

Sexual Violence and the Law in Pakistan, 2011

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SEXUAL VIOLENCE AND THE LAW IN PAKISTAN

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ABBREVIATIONS

ADB	Asian Development Bank
ATC	Anti-terrorism Court
CIDA	Canadian International Development Agency
CrC	Criminal Cases
CrPC	Criminal Procedure Code
FSC	Federal Shariat Court
SGBV	Sexual and Gender-based Violence
Kar	Karachi
Lah	Lahore
MLD	Monthly Law Digest
MLO	Medico-legal Officer
PCrLJ	Pakistan Criminal Law Journal
PLD	Pakistan Law Digest
PPC	Pakistan Penal Code
PSC	Pakistan Supreme Court
SC	Supreme Court
SCMR	Supreme Court Monthly Review
SHC	Sindh High Court
SV	Sexual Violence
UNICEF	United Nations International Children's Emergency Fund
US	Under section
VAW	Violence Against Women
WAR	War Against Rape
WHO	World Health Organization
YLR	Yearly Law Reports

ABOUT THE ORGANIZATION

War Against Rape (WAR) was founded in 1989 in Karachi, by a group of women associated with the Women's Action Forum (WAF), one of the most prominent and active women's rights group in Pakistan. Back then, the printed media were publishing various reports of dacoits breaking into homes, robbing families and raping the women of the household. Although the robberies were reported to the Police, the families were not reporting sexual assault and rape. The need for an advocacy group against this problem was felt at a time when the Hudood Ordinances, 1979, had made convictions impossible and women reluctant to report rape.

Starting mainly as a pressure group to promote a 'breaking of silence' around rape and demanding the repeal of the draconian Hudood laws, WAR over the years has assumed the position of the sole organization dedicated exclusively to providing specialized services to survivors. Presently, WAR is involved in investigating close to a hundred cases from Karachi each year, which may or may not be reported to the authorities, providing free legal aid to over 20 survivors/families annually and extending psychotherapeutic counselling services. It also has a robust advocacy, capacity-building and awareness-raising component through which it reaches out to communities across Karachi for dialogue on sexual violence, conducts technical and sensitization trainings for police officials, medico-legal staff, judiciary, CBOs/NGOs, media & secondary care-givers, and works toward legal and procedural reforms in relevant sectors.

WAR's Mission

WAR is committed to work towards creating a rape free society. It shall endeavour to work on all social, legal, medical and administrative issues that could help either in the reduction of such acts of violence, or support, facilitate and improve human rights and conditions for survivors.

WAR's Strategic Objectives

- 1) Increase general awareness on and understanding of the issue of sexual violence;
- 2) Strengthen the capacity of stakeholders in responding to the issue of sexual violence, such as but not limited to communities, police (including women police), judiciary, medico-legal personnel, civil society organizations, media, educationists, and different State departments.
- 3) Advocate for efficient and dignified State services for rape survivors (including police and medico-legal support) in Pakistan;
- 4) Research on national laws to determine their impact and policy/ procedural problems affecting women and child survivors of rape in Pakistan;
- 5) Lobby for change in discriminatory policies/ working procedures and laws relating to sexual violence in Pakistan;
- 6) Network with other NGOs, government departments and agencies that have objectives similar to WAR;
- 7) Develop and continually improve an integrated legal support system that provides legal services that are responsive to the needs of rape survivors, free of cost;
- 8) Liaise with media (print and electronic) for the purpose of highlighting case-related problems and gaps in State-sponsored services and for offering legal and sexual rights education to the general public.

ABOUT THE AUTHORS

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Ms. Zia also has various publications and researches to her name including studies on the predicted impact and analysis of the Protection of Women Act, 2006, the independence of the judiciary in Pakistan, Muslim family laws in Pakistan and report on CEDAW related case law in Pakistan.

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PREFACE

The initial idea behind this report was to develop a handbook for lawyers - public prosecutors in particular - and judges, for quick reference on what constitutes sexual offence and related legal provisions and procedures in Pakistan. Little did we realize in the beginning that that idea would develop into a full-fledged research report analysing different areas of law in Pakistan for elements of sexual violence and an opportunity to bringing near-adequate charges in other offenses related to rape and sexual assault. Indeed, it was heartening to see that, if interpreted intelligently and prudently, many areas of the Pakistan Penal Code allow for effective case preparation and litigation in sexual violence cases.

This report is part of WAR's legal literacy project funded by ICCO and the Global Fund for Women. It serves to educate practising and would-be lawyers and human rights defenders on Pakistani laws pertaining to sexual offences. It lays special emphasis on the inadequacies in the Criminal laws Amendments, Protection of Women Act, 2006, and draws attention to other existing laws that may address sexual violence, but are not considered in relation to this issue in legal practice. Its purpose is to question the narrow definition granted to sexual violence in Pakistan's statutes, call for a wider understanding and interpretation of the issue in all its forms in addition to rape, and equip legal practitioners and researchers with knowledge of key legislative, procedural and theoretical issues in trying and prosecuting such cases.

This report is the first of its kind in terms of legal research around sexual violence in Pakistan. It identifies supportive statutes that do not explicitly address sexual violence but may relate to it, and cites case law to support its analysis. It can in no way be taken as an exhaustive study of the present laws that may be said to contain elements of sexual violence. Readers are encouraged to do their own analysis and further their knowledge by conducting similar research in their area of legal interest. Readers are also encouraged to share their findings with the authors of this report and the organization for furtherance of knowledge and understanding.

We hope that you will find this report useful professionally and of general interest. It is our aim that readers and researchers use the contents of this book to further the cause of women and children affected by sexual violence in Pakistan and demand that a fresh perspective is developed in the legal community for sustained improvement in the course of justice.

Sarah Zaman
Editor
Director |War Against Rape

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This report is a publication of War Against Rape (WAR), Karachi. Sarah Zaman, Director for WAR conceptualized this report in 2008, with was later developed and subsequently authored by Maliha Zia Lari, Advocate, High Court. Madiha Riaz and Fizza Tariq carried out the necessary and vital research of Pakistani case law to support this report's analysis and findings.

It has been produced with inputs and suggestions from the Board member of WAR, Barrister Danish Zuberi, as well as Advocate Supreme Court, Mohsin Kayani, and psychologist, Dr. Asha Bedar.

WAR and the authors of this report are grateful to these individuals for contributing their expertise and valuable time which helped shape its content.

The report has been edited by Sarah Zaman, who carried out the task of fact-checking as well drafting some sections of the report.

INTRODUCTION

Sexual violence against women and minors is endemic across Pakistan. It is also the least reported forms of violence against women, where adverse conditions for survivors keep a good 60% to 70% women from initiating any engagement with the law and its instruments¹. In any given year, cases of sexual violence against women and children are reported in thousands, with a recent increase in child sexual violence across the country. A recent study by the Aurat Foundation suggests that as many as 8 women, half of them minor, are raped everyday in Pakistan.² A report³ by Sahil on child abuse in Pakistan published in 2011 estimates that 2,252 cases of child sexual abuse were reported all over Pakistan in 2010. It is therefore important to contextualize this report to include considerations for the most vulnerable sections of society after women: children.

A Factsheet published by WAR in 2011, claims that the average age of rape survivors in Karachi has fallen from 18 years over the last three years to 13 years till mid-year 2011. The organization has been voicing concern over the increasing frequency in child rape, where many children, some as young as 3 years have been raped and killed by the attacker(s). The statistics, as shared by WAR in a press conference in 2011 are included as appendices at the end of this report.

Of the cases that do get reported, a much smaller fraction enters the legal system through representation in courts. According to data collected and compiled by WAR since 2004 on reported cases in Karachi, one-thirds to two-thirds cases are never *challaned*⁴ in courts, suggesting that they are disposed by investigating authorities as either non-cognizable⁵, falsely reported or exaggerated claims. These figures have also been included in the appendices.

Although according to the data collected over seven and a half years from Karachi depicts a generally declining pattern in reported cases of rape, experts at WAR suggest that this is not due to an actual decline in the incidence of sexual violence but rather an increased unwillingness in women to report. Additionally, the data reveals that not all cases accessing health services at medico-legal services would enter into active litigation against rapists.

In cases where there is active litigation, substantive laws, procedural shortcomings and an intimidating and insensitive court environment further push a substantial 20% cases to settle matters out-of-court. Cases that stay in the system till a verdict is reached are further thwarted by acquittals with the accused extended the 'benefit of the doubt' due to lack of independent corroborative evidence. It is noteworthy, however, that very few examples can be found of police officers being charged with dereliction of duty in their failure to investigate impartially and efficiently or with obstruction of justice due to incompetence.

Additionally, as the maximum sentence in gang-rape is the death penalty, convictions are even harder to secure. WAR estimates that the conviction rate in rape cases in Karachi is between 2 and 4 percent⁶.

¹ War Against Rape (WAR) estimates.

² *Gender-Based Violence Against Women: A Scoping Study*; January 2011; Rakshanda Parween.

³ *Cruel Numbers*, Sahil, 2010

⁴ *Challan* is the charge sheet submitted by the police in courts, prior to the commencement of a trial.

⁵ CrPC clause 157(b): *Procedure where cognizable offence suspected*: Where police officer in charge sees no sufficient ground for investigation, if it appears to the officer in charge of a police-station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

⁶ WAR Report: *Successful litigation between 2006 and 2008*; 2009

In order to gain a better understanding of these trends, it is necessary at this juncture to briefly explore social, economic and cultural factors that exert an influence on Pakistan's legal system, leading to a low conviction rate and deterring women from reporting crimes committed against them. Most of these factors hold true for other forms of violence against women as well.

Legal System of Pakistan and the Impediments to Accessing Justice

The Pakistani criminal justice system is riddled with a multitude of problems and challenges that make justice elusive for litigants. Adopted from the laws of commonwealth countries, some laws are arguably archaic, while statutory interpretation in violence against women laws is precariously limited. The antiquity of these laws often renders them ineffective in addressing emerging crimes, resulting from a changing socio-cultural milieu, for example, cyber crimes such as cyber stalking and the dissemination of pornographic material through cellular phones.

In Pakistan, it is generally difficult for a person to access justice. Besides the high concomitant costs of litigation, particularly if a private council is engaged, protracted trials are the proverbial straws that break the camel's back. Towards this end, the National Judicial Policy Making Committee of Pakistan (NJPMC) developed and passed the National Judicial Policy in June 2009, whereby special attention was given to delays and backlogs resulting in increased pendency of cases at all tiers of the judiciary. The Policy also applies to rape cases which are expected to be disposed in a year's time. The reality, however, is far from this idealism. The Policy, in fact, has faced serious criticism from senior lawyers from across Pakistan for adversely affecting the quality of judgements handed down through hasty trails.

In economic terms, it is almost equally difficult for men and women to go through the litigation process without putting strains on their employment arrangements and financial resources. Widespread poverty is a major deterrent as litigants often need to sacrifice a day's wage in order to make court appearances. Women are more disadvantaged economically, due to lower wages and traditionally having a lesser say in the allocation of the family's resources. This problem is aggravated in cases of minors, where they may be no wish by the guardian to initiate legal proceedings, much less devote resources to it.

Although public prosecutors are assigned to aggressed litigants by the State, the counsel's capacity, knowledge, attitude and skill are often a source of aggravation for plaintiffs. As most public prosecutors practicing at all tiers of the criminal justice system are men⁷, the intricacies of trying sexual violence cases and the realities of women affected by it are often undermined. Feminist jurisprudence is replete with literature exposing the extent to which laws' supposed objective norms reflect male intentions and points of view.⁸ The insensitivity displayed towards the needs of clients can be traced to the fact that human rights law is not offered as a compulsory subject but rather as an optional course in Pakistani law schools at the graduate level. It becomes mandatory in post-graduate studies. It is then not inaccurate to assume that most public prosecutors practising at the lower courts and who hold an LLB degree have had no prior coaching on human rights principles and how to apply those principles to practice. There are also no proper processes in place to ensure transparency and proper monitoring of the professional conduct of public prosecutors.

⁷ WAR *Factsheet, 2010*: As of January 2010, there was a marked imbalance between women and men public prosecutors and judges at the lower and high courts in Karachi. There were a total of 10 (12%) women public prosecutors as opposed to 73 men, and 77 male judges as opposed to 31 (29%) females. There are 28 seats for judges at the Sindh High Court; presently all officiated by men.

⁸ *Feminist Jurisprudence, Women and the Law: Critical Essays, Research Agenda and Bibliography*; Taylor, Rush, Munro; Fred B. Rothman Pub., 1999, New York.

Additionally, there are no state departments that have the capacity to impart pro bono legal services to a substantial number of cases en masse, leaving litigants at the mercy of ill-equipped and often insensitive lawyers.

Women and children are more disadvantaged in terms of accessing the dispensing instruments of the law. Women are often wary, if not fearful of going to police stations to file a complaint. This fear is not unfounded as the investigation procedures, attitudes and general treatment by investigating officers and even those filing the First Information Report (FIR) is purportedly intimidating, biased and sometimes antagonistic. Numerous cases of custodial violence reported across the country each year validate these fears. Having intervened directly in hundreds of cases at the reporting stage, WAR has had extensive exposure to the adverse handling of cases of violence against women, particularly rape and domestic violence at the local police stations by insensitive and prejudiced police officers.

Judgment calls on the veracity of the complaint at this level dissuade women from going any further. Also, restrictions on women and children's movement in public spaces by male members of the household mean that not only would a survivor have to solicit permission and seek advice from the males and elders of the house, s/he would also have to divulge details and take them into confidence for their continued support. In the event that a woman or child is able to get a formal complaint lodged with the Police, the ensuing investigations and evidence collection are flimsy, clumsy and partial.

Past the reporting stage, the courts are marred with mayhem without proper waiting areas for litigants and discomfort from long hours spent waiting. Custodies of the accused are often brought in front of the aggrieved, creating an intimidating and hostile environment. Cases have been reported in the lower courts of Karachi where the complainants hurled shoes at the accused, and defendants turning hostile towards survivors with death threats made inside the court rooms. Indeed, there have been cases reported where irate husbands killed their wives from attempting to seek a divorce inside or en route to courts.⁹

The process of litigation, besides being protracted, is a source of tremendous burden and trauma for survivors. Working with loosely enforced ethical guidelines and discriminatory laws, the stages of cross-examination and examination-in-chief are particularly painful, where the defence may proceed to show that a survivor is of general 'bad moral character', thereby shifting the blame for the offence onto the aggrieved¹⁰. Herein lies the dichotomy of a supposed neutral legal system. While courts may assume that 'no one asks to be robbed' in robbery cases, a woman may be 'asking to get raped', through certain actions, clothing or disposition. It is not uncommon to see rape trials decent into a trial of someone's personality, whether it is the prosecutrix or the defendant.

Proceedings become more traumatic if the prosecutrix's actions prior or subsequent to the offence do not fit the 'scripts' or the 'ideal patriarchal tale' of lawyers and judges who may have fixed ideas of how s/he should have acted before, during and after the assault¹¹. As the courts are male-dominated, there is no accounting for the behaviour differentials between male and female survivors or adult and minors. These scripts, prejudicial as they may be, often filter into judgements, causing moral values and beliefs to influence verdicts.

⁹ <http://zamaswat.com/en/2011/10/01/husband-kills-his-court-bound-wife-at-char-bagh/>

¹⁰ Law of Evidence, 1984, clause 151(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".

¹¹ Law of Evidence, 1984, clause 21(j); "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...".

Sexual Violence in the Socio-cultural Context

All offences under the law have legal as well as social construction. The latter is truer with cases of sexual violence, as survivors of these offences are less likely to be believed than those of any other criminal offence for example, robbery, murder or car theft. Professor Morrison Torrey, in her book, *When Will We be Believed: Rape Myths and the Idea of Fair Trial* writes:

“Jurors will even distort and twist evidence until it becomes consistent with their attitudes. These fundamental premises that jurors bring with them to the courtroom are what psychologists call “cognitive structures.” While cognitive structures allow individuals to learn new information, they tend to perpetuate themselves by screening out information that is inconsistent with what is already believed. Cognitive inflexibility is what prosecutors face in trying to convict rapists when jurors have cognitive structures based on rape myths. Jurors will strive to reach a verdict in a rape case that will not conflict strongly with the rape myth cognitions they hold at the beginning of the trial.”¹²

Due to the lack of a social construct and acceptance of these acts as crimes as opposed to ‘things that just happen’, connection to the illegality and criminality of sexual abuse and violence is often not made by the criminal justice system or for that matter, society at large. The criminal justice system’s responsibility to be fair, impartial and just becomes redundant in the face of a pervasive inclination to believe that women are pathological liars who concoct stories or make slanderous and exaggerated claims to implicate innocent men; believes fuelled by the numerous myths attached to rape and survivors themselves.

The credit for this judicial tendency can be traced back to the legal tradition set by British laws under the 17th century English jurist, Mathew Hale, who said that rape is a charge “which is easily made and, once made difficult to defend against, even if the person accused is innocent”. This is often referred to as the *Hale warning* and cautions the judiciary to try rape cases with utmost skepticism and was routinely read out to the jury before they went to deliberate the innocence or guilt of a defendant charged with rape. This wasn’t done for any of the other cases appearing before the jury and court of law in England. This tendency has been absorbed into Pakistan court proceedings in sexual violence cases by default, after gaining independent from the British India in 1947.

The justice system in Pakistan is also highly influenced by historic cultural and religious factors which dictate its social and moral order. The result is an overlap and interplay between these with the law supporting and perpetuating the social and moral order so established. This is essential to recognise within the context of law and women, as all the interpretations of culture and religion have been historically male-dominated.

The social and moral order of Pakistan thus perpetuates inequalities between men and women. The basis of men’s ‘superiority’ over women is based on two concepts: the ‘commodification’ of women and men’s honour.

The patriarchal elements in Pakistani society often attempt to place women within a certain sphere based on gendered roles: the role of a caregiver; the role of a reproducer; the role of a mother, a sister, a wife and a daughter.

The first concept is based on men’s ownership of women. This is based on a patriarchal system’s obsession with the idea of patrilineage¹³ i.e., ensuring protection and/or ownership of the women’s womb. The woman’s only asset is considered to be her reproductive capability and as an object of sexual desire. Thus, these ‘assets’ need to be protected and this

¹² Morrison Torrey, *When Will We be Believed: Rape Myths and the Idea of Fair Trial*, 24 U.C. DAVIS L.REV. 1013, 1050 (1991).

¹³ *Beyond Honour*, Tahira S. Khan, Oxford University Press; P 45.

duty falls upon the men, resulting in the perception that men hold the rights over women's sexuality, including the right to decide whom she marries.

