ARTICLES

LOST CHASTITY TO LOST HONOR: THE HEURISTIC SHIFT IN RAPE DISCOURSE BY THE SUPREME COURT OF PAKISTAN

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ABSTRACT

The Supreme Court of Pakistan has shown a propensity to engage in behavioral analysis to assess whether a purported rape victim fit the bill of the prototypical profile of a female rape victim as defined by societal norms, by inculcating this version within its common law discourse. This phenomenon has been visible especially between 1980–1999 during Zia's radical Islamization era and can be traced back to pre-colonial era. From 2000–2018, there is a gap in literature, which this paper aims to fill by engaging in case law analysis and trend identification. A close examination of rape cases of the Supreme Court of Pakistan over the last 18 years show that the Supreme Court has deviated from its earlier precedents of using character as a factor to determine the veracity of female rape victim's allegations. However, the Supreme Court's judicial discourse is still deeply entrenched in sexist assumptions about the role of women in society. This paper proposes a complete overhaul of the linguistics, heuristics and common law assumptions made by the Supreme Court of Pakistan as an essential institutional restructuring mechanism, which is necessary in making access to justice easier for female rape victims.

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INTRODUCTION

In 1983, Jehan Mina was fifteen years old and six months pregnant when she reported to the police that she had been raped by her uncle and cousin.[1] Her grandfather wanted her dead for bringing dishonor to the family.[2] The local court acquitted the accused, saying that Jehan's statement alone was not enough to prove rape.[3] Instead the Court convicted Jehan of *zina*[4] or fornication, and sentenced her to one hundred lashes.[5] The Court reasoned that "[t]he basis of the conviction is her unexplained pregnancy coupled with the fact that she is not a married girl" and her failure to disclose the rape earlier to her grandfather.[6] The case was highly criticized by the international community and human rights activists; consequently, the case became a symbol of gross judicial injustice faced by rape victims in the 1980s.[7]

In 2018, Zainab Ansari was six years old when she was reported missing and found days later by her neighbors in a garbage dump—raped both vaginally and anally, and murdered through suffocation.[8] Law enforcement arrested a relative of Zainab for the crime and the local court sentenced him to death. The Supreme Court of Pakistan termed the rape "absolutely horrendous and barbaric" and upheld the sentence.[9]

From Jehan Mina to Zainab Ansari, the superior judiciary of Pakistan has come a long way since 1983 in developing its common law jurisprudence in rape

1. Jehan Mina v. State, (1983) 35 PLD (FSC) 183 (Pak.).

2. Moeen. H. Cheema, *Cases and Controversies: Pregnancy as Proof of Guilt Under Pakistan's Hudood Laws*, 32 BROOK. J. INT'L L. 132, 122–60 (2006).

3. *Jehan*, 35 PLD (FSC) at 186.

4. Offense of Zina (Enforcement of Hudood) Ordinance, No. VII of 1979, (amended 2007) (Pak.) (articulating that a man and a woman are said to commit *zina* if they willfully have sexual intercourse without being validly married to each other).

5. See *Jehan*, 35 PLD (FSC) at 188. The Federal Shariat Court, which was an alternative superior judicial court, reduced her sentence to 3 years imprisonment and fewer lashes.

6. *Id*. at 187.

7. SHAHLA ZIA, VIOLENCE AGAINST WOMEN & THEIR QUEST FOR JUSTICE 81 (2002).

8. *Justice for Zainab: Time of the Kasur Rape, Murder Case that Gripped the Nation* DAWN NEWS (Oct. 17, 2018), https://www.dawn.com/news/1439587.

9. Imran Ali v. State, (2018) Jail Petition No. 298 SC (Pak.).

cases.[10] However, an uncomfortable question still persists: would the Courts have convicted the accused this quickly, or believed Zainab if she was an adult woman, alive, was single, a divorcée, or had an active, healthy sexual history? Do Pakistani courts believe some victims more than others? This paper is an exposition on the Supreme Court of Pakistan's common law development in rape cases over the last four decades, specifically the heuristics, linguistics, prose, and assumptions made by the Court regarding the "character" and "morality" of female rape victims in deciding a case. In doing so, the paper examines the assumptions made by the Court, in line with evolution of the social-political context of Pakistan over the years.[11]

Social narratives, which both inform the courts and are informed by the courts, are often designed to hold women culpable for acts of violence inflicted on them; further, these narratives reinforce the repercussions of transgressing ascribed social and sexual boundaries.[12] This ultimately casts a reductionist perspective on the effects that such violence can have on women—physically, psychologically, and economically,[13] alongside reduction of access to public[14] and political spaces.[15]

10. The author acknowledges that there are fundamental differences in the facts of both the cases, which makes drawing an analogy to represent the growth of the Supreme Court over time difficult to posit. Zainab's case came at a time when several other female children were found raped and murdered in the same locality thus garnering outrage. Additionally, there was a plethora of evidence that led to the conviction. Jehan Mina's conviction came at a time when the Hudood Ordinances had been promulgated that eradicated the difference between rape and *zina*, thus women who came forward with allegations of rape were found guilty of *zina* if the rape was not proven. Furthermore, the Jehan Mina case, along with a few others, serves as an anomaly of misinterpreting the law massively rather than the general rule in the 1980s. Despite the differences, the key aspect to take from the examples is the level of social outrage that the concept of rape invoked in society as well as the change in linguistics adopted by the Supreme Court in assessing rape in both cases.

11. Due to the limitations of the scholarship undertaken, this paper can offer only rudimentary dives into the socio-political context that can help understand how the common law assumptions were formulated.

12. *See* Shehar Bano Khan & Shirin Gul, *The Criminalization of Rape in Pakistan* (Chr. Michelsen Institute, Working Paper No. 8, 2017), https://www.cmi.no/publications/6323-the-criminalisation-of-rape-in-pakistan. Daily reports and discussion on the prevalence of instances of violence against women, especially rape, tend to focus overwhelmingly on the gravity of injury inflicted on the victim, the sheer scale and number of women harmed, gory details about the act, and any subsequent act of shaming that went with it, with the focal point ultimately being on the sexualized female body.

13. Eleanor Lyon, *Welfare and Domestic Violence Against Women: Lessons from Research*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN (Aug. 2002), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_Welfare2.pdf; ANDREW R. MORRISON & MARIA B. ORLANDO, *SOCIAL AND ECONOMIC COSTS OF DOMESTIC VIOLENCE: CHILE AND NICARAGUA*, TOO CLOSE TO HOME: DOMESTIC VIOLENCE IN THE AMERICANS 51, 66–80 (Andrew R. Morrison et al. eds., Inter-American Dev. Bank 1999).

14. Ammar A. Malik, Yasemin Irvin-Erickson & Faisal Kamiran, *Women's Safety in Public Spaces & Urban Transit – Pakistan Research & Global Analysis*, WOMEN'S UN REP. NETWORK (Jan. 22, 2018), https://wunrn.com/2018/01/womens-safety-in-public-spaces-urban-transit-pakistan-research-global-analysis/.

15. *Violence Against Women in Politics: Expert Group Meeting Report and Recommendationsn*, UNWOME (Mar. 8–9, 2018), https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2018/EGM-report-Violence-against-women-in-politics-en.pdf.

Courts in this social paradigm can develop common law jurisprudence in rape cases that can either reflect the dominant harmful social stereotypes attached to female sexuality when conceptualizing consent or help realign social narratives by adopting feminist normative values.[16]

The current discourse regarding the law and order situation for women in Pakistan[17] portrays a complex and dismal picture of pervasive, intractable problems in both the social and institutional fabric.[18] Scholars have expressed skepticism in utilizing the law as a tool for changing social narratives due to the sheer insurmountable nature of problems within a predominantly broken legal system.[19] Scholarship has been extensively done on understanding the pandemic institutional incapacity in the criminal justice system, which of course has enormous practical worth.[20] However, little attention is paid to finding solutions within the criminal justice system to address the deeply rooted sexist bias[21] present in the legal proceedings, or the common law jurisprudence which questions the "character" of female victims to adjudicate on the question of rape.[22] Legal malaise in the criminal justice system faced by rape victims cannot be treated by

16. Office of the High Commissioner for Human Rights (OHCHR), *Background Paper on the Role of the Judiciary in Addressing the Harmful Gender Stereotypes Related to Sexual and Reproductive Health and Rights: A Review of Case Law*, 1, 33 (2018), https://www.ohchr.org/Documents/Issues/Women/WRGS/JudiciaryRoleCounterStereotypes_EN.pdf.

17. Thomson Reuters Foundation, *Factbox: Which are the World's 10 Most Dangerous Countries for Women*, REUTERS (Jun. 25, 2018, 9:39 PM), https://www.reuters.com/article/us-women-dangerous-poll-factbox/factbox-which-are-the-worlds-10-most-dangerous-countries-for-women-idUSKBN1JM01Z. Pakistan has also been portrayed in the media consistently as one of the most dangerous countries for women with respect to violence.

18. Ayesha Khan & Sarah Zaman, *The Criminal Justice System and Rape: An Attitudinal Study of The Public Sector's Response to Rape in Karachi*, WAR AGAINST RAPE & COLLECTIVE FOR SOC. SCI. RSCH. (Jan. 2012), http://www.researchcollective.org/Documents/The_Criminal_Justice_System_and_Rape_NEWFINAL.pdf.

19. Clifton B. Parker, *Laws May be Ineffective if They don't Reflect Social Norms, Stanford Scholar Says*, STANFORD REP. (Nov. 24, 2014), https://news.stanford.edu/news/2014/november/social-norms-jackson-112414.html.

20. *See* Syed Junaid Arshad, *Criminal Justice System in Pakistan: A Critical Analysis*, COURTING THE LAW (Feb. 15, 2017), http://courtingthelaw.com/2017/02/15/commentary/criminal-justice-system-in-pakistan-a-critical-analysis. Pandemic institutional incapacity—a shambolic system of legislators, law enforcement officials, prosecutors, defense attorneys, medical examiners, and ultimately judges—informs a discourse, whereby one actor cannot be divorced from another whilst advocating for widespread change. Thus, possible solutions posited by local commentators involve suggestions to have faster, more efficient court systems that speed up the process for rape victims seeking justice, amendments to laws, better investigations and greater accountability. These solutions, which cut across specialties and multiple institutions, though practically important, are band-aid measures deployed to cure a festering infection.

21. The claim here is not that scholarship has not been done to find solutions within the criminal justice system to address the procedural and substantive problems faced by rape victims. Rather, the contention here is that the power of law to change social narratives, which are harmful to rape victims, is looked at with great skepticism. Thus, less attention is paid to linguistics, language, and heuristics employed within the judicial discourse and the harm they do, and consequently how change in those can have impact on societal narratives.

22. *See Crime or Custom? The State Response to Violence Against Women*, HUMAN RIGHTS WATCH (1999), https://www.hrw.org/reports/1999/pakistan/Pakhtml-06.htm.

perfunctory methods that examine only symptoms. Rather, the judicial disease of non-gender-neutral discourse in the conceptualization of rape needs to be cured.

Part I of this paper outlines the relevant substantive and procedural laws that placed importance on the character of victims in rape cases. Part II assesses the common law presumptions made from the 1980s–1990s while Part III explores the 2000s to 2018. In doing so, this paper looks at specific trends of how medical evidence, evidence regarding chastity and morality, and the timing of filing a police report have evolved over these 40 years, alongside the heuristics and language adopted by the Supreme Court in describing, understanding, and judging rape cases. Part III engages in establishing a narrative within which an argument for bringing change in the legal discourse as a means to redirect social discourse on rape can be made.

I. LAW ON RAPE AND 'CHARACTER' LAWS

Though this paper focuses on the common law jurisprudence of the Supreme Court in rape cases, it is useful to see the language adopted by the legislature in defining rape and character—in order to assess the legal lacunas the Court has to fill.[23] For the time period covered by this article, legislature defined rape in the following manner:

> A man is said to commit "rape" who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:
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> (i) against her will,
> (ii) without her consent,
> (iii) with her consent, when her consent has been obtained by putting her in fear of death, or of hurt,
> (iv) 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
> (v) with or without her consent when she is under sixteen (16) years of age.
>
> **Explanation.** Penetration is sufficient to constitute the sexual intercourse. . .[24]

23. The law defining rape was different in the 1980s–1990s due to the promulgation of Hudood Ordinances. *See* discussion *infra* Part IV.

24. PAK. PENAL CODE § 375 (1860). The Law has changed in 2021 with the promulgation of the Anti-Rape (Investigation and Trial) Ordinance 2020 and the Criminal Law (Amendment) Ordinance 2020, which has changed the definition of rape to be more inclusive of multiple sexual acts and not just vaginal penetration, and is more gender neutral. Combined, there have been changed made to procedural laws and punishments related to rape as well.

