

Matrimony Law and Islamic Sharia Law in Pakistan.

Report for the Pakistani Women's Human Rights Organizations
<http://www.pakistaniwomen.org/>

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SIS-645 International Communication and Cultural Policy Summer 2014
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3 PAKISTAN

"Pakistani women are left with little, if any, protection from violence and discrimination. In addition to Pakistani laws being discriminatory, the judicial system condones and exacerbates the problem by failing to view violence against women as a serious violation of women's human rights."

—Noreen Haider, Madadgar Trust for Research and Development



Introduction

As a consultant for the Non Governmental Organization - Pakistani Women's Human Rights Organization, I will be examining the existing Matrimony Law and compare the overlap with the Sharia Law. I intend to highlight the possible areas of discord and abuse of women's rights based on these reasons. Pakistani Women's Human Rights Organization (PWHRO) is an organization devoted to the task of fighting for Human Rights for the women of Pakistan within the country. The main aim is raise awareness about the plight of Pakistani women fight for the removal of outdated practices and ordinances imposed by the Sharia law existing in parts of Pakistan.

Pakistan is an Islamic Republic that got its independence from the British and separated from India or Hindustan to be built on the ideology of Islam under the leadership of Mohammed Ali Jinnah in 1947. The ideology of Islam had many connotations and political leaders fulfilled their own aspirations from the partition. The country's constitution was written in conjunction with the Islamic values and principles, God and the Qur'an being the overriding factor in any given situation. The Sharia or Shariat Law is the moral and religious code of Islam. The sources of the Sharia are from the Qur'an and the "*Sunnah*" or Prophets teachings or traditions.

Cultural Background

Each Islamic country interprets the Sharia law as per its cultural history. The Pakistan's government model is a parliamentary democracy but that has been challenged multiple times by martial law. Each time the martial law took effect the government policies were questioned and updated. The 1980s, the Government under General Zia-Ul-Haq changed the dynamics of Pakistan and introduced strict Islamic law. This action has laid the foundation to present day fundamentalism and sectarianism.

According, to the communication policy models we have studied Pakistan falls under the Nationalist-Cultural Model. The function of public and social communication is preservation of

the ideology of Islam and the national identity being a Muslim. The country's constitution is based on Islam. The presence of mosques, prayer rooms and accommodations for Ramadan is made to help every citizen be a better Muslim. The national language is Urdu and the government has complete control over every aspect of the citizen's life in the public domain including head covering of women. The freedom of press is very limited and is controlled by the government. There is a lack of transparencies of policies. The original Marriage and Family Act is unavailable. The TV and media regulations are set up in such a way that if they don't align with the National policies and are against Islam it can't be telecast, published or distributed. In fact, during the height of the Taliban presence in Pakistan, even listening to music or watching TV was a punishable offence. Women always have to be accompanied by a man in public and female education is discouraged in rural and tribal areas

The Marriage Act

The original Marriage Act of Pakistan has undergone many changes to clarify issues and ordinances in conjunction with the Muslim Family Law ordinances. The Law as it stands now states that the legal age for marriage for a male is 18 years and female is 16 years.

The entirety of the marriage act has been written in terms of a man.

How to register a marriage, how polygamy can be practiced with written permission from the previous wife, how he can divorce his existing wife by reciting the word "*Talaq*" along with a few bureaucratic steps of registering the divorce. Dissolution of a marriage by the wife or family is possible especially if she is initiating the divorce and wishes to exercise her right by the provisions in the original marriage contract or "*nikhanama*". In case it hasn't been agreed upon the wife's request to dissolve the marriage is null and void.

The policy has not undergone any changes to reflect changing times or to make it relevant. The actual application and interpretation of the policy is in the hands of the religious leaders. The degree of fundamental religious reactions changes from leader to leader. The worst was under

General Zia-Ul-Haq's regime, he took the right wing approach and established Islam law over all arenas of public life not just personal life. From the country's point of view it is a successful policy, but from the point of view of women's right it is oppressive. There aren't any accommodations made for women and the interpretations of the law typically lies in the hands of male, religious leaders.

