

Submission to the UN SRVAW thematic report on rape as a grave and systematic human rights violation and gender-based violence against women

By Musawi¹

Questions & Answers:

- 1. Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full-translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.**

The Pakistan Penal Code, 1860 lays down the offence of rape and stipulates punishment for rape, gang rape and more recently, rape of a minor.

The relevant legal provisions as contained in the Pakistan Penal Code, 1860 (PPC), as well as the Code of Criminal Procedure 1898 (CrPC), and Qanun-e-Shahadat (Law of Evidence), 1984 are stated below in their original text:

➤ **Pakistan Penal Code 1860**

The statutory definition of rape is found under Section 375 of the Pakistan Penal Code. The main ingredients include consent and penetration.

Section 375 of PPC provides:

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

i) Against her will;

ii) Without her consent;

iii) With her consent, when the consent has been obtained by putting fear of death or of hurt,

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iv) With her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or

v) With or without her consent when she is under the age of 16.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Section 376 of PPC provides the punishment for the offence of rape:

(1) Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than 10 years and more than 25 years and shall also be liable to a fine.

(1A) Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of this section, section 377 or section 377B, and in the course of such commission causes any hurt punishable as an offence under section 333, section 335, clauses (iv), (v) and (vi) of sub-section (3) of section 337, section 337C, clauses (v) and (vi) of section 337F, shall be punished with death or imprisonment for life and fine

(2) When rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life.

(3) Whoever commits rape of a minor or a person with mental or physical disability, shall be punished with death or imprisonment for life and fine.

(4) Whoever being a public servant, including a police officer, medical officer, or jailor, taking advantage of his official position commits rape shall be punished with death or imprisonment for life and fine.

Section 376A (1) of PPC protects the identity of the victim:

“Whoever prints or publishes the name or any matter which may make known the identity of the victim, against whom an offence under sections 354A, 376, 376A, 377 and 377B is alleged or found to have been committed, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to a fine”

Further, **Section 377 of PPC** provides:

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of

either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Attempt to rape is covered under **Section 511 of PPC:**

Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence for a term which may extend to one-half of the longest term of imprisonment provided for that offence or with such fine daman as is provided for the offence, or with both.

Section 55 of PPC provides that the sentence in rape cases shall not be commuted:

“Provided further that in a case in which the sentence for life imprisonment has been passed against an offender for an offence punishable under sections 354A, 376A, 377, or 377B, or where the principle of fasad-fil-arz is attracted, such punishment shall not be commuted.

Section 166 of PPC and Section 186 of PPC stipulate a penalty for ineffective investigation:

“166 (2) Whoever being a public servant, entrusted with the investigation of a case, fails to carry out the investigation properly or diligently or fails to pursue the case in any court of law properly and in breach of his duties, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

186(2) “Whoever, intentionally hampers, misleads, jeopardizes or defeats an investigation, inquiry or prosecution, or issues a false or defective report in a case under any law for the time being in force, shall be punished with imprisonment for a term which may extend to three years; or with fine, or with both.”

➤ **Code of Criminal Procedure 1898**

Several provisions of the Code of Criminal Procedure deal with the offence of rape.

Section 53A of CrPC provides the mandate for and details the procedure for the medical examination of the person accused of rape. It states:

(1) When a person is arrested on a charge of committing an offence of rape, unnatural offence or sexual abuse or an attempt to commit rape, unnatural offence or sexual abuse under section 376, section 377 and section 377B respectively and there are reasonable grounds for believing that an examination of this person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely: -

- a) the name and address of the accused and of the person by whom he was brought;*
- b) the age of the accused;*
- c) the description of material taken from the person of accused for DNA profiling; and*
- d) other material particulars in reasonable detail.*

(3) The report shall state precisely the reasons for each conclusion arrived at.

The exact time of commencement and completion of the examination shall also be noted in the report. The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate through Public Prosecutor referred to in section 173² as part of the report referred to in that section."

In addition, Section **164A CrPC** provides for the medical examination of the victim. It states:

(1) Where an offence of committing rape, unnatural offence or sexual abuse or attempt to commit rape, unnatural offence or sexual abuse under section 376, section 377 or section

² Code of Criminal Procedure 1898, Section 173: Report of police officer. (1) Every investigation under this Chapter shall be completed, without unnecessary delay, and, as soon as it is completed, the officer in charge of the police-station shall, [through the public prosecutor] (a) forward to a Magistrate empowered to take cognizance of the offence on a police-report a report, in the form prescribed by the Provincial Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond and, if so, whether with or without sureties, and (b) communicate, in such manner as may be prescribed by the Provincial Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.

