

ZINA¹, RAPE, AND ISLAMIC LAW: AN ISLAMIC LEGAL ANALYSIS OF THE RAPE LAWS IN PAKISTAN

**A Position Paper by
KARAMAH: MUSLIM WOMEN LAWYERS FOR HUMAN RIGHTS**

Introduction

The *zina* and rape laws of Pakistan are the subject of heated debate both inside and outside the Muslim world. Opponents of the *Shari'a* law have found in the subject an ideal opportunity to attack Islamic law as patriarchal and unjust to women. Some have even argued that *Shari'a* law, in its entirety, should be abolished. On the other hand, many serious Muslim scholars and activists are themselves troubled by these Pakistani laws regarding *zina* and rape. They view them as incompatible with basic Qur'anic principles and the prophetic tradition.

After serious study, we at KARAMAH have concluded that the Pakistani laws of *zina* and rape as they currently stand, are incompatible with Islamic law. In reaching this conclusion, we have relied first on the Holy Qur'an and the *Sunnah* of the Holy Prophet, then on the works of such major scholars as the great Imam Abu Hanifah, whose school of thought provides the foundation of Pakistani law. We also relied on the works of Imam Malik, Imam al-Shafi'i, Ibn Hazm, and others, as the rest of this position paper will make clear.

Furthermore, it is our deep belief that the practice and application of Islamic law must be accomplished within its intrinsic objectives and intentions. Indeed, *hudood*² are to be perceived as part of a comprehensive system of social and moral values that works in harmony to build a healthy society and protect it, not only as punishment for wrongdoers and criminals. The *hadd* of *zina*, as it is currently understood and applied in Pakistan, is a flagrant example of how the misconception of the spirit and goals of the *Shari'a* can lead to injustice and discrimination, the opposite of the Islamic ideal of '*adalah* (balance, justice, harmony).

For this reason, we shall examine in this paper the *zina* and rape laws of Pakistan from an Islamic legal perspective, which keeps in mind the core Islamic principle of '*adalah*. Our purpose is to highlight the difference between the act of *zina*, which involves two consenting adults, and the act of rape, which is an aggressive coercive act that destroys altogether any possibility of consent. This is not only an important factual distinction, but Islamically an important jurisprudential one as well that some modern Muslim scholars have unfortunately failed to recognize.

We shall commence our discussion by carefully studying the applicable passages from Holy Qur'an and the *sunnah* of the Holy Prophet on this important subject. We shall then turn to the Hanafi School's jurisprudential contribution to this topic because of the school's special significance to Pakistani law. However, we shall later take into account opinions from other jurisprudential schools, especially the Maliki School, as it

¹ The word *zina* is used in this paper as a generic word that encompasses, as the original Arabic word does, both adultery and fornication (i.e., illicit sexual relationships).

² (Sing. *Hadd*), means literally (God's) limits, and refers to His divinely ordained punishments for those who transgress them.

seems to us that the Maliki position on *zina* and rape has influenced the Pakistani legislation related to the matter.

Zina In Islamic Law: Definition, Requirements For Proof of Zina And Punishment:

The *Zina* Ordinance, as defined by the statutory criminal law of Pakistan, deals with fornication, adultery and rape and provides evidentiary requirements and punishments for them, treating them as related offences. It specifies the punishments of stoning to death or public flogging for both offenses if certain evidentiary requirements are fulfilled.

However, by looking at the Pakistani legislation, it appears that the legal definition of *zina* blurs the distinction between *zina* and rape. For the purpose of the ordinance, both acts of *zina* and *zina-bi'l-jabr* (forced illicit sexual relations, i.e., rape) are defined as “sexual intercourse without being validly married.” Clearly, the only difference between the two acts (and it is a major difference) is that rape occurs without consent. This difference has major legal implications. Indeed, under current Pakistani law if a woman cannot prove that the sexual act occurred without her consent (i.e., if she cannot prove that she was indeed raped), the sexual act itself becomes a crime against society and therefore, the woman becomes liable for the *hadd* of *zina*.

As a result of this approach, instead of protecting Muslim women from violence and rape, Pakistani *zina* laws effectively punish raped women for reporting crimes against them and their families. Consequently, these laws have a devastating effect on the reporting of such crimes. Further, Pakistani rape laws have proven to be counter-productive over the years, having resulted in an alarming increase in rape. Once we know that in Muslim societies, acts of rape typically do not impact the individual woman alone, but severely impact her extended family as well, we start perceiving the alarming scope of the problem. Yet the ideal Muslim state is not one where reports of crimes are decreased for fear of retaliation or punishment. Rather, it is a state in which each victim is encouraged to appeal to the *wali* (head of state), the *qadi* (the judiciary), or *ahl al-hall wa al-'aqd* (community leaders/ representatives of the people), for justice and relief in accordance with divine ‘*adalah*’.

Clearly, the roots of the problem are not religious, but are found in a *Jahili*³ behavior in society which must be uprooted. They can also be found in the erroneous application of basic *Shari'ah* principles to the evidentiary requirements and the assignment of the burden of proof in rape cases. As these stand, they place an unreasonably heavy burden on the victimized woman. Furthermore, rape laws in Pakistan commit a serious conceptual error by conflating the crimes of rape and *zina*, something that traditional jurists were keen not to do. The cumulative effect of these errors, combined with *Jahili* behavior, has resulted in grave harm to Pakistani women and their families. This unfortunate state of affairs is intolerable for the *maslahah* (well-being) of the *ummah*, and must be addressed by the *wali*, the *qadis*, and *ahl al-hall wa al-'aqd* through both extensive education and the promulgation of better, more effective laws.