The definition did not envisage a gender-neutral conception of rape but prematurely assorted men and women in neat categories of "perpetrators" and "victims" respectively. Troublingly, instances of rape against men and boys were not recognized under this section. Instead the governing provision for rape against men and boys was considered to be Section 377 of the Pakistan Penal Code, which criminalized "unnatural offenses" such as sodomy, a law introduced by the British when they ruled India to penalize homosexuality and bestiality.[25] Not only does Section 377 envision that the sodomy should be "voluntary," thus criminalizing the act of anal sex but not of rape against men or boys, but it also provides the minimum punishment of two years and maximum of life imprisonment—as opposed to the minimum punishment of rape of women as 10 years and the maximum punishment of the death penalty.[26] Thus the substantive law on the subject itself explicitly regurgitated the social narrative that only women can be raped and trivializes the trauma of male rape victims since lack of consent is not an essential element in sodomy cases.[27]

Provisions of evidence law further allowed the "character" of the rape victim to be attacked by the prosecuting party in the following manner:

> *Impeaching credit of witness*: The credit of a witness may be impeached in the following ways by the adverse party or with the consent of the Court, by the party who calls him. . . (4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.[28]
>
> *Motive, Preparation and Previous or Subsequent Conduct*: The question is whether A was ravished . . . the facts that 'shortly' after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made are relevant.[29]

Much like the substantive definition of rape, the criminal procedure rules also did not envisage male rape victims to undergo similar examination.[30] More

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25. *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism 18,* HUMAN RIGHTS WATCH (2008), https://www.hrw.org/sites/default/files/reports/lgbt1208_webwcover.pdf.

26. PAK. PENAL CODE § 377 (1860) ("Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."); *see also* § 376 ("Punishment against rape:

> (1) Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than ten years or more, than twenty-five years and shall also be liable to fine. (2) When rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life.").

27. *Id.* §§ 376–77.

28. QANUN-E-SHAHADAT ORDER, art. 151(4) (1984) (Pak).

29. *Id.* art. 21(j).

30. Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*, 18 MICH J. INT'L L. 287, 297–98 (1997) (critiquing the *Zina* Ordinance).

importantly, male perpetrators and those accused of rape were not, under law, made to go through similar examinations of character, past sexual behavior, or castigation for alleged looseness in morality.

The legislative scheme also allowed courts to place inordinate importance on the conduct of women in the immediate aftermath of rape, their sexual history, and encourages assessments of general immorality (at least until 2016)[31] in order to assess whether a victim is telling the truth. Since the legislature had not precisely defined the parameters of "generally immoral character,"[32] the language allowed courts to view the terms "character" and "immorality" as dichotomous and opposing to "morality" and "chastity."[33] If we assume that courts will derive meaning of terms based on little more than societal definitions of morality, it raises multiple questions about the heuristics adopted in its dicta. How does the Court determine the authenticity of statements given by those victims who were sexually active prior to the rape in a society where virginity and chastity are prized? What is the value of testimonies of victims who do not immediately report their rape to the police? Is the Court donning a puritanical cap when deciding on whether female victims are 'loose'?

This paper argues that the societal assumptions made implicitly in criminal law—substantive and procedural—about female sexuality have been assimilated in the legal vernacular of the Supreme Court in rape cases. Thus, the problems faced by rape victims when seeking redress are far from the garden variety host of issues faced by normal litigants in their interactions with the criminal justice system[34]—precisely because the odds are stacked against the victim even before they formally approach the court. The judicial process effectively ensures that rape victims re-live their horrific experiences in the form of a state-sanctioned, formalized second rape.

Part II of this paper explores this proposition by examining the development of common law presumptions made by the Supreme Court from 1980–1990 in rape cases. This is essential in understanding how suppositions about rape and gender relations seeped into the current doctrine.

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31. *See* QANUN-E-SHAHADAT ORDER, art. 151(4). In 2009, this section was declared violative of the principle of gender equality in Islam by the Federal Shariat Court in *Mukhtar Ahmad Shaikh v. Government of Pakistan*. Mukhtar Ahmad Shaikh v. Gov. of Pakistan, (2009) PLD (FSC) 65. However, this continued to be part of the law until 2016 when the government omitted Article 151(4) of the Qanun-E-Shahadat Order by the Criminal Law Amendment (Offenses relating to Rape) Act, 2016.

32. QANUN-E-SHAHADAT ORDER, art. 151(4).

33. U.S. DEP'T OF JUST., COUNTRY POLICY AND INFORMATION NOTE: PAKISTAN: WOMEN FEARING GENDER-BASED VIOLENCE 39–43 (Version 4.0) (2020), https://www.justice.gov/eoir/page/file/1250691/download.

34. *See* Camille E. LeGrand, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 919 (1973) ("Indeed, rather than protecting women, the rape laws might actually be a disability for them, since they reinforce traditional attitudes about social and sexual roles. Although societal attitudes no doubt are responsible for the present construction of rape laws, it is also true that this construction serves to reinforce those attitudes. If the laws were changed to relate more rationally to the reality of the crime and to the goal of sexual equality, attitudes about the crime might also change.").

II. 1980–1990: SUPREME COURT TRENDS IN RAPE CASES

The fluctuation of trends observed from the 1980s to the 1990s in the judicial discourse can be juxtaposed against the political context, primarily the subsequent change in leadership which promised a different criminal justice regime.[35] Current scholarship posits that "each time Pakistan faced hard times, the leader most able to promise a stronger future of Islam prevailed,"[36] and since the conception of Islam also remained fluid according to the interpretation most suitable to the leader of the time, so did the rights granted to women at that time.[37] This is certainly true in explaining the changes made in substantive criminal law in Pakistan in the 1980s.

In the late 1970s, Military General Zia-ul-Haq declared martial law in Pakistan after leading a successful military coup and took the gauntlet to bring the laws in line with the teachings of Islam.[38] Scholars agree that some of the most notorious amendments made in the criminal laws are the Hudood Ordinances,[39] and specifically the *Zina* Ordinance which made access to justice harder for rape victims.[40] In essence, the Hudood laws were enforced to implement additional punishments, as ordained in the Islamic scripture, to specific crimes: theft, extramarital sexual intercourse (*zina*), falsely accusing someone of *zina* (*qazf*), and drinking alcohol.[41] Such punishments, known as *hadd* punishments, were corporal in nature, such as whipping, flogging, or stoning to death. The standard of proof required for these crimes was much higher—for *zina* to be liable to a *hadd* punishment, the act of penetration in itself had to be witnessed by four upstanding male Muslims. The crime could still be tried as a *tazir* or state crime, which had a lower

35. MIR Z. HUSSAIN, ISLAM IN PAKISTAN UNDER BHUTTO AND ZIA-UL-HAQ (Mutalib et al. eds., Macmillian, 1994). During the 1980s the military dictator Zia-l-Haq came into power, and under his reign, an Islamization project that was among other things, geared towards changing the criminal justice system was undertaken. Part of this included the introduction of the controversial Hudood Ordinances that inculcated the traditional Islamic punishments into the law for theft, fornication, adultery etc. Earlier Bhutto, who had been deposed by Zia-l-Haq and later executed, had also declared an Islamic minority (Ahmedis) as non-Muslims after succumbing to religious pressure and in a bid to retain his legitimacy. Under this reign, it became a crime to be belong to the Ahmedi sect and to call yourself a Muslim. Both of these trends show that rights of minorities and women in the criminal justice system were gradually curbed due to political instability.

36. Julie D. Chadbourne, *Never Wear Your Shoes After Midnight: Legal Trends Under the Pakistan Zina Ordinance*, 17 WIS. INT'L L.J. 179, 182 (1999).

37. Nida Kirmani, Project, *Women's Rights as Human Rights: The Case of Pakistan*, TRACE: TENN. RSCH. AND CREATIVE EXCH. SENIOR THESIS PROJECTS 23 (2002), https://trace.tennessee.edu/cgi/viewcontent.cgi?article=1046&context=utk_interstp2.

38. Shahid. J. Burki, *Pakistan Under Zia*, *1977-1988,* 28 ASIAN SURV. 1082, 1084–100 (1988).

39. Martin Lau, *Twenty-Five Years of Hudood Ordinances- A Review*, 64 WASH. & LEE L. REV. 1291, 1295 (2007).

40. DOROTHY Q. THOMAS, ASIA WATCH & WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, DOUBLE JEOPARDY: POLICE ABUSE OF WOMEN IN PAKISTAN 52-48 (1992); Seth Mydans, *In Pakistan, Rape Victims Are the 'Criminals'*, N.Y. TIMES (May 17, 2002), https://www.nytimes.com/2002/05/17/world/in-pakistan-rape-victims-are-the-criminals.html.

41. Lau, *supra* note 39, at 1295.

punishment and standard of proof. Furthermore, before the 1980s, fornication and adultery were not categorized as criminal offenses.[42] The new regime, however, criminalized extramarital sexual relations—with the law drafted so poorly that it eradicated the difference between rape and consensual sex.[43] It is almost unanimously agreed by scholars that the newfound zeal for Islamization had little to do with any religious fervor and was undertaken in a bid to legitimize military rule.[44]

On paper, it worked. A veneer of populism and legitimacy was given to the legal changes made in the criminal laws by re-constructing the identity of Pakistan along dogmatic and superficial interpretations of Islam.[45] However, the eradication of distinction between rape and consensual sexual intercourse outside the bond of marriage now meant that female rape victims who approached courts to get justice feared being convicted of *zina*.

This fear was not ill founded. In cases where rape was not proven, women were indeed convicted of *zina*.[46] However the cases are fewer in number than the common international discourse posits.[47] The instances where grave injustice did occur were immensely publicized and the higher courts were seen as being actively complicit in massive discrimination against female rape victims.[48] However, empirical evidence and analysis of court judgments surprisingly shows that, for the most part, the Court tried to reduce the damage done by the poorly drafted *Zina* Ordinance by increasing acquittal rates. In fact, although the Ordinance was an indelible nuisance, for practical purposes, figures of conviction actually show that the number of men imprisoned under the law was higher than women.[49] Furthermore, the actual punishments given under *hadd*[50]—such as

42. *Id.*

43. *See* Offense of Zina (Enforcement of Hudood) Ordinance, *supra* note 4, §§ 4, 5(1), 5(2)(a), 8(b).

44. AYESHA JALAL, THE STATE OF MARTIAL RULE: THE ORIGINS OF PAKISTAN'S POLITICAL ECONOMY OF DEFENSE 323–24 (Cambridge University Press, 1990).

45. Lau, *supra* note 39, at 1295.

46. Kirmani, *supra* note 37, at 27–28. The most famous cases are that of Safia Bibi, a blind woman who was unable to prove the allegation of rape and was instead convicted of *zina* and sentenced to 15 lashes, three years of imprisonment and fine of Rs. 1000 because she could not produce 4 male witnesses. Another famous case is of Lal Mai who, in 1983, is stated to be sentenced to whipping for the offense of *zina*.

47. Charles H. Kennedy, *The Implementation of the Hudood Ordinances in Pakistan,* 28, no. 3 UNIIV. OF CAL. PRESS 307, 308–19 (1988).

48. *See, e.g.*, Safia Bibi v. State, (1985) PLD (FSC) 120 (Pak.) (acquitting a defendant and prosecuting the complainant in a case where a blind woman came forward with allegation of rape but was unable to prove the rape against the accused due to deficiencies in evidence).

49. Kennedy, *supra* note 47, at 315. *But see* SADAKAT KADRI, HEAVEN ON EARTH: A JOURNEY THROUGH SHARI'A LAW FROM THE DESERTS OF ANCIENT ARABIA TO THE STREETS OF THE MODERN MUSLIM WORLD, 227 (2012) (responding to Kennedy's piece that "Kennedy reached that mistaken view" because he compared male and female "conviction statistics as though they were alike, ignoring the fact that most men would have been rapists, whereas the women would all have been rape victims or alleged consenting adulterers.").

