

Introduction

Sexual Violence in Contemporary Muslim Societies

Male sexual violence against women and girls is a major problem in contemporary Muslim societies. Human rights and women's rights organizations, media sources, and government reports regularly detail the frequent occurrence of numerous forms of such violence, including molestation, rape and incest, underage or forced marriage, abduction and forced prostitution, marital sexual abuse, genital mutilation, and honor killings, among others. The high incidence of male-female sexual violence in Muslim societies appears to be due in large part to sociocultural attitudes and practices that are patriarchal or even misogynistic in nature, and that may contravene the dictates of the law in those societies. Factors such as poverty and economic stagnation, lack of education, absence of protective kinship structures, remoteness from urban centers or centers of judicial and governmental authority, and warfare or political unrest can exacerbate sexual violence against women and girls and can hinder the enforcement of women's rights even where such rights exist in the law. However, the problem of sexual violence in Muslim societies cannot be analyzed only with reference to sociocultural, economic or political factors. Male-female sexual violence in Muslim societies is just as much a problem of the law itself. Legal institutions in many majority-Muslim states function to promote violence against women in systematic ways, ranging from establishing and enforcing male authority and power over females, to phrasing laws in ways that appear neutral but in fact are structurally discriminatory toward women, to providing legal cover for males who perpetrate violence against females. A review of well-known

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cases and problematic laws will highlight some of the challenges in the area of sexual violence toward women and girls in Muslim states.

One of the countries that has received the most attention for its handling of rape, and that demonstrates the potentially adverse impact the law can have in these cases, is Pakistan. From 1979 until 2006, the adjudication of sex crimes was governed by the *Hudood* Ordinances, which sought to impose severe *sharī'a*-based punishments – known as *ḥudūd* (sing. *ḥadd*) – on those who engaged in extramarital sex, or *zinā*. The *Hudood* Ordinances had a devastating effect on female victims of sexual violence. Between 1980 and 1988, the number of women imprisoned on *zinā* charges jumped from 70 to 6,000.¹ By 2000, more than half the imprisoned women awaiting trial had been apprehended on *zinā* charges.²

Individual Pakistani cases reveal the types of problems caused by the *Hudood* laws: In 1983, sixteen-year-old Jehan Mina claimed to have been raped and impregnated by two relatives. The police in turn arrested her for engaging in fornication (*zinā*). The court acquitted the two accused men on the grounds of insufficient evidence. However, under the *Hudood* laws, pregnancy out of wedlock was seen as presumptive evidence of consent to *zinā*, unless countermanding evidence of coercion could be shown. Because she did not have such evidence of coercion, Mina was sentenced to receive the *ḥadd* punishment for *zinā*, which was one hundred lashes.³ That same year, a blind girl – Safia Bibi – claimed to have been assaulted and impregnated by her landlord and his son. In court, she was unable to identify her assailants, and so the charges against them were dismissed. Her pregnancy, however, was treated as evidence of consent to fornication, so she was sentenced to imprisonment for three years, fifteen lashes, and a fine.⁴ The following year, Razaqat Bibi filed a complaint of rape

¹ Rahat Imran, citing the *Human Rights Commission of Pakistan Annual Report, 1999* (Lahore: 1999), and Asma Jehangir, “Women’s Commission and Hudood Ordinances” (www.peacewomen.org/news/Pakistan/newsarchive03/Zina.html).

² Rahat Imran, citing the report *Human Development in South Asia 2000: The Gender Question* (Islamabad: Mahbub-ul-Haq Human Development Centre, 2000).

³ This was later reduced to thirteen lashes and three years of jail time in view of Mina’s being a minor – an example of “lenience” by the court in light of her “crime.” Moeen Cheema, “Cases and Controversies: Pregnancy as Proof of Guilt under Pakistan’s *Hudood* Laws,” *Brookings Journal of International Law* 32 (2006–07), 139–40.