377B respectively of the Pakistan Penal Code, 1860, is under investigation, the victim shall be examined by a registered medical practitioner, in the case of female victim by a female registered medical practitioner, immediately after the commission of such an offence:

Provided that in all cases, where possible, the female victim shall be escorted by a female police officer or a family member from a place of her convenience to the medical examination.

(2) The registered medical practitioner, to whom such victim is sent shall without delay examine him or her and prepare a report of the examination giving the following particulars, namely:

- a) the name and address of the victim and of the person by whom she was escorted;*
- b) the age of the victim;*
- c) the description of the material taken from the body of the victim for DNA profiling*
- d) marks of injury, if any, on the body of the victim;*
- e) general mental condition of the victim; and*
- f) other material particulars in reasonable detail.*

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the victim, or his or her natural legal guardian, to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigation officer who shall forward it to the Magistrate along with other requirements as specified under clause (a) of sub-section (1) of section 173.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the victim or of any person authorized under subsection (4).

Section 164B of CrPC deals with the DNA test of the victim and the accused:

(1) Where an offence under Section 376, section 377 or section 377B of the Pakistan Penal Code, 1860... is committed or attempted to have been committed or is alleged to have been committed, Deoxyribonucleic Acid (DNA) samples, where practicable, shall be collected from the victim, with his or her consent or with the consent of his or her natural or legal guardian, and the accused³ during their medical examinations conducted under section 164A, within optimal time period of receiving information relating to the commission of such offence.

(2) The DNA samples collected under sub-section (1) shall at the earliest be sent for investigation to a forensic laboratory whereat these shall be properly examined and preserved:

Provided that the confidentiality of such examination shall at all times be observed.

Section 154 of CrPC covers recording of victim's statement:

Provided that if the information is given by the woman against whom an offence under section 336 B, section 354, section 354A, section 376 or section 509 of the Pakistan Penal Code, 1860, is alleged to have been committed or attempted, then such information shall be recorded, by an investigating officer in the presence of a female police officer or a female family member or any other person with the consent of the complainant, as the case may be:

Provided further that if the information is given by the woman against whom an offence under section 336B, section 354, section 354A, section 376 or section 509 of the Pakistan Penal Code, 1860, is alleged to have been committed or attempted, is distressed, such information shall be recorded by an investigating Officer, at the residence of the complainant or at a convenient place of the complainants choice, in the presence of a police officer, or family member or any other person with the consent of the complainant, as the case may be.

Section 161 of CrPC adds:

Provided that a statement of a woman against whom an offence under section 336B, section 354, section 354A, section 376, or section 509 of the Pakistan Penal Code, 1860 (Act XLV of 1860), is alleged to have been committed or attempted, shall be recorded by an investigating officer, in the presence of a female police officer, or a female family member or other person of her choice.

Section 352(2) of CrPC provides for trial to be conducted in camera:

³ Jurisprudence of the Higher Courts states that the DNA of the accused in allegations of rape under Section 376 of PCC is mandatory; *Salman Akram Raja v the Government of Punjab through Chief Secretary and Others*, [2013] SCMR 203 (SC) (here in referred to as "The Salman Akram Raja Case")

(2) Notwithstanding anything contained in sub-section (1), the trial of offences under sections 354A, 376, 376A, 377 and 377B of the Pakistan Penal Code, 1860 shall be conducted in camera.

Provided that the Presiding Officer, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the court.

(3) Where any proceedings are held under sub-section (2), the Government may adopt appropriate measures, including holding of the trial through video link or usage of screens, for the protection of the victim and witnesses.

(4) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish or broadcast any matter in relation to any such proceedings, except with the permission of the Court.

The right to legal representation has been provided under Section **161 A of CrPC** which states:

(1) Where an offence under section 354A, section 376, section 377 or section 377B of the Pakistan Penal Code, 1860, has been committed or attempted to be committed, the police officer, after recording the information under section 154, shall inform the victim against whom such offences have been committed or attempted to be committed of his or her right to legal representation.

(2) If the victim requires free legal aid the police officer shall provide the list of lawyers maintained by the Provincial Bar Councils for this purpose.

