Articles

NEVER WEAR YOUR SHOES AFTER MIDNIGHT: LEGAL TRENDS UNDER THE PAKISTAN ZINA ORDINANCE*

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CONTENTS

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I. OVERVIEW

The Zina Ordinance was promulgated in 1979 as part of the Hudood laws in an effort to Islamisize Pakistan. It regulates sexual behavior and offenses such as adultery, fornication and rape. As recently as 1996 and 1997, statistics indicate that almost one-half of all Hudood cases fall under the Zina Ordinance. Despite the social, legal and political impact of the Zina Ordinance in Pakistan, there is still little or no analysis of the substantive law relating to the Offence of Zina.

Instead, Pakistani practitioners as well as the Western media have focused their energies on publicizing a few "shocking" cases and on expressing their beliefs that the Ordinance is wrong and must be repealed. While it is true that there are problems with the Ordinance and that it has the capacity to support a social system which is highly biased against women, it is crucial that activists stop the debate on these points long enough to understand how the Ordinance actually affects the lives of women and girls in Pakistan. Until they do, they will remain denuded in their advocacy efforts because they will see neither the true impact the Zina Ordinance has on people living in Pakistan nor will they see that in the eye of the storm the judiciary is their greatest ally in ameliorating the practical impact of the Zina Ordinance.

This article will demonstrate that, while the body of law relating to the Zina Ordinance is varied, the Pakistani judiciary is developing case law that may assist future advocates and prosecutors in their efforts on behalf of their clients. Ignoring these judgments may prove detrimental as at some point the judiciary may simply fatigue itself. It may no longer be able to--or feel the need to--evolve in its application of the Ordinance because advocates, prosecutors and activists are not bringing information to the courtroom that can aid judges in understanding the social issues and values upon which they have been asked to adjudicate. For example, without external input, the judiciary cannot be expected to understand or have the time to contemplate issues such as what it means to be raped, why rape occurs in civilized society or the Islamic reasoning behind criminalizing adultery.

This article is meant to begin bridging the gap between the activists' passionate pleas for justice and the practical knowledge of how the Zina Ordinance has been used. It is hoped that advocates, prosecutors and activists will not only utilize the research results presented here to further the current judicial movement forward, but continue that research in future endeavors so that the harmful impact of the Zina Ordinance may be best reduced. To this end, this article summarizes extensive substantive law research of developments over the almost two decade period since the

inception of the Zina Ordinance.[1] Trends from the 1980s and the 1990s are emphasized, highlighting changes and developments of Zina law. The discussion has been grouped into six major areas of legal development with analysis and recommendations where relevant.

II. INTRODUCTION

Discussion of Pakistan in the West is often fraught with confusion, fear, ignorance and even anger. The myriad of mixed sentiments and misunderstandings evoked by the mention of "Pakistan" and "Islam" is captured well in Asifa Quraishi's statement:

> I remember as a child having to describe Pakistan as that small country next to India. I haven't used that description in a long time. By now, Americans have heard of Pakistan, and the reference is no longer exotic. Instead, the name conjures up confused images of women and non-Muslims in a third world country struggling to battle Islamic fundamentalism. Recent reports of the unjust application of Pakistan's rape laws, enacted as part of the "Islamization" of Pakistani law, further cement the impression that Islam is bad for women.[2]

These impressions ring particularly true in light of recent political events such as nuclear bomb testing, the proximity of Pakistan to the much-publicized Taliban fundamentalist Islamic forces, and frequent reports that Prime Minister Nawaz Sharif promises to further "Islamisize" Pakistan.

Promises and campaigns to Islamisize Pakistan are nothing new. Rather they serve as historical testimony to Pakistani politics. In fact, in many ways, Pakistan was borne out of a promise to Islamisize. The dominant theme of partition politics was the Muslim League's demand for a separate Islamic state in which Indian Muslims could freely enjoy an Islamic way of life. The Muslim League's political platform argued that being Muslim or Hindu went much further than religious identification--being Muslim constituted a cultural force. Indeed, upon partition from India in 1947, the first Constitution revealed in its Objectives Resolution that Pakistan was to be an Islamic, not a secular, state.[3] 3 And, as fate would have it, each time

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[1] This article contains primary case analysis that is based upon the author's original research. All statistical, numerical, and substantive analysis contained herein is based upon that research. This case analysis is on file with the author.

[2] Asifa Quraishi, *Her Honor: An Islamique Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*, 18 MICH. J. INT'L L. 287 (1997).

[3] See, e.g., Liaquat Ali Khan, *Speech on "Objectives Resolution" delivered to the Constituent Assembly* (March 7, 1949), THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN 1973, 177 (Irfan Law Book House, Lahore, 1st ed., 1992). See also Charles H. Kennedy, *Repugnancy to Islam - Who Decides? Islam and Legal Reform in Pakistan*, 41 INTL & COMP LAW QUARTERLY 769, 769 (1992).

Pakistan faced hard times, the leader most able to promise a stronger future of Islam prevailed.[4]

Probably the most critical time in Pakistan's history of Islamization, especially with respect to women, was in the late 1970s. After the independence of Bangladesh from Pakistan in 1973, Pakistan, for the first time ever, had a national consensus on a new Constitution.[5] A new era in Pakistan began with the adoption of the 1973 Constitution, whose key to public support was its traditional emphasis on strengthening Pakistan's Islamic character. By 1977, however, there were heavy demonstrations, rumors that Prime Minister Zulfikar Ali Bhutto's re-election had been rigged, and an essentially non-functioning government. The then-head of the military forces, General Zia-ul-Haq, led a military coup against the Bhutto government. Soon after, Bhutto was hanged on allegedly false murder charges despite the outcry of many human rights organizations who had hoped for an executive pardon.[6]

Zia succeeded in consolidating his position of influence and power by promising Islamic revivalism. He immediately implemented policies such as compulsory prayer, "traditional" dress and fasting; promoted Urdu as a national language; and encouraged vast media censorship.[7] Yet Zia's legacy had only just begun. In 1979 he promulgated the Hudood Ordinances in an

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[4] See, e.g., the political tension between Benazir Bhutto and Nawaz Sharif. Benazir was heavily criticized for not adhering enough to Islamic policy while Sharif promised new and stronger reforms. Similarly, in the time of Zulfikar Ali Bhutto and General Zia-ul-Haq, Bhutto lost support because he was accused of having forsaken Islam while Zia promised to revolutionize Pakistan with Islamic living (in banking, work and family life, and legally).
For discussion of Islamisation and its role in political leadership, see Kennedy, supra note 3, at 771. See also RUBYA MEHDI, THE ISLAMIZATION OF THE LAW IN PAKISTAN 25 & 32 (Curzon Press Ltd., 1994) (describing Zulfikar Bhutto as a modern secular politician in his time and reiterating the oftstated observation that Bhutto's opposition derived from the PNA's (Pakistan National Alliance) accusation that Bhutto was behaving "un-Islamically").

[5] This was critical nationally because prior to the independence of Bangladesh, Pakistan was divided geographically and ideologically such that it functioned as a weakened state. Bangladesh, then East Pakistan, did not prefer the more fundamentalist inclusion of Islamic law that West Pakistan did. In addition, there were wars between Pakistan and India over the border between the two. This further weakened Pakistan's ability to politically solidify and institute a governmental structure that could ensure stability and growth to the country. Bangladesh's independence opened the door to a new national spirit and resolve in West Pakistan; thus, the first national consensus on a constitution. See PAK. CONST. (1973).

[6] This was particularly disturbing and disappointing at the time because when Zia took over there were rumors, and many hoped, that Bhutto and Zia were in cahoots, collaborating for stabilization.

[7] See Mehdi, supra note 4, at 25-26.

ultimate effort to Islamisize Pakistan.[8] The Hudood Ordinance is a set of five Ordinances, or "statutes." Each covers a particular category of legal offenses.[9] The Ordinances are comprehensive in that they each provide definitions of the offenses contained therein as well as applicable evidentiary standards and punishments. For example, one Ordinance governs the laws relating to offenses against property such as theft while another governs the laws relating to prohibition. Most critical for the lives of women, particularly those from lower socio-economic classes,[10] was the Zina Ordinance. It removed the crime of rape from the Pakistan Penal Code[11] and placed it within the Ordinance alongside two new crimes: adultery and fornication, i.e., consensual intercourse outside a valid marriage by either previously married or unmarried persons.[12]

What made the Hudood Ordinance a unique part of the Islamization campaign was the inclusion in each Ordinance of Islamic evidentiary

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[8] Under Article 89 of the Constitution of Pakistan, the President may promulgate new law if the National Assembly is not in session and circumstances at the time require immediate legislation. Typically, the law will lapse in four months time if the National Assembly has not endorsed it; however, often times, and in the case of the Hudood Ordinance, the President simply reintroduced the law after the four months had lapsed. In Zia's time, Pakistan was under martial law, and thus, he could promulgate new law. See PAK. CONST. (1973) art. 89.

[9] The Hudood Ordinance includes the Ordinances for crimes against property, alcohol and narcotic consumption, zina (sexual misbehavior in the form of adultery or fornication and rape) and qazf (false accusation of zina). See Hudood Ordinance: 1) Offences Against Property (Enforcement of Hudood) Ordinance of 1979; 2) Prohibition (Enforcement of Hadd) Order of 1979; 3) Offence of Zina (Enforcement of Hudood) Ordinance of 1979; 4) Offence of Qazf (Enforcement of Hadd) Ordinance of 1979; and 5) the Execution of the Punishment of Whipping.

[10] See Mehdi, supra note 4, at 28-31, for a discussion of the effect of Islamization policies on various classes of women, e.g., adverse effect of sports and dress restrictions on upper class women versus the impact of social restrictions and resultant patriarchal scheme that more directly affects lower class women. In the latter sense, women from lower classes are more affected by the Zina Ordinance because the Ordinance laws promote an environment of male control over women allowing for charges of fornication to be made against women who, for example, do not comply with their fathers', brothers', uncles', or pre-arranged partners' wishes that they marry a particular person. This issue will be discussed in more depth in the Harassment Section of this article. See infra text 217-229. Note, as well, that bail fines in place of jail time or stripes, which as of 1996 have been abolished as a punishment, will clearly more adversely affect women who have lesser financial means. See infra note 118 and accompanying text.

[11] See Offence of Zina (Enforcement of Hudood) Ordinance No. VII of 1979, §§ 3 and 19(3) in PAKISTAN LEGAL DECISIONS 1979 Cent. Statutes 51 [hereinafter Zina Ordinance]. See also infra note 35 and text at pp. 190-194.

[12] See Zina Ordinance, supra note 11, preamble; See also ASHFAQ BOKHARY, LAW RELATING TO HUDOOD CASES (1992); SHAUKAT MAHMOOD & NADEEM SHAUKAT, HADOOD LAWS (MUSLIM PENAL LAWS) 29 (1994).

standards and punishments. In fact, the word "Hudood" is actually the plural form of "Hadd," a term denoting the Islamic legal categorization of crimes for which God has already prescribed definition and punishment.[13] Although many Islamic countries such as Saudi Arabia[14] had previously included Islamic punishments in their criminal codes, to date Pakistan had not. Strikingly, this aspect of the Ordinances has been heralded as the center of debate. However, in reality, despite convictions under the Ordinance, the corresponding Islamic, or Hadd, punishments have never been administered in Pakistan.[15]

Moreover, they are only a small part of the Hudood Ordinance. As was mentioned above, each Ordinance includes definitions of offenses, evidentiary standards and punishments. This means that while the Hadd punishments and corresponding evidentiary standards are part of the Ordinance, so too are the evidentiary standards and punishments that do not fall under Hadd. These alternative evidentiary and sentencing guidelines are referred to as Ta'zir standards.[16] Ta'zir essentially means that the standards

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[13] See Mahmood & Shaukat, supra note 12, referring to ABDUR RAHMAN I. DOI, SHARI'AH: THE ISLAMIC LAW 221 (1984).

[14] See generally Amnesty International, "Saudi Arabia: An upsurge in public executions," AI Index: MDE 23/04/93 (15 May 1993). See also generally DAVID E. LONG, THE KINGDOM OF SAUDI ARABIA, University Press of Florida, 1997. Note that, in fact, Saudi Arabia does not have a written comprehensive civil, criminal, or commercial code. Instead, Saudi Arabia officially follows "Islamic law," which includes Islamic punishments according to Shariah, e.g., stoning to death for married women who commit adultery.

[15] See ASMA JEHANGIR & HINA JILANI, THE HUDOOD ORDINANCES: A DIVINE SANCTION? 32 (Lahore: Rhotac Books, 1990) [hereinafter A Divine Sanction?]. But see HUMAN RIGHTS WATCH, DOUBLE JEOPARDY: POLICE ABUSE OF WOMEN IN PAKISTAN 60 (1992), citing *First Public Flogging Under New Law*, DAWN, November 2, 1991, p.l, as a newspaper article discussing a public flogging of three men who were convicted for raping a minor girl. [hereinafter Human Rights Watch Report]. The Human Rights Watch Report does not mention a case name or whether the persons were convicted under Hadd or Ta'zir, thus, this may have been a "non-sanctioned" flogging. Moreover, the Report states in another section that no Hadd punishments have been carried out in Pakistan, thus implying that this flogging was not a Hadd sentence. Id. at 53. While there have been some floggings as a result of Ta'zir sentencing, which permits a certain number of stripes depending on the crime, in fact, the Punishment of Whipping Ordinance has been repealed, and is no longer applicable.

[16] Unlike with Hadd offenses, the evidentiary requirements for Ta'zir offenses are not part of the Ordinance itself. The evidentiary standards and rules governing Zina Ordinance offenses which are liable to Ta'zir are contained in the Qanun-e-Shahadat [The Law of Evidence]. The Qanun-e-Shahadat was enacted in the early 1980s to replace the British colonial Evidence Act of 1872 so that evidence laws could be better interpreted in light of Islamic theory and practice. However, portions of the Pakistani Penal and Criminal Codes which have not been repealed still function simultaneously in Ta'zir cases. Thus, although the Ordinance does not itself create

written into the Ordinance are created by the legislature, not derived from Islam or the Koran. Although the ongoing debate and publicity surrounding the Ordinance has focused on Hadd,[17] and not Ta'zir, it is Ta'zir which dominates the standards and punishments administered by the courts today. Thus, this article focuses on judgments under Ta'zir.[18]

In reaction to Zia's Hudood Ordinance, human rights organizations as well as activists and women's groups from within Pakistan gathered in revolt against the institution of the Zina Ordinance. Almost overnight women felt endangered and bitter about the advent of Islamic law in Pakistan. In fact, for the first time in Pakistan, women banded together in a women's movement, creating coalitions for women's rights that had not previously existed.[19]

Much of their activity and increased passion to rally against the Ordinance derived from some of the early decisions of the Pakistani courts

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the evidentiary standard for proof in Ta'zir cases, external legal sources dictate that in rape cases, for instance, the prosecution must prove their case to the satisfaction of a preponderance of the evidence standard. Moreover, this means that the judiciary has ample discretion to rely on any evidence that is admissible--photos, testimony, medical records, etc.--under the general criminal law for conviction or acquittal of the accused. See Mahmood & Shaukat, supra note 12, at 51, citing KLR 1982 FSC 129.

In contrast, the Ordinance does provide a set sentence for those offenses which are liable to Ta'zir. See Zina Ordinance, supra note 11, § 10: for adultery and fornication, a maximum sentence of ten years rigorous imprisonment + whipping numbering 30 stripes + liable to a fine; for rape, a minimum imprisonment term of four years, which may not extend to more than twenty-five years + 30 stripes.

Rigorous imprisonment is a harsher form of imprisonment sentencing utilized in the Pakistani criminal system. Stripes are lashes or strokes in whipping. Although the Ordinance still includes this as punishment, in fact, whipping as a sentence was abolished in the Pakistani criminal system in 1996. See Punishment of Whipping Act (1996).

[17] For almost twenty years now, the Western media and Pakistani activists have exploited the inclusion of Hadd punishments because they sound extreme and inordinately severe, i.e., stoning to death if the convicted was Muhsan (validly married and sexually active with the partner at one time), and 100 stripes, or lashes, in a public place for non-Muhsans (persons who have never been validly married). See Zina Ordinance, supra note 11, § 5. In addition, activists have targeted the evidentiary standards for debate on the discriminatory nature of the Zina Ordinance because proof of sexual activity under the Zina Ordinance for Hadd requires: 1) a confession; or 2) four male Muslim (unless the victim is non-Muslim) eyewitnesses to the act of penetration. See id. § 8.

[18] Presently, prosecutors, activists, and the media have paid little attention to the offenses which fall under Ta'zir other than the debate that they are by definition un-Islamic. See, e.g., Quraishi, supra note 2, at 310-12.

[19] Again, the focus and debate was predominately on the issue of clear discrimination against women in evidentiary standards and the harshness of Islamic punishments so new to a country like Pakistan.

with respect to Zina Ordinance cases. These early 1980s cases inadvertently solidified intense public opposition to the Zina Ordinance. For instance, in 1982, a fifteen-year-old girl, Jehan Mina, was convicted under Hadd because the Court took her state of pregnancy--due to rape by her uncle--to be an automatic confession of fornication.[20] Similarly, Safia Bibi, a young blind girl, who had been raped by a landlord and his son, was convicted of zina (adultery) because she had borne an illegitimate child. Meanwhile, the accused were given the benefit of the doubt due to a "lack of evidence" and dismissed from the trial altogether.[21]

Both of these judgments and others like them were ultimately overturned, and, in fact, as previously mentioned, Hadd punishments have never yet been administered in Pakistan. Moreover, in the 1990s, the Pakistani courts almost never adjudicate on the basis of Hadd evidentiary standards and sentencing. In fact, the type of evidence necessary to trigger Hadd has always been at such a high threshold that it has been virtually impossible to successfully plead a case on this basis. Instead, the Ta'zir standards have been utilized. Despite these realities, however, the majority of activists and writers on the topic of the Zina Ordinance focus on either the severity and unjust "application" of Hadd or on Islamic arguments against the Ordinance. Consequently, almost twenty years after the inception of the Zina Ordinance, little has been said other than "they are bad--repeal, repeal, repeal."[22]

Activists, advocates and prosecutors speak out in outrage against the Zina Ordinance; yet, they do not know how many cases of rape and adultery are reported each year, how many are settled out of court, how many result in conviction at the district court level, or even what constitutes the underlying substantive law of the Zina Ordinance.[23] Instead, current legal

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[20] Mst. Jehan Mina v. State, PAKISTAN LEGAL DECISIONS [hereinafter PLD] 1983 Federal Shariat Court [hereinafter FSC] 183.

[21] Mst. Safia Bibi v. State, PLD 1985 FSC 120.

[22] Ascertained through discussions with Pakistani advocates and activists, news clippings still calling for repeal, and current protest slogans which essentially translate as "Repeal; Repeal; Repeal."

[23] Currently, there is no log of the Zina cases brought to and/or adjudicated at the district court level. Moreover, there is no reference on the docket indidcating whether the case was a rape or zina case, nor are the judgments written in a standard or typed format accessible to lawyers interested in working in this area. Only upon appeal are the case files retrieved from their storeroom and organized to form the appeal case file that results in the fact summaries and judgments later reported on in the Pakistani law reporters. There are no law reporters in Pakistan that highlight these cases nor are there systems to track these cases. All of the citations found here, as well as statistical results referenced in this article, refer to the decisions of the High, Federal Shariat, and Supreme Courts of Pakistan. Much of the real work to be done with regard to the Zina Ordinance is actually at the district court level, or the court of first instance. The results of cases on appeal, as seen throughout this article, substantiate the general belief in Pakistan that the district courts are

strategies focus on procedural aspects of individual cases such as which documents must be filed when and where. The legal arguments utilized do not appear to move into the substantive case law of the Zina Ordinance. Rather, they focus on the narrow facts of the case at hand. Many advocates, particularly at the lower court level, act on the assumption that prior case law is unimportant and unhelpful and that, ultimately, appeal is a possibility and perhaps a forum in which these issues can be discussed in more depth.[24] While it is true that appeal is a technical reality, it is not a practical reality for many. More importantly, it is an avenue that could be avoided were advocates to argue Zina Ordinance cases more effectively from the start. Public debate and rally efforts against the Ordinance itself outside the courtroom are simply not enough to influence the effect of the Zina Ordinance on the populace of Pakistan.

The Zina debate is now more or less at a standstill. Pakistan is sensing world pressure after the nuclear bomb contest with India. Its populace desires a move toward security. In the traditional pattern, Prime Minister Nawaz Sharif is promising to further Islamisize Pakistan.[25] Simultaneously, the Muslim world is invested in Pakistan surviving as an Islamic state. Removal of the Zina Ordinance, whether right or wrong, is highly unlikely to happen in the current political environment. Thus, it is more critical than ever that prosecutors, advocates and activists truly understand the nature of the Zina Ordinance and its implications and impacts on Pakistani society.[26]

This article attempts to move the debate beyond the current standstill by providing empirical research results and extensive case law analysis necessary to understand the substantive law of the Zina Ordinance. It will begin with a detailed examination of the structure of the Ordinance so that readers may more easily follow case law discussion. From there, discussion of the substantive law of Zina will take place in the context of identification

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inadequately adjudicating Zina cases. Research into those cases as well as legal education efforts as to appellate court decisions should commence as soon as possible. If not, only those privileged to have the time and financial security to proceed to appeal will benefit from the analysis discussed in this article.

[24] See, e.g., interviews with Danish Zuberi, attorney; staff at WAR; and Ayesha Malik, attorney, Karachi, Pakistan (Mar.-May 1998); see also observations in court proceedings and reading of case files by author.

[25] See generally *Pakistan Premier Proposes an Islamic Society Based on Koran*, N.Y. TIMES, Aug. 29, 1998, at A2; see also Dexter Filkins, *Pakistan Moves Toward Full Islamic Law*, L.A. TIMES, Oct. 10, 1998, at A1.

[26] Empirical research for the years 1996 and 1997 showed that close to 50% of all Hudood Ordinance cases fall under the Zina Ordinance. As such, the Zina Ordinance is a practical issue for women, not merely an issue raised by the press or an opposition platform. Given the numbers of cases (75+) a year, it becomes more critical than ever that advocates et al understand the nature of Zina law. See generally PAKISTAN CRIMINAL LAW JOURNAL [hereinafter PCr.LJ] (1996-97) and PLD (1996-97).

and analysis of six legal trends that span the almost two-decade period since the inception of the Zina Ordinance. The following trends will be traced, highlighting changes in the law as well as possible interpretations of current case law:

1. Consent issues;
2. Pregnancy as a basis for conversion of rape claims against women;
3. Judicial conversion of rape claims for the benefit of the accused;
4. Adultery claims as evidence of undue harassment against women, and not justice;
5. Delay in reporting rape or adultery issues; and
6. Medical evidence issues as they relate to judicial decisions and guide rules of corroboration.

Many of these six sections inevitably intermingle, causing confusion when attempting to understand any one area in isolation. Where possible, this article will direct the reader to other relevant sections that discuss the issue either in more detail or differently. For example, the issue of whether there are "marks of violence" on a rape victim's body is an issue discussed in both the Consent and the Medical Evidence Sections and, to a lesser degree, in the Delay Section. The reader will, therefore, be directed to these corresponding sections as all three play critical roles in understanding the importance of "marks of violence" as evidence in a rape case.

This article aims to provide conclusions, suggestions and recommendations for working successfully within the current process until repeal is possible. It is not, however, an attempt to replace the need for a comprehensive and unbiased text on the law of the Zina Ordinance. Rather, this article hopes to begin the process of creating a collective understanding of the Zina Ordinance by highlighting the legal developments emerging through Zina case law since the early 1980s.[27] To this end, this article includes a substantial amount of case decision quotations for the benefit of advocates, prosecutors and activists in the field who wish to replicate the voice of the Pakistani judiciary in their efforts to establish a fairer rule of Zina law. Relevant case law and statistical findings, particularly for the latest year, 1997, will be discussed in the body of this article as a convenient base from which to compare legal developments since the promulgation of the Hudood Ordinance in 1979.

It should be noted as well that this article includes three parallel Appendices: Appendix A, 1994; Appendix B, 1995; and Appendix C,

[27] Efforts to trace trends and developments from the early 1980s until 1988 revealed and publicized problems such as: pregnancy as a physical confession to zina even where the woman alleges rape; judicial conversion of rape to zina for male accused; zina charges being used to harass women; attempt and preparation versus actual rape; Christian divorce issues; surety issues; and police brutality. See A Divine Sanction?, supra note 15 (has served as authoritative text on Hudood Laws for many advocates in the field).

1996.[28] 28 Each Appendix analyzes all Zina Ordinance cases reported in the Pakistan Criminal Law Journal (PCr.LJ) for that particular year.[29] As such, year-relevant statistical and substantive interpretations of the results will be highlighted, inevitably touching upon some of the major trends and issues discussed in the body of this article. The Appendices also include more comprehensive case discussion and citations for those interested in the basis of research findings or who want to use the case law as a basis to pursue particular trends in more detail than can be provided in an overview article such as this. Where possible, the author will direct the reader to the appropriate Appendix.

III. THE STRUCTURE OF THE PAKISTAN ZINA ORDINANCE

A. Pre-Zina Ordinance

Prior to the enactment of the Zina Ordinance, the Pakistan Penal Code of 1898[30] dealt with all criminal offenses. Fornication, i.e., consensual intercourse between a man and a woman who are both unmarried, was not considered a criminal or punishable act. Adultery and rape, on the other hand, were considered criminal acts punishable under the Code.[31]

Adultery, however, was an extremely limited offense only applicable to married men who had engaged in extra-marital sex with a married woman without the direct permission of her husband. Only the victim - the husband whose permission had not been sought - could file a complaint of adultery. Women could not file complaints against their husbands nor could they themselves be charged with adultery.[32] The composition of these laws was

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[28] The author read all Hudood Ordinance cases appearing in the Pakistan Criminal Law Journal (PCr.LJ) in 1997, checking head notes for accuracy. Because the accuracy rate for these issues was extremely high, statistics and general trend observations for the years 1994-1996 are based predominately on the head notes. Where there was a specific point of law or a particularly relevant case, the author read the case in its entirety.

[29] The Pakistan Criminal Law Journal is one of the main court reporters in Pakistan. Like the Pakistan Legal Decisions series and other reporters, the journal is not obliged to report on particular cases. It is the general impression among advocates, however, that the PCr.LJ reports on the majority of criminal cases, including crimes falling under the Zina Ordinance. For this reason, the bulk of analysis was taken from the PCr.LJ Cross-references to the PLD, however, were made to ensure research accuracy.

[30] The late 1800s Pakistan Penal Code was framed by the Britishers for the whole of India. Pakistan, until the late 1970s, used this Code as its Criminal Code. Portions of the Code that have not been altered by subsequent legislation are still in force today. See PAK. PEN. CODE (1898).

[31] See, e.g., PAK. PEN. CODE § 375 (1898) (rape).

[32] RASHIDA PATEL, ISLAMISATION OF LAWS IN PAKISTAN 41 (1986) (Karachi: Faiza Publishers), citing PAK. CODE CRIM. PROC. § 199.

not accidental. In fact, when the Penal Code was framed in 1860, the framers made a conscious effort to exclude women from liability. They stated, for instance, that they did not believe women could legally or practically protect themselves against the possibility of being charged with, and convicted for, adultery in the socio-cultural environment that existed at that time.[33]

The offense of rape under the Code was fairly similar to what it is today under the Zina Ordinance, with three major exceptions.[34] First, the Code covered forced intercourse, which constituted rape, even when it was said to have occurred within the context of a valid marriage. The Zina Ordinance, however, does not have a marital rape provision. Second, the Code included a statutory rape provision, which made consensual and nonconsensual intercourse with girls under the age of fourteen "rape" - even if there was a valid marriage between the partners. The Zina Ordinance does not have a similar provision. And, third, under the Code, only men could be charged with the offense of rape. The Zina Ordinance, on the other hand, permits accusations of rape against both men and women. Thus, the assertive efforts the Framers made to protect women from being accused of adultery, or even rape, and to protect them from violation even where a valid marriage existed, were foiled by the new laws the Zina Ordinance brought to bear.

B. The Zina Ordinance

The enactment of the Zina Ordinance abolished all Pakistan Penal Code sections which dealt with adultery and rape, replacing them with the new law dictated in the Ordinance itself. Although old case law may be used to substantiate, define, and distinguish evidentiary issues relating to the offenses of adultery or rape, the Zina Ordinance itself is currently the only black-letter law of adultery and rape. Similarly, portions of the Penal Code that dealt with the offenses of kidnapping and prostitution for illicit sexual purposes, and which overlapped with the new Zina law, were also repealed. Section 3 of the Zina Ordinance specifically states:

> *Ordinance to override other laws.*--The provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force.[35]

The Zina Ordinance is essentially comprised of a preamble and 22 sections. The preamble states that the Zina Ordinance was included in the Hudood Ordinance "to modify the existing law relating to zina so as to bring it in conformity with the Injunctions of Islam."[36] Section 1 clarifies the title,

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[33] See id. at 42.

[34] See id. at 48-50 for a traditional analysis of pre- and post- Zina Ordinance rape laws. See also PAK. PEN. CODE § 375.

[35] Zina Ordinance, supra note 11, § 3. See also id. §§ 19-20.

[36] See id. at preamble.

scope, and commencement of the Ordinance, while the final sections of the Ordinance deal with practical issues relating to its implementation.[37] The heart of the Zina Ordinance resides in Sections 2-16. These sections cover the definitions necessary to apply the Ordinance, provide elements for the offenses contained within the Ordinance, include evidentiary proof standards to be met for Hadd conviction, and prescribe punishments for both Hadd and Ta'zir offenses.[38] Although the Zina Ordinance covers the offenses of kidnapping and prostitution,[39] those offenses will not be directly addressed in this article.[40]

The remaining sections of the Zina Ordinance focus on the offenses of "zina" and "zina-bil-jabr."[41] Section 4 of the Ordinance defines Zina as follows:

> *Zina.* A man and a woman are said to commit 'zina' if they wilfully have sexual intercourse without being validly married to each other.[42]

For the purposes of the Ordinance and this article, the term zina encompasses both fornication and adultery, the two forms of criminalized consensual intercourse outside the scope of a valid marriage.[43] Thus, unmarried consensual partners may be charged with zina. The difference

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[37] See id. §§ 19-22.

[38] See infra notes 41-49 and accompanying text.

[39] Zina Ordinance, supra note 11, § 11-16.

[40] Sodomy will also not be heavily addressed in this article. Sodomy case law comes under the Zina Ordinances at times because Section 377 of the Pakistan Penal Code can be filed in conjunction with a Section 16 abduction claim under the Ordinance. Sodomy cases focus predominantly on issues of medical evidence. See, e.g., Muhammad Ibrahim alias Papu v. State, 1996 PCr.LJ 2504 (discussing penetration requirements in sodomy cases); Tajammal Hussain v. State, PLD 1989 (SC) 747 (interpreting medical evidence in discussion of attempt versus manifest sodomy-rape); Muhammad Rafique and another v. State, 1984 PCr.LJ 1003, 1005 (refusing bail to accused on basis of "cruel and heinous" quality of crime).

[41] See Zina Ordinance, supra note 11, §§ 2-10.

[42] Id. § 4.

[43] Although this Section highlights the black-letter law of the Zina Ordinance, it must be noted that one critical problem with the law as it is utilized in judgments is the use of the word "Zina." Judges consistently refer to both rape and zina as "Zina." This becomes clear when reading the decisions quoted throughout the article. However, in terms of the body of this article, the use of "zina" refers only to adultery and fornication, while the use of "rape" or "zina-bil-jabr" refers to non-consensual intercourse between unmarried persons. At times, the author uses the term "zina-adultery" interchangeably with "zina." This does not connote any differentiation between adultery and fornication. The term is simply used at points in which the author wants to emphasis consensual versus nonconsensual (i.e., rape) intercourse by using the word "adultery." When "Zina" or "Zina law" appear on occasion in the text of this article, not in quotations, the term is meant to encompass both adultery and rape (i.e., the Zina Ordinance laws generally).

between adultery and fornication arises only in the context of Hadd punishments, not in terms of evidentiary standards or elements of the crimes.[44]

Zina-bil-jabr (zina with force) essentially means rape. The terms "rape" and "zina-bil-jabr" will be used interchangeably throughout this article in reference to nonconsensual intercourse. Section 6 of the Zina Ordinance defines zina-bil-jabr in the following manner:

> 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 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.[45]

In sum, either a man or a woman can commit rape if he or she engages in intercourse with a person of the opposite sex without the will or consent of that person.[46] Furthermore, if consent is granted on the basis of fear or deceit, it becomes void. As mentioned in Section A above, rape within a marriage is not considered a crime under the Zina Ordinance. Nor does statutory rape remain a crime.

Zina and zina-bil-jabr liable to Hadd are further defined in the Ordinance in Sections 5 and 6(2). The standards of proof and a list of circumstances in which Hadd punishment will not be carried out are contained in Sections 8 and 9.[47] 47 Because Hadd punishments have never been carried out and few, if any, prosecutors actually attempt to meet those evidentiary requirements in support of their case, Hadd issues will not be further discussed in this article.[48]

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[44] More specifically, under Islamic punishment, or Hadd, married persons proved to be engaging in extra-marital sex are sentenced to a punishment of stoning to death, while fornicators will be sentenced to whipping of 100 lashes.

[45] See Zina Ordinance, supra note 11, § 6.

[46] To date, no men have filed charges of rape against women. Consequently, this article often refers to the victim as female and the accused as male.

[47] See Zina Ordinance, supra note 11, §§ 5-6, 8-9.

