

The Impact of the *Zina* Ordinance, 1979 on Cases Involving Minors

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Abstract

This article aims to highlight the impact of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (the 'Zina Ordinance') on cases of rape involving minor girls. It is maintained that the Zina Ordinance altered rape laws in a way that exposed very young girls, as young as twelve years old, to criminal liability for illicit sexual intercourse. This was due to the fact that their consent was made operative by the removal of the provision on statutory rape from the PPC. To this end, the first part of this paper will detail the changes introduced by the Zina Ordinance to the PPC provisions on rape in force at the time, in 1979. The second part will analyse several cases where it was debated whether the minor girls in question had given their consent or not. It will then be concluded that the Zina ordinance negatively impacted minor girls who were victims of rape, or who were involved in consensual sexual intercourse, by holding them criminally responsible where they would not have otherwise been under the previous law.

Introduction

Children have long been considered to be one of the most vulnerable sections of society, and violence against them is something that occurs on a global scale.¹ The status of children as minors indicates the requirement that they are to be treated differently when it comes to legal matters. This explains why, all around the world, there are different standards of punishment put in place for minors and adults when it comes to criminal responsibility.

In Pakistan, the age of majority is eighteen. However, in the Pakistan Penal Code, 1860 (the 'PPC'), criminal responsibility can be attributed at different ages, depending on the offence committed. This article aims to highlight the impact of the Offence of *Zina* (Enforcement of *Hudood*) Ordinance 1979 (the '*Zina* Ordinance') on cases of rape involving minor girls.

It is maintained that the *Zina* Ordinance altered rape laws in a way that exposed very young girls, as young as twelve years old, to criminal liability for illicit sexual intercourse. This was due to the fact that their consent was made operative by the removal of the provision on statutory rape from the PPC.² To this end, the first part of this paper will detail the changes introduced by the *Zina* Ordinance to the PPC provisions on rape in force at the time, in 1979. The second part will analyse several cases where it was debated whether the minor girls in question had given their consent or not. It will then be concluded that

¹ See UNICEF, 'Together for Girls: Sexual Violence Fact Sheet' (2012) (At the time of the last global estimates in 2002, 150 million girls and 73 million boys under the age of 18 had experienced forced sexual intercourse or other forms of sexual violence involving physical contact) <https://www.unicef.org/protection/files/Together_for_Girls_Sexual_Violence_Fact_Sheet_July_2012.pdf> accessed on 16 Dec 2019.

² See Women Living Under Muslim Laws, 'How Far Are the Penal Laws Effective in Protecting Women', Dossier #3 (1988) 33.

the *Zina* Ordinance negatively impacted minor girls who were victims of rape, or who were involved in consensual sexual intercourse, by holding them criminally responsible where they would not have otherwise been under the previous law.

A. The Changes brought into Rape Laws by the *Zina* Ordinance, 1979

1. Rape Laws in Pakistan before the *Zina* Ordinance, 1979

Before 1979, Section 375 of the Pakistan Penal Code, 1860 (the 'PPC') defined rape as follows:

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

First. – Against her will,

Secondly. – Without her consent,

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

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

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

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: Sexual intercourse of a man with his own wife, the wife not being under thirteen years of age, is not rape.³

Therefore, Subsection 5 of Section 375 of the PPC criminalised sexual intercourse with a girl under the age of fourteen, with or without her consent. This was in line with the internationally recognised concept of statutory rape. This means that even if a girl whose age was less than fourteen years at the time, had consented to sexual intercourse with a man, he would be liable for committing statutory rape. Although, through such laws, the state appears to exhibit a paternalistic attitude towards women, statutory rape is a very old tradition at common law⁴ and is justified by the need to provide extra protection to minor girls who are often exposed to manipulation and coercion by older men.⁵

The lawmakers at the time had expressed that the intention of the law was to protect children, meet the ends of justice and to maintain tranquillity in society. To this end, Subsection 5 of Section 375 of PPC could have proven quite useful for the protection of underage girls in cases of rape, if it had been properly implemented. However, the law was changed in 1979 by the *Zina* Ordinance, which is discussed next.