In addition, **Section 344A of CrPC** stipulates the time-frame of concluding trials:

The Court shall, upon taking cognizance of a case under sections 354A, 376, 377, and 377B of the Pakistan Penal Code, 1860, decide the case within 3 months failing which the matter shall be brought by the court to the notice of the Chief Justice of the High Court concerned for appropriate directions.

Lastly, **Section 417(5) of CrPC** states:

(5) An appeal against an order of conviction or acquittal under sections 354A, 376, 376A, 377 or 377B of the Pakistan Penal Code, 1860 shall be decided within 6 months.

➤ **Qanun-e-Shahadat Order 1984**

*Under the Criminal Law Amendment (Offences Relating to Rape) Act 2016, **Section 151** of Qanun-e-Shahadat Order, 1984, was amended to omit clause (4).*

This clause stated: “(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.”

Section 151 of the Qanun-e-Shahadat Order, 1984 deals with the credibility of witnesses and as amended states that:

“...the credit of a witness may be impeached in the following ways by the adverse party or with the consent of the Court, by the party who calls him:

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be un-worthy of credit;

(2) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;”

2. Based on the wording of those provisions, is the provided definition of rape:

a. Gender specific, covering women only

YES. The definition of rape under the criminal code covers women only. Section 375 of PPC clearly states “a man is said to commit rape who has sexual intercourse with a woman... without her consent.”

b. Gender neutral, covering all persons

NO. The wording of Section 375 of PPC is not gender-neutral. Rape committed against other genders may fall within the purview of Section 377 of PPC, which criminalizes unnatural offences. However, the definition of Section 377 of PPC remains vague at present; the interpretation taken by courts seems to suggest that only sodomy is criminalized under this provision.

c. Based on the lack of consent of victim

YES. However, where consent is known to be given under fear of death or hurt or due to the victim's misconception that she is married to the perpetrator, or if consent is given by a child/minor, in these circumstances consent does not negate the commission of rape.

d. Based on the use of force or threat: YES

e. Some combination of the above. YES

f. Does it cover only vaginal rape?

The provision states that "penetration" is sufficient for sexual intercourse for the offence of rape. Sexual intercourse is not defined under the law but generally refers to apply to vaginal rape. Other instances of non-vaginal penetration, such as anal rape are covered under Section 377 of PPC. In more recent times, there has been precedent that where the rape is anal rather than vaginal, the courts may process it under both rape and sodomy⁴. Moreover, according to charging standards developed by the Prosecution Department of the Government of Punjab, it is noted that oral rape may be covered under Section 375.⁵

g. Does it cover all forms of penetration? NO.

h. Is marital rape in this provision explicitly included? NO

i. Is the law silent on marital rape? YES

j. Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included?

Previously, the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 defined rape as a man having sexual intercourse with a woman who is not his wife without her consent.⁶ The wording was very specific in providing that a man was incapable of raping his wife; hence, marital rape was not criminalized. In 2006, however, the

⁴ Shaukat Ali v The State [2018 PCrLJ 1275]

⁵ Punjab Prosecution Department, 'Charging Standards in Rape Cases' available at <https://pg.punjab.gov.pk/system/files/Charging%20Standards%20Rape.pdf>

⁶ Section 6, Offence of Zina (Enforcement of Hudood) Ordinance, 1979

law was amended and rape was brought under the ambit of the Pakistan Penal Code 1860. Section 5 of the Protection of Women (Criminal Amendment) Act 2006 changed the wording of the definition of rape to “a man is said to commit rape who has sexual intercourse with a woman without her consent and there is penetration” thus bringing marital rape in the equation.

However, there are no reported judgments before the High Courts or Supreme Court of Pakistan, which clarify the position of the law and interpret it to include/exclude marital rape within the purview of Section 375.

In 2018, a woman in Multan brought a case against her husband for marital rape.⁷ However, her case was heard not under section 375 but under section 377, which covers unnatural offenses of a carnal nature - the maximum punishment for which is 10 years, unlike Section 375, for which the maximum punishment is death or imprisonment up to 25 years. In the same year, the Rawalpindi police registered a rape case against a husband on the complaint of his wife under the same Section.

k. Is marital rape excluded in the provisions, or is marital rape not considered as a crime?

The provisions do not explicitly exclude it.

3. Are there any provisions excluding criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit it.

There are no such provisions.

4. What is the legal age for sexual consent?

The legal age for sexual consent is 16.