³ This refers to the pre-Islamic Age of *Jahiliyyah* or ignorance. Muslim thinkers have argued that some Muslim societies are going into a modern (secular or tribal) *Jahiliyyah* that does not reflect Islamic values.

We believe that the failure in establishing a legislation that protects the rights of individuals, men and women, their families, and society at large, is in great part due to a misreading of divine law related to *zina* as stated by the Holy Qur'an and the *Sunnah*. *Qadis* have a duty to correct such grave misreading of Islamic law, but so far they have not done so. We shall therefore explain herein the full extent of this misreading of the Islamic law by briefly visiting the fundamentals of Islamic law as they pertain to our subject.

Islam considers *zina* a major sin and an evil path. In this Islam shares the same views as other Abrahamic religions. We have to point out here that the concept of *zina* in Islamic law applies only to the actual intercourse, i.e. physical penetration. No act short of that is considered *zina*, nor does such act fall under the same legal framework as *zina*. From the perspective of the Qur'an, the prophetic tradition, and Islamic law, sex uncoupled with a legally binding marital tie⁴ is considered *zina*, and is equally punishable for both women and men. It is important to note that when it comes to punishment for illicit intercourse, men and women are treated exactly alike. Thus clearly, the traditional Islamic framework for dealing with illicit sexual behavior is gender-balanced and fair.

The Qur'an deals with *zina* in several places. We start by providing the Qur'anic general rule that commands Muslims not to commit *zina*:

"Nor come nigh to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils)." (17:32).⁵

Most of the rules related to illicit sex (*zina*), adultery, and false accusations from a husband to his wife or from members of the community to chaste women, can be found in *Surat an-Nur* (the Light). The *surah* starts by giving very specific rules about punishment for *zina*:

"The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment." (24:2).

Then it turns to false accusations from members of the Muslim community to chaste righteous women:

"And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their testimony ever after: for such men are wicked transgressors;- Unless they repent thereafter and mend (their conduct); for Allah is Oft-Forgiving, Most Merciful." (24: 4-5)

⁴ *Milq al-Yameen* (which refers to the now outdated concept of a lawful female slave partner) was also recognized as a legally binding tie that would shield a person from the charge of *zina*.

⁵ We are using in this paper Yusuf Ali's translation of the Qur'an, with minor revisions to better accord with the original Arabic meaning of the verse.

The rather harsh treatment of *zina* in Islam should be considered in light of the moral system articulated by the Islamic faith. It must also be understood within the context of the Islamic social system based among other things on relationships of blood and kinship (as reflected for example in laws of inheritance and marriage). The laws of *zina* are crucial for protecting society and preserving the purity of these blood relationships.

Given the severity of punishment for the offense of *zina*, the Qur'an requires solid proof beyond the shadow of doubt before convicting an individual, be it a man or a woman, of *zina*. Muslim jurists derived from the *sunnah* of the Holy Prophet very strict requirements for proving *zina*. In fact, jurists unanimously agree on only two means of doing so:

1. A clear, free, and willful confession by the person guilty of the act of *zina*. However, if that person retracts his/her confession, he/she is not punishable (barring the presence of witnesses, as indicated below), because there would no longer be any proof of the occurrence of the prohibited act, and alternatively,

2. The testimony of four reliable Muslim male eye-witnesses, all of whom must have witnessed the actual intercourse at the same time.⁶

It is worth noting that in the case of a confession, it is recommended that the judge ignores the first three iterations of such confession. The confession does not become binding unless it is repeated freely four different times. Abu Hurayrah narrated: "A man from the tribe of Aslam came to the Messenger -peace be upon him- while he was in the mosque and said to him,: 'O Messenger of God, I have committed adultery.' The Messenger turned away from him. The man, then, stepped in front of the Messenger and said,: 'I committed adultery.' The Messenger again looked away. The man did the same thing four times. When he confessed four times the Messenger called upon him and asked him,: 'Are you insane?' The man said,: 'No!' The Messenger then asked him: 'Were you married (*muhsan*) when you committed this act?' to which he said,: 'Yes!' Only then did the Prophet order that the man be punished for *zina*⁷.

Moreover, for a confession to be valid, it is required that the person accurately state the facts of the act of adultery/illicit sex in clear, real, and non metaphoric words, so that all doubts are removed. This eliminates ambiguities, since the term "*zina*" might be used by some to refer to other minor acts that are not punishable in the same way. Ibn Abbas reported that the Prophet – peace be upon him- said to Ma'iz: "Maybe you just kissed, maybe you touched her, or looked..." and the man said: "No!" He (the Messenger) said, "So, did you penetrate⁸ her? (using no metaphors), and the man said: "Yes!"⁹ The Prophet then ordered his punishment. In another version of the same hadith, the Prophet asked the man: "Till that of yours disappeared in that of hers?" the man said, "Yes", the Prophet asked, "Like a stick disappears in a *kohl* canister and a rope in a well?" The man said, "yes!" He then asked him, "Do you know the meaning of *zina*?"

⁶ Three Imams, Abu Hanifah, Malik, and Ibn Hanbal agreed on the fact that the four witnesses have to testify at the same time and place, whereas al-Shafi'i stated that it is acceptable for witnesses to testify in different places.

⁷ Reported by al-Bukhari and Muslim. MUWAFFAQ AL-DIN IBN QUDAMAH, AL-MUGHNI. (Beirut: Dar al-Kitab al-'Arabi, n.d) vol. 10, p. 166.

⁸ The Arabic word used by the Prophet in this *hadith* means the actual intercourse, leaving no possible confusion.

⁹ IBN QUDAMAH, *supra* note 7, at vol. 10, p. 167.

