



YOUTH GENERAL ASSEMBLY

ANTI-RAPE LAWS IN PAKISTAN

STATUTORY REVIEW



YGA LEGAL FORUM
A Project of Youth General Assembly



YGA Business Forum
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YOUTH GENERAL ASSEMBLY

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1.1 Introduction

1.1.1 What is Rape?

While starting with the notion of the general public about the term "rape", most people say that it's sexual intercourse without the consent of the person. Rape is any sexual assault usually involving sexual intercourse or other forms of sexual penetration carried out against a person without the consent of that person.¹ While the Pakistan Penal Code² defines it, Rape:-

A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,

- (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.

While the general perception about rape is true, there is still a lack of awareness that surrounds the concept of consent and what it entails. Rape is one of the defined types of sexual violence. According to the World Health Organization³, sexual violence is any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or act to traffic, or

¹ 'Main Types of Rape' (*The Impact of Rape Among Women*, 2022) <<https://212906806124441495.weebly.com/main-types-of-rape.html>> accessed 31 March 2022.

² Pakistan Penal code, 2022 edition, Section 375.

³ 'Violence Against Women' (*Who.int*, 2022) <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women#:~:text=It%20includes%20rape%2C%20defined%20as,report%20on%20violence%20and%20health>> accessed 21 July 2022.

otherwise directed, or against a person's sexuality using coercion, by any person regardless of their relation to the victim, in any setting, including but not limited to home and work. The element of conduction of this act may involve physical force, coercion, or abuse of authority, against a person who is unable to give his or her consent, such as one who is unconscious, incapacitated, deception, has an intellectual disability, or below the legal age of consent.⁴ The term "rape" is not limited to sexual intercourse by the sex organ, it also includes sexual penetration by other body parts or foreign objects: for example, sexual intercourse includes vaginal, anal, and oral penetration. In many jurisdictions of the world, the term rape is subsumed or interchangeably used with sexual assault.

1.2 Kinds of rape

From the context, there are multiple kinds of different organizations in their respective regions. Some of these kinds are recognized not only locally but also internationally.

1.2.1 Rape by sexual intercourse:

In this kind, the preposition fulfilled that rape can be possible from a male to female, female to male, male to male, or female to female (Supra).⁵ While gender preference does play a role in the rape, this type is primarily classified by sex rather than gender.⁶

1.2.2 Marital or Spousal Rape:

⁴ Anne Mie Friis-Rødel, Peter Mygind Leth and Birgitte Schmidt Astrup, 'Stranger Rape; Distinctions Between the Typical Rape Type and Other Types of Rape. A Study Based On Data from Center for Victims of Sexual Assault' (2021) 80 *Journal of Forensic and Legal Medicine*.

⁵ Pakistan Penal Code, section 377.

Unnatural offenses:

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to fine.

⁶ 'Types of Rape' (*Psychology Wiki*, 2022) <https://psychology.fandom.com/wiki/Types_of_rape> accessed 31 March 2022.

Marital rape is also termed Intimate Partner Sexual Assault (IPSA), domestic abuse, or sexual abuse. The sexual assault between married couples without the consent of either the spousal or marital rape. Historically, it wasn't considered rape but the graph shifted from 1990 to 2012, and the first development in this sector was initiated in R Versus R (Rape: marital exemption) case.⁷ After that, people are considering this a serious type of rape.⁸ Psychiatric research data shows that the condition of the victim is the same as in the case of a person raped by a stranger.

1.2.3 Acquaintance or Date Rape:

Acquaintance rape is non-domestic rape but the victim knows the person who committed the rape. The other term used for this is Drug-Facilitated Sexual Assault (DFSA). In this case, the victim is incapacitated, under the influence of intoxication, or medical condition, asleep, or unable to give their consent. In these circumstances, the rapist could be a friend, co-worker, schoolmate, family, teacher, trainer, or person who is dating. There is an increasing trend of these types of rape studied has shown.⁹

1.2.4 Gang Rape:

When two or more people tried to have sexual intercourse with one person, is known as gang rape. Generally, those who tend to get engaged as a perpetrator are those who are weak, alcoholics, and drug addicts.¹⁰ The victim, in this case, undergoes serious injuries, and in most cases, they try to kill the person or the person is unable to survive.¹¹

⁷ [1991] 4 All ER 481

⁸ 'Types of Rape' (*Psychology Wiki*, 2022) <https://psychology.fandom.com/wiki/Types_of_rape> accessed 31 March 2022.

⁹ *ibid*

¹⁰ Jessica Woodhams and Claire Cooke, 'Suspect Aggression and Victim Resistance in Multiple Perpetrator Rapes' (2013) 42 *Archives of Sexual Behavior*.

¹¹ 'Types of Rape' (*Psychology Wiki*, 2022) <https://psychology.fandom.com/wiki/Types_of_rape> accessed 31 March 2022.

1.2.5 Serial Rape:

Serial rape is the continuity of action on behalf of the rapist to commit rape on multiple victims. The person follows a specific pattern or method to perform the rape and mainly it is unknown to the victim.¹² They are considered highly developed criminals as they use less force and that is the way they can perform multiples.

1.2.6 Rape of Minor:

When a child sexually abuses or rape another child it is called child-on-child rape. When other adults like parents, relatives, closers, aunts, and uncles, then it is incest.¹³ When the adult person is unknown like a teacher, trainer, religious authority, caregiver, or therapist then it is known as incestual rape.¹⁴ In all these sexual intercourses the child bears a long-term psychological trauma and is unable to develop properly.