5. Are there provisions that differentiate for sexual activity between peers? If so, please provide them.

There are no such provisions.

⁷ 'Woman files case of 'marital rape' against husband', The News, September 16, 2018, available at <https://www.thenews.com.pk/print/369113-woman-files-case-of-marital-rape-against-husband>

6. Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.

The punishment for rape is provided under Section 376 of PPC. Rape is punishable by death or imprisonment for a term between 10 - 25 years with a fine.

The law also provides that gang rape, rape of a minor or a person with a mental or physical disability and rape by a public officer, including a police officer, medical officer, or jailor, taking advantage of his official position is punishable by death or life imprisonment and fine.

7. What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator?

Section 376 of PPC sets out that the punishment for rape is to be death, imprisonment for life, or a fine. S. 63 of the Penal Code specifies that where a specific amount for the fine is not given - as in the case of rape - then the amount of said fine could be extended without limit, so long as it was not 'excessive'⁸. However, there are no specific legal provisions, catering to other forms of reparation for in rape cases. In Pakistan, many survivors of GBV and affected families face tremendous societal pressure and ostracization.⁹ There are very few shelter homes for women seeking refuge and there exist no long-term rehabilitation plans for victims of violence supported by the Government.¹⁰

Compensation

Pakistan's law on compensation is set out under S. 544 of the Code of Criminal Procedure. Its aims were set out in **The State v Rab Nawaz and Another [PLD 1974 SC 87]** where it was stated that upon conviction of the accused, a compensation must be awarded to the victim, and such is a mandatory provision. The purpose of said compensation was expressly stated to be to alleviate the suffering of the injured person, or the family of the victim, and was stated to be a deterrent otherwise.

Specifically in terms of the jurisprudence on compensation in **rape cases**, in **Safdar Ali v The State [PLD 2015 Lahore 512]** the court held that in addition to the fine that was specified as a punishment under S.376 of the Pakistani Penal Code, the Code of Criminal Procedure 1898 S.544-A provided compensation for any death, hurt, injury, mental anguish, psychological damage, or damage to property. The payment of said compensation was a mandatory requirement.¹¹ Compensation was distinguishable from a fine, and had to be commensurate to the loss suffered by the victim and their family. The court highlighted that many trial

⁸ Pakistan Penal Code 1860, S.67: Amount of fine: Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

⁹ Sarah Zaman, Maliha Zia: 'Women's Access to Justice in Pakistan', 54th CEDAW Session

¹⁰ Ibid.

¹¹ PLD 2004 SC 89; 1995 SCMR 1679; 1992 SCMR 549

courts were not passing orders for compensation in cases of rape and sodomy. It was laid down that under such a situation a victim could invoke the provisions of the CrPC under the sections 435, 439, and 439-A to challenge the propriety of the sentence and to request compensation.

That compensation is mandatory in the case of rape was recently reaffirmed in the case of in the case of **Wishal Masih v The State [2017 YLR 2031]** where the trial court had convicted the accused for the rape of a minor. While the accused was given a conviction of ten years, no fine had been imposed. At the appeal stage, the high court stated that such a fine was mandatory, and imposed a fine of Rs. 100,000 to be paid to the victim.

In **Nadeem Masood v The State [2015 PCRLJ 1633]** the courts ordered the convict to pay a fine of Rs 1,000, 000 as compensation to his daughter born illegitimately as a result of rape under S. 544 of the CrPC. This was done because a daughter born in the result of a crime was stated to fall under the ambit of having to suffer 'mental anguish' and 'psychological damage' for life. This was paid in addition to the Rs. 100,000 fine payable to the victim. This illustrates that the scheme of compensation extends to provide relief to children born out of rape, and furthermore the attitude of the courts in factoring in the psychological aspects of rape.

In practice, there are challenges in accessing compensation in rape cases. Other forms of reparation are also lacking.

Aggravating and mitigating circumstances

8. Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?

YES. Various factors may constitute as aggravating factors when sentencing rape cases. These include gravity of the offence, married status of the offender and conduct of the accused and relationship with the victim. In *Zulfiqar Ali v The State*¹², the Court remarked that the gravity as well as the sentences of the offence varied according to the marital status of the offender. If the offender was unmarried, the quantum of punishment was somewhat less than that of the married one. In this case, the victim girl was raped by her own father and the court was of the view that keeping in view the gravity of the offence, the accused deserved an exemplary deterrent punishment.

a. Is rape by more than one perpetrator an aggravating circumstance? YES

¹² 2012 YLR 847 Federal Shariat Court

- b. Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between the alleged perpetrator and victims? (For example, doctor/patient; teacher/student; age difference).**

YES. Under Pakistani jurisprudence, various factors may lead to the aggravation of a sentence based on imbalances. These have included age gaps¹³, a teacher student relationship¹⁴.

