains, the courts uphold their claims on a theoretical premise that undermines women's rights. The tone of these judgments seems to reflect and reinforce the "assumption that women are not capable of taking important decisions; hence the constant need for protection."³⁵ A similar gendering process through court judgments was seen in relation to a woman's right to marry as provided in Islam. For example, in a famous 1996 case, the Lahore High Court validated Samia Waheed's marriage, which she had contracted out of her own free will, despite the wishes of her guardians to the contrary. However, as the following passage from the opinion delivered by Justice Khaliur Rehman Ramday suggests, the courts were eager to serve as moral guardians of women's behaviour, reflecting a deeply patriarchal mindset: "The concept of a young girl or a boy for that matter, venturing out in search of a spouse is alien to the teaching of Islam and even otherwise this scheme of Husband-Shopping which obviously involves testing and trial of the desired material is fraught and pregnant with dangers and cannot be viewed with favour..."³⁶

A pernicious aspect of General Zia's legacy was the reinforcement of the idea that a woman was only marginally *sui juris* (capable of managing one's own affairs), and was essentially the property of her husband, family, and community, with her own choices precariously bordering on the illicit.³⁷ There is also merit in the argument that the role of Islam in Pakistan's legal system is not the only relevant variable in understanding women's experience of law. As Justice Ramday's obiter comments in the Saima Waheed case suggest, even the

³⁴ Jalal (n 10) 86-7.

³⁵ Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (Kluwer Law International, the Hague 2000) 150.

³⁶ *Saima Waheed Case*, PLD 1997 Lah. 301, at 381.

³⁷ Sadia Toor (n 20) 134.

rights granted to women by Islam could become a source of anxiety and inconvenience in a system infused with patriarchal values.³⁸

Common to both honour killings and rape – in and outside the court - is a set of gendered notions of shame, female chastity and respectability, and male honour. In this ideology, to illustrate the point, a woman fails to qualify as a victim of rape if her conduct does not accord with the ideal of female behaviour that judges, police officials, and society at large subscribe to. The same warped logic can be seen at work a rape survivor and her family are made to live with ‘shame’ and stigma. Similarly, communities are known to side with the murderer who restores ‘family honour’ by killing a ‘fallen’ woman.³⁹

A final overarching conceptual point to bear in mind is that the moral regulation of women and the surveillance of their bodies is also invested with national identity and national pride. As the Parliamentary debates on the Protection of Women Bill, 2006, make abundantly clear, opposition of right-wing parties in the National Assembly largely turned on the idea that the separation of the offence of rape and adultery – and other measures proposed under the Bill – amounted to an attack on “our culture” and the “ideological foundations of the State.”⁴⁰

³⁸ Danette C. Cashman, *Negotiating Gender: A Comparison of Rape Law in Canada, Finland and Pakistan*. 9 Dalhousie Journal of Legal Studies. 120, 2000. For a nuanced exploration of the complexities of women’s lives and the interplay between gender and religion in Pakistan, also see: Farida Shaheed, *The Other Side of the Discourse: Women’s Experiences of Identity, Religion and Activism in Pakistan*, in Patricia Jeffery and Amrita Basu (eds) *Resisting the Sacred and the Secular: Women’s Activism and Politicized Religion in South Asia*. (Kali for Women, New Delhi 1999), 143 – 64.

³⁹ Maliha Zia Lari, *A Pilot Study on Honour Killings in Pakistan and Compliance of Law* (Aurat Foundation, Islamabad 2011), 22-3.

⁴⁰ The National Assembly of Pakistan. Debates. Official Report, 15th November 2006 (38th Session) 324-417.

The Law of Honour Killings

Historical Background

It has been said about the British colonial government in India that so long as its own authority was not challenged by the hierarchies of traditional structures of social control, it was in its interest to work with those hierarchies. For example, in the Tribal Areas the British used the deeply entrenched customary norms to their advantage by maintaining a tribal judicial forum. The supposed intention was non-intervention in local customs of the natives. However, what they achieved in reality, some suggest, was to stunt the normal progression of customary practices and prevent their future growth.⁴¹

Similarly, the Indian Penal Code (Section 304, Sub-section 1) devised by the British provided a partial defence of “grave and sudden provocation” to a husband who had killed an adulterous wife, converting the charge of murder into manslaughter. There are hosts of cases from the pre-partition era in which the courts accepted the provocation plea to award reduced sentences.⁴² Post-independence, Section 302 of the Pakistan Penal Code, 1860, laid down the law on murder as punishable by death or imprisonment for life. The same section provided a number of exceptions, the first of which provided that it “is not murder if the offender, while deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation.” Instances where men successfully pleaded a plea of “grave and sudden” provocation can be found in the reported case law as far back as 1965.⁴³ Interestingly, the Shariat Court ruling in *Federation of Pakistan v. Gul Hasan Khan*, which paved the way for the *Qisas and Diyat Ordinance*, 1990, also declared the “provocation plea” to be un-Islamic.⁴⁴ In compliance with the ruling, the Ordinance removed all exceptions, save self-defence, from the penal code. However, “grave and sudden provocation” has enjoyed abiding patronage by judges in honour killing cases as we discuss shortly.⁴⁵

⁴¹ Shaheen Sardar Ali (n 35) 154.

⁴² See for example, *Mangal Ganda vs. Emperor* A.I.R. 1925 Nagpur 37; and *Emperor vs. Dinbandhu* A.I.R 1930 Calcutta 199.

⁴³ See for example, *Mohammed Saleh vs. The State* PLD 1965 SC 446.

⁴⁴ *Federation of Pakistan v. Gul Hasan Khan*, PLD 1989 SC 633, at 674.

⁴⁵ Moeen H. Cheema, *Judicial Patronage of ‘Honour Killings’ in Pakistan: The Supreme Court’s Persistent Adherence to the Doctrine of Grave and Sudden Provocation*. 14 Buffalo Human Rights Law Review 51, 2008.

The Legacy of *Qisas* and *Diyat* Law

Although General Zia’s administration did not follow through on the 1980 ruling in the Gul Hasan case in respect of certain provisions related to offences against the human body in the Penal Code being un-Islamic, the introduction of the Hudood Ordinances itself inaugurated an environment conducive to honour killings.⁴⁶ The message sent out to the society was that women accused of adultery or fornication deserved punitive measures.