Men therefore are tasked with the duty to ensure their women do not 'misbehave' and act in accordance with the norms of society. A man will only be considered 'respectable' and 'honourable' if he is able to control the sexual behaviour of his wife, daughters, sisters and even mother, and their value as men depends on the 'virtue' of the women in their lives. This results in an obsessive control over women in terms of their movement, their interactions with people, especially other men, and their freedoms. If any harm does befall upon a woman, the blame lies on her for being at the wrong place at the wrong time, not fighting back enough, etc; the society and legal systems are usually sympathetic to the family and the men and see it as their tragedy rather than a heinous act of violence of which the main victim is the woman herself. Ironically, despite the importance given to women's sexuality, it is not considered acceptable to bring it out in the public realm. Much like everything else related to women in Pakistan, any infringement on a woman's sexuality is considered to be private matter, meant to be dealt with away from the public eye and the courts. To publicize that a woman in a family has been 'soiled' could have severe repercussions on the family's honour and cause an immense amount of shame to the family, community and the victim.

Bearing this background in mind, when one examines the response of the justice system in Pakistan to sexual violence, it is clear that the lines between law, justice, culture and religion are often blurred. This interplay manifests itself in the inability to enact women-friendly laws, enactment of incomprehensive legislation and its subsequent interpretation and enforcement. This point will be demonstrated later in this report. It should also be noted that laws that attempt to control and regulate sexuality, both overtly or covertly, are political in nature as they reveal the uneven distribution of power within society and expose the contradiction that accompanies the idea of equality before the law¹⁴.

¹⁴ "Moral Panic: The Criminalization of Sexuality in Pakistan", talk by Hooria Khan.

WHAT IS SEXUAL VIOLENCE?

There are several forms of violence against women (VAW) practiced throughout the world, and while many of these overlap, they have distinct characteristics making each type of violence unique. There are a number of underlying social factors that are common to these acts, which include the perpetuation of certain social orders and cultural norms; the victim's or perpetrator's socio-economic standing and political affiliations; physical and social environment within the home or community; and the substantive laws, policies and legal instruments of the country. What differentiates sexual violence from other forms is that the main motivation is to humiliate, dominate and exert control over the victim.

The World Report on Violence and Health¹⁵ provides a definition of sexual violence that is now widely used and offers a useful conceptual framework. Sexual violence is defined therein as:

"Any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting including but not limited to home and work.

This definition includes rape, defined as the physically forced or otherwise coerced penetration of the vulva or anus with a penis, other body part or object – however the legal definition of rape may vary in different countries."

In the most basic terms, sexual violence can be defined as a wide array of non-consensual sexual activities, with the use of physical or emotional force or to engage in abusive sexual contact, which may be perpetrated by partners, friends, family, acquaintances, or strangers.¹⁶

The World Health Organization (WHO) definition is often quoted in reports and publications pertaining to VAW. The definition of 'coercion' is expanded to include a whole spectrum of degrees of force, apart from physical force, including psychological intimidation, blackmail or other threats, or when the person aggressed is unable to give consent for any reason.

Sexual violence against women manifests itself in a number of different forms. While the most commonly recognised form of sexual violence is rape, it consists of a wide variety of acts ranging from child sexual abuse, incest, exhibitionism, voyeurism, obscene phone calls, fondling, sexual harassment¹⁷, ridiculing a woman to try to limit her sexuality, controlling her reproductive choices, withholding sexual activity in an attempt to punish or hurt her, and *pathologizing* or treating women as immoral or sinful for expressing sexual needs or desires¹⁸.

The most common internationally recognised forms of sexual violence have been identified in the following section with the intention to provide a substantive understanding of variations within the broad category of sexual offences. An appreciation of all forms is essential for the re-interpretation and satisfactory application of existing laws in Pakistan to situations of sexual violence.

Different Forms of Sexual Violence

Although the different forms of sexual violence may overlap in a number of ways, each is distinct and can be differentiated on the basis of not just the acts themselves, but also the

¹⁵ Heise & Garcia-Moreno, 2002; Jewkes, Sen & Garcia-Moreno, 2002.

¹⁶ *The Facts About Sexual Violence*: <http://www.vaw.umn.edu/documents/inbriefs/sexualviolence/sexualviolence.html>

¹⁷ *Islam and Muslims Oppose Violence Against Women: A Guide for Muslim Women*, Islamic Women's Welfare Council of Victoria, 2010.

¹⁸ Ibid

context, severity and circumstances involved, e.g., marital rape as opposed to stranger rape, where the primary difference is the relationship between the perpetrator and the aggressed. In addition to the actual acts of violence themselves, there also fall within this definition a number of other actions which can be considered 'preparatory' offences. These are acts done as preliminary steps and in preparation of the commission of the major crime. This could include conspiring to kidnap or inciting a woman or child to perform a sexual act, procuring a drug to disable the victim, and wrongfully confining someone with the intention to commit an act of sexual violence. If people, other than the main perpetrator are involved in any preparatory acts, they would also be liable as aiders and abettors.

This chapter attempts to identify the most prevalent forms of sexual violence. While the wordings of the definitions may change from country to country or state to state, the overall meaning and intention behind the words remains the same.

Rape

Rape refers to forced sexual intercourse against a person's will and/or against her/his consent. It is physically forced or otherwise coerced penetration – even if slight – of the vulva or anus, using a penis, other body parts or an object. The attempt to do so is known as attempted rape. Rape of a person by two or more perpetrators is known as gang rape¹⁹. It is a violent, hostile assault that a person commits to dominate, overpower and humiliate the aggressed. It is an act of exerting power and control.

Rape may or may not involve actual overt violence. A person can be raped if she/he is coerced into performing a sexual act²⁰. Coercion may take a variety of forms. It may involve physical force, threats of bodily harm, financial deprivation or dire consequences. A common feature of this coercion is the abuse of power to subjugate the victim. Categories of rape²¹ can include *marital/partner rape*, when the perpetrator is the individual's current partner (married or not), previous partner, or co-habitator; *acquaintance assault* which involves coercive sexual activities that occur against a person's will by means of force, violence, duress, or fear of bodily injury and is committed against them by someone they know (a friend, relation, or acquaintance); *stranger rape* is when the perpetrator is not known to the victim; and *systematic rape during war*, where rape is used as a weapon of war, whether to spread fear or as a tool for ethnic cleansing.

Sexual assault

This is any act, attempt, or threat of force of unwanted sexual contact that stops short of rape or attempted rape²². This includes sexual touching and fondling (but, be aware, some use this term interchangeably with rape). Perpetrators can be strangers or intimate partners (husband, fiancé, boyfriends) or even family members.

This can include what is defined as *date violence*, as well as, *domestic violence*. These occur in all socio-economic, ethnic, racial, and age groups. The issues of power and control are at the heart of family violence. The batterer uses acts of violence and a series of behaviours to gain power and control. Examples of such behaviour include intimidation, threats, isolation and emotional abuse²³.

¹⁹ *World report on violence and health*, Volume 1, Etienne G. Krug, World Health Organization.

²⁰ *Definition of Key Terms*, Rozan, <http://rozan.org/content/view/49/68/>

²¹ <http://www.commerce.wa.gov/site/261/default.aspx>

²² <http://www.womenagainstviolence.org/Overview.asp?sid=93455%3A1%2F21%2F2011+3%3A10%3A39+AM&source>

²³ Rape, Abuse & Incest National Network; <http://www.rainn.org/get-information/types-of-sexual-assault/drug-facilitated-assault>

Sexual harassment²⁴

Unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature in which submission to or rejection of such conduct explicitly or implicitly affects an individual's productivity or creates an intimidating, hostile, or offensive work or school environment.

Voyeurism

This is defined under different international laws as watching a person engaged in a private act for the purpose of sexual gratification, where the person being observed does not consent to being observed for that purpose.²⁵

Exhibitionism

Compulsion to reveal a body part, often one's genitals, to an unsuspecting stranger.²⁶

Sexual Photography

Taking photographs of sexual nature without the consent of the subject(s) and/or public display of images taken in private without the subjects' consent.²⁷

Forced Marriage or Co-habitation

A forced marriage is a "union of two persons, at least one of whom has not given their full and free consent to the marriage"²⁸

Denial of Rights of Bodily Integrity²⁹

Denial of right to use contraception or to adopt other measures to protect against sexually transmitted disease. Other examples could include forced abortions³⁰.

Violent Acts Against the Sexual Integrity of Women³¹

This could include female genital mutilation³², obligatory inspections for virginity and customary practices such as marrying women to the Quran.

Child Sexual Abuse

Child Sexual Abuse is any situation in which an adult or another child threatens, forces or manipulates a child into sexual activity. Physical force is not necessary as often the offender will take advantage of their position of trust and authority.

Child sexual abuse can include exposing a child to pornography, fondling the sexual parts of a child's body, making a child engage in sexual activity with others, and sexually penetrating a child, orally, anally or vaginally with the penis, hand or any object. Incest is intercourse or touching of sexual parts between an adult family member and a child or between siblings.³³

Incest

Incest is where sexual contact between persons who are so closely related that their marriage is illegal (e.g., parents and children, uncles/aunts and nieces/nephews, etc.). This usually takes the form of an older family member sexually abusing a child or adolescent.³⁴

²⁴ <http://www.commerce.wa.gov/site/261/default.aspx>

²⁵ Section 162, Criminal Code of Canada, 2006'; Section 91, Crimes Act 1910 of Australia; Revised Penal Code of Washington

²⁶ Violence Against Women Online Resources, 2010, <http://www.vaw.umn.edu/documents/inbriefs/sexualviolence/sexualviolence.html>

²⁷ Violence Against Women Online Resources, 2010, <http://www.vaw.umn.edu/documents/inbriefs/sexualviolence/sexualviolence.html>

²⁸ European Parliamentary Assembly Resolution 1468 "Forced Marriages and Child Marriages" (2005)

²⁹ World report on violence and health, Volume 1, Etienne G. Krug, World Health Organization

³⁰ Ibid

³¹ Ibid

³² Ibid

³³ Officer of Crimes Victims Advocacy, Commerce, <http://www.commerce.wa.gov/site/261/default.aspx>

³⁴ Rape, Abuse & Incest National Network, <http://www.rainn.org/get-information/types-of-sexual-assault/drug-facilitated-assault>

Child Abuse

Any act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse, or exploitation, or an act or failure to act which presents an imminent risk of serious harm to a child.³⁵

Sexual Exploitation by a Helping Professional

Sexual contact of any kind between a helping professional (doctor, therapist, teacher, cleric, professor, police officer, lawyer, etc.) and a person.³⁶

Forced Prostitution and Trafficking of People for the Purpose of Sexual Exploitation³⁷

The term Forced Prostitution refers to the process of coercing women, men, children to exchange sexual services for money or other payment against their will. Individuals can be threatened with violence and/or sexual abuse, falsely imprisoned, held through debt-bondage, or in other ways coerced; The 'owner', exploiter or 'pimp' will sometimes split the revenue from the sexual act with the prostitute, sometimes simply offer the prostituted individual a minimum by which to live³⁸.

Prostitution and trafficking are sexual offences that result in economic profit for perpetrators. Described by survivors as "paid rape," prostitution provides buyers (johns, tricks, dates) constant sexual access to women and children.

Trafficking is a direct result of cultural and economic forces which sweep a woman or child into prostitution including not only coercion, manipulation, deception, initial consent, and family pressure but also past or present family and community violence, economic deprivation, racism, and conditions of inequality between the sexes³⁹. Since pimps/traffickers move people to wherever they are sold for sex, a better definition of trafficking would include movement of people within a country as well as across international borders for the purpose of sexual exploitation.

Stalking

Legal definitions vary on the definition of stalking but it is generally described as wilful, malicious, and repeated following and harassment. Stalking is a pattern of repeated, unwanted attention, harassment, and contact. In general it is a course of conduct that can include:

- Following or laying in wait for the victim;
- Repeated unwanted, intrusive, and frightening communications from the perpetrator by phone, mail, and/or e-mail;
- Damaging the victim's property;
- Making direct or indirect threats to harm the victim, the victim's children, relatives, friends, or pets;
- Repeatedly sending the victim unwanted gifts;
- Harassment through the internet, known as cyberstalking, online stalking, or internet stalking; and
- Securing personal information about the victim by: accessing public records (land records, phone listings, and driver or voter registration), using internet search services, hiring private investigators, contacting friends, family, colleagues, or neighbours, going through the victim's garbage, following the victim, etc.⁴⁰

³⁵ CAPTA Reauthorization Act of 2010 (P.L. 111-320), § 3., quoted from Child Welfare Information Gateway, www.childwelfare.gov/systemwide/laws_policies/statutes/define.cfm

³⁶ Rape, Abuse & Incest National Network, <http://www.rainn.org/get-information/types-of-sexual-assault/drug-facilitated-assault>

³⁷ *World Report on Violence and Health*, Volume 1, Etienne G. Krug, World Health Organization

³⁸ Sex work and Sexual Exploitation in the European Union, <http://people.exeter.ac.uk/watupman/undergrad/aac/index.htm>

³⁹ "Prostitution and Trafficking of Women and Children from Mexico to the United States", Marisa B. Ugarte, Laura Zarate, and Melissa Farley, *Journal of Trauma Practice* (2003) 2 (3/4): 33-74; Also appears in: Farley, Melissa (ed) (2003) *Prostitution, Trafficking, and Traumatic Stress*. Binghamton: Haworth Press.

⁴⁰ National Center for the Victims of Crimes, 2000

Drug Facilitated Assault

This is when drugs or alcohol are used to compromise an individual's ability to consent to sexual activity. In addition, drugs and alcohol are often used in order to minimize the resistance and memory of the victim of a sexual assault.⁴¹

Hate crime

Hate crimes are defined as the victimization of an individual based on that individual's race, religion, nation of origin, ethnicity, gender, or sexual orientation.

Acts of such crimes include rape, sexual assault, physical assault, verbal or physical harassment, vandalism/robbery and attacks on homes or places of worship.

While any targeted group can experience rape and sexual assault as a form of hate crime, women are one of the most noted victims of this particular form of hate crime. Many believe that all violence against women, including rape and sexual assault, is a hate crime because it is not simply a violent act, but is "an act of misogyny or hatred for women".⁴²

Spiritual and Religious Abuse⁴³

This is a form of abuse uses religion to justify, legitimise and normalise abuse and violence.

Examples of religious or spiritual abuse include:

- using religion to dominate, exercise authority and claim superiority for one person in a relationship with another
- using religious or spiritual beliefs to manipulate
- preventing someone from practicing her/his religious or spiritual beliefs
- ridiculing a person's religious or spiritual beliefs
- labelling a person as ungodly or irreligious if they do not do everything the other demands
- forcing children to be reared in a faith that the mother has not agreed to

Examples specific to Pakistan include using religion as justifications for not allowing women access to contraception for birth control and birth spacing, denying them health care at the post-abortion or post-miscarriage stage, marriage to the Quran, and acceptance of domestic violence.

In fact, spiritual and religious abuse leads women to believe that any of the forms of family violence listed above are acceptable and sanctioned by their religion.

Sexual Torture

This is a relatively new concept in the discourse on sexual violence. Torture is defined in the International Convention on Torture (ICT) as:

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". (Article 1)

In general, 'torture' would include methods such as severe beatings, electric shock, prolonged solitary confinement, near drowning, and near suffocation. It also includes within its ambit, psychological torture.⁴⁴

⁴¹ Rape, Abuse & Incest National Network, <http://www.rainn.org/get-information/types-of-sexual-assault/drug-facilitated-assault>

⁴² Copeland & Wolfe, 1991

⁴³ "Islam and Muslims Oppose Violence against Women: A Guide for Muslim Women", Islamic Women's Welfare Council of Victoria, 2010

⁴⁴ "Sexual torture and CIDT of women by State-agents", Asian Legal Resource Centre, 11-11-2002

The concept behind the term 'sexual torture' is that women are often subjected to other forms of severe abuse that qualifies as torture, cruelty and/or inhuman and degrading treatment and punishment.

SEXUAL VIOLENCE IN THE LEGAL CONTEXT

Implementation of Law in Pakistan

There are three elements of law: the substance (the text), the structure (who dispenses it and how it is applied, e.g. the police, medico-legal officers, and the judiciary), and the culture (the attitudes, values and other socio-cultural determinants). All three of these carry equal importance in providing substantive or equitable justice to the aggrieved.

The Substance

A legal system may give recognition to an issue by legislating on the matter, thereby, bringing it under the laws of the country, defining and stating certain acts to be illegal or unlawful and setting punishments for the offender. This is a formal acceptance of an issue. As discussed above and will be demonstrated later, there is to a certain extent, substantive recognition of sexual violence under the laws of Pakistan through different legislation including the Sexual Harassment Act 2010, the Protection and Prevention of Trafficking Ordinance 2002, provisions of the Pakistan Penal Code 1860, the Anti-Terrorism Ordinance 1997, and more recently, the Anti-women Practices Act, 2011.

The Structure

One of the duties of the courts is to take legislation and apply it to situations that come before it. However, the onus of interpretation of law does not lie purely on the judges. This responsibility also lies upon lawyers by bringing before the court, creative legal arguments and discussions in order to allow the judge to adjudicate on matters and enhance the interpretation of the law based on these arguments. This gives the judge room to exercise a certain amount of ingenuity in their interpretation of the laws and give fitting rulings.

As identified above, this is a key issue facing Pakistan's criminal justice system at this point in time, where both the lawyers and judges are either unwilling or unable to exercise this space thus emasculating the issue of sexual violence.

There are, however, exceptions to the rule, and credit must be given to judges and lawyers who have indeed tried to do exactly this. Unfortunately, such lawyers and judges are few in number.

The Culture

The culture of the criminal justice system includes the attitudes, belief systems, behaviours and value judgements of the people affiliated with it, including the police, medico-legal officers, lawyers and judges. Even if policies, procedures and laws have been explicitly laid down, the attitudes and values dictate how these are implemented. Sensitive handling of cases can improve chances of a quicker recovery and help alleviate some of the trauma survivors of sexual violence may be suffering from.

Pakistani Case Law on Sexual Violence

For the purpose of this report, an evaluation of reported case law was undertaken to gain an understanding of how the courts have dealt with sexual violence cases in the past. A number of over-arching themes were identified:

Firstly, reported cases usually involve situations where extreme violence has occurred e.g., acid burning, gang rape, aggravated sexual assault or rape and murder. Few of the reported cases deal with any of the non-extreme forms of violence such as voyeurism or eve teasing. Therefore, it is noted that 'lesser' forms remain ignored and unrecognised whereas sexual violence is only acknowledged in its most brutal forms.

It has also been observed that recently, Pakistani courts have passed some landmark judgements in cases of rape and not allowed perpetrators the usual impunity that could be witnessed earlier⁴⁵. However, it must also be pointed out that extremely negative judgments, such as that in the Mukhtaran Mai case⁴⁶, are expected to set particularly negative precedents for future litigation involving gang rape and rape.

Secondly, reported cases are few in number, which makes finding relevant case law difficult. There are a variety of reasons for this, some of which have already been discussed under impediments to accessing justice.

The Principles of Statutory Interpretation⁴⁷

While the main function of the judiciary is to implement laws that have been passed by the Parliament, it also has the power to expand the scope of laws to fit a variety of situations that come before it. Indeed, as no two cases represent the same set of facts, laws are deliberately kept broad to allow the judiciary to take into account the uniqueness of each case. This takes the form of statutory interpretation or construction.