The Sharia Law – “the straight path”

There are two main sources of the Sharia law – the principles proclaimed in the Qur’anic verses or *ayahs*, and the traditions set forth by Prophet Muhammad in the “*Sunnah*”. The “*sunnah*” of the Prophet extends to his words, habits, dealing with friends and family and future alliances. Islamic judges or “*Qadis*” and religious leaders or *Imams* interpret the Sharia. This process is called “*fiqh*” or intelligence or Islamic jurisprudence. For occurrences that are not directly covered by the main sources, the religious scholars or “*ulamas*” apply analogies or “*qiyas*”, and come to “*ijma*” or consensus among the Muslim scholars. The “*fiqh*’s” jurisdiction extends to religious, civil, political, constitutional and procedural law. The “*fiqh*” is fallible since it entirely depends on a person’s interpretation and formal logic or “*mantiq*” and local customs or “*urf*”.

Council of Islamic Ideology (CII), Government of Pakistan was established in 1962 and was re-designated in its current day form in 1973. It is an advisory body and presents constitutional recommendations based on the Sharia. Pakistan’s government and parliament seeks guidance and legal advice from the CII on all matters. The council has aided in revising and recommending changes to laws.

Expert Opinions

A marriage under Islam is a civil contract that is null and void after either of the spouse’s death. The contract can also be executed and dissolved. Under Islam, both parties have the right to dissolve a marriage but only the husband has the inalienable legal right to divorce or recite

“*talaq*” to his wife. The wife on the other hand can only divorce her husband if she had the option in her original marriage contract. Under the circumstances that the right of divorce is allowed to the wife she has only recourse, which is to file a “*khula*” or untying the knot before the family court.

A report “Law of Divorce and Khula in Pakistan” written by Barrister Ali Shaikh explains in layman terms the rights of a woman and how the Muslim Marriage is interpreted as per Pakistani Law. It is interesting and frustrating to note that a man can marry multiple times but a woman is required to go through the process of “*talaq*” or “*khula*” lest it be misconstrued as bigamy or “*zina*” or adultery committed by the woman. A man is supposed to pronounce the “*talaq*” over a few months and send a written notice to the Union Council stating his intention. This process is in place to ensure the husband is not hasty to separate but give it his best shot. If the original “*nikhanama*” or marriage contract didn’t include the wife’s “Right of Divorce” her only course is to seek a judicial divorce. There are defined grounds on which a wife may ask for judicial divorce unlike the man who may choose to leave his wife based on his whim and fancy. In the study “Between Law and Custom: Women, Family Law and Marriage in Pakistan” Citrelli examines a woman’s freedom to enter and leave a marriage at their own will. She also conducted interviews with 15 women who live in a shelter due to various unfortunate occurrences in their lives. She also highlights the fact that economic disparity affects the protection of women. In rural and tribal settings the women are treated like commodities rather than people. She states that the imposing of Sharia interferes with women’s rights and doesn’t give the women a fair chance. The author clarifies that the interpretation of the Sharia is not limited to the tenets of Islam but is deep rooted in the tribal and clan based practices. The study ran extensive interviews of the 15 residents of the shelter and discovered that most of them were forced into marriages or were not supported because they picked their husband or had a “love marriage” or wanted to divorce their husband due to verbal and physical abuse.

According to Professor Ali A. Mazrui, the punishments laid down under the tenets of Islam were relevant fourteen centuries ago. There is a movement by modern liberal Muslims to re-interpret and make it relevant for today's times. Another issue to be considered is that people want to own their identity and tribal separateness and belong to a group of people. The attitude towards nationalism and ethnic culture is prevalent and this builds the case for the Pakistanis accepting the Sharia law over civic law. (Kukathas 1992 p. 106)

There has to be a clear outline to deal with cultural rights when it overrides fundamental human rights, especially those of women, children and other vulnerable groups. This reinforces the point that despite of the Sharia being the law in Pakistan, women do get a raw deal. The basic civil law also in in favor of the men and written with them in mind. The women are not considered or protected. (Renteln, Human Rights Dialogue, Spring 2005)

The first the issue Women's rights being recognized by the Pakistani government was in 1973 but it experienced a setback during General Zia-ul-haq's regime. Federal Sharia law "*Hudood*" or punishment ordinances were established in 1980 along with the stigma of "*Zina*" (unlawful/out of wedlock sexual intercourse or adultery).

