



A Shari'ah-Based Critical Analysis of Rape laws in Pakistan

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Abstract:

Rape is a heinous crime universally condemned by all faiths and legal systems, as it violates both divine and human rights. In Pakistan, rape laws have undergone significant revisions, particularly through the Criminal Laws (Amendment) Act, 2021 (CLA 2021), which amended Sections 375 and 376 of the Pakistan Penal Code, 1860. This paper critically examines the updated legal framework, which introduces a gender-neutral and expanded definition of rape, marking a departure from traditional understandings.

The primary objective of this research is to evaluate the amended rape laws from an Islamic perspective. It analyzes key aspects, including prescribed penalties, statutory rape provisions, the legal age of consent, the expanded concept of gang rape, and historical developments in Pakistan's rape laws. Using an analytical approach, the study draws on legal texts, juristic interpretations, and Shari'ah principles, referencing the Qur'an, Sunnah, and the four major schools of Islamic legal thought. By integrating legal and Islamic jurisprudential insights, this research aims to deepen the understanding of the revised rape provisions and assess their compatibility with Islamic principles.

The findings reveal several conflicts between the CLA 2021 and Islamic injunctions, particularly concerning the elimination of hadd punishments, the lack of proportionality between crimes and penalties, the recognition of transgender individuals as a third gender, and the criminalization of consensual sexual relations within valid child marriages. The study concludes with recommendations for aligning existing rape laws with Islamic principles to ensure justice and adherence to Shari'ah.

Keywords: Rape laws, Criminal Laws, Gender neutrality, Statutory rape, Shari'ah

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Introduction

The legal definition of rape has undergone significant changes since the late 20th century. Traditionally, it was narrowly defined, restricted to non-consensual sexual intercourse between a man and a woman, with specific emphasis on gender and age. Modern legal frameworks, however, have expanded this definition to recognize that perpetrators and victims can be of any gender or age. Although rape can occur in same-sex contexts, it is most frequently perpetrated by males against females.

In 2021, Pakistan's Parliament introduced substantial legal reforms through The Criminal Laws (Amendment) Act, 2021 (hereinafter CLA 2021), aimed at addressing sexual violence, particularly against women and children. These reforms sought to strengthen legal protections and impose stricter penalties for sexual offenses. However, the CLA 2021 has sparked considerable debate, with critics arguing that certain provisions may conflict with Islamic principles as derived from the Qur'an and *Sunnah*.

In light of Pakistan's constitutional mandate requiring all laws to align with the Qur'an and *Sunnah*, this study critically examines the CLA 2021 within the framework of Islamic Law, assessing the compatibility of its provisions with Islamic principles, focusing on areas where potential conflicts or shortcomings may arise.

The study adopts an analytical approach, utilizing legal research and conceptual analysis to explore juristic perspectives and *Shari'ah* rules related to rape and sexual offenses. The analysis is grounded in primary Islamic sources, including the Qur'an, the *Sunnah*, and the authoritative opinions of the four major schools of Islamic legal thought.

The paper is divided into two parts. The first part traces the historical evolution of the legal definition of rape in Pakistani law and examines the revised concept of rape introduced by the CLA 2021. The second part provides a critical analysis of the CLA 2021, identifying potential inconsistencies or conflicts with *Shari'ah* principles. Through this structured examination, the study aims to contribute to the ongoing discourse on harmonizing contemporary legal reforms with Islamic teachings.

1. The Crime of Rape in Pakistani Law

1 An Outline of Historical Changes in Pakistani Law's Definition of Rape

The legal definition of rape in Pakistan has undergone several revisions over time. The most recent update to the rape definition occurred with the passing of CLA 2021. Here is a brief overview of the previous three stages:

1.1 Pre-*Hudood* Ordinance (Prior to 1979)

Prior to the *Hudood* Ordinance of 1979, rape in Pakistan was defined under Section 375 of the 1860 Pakistan Penal Code. It stated that a man commits rape if he has sexual intercourse with a woman under conditions such as against her will, without her consent, with consent obtained through fear of death or harm, with consent given under the mistaken belief that he is her lawful husband, or with or without consent if she is under fourteen. The provision further clarified that penetration is sufficient to constitute the act of sexual intercourse required for the

offense of rape. However, sexual intercourse between a man and his wife was exempted, as long as the wife was above the age of thirteen.³

Under this definition, rape was treated as a gender-specific crime, exclusively recognizing women as victims and men as perpetrators. Furthermore, the legal age of consent for women was set at 14 years. This meant that if a girl below the age of fourteen consented to sexual relations with a man who was not her spouse, he would still be held accountable for statutory rape.

1.2 *Hudood Ordinance 1979*

The Offense of *Zinā* (Enforcement of *Hudood*) Ordinance 1979 repealed Section 375 of the Pakistan Penal Code, 1860, and introduced the term *zinā-bil-jabr* to replace the concept of rape. Under this ordinance, *zinā-bil-jabr* occurs when a person, regardless of gender, engages in sexual intercourse with someone they are not validly married to under circumstances such as: against the victim's will, without their consent, with consent obtained through fear of death or harm, or with consent given under the mistaken belief that the offender is someone to whom the victim is or believes themselves to be lawfully married. The law also clarified that penetration alone is sufficient to constitute the act of sexual intercourse required for the offense of *zinā-bil-jabr*.⁴

Unlike the previous definition, which was gender-specific, this new definition recognized that both men and women could be perpetrators or victims of rape. Additionally, the ordinance did not establish a fixed legal age for consent. Instead, it defined an 'adult' as someone who had either reached the age of 18 (for males) or 16 (for females) or had attained puberty. This shift raised concerns about the elimination of statutory rape as a concept, as the age of consent became linked to puberty rather than a fixed age. Critics argued that the ordinance failed to adequately protect minors, as it effectively removed clear legal boundaries for statutory rape.

1.3 Protection of Women (Criminal Laws Amendment) Act 2006

The Protection of Women (Criminal Laws Amendment) Act 2006 amended the *Hudood Ordinance, 1979*, and reincorporated rape into the Pakistan Penal Code (PPC), 1860. The revised definition under Section 375 stated that a man commits rape if he engages in sexual intercourse with a woman under circumstances such as: against her will, without her consent, with consent obtained through fear of death or harm, with consent given under the mistaken belief that he is someone she is or believes herself to be married to, or with or without her consent if she is under sixteen years of age. The law clarified that penetration alone is sufficient to constitute the act of sexual intercourse necessary for the offense of rape.⁵

³ *Pakistan Penal Code*, 1860, sec. 375.

⁴ *The Offence of Zinā (Enforcement of Hudood) Ordinance*, 1979, sec. 6.

⁵ *Protection of Women (Criminal Laws Amendment) Act* 2006, sec. 5.