³ The Pakistan Penal Code (Act XLV of 1860), Section 375 as contained in the Code prior to its repeal by the Offence of *Zina* (Enforcement of *Hudood*) Ordinance 1979, Section 19 (Section 375 has now been reinserted, but it is different from the original one, discussed in more detail in the Conclusion).

⁴ Rita Eidson, 'The Constitutionality of Statutory Rape Laws', (1980) 27 *UCLA Law Review* 757,762 n.35 (citing the Statute of Westminster I, 1275, 3 Edw. 1, c.13: '[T]he King prohibiteth that none do ravish, nor take away by force, any Maiden within Age').

⁵ Michelle Oberman, 'Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law' (1994) 85(1) *Journal of Criminal Law and Criminology* 15, 18-22.

2. Amendments to Rape Laws by the *Zina* Ordinance, 1979

In July 1977, Zia-ul-Haq, the chief martial law administrator took charge of the country. In doing so, he assumed the responsibility of revolutionising the laws of Pakistan so that they could be brought in conformity with the teachings of Islam. Therefore, the Zia regime introduced the *Zina* Ordinance in 1979. After the promulgation of the *Zina* Ordinance, cases of rape were dealt with in accordance with the provisions thereof instead of under the PPC. The provision regarding rape, which was renamed to the provision on '*zina-bil-jabr*' under Section 6, is as follows:

(1) A person is said to commit *zina-bil-jabr* if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely:-

- (a) against the will of the victim;
- (b) without the consent of the victim;
- (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt; or
- (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to who the victim is or believes herself or himself to be validly married.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of *zina-bil-jabr*.⁶

⁶ Offence of Zina (Enforcement of Hudood) Ordinance 1979, Section 6.

The promulgation of the *Zina* Ordinance and its disregard of the extra standard of care that is usually put in place for minors (by the use of the offence of statutory rape) has since then negatively impacted minor victims. In light of certain rulings made in cases involving minors, it can be said that minors were subject to grave consequences due to the absence of a provision regarding statutory rape in the Ordinance. These cases involved pleas of consent being raised by the defendants in order to establish that the intercourse was consensual, as well as the use of evidence indicating absence of marks of violence to establish such consent.

In fact, a quick glance at the language of Section 6 makes it clear that there is no mention of minors within the offence. The *Zina* Ordinance 1979 therefore, knowingly or unknowingly, removed the offence of statutory rape from the criminal law of Pakistan. This section remained applicable to all rape cases from 1979 to 2006.

After the introduction of the *Zina* ordinance in 1979, the courts started taking the element of consent into consideration even in cases where children under the age of 16 were involved in any kind of sexual activity. Therefore, consensual sex with a girl under the age of 16 was construed as *zina* rather than *zina bil jabr* (rape), which was the situation before the Ordinance. In cases involving minors, a person who has seemingly given his or her consent is sometimes not aware of the consequences of that act. Additionally, the fact that the perpetrator is usually much older than the victim creates a power dynamic that the courts have failed to consider in these cases.

In fact, there is a degree of confusion regarding the meaning and scope of consent even in cases of rape involving adult individuals; it is therefore unreasonable to criminalise young and vulnerable children for seemingly giving their consent to sexual intercourse as it is quite likely that their consent is meaningless at that age.

The ability of adults to lure in young and unsuspecting children into such situations where they are groomed, abused, and raped must not be underestimated.

This is particularly true for countries like Pakistan, where sex education is not provided in schools. Therefore, even if a child does give his or her ‘consent’, they are unlikely to be aware of what they are consenting to. Our society still considers sex a taboo and children are unlikely to be told anything about sexual intercourse or a ‘good touch’ or ‘bad touch’ during their early years

Furthermore, under Section 8 of the *Zina* Ordinance 1979, four adult male witnesses were required to prove the offence of *zina-bil-jabr* in order to make it liable to the Hadd punishment under the Ordinance. This provision proved to be particularly problematic when women alleging rape were charged with adultery or fornication in cases where they were unable to provide these four male witnesses.⁷

For example, Jehan Mina, a fifteen-year-old girl, became pregnant as a result of being raped. In the proceedings that followed, she was unable to bring four male witnesses to the court who could testify in her favour.⁸ Therefore, her medical reports and the evidence of her pregnancy led to her being convicted for the offence of committing *zina*. As a result, she was forced to give birth to the child she had conceived as a consequence of rape in prison.⁹ The judgment in the *Jehan Mina case* stated that:

[Mst. Jehan Mina] did not take the position that the *zina* had been committed with her at a secluded place

⁷ Asifa Quraishi, ‘Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective’ (1997) 18 Michigan Journal of International Law 287.

