

1-1-2000

Negotiating Gender: A Comparison of Rape Laws in Canada, Finland, and Pakistan

Danette C. Cashman

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/djls>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 License](#).

Recommended Citation

Danette C Cashman, "Negotiating Gender: A Comparison of Rape Laws in Canada, Finland, and Pakistan" (2000) 9 Dal J Leg Stud 120.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Journal of Legal Studies by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

NEGOTIATING GENDER: A COMPARISON OF RAPE LAWS IN CANADA, FINLAND, AND PAKISTAN

DANETTE C. CASHMAN[†]

I. GENERAL INTRODUCTION

Sexuality for humans never just is: it has no reality sui generis, and a concern with it always brings with it wider social psychic issues in their wake. Human sexualities have to be socially produced (no human can ever just do it), socially organized, socially maintained and socially transformed. And, as cultures change, so do sexualities.¹

Since the 1970s, rape has been a central theme of feminist research in North America. The issue has garnered volumes of papers, books, and theses, spanning a range of disciplines and topics including, to name just a few: psychoanalytical inquiries into the mind of the rapist and his victims; strategies of resistance and avoidance; cost-benefit analyses of using law as an instrument of control and sexual regulation; and, investigations into the competence of medical research to corroborate (or confute) crimes of rape. The goals underlying the feminist interest in rape are several. No longer content to view rape as the pathological act of a lone and isolated perpetrator, feminists have sought a sociological understanding of the meaning of rape. Feminists have also sought legal reform, attempting to give voice to women's experience of rape in a discourse that has traditionally excluded women's perspectives despite the fact that theirs were the bodies actually implicated in the crime. Feminist legal research has persuasively shown how the criminal law has traditionally represented and protected male interests and standpoints, largely ignoring the harm done to the victim. In addition to

[†]The author is deeply grateful to the following people for helping to fill in the gaps in the English literature on Finnish rape law: **Heikki Jaatinen**, Professor of Criminal Law at Turku University, **Meri Steinburg**, Advocate for Unioni, the Finnish League of Women, **Päivi Honkatukia**, Research Officer at the National Research Institute of Legal Policy, and Finnish Law Student **Tuomas Koivula**. Special thanks to **Kevät Nousiainen**, Professor of Legal Theory at Helsinki University.

¹ Ken Plummer, "Forward" in *infra* note 5 at xvii.

the above, feminists and women's action groups have sought to develop new strategies of resistance and prevention.

The importance of law in feminist discussions of rape cannot be underestimated. Initially motivated by what were perceived as injustices within the legal system, implicitly and inevitably, the feminist inquiry always ends where it begins, with a discursive exchange with the law. This, despite ever increasing demands that women look outside the law to find new strategies of resistance. In the modern world, law as an "instrument of truth,"² to use Carol Smart's words, has become a site of gender conflict. The feminist inquiry into rape has clearly demonstrated how gender categories are both constructed and maintained through legal systems. But if law is a site of gender construction, it is also a site of gender renegotiation.

Noticeably absent from the body of feminist literature are accounts of rape that are historically and culturally situated. Illich, for instance, argues that:

[t]he social history of modern rape still remains to be written, in part because modern, sexist rape under assumptions of general conditions of scarcity still has not been clearly distinguished from age-old forms of physical, genital violence against women...what American women now fear most is rape as the supreme physical expression of modern sexism—and sexism as an experience always tastes of this rape. I argue that modern rape is implicitly fostered by the obliteration of gender.³

Illich recognizes that the definition, practice and experience of rape is socially and culturally contingent. But with few exceptions, feminist analyses tend to proceed from the assumption that rape is a universal phenomenon that produces common experiences for women. Cross-cultural analyses, when they are done at all, become tools for verifying and thereby legitimating feminist conclusions.⁴ Cultural and historical

² Carol Smart, "Law's body, the Sexed Body, and Feminist Discourse" (1990) 11:17 *Journal of Law and Sociology* 194.

³ Ivan Illich, *Gender* (New York: Pantheon Books, 1983) at 31-32. See also Herietta Moore, "The problem of explaining violence in the social science" in Penelope Harvey and Peter Gow, eds., *Sex and Violence: Issues in representation and experience* (New York: Routledge, 1994) 138, who sees crisis in gender identity as a source of violence in gender relations.

⁴ For an exception to the rule see Cecilia McCallum "Ritual and the origin of sexuality in Alto Xingu" in Penelope Harvey and Peter Gow, eds., *Sex and Violence: Issues in representation and experience* (New York: Routledge, 1994).

variation has been effectively ignored and silenced in the North American discussions. This position is unjustified in light of Simon's claim that "all discourses of sexuality are inherently discourses about something else; *sexuality rather than serving as a constant thread that unifies the totality of human experience is the ultimate dependent variable*, requiring explanation more often than it provides explanation" [emphasis added].⁵

The crime of rape is unique insofar as it defines deviant sexual activity and therefore establishes the limits and terms of normal heterosexual encounters and gender relations. It is therefore essential that the meaning of rape be considered in cultural specificity. This is not to say that cross-cultural comparison at a micro level is never appropriate, or that universal themes never emerge. These approaches, however, need to be exercised with caution, heeding the logical coherence of different cultural forms. If we accept feminist claims that rape is socially and culturally produced, then rape must be examined within the framework of different legal and sexual cultures. Catherine MacKinnon⁶ argues that, for feminism, (hetero)sexuality is analogous to the economic base in Marxism; it is the foundation upon which the superstructure of contemporary society is built. Even if one does not subscribe completely to this argument, it nevertheless illustrates the importance of examining the way in which different cultures understand and use the sexual in constructing the gender relation. Examining the law of rape in different cultural landscapes thus becomes an important area of research for feminism.

In this paper, I analyze and compare the definition of rape in three different legal and sexual cultures: Finland, Pakistan, and Canada. Ultimately, it is an attempt to release the current feminist discourse from the straight-jacket of theoretical essentialism. In many ways, this work represents three separate undertakings, which are themselves self-contained and self-defining. The common thread that links them, however, is the way in which the law of rape serves as a site of gender negotiation. In each case, the way in which the question of rape is framed, understood, and negotiated is a product of the legal culture in

⁵ William Simon, *Postmodern Sexualities* (London: Routledge, 1996) at xvii.

⁶ Catherine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989).

which it is situated. Comparative analysis of rape law demonstrates the synergic interplay between law and culture and highlights the fact that rape as it is legally defined is culturally contingent. The law of rape not only impacts on how rape is culturally understood, but the legal culture in which the law is situated sets the parameters of negotiation and reform. Thus, in Canada, liberal legalism has been a defining feature in the evolution of the rape laws. In Finland, the emergence of 'women's law' has, in a legopolitical climate of 'gender harmony', created a discursive space for feminists to begin to address issues of violence against women. And, in Pakistan, the current trends towards Islamization poses special challenges for the way in which women are able to articulate crimes of sexual violence. Western frames of reference, though informative, can ultimately be counterproductive if they are not properly tailored, to meet the cultural and legal requirements of Islam including recognition of the special status that women's sexuality plays in maintaining the social order. In the pages that follow, I will undertake to examine the intersection of law and culture in the legal definition of rape. In each of the cases studies, rape law emerges as a site of gender negotiation, but, as will be demonstrated, the issues surrounding legal reform are culturally unique in terms of both content and process.

II. THE LAW OF RAPE IN CANADA: A GENERAL INTRODUCTION

The area where contemporary feminism has suffered the most self-inflicted damage is rape. What began as a useful sensitization of police officers, prosecutors, and judges to the claims of authentic rape victims turned into a hallucinatory overextension of the definition of rape to cover every unpleasant or embarrassing sexual encounter. Rape became the crime of crimes, overshadowing all of the wars, massacres, and disasters of world history. The feminist obsession with rape as a symbol of male-female relations is irrational and delusional. From the perspective of the future, this period in America will look like a reign of mass psychosis, like that of the Salem witch trials.⁷

⁷ Camille Paglia, *Vamps & Tramps* (New York: Vintage Books, 1994) at 24.

Reforming rape and sexual assault law has been a central issue for Canadian women's groups since the 1970s. Informed by the rape debate in the United States, one of the central philosophical issues for feminists has been 'what are the characteristics of the offending act that transform it from sex into rape.' This has been a divisive issue for feminist academics. Early strategies for reform involved de-emphasizing the sexual nature of the act and defining rape as a violent attack, analogous to other types of assault. But later feminists, responding to this definition, have argued that the problem of rape is really a problem of the way gender is constructed, and produced, in society. Society cannot stop rape until gender relations are reconstructed. As a result, this later generation of feminists have sought to re-establish rape as a sexual crime. This strategy, however, has been criticized by feminists committed to the liberal ideal. An interesting aspect of evolution of Canadian rape law is the way in which legislators have responded to feminist criticisms by reconstituting old conceptual forms, in particular liberal legalism.

1. Canada's Rape Laws in Historical Perspective

Prior to 1983, rape in Canada was defined as 'sexual intercourse by a male person with a female person who is not his wife without her consent, or with her consent if the consent was extorted by threats of fear or bodily harm, is obtained by personating her husband, or by false representations of the nature and quality of the act.'⁸ 'Indecent Assault of a Female' and 'Indecent Assault of a Man by a Man' were both separate categories of offences. In general, however, these latter provisions were reserved for situations of sexual contact with children where no force was used.⁹ With some exceptions, the Canadian legislation reflected the way in which rape was dealt with in other western jurisdictions, most notably in the United States. Where drafting differences existed, similar patterns of judicial interpretation, as well as common rules of evidence, meant that the crime of rape was similarly treated among common law jurisdictions.

During the 1970s and 80s, the subject of rape was taken up as a cause of feminism, and the rape law itself became a source of

⁸ Law Reform Commission of Canada, *Criminal Law: Sexual Offences, 1978* at 55.

⁹ *Ibid.* at 18-9.

controversy for women's groups, not only in Canada, but in England,¹⁰ Australia,¹¹ and the United States.¹² Criticism was launched at the basic legal definition of rape, as well as at the law of evidence insofar as it impacted on the definitional landscape. Feminists attacked the basic definition of rape, as it emerged from the legislative texts, common law doctrines and rules of evidence. The central issue was the way in which the legal definition of rape both directly and indirectly represented male perspectives and interests, rather than those of the victim.¹³

Feminists objected to what they perceived as the gender inequities of the rape provisions. For women's groups who based their demands for reform on liberal principles of individual autonomy, self-determination, and equality, the fact that rape, as it was legally defined, could only be perpetrated by a man on a woman, had particular symbolic significance. Inequality with respect to culpability could not be justified within a liberal framework. Furthermore, feminists saw the language of rape as connotatively emphasizing the act of sexual penetration and thus privileging a male perspective with respect to the essential nature of sexual crimes. The marital exemption was also a prime target of criticism. Typically, the justifications that were offered for the exception included: that a rape charge would disrupt familial harmony; that, in an era before no-fault divorce, a change in the legislation could lead to false accusations; and finally that rape within the context of marriage would be too difficult to prove. For women's groups, however, the fact that there was no legal recourse for a woman who had been raped by her husband was an affront to a woman's self-determination and physical integrity. Moreover, at a symbolic level, women objected to the law's implied notion that, upon marriage, women were consenting to all future acts of intercourse. Thus, by shifting to a generic sexual assault

¹⁰ See Lees, *Carnal Knowledge: Rape on Trial* (New York: Penguin Books, 1997).

¹¹ See Gail Mason, "Reforming the law of rape: incursions into the masculinist sanctum" in Diane Kirkby, ed., *Sex, Power and Justice: Historical Perspectives of Law in Australia* (New York: Oxford University Press, 1995) 50.

¹² See Mary Ann Lergen, "Rape-Law Reform: An Analysis" in Ann Wolbert Burgess, ed., *Rape and Sexual Assault II* (New York: Garland Publishing, 1988) 271.

¹³ For a general examination of the evolution of the legislative reform in Canada see: Loreen Snider, "Legal Reform and Social Control: the Dangers of Abolishing Rape" (1985) 13 *International Journal of the Sociology of Law* 337; Jennifer Temkin, "Women, Rape and Law Reform" in Sylvana Tomaselli & Roy Porter, eds., *Rape* (New York: Basil Blackwell, 1986).

provision, which emphasized the violent nature of rape, women hoped to overcome the gender discrimination inherent in the law.

It should be noted that during this early period of reform, the notion of consent was treated as relatively unproblematic. Lack of consent (which could ordinarily be discerned by the fact that violence was used) was seen to be *the* definitional element of the crime – it was what transformed ordinary sex into the sexual attack. What eventually did become an issue for reformers, however, was the way in which consent was demonstrated in court, that is the way sexual history, general lifestyle, and complainant character evidence was used to demonstrate that a woman was, in some senses, ‘unrapable.’ Issues related to consent also arose in the context of required fault. At common law, the Crown must prove that the accused had subjective knowledge of the lack of consent. Thus, there is no requirement that a mistake with respect to consent be a reasonable one.¹⁴ A question therefore arises as to whether subjective knowledge is the appropriate standard of fault or whether something less should be required.¹⁵ Debate over the appropriateness of the consent requirement itself, however, has largely only occurred outside of the legal discourse.

Women’s demands for reform extended not only to the legislative definitions of the offence, but also to the laws of evidence insofar as they impacted on the basic definitional issue. The first issue of concern was in regards to the common law doctrines of ‘corroboration’ and ‘recent complaint’. Under the doctrine of corroboration, an accused could not be convicted unless the victim could produce corroboratory evidence, such as bruises or a witness to the act, which could support her testimony or version of events. Under the doctrine of recent complaint, juries were warned about the general unreliability of testimony from a complainant who failed to report an attack in a timely manner. A second area of concern was the unadulterated use of the victim’s sexual history as evidence of consent. Together, victim’s advocates argued, these rules of evidence created ‘rape myths’ which ultimately defined rape in a way

¹⁴ See the Supreme Court’s decision in: *R. v. Pappajohn* [1980] 2 S.C.R. 120, where it was affirmed that mistaken belief in consent can form the basis of a defense. It was, however, held that there needed to be an “air of reality” to the defense before it could be presented to the jury.

¹⁵ In *R v. Sansgaret* [1985] 1 S.C.R. 570, the Supreme Court held that “willful blindness” could constitute the mental element of rape.

that protected male, rather than the victim's, interests. These myths included, among others, that 'woman often lie about being raped', that 'only chaste women can be raped,' that 'when a women says no, she can be seduced into sex,' and that 'a women consents when she doesn't resist.'