[48] Note that this is not to say that trial courts have never awarded Hadd punishment. On appeal, however, Hadd has been overturned in all but three cases (unrelated to the discussion in this article, and never actually enacted). See A Divine Sanction?, supra note 15.

Zina and zina-bil-jabr liable to Ta'zir are further clarified in Section 10 of the Zina Ordinance, probably the most frequently used section of the Ordinance. Section 10 is essentially a default provision. When there is either no confession or insufficient eyewitnesses--the Hadd requirements--conviction for rape, adultery or fornication under Ta'zir is the only possibility; thus, Section 10 takes effect. This does not mean that Sections 4 and 6, which define the crimes of zina (adultery and fornication) and zina-bil-jabr (rape), are no longer operative. It simply means that if the Court finds an accused guilty of either zina or zina-bil-jabr, the judge will look to Section 10 for guidance in sentencing; the Court will not look to the Hadd sections, i.e., Sections 5, 6(2), 8 and 9, of the Ordinance. Section 10 prescribes punishment for adultery/fornication and rape as follows:

> 10(2) Whoever commits zina liable to tazir shall be punished with rigorous imprisonment for a term which may extend to ten years . .
>
> 10(3) Whoever commits 'zina-bil-jabr' liable to tazir shall be punished with imprisonment for a term which [shall not be less than four years nor more than] twenty-five years . . . .[49]

In sum, the Zina Ordinance replaced the British Penal Code of 1898 for the offenses of adultery, rape, and some aspects of kidnapping and prostitution. Essentially one-half of the Ordinance deals with the offenses of zina (adultery) and zina-bil-jabr (rape). The majority of that law defines proof standards and punishments for offenses liable to Hadd. In fact, only Section 10 actually deals with zina and zina-bil-jabr liable to Ta'zir.

In the course of analyzing twenty years of cases decided under the Zina Ordinance, six trends have been identified in the development of the law: consent issues; pregnancy as a basis for conversion of rape claims against women; judicial conversion of rape claims for the benefit of the accused; adultery claims as evidence of undue harassment against women, and not justice; delay in reporting rape or adultery issues; and medical evidence issues as they relate to judicial decisions and guide rules of corroboration. Each of these trends will be discussed below in the hope that advocates and prosecutors will be able to ameliorate the discriminatory impact the Zina Ordinance sometimes has on innocent women.

IV. Six Legal Trends of the Pakistan Zina Ordinance

A. Consent

The relevance of consent in Zina Ordinance cases arises in two contexts. At the first level of analysis, the Court must determine whether the alleged offense constitutes illegal nonconsensual intercourse or illegal consensual

[49] Zina Ordinance, supra note 11, § 10 (emphasis added).

intercourse. In other words, did the First Information Report (FIR),[50] or police report, charge the accused with rape (Section 10(3) of the Ordinance) or zina (Section 10(2) of the Ordinance)? If the case is based on an allegation of zina, consent in that context is implied between the partners; the only job left for the prosecution is to prove that intercourse occurred between those two people outside the scope of a valid marriage contract.[51]

If, on the other hand, the case is based on an allegation of rape, consent arises in the context of a defense. In order to rebut the prosecution, Pakistani practitioners have typically utilized the following defense strategies: 1) Demonstrative evidence implying consent on the part of the victim, such as delay in reporting or physical evidence such as an absence of injuries on the victim's body; 2) Evidence or testimony of a woman's poor moral character, suggesting her implicit consent; and 3) Demonstration of enmity, or ill-will, between the parties sufficient to suggest the victim's motivation to falsify a claim of rape against the accused. In addition, the defense has, at times, put forth evidence or testimony of a valid marriage between the victim and the accused at the time of the alleged intercourse. This defense goes to the heart of the charge since the Pakistani Zina Ordinance does not recognize rape between two married individuals.

In order to counter these defenses, some prosecutors have argued that, in certain circumstances, the victim is unable to consent. Their position is that in situations such as gang rape,[52] rape at gunpoint,[53] or sexual intercourse between a young victim and a substantially older male, such as her father,[54] diminish the ability of the victim to will or consent to the intercourse.[55]

This section has been subdivided into the following five areas of substantive development of zina law as they pertain to the use of consent in defense or rebuttal of the allegations before the court: demonstration of consent as a defense; poor moral character as an indication of consent; the enmity defense; the marriage defense; and inability to consent.

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[50] A First Information Report is a police report required in all Zina Ordinance cases in Pakistan. Many activists have suggested that the fact that anyone may make a FIR about persons whose conduct is unconnected to them without incurring personal liability has encouraged criminalized adultery to be used as a coercive tool of attack against women. Qazf legislation was meant to curb the possibility that false charges would be brought; yet, few Qazf cases are brought to court and almost none have succeeded.

[51] See Zina Ordinance, supra note 11, § 4.

[52] See generally Muhammad Qasim v. State, 1997 PCr.LJ 1095; Muhammad Riaz v. State, 1997 PCr.LJ 1114.

[53] See Muhammad Nawaz v. State, 1997 PCr.LJ 893, 894; Muhammad Sadiq v. State, 1997 PCr.LJ 546, 549 (upholding conviction, and suggesting the sentencing should have been more harsh).

[54] See Muhammad Ashraf v. State, 1997 PCr.LJ 1351, 1353.

[55] Italics refer to word choice in Zina Ordinance, supra note 11, § 6.

1. *Demonstration of Consent as a Defense*

The Zina Ordinance does not indicate that proof of non-consent is a legal element of the crime of rape. Thus, Pakistani Courts have never required a victim to prove rape was nonconsensual per se. In fact, consent has most often appeared as an element of the defense. The prosecution may, however, present a lack of consent in its case-in-chief to further substantiate the brutality of the rape.

Under Pakistani rape law, the Courts have often adopted the view that non-consent is something that should be physically observable; therefore, the absence of physical indicators of rape may signal consent. Decisions from the 1980s reveal that Courts frequently implied consent because the physical condition of the woman victim did not reveal a story of rape. Proof of intercourse and circumstantial evidence supporting rape were simply not enough. Her inability to display enough cuts, bruises, or broken bones signaled to the Court that she had inadequately resisted and had, therefore, consented.[56] As the Court in Ubaidullah v. State[57] noted, "since no violence was found on her body, it could be reasonable to infer that she was a willing party to sexual intercourse."[58]

Such evidence has serious legal consequences. In the 1980s, Pakistani Courts frequently deemed evidence of consent a signal to convert rape charges against the accused to zina charges. Either the Court implicitly altered the woman's complaint of rape by convicting the accused under Section 10(2), offence of zina, instead of Section 10(3), offence of rape; or,

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[56] See discussion under Judicial Conversion, infra notes 136-138 and accompanying text. See also Bahadur Shah v. State, PLD 1987 FSC 11, 12; Bashir and Nawab v. State, NLR 1986 SD 347; Sultan Maqsood v. State, NLR 1986 SD 5; Sohail Iqbal v. State, PLD 1983 FSC 514, 515; Ubaidullah v. State, PLD 1983 FSC 117; Niamat Ali v. State, PLD 1982 FSC 220; Mst. Khananul Haq v. State, PLD 1982 FSC 126; Ihsan Ahmad alias Nanna v. State, 1980 PCr.LJ 1037.

[57] PLD 1983 FSC 117.

[58] See id. at 123 (representing these facts in the judgment: the victim was betrothed to the accused. At some point, the engagement broke off. Two years later the accused, with five armed men, abducted and raped the victim. The medical examination "found sufficient evidence to show on examination of the vagina . . . that she had been subjected to sexual intercourse," yet the Court still convicted the accused under Section 10(2) of the Zina Ordinance.).
Consequently, the woman's aggressor was convicted of zina--just in case the victim really had been a willing party. In turn, this decision permitted the Court to escape the mandatory minimum sentence of four years that is required under the Zina Ordinance for all rape convictions. See Zina Ordinance, supra note 11, § 10(3). See also Bahadur Shah, PLD 1987 FSC at 15 (stating, "She was bound to sustain injuries like bruises, contusions, scratches or abrasions on different parts of her body as she was supposed to put up resistance."); Khoedad Khan and another v. State, PLD 1980 Pesh. 139, 144 (stating that no marks of violence is indicative of a victim's consent).

where consent in some form was established in the early stages of the case, the woman herself became subject to a charge of zina as a co-accused.[59] The fundamental issues relating to the legality and practice of judicial conversion of rape to zina as well as the possibility that consent may have multiple meanings within the context of the substantive law of the Zina Ordinance will be addressed in more depth in the Judicial Conversion of Rape to Zina Section of this article, Section C below.

In Mst. Jehan Mina v. State,[60] the Court went one step further in its interpretation of consent. Fifteen-year old Jehan Mina became pregnant through rape, but was called as an accused to the act of zina because she had not sufficiently proven that her pregnancy was the result of rape.[61] One of the more telling comments made by the Federal Shariat Court (FSC)[62] in converting her sentence from a Hadd conviction to the "lesser" Ta'zir sentence[63] was:

> [Mst. Jehan Mina] did not take the position that the zina had been committed with her at a secluded place in a jungle where she could not cry for help. [Furthermore], she has not even explained as to what force or threat [was] used against her when she was subjected to zina-bil-jabr . . . .[64]

The issues of pregnancy as consent and a basis for zina-adultery charges against women are further discussed in Section B below.

More recent decisions from the 1990s discussing the issue of consent have begun to show a subtle change from earlier decisions. The judiciary is disguising itself more than ever behind the veil of "appreciation of medical evidence." Rather than argue outright that the victim consented, courts rely

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[59] n59 See discussion in A Divine Sanction?, supra note 15, at 85.

[60] PLD 1983 FSC 183.

[61] See id.

[62] The Federal Shariat Court (FSC) was established in 1980 for the purpose of providing a Court that would adhere to the injunctions of Islam. It effectively reorganized and centralized (took the place of) the Shariat benches Zia had established in 1978 in each of the High Courts, also for the purpose of ensuring that no judgment passed was repugnant to the Quran or Sunnah. See Constitution (Amendment) Order of 1980. See also discussion in Human Rights Watch Report, supra note 15, at 19-20 & 98-101, citing Stephen P. Cohen, State Building in Pakistan, in THE STATE, RELIGION, AND ETHNIC POLITICS 349 (Ali Banuazizi & Myron Weiner eds., 1986); Kennedy, supra note 3, at 772-773.
The FSC is the Court of Appeals for all Hudood Ordinance cases. It must approve all Hadd convictions and has the discretion to review any and all Hudood cases. "Federal Shariat Court" and "FSC" are used interchangeably throughout this article.

[63] Under Hadd she would be given 100 stripes, but under Ta'zir she had to serve three years rigorous imprisonment and take 10 stripes. Furthermore, if she wanted to remain home with her newly-born baby for a short two years she was required, as a poor woman mind you, to furnish a bond of Rs.2,000 in only 2 weeks time.

[64] Mst. Jehan Mina v. State, PLD 1983 FSC 183, 187.

heavily on the Medico-legal Report[65] (MLO Report) presented in court, often stating matter-of-factly that since the MLO Report did not indicate any marks of violence, they were inclined to find there had been consent on the part of the victim. Please refer to the Marks of Violence Section under Medical Evidence for further discussion, in Section F below.

2. *Poor Moral Character as an Indication of Consent*

As one Pakistani advocate boldly states:

> Today all women, whether in the West or East, are tormented by the concept of 'consent' in rape cases. It is not the infidelity of women which is a problem in Pakistan, but the exploitation of women in the name of chastity.[66]

Not surprisingly, a sub-issue of consent is the use of the morality of women victims against themselves. While this is not a problem unique to the Zina Ordinance, its application is particularly harsh. Pakistani Courts have ruled that testimony of women of "easy virtue" loses its evidentiary weight. In fact, in a 1997 Federal Shariat Court case, the Court states that:

> The rule laid down is that when a victim is proved to be a woman of easy virtue, her credibility is lost and no reliance can be placed on her testimony.[67]

This position is directly supported by the Qanun-e-Shahadat, or the Law of Evidence utilized in Pakistani Courts for offenses liable to Ta'zir, which states:

> when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of [a] generally immoral character.[68]

In a text of judicial commentary about the Law of Evidence, Justice Khalilur-Rehman Khan explains that the immoral character of a woman creates an inference that she was a willing party to the alleged rape. Thus, in fairness to the defense, the Court must accept evidence to impeach her statement.[69] Such evidence may be placed before the Court even where she

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[65] The Medico-legal Report (MLO Report) is the standard medical examination report for all Zina Ordinance cases. Each rape victim and all accused--of rape or zina--are medically examined. Observation and conclusions are written on a standardized medical form.

[66] See A Divine Sanction?, supra note 15, at 87.

[67] Muhammad Khalil alias Kach v. State, 1997 PCr.LJ 1639, citing Muhammad Sadiq v. State, 1995 SCMR 1403 and Yaqoob v. State, 1996 SCMR 1897.

[68] QANUN-E-SHAHADAT, art. 151(4) Impeaching credit of witness.

[69] JUSTICE KHALIL-UR-REHMAN KHAN, 2 PRINCIPLES & DIGEST OF THE QANUN-E-SHAHADAT (10 of 1984), 1816 (1993) Vol. II, arts. 70-166, 1816 (PLD Publishers: Lahore) (providing commentary for art. 151(4)).

has not been called as a witness or, if called, not asked about her chastity on cross-examination.[70] Specific acts of immorality, however, are only admissible as evidence when properly put to the victim-complainant during cross-examination.[71] As would be expected, courts in the 1980s often granted bail or acquittals on the basis of an accused's defense that the woman's morals implicitly revealed her consent.[72]

More recent decisions from the 1990s indicate a divergence developing in the Court's willingness to rely heavily on morality as a defense. In some cases, for example, Courts are still saying that:

> No implicit reliance can be placed on the statement of a woman of easy virtue unless some other independent evidence of commission of Zina by the accused with her is available on record.[73]

Alternatively, courts imply a woman's lack of morals by making comments such as "each and every allegation made by a certain abductee in her statement . . . should not be viewed a gospel truth."[74]

Yet, in 1996, a bail application brought by a man accused of zina-bil-jabr "under threat" resulted not only in the Court's refusing bail, but in the Court explicitly stating that the morality of the victim, "whether she has a good character or bad," is immaterial to having succeeded in making out a Zina case.[75] Likewise, in a 1997 case, the Court rejected the argument that because the accused woman belonged to a regional class of Pakistanis that are said to engage in premarital intercourse, her medical examination results

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[70] See id.

[71] See id.

[72] See Abduk Kalam v. State, NLR 1986 SD 61 (granting accused bail because MLO Report said woman "habitual"--She was a married woman.); Shabbir Ahmed Watto v. State, 1983 PCr.LJ 2014, 2015 (granting pre-bail because woman found to be "habitual to intercourse"); Muhammad Abbas v. State, 1982 PCr.LJ 982, 982 (bail awarded to alleged rapist based on, inter alia, evidence presented that alleged victim "led a life of adultery for 8 months"); Falek Sher v. State, PLD 1982 FSC 240, 244 (acquitting, reasoning "[it] appears Mst. Zakhran is a girl of loose character and was a habitual case of enjoying sexual intercourse"); Latif v. State, 1980 PCr.LJ 1101, 1104-05 (acquitting defendant because alleged rape victim was "reputed to be immoral in the village [and] she was not a woman of virtue."); 1982 PSC 1197 (on file with Pakistan College of Law) (indicating woman of loose character accustomed to sexual intercourse cannot be believed without strong corroboration).

[73] Juma Gul v. State, 1997 PCr.LJ 1291, 1295 (acquitting woman victim and her accused, who were both convicted in the lower courts of zina-adultery), citing Muhammad Sadiq v. State, 1995 SCMR 1403.

[74] Zafar Iqbal v. State, 1995 PCr.LJ 943, 944 (granting bail).

[75] Yaran Khan v. State, 1996 PCr.LJ 984, 985.

and, impliedly, her testimony must be given less evidentiary weight.[76] Thus, there may no longer be an operative presumption that the case is baseless against the accused just because an immorality defense is raised. While some judges still seem to readily accept the immorality defense, others have become less willing to entertain such defenses.

While morality per se may be undergoing a change in acceptability as a defense, the issue still arises cloaked in conclusions offered as medical evidence. More than ever before, doctors, rather than defense counsel and accused persons or witnesses, have become the arbiters of morality by concluding, when they see fit, that a woman is "used to sexual intercourse."[77]

3. *The Enmity Defense*

A splinter issue of consent that cannot be ignored is the issue of enmity, or ill-will. In 1995 alone, 38% of all acquittals for accused rapists involved the issue of enmity.[78] While enmity was not the sole reason for acquittal, the possibility of maliciously founded allegations certainly weighted the decision against the victim-complainant. Similarly, bail applications that suggested some enmity between the parties resulted in bail granted for the accused,[79] while a lack of enmity helped to support the refusal of bail in close to 20% of all 1995 Bail Refusals.[80]

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[76] See Gul Sambar Khan and another v. Damad Khanb and another, 1997 PCr.LJ 1261, 1268-69 (wherein counsel for the accused argued on acquittal that the positive report of the Chemical Examiner should not have been given evidentiary weight because it was a known fact that the Chitrali people (Northern Pakistani group) engaged in premarital intercourse; thus, the positive test results were inferable due to the woman's illicit interactions with her fiance. The Court rejected this argument, but only on the basis of the circumstances of the present case.).

[77] Please refer to the Medical Evidence Section of this article for further analysis and discussion, in Section F below. See infra text notes 398-408 and accompanying text.

[78] See Ghias Ahmad alias Shado and another v. State, 1995 PCr.LJ 650, 652 (explaining existence of "previous blood feud enmity" among parties); Munir Ahmad v. State, 1995 PCr.LJ 1745, 1747-48 (including evidence of previous litigation and enmity in acquittal of the accused); Muhammad Aslam v. State, 1995 PCr.LJ 157, 159 (justifying acquittal based on, inter alia, determination that charge appeared to have been levelled against the accused "on account of some differences" between the parties' families).

[79] See, e.g., Manzoor Ahmed v. State, 1995 PCr.LJ 1139, 1140 (granting bail, and noting that "previous enmity . . . is also established [and] the possibility of false involvement cannot be ruled out"); Shahadat Ali alias Shahadat v. State, 1995 PCr.LJ 636, 637 (granting bail and indicating that the "question of enmity" will be addressed at trial).

[80] Case analysis on file with author. See, e.g., Ahmad alias Lota v. State, 1995 PCr.LJ 1906, 1907 (refusing bail in part because counsel for the accused "was unable to point out any enmity to falsely implicate the petitioner [accused]"); Dost Muhammad v. State, 1995 PCr.LJ

As of 1997, however, enmity seems to have lost its power of persuasion in the Pakistani Courts. The judiciary appears to be spending more time dismissing, and even condemning, the defense of enmity than in permitting it to play a key role in determining the legitimacy of the woman's plea of rape. All 1997 Pakistan Criminal Law Journal (PCr.LJ) cases involving enmity were cases on appeal. Of these appeals, three rape convictions were upheld in part on the basis that there was no evidence of animus or animosity souring the validity of the women's allegations.[81] In the other cases, the Court outright rejected the enmity defense. In all but one of these cases, the Court dismissed the suggestion of enmity as implausible and absurd, and upheld the conviction and sentence.[82] In fact, the FSC Court did not simply reject the pleas and go about its business. It boldly stated:

> No woman of Pakistani society would expose herself to the infamy of the attempt of Zina-bil-Jabr with her on a trifling altercation between the appellant and a distant relation of the complainant;[83] and
>
> Prosecutrix being a married woman could not be expected to have falsely implicated the accused in such a heinous offence without any rhyme or reason at the risk of her honour and married life;[84]
>
> and
>
> [the enmity suggested by the defense] cannot be termed as an enough raison d'etre for a married middle-aged woman to involve her own respect, reputation and create a permanent scar on her own face in a society like the one which exists in Pakistan;[85]
>
> and
>
> [enmity] cannot be a reason for [victim's father] lodging a false report of Zina against the accused because the reporting of an occurrence of commission of Zina with a daughter, sister or wife . . . puts on stake the reputation, honour and future of the girl also as well.[86]

1812, 1813-14 (refusing bail where counsel for the accused unable to show malice on the part of the complainant).

[81] See Muhammad Aslam v. State, 1997 PCr.LJ 1689, 1695; Muhammad Riaz v. State, 1997 PCr.LJ 1114, 1121; Muhammad Sadiq v. State, 1997 PCr.LJ at 546, 548.

[82] See generally PCr.LJ (1997). But see State v. Mushk-e-Alam, 1997 PCr.LJ 1082, 1087 (dismissing state's appeal and letting acquittal stand as "possibility of the accused having been falsely implicated on account of personal grudge or enmity cannot be ruled out," although there appeared to be poor medical evidence which could have served as its own basis for dismissal).

[83] Khadim Hussain v. State, 1997 PCr.LJ 1714, 1716 (upholding conviction despite defendant's claim of enmity).

[84] Muhammad Nawaz v. State, 1997 PCr.LJ 893 (upholding conviction and sentences; quotation paraphrased from discussion at page 895).

[85] Muhammad Qasim and another v. State, 1997 PCr.LJ 1095, 1102 (upholding conviction).

[86] Karam Hussain v. State, 1997 PCr.LJ 1717, 1721 (upholding conviction). Note the similarity of the language the Court uses, on the one hand, to defeat enmity claims in rape cases where the rejection of these claims will ultimately support the women alleging rape

Thus, the Federal Shariat Court appears to have recently banished the enmity defense--unless there is clear substantiation of enmity allegations and other evidence that further weakens the prosecution's case. While it is not certain whether this trend is temporary or the foundation for enduring precedent, recent cases powerfully reject past decisions that imply women are morally defunct creatures who are apt to bring false claims. It is critical that advocates and prosecutors fully utilize this trend before it is possibly overshadowed by more discriminatory case law.

4. *The Marriage, or Nikah, Defense*

The Zina Ordinance criminalizes sexual intercourse that does not take place within the context of a valid marriage. Under Pakistani family law, a Nikahnama, or Nikah, serves as proof of a valid marriage.[87] In Western terms, a Nikah is essentially an Islamic marriage contract. It must be signed willingly by both parties to the marriage in the company of a certain number of witnesses who certify the validity of the marriage. Sexual intercourse between people who are a couple and planning to marry, but who have not yet proceduralized the marriage, is still a criminal offense.[88]

Not surprisingly, then, another tool which has been utilized to imply consent in rape cases is the defense's production of a Nikahnama between the accused and the female victim. Upon production of the Nikah, Pakistani Courts in the 1980s were sometimes led to presume the victim's consent to intercourse such that the accused was quickly released on bail or acquitted.[89]

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while, on the other hand, to question the legitimacy of its own statements in the context of zina-adultery cases. Given its general acceptance that many zina claims are brought for harassment value, the Court paradoxically uses the same standard to credit one set of cases and discredit another. For a comparison, see infra note 171 and accompanying text.

[87] See generally Muhammad Azam v. Muhammad Iqbal, PLD 1984 SC 95 (discussing Nikah issues fully).

[88] The Family Court, not the FSC, has been empowered to determine whether the Nikah is valid, irregular, or void. See Kennedy, supra note 3 (discussing constraints on jurisdiction of Federal Shariat Court, e.g., art. 203-B of the 1985 Constitution of Pakistan, as interpreted by Federation of Pakistan v. Mst. Farista, PLD 1981 SC 120).

These distinctions will not be discussed in depth in this article. However, it is important to note that in terms of the Zina Ordinance, the Nikah sanctifies sexual intercourse between the parties to the Nikah agreement. Thus, the condoning effect of a valid Nikah remains whether the Nikah serves as evidence in a zina case or in a rape case. Yet, as this article argues, the presumptive effect of this legality should not adversely affect the outcome of rape cases in which a fraudulent Nikah is presented as a defense.

[89] See Allah Ditta and another v. State, PLD 1989 (SC) 744, 745-46 (discussing bona fide plea of Nikah in defense of rape charge); Ali Hussain, NLR 1986 SD 27 (Supreme Court canceling bail because the Nikah date was two days after the FIR was registered); Muhammad Ashraf v. State, 1983 PCr.LJ 2432, 2433-34 (granting bail despite victim's claim that marriage never occurred). But see Muhammad Amin and another v. State, 1982 PCr.LJ

While it is true that the Nikah does and should serve as a valuable piece of evidence in defense of zina charges against married couples, it does not logically follow that the same presumptive benefit should be extended to those accused of rape. Rape victims are often under a great deal of physical pressure as it is and could easily be forced into signing marriage documents under threat. The defense should bear the burden of proving that the Nikah is valid, and thus indicative of consent, as the prosecution must in zina cases. Production of the Nikahnama must not function as "a passport to bail."[90] If it does, there is exists the danger that rape will vanish as a punishable crime because the ultimate defense is so readily available.

Unfortunately, the Nikah defense in rape cases is not unique to the 1980s.[91] As recently as August 1997, the FSC dealt directly with this very topic.[92] The woman complainant claimed that she had been abducted and raped over the course of several weeks, and had been forced under threat of death to sign and thumbprint the Nikahnama in question. The accused, however, stated that the woman had been so in love with him that she eloped, despite severe parental constraints, and happily signed the Nikahnama in front of five witnesses. The Family Court had previously declared the Nikahnama irregular,[93] which brought issues such as the number of witnesses present for the Nikah signing and the consensuality of the agreement to the forefront. The presiding FSC judge, Justice Dogar, looked past discrepancies in the accused's version of facts and the lower court's conviction, and sided with the accused.[94] He even went so far as to maintain that because the accused had reason to believe he was validly married to the complainant, he could not, by definition, rape her.[95] Accordingly, Justice Dogar acquitted the accused of all charges, stating that:

110, 110 (declining petition for bail because the abductee stated Nikah signatures were obtained under threat).

[90] A Divine Sanction?, supra note 15, at 114.

[91] See Zafar Iqbal v. State, 1995 PCr.LJ 943, 944 (granting bail to accused even though abductee says Nikah was forged); Attique Ahmad and others v. State, 1994 PCr.LJ 2217, 2218 (granting bail upon determination that examination of genuineness of Nikah between accused and abductee ex facie constituted further inquiry); Muhammad Tariq v. State, 1994 PCr.LJ 1879, 1880 (granting bail until genuineness of Nikah, alleged by the abductee to have been forced, is determined in Family Court).

[92] See Sana Ullah v. State, 1997 PCr.LJ 1666.

[93] A determination that a marriage is irregular in Islamic marriage and family law invalidates the marriage contract from that moment of determination onwards, although it does not make the union void during the questionable time period. Issues which bring upon determinations of irregularity may include a lack of witnesses or other evidentiary standards that support a valid contract of marriage. As previously stated, supra note 88, it is the Family Court, not the FSC, that has authority to adjudicate on these matters; thus, the FSC must accept the determination of the Family Court that the Nikah was "irregular" and act in understanding of what that means in law.

[94] See Sana Ullah v. State, 1997 PCr.LJ 1666, 1670-71.

[95] See id. at 1672.

> ....willful [as used in Section 4 of the Zina Ordinance] commission of Zina cannot be alleged against a person who believes for good reasons that the woman with whom he is having sexual intercourse was his wife and he had entered into marriage with her lawfully.[96]

In an article written for WAR, a Karachi-based Women's Aid Non-Governmental Organization, this author queried whether this decision means "[that] any old Nikah and some witnesses will do in defense of a woman's plea of rape?"[97]

5. *Inability to Consent: Changes in Judicial Understanding of Incest and Social Power Relationships*

Incest is one example of a counter to the defense of consent because of the inability of the victim to consent. The Zina Ordinance case law addressing incest is an area in which great progress has been made toward protecting women and girls. As previously discussed, the old British colonial penal code provided a limited statutory rape law for girls under the age of fourteen.[98] However, the Zina Ordinance removed all implication of an existing statutory rape provision. The Courts were left to carve out this trend on their own.

As late as 1988, the Pakistani Courts, were completely denying that incest was a possibility. In Masood Aziz, for instance, a man raped his nine-year-old daughter. Immediately after, she told her brother what had happened, and together, they went through the registering and medical examination procedure. From the outset, both she and her brother maintained their stories. The medical evidence fully corroborated the rape and, in fact, the young girl's father was convicted in two different trials at the maximum sentence. However, this man was, in the end, acquitted--essentially because the Federal Shariat Court could not accept that a father would rape or even abuse his own flesh and blood.[99] Similarly, the Supreme Court of Pakistan stated in Liaquat Ali that the issue of whether a father can

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[96] Id. This decision begins to touch upon the volatile issue of marital rape. It not only clarifies once again that under the Zina Ordinance there is no room for discussion or interpretation of marital rape, but further emphasizes that at present, and despite legislative reforms, certain Pakistani judges would likely be unable to accept the occurrence of marital rape as a possibility. Interestingly, it appears that a woman can, however, register a FIR against her husband for sodomy. See Syed Munawar Ali Shah v. State, 1988 PCr.LJ 688(2), 689.

[97] Julie Chadbourne, *Rape-Schmape, Zina-Wina: What are our courts telling us?*, WAR NEWSLETTER (WAR (War Against Rape), Karachi, Pakistan), 1998.

[98] See supra notes 31-34 and accompanying text.

[99] See Masood Aziz, Crim Appeal No. 288/L of 1988. Although the FSC implied that it based its decision on some minor discrepancies in the record, one can infur that the crux of discussion and dissension was this issue of impossibility.

commit zina-bil-jabr with his real daughter "needed serious probe."[100] In contrast, the Courts have held non-biological fathers to a different standard. Almost a decade earlier the Pakistani appellate courts accepted with ease that males who have assumed the position of "father," such as stepfathers, were capable of rape and worthy of conviction.[101]

The use of different legal standards for biological and non-biological "fathers" is beginning to disappear. As of 1997, the judiciary in Pakistan seems to have leapt out from behind its benches to declare that a child subjected to sexual intercourse by her real father, or a man who could be her father due to a significant age disparity, is a man of the most despicable sort, worthy of condemnation and conviction for a heinous offense. In fact, consent in the context of incest cases has developed its own set of rules. Rather than allow the morality or physical condition of the female victim to take precedent in the courtroom, the judiciary has eliminated a defense of consent in cases which demonstrate any dynamic of power, domination, fiduciary duty, or dependent relationship between the victim and offender.

For instance, in Muhammad Ashraf v. State, the Court declared that a young girl could not, by definition, consent to sexual intercourse with her father.[102] The Court emphasized that the Zina Ordinance defines zina-bil-jabr as being against the will of the victim as well as without consent. Where consent is an impossibility, any act against the person becomes "against her will," thus constituting rape.[103] The Court further restricted consent in cases in which there is an utter lack of availability of choice or faculty to choose by holding that:

> The very force of circumstances may constitute Jabr (Ikrah). [Furthermore,] even if no threat was given, the very position of command, supervision, sustenance, shelter and protection which [a] father possess[es] as against his daughter constitute[s] sufficient compulsion that resistance or abstinence cannot be expected.[104]

Going one step further, the FSC, in another case, declared that the absence of any mark of violence on the body and genital area of the victim could not serve as proof of the victim's consent where the accused was old enough to be the victim's father. Thus, even where the man is not the girl's real father, but has a position of authority over her, the Court seems to be

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[100] Liaquat Ali, NLR 1988 SD 494.

[101] See Hamid Khan v. State, 1981 SCMR 448, 450-51 (upholding conviction of a man who raped his 14/15 year old stepdaughter).

[102] See Muhammad Ashraf v. State, 1997 PCr.LJ 1351, 1366. Note as well that the judge declared the sentence of twenty-five years of rigorous imprisonment, a sentence which is unusually high for anything falling under the Zina Ordinance, was "proper and in no way excessive." Declarations along these lines may substantiate suggestions that judges act more quickly and harshly in favor of minors or otherwise disadvantaged victims.

[103] Id. at 1360.

[104] Id. at 1366.

holding that per se consent cannot be implied.[105] Note, however, that in this case there was no delay in registering the case and the medical evidence corroborated the victim's testimony, both factors which the Court would typically find supportive on their own.[106] Therefore, what may appear to be a positive trend may, in fact, only be idiosyncratic.

Either way, it is clear that the issue of consent has taken great strides and developed new facets over the last ten years. Where consent was once a battle over morality and marks of violence, the subtleties now include implied non-consent where the power dynamics between the victim and accused prevent free choice.[107] For example, in Muhammad Khalil alias Kach v. State,[108] the prosecutor made the argument that by definition his client could not have consented to the alleged rape because the accused was a landlord's son who held great authority and power over her, the daughter of a tenant.[109] Critically, the Federal Shariat Court did not baldly refute this plea even in light of its decision not to extend an implied non-consent argument in this particular case.[110] This may be the beginning of a new and positive trend in the area of consent under Pakistan rape laws.

B. Pregnancy as a Basis for Conversion

Although pregnancy features in the above discussion of consent, it has held its own place in trends under the Zina Ordinance. As such, pregnancy used as a means for converting a rape allegation against the accused to a charge of zina-adultery against the victim herself warrants its own discussion.

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[105] See Muhammad Sadiq v. State, 1997 PCr.LJ at 546, 548.

[106] See infra text pp.229-260.

[107] See, e.g., Muhammad Ishtiaq v. State, 1995 PCr.LJ 1736, 1738. In determining that a woman's pregnancy was a result of her rape, the Court discusses power dynamics between the woman and her accused, highlighting presumptions which may lead to an extension of the types of cases that fit into a presumptive category of no-choice:

It is common knowledge and judicial notice of which can also be taken that in our rural society the feudal lords are very powerful. All the menial workers and artisans of the village are at the mercy of the landlords. They have to obey every command of the feudal lords and specially their women folk lead a miserable life because they are free source of enjoyment to the feudal lords. Of all the residents in the village, the prosecutrix has directly named and charged the appellant for subjecting her to Zina-bil-Jabr which would clearly establish that the appellant was guilty of subjecting her to rape.