Legislation usually involve an 'inescapable measure of uncertainty', which can only be addressed through judicial interpretation. It is in the interest of fairness and justice for courts to apply relevant legislation to the facts of a case. In fact, courts will often go to great lengths to determine the true meaning of a statute. Statutory interpretation then is an essential role of the judiciary which ensures that every offence or charge is addressed through legislation and prescribed appropriate penalties and punishment.

Some basic principles have been established in Pakistani law over time that accept that a court of law is not authorized to alter the language of a statute for the purpose of supplying a meaning, yet in certain circumstances it is permissible for the courts to give effect to the true and patent intention of the law-maker. It is also permitted in some cases to supply the omission in order to avoid doing a manifest injustice. An interpretation of law which leads to manifest absurdity or injustice should, however, be avoided.

While it is the duty of the court to fill in the gaps in legislation, the interpretation must be in line with the object and intention of a statute and placed within the context of the whole legislation and not in isolation. It is important that the spirit of the law be maintained in order to make it meaningful. It is this spirit of law that gets precedence over hyper-technical reliance upon literal statutory provisions.

⁴⁵ 2011 PCrLJ 1443 FSC; 2010 PLD 47 SC

⁴⁶ 2011 PLD 554 SC

⁴⁷ This section has been drafted with reference to "The English Legal System", 8th Edition, Slapper and Kelly; 2007 PLD SC; PLD 2003 Lahore 138; 2001 SCMR 664; PLD 1989 SC 128; PLD 1996 SC 324; PLD 1999 SC 57; PLD 2000 SC 111; 2002 SCMR 250; PLD 2006 SC 602; Reference No.2 of 2005 by the President of Pakistan (Hisba) PLD 2005 SC 873; 2001 SCMR 103; PLD 1964 Dacca 756; PLD 1962 Lah. 878; PLD 1964 Lah. 101; PLD 1965 Pesh. 65; PLD 1961 SC 119; PLD 1972 Kar. 421; PLD 1973 Lah. 114

The following sections of this report will attempt to do exactly this: provide options for a re-interpretation of Pakistani laws which may indirectly address sexual violence and that may be used by the Police to register all relevant charges, by lawyers to prosecute on all counts and by the judiciary to give fitting judgements.

THE RECOMMENDED INTERPRETATIONS **OF PAKISTANI LAWS TO INCLUDE** **SEXUAL VIOLENCE**

As discussed above, there exist a number of legal provisions and acts that deal directly with situations of sexual violence against women. The current regime of law in Pakistan deals with offences against the person primarily under the Pakistan Penal Code (PPC). Accordingly, even recent pro- women legislation such as the Protection of Women Act 2006 and Criminal Law (Amendment) Act 2004 have primarily consisted of amendments and additions to the PPC and the Criminal Procedure Code 1898 (CrPC). In addition to these provisions in the PPC and CrPC, there are provisions in a number of other laws such as the Anti-Terrorism Act 1997 and the Child Marriage Restraint Act 1929, which address sexual violence.

This section identifies the existing provisions of law relating to sexual violence. The provisions have been identified chronologically for easy reference. These provisions fall into four categories:

1. Provisions that directly deal with sexual violence or elements of sexual violence;
2. Provisions that could be interpreted to deal with sexual violence or elements of sexual violence;
3. Provisions covering offences that can be said to be preparatory offences, i.e., that are committed in preparation for acts of sexual violence; and
4. Provisions that cover situations and offences that may not in themselves be sexual in nature, but are committed as a consequence of sexual violence, such as physical violence during or after rape.

In addition to the text of these laws, the relevant definitions as per case law have also been included to provide a greater understanding of their applicability to the reader, i.e., cases that provide definitions or decisions that are made through practical situations faced by the Pakistani court. These definitions also demonstrate the use of statutory interpretation. These precedents widen the scope of the law, as well as provide a more in-depth understanding of the law for readers.

PAKISTAN PENAL CODE 1908

34. Acts done by several persons in furtherance of common intention

When a criminal act is done by several persons, in furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it were done by him alone.

Definitions under Case Law⁴⁸

This section was enacted with the purpose of dealing with cases where there is more than one individual involved in an offence. It serves to distinguish between the acts of different individuals to prove exactly what part was played by each of them.

It is necessary for this section to be applicable that there be a “common intent” between the co-conspirators. Common intent implies acting in concert, existence of a pre-arranged plan which is to be proved from conduct, circumstances or any incriminating facts. It is necessary that all the individuals not only know each others’ intentions, but also share them. This intention can also be formed at the spur of the moment. Mere presence or ‘similar’ intention is not sufficient. It has to involve a prior meeting of minds.

The main feature of this section after establishment of common intent is the element of participation in the action. It embodies a principle of joint liability in committing a criminal act and the essence of that liability is the existence of a common intent. Once common intention is found, it is immaterial as to which part was played by whom and each one of such persons would be liable for the offence as if he alone had perpetrated it.

Due to this joint liability, all are guilty of the principle offence, not just of abetment. The reason why all are deemed guilty in such cases is that the presence of accomplices gives encouragement, support, and protection to the person actually committing the act. This section enacts a common law principle of substantive law that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually.

To prove common intention is difficult and must be inferred from his act or conduct, facts disclosed in evidence and surrounding circumstances of the case.

Elements of Sexual Violence Falling Under the Provision

This section may not specifically deal with sexual violence, but it does cover a number of related issues. In situations where there is more than one perpetrator involved, they can all be held liable for having a common intention. If there is an intention to commit an illegal sexual act, they all would have committed an offence.

Most importantly, there is a possibility to use this section in cases involving parallel systems such as *panchayats* or *jirgas*, i.e., those who have a common intention to hold an illegal council, thereby committing an illegal act.

⁴⁸ PLD 2007 SC 87; 2009 PCrLJ 1058; PLD 2010 SC 47; 2008 PCrLJ 1000; PLD 2007 SC 97; 2005 PCrLJ 784; 1998 PCrLJ 1192; 1994 PCrLJ 1640; 2005 PCrLJ 1384; 2005 PCrLJ 1442

38. Persons concerned in criminal act may be guilty of different offences

Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Definitions Under Case Law⁴⁹

This section is literally interpreted in the courts. It simply provides different punishments for all the different offences committed.

Elements of Sexual Violence Falling Under the Provision

As with all crimes, there may be incidents where more than one person is involved as is often the case with a variety of forms of sexual violence that take place in Pakistan.

This clause is a general provision that works towards ensuring that all the people involved in the commission of a crime, irrespective of their level of involvement, will be punished according to their actions during the commission of the offence. For example, one may be the main perpetrator, while another might be charged for incitement and another for abetting. Accordingly, this section is vital to ensuring that the involvement of all parties is covered under the law, and all are being held responsible for their actions.

⁴⁹ AIR 1925 PC 1 = 52 IC 40

90. Consent known to be given under fear or misconception

A consent is not such a consent as is intended by any action of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person: If the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child: Unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

Definitions Under Case Law

Consent has to be informed consent. If consent is given due to being misled by misrepresentation, it is not deemed to be consent.⁵⁰

Elements of Sexual Violence Falling Under the Provision

The notion of consent is extremely important in cases of sexual violence. Unless for one of the above mentioned reasons one is unable to give consent, real and actual consent can be a complete defence to the commission of a crime.

The United Kingdom law goes on to discuss that there are two fundamental questions that need to be asked in relation to consent.

(1) Whether a complainant had the capacity (i.e. the age and understanding) to make a choice about whether or not to take part in the sexual activity at the time in question.

In terms of consent, the question of state of mind is vital. The question is whether the complainant fully possesses their full capacity to give consent, i.e., whether the complainant had proper understanding and knowledge that she was not in a position to decide whether to consent or resist. This is especially important when discussing whether women in vulnerable positions feel that they do not have any other option but to consent.

(2) Whether he or she was in a position to make that choice freely, this is not constrained in any way. Assuming that the complainant had both the freedom and capacity to consent, the crucial question is whether the complainant agrees to the activity by choice.

⁵⁰ 1984 PCRLJ 2762

97. Right of private defence of the body and of property

Every person has a right, subject to the restrictions contained in section 90, to defend:

First. His own body, and the body of any other person, against any offence affecting the human body;

Secondly. The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of the theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

100. When the right of private defence of the body extends to causing death

The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:--

Thirdly: An assault with the intention of committing rape.

Fourthly: An assault with the intention of gratifying un-natural lust.

Fifthly: An assault with the intention of kidnapping or abduction.

Definitions Under Case Law⁵¹

Right of private defence is recognised by the courts and is extended to voluntary causing of death depending on the circumstances. Right of self-defence would start the moment the apprehension to the body arises and would continue until the danger was over. It is not necessary that one received any injury, as apprehension of bodily injury or death could not be measured at golden scale. It includes reasonable apprehension of wrongful confinement. It means that the circumstances must make a person reasonably apprehend that he will be unable to have recourse to the public authorities. However, right of private defence available to the accused person should not have been exceeded by them, thereby exempting them from being convicted under Section 302 PPC.

In such cases, the burden of proof lies on the accused that raises the plea of self defence of his person or property and wants to bring his case under this exception.

Elements of Sexual Violence Falling Under the Provision

This is an extremely important provision for potential victims of sexual offences and should be easily identifiable by the lawyers.

The purpose behind the sections relating to private defence, is that in situations where the intended victim fights back, their right to fight back in their defence is protected.

⁵¹ 2010 YLR 1445; 2009 MDL 596; 2002 YLR 4008 PLD 2002 SC 553; P. L. D. 1951 Lahore 279

101. When such right extends to causing any harm other than death

If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death.

Definitions Under Case Law⁵²

As with the section above, there is a right of private defence when danger is apprehended, although receiving an injury is not necessary before apprehending imminent danger to one's life, but the question is of whether that right was exceeded. It is accepted that the accused cannot be expected to regulate the extent of force to be used by him to keep his act within the limits prescribed by law. Therefore, where the force used is grossly out of proportion to the danger apprehended, or if the force used is after the danger is over, is considered to be force excess of the right of self-defence and therefore punishable.

It is also accepted that the degree and imminence of apprehension of threat should not be measured by injuries. Right of the defending person by keeping statutorily his right one step above that of the person invading that right for example, is extended to causing death, *inter alia*, where only grievous hurt was apprehended or, if causing grievous hurt where only simple hurt was apprehended. Such right commences "as soon as reasonable apprehension of danger to body arises from an attempt or threat to commit offence, though the offence may not have been committed, and it continues as long as such apprehension or danger to body continues".

Circumstances need to be considered before reaching any conclusions.

Elements of Sexual Violence Falling Under the Provision

This provides a right to the potential victim to use physical force in the protection of one's own body. If she is charged with a crime for having done so, she can refer to this provision as a defence.

⁵² 1963 PLD 771; 2009 MLD 1450; 2009 YLR 1938; 1986 PLD 335; 1974 PLD 274

102. Commencement and continuance of the right of private defence of the body

The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

Definitions Under Case Law⁵³

The definitions relating to the right of private defence given in the previous section are also applicable here. It is clear that right of self-defence starts, the moment apprehension of bodily injury arises, and continues till the danger is over and it is not necessary that one receives any injury, as apprehension of bodily injury or death cannot be measured.

Elements of Sexual Violence Falling Under the Provision

As above, the right of a potential victim using force to thwart off the assailant and in self-defence is protected.

⁵³ 2009 MLD 596

106. Right of private defence against deadly assault when there is a risk of harm to innocent person

If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

Definition Under Case Law⁵⁴

The principles of right to private defence discussed above are also applicable under this section.

The principles under this section also focus on the accused specifically. It is necessary for an accused relying on this defence to prove that his presence on the spot when the incident occurred was bona fide, faultless and that his act was devoid of elements of mens rea (guilty knowledge or intention to commit a prohibited act) or actus reus (the conduct of the accused). Further the accused must prove that there was danger to the life of the accused or of grievous bodily hurt or a genuine apprehension to that effect and that the situation he faced should be such that the accused is left with no option of a safe exit. He must also prove that the force used by him in his 'private defence' is proportionate to the apprehended danger. There must be credible evidence or circumstances presented and proved to indicate that the causing of death was necessary to save the life of the accused are to be present in case of murder.

Elements of Sexual Violence Falling Under the Provision

The commentaries on earlier provisions on private defence are also applicable here.

This is a defence to an intended victim of sexual violence. If the intended victim has serious apprehension that her/his life is endangered or s/he may suffer grievous bodily hurt at the hands of the accused, and reacts in a manner that results in the death of the perpetrator, this provision would apply.

⁵⁴ 2009 SCMR 929; 1994 SCMR 1161

107. Abetment of a thing

A person abets the doing of a thing, who:-

First. Instigates any person to do that thing; or

Secondly. Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly. Intentionally aids, by any act or illegal omission, the doing of that thing.

108. Abettor

A person abets an offence, who abets either the commission of an offence, or the Commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of abettor.

Definitions Under Case Law⁵⁵

It is necessary for the accused under this section to commit an offence. He has to act in such a manner with the same intention or knowledge as that of the person he is abetting. Only then can he be guilty of abetment of an offence. The element of criminality in the act must be clearly spelt out before a person is indicted for abetment.

'Instigate' is defined to mean 'to stimulate or goad to an action, specially a bad act, to incite, to foment, specially the commission of a crime' and as 'incitation, urging, solicitation'.

The helper or abettor is liable in the same manner as the offender.

Elements of Sexual Violence Falling Under the Provision

As mentioned with reference to an earlier section above, there can be several people involved in the committing of a crime of sexual violence, e.g., someone assisting in abduction, in hiding of the victim, and of incitement.

This section recognises and identifies the person who actually abets the offence. It includes instigators and co-conspirators.

It can have both a positive or negative action, i.e., to do a certain act which results in abetment or an omission to do something such as report an offence to the police, which results in the commission of the act.

This section can be valid for anyone who abets in any manner whatsoever in the commission of a sexually violent act. These accomplices who are complicit with the crime should not be allowed to go free without being held accountable for the part they played in the crime. This is important as often, in such cases, everyone apart from the main perpetrator is acquitted. This section provides that anyone abetting should be given the same punishment as the main perpetrator.

⁵⁵ 1992 P Cr.LJ 58; 2005 PCr.LJ 1648; 1995 P Cr.LJ 1424; 1970 P Cr.LJ 776; PLD 1984 FSC 55; PLD 1999 Karachi 151

120-A. Definition of criminal conspiracy

When two or more persons agree to do, or cause to be done,

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|-----|---|
| (1) | an illegal act, or |
| (2) | an act which is not illegal by illegal means such an agreement is designated a criminal conspiracy: |

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation: It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

Definitions under Case Law

The necessary elements to constitute a conspiracy include:

- a) An agreement between two or more persons;
- b) To do an act which is illegal; or
- c) Being done by illegal means.

The 'agreement' forms the most important part of this offence. It is not a question of intention, but of actual agreement between two or more parties involved in committing a criminal offence.

Illegal agreement can be inferred from the acts of the accused alone.

The courts have stated in judgments, that it is appropriate to observe that privacy and secrecy of an agreement may be oral or written to enter into a criminal conspiracy and it is essential to establish that prior to the event, two or more persons have conspired to commit an act.

'Abetment' and 'conspiracy' must be distinguished. 'Abetment' is not considered an offence on its own, but can be prescribed punishment based on the original offence, i.e., the offence that is being abetted. 'Conspiracy' on the other hand stands an offence on its own, without being attached to any other act or crime. Therefore, the offence of conspiracy may have element of abetment in it, thereby making it a greater offence than just abetment.

Conspiracy can be proved by invoking circumstantial evidence. As illegal agreements can be inferred from the acts of the accused alone, inference must be founded on solid facts. Surrounding circumstances, antecedent and subsequent conduct, among other facts constitute relevant material to prove conspiracy. The relevant time for it to be an offence must be when conspirators engage themselves to do a particular thing.⁵⁶

Exceptions to prosecution include a conspiracy between husband and wife.

Elements of Sexual Violence Falling Under the Provision

This is similar to the above mentioned sections relating to more than one person involved in an offence. In this situation, the act of conspiring is a crime on its own. Again, if the conspiracy involves an intention to commit a sexual offence, it can be considered a preparatory offence.

⁵⁶ 1998 PCrLJ 1486; 1989 PSC 533; PLD 1979 SC 53; PLD 1967 Lah. 1190; 2006 SCMR 1292; 2001 SCMR 424; PLD 1957 PC 92

141. Unlawful assembly

An assembly of five or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly is:

First: To overawe by criminal force, or show of criminal force, the Central or any Provincial Government or Legislature, or any public servant in the exercise of the lawful power of such public servant; or

Second: To resist the execution of any law, or of any legal process; or

Third: To commit any mischief or criminal trespass, or other offence, or

Fourth: By means of criminal force, or show of criminal force to any person to take or obtain possession of any property or to deprive any person of the enjoyment of a right of way, of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth: By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do or to omit to do what he is legally entitled to do.

Explanation. An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

Definitions Under Case Law⁵⁷

It is necessary for the members of a lawful assembly to be aware of the facts that render the assembly an unlawful one, and intentionally join or continue in it in order for them to be liable for the offence. An assembly may become unlawful at some stage after the start of an assembly, but it would be necessary to prove a circumstance applicable to all persons assembled which influenced them all in one direction namely, that of using criminal force or committing mischief, criminal trespass, or other offences or of resisting the execution of law or legal process.

It is also necessary to identify a common object of the assembly. However, it is not proper to take all offences committed and to infer that all of these were from the very beginning part of the common object. This has to be based on evidence, as opposed to the mere facts themselves. A joint action by a number of persons is not necessarily an action performed with a common object. It may be performed on the spur of the moment as a reaction to some incident, and such a case would fall more correctly within the rule of constructive liability laid down in section 34, P. P. C., which is based on "common intention"; a condition of mind which is more directly and proximately connected with the action than in the formation of a common object. In cases such as these, liability of each member depends on the intention or knowledge of the other members.

If members of the family of the appellants and other residents of the village assemble, all such persons could not be condemned ipso facto as being members of that unlawful assembly. It is necessary, therefore, for the prosecution to lead evidence pointing to the conclusion that all the appellants had done or had been committing some overt act in pursuance of the common object of the unlawful assembly. The omnibus kind of evidence that all the appellants and many more were the miscreants and were armed with deadly weapons like guns, spears, *pharsas*, axes, *lathis* etc., has to be very closely scrutinised in order to eliminate all chances of false or mistaken implication. The case of each individual accused has to be examined to satisfy that mere spectators who had not joined the assembly

⁵⁷ 1971 P.Cr.L.J. 528; PLD 1956 S.C. (Ind.) 249; PLD 1963 S.C. 109; PLD 1964 Dacca 480; 1971 P.Cr.L.J. 528; 1968 P.Cr.L.J. 300; PLD 1968 S.C 372; Explanation-In PLD 1963 S. C. 109; 1984 SCMR 823

and were unaware of its motive not be branded as members of the unlawful assembly which committed the crime.

