

# Crime against Soul: A comparative Study of Pakistan and Afghanistan (2016-2018)

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## ABSTRACT

Rape is considered a heinous crime and regarded as a crime against the soul. It is the most occurring and reported case in Pakistan and Afghanistan as compared to other offences against women. The aim of the paper is to assess the response of High Courts and Supreme Court of Pakistan and Afghanistan in contending the offence of Rape. The fundamental values of justice of a country are reflected in its legal system and the social structure of its society. The effectiveness of law and the legal system depends on the attitude and mindset of the people in a certain society. Law defines and provides the parameters of acceptable behavior that are enforced by state institutions or local and informal bodies. This paper aims to depict a brief comparison of Laws of major offence against women, punishments provided by laws, Court decisions and role of the administrative institutions fighting against VAW in Pakistan and Afghanistan. As the law is becoming more cosmopolitan, as a result, comparative law becomes a growing interest and phenomenon in legal education. The study will help to improve the existing laws and in the introduction of new laws, social and political policies to solve the problem of VAW.

**KEYWORDS:** Rape, Violence against Women, Acts, Superior Courts

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## LITERATURE REVIEW

In 1977 after imposition of Martial Law the Chief of Army Staff General Zia ul-Haq has promulgated Hudood Ordinances. The Offences of Zina (Enforcement of Hudood) Ordinance, 1979” (Daud, 2013). Era from 2002-2007 is considered the “years of pro-women laws” as major legislation on women issues and against anti-women practices was made in these years. (Mirza, 2011). For the protection of women from the abuse and misuse of authority, if any woman accused of the offence of Zina, she shall not be arrested without permission of the Court. The superintended Police or above rank police officer can only investigate such offence (Sections 156-B).

The parliament passed an Act under the mandate given by articles 14, 25 and 37 of the Constitution of Pakistan 1973 called “The Protection of Women (Criminal Laws Amendment) Act, 2006”. The main objectives of this Act were:

- 1) To prevent violence against women
- 2) To protect and provide aid to the victim of violence
- 3) To prevent the exploitation of women

- 4) To protect women from abuse and misuse of the law

For fulfilling the above-stated purposes, a new section 365B was inserted in Pakistan Penal code where kidnapping, abducting a woman for the purpose to compel her for marriage or illicit intercourse was made punishable with imprisonment for life. For prohibiting prostitution, which is another violence against women, section 371A was inserted. It prohibits selling, letting to heir or otherwise disposed to any person for prostitution, provided with punishment of twenty-five years.

“The *Protection of Women Act, 2006*” re-define the punishment of rape and increase its

Punishment as;

*“A man is said to commit rape who has sexual intercourse with a woman without her consent, or consent has been obtained by putting her in fear of death or of hurt”.*

*The article further says that if a person obtained her consent knowing that, “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”.*

*In case of minor consent shall not be considered as it says;*

*With or without her consent when she is under sixteen years of age. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape” (PPC 1860 Article 375).*

Section 376 provide punishment for rape and gang rape which states tha;

*“Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than ten years or more, than twenty-five years and shall also be liable to fine”.*

For gang rape it states that;

*“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”.*

Two new sections 375 and 376 were made the part of the Pakistan Penal code to combat the offence of rape. These sections provide a detailed definition of rape with punishments of death, life imprisonment or imprisonment of 10-25years according to the case. For gang rape, the punishment shall be death or imprisonment for life. To protect the honour of a woman, if a person deceitfully cohabitates with her, shall be punished with life imprisonment and if enticed, took away or detained her for illicit relations shall be punished for seven years (The Protection of Women (Criminal Laws Amendment) Act, 2006).

Another important law known as “Criminal Law (Amendment) (offences relating to rape) Act, 2016” was enacted to prevent the offences of rape. For this purpose, a detailed account of the offence, its investigation, medical examination of the victim, the conclusion of trial with time are given in the Act. “*Criminal law (Amendment) (Offence of Rape) Act, 2016*” provide a detail account on rape, kinds of rape, provide punishment when a person impede investigation, about

the commission of custodial rape, disclosure of identity of the alleged victim, procedure to record statement of the victim, medical examination of the victim, legal aid and trial of the offence by the court .Section 376, 376A, 53A, 154,161A, 164A and 164B of PPC were added and amended under the Criminal law Amendment, 2016. However, there exists a serious challenge about the effective implementation of existent legislative frameworks.

In Pakistan, the constitutional task of enforcement of fundamental rights is given to Superior courts. For this purpose, original and appellate jurisdiction is given to the superior judiciary to entertain such cases under the Constitution of Pakistan 1973 (The Constitution of Pakistan, 1973, art. 199 &184(3)).