The man said, “Yes! I did with her illegally what a husband does with his wife legally.”¹⁰ The Hadith carries on as reported by Abu Dawud.

Other hadiths that reaffirm this previous hadith abound and can be found in the major hadith books. There is no need to relate all of them in this short paper. However, they all support the position that a confession ought to be willful, repetitive and insistent, denoting the desire of the sinful person to purify himself/herself before God, and take his/her punishment on earth rather than in the thereafter. Confession therefore is a clear act of repentance that purifies the person and brings him/her back to the original state of innocence and purity, spiritually as well as socially. The Prophet established this fact in the following incident. A woman who repeatedly confessed to having committed *zina* was finally punished. A person who was present at the time showed contempt towards her. The Prophet was so displeased that he told the man, “She repented such a repentance that if divided between seventy people of Madina, it would suffice them.”¹¹

The relevant hadiths are so clear-cut that the four *Sunni* schools of thought, including the Hanafi School, agreed on the requirements that a valid confession must satisfy. They are also unanimous about the requirements necessary for establishing *zina* through the testimony of eyewitnesses. Indeed, there is no disagreement among scholars about the qualifications of these witnesses. Each witness must meet the following criteria:

- (a) He should be a credible, free, Muslim male,¹² and
- (b) He should have eye-witnessed the actual act of intercourse (i.e., actual penetration),¹³

Scholars also agreed on two additional requirements:

- (c) There should be at least four witnesses, and
- (d) The witnesses should testify in the same hearing, about the same *zina* act. Any disagreement about the time of the act, its place or even the color of the clothes of accused persons, leads to the rejection of the accusations.

These severe requirements relating to the establishment of guilt through the testimony of eyewitnesses are very specific to the *hadd* of *zina*. Generally, the testimony

¹⁰ IBN QUDAMAH, *supra* note 7, at vol. 10, p. 168.

¹¹ Narrated by at-Thirmidhi. IBN QUDAMAH, *supra* note 7, at 132; 165 (margins)

¹² Credibility is denied to those who have lied previously or committed other reprehensible acts. Freedom in an age where slavery existed was important to insure that the testimony would not be influenced by another who had power over the slave. Faith was necessary to insure that the witness fully understands the significance of both the offense and the testimony. The issue of women as witnesses is a controversial issue that has to be studied in light of the Qur'an and Sunnah. Women's testimony was not accepted in this setting for reasons discussed later in this paper. Nevertheless, 'Atta' and Hammad, two Islamic scholars, are known to have accepted the testimony of three men and two women. See IBN QUDAMAH, *supra* note 7, at vol. 10, p. 175.

¹³ Anything else but the actual act of intercourse/penetration is not acceptable to carry on the *hadd*. The jurisprudential books report in great details the incident relating to al-Mughirah ibn Shu'bah, which took place during the ruling of Omar the second Khalifah and which is very clear about the requirements of the *zina* evidence. In brief, we learn that al-Mughirah was accused of *zina*, three of the witnesses testified against him describing the actual act of intercourse. When the fourth man's turn came, he reported having seen two people in a suspicious setting. He stated, "I saw a behind going up and down, heavy breathing, and I saw her legs on his shoulders like a donkey's ears. I do not know beyond that." Although some might think that this testimony should be more than enough to convict the accused man and woman of *zina*, it was not. Based on the fact that the fourth testimony was not sufficiently explicit, Khalifah Omar dismissed the *zina* charge and convicted the three men with false accusation. IBN QUDAMAH, *supra* note 7, at 197-198.

of two men is sufficient for the establishment of a criminal violation under Islamic law. Yet the law of *zina* requires four witnesses.

It is pertinent to point out here that the evidentiary requirement for *zina* was initially intended to protect women from frivolous charges. This intention derives directly from *Asbab al-Nuzul* (reasons of revelation) relating to the Qur'anic verse that establishes the *hadd* of *zina*¹⁴. We therefore believe that the requirement of four witnesses (with all its restrictions and specifications) is a merciful measure from God in order not only to avoid incriminating innocent people, but also to preserve the privacy of Muslims, which is one of the most valued principles in Islam (the concept of *sitr*). It is not accidental that the privacy principle is stated in the same chapter, a few verses later:

“O ye who believe! Enter not houses other than your own, until ye have asked permission and saluted those in them: that is best for you, in order that ye may heed (what is seemly).” (24: 27)

In fact, most Muslim scholars agree that the act of *zina* encompasses two rights, the right of God and the right of society or the community. The fact that a person has committed a forbidden act, even secretly, means that the right of God was transgressed.¹⁵ But when the act becomes public, in one way or another, then the right of society to protect its morals is activated. The earthly punishment of *zina*, which is its *hadd*, is then not directed towards the act itself, because this is a matter that only God can judge, but rather towards the fact that such an act has become known to the community, and therefore has disturbed public order and morality.

We also believe that the requirement of male witnesses constitutes another protective measure that makes it more difficult to prove *zina*. After all, in Muslim societies women have more facility and liberty to enter houses and access each other's private apartments than men usually have.

From the rich jurisprudence related to the matter, one can easily conclude that Muslim jurists were very cautious not to convict an innocent person. They went so far as to state that it is better to let a guilty person get away with his/her crime than to punish an innocent person¹⁶. For, even when a person escapes the worldly punishment, the right of God remains. He will ultimately decide whether to punish or forgive the sinful.

Muslim scholars also derived some ethical principles from the Qur'an, hadith and *sunnah* related to *zina*. First of all, it is preferable for a person who witnesses an act of *zina* not to report it, and instead to cover the shortcoming ('awrah) of others while at the same time advising them to change their behavior. This principle is in harmony with the hadith that states: “Whoever covers the shortcoming ('awrah) of a Muslim, God will

¹⁴ Verse 24:3 stating the eyewitness's requirement was revealed in the aftermath of the slander incident involving A'ishah, the Prophet's wife, who was lost in the desert and was returned by a young man to her tribe..

