

NUMBER 8

CMI WORKING PAPER

SEPTEMBER, 2017



AUTHORS
Shehar Bano Khan
Shirin Gul

The Criminalisation of Rape in Pakistan



CMI CHR.
MICHELSEN
INSTITUTE

The Criminalisation of Rape in Pakistan

CMI Working Paper number 8

September 2017

Authors

Shehar Bano Khan

Shirin Gul

Graphic designer

Kristen Børje Hus

Cover photo

Liv Tønnessen

ISSN 0804-3639 (print)

ISSN 1890-5048 (PDF)

ISBN 978-82-8062-657-8 (print)

ISBN 978-82-8062-658-5 (PDF)

www.cmi.no

The Criminalisation of Rape in Pakistan

by Shehar Bano Khan and Shirin Gul



Table of Contents

	The Criminalisation of Rape in Pakistan	2
1	Introduction.....	2
2	Background.....	3
2.1	Influences and schools of thought in South Asia.....	3
2.1.1	Early theological strands in the Indian sub-continent.....	3
2.1.2	Islamic resurgence in Pakistan.....	3
2.2	Pakistan’s legacy of polycentrism and legal pluralism.....	4
2.3	Pakistan: An Islamic state?.....	5
2.4	Institutional set-up for Islamization.....	6
3	Legal classification and definition of rape in Pakistan.....	9
3.1	Classification and definition of rape in religion and society.....	9
3.2	Before the 2006 Women’s Protection Act.....	10
3.2.1	British colonial rule and the law upon independence.....	10
3.2.2	The era of Islamization and the Hudood Ordinances.....	10
3.3	The Women’s Protection Act of 2006.....	12
3.3.1	The nature of rape as a crime.....	14
3.3.2	Evidence required to convict.....	14
3.3.4	Arrest and detention.....	15
4	The Women’s Protection Act and prevailing societal views.....	15
4.1	Perceptions of women and rape in the prevailing discourse.....	15
4.2	Barriers to implementing the Women’s Protection Act.....	18
4.1.1	Status of women in society.....	18
4.1.2	Lack of knowledge and awareness.....	19
4.1.3	Implementation.....	19
4.3	Case study: Gang rape in rural Punjab.....	20
5	Conclusion.....	21
	Reference List.....	22

The Criminalisation of Rape in Pakistan

by Shehar Bano Khan and Shirin Gul

1 Introduction¹

The prevalence of sexual violence against women is a distressful reality, even in the technologically advanced and intellectually evolved 21st century. It intersects society, religion, caste, and class, reducing the value of a woman's body in all regions of the world. In many parts of the world, social pressure or cultural attitudes tend to obscure the boundaries of acceptable and unacceptable sexual behaviour of men towards women, often leaving victims of sexual violence without any real recourse, even when rape is legally categorised as a crime.

In Pakistan, the legal recognition of rape as a crime has changed in pace with the dominant narrative on women's sexuality. The country's most troublesome categorisation of rape was, unfortunately, introduced under the pretext of compliance with the Islamic Law, as part of the so-called Hudood Ordinances of 1979. The Hudood Ordinances introduced ambiguity into the law by putting the criminal act of rape into the same category as fornication and adultery, which is at odds to how most national legislatures categorise the crime rape.

In 2006, Pakistan adopted the Protection of Women (Criminal Law Amendment) Act (Women's Protection Act or WPA), which reclassified rape differently from fornication and adultery and substantively revised sections of Pakistan's Penal Code that dealt with the crime. This report primarily focuses on these changes in Pakistan's rape laws and how they have been implemented. It relies on research of secondary sources as well as direct interactions with women's rights activists, political party members, legal professionals, and religious scholars.

We collected first-hand information for this report through six in-depth interviews with key individuals in the Layyah district. The interviews were semi-structured, and each participant was asked six open-ended questions. In addition, we asked the same six open-ended questions in a focus group with local women. Our goal was to find out the respondents' perceptions about women's protection laws, including (i) whether more laws are needed, (ii) what barriers make obtaining justice for victims of sexual violence difficult, and (iii) how the rape incident discussed as a case study at the end of this report was handled.

The report begins with a brief discussion of Pakistan's colonial heritage of polycentricism and its struggle with its political identity, including the role of Islamic thought in its post-independence legal framework. Building on this background, the report then discusses the narratives on rape in the country today, specifically in the context of the Women's Protection Act of 2006. It ends with a discussion of a gang rape incident that occurred in rural Punjab in late 2014. The report concludes that the debate on rape laws forms part of a larger discourse on female sexuality and can be framed in terms of religion, society, and the state.

¹ Acknowledgement: We would like to thank the following for their valuable contribution during the fieldwork: Fatima Abbas, Saadia Gul Mehvish Munib and Abdullah Nizami. We would also like to thank especially Melanie Reed, and also Mari Norbakk and Liv Tønnessen for their contribution in the editing process.

2 Background

2.1 Influences and schools of thought in South Asia

2.1.1 Early theological strands in the Indian sub-continent

Like other religions, Islam is not a monolith, and “not all Islamic activisms are alike” (Metcalf 2002, 2). Different schools of Islamic thought influence the understanding of how Islam should be practised in ritual and in everyday life, both across the world and within specific regions. In Pakistan, most Muslims identify themselves as Sunni Muslims.

During British colonisation, there arose a feeling in the Indian subcontinent that Islam was being corrupted and that young Muslims needed to be better educated in Islamic law. This led to a period starting in the 19th century where Muslim scholars (*ulema*) “competed in public life to show themselves as the spokesmen or defenders of ‘Islam’ to their fellow Muslims” (ibid., 6–7). Not only did this constitute a new way of looking at the various strands of Islam—as competing factions—but it also gave religious leaders a new role in the public sphere (ibid.). Two dominant traditions ultimately emerged that shaped the role of religion in Pakistan’s public life.

First, the Deobandi movement arose in 1867 out of the Dar-ul-Uloom seminary (*madrassa*) in Deoband, India (ibid., 1). It established itself through setting up other seminaries throughout the area to focus on teaching the principles of Islam (ibid., 4). In the movement’s early days, Deobandi *ulema* “adopted a stance of a-political quietism,” but following World War I, as the Indian nationalist movement arose, the Deobandi began organising in opposition to British rule (ibid., 7). Nonetheless, the Deobandi preferred operating “in an officially secular context apart from the government” and opposed the movement for an independent, Muslim Pakistan (ibid.).

Second, the Barelvi movement originated in Bareilly, India, about 50 years after the Deobandi movement. Like the Deobandi, the Barelvi sought to implement *sharia* law and did so through establishing religious seminaries. However, unlike the Deobandi, the Barelvi (also called Sufi or Ahle Sunnat wal Jama’at) unequivocally supported the movement for a free and separate Pakistan that arose in the 1940s. Barelvi has become the most “pervasive strand of Islam among the subcontinent’s Muslims” (Haider 2010, 40).

Mosques and seminaries became defined by their adherence to labels such as “Deobandi” and “Barelvi, as did a wide range of political, educational, and missionary movements (Metcalf 2002, 6). These orientations have come to define the theological differences between Sunni Muslims in South Asia, and the distinctions between movements persist even today (ibid.).

2.1.2 Islamic resurgence in Pakistan

The first examples of an Islamic resurgence in the 20th century can be traced to the Society of the Islamic Brotherhood, founded in Egypt in 1928 (Black 2011, 307–308). Some years later, in 1941, Sayyid Abul A’la Maududi established the Jamaat-e-Islami (JI) movement in what was then British India (Black 2011, 307–308). These organisations differed in many respects, but they had a common concern with bringing Islam more into everyday life. They provided ideological and organisational models for contemporary Islamic movements and organisations (Knudsen 2002, 10; Esposito 1997, 9).

In particular, Maududi argued that “Indian Muslims must establish their own separate state, not a nation-state, but rather an ‘Islamic state’ with a religious rather than ethnic identity” (Black 2011, 309). Maududi’s influence was felt beyond British India and set the tone for a political resurgence of Islam in South Asia during the Zia era of the 1970s (Nasr 1997, 136; Aboul-Enein 2010).