[108] 1997 PCr.LJ 1639.

[109] See id. at 1645.

[110] See id. at 1644-45 (noting, however, that the Court found the woman (originally the victim) to be a "very clever girl." Based on this quality in addition to her poor medical evidence ("habitual" etc.), a long delay in reporting rape, and her pregnant status, the Court could not buy this "hypothetical proposition.").

1. *Pregnancy as Confession in the 1980s*

An aberration in Zina Ordinance case law in the 1980s was the extent of the concept of confession. Section 8 of the Ordinance states that proof of zina or zina-bil-jabr liable to Hadd may be in the form of "the accused [making] before a Court of Competent jurisdiction a confession of the commission of the offence."[111] Hadd punishment is immediate upon confession. However, if an accused revokes his or her statement, the Court is forced to convict or acquit under Ta'zir. It may then utilize its discretionary power to admit evidence permissible under the general criminal law of Pakistan.[112]

While confession has typically been regarded as an oral admission of guilt, judicial decisions under the Zina Ordinance have not always been restricted in this way.[113] In the early 1980s, physical confession in the form of pregnancy was used on more than one occasion as proof of zina. For example, in both Allah Bux and Mst. Fehmida v. State and Mst. Sakina v. State, two couples were convicted of zina because the Court determined that the women's pregnancies had occurred prior to the couples' Nikahs.[114]

In Mst. Nehmat Bibi v. State, an anonymous tip stating that the woman's husband had been in Iran during the time of conception served as the basis for registering a First Information Report of zina against a pregnant married woman. In her fifth month of pregnancy, Mst. Nehmat Bibi was convicted of zina due to her unavoidable physical "confession" and the fact that someone had anonymously stated that her husband could not be the father. As irony will provide, her husband was not in Iran for months at a time, but in Balochistan,[115] and simply never contacted about the charges until they had gotten out of hand.[116]

Some of the more tragic victims of the early courts' misapplication of the concept of "confession" were the girls and women who became pregnant by rape. The Jehan Mina case is a classic example. Jehan Mina, a fifteen-year-old, was raped by an uncle and a cousin. As a result, she became pregnant. The Court took her "unexplained" state of pregnancy as an automatic

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[111] Zina Ordinance, supra note 11, § 8(a).

[112] See supra note 16. See also Mahmood & Shaukat, supra note 12, at 51, noting that where one of the four eyewitnesses recants his testimony prior to the implementation of Hadd punishment, the Court may no longer convict under Hadd, but "the Court may award tazir on the basis of the evidence on record," citing Wali Muhammad v. State, PLD 1983 FSC 1.

[113] See A Divine Sanction?, supra note 15, at 54-55.

[114] See Allah Bux and Mst. Fehmida v. State, PLD 1982 FSC 101 (wherein the lower court convicted the couple under Section 5, Zina liable to Hadd, on the finding that Mst. Fehmida's pregnancy occurred two weeks prior to the couple's Nikah. The couple recanted their confessions so the case was remanded, and, ultimately, the couple was not convicted.); Mst. Sakina v. State, PLD 1981 FSC 320 (lower court convicting couple because the date of pregnancy was deemed to have been prior to the Nikah date; FSC later overturned).

[115] Balochistan is the western-most province in Pakistan, i.e., not far from the wife's abode.

[116] See Mst. Nehmat Bibi v. State, PLD 1984 FSC 17 (defendant was eventually acquitted).

confession of zina liable to Hadd. She was convicted and sentenced while her uncle and cousin were acquitted despite having presented no defense.[117]

The decision of the FSC on appeal was critical in the Jehan Mina case. Although Jehan Mina remained convicted, the Court lowered her conviction to the "less severe" Ta'zir structure.[118] This decision marked the beginning of a change in the way the Court views pregnancy. On appeal, pregnancy was not considered an automatic confession. Instead, it was evidence of sexual intercourse implicating Mst. Mina in the offense of zina. To rebut that presumption and achieve acquittal, Mst. Mina was required to establish non-consent to the intercourse that resulted in her pregnancy. However, factors of morality and delay in reporting the incident served as evidence of her consent and, therefore, guilt.[119]

And therein lies the dilemma. While an accused rapist's innocence was elevated to an untouchable status, often resulting in acquittal for want of evidence, the onus of guilt shifted severely to the pregnant victim who suddenly found herself struggling to fight off an almost automatic conviction for zina.[120] As advocates in the field noted at the time, "silence [had become] as risky as making a complaint of rape."[121] A victim who did not yet know her pregnancy status faced a brutally difficult choice. She must either move forward immediately with a "water-tight" prosecution case that would allow absolutely no room for the Court to imply consent that might warrant conversion of the rape charge into a charge of zina against her; or, she must wait silently, and in full prayer, that she had not become pregnant, lest she be discovered and accused of zina.

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[117] See Mst. Jehan Mina v. State, PLD 1983 FSC 183.

[118] See id. The Federal Shariat Court revised lower court judgment to now satisfy Ta'zir and sentenced Mst. Mina to three years rigorous imprisonment and 10 stripes, which could be suspended until her child was two-years old if she paid a bail of Rs.2,000 within two week's time. Because Jehan Mina was non-Muhsan, under Hadd she would have received 100 lashes and then gone home to her child. Depending upon her socio-economic status, Rs.2,000 could be a hefty bail fee to deliver, especially within a two-week time period. Thus, arguably, in this case, the Hadd punishment was less severe than the revised Ta'zir punishment. Also, see supra note 10, for a discussion on the disparate impact of Zina Ordinance for various classes of women.

[119] See generally Mst. Jehan Mina, PLD 1983 FSC 183.

[120] See also Mst. Rafaqat Bibi, NLR 1984 SD 165 (Court converting FIR of rape to zina where pregnancy was the result of rape. She was sentenced to five years rigorous imprisonment, five stripes, and Rs.500 while the trial court simultaneously acquitted the accused. On appeal to the FSC, she was acquitted.). See also Shabbir Ahmad v. State, PLD 1983 FSC 110 (wherein woman got pregnant from rape and said nothing out of shame, but had told her parents. Two days before delivery, her father reported that she had been raped. The accused denied the charges and declared Mst. Shabbir to be a woman of "easy virtue." The rape charge was converted to zina and both the accused (the pregnant woman and the man she accused) were sentenced to five years rigorous imprisonment, 30 stripes and a Rs.1,000 fine. Mst. Shabbir's baby died in jail at age two-months, and since she never appealed, she remained in jail.).

[121] A Divine Sanction?, supra note 15, at 88.

By 1985, this dilemma exploded before a global audience in the form of the hotly debated Safia Bibi case.[122] Safia Bibi was a young, unmarried blind woman who was impregnated by her rapist. She carried the child to term. Upon the child's delivery, her father reported that she had been raped. The Court viewed this as an exculpatory statement to the charge of zina-bil-jabr. Accordingly, they altered the charge to one of zina-adultery and called Mst. Bibi forward as an accused. She was convicted and sentenced to three years of rigorous imprisonment, fifteen lashes, and a fine of Rs. 1,000. Her co-accused, the man she says raped her, was, as in Jehan Mina, simultaneously acquitted for "want of evidence."[123] After tremendous debate and public exposure at both a national and international level, the FSC reconsidered the legality of this decision. They "came to the conclusion that she could not be convicted for Zina on the plea of pregnancy as a result of the commission of offence of rape on her."[124]

2. *Pregnancy as Confession in the 1990s*

Fortunately, pregnancy as a form of physical evidence of confession seems to have continued to diminish in the trend begun by the Jehan Mina and Safia Bibi cases. While there are still cases in which pregnant women report rape but are charged and sometimes convicted of zina,[125] their occurrence is less frequent.[126] More importantly, judges have at times made it a point to emphatically declare that pregnancy as proof of zina is not permissible, particularly where the woman has stated she was raped:

> The evidence of pregnancy alone is not sufficient to convict a woman for Zina especially when she claims the pregnancy to have been caused by Zina-bil-jabr.[127]

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[122] Mst. Safia Bibi v. State, PLD 1985 FSC 120.

[123] Id. at 121.

[124] Juma Gul v. State, 1997 PCr.LJ 1291, 1294 (FSC interpreting its decision in Mst. Safia Bibi, PLD 1985 FSC 120).

[125] See id. at 1292-95 (FSC acquitting both the woman and her accused, but only after the Court arrayed her as an accused and arrested her because, after she reported the rape, her medical examination revealed she was pregnant).

[126] See infra Apps. A, B & C.

[127] Juma Gul, 1997 PCr.LJ at 1294, relying on decision in Mst. Rani and others v. State, PLD 1996 Kar. 316: "Proof of pregnancy or some form of medical testimony/report itself would be of no consequence as the same would at best only serve as corroborative in nature;" and citing to Mst. Safia Bibi, PLD 1985 FSC at 124 (holding that "if an unmarried woman delivering a child pleads that the birth was the result of [a] commission of the offence of rape on her, she cannot be punished.") and Mst. Siani v. State, PLD 1984 FSC 121, 126 (holding that mere pregnancy of either an unmarried girl/widow or married woman whose husband did not have access to her was not enough to convict the woman of zina).
See also, supra note 107, citing Muhammad Ishtiaq, 1995 PCr.LJ at 1738 (case in which a pregnant woman reported she had been raped 6 1/2 months after the allegend incident, but the Court maintained that, because of the power dynamics in the rural society in which she lived and worked, they could conclude that she had been raped).

It is important to note, however, that despite what appears to be a diminishing trend, as recently as 1997, the FSC in Muhammad Khalil v. State upheld the conviction of a woman whose complaint of rape was converted to a zina charge against her. The Court stated that:

> .....complained to anybody about her having been subjected to zina-bil-jabr by her co-accused--Accused, thus, was a consenting party and had been willf[the] accused throughout the period of her pregnancy kept silent and never fully committing sexual intercourse with co-accused.[128]

While this reasoning sets out the basic consent argument utilized in defense of rape cases for the benefit of doubt of the accused, in all fairness, this case can be distinguished from the blatantly unjust decisions of the prior decade.[129] There were aspects of this case that could lead even the staunchest opponents of the Zina Ordinance laws to concede that there were possible signs of what Pakistani Courts would currently characterize as "consent."[130] Thus, even the relevant cases dealing with pregnancy as a form of physical confession of zina have begun to distinguish themselves such that in the 1990s conversion has rarely been used, and justified when used.

However, a last word of caution is necessary. Although the holding of the case may be justifiable at some level, the decision attempts to cast a new--and worrisome--analysis on the infamous Safia Bibi case. The Court suggests that the victim's eventual acquittal in Safia Bibi was only a matter of publicity, not reconsideration of the relevant law.[131] This is critical because the Safia Bibi case is currently the foundation of Pakistani court precedent that pregnant women, particularly those who became pregnant through rape, may not be convicted of zina on the basis of their pregnancy. Should subsequent cases also distinguish themselves from Safia Bibi by declaring that the latter was based on publicity and not the law, it will become easier for the Safia Bibi precedent to fade.

The Muhammad Khalil decision must alert prosecutors, advocates, and pressure groups to act now. They cannot afford to ignore substantive legal decisions at the expense of losing what may be one of the most positive trends in Zina Ordinance law over the past two decades. The double bind that women face, particularly pregnant women, is standing at the precipice

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[128] Muhammad Khalil alias Kach v. State, 1997 PCr.LJ 1639, 1640.

[129] See id.

[130] This case did not fall under incest so implied non-consent was not readily accepted as a defense for what may have appeared to be consensual, but was, in fact, not. See id. at 1639. The woman in this case stated that her Landlord's son raped her, but later continued to entice her into continuing a sexual relationship with promises of marriage. It is certainly arguable that the current social and cultural emphasis on marriage and class in Pakistan as well as traditional gender and power dynamics functioning at all levels of society could realistically provide the proper environment for "coerced consensual intercourse."

[131] See id. at 1644.

of change. It is up to the professionals in Pakistan involved in the Hudood Ordinance to protect this trend. To fail to act while there is still the opportunity to do so will mean that professionals have helped create yet another hurdle of institutionalized discrimination for Pakistani women.

C. Judicial Conversion of Rape to Zina: Section 10(3) to 10(2) in Pakistani Courts

Another type of conversion that appears in the Pakistani Court System is judicial conversion. Judicial conversion refers to judicial action that alters the offense under which an accused was charged or convicted. While the previous section on pregnancy deals with the conversion of a woman's claim of rape to a charge of zina being brought against her because her state of pregnancy served as proof of sexual intercourse, judicial conversion in this section focuses on conversion of a charge of rape to one of zina for the accused, regardless of whether the victim is also charged or implicated.

As mentioned in the Consent Section of this article in Subsection A above, rape cases brought under the Zina Ordinance frequently result in judicial conversion of the alleged rape offense to a conviction of zina. Conversion from rape (Section 10(3)) to zina (Section 10(2)) lowers the minimum Ta'zir sentencing requirements. While punishment for zina is discretionary so long as it does not exceed ten years imprisonment, conviction for rape requires the judiciary to sentence the convicted to a minimum of four years rigorous imprisonment, with a maximum of twenty-five years.[132]

There are several legal issues that arise with the application of judicial conversion. Primarily, there is the issue of whether and when conversion is an appropriate legal alternative for the Court. The Federal Shariat Court itself has held on more than one occasion during the period of Zina enactment that the "benefit of [the] doubt of the accused can only result in acquittal of the accused. It can never be a ground for reduction of sentencing."[133] Thus, where the prosecution case fails to eliminate all doubt in rape cases, conversion to a different crime under the Ordinance for the purpose of extending the benefit of the doubt to the accused is legally improper.[134]

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[132] See Zina Ordinance, supra note 11, § 10.

[133] Liaqat Ali v. Sarkar, PLD 1988 FSC 119. See also Muhammad Ali v. State, 1987 PCr.LJ 671, 676 (setting aside conviction and sentence of the accused); Janoo alias Jan Muhammad v. State, PLD 1982 FSC 87, 94 (finding that doubt in the prosecution case is "material only in regard to the conviction of the appellant [accused] and not for determination of the question of severity or laxity of sentence.").

[134] Conversion in this case is not synonymous to plea bargaining for conviction of a lesser offense. Adultery and rape are entirely different offenses. See discussion supra text pp. 195-197. See also infra text pp. 210-213.

Yet, this is exactly what has been happening and what continues to happen in the Pakistani Courts.[135] The most popular basis for courtroom conversion of rape to zina is the idea that the victim may have consented. To prevent injustice, it is necessary to extend the benefit of the doubt to the accused.[136] For instance, in one 1982 FSC case, the Court converted a rape conviction to zina on the basis that it was not quite sure if the ninety-four pound, sixteen-year-old girl had exercised full resistance to the attack despite the fact that medical evidence supported rape, and her mother testified to having heard her young daughter shrieking.[137] The accused appealed the verdict, arguing that if the girl did consent, she too should have been convicted of zina. Fortunately, the Supreme Court refused "to agree that it might have been a case of consent" and held the argument "misconceived."[138]

It is certainly possible that the Courts believed the prosecution in these cases failed to establish beyond a reasonable doubt that the female victims had been raped. If that were the case, though, the Court should have acquitted the accused.[139] To then sentence the accused for zina is like

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[135] For discussion separate from this article, see Human Rights Watch Report, supra note 15, at 53-60.

[136] See Muhammad Akram v. State, PLD 1989 SC 742, 743 (observing that because the FSC had already converted the man's conviction from 10(3) rape to 10(2) zina, which reduced his sentence, it was not necessary to further reduce his sentence, or to acquit him). Strikingly, the Supreme Court of Pakistan makes no note of the legal invalidity of conversion to an entirely different offense purely for the basis of reducing the accused person's sentence. Rather, it condones the practice without comment. See also Khushi Muhammad alias Bogi v. State, PLD 1986 SC 12, 12 (describing lower court conviction of the accused under Section 10(2) instead of Section 10(3) because although it believed there may have been some element of consent on the victim's part, "consent does not absolve the offender totally."); Muhammad Asghar v. State, PLD 1985 FSC 1, 6 (altering the conviction of zina-bil-jabr to zina because the Court believed the woman consented); Niamat Ali v. State, PLD 1982 FSC at 225-27; Mst. Khananul Haq v. State, PLD 1982 FSC 126; Ihsan Ahmad alias Nanna v. State, 1980 PCr.LJ 1037, 1037-1039 (describing lower court conviction of the accused under Section 10(2) because it determined that the victim had eloped with the accused, and not been abducted and raped as she had alleged.); Sohail Iqbal, PLD 1983 FSC at 516; Sohail Iqbal v. State, NLR 1982 (SC) Criminal 500, 501 (noting lower court conversion from rape to zina for the benefit of the doubt of the accused, but holding that it was "unable to agree that it might have been a case of consent," yet nevertheless dismissing the petition, finding that there was no need to interfere with the previous adjudication and sentencing).

[137] See Sohail Iqbal, PLD 1983 FSC at 516 (holding "the possibility cannot be ruled out that this was done with her consent" even in light of uncontroverted medical evidence of abrasions and bruises on her arms, a fresh hymeneal tear, swelling and soreness in her vaginal area, and the presence of semen on vaginal swabs taken during examination).

[138] Sohail Iqbal, NLR 1982 Criminal at 501 (dismissing petition to appeal FSC decision).

[139] For example, in Ihsan Ahmed, 1980 PCr.LJ at 1037-1039, the Court noted that the lower court had converted a rape charge against the appellant to a conviction and sentence of zina because it believed the woman (victim) had consented. The appellate court further extended the benefit of the doubt to the accused as to whether even zina had occurred as the woman herself had never been called forth as a co-accused to the charge of zina. See also discussion in A DIVINE SANCTION?, supra note 15, at 92 ("If the benefit of the doubt did exist,

sentencing him for the crime of prostitution instead of the crime of rape. Both constitute sexual offenses under the Zina Ordinance, but, clearly, prostitution and rape are not the same crime. The elements of the crimes themselves, plus those needed to support the prosecution differ, as do the sentencing requirements.

It is equally clear that rape and zina constitute distinctly different offenses. They are as separate from each other as they are from the other sexual offenses defined under the Ordinance. The Zina Ordinance does not define zina as a lesser version of rape. Although both crimes involve intercourse outside the context of a valid marriage, the Ordinance clearly holds them out as polar opposites on the spectrum of consent. The offense of zina is a crime to which both parties consent, while the offense of rape is a crime in which one party is forced.

This disparity highlights a second problem related to conversion: the social effect of conversion upon the victim. Converting an accused's sentence to zina instead of rape suggests that he and the victim engaged in consensual intercourse. If this is true, how can the woman escape accusation for her part in the commission of adultery or fornication? If this is not true, why should she now be punished for the benefit of the doubt of her accused? Intercourse outside of marriage is a crime in Pakistan. Moreover, the appearance of chastity is intricately woven into the fabric of Pakistani society. A woman who bears the brunt of a judgment suggesting she either wanted to be raped, or falsely claimed she was raped in order to exculpate herself from zina charges, will inevitably face stigmatization and scorn by her community.

The decision in Bashir and Nawab v. State is an example of this dilemma.[140] In that case, a woman accused two men of raping her. The trial court convicted them both. On appeal, however, the FSC deemed the woman a "willing party."[141] Consequently, the Court reduced the accused parties' sentences and changed their convictions from rape to zina. On the one hand, this woman was lucky not to be called as a co-accused for the offense of zina.[142] On the other hand, however, she most likely suffered social ostracization and emotional harm when the Court held that she willingly engaged in deviant sexual behavior. She was left to explain and defend herself anew, perhaps never marrying or fully reintegrating herself into her community, because her morality was so seriously brought into

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principles of criminal law require the court to acquit the accused and not to construe it as a mitigating circumstance."); Manzoor Hussain, NLR 1985 SD 67 FSC.

[140] NLR 1986 SD 347.

[141] Id.

[142] If she had been called as a co-accused, the prosecution would have had to meet their burden of proof in showing she had willfully engaged in consensual intercourse. It is uncertain whether they would have met their burden; perhaps accusation would have resulted in the clearing of her name on the charge of zina.

question. Meanwhile, the two men who raped her were given two additional years of freedom when their sentences were reduced.[143]

One of the more recent cases in which the judiciary converted a charge of rape to one of zina in favor of the accused is Mushtaq Ahmad v. State.[144] The Court's decision turned in part on the fact that the female victim was wearing shoes at 1:00 in the morning when she was "subjected to sexual intercourse with her own consent."[145] The Court reasoned that wearing shoes, which she had put on (willingly), proved she had consented to accompany her accused, whom she would have resisted unless she desired the illicit intercourse.[146] Accordingly, the FSC maintained the trial court's converted conviction of zina, but reduced the sentence.[147]

This decision brings to mind two questions: 1) What does footwear have to do with consent? and 2) Can one be subjected to something consensual? It may well have been that there was shaky evidence supporting the prosecution's case against the accused. However, that is no excuse to ignore the fact that that zina and rape are two entirely different offenses that should not be interchanged simply to express sympathy for the unfortunate person accused of rape.[148]

In some instances, conversion from rape to zina occurs, but is not explicitly discussed. This lack of explanation seems to indicate that the judge feels the freedom to adjust the penalty without adjusting or acknowledging the technical charge. For example, in Sultan Maqsood v. State,[149] both the trial court and the FSC convicted the male accused of zina without ever arraigning the woman as a co-accused. Only when the case reached the Supreme Court of Pakistan did a judge suggest that maybe the woman had not been a consenting party. Since she had not appealed the judgment for enhancement of the accused's sentence, and there was no mention of Section 10(3), or rape, in the previous court judgments, the Supreme Court maintained the accused's conviction under zina but enhanced his fine in order to compensate the woman. Advocates, then and now, rightly ask why a woman should be compensated for her involvement in zina, or whether such "compensation" acknowledges that it could not have been zina that occurred after all.

In August 1997, the FSC acquitted a man who was convicted of zina under Section 10(2) in the lower courts.[150] Nowhere in the judgment did the presiding judge, or even the trial court in excerpts, identify the case as a

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[143] See Bashir and Nawab, NLR 1986 SD at 347 (decreasing the men's sentences from seven years and 10 stripes to only five years).

[144] 1995 PCr.LJ 1742, 1744-45. See also infra App. B and accompanying text.

[145] Id. at 1745.

[146] See id. at 1744-45.

[147] See id. at 1745.

[148] See discussion infra App. B.

[149] NLR 1986 SD 5.

[150] See Sana Ullah v. State, 1997 PCr.LJ 1666.

claim of rape under Section 10(3) of the Zina Ordinance. Instead, the judgments discussed legalities and sentencing as though the case were a standard adultery case under Section 10(2).[151] The Courts completely ignored the fact that the woman, Mst. Shazia, consistently stated she had been raped. They did not acknowledge the fact that Mst. Shazia was never charged with or implicated in the crime of zina. The trial court even went so far as to punish the "accused" without once mentioning the involvement of Mst. Shazia in adulterous conduct. As this author pointed out at the time:

> Clearly, something is amiss. The courts must either acquit the accused of rape charges due to lack of evidence or plead an actual case of Zina-Adultery. Regardless of the outcome, active ignorance of her plea victimizes Mst. Shazia in the courtroom and wreaks havoc on those who desire to understand the law behind such cases.[152]

Unfortunately, this case is not the only instance of conversion in the 1990s. In fact, it appears that conversion in favor of the accused is a recurring, albeit minority,[153] theme in Zina Ordinance judgments.[154] In 1996, in Rashid Ahmad v. State the Court implied that the solitary statement of a rape victim is inadequate for conviction.[155] Then, despite the Court's own use of the word "rape," the case was pled and decided as a zina case.[156] Likewise, in 1997 alone there were several conversion cases, none of which condemned or even took note of the legal aspects of this trend to convert offenses.[157]

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[151] See id.

[152] Chadbourne, supra note 97.

[153] The trend is critical legally, but the actual number of cases is smaller than the cases synthesized in other sections of this article.

[154] See also Allah Ditta and another v. State and another, 1993 PCr.LJ 1069, 1072 (upholding FSC conversion of a rape charge into a conviction for zina (Section 10(2)) even while simultaneously noting that the woman maintained throughout the judicial process that she had been raped); Muhammid Shabbir v. State, 1992 SCMR 2063, 2065 (setting aside a conviction of rape, replacing it with a Section 10(2) conviction and reducing the accused sentence); Muhammad Salim alias Akhtar v. State, 1992 PCr.LJ 1857, 1860-61 (altering conviction under Section 10(3) to conviction under 10(2) of the Ordinance, and reducing appellant's sentence despite either the victim's statement that she had been raped or the fact that she had never been co-charged for the commission of zina); Saeed v. State, 1992 PCr.LJ 1817, 1822 (holding that "in the circumstances . . . I am convinced that appellant [the accused] has committed sexual intercourse with Mst. Rashida [woman claiming she had been raped] but not without her consent. Thus, I am inclined to convert the conviction of the appellant from Section 10(3) to Section 10(2) of the Ordinance.").

[155] Rashid Ahmad v. State, 1996 PCr.LJ 612, 615.

[156] See id. at 615.

[157] See Juma Gul v. State, 1997 PCr.LJ 1291, 1294-95 (describing that woman reported rape and when medical examination showed she was pregnant, she was arrested and the lower court arrayed her as an accused; both were acquitted on appeal to the FSC); Muhammad Khalil alias Kach v. State, 1997 PCr.LJ 1639, 1645-46 (upholding the conviction of a man under Section 10(2) zina where a woman who was pregnant stated she was raped); Sana Ullah v. State, 1997 PCr.LJ 1666, 1672 (rejecting possible Section 10(3) offense and considering only Section 10(2) offense).

A subset of judicial conversion cases falling under the Zina Ordinance addresses the issue of physical evidence of consent. At times, the Pakistani judiciary has indicated that the absence of marks of violence demonstrates a lack of resistance, and, therefore, constitutes evidence of the victim's consent.[158] In 1997, the Court declared in Muhammad Ikram v. State[159] that because the woman did not have marks of violence on her body and had not adequately proven her resistance during cross-examination, "the offence of Zina-bil-Jabr punishable under Section 10(3) of the Ordinance is, therefore not made out. The case of Zina punishable under Section 10(2) of the Ordinance stands however proved."[160]

As recently as 1998, the FSC acquitted a man who had been convicted for zina under Section 10(2) for similar reasons.[161] The Complainant emphatically stated that the accused abducted and then raped her over the course of more than a week.[162] Presumably, the lower court, finding no marks of violence on the woman's body, extended the accused the benefit of the doubt that the woman victim had consented, and convicted him under Section 10(2) zina rather than Section 10(3) rape. Apparantly, no one took notice of the fact that doctors examined the woman some three months after she recovered from the alleged assault, nor did anyone mention the distinctively different natures of forced and consensual intercourse.[163]

The most popular basis for converting rape to zina has been the idea that although there is proof of intercourse, the victim's resistance to her assailant was inadequate to support a claim of rape. It appears that Courts are viewing consent as a presumptive element of the crime. In this sense, failure to actively demonstrate non-consent implies that although intercourse may have occured, rape did not. It seems that the Courts may be attempting to carve out a judicially created offense under the Zina Ordinance: rape without brutality.

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[158] See Bahadur Shah v. State, PLD 1987 FSC 11, 16 (holding, "Mst. Kalsoom Bibi had put no real resistance and it appears that the act was done with her consent. We are, therefore, of the view that the appellant [the accused] has committed the offence of zina with consent which is punishable under Section 10(2) of the Ordinance." The accused's conviction of rape under Section 10(3) was altered to a conviction for Section 10(2) zina under the Ordinance.); Ubaidullah, PLD 1983 FSC 117 (maintaining the lower court conviction under Section 10(2) zina [consensual intercourse] for two men accused of abducting and raping a woman because the victim did not present evidence of marks of violence. She was never brought forward as an accused.). See also supra text pp. 195-197.

[159] Muhammad Ikram alias Munji v. State, 1997 PCr.LJ 1079.

[160] Id. at 1081-82.

[161] Abdur Razzaq v. State, 1998 PCr.LJ 365 (extending benefit of the doubt to the accused).

[162] See id.

[163] See id. It could be argued that judicial conversion in cases in which the judiciary holds there was consent to the intercourse (the alleged rape) would be proper because legally zina presumes that the intercourse is consensual. However, the fact that victims rarely become co-accused indicates that judges may not actually believe these women fully consented, or committed zina. Thus, the argument that conversion is legally sustainable would probably not prevail.

The definition of zina as a crime of adultery or fornication precludes the punishment of nonconsensual intercourse or the punishment of one partner and the acquittal of the other. However, the Courts are sending the message that they are uncomfortable with the rigidity of Zina Ordinance law. Few cases fit neatly into the category of strict zina.[164] Simultaneously, few crimes display the heinous quality the judiciary may be associating with the term "rape." The judiciary may be therefore distinguishing between obvious displays of violent rape and rape that occurs against the will of the woman, but involves less physical brutality.

The fact that there is only one category of punishment for rape under the Ordinance[165] may be forcing the judiciary to include both adultery and a less violent form of rape within the definition of zina. Thus, it seems likely that the Court is dually defining consent: first, as consent in the form of an open agreement to engage in sexual intercourse with the partner (adultery); and second, as consent in the form of non-refusal to the intercourse or a failure to demonstrate sufficient resistance. A change in the Zina Ordinance appears necessary to address the confused interplay between consent and the levels of brutality exhibited by the rapist. In the absence of such change, the judiciary is faced with a conflict that has no proper resolution.[166]

As the keepers of law in Pakistan, both the judiciary and its players have a responsibility to ensure nondiscriminatory justice. Lawyers must become more professionally responsible. They must focus on arguments that they believe will not only win, but are legally accurate. Otherwise, they risk undermining what could be a respectable and nondiscriminatory legal system. Lawyers must begin to make the Pakistani Courts at all levels--

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[164] One of the few cases that seems to fulfill zina as covered in the Ordinance is Mst. Gul Nisa and Fazal Dad, Cr. Appeal No. 137/I of (1986). The couple were not married, but Gul Nisa was pregnant with their child. The trial court sentenced them to stoning to death on the basis of a verbal confession. After recantation of the confession, the couple were tried again and acquitted. See id.

See also Akbar Hussain v. State, 1997 PCr.LJ 543, 546 (acknowledging that the couple were not validly married, although acting to be, and reducing their sentence as they were young and essentially the law required the Court to do something it was ambivalent to do, i.e., maintain the conviction); Mukarram Khan v. S.H.O. Police Station, New Multan and 4 others, 1995 PCr.LJ 2043, 2046 (expressing that this case requires reinvestigation, but prima facie falls within zina because the couple living together was too closely related to be validly married); Jamroz v. State, 1995 PCr.LJ 470, 473 (granting reduction of sentence implying woman's involvement in zina was unavoidable).

[165] In the sense that Hadd is essentially non-existent. Thus only rape liable to Ta'zir remains (Section 10(3)). As previously indicated, Section 10(3) is a simple description of the minimum and maximum punishment that may be prescribed for a person convicted of rape.

[166] Legislative change could include, for example, flexible sentencing for rape. This would enable the judiciary to acknowledge the seriousness of rape even in cases where it does not feel it has enough physically observable signs of non-consent.

district, FSC and Supreme[167] --aware of the problems implicit in judicial conversion. Trained advocates and prosecutors should be working on behalf of their clients within the scope of legally permissible solutions. Simultaneously, the Pakistani judiciary must stop implicitly deciding what constitutes the crimes of rape and zina on a case-by-case basis. They must begin to take note of, and reverse, decisions that give the benefit of the doubt to the accused by converting convictions from rape to zina. The judiciary's failure to act has encouraged advocates to argue for conversion because it is an easy, albeit legally improper, method of reducing clients' sentences for rape.[168]

In sum, judicial conversion is not an issue of the past. Inappropriate conversion is not only contrary to legal principles,[169] but grossly unfair to women reporting rape. Moreover, it provides an insufficient solution to the dilemma of under-defined and over-categorized legislation. The Supreme Court recognized judicial conversion as a problem in 1986, but has failed to highlight or even attempt to curb the practice beyond its simplistic observation in Muhammad Sharif v. State that courts "should avoid conversion as it mars the reputation of girls."[170] It is time for action against this small, but potent, trend in Zina Ordinance law. It will only change with awareness and publicity of the inherent contradictions present in implicit consent requirements and the recognition that judicial conversion is an inappropriate solution.

D. Zina Charges as a Tool of Harassment Against Women

In 1990, the Pakistani Supreme Court noted it would not ordinarily believe that a father would falsely charge his unmarried daughter with zina and thus place the "chastity, honour, and future career of his unmarried

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[167] In terms of the Zina Ordinance, the High Court only deals with bail applications, and, thus is not directly relevant to this discussion.

[168] For example, in recent cases such as Muhammad Ashraf v. State, 1997 PCr.LJ 1351, 1359, the Learned Counsel for the Appellant argued for an extension of the benefit of the doubt to the accused, in order to reduce his client's conviction from a Section 10(3) offense to the "lesser" Section 10(2) offense, on the basis that there was no proof that the victim sufficiently resisted forced sexual intercourse. The FSC refuted the argument, but did so on the ground that the woman in that case, by definition, could not have resisted. Thus, essentially, resistance to rape was fulfilled, the argument and request to extend the benefit of the doubt ignored, and the accused rightly convicted under Section 10(3) of the Ordinance. Id. at 1366.

[169] There has been some discussion that judges and advocates may be converting because of the grammatical structure of the Zina Ordinance. While it is implicit that zina takes two, the Ordinance is actually written in the singular form, which may induce the misunderstanding that it is acceptable to punish one, not two, people under Section 10(2). See discussion with Ayesha Malik, advocate, in Karachi, Pakistan (May 1998).