50. Moeen H. Cheema, *Cases and Controversies: Pregnancy as Proof of Guilt Under Pakistan's Hudood Laws*, 32 BROOK. J. INT'L. L. 132, 122–60 (2006) ("Hudood are generally defined as those crimes for which punishment has been fixed by divine commandment. Though this definition is

whipping, stoning, and flogging—never actually physically transpired.[51] Thus, substantive criminal law was susceptible to abuse and was misused to bring forward adultery or fornication charges against female victims, who failed to prove rape—but courts never enforced the corporal punishment.[52]

Yet, this did not prevent the *Zina* Ordinance from being misused by disgruntled husbands who often filed false *zina* cases against their ex-wives who had remarried, or by men who filed false *zina* cases against women in their household who wanted to marry against the wishes of their family, or false cases of rape against the lovers of such women.[53] The overuse of the *Zina* Ordinance for vindictive purposes has led to judicial skepticism of female testimonies where rape has actually transpired. The next section delineates the trends identified in the 1980s as a direct result of the *Zina* Ordinance by looking at the Court's jurisprudence on A) the usage of medical evidence, B) importance given to questions surrounding the "character" and sexuality of rape victims, and C) timely reporting to law enforcement.[54]

A. THE MEDICAL REPORT TREND

The little known, but typical, case of Lal Begum perhaps encapsulates, in one way or another, nearly all the judicial biases present in the 1980s that are to be discussed in this section. In 1980, as a 20-year-old woman, Lal claimed that after returning from the funeral of a cousin, she was accosted, dragged to a room, and raped at knifepoint by two men who later told her that they had raped her to

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uniformly adhered to by the ulema, the catalogue of the Hudood crimes in fact varies. As such, some consider only those crimes to be Hudood which have been mentioned in the Qur'an and for which the punishment has been explicitly prescribed therein. Others include those crimes that, though mentioned in the Qur'an, punishment is not explicitly provided. For example, the consumption of alcohol is forbidden by the Qur'an, but it provides no punishment. Yet, a majority of the ulema consider this to be a hadd offense and derive its punishment from the Sunnah. A third category of ulema point[s] out that there is no distinction between hadd and tazir in the Sunnah, and consider[s] all those crimes which are referenced in the Qur'an or the Sunnah to be hadd crimes. There are only four crimes that have been explicitly mentioned in the Qur'an: *zina*, *haraabah* (variously defined as highway robbery, forcible taking of property, or waging war against the state); *shurb al-khamr* (consumption of wine); and *qazf* (unwarranted accusation of *zina*). Of these, the punishment for shurb *al-khamr* is not mentioned in the Qur'an. Verse 5:33 of the Qur'an, which deals with *haraabah*, mentions four possible punishments for this category of crimes: *taqteel* (execution), *tasleeb* (crucifixion), amputation of a hand and the opposite foot, or exile. As regards *zina*, although the Qur'an expressly mentions the punishment of one hundred lashes in verse 24:02, a majority of the ulema have relied on certain *ahadith* (narrations on what the Prophet Muhammad approved) to establish rajm as the appropriate hadd punishment."); *See also* ABDUR R. I DOI, SHARI'AH: THE ISLAMIC LAW 221 (Ta Ha Publishers, 1984).

51. Chadbourne, *supra* note 36, at 184.

52. Lau, *supra* note 39, at 1259. It did however mandate imprisonment for rape victims who, because of their inability to prove rape, were charged with "fornication" or "adultery." In appeals, victims usually got acquitted, but this happened often after years of imprisonment.

53. Kennedy, *supra* note 47, at 317.

54. *See generally* Chadbourne, *supra* note 36. The study is useful in identifying trends in seminal judgments coming out of both the Supreme Court of Pakistan and the Federal Shariat Court. The Federal Shariat Court is an alternate Court system created by General Zia, which mainly deals with offenses that come under the *Hadd* offenses, those that are prescribed under the Islamic regime.

avenge the honor of their own female cousin, who had been allegedly abused by Lal's family.[55] Battered and broken, she went to the police the next day to get her statement recorded and had her medical examination done two days after the rape.

The first trend that emerged in rape cases in the 1980s was the Court's emphasis on evaluating the medical evidence of rape victims.[56] The Court began to reason that absence of external signs of physical violence on the victim's body—that could have depicted that the victim resisted or struggled against the assault—showed a degree of compliance, and even consent, to sex.[57] The Court was also skeptical in accepting testimonies of rape victims where medical observations showed that the victim was not a virgin.[58] Absence of hymen or comments by a medical practitioner showing that the victim was sexually active,[59] often by deploying the notorious two-finger rape test, meant that her allegations would be viewed with disbelief.

The two-finger rape test is a medical test that was, until January 2021, conducted on victims of rape, whereby two fingers are inserted by a medical professional in the vagina of the victim to assess how tightly the vagina admits the two fingers.[60] The presumption made by medical officers, who then indicate this on the Medico-Legal Report admissible in Court as evidence, is that if the vagina admits two fingers easily, then the victim has had previous sexual relations and is a woman of "loose character" who might be lying in the present instance. On the flip side, if the fingers are admitted tightly, then the assumption is that the woman was a virgin prior to rape, and therefore is more likely to be telling the truth.[61]

The brunt of this judicial discourse was faced by married women and unmarried women who had sexual relations outside marriage. Such a view also propagated the assumptions already embodied in the substantive law: that female

55. Khan v. State, (1985) SCMR (SC) 1170 (Pak.).

56. The medical evidence used by Courts in determining whether rape had occurred comprises of three elements. This includes the Medico-Legal Report (MLR), a report by the Chemical Examiner, and a report by the Serologist. Medical evidence has been seen by the Supreme Court as a definitive statement of whether rape happened, the assumption being that it is scientific and objective in nature, when compared to other corroboratory considerations such as the morality of the rape victim, the testimony of the victim, and the delay in filing a report with the police.

57. Ubaidullah v. State, (1983) PLD (FSC) 117 (Pak.).

58. Mustafa alias Baggi v. State, (1988) PCrLJ (Lah) 779, 780 (Pak.).

59. Kalam v. State, (1986) PCrLJ (Kar) 1587 (Pak.). Note that the victim here was a married woman.

60. The test was banned in 2021 by Pakistan's Supreme Court in Zareef v. State, (2021) SCMR (SC). It is not mandated by law, but the practice was widely accepted in Pakistan. The courts have used the results of the MLR, the two-finger rape test, and the Medical officer's moral judgment to assess the veracity of a rape victim's allegations. *See* Zareef v. State, (2021) SCMR (SC).

61. Sabrine Rose Bhatti, *The Two-Finger Test Continues to Traumatise Rape Survivors in Pakistan*, DAWN NEWS, https://images.dawn.com/news/1184919(last updated Apr. 7, 2020, 3:04 PM).

sexuality needs to be regulated in a bid to generally preserve the moral, social, and religious fabric of the home and society.[62]

In Lal's case, her medical examination showed several abrasions on one side of her face but no marks of violence on her body, and though semen was found present in her vagina, the two-finger rape test showed that her vagina admitted the two fingers easily. The Supreme Court, in a two-page judgment, ruled that Lal's testimony of rape was not corroborated by sufficient evidence that showed "resistance which one would naturally expect from a woman unwilling to yield to sexual intercourse forced upon her."[63] Not taking into consideration that she was held at knife-point, the opinion instead focused on the absence of evidence it felt should have been present in an instance of resistance, including tearing of clothes and injuries to private parts.

Lal's alleged assault could, at least, have still been tried as rape in the 1980s. The *Zina* Ordinance, which had defined rape and adultery, had also stated that "penetration is sufficient" to classify sexual intercourse as either one of those offenses.[64] This meant that "forcible oral penetration, anal penetration or any form of homosexual intercourse" was not included in the definition of rape and such crimes were classified under different laws with lesser punishments.[65] The definition of rape from the 1980s was further limited when the Court declared that penetration by "animals or other devices"[66] did not constitute rape, thus only penile penetration constituted as rape. Though penetration of any degree had been held by courts to be sufficient evidence of rape even before the promulgation of the *Zina* Ordinance,[67] proving it through medical evidence was difficult.

The Chemical Examiner's report in Lal's case was used extensively to ascertain the presence of semen to indicate ejaculation as part of the rape, but the courts have consistently held that the absence of semen itself cannot be a ground for dismissing rape charges.[68] From the case law, it appears that courts were more skeptical of the prosecution's case when the Chemical Examiner's report was not presented, as compared to cases where the report indicated the absence of semen.[69] This brings forward a question nearly impossible to answer in hindsight. Is it possible that in the 1980s, even though the Court declared that absence of semen in rape cases would not determine whether the accused was culpable of rape, the non-production of Chemical Examiner's report or absence of semen still

62. Karin C. Yefet, *What's The Constitution Got to Do With It? Regulating Marriage in Pakistan*, 16 DUKE. J. OF GENDER & L. & POL'Y 347 (2009); *see also* Naz K. Modirzadeh, *Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds*, 19 HARV. HUM. RTS. J. 191, 193–94 (2006).

63. *See* Khan v. State, (1985) SCMR (SC) 1170 (Pak.).

64. *See* "Offense of Zina (Enforcement of Hudood) Ordinance, *supra* note 4," § 4 and 6.

65. CHADBOURNE, *supra* note 36, at 237–38.

66. Naseer v. State, (1988) PLD (FSC) 58, 72 (Pak.).

67. Misra v. State, (1957) Ori 44, 78 (1956) (Pak.).

68. Muhammad v. State, (1982) PLD (SC) 87, 94 (Pak.); Abbas v. Riaz, (1984) PLJ (SC) 300, 303 (Pak.); Muhammad Ali and Mst. Jantan v. State, (1983) 662 NLR Cr. 665 (Pak.).

69. *See* Muhammad Ali and Mst. Jantan v. State, (1983) 662 NLR Cr. 665 (Pak.).

made it seem more likely that the victim was lying, in the judge's mind? We might never know the extrajudicial factors that might have played a role when determining such cases.

The dominant discourse in the 1980s demonstrates a shocking lack of understanding of the specific nature of rape. It is unimaginative in conceptualizing the various forms of coercion that exist and different responses they invoke from rape victims, which may not always manifest itself in physical resistance. Rape in this judicial paradigm was never seen as an anomaly or sexual deviancy but as part of the male sexuality, exhibited by the completion of the act through production of semen and considered rape only through penile penetration—the real deviancy was past sexual conduct of rape victims as exhibited by medical evidence.[70]

B. MORAL CHARACTER AND SEXUALITY

The Court also showed propensity to focus on the moral character of the rape victim herself.[71] The Court in the 1980s often classified women with "loose character" and used this as a justification for stating that the case is "a habitual case of enjoying sexual intercourse," rather than rape.[72] The emphasis used by the Supreme Court here on the word "enjoying" is particularly striking since the ultimate crime, far from being rape, is seen as not mere acquiescence to sexual intercourse, but actually deriving pleasure out of it. In other instances, medical evidence, such as the lack of tightness of the vaginal walls, was used extensively to grant bail to the accused even where the victim was a married woman and arguably had sexual relations with her husband prior to the rape.[73]

In cases where the Court could have cited lack of evidence to acquit an accused rapist, it instead made a legally unnecessary assertion that the rape victim was "reputed to be immoral in the village [and] she was not a woman of virtue."[74] The substantive law produced an environment conducive for the Supreme Court to freely adjudge the character of women without a social backlash. The message was often clear. Only chaste women could be raped and thus be given justice by arresting male culprits; anything less immediately invoked the court's anxiety to protect the rights of defendants in rape cases. Even where assertions about the character of a victim were not written explicitly, they played a part in the final

70. Veena Das, *Sexual Violence, Discursive Formations and the State,* 31 ECON. & POL. WKLY. 2411, 2412–13 (1996).

71. *See, e.g.*, Khalil alias Kach v. State, (1997) PCrLJ (FSC) 1639 (Pak.); Sadiq v. State, (1995) SCMR (SC) 1403 (Pak.); Yaqub v. State, (1996) SCMR (SC) 1897 (Pak.).

72. Sher v. State, (1982) PLD (FSC) 240, 244 (Pak.); *see also* Mustafa alias Baggi v. State, (1988) PCrLJ (Lah) 779, 779 (Pak.) (stating that the victim was "used to sexual intercourse" since the two-finger rape revealed that the two fingers were admitted by the vagina); Begum v. State, (1986) PLD (FSC) 268 (Pak.); *See* Kalam v. State, (1986) PCrLJ (Kar) 1587 (Pak.); Hussain v. State, (1990) PCrLJ (Kar) 658 (Pak.) ("habitual to sexual intercourse").

73. Kalam v. State, (1986) PCrLJ (Kar) 1587 (Pak.).

74. Latif v. State, (1980) PCrLJ (SC) 1101, 1104–05 (Pak.). The Court has indicated that women of loose character, accustomed to sexual intercourse, cannot be believed without strong corroboration.

result—Lal, as an unmarried non-virgin, was deemed less credible of a witness due to her past sexual history.[75]

C. FILING A CRIMINAL COMPLAINT

The last trend in the 1980s relevant to this paper involves the legal importance placed by courts on the filing of the First Information Report ("FIR"),[76] which is essentially a criminal report filed before the police by a victim or a representative of the victim. Delay in filing the FIR in rape cases, sometimes even by just mere days, could prove fatal to the prosecution's case.[77] The Court assumed that any delay in approaching law enforcement and filing an FIR was a result of the alleged victim using that time to fabricate facts about the rape.[78] Attempts made by the victim to explain the reasons for the delay, such as temporary capitulation to societal pressure to compromise or forgive the accused, were not accepted by the Court during this time.[79] Courts viewed a delay in filing an FIR as indicative of consent or bad faith on behalf of the victim, even in cases where it was by a mere day.[80] This trend was exhibited in Lal Begum's case where even though the case was filed the day after the rape, the previous family animosity between the two parties made the court skeptical that extra time had been taken up to fabricate details.[81] Even a pregnant rape victim who filed an FIR at a late stage of her pregnancy was viewed with skepticism.[82]

The delay had to be explained and was accepted by the courts on exceedingly narrow grounds. Courts scrutinized the specifics in an FIRs by assessing how far the nearest police station was located from the place of crime to evaluate whether the filing delay was reasonable. In the 1983 case of *Khalid v. State*, a delay of eight hours was accepted by the court as reasonable because one of the victims was a 13-year-old girl who, due to extensive bleeding and injuries, could barely walk back to her home, which in turn was at a considerable distance from the police station.[83] Delay of a few hours would prove fatal to another case where the

75. *See* Khan v. State, (1985) SCMR (SC) 1170 (Pak.).