Since Pakistan became independent in 1947, JI “has expended extensive efforts in imposing [its] vision of Sharia on Pakistan’s public life” (Aboul-Enein 2010). In particular, JI opposes secularism, believing it to be a modern “religion” instead of a way “to manage Pakistan’s diverse ethnic and religious . . . groups”; JI not only rejects non-Muslim sects, but also does not tolerate other Muslim sects that have beliefs different from itself (ibid.).

While some scholars argue that JI is “no longer the genomic progeny” of its founder Maududi, this movement set out an ideological basis for ideas about gender relations that persist even today (Zia 2013). For example, this Islamic reference point is the root of the argument that a woman’s “noble” mission is to be a wife and mother and thus she should be protected from “unnatural” duties, such as voting or running as a candidate for public office (ibid.).

2.2 Pakistan’s legacy of polycentrism and legal pluralism

For centuries, Pakistan was part of a region with multiple faiths and areas influenced by Muslim and Hindu rulers. “The Sultans of Delhi were the first to introduce the concept of personal law in India; the Mughals adhered to it; and the British rulers adopted it in order to avoid unrest among the subjects, secure their territorial possessions and suit their other political and administrative strategies and goals” (Serajuddin 2011, 13). Even after the Mughuls established Muslim rule, they designated Delhi as the seat of government, while Hindus ruled vast territories outside of this urban centre.² The central government did not rigidly impose Islamic law, but rather took elements from both classical *fiqh* (Islamic jurisprudence) and local customary law (Mir-Hosseini and Hamzić 2010, 160; see also Lau 2010, 378–379). Thus, at the time of British colonisation in the 1600s, the India subcontinent was already operating under a pluralistic legal system.

With the advent of the East India Company Act of 1784 and the subsequent appointment of Charles Cornwallis as India’s first governor general (from 1786 to 1793), a process of changing the legal system was undertaken. In particular, Cornwallis sought “change the penal law, the basis of which was Islamic, applicable to all persons regardless of religion” (Jones-Pauly and Tuqan 2011, 208). However, rather than overhauling the entire legal system, he “undertook the task in a piecemeal way,” leaving laws governing personal status intact for the most part (Jones-Pauly and Tuqan 2011, 208; Lau 2010, 378).

In the 1800s, British colonists established commissions on legal reform, which proposed wide-ranging reforms in 1834 and 1853, including a division between public and private law. On private matters, Islamic law governed Muslims, while Hindi law governed Hindus (Lau 2010, 378–379). However, a compromise was made: although a pluralistic set of laws would govern personal status, the notion of repugnancy was introduced as a yardstick against which all customary laws would be judged (ibid.; see also Mullally 2006, 171; Mir-Hosseini and Hamzić 2010, 160).

² Serajuddin (2011, 13) explains that Muslim leaders allowed other religious communities to follow their own customs and law with reference to guidance laid down in *Hedaya*, a comprehensive commentary on Hanafi jurisprudence.

This division between family law and all other legal matters still persists in Pakistan today, and the justice system still considers notions of equity and repugnancy, especially when it comes to women's protection in a largely patriarchal setting. However, the legitimacy of traditional justice is also very much in debate. Given Pakistan's tenuous balance of democracy among executive, legislative, and judicial branches of government, judicial activism is seen by some as a way to reinforce Pakistan's weak democracy as it deals with internal conflicts between religion and secularism.

2.3 Pakistan: An Islamic state?

Pakistan emerged as a Muslim majority country in August 1947. Nonetheless, the country continues to struggle with its own history and over six decades after its inception, there is still no clear consensus on whether Pakistan is an Islamic or unambiguously secular state (Esposito and Voll 1996, 121; Lau 2010, 373).

Mohammad Ali Jinnah, Pakistan's founding father, is frequently understood to have envisioned a secular state. He resorted to religion, not as an ideology to which he was committed or even as a device to use against rival communities, but merely as a way to unify and solidify his divided Muslim constituents. As Haider (2010, 6) explains,

Jinnah was ultimately part of a movement that was shaped by circumstances and alliances—one that evolved from fashioning an equitable postcolonial constitutional arrangement for India's Muslims to securing an independent nation. Indeed, throughout the movement, there never was a uniform vision of Pakistan or the role of Islam. Pakistan was and remains a product of contesting visions.

Jinnah's demand for a "Pakistan" as a majority Muslim country was both specific enough to command support of his constituents, while ambiguous and imprecise in every other way (ibid., 4; Jalal 1994). In fact, Jalal (1994) contends that Pakistan as a separate sovereign state was not Jinnah's real demand, but only a bargaining chip. What he really wanted was political equality for Muslims, and his initial vision was a loose federal structure, with Hindus and Muslims sharing power equally. The rejection of this by the Indian National Congress forced Jinnah's hand (ibid.).

Jinnah served as Pakistan's first governor-general from independence until his death just one year later, in September 1948. Following his death, in March 1949, the legislators of Pakistan's first Constituent Assembly passed the Objectives Resolution, which decreed Pakistan's constitution to be in line with the Islamic vision (Mullally 2006, 172).³ Non-Muslim members of the constituent assembly strongly opposed the resolution and voted against it. In a speech on the floor, the respected leader Sri Chandra Chattopadhyay famously asserted, "What I hear in this resolution is not the voice of the great creator of Pakistan—the Quaid-i-Azam . . . , nor even that of the Prime Minister of Pakistan, the Honorable Mr[.] Liaquat Ali Khan, but of the ulemas of the land" (Jilani 2013).

³ Specifically, the resolution states that Muslims are able to "order their lives in the individual and collective spheres in accord with the teachings and requirements of Islam" (Mullally 2006, 172 n. 19; quoting Constituent Assembly of Pakistan Debates, 1949, vol. V, no. 5).

In 1956, the country adopted its first constitution as an independent nation. That constitution officially declared the country to be the Islamic Republic of Pakistan (Mullally 2006, 173). At the same time, due to the work of activists under the auspices of the All Pakistan Women's Association (APWA), the constitution gave a double franchise to women: they were allowed to cast two votes, one for general seats in the legislature and the other for women's reserved seats. They were also allowed to run as candidates for the general seats.

Constitutional rule of law was short-lived, however, as Pakistan's President Iskander Mirza declared martial law in 1958. Following Mirza's deposition by General Mohammed Ayub Khan, the country adopted a new constitution in 1962, which renamed the country the Republic of Pakistan. Nonetheless, that constitution was soon amended to reintroduce "Islamic" into the nation's name (ibid., 173). In addition, Pakistan still adhered to the Objectives Resolution and introduced an advisory Council on Islamic Ideology (CII). Following a constitutional crisis in 1970 and the ceding of East Pakistan, President Zulfikar Ali Bhutto called for a new constitutional convention in 1972. The current constitution was adopted by the National Assembly in February 1973. That constitution renamed the country the Islamic Republic of Pakistan and declared Islam to be the state religion.

The 1973 constitution gave the country's religious lobbies a political space that they have often cleverly used as leverage ever since (see Nasr 1997). Importantly, the religio-political parties led by JI had opposed Khan's presidency (which lasted until 1968), and some argue these parties played a significant role in the demonstrations against him. Therefore, it was pragmatic for Bhutto as both president (1971–1973) and prime minister (1973–1977) to cloak his politics in the palatable terminology of "Islamic Socialism." Nonetheless, JI spearheaded opposition to Bhutto as well, under the auspices of the *Nizam e Mustafa* ("Way of the Prophet") movement, which resulted in Bhutto's ouster in 1977.

Perhaps the watershed moment for religio-political parties in Pakistan was General Muhammad Zia-ul-Haq's pursuit of Islamisation to gain support of religio-political parties for his military rule following his coup d'état in July 1977 (Esposito and Voll 1996, 109). Specifically, Zia's promulgation of the Hudood Ordinances in 1979 marks an important step in setting up an Islamic legal framework in the country.