Pakistan's legal system provides capital punishment for the offence. Sexual abuse is one of the prevalent violence against women which includes any conduct which is sexual in nature that abuses, humiliates, degrades or otherwise violates the dignity of the aggrieved person. Sections 375,376,377 of Pakistan Penal Code and “*Offence of Zina (Enforcement of Hudood) Ordinance, 1979*” deal with different situations when an act of sexual nature has taken place (Rahman & Farhat, 2014).

### **An Offence of Rape in Afghanistan**

Penal Code of Afghanistan did not define rape but mentioned some aggravating conditions. The kind of punishment to award whether medium or long term imprisonment depends on aggravating circumstances. The offender shall be convicted with the death penalty or continued imprisonment if death of the victim has been committed (Afghanistan Penal Code Article 428). Article 427 provides these conditions as when the victim is:

- Less than 18-years of age
- Third grade relative of offender
- Used his influence or authority over the victim for the rape
- Virginity has been damaged
- Gang-raped
- Caused by a genital disease
- Becomes pregnant

The word ‘person’ which may be male or female is used for the victim. There is no specific clause for

women. The Penal Code further provides that if rape has been committed through violence or threat or by deceitful means, the offender shall be imprisoned for not more than 7-years. If the age of the victim is below 18 years, the offender shall be punished with a term not exceeding 10 years (Afghanistan Penal Code Article 429). Article 17 of EVAW law describes the sexual assault in a broader context and includes rape, adultery, pederasty, intimidation, and assault. It states various kinds of sexual activity and their punishments similar to the Penal Code. An amount that may be fixed by the court shall be paid to the victim as compensation.

**Law on the Elimination of Violence against Women, 2009**

The first and foremost important law on the protection of women's rights and elimination of violence against women is the “law on the elimination of violence against women, 2009. The objective of this law as enumerated by article 2 of this act are:

- To combat against all those custom, traditions and practices causing violence against women

- To prevent violence against women
- To protect victims of violence through a state institution.
- To raise public awareness about violence against women
- To prosecute the culprit of violence against women

Article 3 of the said law defines violence and violence against women and article 5 specified and declared twenty-three different acts as violence against women. (Law on Elimination of Violence against Women, 2009).

**Data Analysis/ Discussion**

A total of 29 cases of rape have been decided in 2016-18 by Superior Courts of Pakistan (as shown in the table 1). The Courts gave stern decisions to discourage the occurrence of this offence. The percentage of conviction is high as compared to other offences. Among 29 cases, capital punishment was provided by the Courts in 10 cases. The percentage of conviction was 55% while acquittal was 45% (table 2) (PLD, MLD, PCr. LJ, YLR &SCMR of 2016, 2017, 2018).

**Table: 1: Total no. of Rape cases decided in the years 2016-2018 in Pakistan**

<b>Offence: Kidnapping for Rape</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>Total</b>
<b>Balochistan High Court</b>	-	-	-	-
<b>Lahore High Court</b>	3	11	6	20
<b>Peshawar High Court</b>	-	-	2	2
<b>Sindh High Court</b>	5	1	-	6
<b>Supreme Court</b>	-	-	1	1
<b>Total</b>	8	12	9	29

**Table:2: Conviction percentage in Rape Cases**

No. of Cases &percentage	Execution	Life Imprison. 14-25 years	Long Term Imprison. 3-7 years	Short Term Imprison. 1-3 years	Fine	Acquittal
29	3	7	6	-	16	13
100%	15%	24%	21%	-	55%	45%

**Rape cases in Afghanistan in the years 2016-2018**

According to media centre of the Supreme Court of Afghanistan (2019), Courts in Afghanistan decided a total of 3491 cases of major violence against women.

Among these, 920 were cases of rape. The following sentences were awarded by the Courts as shown in table (MOVA, 5<sup>th</sup> Report, 2018).

**Conviction percentage in Rape cases in the years 2016-2018**

Cases &percentage	Execution	Life Imprison. 14-25 years	Long Term Imprison. 3-7 years	Short Term Imprison. 1-3 years	Fine	Acquittal
920	2	7	320	205	405	386
100%	0.2%	0.7%	35%	22%	46%	42%

**Findings**

- Offence of rape is the most occurring crime in both countries.
- The offence of rape has taken seriously by Court as conviction percentage is high in this offence as compared to other offences.
- On analysis of Cases decided by Courts, it is found that in many cases of violence against women, lack of evidence leads to the acquittal of the accused. In such cases, either family is reluctant to provide evidence or a lack of interest in the case.
- Statements of the victim play an important role in awarding punishment to the accused. Divergent statements of the victim in case of violence particularly in the offence of rape provide a safe passage to the accused.