The 2006 Act redefined rape as a gender-specific offense, providing protection exclusively to women and excluding men. This reinforced the notion that only men could be perpetrators and only women could be victims of rape. Another significant change was the elimination of the phrase "to whom he or she is not validly married" from the rape definition, opening the door for marital rape to be recognized as a criminal offense. As a result, some legal experts argued that this removal implicitly brought marital rape within the scope of the law.⁶ Additionally, the Act set 16 years as the legal age of consent for sexual intercourse, applying to both males and females.

1.4 Criminal Laws (Amendment) Act 2021

The Criminal Laws (Amendment) Act, 2021 (CLA 2021) introduced a broader and more inclusive definition of rape into the Pakistan Penal Code (PPC), 1860. Under the revised Section 375, rape is defined as an act where a person (A) commits rape by engaging in any of the following acts: penetrating his penis into the vagina, mouth, urethra, or anus of another person (B) or compelling B to do so; inserting any object or body part (other than the penis) into the vagina, urethra, or anus of B or forcing B to do so; manipulating any part of B's body to cause penetration into the vagina, urethra, anus, or any other part of B's body or compelling B to do so; or applying their mouth to the vagina, anus, urethra, or penis of B or forcing B to do so.

These acts constitute rape if they occur under circumstances such as: against B's will, without B's consent, with consent obtained through fear of death or harm, with consent given under the mistaken belief that A is B's lawful husband, with consent given while B is unable to understand the act due to unsoundness of mind, intoxication, or the administration of a stupefying substance, with or without consent if B is under sixteen years of age, or when B is unable to communicate consent.⁷

Key Features:

i. Gender Inclusivity:

The CLA 2021 introduced a gender-neutral definition of rape. Gender neutrality in law aims to eliminate gender-based distinctions. In the context of rape laws, it means removing gender-specific roles, allowing both men and women to be recognized as potential perpetrators or victims, and ensuring equal treatment under the law. The definition now explicitly includes males, females, and transgender individuals as potential victims and perpetrators.

ii. From Vaginal Intercourse to a Broader Definition

The concept of rape in previous Pakistani laws was limited to vaginal intercourse, as the prior three laws explicitly stated that penetration alone was sufficient to constitute the act of sexual intercourse necessary for the offense of rape. Although the law did not explicitly define sexual intercourse, it was commonly understood as vaginal rape. However, the CLA 2021 redefined rape to include both penetrative and non-penetrative forms of sexual violence, significantly broadening its scope. Under the updated definition, rape now encompasses:

⁶ See, Martin Lau, "Twenty-Five Years of Hudood Ordinances: A Review," *Washington and Lee Law Review* 64, no. 4 (2007): 25.

⁷ *Criminal Laws (Amendment) Act, 2021*, sec. 2.

- **Penetrative Acts:**

- Non-consensual insertion of the penis into the vagina, urethra, mouth, or anus, irrespective of the victim's gender.
- Non-consensual insertion of any object or body part (other than the penis), such as fingers or a sex toy, into the vagina, urethra, or anus.

- **Non-Penetrative Acts:**

- Non-consensual oral sex, including acts involving two men, two women, or a man and a woman.
- Forcing another person to engage in any of the above acts, even if the perpetrator does not directly participate.

For instance, non-consensual acts such as finger insertion between two females or by a female into the anus of a male are now classified as rape. Similarly, if a woman engages in non-consensual oral-genital contact with another person, it is also considered rape. In essence, this expanded definition moves beyond the traditional understanding of rape as non-consensual vaginal intercourse. Instead, rape has become a broader term encompassing various forms of sexual violence.

- iii. **Marital Rape:**

While the definition does not explicitly mention marital rape, the inclusive language and focus on consent leave room for its interpretation within the legal framework.

- iv. **Statutory Rape**

Statutory rape refers to sexual activity with a minor below the legally defined age of consent, regardless of the minor's apparent willingness. The 'legal age of consent' is the minimum age at which a person is considered legally capable of consenting to sexual relations.

The Protection of Women (Criminal Laws Amendment) Act, 2006 established the legal age of consent at 16 years. This provision has been retained in the Criminal Laws (Amendment) Act, 2021 (CLA 2021). Consequently, sexual activity with a minor under 16 is classified as rape, regardless of the minor's consent, as their consent is not legally valid

The law is explicit when one party is above the legal age of consent and the other is below it. In such cases, the older individual is considered the perpetrator, and the minor is the victim. If both individuals are below the legal age of consent (16 years) and engage in sexual activity with mutual consent, the law remains unclear. It is uncertain whether one will be treated as the perpetrator and the other as the victim, both as perpetrators, or both as victims.

- v. **No Exceptions for Married Couples:**

The CLA 2021 does not provide exceptions for married couples if one or both spouses are under 16. Even if the individuals have reached puberty, sexual activity between underage spouses is considered rape. In contrast, prior to the *Hudood Ordinance*, the age of consent was

established at fourteen, and there was an exceptional clause allowing a husband to have sexual relations with his wife if she was under fourteen but not under thirteen years old.

vi. Explanation of Consent

The Criminal Law Amendment (CLA) of 2021 introduced a new clause to clarify the distinction between consensual and non-consensual sexual acts, a critical element in the legal definition of rape. Unlike earlier legislation, which did not explicitly address the concept of sexual consent, the 2021 amendment provides a detailed explanation. According to the amendment, consent is defined as a clear and voluntary agreement expressed through words, gestures, or any form of verbal or non-verbal communication, indicating a willingness to engage in a specific sexual act. Importantly, the amendment specifies that the absence of physical resistance during penetration does not, by itself, constitute consent to the sexual activity.⁸

This explanation states that sexual consent needs to have three key features: Firstly, consent must be expressed in a way that leaves no doubt about the individual's willingness to engage in the sexual act; secondly, consent must be given freely, without coercion, pressure, or manipulation; and thirdly, consent can be communicated through words, gestures, or other verbal and non-verbal means.

The general belief is that determining the difference between consensual and non-consensual sexual acts relies on whether the victim resists physically. It is commonly thought that the lack of physical resistance implies agreement to the sexual activity. However, according to the aforementioned explanation, the mere absence of physical resistance does not indicate consent. Rather, consent must be demonstrated through methods other than the lack of physical resistance.