Elements of Sexual Violence Falling Under the Provision

This is directly relevant to illegal parallel justice systems such as *panchayats* and *jirgas*. These illegal systems judge on different issues facing a community. They are seen to be extremely discriminatory towards women. Not only are women not allowed to be members of the council but they are condemned without being allowed to be heard or even appear before them unless they were being punished.

The punishments given by such councils have included some horrific examples, including justifying honour killings; gang rape; and the giving of women and girls to opposing feuding parties as part of a compromise. Such councils are some of the biggest violators of women's rights and implicit in violence against women, especially sexual violence.

While the Sindh High Court has declared these councils illegal, they continue to exist without any attempts of quashing them. In fact, members of the Government have been known to sit on such councils. The participation and acceptance by prominent and powerful individuals and parties have encouraged and they play an implicit role in their continued existence. There have been many attempts at trying to outlaw them that have not been very successful.

Without any law which specifically deals with illegal parallel systems, this section can be used to punish the persons who take part in such an unlawful assembly.

292. Sale, etc., of obscene books, etc.

Whoever:-

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| (a) | sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or |
| (b) | imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or |
| (c) | takes part in or receives profits from, any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of -the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or |
| (d) | advertises or makes known by any means whatsoever that any person he engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or |
| (e) | offers or attempts to do any act which is an offence under this section, |

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine or with both.

Exception: This section does not extend to any book, pamphlet, writing, drawing or painting kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

293. Sale, etc., of obscene objects to young person

Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Definitions Under Case Law⁵⁸

Under this section it is first necessary to define 'obscene'. 'Obscene', as per case law, has to be determined with reference to standards current in society in which words are uttered or published. The question can only be determined by the reaction of a normal man and by prevailing normal standards and conditions of society. The duty falls on the court alone to decide on facts of each case and whether or not the material in question is obscene or not according to surrounding circumstances and facts in each and every case.

⁵⁸ 2008 MLD 467; 1990 PLD Lah. 499; 1979 PLD Lah. 279; 1960 PLD Lah.172; 1952 PLD Lah. 384

As per this section, it is objectionable to exhibit or display such material but watching it is not an offence.

In recent cases, modern technology was taken into account when electronic devices were used to film an unsuspecting victim as she was nude in her room and bathroom, and the same video was distributed to others through the internet.

Elements of Sexual Violence Falling Under the Provision

These sections deal primarily with the distribution, sale and profit from pornography, specifically to children.

What it unfortunately does not deal with is the watching and purchase of pornographic material and especially child pornography. Due to the specific words involved, it seems difficult to interpret this section too widely. However, with the discretion of the judges, incidents that fall under this section that involve children, including child pornography, sale to children, exhibiting or display of such material to children, etc, should be considered a greater offence with a higher punishment.

294. Obscene acts and songs

Whoever, to the annoyance of others, --

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| (a) | does any obscene act in any public place, or |
| (b) | sings, recites or utters any obscene songs, ballad or words, in or near any public place, |

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Definitions Under Case Law⁵⁹

The word 'obscene' would be something which is offensive to modesty or decency, or expressing or suggesting unchaste or lustful ideas or being impure, indecent or lewd.

The objective of the section is to indulge in something which the authorities may term as prejudicial to public safety or maintenance of public order; some activity that can be a terror to the public safety. In some circumstances, a 'mischief' interpretation would be appropriate. It is clear that the original intention of the section was to stop the menace of all prostitution and similar other activities in or near any public place. It is also necessary that the place or occurrence be a public place, as private places are exempt.

Elements of Sexual Violence Falling Under the Provision

This section falls under sexual harassment, as defined earlier in this report. In order to provide such an interpretation of this section, it will be important to prove that the words used are 'obscene' and were uttered with the intention to annoy/harass the other.

This is important as the Protection Against Harassment Act 2010 deals with sexual harassment in the workplace, this places the offence in the public realm.

"Obscene acts" can include a number of different things, including acts such as pornography, exhibitionism/exposure, any forms of eve teasing, sexual harassment, etc.

⁵⁹ 1991PCr.LJ 9; 2009 P Cr. L J 173; 1955 PLD 261

300. Qatl-i-Amd

Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with-the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit qatl-e-amd.

302. Punishment of Qatl-i-Amd

Whoever commits Qatl-i-Amd shall, subject to the provisions of this Chapter be;

(a) Punished with death as *qisas*;

(b) Punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or

(c) Punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the Injunctions of Islam the punishment of *qisas* is not applicable.

[Refer to:

299. Definitions: In this Chapter, unless there is anything repugnant in the subject or context:

(ii) "offence committed in the name or on the pretext of honour" means an offence committed in the name or on the pretext of karo kari, siyah kari or similar other customs or practices;]

Definition Under Case Law⁶⁰

Section 300 defines the offence of Qatl-i-Amd i.e. murder, while section 302 deals with the punishment. The latter must be included in the discussion as it provides an expansion and deeper analyses of the different elements of the section.

There is a large amount of discussion relating to these sections. There is not enough space within this document to embark on a complete discussion on the different elements relating to Qatl-i-Amd, but nevertheless, some of the salient features, specifically those which are of relevance to this discussion are discussed below.

There are three categories of Qatl-i-Amd:

- (1) Qatl- i- Amd which is punishable by death as Qisas;
- (2) Qatl-i-Amd punishable by death or life imprisonment as Ta'zir

⁶⁰ 2007 MLD 935; 2005 PCrLJ 182; 2010 PCrLJ 63; PLJ 2001 (CrC) Lah 953; 1981 SMR 206; PLD 1996 SC 274; 2004 PCrLJ 1518; PLJ 2001 CrC Lah 853; 1989 MLD 4069; 1969 SCMR 637; PLD 2007 SC 237; PLD 1968 Kar 673; PLD 1999 Lah. 56; 1997 PCrLJ 1628; PLJ 1976 SC 283; PLD 2008 SC 503

(3) Qatl-i-Amd punishable with imprisonment of either description for a term which may extend to twenty five years, where according to the Injunctions of Islam the punishment of *Qisas* is not applicable.

To come within this category, there has to be a death and if the death is a direct result of the injury. Ingredients of the offence are felonious intention and an injury causing death.

Motive is an important ingredient in this offence. Motive is the cause, manner and method of thoughts in the mind of the person for performing action which is hidden in the mind of the accused. If the prosecution can prove its case beyond any doubt, then it is not necessary to prove motive. However, where there is a clear proof of motive for a crime, it lends additional support. Motive on its own is also not adequate on its own for a conviction. Absence is also not a ground for acquittal.

Negligence can also be an actionable cause, i.e., where there is neglect of the use of ordinary care or skill by which neglect there is injury to the person or property. Where no such duty is owed, the neglect is not actionable.

It is important to make a distinction between the knowledge and intention. The former signifies a state of mental realisation with the bare state of consciousness of certain facts in which the human mind remains supine or inactive. Intention is a conscious state of mind i.e. shaping of one's conduct so as to bring about a certain end. It does not necessarily involve premeditation. Whether such intention exists or not is a question of fact. However, it is not necessary to have previous ill-will or premeditation as long as the intention to kill is there at the moment of action. There must be intention to commit such an act.

Capital punishment cannot generally be awarded on the basis of circumstantial evidence.

In order to provide a defence to Qatl-i-Amd, there are a number of provisions that can be considered mitigating factors e.g. grave and sudden provocation, honour killings, etc. Defences to Qatl-i-Amd include self defence.

Grave and sudden provocation is a psychological matter and it mainly consists of three elements namely, the act of provocation, the loss of self control, both actual and reasonable and retaliation proportionate to the provocation. There are five conditions for bringing a case of an accused person under the ambit of provocation, which are (i) the deceased must have given provocation to the accused; (ii) the provocation must be grave (iii) the provocation must be sudden (iv) the offender by reasons of the said provocation should have been deprived of his power of self-control and killed the deceased during the continuance of the deprivation of power of control; and (v) the offender must have caused the death of a person who gave provocation. Provocation must be such as temporarily deprives the person provoked of power of self-control as a result of which he commits the unlawful act which causes death.

Self defence is a fundamental right of all individuals. It is necessary that requisite intention must not be in the mind. It is important that the right of self-defence is not exceeded.

Crime of *karo kari* and *siyah kari*, i.e., honour killings, is considered murder but is considered a mitigating factor during sentencing, as can be seen to be done in numerous cases. This 'mitigation' is on the discretion of the judge.

Elements of Sexual Violence Falling Under the Provision:

The question of murder is of course relevant in situations where sexual violence may be taken to a fatal level, i.e., sexual abuse resulting in death. It is important to understand the different components involved.

Under this section, the intention to cause death is the most important factor. Death can be a result of extreme sexual violence.

This section is also important in relation to cases of honour killing, which are related to incidents of sexual violence. Under the Criminal Law (Amendment) Act 2004, which amended the PPC and CrPC, among other laws, honour killings were recognised as murder and placed within the PPC. However, there have been a number of reported cases which allow 'honour killings' to be used for mitigation of a sentence from murder to manslaughter and reduction of sentence. This practice should be condemned as allowing perpetuation of VAW and the courts must not be allowed to continue in this practice.

303. Qatl committed under 'Ikrah-i-Tam or Ikrah-i-Naqis'

Whoever commits qatl,

(a) under *Ikrah-i-tam* shall be punished with imprisonment for a term which may extend to twenty-five years but shall not be less than ten years and the person causing '*Ikrah-i-tam*' shall be punished for the kind of qatl committed as a consequence of his *Ikrah-i-tam*; or

(b) under *Ikrah-i-naqis* shall be punished for the kind of qatl committed by him and the person causing '*Ikrah-i-naqis*' shall be punished with imprisonment for a term which may extend to ten years.

[Refer to:

299. Definitions : In this Chapter, unless there is anything repugnant in the subject or context:

(g) "Ikrah-e-tam" means putting any person, his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant death or instant, permanent impairing of any organ of the body or instant fear of being subjected to sodomy or zina-bil-jabr;

(h) "Ikrah-e-naqis" means any form of duress which does not amount to ikrah-i-tam;]

Definition Under Case Law⁶¹

The bare perusal of section 299(g), PPC shows three ingredients necessary for this offence. Therefore, the culprit for the commission of this offence would be a person who:

(1) puts any person, his spouses or any of his blood relations within the prohibited degree of marriage in fear of instant death; or

(2) instant permanent impairing of any organ of the body;

(3) or instant fear of being subjected to sodomy or *Zina-bil-Jabr*.

It is important to note that this section cannot be used as a legal defence but instead it is a definition of an illegal form of harm done by the perpetrator and not by the victim.

Elements of Sexual Violence Falling Under the Provision

The third element in the definition of *ikrah-e-tam* is directly related to situations of forced sexual activity to one's spouse or blood relations.

Under this section, it is necessary for the complainant to have 'fear' in order to constitute an offence. As this includes the relationship of blood, it can be immediately linked to familial sex offences, especially those against children. It would be important in situations of incest and child abuse where the grownup abuses his trust and authority over the child.

This section could apply to cases where there is a fear of marital rape, sexual abuse, child abuse, child molestation, physical violence and physical violence leading to death.

⁶¹ PLD 1997 Lah 110; 2002 Y L R 4008

310. Compounding of Qisas (Sulh) in Qatl-i-Amd

- (1) In the case of Qatl-i-Amd, an adult sane *wali* may, at any time on accepting *Badl-i-sulh*, compound his right of qisas:

Provided that a female shall not be given in marriage or otherwise in *Badal-i-sulh*.

Definition Under Case Law⁶²

The word '*Badl-i-sulh*' is not defined in the PPC, yet in the context of the PPC, the same is to be construed as giving or accepting some compensation of right of Qisas and the right of Qisas always arises at the time of commission of offence.

However, the concept is totally different from the concept of Diyat in the terms of S. 310(5), PPC. *Badl-i-sulh* is to be "mutually agreed" between the parties as a term of Sulh between them; Diyat on the other hand, is punishment and provisions of S. 299(e), PPC and S. 323, PPC manifest that amount of Diyat is to be fixed by Court.

In one case, it was stated that the concept of *Badl-i-sulh* was a concept confined only to the offences affecting the human body. Such offences, being compoundable, and to which the concept of *Sulah* (reconciliation) was attached. Giving away of a minor girl on account of compromise in a case of enticement/abduction of a female, which is an offence that was not compoundable and thus did not deal with the concept of *Sulah*.

Elements of Sexual Violence Falling Under the Provision

This deals directly with the issue of giving women to an opposing party as part of a compromise. This is an extremely positive provision, but it needs to include compromise in cases other than cases just involving offences affecting the body.

This section is highlighted as it is dealing with an issue of sexual violence, i.e., when girls are given in compromise to non-blood relations, usually for marriage. This means not only do they not have a choice in the matter but they are also being treated as chattels and as collateral, to be married off and have sexual relations with persons on the basis of compromise as opposed to of their own choosing.

⁶² 2007 PLD SC 48; P L D 2010 SC 695; PLD 2007 Lah. 276

315. Qatl Shibh-i-Amd

Whoever, with intent to cause harm to the body or mind of any person, causes the death of that or of any other person by means of a weapon or an act which in the ordinary course of nature is not likely to cause death is said to commit Qatl -Shibh-i-Amd.

Definitions Under Case Law⁶³

The main distinguishing feature between *Qatl- i- Amd* and *Qatl- Shibh- i- Amd* is that for the former, the assailant must have the intention to cause death or such bodily injury which in the ordinary course of nature is "likely to cause death. In *Qatl- Shibh- i- Amd*, the intention should be to cause such harm to the body or mind of the person which in the ordinary course of nature is "not likely to cause death". Meaning thereby, that in case of *Qatl Shibh-i-Amd* "intention to cause death or cause such bodily injury which in the ordinary course of nature is likely to cause death" must be non-existent. Rape can be considered to fall under this section, while abortion which results in the death of the mother, cannot as there was no intention to cause death.

The intention relating to the crime can be gathered from the attending circumstances.

Elements of Sexual Violence Falling Under the Provision

There are three parts to this offence: (i) to intent to cause harm; (ii) the causing of that harm; and (iii) that harm resulting in death.

It is important to consider how 'harm' is defined under the law and how it can be further interpreted to include sexual violence.

'Harm' can be interpreted widely. In simple terms it means to injure physically, morally or mentally.

In terms of this study, it would mean an aggravated form of sexual violence, i.e., any act of sexual violence that could either be done to such an extreme that it would result in death, or cause some kind of damage that would eventually result in death i.e. sexual abuse resulting in death.

Examples could include forms of sexual violence such as aggravated rape, sexual assault, and domestic violence, emotional and psychological abuse which result in women taking their own lives. It could also include harm such as transference of sexually transmitted diseases which could result in the death of the victim.

⁶³ P L D 2007 Supreme Court 217; 2006 P Cr. L J 662; P L D 1984 Federal Shariat Court 136; 1987 PCRLJ 361

321. Qatl-bis-Sabab

Whoever, without any intention, cause death of, or cause harm to, any person, does any unlawful act which becomes a cause for the death of another person, is said to commit Qatl-bis-Sabab.

Definitions Under Case Law⁶⁴

Here, it is not necessary to have the mens rea to cause harm or death, but instead the most important ingredient is the doing of an unlawful act which becomes a cause for the death of another person.

When the perpetrator commits an unlawful act, he is responsible for the natural consequences that flow from the act, i.e., if the victim was hit on the head by the accused and it sets up septic pneumonia, killing the accused, the perpetrator will still be held liable.

While this section may only seem to refer to the person directly responsible for the physical consequence, it generally excludes the person when all he does is influence the will of another person who voluntarily produces the physical consequence. However, this does not mean that the offender will not be deemed to have caused the physical consequence if (1) while taking step to produce such consequence he also employs a human will, or (2) he threatens his victim with immediate serious harm so that the victim out of fright and in order to protect himself acts to his detriment or (3) the offender creates a situation in which the victim must come to harm either by the physical act of the offender or by his own act and the victim chooses the latter alternative. In all these cases the offender causes the harm as surely as he does when he causes an injury with his hand. Therefore, when one person attacks or threatens to attack another and compels the person attacked by bodily force, or induces him by a well-grounded apprehension of immediate serious violence, to do some act which directly results in his death, the person attacking or threatening to attack is guilty of murder.

Elements of Sexual Violence Falling Under the Provision

This section relates to a different state of mind from the previous section, i.e., unintentional harm and causation of death. Nevertheless, the offence would in essence be applicable to cases of sexual abuse resulting in death.

This could include situations of infliction of sexually transmitted diseases when there is no knowledge of disease, or in cases of forced abortion and result in the woman's death.

⁶⁴ 2003 Y L R 2126; PLD 1994 Lahore 442; P L D 1956 (W. P.) Lahore 453

328. Exposure and abandonment of child under twelve years by parent or person having care of it

Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment⁶⁵, of either description for a term which may extend to seven years, or with fine, or with both.

Definitions Under Case Law⁶⁵

There have been no reported cases, to the best of the knowledge of the researcher that discuss in detail the different aspects of this section. While the majority of the cases refer mainly to the question of bail and questions relating to the maternity and paternity, the definition of this section is taken as simple and literal abandonment of (usually) a new born baby.

Elements of Sexual Violence Falling Under the Provision

This section is limited with regards to age of the abandoned or exposed child. Although this section, in a literal sense, relates to actual abandonment or exposure, but it can easily be expanded. It relates to parents or guardians of a child who intentionally or recklessly endanger a child by

1. Causing or permitting any child to be placed or left in a situation which creates a substantial risk to the child of being a victim of serious harm or sexual abuse; or
2. Failing to take reasonable steps to protect a child from such a risk while knowing that the child is in such a situation⁶⁶.

The interpretation and notion of abandonment or exposing of a child could include parents or guardians who allow their children to enter into child marriages or as part of *Badl-i -Sulh*, prostitution.

Parenting is to protect your child and ensure his/her well-being. If a parent is not protecting their child and is in fact giving them away, not for the good of the child, but for other motivations, could be said to have abandoned the child and exposed her/him to potentially harmful/dangerous circumstances.

⁶⁵ 2010 YLR 1332; 2006 PCrLJ 893

⁶⁶ Criminal Justice Act 2006, Ireland

332. Hurt

(1) Whoever causes pain, harm, disease, infirmity or injury to any person or impairs, disables or dismembers any organ of the body or part thereof of any person without causing his death, is said to cause hurt.

(2) The following are the kinds of hurt:

(a)	Itlaf-i-udw
(b)	Itlaf-i-salahiyyat-i-udw
(c)	Shajjah
(d)	Jurh and
(e)	All kinds of other hurts.

Definitions Under Case Law⁶⁷

Hurt is defined in the PPC as:

Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

It is not necessary that in fact, there should be marks of violence. If a person causes bodily pain to another person he is guilty of causing hurt.

Elements of Sexual Violence Falling Under the Provision

Hurt does not necessarily mean just the physical hurt. By using the words 'disease' and 'infirmity', it widens the realm of the types of hurts.

