If I were to speak your kind of language, I would say that man's only moral commandment is: Thou shalt think. But a 'moral commandment' is a contradiction in terms. The moral is the chosen, not the forced; the understood, not the obeyed. The moral is the rational, and reason accepts no commandments.  

-- Ayn Rand, Atlas Shrugged

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1 AYN RAND, ATLAS SHRUGGED, 1018 (1999).
INTRODUCTION

In 1992, Shamim, a twenty-one year old mother of two was kidnapped and raped by three men in Karachi.\(^2\) When a rape complaint was lodged against the perpetrators, Shamim was arrested and charged with *zina* (consensual, extramarital sex) when her family was unable to post bail. While in custody, Shamim was repeatedly raped by two police officers and an unnamed third person.\(^3\) That same year, forty-year-old Veena Hyat, the daughter of a prominent politician, reported that she was gang raped for twelve hours in every room of her house by five armed men.\(^4\) Despite her father taking the risk of publicly reporting the attack, a judicial investigation ended without conviction due to “insufficient evidence.”\(^5\)

In 2004, a Colorado woman found herself in a car with two men who threatened to slit her throat if she didn’t hand over all her money.\(^6\) The men then forced her to undress and drove around Colorado until they found cocaine.\(^7\) Afterwards, they drove her to Garden of Gods and raped her.\(^8\) The men then went to a nearby store, bought condoms, and raped her again.\(^9\) Though they locked her in the trunk of the car, she managed to escape by crawling through the back seat.\(^10\) The defense attorney tried to spin the case against the victim by painting her as a drug

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\(^3\) Quraishi, *supra* note 2, at 291.
\(^4\) Id. at 292.
\(^5\) Id. at 292.
\(^7\) Id.
\(^8\) Id. Forcible rape, as defined in the Uniform Crime Reporting (UCR) Program, is the “carnal knowledge of a female forcibly and against her will. Assaults and attempts to commit rape by force or threat of force are also included; however, statutory rape (without force) and other sex offenses are excluded.” Department of Justice Federal Bureau of Investigation, Crime in the United States 2004, http://www.fbi.gov/ucr/cius_04/offenses_reported/violent_crime/forcible_rape.html.
\(^9\) Id.
\(^10\) Id.
addict who fabricated the incident. Yet, unlike the Colorado woman, protected by certain rape law reforms in the United States, women in Pakistan fall victim to the country’s legal system and socially prejudicial society.

Pakistani rape laws under the controversial Hudood Ordinance create a serious risk of imprisonment for the victim. The Ordinance requires that evidentiary showings and punishments for the crimes of rape, adultery, and fornication must follow the Islamic standard. However, it fails to recognize that there is no Quranic standard for rape. Further, without a confession from the accused, the law requires the testimony of four Muslim men that they witnessed the actual penetration to corroborate a rape.

Despite base-level reform of the rape laws, Pakistan continues to violate its commitment to international human rights standards, as well as the intent behind Shar‘iah law. This is because the continued implementation of the Hudood Ordinance promotes discriminatory laws, careless investigative procedures, and an unresponsive criminal justice system in a country

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11 Id. This depiction of women who are victims of rape is not uncommon. “In the contemporary United States, men generally are trained in a variety of ways to view sex as the acquisition of pleasure by the taking of women. Sex is a sphere in which men are trained to see themselves as naturally dominant and women as naturally passive. Women are objectified and women’s sexuality is turned into a commodity that can be bought and sold. Sex becomes sexy because men are dominant and women are subordinate.” Robert Jensen, Rape is Normal, COMMONDREAMS NEWS CENTER (Sept. 1, 2002) http://www.commondreams.org/views02/0903-05.htm.
12 Quraishi, supra note 2, at 289.
13 Bharathi Venktraman, Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, 44 AM. U.L. REV. 1949, 1994 (1995). The Quranic standard used to justify many of these laws does not necessarily exist. As Elisabeth Eide recognizes, the language of the Pakistani Constitution and the religious texts it relies on is open for interpretation. A critical example of this being the freedom of expression in Pakistan, which is regulated by anti-blasphemy laws. “In May 2005 Reporters Without Borders published a list of 34 countries whose governments directly curbed Press freedoms. Pakistan was named alongside Iran, China, Bangladesh and Cuba. This ranking may seem unjust, since the multitude of press in Pakistan is rather different from some of these states and since the press, even under dictatorship, has been able to voice a fair amount of harsh critique of leaders and powerful institutions.” ELISABETH EIDE, PAKISTAN: CRITIQUE, ANGER, AND UNDERSTANDING, available at http://www.kajmunk.hum.aau.dk/inc/pdf/20070829/20070326_Elisabeth_Eide.pdf.
14 Venktraman, supra note 13. As Jensen notes when talking about the United States, “The predictable result of this state of affairs is a culture in which sexualized violence, sexual violence and violence-by-sex is so common that it should be considered normal. Not normal in the sense of healthy or preferred, but an expression of the sexual norms of the culture, not violations of those norms.” The same idea applies to the laws in Pakistan where rape is illegal, but the sexual ethic that underlies rape is fused into the cultural fabric further complicated with zina laws. Jensen, supra note 11.
striving towards modernity and democracy.\textsuperscript{16} At a basic level, this Article is a demand for the reform of rape laws in Pakistan. However, in order to sustain change in Pakistan’s patriarchal society, all laws and judicial practices legitimizing or sanctioning gender inequality under the guise of religion must be repealed. Only with the repeal of the \textit{Hudood} Ordinance will Pakistan mirror domestic progressive attitudes and provide necessary tools for the government to shape and enforce a new set of societal values, unmarred by archaic interpretation of Islam.

This Article will conduct a critical analysis of rape laws in Pakistan, as well as the overarching gender inequality perpetuated by the \textit{Hudood} Ordinance. Part I will focus on the political context behind the \textit{Hudood} laws in Pakistan and the creation of the Federal Shariat Court. This section discusses the text of the \textit{Hudood} Ordinance, focusing on the Ordinance’s collapse of rape and adultery under \textit{Shar’iah}, the requirement of four male witnesses to corroborate a rape, and implications of \textit{zina} laws.\textsuperscript{17} Part I also discusses the legislative review of all laws pertaining to \textit{Shar’iah}.

Part II of this Article analyzes the purported origins of the \textit{Hudood} Ordinance in \textit{Shar’iah}. This section discusses the origins of \textit{Shar’iah}, analyzing the text of the Ordinance to demonstrate the inadequate application of Islamic law by Pakistan in regards to rape. It further highlights the stark similarities between Pakistan’s rape laws and old British common law, rather than \textit{Shar’iah}. Part II also analyzes the “four male witness” requirement under \textit{Hudood}.

\textsuperscript{16} Quraishi, \textit{supra} note 2, at 290.
\textsuperscript{17} SHAHNAZ KHAN, \textit{GENDER, RELIGION, SEXUALITY, AND THE STATE: MEDIATING THE HADOOD LAWS IN PAKISTAN}, 5 (2001), available at http://www.cravwc.ca/docs/pub_khan2001.pdf. With the adoption of \textit{zina} laws, for the first time in Pakistan's history, fornication became a crime against the state and along with adultery, made non-compoundable, “non-bailable and punishable by death.” Those prosecuted on such charges are not eligible as of right of release pending trial by posting bond. Bail is left to the discretion of the judge “Legally this means that if it cannot be proved that sex occurred without consent (rape), the sex itself becomes a crime against the state. Although to date no woman convicted under these laws has been stoned to death in Pakistan, \textit{zina} laws allow for greater control of women within state sanctioned interpretations of the sacred books of Islam.” \textit{Zina Laws In Pakistan}, http://zinalaws.tripod.com/ZinaLaws/.
Part III discusses the implications of the *Hudood* Ordinance on Pakistan’s commitment to international human rights movements and its quest for modernity. The section focuses on the fact that the state has an obligation to strive to prevent, investigate, and prosecute violations of human rights, which includes the unequal treatment of women.\(^\text{18}\) Part IV focuses on the domestic ramifications of *Hudood* laws. Part V of the Article outlines rape law reform in the United States and the need for continued reform in Pakistan, supported by the government. This section discusses the current reforms of rape law in Pakistan\(^\text{19}\) and recommends the repeal of the entire *Hudood* Ordinance. Further, this section notes that government action is necessary to sustain any reformation of Pakistani laws, in order to create an effective change in societal views regarding gender equality and human rights.\(^\text{20}\)

I. **BACKGROUND AND CONTEXT: ISLAMIZATION**

The *Hudood* Ordinance enacted after the 1977 military coup by General Zia-ul-Haqq.\(^\text{21}\) His claim to power was supported by right-wing religious parties and feudal landlords, who were opposed to the current Pakistani government.\(^\text{22}\) To maintain his power through the religious parties, Zia initiated *Nizam-e-Mustafa* (the system of the Prophet Mohammed) to “bring the laws of Pakistan into ‘conformity with the injunctions of Islam.’”\(^\text{23}\) Islamization strengthened the ties between the religions, the Pakistani State, and the military.\(^\text{24}\) Law, religion, and patriarchy

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\(^\text{21}\) Quraishi, *supra* note 2, at 288. Geo TV interviewed 26 religious scholars regarding the so-called “divine” nature of the *Hudood* laws. All “26 religious stakeholders agreed that the law was not only man-made but is open to change and improvements.” *Hudood* Ordinance: Zara Souchiye, http://blogcritics.org/archives/2006/05/31/0046392.php (last visited February 23, 2008).

\(^\text{22}\) KHAN, *supra* note 17, at 5.

\(^\text{23}\) Quraishi, *supra* note 2, at 288.

\(^\text{24}\) KHAN, *supra* note 17, at 5.
intertwined and “drew their coercive power through the state. The result was a series of retrogressive laws designed to curb rights of women and minorities.” This had particularly strong ramifications for Pakistani women because, “women were visualized as the cultural markers of Zia’s Nizam-e-Mustafa and regulation of their sexuality/morality was a crucial component of the equation.” As a result, Islamization increased the State’s power over the lives and liberties of women in particular, creating an “abusive and corrupt criminal justice system” supposedly based in Islam.

Zia furthered Islamization by establishing the Federal Shariat Court through Article 203 (C) of the Pakistani Constitution. Under the Shariat Court, the Pakistani government created an impossible threshold for proving rape under the Hudood Ordinance, leaving most women accused of extramarital sex under the skewed Shar’iah law.

A. The Federal Shariat Court

In 1979, a constitutional amendment established the Shariat Benches, appointing three judges in each High Court of Pakistan’s four provinces. The Shariat Appellate Bench was also

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25 Id. This way of thought is culturally infused into the interpretation of religion in Pakistan and these interpretations were eventually brought into the legal system. Though Pakistan ratified the United Nation’s Convention on the Elimination of Discrimination Against Women in 1996, “it has failed to remove discriminatory laws against women. It has additionally failed to create new laws and to enforce existing laws that protect women from discrimination and violence.” Alice Bettencourt, Violence Against Women in Pakistan, HUMAN RIGHTS ADVOCACY CLINIC (Spring 2000), available at http://www.du.edu/intl/humanrights/violencepkstn.pdf.

26 KHAN, supra note 17, at 5. Pakistan’s concern with regulating sexuality is often linked to their desire to prevent the sexualization of women in society. Often, this backfires and women are sexualized simply because they are viewed as “hidden treasures” that need protection rather than self-sufficient human beings.

27 Id.

28 JOHN ESPOSITO, WOMEN IN MUSLIM FAMILY LAW, 89 (2001). Article 203 (D) specified that the Shariat Court was to examine laws and legal provisions to verify their adherence to the precepts of Islam as laid down in the Qur’an and the Sunnah of the Prophet Muhammad. Id.

29 HUMAN RIGHTS WATCH, PAKISTAN: PROPOSED REFORMS TO HUDOOD LAWS FALL SHORT (2006), http://hrw.org/english/docs/2006/09/06/pakist14124_txt.htm (hereinafter HRW). These proposed laws are defended with religious vigor by most Muslim countries in an effort to use religion as a justification for cultural perceptions. It is difficult to discuss the subject without crossing the boundaries of religious interpretation, leaving little room for logic-based arguments.

created as part of the Supreme Court of Pakistan under the same amendment, to further the Islamization of Pakistan. Despite these structural changes of the High Courts, Islamization of the Pakistani judicial system was slow, leading to the creation of the Federal Shariat Court of Pakistan in 1980.