[170] Muhammad Sharif v. State, NLR 1986 SD 9 SC.

daughter at stake" merely for monetary benefit or another's pleasure.[171] That the Court needed to make this observation indicates that its awareness of the fact that some zina charges are filed without basis. Independent research on high and appellate court case law substantiates the Court's belief and confirms the general consensus in Pakistan that fathers and husbands bring false zina suits against their daughters and wives for purposes of harassment regardless of the results.[172]

1. *Harassment in the 1980s*

In the 1980s, harassment claims brought by fathers implicating their daughters tended to occur in situations where daughters married against their father's wishes. In retaliation, some fathers would file Section 16 abduction claims under the Zina Ordinance,[173] alleging that their daughter's paramour had abducted her for the purpose of illicit intercourse.[174] Alternatively, some fathers reported that their daughter and the disliked

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[171] Muhammad Nawaz v. State, 1990 SCMR 886. Compare to rape cases, e.g., Saeed v. State, 1992 PCr.LJ 1817, 1822 (stating "It may be observed that people in this country due to enmity over trifle matter of business or for likewise matter do not put at stake their women-folk generally and unmarried females particularly."), relying on, Ghulam Kibria v. State, PLD 1982 FSC 1; Bahadur Shah v. State, PLJ 1987 FSC 4, 8 (remarking that the alleged victim's father would not likely put his daughter's honor at stake over a business transaction). See also supra note 86.

[172] See discussion in Human Rights Watch Report, supra note 15, at 61-66 (concluding "we found that disgruntled husbands and fathers may bring ill-founded adultery or fornication charges against their daughters and wives who, on the basis of such accusations, often unsupported by any evidence, are arrested and imprisoned pending trial."). The Report also highlights that in a 1988 survey they conducted of 90 women prisoners accused of zina, more than one-half of these women had been accused by their fathers or husbands. It also points out that zina is a non-compoundable offense in Pakistan. In other words, once an ill-founded charge has been brought, the charge cannot simply be dismissed even upon removal of the allegations from the original complainant. Id. at 49. For discussion of judicial procedures to dismiss false claims, see infra text pp. 221-222, on Section 561-A motions.
See also A Divine Sanction?, supra note 15, at 103 ("Often husbands file Zina cases against their wives or former wives, to keep them in forced marriages or simply to humiliate them. Mere suspicion of adultery by the wife is often reported as Zina."); SABIHA SUMAR AND KHALID NADVI, ZINA: THE HUDOOD ORDINANCES AND ITS IMPLICATION FOR WOMEN 37, Dossier # 3 (1988) (highlighting similar jail statistics as Human Rights Watch in addition to anecdotal evidence demonstrating that at least one-half of women accused of zina and now awaiting trial in jail were accused by relatives who did not condone their having left their homes with men of their own choosing).

[173] See Zina Ordinance, supra note 11, § 16 (cover crimes of abducting a person for the purpose of illicit intercourse).

[174] See Mst. Hadayatan, NLR 1988 SD 103; Imam Bux v. State, 1983 PCr.LJ 1342, 1343 (granting bail to the husband of a woman who had married against her father's wishes); Ashraf Ali v. State, 1982 PCr.LJ 1250, 1251 (granting bail to a man whose fiancee had run away to marry him); Muhammad Imtiaz v. State, PLD 1981 FSC 308 (overturning conviction of a man who, despite producing a marriage certificate in court, was convicted because he had been unable to obtain the consent to marry his wife from her guardian).

partner were engaging in illegal zina.[175] Sadly, many of these First Information Reports resulted in false convictions.[176] While the convictions were later overturned, it was not before the couple had spent significant and unnecessary time and money in jail and in the courts.[177]

Harassment claims were also frequently brought by husbands or ex-husbands of the women targeted. In the 1980s, there were several cases in which a husband slapped a zina charge on his wife or ex-wife; consequently, she was convicted at trial even though later it was necessary to acquit her due to a total lack of evidence against her.[178] Frequently, when a woman filed for dissolution of marriage, her husband would file a complaint of zina in retaliation against her.[179] In a few cases where women had previously filed suits against their ex-husbands for jactitation of marriage,[180] the ex-husband responded by registering a zina case against her and her new husband.[181] In one case, a woman took her children and left her husband after he beat her. He then registered a zina case against her.[182]

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[175] See Mst. Maryam, NLR 1988 SD 19; Muhammad Yakoob and Mst. Shamim Akhtar, NLR 1985 SD 169 (convicting and sentencing the man and the woman to six years rigorous imprisonment and 20 stripes despite their presentation of a valid Nikah, but later acquitting them on the basis that consent of wali (parents) not necessary for a valid marriage); Arif Hussain and Azrah Parveen v. State, PLD 1982 FSC 42 (convicting and sentencing accused to ten years rigorous imprisonment and 30 stripes despite their production of a valid Nikah, but acquitting them after one year imprisonment); Mst. Saeed Fatima v. State, 1981 PCr.LJ 1257.

[176] See A Divine Sanction?, supra note 15, at 106-07.

[177] See id.

[178] See Muhammad Ali, NLR 1988 SD 47; Zulfikar Ahmed and Kaneez Fatima, NLR 1986 SD 199; Mst. Robina Shamim v. State, 1986 PCr.LJ 1588, 1588-89 (refusing bail to a woman whose first husband had brought charges against her and her new husband. Cosequently, the woman, who was pregnant from her second marriage, remained in jail until after the birth of her baby.); Gul Zaman, NLR 1986 SD 582; Ehsan Begum v. State, PLD 1983 FSC 204.

[179] See Wali Muhammad, NLR 1987 SD 460 (acquitting both parties after they had been convicted, sentenced to seven years rigorous imprisonment and 30 stripes, and spent two years in jail); Muhammad Baksh alias Hamida, NLR 1986 SD 214 (granting bail to wife whose husband brought a zina charge against her seven months after she left him and filed for dissolution); Muhammad Siddique and another v. State, PLD 1983 FSC 173 (setting aside a dissolution of marriage decree on the request of the ex-husband, thereby giving rise to zina charges against the man's ex-wife after she had already been married to another man for a year); Abdul Majid v. State, 1982 PCr.LJ 948, 949 (granting bail to man accused of "enticing away" another man's wife); Muhammad Ashraf v. State, PLD 1981 FSC 323 (granting court order to set aside dissolution of marriage on the request of a man whose ex-wife had been remarried with another man for five months. In turn, the woman and her new husband were convicted and sentenced to seven years rigorous imprisonment, 10 stripes, and a fine.).

[180] Jactitation is defined as the presentation of "a false pretense of being married." See Muhammad Azam v. Muhammad Iqbal, PLD 1984 SC 95, 142.

[181] See Mst. Bashiran, NLR 1988 SD 261; Shakir Muhammad and Mst. Maqsood Mai, NLR 1986 SD 13 (Supreme Court ordering a retrial because their conviction was based on insufficient evidence; nevertheless, the couple remained in jail from 1982 to 1986).

[182] Gafoor and others v. State, 1986 PCr.LJ 195 (Court indicating that the husband brought two Zina actions, one against persons who allegedly abducted the woman and another private action, which involved the woman in an allegation of zina).

A well-publicized area of husband-harassment litigation in the 1980s centered around divorce issues. In some cases, a woman had been granted a valid divorce, yet her ex-husband later registered a FIR of zina against her anyway.[183] In one case, a husband went so far as to abandon his wife and then send her fraudulent divorce papers. Relying on their validity, she remarried only to find herself later charged with and convicted for zina.[184] Much of the divorce-based harassment litigation stems from the Muslim Family Laws Ordinance of 1961[185] requirement that husbands formally register their divorce with notice to the local Chairman. The action of registration is what makes the divorce effective. However, husbands often neglected to fulfill their duty to register the divorce. As a result, the divorced wife and her new husband became potentially liable under the Zina Ordinance for the offense of adultery.[186] In Mst. Razia Bibi v. State, for example, failure to register the divorce resulted in a woman and her second husband being arrested and charged for the offense of zina. The couple spent nine months in jail before bail was even granted.[187]

Likewise, in Shahida Parveen v. State,[188] a woman and her new husband were convicted and sentenced to stoning to death. The November 1987 district court decision ruled that since the previous divorce of one of the partners had not been registered, the new marriage was void. The couple's admission of living together was seen as tantamount to a confession of zina.[189] On appeal, the Supreme Court of Pakistan acquitted the couple and clarified that since 1982 it had been its understanding and policy that failure

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[183] See Mst. Jamila Khatoon, NLR 1985 SD 212; A Divine Sanction?, supra note 15, at 106, referring "Mst. Sobo case;" Criminal Appeal No. 47/L of 1989 (Woman and new husband convicted because Court said there had not been a proper Christian divorce; FSC acquitted.).

[184] See discussion in A Divine Sanction?, supra note 15, at 106-07 (Supreme Court eventually acquitted her).

[185] The Muslim Family Laws Ordinance of 1961 (MFLO) is essentially codified Islamic family law, including regulations and laws governing divorce and marriage. Section 7 of the MFLO requires that husbands who divorce their wives by pronouncing talaq (an Islamic form of divorce which will not be fully addressed in this article) register their divorce with the local Chairman. The local Chairman is then responsible for attempting a reconciliation between the couple. If there is no reconciliation, the divorce becomes effective 90 days after this determination. Whether because of ill-will or ignorance (the literacy rate in Pakistan is quite low so many Pakistanis do not know the new law), many divorces are not reported to the Chairman. Thus, they do not qualify as divorces under the literal terms of the MFLO. Therefore, a subsequent marriage on the part of the woman, even in cases in which she thought she was legally divorced, would technically be a violation of the Zina Ordinance. Muslim Family Laws Ordinance, Ordinance No. VIII of 1961, § 7 PAK. CODE Vol. XIV, (1961-62).

[186] See A Divine Sanction?, supra note 15, at 105. See also Muhammad Sarwar and Shahida Parveen, NLR 1988 (SD) FSC 188.

[187] Mst. Razia Bibi, NLR 1987 SD 152.

[188] NLR 1988 (SD) FSC 188.

[189] See id.

to give notice of divorce would not render a subsequent marriage void, thus enticing punishment for zina.[190]

In sum, a number of cases in the 1980s were clearly predicated on purposes of harassment rather than as legitimate reports of zina. The majority of these cases were brought because daughters married against their father's wishes or women remarried after divorce despite their ex-husbands' desires that they remain unmarried.

2. *Harassment in the 1990s*

Generally, case law combined with case dismissal judgments from the mid-to-late 1990s indicates that the Zina Ordinance is still frequently used to harass rather than to effect justice. This conclusion is sometimes evident in judicial statements, but can often be inferred from the courts' responses to petitions for dismissal and high acquittal rates.

In the Pakistani legal system, a Section 561-A motion may be brought by any party to request the Court to dismiss the proceedings and/or the FIR underlying the original complaint as there is no basis for the case before the Court. While this Petition does not require a determination that the case was brought purely for harassment reasons, Courts have begun to utilize it in this manner for cases arising under the Zina Ordinance.[191] Not infrequently, the Court supports its determination to quash the proceedings with statements acknowledging harassment, noting, for example, that "the F.I.R. has been lodged for mala fide purposes when the alleged abductee had filed a civil suit [for dissolution of marriage against the complainant (husband).]"[192] Other decisions by courts include declarations that the case at hand amounts to "an abuse of process of law"[193] or that "continuation of proceedings ... will amount to unnecessary harassment."[194] In Mst. Zahida Bibi v. State,[195]

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[190] See id. at para. 13 & 18. See also Mirza Qamar Raza, NLR 1988 SD 117 (Sind High Court declaring Section 7 of the MFLO, requiring notice to the Chairman for talaq to be effective, repugnant to Islam and, therefore, without effect), supported by Shahida Parveen, NLR 1988 (SD) FSC 188, para. 18; Noor Khan v. Haq Nawaz and 2 others, PLD 1982 FSC 265 (acquitting husband and wife of zina where previous husband denied having divorced her ten years before).

[191] See generally Maj.-Gen. (Retd.) Abdul Aziz v. Mst. Kanwal Rabbani, 1996 PCr.LJ 2030, 2033-34 (holding "no doubt no person can be prevented from going to Court but it is the duty of the Court to see that no attempt is made to abuse the process of the Court and the matter appears to be genuine and having actually taken place. The Courts would not allow abuse of their process." Accordingly the Court accepted the Section 561-A Petition and quashed all proceedings pending before it.).

[192] Javed Iqbal v. S.H.O., Police Station Factory Area, Sargodha and three others, 1995 PCr.LJ 1925, 1926.

[193] Mst. Sakina v. S.H.O., Police Station, Basti Malook and others, 1996 PCr.LJ 1809, 1810-11 (noting that the judge ("A-S" or Additional Sessions judge) "has been warned not to act in this manner in future because he has taken the law in his hands to illegally help Manzoor complainant [to harass woman] . . . for the reasons best known to him.").

[194] Mst. Nadia Siddique v. S.H.O. and others, 1997 PCr.LJ 594, 597.

the Court even went so far as to state that "the F.I.R. was a cock and bull story and had no independent legs to stand [on]."[196] In 1995 alone, 80% of all Section 561-A requests granted resulted in the judge spontaneously suggesting that the purpose of the original case was harassment and that the case was based on mala fide purposes.[197] Similarly, many of the judgments to quash claims of zina in 1997 included judicial notices that the original allegations appeared to be harassment tools more than anything else.[198]

Even where the judiciary does not highlight an element of harassment in the case being quashed, it may be implied that there is a high likelihood the case was not originally brought or continued for the purpose of effecting justice. The wording of Section 561-A itself suggests that in cases where the judiciary finds an abuse of power or mala fide motives, it must quash, or immediately stop, the proceedings to limit further abuse or harassment. Thus, where one sees the immediate quashing of a FIR or proceedings, one can confidently suspect an element of harassment in the case which was dismissed.[199]

Additionally, there are a disturbing number of zina cases which ultimately result in acquittal for the accused person or couple due to findings that the lower Court or police investigation failed to discover the existence

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[195] Mst. Zahida Bibi v. State, 1995 PCr.LJ 1525.

[196] Id. at 1527.

[197] See infra App. B, pp. 273-276. Case analysis on file with author.

[198] See, e.g,. Mst. Faizan Bibi and another v. State, 1997 PCr.LJ 416, 418 ("Registration of F.I.R. against accused petitioners being mala fide and to be used by their rivals as a lever" and "was abuse of process by law"); Mst. Rani Bibi v. S.H.O. and others, 1997 PCr.LJ 974, 976 (quashing FIR as appearing to be a "misuse of process of law and nothing else").

[199] Empirical research on case law from 1994-1997 indicates that between 75-100% of all Section 561-A petitions to dismiss zina charges and proceedings were immediately quashed: in 1994, 75% were quashed outright; in 1995, all but one petition to quash was granted; in 1996, close to 100% were quashed outright; and in 1997, 75% were quashed outright. See infra Apps. A, B & C. Case analysis on file with author.

The remaining petitions to quash zina proceedings were not immediately granted only because further inquiry into the claim was necessary. For example, in one case, the age of the woman was in dispute, preventing the Court from determining the validity of the Nikah without further consideration. However, after a lengthy discussion, the Court held that "it is declared that her Nikah with Abdul Ghaffar was valid and that the order of the Magistrate . . . was not sustainable in law. Resultantly, Petition No. 1216 of 1997 is allowed and Criminal Miscellaneous No. 6/H of 1997 is dismissed. Mst. Allah Moafi is allowed to join her husband." Abdul Ghaffar v. Ishtiaq Ahmad Khan, 1997 PCr.LJ 1150, 1156.

Other petitions may not have been quashed in order to protect the victim against the accused's attempt to use Section 561-A to halt her charge of rape. For example, in 1997, two Section 561-A claims brought for cases involving an allegation of rape resulted in the Court not quashing the FIR or proceedings in order to protect the victim. See Muzaffar Khan v. Station House Officer, Police Station Kala Bagh, Tehsil Esa Khel, District Mianwali, 1997 PCr.LJ 1724; Haji Muhammad Yaqoob v. Superintendent of Police, Vehari and 2 others, 1997 PCr.LJ 876. In both cases, the girl's father had filed the claim on her behalf and there was enough evidence to implicate the accused.

of a valid divorce or marriage.[200] Similarly, research indicates that in some years an overwhelming number of bail application cases relating to zina charges result in decisions in favor of the accused.[201] For example, Appendix B indicates that in 1995 every single bail application dealing with zina was decided in favor of the party accused. In two cases, the judge acknowledged an unwarranted abuse of power against the accused. And, in seven cases, the accused woman had previously declared she had married of her own free will, and often had a valid Nikah to support her claim.[202]

In fact, analysis shows that 90% of these 1995 bail claims were directed at harassing the women accused.[203] Likewise, in 1997 almost every bail application resulted in the accused parties to zina being granted bail.[204] And, finally, a great many of the bail applications were granted because the existence of a valid marriage was clear enough on the face of the application that there was no reason to deny bail for illegal conduct. It is important to note that in each of those situations, the couple likely returned to their homes, families, and each other--certainly not a situation the Court would condone were there serious validity behind the original zina allegations.

A comparison of Section 561-A Petitions, bail applications, and acquittals against the total number of zina (adultery) cases brought each year indicates that there is a strong trend toward the attempted misuse of the Zina Ordinance.[205] How often this misuse occurs is critical. Were it a mere three or four cases a year, one could perhaps see it as a minor trend not worth reform efforts. However, this is not the case.

While case-type distribution varies from year to year,[206] the number of cases brought under Section 561-A has remained steady at about 15-18%

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[200] See, e.g., Lal Khan and another v. State, 1995 PCr.LJ 1897, 1898. Note that the scenario in which a husband, who divorced his wife, is the complainant for an offense of zina against his ex-wife on the basis that her previous divorce is not final is fairly indicative of harassment in and of itself.

[201] Unlike in the US system, the granting of bail in Pakistan Zina Ordinance cases appears to indicate the weakness of the prosecution's case. This does not, however, mean that all cases which are granted bail will fail.

[202] See infra App. B for analysis of 1995.

[203] See id.

[204] But see Ishfaq Ahmad v. State, 1997 PCr.LJ 878 (granting bail to female co-accused only. There was some question as to whether this was a case involving rape or zina.); Falek Sher v. Noor Muhammad and 3 others, 1997 PCr.LJ 1810 (canceling bail because there was an issue involving the validity of the woman's Nikah to another man than whom she had been living with when charged).

[205] For instance, analysis of 1997 case law reported in the Pakistan Criminal Law Journal revealed that approximately 95% of all zina cases resulted in the Prosecution losing its case against the couple. PCr.LJ (1997). See infra Apps. A, B & C. Case analysis on file with author.

[206] While in 1994 the percent of bail applications was as high as 70% of the total Zina Ordinance cases, each year the total percentage shrank so that by 1997 the number of bail application cases was one-half of what it had been four years earlier (1995: 47% bail

from 1994 through 1997.[207] Moreover, not a single case researched from 1994 through early 1998 resulted in the Court's suggestion that the case at hand was satisfactory as it stood. Considering that at least 90% of all Section 561-A claims relate to original charges of zina, not rape, this is even more significant. This means that the courts are implicitly concluding that approximately 35% of all zina charges brought each year are for harassment value. If one adds this percentage to that of bail applications and acquittals granted each year, it becomes clear that, in a given year, 50% or more of the zina cases immediately bring the issue of possible harassment to the forefront.[208]

It is clear that the Pakistani judiciary recognizes the existence of mala fide motives in bringing zina claims. However, any attempt to curb this misuse must identify the misusing parties and motives. The majority of all the Section 561-A zina claims are brought by either fathers or ex-husbands over issues of sui juris marriage[209] or the validity of the previous divorce.[210] In 1997, for instance, two-thirds of the original zina cases in which there was a later Section 561-A claim were brought against women and their co-accused by the women's fathers, or, in one case, by her mother.[211] Another 17% were brought by the women's ex-husbands.[212]

All of the cases brought by parents against their daughters involved the issue of her right to wed a husband of her own choice.[213] Pakistani judicial history makes it abundantly clear that a woman may marry without the consent and approval of her parents.[214] Not surprisingly, then, only two of

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applications; 1996: 39% bail applications; and 1997: 36% bail applications). PCr.LJ (1994-1997). Case analysis on file with author.

[207] The percentage of Section 561-A cases in 1996 was slightly lower because there were fewer zina versus rape cases that year. PCr.LJ (1996). Case analysis on file with author.

[208] Case analysis on file with author.

[209] Sui juris is defined, literally, as "of age" - the term is used to assert that the girl marrying is old enough to marry without parental consent or approval.

[210] Case analysis on file with author.

[211] Case analysis on file with author.

[212] Case analysis on file with author.

[213] See Nabeela Anjum v. Rani Muhammad Azam and 2 others, 1997 PCr.LJ 1437, 1443; Muhammad Arshad v. S.H.O. and others, 1997 PCr.LJ 928, 929; Mst. Sajida Bibi v. S.H.O., Jaranwala, District Faisalabad and 7 others, 1997 PCr.LJ 788, 789-90; Abdul Ghaffar v. Ishtiaq Ahmad Khan, 1997 PCr.LJ 1150, 1152-55; Muhammad Tariq Mahmood and others v. S.H.O., Police Station Millat Park, Lahore, 1997 PCr.LJ 758, 759; Mst. Abida Parveen and another v. State and 2 others, 1997 PCr.LJ 880, 880-81; Muhammad Riaz and others v. State, 1997 PCr.LJ 991, 992-93; Mst. Nadia Siddique v. S.H.O. and others, 1997 PCr.LJ 594, 595.

[214] See generally, Abdul Waheed v. Asma Jehangir, PLD 1997 Lah. 301 (known as "the Saima case"); See also Arif Hussain and Azra Parveen v. State, PLD 1982 FSC 42; Muhammad Imtiaz and another v. State, PLD 1981 FSC 308; Ali Akbar v. State, 1997 PCr.LJ 783 ("She had exercised her choice and free will to marry with accused as her parents wanted to marry her with a person not liked by her.").

For other cases in which the Pakistani superior courts approved marriages between parties who were sui juris [of age] and performed the Nikah with their own free will, see Mst. Bushra Bibi v. S.H.O., 1995 PCr.LJ 401, 404 (declaring "it is the duty of the State to

the Section 561-A cases brought by parents against their daughters did not result in an immediate quash. In one case, the age of the woman still needed determination;[215] in the other, more Nikah evidence was required before that decision could be made.[216]

Cases brought by ex-husbands also resulted in the judiciary immediately quashing the FIR and proceedings before it. For instance, in some cases the ex-husband would register a complaint against his ex-wife and her new husband alleging that they were committing zina even though the new couple was validly married. The ex-husband could do so because he had not previously registered notice of the divorce. The new couple could continue to be harassed until, like in a recent 1997 case, a judge recognized the abuse and quashed all further proceedings.[217]

The disproportionate number of cases brought by fathers against their daughters appears, however, to be unique to Section 561-A cases.[218] Analysis of all zina-adultery claims reported in the Pakistan Criminal Law Journal (PCr.LJ)[219] in 1997 reveals a different distribution of complainants.

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safeguard the fundamental right to marriage", and that continuation of the proceedings would "amount to unnecessary harassment"); Muhammad Banaras v. S.H.O. and others, 1995 PCr.LJ 94, 95-97 (stating that continuation of the proceedings would "amount to unnecessary harassment"); Ayita Nasir and another v. S.H.O., Police Station Badana, Tehsil Pasrur, District Sialkot and another, 1995 PCr.LJ 1657, 1661 (holding continuation of case would be further harassment).

[215] Nabeela Anjum, 1997 PCr.LJ at 1442-43.

[216] Mst. Abida Parveen, 1997 PCr.LJ at 881.

[217] See, e.g., Mst. Faizan Bibi and another v. State and 3 others, 1997 PCr.LJ 416, 418.

[218] Crossed with case-type, e.g., quash petitions, bail, or appeal, this distribution between father-brought and ex-husband-brought allegations may highlight a trend of the 1990s. While generally it is legally certain that a woman may marry without the consent of her Wali (parents) and that a non-registered divorce cannot nullify a future valid marriage, it appears that players in the legal community acknowledge the first legal principle more frequently and readily than the latter.

There were a significantly high number of claims brought by fathers that were quashed. There did not appear to be much ambivalence that these claims were maliciously motivated and had no place in a court of law. Thus, it remains a distinct possibility that Section 561-A petitions were never actually brought. It is unclear whether this is because advocates did not think they would succeed in their petitions or whether they were confused about the legality of divorce issues. If, in fact, advocates did file Section 561-A petitions that were rejected, the obvious question is why. Are lower courts less often immediately aware of the validity of re-marriage after talaq? Are they less aware of the critical nature of a divorce defense for zina allegations? If so, could it be because there have been more high-profile Saima and Fehmida Bux cases exposing sui juris marriage issues than high-profile divorce-related cases? An affirmative finding would implicitly suggest solutions that again bring reform effort techniques back to legal awareness.

Unfortunately, there are no ready answers to these questions. Extensive research at all levels of the judiciary with simultaneous case file analysis is the only way to truly track the manner in which zina cases are being tried. It is important to acknowledge that a clear pattern in the way father-brought and husband-brought charges of zina are flowing through the Pakistani judicial system seems to be emerging. Further research and legal awareness efforts are now required to bring the two distinct categories into focus with each other.

[219] See PCr.LJ (1997).

Instead of fathers predominately bringing complaints, husbands brought at least as many claims as fathers.[220] The percentages of original claimants for all Zina Ordinance cases reported in the PCr.LJ in 1997 are as follows: husbands, 39%; fathers, 36%; brothers, 9%; and mothers, 6%.[221] This means that when Section 561-A cases are subtracted from the total, husbands, not fathers, are disproportionately responsible for bringing the majority of the charges of zina.[222]

This analysis is critical because the majority of the cases brought by ex-husbands against their ex-wives were reported as judgments on appeal,[223] indicating that trial courts are convicting ex-wives in cases brought for the purpose of harassment. On appeal, almost all of these cases dealt with the issue of the validity of the previous divorce.[224] Two trial court decisions convicted women accused of zina without ever addressing the possibility of her having previously and validly divorced the husband complainant.[225] In another case, the woman and her new husband were convicted because her first husband, the complainant, had not registered their divorce.[226] However,

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[220] Case analysis on file with author.

[221] For three cases, it was unclear in reading the judgment who brought the original claim. Otherwise, the original claims were brought by the following parties: husbands, 13; fathers, 12; brothers, 3; mothers, 2; and SHO "Station House Officer" (equivalent to police precinct commander), 3. Calculations are based on the 33 cases which clearly identified the original Complainant.

Although three cases were indicated to have been brought by the SHO, the implications and aspects relating to SHO-brought charges will not be directly addressed in this article. The author would like to note, however, that the two zina-adultery cases which appeared to be brought by the SHO or another inspector were also quashed. See Mst. Rani Bibi v. S.H.O. and others, 1997 PCr.LJ 974, 975-76; Mst. Zarina v. State, 1997 PCr.LJ 1271, 1274.

Compare these statistics to the percentages of complainants who brought forth rape allegations in the same year: all but three or four out of 38 cases in which rape appeared to be the original basis for a FIR were brought by the women victims themselves or by them in conjunction with a family member. Two out of 38 cases were brought by the SHO and only two cases suggest possible foul play or harassment. See State v. Mushk-e-Alam, 1997 PCr.LJ 1082, 1086 (woman recanting testimony and denying that she had been raped by the accused); Abdul Lateef v. State, 1997 PCr.LJ 1794. It is uncertain in reading the latter judgment whether this is a rape or zina case. The husband complainant brought the case against his wife and a man she claims abducted and raped her. See id. at 1795.

[222] In fact, statistics change such that husbands brought 52% of the original non-Section 561-A claims currently on appeal or being pursued in a bail application case. Fathers, on the other hand, only brought 24% of these non-Section 561-A claims, with brothers bringing 14% and mothers bringing 5% of the claims. Additionally, note that 5% of all claims were brought by the SHO. Again, this will not be addressed further in this article. All calculations performed as described in supra note 221.

[223] Case analysis on file with author.

[224] Case analysis on file with author.

[225] See Mst. Khial Meena v. State, 1997 PCr.LJ 539, 542; Muhammad Aslam v. State, 1997 PCr.LJ 307, 309 (both cases remanded).

[226] See Riaz Hussain and another v. State, 1997 PCr.LJ 1312, 1314 (FSC acquitting). See also Muhammad Siddique and another v. State, 1997 PCr.LJ 1655, 1657-58 (FSC also acquitting).

not a single zina-adultery appeal in 1997 resulted in the couple's conviction being upheld.[227]

It is the fact that these cases initially result in conviction that is the concern. The recognition of the inappropriate use of zina charges for harassment unfortunately seems to be developing more slowly in the trial courts. The Section 561-A petition is a powerful tool for defense counsel, yet the zina appeals cases do not mention whether the defense attorney ever brought a Section 561-A petition. There is also no indication that such a petition would not have been successful. Advocates should be responding to prosecutors of zina claims with Section 561-A petitions where there appears to be misinformation or harassment warranting dismissal of the case, regardless of who originally brought the claim. Neither advocates nor the judiciary should permit such weak prosecution cases to drag individuals through years of jail time, motions, and financial loss only to eventually have them easily acquitted on appeal.

Similarly, a defense that highlights the existence of harassment should not stop merely at the successful bail application. A grant of bail does not foreclose the possibility of a later prosecution and potential conviction for zina-adultery, which may ultimately result in far greater jail time and social stigmatization. Bail applications must be followed up by petitions to dismiss cases where there is already evidence suggesting a weak and improper prosecution. The current state of affairs is an injustice to defendants and the Pakistani judicial system at large.

In sum, harassment of women by fathers and husbands via the Zina Ordinance is not merely a trend of the 1980s. The practice has remained entrenched despite judicial efforts to curb and correct it. Reforms should take place to curb the misuse evident in a majority of zina claims, including new, strengthened Qazf legislation,[228] the use of Suo-Moto, or independent, action by the Court to dismiss cases that are not legally founded, and the promotion of legal awareness of the extent to which harassment occurs. Failure to effect these changes will prevent the Zina Ordinance from achieving its goal of a just Islamic society.

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[227] Fifty-five Percent of appeals were outright acquittals, with 18% case remands, 9% sentence suspensions, and 18% sentence reductions or modifications.
Note as well that one of the sentence modifications dealt with a murder case in which the man claimed extreme provocation at seeing his wife in a precarious position. See Muhammad Ibrahim v. Soofi Abdul Razzaq and another, 1997 PCr.LJ 263, 280 (holding there was not enough evidence of zina but accepting that the accused may well have been sufficiently provoked). See further discussion infra note 238.
See also supra notes 200-04 and accompanying text, for discussion of bail application grants also supporting this trend.

[228] Qazf legislation is meant to criminalize the making of false allegations of zina. See Offence of Qazf (Enforcement of Hadd) Ordinance of 1979. Currently there are virtually no Qazf claims. Case analysis on file with author.

3. *Zina Allegations Used as a Societal Tool of Harassment*

A special subset of the use of zina charges as harassment involves "faceless" or "societal" complaints. Validly married couples were sometimes charged and convicted with zina in the 1980s on evidence as obscure as anonymous tips[229] and random police raids.[230] Equally suspect, some zina charges were based solely on reports of having seen unmarried men and women together, perhaps walking or simply talking to one another.[231]

In recent years, the Courts have been taking a stand against the use of anonymous tips or police raids that result in zina charges. For example, in early 1996, the FSC granted an application to desert a zina charge despite the trial court's verdict.[232] This decision was based on the fact that the police raid was motivated by an anonymous tip, and anonymous tips are insufficient to prove the commission of zina, even when they result in the discovery of a man and a woman, both nude, dancing together.[233] Similarly, in a 1994 case, the judge held that a "raid conducted by the police at the house in the odd hours of the night was not justified in the eye of the law."[234]

Courts also seem to be making a conscious effort to ward off malicious reports of zina in circumstances which would ordinarily be considered private. For example, in a 1994 case filed against a woman for zina, the judge admonished the case witnesses, stating that:

> Conduct of the P.Ws. [prosecution witnesses] to peep into the house of the lady [accused] during the night to detect her sin and to put her under the charge of Zina carrying rigorous penalty without being conscious of the Injunction of Holy Qur'an and Sunnah is highly unfair, and their evidence cannot be given much weight.[235]

The judge further stated that:

> The allegations of Zina against a woman causing serious damage to her life in the society is always subject to deep scrutiny. Islam professes that unless the offence is not committed at public

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[229] See Muhammad Ramzan v. Muhammad Saeed and 3 others, PLD 1983 FSC 483 (sentencing three men, who had falsely charged, and obtained a conviction of, a validly married couple for zina, to three years rigorous imprisonment each).

[230] See Wajid Ali, NLR 1988 SD 452.

[231] See Zaheer and Mst. Anwar Jan v. State, PLD 1983 FSC 188; Muhammad Nawaz and others v. State, PLD 1983 FSC 522.

[232] See Malik Mukhtar Ahmad Awan and 3 others v. State, 1996 PCr.LJ 184, 185. In this case, the police failed to seek a search warrant. But beyond this, the greater issue for the purposes of this article is that to prove zina in a Pakistani court, one must prove intercourse. This proof must be more substantial than an anonymous tip.

[233] See id. at 185.

[234] Abid Mahmood and another v. State, 1994 PCr.LJ 1132, 1134 (finding that a raid conducted on the basis of spy information that resulted in finding the accused committing zina was "tainted with malice").

[235] Mst. Nusrat Mai v. State, 1994 PCr.LJ 2034, 2036.