¹⁵ For the distinction between the right of God and the right of society, see, e.g., ABU MUHAMMAD ALI IBN SA'ED IBN HAZM, AL-MUHALLA BI AL-ATHAR (Beirut: Dar al-Kutub al-'Ilmiyyah, 1988) vol. 12, p. 261.

¹⁶ In this regard, 'Aishah narrated that the Prophet said, “ Shield Muslims from *hudud* as much as you can, if a person has a way [e.g., alibi] let them go for it is better for a judge to make a mistake in dismissing charges than in applying the punishment on an innocent.” reported by at-Tirmidhi, in *Sunan at-Tirmidhi* (Reprint, Beirut: Dar al-Fikr, 1974), Bk. Hudud, Vol. 2, pp. 438-39.

cover his shortcomings here and in the thereafter.”¹⁷ Scholars also concluded from the Prophet’s example that it is preferable for the imam or the judge to suggest to the person who confesses that he/she retract his/her confession, and to the witnesses not to testify.¹⁸

What we learn from this attitude is that the *zina* punishment should not be understood as a revengeful measure. To the contrary, it has to be understood as a measure designed to protect the morality of Muslim society whenever this morality is threatened. It is also very important to keep in mind, as we said earlier, that such a crime is not punishable unless it crosses the boundaries that separate the private sphere from the public sphere. The four witnesses’ requirement is clear evidence that such an act cannot possibly be proven unless the offending parties flagrantly disrespect the Islamic society they live in by transgressing those boundaries.

We discussed so far the two undisputed ways to proving *zina*. There is a third way to prove *zina*, upon which Muslim scholars greatly disagreed. It revolves around the following question: Is the pregnancy of an unmarried woman clear evidence that she had committed *zina*? Because of the significance of this question to the issue of rape, we now turn to it.

Is extramarital pregnancy proof of *zina*?

Pakistani *zina* law considers extramarital pregnancy as proof of *zina*. We shall now look at the Islamic legal foundation of this statement.

Major Muslim scholars vastly disagreed on whether extramarital pregnancy should be considered evidence for *zina*. Imam Abu Hanifah was firm in rejecting the use of extramarital pregnancy as an evidence of *zina*. Basing his judgment on clear injunctions from the Qur'an and *sunnah*, he considered pregnancy as mere circumstantial evidence that does not constitute sufficient proof of *zina*. In his view, the judge has to ask the woman being tried for such accusation to defend herself. If she claims that she was raped, or forced into a sexual relationship, or that she had intercourse with a man to whom she thought she was married¹⁹, then she would not be liable for *hadd*. This opinion is in conformity with the opinion of the Prophet's companions, especially Omar before whom an unmarried pregnant woman was tried for *zina*. Omar asked her to defend herself, she then said: “I am a sound/heavy sleeper, and a man raped me while I was asleep and then he left. I could not recognize him thereafter.” Omar accepted her defense and released her.²⁰

Abu Hanifah went so far in his reasoning as to state that an unmarried pregnant woman who claims that she was raped or married does not have to provide clear evidence of her rape or marriage. Her word alone suffices. Abu Hanifah referred to another incident involving Imam Ali who was khalifah at the time of the incident. He asked a

¹⁷ IBN QUDAMAH, *supra* note 7, at vol. 10, p. 188.

¹⁸ *Ibid.*

¹⁹ Abu Hanifah goes very far in defining the element of doubt concerning the existence of a marriage contract. He indeed argues that if a man pays a woman to perform some work for him and then has sex with her, or if he even pays her to have sex with him, then there is a suspicion of marriage as the money given to the woman could be analogized to the mahr. Other jurists, including Ibn Qudamah and Ibn Hazm rejected vehemently this position. See, IBN HAZM, *supra* note 15, at vol. 12. pp. 195-198; IBN QUDAMAH, *supra* note 7, at 194-95

²⁰ IBN QUDAMAH, *supra* note 7, at vol. 10, p. 193.

pregnant woman: “maybe you were forced to have sex?” she said: “No.” He then said: “then maybe somebody raped you when you were asleep?”²¹ Considering the fact that Pakistan adopts the Hanafi School, it is rather obscure why the Pakistani legislators rejected Abu Hanifah’s view on the matter.

Al-Shafi’i and Ahmad Ibn Hanbal opted for the same opinion, and so did many other scholars. The well-known scholar Ibn Qudamah has a very interesting view about the pregnancy of a virgin or unmarried woman, he said: “In our opinion, [pregnancy can occur from] rape or a suspected marital contract. *Hudud* must be dropped if there is an element of doubt, *shubhah*, according to the hadith. It is also believed that a woman can get pregnant without intercourse because the sperm of a man may get into her in many ways, whether passively or actively [that is, by her own will]. The pregnancy of virgins is a logically accepted fact because it did happen.”²² It is important to note here that the analogy with artificial insemination is rather striking.

However, Malik had a different view on the matter. He stated that an unmarried woman who becomes pregnant is liable to zina punishment unless she proves that she was raped or that she is married. However, Malik did acknowledge the possibility that pregnancy can result from an unwilling sexual act. Thus, he established a number of safeguards that aim to assure that no innocent is convicted unjustly. First, physical evidence is undeniable proof of rape. If a woman comes bleeding to the judge [or the police today] and claims that she was raped, her word is accepted because of her physical state.²³ If somebody hears her asking for help, his testimony is accepted. From this perspective, even if the Pakistani legislators were influenced by the Maliki view, they should adopt it in its totality and hence allow women to rebut the pregnancy proof by physical/medical evidence that they did not consent to the intercourse.