1.2.7 Statutory Rape:

A person who has been raped without the legal age of consent is also termed statutory rape. As in the United States, the age-of-consent¹⁵ law is drafted and any person who violated that law will fall in the category of statutory rape.¹⁶

1.2.8 Rape by deception:

¹² Anne Mie Friis-Rødel, Peter Mygind Leth and Birgitte Schmidt Astrup, 'Stranger Rape; Distinctions Between the Typical Rape Type and Other Types of Rape. A Study Based On Data from Center for Victims of Sexual Assault' (2021) 80 Journal of Forensic and Legal Medicine.

¹³ P Gilmartin, 'Rape, Incest, And Child Sexual Abuse: Consequences and Recovery' (1994) 32 Choice Reviews Online.

¹⁴ 'Types of Rape: The Different Forms of Rape | Healthyplace' (*Healthyplace.com*, 2022) <<https://www.healthyplace.com/abuse/rape/types-of-rape-the-different-forms-of-rape>> accessed 31 March 2022.

¹⁵ 18 U.S.C.A. § 2241 and § 2243.

¹⁶ 'Statutory Rape: A Guide to State Laws and Reporting Requirements' (ASPE, 2022) <[https://aspe.hhs.gov/reports/statutory-rape-guide-state-laws-reporting-requirements-1#:~:text=In%20the%20majority%20of%20states,and%2011%20states%2C%20respectively\).&text=Note%3A%20Some%20states%20have%20marital%20exemptions.](https://aspe.hhs.gov/reports/statutory-rape-guide-state-laws-reporting-requirements-1#:~:text=In%20the%20majority%20of%20states,and%2011%20states%2C%20respectively).&text=Note%3A%20Some%20states%20have%20marital%20exemptions.)> accessed 22 July 2022.

This type of rape occurs when a person gets the consent of the victim by fraud or misrepresentation. It also includes the wrongful use of power or authority.¹⁷

1.2.9 Custodial Rape:

A person employed by the state who is in authority whether it's the police, public servant, or hospital staff, and the person uses his or her authority to perform sexual assault on the person in their remand is known as custodial rape. This kind of rape majorly falls in the region of Pakistan and India.¹⁸

1.2.10 Prison Rape:

In Pakistan, the rate of prison rape is 3% to 12% as these practices have happened among the inmates of the jail.¹⁹ The type of this rape is between the same sex because prisons for the opposite sex are separated.²⁰ The power dynamic within these prison systems actively contributes to the occurrence of this type.

1.2.11 War Rape:

War rape from the very term of it predates centuries where females and transgender, became part of collateral damage where they were forced into prostitution and raped. These rapes were happening during the war when one party wins the war, they rape the girls and women of the losing party and forced prostitution is also their practice²¹. These rapes are performed in the name of psychological warfare, undermining their morals, and ethnic

¹⁷ 'Main Types of Rape' (*The Impact of Rape Among Women*, 2022)

<<https://212906806124441495.weebly.com/main-types-of-rape.html>> accessed 31 March 2022.

¹⁸ 'Types of Rape' (*Psychology Wiki*, 2022) <https://psychology.fandom.com/wiki/Types_of_rape> accessed 31 March 2022.

¹⁹ Tanvi Akhauri, 'Pakistan Media Underreports Cases of Women'S Violence: Report' *She the People* (2021) <<https://www.shethepeople.tv/news/womens-violence-in-pakistan-underreported-ssdo/>> accessed 31 March 2022.

²⁰ 'Types of Rape' (*It's Not Your Fault*, 2022) <<https://helpnyf.wordpress.com/types-of-rape/>> accessed 31 March 2022.

²¹ 'Types of Rape' (*Psychology Wiki*, 2022) <https://psychology.fandom.com/wiki/Types_of_rape> accessed 31 March 2022.

cleansing. But after the 1949 Fourth Geneva Convention, Article 27 prescribed it as a war crime²² and it is also reinforced in the 1977 Additional Protocol.

1.2.12 Payback Rape:

It is rape in the name of revenge in some cultures. When a person from the family performs an act and in revenge, for the act, several members rape the women of that family. Unfortunately, his practice is still common in rural areas around the world.²³

1.2.13 Recognized in Pakistan

Pakistan is continuously developing in the understanding of the concept of rape and in recent years, much progress has been made in this process. The cases of rape are observed by the public and through different sources, these are the types of rape that are known to the general public. It includes Marital or Spousal Rape, Gang Rape, Rape of Minor, Statutory Rape, Custodial Rape, and Payback Rape.

1.3 Requirements for proof

The aggravating factors in the rape case are more relevant and interesting. In rape cases, mens rea (guilty mind) and actus rea (guilty action) are elaborated in detail. The mens rea includes the severity of the crime, conduct of the accused, whether it was planned and intentional, the marital status of the offender, and relationship with the accused. Based on these factors some evidence is required to prove that the offender is guilty. Proof and evidence of rape are dependent on the facts of every case. It is a well-settled principle of law that the evidence (actus rea) of a rape victim is on the same footing as the evidence of an injured complainant or witness. The burden of

²² International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, <<https://www.refworld.org/docid/3ae6b36d2.html>> accessed 22 July 2022.