> places and is injurious from the society point of view, it has to be overlooked and ignored.[236]

Moreover,

> The allegation of Zina against a woman is a serious matter in Sharia and if a person accuses a lady and could not produce four witnesses in support of his version, he is liable to be awarded the punishment of 80 stripes and in future his evidence is not accepted.[237]

Following in this vein, the Court seems, at times, to be attempting to limit the scope of zina prosecution. For instance, in one 1997 case, the judge discussed at length appropriate evidentiary standards for proving zina.[238] The case quoted past judicial decisions, which found that "even the presumption that male and female having lived in the same room must have committed Zina was not found acceptable"[239] and that "living together may cause suspicion which was not enough for conviction for the Offence of Zina."[240] The judge goes on to state that in order to support an allegation of zina "there must be some categorical assertion by the witness showing the existence of illicit relations,"[241] and the prosecution must bring forth positive and direct evidence of willful intercourse outside the scope of a valid marriage.[242] Moreover, the judge notes that:

> These hard rules of evidence themselves indicate that the purpose of the law is not to fix scaffold in crossings to flog people every day but to punish only those who, despite preventative methods adopted by Islam, commit Zina in such a wanton way that four or more persons can see them.[243]

Thus, like in the area of father and husband harassment, the Pakistani courts are taking a stand against harassment as a societal tool. By attempting to limit unreliable reports and insufficient evidence, the Courts are establishing case law to curb unjustified zina allegations.[244]

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[236] Id.

[237] Id.

[238] See Muhammad Ibrahim v. Abdul Razzaq, 1997 PCr.LJ 263, 275-77. This was a murder case in which the man claimed he killed his wife because he caught her in the act of zina. See id. Considering this was a murder case, the portion of this judgment on zina evidence case law was unusually long. This may be indicative of the Court's reluctance to permit baseless zina prosecution. Because this case is plead as a murder case, and not under the Zina Ordinance, it has been appealed to the Quetta High Court rather than the FSC.

[239] Id. at 275, citing Ghulam Hassan and another v. State, PLD 1983 FSC 497.

[240] Id. at 275, citing Muhammad Nawaz and others v. State, PLD 1983 FSC 522.

[241] Id.

[242] Id.

[243] Id.

[244] The Court is also implicitly acknowledging the recurring debate about the ease at which Zina Ordinance charges may be brought against an individual. Little liability or personal involvement with the charges is necessary for their initiation. A person(s) has only to go to

E. Delay

Any delay by the victim in reporting a rape presents the accused with the opportunity to use that delay in their defense. At times, the underlying assumption has been that victims would rush to report crimes such as rape committed against their persons. Thus, any delay in reporting could be considered evidence of consent. As discussed earlier, a finding of consent can result in the acquittal of an accused in a rape case, in his being convicted for zina rather than rape, or even possibly conversion of the rape allegation into a charge of zina against the woman. Clearly, the impact of delay is potentially significant.

1. *Delay Issues in the 1980s*

During the 1980s, a victim's delay in reporting rape was a strong factor in the determination of guilt or innocence of the accused. Delay was sometimes seen as indicating consent; at other times, it was considered simply one more factor that worked for the benefit of either party. Delay, particularly for the purpose of compromise or settlement between parties, was viewed negatively in the eyes of the judiciary. The judiciary did not accept that attempts to compromise in a rape cases would ever be made. Thus, delay explained on these grounds, even if only one day long, often resulted in acquittals or otherwise weakened prosecution cases.[245] Delay in reporting rape was also viewed negatively if the woman was at the end of her term of pregnancy. At times, courts perceived the delay as symbolic of her guilt, suggesting that her allegations were really just "an exculpatory statement."[246] Similarly, delay reflected particularly poorly on the prosecution case where there were suggestions of enmity or "strained relations" between parties.[247] Some cases even seemed to suggest that delay alone was enough to warrant bail.[248]

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the police station and file a complaint. As such, claims are easily brought by strangers, enemies, and family members with a vendetta.

[245] See Khan Muhammad v. State, PLD 1986 FSC 262; Sanaullah alias Sanata v. State, PLD 1983 FSC 192 (disbelieving the victim's argument that a one day delay in reporting was the result of her brother's trying to reach a compromise, and therefore, ordering acquittal). But see Khalid v. Sarkar, 1988 SCMR 2004 (holding that negotiations between the accused and the complainant parties were deemed a reasonable explanation for delay).

[246] PLJ 1982 FSC 174 (on file with Pakistan College of Law).

[247] Mazhar Hussain v. State, 1989 PCr.LJ 198, 202 (setting aside a conviction and sentence on the basis of delay and strained relations, in addition to other evidentiary problems).

[248] See Sarfraz Khan v. State, 1988 PCr.LJ 678, 678 (holding that a four-day delay helped justify bail); Muhammad Rafiq v. State, 1986 PCr.LJ 1008, 1009 (holding that a five-day delay justified bail); see also Muhammad Aslam and others v. State, 1985 PCr.LJ 2850, 2851 (holding that an "inordinate delay" of 15 days before bringing charges justified bail); Aula Mian and 2 others v. State, 1984 PCr.LJ 3051(1), 3051 (holding that a fourteen-day delay in bringing FIR charges was a sufficient basis for granting bail to the men accused of abducting a girl); Pir Bakhsh and another v. State, 1984 PCr.LJ 2425(2), 2426 (finding that bail was

Delay had a decidedly negative impact in cases where there was poor medical evidence, especially where there were no marks of violence to prove the woman resisted her aggressor.[249] In these cases, it appeared that while delay alone was not necessarily conclusive, the effect of delay was heightened or diminished depending on the results of the MLO Report. Similarly, the strength of medical evidence was affected by the length of delay and the reasons given for it. For example, in one 1988 case, it was reported that the hymen was not intact, there was no blood or vaginal discharge, and there were no fresh hymeneal tears.[250] None of these medical conditions would definitively make or break a prosecution case, but coupled with delay it was believed that the prosecution case was too weak to even warrant refusing bail.[251] Conversely, delay had little effect where medical and testimonial evidence consistently supported the prosecution story.[252]

Predominately, though, the emphasis during this period was on whether or not the delay in question had been adequately explained. For example, an unexplained delay of just a few hours in filing the FIR at a police station located only seven or eight kilometers away cast doubt on the prosecution's case.[253] On the other hand, while unexplained delays triggered doubt in the

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justified by the unexplained twelve-day delay in bringing charges); NLR 1984 SD 239 (demonstrating that an ordinary delay of two days proved fatal to the prosecution) (on file with Pakistan College of Law).

[249] This held particularly true in bail application cases. See Aziz alias Kala v. State, 1990 PCr.LJ 1362, 1363 (holding that bail was justified where there was a "considerable delay" of seven to eight days and there were no marks of violence); 1988 PCr.LJ 53 (granting bail on the basis of a three day delay and the absence of marks of violence) (on file with Pakistan College of Law); 1988 PCr.LJ 1789 (on file with Pakistan College of Law); Liaquat Ali v. State, KLR 1987 Sh.C. 14, 15 (holding that bail was warranted when a FIR was filed after a delay of five days, and there were no marks of violence); Musa v. State, 1983 PCr.LJ 16, 17 (allowing bail in a case with a four to five day delay and no marks violence).

[250] See Mustafa alias Baggi v. State, 1988 PCr.LJ 779, 780.

[251] See id. at 780-81 (holding that "Keeping in view all the facts and circumstances of the case, particularly the inordinate delay in lodging the F.I.R. and late medical examination, I feel inclined to the view that a case for . . . [bail] is made out.").

[252] See Khalid alias Bhola v. State, 1989 PCr.LJ 313, 315 (holding that where the medical examination had proven sexual intercourse with the woman "delay . . . has been explained in a satisfactory manner.").

[253] See Azmat Khan v. State, PLD 1982 FSC 4, 10 (assuming that if the woman had truly been abducted by the accused, her brother-in-law would have "rushed to the police station" to report immediately).

prosecution case,[254] reasonable explanations removed delay as a factor supporting either the prosecution or the defense.[255]

Examples of reasonable explanations included scenarios such as a case in which a child failed to report for three days that her stepfather raped her because she lived with him and feared for her life.[256] In another case, a woman was raped while her husband was out of town.[257] Her waiting until his return to report the incident to the police was considered sufficient to explain the delay and not prejudice the prosecution case.[258] Other explained delays accepted in the courts included: the complainant trying to contact some influential person to get the case registered;[259] absence of the husband of the victim; and a child, raped while her parents were absent from the house, waiting for her parents' return before she reported the rape.[260] The pivotal issue in the 1980s was, therefore, whether the delay had been reasonably explained. If it was, then the prosecution case was not prejudiced. If it was not, the case was weighted against the prosecution, regardless of how minimal the delay was.

2. *Delay Issues in the 1990s*

Delay issues in the early 1990s were largely the same as in the 1980s, with a few new clarifications. The practice of requiring explanations for delay appears to have become a fixture in the case law. For instance, a 1991 case held that where there is a prima facie case against the accused, and an explanation for delay in reporting, bail cannot be granted.[261] In addition, research from the 1990s has revealed that medical evidence and delay continue to be highly correlated.[262]

While a comprehensive overview of delay reveals the importance of its explanation to any case, closer examination of case law addressing delay

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[254] See Khoedad Khan and another v. State, PLD 1980 Pesh. 139, 141-42 (finding a delay of three days added to an already weak case); Ihsan Ahmad alias Nanna v. State, 1980 PCr.LJ 1037, 1038 (noting "delay of nearly five days"); Mst. Asho and 3 others v. State, 1987 PCr.LJ 538, 542 (finding a delay of eight or nine days weakened the case); Haji Riaz Hussain v. State, 1990 PCr.LJ 1299, 1300 (granting bail because a three day delay in receiving a medical exam was not sufficiently explained).

[255] See Bayazeed alias Kali v. State, 1988 PCr.LJ 1458, 1461 (finding delay explained, and therefore allowing the medical evidence to more fully support the prosecution). See also Muhammad Ashraf v. State, 1987 PCr.LJ 2119; Shaukat Masih v. State, 1982 PSC 164, 167.

[256] See Hamid Khan v. State, 1981 SCMR 448, 450.

[257] See 1968 PCr.LJ 218 (SC) (on file with Pakistan College of Law).

[258] See id.

[259] See Mushtaq Ahmad v. Sarkar, 1988 SCMR 2001.

[260] See Muhammad Ashraf and others v. State, PLD 1984 FSC 59, 65-66 (child advised by siblings to wait because they were unsure what to do without guidance from their parents).

[261] See Mst. Nasreen v. Fayyaz Khan and another, PLD 1991 SC 412, 418 (noting both that this rule applies to bail applications in which elements of the alleged crime are prima facie met, and that this decision shall not influence the respondent's trial on merits).

[262] Case analysis on file with author.

may highlight ancillary trends worthy of further consideration.[263] For the purposes of this discussion, however, only 1997 will be analyzed comprehensively.

3. *1997 as an Example of the Impact of Delay*[264]

In 1997, fifteen of the seventy-nine Zina Ordinance cases reported in the Pakistan Criminal Law Journal included the issue of delay in deciding the verdict. In other words, almost 20% of all Zina Ordinance cases involved some discussion of delay. The majority (thirteen of the fifteen cases) of delay issues appeared in rape cases. One-third of the cases dealing with delay were bail cases while the other two-thirds were cases on appeal.

For approximately 60% of the cases, discussion of delay in the decision did not signal a weakened prosecution case. In fact, in three cases, absence of delay was highlighted as an additional, though not decisive, corroborating factor supporting maintenance of conviction and sentencing.[265] Courts dismissed the delay in question in six cases as either immaterial or non-prejudicial on the basis that the delay was "plausibly explained."[266] One case even went so far as to contend that:

> In cases of rape delay in reporting might be stretched up to months provided a plausible natural explanation for such a delay has been placed on the record.[267]

Thus, in the majority of the cases, the issue of delay in reporting was easily resolved if the victim provided any explanation at all.

On the other hand, delay in reporting, whether long or short, adversely affected the outcome of the remaining 40% of cases. At least three of these

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[263] Professionals in the field who are interested in delay as a greater issue may refer to Apps. A, B & C.

[264] The statistics and empirical statements of trends were computed by the author based on research of all 1997 cases reported in the Pakistan Criminal Law Journal. See PCR.LJ (1997).

[265] See Muhammad Aslam v. State, 1997 PCr.LJ 1689, 1694; Intizar Hussain v. State, 1997 PCr.LJ 1374, 1376; Muhammad Sadiq v. State, 1997 PCr.LJ 546, 548.

[266] Ishfaq Ahmad v. State, 1997 PCr.LJ 878, 879; Khadim Hussain v. State, 1997 PCr.LJ 1714, 1716; Karam Hussain v. State, 1997 PCr.LJ 1717, 1719 (reading of the judgment does not clarify why, in the face of strong victim corroboration, the sentence was, in fact, reduced); Muhammad Riaz v. State, 1997 PCr.LJ 1114, 1117; Muhammad Ismail v. State, 1997 PCr.LJ 115, 116; Muhammad Qasim v. State, 1997 PCr.LJ 1095, 1098-99 (distinguishing effect of delay in present case from that in Mst. Rabia Khatoon and others v. State, 1995 PCr.LJ 1048, on the basis of there having been no explanation in the 1995 case). All six of these cases, despite delay issues, resulted in positive verdicts for the original complainant. In four of the cases, the judge maintained the convictions and sentences. The other two cases were bail applications in which the Lahore High Court refused bail. In one case the incident was even reported after one month. The judge, however, found the delay plausibly explained and refused bail to the male accused in support of the original claimant. See Ishfaq Ahmad, 1997 PCr.LJ at 879.

[267] Muhammad Qasim, 1997 PCr.LJ at 1099.

cases seemed to rely on old case law giving significance to the delay out of proportion to other evidence.[268] In one case, for instance, the judge suggested that silence equals consent.[269] A young pregnant woman who said she was raped, but who was convicted in the lower courts for zina, was not acquitted largely because "throughout the period of her pregnancy [she] kept silent. She never complained to anybody that she was subjected to Zina-bil-Jabr [rape]."[270] Similarly, in one zina case, the Court granted bail on the basis that a delay of twenty-one days had "caste a serious doubt on the veracity" of the allegations.[271] In another case, the Court granted bail because there was a two-and-one-half month delay in registration of a case against the petitioner who was said to have abducted the woman's daughter for the purpose of illicit sex.[272]

It is the remaining two cases, however, that may be the most significant. In both cases, the delay was less than a week: two days [273]and five days.[274] Given the socio-cultural taboo against rape in Pakistan, and judicial decisions from the same year permitting delay as long as a month, it would not normally be expected that such a short delay in reporting would adversely affect the prosecution. Yet, the Court acquitted the accused of rape in one, and granted bail in the other.[275] It cannot go unnoticed that both of the victims were married women. The Court even highlighted this distinction in suggesting that "an inordinate delay of 48 hours" wrecked the validity of one woman's case because she had slept both nights in her home.[276] It may be that the Court has an implicitly different reporting standard for married women than for young or single women.

At least two-thirds of all delay-related cases in the 1997 PCrLJ also include medical evidence issues on their face.[277] In fact, in every single case in which delay negatively affected the prosecution there was either no medical evidence discussed or the medical evidence was not corroborative.[278] For example, in one case the medical examination was conducted five days after the rape so there were no longer marks of violence to support the victim's story.[279] And, in another case, which involved

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[268] See Muhammad Khalil alias Kach v. State, 1997 PCr.LJ 1639 1643; Munir Ahmed v. State, 1997 PCr.LJ 91, 92; Mst. Karim Khatoon v. State, 1997 PCr.LJ 1443, 1444.

[269] Muhammad Khalil, 1997 PCr.LJ at 1645.

[270] Id. at 1645-46 (neither woman nor man she accused acquitted on appeal).

[271] Munir Ahmed, 1997 PCr.LJ at 91-92.

[272] Mst. Karim Khatoon, 1997 PCr.LJ at 1445.

[273] See Roshan Ali v. State, 1997 PCr.LJ 1342, 1343.

[274] See Manzoor Hussain and 2 others v. State, 1997 PCr.LJ 1471, 1471.

[275] Roshan Ali, 1997 PCr.LJ at 1344; Manzoor Hussain, 1997 PCr.LJ at 1471-72, respectively.

[276] See Roshan Ali, 1997 PCr.LJ at 1344.

[277] Case analysis on file with author. See generally PCr.LJ (1997).

[278] Id.

[279] See Manzoor Hussain, 1997 PCr.LJ at 1471.

conversion on the basis of pregnancy, the delay was long enough that it would have been impossible for the medical evidence to speak to anything but the fact of pregnancy or that the accused was "fit for sexual intercourse."[280] These types of cases are critical in that they highlight the importance of timely examination procedures and the interplay between more progressive acceptance of explanation for delay on the one hand,[281] and an adherence to medical evidence on the other that may make delay considerations obsolete.

The usefulness of delay as a defense, therefore, has weakened in the 1990s. Where once the judiciary could not conceive of socio-cultural realities such as fear of reporting, compromise, or family honor, judges are now accepting that these realities may be a normal part of the process a rape victim will experience.[282] One judge acknowledged as early as 1984 that delay in reporting is not uncommon in cases of rape and abduction of married women, particularly because of considerations involving the honor of the woman, her husband, and their families.[283] It was not until the 1990s, however, that this line of thinking became commonly expressed and explored. In 1997, a court cited this judge, stating that "it is a matter of common knowledge that in abduction cases where the honor of the family is involved the people in the country do not run to the police."[284]

Similarly, in 1997, the Court in both Azhar Iqbal v. State and Muhammad Qasim v. State quoted the following excerpt from Understanding the Rape Victim:[285]

> The majority of rape victim[s] decide not to report at all. Instead of penalizing the victim who delays in reporting the case, she should be rewarded with kindness and consideration for her difficult decision to help society apprehend a criminal, even at some sacrifice of her own well-being.[286]

The Azhar Iqbal Court concluded that delay in the case before it was "a natural result of the socio-ethnic situations coupled with painful mental

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[280] Muhammad Khalil alias Kach v. State, 1997 PCr.LJ 1639, 1641.

[281] See generally infra text accompanying notes 282-290 and pp. 235-260.

[282] Compare Azhar Iqbal v. State, 1997 PCr.LJ 1500, 1505 ("This observation is equally applicable upon male victims of rape as well. After all their male-ego and family honour is involved and in the social fabric of Pakistan . . . [victims] do make efforts for compromise specially when the parties belong to the same village and/or tribe.") with Sanaullah alias Sanata v. State, PLD 1983 FSC 192, 194 ("How can we expect a father or a brother whose daughter or sister has been violated and disgraced to agree to compromise the matter with a person who had committed such a heinous crime? This seems to be lame excuse and has been put forth with a bad faith.").

[283] See Suleman v. State, 1984 PCr.LJ 1209, 1213-14.

[284] Muhammad Ismail v. State, 1997 PCr.LJ 115, 116.

[285] SEDELL KATZ & MARY ANN MAZUR, UNDERSTANDING THE RAPE VICTIM 191 (Dep't of Psychiatry, Univ. of Wash. ed., John Wiley & Sons, New York, 1979).

[286] Azhar Iqbal and 2 others v. State, 1997 PCr.LJ at 1505; Muhammad Qasim v. State, 1997 PCr.LJ 1095, 1099.

condition of the victim and his close relatives."[287] And in both cases, delay was referred to as a "universal phenomenon."[288]

Courts are also beginning to make semi-categorical statements suggesting that delay in lodging the FIR becomes important only when there is an obvious "element of witch hunting and planned nomination."[289] One Court held that:

> Delay per se is no ground to discard the statements of P.Ws. [prosecution witnesses] [unless] it is found to have been utilized for consultations and deliberations for naming somebody as accused.[290]

Thus, it appears that delay is becoming less critical to the outcome of rape cases so long as there is an explanation for delay in reporting the offense; and/or the medical evidence is strong enough to rebut the negative implications of delay. The Courts are now demanding strengthened medical evidence and explanation for any delay. Raising awareness as to the importance of expedient medical examination and immediate explanation of any delay while registering the FIR will significantly curb the adverse effects of delay left unexplained.

F. Medical Evidence

Medical evidence has gripped the nature of Zina Ordinance case law by its throat since the inception of the Hudood Ordinances in 1979. A large number of case decisions hinge on the corroboratory nature of the medical examination report.[291] Yet, the areas in which medical evidence must be proffered, the weight to be granted such evidence, and the very form of the evidence are much in transition and controversy. Comprehensive research of case law reported between the years 1994 and 1997 indicates that medical

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[287] Azhar Iqbal, 1997 PCr.LJ at 1505 (extending delay analysis to victims of sodomy as well as rape). Note, however, that this article does not focus on issues related to sodomy. See supra note 40 and infra note 298.

[288] Azhar Iqbal, 1997 PCr.LJ at 1504; Muhammad Qasim, 1997 PCr.LJ at 1099.

[289] Muhammad Aslam v. State, 1997 PCr.LJ 1689, 1694. See also Azhar Iqbal, 1997 PCr.LJ at 1504 (noting that delay "cannot be brushed aside unless the very commission of [the] offence itself is clearly dubious.").

[290] Ijaz Hussain v. State, 1997 PCr.LJ 1707, 1712.

[291] See Mamman v. State, NLR 1980 Cr. 529, 532 (Lah) (holding that a statement of the victim that is fully corroborated by a MLO Report and medical statement is sufficient to prove the sexual act: "The placing on record of the Chemical Examiner's report is not the only manner in which a sexual act can be proved."); see also Muhammad Hanif v. State, 1996 PCr.LJ 1377, 1378 (pointing to a medical certificate supporting the victim's statement when denying bail despite a two-day delay in reporting); Muhammad Sheraz v. State, 1996 PCr.LJ 717, 719 (denying bail to an accused in a case where the MLO Report supported the victim); Muhammad Mohsan v. State, 1993 PCr.LJ 9, 11 (upholding conviction because the medical evidence and Chemical Examiner's Report corroborated the prosecution).

evidence issues arise in close to 50% of all cases.[292] Unlike consent issues, which are primarily defensive in nature, medical evidence is an affirmative element of the prosecution's case. Without medical evidence of some form, there is essentially no viable charge under the Zina Ordinance.

Medical evidence typically appears in Zina Ordinance cases in the form of an MLO Report, a Chemical Examiner's Report, or a Serologist Report. In addition, doctors may be called forth for testimony throughout the course of proceedings, and medical texts and educational devices, even if unrelated to the particular case at hand, may be utilized in argument. The MLO Report is the most critical aspect of medical evidence. It is generally understood in practice in Pakistan that a Zina Ordinance case cannot move forward without the MLO Report.[293] Ironically, the Report itself is only a short questionnaire with blank spaces requesting information about the patient's family names, age, physical characteristics, and possible marks of violence from the alleged incident. As part of an examination, swabs are taken and sent out for analysis. The Chemical Examiner's and Serologist Reports are

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[292] For example, in both 1996 and 1997, 30% of all Zina Ordinance cases directly identified medical evidence issues in their judgments. More importantly, this figure takes into account all Zina Ordinance cases, including claims such as petitions to quash that would not normally include medical evidence issues. Once these non-medical case-types are removed, and calculations redone, it becomes apparent that close to 50% of all Zina Ordinance cases deal with medical evidence in some manner. In 1997, for example, 61% of all rape cases dealt with medical evidence issues. And, in 1994, approximately 50% of all appellate decisions discussed medical evidence issues in their judgments. See infra Apps. A, B & C for other relevant statistics.

[293] See, e.g., Jani and another v. State, 1996 PCr.LJ 656 (pointing to a lack of medical examination, i.e., medical evidence, with which to corroborate victim testimony as a "significant factor" in the acquittal of the accused).

There has been some debate about the necessity of the MLO Report and which medical examiners and hospitals are qualified to issue the Report. While it is most likely technically accurate that a MLO Report from any doctor will suffice for support of the prosecution's case, practice has created the impression that the Report must be made at a particular public hospital. The specific hospital depends upon the locality of the incident alleged. Compare Mst. Rehmat Bibi v. Muhammad Najib and another, 1997 PCr.LJ 331, 336, with Interview with Samya Burney, attorney for Human Rights Watch, Women's Rights Division, in New York, N.Y. (Sept. 1998); Interview by Samya Burney with Hina Jilani, Pakistani human rights attorney at AGHS, in Lahore, Pak. (1997).

The fact of the matter is, however, that if the custom dictates that the examination and Report must come from a particular hospital, then people wait to be seen there and do not generally "bend the rules." This is a problem because it is typically understood that "lady-doctors" should see these patients; therefore, if a female gynaecologist is not available for two or three days, the patient may either not be seen or her condition will be significantly different. In addition, many activists complain that the conditions under which the examination is performed are less than satisfactory. They are reported to be unclean, dimly-lit and certainly not uniform enough to create a general public understanding of the patient's condition (at the time of examination) when her case finally gets to court. See Interviews with staff at WAR, Danish Zuberi, and Samya Burney, in Karachi, Pak. (Mar.-May 1998).

then created by laboratories, which are generally located outside the hospital in which the samples are taken.[294]

In the context of the case law, medical evidence issues naturally fall into three main subcategories that deserve independent examination. These include penetration, marks of violence, and morality. As discussed in Section IV, the Chemical Examiner's Report findings are often used as corroborative or primary evidence of conclusions involving morality and delay, both aspects of consent. To that extent, the discussion of morality and delay in this section is limited.

1. *Penetration*

Medical evidence involving penetration has clearly identifiable subcategories, that is, the presence or absence of semen, the state of the girl or woman's hymen, and reproductive capability. However, before examining these subcategories, it is helpful to carefully consider how the Pakistani courts define "penetration."

a. *Penetration as defined through the ordinance and case law*

The Zina Ordinance, in defining sexual intercourse, states that, "penetration is sufficient to constitute the sexual intercourse necessary to the offence of Zina [or Zina-bil-Jabr].[295] The Ordinance provides no further clarification of what constitutes proof of zina or rape. Case law and the authors of authoritative texts on the Hudood Laws have made it clear that "penetration is the essential ingredient."[296] Unfortunately, though, this statement goes no further than simply reiterating the explanation highlighted above. Beyond knowing that a successful case requires penetration, it is critical to determine the elements an advocate or public prosecutor must seek in order to provide proof of penetration.

Two threshold questions must be answered prior to examination of the subcategories of penetration: (1) What is it that must be penetrated? and (2) What must serve as the object of penetration? It is clear that it is a vagina that must be penetrated.[297] The Zina Ordinance does not address or include offenses that involve forcible oral penetration, anal penetration, or any form of homosexual intercourse. Instead, issues of sodomy or non-heterosexual

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[294] This has also been targeted as an area of concern for activists. Often the swabs must travel long distances in un-airconditioned spaces only to remain sitting at the lab until analysis may be done. The results are certainly not confidence inspiring. See discussion between author and activists such as Samya Burney of Human Rights Watch and Danish Zuberi of WAR.

[295] Zina Ordinance, supra note 11, §§ 4 & 6.

[296] Mahmood & Shaukat, supra note 12. See also, e.g., Muhammad Ibrahim alias Papu v. State, 1996 PCr.LJ 685, 687.

[297] Mst. Sukhan v. State, 1985 PCr.LJ 110, 119 ("In simple language, penetration means entering of the male organ (penis) into the vagina.").

vaginal intercourse must be prosecuted under the Pakistan Penal Code.[298] Furthermore, it has become clear through case law over the last ten years, that it must be a male penis that penetrates the vaginal canal, not pens, animals, fingers, or other objects.[299]

Once penetration is established, the more subtle issues of how much penetration is sufficient to constitute rape and what evidence is used to support a conclusion of sufficiency must be addressed. Pakistani case law seems fairly emphatic that full penetration is not required. In fact, as far back as the 1950s, courts have held that "the slightest penetration is ample."[300] However, this holding loses its impact in many cases when the judiciary discusses proof of penetration in terms of whether there is sperm or a burst hymen, thereby indicating an implied standard of full, not slight, penetration. Other cases bypass any and all implications, stating outright that evidence of sperm alone may not even be sufficient to constitute proof of penetration.[301] When addressing the issue directly, however, the general judicial consensus in recent years still seems to be that slight penetration, however slight, is sufficient.[302]

b. *Presence or absence of semen as proof of penetration*

However the standard is articulated, courts generally demand proof of penetration as an essential element of the alleged crime. While there is, in fact, a wealth of case law that suggests that presence of sperm is not necessary for a successful rape prosecution,[303] a negative chemical report,

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[298] At times, cases involving sodomy come within the auspices of the Zina Ordinance because Section 377 of the Pakistan Penal Code may be filed in conjunction with a charge of abduction for illicit sexual purposes, i.e., Zina Ordinance, supra note 11, § 16. See PAK. PEN. CODE § 377.

[299] See Muhammad Naseer v. State, PLD 1988 FSC 58, 72 (holding that penetration with "animals or other devices" does not constitute zina); Wajid Ali v. State, 1996 PCr.LJ 610, 612 (holding penetration by a pen, not a penis, is insufficient for rape conviction).

[300] Ghanshyam Misra v. State, 1957 AIR 44 (Ori.) 78. See also In re. Anthony alias Bakhtavatsalu, 1960 AIR 47 (Madras) 308. Note that these cases continue to be relevant because before the instigation of the Hudood Ordinance in 1979, all sexual crimes, including rape and sodomy, were dealt with under what was the old British colonial legal system prior to Partition in 1947. Ta'zir evidence for rape and the Penal Code for sodomy still apply, as would case law relating to such points.

[301] See Muhammad Ali v. State, 1993 PCr.LJ 234, 238; infra text pp. 241-245.

[302] Mst. Sukhan, 1985 PCr.LJ at 119 (noting that any penetration "however slight an extent" will be deemed sufficient and discussing what does not constitute penetration: "lovemaking activities, howsoever objectionable morally and socially might be, of such male and female like kissing, embracing or lying on the same cot or even lying on each other will not bring the case within the mischief of Zina unless they indulge in actual penetration."). See also Mamman v. State, NLR 1980 Cr. 529, 531 (Lah) ("Once penetration is established, its extent is immaterial . . . .").

[303] See, e.g., Janoo alias Jan Mumhammad v. State, PLD 1982 FSC 87, 94 (stating that the fact that the Chemical Examiner's Report was negative "could have been material only if this fact [of rape] had been doubtful.").

i.e., a finding of no sperm on the vaginal swabs submitted for testing, surely leaves behind subtly different, and adverse, perceptions in the courtroom. Advocates and prosecutors must remember decisions from as far back as 1960, 1961, and 1980 in which the Court held that:

> To constitute the offence of Zina it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of the hymen. Partial penetration of the penis within the labia majora of the vulva or pudendum with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of law.[304]

The adverse effects of finding an absence of sperm in chemical analysis are not easily quantifiable. One can only speculate that while the courts are enunciating the accepted standard, they are operating with the implicit standard that a positive Chemical Examiner's Report is mandatory. It has become vital that the prosecutor amass other medical evidence to allow the case to move past that unspoken barrier to a successful prosecution. For example, in Muhammad Shafiq v. State, the Court specifically held that "it is immaterial whether ejaculation took place or the hymen could be torn."[305] Nevertheless, the Court's decision relied on other medical confirmation that penetration, to some extent, occurred:

> From the medical examination it was established that penetration had taken place although not to the full because the hymen was found intact. But the condition of the vagina clearly established that penetration had taken place.[306]

It is necessary for advocates and prosecutors to acknowledge and voice that courts often apply an implicit standard that medical proof of full penetration is mandatory. Were prosecutors and advocates to consistently remind the judge of his/her colleagues' decisions--that the effects of a negative chemical examination should be nil--judicial decisions may be less likely to be subtly prejudiced by the missing nonessential evidence. Some early 1980s cases support the proposition that the absence of semen cannot be held to be decisive.[307] The Court in Muhammad Abbas v. Muhammad Riaz, for example, held that the absence of semen does not disprove the commission of zina, reasoning that, despite penetration, the male may not

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[304] Mahmood & Shaukat, supra note 12, citing Habib Ahmad v. State, NLR 1980 Cr. 520 (Lah); 1960-2 (Ori.) J.D. 437 (on file with Pakistan College of Law); Bhudhan Lal Sarma v. State, 1961 (1) Cri. L. Jour 689 (vol. 62 C.N.192).

[305] Muhammad Shafiq v. State, 1997 PCr.LJ 475, 477.

[306] Id.

[307] See Muhammad Abbas and another v. Muhammad Riaz, PLJ 1984 Cr.C. 300, 303; Muhammad Ali and Mst. Jantan v. State, NLR 1983 Cr. 662, 665.

have ejaculated semen due to anxiety or nervousness at the time.[308] Another early 1980s Federal Shariat Court decision held that evidence of penetration in rape cases need not be in the form of the Chemical Examiner's Report, indicating that no evidence of sperm was necessary.[309]

The effect of finding the presence of sperm in chemical analysis is almost as difficult to evaluate as its absence. With respect to children and "grown-up virgins," courts have held that presence of sperm is "a positive sign of rape."[310] Proof of penetration, however, may be in the form of either a Chemical Examiner's or a Medical Report. To this effect, the Federal Shariat Court held in 1988 that a conviction for "commission of zina" could be proven irrespective of whether the Chemical Report supported rape, where there were other "positive signs of intercourse."[311] Thus, the Report was important but still not the cornerstone in determining the verdict. Where there is evidence of sperm in the form of a positive Chemical Examiner's Report, however, courts tend to favor the victim or complainant more readily. In at least one case where there was a positive Chemical Report and the male accused was found "fit for intercourse," the Courts refused bail.[312] Similarly, some convictions and sentences are substantiated, and thus, upheld, where, based on a positive Chemical Examiner's Report, the doctor opined that the woman had been subjected to sexual intercourse.[313]

It appears, however, that the courts have subtly changed how they perceive proof of penetration in the 1990s to require even more medical evidence. While there are still cases in which positive Chemical Reports serve as support for proof of penetration, a number of cases are rejecting this level of proof as substandard. For instance, an early 1990s case stated that the Chemical Examiner's Report could not be taken as "fool-proof testimony of sexual intercourse without any proof of actual penetration."[314] Moreover, the Court concluded that:

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[308] Muhammad Abbas, PLJ 1984 Cr.C. at 303 (canceling bail for the accused, and holding that, despite medical examiner's opinion that the victim had not been subjected to intercourse, she clearly had been and "the moments were turbulent to affect his ability to ejaculate.").