The Federal Shariat Court consists of eight Muslim judges, including the Chief Justice, appointed by the President of Pakistan. The Federal Shariat Court’s jurisdiction exceeds that of the High Courts because it alone has “revisional” powers. The Federal Shariat Court has judicial review over all Pakistani laws, initiated by its own motion or through a petition by a citizen or a government (federal or provincial). In the process of reviewing laws, the Federal Shariat Court determines whether or not a certain “provision of law is repugnant to the injunction of Islam.”

Under Article 203(DD) of the Pakistani Constitution, “revisional jurisdiction in [Hudood] cases is vested in the Federal Shariat Court.” Despite this provision, many High Courts reviewed petitions arising from Hudood cases and interfered in the pending proceedings of the Hudood cases “in the exercise of its writ jurisdiction.” Due to this interference by the parallel court system (based in penal codes and not Islamic law), the Federal Shariat Court conducted a thorough examination of the “Constitutional provisions and relevant case-law” regarding

31 Id.
32 Id.
34 See generally Id. Of these eight judges, three are required to be Ulema (Muslim scholars trained in Islam and Islamic law) who are well versed in Islamic law.
36 See generally Lau, supra note 33, at 127-30.
37 Id. If the court decides that a certain provision of law is “repugnant to the injunctions of Islam,” the government must take necessary steps to amend the law “so as to bring it in conformity with the injunctions of Islam.” Id. at 127-30.
38 See generally, Id.
39 Id. “The laws in Pakistan have been gradually modified to become more in line with the Islamic Shari’a law, due to pressure from religious parties. This change has lead to a situation in which freedom of expression is more limited than when the state came into being.” See Eide, supra note 13, at 2.
jurisdiction over *Hudood* cases, concluding that High Courts can neither “interfere with [the Federal Shariat Court’s] writ jurisdiction nor can it lawfully exercise revisional jurisdiction” in cases covered by *Hudood*.\(^{41}\) In addition, the Federal Shariat Court can change any finding or sentence in any case decided under the *Hudood* laws.\(^{42}\) This includes the ability to change an acquittal to a conviction without risking double jeopardy.\(^{43}\)

Contrary to the Federal Shariat Court’s assertion that the *Hudood* Ordinance are of divine nature, a fifteen-member special committee reviewed the Ordinance in 2000.\(^{44}\) The committee recommended the repeal of these laws because, “the Hudood Laws as enforced are full of lacunas and anomalies and the enforcement of these has brought about injustice rather than justice.”\(^{45}\)

Despite this recommendation, the Federal Shariat Court continued to review cases under *Hudood* due to its exclusive power to decide whether the Ordinance is repugnant to the injunctions of Islam or not. The critical issue with this court system is that it leaves the Federal Shariat Court’s powers unchecked regarding *Hudood* Ordinance in Pakistan’s quest for Islamization.

**B. The Hudood Ordinance**

\(^{41}\) *Id.* at 12.  
\(^{42}\) **PAK. CONSTITUTION**, Part VII, art. 203D. This issue is another point of debate for public policy reasons. Political pressures in Pakistan allow for the severe misuse of this clause, allowing the judiciary to convict as they see fit, with little regard to the justice system.  
\(^{43}\) *Id.* This set up is based on the claim that *Hudood* laws are based entirely in Islamic law, and therefore cannot be properly reviewed by secular courts.  
\(^{45}\) *Id.* at 5. “This law is used mostly for revenge,” says Parveen Parvez, a lawyer at Karachi’s City Courts, talking about Pakistan’s Zina, or adultery, laws that are part of the Hudood Ordinance of 1979. “Most cases are registered by parents against their daughters who have married of their own choice, or husbands whose wives re-marry after divorce.” Beena Sarwar, Pakistan’s Hudood Laws: Extremely Misused (March 9, 2004), http://www.chowk.com/articles/7207.
The Federal Shariat Court has jurisdiction over all laws based in Shar’iah, specifically those under the Hudood Ordinance. Shar’iah is Islamic law which is the “product of a process of interpretation of, and logical derivation from, the text of the Qur’an and Sunnah and other traditions.”

By utilizing an interpretation-based form of religious understanding, the gaps or missing parts in the Shar’iah were greatly exploited by societal forces to perpetrate great cruelty on women and children, particularly minor females, as discussed in this paper.

In Islam, the term “hudood” refers to legally prohibited acts that God expressly prohibits by way of fixed, predetermined punishments, the execution of which is considered mandatory. According to some Islamic jurists, these punishments have certain peculiarities that set them apart from others, including that: (1) these punishments may neither be increased or decreased; (2) these punishments may not be waived by the judge or political authority; and that (3) these punishments are the “right of God” in that the legal right involved is of a general nature where societal good is heavily analyzed. Adultery and fornication are amongst the generally established hudood crimes in Islam.

The 1977 Hudood Ordinance of Pakistan subsumes adultery, fornication, rape and prostitution under the rubric zina and treats them as offenses against the State. For purposes of the Ordinance, zina is defined as any case where a “man has a coitus with a woman who is

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46 FEDERAL SHARIAT COURT, ANNUAL REPORT 2003, supra note 30, at 12.
47 AN-NA’IM, supra note 20, at 11.
49 Id.
50 Id.
51 KHAN, supra note 17, at 5. In Pakistan, women accused of these crimes face more than imprisonment. At least some women have undergone the pain and humiliation of being whipped, “like Lal Mai, administered 15 lashes in public in Bahawalpur on Sept 30, 1983, and Rukhsana Yusuf, 15 lashes in Karachi Central Jail, on July 18, 1987.” Sarwar, supra note 45.
unlawful to him.” The laws criminalized zina which occurs if a man or woman “who is an adult and is not insane” has sexual intercourse with a person whom he is not and does suspect himself to be married to. The Qur’an prohibits zina, declaring it an offense punishable by whipping and a prison sentence. Unlike the Qur’an definition of zina, as discussed later, the Hudood Ordinance defined zina more liberally to encompass the acts of adultery, fornication, prostitution, and rape. Thus, rape became a type of zina, zina bil-jabr, which directly translates as “consensual sex by force,” effectively blurring the distinction between rape and adultery.

The crime of zina-bil-jabr, rape, under the Ordinance is defined as sexual intercourse (1) against the will of the victim; or (2) without consent of the victim; or (3) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt; or (4) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

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52 Al-Maula, supra note 48. Like many countries, Pakistan’s decision to enact such “moral” laws link to a desire to control sexuality by confining women. Yet, solutions to the issues of rape “lie not in the conservatives’ call for returning to some illusory "golden age" of sexual morality, a system also built on the subordination of women. The task is to incorporate the insights of feminism into a new sexual ethic that does not impose traditional, restrictive sexual norms on people but helps creates a world based on equality not dominance, in which men's pleasure does not require women's subordination.” Jensen, supra note 11.
53 HRW, supra note 29.
55 Id.
56 Quraishi, supra note 2, at 293. The crime of zina-bil-jabr involves sexual intercourse (1) against the will of the victim; (2) without consent of the victim; (3) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt; (4) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married. Id.
57 Farooq, supra note 54.
59 Quraishi, supra note 2, at 289.
The level of proof required to convict a man of rape was drastically elevated under the Ordinance. In the absence of the necessary proof of non-consent, the accused is released for lack of evidence while the alleged rape victim is vulnerable to a charge of adultery, *zina*. Under the Ordinance, accusing someone of rape is itself a confession of extra-marital sex. The alleged victim must prove the rape by either obtaining the accused’s confession before a court of competent jurisdiction, or producing four pious and trustworthy male witnesses to give testimony against the accused. As Allama Syed Razi Jaffer Naqvi notes, “it seems impossible that someone can commit [rape] in front of four pious and trustworthy people” because if the witnesses were pious and trustworthy they would “use their strength and stop the crime” instead of merely witnessing penetration of the victim.

1. Requirement of Four Male Witnesses under Hudood

Testimonial limitations under the *Hudood* Ordinance further obstruct justice in rape trials. Under *Shar’iah*, as applied by the Federal Shariat Court, if the accuser is a woman her testimony must be discounted. The law requires that the accuser produce four males who witnessed the actual penetration to prove rape; a woman’s testimony is not admissible. This promotes the “Islamist” perspective that they are not “against” women but that they give women a particular

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60 KHAN, *supra* note 17, at 5.
61 Quraishi, *supra* note 2, at 290.
62 The court must feel satisfied as to the credibility of the witnesses in that they are truthful people, abstain from major sins, and give eye witness accounts of the act of penetration to the offense.
63 Quraishi, *supra* note 2, at 290. According to Parveen Parvaz, a lawyer at Karachi’s city courts, this law makes multiple groups of women victims to the police and government policies, “‘Girls who are raped are also imprisoned in our jails under the zina laws. Then there are the prostitutes - but some ‘dalal’ or other always gets them out. And fifth, there are those girls who are forced into this profession by their fathers and brothers, I have met such girls in jail myself, who say they were forced, and arrested during a police raid.’” Sarwar, *supra* note 45.
66 *Id.*
status in society.\textsuperscript{67} This unmistakably places women in a situation of inequality, creating a hierarchy that “can be characterized as violence that is perpetrated against women.”\textsuperscript{68} When a \textit{zina-bil-jabr} case fails for lack of four male witnesses, courts often conclude that the intercourse was consensual, resulting in the charge of \textit{zina} against the rape victim.\textsuperscript{69} If convicted of \textit{zina} under the terms of these laws, the rape victim is sentenced to one hundred lashes if she is unmarried and to death by stoning if she is married.\textsuperscript{70}

This inequity was clear in the 2002 case of Zafran Bibi, who was sentenced to death by stoning under the \textit{Hudood} Ordinance.\textsuperscript{71} Despite Bibi’s repeated charges that her brother-in-law had raped her on multiple occasions, the presiding judge convicted her of \textit{zina}.\textsuperscript{72} As is common in such cases, the man involved suffered no consequences.\textsuperscript{73} In these cases the standards imply that male perpetrators are presumed “‘innocent until proven guilty’” while women are subjected to a presumption of guilt.\textsuperscript{74}

2. \textit{Conviction and Punishment of Rape Victims under Hudood Laws}

\textsuperscript{67} Id. at 94.
\textsuperscript{68} Id. at 94.
\textsuperscript{69} Quraishi, \textit{supra} note 2, at 290.
\textsuperscript{70} KHAN, \textit{supra} note 17, at 5.
\textsuperscript{72} Id. Bibi was acquitted by a higher court after an international outcry by domestic and foreign press and nongovernmental organizations. \textit{Id}.
\textsuperscript{73} Id.
\textsuperscript{74} Manar Waheed, \textit{Domestic Violence in Pakistan: The Tension Between Intervention and Sovereign Autonomy in Human Rights Law}, 28 \textit{BROOK. J. INT’L. L.} 937, 955 (2004). For reasons of such inequity, the Hudood Ordinances have been harshly criticized. Justice Majida Rizvi comments on the review these laws by the Commission, noting that the drafting is too flawed for these laws to be properly applied despite any altruistic ideologies behind them, "We studied each line, each word, of the Zina Ordinance, to see whether those who drafted these laws correctly interpreted religion, and applied its principles”’ she says, “‘The majority of the members were of the view that there are so many flaws in these laws, that it would be impossible to correct them. Therefore, we came to the conclusion that these laws should be repealed, and if the government really wants to enact Hudood Laws, this should be done after a thorough study, and after there is a debate in parliament and in public to ensure that any such law is actually in conformity with the injunctions of Islam.’” Sarwar, \textit{supra} note 45.
If the victim cannot prove zina-bil-jabr they are often charged with zina.\textsuperscript{75} Once convicted of zina the Ordinance mandates a hadd (maximum sentence).\textsuperscript{76} Yet, sentencing varies according the religious and marital status of the accused, the witnesses, and the evidence on which the conviction rests.\textsuperscript{77} If the accused is a Muslim and (a) confesses or (b) there are four adult male witnesses to the act; and (c) the accused is married, then the accused shall be sentenced to death by stoning.\textsuperscript{78} If the accused is a non-Muslim or unmarried and (a) confesses or (b) the crime is witnessed by four adult males, the accused must be sentenced to 100 lashes by a whip.\textsuperscript{79} The hadd punishment for fornication, adultery, and rape is identical under the Ordinance.\textsuperscript{80}