Zia's Islamisation project was premised on the ideology of excluding women from public life. Women strongly resisted this ideology and ultimately organised as the Women's Action Forum (WAF) in 1981. A detailed discussion of the women's movement is beyond the scope of this report, but an excellent account is given in *Women of Pakistan: One Step Forward, Two Steps Back?* (Mumtaz and Shaheed 1987). Nonetheless, the discourse between WAF and JI-inspired Islamists demonstrates the internal struggle Pakistan has had with creating its identity as an Islamic state. Ultimately, Zia's military government ceded more political space to Islamic parties, which allowed the state to legislate on the female body, as discussed further below in this report.

2.4 Institutional set-up for Islamization

Most discussions on rape laws in Pakistan glance over the structures for law-making in the country. Understanding Pakistan's institutional framework is key to understanding its current legal structures, however. Importantly, under Pakistan's unique legal system, the Pakistan Penal Code and Islamic law run in parallel to each other. Under Pakistan's 1973 constitution, any law that is contradictory to the Qur'an is automatically repudiated. Thus, changing laws

that harm women is not enough. The formal and informal institutions that govern what is considered lawful under the Qur'an must also be critically examined and where necessary, reformed.

By co-opting, revitalising, and developing both formal and informal institutions in the country, Zia's Islamisation movement supported both an Islamic narrative within the country and a sustainable structure that, to date, has made discussions on the Muslim way of life an essential part of law-making in Pakistan.⁴ For example, although the Women's Protection Act of 2006 was strongly debated and opposed by some, it never would have been enacted had the debate not been placed in an Islamic interpretative frame.

Zia's regime supported judicial institutions that implemented his vision of Islamisation. Table 2 below gives a snapshot of three formal structures involved in Islamisation of Pakistan's law—the Council of Islamic Ideology (CII), the Federal Shariat Court (FSC), and the Law and Justice Commission (LJC). In particular, the CII and FSC remain key voices for Islamisation today.

CII is the oldest of these institutions, having been established under Ayub Khan's leadership (1958–1969). It is an advisory body that has the authority to review existing and proposed laws from an Islamic perspective, when so requested by the president or the legislature. While CII's recommendations are only advisory, they are influential. For example, the FSC and LJC were both established upon CII recommendation.

Under Dr. Muhammad Khalid Masud's chairmanship (2004–2010), CII also played an important role in initiating debate on the Hudood Ordinances that ultimately led to the Women's Protection Act of 2006. Part of this debate is memorialised in CII's 2007 report on the Hudood Ordinances, which concludes that the Hudood Ordinances (i) do not define *hadd* as defined in the Qur'an and Sunna, or even in accordance with Islamic jurists; (ii) do not identify and divide crimes as *hudud*, *qisas*, and *ta'zir* in a consistent way; (iii) selectively and arbitrarily adopt *fiqhi* identification and classification for *hudud* offences; (iv) mix common law criminal procedure and *fiqhi* procedure, creating confusion; and (v) are not consistently enforced (CII 2007, 2).

Nonetheless, since Masud left CII in 2010, the council seems to have taken a view towards strengthening retrogressive attitudes to gender. For example, CII has recently issued very retrogressive opinions regarding child marriage and wife beating (Boult 2016; Tharoor 2016).

⁴ Not only the Jamaat-e-Islami movement (originally founded by Abul Ala Maududi in 1941), but also the Tanzeem-e-Islami movement (founded by Dr. Israr Ahmed in 1975), gained momentum during the Zia era.

Table 1. Islamising state institutions in Pakistan

	Establishment	Purpose/Authority
Council of Islamic Ideology	<ul style="list-style-type: none"> Created in 1962 under Ayub Khan's government 	<ul style="list-style-type: none"> Review existing and new laws from an Islamic perspective and Recommend ways to bring the daily lives of Muslims in Pakistan in accordance with Islam Cannot take cognizance its own accord (president or legislature must request advice) CII recommendations are only advisory
Federal Shariat Court	<ul style="list-style-type: none"> Created in 1980, as per CII recommendation Part of judicial branch under Pakistan's constitution 	<ul style="list-style-type: none"> Examine any law and decide whether it is repugnant to Islam Provide appellate jurisdiction for Hadd Ordinances The Muslim Family Law Ordinance is one of the laws outside of FSC's jurisdiction, as per article 203-B
Law and Justice Commission	<ul style="list-style-type: none"> Set up under the Law and Justice Commission Ordinance of 1979, as per CII recommendation 	<ul style="list-style-type: none"> Review laws with an eye to modernisation in view of societal needs, while also staying in line with Islamic ideology Eliminate redundancies in the law

At the advice of CII, Pakistan's 1980 constitution set up the FSC, consisting of five Muslim judges—the chairman qualified as a supreme court judge and the four other judges qualified as high court judges.⁵ The next year, the constitution was amended to allow for eight members of the court, including *ulema* (Islamic scholars).⁶ Zia added these *ulema* to the court after a bench of judges ruled that *rajam* (stoning to death) was not a *hadd* punishment.⁷ After *ulema* joined the bench, a second judgment recognised stoning to death as a *hadd* punishment. Pakistan's current constitution provides for a FSC with eight Muslim judges, including a chief justice, four Muslim judges, and three *ulema* with “at least fifteen years experience in Islamic law, research or instruction.”⁸

The LJC's primary role is eliminating redundancies in the law, as well as setting an agenda for legal reform and improving administration of justice. Its membership includes members of CII, as well as civil society activists. As is the case in most post-colonial states, leadership often matters more than institutions. Under its current leadership, LJC is slowly but surely moving towards playing a positive role in Pakistan's judicial system.

⁵ Constitution (Amendment) Order, President's Order no. 1, *Gazette of Pakistan, Extraordinary*, Part 1, 27 May 1980, http://www.pakistani.org/pakistan/constitution/orders/po1_1980.html; Constitution (Second Amendment) Order, President's Order no. 4, *Gazette of Pakistan, Extraordinary*, Part 1, 21 June 1980, http://www.pakistani.org/pakistan/constitution/orders/po4_1980.html.

⁶ Constitution (Second Amendment) Order, President's Order no. 7, *Gazette of Pakistan, Extraordinary*, Part 1, 27 May 1981. http://www.pakistani.org/pakistan/constitution/orders/po7_1981.html.

⁷ See *Hazoor Bakhsh v. State*, 59/L of 1979, 62/L of 1962, <http://federalshariatcourt.gov.pk/1.html>. Ironically, discussions of the Zina Ordinance still consider *rajam* to be a non-*hadd* punishment (CII 2007); accordingly, *rajam* is still part of the Zina Ordinance.

⁸ Constitution of Pakistan art. 203C, <http://www.pakistani.org/pakistan/constitution/part7.ch3A.html>.

3 Legal classification and definition of rape in Pakistan

3.1 Classification and definition of rape in religion and society

For some time, the issue of rape has been one of the most contentious debates within Islamic legal scholarship and practice (Ahmad 2014, 161). The process of transforming the religious debate on rape to enacted laws is coloured by the many shades of Islamic narrative, and in Pakistan it is often difficult to distinguish where society influences religion and vice versa. Nonetheless, Pakistan, like other societies, finds justifications for its prevalent behaviours and attitudes.

Islamic penal law defines crimes to include both actions absolutely forbidden by religious law and those that are merely discouraged; penalties are mandatory (*hadd* or *qisas*) or discretionary (*ta'zir*) depending on the type of crime (Noor 2010, 418, 420). For *hadd* crimes, not only the punishment, but also the evidence required to convict, is mandatory and prescribed by Islamic law (*sharia*) (ibid., 420). This implies that *hadd* penalties cannot be imposed if the evidence provided is insufficient (ibid.).

Zina includes the crimes of fornication and adultery and is a *hadd* crime (ibid., 419).⁹ However, as discussed further below, the Zina Ordinance introduced during Zia's regime went further and added rape to the crime of *zina*, without making any distinction between rape, adultery, and fornication. All three were considered *hadd* crimes with the same level of punishment.