76. An FIR is filed with the police. An FIR contains a description the crime as narrated by the victim, the time of the occurrence, the time of reporting the crime, the delay in reporting the crime, and any explanation offered by the victim as to why there was a reporting delay. Traditionally, an FIR also names the culprit, their role in the crime, the place of crime and the distance between the police station where the complaint was lodged and the place of occurrence.

77. Sarah Zaman & Maliha Zia, *Women's Access to Justice in Pakistan,* (Comm. on Women's Access to Justice, Working Paper, 2013), https://www.ohchr.org/documents/HRBodies/CEDAW/AccesstoJustice/AuratFoundationAndWarAgainstRape_Pakistan.pdf.

78. Asghar v. Riaz, (2001) LHC (YLR) 715 (Pak.); *see also* Piyaro v. State, (1998) SCMR (SC) 1749 (Pak.).

79. Chadbourne, *supra* note 36, at 229.

80. *See* Muhammad v. State, (1986) PLD (FSC) 262 (Pak.); Sanaullah alias Sanata v. State, (1983) PLD (FSC) 192 (Pak.) (noting the Supreme Court acquitted the accused in this case because the victim filed an FIR a day after allegedly being raped).

81. Khan v. State, (1985) SCMR (SC) 1170 (Pak.).

82. Chadbourne, *supra* note 36, at 229.

83. Khalid v. State, (1983) PCrLJ (SC AJK) 761 (Pak.).

FIR stated that the police station was located only seven or eight kilometers away, especially since the brother-in-law of the victim purported to have knowledge that she had been kidnapped by the accused party, but had not immediately gone to the police station.[84] A delay in filing the FIR has not been just used by defense teams to argue for acquittal or for a reduction in sentence, but used as a ground to grant bail to the accused.[85] The rule of disbelieving the victim on the basis of her timing of reporting the crime was offset by not making it a bright line rule. Exceptions existed within the jurisprudence, though the scope was narrow, and applicable only where the delay did not lapse into weeks.[86]

Overall in the 1980s, a mechanical scrutiny of the combination of delay in the filing of an FIR, lack of external signs of injury, and past sexual history could completely destroy a rape victim's case. The next part of this paper delineates how the jurisprudence evolved on all three factors over the next decade.

III. NUANCED CHANGES IN THE 1990S JURISPRUDENCE

In the 1990s, the Supreme Court began to slowly change the trend of associating the character of female victims, and delay in lodging a criminal report, with the merits of the case. The definition and scope of rape does not seem to have evolved much, with the court holding that penetration "by a pen, not a penis" would not be classified as rape.[87] However, the Supreme Court in its judgments showcases increasing attempts to deliberately be cognizant of alternative explanations provided by rape victims about filing FIRs late.[88] In doing so, emphasis was now placed on developing spaces within the legal paradigm that are more sensitized to the view of rape as a criminal offense and acknowledgement of its long-term psychological and physical repercussions, though the narrative still remained obtusely focused on assessing the victim's rather than the accused party's conduct. For instance, in *Muhammad Khalil v. State*, the victim stated that while she was initially raped by the son of a local landlord, he afterwards

84. Khan v. State, (1982) PLD (FSC) 4 (Pak.).

85. *See* Khan v. State, (1988) PCrLJ (SC) 678 (Pak.) (granting bail to the accused because the victim reported the crime after four days); *see also* Rafiq v. State, (1986) PCrLJ (SC) 1008 (Pak.) (granting bail to the accused because the victim reported the crime after five days); Aslam v. State (1985) PCrLJ (SC) 2580 (Pak.) (reporting the crime after fifteen days was termed by the Court as an "inordinate delay"); Man v. State, (1984) PCrLJ (SC) 3052 (Pak.) (granting bail to the accused because the victim reported the crime after fourteen days); Bakhsh v. State, (1984) PCrLJ (SC) 2425 (Pak.) (granting bail to the accused because the victim reported the crime after twelve days).

86. *See, e.g.*, Khan v. State, (1981) SCMR (SC) 448 (Pak.) (reporting to the police after three days since the female victim lived with her stepfather who raped her); *but see also* Ahmad v. Sarkar, (1988) SCMR (SC) 2001 (Pak.) (This was termed by the Court as a highly politicized case where the victim needed the help of a socially and politically powerful person in order to get the police to file a report. The delay in filing the report before the police who had been unwilling to do so was therefore accepted by the Court.); Ashraf v. State, (1984) PLD (FSC) 59 (Pak.) (Female victim wanted her parents to be there when she went to the police. At the time of the commission of the rape they were away, delaying the FIR.).

87. Wajid Ali v. State, (1996) PCrLJ (FSC) 610, 612 (Pak.).

88. Chadbourne, *supra* note 36, at 231.

promised to marry her and they continued having consensual sexual relations, as a result of which she got pregnant.[89] The Court held that the evidence did not prove beyond a reasonable doubt that rape had been committed. However, it did consider that there was inequality in the social positions between the wealthy landowner and the victim which would have sufficient bearing in why the victim might have consented to the sex later on. Thus, the Court was now expanding its understanding of the power dynamics between the accused and victim to assess whether the relationship was one where the female victim could have consented to sexual intercourse.

Similarly, holdings from the Supreme Court started emerging in the 1990s that the lack of external signs of violence as exhibited in the Medico-Legal Report could not be taken as a categorical nullification of rape charges.[90] The required standard of proof of penetration, according to Julie Chadbourne, also seems to have become more stringent in the 1990s, depending on the amount and quality of medical evidence presented.[91] So, while the old judicial doctrine that stated that penetration is sufficient to prove rape is still intact, the Court now places additional qualifiers on the kind of medical evidence that can prove it. In one instance, the Court did not consider medical evidence showing swabs of semen taken from the victim alone to prove that penetration happened.[92]

Similarly, the Court started requiring conclusive medical proof in order to find for a rape conviction, such as both the Serologist and Chemical Reports that identify the semen and link it to the accused respectively.[93] This was devastating in rape cases with shoddy investigation. More importantly, it seems that the lack of DNA testing or Serologist reports during the 1990s produced more adverse legal insinuations against married versus unmarried women. Mere positive reports indicating the presence of semen did not prove rape of married women.[94] The Court assumed instead that married victims necessarily have sex with their husbands as part of their marital duties and not only dismissed marital rape entirely but also made it harder for married women to prove rape in cases where the

89. Muhammad Khalil v. State, (1997) PCrLJ (SC) 1639 (Pak.).

90. Chadbourne, *supra* note 36, at 252.

91. *Id.* at 69–72.

92. Muhammad Ali v. State, (1993) PCrLJ (SC) 234, 238 (Pak.) (holding that the state failed to prove its case by presenting semen samples found on the deceased's body because the autopsy did not specifically check for penetration, laxity of the vaginal walls, or a torn hymen). This shows that Courts were applying more stringent standards in deducing whether rape had occurred, and only one kind of medical evidence was no longer sufficient to prove or disprove rape. *See also* Tahir alias Tahri v. State, (1996) PCrLJ (SC) 186, 188 (Pak.).

93. Abid Saved alias Mithu v. State, (1996) PCrLJ (SC) 1161 (Pak.).

94. Mazhar Hussain v. State, (1989) PCrLJ (SC) 198 (Pak.) (holding that because the victim was married with three children and the report did not show positive for semen, that there was no evidence of rape, depsite the victim's claim that she had been held captive for weeks before she was able to report the crime). This opinion implies, although it does not explicitly state, that ejaculation is a requirement of penetration in rape. *See also* Mst. Asho v. State, (1987) PCrLJ (SC) 538 (Pak.).

husband was not the perpetrator.[95] Ironically enough, the Court held in multiple cases that presence of sperm was sufficient to prove adultery,[96] but not rape. Thus, the trend in 1990s shows a shift towards more stringent medical standards laid down by the superior judiciary in rape cases, which were often impossible for rape victims to meet due to the inefficiencies present within the justice system.

The Court also changed its medical jurisprudence in other ways. In the 1980s it had stated many times that freshly torn hymen or ruptured hymen showed that rape had been committed.[97] Conclusions reached in this framework in 1980s had drastic consequences since neither courts nor medical officers acknowledged medical advancements which showed that not all women have hymens, or that some are torn without sexual intercourse.[98] In the 1990s this trend shifted with the Court looking at a variety of secondary medical literature on the hymen[99] to state that even in gang rape cases an intact hymen does not rule out that rape did

95. Inferences regarding the role of women in a marriage here are clear. The Court assumes that men have access to their wives at all times, and therefore the presence of semen is not considered evidence of rape of married women because it is assumed to belong to her husband. The assumption that men always have sexual access to their wives reinforces the societal role of married women as vessels for fulfillment of sexual desire and unmarried women as chaste and not engaging in sexual relations. Further, the two-finger rape test, which purports to measure the laxity of the victim's vaginal walls, creates an additional burden on married women and unmarried women who have had sexual intercourse. The test assumes that the tighter the space is, the less often the victim has sexual intercourse, which in turn assumes that she is less likely to lie about being raped. In other words, women who have had sexual intercourse before cannot use this test to assert their truthfulness, while women who are virgins are rewarded by the Court for their chastity.

96. Akbar Hussain v. State, (1997) PCrLJ (SC) 543 (Pak.).

97. Muhammad Sadiq v. State, (1997) PCrLJ (SC) 546 (Pak.); Muhammad Mohsan v. State, (1993) PCrLJ (Sh.AC) 9 (Pak.) (holding ruptured hymen "demonstrated beyond any shadow of the doubt that the girl was subjected to rape").

98. David G. Berger & Morton G. Wenger, *The Ideology of Virginity*, 35 J. MARRIAGE & FAM. 666, 668 (1973).

99. *See, e.g.*, Muhammad Riaz v. State, (1997) PCrLJ (SC) 1114 (Pak.); ALFRED S. TAYLOR, TAYLOR'S PRINCIPLES AND PRACTICE OF MEDICAL JURISPRUDENCE 75 (13th ed., Long man Group (FE) Ltd. Hong Kong 1986) ("The anatomy of the hymen varies enormously from individual to individual . . . In shape it may take the form of a very thin crescent with a large orifice; annular with small orifice; congenital frilly with a large orifice; strong midline bar only. Commonly the membrane is deficient anteriorly, and most pronounced posteriorly, and it follows that damage to the hymen occurs almost invariably in the posterior quadrant, Rupture of the hymen on first penetration is of course very common but it is not inevitable, for the thin elastic yen is quite capable of stretching to accommodate penetration even by an erect adult penis without frank rupture."); JAISING P. MODI & C.A. FRANKLIN, MODI'S TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY 315 (21st ed., N.M. Tripathi 1988) ("Cases are on record, of women having regular marital relations, of pregnant women and even prostitutes in whom the hymen appeared untouched. It is seen that the presence of an intact hymen is not an absolute sign of virginity."); C.K. PARIKH, PARIKH'S TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY 454 (3rd ed., 1977) ("The hymen may be intact but this does not prove virginity, if the hymen is thick and distensible it may admit two fingers. In such a case; a sexual connection may not rupture the hymen. Such cases where sexual connection has taken place without rupture of the hymen are known as false virgins. Thus, with an intact hymen, there can be true virgins and false virgins."); R.L. GUPTA, THE MEDICO-LEGAL ASPECT OF SEXUAL OFFENSES 57 (2nd ed., Eastern Book Company 1984) ("In odd cases, the hymen has remained un ruptured after coitus and during resultant pregnancy, and has remained intact until ruptured by the birth of the child, or until incised to permit the passage of the child:

not take place where other evidence points to that direction.[100] Neither was the absence of marks of violence on the body of the victim enough to dislodge the testimony.[101] However, the positive impact it could have had was offset since the Court showed greater predilection to believe rape victims who didn't have marks of violence in gang rape cases[102] or victims who were young.[103] This form of judicial discourse development ultimately protects some rape victims more than others, i.e. unmarried, young virgins who are deemed more physically fragile than married, older, and working class women.