The *Qisas* and *Diyat* Ordinance, 1990 – later enacted as *Qisas* and *Diyat* Act, 1997, under Nawaz Sharif’s second term in office – introduced a new categorisation of homicides based on “the form of proof of murder and the relationship of the offender to the deceased” and not the intensity of the crime.⁴⁷ The offence of *qatl-e-amd* (intentional murder) liable to *qisas*, as defined in Section 302 of the Pakistan Penal Code, now required a higher standard of proof (Section 304) as a voluntary confession or two eye-witnesses who met the requirement of *tazkiya-ul-shahood*, i.e. they are truthful and abstain from major sins.⁴⁸ Sections 309 and 310, as amended by the Ordinance, gave the *walis* or legal heirs of the victim the right to waive *qisas* and pardon the offender or accept compensation, thus making the offence of murder “compoundable”. Under the terms of Section 302 (b), intentional murder could still be punished with death or life imprisonment as *tazir* where a lower standard of proof (circumstantial evidence or additional eyewitnesses) was met beyond reasonable doubt. Significantly, Section 306 of the Penal Code provided that *qatl-e-amd* “shall not be liable to *Qisas*” where the “offender causes the death of his child or grandchild” or “when any *wali* of the victim is a direct descendent of the offender.” In such cases, the court was authorised to award *diyat* and a maximum sentence of 14 years in prison (Section 308).

One implication of cases involving an honour killing was that the issue could now be settled with the offender being forgiven by the victim’s next of kin or by payment of blood money to the family of the victim. The provision of “compoundability” particularly suited the rich and the powerful who could literally get away with murder by paying compensation to a victim’s family. In most cases, the murderer was a woman’s husband, brother, or son, and could be pardoned by other members of the family. Additionally, where a husband murdered his wife and happened to have children from that wife, he was automatically excluded from *qisas* punishment. However, it has to be noted that given the strict evidentiary requirements for *qisas*, those convicted of murder are, in most

⁴⁶ Sohail Akbar Waraich, ‘Honour Killings’ and the law in Pakistan, in Kynn Welchman and Sara Hossain (eds), *‘Honour’: Crimes, Paradigms, and Violence against Women* (Zed Books, London 2005) 78-110. 79.

⁴⁷ Maliha Zia Lari (n 39) 28-9.

⁴⁸ As outlined by Article 17 of the Law of Evidence, 1984.

cases, sentenced under *tazir* anyway.⁴⁹ While this paper strongly advocates prosecution of those charged with honour killing, it does not endorse the demand raised by some activists that the offender be sentenced to death under *qisas* given well-known moral objections to capital punishment.⁵⁰ To be fair though, the idea of retribution or *lex talionis* (an eye for an eye) is not exclusive to Islamic criminal law. The ideology also runs deep in Western liberal philosophy represented by Immanuel Kant and G.F. Hegel.⁵¹

That said, the most egregious consequence of the *qisas* and *diyat* law has been that it turned murder and honour killing into a private matter to be settled between the parties involved, rather than a crime against the State, thus “opening floodgates of community and familial violence against women.”⁵² Whereas honour killings were historically committed in reaction to suspicion of adultery, the climate of impunity engendered by the *qisas* and *diyat* provisions arguably widened the scope to cover instances where a woman simply expressed her autonomy by choosing a husband, seeking a divorce, or in parts of the country, having a conversation with a man she was not related to.⁵³ Both women and men considered to have transgressed gender norms are liable to be attacked and killed in the name of honour.

In theory, with the defence of “grave and sudden provocation” having been expunged from the Penal Code, the courts could still be expected to hand down tough penalties under *tazir*. However, following a series of conflicting judgments, the Lahore High Court held it to be “obvious that a murder committed on account of *ghairat* is not the same as *qatl-e-amad* pure and simple and the persons found guilty of *Qatl* committed on account of *ghairat* do deserve concession which must be given to him.”⁵⁴ The court concluded that murder in such circumstances did not fall under section 302 (a) of the Penal Code. In the given instance, it reduced the sentence of the appellant to five years.

In a 1997 case, the Lahore High Court elevated the plea of provocation into an absolute defence by declaring a murder committed in the name of honour not to be an offence and acquitting the accused. The reasoning offered is instructive for anthropological assumptions it makes about human nature and the desirability of restoring honour: “in such a situation, the appellant, being the father of Mst X, one of the deceased, was

⁴⁹ Tahir Wasti (n 19) 244.

⁵⁰ For an overview, see: Tom Sorrel. *Moral Theory and Capital Punishment*. (Basil Blackwell/Open University, Oxford 1987).

⁵¹ Immanuel Kant, *The Groundwork for the Metaphysics of Morals* (1785); and G.F Hegel, *The Philosophy of Right* (1821).

⁵² Sadia Toor (n 20) 134; also see Tahir Wasti (n 19) 22.

⁵³ Sohail Akbar Waraich (n 46) 79.

⁵⁴ *Ghulam Yasin vs. The State* PLD 1994 Lahore 392, at 398, para 17.

overpowered by the wave of his family honour, ghairat, and killed both the deceased at the spot. In my opinion he has committed no offence liable to punishment.”⁵⁵

Judgments delivered during the 1990s also drew on the concept of *masum-ud-dam* (innocent/one whose life is protected) as articulated by the Shariat Appellate Bench of the Supreme Court in the aforementioned *Gul Hasan* case. This resulted in courts awarding lesser sentences where the accused had murdered an adulterous woman who was subsequently deemed “not entirely innocent.”⁵⁶ In *Ali Muhammad v. Ali Muhammad*, the court went to the extent of equating provocation with self-defence by holding that “the appellant as custodian of honor of his wife had the right to kill the deceased while he was engaged in sex act with his wife and he had not earned liability of Qisas or Tazir or even Diyat.”⁵⁷ Apart from undesirable outcomes in particular cases, these judgments are also notable for the kind of messages they send out to the community about how the State views the conduct of the victim and the offender.⁵⁸

Criminal Law (Amendment) Act, 2004

The Criminal Law (Amendment) Act, 2004, which came into force in 2005, added a specific offence of “honour crime” committed “on the pretext of *karo kari*, *siyah kari* or similar other customs or practices” in the Pakistan Penal Code (PPC), 1860.⁵⁹ Amending Section 305 of the PPC, the Act barred the accused or the convict to act as *wali* if the murder is committed in the name of honour. Changes to this effect were also made in the “compundability” provision in the Criminal Procedure Code (CrPC), 1898.⁶⁰ With regard to waiver or compounding of crimes committed in the name of honour, a proviso was added to Section 338-E, Sub-Section 1, providing that the court may impose conditions that it deems “fit to impose with the consent of the parties having regard to the facts and circumstances of the case.” Changes to this effect were also made in Section 345 of the CrPC.