For example, in Safia, a blind girl failed to provide four witnesses as proof of rape by her employer.\textsuperscript{81} Consequently, she was convicted of adultery and sentenced to fifteen lashes, three years of imprisonment, and a fine based on her subsequent pregnancy.\textsuperscript{82} Similarly, thousands of female sexual assault victims remain unable to seek redress through the Pakistani criminal justice system because they are vulnerable to charges of illegal sex.\textsuperscript{83} Under these laws, the number of women imprisoned for zina went up an astounding 3000% from 1979 to 1988.\textsuperscript{84}

\textsuperscript{75} Quraishi, \textit{supra} note 2, at 290.
\textsuperscript{76} KHAN, \textit{supra} note 17, at 5.
\textsuperscript{77} Id. Justice Majida Rizvi notes a critical problem regarding the threshold for witnesses under the Hudood laws: if a crime is committed in a place where there are only women, the rapist or thief can’t be brought to justice, because the only witnesses are women. “What kind of justice is that?” asks Justice Majida Rizvi. ‘Are they trying to say that Islam does not recognise women as witnesses, when the murderers of Hazrat Usman were caught on the evidence of just one woman?’ Sarwar, \textit{supra} note 45.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{82} Id. As a result of this conviction, there was forceful public protest, in reaction to which the Federal Shariat Court was forced to exculpate the girl. However, most women do not receive such high levels of publicity and therefore receive zina convictions. Id.
\textsuperscript{83} HRW, \textit{supra} note 29.
\textsuperscript{84} Abira Ashfaq, Reform in Pakistan: Real Change, or a Band-Aid, PEACEWORK MAGAZINE, http://www.peaceworkmagazine.org/node/452. In 1979, there were only seventy women in prisons all over Pakistan. This figure was at 6,000 due to increase in prosecutions under the Zina Ordinance, becoming the main
With the adoption of Hudood laws, all extra-marital sex was rendered illegal for the first time in the history of Pakistan. Since the implementation of these laws, the Pakistani government prosecuted hundreds of women for adultery or fornication unless they provided extraordinary compulsive proof that their “participation” in impermissible intercourse was forced; the accused rapist on the other hand, was usually acquitted of all charges. Although many of the women imprisoned for zina offenses are eventually released, they can face years of incarceration before trial.

C. Legislative Review of the Hudood Ordinance

In September 1994, the Senate passed a resolution which set up a Commission of Inquiry for Women (Commission), comprised of lawyers, women activists, and members of government headed by a Supreme Court judge. It was mandated to “review all the existing laws which are discriminatory to women or affect their rights being equal citizens of Pakistan” and to recommend amendments on how to bring laws and rules “in accordance with the injunctions of Islam as enshrined in the Holy Qur'an and [Sunnah].”

cause of action used against women in Pakistan. Within three years (1994-96), the Women Police Station Karachi South, registered 113 cases against women, of which 80% came under the Zina Ordinance. Sarwar, supra note 45. KHAN, supra note 17, at 5. As illustrated in several accounts, the Hudood Ordinance places a heavy and nearly impossible, burden of proof on women and girls who fall victim to rape. “Once they complain, those women and girls are themselves exposed to charges of Zina - having admitted to the fact of ‘penetration’ outside of wedlock, which is a crime under the Ordinance. In such a situation, the victims are in fact more likely to be convicted than the perpetrators.” AMNESTY INT’L, HUDOOD ORDINANCES, CRIME AND PUNISHMENT FOR ZINA, supra note 85.

HRW, supra note 29. The presence of these ordinances in the Constitution means that these severe and unfounded punishments could be carried out. It is not a matter that should be brushed aside simply because the severity of the punishments carried out thus far does not match the punishments possible under these laws. Furthermore, the law allows many women to languish in jail for years before they are released. Even after their release, these women remain victims to their past and most have never received justice for being locked away for a crime that was committed upon them by both a perpetrator and the government itself. AMNESTY INT’L, HUDOOD ORDINANCES, CRIME AND PUNISHMENT FOR ZINA, supra note 85.

In August 1997, the Commission submitted its report and recommendations to Prime Minister Nawaz Sharif. The report concluded that “[t]he Commission urges decision makers, including political party leadership, the legislators, and the judiciary, to give the issue of women's rights the critical priority it deserves, not as a favour or protective gesture, but as their fundamental inalienable right.” Despite such a strong statement by the Commission, the Sharif Administration failed to adopt any of the Commission's recommendations.

In 1999, President Pervez Musharraf set up the National Commission on the Status of Women. The commission was an Islamabad-based council of religious scholars, government officials and legal experts charged with examining laws pertaining to women's rights. In a 2003 report to the President, this Commission voted overwhelmingly to repeal the Hudood.

II. MISREPRESENTING ISLAMIC TEXTS

The Hudood Ordinance derive their strength from a purported base in Shar’iah. Since the implementation of Shar’iah as a controlling force regarding rape, hundreds of incidents occurred where women subjected to rape were eventually accused of zina, consensual extra-

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90 Id. The report presented a comprehensive picture of the deprivation of rights suffered by women at all social levels and in all parts of the country. Id.
91 Id.
92 Id Dr Aslam Khaki, a Supreme Court lawyer and honorary counsel to the Federal Shariat Court, a “product of madrassah education himself,” unhesitatingly cites the relevant “Quranic verse or hadith when crossing swords with the self-appointed custodians of Islam. "The motive behind these laws was political, not religious," he states. 'Gen. Ziaul Haq had come into power after toppling a popularly elected government, and he had to justify his act. The slogan of Islamisation was convenient for this purpose.’” Sarwar, supra note 45.
94 Id.
95 Id. When the issue was brought up again in the 2000s, as expected, “the recommendation once again ignited the ongoing 20-year old debate about the Hudood laws. Veiled Muttahida Majlis-e-Amal (MMA) women demonstrated in Islamabad against the NCSW recommendation, and in favour of retaining the Hudood laws. The NWFP Assembly passed a unanimous resolution condemning the NCSW recommendation as part of the 'conspiracy against Islam'. Men and women activist groups demonstrated in Islamabad and Karachi in support of the NCSW, and against the Hudood laws.” Sarwar, supra note 45.
marital intercourse, and thereby subjected to persecution.\textsuperscript{96} Due to these inappropriate accusations against rape victims, Majida Rizvi, a former Supreme Court judge and head of the National Commission on the Status of Women\textsuperscript{97} stated, “These laws have been a disgrace since they were introduced.”\textsuperscript{98} According to the Human Rights Commission of Pakistan, there were a total of 2,972 rapes reported involving 3,145 victims from 1998-2002.\textsuperscript{99} Even in the face of such statistics, prosecutors from the Lahore District Attorney’s office commented that rape claims must be entirely fabricated because a woman could simply slap a man to defend herself; thus, she must have consented.\textsuperscript{100} In a culture of sexual repression that continuously breeds honor killings and sexual violence, the introduction of the Hudood Ordinance worsened discrimination against women by claiming its origins in Islamic law, \textit{Shar‘iah}.

The term \textit{Shar‘iah} means “divine law” or a “way of belief or practice.”\textsuperscript{101} Due to this definition, Muslims often confuse \textit{Shar‘iah} to represent a law derived straight from the word of God, which leads to Muslims giving deference to laws allegedly derived from the religion.\textsuperscript{102} What most Muslims fail to realize is that \textit{Shar‘iah}, as it stands today, is borne from a mixture of sources that include, but are not limited to, the Qur’an and \textit{Sunna} (teachings from the life of the Prophet Muhammad).\textsuperscript{103} While the Qur’an is psychologically and religiously the source of \textit{Shar‘iah}, most “Islamic laws” purported by “Islamic” governments cannot be traced verbatim to

\textsuperscript{96} Id.
\textsuperscript{98} Id. Like many others, Rizvi takes issue with the proposal that this is in fact God’s law, and cannot be tampered with. Rizvi states that, “‘This is a man-made law, it was brought in by presidential ordinance, without any parliamentary debate.’ Many legal and religious experts are clear that in any case, these laws do not fulfill the criteria for providing justice under national, international or religious law. Sarwar, supra note 45.
\textsuperscript{100} Waheed, supra note 74, at 957.
\textsuperscript{101} See generally AN-NA’IM, supra note 20.
\textsuperscript{102} Id.
\textsuperscript{103} Id. Retired Sindh High Court judge Shaiq Usmani comments that “‘there are flaws in the very drafting and enactment of these laws.’” Sarwar, supra note 45.
A. Sources of Shar’iah

Laws often originate from individuals striving to interpret the legal needs of a community. The creation of Islamic law under the principles of Shar’iah serves a political purpose within a sphere of cultural knowledge. Humans utilized so-called divine principles based in the Qur’an to further a patriarchal legal system ignoring “the gender-egalitarian nature of the religion,” which created inequality occurred because most jurists responsible for compiling the Qur’an and the Sunnah from an established oral tradition, years after the death of the Prophet, were part of a patriarchal Arab society.

Islamic jurisprudence began during the time of the Prophet Muhammad, who dealt with problems as they arose in the Muslim community, since the Qur’an did not address each and every need for daily regulation of a group of people. This system of need-developed law continued after the Muhammad’s death, at which point Muslims were left with the text of the Qur’an. The Qur’an is minimally normative, with only 500 out of 6,000 versus depicting legal rules. Further, only 80 of those 6,000 verses set out clear-cut rules. The Qur’an does not address rape in any of the verses dealing with legal rules; neither do any of the other major sources of Shar’iah, as discussed below.

104 Id.
105 Id.
106 Quraishi, supra note 2, at 293-94.
107 Interview with Abdullahi Ahmed An-Na’im, Professor, Emory School of Law, in Altanta, Ga. (Nov. 9, 2006) [hereinafter Interview].
108 Id. At the heart of the disagreement between the two groups is the question of whether the Qur’an lays down specific and binding rules, or general guidelines. For the literalists, it lays down concrete rules while moderate and liberal Muslims believe that it only contains general principles, and that it is up to Muslims to interpret them in accordance with the needs of the society and the times they live in. They argue that “if Islam - as most Muslims believe - is about tolerance, peace and freedom from oppression, then it is up to individual Muslims to make choices that do not infringe on the rights of others.” Analysis: Interpreting Islam, BBC NEWS MIDDLE EAST, July 9, 2004, http://news.bbc.co.uk/2/hi/middle_east/3880151.stm.
109 LAWYERS COMMITTEE FOR HUMAN RIGHTS, supra note 65, at 66. Islam is only what Muslims believe and how they behave at different times. What Islam is, is what Muslims have come to define and articulate as their understanding of Islam, specially Shar’iah because the Qur’an’s language is beyond human understanding. Id.
110 See generally AN-NA’IM, supra note 20.
Qur’an—which had yet to be transcribed—and the Sunna/Hadith, as reported and understood by his surviving Companions.\textsuperscript{111} The Muslim community holds the Sunnah as the practice of the Prophet and his oldest Companions.\textsuperscript{112} If an issue arose that was not covered by the Qur’an or Sunnah, consensus of other leading Companions was required to create new “law.”\textsuperscript{113} Problems arose when it became clear that much of the Sunnah was fabricated, often due to the psychological step from a Companion feeling confident of the Prophet’s view on a manner as opposed to recounting an actual sentiment expressed by the Prophet.\textsuperscript{114} Despite this problem, many jurists still cite many unauthenticated Sunnah/Hadith to justify laws allegedly mandated by God.\textsuperscript{115}