[309] See Shaukat Masih v. State, PLD 1982 FSC 19, 20 (upholding conviction after finding that, though the Chemical Examiner's Report of the vaginal swabs was not produced into evidence, the stained shalwar (pants) were tested, and the positive Report was produced in Court.) It must be noted, however, that, separate from the issue of whether sperm and Chemical Reports are decisive, even in the 1980s, when Chemical Reports were less important, not producing the Report when it should have been available was sometimes tantamount to suggesting it would not support the prosecution's case. See Muhammad Ali and Mst. Jantan, NLR 1983 Cr. at 665.

[310] Alam Sher v. State, 1991 PCr.LJ 637, 643 (quoting MODI'S MEDICAL JURISPRUDENCE AND TOXICOLOGY 325 (21st ed.)); Noor Akbar v. State, NLR 1981 Cr. 103, 105.

[311] Bayazeed alias Kali v. State, 1988 PCr.LJ 1458, 1462.

[312] See Atta Muhammad v. State, 1996 PCr.LJ 1601, 1601-02.

[313] See Muhammad Nawaz v. State, 1997 PCr.LJ 893, 894 (upholding conviction and sentence on the bases that the MLO Report supported the prosecution's case and there was no evidence of enmity).

[314] Muhammad Ali v. State, 1993 PCr.LJ 234, 238.

> Since the dead body [of a four to five-year-old child] was not examined to find out that penetration had actually taken place the presence of semen on the [vaginal] swabs would prove nothing.[315]

The Court emphasized, on more than one occasion, that the doctor had failed to examine the child's labia minora and labia majora as well as her vagina "to find out if the hymen was torn or whether the vagina was lax or tight."[316] Accordingly, it concluded outright that "there was no proof of penetration."[317] Similarly, in 1996, the Federal Shariat Court held in Tahir v. State that "the presence of sperm on vaginal swabs would not necessarily prove penetration because there were no other signs of penetration having taken place on the person of the victim."[318]

This trend appears to be particularly strong where married women are concerned. In a 1990 case, for example, the Supreme Court of Pakistan held that "a positive Chemical Examiner's Report cannot serve as conclusive proof of zina-bil-jabr [rape]" for married women.[319] Similarly, two case decisions from 1997 substantiate a bias against married women in the courts.[320] In one case, the Court held that:

> [The] medical evidence and chemical result of [the victim's] vaginal swabs were of no consequence and did not advance the prosecution's case . . . [because she was] a married woman [who had spent] two nights in her house in the company of her husband before reporting the matter to the police.[321]

In the other case, the Court found that:

> [The] Medical Report, prima facie, did not support the prosecution version as the victim was a married woman and her medical examination was conducted about five days after the alleged occurrence. [322]

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[315] Id. There was some discrepancy in how much time passed between the time the vaginal swabs were taken and when they were actually sent for analysis. The Court does not discuss in its medical conclusions that the time gap may invalidate the sample. Perhaps time does have that effect, but the Court's refusal to credit medical evidence in an effort to scientifically back its final conclusion, that penetration was not proven, is disturbing.

[316] Id. at 236-37. Lax or tight vaginal capacity will not be discussed in this article; but it is an important issue in determining acceptable standards and conclusions utilized through medical examinations for rape and adultery.

[317] Id.

[318] Tahir alias Tahri v. State, 1996 PCr.LJ 186, 188.

[319] Zulfiqar Ahmed alias Pappu v. State, NLR 1990 SD 771. See also Mazhar Hussain v. State, 1989 PCr.LJ 198, 201 (holding medical evidence carries less weight when offered in relation to married women); Mst. Asho and 3 others v. State, 1987 PCr.LJ 538, 541 (stating medical exam had no value because there had been a delay in reporting the case and "she is a married woman and her husband is alive.").

[320] See generally Roshan Ali v. State, 1997 PCr.LJ 1342; Manzoor Hussain and 2 others v. State, 1997 PCr.LJ 1471.

[321] Roshan Ali, 1997 PCr.LJ at 1343 (headnote paraphrasing holding).

[322] Manzoor Hussain, 1997 PCr.LJ at 1471.

The Pakistani judiciary seems to believe that if a woman and her husband sleep in the same house they will inevitably engage in sexual intercourse. This suggestion and assumption, particularly where a woman has just been severely violated, is demeaning and misplaced.[323]

Subtle discrimination against married women appears to be a common theme in Zina Ordinance cases. For instance, in a 1996 case, medical evidence reported the presence of sperm on vaginal swabs taken from a deceased woman who had been raped. The Federal Shariat Court reversed the lower court conviction because the presence of sperm could not support the contention of penetration for a married woman.[324] This ruling by the FSC makes it almost impossible for a married woman who is not visibly beaten and physically marked to support an allegation of rape against the presumption that she has either consented or just been marked by her own husband's sperm.[325]

Consistent with the judiciary's insistence on better physical evidence, there appears to be a recent push toward requiring the prosecution to support positive Chemical Reports with Serologist Reports that specifically identify

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[323] The notion that women are sexually available to their husbands at all times, and that, in fact, married persons daily engage in sexual intercourse is implicit. The fact of her availability is certainly an issue in terms of the possibility that evidence may have been tampered with, but the evidentiary standard should not require a positive Chemical Examiner's Report anyway. The Court is not providing alternative analysis to deal with the legal issue of evidentiary standards for certain classes of persons. Instead, the Court appears to simply negate those cases as being beyond the realm of justiciability.

The Zina Ordinance does not directly address the issue of medical evidence, thus, the desire for evidence in this form should not necessarily override all other forms of corroborative evidence in support of the prosecution's case.

The Court's subtle dismissal of married women as sexually available and, therefore, not qualified to bring a charge of rape, ignores the nature of rape as a crime. It also ignores the possibility that married women may not consent to sexual intercourse with their husbands after being raped. Moreover, such dismissal reinforces the notion that married men have no regard for what it means to be raped. It also lends credence to a patriarchal social excuse that intercourse, for men, fulfills a carnal need which cannot, and should not, be denied. If the judiciary sees rape simply as a crime of sexual lust, it becomes almost impossible for them to decide cases in an unbiased manner.

[324] See Abdul Majeed v. State, 1996 PCr.LJ 629, 634. See also infra App. C.

[325] Ironically, however, presence of sperm has served as conclusive proof against women for the offense of zina. See Akbar Hussain and another v. State, 1997 PCr.LJ 543. Although this case addresses the validity of marriage due to the accused woman's previous divorce, the result remains the same: a medical examination confirmed sexual intercourse, i.e., sperm presence, and the conviction of the two accused "adulterers" was upheld. It is uncertain whether the claimants originally stated they had not engaged in sexual intercourse or whether they admitted to such on the assumption that their marriage was valid. Either way, the Court's use of sperm presence signals the potential to use this standard against married women accused of zina.

Compare to Sh. Muhammad Anwar and another v. State, 1994 PCr.LJ 327, 330 (concluding that since the female accused was a married woman, "the presence of semen in her vagina would not prove her guilt [of zina] in the absence of any other positive evidence.").

the accused. In Abid Javed alias Mithu v. State, the Federal Shariat Court held that:

> Semen found on vaginal swabs loses evidentiary value if the semen of the accused is not obtained and got examined and matched with semen found on vaginal swabs by the Serologist.[326]

The resulting acquittal was only partially based, however, on the absence of a serology report. It probably had more to do with the fact that there had not been any follow-up on the results of a semen test that had already been sent to the Serologist. Nevertheless, this case remains critical because it highlights the Court's tendency to desire, and ultimately require, scientific proof of rape and identification of the rapist, e.g. Serologist Reports in addition to positive Chemical Reports. In fact, the Court specifically states that "in cases of Zina the prosecution would be well advised to obtain the semen of the accused and have it analyzed by the Serologist."[327] The Court goes on to state that in 1983 it had advised the same, and even sent copies of the judgment to the Secretary Interior, Secretary Department of Law, Police Provinces and so forth.[328] It noted its disapproval and inability to understand why Serologist Reports were not routine.[329]

One year later the Federal Shariat Court again acquitted on the basis that the Serologist Report had not been introduced into evidence.[330] Continuing in this vein, the Court also held in 1997 that because the semen of the accused had not been sent to the Serologist for grouping in the first place, the evidentiary value of semen-stained swabs was lost.[331] However, the same judge held in Muhammad Qasim v. State that, in the case of an armed gang rape, the Report of the Chemical Examiner "left no doubt in the final opinion,"[332] and thus, the failure to place a Serologist Report into evidence did not warrant acquittal. Justice Abdul Waheed Siddiqui further highlighted the special nature of serology reports by stating that:

> Reports of serologist are essential in character, inter alia, in the cases of disputed paternity and rape by one person but many persons are suspected.[333]

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[326] Abid Javed alias Mithu v. State, 1996 PCr.LJ 1161, 1164.

[327] Id. at 1164-65.

[328] See id. (referring to the Court's earlier decision in Mst. Ehsan Begum v. State, PLD 1983 FSC 204, 209).

[329] Id.

[330] See Zarina Bibi v. State, 1997 PCr.LJ 313, 317 (describing how semen swabs were sent for analysis but no Report was entered into evidence).

[331] See Wagar-Ul-Islam and another v. State, 1997 PCr.LJ 1107, 1111.

[332] Muhammad Qasim and another v. State, 1997 PCr.LJ 1095, 1107. It is important to note that, even in this case, there was some controversy over whether instructions for semen to be sent to the Serologist were given. No Serologist Report was produced. The judge contended that no such suggestion had been made to the Doctor.

[333] Id.

These cases dealing with Serology may be critical for two reasons. First, it is clear the Federal Shariat Court is moving toward new, firmer requirements for the prosecution case with regard to proof of penetration. This trend is potentially in conflict with the Court's traditional position that slight penetration is sufficient. At a certain point, the judiciary will take a stance, perhaps creating an evidentiary standard most prosecution cases could never meet. In a society where expedient medical results are rare and often unreliable, it is vital that those activists, prosecutors and advocates, who desire justice, work now to ensure that this does not happen. Second, judicial decisions are highlighting a preference for a lighter standard of scrutiny applied to special categories of protected victims in rape cases. Justice Waheed Siddiqui's Muhammad Qasim judgment on gang-rape may provide an avenue for avoiding the trap of too stringent proof requirements that the judiciary appears to be moving toward. Not only does his decision indicate lower medical evidence standards for particularly serious allegations, but he highlights paternity cases as the only real situation that absolutely requires the inclusion of a Serologist Report into evidence. The Serologist Report should be used to confidently identify the accused as the rapist, not to determine whether the rape has occurred.

In sum, slight penetration is the stated evidentiary standard that must be met to establish sexual intercourse. Practically, however, evidence of full penetration with ejaculation in the form of a positive Chemical Examiner's Report is critical to the success of many prosecution cases for rape. Where this is not an evidentiary possibility, old standards of "marks of violence" may substitute. This is particularly true for women who are married. They remain at a distinct disadvantage as no evidence of penetration consistently appears to be sufficient to establish rape in a Pakistani court of law.

It is the role and responsibility of advocates to demand the courts acknowledge the standard for penetration set by the Federal Shariat Court itself. In doing so, advocates must begin seeking serology tests to confirm the source of the sperm where possible and necessary to support a case. Simultaneously, they must utilize their professional training to convince the judiciary that it must hold a uniform standard of proof to all women, be they married, unmarried, virgin, or non-virgin.

c. *Hymeneal Condition as an Indicator of Proof of Penetration*

An issue that appears to be inextricably connected to proof of penetration is that of the hymeneal condition of the woman stating she was raped or charged with the offense of adultery or fornication. Dr. Nawal El Saadawi illustrates the social importance of the hymeneal condition in The Hidden Face of Eve:

> Every female Arab child, even today, must possess that very fine membrane called a hymen, which is considered one of the most essential, if not the most essential, part of her body. However,

> the mere existence of the hymen is not in itself sufficient. This fine membrane must be capable of bleeding profusely, of letting out red blood . . . . No girl can be more unfortunate than she whom nature has endowed with an elastic hymen, capable of widening and stretching at the moment when a man's . . . sexual organ penetrates upwards in the vagina, for such a hymen will not bleed. No girl can suffer a worse fate than she whom nature has forgotten to provide with a hymen, or whose hymen is so delicate it is torn away and lost by repeated riding on a bicycle or a horse, or by masturbation, or by one of those minor accidents that happen so often in childhood. No human being can know greater misery and humiliation than a girl whose hymen is thick, deprived of an orifice, and elastic. For then neither the male finger nor the man's penis can draw blood as it pushes the hymen before it like a rubber membrane.[334]

Despite such provocative social views of the hymen, the Pakistani judiciary seems for the most part to have bypassed social prejudices in its interpretation of rape cases where hymeneal condition is an issue.

In discussing penetration, judges often indicate in their decisions whether the hymen was intact. When it is not, the court is usually inclined to support its conclusion that the victim was raped with that observation.[335] For example, in Muhammad Mohsan v. State, the Court began its conclusion with the following two sentences:

> The medical evidence demonstrated beyond any shadow of the doubt that the girl was subjected to rape. The doctor found that the hymen of the girl was ruptured.[336]

For the most part, however, the message from the Federal Shariat and Supreme Courts is consistent: an intact hymen may not serve as conclusive or even prejudicial proof that sexual intercourse did not occur.[337] At times it

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[334] NAWAL EL SAADAWI, THE HIDDEN FACE OF EVE 25 (Dr. Sherif Hetata, Zed Books Ltd., 8th ed. 1991) (1980). Medical research conducted over a thirty-year period in Iraq suggest that "11.2% of all girls are born with an elastic hymen, 16.16% with so fine a membrane that it is easily torn, 31.32% with a thick elastic hymen, and only 41.32% with what may be considered a normal hymen." See id. at 26, citing Statistics of the Institute of Forensic Medicine, Baghdad, Iraq, 1940-1970, in IRAQI MEDICAL JOURNAL (Feb. 1972).

[335] See, e.g., Muhammad Sadiq v. State, 1997 PCr.LJ 546, 548 ("Her medical examination clearly established that she was a virgin before the occurrence as there were fresh tears of the hymen and some blood also oozing from the vagina."). Actually her hymen could have re-torn. Neither the Court nor the doctor seemed to acknowledge that hymeneal tearing establishes very little conclusive evidence of anything except the current condition of the hymen.

[336] Muhammad Mohsan v. State, 1993 PCr.LJ 9, 12. While there were other factors leading to the conclusion that the child was raped, it is noteworthy that the judge considered first that her hymen was no longer intact.

[337] See Alam Sher v. State, 1991 PCr.LJ 637, 638 ("Penetration [can] be effected without rupturing or injuring the hymen. Normally the hymen is ruptured by the first act of coitus,

even appears that judges have become more savvy about hymeneal condition than the doctors actually performing the medical examinations.

For example, in 1982, the Court decided a case in which the medical examiner determined that an 11-year-old child had been subjected to, or engaged in, sexual intercourse one week prior to the date of the alleged rape. The Court, rather than accept a potentially fatal insinuation, suggested that the medical examiner failed to take note that rupture of the hymen is not always due to coitus. Rupture may occur because of an accident, playing,[338] or even during a medical examination when instruments are inserted into her vagina.[339]

Interestingly, in 1997 alone, at least 15% of the case decisions on appeal dealing with medical evidence highlighted the issue of hymeneal condition.[340] One case concluded that neither ejaculation nor a ruptured hymen were necessary to prove the offense of rape. In other words, the Court confirmed that slight penetration, which would include evidence of neither in the medical examination, is the standard for proving rape.[341]

In Muhammad Riaz v. State, the Court concluded that silence in the medical report with regard to the hymen of a woman alleging multiple rapes could lead "only [to the] presumption . . . that the hymen of the victim was

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though it may persist even after frequent acts of coitus if it happens to be loose, folded and elastic, or thick, tough and fleshy."). Note, however, that in Munir Ahmad v. State, 1995 PCr.LJ 1745, 1747, the Court states:

> Assertion of the prosecution was that she was virgin before the said occurrence, but the medical examination neither showed fresh tear of the hymen nor any other injury on the vagina nor was there any swelling of the hymen which are prerequisites of a first sexual intercourse. Since according to her assertion it was a case of rape and in that event, the aforesaid signs are a must and their non-presence shows that she was previously used to sexual intercourse.

This decision, though an extreme departure from the conclusion in this article regarding hymeneal condition, is likely the result of several additional factors and lines of thought affecting the Court at that time. The Court further emphasized its holding with notice of both delay and enmity. In addition, there was a photo of the woman and her accused together, which led the judge to conclude they had previously been intimate.

Similarly, in Mustafa alias Baggi v. State, 1988 PCr.LJ 779, the Court notes, in its litany of reasons why it did not sufficiently believe the woman had been raped, that her hymen was "not intact." It is inescapable that the medical examiner in this case also opined that the woman was "used to sexual acts" and that there was what the court referred to as an "inordinate delay," a factor which could leave the hymen to heal, though not necessarily reseal itself, if by chance the woman naturally had an intact hymen at the time of the rape anyway. Id. at 780. For further discussion on the intersection between medical examiner's observations on morality and judicial decisions, see supra text, at pp. 197-199 and infra text, at pp. 258-260.

[338] Such as playing on a seesaw at the playground.

[339] See Ghulam Rasul v. State, PLD 1982 FSC 108, 111, citing MODI'S MEDICAL JURISPRUDENCE AND TOXICOLOGY 313 (22nd ed.).

[340] Case analysis on file with author.

[341] See Muhammad Shafiq v. State, 1997 PCr.LJ 475, 477.

elastic in nature."[342] The decision continued with an entire page of citations from Modi's Medical Jurisprudence and Toxicology discussing the nature of the hymen, and conclusions and observations that one could make with regard to a ruptured or intact hymen. In sum, the Court highlighted that the hymen is extremely variable between women and that:

> The presence of intact non-ruptured hymen or the silence of medico-legal certificate about hymen of pubert female victims in the circumstances of the presence of other strong signs and signates of the intercourse, even in gangrape cases, or even in the case of pregnants does not rule out intercourse with complete penetration for a considerable duration. In fact the presence of an intact hymen in adult females is not conclusive proof that an intercourse with partial or complete penetration has not taken place.[343]

In one of the few Zina Ordinance cases to reach Pakistan's Supreme Court, the Court upheld the conviction of the accused despite the fact that the victim's hymen was intact.[344] In Mst. Rehmat Bibi v. Muhammad Najib, the Supreme Court held that:

> The fact that sperms were detected in the vagina swabs, it is clearly proved that Mst. Rizwana Parveen was actually raped and the finding of the Courts below that it was merely an attempt of rape is fallacious on the very face of it.[345]

Critically, the 4-1/2 year old victim in this case also displayed marks of violence. Although her hymen was not ruptured, she did have some swelling and tears in her genital area and bruising on her forearms.[346] Sadly, the Supreme Court failed to take this opportunity to present a coherent standard of proof for penetration on which future prosecutors and advocates may depend. Rather, the decision highlighted the importance of marks of violence, and solidified that it is unnecessary for the victim to present a ruptured hymen, particularly if she is a child.[347]

In The Hidden Face of Eve, Saadawi passionately states that "the anatomical and biological constitution of human beings, whether men or women, can have no relation to moral values."[348] In recent years, the

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[342] Muhammad Riaz v. State, 1997 PCr.LJ 1114, 1119.

[343] Id. at 1120.

[344] See Mst. Rehmat Bibi v. Muhammad Najib and another, 1997 PCr.LJ 331, 337-39.

[345] See id. at 337.

[346] See id.

[347] The hymen tends to be located higher in the vaginal canal for children; thus, an intact hymen in children has been interpreted to have less evidentiary value in Pakistani courts. See id. See also Alam Sher v. State, 1991 PCr.LJ 637, 642, citing MODI'S MEDICAL JURISPRUDENCE AND TOXICOLOGY 325 (22nd Ed.) (pointing out that an intact hymen in children does not necessarily indicate that sexual intercourse has not taken place).

[348] EL SAADAWI, supra note 334, at 27.

Pakistani Courts have consistently adhered to this principle in their analysis of rape cases that deal with the hymeneal condition of female victims.

d. *Reproductive capacity of the accused*

The final aspect of penetration issues arising under the law of the Zina Ordinance is that of reproductive capacity. While cases under the Zina Ordinance rarely invoke discussion of whether or not the accused is a minor, this is, in fact, a critical distinction. Although adulthood is not a prerequisite to being subject to a charge of zina or rape, the Ordinance deals differently with convicts who are not adults.[349] Section 7 of the Ordinance constrains punishment for non-adults.[350]

A focal point of debate has been what constitutes adulthood under the Ordinance. The dissension mainly derives from both a sense of gender inequities that discriminate against women and girls as well as confusion in the courts over what constitutes adulthood in males. The Zina Ordinance states in Section 2 that, "'adult' means a person who has attained, being a male, the age of eighteen years or, being a female, the age of sixteen years, or has attained puberty."[351] Puberty is defined for females as the attainment of menstruation, which means many young girls well under the age of sixteen will be deemed adults. On the other hand, what constitutes puberty for males is much less clear.

In 1985 the Pakistani judiciary argued that "the capacity to commit sexual intercourse alone would not be sufficient to hold a male to be a pubert."[352] Rather, "the most important of all symptoms of puberty is ability to secrete semen, or the capacity to impregnate a female."[353] Leading advocates in Pakistan concluded by the late 1980s that case law suggested that the accused must be "capable of reproducing."[354] There is little support that this trend has changed.

Court dialogue, though, predominately focuses on the term "potency," not "reproduction." The Court formally defines potency "as the ability to develop or maintain a penile erection sufficient to conclude coitus to orgasm and ejaculation."[355] This means, inadvertently, that, yes, one could argue

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[349] See, e.g., Muhammad Hussain v. Muhammad Ramzan, PLD 1982 FSC 11, 12 (giving a twelve to fourteen-year-old boy a reduced punishment for raping a six-year-old girl due to his status as a minor).

[350] Zina Ordinance, supra note 11, § 7 (stating that punishment for zina or zina-bil-jabr should not exceed five years).

[351] Id. § 29(a).

[352] Muhammad Razak v. State, PLD 1985 FSC 298, 299.

[353] Id.

[354] A Divine Sanction?, supra note 15, at 54, citing Muhammad Razak, PLD 1985 FSC at 298.

[355] Sarwar v. State, PLD 1984 FSC 20, 23. See also Abdul Jabbar v. State, PLD 1991 SC 172; Sarwar v. State, PLJ 1983 FSC 257.

that in order to commit the offenses of rape or zina, a male must be capable of reproduction. It should, however, go without saying that reproduction and potency are two different aspects of sperm ejaculation. A male adult may ejaculate but not be able to biologically reproduce.

However, the Court acknowledges that puberty often occurs after the capacity for sexual intercourse exists within a male minor, indicating once again that puberty has less to do with the act of intercourse than it does with reproductive capacity.[356] Thus, many boys in their late teens, who are seen by themselves and their communities as adults, may meet the penetration requirement under the Zina Ordinance, but escape standard punishment because they are not yet able to ejaculate for the purpose of reproduction.[357]

This is particularly troublesome because the ability to engage in intercourse seems far more relevant than does reproductive capacity to the crimes of rape and zina. The legislature and the courts have indicated the need for the act to be "wilful."[358] A young male's punishment should turn on his active intent to penetrate a woman rather than the possibility of accidental impregnation. Moreover, while it is clear that capacity to act willfully is enhanced with maturity, and in that sense linked to the attainment of puberty, it is not clear why the capacity to procreate suddenly summons "adulthood" in males.

Furthermore, there is a larger social issue at work here of which the courts do not seem cognizant. If the Court holds reproduction as the standard, it seems to imply that the major harm in rape is the possibility of impregnation as opposed to all of the other psycho-socio-cultural factors resulting from violent crime. This implies that when a man cannot impregnate the girl or woman he has raped, his act is somehow less, if at all, harmful. This distorts the reality of why rape occurs as well as the full range of consequences, placing emphasis only on a secondary and possible consequence of rape.

Thus, the reproductive capacity standard seems unconnected to the evidentiary requirements for the offenses of rape and zina; is discriminatorily high in comparison to the standard of adulthood for women;

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[356] See Muhammad Ashraf alias Guddoo v. State, PLD 1987 FSC 33, 34; Sarwar, PLD 1984 FSC at 21.

[357] For example, a fifteen-year-old boy who can maintain a penile erection and who engages in the act of penetration, either consensually or without consent, is unlikely to consider whether he can father children. Moreover, that same fifteen-year-old may engage in intercourse on a regular basis with his girlfriend who is fourteen years old, but already menstruating. She would face fornication charges under the Ordinance as an adult, i.e., up to ten years of rigorous imprisonment if convicted under Ta'zir, while her older male lover would face the same charges under the Ordinance, but as a minor, i.e., up to five years of ordinary or rigorous imprisonment if convicted, because he still does not have the capacity to reproduce. See Zina Ordinance, supra note 11, §§ 7 and 10.

[358] See Zina Ordinance, supra note 11, § 4. See also Sukhan, 1985 PCr.LJ at 118 (defining "wilfully [as] meaning an act which is done deliberately and intentionally, not by accident or inadvertence but so that the mind of the person who does the act goes with it.").

and sends a false message to society about the harm of rape. Advocates, prosecutors, and activists must encourage the Court to more clearly define the attainment of male puberty in light of medical and social considerations. While there is clearly a gender discrepancy written into the Ordinance, this does not mean that Court decisions must further reinforce this standard. Legislative reform and judicial activism have the capacity to equalize culpability and punishment standards for males and females under the Ordinance.[359]

To create a successful integration of law as a standard which upholds societal ideologies and norms, the Courts must encourage interdisciplinary approaches to resolving the sub-definitions legally implied by the Zina Ordinance. It is important that the medical profession become aware of its impact on cases falling under the Zina Ordinance. It would benefit everyone concerned if medical examiners were to adopt a common procedure designed to address the issue of whether the male examinee has indeed attained puberty. The Court has been defining for itself medical terms such as "puberty," "potency," and "reproductive capacity." It is the proper role of the medical profession, not the judiciary, to equalize these definitions and standards in the medical field. The Court is expected to place social and medical perspectives into the context of law. It cannot do so without the aid of professionals in the medical sphere. Additionally, advocates, prosecutors, and activists must work to ensure that examination of each male accused is standardized. This will improve the reliability of the evidence available so that convicted minors are accurately punished as minors under Section 7, and adults are liable to punishment under Section 10 of the Ordinance.[360]

In sum, there is clear indication that the Pakistani judiciary sees reproductive capacity as synonymous with potency, or attainment of puberty. This standard flies in the face of both a sufficient penetration requirement for rape and zina and the connotation of intent necessary to

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[359] Another problem with the potency standard is the manner in which the medical profession makes its determinations. The standard medical examination for males accused under the Zina Ordinance, even as recently as 1997, seems to focus only on whether the male accused is potent, i.e., "whether he is fit to perform sexual intercourse." Muhammad Nawaz v. State, 1997 PCr.LJ at 893, 894. Yet, in many cases, the catch-all phrase that a boy or man is "fit to perform sexual intercourse" is not further clarified. It is unclear how medical examiners make their determinations. Is attainment of any erection adequate? Is maintenance of the erection required, and if so, for how long? Is reproductive capacity tested, and if so, how?

The vague nature of medical reports has, at times, led the Court to reduce a conviction of rape to a conviction under Section 7 for minors for the benefit of the doubt of the accused. For example, in 1982 the Federal Shariat Court reduced the rape conviction of an eighteen-year old male to a conviction under Section 7 for minors on the basis that the man could have been 16 or 17 at the time, and the prosecution had not proven by medical evidence that he had attained puberty. The judge further stated that puberty could have been proven by a positive Chemical Examiner's Report. See Shaukat Masih v. State, PLD 1982 FSC 19, 21.

[360] Assuming Hadd evidentiary standards have not been met and only Ta'zir, or Section 10, applies.

commit the crimes of rape or zina. In addition, the standard unnecessarily fuels the already disparate treatment of males and females under the Zina Ordinance and relies on the false belief that the medical profession is currently applying standardized procedures for medical examination and interpretations of puberty for each male offender before it.[361] It is necessary that advocates, prosecutors, and activists work to iron out the judiciary's standard into a comprehensible and socially applicable format. Simultaneously, they must encourage the medical profession to recognize its impact and, accordingly, crystallize procedure.

2. *Marks of Violence*

Marks of violence remains a complex area of case law under the Zina Ordinance. While technically the topic falls under the heading of medical evidence because the "marks" are documented in the Medico-legal Report (MLO Report), the emphasis in the courts has been on its use in a consent argument. Because failure to resist may imply consent, marks of violence is one of the easier ways to establish a victim resisted and was therefore raped. In this vein, a comment from the medical examiner that there were "no marks of violence" has typically been used to either convert a charge of rape to one of zina for the benefit of the doubt of the accused; or, to insinuate that since the woman was consenting, the man cannot be convicted of the heinous act of rape. Delay in reporting rape also appears to play a pivotal role in how the absence of marks of violence is interpreted by the Courts.[362] Accordingly, the issue of marks of violence is also addressed in Section A on Consent, Sections B and C on Conversion, and Section E on Delay of this article.[363]

Comprehensive research of case law from 1994 through 1997 indicates that the Court has consistently acknowledged the issue of marks of violence and the crucial role it plays in the courtroom. In the late 1990s in particular, the judiciary seems to be shifting toward a more medical or scientific approach to determining the outcome of rape cases. Judges seem more comfortable stating their verdict if it may be couched in "objective" terms--so much so that close to 50% of all cases deal with medical evidence in some manner.[364] Since marks of violence is undeniably one of the more corroborative pieces of evidence the prosecution may use, the court must

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[361] See supra notes 293-94 and accompanying text.

[362] As with most areas of Zina Law analysis, the same foundational debate applies to bail application procedures. See Abdul Razaq alias Allah Ditta v. State, 1986 PCr.LJ 774, 775; Mahmud v. State, 1984 PCr.LJ 2504, 2505 (allowing bail in both cases where there were no "marks of violence" and a negative Chemical Examiner's Report).

[363] See supra text pp. 194-205 (Consent Section); supra notes 158-166 and accompanying text (Judicial Conversion Section); and supra notes 249-252 and accompanying text (Delay Section).

[364] See infra App. A, B & C. See also PCr.LJ (1997).

often rely on that evidence to scientifically back its decisions. Not surprisingly, then, a large percentage of cases turn on the basis of the severity of marks of violence as indicated in the MLO Report.[365]

In determining whether medical evidence is supportive of the prosecution case, the Court does deal with issues such as penetration and Chemical Examiner's Reports, but the bulk of discussion addresses other medically relevant indicia, such as marks of violence. It seems unavoidable, really. The Zina Ordinance itself requires proof of penetration. If proof is not found through a burst hymen, fresh semen, or eyewitnesses, the Court refers to the victim's body for a story of the battle she fought.[366] Because of its sense that medicine and science may be the most equitable gauges of justice, the Pakistani judiciary has created an assumption that the victim's body, and thus the story of her rape, is contained in the MLO Report itself.

In some circumstances, however, the judiciary has indicated that it is wary of the traditional no-marks-of-violence-equals-consent analysis. For example, in 1990, the Supreme Court of Pakistan held outright that marks of violence were unnecessary to establish rape.[367] Similarly, two 1997 cases suggested that marks of violence were no longer necessary evidence to prove rape.[368] Note, for instance, that in Tariq v. State the judge states:

> I totally agree with the learned Additional Advocate-General that absence of marks of struggle on the body of victim is not the disproof of the evidence of Zina.[369]

At first glance, this language seems to indicate a dynamic trend that could potentially turn rape prosecution away from heavily focusing on prejudicial consent standards for victims. Closer examination, however, reveals that the Court is carving out a small core of protected victims from the standard applicable to all other victims. For example, in Muhammad Nawaz v. State, the Supreme Court notes, in its rebuke of the need for proof of marks of violence, that the victim was a virgin girl of thirteen years.[370] Similarly, in a recent 1997 case, the Court held that a victim of a gang rape was not expected to resist under a direct threat of death or severe bodily

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[365] Please refer to Appendices for more information. Note, however, that between 30% and 60% of the time the Court acts according to the corroboratory nature of the MLO Report (i.e., in reaction to the presence or absence of marks of violence). Case analysis on file with author.

[366] In cases of sodomy, it would be the battle "he" fought.

[367] See Muhammad Riaz v. State, 1997 PCr.LJ 1114, 1121 (concurring with and citing an earlier Supreme Court case, Muhammad Nawaz, 1990 SCMR 886, that also held that marks of violence were not necessary).

[368] See Muhammad Qasim and another v. State, 1997 PCr.LJ 1095, 1101; Tariq and another v. State, 1997 PCr.LJ 1409.

[369] Tariq, 1997 PCr.LJ at 1411.