- c. Is rape by spouse or intimate partner an aggravating circumstance?**

NO. There is no jurisprudence on this.

- 9. Does the law foresee mitigating circumstances for the purposes of punishment? YES/NO If yes, please specify.**

YES. Various factors has been seen as possible mitigating circumstances, including the age of the perpetrator¹⁵ and his past criminal record¹⁶, or a compromise having been achieved between the parties¹⁷.

- 10. Is reconciliation between the victim and the perpetrator allowed as part of a legal response? NO**

- a. Regardless of the law, is reconciliation permitted in practice? YES/NO and what is the practice in this regard? YES**

The Penal Code defines heinous crimes such as rape as a non-compoundable offence, which means that regardless of any agreement/settlement between the complainant and the defence, the state is under an obligation to pursue the matter until it reaches its verdict.

However, despite the non-compoundable nature of the offence of rape, there are instances where parties reach an out-of court settlement, making prosecution of rape difficult. In such cases, often complainants would give reasons such as mistakenly identifying the wrong person, being coerced by others to accuse a certain person, or even that the accused was wearing a mask, so she was unable to properly identify him. These cases usually

¹³ Nathu Khan v The State [PLD 1986 Supreme Court 82]

¹⁴ [Lahore 1988 PCRLJ 641]

¹⁵ Abdul Ghaffar v The State [2005 Federal Shariat Court PCrLJ 887]

¹⁶ Rasheed Ahmad v The State [2004 Federal Shariat Court PCrLJ 1661]

¹⁷ Salman Akram Raja and another v Government of Punjab through Chief Secretary and others [2013 SCMR 203]

categorized as cases in which there was insufficient evidence and ‘resiling of witnesses’.¹⁸

In 2012, a brutal gang rape of a 13-year-old girl in Rawalpindi brought to attention the practice of out-of-court settlements between parties as the basis of awarding acquittals. At the trial court, the father of the victim stated that he had entered into an out-of-court settlement with the accused parties under a *jirga* and wanted to drop the charges of gang rape. The trial court acquitted the accused under Section 265-K of the Code of Criminal Procedure — a provision that provides courts discretion to acquit accused parties at any stage due to a low probability of conviction. However, the validity of the acquittal on the basis of compromise was challenged before the Supreme Court in a public interest petition.¹⁹ It was held that rape was an offence against the whole society and even if the victim did not come forward to produce evidence due to an out-of-court settlement, it was the responsibility of the state to pursue the case to its end.²⁰ Moreover, the Court issued directives - such as recording of victims testimony before female magistrates, in camera trial, administration and preservation of DNA tests and samples, and psychological counseling for the victim - to protect victims and families against any pressure leading to an out of court settlement with the accused.

However, victims or their families still resort to settling matters out of court — often through intimidation and threats from the accused. In 2018, the father of a girl who was raped pardoned the accused. The father, after hearing screams and cries of his daughter reached where the incident took place. He immediately filed a complaint; however, following a settlement, against the wishes of his daughter, he told the court that he had made a mistake and wanted to withdraw his complaint. He reported to the media that he was made to sign the affidavit by "influential elders" and was unaware of what was written in it. He stated that he belonged to a poor family, and the accused was a relative of the family he worked for.²¹

¹⁸ Fatima Yasmin Bokhari, Accountability for Rape: A Case Study of Lodhran, 2018, available at <http://musawi.org/#accountability> ; Rafia Khan, Shagufta Aziz: Compromising Justice: Pakistan’s Low Conviction Rates for Rape, 2015;

¹⁹ Salman Akram Raja v Government of Punjab [2013 SCMR 2013 SC]

²⁰ Ibid

²¹ ‘Father pardons man he saw rape his 17-year-old hearing impaired daughter’, The DAWN, February 03, 2018, available at <https://www.dawn.com/news/1387046>

11. Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? NO

a. **if the perpetrator marries the victim of rape? NO**

b. **if the perpetrator loses his “socially dangerous” character or reconciles with the victim? NO**