More significantly, Section 311 of the PPC, as amended by the Criminal Law (Amendment) Act, 2004, authorises courts to punish an offender in honour killing cases against whom the right of *qisas* has been waived or compounded with on the basis of *fisad-fil-arz* (aggravating circumstances). *Fisad-fil-arz*, as provided under Section 311, includes the past conduct of the offender, previous convictions, “the brutal or shocking manner in which the

⁵⁵ *Sardar Mohammad vs. The State* 1997 MLD 3045; para 13, 3049.

⁵⁶ *Abdul Haque v. The State*, P.L.D. 1996 SC 1; *The State v Mohammad Hanif* SCMR 2047.

⁵⁷ *Ali Muhammad v. Ali Muhammad* 1993 P.Cr.L.J. 557 at 563.

⁵⁸ Amir Jafri, *Honour Killing. Dilemma, Ritual, Understanding* (Oxford University Press, Karachi 2008) 113.

⁵⁹ Section 299 h (ii), PPC, 1860 as amended by The Criminal Law (Amendment) Act, 2004.

⁶⁰ Section 345, CrPC, 1898.

offence has been committed which is outrageous to the public conscience,” if the offender poses a potential danger to the community, or if “the offence has been committed in the name or on the pretext of honour.” The maximum penalty available is fourteen years. The same section provides a mandatory minimum of ten years when the offence has been committed in the name of honour.⁶¹

Welcome as these changes were, the Act did not meet all the demands of women’s rights campaigners. The law was criticised for retaining the waiver or compundability provision, albeit excluding the offender to act as a *wali* and pardon himself.⁶² Similarly, the law fell short of providing that the State act as *wali* in all cases of honour killing thereby retaining control over prosecution decisions.

Post-Amendment Case Law

Earlier analyses of case law covering the years immediately following the enactment of the Criminal Law (Amendment) Act, 2004 revealed a disturbing trend.⁶³ Any benefit that could have come about in terms of stricter penalties for honour killing, it appeared, was being cancelled out by the defence strategy of provoking a plea of “grave and sudden provocation”.⁶⁴ In a 2006 case, *Mohammad Ameer v. the State*, the petitioner who had been convicted of a double murder and sentenced to life imprisonment as *tazir*, pleaded that he had lost control upon hearing his sister had been “raped”. Refusing to grant the leave to appeal, the Supreme Court held:

*The commission of an offence due to Ghairat or family honour must be differentiated from the grave and sudden provocation in consequence to which crime is committed in the light of facts and circumstances of each case. The plea of grave and sudden provocation may not be available to an accused who having taken plea of Ghairat and family honour, committed the crime with premeditation.*⁶⁵

The court’s approach seems to suggest that the plea of provocation could still succeed in cases of honour killing as a mitigating circumstance where the element of premeditation is lacking. The subsequent case law does not bear out that the courts are restricted even by the premeditation requirement. So, for example, in a criminal appeal and murder reference (*Muhammad Akhtar v. the State*) heard on December 15, 2008, the Lahore High Court converted into life imprisonment the sentence of death awarded to the appellant because he had the “suspicion of

⁶¹ Inserted by the Criminal Law (Amendment) Act, 2004, Section 8 (v).

⁶² Sohail Akbar Waraich (n 46) 105-6.

⁶³ Moeen Cheema (n 45).

⁶⁴ *Muhammad Ameer v. The State* 2006 PLD 283 52; *Muhammad Arshad v. The State*, 2006 SCMR 89 53; *Abdul Jabbar v. The State*, 2007 SCMR 1496,

⁶⁵ *Muhammad Ameer v. The State*, PLD 2006 S.C. 283, at 288.

illicit liaison” between the person he had murdered and his wife. On the facts of the case, the appellant, Mohammad Akhtar, had scaled the walls of the complainant’s home and killed his son (the person he suspected was having an affair with his wife) by pouring acid over his body. Despite the premeditated nature of the act, the court deemed it fit to award a lesser sentence because it could not be ruled out that the appellant had acted in the name of *ghairat*. As such the award of the death sentence by the trial court, in the words of Justice Ali Hassan Rizvi, “is a harsh order.”⁶⁶

In more recent years, courts have handed down conflicting judgments. In a 2014 case (*Zahidullah v. the State*), the Peshawar High Court refused to accept the “grave and sudden provocation” plea, as the motive of murder being family honour had been established beyond any “shadow of doubt.” By contrast, the Sindh High Court in an appeal heard the same year converted the death sentence into life as the appellant had acted upon “sudden provocation which was on account of teasing and annoyance of his sister by (the) deceased.”⁶⁷ Since this write-up does not advocate the death penalty, what is more important than the quantum of the sentence being awarded, is the legal discourse which seems to approve that men have a right to be provoked by every incident supposedly involving honour. Also missing in the case law is any consideration of “proportionality” where the plea of provocation is raised. Even if the defence is accepted as valid, the further question to be addressed is whether the reaction that followed a provocation was proportionate or not.⁶⁸

One legal solution to the pernicious problem of the provocation plea in honour killing cases could be to bring a statutory exception, excluding this defence where a person commits murder in the name of honour. A similar change was introduced in England and Wales where killing of a woman on grounds of adultery historically allowed a husband to raise the defence of sudden provocation. The defence was abolished by the Coroners and Justice Act, 2009.⁶⁹

Additionally, a 2102 ruling from the Balochistan High Court signposts an alternative prosecution strategy within the existing legal framework that could perhaps bypass both the issue of compoundability and the plea of “grave and sudden provocation.” The case involved the killing of a woman and her alleged partner on “the bald

⁶⁶ *Muhammad Akhtar v. The State* 2009 YLR 1092, at para 17.

⁶⁷ *Asghar Hussain v. The State*, 2014 PCrLJ 361.

⁶⁸ For a theoretical and historical perspective, see A.J Ashworth, *The Doctrine of Provocation* 35, Cambridge Law Journal, 292. 1976.