The polygamy law went into effect in 1955 because the then Prime Minister wanted to take on a second wife. The Marriage commission found Islamic laws to substantiate the claims, including the fact that the Prophet had many wives. The first signs of assertion of women's right occurred in conjunction with this law passing. Fifty women in Karachi took to the streets to boycott the polygamy law. (Abbott 1962)

Policy Analysis and Recommendations

The Marriage Act and Family Law ordinances are considered civil laws but are interpreted through the Sharia or Islamic law. Historically, the laws seem to benefit ta man and make it difficult for a woman to assert her rights. The policy model aligns with the Nationalist model where the goal is to uphold the Islamic values of the country. Even though the policy is simply

laid out and is transparent it is definitely not easily interpreted, especially since it is in the hands of the religious leaders who are typically male. It is primed for skewed judgments against women. The “*zina*” punishments meted out to women is almost inhuman and includes flogging and being paraded naked in public. I have attached Appendix A where the case of Safia Bibi vs State in Pakistan has been discussed in detail. While the acutely myopic Safia, then twenty years old and unmarried girl was working at Maqsood Ahmed’s house, was raped by him. The girl was sent back to work at their household in spite of this unfortunate occurrence and was even raped by the boy’s father Muhammed Ali subsequently. As a result of this, she was impregnated and gave birth to a child who passed away at the hospital. The frustrating part is that since it is considered “*zina*” a case was registered against her and Maqsood was charged for rape. The way the entire case played out alarms me, the reference to the Qur’an, “*sunnah*” is brought up and Maqsood was not charged of rape since there was insufficient evidence and Safia was charged with “*zina*” – three years of imprisonment, fifteen stripes and a fine of Rs.100. People were outraged and demonstrated against this decision. The second time around Maqsood was still not charged since there was no statement forthcoming other than Safia’s and the Islamic judges acquitted her of “*zina*” stating “this being a case of no evidence, the appeal is accepted”.

This above case illustrates that the interpretation of the Sharia is not consistent and it is biased towards men. How can a woman feel safe and protected in such an environment? Especially, women from rural and tribal areas with no education have very little hope of being protected by the government. There is a distinct disparity in rural vs urban, educated vs uneducated, upper and middle class vs lower classes or poorer sections.

Culturally, marriage is a social choice between two families and not a choice of two individuals and considered the right and duty of the family to arrange it. There are multiple layers of complexities in the choice of a husband and wife. There are records of forced and child

marriages that happen even today. In the case of arranged marriages when the woman or man doesn't assent to the marriage its considered forced. The Qur'an or Sharia does not affirm this practice but the culturally the head of the family makes the familial decisions. (Citrelli 2012)

Child marriage had been abolished as of 1971, but recently has been in the news again in March 2014, the CII ruled that the law against Child Marriage was un-Islamic and has to be banned. The CII doesn't have the powers to pass or enact the law; the parliament will consider this and make a decision. (Right Visions News)

The root of the matter is that the intentions might be in alignment of Islam and the Prophet's life but the leaders and scholars interpretations are not consistent and are subject to change. There should be an overall consensus and clear-worded laws outlined that makes it binding in any situation. (Ahmed 1987 p.160) Values prescribed by Islam should be applied in current times and regulated and punishments should be more secular, relevant and current. A girl abused by her husband or raped doesn't need the humiliation of being flogged or paraded naked in public as punishment for "*zina*".

- The first step is to get rid of all barbaric punishments. Reevaluate the laws and regulations referring to rape. A pertinent step is a countrywide education of women's rights and availability of rape kits or even secular doctors who are easily approachable will alleviate the situation.
- Inclusion of women in the regulatory bodies who interpret the sharia can also help the cause.
- Honestly, keeping the marriage and family law strictly a civil affair will make this a cleaner and safer system for women.

