

**ABORTION BY RAPE VICTIMS:
A CRITICAL ANALYSIS OF PAKISTANI LAW
IN THE LIGHT OF ISLAMIC LAW**

*A dissertation submitted in partial fulfillment of
the requirements for the degree of Ph.D in Law*



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TABLE OF CONTENTS

ABBREVIATIONS.....	VI
DEDICATION	VII
ACKNOWLEDGEMENTS	VIII
ABSTRACT.....	X
CHAPTER NO.1 INTRODUCTION AND SIGNIFICANCE OF THE RESEARCH:	1
1.1 INTRODUCTION.....	1
1.2 EXPLANATION OF IMPORTANT TERMINOLOGIES.....	3
1.3 THESIS STATEMENT.....	6
1.4 RESEARCH PROBLEMS.....	7
1.5 OBJECTIVES OF RESEARCH.....	8
1.6 RESEARCH METHODOLOGY.....	8
CHAPTER NO.2: RAPE AND ABORTION LAWS IN PAKISTAN	13
2.1 INTRODUCTION.....	13
2.2 THE OFFENCE OF ZINĀ (ENFORCEMENT OF HUDOOD ORDINANCE, 1979).....	14
2.3 WOMEN PROTECTION ACT, 2006	21
2.3.1 IMPACT OF WOMEN PROTECTION ACT, 2006	23
2.4 ACCESS TO JUSTICE FOR RAPE VICTIMS.....	23
2.5 CRITICAL ANALYSIS OF THE LAWS ON RAPE	25
2.6 CRIMINAL LAW (AMENDMENT) (OFFENCES RELATING TO RAPE) ACT, 2016.....	28
2.7 RAPE AND THE NEED FOR LAW REFORMS.....	31
2.8 RAPE, PREGNACY AND ABORTION	36
2.8.1 CHILDREN BORN AS A RESULT OF RAPE.....	41
2.8.2 FOUNDLING.....	44
CONCLUSION.....	49
CHAPTER NO.3: RAPE AND ABORTION LAWS IN ISLAM.....	51
3.1 INTRODUCTION.....	51
3.2 ZINĀ IN ISLAMIC LAW: REQUIREMENTS FOR PROOF OF ZINĀ AND PUNISHMENTS 52	
3.3 RAPE (ZINĀ -BIL-JABAR) IN ISLAMIC LAW	55
3.4 PREGNANCY AS A RESULT OF UNLAWFUL SEXUAL INTERCOURSE	65
3.5 ILLEGITIMATE CHILD (WALADŪ ZINĀ).....	67

3.6	ABORTION	69
	CONCLUSION.....	80
CHAPTER NO.4: RIGHT TO ABORTION FOR RAPE VICTIMS.....		82
4.1	INTRODUCTION	82
4.2	A GLOBAL REVIEW OF LAWS ON ABORTION	83
4.3	INTERNATIONAL LEGAL DEVELOPMENTS	92
4.3.1	LEGAL ABORTION WHEN PREGNANCY RESULTS FROM RAPE	94
4.4	A REVIEW OF LAWS ON ABORTION IN MUSLIM-MAJORITY COUNTRIES	97
4.4.1	ABORTION WHEN PREGNANCY RESULTS FROM RAPE	103
4.5	RIGHT TO ABORTION OF RAPE VICTIMS DURING ARMED CONFLICT	111
	CONCLUSION.....	127
CHAPTER NO.5: A SURVEY RESEARCH.....		130
5.1	INTRODUCTION	130
5.2	ABORTION: FROM MEDICAL PERSPECTIVE	131
5.3	INTRODUCTION TO SURVEY.....	134
5.4	FIRST PART OF SURVEY RESEARCH	136
5.4.1	RESULTS: RESPONSES OF MEDICAL OFFICERS	137
5.4.1.1	FREQUENCY TABLES OF RESPONSES.....	137
5.4.1.2	RESPONSES IN THE FORM OF TABLES.....	139
5.4.2	RESULTS: RESPONSES OF LEGAL OFFICERS	141
5.4.2.1	RESPONSES IN THE FORM OF PIE CHARTS.....	143
5.4.3	DISCUSSION AND ANALYSIS OF RESULTS.....	148
5.5	SECOND PART OF SURVEY RESEARCH.....	150
5.5.1	CASE DESCRIPTIONS OF VICTIM'S INTERVIEWED	151
5.5.2	DISCUSSION AND ANALYSIS	168
	CONCLUSION.....	172
CONCLUSION AND RECOMMENDATIONS.....		174
	RECOMMENDED LEGISLATIVE DRAFT	187
BIBLIOGRAPHY.....		190
	ARTICLES:	190
	BOOKS:	196
	CASE LAWS:.....	203
	INTERNATIONAL CONVENTIONS:.....	205
	STATUTES AND ACTS.....	205
	WEBLIOGRAPHY	206

APPENDIX A.....	208
APPENDIX B.....	209
APPENDIX C.....	210

ABBREVIATIONS

CAT: Committee against Torture

CEDAW: Convention on the Elimination of all Forms of Discrimination against Women

CIL: Customary International Law

CRC: Convention on the Rights of the Child

HRW: Human Rights Watch

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

ICPD: International Conference on Population and Development

ICRC: International Committee of the Red Cross

ILO: International Labor Organization

JAKIM: Malaysian Department of Islamic Development

OIC: Organization of Islamic Cooperation

TMBs: Treaty Monitoring Bodies

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNFPA: United Nations Fund for Population Activities

USAID: United States Agency for International Development

WHO: World Health Organization

DEDICATION

This work is dedicated to my parents, my husband, my daughter and
the rape victims.

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STATEMENT OF DECLARATION

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I Qurratul-Ain-Munir Minhas bearing the university registration number 61-SF/PHDLAW/F14, hereby state in the name of Allah that my work titled:

“Abortion by Rape Victims: A Critical Analysis of Pakistani Law in the Light of Islamic Law”.

submitted to the Law Department, Faculty of Shariah and Law is my work and has not been submitted or written before. I moreover seriously proclaim that this work shall not in future be used for acquiring any other degree from this or any other university or institution.

I do, hereby, know that if the indication of plagiarism is found in my dissertation, the work may be annulled at any stage, even after the accolade of a degree.

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ABSTRACT

This research primarily focuses on the crime of rape and its effects and aftermaths. This research also examines Islamic, Pakistani and International law which deals with rape and abortion. It studies rape and abortion in the perspective of war also. The question of abortion in circumstances of rape is one of the hardest and most sensitive topics to address. The unborn is a human being with intrinsic value and worth, and nevertheless the mother who has been raped in the most profound way is a living being who has various rights. The whole issue comes to the point whether or not unborn children are human beings. Around the globe, the legitimacy of abortion is hotly argued. The focus of the research is on the need of making an exception in current abortion laws for women who have been raped. The universally binding laws or various conventions set down that abortion should be legalized at least in the instance of rape by the state parties. The proposed hypothesis of this research is that pregnancy occurring as a result of rape does lead to grave consequences for the women concerned. The pregnancy from rape can seem to compound and prolong the victim's anguish. Therefore, the choice of abortion should be given to her in such situation by law or the adequate remedy and rights should be provided to such mother and child.

In the end, the findings reflect that under the prevailing law of Pakistan, abortion is not legal in rape cases. The section 338 of the PPC which deals with the question of abortion is rather ambiguous and does not completely detail on all significant terms like "necessary treatment", that is why the law remains to be reviewed. A modification to this need is suggested in which all essential terms are copiously

explained. However, because of lack of accessibility of safe abortion clinics, abortions conduct under dangerous circumstances, which cause great damage to women both psychically and mentally. It is the findings of the researcher that enlightened modifications of rape laws, that guarantee, impartiality for victims are required and desirable. There is a need of revision of the description of rape provided under Sec 375 of the “Pakistan Penal Code”. The substantial reforms are required in the law related to rape and abortion for the purpose to provide ample safeguard to rape victims. This research has been performed in a descriptive and analytical way and it is likewise an effort to provide some bases and suggestions to reform existing codes following an indication of protective strategies employed by some Islamic countries and International law. The abortion is permissible in Islamic law under certain conditions, if it is performed within the first 40 days of pregnancy. According to more lenient interpretation, it can be performed within the initial 120 days of pregnancy, calculated from the time of fertilization. This research discusses the perspectives of Islamic jurists on these matters and the actual practice in Muslim majority countries. This research also analyses the Islamic basis for the proscription of abortion and the grounds for its validation.

CHAPTER NO.1

1.1 INTRODUCTION AND SIGNIFICANCE OF THE RESEARCH

Rape is one of the most widespread sexual assaults against women in Pakistan. It does not really matter what the statistics of rape related pregnancies are, as the experience itself can be a terrifying and an isolating thing to confront. Pregnancy occurring as a result of rape leads to grave consequences for the women concerned. The decision related to pregnancy that occur from rape is a very personal decision in which a victim deserves a full reach of choices without judgment or coercion from others. In Pakistan, the choice to abort such pregnancies is circumscribed legislatively in the framework of Islamic philosophies and patterns, with comprehensible gaps between ideals and reality.¹

The number of induced abortions performed worldwide is unexpectedly high; where the access to legal abortion is barred from women to seek to terminate their pregnancies by unsafe methods. The “World Health Organization (WHO)” estimated that 25 million² unsafe abortions take place around the world annually. If safe abortion services were available, these backdoor abortion centers would have died a natural death. Under Islamic law, the woman who has been raped if exerted, her maximum effort to resist is not guilty of any sin, because she was forced into it. Even the one who is compelled towards kāfir (disbelief in Allah), which is worse than Zinā (unlawful sexual activity), is not accountable of sin because of being forced into it, as Allah says:

¹ Karim Ullah Sraw, “Abortion Law of Pakistan: Reforms Needed,” *Human Rights Review* 2, no.6, (January 2018), https://uclhumanrightsreview.wordpress.com/volume-ii-students/abortion-law-of-pakistan-reform-needed/#_ftn17.

² News Release (Geneva: World Health Organization, 2017). For further details check the link given below: <http://www.who.int/news-room/detail/28-09-2017-worldwide-an-estimated-25-million-unsafe-abortions-occur-each-year>.

“الْأَمَّاكْرُ هُوَ قَلْبُهُمْ طَمَنُّنًا بِالْإِيمَانِ ”

*“Except for someone who is compelled, while his heart
rests securely in Faith” ...³*

Islamic jurisprudence usually mentions rape as *zinā bī al-ikrāh* or *al-Zinā bil-jabr*⁴. The term rape is a likely derivative of the Latin word *raper*, and its literal meaning is forcible seizure. In International law forced pregnancy was first described by the Rome Statute. According to the “Rome Statute”:⁵

“The unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violation of International law.”

Pregnancy is a potential result of rape. Rape has been studied under this research in the context of war, particularly as a tool for genocide, as well as other related contexts, such as rape as a daily gendered based violence. The area or center of this research is rape victims who get pregnant because of rape and the predicaments faced by them. The abortion laws in Pakistan ignore the issue of rape related pregnancies. They do not give the option of abortion to the victim nor provide any adequate remedies to such mothers. This research is an effort to offer a resolution to this problem by indicating the procedure to be embraced in such position. The cornerstone of discussion is that pregnancy occurring as a result of rape can lead to grave consequences for the women concerned. The pregnancy from rape can seem to

³ Al-Quran, Surah An-Nahl: 106, Translated to English by Talal Itani, *The Quran* (Dallas. Beirut: Clear Quran, 2012), 139.

⁴ Rashida Patel, *Islamisation of Laws in Pakistan* (Karachi: Faiza Publications, 1986), 48.

⁵ See Rome Statute of the International Criminal Court. art. 7(2) (f). July 17. 1998. See also Milan Markovic, “Vessels of Reproduction: Forced Pregnancy and the ICC”, *Michigan State Journal of International Law* 16, no.439 (2007):441.

intensify and prolong the victim's pain and suffering. Therefore, the choice of abortion should be granted to her in such a situation by law. And if she decides to give birth to that child, then sufficient rights and remedies should be provided to her. Therefore, this dissertation is intended to analyze and answer all these questions and to suggest reforms in current rape and abortion laws. This study is therefore not limited to descriptive research, but rather it also takes the shape of an analytical and comparative study in nature.

1.2 EXPLANATION OF IMPORTANT TERMINOLOGIES

1. **Zinā** means the carnal conjunctions which occasion punishments of Zinā and this is the carnal conjunction of a man with a woman who is not his property either by right marriage or of slavery. It is the denomination of an illegitimate union of the sexes⁶. According to D.F. Mullah, Zinā is a sexual intercourse, not permitted by the Mohammedan law. The offspring of such intercourse is illegitimate⁷. According to the Hanafi school of thought, Zinā is a prohibited vaginal sexual relationship with a female who is not a right-hand ownership (milk al-yamin), not in the quasi-ownership of the man, nor validly married or quasi-married in an Islamic state. According to the Mālik, Shafi'i and Hanbali⁸ schools of thought the vaginal or anal intercourse between a man who is

⁶ Burhan al-Din al-Farghani al-Marghinani, *The Hedaya or Guide: A Commentary on the Mussulman Laws*, trans. Charles Hamilton (Lahore: premier Book House, 1957)182.

⁷ Dinshah Fardunji Mulla, *Principles of Mahomedan Law* (India: Bombay Thacker, 1961),153.

⁸ Ahmad 'Ibn Mu'ammad 'Ibn 'Ali al-Muqri al-Fayyumi, *Egyptian Arabic lexicographer* (d. 770 AH/1368 CE), al-Misba' al-Munir (Beirut: al-Maktaba al-'Ilmiyya, N. d) and Malik 'Ibn Anas, *al-Mudawwana al-kubra* (Cairo: Matba'at al-Sa'ada, 1905). And Abū Mu'ammad 'Abd Allah 'Ibn Qudama al-Maqdisi (d. 620 AH/1223 CE), *al-Mughni* (Beirut: D'Ér al-Fikr, 1405 AH). See also Dr Azman Mohd Noor, "Punishments for rape in Islamic Law," *Malayan Law Journal* 5 (2009):1-2.

rational and who has attained the age of adolescence and a woman who is not in his possession with a joint consensus is identified as Zinā⁹.

2. Both **adultery and fornication** are kinds of Zinā. According to “*Black’s Law Dictionary*” adultery is the offence of incontinence by married persons¹⁰. Adultery is an extramarital sexual relationship while fornication means sexual intercourse between individuals who aren't married to each other (regardless of their marital status)¹¹.
3. In simple terms the offense of **rape** may be specified as the forcible intercourse with a female by a male who is not his wife. According to the majority of Muslim jurists, rape means illegitimate intercourse where there is no consent and deliberation of the victim¹². According to Malik's view any kind of illicit sexual union by usurpation and without free will of a woman is rape¹³. Under the “Section 375 of Pakistan Penal Code”, a man is alleged to carry out rape if he has sexual intercourse with a woman under any of the following five conditions:
 - Contrary to her will
 - Devoid of her consent
 - With her consent, when the consent has been attained by putting her in fear of death or of hurt,

⁹ Ibid.

¹⁰ See Henry Campbell Black, 6th ed. 1990, 51.

¹¹ Zafar Hussain Chaudhary, *Islamic Law of Hudood and Tazir* (Lahore: Urdu Bazar, 1983), 18-17.

¹² Dr Azman Mohd Noor, “Punishments for Rape in Islamic Law,” *Malayan Law Journal* 5 (2009):1-2.

¹³ Imam Malik, *Muwatta*, trans. Muhammad Rahimuddin (Lahore: Sh. Muhammad Ashraf Publishers, 1980), 354.

- With her consent, when the man knows that he is not married to her and that the consent is given as she believes that the man is another person to whom she is or believes herself to be married, or
 - With or without her consent when she is below sixteen years of age¹⁴.
4. The words **maslahah and manafa'ah** are considered as alternative expression. Manafa'ah means “benefits” or “utility”, that is, it goes to certain sorts of advantage. The precise meaning of maslahah is, looking for benefit and the resisting of damage. This principle was first used by Imām Mālik and it was further enlarged and developed in the works of Al_Ghazali¹⁵.
 5. Islamic Law describes possession rights to each single part of one's body, and a right to equivalent remedy for any harm done illegally to any of those parts. This is known as law of jirāh under Islamic law¹⁶.
 6. The original word for **Hirābah** or muharaba is haraba which means fight. The word ḥarb means war and/or enemy. The one who fights is known as Muharib¹⁷. In that respect there are three terms that are usually employed for this offense; i) Hirabah (armed robbery) ii) Qat-al-Tariq (highway robbery) iii) Sariqa al-Kobra (great theft). The Malikis defined hirabah as the action of terrorising people for the purpose of robbery or other purposes. The act of terrorising people is believed to be the primary factor in this definition. It implies that all acts which involve terrorizing people, whether by the exercise of force or not are considered as hirabah. The element of the instrument is also

¹⁴ See Pakistan Penal Code, 367.

¹⁵ Al-Ghazali, *Shifa al-Ghalil fi Masalik al-Talil*. See also Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Islamabad: IIIT & IRI, 2000), 195&201.

¹⁶ Gisela Webb, *Windows of Faith*, 1st ed. (New York: Syracuse University Press, 2000), 131.

¹⁷ Hans Wehr, *A Dictionary of Modern Written Arabic*, ed. Milton Cowan, 3rd ed. (New York: Spoken Language Service, Inc, 1960), 166.

not included in this definition. Therefore, the act of hirabah can also be carried out without the use of a weapon, according to this definition. The definition also excludes the site of the commission of hirabah, which is contained in some definitions of the jurists. By excluding the site of the commission of hirabah, it is assumed that the crime of hirabah can take place anywhere as long as the act of terrorising people takes place. Some jurists integrate robbery as one of the elements in hirabah. According to Imām Al-Shafhi'i hirabah is described as when a set of people, armed with offensive weapons robs another group, either in the desert or on the highway. It is possible to commit this crime, yet in a Bedouin camp or in a small town. According to Al- Shafi'i opinion, the crime of hirabah must be carried out by a group of people¹⁸. In Islamic Law, hirabah is a legal category which encompasses highway robbery, usually understood as a robbery with ferocity or grand burglary, unlike theft which has a different punishment¹⁹.

1.3 THESIS STATEMENT

Rape victims often become pregnant, but the law does not allow the termination of these forced pregnancies, nor does it help in effecting the resolution of the numerous problems faced by these victims, which calls for an immediate assessment of changes required in the law and of corresponding legislative proposals.

¹⁸ Dr Nik Rahim Nik Wajis Usim, "The Crime of Hirabah in Islamic Law", (Ph.D. diss., Glasgow, Caledonian University, 1996), 166.

¹⁹ Javed Ahmad Ghamidi, "The Penal Law of Islam", *Al-Mawrid: A Foundation for Islamic Research and Education* (1999).

1.4 RESEARCH PROBLEMS

1. Is abortion allowed at any stage in case of rape conceived pregnancies under Shariah and law?
2. What are the legal and extra-legal issues that arise when raped women decide to give birth to and raise their rape conceived children?
3. What are the remedies provided by Shariah and State to such pregnant women and children?
4. Comparative analysis of Shariah and State legislations on the issue of rape conceived pregnancies.
5. Is the right to abortion to rape victim constitute a violation of the right to life?
6. Is actual proof of rape in case of law is required for this or mere allegation will be enough to create this right for women.
7. What is the abortion law in Muslim majority countries, particularly in case of rape resulting pregnancies?
8. What is the opinion of contemporary scholars on the issue of rape conceived pregnancies in the light of fatwas?
9. What is the opinion of rape victims on the choice of termination of pregnancy in case of rape and what are the problems faced by them in society?
10. What reforms can be introduced in policies and laws to better protect the rights of children and women who become mothers through rape?

1.5 OBJECTIVES OF RESEARCH

This research is aimed to:

1. Understand, that is abortion allowed at any stage in case of rape conceived pregnancies under Shariah and law.
2. Understand the legal and extra-legal issues that arise when raped women decide to give birth to and raise their rape conceived children.
3. Understand the remedies provided by Shariah and State to such pregnant woman.
4. Understand the abortion law in Muslim majority countries, particularly in case of rape resulting pregnancies.
5. Understand the opinion of contemporary scholars on the issue of rape conceived pregnancies in the light of fatwas.
6. Understand the opinion of victims of rape on the issue of abortion in case of rape conceived pregnancies and the problems they face in society.
7. Understand and suggest the reforms in policies and laws to better protect the rights of women who become mothers through rape.

1.6 RESEARCH METHODOLOGY

While conducting this research the principal source is in the form of books, articles and other appropriate research material. The research papers, magazines and electronic media are the secondary sources of the information. The evaluative and analytical methodology has been adopted for this research work. The chapter one deals with the introduction of the research, thesis statement, research questions, objectives and adopted methodology to provide a clear idea about the research work. The basic definitions relevant to the subject are also provided in (chapter I). The study then reviews rape and abortion laws with reference to Pakistani laws and also emphasise on the legal and non-legal issues faced by victims and children born as a result of rape (chapter II). This study analyzes the offense of rape holistically. The

effects and consequences of rape have also been studied. While studying the effects and aftermaths of rape, the researcher has predominantly focused on the pregnancy as an outcome of rape. Abortion is one of the crucial philosophical, spiritual and medical issues and almost too dangerous to contend with. The liberal societies have granted women the right to abortion on the basis of the concept of individual freedom. Under Pakistan Penal Code the person who causes abortion and the one who aborts can both be penalized. In spite of these laws and regulations the tragedy of death resulting from illicit abortions is high in Pakistan. The incidents of abandoned newborn infants are many. Women's rights activists are demanding the validation of abortion in incidents of rape. The conferences on this topic were also conducted and all shades of opinion agreed to it in precept. In Pakistan there is a restricted debate on the matter of abortion in situations of rape resulting from pregnancy.

The review on the rape and abortion laws under the Shariah (Islamic Law), including the rights and remedies for rape victims and such children(chapter III). This chapter explores competing ways in which Muslim jurists approached rape, as there are various small points of divergence between the Islamic schools of law regarding rape. The study has focused on those as well. This chapter concentrates on the entire concept of rape. The other motive of this chapter is to study rape and abortion laws in Islam and to discuss the historical context of the Islamic law of Zinā by looking at the original incidents believed to have led to the Quranic verses on adultery and analyze the rationale behind it. This follows by a conversation on different viewpoints of Muslim jurists on the subject of abortion. Although procreation is the important purpose of marriage, Islam does not prohibit the usage of temporary ways of contraception. Likewise, abortion is generally not tolerated, but in some circumstances, there is a permissibility of abortion under Islamic jurisprudence. On

the basis of various Ḥadīth, there are two clarifications of fetal development. One suggests three successive levels, each of 40 days, totaling 120 days before the soul is blown into the fetus, and the other indicates that the three phases occur within the same 40 or 42 days. In this research, the researcher will explore both notions, which are supported by the majority of jurists. The concept of the soul, ensoulment and the point from which human life begins has also been examined.

A comparative analysis has been made to look at the status of abortion in other Muslim majority countries (chapter four). The research discusses the ideas of contemporary scholars on the concern of rape conceived pregnancies and also draws attention to the right to abortion to rape victims in different Islamic countries. The bird's eye view of the issue of abortion of rape victims during armed conflict is also a point discussed in this chapter. The ultimate objective is to compare the Pakistani law regarding abortion with other Muslim states. To attain this goal, the researcher will first provide the overview of abortion laws in other Muslim states and this will be followed by an examination of the rights and remedies provided to victim who turns out to be pregnant as an outcome of rape under each system of law. To find out whether Pakistan should adopt relaxation in abortion laws, particularly in case of rape resulting in pregnancy as adopted by other Muslim countries, the researcher has conducted a survey in Pakistan (chapter v). The field study comprised of unstructured interviews with the rape victims to seek their opinions on the choice of termination of pregnancy in case of rape and to perceive the legal problems confronted by them in society. The Legal Officers and Medical Officers were also interviewed under this research. The goal is to determine: (i) Is abortion justifiable when pregnancy is a result of rape? (ii) Do they think pregnancy from rape leads to serious issues and seems to prolong the victim's anguish? (iii) Do they support any changes in the law

regarding abortion for rape victims? (v) Do they consider that providing safe abortion to women who become pregnant as an outcome of rape will improve women's mental and physical wellness, and will save their lives?

Qualitative research is multimethod in focus, involving an interpretive approach to its subject matter. By this method of research, researchers have studied things in their natural settings, attempting to make sense of, or interpret the phenomena of rape and its consequences in terms of the meanings people understand. The aim of qualitative research is to understand the social reality of crime of rape and its outcomes, including pregnancy, abortion, etc. as nearly as possible as its participants feel it or leave it.

The qualitative approach followed by the researcher is exploratory and seeks to explain 'how' and 'why' a particular phenomenon or behavior operates as it does in a particular context. The researcher has used several methods for collecting empirical materials, ranging from the interview to observe, to the analysis of documents, and records, to the use of personal experience. The unstructured interviews have been conducted which generated qualitative data through the use of open questions. This allows the respondent to talk in some depth, choosing their own words. This helps the researcher develop a real sense of a person's understanding of a situation. After the mountains of empirical data the researcher has written up her findings.

Furthermore the quantitative research method has been used to gather data in a numerical form which can be put into categories, or in rank order. This type of data was used to construct graphs and tables of raw data. The closed-ended questions on a questionnaire have been used to generate quantitative data, as such data can be put into categories (e.g., "yes," "no" answers). By the help of statistics, research has

turned quantitative data into useful information to help with decision-making. Though a qualitative and quantitative research method lies on separate continuum, research aimed at identifying the problems of rape victims using different approaches. The work has been concluded with recommendations on whether Pakistan should make a choice of termination of pregnancy in case of rape and whether it should amend current rape and abortion laws. At the end, a summary of the important findings of the whole thesis and suggestions for possible reforms is presented.

CHAPTER NO.2: RAPE AND ABORTION LAWS IN PAKISTAN

2.1 INTRODUCTION

Most of the lodged cases of rape are not proven, particularly when the case by the victim is reported late, or the case being of such nature that related findings were furnished inadequate to establish the evidence. Rape is the deadliest object that can be employed against the woman and her family, resulting often in complications such as divorce, the refusal of the people, sickness, infections, illegal pregnancies, miscarriages, along with long term damages and mental impairment. Rape is the sexual assault, which is easily inflicted and difficult to establish. Rape affects not merely the individual in question, but many other individuals related to the victim.²⁰

Abortion in the case of rape is an issue of social justice, human autonomy and women's health. As Pakistani laws do not provide freedom to women to choose for themselves, our law also has nothing to deal with an issue of rape related pregnancies²¹.

This chapter will deal with the analysis, explanation and discussion along with the subject of rape, abortion, and children born as a consequence of rape. The issue of pregnancies as a consequence of rape will also be highlighted with reference to

²⁰ Farhat H Mirza, Hamid Ali Parhyar, Qudsia Hassan and Ishtiaq Ahmed Langah, "The Killing of Women Without Weapon: 5-year Medico-legal Study of Rape Cases in Karachi," *Pakistan Journal of Medicine and Dentistry* 3, no.4 (2014): 9-12.

²¹ Shakir Lakhani, "Options for rape victims in Pakistan: Stay silent, get an abortion or set yourself on fire," *The express Tribune*, (2014). <http://blogs.tribune.com.pk/story/21475/options-for-rape-victims-in-pakistan-stay-silent-get-an-abortion-or-set-yourself-on-fire/> (accessed on, 13 December, 2016).

abortion laws. The legal rights and shelters offered to victims and such children will also be critically examined. This chapter will deeply look at the rulings on rape and abortion, their existing standing and basic substantive and procedural gaps in the legal framework. In Pakistan there is a limited debate and legislation on abortion so all the available material will be discussed in this chapter. In the end, the conclusion will be drawn.

2.2 THE OFFENCE OF ZINĀ (ENFORCEMENT OF HUDOOD ORDINANCE, 1979)

When Pakistan appeared as a sovereign state the laws which were prevailing in British India associated with Muslim Family Law were continued to administer personal status²². The women of Pakistan faced great difficulties in recognition of their rights in their own land. The religious circles made the demand of molding the Pakistani society strictly according to Islam, and one of their notions was that women had to be saved from western education, as they considered the cry for female rights a political stunt. These conservative elements showed a stubborn resistance for every subject raised in the defense of women's right. Hence, in this situation, women came out of their houses and raised their voices for the protection of their rights, interests and dignity. In 1954, Begum Shah Nawaz presented a "Charter of Women's Rights" in the final meeting of Pakistan's first Constituent Assembly and demanded 10% reserved seats for women, equal opportunity, pay, status and assurance of rights for women under Islamic personal law²³. The committee on marriage and family laws was formed by the Government of Pakistan in 1955. Its objective was to study whether modification is necessary or not in prevailing family laws for the effect to

²² Ahmed Akgunduz, *Introduction to Islamic Law* (Turkey: Islamitische universiteit Rotterdam, 2010), 272-276.

²³ Sabeeha Hafeez, *The Metropolitan Women in Pakistan: Studies* (Karachi, Royal Book Company, 1981), 347.

offer women an appropriate position in the society. The numbers of reforms were proposed by the commission in its report submitted in 1956. The defects in Anglo-Muhammadan law and its inflexibility were also pointed out. It indicated that for the respectable status of women, modifications are essential in Family laws. In 1961, the Family Law Ordinance was adopted along the basis of the commission report. It regulated divorce, wedding, and the polygamy and raised the least marriage age of girls to 16. In 1972, administrative reforms enabled women to enter into foreign services and in civil services of Pakistan. The Constitution of 1973 gave more rights to women than previous constitutions. In 1977, Martial law was enacted by Zia-ul-Haq, and Hudood Ordinance was promulgated by Zia-ul-Haq, which introduced the Islamic punishments for act of crimes, including assault, adultery, Zinā, and prostitution²⁴. The husband had a right to file the complaint of adultery and to revoke it at any point. It denied the women right of complaint for adultery. The marital rape was not admissible as a crime and a defendant was capable to claim approval of the victim as a mean of escaping the allegation of rape and in this manner changing rape into Zinā under Hudood laws, consent amount to Zinā, necessitating investigation and punishment. The advances in the status of women were terminated by the imposition of martial law. The decision of General Zia-ul-Haq to Islamize the laws of Pakistan turned over authority to the fundamentalist religious forces of cutting back the women's freedom and rights by taking the cover of the Islam. The Zinā ordinance was the most devastating for those who were victim to its unjust application and misuse²⁵. The sections of the “Pakistan Penal Code” which have administered sexual crimes

²⁴ Asma Jahangir & Hina Jilani, *The Hudood Ordinances: A Divine Sanction?* (Lahore: Sang-e-Meel Publications, 2003), 1-3.

²⁵ Martin Lau, “Twenty-Five Years of Hudood Ordinances: A Review,” *Washington and Lee Law Review* 64, no. 4 (2007): 1295-1295.

were more or less rescinded by the “Offense of Zinā (Enforcement of Hudood) Ordinance” and substituted them with its own ostensibly Islamic provisions. Under this Ordinance the sexual intercourse other than under a valid marriage was declared criminal offense. The women and men who were liable of Zinā were to be whipped hundred stripes, each if unmarried and stoned to death if married on the condition that their act was viewed by four male Muslims of respectable character. The testament of a woman was unacceptable in hudood crimes, so in rape cases the victims were at times suspected with fornication and imprisoned. Hence their rapists were freed as it was not particularly possible for the women to meet the Islamic Hadd requirements of four sound male Muslims affirming the crime²⁶. The modifications to the Islamic law of rape in 1979 made women in Pakistan respond strongly, because it posed a direct challenge to them. The definition of rape provided in Islamic law of 1979 was similar to the definition provided in section 375 of the Pakistan Penal Code, prior to 1979, with the exception that the earlier law protected girls under the age of fourteen with whom sexual intercourse was prohibited with or without her consent. Zinā ordinance 1979 does not provide any protection to girls who are less than fourteen. Moreover, the law before 1979 declared that rape in marriage is not considered as rape if the wife is over thirteen years of age. The major difference between the two laws is that the Islamic law of 1979 has changed the punishment of imprisonment and a fine (ten years' imprisonment and fine) into the punishment of whipping and stoning to death. The major difference concerned the evidence about the offence of rape was that in the 1979 ordinance very hard and fast rules have been prescribed for a witness, for example Tazkiya Al-Shahood enjoins upon a Qazi (Muslim judge) to inquire into the character of a witness and his credibility. The court must be satisfied that the

²⁶ Rahat Imran, “Legal Injustices: The Zina Hudood Ordinance of Pakistan and its Implications for Women,” *Journal of International Women’s Studies* 7, no. 2 (2005): 88-87.

witnesses are truthful and abstain from major sins. Moreover, only Muslim male witnesses are accepted which was not the case before 1979²⁷. A few disturbing cases will illustrate the concern. In 1982, fifteen year-old Jehan Mina became pregnant as a result of a reported rape. There was a lack of testimony of four eyewitnesses to prove that the intercourse was rape, Jehan was convicted of Zina on the evidence of her illegitimate pregnancy. Her child was born in prison²⁸. Later, a similar case triggered public outcry and drew public attention to the new law. In 1985, a sixteen-year-old nearly blind domestic servant (Safia Bibi), reported that she was repeatedly raped by her landlord and his son, and became pregnant as a result. Her case was also being dismissed for lack of evidence, as she was the only witness against them. Safia, however, being unmarried and pregnant, was charged with Zina and convicted on this evidence.

This ordinance puts an end to Pakistan's statutory rape law, so the young girls were also sometimes detained and put on trial for having extra-marital sex. Many of its provisions were ambiguous, ill-specified and it was badly drafted²⁹. It was not difficult at all to file a case of adultery against a woman; the Zinā Ordinance made it really tough for her to get bail in a pending trial³⁰.

27 Rubya Mehdi , “The offence of rape in the Islamic law of Pakistan,” *International Journal of the Sociology of Law* 18, no.1 (1990): 710-711.

28 Jehan Mina v. The State, Federal Shariat Court 183 (Pak.), P.L.D. 1983.

29 Vikram Parekh, *Prison Bound: The Denial of Juvenile Justice in Pakistan* (New York: Human Rights Watch, 1999), 18. This report is based on the research conducted in Pakistan in 1998 by a Human Rights Watch Researcher. p. 18. Retrieved 29 January 2015.

30 Shahnaz Shoro, *Honour Killing in the Second Decade of the 21st Century* (UK: Cambridge Scholars Publishing, 2017), 8.

The Zinā Ordinance was one of the laws which clearly discriminated against women in the name of Islam and was more controversial³¹. Subsequently the Pakistani women's rights movement, consisting of internationally known NGOs like the "Women's Action Forum and Shirkat Gah" after many years of struggle were able to satisfy the government to form a "Commission of Inquiry" for Women. The report of the commission presented in 1997 rejected the Zinā Ordinance, maintaining that it was not in conformity with Islam, conflicted with numerous human rights assured by the Constitution, and dishonored Pakistan's international obligations. It recommended the drastic changes in the Ordinance³².

Under Pakistani Legal System, rape has never been regarded as hirabah. However, in the Federal Shariat Court there has been a serious dialogue regarding this. In *Rashida Patel v The Federation of Pakistan*³³, rape was concluded as a form of hirabah not Zina by the Federal Shariat Court but the law could not be changed because appeal was preferred against this decision to the Shariat Appellate Bench of the Supreme Court which did not dispose of the case till the law was changed in 2006 by the Protection of Women (Criminal Laws Amendment) Act. This later Act repealed the provisions of the Offence of Zina Ordinance concerning to the offence of zina bil jabr and revived the PPC provisions on rape. It was in this background that the Federal Shariat Court in *Rashida Patel v The Federation of Pakistan*, declared that Zina bil jabr was a sub-set of hirabah, not Zina. The Federal Shariat Court heavily relied on

³¹ Ayesha Jalal, *Women, Islam and the State*, ed. Deniz Kandiyoti (United Kingdom: Palgrave Macmillan, 1991), 101.

³² Mumtaz Khawar and Mitha Yameema, *Pakistan: Tradition and Change* (UK: Oxfam Publishing, 2003), 46.

³³ *Rashida Patel v The Federation of Pakistan*, PLD 1989 FSC 95.

the views of Mawlana Amin Ahsan Islahi³⁴ (d. 1997) for reaching to this conclusion, In his commentary on the verses of hirabah Islahi opined that taqil (and not qatl) is one of the punishments of hirabah which does not simply mean killing but killing through an archetypal way³⁵. Thus, he made the ground for stressing that rajm (stoning) was a form of taqtil and as such a punishment for hirabah. Islahi went to the extreme of asserting that the Prophet (peace be on him) had given the rajm punishment to those persons who were habitual offenders and that punishment was given to them not for Zina but for hirabah³⁶. The Federal Shariat Court concluded in Rashida Patel that rape is a form of hirabah, not zina. The court was influenced by the theory of Islahi, Judge Fida Muhammad Khan observed that “*Zina bil jabr is different from the other cases of zina and in our opinion it is a serious kind of fasad fi 'l-ard (creating mischief and disorder in the land) and hirabah. Hence, for proving this offence the required standard of evidence is that of hirabah, not zina*³⁷”. The Court placed an interesting argument that if attack on the property of a person is called hirabah, why not the attack on a person's honor should also be deemed so? After all, in all that a person has what is more precious than his honor and as such what can be the worst form of fasad except attacking his honor? Thus, even though the court declared that rape was a form of hirabah, it did not order the government to remove the provisions regarding rape from the Offence of Zina Ordinance and place them in the Offences against Property Ordinance. It also did not ask the government to change the definition of hirabah so as to include rape in its scope. Finally, the Court did not apply the punishment of hirabah to rape even after declaring that rape was a serious

34 A famous scholar who had expertise in the Qur'anic studies, particularly the theory of coherence (nazm) in the Qur'an

35 Tadabbur-i-Qur'an (Lahore: Faran Foundation, 2001), 2: 505-508.

36 Ibid., 5: 361-77.

37 PLD 1989 FSC 95 at 134.

form of hirabah³⁸. In 1989 it was claimed by women's rights activists that the number of provisions of the Hudood Ordinances were abhorrent to Islam. One of them was the provision dealing with Zinā and rape. These provisions were studied by the court and it was expected that a strong difference would be established between Zinā and rape. Therefore, the judges were of the view that rape should be placed under the harabah and be removed from the category of hud. According to them, this would reduce the harsh necessity of evidence of four male to two male witnesses. They perceived that this would establish a difference between Zinā and rape and that it would equally alleviate the liability of the victim of proving rape³⁹. Although this finding under the Pakistani legal system was never codified as a statute. The more victims were created under Hudood Ordinance rather than protecting the ones already living⁴⁰. The first and primary purpose of law is providing justice to victims. Whichever law that stays unsuccessful to safeguard its people is a disastrous law and inconsiderately the rape laws under this Ordinance not only died, but also mistreated the sufferers themselves. However the law concerning rape was lastly reviewed in 2006, the maltreatment that has been suffered by the victims for nearly three years cannot be unmade⁴¹.

³⁸ Muhammad Mushtaq Ahmad, "The Crime of Rape and The Hanafi Doctrine of Siyasaḥ," *Pakistan Journal of Criminology* 6,no.1 (2014):178-179.

³⁹ Begum Rashida Patel v. State, Federal Shariat Court, PLD 1989, S.P.Nos.10, 11, 12 and 13-K of 1983. <https://www.scribd.com/doc/88327494/Decided-Shariat-Cases> ,(accessed: June 27, 2018).

⁴⁰ Naeem Shakir, "Women and Religious Minorities under the Hudood Laws in Pakistan," *Asian Legal Resource Centre* 3, no. 3 (2004). <http://alrc.asia/article2/2004/06/women-and-religious-minorities-under-the-hudood-laws-in-pakistan/> (accessed: July 16,2018). See also *Report of the Commission of Inquiry for Women* (Islamabad, Pakistan: Ministry of Women Development, Social Welfare, and Special Education, 1997).

⁴¹ Ruba Saboor, "Rape Laws in Pakistan: Will We Learn from our Mistakes", 84-86.