2. A Shari'ah Analysis of the Criminal Laws Amendment Act, 2021

2.1 Rape in Islamic Law: Conceptual Framework and Terminology

In Islamic Law, the term *zinā* encompasses both consensual and non-consensual illicit sexual intercourse. The latter is akin to the conventional understanding of rape. However, there is no specific term for rape in *Shari'ah*. Traditional jurists often refer to rape as "*al-ikrāh 'ala l-zinā*", which translates to "coerced illicit sexual intercourse." Sarakhsī has even dedicated a topic to this concept with the title "*al-ikrāh 'ala l-zinā*". This phrase is also used by other scholars, such as Al-Kāsānī, Zakariya Ansārī al-Shafī'i, and many more.⁹ Other scholars have used the phrase "*al-ikrāh 'ala l-waṭ'i*" or other similar words.¹⁰ Imām Bukhārī has set a chapter with the title:

"باب إذا استكرهت المرأة على الزنا فلا حد عليها"

⁸ *Criminal Law (Amendment) Act*, 2021, sec. 2.

⁹ For further details, see Shams ul A'immah Abū Bakr Muḥammad ibn Aḥmad Sarakhsī, *Al-mabsūṭ*, vol. 9 (Beirut: Dār al-Ma'rifah, 1993), 59; Ala' al-Din Abū Bakr ibn Mas'ud Al-Kāsānī, *Bada'i' al-Sana'i' fi Tartib al-Shara'i*, vol. 7 (Beirut: Dār al-Kutub al-'ilmīya, 1986), 180; and Shaykh al-Islam Zakariya ibn Muhammad al-Ansarī, *Asna al-Matalib Sharh Rawd al-Talib*, vol. 4 (Beirut: Dar al-Kitāb al-Islamī, n.d.), 9.

¹⁰ Ibn Qudāmah, Muwaffaq al-Dīn. *Al-Mughnī*. Vol. 3. Cairo: Maktabat al-Qāhirah, 1968, p. 138.

“Chapter: If a woman is forced to engage in illegal sexual intercourse against her will, she will not be subject to *ḥadd* punishment”.¹¹

Mālikī jurists, on the other hand, have used terms like "*ghaṣb*" or "*ighṭiṣāb*"¹² in their writings. While these terms originally referred to usurpation, they were adapted in Mālikī texts to denote rape. Today, the term "*ighṭiṣāb*" is widely used in contemporary Arabic to describe rape.

English Terminologies for sexual intercourse

In English, consensual sexual intercourse is categorized into two distinct terms: adultery and fornication. Adultery refers to voluntary sexual intercourse between a married person and someone other than their spouse.¹³ Fornication refers to unlawful sexual intercourse between two unmarried individuals. If one party is married and the other is not, it constitutes adultery for the married person and fornication for the unmarried one.¹⁴ Non-consensual sexual intercourse is termed rape, defined as the act of a man penetrating a woman's vagina without her consent, accomplished through coercion, threat, or intimidation.¹⁵

It is worth noting that the legal definition of rape has evolved significantly since the late 20th century. Traditionally, the definition of rape was restricted to non-consensual sexual intercourse committed by a man against a woman without her willingness or agreement. In contrast, contemporary definitions have expanded to include broader contexts, such as gender-neutrality, the recognition of various forms of coercion, and the inclusion of non-penetrative sexual acts.¹⁶

Key Differences between Islamic and English Legal Frameworks

Islamic law doesn't distinguish between fornication and adultery; both are considered *zinā*. Even though the punishment for *zinā* can vary based on whether the perpetrator is considered *muḥṣan* or not *muḥṣan*. Moreover, a comparison of the definition of adultery and *muḥṣan* reveals that adultery is not synonymous with *zinā* committed by a *muḥṣan* person.¹⁷

Non-consensual *zinā* (*ikrāh 'ala l-zinā*) in Islamic law is akin to the conventional understanding of rape. Coercion (*ikrāh*), in this context, refers to the absence of consent, which arises when the victim does not willingly engage in sexual activity due to coercion or other factors that

¹¹ Muḥammad ibn Ismā'īl al-Bukhārī, *Sahih al-Bukhārī*, 1st edition, vol. 9 (Beirut: Dar Tawq al-Najat, 2001), 21. The hadith is also accessible online at <https://sunnah.com/bukhari:6949>.

¹² Abū al-Walīd Muḥammad ibn Aḥmad Ibn Rushd Al-Qurtabī, *Al-Bayan Wa'l-Tahsil Wa'l-Sharh Wa'l-Tawjih Wa'l-Ta'lif Fi Masa'il Al-Mustakhraja*, vol. 11 (Beirut: Dār al-Ghārb al-Islāmī, 1988), 253.

¹³ *The Law Dictionary*, s.v. "adultery," accessed June 3, 2024, <https://thelawdictionary.org/?s=adultery>.

¹⁴ Ibid., <https://thelawdictionary.org/?s=Fornication>.

¹⁵ "Rape," *LAW.COM Dictionary*, accessed June 3, 2024, <https://dictionary.law.com/Default.aspx?typed=RAPE&type=1>.

¹⁶ Anne L. Barstow, "Rape," *Encyclopedia Britannica*, February 16, 2024, <https://www.britannica.com/topic/rape-crime>.

¹⁷ "A *muḥṣan* is someone who fulfills the requirements of *iḥṣān*. There are two types of *iḥṣān*: *iḥṣān al-rajm* and *iḥṣān al-qadhf*. In order for someone to be considered as a *zānī muḥṣan* in *rajm* punishment, seven conditions must be met: sanity, puberty, Islam, freedom, a valid marriage contract, both spouses meeting these conditions, and intercourse within the valid marriage contract after meeting these six conditions". See, 'Ala' al-Din Abu Bakr ibn Mas'ud al-Kasani, *Bada'i' as-Sana'i' fi Tartib ash-Shara'i*, vol. 7 (Beirut: Dāru'l-kutub al-'ilmiyya, 1986), 37.

render their consent invalid, such as mental, physical, or legal incapacity. Consequently, *zinā* and the absence of voluntary agreement are the primary elements that constitute rape.

In Islamic law, the difference between rape and consensual *zinā* (*zinā bi riḍā ṭ-ṭarafayn*) lies in the severity of the act. While both involve illicit sexual intercourse, rape is considered a more serious crime because it involves coercion, making it a more severe offense. According to Sarakhsī, a man's crime is more severe if he coerces a woman into committing *zinā* than if she willingly engages in it.¹⁸ The severity of rape cases can also vary depending on circumstances, sometimes involving kidnapping, physical harm, or murder. This shows that rape and consensual *zinā* are not equally serious. Furthermore, rape involves a perpetrator and a victim, while consensual *zinā* only involves consenting parties with no victim.

2.2 Classification of Rape in Islamic Law

The classification of rape in Islamic law significantly impacts the standards of evidence and the corresponding punishments. Scholars differ on whether rape should be categorized under *ḥadd* crimes, such as *zinā* or *ḥirāba*, or treated as a *ta'zīr* offense. This discussion briefly explores these perspectives and evaluates their arguments.