Furthermore, bail was not granted solely on the basis of the victim approaching the police too late; rather, the Court accepted alternative explanations where strong evidence existed against the accused.[104] The delay in lodging the FIR now, if plausibly explained by the victim, was no longer used as a ground for discarding her testimony, and judges incorporated within their discourse a greater variety of extraneous reasons which could explain such delay.[105] The Court's thinking thus evolved to acknowledge the particular circumstances of rape victims to state that:

> [A] victim of rape should not be penalized on account of ostensible delay in reporting what she has undergone. On the contrary, kindness, encouragement and understanding are the requirements to approbate a victim's difficult decision to purge the society of perpetrators of such heinous offenses.[106]

In yet another judgment by the Supreme Court, the mental toll and trauma of rape was acknowledged as a factor that would not automatically guarantee a timely reporting of the matter, with the Court stating that delay in such cases was a "universal phenomenon."[107] While previously, Courts looked at "excessive time" taken by the victim in reporting the crime to be indicative of "bad faith," thus denoting consent or an entrapment attempt against the accused, in the 1990s

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In these rare cases the hymen has been annular and distensible type which has permitted the entry of the male organ without rupture.").

100. Muhammad Riaz v. State, (1997) PCrLJ (SC) 1114 (Pak.); Mst. Rehmat Bibi v. Muhammad Najib, (1997) PCrLJ (SC) 331 (Pak.) (holding that the rape of a female child did occur based on external signs of violence on the victim's body).

101. Muhammad Nawaz v. State, (1990) SCMR (SC) 886 (Pak.); Muhammad Qasim v. State, (1997) PCrLJ (SC) 1095 (Pak.); Tariq v. State, (1997) PCr LJ (SC) 1409 (Pak.).

102. Muhammad Qasim v. State, (1997) PCrLJ (SC) 1095 (Pak.).

103. Muhammad Nawaz v. State, (1990) SCMR (SC) 886 (Pak.) (involving a thirteen-year-old victim).

104. Mst. Nasreen v. Fayyaz Khan, (1991) PLD (SC) 412 (Pak.).

105. Azhar lqbal and Two Others v. State, (1997) PCrU (SC) 1505 (Pak.); Muhammad Qasim v. State, (1997) PCrLJ (SC) 1095 (Pak.).

106. Mehboob Ahmed v. State, (1999) SCMR (SC) 1102 (Pak.).

107. Muhammad Qasim v. State, (1997) PCrLJ (SC) 1095 (Pak.).

the reporting of a rape was seen as a factor bolstering the victim's case.[108] Delay of mere days thus no longer completely disproved rape; instead, arguments that served to explain months of delay were being accepted by Court.[109]

Thus, the earlier judicial narrative that treated corroboratory facts clinically to assess rape cases was slowly metamorphosing to one that at least attempted to understand the multifaceted nature and various forms of coercion and reactions to rape.[110]

It is essential to note however, that this shift is still steeped in essentially paternalistic and deeply problematic views of the nature of rape, as a crime not committed against a woman's body and agency, but rather against the male honor in her family.[111] Plausible explanations the Supreme Court accepted in this era branded the female body as a symbol of male honor, the defiling of which could have understandably been shameful for the family, hence explaining the reluctance in lodging a complaint immediately after the crime.[112] Yet, the reluctant and slow march to developing a mildly gender friendly judicial discourse aimed at not stigmatizing rape victims had begun. The next part of this paper shows how the Court, over the past eighteen years, shifted toward this new discourse, and why this welcome change is still rooted in troubling heuristics.

IV. 2000–2018: DEVELOPMENT BY THE SUPREME COURT

Though some trends showing the evolution of common law assumptions made against women in rape cases have been identified in the rulings of the Supreme Court towards the end of the 20th century, there exists little to no systemized scholarship on the how these trends have evolved to present day. Ultimately, any shift seems to be rather incidental in nature and might be due to changes in the substantive law and greater political stability,[113] rather than a concerted judicial effort to zealously dispel socio-legal stereotypes regarding rape victims.

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108. Muhammad Aslam v. State, (1997) PCrLJ (SC) 1689 (Pak.); Intizar Hussain v. State, (1997) PCrLJ (SC) 1374 (Pak.); Muhammad Sadiq v. State, (1997) PCrLJ (SC) 546 (Pak.).

109. *See* Muhammad Qasim v. State, (1997) PCrLJ (SC) 1095 (Pak.).

110. Muhammad Ismail v. State, (1997) PCrLJ (SC) 115, 116 (Pak.) (Court stated that in cases of rape, families of victims tend to place importance on notions of "honor," leading to delays in reporting cases).

111. *Id.*

112. Chadbourne, *supra* note 36 at 922.

113. Lau, *supra* note 39, at 1300–06. There are many reasons that can be attributed to this. The Islamization process that was undertaken by Zia's regime was counteracted to a certain degree by the military dictator General Musharraf, who wanted to be seen as more liberal than Zia in a bid to legitimize his rule. In 2006 for instance, the *Zina* Ordinance was amended considerably by the Protection of Women (Criminal Laws Amendment) Act under Musharraf's rule. Through this amendment, distinction was drawn between rape and fornication alongside the implicit recognition of marital rape. Musharraf's bid to reverse the process undertaken by Zia should not be seen in isolation. He was spurred also by movements led for greater recognition of rights of women and condemnation of the *Zina* Ordinance which were happening around the late 1990s through reports such as the 1997 report by the National Commission for the Status of Women. The Council of Islamic Ideology also reviewed the Hudood Ordinances and asked that some provisions should be repealed. The protests, alongside international censure, had made it far easier to make amendments without invoking too big a backlash at

The settled law by this time—on the standard of evidence required to prove rape—is that "conviction could have been awarded on the solitary statement of the prosecutrix alone,"[114] as long as it "inspires confidence."[115] The Court has also stated on numerous occasions that "it is not necessary that each and every bit of statement of the prosecutrix in a rape case requires corroboratory evidence."[116] However, the proviso that the testimony should be "confidence inspiring" has been used by the Court as a loophole to allow instances where corroboratory evidence does play a huge part in deciding the outcome of a case.[117] The following section identifies trends from 2000-2018 on the value placed on such corroboratory evidence such as: A) medical evidence and lack of virginity, B) the delay in filing of First Information Reports (FIRs), and C) the moral character and honor of the victim.

A. MEDICAL AND CHARACTER TRENDS IN COMMON LAW ASSUMPTIONS

The common strand found in judgments emanating from the Supreme Court in rape cases within the 18 year time period covered by this section is that common law assumptions (such as delay in lodging FIR, lack of marks of violence on the female victim's body, and character), *in isolation* cannot be deemed sufficient to disprove rape allegations.[118] Thus, the Supreme Court since 2000 has not completely gotten rid of its common law assumptions, but rather diluted their importance if they are present in isolation or stand contradicted by other evidence. Similarly, taken together the Court shows propensity to inflate their significance in a case already replete with evidence pinpointing to the accused's innocence.[119]

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the time. Alongside this, a widely televised debate on Geo News brought the topic of "double jeopardy" (faced by women who came forward with allegations of rape and upon unsuccessful prosecution got charged with adultery) to the national forefront and called them out for being un-Islamic.

114. Ramzan Ali v. State, (1967) PLD (SC) 545 (Pak.); *see also* Ashraf v. Crown, (1956) PLD (FC) 86 (Pak.); Ghulam Sarwar v. State, (1984) PLD (SC) 218 (Pak.); Haji Ahmed v. State, (1975) SCMR (SC) 69 (Pak.); Shahid Malik v. State, (1984) SCMR (SC) 908 (Pak.); Ehsan Begum v. State, (1983) PLD (FSC) 204 (Pak.); Muhammad Akram v. State, (1989) PLD (SC) 742 (Pak.); Shakeel v. State, (2010) PLD (SC) 47 (Pak.); Shahzad alias Shaddu v. State, (2002) SCMR (SC) 1009 (Pak.).

115. Ibrar Hussain v. State, (2007) SCMR (SC) 605 (Pak.).

116. *See, e.g.*, Gul Noor v. State, (2007) PLD (SC) 183 (Pak.).

117. Compare *Ibrar Hussain*, 2007 SCMR at 605 (stating that since the alleged victim changed her statement four times about important aspects of the rape such as the place and manner of commission, her statement did not "inspire confidence." Benefit of the doubt was given to the accused, who was acquitted.), with Mushtaq Ahmed and Another v. State, (2007) SCMR (SC) 473 (Pak.) (holding that the minor victim's testimony was "confidence inspiring" since she was pregnant and hymen was absent). Thus medical evidence was used to decide one particular case and not another.

118. Sheraz Mehmood v. State and Another, (2005) YLD (SC AJK) 2467 (Pak.) (delay in FIR per se was not a ground to reject the prosecution's case and that the facts and circumstances of the case had to be looked at); Nadeem alias Dhemu v. State, (2007) SCMR (SC) 255 (Pak.) (lack of presence of marks of violence on the body of victim in itself would not dislodge the case).

119. Muhammad Tanvir v. State, (2017) SCMR (SC) 366 (Pak.) (granting bail to the accused since FIR was lodged after 2 days, the medical examination was conducted after 3 days, and DNA was negative. Here the delay in medical examination and FIR is not being explicated by looking at the facts that the victim was in her house when raped and probably too fearful to report the case); Haibat Khan v. State, (2016) SCMR (SC) 2176 (Pak.) (granting bail in the case of rape against minor because there was

Numerous judgments reflect this trend. In cases involving the absence of marks of physical violence on the female body, the Supreme Court has now categorically held that mere absence of such marks does not denote that rape did not happen or that it happened by consent.[120] The Court takes into account that in certain situations, such as being held at gunpoint, "resistance was, perhaps, not possible,"[121] or in other scenarios where facts were egregious in nature and victims were intoxicated.[122]

Though the tone of the Court still acknowledges instances where rape victims would practically be unable to resist violence, there is a generalized distinct lack of understanding that rape will produce different responses from different people. Would the Supreme Court, for instance, reason that rape happened in a case where there was no weapon, no external sign of violence, no physical resistance, no verbal rejection because the victim was in a general state of fear or shock or the socio-economic power dynamic between the rapist and victim made it impossible to voice resistance? The current common law jurisprudence on consent is in its nascent stages, so probably not.

Another identifiable judicial trend is the level of importance placed on the two-finger rape test. In *Mst. Yasmin Butt v Majid Baig*, there was a divergence between the opinion presented by the medical officer, who said that the hymen of the victim was intact, and the position taken by the Medical Board, which stated that the vagina admitted two fingers.[123] The Court reasoned that the accused had asked the medical officer to commit perjury and to falsify medical records to show that the hymen was intact; therefore the Medical Board, which stated that the vagina had been opened enough to allow two fingers, supported the contention that rape might have occurred.[124] The reasoning adopted here heavily relies

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a delay in reporting to the police, no external signs of violence, and the Chemical Examiner's report was negative. That the delay was of fourteen days, which could have led to the eradication of evidence, was not discussed by the Court.); Syed Nadeem Shah v. State, (2005) PLD (SC) 181 (Pak.) (No mark of violence found on the body of the victim and the hymen was found to be intact. In this case, the prosecution changed its stance repeatedly, casting doubt on its case).

120. Habibullah v. State, (2011) SCMR (SC) 1665 (Pak.) (Absence of marks of violence in itself does not mean that rape did not happen. This could also be because other medical evidence in this case was strong: the victim was a minor, her hymen was not intact, her vagina needed to be stitched because of the injuries, and she was held at gunpoint).

121. Mst. Yasmin Butt v. Majid Baig, (2008) SCMR (SC) 1602 (Pak.) (Court noted that the medical evidence in totality did show a probability of rape; the hymen was not torn but the vagina admitted two fingers, no semen was found, and there were no signs of violence on the body. However, the Court took into account that the rape in this particular case would not have resulted in the necessary violence that one always associates with rape. It should be noted that the bail granted to the accused was cancelled by the Supreme Court in this case and no conviction actually took place based on these facts.); *see also Habibullah*, (2011) SCMR at 1665 ("Marks of violence were not essential to establish factum of [rape]").

122. Nadeem alias Dhemu v. State, (2007) SCMR (SC) 255 (Pak.) (Rape was committed against two sisters and their brother—which the court classified as sodomy rather than rape—who were intoxicated and unable to resist. The Chemical Examiner and Serologist reports all matched; therefore, absence of other signs of struggle was deemed by the Court to be insufficient to dislodge the case).

123. *Mst. Yasmin Butt*, (2008) SCMR at 1602.

124. *Id.*

on tying the truthfulness of a victim's allegations to her acquiescence to undergo and "pass" the two-finger rape test.