2.3 WOMEN PROTECTION ACT, 2006

The leading thoughtful effort to modify the Zinā Ordinance of 1979 was taken by General Pervez Musharraf. He signed the “Protection of Women (Criminal Laws Amendment) Act” at the end of 2006. The various occasions had already set the grounds for the passage of the Protection of Women (Criminal Laws Amendment) Act. The report of the “National Commission on the Status of Women” in 1979 analyzed all five Hudood Ordinances and recommended modifications in them. The Legal Committee of the “Council of Islamic Ideology” in early 2006 initiated to examine the Hudood Ordinances and on June 27 suggested that it must be re-written⁴². The argument on the Geo channel identified several problematic issues of the regulation. The foremost one was associated with the crimes of adultery and fornication. It was argued that if it is specified by Quran that these offenses must be seen by four adult male Muslims of good character, then why it was possible to convict a woman for these criminal offenses when the status of evidence have not been met. This debate recommended that the police should not register the cases of adultery, let alone go to the trial, unless evidentiary conditions are met. Secondly the matter of double jeopardy faced by the victims who filed a charge of rape was also exposed by this debate. The woman who claims to have been raped, can be alleged of committing the offense of Zinā if fails to provide the evidence as required under the Hudood Ordinance. Ultimately, it advocated that there should be equivalence before with regard to the laws of evidence⁴³. The grounds were thus devised for the “Protection of Women (Criminal Laws Amendment) Act, 2006”.

⁴² *A Critical Report* (Islamabad: Council of Islamic Ideology, 2007).

⁴³ Javed Ahmad Ghamidi, “Is Hudood Ordinance in Pakistan Islamic... Zara Sochiye”, Available at: <http://www.javedahmadghamidi.com/index.php/videos/view/a-debate-on-hudood-ordinance>.

The Act was passed by the National Assembly of Pakistan in December 2006. This Act was for the protection of women charged under Hudood Ordinance 1979. It essentially provided relief to the women against the ill-treatment and prevented them from victimization. The chief intent of women protection Act was to abide by the laws connecting to Zinā and qazf, with the above mentioned purposes of the constitution of Pakistan. This Act made amendments in Hudood ordinance 1979⁴⁴. The Women Protection Act inserted and deleted some sections and transferred some offenses to the Pakistan Penal Code. For instance, the offense of rape was removed from the Hudood Ordinances and inserted in the Penal Code. The Protection of Women Act 2006 also made amendments to Qazf ordinance 1979. It removed subsection (3) and (4) of section 14 (which deals with a procedure of lain) and section 15 of Qazf ordinances 1979 and made many other amendments in Qazf ordinance and in other laws as well. The sections 365B, 367A, 371A, 371B were introduced in Pakistan Penal Code (Act XLV of 1860)⁴⁵. The Sections 375 and 376 were also inserted in the Pakistan Penal Code under the sub-heading of rape. The rape victim was no longer under obligation to provide four Muslim male virtuous witnesses to support the claim. The circumstantial evidences would be necessary to consider the cases and the victim of rape would no longer face the charges of Zinā. The method for the trial of the tāzir offenses of Zinā-bil-jabr, gang rape and for all other tāzir offenses

⁴⁴ Rubya Mehdi, "The offence of rape in the Islamic law of Pakistan," *International Journal of the Sociology of Law* 18, no.1 (1990): 710-711.

⁴⁵ Dr. Munir Ahmad Mughal, *Protection of Women Along with the Protection of Women : Criminal Law Amendment Act, 2006 [VI of 2006]*, 2nd ed (Lahore : Muneeb Book House, 2007), 35-37.

under the Pakistan Penal Code was to be controlled by the Code of Criminal Procedure 1898.⁴⁶

2.3.1 IMPACT OF WOMEN PROTECTION ACT, 2006

This Act basically created modifications in Zinā and qazf ordinances, and this was the result of the efforts of the feminist movement in Pakistan. It took almost twenty-five years to uncover the prejudiced and the bias nature of the Hudood laws. There were many flaws in the new law, but it was a strong move in the direction of the fortification of the rights of women. The broad-spectrum effect on women was positive. It obstructed the ways of fabricated FIRs in the matters of Zinā since after the enactment of the new law, it became challenging for the individuals to falsely incriminate the persons on the accusations of adultery or Zinā⁴⁷.

Before the new law, the females were diffident to report the rape. The Islamic fundamentalist parties badly criticized the Women Protection Act and believed that it will make Pakistan an unrestricted sex zone and will also offer a shield to prostitution. However, this law was applauded and acknowledged by women as a move on the way to the defense of their rights⁴⁸.

2.4 ACCESS TO JUSTICE FOR RAPE VICTIMS

The honor killings, incendiarism, and rapes in Pakistan can be foreseen as representing insufficient legal protection for women. In Pakistan, there are numerous obstructions to women's rights to use to justice. Either a woman is looking for legal

⁴⁶ Mahmud Khalid Rahman, *Manual of Protection of Women Laws* (Lahore: National Law Book House, N.d), 7- 22.

⁴⁷ Dr. Razia Musarrat and Naveeda Noreen, "Protection of Women Rights through Legal Reforms in Pakistan", *Journal of Public Administration and Governance* 3, no.4 (2013): 126.

⁴⁸ Shahzad Bokhary, *The law of crimes of Pakistan* (Pakistan: Ahmad Pak Book Depot, 1970), 785.

relief for rape, domestic violence or cyber nuisance, barricades are present at all stages from the beginning and a lot of time ends in a complete miscarriage of justice. The justice does not simply mean a favorable court verdict, it means the re-establishment of a victim's self-respect and her restoration into society⁴⁹.

The foremost point of access is the police, which is usually unresponsive and many a time change the offense in the opposite direction by accusing the woman for welcoming trouble onto her⁵⁰.

The Medico-legal officers often lack essential apparatus to administer these examinations and also do not conduct whole-body examination. The important thing is that victims are nearly never tested for HIV/AIDS, pregnancy and they are usually not referred to a therapist for mental health and wellness, unless they seem exceptionally anxious. The minors are not given extraordinary care nor are they safeguarded during the identification process. The defense is allowed to question the victim's sexual history, and often mentions the absence of medical evidence to show the consent of the victim. Later on this provision was deleted by the Parliament but still defense use this practice in rape cases. The state awards no tangible protection to victims, which provide a way for offenders to torment the victims and her family. The legal proceedings are lengthy, tough and have great collateral costs.⁵¹

⁴⁹ Sarah Zaman and Maliha Zia, *Women's Access to Justice in Pakistan* (Karachi: Committee on Women's Access to Justice, 2012), 2.

⁵⁰ Rubeena Zakar, *Intimate Partner Violence against Women and its Implications for Women's Health in Pakistan* (Germany: Disserta Verlag, Hamburg, 2012), 152.

⁵¹ Zainab Mustafa, "Violence in Pakistan: A Gendered Perspective," *Research Society of International Law*, (2014).

2.5 CRITICAL ANALYSIS OF THE LAWS ON RAPE

There are three elements of law, the first one is the substance that means the text, the second is structure that means who administer it and how it is functional, e.g. the police, medico-legal officers, and the judiciary, and the third one is culture, the approaches, standards and other socio-cultural factors. All three of these elements are of equivalent significance in giving that substantive or equitable justice to the aggrieved. To a certain extent, the issue of rape has substantive recognition under the laws of Pakistan through different legislations. It is the responsibility of the courts to observe the rule and apply it to state of affairs that come before it. Still, the responsibility of interpretation of law does not has to be merely on the judges. This duty is also upon the lawyers. The intelligent management of the cases can increase the probabilities of a faster recovery and help relieve some of the trauma from which rape survivors may suffer. Some landmark judgments in cases of rape by the Pakistani courts have been passed recently, which did no allow culprits the usual immunity that could be observed earlier⁵². For instance, in the case of “**Khadim Hussain v. State**”, the Federal Shariat Court has maintained that the rape victim was exposed to sexual intercourse by considering the remarks of lady doctor sufficient evidence of the fact, regardless of the point that the DNA report about the swabs did not match with the profile of the accused. It was held that the non-receipt of the matching report of DNA test did not contradict the visible description of prosecution

⁵² Maliha Zia Lari and Sarah Zaman, *Sexual Violence and the Law in Pakistan* (Karachi: WAR’s Legal Education Program, 2011), 13-14.

witnesses, and the assessment of the female doctor lent validation to the testimony of the victim that the accused had exposed her to Zinā⁵³.

In Pakistan the conviction rates of the accused are abysmally low in rape cases. Likewise, in a reported case of a young girl, “Mst. **Taslim Bibi**”⁵⁴, who delivered a child and filed a charge of rape. The trial court sentenced both the complainant and the accused for Zinā. The defendant appealed to the Federal Shariat Court and got acquitted⁵⁵. The constitution of the “Islamic Republic of Pakistan” 1973, protects the fundamental rights of its citizens. It is also mentioned that the law shall be declared void if it is inconsistent with fundamental rights.⁵⁶

According to section 375 of Pakistan Penal Code, the penetration is ample to establish sexual intercourse and that is crucial for the offense of rape. The exception is also provided by the provision that if the wife is above 13 years of age and a man subject his wife to sexual intercourse, such act will not be considered a rape. In the offence of rape, the police is authorized to register cases and take the offender into the custody without a warrant for arrest, it has been made non-bailable and non-compoundable offence⁵⁷. According to sub-sections 2, 3, 4, 5 and 6 of section 203-C of the code of criminal procedure, a magistrate shall summon a person, who is accused of adultery, and is required to record the statement of accused, and if the court is content that a case is prima facie established, it shall instruct the police to

⁵³ *Pakistan Criminal Law Journal, (P Cr. LJ)*, ed. Mr. Muhammad Anwar Khokhar, Muhammad Wahaj Azhar, and Kashif Mir Zubair, 2011 P Cr. LJ 1443 (Federal Shariat Court). Jail Criminal Appeal No. 78/1 of 2010, *Journal of Criminal Rulings XLIV*, no. 8 (2011):1444.

⁵⁴ PLJ 1982 FSC 174.

⁵⁵ Rubya Mehdi, “The Offence of Rape in the Islamic Law of Pakistan”, 19–29.

⁵⁶ Ch. Zulfiqar Ali, *Constitution of Pakistan.1973: Amended up-to-Date* (Karachi: Al-Noor Law House, 2013), 5-8.

⁵⁷ Mohammad Mazhar Hasan Nizami, *The Code of Criminal Procedure (Act V of 1898) as adapted in Pakistan and amended up-to-date* (Lahore: All-Pakistan Legal Decisions, 1960), 152-155.

inquire after registering the case. It furthermore, clearly declares that no complaint shall be entertained against the rape victim, if the case against her is already pending in the court or the case has been discharged or she has been released⁵⁸.

It is significant to recognize that absence of consent is the most central component in the section 375 of PPC. It is also important that there needs to be valid consent, i.e., the consent of a girl below the age of sixteen cannot be considered valid. Furthermore, it has been argued that consent must be voluntary and explicitly. It is likewise noteworthy to mention that consent and submission are not one and the same terms. Furthermore, it is not essential to be complete penetration. Evidence can be collected through injuries on the victim's body, DNA report and other circumstantial and forensic evidences are also important to gather, as they verify the survivor's testimony⁵⁹. The law provides that usually a testimonial by a victim, if corroborated by medical evidence, is adequate to establish the accusation of rape punishable under Section 376. But, if the victim's personal character comes along to be suspicious, then her solitary statement cannot be deemed enough to prove the allegation. In "**Ghulam Mohay-ud-Din alias Baoo vs. The State**", the court deeply depend on the medical evidence of the victim, which prime facie indicated her being sexually active. The court cites the medical report which mentions that the doctor has certainly identified that hymen of the victim was ruptured, but the tears were not new and healed, and the vagina admitted two fingers. The court documented about the survivor that she has explained that she was not habitual but was exposed to sexual intercourse on several times before and on this basis, the court believed, "it is

⁵⁸ G.M. Chaudhry, *The Protection of Women Act 2006 with other Relevant Laws, etc.*, 23.

⁵⁹ Maliha Zia Lari and Sarah Zaman, *Sexual Violence and the Law in Pakistan* ,68.

obvious that she is a person of dubious character. Her solitary statement was not sufficient to prove the allegation of commission of illicit intercourse with her⁶⁰”.

In the Pakistani male dominated society, a woman is often held responsible rather than the rapist. In Pakistan most cases in which the rapist has been convicted promptly are those involving young girls or brutal physical injuries, otherwise victim has to wait long for justice to be done. The delay in filing the case or in the medical examination also provides the suspect the benefit of the doubt⁶¹. Another problem which needs to be addressed is the protection during the course of the legal processes. However the laws are legislated under which it is required that a female officer should search the suspected female and examined by a female doctor, but there is a less actual application of this due to lack of female officers. In Pakistan, women prisoners live in practically inhuman conditions⁶². A vast majority of the prisoners experienced an exceptionally bad behavior of law enforcing agencies. The most badly criticized one is the police force⁶³.

2.6 CRIMINAL LAW (AMENDMENT) (OFFENCES RELATING TO RAPE) ACT, 2016

This Act further amended the “Pakistan Penal Code, 1860”, the “Code of Criminal Procedure, 1898” and the “Qanun-e-Shahadat, 1984” in order to make stringent laws regarding the crime of rape. This Act amended section 55 of PPC and declared offences associated to rape non commutable. The Section 376 of PPC was also

⁶⁰ 2012 PCrLJ 1903. Para 7 of the judgment.

⁶¹ Rubya Mehdi, “The Offence of Rape in the Islamic Law of Pakistan”, 28-29.

⁶² Zahid Anwar and Sayed Zubair Shah, “Women Prison Reforms in Pakistan: A Case Study of Peshawar Prison,” *Journal of the Research Society of Pakistan* 54, no. 1, (2017): 245

⁶³ Pervaiz Naem Tariq, *A Study of Female Crime in Rural and Urban Areas of Pakistan* (Islamabad: Women's Division, Govt. of Pakistan, 1981).

revised and it was provided that life imprisonment or death penalty will be executed in case rape of a minor and mental or physical disable individual. It further specified that if the rapist is a public servant, he shall also be penalized with the same penalties with fine. This amendment also prohibited the revelation of identity of victims of rape under section 376A. The Code of Criminal Procedure has also been amended under this Act. The new section 53A was introduced in CrPC after section 53, and it describes that it shall be legal for a registered medical officer to examine a person alleged of rape, unnatural offense or sexual abuse or try to commit rape, unnatural offense or sexual abuse under section 376, 377 or section 377B respectively, of the Pakistan Penal Code. Such officer is under obligation to examine and formulate a report of his examination without any delay⁶⁴.

Under the new amendment made in section 154 of the Code of Criminal Procedure, it is postulated that the lady police officer or any other female relative of the victim should be present when the investigation officer record the declaration of the victim. Similarly, the presence of a female police officer is likewise necessary to record FIR of such offences. Under the new section 161A inserted in CrPC, the police officer is required to inform about the right to legal representation to the victim and provide him or her with the list of lawyers maintained by the Provincial Bar Council for free legal aid. Furthermore, the new section 164A and 164B have been inserted in the Code of Criminal Procedure after section 164. The 164A describes where the crime of rape, unnatural offense or sexual abuse or attempt to commit rape, unnatural offense or sexual abuse under section 376, 377 or section 378 respectively, of the Pakistan Penal Code, are under investigation, the female victim shall be examined by

⁶⁴ *The Gazette of Pakistan, Extra* (Karachi: The Deputy Controller, Stationery and Forms, 2016), 791-792.

a registered female medical physician instantly after the commission of such crime⁶⁵. If these provisions are implemented correctly, this would increase reporting of such crimes as women will have support and will not feel alone. It will also eliminate the reluctance which some women may have in dealing with a male officer. The presence of a female police officer or an examiner will reduce the shame and embarrassment along with apprehension of the judgement that accompanies sexual crimes. Perhaps the most ground-breaking provision is the new Section 164B in the CrPC, under which the DNA test is mandatory, but with the approval of the victim or her legal heirs, and it is the obligation of the investigating officer to send the samples of DNA to laboratory as early as possible. This provision will make sure that solid evidence will exist in a rape case to exonerate or condemn a defendant beyond a reasonable doubt while at the same time ensuring that the victim gets justice. It further provides that such evidence can only be obtained when there are judicious grounds to consider that medical testing will lead to evidence. The objective of this law is not to compromise the individual's right to privacy. The new act also deals with an issue of misconduct by public officials by recommending a sentence of up to three years to those who fail to investigate the cases diligently under Section 166 (2) of Pakistan Penal Code. Furthermore, Section 186 supplements this by providing the punishment of three months to year, along with a fine to those who obstruct an official from carrying out an investigation or hampering an inquiry⁶⁶. After section 344, a new section 344A was introduced in Criminal Procedure Code, which bounds the courts to conclude the rape trials within 3 months. One of the major problems of the victims of sexual crimes, who took action, is the publicity it brings. This means

⁶⁵ Qamar Sohail Lodhi, *The Gazette of Pakistan, Extra*, 792-794.

⁶⁶ Ayesha Yezdani, "Understanding the Anti-Rape Law", *International The News*, 13 November 2016.

that they are afraid of action being taken by the public or even people in her own social circle including family. To combat this, Section 352 of CrPC now provides that hearings are to be held in camera and not in open and public court, where the access will be available only by application to the presiding officer. The screen can also be provided to victims and witnesses to protect their identity. Though, secrecy is crucial for providing security to the victims and to safeguard them from further trauma. The idea of applying for permission to attend a trial can lead to undue difficulty for people who have the right or interest to appear in the trial. Therefore, it would be more appropriate to have an open and public trial where the judge has the discretion to refuse entrance of the people based on an analysis of safety and security for the victim or at her request⁶⁷.

2.7 RAPE AND THE NEED FOR LAW REFORMS

Rape is a cognizable offence under the law of Pakistan and arrest can be made without prior warrant. Under Section 153 of Cr.PC, a magistrate has the authority to mandate the police to register cases, conduct investigations and submit a charge sheet. The Section 512 of the Cr.PC permits that evidence can be recorded in the nonappearance of the defendant and a trial can also be commenced in absentia, till he is arrested.

The Law of Evidence 1984 manages the evidence of facts in legal proceedings. It is appropriate to discuss two foremost prejudiced provisions in the Law of Evidence related to sexual crimes. According to section 151 (4), when a legal action is taken against a man for the crime, rape or an attempt to rape, and if it is proven that the prosecutrix was of the normally indecent character, then on the basis of this

⁶⁷ Ayesha Yezdani, “Understanding the Anti-Rape Law”, International The News.

provision, accused person can take advantage by showing that the female's imposing allegation of rape has a history of decadent conduct. Furthermore, under section 21(j), the issue is whether A was raped. The fact that soon after the suspected rape, she filed a complaint concerning the offense, the situations under which, and the conditions in which, the complaint was made are relevant⁶⁸. This lets the court to deduce negative presumption from deferral in reporting by litigants. These two provisions let the defense to challenge the previous sexual history of the plaintiff, to point out or put such questions related to sexual history of the rape victim to prove consent or else to release the accused whole or partial responsibility. The intentions of survivors are often regarded as malafide or damaging in case of delay reporting and conducted to point in the direction of fabrication and a scheme to deceptively incriminate the accused⁶⁹.

In addition to these inequitable provisions, there are also some forms of sexual assaults on which there exists a lack of legislation, such as an object and digital rape. The other cases of penetration not through the vagina may establish rape are explicitly excluded by the law on rape even yet there have been reported cases of non-penile rapes across the country. Yet worldwide, the definition of rape has been extended, but in Pakistani law the emphasis is on penetration of a penis into the vagina or anus of another. Internationally the other modes of penetration such as of the mouth, vagina and anus and the use of any object for the purposes of penetration is now accepted. The sexual assault statutes of the United States now acknowledge that rape also comprises the deliberate touching, through the clothing of the private

⁶⁸ Muhammad Mahmood, *The Major Acts: Revised and Enlarged with Much More Case Law 2016* (Lahore: Al-Qanoon Publishers, 2106), 1257, 1331.

⁶⁹ Ayesha Khan and Sarah Zaman, *The Criminal Justice System and Rape* (Karachi: War Against Rape (WAR), 2007), 9-10.

parts of any other individual who has not reached to the age of sixteen with the intention to molest, disgrace, tease and stimulate the sexual desire of any individual. The rape has taken various forms, so it is important to re-define the definition⁷⁰. The international law, even now articulates that rape may possibly be recognized as the sexual penetration, not just penile penetration⁷¹. In Pakistan there is also no law on digital rape and necrophilia despite the fact there was a highly publicized case, including the rape of 48 dead bodies committed by a man within 8 years⁷².

Pakistani law evidently declares that having sexual intercourse with a female who is under 16 years of age with or without her permission is rape and called it statutory rape. The legal application of this law appears to be lacking. The sexual account of the young women and the perception about their virginity in such cases seem to consider by the courts than passing a decision on the accusation of sexual intercourse with them⁷³. Another issue in rape cases is out of court settlement. Rape is a non-compoundable offence, but the parties do turn out in out-of-court settlements due to gender biased social practices and related pressures. In case of such compromises and settlements either witnesses withdraw or evidence is misleading results in the discharge of the accused, or easement are desired from the courts on the ground of such settlements. In **Manzoor Chachar v State**⁷⁴, on the ground of an out-of-court settlement the Sindh High Court decreased the punishment of an offender of rape from life imprisonment to 10 years. Such compromises enhance the perpetuation of

⁷⁰ Maliha Zia Lari and Sarah Zaman, *Sexual Violence and the Law in Pakistan*, 68.

⁷¹ R. C. Jiloha, "From Rape to Sexual Assault: Legal Provisions and Mental Health Implications," *Indian Journal of Social Psychiatry* 31, no.1 (2015):11.

⁷² George Palermo and Mary Ann Farkas, *The Dilemma of the Sexual Offender*, 2nd ed. (Springfield: Charles C Thomas Publisher, 2013), 84.

⁷³ Sohail Akbar Warraich, *Access to Justice for Survivors of Sexual Assault* (National Commission on Status of Women (NCSW), Gender Equity Program (GEP) Aurat Foundation (AF), 2014), 25.

⁷⁴ *Manzoor Chachar v State*. Sindh: High Court, 2015 PCrLJ 690.

violence against women. The compromises and out-of-court settlements generate a frightening surroundings for survivors⁷⁵.

The law regarding rape is quiet in need of considerable improvement for the sake to bring satisfactory protection for rape victims⁷⁶. The case of Salman Akram Raja⁷⁷ grasps a prodigious worth in association to suggesting and recommending modifications in rape laws of Pakistan. In this case the six recommendations were put forward by the petitioner that needed to be enforced for all matters of rape in Pakistan. The rape victims have injuries, both psychologically and emotionally, so they stand on a higher pedestal than other victims. The cases of goondaism, molestation and sexual harassment are aggregating day by day. Rape is a grave crime and any woman is at peril of getting raped whether young or old. The effects of rape are many and severely traumatic. The situation is worse if the girl turns out to be pregnant as a result of it. The setting up of special courts where female judges will try rape cases can bring a new dimension to the whole legal system. With the setting up of special courts, a very humane system could be expected. Only a woman understands what another woman suffers. The conviction rate, which is very low, can be improved if we have female judges⁷⁸.

A number of substantive and procedural changes deal with the challenges and inequalities faced by women were introduced by the Criminal Law (Amendment Act)

⁷⁵ Sohail Akbar Warraich, *Access to Justice for Survivors of Sexual Assault*, 26-28.

⁷⁶ Rachel Bubb, "Reform of the Pakistani Rape Law: A Move Forward or Backward," *The Journal of Gender, Race and Justice* 11, no.1 (2007): 14-120.

⁷⁷ Salman Akram Raja and another Petitioners versus Government of Punjab through Chief Secretary, Civil Secretariat, Lahore and others—Respondents. PLJ 2013 SC 107 (Original Jurisdiction), Constitutional Petition No. 38 of 2012, Decided on 2.10.2012. pgil.pk/wp-content/uploads/2014/07/DNA-SC-Judgement.doc (accessed on 28 June,2018).

⁷⁸ Dr. V. Mohini Giri, *Deprived Devis: women's Unequal Status in Society* (New Dehli: Gyan Publishing, 2006), 18, 50-53.

2016. It introduced numerous amendments in the “Pakistan Penal Code (Act of XLV of 1860)”, “Code of Criminal Procedure (Act V of 1898)” and “Qanun-e-Shahadat Order (Order X of 1984)”. There is a need to discontinue the practice of giving importance to the character or sexual history of the rape victim with the intention of proving the consent. The strong provisions need to be introduced under which the police or any other officer who neglects or delays to file an FIR under section 375 PPC shall be penalized without any unnecessary delay. Furthermore, new provisions need to be presented covering penalties for child rape, digital rape and necrophilia. The object of rape or compelling an individual to have intercourse with another should also emanate under the criteria of rape in Pakistan Penal Code⁷⁹. Every police station should have female police officers because due to no or few female officers, the women have to remain in custody of male officers. The women police stations are very less in number. The percentage of women judges are also very low and hardly any female public prosecutors. There is a necessity to make more accessible women police stations and the number of female officers should also be increased. The out of court settlement or compromise is really common for police, judges and lawyers, which if agreed upon result in discharge of the case and the acquittal of the accused. Thus the out-of-court settlements need to be outlawed with harsh punishments for offending individuals. The government should set up more shelter homes, both in rural and urban areas of Pakistan with proficient staff. The helplines for distress calls and education on preventive tips through mass media and social media should also be provided. The protection for women and minors who have been endangered and who may be beleaguered into dropping allegations should be included in the laws regarding witness protection. There is a need to curb the officers from establishing

⁷⁹ Shehar Bano Khan and Shirin Gul, “The Criminalization of Rape in Pakistan”, *Chr. Michelson Institute (CMI) Working Paper*, no.8 (2017): 12-20.

their own conclusions before investigation. The government should implement the “World Health Organization’s” parameters for conducting medico-legal examination of rape victims and should as well introduce the standardized rape examination kits and appropriate protocols instead of finger and virginity testing which exposed women specifically minors to distress equal to the sexual assault they endure.

With the intention to culminate the approaches and partialities that dominate and make trial of rape harrowing in Pakistan, a great deal of reform is needed⁸⁰. A comprehensive view of the offence of rape should be taken. The vagina penetration should not only be included, but also the rectum and mouth penetration carried out from a body part other than the penis, e.g. fingers and penetration by any object other than one’s body parts (e.g. bottle or stick) should also be included. The crime of causing sexual activity without consent should also be included. If the victim is required to pull such an act on, by consenting or non-consenting, third party (this would also embrace the subject of forced prostitution) and, or, if the victim is asked forcefully to take part in a sexual act with the offender, this should also be admitted. Therefore, the concept of consent should be properly defined⁸¹.

2.8 RAPE, PREGNACY AND ABORTION

The laws of morality are difficult to legislate and implement. The common struggle regarding enacting morality is to choose whose idea of morality is to be enforced. The basic disagreement is always there over moral disputes, which is obvious from the debate of abortion. There are some who consider the right to abortion as a form of murder, whereas others consider that this call follows from a woman's right over her

⁸⁰ Sudhir Kumar Singh, *Human Rights in Pakistan* (America: Pentagon Press, 2007), 114.

⁸¹ Ruba Saboor, “Rape Laws in Pakistan: Will We Learn from our Mistakes”, 94.

body. The liberal societies, who believe in the concept of individual freedom, have approved women's right to abortion within the early weeks of pregnancy⁸².

In Pakistan, everyone is aware of quack abortion centers, but still they are there and perform illegal abortions. Prime Minister, Imran Khan acknowledged the lack of political will on the issue and promised pro-contraception campaigns using the media, cell phones, schools and mosques. But the Council of Islamic Ideology, a religious body which advises the government, says otherwise, insisting that family planning is against Islam⁸³. That has left Pakistani women at the mercy of back-alley abortion providers. The state is careless about the predicaments of women who suffer unwanted pregnancies, whether as a result of rape or otherwise. Women will always find a way to have an abortion. It is up to state to decide if they will be able to do that safely and with dignity, or in a way that keeps the maternal mortality rate so high that the ratio between men and women in our population becomes even more unbalanced. And with women suffering from nightmarish complications from unsafe abortions, such as perforated uteruses or sepsis, and with backstreet abortion methods like stuffing rags dipped in sulfur into women's vaginas, it should be pretty obvious what state responsibilities are towards women and their health.

The cases of abandoned newborn infants are many. Abortion does not always constitute a criminal offense in some cases; it is needed because the absolute prohibition of abortion does not solve the problem. Hence, refusing abortion is a dilemma. Before 1990, abortion in Pakistan was regulated under the century-old

⁸² Khiara M. Bridges, "When Pregnancy is an Injury: Rape, Law, And Culture," *Stanford Law Review* 65, no.457 (2013): 457-501.

⁸³ Pakistani women use abortions as birth control in desperation, February 18, 2019. Available at: <https://gulfnews.com/world/asia/pakistan/pakistani-women-use-abortions-as-birth-control-in-desperation-1.1550463433356>.

provisions of the Penal Code 1860. Under this law, abortion was a crime, the only exception being its performance in good faith so as to save the pregnant woman's life. It was provided under Article 312 of the Penal code that any person performing an illegal abortion was subject to imprisonment for three years and/or a fine, if the woman was "quick with child", the penalty was imprisonment for up to seven years and payment of a fine. Females opting for an abortion incurred the same penalty. The first step to reform abortion laws was taken by the government of Pakistan in 1990. In 1989 the Supreme Court of Pakistan declared void, the portion of the Penal Code of 1860 related to the offences against the human body on the ground that it was inconsistent with the rulings of Islam. The multiple provisions were reformed and revised to comply with Islamic legal principles. From 1990 onwards the amended law was tentatively applicable and became permanent law in 1997⁸⁴. An exception for abortion was made under the new law. Abortion was allowed before the development of fetal organs only as a required treatment to save a woman's life or her health. After the development of organs, abortion was only lawful to protect the mother's life. In 1996, under the presidential order it was declared that the offender has to pay blood money (Diyat) in case the fetus has been developed. Previously the abortion was legalized merely to save the life of the mother. But by the virtue of the 1997 amendment, abortion was also declared legal to safeguard the health of the mother.

Despite the amendments, the biggest problem was the restraint on providing a woman the choice to terminate. The abortion is allowed only to rescue a woman's life⁸⁵. The

⁸⁴ Karim Ullah Sraw, "Abortion Law of Pakistan: Reforms Needed," *Human Rights Review* 2, no.6. https://uclhumanrightsreview.wordpress.com/volume-ii-students/abortion-law-of-pakistan-reform-needed/#_ftn17.

⁸⁵ *Facts on Induced Abortion in Pakistan: In Brief* (Karachi: National Committee for Maternal and Neonatal Health, 2009). See also *Abortion Policies: A Global Review* (New York: United Nations Population Division, 2002).

number of recommendations concerning women's health and rights was suggested by the commission of Inquiry for women which was appointed by the Government of Pakistan. The Commission was headed by judge of "Supreme Court, Justice Nasir Aslam Zahid". He proposed in August 1997 that within the first 120 days of pregnancy the woman's right to take an abortion by their own consent be unequivocally declared an absolute legal right. It was further suggested that beyond 120 day period, the abortion should be made permissible in the circumstance of rape resulting pregnancy, seriously disabled girls, menace to the life of woman or health and in the case of any exposure to disease or other hazards which may result in abnormalities of the child⁸⁶. These recommendations are yet to be legislated. The legal system of Pakistan should give women the authority over what is such a significant decision. A rape survivor who becomes pregnant has no choice to terminate the fetus even in the course of the initial weeks, but if she wants to terminate, her options include illegal abortion or a suicide in extreme cases. Even though the law does not sanction abortions; the Population Council of Pakistan during a study revealed that about 890,000 abortions are taking place nationwide. These are just the reported cases, half of them even more are being done by quacks. This study indicates that 696,000 women visit health facilities yearly with post-abortion complications. So safe abortions should be accessible at least in the event of rape resulting pregnancy to improve women's health, rights and lives⁸⁷. The society is also unsympathetic to children born outside of marriage. Few years back people killed the

⁸⁶ Shahida Zaidi, Azra Ahsan, Sadiqua Jafarey and Imtiaz Kamal, *Unsafe Abortions in Pakistan: A Situation Analysis* (Pakistan: National Committee for Maternal and Neonatal Health, 2010), 11.

⁸⁷ Shakir Lakhani, "Options for Rape Victims in Pakistan: Stay Silent, Get an Abortion or Set Yourself on Fire,".

newborn on being provoked by the Maulvi, who stated that infant was the product of the fiend. A case was shown against those people, but no arrests were ever made⁸⁸.

Under the Pakistani law, on the basis of stage of pregnancy the abortion offenses are divided into two categories. According to Sec. 338 of PPC, abortion is characterized as the act in which a woman causes a death of such a child in her womb whose limbs have not been formed yet, thus, causing its death before its birth. If abortion has been done to save the life of the woman and it becomes necessary to do such an act during her medical treatment, then, it is not illegal. On the other hand, if an abortion is performed without any reasonable cause, then the same would amount to a crime. If the woman causes herself to miscarry, then it would also be considered a crime. Abortions that are performed before the formation of the organs of unborn child are known as *Isqāt-i-Hamal*. The offender shall be subjected to *tāzīr* penalty, which is imprisonment for up to three years, if the woman acquiesces and if she does not consent then up to ten years. If as a consequence of such abortion any injury is inflicted to the woman or she dies, the offender shall also be legally responsible for the penalty provided for such hurt or death as the case may be⁸⁹.

At the stage when some of the organs have been formed and if abortion is carried out, it is known as *Isqāt-i-Janin* under section 338-B of PPC and is prohibited except for the first of the above reasons. The offender shall be required to pay *diyat* to the heirs of the victim. If the child is born dead the *diyat* will be one twentieth and if born alive,

⁸⁸ Asma Jahangir, "How far are penal laws effective in protecting women," *Dossier Articles South Asia Pakistan Law Reform General* (1988): 34-35.

⁸⁹ Sajad Anwar Khan and Hassan Mehmood Butt, *The Pakistan Penal Code 1860 XLV of 1860 with New Islamic Laws 1979* (Lahore: Eastern Law Book House, 2016), 128.

but dies as a consequence of an action of the offender, then in such case, a full diyat is payable and imprisonment up to seven years⁹⁰.

Abortions are acceptable not only to save the pregnant woman's life, but besides, provide necessary treatment, a phrase that even though not defined. The forfeits for the offense of abortion are reliant on the stages of growth of the pregnancy and on either the woman consents or not. There is no strong distinction of the two stages of pregnancy and clear definition of what constitutes "necessary treatment" thus the law is somewhat ambiguous. The law reflects a complete insensitivity to women, it does not admit this possibility and not even exempt rape victims, who would have to live with not only the trauma of the violence, but a constant reminder of it in the form of an unwanted child. The society has no place for illegitimate child at social and legal levels⁹¹.

2.8.1 CHILDREN BORN AS A RESULT OF RAPE

Abortion is prohibited in Pakistan, so it creates a circumstance where children born outside of marriage are clandestinely murdered every year. According to the "Edhi Welfare Foundation", more than 1,100 infants were killed and dumped in garbage in 2014 only, and this is the figure only from the big cities of the country, and the figure can be much bigger nationally. According to the manager of the Edhi Foundation, Anwar Kazmi, a child who was six-days old was burnt to death. There have been cases where corpses of babies have been found hanged or eaten by animals. There was another case in which a child was left in front of a mosque by a woman expecting

⁹⁰ Muhammad Abdul Basit, *The Pakistan Penal Code: Act No. XLV of 1860 (Bare Act)* (Lahore: Federal Law House, 2017), 130.

⁹¹ Sangh Mitra, and Bachchan Kumar, *Encyclopedia of Women in South Asia: Pakistan*, Vol.2 (India: Kalpaz Publications, 2004), 48.

that someone would take him but that child was stoned to death by the people on the order of the cleric of the mosque⁹².

Under Pakistani Law, a mother is authorized to the custody and guardianship of illegitimate children. The father has no legal tie with such a child, even though he is the biological father. However, an illegitimate child has a complete legal tie with his mother and there is no hindrance in the way of the child inheriting from his mother⁹³.

In **Nadeem Masood v. The State**⁹⁴ case, a revolutionary decision was made by Lahore High Court that has a potential to economically empower children born as an effect of rape. The court ordered the appellant, Nadeem Masood, to pay Rs. 1,000,000 to his illegitimate daughter born as an outcome of rape. By dispensing such an order, the LHC invoked the right of appellate courts to order compensation to be paid under Sections 544-A and 545 of the Criminal Procedure Code 1898. The illegitimate children born as a consequence of rape have never been specifically compensated by the Pakistani courts and their mental anguish and psychological damage was never been considered before. Justice Anwaarul Haq established, that it is a legal right of such children to be compensated for the trauma they suffer. The Lahore High Court justifies this right to compensation in two ways. Firstly, the judgment looks at the precedents set by the “Supreme Court of Bangladesh” and the “Indian Supreme Court” to conclude that a child holds an unquestionable right of life and that has to be secured by the biological parents and the State. This right also covers the children

⁹² Imtiaz Ahmad, “Illegal Newborns Murdered and Discarded,” (2014). <http://www.dw.com/en/illegitimate-newborns-murdered-and-discarded/a-17582853>

⁹³ Syed Ameer Ali, *Mohammedan Law*, vol.2, Compiled by Said Akbar Khan (Lahore: All Pakistan Legal Decisions, 1965), 238.

⁹⁴ Lahore: High Court, F.I.R No.214/2010, Criminal appeal No. 2066 of 2012, Date of Hearing :01.06.2015. <http://sys.lhc.gov.pk/appjudgments/2015LHC4524.pdf> (accessed on 27 June, 2018).

given birth as an outcome of rape and cannot be rejected due to the inauspicious circumstances of their birth that they had no control over. Secondly, the judgment elucidates Sections 544 and 545 of the Cr.PC to conclude that an appellate court can pass an order in favor of a child born as a consequence of rape committed by the accused. The analysis of Section 545-A makes it absolute that the court directed compensation is not limited to the victim or legal heirs of the victim, but can be stretched to any individual who has undergone mental agony or psychological impairment triggered by the crime. Furthermore, under section 544-A (5), the appellate court has a right to modify judgments concerning the compensation allocated to all entitled parties. Thus, appellate courts can apply these provisions to modify the trial court's judgment and order compensation to be paid to any person i.e. the child born as a consequence of rape⁹⁵. The monetary compensation for illegitimate children can help in financially empowering women who raise them and get rid of some social stigma attached to their birth. This small glimpse into the psychological torment that blights the life of a rape victim and any child born as a consequence is simply aggravated by the fact that rape is not a ground on which Pakistani law allows abortion. While that doesn't preclude those who seek out the option, granting monetary compensation is only humane for women and children trapped in such situation, especially when the State doesn't even provide rape victims the choice of abortion. Therefore, this judgment has established a precedent for other courts to follow and it can financially and socially help the rape victims. In Pakistan, no legislative action has yet been taken to specifically protect the rights of children born due to rape. Under sections 488-490 of the Cr.PC, an illegitimate child was allowed to get a monthly allowance from the biological father under certain

⁹⁵ Orubah Sattar Ahmed, "Compensation Payable by Convicted Rapists to their Illegitimate Children," *Lums Law Journal* 2, (2015): 96-99.

circumstances. But these sections were repealed in 1981 during the period of Islamization of laws and it was held that under Islamic law, illegitimate children have no right of maintenance and inheritance from their fathers, and no other alternate legislation was introduced to guard the rights and benefits of illegitimate children. This is very ironical because the teachings of Islam direct that state and lawmakers should care for the rights of children and women and protect them against physical and moral humiliation⁹⁶.

2.8.2 FOUNDLING

It is an established fact that in the early period of Islam adoption existed and was practiced by Muslims. Later, when the Prophet exhorted the Arabs to give up the unreasonable, unnatural and inhuman practices of pre-Islamic Arabia, he also gave them higher ideas of the domestic relationship and explained to them in full that adoption similar to what was practiced in the "Days of Ignorance" created no such ties between the adopted son and the adopting father as resulted from blood relationship. Under the classical Muslim Law adoption gives no right of inheritance to the adopted child in the property of the adoptive parents, nor to the adoptive parents in the property of the adopted child.⁹⁷ Islam fully supports the concept of helping the orphan and poor, and taking them under the wings. If there is no one to take care of the orphan and poor children, then this responsibility falls upon the Islamic government. Islam differs on the the implications and legal consequences of adoption. It is this part of the adoption procedure that Islam does not accept. However, changing the family name of the adopted child is not allowed. If the child is two years old or less and is

⁹⁶ Orubah Sattar Ahmed, "Compensation Payable by Convicted Rapists to their Illegitimate Children, 99-104.