⁶⁹ Section 56 (1).

allegation of *siyah kari*.”⁷⁰ The High Court directed the Sessions Judge to transmit the case to Anti-Terrorism Court under Section 5A (7) of the Suppression of Terrorist Activities (Special Courts) Act, 1975. The court grounded its ruling in Section 6, Sub-section (ii) of the Anti-Terrorism Act, which designates “taking the law in own hands, award of any punishment by an organization, individual or group whatsoever not recognized by the law, with a view to coerce, intimidate or terrorize...” It is not hard to see that most cases of honour crimes would meet this definition as they clearly involve taking the law into one’s own hands and awarding extra-legal punishment.

Another option, on which recent case law is woefully silent, is the amended provision in Section 311 whereby the court “may hand down a sentence of up to fourteen years where all the *wali* do not waive or compound the right of *qisas*,” with a mandatory minimum of ten years if the offence has been committed in the name or on the pretext of honour. As for the waiver and compoundability provisions, the courts appear to have adopted a more robust approach in recent years in respect of the requirement that “compromise deeds” be carefully scrutinised. For example, in *Khadim Hussain and another v. the State* (2012), the Balochistan High Court observed that compromises effected outside the court had no value “unless sanctioned by a court as envisaged in Column 3 of Section 345 (2) of the CrPC.”⁷¹

Other Issues in Implementation

From the perspective of prosecution, the fact that legal heirs of a victim still retain the right of dropping charges at any point during the trial entails a risk that all the effort involved in investigation and collection of evidence can be in vain.⁷² It has also been reported that the First Investigation Reports (FIRs) fail to record honour killings under the relevant provisions of the Penal Code as amended by the Criminal Law (Amendment) Act, 2004 as a result of collusion between the accused and the police. To cite a 2011 research on the implementation of the amended law on honour killing: “The words honour killing are never actually used, which means that any positive aspect of the 2004 legislation is avoided such as the restrictions on compromise.”⁷³ That study, based on an analysis of FIRs and interviews with lawyers and victims’ families in four districts (Naseerabad, Ghotki, Nowshera, and Gujrat), puts the practice down partly to the collusion between the accused and the police in exchange for

⁷⁰ *Sher Ahmed v. Khuda-e-Rahim*, 2012 MLD 158.

⁷¹ *Khadim Hussain and another v. The State*, PLD 2012 Quetta 179.

⁷² Tahir Wasti (n 19) 247.

⁷³ Maliha Zia Lari (n 39) 70-71.

bribes. Lack of capacity and understanding of the Criminal Law Amendment Act (2004) are cited as additional reasons for ‘incomplete’ or ‘wrong’ FIRs, which potentially weaken the prosecution case and favour the accused.⁷⁴

Despite express provisions to the contrary, the culture of out-of-court settlements still runs deep and the police are known to encourage the practice. These problems shed light on an additional lacuna in the law, one that relates to faulty investigations. By way of comparison, reference can be made to an Indian law, the Criminal Law (Amendment) Act, 2013. In bringing changes to the Indian Penal Code, 1860 and the criminal procedure in respect of the offence of throwing acid to cause harm to individuals, the law penalises the acts of omission and commission of public servants. Under Section 166-A of Criminal Law (Amendment) Act, 2013, if public servants intentionally disobey the requirements of the law regulating investigation in cases of acid-throwing and other cognizable offences, or if they fail to record information in relation to cognizable offences, they are liable to be punished with a minimum prison term of six months and a maximum of two years.

There is no independent and accessible source on the incidence of honour killings and other honour based crimes. The Police Superintendent (SP) in every district is required to compile an Annual Administration Report detailing the situation of crime during the previous year. However, it has been pointed out that these reports are silent on the causes of crime, the number of accused sent for trial, and the number of cases where investigation was cancelled.⁷⁵ The National Police Bureau’s Gender Crime Cell is said to be collecting data on violence against women. Regrettably, just like the Annual Administration Reports prepared by SPs, this data is not publically available.

Finally, it has to be noted that the duty to investigate and prosecute violence against women is but one aspect of the State’s international obligations towards women’s rights. A more fundamental obligation involves providing protection to women from being targeted in the first place. Admittedly, this would require major structural changes, but the importance of immediate measures, such as availability of shelters for women at risk cannot be stressed enough. The Committee on the Elimination of Discrimination against Women has held State parties accountable for their failure to act with due diligence in addressing violence against women. Under the individual complaints mechanism, in the cases of *Goekce (deceased) v. Austria*, and *Yildirim (deceased) v. Austria*, both concerning women victims of domestic violence, the Committee found that the State had discriminated against the women for failing to act with due diligence to protect their rights to life and to physical and mental

⁷⁴ Maliha Zia Lari (n 39) 38-9, 71.

⁷⁵ Tahir Wasti (n 19) 251-2.

integrity.⁷⁶ The obligation to act with due diligence, it can be argued, is engaged where a woman is in danger of being attacked or killed on account of allegations of adultery, extra-marital relations, or other such suspicions.

⁷⁶ *Şahide Goekce (deceased) v Austria* (Communication No. 6/2005); *Fatma Yildirim (deceased) v Austria* (Communication No. 6/2005).

The Law of Rape

Historical Background

In July 1983, Safia Bibi, a twenty-year-old woman, who was almost blind and worked as a domestic worker, was convicted of *zina* (extramarital relations) under section 10 (2) of the Offence of Zina (Enforcement of Hadd) Ordinance, 1979. Before her father filed a report with the police claiming Safia had been raped while at work, she gave birth to a child who died shortly afterward. Despite the fact that there was no evidence of her having consented to sexual intercourse, the trial court sentenced her to three years imprisonment, whipping, and a fine, in default of payment of which she was ordered to undergo an additional six months imprisonment. The co-accused was acquitted of *Zina-bil-Jabr* (rape), since Safia Bibi's statement against him was not sufficient evidence in the absence of independent corroborative evidence. Luckily for Safi Bibi, on appeal, the Federal Shariat Court overturned the sentence and held that the trial judge had departed from the well-known principle of criminal law that it is the duty of the prosecution to establish by evidence the offence of the accused beyond reasonable doubt.⁷⁷

Other women were not so "lucky" as their testimony of rape was treated as confession of adultery, and an "unexplained pregnancy" provided proof of adultery. So did a delay in reporting rape and a failure on the part of a woman to "cry for help" when the rape was being committed. Once consent was established, the offence could be converted from rape to adultery, an entirely new criminal offence created by the Zina Ordinance. Those accused of rape, on the other hand, were often acquitted.⁷⁸ The judicial language in cases involving sexual violence and rape betrayed a deep-seated gender-bias bordering on misogyny. Indeed, it is not uncommon to find terms such as 'easy virtue', 'loose woman', and 'unstable character' in this legal literature.⁷⁹

Any aggrieved person could register an FIR with the police and the police could arrest those accused of adultery. Many women (and men) who were arrested were simply left in prison for years without any legal assistance. Scores of women convicted by trials courts were eventually acquitted by the Federal Shariat Court but by then they had already spent years in jail.