Currently, there seem to be multiple opinions in Pakistan on how rape should be classified under Islamic law (*sharia*):

- that rape is a crime of *zina* (like fornication or adultery) and is therefore subject to the same punishment, but a different burden of proof (in line with the Zina Ordinance of 1979);
- that rape is the *hadd* crime of *muharaba* (spreading anarchy) and has a more severe punishment than adultery or fornication—a view shared by Dr. Javed Ahmed Ghamidi, a fervent advocate for changing the Hudood Ordinances of 1979 and others who advocated for the Women's Protection Act of 2006; or
- that rape is a third category of crime under Islamic jurisprudence, crimes against community.¹⁰

Interviews conducted with a cross-section of interlocutors within Pakistan's government and society suggested a lack of clarity about which of these views currently prevails.

⁹ Other *hadd* crimes are theft, highway robber, defamation, and wrongful accusation of adultery (Noor 2010, 419). *Qisas* crimes are those that involve intentional or unintentional injuries to another person, such as homicide or manslaughter; punishment is required (ibid., 418). *Ta'zir* crimes involve infringements of the rights of Allah, and discretionary punishment may be given "as edification and a deterrent" (ibid., 420).

¹⁰ Ahmad (2014, 166) describes these three categories slightly differently, as follows: (i) those who believe rape is a crime of *zina*, subject to the same level of proof (confession of the wrongdoer or testimony from four witnesses); (ii) those who believe rape is a crime of *fasad* (mischief), which can be proven using circumstantial evidence; and (iii) those who mix these two schools, seeing rape as a crime of *zina*, but allowing its proof through circumstantial evidence.

3.2 Before the 2006 Women's Protection Act

Pakistan's legally pluralistic and polycentric context has influenced the development of its laws against rape.

3.2.1 British colonial rule and the law upon independence

Rape was considered a crime under the Indian Penal Code, which the British put in place in the Indian subcontinent in 1860. However, British colonial jurisprudence was hostile towards rape victims and generally assumed that any evidence put forth by a female victim was not credible (Kolsky 2010, 115–116). Accordingly, a rape victim had the burden of corroborating her charge and proving non-consent to the sexual act (*ibid.*, 116). The high court generally expected one (or all) of the following: (i) a promptly filed complaint, (ii) evidence of physical resistance to the crime, (iii) evidence that the victims had no prior sexual history, and (iv) information on class and caste status (*ibid.*). However, the law did protect girls under the age of 14, who were considered to be victims of rape regardless of consent (unless over age 13 and married) (Mehdi 1997, 99). Pakistan inherited the Indian Penal Code (which it renamed the Pakistan Penal Code) when it gained independence in 1947 (*ibid.*).¹¹

Following its independence, Pakistan could have chosen to use legal reform to create more space for women within the socio-cultural milieu. In fact, it did so in part with regard to other women's issues, through the Muslim Family Law Ordinance of 1961 (MFLO). The MFLO set forth a number of progressive reforms in the area of family law, such as recommending that marriages be registered with the local council, requiring a husband to get permission from his existing wife before seeking a polygamous marriage, allowing women the right to divorce, and (somewhat) curtailing the right of men to obtain a unilateral divorce (Zia 1994). Unfortunately, however, Pakistan did not make any updates to its criminal rape laws until Zia undertook his Islamization process in 1979.

3.2.2 The era of Islamization and the Hudood Ordinances

General Zia ul-Haq came to power through a coup d'état in 1977 (Lau 2007, 1292). One of his primary platforms was the Islamisation of Pakistan's criminal legal system, which he accomplished in part by adopting the Hudood Ordinances (Mullally 2006, 177). These ordinances, promulgated in 1979 and enforced in 1980, included five criminal laws: (i) the Zina Ordinance, dealing with rape, abduction, adultery, and fornication; (ii) the Qazf Ordinance, dealing with false accusations of *zina*; (iii) the Offences Against Property Ordinance, dealing with the theft and armed robbery; (iv) the Prohibition Ordinance, dealing with the use of alcohol and narcotics; and (v) the Execution of Punishment of Whipping Ordinance, dealing with the mode of whipping for those convicted under the other Hudood Ordinances (Jahangir and Jilani 2003, 23). These ordinances ushered in an era of using what were deemed to be *sharia* punishments for these distinct crimes (Weiss 2014, 25).

¹¹ In 1937, Muslim members of the Imperial Legislative Assembly had already passed the Muslim Personal Law (Shariat) Application Act, which applied to personal issues, such as marriage (Lau 2010, 386). This could be viewed as "the first phase of the Islamisation of laws in Pakistan," since Pakistan also inherited these Muslim personal laws upon its independence (*ibid.*).

The Zina Ordinance was problematic for several reasons. First, it obliterated the difference between rape, fornication, and adultery. The Zina Ordinance (as quoted in Mehdi 1997, 101) defined rape as different from consensual sexual intercourse:

. . . if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married in any of the following circumstances, namely

(a) against the will of the victim,

(b) without the consent of the victim,

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

or

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

Previously, adultery was a crime against the spouse but fornication was not a crime in the legal sense. In addition, the Zina Ordinance also did not protect girls younger than 14, as the British Penal Code had done (ibid., 99).

Even though rape, adultery, and fornication were all considered *zina* crimes and allotted the same level of punishment, the Zina Ordinance provided for a different burden of proof when it came to providing evidence for conviction. Four male witnesses were needed to prove rape, and, as a practical matter, this meant that the crime was never convicted. On the other hand, if a woman accused a man of rape, she needed to provide four male witnesses to prove that she was innocent of *qazhf* (a false accusation of rape; see Ghamidi 2004, 62). While the requirement was clearly meant to avoid the spread of rumours and to protect the social fabric, it created an insurmountable standard in many instances.¹² In short, the rules of procedure that applied to the Zina Ordinance discriminated against women.

Although, ostensibly, the Hudood Ordinances were promulgated to bring the criminal justice system of Pakistan in conformity with the injunctions of Islam (Jehangir and Jilani 2003, 24), a closer examination shows that they took a view of rape similar to that of British colonial jurisprudence:

The statutory definition of *zina-bil-jabr* in the Hudood Ordinance explicitly borrowed elements from colonial law, particularly in its structuring of the crime around the concept of consent. In practice, too, the Pakistani courts have relied on forms of evidence and assumptions foreign to the Islamic tradition, demanding “material particulars” to corroborate a rape charge, especially where the complainant is not a virgin. The very factors which were central

¹² For example, if an individual accuses his or her spouse of *zina* (i.e., in a case of adultery), the standard of evidence is still four witnesses.

determinants to the outcome of colonial rape cases—fresh complaint, moral character, virginity and physical evidence of force and resistance—have also featured prominently in the postcolonial *zina* case law even though these factors have no application in Islamic law. (Kolsky 2010, 125)

In other words, the evidence required by the Zina Ordinance had “no relevance to the Islamic legal tradition except to sharpen its evidentiary edge” (ibid., 126). Rather, these evidentiary requirements grew out of British colonial requirements that gave little credence to the testimony of a woman (ibid.). As per the evidentiary requirements of the Zina Ordinance, “a man had to actually be observed committing *zina* to be convicted, while a woman could also be convicted if she became pregnant (i.e., pregnancy was allowable as admissible evidence)” (Weiss 2014, 26).

To add fuel to the fire, four years after the Zina Ordinance was adopted, a law of evidence was promulgated that did not allow women to testify at all in certain cases and in others considered a woman’s testimony irrelevant, unless corroborated by that of another woman. This essentially gave men and women different legal rights, underscoring that the state did not regard women and men as equal actors (ibid.). Further, it led to the clear perception that the state condoned, control over women’s sexuality, which inevitably, exacerbated violence against women within the society.