²³ 'Types of Rape' (*It's Not Your Fault*, 2022) <<https://helpnyf.wordpress.com/types-of-rape/>> accessed 31 March 2022.

proof is on the shoulder of the complainant in this case. As in the case of Abdul Waheed vs. Dai, the court made the medical evidence and examination as proof.²⁴ In the same case, the question of the timing of the first information report with the police has also been adhered to in court. The third is that eye-witness and trustworthiness are also considered like in all crimes. The aforementioned is reaffirmed in the case of Muhammad Arshad vs. The State, this principle is elaborated as a shred of evidence in the rape case.²⁵

The fourth but the most important element, in this case, is the statement of the victim as in many cases the statement of the victim is upheld overall evidence (Mazhar vs. The State, 2012 YLR 652 Federal Shariah Court). Testimony alone is sufficient evidence for the conviction. In rape cases, the law does not require corroboration. But in the Mukhtaran Mai case²⁶, the Supreme Court upheld the exception to this rule. The verdict of this case shows that the validity of testimony without corroboration varied from case to case. If there is any history of grudge, rift, or tiff arising in the case then this rule will be considered with corroboration. Endorsing the same principle in Tukarama vs. Maharashtra²⁷, the Supreme Court of India had overruled the statement of the victim of rape because circumstantial evidence did no inference of guilt.²⁸

1.4 Statistics of Reported Versus Unreported Cases

Pakistan has seen a tremendous increase in reported rape cases over the last few years. This year²⁹ the number of rape cases reported has increased significantly as compared to the previous year. According to Daily Times research survey, an average of ten rape cases are reported in Pakistan every day. On 25th August about five rape cases were reported to the police within 24

²⁴ 2012 YLR 2701 (Karachi)

²⁵ 2012 YLR 886 (FSC)

²⁶ 2005 MLD 232

²⁷ 'Tukaram and Anr. Vs State of Maharashtra | Lawfoyer' (*LawFoyer / A daily doze for inquisitors*, 2022) <<https://lawfoyer.in/tukaram-and-anr-vs-state-of-maharashtra/>> accessed 16 June 2022.

²⁸ AIR 1979 SC 185

²⁹ 2022

hours in Lahore.³⁰ The statistics for the previous six years show that there are 22,000 rape cases are reported to the police.³¹ In these cases, only 77 of those accused have been convicted.³² The statistics of rape cases are increasing from 2002 Mukhtara Mai's gang-rape to the 2020 Lahore-Sialkot Motorway rape case,³³ where on the other side about 77% of the rape cases are unreported or unlighted in Pakistan due to various reasons. According to a news article published in Dawn, about 1,890 women were raped in the first six months of 2021 in Punjab.³⁴ But the number shown in the media is very less - out of 3,721 cases only 938 cases were reported by media outlets.³⁵

Detailed research was conducted about the rape cases from 12th October 2020 to 12th October 2021. The statistics show that a total of 1,040 cases were reported from all over Pakistan.³⁶ 936 cases from Punjab and 44 attempts to rape are also reported in Punjab.³⁷ 60 cases in Sindh and more than 10 attempts were reported.³⁸ 11 cases from Baluchistan, 20 from KPK, 13 from Islamabad, and 0 from Azad Kashmir were reported in that research.³⁹ Of the cumulative number of victims, there were 351 adults and 685 minors.⁴⁰ Along with them, there were also 4 transgender victims. A total of 69 deaths were also reported due to rape.⁴¹ As it can be seen properly that many

³⁰ M Ayyaz Khan Niazi, 'Rape Rage in Our Society' *Daily Times* (2021) <<https://dailytimes.com.pk/809084/rape-rape-in-our-society/>> accessed 31 March 2022.

³¹ *ibid*

³² Web Desk, '11 Rape Incidents Reported in Pakistan Every Day, Official Statistics Reveal' *The News International* (2020) <<https://www.thenews.com.pk/latest/743328-about-11-rape-cases-reported-in-pakistan-every-day-official-statistics-reveal>> accessed 31 March 2022.

³³ Tanvi Akhauri, 'Pakistan Media Underreports Cases of Women'S Violence: Report' *She the People* (2021) <<https://www.shethepeople.tv/news/womens-violence-in-pakistan-underreported-ssdo/>> accessed 31 March 2022.

³⁴ *ibid*

³⁵ *ibid*

³⁶ Sajjal Jamil, 'Share On Facebook Share On Twitter Share On Whatsapp Share On Linkedin Data: One Year of Rape Cases in Pakistan' *The Current* (2021) <<https://thecurrent.pk/data-one-year-of-rape-cases-in-pakistan/>> accessed 31 March 2022.

³⁷ *ibid*

³⁸ *ibid*

³⁹ *ibid*

⁴⁰ *ibid*

⁴¹ *ibid*

of the cases are not reported. But with the awareness, many numbers of reported cases have increased. Electronic and social media has aided the number of reporting cases. The main highlighted cases of recent times are Mufti Aziz-ur-Rehman: sexual assault case on June 17. After that 10.7 percent increase in the reporting of rape cases in June.⁴² In Usman Mirza's sexual assault on a couple case, after his arrest on July 7, there is a 9 percent increase in July.⁴³ On reporting the case of Noor Mukadam's murder case on July 20, there is a 12.6 percent increase in reporting in August.⁴⁴ All these cases show that the criminal should be held liable and the severe punishment of the death penalty in such cases makes society realize that this is a severe crime. As the people are now encouraged that they will get justice, it increases the reporting of cases in Pakistan.

1.5 Islamic History of rape and its inclusion in Pakistan law

Islam deals with rape under the same rules that apply to coercion and duress. The Arabic term "*Ikrah*" is used to elaborate coercion. It is defined as the commission of an illegal act by one person to another which is injurious and harmful to him, without his consent or that such deed forced upon. *Ikrah* is divided into two categories; *Ikrah ta'am* refers to the situation when a person hasn't given his consent or is unable to give his consent.⁴⁵ The other is *Ikrah Naqis* which refers to the situation that if a person refuses to give his consent the consequences will not be so dire. Both categories are known as absolute coercion and imperfect coercion respectively.⁴⁶

According to the four major schools of thought, i.e. Hanafi, Maliki, Shafi, and Hanbali, the situation of *Ikrah* initiates the moment to do an illegal act. After the act, the person will not be

⁴² Sajjal Jamil, 'Share On Facebook Share On Twitter Share On Whatsapp Share On LinkedIn Data: One Year of Rape Cases in Pakistan' *The Current* (2021) <<https://thecurrent.pk/data-one-year-of-rape-cases-in-pakistan/>> accessed 31 March 2022.