As has already been stated, during the 1970s and 80s, rape became a central issue for feminist scholarship. Criticisms directed at specific pieces of legislation soon led to a broader discussion of the content and structure of the legal system and the nature of the heterosexual relationship. It is necessary to understand the content of the larger debates in order to understand the direction that the law has taken since this early period.

2. The Philosophical Debate and Emerging Feminist Strategies

The philosophical debate in North America has primarily focused on the (re) definition of rape or sexual assault, so that *women's* experiences formed the content of the law. The debate was spurred, in part, by a perceived inadequacy with respect to the way in which rape was handled in the criminal justice system – an inadequacy that manifested itself in under-reporting, low conviction rates, and a feeling on the part of the victim that she was being 'raped' a second time by the criminal justice process. With respect to this latter issue, MacKinnon argues that one of the reasons that women do not report incidents of rape is that:

[they] cannot bear to have their personal account of sexual abuse reduced to a fantasy they invented, used to define them and to pleasure the finders of fact and the public. I think that they have a very real sense that their accounts are enjoyed, that others are getting pleasure from the first-person recounting of their pain, and that is the content of the humiliation at these rituals. When rape victims say they feel raped again on the stand, and victims of sexual harassment say they feel sexually harassed in adjudication, it is not exactly a metaphor. I hear that they – in being publicly sexually humiliated by the system, as by the perpetrator – are pornography. The first time it happens, it is called freedom; the second time, it is called justice.¹⁶

¹⁶ Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987) at 111.

MacKinnon's account of the rape trial demonstrates how:

women come to embody the standard fantasy of the pleasure of abuse and sexual power. It is not just that they must repeat the violation in words, not that they may be judged to be lying, but that the women's story gives pleasure in the way that pornography gives pleasure. The naming of parts becomes almost a sexual act, in that it draws attention to the sexualized body. But her account, distorted by the cross-questioning techniques of the defense counsel, does not only sexualize her, it becomes a pornographic vignette. Unfortunately for the woman in the dock she differs from the photograph because she is there in the flesh to feel her humiliation. The judge, the lawyers, the jury, and the public can gaze on her body and re-enact her violation in their imaginations.¹⁷

Bumiller¹⁸ illustrates how these types of sexual imaginings by the audience are enabled by the legal discourse itself, manifested in the trial techniques of examination and cross-examination. The process is meant to “separat[e] out the truth from the hysteria of the victim”¹⁹ and, in the end, stifles the woman's ability to recount the event as she experienced it. Bumiller warns:

The forms of communication that are appropriate in a courtroom and that are disseminated by the media conform to conventions of the ‘public discourse’ of news reporting and the ‘professional discourse’ of criminal procedure. If reformers strive toward transforming the social construction of rape, even abandoning the model of consent, then changes in the public understanding of the crime may only come about with challenges to the dominance of the legal discourse.²⁰

From its inception, feminist writing on the topic involved a broad inquiry into the interaction between the crime of rape and the larger social structures that construct women as the victims of rape. The early research focused on the way in which traditional ideas of gender sexuality – for instance, man as (normatively?) sexually aggressive and

¹⁷ Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989).

¹⁸ Kristin Bumiller, “Fallen Angels: The Representation of Violence against Women in Legal Culture” in Martha Fineman & Nancy Thomadsen, eds., *At the Boundaries of Law: Feminism and Legal Theory* (New York: Routledge, 1991) 95.

¹⁹ *Ibid.* at 108.

²⁰ *Ibid.* at 110.

women as (normatively?) sexually passive²¹ – became implicated in legal definitions and procedures. In addition, early feminist²² writing demonstrated the way in which rape laws have traditionally represented male interests and perspectives.²³ An inquiry into the social and cultural aspects of rape eventually led feminists to the problem of what distinguished rape, from a woman's point of view, from normal heterosexual acts. Traditionally the law solved this problem by categorizing women as rapable or non-rapable, and, for the former, rape occurred in the context of extra-marital intercourse. Drawing on the work of Anna Clark, Smart argues:

consent was crucial in the nineteenth century, but the meaning of that consent is quite different than the meaning of consent now...consent was not a matter of woman's will or whether she resisted or not. Rather consent was a matter of how she conducted herself, whether she – by her conduct – made it clear that she was the sexual property of her husband or her father or the common property of all men. So if a woman was deemed to be unchaste, it did not matter whether she clearly resisted the rape, she had consented at a general level.²⁴

Smart goes on to argue that the legal (and social?) context of rape has changed so that “consent and non-consent are no longer the self-evident properties of certain categories of women. Consent is being psychologized, it is becoming the state of mind which can be attributed to all or any women. To this extent rape is being democratized.”²⁵ Thus, the distinguishing features of sexual assault have become a central issue for feminist scholars. As Griffin notes, “[t]hrough the law of rape attempts to make clear a division between rape and sexual intercourse, in fact, the courts find it difficult to distinguish between a case where the

²¹ This idea has been extensively written about both within and outside of legal discourse. See, for instance, Susan Edwards *Female Sexuality and the Law* (Oxford: Martin Robertson, 1981) and Susan Brownmiller's seminal work *Against Our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975).

²² I tend to see the rape discourse as an evolution, but not in the sense of linear development or the simple accumulation of knowledge, but rather as a continual taking up and responding to other positions, a process that ultimately leaves no position unmodified or unchanged.

²³ Brownmiller, *supra* note 21.

²⁴ *Supra* note 17 at 41.

²⁵ *Ibid.*

decision to copulate was mutual and where a man forced himself upon his partner.”²⁶

The relationship between rape and normal heterosexual intercourse has been a source of controversy and has, to some extent, caused a rift in the feminist community. Burgess-Jackson²⁷ has discerned two streams of thought in the feminist rape debate – those who see rape as battery and those who see rape as degradation. From his perspective, both of these factions are participating in what he calls “persuasive redefinition” – using the emotive content of the language of rape to redefine its substantive qualities. For the liberal feminist, who defines the offensive act as battery, rape is viewed as deviant sexual activity in which an individual’s freedom to choose is suspended, where the victim becomes an object, or an instrument of use, for the rapist. Thus, lack of consent – the bypassing of the victim’s subjectivity – becomes the defining feature of the crime of rape. The radical feminist, who defines rape as degradation, also sees the objectification of women as what is at stake in the crime of rape. But this objectification is not seen as an act of deviance, but, rather, as integral to the normal heterosexual relationship, which is always marked by power difference. Lack of consent cannot be the defining feature of rape because, from the radical perspective, consent is always coerced.

Feminists are also divided on the issue of whether rape is about ‘sex’ or ‘violence.’ In order to achieve a critical standpoint with respect to the traditional cultural and legal definitions of rape, early feminist writings focused on the subjective consequences of a rape event for the individual women, leading to a theoretical position that rape is an act of ‘aggression’ or ‘violence’ and that what is at stake in the crime of rape is also what is at stake in any other type of assault. Although this position gained favour by legal reformers, it has become highly controversial in the more philosophical discourses. Critics argue that “the complex relations between sexuality and power is underscored by the fact that rape, and the fear of rape, are experienced by women sexually, not as

²⁶ Susan Griffin, “Rape: the All-American Crime” in Mary Vetterling-Braggin, Frederick Elliston & Jane English, eds., *Feminism and Philosophy* (New Jersey: Rowman and Littlefield, 1977) 313 at 318.

²⁷ Keith Burgess-Jackson, *Rape: A Philosophical Investigation* (Vermont: Dartmouth Publishing, 1996).

domination.”²⁸ Smart says that it is “a dubious feminist strategy that, in finding sex problematic, attempts to transpose it into violence as something easier to deal with. It overlooks that violence is not violence if it is sexualized, or that violence is exonerated if pleasure can be achieved.”²⁹ To view rape as about violence, rather than sex, is seen as a mistake because rape cannot simply be viewed as a tragic event in the life of the particular woman involved. Rather it is representative of, although perhaps in its extreme form, the heterosexual relation. To divorce sex from rape is dangerous because it makes invisible the fact that “rape is a man’s act, whether it is a male or a female man and whether it is a man relatively permanently or relatively temporarily; and being raped is a woman’s experience whether it is a female or a male woman and whether it is relatively permanently or relatively temporarily.”³⁰ MacKinnon, who is perhaps the modern spokeswoman for the ‘rape is sex’ position, argues:

If sexuality is central to women’s definition and forced sex is central to sexuality, rape is indigenous, not exceptional to women’s condition. In feminist analysis, a rape is not an isolated event or moral transgression or individual interchange gone wrong but an act of terrorism and torture within a systemic context of group subjugation, like lynching.³¹

In other words, rape is a consequence of a social context that treats sexuality in terms of gendered, hierarchical norms.³² For MacKinnon, Karl Marx was wrong — sex, and not economics, is the base upon which the social superstructure of Western society is built.

To expend much energy on the ‘violence vs. sex’ debate is, to some extent, to pursue a red herring. Rape is, of course, both. Marcus defines rape as a “sexualized and gendered attack which imposes sexual

²⁸ Winfred Woodhull, “Sexuality, Power and the Question of Rape” in Irene Diamond and Lee Quinby, eds., *Feminism & Foucault: Reflection on Resistance* (Boston: Northeastern University Press, 1988) 167 at 171.

²⁹ *Supra* note 17 at 46.

³⁰ Carolyn Shafer & Marilyn Frye, “Rape and Respect” in Mary Vetterling-Braggin et. al., eds., *Feminism and Philosophy* (New Jersey Rowman and Littlefield, 1977) 333 at 333.

³¹ *Supra* note 16 at 172.

³² This does not mean that rape wouldn’t occur in other social settings, but it would have a different meaning. Just as sexuality is socially constructed, the meaning of rape is necessarily tied to that construction.

difference along the lines of violence.”³³ For the early feminists, however, it was necessary to disengage rape from legal and cultural norms that overdetermined its defining characteristics as sexual, where sexuality was understood from the male perspective. Strategically, then, feminists began to focus their analysis on the very real aspects of violence and aggression in the sexual attack. Their project was successful in initiating legislative reform, in large part, because it was compatible with the prevailing ideology of liberalism: the protection of woman’s bodies and self-integrity was seen as a natural extension of the law. Lacey argues that “[i]n a modern liberal system, the most obviously relevant interest – the one which forms the normative framework for many academic commentaries on the sexual offences, is sexual autonomy – the freedom to determine one’s own sexual experiences, to choose how and with whom one expresses oneself sexually.”³⁴ What has emerged since that early period, however, is a shift in emphasis to the broader issues of how rape is actually produced in and through culture. Foa, for instance, argues:

against those who maintain that the special wrongness of rape arises from and is completely explained by a societal refusal to recognize women as people...The special wrongness of rape is due to, and is only an exaggeration of, the wrongness of our sexual interactions in general. Thus, a clear analysis of the special wrongness of rape will help indicate some of the essential features of healthy, non-rapine sexual interactions.³⁵

This shift in emphasis, like the earlier shift to rape-as-violence, should be seen as a strategic response to current cultural norms. The strategy is, of course, shaped by the current discursive climate, of which the rape-as-violence discourse is part. The following passage is illustrative:

The refusal to link the crime to sex comes in response to the reactionary claim that rape is the inevitable result of a supposedly innate male aggressivity coupled with an uncontrollable sexual need. However, the feminist counterargument ultimately rests on a notion of

³³ Sharon Marcus “Fighting Bodies, Fighting Words: A Theory of Politics and Rape Prevention” in Judith Butler & Joan Scott, eds., *Feminists Theorize the Political* (New York: Routledge, 1992) 385 at 397.

³⁴ Nicola Lacey “Unspeakable Subjects, Impossible Rights: Feminism, Sex and Criminal Law” *Legal Theory Workshop Series* (University of Toronto, Faculty of Law, 1997) at 4.

³⁵ Pamela Foa, “What’s Wrong with Rape” in Mary Vetterling-Braggin et. al., eds., *Feminism and Philosophy* (New Jersey Rowman and Littlefield, 1977) 347 at 347.

power divorced from sex, as if sex preexisted the social, from which power is said to derive. In doing so, it falls prey to the ruse of power cited by Foucault, namely, the designation of “sex as a biological or ontological given whose function is to guarantee that sexuality appear to have its origin outside of and prior to power. To accept this theoretical alibi is thus unwittingly to comply with the power one aims to elude.³⁶

The current strategy is thus to provide a broader critique of gendered power than the sex-as-violence discourse will allow.

For critics like Catherine MacKinnon and Carol Smart, social institutions in general, and the law in particular, normalize “dominator models”³⁷ of sexual interaction by eroticizing them. Recognizing the difficulties inherent in current legal structures, however, cannot lead to social determinism if it is to achieve its strategic purpose. As Sawacki argues:

The relationship between the individual and society is not pictured as one of social determination—complete socialization. Socialization emerges as a theoretical project that is never fully realized in practice. Therefore, social constructionism need not imply social determinism. In such a relational view of personal identity, one’s interests are a function of one’s place in the social field at a particular time, not given. They are constantly open to change and contestation.³⁸

In order to take up the challenge posed by modern radical rape theory, the issue that must be addressed by legal discourse is not only ‘how is law informed and determined by cultural norms of sexuality and gender,’ but ‘how, as an instrument of the social, can the law be used to produce cultural norms.’ Marcus³⁹ defines rape as a “scripted interaction” and suggests that women, in strategies of rape prevention, attempt to disrupt the script. She advises women, for instance, to disregard their traditional scripted role as victim or “subject of fear” and to treat the rape event as a “subject-to-subject” encounter, similar to a physical assault between men. She tells women to avoid seeing the penis

³⁶ Woodhull, *supra* note 29 at 170.

³⁷ I borrow this term from Riane Eisler *Sacred Pleasure: Sex, Myth and the Politics of the Body — New Paths to Power and Love* (San Francisco: Harper, 1995).

³⁸ Jana Sawicki, “Identity, Politics and Sexual Freedom” in Irene Diamond & Lee Quinby, eds., *Feminism & Foucault: Reflections on Resistance* (Boston: Northeastern University Press, 1988) 177 at 184.

³⁹ *Supra* note 34.

as an “indestructible weapon that cannot help but rape”, but rather to view it as a source of vulnerability. Marcus tells the tale of one woman who, in the midst of her assault grabbed her assailant’s penis and threatened to “break it off”, causing him to lose his erection and run off. The law, of course, has been complicit in creating the social script of rape. The question now becomes can the law be used as an ‘instrument of disruption,’ ‘a site of resistance,’ or more particularly, ‘a site for the renegotiation of the social scripts of sexuality and gender.’