The Zina Ordinance was condemned both within and outside of Pakistan. In Pakistan, the Ordinance led to a discussion on rape laws taking centre stage, as it had not been discussed much in the legal discourse prior to that time (Zia 1994). Human rights groups and international organisations outside of Pakistan argued that Pakistan’s law inverted a basic principle of justice by placing the burden on a rape victim to prove that she was not guilty of the crime of fornication or adultery. When Pakistan became a state party to CEDAW in 1996, it became incumbent for the state to change its laws to eliminate discrimination against women. However, legislative change did not occur for another decade.

3.3 The Women’s Protection Act of 2006

The Women’s Protection Act received presidential assent on 1 December 2006. It is not a repeal act, but an omnibus act that amends several acts, including the Zina Ordinance of 1979, the Qazf Ordinance of 1979, and the Pakistan Penal Code of 1860. The act was passed following a lengthy debate that brought together women’s rights activists and Islamic scholars and legal experts on both sides of the issue. The most important aspects of the act relate to the separation of the offences of rape and *zina*, the definition of rape, the nature of confession, and the procedure governing complaints of *zina*.

Table 1 below compares the situation before and after the WPA was passed. The following subsections describe key changes in more detail.

Table 2. A comparison of Pakistan’s rape, fornication, and adultery laws before and after the Women’s Protection Act of 2006

	Before the WPA	After the WPA
Rape	<p><i>Nature of offence</i></p> <ul style="list-style-type: none"> ▪ <i>Hadd</i> crime ▪ No distinction from fornication and adultery 	<p><i>Nature of offence</i></p> <ul style="list-style-type: none"> ▪ No longer a <i>hadd</i> crime ▪ Separate crime from fornication and adultery
	<p><i>Evidence</i></p> <ul style="list-style-type: none"> ▪ Onus on the complainant to produce four male Muslim witnesses 	<p><i>Evidence</i></p> <ul style="list-style-type: none"> ▪ No witnesses required ▪ Victim’s testimony considered part of evidence ▪ Procedure for confession provided by law
	<p><i>Relationship with other crimes</i></p> <ul style="list-style-type: none"> ▪ Compoundable offence ▪ Possible to be taken into custody for fornication/adultery as confession of having sexual intercourse ▪ Automatic <i>qazf</i> (false accusation) penalty 	<p><i>Relationship with other crimes</i></p> <ul style="list-style-type: none"> ▪ Not a compoundable offence ▪ Cannot be converted to fornication or adultery
	<p><i>Arrest and bail</i></p> <ul style="list-style-type: none"> ▪ Cognisable (police may arrest without court order) ▪ No bail available 	<p><i>Arrest and bail</i></p> <ul style="list-style-type: none"> ▪ Non-cognisable (arrest only allowed following court order) ▪ Bail available
Fornication and Adultery	<p><i>Nature of offence</i></p> <ul style="list-style-type: none"> ▪ <i>Hadd</i> crime ▪ Crime against the state (not a personal crime) ▪ No distinction from rape 	<p><i>Nature of offence</i></p> <ul style="list-style-type: none"> ▪ Still a <i>hadd</i> crime ▪ Separate crime from rape
	<p><i>Evidence</i></p> <ul style="list-style-type: none"> ▪ No witnesses needed for conviction of woman (pregnancy is enough) 	<p><i>Evidence</i></p> <ul style="list-style-type: none"> ▪ Complaint can only be made in court of session ▪ Four male, pious witnesses must testify in court of session. ▪ Almost automatic penalty for false accusation possible
	<p><i>Relationship with other crimes</i></p> <ul style="list-style-type: none"> ▪ Compoundable offence 	<p><i>Relationship with other crimes</i></p> <ul style="list-style-type: none"> ▪ Not a compoundable offence ▪ Cannot be converted to rape
	<p><i>Arrest and bail</i></p> <ul style="list-style-type: none"> ▪ Cognisable (police may arrest without court order) ▪ No bail available 	<p><i>Arrest and bail</i></p> <ul style="list-style-type: none"> ▪ Investigation to be conducted by a Police Officer not below the rank of Superintendent of Police* ▪ Non-cognisable (arrest only allowed following court order)

* Change made as part of Criminal Law (Amendment) Act of 2004.

3.3.1 The nature of rape as a crime

The WPA amends relevant sections of the Zina Ordinance and the Pakistan's Penal Code to distinguish between rape and adultery or fornication. Rape is no longer a *hadd* crime covered by the Hudood Ordinances, but rather part of the Penal Code.

Article 375 of the amended Penal Code 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 her out of fear of death or of harm;
- 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.

In addition, the WPA's amendments to the Zina Ordinance prevent the conversion of a complaint of rape or adultery into fornication (and vice versa).

Adultery and fornication remain *hadd* crimes (and consequently are still subject to the Zina Ordinance). However, the WPA abolishes the death penalty and flogging for those accused of *zina* and also allows them to post bail (which had not previously been allowed). Adultery can only be established if witnessed by four pious male Muslims. The role of the police is also curtailed, since a complaint of adultery can only be made in a court of session. False accusations of fornication and/or adultery result can result in almost immediate sentencing after the presiding officer of the court of session hears witnesses that support the complaint.

3.3.2 Evidence required to convict

Prior to the WPA, expert opinions, medical evidence, or documentary proof could not be provided as evidence for rape. The only forms of admissible evidence allowed by the Zina Ordinance were the confession of the accused or the testimony of four male eyewitnesses. Effectively, this meant that any woman who lodged a complaint of rape could be found guilty of the *hadd* crime of fornication or adultery, since by lodging her complaint she would have confessed to having had sexual intercourse (and would almost certainly be unable to provide the required evidence to convict). She also could be convicted of making a false claim of *zina* (*qazf*) against her rapist. In short, a woman complaining of rape was guilty until proven innocent.

The WPA amendments restore the principle of "innocent until proven guilty" in crimes of rape, adultery, and fornication. To further safeguard the victim, the WPA also provides that a complaint of rape cannot be converted to fornication or adultery, as mentioned above. Any confession to a crime must be made to a court of session with jurisdiction in the matter, under specific legal conditions that apply to each crime, which keeps a rape complaint dismissed by a court from becoming a confession to fornication or adultery.

The WPA also provides a safeguard against money being given to the victim and/or the victim's family in order to drop charges, although as the case study below shows, this safeguard may not be applied in practice.

3.3.4 Arrest and detention

Because the Zina Ordinance allowed the police to arrest any individual suspected of having sex outside of marriage, scores of women languished in jail awaiting trial, even though most such cases ended in acquittal. The WPA removes the right of the police to arrest an individual suspected of having sex outside of marriage. Instead, a court of session must issue a warrant before an individual accused of adultery or fornication can be taken into custody.

4 The Women's Protection Act and prevailing societal views

4.1 Perceptions of women and rape in the prevailing discourse

The debates leading up to the Women's Protection Act publicly highlighted for the first time shortcomings in the Hudood Ordinances, including their validity under Islamic law. Several government-appointed commissions studied the law and a several months long televised debate on the subject "No debate on Hudood Allah [Allah's laws as prescribed in the Qur'an and Sunna]: Is the Hudood Ordinance [man's interpretation of Allah's law] Islamic?" aired on a private news channel.

We interviewed Dr. Khalid Masud, CII chairperson from 2004–2010, and he explained his agency's role in these debates as follows:

It was during the time when I held office as [CII] chairperson that the Council started making recommendations to amend the Hudood Ordinance. . . . The Council made the strategy and contacted media channels for awareness raising campaigns on the Hudood [Ordinance]. . . . We had decided that only amending the law will not make a difference, so we must start a campaign. We contacted embassies, arranged an international conference, and sent delegations to other Muslim countries, including Sudan, Iran, Egypt, Qatar, and Saudi Arabia. We launched this entire campaign after meeting with cabinet members.

Masud went on to explain that when parliament was first presented with the draft law, it passed it on to be reviewed by a committee of *ulema*. This committee included members who were involved in drafting the original Hudood Ordinances, and they provided analysis of the draft law on a "discrete" basis.