In addition to the Qur’an and the potentially faulty understanding of Sunna, ijma and qiyas were additional sources of the Shar’iah.\textsuperscript{116} Ijma is translated as “consensus” in which the Muslim Ummati (community) agrees on a law or principle.\textsuperscript{117} Qiyas in Islamic jurisprudence is when a jurist applies qiyas (analogy), “‘concluding from a given principle embodied in a precedent that a new case falls under this principle or is similar to this precedent on the strength of a common essential feature called the “reason” (‘illa).’”\textsuperscript{118} Jurists utilize this feature of

\begin{footnotesize}
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\item[111] Interview, supra note 107. The “Companions” of the Prophet Muhammad refers to those individuals that he kept counsel with regarding affairs of the Muslim community. Id.
\item[112] Id.. This concept of Sunna is a variant of an ancient Arab concept that means to fashion a thing and produce it as a model often set by forefathers of a tribe or community. Id.
\item[113] See generally AN-NA’IM, supra note 20.
\item[114] Interview, supra note 107.
\item[115] MICHAEL COOK, FORBIDDING WRONG IN ISLAM: AN INTRODUCTION, 3 (2003).
\item[116] AN-NA’IM, supra note 20, at 19. There is a detailed process for authenticating Sunnah/Hadith. There are only three authenticated sources of Sunnah/Hadith that are given most reverence to by Muslims. Id. An additional level of interpretation, for each individual’s personal practice, gives the license to re-interpret the Qur’an and Islamic tradition is known in Islam as “ijtihad.” Roughly defined, “ijtihad is the right of Muslim scholars to develop original interpretations of the Koran with the aim of formulating religious edicts on matters that were unknown in the time of the prophet more than 1,400 years ago, such as cloning or organ transplant.” Analysis: Interpreting Islam, supra note 108.
\item[117] Id. supra note 20, at 23.
\item[118] Id. at 24.
\end{enumerate}
\end{footnotesize}
religious interpretation to inject their own, personal opinion as to what a law should be.\textsuperscript{119} In regards to rape under \textit{Hudood}, jurists used these additional sources of \textit{Shar’iah} to incorrectly encompass rape under \textit{zina},\textsuperscript{120} as stated by Dr. Memood Ghazi, the former Federal Minister for Religious Affairs, “It is a matter of [jurist] opinion whether zina (adultery) and zina bil jabr (rape) should be treated separately or not.”\textsuperscript{121}

A combination of the Qur’an, \textit{Sunnah, ijma, and qiyas} led to the formation of \textit{Shar’iah} law as it stands today,\textsuperscript{122} allowing for personal opinion and patriarchal societies to develop a religious jurisprudence.\textsuperscript{123} Due to these gaps in a clear understanding of an allegedly divine law, it appears that “the practical application of [\textit{hudood}] is subject to political factors” and other sociological considerations, instead of the verbatim word of God.\textsuperscript{124}

\textbf{B. Textual Misrepresentation in Drafting Pakistan’s Rape Laws}

Perpetuating the subordination of women through \textit{Shar’iah} leads the citizens of Pakistan, as well as the international community, to believe that the detrimental effects of the rape law are based in Islamic principles.\textsuperscript{125} The purpose of \textit{Shar’iah}, also called \textit{maqsaed al-shariah}, was to “protect the well-being or the interest” of mankind.\textsuperscript{126} Thus, when an “Islamic” law unjustly deprives any human being of the essentials of life, “then the intent of the law is violated, and therefore the law should be invalid because the text of a law cannot violate the intent of the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 25.
\item Id. Dr. Ghazi further states that some jurists find that rape and adultery are separate under \textit{Shar’iah}, while others believe “that they are both the same crime. The Hudood Laws were drafted on the basis of the latter point of view. But experience has taught us that it was not a correct decision. It should be changed.” Id.
\item Quraishi, supra note 2, at 293-94.
\item Id. Given the lack of “reliable specialized historical information” it is difficult to assess how criminal justice was administered throughout Islamic history, based upon \textit{Shar’iah}. AN-NA’IM, supra note 20, at 105.
\item Id. at 112.
\item Quraishi, supra note 2, at 293.
\end{enumerate}
\end{footnotesize}
Due to the wide-range of judiciary discretion, judicial opinions often reflect socially cultivated gender discrimination under the guise of Islam. Strangely, critical scrutiny of Islamic texts demonstrates the lack of religious basis for the zina-bil-jabr laws under the Hudood Ordinance, as explained below.

1. Absence of Zina-bil-Jabr from the Qur’an

Although the Qur’an discusses the general concept of zina, the words zina-bil-jabr do not appear in the Qur’an. While the dangers of adultery are discussed in the Qur’an, stating that individuals should “not go near fornication [zina] as it is immoral and an evil way” it only criminalizes illegal sexual relations for the sake of a public good. Under this concept, “the adulteress and adulterer should be flogged a hundred lashes each…and the punishment should be witnessed by a body of believers.”

The Qur’an also provides strict guidelines for proving illegal sexual liaisons – not for the sake of the act itself, but in order to protect the character of women in society. The Qur’an recognized that the character and reputation of women in Arabian societies was a serious quality

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127 Id.
128 HUMAN RIGHTS WATCH, CRIME OR CUSTOM? VIOLENCE AGAINST WOMEN IN PAKISTAN, supra note 88, at 45. See also Waheed, supra note 74, at 964.
129 Waheed, supra note 74, at 964. Islam does not allow for any violence against women, yet judges and religious scholars naturally interpret religion via cultural understanding that is most beneficial to the dominant male population.
130 Quraishi, supra note 2, at 293-95.
131 Naeem Shakir, Women and Religious Minorities Under the Hudood Laws in Pakistan, http://www.article2.org/mainfile.php/0303/144/ (last visited March 4, 2007). Zina-bil-jabr is developed through the Sunnah being that rape is not mentioned in the Qur’an, likely because the issue was not presented during that era. Id. Despite this fact, the general public lashes out against any criticism of these laws claiming that they are based on the “word of God” in the Qur’an. A lack of education, including the inability to read and interpret the Qur’an from Arabic into a local language, feeds into this mass misunderstanding of the issues. Furthermore, many religious clerics in Pakistan have fuelled the fire by disseminating faulty information regarding the origins of these laws.
132 Qur’an 17:32.
133 Id. at 24:2.
134 Id. at 24:2.
fiercely protected by clans. In order to maintain order in societies, and prevent the humiliation of women, the Qur’an mandates that defamers that cannot bring forth at least four witnesses that will swear that extra-marital sexual acts occurred between two people should be harshly punished and be stripped of the right to testify in further trials.

The text makes it apparent that the prescriptions of zina are meant to prevent unfair accusations against a woman’s chastity and honor. Convictions become limited to situations in which four upright individuals can swear under oath that they witnessed the sexual penetration and further that they did in a way that did not violate the privacy of the two alleged fornicators. Therefore, the criminality is based upon a corrupting of public morals by committing illicit fornication in a public setting. Simply, the Qur’an and Sunnah regarding zina concern themselves with the relationship of the individual with the public, and leave truly religious, immoral issues to God – leaving no room for a public judgment on the issue.

In this context, the Qur’an and Sunnah focus on the need to protect the dignity of women when their chastity and honor is questioned. A clear example of this is the fact the laws of zina were revealed just after an incident involving the Prophet’s wife, Aisha, preserved in Hadith. The incident, widely known in traditional Islamic history as the “Affair of the Necklace” occurred when Aisha, Prophet Muhammad’s beloved wife and a well known political influence in Islamic history, was mistakenly left behind by a caravan in the desert while she was searching

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135 Id. at 24:4.
136 Id.
137 Id.
138 Quraishi, supra note 2, at 299.
139 Dr. Abdurrahman Al-Maula, Crime and Punishment in Islam (part 5 of 5): The Objectives of the Islamic Penal System, THE RELIGION OF ISLAM, Mar. 8, 2006, http://www.islamreligion.com/articles/249/. Therefore, committing zina in the privacy of one’s home does not violate public decency standards for which the prescriptions were enacted; the immorality of the act is left between the individual and God. Id.
140 Quraishi, supra note 2, at 299.
for her lost necklace. She was picked up by a young man who found her and gave her a ride home. Rumors ran abound about the town of Medina regarding the time Aisha and the young man had spent alone, causing a “great distress” to the Prophet; it became a question of Aisha’s dignity and honor. At this time, especially in Arabian society, the loss of a woman’s chastity and honor could result in a divorce or lasting shame to her family. To protect women from unfair and baseless accusations in a male-dominated society, the Qur’an set forth the high evidentiary standard of four witnesses to the actual sexual penetration, done without invading an individual’s privacy, in order to prove any accusation of zina. The text of the Qur’an reads as follows:

Lo! They who spread the slander are a gang among you. Deem is not a bad thing for you: nay, it is good for you. Unto every man of them (will be paid) that which he hath earned of the sin; and for him among them who had the greater share therein, his will be an awful doom. ‘Why did not the believers, men and women, when ye heard it, think good their own folk, and say: it is a manifested untruth?’

These protective constructs of zina are perverted under the Hudood laws where Pakistani law subsumes rape as zina-bil-jabr under the general zina law of extramarital sexual relations. “[W]herever the Quran has mentioned zina (adultery), it is of the consensual kind.” Since the Qur’an does not mention rape, lawmakers and clerics have found zina to be the closest form of “illegal” sexual acts with which to compare rape to. As this paper will later discuss, many lawmakers in Pakistan do not believe that rape can happen and therefore, wherever the Qur’an

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\begin{align*}
143 & \text{ Id.} \\
144 & \text{ Id.} \\
145 & \text{ Id.} \\
146 & \text{ Id.} \\
147 & \text{ Qur’an 24:11-12.} \\
148 & \text{ See generally Zara Sochieye, Expert Comments: Professor Khalid Zaheer of LUMS,} \\
& \text{http://groups.yahoo.com/group/mukto-mona/message/36285 (last visited February 23, 2008).} \\
149 & \text{ See generally Id.} \\
150 & \text{ Id.}
\end{align*}
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mentions *zina*, “people have confined its meaning to be both, consensual and forced zina. In view of the [Qur’an] and common sense, this understanding is, however, totally flawed.”

Here, some scholars argue that *zina* and *zina-bil-jabr* are forms of the same crime since “there is a common assumption and one that has been incorporated into the Hudood Ordinance, that whether zina (adultery) is consensual or forced, the are both the same,” however, “whenever the Quran has mentioned zina (adultery), it is of the consensual kind. Zina bil jabr (rape) has been referred to where Allah has mentioned those people who create chaos and put others’ life and property in danger.”

On the same issue, numerous scholars clarify that *zina* and *zina-bil-jabr* are two very different crimes because the violent character and process of rape clearly differentiates it from the consensual construct of extramarital sex. Here, the inability to differentiate between the two kinds of issues leads to both being identified as “adultery” instead of adultery and rape as separate criminal acts. Furthermore, *zina* and rape were viewed separately in *Hadith*, contrary to the *Hudood* Ordinance.

2. **Clear Distinction Between Zina and Rape in the Hadith**

Based on *Hadith* and *Sunna*, the Muslim jurist Ibn Qudamah stated if a woman becomes pregnant without having a husband, she may not be punished without a proper inquiry into the matter. During the time of the Prophet “the victim was freed with the hope that they would obtain forgiveness form God” while those that committed the aggressive crime of rape were

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151 *Id.*
152 Professor Khalid Zaheer, Social Sciences Department, LUMS, http://groups.yahoo.com/group/mukto-mona/message/36285 (last visited February 23, 2008).
punished in order to protect society from such behavior.\textsuperscript{155} This argument is supported by multiple \textit{Hadith} that is noted as “sahih” or “truthful” in Islamic jurisprudence. Specifically, one \textit{Hadith} by Imam al-Turmudzi, which has been cited by numerous scholars, notes an instance in which a rape victim was brought to the attention of the prophet. Turmudzi notes that the girl was not punished extra marital sexual relations “while the perpetrator was subjected to punishment.”\textsuperscript{156} Even after the death of Prophet Muhammad, leaders of the early Muslim community stressed the importance of punishing the perpetrator and \textit{not the victim}.\textsuperscript{157}

Therefore, the misrepresentation of Islam in the enactment of \textit{Hudood} Ordinance reflects a serious flaw in both the law and its review by the Federal Shariat Court. In addition to the absence of rape from the Qur’an and the distinction between rape and \textit{zina} (extra-marital sex) in the \textit{Sunna}/\textit{Hadith}, the requirement of four male witnesses under \textit{Hudood} Ordinance is also misrepresented by the Pakistani legal system.\textsuperscript{158}

As a result of the above analysis, it is evident that the Qur’an does not discuss the composition of any laws regarding rape. The reason rape is absent from the Qur’an is because rape was not a prominent social issue at the time of the revelation, and it was dealt with through the legal analysis of Prophet Muhammad and his Companions as mentioned earlier.\textsuperscript{159} At the time of the Qur’an’s revelation, the Arab culture allowed for concubines and slaves, and the bigger social issue was that of questioning a woman’s chastity, not that of rape. Further, current

\begin{footnotes}
\item[155] Faqihuddin Abdul Kodir, \textit{Hadith on Incest and Rape}, http://www.crescentlife.com/psychissues/hadith_on_incest & rape.htm (last visited March 4, 2007). Unlike these examples found in the Prophet’s time, Pakistan’s Article 151(4) of the Qanun-e-Shahadat Order of 1984 allows the “immoral character” of the victim is allowed to be admitted into evidence. Women “fear that their families and communities will feel dishonored due to these allegations, thus leading them to often fear for their lives.” Further, women “who have filed complaints of rape have often been murdered by family members on the basis that she ‘dishonored’ her family. These evidentiary obstacles prevent women from being ensured justice. Furthermore, these obstacles encourage violence against women due to the impunity given to male perpetrators.” Bettencourt, \textit{supra} note 25, at 9.
\item[156] Kodir, \textit{supra} note 155.
\item[157] \textit{Id.}
\item[158] Quraishi, \textit{supra} note 2, at 297-98.
\item[159] Interview, \textit{supra} note 107.
\end{footnotes}
rape laws frustrate the intent behind *zina* laws, which were discussed in the Qur’an to protect women instead of persecute them. Therefore, there is no Quranic basis for *zina-bil-jabr* under *Hudood* and the government must review the law due to its conflict with the religious intent behind *zina*. Additionally, because there is no basis for the laws in religious texts, it is likely that the text of the rape laws under the *Hudood* Ordinance stem from the original British common law, as discussed below.