Prosecution

12. Is rape reported to the police prosecuted ex officio (public prosecution)? YES

13. Is rape reported to the police prosecuted ex parte (private prosecution)? YES

14. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women? NO

15. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children? NO

16. Please provide information on the statute of limitations for prosecuting rape.

There is no statute of limitations regarding the prosecution of rape, with the courts even commenting that a victim of rape should not be penalized on account of delay in undergoing what she had undergone. *“On the contrary, kindness, encouragement and understanding are the requirements to approbate a victim’s difficult decision to purge the society of perpetrators of such heinous offenses”*²². Courts have also acknowledged that due to the traumatic nature of rape, the hesitation of a victim in reporting should not be seen as ‘silence, construed as mischief’²³.

However, in practice any delay in prosecution that is not adequately explained to the court creates an adverse inference for the person bringing the claim and a delay in registering the First Instance Report has often been cited by the courts as a reason for not having met the threshold of beyond a reasonable doubt, especially where such a delay gives rise to the inference that there had been deliberations prior to registering the case²⁴. While a delay is considered to only be fatal where there are doubts of manipulation, deliberation or enmity²⁵ the longer the delay is, the greater the chances that the courts will look upon such

²² Mehboob Ahmad v The State [1999 SCMR 1102]

²³ Yasir Ayyaz and others v The State [Lahore PLD 2019 366]

²⁴ Muhammad Arshad v The State [1995 SCMR 1639]

²⁵ Zulfiqar Ali v The State [Federal Shariat Court 2012 YLR 847]

adversely²⁶.

17. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood? NO

18. Are there mandatory requirements for proof of rape, such medical evidence or the need for witnesses?

NO. There is no mandatory evidence required to prove rape per se and it is a settled area of law that the sole testimony of the victim is sufficient for the basis of conviction if it inspires confidence²⁷²⁸²⁹ as corroboration 'is not a rule of law but that of prudence'³⁰. However, while there is no statutory requirement, in most cases the courts do require corroboration for the high burden of proof to be met. This can be corroboration via the ocular accounts of witnesses, corroboration through medical evidence, or otherwise.

After the Salman Akram Raja Case, it is now mandatory as part of procedure to collect DNA evidence and send it for testing³¹. However, while this is true as a procedural requirement, it is not a prerequisite for conviction. DNA evidence was to be obtained only with the consent of the victim and could be used for the benefit of the victim.

19. Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman's sexual history during trial?

Yes, to an extent. Previously, Article 151(4) of the Qanun-e-Shahadat Order explicitly allowed the accused to show that the woman levying charges of rape has a sexual history, either in the form adultery or fornication and/or being habitual to sexual intercourse before marriage. However, in 2016, the Criminal Law Amendment (Offences Relating to Rape) Act 2016, was amended to omit the said provision.

²⁶ Mumtaz Ahmad and 2 others v The State [Federal Shariat Court 2012 YLR 2529]; see also Fatima Yasmin Bokhari, Accountability for Rape: A Case Study of Lodhran, UCL Center of Human Rights, 2018 available at <http://musawi.org/#accountability>

²⁷ 2005 SCMR 1936

²⁸ Maqbool Ahmad v The State [Lahore High Court 2000 PCrLJ 1270]

²⁹ Ibrar Hussain and others v The State [2007 SCMR 605]

³⁰ Muhammad Imran v The State [Lahore (Rawalpindi Bench) 2017 PCrLJ 452]

³¹ Salman Akram Raja and another v Government of Punjab through Chief Secretary and others [2013 SCMR 203]

However, one of the findings of a report based on rape cases in Lodhran suggest that despite the amendment to the law, removal of grounds allowing evidence of bad character of the victim, judges continue to rely on this in practice.³² The report mentioned that in a 2017 case³³, the Judge noted that the victim was “a lady of easy virtue and hence corroboration of her statements was needed...” Her father-in-law, who claimed that she had illicit relations with the accused, highlighted the character of the victim. The same judgment further affirmed the importance of the victim’s good character by adding, “I do agree with the learned counsel for prosecution that simple penetration is sufficient and positive report of swabs and DNA are not a requirement of law but I would say that when the victim is enjoying bad character, then these things are important to believe her version.”

20. Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings? YES/NO. If yes, please specify.

Yes, but these are insufficient and there remain challenges of implementation.