⁹⁷ Ali Raza Naqvi, "Adoption in Muslim Law", *Islamic Studies Islamabad* 19, (1980): 286:288.

also breast fed directly by the adoptive mother for at least a day and a night (or fifteen times consequently), then the child will become mahram to the new family. If the child is not breastfed as mentioned above, then he or she will remain non-mahram to the new family. Adoption in rizâ`i or non-rizâ`i form does not give the adopted child a right to inherit the estate of the adoptive parents nor does it deprives him or her from inheriting the estate of the real parents⁹⁸. (However, the adoptive parents have the option of writing up to one-third of their estate for their adopted child.) Islam focuses on kafalah as an alternative care option for children deprived of a family environment in comparison with other forms of alternative childcare. The inclusion of kafalah in the Convention on the Rights of the Child (CRC) is the first time an exclusively Islamic concept is recognised in a binding international instrument. Prior to this development, however, kafalah, as a subject of international law was first mentioned in the 1986 United Nation Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986 Declaration). The 1986 Declaration contains the first internationally agreed upon standards of care for children whose parents are unavailable or inappropriate. Kafalah is also recognized in the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. It is provided as one of the measures that can be taken to ensure the protection of the person or property of the child. In the United Nation Guidelines,

⁹⁸ Kerry O' Halloran, *The Politics of Adoption: International Perspectives on Law, Policy & Practice*, 2nd ed (England: Springer, 2005), 379-380.

kafalah is recognised as an ‘appropriate and permanent solution’ for children who cannot be kept in, or returned to, their original families⁹⁹.

Consequently, caring for orphans and vulnerable children generally is a key tenet of Islam in order to provide them with the safety and security that a family environment offers. Indeed, there is greater agreement between the major Islamic sects on the matter of caring for such children than on any other matter of law, and the Qur’an provides specially for the subject. For instance, upon taking in a ‘foundling’ (laqit), the child must never again be abandoned. There is a moral duty and an obligation to render social assistance to children (and adults) who lack the basic necessities of life, whether or not they ask for it¹⁰⁰.

In Islam, it makes no difference whether or not these children have parents. The emphasis is on ensuring their sustenance through the provision of basic needs. Poverty is thus a cause for concern in relation to the proper care of children. The Islamic law defines the magnificent advantages and blessings that one receives in adopting and caring for a foundling. The term laqit is used in Islamic Law, which means taking into custody. Taking child into custody is recommended as in this, there is a survival of the child and it becomes obligatory if the person is convinced that the child will die. The Bayt al-mal is responsible to maintain the foundling because he is the person who is unable to earn and has no wealth and relatives. If any person takes foundling into custody, then no other person has a right to take such child away from him. Furthermore, foundling is a free person and if some wealth is found tied to him,

⁹⁹ Usang M Assim and Julia Sloth-Nielsen, “Islamic kafalah as an alternative care option for children deprived of a family environment”, *African Human Rights Law Journal* 14, (2014):333.

¹⁰⁰ Shabnam Ishaque, “Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of a Child’s Right to an Identity”, *International Journal of Law, Policy and the Family* 22:3 (2008).

then it belongs to the foundling, the finder of the child has the authority to hold onto it and to buy things necessary for the foundling. But, he does not have authority to undertake transactions in the wealth of the foundling. He can accept a gift on behalf of the foundling. The person who finds a child has no authority to marry her¹⁰¹.

Most of the jurists believe that collecting the abandoned and neglected children and taking care of them is a collective or communal act. It is obligatory to collect the unattended and abandoned children, shelter them, and fulfill their needs. There is larger unanimity among the Muslim Jurists on the subject of taking care of foundling children than on any other problem of law, and the Qur'an provides clearly for this issue. The taking upon foundling known as *laqit* and it is required that such child should not ever again be left alone. There is a liability and moral responsibility to provide social support to such children. The concept of *kafalah* is there in Islamic law under which there is a pledge to willingly take care of a minor in the equal manner as a father would do it for his son. There is no right of inheritance of a child who is adopted under *kafalah* from the adoptive family, but inheritance can be assigned to such child through testamentary succession¹⁰². According to some Shafi'i jurists, the presence of a witness is necessary when picking the abandoned child because such child must remain secure both in terms of life and parenting. While some jurists argued that the presence of a witness is not obligatory. A group of jurists also believe that if the founder of the child (*multaqit*) is a just person, there is no need for holding

¹⁰¹ Burhan al-Din al-Farghani al-Marghinani, *Al-Hidayah: The Guidance*, trans. Imran Ahsan Khan Nyazee, Vol. 1&2, 1475-1480.

¹⁰² Usang Maria Assim and Julia Sloth-Nielsen, "Islamic *kafalah* as an alternative care option for children deprived of a family environment," *African Human Rights Law Journal* 14, (2014): 329-330.

a witness, however, if his or her justice is not manifest, taking a witness is obligatory, as this would produce more confidence in that individual¹⁰³.

In Europe, from at least the 12th century in the middle ages, societies have established means to shelter the abandoned babies. There was a crib system known as “baby hatch” placed outside a hospital or any other area where people could securely drop off a baby. This was because Catholic Church did not allow the abortion and so required a place for undesirable babies. There used to be a circle in a wall in which a baby could be placed and be safe, known as foundling wheel. In the United States, there were laws known as safe haven and their purpose was to put the welfare of the infant at priority. In some states, a woman was allowed to give birth to an illegitimate child in the hospital safely and secretly leave without the baby. These unlucky children are usually found deprived of shelter, inhabitation, starving in the streets under the relentless open sky. The society due to its carelessness and acute indifference dispossess the human rights of such children and in the end, lead them towards baneful destructive activities like begging and drug addiction¹⁰⁴.

According to article 25 of the constitution of Pakistan, the state is required to make special provision regarding child protection. The “Child Protection Welfare Bureau” (CPWB) is a self-governing body which was set up under the “Punjab Destitute and Neglected Children's Amendment Act-2007”. Its centers are in different cities of Punjab, and its purpose is to provide amenities for children once it adopts them¹⁰⁵. The alternative care which is provided by the state and private sector for abandoned and illegitimate children are clearly insufficient and very low. There is a heavy deal of

¹⁰³ Saeid Nazari Tavakkoli, *Child Custody in Islamic Jurisprudence*, trans. Ahmad Rezwani, ed. Ahmad Namaee (Iran: Islamic Research Foundation Astan-e Quds Razav, 2011), 63-68.

¹⁰⁴ Dr. Hussain Mohi-ud-din Qadri, *Child Abandonment-A Social Tragedy* (Lahore: Manhaj-ul-Quran Publishers, 2009), 117-118.

¹⁰⁵ Abdul Wahid, *Manual of Child Related Laws* (Lahore: Popular Law Book House, 2000), 24-27.

fear involving the handling of children in the institutions. The societal prejudice against illegitimate children is yet more. Even in adoption, there is a strong inequity against such children. In Pakistan, the Edhi Foundation has a scheme of accommodating the disown babies called *jhoola* since 1952. There are two most important and appreciated adoption centers in Karachi named as “Kashana-i-Atfal's Naunihal Baby Centre” and the “Bilquis Edhi Foundation”. In Lahore and Rawalpindi there is an “SOS Children's Village”¹⁰⁶.

CONCLUSION

The number of rape cases in Pakistan is very disquieting and disturbing. First, it is unmanageable and difficult to impose the harsh hadd penalty on the rapist because it necessitates a high standard of evidence. The laws related to rape are still underdeveloped or outdated, so they should speedily be updated. The prosecuting mechanisms should be strengthened with knowledgeable and experienced staffs in the criminal justice sector, to cut down the percentage at which wrongdoers escape the sentence. There should also be specialized courts (Fast-track court) with a minimum amount of burdensome rules of procedure and substantiation for the purpose to fast track the trial of rape accused. There is a need of broad-based-strategy for confronting and tackling the issue of rape. The factors like, poverty, physical and social surroundings, rules and procedures, societal standards, International developments and pecuniary issues, cataclysms, war, absence of institutes or infrastructure, feminist theory, annoyance, influence, sadism and psychopathy are responsible for occurrence of rape. The causes have to be strongly undertaken first and foremost to reduce or eliminate rape.

¹⁰⁶ Samra Fayyazuddin, Anees Jillani, and Zarina Jillani, *The State of Pakistan's Children* (New Delhi: A.P.H Publishing, 1998), 20.

As far as rape victims are concerned, they must be support of the society, emotional support, security and satisfactory compensation for them. The network should be formed by Non-Governmental Organizations (NGOs) to help create more awareness campaigns, both locally and internationally on the issue of rape. The campaign against rape must also be contained within our educational institutes. There is also a need to introduce public hanging for people who rape children less than fourteen years of age.

The rate of illegal abortions in Pakistan is very high, but it has not been an area of major governmental concern. Under Pakistani law, abortion is allowable only to safeguard the woman's life or as a necessary treatment. Abortion law in Pakistan has not been reformed contrary to the worldwide consensus of Islamic scholars. It is still unthinkable due to the deep-rooted cultural-religious philosophy. In cases of rape, Islamic scholars do permit an abortion in the course of the early weeks of pregnancy. So the abortion laws should be modified accordingly, but in our country once a law is established, it is hard to switch it. Even the Quran gives us acquiescence to make changes and modifications according to developments.

CHAPTER NO.3: RAPE AND ABORTION LAWS IN ISLAM

3.1 INTRODUCTION

In Islam, there is no penalty for a female who has been raped and this opinion is accepted by the mainstream Muslim scholars. Rape involves coercive sexual intercourse, so the majority of the classical jurists named it Zinā bi al-ikrāh. Islam gives distinctive place and respect to women in the society¹⁰⁷. Allah has clearly delineated the rights of females in the Quran, thus there is no level of injustice or wrong with females. The madhhabs of Islamic law entirely agree that rape is a crime. Rape is viewed as a trespass of the right of Allah and also of human beings¹⁰⁸.

In this chapter concentration will be on the notion of rape, including rights, remedies provided under Shariah to the victim. This chapter will provide a description of how rape was dealt with in the early Islamic law. In addition, this chapter will show that the Islamic legal system has great potential to criminalize rape and implement the protective policies in harmony with and supported by Islamic principles. It will also illustrate Islam's policies and principles regarding the prohibition of rape and its penalty. In short, the Islamic jurisprudence on rape and abortion will be elucidated here with reference to the Holy Qur'an, the Sunnah of the Holy Prophet, and with the work of well-known Muslim scholars. Then the subject of rape conceived pregnancies under Shariah will be discussed. At the end, all the findings will be concluded.

¹⁰⁷ Rashida Patel, *Islamisation of Laws in Pakistan*, 48.

¹⁰⁸ Zafar Hussain Chaudhary, *Islamic Law of Hudood and Tazir*, 23-26.

3.2 ZINĀ IN ISLAMIC LAW: REQUIREMENTS FOR PROOF OF ZINĀ AND PUNISHMENTS

In Islamic law, those who indulge in any extra-marital sex are transgressors. Adultery is a grave offense under Shariah and both man and woman are equally guilty except in the case of rape¹⁰⁹. The numerous forms of illegal sexual union existed in pre-Islamic Arabia. The Qur'an undoubtedly condemns and introduces measures to reform the established sexual and ethical codes among the Arabs¹¹⁰. In Islamic law, all the sexual relationships outside the legitimate marriage would allegedly fall under the title of Zinā. It is a legal issue when both of the accused couple confesses to willful intercourse out of the wedlock under oath or it is witnessed by four pious Muslim males. The punishments for adultery are also determined in the Quran¹¹¹, which states:

«الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِئَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلَيْشَتَهُذَّ عَذَابُهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ»

“The adulteress and the adulterer—whip each one of them a hundred lashes, and let no pity towards them overcome you regarding God’s

¹⁰⁹ Ziba Mir Hosseini, *Criminalizing Sexuality: Zina Laws as Violence Against Women in Muslim Contexts*, ed. Rochelle Terman (The Global Campaign to Stop Killing and Stoning Women and Women Living Under Muslim Laws, 2010), 14-16.

¹¹⁰ Hamilton Alexander Rosskeen Gibb and Johannes Hendrik Kramers, *Shorter Encyclopedia of Islam* (Leiden, Brill Publishers, 1961), 658-659.

¹¹¹ Muhammad Abdel Haleem, Abel Omar Sherif and Kate Daniels, ed. *Criminal Justice in Islam* (New York: I. B Tauris & Co. Ltd, 2003), 36-38.

*Law, if you believe in God and the Last Day. And let a group of believers witness their punishment”.*¹¹²

Another punishment added by the Sunnah is the exiling of the person responsible for adultery or fornication for a year. Narrated by “Ubada bin As-Samit Allah’s Messenger (p.b.u.h)” said:

“Take from me, take from me, Allah has indeed made a way for them (women).

*Al –Bakir (one who has not had sexual relations in a legitimate marriage) (if he commits fornication) shall receive one hundred lashes and be banished for a year. Ath _Thaiyab (one who has had sexual relation in a lawful marriage) (if he commits fornication) shall receive one hundred lashes and be stoned to death*¹¹³.”

Agreeing to this hadith the penalty of fornication for (Al-Bakir)¹¹⁴, man or woman is flogging with a hundred lashes each and their expatriation from the Islamic state for the period of one year. The punishment of banishment is an addition which is acknowledged by all the narrators of the Ḥadīth. If adultery is committed by ath _thaiyab¹¹⁵ az-zanithe punishment is Rajm¹¹⁶ according to a general consensus of all the scholars. Imām Mālik is of the opinion that a woman is not to be exiled, as this will expose her to hardships and she should not be allowed to travel alone. She should

¹¹² Al-Quran, Surah an-Nur: 2, Translated to English by Talal Itani, *The Quran*, 179.

¹¹³ Muhammad bib Ismail Al Sanani, *Bulugh Al Maram: Attainment of the Objective*, 2nd ed. Compiled by Al_Hafiz ‘Ibn Hajar Al-Asqalani (Suida Arabia, Riyadh: Darussalam, 2002), 390-392.

¹¹⁴ The one who is not married and commits zina.

¹¹⁵ The one who is married and commits Zina. See also Prof.Muhammad Ismail Saleh, *Dictionary of Islamic words and Expressions*, 3rd ed. (Riyadh: Dar-Us-Salam, 2011).

¹¹⁶ Rajm is the sanction of stoning to death for adultery.

only be flogged a hundred lashes and the male is to be flogged and exiled. According to other scholars if she is exiled, she must be with a mahram¹¹⁷.

In Islamic law, the witness and confession are manifest evidences because the truth in it is predominant, particularly when it concerns the proof of injury and incrimination. As arriving at certain knowledge is difficult, obvious evidence is held sufficient. When the four witnesses testify that a man and woman have committed Zinā, the Imām then asks them questions about Zinā, as to what it is and how it is committed, where and when did he commit and with whom he committed Zinā. The Prophet (p.b.u.h) required an elaboration from Ma'iz¹¹⁸ about the commission of Zinā and about the woman with whom he committed it. An exhaustive investigation is to be made to find a way to avoid the hadd (punishment). For confession it is very important that it should and must be made by major and sane person. The person has to do this four times in four different sessions, with the Qadi (the judge), rejecting his confession each time. According to al-Shafi a single confession is sufficient, on the analogy of remaining rights. But according to the confession of Ma'iz (God be pleased with him), the Prophet (p.b.u.h) delayed the implementation of the hadd till the confession was made by him four times in four sessions. He (p.b.u.h) would not have delayed the matter for the proof of implementation if less was sufficient to bring out the truth. If a person retracts his confession prior to the execution of hadd or during it, that retraction is to be accepted and he or she is to be released. Only

¹¹⁷ Imam 'Ibn Hajr, *Bulugh Al-Maram Min Adillat Al-Ahkam*, trans. Dr. Nancy Eweiss (Egypt, El-Mansoura: Dar Al-Manarah, 2003), 451-454.

¹¹⁸ It is recorded by Abū Dawud. Another tradition conveying a similar meaning is also recorded by Abū Dawud as well as al-Nasā'ī. *Al-Zayla'ī*, vol.3, 308.

according to Al Shafhi‘i and ‘Ibn Abī Laylā¹¹⁹, the hadd is to be implemented because it became binding through his confession, thus, it is not annulled due to his denial. When hadd becomes obligatory and the zani is a muhsan¹²⁰, he is to be punished with stones till he is dead. The basis is that the prophet (God bless him and grant him peace) ordered the stoning of Ma’iz, who was a muhsan¹²¹.

The Islamic legal system requires the adulterer to be stoned in order that he or she may be tortured and taste the pain of the punishment. The wisdom behind the punishment is that the body ought to be punished to the extent that it derived pleasure¹²².

3.3 RAPE (ZINĀ -BIL-JABAR) IN ISLAMIC LAW

Adultery is treated as a crime and forcible commission of the offence (Zinā-bil-jabar) as an additional crime in Islamic law. The crux of the offence of rape is that the sexual connection takes place without the approval of the woman. Non-consent is therefore the substance of the offence. In the offence of rape, the consent is not present or it has been acquired by placing the victim under the fear of injury.¹²³ In Islamic law, no legal punishment is provided for the one who has been coerced. It has been narrated from Abdūl-Jabbār bin Wa’il that his father said:

¹¹⁹ Abū ‘Īsā ‘Abd al-Raḥmān Yasār al-Anṣārī al-Kūfī (d. 83/702), known as ‘Ibn Abī Laylā, was a Shiite faqih, judge, reciter of the Holy Qur'an, and muhaddith.

¹²⁰ Adult, free, Muslim, and having been married, a man having these qualities is called muhsan and a woman muhsanah.

¹²¹ Burhan al-Din al-Farghani al-Marghinani, *Al-Hidayah: The Guidance*, trans. Imran Ahsan Khan Nyazee, Vol. 1&2 (Lahore: Federal Law house, 2015), 1228-1233.

¹²² Abee Zakariyyah Muhyee Al-Deen Yahya Al-Nawawee, *An Explanation of Riyadh al-Saliheen. from the Words of the Master of the Messengers*, trans. Sajad ‘Ibn Abdur Rahman (Jeddah: House of Knowledge, 1998), 254.

¹²³ Zafar Hussain Chaudhary, *Islamic Law of Hudood and Tazir*, 44.

“A woman was coerced (i.e., rape) during the time of the Messenger of Allah. He waived the legal punishment for her and carried it out on the one who attacked her¹²⁴”.

It is also indicated by the statement of Allah that coerced woman is not liable for the punishment of illegitimate carnal conjunction.

The intimidation of violence or captivity or actual application of force can be considered as coercion. The classical jurists take into account the responsibility of the coercer toward the person compelled and any third person who has been affected by the act. According to the Hanafīs, if the conduct is performed under duress of the highest form, the will of the coerced would be viewed as vitiated, and if such an act can be appropriately accredited to the volition of the coercer, at that point the law would treat the volition of the former as if it did not be existent and refer the result to the volition of the latter. In other words, the coerced person would be considered as an instrument of the coercer. On the other hand, if what has happened is not capable of being attributed to the coercer, then the coercer will not be said responsible. According to Imām Abū Hanifa, the coercer would be liable in all the cases, while according to Imām Zafar, the person who has done any crime under coercion will also be held liable for that crime. In the opinion of Imām Shafhi‘i, the coercer would be held liable in all the cases¹²⁵. It was by Abū Suhail Nafi' ‘Ibn 'Abd ar-Rahman that a slave was appointed to look after the slaves and their girls. He raped one of them. Umar bin Khattāb whipped him and dismissed him. He did not order that girl to be

¹²⁴ See Ahadith No. 2598, One Who is Coerced. See also, *Sunan ‘Ibn Majah Al Quran*, trans. Nasiruddin al Khattab, ed. Hafiz Abū Tahir Zubair Ali za’i, Compiled by Imam Muhammad Bin yazeed, vol.3 (Riyadh: Darussalam, king Fahd National Library, 2007) 489.

¹²⁵ Sir Abdul Raheem, *The Principles of Muhammadan Jurisprudence* (Lahore: Manzoor Law Book House, 2016), 355-357.

whipped because she had surrendered under coercion¹²⁶. Furthermore, if a person is coerced by the Sultan to commit Zinā and he does it, he will not be exposed to hadd. Imām Abū Hanifa used to say that he is to be awarded hadd and this was the view of Imām Zafar as well. The reason behind this opinion is that intercourse on the part of male is not possible without the erection of the penis, and this erection is an evidence of consent. Thereafter, he retracted his opinion and held that there is no hadd for him as there is an existence of a cause of duress and erection sometimes occurs without the intention, as it occurs naturally and not voluntarily, like in the case of sleeping. According to Imām Abū Hanifah, if the coercion is by a person other than the sultan, then he will be subjected to hadd. According to Imām Abū Hanifah and Imām Zafar, if two witnesses testify that he had intercourse with so and so and coerced her while another two testify that she submitted willingly, the hadd is to be waived from both. All the jurists agreed on this point that in case of coercion woman will not be subjected to hadd¹²⁷.

The word ikrāh is used under Islamic Law to describe coercion. Ikrāh has been split into two sub-categories. The first one is ikrāhta'am in which person has not given permission, nor is he in any place to deny the coercer. This is known as unconditional ikrāh or complete coercion. The second kind is that of ikrāh naqis or inadequate coercion, where the consent has not been given by coerced, but the effects of refusal are not so frightful¹²⁸. The four foremost schools of thought, i.e., Hanafi, Malik, Shafi and Hanbali, explain that the circumstances of ikrāh starts from the point when one

¹²⁶ Imam Malik, *Muwatta*, trans. Muhammad Rahimuddin (Lahore: Muhammad Ashraf Publishers, 1980), 354.

¹²⁷ Al Marghinani, *Al Hidayah: The Guidance*, 1257-1265.

¹²⁸ Abdul Qadir Au'dah, *At-Tashree' Al-Jinai Al-Islami* (Beirut: Musawwamat ur Risalah, 1997), 1:563-564.

that is coerced to perform the prohibited act is wracked with terror. Later on that moment, he will not be dealt as a regular offender, but under the rules of ikrāh provided that the threat is physically possible. As such victim actions were not his own, so he is not liable to any kind of punishment. However, if the victim considers himself to be a mukrih (one who is coerced) yet the situation is such that may easily be avoidable, so he may perhaps still be held legally responsible for he had the chance to escape it. In such a case the mental capacity of the mukrih will be considered before making a decision. There is a unanimity among all most important schools of thought that murder cannot be taken under the circumstance of ikrāh. One is not permitted to take other's life, even under coercion¹²⁹.

According to Imām Abū Hanifah, Imām Muhammad and Imām Yusuf, the nuptial of a man and a woman, who committed Zinā, will itself not have any effect on the hadd penalty. Thus, it will not be waived. Furthermore, if Zinā results in a death of a woman then the offender will be liable for both hadd¹³⁰ and diyat¹³¹. According to Imām Mālik, the bride-price is necessary to be paid by the man who rapes a free female, either virgin or non-virgin. In case a victim is a slave girl then the offender should recompense what he has decreased of her value. The hadd sentence is only for the rapist not for the raped woman¹³². Both Hanafi and Maliki schools agreed on the point that the adult male offender has to receive the hadd penalty for an act of rape, but the female will be held innocent and relieved of the hadd punishment. In the

¹²⁹ Abdul Qadir Au'dah, *At-Tashree' Al-Jinai Al-Islami*, 1:564. See also Ruba Saboor, "Rape Laws in Pakistan: Will We Learn from our Mistakes", *Islamabad Law Review* 1, no.1 (2016): 66-67.

¹³⁰ *Badai al-Sanai fi Tarteeb al-Sharaii*, Imam Abū Bakar Ala al-Din Kasani, trans. Dr Mahmood Ul Hasan Arif, vol.1 (Pakistan, Lahore: Research Center, 1993), 177-176.

¹³¹ It is the monetary redress paid to the victim or successor of a victim in the instances of murder, physical injury or property damage.

¹³² Imam Malik, *Muwatta*, trans. Muhammad Rahimuddin.

vision of the Malikis, an act of rape includes both fornication, and a usurpation of sexual property. Accordingly, not only God’s rights are violated, but also the interpersonal rights (ḥuqūq ādamīya) of the ravished female herself, so her rights also have to be satisfied. They argued that an offender should not only receive the hadd punishment in fulfillment of God’s right, but he should also compensate the victim by the amount which she would customarily receive in an altercation of her right to sexuality on the marriage that is, a fair amount of dower (sadāq al-mithl)¹³³. For Hanafi scholars, the ḥadd punishment and the dower compensation cannot be applied at the same time. The classical Hanafi scholars explain the incompatibility of the ḥadd and the dower in terms of the mutual exclusivity and hierarchy between the rights of God and the rights of persons. So in a case of rape, the divine right has to take precedence where there had occurred both a transgression against God and also an infringement against a human being. Hanafi jurists also argued that the cohabitation in the context of rape is not to be compared with cohabitation in the context of marriage. Whereas classical Maliki jurists conceived that the ḥuqūq Allah and the ḥuqūq ādamīya do not exist in a hierarchy, but rather on a par¹³⁴. According to the opinion of “Ibn Qudama” the penalty of illicit sex involves only a God’s right and he further argued that it does not raise any private interests, instead maintains the common good¹³⁵.

In the Hanafi perspective, rape only consists of Zinā, it is the responsibility of the court to decide whether Zinā had taken place or not and then whether the female

¹³³ Temel Ücüncü, “Law making in Islam”, (Masters diss., Canada, McGill University, 2016), 59.

¹³⁴ Hina Azam, *Sexual Violation in Islamic law: Substance, Evidence, and a Procedure* (New York: Cambridge University press, 2015), 142-334.

¹³⁵ ‘Ibn Qudamah, al-Mughnī, 8:284-285. See also Anver M. Emon, “Ḥuqūq Allāh and Huqūq al-‘Ibād: A Legal Heuristic for a Natural Rights Regime”, *Islamic Law and Society* 13, no. 3 (2006): 344.

participant had consented or resisted. If the court cannot categorically find that Zinā had occurred, then the charges will be dismissed, and the ḥadd punishment will be averted from him. The Muslim school authorities have not proposed any lesser discretionary punishment in cases of inadequate evidence for Zinā. According to Maliki jurisprudence, rape is a crime that equally consists of an action of Zinā and an usurpation of sexual property, or ighṭiṣāb. The court has to make an independent determination about both fornication (Zinā) and usurpation of sexuality (ighṭiṣāb). If the criteria for Zinā is fulfilled, then the perpetrator would have to take the ḥadd sentence, and if the criteria for ighṭiṣāb are also met, then he would pay the damages to his victim¹³⁶.

Under Islamic law, the woman who is forced to have sex is forgiven for engaging in Zinā. The juristic principle is that one is not morally and legally liable for sexual act carried out without her will. Under Islamic Law, both consensual and coercive unlawful forms of sex are called Zinā, but the Prophet differentiated between them. For instance, according to the Hadith, the Prophet punished a man who had committed Zinā but did not administer the same punishment to a woman who had been forced to do so. This distinction indicates the extent to which Islam and the Islamic legislation give great honor and dignity to women. A report on rape, which occurred during the period of the Prophet, shows us that a woman who was on her way to the mosque. She was attacked by a man who committed Zinā with her and ran away afterwards. The woman shouted and asked for help. A group of people passing by heard her and ran after the man and caught him. The woman recognized the man and confirmed him as her rapist. The man was taken to the Prophet, who condemned

¹³⁶ Marie. A Failing, Elizabeth R. Schiltz, and Susan J. Stabile, *Feminism, Law, and Religion* (United Kingdom: Ashgate Publishing Ltd., 2013), 335-336.

him for being stoned. Later, another man showed up, who confessed that he was the real committer. Then the Prophet ordered the first man to be released and the second one to be stoned. No punishment was imposed on the woman¹³⁷. Likewise, in another report, a man confessed before Abū Bakr that he had committed Zinā with a slave woman by force. He imposed the sentence on man, but did not punish the woman. Another similar case is a report on Zinā committed during the time of Umar bin Khattāb, where a man had Zinā with a woman by coercion and also injured her. The caliph imposed flogging on him and recommended to compensate all the damages caused by the injuries inflicted to the woman by him. This indicates that rape is a crime under the Islamic law, which suggests that the victim should not receive any punishment, but rather the perpetrator should be punished for being guilty of rape¹³⁸.

According to early Islamic legal systems, only the culprits of coercive Zinā may receive punishments which include flogging, exile and stoning. There is no punishment for women being compelled to have sex. According to Shiite jurists, the intensified version of Hadd punishment for Zinā, which is a death penalty, should be inflicted on the coercing party irrespective of being married or single¹³⁹.

According to Hanafi jurists, an act of fornication could be proven through two methods. One was confession by a participant to the act. The other was the testimony of four sane, upright, mature, male eyewitnesses to the act itself, called bayyina. This testimony had to be concurrently presented and contain no discrepancies about the

¹³⁷ Present in many variants; this is from Abū Dawud, Sulaymān B. Al-Ashath Al-Sijistani, (D.275/889) Sunan, 3 Dar al-Kutub al-`Ilmiya, 1996. See also Hajar Azari, "Protection of women victim of rape: Islamic and international legal perspectives," (Ph.D. diss., Tilburg University, 2014), 57-60.

¹³⁸ *Sahih Al Bukhari*, trans. Dr. Muhammad Muhsin Khan, Vol.9 (Riyadh: Darussalam,1997), 63.

¹³⁹ Syed Ahmed, *Law Relating to Fornication (Zina) in the Islamic Legal System: A Comparative Study* (India: Andhra Legal Decisions, 1999).

time and location at which the act had occurred, or about the identities of the participants. Witnesses also had to agree as to whether the cohabitation was consensual or non-consensual. Malikis allowed rape victims to support their claims based on the testimony of only two witnesses (rather than the four required for Zinā) and through the use of the oath and counter. Also, categorizing rape as an interpersonal violation allowed jurists to admit to the use of circumstantial evidence. Jurists listed several types of acceptable circumstantial evidences, such as testimony that the victim had been heard screaming or crying for help, that she was seen being taken into isolation by someone, that she reported being assaulted and, or identified her assailant in a timely fashion, that she was bleeding, or that traces of an assault could be seen on her. If coercive Zinā could be proven with certainty, then the ḥadd and dower fine would both be applied. But even without proof of Zinā, if sexual assault could be shown through the use of indirect evidence to have probably occurred, then a lesser discretionary punishment could be applied along with the dower fine¹⁴⁰. Whereas the Shiite perspective is, if the victim claims that she has been raped, the judges have to accept it and the other party should prove otherwise. Thus, there is no burden of proof on the victim, but on the accused, who would have to prove that it was a consensual relation. The majority of Shiite jurists and some Sunni jurists agree that judges can apply their knowledge, using circumstantial evidence, in all claims including civil and criminal cases¹⁴¹. Some jurists stressed that Islamic law has not merely characterized rape as a distinct criminal offense under hirabah and jirāh, but has as well permitted civil compensation to victims. The incorporation of

¹⁴⁰ Marie. A Failing, Elizabeth R. Schiltz, and Susan J. Stabile, *Feminism, Law, and Religion*, 335-336.

¹⁴¹ Hajar Azari, "Protection of Women Victim of Rape; Islamic and International Legal Perspectives", 83-84.

rape within the purview of hirabah has support throughout the Islamic history. The sexual independence and pleasure is an essential right of both men and women, so taking this right by force is therefore a form of hirabah¹⁴². Hirabah is another hadd crime mentioned in the Quran. The offense of rape appears under the debate of the crime of hirabah. An analysis of the traditional explanation of hirabah discloses that rape precisely contains several forms. The famous Muslim jurist “Ibn Hazm” a follower of the Zahiri school while defining hirabah includes rape in it. Lastly, four witnesses are not necessary in the case of hirabah to verify the offense, unlike Zinā. The circumstantial evidence, expert testament and the most possible forms of the evidences are used to litigate such crimes¹⁴³. According to Al -Dasuqi¹⁴⁴ if a woman is required by any person to commit sex then the action of such person would be taken as committing hirabah. Furthermore, a Maliki judge, Ibn Arabi narrates a story in which a group was taken on and a woman part of that group was raped. There were arguments that hirabah crime was not committed as no weapons were used and no money was taken, while responding to this he replied angrily that hirabah with a secretive part is far eviler than hirabah including the taking of money¹⁴⁵. Islamic law also establishes an opportunity for civil compensation for a rape victim in its law of

¹⁴² Abū Ḥāmid Muḥammad ‘Ibn Muḥammad al-Ghazali, *Iḥiyā’ ‘ulūm ad-dīn*, See also The Revival of the Religious Learnings, Imam Ghazzali’s Ihya Ulum Al-din, trans. Fazl-ul-karim (Karachi: Darul-Ishaat, 1993) and Uzma Mazhar, “Rape and Incest: Islamic Perspective” (2002) <http://nuralislaamarticles.tripod.com/id116.html>

¹⁴³ Sayed Sabiq, *Fiqh-Us-Sunnah: Chapter on Hudood*, 10th ed. (1993),450- 447. See also Iftikhar Murshed, “The Hudood Ordinances of Pakistan and the Denial of Justice”, Criterion Quarterly 5, No.1(2012).

¹⁴⁴ Al-Dasūqī, Burhān al-Dīn Ibrāhīm b. Abī al-Majd ‘Abd al-‘Azīz (or ‘Abd al-Majīd) (mid to late 7th/13th century), was an Egyptian Sufi saint and Imam and the founder of the Desouki order.

¹⁴⁵ Abdullah R. Muhametov and Laila-Olga, *Love and Sex in Islam: Collection of Fatwas and Articles* (Bloomington: Booktango, 2013), 313-316.

jirāh (wounds).¹⁴⁶ Under the classical Islamic jirāh jurisprudence the injury to a sexual part thus enables the person to suitable pecuniary compensation. Thus, according to all schools of Islamic law where a victim is injured through sexual intercourse, she is authorized to monetary reparation for the injury. This classification would deliver financial advantage to every single rape victim who has suffered any damage to her body as a result of the rape¹⁴⁷. According to Imām Mālik, if a female accuses a faithful and righteous man for rape and not produce any eyewitnesses or corporal proof, then she is legally responsible for the penalty of qadhf. On the other hand, if the defendant is famous for his hostile behavior, then it is the judge who has to decide the reliability of the woman's statement. But Ibn Hazm repudiated the Maliki interpretation that the behavior of an accused must not upset the decision of a judge. He argues that a rape victim should not be regarded as making a false allegation. She must provide strong proof to support her claim and then the accused has to be penalized consequently and just in case she is not able to provide ample evidence, then the oath should be taken by the accused that he did not force her into any action. Afterward the two parties are not liable for any punishment¹⁴⁸.

Furthermore, according to the Hanafī and Hanbali school, fornication and adultery establish affinity. Therefore, he who establishes illegitimate sexual relation with a woman, the mother and daughter of that woman will become haram for him, and that woman will be haram for his father and his son. But according to Imām Shafhi'i, the illegitimate sexual intercourse does not establish affinity, and Imām Yusuf also

¹⁴⁶ Abū Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Maqdisi, *Al Mughni Ala MukhtasarAl-Khirqi*, (Dar al-Kutub al-Ilmiyyah, 1994), 3.

¹⁴⁷ Asifa Quaraishi, "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): 317-318.

¹⁴⁸ *Zina Rape and Islamic Law: An Islamic Legal Analysis of the Rape Laws in Pakistan* (United States, Washington: Karamah: Muslim women Lawyers for Human Rights, 1993), 12-14.

disagreed with this notion. There is a disagreement among the classical jurists regarding the prohibition raised by sexual intercourse outside the wedlock. According to Imām Shafhi'i, unlawful sexual intercourse with a woman does not forbid marriage with her mother or her daughter or her marriage with the offender's father and son. According to Imām Abū Hanifah, unlawful sexual intercourse makes illegal what is illegal by marriage. Imām Mālik has an opinion similar to Imām Shafhi'i and 'Ibn –al-Qāim has an opinion identical to that of Abū Hanifah¹⁴⁹.

3.4 PREGNANCY AS A RESULT OF UNLAWFUL SEXUAL INTERCOURSE

If the pregnancy occurs outside of marriage, the woman may possibly undergo psychological or physical violence as a punishment for getting pregnant. Such violence may be carried out against her by family members. If a pregnancy is a result of unlawful sexual intercourse, either it's by Zinā or Zinā bil -jabar, Islam requires a good treatment with such pregnant woman. It is stressed upon to treat her nicely, as in such cases the relatives of that woman usually keep cursing her and utter other calumnious remarks about her. Observing any such remarks is considered as inflicting an injury on her heart, which is an atrocity, and thus unfair and not permissible in Islam. In Islamic law, no punishment is to be inflicted on the pregnant woman until she has given birth, even if she was unmarried. A juhainah woman approached Prophet Muhammad "sallallahu alayhi wa Salaam" while she was pregnant as a consequence of adultery. He called her guardian and said, "Be good to her, and when she delivers, bring her back to me." This reveals Islam has always encouraged a good

¹⁴⁹ Dr. Tanzeel Ur Rahman, *Majmua Qawaneen E Islam*, Vol.1 (Pakistan: Tahqiqaat E Islami, Int. Islamic University Islamabad, 1965), 202-205.

treatment with pregnant women, even if their pregnancy is a result of adultery¹⁵⁰. According to Islamic perspective, women make up one half of the society, so should be processed with carefulness, sensitivity and love¹⁵¹.

According to the majority of jurists, it is not allowable to marry a woman who is pregnant until after the pregnancy ends, in order to avoid the confusion of parentage. They consider such marriage as invalid. According to Imām Abū Hanifah, Imām Ahmad bin Hambal and others, it is permissible to do the marriage contract with a woman who is pregnant as an effect of Zinā and to have a sexual intercourse with her after getting married, if he is the one who has committed Zinā with her. But if the pregnancy is a result of Zinā committed by some other person, then the marriage will be valid. But it is required that the husband does not have sexual intercourse with her until the delivery of the child¹⁵².

According to Imam Abū Hanifa, an unmarried or married pregnant woman who claims to be raped is under no obligation to provide available strong evidence of her rape or marriage. Her words solitary are sufficient evidence. The Hanafī scholars acknowledged her sole words and did not demand her to establish evidence whatsoever for her allegation. They also specified that if the concerned man refutes the woman's claim, then there is no case even if she acknowledges four times that she has committed Zinā with the person she names. They claimed that the action of Zinā could not probably happen without the strong (physical) involvement of the man.

¹⁵⁰ Muhammad bib Ismail Al Sanani, *Bulugh Al-Maram: Attainment of the Objective*, 2nd ed. Compiled by Al-Hafiz 'Ibn Hajar Al-Asqalani (Saudi Arabia, Riyadh: Darrussalam, 2002), 393.

¹⁵¹ Haifaa A. Jawad, *The Rights of Women in Islam: An Authentic Approach* (New York: St. Martin Press, INC.,1998), 11.

¹⁵² Dr. Tanzeel Ur Rahman, *Majmua Qawaneen E Islam*, Vol.1 (Islamabad: Tahqiqaat E Islami, Int. Islamic University Islamabad, 1965), 202-205.

Since the man repudiates the action of Zinā then the act itself turn out to be inconceivable¹⁵³. Ibn Hazm introduced a new procedure to manage this status quo and to hold the loss to a lower limit. He is of the belief that when a woman comes to the court blaming a person for rape, instead of taking it as a fallacious charge, she ought to be seen upon as a plaintiff in quest of justice. This would free her from the accountability of qadhf, hence releasing her of any terror from forthcoming court proceedings. There are two ways of action as a plaintiff: (1) a strong evidence be provided to corroborate her allegation, and if produced, the respondent be penalized therefore (2) if she is unsuccessful in providing an appropriate evidence, then it would be necessary for the man to take a vow, swearing that he did not rape her neither did he constrain her to manage anything without her consent. Once the oath is made both parties would be free from any punishment whatsoever¹⁵⁴.

3.5 ILLEGITIMATE CHILD (WALADŪ ZINĀ)

A child who is an offspring of a man and his wife or of man and his slave, is a legitimate child and other offspring is the offspring of Zinā under Islamic Law.

In pre-Islamic period, a child who was a result of illegal affair used to be considered of the same man due to whose affair it was born. Following the same custom of the period of ignorance, Sa'ad bin Abū Waqas wanted to have the guardianship of the child born to a female slave of Zam'ah, a legal child of his brother. Abd bin Zam'ah

¹⁵³ Muhammad b. Ahmad b. Abi Sahl Abū Bakr al-Sarakhsi, *Kitāb al-mabsūt*, Vol.9 (Reprint. Beirut: Dar al-Ma'rifah, n. d), 99. See also *Zina, Rape and Islamic Law: An Islamic Legal Analysis of the Rape Laws in Pakistan* (Washington: Karamah: Muslim Women Lawyers for Human Rights, 1993), 12-14.