⁴ Rahat Imran, “Legal Injustices: The Zina Hudood Ordinance of Pakistan and Its Implications for Women,” *Journal of International Women’s Studies* 7:2 (November 2005), 78–101. Also, Asifa Quraishi, “Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective,” *Michigan Journal of International Law* 18:2 (Winter 1997), 287–319.

against Muhammad Suleman. But when it was found that she was pregnant, both woman and man were charged with (consensual) fornication. The court convicted Rifaqat Bibi for *zinā* and sentenced her to five lashes and five years in jail. The man, however, was acquitted.⁵ Then, in 1992, a twenty-one-year-old mother of two named Shamim charged three men with abducting and violating her. In response, the police arrested Shamim herself on the charge of *zinā*.⁶ That same year, Veena Hyat, daughter of a prominent politician, was gang raped in her own home by five armed men, after which her father reported the attack. A judicial inquiry concluded that there was insufficient evidence for conviction, and so the assailants went free.⁷ Assaults on high profile women such as Veena Hyat highlight the ways in which Pakistan's rape laws worked against even women possessing more than most in the way of social, political, economic, and legal resources.

After the turn of the century, public opinion began to mount against the handling of sex crimes under the *Hudood* Ordinances. A turning point seems to have occurred in 2002, when a working class housewife named Zafran Bibi raised accusations against her brother-in-law. The court concluded that her accusation constituted an admission to *zinā*, and, as she was married, sentenced her to the capital *ḥadd* punishment of stoning. This was the first widely publicized sentence of stoning to be pronounced under the *sharī'a*-based laws, and it provoked public outcry. After she had spent several months in prison, social pressure led then-president Pervez Musharraf to suspend the death sentence in her case. All the while, as was the norm during this period, the accused was never brought to trial.⁸ By 2006, the activism of feminists and human rights groups began to show fruit, and Pakistan passed the Women's Protection Bill, which amended the penal code to remove sexual violence

⁵ Fortunately, her sentence was later overturned on the grounds that her charge of rape should not be interpreted as a confession on her part to unlawful sex. Moeen Cheema, 142.

⁶ She was held in custody for six days, where police continued to brutalize her. Asifa Quraishi, "Her Honor," citing the Amnesty International 1993 report, *Pakistan: Torture, Deaths in Custody and Extrajudicial Executions* (New York: 1993).

⁷ Asifa Quraishi, "Her Honor."

⁸ Hannah Bloch, "Blaming the Victim," *Time Magazine* (May 20, 2002). Also, Seth Mydans, "Sentenced to Death, Rape Victim Is Freed by Pakistani Court," *The New York Times* (June 8, 2002). In the mid-2000s, another case of unmarried pregnancy arose with nineteen-year-old "Fareeda." Like Jehan Mina, Fareeda had no proof to show that she had not consented to the sex act, and so her claim of rape was considered unsubstantiated. As a result, Fareeda was convicted of *zinā* and flogged twenty-five lashes and jailed. (Dan McDougall, "Fareeda's Fate: Rape, Prison and 25 Lashes," *The Guardian-Observer* [January 16, 2006].)

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from under the governance of the *Hudood* laws and place it under the ordinary civil code. Consequently, the most unjust aspects of the law have been repaired. Nevertheless, Pakistan offers a particularly egregious example of the problems that have arisen when countries have tried to adjudicate male-female rape according to classical constructions of Islamic law.

Other *sharia*-based jurisdictions have enacted or experienced similarly prejudicial laws against female rape victims. Nigeria has witnessed several incidents in which women and girls have become entangled in laws regarding fornication and rape, particularly since the institution of such laws in 1999 in several Muslim-majority states.⁹ In 2000, the unmarried Bariya Magazu was found pregnant. When questioned, she claimed that three men had assaulted her. However, lacking witnesses to support her claim of coercion, she was sentenced to one hundred lashes for *zinā*; she was also sentenced to an additional eighty lashes for unsubstantiated accusations of *zinā* against the three men. The accused men were not prosecuted.¹⁰ A short while later, in 2001, a thirty-five-year-old divorcée from Sokoto state named Safiya Husaini gave birth to a child who she claimed was the result of rape. Her claim was dismissed for lack of evidence of coercion, and she was sentenced to death by stoning for consensual adultery. International outcry, however, resulted in a suspension of her sentence.¹¹ An Amnesty International 2006 report concurs that the construction of rape in Nigerian *sharī'a* codes fails to provide sufficient protection and redress for victims, and that those codes put an unfair burden on rape victims to prove their nonconsent.¹²