3. **Origins of Zina-bil-Jabr in Pakistan’s Old Common Law Rather than Religious Text**

Pakistan’s legal system, which was originally modeled after British common law, has become increasingly entwined with religious legal traditions, blurring the line between secular law and religious law. Many laws on the books in Pakistan are derived from English Common Law, such as the blasphemy laws, which were often based on canon law, prompting Sir Mathew Hale to state in 1676 that “Christianity is parcel of the laws of England” which now indicates that canon law plays a part in the laws of Pakistan. Therefore, as Quraishi notes, it is not surprising to find that parts of the *Hudood* Ordinance dealing directly with rape is nearly identical to Pakistan’s old common law of rape which represents the British common law.

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161 Anwar Syed, Anatomy of Blasphemy Laws, http://www.thepersecution.org/news/2006/dawn0716.html (July 16, 2006). In addition to *Hudood* laws, blasphemy laws in Pakistan also appear to be derived from British law. The blasphemy laws appear in several sections of the Pakistan Penal Code, including Section 295 B and C and 298 A, B, and C. It imposes a variety of penalties for different forms of blasphemy, including the death penalty for anyone found to have “by words or visible representation or by an imputation or insinuation, directly or indirectly, defiled the name of the Muhammad of Islam.” Pakistan Penal Code section 295/C. Similarly, under English law, the following expressions were punishable: denial of God’s being and providence; “contumelious reproaches” of Jesus Christ; “profane scoffing” of the holy scriptures, or exposing any part thereof to contempt or ridicule; reviling the sacrament of the Last Supper; rejection by a person professing to be Christian of the belief that members of the Holy Trinity were God, or that the holy scriptures were of divine origin.

162 See generally Quraishi, *supra* note 2.
Pakistan’s common law statute reads that “rape” occurs when a man has sexual intercourse with a woman under circumstances falling under any of the following descriptions: 163

First: Against her will.
Secondly: Without her consent.
Thirdly: With her consent, when her consent has been obtained by putting her in fear of death or of hurt.
Fourthly: With her consent when the [man is] not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Not surprisingly, the law of zina-bil-jabr follows British-based common law, stating that an individual commits zina-bil-jabr when he or she has extra marital sex with someone in any of the following circumstances: 164

(a) against the will of the victim;
(b) without consent of the victim;
(c) with the consent of the victim; when the consent has been obtained by putting the victim in fear of death or hurt; or
(d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

The only clear difference in the two laws is that the common law statute applies only to men committing the crime while Pakistan’s laws apply to both men and women, with other language of the two laws being nearly identical. The law not only has no basis in Qur’anic principles or Hadith, it is in fact contrary to the spirit of equality under Islam. The purpose of

163 Pakistan Penal Code 1860, sec. 375.
Islamic jurisprudence, also called *maqsid al-shari’a*, was to “protect the well-being or the interest” of mankind and when an “Islamic” law unjustly deprives any human being of the essentials of life, “then the intent of the law is violated, and therefore the law should be invalid because the text of a law cannot violate the intent of the law.” Taking this striking similarity into consideration, in addition to the lack of a Quranic mention of *zina-bil-jabr* and the unjust spirit of the law, it seems that the textual validity of Pakistan’s rape laws under the *Hudood* laws have no basis in *Shar’iah*.

Further, Pakistani law reflects the British common law perspective that rape is a violent and aggressive act in which a man has *forcible* sex with a woman without her consent, in a way that leaves no doubt that the man had “carnal” knowledge of a female without her allowing it to occur. In order to placate the no-consent requirement, these laws required a woman to demonstrate that she resisted the assailant to the utmost of her physical capacity. Therefore, like many modern nations that derive from British common law, there is two-fold requirement of

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165 Chaudry, *supra* note 126, at 521. Islam inherently recognizes the concept of “natural rights,” which was propogated in the Enlightenment, particularly by the works of John Locke who stresses that human beings have natural rights to life, liberty, and property. These ideas were the intellectual underpinnings for such important declarations of human rights as the French Declaration of the Rights of Man and the American Declaration of Independence. Jerome Shestack, *The Philosophic Foundations of Human Rights*, 20.2 HUM. RTS. Q. 201, 207 (1998).


167 *Id.* See also WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 209 (1895). Similar to current Pakistani law, British common law defined “forcibly” as the male assailant using physical force or its threat to obtain sexual penetration; “against her will” was defined as the woman not consenting to sexual penetration. Specifically, these definitions were geared to ensuring that a female victim present evidence that she resisted the rape, that she did not lead the man on, and that there actual force involved. Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998, 4 U. ILL. L. Rev. 953, 962-63 (1998).

168 Anderson, *supra* note 167, at 962-63. Under the Hudood Ordinance, rape is not possible unless there is material evidence of a rape which includes, but is not limited to bruises and scratches. Unless these telltale signs of force are used, or unless there is weapon involved, there is no rape under the eyes of the judicial system. Instead, the victim of sexual assault becomes an “immoral” woman of bad character who is trying to shield herself from the guilt of extra marital sex by crying rape. “These biases are a direct violation of the Constitution’s guarantee of equality before the law.” Bettencourt, *supra* note 25, at 9.
resistance: (1) there must be evidence that the victim physically resisted the unwanted sexual attack; and (2) a rapist must overcome the victim’s physical resistance with force.\textsuperscript{169}

Therefore, Pakistan’s rape laws appear to be an inadequate hybrid of the country’s old common law and the misinterpretation of \textit{Shar’iah}, as evidenced by the lack of religious basis for \textit{zina-bil-jabr}. This hybrid law is further invalidated when analyzing the “four male witnesses” requirement imposed by the Pakistani government to corroborate a rape accusation under \textit{Hudood}, as discussed below.

\textit{C. Incorrect Interpretation of Arabic Text Regarding Male Witnesses}

The next textual issue regarding \textit{zina-bil-jabr} laws is the requirement of “four male witnesses” that allegedly arise from the \textit{Qur’an}, according to proponents of the \textit{Hudood} Ordinance. This exclusion of female testimony expands to the victim of rape herself, and her own testimony is discounted, transforming an outdated male bias into a direct violation of the human rights of women.\textsuperscript{170} There are two issues with the requirement of male witnesses in rape cases under \textit{Shar’iah}: (1) blanket application of one verse in the Qur’an that differentiates a woman’s testimony from a man’s; and (2) the Qur’an does not specify the gender of required witnesses for \textit{zina}.

\textit{1. Blanket Application of One Quranic Verse}

\textsuperscript{169} Anderson, \textit{supra} note 166. It is interesting to note that while there is no language requiring such evidentiary standards, there is no other way to prove “physical resistance” or non-consent then by material evidence.

\textsuperscript{170} Quraishi, \textit{supra} note 2, at 305.
A largely accepted view in Islamic scholarship is that the Qur’an equates the testimony of two women to that of one man; this is a common, yet erroneous interpretation of Quranic text.\(^{171}\)

The Qur’an generally equates the testimony of men and women: \(^{172}\)

> And for those who launch a charge against their spouses and have no evidence but their own [testimony], their solitary evidence [is admissible] if they bear witness four times [under oath] by Allah that they are solemnly telling the truth; And the fifth [oath should be] that they solemnly invoke the curse of Allah on themselves if they tell a lie. But it would avert the punishment from the wife if she bears witness four times [under oath] by Allah that [her husband] is telling a lie; And the fifth [oath] should be that she solemnly invokes the wrath of Allah on herself if [her accuser] is telling the truth.

Despite passages equating the testimonial weight of woman to that of a man, many jurists focus on one reference in the Qur’an that distinguishes between the testimonial weight of a male and a female. The passage refers to transactions, reading, “And get two witnesses out of your own men, and if there are not two men, then a man and two women, such as you choose for witnesses so that if one of them errs, the other can remind her.”\(^{173}\)

This singular verse is most commonly cited by Muslim jurists to establish a Quranic rule that a woman’s testimony is worth half a man’s, however the earlier passage from the Qur’an voids this “rule” by “explicitly equat[ing] the testimony of both genders.”\(^{174}\) Since no other verse from the Qur’an is available to support the claim that a woman is “half” that of a man in terms of testimonial value, it is imperative to note that the verse refers to the second woman as someone who can remind the first woman of any error in case “any one of the women confuses her testimony, the other may help her.”\(^{175}\) Progressive scholars have interpreted this verse in its context is that Arab society during the time of the Prophet did not boast the business education of


\(^{172}\) *Id.* (quoting Qur’an 24:6-9).

\(^{173}\) Qur’an 2:282

\(^{174}\) Badawi, *supra* note 171.

women, making it harder for them to understand business jargon in a financial deal.\textsuperscript{176} Therefore, the verse cannot serve as a basis for blanket roadblock against the testimonial eligibility of women, especially in regards to personal and society matters such as zina.\textsuperscript{177}

2. Lack of Gender Specifications in Islamic Texts

Since the crime of zina-bil-jabr inappropriately derives from zina, there is no support for the theory that only four males can serve as witnesses.\textsuperscript{178} This verse refers to the witness requirement using the term “shuhada” which directly translates to “witnesses,” without a gender-specific connotation attached\textsuperscript{179} In fact “shuhada” is also used in Islamic jurisprudence to describe the “witness over mankind” when one converts to Islam, connoting simply that the “shuhada” is a legal term\textsuperscript{180} Therefore, including the requirement that witnesses be male creates an erroneous interpretation of Quranic text and context, employing a cultural spin with a religious façade.

Despite the Quranic use of the plural noun referring to both men and women, Islamic jurists and scholars have often required that the four witnesses be male.\textsuperscript{181} This requirement stems from several schools of Islamic thought that derived their interpretation of religion through an understanding of religious texts, as well as the cultural norm of their time.\textsuperscript{182} Unfortunately, the major schools of Islamic jurisprudence have opted to pursue the restrictive interpretations of

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\textsuperscript{176} Women in Islam, http://www.muslima.ca/woman/womaninislam.html (last visited May 17, 2008). ("It would be unreasonable to interpret this requirement as a reflection on the worth of women's testimony, as it is the only exception found in the text of the Quran.")

\textsuperscript{177} Id.

\textsuperscript{178} Quraishi, supra note 2, at 305-07.

\textsuperscript{179} Id. See also Qur’an 24:6-9.


\textsuperscript{181} MOHAMMAD S. EL-AWA, PUNISHMENT IN ISLAMIC LAW, 124-26 (1982).