In *Amanullah v. State*, the fact that the hymen had been torn, and that the two-finger rape test showed that the fingers were admitted tightly in the vagina, was used by the Supreme Court to reason that the victim was "not a female of easy virtue," thus convicting the accused.[125] This was so even though the DNA test found that the semen taken from the female victim did not match the accused's DNA.[126] The Court reasoned based on the two-finger rape test and chastity, rather than DNA testing, to hold that "no reasons could be offered as to why the prosecutrix who had admittedly been subjected to sexual intercourse, should have spared the actual offender."[127] Yet in another case where the hymen was found freshly torn and two fingers were admitted painfully in the vagina, the Court held that the timing of the occurrence as stated by the victim did not match the rate of her bleeding, thus acquitting the accused.[128]

In *Nasreen Bibi v. Farrukh Shahzad*, a similar inference was drawn with the Court being more sympathetic to the victim since "the petitioner was a virgin lady and according to medical evidence was subjected to sexual intercourse."[129] The Court, on another occasion, stated, while assessing the medical evidence of a dead rape victim:

> The perusal of the post mortem report shows that presence of ligature marks all around the net from the petitioner on his plantation and other contusion marks over the entire body of the deceased go to show that the deceased had resisted strongly prior to being subjected to rape. *This all above shows that she was not a lady of loose character*.[130]

This particular strand of legal jurisprudence uses language and jargon to associate societal ideas of chastity, and rewards rape victims for possessing a certain judicially pre-approved prototype of purity, to punish accused persons. The Court relied on the two-finger medical rape test to determine whether the rape victim was sexually active, and drew inferences based on past sexual conduct to determine the veracity of current allegations, abandoning the practice only recently in January 2021.

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125. Amanullah v. State, (2009) PLD (SC) 542 (Pak.).

126. *Id*. at 542.

127. *Id*.

128. Javed Iqbal v. State, (2018) SCMR (SC) 1380 (Pak.) (Here, even though the medical evidence showed that rape had been committed, the victim alleged that it happened the day before she went to the medical examiner, and the medical examiner purported that it happened the same day. This discrepancy shows the credence given to MLRs and doctors performing them).

129. Nasreen Bibi v. Farrukh Shahzad, (2015) SCMR (SC) 825 (Pak.) (Bail was cancelled in this case. The case does not mention any other medical evidence to ascertain that rape had happened except that it was proven that she was a virgin before the commission of rape).

130. Tariq Mehmood v. State, (2002) SCMR (SC) 1602 (Pak.) (emphasis added).

The Court lent credence to the medical evidence when it showed that the hymen had "been old torn" and where there were no external marks of violence on the female body as a valuable part of its dicta when explicating the reasons for acquitting.[131] The Court has also started relying heavily on the Chemical Examiner's report indicating presence of semen corroborating with the Serologist's report, which matches it to the accused, even in gang rape cases.[132] In *Muhammad Nawaz v. State*, alongside the absence of Chemical Examiner's report, one of the reasons used by the Court in acquitting was that "no hue and cry" was raised after the rape, showing the dangerous proclivity of Court to inflate some behavioral tendencies as more indicative of a "true" rape.[133]

Such common law assumptions are an unnecessary relic of the past and serve mostly as instruments to bring to the table the sexual history of a rape victim in any case where having a sexual history does not have value as corroboratory evidence. Unwarranted intrusion in the sexual past of a rape victim, or allusions to possible consent to the rape, can have devastating emotional impact and social repercussions for the victim.[134] The judicial discourse that actively ascribes to a social order that demands regulation of female sexuality, doesn't then prevent rape of female bodies, or even acceptance of rape by the male body as a heinous societal crime, but only seeks to punish those women who don't ascribe to such a model. Even more so, this is a case of a superior judiciary with predominantly

131. Haider Ali v. State, (2016) SCMR (SC) 1554 (Pak.). (Three men were accused of gang rape. The fact that the victim in question had sexual relations prior to the rape and had not physically struggled, at least enough during the rape, were part of the reasons for acquittal reasons for acquittal. Other factors, such as lack of a DNA test and problems with the identification parade, counted as valuable pieces of evidence in giving the accused the benefit of the doubt, and that, in isolation, the MLR and past sexual history would not have led to an acquittal. However, the assumptions castigated at the woman coming forward were unmistakable).

132. *Id*. ("No DNA test had been conducted nor any semen matching was undertaken so as to conclusively establish that the semen found on the vaginal swabs of the alleged victim belonged to any of the accused persons.").

133. Muhammad Nawaz v. State, (2016) SCMR (SC) 267 (Pak.).

134. Kimberly A. Lonsway & Sergeant Joanne Archambault, *Victim Impact: How Victims are Affected by Sexual Assault*, END VIOLENCE AGAINST WOMEN INT'L 34 (Mar. 2019), https://evawintl.org/wp-content/uploads/Module-3_Victim-Impact.pdf. ("Research documents that mistreatment experienced during the law enforcement investigation, medical forensic exam, and criminal prosecution have negative effects on the well-being of sexual assault victims (citation omitted). To illustrate, research demonstrates that victims are often extremely distressed when professionals such as law enforcement investigators or health care providers respond by doubting the victim's report of having been sexually assaulted, failing to take the report seriously, and/or blaming the victim for having 'caused' the sexual assault (citation omitted). Such responses by first responders are associated with a higher level of post traumatic symptoms among sexual assault victims, and they are especially common in cases of non-stranger sexual assault – where the victim and suspect know each other to some degree (citation omitted)."); *see also* Gail Steketee & Anne H. Austin, *Rape Victims and the Justice System: Utilization and Impact*, 63 SOC. SERV. REV. 285, 285–303 (1989) (discussing the impact and various reactions of rape victims, including self blame, PTSD, severe trauma, and inability to assimilate in society that can impact their interaction with the criminal justice system; the nature of interaction with the criminal justice system can either help victims heal or ensure that the trauma lasts a lifetime).

male judges deciding on what constitutes as "believable" behavior by a female rape victim, which can often be misinformed and myopic.

B. IDENTIFIED CHANGE IN TREND OF FILING FIR WITH A DELAY

The Supreme Court's trend in accepting delays in the filing of FIRs in rape cases since the 2000s has also greatly increased, though its dicta is curious. The delay in filing an FIR is acceptable in cases where the petitioner is termed as a "virgin lady" or "a deaf and mute lady."[135] The Court now accepts that victims are hesitant to report rape, reasoning that "people naturally avoid rushing to the police because of family honor."[136] In other instances, the Court termed a delay of ten days in reporting the matter to law enforcement agencies as understandable since it "becomes difficult to marry the victim respectably after the tragedy."[137] At the same time, Supreme Court jurisprudence does not discuss the shock and trauma of rape as a possible reason for the victims approaching the police late, unless the facts are particularly horrifying.[138] In a classic Catch-22, an FIR filed too promptly could have adverse consequences for the case as well, drawing skepticism that aspects of the factual narrative posited had been fabricated in advance.[139]

While the Supreme Court has come a long way in overturning or mollifying the common law obtuseness it showed in the 1980s, the language used to justify this change still pays ode to patriarchal narratives of rape. Rape, according to this judicial discourse, is a societal crime perpetrated by men as a matter of routine to bring dishonor to other men, with women only serving as intermediaries or commodities that can be valued according to their worth on the marriage market. This essentially strips women of their bodily agency not only through the physical act of rape and social acts of ostracizing, but also through legal vernacular that refuses to categorize rape as a deeply personal violation of independence, liberty, and bodily autonomy.

C. LEGAL LANGUAGE: ASSUMPTIONS AGAINST CHARACTER OF RAPE VICTIMS

Assuming that words are important—as this paper does—the present judicial discourse has enormous responsibility in informing each succeeding generation

135. Human Rights Case No. 42389-P of 2013, (2014) SCMR (SC) 515 (Pak.) (The case was taken up by the Court in its original jurisdiction because the media played a big role in highlighting the atrocity committed. Special importance is seen to be placed by Court in assessing rape cases more favorably for women who are disabled or less sexually experienced).

136. Nasreen Bibi v. Farrukh Shahzad, (2015) SCMR (SC) 825 (Pak.).

137. Mst. Yasmin Butt v. Majid Baig, (2008) SCMR (SC) 1602 (Pak.).

138. Nadeem alias Dhemu v. State, (2007) SCMR (SC) 255 (Pak.) (recognizing trauma-induced medical treatment as a sufficient reason for approaching the police later than would otherwise be acceptable); *Human Rights Case No. 42389-P of 2013* (2014) SCMR at 515 (allowing a delay of 17 days due to police negligence in filing the case of a deaf, mute woman).

139. Kachkool v. State, (2002) PCrLJ (Pesh) 2021 (Pak.) (stating that a "[v]ery promptly lodged F.I. R. had rather suggested that things were pre-planned").

of law students, lawyers, judges, and jurists to the inner workings of the Supreme Court and its role in restructuring societal debates on marginalized communities.

Consider instances where the Court, in assessing a litigant's claim that her daughter had been raped, emphasizes that such an assertion is trustworthy since "no sane person would damage the *career* of her child over something so petty."[140] The word career here denotes the eligibility to marry without a besmirched character or history marred by past sexual encounters, even in cases resulting from acts of violence. The Court, when convicting the accused in *Habibullah v. State,* similarly states that "nobody would like to stigmatize her innocent daughter for her entire life which would have a substantial bearing on her future."[141] In one case where a brother came forward claiming his sister had been raped, the Court made its anxiety even more explicit by stating that "false implication by the brother involving his *unmarried* sister cannot be believed, as [a] brother is not likely to jeopardize the future of his sister."[142] The Court convicted all of the accused in the cases highlighted above.

A valid question thus arises: why do we care about the legal heuristics adopted by the Court in deriving its conclusion when the result is arguably "just"? The Supreme Court of Pakistan, as the ultimate precedent-setting judicial institution of the country, wields enormous power to not only define the customary laws of a society, but also to potentially change them for the better.[143] The Court unintentionally trivializes not only rape but also the role of women in society by evaluating the harm that rape causes from purely the perspective of male members of a victim's family because of their association with her. The judicial discourse further paints men as protectors of women with whom they have blood ties, assuming they wouldn't harm their future marital prospects (as if those are the only

140. Mushtaq Ahmed v. State, (2007) SCMR (SC) 473 (Pak.) (emphasis added).

141. Habibullah v. State, (2011) SCMR (SC) 1665 (Pak.).

142. Gul Noor v. State, (2007) PLD (SC) 183 (Pak.) (emphasis added).

143. Melvin A. Eisenberg, *The Principles of Legal Reasoning in the Common Law*, *in* COMMON LAW THEORY 81, 101 (Douglas E. Eldin, ed., 2007) (Common law theorists in fact posit that the reasoning adopted within judicial discourse is subject to the "social propositions" that inform them, and a change in the latter can bring about a change in the former. Thus "if at any time, the social propositions change or alter, discourse in secondary literature and criticism in briefs can show that the social propositions have changed and then bring about a change in the common law rules as well."); Rosemary Hunter, Clare McGlynn & Erika Racklay, *Feminists Judgments: An Introduction*, *in* FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE 3, 6–7 2010) (yet, by viewing social change as an insuperable impediment that must be overcome first before there is hope or impetus for changing common law, is also erroneous. With respect to changing categorized and limited gender roles in the legal realm, the law can act as a "powerful and productive social discourse which creates and reinforces norms . . . . [L]aw does not simply operate on pre-existing gendered realities, but contributes to the construction of those realities."); Udi Sommer, Katie Zuber, Victor Asal & Jonathan F. Parent, *Institutional Paths to Policy Change: Judicial Versus Nonjudicial Repeal of Sodomy Laws*, 47 L. & SOC. REV. 409, 430 (2013) (though this is an undoubtedly optimistic yet oddly axiomatic viewpoint, it allows the development of common law in Pakistani rape jurisprudence to not be viewed as a mere reflection of what the society is, but also an impetus to change the societal norms to what they can be. Thus, "[w]hen Common Law and strong religious constituencies are present in a polity, courts may be the venue of choice for those seeking social change.").

future prospects that a woman could have). This also indirectly bolsters assumptions about the prototypical rapist as a stranger rather than a relative.[144] The nomenclature rarely seeks to use language pinpointing male violence as a social epidemic, yet has no compunctions lumping women together as the victims of violence. In instances where the Court was presented with the opportunity to play a more impartial role, its contributions to the debate have been contradictory and thus ultimately unhelpful.[145] Instances where the Court has stepped forward and actively stated that past sexual behavior of a victim should not dictate how present rape cases unfold have been few and far between. The scant judgments that do employ different language from the general legal jargon pontificating on female sexuality are not heralded as precedents worth frequent citation. In 2010, the Court in *Shakeel v. State* was not persuaded by the argument that "the vagina . . . admitted two fingers easily hence being a lady of an easy virtue her statement should have been discarded."[146] Instead, it further stated that "even if it is admitted that she was a girl of an easy virtue, no blanket authority can be given to rape her by any one who wishes to do so."[147] Instances of such statements are sporadic,[148] and thus are possibly explained by the judge's different way of thinking

144. Laurence A. Greenfeld, *An Analysis of Data on Rape and Sexual Assault: Sex Offenses and Offenders*, U.S. DEP'T OF JUST. 3 (Jan. 1997), https://www.bjs.gov/content/pub/pdf/SOO.PDF; Lucy Adams, *Sex Attack Victims Usually Know Attacker, Says New Study*, BBC NEWS (Mar. 1, 2018), https://www.bbc.com/news/uk-scotland-43128350.