On the progressive side of these debates, a notable voice was Dr. Javed Ahmad Ghamidi, a religious scholar who heads Al-Mawrid, a centre for Islamic research and education that he founded in 1983.¹³ It could very well be argued that Al-Mawrid's arguments from within

¹³ Al-Mawrid seeks to revive the intellectual process within religious inquiry itself, explaining that "the interpretation of Islam from its original sources should be an ongoing process because the element of human error can never be eliminated" (Al-Mawrid Executive Council, n.d.). The value Al-Mawrid gives to continuous reflection, criticism, interpretation, and inference makes it an engaged group of religious scholars who (amidst opposition from more orthodox religious scholars) are continuously adding to the religious aspects of social debate in Pakistan, including the debate on rape laws in Islamic jurisprudence.

Pakistan's religious discourse directly contributed to enactment of the WPA. During discussions leading up to the WPA, experts from Al-Mawrid supported major amendments to the Zina Ordinance. For example, during televised debates Ghamidi presented examples from Islamic jurisprudence to show that *rajam* (stoning) was not a *hadd* punishment (that is, not prescribed in the Qur'an).¹⁴

Although Al-Mawrid did not succeed in its argument regarding *rajam*, it successfully facilitated a change in how rape was defined under the WPA. As one Al-Mawrid religious scholar explained in an interview in Lahore,

Gawah ["witness"], is not in the Qur'an; neither does it [the Qur'an] comment on rape. It has talked about the crime of *zina* ["adultery"], where the man and woman are both doing it willingly. But Allah says that it is not to be discussed; if so, the evil will spread. If someone is doing it in private, just stay quiet. If you bring it to a court of law, it will not be registered until such time when four eyewitnesses profess its occurrence; otherwise, people who bring it in the public sphere will be flogged. It [*zina*] has nothing to do with rape, which is not mentioned in the Qur'an. Again, this is a wrong understanding. It was meant only for *zina*, not for rape. Rape is a bigger crime and must be treated completely differently. If a woman is asked to bring four eyewitnesses, it means you are promoting rape. Criminals will be set free and the poor woman will not get justice.

However, in spite of a growing interest in a progressive interpretation of Islamic law, many political leaders seem to have continued to engage in "acquiesced compliance" with the status quo. For example, Masud told us that "real agitation started" once the draft Women's Protection Act was introduced in parliament:

Most of newspapers and magazines started controversies. The Council had come under attack. There were eight members in the Council at that time with different opinions. Some of the members did not agree with the recommendations. They did not resist, however, but wrote a note of dissent. Technically there was no attention given to improving the law. A big reason for this was that the *fiqh* we subscribed to was established in a society steeped in tradition, very different from the society we experience, but we still practiced this *fiqh*.

In fact, when asked about the protections available to women, most legal practitioners we interviewed shared their view that Islam itself provides sufficient safeguards for rape victims, even though they were unable to explain how those safeguards would work in practice. For example, a female high court lawyer in Islamabad explained, "If we stay within the boundaries given by our religion, we will be protected. It is when women breach the boundaries given by Allah that there is a problem." She explained that breaching these boundaries could include wearing inappropriate attire, having short hair, or failing to cover her head—all of which would be perceived as immodest under her interpretation of Islam. Some lawyers also mentioned the religious frame of reference as a *sine qua non*. For example, a male lawyer and constitutional law expert in Lahore explained, "I think the right approach is that we have religious

¹⁴ This was similar to the view taken by the FSC in 1981, which prompted the addition of *ulema* to the FSC. Unfortunately, orthodox religious lobbies prevailed on this argument and *rajam* remains a part of the Zina Ordinance.

implications embedded in our law and constitution and, by virtue of the constitution, in other laws.”

Some lawyers and government officials went so far as to suggest that women were partly at fault for violence against them. These respondents expressed their belief that women should not be able to get away with flaunting public morality. For example, one government official explained, “It is true that the law on sexual harassment is a positive law and if there is more knowledge about it, women will benefit. But we should not forget that the responsibility of women protecting themselves from harassment is also theirs—especially in their get-up.”

One religious scholar and former CII member explained in an interview his belief that removing rape from the Zina Ordinance violated Islamic principles:

To abolish the punishment of rape would have been a clear violation of injunctions given in the Qur’an and Sunna. However, it is being claimed that the punishment ordained by the Qur’an and Sunna is only applicable when both the man and woman commit adultery with mutual consent; and that in the case of rape, the Qur’an and Sunna have not prescribed any punishment.

A member of Pakistan’s national assembly, nominated on a reserved seat by the Pakistan Muslim League (Nawaz) (the incumbent political party, PML-N) told us she questions whether WPA will really help women because the real problem is a society that lacks traditional values:

The point is, what can such a law do for women in the long run? Wherever there will be such incidents, you will find that there is something missing in the bringing up of these children. Nowadays, mothers don’t even cook themselves, they pick up kids from schools, feed them a McDonald’s meal and a glass of Pepsi, so how will such mothers raise a respectable, responsible generation? What will be the children’s impression of their mother? I am not saying a man charged with rape comes from a specific class. But definitely something is amiss somewhere in that person’s upbringing. Children who have been raised wrong, no law of the world will ever be able to do anything for them, no lawmaker, no parliamentarian can do anything.

Ultimately, the debate between conservative and progressive voices comes down to gender equality. More conservative groups, such as JI, simply do not consider women to be equal to men. Yet gender roles matter even to more progressive scholars. For example, one Al-Mawrid scholar in Lahore explained the functional difference between men and women as follows:

A man and a woman are equal, have equal roles and the same level of respect and value in the eyes of God Almighty. Nonetheless, they are independent. They are responsible for what they do and will be rewarded for it accordingly. But in this life we must go through certain processes of living and certain administrative decisions are taken. For the specific purpose of procreation, a difference is created in both the sexes. Whatever little differences you find are meant to make sure human beings are able to function in such a way that their differences are not a source of conflict and do not cause the journey to be unnecessarily marred by competition or tension that could be there because of lack of recognition of those differences. A decision has to be made about when to form a family. It could be taken by a woman, a man, or decided at the time

of marriage—maybe through flipping a coin. But Allah has decreed that man has the role to make that decision.

In summary, women’s right activists in Pakistan had originally hoped to repeal the Zina Ordinance, and even obtaining amendments to the law was a commendable feat. However, the Women’s Protection Act is not an end, but only a beginning. Although the WPA has been hailed as a watershed law ensconced in the liberal values of freedom and justice, translating this legislative success into implementation requires a release of the issue of rape from the grasp of entrenched misogynistic values. Both conservative and progressive forces have seized upon the WPA “to lend weight to their populist agendas”—the government “to justify its claim of pursuing an agenda of ‘enlightened moderation’” and right-wing parties to support the honour and chastity of women (Jahangir 2006, 6).

As a women’s rights activist in Peshawar said in an interview, “Some laws are very encouraging for women, but because they are not implemented with the right intention and with the required zeal, they become ineffective.” She added,

Until a repeal act is brought in and the mullah’s work institutionalising his particular brand of Islam within Pakistan’s legal system is challenged—these small victories will be like window dressing. Yes, the WPA has addressed some of the glaring discriminations and injustices meted out to women by the promulgation of the Zina Ordinances in 1979, but it does not question role of religion in the state.

During our interviews, lawyers and government officials candidly shared that implementation of WPA is hampered because the law is not shared down to lower tiers of government and society. In addition, interviewees noted that even when a law looks good on paper, society’s gender-based hierarchy can make it undesirable for the law to be implemented in both letter and spirit.

4.2 Barriers to implementing the Women’s Protection Act

Even though the WPA now provides protection for victims of rape, the cases that arise in practice often compromise the delivery of justice. A number of social, cultural, and structural barriers contribute to this, including society’s view of the status of women, knowledge about the law itself, and lack of effective implementation.