⁴³ *ibid*

⁴⁴ *ibid*

⁴⁵ Ruba Saboor, *Rape Laws in Pakistan: Will We Learn from Our Mistakes?* (1st edn, Islamabad Law Review 2017) <<http://irigs.iiu.edu.pk:64447/ojs/index.php/ilr/article/view/1600>> accessed 31 March 2022.

⁴⁶ *ibid*,67

dealt with by ordinary law like an ordinary criminal, he will be dealt with by the rules of *Ikrah*. Some conditions are set for the implementation of *Ikrah*, other than that it is questionable.⁴⁷ The conditions that allow for the practice of *Ikrah* include the person being coerced must feel the fear of death or injury in case of refusal, the threat must be immediate or the person has very little opportunity to protect himself and lastly, the person must believe that the threat will be carried out, whether the person can carry it out or not is irrelevant.⁴⁸

While focusing on rape, Islamic law treats it in the same category as *Zina*. Its sub-category *Zina-bil-jabr* is also used to describe it. In the Holy Quran, scholars are unable to find directly mentioning of coercive sexual relationships but Muslim scholars based their argument on the help from the Hadith⁴⁹ of the Holy Prophet (P.B.U.H).⁵⁰ The majority of the scholars made a consensus that the person who is forced into an illegal sexual relationship, is not to be subjected to punishment. From the incident of women in the court of Caliph Omar, the consensus made that if there is an "if" or a "maybe" in a *hadd* case, it cannot be applied.⁵¹ Many scholars have different views about the *hadd* punishment in case of forced coercion⁵². Some believe that there is no forced coercion from the side of women as they believe that males have the organ to perform such acts

⁴⁷ Ibid, 67

⁴⁸ Ibid, 67-68

⁴⁹ "A governmental male-slave tried to seduce a slave-girl from the Khumus of the war booty till he deflowered her by force against her will; therefore 'Umar flogged him according to the law and exiled him, but he did not flog the female slave because the male-slave had committed illegal sexual intercourse by force, against her will." Az-Zuhri said regarding a virgin slave-girl raped by a free man: The judge has to fine the adulterer as much money as is equal to the price of the female slave and the adulterer has to be flogged (according to the Islamic Law); but if the slave woman is a matron, then, according to the verdict of the Imam, the adulterer is not fined but he has to receive the legal punishment (according to the Islamic Law)."

⁵⁰ Sahih al-Bukhari 6949, In-book reference: Book 89, Hadith 10, USC-MSA web (English) reference: Vol. 1, Book 85, Hadith 81

⁵¹ Ruba Saboor, *Rape Laws in Pakistan: Will We Learn from Our Mistakes?* (1st edn, Islamabad Law Review 2017) <<http://irigs.iiu.edu.pk:64447/ojs/index.php/ilr/article/view/1600>> accessed 31 March 2022.

⁵² Au'dah, "At-Tashree' Al-Jinai Al-Islami", 1:573, and Charles Hamilton, "The Hedaya" (Lahore: Premier Book House, 1987), 187, and Karamah: Muslim Women Lawyers for Human Rights, "Zina, Rape, and Islamic Law- An Islamic Legal Analysis of the Rape Laws in Pakistan". <<http://karamah.org/wp-content/uploads/2011/10/Zina-Rape-and-Islamic-Law-AnIslamic-Legal-Analysis-of-the-Rape-Laws-in-Pakistan1.pdf>> (accessed: July 22, 2022)

and they are more powerful⁵³. Some believe that forced coercion is possible. In conclusion, they believe that in any case if there is doubt about coercion even if it is absolute or imperfect the punishment of *hadd* is not applicable.⁵⁴

1.6 The spectrum of change in law from 1947 – 2021

1.6.1 Pakistan Penal Code, 1860

Pakistan Penal Code (PPC) is the law related to crime and its punishments in detail. It was originally prepared by Lord Macaulay with a great consultation in 1960. It was formed on the behalf of the Government of India as the Indian Penal Code. After independence, Pakistan adopted the same law with multiple amendments. It is now the mixture of Islamic and English law under the name of the Pakistan Penal Code. Rape was defined as a crime under the Indian Penal Code, but the provisions are too vague as they are hostile towards the victims. The procedure of evidence and burden of proof is on the victim along with corroborating. The evidence considered in the rape case has properly filed a complaint, evidence of physical resistance, no prior sexual history of the victim, and information of class and status. However, the law protects a female under the age of 14, without considering the concept of consent.

After the code was adopted by Pakistan as Pakistan Penal Code (PPC), it was amended to create more female-inclusive laws. Concerning women's issues, the Muslim Family Law Ordinance 1961 (MFLO) was introduced. In the MFLO, many rights of women have been defined but there are no rules and regulations about criminal liability surrounding the offense of rape. The Hudood Ordinance 1979 was introduced by General Zia Ul-Haq. In this Ordinance, the issue is addressed first and then onwards many amendments were made to the Pakistan Penal Code and

⁵³ Karamah: Muslim Women Lawyers For Human Rights, "Zina, Rape, and Islamic Law- An Islamic Legal Analysis of the Rape Laws in Pakistan", 10-11

⁵⁴ Karamah: Muslim Women Lawyers for Human Rights, "Zina, Rape, and Islamic Law- An Islamic Legal Analysis of the Rape Laws in Pakistan", 10-11.

the issue is addressed completely. Section 375 to 377B⁵⁵ are included in the PPC to specify rape and sexual abuse and its punishment (Supra).