It is worth noting here that many Muslim scholars criticized the Maliki point of view regarding pregnancy as proof of zina. The famous jurist Ibn Hazm vehemently disagrees with the Maliki analysis based on the clear and emphatic injunctions in the Qur’an. He argues in his book *Al-Muhalla Bi al-Athar* that the Maliki ruling is not in conformity with divine law. He says:

“We have not seen anyone more audacious [than some jurists who] mete out a sentence based on mere circumstantial evidence, [i.e., based on a type of evidence] where there is no room for any sentence to be meted out...the Malikis establish the *hadd* of zina based on mere pregnancy, whereas pregnancy could result from rape.”²⁴

It is therefore clear that Muslim scholars agreed upon the fact that a woman²⁵ forced into a sexual relationship cannot be held responsible for this act. They disagreed,

²¹ ABU AL-WALEED IBN RUSHD AL QURTUBI, BIDAYAT AL-MUJTAHID WA NIHAYAT AL-MUQTASID. (Reprint. Beirut: Dar Ibn Hazm, 1995), vol. 4, p. 1728.

²² IBN QUDAMAH, *supra* note 7 , at vol. 10, p. 193.

²³ AL-ZURQAANI, HASHIYAT AL-ZURQANI ALA MUWATTA’ AL IMAM MALIK. (Beirut: Dar al-Ma’rifah, 1989) Vol. 4, p. 150. Further discussion of this issue will follow.

²⁴ IBN HAZM, *supra* note 15, at vol. 12. p. 61.

²⁵ Most scholars say that a man can also be forced into intercourse, not by a woman as some wrongly understood, but by somebody who has power over him, such as the ruler or a bandit. In such cases, he is not to blame or to be punished. Abu Hanifah departed from this view at an early stage of his life, he said that a

however, on the type of proof they considered sufficient for establishing sexual coercion. For this reason, we shall examine next the various ways in which Muslim scholars dealt with situations that included claims of rape.

Rape and Coercive Sexual Relationships in Islamic Law:

As stated earlier, Pakistani law treats rape as an act of *zina*. It then extends the evidentiary requirement for proving *zina*, i.e., the requirement of four qualified Muslim male witnesses, to cases of rape as well. This treatment is supposedly based on Islamic law. We shall refute this claim, and eliminate these misunderstandings about the correct position of Islamic law, by discussing some of the major jurisprudential views on the matter.

It is true that Islamic jurisprudence treated rape, usually referred to as *al-istikraah* or *al-zina bi'l-jabr*, under the general law of *zina*. This is understandable since Qur'an does not deal with coercive sexual relationship. It only addresses the case of consensual sexual relationships. Consequently, jurists were forced to derive laws relating to rape based on arguments from analogy and other modes of legal reasoning. We shall now discuss the divergence of views regarding the claim of rape.

Muslim scholars based their arguments on the hadith that says, "God has forgiven to my people mistakes, forgetfulness and anything that they were coerced into (*ma istukrihu 'alayh*)"²⁶. They concluded from this hadith that if a person, especially a woman was forced into a sexual act, then she/he would not be subject to punishment. Jurists are unanimous on this matter as the following incidents and views show.

Ibn Qudamah emphasizes the agreement among scholars about the innocence of *al-mustakrahah 'ala al-zina* (the woman forced into an illicit sexual act), he says, "There is no sentence against a coerced woman according to the overwhelming majority of Muslim scholars. This is the view of Omar, al-Zuhri, Qatadah, al-Thawri, al-Shafi'i, and others and we do not know anyone who departed from this view"²⁷. Later on, Ibn Qudamah narrates different hadiths and incidents that support this view. For instance, a woman claimed that she was raped during the Prophet's time; the Prophet did not charge her with any crime. He also narrates that some female slaves were raped by some male slaves and were brought before Khalifah [Caliph] Omar. Omar cleared the females of any wrongdoing and flogged the male slaves²⁸.

In another incident, an alleged adulteress was brought before Omar, and she claimed that she was sound asleep when a man came unto her. Omar released her though she was not able to recognize and hence identify the rapist. When asked about his decision, he explained that the ruler was bound to waive the *hadd* whenever there was the slightest doubt about its applicability.

Moreover, jurists extended the definition of coercion to include not only coercion by means of physical force, such as in the case of a man forcing his way on a woman, but

man cannot be forced to have sex, because such act requires an active participation from his side, unlike a woman who is passive and can be forced into it. But he later on changed his opinion and stated that if a man's life is threatened at the moment of the intercourse, then he is not to be blamed. He argued that the physical response (from a man) is not proof of consent or will but only of maleness. SHAMS AL-DIN AL-SARKHASI, KITAB AL-MABSUT. (Reprint. Beirut: Dar al-Ma'rifah, n.d) vol. 9, p. 59.

²⁶ IBN QUDAMAH, *supra* note 7, at vol. 10, p. 184.

²⁷ IBN QUDAMAH, *supra* note 7, at vol. 10, p. 158.

²⁸ IBN QUDAMAH, *supra* note 7, at vol. 10, p. 159.

also by other means. For example, threats to kill or hurt the woman were included in the definition of coercion. Jurists even included denial of food or water to a needy woman in the definition as well, when the waiver of such denial is conditioned on the woman's acceptance to engage in a sexual act. Indeed, a woman who was tried before Omar for *zina* claimed that she was thirsty and asked a shepherd for some water. The shepherd denied her water unless she allowed him to have sex with her. Having no choice, she did. Omar consulted with Ali whose opinion was that the woman had no other choice. Consequently, Omar dropped the case against her and even gave her monetary compensation.²⁹ Jurisprudential books narrate many similar stories.