This could, for example be interpreted to mean sexually transmitted diseases (STD) or any other disease. Under the UK law, it is now accepted that if the perpetrator intentionally or negligently infects another person with a STD, he is said to have caused or inflicted 'hurt' on another.

'Infirm' defined in the Oxford dictionary⁶⁸ is defined as: a person who is "not physically or mentally strong, especially through age or illness." This illness could include mental or psychological diseases or illness, which could also be the result of a rape, sexual assault, domestic violence or sexual abuse etc.

It could also include victims of an abusive relationship. An abusive relationship would not just be purely physical abuse but would include relationships in which there is control over the victim by the perpetrator, with the abusive person's needs and opinions dominating and the victim feeling controlled by them. Hurt, if defined widely, could also include hurt being caused by taking away the right of choice from the victim, including those rights such as choosing to work, mobility, choosing to take contraception, etc. Aside from a possible offence of hurt, these would also constitute violation of the fundamental rights as under the Constitution of the Islamic Republic of Pakistan, 1973⁶⁹.

With respect to physical violence while committing a sexual act without consent, if an increased amount of violence is used, it could also be described as aggravated sexual abuse i.e. sexual abuse along with physical violence.

⁶⁷ 1984 PCrLJ 794

⁶⁸ Oxford Dictionaries Online, <http://oxforddictionaries.com/words/about>

⁶⁹ Chapter 1, Constitution of the Islamic Republic of Pakistan 1973

333. Itlaf-i-Udw

Whoever dismembers, amputates, severs any limb or organ of the body of another person is said to cause Itlaf-i-udw.

334. Punishment for Itlaf-i-Udw

Whoever by doing any act, with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, causes *itlaf-i-udw* of any person, shall, in consultation with the authorized medical officer, be punished with *qisas*, and if the *qisas* is not executable keeping in view the principles of equality in accordance with the injunctions of Islam, the offender shall be liable to *arsh* and may also be punished with imprisonment of either description for a term which may extend to ten years as *ta'zir*.

Definitions Under Case Law⁷⁰

There are not many cases that have elaborated on this section and embarked on a deeper discussion on the different elements of this offence.

The type of hurt under this section has to be 'grievous hurt'. It has been taken to include hurts such as the victim sustaining a bullet injury on his hand, the bullet having pierced through the palm; or amputation of any body parts which could also be a consequence of some other hurt e.g. firing.

In a 2008 case, cutting off the nose was considered as permanent damage falling under the purview of Itlaf- i- Udw, and has been explicitly recognised as 'a worse type of domestic violence and there was an increasing tendency of such violence in the society'.

Elements of Sexual Violence Falling Under the Provision

As discussed earlier, offences that have their base in some form of sexual violence are also being included here. One of the examples given above is of an extreme form of domestic violence; other examples could include forms of revenge for rejection of sexual advances, applying for divorce, etc.

This section is particular to dismembering, amputation or severing any limb or organ of the body of another person. Therefore, violent acts such as cutting of the nose or breasts, and female genital mutilation would be applicable here. These could all be considered forms of aggravated sexual abuse.

⁷⁰ PLD 1963 Supreme Court 34; 1972 SCMR 401; 2008 MLD 866; 2007 PCrLJ 1730; 2005 PCrLJ 975; 2003 PCrLJ 1574

335. Itlaf-i-Salahiyyat-i-Udw

Whoever destroys or permanently impairs the functioning, power or capacity of an organ of the body of another person, or causes permanent disfigurement is said to cause itlaf-i-salahiyyat-i-udw.

336. Punishment for Itlaf-i-Salahiyyat-i-Udw

Whoever, by doing any act with the intention of causing hurt to any person, or with the knowledge that he is likely to cause hurt to any person, causes *itlaf-i-salahiyyat-i-udw*, of any person, shall, in consultation with the authorized medical officer, be punished with *qisas* and if the *qisas* is not executable keeping in view the principles of equality in accordance with the Injunctions of Islam, the offender shall be liable to *arsh* and may also be punished with imprisonment of either description for a term which may extend to ten years as ta'zir.

Definitions Under Case Law⁷¹

One of the main elements that can be inferred from cases under this section is that the injury must attract permanent paralysation and incapacitation of the organ of the injured. There must be a grievous hurt with far-reaching effects from the injury. It is also noted that causing an injury of grave nature with a sharp weapon like razor or knife tantamount to permanent disfigurement.

Disfigurement is also discussed in a Supreme Court judgement. Quoting different texts, it noted that:

“Disfigurement means 'the act of disfiguring' or the state of being disfigured also that which disfigures; a defacing; a blot; a blemish, scar, or mutilation; that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner; a change of external form to, or for, the worse”.

And “as spoil beauty of, deform or deface”.

Therefore any disfigurement as falling under the above definitions, fall under this section.

Elements of Sexual Violence Falling Under the Provision

This section is similar to the one above (Section 333. Itlaf-i-Udw'; Section 334. Punishment for Itlaf-i-Udw) and thereby the commentary given there is also applicable here, except that here it is specific to destroying or permanently impairing the functioning, power or capacity of an organ of the body of another person, or causing permanent disfigurement.

Examples here could include acid throwing, burning, injuries due to physical assaults and injuries that are the result of physical forms of sexual violence such as rape and gang rape.

⁷¹ 2006 YLR 409; 2004 PCrLJ 1087; 2004 YLR 1835; 2002 SCMR 923; 2010 SCMR 401

337. Shajjah

(1) Whoever causes, on the head or face of any person, any hurt which does not amount to itlaf-i-udw or itlaf-i-salahiyyat-i-udw, is said to cause shajjah.

(2) The following are the kinds of shajjah namely:

(a)	Shajjah-i-Khafifah
(b)	Shajjah-i-mudihah
(c)	Shajjah-i-hashimah
(d)	Shajjah-i-munaqqilah
(e)	Shajjah-i-ammah and
(f)	Shajjah-i-damighah

(3) Whoever causes shajjah:

(i)	without exposing bone of the victim, is said to cause shajjah-i-khafifah;
(ii)	by exposing any bone of the victim without causing fracture, is said to cause shajjah-imudihah;
(iii)	by fracturing the bone of the victim, without dislocating it, is said to cause shajjah-ihashimah;
(iv)	by causing fracture of the bone of the victim and thereby the bone is dislocated, is said to cause shajjah-i-munaqqilah;
(v)	by causing fracture of the skull of the victim so that the wound touches the membrane of the brain, is said to cause shajjah-i-ammah;
(vi)	by causing fracture of the skull of the victim and the wound ruptures the membrane of the brain is said to cause shajjah-i-damighah.

Definitions Under Case Law⁷²

Different types of *shajjahs* are not explained in case law apart from bare readings of the law. The text itself is self-explanatory but there is dearth of discussion in case law that expands on the literal text. Therefore, the section has been applied literally in cases, depending on the type of injury, without elucidating circumstances or context under which it was inflicted. Examples of injuries considered as *shajjah* include pistol blows to the head of the victim, wounds from a hatchet, stab wounds, and hitting with sticks.

Elements of Sexual Violence Falling Under the Provision

This provision also focuses on physical violence. It could include any form of physical violence which results in injury. If any form of sexual violence results in hurt as described in this section, these provisions would be applicable. The important element to focus on is the actual hurt inflicted as opposed to how it is caused.

⁷² 2009 YLR 6531; 2010 PCrLJ 1885; 2010 MLD 1008; 2008 PCrLJ 1606; 2004 SCMR 89; 2002 YLR 3044; 2007 PCRLJ 1428; 2010 YLR 2446

337-B. Jurh

(1) Whoever causes on any part of the body of a person, other than the head or face, a hurt which leaves a mark of the wound, whether temporary or permanent, is said to cause jurh.

(1) Jurh is of two kinds, namely:-

- (a) Jaifah; and
- (b) Ghayr-Jaifah

337-C. Jaifah

Whoever causes jurh in which the injury extends to the body cavity of the trunk, is said to cause jaifah

337-D. Punishment for Jaifah

Whoever by doing any act with the intention of causing hurt to a person or with the knowledge that he is likely to cause hurt to such person, causes jaifah to such person, shall be liable to arsh which shall be one-third of the diyat and may also be punished with imprisonment of either description for a term which may extend to ten years as ta'zir.

Definitions Under Case Law⁷³

To treat any injury as Jaifah, the injury must extend to the body cavity of the trunk. The word "extend to the body cavity" is of significance. .

The word "body cavity of the trunk" has neither been specified nor has been defined in the Pakistan Penal Code. For that purpose, reference has to be made to the Medical Dictionary, medical books on the subject of anatomy, medical jurisprudence and pronouncements of authoritative description of "body cavity".

Body cavity as defined in Dorland's Illustrated Medical Dictionary⁷⁴, is a hollow place or space, or a potential space, within the body or in one of its organs. Furthermore, body cavity has been defined as visceral cavity such as the thoracic, abdominal or pelvic cavity. Considering these definitions, body cavity means a portion of the body which contains viscera. It is a hollow place and contains vital organs. The cavity under discussion would mean the chest cavity which contains lungs, heart, liver etc., i.e. upper part of the body above the diaphragm.

Supplementing these definitions with that of the meaning assigned to "body cavity" in ordinary parlance, reference is made to Chambers English Dictionary⁷⁵ wherein the "body cavity" has been defined as the coelom or cavity in which the viscera of the higher animals lie. Taking up the meaning and the definition assigned both in ordinary and medical dictionaries, the "body cavity" means a part of the body which contains viscera or vital organs of the body, as noted above. For further precision, reference to Gray's Anatomy⁷⁶, is also helpful. Perusal of this chapter reveals that body cavity means that part of the body which contains vital organs over or below diaphragm.

⁷³ PLD 1998 Lahore 84; 2009 PCrLJ 640; 2010 PCrLJ 1117; 2008 YLR 2818

⁷⁴ Page 232, Dorland's Illustrated Medical Dictionary, 26th Edition

⁷⁵ Page 156, Chambers English Dictionary

⁷⁶, Page 219, Chapter- Development of the Body Cavities, Gray's Anatomy, Thirty Third Edition

The cavity does not denote only an area starting from upper part of the shoulder up to diaphragm and then from diaphragm to lower part of pelvis but it in fact means a part of the body under which vital organs are located and if an injury penetrates into the body cavity and then enters that part of the body wherein vital organs are located, only then that can be treated as Jaifah and punishment can be awarded accordingly.

Elements of Sexual Violence Falling Under the Provision

As discussed in the previous section, this provision also focuses on physical violence, but focuses on where the hurt occurs. Therefore if any hurt is caused to the body cavity of the trunk through any form of violence which falls into the ambit of sexual violence, then this section would be applicable. Thus, if due to any act which has any element of sexual such as violent rape, gang rape or rape with objects that cause internal injuries to a woman, this legal provision would apply.

337-E. Ghayr-Jaifah

(1) Whoever causes jurh which does not amount to jaifah, is said to cause ghayr-jaifah.

(2) The following are the kinds of ghayr-faifah, namely:-

- (a) damihah
- (b) badi'ah
- (c) mutalahimah
- (d) mudihah
- (e) hashimah; and
- (f) munaqqilah

(3) Whoever causes ghayr-jaifah:

- (i) in which the skin is ruptured and bleeding occurs, is said to cause damiyah;
- (ii) by cutting or incising the flesh without exposing the bone, is said to cause badi'ah;
- (iii) by lacerating the flesh, is said to cause mutalahimah;
- (iv) by exposing the bone, is said to cause mudihah;
- (v) by causing fracture of a bone without dislocating it, is said to cause hashimah; and
- (vi) by fracturing and dislocating the bone, is said to cause munaqqilah.

Definitions Under Case Law⁷⁷

When an injury cannot be treated as Jaifah, it would be punishable as Ghayr-Jaifah depending on the extent and nature of the damage caused and under the sub-clause of Ghayr-Jaifah the same is covered. For example, if an injury does not pass through the chest or abdomen and merely penetrates through flesh or muscles of the body on the upper part of the chest cavity.

The text is quite self-explanatory. These offences are contained widely under case law, including cases involving pistol shots to non-vital parts of the body, being stabbed in non-vital parts and fist blows.

Elements of Sexual Violence Falling Under the Provision

The commentary given in the preceding (Section 337- B. Jurh) is also applicable here. It is important to note that acts involving sexual violence, such as object rape, for example, which result in any injury would constitute a criminal offence as per this provision as well. It is the type of injury caused, not how it was inflicted that should be given primary consideration.

⁷⁷ PLD 1998 Lahore 84; 2006 PCrLJ 1548; 2005 YLR 1799; 2005 YLR 661; 2003 PCrLJ 1440; 2009 PCrLJ 719; 2010 SCMR 1742; 2011 MLD 82; 2009 YLR 588 ; 2010 PCrLJ 1355

337-L. Punishment for other hurt

Whoever causes hurt, not mentioned hereinbefore, which endangers life or which causes the sufferer to remain in severe bodily pain for twenty days or more or renders him unable to follow his ordinary pursuits for twenty days or more, shall be liable to daman and also be punished with imprisonment of either description for a term which may extend to seven years.

Whoever causes hurt not covered by sub-section (1) shall be punished with imprisonment of either description for a term which may extend to two years, or with daman, or with both.

Definitions Under Case Law

'Other hurt' is not seen to be clearly defined under the case law examined; however, logic would seem to imply that it would cover 'hurt' to the exclusion of the others mentioned earlier in the law.

Elements of Sexual Violence Falling Under the Provision

This section is relevant for penalisation of instances not covered under the previous sections.

It can be made to include any sort hurt as a consequence of sexual abuse, sexual assault, child abuse, child molestation, incest, etc. It can even cover the hurt caused to women by forced abortions and miscarriages, as well as miscarriages caused by violent acts. Similarly, it can cover penalisation for emotional, psychological or mental harm as 'other hurt', which can be a result of any of the mentioned forms of sexual violence or as separate forms of sexual violence themselves (see different forms of sexual violence bill on page 7).

337-Q. Arsh for single organs

The arsh for causing itlaf of an organ which is found singly in a human body shall be equivalent to the value of diyat.

Explanation: Nose and tongue are included in the organs which are found singly in a human body.

337-R. Arsh for organs in pairs

The arsh for causing itlaf of organs found in a human body in pairs shall be equivalent to the value of diyat and if itlaf is caused to one of such organs the amount of arsh shall be one-half of the diyat:

Provided that, where the victim has only one such organ or his other organ is missing or has already become incapacitated the arsh for causing itlaf of the existing or capable organ shall be equal to the value of diyat.

Explanation: Hands, feet, eyes, lips and breasts are included in the organs which are found in a human body in pairs.

337-S. Arsh for organs in quadruplicate

The arsh for causing itlaf of organs found in a human body in a set of four shall be equal to-

- | | |
|-----|--|
| (a) | one-fourth of the diyat, if the itlaf is one of such organs; |
| (b) | one-half of the diyat, if the itlaf is of two of such organs; |
| (c) | three-fourth of the diyat, if the itlaf is of three such organs; and |
| (d) | full diyat, if the itlaf is of all the four organs. |

Explanation: Eyelids are organs which are found in a human body in a set of four.

337-T. Arsh for fingers

- | | |
|-----|---|
| (1) | The arsh for causing itlaf of a finger of a hand or foot shall be one-tenth of the diyat. |
| (2) | The arsh for causing itlaf of a joint of a finger shall be one-thirteenth of the diyat. |

Provided that where the itlaf is of a joint of a thumb, the arsh shall be one-twentieth of the diyat.

337-U. Arsh for teeth:

- (1) The arsh for causing itlaf of a tooth, other than a milk tooth, shall be one-twentieth of the diyat.
Explanation: The impairment of the portion of a tooth outside the gum amounts to causing itlaf of a tooth.
- (2) The arsh for causing itlaf of twenty or more teeth shall be equal to the value of diyat.
- (3) Where the itlaf is of a milk tooth, the accused shall be liable to daman and may, also be punished with imprisonment of either description for a term which may extend to one year:
Provided that, where itlaf of a milk tooth impedes the growth of a new tooth, the accused shall be liable to arsh specified in sub-section (1).

337-V. Arsh for hair

- (1) Whoever uproots:-
- | | |
|-----|--|
| (a) | all the hair of the head, beard, moustaches eyebrow, eyelashes or any other part of the body shall be liable to arsh equal to diyat and may also be punished with imprisonment of either description for a term which may extend to three years as ta'zir; |
| (b) | one eyebrow shall be liable to arsh equal to one-half of the diyat; and |
| (c) | one eyelash, shall be liable to arsh equal to one fourth of the diyat. |
- (2) Where the hair of any part of the body of the victim are forcibly removed by any process not covered under sub section (1), the accused shall be liable to daman and imprisonment of either description which may extend to one year.

337-W. Merger of arsh

- (1) Where an accused more than one hurt, he shall be liable to arsh specified for each hurt separately:
Provided that, where:-
- | | |
|-----|---|
| (a) | Hurt is caused to an organ, the accused shall be liable to arsh for causing hurt to such organ and not for arsh for causing hurt to any part of such organ; and |
| (b) | The wounds join together and form a single wound, the accused shall be liable to arsh for one wound. |

Definitions Under Case Law⁷⁸

Arsh is compensation for offences relating to various kinds of hurt. In some cases it was awarded in addition to sentence of imprisonment, but in other cases, it is mandatory and a sentence of imprisonment could be an addition. In cases involving more than one damage to an organ, i.e., where compensation as Arsh could be given for each organ separately, punishment could be awarded for each organ separately.

⁷⁸ 2002 YLR 513 ; 2000 SCMR 1675; 2011 SCMR 45; 2006 PCRLJ 1753; 1997 PCRLJ 131; 2002 YLR 513

Elements of Sexual Violence Falling Under the Provision

This section is noted here purely for reasons of identification. In cases of physical violence against women, the perpetrator can be made to pay damages for every little bit of harm done to the woman, as can be evidenced from the provisions mentioned above.

The usual practice in the legal system currently, as identified earlier, is usually to just charge a perpetrator under standard sections of the PPC. However, an attentive lawyer or police officer can apply these laws in order to provide the victim with the proper compensation that is due to the victim.

338. Isqat-i-Hamal

Whoever causes woman with child whose organs have not been formed, to miscarry, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman, or providing necessary treatment to her, is said to cause isqat-i-hamal.

Explanation: A woman who causes herself to miscarry is within the meaning of this section.

338-A. Punishment for 'Isqat-i-Hamal'

Whoever causes '*Isqat-i-hamal*' shall be liable to punishment as *tazir*:

(a) with imprisonment of either description for a term which may extend to [ten]4 years, if *Isqat-i-hamal* is caused with the consent of the woman; or

(b) with imprisonment of either description for term which may extend to [three]5 years if *Isqat-i-hamal* is caused without the consent of the woman;

Provided that, if as a result of *Isqat-i-hamal* any hurt is caused to the woman or she dies, the convict shall also be liable to the punishment provided for such hurt or death, as the case may be.