4.1.1 Status of women in society

The respondents unanimously shared their opinion that women are suppressed in Pakistan and face a number of barriers in everyday life. This makes it difficult for women to benefit from women’s protection laws in place. The respondents focused on the fact that in Pakistan’s male-dominated culture, women are suppressed and therefore vulnerable to exploitation and violence. Even after an incident, they must depend on their male relatives to seek justice, as they cannot move alone due to traditional gender roles. For example, this means that a male member of the family always accompanies a women to report a crime. Consider the following statements

It is very rare that a woman victim comes alone to the police station to lodge an FIR [first information report filed with the police]. (Interviewee 4)

In our area, women suffer, as men do not allow them to go to police or court. If any woman goes to police or court she is considered of bad character. (Interviewee 6)

The police and other government institutions are active in helping women get justice, but society at large disapproves of women approaching these institutions in the quest for justice. (Interviewee 2)

Interestingly, the interviewees could easily identify the barriers women face in seeking justice and even stated that gender traditions harm women, yet none of them expressed a sense that these traditions need to change. Rather, there seems to be a general atmosphere of acceptance for these age-old traditions, in spite of the fact that all interviewees were either in or had been in a position where they could advocate for change.

In summary, even though some of Pakistan's laws may be progressive, the environment where they are to be implemented is far from it. In fact, some crimes punishable by the law are considered to be traditional practices and are not even reported.

4.1.2 Lack of knowledge and awareness

Respondents also identified lack of information as a barrier to women seeking justice. For example, most women who participated in the focus group discussion were not even aware of the existence of the WPA. These women observed that many Pakistani women are unable to demand even their most basic rights because they are unaware of them. Rather, women accept their position in the society as dictated by men.

None of the interviewees stated a need for women to be empowered or educated, but they did express a need to create awareness about the laws among the police and society at large:

There is dire need to start awareness raising campaigns in our district in order to curb the violence against women and especially to teach the men about women's rights and their respect. (Interviewee 1)

If the majority is unaware about the Women's Protection Act, how can we expect its implementation? (Interviewee 6)

Our colleges and universities should introduce moral training classes to teach the young generation about the human rights and how to behave with women. (Interviewee 2)

On the other hand, the women in the focus group discussion shared their belief that education for girls is an important aspect of empowerment.

4.1.3 Implementation

The respondents universally believed that more laws are not needed to protect women, but that the pressing need is to make present laws more effective through proper implementation. As interviewee 1 explained, "Laws exist in our country to provide justice and protection to women

but their implementation is a big challenge.” The gang rape case discussed in the next section demonstrates how ineffective implementation of the WPA allows perpetrators to go free.

4.3 Case study: Gang rape in rural Punjab

On 23 November 2014, in a small village of Punjab, a 21-year-old female teacher was gang raped by four men. The men had kidnapped the woman and taken her to a home construction site, where they gang raped her. They also made a video of their crime and threatened the woman with dire consequences if she told anyone about the incident.

A few days later, the rapists leaked the video of the shameful crime onto social media and distributed it among the local community. One young man had the courage to contact a local journalist, who reported the case to the police. The police took immediate action. Two of the men in the video were traced by the police, and a first information report (FIR) was lodged against all four assailants. Local and national media very actively followed and reported about the case. The accused were taken into custody, and the case was investigated on special instructions of the chief minister of Punjab.

However, a few months after the incident, the victim’s father changed his statement and withdrew the case, allegedly making a financial settlement with the culprits’ family for the sum of PKR 3 million (about US\$ 28,500). Local rumours suggest that a local attorney with whom the victim’s father worked played a role in facilitating this deal and may even have received part of the settlement funds. Sadly, the case was not investigated or prosecuted further after the father withdrew the complaint—even though it merited a full trial and the WPA contains safeguards against such settlements. This reflects lack of legal knowledge about the WPA even on the part of the police and the judiciary.

All of the interviewees and focus group participants knew about this rape case. They lauded the role of the media, the police, and the government in handling the case. But they were disappointed that the victim’s father made a financial deal with the assailants and withdrew the case, thus denying his daughter justice. Nearly all the respondents maintained that this turn of events generated a tremendous public outcry, as the public felt the culprits should have been brought to justice. Yet, none of the interviewees (even the police officer) questioned how the complaint could have been withdrawn without a full investigation.

Most respondents redirected blame for the incident on the misuse of cell phones and social media and called for a ban on them:

It is the misuse of cell phone and social media by the young generation that has ruined all our traditions and norms. (Interviewee 5)

Some respondents even portrayed the victim as corrupt and blamed her for the crime:

No wrong was done to the girl, she had an affair and illicit relations with those men and that is the reason for her changing her statement. (Interviewee 5)

Many people in our area believe that the girl was involved and it was not a rape. (Interviewee 6)

She herself had plans to go with one of them, but her boyfriend bluffed her and invited three of his friends as well. (Focus group participant)

The women who participated in the focus group shared their view that the government and its representatives did not support the victim and her family; they only offered sympathy and verbally condemned the incident. These women asserted that more logistical support—including free legal aid—is needed for victims of sexual crimes. They also explained their belief that women and girls from poor families are more vulnerable to rape and violence and their fear that if culprits are not punished the situation will become worse.

Now culprits will become more courageous and plan again to victimise another poor girl. (Focus group participant)

This case, and the reactions of respondents to it, sheds light on the barriers to implementation discussed above. So long as Pakistani society views women as non-credible witnesses who bring harm upon themselves by the way they act, victims of sexual crimes will have little recourse. In addition, for women to effectively advocate for their safety, they must be able to present their complaints without a male guardian. In this case, the victim's father unilaterally ended the case, allowing the victim's assailants to go free—in the very community where the victim lived. Furthermore, investigators, prosecutors, and judges need to be adequately trained on the WPA's legal requirements, so that cases are not dropped simply because a male guardian desires it to happen. Until Pakistani society affords women the respect and independence they need to assert their rights, sexual offenders will continue to act with impunity.

5 Conclusion

In Pakistan, women related legislation must be understood within a complex political economy with opposing voices. Pakistan's social structure simply does not accommodate women as equal citizens. Rather, women in Pakistan live within an environment of retrogressive cultural practices that are often viewed as religious mandates. Not only do these religious interpretations relegate women to a position inferior to men, but they also foreclose avenues through which women might otherwise be able to challenge the status quo. Furthermore, progressive voices are often labelled as “radical” because of Pakistan's legacy of conscious Islamisation, which started in 1979. As activist Asma Jahangir stated in an interview with us, “All security-minded lobbying groups, religious extremists, conservative lobbying groups, and preachers against rights and regional peace found me unbearable.”

The Women's Protection Act of 2006 reforms some blatant discrimination against women when it comes to defining sexual crimes, especially rape. However, this important “win” is undermined by the lack of a concentrated effort by the government to familiarise legal practitioners, victims, and their families with this law. Moreover, the Pakistani state has, as of yet, failed to consistently counter the open criticism voiced by religious political parties to the law, whether directly or by supporting and promoting religious leaders with more progressive views.

For long lasting reform to occur, both the law itself and the institutional structures supporting the law must be streamlined. The CII and FSC are parallel structures that undermine the efficacy of Pakistan's Supreme Court, high courts, and the legislature. Pakistan's constitution provides that the high courts are the courts of appeal for violations of citizens' fundamental

rights; however, the high courts are not available as an appellate court for violations under the Hudood Ordinances. Those appeals fall within the FSC's jurisdiction.

In the past four years or so, the CII has issued controversial and clearly retrogressive opinions on gender-related aspects of Pakistan's laws. Such statements by the CII not only make it difficult for legislators to pass progressive legislation, but also clearly undermines the ability of the government to implement and enforce laws once they are passed.

As the gang rape case shows, there is a persistent disconnect between law-making and society in Pakistan. The government should work with civil society to close the gap between law and practice, through efforts to train enforcement authorities on the WPA and to raise awareness of women's rights under this law among members of the public.