We can thus safely assert that the difference between the majority view of Muslim jurists and the minority view is not really about whether a raped woman should be punished or not. It is rather about proving that the sexual act occurred against the will of the woman. The disagreement among scholars on this point encompasses two cases:

First: the case of an unmarried woman who is found to be pregnant, and who claims that she had been raped but cannot name her assailant.

Second: the case of a woman who reports to the authorities that she was raped by a certain individual whom she may be able to identify.

The second case is different from the first one because the woman in the second case was neither caught in the act of having illicit sex or its consequences, nor was she otherwise accused. Instead, she came forward of her own accord seeking justice. It is very important to keep this difference in mind, if we want to understand Islamic law of *zina* properly and not separate it, through hasty judgments, from its fundamental '*illah* (reason).

The Case of an Unmarried Pregnant Woman Who Claims Rape:

Muslim scholars widely disagreed about the extent to which the claim of rape by an unmarried pregnant woman may be accepted without evidence. Here again the Pakistani legislation departs completely from the Hanafi view on the matter. Indeed, as we mentioned earlier, the jurist Abu Hanifah states that a woman who claims rape is not required to prove it,³⁰ nor is she required to recognize or name her assailant.³¹ Imam Abu Hanifah argued that if there was no way to verify the woman's claim or to prove *zina*, then it would be better to release her according to the hadith "dismiss the *hudud* if there is an element of doubt (*shubhat*)". His argument shows that Imam Abu Hanifah clearly appreciated the fact that a woman being raped could not be expected to memorize the identity of her aggressor or name him thereafter.

Imam Abu Hanifah also based his opinion on numerous incidents where the Prophet's Companions, notably the *Khulafa' ar-Raashidun*, dismissed apparent cases of *zina* when women claimed rape.

We have already mentioned some of these cases, which occurred during the rule of Omar. Indeed, after Omar dismissed an apparent *zina* case against an unmarried pregnant woman based on her claim that she was raped, he issued a decree to all his

²⁹ IBN QUDAMAH, *supra* note 7, at vol. 10, pp. 159-160.

³⁰ IBN RUSHD, *supra* note 19, at 1728-29.

³¹ Ibid.

governors ordering them not to execute any one without consulting with him first.³² This decree is highly significant for cases involving apparent *zina*. Also, Khalifah Ali and the famous companion Ibn Abbas stated: “if there is an ‘if’ or a ‘maybe’ in the case of *hadd*, it cannot be applied.”³³

However, other jurists, including Imam Malik, departed from this view arguing that pregnancy is sufficient proof of *zina*, unless marriage or rape are proven. They based their view on the following statement by Imam Ali: “O People, *zina* has two forms; it can be secret or public. As to secret *zina*, only the testimony of witnesses can prove it...whereas public *zina* is when there is a pregnancy or a confession...”³⁴ The scholars who use Imam Ali’s statement seem to forget that he defined certain requirements for extramarital pregnancy. In such cases, he always provided the pregnant woman with the opportunity to defend herself by claiming either rape or a previously undisclosed marital relationship. He was also inclined to dismiss charges in case of *shubhah* (doubt, possibility of innocence).

For these reasons, the proper way of reconciling the various views of Imam Ali and thus understanding his proper intent in the statement about secret and public *zina* is the following: A secret (private) illicit sexual act becomes known (publicly) when pregnancy occurs. At that time, the illicit sexual relationship leaves its exclusively private sphere and acquires a public dimension. The apparent pregnancy of an unmarried woman impinges on society by affecting public morality. This state of affairs activates in Islamic jurisprudence the right of the society to protect its moral values. So, it becomes absolutely necessary for the pregnant woman to justify her pregnancy either by claiming rape or marriage. If she fails to do so, and there are no other *shubhat* in the matter, then (and then only) pregnancy becomes a proof of public *zina* without the need for four witnesses or a confession.

The incident narrated earlier supports this interpretation. Imam Ali actually suggested to the pregnant woman brought before him different ways to justify her pregnancy, by asking her questions like: “maybe you were forced to have sex?” And “maybe somebody raped you when you were asleep?”³⁵ Muslim scholars who used Imam Ali’s statement distinguishing between secret and public *zina* completely missed his point because they took it out of context and did not understand it in light of his other statements and rulings that protect pregnant women in this context.³⁶

The imposition of *hadd* of *zina* unfairly is such a serious matter, that even Malik moderated his rather rigid view on the matter by accepting physical evidence, such as bruises and bleeding, as proof of rape. This is an important point, given that proving rape through medical means has been made a lot easier in our modern times by advanced medical technology. Other scholars accepted the testimony of a single person who hears the victim asking for help. This position is based on an incident involving Khalifah Omar Ibn Abd al-Aziz, where a woman brought before him claimed that a man raped her.

³² IBN QUDAMAH, *supra* note 7, at 194.

³³ Ibid.

³⁴ IBN QUDAMAH, *supra* note 7, at 193.

³⁵ See *supra* note 19.

³⁶ Among those statements, his saying: “if there is an “if” or a “maybe” in the case of *hadd*, it cannot be applied”, see, *supra* note 28; and also the fact that when a pregnant woman claimed that she was forced to have sex with a man who refused to give her water when she was thirsty. He didn’t ask her to prove her claim and he advised Omar to release her, *see supra* note 27.