⁸ *Jehan Mina v The State* PLD 1983 FSC 183 (Pak)

⁹ *Ibid.*

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*.¹⁰

In cases where there was an absence of marks of violence on the victim's body, the courts in the 1980s were content to use this as an indication of consent from the victim. Medico-legal reports were heavily relied on for this purpose as well.¹¹

The use of the defence of implied consent (based on the absence of marks of violence or delay in lodging of the FIR etc.) has been rebutted by the prosecutors in cases involving minors. This is because the simple fact of there being an age gap between the victim and the rapist means that the victim is not able to give or abstain from giving consent. For instance, in cases involving young victims and considerably older men, the circumstances faced by the victim are completely out of their control.¹² However, the courts have not always been open to this assertion. A few examples of such cases are outlined below.

¹⁰ Ibid.

¹¹ Julie Dror Chadbourne, '*Never Wear Your Shoes after Midnight: Legal Trends under the Pakistan Zina Ordinance*', (1999) 17 *Wisconsin International Law Journal*., 179, 280.

¹² Ibid.

B. An Analysis of Cases Involving Minors after the Zina Ordinance: The Issue of Consent

In *Muhammad Rafiq v The State*,¹³ the Supreme Court reduced the punishment of the defendant as the court was of the view that the victim did not try to escape or cry for help when she apparently had the opportunity to do so. Therefore, in this case the court viewed a lack of evidence of struggle as an indication of consent even though the victim was a minor.

*Yousaf Masih v The State*¹⁴ was a case involving the rape of a twelve year old girl. The rapist in this case raised the plea of consent during the appeal. It is asserted, again, that consent is simply not operative in cases of this nature.

*Hafiz Muhammad Riaz v The State*¹⁵ is another similar case in which a sixteen year old girl was abducted and raped. The defence used the *Yousaf Masih case* (mentioned above) in order to have the punishment of the accused reduced. The victim in *Hafiz Muhammad Riaz* had gone with the rapist with her free will, and this fact was used by the defendant to allege that the victim had consented to intercourse as well. Luckily, however, the judgment in this case stated that the consent of the victim in going with the defendant did not signify that she had consented to the sexual intercourse as well.

While quoting the *Yousaf Masih case*¹⁶, the judge in the *Muhammad Riaz case*¹⁷ stated that in the former case ‘the consent of the girl, even if she is less than sixteen years, can be taken into consideration for awarding a lesser punishment under Section 11 of

¹³ *Muhammad Rafiq v The State* 1986 SCMR 1480.

¹⁴ *Yousaf Masih v The State* 1994 SCMR 2102

¹⁵ *Hafiz Muhammad Riaz v The State* 1998 SCMR 1126

¹⁶ *Yousaf Masih v The State* 1994 SCMR 2102

¹⁷ *Hafiz Muhammad Riaz v The State* 1998 SCMR 1126

the Ordinance.’¹⁸ However, the judge then went on to state that ‘it is obvious that the word ‘consent’ in this subsection means the consent made by a person who is capable to give consent. Therefore, sexual intercourse committed with a non-adult girl shall always be covered by this definition of *zina-bil-Jabr*.’ Whereas the actual wording of the judgment is:

[T]he learned counsel submitted that at the most it was the case of consent and not of *zina-bil-Jabr*. This point has also been noted in the Order Granting Leave. We also feel that the conduct of the girl shows that she was a consenting party to the whole affair, but the difficulty is that according to the Exh. PL her date of birth is 3-8-1978 which means that at the time of occurrence she was only twelve years and four months old and, being a minor, her consent cannot be taken into account.¹⁹

The judgment continues by saying:

[I]f the puberty of the girl is proved on the record before the age of 18 years, she can be held as adult, but in the absence of any sign of puberty she cannot be held as adult unless she acquires the age of 18 years.²⁰

Interestingly, the same judge has written the judgments for both the *Yousaf Masih* case and the *Muhammad Riaz case*. This illustrates how judges tend to give different meanings to the law and to their own words depending on the circumstances of the case and

¹⁸ Ibid.