- **Informal justice System**

Pakistan and Afghanistan there is legal pluralism which means two systems of laws are controlling the behaviour and conduct of people. These are formal legal system inform of written codified law and informal system which include customs, practices and alternative disputes resolution methods. Informal justice is not in favour of women's rights so most of the crimes committed against women were settled between the parties outside the court with or without relief.

- **Medico-legal aspect:** It falls into two categories
  - False history
  - Late reporting

In cases of violence where the perpetrator is a close relative of the victim, she is compelled to give a false

history of the occurrence which leads to non-reporting of the case. Late reporting in the incident of rape, destroyed shreds of evidence as blood and saliva on the body of the victim is washed or cleaned. In laceration and hurts, wounds get to heal and make it difficult to classify it properly, wherein femicide/homicide there are signs of resistance, but family members deny facts and emphasis on suicide or accidental death.

- Delay in lodging First Information Report means a delay in the investigation. Such delay leads to the destruction of evidence which results in either acquittal or alleviate the sentence.
- Underreporting is the common cause in both the system for imprecise data. Institutions like HRCP depend on newspapers and international organizations for the collection of data. While most cases in remote and rural areas were not even reported by newspapers so they remain unreported. Cases decided by the courts and complaints received by relevant authorities are only a fraction of actual happened crimes.
  - The social reality of both the Countries: the rate of commission of crimes in any country depends on its economic, social and political condition and law and order situation. In Pakistan and Afghanistan, these conditions remain unfavorable for the promotion and protection of human rights which increases crimes, particularly against women.
- Absence of case laws: In both countries there is the absence or very limited case law on violence against women. For instance, Balochistan High Court has not entertained a single case of violence in the years 2016-18. Such conditions may have different opinions from the concerned as the issues are solved outside the Court or victim of violence as in rape case is reluctant to take legal assistance under extreme societal pressure.

### SUGGESTIONS/ CONCLUSION

- The equality of man and women is stamped by the Constitution which is the basic structure of all Laws, as mentioned in Article 25 of the Constitution of Pakistan. It is always the undeniable duty of the State to

ensure the protection of every single soul but also recognizes the status of both men and women as equal and make laws focusing on the protection of women in particular.

- If there exists laws and punishments specifically addressing the issues for all said illegal acts yet there is no change in statistics. It is relevant to state that the purpose of law enforcing agency is not only restricted to lodging FIR or submitting reports in courts to try the accused but the prime duty of law enforcing agency is:
  - Prohibiting happening of offences;
  - Assuring sense of security/ protection to every single individual;
  - Ensuring a sense that a guilty shall not escape from legal and lawful punishment;
  - Punishment of guilty
  - Make a sense of immediate safety/protection at the gross root level to such victims, who otherwise need not approach the constitutional courts by spending a considerable amount.
- The government should establish Rescue Centers/Crises Centers at each district level, under the charge of women police officers and staff but may include male police staff, which shall attend the complaint(s) of any kind of violence against women. In these Centers, women can receive emergency medical attention, counselling to help cope with the trauma, assistance in filing a report. The state must ensure that every female victim receives a dignified and prompt support in these Centers.
- Police Stations for Women. Women in both countries are reluctant to go to police stations to file their complaints. Such reluctance is due to the attitude of the police towards women generally and victims of violence in particular. There are many cases of police violence against women that go unpunished. Due to illegal detention and arrest, a woman also restrains herself from going to the police station. In such a situation, it is necessary to have women police stations with female officers and staff. So the women victims who need to file their complaints may do so without any fear that they might be victims of violence again.

- Serious questions toward the effectiveness of pro-women laws in Pakistan and Afghanistan. Laws in the statute book are mere words in the absence of the will of enforcing individuals and authorities to implement them.
- Co-ordination of related departments working for the prevention of violence. Problems created by malfunctioning of institutions cannot be dealt with through further legislation, Government functionaries will have to show a sense of responsibility and commitment to law and justice as well as rights of the people to bring a real change.
- Both the Governments at the federal and provincial levels should steer the consultative process for devising comprehensive and effective legislation and formulate and implement a mechanism for the control and prevention of these crimes and the welfare of the victim.
- Crimes require punishments which put the offender under some suffering and abstain and deter him from further crimes. It is necessary that criminal psychology has to deal as various level to understand factors led to such crimes.

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