It is a matter of some controversy whether law can and should be used as a site of renegotiation for broader gender relationships. Bumiller, for instance, argues that such a possibility would require “challenging the dominance of the legal discourse” and this idea poses a problem for feminists who are committed to the liberal ideal. As has already been argued, the success of the first wave of legal reforms was due, in large part, because of its consistency with liberal legalism and there is, therefore a reluctance to stray too far from liberal principles. Moreover, there seems to be an unarticulated fear among many women’s groups that a move away from liberalism, as a conceptual framework, may have the effect of reconstituting traditional legal forms. Many feminists, however, question the adequacy of liberal forms. Nedelsky argues that “[f]eminism appears equivocal in its stance toward liberalism because it simultaneously demands a respect for women’s selfhood and rejects the language and assumptions of individual rights that have been our culture’s primary means of expressing and enforcing respect for selfhood.”⁴⁰

Lacey and Bumiller both argue that the liberal principles that form the foundations of modern rape laws are inherently problematic. Lacey states:

It is an image of the body as territory, in the sense of both bounded space and property; divorced from reason and emotion, bodies are boundaries which separate autonomous individuals rather than aspects of lived subjectivity within which subjects relate to one another. This atomistic vision marginalises values which one might hope to see criminal protect.⁴¹

⁴⁰ Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” in Allan Hutchinson & Leslie Green, eds., *Law and the Community: The End of Individualism* (Toronto: Carswell, 1989) at 220..

⁴¹ *Supra* note 35.

For Lacey, the liberal construct of the “disembodied” and “atomistic” subject does not serve to adequately protect those things that society (women?) values most about the sexual encounter: “self-expression, connection, intimacy, relationship.”⁴² For Bumiller, not only is the law inadequate in its protection, but also potentially dangerous:

legal regulations in which the law appears to be protecting the territory of the self (ie., pornography and sexual assault) can be seen as creating the social space to inscribe bodies with sexual fears and dangers of the epidemic. The question becomes not how the body matters in legal discourse, but how dangerous the law might become to its embodied subjects.⁴³

Bumiller recognizes that it is the *institution* of rape that serves to oppress women and deeply embedded within this institution is the legal treatment of rape. Bumiller also recognizes, however, the possibilities that law reform offers:

once the body is potentially seen as the site of oppression, then the law is challenged to take into account the effect of “living” in a body marked as different. For the law to see bodily difference, it would have to bring into view the different experiences of both victims and perpetrators of acts of oppression.⁴⁴

For both Bumiller and Lacey, the possibilities of the law serving as a site of gender renegotiation are tied to a move from ‘subject’ to ‘subjectivity.’ The question becomes can such a move take place within existing legal forms. Nedelsky’s words are instructive here when she states:

[f]eminism requires a new conception of autonomy. The prevailing conception stands at the core of liberal theory and carries with it the individualism characteristic of liberalism. Such a conception cannot meet the aspirations of feminist theory and is inconsistent with its methodology. The basic value of autonomy is however, central to feminism. Feminist theory must retain the value while rejecting its liberal incarnation.⁴⁵

⁴² *Ibid.* at 5.

⁴³ Kristin Bumiller, “Body Images: How does the Body Matter in the Legal Imagination” in Bryant Garth & Austin Sarat, eds., *How does the Law Matter?* (Illinois: Northwestern University Press, 1998) 145 at 159.

⁴⁴ *Ibid.* at 153.

⁴⁵ *Supra* note 40 at 219.

3. Legal Reform in a Culture of Liberal Legalism

The revised sexual assault provisions were finally enacted in 1985 and the new legislation was comprehensive with respect to the way it has responded to women's early critiques.⁴⁶ The 'rape' provision has been repealed and replaced with a gender-neutral, three-tiered 'sexual assault' law. The legislation distinguishes between three types of sexual assault based on the level of violence used. The marital exception has been eliminated and the act of penetration is no longer required. In addition, the legislation includes a series of 'rape shield' provisions, which are meant to preclude the defense from introducing irrelevant sexual history evidence, as well as to limit the use to which such evidence in the event that it is ultimately admitted.⁴⁷ Finally, the corroboration⁴⁸ and recent complaint doctrines⁴⁹ have been abrogated. Consent has remained an explicit element, but in the current legislation is deemed to be invalid when brought about by force or threat thereof, by fraud or by the exercise thereof. In 1992, the government again amended the sexual assault provisions to include: an articulation of circumstances in which the victim's consent would be vitiated;⁵⁰ limitations with respect to the circumstances in which the accused could make use of the mistaken belief in consent defense;⁵¹ and, a reworking of the 'rape shield' provisions in response to a declaration by the court of unconstitutionality.⁵² In 1997, legislators have also introduced a series of new provisions relating to the production and use of the complainant's psychiatric records.⁵³

From a legislative standpoint, the reforms directly responded to and met the demands placed on them by women's groups. Stuart says of the 1992 reforms: "the process was a partisan one, with the voices of men, no doubt for the first time in the history of the development of

⁴⁶ *Criminal Code*, R.S.C. 1985, c.19 (3d Supp), s.10.

⁴⁷ *Criminal Code*, R.S.C. 1985, c.19 (3d Supp), s.12.

⁴⁸ *Criminal Code*, R.S.C. 1985, c.19 (3d Supp), s.11.

⁴⁹ *Criminal Code*, R.S.C. 1985, c.19 (3d Supp), s.11.

⁵⁰ *Criminal Code*, 1992, c.38, s.2.

⁵¹ *Criminal Code*, 1992, c.38, s.2.

⁵² *Criminal Code*, 1992, c.38, s.1.

⁵³ *Criminal Code*, 1997, c.30, s.1. These provisions were introduced to replace provisions enacted in 1985, which were held to be unconstitutional in *R. v. O'Connor* [1995] 4 S.C.R.411.

Canadian criminal law, largely excluded.”⁵⁴ But the legal definition of sexual assault is not dependent exclusively on the legislative texts. Judicial interpretation and elaboration of the law are also important, and can often put a halt to statutory reform. Vandervort states:

In Canada a strong common law tradition and the preservation of common law defenses, insofar as these are not inconsistent with statutory provisions, tends to encourage deference to customary norms and dominant social interests in the interpretation and enforcement of statute law.⁵⁵

With respect to the judicial interpretation of the law, three general areas of concern emerge: fault, relevance, and consent.

The Supreme Court has consistently held that there must be subjective fault in order to convict an accused of sexual assault. Thus the accused must either have actual knowledge of the victim’s lack of consent, or be reckless or willfully blind⁵⁶ to such knowledge. In *R. v. Pappajohn*,⁵⁷ the court confirmed that subjective fault is a required element and that the defense of ‘honest but mistaken belief’ is simply an abrogation of the required fault. One caveat, however, is that before a defense of mistaken belief goes to the jury, there would have to be an ‘air of reality’ to the defense. In practice, then, there is a shift in evidentiary burden to the accused with respect to the issue of fault.

Many argue that subjective fault is an inappropriate measure of guilt for sexual assault. Stuart suggests that “[t]he time has arrived for Parliament to declare some criminal responsibility for objectively unreasonable sexual behaviour,”⁵⁸ although he does not believe the “stigma” of sexual assault should be so attached.⁵⁹ Archard argues that “men have a duty to take reasonable care lest women do not consent.”⁶⁰ Archard maintains the impossibility a man being unaware of the particular character of the intercourse in which he is engaging as this is

⁵⁴ Don Stuart, *Canadian Criminal Law: A Treatise* (Toronto: Carswell, 1995) at 273.

⁵⁵ Lucinda Vandervort, “Mistake of Law and Sexual Assault: Consent and Mens Rea” (1987) 2 Canadian Journal Of Woman and the Law 233 at 240.

⁵⁶ See *R. v. Sansregret*, *supra* note 15. This ruling has not been incorporated into the legislative text.

⁵⁷ *Supra* note 14.

⁵⁸ *Supra* note 54 at 275.

⁵⁹ *Ibid.* at 277.

⁶⁰ David Archard, *Sexual Consent* (Boulder: Westview Press, 1998) at 145.

something that can be easily judged in terms of “pleasurability, ease, duration, awkwardness, and so on”;⁶¹ in other words, the lack of consent becomes abundantly clear through a woman’s body language. In addition, a man can desist from intercourse with little or no cost to himself, while the costs of forcing or coercing unconsented sex on a woman are considerable. Archard argues that men should exercise care by “being sensitive to a lack of evidence on the part of a woman,...evidence [which] is palpable, or...can be made so if men take certain measures.”⁶²

Section 273.2(b) of the Criminal Code prohibits the accused from raising the issue of honest but mistaken belief if he “did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.” This provision seems to be creating an objective standard with respect to fault. Stuart argues that the provision raises a constitutional question because it is an objective standard that “does not require a marked departure from the objective norm.”⁶³ The issue of the way in which section 273.2(b) impacts upon the whole of the sexual assault provisions, however, particularly with respect to issue of the required fault, has not yet been directly dealt with by the court. The explicit move from a subjective to an objective standard, however, will be a difficult one for the court. Burgess-Jackson states:

on no other aspect of rape law is the disagreement between liberals and radicals clearer – and for that reason more politically charged – than the mental state necessary for criminal liability. The disagreement over *mens rea* raises large, complex, and difficult issues, some conceptual and some evaluative, concerning the purpose of the criminal law, the comparative importance in that body of law of harmful results and culpable mindsets, and the appropriate punishment for the different results and mindsets.⁶⁴

Liberalism as a theory seeks to protect the individual, *qua* individual, from the zeal of various majorities and from political and legal pressures to use individuals as a means to collective ends, such as the prevention of crime. The doctrine of *mens rea* is designed and functions, at least in part, to ensure that only those individuals who are

⁶¹ *Ibid.* at 144.

⁶² *Ibid.* at 145.

⁶³ *Supra* note 54 at 278.

⁶⁴ *Supra* note 28 at 137.

both deterrable and deserving of punishment are punished. It seeks to treat individual fairly, taking into account their particularities and the details of their conduct. The law of rape, like the law of battery incorporates this mental element, *as one would expect if the liberal theory has been instrumental in shaping it* [emphasis added].⁶⁵

Discarding the subjective element of fault, particularly in an offence that is as politically charged as sexual assault, is an attack on the discourse of liberal legalism itself.

Another area of concern for law reformers involves the admissibility of evidence relating to the complainant's sexual history, lifestyle, and therapeutic history. The rape shield provisions substantially curtail the admissibility of this evidence, but the Supreme Court has thrice struck down these laws on the basis that they infringed the accused's right to full answer and defence.⁶⁶ In *R. v. Oslin*,⁶⁷ the Court demonstrated a willingness to uphold the current legislative provisions limiting the use of sexual history evidence provided that there was residual discretion granted to the trial judge to admit the evidence where "probative value outweighed prejudice." In the recent case of *R. v. Mills*,⁶⁸ the Supreme Court upheld the constitutionality of the latest *Criminal Code* provisions restricting defense access to the complainant's therapeutic records on the grounds that the right to full answer and defence in the context of sexual assault cases cannot be defined without reference to the complainant's equality and privacy rights. The legislative provisions considered by the court in both *Oslin* and *Mills* instruct the trial judge to balance the defendant's and the complainant's constitutional rights.⁶⁹ In balancing these rights and

⁶⁵ *Ibid.* at 60

⁶⁶ The Supreme Court in both *Forsythe v. R.* (1980), 53 C.C.C. (2d) 225 (S.C.C.) and *R. v. Seaboyer* [1991] 2 S.C.R. 577 strike down legislative restrictions on the admissibility of a complainant's sexual history for the purposes of demonstrating consent or discrediting the witness. Forsythe was a pre-Charter case. In *R. v. O'Connor*, the Supreme Court strikes down legislative restrictions pertaining to the use of a complainant's therapeutic records.

⁶⁷ [1993] 4 S.C.R. 595.

⁶⁸ [1999] S.C.J. No. 68 (QL).

⁶⁹ It was established by the court in *Seaboyer*, *supra* note 66 that sexual assault laws invoke the equality rights of women. Several reasons have been articulated for this including: that sexual assault is disproportionately a crime perpetrated by men against women; that gender stereotypes are often associated with the prosecution of the crime; and that as a result of the legal treatment of rape, women's right to privacy is disproportionately encroached upon when rape is compared to other types of offenses.

weighing the probative value of the evidence, the trial judge is not permitted to use lines of reasoning that are based on “groundless myth and fantasized stereotypes.”⁷⁰ However, the grant of judicial discretion remains problematic.

The problem with judicial discretion is twofold. First, the accused’s Constitutional rights to full answer and defense have generally taken precedence over the rights of the victim. For the last several years, the Supreme Court has consistently held that the accused right to full answer and defense needs to be balanced against the complainant’s right to equality and privacy.⁷¹ But, until recently, in the hierarchy of Charter rights, the accused rights to full answer and defense have generally prevailed. Dawson argues that the jurisprudence surrounding the accused’s right to full answer and defense is legitimated on notions of liberal legalism which are inherently androcentric, despite pretensions to gender neutrality. She argues that “the ‘constitutional right to raise a doubt’ on behalf of the individual accused appears to overlook the collective origins and meaning of evidence.”⁷² To overcome this dilemma, Dawson maintains that the legislative purpose of the rape shield provisions – gender equality – must be incorporated into the analysis of fundamental justice and the accused’s right to a fair trial, at least in the context of a gendered crime of rape. Implicit in her argument is the idea that women’s perceptions of what is relevant must be accounted for. This may mean shifting emphasis from values of individualism, rationality and logic, which are traditionally associated with liberal legalism to values of community responsibility and emotions of care and connection. This shift in emphasis would give new content to the meaning of ‘fair trial’, ‘fundamental justice’, and ‘standards of relevance.’ Recently, the Supreme Court has held that the content of ‘fair trial’, ‘full answer and defense’ and ‘fundamental justice’ in sexual assault cases are to be informed by the equality rights

⁷⁰ The existence of “rape myths” in criminal prosecutions of such offenses was first identified in *Seaboyer, ibid.*

⁷¹ The court explicitly recognized this need to balance for the first time in *R. v. O’Connor*, supra note 15. The issue in *O’Connor* was whether and how an accused in a sexual assault case should be able to gain access to the complainant’s counseling and medical records where such records are in the hands of a third party and are not a part of the case to meet.

⁷² T. Brett Dawson, “Sexual Assault Law and Past Sexual Conduct of Primary Witnesses: The Construction of Relevance” (1988) 2 *Canadian Journal of Women’s Issues* 310.

of the complainant.⁷³ Thus, the equality rights of the victim in cases of sexual assault have now been constitutionalized and given status equivalent to the rights of the accused. How the *Mills* decision will impact on that trial judge's use of discretion when balancing the rights in any particular case remains to be seen.