Lastly, the Sharia is not limited to Pakistan it is prevalent in all Islamic countries. There has to be a worldwide committee to agree on how the Sharia is interpreted and question the need for Sharia in marriage and family law ordinances.

Conclusion

Various NGOs including the Pakistani Women's Human Rights Organization are working to bring attention to the inconsistencies in the interpretation of the Sharia law and are fighting to protect women in Pakistan. The "Sisters in Islam" organization consistently, works to change the system in Malaysia. In 2011, Zainah Anwar, director of another organization called Musawah proposed that the "*Hudood*" should be imposed on political leaders in Malaysia to be able to experience the impact. She said, the only people who are subjected to the punishments "are the poor, the illiterate and the women." (D. Kanyakumari 2011) Recently, in India the "Bharatiya Muslim Mahila Andolan" (BMMA), Muslim women's rights groups in India have been the news. They are demanding the government update the Shariat Application Act of 1937 and the Muslim Personal Law, among other things also ban polygamy and unilateral "*talaq*" or divorce. (PTI 2014)

In an ideal world, the best-case scenario is for the Pakistan to keep the Sharia separate from the family and marriage laws and leave it in the codified civil court.

In the real world, we recommend that if Sharia law is to be used, there has to clear understanding of how the interpretation of the Sharia will be ensue and not be under the mercy of fundamental, male religious scholars. The Islamic countries across the world need to create a committee to examine the Sharia laws in detail. The committee then needs to make accommodations for current reservations and situations and punish accordingly.

It is evident that there is a movement to make changes to the ancient system, from the grassroots levels. The growing number of women's rights groups is pushing for the agenda of protecting women, especially those who come from rural and tribal and uneducated backgrounds.

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APPENDIX A – Case of Safia Bibi



Zina (Adultery/Fornication) and Rape

CASE NAME	<i>Safia Bibi v. State</i>
CITATION	PLD 1985 FSC 120
COURT	Pakistan Level of Court: Federal Shariat Court, Criminal Appeal Name of Judges: Aftab Hussain
SUMMARY OF FACTS	<ul style="list-style-type: none"> The father of Safia Bibi lodged a complaint on behalf of his daughter, an unmarried twenty-year-old suffering from acute myopia, who had been subjected to Zina-bil- Jabr by Maqsood Ahmed whilst working for his family. Under shock she told her mother about the incident and refused to continue working for this family. Nonetheless, she reluctantly agreed to go back when Mst Rashida Bibi, Maqsood's mother, "took her away in the absence of her parents." (Hussain, 122: 6). On this instance the father of Maqsood Ahmad, Muhammad Ali, committed the same offence. From this zina Safia Bibi gave birth to a child who later died in hospital. A case was registered by the police against both Safia and Maqsood —Safia for fornication and Maqsood for rape. Chaudry Muhammed Aslam, the Additional Sessions Judge ruled that there was insufficient evidence linking Maqsood with the charge of rape, and that Safia's testimony was self-exculpatory and accordingly inadmissible. "He sentenced her under section 10(2) of the Zina Ordinance to 3 years imprisonment, 15 stripes, and imposed fine of Rs. 100." (Kennedy, 1998: 41) The case attracted publicity and press intervention which subsequently resulted in the FSC calling for the case to be reheard.
LEGAL REASONING	<ul style="list-style-type: none"> Whether it is possible to convict someone of zina using his/ her own self-exculpatory statement alleging rape as grounds of evidence? <p>"There is also no evidence against Mst Safia Bibi." (Hussain, 122: 11) She was merely convicted 'on the ground that there was no evidence that she had ever complained about the commission of the offence by Maqsood Ahmad and had kept quiet for almost 10 months' (Aftab Hussain, 123: 12). This is a clear departure from the well-known principles of criminal law that it</p>

is the duty of the prosecution to establish by evidence the offence of an accused person beyond any shadow of doubt. It is settled law that a confession should be read as a whole and the self-exculpatory portions therein cannot be excluded from consideration unless there be evidence on record to prove those portions to be incorrect. The learned Additional Sessions Judge could not hold Mst. Safia Bibi guilty of Zina by consent under section 10(2) of the ordinance, in the absence of any evidence to establish that she and Maqsood Ahmad had any sentimental attachment for and were on intimate terms with one another. No such evidence is forthcoming on record" (Hussain, 123:13).

