

## HER HONOUR: AN ISLAMIC CRITIQUE OF THE RAPE PROVISIONS IN PAKISTAN'S ORDINANCE ON *ZINA*

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### INTRODUCTION

When the Western world encounters Islamic law, it tends to misunderstand and misrepresent it, often drawing conclusions which belittle the *Sharī'ah*. These misrepresentations constitute a disservice to Islam and its rich legal heritage. It is far worse, however, when because of these misrepresentations or because of any other reasons Muslims themselves tend to misunderstand or misapply their own Islamic law. This, unfortunately, seems to have occurred in Pakistan in the case of "The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, No.VII of 1979" (hereinafter referred to as the Ordinance on *Zina*) and its application to rape cases.

It is well known that the Qur'ān declares extramarital sex, *zinā*, both a sin and a criminal offence. It is also well known that the Qur'ān's requirements to prove *zinā* are extremely stringent: four eyewitnesses to the act are required and any number less than four are punished for slander. The Ordinance on *Zina* of 1979 follows this *Sharī'ah* guidance, setting forth *zina* as a prosecutable crime upon proof of four eyewitnesses. But it also includes "*zina-bil-jabr*" ("*zina* by force") or rape, under the same statute, thus also requiring four eyewitnesses to prove a rape assault. Is this the *Sharī'ah* law on rape? As this article will demonstrate, a careful examination of Islamic law indicates that Pakistan may have unwittingly

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misapplied Islamic law in its own Ordinance on *Zina*, ironically leading to injustices which the *Sharī'ah* seeks to avoid.

Rape was never treated as a subcategory of *zinā* in the traditional *Sharī'ah* texts. Where it does appear is in two completely separate legal categories: the laws of *ḥirābah* (violent taking) and *jirāh* (wounds). Thus, the violent nature of rape, which is quite different from the act of *zinā* committed by the consent of the two parties, is recognized in the *Sharī'ah* as the crime of a different category. This is evident from the fact that rape is considered one of the violent acts which fall under the category of *ḥirābah*. As a consequence, the crime of rape as *ḥirābah* is prosecuted according to normal evidentiary rules and four eyewitnesses are not required. Moreover, the *Sharī'ah* goes even further. Recognizing the physical harm resulting from rape, it provides a civil remedy to the victim in the form of financial compensation for *jirāh*.

Pakistan's 1979 Ordinance on *Zina*, however, does not draw from this Islamic legal heritage of *ḥirābah* and *jirāh*. Instead, it subsumes rape as a type of *zina* ("*zina-bil-jabr*"), resulting in a misapplication of the stringent Islamic evidentiary rules for *zinā* to a category of crime never meant to be included under it. Moreover, the above Ordinance's section on rape reads more like the old British common law than the *Sharī'ah* from which it is supposed to be derived. The language of the "*zina-bil-jabr*" section is virtually identical to the British common law rape statute, the criminal law in Pakistan before the promulgation of the *Hudood* Ordinances. This is an unfortunate backward step in legal evolution. As legal scholars in the West have recently realized, Western treatment of the crime of rape is built on the ancient notions of women as property rather than perceived as violent assault which it is. Even now, legal reformers in places like the United States are struggling to update the law of rape to fit with the current notions of decency and personal autonomy. The *Sharī'ah*, on the other hand, recognized rape centuries ago not as a taking of male property but rather as a seriously violent act of *ḥirābah*, and thus attached grave punitive consequences upon its conviction. Moreover, the *Sharī'ah* provisions of *jirāh* provide rape survivors with a civil remedy for their ordeal, reflecting the personal hurt caused by rape in addition to the fact that it is regarded as a criminal offence to the state.

This article critiques the Pakistan Ordinance on *Zina* in light of the traditional *Sharī'ah* treatment of *zinā*, with special attention to the crime of rape. It concludes with a suggestion as to how Pakistan might amend its *Hudood* Ordinances to reflect the true Islamic law rather than inappropriately importing inferior common law provisions in place of the *Sharī'ah* laws on rape based on justice. With the suggested amendments, Pakistan's law of rape could stand as a positive example of Islamic law in

the modern world, a law which — contrary to popular Western perceptions — firmly seeks to affirm and protect the autonomy of women.

## CRITIQUE OF THE ORDINANCE ON *ZINA*

### A. The Ordinance on *Zina* and its Application in Pakistan

In 1977, under President Zia-ul-Haq, Pakistan enacted the "*Hudood*"<sup>1</sup> Ordinances, ostensibly to bring the laws of Pakistan into "conformity with the injunctions of Islam".<sup>2</sup> These Ordinances, setting provisions for crimes such as theft, adultery, slander, and alcohol consumption, became effective in February 1979.<sup>3</sup> The "Offence of *Zina* (Enforcement of *Hudood*) Ordinance, VII of 1979" criminalizes "*zina*", or extramarital sexual relations. The Ordinance states:

A man and a woman are said to commit '*zina*' if they wilfully have sexual intercourse without being validly married to each other.

*Zina* is liable to *hadd* [punishment] if

- (a) it is committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be married; or
- (b) it is committed by a woman who is an adult and is not insane with a man to whom she is not, and does not suspect herself to be married.<sup>4</sup>

Under its heading of *zina*, the Ordinance includes the category "*zina-bil-jabr*" ("*zina* by force") which lays out the definition and punishment for sexual intercourse against the will or without the consent of one of the parties. The section pertaining to the crime of rape, as *zina-bil-jabr*, states:

A person is said to commit *zina-bil-jabr* 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 hurt; or

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

*Explanation.* — Penetration is sufficient to constitute the sexual intercourse necessary to the offence of *zina-bil-jabr*.

*Zina-bil-jabr* is liable to *hadd* if it is committed in the circumstances specified [above].<sup>5</sup>

Finally, the Ordinance lays down the evidence required to prove both *zina* and *zina-bil-jabr*:

Proof of *zina* or *zina-bil-jabr* liable to *hadd* shall be in one of the following forms, namely:-

- a) the accused makes before a court of competent jurisdiction a confession of the commission of the offence; or
- b) at least four Muslim adult male witnesses, about whom the court is satisfied, having regard to the requirements of *tazkiyah al-shuhood* [credibility of witnesses], that they are truthful persons and abstain from major sins (*kabair*), give evidence as eyewitnesses of the act of penetration necessary to the offence.<sup>6</sup>

The placement of rape as a subcategory of *zina* in the Ordinance has raised questions about the justice of the Islamic law as embodied in the provisions of this Ordinance. That is, cases have arisen in which a woman's charge of *zinā bi'l-jabr* fails for lack of four witnesses; moreover, when force is not proven, sometimes it is concluded (especially if a pregnancy results), that the intercourse was, therefore, committed with the consent of the parties. Since pregnancy clearly indicates that sexual intercourse took place, and for sure the pregnant woman was certainly one party in the act, the woman who was, in fact, the victim of the brutal offence of rape is charged with *zinā*.

Some significant cases were widely reported in the Western press. For example, in 1982, fifteen-year-old Jehan Mina became pregnant as a result of a reported rape. Lacking the testimony of four eyewitnesses that the intercourse was in fact rape, Jehan was convicted of *zina* on the evidence of her illegitimate pregnancy.<sup>7</sup> Her child was born in prison.<sup>8</sup> Later, a similar case caused public outcry and drew public attention to the new law. In 1985, Safia Bibi, a sixteen-year-old nearly blind domestic servant reported that she was repeatedly raped by her landlord/employer

and his son, and became pregnant as a result. When she charged the men with rape, the case was dismissed for lack of evidence, as she was the only witness against them. Safia, however, being unmarried and pregnant, was charged with *zina* and convicted on this evidence.<sup>9</sup> Short of conviction, women have also been held for extended lengths of time on charges of *zina* when they alleged rape.<sup>10</sup> For example, in July 1992, Shamim, a twenty-one-year-old mother of two complained that she was kidnapped and raped by three men in Karachi. When a rape complaint was lodged against the perpetrators, the police arrested Shamim instead, and charged her with *zina*, and the perception is that this was done because the family of the victim did not or could not bribe those who mattered. The police held her in custody for six days, during which she reports that she was repeatedly raped by two police officers and a third unnamed person.<sup>11</sup> There have been numerous reports of such custodial rapes.<sup>12</sup>

Police action and inaction in rape cases in Pakistan have in fact been widely reported as an instrumental element to injustice. There is evidence that police have deliberately failed to file charges against men accused of rape, often using the threat of converting the rape charge into a *zina* prosecution against the female complainant to discourage women from reporting.<sup>13</sup> Whenever the perpetrator of this offence is a police officer himself, the chances of pursuing a case against him are nearly non-existent. Shahida Parveen faced this very situation when she reported that in July 1994 two police officers broke into her house and locked her children in a room while they raped her at gunpoint. A medical examination confirmed that she was raped by more than one person, but the police refused to register her complaint.<sup>14</sup>

Cases such as these resulting from the unfortunate misapplication of the Ordinance on *Zina* are widely reported in the Western media.<sup>15</sup> The issue is now a primary topic in global women's and human rights discussions,<sup>16</sup> and is a primary argument in accusations that Islam and its *Sharī'ah* lead to oppression of women. The resulting global debate and propaganda surrounding it, however, rarely addresses the central question: What is the Islamic law of rape? Any real substantive analysis of the *zinā bil-jabr* law and its application must first approach it from this framework — the same framework upon which the law is supposed to be based. This article will, therefore, ask the critical question: Does Pakistan's Ordinance on *Zina* accurately articulate the Islamic law of rape?