The second problem with judicial discretion is the tendency for judges to incorporate old legal forms into the new law. In enacting the new sexual assault provisions, the legislators intended to create a new legal regime in order to overcome culturally embedded notions of rape. Arguably, judges are also influenced by the culture's rape myths and, as a result, these myths impact on the exercise of judicial discretion. The way in which rape myths can impact on legal (rather than purely factual) findings is illustrated in the recent the case of *R. v. Ewanchuk*⁷⁴ where the issue before the court was the legal definition of consent. In the Court of Appeal, McClung J.A., setting the context for his decision, stated that: "it must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines;"⁷⁵ and, that "she was the mother of a six-month-old baby and that, along with her boyfriend, she shared an apartment with another couple."⁷⁶ Although this decision was not about evidence admissibility, it demonstrates how judges often interpret the law in a way that imports traditional understandings of rape and sexual assault. In her decision, L'Heureux-Dube J. states:

Even though McClung J.A. asserted that he had no intention of denigrating the complainant, one might wonder why he felt necessary to point out these aspects of the trial record. Could it be to express that the complainant is not a virgin? Or that she is a person of questionable moral character because she is not married and lives with her boyfriend and another couple? These comments made by an appellate judge help reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity. Based on those attributed assumptions, the implication is that if the complainant articulates her lack of consent by saying "no," she

⁷³ *R. v. Mills*, *supra* note 68.

⁷⁴ *R. v. Ewanchuk* [1999] S.C.J. No 10.

⁷⁵ *Ibid* at para 88.

⁷⁶ *Ibid*.

really does not mean it and even if she does, her refusal cannot be taken as seriously as if she were a girl of “good” moral character.⁷⁷

The final area relevant to law reform is with respect to the issue of consent. Consent seems to be firmly established within the legal discourse, if not the philosophical one, as the defining feature of the crime of rape. Nevertheless, consent cannot be seen as unproblematic. The *Criminal Code* lays out circumstances in which the victim’s consent is vitiated, that is circumstances in which she cannot consent, for instance, if she is in a state of intoxication. But the deeper meaning of consent is not to be found in the legislative texts and has therefore been left to the courts to elaborate. What is the measure of consent? Is there an objective or implied consent in sexual activity? How do you demonstrate consent? Clearly, this is an area where traditional legal frameworks can intrude upon the law and stifle legislative reform.

Recently, in *Ewanchuk*, the Supreme Court clearly articulated its position. With respect to the issue of consent, speaking for the majority of the court, Major J. held that “for the purposes of determining the absence of consent as an element of the *actus reus*, the actual state of mind of the complainant is determinative. At this point, the trier of fact is only concerned with the complainant’s perspective. The approach is purely subjective.”⁷⁸ With respect to this issue, the court was unanimous. Major J. justified his position by stating:

The rationale underlying the criminalization of assault explains this. Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one’s body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the Code expresses society’s determination to protect the security of the person from any non-consensual contact or threats of force.⁷⁹

The approach taken by the courts is, in some ways, revolutionary, in that it bases itself on a new model of sexual assault – “the communication model.”⁸⁰ Interestingly, however, is the way in which this new model is

⁷⁷ *Ibid.* at para. 89.

⁷⁸ *Ibid.* at para 27.

⁷⁹ *Ibid.* at para. 28.

⁸⁰ Several authors have emphasized communication as the emerging definitional element of assault. See, for instance, Lois Pineau, “Date Rape: A Feminist Analysis” (1989) 8 *Law and Philosophy* 217 and Archard, *supra* note 51.

rooted in the traditional legal forms of liberalism, that is the protection of physical integrity and autonomy.

The potential impact of this new model in other areas of the sexual assault laws is substantial. The interplay between the consent and the fault element is important here:

The criteria for mens rea, for the reasonableness of belief, and for consent are closely related. For although a man's sincere belief in the consent of his victim may be sufficient to defeat mens rea, the court is less likely to believe his belief is sincere if his belief is not reasonable. If his belief is reasonable, they are more likely to believe in the sincerity of his belief. But evidence of the reasonableness of his belief is also evidence that consent really did take place. For the very things that make it reasonable for him to believe that the defendant consented are often the very things that that incline the court to believe that she consented. What is often missing is the voice of the women herself, an account of what it would be reasonable for her to agree to, that is an account of what is reasonable from her standpoint.⁸¹

This means that reconstituting notions of consent can also impact on the content of the *mens rea* requirement. It can be argued, for instance, that in many cases failure to communicate is not simply a negligent act on the part of the part of the accused, but that it represents willful blindness or recklessness. Such a shift in the content the *mens rea* requirement can be said to be reflective of a shift in the cultural norms of sexual encounters. If the communication model is legally (and culturally) understood as standard practice in sexual encounters, lack of communication on the part of the accused can be characterized as evidence (although perhaps not conclusive evidence) of a guilty mind.

Likewise the shift in conceptual paradigms will, to some extent, allow the court to bypass the constitutional dilemma with respect to the admissibility of sexual history evidence. The question thus shifts from an issue of constitutional admissibility to an issue of relevance. If the question to be determined at trial is whether consent took place and consent is judged by the type and quality of the communication between the parties during the sexual encounter, then most of the evidence having to do with the victim's past sexual history and lifestyle, particularly with other partners, becomes irrelevant. New forms of evidence will have to be adduced:

⁸¹ Pineau, *ibid.* at 219.

On the old model of aggressive seduction we sought evidence of resistance. But on the new model of communicative sexuality what we want is evidence of on-going positive and encouraging response on the part of the plaintiff. This new model will require quite different tactics on the part of cross-examiners, and quite different expectations on the part of juries and judges.⁸²

Clearly, the full impact of the *Ewanchuk* decision is not yet known. What is interesting, however, is the way in which both the courts and the legislators have gradually taken up the criticisms posed by both radical and liberal feminists and have transformed old ideologies of liberalism and individualism into new conceptual frameworks.

III. THE LAW OF RAPE IN FINLAND: A GENERAL INTRODUCTION

It is interesting to consider, nonetheless, what a rape law framed around the ideal of sexual integrity and embodied autonomy might look like. The most obvious change would be a move away from the emphasis on lack of consent as the central determinant of sexual abuse. Rather these feminist arguments would favour a more complex sexual assault law which specifies particular conditions under which coercive, violent or degrading sexual encounters should be prohibited. This is not to say that the value of sexual integrity would direct a very great reliance on criminalisation as a mode of protecting the imaginary. On the contrary, criminalisation is likely to be an effective defender of the imaginary domain at the symbolic rather than the instrumental level. Furthermore, though lawyers are inclined to lose sight of the obvious fact, the most important conditions for sexual equality and integrity lie in cultural attitudes rather than coercive legal rules.⁸³

In January 1999, as an on-going effort at redrafting its Penal Code, Finland introduced major revisions to its sexual offences laws. Chapter 20, which is now entitled 'Of Offences against Sexual Self-determination', covers offences relating to: rape and other forms of sexual coercion; sexual exploitation of children, the disabled and other

⁸² *Ibid.* at 240.

⁸³ *Supra* note 35 at 10.

vulnerable persons; as well as, sexual procurement or 'pimping'.⁸⁴ Because of the novelty of these enactments, the practical effects of these changes are still unknown. What will be examined in this paper, however, are the legal and social forces that influenced the direction of the current legislation. One interesting aspect of the Finnish reforms is that they are somewhat out of keeping with the country's larger penal reform movement, which emphasizes decriminalization. In the area of sexual offences, the scope of the law has actually increased. These legislative changes have been informed by a growing awareness by Finnish scholars of feminist or 'women's law' issues.

1. The New Legislation in Context

Prior to the legislative reforms enacted in 1999, there were two categories of crimes that could properly fall within the current scope of the Canadian sexual assault provisions. 'Forcible rape', which was punishable with up to 10 years imprisonment, occurred when a woman was forced to have sexual intercourse 'by violence or by threat of an imminent danger.' 'Sexual assault', which was punishable by fine or for up to 4 years, occurred when a woman was forced to have sexual intercourse or some other indecency 'by violence or by threat.'⁸⁵

It should be noted that in neither set of provisions was 'lack of consent' a definitional element of the offence, nor, although formally available to the accused as a justification, was it an arguable issue at trial, despite regular pronouncements by the defendant that "she wanted to".⁸⁶ Jaatinen argues that the penal code provisions are comprehensive in their form and any that any discussion with respect to defenses, such as consent or duress, are merely academic exercises.⁸⁷ The crime of rape or sexual assault, however, is understood to be a crime against the self-determination of the victim. Therefore, lack of consent is an implicit element of the offence. In addition, in the context of the presentation of

⁸⁴ (*Unofficial*) *Penal Code of Finland* (Ministry of Justice, Law Drafting Department) [unpublished].

⁸⁵ Edward Wise, ed., *The Penal Code of Finland and Related Laws*, trans. Matti Joutsen, (Colorado: Fred B. Rothman & Co., 1987).

⁸⁶ Telephone interview with M. Steinburg by D. Cashman (1 March 1999). Meri Steinburg is an advocate with Unioni, the Finnish League of Women.

⁸⁷ Telephone Interview with H. Jaatinen by D. Cashman (23 February 1999). Heikki Jaatinen is a Professor of Criminal Law at Turku University

evidence, many things at a practical level hinge on whether or not there has been consent.⁸⁸ But these issues are rarely articulated using the language of consent. Instead, the court focuses on the physical evidence, as well as the conduct of the parties, in order to determine culpability. The pivotal issue has typically not been consent, “but the nature of the threat.”⁸⁹ In Finland, ‘taking advantage of someone who is unable to defend himself/herself or to make or express a decision’ falls under a separate crime of ‘sexual abuse,’⁹⁰ and this seems to care of those circumstances where the victim’s consent would said to be vitiated under Canadian law (for example, in instances of intoxication).⁹¹ The issue of consent as justification or excuse is generally restricted to “hockey, boxing, karate, and other contact sports where injuries sometimes occur.”⁹² Koivula states:

About 400 rapes/year are reported to police and studies indicate that the real figure could be as much as 1500. Among these 400 there are possibly 5-10 cases where consent is even mentioned let alone taking into consideration. These are usually cases where rape has not occurred and the woman is after vengeance or money. Consent is pretty hard to prove by the accused in a rape trial so it is a very rarely tried by the defense.⁹³

Nousiainen argues that because consent is not a definitional aspect of the offense in Finland, it makes it difficult to raise the issue as a defense. She states:

I would say that [the fact that consent is not a definitional element] has made it more difficult to point out the relevance of the discussion and also to develop a rape specific discussion on the thing...I could say that somehow it seems that we haven’t been having a very good discussion about the problems involved in these specific types of cases compared to what is consent in some other contexts. It is a very different thing if you are talking about consent to rough sport and so on.⁹⁴

⁸⁸ Telephone interview with K. Nousiainen (7 March 2000). Kevät Nousiainen is a Professor of Legal Theory at the University of Helsinki.

⁸⁹ Telephone Interview with K. Nousiainen by D. Cashman (3 March 1999).

⁹⁰ *Supra* note 84.

⁹¹ Telephone Interview with K. Nousiainen by D. Cashman (5 April 1999).

⁹² E-mail correspondence of T. Koivula to D. Cashman (6 March 1999). Tuomas Koivula is a Finnish law student.

⁹³ *Ibid.*

⁹⁴ *Supra* note 88.

The substantive highlights of the 1999 changes can be summarized as follows. There are now four categories of offences that would attract the Canadian sexual assault provisions. 'Rape', punishable for 1-6 years, is defined as forcing sexual intercourse by violence or threat of violence. Included under this provision is causing an unconscious state of mind and taking advantage of that state. 'Aggravated rape', punishable for 2-10 years, occurs where there is rape and: a) there is intent to cause bodily injury, disease, or to endanger the victim's life; b) many persons participated in the rape or the rape resulted in extreme mental or physical suffering; c) the act was committed in a particularly humiliating, harsh, or cruel manner; d) guns, knives or other deadly weapon was used; or e) there were other circumstances considered to be particularly harsh or brutal. 'Coerced sexual intercourse', punishable by no more than 3 years, occurs where the violence or threat was marginal, there were mitigating circumstances, or the threat used was not one of violence. 'Coerced sexual activity', punishable by a fine or no more than 3 years in prison, occurs when sexual activities other than rape are forced by violence or threat and the result is a violation of one's right to sexual self-determination. The definition of intercourse has been expanded to include non-vaginal penetration. Also, the language is now gender neutral in its application. Prosecution with respect to the first two offences is no longer at the discretion of the victim. It is also worth noting that since 1994, marriage is no longer a defense to the crime of rape.

When comparing the Finnish and Canadian legislation, several differences emerge. As already noted, lack of consent is not a definitional element of any of the sexual assault offenses under Finnish legislation. Historically, 'use of force' was the essential and defining feature of rape. Recognition of the inadequacy of such a narrow definition of rape, however, helped to spur the recent legislative reforms. The goal of the recent amendments was to broaden the scope of the law, by criminalizing sexual acts in circumstances of sexual coercion. Unlike the Canadian sexual assault provisions, which are broadly drafted to include any non-consensual sexual act, the Finnish law clearly sets out prohibited conditions and circumstances in the *actus reus* of the offense. With respect to the crime of aggravated assault, some attention is also paid to the injuries sustained by the victim as a result from the offence. Also, the Finnish legislation clearly distinguishes between criminal acts, which include penetration (of any

“sexual organ”), and other sexual crimes. It is also worth noting the lower maximum penalties for sexual crimes under the Finnish legislation.

A word needs to be said about the admissibility of evidence in Finland. Finland, like other civil law jurisdictions, has a general rule of ‘free evaluation of evidence.’ This means that very little is excluded. There is, however, no jury in Finland – cases are generally heard in front of one professional judge, who directs the process, sitting with two lay judges. Evidence of the complainant’s general lifestyle and sexual history is rarely adduced by the defense; it is generally not seen as relevant.⁹⁵ In 1998, new criminal law procedures were introduced which severely restricted the length of the trial process. This has also led to a decrease in the use of sexual-history evidence by the defendant.⁹⁶ This means that the problem of rape myths, as they have been described in Canada, has not been an issue in Finland. What the court does tend to be evaluate, however, is the level of responsibility that the parties should assume.⁹⁷ How the parties behaved, or should of behaved, becomes relevant in this context.⁹⁸

Physical evidence is the primary mode of proof for the prosecution.⁹⁹ In Helsinki, a specialized unit within the hospital has been established to examine rape victims after a crime has been reported.¹⁰⁰ Secondary sources of evidence include psychiatric evidence of ‘rape trauma syndrome’, testimony from the victim’s relatives and friends with whom she may have confided after the rape, and the victim’s own testimony.¹⁰¹ It is rare, however, except in cases where the victim and the perpetrator are strangers (and the women’s story is presumed to be true), or the women’s story is particularly compelling, that the defendant will be convicted without physical evidence supporting the victim’s claim. Indirectly, then, the court does consider the issue of consent, although it is never articulated as such.