¹⁵⁴ Abū Muḥammad 'Alī 'Ibn Aḥmad 'Ibn Sa'īd 'Ibn Hazm, *Al-Muhallā bi'l Athār*, Vol. 12 (Beirut: Dar al-Kutub al- 'Ilmiyyah, 1988). 261-262. See also *Zina Rape and Islamic Law: An Islamic Legal Analysis of the Rape Laws in Pakistan*, 13-14.

had the opinion that legally child was his brother regardless of the fact who should be the real father, because the child was a son of female slave of his father. The apparent features showed that child was born of Sa'd's brother, but according to Islamic Shariah, he was regarded the brother of Abd bin Zam'ah. It was ruled out by the "prophet (p.b.u.h)" that child belongs to the bed and fornicator gets nothing, he has nothing to do with the child. He is deprived of all legal benefits from the child, like inheritance etc.¹⁵⁵

The maternity is a lawful relationship between the mother and the child; it is immaterial whether the child is offspring of Zinā, or marriage. A child who is born as a consequence of Zinā will be considered to be the child of the mother and will inherit from her and her relations. But the man will not be considered a father and the child will not inherit from him. The paternity is only established by marriage¹⁵⁶. A child who is born within 6 months after marriage will also be considered illegitimate. According to Imām Abū Yusuf the maximum period of pregnancy is 2 years¹⁵⁷, and according to Lais bin Sad it is 3 years, and according to Imām Shafhi'i it is 4 years, and according to Alzuhri it is 7 years, and the minimum period is 6 months. Under Hanafi law, the mother is entitled to inherit from the illegitimate child and so can the child inherit from his mother. But under Shia Law, illegitimate child is not eligible to

¹⁵⁵ *Sunan 'Ibn Majah*, trans. Nasiruddin al-Khattab, 146-147.

¹⁵⁶ Saleem Aftab Shaikh, *Principles of Muhammadan Laws* (Lahore: Punjab Law Book House, 2017), 409.

¹⁵⁷ Dr. Hussain Hamid Hassan, *Introduction to Islamic Law* (Islamabad: International Islamic University Shariah Academy, 1997), 230.

inherit from the mother and her relations, nor do they have any right to inherit from him¹⁵⁸.

Neither the child, nor his biological father will have any legal obligations toward each other. For the Shias, an illegitimate child is regarded as a ‘nullus filius’ (the son of no one), and cannot inherit from the father or the mother¹⁵⁹.

3.6 ABORTION

The literal meaning of abortion is the intentional attempt to terminate a human pregnancy, elimination of a fetus from the womb before birth. When it occurs spontaneously, it is likewise called a miscarriage and when it is done purposefully, it is termed as induced miscarriage. The word al-Ijhadh is used for abortion which means to dispose of something and according to the scholars of jurisprudence abortion is the ejection of a fetus from the womb before it grows. Thus, the scholars of Fiqh (jurisprudence) use different terms, such as al-inzal, al-implas, al-ikhraj, al-Isqāt, al-ilqa’a and al-istijhadh for abortion. According to Hanafi jurist Ibn Abidin the act of taking out an embryo from the womb before it ends its evaluation period is called abortion.

Islam is acquainted with the importance and worth of a human life, and admits that it must be secured entirely, as Islam maintains the inviolability of life. There are many Quranic verses which affirm this, such as:

¹⁵⁸ Al-Haj Mahomed Ullah ‘Ibn S. Jung, *The Muslim Law of Inheritance* (Lahore: Law Publishing Company, 1934), 237.

¹⁵⁹ Eva Schlumpf, “The Legal Status of Children Born out of Wedlock in Morocco”, ed. Dr. Andrea Büchler, *Electronic Journal of Islamic and Middle Eastern Law* 4 (2016):14.

"وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِنَ الطَّيِّبَاتِ

وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ مِمَّنْ خَلَقْنَا تَفْضِيلًا"

“ We have honored the Children of Adam, and carried them on land and sea, and provided them with good things, and greatly favored them over many of those we created¹⁶⁰. ”

Though, Islam permits the Muslims to plan their family¹⁶¹. The coitus interruptus was the accepted way of contraception used in the period of the “Prophet (p.b.u.h)”. It is the pulling out of the penis from the vagina just before ejaculation to prevent the entrance of semen.

“Narrated Abū Sa'id Al-Khudri that while he was sitting with Allah's Messenger (an Ansari man came) and said, O Allah's Messenger! We get female captives as our share of booty, and we are interested in their prices, what is your opinion about coitus interruptus?” The Prophet said, “Do you really do that? It is well for you not to do it. No soul that which Allah has ordained to be existent, but will certainly come into existence.....¹⁶². ”

For employing the contraception, there must be a necessity or valid reasons. The fear of health and upbringing of children is also a valid reason. Another valid reason is the apprehension that a previous suckling child might be affected by the new pregnancy or a new baby. The Prophet (p.b.u.h) observes that pregnancy may harm the suckling

¹⁶⁰ Al-Quran, Surah al-Isra: 70, Translated to English by Talal Itani,144.

¹⁶¹ Asaf Ali Asghar Fyzee, *Outlines of Muhammadan Law* (New Delhi: Oxford University Press, 2002), 190.

¹⁶² Abū 'Abd Allāh Muḥammad 'Ibn Ismā'īl 'Ibn Ibrāhīm 'Ibn al-Mughīrah 'Ibn Bardizbah al-Ju 'fi al-Bukhārī, or Bukhārī, *Sahih Al-Bukhari*, trans. Muhammad Muhsin Khan, Vol. 3, (Riyadh: Maktaba Dar-Us-Salam, 1997), 239 and 413.

newborn in the equivalent manner as being thrown off a horse harms a rider, it is damaging but not to the amount of killing the baby. He recommended them to evade intercourse that leads to the pregnancy while the woman is nursing an infant but did not forbid it¹⁶³. The consent is essential for contraception. According to Imām Ahmad bin Hanbal the wife's consent is essential because she has the right both to sexual delight and to choose whether she needs a child or not. It is stated that Umar bin Khattāb outlawed the use of coitus interruptus without the consensus of the wife. This was a notable step on the behalf of Islam on the way to inaugurating the rights of women in an age in which they possessed no rights¹⁶⁴.

According to the majority of the jurists it is mandatory in the situation where the baby was aborted alive and then pass away to pay off the blood money (diyat), while if a baby was terminated dead a fine of lesser amount is to be paid¹⁶⁵. The prophet required that for the dead woman diyat should be paid and it is recognized as ghurrah for the fetus. If the miscarriage is caused intentionally, then besides ghurrah the punishment may possibly also be inflicted as tāzir under the siyāsah jurisdiction of the head of state. If the abortion is induced by the pregnant woman herself then in such case jurists generally assume that the ghurrah is to be paid whether to the remaining heirs of the fetus or to the father of the child¹⁶⁶.

¹⁶³ Yusuf al-Qaradawi, *The Lawful and The Prohibited in Islam: Al-Halala Wal Haram Fil Islam*, trans. Kamal El-Helbawy, Muhammad Moinuddin Siddiqui and Syed Shukry (America: Trust Publication, 1994), 193-194.

¹⁶⁴ Sunan 'Ibn Majah, trans. Nasiruddin al -Khattab, 105.

¹⁶⁵ *Sunan 'Ibn Majah*, trans. Nasiruddin al -Khattab, 519.

¹⁶⁶ Jonathan E. Brockopp, *Islamic Ethics of Life: Abortion, War and Euthanasia* (Columbia: University of South Carolina press, 2003), 21-25.

The Prophet (p.b.u.h) levied the payment of diyat and ghurrah both on the Aqilah¹⁶⁷ of the female offender. In the occasion in which pregnant woman was struck to the pole that killed her and her fetus, aqilah of the woman offender was required by the prophet (p.b.u.h) to pay diyah for deceased woman and ghurrah for the fetus¹⁶⁸. Furthermore, according to Imām Mālik, anything appears at miscarriage, from which it can be determined that it would have been a child the ghurrah is required to be paid. Whereas according to Imām Shafi’i, ghurrah is mandatory when it becomes evident that it was a child, for it is better to consider the manifestation of spirit. Otherwise nothing is to be paid¹⁶⁹.

The right to life is guaranteed in all legal systems, whether religious, national or international. The “Universal Declaration of Human Rights¹⁷⁰” says that everyone has the right to life, liberty and security of person”. The “ International Covenant on Civil and Political Rights¹⁷¹” says that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. The right to life is also guaranteed by the “Constitution of Pakistan 1973”¹⁷².

Is abortion, which constitutes a disruption of pregnancy, establishes a violation of the right to life? To resolve this query, we have to answer when does life begin? Or when

¹⁶⁷ If member of one tribe was killed by another tribe, the blood money will be paid to heirs of the victim by the next of kin of the killer. The next of kin of the killer is known as al-’aqilah.

¹⁶⁸ Imran Ahsan Khan Nyazee, *The Rules of Causing Abortion and Causing Miscarriage: Isqāt-i-Haml and Isqāt-i-Janin in the Pakistan Penal Code* (Fatwa Issued for virtual Shariah court, 2012), 4- 5.

¹⁶⁹ ‘Ibn Rushd, *The Distinguished Jurist’s Primer: Bidayat al-Mujtahid wa Nibayat al-Muqtabid*, trans. Imran Ahsan Khan Nyazee, 502-503.

¹⁷⁰ The United Nations General Assembly at its third session on 10 December 1948. See Article 3.

¹⁷¹ A multilateral treaty by the United Nations General Assembly with resolution 2200A (XXI) on 16 December 1966, and effective from 23 March 1976 in line with Article 49 of the covenant. See Article: 6.1.

¹⁷² The Chapter 1 of the Constitution, See article 9.

does the existence of a soul begin? But no international document indicates it. The Quran and Sunnah are the two foremost roots of Islamic jurisprudence. Both sources include elements related to the establishment of the human fetus (Janīn) and elements that classical Muslim jurists used to describe the origin of life. All Muslim jurists agree that if the abortion is done after the rūh is given to the fetus then it is prohibited. In the occasion where the fetus is aborted prior the rūh is given, there is a conflict of view amongst the Muslim jurists about it. Few of them validated it and others have forbidden this subject to the stage of pregnancy¹⁷³.

The five different phases of embryonic growth are described in the Quran, as:

" وَلَقَدْ خَلَقْنَا الْإِنْسَانَ مِنْ سُلَالَةٍ مِّنْ طِينٍ ثُمَّ جَعَلْنَاهُ نُطْفَةً فِي قَرَارٍ مَّكِينٍ ثُمَّ خَلَقْنَا النُّطْفَةَ عَلَقَةً فَخَلَقْنَا الْعَلَقَةَ مُضْغَةً فَخَلَقْنَا الْمُضْغَةَ عِظَامًا فَكَسَوْنَا الْعِظَامَ لَحْمًا ثُمَّ أَنْشَأْنَاهُ خَلْقًا آخَرَ فَتَبَارَكَ اللَّهُ أَحْسَنُ الْخَالِقِينَ "

“We created man from an extract of clay. Then we made him a seed (nūtfah), in a safe repository. Then we established the seed into a clot (‘alaqah), Then We developed the clot into a lump (mudhghah), Then We developed the lump into bones (‘idham), Then We clothed the bones with flesh (lāhim). Then we produced it into another creature. Most blessed is God, the Best of Creators...”¹⁷⁴

The term nūtfah according to hadith and jurisprudence talk about both the male sperm and the fertilized embryo. The nūtfah is a matter which, when positioned in the womb, relaxes down in it for forty days. The first stage is nūtfah which starts with

¹⁷³ *Islamic Verdicts: Cloning, Human Organ Transplantation Abortion, Test-tube Babies, Life Support Systems, Life & Death* (London, Gloucester Road: Al-Khalifah Publications, 1999), 31.

¹⁷⁴ Al-Quran, al-Mu'minun:12–14, Translated to English by Talal Itani, *The Quran* (Dallas. Beirut: Clear Quran, 2012), 174.

conception. The second stage is known as al-alaqah. The alaqah refers to “clinging,” i.e., to the womb wall. It is as well recognized as a stage of clinging. This stage lasts about 2 weeks. Allah described this stage with “creation”. The next stage is of al-Mudhghah (chewed lump). This stage is called as chewing a lump, since the embryo appearances is like it has been masticated by a human mouth. So the three major stages are from the fertilized egg to the start of the small human (0-40 days, roughly) then formation of a tiny human (40-120 days, roughly) and then breathing of the spirit (ensoulment), i.e., 120 days onwards. It is prohibited to harm the fetus. This forbiddance turns out to be more serious after 40 days. The extreme exclusion takes place over 120 days, in this case aborting the fetus would be considered as killing a free human being. Most of the jurists consider abortion as prohibited before the ensoulment. This is the position of the Malikis and Ibadis, Hanafis and Shafi’i Hanbalis and the apparent position of the Zahiris. Some of the Hanafis, Shafi’i, Malikis and Hanbalis permitted abortion before ensoulment, if both the parents consented. Some jurists, including Lakhmi (Maliki) and Abū Ishaq Marwazi (Shafi’i) certified abortion before 40 days, but outlawed it after that. Some Hanafis also permitted abortion before ensoulment with a lawful reason. Some Shafi’i scholars also allowed abortion before ensoulment¹⁷⁵.

At the conclusion of the third stage of growth that is, the mudhghah stage, at 4 months (120 days) of incubation, the rūh is breathed in the body, named wūlūj according to Islamic philosophy. At this stage, the fetus is considered as another creation. At this stage, and afterwards the abortion is unquestionably prohibited except the life of the

¹⁷⁵ Dr. Usama Hasan, *Abortion, Stages of the Embryo and the Beginning of Life*, Summarised from: Dr. Ali Muhyi l-Din al-Qarahdaghi & Dr. Ali Yusuf al-Muhammadi, *Fiqh al-Qadaya al-Tibbiyyah al-Mu’asirah* (Beirut: Dar al-Basha’ir al-Islamiyyah, 2005), 3-8.

mother is endangered by the prolongation of pregnancy¹⁷⁶. It has been mentioned from “Abd Allah ‘Ibn Mas’ud (R) and found in al-Bukhārī’s Sahih”. He said: *Allah’s Messenger (may peace be upon him), said: “The created forms of one of you are gathered in your mother’s belly for forty days, he is then like congealed blood (‘alaqah–clot) like the first; after that he is a lump (flesh) like the previous. Allah then sends His angel to him with four words (decisions). The angel writes down his livelihood, his death, his deeds, his fortune and misfortune. He then breathes the Spirit into him.* ¹⁷⁷.”

The second tradition is from “Ḥudhayfah ‘Ibn Asīd al-Ghifārī,” who said: *“I heard the Messenger of Allah (p.b.u.h) saying: When forty-two nights pass over the nūtfah, Allah sends an angel to it, who gives it form creating his faculties of hearing and sight, his skin, his flesh, and its bones. He then says: My Lord, will it be a male or a female? Your Lord decrees as He desires, which the angel records. The angel then says: My Lord, his duration? Your Lord decides as He likes, which the angel records. He then says: My Lord, his sustenance? Your Lord decrees as he likes, and the angel records it. The angel then leaves with the scroll in his hand without adding to or omitting anything from what was commanded* ¹⁷⁸”.

According to the first tradition, after one hundred and twenty days rūh is breathed into the mudhghah. The second tradition indicates forty-two nights, but does not give the

¹⁷⁶ Bukhari Muslim. Book 80. Al-Faraa’id, Vol. 8. Hadith no: 732, trans. Muhammad Muhsin Khan, (Alexandria, VA: Al-Saadawi Publications, 1996) See also Kamyar Hedayat, Peiman Shooshtarizadeh, and Mohammad Raza, “Therapeutic Abortion in Islam: Contemporary Views of Muslim Shiite Scholars and Effect of Recent Iranian Legislation”, *Journal Med Ethics* 32 (2006): 653.

¹⁷⁷ Bukhari, vol. 6/351.

¹⁷⁸ Muslim, *Ṣaḥīḥ* with Nawawi’s commentary, vol. 16, 193–94.

reference of rūh or the breathing of the Spirit¹⁷⁹. The stages of the embryo and fetus growth are identified as the sperm, also known as nūtfah, then the blood-clot, which is known as alaqah, then the tissue called as mudhghah, then the bone, also known as izām, and lastly the flesh or muscle known as laḥm¹⁸⁰.

It is very essential to recognize the breathing of the spirit because abortion can possibly be performed when the fetus does not so far carry life in it. For this purpose, it is very important to know what is the rūh or spirit. In Islam, al-rūh mainly indicates the vigorous breath of life blown into a living being, which leaves his body at the point of death. There are two types of Al-rūh, the first is known as the lesser death (al-Wafat al-Sugra) which happens in sleep and then the real death (al-Wafat al-Kubra). In both cases, the rūh set off the physical structure, though the nature of this departing is different. Al-rūh is used in the Quran which perhaps means the Quran itself or it may be used to imply Angel Jibril. All the initial religious intellectuals from amongst the Companions of the Prophet (May the blessings and peace of Allah be upon him) and their followers belived on the point that the soul is a generated entity. The concept of its pre-existence is a deceit, presented by the people of modernizations, copying the foreign philosophies to Islam. It is light, nevertheless, that it is something that Allah confers on a child who is about to be delivered. What it is we do not know¹⁸¹.

The question that arises here is whether the fetus has the right to life, and if yes, then at what point? Is it at the point when the God has breathed the soul or at the beginning

¹⁷⁹ Imran Ahsan Khan Nyazee, 12-13.

¹⁸⁰ Muhammad Saīdī Mihr, Amīr Dīvānī, *Islamic Thought (Ma 'ārif Islāmī)*, trans. Abūzar Ahmadi (Tehran: The Ahl al-Bayt World Assembly Publishing and Printing Center, 2011), 168.

¹⁸¹ 'Ibn Sina (980-1037) an-Nafs (The Soul), ed. Fazlur. Rahman, *Avicenna's Psychology* (London: Oxford University Press, 1959) See also Dr. Yusuf Dalhat, "The Concept of al-Ruh (Soul) In Islam", *International Journal of Education and Research* 3, no.8 (2015): 233-234.

of its conception? This leads to the debate of abortion. Some classical jurists adopt a strict position regarding the voluntary abortion and disallow it from the first moment of the conception. According to Imām Al-Ghazali, life originates at the discharge of sperm into the womb of the woman. Nevertheless, the abortion is a more serious offense with the development of pregnancy. If the ejected sperm is attacked it prevents the formation of the human being¹⁸². This view is also adopted by Malikis, some Hanafis and Hanbalis. However, voluntary abortion is allowed by the Shafi's within 40 days (or 42 days, according to some) if both spouses agree and it has been certified by the fair physician that such abortion has no damaging consequences for the pregnant woman and no penalty will be imposed in case of such abortion. But they consider such an abortion as *makrūh* (hateful). The Hanbalis are divided. Some admit voluntary abortion and impose no criminal penalty within 40 days, whereas others permit it within 120 days¹⁸³. The Hanafis are also divided into three groups. Some prohibit abortion from the moment of conception. Others consent abortion within 120 days of pregnancy and some allow it only within 40 days. But the woman commits a sin if abortion is for no reason¹⁸⁴.

Generally Muslim jurists regard abortion prohibited, but not if there is a serious danger to the life or health of the mother. The congenital anomalies which are detected early in gestation may be seen as an acceptable ground for allowing abortion by some jurists. Also, many jurists allow abortion in cases of rape. However, all

¹⁸² Al-Imam Al-Ghazali, *Ihya' Ilm al-Deen (Revival of Religious Sciences)*, 38.

¹⁸³ Abū Abdulla Ahmad 'Ibn Mohammad 'Ibn Hanbal, *Musnad*, trans. Nasiruddin Al-Khattab (Riyadh: Darussalam, 2012) See also Karim Hassanein Ismail Abd-El-Maeboud, "Human Life Cycle and the Beginning of Life: An Islamic Perspective", *Periodicum biologorum 111*, no.3 (2009): 370-371.

¹⁸⁴ Sami Awad Aldeeb Abū-Sahlieh "Abortion in Islamic and Arab Law" (Switzerland: Center of Arab and Islamic Law, Ochettaz 17, 1994), 4.

Muslim jurists come to an agreement that abortion is not allowed, if the age of the fetus is 120 days or more (considered from the start of conception), whether the fetus is malformed or not, or even in incident of rape. This is simply for the reason that 120 days is believed to be the time of ensoulment of the fetus. There are also some jurists who do not permit termination of pregnancy after 40 days of conception¹⁸⁵.

Islamic law does not allow abortion if the pregnancy is the result of adultery. As the Quran says:

" وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَىٰ "

"No burdened soul carries the burdens of another...." (17:15).¹⁸⁶

But if the woman has been raped, the case is different and most authors allow abortion. Such a woman is allowed to keep the child, but if she wants to terminate the pregnancy, then it must be done within 120 days from conception. The earlier the abortion is to the period of conception, the better. But after the specific time period, she is bound to keep the fetus till birth and Muslims should support her in raising her child. According to Al-Boūti¹⁸⁷, abortion can be done in 40 or 120 days, and necessity can be invoked beyond these limits¹⁸⁸. Imām al-Haskafi writes in *Dūrr al-Mukhtār* that abortion is acceptable on the basis of authentic reason, provided the soul has not

¹⁸⁵ Dr. Mohammed Ali Albar, "An Islamic View on Contraception and Abortion", *Journal of the Islamic Medical Association of North America* 21 (1989): 81.

¹⁸⁶ Al-Quran, Surah al-Isra: 15, Translated to English by Talal Itani, *The Quran* (Dallas. Beirut: Clear Quran, 2012), 141.

¹⁸⁷ Mohammed Said Ramadan Al-Bouti was a known Sunni Muslim scholar who was also famous as "Shaykh of the Levant". He was murdered in the Syrian civil war on 21 March 2013.

¹⁸⁸ Sami Awad Aldeeb Abū-Sahlieh, *Abortion in Islamic and Arab Law* (Switzerland: Center of Arab and Islamic Law, Ochettaz 17, 1994), 5.

so far moved in the fetus¹⁸⁹. There exist four key positions on abortion before ensoulment among the schools of legal thought:

- i) Abortion is permissible,
- ii) It is acceptable under definite conditions,
- iii) It is disliked,
- iv) It is not allowed.

Most of the scholars from the Hanafi school permit abortion on condition that the fetus has not been formed under certain reasonable causes. According to Ibn-Abidin, in *Al-Hadiyyah al-alaiyyah*, the Hanafi scholars have endorsed abortion up to the end of four months. According to them husband's consent is not necessary for an abortion, but she should have judicious grounds for this act¹⁹⁰. Granting to the traditional position of the Maliki school, which is expressed by Ibn Juzayyah in his *Kitāb al-qawānin al-Fiqhiyyah*¹⁹¹ that it is not allowable for the husband and wife, or either of them or the master of the slave wife to bring on an abortion when the womb has retained the semen. However, abortion is akin to murder after ensoulment. The bulk of Maliki jurists have labelled abortion as entirely prohibited. In their sight, when the semen settles down in the womb, it is anticipated to grow into a surviving infant and it must not be interrupted by any person. Many Shāfi'ī and Hanbali scholars agreed with the Hanafis in their forbearance of the practice of abortion and some have put a

¹⁸⁹ It is a book on Islamic jurisprudence (fiqh) by 18th century Islamic scholar, Allamah Sayyid Muhammad Amin 'Ibn Abidin ash-Shami. *Radd al-Muhtar* is a "hashiyah" a super-commentary on Imam 'Ala' al-Din al-Haskafi's work of Islamic jurisprudence, *Radd Al-Muhtar ALA Al-Dur Al-Mukhtar*, ed. Lambert M. Surhone, Mariam T. Tennoe, and Susan F. Henssonow, (Betascript Publishing, 2010).

¹⁹⁰ Maria Ulfah Anshor, "Jurisprudence of Abortion: Discourse on Strengthening Women's Reproductive Rights" (Jakarta: Penerbit Buku Kompas, 2006), 93-95, See also Juhansar Andi Latief, "Islamic Ethic and Abortion in The Schools of Hanafiyah and Malikiyah", *Journal Al-Ulum* 10, no.1 (2010), 33.

¹⁹¹ 'Ibn Juzayyah, *Kitab al-qawanin al-Fiqhiyyah*, (Fez: Mataba al Nahda, 1953).

maximum limit of forty days for a legitimate abortion, others eighty days or 120 days¹⁹².

CONCLUSION

Zinā is measured as one of the greatest grievous sins in Islam, and it is addressed in at least twenty-seven verses of the Qur'an. The sentence is equal for culprits, but are separated into categories, Muhsin describes as free men and women, of full age and intellect, who is able to relish legal marriage and non-Muhsin is the one who does not meet these conditions. Islamic law inflicts no punishment on the woman who gets pregnant as an end result of Zinā; in fact, it is stressed to treat her nicely. The child born as an outcome of unlawful sexual intercourse will be considered illegitimate and will belong to the mother only.

Under different schools of Islamic law, rape has been determined as a coercive pattern of illegal sex. Referring to the Quran, one can easily find many verses explicitly condemning Zinā as the differentiating factor in rape is the nonexistence of consent. The Prophet (p.b.u.h) differentiated between consensual and coercive unlawful sex. For instance, according to the various Hadith, the Prophet punished a man who had committed Zinā but did not administer the same punishment for a woman who had been forced to do so. This distinction indicates the extent to which Islam and the Islamic legislation give great honor and dignity to women. The victims are not viewed as committers of the crime and are not exposed to punishment. All the jurists settled on the fact that a coerced woman will not be subjected to any punishment. It can be concluded that rape has been classified under Zinā as a coercive form of unlawful

¹⁹² 'Ibn Taymiyah, *Al-Fatawa al-Kubra*, 5 vols. (Cairo: Dar al-Kutb al-Haditha, 1966). See also Khalid Farooq Akbar, "Family Planning and Islam: A Review", *Hamdard Islamicus XVII*, no.3 (1974):11-20.

sexual intercourse. There are many Qur'anic verses that originally ensure justice and honor for women. Some Islamic legal schools mention payment of compensation in cases of rape and dealing with it as a destruction of property, or ightiṣāb. The rape has also been categorized as the law of jirāh, or wounds, in which rape is understood as a bodily injury.

In case of rape most of the Islamic authors allow abortion at certain stages. In Islam after four months of gestation, the fetus is considered to become a living soul and abortion after that period is generally regarded as impermissible. Each Islamic school of thought has their own reservations on which stage abortion is permissible in Islam. At that place are certain Fuqahā who consider that it is acceptable to take an abortion in the first forty days of gestation. Some of them even allow it till the soul is passed off into the fertilized egg. It is clear that there is no unanimity among the Muslim jurists on the point as to when the ensoulment of the fetus takes place. But they all come to an agreement that after the ensoulment the fetus' right to life originates and abortion is commonly prohibited according to Islamic traditions. The abortion performed before ensoulment at 4 months of gestation is permissible under certain situations and after that with the exception of the danger to life of the mother.

CHAPTER NO.4: RIGHT TO ABORTION FOR RAPE VICTIMS

4.1 INTRODUCTION

The human abortions happened long before this issue was legislated. Different nations deal with the subject of abortion differently based on their distinct traditional backgrounds, interests, as well as their diverse methodologies. Abortion is the most controversial issue of modern times. This chapter shall examine the concept of abortion, views of scholars regarding abortion, circumstances under which abortion may possibly be allowed in different Islamic countries. Muslim scholars around the world have a difference of opinion and they are divided on the grounds that establish abortion legitimate in the perception of the law. The most common justification for legal abortion is a threat to a life of the mother. This point is established on the supposition that it is safer to choose the lesser evil. Making an allowance for rape as one of the reasons for abortion has been intensely argued by Muslim scholars. The phase at which such abortion can be allowed has also correspondingly remained a question of argument. This chapter therefore will scrutinize views of Muslim jurists on the embargoes and exemptions to abortion and the place of abortion in Muslim majority countries will also be analyzed. The orbit of the right to abortion under International Law will likewise be scanned under this chapter. There are some countries which permit abortion without restrictions, while others exclude abortion in general but recognize certain exceptions. The sexual viciousness and abuse are usually widespread in the regions touched by the war and children are often born as a consequence of it. This chapter will also discuss about rape victims during war times,

the right to abortion in this context and also the position of children turned out as a consequence of rape during war. The chapter will end with a conclusion and recommendations along with the practical steps that need to be considered involving the right to abortion.

4.2 A GLOBAL REVIEW OF LAWS ON ABORTION

The pro-life vs. pro-choice is a debate that doesn't seem to have many answers. There are many questions and facts at both sides of the argument. According to some abortion is a women's rights issue, others say it's an issue of morality, and still others an issue of just being right. Every person has an opinion about abortion rights, and it seems that a moral objective has become divided into two different arenas social issues and religious issues. The pro-life movement is that abortion is murder and murder is bad. This movement holds that life begins at the moment of conception. Anything which may disrupt a pregnancy is wrong. On the surface, the pro-life movement seems to impact the reproductive rights of women. The pro-life supporters believe that the law of abortion should not give choice to woman. They believe that all abortions are wrong and that every baby should have a chance to be born. Whereas pro-choice believes women should have the freedom to choose abortion. This group believes abortion is a personally protected choice. They think that prohibition on will increase in back alley abortions, or self-abortions or worse, and that the mother may kill the baby. They believe the fetus is a mass of tissue instead of human. The argument in pro-choice is not necessarily that all women should have abortions, but that women should have the choice whether or not to have one. The Pro-choice is a middle ground and anti-choice is forced motherhood. The pro-choice movement does not advocate abortion over birth-it simply defends the right of women to decide for

them¹⁹³. Abortion for rape is another controversial topic. Babies born of this act are not intended since the sexual act is forced. Pro-life is a group that goes against abortion. They claim human life begins at conception. They believe the unborn deserve life. Even for rape, they believe the child shouldn't be punished for a wrong act¹⁹⁴.

Under Pakistani Law many eventualities have either not been covered by the present law or the law on these point is very much obscure and ambiguous, for example when the pregnancy is outcome of rape, The problem is much serious because it directly affects the public at large and restricting abortion in these cases is denial of free exercise of constitutionally guaranteed rights of life, liberty and human dignity. Therefore, termination of these pregnancies must be allowed in the best interest of public to protect the society from the effect of such atrocious circumstances. Abortion is a subject that arouses passion and controversy. There can be found two extremes on the issue, pro-life, who condemn and pro Choice, who favour the abortion; there is hardly any middle course. Therefore, laws regarding abortion range from complete permission to the absolute prohibition in various jurisdictions depending upon the ethical norms and legal codes. Primarily, abortion raises the fundamental questions about human existence, such as when life begins and what it is that makes us human. Abortion is at the heart of such debatable issues as the right of women to control their own bodies, the nature of the State's duty to protect the unborn, the tension between secular and religious views of human life and the individual and society, the rights of

¹⁹³ UK Essays. Abortion pro-life vs. pro-choice. (2018). Available from: <https://www.ukessays.com/essays/philosophy/abortion-pro-life-vs-pro-choice-philosophy-essay.php?vref=1> [Accessed 20 November 2020].

¹⁹⁴ Warren Quinn, "Abortion: Identity and Loss", *Philosophy and Public Affairs*, 13, (1984):24-54.

spouses and right of the parents to be involved in the abortion decision, and the conflicting rights of the mother and the foetus. And most importantly the central to the subject of abortion is one of the most highly controversial social issues of all, sexuality. Any discussion of abortion almost inevitably leads to a consideration of how a pregnancy came about and ways that the pregnancy could have been prevented. As the time passes, these questions and issues continue to occupy a significant place in public discourse around the world. Under the Roman law the human foetus was not regarded as a legal subject but as merely a part of a woman's body. The foetus had the potential to become a person and the law adopted the "fiction" (a legal term for a binding presumption not necessarily based upon fact) that the unborn person be deemed born whenever it was in its interest to do so, subject to the mandatory condition that child borne alive. Therefore, there was no legal protection if foetus was destroyed or maltreated¹⁹⁵.

The harsh abortion discussions emerged in the Western European public sphere between the late 1960s and the late 1980s. The Western European countries were bound to reconsider their limiting governing rules on abortion due to a rising social awareness of the health hazards in undercover abortions and greater openness on the way to sexuality and gender equality. In the 1960 s, abortion debates emerged in Britain connection to public health apprehensions¹⁹⁶. The factors like lethal backstreet aborticide and the birth of thousands disabled children due to taking drugs during pregnancy, produced a communal backing for reforming the legalization of abortion

¹⁹⁵ Qaisar Abbas, "Pro Life and Pro Choice Debate: A Journey from Restriction to Regulation—Destination Pakistan," *Pakistan Law Journal*, (2009):3-10.

¹⁹⁶ Stephen Brooke, *Sexual Politics: Sexuality, Family Planning and the British Left from the 1880s to the Present Day* (New York, Oxford University Press, 2011), 143.

induction¹⁹⁷. The decision making authority was assigned to the medical system Abortion Act 1967. The Section 1 (1) of the Abortion Act, entitled "Medical Termination of Pregnancy," made a serial publication of legal fortifications for medical specialists carrying out abortions, abstaining completely from rights discourse or the obligation of moral weight either to the women's choice or the fetus's life¹⁹⁸. Furthermore, in public hospitals the standard gynecological service was offered rather than in private clinics in order to limit the possibility of protest against abortion clinics. Likewise, attempts to resist this Act in courts encountered a disinclined judiciary. The British court remarked that this Act has placed excessive social accountability on the shoulders of the medical occupation, so it would be pretty unmanageable for the courts to administer the procedure of the Abortion Act 1967, only an imprudent judge would pursue to interfere¹⁹⁹. In the late 1960s the abortion reforms occurred in the France. The call for the revision of reproductive regulation with the query of abortion was generated due to factors like the varying role of women, developing sexual openness, over-population and life-imperiling secret abortions. The French government introduced the "Voluntary Interruption of Pregnancy Act" in 1975 whose moral effect was considerably one of prevention as one of liberalization²⁰⁰. The abortion was declared medically lawful up to the tenth week of gestation in a case where a woman was in a state of anguish. Before the abortion procedure mandatory counseling was required stressing on family-concerned

¹⁹⁷ *Offences Against the Person Act: 1861, 24 & 25 Victorle, cap. 100*, see Section 58 (England: Bernard Thimont, 1861), 832.

¹⁹⁸ Alec Samuels, "The Abortion Act 1967: Tthe Legal Aspects," *Medicine, Science and the Law* 9, no.1 (1969): 3.

¹⁹⁹ *Paton v. British Pregnancy Advisory Service Trustees*, (1979) Qu een's. Bench Division 276,6.

²⁰⁰ Maggie Allison, "The Right to Choose: Abortion in France," *Parliamentary Affairs* 47, no.2 (1994): 223-230.

strategies and optimistic options for pregnancy²⁰¹. In Germany abortion was law-breaking until 1970s. After the long-lasting and strong parliamentary negotiations, a narrow preponderance endorsed abortion in the early trimester on the condition, that it needs be done by a doctor with the permission of the woman succeeding required counseling. The Christian Democrats challenged this politically-sensitive legislation at the Federal Constitutional Court²⁰². After the prolonged session of discussions, a considerable majority of the unified Bundestag enacted the “Pregnancy and Family Assistance Act”. They adopted a defensive approach to abortion as opposite to penal. The abortion was legalized by the law in early trimester for any purpose subject to certain requirements²⁰³. **Roe v. Wade**²⁰⁴ was a landmark legal decision issued on January 22, 1973, in which the U.S. Supreme Court struck down a Texas statute banning abortion, effectively legalizing the procedure across the United States. The court held that a woman’s right to an abortion was implicit in the right to privacy protected by the 14th Amendment to the Constitution. Prior to *Roe v. Wade*, abortion had been illegal throughout much of the country since the late 19th century. *Roe v. Wade* has proved controversial, and Americans remain divided in their support for a woman’s right to choose an abortion. Since the 1973 ruling, many states have imposed restrictions on abortion rights. Until the late 19th century, abortion was legal in the United States before “quickening,” the point at which a woman could first feel movements of the fetus, typically around the fourth month of pregnancy. Some of the

²⁰¹ Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge: Harvard University Press, 1987), 155-157.

²⁰² *West German Abortion Decision: A Contrast to Roe V. Wade*, Trans. Robert E. Jonas & John D. Gorby, *The John Marshall Journal of Practice and Procedure* 9, no. 605 (1976): 611-649.

²⁰³ Donald P. Kommers, “The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?” *Journal of Contemporary Health Law and Policy* 10, no.1 (1994): 13-21.

²⁰⁴ U.S. Reports: *Roe v. Wade*, 410 U.S. 113 (1973). Blackmun, Harry A. (Judge).

early regulations related to abortion were enacted in the 1820s and 1830s and dealt with the sale of dangerous drugs that women used to induce abortions. Despite these regulations and the fact that the drugs sometimes proved fatal to women, they continued to be advertised and sold²⁰⁵.

In the late 1850s, the newly established American Medical Association began calling for the criminalization of abortion, partly in an effort to eliminate doctors' competitors such as midwives and homeopaths. Additionally, some nativists, alarmed by the country's growing population of immigrants, were anti-abortion because they feared declining birth rates among white, American-born, Protestant women. In 1869, the Catholic Church banned abortion at any stage of pregnancy, while in 1873, Congress passed the Comstock law, which made it illegal to distribute contraceptives and abortion-inducing drugs through the U.S. mail. By the 1880s, abortion was outlawed across most of the country. During the 1960s, during the women's rights movement, court cases involving contraceptives laid the groundwork for *Roe v. Wade*. In 1965, the U.S. Supreme Court struck down a law banning the distribution of birth control to married couples, ruling that the law violated their implied right to privacy under the U.S. Constitution. And in 1972, the Supreme Court struck down a law prohibiting the distribution of contraceptives to unmarried adults. Meanwhile, in 1970, Hawaii became the first state to legalize abortion, although the law only applied to the state's residents. That same year, New York legalized abortion, with no residency requirement. By the time of *Roe v. Wade* in 1973, abortion was also legally available in Alaska and Washington²⁰⁶.

²⁰⁵ <https://www.history.com/topics/womens-rights/roe-v-wade>

²⁰⁶ Adam Lamparello and Cynthia Swann, "Roe v. Wade: The Case That Changed Democracy," SSRN Electronic Journal,(2015).

In 1969, Norma McCorvey, a Texas woman in her early 20s, sought to terminate an unwanted pregnancy. McCorvey, who had grown up in difficult, impoverished circumstances, previously had given birth twice and given up both children for adoption. At the time of McCorvey's pregnancy in 1969 abortion was legal in Texas but only for the purpose of saving a woman's life. While American women with the financial means could obtain abortions by traveling to other countries where the procedure was safe and legal, or pay a large fee to a U.S. doctor willing to secretly perform an abortion, those options were out of reach to McCorvey and many other women. As a result, some women resorted to illegal, dangerous, back-alley abortions or self-induced abortions. After trying unsuccessfully to get an illegal abortion, McCovey was referred to Texas attorneys Linda Coffee and Sarah Weddington, who were interested in challenging anti-abortion laws. In court documents, McCorvey became known as "Jane Roe." In 1970, the attorneys filed a lawsuit on behalf of McCorvey and all the other women "who were or might become pregnant and want to consider all options," against Henry Wade, the district attorney of Dallas County, where McCorvey lived. Earlier, in 1964, Wade was in the national spotlight when he prosecuted Jack Ruby, who killed Lee Harvey Oswald, the assassin of President John F. Kennedy. In June 1970, a Texas district court ruled that the state's abortion ban was illegal because it violated a constitutional right to privacy. Afterward, Wade declared he'd continue to prosecute doctors who performed abortions. The case eventually was appealed to the U.S. Supreme Court. Meanwhile, McCovey gave birth and put the child up for adoption. The Supreme Court in 1973 , struck down the Texas law banning abortion, effectively legalizing the procedure nationwide. In a majority opinion written by Justice Harry Blackmun, the court declared that a woman's right to an abortion was implicit in the right to privacy protected by the 14th Amendment. The

court divided pregnancy into three trimesters, and declared that the choice to end a pregnancy in the first trimester was solely up to the woman. In the second trimester, the government could regulate abortion, although not ban it, in order to protect the mother's health. In the third trimester, the state could prohibit abortion to protect a fetus that could survive on its own outside the womb, except when a woman's health was in danger²⁰⁷.