Rape and the *Ḥadd* of *Zinā*

An examination of Islamic jurisprudence reveals that traditional jurists unanimously agreed that a rapist is subject to the *ḥadd* punishment for *zinā*, as rape is considered a form of unlawful sexual intercourse (*zinā*). The key distinction, however, is that the victim is entirely exempt from punishment in cases of coercion. This ruling is derived from the Qur'ān and clear evidence from the *Sunnah*, which will be further elaborated upon in the subsequent discussion under the title "Elimination of *Ḥadd* Punishment."

All authoritative scholars agree that if rape is proven according to the prescribed *Shari'ah* standards, the *ḥadd* punishment will be applied, just as it is in cases of *zinā*, provided that all necessary conditions are met. However, when the enforcement of *ḥadd* is not possible due to insufficient evidence or legal ambiguities, *ta'zīr*—a discretionary punishment determined by the judge—is imposed. While *ḥadd* requires stringent evidence, *ta'zīr* ensures accountability even when those strict standards are not fulfilled.

Ibn 'Abd al-Barr (may Allah have mercy on him) states that the scholars are unanimously agreed upon the application of the *ḥadd* punishment to a rapist when his guilt is established through either conclusive testimony (*bayyinah*) or his own confession (*iqrār*). However, if such evidence is lacking, the offender remains subject to a discretionary punishment (*ta'zīr*). He further affirmed that if coercion is proven, the woman bears no legal liability (*ithm*) or punishment (*uqūbah*).¹⁹

¹⁸ Sarakhsī, *Al-mabsūṭ*, Vol. 9, p. 49.

¹⁹ Ibn 'Abd al-Barr, *al-Istidhkār al-Jāmi' li-Madhāhib Fuqahā' al-Amṣār* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2000), 146; See also, Abū Zakariyyā Yahyā ibn Sharaf al-Nawawī, *Rawḍat al-Ṭālibīn wa-Umdat al-Muftīn*, ed. 'Ādil Aḥmad 'Abd al-Mawjūd and 'Alī Muḥammad Mu'awwaḍ, 10 vols. (Beirut-Damascus-Amman: al-Maktab al-Islāmī, 1991), 10:174; Ibn al-Humām, *Fatḥ al-Qadīr 'alā al-Hidāyah*, ed. 'Abd al-Razzāq Ghālib al-Mahdī, (Beirut: Dār al-Kutub al-'Ilmiyyah, 2003), 5:259.

This perspective was also reflected in *The Offence of Zinā (Enforcement of Hudood) Ordinance, 1979* in Pakistan, which differentiated between *zinā-bil-jabr* (rape) liable to *ḥadd* and *zinā-bil-jabr* liable to *ta'zīr*, with the latter imposing imprisonment and whipping.²⁰

Rape as *Ta'zīr*

Some modern researchers argue that rape should always be classified under *ta'zīr*, even when *ḥadd* evidence is available. They assert that rape is primarily an act of violence rather than a sexual offense and, therefore, that the *ḥadd* punishment for *zinā* is not appropriate in such cases.²¹ However, this perspective goes against the Islamic injunctions, which hold that the *ḥadd* for *zinā* remains applicable if the crime is proven according to the prescribed *Shari'ah* standards.

Rape as a *Siyāsah* Offense

According to Ibn Nujaym, "*Siyāsah* is an action taken by the ruler based on what he deems best, even if there is no particular legal rule for that action."²² Some modern scholars argue that rape should be classified as a *Siyāsah* offense, contending that the concept of rape (*zinā bil-jabr*) is not explicitly defined in Islamic texts and has been developed through analogy. These scholars propose that rape, being an act of violence against the victim's physical integrity, should be treated as a separate offense under the protection of life, rather than classified as *zinā*.²³ They argue that rape should be separated from *zinā* and classified as a form of violence, emphasizing that its main elements are coercion and force, not sexual intercourse. Consequently, they recommend categorizing rape as a *Siyāsah* offense, granting the state discretionary authority to address it.²⁴ Under this framework, even if rape is proven through *Shari'ah* standards—such as confession or testimony from four witnesses—the *ḥadd* punishment for *zinā* would not apply. Instead, *Siyāsah* penalty would be enforced.

The classification of rape as a *Siyāsah* offense appears to be based on the assumption that *Siyāsah* and *ta'zīr* are distinct forms of punishment with different scopes. However, this assumption is incorrect. Ibn 'Ābidīn, after analyzing the meaning and scope of *Siyāsah*,

²⁰ *The Offence of Zina (Enforcement of Hudood) Ordinance 1979* (Pakistan), sections 6, 10.

²¹ Azman Mohd Noor, "Punishment for Rape in Islamic Law," *Malayan Law Journal Articles* 5 (2009): 5, citing Nagaty Sanad, *Theory of Crime and Criminal Responsibility in Islamic Law* (Cairo: Al-Ma'ārif Press).

²² Zayn al-Dīn ibn Ibrāhīm ibn Nujaym, *al-Baḥr al-rā'iq*, 8 vols. (Beirut: Dār al-Kitāb al-Islāmī, 1997), 5:11. For alternative definitions of *siyāsah*, see Muḥammad Amīn ibn 'Ābidīn, *Radd al-muḥtār 'alā al-durr al-mukhtār*, 6 vols. (Beirut: Dār al-Fikr, [year]), 4:15.

²³ See, Muhammad Munir, "Is *Zina bil-Jabr* a *Ḥadd*, *Ta'zīr*, or *Siyāsah* Offence? A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan," *Yearsbook of Islamic and Middle Eastern Law* 14 (2008–2009): 95; See also, Muhammad Mushtaq Ahmed, "*Taḥaffuz-e-Niswān Bill 2006 – Aik Tanqīdī Jā'iza*," *Monthly Al-Sharia* 17, no. 10 (October 2006): 31, <https://alsharia.org/2006/oct/huqooq-niswan-bill-muhammad-mushtaq> (accessed June 5, 2024).