⁹⁵ Nousianen, *supra* note 88.

⁹⁶ Steinburg, *supra* note 86.

⁹⁷ Jaatinen, *supra* note 87.

⁹⁸ Nousianen, *supra* note 91.

⁹⁹ Steinburg, *supra*, note 86.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

It can be said that the new provisions, insofar as they relate to the crimes of rape and the newly constituted crime of sexual coercion, do not so much represent a change in philosophical direction of the core content of the law, but, rather, represent a moderate expansion of judicial authority. The new title to the Chapter, 'Of Offences Against Sexual Self-Determination', for instance, although *technically* replacing 'Of Offences Against Morality' is simply a formal acknowledgment of what has been clearly recognized by the courts and articulated by the Government Committees and the Law Reform agencies since the 1960s¹⁰² – that the true violation resulting from the crime of rape is a violation of the personal integrity of the individual women.¹⁰³ Whereas in Canada, the legislative reforms have represented an ideological shift, in Finland the reasons for the legislative amendments have been articulated variously as 'to make it easier to prosecute rape', 'to bring more cases to court', and 'to differentiate between crimes, providing lighter sentencing in some cases, in order to convict more defendants.'

From a Finnish feminist perspective, the legal issues posed by the criminalization of rape are significantly different than those posed by Canadian feminists. In Canada, the major source of contestation involves the *definition* of sexual assault and evidentiary issues are thus engendered by concerns over these basic *definitional* questions. In other words, questions about the relevance and admissibility of evidence almost invariably concerns the way in which certain forms of evidence overdetermine how rape is ultimately defined, both in- and outside the courtroom. In Finland, on the other hand, the problem of rape becomes a problem of proof: "we see the problem very much as a question of evidence...and there has been discussion of the problems that arise when too much emphasis is put on the discussion of the violent character or how the violence aspect is to be treated...but the problems of evidence are very much in the foreground."¹⁰⁴ Thus, the changes that occurred with respect to the definition of rape have had more to do with functional purposes (that is, increasing the rates of criminal prosecution), than with changing the core content of the law. While in some camps there were

¹⁰² Nousianen, *supra* note 89.

¹⁰³ According to Nousiainen, the "de-dramatization", and I take her to mean the gradual shift away from rape as a crime of shame and morality, has been occurring in the courts for the last 30 years.

¹⁰⁴ Nousianen, *supra* note 91.

concerns about the symbolism attached to reducing the sentences for acts of sexual aggression, it seems to be widely accepted that the new laws, insofar as they increase prosecuting powers, are beneficial.

Nousiainen believes that one important issue that has not yet been addressed in Finland and which may eventually become a part of the legal debate has to do with the issue of the fault requirement and whose interpretation of events is being considered in the evaluation of evidence having to do with fault. Currently, intent is required to get a conviction. She argues, however, that recklessness or negligence may be a better measure of fault. This issue is presently being debated in other Scandinavian countries.

2. Purposes of the Criminal Law in Finland

In order to understand the contextual differences between Canada and Finland with respect to the way in which the crime of rape is understood, both through law and general legal discourse, it is necessary to say a word about the role of the criminal law in the context of a Scandinavian welfare state. Nousiainen believes, for instance, that the Finnish approach with respect to the purposes of the criminal law have “influenced feminist criminologists so that it hasn’t been possible...to demand for increased or harsher punishments, so that, I think, we have been in a kind of tight position in that on one hand, saying women have not been treated right or equally, or the female victims are not treated well and, on the other hand, trying to say this in terms that are acceptable in the welfare state type of criminal law discussion.”¹⁰⁵

Since the 1970s, there has been a shift in the general penal philosophy of Finland. As in other Scandinavian countries, Finland is moving away from using the criminal law as an instrument for the treatment or punishment of the offender. This is probably truer for Finland, “which emphasizes shorter sentences and fewer convictions,”¹⁰⁶ than for any other country. Finland is very proud of the fact, for instance, that it has been the only Western jurisdiction to have actually reduced its prison population in the last number of years. Anttila and Törnudd attribute this to the fact that:

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

treatment ideology never had time to establish itself as the main reform ideology, it was weak during the 1940s and 1950s and when the old guard relinquished its grip on power in the 1960s, the new reformers had already adopted a critical stance towards both the practice of coercive treatment and its background ideology, the medical model of crime.¹⁰⁷

In a sense, Finland thus leaped-over the treatment stage in the historical development of penal reform ideologies and went directly towards a modern ideology, emphasizing both rationality in the form of a general prevention and classic principles of justice...The special circumstances [of Finland], however, ensured that the justice orientation is only a distant relation to, for example, the neoclassical school of American origin.¹⁰⁸

Nousiainen argues that, in Finland, the use of criminalization as an instrument of social control is restricted to “classical criminal law, with a lot of demands placed on legality.” This is because there is “an understanding that the criminal law is something very bad in itself,” and should be seen as the “the last possible way of doing something to any social problem.”¹⁰⁹ Anttila and Törnudd state:

The evils of indeterminate incarceration under harsh discipline in closed institutions operated by the social authorities enraged intellectuals and human rights activists. Earlier claims for the effectiveness of treatment (and punishment) became suspect in the light of increased methodological sophistication and new research findings. It is fair to say that the new generation of reformers which entered the scene in the 1960s saw the ideology of coercive treatment as one of their main foes.¹¹⁰

The unique Scandinavian approach to the criminal law is consistent with the general ideology of the welfare state and the creation of the “public family.”¹¹¹ The goals behind the welfare state can be summarized in terms of the principles social justice. It is believed that

¹⁰⁷ Inkeri Antilla & Patrik Tornudd, “The Dynamics of Finnish Criminal Code Reform” in Raimo Lahti & Kimmo Nuotio, eds., *Criminal Law in Transition: Finnish and Comparative Perspectives* (Helsinki: Finnish Lawyers Publishing, 1992) 11 at 12.

¹⁰⁸ *Ibid.* at 13.

¹⁰⁹ *Supra* note 91.

¹¹⁰ *Supra* note 107 at 13.

¹¹¹ Alan Wolfe, *Whose Keeper: Social Science and Moral Obligation* (Berkeley: University of California Press, 1989).

“[b]y removing families from the vagaries of the market, by protecting workers against arbitrary firings, by contributing to economic growth, by creating equality in society as a whole and thereby reducing stress”¹¹² a type of social harmony can be achieved. Such harmony would reduce social tensions, which are the general sources of criminal behaviour, and would thereby reduce the need for the intervention of criminal law. Thus, there is a social obligation to decrease criminality at its source. For Finnish law reformers, who are schooled in sociology, the criminal law “is not the proper vehicle for directing social change”¹¹³ because the “level of criminality in a society is primarily determined by factors other than the threat of punishment.”¹¹⁴ For Finns, the social and economic costs of using the criminal law as a mechanism of social change generally outweigh its potential benefits.

Although there is a tendency towards abolitionism,¹¹⁵ most Finns believe that the criminal justice system has an important purpose, but that it should be used sparingly. The purpose of the criminal law tends to be symbolic, rather than practical, a social denunciation of activities so morally repugnant, or socially damaging, that they deserve criminal sanction. Anttila and Törnudd argues that:

to the extent that the criminal justice system does have an impact on crime *this effect is achieved through general prevention mechanisms (using this term in its extensive sense) rather than through mechanisms of e.g. deterrence or individual prevention.* The criminal justice system should meet high standards of justice but the aim of the system is not to do justice but to control human behaviour. While other agencies of social control may be important, no society can manage without a criminal justice system [emphasis added].¹¹⁶

The importance of the criminal system, then, relates to the “indirect” or “symbolic” effects of criminalization. Under this model, using individual offenders to promote social goals is morally unjustifiable. Criminal punishment, in terms of the time spent in prison, should therefore be limited.

¹¹² *Ibid* at 134.

¹¹³ *Supra* note 107 at 13.

¹¹⁴ *Ibid*.

¹¹⁵ See, for instance, Ezzat A. Fatteh, “Beyond Metaphysics” in Raimo Lahti & Kimmo Nuotio, eds., *Criminal Law in Transition: Finnish and Comparative Perspectives* (Helsinki: Finnish Lawyers Publishing, 1992) who sees the criminal justice system as an anachronism of Christian morality and serves no purpose in contemporary society.

Finland's approach to the criminal law cannot be divorced from its legal culture generally. It is significant, for instance, that Finland has a very strong tradition of formal legalism and strict interpretation. Pylkkänen¹¹⁷ argues that historically Finland's strict approach to legal interpretation was used to protect the country against the onslaught of Russian imperialism. But whatever its historical roots, the country's approach to legal interpretation, together with its distinctive understanding of the proper purposes of the criminal law, has meant that the evolution of sexual assault laws in Finland has been historically distinct from that in Canada. In Finland, for instance, the recent legislative reforms have tended to focus on drafting changes that would have the effect of increasing the scope of the law in this area. It is interesting to note that despite the general move towards decriminalization in Finland, the scope of the criminal law in the area of sexual offences has actually increased. This anomaly is, as will be shown, in large part due, to new social circumstances that have given rise to increased reflection on notions of sexuality, and the state's role in regulating sexual relationships. More importantly, however, is the emerging phenomenon of 'women's law' in Scandinavian academic circles, and the way in which this movement has created a social space in which women can address issues that are unique to the particular circumstances of 'womanhood.'

3. Sexuality and Gender in Finland

It is a popular stereotype that Scandinavian countries are sexually promiscuous. This is largely inaccurate, however.¹¹⁸ Finland, in particular, has traditionally had a strong sexual ethic, grounded in the country's agrarian roots. It can be argued that low levels of urbanization are a key factor in the maintenance of traditional values. Even today, Finnish urbanization has not occurred in a scale or in a manner seen in

¹¹⁶ *Supra* note 107.

¹¹⁷ Anu Pylkkänen, "Women's Law and Cultural Understandings of Gender in Finland" in Clare McGlynn, ed. *Legal Feminisms: Theory and Practice* (Hants: Dartmouth Publishing, 1998).

¹¹⁸ There seems to be some anecdotal evidence that Scandinavian countries are becoming more promiscuous in recent years, but this tends to be the general trend in North America, as well. And rather than such promiscuity being inherently Scandinavian, it may be a product of the globalization of American culture.

most industrialized societies. It would be fair to say that the Finnish sexual ethic is quite different than the one found in Canada. It is based on the traditional values of the countryside, rather than on Christian morality. Christianity never established a firm hold on the Finnish society. Not only did Christianity come late to Finland, but, during the early period of welfare reform, the church was co-opted by the state. Goran Gustafsson argues that the integration of the church into the state apparatus occurred in order to secure the state's influence over the institution, thereby effectively eliminating any competing ideologies.¹¹⁹ Therefore, at an *informal* level at least, Finland is perhaps more secularized than either Canada or the United States.¹²⁰

In Finland, sexual morality is not so much marked by strict rules of conduct, culminating in prohibition, but rather by an ethic of responsibility. Historically, marriage was not seen as a prerequisite for sex, but sex was viewed as a precursor to marriage. It was common practice for couples to formalize their union only after the birth of their first child.¹²¹ This does not mean that the society prescribed to an ethic of promiscuity with free and casual sex. On the contrary, sex was only to be undertaken in the context of an intimate and long-term relationship. Honkatukia contends that the North American dating culture does not exist in Finland.¹²² This means that sexual encounters between men and women do not have the same history of social regulation as they do in Canada. In Finland, for instance, it is commonplace for a couple to be introduced at a bar and then to go home together for coffee and conversation, without expectation by either party that sex will take place.¹²³ Sex, however, is seen as an integral part of the dating

¹¹⁹ Goran Gustafsson, "Politicization of State Churches: A Welfare State Model," (1990) 37:1 *Social Compass* 107.

¹²⁰ Lutherism is, however, the state supported church and people pay dues to the church through the tax system. Recently it has become easier to 'divorce the church' but most don't bother, particularly since, as long as they remain due paying members, they are entitled to receive benefits from the church, including free burials, weddings, and communions.

¹²¹ David Bradley, *Family Law and Political Culture: Scandinavian Laws in Comparative Perspective* (London: Sweet & Maxwell, 1996).

¹²² Telephone interview with P. Honkatukia (9 March 2000). Päivi Honkatukia is an Officer at the National Research Institute of Legal Policy.

¹²³ E-mail correspondence from P. Honkatukia to D Cashman on March 9, 2000. Honkatukia collaborated with colleague Heini Kainulainen in drafting this letter.

relationship from very early on and it is anticipated that women will have several sexual relationships before marriage.¹²⁴

The absence of a restrictive code of sexual conduct means that the 'double standard,' a defining feature of traditional North American sexual culture, has not been an issue in Finland. Empirical research has found, for instance, that, at least historically, there was a greater acceptance of the non-virginity of one's sexual partner in Scandinavian than in North American society.¹²⁵ The institution of the sauna in Finland also serves to counter sexual modesty and improve a spirit of openness. It can be argued that Scandinavian sexuality was never repressed nor viewed as a dangerous social contagion that it has in traditional Christian societies. Instead of a double standard, sexuality in Scandinavian countries is marked by a single standard and supported by an ethic of responsibility. Moreover, these values are consistent with the principles of equality and social justice found in the modern welfare state.

It can, perhaps, be argued that where issues of sexuality were largely repressed in North American culture, they were normalized, and thus made invisible, in Scandinavian society. Recently, however, with the break-up of the Soviet Union, rings of organized prostitution, run by the Russian mafia, have made their way into Finland and have spurred debate about what it means to be sexually determining.¹²⁶ In many ways, the introduction of prostitution into Finnish culture makes sexual vulnerability a visible issue. Moreover, Nousiainen argues that this increase in visible prostitution has impacted on the male-female dynamic. She states:

it has become much more difficult for women to uphold sexual self-determination as it has become much more common, for example, that you are bothered in the street, and you also may be bothered also in the restaurants if you are sitting alone, or with other women, you are very often addressed in a way that really didn't occur in the eighties. And

¹²⁴ *Ibid.*

¹²⁵ Harold Christensen and Christina Gregg, "Changing Sex Norms in America and Scandinavia" in Robert Bell & Michael Gorden, eds., *The Social Dimension of Human Sexuality* (Boston: Little Brown and Company, 1972) 47.