145. Salman Akram Raja v. Punjab, (2013) SCMR (SC) 203 (Pak.) (The Supreme Court while exercising its *suo moto* powers — power to take a case on its own accord — had been compelled to listen to the matter due to the particularly egregious nature of the case. The brief facts are that a gang of influential men raped a thirteen-year-old girl and the police refused to file an FIR due to political reasons and outside pressure. Despite medical proof showing that rape had occurred, it seemed that the victim was unable to approach the courts for redress. The family of the victim was forced into making a compromise with the accused party. The consequent suicide by the victim brought the case to limelight resulting in widespread outrage. As a result, third parties—mainly lawyers and human rights activists—came forward with a constitutional petition decrying the injustice of the proceedings, arguing that court mandated reformation in the proceedings in rape cases should be undergone. This included mandatory preservation of DNA samples and on camera trial proceedings for rape trials, thus giving victims greater privacy whilst recording their testimony in the presence of female magistrates. The Court closed the case after acknowledging the need for reformations and being placated by governmental assurances that the recommendations would be considered).

Yet in other cases, the Court while exercising its *suo moto* powers, has shown precedence of giving explicit directions to the government and authorities on the reforms required. *See* Press Release, Supreme Court of Pakistan, *CJP Takes Notice of Deficiencies in the Production Processing and Packing etc. of Different Brands of Packed Milk in the province of Sindh and Fix The Matter for Hearing on 13.1.2018 (Saturday) at Supreme Court Branch Registry, Karachi* (Jan. 10, 2018), http://www.scp.gov.pk/files/newspr/PRESS_RELEASE_10012018_1.pdf; *Suo Moto: CJP takes notice of worsening conditions of hospitals in Sindh*, EXPRESS TRIBUNE PAK. (Dec. 24, 2017), https://tribune.com.pk/story/1591427/1-suo-motu-cjp-takes-notice-worsening-conditions-hospitals-sindh/ (to the standard of healthcare in hospitals); *Supreme Court wraps up sun moto notice on appointment of VCs in medical universities*, DAILY TIMES (Jul. 29, 2018), https://dailytimes.com.pk/274793/supreme-court-wraps-up-suo-motu-notice-on-appointment-of-vcs-in-medical-universities/ (appointment of Vice Chancellors in medical universities).

146. *See* Shakeel v. State, (2010) PLD (SC) 47 (Pak.).

147. *Id.*

148. *Id.* (The court found corroboration through medical evidence such as the Chemical Examiner's report, but not a Serologist's report. Instead of the common trend adopted by the Supreme Court in this

employed on the case rather than the Court functioning as an institution to combat biases against female rape victims.

Perhaps even more importantly, the Supreme Court during this time period still endorsed practices and specific criminal procedure laws that are inherently violative of the female rape victims' rights to privacy, liberty, and dignity. Evidence law that allows a man accused of rape or attempted rape to impeach the testimony of a female victim if she has a "generally immoral character"[149] persisted even though the Federal Shariat Court[150] expressly declared it to be unconstitutional and against the injunctions of Islam.[151] Till 2021, the two-finger rape test was still accepted by courts as a valid method of determining the character of a woman, and based upon that, ultimately the validity of her claims,[152] with no discussion seriously undertaken by courts to assess its constitutionality. Medico-legal Examination Certificates, which are written by doctors after the examination of survivors of sexual violence, include provisions that require victims to give statements on oath regarding their psychiatric and sexual history, which is later flouted in trial courts by lawyers of the accused.[153]

The myriad of problems identified in the above legal paradigm thus shows that although the Supreme Court no longer determines cases *solely* on the basis of the delay in filing criminal complaints, assumptions such as the amount of physical violence exhibited on the victim's body and its nexus to consent, or the character of women as shown by the status of her virginity, *together* still drastically reduce the strength of a rape victim's case. Furthermore, the heuristics behind the judgments and dicta of the Supreme Court are laced with assumptions about the societal role of women defined by their relations to the male members of their family, and the preordained destiny decided by the local customs about their futures and value in society. Explicit homage paid to the two-finger rape test and provisions in the evidence law allowed female rape victims' characters to be questioned, and

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era where both Serologist and Chemical Examiner's report are pivotal, the Court held that not doing semen grouping of all the accused persons in the gang rape case was not fatal to the case since it was a "lapse on the part of [i]nvestigating [o]fficer and the prosecutrix cannot be held responsible for it.") This, however, might be because there was independent evidence which proved the rape, including photos and videos of the rape taken by the accused. Thus it is entirely possible that the reason why the court so vehemently and in such clear terms disregarded the allegation that the woman was of "easy virtue" was because of physical visual evidence to the contrary, making the language adopted in this case an exception rather than the rule.

149. *See* Qanun-e-Shahadat Order, (1984), art. 151(4) (Pak.).

150. Muhammad Munir, PRECEDENT IN PAKISTANI LAW 191 (2014) (Federal Shariat Court is a parallel legal court to the Supreme Court created during Zia's Islamization process that has jurisdiction to determine whether any law or provision is unconstitutional on the basis of being Islam. According to Muhammad Munir, the FSC's decisions, "if unchallenged, or even if challenged, but maintained by the Shariat Appellate Bench of the Supreme Court, are binding on the Supreme Court.").

151. Mukhtar Ahmad Shaikh v. Pakistan, (2009) PLD (FSC) 65 (Pak.).

152. Zainab Z. Malik, *It's Time Pakistan Banned the Two-Finger Test for Decoding Consent in Rape Trials*, DAWN NEWS (Dec. 18, 2017), https://www.dawn.com/news/1377364.

153. Hina Hafeezullah Ishaq, *Analysis of Medico-Legal Examination Certificate for Female Survivors of Sexual Violence*, PLD J. (2013), https://pakistanlaw.pk/articles/18/analysis-of-medico-legal-examination-certificate-for-female-survivors-of-sexual-violence.

punished those that deviate from social mores without specifying whether similar scrutiny is applicable to the accused's actions and past sexual history. Though the Supreme Court has made strides in ensuring that the character of rape victims is not explicitly questioned, in practice this progressive precedent is not being followed by trial courts,[154] which are the first courts of remedy approached by rape victims.

The next section briefly attempts to place the judicial discourse within the societal milieu, to both assess the possible construction of spaces within which the current common law assumptions flourished and understand if a reconstruction of judicial discourse is possible.

V. IMPETUS FOR CHANGE IN JUDICIAL DISCOURSE

Notions of "honor"[155] etched on the female body, rather than the loss of bodily autonomy, dignity, privacy, and liberty, are used in common parlance to explicate both the societal impetus that leads to past instances of inevitable rape and prognostication regarding future ones. The vernacular is ultimately disadvantageous due to its less-than-innocuous roots that symbolize honor as an embodiment of male ownership, and its pervasiveness in society as a norm:

> Honor is more a normative than a distant cultural ideal. Honor is not a value that only tribal or feudal cultures are obsessed with but is an integral component of the overall Pakistani personhood; their indivisible, individual selves. Almost Aristotelian, the Pakistani society views women as incidental and not absolute beings, i.e. not really individuals – ultimately placing the onus on men to show how honorable they and their families are . . . [156]

The discourse is thus predicated to view female bodies as sites of evidence of violence that demonstrate whether the sex was consensual or not, the genesis of which is formulated by men. Such an ascription comes at a cost. What factual value, for example, would the statement of a victim of incestuous rape be in a socio-legal paradigm that shows strong predilection to portraying men as inherent protectors of honor?[157]

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154. Adnan Sattar, *The Laws of Honor Killing and Rape in Pakistan Current Status and Future Prospects*, AAWAZ PROGRAMME 34 (2015), https://docplayer.net/43916263-The-laws-of-honour-killing-and-rape-in-pakistan-current-status-and-future-prospects-adnan-sattar.html.

155. *See In-Depth Study on All Forms of Violence Against Women: Report of the Secretary-General*, 30 ¶ 78, U.N. Doc. A/61/122/Add.1 (July 6, 2006) (While some cultural norms and practices empower women and promote women's human rights, customs, traditions and religious values are also often used to justify violence against women. Certain cultural norms have long been cited as causal factors for violence against women, including the beliefs associated with "harmful traditional practices" (such as female genital mutilation/cutting, child marriage and son preference), crimes committed in the name of "honour," discriminatory criminal punishments imposed under religiously based laws, and restrictions on women's rights in marriage).

156. Maleeha Aslam, *Islamism and Masculinity: Case Study Pakistan*, 39 HIST. SOC. RES. 135, 135–49 (2014).

157. Saana Rasheed & Sarah Zaman, WITH AN END IN SIGHT INCEST IN PAKISTAN: A LEGAL & SOCIO-CULTURAL ANALYSIS 21 (War Against Rape 2012), http://war.org.pk/wp-content/uploads/2020/

By coalescing the experiences of all rape victims into specific legal prototypes, those women that subvert societal expectations are effectively punished for challenging the well-entrenched order which demands dominance of one gender over another for its survival and maintenance.[158] The governing principles establishing male-female relationships in the criminal justice system are thus cemented. Women are raped due to an amalgamation of factors which can be accounted for by illiteracy, poverty, local politics, and men acting on their natural urges, but ultimately and overwhelmingly because they are women.[159] Rape, and violence perpetuated primarily by men, is thus understood in this dominant social paradigm as the lamentable normal, and not an anomaly.[160] The reparations offered and solutions posited by that society will ultimately focus on protecting, covering, and hiding the female body rather than punishing or rehabilitating rapists. In order to understand how judicial discourse can be reconstructed to be more gender neutral, the process of its current construction should be examined.

An examination of rape cases tried in the pre-partitioned colonized subcontinent show that assumptions were made against female rape victims whenever they approached the criminal justice system. So, can the present sexist legal discourse be attributed only to Pakistan's marriage with religion in the 1980s? The answer is simply no.[161] The premise that native women were inherently seen as

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12/research-studie.pdf (This paper examined twelve case studies that briefly track the progress in incest cases that WAR handled between 2004 and 2010. These case studies have been developed as narrated by survivors and their support persons within the family. They are presented here to reflect the treatment meted out to incest cases at all levels in the criminal justice system as well as social and psychological problems connected with incestuous abuse.); *see also* Sarah Zaman & Maliha Zia, *supra* note 77.

158. Das, *supra* note 70, at 2420.

159. Hunter, *supra* note 143, at 283; Lynn Welchman & Sara Hossain, 'HONOUR': CRIMES, PARADIGMS AND VIOLENCE AGAINST WOMEN (xi) (Lynn Welchman & Sara Hossain, eds., 2005) (the prototypes of the "ideal female rape victim" and the "ideal" behavior she exhibits upon being subjected to acts of violence is thus systematically constructed and narrowly tailored through judicial discourse developed primarily by through the male lenses, deeply rooted in societal ideas of the place that a female body should inhibit, a deviation from which can prove fatal to a case); Bano Kahn & Gul, *supra* note 12, at 21 (Such prototypes and their replication in cases across the board do more than the occasional harm to individual women who are fighting battles against the personal violation of their bodies. Rather, such neatly designed judicially created categories of what rape victims can essentially be distilled down to, seeks to make it harder for women who do not neatly fit into the prepared category of an ideal rape victim, to access courts and the justice system for redress.).

160. Das, *supra* note 70, at 2420.

161. PRATIKSHA BAXI, PUBLIC SECRETS OF LAW: RAPE TRIALS IN INDIA 64, 66 (2014) (This has been extensively discussed in the backdrop of the social and moral context that dictated the colonial era laws implemented by and during the rule of the British in the subcontinent. Not only were the laws transplanted from the British system, where the underlying policies dictating the laws were aimed at relegating women to the private sphere, where their sexuality could be firmly regulated in order to maintain the social order which depended on the subservience of women, but racist biases against people of the subcontinent were further used to legitimize sexist rape law regimes. According to extensive work done by Pratiksha Baxi, analysis of colonial texts on criminal procedure rules that have still survived show that books on medical jurisprudence also cautioned believing the native woman when it came to rape cases and echoed the concept that the real purpose of the law was not provision of justice to rape victims but "to separate real rapes from fake ones."); Alastair McClure, *Sovereignty, Law, and the Politics of Forgiveness in Colonial India* 38 COMP. STUD. S. ASIA, AFR. & MIDDLE E. 385

dishonest and thus faked rape cases[162] due to greed, misguided notions of preserving family honor when an illicit affair went awry, or to acquire property can be traced back to Pakistan's colonial roots, and remains prevalent in South Asian countries.[163]

Despite the deep entrenchment of these practices in the judicial discourse even before the creation of Pakistan, the zealous Islamization process during Zia's era eroded the efforts made by legislatures and judiciary to leave such common law assumptions in the realm of the past. Martin Lau argues that by using Islam as a foundational concept, even in its misconceived distorted form, the fate of the laws promulgated under it was sealed to be permanent for a considerably long time.[164]

Pakistan's criminal justice system's treatment of rape victims derives some complexity from the intersection of law and the arguably inaccurate historical

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(2018) (The development of this particular form of legal jurisprudence that placed heavy reliance on letting the female body speak for itself, from being prodded and poked into showing physical manifestations of truth of rape to assessments of moral character and honesty made on the basis of sexual history, can also be traced back to assumptions made by entirely male-dominated colonial courts. Colonization ended formally, but repercussions for women remained as the space dominated by them was still strictly relegated to the private homes.).