[370] See Muhammad Nawaz, 1990 SCMR at 886.

injury.[371] And, in Tariq v. State, the Court justified its determination that marks of violence are an unnecessary standard of proof, by stating that they are unnecessary "particularly when in the circumstances of the case, the victim appears to be a helpless girl as compared to the assailants."[372]

However, it is critical to note that the court's stance on marks of violence failed to support this particular victim even though she alleged that she was raped continually by four men and she was found in their possession by the Station House Officer, who began searching for her when she was reported missing.[373] It is significant that in this case the medical report was adamantly and critically unsupportive of the victim.[374] The Court felt it must defer to the expert opinion of the MLO Report as absolutely relevant and indispensable. As a result of this MLO Report, the judge granted the accused bail.[375]

Likewise, the Court in Muhammad Riaz v. State qualifies its determination that marks of violence are unnecessary with the observation that the victim was "a nubile fragile virgin of sixteen years."[376] Yet, the Court reduced the sentence of the accused rapist, stating that the absence of marks of violence "suggest that the case we are dealing with is a case of simple rape on a grown up adult female without brutality."[377] Thus, while it seems that the Pakistani judiciary is attempting to displace the importance of marks of violence as a standard of proof, it also appears that it is unsure of how to do so. As a result, the judiciary is sending the message that unless the victim is particularly fragile, marks of violence will remain critical to a

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[371] See Muhammad Qasim, 1997 PCr.LJ at 1101 ("In the present case the married victim was overwhelmed by two armed young persons and was under direct threat of murder or injury to body and, therefore, resistance was not expected from her . . . ."). This may highlight a possible trend to require less proof in cases of gang rape or particularly violent circumstances, even if the victim is a married woman.

[372] Tariq, 1997 PCr.LJ at 1411 (emphasis added).

[373] See id.

[374] See id.

[375] See id.

[376] Muhammad Riaz v. State, 1997 PCr.LJ 1114, 1122. It is noteworthy that the victim in this case alleged she was raped by two persons. The Pakistani judiciary appears to listen more attentively and support the prosecution more often where there is a particularly heinous crime, such as gang rape. But cf. Sarja v. State, 1993 PCr.LJ 156, 156-58 (finding in favor of the alleged perpetrator where the victim, a married woman, apparently bore no marks of violence even though she had a positive Chemical Examiner's Report and medical and testimonial corroboration of her statement, reasoning: "[her statement] has found corroboration from the medico-legal report but the fact that her husband had returned in the evening and she was medically examined by the lady doctor on the following day makes the report doubtful."). It is possible to infer from these two cases that the court's view on marks of violence may be influenced by biases. Thus, a heinous crime might bias the Court in favor of the victim, while a victim's marital status might bias the Court against her.

[377] Muhammad Riaz, 1997 PCr.LJ at 1122. Interestingly, when the Court acted to reduce the sentence of the accused, it referred to the victim as "a grown up adult female," not "a nubile fragile virgin," as it previously had in determining the necessity for a showing of marks of violence.

proof analysis where there is no other indicia of proof of penetration, such as an indicative hymeneal condition or the presence of sperm.

Beyond case analysis itself, however, the area of marks of violence is significantly related to both the procedures utilized in performing rape examinations and the sometimes inevitable delay that accompanies reporting and examination of rape victims. The format of the MLO Report itself does not encourage medical examiners to address the extent of marks of violence, genitally or otherwise. There is simply a small section with lines provided for any observations. If there are no marks of violence, the examiners often write "nil."[378]

This does not mean that the examiner is suggesting that there never were marks of violence, only that, at that particular moment in time, there were none on the examinee's body. Because the form does not leave room for or request additional information regarding physical marks of violence, the examiner is not prompted to also indicate the time period between the incident and examination or any other information that could easily explain the absence of marks. At times, there may well have been marks of violence at the time of the examination, but the poor conditions under which exams are conducted led to little evidence. For example, many hospitals examine rape victims in very poor lighting or very quickly, thus leading to incomplete evidence.[379] Consequently, the word "nil" is given carte blanche to wreak havoc on the prosecution's case despite the fact that its very origin is often based on incomplete or inaccurate information, examination, and analysis.

The MLO Report in the Tariq v. State[380] case provides a dramatic example of the limited medical information that may be available to a court, and the importance such information can have despite its inadequacies. As explained above, the Court's decision to grant the accused bail turned on the results of the MLO Report. In fact, the Court even reproduced the report in its judgment:

(1) Hymen not intact. She is not a virgin. No recent signs of intercourse.
(2) According to H.V.S. Report, no dead or alive spermatozoid seen. Conclusion no recent intercourse.
(3) According to X-Ray Report she is seventeen years old.
(4) No signs of struggle seen.[381]

What is striking is the lack of analysis and medically-based conclusions in this MLO Report. First, there is no discussion of why it is clear the woman is not a virgin. As previously discussed, many women do not

[378] See Danish Zuberi, Medical Examination Procedures, DAWN, Feb., 1998.
[379] See Interview with Danish Zuberi, advocate and committee board member of WAR-Karachi in Karachi, Pak. (Apr. 1998); Telephone interview with Samya Burney, attorney with Human Rights Watch, (Apr. 1998).
[380] 1997 PCr.LJ 1409.
[381] Id. at 1411 (emphasis added).

naturally have an intact hymen or have lost their hymen during the course of daily activity.[382] Regardless, even if she were not a virgin, why should that be relevant and left as a dagger hanging over the truth of the victim's statements about her recent rape?

Second, although there need not be ejaculation and full penetration to prove rape,[383] this doctor has uniformly stated that because there is no semen, there was no intercourse. There is no information pertaining to issues such as whether this young woman was menstruating at the time, whether she showered, or whether the accused used condoms. In short, there is absolutely no information given in the medical report upon which to conclude there was no recent intercourse.

Third, her age should have little to do with the question of whether she was raped, except perhaps in encouraging the Court to treat the allegations of younger virgin girls with more delicacy. And, finally, the medical examiner stated unequivocally that there were no marks of struggle. There is no discussion in the Report about the alleged rape or the young woman's assertion that she was "overpowered" by four strong men.[384] There is also no discussion of her socio-economic class or status, factors that may prevent her from "appropriately" resisting.

The doctor failed to provide the Court with any information other than his or her own opinion of the validity of the prosecution's case. The Court, in its eagerness to base decisions on objective, scientific evidence, yielded to the opinion of the doctor that there was no intercourse, rather than requiring that the doctor present scientific evidence upon which the Court could determine whether the legal conclusion of intercourse could be made. Consequently, the Court found no reason to refuse bail to the four accused rapists.[385] Thus, despite the Court's general acceptance that marks of violence are unnecessary to prove rape,[386] its decision reiterated the importance marks of violence--in concert with other physical evidence--plays in evaluating the case.

Even where doctors have attempted to document marks of violence, if they have done so quickly and incompletely, they may later destroy their efforts by poorly testifying before the Court. For example, in Karam Hussain v. State,[387] the doctor documented multiple scratches on the victim's body and went so far as to say "it means sign of struggle were present."[388] However, she failed to indicate the color of the scratches or their

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[382] For further discussion of the unpredictability of the hymeneal condition in women, see supra notes 334-48 and accompanying text.

[383] For a discussion of the evidentiary standard for penetration under the Zina Ordinance, see supra notes 295-332 and accompanying text.

[384] Tariq and another v. State, 1997 PCr.LJ 1409, 1410.

[385] See id. at 1411.

[386] See id. See also supra notes 367-69 and accompanying text.

[387] 1998 PCr.LJ 1717.

[388] Id. at 1719.

dimensions.[389] When the doctor testified sixteen months later about the age of the scratches at the time of the examination, she indicated that they were twenty-four hours old, i.e., longer than the delay between the rape and the examination.[390] Fortunately, the Court preferred the MLO Report over the doctor's testimony because there was insufficient description within the Report for the doctor to form a professional opinion about the scratches sixteen months after having observed them.[391]

It is uncertain whether medical examiners are aware of the implications and power of their conclusions in the legal arena. For instance, in a 1996 case, a five-year-old girl was brought to the hospital after she was raped.[392] The medical examiner stated that there was no injury found on this small child's body, her hymen membrane was intact, and she was not bleeding locally.[393] She concluded, therefore, that the child had not been subjected to rape.[394] Although chemical analysis revealed the presence of semen on vaginal swabs, the Court stuck with the opinion of the medical examiner that this child had not been raped.[395] One cannot help but wonder if this medical examiner had any idea how critical her observation and conclusion--that a small, distraught child of five years had not been subjected to rape because there were no marks of violence--would be to the final outcome of the case.

It would be unfair to the medical profession as well as the victims to allow this influence to continue without at least making medical examiners aware of the implications each and every observation and conclusion may have in court. One viable way to create medical awareness and also improve evidence collection would be to change the format of the MLO Report. Doctors would then need to clarify and support their observations and conclusions in a detailed, specified format. Instead of listing vague questions followed by large blank spaces for writing responses, the format could include specific questions, such as the date of the incident, date of examination, length of delay between the attack and the examination, whether the victim is currently menstruating or has recently given birth, and whether the person has previously had a gynecological exam.

This format would not only encourage more detailed evidence gathering, but would also provide medical examiners with clues of the possible reasons for the state of their examinees. For example, if the MLO Report required a doctor to calculate the number of days that have elapsed between the date of the alleged rape and the date of the examination, the doctor may then conclude that marks of violence or sperm from the incident could not

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[389] See id.
[390] Id.
[391] See id. at 1722.
[392] See Tahir alias Tahri v. State, 1996 PCr.LJ 186, 187.
[393] See id. at 188.
[394] Id.
[395] Id.

possibly be present.[396] Likewise, doctors may not be so quick to state that a woman was not subjected to sexual intercourse on the basis that her vaginal canal was too tight, or did not permit entry of two full fingers,[397] if they realize that this is the girl or woman's first gynecological exam and, in nervousness and fear, she is clenching her vaginal muscles.

3. *Morality*[398]

Morality, like marks of violence, is an issue under medical evidence because its very source of implication often derives from the MLO Report itself. In fact, the MLO Report often serves as the basis for introducing issues of the victim's morality into cases. Doctors seem to see their role in Hudood Ordinance law as deciding whether the woman or man before them was indeed raped or, in the alternative, is guilty of consensual zina. As a result, the MLO reports are augmented by observations that normally fall outside of the objective role of medical professionals. For example, examiners commonly report observations such as "she is used to sexual intercourse"[399] or "[she is] habitual."[400] They support these statements with what appears to be medical proof. For example, they define her "looseness" by her vaginal capacity: one finger or two; tight or loose.[401] Ironically, many

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[396] See Abdur Razzaq v. State, 1998 PCr.LJ 365, 368. Neither the medical report nor the judgment take note of the fact that that the examination occurred three months after the alleged rape. The judgment highlights the existence of a positive Chemical Examiner's Report. Surely, there should be some question as to the validity of sperm analysis three months after intercourse. In addition, the doctor states "there were no marks of violence on any part of her body. Her hymen was torn irregularly and it had old healed marks. Vagina was admitted two fingers." Three months later there should not be marks of violence. Also, the doctor's indication of her vaginal capacity fails to note possible menstruation or the physical size of the woman being examined. The indication is left floating, permitting a palpable reference to the loose morals of this young woman.

[397] Pakistani medical examinations of women typically include notice of how many fingers fit into the vagina as well as whether they fit tightly or loosely. This often seems paired with determinations that the woman was a virgin or, alternatively, "used to sexual intercourse." Conversely, there appears to be little discussion of the numerous biological, environmental and psychological factors that contribute to vaginal size and tightness, not to mention the physical and psychological condition of the examiner. The author attempted to ascertain the origin of this standard as well as techniques which may be being used to somehow make its use more uniform, but was unable to access the answers to these questions.

[398] Morality as an issue is permitted under the auspices of Qanun-e-Shahadat [The Law of Evidence], Section 151(4) - to impeach the credibility of a prosecutrix. For a discussion of morality generally and as it relates to the defense of consent in rape cases or the testimonial validity of a victim's statement, see supra notes 66-77 and accompanying text.

[399] See, e.g., Mustafa alias Baggi v. State, 1988 PCr.LJ 779, 780 ("In the opinion of the doctor she was used to sexual intercourse.").

[400] Mst. Zubeda Begum v. State, PLD 1986 FSC 268; Abduk Kalam v. State, NLR 1986 SD 61.

[401] See, e.g., Mustafa, 1988 Pcr.LJ at 780 ("vagina admitted two fingers easily"). See also author's experience in reading MLO Reports and speaking with advocates working in Pakistan.

of the women for whom these astute observations are made, are, in fact, married or menstruating women.[402]

This becomes particularly critical in a legal system in which past judicial statements have directly held that:

> Once it is found that the prosecutrix had indulged in sexual intercourse previously also, her statement loses weight and her statement has to be looked [at] with caution and unless corroborated in material particulars cannot be made the basis of conviction.[403]

Moreover, at times, court decisions rely almost entirely on what the medical examiner has to say about the condition of the victim, including these notations on morality.[404]

A classic example is a 1995 case brought against a couple on charges of zina.[405] The couple was convicted of zina despite the fact that their "eyewitnesses" observed them from the opposite side of a bolted door on a pitch-dark night.[406] It cannot be ignored that the MLO Report baldly stated that "the [female accused] is used to sexual intercourse,"[407] nor that a statement of this kind creates the atmosphere necessary to presume both accused had indeed engaged in unlawful intercourse. As Appendix B indicates, the decision of the Federal Shariat Court to acquit the couple signifies the positive move of the courts toward honoring real and unbiased evidence. Despite what one thinks happened in that house, without proof and only a derogatory statement made by a doctor with regard to the morality of the woman victim, a decision to convict for an offense which requires proof of penetration cannot be made.

This is just one example of many in which the medical examiner's ultimate opinion regarding the woman's chastity substantially affects the case at hand.[408]

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[402] Abdul Kalam, NLR 1986 SD 61 (granting bail to accused rapist because the MLO Report indicated that the woman was "habitual"). She was a married woman.

[403] See Gul Sambar Khan and another v. Damad Khan and another, 1997 PCr.LJ 1261, 1268, citing Manhoob Hussain v. State, PLD 1988 FSC 3. The judiciary in Gul Sambar Khan cites Manhoob Hussain, but is not very influenced by it. This was likely due to the fact that this case involved severe and violent allegations of gang rape. Nevertheless, the Court does not reject the strength with which previous sexual experience may affect the prosecution's case.

[404] See Nazar Hussain and another v. State, 1990 PCr.LJ 658, 659 & 661 (granting bail based in large part on the opinion of the medical examiner that the seventeen-year old victim was "habitual to sexual intercourse").

[405] See Salim Akhtar and another v. State, 1995 PCr.LJ 233.

[406] Id. at 235.

[407] Id.

[408] See, e.g., Muhammad Khalil alias Kach v. State, 1997 PCr.LJ 1639, 1644 (in discussing morality issues, observed that "in the case of Mst. Zubeda Begum v. State PLD 1986 FSC 268, prosecutrix was proved to be a woman of bad repute and doctor opined her as habitual to sexual intercourse.").

It is critical that the Pakistani legal system decide who ultimately has the responsibility for determining the outcome of Zina Ordinance cases, rape cases in particular.[409] Furthermore, if it is determined that the medical profession bears some or all responsibility for decisions, it must then be decided whether the moral judgments of doctors should impact the courts' decision-making process. If it is decided that such moral judgments should not impact the courts' ultimate decision, then judges must consciously try to prevent inappropriate bias by separating doctors' objective medical opinions from subjective moral observations contained within the MLO Report.

It may indeed be acceptable to have doctors determine morality, but it is doubtful they were meant to have this role. Currently accepted practices for recording MLO Reports encourage biased and inconsistent reporting of the medical condition of victims. Thus, any objective evidence contained within those files of medical evidence may be tainted or corrupted by subjective perspectives, perspectives that Courts currently rely upon to convict or acquit. Judges must not defer to doctors so much so that they neglect to state that a medical opinion on morality is irrelevant as a matter of law or that the medical opinion is unsubstantiated and appears biased on its face.

It appears that misplaced professional roles are inhibiting the dissemination of valid, truthful and complete information. Where there is a misplacement of roles across professions it is the judiciary's responsibility to stand its ground. To fail in this endeavor will compromise its ability to impartially administer justice under the law. Likewise, until judges and pressure groups demand that doctors report only on the physical and immediate psychological conditions of the victim, the legal system will continue to be incapacitated and deluded in its use of medical evidence.

V. CONCLUSIONS AND FURTHER RECOMMENDATIONS

Much time and effort has been focused on the debate over whether the Zina Ordinance is discriminatory toward women and whether it should be repealed outright. As an advocate working in an advisory position in Pakistan, I saw a need at both a social and legal level to move beyond this impasse into an acceptance of the current state of the law. To do so, however, requires accurate and comprehensive research of the body of Zina law from the time of its inception. Only when prosecutors, advocates,

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[409] This point is further supported by the fact that even where morality as construed in the MLO Report is not accepted by the Court, the Court does not base its non-acceptance on a rejection of doctors assuming this role. Instead, the reasoning behind rejecting the examiner's opinion is otherwise medically-based or deals with another evidentiary issue. See, e.g., NLR 1991 SD 48 (on file with Pakistan College of Law), in which the defense argued that since the woman was used to sexual intercourse, this act of sexual intercourse had been without force. The judge stated that this line of argument was unacceptable, particularly where medical evidence supported recent hymeneal tears and positive vaginal swabs. He did not, however, suggest the doctor mistook "his" role.

activists, medical professionals, and the judiciary itself understand the current status of the law, will efforts to modify and correct legal trends succeed. It is in this spirit that this article strives to undertake the ambitious task of categorizing and analyzing six major trends under the Zina Ordinance.[410]

Looking back on the results of this effort, what is most clear is that the judiciary is trying to take an active role in formulating fair decisions under the Zina Ordinance. They have attempted to incorporate changing societal attitudes and definitions into the law which they must apply to citizens of Pakistan. For example, in the areas of enmity, delay, and incest, the judiciary has sharply changed its perspective from what it was in the early 1980s. Enmity as a defense now appears to have little, if any, power of persuasion in the courts. Delay in reporting rape also has almost no influence unless the prosecution fails to explain the circumstances. And, incest has not only become a recognized crime in and of itself, but the judiciary has restricted the use of consent such that certain societal-familial relationships create a presumption of non-consent.[411]

The Pakistani judiciary has also indicated, in its decisions and the language of its judgments, that it is well aware that many zina-adultery claims are brought for the purpose of harassment, not to effect justice.[412] In fact, analysis demonstrated that close to 50% of all zina cases involved undue harassment of the women charged. There is a clear sense in the case law that the courts feel that the allegation of zina should be limited to cases in which the behavior was so outrageous as to be harmful to society itself.[413] For this reason, the judiciary appears to support claims of zina only where a woman may have made herself available to someone other than to whom she belonged.[414] Even these cases, though, seldom ultimately result in

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[410] From a practical perspective, it is important to note that these divisions are purely academic. Courts seem to co-mingle penetration issues with morality, morality issues with marks of violence and so forth. The divisions are lost as each subcategory becomes more or less important depending on the other available evidence. For example, proof of sperm in Chemical Analysis has less probative value where the woman is married or previously characterized as "habitual." Similarly, evidence of penetration is less probative where there are fewer marks of violence. And, a delay in reporting means little where there are obvious circumstances or evidence suggesting rape and resistance, but a great deal where, for example, the woman was pregnant, and, just prior to delivery, stated she was raped. Although one can identify certain case law trends, in practice, judges tend to give more or less credence to each fact, allegation, or detail of the case in making his/her own assessment of "what happened."

[411] See text accompanying supra notes 97-106

[412] See text accompanying supra notes 169-245

[413] See text accompanying supra notes 228-245

[414] This suggests support for the traditional belief that "Zina both in its primitive sense and also in its legal acceptance signifies the carnal conjunction of a man with a woman who is not his property by right of marriage or bondage." See Muhammad Ibrahim v. Abdul Razzaq, 1997 PCr.LJ 263, 275 (emphasis added).

conviction of the accused, especially at the appellate court level. They simply continue as a tool of harassment and a reminder to women that, conceptually, they are chattel.

The case law also indicates that the judiciary seems palpably uncomfortable with the definitions and categorizations of rape and zina. In attempting to balance the equities between the victim and appropriate punishment of the convicted rapist, courts frequently judicially convert less brutal allegations of rape to convictions of "zina with consent" for the accused.[415] While this may be well-motivated, it is a particularly disturbing trend, arising apparently in part because some judges still misunderstand rape, characterizing it as a crime of passion. Even in their condemnation of the accused rapist, they describe rape in terms of it being an excessive "satisfaction of the lust of the culprit."[416]

The belief that rape is about sexual lust, desire, or satisfaction is emphasized by and particularly dangerous in light of the defense's ability to bring in evidence of the woman's moral character as proof of consent. Combined with the concept that rape is acceptable when the woman is a man's property,[417] this belief in the causation of rape creates a dangerous standard for women. If her attacker is insufficiently excessive or she has in the past engaged in intercourse or could otherwise be targeted as a woman of "easy virtue," the Court may decline to find that rape occurred. Or, in the extreme, if her attacker can claim the rights of marriage, his behavior may be justified because she is property subject to his control.

As if in response to its unease with the definitions of rape and zina, the most pervasive trend by the judiciary has been a shift toward requiring scientific or objective indicia or proof of the Zina allegations. Unfortunately, however, the judiciary's sense of when verifiable evidence must be presented is in conflict with their statements of "the law." For example, judges declare the standard of penetration to be "slight," but are tempted to require proof of sperm presence in medical examination.[418] Similarly, the judiciary has consistently stated that proof of a ruptured hymen is unnecessary to support an allegation of rape. However, the majority of the

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This underlying socio-legal notion may explain why father-brought litigation is more readily quashed as well as why the judiciary has made a habit of coming down especially hard on zina allegations which derive from anonymous tips. It may also explain why there has been little attempt on the part of the judiciary to curb the use of the Nikah defense in rape cases.

[415] See text accompanying supra notes 129-168

[416] Muhammad Ashraf v. State, 1997 PCr.LJ 1351, 1366 (stating also that the case before it "was not a case of satisfying the lust under beastardly compulsion once but of repeated assault.") (emphasis added).

[417] Recall that there is no crime of rape between man and wife. See supra note 34 and accompanying text. See also supra notes 91-97 and accompanying text, discussing in particular Sana Ullah v. State, 1997 PCr.LJ 1666.

[418] See text accompanying supra notes 294-363

cases that reach this conclusion have other evidence which "substitute" as proof, i.e., marks of violence or the age of the victim.[419]

This trend by the judiciary toward the use of scientific evidence has also manifested itself in the increasing reliance, albeit misplaced, on Medico-Legal Reports. The format of the MLO Report is inadequate for the persuasive value courts give it. Not only does it encourage incomplete and biased reporting on the condition of the victim, but it appears that medical examiners are unaware of the implications created by their reports. Even if medical examiners appreciate the use and implications of the content of their reports, the conditions under which these examinations take place reduce the likelihood of careful evaluation and written observation. The medical evidence standard the Courts seem to be creating may not be achievable. Courts should acknowledge the current impossibility of routine, efficient, and objective medical examination and serology testing. To attempt to formulate a comprehensive and intricate system demanding physical and scientific proof denies the effects of very real factors such as delay, hospital conditions, mobility of women, and the subjective interpretation of medical examiners who are permitted to focus on the morality of the women they examine.

Although the trends indicated by the cases analyzed in this article are not uniformly positive, much progress is being made. The positive effect of publicity in achieving these changes is critical. For instance, in the area of delay, Pakistani judicial decisions are now more closely aligned with international perspectives and standards for interpreting and understanding delay in reporting rape.[420] Regarding pregnancy issues, the Court responded to national and international publicity, changing its Safia Bibi decision so that pregnancy may no longer operate as proof of zina when a woman claims she was raped.[421] Finally, though not clearly substantiated in the case law, it is reasonable to conclude that the international media exposure and debate regarding incest and sexual abuse of young girls has had an effect on the appellate and Supreme Court's evolution to the current presumed inability to consent standard.

Additional publicity is necessary, however, to encourage the judiciary to understand rape from women's perspectives. In spite of the vague and simplistic definition of rape in the Ordinance, women in the courtroom must no longer be seen as chattel and only considered to have been raped when displaying marks of brutality. Given the progressive judicial movement in areas like consent and incest, there is no reason to believe the Pakistani judiciary will refuse to adapt the Zina Ordinance to better reflect societal perspectives. Even if the Ordinances are eventually repealed, the judiciary

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[419] See text accompanying supra notes 360-399

[420] See supra notes 285-288 and accompanying text.

[421] See Mst. Safia Bibi v. State, PLD 1985 FSC 120.

should in the meantime set out a consistent and nondiscriminatory legal standard of rape law for Pakistani society.

As these examples illustrate, it is vital that activists, advocates, and prosecutors remember that the judiciary is amenable to reflecting evolving social standards in their interpretation of the law. Courts do not operate in a vacuum. However, it is the role and responsibility of advocates and activists to ensure that accurate disclosure and dissemination of public opinion comes into the courtroom. As laudable as their efforts may be, a small number of judges cannot succeed in reshaping a body of substantive law without the vigorous aid of their colleagues. A viable judicial system that truly reflects its society requires an interdisciplinary concert of action. There is a critical need for the judiciary, activists, advocates, prosecutors, and the medical profession to mold and reform the law of Zina together. Each of these professions must become inextricably bound to the other, preventing misplaced professional roles and prejudices from hampering this evolution.

It is important to acknowledge that the social and political movements in Pakistan which created the Zina Ordinance may continue today and serve to reinforce its underlying values. However, given the swift adoption of these Ordinances under martial order, the women's movements and protest rallies that followed, and the ongoing debate surrounding the future of the Zina Ordinance, it is more likely that the earlier time period reflected in the Zina Ordinance is not consistent with present-day Pakistan. This is a debate for the legislature to reconcile in conjunction with input from all aspects of the Pakistani community. For the immediate future, though, the time to recognize that the Zina Ordinance is alive and strong is overdue. Advocates, prosecutors, and activists must track trends and changes in the substantive law. They must question and help to mold those decisions into what Pakistani society deems just. In short, they must no longer ignore an entire body of substantive law in the hope that the law itself will simply disappear. Furthermore, they must approach and fuel the legislature with suggestions for reform.

It is hoped that this summary of several critical areas of the substantive law of Zina will aid prosecutors, advocates, activists, and the medical profession in identifying which avenues will most likely yield reform. It is also hoped that not only will these individuals act upon the legal trends analyzed here, but that they will go one step further and change those procedures and practices that inherently destroy the integrity of the enforcement of the Zina Ordinance in Pakistan.

APPENDIX A: ANALYSIS OF 1994 PAKISTAN CRIMINAL LAW JOURNAL REPORTS[422]

In 1994, the Pakistan Criminal Law Journal reported on a total of seventy cases falling under the Zina Ordinance.[423] Roughly one-half of these were rape, not adultery, cases. Approximately 70% of all Zina Ordinance cases, or fifty out of seventy, were bail-related cases, while the other 30% were either cases on appeal or petitions to quash the FIR or current proceedings (Section 561-A or Article 199 Petitions).

A. Section 561-A Petitions to Quash

Almost one-half of the appeal-related cases reported in the Pakistan Criminal Law Journal in 1994 were S. 561-A claims. Seventy-five percent of these petitions were brought to quash FIRs and proceedings based on allegations of zina-adultery. Of these petitions, the Court granted three-fourths, thus quashing the original FIRs or proceedings for these cases, and indicating that the allegations appeared to be without merit.[424] In one case, the Court went as far as stating that ". . . registration of the case . . . is declared to be without lawful authority. . . ."[425] The other 25% of these petitions were not quashed because they were still under investigation.[426] The two non-adultery quash petitions were brought to silence statements taken in a sodomy case[427] and a forced marriage case.[428] Both FIRs were not quashed in order to protect the victims. Thus, it appears that the underlying claims provoking advocates to seek S. 561-A claims predominately tend to be, both in practice and in the view of the courts, a tool to harass charged parties.

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[422] The analysis within this Appendix is based upon the author's original research into all cases reported in the Pakistan Criminal Law Journal from 1994. All statistical, numerical, and substantive analysis contained herein is based upon that research. This case analysis is on file with the author.

[423] See generally PCr.LJ (1994).

[424] See, e.g., Mst. Naseer Khatoon v. S.H.O., Police Station, Mianwali and another, 1994 PCr.LJ 1111, 1111; Mst. Nusrat Parveen and 2 others v. S.H.O., Police Station, Shahpur, District Sargodha and another, 1994 PCr.LJ 1083, 1084 (dismissing with direction to Investigating Officer to investigate genuineness of Nikah); Mst. Nasrin Akhtar v. State, 1994 PCr.LJ 2016, 2018 ("In my opinion . . . she has committed no offence."); Muzaffar Ali and another v. State and 3 others, 1994 PCr.LJ 1700, 1703 (providing "continuance of proceedings would be abuse of the process of Court").

[425] Mst. Naseer Khatoon, 1994 PCr.LJ at 1111.

[426] See, e.g., Mst. Afzal Mai alias Ajo Mai v. S.H.O., Police Station Saddar, Shujabad and 3 others, 1994 PCr.LJ 1023, 1025 (requiring investigation into the date upon which the Nikah became valid); Mst. Ejaz Bibi v. S.H.O. and others, 1994 PCr.LJ 1482, 1483 (involving issue of whether woman old enough to contract her own marriage at the time of the Nikah).

[427] See Nazar Maqbool and another v. Riaz Ahmed and another, 1994 PCr.LJ 1703, 1706.

[428] See Kaneez Fatima and others v. Hasan Mahmood and others, 1994 PCr.LJ 2317, 2318.

B. Delay

Analysis of the Pakistan Criminal Law Journal Reports of 1994 indicates that delay negatively affects the prosecution case, particularly where there is a bail application at issue. Out of seven cases in which delay was an immediate issue on the face of the judgment, only one bail application was refused.[429] Bail was granted in circumstances such as when the delay was unexplained, was inordinately long, was present without medical corroboration to overcome the deficit, or was present in zina-adultery cases without corroboration.[430]

It is delay in appellate cases, though, that appears to be more critical to an understanding of substantive Zina Ordinance law, particularly where it is analyzed in accordance with whether the original allegation was one of zina-adultery or rape. In two rape cases, there was delay in reporting the incident.[431] The delay was explained and both convictions were upheld. This explanation for delay seems particularly important because neither case smacked of unusually supportive medical testimony, great eyewitnesses, or other positive evidence of the rape that could normally override the negative effect of delay.[432] In contrast, in zina-adultery cases the same year, a delay of 2 days[433] and 4 days[434] weakened the prosecution case.

If this result can be trusted, two conclusions may be drawn. First, explanation of delay is imperative in any successful case. And second, a new and positive trend in the way the Courts are deciding Zina Ordinance offenses is emerging. It is documented that a large portion of zina-adultery cases contain some element of harassment.[435] Thus, a delay in reporting would lend credibility to the notion that the Complainant party was attempting to force the accused person(s) to behave in a certain way and,

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[429] See Ahsan Shabbir Bukhari v. State, 1994 PCr.LJ 1018, 1019 (refusing bail to the accused after allowing sodomy victim to explain his three-day delay and offer medical evidence to support his claim).

[430] See, e.g., Wali Muhammad and another v. State, 1994 PCr.LJ 2133, 2136 (granting bail in part because "no plausible explanation" for delay in reporting the case); Shabbir alias Babu v. State, 1994 PCr.LJ 914, 915 (granting bail to accused in part because delay in registering left unexplained); Mst. Kaniz Fatima alias Malkani v. State, 1994 PCr.LJ 164, 165 (granting bail, and describing the long delay as "without reasonable explanation"); Ghulam Ali alias Goman v. State, 1994 PCr.LJ 375, 376 (highlighting delay of 6/7 days and possible enmity in granting bail to the accused); Muhammad Qasim v. State, 1994 PCr.LJ 2488, 2489 (granting bail to accused in an adultery case because despite seven to eight months in jail still no corroboration that the marriage was somehow illegal); Muhammad Shafi v. State, 1994 PCr.LJ 2412, 2413 (involving six month delay and "no plausible explanation").

[431] See Riaz v. State, 1994 PCr.LJ 1616, 1618 (reporting delay of one week); Zahoor Ahmed v. State, 1994 PCr.LJ 443, 447 (reporting delay of two days).

[432] See id. See also supra text pages 229-235 for a more in-depth discussion of the effect of delay in Zina Ordinance cases.

[433] See Muzaffar Ali and another v. State and 3 others, 1994 PCr.LJ 1700, 1702.

[434] Sh. Muhammad Anwar and another v. State, 1994 PCr.LJ 327, 328.

[435] See supra text pages 217-229.

upon failing, went ahead and filed the claim. On the other hand, delay in reporting rape is indicative of the shame, guilt, and social scorn a victim faces in making the decision to report. As one of the 1994 judgments suggests, the young and unmarried girl victim "could not be expected to have made a statement about attempted rape on her for any distant motive which could also bring some dishonour to her . . . ."[436] It goes without saying that such a difficult decision could cause delay in registration of the offense. Consequently, explanation of her reasons for delay would correct the adverse impact delay can potentially create for a case.

C. Medical Evidence

Another important and recurring issue is medical evidence. In 30% of the appeals, medical evidence was discussed on the bare face of the judgment. Furthermore, that percentage is calculated taking into account the Section 561-A petitions, which by nature do not usually involve medical issues. If these cases are subtracted from the total number of appeal-related cases, the percentage of appeals that deal with medical evidence issues raises to 50%.