In the Netherlands in 1981, the "Termination of Pregnancy Act" was ordained by the limited majority of votes and took effect simply three years subsequently. Abortion was allowed till the twenty-fourth week while a woman is in a distraught state with no other alternative. It was further stated that abortions will be done with certified medical services and before the performance of an abortion, there should also be compulsory psychotherapy, a five-day waiting time and an arrangement of post-operative care along with governmental funding for authorized abortions²⁰⁸. In Italy, abortion discussions heated in the initial 1970s. It instantaneously became the most discussed issues in the country. The Italian Constitutional Court was concerned due to the escalation in life-frightening backstreet abortions and acknowledged that the prevailing law disappointed in providing complete significance to the fetus's legitimate right without sufficient fortification to the mother's health. Finally, the "Norms for the Social Protection of Motherhood and the Voluntary Termination of Pregnancy Law no. 194" was approved. Under this Law abortion was permitted in the first ninety days of pregnancy on the condition of health, economic, social, and family

²⁰⁷ Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*", *North Carolina Law Review* 63, (1985): 385-386.

²⁰⁸ *Termination of Pregnancy Act*, I May 1981, Netherlands. https://www.ieb-eib.org/fr/pdf/wet_abortus-nl-en-anglais.pdf.

circumstances. The unrestrained abortion politics overwhelming Western Europe ended with the Belgian modification in 1990. The purpose of these reforms was to protect the autonomy of the women to decide after several precautions were fulfilled²⁰⁹. In North America, the most significant change was noticed in Canada, where the abortion regulations have been introduced in the provinces and criminalizing abortion is probable to be collided down as constitutional violation. In 1993, the Supreme Court of Canada nullified a local law that prohibited abortions from being performed in facilities other than hospital²¹⁰. In Europe, changes have been consistent with the international trends toward liberalization of abortion laws. The abortion laws were also revisited by many formerly Communist nations. In Belgium and Greece the penal laws were amended in 1990 and permitted an abortion before the expiration of 12th week of gestation if the woman is in a condition of distress. In South Africa after liberalization of abortion laws, abortion was legalized, devoid of any cause in the course of the first 12 weeks of gestation and within 20 weeks on several grounds. The efforts to liberalize the abortion laws are still underway in many Countries. Globally, the emphasis has been made not only on the legalization of abortion but also on the enhancement of accessibility of safe services²¹¹.

The southeastern U.S. state Alabama has recently passed the most restrict abortion law which was introduced by the Senate on May 14, 2019 and signed by Gov. Kay Ivey on 16 May, 2019 which outlaws all the cases of abortion except there is a hazard

²⁰⁹ Ofrit Liviatan, From Abortion to Islam: The Changing Function of Law in Europe's Cultural Debates," *Fordham International Law Journal* 36, no.1 (2012): 122-125.

²¹⁰ *The Queen v. Henry Morgentaler*, Indexed as: *R. v. Morgentaler*, (1993) 3, S.C.R. 463, File no: 22578, (1993): 516.

²¹¹ Anika Rahman, Laura Katzive and Stanley K. Henshaw, "A Global Review of Laws on Induced Abortions: 1985-1997", *International Family Planning Perspectives* 24, no. 2 (1998): 60-62.

to life of the mother or if an unborn child receives a fatal anomaly. Under this law people who perform abortions would face sentences from 10 to 99 years, only the person having the abortion would not be penalized. And a doctor could face detention up to 99 years for carrying out an abortion and he will be considered equivalent before the law as the rapists and assassins. It does not provide any exception to rape or incest cases and challenge the Roe vs. wades case which is the landmark Supreme Court decision that legalized abortion as a constitutional right of women in 1973²¹². The bulk of the democrats called this law horrible, outrageous and wrong. The house of democratic leaders reacted to this law and called it blatantly unconstitutional and unprecedented attack on the right to abortion. Furthermore the most heinous is that this law excludes rape and incest victim as a consequence of this various young girls and women will suffer at the hand of this system. According to a survey conducted in the state 57% of voters think that Roe vs. wade, the important decision of the Supreme Court which legalized abortion should stay in place or upheld²¹³.

4.3 INTERNATIONAL LEGAL DEVELOPMENTS

Abortion is a human rights question and effects of restrictions on abortion have been argued by the international human rights bodies. The first major evolution was in 2003 when the African Union accepted the Protocol to the “African Charter on Human and People’s Rights” on the Rights of Women in Africa. It was declared under the Article 14 (2) of the protocol the medical abortion shall be allowed by State Parties in cases of sexual violation, rape, incest, and threat to the mental and physical

²¹² Michelle Lou, “Alabama doctors who perform abortions could face up to 99 years in prison -- the same as rapists and murderers”, 15, May, 2019. Available at: <https://edition.cnn.com/2019/05/15/us/alabama-abortion-law-felony-trnd/index.html> CNN, May 15, 2019.

²¹³ Meg Wagner, Eric Levenson, Amanda Wills, Brian Ries and Veronica Rocha, “What happens next with Alabama's near-total abortion ban”, 16, May, 2019. Available at: <https://edition.cnn.com/politics/live-news/alabama-abortion-bill/index.html>

health of the mother or the spirit of the mother or the fetus. Even though there are limited direct means of compelling states that have sanctioned the protocol to execute its provisions²¹⁴. The abortion has also been a substance of the most important verdicts of international legal bodies. In 2005 in “**KI v. Peru**” the “United Nations Human Rights Committee” declared that the repudiation of an abortion to a 17-year-old young lady having an anencephalic fetus dishonored several rights under the “International Covenant on Civil and Political Rights”, as well as the right to be free from cruel and humiliating treatment, the right to secrecy and the rights of minors to particular shelters²¹⁵. For the first time a protocol that safeguards the right to abortion under definite situations has been accepted by a local human rights body the “African Union”, and two human rights courts have instructed countries like Peru and Poland to guarantee access to abortion when it is lawful under national law²¹⁶. The statute laws, in other words contained criminal limitations on the practice of abortion sometime as part of criminal or penal codes. In UK, for example, abortion was outlawed under the offences against the “Person Act of 1861” in sections 58 and 59, then additionally explained in the “Infant Life Preservation Act of 1929”, and then in the “1967 Abortion Act”, which allowed abortion in certain justifications and circumstances in Great Britain, which was further revised by the “Human Fertilization and Embryology Act of 1990”. The Abortion Act of 1967 set out the legal grounds as exemptions, to the criminal law, however the 1861 act is still enforced and still being used to take legal action against illegitimate abortions today. In adding to statute law,

²¹⁴ African Union, *Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa*, (2003): 1-16.

²¹⁵ K.L. v Peru,” International Covenant on Civil and Political Rights”, Communication no. 1153/2003, *Human Rights Committee. Eighty-fifth session*, (2005): 2.

²¹⁶ Reed Boland and Laura Katzive “Developments in Laws on Induced Abortion”, *International Family Planning Perspectives* 34, no.3 (2008): 117.

other means to liberalize, limit, or legalize approach to abortion, includes national constitutions, supreme court decisions, as well as higher court decisions²¹⁷. The abortion is viewed as a human right by activists for legal abortion. Many states have legalized, eased restrictions on abortion after the adoption of the “International Conference on Population and Development (ICPD)”. During that same time period there are some states that have enacted restrictions on abortion including European or Eurasian countries. But in the developing world the trend is in the direction of the liberalization of abortion laws. Abortion is embedded in the official agenda of the United Nations by the ICPD. The UN has encouraged lenient abortion laws in numerous ways, including the constant struggle of the “United Nations Population Fund (UNFPA)”, UN Women, and the “World Health Organization (WHO)”. According to World Health Organization, the fulfillment of human rights involves the safe access to abortion in order to shield the health of women. The fortification of women from harsh, insensitive and humiliating behavior entails that those who have turned out to be pregnant as a consequence of rape can legally access the safe abortion services²¹⁸. The UN Women, UNFPA, and WHO, the UN has advanced the perception that there is an international right to abortion²¹⁹.

4.3.1 LEGAL ABORTION WHEN PREGNANCY RESULTS FROM RAPE

Many states worldwide authorizes abortion without limitation, while others recognize certain exceptions. The countries, even with a restraining abortion laws have

²¹⁷ Margoe Berer, “Abortion Law and Policy Around the World: In Search of Decriminalization”, *Health and Human Rights Journal* 19, no.1 (2017): 16-17.

²¹⁸ *Safe Abortion: Technical and Policy Guidance for Health System*, 2nd.ed (Switzerland: World Health Organization, 2012), 16-26.

²¹⁹ *UN Women, Progress of The World’s Women 2015–2016: Transforming Economies, Realizing Rights* (United States: United Nations Entity for Gender Equality and the Empowerment of Women, 2015), 169-170.

sanctioned abortion in occurrences of rape. For instance, the Irish Supreme Court construed Ireland's constitution in "**Attorney General v. X**"²²⁰ and allows abortion when there is a hazard to the woman's life, as well as the danger of suicide result from an undesirable pregnancy. It is eminent that many countries worldwide that have framed laws, authorizing women to use abortion services when pregnancy is a result of rape. The United Nations human rights treaty monitoring bodies widely agree that in case where pregnancy is a consequence of rape the abortion should be legal and have recurrently insisted countries to revise their laws to this effect. In 2011, in the case of "**L.C. v. Peru**"²²¹, it was recommended by the CEDAW Committee that the state party has to consider its law with an opinion to legalizing abortion when the pregnancy is a consequence of rape. The "World Health Organization" (WHO) has also undoubtedly specified that women who become pregnant due to rape should have access to safe, legitimate abortion facilities based on their claim of rape without being required to take excessive administrative or judicial action. The excessive and needless requirements can prevent the woman to meet the gestational perimeter for lawful abortion. The WHO recommends that the suitable training, elaborate criteria and strategies, including recommendations to abortion amenities, for both police and health care providers should be offered by the states. Furthermore, the U.N. treaty

²²⁰ The Attorney General Plaintiff verses. X. and Other Defendants. Ireland: Supreme Court, (1992) IESC 1; (1992) 1 IR 1, www.supremecourt.ie/supremecourt/sclibrary3.nsf/.../AG%20v%20X_1992.rtf (accessed on 28 May, 2018).

²²¹ *Committee on the Elimination of Discrimination Against Women (CEDAW Committee) fiftieth session views, L.C. v. Peru* (Communication No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009, 2011).

monitoring bodies repetitively stressed to raise the accessibility of emergency contraception mainly in the countries with restricting abortion laws²²².

The “African protocol on the Rights of Women” under Article 14.2(c) also required the state parties to authorize the medical abortion in cases of sexual assault and rape. Abortion laws when deny women’s choice are viewed as human rights violations. The restrictive laws and governmental rules are viewed as discourteous of women’s needs, welfares, health, and bodily integrity. The African Charter does not explicitly deal with the right of rape victims to access lawful abortion, but the article 18 unconditionally eradicates all inequality against women and also guarantees the fortification of the rights of the women and the child as specified in international declarations and conventions. The Women’s Protocol in article 14 also establishes the right to medical abortion in situations of rape²²³.

The United Nations has forced repeatedly for more permissive abortion laws through “Human Rights Treaty Monitoring Bodies (TMBs)”, they have asked for legalizing abortion in circumstances where pregnancy resulting from rape²²⁴. The international law demands the acknowledgment of a right to abortion, so as a result of this, many countries have made modifications in their abortion laws. Recently, it has been claimed by TMBs that states with narrow abortion laws are not in respect with international treaties. Recent developments in Bolivia established the effectiveness of TMBs in impelling state abortion laws. Bolivia’s law permits abortion in situations of rape. Nevertheless, the law initially needed women to obtain judicial sanction prior to

²²² Piero A. Tozzi, *International Law and the Right to Abortion* (New York: Catholic Family and Human Rights Institute, 2010), 13-15.

²²³ Simangele Daisy Mavundla, “Access to Legal Abortion by Rape Victims as a Reproductive Health Right: Case study Swaziland and Ethiopia,” (LLM diss., University of Pretoria, 2009), 31-37.

²²⁴ Kelsey Zorzi, “The Impact of the United Nations on National Abortion Laws,” *Catholic University Law Review* 65, no.2 (2015): 416.

the abortion. This requirement was declared invalidated by Bolivia's Constitutional Court in 2014. The court trusted deeply on UN Human Rights Treaty Monitoring Bodies elucidations of international law in its decision. The court specifically considered the recommendations of the "Human Rights Committee", "the Committee against Torture (CAT)", and CEDAW. Colombia is another case of strong judicial dependence on TMB recommendations. In 2006, abortion was legalized by Colombian Constitutional Court without stipulating the gestational limit in the cases where the women's health or life is in danger due to pregnancy, the fetus is deemed to have malformations or the pregnancy is the outcome of felonious acts of others such as rape or artificial insemination without the woman's approval. The TMBs also have swayed abortion laws through the utilization of their quasi-judicial roles. A latest decision of the National Supreme Court of Argentina which allowed abortion in all rape cases reveals the influence that TMBs' quasi-judicial functions can deliver on national abortion laws. Previously in rape cases only women with mental incapacities were clearly allowed to get an abortion. The international soft law has developed in influence at least in relation to this perspective of internal law and has taken on a part in reforming domestic abortion laws²²⁵.

4.4 A REVIEW OF LAWS ON ABORTION IN MUSLIM-MAJORITY COUNTRIES

Abortion has never been subject to as much controversy, as it has been in contemporary times. The description of personhood, the stage of the start of an individual's life, and the right to life are debated by many philosophers, theologians

²²⁵ Kelsey Zorzi, "The Impact of the United Nations on National Abortion Laws," *Catholic University Law Review* 65, no.2 (2015): 422-425.

and scientists²²⁶. The Muslim countries of the world are beneath the shade of the “Organization of Islamic Cooperation (OIC)”. It is comprised of 57 members with Muslim preponderances or pluralities²²⁷. Most Muslim member states of the OIC allow abortions simply when the life of the mother is vulnerable, they have restrictive abortion laws²²⁸.

In Malaysia, abortion is normally a crime, but under “Malaysian Penal Code”, it is allowable in situations where there is a threat to the existence of the pregnant woman or intimidation of damage to her physical or mental health²²⁹. Under the “Penal Code and the Criminal Code of Nigeria” abortion is illegal²³⁰. The “Algerian Criminal Code” 1966, under Article 304 to 313, forbids to get an abortion except it is executed as a crucial step to preserve the life of the mother. The “Public Health Code of 1976” (Ordinance No. 76-79), under Article 28 and 414, narrows down that if abortion is done prior fetal viability, as an important restorative step to preserve the life of the mother or to maintain her extremely imperiled health then in such situation it is lawful. The Law on the “Protection and Promotion of Public Health (Act No. 85-05 of 1985)”, under Article 72, liberalizes abortion laws more by also authorizing it as a

²²⁶ Dr. Serdar Demirel, “Abortion from an Islamic Ethical Point of View,” *International Journal of Business and Social Science* 2, no. 1 (2011): 231, 237.

²²⁷ It is an international non governmental organization incorporated of Islamic states and was established in September 1969. See Devon A. Hansen and Mohammad Hemmasi, “The State of the Organization of Islamic Conference at the Dawn of the New Millennium”, *Prairie Perspectives* 104.

²²⁸ Rita James Simon, *Abortion: Statutes, Policies, and Public Attitudes the World Over* (USA: Greenwood Publishing Group, 1998), 3.

²²⁹ Ahmad Bin Muhammad Husni, Abdul Basir Mohammad, Amir Husin Mohd nor, Hayatullah Laluddin and Mohd. Al Adib Samuri “Abortion in Malaysian Law: A Comparative Study with Islamic Jurisprudence,” *Advances in natural and applied sciences* 7, no.1 (2013): 41.

²³⁰ Section 228 Criminal Code Act, *Chapter 21 Offence Against Morality*, Laws of the Federation of Nigeria (1990) and Section 232 Penal Code (Northern States) Federal Provisions Act, *Chapter 345*, Laws of the Federation of Nigeria (Revised ed. 1990).

critical action to save a woman's mental stability when it is seriously in danger. In Tunisia abortion is allowed to be executed till the end of the third month. In 1965, Law no. 65-24 revised the Tunisian penal code to tolerate abortion to be done in the course of the first three months of pregnancy on the grounds that the couple has no less than five existing children and they have submitted a written request for an abortion. It is required that abortion must be done in a hospital or in a certified clinic by an expert physician licensed by the law. These provisions were viewed by the women's organization as excessively prohibitive of women's right to abort. The report was submitted by the Tunisian women's union to the Minister of Health requesting that according to Tunisian medical doctors, hundreds of women visit hospitals every year, suffering from hemorrhage when trying to abort in unhygienic conditions. After being persuaded by their point of view, in 1973 the Parliament of Tunisia ratified an amendment in the law and removed the provision of a written request by both parents and five alive children as a condition for permitting an abortion. This new law also legalized abortion at any point of the pregnancy, if its continuance posed a risk to the health of the pregnant woman²³¹. In Morocco, abortion was permissible only in a case where the mother's life is in endangerment. The abortion laws were first deregulated in 1967. The article 453 of the Penal Code was rewritten by Royal Decree No. 181-66 (1 July 1967) to provide that there will be no punishment for the performance of abortion if it would be required to maintain the health of the mother and done by a doctor or a surgeon with the consensus of the spouse. In the situation where there is no husband or he refuses to give a consent, then abortion will be performed with written permission of a chief medical officer verifying that the interference is the only way to safeguard the wellbeing of the woman. But if the physician considers that the

²³¹ *Abortion Policies: A Global Review*, Vol.3 (New York: United Nations Publications, 2003), 183.

woman's life is in danger, the approval of the spouse and view of the chief medical officer is not mandatory. In all other circumstances, abortion was declared illegal and punishable under the Penal Code. Now a revision to Morocco's abortion law has been ratified by the government as part of struggles to change the country's Penal Code in accord with the 2011 constitution²³². In Bahrain²³³ and Jordan,²³⁴ abortion is certified in instance of risk to the mother's health. In Iraq,²³⁵ abortion is allowed in case of serious fetal malformation. However, abortion on health grounds is generally tolerable in the world.

The majority of Middle East North African countries accept Islam as the state religion. Turkey is the secular state in the region, while Iran, Saudi Arabia and Sudan put on Islamic law to all issues, as well as on abortion. The abortion policy in Algeria, Iran, Lebanon, Mauritania, Morocco, Syria and Tunisia is influenced by French colonial law. Numerous countries after freedom have liberalized their abortion laws and the settings under which abortion has to be lawful. The laws have also been updated to stand more meticulously to Islamic philosophies²³⁶. In many countries recommendations to broaden the legal indications for abortion have been conferred. The early abortion on request is tolerable in Turkey and Tunisia. In 1964 the first population policy was established by Tunisia whose primary purposes were to enhance the women's health, safeguard the completed development of families, population control, growth and lessen the damaging health consequences of perilous

²³² Barbara Stark, *International Family Law: An Introduction* (England: Ashgate Publishing Limited, 2005), 151.

²³³ Article 321 of Bahrain Penal Code of 1976, *Chapter 2 Offences against Family*.

²³⁴ Article 324 of Jordan Penal Code 1960, *Crimes against Morality and Public Ethics*.

²³⁵ Article 417 and 418 of the Iraqi Penal Code of 1969 as Amended to 14 March 2010, Part Three: *Offences against the person, Chapter One: Offences affecting the life and physical safety of others*.

²³⁶ Leila Hessini, "Abortion and Islam: Policies and Practice in the Middle East and North Africa," *An international journal on sexual and reproductive health and rights* 15, no. 29 (2007): 78.

abortions. The 1940 penal code of Tunisia was substituted in 1965 under the new law, abortion was allowed on demand if done before the end of the first trimester. Tunisia was the first Middle East North African country that liberalized its abortion laws. The approval of the spouse is not obligatory, and women do not have to be married to have an abortion. In current years, the Tunisian government has provided pubescent friendly amenities and medical abortion into its public clinics²³⁷. Till 1983, abortion in Turkey was allowed just to redeem the life or secure the health of the pregnant women and in instances of fetal impairment. The unsafe abortion came out as a most important community health apprehension in Turkey in the late 1970s. In the early 1980s, the increasing incidence of perilous abortion in Turkey and the resulting injury and mortality headed the government to liberalize the law more and make abortion extensively available. In 1983, under “Population Policy Law No. 2827” abortions are authorized on demand up to ten weeks of pregnancy and for medical indications up to 24 weeks. The pregnant woman’s consent is necessary for an abortion. And if she is a minor, the consent of her legal guardian is mandatory. If the pregnant woman is mentally incompetent, then in such case also the consent of her legal guardian must be acquired. The existing law necessitates married women to get the husband’s consent prior to have an abortion. There are no consent requirements if the pregnancy contains an instant threat to the life of the woman. After considerable debate, religious scholars concentrated on ensoulment and a resolution was reached that abortion would be permissible on the application until ten weeks after conception (12 weeks LMP)²³⁸.

²³⁷ Leila Hessini, “Abortion and Islam: Policies and Practice in the Middle East and North Africa”, *An international journal on sexual and reproductive health and rights* 15, no. 29 (2007): 78-79.

²³⁸ Axel I. Mundigo and Cynthia Indriso, *Abortion in the Developing World* (London: Zed Books, 1999), 259–278.

The Islamic legal philosophy has historically been malleable and thoughtful to community demands and social realities. In summation, there are two principles set forth by scholars that have served in this flexibility, *istislāh* (public good) and *istihsan* (seeking an equitable and just solution), when the legitimate issue of a law based on Shari'ah principles is tough or unfeasible in application²³⁹.

It appears that abortions is allowed by many Shiites and Sunni scholars on limited social and medical reasons. Furthermore, many reasons may possibly have directed Shiite scholars to review the customary prohibition on abortion after conception. The insertion of a theocracy in the “Islamic Republic of Iran” thrusts religious scholars into an exceptional part of the duty and participation in social planning and public health. The health emergencies on a huge scale put forward the scholars for invoking *istislāh* and *istihsan* in their declarations on medical and health matters, rather than making an allowance for a query in an isolated or hypothetical sense as was practiced in the past²⁴⁰.

According to an official notice from the head of the judiciary (2003-2004) to the “National Legal Medicine Organization (Sazman-e Pezeshki-e Qanooni-e Keshvar)” of Iran, a therapeutic abortion may be done in various medical circumstances. This notice was sent by the “National Medical Council (Nizam-e Pezeshki)” which lawfully allows the physicians to perform abortions on the basis of the conditions cited in the notice. The “Majlis-e Shura-e Islami (Islamic Consultative Assembly or Parliament)” of Iran, in 2004, also sanctioned a bill concerning therapeutic abortion in

²³⁹ Ahmed Abdel Aziz Yacoub, *The Fiqh of Medicine: Responses in Islamic Jurisprudence to Development in Medical Science* (London: Ta-Ha Publishers, 2001), 26.

²⁴⁰ Kamyar Hedayat, Peiman Shooshtarizadeh, and Mohammad Raza, “Therapeutic abortion in Islam: contemporary views of Muslim Shiite scholars and effect of recent Iranian legislation,” *Journal Med Ethics* 32, (2006): 655.

which consent of three specialists is required for the validation of abortion. The “Guardian’s Council” overruled the bill two times on technical grounds, later on it was amended by the parliament according to the recommendations of the Guardian’s Council on 21 June, 2005. It stated that therapeutic abortions may be executed under the subsequent conditions. Foremost, the fetus needs to be less than four months of age, that is, before the spirit is blown into it. Second, there is deep developing delays or deformations or abnormalities in the fetus. Thirdly, the mother is in distress due to these fetal problems and there should be hardships for the fetus as well. Fourth, the life of the mother is at risk. Fifth, both the parents give their assent to the operation or procedure. The doctor executing the abortion shall not be punished for the accomplishment of these services²⁴¹.

4.4.1 ABORTION WHEN PREGNANCY RESULTS FROM RAPE

Muslim scholars are divided on the agenda of making abortion legitimate. Making an allowance for rape as one of the grounds to permit abortion and the phase at which such abortion can be legalized has been a topic of discussion among the Muslim scholars.²⁴² In 1983, when an Islamic penal code was first inaugurated in Sudan (the so-called “September Laws”), the sentence for carrying out an abortion was reviewed to reproduce the Islamic punishment of payment of blood money. An individual who dishonored the law was subjected to fines, detention, and compensation. The compensation was required to be remunerated to the kin of the fetus or mother subject to the situations of the miscarriage. The Criminal Code of 1991 under Article 135

²⁴¹ Mahmoud Abbasi, Ehsan Shamsi Gooshki, and Neda Allahbedashti, “Abortion in Iranian Legal System”, *Iran Journal Allergy Asthma Immunol* 13, no.1 (2014): 75-78.

²⁴² Maudarbux Belall, “Abortion in Islamic Law: Beyond the Pro-Life vs. Pro-Choice Debate”, (2014) <https://www.centuryassociation.org/belall-maudarbux-toc/79-abortion-in-islamic-law-beyond-the-pro-life-vs-pro-choice-debate>.

extended the conditions under which an abortion is lawful. The law now specifies that an individual who deliberately induces a woman to miscarry is not liable of an offense where (a) the abortion is essential to preserve the life (b) the pregnancy is the outcome of a rape that happens not more than 90 days before the pregnant woman takes the abortion or (c) the unborn child has perished in the mother's uterus. Sudan is the only country in the Middle East and Northern Africa section that presently permits abortion in situations of rape. It is significant to note that Sudan's reforms are a consequence of struggles to safeguard women's honor and to protect her marriageability after rape rather than because of a commitment to human rights²⁴³.

In many cases, the complete prohibition of abortion does not resolve the distress, repudiating abortion is a quandary. In Indonesia, abortion is governed under some legislation. Under Health Law number 36 (2009) Article 75 paragraph (2) b, abortion is permissible, if pregnancy as a outcome of rape can cause psychological distress for the rape victim, but it can only be done before pregnancy aged 6 (six) weeks calculated from the beginning day of last menstruation, with the exception of instances of medical emergencies. It can only be performed by trained health workers. Under the Health Act, it is also required that there should be psychotherapy and pre-action advice for rape victims and it ends with the action taken by the competent counselor and authorities. It is mandatory that physicians consider the evidence of a certificate of the police investigation. After holding a police investigation letter testifying that the victim truly became pregnant because of rape, the physician would be capable to do abortion. If the certificate granted by the police investigation did not prove accurate, or lapse date of the incident or the victim reporting to the police with

²⁴³ Dr. Muna Eltayeb M. Eltayeb, "Jurisprudence on Sexual Offences and Proposals to Close the Gaps for the Prosecution of Rape in the Sudan" (Equality Now and New Partnership for Africa's Development (NEPAD), 2014), 8-16.

the gestational age 6 weeks (determined by Health Act), then the doctor cannot progress further because the limit prescribed by the Act has been passed. The Muslim woman faces great trouble in the presence of limiting abortion laws. A married woman who turns out to be pregnant as a consequence of rape can either hope her husband would consent to accept such child as his, or carry the gist of its upbringing on her own. The child born of rape is treated like that born of adultery (*waladū zinā*) and is usually deprived of his definite rights and the respectable social status²⁴⁴.

Rape resulting into pregnancy is one of the grounds on which abortion is permitted in Tunisia. The abortion should be done during the first trimester of pregnancy by a physician legally practicing his profession in a hospital, healthcare establishment or authorized clinic. The article 1 of the constitution of Tunisia states that Tunisia is a free, autonomous, and a sovereign state, and Islam is its religion. Furthermore, Arabic is its linguistic, and its government is republican. The Minister of Health defended that the purpose of the enactment of this law is to guard a woman's life from hazardous abortions, while still not refuting the doctrines of Shari'ah, as some schools license abortion in the course of the first four months of pregnancy, before the soul passes to the fetus²⁴⁵. Under article 99 (Sec.6) of Turkish Penal Code,²⁴⁶ abortion is permissible in instance of pregnancy as a consequence of a rape provided that the gestation period does not go above twenty weeks and the approval of the woman is there. In such cases, professional doctors in a hospital setting should perform the

²⁴⁴ Peter Radan, Denise Meyerson, and Rosalind Frances Atherton, *Law and Religion: God, the State, and the Common Law* (London and New York: Routledge, 2005), 253-256.

²⁴⁵ Oren Asman, "Abortion in Islamic Countries: Legal and Religious Aspects," *Medicine and Law* 23, (2004): 81-82.

²⁴⁶ European Commission For Democracy Through Law, CDL-REF(2016)011, Opinion No. 831 / 2015, Penal Code of Turkey, 15 February 2016 Available at : https://www.legislationline.org/download/action/.../Turkey_CC_2004_am2016_en.pdf

abortion²⁴⁷. Islam does not encourage abortion nor does it prohibit it completely. In Morocco previously under Article 453 of the Penal Code, abortion was merely permitted if the mother's physical health was in danger of extinction. Now the new amendment, which occurs as part of attempts to modify the country's Penal Code in accordance with the 2011 constitution allows abortion in cases of rape, incest and fetal impairment. The health minister of Morocco “**al-Hussein Louardi**” supported the legalization of abortion and believed a woman should have control over her own body and abortion is not only a medical problem but also a social²⁴⁸. The discussion on Morocco's abortion law was opened by King “Mohammed VI” after the Moroccan connotation in the battle against undercover abortion. Abortion advocates argue that the procedure, performed under the right conditions, has been tested to save lives. They have limited maternal and child mortality and have empowered women. It particularly shields young girls, letting them to follow their education and employment and have healthy children when they are ready and also helping in ending the cycle of poverty. Morocco in general follows the Maliki school of law, which prohibits abortion. Nevertheless, the other three schools license conditional abortions. The Hanafi and Shafhi‘i schools permit women to abort till the 120th day of gestation, while the Hanbali school authorizes abortion within 40 days. Since Morocco’s progressive 2004 Family Law was inclined toward the Hanafi school of

²⁴⁷ Michael Goldberg, “Four countries liberalize abortion laws,” *Plan Parent Review Journal* 4, no.1 (1984): 20-1.

²⁴⁸ Morocco approves progressive abortion law amendment, *The New Arab*, 11 June, 2016. <https://www.alaraby.co.uk/english/society/2016/6/11/morocco-approves-progressive-abortion-law-amendment>.

law, supporters of abortion validation look forward that the regime will go forward to move away from Maliki stances²⁴⁹.

A fatwa is a legal perception of Muslim jurists on Islamic law as decided by scholars (or muftis). It has no legal binding effect still contemporary fatwas hold momentous authority in updating Shariah law. If published by important individuals then they are enormously influential²⁵⁰.

More recently, several modern-era fatwas have supported exceptions in cases of rape. In 1998, a fatwa was issued by the Egyptian Grand Sheikh of Al-Azhar, **“Muhammed Sayed Tantawi,”** that unmarried women who had been raped ought to be allowed to have an abortion, and in the same year, the **“Algeria Islamic Supreme Council”** issued a fatwa maintaining that abortions should be permissible in circumstances of rape, as rape can be used by terrorists as a weapon of war. The women’s liberty is not necessarily the objective of modern fatwas. The Grand Mufti **“Sheikh Nasr Farid Wasel”**²⁵¹ of Egypt debates that rape victims ought to have right to abortions besides with repair hymen surgery for the purpose to reserve female virginity and marriageability²⁵². The Dialogue Fatwa Committee of the “National Council for Islamic Religious Affairs”, Malaysia in its 52nd meeting conducted on 1 July, 2002, delivered a fatwa on the legitimacy of abortion for rape sufferers. They

²⁴⁹ Laurel A. Spielberg, and Lisa V. Adams, *Africa: A Practical Guide for Global Health Workers* (England: Dartmouth College Press, 2011), 118-119.

²⁵⁰ Nasir Mohamad Abdun Asnawi, “The Majelis Ulama’s Fatwa on abortion in contemporary Indonesia,” *The Muslim World 101*, no.1 (2011): 33–52.

²⁵¹ Chairman of the Board of rights and reform, the former Grand Mufti of Egypt from 1996 to 2002. He is a Professor at the College of Sharia and Law at Al Azhar University in Cairo, and was assigned to the post of the Head of the Faculty of Sharia and Law in Daqahlia Governorate in 1995.

²⁵² Kiarash Aramesh, “A Shiite Perspective Toward Abortion,” *Journal of Medicine Ethics and History of Medicine*, no.1 (2006):39.

reasoned that it is unlawful if the fetus is older than 120 days, then at this point the soul has been given to the fetus. But unlawful sexual affairs are not an excuse for abortion in Malaysia²⁵³. The issue of termination of pregnancy in case of rape was subjected to detailed discussion in the seminars administered by the Jordan Society for Islamic Medical Sciences in 1995. These seminars comprised of scholars of Islamic Jurisprudence (Fiqh) and experts of medical sciences. The summary of these discussions was that medical actions to avoid pregnancy, including emergency contraception, the morning after pill and menstrual extraction should be allowed in case where victim presents immediately after the rape. If there is a positive pregnancy test representing establishment of the embryo in the womb, then termination is not permitted. However, some jurists argued in favor of termination of pregnancy prior to ensoulment at 40 days and specified that the state of rape is a strong excuse, in view of its social and psychological ramifications²⁵⁴.

In 2007, MP for the “**National Democratic Party Mohamed Khalil Quetta**” called on the People’s Assembly to legislate a law permitting a rape victim the right to have an abortion. For this purpose this is important that the woman head right away to a police station and report the incident. The police then need to send the victim to a forensic doctor for detailed examination. The forensic doctor looks for marks of ferocity, collect semen samples from her body, and in the event of an unmarried young lady, would hold back if she has lost her virginity. The victim at that point will go back to the police station where the prosecutor observes the findings and either

²⁵³ Dr Umi Adzlin Silim, Muhammad Azizul A, Uma V and Nor’Izam A, “Termination of Pregnancy for a Muslim Rape Victim and Dilemma in Malaysia Setting: Case Report,” *Malaysian Journal of Psychiatric* 21, no.1 (2012).

²⁵⁴ Hossam Fadel, Misha'l, Aly A, Abūl Fadl Mohsin Ebrahim, and Musa bin Mohammad Nordin, *Encyclopedia of Islamic Medical Ethics- PART I* (Amman: Jordan Society for Islamic Medical Sciences, 2014), 39.

provides her authorization for abortion in instance of pregnancy or refutes it. This process is being taken up in the committee of legalization, headed by former Minister of Social Affairs “Amal Osman”. This law is still not carried out, although approved by parliament two years before and has also obtained sanction from the Islamic Research Academy. The approval of the “Islamic Research Academy” is no minor effort, considering that Al-Azhar scholars are not unified on abortion. The Muslim Scholars are divided in three manners, prohibiting abortion all in all, acknowledging abortion before the fetus has touched 120 days, and abortion before 120 days merely if necessary. According to “Mohamed Raafat Osman”, an Al-Azhar scholar, the 120-day mark is significant in Islam as according to the hadith, ensoulment takes place on the 120th day after creation. As Quetta’s law is yet to be legislated and abortion is still unlawful, Quetta hopes that the law will ease the agony of rape victims. Critics have objected that many women will exploit the new law and abortions will become widespread. Quetta has responded to this concern that this law does not open the door for immorality, allowing any compromised woman to employ it to demand an abortion, according to him that's why we want a medical examiner's statement confirming that the woman was indeed raped²⁵⁵.

He further stressed that rape has turned into a perilous phenomenon in Egyptian society. In an event of rape resulting into pregnancy; woman after giving birth to an illegitimate child would face not only a terrible trauma, but also a social banishment and the certainty of not being able to remarry. Additionally, once the child of rape

²⁵⁵ Ekram Ibrahim, “The Right to Control: The Right to Abortion”, *Egypt Independent*, 27 December 2009. <http://www.egyptindependent.com/right-control-right-abortion/>

grows up, he will unavoidably become subject to severe discriminations within his own family and society²⁵⁶.

In rape cases nearly all contemporary scholars approved that it is permitted for a raped woman to terminate the fetus, with the purpose to alleviate suffering and adversity. Consequently, abortion is permissible for her, if she undergoes a psychological disorder due to rape or if she believes that disgrace may come upon her family or she may be apprehensive that she can be exposed to impair for a sin she is not guilty. Similarly, abortion is allowed if she believes that the child would undergo damage, such as being an outcast. Their view is based on some basic philosophies of Shariah, such as *raf' al-haraj* (release of hardship) and *izalat al-darar* (eradicating damage). Nevertheless, scholars say that abortion in all circumstances is forbidden after the first 120 days of pregnancy²⁵⁷. In Egypt, Muhammad Sayed Tantawi issued a debatable draft in 2004 which allowed abortion in case of rape even after 120 days, on condition that the victim is of good character, uncorrupted and pure²⁵⁸.

According to “**Muhammad Saalih Al-Munajjid**”, who is an Islamic scholar recognized for establishment of the fatwa website IslamQA.info, which offers replies to queries consistent with Salafi Islamic teachings and was the first person to introduce a website signifying Islam in Saudi Arabia, if pregnancy is a consequence of rape, then she has the option to have the child or go for abortion but she needs to do

²⁵⁶ Vardit Rispler and Chaim Berna Arda, *Islam and Bioethics* (Turkey: Ankara University, 2011), 90-91.

²⁵⁷ Fawzy Shaban Elgariani, “Al- Qawa'id al-Fiqhiyyah (Islamic Legal Maxims): Concept, Functions, History, Classifications and Application to Contemporary Medical Issues,” (Ph.D diss., University of Exeter, 2012), 356.

²⁵⁸ Kiarash Aramesh, “Abortion: An Islamic Ethical View,” *Iran Journal of Allergy Asthma and Immunol* 6, no.5 (2007): 32.

so within four months of gestation. Subsequently, it is the obligation of the community to nurture the child²⁵⁹

4.5 RIGHT TO ABORTION OF RAPE VICTIMS DURING ARMED CONFLICT

Women who get pregnant due to rape in the armed conflicts, deal with a tremendously tough and excruciating condition. Pregnancy often enlarges dilemmas to their sufferings as they are required to make agonizing decisions, and may confront major challenges and hazards to their health and endurance. Nonetheless, availability of safe abortion care in circumstances of armed disputes is not constantly accessible. There are numerous causes for this unavailability of access to safe abortion. First, it relies on the legitimate standing of abortion in the state. In almost all states, nevertheless abortion is legal in order to protect a woman's life and in the majority of states, to secure her physical and mental health. How these exemptions are taken, and the evidence and procedure needed for authorization being granted, differs from country to country and can be a hindrance to access for various victims²⁶⁰. The right to abortion or a universal responsibility to make available abortions to rape victims cannot clearly said to be provided by International Human Rights Treaties. However, there are a many provisions that are applicable and beneficial for the humanitarian issue faced by rape victims. If IHL was fully valued, then the humanitarian problem of women who turn out to be pregnant as an outcome of rape committed in line with the armed conflict would not be existent. The International Human Rights law provisions covered the raped and pregnant women. This is shown, for example, by

²⁵⁹ Muhammad Saed Abdul-Rahman, *Islam: Questions and Answers, Jurisprudence and Islamic Rulings: Transactions*, Part5, Vol.26 (London: MSA Publications, 2007), 274.

²⁶⁰ Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?* (Sweden: Orebro University, 2010), 141-148.

Article 8, paragraph A, of Additional Protocol I to the “Geneva Conventions”, which describes injured and sick as persons, whether military or citizen, who for the reason of hurt, illness or other physical or mental sickness or incapacity, are in necessity of medical aid or attention and who abstain from the whatsoever act of ill will²⁶¹. The Protocol to the “African Charter on Human and Peoples Rights on the Rights of Women in Africa” in 2003, named as “Maputo Protocol”, explain under article 14, paragraph 2 (c) that all the appropriate actions to protect the reproductive rights of women shall be taken by state parties. It is the only human rights treaty which explicitly provides that it is the obligation of States to adopt all suitable steps to authorize medical abortions in certain exceptional instances²⁶². Granting to the world health organization women who have come to be pregnant as the outcome of enforced sexual actions can legally access to safe abortion facilities. The “International Committee of the Red Cross” (ICRC) knows the persuasive demand to guarantee that rape victims get quality medical care which is deficient in many states. The ICRC can also back state agencies in refining their legal outlines, health patterns and operations²⁶³.

For so many years, previous Yugoslavia was emaciated by a war in which unintelligible and dreadful brutality were carried out on a massive scale. Among the

²⁶¹ See article 3 common to the Geneva Conventions, article 12, para. 2, and 15, para. 1, of the first Geneva Convention, article 12, para. 2, and 18, para. 1, of the Second Geneva Convention; Article 16, para. 1, of the Fourth Geneva Convention, Jean Marie Henckaerts and Louise Doswald, *Customary International Humanitarian Law*, Vol.1 (New York: Cambridge University Press, 2005), 308-400.