Elizabeth Kolsky argues that:

> The legacies of colonial rape law have had disastrous consequences for women in post-colonial India and Pakistan. After independence, Indian nationalists chose to retain virtually the entire administrative, judicial and penal structures created by British administrators in the nineteenth century, including the Indian Penal Code and the Indian Evidence Act.

Elizabeth Kolsky, *The Body Evidencing the Crime: Rape on Trial in Colonial India*, 22 GENDER & HIST. 109, 123 (2010). Jaising P. Modi further notes:

> Tests such as the "insertion of glass rods, cones, pipettes, or fingers" were essentially a practice adopted by the British in 19th Century, and the two finger rape test in Pakistan, which involves the insertion of two fingers in the vagina of a rape victim to test the laxity of her walls in a determination of her status as a woman habituated to sex to formulate assumptions that previous instances of giving consent to sex can be used to demonstrate consent in the present case, is a sad remnant of that era. Thus, the idea of women having intercourse was inextricably linked to their morality, and morality to the likelihood of telling a falsehood in a rape case.
>
> Within this theoretical framework thus, the discourse had always been skewered towards overt sexualization of the female body, and using the signs exhibited by it to determine whether rape had occurred rather than focusing on male bodies as violent offenders.

Modi, *supra* note 99, at 337.

162. Kolsky, *supra* note 161, at 123.

163. Khan & Zaman, *supra* note 18, at 31.

164. Lau, *supra* note 39, at 1293, 1298, 1306–07.

Islam was one of the driving forces that led to the formation of Pakistan, the rallying cry used against the British in demanding a separate State, and an inextricable link to its identity as a sovereign nation. Any attempts to repeal it therefore would amount to a repudiation of a core principle that acted as a unifying force in a country that was deeply fractured along social, cultural and ethnic lines. To date, the actual *Zina* Ordinance, though heavily amended to regain some gender balance in rape cases after overcoming multiple hurdles, has still not been repealed.

and present peddling of politically convenient versions of Islam.[165] Cyclical institutionalized systems and social norms use Islam as fodder for toxic masculinity and brutality against women. Thus "[m]en use Islamism and its variants as means of self-actualization and directly in service of matters associated with personhood, masculinity, and particularly honor."[166]

Furthermore, increasing globalization over the years has also contributed to the dominant social narrative[167] in which female subjugation under the guise of implementation of Islamic principles became more palatable:

> Globalization and the introduction of western socio-economic liberal frameworks in postcolonial Muslim societies have certainly played a role in introducing religion-based ultra-conservatism, fundamentalism and orthodoxy in these populations. Globalization patterns deny justice and autonomy to local populations who become increasingly alienated from the systems within which they operate. Societies become more fragmented, i.e. those moving within western ideological frameworks are considered as very productive and useful for society as opposed to those who resist Western influence are immediately labeled as threats to society. The larger segment of population becomes increasingly isolated – labeled as marginalized in social sciences.[168]

This should be seen in conjunction with the effect of poverty in driving some narratives, such as the importance of male honor, more to the forefront than others:

> Issues of self-actualization and feelings of inadequacy often caused by unemployment affect masculine practices in a negative manner. Among Muslim communities, where men are supposed to be qawwam of their household, poverty jeopardizes masculine honor at a subjective and somewhat communal level. The affected man makes attempts to regain his position in the appropriate gender order through acts of violence that are culturally perceived as normative performances of the masculine.[169]

It would be fallacious to argue that dominant social narratives form in isolation or even through the intersectionality of a few extra-legal denominators. The

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165. Muhammad Waseem, *Constitutionality and Extra Constitutionalism in Pakistan*, *in* UNSTABLE CONSTITUTIONALISM LAW AND POLITICS IN SOUTH ASIA 148, 149 (Mark Tushnet & Madhav Khosla eds., 2015).

166. Aslam, *supra* note 156, at 138.

167. Saskia Sassen, *Women's Burden: Counter-Geographies of Globalization and the Feminization of Survival* 53 J. INT'L AFF. 503, 507 (2000).

168. Aslam, *supra* note 156, at 143.

169. *Id*. at 148.

current premise does not fantasize espousing law, and law alone, as a means of enacting social change, or eschewing complex and entrenched socio, political, economical, and religious institutional inequalities, which all contribute to the dominant rape narrative. Words on paper mean nothing if meaning isn't ascribed by the populace. Thus, post-colonial changes to the substantive criminal laws in Pakistan by the legislature, as witnessed over the last few decades or so with the promulgation of a series of progressive pro-women laws,[170] have little chance of creating a dent. The legal paradigm is inherently sexist and the judiciary implicitly reinforces societal values that place blame on rape victims. This paper is thus limited to exploring the capacity of the Supreme Court of Pakistan to change the heuristics it adopts in rape cases, as a means of repositioning the societal value that female bodies have in such cases, without denying that change in social propositions is a necessary corollary.[171]

It is unlikely that the judicial discourse would in reality change to a more gender neutral one on a Supreme Court bench containing members of only one sex. Perhaps more specifically, the Court needs more feminist judges than female judges. Multiple projects undertaken globally, by countries such as the United States, the United Kingdom, Canada, New Zealand, and Ireland have explored the value that diverse feminist perspectives can bring to the evolution of all areas of law—not just criminal law in rape cases—by rewriting pivotal judgments of the Supreme Court of their jurisdiction from a feminist perspective.[172] The result is quite unmistakable, as the rewritten judicial prose, linguistics adopted, heuristics involved, and argumentation all point to a more egalitarian and minority-rights-centered judicial discourse.[173] A similar undertaking in Pakistan could be a game changer in the legal fraternity. Rewriting Supreme Court judgments from a variety of feminist and Islamic schools would demonstrate the academic and

170. *See* PAK. PENAL CODE § 509 (1980) ("Word gesture or act intended to insult the modesty of a woman); PAK. PENAL CODE § 377 ("Unnatural Offences"); PAK. PENAL CODE §§ 354–55 ("[A]ssault or criminal force to woman with intent to outrage her modesty, assault or criminal force with intent to dishonour person"); PAK. PENAL CODE § 366 ("Kidnapping, abducting or inducing a woman to compel for marriage"); PAK. PENAL CODE § 367 ("Kidnapping or abducting in order to subject person to grievous hurt"); PAK. PENAL CODE § 338A ("Forced abortion"); PAK. PENAL CODE § 371 ("[H]uman trafficking"); PAK. PENAL CODE §§ 366A, 366B ("Procuration of minor girl," "Importation of girl from foreign country"); PAK. PENAL CODE § 493 ("Cohabitation caused by a man deceitfully inducing a belief of lawful marriage"); PAK. PENAL CODE § 496 ("Marriage ceremony fraudulently gone through without lawful marriage"); PREVENTION & CONTROL OF HUM. TRAFFICKING ORDINANCE § 3 (2002) ("Punishment for Human Trafficking"); THE PREVENTION OF ELEC. CRIMES ORDINANCE §§ 13, 19, 20 (2009); PROT. OF WOMEN (CRIM, LAWS AMEND.) ACT (2006) § 5 ("[R]ecognition of implicit rape); The Protection Against Harassment of Women at Workplace Act (2010); CRIM. L. (THIRD AMEND.) ACT (XXVI OF 2011) § 3 (2011) (criminalizing marrying a woman forcibly); THE PUNJAB PROTECTION OF WOMEN AGAINST VIOLENCE ACT (2016) (recognition of domestic violence).

171. Eisenberg, *supra* note 143, at 81.

172. FEMINIST JUDGMENTS, *supra* note 143, at 7.

173. *See* Jennifer Koshan, *Impact of the Feminist Judgment Writing Projects: The Case of the Women's Court of Canada*, 8 OÑATI SOCIO-LEGAL SERIES 1325, 1327 (2018); Linda L. Berger, Bridget J. Crawford & Kathryn Stanchi, *Methods, Impact, and Reach of the Global Feminist Judgments Projects,* 8 OÑATI SOCIO-LEGAL SERIES 1215, 1218 (2018).

practical value that female judges at higher positions could bring to legal academics, students, lawyers, and aspiring judges.

Furthermore, though the Supreme Court over the years has arguably liberalized its perspective in rape cases[174] and its precedents have denounced the questioning of character of female rape victims, there seems to be a structural dissonance between the superior judiciary and trial courts. The trial courts still allow defense attorneys to question the character of female rape victims in an attempt to dislodge their testimony.[175] Though courts have held that in criminal cases the law of precedent differs from other legal arenas since "each case [has] to be decided on its own merits"[176] and in accordance with different facts, the present scenario is different.

Here, trial courts, through ignorance or willful disobedience, are actively allowing pervasive and demeaning questions to be flouted in rape trials, and are using them in their reasoning in acquitting.[177] This is despite the explicit precedent laid down by the Supreme Court, which states that such character assessment is irrelevant to the proceedings of, and in determining the outcome of, rape cases. Removal of this judicial dissonance within the institution, a project that can be undertaken by the Supreme Court through regulatory measures, is crucial to developing a narrative that does not rely on past sexual conduct or a socially constructed "character" of female rape victims to dislodge their cases.

CONCLUSION

In 1983, Jehan Mina was convicted of *zina* after she failed to prove that she had been raped and was sentenced to one hundred lashes.[178] On appeal, the Federal Shariat Court reduced the sentence to three years imprisonment by reasoning that she was "of tender age."[179] Scholars cite this as a case representing an anomaly of bad judgment. Meanwhile, Jehan Mina gave birth to a stillborn child and was rendered mute by her experience.[180] The Court no longer views pregnancy itself as a proof of committing *zina* and or as grounds for dismissal—it has evolved. Within this evolution a different Jehan Mina emerges: one whose rape might be recognized within the parameters set by current laws, but whose rape is still seen as a loss of honor rather than bodily autonomy, privacy, and liberty.

The Supreme Court has come a long way. Colonial laws in the pre-partition subcontinent inculcated a deep mistrust of testimonies of native women who

174. Ihsan Yilmaz, *Pakistan Federal Shariat Court's Collective Ijtihād on Gender Equality, Women's Rights and the Right to Family Life*, 25 ISLAM & CHRISTIAN–MUSLIM REL. 181, 186 (2014).

175. Sattar, *supra* note 154, at 29.

176. Haji Muhammad Nazir v. State, (2008) SCMR (SC) 807 (Pak.); Mst. Muhammad v. Ghulam Nabi, (2007) SCMR (SC) 761 (Pak.); See also Munir, *supra* note 150, at 191.

177. Sattar, *supra* note 154, at 29.

178. *See* Jehan Mina v. State, (1983) 35 PLD (FSC) 183, 188 (Pak.).

179. *Id.*

180. Asma Jahangir, *A Law to Lament*, DAWN NEWS (Jun. 5, 2002), https://www.dawn.com/news/1063196.

came forward with allegations of rape. Subsequent scholarship has demonstrated the permeation of this distrust in both the social and judicial discourses of Pakistan. Zia's Islamization process during the 1980s, which eradicated the difference in criminal law between rape and *zina*, certainly did not help victims like Jehan Mina. The common law developed during that time, from the 1980s to 1990s, thus placed excessive importance on a multitude of specific corroboratory evidences to denote whether a rape victim's testimony should be accepted by the Court. Failure at virginity and hymen tests could sound the death knell for prosecution. Victims who did not show visible signs of struggle, or approached law enforcement even the day after being raped were disbelieved in court.

This article has looked at the reported rape cases emanating from the Supreme Court since 2001 to identify trends in the evolution of common law assumptions. That the Court has come a long way since the 1980s is not contested. However, examining the conduct of a female victim and attaching notions of honor to a woman's body are still part of the legal vernacular, and though they are not the sole determining factor in rape cases, heuristics adopted by judges showcase the importance they still retain in the mind of the Court. Though medical evidence such as lack of external signs of injuries, the state of the hymen, delay in filing an FIR, and general assertions against character individually do not warrant a dismissal of a rape allegation, together they can still prove fatal to a case. Where the Court does convict rapists, emphasis within the legal vernacular is placed on defining rape as a crime against male honor and the stigma of shame associated with it, instead of viewing it as a private injury and loss of bodily autonomy and liberty. The importance of societal metamorphosis that reduces incidences of violence against women—of which law is but one component—is not lost here. 2021 has brought forward some hope though, with the banning of the two-finger rape test. But it is high time that the Supreme Court engages in reorienting the judicial discourse to view rape as a crime against personhood, without engaging in non-gender-neutral heuristics to judge cases.