¹²⁶ It has largely been held that until recently, prostitution did not exist in Finland. It has emerged in the context of increasing freedom of movement by Russian and Estonian nationals, and, to some extent, by rising unemployment in Finland, which has made women particularly vulnerable.

there has been quite a lot of talk, for example, about the way children seem to behave in the schools. It is very typical today that boys, for example, call girls whores, which, as far as we know, wasn't very typical ten years ago, let's say. That way of talking about girls seems to have become really very common. Of course, it is difficult to say what are the reasons, and what are the causes, and what are the results, but there has been a change.¹²⁷

Thus, whereas in the past issues of sexuality were largely invisible and noncontroversial in Finland, they have recently become the centre of social debate. Coincidentally, the rise of prostitution in Finland has coincided with the Scandinavian women's law movement, which is an attempt to bring a women-centered perspective to political and legal discourse.

4. Feminism in Finland and the Emergence of Women's Law

Julkunen argues that "the concept of individual rights has never been as important in Nordic countries as in Anglo-Saxon countries. Constitutional rights are not invoked here, as in the United States."¹²⁸ Although the concept of individual rights and liberties is accepted as noncontroversial in the Scandinavian context, the emphasis has tended to be on the protection of "social rights – guaranteed minimum income, employment, education and health – [those things which] make citizens free and equal."¹²⁹ This has meant that "[e]quality between classes has been the principle and guiding rationale for the Nordic welfare state"¹³⁰ and traditionally women have had to invoke this conceptual framework in order to pursue their interests and views.

Because of its emphasis on equality, and what this has meant in terms of women's basic social needs, Finland is often cited by international agencies as being the best place in the world for women to live. Julkunen argues that women's equality with men is the result of Finland's unique history, which laid the groundwork for "structures and mentalities conducive to equality between the sexes." She argues that historically:

¹²⁷ *Supra* note 91.

¹²⁸ Raija Julkunen, "Women's Rights in Finland" in *Finnish Perspectives* (Finnish Ministry of Foreign Affairs, 1996) 3 at 3.

¹²⁹ *Ibid.* at 4.

¹³⁰ *Ibid.* at 4.

[w]omen's labour was indispensable in agrarian communities and the low salaries of male workers in combination with only rudimentary health and social security forced wives to work outside the home. The absence of the traditional male breadwinning role prevented the development of a strong patriarchal culture with its associated institutions.¹³¹

Scandinavian countries, in general, are characterized as the 'weak male breadwinner' or 'dual breadwinner' societies. As a result, in Scandinavia, gender categories are generally more fluid than they are in North America:

The space within which we as gendered beings can manoeuvre is fairly wide in our (Scandinavian) culture...Here a personal mixture of gender symbols in conduct and attitudes is acceptable, on condition that certain prescribed limits are observed or certain ceremonial rituals are performed.¹³²

It needs to be clarified that, at least in Finland, the political focus has traditionally "centred on equalizing differences between social classes, regions and the sexes. At the same time, however, minority rights and human rights have not been well protected."¹³³ This is important to understand because the paradox of the Finnish emphasis on equality is that, in many ways, it tends to subvert considerations of difference. Pylkkänen states: "[e]quality policies have concentrated on administrative measures against discrimination mostly in working life, and in allocating some resources to women's studies, but is characteristic of Finland that a public discourse of gender equality – or rather gender differences – has nevertheless been extremely limited."¹³⁴ In homogeneous Finland, any form of difference, unless based in class inequality, is viewed with suspicion. Moreover, the politics of consensus and social harmony, which are the dominant features of the Finnish social and political structures, has further marginalized discourses of difference. Korvajärvi argues, for instance, that the subversion of difference between the sexes determines the character of the Finnish workplace:

¹³¹ *Ibid.* at 5.

¹³² Lis Højgaard, "Working Fathers – Caught in the Web of the Symbolic Order of Gender" (1990) 4(3) *Acta Sociologica* 245 at 248.

¹³³ Julkunen, *supra* note 128 at 6.

¹³⁴ *Supra*, note 117.

There is little Finnish precedent when it comes to major public conflicts between women and men...As a general rule...women and men strive to avoid gender-based conflicts, preferring instead to work for mutual harmony. This also contributed to an image of successfully achieved equality between women and men in working life. It is further promoted the notion that sexuality and gender do not belong in working life...

Those who still dare to oppose gender equality are few and far between. At the same time, gender equality and the related aspects of gender neutrality have led to the avoidance of official conflicts between women and men... Harmony nonetheless has a way of hiding actual gendering practices in working life. It is difficult for both women and men to conceive of forms of gendering in working life because they can even elude verbalization. Events and processes speak for themselves here. It is culturally problematic for women to view themselves as “women”, above all else. Instead they prefer to identify themselves as “workers” or “human beings.”¹³⁵

This principle of gender neutrality has also impacted legal discourses in a broad range of areas. Julkunen argues, for instance, that “Finland’s permissive Abortion Act was not justified in terms of women’s rights but in terms of public health and of equality between social classes and regions.”¹³⁶ In other words, it was argued that poorer women, living in remote districts, “should not be forced to give birth to unwanted children or to undergo illegal abortions that have adverse effects on health.”¹³⁷ Julkunen goes on to state that:

discussions of sexual harassment, rape, wife abuse and the sexual coercion of wives have continued to suffer the fate of suppressed, almost taboo subjects in Finland. These family violence phenomena cannot be seen as cases of class or regional inequality as can abortion. Family violence occurs in all social categories, which makes it essentially an issue centred on the relationship between the sexes.¹³⁸

The slow emergence of ‘women’s law’¹³⁹ during the last decade can best be described by the oft quoted passage of Tove Dahl who says

¹³⁵ Päivi Korvajärvi, “Gendering Practices in Working Life” in *Finnish Perspectives* (Finnish Ministry of Foreign Affairs, 1996) 11 at 14-15.

¹³⁶ *Supra* note 128 at 7.

¹³⁷ *Ibid.* at 7

¹³⁸ *Ibid.* at 7.

¹³⁹ For general discussions about the idea of women’s law see: Tove Stang Dahl, *Women’s Law: A Introduction to Feminist Jurisprudence*, Ronald Craig, trans. (Oslo: Norwegian

that the purpose of women's law is "to describe, analyze, explain and understand the legal status of women in order to improve their status in law and in society in general."¹⁴⁰ Women's law involves moving beyond doctrines of gender neutrality in order to meet the needs of a gender-specific reality. In particular, women's law has been interested in the way in which the instruments of the welfare state can be used to improve women's lives. Importantly, women's law is not simply a *legal* discourse. Rather it has been systematically incorporated into a broader philosophical frameworks and has become a part of a larger feminist strategy. Pylkkänen argues, however, that the women's movement poses special challenges for the science of law, which has been dominated by a legal culture that is "young, positivist, and male."¹⁴¹

It is within the analytic framework of women's law that the issue of violence against women is currently being debated. Dahl states: "protection against violations of integrity has been in the centre of woman's politics the last few years, and women studies have contributed by revealing the nature and extent of these violations, analyzing their effects, and suggesting reforms."¹⁴² Nousiainen states that today "questions of violence against women occupy our time here."¹⁴³ Women's law has thus created a discursive space within which the issue of rape can be released from the proverbial closet. Feminist have recently begun to address, for instance, the issue of why "few [rape] cases are prosecuted", despite high rates of attacks.¹⁴⁴ This has meant changes to the definitional aspects of rape, in order to overcome evidentiary obstacles. The new legislative scheme has therefore attempted to clearly articulate the conditions under which rape is said to occur, thereby extending the arm of the law to a broader range of prohibited acts. In addition, at least in regard to the more serious

University Press, 1988); Hane Petersen "On Women and Legal Concepts: Informal Law and the Norm of Consideration," (1992) 1 *Social and Legal Studies* 493; Agnette Weis Bentzon, "Comments on Women's Law in Scandinavia," (1986) 14 *International Journal of the Sociology of Law* 249; Tove Stang Dahl "Taking Women as a Starting Point: Building on Women's Law" (1986) 14 *International Journal of the Sociology of Law* 239.

¹⁴⁰ Dahl (1988) *ibid.*

¹⁴¹ *Supra* note 117 at 152.

¹⁴² *Supra* note 139 at 101.

¹⁴³ *Supra* note 89.

¹⁴⁴ *Ibid.*

offenses, the decision to prosecute is no longer at the discretion of the victim for fear that she may be “intimidated” or “paid off”.¹⁴⁵ This does not mean, however, that the criminal law is seen as a panacea. Feminists continue to be deeply influenced by the Scandinavian penal philosophy, which restricts the use of the criminal law:

In the last few years the question of what criminal law responses could most effectively deter sexual offences has aroused considerable debate. Researchers in woman’s law have in this context relied upon the general conviction in criminology and criminal law that increased punishment seldom lead to a change of conduct in an area like this – and that a change in conduct must despite everything be the main objective. For rape victims the legal system will seldom involve restitution.¹⁴⁶

As an alternative to the singular focus on criminal conviction, women’s groups, as well as Finland’s Department of Health, both contribute resources to providing therapy to women victimized by violence.¹⁴⁷ In addition, women’s groups devote some of their budgeted resources to obtaining higher compensation and damage awards for victims of rape related offenses.¹⁴⁸

One interesting aspect of the women’s law movement in Finland is that, as a source of social critique, it has largely emerged from within state institutions. Pylkkänen states that “the pursuit of equality...has been very much connected with the state, at the same time that it has been an academic discipline. Since the 1960s era of state feminism, a women’s movement separate from the state has been almost non-existent.”¹⁴⁹ Pylkkänen argues that the movement’s inextricable link to the state has weakened the scope of its critique because it provides no external opposition to existing legal institutions. The context of legislative reform in Finland has thus been very different that that which has occurred in Canada where feminists have actively engaged in debates about the legitimacy of the legal foundations upon which the sexual assault laws have been built.¹⁵⁰ Pylkkänen states:

¹⁴⁵ Steinburg, *supra* note 86.

¹⁴⁶ Dahl (1988), *supra* note 139 at 103.

¹⁴⁷ Nousianen, *supra* note 88. Most of these resources tend to do to victims of domestic violence, but increasing rape victims also have access to these resources.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Supra* note 109.

¹⁵⁰ Honkatukia and Kainulainen, *supra* note 123, argue that “in Finland there has been

In the Finnish tradition, there is a strong tendency to negotiate and be constructive instead of being radical. Instead of strong individualism, communitarian values still dominate. I would say that a negotiation of meanings is going on all the time, not struggle. Feminist research and theory cannot develop without specific institutional forms, but unlike many others, Finns always want to integrate and avoid overt controversy.¹⁵¹

Pylkkänen argues that “[a]lthough practitioners of women’s law do also engage in official equality policies and administration, *it is even more important [for them] to develop a specific critical approach to legal science and the legal system itself as a whole*” [emphasis added].¹⁵² Pylkkänen states:

With its theoretical emphasis, Finnish feminism within law is less pragmatic and in a sense less radical than in many other countries. But I would like to stress that maybe this approach is even more radical with its aims at redefining many aspects of the mainstream legal science itself. We do not want to accept descriptions of ‘gender’ or ‘equality’ as defined in current cultural and legal codes but try instead to find ways to redefine them to get distance from dichotomous heterosexist thinking of gender as well as rationalities in the liberal thinking of justice.¹⁵³

Thus, in Finland, the issue is not changing heterosexual norms as they are understood within North American culture. Honkatukia argues that this is because the paradigm of gender neutrality has served Finnish women well and, as a result, issues that could potentially harm gender harmony have been avoided.¹⁵⁴ The process of legislative reform has therefore been less radical in Finland than in Canada. The issues raised by woman’s law include: ‘what are the particular needs of women as a group?’ ‘how are men and women differently effected by their social interactions?’ and ‘in what ways can the law be used to deal with the particular circumstances in which women find themselves?’ One area that was not addressed by the recent reforms, which primarily focused

hardly any discussion around rape, and it has been only in the 1990’s that violence against women in general has been recognized as a social problem in public discussions...Recently, ‘partner violence’ has raised a lot of attention, but the issue of rape has not been talked about.”

¹⁵¹ *Supra* 117 at 161.

¹⁵² *Ibid.* at 159.

¹⁵³ *Ibid.* at 161.

¹⁵⁴ *Supra* note 123.

on evidentiary rather than definitional problems, concerns the issue of fault and whose understanding of the events is emphasized when evaluating evidence pertaining to fault. Although this issue has not yet reached a level of debate of any significance in Finland, it is an issue that is appropriate to the content of the women's law movement.

IV. RAPE IN PAKISTAN: GENERAL INTRODUCTION

Islamist women I spoke to saw rape as a symptom of the lack of religious values in the society. It was argued that rape was imported into cultural value systems along with other cultural institutions – it is alien to the Islamic culture... According to some Islamist women, the only way to eradicate rape was to re-educate men, women and children about Islam and thus re-instate Islamic values and morality. Any other means, especially the existing penal code, are superficial and ineffective.¹⁵⁵

Since partition in 1947, Pakistan has struggled to create an identity for itself. In a 1999 report for CBC's *Ideas*, reporter Liza Hebert stated: "Pakistan was established as a country for Muslims and has evolved further into a Muslim country. Critics say Pakistan is moving very close to a theocratic state."¹⁵⁶ In order to understand the origins of the Pakistani rape laws, it is necessary to have an understanding of the role that such laws play under Islam. Tohidi states:

Some Western-oriented feminists may find it difficult to accept the fact that in many 'Third World' countries...women—and many men as well—value the interests of their families more than their own self-interests...Many women in developing countries, however, although wanting to ensure that their rights are respected and acknowledged, cannot afford or are unwilling to assert women's rights in a way that 'estranges them not just from their family but also from the larger community.'¹⁵⁷

Because of the symbolic role that women have been given in Islam, the struggle over Islamization is, at one level, a gender struggle. Few would

¹⁵⁵ Azza Karam *Women, Islamisms and the State: Contemporary Feminisms in Egypt* (New York: St. Martin's Press, 1998).

¹⁵⁶ Liza Hebert, "From Purdah to Politics: Conflict over the Islamic Path" on *Ideas* (CBC Radio: 13 April 1999).

¹⁵⁷ Herbert Bodman and Nayereh Tohidi, eds., *Women in Muslim Societies: Diversity within Unity* (Boulder: Lynne Reiner, 1998) at 282.

disagree with the statement that the current rape laws do injustice to women. In fact, one Islamic fundamentalist, when asked by interviewer Liza Hebert whether the current rape laws in Pakistan were working, *admitted they were not* – but went on to argue that the problem was not the laws themselves, but the fact that the *shari'a* has not yet been fully integrated into Pakistani culture and legal institutions.¹⁵⁸ Given the current political climate in Pakistan, the success at any attempt at legal reform will almost invariably depend upon whether such reforms have foundations in Islamic law. In Pakistan, religion, politics, and law are inseparable.