²⁴ See, Muhammad Mushtaq Ahmad, "The Crime of Rape and the Hanafi Doctrine of *Siyasah*," *Pakistan Journal of Criminology* 6, no. 1 (January-June 2014): 161-192, 188, <https://ssrn.com/abstract=2238443>

concluded that *Siyāsah* and *ta'zīr* are synonymous and interchangeable. Both refer to discretionary punishments determined by the ruler or a judge acting on his behalf.²⁵

Once it is established that *Siyāsah* and *ta'zīr* are interchangeable, the classification of rape under *Siyāsah* effectively aligns with the view that rape should be only subject to *ta'zīr* punishment rather than *ḥadd*. This means that in all rape cases, *ta'zīr* punishment will be imposed, and *ḥadd* will not be applied, even if the rapist confesses or four witnesses testify to the crime. However, this perspective contradicts the established injunctions of Islam. As Imām al-Sarakhsī (may Allah have mercy on him) explicitly states: "If a man compels a woman to engage in unlawful intercourse (*zinā*), the *ḥadd* punishment is applied solely to the man, not the woman."²⁶

Rape as *Ḥirābah*

Some contemporary scholars argue that rape should be classified as a *ḥirābah* offense, a severe crime in Islamic law. Asifa Quraishi supports this view by citing traditional Mālikī jurists. For example, the Maliki judge Ibn 'Arabī recounted an incident where a group was attacked and a woman among them was raped. When challenged that the crime did not qualify as *ḥirābah* because no money was stolen and no weapons were used, Ibn 'Arabī responded firmly, stating that "*ḥirābah* with the private parts" is far worse than stealing wealth.²⁷

In *Rashida Patel v. The Federation of Pakistan*, the Federal Shariat Court (FSC) also ruled that rape should be classified as *ḥirābah*, not *zinā*, aligning with the views of Mālikī jurists. Justice Fida Muhammad Khan argued that *zinā bi l-jabr* (rape) is different from consensual *zinā*. He argued that if taking someone's property by force is considered *ḥirābah*, then violating a person's honor should also fall under the same category.²⁸

Mālikī jurists have addressed the issue of rape within two distinct legal frameworks: *al-ikrāh 'ala l-zinā* and *ḥadd al-ḥirābah*. When discussing rape in the context of *ikrāh*, they clarify that the *ḥadd* punishment for *zinā* applies to the offender but not the victim. For example, Ibn al-'Arabī, in his commentary on *Sunan al-Tirmidhī*, specifically in the chapter concerning a woman who was forced to commit *zinā*, discusses the enforcement of the *ḥadd* of *zinā* on the perpetrator while exempting the victim from punishment, as well as the victim's right to a dowry.²⁹ However, he does not consider the application of the *ḥadd* of *ḥirābah* in this case.

²⁵ Muḥammad Amīn ibn 'Umar Ibn 'Ābidīn al-Shāmī, *Radd al-muḥtār 'alā al-durr al-mukhtār*, 6 vols. (Beirut: Dār al-Fikr, 1992), 4:15.

²⁶ Sarakhsī, *al-Mabsūt*, 9:54.

²⁷ Asifa Quraishi, "Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective," *Michigan Journal of International Law* 18, no. 2 (1997): 315-16.

²⁸ Begum Rashida Patel v. Federation of Pakistan, PLD 1989 FSC 95. It is important to mention that an appeal was filed with the Shariat Appellate Bench of the Supreme Court regarding this ruling. However, before the Supreme Court could issue a definitive ruling or conduct a hearing, the provisions of the Zinā Ordinance 1989 concerning *zinā bil-jabr*, on which the Federal Shariat Court's stance was based, were amended by the Protection of Women Act of 2006. As a result, the Rashida Patel judgment has become legally redundant and is no longer applicable to that extent.

²⁹ Abū Bakr Muḥammad ibn 'Abdullāh Ibn al-'Arabī al-Mālikī, *Ārīḍat al-Aḥwadhī bi-Sharḥ Jāmi' al-Tirmidhī*, vol. 6 of 13 (Beirut: Dār al-Kutub al-'Ilmiyah, n.d.), 431-437.

If all rape cases were classified under *ḥirābah*, then why was the *ḥadd* of *ḥirābah* not enforced in this incident? While Mālikī jurists have categorized some cases of rape as *ḥirābah*, they define *ḥirābah* more broadly, not restricting it solely to banditry, robbery, or highway robbery. Under this broader definition, certain instances of rape may be included when they meet the conditions of *ḥirābah*, but not all rape cases automatically fall under this classification. Dasūqī emphasizes that *ḥirābah* should be understood within its specific context. He highlights that the essence of *ḥirābah* lies in the victim's inability to seek help. In such cases, *ḥirābah* is linked to the perpetrator's dominance and influence rather than the use of physical force, as long as the wrongdoer is able to achieve their harmful intent.³⁰

This clearly indicates that, according to Mālikī jurists, rape cases do not always fall under *ḥirābah*; rather, their classification depends on specific circumstances. Therefore, no school of thought considers all rape cases as *ḥirābah* in situations where the essential elements and conditions of *ḥirābah* are not met.

Misconceptions in the Classification of Rape

Following this discussion, it becomes evident that modern scholars and researchers who classify all rape cases under *ḥirābah*, *ta'zīr*, or *siyāsah*—contrary to traditional and the majority of contemporary jurists—are mistaken in two key aspects. Firstly, they fail to consider the various circumstances in which rape can occur, instead focusing on specific cases to generalize the classification of all rape incidents. Secondly, they overlook a fundamental element of rape, which is illicit sexual intercourse (*zinā*).

Zinā is an integral component of rape and cannot be separated from it. However, there are instances where multiple crimes occur simultaneously—for example, when an individual kidnaps a woman, rapes her, then murders her and seizes her property. In such cases, the crimes of kidnapping, rape, murder, and robbery are all committed together. In situations involving multiple offenses, it is essential to examine the *Shari'ah* principles on the merger of punishments (*Tadākhul al-'Uqūbāt*)³¹ to determine the appropriate legal ruling. According to this principle, it must be determined whether the offender should face all applicable penalties or only the most severe one. Therefore, it is essential to evaluate each rape case based on its specific context and the manner in which it is proven before determining the appropriate punishment. Categorizing all rape cases solely as *ḥirābah* or *ta'zīr* without considering the differing circumstances contradicts Islamic injunctions.

2.3 *Ta'zīr* Penalty for Rape in the law of Pakistan

In the current Pakistani legal system, rape is classified exclusively as a *ta'zīr* offense, with all rape cases subject to discretionary penalties. The *ḥadd* punishment for rape has been entirely abolished. Section 376 of the Pakistan Penal Code (PPC) prescribes the punishment

³⁰ Muḥammad ibn Aḥmad ibn 'Arafah al-Dasūqī, *Ḥāshiyat al-Dasūqī 'alā al-Sharḥ al-Kabīr*, vol. 4 (Beirut: Dār al-Fikr, n.d.), 348; see also Muhammad Hameedullah Md Asri and Md Khalil Ruslan, "Crime of *Ḥirābah*: Approach, Justification, and Significance," *Jurnal Syariah* 28, no. 3 (December 2020): 386–387.

³¹ "*Tadākhul al-'Uqūbāt*" refers to the merging of punishments for multiple crimes, resulting in all offenses being penalized with a single penalty

for rape as either death or imprisonment, with a minimum term of ten years and a maximum term of twenty-five years. The offender may also be liable to pay a fine.