Various acts exist to safeguard victims, such as the Witness Protection, Security and Benefit Act 2017³⁴, the Sindh Witness Protection Act 2013³⁵ or the Punjab Witness Protection Act 2018³⁶. While all of the above include within their scope protections for victims of rape and sexual violence, their practical application has often left much to be desired, with gaps in the protection of various witnesses³⁷. Furthermore, under Article 497 of the Pakistan Code of Criminal Procedure, the court can deny bail to any offender if they find ‘reasonable grounds’ for believing that he is guilty of rape.

After the Salman Akram Raja case, various recommendations were given by the courts, which have not yet been made part of legislation. These include trial by camera, rape cases being argued in front of female judges, screens to separate the victim from her perpetrator in court, the recording of evidence via video conferencing. Although initiative was taken to set up special courts to address gender-based violence, these courts are limited in number.

³² Fatima Yasmin Bokhari, Accountability for Rape: A Case Study of Lodhran, 2018, UCL Center for Human Rights, available at <http://musawi.org/#accountability>

³³ Sessions Case No. 124/OSC of 2017 (Para. 23), Case FIR No. 195/2017

³⁴ The Witness Protection and Benefit Act. 2017 available at http://www.na.gov.pk/uploads/documents/1495189375_167.pdf

³⁵ The Sindh Witness Protection Act, 2013 available at <http://www.pas.gov.pk/uploads/acts/Sindh%20Act%20No.LI%20of%202013.pdf>

³⁶ The Punjab Witness Protection Act 2018 available at <http://punjablaws.gov.pk/laws/2713.html>

³⁷ ‘Key witness in Sabeen Mahmud murder case shot dead in Karachi’, The Dawn, September 07, 2015 available at <https://www.dawn.com/news/1205489>

War and/or conflict

21. Is rape criminalized as a war crime or crime against humanity?

Pakistan is a signatory to the Geneva Conventions however there is no specific provision criminalizing rape as a war crime or crime against humanity in the national legal framework.

22. Is there a statute of limitations for prosecuting rape in war or in conflict contexts?

NO.

23. Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? NO.

24. Has the Rome Statute of the International Criminal Court (ICC) been ratified? NO

Data

25. Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.

There is no reliable national, provincial, or local statistics on rape due to underreporting and reported cases of rape and gang rape represent a small percentage of actual incidents. Moreover, the continued absence of any centralized law enforcement data collection system and environment sensitive to the issue discourages women and trans people from reporting.³⁸ Existing data on rape is a combination of documentation efforts by national and international CSOs and some individual government departments. The Human Rights Commission of Pakistan in its report of 2019 notes that “the Punjab police registered 3,881 cases of rape and 190 cases of gang rape in the province for the period January to December 2019.”³⁹ In the first two months of 2020, 533 rape cases were reported to the Punjab police out of which, 240 were under investigation and 51 were cancelled. Moreover, 42 cases of gang rape were reported.⁴⁰ In 2018, 325 rape cases were reported to the Sindh police, in addition to which, 64 cases of gang rape were also reported.⁴¹

³⁸ HRCP, ‘State of Human Rights in 2018’ (2019), HRCP

³⁹ ‘State of Human Rights in 2018’ (2019) available at http://hrcp-web.org/hrcpweb/wp-content/uploads/2020/04/REPORT_State-of-Human-Rights-in-2019-20190503.pdf

⁴⁰ Punjab Police Crime Statistics available at <https://punjabpolice.gov.pk/crimestatistics>

⁴¹ Crime Figures for the Year 2018 – Sindh Police available at https://sindhpolice.gov.pk/announcements/Crime_statistics/2018/crime_fig_year%20-2018.pdf

According to an independent report assessing accountability for rape in Punjab by UCL's Center for Human Rights, in 2016 the number of reported cases of rape in Punjab was 3,162, while it was 2,702 in 2015 – as per data recorded by the Prosecution Department of Punjab.⁴² The total number of reported rape cases in Punjab was 7120, out of which 5814 cases were decided, leading to a conviction in only 216 cases.⁴³ There are also challenges in corroborating various data sources due to differences in categorization as well as recording of instances of rape.

Other

26. Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.

Many women fail to report their cases to the police because of the shame and dishonor attached with the crime of rape. Studies have noted that women are often not the key decision makers in the family, which makes it difficult in reporting rape as they face resistance from members.⁴⁴ The perception is that it is not expected of respectable families and their women to raise their voices about such incidents. The same is true for law enforcement and other stakeholders that lack the sensitization for dealing with issues surrounding rape.