### **B. Law of God: The Qur'ān on *Zinā***

As pointed out earlier, the Pakistani Ordinance on *Zina* subsumes rape — as *zina-bil-jabr* — under the general law of unlawful sexual relations. To analyze the appropriateness of this categorization, we must

first analyze the Islamic law regarding *zinā*. The preamble of the Pakistan Ordinance on *Zina* states that it is enacted "to modify the existing law relating to *zina* so as to bring it in conformity with the Injunctions of the Holy Qur'ān and *Sunnah*".<sup>17</sup> Indeed, the term *zinā* itself appears in the Qur'ān. Sounding a general warning against the dangers of adultery, the Qur'ān states: "And do not go [even] near fornication (*zinā*) as it is immoral and an evil" (17:32)<sup>18</sup> Elsewhere, the Qur'ān more specifically sets out actual legal prescriptions criminalizing illegal sexual relations:

The adulteress and adulterer should be flogged a hundred lashes each, and no pity for them should deter you from the law of God if you believe in God and the last day; and the punishment should be witnessed by a body of believers (24:2).

Following this definition of the offence are extremely strict evidentiary rules for the proof of such a crime:

Those who defame chaste women and do not bring four witnesses should be punished with eighty lashes, and their testimony should not be accepted afterwards, for they are profligates (24:4)<sup>19</sup>

Thus, after criminalizing extramarital sexual relations, the Qur'ān simultaneously attaches to the prosecution of this crime nearly insurmountable evidentiary restrictions: four eyewitnesses are required to prove a charge of unlawful intercourse.<sup>20</sup>

Islamic jurisprudence further interprets the evidentiary rules laid down by the Qur'ān to establish the charge of *zinā*— quadruple testimony affirming the actual act of sexual intercourse, and nothing less.<sup>21</sup> This interpretation is based on a *ḥadīth* of the Prophet Muḥammad (peace be on him). According to this *ḥadīth*, after a man persisted in confessing to adultery, the Prophet (having turned him away to avoid hearing the information several times before), asked several specific questions to confirm that the act had truly been performed.<sup>22</sup> Moreover, the Islamic law of evidence requires the witnesses to be mature, sane, and of upright character.<sup>23</sup> Furthermore, if any eyewitness testimony was obtained by violating a defendant's privacy, it is inadmissible.<sup>24</sup> And lastly, according to *The Hedaya*, a key reference work of Ḥanafī jurisprudence and a prominent legal work which has been the major source of Muslim law in India,<sup>25</sup> even a statute of limitations is set for charging someone with *zinā*.<sup>26</sup>

Why should there be so many evidentiary restrictions on a criminal offence prescribed by God? Muslim scholars posit that it is precisely to minimize worldly punishment for this sin. That is, it is clear from

the Qur'ānic prohibition of *zinā* that extramarital sex is a serious transgression against the law of God, but the evidentiary hurdles dictate that the role of the state in prosecuting this crime in the worldly realm should be quite limited. Conviction is limited to only those cases where four individuals actually saw the sexual act to have taken place. In essence, the crime will realistically be punished only if the two parties are committing the act in public and are naked. That is, even if four witnesses saw a couple having intercourse, but, for example, under a cover, this testimony would not only fail to support a *zinā* charge, but these witnesses would also be liable for slander.<sup>27</sup> Thus, while the Qur'ān clearly condemns extramarital sex as an evil, it authorizes the Muslim legal system to prosecute someone for committing this crime only when it is performed so openly that four people can see the culprits without invading their privacy. As a result, *zinā* is prosecutable by the state only when it is a public act of indecency.<sup>28</sup> As Cherif Bassiouni puts it, "the requirement of proof and its exigencies lead to the conclusion that the policy of the harsh penalty is to deter public aspects of this form of sexual practice".<sup>29</sup>

This analysis is consistent with the tone of the Qur'ānic verses which immediately follow the verses on *zinā* quoted above. After the verses establishing the crime and the attendant standards of proof, the Qur'ān states:

Those who spread lies were a clique among you. Do not think it was bad for you: In fact it has been good for you. Each of them will pay for the sin he has committed, and he who had greater share (of guilt) will suffer grievous punishment.

Why did the faithful men and women not think well of their people when they heard this, and (say) "This is a clear lie"?

Why did they not bring four witnesses (in support of their charge)? And since they did not bring the four witnesses, they are themselves liars in the sight of God.

Were it not for the grace of God and His mercy upon you in this world and the next, you would have suffered a great affliction for the false accusation.

When you talked about it and said what you did not know, and took it lightly — though in the sight of God it was serious —

Why did you not say when you heard it: "It is not for us to speak of it? God preserve us, it is a great calumny"!

God counsels you not to do a thing like this, if you are believers (24:11-17).

The Qur'ān's call to respond to charges of sexual misconduct with "it is not for us to speak of" echoes the *ḥadīth* in which the Prophet Muḥammad (peace be on him) was reluctant to take even a man's confession of adultery.<sup>30</sup> The Qur'ān contemplates a society in which one does not engage in publicizing others' sexual indiscretions.

Placing these Qur'ānic verses into context will further emphasize the importance of this concept in Islamic law, and in particular, its close connection to the dignity of women. The verses setting forth the crime of *zinā* and the accompanying verses denouncing public discussion of the matter were revealed just after the famous "Affair of the Necklace", in which the Prophet Muḥammad's wife, `Ā'ishah, was mistakenly left behind a caravan in the desert when she went looking for a lost necklace.<sup>31</sup> She returned with a young single man who saw her and gave her a ride back to the camp. Rumours of `Ā'ishah's time alone with this man spread quickly throughout the small town of Madīnah, until the above verses finally ended the gossip. Thus, the very revelation of these verses was prompted by an incident involving attacks on a woman's dignity — `Ā'ishah's honour. Indeed, the verse setting forth severe punishment for slander is directed specifically against charges impugning a woman's chastity. It says: "Those who defame chaste women, and do not bring four witnesses, should be punished with eighty lashes, and their testimony should not be accepted afterwards ...." (24:4. Emphasis added). It is significant that men have not been directly and specifically mentioned here, which shows the importance given to protecting the honour and good reputation of women. (This, however, does not detract from the fact that in Islamic law defaming men is also a sin and calls for the same punishment.)

Why, one might ask, is the focus on women? Looking at the issue from a cultural perspective, this focus is not surprising. In nearly every culture of the world, women's sexual morality appears to be a particularly common subject for slander, gossip, and insult.<sup>32</sup> The tendency of patriarchal societies, in fact, is to view a woman's chastity as central to the honour of her family, especially of the men in her family. For example, under the British common law (the law in Pakistan before the *Hudood* Ordinance), rape was a crime punishable against men, to be lodged by the husband of the woman, against the man who violated her.<sup>33</sup> The woman's place in the common law of rape was apparently on the sidelines of a prosecution by her husband against her rapist. Similarly, personal revenge against women suspected of some sort of infidelity or some other social embarrassment manifested in such acts as "honour killings"<sup>34</sup> or "bride



burnings" also depicts an attitude that women's honour is the dispensable property of others.

The Qur'ān, however, has harsh words for such attitudes towards women's autonomy and violent action against them based solely on suspicion without due judicial process or proof. As if anticipating the suspicious tendencies of society, the Qur'ān first establishes that there is to be no speculation about a woman's sexual conduct. No one may cast any doubt upon the character of a woman except by formal charges, with *very* specific, *secure* evidence (i.e. four eyewitnesses to actual intercourse) that the woman is disrupting *public* decency with her behaviour.<sup>35</sup> If such direct proof does not come by, then anyone engaging in such a charge is subject to physical punishment for slander. For even if the information is true, any witness who is not accompanied by another three will be punished for slander.<sup>36</sup> As for the public at large, they must leave her alone, regardless of the outcome. Where the public refuses to perpetuate rumours of *zinā*, responding instead that: "it is not for us to speak of" (Qur'ān, 24:16-17), the tendency to suspect the honour of women without proof loses force. In the face of any hint of a woman's sexual impropriety, the Qur'ānic response is: Walk away. Leave her alone. Leave her dignity intact. The honour of a woman is not someone else's property; it is her fundamental right.