Moreover, **as per the classical Islamic Schools rape absolved the woman of any liability thus her admission that she was raped was sufficient to absolve her.**

- **Whether a confession of one accused is sufficient evidence to convict the other of his charge?**

Safia "produced three defence witnesses... but their evidence is not at all helpful since they did not throw any light on the occurrence" (Aftab Hussain, p. 122). Therefore "it is clear from this evidence that no offence was proved against Maqsood Ahmad as the bare statement of his co-accused was not sufficient for his conviction" (Aftab Hussain, p. 122).

"It would be clear that even in Shariah the confession of one accused against the co-accused is not sufficient for the conviction of the latter. Views differ only on the point whether the person denying should be acquitted or the person confessing should also be absolved of the charge. There is no difference on the main point between Fiqh, the Common Law of England or the Law in Pakistan, that the appellant also cannot be convicted on the evidence on record." (Hussain, 125: 29).

The learned judge lingered on the improbability of a judgement in which only one party was convicted, while the other namely the male, was acquitted. The judge refers to this as "strange" (Hussain, 123: 14).

He then enumerates the circumstances in which only one party was convicted might be understandable:

1. 'If there is no evidence of eye-witnesses and the only evidence is for example, a confessional statement (as opposed to a self-exculpatory statement) made by the girl involving the male accused, then in the absence of any other evidence against the male accused, he cannot be convicted but the girl can be convicted on her confession' (Hussain, 123: 14).
2. 'Another category may be, in which a self-exculpatory statement is made by the girl, as in this case, putting the entire blame for committing rape with her on the male accused. If there is evidence on the record showing that both of them had been seen in amorous position off and on, and that their relationship was of close and intimate lovers negating the possibility of rape, it may be sufficient to hold that the statement of the girl to the extent of self-exculpation, is not correct'.

(It is important to note: **This does not mean that parties who share a close relationship as lovers, (prima facie) concludes that the possibility**

	<p>of rape is negated, as rape can take place even between intimate partners who have previously consented to intercourse (as prior consent does not mean consent for all time): what the judge is stating here is that, proof of prior sexual intimacy can challenge the truth of her self-exculpation). <i>"In such a case she may be convicted. But her statement would not be evidence against her paramour under section 30 and in the absence of any other evidence, he may be acquitted"</i> (Hussain, 123: 16).</p> <ul style="list-style-type: none"> • Whether the burden of proof lies with the woman accusing a man of rape? <p><i>"If an unmarried woman delivering a child pleads that the birth was the result of commission of the offence of rape on her, she cannot be punished. This is the view of the Hanafis and the Shafis. But Imam Malik said she shall be subjected to Hadd punishment unless she manifested the want of consent on her part by raising alarm or by complaining against it later."</i></p> <p>Thus, applying these views Safia Bibi would be absolved of criminal liability as <i>"information had been given by Mst Safia Bibi to her mother"</i> of the incident (Hussain, 122: 6). Although the judge did not specifically mention whether the decision would have been the same had she not told her mother, following the fact that he had given the view of Imam Malik less prominence in his judgement, it is possible to infer she may still have been acquitted.</p> <p>This highlights that the burden of proof does not lie with the woman on accusation of rape.</p>
<p>CONCLUSION</p>	<p>In the absence of any other evidence other than the statement of Safi Bibi, Maqsood Ahmad was not convicted in respect of Zina- bil- Jabr, but the court also came to the conclusion that Safi Bibi could not be convicted for Zina when she pleaded the pregnancy to be the result of rape. Thus <i>"this being a case of no evidence, the appeal is accepted and she is acquitted"</i> (Hussain, 126: 31).</p>
<p>REFERENCES</p>	<ul style="list-style-type: none"> • Reference to the Quran and Sunna <p>Sunna- <i>'Abu Daud reported on the authority of Saad ul Saaidi that a man came to the Prophet (S.A.W) and confessed that he had committed adultery with such women. He named the woman. The Prophet (S.A.W) sent for the woman and enquired from her about it. She denied the allegation. The Prophet (S.A.W) punished the male but acquitted the female (Al Mughni by Ibn- e- Qudama, Vol. VIII, p. 193)'</i> (Hussain, 125: 24)</p> <p>This tradition was cited throughout the case as indicative of the Prophet's view that the confession of one accused is not a valid ground to convict the other of zina.</p> <p><i>'My people are excused from mistakes, forgetfulness and for anything done under compulsion. It is reported from Abdul Jabbar in the authority of his father that a woman was raped and the Prophet (S.A.W) acquitted her of the charge punishable with Hadd.'</i> (Hussain, 124: 19)</p> <p>This demonstrates that <i>'there is no Hadd on one who is raped'</i> (Hussain, 124: 19) as contented by Ibne Qudama and other Hanafi scholars, which is</p>