⁷⁷ *Safia Bibi v The State*, PLD 1985 FSC 120.

⁷⁸ See, for example, *Jehan Mina v. the State* PLD 1983 FSC 183.

⁷⁹ Shahnaz Rouse, *The Outsider(s) Within. Sovereignty and Citizenship in Pakistan*, in Patricia Jeffery and Amrita Basu (eds) *Appropriating Gender: Women's Activism and Politicized Religion in South Asia* (Routledge, New York 2011) 56.

Reforming the Zina Ordinance: Thinking the Unthinkable

The ostensibly Islamic nature of the Offence of Zina (Enforcement of Hadd) Ordinance 1979 lent the law a legitimacy and rhetorical salience that outlived its creator. Even the criticism rooted within Islamic thought failed to cut ice with hardliners who would not tolerate any attempt at tinkering with what they believed was divine sanction. Some feminists, for example, argued that there was a disconnect between the framing of rape (*zina-bil-jabr*) in Hudood Ordinance and the debate within Islamic law about *zina* under duress either as *hiraba* (forcible assault) or civil redress for a rape survivor in its law of *jirah* (wounds).⁸⁰ Others pointed out that *hadd* punishments for *zina* had been virtually absent in Islamic history up until the twentieth century.⁸¹

General Pervaiz Musharraf, the latest in a long line of military dictators, distinguished himself from his predecessor on account of his policy of ‘enlightened moderation’ and progressive views on women’s issues. The Musharraf administration and women’s rights groups found an unlikely ally in a reconstituted Council of Islamic Ideology (CII), now headed by a liberal-minded scholar, Professor Khalid Masud. In June 2006, the legal committee of the CII recommended that the Hudood Ordinances be rewritten in the light of the teachings of Islam.⁸² Before formally presenting an Amendment Bill in the National Assembly, the government set up an *ulama* committee to work with a Parliamentary Select Committee to prepare a draft law.

The ensuing debate in the National Assembly reveals much about how the issues of rape, adultery, and women’s sexuality are entangled with Pakistan’s *raison d’être*, national identity, and global geo-politics. The repugnancy clause and the Objectives Resolution as a substantive part of the Constitution were used in the opposition’s rhetorical charge. In the words of Hafiz Hussain Ahmed, one of the most senior opposition leaders: “[According to] Article 2A of the Constitution, Islam is the official religion and Article 227 provides that no law in contradiction with Quran and Sunnah can be formulated...the government has disrespected the Quran and Sunnah by presenting this Bill.”⁸³

When the Motion for Consideration of the Bill was moved on November 15, 2006, the opposition, then dominated by a coalition of religious parties, *Muttahida Majlis-e-Amal* (MMA), accused the government of having disregarded the recommendations of the *Ulama* Committee. Maulana Fazlur Rehman, then Opposition Leader in

⁸⁰ Asifa Qureshi *Her Honor: an Islamic Critique of the Rape Laws of Pakistan from a Woman-sensitive Perspective*, Michigan Journal of International Law 18, 1997, 287.

⁸¹ Judith E. Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge University Press, New York 2008).

⁸² Martin Lau (n 19) 1302-4.

⁸³ The National Assembly of Pakistan. Debates. Official Report, 23rd August 2006 (38th Session) 1641.

the National Assembly, complained that the government had reneged on its commitment given to the *Ulama* Committee “that rape would stay (on statute books) as a *Hadd* offence.” The religious opposition had also demanded the “inclusion of a provision to underscore the superiority of the law of the Quran and Sunnah to prevent introduction of any law in conflict with Islam.” The Bill as being presented before the National Assembly, on Fazlur Rehman’s account, was an effort to turn Pakistan “into a free-sex zone in the name of *zina*.”⁸⁴ Sahbzada Haji Mohammad Fazl Karim declared the Bill to be un-Islamic, and an “embodiment of shamelessness and immodesty” that will “shake Pakistan’s social structure to its roots.” He was particularly displeased about the fact that the proposed law “provides the penalty of death or life imprisonment or 25 years for rape but just 5 years and a Rupees 10,000 fine for consensual sex.”

Even though the Pakistan Muslim League (N) abstained from voting, one of its most vocal leaders, Saad Rafique, was of the view that the Women’s Protection Bill be renamed “promotion of immodesty bill.” The proposed law, he suggested, was meant to promote westernised open-mindedness and turn Pakistan into a secular State.⁸⁵

The terms of the debate and the religious idiom employed by the Opposition meant that those in favour of the Bill also had to ground their arguments within a religious framework. Sherry Rehman from the Pakistan People’s Party held that in creating the impression that the women’s movement was something immodest, religious leaders were negating “Islam’s spirit of tolerance.” Islam, she said, “does not allow injustice; we are today attempting to amend an unjust and discriminatory law.”⁸⁶

Echoing the same reasoning, the “Statement of Objects and Purposes” appended to the proposed law stated that it was aimed at bringing the “laws relating to *zina* and *qazf* (false allegation of adultery or fornication), in particular, in conformity with the stated objectives of the Islamic Republic of Pakistan.” The Statement is an extraordinary document in that it sums up a range of problems that had resulted from the Hudood Ordinances. Part of it reads as follows:

The Zina and Qazf Ordinances have been a subject of trenchant criticism by citizens in general and scholars of Islam and women in particular. The criticisms are many. These include the lumping of the offence of zina with zina-bil-jabr (rape) and subjecting both to the same kind of proof and punishment. This has facilitated abuse. A woman who

⁸⁴ The National Assembly of Pakistan. Debates. Official Report, 23rd August 2006 (38th Session) 343-4.

⁸⁵ The National Assembly of Pakistan. Debates. Official Report, 15th November, 2006 (38th Session) 357.

⁸⁶ Ibid, 363.

*fails to prove rape is often prosecuted for zina.... Her complaint is, at times, deemed a confession.*⁸⁷

As an aid to statutory interpretation, the Statement of Objects and Purposes leaves no doubt that the 2006 Act aimed to redress past wrongs and provide maximum relief to rape victims and those accused of adultery and fornication.