1.6.2 Hudood Ordinance, 1979

The Hudood Ordinance is part of the PPC and provides the Islamic provision related to the topic of rape. General Zia ul-Haq came to power in 1977 and one of his aims was the Islamisation of Pakistan's Criminal legal system. In order to reform Pakistan's criminal justice system, he introduced the Hudood Ordinance which laid down punishments for *hadd* offenses.⁵⁶ The Ordinance consists of five parts and the first two parts are related to the *Zina* Ordinance and *Qazf* Ordinance. The *Zina* Ordinance deals with rape, abduction, adultery, and fornication whereas the *Qazf* Ordinance deals with the false accusation of *Zina*. These ordinances are based on the sharia punishments for these distinct crimes. Muslim Personal Law was also adopted at that time in Pakistan. *Zina* Ordinance defines rape as different from consensual sexual intercourse, fornication, and adultery. It elaborates on the provision related to the consent of the man or woman and how they are convicted in the case of *Zina*. Before the passage of the Ordinance, adultery was a spousal crime while fornication was not a crime. *Zina* Ordinance protects children under age 14 and

⁵⁵ 375. Rape: -

A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions, (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.

376. Punishment for rape

(1) Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than ten years or more, than twenty-five years and shall also be liable to fine.

(2) When rape is committed by two or more persons in furtherance of the common intention of all, each of such persons shall be punished with death or imprisonment for life."

377. Unnatural offenses:

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to fine.

⁵⁶ The Offence of Zina (Enforcement of Hudood) Ordinance 1979, preamble. See also Izzud-Din Pal, "Women and Islam in Pakistan", Middle Eastern Studies, 26:4 (1990), 459-460.

declares rape, adultery, and fornication are considered *Zina* crimes and they are punishable on the same level of punishment.⁵⁷ It creates a different burden of proof related to convictions about men and women. Four male witnesses were required to prove that conviction does not happen and four witnesses were required to prove the innocence of *qazf* for the female victim. These rules seem discriminatory toward women.

The definition of *Zina-bil-jabr* is also borrowed from colonial law to structure the concept of consent. In practice, the court also requires material proof and corroboration rape charges when the victim is not a virgin. The evidence is all the same and not taken from Islamic legal tradition. The same evidence was required to prove the rape charges as mentioned in colonial rules. Women are discriminated against based on their testimony as they still require four witnesses and if she gets pregnant then she will be convicted. After that, the law of evidence was promulgated which removed the testimony of women in some cases and allowed it only in some cases. In this way, the rights of women were separated and the state was not regarded women as men. There is clear discrimination in the laws of the state and the burden of proof on the victim to prove that she is not guilty of fornication or adultery is also unjustified. Before any reforms can be made, Pakistan was included in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1996. Being a member of CEDAW Pakistan can't change its laws for ten years and these laws remain for another decade.

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

Protection of Women (Criminal Laws Amendment) Act, 2006 (WPA) amends several acts related to the provision of rape and other women's safety issues. It was passed by the President on

⁵⁷ Shahnaz Khan, "Locating the Feminist Voice: The Debate on the Zina Ordinance", ed. Sadaf Ahmed, *Pakistani Women: Multiple Locations and Competing Narratives* (Karachi: Oxford University Press, 2010), 147.

1st December 2006. It amends the *Zina* Ordinance, *Qazf* Ordinance, and Pakistan Penal Code 1860. The important provision of this Act is that it separates the offenses of rape and *Zina*. It elaborates on their definition, nature of confession, and procedure for these offenses. The WPA amends sections to separate rape and fornication or adultery. After WPA, rape is no longer a crime covered by *hadd* but now it's a part of the PPC. Section 375 of the PPC defines rape and its relative provisions related to consent (supra). WPA also distinguishes the fact that complaints of rape or adultery cannot fall into fornication. Adultery and fornication are still fallen under the crimes of *hadd*. WPA removes the death penalty and flogging and also allows to post bail for the accused of *Zina*.

Adultery is only established when there are four pious male witnesses and it can only be held in session court. False accusing brings immediate sentencing after the court of session hears the witnesses that support the complaint. Before WPA, the only evidence is the confession of the accused or the testimony of four male eyewitnesses. The WPA restores the principle of "innocent until proven guilty" in the crime of rape, adultery, and fornication. The complaint cannot be converted into fornication or adultery. The safeguard was also provided against the money provided by the victim to drop charges. In case of adultery or fornication, the court of the session must issue the warrant for the arrest of the accused individual, the police cannot perform this action on their own.

1.6.4 The Criminal Law (Amendment) Ordinance, 2016

The amendment was made to cover the offense related to rape on 18th March 2016. This act amends the Pakistan Penal Code of 1860, which penalizes offenses related to rape in 2006. Section 55 of PPC was amended and made the offenses related to rape non-commutable⁵⁸. Section

⁵⁸ Commutation of sentence of imprisonment for life:

376 of PPC amends, that person commits rape of a minor or a person with mental or physical disability shall be punished with the death penalty or life imprisonment. This also includes public servants, such as police, jailors, and medical officers. The amendment of section 376A prohibits the disclosure of the identity of the victim. The obligation made that for taking the statement of the victim there must be a lady police officer or female member of the family present with the victim. These amendments clear out discrimination and provide moral and emotional support to the victim. It brings the cultural shift from falsifying the woman and her testimony to sympathies with women and providing possibly the best environment.