Definition Under Case Law⁷⁹

A plain reading of the said section shows that in order to bring home a charge under section 338 of the PPC, miscarriage of a child whose organs have not been formed has to be proved. Cases that have come under this section have been more focused on the commission of the offence of "zina" as opposed to the abortion/miscarriage.

The brunt of this section is focused on who causes the miscarriage. The accused have usually included a rapist whose violent rape caused an abortion (i.e., miscarriage), the mother-in-law of the girl and the midwife who performed the abortion.

Elements of Sexual Violence Falling Under the Provision

While this law is primarily meant to illegalise voluntary abortions by women, it effectively also includes in its ambit forced miscarriages and abortions. It holds responsible the persons i.e., whoever causes the miscarriage or abortion. This could include the husband, in-laws, a paramour, and parents.

Apart from forced abortions, an act which results in the miscarriage of the fetus can also fall within this provision, including beating a pregnant woman or causing pre-natal maternal distress.

⁷⁹ 1995 PCrLJ 444; 2006 PCrLJ 662; 2007 PCrLJ 856; 2002 PCrLJ 1292; 2004 YLR 1294; 2008 SCMR 914

338-B. Isqat-i-Janin

Whoever causes a woman with child some of whose limbs or organs have been formed to miscarry, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman, is said to cause Isqat-i-janin.

Explanation: A woman who causes herself to miscarry is within the meaning of this section.

Definition Under Case Law⁸⁰

The main difference between this section and the previous section is the extent of formation of the limbs and organs of the child. In this section, it is necessary for the limbs and organs of the fetus to have been formed.

There are not many cases that appear under this section. This section, however, has been misused, for example it has been used against women in cases where the wife applies for dissolution of marriage and the husband attempts to blackmail her through the law.

The accused have included the 'mother' and even the doctor of a private clinic where an alleged miscarriage was carried out.

Elements of Sexual Violence Falling Under the Provision

As in the preceding section (Section 338 and 338.A), any person who causes the miscarriage or abortion of a fetus who is at a later stage of formation than in the former section will be held liable under this provision. In terms of sexual violence, this could include any person, including a husband, in laws, a paramour and parents who force a woman to have an abortion. This is especially relevant in situations where abortions are forced upon women once it is discovered that the fetus is a girl.

Apart from forced abortions, an act which results in the miscarriage of the fetus can also fall within this provision, including beating a pregnant woman or causing her distress.

However what is not covered is the harm done to women due to forced abortion or miscarriage.

⁸⁰ 2006 YLR 2221; 2005 PCRLJ 1162

339. Wrongful restraint

Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Exception: The obstruction of a private way over land or water, which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

Definitions Under Case Law⁸¹

Wrongful restraint would include obstruction of any kind. The physical obstruction and mere threat would not amount to obstruction. Prosecution must prove that the complainant had a right to proceed towards a particular direction or way.

Elements of Sexual Violence Falling Under the Provision

This section is another example of an offence that is addendum to an offence of sexual violence. Due to the higher social status enjoyed by men in Pakistani society, men are able to control women's movements. Whether this is due to the social pressure, abuse, financial control or through threats and other forms of violence, this act can and has been committed in a variety of cases where there has been sexual violence. It is important to recognise that such an offence can be identified as a preparatory act, done with the intention to commit an illegal sexual act, e.g. sexual violence.

⁸¹ 2002 PCrLJ 530; 1996 PCrLJ 735

340. Wrongful confinement

Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.

343. Wrongful confinement for three or more days

Whoever wrongfully confines any person for three days or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

344. Wrongful confinement for ten or more days

Whoever wrongfully confines any person for ten days, or more, shall be punished with imprisonment of either description for a term which extend to three years, and shall also be liable to fine.

346. Wrongful confinement in secret

Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person of public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any other punishment to which he may be liable for such wrongful confinement.

Definitions Under Case Law⁸²

The definition of "wrongful confinement" relates back to the definition of 'wrongful restraint'. An essential ingredient of this offence is a physical obstruction to the movements of a person. Confinement in any place or area constitutes the offence. It is important to also note that in situations where there is a combination of different offences for, e.g., in cases where there is robbery, abduction and wrongful confinement, each will be charged separately.

Wrongful confinement has included situations where the appellant has abducted the complainant from his house and confined him in a room for several hours; and situations where the police have illegally confined someone in their custody without any basis and justification and without legal sanction.

Elements of Sexual Violence Falling Under the Provision

As above, this offence can and continues to be used as an element of sexual violence. Often this confinement is the most significant part of an offence of sexual violence. There are different levels of punishment according to the time period spent in wrongful confinement. The question that must come up is whether there was an intention to commit an illegal sexual act, and whether this is the motive for said confinement. If that is the case, then the offence can be said to fall within the dimension of sexual violence.

⁸² 2007 YLR 1976; 2000 PCrLJ 955; 1984 PCrLJ 794; PL 1963 (W. P.) Lahore 357; P L D 1999 Karachi 151; 1996. PCrLJ 975; 1992 PCrLJ 1095; PLD 1972 Lahore 474

As identified by the case law on this section, this offence can be charge as a separate individual offence. This would therefore include not just the sexual offenders themselves, but anyone who assists in the continuance of wrongful confinement, including those who were negligent or chose not to inform anyone else in order to free the victim from this wrongful confinement. It could include friends, associates, family members, and any person who assisted in the commission of the offence.

349. Force

A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described:

First:	By his own bodily power.
Secondly:	By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.
Thirdly:	By inducing any animal to move, to change its motion, or to cease to move.

Definitions Under Case Law⁸³

There are different ways that force is said to be used. For example, threatening and assuming a fighting attitude would be a show of force. Also if force or intimidation is used to prevent any action etc, it falls under this section.

Elements of Sexual Violence Falling Under the Provision

This section is mentioned here for reference and definition relevant to the section below (Section 350: Criminal Force).

⁸³ PLD 1972 Lahore 474; 1969 PCrLJ 1097

350. Criminal force

Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

Definitions Under Case Law

To the best knowledge of the researchers of this report, there have been no reported cases that have discussed this section and enhanced its meaning beyond its literal interpretation.

Elements of Sexual Violence Falling Under the Provision

This section relates to the unlawful touching of another person without their consent, according to the definitions provided in the previous section (Section 349. Force).

This offence falls under the ambit of sexual violence in terms of the methods used to commit the act itself, i.e., with force, as defined in the previous section.

All forms of criminal force, from touching which is not consented to, to hitting or pushing or harming, can fall under the ambit of this section (Section 349. Force).

It is important to remember that criminal force is not a necessary element in acts of sexual violence. It can, however, be part of an offence of sexual violence. It can also add an element of aggravation to the offence of sexual violence and therefore could result in a higher punishment for the crime. Criminal force, however, constitutes an offence on its own. Therefore, even if the sexual element is not always recognised, a charge of criminal force can also be framed in order to punish the perpetrator.

It is vital to avoid the mistake of failing to distinguish between consent and submission. Submission does not mean consent. There may be situations where due to non-physical force, intimidation or incitement, a person may be the subject of sexual abuse. This is vital as in some cases in which a conservative judge is presiding they might expect or demand physical bruises and marks as necessary evidence of resistance to connote that there was no consent in order for there to be a conviction. It must be understood that the requirement of 'force' to mean that the perpetrator compelled submission by physically overpowering the victim or by threatening to inflict bodily injury.

Current interpretations of the 'force' requirement are more flexible than in the past. Courts are now more willing to find implicit threats sufficient for a conviction. Even without an implicit threat, a complainant's fear can satisfy the force requirement, provided the fear is "reasonably grounded."

This section could also be widened to include the elements of sexual contact, i.e., the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh or buttocks of any person with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person.

If sexual contact is not consented to or the victim is not legally able to consent to such touching and the perpetrator does not reasonably believe the victim has consented to this, it would result in constituting a crime of sexual assault.

Any violence attached to these would constitute aggravated criminal force.

351. Assault

Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will-cause any person present to apprehend that he who makes that gesture or preparation it about to use of criminal force to that person, is said to commit an assault.

Explanation: Mere words do not amount to an assault, but the words which a person uses may give to his gesture or preparation such a meaning as may make those gestures or preparations amount to an assault.

Definitions Under Case Law⁸⁴

Examples under case law of assault include unconditional threats being extended to another; or when the petitioner enters into a house armed with a gun at the time of his entry.

Elements of Sexual Violence Falling Under the Provision

The main ingredient for this section to apply is that there must be apprehension in the victim that the perpetrator will cause her/him harm. There must be a course of conduct which causes fear in the other that use of violence is imminent. The test must be one in which if a reasonable person in possession of the same information would think the course of conduct would cause the other to fear on that occasion.

Therefore, any gesture, such as raising a hand in preparation to hit another, exposing oneself to another or any such act that places another in fear of harm would fall under this act. In cases of sexual violence, any preparation or gesture relating to an act of sexual violence which makes another feel that it is imminent constitutes an offence.

⁸⁴ 2010 YLR 1445; 1991 PCrLJ 1759; 1985 SCMR 1748

354. Assault or criminal force to woman with intent to outrage her modesty

Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both.

Definitions Under Case Law⁸⁵

The term 'modesty' has not been adequately described under case law. In one of the judgments referenced below in the footnotes, it is noted that this section identifies 'outraging modesty' in terms of somewhat minor acts such as indecent expression or gesture, such as touching a woman in a lewd or indecent manner.

At the same time, however, cases of attempted rape have been prosecuted under this section, despite a ruling of the Federal Shariat Court, as referenced below in the footnotes. Therefore, a number of cases which are clearly preparations to commit rape, for example, untying the strings of a woman's *shalwar*, are considered to fall under this section rather than attempted rape. Seemingly, if the perpetrator is stopped for some reason from being able to take his actions further, it is considered a mitigating factor.

The majority of cases under this section are somewhat ambiguously defined which include cases which are in reality cases of criminal force upon a woman, attempted or actual acts of sexual assault on a woman. As a result, it seems that the offences are being identified as falling under this section and being charged accordingly. This is seen to extend protection to the perpetrators of these crimes against women as the punishments under this section are much less severe than for example, attempted rape. Resultantly, it appears that instead of widening the interpretation of this section to include forms of violence which are not identified elsewhere, this section is being used as a means of escaping the harsher punishment for the commission of offences against women and receiving lighter sentences.

Elements of Sexual Violence Falling Under the Provision

All sexual violence is an outrage of women's modesty. Different forms of sexual assault, child abuse and molestation would fall under this section. It could include other more ambiguous forms, for example, faith based violence, i.e., where false or inaccurate interpretations of religion are used to manipulate women into subjugation, thereby denting her modesty. Examples could include leading women to believe that there are religious sanctions for wife-beating and that wife cannot refuse their husbands sex.

It could also include the denial of rights to bodily integrity by including taking away women's sexual and reproductive rights, such as right to contraception, forced abortions, female genital mutilations, marriage to the Quran, and *watta satta* (exchange) marriages.

It could also include relatively new forms of violence against women such as cyber stalking, as well as violence perpetuated through the internet, e.g., pictures and videos and be read with section 13 of the Prevention of Electronic Crimes Ordinance, 2009 i.e. Cyber Stalking.

It must, however, be noted with concern that attempts to commit rape are being registered and prosecuted under this section. If the intention of the perpetrator is to commit rape, all acts committed with this intention should fall under the section relating to attempt.

⁸⁵ 1994 PCrLJ 322; 1996 M D 878; 1998 MLD 312; 1985 SCMR 1443; 2010 PCrLJ 1698; 2010 PCrLJ 1806 ; 2010 PCrLJ 368; 2010 PCrLJ 221

354-A. Assault or use of criminal force to woman and stripping her of her clothes

Whoever assaults or uses criminal force to any woman and strips her of her clothes and in that condition, exposes her to the public view, shall be punished with death or with imprisonment for life, and shall also be liable to fine.

Definitions Under Case Law⁸⁶

There are two conditions that are necessary for this section. Firstly there should be stripping of the clothes of the woman, and secondly, she in that condition be exposed in the public view.

The word 'strip' would imply pulling or tearing off clothes, outer cover and even connote forcible or even violent action and total deprivation of clothing. Removal of *dupatta* from head of a lady does not fall within the purview of this penal clause. It does not apply when a small part of the shirt is torn.

Elements of Sexual Violence Falling Under the Provision

This provision is straight forward, not leaving much room for interpretation. Nevertheless, issues such as what constitutes as 'public' may be brought up. Situations in cases of gang rape, punishments meted out by *panchayats* or *jirgas* of rape or forcing women to be stripped naked and paraded would all fall under this section, making all parties responsible as main respondents as well as abettors.

⁸⁶ PLD 2008 Lah. 308; PLD 2008 Lah 308; 1997 PCrLJ 600

364-A. Kidnapping or abducting a person under the [age of fourteen]

Whoever kidnaps or abducts any person under the [age of fourteen] in order that such person may be murdered or subjected to grievous hurt, or slavery, or to the lust of any person or may be so disposed of as to be put in danger of being murdered or subjected to grievous hurt, or slavery, or to the lust of any person shall be punished with death or with imprisonment for life or with rigorous imprisonment for a term which may extend to fourteen years and shall not be less than seven years.

Definition Under Case Law⁸⁷

It is first necessary to see whether there was 'kidnapping' in the first place i.e.,

- (i) The minor was taken or enticed away by the kidnapper;
- (ii) The minor was out of keeping of the lawful guardian;
- (iii) The keeping of the minor was without the consent of the guardian.

Once the kidnapping is established, the question then is whether the appellant intended to murder the victim or subject her/him to grievous hurt or lust.

Elements of Sexual Violence Falling Under the Provision

This section specifically deals with child abuse alongside the necessary component of abduction. It is necessary for a child to be taken away from the lawful guardian without their consent. However, by omission, it covers assault by blood relatives, along with foster and adoptive parents and other family members.

However, possible interpretations relating to the word 'abduction' may be raised. Perhaps a new definition of abduction relating to taking a child away from the guardian for these purposes would be sufficient without the intention of kidnapping for a long period of time. This would widen the ambit to ensure protection of children from lust, harm or slavery.

⁸⁷ 2008 PCrLJ 627 FSC

365-B. Kidnapping, abducting or inducing woman to compel for marriage, etc

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced, or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment for life, and shall also be liable to fine; and whoever by means of criminal intimidation as defined in this Code, or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

Definition Under Case Law⁸⁸

There are two factors in this crime: Firstly, removal of women by force from one place to another and secondly the object of this removal must be to compel her to marry any person against her will or in order that she could be seduced to illicit intercourse.

A female, though not having attained the age of majority but having attained puberty, cannot be compelled to swear that her nikah/marriage has been entered into by her own free will. When law does not prohibit the parties from marrying each other and they have entered into a valid contract of marriage, it is the duty of the State to protect the marriage and family.

Elements of Sexual Violence Falling Under the Provision

The most important ingredient here is the 'compelling' of the woman. This section deals primarily with forced marriages. It makes liable the person who commits the abduction or kidnapping or the compelling, or all of the persons involved in these offenses.

⁸⁸ PLD 2009 Lah. 223

366-A. Procuration of minor girl

Whoever by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

Definition Under Case Law

This section has not been adequately dealt with under case law to provide any analysis.

Elements of Sexual Violence Falling Under the Provision

This section addresses internal trafficking of minors. The necessary elements for trafficking exist and fall here.

This section also deals with cases of bride buying, as long as the 'brides' are below the age of 18.

366-B. Importation of girl from foreign country

Whoever imports into Pakistan from any country outside Pakistan any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

Definition Under Case Law

This section has not been adequately dealt with under case law to provide any analysis.

Elements of Sexual Violence Falling Under the Provision

This section relates to trafficking across international borders, while the previous one (Section 366 A: Procurement of Minor Girl) deals with internal trafficking.

367-A. Kidnapping or abducting in order to subject person to unnatural lust

Whoever kidnaps, or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with death or rigorous imprisonment for a term which may extend to twenty-five years, and shall also be liable to fine.

Definition Under Case Law⁸⁹

It is an accepted principle that if two separate acts make up one single offense, they cannot be charged as separate offenses. Therefore, in order to constitute an offence under this section, a child must be removed from lawful guardianship to commit an act of 'unnatural lust'. The removal or taking away a child from legal guardianship would not make an additional offence of abduction.

Elements of Sexual Violence Falling Under the Provision

This section deals with unnatural lust alongside kidnapping or abduction of the victim. The definition of what is 'unnatural' can be expanded here. On the face of it, it refers to sodomy, but it can in fact refer to other forms of rape. Examples can include rape with objects, necrophilia and un-consented sadomasochistic behaviour.

⁸⁹ 2010 PCrLJ 274

371-A. Selling person for purposes of prostitution, etc

Whoever sells, lets to hire, or otherwise disposes of any person with intent that such a person shall at any time be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person shall at any time be employed or used for any such purpose, shall be punished with imprisonment which may extend to twenty-five years, and shall also be liable to fine.

Explanations:-

(a) When a female is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

(b) For the purposes of this section and section 371B, "illicit intercourse" means sexual intercourse between persons not united by marriage.

Definition Under Case Law⁹⁰

The important ingredients in this offence include whether the girl was purchased; whether she was recovered from the custody of the accused; and whether she was to be used in future for the purpose of prostitution.

Elements of Sexual Violence Falling Under the Provision

This section deals with the offence of prostitution, as is explained clearly in this section. This particular section focuses on those who are selling the victim for this purpose. All those involved in the different phases of the 'sale' can fall under this section.

⁹⁰ 2009 YLR 1013

371-B. Buying person for purposes of prostitution, etc

Whoever buys, hires or otherwise obtains possession of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, shall be punished with imprisonment which may extend to twenty-five years, and shall also be liable to fine.

Explanation: Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Definition Under Case Law⁹¹

There are a number of different ingredients under this provision. First is the question of "possession". The law does not specify the nature of possession nor its duration nor intensity. The question is what possession means and what amounts to obtaining possession. Possession should be such as would imply a sufficient control over the minor. The gist of the offence under the section lies in the exercise of effective control over a person under the age of eighteen years. It is not necessary that possession should be obtained from a third party.

Secondly, there must be a specific object, namely prostitution or illicit intercourse. The only test which is necessary and sufficient for this section is whether in each case, the possession is such as to be consistent with the purpose or intention or knowledge of prostitution or illicit intercourse. The requirement for possession is that it is obtained for the purpose of a single act of sexual intercourse and that possession "denotes definite control over the person of whom possession is obtained".

Thirdly, it is necessary that the accused who is obtaining possession must know it to be likely that she would be employed or used for purpose of prostitution, illicit intercourse or for any other unlawful and immoral purpose. The evidence of intention or knowledge must be that the receiver was "at the time of receipt" compelled by the desire of employing or using her as a prostitute. It is an intention as to the future course of conduct which constitutes the offence.

Elements of Sexual Violence Falling Under the Provision

As the above section deals with selling, this section focuses on the buying side. This side is extremely important to focus on, as if in when 'demand' is controlled, there would be less supply.