Other states with *sharī'a*-based laws have experienced similarly high rates of sexual violence, incrimination of females, and perpetrator impunity. In Mauritania, for example, conviction of men for rape is exceedingly low.¹³ As in Pakistan, Mauritanian women who accuse men of

⁹ For an overview of sexual violence issues in Nigeria, see Chineze J. Onyejekwe, "Nigeria: The Dominance of Rape," *Journal of International Women's Studies* 10:1 (October 2008); also "Nigeria: Rape – the Silent Weapon" (November 2006, Amnesty International). For a review of *zinā* trials in the northern *sharia*-based states of Nigeria, see Gunnar J. Weimann, "Divine Law and Local Custom in Northern Nigerian *zinā* Trials," *Die Welt des Islams* 49 (2009), 429–65.

¹⁰ "Rape – the Silent Weapon," 34.

¹¹ "Sharia Court Frees Nigerian Woman," *BBC News*, Monday, March 25, 2002 (<http://news.bbc.co.uk/2/hi/africa/1891395.stm>, accessed 4/28/14).

¹² Onyejekwe, 52, citing "Nigeria: Rape – the Silent Weapon," 25ff.

¹³ "Mauritania: Justice Not Working for Rape Victims," *IRIN Africa* (May 13, 2008) (<http://www.wluml.org/node/4637>, accessed 12/31/12).

assault may themselves end up convicted of fornication and imprisoned.¹⁴ Twenty-two-year-old “Aminetou,” for example, reported to police that she had been raped by a stranger at home one night. She was simply told that she should not have let her virginity be taken from her and that she had lost her honor.¹⁵ According to the Mauritanian Association for Maternal and Child Health, seven women who raised rape charges against their assailants ultimately were imprisoned on *zinā* charges in the year 2009 alone.¹⁶ Similarly, in Malaysia, notably in states such as Kelantan and Terengganu, *ḥudūd* bills were passed in the 1990s, leading to problems for victims of sexual violence.¹⁷ A report published by Refugees International in 2007 details the high incidence of sexual violence and the absence of legal avenues for women and girls in Sudan, as well.¹⁸ Finally, the highly publicized case of the “girl from Qaṭīf” in Saudi Arabia, in which a victim of a gang rape was sentenced to ninety lashes, exemplifies yet again how poorly equipped *sharīʿa*-based legal systems are to adjudicate sexual violence in a gender-just manner.

The preceding review serves to highlight the problem of male-female sexual violence in Muslim societies. More than that, though, this review underscores some of the specific challenges faced by sexual assault victims in those legal systems. What is common to all the cases reviewed – despite their different histories, politics, and demographics – is that they transpired in *sharīʿa* regimes. That is, they occurred in jurisdictions in which laws governing sexuality and gender relations are purportedly drawn from classical Islamic law (*sharīʿa*). As is made evident by the recurrence of the same types of problems in otherwise dissimilar contexts, the reliance of these states’ legislative and judicial bodies and policies on *sharīʿa* precepts means that their laws share certain similarities in structure – a structure that seems inevitably to work to the detriment of women and

¹⁴ Mohamed Yahya Abdel Wedoud, “Mauritania: Rape Victims Fear Being Jailed for ‘Zinā,’” *CNN* (December 22, 2010) (<http://www.wluml.org/node/6874>, accessed 12/31/12).

¹⁵ “Mauritania: Rape Victims Seek Justice But Find Jail,” *IRIN* (May 11, 2009) (<http://www.wluml.org/node/5239>, accessed 12/31/12).

¹⁶ “Mauritania: Rape Victims Seek Justice But Find Jail,” *IRIN* (May 8, 2009) (<http://www.irinnews.org/report/84302/mauritania-rape-victims-seek-justice-find-jail>, accessed 4/20/14).