The Protection of Women (Criminal Laws Amendment) Act, 2006

The Protection of Women (Criminal Laws Amendment) Act, 2006 which received Presidential assent on December 1, 2006, brought changes in the Pakistan Penal Code, 1860; the Code of Criminal Procedure, 1898; the Dissolution of Marriages Act, 1939; the Offence of Zina (Enforcement of Hadd) Ordinance, 1979; and the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979. Most significant amendments for the purposes of this discussion relate to the separation of the offence of rape and *zina*, the definition of rape, nature of confession, and the procedure governing complaints in cases of *zina*. Earlier, the Criminal Law (Amendment) Act, 2004 had already modified the Criminal Procedure Code (CrPC) requiring that investigation in cases where a woman is accused of *zina* should be carried out by Superintendent of Police or a higher ranked officer. Furthermore, the accused could no longer be arrested without permission of the court.⁸⁸

The offence of rape has been removed from the Zina Ordinance and placed under the Penal Code. Section 375 of the PPC as amended by the Protection of Women Act defines rape as a man having “sexual intercourse with a woman” under the following circumstances: (i) against her will, (ii) without her consent, (iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt, (iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married, or (v) with or without her consent when she is under sixteen years of age.

There are several striking features to this definition. First, the definition does not restrict the offence of rape to sex outside marriage. Technically, this implies an end to the marital exemption to rape, historically a prime target of criticism from feminists the world over. In England, the House of Lords declared the “common law marital exemption” to be a legal fiction, which had become “anachronistic and offensive” in modern times. It was held that

⁸⁷ The National Assembly of Pakistan. Debates. Official Report, 15th November, 2006 (38th Session) 403-4; see also Martin Lau (n 19) 1307-8.

⁸⁸ Section 156 B, CrPC, 1898 as modified by the Criminal Law (Amendment) Act, 2004.

the definition of rape as “unlawful sexual intercourse with a woman who at the time of intercourse does not consent to it” as provided by the Sexual Offences (Amendment) Act 1976, “should not be viewed as meaning ‘illicit’ or outside of marriage.”⁸⁹ There has been no judgment from a court in Pakistan to date that could shed light on the judicial position on this particular matter.

Second, in defining rape as a man having “sexual intercourse with a woman,” the 2006 Act has simply overlooked the possibility of male rape. A separate, pre-existing section in the Penal Code, 1860 (Section 377) outlaws “carnal intercourse against the order of nature with any man, woman or animal” under the vague heading of “unnatural offences”. The so-called unnatural offences are punishable with life imprisonment or a prison term not exceeding ten years and not less than two years.

While an explanation added to Section 375 states that “penetration is sufficient to constitute the intercourse necessary for the offence of rape,” the definition does not seem to encompass “object rape,” i.e. vaginal or anal penetration with an object, or oral sex.⁹⁰ That said, some feminists would argue that the emphasis on the act of sexual penetration itself privileges a male perspective with respect to the essential nature of sexual crimes.⁹¹ Finally, designating sexual intercourse with a woman below the age of 16 as rape irrespective of consent is an important and far-reaching step. It could be argued, however, that in line with Article 1 of the Convention on the Rights of the Child, the age specified should ideally have been 18 years.

Section 376 of the PPC provides the penalty for the offence of rape as death sentence or life imprisonment or a term of prison not exceeding 25 years with a mandatory minimum of 10 years. The penalty for gang rape is death or life imprisonment. Changes made in the Offence of Zina (Enforcement of Hadd) Ordinance, 1979 now preclude the conversion of a complaint of adultery or rape into one of fornication or vice versa.⁹² The Protection of Women (Criminal Laws Amendment) Act, 2006 has also removed references to *tazir* punishments for the offense of adultery. The offence can only be established if witnessed by four pious, male Muslims or if the accused confesses. Further, with changes made in the Criminal Procedure Code, a complaint of adultery can only be lodged directly in a court of sessions, thereby circumventing the role of police officers altogether.⁹³ Making a false

⁸⁹ *R v R* [1991] 3 WLR 767, House of Lords.

⁹⁰ See, for example, Ayesha Khan and Sarah Zaman, *The Criminal Justice System and Rape: An Attitudinal Study of the Public Sector’s Response to Rape in Karachi*. (Collective for Social Science Research/War against Rape, Karachi 2011).

⁹¹ Danette C. Cashman, *Negotiating Gender: A Comparison of Rape Law in Canada, Finland and Pakistan*. 9 *Dalhousie Journal of Legal Studies*. 120, 2000, 125.

⁹² Section 5A, The Offence of Zina (Enforcement of Hadd) Act, 1979.

⁹³ CrPC Section 203 A.

accusation of adultery (*qazf*) may now incur an almost automatic penalty as the judge is authorized to pass a sentence if “satisfied that the offence of *qazf* liable to *hadd* has been committed.”⁹⁴

Post-Amendment Case Law

Despite representing a major advance in the law of rape in Pakistan, the 2006 Act has some weaknesses, which have not received much attention from lawyers and activists. The first of these concerns the law of evidence. Historically in rape trials the world over, the defence was permitted to present evidence or cross-examine the complainant concerning her relationships and sexual history, past conduct, and standing in society. Judges and lawyers used to – and still do – bring their own biases into the courtroom. The whole procedure loads the dice against the complainant.⁹⁵ The admission of sexual history evidence and humiliating cross-examination has been cited as a major reason for women not reporting rape, withdrawing complaint, or failing to secure a conviction. Since the 1970s, a number of countries have imposed restrictions on the introduction of evidence of the complainant’s sexual behaviour in what are often called the “rape shield” laws.⁹⁶

In Pakistan, the Qanun-e-Shahadat Order, 1984, provides that “when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix is generally of immoral character.” The provision (Section 151, Sub-section 4) was challenged before the Federal Shariat Court in 2009 as being repugnant to the teachings of the Quran and Sunnah and incompatible with Article 25 of the Constitution (gender equality).⁹⁷ In what can be construed as their lack of commitment to women’s rights and victims of rape, the Federal Government and the Governments of Balochistan, Punjab, and Sindh filed comments in the court opposing the petition. To its credit, the Government of Khyber Pakhtunkhwa supported the petition. In a remarkably progressive ruling, the Shariat Court held the Sub-article 4 (Article 151) of the Qanun-e-Shahadat Order, 1984, to be repugnant to the Quran and Sunnah, directing the government to repeal it within six months, “failing which the said provision shall cease to have effect whatsoever,”⁹⁸ The government never followed through on the court’s direction. Technically, the provision is legally void but lawyers report that evidence concerning a woman’s attire and social standing is routinely presented and her behaviour put on trial during cross-examination to discredit the complainant.