1.6.5 Anti-Rape (Investigation and Trial) Ordinance, 2020

Before Anti-Rape (Investigation and Trial) Ordinance, 2020, anti-honor killing laws and anti-rape laws were passed in 2015. These laws focused on harsh punishment, an advanced system of delivery, trial, and procedure of rape cases. But this Ordinance is based on the formation of special courts and systems for rape cases. It also abolishes the two-finger test⁵⁹ as it is inhumane and has no substantive value in the case of a rape victim, the Ordinance is more victim-centric as it includes the elements of support through a doctor, psychologist, and lawyer.⁶⁰ They all assist

In every case in which a sentence of imprisonment for life shall have been passed, the Provincial Government of the Province within which the offender, shall have been sentenced may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years:

Provided that, in a case in which a sentence of imprisonment for life shall have been passed against an offender convicted for an offense punishable under Chapter XVI, such punishment shall not be commuted without the consent of the victim or, as the case may be, of his heirs.

⁵⁹ 13. Evidence and guidelines. (1) The two-finger virginity testing, for the purposes of medico-legal examination of a victim relating to Scheduled offenses, shall be strictly prohibited and no probative value shall be attached thereto. (2) In respect of any Scheduled offense, any evidence to show that the victim is generally of immoral character, shall be inadmissible. (3) The testimonies and evidence of victims, accused and witnesses in Court shall be video-recorded, preserved, and reduced in writing.

⁶⁰ 8. Victim and witness protection. (1) A victim and witness protection system shall be established as prescribed by the Prime Minister through rules notified by him and shall, with a view to carry out the propose of this Ordinance and without generality of the aforesaid, include the following: - (i) special security arrangements for witnesses and victims; (ii) concealment of identity; (iii) distance recording of testimonies through video-conferencing, audio-video links and by the use of modern devices; (iv) re-location of victims and witnesses; (v) provision of reasonable financial assistance; (vi) compensation to legal heirs of protected victims and witnesses; (vii) safe-houses, dar-ul-amans etc.; (viii) such other measures as may be necessary and ancillary. (2) Till such time the rules envisaged in sub-section (1) are prescribed, the witness protection system and benefits prescribed under the Witness Protection,

the victims in the process of getting justice. Furthermore, it also significantly expedites the trial for such cases by stating that they should be completed within four months under and any appeal should be completed in six months.⁶¹ The concept of In-camera, trials (The court held its session with a video link to the victim to avoid her from any trauma) are also introduced in this ordinance so the perpetrator of the crime is not being able to ask questions directly to the victim.⁶² There will be only one statement before the magistrate. The concept of anti-rape crisis cell is also introduced in this Ordinance which serve the purpose of protecting and preserving the evidence for the trial.⁶³ After the medico-legal examination, it is the responsibility of the cell to launch a First Information Report (FIR) and investigation without delay. These laws have the power to make significant changes in the evidence handling and investigative methods involved in rape cases.

Security and Benefit Act, 2017 (Act XXI of 2017) shall be applicable to both victims and witnesses under this Ordinance, *mutatis mutandis*.

⁶¹ 16. Trial. (1) The Court upon taking cognizance of a case, under this Ordinance, shall decide the case expeditiously, preferably within four (04) months. (2) A Special Court shall not grant more than two (02) adjournments during the trial of a case, out of which one (01) adjournment shall be upon payment of costs by the person seeking adjournment. Where the defense counsel does not appear after two consecutive adjournments, the Court may appoint another defense counsel with at least seven (07) years standing in criminal matters for the defense of the accused from the panel of advocates maintained by the Special Committee. (3) If, in the course of a trial, the Court is of the opinion that any of the offences which the accused is alleged to have committed is not a Scheduled offence, the Court shall record such opinion and try the accused only for such offences, if any, as if these were Scheduled offences. (4) A Special Court may also try offences, not listed in the Schedules, committed in connection with the Scheduled offences, as if those offences were Scheduled offences. Explanation.—It is clarified that sub-section (4) will also be applicable where the provisions of the Anti-Terrorism Act, 1997 (Act XXVII of 1997) are invoked or invocable in respect of offences under this Ordinance.

⁶² 12. In-camera trial.— (1) The trial of Scheduled offences shall be conducted *incamera*: Provided that the Court, if it thinks fit, on its own or on an application made by either of parties, allow any particular person to have access to court proceedings, or be or remain in the Court. (2) Notwithstanding anything contained in any other law for the time being in force, where any proceedings are held under subsection (1), the Court may adopt appropriate measures, including holding of the trial through video-link or usage of screens, for the protection of the victims and the witnesses. (3) Where any proceedings are held under subsection (1), it shall not be lawful for any person to publish or broadcast any matter or information in relation to any such proceedings, except with the permission of the Court.

⁶³ 4. Anti-Rape Crisis Cells. (1) The Prime Minister shall establish or designate as many Anti-Rape Crisis Cells throughout the country in relation to offences mentioned in Schedule-II, in such public hospitals with adequate medical facilities, as he may deem fit. (2) The Anti-Rape Crisis Cells shall be headed by the concerned Commissioner or Deputy Commissioner of the area, as deemed fit by the Prime Minister, and shall also comprise the Medical Superintendent of the public hospital designated under sub-section (1), at least one Independent Support Adviser, and the District Police Officer of the concerned District or a Police Officer heading a Division, as deemed fit by the Prime Minister. Provided that at least one member of the Anti-Rape Crisis Cell shall preferably be a woman.

1.6.6 The Criminal Law (Amendment) Ordinance, 2020

The Criminal Law (Amendment) Ordinance, 2020 deals mostly with the punishments related to the offenses of rape. The amendment made in section 376 of PPC that the punishment of the person who rapes will be the death penalty or life imprisonment along with a fine. There will be no parole available for such criminals. Section 381 states that the punishment under section 376 of PPC is executable. The punishment of death should be given publicly with the warrant of the High court. If there is an appeal made in the Supreme Court of the order passed by the high court under sections 376 and 377 of the PPC then the time for the completion of the appeal is two weeks. These amendments clarify and established the straight punishment for the criminal. It ensures that there is no leniency in the punishment of rape crime and its enforceability.