¹⁷ Mohammad Hashim Kamali, “Punishment in Islamic Law: A Critique of the Ḥudūd Bill of Kelantan, Malaysia,” *Arab Law Quarterly* 13:3 (1998), 203–34. Also, Nik Noriani Nik Badli Shah, “Man Made Codifications of ḥudūd Law,” *Sisters in Islam* (October 26, 2002) (www.sisterinislam.org, accessed 12/31/12).

¹⁸ Adrienne L. Fricke and Amina Khair, *Laws without Justice: An Assessment of Sudanese Laws Affecting Survivors of Rape* (Washington, D.C.: Refugees International, 2007).

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girls and to perpetuate male-female sexual violence in systematic ways. Thus, a larger point to be gleaned from examining the adjudication of rape in Muslim societies today is that classical Islamic law, far from being a medieval system devoid of contemporary significance, continues to be highly influential in modern Muslim legal codes.

The framing of these states' legal codes as "Islamic" or drawn from *sharī'a* puts the weight of God and religion behind their sex-crimes statutes, making those statutes uniquely authoritative and particularly difficult to interrogate. Nevertheless, given the types of problems faced by victims of sexual violence in *sharī'a* regimes, such interrogation is necessary. One line of interrogation is to question the claim that modern applications of the *sharī'a* are in fact continuous with classical Islamic law. For example, Asifa Quraishi has challenged the idea that Pakistan's *Hudood* rape laws were ever continuous with classical Islamic jurisprudence.¹⁹ Besides seeking discrepancies between classical jurisprudence and contemporary applications, another line of interrogation is to evaluate classical jurisprudence itself critically, to see whether contemporary injustices can legitimately be attributed to that system.²⁰ This is the type of analysis offered, for example, by Kecia Ali in her work on classical Islamic marriage law.²¹ In any event, the claim that contemporary Muslim laws reflect *sharī'a* or classical Islamic law generates confusion at multiple levels, at the same time that the ostensible sanction of both God and tradition serves to legitimate practices and policies that are severely injurious to sexual assault victims. Furthermore, there is no indication that moves toward more "Islamic" or *sharī'a*-based laws are on the decline. Indeed, such efforts appear to be on the increase. The need for critical appraisal of these laws, on both human rights grounds and religious grounds, is therefore urgent. If a state claims that its sex crimes laws are in accordance

¹⁹ See Asifa Quraishi's influential critique of the *Hudood* laws of Pakistan in "Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective," *Michigan Journal of International Law* 18 (1997).

²⁰ Indeed, in some cases, courts have appealed to classical juristic doctrines in order to resist the types of application of *zinā* laws reviewed here. See various court opinions aimed at reducing sentences on women in alleged rape cases in Moeen Cheema, 144ff.

²¹ See Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge, MA: Harvard University Press, 2010); and also, her chapter, "Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines," in *The Islamic Marriage Contract: Case Studies in Islamic Family Law*, eds. Asifa Quraishi and Frank E. Vogel (Cambridge, MA: Harvard University Press, 2008). Perhaps her most direct deconstruction of classical marriage law and contemporary Muslim discourses on marriage is found in "Progressive Muslims and Islamic Jurisprudence," Ch. 7 of *Progressive Muslims: On Justice, Gender, and Pluralism*, ed. Omid Safi (London: Oneworld, 2003).

with religious law or seeks to modify its laws so as to comply better with religious law, then it is necessary to be able to assess its claims, given the power that laws acquire by being designated as “Islamic.” In short, the present legal situation cannot be properly deciphered without a solid understanding of how sexual violence was constructed in classical Islamic jurisprudence.