⁹¹ 1970. PCrLJ 120; PLD 1963 (W. P.) Lahore 357; PLD 1963 (W. P.) Lah 239

375. Rape

A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,

(i) Against her will;

(ii) Without her consent;

(iii) With her consent, when the 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 the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or

(v) With or without her consent when she is under sixteen years of age.

Definition Under Case Law⁹²

It is important to understand that lack of consent is the most important factor in this section. Consent also has to be valid consent, i.e., a girl below the age of sixteen cannot ever be said to have 'consented'. Consent has been argued to constitute 'unequivocal voluntary consent'.

It is also important to note that 'consent' and 'submission' are not synonymous terms.

It is not necessary for there to be complete penetration. Partial penetration is sufficient for conviction. Evidence can be collected through injuries on victim's body—however, this is not to say that absence of injuries proves otherwise. DNA and other circumstantial and forensic evidences are also important to collect as they corroborate the survivor's testimony.

However, this section is often used against couples who have eloped or married without the consent of their parents. In such cases, consent of an adult must be established in order to prevent injustice.

Elements of Sexual Violence Falling Under the Provision

Rape in Pakistani law has been defined to focus on penetration of a penis into the vagina or anus of another. However, worldwide, this definition has been widened. It is now accepted as including penetration of the mouth as well as vagina and anus, as well as object rape, i.e., the use of any object for the purposes of penetration.

The United States statutes now accept that rape also includes the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of sixteen (16) years with the intent to abuse, humiliate, harass, degrade, arouse or gratify the sexual desire of any person.

Also it is important is to re-define rape in connection with the definitions given earlier in the study, where rape has been shown to take various forms.

⁹² 1987 MLD 2172; 1963 PLD 684; 1959 PLD38; 2010 YLR 2019; 1983 PCrL 992; PLD 1979 Lahore 155; 2010 YLR 1061; 2010 YLR 766

377. 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.

Definition Under Case Law⁹³

Under this section, the offence is complete when there has been carnal intercourse against the order of nature with any man, woman or animal. Consent is immaterial, except as a possible mitigating factor.

In order to prove the offence, proof of ejaculation is not required and neither are marks of violence. It is sufficient that the accused discharges by rubbing of private parts, meaning that actual penetration is not necessary to constitute an offence, nor even in a legal sense of attempting penetration. If illegal means are used to fulfil an unnatural lust, it falls under this section.

Elements of Sexual Violence Falling Under the Provision

The definition of unnatural lust was discussed in an earlier section and is re-produced here.

The definition of what is 'unnatural' can be expanded here. On the face of it, it refers to sodomy, but it can in fact refer to other forms of rape. Examples can include rape with objects, necrophilia, un-consented sadomasochistic behaviour, etc.

⁹³ 1961 PLD 7; 1970 PLD 230; 1961 PLD 447; 1959 PLD 623; 1991 PCRLJ 1017; 2007 SCMR 698; 1990 ALD 394 (1); 1988 SCMR 1614I PLJ 2003 CrC (Lah) 852; 2005 PCrLJ 58

441. Criminal trespass

Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass".

Definitions Under Case Law⁹⁴

The necessary ingredients of this offence are to commit trespass to intimidate, insult or annoy any person in possession of the property in dispute.

There is a distinctive difference between "criminal" and "civil" trespass. In the latter, all that is needed is that the offence is committed by taking possession of the property without the consent of the person in possession. In the former, it is necessary for there to be insult or annoyance to the person in possession of such property and is a condition precedent. If the person would not be annoyed or intimidated in absentia and in such a situation the charge of criminal trespass would not be sustainable.

From the plain reading of this provision, it is manifestly clear that to constitute an offence of criminal trespass one must enter into the possession of another unlawfully and unlawfully remain there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence.

It is vital for the prosecution to establish that there must have been a real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant, and that any claim of right was a mere cloak to cover the real intent or at any rate constituted not more than a subsidiary intent, however, ill-founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is of annoyance to the occupant.

Criminal trespass can be committed even in absence of the occupier of the premises. Nor can a trespassor claim the right of self defence unless to bring an end to his own trespass. Further mere knowledge that a particular consequence might follow is not sufficient to bring at trespass within this section.

Elements of Sexual Violence Falling Under the Provision

Criminal trespass would be another ancillary offense to one of sexual violence. This would, again be considered as an act of preparation to any form of sexual violence if the trespass was committed with the intention to commit an illegal sexual act, i.e., rape and gang rape.

⁹⁴ 2006 PCrLJ 539; PLD 1982 Karachi 600; PLD 556 SC 1975; 1983 PCrLJ 42; 2008 PCrLJ 812; PLD 1965 SC 640

442. House-trespass

Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass".

Explanation: The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house trespass.

Definitions Under Case Law⁹⁵

The main purpose of this section is that without getting the permission of the occupant or without a search warrant, no stranger, including a police officer can enter the house of any person. It is even illegal for a magistrate to enter any premises if he is not authorised to enter into the premises without due process of law or permission of occupants.

Case law has also defined the word 'building' to include even a courtyard consisting of a walled enclosure with four rooms opening into it and an outer door to get into it. Similarly, a walled cattle yard has also been held to be a building.

Elements of Sexual Violence Falling Under the Provision

As above, this may be an ancillary offence, i.e., an act of preparation to commit an offence of sexual violence.

⁹⁵ 2008 PLD SC 376; 1996 PCRLJ 1608; 1968 PCRLJ 1857

493-A. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage

Every man who deceitfully causes any woman, who is not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief, shall be punished with rigorous imprisonment for a term which may extend to twenty-five years and shall also be liable to fine.

Definition Under Case Law

This section has not been adequately analysed and interpreted under case law.

Elements of Sexual Violence Falling Under the Provision

Due to the lack of case law, this section has been laid wide open. This offence addresses the 'false' husband; a number of situations may arise where the husband makes his 'wife' believe they are lawfully married, while in fact they are not.

However, this section can be interpreted loosely in order to include within it, husbands who are aware that their marriage was conducted in contravention to any of the laws in Pakistan, i.e. a second marriage without permission from the Arbitration Council or the first wife or the marriage with a 'child' as per Child Marriage Restraint Act (discussed further in this report).

Due to the deceitfulness of the husband, making his wife believe that they have fulfilled all legal criteria to be married, he can be said to have induced a belief of a 'lawful' marriage and therefore be guilty under this section.

Thereby a "false" husband can also be tried for rape, if this section is read with the amendments incorporated into the PPC with the Protection of Women Act 2006, specifically the definition of "rape" under Section 375 PPC.

496. Marriage ceremony fraudulently gone through without lawful marriage

Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall be liable to fine.

Definition Under Case Law⁹⁶

It is interesting that under this section of the PPC, instead of cases that actually pertain to the elements of this offence. There are a large number of cases where women whose families claim that they have been abducted and forced to enter into *nikahs* (marriage contracts) with their abductors. However, these women have come before the court and declared that they married of their own free will.

Elements of Sexual Violence Falling Under the Provision

As above, this section can be expanded to cover situations where the groom and/or other relevant persons, including the *Qazi*, do not reveal the fact that the marriage is not 'lawful'. This would cover, as above, situations of forced marriages, where the wife has already gone through a *nikah* with another and child marriages, etc.

⁹⁶ 2009 YLR 1425; 2008 YLR 1097

496-A. Enticing or taking away or detaining with criminal intent a woman

Whoever takes or entices away any woman with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any woman, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Definition Under Case Law⁹⁷

This section is also not adequately discussed under case law from those studied. Unfortunately, this provision seems to have been used more as a tool to control women's choice in marriage by charging her and her husband of choice in order to pressurise her to return to the fold and repudiate her marriage of choice.

This section is similar to section 498 (Enticing of taking away or detaining with criminal intent a married woman); the only difference being of the marital status of the women. One can presume that the ingredients will be similar between the two.

Elements of Sexual Violence Falling Under the Provision

This involves the elements of enticing or detaining a woman with criminal intent. This would include all parties who have been involved in any sort of unlawful behaviour with a woman. This could include sexual abuse, rape, etc. This too, could be considered a preparatory act to be followed by a form of sexual violence.

⁹⁷ 2010 PCrLJ 1342; 2009 YLR 49

498. Enticing or taking away or detaining with criminal intent a married woman

Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Definition Under Case Law⁹⁸

From case law studied and as referenced in the footnotes below, this section is also often used by men to try to 'control' their women, for example, where a woman tries to leave her husband for any reason. The courts have noted that in order to continue proceedings in such cases is an abuse of the process of the Court.

The first requirement in this section is to prove that the woman was the wife of the complainant and the accused knew and had reason to believe that she was the wife of the complainant. This is subject to strict proof.

Secondly, the concept of 'taking away' needs to be defined. A woman going in the company of another does not establish "taking away" a woman. There must be physical or moral influence to induce a woman to leave her husband. There must be a strong influence emanating from the accused and operating on the woman's mind. This is necessary in order to get a conviction under this section.

It is also important to note that women cannot be an accused under this section. She is excluded from punishment, even as an abettor.

Elements of Sexual Violence Falling Under the Provision

The only difference between this and the last section (Section 496 A. Enticing or taking away or detaining with criminal intent a married women) is the marital status of the woman, i.e., this section specifically applies to married women.

⁹⁸ PLD 1961 (W. P.) Karachi 150; PLD 1963 Dacca 798; PLD 1963 Supreme Court 51; PLD 1974 Lahore 1; 1980 PCrLJ 974; PLD 1974 Lah 500; 1980 PCrLJ 626

503. Criminal Intimidation

Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Definitions Under Case Law⁹⁹

There are three main essential ingredients under this section:

- (1) There must be a threat;
- (2) That threat must be causative of injury to a person, reputation or to his property or to any other one in whom that person could be interested; and
- (3) That there must be a purpose of threat also which could cause harm to that person or to do any act which he was not legally bound to do or omit which that person was legally entitled to so as the means of avoiding execution of such threat.

Therefore, simple threats would not be sufficient to constitute an offence under this section. It is necessary to have the intention enunciated in the third ingredient in a threat for it to constitute an offence. The word 'threat' implies a declaration of indication of an intention to inflict, punish or hurt, to intimidate by threat to indicate danger.

Elements of Sexual Violence Falling Under the Provision

This section is significant for a number of reasons.

The most obvious aspect of this provision is the act of threatening harm in situations such as domestic violence, rape, assault, or abuse of the person being addressed or anyone connected to that person. It also makes it an offence to threaten the reputation of a person. This is an essential element as a woman's reputation is considered to be extremely important in Pakistani society. If her reputation is tarnished, it can amount to her being isolated by her community, being taunted, leading to sexual harassment, abuse and assault, etc. This section can also be used to cover issues of blackmail and manipulation.

Threats therefore could be implicit in offences such as forced marriages, domestic violence, rape, prostitution, and trafficking.

In view of the current times and modern technology, the means of threats must also be recognised and included. It could thereby include situations where an indecent, offensive or threatening letter, electronic communication or other article is sent to another person, as well as sending telephone messages which are indecent, offensive or threatening.

Aggravated sexual abuse is not defined specifically under the law. Nevertheless, its several components are spread out, including criminal intimidation in commission of the crime. Therefore, this section, in combination with any of the sections in which an act of sexual violence is committed, could constitute as aggravated sexual abuse.

⁹⁹ 2010 MLD 291; 2007 YLR 441; 2002 PCRLJ 530; 1988 PCRLJ 1560; 2002 PCrLJ 530; 1991 PCrLJ Noted 68; 1988 PCrLJ 270

509. Word, gesture or act intended to insult the modest of the woman

(1) Whoever:

- a) Intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman;
- b) conducts sexual advances, or demands sexual favours or uses written or verbal communication or physical conduct of a sexual nature which intends to annoy, insult, intimidate or threaten the other person or commits such acts at the premises of work place, or makes submission to such conduct either explicitly or implicitly a term or condition of an individual's employment, or makes submission to or rejection of such conduct by an individual a basis for employment decision affecting such individual, or retaliates because of rejection of such behaviour, or conducts such behaviour with the intention of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment,

shall be punished with imprisonment which may extend to three years or fine up to five hundred thousand rupees or with both.

Explanation-1

Such behaviour might occur in public place, including, but not limited to, markets, public transport, streets or parks, or it might occur in private places including, but not limited to work places, private gatherings, or homes.

Explanation-2

Workplace means, the place of work or the premises where an organization or employer operates, this may be a specific building, factory, open area or a larger geographical area where the activities of the organization are carried out. Sexual advances may occur after working hours and outside workplace. It is the access that a perpetrator has to the person being harassed by virtue of a job situation or job related functions and activities.

Definition Under Case Law¹⁰⁰

It is not sufficient to complain about offending the modesty of women in general. Also, even if the complaint does not necessarily need to be filed by the woman concerned, it must specify the particular woman or women whose modesty has been insulted.

This act will also apply only to those who have specifically performed the act. Also it depends on whether the words themselves would become obscene with reference to the person or occasion.

Elements of Sexual Violence Falling Under the Provision

This section specifically covers the offense of sexual harassment. This is a new law and has not been fully implemented as yet. It is important to note that this section focuses on harassment in public as well. The language of the provision is clear cut and wide, so it remains to be seen how well it is truly implemented by the courts.

¹⁰⁰ 1955 PLD 261; 1957 PLD 201; 1979 PLD 659

ANTI TERRORISM ACT, 1997

6. Terrorist act

A person is said to commit a terrorist act if he,

...

(c) commits an act of gang rape, child molestation, or robbery coupled with rape as specified in the Schedule to this Act; ...

Definition Under Case Law¹⁰¹

Under this section, the commission of the act need not necessarily have caused panic and terror among the people. It does not even necessarily have to take place within the view of the general public. It is necessary for the court to be able to see whether the act is one which would have the tendency to create a sense of fear or insecurity in the minds of the people or any section of society and it has a psychological impact on their minds. The act itself must have taken place in a barbaric and gruesome manner which has created fear and insecurity. Therefore a key ingredient that needs to be confirmed is whether there is or has the potential of creating fear or insecurity in the minds of the people.

This section cannot be determined without examining the nature, gravity and heinousness of the alleged offence, contents of the F.I.R., its cumulative effects on the society and a class of persons and the evidence which has come on record. Where the action of an accused person results in striking terror or creating fear, panic, a sensation of helplessness and sense of insecurity among the people in a particular vicinity, it amounts to terror and such an action squarely falls within the ambit of this section.

A heinous offence is an offence which is wicked, atrocious, cruel and offensive. To fall under this section, the act must therefore be of such nature, therefore it is maintainable in front of a special court.

Child molestation has been widely defined in case under this act. This definition is extremely positive as child abuse and molestation are not defined in the law. This case definition therefore provides the set standard of these heinous acts:

"We note that the expression "child molestation" has not been defined in any law in Pakistan. The Concise Oxford Dictionary, 8th Edition, defines the word molest as under:-

(i) Annoy or pester (a person) in a hostile or injurious way;

(ii) Attach or interfere with (a person) specifically sexually.

¹⁰¹ PLD 2003 SC 224; 2006 PLD 109; P L D 2000 Lah 449; 2005 MLD 1096

The term "child molestation" is sometimes used as synonymous to child abuse. However, they do not always refer to the same transaction. Child abuse could take more than one forms as under: -

- (i) Physical beatings to a child or subjecting him to severe beatings, burns, strangulation, or human bites,*
- (ii) (Neglecting a child by not providing the basic necessities of life including refusal or delay in providing food, clothing, shelter, medical care, and education, as well as abandonment and inadequate supervision.*
- (iii) Emotional abuse is a kind of behaviour that attacks a child's emotional development and sense of self-esteem. Examples include constant criticizing, belittling, insulting, rejecting, and providing no love, support, or guidance.*
- (iv) Sexual molestation is the sexual exploitation of a child, including rape, incest, fondling of the genitals, pornography, or exhibitionism.*

Thus child molestation would certainly be a child abuse but all acts of child abuse would not necessarily be child molestation. Sexual molestation of child could be of various types. It could be fondling of the genital organs of the child, or it could be showing him nude photographs to arouse his sexual emotions or it could be in form of physical nudity with the object of sexually provoking or exploiting a child. Most of the foregoing acts have not been specifically made offences in our criminal law nor has the rape of a child been separately catered to. The rape of a child or "Zina-bil-Jabr" is an aggravated form of child molestation and a person who is proved to have committed the offence would be punished in terms of the punishment provided in the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The effect of Anti Terrorism Act, 1997 is that this alleged offence of child rape would be tried by a Special Court under the afore-referred. The offence substantially remains the same, only forum of trial has changed."

Elements of Sexual Violence Falling Under the Provision

It is extremely positive that gang rape and child molestation have been included as terrorist acts. This recognition leads one to believe that such issues are being given some priority, albeit on paper at the present time, but the recognition of them as major crimes is a huge stride towards the future.

The wide definition of child molestation included under this section provides a great deal of protection for children and punishment for the perpetrators under section 7 of the act. It could therefore include within it:

Child sexual abuse and assault; child pornography; abuse of children through pornography; sexual exploitation of children, forcing children to watch sexual acts, causing, encouraging, arranging or facilitating child prostitution or pornography, and controlling any of the activities of a child involved in prostitution or pornography, etc.

This section does not exclude the possibility of 'anyone' being the perpetrators, thereby covers only molestation by strangers, but also blood relatives, as well as foster and adoptive parents and guardians, etc.

Potentially, this section could also include rapes during conflict whether internal or external conflicts, as long as the offence is committed in Pakistan.

PREVENTION AND CONTROL OF HUMAN TRAFFICKING ORDINANCE, 2002

2. Definition.

In this Ordinance, unless there is anything repugnant in the subject or context

(b) “child” means any person who has not attained the age of eighteen years

(d) “coercion” means the use of force, violence, physical restraint, deception, fraud or acts or circumstances not necessarily including physical force but calculated to have the same effect, such as the credible threat of force or of infliction of serious harm

(f) “exploitative entertainment” means all activities in connection with human sports or sexual practices or sex and related abusive practices

(h) “human trafficking” means obtaining, securing, selling, purchasing, recruiting, detaining, harbouring or receiving a person, notwithstanding his implicit or explicit consent, by the use of coercion, kidnapping, abduction, or by giving or receiving any payment or benefit, or sharing or receiving a share for such person’s subsequent transportation out of or into Pakistan by any means whatsoever for any of the purposes mentioned in section 3.

Definition Under Case Law

These definitions have not been further enunciated under recorded case law for more effective clarity or discussion.

Elements of Sexual Violence Falling Under the Provision

Human trafficking has been an increasing problem across the world. Pakistan is a major player in this illegal industry as a port of origin, transit and destination.

This law identifies the sexual nature of trafficking and makes it illegal. This is a positive law relating to women, except that it excludes internal trafficking. Nevertheless, it is vital to international trafficking and needs to be implemented more often.

In the normal course of events, the Foreigners Act comes into play but rarely is this Act referred to and have cases registered under it. The police and the lawyers need to be more proactive to recognise the ingredients of this law and to apply it.

3. Punishment for human trafficking

The human trafficking shall be punishable as under.