²⁶² *Sexual Violence in Conflict and the Role of the Health Sector* (Norad Scoping Paper Discussion, 2011), 12-17.

²⁶³ Gloria Gaggioli, *Is There a Right to Abortion for Women and Girls who Become Pregnant as a result of Rape: A Humanitarian and Legal Issue* (ICRC: Vulnerabilities in Armed Conflicts: Selected Issues, 2013), 7-3.

other violence, estimated 30,000 to 50,000 Bosnian women were raped by the Serbian armed forces²⁶⁴. After World War II, numerous intercontinental documents were made to control such vindictiveness and bloodshed²⁶⁵. These treaties addressed rape explicitly, but did not deliver proper executable remedies for their infringements. The massacres done in former Yugoslavia, though, have invigorated the “United Nations Security Council” to establish an “International War Crimes Tribunal” to take legal action against those who were accountable for the terrors committed in former Yugoslavia since 1991. The Serbian approach was to get rid of the Muslim population of Bosnia through an attack on Muslim women. The purpose behind the rapes was to make Muslim women pregnant and they were held in custody in order to preclude a safe abortion so that they would give birth to undesirable Serbian babies²⁶⁶. Many children were left by their mothers or relatives to live in miserable circumstances in hospitals and orphanages²⁶⁷.

After World War II the most significant document emerged which was known as the “Genocide Convention”, which was intended to identify genocide as a crime under international law. The mass rapes of Muslim women in Bosnia fall below the description of genocide under the Genocide Convention as they were committed as part of the Serbs movement to eradicate a national, religious, or ethnic group. This purpose was acknowledged by the International Court of Justice, which delivered an interim ruling barring numerous Serbian actions in Bosnia. Furthermore, rape is

²⁶⁴ Catharine A. MacKinnon, “Crimes of War, Crimes of Peace,” *UCLA Women's Law Journal* 4, no.1(1993): 61.

²⁶⁵ John Darnton, “Does the World Still Recognize a Holocaust,” *New York Times*, 25 April 1993.

²⁶⁶ “No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia,” Women in the Law Project, Hastings *Women's Law Journal* 5, no.1 (1994): 91-96.

²⁶⁷ Dr. Thio Li-Ann, “Situating Children of Genocidal Rape: Towards Membership in an Ethnic Community,” *Singapore Law Review* 23, (2003): 45.

clearly outlawed under article 27 of the “Civilian Convention”, which is for the protection of civilians in period of war²⁶⁸.

The “International Covenant on Civil and Political Rights” (ICCPR) recommends that the protection of civil and political rights of the citizens is the duty of states. Article 17 specifically relates to women as a prevention against illegal attacks on integrity, and article 7 disallows cruelty and other harsh, merciless or shameful conduct thus rape can be regarded as such an action under both the ICCPR and the “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (Torture Convention)²⁶⁹.

The United Nations Security Council in 1993 set up a war crimes tribunal and provided the Tribunal subject matter jurisdiction over the crimes, covering severe violations of the 1949 Geneva Conventions, abuses of the laws or customs of war, genocide, and crimes against humanity. In addition, rape establishes a crime against humanity. Since the Tribunal's statute unambiguously identifies rape as a crime against humanity, it can be prosecuted in the Tribunal as such²⁷⁰.

The thousands of girls and women, raped and impregnated in armed conflict, are normally repudiated abortions with disturbing outcomes. Since rape is an under reported crime, accurate statistics about it in armed conflict are hard to obtain. Notwithstanding, even based on the conservative approximations, the absolute scale

²⁶⁸ Theodor Meron, “Rape as a Crime Under International Humanitarian Law,” *The American Journal of International Law* 87, no.3 (1993): 424-427.

²⁶⁹ Adriana Kovalovska, “Rape of Muslim Women in Wartime Bosnia,” *ILSA Journal of International & Comparative Law* 3, no.931(1997): 64.

²⁷⁰ Oren Gross, “The Grave Breaches System and the Armed Conflict in the Former Yugoslavia,” *Michigan Journal of International Law* 16, no. 3 (1995): 783-823.

of this targeted violence against women and girls is shocking²⁷¹. The choice of an abortion is routinely left out by the major providers of medical humanitarian services to young women and women raped in armed struggle. Although a few brave physicians and organizations make abortion services available from time to time²⁷². In places of armed conflicts, the Geneva Conventions and norms of customary international humanitarian law take preference over internal laws²⁷³.

The children who are born as an effect of rape also undergo a lot, as they are frequently acknowledged as children of the enemy. In Rwanda, such children are known as infant's mauves souvenirs, or children of bad reminiscences. Where women are required to keep such pregnancies, the children often experience desertion, denial by the community and even by the mother and also the infanticide²⁷⁴. The "International Criminal Tribunal" for Rwanda in Akayesu said that with respect to rape and sexual violence that they establish genocide in the equal manner as any other action provided that they were done with the explicit intention to abolish, wholly or partially, a specific group, targeted as such²⁷⁵. Consequently, providing the choice of abortions for young women and women who are raped is a substance of avoiding the genocide from taking place. The right to abortion of girls and women raped in armed conflict arises under common article 3 of the "Geneva Conventions", articles 10 and 16 of Additional Protocol I, articles 7 and 10 of Additional Protocol II, and customary international law (CIL). The common article 3 also forbids harsh treatment and

²⁷¹ Tara Gingerich, and Jennifer Leaning, *The Use of Rape as a Weapon of War in the Conflict in Darfur* (Massachusetts USA: Program on Humanitarian Crisis and Human Rights, 2004), 8.

²⁷² Susan Bartels et. Al., "Patterns of sexual violence in Eastern Democratic Congo," *Journal of International Women's Studies* 11, no.4, (2010): 43-46.

²⁷³ See *Geneva Conventions*, 1949 common Article 2.

²⁷⁴ Leslie Shanks and Michael J. Schull, "Rape in War: The Humanitarian Response," *Canadian Medical Association Journal* 163, no. 9 (2000): 1153.

²⁷⁵ *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR 96-4-T, Trial Judgment (1998):288-289.

torment and violence upon personal self-respect, in particular shameful and demeaning treatment²⁷⁶. These rights have been extended on by the Additional Protocols, and they are immediately seen to form customary international law (CIL). Thus the girls and women raped in the armed disputes appropriately falls within the category of victims protected under the Geneva rules. If the state party to a conflict fails to provide the right of abortion, then it will be measured as an abuse of international humanitarian law. By pulling them to carry to term an undesirable pregnancy will subject the women and girls to even further injury²⁷⁷. Rape during armed conflicts is acknowledged under United Nations Security Council Resolution 1820 as a war crime and a crime against humanity²⁷⁸.

In 1991, Sudan's Islamist government extended the conditions under which abortions are admissible within 90 days of conception, to take account of rape. This modification has received inordinate attention after the Darfur conflict broke out in 2003, because sexual violence and rape come to be extensively documented²⁷⁹. Many UN agencies and humanitarian organizations provided targets of sexual violence with rape kits that comprised of the morning after pill, in order to prevent the pregnancy if taken within 72 hours after a rape. The activists and medical organizations intent to

²⁷⁶ Francesco Francioni and Natalino Ronzitti, *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (New York: Oxford university Press, 2011), 288-289.

²⁷⁷ *The Right to an Abortion for girls and Women Raped in Armed Conflict* (New York: The Global Justice Center, 2010), 6-7,15.

²⁷⁸ Alyson M. Drake, "Aimed at Protecting Ethnic Groups or Women? A look at Forced Pregnancy Under the Rome Statute," *William. & Mary Journal of Women & the Law* 18, no.3 (2012): 611.

²⁷⁹ Asma Abdel Halim, *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, ed. Lutz Oette (UK: Ashgate, 2011): 227-243.

know Islam in a manner that ease up rather than restrain the Sudanese women's right to abortion²⁸⁰.

Some contemporary jurists have revisited the issue of termination of pregnancy in certain circumstances, including rape during brutal hostilities. In 1995, this issue was subjected to dialogues in a succession of seminars directed by the Jordan Society for Islamic Medical Sciences. In this perspective, “**Shaikh Yusuf al Qaradawi**”²⁸¹ responded to a question about Muslim rape victims in the Serbian belligerence in Bosnia. He stated that, unquestionably, rape of a Muslim woman by a wicked enemy is a solid cause for the victim, and for her family, to have an abortion, for she will dislike this fetus. The earlier in pregnancy the better, this exemption is to be given because of necessity. Besides, there is nothing immoral for a Muslim woman to sustain such fetus. The child born will be a Muslim child. It was further mentioned that the event of rape must be fully established with its conditions as prescribed under total coercion, whereby one has no option at all. These conditions are following²⁸²:

- a. The compulsion must be from a person capable of holding out his threats and the person being coerced is unable to defend himself even by running.
- b. The person being coerced must be convinced that if he does not behave as he is told, the threat will be borne away.
- c. The menace must be such that it will be taken out at once.

²⁸⁰ Liv Tonnessen, “Women’s Right to Abortion after Rape in Sudan,” *Chr. Michelsen Institute*, no.2 (2015).

²⁸¹ Yusuf al-Qaradawi is an Egyptian Islamic theologian based in Doha, Qatar, and chairman of the International Union of Muslim Scholars.

²⁸² Hossam Fadel, Misha'l, Aly A, Abūl Fadl Mohsin Ebrahim, and Musa bin Mohammad Nordin, ed. *Encyclopedia of Islamic Medical Ethics- PART I* (Amman: Jordan Society for Islamic Medical Sciences, 2014), 48-49.

- d. Abortion must be posted away as soon as pregnancy is detected without any delay; otherwise the delay may be considered an indication that the woman is pleased with the pregnancy.
- e. Abortion must be extended out under a reliable medical supervision and with the license of the woman and her guardians or by an official body after establishing the case of rape.
- f. The pregnancy should not be more than four months because that will be considered killing a person²⁸³.

After the rapes of Kuwaiti women by Iraqi combatants (in 1991) and the rape of Bosnian and Albanian women by Serb militaries, the Muslim scholars debated to make exceptions. In 1991, the Grand Mufti of Palestine, “**Ekrima Sa'id Sabri**”²⁸⁴ stated that abortifacient medicine can possibly be used by the Muslim women raped by their rivals in the Kosovo War take as the children born to those women might one day fight against Muslims²⁸⁵.

There has been an armed conflict going on in Yemen since the end of March 2015, it is going through a humanitarian disaster universally. The number of allegations of infringement and misapplications of international human rights law has brought by this war. The outcomes of this conflict have been painful, and have had harsh consequences for all citizens, but particularly on the lives of females and young girls. They have been left unprotected to brutal ferocity, physical and mental abuse and victimization. Abortion is almost forbidden in Yemen. Only during the past decade,

²⁸³ Hossam Fadel, Misha'l, Aly A, Abūl Fadl Mohsin Ebrahim, and Musa bin Mohammad Nordin, ed. *Encyclopedia of Islamic Medical Ethics*, 48-49.

²⁸⁴ He was the Grand Mufti of Jerusalem and Palestine from October 1994 to July 2006. He was appointed by Yasser Arafat.

²⁸⁵ Ruth Austin Miller, *The Limits of Bodily Integrity: Abortion, Adultery, and Rape Legislation in Comparative Perspective* (England: Ashgate Publishing Limited Company, 2007), 171

society and Islamic sheikhs have started to accept abortion on the reason of a threat to the mother's health, congenital defect and rape²⁸⁶.

The contemporary history has witnessed an escalation in the practice of sexual violence as an illegitimate method of warfare. Rape carries on with huge-scale impunity in Afghanistan, Burma, Central African Republic, Mali, Somalia, South Sudan and Yemen²⁸⁷. Appending to the repugnance of this occurrence, war rape is astonishing for its barbarity²⁸⁸. In Burma, military attackers even claimed that they had the authority to rape women²⁸⁹. In Iraq, Islamic State extremists methodically exposed women to sexual violence, including assault and sexual servitude. After being raped, many victims carry on with depression, anxiety, fear, anger, withdrawal, flashbacks, rejection from family and society and substance abuse²⁹⁰. These struggles are augmented if the victim becomes pregnant by rape²⁹¹. There is a critical requirement to guarantee abortion facilities as a measure of a humanitarian relief program due to the magnitude of rape and the resulting pregnancies²⁹².

²⁸⁶ Amal Mamoon & Nasser al-Sakkaf, "Abortion in war time: How women break taboos in Yemen," *News, Newsletter Yemen*, 23 May 2017.

²⁸⁷ *Summit Report: End Sexual Violence in Conflict* (London: Global Summit, 2014): 11

²⁸⁸ Denis Mukengere Mukwege and Cathy Nangini, "Rape with Extreme Violence: The New Pathology in South Kivu, Democratic Republic of Congo," *PLoS Medicine Journal* 6, no.12 (2009): 1-2.

²⁸⁹ *Same Impunity, Same Patterns: Sexual Abuses by the Burma Army will not stop until there is a genuine civilian government* (The Women's League of Burma, 2014), 11.

²⁹⁰ *What Rape in War Looks Like?* (New York: Global Justice Center European Union, 2015).

²⁹¹ Dr. Helen Liebling, et al., "Women and Girls Bearing Children through Rape in Goma, Eastern Congo: Stigma, Health and Justice Responses," *Itupale Online Journal of African Studies* iv, (2012):19-22,25.

²⁹² Tara Gingerich, *The Use of Rape as a Weapon of War in the Conflict in Darfur, Sudan* (United States: Harvard School of Public Health and Physicians for Human Rights, 2004), 20.

The Islamic law promotes peace and emphasizes on living in peace, first with oneself, and second with and in society. The Qur'an and the Sunnah are the two foremost sources of Shariah. The jurists use the practice of *ijtihād* to originate the principles of Shari'ah from the main sources. *Ijtihād*, in effect, calls for understanding the main authors when the chief sources are quiet on a particular issue. The jurists put on *ijtihād* practice a variety of reasoning acknowledged as *Maslahah* to apply Shariah philosophies to contemporary social circumstances. Under *Maslahah*, the spiritual scholars interpret the law in a way that is appropriate to work for public interest²⁹³.

Under Islamic law, non-international armed conflict means conflict going on between groups of Muslims in the region governed by the caliph or between Muslims and the caliph. In an armed dispute the entire set of the Islamic law of *qital* (War & Peace) is applicable as well as the rules controlling both armed conflicts. On the contrary, Islamic law describes international armed conflict as a difference between Muslims and non-Muslims and only takes on the conventions of international armed conflict²⁹⁴. The Qur'an mentions the Muslim rivals as *mushrikun* (polytheists), *kuffar* (nonbelievers), *munafiqūn* (charlatans), and *ahl al-kitāb* (people of the book such as Jews and Christians). The religion is not an excuse for war, it simply classifies the parties to the conflict²⁹⁵. Therefore, the Qur'an commonly prohibits insurgence by necessitating Muslims to follow the head of state, and also be informed of the non-international conflict and by prolongation it can take place among Muslims. Since the Qur'an and the Sunnah do not usually back revolt, jurists have trusted upon the

²⁹³ Patrick Brian Grant, "Islamic Law, International Law, And Non-International Armed Conflict in Syria," *Boston University International Law Journal* 35, no.1 (2017): 2-11.

²⁹⁴ Niaz A. Shah, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan* (London and New York: Taylor and Francis Group, 2011), 47, 61-64.

²⁹⁵ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, 1st ed. (New York: Palgrave Macmillan, 2011), 47.

patterns of the Prophet's successors to distinguish when rebellion is tolerable and what principles should apply to non-international armed conflicts²⁹⁶. The guidelines concerning rebellion are mostly derivative from the first and the fourth caliphs. Hazrat Abū Bakr, father-in-law of the Prophet (p.b.u.h), was nominated as the first successor to the Prophet. Abū Bakr started a series of military operations named as the Ridda Wars (wars of apostasy) to return tribes to the caliphate that denied to pay zakāt (taxes) upon the demise of the Prophet (p.b.u.h). The fourth caliph, Ali 'Ibn Abi Tālib, who was the cousin and son in-law of the Prophet (p.b.u.h), like Abū Bakr, also used armed force against fellow Muslims who were not inclined to take on his accession to the caliphate²⁹⁷.

Like Common article 3 and Additional Protocol II, Islamic law differentiates between al-muhāribūnlqūta (armed robbery, highway robbery, and theft) and al-bughah (mutiny and secession) to conclude whether Islamic law offers a group any safeties. Under Islamic law, if a group of individuals comes together to use weapons, destroy public road, steal property, murder people and preclude the free passageway of individuals, they are simply al-muhāribūnlqūta. Islamic law's rules about non-international armed conflicts are not applicable to the al-muhāribūnlqūta, so the government may penalize them as any other offenders. If the level of a non-international armed conflict extends to the stage of al-bughah, Islamic law put on both the guidelines of non-international and international armed conflict. The ultimate objective of Islamic law is to get the insurgents back under government law and reestablish public order, the principles that administer the dispute emphasis on kind dealing of insurgents. These rules include settlement, civilian protection, gentle

²⁹⁶ Niaz A. Shah, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan*, 32-33, 61-62.

²⁹⁷ Bernard Lewis, *The Arabs in History*, 6th ed. (UK: Oxford University Press, 2002), 49-62.

handling of hostages, the exclusion against indiscriminate arms, and safety of the belongings²⁹⁸. It is also required that government militaries cannot deliberately aim women, children, the ill, and the injured, who may perhaps be escorting the mutineers, but are not taking part in the conflicts. Islamic law also prevents the annihilation of the resources required for the sustenance of life, for example, sources of food and water in order to protect the civilians²⁹⁹. Islamic law varies considerably from International Law on the subject of penalty of rebels when the combat is ended. Islamic jurisprudence does not inflict any sentence for insurgents as the involvement in a revolt is not a reprehensible deed. Unlike convicts, the *bāghi* must have a genuine feeling that they are struggling for a just reason. Therefore, the government cannot execute, detain, or seize *bāghi*'s property, and it needs to set *bāghi* captives free upon the termination of war³⁰⁰.

Islamic and International Law share common benchmarks that activate certain shields for persons involved in disputes. Even where the triggering criteria vary, the principle behind the criteria is the same. Islamic law offers larger protection to the insurgents than does International Law as Islamic law is extra apprehensive with the settlement of the belligerent parties³⁰¹.

The subject of rape as a war crime evolved over the years, but today international law recognizes rape as a crime against humanity. The article 27 and Additional Protocol I article 76 (1), under the Geneva Convention IV protect the women against any

²⁹⁸ Niaz A. Shah, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan*, 63-64.

²⁹⁹ Omar Yousaf, "IHL as Islamic Humanitarian Law: A Comparative Analysis of International Humanitarian Law & Islamic Military Jurisprudence Amidst Changing Historical Contexts," *Florida Journal of International Law* 24, no.2, (2012): 445-457.

³⁰⁰ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, 150-167.

³⁰¹ Patrick Brian Grant, "Islamic Law, International Law, And Non-International Armed Conflict in Syria," *Boston University International Law Journal* 35, no.1 (2017): 19.

violence on their honor. Furthermore, article 7 of ICC statute recognizes rape and sexual enslavement as a crime against humankind. The Islamic Law prohibits sexual intercourse outside of marriage, whether consensual or non-consensual. This rule is applicable in peace and war times. Henceforth, rape committed in the course of armed war is treated as a serious crime by Islamic Law. The International law of armed conflict and Islamic Criminal law, both treat rape as a war crime and are compatible³⁰². Under International humanitarian law, individuals, citizens or armed personnels can be held accountable for war crimes. The UN Security Council in Resolution 1820 (2008) strongly disapproved sexual violence in armed battle. It puts forward that rape and other categories of sexual violence can establish a war crime, a crime against humanity, or a constitutive act with respect to genocide³⁰³.

The undesirable pregnancies are one of the utmost excruciating difficulties follow-on from war related assault. In Eastern Congo only, as many as 50,000 children were born due to rape in the previous two decades. In many states of Africa and the Middle East, they are not entitled for national IDs without a father's name on the birth certificate, which precludes them from getting to school or getting government benefits, they are also not accepted and frequently face discrimination³⁰⁴. Rape at the present is used intentionally in the war to embarrass and undermine the confidence of the alleged enemy, to frighten inhabitants, and to thrust the enemy to abscond. For example, in Rwanda, conducts of rape and sexual mutilation were not ancillary to the murders but were taken with the intention of eliminating the Tutsi. The unwanted

³⁰² Niaz A. Shah, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan*, 79.

³⁰³ *Escape from hell Torture and sexual slavery in Islamic State captivity in Iraq* (London: Amnesty International December, 2014), 15-16.

³⁰⁴ Aryn Baker, "The Sceret War Crime: The Most Shameful Consequences of Conflict Comes out in Open", *New York: Time*, (2018).

pregnancies due to rape frequently lead to hazardous abortions. Women who are required to keep and accept the children of their invaders undergo from grave psychological, physical, and spiritual damage. Unfortunately, trial of rape offenders has hardly happened³⁰⁵. The humiliation and discrimination of sufferers are heightened by the pregnancy subsequent from rape and the delivery of a child consequential from it³⁰⁶.

Likewise, rape is often not explicitly enumerated as a criminal offense under international humanitarian law, but it has been broadly assumed that rape falls under the definitions of crime against international humanitarian law, including war crimes, serious violations of the Geneva Conventions, and criminal offenses against humanity. A course of action of forced pregnancy is not just a war crime, or merely a normal crime, or just soldiers taking the spoils of war, it is genocide³⁰⁷.

A rape has also been employed as a weapon of combat by Indian militaries since the beginning of the insurrection in Jammu and Kashmir in 1988. A large number of Muslim women were captured and raped in the Jammu region of the state³⁰⁸. According to a 1993 Human Rights Watch (HRW) report, the Indian army used rape as a way of revenge against Kashmiri citizens in the retaliation outbreak, after militant surprise attacks. The soldiers used to enter the homes of citizens, slaughter or sent away the men and then raped the women present. Rape is an indispensable ingredient

³⁰⁵ Susan McKay, "The Effects of Armed Conflict on Girls and Women, Peace and Conflict," *Journal of Peace Psychology* 4, no.4 (1998): 383-386.

³⁰⁶ Omba Kalonda Jean Claude, Kittel France and Piette Danielle, "Stigma of Victims of Sexual Violence's in Armed Conflicts: Another Factor in the Spread of the HIV Epidemic?" *Epidemiol* 3, no.2 (2013): 2-3.

³⁰⁷ Siobhan k. Fisher, "Occupation of the Womb: Forced Impregnation as Genocide," *Duke Law Journal* 46, no. 91(1996): 91-93.

³⁰⁸ Christine Chinkin, "Rape and Sexual Abuse of Women in International Law," *European Journal of International Law* 5, no.3 (1994): 327.

of the Indian military policy in Kashmir³⁰⁹. According to Seema Kazi, the purpose of rape in Kashmir is same to the rapes which were perpetrated in Rwanda and the Balkans. The purpose of rape is to demoralize the Kashmiri resistance³¹⁰. According to the study conducted in 2008 by Médecins Sans Frontières, the most horrible victims of sexual violence in the world are Kashmiri women, with 11.6% of respondents, out of a total 510 persons in the study, describing that they had been subjected to rape. Furthermore, women who were pregnant while being raped either miscarried or gave birth to deformed children³¹¹. Women who conceived as a result of rape by Indian security forces underwent a lot. They were abandoned and there was no funding from anywhere to provide relief and shelter to them. The Indian Security Forces have not just violated all international human rights and humanitarian laws, but also have been disrespectful to their own country's constitutional laws as well³¹².

In 1993, the director of the "Documentation Center for Genocide and War Crimes" in Zagreb specified that women who could not have abortions either left their newborns or murdered them. The children of war rape who are tolerable to live may be ill-treated or deserted³¹³. Sexual violence against women takes place in all contemporary armed struggles, particularly in the case of rape, it is the most common and major form of grievous infractions of the law against women. Some other instances of rape

³⁰⁹ "Rape in Kashmir: A Crime of War," *Washington DC: Asia Watch & Physicians for Human Rights a Division of Human Rights Watch*. 5, no. 9 (2005): 1.

³¹⁰ Seema Kazi, "Rape, Impunity and Justice in Kashmir," *Socio-Legal Review journal* 10, (2014): 27-29.

³¹¹ S'Ibnath Deb, *Child Safety, Welfare and Well-being: Issues and Challenges* (New Delhi: Springer, 2015), 85.

³¹² Massarrat Abid and Ayesha Ashfaq, "Atrocities on woman committed by Indian armed forces in the Indian held Kashmir," *Pakistan Vision* 17, no.1 (2017): 253-256.

³¹³ R. Charli Carpenter, "War's Impact on Children Born of Rape and Sexual Exploitation: Physical, Economic and Psychosocial Dimensions," *Reproductive Health in Conflict Situations* (2007): 6-8.

during contemporary armed conflict is rape committed by Burmese security forces against women and female children as part of a movement of ethnic cleansing against Rohingya Muslims in Burma's Rakhine State. The UN Security Council must execute a full arms prohibition on Burma and individual punishments against armed leaders accountable for severe abuses of human rights, including sexual violence³¹⁴. Women become victims of rape not just in the course of the battles, but likewise in the direct aftermath of the combat or during the edging of the troops or hostile occupation. The way the sexual violence is employed in most contemporary conflicts involves deliberate, conscious and intended effort to degrade and frighten not merely women, but all members of the community or ethnic group in a society and in extreme cases to attain ethnic cleansing and to eradicate³¹⁵. Likewise, during Sierra Leone civil war (1991–2000), a number of women were savagely raped and were required to be wives of insurgent leaders and soldiers and reversed them into sex slaves. During the fight in Iraq and Syria, thousands of women were raped, abducted and forced to work as sex slaves by terrorists. The most dreadful is the case of Yazidi population, against which systematic actions of massive violence are committed. Women are sold for money, bartered for weapons or given as a gift. Those who convert to Islam are sold as brides to Daesh and those who do not are raped³¹⁶.

The CEDAW Committee has also acknowledged that there is a need of precise protective and punitive actions and has clearly called on states to guarantee access to

³¹⁴ *Burma: Widespread Rape of Rohingya Women, Girls* (United States of America: Human Rights Watch, 2017).

³¹⁵ Vincent Bernard, "Sexual violence in armed conflict: From breaking the silence to breaking the cycle," *International Committee of Red Cross* 894, (2014): 96.

³¹⁶ Natalia Buchowska, "Violated or protected. Women's rights in armed conflicts after the Second World War," *International Comparative Jurisprudence* 2, (2016): 73-74.

contraception, including emergency contraception in war affected areas³¹⁷. The Committee Against Torture has shown apprehension that complete restriction on abortion may establish torment or abuse. The UN Secretary General has called for humanitarian reactions including no access to dangerous abortion, the right to abortion, humanitarian aid and funding for pregnancies due to rape, and the UN Security Council has acknowledged the importance of access to the full variety of sexual and reproductive health amenities for women and girls affected by war³¹⁸.

CONCLUSION

In recent years, abortion proponents have tried to promote the notion that a right to abortion based on the International Human Rights law is existent and the independent countries ought to revise their rules and regulations to license the use of this right. The Human Rights Committee has accepted that refuting women access to lawful abortion facilities is an indiscriminate intrusion in their private lives. International law acknowledges that women possess a right to be free from harsh, merciless, or demeaning treatment. The UN bodies, such as UN Women, UNFPA, and WHO, promote the point that access to abortion is a right retained by all females. The treaty-monitoring bodies stress the states to reform their abortion regulations through ultimate remarks and quasi-judicial verdicts. The modern Islamic States demonstrate amalgamation between a religious tradition, nearly 1400 years old, and a social veracity that deals with the complications and quandaries of modern life. The different Islamic states have chosen several concessions, as in the cases of Egypt, Kuwait and Tunisia. However, no one of these states, even the most liberal ones have promulgated a law which contradicts Shariah, but preferably, accepted a less limiting

³¹⁷ *Ensuring Sexual and Reproductive Health and Rights of Women and Girls Affected by Conflict* (New York: Center for Reproductive Rights, 2017), 12&17-20.

³¹⁸ *Conflict Related Sexual Violence* (Report of United Nation Secretary General, 2014), 12.

religious methodology towards it. A liberalization of abortion law is probable, without contradicting the Shariah, but must be done in analogous with enlightening movement, intended to make known the hazards of illicit abortions, and the religious reasoning behind the more liberal lawful approach. Islamic authorities have also issued Fatwas, allowing women to abort in case of rape resulting pregnancy and some have argued to complete abortion within 40 days and some permitted it before 120 days. Nevertheless, some jurists have the view that abortion is permitted till ensoulment takes place at 40 days of gestation, and other scholars who consider that ensoulment takes place at 120 days sanction it till that period.

Recent history has witnessed intensification in the role of sexual violence as an illegitimate approach of warfare. The children born as an effect of rape are denounced as both illegitimate and as enemy children, their human rights may possibly be compromised in many ways. Sexual violence is forbidden under International Humanitarian Law, including the “Geneva Conventions of 1949, the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of all kinds of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the International Labor Organization (ILO), Forced Labor Convention of 1929 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”. Under the “Rome Statute of the ICC”, the rape can constitute war crimes and crimes against humanity. Some Islamic contemporary jurists have also revisited the subject of abortion in certain circumstances, including rape during brutal hostilities. Some jurists believe that unquestionably, a Muslim woman being raped by a malevolent enemy is a strong reason for abortion. The earlier an abortion is performed in pregnancy the better. The abortion laws of countries worldwide have established conditions related to health, economic, social, or family

circumstances, required waiting periods, counselling, restrictions on places where abortions can be performed, (i.e., processes for decision-making on abortion, and social and financial incentives for life with a child). But under Pakistani law, no such step has been taken, thus the abortion laws are very restrictive and the existing law is disappointing in giving absolute significance and sufficient protection to the health of the mother. Despite being one of the founding UN members and a signatory to CEDAW, policy level changes guaranteeing women the right to their own bodies have been limited in Pakistan. Socio-cultural norms, societal taboos, and lack of a clear distinction between religious jurisprudence and the law of the land have collectively made it impossible for legislative changes to be implemented without raising any alarms. In conservative societies, especially like Pakistan, abortion has also been linked with illicit sexual relations and sexual immorality. Sexual morality is often deeply tied to religious norms in the society. In Pakistan, for example, the rules relating to abortion are heavily influenced by Islamic legal provisions on the subject. Yet, abortion also has numerous other factors which contribute to how it is perceived among ordinary people depending on the specific culture and the dynamics of the locality. Abortion law in Pakistan is perceived to be strict, not just because of religious fundamentalism but also due to socially conservative factors.

CHAPTER NO.5: A SURVEY RESEARCH

5.1 INTRODUCTION

The term women's right is defined as freedom and entitlement of women³¹⁹. In actual practice, women in all societies of the world are ill-treated and men are dominating. So, like the rest of the world women in Pakistan are suppressed and also not being permitted to live positively the life of a human being³²⁰. The most common violence faced by the women in Pakistan is sexual violence. Worldwide the incidents of rape and other kinds of sexual violence is rapidly aggregating. The physical consequences of rape-injury, sexually transferred diseases, and undesirable pregnancy cause psychological issues which are often neglected. Women who have experienced rape are at high hazard for a number of mental health problems, including depression, nervousness, and substance abuse. As the cases of rape are increasing day by day, there is a need to deal with associated factors, so this problem can be treated with proper preparation and implementation of laws³²¹. Abortion is under debate everywhere in the world. Pakistan is no exception to that. In most of the situations, a woman is not afforded an opportunity to reach a decision by herself even if a pregnancy is an outcome of rape. Due to fear of shame and oppression, the female is either forced to bear a child and face banishment or ultimately kill herself. It's

³¹⁹ Mohammad Dhoot, "Awareness of Educational Rights among B.Ed. Girl Students: A Study," *Education*1, no. 5 (2011).

³²⁰ Trilok Singh, *Towards Women's Rights Protection* (India: New Delhi: Cyber Tech Publications, 2011), 1-7.

³²¹ Iram Manzoor, Noreen Rahat Hashmi and Fatima Mukhtar, "Medico-legal Aspects of Alleged Rape Victims in Lahore," *Journal of the College of Physicians and Surgeons Pakistan* 20, no.12 (2010): 785.

distressing that the Pakistani legal system offers no aid to rape victims who get pregnant as a consequence of it. The common assumption is that victims of rape need abortion in order to avoid facing what happened to a woman. Because the pregnancy is a tangible reminder of what she lived through³²². The advocates for the abortion consider pregnancy as an outcome of rape, an injury to the women and abortion as a remedy aiding to heal a woman of her injury. So, in this chapter the survey will be conducted for determining and studying the problems confronted by rape victims in the society. For this purpose, the views of the legal counsel, medical officers (doctors) and rape victims will be obtained. This chapter will also analyze abortion from a medical perspective. At the end, findings of the survey will be summed up in the conclusion.

5.2 ABORTION: FROM MEDICAL PERSPECTIVE

It's significant to realize that whether medical knowledge clarifies the moral condition of the fetus as a human being, confirms abortion to be secure and effective for woman, provides information on performing early versus late abortions, and provides public health and international perspective on miscarriage. Abortion is divided into three types, i.e., spontaneous abortion, induced abortion and recurrent abortion. The spontaneous abortion is well-defined as the eviction of a fetus from its mother. The difference between spontaneous and induced abortion is that in the former, process of expulsion starts on its own without any intervention, whereas in the induced abortion the progressing pregnancy is interrupted. The recurrent is defined as three or more consecutive spontaneous abortions³²³.

³²² Mahroo Rashed, "Abortion: The Autonomy of a Woman," *Courting the Law*, Feb,16, 2018.

³²³ Arshad Chohan, *Fundamentals of Gynecology* (Lahore: Mar publications, 2013), 59-62,73-78.

The first movement is at 7-8 weeks, the beating of the fetal heart followed by fetal movements. The baby's heart starts to beat at about 6 weeks. According to American Pregnancy Association, by the seventh week, detection of a heartbeat is probable. Normally there is no need of surgical abortions before seven weeks or forty-nine days LMP. For the duration of the seventh through the tenth week, finger and genitals appear and the child's face becomes recognizably human³²⁴. After the first trimester, induced abortions are problematic and less safe for the mother. The assessment of pain in the fetus is challenging, as pain is generally identified as an individual phenomenon. Initial studies of neurologic development demonstrate that fetus's reactions to painful stimuli is decorticated in nature and that insight or localization of pain is not existent. Additionally, as the fetus may not have memories of painful familiarities, they are not considered capable of interpreting pain in a mode alike to that of adults along a theoretical base. The traditional views have led to a widespread opinion in the medical community that the fetus may not be capable of feeling pain. The advocates of moderate views consider that realization and the capacity to feel pain develop after about six months. The principal brain activities are apparent after the seventh week, so that it is thinkable to conclude that the fetus may perhaps feel pain after this date. The small unborn brain of eight weeks already contains midbrain cells that are capable to get the chemical dopamine, which is responsible for some of the more developed, advanced forms of adult voluntary movement and raised stress hormones, the same as those discharges by adults in pain are found to be immensely high when a painful blood extraction method is done on unborn infants as early as eighteen weeks. An involuntary defensive reaction to pain takes place in a fetal brain circulation in just sixteen weeks of pregnancy. More worryingly, recently discovered

³²⁴ Philip N Baker and Louise C Kenny, *Obstetrics by Ten Teachers*, 19th ed. (London: Hodder Arnold, 2011), 44.

brain chemicals devoted to pain perception have now been noticed of the fetal brain as early as eleven to thirteen weeks³²⁵.

But what of that human being, which grows from newly fertilized ovum, to pre-embryo, embryo, fetus, new born baby, to undeniably mature, autonomous person with complete moral standing as well as a moral and legal right not to be killed in any case³²⁶. Some people have construed, when the fetus is sustainable and capable of free survival if detached from the locale of the uterus can be regarded as a person. If one is obstinately against abortion, then he is consecrated to a certain set of standards, which stresses that women who get pregnant (whether deliberately or accidentally) are required to complete the course of pregnancy and birth, no matter how sad, hurting and perilous it is for them. The extreme antagonists of abortion maintain that abortion is tantamount to killing and that, no matter how many women may suffer, they cannot be legalized to kill their children. There is a dispute in many countries regarding the issue of termination of pregnancy. On the other hand, some women's organizations highlight that a woman possesses an ultimate right to determine for herself as to whether pregnancy should be ended or not³²⁷. Unfortunately, there's no settlement in medicine, philosophy or theology on the point that what stage of fetal development should be linked with the right to life. Because of the difficulty in determining that at what stage a fetus possesses the right to life, some people claim that we should favor the earlier date. At the early stage abortion can be done by the medicine without the surgical intervention. When proper medicines are used in the first 49 days of a

³²⁵ Janet J E. Gans Epner, Harry S. Jonas, and Daniel L. Seckinger, "Late-Term Abortion," *Journal of the American Medical Association* 280, no.8 (1998): 726-728.

³²⁶ Raanan Gillon, "Is there a 'new ethics of abortion'?" *Journal of Medical Ethics* 27, no.2 (2001):5-9.

³²⁷ Alka B. Patil, Pranil Dode, and Amrute Ahirrao, "Medical Ethics in Abortion," *Indian Journal of Clinical Practice* 25, no.6 (2014): 545-547.

gestation, an efficacious and harmless termination of pregnancy takes place in 96% of cases³²⁸. Another point on this subject is that embryo is not a legal person, therefore it does not contain any right. Hence there is no issue of breach of any personal rights if one gets aborted. In the instance of rape, when a woman is enforced to keep a pregnancy, it will cause more psychological damage and strong abuse of her right to self-esteem and the right to health. Any law concerning elimination of abortion is nothing but a strong violation of a woman right. It encroaches upon women's rights to health, right to self-respect, right to liberty, right to privacy, and overall her right to life. Abortion needs to be lawfully allowed in society to guard these utmost civil rights of females³²⁹. While clandestine abortions can be life threatening as well. The outlawing of abortion pushes the practice underground and resultant illegal provision of services. The clandestine abortion providers are thus able to work without requiring to be accountable for the health of their patients³³⁰.

5.3 INTRODUCTION TO SURVEY

Regrettably, women are the oppressed and poorly educated community of Pakistan. They are disempowered to claim their rights and entitlements because of lack of education, understanding and awareness. They are not cognizant of their legal rights, so cannot claim the benefits under them³³¹.

³²⁸ Hillary Kunins and Allan Rosenfield, "Abortion: A Legal and Public Health Perspective," *Annul Review Public Health* 12, (1991): 376.

³²⁹ Diane Taylor, "Does a fetus have more rights than its mother," *The Guardian, International Edition*, 23, April, 2004, and "Rights of Fetus and Mother in the Abortion Debate," Law Teacher: The Law Essay Professionals, www.lawteacher.net

³³⁰ J. Douglas Butler, *Abortion, Medicine, and the Law*, ed. David F. Walbert, 5th ed (USA: Fideli Publishing Inc., 1992): np.

³³¹ Zainab Rehman, *Women and Society* (India, Delhi: Kalpaz Publication, 2005), 15-16.

Sexual assaults resulting in a pregnancy can have tragic effects on women's physical and psychological health. It is a misconception that when women are truly raped, they don't get pregnant. At that point, there are no legitimate options for rape victims in Pakistan if she gets pregnant, her possibilities include moving to one of those untrained and unprofessional women who illegally perform abortion and in some instances the victim may commit suicide because of the fear of being blamed or carrying an illegitimate child with no one to look afterwards³³². It is distressing to point out that the Pakistani legal system does not offer any assistance either. Abortion is only allowed in order to save the woman's life or to provide her with necessary treatment. There is a severe need of reform in this area because this is something which is associated to the private life of a woman and thus she must be allowed to decide for herself whether she wants to undergo the procedure or not. In that respect, there is much necessity for reappraisal of the current policies of the government regarding abortion. The present policy allows abortions for medical reasons, but rape should also be included in the exception. Therefore, the main crux of the line of reasoning is that abortion is something which concerns the autonomy of the woman and must not be subjected to anyone else's discretion³³³. So, in circumstances of rape, abortion should be permissible on the request of the victim. According to many contemporary scholars, if pregnancy consequence from a circumstance beyond a woman's approval (e.g. rape), she should be permitted to have the child and if the woman does not desire to keep the child, she should be allowed to terminate the pregnancy in 120 days from conception. So, the main crux of the research is abortion

³³² Shahla Haeri, *No Shame for the Sun: Lives of Professional Pakistani Women* (New York: Syracuse University Press, 2002), 163.