### ***Pregnancy as Proof of Zinā?***

Given the Qur'ān's strict standard of proof for a *zinā* case, one might now wonder whether the conviction of women like Jehan Mina and Safia Bibi for *zinā* on the evidence of their pregnancy alone<sup>37</sup> could be justified by Islamic law. As it turns out, in traditional Islamic jurisprudence, the majority opinion — including that of the Ḥanafī and Shāfi'ī schools of law<sup>38</sup> — is that pregnancy is *not* sufficient evidence alone to prove *zinā*, based on the fact that the Qur'ān specifies nothing less than four eyewitnesses, and the fundamental principle of Islamic criminal procedure that the benefit of doubt lies with the accused.<sup>39</sup>

A minority of Muslim scholars have held that pregnancy does amount to the proof of illegal sexual relations if the woman is unmarried and has not claimed rape. Mālik, and reportedly also Aḥmad ibn Ḥanbal, for example, considered unmarried pregnancy *prima facie* a sufficient evidence of *zinā*.<sup>40</sup> This opinion is based in large part on the reported positions of the three famous caliphs, `Umar ibn al-Khaṭṭāb, `Uthmān ibn `Affān, and `Alī ibn Abī Ṭālib, that "adultery is public when pregnancy appears or confession is made".<sup>41</sup> The difference of opinion is also due to differing interpretations of the role of circumstantial evidence in *ḥudūd* cases.<sup>42</sup> The rationale that "adultery is public with pregnancy" causes some

practical problems which the majority view (*viz.* that pregnancy alone does not prove *zinā*), avoids. For example, it does not take into account the modern medical advancements such as artificial insemination, which might be an alternative explanation for pregnancy, not to mention pure force. More substantively, it unfairly places the burden of proof upon women — especially raped women — who were unlucky enough to have become pregnant. Forced to prove that the intercourse was nonconsensual in order to avoid a *zinā* prosecution, a woman is automatically put in the position of defending her honour against accusations which do not meet the Qur'ānic four-witness requirement. This unfairness does not seem to be supported by the spirit of the Qur'ānic verses which discourage presumptions about a woman's sexual activity by insisting that no presumptions be made about women's sexual activity without four witnesses to the actual act.<sup>43</sup> When the pregnancy resulted from rape rather than adultery, the injustice resulting from the view that pregnancy alone proves *zinā* becomes even more patent: pregnant rape victim is forced to defend herself against a *zinā* prosecution, whereas her rapist escapes suspicion and criminal prosecution altogether.

Pregnancy is something which only applies to women. If pregnancy alone constitutes sufficient evidence of *zinā*, the result seems to ignore that the very purpose of the verses on *zinā* is to protect women's honour. As discussed earlier, women tend to be more vulnerable to suspicion and accusation, and the Qur'ān addresses this susceptibility directly by enjoining any charges against women without solid proof.<sup>44</sup> If pregnancy is allowed as sufficient proof of *zinā*, a pregnant adulteress or rape victim might be convicted without any testimonial proof, while her adulterous partner or rapist escapes punishment with his reputation intact. The woman-affirming spirit of the verses on *zinā* is lost.

### C. Drafting Mistakes in the Ordinance on *Zina*

#### 1. Rape as a Type of *Zinā*

As we have seen, the Qur'ānic verses regarding *zinā* do not address the concept of nonconsensual sex. This omission is a logical one. The verses on *zinā* establish a crime of public sexual indecency. Rape, on the other hand, is a very different crime. It is a reprehensible act which the society has an interest in preventing whether or not it is committed in public. Therefore, rape does not logically belong as a subset of the public indecency to the crime of *zinā*. Unfortunately, however, the Ordinance on *Zina* seems to run exactly counter to this Qur'ānic omission and it includes *zina-bil-jabr* (*zina* by force) as a subcategory of the crime of *zinā*.<sup>45</sup>

Where did the *zina-bil-jabr* section in the Ordinance come from, then, if it is not part of the Qur'ānic law on *zinā*? We will see later that in Islamic jurisprudence addressing *zinā*, there is significant discussion of whether there is liability for *zinā* under duress.<sup>46</sup> But the language of the *zina-bil-jabr* section in the Pakistani Ordinance does not appear to be drawn from these discussions. That is, it is not presented as an exception to *zinā* in the case of duress. Rather, the language of the *zina-bil-jabr* section is nearly identical to the language of the old common law of rape in Pakistan, the borrowed British criminal law in force in Pakistan before the *Hudood* Ordinance. Specifically, the old common law rape statute in Pakistan reads:

A man is said to commit "rape" who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:-

*First* – Against her will.

*Secondly* – Without her consent.

*Thirdly* – With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

*Fourthly* – With her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

*Fifthly* – With or without her consent, when she is under [fourteen] years of age.

*Explanation* – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.<sup>47</sup>

With the exception of the statutory rape section (under "Fifthly"), the language specifying what constitutes rape is almost identical to the *zina-bil-jabr* language under the *Hudood* Ordinance. Even the explanation that penetration is sufficient to constitute the necessary intercourse is the same. This apparent intention to retain rape as a crime under the new Islamization of Pakistan's laws is a laudable one. But the reenactment of the old secular law of rape under the Muslim heading of *zinā* (as *zinā* by force), along with the four-witness evidentiary rule unique to *zinā*, results in an inaccurate application of Islamic criminal law, with devastating consequences to victims of rape as well as to the integrity of the *Sharī'ah*.

## 2. *Suspicion and Zinā Adjudication*

Laws on rape in the West have long reflected cultural patriarchal assumptions about female sexuality and consent. A frequent casualty in rape trials is the rape victim's reputation as the court attempts to sort out the issue of consent.<sup>48</sup> This problem is exacerbated in Pakistan because the convoluted placement of rape as part of the Ordinance on *Zina* encourages the use of a woman's unsuccessful claim of rape as some sort of default evidence of *zinā*. Thus, there is a strong tendency to suspect any charge of rape to be a "loose woman's" attempt to escape the punishment for *zinā*.<sup>49</sup> This bias also manifests itself in conclusions that a given sexual encounter must have been consensual if there is no physical evidence of resistance by the woman (another issue familiar to rape law reformers in the West). Many Pakistani judgements of rape have been converted into *zina* cases because there is no evidence of such resistance.<sup>50</sup> This stereotypical concept of women presumes that if a woman does not struggle against a sexual assault, then she must be a sexually loose woman — justifying a conversion of the charge to *zinā*. This attitude unfairly generalizes human reaction to force and the threat of violence. It also works to the detriment of women who have been subjected to a rapist's attack and survived only by submitting without putting up any physical resistance.

Ironically, this is exactly the type of speculation regarding women's sexual activity which the Qur'ān explicitly condemns in the very verses establishing the crime of *zinā* (24:11-17). Judicial and social speculation about women's sexual looseness clearly does not comply with the Qur'ānic admonition that "it is not for us to speak of". The intertwining of rape with *zina* in the Pakistani Ordinance, however, encourages such speculation. Rather than constituting a separate violent crime against women, rape — under the title of *zina-bil-jabr* — is perceived more as a woman's expected defence to a *zinā* charge and thus subject to judicial speculation.<sup>51</sup>

## 3. *Zinā as Ta`zīr*

Islamic criminal law acknowledges two categories of crime and punishment. The first, known as *ḥudūd*, encompasses crimes, the punishment whereof is specifically articulated by God in the Qur'ān and through the *Ḥadīth*. Islamic jurisprudence acknowledges, however, that society may legislate additional crimes and punishments as needed. These societally legislated crimes and punishments are called "*ta`zīr*". *Ta`zīr* crimes can sometimes carry much lighter evidentiary or sentencing schemes than the *ḥudūd* crimes.<sup>52</sup> In Pakistan, when the strict quadruple

witness standard of proof is difficult to meet, it has become increasingly common for *zinā* cases to be prosecuted as *ta`zīr* crimes as opposed to *ḥudūd* crimes.<sup>53</sup> The Ordinance on *Zina* includes a clause providing for *ta`zir* prosecutions of *zina* where there is insufficient evidence:

*Zina* or *zina-bil-jabr* liable to *ta`zir*.

... Whoever commits *zina* or *zina-bil-jabr* which is not liable to *hadd*, or for which proof in either of the forms mentioned ... [i.e. confession or four witnesses] is not available and the punishment of *qazf* (slander) liable to *hadd* has not been awarded to the complainant, or for which *hadd* may not be enforced under this Ordinance, shall be liable to *ta`zir*.<sup>54</sup>

With the creation of *zinā* as a *ta`zir* crime, women charging rape who cannot prove *zinā bi'l-jabr* with four eyewitnesses find themselves open to the possibility of prosecution for *zinā* under the relaxed *ta`zīr* evidentiary rules (which do not require four eyewitnesses).<sup>55</sup> Thus, the relaxed evidentiary rules of *ta`zīr* (corresponding to its lesser punishment) open the law on *zina* to further manipulation by the authorities, who may threaten a woman with prosecution for *zina* under *ta`zir* evidence if there is not enough proof to convict under *hudood*.

Yet this phenomenon is exactly contemplated — and prohibited — by the Qur'ān. The verse on *zinā* which began our discussion states:

Those who defame chaste women, and do not bring four witnesses, should be punished with eighty lashes, and their testimony should not be accepted afterwards, for they are profligates (24:4).