The Criminal Law (Amendment) Act of 2021 enhanced the penalties for rape under the Pakistan Penal Code (PPC). Section 376(a) was amended to include the option of imprisonment for the remainder of the offender's natural life, in addition to the existing punishments of death or imprisonment ranging from ten to twenty-five years. Furthermore, Section 375A specifically addresses gang rape, stipulating that if a person is raped by one or more individuals acting as a group or with a common intention, each perpetrator shall be guilty of gang rape. The punishment for this offense includes death, imprisonment for the remainder of the offender's natural life, or life imprisonment, along with a fine.³²

Thus, under current Pakistani law, rape is categorized solely as a *ta'zīr* offense, with no provision for *ḥadd* punishment, even if the conditions for *ḥadd* (such as confession or testimony of four eyewitnesses meeting *Shari'ah* standards) are met.

2.4 Elimination of *Ḥadd* Punishment

The revised definition of rape in the PPC includes illicit non-consensual vaginal intercourse. However, even in cases where the rapist confesses or the crime is proven by four eyewitnesses meeting *Shari'ah* standards, the law mandates *ta'zīr* punishment with no *ḥadd* punishment. This goes against the Islamic principles, as outlined in the Qur'an and *Sunnah*. ALLAH (s.w.t) states:

{الرَّائِيَةُ وَالرَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ} [النور: 2]

“The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes”.³³

The term *zinā* in this verse is absolute and unconditional, encompassing both consensual (*zinā bi riḍā ṭ-ṭarafayn*) and non-consensual acts (*al-ikrāh ‘ala l-zinā*). Rape, being a form of *zinā*, falls under this Qur'anic injunction, and the imposition of *ḥadd* punishment is required if the necessary conditions are met.

The *Sunnah* further reinforces this principle. Imām Bukhārī, in his *Ṣaḥīḥ*, has dedicated a chapter titled “If a woman is compelled to commit illegal sexual intercourse against her will.” In this chapter, he cites a verdict from Caliph 'Umar ibn al-Khaṭṭāb (R.A), who ruled in a case where a male slave forcibly deflowered a slave-girl. 'Umar (R.A) imposed the *ḥadd* punishment of flogging and exile on the perpetrator, while the victim was exempted from any punishment as she was coerced.³⁴

In another *ḥadīth*, 'Abdul-Jabbar bin Wa'il bin Ḥujr narrated that his father said: “A woman was forced to commit illegal sexual relations during the time of the Messenger of Allah (ﷺ). The Messenger of Allah (ﷺ) did not enforce the legal punishment upon her, but he enforced it

³² Pakistan Penal Code, secs. 376(a) and 375A, as amended by the *Criminal Law (Amendment) Act*, 2021.

³³ The Noble Qur'an, Surah An-Nur 24:2, trans. Sahih International, accessed March 28, 2025, <https://legacy.quran.com/24/2>.

³⁴ Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Vol. 9, P. 21 #6949. See also: <https://sunnah.com/bukhari:6949>

upon the one who had done it to her. And the narrator did not mention him assigning a dowry to her.”³⁵

It is indeed true that imposing *ḥadd* punishment for *zinā* is very rare due to the difficulty of proving it with four eyewitnesses or the accused's confession. Additionally, suspicions also prevent the implementation of *ḥadd* punishment. Consequently, *ta'zīr* punishment is commonly applied in cases of *zinā* and rape. However, *Shari'ah* does not permit the complete elimination of *ḥadd* for rape. Pakistani law, by removing the possibility of *ḥadd* punishment for rape, diverges from the Qur'anic and *Sunnah*-based principles.

2.5 Statutory Rape in the law of Pakistan

Under current Pakistani law, the age of consent for sexual activity is set at sixteen years, as established by the Protection of Women (Criminal Laws Amendment) Act of 2006 and upheld in the Criminal Law Amendment (CLA) Act of 2021. Engaging in sexual intercourse with a minor under sixteen is classified as rape, regardless of the minor's consent. This provision raises significant *Shari'ah*-related concerns, as outlined below:

- If a sixteen-year-old boy is lawfully married to a girl who has reached puberty but is under sixteen, and they engage in consensual sexual intercourse, the boy can be prosecuted for rape under the law, despite the marriage being valid under Islamic law.
- Similarly, if a boy under sixteen (who has reached puberty) is married to a sixteen-year-old girl, and they engage in consensual sexual activity, the girl can be charged with rape, as the boy's consent is not legally recognized.

In both scenarios, the marriage contract and wedding are considered valid under Islamic law when both individuals are adults and in good health. Islamic law permits these partners to engage in consensual sexual relations without any restrictions, as it is deemed their right. However, under current rape laws, sexual activity in both cases is classified as a rape offense. Consequently, the perpetrator will be subject to the harsh penalties for rape, regardless of whether the sexual activity was initiated at the victim's request.

The marriage of a minor and the consummation of that marriage (referring to intercourse with a young girl) are distinct issues. Scholars unanimously agree that the marriage of a minor is valid and permissible in Islamic law. However, the timing of consummating such a marriage has been a subject of debate and disagreement among scholars. Below, we present evidence from Islamic law regarding the validity and permissibility of a minor's marriage.

Evidence from Islamic Law

- ALLAH (s.w.t) states:

{وَاللَّائِي يَلْسَنَنَّ مِنَ الْمَجِيزِ مَنْ نَسَانِكُمْ إِنْ ارْتَبْتُمْ فَعِدَّتُهُنَّ ثَلَاثَةُ أَشْهُرٍ وَاللَّائِي لَمْ يَحْضُنْ وَأُولَئِ الْأَخْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ} [الطلاق: 4]

³⁵Muḥammad ibn 'Īsā al-Tirmidhī, *Sunan al-Tirmidhī*, authenticated by Dr. Bashār 'Awad Ma'rūf (Beirut: Dār al-Gharb al-Islāmī, 1998), vol. 3, p. 107, hadith #1453. For an online reference, see <https://sunnah.com/tirmidhi:1453>.

“And those of your women as have passed the age of monthly courses, for them the *'Iddah* (prescribed period), if you have doubt (about their periods), is three months; and for those who have no courses [(i.e. they are still immature) their *'Iddah* (prescribed period) is three months likewise, except in case of death]. And for those who are pregnant (whether they are divorced or their husbands are dead), their *'Iddah* (prescribed period) is until they lay down their burden.”³⁶

In this verse, the Qur'an specifies a waiting period called *'Iddah* that women must observe before getting remarried. The duration of this waiting period may vary depending on the circumstances of the woman. The mentioned verse details the waiting periods (*'Iddah*) for three specific groups of women: elderly women who no longer menstruate, young girls who have not started menstruating yet, and pregnant women.