Another man testified that he heard her screaming. So Omar released her.³⁷ Malik's comments suggest that he also accepts this view, and it is well that he does since even the Qur'an refers to this type of evidence in clearing the Prophet Joseph (*alayhi assalam*) from the accusations of the wife of the Pharaoh.³⁸

Consequently, if the Pakistani legislature adopts the Hanafi view, which permits a claim of rape to justify extramarital pregnancy, then it should also accept the fact that a woman is not required under the Hanafi position to *prove* that she was actually raped. Her word suffices. On the other hand, if the legislature opts for the more onerous Maliki view, then it should not denude it from its balancing elements of mercy and fairness, the hallmarks of Islamic '*adalah*'. Thus, in the absence of eyewitnesses, medical/physical proofs must be admitted to establish the woman's innocence, just as the Prophet Joseph used them, in the Qur'anic story, to clear his name.

The Case of a Woman Who Reports That An Identified Individual Raped Her:

Muslim jurists unanimously agree that a woman who is raped is neither legally nor morally (religiously) at fault. They however disagreed on the legal implications of the case of a woman who names a specific individual and accuses him of raping her without being able to fully establish her claim. Several opinions were expressed on this matter.

Imam Malik stated that if the woman accuses of rape a man known for his piety and righteousness, without providing witnesses or physical evidence, then she is liable for the punishment of *qadhf* (a punishment of 80 lashes meted out to those who make false accusations).³⁹ But if the accused is known for his ill conduct (*fisq*) then the assessment of the veracity of the woman's claim is left to the judge. If he believes the woman, the judge may inflict corporal punishment onto the presumed assailant, imprison him, and make him pay the woman a *mahr*, or more accurately, a value equivalent to her *mahr*.⁴⁰ Moreover, a woman can accuse a man of rape and yet avoid the *hadd* of *qadhf*, in the opinion of Omar Ibn Abd al-Aziz, if the woman is able to produce one testimony from a

³⁷ IBN HAZM, *supra* note 15, at 259.

³⁸ Qur'an (12:26-27)

³⁹ It is important to point out that Muslim jurists disagreed a great deal on whether the verse related to *qadhf* (defamation regarding one's chastity) (24:3) can be applied to men. Indeed, the ayah addresses those who accuse falsely chaste/righteous women (*muhsanat*). Some scholars, especially those who adopt *qiyyas* (reasoning by analogy), argue that men are not included in the *ayah* since it states flatly: "those who defame chaste women..." If we adopt this view, then the meaning of *qadhf* itself would be strictly limited to men who accuse women and never the opposite. See IBN HAZM, *supra* note 15, at 226-230 (and margins).

⁴⁰ The fact that the presumed rapist is required to pay a value equivalent to the *mahr* of his alleged victim does not mean that he is required to marry her (as some cultures do). That would be repugnant under Islamic law. The payment is simply compensation for the damages the rapist caused, and is in addition to the punishment he receives from the court. Muslim scholars disagreed on the fairness of this approach. Al-Shafi'i agreed with Malik that if a man is found guilty of rape he is liable to *hadd* of *zina*, and he should pay his victim a value equal to her *mahr*, see, MUHAMMAD IBN IDRIS AL-SHAFTI, KITAB AL-UMM. (1st edition, Cairo: Maktabat al-Kuliyyat al-Azhariyyah, 1961) Vol. 3, p. 258. Other scholars argued that such an approach imposes double jeopardy upon the perpetrator, which is unfair and inconsistent with the Qur'an. They also argued that the *mahr* is a marital gift that is exclusively required from a husband to his prospective wife, and hence the perpetrator should not be required to pay it. See, Ibn Rushd, *supra* note 19, at vol. 4, p. 1729.

person who heard her calling for help. It is important to note that, for the Malikis, while this evidence would not suffice to legally establish the guilt of the man⁴¹, otherwise they would have sentenced him to the *hadd* of *zina* on him, it suffices to protect the woman from the *hadd* of *qadhf*. It is clear that the Maliki reasoning here has serious flaws. Indeed, why should a man whose guilt was not irrefutably established be punished even by a lesser sentence than the *hadd*? The woman can also avoid *hadd* of *qadhf*, if someone saw her with the accused (thus establishing opportunity), or if the accused had scratches on his body or other similarly incriminating evidence⁴².

Despite its attempts to ameliorate the situation of an unmarried pregnant woman, it is our considered opinion that the Maliki point of view is demonstrably inconsistent with Qur'anic injunctions, as well as precedents from the *sunnah* of the Holy Prophet. The famous jurist Ibn Hazm agrees with us, and disagrees vehemently with Imam Malik whose reasoning on this matter he refuted point by point.

Ibn Hazm rejected the Maliki view that the righteousness or ill conduct of a man accused of rape should affect the legal ruling of a judge. He argued that neither the Qur'an, *sunnah*, *ijma'*, *qiyyas* nor the tradition of the Companions, support this opinion. To the opposite, a judge should treat people equally whether they are known for their righteousness or their ill conduct, and whether they are Muslims or non-Muslims. Evidence from the *hadith* and the consensus of the Companions and scholars show that when a person accuses another of any charge and the defendant denies the claim, then the defendant must swear to his/her innocence of the charge brought against him, even if the said defendant were a companion of the Prophet.⁴³ Ibn Hazm argues vehemently against the distinction Malik makes among Muslims in legal matters and considers such a rule as a wide open door to all kinds of injustice and discrimination. He states flatly that in such cases, the oath should be required from every person, no matter who he may be.

A most important point raised by Ibn Hazm's reasoning is the following: if we adopt the Maliki argument, then a woman who is raped by a well-known man and has no evidence to support her claim is left with only two options. Either she reports him, and becomes liable for the *hadd* of *qadhf*, or she remains silent. In the latter case, she risks the *hadd* of *zina* if she becomes pregnant. Ibn Hazm describes this outrageous situation as an extreme injustice towards women⁴⁴.