As we saw earlier, this verse contemplates the possibility of adultery charges being brought against women upon less evidence than four witnesses, and condemns it as a grievous slander. By allowing prosecution for *zina* as a *ta`zir* punishment, and thereby loosening the evidentiary rules, the Pakistani Ordinance on *Zina* has ironically succeeded in contravening the very Qur'ānic verse upon which it is based.<sup>56</sup> In fact, *zinā* is the only *hadd* crime for which the Qur'ān sets out a specific punishment for not meeting its strict evidentiary rules.<sup>57</sup> The Qur'ān thus appears to indicate that, as in other *hadd* crimes, there should be no *ta`zīr* crime of *zinā*. That is, for this one crime, if four eyewitnesses are not produced, the state and society must walk away and not speak of it again.<sup>58</sup>

The Ordinance on *Zina* goes even further in missing the Qur'ānic injunction of all-or-nothing proof of *zinā*. It includes a provision for "attempt" of *zina*, setting for the punishment of imprisonment, whipping, and a fine.<sup>59</sup> Again, this directly contradicts the spirit of the Islamic law

on *zinā*. Both the Qur'ānic verses quoted above and the *ḥadīth* of the Prophet Muḥammad (peace be on him) establish that unless the act was actually committed, it is not punishable at all by the state.<sup>60</sup> There is thus a compelling Qur'ānic spirit against either a *ta`zīr* or an attempt version of *zinā*. Unfortunately, the Pakistani Ordinance on *Zina* has lost sight of the unique status of *zinā* as a *ḥadd* crime of public indecency and expanded it to areas which inevitably result in injustice and discrimination against women — the focus of the Qur'ānic verses on the subject in the first place.

### RAPE IN ISLAMIC JURISPRUDENCE

In this critique of the Pakistani Ordinance on *Zina* we have seen that the crime of *zinā* set forth in the Qur'ān is primarily a social crime of public indecency, and for that reason strict evidentiary standards of proof are attached to its prosecution. We have also seen that some of the application of the Qur'ānic evidentiary standard for *zinā* has been skewed to the detriment of women. The subcategorization of rape under *zinā* and the creation of a *ta`zīr* version of *zinā* are examples of aspects of Pakistan's law on *zina* which misapplies the crime of *zinā* as conceived in the Qur'ān and results in dishonouring and failing to protect women.

So far, we have seen that the rationale for the strict evidentiary requirements for *zinā* is the protection of privacy and especially women's honour: unlawful sexual intercourse will be prosecuted by the state only when it is publicly indecent. No gossip or suspicion without concrete proof is allowed. Within the privacy of one's home, the immorality of the act is something left between the individual and God. The same rationale would not, however, apply to the crime of rape. In rape, public display is not the crucial element to the criminality of the act. Rather, the attack itself is a crime of violence whether committed in public or in private. Rape is not consensual sexual intercourse. It is a violent assault against a victim, man or woman, boy or girl, where the perpetrator uses sex as a weapon. Consistent with our analysis thus far, the Qur'ān does not include any direct mention of rape under the general crime of *zinā*. How, then, has the *Sharī'ah* addressed the crime of rape?

#### A. Duress: Rape as a Negation of Intent for *Zinā*

In their chapters on *zinā*, Islamic legal scholars have acknowledged that where one or more parties engaged in *zinā* under duress, they are not liable for *zinā*.<sup>61</sup> A *ḥadīth* of the Prophet Muḥammad (peace be on him) establishes this principle: upon a woman's reporting to the Prophet (peace be on him) that she was forced to have sex, he did not punish her, but he did punish the perpetrator.<sup>62</sup> Similar rulings by the Caliph `Umar ibn al-

Khattāb<sup>63</sup> and Mālik<sup>64</sup> further reinforce this principle in Islamic law. Islamic jurisprudence, in fact, devotes much attention to the concept of duress as a negation of intent generally, thus eliminating liability for an offence.<sup>65</sup> The application of this field of law to *zinā* results in a thorough analysis of liability in possible permutations of forced *zinā*. Thus, the *Hedaya* devotes several paragraphs to resolving conflicting stories regarding a sexual encounter where one party claims it to be consensual, and the other claims it to be otherwise.<sup>66</sup> Matters become more complicated where the witnesses to the encounter are of different genders.<sup>67</sup> There is also discussion and difference of opinion as to whether a man can be forced to commit *zinā* and thus not be liable for *ḥadd* punishment.<sup>68</sup>

Thus, the discussions of forced sex in jurisprudential writings on *zinā* exhaustively discuss nonconsensual sex as a negation of the requisite mental state for *zinā*. But does Islamic law address rape as an independent crime? As it turns out, contrary to what the Ordinance on *Zina* suggests, Islamic jurisprudence has in fact not only categorized rape as a separate criminal offence (under *ḥirābah*), but has also allowed civil compensation to rape survivors (under *jirāh*). These two remedies are addressed in turn.

### B. *Ḥirābah*: Rape as a Violent Taking

*Ḥirābah* is a *ḥadd* defined in the Qur'ān. It is variously translated as "forcible taking", "highway robbery", "terrorism", or "waging war against the state". The crime of *ḥirābah* is based on the following Qur'ānic verse:

The punishment for those who wage war [*yuhāribūna*] against God and His Prophet, and perpetrate disorders in the land is: kill or hang them, or have a hand on one side and a foot on the other cut off or banish them from the land (5-133).

Islamic legal scholars have interpreted this crime to be any type of forcible assault upon a person involving some sort of taking.<sup>69</sup> It differs from ordinary theft in that the Qur'ānic crime of theft (*sariqah*) is a taking by stealth whereas *ḥirābah* is a taking by force.<sup>70</sup> (Thus, the popular translation of the latter is "armed robbery".) Although it is generally assumed to be violent public harassment, many scholars have held that it is not limited to acts committed in public places.<sup>71</sup>

It is in the discussions of the crime of *ḥirābah* where the crime of rape appears. A brief review of the *Sharīah* descriptions of *ḥirābah* reveals that rape is specifically included among the acts constituting *ḥirābah*. For example, Sayyid Sābiq in his *Fiqh al-Sunnah*, a modern

summary of the major traditional schools of thought on Islamic law, describes *ḥirābah* as: a single person or group of people causing public disruption, killing, forcibly taking property or money, attacking or raping women ["*hatk al-`ird*"], killing cattle, or disrupting agriculture.<sup>72</sup> Reports about the opinions of individual scholars on the subject further confirm the *ḥirābah* classification of rape.<sup>73</sup> For example, al-Dasūqī, a Mālikī jurist, held that forcing a woman to have sex amounts to a commission of *ḥirābah*.<sup>74</sup> In addition, the Mālikī jurist Ibn `Arabī relates a story in which a group was attacked and a woman in their party raped. Responding to the argument that the crime did not constitute *ḥirābah* because no money was taken and no weapons were used, Ibn `Arabī replied indignantly that "*ḥirābah* with the private parts" is much worse than *ḥirābah* involving the taking of money, and that anyone would rather be subjected to the latter than the former.<sup>75</sup> Finally, the famous Spanish Muslim jurist, Ibn Ḥazm, a follower of the Zāhirī school, reportedly had the widest definition of *ḥirābah*. He defined a *ḥirābah* offender as: "One who puts people in fear on the road, whether or not with a weapon, at night or day, in urban areas or in open spaces, in the palace of a caliph or a mosque, with or without accomplices, in the desert or in the village, in a large or small city, with one or more people ... making people fear that they will be killed, or have money taken, or be raped ("*hatk al-`ird*") ... whether the attackers are one or many".<sup>76</sup>

Thus, this cursory review of traditional Islamic *Sharīah* shows that the crime of rape is classified not as a subcategory of *zinā*, but rather as a separate crime of violence under *ḥirābah*. This classification is logical because the "taking" is of the victim's property (the rape victim's sexual autonomy) by force. In Islam, sexual autonomy and pleasure is a fundamental right of both women and men.<sup>77</sup> It is logical, then, that Islamic law would classify the taking by force of someone's right to control the sexual activity of one's body as a form of *ḥirābah*.<sup>78</sup> Moreover, *ḥirābah* does not require four witnesses to prove the offence, unlike *zinā*. Circumstantial evidence and expert testimony, then, presumably form the evidence used to prosecute such crimes. In addition to using eyewitness testimony, medical data and expert testimony, a modern *ḥirābah* prosecution of rape would likely take advantage of modern technological advances such as forensic and DNA testing. Finally, the classification of rape as *ḥirābah* promotes the principle of honouring women's dignity established in the Qur'ānic verses on *zinā*. Rape as *ḥirābah* is a separate violent crime which uses sexual intercourse as a weapon. The focus in a *ḥirābah* prosecution would be the accused rapist and his intent and physical actions, rather than just guessing the consent of the rape victim,



which, as we have seen, is likely to happen if rape is classified as a type of *zinā*.<sup>79</sup>