¹⁹ *Yousaf Masih v The State* 1994 SCMR 2102

²⁰ Ibid.

their own will. The fate of minors should not be left to the will of the judges, but instead should be clearly laid out in the legislation.

Ghulam Sarwar v The State,²¹ was a case of the rape of a fifteen or sixteen year old girl, who belonged to a family of labourers, by the landlord of that area. The plea of consent was raised by the defendant in this case, but the judges handled the case quite carefully. The plea of consent was not entertained and it was reiterated that the mere absence of marks of violence does not mean that the victim consented to the alleged intercourse.

*Mureed Ahmed v The State*²² was a case of the rape of a six year old girl by a servant of the family, in his quarters. At first, he was convicted under both Section 18 and Section 11 of the *Zina* Ordinance. However, it was later proven at the appeal stage that the girl had gone to his quarters with her own free will. As a result, the defendant was acquitted from the punishment under Section 11 as the court felt that the girl had not been abducted. However, the conviction under Section 18 was maintained by the court.

*Riaz v The State*²³ was a case in which the Shariat Appellate Bench reduced the sentence of an accused from fourteen years to six years even though he had raped a child who was only ten or eleven years old at the time. The rationale for this was the age of the rapist, which was seventeen, at the time of the commission of the crime. Oddly enough, this shows that the courts were sympathetic towards the age of the accused, while simultaneously taking into consideration the consent of girls who were less than 16 years of age.

²¹ *Ghulam Sarwar versus The State* PLD 1984 Supreme Court 218 (Shariat Appellate Bench)

²² *Mureed Ahmed versus The State* 1986 SCMR 1890

²³ *Riaz versus The State* 1994 SCMR 358

By looking at the case law above, it can be seen that in a number of cases the sentences of defendants were reduced by the courts due to the plea of consent being raised. However, it is asserted that under the legal and moral standards of any civilised society, the consent of minors (especially when the alleged rapist is much older in age) cannot be considered a valid defence to rape.

Even under the Pakistan Penal Code, before the promulgation of the Zina Ordinance, Subsection 5 of Section 375 clearly stated that sexual intercourse with a minor girl under fourteen years of age is rape regardless of whether it is consensual or non-consensual.

Therefore, while conforming to the changes in rape law brought about by the Zia regime, the courts made some problematic decisions where the consent of minors was held to be a valid defence in rape cases.

The reason why the inability of minors to consent to sexual intercourse was not considered by the framers of the *Zina* Ordinance 1979 is still not known. One of the reasons could be that the purpose of the *Zina* Ordinance was to bring the laws relating to adultery and rape in accordance with the injunctions of Islam.

Siddiqi explains that, in Islam, a girl is eligible to enter into a marriage contract the moment she attains puberty.²⁴ There are contradictory opinions over the age of Aisha (RA), who was the wife of the Prophet Muhammad (PBUH). Sahih Al Bukhari, which is known to be one of the most authentic books on Islam states that:

the Prophet married her when she was six years old and he consummated his marriage when she was nine years old. Hisham said: I have been informed that

²⁴ Siddiqi, Muhammad Iqbal, *The Family Laws of Islam* (Kazi Publications, 1984) 68.

Aisha remained with the Prophet for nine years (i.e. till his death).²⁵

According to the chronology of Ibn Khallikān²⁶, however, she would have been nine at the time of her marriage and twelve at the time of its consummation.