1.7 Constitution Provisions

1.7.1 What does the Constitution of Pakistan say about Rape?

The Constitution of Pakistan provides the right to be protected from rape and sexual assault to the people. This fundamental right is one of the pillars on which the construct of gender justice stands. The inherent right to life and equality gives the interpretation which includes the protection against rape and sexual assault. While considering the fundamental right of freedom to women, Article 25(3)⁶⁴ of the Constitution creates the possibility for the State to draft specific provisions for women and children. Along with Article 25(3), Article 14⁶⁵ and Article 25(1) firmly enshrined the equality of women and children in the fabric of the society of Pakistan. Besides these

⁶⁴ 25A. Equality of citizens 25. (1) All citizens are equal before law and are entitled to equal protection of law. (2) There shall be no discrimination on the basis of sex 1 *. (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children

⁶⁵ Inviolability of dignity of man, etc. 14. (1) The dignity of man and, subject to law, the privacy of home, shall be inviolable. (2) No person shall be subjected to torture for the purpose of extracting evidence.

provisions, Article 34⁶⁶ provides the complete procedure and steps to enforce the full participation of women in all the fields of national life.

Additionally, Article 9⁶⁷ provides the protection and security of a person, and Article 14 guarantees that any form of violence, or assault, sexual or otherwise, on women is a violation of the fundamental right to dignity. These fundamental rights include the safety and bodily integrity of women. It provides them with free space and free will. Collaborating with free will Article 25 provides equality in society, and it eliminates all the discrimination against women in every matter of life in the state of Pakistan. Article 34 ensures the participation of women in all fields of life and ensures the interpretation of Article 25 in its implementation. If they are not implemented faithfully then these laws will remain rhetoric and dead letters on paper.

1.8 Case-Studies

1.8.1 Noor Mukadam's Murder Case

Noor Mukadam was the daughter of former Pakistani diplomat Shaukat Mukadam. She made a call to her parent and told them that she went on a trip to Lahore with her friends on the 19th of July⁶⁸. On July 20, around 10 p.m. the complaint was received about the murder of Noor Mukadam from Kohsar Police Station, Islamabad to her parents. She was raped, beaten, beheaded, and murdered in a posh neighborhood of Islamabad. Her age is 27. She was raped by Zahir Jaffer, the son of one of Pakistan's richest families. This brutal killing took place at his home on 20 July. Her struggle to escape was seen through the CCTV footage. The case was filed against Zahir Jaffer for a charge of murder and after a DNA test, the charges of rape were also included. The

⁶⁶ Full participation of women in national life
34. Steps shall be taken to ensure full participation of women in all spheres of national life.

⁶⁷ Security of person 9. No person shall be deprived of life or liberty save in accordance with law.

⁶⁸ Malik Asad, 'Noor Mukadam Made Six Attempts to Escape, Save Her Life: Police' (*DAWN.COM*, 2022) <<https://www.dawn.com/news/1645648>> accessed 16 June 2022.

examination report was made. The evidence was taken into custody with the seal of the National Forensic Science Agency (NFSA). It includes nails, a buccal swab, knuckle, weapon, cigarette bud, the fingerprint of the accused, bloodstained cotton, last-worn clothes of the deceased, the shirt of the accused, DVR, and a hard disk seal with MG.

The proceedings were held in the special court Gender-based Valiance (GBV) east/west Islamabad. Mr. Muhammad Atta Rabbani was the Additional Session Judge presiding over this case. All proceedings were conducted on the grounds and collaboration of Investigating Officer (I.O) and the Punjab Forensic Science Agency (PFSA). A detailed medical report was present in the court. After a thorough proceeding of the court, the decision was made. Zahir Jaffer was proved for the crime of brutal murder (*Qatl-e-Amd*) with a sharp knife, abducting Noor from the gate of her house, and rape. He was sentenced to death as Tazir and a fine of Rs. 500,000, imprisonment of 10 years with Rs.1 lakh fine for abducting imprisonment of one year for wrongful confinement, and imprisonment of 25 years with Rs. 2 lakhs fine for rape. While Muhammad Iftikhar (watchman) and Muhammad Jan (gardener) were convicted of abetting these crimes as they did not inform the police. Both of them were punished with 10 years of imprisonment with Rs. 1 lakh fine under section 109 of PPC for abetting, 10 years' imprisonment with one lac fine for abducting, imprisonment for one month for their omission to inform the police, 7 years' imprisonment with Rs.1 lakh fine for concealing design to commit the offense.

1.9 Landmark Cases that Reformed Rape Jurisprudence in Pakistan

In 2002, the case of Mukhtaran Bibi was going into the headlines. A 30-years-old female was gang-raped in the name of honor rape. She spoke up for herself and the Anti-Terrorism Court sentenced the death penalty to six men which was then overruled by the Supreme Court. This case brings the issue in highlights and Mukhtaran Bibi played a tremendous role in speaking up for her

rights and justice. Kainat Soomro's case was also a gang rape of a 13-year-old schoolgirl. The protests about this case arose all over Pakistan. These cases show that society is overwhelmed with this issue and there is a dire need for its solution. These cases are the base of the Protection of Women (Criminal Laws Amendment) Act, 2006. The case of Shazia Khalid in Baluchistan also took place. This case upraises the voice of women in Baluchistan and it continued to the verdicts which is not according to the terms. The rape of six women and filming in Dera Ghazi Khan by the police was also happening in 2012. It was a massacre of women's rights and their protection. This bring the hype in society and many reforms were made but on a small level.