### C. *Jirāh*: Rape as Bodily Harm

Islamic legal responses to rape are not limited to criminal *ḥirābah* prosecution. The *Sharīah* also creates an avenue for civil redress for a rape survivor in its law of "*jirāh*" (wounds). Islamic law designates ownership rights to each part of one's body, and a right to corresponding financial compensation for any harm done unlawfully to any of those parts.<sup>80</sup> In the *Sharīah*, this is called the law of *jirāh*. Harm to a sexual organ, therefore, entitles the person harmed to specific financial compensation under classical Islamic *jirāh* jurisprudence.<sup>81</sup> Thus, each school of Islamic law has held that where a woman is harmed through brutal sexual intercourse, she is entitled to financial compensation for the harm. Further where this intercourse was without the consent of the woman, the perpetrator must pay the woman both the basic compensation for the harm, as well as an additional amount based on *diyāh* (financial compensation for murder).<sup>82</sup>

Since rape could occur even without a clear threat of physical force (i.e. thus perhaps not constituting *ḥirābah*, but nonetheless constituting sex without consent), the categorization of rape under the Islamic law of *jirāh* makes logical sense. This categorization would provide financial compensation to every victim of rape for any harm done to his/her body as a result of the attack. Taking the analysis further, because the right to control one's own sexual activity is a fundamental Islamic and human right,<sup>83</sup> it could be argued that foreign invasion of one's sexual organs against one's will constitutes a *jirāh* harm, even where there is no physical bruising or tearing. Modern Islamic jurisprudence and legislation might, therefore, consider to provide that either instead of or in addition to *ḥirābah* punishment against the rapist, a woman might also claim compensation for her ordeal under the law of *jirāh*.<sup>84</sup> Such financial compensation not only symbolically emphasizes the personal nature of the harm caused by rape, but also provides a rape survivor with the means to seek professional counseling to work through the psychological harm which accompanies an attack of rape.

Interestingly, Western legal discourse has only recently begun to re-evaluate the crime of rape, and is still struggling to overcome its patriarchal articulation of the crime. But Islamic jurisprudence offers a unique escape from these mistakes. In addition to its *ḥirābah* treatment of rape as a violent act, Islamic law has the unique resource of a *jirāh* system of established law of compensation for bodily harm to give a civil remedy directly to rape survivors. In Western history, ancient Roman law also

recognized compensation as a means of responding to rape, but it took a patriarchal approach: it found that the father (or other male authority) of the rape victim was entitled to damages because the rape implied his inability to protect the woman.<sup>85</sup> Islamic law, with its liberating introduction of a woman's right to own property and its affirmation of sexual autonomy as her fundamental right, already employs an unbiased attitude in this area of law. In fact, there is a *ḥadīth* specifically directed to transforming the early Muslim population out of this patriarchal attitude of being paid exclusively to the males in case the honour of women for whom they were responsible was subjected to violent transgression. During the time of the Prophet Muḥammad (peace be on him), a young man committed *zinā* with his employer's wife. The father of the young man gave one hundred goats and a maid as compensation to the employer, who accepted it. When the case was reported to the Prophet (peace be on him), he ordered the return of the goats and the maid to the young man's father and prosecuted the adulterer for *zinā*.<sup>86</sup> Early Islam thus established that there should be no tolerance of the attitude that a woman's sexual activity is something to be bartered, pawned, gossiped about, or owned by the men in her life. Personal responsibility of every human being for his or her own actions is a fundamental principle in Islamic thought.

#### **CONCLUSION: AMEND THE *HUDOOD* ORDINANCE AND FOLLOW THE *SHARĪAH* LAW OF RAPE**

We have seen that categorization of rape as a form of *zinā* in the Ordinance on *Zina* is a misapplication of the actual treatment of rape in traditional *Sharī'ah*. The brief discussion here also reveals that it would not be difficult to amend the statutes in Pakistan to accurately reflect the *Sharī'ah* and eliminate the injustice which the existing Ordinance represents. Traditional Islamic jurisprudence includes two very appropriate avenues to justly respond to the crime of rape, its seriousness, and its effect on women in particular. Modern Pakistani legislators should take the *Sharī'ah* provisions on *ḥirābah* and *jirāh* to promulgate a comprehensive law of rape which does not counteract the positive honouring of women which is inherent in the Qur'ānic legal verses on *zinā*. Thus, the section entitled "*zina-bil-jabr*" should be deleted from the Ordinance. Instead, rape should be specified as a form of *ḥirābah* in the *ḥirābah* section of the *Hudood* Ordinance,<sup>87</sup> thus identifying it as a violent

crime for which the perpetrator is subject to serious punishment.\* Legislation might also be enacted to treat rape as a case of *jirāh*, thus creating grounds for rape victims to receive some compensation for the physical and psychological harm caused by rape.

These amendments would help transform the Pakistani laws into a positive example of the sophistication with which the *Sharī'ah* deals with crime and punishment. Islamic law offers an advanced, respectful treatment of the nature of the crimes of *zinā* and rape and their special impact on women. By adding new provisions in its legal codes in consonance with this spirit, Islamic law could become, as it once was, the legal example from which the Western world could learn a great deal. Such examples are critically important to Muslim scholars, especially those living in the West, who might perhaps be in a better position to respond to Western criticisms which portray Islamic law as outdated or inferior. As a nation which claims to be an Islamic state, Pakistan is continuously looked upon as an example of Islamic law in the modern world.

It might be pertinent to clarify that the purpose of this paper is not to belittle the attempts made in Pakistan to operationalize Islamic law. Far from that, we wish to contribute, in a positive manner, to the work that has been done so far, and to point out whatever mistakes might have been made in this regard. If we suggest any amendment to remove this mistake it is precisely because of our recognition of the important role that Pakistan plays in the world as one of the few countries who wish to bring their laws in conformity with Islamic Law. The more faithful Pakistan is to the true *Sharī'ah*, the more it will be possible for Muslim scholars in the West to defend attacks on Islam and Islamic law. As we have seen, the traditional Islamic laws on rape represent one of the most sophisticated and advanced treatments of that crime in the world to date. Moreover, the Qur'ānic verses on *zinā* are good examples of the basic purpose of some of the legal prescriptions of Islam – to protect the honour of women. With an appropriate reflection of these laws in Pakistan's legal codes, Muslims around the world will have a valuable tool to use in their effort to highlight the justice and other benevolent ends that Islamic law is geared to achieve.

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\*It would be interesting to mention that a judgment of the Federal Shariat Court of Pakistan has expressed the same view as that of the author of the present article, viz. that the offence of rape should be treated under the Islamic law of *hirābah*. See PLD (1989), FSC 127, 128 and 134.

<sup>1</sup>The word *hudood* (*hudūd*) is the plural of *hadd* a term denoting the Islamic legal categorization of crimes for which the definition and punishment is set by the Lawgiver. Abdur Rahman I. Doi, *Shariah: The Islamic Law* (London: Ta Ha Publishers, 1984), 221.

<sup>2</sup>The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, No.VII of 1979. Preamble: The text of the Ordinance can be found in *The All Pakistan Legal Decisions* [PLD] 1979 Cent. Statutes, 51 (Pak.); Ashfaq Bokhary, *Law Relating to Hudood Cases* (Lahore: Khyber Law Publishers, 1979), 162; "The Islamic Criminal Laws" in *The Major Acts* (Lahore: Khyber Law Times Publications, 1992), 10.

<sup>3</sup>See The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, Sec.1 (stating commencement date); PLD 1979 Cent. Statutes, 51; Bokhary, *Law Relating to Hudood Cases*, 164.

<sup>4</sup>The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, Sec.4,5; PLD 1979 Cent. Statutes, 52; Bokhary, *Law Relating to Hudood Cases*, 176 (with comment and annotations).

<sup>5</sup>The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, Sec.6; PLD 1979 Cent. Statutes, 52; Bokhary, *Law Relating to Hudood Cases*, 182 (with comment and annotations).

<sup>6</sup>The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, Sec.8; PLD 1979 Cent. Statutes, 53; Bokhary, *Law Relating to Hudood Cases*, 182 (with comment and annotations). I have not included the punishments specified for each crime, as that is not within the focus of this article. Here, I am primarily concerned with the definition and categorization of each of these offences. Briefly, however, the *hadd* punishment prescribed in the Ordinance for a *zina* offence is either public stoning or whipping. For a "*zina-bil-jabr*" conviction, it prescribes imprisonment and/or public whipping. See the Ordinance, Sec. 6.

<sup>7</sup>Jehan Mina v. The State, 1983, PLD Federal Shariat Court 183 (Pak).

<sup>8</sup>See Rubya Mehdi "The Offence of Rape in the Islamic Law of Pakistan", *International Journal of Society and Law*, vol.18, 1990, pp.19, 25.