⁹⁴ Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, Section 6(2).

⁹⁵ Sue Lees, *Ruling Passions: Sexual Violence, Reputation and the Law* (Open University Press, Buckingham 1997) 62.

⁹⁶ Andrew L-T Choo, *Evidence* (Oxford University Press, New York 2009) 381-88.

⁹⁷ *Mukhtar Ahmad Sheikh v Government of Pakistan*, PLD 2009 Federal Shariat Court 65.

⁹⁸ *Ibid*, at para 12

An equally historic judgment was delivered by the Supreme Court in a 2013 constitutional petition, *Salman Akram Raja v. the Government of Punjab through Chief Secretary and Others*.⁹⁹ The case turned on the validity of compromise in cases of rape and an entire gamut of issues related to evidence and court procedure. It concerned Ayesha, a 13-year-old girl from Rawalpindi who was raped in March 2012. There was an unexplained delay in the registration of an FIR even though her father had approached the local police station following the incident. Ayesha in the meantime attempted suicide. Following a *suo motto* action by the Lahore High Court, the FIR was eventually registered. However, when the case was fixed before the Sessions Judge, the complainant (Ayesha's father) informed the court that he had reached an out-of-court settlement for a consideration of Rupees 1 million. Fearing that the accused would be acquitted, the petitioners (Salman Akram Raja and other activists) approached the Supreme Court and pleaded that the out-of-court settlement be declared invalid and the criminal liability of the offender be deemed unaffected in what is a non-compoundable offence (rape). The petitioner also sought the court's directives to the government that DNA evidence is collected in every rape case.

Accepting the petitioners' arguments, the Supreme Court held that rape was a crime against society, and where the complainant did not pursue the matter, or dropped charges on account of an out-of-court settlement, the State should step up to take the trial to its culmination. Considering the advances made in DNA evidence collection and citing domestic case law where such evidence has been deemed admissible, the Court directed that the collection of DNA evidence be made mandatory in rape cases subject to a victim's consent. The court further directed that such evidence be preserved for a certain number of years keeping in mind instances in other countries where DNA evidence had helped during re-trials and led to some wrongful convictions being overturned.¹⁰⁰

In addition, Chief Justice Iftikhar Chaudhry drew heavily on a judgment of the Delhi High Court to issue a range of guidelines.¹⁰¹ Most notable among them are: the liaison between police stations and NGOs for the purpose of providing legal aid and counselling services to rape victims, holding in-camera trials, and providing screens during the trial to prevent the encounter between the complainant and the accused and to minimise re-victimisation and humiliation of the victim.

⁹⁹ *Salman Akram Raja v the Government of Punjab through Chief Secretary and Others*, 2013 SCMR 203.

¹⁰⁰ *Ibid.* At para 7.

¹⁰¹ *Delhi Commission for Women v Delhi Police*, W.P (CRL) 696/2008.

Whereas the government never moved to bring in legislative and administrative changes as directed by the court, a significant follow-up initiative was taken by Senator Sughra Imam. Ambitiously titled, Anti-Rape Laws (Criminal Laws Amendment) Act, 2013, the Bill was introduced in the Senate on January 1, 2014. The bill was approved by the Standing Committees in both Houses of the Parliament but lapsed in the National Assembly in October 2015. The proposed law had sought changes in the Pakistan Penal Code 1860, the Code of Criminal Procedure, 1898, and the Qanun-e-Shahadat Order, 1984. The bill proposed penalties for defective investigation in rape cases, conclusion of trials within six months, mandatory medical test and extraction of DNA within twenty-four of hours of receipt of information of the offence of rape, and penalties for the disclosure of the identity of rape victims. The last of these measures is open to debate as it might be seen as reinforcing the shame and stigma surrounding rape. Nonetheless, it is unfortunate that the proposed law never came up for discussion in the National Assembly. Considering the ambiguous stance of the PML (N) during the assembly debate on the Protection of Women Act, 2006 as discussed earlier, perhaps it is hardly surprising that it should be ambivalent on tightening the law of rape in Pakistan.

As for the 'non-compoundable' nature of the offence of rape, one would have assumed that the Supreme Court ruling in the Salman Raja petition had settled the matter decisively. However, as a 2015 judgment by the Lahore High Court suggests, this is not the case. The judgment rests on shaky conceptual ground. It is purportedly concerned with the 'right' of a rape victim to compensation but the *ratio decidendi* of the case is deeply problematic as it opens up the possibility of compromises during rape trials. In the said case, the Lahore High Court upheld rape conviction but accepted the joint request of the parties for a reduction of sentence of the appellant against an out-of-court settlement between the parties. The Court reduced the sentence of twenty-five years in prison awarded to the appellant under Section 376 of the Penal Code (as amended in 2006) to ten years' imprisonment. The court directed that the fine of Rupees 100,000 originally awarded to the appellant be paid to the victim in addition to a Savings Deposit Certificate worth Rupees 750,000 already handed over to the victim's family by the appellant. The judgment erroneously conflates the requirement that the courts ought to pass compensation orders (in addition to a conviction sentence) with the issue of compoundability as provided under Sections 544A and 545 of the CrPC, 1898.¹⁰²

¹⁰² *Safdar Ali alias Soni v. The State*, 2014 PCrLJ 361.

Other Issues in Implementation

To round off the discussion, we shall attempt to draw out some key implementation issues as experienced by a rape victim based on a recently published case study.¹⁰³ Nadia, an eighteen-year-old college student in district Sheikhpura, Punjab, was abducted in March 2012 on her way back from school. She was taken to a deserted place allegedly by two policemen, a government employee, and a sepoy from the Rangers. She was gang-raped and thrown by the roadside late at night. Nadia told the interviewer:

My mother was in shock, my father shouted at me and blamed me for this tragedy. I had ruined the family honour, my father cried. My relatives termed it a result of girls' education. Nobody was there to sympathise with me and condemn the rapists. I was the punching bag for everybody. I could not tolerate this at all. I went into acute depression and tried to commit suicide twice.¹⁰⁴

The local police arrested the perpetrators following media coverage. The lower court granted bail to two of the perpetrators but both were later re-arrested. When the complaint was filed with the local police station, they took Nadia from Sheikhpura to Lahore for DNA tests “along with three of the rapists in the same vehicle.” As Nadia recounted: there had been “no female constable accompanying me during the journey or during the medical test in the hospital. I was scared all the way.”¹⁰⁵

With the case pending with the Additional Session Judge of Sheikhpura (as of 2014), Nadia's family was said to be under immense pressure from the police and local influential people to withdraw the complaint and accept compensation. The family members had received death threats from the accused. The family had to shift from their village to Sheikhpura town, where Nadia had a hard time returning to normal life while her family was facing financial problems and sold her younger brother into bonded labour. In Nadia's own words: “My sister was expelled from school because she is the sister of a girl who was raped. I hate such a society.”¹⁰⁶

¹⁰³ Bushra Khaliq, To Be a Woman in Pakistan: Stories of Struggle and Survival, in Margaret Alston (ed) *Women, Political Struggles and Gender Equality in South Asia*. (Palgrave Macmillan, Basingstoke 2014) 58-71.