This book seeks to provide such an understanding of sexual violence in formative and classical Islamic jurisprudence (*fiqh*), particularly in the Sunnī tradition as represented by the two earliest schools of law (*madhhabs*) to grow out of that tradition, which were the Ḥanafī and Mālikī schools. While the substance of this book is squarely focused on late antique and medieval discourses, it may be read in some ways as an extended critique of contemporary *sharī‘a*-based rape laws. The manner of this critique is not through the fields of political science or legal policy, however, but through the discipline of religious studies and the field of Islamic studies, particularly Islamic intellectual history. While my purpose in writing this book is not directly activist in nature, I believe that understanding the construction of rape in early and classical juristic discourses will enable us to assess better where we are today, and where we need to go. Thus, the question at the heart of this project is genealogical and etiological in nature: How did medieval Islamic legal discourses on sexual violation emerge and take their classical forms? How were these discourses and doctrines products of their particular ideal and material contexts? At the same time that this question is historical in nature, it is also in some ways oriented toward the potential: What can a study of the divergent ways in which Islamic doctrines evolved – and the very human ways in which jurists pursued the various lines of reasoning to which they were committed – tell us about the lines of reasoning not taken, about other directions in which these doctrines could yet develop? In the end, while this project is primarily about what Islamic jurisprudence has in fact said about sexual violation, it also hints at what it could have said, and what it might yet say. For while the political and social systems of the world have changed dramatically from the times in which the Prophet lived and in which the great traditions of Islamic theology and moral law were developed by their founding scholars, Islam is a living religion. It continues to be the guiding spiritual, devotional, and moral system of a billion people. For Muslims today as in the past, the quest to understand and reflect the divine will and the divine word, to learn from the example of the Prophet, his companions and his family, and to construct from these a moral vision that at once feels authentic to those sources and to

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a contemporary sense of truth and justice is of the utmost importance. It is not enough for Muslims to wring their hands hopelessly in the face of sexual violence in the name of “Islamic law” and lament, “This is all we have. This is all that God ever wanted for us.” Rather, a comprehension of what jurists thought and how they reasoned, and of how they could diverge so radically from one another despite drawing from the same well in pursuit of their own visions of truth and justice should inspire a hopeful recognition of the potential of Islamic ethico-legal discourses to express a more woman-friendly and gender-just vision of the same.

Key Themes and Arguments of This Book

This book seeks to tell a story, the story of a particular legal idea – that of male sexual violence against females, or what we commonly refer to as “rape” – from its beginnings in the formative period of Islam through its maturation in classical Sunnī legal discourse. This story, at its most basic level, seeks to answer a set of questions: Does Islamic law possess a legal concept of sexual violation akin to contemporary Western concepts of rape? If so, how is it defined? How is it to be punished? What types of evidence and procedure are to be used to establish a victim’s claim, or to verify a defendant’s denial? How were Islamic legal doctrines on each of these points formulated, argued, and defended? In this book, I show that from the earliest period of Islam – indeed, perhaps from the time of the Prophet himself – Muslim legal authorities did in fact maintain a notion of sexual violation as a punishable crime. We will see how various early authorities defined sexual violation, on the basis of their understandings of the Qur’an and the Prophetic legacy, and within the theological, ethical, and cultural parameters in which they worked. I will show how the idea of sexual violation was elaborated over time, through the discourses of certain Sunnī jurists, and how the atomistic legal pronouncements of precedential figures of the formative period of Islam were gradually woven together and rationalized by later medieval scholars into increasingly comprehensive theories about the interrelationships between divine claims and human claims, between sexuality and property, and among volition, legal capacity, and legal liability.

The story of rape’s construction in Islamic jurisprudence begins not with the Qur’an and the Prophet Muhammad, but rather, in the long centuries of religious and legal development in the ancient Near East, and in the late antique period during which Islam emerged. This story begins

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in the pre-Islamic period because Islamic legal discourses on sexual violation were themselves unlikely to have been purely “Islamic” in origin. That is, the specific principles, institutions, and practices that formed the core of Islamic doctrines concerning sexual violation were only partially drawn from the theological and ethical content of the Qur’an and the Prophetic example (*sunna*). Rather, they seem to have stemmed in good part from religious, cultural, and legal systems that preceded them in both pre-Islamic Arabia and the larger late antique Near East. Indeed, many of the concepts and institutions that were critical to Islamic rape doctrines were not entirely unique to Islamic thought, nor entirely discontinuous from other late antique religious and legal systems of the Near East. Accordingly, Chapter 1 reviews approaches to sexual violation in preexisting ethico-legal systems – Jewish (Biblical and rabbinic), Latin (Roman and Christian), and pre-Islamic Arabian – and sketches out some of the categories essential to this study. The central exploration of this chapter is the tension between theocentric and proprietary approaches to sexual violation prior to Islam, and the hybrid nature of many relevant laws in those systems.