\textsuperscript{182} Quraishi, supra note 2, at 305-07.
a woman’s ability to serve as witnesses in any form. As an example, the Hedaya, a central source of *Shar’iah* in Pakistan, states that there is ample evidence in religious text that four men are required and that the testimony of a woman cannot be admitted. According to the Hedaya, “in the time of the Prophet and his two immediate successors it was an invariable rule to exclude the evidence of women in all cases inducing punishment or retaliation” alleging that the testimony of women involved a great degree of emotional and doubt. Interestingly, this view is espoused through an 18th century translation of the original Arabic, which itself was compiled in the twelfth century, years after the death of Prophet Muhammad. Further, certain Islamic jurists have cited to numerous *Hadith/Sunna* in which Prophet Muhammad and his Companions exonerate a woman based on her own testimony. Ibn Qudamah stated the following:

> If a woman becomes pregnant without having a husband or a master, she may not be punished and, in stead, she should be asked about it, if she claimed that she was coerced into it or that she committed adultery under dubious circumstances, or if she simply does not confess adultery then she will not be punished...because she may be pregnant as a result of a forceful intercourse or dubious circumstances. Punishment will be abandoned in case suspicion exists. It is well known that a woman could become pregnant without committing the [consensual] intercourse.

Therefore, the principle that a woman being “emotional” or having “doubt” in her testimonial recount is a hardly laudable especially when the reasoning behind it focuses on language such as, “the testimony of four male witnesses is required as a female is weak in character.” In fact, the content of the verse calling for two women in place of one male witness does “not allow us to say that the testimony of a woman in the eyes of the Qur’an carries half as much weight as that

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183 *Id.*
185 HAMILTON, *supra* note 185.
186 KHAN, *supra* note 17, at 5.
188 *Id.*
189 A.D. AJIOLLA, INTRODUCTION TO ISLAMIC LAW, 134 (1981).
of a man” when looked at in its proper context. Moreover, the Hadith, a source of Shar’iah cited by most jurists regarding the “four witnesses” requirement demonstrates that even the Prophet Muhammad accepted the testimony of the female victim to exonerate her. An illustration of the Pakistani government’s deviation from Hadith/Sunna and favor towards the Hedaya is Mina v. State, in which a 15-year-old is sentenced to 100 lashes on account of her pre-marriage pregnancy. Despite her complaint that her uncle and his son raped her, the court discounted her testimony due to the Hudood Ordinance.

Assumptions that women are “emotional” or “weak in character” instead of competent witnesses stems from a condescending view of women in a patriarchal culture perpetuated in Pakistan. However, they do not reflect the attitudes espoused in the Qur’an, as the religious text takes pains to establish the equality of men and women before God and the responsibility of both genders as “vicegerents of God on earth.” The culture of male bias is apparent in Pakistan’s decision to require men to testify for zina cases, reflecting the lack of female participation in the public sphere during the creation of Islamic jurisprudence throughout history. The absence of women from the legal arena during this critical time allowed the bias in favor of men, as has always been the case in the Arab culture in which Islam took root.

Ancient Arab customs that prevented women from participating the legal sphere account, to a degree, for the misinterpretation of Quranic text, forcing progressive Islamic scholars to argue that “all rules in the Shar’iah that are based upon customs [must] change when customs

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190 Understanding Islam, Women's Witness, supra note 175.
191 Juferi, supra note 154.
192 Terzieff, supra note 71.
193 Id.
194 Quraishi, supra note 2, at 306-07.
196 Quraishi, supra note 2, at 307.
197 Id.
Thus, the Hudood requirement of four male witnesses to corroborate zina-bil-jabr has no textual basis in either the Qur’an or Sunna/Hadith and should be repealed. Additionally, depriving women of such testimonial rights in rape cases has international societal ramifications because it develops the assumption that women are considered “less” than men in Islamic jurisprudence, when in fact it is a concept based in a highly patriarchal view espoused by conservative Islamic scholars, as discussed below.

III. PAKISTAN’S VIOLATION OF INTERNATIONAL STANDARDS

Unlike most crimes, rape is more than a violation of sexual autonomy; it is “sexually invasive dehumanization.” Dehumanize means to “deprive of human character or attributes, make inanimate, treat as an object, and deprive of one’s concern.” The role of rape as a weapon of dehumanization makes it a pressing international concern, especially due to its role in the subjugation of women. The Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) and the Declaration on the Elimination of Violence Against Women (DEVAW) provides a foundation for holding states responsible for issues such as gender inequality and violence against women. Therefore, international human rights must serve as a catalyst for the Pakistani government to repeal the Hudood Ordinance.

A. Convention on the Elimination of All Forms of Discrimination against Women

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198 Id. at 308.
199 Anderson, supra note 166.
200 Id.
201 KHAN, supra note 17, at 5.
202 Ruane, supra note 15, at 1562. In addition to Pakistani laws being discriminatory, “the judicial system condones and exacerbates the problem by failing to view violence against women as a serious violation of women’s human rights. The judicial system, including but not limited to police officials, prosecutors, defense attorneys, judicial medical examiners and judges, is plagued by gender bias.” This bias is reflected in the number of violent crimes against women that go unpunished, let alone investigated. The “failure of the judicial system to protect women who are victims of violence as well as its failure to prosecute the perpetrators of this violence has perpetuated society’s views that women’s rights are less valuable than men’s rights.” Bettencourt, supra note 25, at 9.
CEDAW establishes the right of women to “enjoy human rights and fundamental freedoms in the political, social, cultural, and civil fields on an equal basis with men.” As a party to CEDAW, Pakistan is obligation to “pursue by all appropriate means and without delay a policy of eliminating discrimination against women.” Discrimination includes “any distinction, exclusion or restriction made on the basis of sex.” Under this definition, the requirement of “four male witnesses” under Hudood clearly violates the required equality of men and women under CEDAW. Specifically, the belief of Muslim jurists that a woman’s testimony is equivalent to one of a man’s testimony demonstrates an obvious disparity between the treatment of men and women under the Hudood Ordinance.

Further, Pakistan’s lax attitude towards providing unbiased law enforcement and judicial remedy for violence against women “violates its voluntary membership to international human rights conventions and constitutes a denial of a woman's right to equal protection of the laws as required under CEDAW.”

B. Declaration on the Elimination of Violence against Women

Echoing CEDAW, DEVAW affirms that states must “exercise ‘due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.’” In addition, DEVAW

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203 Id. at 1563.
205 Id.
206 Badawi, supra note 171.
207 Id.
208 Ruane, supra note 15, at 1565. For example, the Lahore High Court in 1997 upheld that a woman can marry without the consent of her “wali” (guardian). However, many courts fail to prosecute family members who kill women who chose their own spouse. See U.S. Department of State’s 1999 Country Report on Pakistan.
encourages states to take proactive steps in preventing violence against women as well as providing accessible options if any such violence has occurred.\textsuperscript{210} Yet, Muslims jurists often cite to the \textit{Shar’iah} as justification for the disparity between the treatment of men and women, especially in regards to rape.\textsuperscript{211} Due to the claim of religious origin, Pakistan claims that the \textit{Shar’iah} is a genuine law under the principles of Islam\textsuperscript{212} and may not be subjected to “scrutiny from an international human rights perspective.”\textsuperscript{213} However, in adopting DEVAW, United Nations “contradicted this notion and urged states not to ‘invoke custom, tradition, or religious consideration to avoid their obligations’ to eliminate discriminatory treatment of women.”\textsuperscript{214}

As long as Pakistani officials and political parties continue to appeal to \textit{Shar’iah} as the basis for inequality under the \textit{Hudood} Ordinance, the country will continue to oppose CEDAW and DEVAW. International organizations must highlight “principle[s] of change, dynamism and adaptability” in \textit{Shar’iah}.\textsuperscript{215} Islamic jurisprudence allows for numerous ways (\textit{ijma}, \textit{qiyas}) to derive new laws for current problems, to prevent the frustration of \textit{maqasid al-shar’iah} (intent behind the laws).\textsuperscript{216} Only by highlighting the “flexible nature of Islamic religious interpretation will the Muslim community be disabused of the myth that the only acceptable view of Islam is one that precludes according equal rights to women.”\textsuperscript{217}

Therefore, Pakistan must expunge the requirement of four male witness under \textit{Hudood} because it frustrates the \textit{maqasid al-shar’iah} of social harmony and equality propagated by Islamic law and prevents the country from developing strong human rights standards. In view of

\begin{footnotesize}
\begin{enumerate}
\item Ruane, \textit{supra} note 15, at 1566.
\item A\textsuperscript{N-N}A’T\textsuperscript{IM}, \textit{supra} note 20, at 176.
\item Al-Maula, \textit{supra} note 48.
\item Ruane, \textit{supra} note 15, at 1567.
\item \textit{Id.}
\item Chaudry, \textit{supra} note 126, at 523.
\item \textit{Id.}
\item Ruane, \textit{supra} note 15, at 1569.
\end{enumerate}
\end{footnotesize}
the analysis by several scholars disproving any religious basis for the rape under *Hudood*, the
government should take definitive steps to repeal the religiously-supported laws, combined with
diligence and care to remove the discriminatory view of rape victims by the criminal justice
system.

IV. PERPETUATING GENDER INEQUALITY UNDER THE GUISE OF ISLAM

According to Fatima Ambreen, coordinator of War Against Rape (WAR),\textsuperscript{218} four out of
seventy-five reported cases of rape will reach the court systems, of which maybe one will result
in a conviction.\textsuperscript{219} The negative repercussions of *Hudood* give light to the suggestion by many
international policy makers that Islamization of a state constitution inevitably leads to
“unfortunate changes to the legal system.” Islamization hinders “a country’s ability to develop
democratic governance structures, to conform to human rights norms or to engage fully in the
global economy.”\textsuperscript{220} Developing countries, such as Pakistan, prove this suggestion by using
women’s rights issues as “‘trump card[s]’ in political struggles for power. [This use] has tipped
the delicate balance between the traditional and modernist elements whenever legal reform has
been attempted in Pakistani history.”\textsuperscript{221} The male-led religious right of Pakistan holds onto this
power by citing to the Qur’an and the Prophet to validate their jurisprudence against women and
non-Muslims, despite the call for equality in Islam.\textsuperscript{222} Further, the religious right in Pakistan
argues that the *Hudood* Ordinance and the Islamization of Pakistan serve as a protective force

\textsuperscript{218} WAR is a Pakistani aid organization dealing specifically with rape issues. It was set up in the early 1990s by a
group of 15 individuals. It now has offices in most major Pakistani cities with dozens of professionals lending skills
to combat the prevalence of rape through various educational and government campaigns.

\textsuperscript{219} Terzieff, *supra* note 71.

\textsuperscript{220} Clark B. Lombardi and Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari’a Threaten Human
Rights? How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT’L
L. REV. 379, 382 (2005). A hindering, yet prevailing view among police officials in Pakistan, which leads to the
lack of protection and poor enforcement of any fair rape laws, is that women who have been raped are either scorned
lovers or fear family reprisals, thus they “fabricate” a story to frame the men. Police officials often view domestic
violence, including honor killings, as a private matter to be resolved within the family or tribe, not the criminal

\textsuperscript{221} Venktraman, *supra* note 13, at 1991.

\textsuperscript{222} Id.
against “promiscuity among young girls.” In their effort to retain power based on a religious “cause” these politicians in effect punish women for being victims of sexual predators, as discussed below.

A. Political Bias against Rape Victims

Pakistan remains bitterly divided over the Hudood Ordinance. While orthodox clergymen portray the laws as divinely mandated, human rights advocates have demanded its repeal since the 1980s stating that the Ordinance “not only negate the rights of women but are also a misinterpretation of Islam.” Skepticism and scorn about women’s complaints of violence are similarly rife amongst police officials in Pakistan, who in fact function as gatekeepers with respect to women’s access to the criminal justice system. Ashiq Martha, the Chief or Station House officer (SHO) of Ichra Thana told the Human Rights Watch that non-consensual sexual intercourse does not exist in Pakistan and that in most cases women fabricate the rape. Similarly, the SHO of the Women’s Police Station in Karachi, Farrukh Sultana, stated that “[r]ape is indicated by marks of violence on the woman. In consensual cases there are no marks, though the woman calls it rape anyways.”