1. Islam: A religion of the Law

Joseph Schacht, in a paper exploring the historical relationship between theology and law in Islam, begins by stating that “[i]t is a truism to say...that Islam is a religion of the Law”¹⁵⁹ and later argues “[f]rom its very beginnings Islam was a religion of action rather than belief.”¹⁶⁰ It is not within the scope of this paper to explore the profound implications that this has for the Islamic state in the modern world. However, it is necessary to understand some of the more specific consequences that it has for the criminal law in order to do an analysis of rape in the Islamic state of Pakistan. Sandeela¹⁶¹ provides a useful analytic framework; he defines the *shari'a* in the following terms – simultaneously as “Divine Law”, “Revealed Law”, “Founded Law”, “Unchanging Law”, “Natural Law”, “Comprehensive Law”, and “Open Textured Law”.

Islam is comprehensive, in that “the sacred or religious law of Islam does not only consist of legal rules in the narrow sense, as we understand them; it is an all-embracing body of religious duties, the totality of *Allah's* commands that regulate the life of every Muslim in all aspects.”¹⁶² It is comprehensive in the sense that it incorporates both a public and a spiritual function. The public function, which governs the

¹⁵⁸ *Supra* note 156.

¹⁵⁹ Joseph Schacht in G.E. von Grunebaun, ed., *Theology and Law in Islam* (Weisbaden: Otto Harrassowitz, 1971) 3 at 3.

¹⁶⁰ *Ibid.* at 4.

¹⁶¹ Fateh Sandeela, “The Distinctive Features of Islamic Law” (1982) 2 *Islamic & Comparative Law Quarterly* 81.

¹⁶² *Supra* note 159 at 4.

relationship between men, is connected to the spiritual, which is to purify the soul from the baser instincts in preparation for the afterlife. The two are connected, as will be demonstrated, through the concept of *umma* or the collective identity of Islam. Under Islam, there is no separation of the public and private, as it is understood in North American legal culture.

Islamic law is both revealed and divine law, its primary sources being the *Qur'an*, the “True Word of God”, and the *Sunna* of the Prophet Mohammed whose life gave effect to God’s rules as they are prescribed in the *Qur'an*. The role of *fiqh*, Islamic jurisprudence, has been deeply influenced by the law’s divine aspect:

There was a suspicion of theological speculation in the minds of many leading Muslims. Theological speculation implied the use of human reasoning, and it was one thing using one’s reasoning to safeguard against oneself from unwittingly transgressing *Allah’s* commands, as the ancient specialist in religious law used to do, and quite a different thing trying to pry into the secrets, for instance, of God’s nature and predestination.¹⁶³

Fiqh is the preeminent Islamic science insofar it elaborated God’s divine law. “The purpose of *fiqh* was to produce pious deeds, and not familiarity with legal rules and traditional knowledge.”¹⁶⁴ It is the instrument through which man can obey God’s command. Islamic law is also founded and unchanging law, insofar as it neither “evolved from historical antecedents”¹⁶⁵ nor is evolutionary in character. The law, however, is open-textured in that there are few “firm rules”, leaving space for *ijtihad*, the exercise of judicial reasoning.

2. Sources of Islamic Criminal Law

Shari’a is the term used to identify the divine law. In particular, it refers to “the laws and way of life prescribed by *Allah* for his servants.”¹⁶⁶ As has already been stated, the *Shari’a* is a comprehensive system of law, which is not simply concerned with prohibitions but with

¹⁶³ *Ibid.* at 11.

¹⁶⁴ *Ibid.* at 4.

¹⁶⁵ *Supra* note 159 at 83.

¹⁶⁶ University of Southern California, *Shari’ah and Fiqh*: online (February 28, 1999) <<http://www.usc.edu.dept/MSA/las/shariahintroduction.html>>.

issues of “ideology and faith; behaviour and manners; and practical daily matter.”¹⁶⁷ There are five general sources of Islamic law:¹⁶⁸ the *Qur’an*, which is quite literally “the Word of God”, “revealed to the Prophet Muhammad for governing man’s behaviour” and his “social and religious life”; the *Sunna*, which is “the authentic tradition of the Prophet Muhammad” and includes both his “sayings in specific cases and his conduct in specific situations”; *ijma*, which refers to the consensus of Muslim scholars; *ijtihad*, which refers to judicial interpretation; and *quisas*, which refers to “juristic analogy.”

There is an issue over the legitimacy of modern penal codes, even with respect to those that base themselves on the *shari’a*.¹⁶⁹ On the one hand, the role of the state is to defend the religion and to enforce God’s laws.¹⁷⁰ On the other hand, the orthodoxy of the penal codes is in question. This issue was addressed in Pakistan in the context of the *Zina Ordinance* a few years after the law was enacted.¹⁷¹ In 1981, in *Hazoor Bakhsh v. Federation of Pakistan*, the *Federal Shariat Court* had to address the question of whether the punishment of *rajm*, stoning, is ordained in *Qur’an* for *zina* (illicit sexual intercourse). The court took the unpopular position that it did not, but their judgment led to a re-constitution of the court. In 1982, the decision was reconsidered and the new court, applying the constitutional-law doctrine of eclipse, overturned the earlier decision.

At a general level, the degree to which the *shari’a* can and should be used as a resource for feminists issues is hotly debated. Abdella Doumata states:

Muslim society has a built in mechanism for promoting the human rights of its people, and that is the holy law, the *shari’a*. It is a mechanism that can be used on behalf of human rights, not because it is fixed or God-given, but because it is in fact flexible, allowing for

¹⁶⁷ *Ibid.*

¹⁶⁸ Nagaty Sanad, *The Theory of Crime and Criminal Responsibility in Islamic Law* (Chicago: University of Illinois, 1991) at 38-40.

¹⁶⁹ George Gfeir, “Source of law and the Issue of Legitimacy and Rights” (1988) 42 (3) Middle East Journal 437.

¹⁷⁰ Bernard G. Weiss, *The Spirit of Islamic Law* (Georgia: University of Georgia Press, 1998).

¹⁷¹ Tahir Mahmood, “Some Notable Rulings from Muslim Countries,” 2:2 *Islamic & Comparative Law Quarterly* 127.

interpretation by men and women, and adoptable to changing needs and changing cultural understandings.¹⁷²

But Abdella Doumata's view is not a universal one. The first question that arises is the extent to which the content of Islamic law can give a voice to modern feminist concerns. Some view Islam as inherently oppressive to women, citing *Qur'anic* verses that subordinate women to their husbands, giving men the right, for instance, to "discipline" their wives. Most, however, prefer to focus on the 'revolutionary' aspects of the religion, highlighting the fact that the spirit of Islam was to free women from the constraints imposed on them in pre-Islamic societies.¹⁷³ They point to the fact that under Islam, men and women were granted equality before God, with women given special status as mothers. Moreover, under Islamic law, women were granted legal independence, including the right to hold their own property in their own name, as well as the right to consent to marriage. The second issue, closely related to the first, is the extent to which feminists *should* use Islamic law to give voice to their concerns. For Gardezi,¹⁷⁴ for instance, women's rights have their origins in secular human rights and the use of Islam to justify such rights gives an unwarranted legitimacy to Islamic fundamentalism by inadvertently making Islam the framework of analysis.

A third issue that arises is the extent to which the doors of the *ijtihad* – juridical reasoning – are open to re-interpretation. Traditionally, it has been held that since the third century of *hirji*, "all jurists were... *muqallids*, that is those whose duty it is to accept the opinions of the great predecessors without the exercise of private judgment."¹⁷⁵ In other words, it was believed that the various schools of Islamic thought had been crystallised and the faculty of *ijtihad* put into abeyance. An-na'im argues, however, that:

¹⁷² Eleanor Abdella Doumato, "The Ambiguity of Shari's and the Politics of 'Rights' in Saudi Arabia" in Mahnaz Afkani, ed., *Faith & Freedom: Women's Human Rights in the Muslim World* (Syracuse, New York: Syracuse University Press, 1995) 135 at 153.

¹⁷³ See: Jamal Badawi *Gender Equity in Islam: Basic Principles* (Indiana: American Trust Publication, 1995); Asghar Ali Engineer *The Rights of Women in Islam* (New Dehli: Sterling Publishers Ltd, 1992).

¹⁷⁴ Fauzia Gardezi, "Islam, feminism, and the women's movement in Pakistan: 1981-91" in Kamla Bhasin et. al., eds., *Against All Odds: Essays on Women, Religion and Development from India and Pakistan* (New Dehli: Kali for Women, 1994) 51.

¹⁷⁵ J.N.D. Anderson, *Islamic Law in the Modern World* (London: Stevens & Sons, 1959) at 14.

[a]s a product of human interpretation, *shari'a* should be seen as an inherently and constantly evolving and changing ethical and legal system, and each generation of Muslim men and women have the right, indeed obligation...to contribute to that process in terms of their own historical context.¹⁷⁶

She goes on to say, however,

that the process of reinterpretation of Islamic sources will not achieve significant results if it is confined to marginal 'reform' with the jurisprudential and methodological framework of *shari'a* as established by the founding jurists, commonly known as *usul al-fiqh*, the foundations of Islamic jurisprudence. The process of reinterpretation must include the assumptions and methodology of traditional formulation, as well as the content of the principles and the rules of the *shari'a*.¹⁷⁷

There are also differing opinions among the different schools of Islamic jurisprudence regarding the possibility of continuing *ijtihad*. In Pakistan, the government belongs to the *Hanafi* school, which has left the door open for possible reinterpretation of Islamic law in the context of contemporary social conditions. There is a large contingent of *Shi'ite* Muslims within the country who consider the era of *ijtihad* as having closed. The government has thus been inconsistent in its approach, variously appealing to *ijtihad* and applying a strict traditional *Shi'ite* interpretation of the law when it is convenient to do so. Weiss argues that the rigid interpretation of the conservative school has dominated the programme of legal reform in Pakistan.¹⁷⁸

3. Categories of Offences and the Crime of Zina

There are three categories of crime under Islamic law. Unlike western law, which distinguishes wrongful acts in terms of concepts of public and private law, Islamic categories directly correspond to the three types of penalties available: *hadd* (pl. *hudud*), *ta'zir* (pl. *ta'azir*), and *qisas*.¹⁷⁹ *Hudud* punishments, which form the basis for the Islamic

¹⁷⁶ Abdullahi An-na'im, "The Dichotomy between Religious and Secular Discourse in Islamic Societies" in Mahnaz Afkhami, ed., *Faith & Freedom: Women's Human Rights in the Muslim World* (New York: Syracuse University Press, 1995) 51 at 58.

¹⁷⁷ *Ibid.*

¹⁷⁸ Anita M. Weiss, *Women in Pakistan: Implications of the Current Program of Islamization* (Berkeley: Working Paper #78, 1985).

¹⁷⁹ For a general survey of the categories of offenses under Islamic Law see: Nagaty Sanad,

penal code in contemporary Pakistan, represent the limits of acceptable penal sanctions. *Hudud* is meted out for the commission or omission of an act that is in contradiction to any divinely ordained command for which a *hudud* punishment is explicitly laid out. There are seven crimes to which *hudud* punishments are attached: adultery (*zina*), theft (*sariqa*), banditry (*haraba*), defamation (*qadhif*), transgression (*baghi*), drinking alcohol (*shorb al-khamr*), and apostasy (*ridda*). Because *hudud* crimes are regarded as being against God's commands, they are considered absolute, rather than discretionary, and they serve as the limits of punishment that can be imposed on the *ta'zir* category of crime. *Ta'azir* crimes are those for which the means of punishment is not spelled out in the *Qur'an* or *Sunna* and is, instead, left to the discretion of the judge. The lawfulness of *ta'zir* is indicated by the Tradition of the Prophet. Finally, the law of *qisas* concerns laws of retaliation and blood money.

The relationship between the offences is an important one to understand. Rosen describes the logic of the *hadd-tazir* distinction in the following manner:

Acts that are subject to discretionary remedies have in common that they break the continuity of a relationship forged by human beings as proprietary creatures in such a way that it is nevertheless possible to reconstitute ongoing relationships without having to consider their impact on society at large. The harm these acts cause is, in a sense, limited by the break in continuity of relationship which a properly chosen remedy could help to reconstruct. *Hadd*-type wrongs go beyond this boundary inasmuch as, in the Islamic concept, they not only intrude on a domain marked out by God but because that domain is perceived as fraught with vast potential for social chaos. It is a realm of acts in which the reconnecting of bonds is regarded as particularly difficult and in which the systematic repercussions for many other networks of obligation are difficult to foresee and control¹⁸⁰

The Theory of Crime and Criminal Responsibility in Islamic Law (Chicago: University of Illinois, 1991); Mohamed el-Awa *Punishment in Islamic Law* (Indianapolis: American Trust Publications, 1982); Tahir Mahmood et al, eds., *Criminal Law in Islam and the Muslim World* (Dehli: Institute for Objective Studies, 1996).

¹⁸⁰ Lawrence Rosen, "The Anthropology of Justice" in R.S. Khare, ed., *Perspectives on Islamic Law, Justice and Society* (Virginia: Committee on the Comparative Study of Individual and Society Centre for Advanced Studies, 1987) at 15.

Sherwani distinguishes the three offences in the following manner:

Qisas being a retaliatory measure satisfies the psychological urge of revenge; *Hudud* helps the prevention of crimes by providing severe punishment to hardened, incorrigible and habitual criminals and deterrence to other notorious members of the community; while *Ta'zir* aims at reforming the character of the culprit and his rehabilitation in the society.¹⁸¹

Sherwani's characterization of *hadd* as based on "the principle of deterrence" with "its main objective [being] the prevention of crimes and the protection of civil life"¹⁸² is an interesting one because it demonstrates the role that *hadd* punishments play in maintaining the Symbolic Order of Islamic society. Sherwani goes on to say that in the case of *hadd*, "the interest of the individual (the criminal in question) should, in part, be sacrificed to protect the larger interests of the community...It is essential to curb the ferocity of crimes for the sake of protection of the society."¹⁸³ Similarly Rosen states: "the establishment of a *hadd* wrong removes the individual from further consideration as a person (in the Arab sense) since direct reintegration is regarded as far more difficult...justice is rendered...by the very act of depersonalization...[or] in the withdrawal of sociality through depersonalization."¹⁸⁴ In the case of *zina*, where the prescribed punishment is death by stoning, the symbolic expression of the law is materially significant because:

[i]n and through the act of stoning, the sense of outrage is at once expressed and inculcated. Not only does the individual participate directly and deliberately in the administration of justice but also affirms his own commitment to its ideal and expectations. Not only does he tender his services to the upkeep of the social, political and legal ethic, but also trains his own and others' sentiments and sympathies aright. Only thus can the moral sense of the community be kept keenly alive, and the strength and purpose imparted to the administration of justice.¹⁸⁵

¹⁸¹ A.A.K. Sherwani, *The Impact of Islamic Penal Laws on the Traditional Arab Society* (New Dehli: M D Publications, 1993) at 45.