<sup>9</sup>See Safia Bibi v. The State, 1985, PLD Federal Shariat Court 120 (Pak). She was sentenced to fifteen lashes, three years imprisonment, and a fine. Public outrage eventually led the appellate court to set aside the punishment. See Rashida Patel, *Socio-Economic Political Status and Women and Law in Pakistan* (Karachi: Faiza Publishers, 1991), 25-26; Ayesha Jalal, "The Convenience of Subservience: Women and the State in Pakistan" in Deniz Kandiyoti, ed., *Women, Islam and the State* (Philadelphia: Temple University Press, 1991), 102; Mehdi "The Offence of Rape ...", 19, 24-26; Shahid Rehman Khan, "Under Pakistan's Form of Islamic Law, Rape is a Crime – For the victims", *Los Angeles Times*, May 25, 1986, Sec.1, p.27 (reporting *Bibi* case, and another similar case).

<sup>10</sup>See Asia Watch and Women's Rights Project, *Human Rights Watch Double Jeopardy: Police Abuse of Women in Pakistan* (New York: Human Rights Watch, 1992), 41-60.

<sup>11</sup>See Amnesty International, *Pakistan: Torture, Deaths in Custody and Extrajudicial Executions* (New York: Amnesty International, 1993), 11-12.

<sup>12</sup>See Asia Watch, *Double Jeopardy*; Patel, *Socio-Economic Political Status ...*, 36; Mehdi, "The Offence of Rape ...", 27 (citing report by attorney

Asma Jehangir of fifteen incidents of police rape of women in detention in 1988/1989); Seminar, "Adultery and Fornication in Islamic Jurisprudence: Dimensions and Perspectives", *Islamic and Comparative Law Quarterly*, vol.2, 1982, pp.267, 286-87 (convenor Tahir Mahmoud noting "cases of rape ... in private (including those committed by policemen) are alarmingly on an increase in the [Indo-Pakistani] subcontinent").

<sup>13</sup>See, e.g., Amnesty International, *Pakistan, The Pattern Persists: Deaths in Custody, Extrajudicial Executions, and "Disappearances" under the PPP Government* (New York: Amnesty International, 1995), 35 (reporting January 17, 1994, gang rape of five women, stating that police pressured women to report only robbery, and conceal rape); Amnesty, *Torture*, 11-12 (citing Shamim case, and similar Imamat Khatoon case). In 1992, more than 2,000 women were in jail awaiting trial for *zina*. See Asia Watch, *Double Jeopardy*, 69. Many women are eventually acquitted after enduring long trials. See Patel, *Socio-economic political status ...*, 28.

<sup>14</sup>Amnesty International, *Pattern Persists*, 14.

<sup>15</sup>See, e.g., John Branion, "Note, Recent Development: A World of Rape", *U.C.L.A. Women's Law Journal*, vol.2, 1995, pp.275-76; Mary Curtius, "Report Blasts Global Abuse of Women's Rights; 'Conflict Zone' Governments Found to be Worst Offenders", *Boston Globe*, March 8, 1994, p.2; Mark Fineman, "Pakistan Women Fear New Islamic Law May Blunt Struggle for Rights", *Los Angeles Times*, July 2, 1988, pt. 1, 5; Lori Heise, "When Women are Prey; Around the World, Rape is Commonplace – and the Victims Can't Fight Back", *The Washington Post*, December 8, 1991, pt. C1; Aslam Khan, "Zia's Islamic Democracy: Leading Pakistan into the Past", *The Nation*, June 29, 1985, p.791; Khan, "Zia's Islamic Democracy ..." p.27; Ahmed Rashid, "Rape Scandal Rocks Pakistan: Ahmed Rashid in Islamabad on a Gang Attack that is Exposing a Rotten State Machine", *Independent* (London), December 29, 1991, p. 14; Melissa Robinson, "Unveiled Rape in Pakistan", *New Republic*, March 9, 1992, p. 11; Deborah Scroggins, "Playing the Power Game with Rape Series: Women of the Veil", *Vancouver Sun*, July 13, 1992, p. A10; Katharine Whitehorn, "The Apartheid of Gender", *Observer* (London), June 19 1994, p. 23.

<sup>16</sup>See, e.g., U.S. Department of State, *Country Reports on Human Rights Practices for 1993, 1994*, 1370, 1382; Amnesty International, *Amnesty International Report* (New York: Amnesty International, 1994), 232–33; Amnesty International, *Women in Pakistan: Disadvantaged and Denied Their Rights* (New York: Amnesty International, 1995); Amnesty, *Double Jeopardy*, 53-60; Amnesty International, *Amnesty International Report 1992* (New York: Amnesty International, 1992), 207-8; Patel, *Socio-Economic Political Status ...*, 15, 19, 26-28 (citing activities of All Pakistan Women's Association, Pakistan Women Lawyers' Association, Pakistan Women's Rights Committee); Amnesty, *Pattern Persists*, 14, 35; Amnesty, *Torture*, 10-13; Jalal "The Convenience of Subservience ...", 103-9 (describing activities of Women's Action Forum in Karachi); Peregrine Hodson, "Bhutto Appeals for Reward over Moderate Stand", *Times* (London), November 26, 1994, p.16 (quoting Prime Minister Bhutto's urging to change the provisions of the Ordinance on *zina*); Anwar Iqbal, "Bhutto Seeks Laws Against Rape", *UPI*, August 1, 1995, available in LEXIS, News

Library, Upi File; Bushra Jabbar, "The Reality of Rape", *Economic Review* (Pakistan), July 1991, pp.7-8; Beena Sarwar, "Pakistani-Women: Bhutto Campaigns Against Domestic Violence", *Inter Press Service*, July 12, 1995, available in LEXIS, News Library, Inpres File.

<sup>17</sup>The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, Preamble; *Major Acts*, 10.

<sup>18</sup>Another verse generally urging against fornication states:

Devotees of Raḥmān [The Merciful] are those ... who do not invoke any god apart from God; who do not take a life which God has forbidden except for a cause that is just, and do not fornicate [*zinā*] and anyone who does so will be punished for the crime (25:63, 68).

Note that all English renditions of the Qur'ānic verses cited in this article come from the Ahmed Ali translation, published as *al-Qur'ān*, tr. Ahmed Ali (Princeton: Princeton University Press, 1984).

<sup>19</sup>The verse goes on to specify a relaxed evidentiary standard between the spouses, understandable given the personal nature such an accusation would have on the marital relationship:

Those who accuse their wives and do not have any witnesses except themselves, should swear four times in the name of God, the testimony of each such person being that he is speaking the truth.

And (swear) a fifth time that if he tell a lie, the curse of God be on him.

The woman's punishment can be averted if she swears four times by God as testimony that her husband is a liar.

Her fifth oath being that the curse of God be on her if her husband should be speaking the truth (24:6-9).

For further discussion of this spousal *zinā* situation, see Abdur Rahman I. Doi, *Women in Shariah (Islamic Law)* (London: Ta Ha Publishers, 1989), 126-28; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2d ed., 1991), 156; Muḥammad ibn Idrīs al-Shāfi'ī, *al-Risālah: Treatise on the Foundations of Islamic Jurisprudence*, tr. Majid Khadduri (Cambridge: Islamic Texts Society, 2d ed., 1987), 146-47. Note that here, there is no discrepancy in the weight of testimony based on the gender of the party, because in a charge of adultery between spouses, a woman's word is equal to that of a man.

<sup>20</sup>See Doi, *Shariah*, 236-40 (summarizing crime of *zinā*); Mohamed S. El-Awa, *Punishment in Islamic Law* (Indianapolis: American Trust Publications, 1982), 13-15 (general discussion of the law on the offence of *zinā* as laid down in Qur'ānic verses). The "proof of *zina*" section of the Offence of *Zina* Ordinance, which also requires four witnesses, comes to mind. Thus, in setting *zinā* as a crime in Pakistani law, and requiring four witnesses as necessary proof of such a crime, the Ordinance does in fact appear to be based, at least in structure, on

Islamic law. However, as discussed in the following sections, the details of the Ordinance and especially its subcategorization of rape as a type of *zina* is not an accurate implementation of Islamic law.

<sup>21</sup>See Doi, *Women*, 122; Muhammad Iqbal Siddiqi, *The Penal Law of Islam* (Lahore: Kazi Publications, 2d ed., 1985), 69; M. Cherif Bassiouni, "Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System", *The Islamic Criminal Justice System* (London: Oceana Publications, Inc., 1982) (citing the rule of thumb that hypothetical thread must not have been able to pass through the two bodies).

<sup>22</sup>See al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, tr. Muhammad Muhsin Khan, vol.8, Book 82, nos. 806, 810, 812-814, pp.528-35 (Beirut: Dar al-Arabia, 1985); Abū Dā'ūd, *Sunan Abī Dā'ūd* (tr. Ahmad Hasan), vol.3, Nos. 4413-14 (New Delhi, Lahoti Fina Art Press, 2d ed., 1990). It is interesting to note that although the man was punished based on his confession, the woman was apparently never prosecuted or even investigated. The significance of this point will be apparent later, in the discussion of the context of the Qur'ānic verses on *zinā*, and their impact on women's privacy.

<sup>23</sup>See Ma'amoun M. Salama, "General Principles of Criminal Evidence in Islamic Jurisprudence" in Bassiouni, *Criminal Justice System*, 109, 116-20. See also El-Awa, *Punishment in Islamic Law*, 126-27; Siddiqi, *The Penal Law of Islam*, 43-49.