Reference List

Aboul-Enein, Y. 2010. "Discourse on Pakistan's Jamaat-e-Islami and Its Founder Abu al-Ala al-Mawdud: Uncovering the Philosophy of America's Adversary in Pakistan." *Small Wars Journal*, 2 June. <http://smallwarsjournal.com/jrnl/iss/201006>.

Ahmad, M. M. 2014. "The Crime of Rape and the Hanafi Doctrine of Siyasa." *Pakistan Journal of Criminology* 6, no.1: 161–192.

Al-Mawrid Executive Council. n.d. "Al-Mawrid Institute of Islamic Sciences: An Introduction." *Renaissance: A Monthly Islamic Journal*. <http://www.monthly-renaissance.com/issue/content.aspx?id=538> (last visited 27 July 2017).

Black, Antony. 2011. *The History of Islamic Political Thought: From the Prophet to the Present*. 2nd ed. Edinburgh: Edinburgh University Press.

Boult, A. 2016. "Men Can Beat Wives 'Lightly' Says Pakistan's Islamic Council." *Telegraph*, 29 May. <http://www.telegraph.co.uk/news/2016/05/29/men-can-beat-wives-lightly-says-pakistans-islamic-council/>.

CII (Council of Islamic Ideology). 2007. *A Critical Report on Hudood Ordinance 1979*. <http://cii.gov.pk/publications/h.report.pdf>.

Esposito, J. L. 1997. "Introduction." In *Political Islam: Revolution, Radicalism or Reform?*, edited by John L. Esposito, 1–14. Boulder, CO: Lynne Rienner Publishers.

Esposito, J. L., and J. O. Voll. 1996. *Islam and Democracy*. New York: Oxford University Press.

Ghamidi, J. A. 2004. *The Penal Shari'ah of Islam*. Translated by S. Saleem. Lahore: Al-Mawrid Institute of Islamic Sciences.

Haider, Z. 2010. *The Ideological Struggle for Pakistan*. Stanford, CA: Hoover Institution Press.

Jahangir, A. 2006. *State of Human Rights in 2006*. Lahore: Sang-e-Meel Publications.

Jahangir, A., and H. Jilani. 2003. *The Hudood Ordinances: A Divine Sanction?* Lahore: Sang-e-Meel Publications.

Jalal, A. 1994. *The Sole Spokesman: Jinnah, the Muslim League, and the Demand for Pakistan*. Cambridge: Cambridge University Press.

- Jilani, A. 2013. "Singling Out the Minorities." *Express Tribune*, 4 Oct. <http://tribune.com.pk/story/613530/singling-out-the-minorities/>.
- Jones-Pauly, C., and A. D. Tuqan. 2011. *Women under Islam: Gender, Justice and the Politics of Islamic Law*. London: I. B. Tauris.
- Knudsen, A. 2002. *Political Islam in South Asia*. CMI Report R 2002:14. Bergen: Chr. Michelsen Institute. <https://www.cmi.no/publications/796-political-islam-in-south-asia>.
- Kolsky, E. 2010. "'The Body Evidencing the Crime': Rape on Trial in Colonial India, 1860–1947." *Gender & History* 22, no. 1: 109–130.
- Lau, M. 2007. "Twenty-Five Years of Hudood Ordinances—A Review." *Washington & Lee Law Review* 64, no. 4: 1291–1314.
- . 2010. "Sharia and National Law in Pakistan." In *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, edited by J. M. Otto, 373–432. Leiden: Leiden University Press. <https://openaccess.leidenuniv.nl/bitstream/handle/1887/21170/file221087.pdf?sequence=1>.
- Mehdi, R. 1997. "The offence of Rape in the Islamic Law of Pakistan." In *Living Under Muslim Laws*, dossier 18, edited by M. Hélie-Lucas and H. Kapoor, 98–108. <http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/dossier18/D18.pdf>.
- Metcalf, B. D. 2002. "'Traditionalist' Islamic Activism: Deoband, Tablighis, and Talibs." ISIM Papers. Leiden: International Institute for the Study of Islam in the Modern World (ISIM). https://openaccess.leidenuniv.nl/bitstream/handle/1887/10068/paper_metcalf.pdf?sequence=1.
- Mir-Hosseini, Z., and V. Hamzić. 2010. *Control and Sexuality: The Revival of Zina Laws in Muslim Contexts*. London: Women Living Under Muslim Laws. <http://www.wluml.org/sites/wluml.org/files/CaS%20e-book.pdf>.
- Mullally, S. 2006. *Gender, Culture and Human Rights: Reclaiming Universalism*. Oxford: Hart Publishing.
- Mumtaz, K., and F. Shaheed. 1987. *Women of Pakistan: Two Steps Forward, One Step Back?* London: Zed Books.
- Nasr, S. V. R. 1997. "Islamic Opposition in the Political Process: Lessons from Pakistan." In *Political Islam: Revolution, Radicalism or Reform?*, edited by John L. Esposito, 135–156. Boulder, CO: Lynne Rienner Publishers.
- Noor, A. M. 2010. "Rape: A Problem of Crime Classification in Islamic Law." *Arab Law Quarterly* 24, no. 4: 417–438.
- Serajuddin, A. M. 2011. *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism*. Oxford: Oxford University Press.
- Tharoor, I. 2016. "Bill Banning Child Marriage Fails in Pakistan after It's Deemed 'Un-Islamic.'" *Washington Post*, 15 Jan. https://www.washingtonpost.com/news/worldviews/wp/2016/01/15/bill-banning-child-marriage-fails-in-pakistan-after-its-deemed-un-islamic/?utm_term=.53fa552e4654.
- Weiss, A. M. 2014. *Interpreting Islam, Modernity, and Women's Rights in Pakistan*. Basingstoke, UK: Palgrave Macmillan.

Zia, A. S. 1994. *Sex Crime in the Islamic Context: Rape, Class and Gender in Pakistan*. Lahore: ASR.

———. 2013. “Engendering the Sovereignty of the Islamic Republic of Pakistan.” *KAFILA* Blog, 10 Jan. <https://kafila.online/2013/01/10/engendering-the-sovereignty-of-the-islamic-republic-of-pakistan-afiya-shehrbano-zia/>.

In Pakistan, the legal recognition of rape as a crime has changed in pace with the dominant narrative on women's sexuality. The country's most troublesome categorisation of rape was, unfortunately, introduced under the pretext of compliance with the Islamic Law, as part of the so-called Hudood Ordinances of 1979. The Hudood Ordinances introduced ambiguity into the law by putting the criminal act of rape into the same category as fornication and adultery, which is at odds to how most national legislatures categorise the crime rape.

In 2006, Pakistan adopted the Protection of Women (Criminal Law Amendment) Act (Women's Protection Act or WPA), which reclassified rape differently from fornication and adultery and substantively revised sections of Pakistan's Penal Code that dealt with the crime. This report primarily focuses on these changes in Pakistan's rape laws and how they have been implemented. It relies on research of secondary sources as well as direct interactions with women's rights activists, political party members, legal professionals, and religious scholars.

We collected first-hand information for this report through six in-depth interviews with key individuals in the Layyah district. Our goal was to find out the respondents' perceptions about women's protection laws, including (i) whether more laws are needed, (ii) what barriers make obtaining justice for victims of sexual violence difficult, and (iii) how the rape incident discussed as a case study at the end of this report was handled.

Chr. Michelsen Institute (CMI) is an independent, non-profit research institution and a major international centre in policy-oriented and applied development research. Focus is on development and human rights issues and on international conditions that affect such issues. The geographical focus is Sub-Saharan Africa, Southern and Central Asia, the Middle East and Latin America.

CMI combines applied and theoretical research. CMI research intends to assist policy formulation, improve the basis for decision-making and promote public debate on international development issues.

CMI (Chr. Michelsen Institute)
Phone: +47 47 93 80 00
Phone from abroad: +47 55 70 55 65

P.O. Box 6033,
N-5892 Bergen, Norway
Visiting address:
Jekteviksbakken 31, Bergen

E-mail: cmi@cmi.no
Web: www.cmi.no