	<p>further verified by the Shaafis and Malikis.</p> <p>Another tradition is of Aseef. A rustic came with another person to the Prophet (S.A.W) and said that his son had committed adultery with the wife of the person accompanying him... the Prophet (S.A.W) announced the sentence for the male culprit and ordered Onaid to go to the woman and punish her if she confessed. (Muslim, English Translation, Vol. IV, pp. 917, 918) (Hussain, 125: 25)</p> <p>This sunna demonstrates <i>“obviously the punishment of the woman was dependent on her confession”</i> (Hussain, 123: 25), highlighting the importance of considering and accepting the testimony of the woman before charging her- she is innocent until proven guilty. It is not sufficient to charge someone on the basis of the claim given by another.</p> <ul style="list-style-type: none"> • Reference to statute- <ul style="list-style-type: none"> ◦ Section 10 (2) Offence of Zina (Enforcement of Hudood Ordinance) <p>Allegation of zina- confession—procedure— Court should record her statement four times at intervals and each time accused should be asked to go out of the view of the court—confession should be independent and made without any pressure, undue influence or coercion. Falling under this offence carries a lesser sentence in the form of a tazir (discretionary) conviction.</p> <ul style="list-style-type: none"> • Section 30 Evidence Act <p>When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.</p> <p>The FSC stood firmly against the trial judge's judgement that Safia's testimony was self exculpatory and so could not be called a confession under the provisions of this Act. Aftab Hussain stated “a confession should be read as a whole and the self exculpatory portions therein cannot be excluded from consideration unless there is evidence on record to prove these portions incorrect” (Hussain, 123: 13).</p> <p>Judge Aftab Hussain explains this section of the Act: it <i>“allows the Court to take into consideration a confession of one accused made in the Court in a joint trial of more persons than one, against co-accused. But it is settled law that that conviction of the co-accused cannot be based on such confession unless it is corroborated by independent evidence”</i> (Hussain, 123: 15).</p>
<p>LANDMARK PRECEDENTS</p>	<p>State v Zulfiqar Ali Bhutto PLD 1978 Lah 523</p> <p>Alongside a confession, the need for “independent evidence” as highlighted in the Zulfiqar Ali Bhutto case allowed the FSC to take a different approach in comparison to the trial judge who had charged Safia Bibi. It was not enough for the judges to use confession alone as a basis of conviction as supported by the Sunna of Aseef (above).</p>

**ISLAMIC
EXPERTS/
AUTHORS
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• **Hazrat Ali (p.124)**

'When Shahura came to him and said, "I have committed adultery", Hazrat Ali said to her, "You might have been forced to, someone might have committed sexual intercourse with you while you were sleeping."(Kitabul Fiqh alal Mazahibil Arabaa (Urdu Translation), Vol. V, pp166, 167.)'