<sup>24</sup>See Osman Abd-el-Malek al-Saleh, "The Right of the Individual to Personal Security in Islam" in Bassiouni, *Criminal Justice System*, 55, 69-70 (citing incident where Caliph `Umar ibn al-Khattāb and a companion passed by a party in which, behind locked doors, individuals were drinking alcohol; because of Islamic injunctions against spying, the two disregarded the private party and returned home). See also Siddiqi, *The Penal Law of Islam*, 19-20 (citing requirement to knock before entering a residence, even of one's family). But see *The Hedaya or Guide: A Commentary on the Mussulman Laws*, tr. Charles Hamilton (Delhi: Islamic Book Trust, 1982), Book VII, Ch.III, p.194 (allowing evidence unlawfully obtained).

<sup>25</sup>See Ṣubḥī Maḥmaṣānī, *Falsafat al-Tashrī fi'l-Islām: The Philosophy of Jurisprudence in Islām*, tr. Farhat J. Ziadeh (Kuala Lumpur: Penirbitan Hizbi, 1987), 23, 49, for the history and significance of the *Hedaya*.

<sup>26</sup>*Hedaya*, Book VII, 188. This statute of limitations, significantly, does not apply to a charge of slander. In addition to the above restrictions, where a *zinā* conviction is a result of confession rather than testimony, the confession may be retracted at any time (including during execution of the sentence). See Salama "General Principles of Criminal Evidence in Islam", 120.

<sup>27</sup>See Qur'ān 24:4 (stating that those who charge women with *zinā* and do not have four witnesses should be given eighty lashes and their testimony should not be accepted thereafter). See also al-Ṭabarī, *The History of al-Ṭabarī*, tr. G.H.A. Juynboll (Albany: State University of New York Press, 1989), 13: 110-14 (describing incident where Caliph `Umar punished witnesses supporting *zinā* charge against al-Mughīrah ibn Shu'bah, governor of Baṣrah because of conflicting details in the testimony of the eyewitnesses).

<sup>28</sup>See Salama, "General Principles of Criminal Evidence in Islam", 118, n.\* ("the nature of such rigorous proof makes it a crime of public indecency rather than adultery").

<sup>29</sup>Bassiouni, *Criminal Justice System*, 6. See also El-Awa, *Punishment in Islamic Law*, 17 ("The desire to protect public morality and to safeguard it against corruption by publicizing the offense, is the reason for limiting the methods of proof", p.29). ("This punishment is prescribed in fact for those who committed the crime openly ... with no consideration for the law or for the feeling of the community", quoting Muḥammad Muṣṭafā Shalabī, *al-Fiqh al-Islāmī bayn al-Mithāliyyah wa'l-Wāqī'iyah*, 1960, 201.)

<sup>30</sup>See *supra* text-accompanying note 22.

<sup>31</sup>See al-Ṭabarī, *Jāmi` al-Bayān `an Ta'wīl al-Qur'ān* (1910), 18:86-101, cited in D.A. Spellberg, *Politics, Gender, and the Islamic Past: The Legacy of `Aisha Bint Abi Bakr* (New York: Columbia University Press, 1994), 82; Akram Diya al `Umari, *Madinan Society at the Time of the Prophet*, tr. Huda Khattab (Herndon Virginia: International Institute of Islamic Thought, 1991), 2:82-84. Note that this is primarily a Sunnī account of the context of these verses. Many Shī'ī scholars do not attribute these verses to the "Affair of the Necklace" incident. See Spellberg, *Politics, Gender, and the Islamic Past*, 81-82 (citing the Shī'ī author al-Qummī, but also noting Shī'ī author al-Ṭabarsī, who took the Sunnī position).

<sup>32</sup>See, e.g., Dale Spender, *Man Made Language* (London, Boston: Routledge & Kegan Paul, 1980) (discussing the asymmetry of language and insults that tend to be based on women's sexuality).

<sup>33</sup>See Matthew Hale, *History of the Pleas of the Crown* (London: Assigns of Richard Atkins & Edward Atkins, Esq., 1778), 637-39. See also Rubya Mehdi, *The Islamization of the Law in Pakistan* (London: Curzon Press, 1994), 116, Sec. 3.3.1 (stating that before the *Hudood* Ordinances, the penal law of Pakistan included adultery as an offence, but defined it as intercourse by a man with the wife of another without his permission; women were not punished even as abettors); Afiya Shehribano Zia, *Sex Crime in the Islamic Context: Rape, Class and Gender in Pakistan* (Lahore: Asr Publications, 1994), 25-26 (stating that under the pre-*Hudood* criminal legal system inherited from the British, a complaint of adultery could only be lodged by the husband); Donald A. Dripps, "Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent", *Columbia Law Review*, vol.92, 1992, p.1782 ("Until the twentieth century, ... female sexual autonomy had little to do with the law of rape. The law instead struck a balance between the interests of males-in-possession and their predatory counterparts"). The Pakistani Penal Code prior to 1979 borrowed from this English common law of rape. See *Pakistan Penal Code*, 1869 Sec. 375 (repealed 1979), reprinted in R.A. Nelson, *The Pakistan Penal Code*, 1975, 2109-10 (legislating and elaborating on rape defined as "the ravishment of a woman without her consent, by force, fear, or fraud", citing English common law precedent).

<sup>34</sup>See, e.g., Amnesty International, *Human Rights are Women's Rights* (New York: Amnesty International, 1995), 92 (discussing honour killings in Egypt and Iraq).

<sup>35</sup>See *supra* nn. 26-29 and Qur'ān; 26:11-17 and accompanying text.



<sup>36</sup>See Qur'ān, 24:2.

<sup>37</sup>See nn. 7-9, and accompanying text.

<sup>38</sup>For more information and background on the five schools of Islamic law, see Maḥmaṣānī, *Falsafat al-Tashrī fi'l-Islām*, 15-39.

<sup>39</sup>See ibn Qudāmah Muḥammad al-Maqdisī, *al-Mughnī `ala-Mukhtaṣar al-Kharaqī* (Cairo: Dār al-Kutub al-`Ilmiyyah, 1994), 8:129, 145 (stating that Ḥanafī and Shāfi'ī schools of thought hold that pregnancy alone does not constitute sufficient evidence for punishment of *zinā*, but noting that the Mālikī school of thought presumes punishment unless there are signs of coercion); Siddiqi, *The Penal Law of Islam*, 71 (but citing `Umar's reported position that pregnancy furnishes sufficient proof of *zinā* against unmarried woman); Seminar, "Adultery and Fornication . . .", 271 (stating that majority of jurists hold that pregnancy is not *prima facie* evidence of *zinā*).

<sup>40</sup>See Mālik, *al-Muwatta'*, tr. `A'ishah `Abdarahman at-Tarjumana and Ya`qub Johnson (Norwich, England: Diwan Press, 1982), Section 41:4, p.392 (stating that an unmarried pregnant woman who claims that she was forced to have sex is liable for punishment unless she can prove her claim); Salama "General Principles of Criminal Evidence . . .", 121. See also El-Awa, *Punishment in Islamic Law*, 130-31 ("The offence of *zina* may be proved against an unmarried woman if she is pregnant", citing Mālikī jurists who considered circumstantial evidence important and admissible as proof).

<sup>41</sup>Salama, "General Principles of Criminal Evidence", 121. See also Abū Dā'ūd, *Sunan*, vol.3, no.4404 (quoting `Umar ibn al-Khaṭṭāb's statement that fornication exists "when proof is established or if there is pregnancy, or a confession"). See also al-Bukhārī, *Ṣaḥīḥ*, vol.8, Book 82, no. 816, 536-37.

<sup>42</sup>Salama, "General Principles of Criminal Evidence", 120-21 (summarizing the role of *qarā'in*, presumptions, or circumstantial evidence, in *ḥadd* jurisprudence).

<sup>43</sup>See *supra* Part I.B.

<sup>44</sup>See Qur'ān, 24:2.

<sup>45</sup>See *supra* nn. 4-5 and accompanying text.

<sup>46</sup>See *infra* Part II A.

<sup>47</sup>*Pakistan Penal Code*, 1860, Sec.375 (repealed 1979), reprinted in Nelson, pp.2109-10. For comparison, the *zina-bil-jabr* section reads:

A person is said to commit *zina-bil-jabr* 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 hurt, or
- d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is

given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

*Explanation.*—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of *zina-bil-jabr*.

The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, Sec.6; PLD 1979 Cent. Statutes, 52; Bokhary, *Law Relating to Hudood Cases*, 182 (with comment and annotation); *Major Acts*, 11-12.

<sup>48</sup>See, e.g., Dripps, "Beyond Rape ..."

<sup>49</sup>For example, on appeal of one rape conviction, the Pakistani Federal Shariat Court stated:

Wherever resort to courts is unavoidable for any reason, a general possibility that even though the girl was a willing party to the occurrence, it would hardly be admitted or conceded. In fact it is not uncommon that a woman, who was a willing party, acts as a ravished woman, if she is surprised when in amorous courtship, love-making or in the embrace of a man she has not repulsed.