³³³ Mahroo Rashed, "Abortion: The Autonomy of a Woman," *Courting the Law*, 16feb, 2018.

for rape victims with a critical analysis of Pakistani law. This survey is divided in two parts.

5.4 FIRST PART OF SURVEY RESEARCH

To get together and write the fact-based data for this part of survey research, researcher has interacted with 120 people, including Advocates and Medical Officers among which 75 respondents were Legal officers and 45 where Medical officers. It is a truism that law plays a critical role in social change. Also, there is no doubt that lawyers individually and as professionals are frequently the architects of law and are among the most significant contributors to the reclamation of the social order and law. It is the function of the legal counsel to review the new laws, proposed laws and regulations, review of litigation and regulatory actions. So, for proposing a new law under this research it was important to obtain the opinion of lawyers. The opinion of doctors has also been obtained because they are the persons who closely deal with rape victims and are aware of many facts regarding the offense of rape and development stages of the fetus. For collecting the required information, a questionnaire was formulated. The part one of survey research comprises of two sections. The section 1 is comprised of questions to compute out the opinion of the legal counsel on the subject of rape, and its consequences, including abortion in case of rape resulting pregnancy, and section 2 consists of questions in order to obtain the view of medical officers on the same issue. The research was limited to Rawalpindi and Islamabad. This survey research was conducted within the urban area. For collecting the data connected to this research, survey opinion questionnaire has been used. The Statistical Package for the Social Sciences (SPSS) has been used for data analysis. The pie charts have also been used. The survey was conducted by a variety of people of different ages and occupations. The closed ended questions were drafted.

This part of survey research deals with the analysis, elucidation and discussion of data which has been collected from two groups of the respondents, Medical Officers and Legal Officers through interview schedule. The data is presented in tabulated form to explicate the research. The results are listed below.

5.4.1 RESULTS: RESPONSES OF MEDICAL OFFICERS

5.4.1.1 FREQUENCY TABLES OF RESPONSES

1. Abortion should be permitted if the pregnancy is the result of rape?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	41	91.1	91.1	91.1
	No	4	8.9	8.9	100.0
	Total	45	100.0	100.0	

- Collected data shows that 91.1% Medical Legal Officers with the frequency of 41 agreed on the point that the abortion should be permitted if the pregnancy is the outcome of a rape and only 8.9% with the frequency of 4 think that it should not be permitted irrespective of the fact that pregnancy is an outcome of rape.

2. At what stage of pregnancy, abortion becomes painful for the un-born baby?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Embryo	15	33.3	33.3	33.3
	Fetus	30	66.7	66.7	100.0
	Total	45	100.0	100.0	

- Collected data shows that 33.3% responded with the frequency of 15 believes that the abortion is painful for the un-born infant at the phase of embryo, whereas 66.7% with the frequency of 30 believes that it is painful at the stage of fetus.

3. At which stage abortion should be allowed in case of rape resulting pregnancy?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	At the stage of fetus	5	11.1	11.1	11.1
	As soon as pregnancy is confirmed	4	8.9	8.9	20.0
	At the stage embryo	8	17.8	17.8	37.8
	I do not know	28	62.2	62.2	100.0
	Total	45	100.0	100.0	

- Collected data shows that 11.1% of respondents with the frequency of 5 consider that abortion should be allowed till the stage of fetus, if the pregnancy is a result of rape, 8.9% with the frequency of 4 think that it should be allowed as soon as pregnancy is confirmed, 17.8% with the frequency of 8 have a consensus that abortion in case of rape should be allowed before it passes the stage of embryo and 62.2% of respondents with the frequency of 28 have no idea at which stage it should be allowed.

4. If a rape victim gets pregnant, the situation can be worse, it can compound and prolong the victim's mental and physical sufferings?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	35	77.8	77.8	77.8
	No	2	4.4	4.4	82.2
	To some extent	8	17.8	17.8	100.0
	Total	45	100.0	100.0	

- According to the collected data 77.8% of respondents with the frequency of 35 viewed that if a rape victim gets pregnant the situation can be worse, it can compound and prolong the victim's mental and physical sufferings, only 4.4% with the frequency of 2 disagree with this notion and 17.8% with the frequency of 8 think that to some extent the pregnancy can prolong the victim's sufferings.

5. Providing safe abortion to women who get pregnant as a result of rape will improve women's mental and physical health, and will save lives

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	31	68.9	68.9	68.9
	No	4	8.9	8.9	77.8
	I do not know	10	22.2	22.2	100.0
	Total	45	100.0	100.0	

- Collected data shows that 68.9% respondents with the frequency of 31 agreed that providing safe abortion to women who get pregnant as an effect of rape will improve women's mental and physical wellness, and will save lives, 8.9% with the frequency of 4 believes it will not produce any difference and 22.2% with the frequency of 10 don't know that providing safe abortion to women who get pregnant as a result of rape whether will improve women's health and life or not.

5.4.1.2 RESPONSES IN THE FORM OF TABLES

TABLE# 11

		Count
Do you think that abortion should be permitted if the pregnancy is the result of a rape?	Yes	41
	No	4
	I do not know	0
What do you think as a doctor when does the abortion gets painful for the un-born baby?	At the stage of fertilized ovum	0
	Zygote	0
	Embryo	15
	Fetus	30
	Any other stage	0
What do you think at which stage abortion should be allowed in case of rape resulting pregnancy?	At the stage of fetus	5
	As soon as pregnancy is confirmed	4
	At the stage of embryo	8
	I do not know	28
	It should not be allowed at any stage	0
What do you think, if a rape victim gets pregnant the situation can be worse, it can compound and prolong the victim's mental and physical sufferings?	Yes	35
	No	2
	To some extent	8
Do you think providing safe abortion to women who get pregnant as a result of rape will improve women's mental and physical health, and will save lives?	Yes	31
	No	4
	I do not know	10

TABLE#2: DESCRIPTIVE RESPONSES

Descriptive Statistics						
	N	Minimum	Maximum	Sum	Mean	Std. Deviation
Do you think that abortion should be permitted if the pregnancy is the result of a rape?	45	1	2	49	1.09	.288
What do you think as a doctor when does abortion gets painful for the un-born baby?	45	3	4	165	3.67	.477
What do you think at which stage abortion should be allowed in case of rape resulting pregnancy?	45	1	4	149	3.31	1.041
What do you think if a rape victim gets pregnant the situation can be worse, it can compound and prolong the victim's mental and physical sufferings?	45	1	3	63	1.40	.780
Do you think providing safe abortion to women who get pregnant as a result of rape will improve women's mental and physical health, and will save lives?	45	1	3	69	1.53	.842
Valid N (list wise)	45					

5.4.2 RESULTS: RESPONSES OF LEGAL OFFICERS

TABLE#1

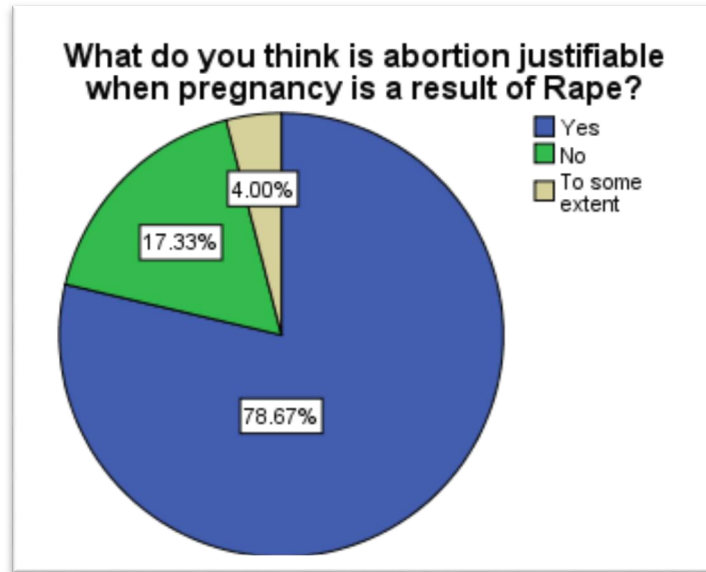
Is abortion justifiable when pregnancy is a result of rape?	Yes	Count	59
	No	Count	13
	To some extent	Count	3
What choices do you think victim usually avail when she finds out she is pregnant by rape?	Termination	Count	49
	Giving birth and raise the child	Count	10
	Adoption	Count	12
	Abandon	Count	4
Do you think pregnancy from rape leads to grave consequences and seem to prolong the victim's anguish?	Yes	Count	65
	No	Count	3
	To some extent	Count	7
Do you suggest any modifications in the law regarding abortion access to rape victims?	Yes	Count	62
	No	Count	8
	To some extent	Count	5
Should abortion be authorized on the request of the victim on the basis of FIR, medical examination by a forensic doctor confirming that the woman was indeed raped, and perform the DNA test, within a specific time frame?	Yes	Count	65
	No	Count	10
Is a mental trauma for rape victims more devastating than being physically assaulted?	Yes	Count	70
	No	Count	5

TABLE#2: DESCRIPTIVE STATISTICS

Questions	N	Minimum	Maximum	Mean	Std. Deviation
Is abortion justifiable when pregnancy is a result of rape?	75	1	3	1.25	.522
Do you think pregnancy from rape leads to grave consequences and seem to prolong the victim's anguish?	75	1	3	1.23	.606
Do you suggest any modifications in the law regarding abortion access to rape victims?	75	1	3	1.24	.566
Should abortion be authorized on the request of the victim on the basis of FIR, medical examination by a forensic doctor confirming that the woman was indeed raped, and perform the DNA test, within a specific time frame?	75	1	2	1.13	.342
Is a mental trauma for rape victims more devastating than being physically assaulted?	75	1	2	1.07	.251
Valid N (list wise)	75				

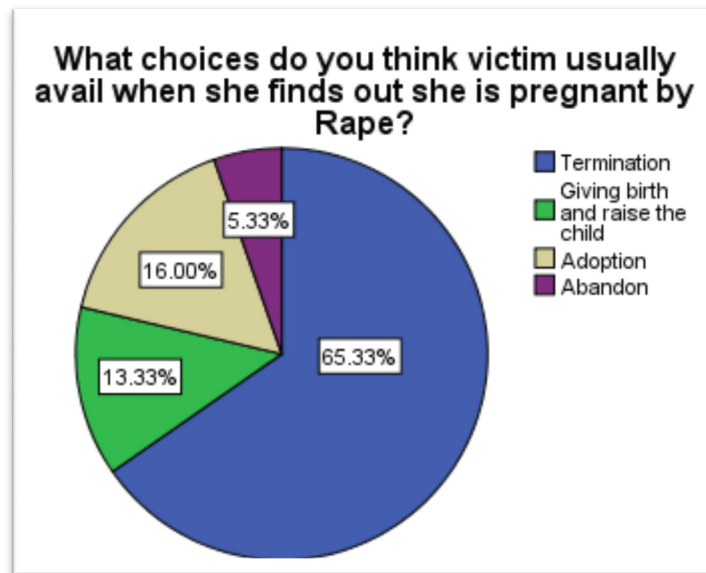
5.4.2.1 RESPONSES IN THE FORM OF PIE CHARTS

Question#1



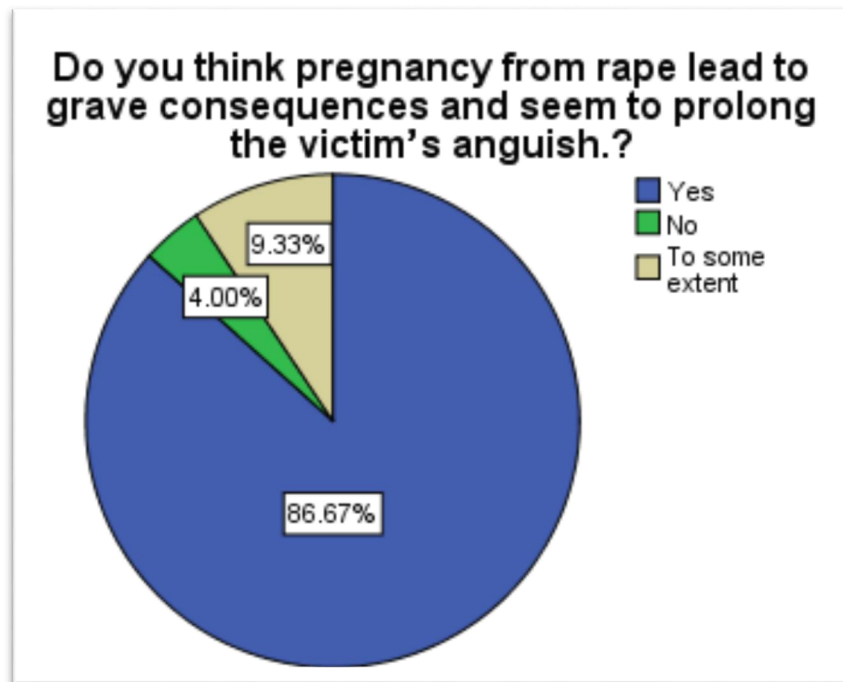
- ✓ This pie chart illustrates that 78.67% lawyers consider abortion a justifiable option in the case of rape resulting pregnancy, and 17.33% disagree with this point of view and 4% think that it is a justifiable option to some extent.

Question#2



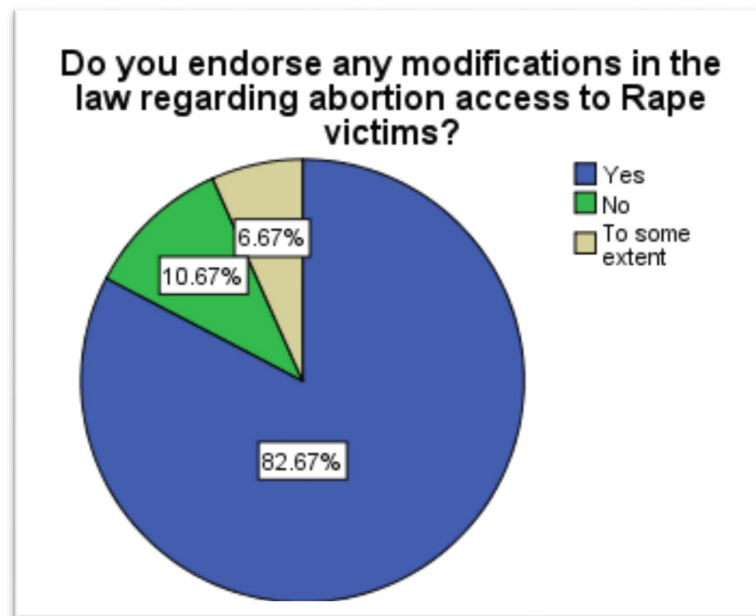
- ✓ According to the readings on this pie chart 65.33% respondents believe that the victim may seek to terminate the pregnancy by a resort to unsafe and 13.33% think that she may decide to give birth and raise the child and 16% are of the opinion that she may decide to give up the child for adoption and 5.33% believe that she may decide to abandon the child.

Question#3



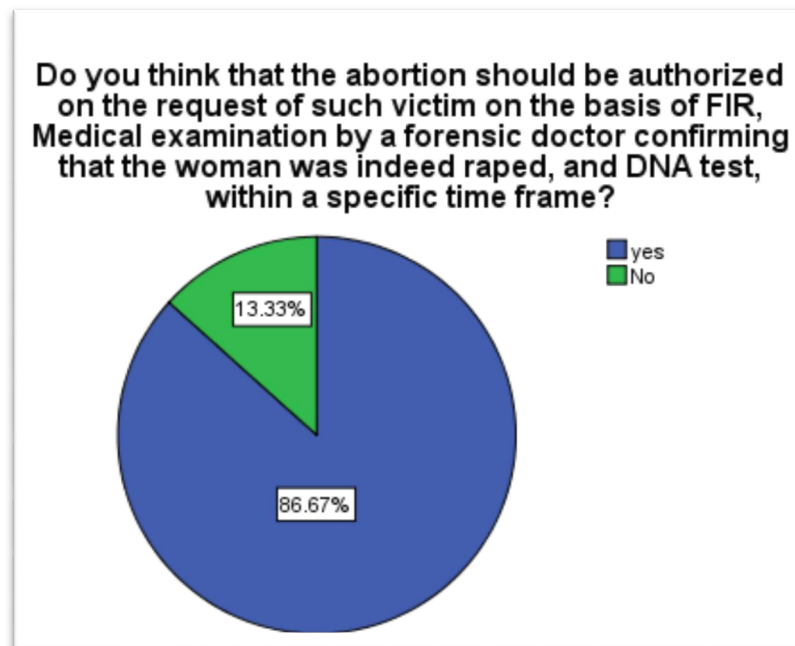
- ✓ This pie chart illustrates that 86.67% respondents agree that pregnancy from rape leads to grave consequences and seem to prolong the victim's anguish and 4.00% disagree with this point of view and 9.33% think that to some extent it prolongs victim's anguish.

Question#4



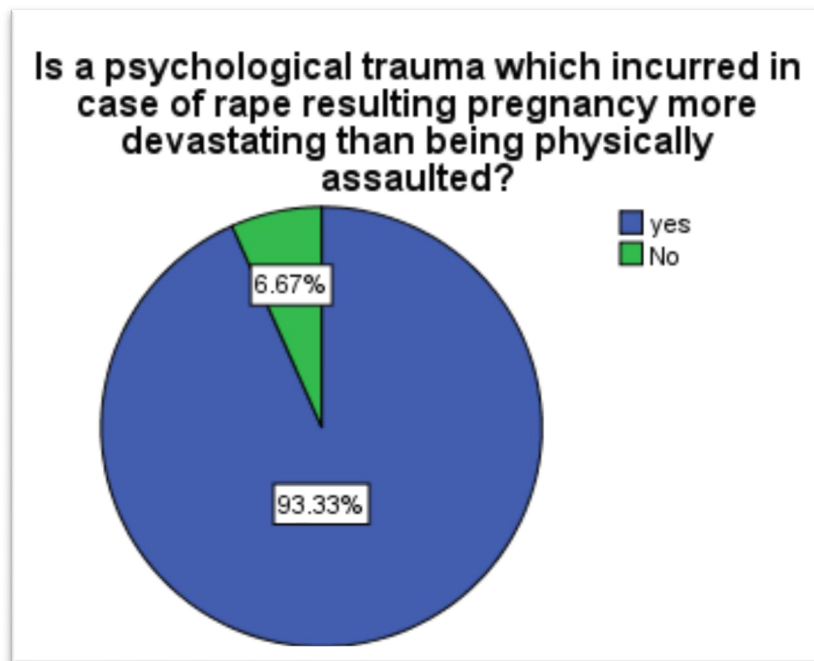
- ✓ 82.67% respondents endorse the modification in the law regarding abortion access to rape victims and 10.67% disagree with such change in the abortion laws and 6.67% favor such modification in the abortion law to some extent with proper procedure to be adopted in such situation.

Question#5



- ✓ According to 86.67% responded that the victim should be authorized to have abortion in case of rape, if she desires, on the basis of the FIR, Medical examination by a forensic doctor confirming that the woman was indeed raped, and DNA test was performed within a specific time frame but 13.33% respondents disagreed with such authorization.

Question#6



- ✓ This pie chart explains that 93.33% of respondents think that psychological trauma which incurred in case of rape resulting pregnancy is more devastating than being physically assaulted and 6.67% think that psychological trauma is not devastating than being physically assaulted.

5.4.3 DISCUSSION AND ANALYSIS OF RESULTS

In the first portion of the survey research, 120 questionnaires were distributed, out of which 45 were distributed to Medical Officers of Government hospitals in Rawalpindi and Islamabad. 41 out of 45 respondents had an impression that abortion is a justifiable option in case of rape resulting pregnancy and it should be empowered in such cases on the postulation of the victim. The remaining 75 questionnaires were distributed to legal officers, consisting of male and female who work in Rawalpindi and Islamabad. Among those 75 respondents, 65 were of the view that abortion should be authorized if the pregnancy is an outcome of rape; it is a justifiable option. Majority of doctors think that abortion can be painful for the un-born child at the stage of fetus.

According to some, it should be allowed before it reaches to the stage of fetus. Whereas others, believe that it should be allowed till the stage of embryo and there were some who had the viewpoint that in case of rape, abortion should be allowed as soon as pregnancy is confirmed.

The bulk of respondents either Medical officers or Legal officers were of the viewpoint that it is a really significant issue and silence should be broken, we need to talk about it and legislation should be proposed regarding rape resulting pregnancies. The vacuum in the law should be filled. Pregnancy can be dangerously traumatic for the rape victim and can sustain the victim's sufferings both physically and mentally. The other aspect or face of rape is pregnancy, which can result from it and there should be well framed laws to deal with this aspect. The victim should have legal options and should be free in making her decision. This issue can't be overlooked. Since abortion in such a case is not lawfully permissible, many women are forced to seek non-professional help, which is precarious and could pose a risk to the woman's life. It was further indicated that women deserve access to better reproductive health facilities, thus on that point, there should be laws in place, with sufficient and proper implementation. The absence of legal clarity pushes numbers of women to undergo backstreet abortions in Pakistan. The respondents further maintained that more exemptions, which are considered to be religiously, and else lawful across the Muslim world, need to be created. The Pakistani law has nothing to guide on rape resulting pregnancy. A woman cannot probably ask for abortion in such circumstances, which is unfortunate. Abortion at initial stages, with the approval of the woman, can lessen many problems faced by the victims. Furthermore, in the public sphere, there is almost no discussion on the subject which further impedes the reform process.

5.5 SECOND PART OF SURVEY RESEARCH

After scrutinizing the data obtained by questioning the people, the researcher reached to the conclusion that the mainstream of the people is in favor of giving the right to abortion to rape victims. Then after getting this information, researcher moved to the second portion of the research. In this portion of survey research, the interviews were conducted with rape victims because before proposing and legislating any law it is always important to obtain the sight point of the division for whom law has been proposed and at the same time it is important to address their problems which are only possible by direct interaction with them. Thus, for this purpose, interviews were taken. The data has been compiled in detail from 10 rape victims. The direct interviewing technique with structured questionnaire has been used in this esteem. Observation has been practiced as the auxiliary technique respectively. The necessary and timely information has also been collected from the non-governmental organizations and Legal Aid workers. Collected data has been edited first, and then described sequentially. For data collection and sampling, researcher has interacted with 10 rape victims of different ages from different cities. The questionnaires have been used to record their impressions. Different questions were asked from them, related to how they describe the criminal offense of rape, how it has affected their personality, what problems they faced and what relief they require. The questions referring to pregnancy as a consequence of rape were also asked. The questionnaire therefore became the primary source of data about the public opinion. This was researcher's direct interaction with the public. At present, rape is a great problem among other socioeconomic problems of huge women community. Thus, the solution to the problem requires extensive research, policy formulation and implementation of the program accordingly. It is not possible to get the overall depiction of problems

faced by the victims in the country through this study executed on extremely small sample size. Only very small sample concept can be achieved about rape related issues. The research was limited to Rawalpindi and Islamabad, Lahore, Gujrat, Attock, Sawat and Jacobabad. The researcher personally visited the shelter homes, welfare organizations, police stations and courts in Rawalpindi, Islamabad, Lahore, Gujrat and Attock. Cities like Jacobabad and Sawat where personal visit was not possible, the interviews were conducted through Skype, Imo and Telephone. The researcher took the help of the legal aid workers for accessing the victims. Moreover, the respondent's emotions, mental state, lack of parental consent, lack of social security and the future risk of damage, conservative social aspects etc. have impeded this study variously. Some names and other particulars which may possibly contribute to victims being identified have been altered or withheld for security and privacy grounds.

5.5.1 CASE DESCRIPTIONS OF VICTIM'S INTERVIEWED

Case No. - 01:

Name: Noor Jehan, Age: 20 years, Religion: Islam. She was kidnapped and was held in confinement where she was gang raped. Four men raped her in detention. She was sent back home approximately after 15-20 days with injuries on several parts of the body. She was studying and was living in Gujrat, but after this event she had to leave the studies and her residence. She was extremely depressed and shattered mentally, physically and morally. According to her, this event has changed her whole life. She is no more a confident person, feels hesitant in talking to people. Many years have passed, but the effects of this heinous crime are still there with her. The victim's brother quoted that accused persons belong to influential family and one of the

accused is a police officer, so police didn't cooperate with them in fact they tried to put the blame on their sister and attempted to change the rape into adultery. Later on, after the pressure of social welfare organizations, police had no choice except to lodge the FIR but made unnecessary delay in medical examination with the intention to hide the reality, they also made changes in the statement of the victim and in the medical report as well. The victim and her family are still waiting for justice; they demand that there should be check on police's powers and furthermore female police officers should record the victim's statement. Police should be bound to lodge the FIR and send the victim for medical examination as early as possible and if the police don't accommodate the victim, proper legal action should be taken against them. They further added that some financial aid or funding should be offered to the victim. It can't heal the wound but can at least diminish the other associated problems. When the victim was asked about the question of pregnancy related to rape, she answered that she missed her periods after the event of rape, but she didn't notice due to the other problems she was going through, but when second time she missed her periods she discussed with her sister who took her to the lady doctor in their area who confirmed her pregnancy. This was very devastating for her and her family. She was blank and didn't know whose child was this because she was raped by four men. She went into an acute depression and had a miscarriage. Her sister had also requested the doctor for miscarriage, but doctor strictly refused and said it's illegal and a punishable crime. But she was relieved on having a natural miscarriage. She quoted that she couldn't even think of giving birth to such a child and if she hadn't experienced a miscarriage, she would have killed herself and the baby. She said it is very essential for the government to address this issue and provide proper guidance on what should be done in this situation. Abortion should be allowed, she doesn't know within which

time frame, but it should be. Abortion in society is taken as a taboo and evil, but rape is a much bigger evil than abortion. Nobody talks about the problems suffered by the victims and pregnancy is one of the biggest consequences of rape which should not be neglected. She thinks that in case of pregnancy, the rape victim will definitely try various methods of abortion. The case is in the court and pending due to lack of evidence. The victim and her family seemed really hopeless and dejected.

Case No. - 02:

Name: Munaza Bibi, Age: 6 years, Religion: Islam. She lives in Swat with her parents. She is a 6-year-old child. When she was 4 years old, she was raped by a boy who was her relative. The police arrested the accused and he restrained in custody for 17 months, but after that he was released on bail. According to the parents of the victim, this event has badly affected their daughter mentally, physically and morally. She yells at night, experiences nightmares, doesn't talk to anyone, and doesn't play much. She is today a quiet child, which is very devastating and depressing for the parents. According to Abdūl Samat, the father of the victim, police had tempered the investigation, not cooperated with the family and excluded important details from the FIR. The police had also made some changes in medical reports and did unnecessary delay in lodging the FIR. They didn't facilitate the victim's family, in fact discouraged them on the step of coming forward and filing the complaint. Her father also demands for speedy justice. Since 2015 the case is in the court and is still in the court. It has caused a lot of financial damage to them and has also increased the pain of the family and the victim. The delay in justice has increased the depression and anxiety. The family also demands that there should be more or less fixed amount allotted to the victim for bearing legal expenditures. Strict laws should be formulated, which ensure the speedy justice and positive role of the police. There should be some

substantiation on the police that they facilitate the victim by lodging the FIR properly. The police officer should be legally responsible to guide the victim and his family about the relevant laws and procedures applicable in the particular situation and furthermore, the investigation and questioning from the victim or female members of a family should be made by female police officers and there should also be female judges, so that the victim can express herself conveniently.

When her parents were asked about the question of pregnancy related to rape, they replied that it is a real important issue which is commonly overlooked. Her mother said that her daughter was really young when she was raped so there was no prospect of pregnancy, but she knows someone who lives in her area and delivered a child as a consequence of rape. Later on, that child died, but no one knows the real cause of the child's death, however, there are some speculations that the family of the raped girl has killed that child. The victim Munaza's father is a school teacher and Imām of local Masjid. He stated that it's only one event, he knows so many other stories where parents bring their daughter to midwives for abortion and if abortion is not possible, they either kill the child or force the victim to marry an accused, if he is one from the family. Usually abortion and killing of infant are common. In the city of Swat, rape is a criminal offense that is increasing rapidly and consequences of rape like pregnancy, suicide, unsafe abortions, and infanticides are likewise usual. He said because there is no permission for legal abortion so victims hide their pregnancies and go for hidden and unsafe abortions or kill the infant. He is of the opinion that although that child born as a consequence of rape is innocent but we have to take the lesser evil. Even Islam permits abortion within the first 40 days in case of necessity. He further argued that in case of rape if the victim is pressurized to give birth who will then take care of that child and mother financially, who will marry such girl and own the child, that

child will be an aide memoire of the incident that happened to her and will make her life more wretched. He suggested that government should allow the abortion within the first 40 days at the request of the victim and should provide her safe abortion services and care but if she wants to keep the child, some financial aid should be provided to her throughout the pregnancy and till that child matures. He also cited that the place from where he belongs, people usually don't report the rape cases due to fear of society and due to rude, unfriendly attitude of the police. The police try to put down and increase the nuisance by asking awkward questions from the victim and family. But he took a stand for his daughter and he is proud of it.

Case No. - 03:

Name: Aneela, Age: 18 years, Religion: Islam, Case details: No. 2(287)117-Complain (NCHR) Petition, S-05/2017 And CrL. Bail Application No-602/2017, U/S 365-B, 376,342,148PPC. Crime No: 45/2017 PS Civil Line, Jacobabad. Aneela is a resident of Jacobabad. She was 17 years old when she was raped. While going to tuition center, three boys abducted her. They brought her in their home and forcefully committed gang rape with her for 2 days. After 2 days she managed to escape and after that she came to the police station with her father and lodged the FIR against the perpetrators. The victim further explains that the police didn't cooperate with her and her family, in fact, they tampered with the evidence, misplaced the clothes of victim which she was wearing at the time of the rape, delayed in lodging the FIR, also made changes in the victim's declaration and provided no help and guidance. She stated that the outcome of rape has altered her whole life and has severely affected her morally, physically and mentally. Even so much time has faded and many things have changed in her life, she got married, but even then, it's hard to forget and speak about this. She suggested that modifications in the legal system can decrease the misery of the victim.

Firstly, there should be check on police; they should be monitored for not registering the complaints on time, and for anomalous behavior, which they usually show if the victim is not from an influential family. Secondly, there should be female police stations in rural areas as well and the basic investigation from the victim, regarding the event that happened to her, should be done by female police officers, so that the victim may not hesitate and may not feel defamed. Thirdly, there should be female judges for such cases and rape cases should be put away as early as possible. Speedy justice should be provided against such cruel incidents. Fourthly, financial aid should be offered to the victims for bearing legal and other outlays. Lastly, the awareness of the law is required in rural areas because people here are mostly uneducated and they don't know what to do in such circumstances and where to go for help as she and her family didn't know what to do until she found assistance of a social worker. The victim first goes to the police station after the occurrence of the rape, so the police should be obliged to provide legal guidance to the victim and her kin.

Furthermore, when she was asked about the personal and social problems, she replied that people treat such girls with disgrace and people around her used to rally her, passed comments on her and considered her a bad girl and also believed that she did something provocative, that's why she was raped. The society blames the victim for rape. She further said that the effect of the assault is there in her married life as she can't completely enjoy her marital relations. It was very hard for her to take in a healthy physical relationship with her husband. She sometimes associates her lawful physical relations with bad memories she has, but she is trying to liberate herself from her past. When she was asked about the subject of pregnancy as a result of rape, she stopped responding and stayed silent. It sounded like she was probably crying. Observing this, I moved onto the next question and needed her opinion about the

sanction of abortion in such instances. She responded that with a yes but refused to spill the beans about it more. At this stage, I had to weave up the discussion because the victim sounded depressed and in deep pain. Her silence answered a lot of questions which she was not able to answer due to social pressure. Rape is a non-compoundable offence under Pakistani law, but it has a less practical application. In this case, Aneela Bibi and her family have pardoned the offender and have withdrawn the case.

Case No. - 04:

Name: Aneesa Bibi, Age: 20 yrs, Religion: Islam, Case Details: FIR No:123/18, Initial Report No: 16, Dated: 03-04-2018, U/S 365 and 376 PPC, PS City, Attock.

Aneesa Bibi lives in Attock. She sustained a friendship with a man Qadeer. They used to meet and knew each other for a long time. One day he took her to his home, where there was no body. She didn't know what happened, but she felt really dizzy and slept there at his place. When she woke up, she realized that she had been raped. When she asked him about the night, he replied that all that happened by mistake and he was not in his mind. She shouted at him and left the place and reached home. She stated that she was in great guilt and was broken down morally, so she decided not to meet him further, and ended all ties with him. A few days after all of this, she realized that she was pregnant. She was in great fear, so she informed him and demanded for conducting marriage immediately. They decided to marry secretly without the permission of their families. It was Sunday when she reached near his home and according to set plan called her. She reached at the spot where he was already there with one of his acquaintances. He held her in his friend's house and told her the Maulvi and a witness got stuck in some personal problem, so marriage will be held tomorrow. She had no option except to believe him. They both slept in the living

room and at night he raped her again and ran away by leaving her there alone. The next day his uncle came to that place and asked her to leave and told her that Qadeer (accused) will never come back again and will never marry her. His uncle dropped victim to her house in his van and said, he will try to locate him and will inform her. But he never returned back. She further explained that he used condom, so there was no chance of pregnancy. If he hadn't used it, then in case of pregnancy, she would have definitely gone for an abortion.

She lodged an FIR against him with the help of a legal Aid worker in the Attock Police Station and wanted justice to be done with her. The victim further explained that pregnancy as a consequence of rape is a real significant issue which needs to be addressed. Safe abortion services should be provided to close the backdoor abortion centers. According to her, abortion is the only option in the case of rape because no one can bear the side effects of raising the illegitimate child and such child will have no acceptance in society and even it is difficult for a mother to love such child. Rape victim has to endure so much e.g., character assassination, teasing, boycott from friends and family and label of being a shameless girl, so with all these factors pregnancy will increase her sufferings. She believes that if any of rape victim ever gets pregnant, that victim will definitely go for illegal abortion either by a midwife or by some other means, but she thinks no one would like to give birth to such child in this society. She has filed a complaint under "section 365B and 376 of Pakistan Penal Code" and the case is pending in the Attock court and the next hearing is on 5th May, 2018.

Case No. - 05:

Name: Marium Shazadi, Age: 28 yrs, Religion: Islam, Case Details: FIR No: 252/17, Initial Report No: 34, Dated: 26-02-2017, U/S 376 and 292PPC, PS City, Attock.

Marium lives with her grandmother and she has two daughters. Her husband has divorced her. She wanted to file a case against her husband, so went to Attock Kacheri where she met a person named Ramadan, who offered her help in finding a good advocate. He led her to the advocate who asked for her original Nikhanama. Ramadan said that he will help her in getting copies of her Nikhanama. Then one day, he visited the victim and said her thumb impression is required for collecting a Nikhanama and for this purpose she has to go to an office of Union Council. He brought her somewhere else rather than taking her to the office of Union Council and when she inquired, he denied the fact. Later on, about three persons entered into the room and put a gun on her shoulder and tied her and took off all of her clothes. She was in shock and was unable to understand what was happening with her. She was being raped by five men. One by one they raped her. Marium Shazadi was gang raped with brutality. She lodged the FIR against the culprits and wants them to be penalized as severely as possible. The victim requested the concerned persons to provide justice as early as possible. She suggested that rape victims usually have security concerns, so government should provide protection to them. She also proposed that there is a need of law awareness, the government institutions should make arrangements for law awareness programs in small cities and towns, so no one can mislead uneducated and innocent females in the name of law. She further pointed out that the number of female police stations should be increased even at male police stations in case of rape, the inquiry and basic investigation from the victim should be done by a female officer. She also added that society mostly puts the blame on the victim and increases

her problems, this mindset should be changed. Moving further when she was asked about pregnancy as an outcome of rape, she replied that in her case all five criminals used condoms and then raped her, so there was no possibility of pregnancy and if she had gotten pregnant, she would have definitely gone for an abortion because she can't even think of giving birth to such child. She had a viewpoint that abortion has to be allowed in incident of rape resulting in pregnancy, and the pregnancy can be very devastating and add to the victim's sufferings. The police investigation is under process and all the accused persons are released on interim bail and the victim is hoping for speedy justice to be done.

Case No. - 06:

Name: Soriya Bibi, Age: 40 yrs, Religion: Islam, Case Details: FIR No, 104/18, Initial Report No:8, Dated: 01-05-2018, U/S 376,2922 and 506ii PPC, PS Saddar City, Attock. She was living a happy married life with her husband and four kids, but this event had ruined her life. Her husband divorced her and kept all four kids, she was forced to leave the house and kids. She explained that the man who raped her was her relative, he did not just rape her but also made a video of it, on the groundwork of which the accused used to blackmail her and coerced her to set up a sexual relationship with him. She strongly refused and as a consequence of refusal, he showed that video to her husband and other family members. After this she got divorced and came to her parent's home. Now she is living with her mother in Attock city. She further explained that this whole affair has destroyed her life. She is in great mental trauma that she even attempted to commit suicide. The society and her family are punishing her for what she has not done, people around her tease her and charge her for everything. She added that a rape victim has to go through a lot physically and mentally, but with all this society adds more suffering. The victim also has to tolerate

the inhuman and the unjustified attitude of society. They assume that victim's personality has invited a crime. She also explained that she has filed the FIR against the accused, but nothing has been done so far, no arrest has been made, infact police is pressurizing her to compromise. This attitude of police discourages the one who comes ahead and files the complaint. The police don't perform the duties effectively as they make unnecessary delays which favor the accused. She added that security is also a big issue which the victim and her family faced; the government should make some arrangements for the security of such victim. She also made a request to the police that she needs protection against the accused, but the police has not provided any security.

Moving further she revealed that she also got pregnant as an effect of rape, and that was the most difficult and depressing phase of her life. She didn't want to give birth to that child, so she went to the midwife and took some medicines and had a miscarriage. She explained that she is no more regarded as a respectable woman, people see her as a woman of a bad character and label her with different claims, she can catch all this in their eyes, the friends and relatives have also left her alone. So, with all this who would have accepted that child and given him love and acceptance, that child would simply be a burden on her and constant reminder of the accused. She said that "why should I give birth to such unwanted child who would make my life more miserable, I know kids are innocent, they should not be blamed, but I was also destitute and helpless in front of the accused, but no one ever sees this, so who would have sympathy for that child when nobody has for me". She added that mental trauma which rape brings is difficult to cope with, so in all this, carrying pregnancy is extremely hard. So, victim should have authority to take the decision related to pregnancy as a result of a rape. The government should address this matter seriously

and should create some exceptions in current abortion laws. This will help in lessening the misery of the victim. The investigation is under process, she demands that police complete the inquiry without any further postponement and arrest the accused as early as possible.

Case No. – 07

Name: Batool, Age: 18 yrs, Religion: Islam, City: Attock. The victim lives in the Attock city with her family. She was raped in September 2017. The accused was a son of her uncle who came to her house when she was alone and raped her. After all this the victim immediately informed her mother and told her about the incident. Her mother Naseem went to the accused's home and had an argument with his parents. The offender and his family firstly denied all the charges, but when she articulated that she will run to the police and file a complaint against their son, they admitted their son's crime and asked for forgiveness. After this all the elder family members came to her place and requested for forgiveness of the wrongdoer. The victim's mother explained that she has to compromise with them because there was a great deal of family pressure and she likewise suffered a fright in a back of mind that if the matter will go to the court it will bring a lot of shame for her daughter and she is a poor widow who just makes both ends meet, so how she will bear all the expenses of the judicial system. So, she decided to compromise. The victim added that she understands her mother's problems and doesn't want to add more, her mother is raising her and her siblings with great difficulty, so the compromise was the only option we had. She stated that she can never ever forget what happened to her. She is still ascertaining the answer why her; it has borne upon her whole personality. She strongly prays that may Allah punish the accused in this world and she may see this. When she was asked about the topic of pregnancy as a consequence of rape, she

looked at her mother and remained still for some time and then answered yes, she had. Her mother explained that as early as her daughter told her about the pregnancy, she gave her some herbal medicine, which she took from a local woman and as a result of those medicines her daughter had a miscarriage. The victim claimed that rape itself is difficult to cope with, so the pregnancy is more misery and against which there is no legal relief. So, she had to look for the backdoor abortion. The victim's mother suggested that abortion must be legitimized in the early weeks in circumstance of pregnancy as an outcome of rape and sound health facilities should be supplied to victims, so they may not risk their lives by using dangerous methods. Her mother further added that abortion is a sensitive issue, some people raised their concerns for the unborn child, but what about the rights of the victim who is already born, her mental physical state should be a level of worry. She added that according to her knowledge of Islam, even Islam allows abortion within first 40 days with a valid reason and rape is the most genuine reason.