227 Id. An example of the police’s bias towards women resonates from the statement to Human Rights Watch by a chief officer in Lahore, “Women have a lot of rights... It is wrong of courts to believe women so that the poor man ends up in jail.” Bettencourt, supra note 25, at 9.
228 Id.
Due to such biased comments, women activists are particularly concerned by the implicit discrimination underlying the Ordinance. While a man could only be convicted of zina if he had been observed by four Muslim men in the act of penetration or confessed to the act throughout the trial, a woman could be convicted on the basis of her own pregnancy or medical report. An illustration of this was in Mina, when 15-year-old Jehan Mina became pregnant and alleged rape by her uncle and his son. After filing a complaint with police Mina was charged and sentenced for illegal fornication on the grounds of her pregnancy and received an original sentence of 100 lashes. This punishment does not comply with the social policy behind the Hudood crimes under the Qur’an, because the punishment is not a recompense for the crime. Under Islamic principles, it is “undesirable to treat a criminal lightly who threatens the security of the society with danger.” Sentencing a young woman with 100 lashes for reporting a rape does not provide recompense for her actions. Further, even if she was accused of pre-marital sex under zina there was no proof that the sex was consensual, without which punishment would be unlawful under Islamic principles.

Many human rights activists witnessing cases such as Mina face a backlash from conservative Muslims females who fully support the religious right, specifically the Jamaat-e-Islami party. The party is controlled by conservative Muslims calling for a strict implementation of Islamic jurisprudence, without the understanding that the rape provisions in

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229 Id.
230 ESPOSITO, supra note 28, at 90.
232 Sahibzada, supra note 225.
233 Id. The judge later reduced the sentence from 100 lashes to 10 lashes due to Mina’s young age. Id.
234 Al-Maula, supra note 138.
235 Id.
236 Id.
the *Hudood* Ordinance are not based in any religious text.\textsuperscript{238} For example, in September 2006, fifty veiled female activists of Jamaat-e-Islami gathered outside the main gate of the National Assembly with placards which said that they would not accept the recommendations to repeal the rape guidelines under *Hudood*.\textsuperscript{239} Further, in a speech at a seminar titled “Hudood Ordinance: amendable or revocable,” organized by the Jamaat-e-Islami Women’s Commission, the Commission Chairperson, Rahila Qazi, stated that Pakistan’s “‘so-called’ liberal lobby, encouraged by Western countries, was behind moves to repeal the Hudood laws. ‘Their purpose is to hinder the establishment of a purely Muslim society.’”\textsuperscript{240} Qazi went so far as to claim that repealing the *Hudood* Ordinance in regards to its rape provisions would lead to “licentiousness and ‘end the natural division between men and women created by Allah.’”\textsuperscript{241}

In a developing country entrenched in archaic interpretations of the Qur’an and Sunnah, the repeal of rape laws would prove fruitless unless it received full support from the government and legal officials. Otherwise, the ideologies espoused by political parties drawing on the country’s fears of Westernization and loss of religion would cause women to face continued difficulties even under reformed rape laws.

### B. Rape in Police Custody to Prevent Women from Pursuing Rape Claims

In addition to the difficulty of pursuing a rape case on the legal front, societal misperceptions and the reluctance of law enforcement officials to investigate violence against women perpetuate an environment where sexual violence is rarely acknowledged and punished. Many women who file rape complaints at police stations are beaten and raped by the police

\textsuperscript{238} *Id.*  
\textsuperscript{241} *Id.*
officers\textsuperscript{242} so as to humiliate them and intimidate them from further pursuing a case.\textsuperscript{243} This practice is commonly utilized by law enforcement officers in Pakistan to maintain a male dominant culture, which they bolster by charging rape victims of \textit{zina}, after they rape the victims again.\textsuperscript{244}

In one case, a woman filing a rape claim was charged with adultery and held in police custody during which police officers repeated raped her.\textsuperscript{245} Reports indicate that sixty-two percent of female prisoners were raped by prison officials.\textsuperscript{246} Documented abuses included gang rape, the insertion of foreign objects into the vagina and rectum, and suspension in mid-air with their hands tied behind their backs.\textsuperscript{247} This form of custodial violence and sexual assault in police custody are so widespread in Pakistan that the penal law was amended to bar the remand of women to police custody.\textsuperscript{248} Despite court orders and regulations requiring that female suspects “be interrogated only by female police officers, women continue to be detained and abused by male officers at regular police stations” when trying to file a rape complaint.\textsuperscript{249} Further, since rape at the “hands of law enforcement officials is often not prosecuted, the devastating effect is a message to society that the government does not consider rape a serious crime.”\textsuperscript{250}

Even if a rape victim successfully registers a complaint, her struggles with the legal system are far from over. The police may inaccurately record the complainant's statement or

\textsuperscript{242} Waheed, \textit{supra} note 74, at 955.
\textsuperscript{243} \textit{Id.} at 954
\textsuperscript{244} \textit{Id.}
\textsuperscript{245} \textit{Id.} at 956
\textsuperscript{247} \textit{Id.} at 657.
\textsuperscript{248} Waheed, \textit{supra} note 74, at 956.
\textsuperscript{249} Ruane, \textit{supra} note 15, at 1544.
\textsuperscript{250} Gotfredsen, \textit{supra} note 247, at 657.
tamper with the statement after receiving a payoff from the accused.\textsuperscript{251} Furthermore, police officers frequently “‘embellish, modify, or incorrectly transcribe’ witness statements, so as to make it easier for them to close and dispose of cases.”\textsuperscript{252}

Such cases are excessive in Pakistan, where even medical examiners responsible for collecting forensic evidence to verify a woman’s allegation of assault are unlikely to believe the complaints. In one case a police employee conducting a medicolegal exam opined to the lawyer of two minor rape survivors that the girls were probably “‘willing participants’ in the act.”\textsuperscript{253} Dr. Nizamuddin Memom, who oversees all medicolegal services, stated that rape does not really exist.\textsuperscript{254} He stated to the Human Rights Watch, “A woman who is well developed cannot be raped unless there are four or five men involved. One man cannot rape a woman. Only children under [five] can be raped…otherwise rape is only gang rape. One-on-one cannot be rape unless a gun or other arms are used.”\textsuperscript{255}

This attitude is further reflected in the May 2004 case of seven-year-old Sharee Barkat who was raped by 23-year-old Alid Bahader.\textsuperscript{256} The seven-year-old was found lying unconscious in a cemetery, bleeding due to the assault.\textsuperscript{257} In a rare defiance of a society that discourages

\textsuperscript{251} Ruane, supra note 15, at 1544.
\textsuperscript{252} Id.
\textsuperscript{253} Waheed, supra note 74, at 952-953.
\textsuperscript{255} Id. Additionally, the mediocological examinations of sexual assault victims in Pakistan contribute to the “impunity with which violence against women occurs.” Id. Doctors “do not simply record the virginity status of the [victims]…they frequently make notations such as ‘She is well used to sexual intercourse’ or ‘She is habituated to sexual intercourse.’” Id. These notations are used by defense attorneys to “discredit and attack” the character of victims of sexual assault, further exposing these victims to prosecution. Id. Therefore, these mediological examinations and reports are fodder for a defense lawyer’s case theory “by providing them with the basis for vilifying, retraumatizing, and stigmatizing the victim, which then serves to discourage other victims from pressing charges.” Id. Furthermore, Dr. Lubna, a doctor in Karachi, Pakistan, views a such medical examinations as the one way to discredit victims of sexual assault instead of simply conducting an object medical procedure. Id. According to Dr. Lubna, “‘We don’t take a history from the woman because she could fabricate or say what her parents have told her to say,’” and “that it was important to match any semen found on an examinee’s body with that of the defendant because ‘[s]he could have put someone else’s semen on herself’ to frame the defendant.” Id.
\textsuperscript{256} Terzieff, supra note 71.
\textsuperscript{257} Id.
victims from speaking out against rape, Sharee's mother, Barkat, went public with the case.\footnote{258} With the help of local nongovernmental organizations, she called a press conference in early June 2004 to ask Pakistani President Pervez Musharraf to personally ensure Bahader is punished for his actions.\footnote{259} But such cases of public declaration of rape are rare,\footnote{260} especially in a country built on the subjugation of women. Despite this, Pakistan has taken no active measures with law enforcement officials to better protect women against such human rights violations, which are further perpetuated by the negative impact of the \textit{Hudood} laws.

Pakistan’s inaction also further violates its international commitments under CEDAW. Under standards set by numerous international agreements, the state must exercise due diligence in preventing, investigating, and punishing violence against women.\footnote{261} Accordingly, the state “has a legal duty to take responsible steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction” and “to impose the appropriate punishment and to ensure the victim adequate compensation.”\footnote{262}

In addition to violating international commitments, the government’s inaction also prevents the repeal of the \textit{Hudood} Ordinance. Without an enforcement mechanism, legal changes are futile. Even the reformed rape laws of the United States required government support, without which they remain vulnerable to judicial interpretation, as discussed below.

\footnotesize
\begin{itemize}
\item \footnote{258}\textit{Id.}
\item \footnote{259}\textit{Id.}
\item \footnote{260}Many judges uphold the “laws of Islam” (as interpreted by Pakistan’s Constitution) over the Constitution’s guarantee of non-discrimination and equality under the law. Gender-bias and the enforcement of Islamic law by judges, specifically concerning the issue of honor killings, has been explained by Human Rights Watch in their 1999 report on violence against women in Pakistan, “The court explained that the Koranic verse 34 of Sura Al-Nisa establishes men as the ‘custodians of women;' hence a man who kills another man for defiling the honor of his wife or daughter is protecting his property and acting in self-defense.” Crime or Custom? Violence Against Women in Pakistan, Human Rights Watch, August 1999, pp. 44-45.
\item \footnote{262}Velasquez Rodriguez Case (Honduras), 4 Inter-Am. Ct. H.R. (ser. C) at 92 (1988).
\end{itemize}
V. Effective Implementation of Legal Reforms

Proving the crime of rape in any society is difficult.\textsuperscript{263} This is no more evident than in Pakistan, where rape law reform has yet to translate into effective implementation. To enforce rape laws, strong government support, effective legal and structural safeguards, and the repeal of the Hudood Ordinance is required. A comparative analysis of the United States’ and Pakistan’s rape laws provides a deeper understanding of how rape law in Pakistan can be strengthened.

A. Rape Law Reform in the United States

In the United States, rape laws have gradually evolved in favor of the victim. The United States’ rape law reforms in the 1970s swept away most legal language that implicitly encouraged biased results against the victim.\textsuperscript{264} The primary reforms stem from three sources:\textsuperscript{265} the Model Penal Code (“MPC”),\textsuperscript{266} the Michigan statute,\textsuperscript{267} and the New York statute.\textsuperscript{268} Most states utilize all three models to construct their rape laws.\textsuperscript{270}

Despite such reforms, the United States still uses archaic definitions of rape. The MPC emphasizes consent but avoids the question of the victim’s subjective non-consent, focusing purely on physical manifestations of non-consent such as resistance, corroborating testimony, or “fresh complaint.”\textsuperscript{271} Additionally, the MPC follows the old common law rape requirement of

\textsuperscript{263} Rape Reporting After Reforms, http://vaw.sagepub.com/cgi/content/refs/11/2/150 (last visited May 17, 2008).
\textsuperscript{264} POSNER, supra note 271.
\textsuperscript{265} Id.
\textsuperscript{266} Id. Fresh complaint focuses on how much time elapsed between the rape and the reporting of the rape. Id.
\textsuperscript{267} Id. As a progressive decision, the Michigan statute was also the first to use gender-neutral language. Id.
\textsuperscript{268} Id. Under the statute, conviction of the highest level of sexual offense is possible without severe physical injury to the victim, unlike the MPC. Id.
\textsuperscript{269} Id.
\textsuperscript{270} Id.
\textsuperscript{271}
“utmost resistance.” The MPC fails to recognize that, “[m]ore rapes occur within the property lines of fraternity and sorority houses than in any other specific area in the United States” excluding only military bases and prisons. Rather, approximately sixty percent of sexual assaults occur in the victim’s own home or in the home of a friend, relative, or neighbor. Therefore, the MPC’s “utmost resistance” requirements remain difficult to satisfy, much like its British common law predecessor which is still followed by Pakistan under the guise of Shar’iah.

Further, the vast majority of laws in the United States derive from the classic rape narrative, as they require a defendant to “exert force against his victim before the state may convict him of what is commonly thought of as rape.” Statutes in forty-three states and the District of Columbia require that the defendant use force against his victim. Only recently did sixteen states and the District of Columbia criminalize non-consensual sexual penetration without force, but they impose less punishment upon nonconsensual penetration. The commonly used language in these laws is similar to Blackstone’s 235-year old commentary on rape, and to British common law as utilized by Pakistan.