In Chapter 2, we turn our attention to the Islamic context, particularly the formative period of Islam – the first two centuries or so, when the classical Sunni “schools of law,” or *madhhabs*, were yet to be formed, and when legal practices and doctrines were in considerable flux. This chapter consists of two parts. In the first part, I suggest that a number of religious, cultural, and ethico-legal trends flowed together in the early Islamic period to form four themes or conceptual clusters that proved essential to the configuration of classical rape doctrines. The first of these was the germination, following the Qur’anic-Prophetic impetus, of an overpoweringly theocentric notion of ethics, at the center of which was a single, omniscient Deity who demanded virtuous conduct from His human subjects. This chapter examines how this theocentric ethics absorbed and assimilated into itself all areas of human activity, including sexuality, thereby making sexuality into a moralized space. A second critical development in the early period of Islamic law was the formation of a language of rights or claims, and the further division of all rights or claims into the categories of divine rights (*ḥuqūq Allāh*) and interpersonal rights (*ḥuqūq al-‘ibād*, also called *ḥuqūq ādamīya*). The dichotomous scheme of divine and interpersonal rights and ensuing debates over the nature and relationship between these two types of rights were critical to the conceptualization of rape in Islamic jurisprudence. A third core set of ideas that took

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shape in the formative period of Islamic law was related to questions of the divine address and moral agency (*taklīf*), legal capacity (*ahlīya*), and volition (*irāda*, “intent,” or *riḍā*, “consent”). Early consensus on the general principle that persons are spared punitive liability for incapacity or nonconsent was central to the development of Islamic rape law. The fourth and last set of ideas pivotal to the configuration of Islamic rape law was related to the conception and institutionalization of female sexuality as a type of property or commodity. While sexuality – or more specifically, sexual rights over females – had long and widely been conceived in proprietary terms throughout the late antique Near East, the key development of this idea in the early Islamic period was its absorption and reframing within the new theocentric worldview of Islam. The problem was that this proprietary sexual ethics did not align readily with the theocentric sexual ethics in which it was being framed. Islamic legal discourse on the topic of sexual violation was thus, from the start, rent by two incongruent orientations, one theocentric, the other proprietary. The tension between these two orientations showed up nowhere more clearly than in discourses surrounding rape, particularly the rape of free women, who – unlike slave women – occupied a double space of both person and property, both ethical subject and sexual object.

Formative period sources describe several incidents of sexual violence. Information about these incidents, as well as about associated judgments and sentences, have reached us through late 2nd/8th to late 3rd/9th century compilations of legal reports (*āthār* or *ḥadīths*).²² In addition to rulings attributed to the Prophet himself or to his Companions – all of whom lived in the beginning of the formative period – these compilations include the legal opinions of a number of early juristic authorities. The second part of Chapter 2 surveys the most relevant of these legal reports. On the basis of an analysis of these reports, I suggest that by the end of the formative period, certain areas of consensus had emerged within Sunnī doctrine, and certain areas of divergence, as well: The points of consensus stemmed from an overarching adherence among all authorities to a theocentric sexual ethics, while disagreement occurred over the extent to which proprietary concerns should be considered in the case of rape. This disagreement was expressed through a debate over monetary compensations, with the majority favoring compensations and a minority

²² These legal reports are known generally as *āthār* (sing. *athar*), or as *aḥādīth* (sing. *ḥadīth*) when specifically relating the words and deeds of the Prophet. Here, I use *ḥadīths* rather than *aḥādīth* as the plural of *ḥadīth*.