The example of the Holy Prophet (PBUH) could be the reason why those involved in the drafting of the *Zina* Ordinance did not consider children below the age of fourteen as more vulnerable than adults in the context of sexual offences. On the other hand, some scholars have asserted that the aforementioned analogy is a patriarchal interpretation of Islamic historical narratives. In this regards, Asma Barlas wrote that:

On the other hand, however, Muslims who calculate Ayesha's age based on details of her sister Asma's age, about whom more is known, as well as on details of the Hijra (the Prophet's migration from Mecca to Madina), maintain that she was over thirteen and perhaps between seventeen and nineteen when she got married. Such views cohere with those Ahadith that claim that at her marriage Ayesha had 'good knowledge of Ancient Arabic poetry and genealogy' and 'pronounced the fundamental rules of Arabic Islamic ethics'.²⁷

²⁵ Sahih al Bukhari, *Book of Marriage*, Volume 7, Book 62, Hadith 65.

²⁶ Ibn Khallikan, *Wafayat al-Ayan (The Obituaries of Eminent Men)* (1256-1274) translated into English by William MacGuckin (also known as Baron de Slane), 3:16.

²⁷ Asma Barlas '*Believing Women*' in *Islam: Unreading Patriarchal Interpretations of the Qur'an*. (University of Texas Press 2012) 126.

However, no matter what the reasons were for the setting aside of the provision regarding consent in cases involving minors, the *Zina* Ordinance had negative consequences for victims.

Almost half of Pakistan's population is under the age of eighteen, according to a report published by the United Nations Children's Fund in 2011.²⁸ Therefore, issues related to minors should be the focal point of discussion in our law-making institutions. Child protection problems are quite common in the country and are caused mainly by social, structural and institutional factors such as poverty, illiteracy and hierarchical relationships.²⁹

The 2006 National Plan of Action (NPA) for children states that child protection is a complicated and sensitive domain. This is why very few statistics relating to child protection issues are available (according to the Ministry of Social Welfare and Special Education, 2005).³⁰

A report was published in the *Research Journal of South Asian Studies* in 2014, written by a faculty member at Punjab University, Lahore that contained a review of cases of child abuse reported in two major newspapers of Pakistan.³¹ According to the writer of the report:

The newspaper review included coverage of child protection issues in one Urdu (*Jang*) and one English (*Dawn*) dailies published between the years 1990 (the year Pakistan ratified the United Nations' Convention

²⁸ Tahira Jabeen, 'Child Protection Data: An Analysis of Newspapers Coverage of Child protection issues in Pakistan' (2014) 29(1) *South Asian Studies Research Journal* 125-136 <http://pu.edu.pk/images/journal/csas/PDF/9%20Dr.%20Tahira_29_1.pdf>

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

on the Rights of the Child, which serves as guiding policy principles for the state policies relating to children) and 2010 (the year this research was conducted).³²

As one of the countries that has a relatively weak system of child protection, these statistics present a picture of a legal system in need of reform in order to protect children from rape.

Conclusion

Section 6 of the *Zina* Ordinance did not take into account Subsection 5 of Section 375 of the PPC that dealt with statutory rape before the promulgation of the *Hudood* Ordinances. The impact this diversion in the law has had on rape cases in Pakistan was that the element of consent became operative, even in cases involving victims under the age of sixteen. This new law provided the accused persons in child rape cases with the plea of consent.

The actual reasons behind such an amendment in the law are still not clear. The framers of the Ordinance should have paid attention to the dire situation of children in our country and laws should be drafted in a manner that is cognisant of and sensitive towards the most vulnerable members of society.

In 2006, the rape provisions of the *Zina* Ordinance were repealed by the Protection of Women (Criminal Amendment) Act 2006 and Sections 375 and 376 have been reinserted in the Pakistan Penal Code. The provision on statutory rape has found its way back into the criminal law of Pakistan, although the age of consent has been

³² Ibid.

raised to sixteen. Although not perfect, the rule appears to provide more protection to minor girls. The recent establishment and operation of the Gender Based Violence Court in Lahore is a welcome step as well. Recent convictions of child rapists are positive signs that minor girl who survive rape will now be able to find gender sensitive and age appropriate justice in Pakistan.³³

³³ Rana Bilal, 'Gender-based violence court in Lahore sentences child rapist to life in prison', *Dawn* (13 Nov 2018) < <https://www.dawn.com/news/1445370/gender-based-violence-court-in-lahore-sentences-child-rapist-to-life-in-prison>> accessed 19 Dec 2019.

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