Case No. – 08

Name: Saman Ali, Age: 20 yrs, Religion: Islam, Case Details: FIR No:15 /2016, dated: 11,1.2016, U/S 336-B,506 PPC, 7 ATA,1997, P.S Mustafa Town, Lahore. The victim Saman Ali is a resident of Lahore. The accused, named Zafar Iqbal, who is her brother in law, threw acid on her face and in this incident the face of the client has been burnt badly. She stated during the interview conducted for the intention of this research that accused, who is a husband of her sister also raped her and desired to establish sexual relationship with her. He used to force her for a sexual relationship with him, but she refused his offers. He threatened her that if she did not, he will spread it among the relatives and society that the client is a girl of bad character. On her refusals, he got annoyed and threw acid on her face. On 08-07-2017 finally, anti-

terrorism court, Lahore gave the final decision of the case and accused Muhammad Zafar Iqbal is sentenced to imprisonment for fourteen years, along with one million rupees fine. The accused Zafar Iqbal has filed his appeal in Lahore High Court against the judgement of the “Anti-Terrorism Court”, in his appeal he stated that his conviction by the trial court is false and against the law. Now the date of the hearing is 19-06-2018 for final arguments. The victim Saman Ali now a days is doing BS (Applied Statistics) from University of the Punjab. She requested that at least half of the amount of the fine which is specified by the court should be dedicated to her because she belongs to middle class family, so it is difficult for her to afford the expenses that incurred during plastic surgery. She suggested that finance is a big issue, the government should make sure that victims of rape, acid throwing or of any other heinous crime must receive a satisfactory amount of compensation at the appropriate time. She also added that security is another big issue, the accused family and friends usually try to harass and threaten the victim to take back the complaint. Hence, it is an obligation of the law enforcing agencies to arrange for protection of the victim, so she can pursue her case with a peace of mind. She also highlighted that lack of legal awareness is also a major cause of the underprivileged condition of women in Pakistan. There are very strong laws to provide protection against these crimes, but they are just a piece of paper because most of the women are ignorant of their rights and legislations formulated for their protection. The laws related to a woman should be made a part of the curriculum, so if any woman unfortunately becomes a victim of any serious crime, she would have an idea to handle that situation legally. The other thing highlighted by the victim is that cyber laws should be revised and made sounder and more operative. The overall judicial system is weak, so it makes the victim feeblest. She further stated that police usually do not play their role, they lack the

basic ethics, education and training to handle such victims, they try to demoralize the victim and force for out of court settlement. She suggested that there should be special cell in a police station consisted of well-educated and trained staff, including both male and female officers to dispense with such heinous offenses. Lastly, the victim Saman Ali suggested that there is a need to make an amendment in current abortion laws, the exception of rape should be added. It should be legalized during the early weeks till the stage when human features are not visible. It will be a great step to secure the future of rape victims and it will also prevent infanticide and back street abortions. She stated that she knows somebody who committed suicide, when she realized that she was pregnant as an effect of rape. If someone wants to hide what happened to her and wants to resume a normal life, this pregnancy fact will make visible all that she wants to hide. Giving birth to a baby is not easy, it may be easier for people to say that abortion will be an infringement of fundamental rights of an unborn child, but what about the rape victim, giving birth to such child will only add problems, particularly if the victim is unmarried and it will also not be beneficial for that child. That child will always live with a tag of being unwanted or illegitimate and a constant reminder of the rapist and rape.

Case No. – 09

Name: Fozia Sheen, Age: 33 yrs, Religion: Islam, Case Details: FIR No: 113/17, dated: 22-05-2017, U/S376 PPC, P.S City Attock. She is a married woman and has four children. Her husband lives in Dubai. She was raped by a man named Mujahid Shah, who lived on her street and was known for his bad character. She stated that one day he came to her home, locked it up and raped her. He threatened her that if she will inform the police, he will hurt her and her children. But she took a stand and lodged an FIR against her. Police was reluctant to bring any action against the accused as he

was an influential man. In fact police discouraged the victim, they harassed her and asked her to take the complaint back. The victim explained that she was dejected after the attitude of the police; she forced them to lodge the FIR and arrest the accused. After the struggle of so many days police lodged the FIR and they arrested the accused, he stayed in detention for nine days and then was released on bail. The case stayed in court for approximately 3 months, but later on she withdrew the case and compromised with the accused party. She indicated that she had no option. She had family pressure and there were threats to her and her children's life. In all this, there was no help of the police; they were not providing any protection or support. In fact, they were in favor of compromise. Her case was also not that much stronger due to lack of evidences, she added that the police made an intentional delay in registering the FIR, and then also delayed the medical examination. So, all this delay favored the accused and the victim further stated that all the internal and external factors were against her; the family, society and law. No one was kind to her, so the compromise was the only option left.

One year has passed, but she still holds the memories of those days, which will stay with her forever. She explained that rape is such a deadly crime that puts down the victim internally and externally, the outer wounds get healed with the passage of time, but scars, which are on the soul never heal and the victim has to live with this burden. On the question of pregnancy as an outcome of rape, she replied that she also became pregnant as a consequence of rape, but with the support of family, she aborted that baby whom she never wanted to give birth at any cost. She added that even if abortion would have imperiled her life, she still would have gone for it. She said that it does not matter either it's legal or not because what happened to her was also not legal. She said it's a noteworthy issue and abortion should be allowed in case of rape resulting in

pregnancy as this would help in improving the mental and physical health of the victim.

Case No. – 10

Name: Nadia Ameer, Age: 22, Religion: Islam, Case Details: FIR No: 16/2018, dated: 11-01-2018, U/S 376 PPC, P.S City Attock. The victim is an unmarried, young girl who was raped by the one whom she was going to marry. The accused named Rehan Mustafa and his family came to her home with a marriage proposal. The victim's family accepted the marriage proposal. Then subsequently one-day, the accused called the victim to meet him for the purpose of discussing the arrangements of marriage. Then when she went to meet him, he took her to his home by saying the whole family is there and wanted to have lunch with her, but when they reached, there was no one at home and the accused locked the door and raped her and also took her pictures. He extorted her that if she would tell anyone in the family, he would upload the pictures on the internet. Later on, he disconnected all the ties with her and spread the rumors that she (victim) is a girl of bad character. She informed about all that which happened to her to her elder sister who took her to the police station, where they filed a complaint against the accused. The police advised them not to take any legal action because this will affect her and her family's honor. But she pressurized them to take a strong legal action. She further explained that the police were not vigilant in taking any action. Later on, the police called victim and accused's family and settled the matter. She alleged that the accused had some connections in the police, so on behalf of which police forced for the out of court settlement. The victim added that she belongs to an underprivileged household and her father is a simple man. So, he decided to compromise rather than taking the matter to the court. She

added, her family had no courage to face the society and to bear the expenses that would incur in lingering on this matter.

The victim further explained that she had a pregnancy as a consequence of rape and she aborted that child with the help of her elder sister who is married. She has an approach that giving birth to such child can never be a good option, it will only increase the glitches of the victim, no one will marry her and the child will also be a source of ignominy for her and her family. She added that abortion must be legitimized in case of rape resulting in pregnancy. This right should be provided by the government to the rape victims.

5.5.2 DISCUSSION AND ANALYSIS

In this part of survey research, the detailed interviews with rape victims of different ages and from different cities were conducted. After examining all the interviews, it is averred that there are some common problems faced by all the victims. There are some areas which are disregarded by law and requires legislation. The appropriate and sound inquiry of the cases is essential, but police in Pakistan is enormously unsystematic. And there is a political pressure on the police and other administrative issues are obstacles to the provision of justice. Most of the rape victims claimed that their cases have been manipulated by the police. The FIR is flawed to start with, which leaves lacunas for suspected rapists to elude the penalty. To initiate the criminal proceedings against the culprit, the primary instrument that is required is FIR. The victims have explained that they have experienced many substantial disparities in the registered FIR and Medico-Legal examinations conducted. The rape victims have complained about the delay in the filing of the FIR, the postponement of a little hours, even can act against a victim, as proven by many judicial decisions that

have headed to exonerations. The following investigation reports and charge sheets submitted in the courts are established on the details recorded in the FIR, so incorrect or incomplete FIR is tremendously harmful. The absence of evidence and discrepancies between the victim's statement in Court and the FIR is the usual reason for the discharge of a rape case. Among other problems, the police section has been plagued by widespread fraud, maladministration by the officers, lack of liability, absence of motivations and a general negative image, while courts also don't fulfil their duty and overlook drastic errors in the investigation procedure. All the rape victims who have been interviewed demanded the accountability of police for abusing their powers and check on the power of the police. The rape victims who were interviewed raised concerns regarding the negative attitude of the police. The analysis of the interviews conducted from rape victims calls for ample police reforms deal with these problems, most conspicuously in producing mechanisms for complaint redresses and culpability for exploitations. Often, courts and judges also see the flaws in the investigation on the part of the police is usually overlooked by the courts and judges.

The victims also demanded that female police stations require to be made more reachable, operative and the number of officers should be increased. It is ordinarily really hard and traumatic for a rape victim to articulate the entire incident in front of the male officer and to resolve his doubts. Despite the fact that almost half of the country's population is comprised of women, their representation in Pakistan's police force is appalling. In that respect is also a requirement to discourage officers from making their own conclusions early before investigating decision in a lawsuit. Some of the victims also suggested that there should be special cells in a police station consisted of well-educated and trained staff, including both male and female officers

to dispense with such heinous offenses. Another issue raised by rape victims is a delay in justice, they demanded speedy justice. Rape cases stay pending for years, and the victims have to undergo the excruciating trial of refabricating the sight of being raped over again. Another important issue is that Pakistan's legal system suffers from two important and lethal inadequacies which unswervingly effect rape victims, the shortage of women judges on the bench and the lack of policies to safeguard rape survivors as they appear to give their testament. To the first shortcoming, merely having women judges may not resolve the problem if it is not accompanied by a straight effort to sensitize them in gender or rape issues. The fortification to the survivor and witnesses from coercion by the alleged parties have to be provided by the courts and law enforcement agencies (police, prosecutors, etc.). Moreover, laws should be presented through which victims are offered special protections during the course of a rape trial. The new rape laws have been introduced, but they require a vigilant implementation to overcome all these flaws. The victims argued that rape instances will continue with latitude for the reason that state institutes are not undertaking their job in the most effective way. The society also doesn't provide much support to the victim. It looks as if (being raped) was her own mistake. It is not the sole problem of women, but also a disgusting situation for all, as human beings. Because in this epoch of globalization, if our women community becomes victim of torment and rape in medieval barbaric mode, then that will be a heavy defeat for humanity. If we can't manage to control these undesirable situations rapidly, a major disaster will be gravitated in the entire society in the near future. The family, society, state and non-governmental organizations should be self-motivated to take different initiatives or plans. It is really important to assure the application of appropriate legislation. In summation, it is possible to wipe out crimes like rape from our society

through removing discrimination with avoiding negative and envious attitudes to adult females, ensuring their equal opportunity and human rights, correcting male's behavior, upholding the religious ideals and values among men and women in society and creating greater social cause. Thereby, the society will be taintless, the women will be independent and secure and the real national development will be established with equal participation of men and women. There were some victims who were temporarily residing in the shelter homes, they claimed that living conditions in shelter homes are not good enough, they are heart sickening, lack elementary health facilities. The offices of physiologists and doctors at the numerous of the shelter homes are vacant. They stressed that there is a need for running such institutions in a better way. The government should set up more shelter homes in all regions of Pakistan, with well-educated staff. Most of the victims indicated that awareness programs should be introduced in rural areas, where women are not cognizant of their rights and the law. The lack of awareness is one of the foremost grounds for the increase in violence against them. Most of the victims who have been interviewed were unaware of their rights. There is a need that the government set up the help lines and more institutions that provide free legal counseling services to survivors and awareness-raising activities largely focus on the psychological and social ramifications of violence against women with specific emphasis on rape and domestic violence. The victims also claimed to be economically affected by the rape. The direct costs may possibly take in short and long-term physical or mental health care, spoiled property, and fees associated with the justice system. They demanded that financial assistance should be provided to them.

Most of the victims who were questioned under this research were of the view that abortion must be authorized in circumstance of pregnancy as a consequence of rape.

They have pointed out that there is always a terror of being held responsible or excluded by family, friends or society. Thus a pregnant rape victim desires to hide what has occurred by eliminating the noticeable sign of it. The other reason pointed out by the victims was that giving birth to such child can be the most traumatic experience; the images of the rapist and of the rape would continuously flash through their mind. The majority of victims were of the opinion that a rape victim who has been regrettably turned out to be pregnant should have the option to terminate the fetus in the course of the early weeks.

CONCLUSION

There is one opinion according to which the attainment of humanness is a slow occurrence, rather than one that takes place at any certain moment. While one may have a precise belief in when the embryo turns out to be human, it is hard to validate such a faith exclusively by science. The imperative of human rights law is to enforce no bigger pain and no more encumbrances on women, but to understand the true consideration of the law in the hardest of times, when morality, health, and justice make their strongest demands. On the source of the survey research which has been conducted to know the attitudes of people belong to different occupation toward abortion, the majority of respondents wanted some degree of liberalization of abortion laws. Most respondents are in favor of authorization of abortion in incidence of rape resulting in pregnancy. For the purpose of this survey research some rape victims have also been interviewed. They highlighted numerous problems among which one is current abortion laws, which don't provide any relief to rape victims who get pregnant as an outcome of rape. Under this survey research, it has been scrutinized that they wished to see some liberalization of the present law on abortion, which presently is permitted merely to protect the mother's life. They believe that abortion

must be tolerable at early weeks in incidence of rape resulting pregnancy. While rape is an international issue, countries around the globe are doing much more to guard and make available justice for their women. Our legal systems lack support for rape victims, there are no laws that deal with the aftermaths of rape, most importantly, pregnancy as a consequence of rape. Thus, it is significant to legislate to deal with these issues. And the extreme levels of social humiliation and the prevalent oblivious belief that women normally bring rape upon themselves due to their enticing behavior are illustrative of a status quo that must commute. Nevertheless, moral values set up in Pakistan's patriarchal system have headed the common population to consider that if abortions are taken into account, there will incline to be more irresponsible pregnancies. Well, this is absolutely fictitious due to the absence of legal lucidity, the number of women undergo backstreet abortions in Pakistan. Unless women are viewed as human beings who have an opportunity and a right to their own body, nothing will change.

The researcher try to extend this survey research to religious scholars or ulama but unfortunately they were not willing to express their view on the issue of rape related pregnancies.

CONCLUSION AND RECOMMENDATIONS

The researcher after conducting this research, reach to the following conclusions which are mentioned below with some recommendations.

Shari'ah viewed the offense of rape as a coercive Zinā, and so a hadd crime. The terminologies ghasaba and ightiṣāb have been employed by classical jurists, while debating rape and its sentences. On the other side the crime of rape has classified as a distinct crime of ferocity under hirabah (armed and forceful taking) by certain classical jurists and they apply hadd of hirabah as a punishment for rape. According to the Mālikī, Ḥanbalī, and Shāfi'ī schools of law, the rape of a free woman comprises of not one, but violation of two rights, a breach against a right of God (ḥuqūq Allah), aggravating the ḥadd sentence and a violation against an interpersonal right (ḥuqūq al-'ibad), demanding a financial compensation. Under Islamic Law, rape has also been discussed under the law of jirāh, or wounds, in which rape has been seen as bodily injury. There is a unanimity among all the jurists on the fact that coerced woman will not be subjected to any punishment. It can be concluded that rape has been classified under Zinā as a coercive pattern of illicit sexual intercourse.

All the countries in the world forbid rape in all its forms. Despite some revolutionary modifications in the Pakistani law, access to justice for rape victims does not look to have improved in a significant way. Though now survivors of rape can report it without concern of being legally prosecuted for Zinā but other hurdles still remain. Yet, the “Protection of Women (Criminal Laws Amendment) Act” provided a cure for those women who were facing tough subjugation and adversities due to the Hudood

Ordinance, and have likewise provided a great relief to innumerable women. This Act provided that women would not be detained, if they were not able to prove rape, and it permits rape to be verified on grounds other than witnesses, such as forensics and DNA confirmation.

The current Pakistani law considers rape through the traditional male-on-female paradigm, not including other cases of same-sex rapes or female-on-male rape. This is clear from the words employed in the provision: “a man is said to commit rape who has sexual intercourse with a woman.” It likewise moves on to say that “penetration” is adequate for the crime of rape, unambiguously eliminating other occurrences of non-vaginal penetration offenses that may possibly establish rape. The definition of rape should also include men and transgendered people. Currently, under the section 375 of the Pakistan Penal Code, rape is a crime executed by a man against a woman. Explicitly, condemning rape of sex workers (and make sure they are not accused in turn) could also go a long way in conveying the right message to society about the rights of sex workers and undercut perceptions that such actions in a dispute of payment are every time consensual. There is a need for more efficient review of laws covering sexual violence in its entirety. The provisions guaranteeing the preclusion of rape and sexual abuse undergo from intrinsic substantive and procedural errors. One of the humiliating features of the crime against women is that her standing in the male-controlled structure of society also encumbers her right to have justice. While, reconsideration of the rape laws is a leap forward for women's rights, it is still regarded as a small victory. In order to address ambiguities in the inquiry of rape, the amendments have laid down a detailed guiding principle for conducting a medical-legal investigation of the rape victim, the obligation of the administration of DNA tests and the preservation of DNA samples. Such measures shall help in securing the

collection of quality evidence. The amendments that have been proposed to the procedural law would ease the torment of investigation and trial.

However, the proposed revisions are not inclusive and critical side of the law leaves untouched. The traditional description of rape under Pakistani law makes no provision for other abnormal approaches of commission of the offense. Only penovaginal intercourse can constitute the rape under the current law. The object rape or compelling an individual to take part in a sexual intercourse with another does not come within the domain of rape under the PPC. Indian jurisdiction has set forth essential reform in this area of law. It has widened the scope of the offense of rape under the “Indian Criminal Law (Amendment) Act 2013” and taken within its sphere, object rape, penetration of bodily cavities other than the vagina and manipulation of the victim’s body to cause such penetration or insertion. The laws in the West have equally improved, away from this theoretically out-of-date classification of rape. There is a prerequisite to broaden the definition of rape to accommodate the different methods of commission.

Pregnancy is another issue associated with the crime of rape. Pregnancy from rape is a legal and moral issue. Procreation is considered as the most significant part of the marriage. Islam has provided Muslims comprehensive guidelines to think about and apply in situations of any dilemma arises in his or her life. Another guideline is that repelling off harm has precedence over serving a benefit or interest. Under Islamic Law, the elementary principle with reference to abortion is that it is haram. There are some Fuqahā who think that within the initial forty days of gestation, it is allowed to have an abortion, and according to some within 120 days, if there is any valid reason. Some of the jurists allow it till before the soul is passed into the fetus. The resilient the justification, the perfect the cause for the concession is, and if that is in the first

forty days, this means that the concession is more accurate. The Muslim interpretations on abortion are based on the Hadith along with on the ideas of legal and religious scholars and commentators. The Quran does not openly discuss the issue of intentional abortion in the case of rape. According to some Islamic jurists, the fetus is assumed to turn out to be a living soul after four months of conception, and abortion after that point is usually held as prohibited. There are four different Sunni schools of thoughts Hanafites, Shafi'ites, Hanbalites, and Malikites and they hold their own reservations regarding the matter of when abortion can happen in Islam. The mainstream of Muslim scholars authorizes abortion, even though they diverge on the period of fetal growth, after which it comes to be outlawed. The first stage is Nūtfah (sperm) which from formation to 40 days from the time when the semen has fertilized the ovum. At this stage, Hanafis allow abortion, the majority of Shaifis also authorize abortion and some Hanbalis permit it too, but Malikites do not. The second stage Alaqah (Blood Clot): This is 40-80 days after creation when the fertilized egg has developed like a blood clot. At this stage, Hanafites allow abortion, while only few Shafi'ites and the Hanbalites allow it. The stage three is Mudhghah (Embryo): this is the point 80-120 days after conception where the blood clot has now formed into flesh. At this stage, Hanafites permit abortion, only some Shafi'ites and Hanbalites permit it also. The stage four Khalqan Akhār (Spirit), this is the stage 120 days after conception when a soul or spirit has passed into the body. At this point all four schools of thought do not permit abortion. There is no consensus on the point as to when the ensoulment of the fetus takes place. But all the jurists come to an understanding that after the ensoulment, the fetus right to life begins and abortion is normally forbidden according to Islamic teachings. It is admissible to carry the abortion after 4 months of conception to guard the life of the mother. Some scholars

have put an upper limit of forty days for a legitimate abortion, others eighty days or 120 days.

Many countries around the world permit women to make use of abortion services when pregnancy is an outcome of rape. The “World Health Organization” has also made clear that safe, legitimate abortion services should be available to women on the basis of their complaint of rape and in circumstances when victim do not want to report rape due to fear of shame, to ease access to abortion services in such cases, states should offer proper training and elaborate standards and course of action for both police and healthcare suppliers. Various, United Nations bodies have influenced abortion law transformations. In recent years, nevertheless, internal UN actors have attained more impact and initiated to use the UN to advance a specific agenda. The Treaty Monitoring bodies (TMBs) stress states to modify their abortion laws through concluding comments and quasi-judicial determinations. The International law has influenced and has taken on a part in reshaping domestic abortion laws.

The authorization of abortion is chaotic in Islamic states just as are the Islamic opinion towards abortion. The different Islamic states choose various compromises to deal with the troubles and quandaries of modern life as in the cases of Egypt, Kuwait and Tunisia. These states have adopted a less restrictive religious approach, but not the one which contradicts Shariah. The Sudan’s Criminal Code of 1991 under Article 135 allows a woman to seek a legal abortion in case of rape within 90 days. In Indonesia, abortion is also acceptable on the ground of rape under the Health Act, pregnancies as a consequence of rape can be terminated if that pregnancy causes psychological distress for rape victims before pregnancy aged 6 (six) weeks calculated from the beginning day of last menstruation. In Tunisia abortion is also permitted in case of rape, it is one of the grounds on which abortion is allowed. The

abortion must be done during the first trimester of pregnancy by a physician legally practicing his profession in a hospital, healthcare establishment or authorized clinic. Furthermore, the article 99 of Turkish Penal Code permits abortion to a woman who gets pregnant as a consequence of rape, on condition that the pregnancy period does not go above twenty weeks and the approval of the woman is obtained. The Moroccan Penal Code in accordance with the 2011 constitution also allows abortion in instances of rape. The health minister of Morocco “al-Hussein Louardi” supported the validation of abortion and believed that abortion is not merely a medical problem but also a social.

Through the survey on “Right to abortion for Rape Victims” from Legal Officers, Medical Officers and Rape victims conducted under this research, researcher has come to the point that the majority of respondents have shown a positive reaction towards the incorporation of the right to abortion to rape victims in the law. The respondents, either Medical, Legal officer or rape victims, emphasized that abortion in instances of rape resulting pregnancy should be accepted in the early phases of gestation. The majority of Legal officers have an impression that abortion ought to be legal in episode of rape and should be taken into account during the early weeks at the petition of the victim on the basis of the FIR, medical exam by a forensic doctor confirming that the woman was indeed raped, and DNA test was performed. They endorse the modifications in the law regarding abortion access to rape victims and argued that it’s a justifiable option when pregnancy is an outcome of rape. Furthermore, the Medical Officers (doctors), who have been questioned for the purpose of this research, have the opinion that pregnancy can compound and prolong the rape victim’s mental and physical sufferings; thus, the situation can be worse. They also favor the exception of rape in current abortion laws of the country.

After interviewing the rape victims of different ages from different places, researcher has come to the point that the postponement in registration of FIR, poorly drafted FIRs, no maintenance of forensic evidence, non-operational and orthodox inquiry method results in failure of justice for survivors. Lack of monetary resources for investigation and narrow amenities for forensic examination weakens the case and the extensive delay in getting results benefits the accused in acquiring bail. Furthermore, low paid, not well expert and equipped Medico Legal Officers not only make a massive psychological toll on the victim, but also result in inappropriate information damaging to the prosecution being sent to trial. The compromises and out-of-court settlements are threatening to the victims and ineptly, even the courts have been acknowledging such settlements. The criminal code of procedure precisely declares that it is the fundamental right of any citizen of Pakistan to report or register any complaint to the police. But the rape survivors have to struggle actually to make policemen to acknowledge that a rape has occurred and for lodging a complaint which is the fundamental right of the victim. In a country like Pakistan, liberation can be bribed with money, and usually in rape cases the offenders are in some influence or strong position. The majority of victims who have been interviewed have encountered these kinds of difficulties with police, which is the first point of contact for victims by and large.

The pregnancy as a result of rape is the most serious issue which has been neglected by the law. Under this research, it has been found that victims who got pregnant as an outcome of rape have gone through unsafe abortions carried out by personnel deficient the required skills and in a setting that does not conform to minimal medical standards. They were of the opinion that they can't even imagine giving birth to such child, because as a rape victim, they don't own a respectable position in society. So

how and who will esteem to such illegitimate child and it will also be a constant reminder of that heinous offense. They believe that this is a very important issue that requires immediate legislation, the victim should have right to make a decision and if she opts to abort the child, then legal and safe means should be provided to her simply. If she prefers to keep the child, then proper and complete support system should be offered by the government that should include financial help for raising such child and most importantly the respectable status in society. There is a need to support survivors during the course of the criminal judicial process along with making sure their recuperation and their rehabilitation into society. In our society when pregnancy takes place outside marriage, even if it is a consequence of rape, women face emotional and physical violence, which often results in extreme cases of death.

Several modern-era fatawa have also supported exceptions in cases of rape. On the subject of rape nearly all contemporary scholars agree that it is permitted for a raped woman to terminate the fetus, in order to alleviate suffering and adversity. But Pakistan's legal system does not provide a rape survivor the option to lose the fetus in the course of the early weeks of gestation, which is a result of rape, so it creates a situation where many children born out of marriage are clandestinely murdered each year. Abortion is only endorsed if the mother's life is under danger and that woman need to be a married one. Under no situation a fetus of unmarried woman can be aborted. In addition to unfriendly laws dominated by interpretation of religion by clergymen, poor quality of health services adds to the ordeal of women who are being injured or dying due to unsafe abortions. Due to vagueness of law, safe abortion services are not provided at any government or private tertiary care hospitals and abortion services are largely unregulated. They are being provided by untrained people and are being under reported. Interestingly, the restrictive law which is said to

be this way due to religious opinion is not even Islamic. In cases of rape, Islamic scholars around the world have permitted undergoing an abortion. Hence the Pakistani law is not even following Islamic law and needs reform. With the fear of the conservative right's view on abortion, advocating for review of law becomes tricky. Human rights activist and advocates remain confused, there are unending debates; whether or not to ask for reform in fear of more conservative review while women keep dying and getting injured. For countries like Pakistan the solution may lie in taking small steps instead of outrightly advocating for women's right to decide. This means advocating for inclusion of rape in the permissibility of abortion, to expand necessary treatment to mental and social aspects of health, rather than just physical health and to have a trained medical practitioner rely on their judgement for unpacking necessary treatment. This will not empower women completely, but may make the situation a little more comforting. Because the law now leaves enough room for interpretation, even if only a handful of people understand it, providing abortion access will become much easier. Denying women the right to make informed decisions about their own bodies is a legal, religious, moral and patriarchal problem in Pakistan. Factors contributing to clandestine and unsafe abortion are lack of knowledge about abortion law, strict religious interpretation, and economic conditions, as well as unfavorable attitudes of medical providers towards abortion and a high level of social stigma. Islamically, there is general agreement among Ulama that induced abortion in early pregnancy is accepted. However, abortion is dealt with sensitivity, and so some detailed discussion could be useful, where the Ulama prefer to make a specific resolution based on Islamic law. Abortion could be seen as prima facie haram because it violates the Shariah goal of preserving life. However, there are two crucial questions: whose life we are dealing with? Should we weigh the mother's

life more priority over the fetus' one, if any? If we apply the early 40 days benchmark, then the fetus has (technically) no life, and thus there is not termination of life. Here other life is that of the mother. Here come other Fiqhi principles into play. For example, the Principle of Harm or injury states that harm should be removed and if faced with two evils, chose the least evil. Abortion, if simply seen as termination of the fetus' life, could be seen as the least of the two evils compared to the loss of the mother's life in an honor killing, or as a complication of a neglected pregnancy without ante-natal care, or an illegal unsafe abortion. Here principle of certainty could also justify the decision of abortion in this case. At a gestational age of early 40 days there is little evidence both religiously and medically that the fetus has a meaningful life, so we cannot certainly consider a fetus at this gestational age a life that needs to be protected. Additionally, if we compare this level of uncertainty to the level of certainty that the single mother might get hurt (Principle of Harm) by the factors. The "Commission of Inquiry on the Status of Women", headed by Justice (retd.) "Nasir Aslam Zahid" of the Supreme Court, which was conducted in 1997 to review the laws to prevent the discriminations towards women, also suggested that a right to abortion should be available to women in the first 120 days of pregnancy and have to be explicitly acknowledged an absolute legal right. But this still remains a recommendation. The Hanafi school of thought is primarily followed and enforced in Pakistan, which allows abortion before 120 days of gestation on some rational grounds. In circumstances of rape, Islamic scholars around the world have endorsed undergoing an abortion. If pregnancy is instigated by rape, then she should have the option to have the child or to abort it. Even the Quran provides us acquiescence to modify according to developments. A raped woman who bears the burden of pregnancy and childbirth as a consequence of rape should have the say in the

decision-making course. The Muslims consider the ensoulment as the significant event before which the fetus was not taken as a living being, and caved in the fact that the authorization of contraception supported the observation that abortion should be allowed before ensoulment, possibly it can be proclaimed on the whole that abortion was religiously tolerated. It is likewise evident that comprehensive Islamic principles (i.e., Equality, Al-Masālih Al Mursalah Istislāh,) provide validation for the application of lenient legal rulings when legal principles have been otherwise punitive or impractical in their diligence. It constitutes a part of extended methodological principles of Islamic jurisprudence (Uṣūl al-Fiqh), and signifies prevention or authorization of a thing according to necessity and the certain conditions. Primarily, more lenient abortion laws may be reached through correcting individuals of the incorrect belief that the Quran and Sunnah unequivocally oppose abortion and by stressing more lenient explanations that are existent in certain legal schools.

On the other side, assassinating a newborn is a crime, but it is considered as less significant evil. On that point is perhaps no greater taboo than having a child out of wedlock. As a result, many newborns are mutilated and dumped in the garbage. Many women resort to intake drugs, using severe objects, or physically damage their body resulting in lasting health ramifications. In many cases as a result, young women have even adopted the last choice that is suicide. As far as the rights of children born due to rape are concerned, no legislative action has yet been taken in Pakistan. The infanticide is on the rise in Pakistan, the number of children murdered has escalated gradually over the past five years. According to welfare organizations “The Edhi Foundation”, Pakistan's leading welfare agency, the number of dead babies its ambulances pick up has augmented by almost 20 percent every year since 2010. In Pakistan's socially conformist society, illegitimate children are referred as forbidden

under Islam. The blame of rape is squarely on the victim. Instead of catching the culprits, society deems it correct to exclude the person who has already suffered. In Pakistan no legislative action has yet been taken to specifically defend the rights of children born due to rape. Every year in Pakistan, thousands of children go missing or are abandoned on the streets. Some are found dead on the streets amid piles of trash. Rape is not the only issue, but there are several other problems associated with it. The major problems that need to be addressed are pregnancy, illegal abortion, and children born as a result of rape. The victims who get pregnant are generally treated in the worst possible way by their husbands or family members and society. A woman is considered as being defiled. If she has been defiled, she has no status at all. Rape victims suffer from both sides. There is a double-faced social barrier erected for women who fall victim to rape and then become further victimized if they realize they are pregnant and cannot hide this. The woman who gets pregnant as a result of rape has no choice and facilitates. It is significant for the right to abortion to be enshrined in law. There is a demand to see the relevant subject as well as the need for clear legal provisions and religious discernment. In Pakistan, special laws should be introduced, including developed rationalized procedures to support such women who seek abortion or desire to place their rape-conceived children for adoption. All religious scholars in Pakistan should consider the authentic descriptions of Islamic law on the issue and have to bring these into confidence in parliamentary procedure to solve these matters kindly. Pakistani Law is not permitting the right to abortion to rape victims and neither protecting the lives and rights of such children.

After conducting this research, researcher reached at the conclusion that there is a need to legislate about the issue of rape resulting in pregnancy. When the offense of rape is prohibited, how could its fruit be allowed to continue?. As of this moment, the

government of Pakistan is not doing much. Under Pakistani law, abortion can be borne out when it is done in good faith for preserving the life of the woman or given that necessary treatment. Nevertheless, there is no clear definition of necessary treatment. The abortion is a highly stigmatized subject in Pakistan, pushed beneath the carpet every single time anyone stands up to conjure it. Pregnancy is a potential result of rape and can have negative consequences. Our law has failed to provide a remedy or relief to such pregnant women. The choice must be given to rape victims, they should have a choice either to go for abortion or give birth to such child or give for adoption. The reforms are needed in abortion laws of Pakistan and exception of rape should be included in it. Withdrawing from the examination of Islam's point on abortion, some approaches can be drawn which offer opportunities for the setting up of more liberalized abortion laws in society to better safeguard Muslim women's health and rights. Actually, the flexibility is a cornerstone of Islamic philosophy and as Islam was revealed to all masses for all times, its laws are supposed to be capable of accommodating.

RECOMMENDED LEGISLATIVE DRAFT

After carrying out this research, the researcher has reached to the inference that there is a demand to improve the current laws accompanying to abortion and rape. Here is a recommended legislative draft.

- A. Abortion should remain a criminal act otherwise, but should be authorized on request of rape victim before pregnancy aged 5 (five) weeks calculated from the beginning day of last menstruation. If the victim is minor, the permission of her legal representative should be mandatory. If the pregnant woman is mentally incapable, then in such case also the consent of her legal guardian must be held. For this effect, the woman would require to report the incident to the police station without any delay. The police immediately after lodging the FIR, without any pointless delay, would direct the victim to a forensic doctor for detailed examination. The forensic doctor looks for marks of violence, acquires semen samples from her body. After that the victim would then be produced before the magistrate where the judge looks at the results and either passes on his approval for abortion in the event of rape resulting pregnancy or repudiates it. This law will not open the door for immorality because there would be a necessity of a medical examiner's statement confirming that the woman was indeed raped. It is mandatory that doctor should consider whether the pregnancy was really a result of rape by demanding a certificate or official letter from the magistrate stating that the victim in fact became pregnant for the reason of rape, the doctor would be able to perform an abortion. If the doctor still performs an abortion after the prescribed limit, then he can be convicted. There are two strong opinions under Islamic law regarding the abortion, the one is that abortion is lawful, if done within forty days and the

second opinion is within 120 days. So, putting the limit of five weeks will not contradict the basic principle of Islamic Law. Furthermore, according to the opinion of the majority of medical officers, abortion is painful for the un-born baby on the stage of fetus. The start of the third week after conception marks the beginning of the embryonic period. Later, on the eighth week of gestation and until birth occurs, a developing baby is called a fetus. Between five and half weeks to six and half weeks, fetal heartbeat can be detected. Hence the terminal point of five weeks also covers the aspect of heartbeat.

- B. If a woman who gets pregnant as a consequence of rape decides to keep the pregnancy and raise her child or if the time frame provided for abortion has been lapsed then in such condition, there should be some financial assistance provided to her throughout her pregnancy by the government, so she can bear the expense associated with a pregnancy and after the childbirth certain amount should be fixed for such child for his education and upbringing and he should be entitled to it till the age of maturity which is 18, under Pakistani Law. Raising a child costs money and one of the reasons of abortion is poverty or financial burden. Indeed, financial questions are a leading concern for women facing an unplanned pregnancy as a result of rape. The economic condition of the rape victim can have an influence on her decision to take her child to term, subsequently by offering a financial assistance the government can play an important part in decreasing the problems of the victims.
- C. If the pregnant rape victim has no interest in raising such child, then in that respect there should be a proper arrangement of handing over a child to welfare organizations. The government officer should monitor the whole procedure of handing over the child to registered child welfare organizations.

This will cut the rate of infanticide and illegal abortions in Pakistan. The victim will also be able to return to her natural course of life and child will also grow into safe and healthy environs.

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APPENDIX A

For Legal Counsel

Kindly spare your time, please fill out this questionnaire and play your part in making this research productive. Your answers will be strictly kept confidential and will solely be used for academic purpose.

Qurratul-Ain-Munir

Name _____

Age (optional) _____

Gender _____

1. Is abortion justifiable when pregnancy is a result of Rape?

- A) Yes B) No C) To some extent

2. What choices do you think victim usually avail when she finds out she is pregnant by Rape?

- a) She may seek to terminate the pregnancy by a resort to unsafe methods.
- b) She may decide to give birth and raise the child
- c) She may decide to give up the child for adoption
- d) She may decide to abandon the child

3. Do you think pregnancy from rape lead to grave consequences and seem to prolong the victim's anguish?

- A) Yes B) No C) To some extent

4. Do you suggest any modifications in the law regarding abortion access to Rape victims?

- A) Yes B) No C) To some extent

5. Should abortion be authorized on the request of the victim on the basis of FIR, Medical examination by a forensic doctor confirming that the woman was indeed raped, and DNA test, within a specific time frame?

- A) Yes B) No

6. Is a mental trauma rape for rape victim more devastating than being physically assaulted?

- A) Yes B) No

Thanks a lot for your kind cooperation

APPENDIX B

For Medical Officer (doctors)

Kindly spare your time, please fill out this questionnaire and play your part in making this research productive. Your answers will be strictly kept confidential and will solely be utilized for academic purpose.

Name _____

Age (optional) _____

Gender _____

1. **Do you think that abortion should be permitted if the pregnancy is the result of a rape?**
 - a) Yes,
 - b) No,
 - c) I do not know

2. **What do you think as a doctor when does abortion is painful for the un-born baby?**
 - a) At the stage of fertilized ovum
 - b) At the stage of Zygote
 - c) At the stage of embryo
 - d) At the stage of fetus
 - e) Any other stage _____

3. **What do you think at which stage abortion should be allowed in case of rape resulting pregnancy?**
 - a) At the stage of _____
 - b) It should not be allowed at any stage, irrespective of circumstances

4. **What do you think if a rape victim gets pregnant the situation can be worse, it can compound and prolong the victim's mental and physical sufferings?**
 - a) Yes
 - b) No, the baby can be healing process
 - c) To some extent

5. **Do you think providing safe abortion to women who gets pregnant as a result of rape will improve women's mental and physical health, and will save lives.**
 - a) Yes
 - b) No
 - c) I don't know

Thanks a lot for your kind cooperation

APPENDIX C

For Rape Victims

We realize that answering this questionnaire may be hard for you as you are being asked to think of what happen to you. Please take your time and provide much information as you can remember. The more accurate the detail the better. All the provided information will be kept confidential and will solely be utilized for academic purpose.

Name (optional) _____

Age _____

FIR No _____

Case Details _____

1. What does the term rape mean to you, how you defined it?

2. What damage this crime has caused to your personality?

3. What factors do you think are responsible for what happened to you?

4. What are the legal and social problems you faced or still facing?

5. What do you think is abortion justifiable when pregnancy is an outcome of Rape?

- A) Yes B) No C) To some extent

6. Do you get pregnant as a result of rape?

- A) Yes B) No

7. If yes, what choice you made in that situation?

- a) Terminate the pregnancy
- b) Give birth and raise the child
- c) Abandon / Give up the child for adoption

8. If you decided to give birth and raise such child, then what problems you faced and still facing while raising her?

9. What in your opinion a female should do if she gets pregnant as a result of being raped?

- a) She should seek to terminate the pregnancy by a resort to any method available
- b) She should give birth and raise the child
- c) She should abandon the child or give up the child for adoption

10. Is a psychological trauma which incurred in case of rape resulting pregnancy more devastating than being physically violated?

- A) Yes B) No

11. Do you suggest any modifications in the law regarding abortion access to Rape victims?

- A) Yes B) No C) To some extent

12. Do you think if safe abortion services are available; these backdoor abortion centers would die a natural death?

- A) Yes B) No C) To some extent

Thanks a lot for your kind cooperation