This demonstrates that *"even under Shariah if a girl makes such a statement as made in the present case (accusation of rape upon Ahmad), she cannot be (automatically) convicted of zina"* (Hussain, 124: 18).

"The principle of Fiqh is that she will be asked about the cause of her pregnancy, is he says that she was forced to commit adultery or someone had committed sexual intercourse with her under suspicion about her identity, her statement will be accepted and she will not be convicted. This is based on the (above) tradition of Hazrat Ali" (Hussain, 124).

It will still be necessary to enquire into her confession and decide upon relevant factors before convicting someone of zina. This will include looking into questions of whether she had been *"forced to commit adultery or someone had committed sexual intercourse with her under suspicion about her identity"* (Hussain, 124: 18). In these circumstances, she will not be convicted.

• **Imam Malik (p.124)**

Even *"if an unmarried woman delivering a child pleads that the birth was the result of commission of the offence of rape on her she should still 'be subjected to Hadd punishment unless she manifested the want of consent on her part by raising an alarm or by complaining against it later"* (Hussain, 124: 19).

"There is little difference between the view of Imam Malik and others on the point of law that rape with a woman absolves her of criminal liability. The only difference is on the point of the evidentiary value of the self-exculpatory statement" (Hussain, 124: 20). Whilst the schools agree a woman's statement is sufficient for absolving her of the charge, Imam Malik places the burden on her by requiring circumstantial evidence through raising an alarm or complaining against the incident.

Judge Hussain pointed out that *"the opinion of the other Jurists on the point of burden of proof is preferable (than the view of Imam Malik), and is in conformity with the modern law"* (Hussain, 125). However, he noted that even if the case was to proceed upon the view of Imam Malik, Mst Safia Bibi could not be punished since there is evidence of her complaining to her mother.

• **Imam Abu Hanifa (p.125)**

"In a case where one party confesses and the other party denies the charge, both of them should be acquitted since the confession of one is disproved by the denial of the other" (Hussain, 125: 27).

His students- Abu Yousaf and Al Shaibani (p.125)
According to one version Abu Yousaf was also of the same view. Muhammad Al Shaibani held that the person confession should be punished. According to another version Abu Yousaf agreed with Muhammad.

Despite this lukewarm view of the case he highlights how this case alongside others shows a favourable approach towards women. *“If the implementation of section 10(2) was discriminatory to women one would expect that there would be more women convicted under this provision than men. The opposite is the case. Of those convicted under the terms of 10(2) in district courts and in the FSC, 56% and 70% respectively are men. Therefore, to the extent that gender bias is present in the implementation of this provision of law, it favours women”* (Kennedy, 'Islamization in Pakistan . . . ' (1988), 313; see Table in Kennedy, 1991: 49).

Menski, on the other hand, although acknowledging the success of this case recognises that Pakistani judges took some time to control these kinds of abuses and blatant excesses (Menski: 2006; 374) as Quraishi also confirms *“there have been numerous reports of such custodial rapes in Pakistan. Police action and inaction in rape cases in Pakistan are widely reported as an instrumental element to the injustice”* (Quraishi:1997 ;106).

The extent to which these mixed judgements will end and the courts will fully support women in their struggles remains to be seen. If they follow their latest judgement in 2003 of Zafran Bibi, where it was declared a rape victim should not be considered to have committed a sexual offense and should not be punished then women stand a firm chance in succeeding against their wrongdoer. However, the recent case of Mukhtar Mai (Five of six men charged over a village council-sanctioned gang rape were acquitted by the Supreme Court) places doubts on the judicial stance taken towards women. It was unfortunate the international strength of the media was not victorious in swaying the opinions of the FSC judges. Thus leaving a feeling of apprehension and uncertainty as to the attitudes and concerns of the highest court in Pakistan.