Important rulings of 1994 as reported in the Pakistan Criminal Law Journal, regarding medical evidence are as follows: 1) a married woman giving birth cannot support proof for allegations of zina-adultery;[437] 2) presence of semen on vaginal swabs cannot serve as a basis to convict a married woman of adultery;[438] and 3) where other factors strongly corroborate a victim's allegation of rape, even a negative Chemical Examiner's Report will not irreparably damage the prosecution case.[439] In addition there appears to be a high correlation between the presence of corroborative medical evidence of rape and the Federal Shariat Court's upholding convictions and sentences of the accused.[440]

For bail applications, medical evidence followed its typical 1990s pattern. Medical evidence was an issue in 20% of all bail applications reported on in the Pakistan Criminal Law Journal in 1994. Only one case was based on zina-adultery, while the rest were rape-related cases. Within this sample of cases involving medical evidence, bail was granted for the following reasons: in 30% of the cases, bail was granted because there were no marks of violence on the victim's body or the MLO Report was otherwise unsupportive; in 10% of the cases, bail was granted because an exam had not been conducted; and in another 10% of the cases, bail was granted because the Court would not allow a positive Chemical Examiner's Report for a married woman to serve as a basis to refuse bail. On the other hand,

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[436] Riaz, 1994 PCr.LJ at 1616.

[437] See Mst. Sakina Bibi v. State 1994 PCr.LJ 853, 854.

[438] See Sh. Muhammad Anwar, 1994 PCr.LJ at 330.

[439] See Zahoor Ahmed v. State, 1994 PCr.LJ 443, 445.

[440] See Muhammad Safdar alias Billa and 2 others v. State, 1994 PCr.LJ 62, 66; Peeran Ditta alias Falak Sher v. State, 1994 PCr.LJ 2086, 2086-87.

50% of the cases resulted in bail being refused to the accused because the MLO Report sufficiently supported the woman victim's allegation.

This last statistic is incredibly important for two reasons. First, it shows how powerful an MLO Report in favor of the victim can be. Second, for all of 1994 there were only twelve Bail Refusals for Zina Ordinance cases.[441] This is less than 25% of all bail applications. That almost one-half of these refusals included medical evidence issues speaks to how critical medical evidence is in fighting off an accused person's application for bail.[442] It is important to note that aside from the immediate result of confining a victim's rapist, these decisions cannot help but influence future decisions in these cases as they reflect judgments about the strengths and weaknesses of the case right from the beginning.[443]

D. Perspective of the Judges

A final observation of 1994 case law as reported in the Pakistan Criminal Law Journal is that judges appear to be moving toward a more sympathetic perspective of the players caught in this new world of Zina Ordinance laws. In two separate cases, judges reduced the sentences for clear zina-adultery violations. In one case, the judge recognized that the couple had not realized they were too closely related to be validly married. As such, the judge stated that the zina union was not their fault and reduced their sentences to the terms by which they had already suffered.[444] In the other case, the judge substantially reduced the imprisonment sentences on the basis that the accused were not aware of the legal consequences of living together after non-withdrawal of their divorce.[445]

Similarly, a judge presiding over a rape case felt no qualms about declaring the rape to have occurred in a "monstrous manner and a beastly fashion with a girl who had hardly attained puberty."[446] The power behind such words leaves no question about how this judge would decide this particular case. The quotation also highlights, once again, the trend of

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[441] See generally PCr.LJ (1994).

[442] Other bases for refusal included: allegations of very serious offenses such as causing a "hatchet injury" during the rape, see Fayyaz Hussain and 2 others v. State, 1994 PCr.LJ 448; the Court's not wanting to return a girl to her husband to prevent any possibility of immorality; and a poor Nikah defense.

[443] Note, for example, that in Mst. Nusrat Mai v. State, 1994 PCr.LJ 2034, the judge notes that the fact that the woman accused was granted bail is indicative of how weak the prosecution's case had been from the very beginning. It is highly likely that a future judge, overloaded with cases, would simply accept this basis and yield to this perspective by not convicting."

[444] Haji Abdul Ghafoor and 2 others v. State, 1994 PCr.LJ 200, 202.

[445] Ghulam Muhammad and another v. State, 1994 PCr.LJ 1856, 1858.

[446] Abdul Hameed alias Kali v. State, 1994 PCr.LJ 319, 321 (refusing bail for man accused of rape).

convicting and refusing bail more readily to accused who violate young girls.

E. Concluding Observations

In sum, trends from 1994 indicate that a still large percentage of cases, zina-adultery cases in particular, are being brought to harass the accused and/or their paramours, not to effect justice. Both the S. 561-A Petition results and the decisions relating to delay issues for zina-adultery cases support this proposition. In addition, it appears that medical evidence and delay issues remain the most tangibly effective means of supporting or destroying the prosecution's case. To this end, there are hopeful signs that courts are now realizing the difficulties women and men face in reporting rape or sodomy. Building on this, there are also signs that a more sympathetic and human element may be entering the legal arena through judges presiding over cases brought under the Zina Ordinance.

APPENDIX B: ANALYSIS OF 1995 PAKISTAN CRIMINAL LAW JOURNAL REPORTS[447]

In 1995, the Pakistan Criminal Law Journal reported on a total of sixty-three Zina Ordinance-related cases.[448] Of these cases, twenty-nine were clearly zina cases while twenty-four were clearly rape cases.[449] There was a total of twenty-nine bail issues and thirty-three non-bail, or appellate issues. The percentages of the types of cases reported that year are as follows: 53% zina-adultery cases and 47% rape cases; and 47% bail application cases, 35% appeal-related cases, and 18% Section 561-A claims.[450]

A. Section 561-A Cases

The Zina Ordinance cases falling under Section 561-A claims focused on petitions to quash FIRs or proceedings on the basis that the Zina Ordinance was being used as a harassment tool rather than a means to bring a legitimate case against persons violating the law against zina. Approximately 100% of these claims were brought to quash zina-adultery

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[447] The analysis within this Appendix is based upon the author's original research into all cases reported in the Pakistan Criminal Law Journal from 1995. All statistical, numerical, and substantive analysis contained herein is based upon that research. This cases analysis is on file with the author.

[448] See generally PCr.LJ (1995).

[449] Examination of case notes did not clarify the original claim for nine of the cases.

[450] Case analysis on file with author.

cases.[451] All but one of the petitions was accepted.[452] In fact, in about 80% of the accepted petitions, not only did the judge quash the FIR or proceeding concerned, but he or she explicitly indicated that the case was one of harassment and based on mala fide purposes. For example, in one case, the FIR was quashed because the judge made the determination that the FIR "had been lodged for mala fide purposes after the alleged abductee had filed a suit for dissolution of marriage against the complainant (husband)."[453] And, in another case, the judge quashed the FIR, noting that "continuance of proceedings in the case [would have] amounted to unnecessary harassment."[454] Thus, it is clear that Section 561-A claims are not only abundant (36% of all appeals-related cases), but are typically the result of harassment of the accused person(s) rather than any real effort to seek justice under the Zina Ordinance.

B. Bail-Related Cases

The bail cases included ten zina-adultery cases, thirteen rape cases, and six cases in which the original allegation is difficult to determine.[455] All but two of the bail applications arising from claims in which the original allegations were zina-adultery were bail requests on behalf of one or both of the accused. The other two were bail cancellation petitions filed by exhusbands against the wives they had originally accused and who had subsequently obtained bail.

Every bail application was granted and the two cancellation petitions were dismissed. Reasons for granting bail and denying the petitions fell into

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[451] Eleven out of twelve cases were clearly zina-adultery cases while it was unclear for the twelfth case whether the original allegation had been zina or rape. Percentages were calculated on the basis of the 11 cases.

[452] The FIR was quashed in eight cases. See generally Abid Mahmood v. State, 1995 PCr.LJ 105; Abdul Rashid and 2 others v. S.H.O. Police Station, Renala (Mallianwala) and 3 others, 1995 PCr.LJ 1247; Mst. Manzooran Bibi v. Superintendent of Police, Palipattan Sharif, 1995 PCr.LJ 1188; Mst. Bushra Bibi v. S.H.O., 1995 PCr.LJ 401; Mst. Faiz Begum v. State, 1995 PCr.LJ 1601; Mst. Ruqayya Bibi and another v. S.H.O. Police Station, Bhai Pheru (Phoolnager) and 2 others, 1995 PCr.LJ 978; Mst. Razia Bibi v. S.H.O. Gunjial Tehsil and District Khushab and 2 others, 1995 PCr.LJ 797; Mst. Ayita Nasir and another v. S.H.O. Police Station, Badana, Tehsil Pasrur, District Sialkot, 1995 PCr.LJ 1657.
The proceedings were stayed in two cases. See generally Javid Iqbal v. S.H.O. Police Station Factory Area, Sargodha and 3 others, 1995 PCr.LJ 1925; Mst. Fatima Bibi and another v. Mallan and 2 others, 1995 PCr.LJ 507.
The FIR was not quashed in one case. See Mst. Safia Bibi and 2 others v. S.H.O. Police Station, Saddar Chiniot, District Jhang and another, 1995 PCr.LJ 1078.

[453] See Javid Iqbal, 1995 PCr.LJ at 1926.

[454] Mst. Bushra Bibi, 1995 PCr.LJ at 404.

[455] For these six cases, bail was granted in all but one. Bail was refused for that sole case on the basis that delay in reporting was reasonably explained. Bail was granted on such bases as the need for "further inquiry," the case was "not within the prohibitory clause," the challan was too long, or the co-accused was already on bail.

three categories: 1) two cases held that abuse of power against the accused was unwarranted;[456] 2) seven cases included declarations by women that they had married of their own free will (often complete with a valid Nikah);[457] and 3) one case granted bail to the woman accused because she was a woman.[458] Nine out of the ten (90%) claims, then, were directed at harassing the women accused. It appears that many of these claims were originally brought by fathers or ex-husbands who were unwilling to stop pursuing their claims even after the woman was granted bail.

Of the rape cases, all but one application (a request for bail cancellation) was a request for bail for the accused. While bail was refused in three of the applications, it was granted in nine, and canceled in one. The three successful bail applications were refused because medical evidence supported the victim's statement in one case,[459] and because there was no enmity between the parties to suggest a false claim warranting bail release in the other two cases.[460] The bail cancellation petition was accepted because there was enough evidence to suggest the accused was the culprit as well as medical evidence indicating that he was physically capable of committing rape.[461]

Thirty-three percent of the nine bail applications granted to accused rapists discussed the fact that there was no evidentiary medical support for the victim's allegations.[462] Four bail applications (44%) addressed the victim's delay in reporting, which gave rise to a grant of bail.[463] In one case (11%), bail was granted because the accused used the classic Nikah

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[456] See Mst. Khurshid Bibi and another v. State, 1995 PCr.LJ 1518, 1519 ("It prima facie appears that F.I.R. No. 502 [present case charge] is a counterblast to F.I.R. No. 485 [another complaint filed]."); Mst. Zahida Bibi v. State, 1995 PCr.LJ 1525.

[457] See Ijaz Hussain Shah and others v. State 1995, PCr.LJ 16; Ilyas Hussain v. State, 1995 PCr.LJ 1080 (deciding further inquiry on issue is necessary); Khalid v. State, 1995 PCr.LJ 968, 969; Rehmat Ali alias Rehma v. State, 1995 PCr.LJ 675, 676; Pir Bakhsh alias Peela v. State, 1995 PCr.LJ 1072, 1073; Shah Din and 3 others v. State, 1995 PCr.LJ 688, 689; Muhammad Ashgar v. Ijaz Ahmed and another, 1995 PCr.LJ 1770, 1772.

[458] See Mst. Anwar Bibi v. State, 1995 PCr.LJ 1010, 1011.

[459] See Muhammad Shafiq v. State, 1995 PCr.LJ 561, 563.

[460] See Dost Muhammad v. State, 1995 PCr.LJ 1812, 1813; Ahmad alias Lota v. State, 1995 PCr.LJ 1906, 1907.

[461] See Khalil v. Maulvi Miskeen and another, 1995 PCr.LJ 1701, 1706.

[462] See Liaquat Ali v. State, 1995 PCr.LJ 1628, 1629; Muhammad Nazeer v. State, 1995 PCr.LJ 1982, 1984 (describing sodomy victim displaying marks of violence on his knees and stomach, but not on or around his anus); Kaura alias Abdul Aziz v. State, 1995 PCr.LJ 1134, 1135 (stating that there were old healed tears on the hymen but "no marks of violence" on her body as indicated by a medical exam conducted one month after the alleged rape).

[463] See Sultan v. State, 1995 PCr.LJ 625, 626 (regarding an unexplained delay of 22 days); Manzoor Ahmed v. State, 1995 PCr.LJ 1139, 1140 (finding delay of three days where enmity existed between parties); Kaura, 1995 PCr.LJ at 1135 (regarding one month unexplained delay); Syed Masood Hashmi v. State, 1995 PCr.LJ 1907, 1908 ("The delay in lodging the F.I.R. after a period of six months is itself sufficient circumstance to make the prosecution story, prima facie, doubtful.").

defense.[464] The other two accused (22%) were granted bail because the FIR information was inadequate[465] and because the accused was a minor.[466] The majority of bail grants thus occurred when there was no corroborating medical evidence and/or a delay in registering the FIR.

C. Appeal-Related Cases

Sixty-three percent of the appeal-related cases reported in the 1995 Pakistan Criminal Law Journal were rape cases while 37% were zina-adultery cases.[467] Of these cases, 52% were appeals based on appreciation of evidence, and 36% were petitions to quash FIRs and/or proceedings pursuant to Section 561-A or Article 199 of the Constitution of Pakistan. In addition, there were cases dealing with an Article 199 Reinvestigation Request, a Conviction without Framing Petition, a Sentence Reduction Appeal, and a Suo Moto Article 203-DD Revision.[468]

1. *Zina-Adultery Cases*

The category of zina-adultery cases that did not involve a petition to dismiss the FIR or proceedings as harassing included a reduction of sentence petition,[469] a call for discharge of a case,[470] a call for re-arrest of an accused couple,[471] and five evidentiary appeals. All five of these appeals resulted in acquittals. One couple was acquitted because the Court found documentary evidence supporting the fact that the woman's first husband had divorced her

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[464] See Zafar Iqbal v. State, 1995 PCr.LJ 943, 944 (basing bail on Nikah defense, and adding that "each and every allegation made by a certain abductee . . . should not be viewed a gospel truth.").

[465] See Niaz Ahmad v. State, 1995 PCr.LJ 1511, 1512.

[466] See Shahadat Ali alias Shahadat v. State, 1995 PCr.LJ 636, 637.

[467] Percentages were based on the following: 33 total cases did not deal with bail, including 11 rape, 19 zina-adultery, and three in which the original allegation is uncertain. These three cases were not included in the analysis. Percentages were thus computed from a total of 30 cases. Further case analysis on file with author.

[468] Suo moto refers to an action taken by the court on its own initiative. The court can swoop down and pluck out a case it wants to adjudicate regardless of whether an appeal or petition has been filed by the parties. Art. 184, PAK. CONST. (1973). See, e.g., Suleman v. State, 1995 PCr.LJ 1712, 1714 (stating that the appellate court could consider the victim's conviction using its suo moto revisional powers, even though the victim had not filed an appeal).

[469] See Jamroz and another v. State, 1995 PCr.LJ 470, 473 (granting reduction of sentence, implying that woman's involvement in zina was unavoidable).

[470] See Saee Muhammad and 2 others v. Superintendent of Police, Mandi Baha-ud-din and 3 others, 1995 PCr.LJ 1666, 1667-68 (authorizing police to reinvestigate in a speedy manner).

[471] See Mukarram Khan v. S.H.O. Police Station, New Multan and 4 others, 1995 PCr.LJ 2043, 2046 (concluding that a man cannot marry Bhanji of his wife because the family relation is too close). Note that this is one of the few "strict zina cases." See supra note 164 and accompanying text.

prior to her remarriage.[472] Another woman was acquitted because she had been convicted under Section 16 of the Zina Ordinance and, by definition, a woman cannot be convicted as her own abductor.[473] The remaining three evidentiary appeals resulted in acquittals because the medical evidence upon which the accused was originally convicted was insufficient proof of the charge of zina. For example, in one case, the MLO Report showed the woman to be a virgin and yet, on the basis of eyewitnesses having seen the man and woman together in a hotel room, the trial court still convicted them of having committed sexual intercourse.[474] And in another case, the trial court relied on the Chemical Examiner's positive report of semen on vaginal swabs even though the swabs were sent to the Chemical Examiner some three weeks after they had been taken from the accused.[475]

The final zina appeal case reported is worthy of discussion.[476] The couple was convicted of zina despite the fact that their "eyewitnesses" were in the pitch dark, far away, and on the other side of an outer door bolted from the inside of the house.[477] Though one can never be exactly certain why a judge rules in the way he or she does, it is notable that the MLO Report in this case stated that "the [female accused] is used to sexual intercourse,"[478] thus creating the atmosphere needed to presume that both the accused had indeed engaged in unlawful intercourse. The decision of the Federal Shariat Court to acquit the couple signifies the positive move of the courts toward honoring real and unbiased evidence. Despite what one thinks happened in that house, a conviction for an offense that requires proof of penetration cannot be made solely on the basis of a derogatory statement made by a doctor with regard to the morality of the woman victim.

In sum, the zina-adultery cases focused on either Section 561-A Petitions, as discussed in the first section of this Appendix, or efforts to rectify poor lower court decisions adversely affecting women accused of zina-adultery. This makes it clear that some of the lower court decisions were either based on personal moral judgments or faulty legal analysis.

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[472] See Lal Khan and another v. State, 1995 PCr.LJ 1897, 1898-99.

[473] See Mst. Fauzia v. State, 1995 PCr.LJ 453, 454-55.

[474] See Shaikh Zahid Bashir v. Sarkar and another, 1995 PCr.LJ 877, 881-82.

[475] See Yousuf and another v. State, 1995 PCr.LJ 1739, 1741 (discussing, in the course of acquitting the woman accused, that sperm dies within 72 hours of leaving the body and that heat and storage conditions would affect the veracity of medical examinations such as the one used to convict this woman of zina.). This is an important decision in that it highlights one of the trends of 1990s case law under the Zina Ordinance: judges becoming more savvy about the medical issues behind MLO and Chemical Examiner's Reports.

[476] See Salim Akhtar and another v. State, 1995 PCr.LJ 233.

[477] See id. at 235.

[478] Id.

2. *Rape Cases*

In terms of Zina Ordinance cases falling under rape, not zina-adultery, there were a total of eleven appeal-related cases in 1995. Of these eleven cases, all were evidentiary appeals except one suo moto action by the court.[479] Eight of the eleven, or 73% percent of the appeals, resulted in an acquittal for the accused rapist. One case suggested that there had been a lack of evidence to convict.[480] The remainder of these acquittals were based on circumstances such as a delay in reporting the FIR,[481] existing enmity between the parties,[482] or a lack of medical evidence supporting the prosecution case.[483]

The rape cases that did not result in acquittal are critical to developing an understanding of the random and biased nature of judicial decisions in 1995.[484] In Mushtaq Ahmad v. State,[485] the court pulled classic conversion,[486] converting a Section 10(3) allegation of rape to one of zina-adultery for the benefit of the doubt of the accused under Section 10(2). A significant factual element of the Court's decision was that the victim wore footwear to the accused's house at 1:00 in the morning.[487] Consequently, the Court decided that she had been "subjected to sexual intercourse with her own consent."[488] It is difficult to understand what this means, in part because it is not clear how one can be subjected to something consensual. Nor is it clear why wearing footware is indicative of consent. Perhaps the evidence to convict the accused was indeed shaky. That is no excuse, however, for judges to ignore or actively misunderstand that zina and rape are legally two different allegations that cannot be interchanged, even out of sympathy for those accused of rape.

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[479] See Suleman v. State, 1995 PCr.LJ 1712, at 1712 (acquitting on appeal a man accused of rape on the basis of a lack of conclusive evidence on record. Court also brought, suo-moto, the convicted co-accused, i.e., the alleged victim of the rape, up on appeal, stating that she was a victim of "zina-bil-jabr" and never a consenting party, and acquitting her).

[480] See id. (referring to male convict).

[481] See, e.g., Arshad Ali and another v. State, 1995 PCr.LJ 215, 216-17; Mst. Rabia Khatoon and others v. State, 1995 PCr.LJ 1048, 1051; Ghias Ahmad alias Shado and another v. State, 1995 PCr.LJ 650, 652-53.

[482] See, e.g., Munir Ahmad v. State, 1995 PCr.LJ 1745, 1747-49; Muhammad Aslam v. State, 1995 PCr.LJ 157, 158-59; Ghias Ahmad, 1995 PCr.LJ at 652-53.

[483] See, e.g., Munir Ahmad, 1995 PCr.LJ at 1747; Muhammad Aslam, 1995 PCr.LJ at 158; Arshad Ali, 1995 PCr.LJ at 216-17.

[484] See, e.g., Mushtaq Ahmad v. State, 1995 PCr.LJ 1742 (reducing sentence of accused); Abdul Khalil and another v. State, 1995 PCr.LJ 1894 (upholding conviction and sentence of accused); Muhammad Ishtiaq v. State, 1995 PCr.LJ 1736 (upholding conviction and sentence of accused).

[485] 1995 PCr.LJ 1742.

[486] See text accompanying supra notes 129-172

[487] See Mushtaq Ahmad, 1995 PCr.LJ at 1744.

[488] See id. at 1745.

In utter contrast, a Federal Shariat Court decision issued the very same month upheld the conviction and sentence of a man accused of rape resulting in the woman's pregnancy.[489] In Muhammad Ishtiaq v. State, the woman reported she had been raped twenty-six weeks after the rape happened[490] and yet the Court stated "the only presumption which can be legitimately drawn is the truthfulness of the accusation levelled against him [the accused] by the prosecutrix."[491] In the same year, there were three cases that resulted in acquittals for the accused because, or partially because, of a delay in registering the FIR Were the delays resulting in acquittals of the accused not twenty-four hours,[492] five days[493] and fourteen days[494] the discrepancy might be easier to digest.

Moreover, within a couple of months of this decision another judge suggested that a delay of six months, i.e., about twenty-six weeks, in lodging the FIR was "by itself, prima facie, sufficient to make the prosecution case doubtful."[495] Equally instructive as to the effect of delay, the Appellate Court in Mst. Rabia Khatoon held, in a rape case where the woman lodged her complaint a mere five days after the alleged rape, that the "rule of prudence [dictates that] it may be unsafe to sustain [a] conviction unless the solitary evidence [the victim's statement] is invariably corroborated by some other legal evidence."[496]

So what compelled the Court in Muhammad Ishtiaq v. State to take such a strong position for this woman? Certainly it was not her footwear? Despite the fact that this decision may well have been the just decision, the problem of a simultaneous dichotomy between judgments that apply "rigorous" or "simplistic" measures by which to adjudicate cases remains. This variability makes it is easy to conclude that there is indeed no identified rhyme or reason as to what will make or break a rape case brought under the Pakistani Zina Ordinance. While the Rabia Khatoon "rule of prudence" sounds scholarly and effective, it is neither mandated nor frequently referred to by the Federal Shariat Court. Rather, it appears to merely be this one judge's way of deciding what the fair outcome of this particular rape case should be--thus, the confusion and randomness any quick perusal of Zina Ordinance rape decisions exposes.

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[489] See Muhammad Ishtiaq, 1995 PCr.LJ at 1736.

[490] See id. at 1737.

[491] Id. at 1738.

[492] Arshad Ali and another v. State, 1995 PCr.LJ 215.

[493] Mst. Rabia Khatoon and others v. State, 1995 PCr.LJ 1048, 1050-51.

[494] Ghias Ahmad alias Shado and another v. State, 1995 PCr.LJ 650, 652.

[495] Syed Masood Hashmi v. State, 1995 PCr.LJ 1907, 1908 (quoting from head note, i.e., paraphrased version of judgment, but equally strong use of language).

[496] Mst. Rabia Khatoon, 1995 PCr.LJ at 1050.

D. Concluding Observations

Three main noteworthy conclusions can be gleaned from this dense set of Zina Ordinance cases and judgments. First, there appears to be a misuse of the Ordinance in terms of its effect on women. Section 561-A petitions frequently appear to be maliciously motivated. Evidentiary appeals for zina-adultery cases also reveal a pattern of unfair and unsound legal judgments against women accused. Secondly, 1995, at first glance, marked a year of confused decisions for the Federal Shariat Court. Rather than firmly stand together on any one issue, the judiciary appeared to be making up its own rules as it went along. However, despite the ambiguity in 1995 court decisions, a third conclusion can be drawn from analysis of these cases: medical evidence, delay in reporting, and enmity between parties all impacted the outcome of cases. All three of these issues affected bail refusals, bail grants, conviction acquittals, and the few convictions upheld. Additionally, while there are no hard and fast rules, there appears to be an emphasis on marks of violence as support for demonstrating the victim's lack of consent alongside a showing that allegations were not maliciously founded or the consequence of enmity between the accused and the accuser.

APPENDIX C: ANALYSIS OF 1996 PAKISTAN CRIMINAL LAW JOURNAL REPORTS[497]

Examination of the Pakistan Criminal Law Journal for 1996 reveals that 41% of all Hudood Ordinance cases are Zina-related.[498] Of the fifty-seven Zina Ordinance-related cases reported, 39% are bail applications, 53% are "appreciation of evidence" or other appeals, and 9% are Habeas corpus or Section 561-A petitions.[499] Thirty-three percent of all Zina Ordinance-related cases dealt with medical evidence issues on the face of the report, 12% dealt with delay in reporting issues, and at least 5% highlight some abuse of power or mala fide purpose behind the claim.[500]

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[497] The analysis within this Appendix is based upon the author's original research into all cases reported in the Pakistan Criminal Law Journal from 1996. All statistical, numerical, and substantive analysis contained herein is based upon that research. This case analysis is on file with the author.

[498] There were a total of 138 cases reported: 68 Prohibition; one Qazf; 12 Property; 57 Zina Ordinance. See generally PCr.LJ (1996).

[499] Case analysis on file with author. See generally PCr.LJ 1996.

[500] These percentages were calculated on the basis of issues discussed or reported in the Criminal Law Journal head notes, thus having been critical enough on the face of the judgment to be included there. The percentage calculated for mala fide purposes only includes those cases in which the head notes specifically address this issue, though in reality, the facts of the cases often make it clear that something "mala fide" or "abuse of power-like" is occurring. Note that the author did a random double-check of the headnotes to the cases to ensure that the headnotes adequately reflected the judgments.

A. Section 561-A Petitions and Habeas Corpus Petitions

Although Habeas corpus and Section 561-A petitions reported in the 1996 Pakistan Criminal Law Journal were a comparatively small sample of the overall number of Zina Ordinance cases; nevertheless analysis of these cases on their own proves interesting. The Court identified possible harassment or foul play in almost 100% of the cases. One of the cases was a general case discussing the jurisdiction of Section 561-A claims.[501] Two cases resulted in the FIRs being quashed: one represented the classic father-doesn't-like-that-man scenario,[502] and the other raised the issue of the woman's attainment of majority upon marriage.[503] The latter Court made a point to state, while quashing a FIR, that ". . . the Supreme Court does not give free hand to the police to play havoc with the life, honour and liberty of citizens and to use it as a lever to commit atrocities on innocent citizens under the garb of investigation . . . ."[504]

In terms of the habeas corpus petitions, both cases appeared to result in decisions in support of the women accused. In Mst. Sakina v. S.H.O.,[505] for instance, the judge quashed the FIR upon which the entire case was based, stating that it was a case of the abuse of police power. And in Mst. Fatima v. Kamil Shah,[506] the judge denied the habeas corpus petition because he believed the parents were using it as a smokescreen to get their daughter back after she had married someone of her own choice. Thus, the trend in 1996 decisions relating to Section 561-A claims and habeas corpus petitions indicates an acute awareness on the part of the judiciary that allegations of adultery against women may be unfounded.

B. Outcome of Bail-Related Cases

Eighteen of the twenty-two bail cases were based on original allegations of rape.[507] Nine, or 50%, of these bail applications were refused. Bail appeared to be refused most often where there was medical evidence corroborating the victim's statement (in five cases), where the victims were particularly young (in three cases), and/or where the allegations were somewhat spectacular or unusually serious (in five cases). For example, in one case, the victim was an aged woman with a married daughter who had

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[501] See Gulzar and others v. State, 1996 PCr.LJ 80, 81-82.

[502] See Imtiaz Ahmad alias Bholla and 2 others v. D. A., Gujranwala, 1996 PCr.LJ 458, 461-62.

[503] See Gulnaz and another v. State and 3 others, 1996 PCr.LJ 486, 488-89.

[504] Id. at 488.

[505] 1996 PCr.LJ 1809.

[506] 1996 PCr.LJ 325.

[507] The headnotes for the remaining four cases were unclear as to whether the original claim was rape or zina.

been abducted and raped.[508] The Court held that the allegations were very serious and the accused "deserved no leniency."[509]

On the other hand, bail tended to be accepted or granted most often where there was no medical evidence supporting the victim's statement (43% of the cases) or where the case appeared to be more adultery-related and a Nikah defense was pursued (29% of the cases). Like with bail refusal, bail was canceled for accused persons where the victim's statement was supported by medical evidence (20% of the time), or where she was a minor, thus falling into that more serious or heinous category of allegation (20% of the time).[510]

C. Decisions on Appeal

In terms of the non-bail petitions, about one-half of the cases were clearly identified as rape cases on appeal. Acquittals for the accused occurred five times more often than affirmation of convictions and sentences.

Where convictions and sentences were upheld, the prosecution cases included corroborative medical evidence.[511] On the other hand, 60% or more of all acquittals were based on the lack of support provided by medical evidence. Unfortunately, for at least one of these victims, the reason behind her failure to have proper medical evidence supporting "recent sexual intercourse" was simply that the medical exam was conducted more than one week after the rape.[512] For another victim, there was no medical exam from which to corroborate, or not; thus, without medical evidence, the Court acquitted the accused.[513] Two cases explicitly noted that there were "no marks of violence" in the course of acquitting the accused rapists.[514]

Another case implied that because there were no marks of vaginal injury on a deceased woman, the prosecution had not pled rape beyond a reasonable doubt.[515] Ironically, and significantly, the key medical evidence in this case was the Chemical Examiner's Report, which found sperm on vaginal swabs from the deceased woman.[516] Although the trial court

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[508] See Muhammad Ashiq v. State, 1996 PCr.LJ 1200.

[509] Id. at 1202.

[510] Case analysis on file with the author.

[511] See Shabbir Ahmad alias Bhola and others v. State, 1996 PCr.LJ 1794, 1802; Habib Sultan v. State, 1996 PCr.LJ 853, 859.

[512] Ayoob and 8 others v. State, 1996 PCr.LJ 642, 647

[513] See Jani and another v. State, 1996 PCr.LJ 656, 660.

[514] Asghar Ali v. State, 1996 PCr.LJ 1687, 1688-89; Abid Javed alias Mithu v. State, 1996 PCr.LJ 1161, 1164.

[515] See Abdul Majeed v. State, 1996 PCr.LJ 629, 631-32 (describing the trial court's holding in the case).

[516] See id. at 631.

considered this corroborative of the rape,[517] the FSC said that because she was a married woman, presence of sperm could not support the contention of penetration, which is an essential element in the prosecution case.[518]

This ruling by the FSC makes it almost impossible for a married woman who is not visibly beaten and physically marked to support an allegation of rape against the practical presumption that she has either consented or just been marked by her own husband's sperm. Other decisions reiterate a preference for Chemical Examination Reports, suggesting that the absence of sperm is a case-killer on its own, particularly where there are no marks of violence.[519] And still other cases suggest that even where sperm is found, it is of no evidentiary value if it has not been tested against a sample from the accused in a Serologist Report.[520]

Thus, the FSC has, within the course of one year, acquitted accused rapists because there was no sperm; where there was sperm but the victim was a married woman; and where there was sperm but no Serologist Report. The only common denominator in these acquittals is perhaps the lack of visible "marks of violence" to support the victim's statement. Yet, in contrast, in the same year, the Court ruled in a sodomy case that despite an absence of semen and a nine-day delay in registering the FIR (i.e., no marks of violence possible), it could not conclude that a rape had not been committed.[521] Note, however, yet another contrast: later that same year, a delay of eight days[522] and a delay of ten days[523] in registering the FIR influenced the courts' decisions to acquit the accused in two rape cases.[524] Thus, it remains unclear which factors are most critical in the adjudication of these cases under the Pakistani Zina Ordinance.

D. Concluding Observations

In a nutshell, it is clear that judges acknowledge that at times zina-adultery claims are brought for mala fide purposes. Otherwise, decisions appear to be random and decided on a case-by-case basis, leaving few rules for understanding what constitutes the substantive law of the Zina Ordinance. However, it is undeniable that the issue of medical evidence took center stage in 1996. A majority of both bail and appeal cases hinged on how supportive the medical examination was in terms of corroborating the

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[517] See id.

[518] See id. at 634.

[519] See Asghar Ali, 1996 PCr.LJ at 1687.

[520] See Abid Javed, 1996 PCr.LJ at 1164-65.

[521] See Shiraz v. State, 1996 PCr.LJ 189, 191.

[522] See Jani and another v. State, 1996 PCr.LJ 656, 659.

[523] Ayoob and 8 others v. State, 1996 PCr.LJ 642, 645.

[524] But c.f. Muhammad Hanif v. State, 1996 PCr.LJ 1377, 1378 ("Delay per se is no ground for the grant of bail."). Clearly, the issue of delay received varying treatment by the courts in 1996.

victims' statements. Examination of the woman was of prime consideration, while in only one or two cases was examination of the man even mentioned. The focal point of medical evidence lay in discussion of what constitutes penetration and how it is to be proven.

The most significant subtext of these discussions was that of consent. Whether or not there had been a delay in reporting or marks of violence, "proving" non-consensual intercourse was of frequent and utmost concern to the Federal Shariat Court. Sadly, one can legitimately wonder if the following summation from a 1970 decision is not still on the mark today:

> Even where no defense of consent by the girl is raised but there is absolutely no evidence on the record of any struggle having taken place, nor were marks of any injury found on the person either of the complainant or of the accused, rape is not proved to have been committed upon the prosecutrix. [525]

[525] Mahmood & Shaukat, supra note 12, at 23.