Based on this criticism, Ibn Hazm develops a new argument inspired by the ultimate Qur'anic principle: "If ye differ in anything among yourselves, refer it to Allah and His Messenger" (4:59). He argues that a woman who reports having been raped by a specific man should not be viewed as making a false accusation, *qadhf*. Rather, she

⁴¹ It is understood from the Maliki reasoning that in such cases, the aforementioned evidence is not sufficient to legally establish the guilt of the man accused of rape. Otherwise, Malik would have ruled in favor of applying the *hadd* of *zina* upon him. This gave rise to the following criticism; if it cannot be established that the man is guilty, then why should he receive any punishment, be it imprisonment or other?

⁴² IBN HAZM, *supra* note 15, at 259.

⁴³ This view is supported by the fact that a non-Muslim man hailed Khalifah Ali into court accusing him of not having paid him back his loan. Imam Ali had to swear his innocence because he had no evidence to prove that he actually paid the man his money back. Other Companions, including Khalifah Omar, Khalifah 'Uthman, and Ibn Omar, the great Companion and narrator of hadith [Abd Allah ibn Omar Ibn al-Khattab] had to take the same oath for different reasons; IBN HAZM, *supra* note 15, at 260.

⁴⁴ IBN HAZM, *supra* note 15, at 260-261.

should be viewed as a plaintiff seeking justice, and hence should not be liable for *hadd al-qadhf*. As a plaintiff, the woman has two resorts:

- She should be asked for a *bayyinah* (clear proof) supporting her claim, and if she produces it then the man should be punished accordingly; or
- In case the woman is not able to produce adequate evidence, then the man would have to take an oath that he did not aggress her, nor did he force her into any action. He does not have to swear that he did not commit *zina*,⁴⁵ because such a crime violates the right of God and no one may interfere between a person and his/her God. After the oath, the two parties are free to leave and neither of them is liable for any punishment whatsoever⁴⁶.

In our view, the position of Ibn Hazm is closer to the concept of Islamic ‘*adalah*’ than that of Imam Malik. It is at once, balanced, just, and compassionate, without showing favoritism. It errs on the side of caution, as a Muslim judge ought to do, and thus does not victimize any one. Significantly, Ibn Hazm understood the grave mistake other jurists make when they fail to distinguish between reporting an injustice, and accusing others falsely (*qadhf*). In their failure, other jurists turned a divine law that was meant to protect women into a weapon against them. Ibn Hazm’s reasoning takes into consideration the Islamic ideal of justice and equity, and brings the laws relating to *zina* and rape into conformity with divine law, without loosing sight of the rights of both parties involved in such cases.

It is important to highlight again that the Hanafi scholars were wise and fair in understanding the circumstances surrounding the case of a woman claiming rape without naming her assailant. They therefore accepted her sole word and did not require her to provide evidence whatsoever for her claim. They also stated that even if a woman confesses four times that she committed *zina* with a person she names, and the concerned man denies her claim, then there is no case. They argued that the act of *zina* couldn’t possibly occur without the active (physical) participation of the man. Since the man denies having committed the act, then the act itself becomes inconceivable⁴⁷.

Since Hanafis did not address at length the case of a woman who identifies the man she is accusing of raping her, we believe that the best way to deal with it is to adopt the viewpoint of Ibn Hazm. As noted earlier, this point of view is more compatible with the principles of *Shari'a* and its spirit than other points of view available on this matter, especially that of Malik.

Conclusion:

All schools of Islamic law agree that rape is a crime; they only disagreed on how to prove it. It is clear from our discussion that the foundation of the Pakistani *zina* and rape laws is not in conformity either with the Hanafi School adopted by Pakistan or with the other jurisprudential views related to the matter.

⁴⁵ IBN HAZM, supra note 15, at 261-62.

⁴⁶ Ibid.

⁴⁷ Al-Sarkhasi, supra note 23, at vol. 9, p. 99.

If we adopt the Hanafi position, which is also the majority position on the matter, then:

- Extramarital pregnancy should not be considered as proof of *zina* since it could result from a the woman's wrong belief that she is married to the other party, or rape, or artificial insemination, and so on;
- If a woman claims that she was raped, either to justify her extramarital pregnancy or just to report the assault, she should not be required to prove her accusation. Her word is sufficient evidence; and
- Since the Hanafi School did not rule in the case of a woman who accuses a man of raping her but is unable to provide clear evidence (*bayyinah*), then we can adopt Ibn Hazm's view, and ask the accused to take an oath stating that he did not aggress the plaintiff nor did he force her to do anything against her will. The two parties should then be released. If pregnancy occurs, it should not be held against the woman.

If we adopt the Maliki view, then:

- Physical/medical evidence should be accepted as proof of rape,
- In case no physical evidence exists, we should refer to the jurisprudential principle of avoiding the application of a *hadd* whenever there is an element of doubt (*dar' al-hudud bi al-shubhat*) in the situation. The claim of rape should be viewed as sufficiently strong to overcome any charge of *zina*, especially when the woman reports the crime of her own volition. Her claim should not be treated as either a confession or a false accusation, as Ibn Hazm clearly demonstrated.
- In all cases, we should keep in mind the fundamental Qur'anic principle of '*adalah* (justice, balance, and equity). The law should protect society, its morals and ideals, but without denying to individuals their rights, especially their basic right to life. As all scholars agreed, it is better to let a guilty person get away with his/her sin and face God's justice later than to enforce the *hadd* on a single innocent person.

We ask no more or less from the government and *qadis* of Pakistan.