Classical and most contemporary *Tafseer* books agree that this verse stipulates the waiting period (*'Iddah*) for a prepubescent girl who has been divorced, pointing out that girls who have not yet menstruated can be married off at this young age. Therefore, jurists unanimously agree that a father has the authority to arrange a marriage for his child at any age, and the daughter can be given to her husband for consummation once she is physically capable of intercourse without harm. The comments of some *Mufasssīrīn* on this issue are as follows:

- Al-Ṭabarī states that for girls who have not yet menstruated, the *'Iddah* after divorce is three months, the same as for women who have ceased menstruation.³⁷
- According to Ibn Kathīr, the same applies to young girls who haven't yet reached the age of menstruation. The duration of their *'Iddah* is three months, just like women who have passed the age of monthly courses.³⁸
- ‘Āisha (R.A) narrated that the Prophet (ﷺ) married her at the age of six, and the marriage was consummated when she was nine years old.³⁹
- Scholarly consensus (Ijmā‘)

Ibn al-Mundhir states that the scholars unanimously agreed on the permissibility of a father arranging the marriage of his young virgin daughter, if he marries her to a compatible and suitable spouse (كفء).⁴⁰

Based on the Qur'an, *Sunnah*, and scholarly consensus, there is no doubt about the validity of a minor's marriage in Islamic law. Declaring it invalid would contradict the clear teachings

³⁶ Qur'an 65:4 (The Noble Qur'an, trans. Muhammad Taqi-ud-Din al-Hilali and Muhammad Muhsin Khan).

³⁷ Muḥammad Ibn Jarīr Al-Ṭabarī, *Tafsīr al-Ṭabarī*, 1st ed., vol. 23 (Beirut: Mu'assasat al-Risālah, 2000), 452.

³⁸ Abu al-Fida Ismā'īl ibn 'Umar Ibn Kathīr, “*Tafsīr al-Qur'ān al-'Azīm*, commonly known as *Tafsīr Ibn Kathīr*” 1st ed. (Beirut: Dār al-Kutub al-'ilmīya, 1999), Vol. 8, P. 171.

³⁹ Al-Bukhārī, *Saḥīḥ al-Bukhārī*, 7:17, hadith #5133.

⁴⁰ Abū Bakr Muḥammad ibn Ibrāhīm Ibn al-Mundhir, *Al-Ijmā'*, 1st ed. (Riyadh: Dār al-Muslim li'l-Nashr wa'l-Tawzī', 2004), 78.

of the Qur'an and *Sunnah*. However, the permissibility of consummation is contingent upon the girl's physical readiness and ability to engage in intercourse without harm.

2.6 Analysis of the Rape Penalties

The recent revisions to rape laws have a flaw in rape penalties: the prescribed punishments lack proportionality between the offense and the penalty. This imbalance contradicts *Shari'ah* principles, which emphasize that punishments must correspond to the severity of the crime.

The CLA 2021) has broadened the definition of rape to include various gender combinations and a wide range of sexual offenses. However, the severity of these crimes varies significantly. For example:

- Vaginal intercourse by a male with a female differs in gravity from non-consensual oral sex between two females.
- Forced anal intercourse by multiple male perpetrators is a more severe form of gang rape compared to non-consensual oral sex involving a single offender.

Despite these differences, all such acts are classified as rape and subject to similarly severe punishments, including those for gang rape. While judges are granted limited discretion to impose lesser sentences in less severe cases, this discretion is often insufficient to ensure proportionality.

***Shari'ah* Principles on Discretionary Punishments (*Ta'zīr*)**

There is a common misconception that the determination of discretionary punishments (*ta'zīr*) for non-*hudūd* and *qisās* offenses lies entirely within the absolute authority of the ruler and the court. However, this is not entirely accurate. While they do possess significant authority in this regard, it is not without conditions. Discretionary punishments (*ta'zīr*) are flexible in nature and can take various forms, but their application is guided by specific principles. Two key conditions must be met: first, the severity or leniency of the punishment should correspond to the nature of the crime and its societal impact; second, the character and background of the offender must be considered to determine an appropriate and proportionate response.

Allama Zayla'ī, in his discussion of *ta'zīr*, explains: "In *ta'zīr*, there is no fixed punishment; rather, it is left to the discretion of the imam (ruler) to decide an appropriate punishment based on the nature of the crime. The punishment under *ta'zīr* can vary according to the type of offense committed. For serious sins like engaging in prohibited sexual acts with a woman other than his wife or if a person gathers objects within a home with the intent of stealing and fails to take items out, the maximum penalty should be applied in these cases. . Additionally, the character of individuals should also be taken into account, as some may stop their criminal behavior after a minor punishment, while others may require a harsher penalty to deter future wrongdoing."⁴¹

⁴¹ Fakhr al-Dīn Abū 'Umar 'Uthmān ibn 'Alī Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq*, 1st ed., vol. 3 (Bulāq, Egypt: al-Maṭba'ah al-Kubrā al-Amīriyah, 1897), 208.

Therefore, granting courts broader discretionary powers in determining punishments would align more closely with *Shari'ah* principles and the pursuit of justice. This approach would enable courts to impose penalties that are proportionate to the gravity of the crime, while also considering the conduct and background of the offender. Such flexibility ensures that justice is both fair and contextually appropriate.

2.7 Recognizing Transgender as Third Person

The CLA 2021 defines the term "person" in Explanation 3 to include males, females, and transgender individuals as a third gender. This inclusion, however, is inconsistent with Islamic gender theory, which recognizes only two genders: male and female. Islam does not acknowledge additional genders or gender identities based on self-perception, such as those of transgender individuals. Therefore, recognizing transgender as a third gender contradicts the teachings of the Qur'an and *Sunnah*. The Qur'an explicitly states that Allah created humankind only in two sexes:

{فَجَعَلَ مِنْهُ الذَّكَرَ وَالْأُنثَى} [القيامة: 39]

And made of him two sexes, male and female.⁴²

Furthermore, Islam prohibits men from impersonating women and women from impersonating men. As narrated by Ibn 'Abbās (R.A): "Allah's Messenger (ﷺ) cursed those men who are in the similitude (assume the manners) of women and those women who are in the similitude (assume the manners) of men."⁴³

The inclusion of transgender individuals in the definition of rape stems from the Transgender Persons (Protection of Rights) Act, 2018, which recognizes them as a third gender. However, the Federal Shariat Court (FSC) has struck down certain provisions of this law, ruling them inconsistent with the Islamic teachings of the Qur'an and *Sunnah*.⁴⁴

To summarize, Islam does not recognize additional genders and does not allow for gender identities based on self-perception, such as those of transgender individuals. Therefore, recognizing transgender as a third gender and including it in the explanation of a "person" contradicts Islamic teachings found in the Qur'an and *Sunnah*.