- (i) Whoever knowingly plans or executes any such plan for human trafficking into or out of Pakistan for the purpose of attaining any benefit, or for the purpose of exploitative entertainment, slavery or forced labour or adoption in or out of Pakistan shall be punishable with imprisonment which may extend to seven years and shall also be liable to fine:

Provided that in case of an accused who, in addition to committing an offence as aforesaid has also been guilty of kidnapping or abducting or any attempt thereto in connection with such offence, the imprisonment may extend to ten years with fine: Provided further that whoever plans to commit an offence under this clause but has not as yet executed the same shall be punishable with a term of imprisonment, which may extend to five years and shall also be liable to fine.

- (ii) Whoever knowingly provides, obtains or employs the labour or services of a person by coercion, scheme, plan or method intended to make such person believe that in the event of non-performance of such labour or service, he or any other person may suffer from serious harm or physical restraint or legal proceedings, shall be punishable with imprisonment which may extend to seven years and shall also be liable to fine:

Provided that if the commission of the offences under this clause involves kidnapping or abduction or any attempt thereto, the term of imprisonment may extend to ten years with fine.

Provided further that payment of any remuneration in lieu of services or labour of the victim shall not be treated as mitigating circumstance while awarding the punishment.

- (iii) Whoever knowingly purchases, sells, harbours, transports, provides, detains or obtains a child or a woman through coercion, kidnapping or abduction, or by giving or receiving any benefit for trafficking him or her into or out of Pakistan or with intention thereof, for the purpose of exploitative entertainment by any person and has received or expects to receive some benefit in lieu thereof shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

Provided that if the commission of the offence under this clause involves kidnapping or abduction or any attempt thereto of the victim, the term of imprisonment may extend to fourteen years with fine.

Provided further that plea, if any, taken by the biological parents of the child shall not prejudice the commission of offence under this clause.

- (iv) Whoever knowingly takes, confiscates, possesses, conceals, removes or destroys any document related to human trafficking in furtherance of any offence committed under this Ordinance or to prevent or restrict or attempt to prevent or restrict, without lawful authority, a person's liberty to move or travel shall be punishable with imprisonment which may extend to seven years and shall also be liable to fine.

Definition Under Case Law¹⁰²

To constitute an offence under this section, it is necessary for there to be coercion, kidnapping etc. A mere promise or taking a person outside Pakistan to provide employment abroad will not constitute "human trafficking" within the meaning of Section 3 of this Ordinance.

Elements of Sexual Violence Falling Under the Provision

While this law specifically focuses on the sexual element of human trafficking, which is very positive, it is important that the police, lawyers or anyone else involved in such a case can adequately differentiate between smuggling and trafficking.

The sexual elements must be made more public and ensure awareness of the justice sector, specifically the police and lawyers in order to provide actual punishments under this law.

¹⁰² 2008 PLD 2181; 2006 YLR 1682

THE PROTECTION AGAINST HARASSMENT OF WOMEN AT THE WORKPLACE ACT 2010

2. Definitions. – In this Act, unless there is anything repugnant in the subject or context-

(h) “harassment” means any unwelcome sexual advance, request for sexual favours or other verbal or written communication or physical conduct of a sexual nature or sexually demeaning attitudes, causing interference with work performance or creating an intimidating, hostile or offensive work environment, or the attempt to punish the complainant for refusal to comply to such a request or is made a condition for employment;

Definition Under Case Law

The definition of harassment has not been further clarified or discussed under case law.

Elements of Sexual Violence Falling Under the Provision

To the best of the knowledge, during the research time period, no reported case has come up under this law.

However, this is a pro-women act, focusing on the freedom of sexual harassment at the workplace for women. It immediately provides protection for working women and penalises those who harass them.

CHILD MARRIAGE RESTRAINT ACT, 1929

2. Definitions

In this Act, unless there is anything repugnant in the subject or context,

(a) “child” means a person who, if male, is under eighteen years of age, and if a female, is under sixteen years of age;

(b) “child marriage” means a marriage to which either of the contracting parties is a child;

Definition Under Case Law¹⁰³

Under this section while marriage to a child may be illegal and punishable, it does not render the marriage invalid.

However, an adult husband marrying a child will be liable for punishments. Females will not be punished under this act.

Elements of Sexual Violence Falling Under the Provision

This section confirms that under Pakistani law, a girl cannot be married off until she attains the age of 16 years.

These laws relate to marriage and state clearly that a child under this definition is too young to be married, i.e., the child has not reached a minimum physical or mental maturity. It is accepted across the world that there is much harm, physically, emotionally and mentally, for children to participate in sexual activities. Even more problematic is if the child becomes pregnant and she has to give birth before her body is fully matured to do so. Also even if she may have reached physical maturity, she should not be forced to give up her childhood.

Therefore, if a child is married off before the required age and if the adult husband indulges in sexual intercourse, it should be identified as rape, as a minor cannot legally consent to sexual intercourse.

¹⁰³ 1975 PLD 234; 1970 PLD 323

4. Punishment for male adult above eighteen years of age marrying a child

Whoever, being male above eighteen years of age, contracts child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Definition Under Case Law¹⁰⁴

As it is noted in the section above, an adult marrying an under-age female is liable to punishment. However, if the girl has attained puberty and contracted a marriage with a person of her own free will, then the marriage is valid and her husband is her guardian.

Elements of Sexual Violence Falling Under the Provision

As discussed in the previous section, child marriages should be defined to include sexual intercourse with a child bride as rape. The husband, being an adult, should therefore be charged with rape or sexual abuse along with this section under the law.

Other clauses such as conspiracy to commit a crime or under section 34 PPC, having a common intention to commit a crime, would also be attracted here due to his involvement in the planning and the commission of an illegal act, i.e., marrying a child and having committed sexual assault or rape.

¹⁰⁴ 1970 PCRLJ 1035; 1964 PLD 630

5. Punishment for solemnizing a child marriage

Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both unless he proves that he had reason to believe that the marriage was not a child marriage.

Definition Under Case Law¹⁰⁵

This provision is wide enough to cover the fathers of both the bride and groom.

Elements of Sexual Violence Falling Under the Provision

The previous section (Section 4: Punishment for male adult above eighteen years of age marrying a child), this section and the following section (Section 6: Punishment for parent or guardian concerned in child marriage) focus, not on the definition but on the liability of the crime.

This provision deals with those solemnizing the child marriages. As seen from the case definitions, it can extend to both fathers of the bride and groom. It can however also potentially extend to those who participated in the solemnization of the marriage, such as the *Qazi* (religious judge or adjudicator) who read and registered the *nikah*.

As above, he could also be liable under section 34 PPC.

¹⁰⁵ 1964 PLD 630

6. Punishment for parent or guardian concerned in child marriage

(1) Where a minor contracts a child marriage any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment which may extend to one month, or with a fine which may extend to one thousand rupees, or with both:

Provided no woman shall be punishable with imprisonment.

(2) For the purpose of this section, it shall be presumed, unless and until contrary is proven, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnized.

Definition Under Case Law¹⁰⁶

Violation of this section does not make the marriage invalid though it makes punishable a marriage made in violation of its provisions.

Elements of Sexual Violence Falling Under the Provision

As mentioned above, this section deals with liability of the crime. This provision focuses on the parents or guardians of the child.

Alongside this provision, they could also be liable for conspiracy and common intention under Article 34 PPC, amongst others.

¹⁰⁶ 1988 CLC 113

OFFENCE OF ZINA (ENFORCEMENT OF HUDOOD) ORDINANCE, 1979

5-A. No case to be converted, lodged or registered under certain provisions

No complaint of zina under section 5 read with section 203A of the Code of Criminal Procedure, 1989 and no case where an allegation of rape is made shall at any stage be converted into a complaint of fornication under section 496A of the Pakistan Penal Code (Act XLV of 1860) and no complaint of fornication shall at any stage be converted into a complaint of zina under section 5 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 (Ordinance No. VII of 1979) or an offence of similar nature under any other law for the time being in force.

Definition Under Case Law¹⁰⁷

This section has not been discussed or clarified under case law.

Elements of Sexual Violence Falling Under the Provision

Due to the methods employed by the Zina Ordinance prior to the 2006 amendment (Women's Protection Act), it was common that a complaint of rape would be converted to one of fornication, if the required evidence for rape could not be found.

This section specifically combats this issue. It is vital for the police and lawyers to be aware of this in order to ensure there is no repeat of the previous practices.

¹⁰⁷ Protection of Women (Amendment) Act 2006

PREVENTION OF ELECTRONIC CRIMES

ORDINANCE 2009

13. Cyber stalking

(1) Whoever with intent to coerce, intimidate, or harass any person uses computer, computer network, internet, network site, electronic mail or any other similar means of communication to,- -

- a) communicate obscene, vulgar, profane, lewd, lascivious, or indecent language, picture or image;
- b) make any suggestion or proposal of an obscene nature;
- c) threaten any illegal or immoral act;
- d) take or distribute pictures or photographs of any person without his consent or knowledge; or
- e) display or distribute information in a manner that substantially increases the risk of harm or violence to any other person, commits the offence of cyber stalking.

(2) Whoever commits the offence specified in subsection (1) shall be punishable with imprisonment of either description for a term which may extend to seven years or with fine not exceeding three hundred thousand rupees, or with both:

Provided that if the victim of the cyber stalking under sub-section (1) is a minor the punishment may extend to ten years or with fine not less than one hundred thousand rupees, or with both.

Definition Under Case Law

No cases have been reported by the High Courts under this section.

Elements of Sexual Violence Falling Under the Provision

This section specifically deals with the modern form of communication i.e. electronic. The language of the section is straight forward and self explanatory. Different forms of violence that could fall under this could include pornography, harassment over the internet including emails and through social media networks, taking unauthorized or unwanted pictures or videos of a person and putting them on the internet for private or public viewing.

This section is an excellent provision dealing with one of the most current forms of harassment, violations of rights and violence against women.

19. Of abets, aids or attempts to commits offence

(1) Any person who knowingly and willfully abets the commission of or who aids to commit or does any act preparatory to or in furtherance of the commission of any offence under this Ordinance shall be guilty of that offence and shall be liable on conviction to the punishment provided for the offence.

(2) Any person who attempts to commit an offence under this Ordinance shall be punished for a term which may extend to one-half of the longest term of imprisonment provided for that offence.

Explanation.--For aiding or abetting an offence to be committed under this section, it is immaterial whether the offence has been committed or not.

Definition Under Case Law

No cases have been reported by the High Courts under this section.

Elements of Sexual Violence Falling Under the Provision

As with earlier sections relating to aiding and abetting, any person who aids or abets in a crime under this act is liable to be punished. This could include persons who may have taken unauthorized photos or videos, people who place the photos or videos, those who may have participated in these in any way possible even if their computer was used with the knowledge of what it is being used for, etc.

20. Other offences

Whoever commits any offence, other than those expressly provided under this Ordinance, with the help of computer, electronic system, electronic device or any other electronic means shall be punished, in addition to the punishment provided for that offence, with imprisonment of either description for a term which may extend to two years, or with fine not exceeding two hundred thousand rupees, or with both.

Definition Under Case Law

No cases have been reported by the High Courts under this section.

Elements of Sexual Violence Falling Under the Provision

This section deals with any other electronic or cyber offence not covered specifically by the law. This could therefore include modified or altered photographs placed on the internet for public or private viewing, sex texts, etc.

CONCLUDING REMARKS

The Pakistani statutes do not address many forms of sexual violence against women and children. There are no specific laws on various forms of sexual violence that have been mentioned in earlier sections of this report. There are also no legal provisions that specifically address and prescribe punishment for object rape, incest, digital rape, necrophilia or marital rape. Additionally, the laws on rape carry a restrictive definition of what would constitute rape and explain that penetration is sufficient to constitute the offence of rape, with penetration understood to be penile. They do not take into consideration non-penile penetrative sexual offences that may fall under the category of sexual assault.

The main motivation behind this report was to open a discussion on alternative interpretations of the laws that deal with offences against the person. We have tried to explain how these laws can be used to prosecute a wide spectrum of sexual violence cases for which there currently are no specific provisions. Thereby, different provisions dealing directly or indirectly with sexual violence have been placed together in this report for easy reference for anyone assisting survivors legally, whether through prosecution, advocating for their rights, working with the police, or otherwise.

This report has also attempted to initiate a thought process amongst the police registering cases, prosecutors working to provide legal counsel or aid, and judges trying cases on how to prudently apply existing laws, especially where their non-recognition results in an absurdity. By no means is this study meant to be an exhaustive list of provisions dealing with sexual violence. It is merely an attempt to demonstrate that such interpretations are possible and are in fact quite logical in terms of the motivations behind the provisions discussed.

It is suggested through this report that those assisting survivors ensure that when approached by someone alleging rape, they must listen to the entire narration without prejudice and decide which offences have been committed by the rapist in preparation or subsequent to the act of rape. It is essential to gain as much information from the survivor as possible, without causing further trauma to see if s/he provides clues to acts done in tandem and in support of the main offence of rape. Accordingly, due diligence should be observed to ensure that all relevant charges against the accused are incorporated in the First Information Report (FIR) lodged by the police. If penal provisions are missing from the FIR, magistrates are encouraged to exercise their discretion and authority to order re-investigation by the police and demanding incorporation of additional charges in the FIR. This will ensure at the later stage that if there is not enough evidence to convict the accused for rape, he may be incarcerated for other offences, for which there may be independent corroborative evidence or circumstantial evidence.

This report also strongly recommends the drafting and enactment of a separate legislation relating to sexual offences in Pakistan. It also takes special view of the fact that although many areas of the law allow effective prosecution of cases, as this report also hoped to show, they do not explicate how the laws would work towards preventing sexual violence, what measures would be taken to ensure survivors' reintegration into society, their rehabilitation and their protection from future abuse.

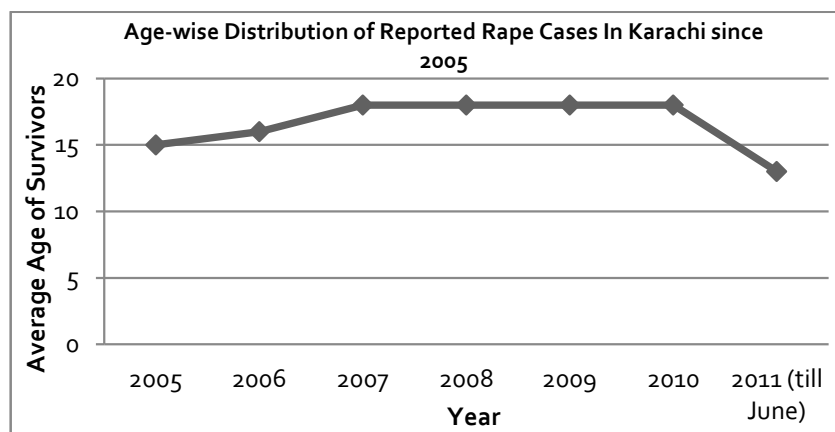
The authors also recognize and appreciate that legislation is time-consuming and that unless it is based on evidence, no matter how good a law, it would remain unimplemented and/or ineffective. Additionally, unless monitoring and evaluation mechanisms form part of legislation, they will perpetuate problems and in effect, limit people's access to justice.

While existing laws may continue to apply in the interim period before a specific code comes into place, it is vital to try to use whatever means and methods to ensure that sexual violence is brought within the ambit of public discourse. It is an area demanding extensive research to

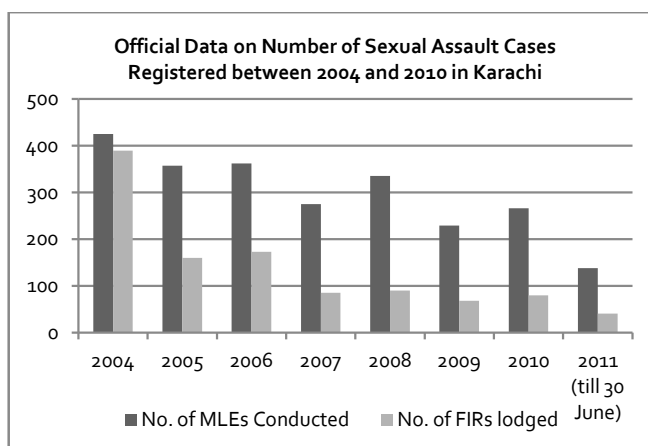
identify its causes in the context of Pakistan, what mechanisms or interventions have worked, and where the gaps lie. It is noteworthy, however, that internationally the reasons for men raping women and children continue to confound the judiciary, which serves to explain why there is a tendency toward inconsistent application of law in trying and convicting sex offenders.

Finally, it is hoped that explaining laws in terms of their inclusivity through this study, lay persons will better understand how the law works, but also be able to use it effectively to protect the rights and increase the chances of justice for survivors.

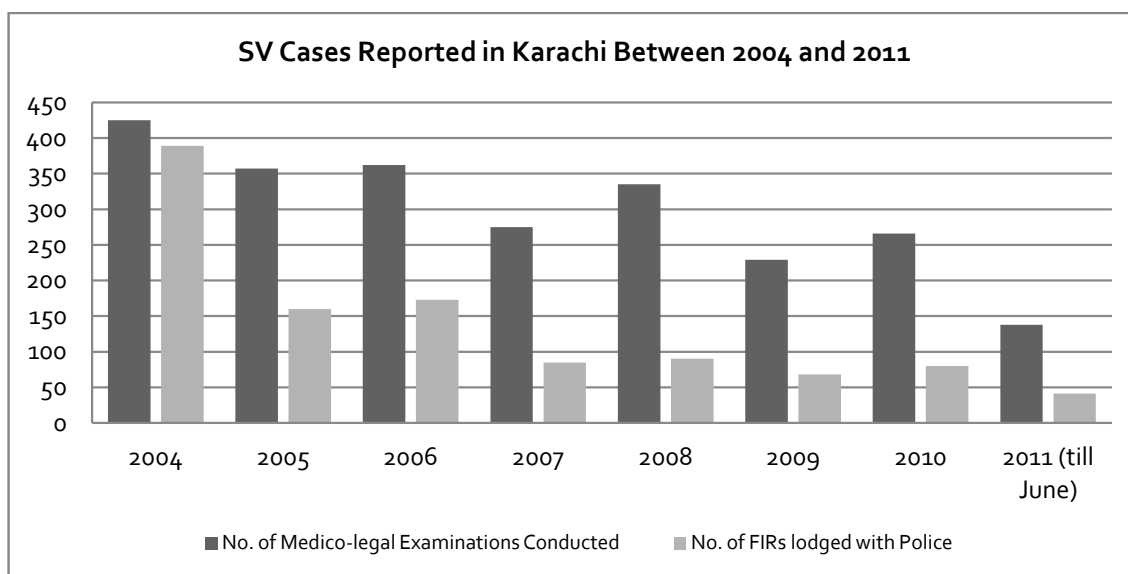
APPENDICES



Source: WAR Factsheet, 2011



Source: WAR Factsheet, 2011



Source: WAR Factsheet 2011