In his judgement, Judge Hussain suggests evidence implying a close and intimate relationship may be sufficient to hold a statement of the girl to the extent of self-exculpation, is not correct, which would mean she may be convicted. However, this conclusion does not sit very well for women. If the burden of proof lies on prosecution to prove the commission of zina, then the refutation of her self-exculpation — should not be absolute evidence that zina had indeed occurred. It merely should release her statement from being taken as evidence/allegation of rape against her partner, but only in so far as there are no other evidences against him weighing stronger to the contrary.

But in relation to her, confession to zina cannot not be expressed in the negative. Refuting her self-exculpation (on the elusive reason that they were intimate: as rape can and usually takes place between partners that have been intimate before) cannot and should not be taken as automatic positive confession. One does not derive automatic and unequivocal confession of zina by “negativising” or refuting the defence of rape. Moreover proof that they were intimate partners does not equate to proof of zina. People can be intimate without having sex. This goes against islamic injunctions which clearly lay out that the Proof of zina, as clearly laid out in the Quran is satisfied with 4 witnesses testifying to the same act of zina. Otherwise if other lesser evidences are permitted by law, then those evidences must be so indicative that zina did take place that there is no space for reasonably doubting the fact of zina. Only then can she be charged with a conviction. But this certainty cannot possibly be achieved through showing a close relationship.

	<p>Following Abu Hanifa's view this case would thus be closed as both litigants would be acquitted.</p> <p>However Judge Hussain rejected this view and made sure to assert that <i>"others did not agree with the view of Imam Abu Hanifa including Imam Shafei because the person confessing should be punished on the basis of his own confession"</i> (Hussain, 125). On the other hand, the person denying would be absolved of guilt on account of absence of proof of his confession, not because of <i>"mere denial of the other"</i>(Hussain, 125). Thus going against the view of Abu Hanifa, Safia's claim would not have been sufficient to acquit or hold Maqsood Ahmad liable.</p> <ul style="list-style-type: none"> • Hazrat Umar (p. 125) <p><i>"Once a woman came to him and said that a man committed sexual intercourse with her while she was sleeping. He then ran away and she could not identify him. Hazrat Umar accepted her excuse and acquitted her."</i> (Hussain, 125: 28)</p> <p>Using this statement, a generally favourable approach towards women can be justified as it demonstrates acceptance of the woman's testimony. Although the word excuse was used in the hadith, it was not an excuse, rather it was an unquestionable (acceptance of her) testimony.</p> <p>Following the stance of Hazrat Umar and despite the ambiguities towards the truth, Safia Bibi's claim was accepted, allowing her the benefit of doubt and absolving her of any offence.</p> <p><i>"The principle of Fiqh is that she will be asked about the cause of pregnancy, if she says that she was forced to commit adultery.... her statement will be accepted and she will not be convicted"</i> (Hussain, 124: 18).</p>
<p>COMMENTARY</p>	<p>One of the main reasons this case had an influential outcome was due to the public outcry in which citizens and human rights activists petitioned and appealed on Safia Bibi's behalf. This is promising for women and groups who wish to pursue a case. In taking a stand against the lower courts and upholding public wishes this case shows how the FSC plays an important role in upholding the rights of women. However this positive stance is also doubtful as it is unclear whether the court had fallen to the demands of the public due to the case receiving <i>"considerable publicity in the national and International Press"</i> (Hussain, 121) and thus had given the above judgement or whether their concern was genuinely for the best interests of women.</p> <p>In spite of this uncertainty, the judges did appreciate the possibility that <i>"if pregnancy alone constitutes sufficient evidence of zina, the result seems to forget that the very purpose of the zina verses is to protect women's honor.... a pregnant adulteress will be convicted without any testimonial proof, while her adulterous partner escapes punishment with his reputation intact"</i> (Quraishi, 2003). Subsequently, whilst many have viewed this case as an important step in granting and upholding women's rights Kennedy argues that this decision merely reiterated a well-established precedent of the FSC's interpretation of the Zina ordinance. Namely, in the case of birth or the pregnancy of an unmarried woman and in the absence of circumstantial or corroborative evidence proving wilful zina doubt should go with the claimant. (Kennedy: 1991; 49).</p>

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