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272 (NEED MPC citation); Another example is the FBI’s Uniform Crime Reports, which defines rape today as “carnal knowledge of a female forcibly and against her will.” FBI, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES, 2002 (2002), available at http://www.fbi.gov/ucr/cius_02/html/offreport/02-nforciblerape04.html.
274 BUREAU OF JUSTICE STATISTICS, US DEPT. OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2002 STATISTICAL TABLES, tbl. 61 (2002) (indicating that the highest percentages of rapes occur in the victim’s home or in the home of a friend or a relative). It rarely involves knives, guns, or other weapons because many rapists find verbal coercion and pinning sufficient because frozen in fright, many women cry or remain passive in the face of a sexual attack. GOLD, supra note 281.
275 Anderson, supra note 167, at 1003 n. 298 (noting studies which indicate that offenders in acquaintance rapes use a high level of verbal abuse but considerably low physical force).
276 Anderson, supra note 166.
277 Id. These statutes often use “force” in the definition of non-consent. Id.
278 Id.
279 Id.
280 Id.
Another highly-criticized aspect of American rape law is requirement that a conviction cannot be obtained on the testimony of the victim unless it is corroborated by a third party or by physical evidence.\textsuperscript{281} This requirement is similar to Pakistan’s requirement of witnesses other than the victim to prove a rape.\textsuperscript{282} The difference between the laws is that Pakistan requires religiously mandated male witnesses, while the United States required third-party witnesses due to negative attitudes against rape victims.

Under the American legal rubric, Pakistan’s rape laws, despite its alleged basis in \textit{Shar’iah}, are similar to rape laws in the United States with regard to the requirement of physical evidence. Both statutes, the MPC and the Hudood Ordinance are based in British common law, further strengthening this comment’s claim that the latter is not rooted in religion, but in secular principles.

\textbf{B. Reforms will Fail without Government Support}

The MPC demonstrates that rape law reform needs to be on-going, based on societal needs, both in the United States and in Pakistan. \textit{Strong government support is required to sustain rape law reform.} Without government support, victims will continue to suffer in fear. For example, women in the United States do not report rape for fear of reprisal from the assailant, as well as public shame, much like the women in Pakistan who suffer overtly under the \textit{Hudood Ordinance}.\textsuperscript{283}

\begin{footnotesize}
\textsuperscript{281} \textsc{Richard A. Posner and Katharine B. Silbaugh}, \textit{A Guide to America’s Sex Laws}, Chapter 1, (1996).
\textsuperscript{282} Badawi, \textit{supra} note 171.
\textsuperscript{283} \textsc{American Rape Statistics}, http://www.paralumun.com/issuesrapestats.htm (last visited March 4, 2007).
\end{footnotesize}
In 1994, the FBI estimated that only thirty-seven percent of all rapes are reported to the police,\(^{284}\) while the U.S. Department of Justice estimated that only twenty-six percent of all rapes or attempted rapes were reported to law enforcement officials.\(^{285}\) In 1993, a report to the Senate Judiciary Committee approximated that only two percent of forcible rapists ever receive prison sentences.\(^{286}\) For example, in 2006, the Maryland Court of Special Appeals held that once a man has begun a consensual act of sexual intercourse with a woman, “he may continue until he climaxes – even if she asks him to stop.”\(^{287}\) While textually Maryland’s law does not delineate any distinction between the giving of consent pre- and post-penetration, the court reasoned that the historical approach to rape was a non-consensual forced “de-flowering” of a woman,\(^{288}\) consequently making any “post-consensual-penetration (and pre-climax) activity relatively insignificant.”\(^{289}\) Yet, instead of analyzing the pure text of the law, Maryland courts choose to “tie a modern interpretation of a statute to the prejudices of the ancients.”\(^{290}\) The decision of the Court of Special Appeals in Maryland and low conviction-rates for rape cases in the United States indicate that social reform and governmental enforcement must support legal change. Unless the government takes action to enforce continued rape law reform, biased judges will bypass the law through “judicial interpretation.”\(^{291}\)

\(^{284}\) Id. There are approximately 350,000 instances of reported sexual assaults each year in the United States, with a woman raped every two to five minutes.

\(^{285}\) GOLD, supra note 281, at 10. The United States has the highest sexual assault rate of the countries that report such statistics – four times higher than that of Germany, thirteen times higher than England, and twenty times higher than that of Japan. Id.

\(^{286}\) Id.


\(^{288}\) Id.

\(^{289}\) Id. The reformed rape law of Maryland simply states, “‘[a] person is guilty of rape in the first degree if the person engages in vaginal intercourse with another person by force against the will and without the consent of the other person.’” Id.

\(^{290}\) Id.

\(^{291}\) Id.
Similarly in Pakistan, social reform is slow to follow legal reform of rape laws because citizens are indoctrinated to believe that the *Hudood* Ordinance is religiously mandated. Consequently, the government must first repeal the *Hudood* Ordinance and proactively enforce the repeal to promote effectiveness and equality in rape cases.

**C. Amended Rape Laws in Pakistan Lack Effective Safeguards**

Pakistan’s passive attitude towards cases of violence against women by private actors allows many sexual offenders leniency under the guise of *Shar’iah*. Despite the passage of the Women’s Protection Bill (“WPB”) on December 1, 2006, (deleted: due to mounting international pressure) the Pakistani government neglects to recognize the need for continuous enforcement of the bill.

The WPB comes after GEO TV, a Pakistani television network, initiated a debate on the controversial nature of *Hudood* laws called “*Zara Sochiye*.”292 The television program informed numerous Pakistani-Muslims about the lack of religious basis behind the *Hudood* Ordinance by using the most powerful tool – religion. The program presented views of diverse religious scholars on the issues of *zina* and *zina-bil-jabr* under *Shar’iah*, highlighting the lack of religious basis for the Ordinance.293 This program increased domestic pressure on the Pakistani government to amend the *Hudood* laws.294

In the wake of the *Zara Sochiye* program and international pressure, the WPB passed on November 23 in the Senate. Many senators abstained from the vote, while the religious parties staged a walkout in protest.295 For example, the Mutthaid Majlis-e-Amal’s (“MMA”) severe

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293 *Id.*
294 *Id.*
295 Ashfaq, *supra* note 84.
backlash to the mere idea of repealing the rape law included statements claiming that the repeal of the law will encourage “free sex,” instead of recognizing the necessity of fair treatment of women. Senior MMA leader, Liaquat Baloch, stated that the government has “given free leave to adulterers and fornicators, and those who spread evil in society.” Such statements imply that societal views of rape in Pakistan view it as “free sex” and “open fornication” by women, instead of understanding the clear difference between rape and adultery, which would still be tried under Pakistan’s Shar‘iah courts. Instead, the legal reform is viewed as “a harbinger of lewdness and indecency in the country’ and against the strictures of the [Qur’an] and [Shar‘iah] law.”

Despite such harsh reactions from the religious movements, the WPB does little to correct the inequality of women under Hudood laws. Since passage of the bill, punishments that are not prescribed in the Qur’an, such as rape, are covered by the Penal Code instead of the Hudood Ordinance. The complaint process is amended to discourage the filing of false accusations of zina, requiring the complainant to take four male eye-witnesses to a session judge. Further, zina defendants are now eligible for bail and the complaint of rape can no longer be turned against the victim.

Still, women may still be stoned for committing zina if four witnesses are produced against them. There is no safeguard preventing a man from alleging zina in the Federal Shariat Court against a woman who filed a case against him for rape under the Penal Code. For example, a woman in the Karachi Jail stated that her husband filed a zina complaint against her.

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297 Id.
298 Id.
299 WPB, supra note 19.
300 Ashfaq, supra note 84.
301 Id.
“by conjuring up sixteen witnesses, mostly [his] family members, who claimed to have known about the affair.” Therefore, when a female victim reports a rape in Pakistan, she is still taking a considerable risk and “severe shame that often accompanies being raped, but unless she is able to prove rape,” the Federal Shariat Court may still allow a case against her for zina under the reformed Hudood laws.

Further, the WPB still calls for four “male” witnesses in cases of zina, claiming that this is an “Islamic” standard, despite lack of religious basis for this standard.

Legal reforms under only the WPB cannot achieve the “desired degree of reform because of the internal limitations of reform with the framework of historical [Shar’iah].” Unless Pakistan repeals the entire Hudood Ordinance, the plight of women under a misrepresented Shar’iah will continue.

D. Critical Need to Repeal the Hudood Ordinance

Although President Musharraf announced that “if a woman is raped, it will not matter whether she has evidence or not, only the rapist will be judged,” the country faces an uphill battle. Pakistan’s rape statistics are overwhelming, with a rape every two hours and with a woman being gang-raped every eight hours. Unfortunately, it is hypothesized that these

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302 Ashfaq, supra note 84.
303 Gotfredsen, supra note 247, at 658.
304 Ashfaq, supra note 84.
305 See generally Quraishi, supra note 1.
306 AN-NA’IM, supra note 20, at 177.
308 From 1998-2002, a total of 2,291 First Incident Reports were filed by victims of gang rape, while only 360 of the accused individuals were held by the authorities. HUMAN RIGHTS COMMISSION OF PAKISTAN, CURRENT HR INFORMATION: WOMEN, supra note 99.
figures are still and under-estimation because most rapes go unreported,\(^{310}\) estimating that for each reported rape case, at least two go unreported to the authorities for a multitude of reasons.\(^{311}\) Therefore, it is a necessary first step for Pakistan to provide women with a legal system\(^ {312}\) that will help them overcome fears of “being blamed by others, their families finding out about the rape, other people findings out, and their names being made public by the news media.”\(^ {313}\)

Additionally, religious education must include clarification of Shar’iah. It is necessary that Pakistani women and men receive an unbiased education regarding lack of religious basis for the Hudood Ordinance and the Prophet’s treatment of victims in rape cases.\(^ {314}\) This requires a great deal of public education, including access to support services for women to help them understand their religious and legal rights, both of which do not support the archaic versions of the rape laws under Hudood.

The Pakistani government must also continue to reform its laws and repeal the Hudood Ordinance. If the Ordinance is continually applied, the society’s perception of women will remain cemented in primitive views of conservative jurists, making it difficult to effectively enforce the basic reforms under WPB. Without effective enforcement by the government and consistent social reform to support a repeal of the Hudood Ordinance, “the limited benefits achieved through these modern reforms are constantly challenged and threatened by more fundamental principles of [Shar’ah].”\(^ {315}\)

\(^ {310}\) Id.

\(^ {311}\) Terzieff, supra note 71.

\(^ {312}\) Dean G. Kilpatrick, Rape and Sexual Assault, National Violence Against Women Prevention Research Center (2000), http://www.musc.edu/vawprevention/research/sa.shtml.

\(^ {313}\) Id.

\(^ {314}\) Pakistani citizens rarely react positively to a secular education regarding Islamic teachings. Therefore, the government must tackle this issue within the constraints of religious scholarship.

\(^ {315}\) AN-NA’IM, supra note 20, at 177.
CONCLUSION

Continuing to develop a country through the principles of Shar’iah as they stand today condones the ill-treatment of women, even under reformed rape laws, because the government still supports a legal structure bathed in a historical bias. While Pakistan has taken definitive steps to repeal the rape laws as they stand under the Hudood Ordinance, Islamic jurisprudence and legal practices remain a part of the country’s structure.316

Pakistani society will never be modernized if they continue to engage in an archaic interpretation of Shar’iah law, implemented through Hudood Ordinance. Their refusal to meet their international legal responsibilities casts doubt on the legitimacy of their commitment to human rights and gender equality. Sanctioning the unequal treatment of women under Hudood not only brings a bad name to Pakistan’s democratic progression, but is also undermines the central teachings of Islam and universally accepted conventions on fundamental human rights.

The repeal of the Hudood Ordinance would not only propel Pakistan in its quest for modernity and human rights, but would also help the country become a forerunner in the progressive analysis of Shar’iah in accordance with maqsaid al-shariah, the intent behind Islamic law.317

316 AN-NA’IM, supra note 20, at 177.
317 See infra Part II.