At times, authorities are unwilling to provide protection for women in cases of violence. In cases where the perpetrators are relatives of victims, instead of filing charges, police typically encourage the parties to reconcile. It is common for police to refuse to register reports of rape. Some police demand bribes before registering cases and investigations are often superficial. Courts often perceive rape victims as immoral in character and therefore to blame.⁴⁵

⁴² The Punjab Commission on the Status of Women available at <https://pcsw.punjab.gov.pk/node/250>

⁴³ Fatima Yasmin Bokhari, Accountability for Rape: A Case Study of Lodhran, 2018, UCL Center for Human Rights, available at <http://musawi.org/#accountability>

⁴⁴ Adnan Sattar, 'The Laws of Honour Killing and Rape in Pakistan: Current Status and Future Prospects', AAWAZ, Programme, 2015, Pg-18, <http://www.aawaz.org.pk/cms/lib/downloadfiles/1448430520v2%20Final%20AS%20Laws.pdf>.

⁴⁵ Ibid

Moreover, the men of the family occupy the traditional role of interacting with the police and relevant external actors, because of which building a consensus around the issue within the family can be a slow process leading to several days of delay.⁴⁶

A delay in reporting of the offence results in a natural delay in other related processes, such as a delayed medical examination, DNA test etc. It has also been noted that such delays have been unfavorable for the prosecution case in majority of the cases, and rather tends to be in support of the accused. Delays have been seen to affect the credibility of witnesses in the case and judges tend to have a notion that if a truthful witness saw something suspicious, they would have reported it immediately.⁴⁷

In addition, as per the law, the act of penetration is required to prove rape; however, jurisprudence is clear there does not have to be complete penetration of the penis with emission of semen and rupture of hymen. Yet, medical examinations and procedures largely rely on the presence of semen to determine rape. This becomes problematic in cases where there was a delay in seeking medical examination; the victim had changed clothes or showered prior to the medical examination.

Moreover, medical examination normally involves the use of the two-finger test and this practice is widespread. Although this test has recently been challenged on the basis of having no legal basis and an infringement of constitutional rights, the test has been part of the medical practices for very long. Reliance on this test has made the position of married women and sex workers in the past very difficult. If the results of medical examination show ‘an old torn hymen’ and that the vagina admits two fingers ‘loosely’, courts look at it as an indication that no rape has been committed. Instead, victims are blamed for being of “easy virtue”⁴⁸ making court proceedings extremely embarrassing for women, thus shattering their courage in reporting such rape. These processes also tend to be deeply traumatizing for victims, and lack of support, counseling and such facilities affects accessibility for victims as well. The lack of female medico-legal officers also acts as a barrier in getting medical examinations conducted.

Often times, judges have noted the inability of the witnesses to remember accurate details, such as discrepancy of dates, times, circumstantial details, or changes/additions in the accounts of the witnesses in depositions from what was said in their statements during the

⁴⁶ Fatima Yasmin Bokhari, Accountability for Rape: A Case Study of Lodhran, 2018, UCL Center for Human Rights, available at <http://musawi.org/#accountability>; Ayesha Khan and Sarah Zaman, ‘The Criminal Justice System and Rape: An Attitudinal Study of the Public Sector’s Response to Rape in Karachi’ Collective for Social Science Research/War against Rape, 2011.

⁴⁷ Ibid

⁴⁸ Abdul Khaliq v The State [1995 SCMR 1412]

FIR. In many cases, the existence of previous hostile terms with the accused has been seen in favor of the accused, as opposed to the victim. This includes any previous litigation between the two parties on issues ranging from custody battles to property disputes.⁴⁹

Courts also place reliance on presence of violence to differentiate rape from consensual intercourse and where no such signs are found – for reasons such as the victim freezing or becoming numb or unconscious as a result of shock, intoxication or due to fear, proving rape becomes difficult. Another major reason for acquittals in rape cases is witness resiling. Often, the resiling of witnesses suggests that an out-of-court settlement took place in these cases. Since witness testimony is primary evidence in Pakistan’s criminal justice system, the resiling of witnesses results in extremely high percentage of acquittals.⁵⁰

⁴⁹ Fatima Yasmin Bokhari, Accountability for Rape: A Case Study of Lodhran, 2018, UCL Center for Human Rights, available at <http://musawi.org/#accountability>

⁵⁰ ibid