¹⁰⁴ Ibid, 67-8.

¹⁰⁵ Ibid, 68.

¹⁰⁶ Ibid.

As other qualitative studies have established, Nadia's is not an isolated or atypical story.¹⁰⁷ Women, it appears, are raped twice: first, at the hands of the rapists, and second, by way of society's prejudices, indifference and the State's incompetence and lack of due diligence.

Low numbers of female police officers, as highlighted earlier, is known to serve as a major disincentive to women filing complaints. Victims of rape frequently attempt suicide. Delays on behalf of the police in registering FIRs occur frequently. Lawyers have also pointed out that the FIR is sometimes registered under Section 377 (unnatural offences) and not Section 376 (rape). Police surgeons and medico-legal officers lack resources and training in conducting medical examination and collecting evidence in a gender-sensitive manner. The understanding of the law of rape in Pakistan as amended by the Protection of Women Act, 2006 has been found to be very limited among the police officials, medico-legal officers, and prosecutors. Prejudices against rape victims and myths about women's tendencies to "make false allegations" and "inviting" rape on account of their attire and behaviour run deep.¹⁰⁸ Often, families of the victim have to flee their homes and live with a stigma all their lives. By and large, the victims belong to the working class and are intimidated into accepting a compromise or dropping the charges altogether.

¹⁰⁷ For similar stories, see Ayesha Khan and Sarah Zaman (n 90).

¹⁰⁸ Ibid.

Conclusions and Recommendations

The analysis of the current status of the laws of honour killing and rape in Pakistan bears out a persistent interplay of tribal and customary values, Islamic law, and colonial judicial traditions with the implication that “any advantage or opportunity offered to women by one law is cancelled out by one or more of the others.”¹⁰⁹ Similarly, a positive substantive provision is, at times, cancelled out by an unfavourable evidentiary rule and vice versa.

Although the law and legal system have always had a measure of male bias built into their structures and logics, Zia ul Haq’s Islamisation campaign – guided largely by political interests – left Pakistan’s criminal law in a mess that survives today. The legal and political discourse it generated reinforced prejudices against women and set the terms of the debate in such a way that it has been nearly impossible to transcend the confines of the religious idiom. Matters were not helped by a judiciary enthusiastic to prove itself more loyal than the king by paving the way for *qisas* and *diyat* laws and appointing themselves as moral guardians of women’s behaviour.

Against this backdrop, both the Criminal Law (Amendment) Act, 2004, and the Protection of Women (Criminal Laws Amendment) Act, 2006, represent a major advance and a step forward. The reforms did not occur overnight. Nor were they offered to the people of Pakistan on a platter. Rather, they were the culmination of years of hard work on the part of scores of brave and indefatigable activists. However, within the confines of the legal framework and social context generated by military dictatorships, the legal reforms inevitably involved some compromises. For example, as we saw in our discussion of the law on honour killings, the 2004 Act stopped short of removing the waiver and compoundability provisions altogether, albeit preventing the accused from acting as *wali*. Positively, however, the amended law authorised courts to punish an offender in honour killing cases against whom the right of *qisas* has been waived or compounded with on the basis of *fisad-fil-arz* (Section 311, PPC).

The issue of rape in Pakistan, as our discussion hopes to have established, is bound up with broader questions of national identity and culture. In failing to take up a recent anti-rape Bill proposed by Senator Sughra Imam, the PML (N) government seems to have replicated the ambiguous stance it had adopted in the National Assembly during the debate on the Protection of Women (Criminal Laws Amendment) Act, 2006. A similar lack of commitment and initiative is reflected in the government’s failure to follow through on the Federal Shariat Court

¹⁰⁹ Simi Kamal and Asma Khan, *Review of the Legal Status and Socio-Economic Context of Women in Pakistan (With Special Reference to Minorities)*, 1997, Research Study on the Interplay of Formal and Customary Laws on Women in Pakistan, Vol I. p ii.

judgment declaring Article 151, Sub-Article 4 of Qanun-e-Shahadat Order, 1984, to be repugnant to the teachings of Islam. Repealing the said evidentiary rule is necessary to restore the balance in rape trials, which is currently tipped in favour of the defendant, who can bring up a woman's past conduct and relationship history during cross-examination to erode the credibility of her testimony.

In addition, by way of recommendations, we stress the need for excluding the partial defense of "grave and sudden provocation" that is routinely applied and accepted by courts in cases of honour killings. We also recommend that the State act as *wali* (legal guardian) in all such cases to prevent the murder of women in the name of honour being effectively turned into a private wrong rather than a crime against the State. In respect of rape, the government ought to follow through on the Supreme Court's far-reaching directives in a 2013 constitutional petition (*Salman Raja v. the Government of Punjab*), especially in terms of making DNA evidence mandatory and facilitating legal aid and counselling services for victims of rape. The government's obligation to act with due diligence as enunciated under international law requires that it provides protection to women (and men) at risk of being targeted in the name of honour, and takes measures to prevent the re-victimisation of rape victims at the hands of insensitive police officials, medico-legal officers, and other actors.

Finally, even as we emphasise the need to tighten the law in respect of honour killing and rape, we need to be wary of a single-minded and an overzealous punitive approach that can sometimes result in the rights of the accused being ignored or watered down. Guarantees of a fair trial, presumption of innocence, and prohibition of retroactive penalties, etc. are too important to compromise on, even when the beneficiaries happen to be those accused of rape and honour killing. It has to be recognised also that even the best of legal systems could provide only partial solutions to social problems. As such, the struggle for women's rights will need to be waged on multiple sites with an agenda for a more fundamental transformation in society and in gender relations.

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