In January 2018, a seven-year-old girl named Zainab Ansari was raped and strangled to death in Kasur. This was the huge decline in law and order in Pakistan. this case got the media and social media attention and several strikes happened for justice. Based on these circumstances the bill was presented in the parliament to reform laws. The bill is named after the deceased victim Zainab. As a result of these The Criminal Law (Amendment) Ordinance, 2016 was passed. Later on, a 16-year-old girl was raped and killed in Sargodha and a day later a 13-year-old boy was sexually assaulted. A dead body of a 3-year-old girl, Asma, was found in Mardan and she has been raped before the murder. In September 2020, a mother was gang-raped in front of her children on Motorway M-11. In February, another gang-raped case of a six-year-old boy came. In June, 50-year-old women were tortured and sexually assaulted in Muzaffargarh. In October, an 18-year-old was gang-raped on the motorway. All these cases are subjected to the attention of the general public and the aforementioned laws and acts were passed based on these cases. As a result of all these cases the Criminal Law (Amendment) Ordinance, 2020 was passed and these are the recent development in the issue.

1.10 How the issue of rape can be addressed by society?

1.10.1 Gap-Analysis

There is a huge gap in the implementation of the law in society. The rape laws are established but their enforceability is not enough to prevent this crime. The public is unaware of their rights and they feel hesitant to report rape cases. Different types of rape are not recognized by law. People don't consider such actions rape and they fall in the category of harassment and bullying. There is a communication and deliverance gap between the courts and the public. The properly trained staff and media are not available to spread awareness from the courts to the public about this topic. People have no belief in the justice system and they try to handle this on their own. Rape is an important issue but it is not highlighted enough so people can understand the severity of this offense.

1.10.2 Ministry of Human Rights

The role of the Ministry of Human Rights should be proactive in the cause of prevention of rape is very important. They should ensure the protection of women's rights by the provisions and laws related to rape should be non-discriminatory and feasible for the victims. The Bill introduced by the Ministry should ensure all provisions according to equality and rule of law. They play their role in facilitating the legal system of the people in these cases and ensuring the enactment of laws on these cases. They should introduce new provisions for facilitating the victim and a budget should also be passed for these types of works.

1.10.3 Non-Governmental Organizations

All Non-Government Organizations should start spreading awareness in society. They should create camps and training classes for the self-defense of the women. The campaign should be targeted to raise awareness among the people on this issue and how they can play their role.

Through different lectures and documentaries, they can help the public tackle the issue of rape. Many NGOs working on these projects like WAR against rape, Bedari, i-care foundation, ActionAid Pakistan, etc. But there is still more to do and they should enlarge their audience and indulge the college and university students more in their projects.

1.10.4 Federal Government

The Government needs to implement the law in all the corners of the state and with its ensure to completely follows the code of conduct during rape trials. They should draft a bill that ensures the safety of women in society by providing special care to the victim to restore her mental condition and swift trial procedure. They need to play their role in the policies of all the public or private institutions to make such an environment where women are not under the influence of men. They should introduce training sessions and self-defense classes.

1.10.5 Police

Police have an important role in these cases. They should file the report with no delay and fully cooperate with the victim. They should arrange a special environment with the help of personal assistance for the victim to help him or her out from the trauma. To make sure these functions they need to provide a gender protection unit in their jurisdiction. The research and investigation should be thorough and with the consent of the victim. The statement of the victim should be taken carefully. For these purposes, they should establish an anti-rape crisis cell where they can specifically focus on this issue with specially trained staff. They should practice self-defense courses for women.

1.10.6 Lawyers

Lawyers should also play their best version with the victim. They should try to help the victim and make their arguments on facts and evidence. They should abstain from character

assassination in court and make valid points. In these ways, many statements are falsified as recently happened in Noor Mukadam's case where the opponent's lawyer character assassinated the victim to create his defense argument. With the recent development of forensics, they should adopt that approach and cooperate with the women to understand their condition.

1.10.7 Judiciary

In making the verdict on rape cases, the judiciary should keep in mind the true essence of the law. No biased decisions and no lineal behavior should be adopted. The verdict should be based on facts, evidence, and medical reports. As recently Justice Atta Rabbani stated in her conference that science is needed to be adopted along with justice. He also recommends producing scientific evidence rather than just accusation of statements. With the progress of forensics, we should rely on these reports to produce verdicts. These trends were highly recommended and followed in other legal systems and they are showing productive results. They should also consider the statement of the victim in this case. They should not use harsh words or character assassination in their decisions.

1.10.8 How can the community at large assist in tackling this crime?

The community has an important role in all this. People should adopt a culture of awareness and they should know how to react to these situations. They should minimize their judgmental comments on the parties. Praises and encouragement should be present for the victims who spoke up for themselves. They should adopt these rules in their daily life. They should be supportive and work as a nation to eradicate this disease from society.

1.11 Policy Recommendation

Rape is a social issue and crime and if we trace its history, we will find this crime progressing from the beginning. It is related to human psychology and how a person perceives it.

Rape, as defined, is sexual intercourse without consent and this crime is related to the sexual needs of the person but a drastically beyond bounds. The punishment of death has happened in the past and it has its effects but still, it can't minimize the crime. The punishment of death penalty, life imprisonment, and castration is the punishment that can lessen these crimes by eliminating the criminals. But there should be a new approach to deal with this issue. New rehabilitation centers especially for rape criminals need to establish. As this is more of a psychological crime so they can be cured and not only these criminals but other people should also be trained in this manner. People need to understand the severity of this crime and they need to eliminate it from society. Students in their institutions should be aware of and study this crime and its different types. They should have an additional session where their mental health issues should be raised and resolved. In this way, there will be fewer people who can be able to commit not only this crime but also other crimes. Along with these approaches, the previous punishment should be there to meet the opposite end of this process. These all can be possible when every institution of the state stands up and work for the protection of their women and support them.

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