See Zia, *Sex Crime in the Islamic Context*, 29 (quoting Federal Shariat Court); Nausheen Ahmed, "The Other Viewpoint", *Dawn*, Karachi, Pakistan, November 14-20, 1995, p.8 (weekly *Tuesday Review* Supplement) (citing case of alleged rape of fifteen-year-old girl where defendant was acquitted and court described the victim as a girl of "loose character" who "has a habitual case of enjoying sexual intercourse", reported at PLD 1982 Federal Shariat Court 241 (Pak.).

<sup>50</sup>See Hina Jilani, "Whose Laws?: Human Rights and Violence Against Women in Pakistan", Margaret Schuler, ed., *Freedom From Violence; Women's Strategies from Around the World*, 1992, 63, 72.

<sup>51</sup>See Jilani, "Whose Laws? ...", 71 ("The offence of rape (*zina-bil-jabr*) is also dealt with by the same law [of *zina*]. The effect of this is that rape has become more of a defense against prosecution for adultery or fornication, rather than being considered as an independent crime").

<sup>52</sup>For further explanation and distinction between *hadd* and *ta'zir* crimes in Islamic law, see El-Awa, *Punishment in Islamic Law*, 1-2; Siddiqi, *The Penal Law of Islam*, 158; Mohammed S. El-Awa, "Ta'zir in the Islamic Penal System", *Journal of Islamic and Comparative Law*, vol.6, 1975, p.41.

<sup>53</sup>See U.S. Department of State, *Country Reports on Human Rights*, 1372 ("in contrast to past years, women are now frequently granted bail for *Hudood* offenses, and convictions have been markedly reduced"); *Double Jeopardy*, 50-52; Mehdi, "The Offence of Rape", 23 (stating that under working law of rape, almost all cases are tried under *ta'zir*); Anika Rahman, "A View Towards Women's Reproductive Rights Perspective on Selected Laws and Policies in Pakistan", *Whittier L. Review*, vol.15, 1994, pp.981, 999-1000 ("Because of the difficulty of obtaining four male Muslim witnesses, men accused of *zina-bil-jabr* have in reality, become exempted from the maximum punishment. Although maximum *Hadd* punishments have been imposed, none have ever been carried out. The majority of *zina* or *zina-bil-jabr* cases are thus heard at the lesser *Ta'zir*

punishment level").

<sup>54</sup>The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, Sec.10; PLD 1979 Cent. Statutes, 53. The section goes on to prescribe the punishment for *zina* of imprisonment for ten years, thirty lashes, and a fine, and for *zina-bil-jabr* twenty-five years imprisonment and thirty lashes.

<sup>55</sup>See Anika Rahman "A View Towards Women's Rights ...", 1000.

<sup>56</sup>See also Patel, *Socio-Economic Political Status ...*, 30-31 (making same argument that there can be no *ta`zīr* punishment for *zinā*). This argument, in fact, was the basis of a challenge to the *ta`zīr* punishment implemented in *zinā* cases in Pakistan, *Ibid* (citing 1983 petition challenging 9(a) and 10 of the above Ordinance on this ground).

<sup>57</sup>See al-Shāfi`ī, *al-Risālah*, 247 ("only the witnesses in the case of adultery should be scourged").

<sup>58</sup>See *supra* Part I.B.

<sup>59</sup>See The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, Sec.18; PLD 1979 Cent. Statutes, 55.

<sup>60</sup>See *supra* nn. 19-26 and accompanying text.

<sup>61</sup>See *Hedaya*, Book VII, Ch. II, p.187 (defining compulsion generally); *al-Mughnī*, 8:129, 145 (including discussion of exemption from *zinā* liability for male forced to commit *zinā*); Seminar, "Adultery and Fornication ...", 269 ("it is an agreed position that females subjected to rape against their consent and without their will would be exonerated from any liability under Islamic law").

<sup>62</sup>See al-Bukhārī, *Ṣaḥīḥ* vol.8, Book 82, Ch.7; also *Mishkāt al-Maṣābīḥ*, tr. James Robson, 2d ed. (Lahore: Sh. Muhammad Ashraf, 1990), 7:762 (citing *ḥadīth* in Tirmidhī and Abū Dā`ūd).

<sup>63</sup>See Mālik, *Muwatta`a`*, Sec.41:3, p.392 (citing case where Caliph `Umar prosecuted the rapist of a slave girl and did not prosecute her); *al-Mughnī*, 8:129 (citing case where Caliph `Umar released a woman who asserted rape).

<sup>64</sup>See Mālik, *Muwatta`a`*, Sec.41:3, p.392.

<sup>65</sup>See, generally, Khaled Abou El-Fadl, "Law of Duress in Islamic Law and Common Law: A Comparative Study", *Islamic Studies*, vol.30, 1991, p.305.

<sup>66</sup>*Hedaya*, Books VII, XXI, pp.189-95, 353-54.

<sup>67</sup>*Ibid.*

<sup>68</sup>*Ibid.*, 187; see also *al-Mughnī*, 8:129.

<sup>69</sup>See El-Awa, *Punishment in Islamic Law*, 7-10; `Abd al-Raḥmān al-Jazā`irī, *Kitāb al-Fiqh `ala` l-Madhāhib al-Arba`ah* (Cairo: Dār al-Kutub al-Miṣriyyah, 1986), 5:409-11; Sayyid Sābiq, *Fiqh al-Sunnah*, 10th ed. (Makkah: Bāb al-Loq, 1993), 2:446 (chapter on *ḥudūd*, describing *ḥirābah*); Siddiqi, *The Penal Law of Islam*, 139-44. See also Doi, *Shariah*, 250 (explaining the context of this revelation: some people came to Prophet Muḥammad under the auspices of being new converts, complained that the weather in Madīnah was disagreeable to them, and the Prophet sent them to live outside the city with cattle belonging to the state; they subsequently killed the cattle keeper and stole the cattle and this verse was revealed shortly thereafter).

<sup>70</sup>See Doi, *Shariah*, 250, 254; El-Awa, *Punishment in Islamic Law*, 7.

<sup>71</sup>Sābiq, *Fiqh al-Sunnah*, 2:447.

<sup>72</sup>*Ibid.*, 450.

<sup>73</sup>Jazā'irī, *Fiqh al-Madhāhib*, 410-11 (summarizing Mālikī school definition of *ḥirābah* offender as someone who "obstructs the road, even without intending to take money, intending to harm someone, or intending to rape a woman").

<sup>74</sup>*Doi, Shariah*, 253.

<sup>75</sup>Sābiq, *Fiqh al-Sunnah*, 2:450.

<sup>76</sup>*Ibid.*

<sup>77</sup>See al-Bukhārī, vol.7, nos. 135-36; al-Ghazālī, *Ihyā' `ulūm al-Dīn [Marriage and Sexuality in Islam]*, tr. Madelain Farah (Salt Lake City: University of Utah Press, 1984), 2:106-7 (citing *ḥadīth* re: rights of wife for sexual pleasure); B. F. Mussallam, *Sex and Society in Islam* (Cambridge: Cambridge University Press, 1983), 27-38 (including the *ḥadīth* and discussion of contraception if it interferes with wife's sexual satisfaction); Symposium, "Religious Law: Roman, Catholic, Islamic and Jewish Treatment of Familial Issues, Including Education, Abortion in Vitro Fertilization, Prenuptial Agreements, Contraception, and Marital Fraud", *Loyola International and Comparative Law Journal*, vol.16, pp.10, 92 (citing schools of thought on role of woman's sexual pleasure in legality of marriage contract).

<sup>78</sup>Note that this principle could also be applied to expand the Islamic law of rape to include the rape of men as another instance of the violent taking of an individual's sexual autonomy.

<sup>79</sup>See *supra* Part I.C.2.

<sup>80</sup>See Ibn Qudāmah, *al-Mughnī*, 8:3 (introduction; describing law of *jirāh*, classification of injuries, etc.).

<sup>81</sup>*Ibid.*, Note that the law of *jirāh* (in addition to other principles of Islamic law) providing for compensation for physical harm even between spouses would support legislation against domestic violence.

<sup>82</sup>*Ibid.* (discussing varying applications of *jirāh* under four Sunnī schools of thought); Bokhary, *Law Relating to Hudoob Cases*, 219 (stating where someone is forced to commit *zina*, she is not punished for *zina*, but rather entitled to compensation).

<sup>83</sup>See nn.75, 76 above.

<sup>84</sup>This analysis would also provide for male rape victims.

<sup>85</sup>See Dripps, "Beyond Rape ..." 1780-81.

<sup>86</sup>Abū Dā'ūd, *Sunan*, vol.3, Book 33, No.4430; al-Bukhārī, *Ṣaḥīḥ*, vol.8, Book 81, Nos. 815, 821, 826.

<sup>87</sup>See *Major Acts*, 7.