2.8 Consent for sexual activity obtained by deception

When consent for sexual activity is obtained through deception, such as falsely claiming to be a married couple, the consent is legally invalid. In such cases, the deceiver is considered the perpetrator, while the deceived party is recognized as the victim. However, the Criminal Law Amendment (CLA) Act of 2021 grants immunity from prosecution only when the deceiver is male and the deceived party is female. If the roles are reversed, a male victim is not afforded the same immunity. The fourth description in the definition of rape specifies that rape occurs when the act is committed with B's consent, but A knows he is not B's husband and that B's

⁴² Qur'an 75:38-39 (The Noble Qur'an, trans. Muhammad Taqi-ud-Din al-Hilali and Muhammad Muhsin Khan).

⁴³ Al-Bukhārī, *Saḥīḥ al-Bukhārī*, 7:159, hadith #5885. See also: <https://sunnah.com/bukhari:5885>.

⁴⁴ *Hammad Hussain v. The State*, PLD 2023 FSC 301.

consent is based on her mistaken belief that A is another man to whom she is or believes herself to be lawfully married.⁴⁵

This implies that if a woman (“A”) engages in sexual intercourse with “B” under false pretenses (e.g., B believes A is his lawful wife), her actions would not be classified as rape. This gender-based distinction contradicts Islamic principles and promotes gender discrimination.

In contrast, the *Zinā* Ordinance of 1979 ensured equal treatment for both genders in cases involving deceitful consent. It defined *zinā bil-jabr* to include situations where the act is committed with the victim’s consent, but the offender knows they are not validly married to the victim and that the consent is based on the victim’s mistaken belief that the offender is another person to whom the victim is or believes themselves to be lawfully married. Under this law, anyone who obtained sexual consent through deception was considered a rapist, and the deceived party was recognized as the victim, irrespective of gender.⁴⁶

2.9 Gang Rape with a Single Rapist

Under previous laws, gang rape required all members of a group to physically participate in the act. For instance, the *Zinā* Ordinance of 1979 stipulated that if two or more individuals committed *zinā bil-jabr* (rape) with a common intention, each participant would be subject to the death penalty. Similarly, the Protection of Women (Criminal Laws Amendment) Act of 2006 defined gang rape as an act committed by two or more individuals with a shared intent. However, the Criminal Law Amendment (CLA) Act of 2021 expanded this definition. According to Section 375A, gang rape now occurs when a person is raped by one or more individuals acting as a group or with a common intention. Each participant is guilty of gang rape and may be punished with death, imprisonment for the remainder of their natural life, or life imprisonment, along with a fine.⁴⁷

Under this new definition, gang rape no longer requires all group members to physically participate in the act. Instead, if one person commits rape while being part of a group with a shared intent, it constitutes gang rape. Even if other group members do not directly engage in the act, their common intention and involvement in the group's actions make them equally accountable and guilty of the crime.

In the context of gang rape, the element of common intention is crucial in establishing gang rape, particularly when one member commits rape while others aid and facilitate him with a shared intention. The common intention is a generic term; it can take various forms, and in different scenarios, the criminal role of group members may also vary in intensity and lightness. To ensure fairness, it is necessary to assign appropriate punishments to each individual based on their level of involvement. In such situations, it would be better if the Court were granted broader powers to assign punishments according to the severity of the offense and the role of each participant in the crime.

⁴⁵ *Criminal Laws (Amendment) Act*, 2021, sec. 2, fourth description.

⁴⁶ *Offence of Zinā (Enforcement of Hudood) Ordinance*, 1979, sec. 6, Zina bil-Jabr.

⁴⁷ *Criminal Laws (Amendment) Act*, 2021, sec. 3.

The updated definition of gang rape under the Criminal Laws (Amendment) Act, 2021 (CLA 2021) may lead to conflicting interpretations with other sections of the Pakistan Penal Code (PPC). For instance:

- Under Section 365B, if a woman is abducted with the intent of forcing or seducing her into illicit intercourse, and she is subsequently raped by another member of the group, both the kidnapper and the rapist may be charged with gang rape if they acted with a common intention.
- Under Section 366A, if a minor girl under 18 is induced for illicit intercourse and raped by a group member, all involved may face gang rape charges due to their shared intent.
- Under Section 367A, if a person is kidnapped for unnatural acts and raped by a group member, all involved may be charged with gang rape if they acted with a common goal.

In these scenarios, the common intention of the group members—whether they are involved in kidnapping, aiding, or directly committing rape—makes them all liable for gang rape. This could lead to overlapping charges and conflicting interpretations within the PPC.

Conclusion

This paper has conducted a critical analysis of the current rape provisions under the Criminal Laws (Amendment) Act, 2021 (CLA 2021) from an Islamic perspective. The key findings of this research include:

- The Criminal Law Amendment (CLA) Act of 2021 has broadened the definition of rape to include non-penetrative acts and gender-neutral scenarios. However, the *ḥadd* punishment is not incorporated into current rape laws and has been entirely abolished, even in cases where the conditions for *ḥadd* under *Shari'ah* are fully met.
- The penalties prescribed under the CLA 2021 lack proportionality, as they impose similarly severe punishments for crimes of varying severity, which contradicts *Shari'ah* principles of justice.
- The law criminalizes consensual sexual relations between lawfully married underage spouses, contradicting Islamic injunctions that validate child marriages under specific conditions.
- The inclusion of transgender individuals as a third gender in the definition of rape is inconsistent with Islamic gender theory, which recognizes only two genders: male and female.

To ensure justice and fairness, it is important to align Pakistan's rape laws with Islamic principles. This study suggests revisiting the CLA 2021 to address these inconsistencies and ensure compliance with the teachings of the Qur'an and *Sunnah*.

Recommendations

1. It is recommended to use *Shari'ah* terms such as *zinā* and *al-ikrāh 'ala l-zinā* in legislation instead of English equivalents like "rape" and "fornication." This would ensure clarity and accuracy in legal interpretations and align the law more closely with Islamic principles.

2. The *ḥadd* punishment for rape (*al-ikrāḥ ‘ala l-zinā*) should be reinstated and enforced if the offense is proven according to *Shari’ah* standards. This would require restoring provisions from the *Zinā Ordinance, 1979*, related to *zinā bil-jabr*.
3. Sexual offenses and their corresponding *ta’zīr* penalties should be centralized under a unified legal framework, categorized into consensual and non-consensual acts. Each offense must be clearly defined, with punishments proportionate to the severity of the crime.
4. Courts should be granted broader discretionary powers in determining *ta’zīr* punishments, allowing judges to impose penalties based on the gravity of the crime and the circumstances of the offender and victim.
5. The law should explicitly address marital rape, ensuring that consensual sexual relations within valid marriages are not criminalized.

By incorporating these suggestions, the current legal framework for addressing sexual violence in Pakistan will be ensured to be both effective and aligned with Islamic principles.