¹⁸² *Ibid.* at 47.

¹⁸³ *Ibid.* at 45.

¹⁸⁴ *Supra* note 180 at 16.

¹⁸⁵ Fateh Sandeela, "Ethics of Punishment: Islamic and Western Dispensations" in Tahir Mahmood et al, eds., *Criminal Law in Islam and the Muslim World* (Dehli: Institute for Objective Studies, 1996) 100 at 113.

In context of symbolic meaning, the distinction between *qisas* and *hudud* crimes is also an important one to emphasize. The penalties for *hadd* and *qisas* are prescribed by God and are therefore, to use Weiss' language, "a violation of his rights."¹⁸⁶ With *hudud* offences, however, the interests protected:

transcend the interests of the individuals qua individuals, and as such they can, given the non-recognition of corporate persons be maintained only with reference to divine rights. Thus fornication ...and false accusation of fornication are both offences against God because they undermine God's ordaining of marriage as the means for legitimate procreation and perpetuation of the family across generations. Theft is an offence against God because it militates against the security of property upon which the well-being of the family and society depends. The drinking of intoxicating beverages is an offence against God because it interferes with rationality, which is an essential ingredient of social order and of proper worship of God and the disposition of the assets that he has conferred upon his human creatures.¹⁸⁷

The *qisas* offences of homicide and bodily harm, however, fall into the category of private law insofar as the effect the individuals' rights *vis-a-vis* each other. The difference between these two categories of offences is illustrated by the story, reported in the books of Traditions of the boy who had the affair with his employer's wife. The father of the boy gave one hundred goats and a maid in compensation, which the employer accepted. When the case was reported to the prophet, however, he ordered the return of the goats and the maid and held both the boy and the wife liable to *hadd*.¹⁸⁸

The crime of *zina* (illicit sexual intercourse) is seen as the most heinous under Islamic law because of the disruption it causes to the family, and thereby to the society at large.¹⁸⁹ The *Qur'an* says:

¹⁸⁶ *Supra* note 161 at 181.

¹⁸⁷ *Ibid.* at 181-2.

¹⁸⁸ S. A. H. Rizvi, G. S. Masoodi & T. Mahmood, "Adultery and Fornication in Islamic Criminal Law: A Debate" in Tahir Mahmood et al., eds., *Criminal Law in Islam and the Muslim World* (Dehli: Institute for Objective Studies, 1996) 223 at 226.

¹⁸⁹ There is no shortage of discussion on the crime of *zina* in the sharia. See in particular: Tahir Mahmood et al., eds., *Criminal Law in Islam and the Muslim World* (Dehli: Institute for Objective Studies, 1996); S. Aminul Hasan Rizvi, "Adultery and Fornication in Islamic Law" (1982) 2 *Islamic & Comparative Criminal Law Quarterly* 267; G.S. Masoodi, "Punishment in Islam for adultery and fornication" (1982) 2 *Islamic & Comparative Criminal Law Quarterly* 275.

“Nor come nigh to adultery,
 For it is a shameful (deed),
 And evil opening the road
 (To other evils).”¹⁹⁰

There numerous references in the primary sources to *zina*, but there is some inconsistency with respect to the appropriate penalties. For example, the *Qur'an* prescribes:

“The woman and the man,
 Guilty of adultery or fornication,
 Flog each of them,
 With a hundred stripes.”¹⁹¹

Despite the *Qur'anic* prescription, there are accounts in the *Sunna* of offenders being stoned to death. Traditionally these inconsistencies have been resolved by differentiating between *muhsan* (married) and non-*muhsan* offenders, where stoning was reserved for the former, more serious offense. Mayer¹⁹² claims, however, that this issue was never completely resolved in the *fiqh* and this has led to the emergence of different sanctions for *zina* in the various Islamic states.

Despite its harsh penalties, the *hadd* punishment for *zina* are rarely carried out because of the evidentiary burden. In order for *hadd* to be inflicted, either the crime must be confessed to or the act of intercourse itself has to be witnessed by four *tazkiyah-al-shuhood* (adult, male pious witnesses). In addition, *qadhif*, or defamation, meaning to falsely charge someone with adultery, is also subject to *hadd*. The *Qur'an* states:

“Those who slander chaste women,
 Indiscreet but believing,
 And cursed in this life,
 And in the Hereafter,
 For them is a grievous penalty.”¹⁹³

“And those who launch,
 A charge against a chaste woman,

¹⁹⁰ Omar al-Mutrak in Tahir Mahmood et al, eds., *Criminal Law in Islam and the Muslim World* (Dehli: Institute for Objective Studies, 1996) 213.

¹⁹¹ *Ibid.*, at 215.

¹⁹² Ann Elizabeth Mayer, “The Shariah: A Methodology or a Body of Substantive Rules?” in Nicholas Heer, ed., *Islamic Law and Jurisprudence* (Seattle: University of Washington Press, 1990).

¹⁹³ *Ibid.* at 220.

And produce not four witnesses,
 (To support their allegations),
 Flog them with eighty stripes;
 And reject their evidence,
 Ever after; for such men are wicked transgressors,
 Unless they repent thereafter,
 And mend (their conduct),
 For God is Oft-Forgiving
 Most Merciful.¹⁹⁴

Together, these obstacles to proof suggest that the punishment for *zina* has a more symbolic significance than a practical one. It should be noted that there is not a separate offence of rape in the primary sources. But under Islamic principles of justice, there is a concept of personal responsibility, which includes some notion of criminal intent so that the rape victim herself cannot be found guilty of *zina*.¹⁹⁵

4. The Islamic Umma and the Symbolic Position of Women

In order to understand the internal coherence and logic of Islamic law, it is necessary to say a word about the *umma*, or the collective identity of Islam. Mernissi argues:

Individualism, the person's claim to have legitimate interests, views and opinions different from the group, is an alien concept and fatal to the highly collectivist Islam. Islam like any theocracy, is group-oriented, and individual wishes are put down as impious, whimsical, egotistical passions¹⁹⁶

Whereas in Western liberalism, where the individual becomes "the basic unit of moral, social, political, and legal analysis,"¹⁹⁷ in Islam, the individual is subsumed within the collective *umma*. The emphasis on personal status as a marker of legal rights is a manifestation of this prioritization of the *umma* as the proper source for subjective identity. H.A.R. Gigg describes the concept best:

¹⁹⁴ *Ibid.* at 221.

¹⁹⁵ Sanad, *supra* note 168.

¹⁹⁶ Fatima Mernissi, "Femininity as Subversion: Reflections on the Muslim Concept of Nushuz" in Diana Eck & Devaki Jain, eds., *Speaking of Faith: Cross-Cultural Perspectives on Women, Religion and Social Change* (New Delhi: Kali for Women, 1986) 88 at 89.

¹⁹⁷ *Supra* note 28.

In its internal aspect, the *Umma* consists of the totality of individuals bound to one another by ties, not of kinship or race, but of religion, in that all its members profess their belief in one God, *Allah*, and in the mission of his prophet, Muhammad... In its external aspect, the *Umma* is sharply differentiated from all other social organizations. Its duty is to bear witness to *Allah* in the relations of its members to one another and with all mankind. They form a single indivisible unit charged to uphold the true faith, to instruct men in the ways of God, to persuade them to be good and to dissuade them from evil by word and deed.¹⁹⁸

Mernissi argues that this concept of *umma* “transformed a group of individuals into a community of believers.”¹⁹⁹ Moreover, the politics of identity that are occurring in the Muslim world today draw upon this concept of *umma*, as is demonstrated by what Mernissi calls “the need to be Muslim.”

It is important to understand that for Muslims, in carrying out the precepts of divine law, they are simultaneously bearing witness to *Allah* and preserving the *umma*, their collective identity. Rosen states:

For the Arabs it also follows that what matters most in evaluating actions is not their connection to a series of abstract propositions that lie behind them but to the consequences that actions have in the world, their impact on the networks of relationship, those webs of obligation, that one constantly encounters reference to the effect that words and deed have in the world as the means for assessing what they really are. And in law it is the consequences of an act, rather than its antecedent precepts, in terms of which a logic of remedy will be fashioned. Indeed, because the harm that people can do varies with their knowledge and hence their connections to others the evaluation of the harm itself turns in so small part on assessment of a person’s situated ties.²⁰⁰

The purpose of Islamic law is to prevent the social oppression that occurs when “the greed and selfishness of the human prey upon society.”²⁰¹ Under Islamic law, the notion of social justice depends upon “the absolute, just, and coherent unity of existence, and the general, mutual responsibility of individuals and societies.”²⁰²

¹⁹⁸ Quoted from Fatima Mernissi, *Beyond the Veil: Male-Female Dynamics in a Modern Muslim Society* (Toronto: Schenkman Publishing, 1975) at xv.

¹⁹⁹ *Ibid.* at xiv-xv.

²⁰⁰ *Supra* note 180 at 9.

²⁰¹ Ibrahim Abdulrahman Tokhais, *Social Justice in Islamic Law* (Michigan: University Microfilms International, 1984) at 53.

²⁰² *Ibid.* at 52.

In Islam, the family and not the individual becomes the primary unit of identification, because it is in the family that the collective identity of Islam is reproduced. “Prophet Muhammad advised his followers to choose their partners carefully because the family...is the backbone of society.”²⁰³ It is not surprising, then, that many authors have described the family as the “heart of the *shari’a*”. Ahmed says of Islamic societies that they:

have remained strictly marriage-oriented and conspire relentlessly to round up every bachelor into the matrimonial fold. To begin, there is Prophet Muhammad’s decree that marriage is the only road to virtue...Islam also prohibits celibacy. The prophet said: ‘There is no celibacy in Islam.’²⁰⁴

In Islam, marriage is too important to leave entirely to the whims of the individual. In the *Hanafi* school, for instance, the concept of a *kafa’a* allows a woman’s guardian to dissolve a marriage contract where the girl chooses to marry beneath herself, or more particularly beneath her family.²⁰⁵ Mernissa argues that “[o]ne of the most enduring characteristics of [early Islamic] history is that the family structure, because divine, is assumed to be unchangeable.”²⁰⁶

One sees God’s interest in the family as the social unit extending into the area of the criminal law by virtue of the crime of *zina*. Several authors have argued that the family was the instrument whereby the first Muslim community was founded in Medina because the family institution made it possible to organize a “society of believers” by disrupting the pre-Islamic tribal system. The goal was to re-orient men’s allegiances away from the tribe to *Allah*. This was accomplished by replacing the tribe with the collective *umma*. The primary social unit within this collective became the family. There is a growing body of research that suggests that in pre-Islamic society, there existed a strong matrilineal, matrifocal system of kinship alongside the patrilineal one and women’s sexual freedom was its defining feature. Such freedom

²⁰³ Ramadan A. Ahmed, “Women in Egypt and the Sudan” in Leonore Leob Adler, ed., *Women in Cross-Cultural Perspective* (New York: Praeger Publishers, 1991) 107 at 121.

²⁰⁴ *Ibid.* at 139.

²⁰⁵ Mona Siddiqui, “Law and the Desire for Social Control: An Insight into the Hanafi Concept of *Kafa’a* with Reference to the Fatawa ‘Alamgiri (1664-1672)” in Mai Yamani, ed., *Feminism & Islam: Legal and Literary* (New York: New York University Press, 1996) 49.

²⁰⁶ *Supra* note 197 at xv.

served as an impediment to the establishment of the Islamic patriarchal structure, so, to use the words of Ghada Karmi, "Islam ensured the ascendancy of the patrilineal over matrilineal marriage by condemning all forms of the latter as fornication, *zina*."²⁰⁷

Mernissi argues that:

because of the novelty of the family structure in Muhammad's revolutionary social order, he had to codify in detail its regulations. Sex is one the instincts whose satisfaction was regulated at length by the religious law during the first years of Islam. The link in the Muslim mind between sexuality and the *Shari'a* has shaped the legal and ideological history of the Muslim family structure and consequently of the relation between the sexes.²⁰⁸

Thus, in order to complete a discussion of rape under the Islamic legal system, it is necessary to say a few words on the issue of sexuality. It is interesting to note that the word *zina*, in addition to illicit sexual intercourse, means "displaying one attractions,"²⁰⁹ "a pleasant setting, an ornament."²¹⁰ Bouhdiba links sexuality in Islam with the sacred, defining *nikah*, the proper institution of sexuality, as "a sacred mission [that] brings us closer to God."²¹¹ "Within the limits of *nikah*, Islam permits, tolerates the sexual life. It integrates it into the social, communal life of the *umma* while warmly recommending believers to take their share (*nasib*) of the sexual pleasures, which are an essential prefiguration of the pleasures of paradise."²¹² "The Islamic view of sexuality...is a total one. Its aim is to integrate the sexual as everyday experience."²¹³

Whereas the Christian experience with sexuality has largely been one of repression, the Islamic view can be best described as reverential. This means that not only it is regulated and integrated into everyday practice, but it is regarded with a measure of suspicion as the potential

²⁰⁷ Ghada Karmi, "Women, Islam and Patriarchalism" in Mai Yamani, ed., *Feminism & Islam: Legal and Literary* (New York: New York University Press, 1996) 49 at 79.

²⁰⁸ *Supra* note 197 at xv.

²⁰⁹ Fazlur Rahman, "Status of Women in Islam" in Guity Nashat, ed., *Women and Revolution in Iran* (Boulder: Westview Press, 1983) 37 at 40.

²¹⁰ Abdelwahab Bouhdiba, *Sexuality in Islam*, Alan Sheridan, trans (Boston: Routledge & Kegan Paul, 1985) at 88.

²¹¹ *Ibid.* at 91.

²¹² *Ibid.* at 103-104.

²¹³ *Ibid.* at 103.

source of social chaos, *finta*. It is important to understand that women, as the carriers of *zina*, become the embodiment of *finta*. “In Islam... the whole system is based on the assumption that the woman is a powerful and dangerous being. All sexual institutions (polygamy, repudiation, sexual segregation) can be perceived as a strategy for containing her power.”²¹⁴ Thus, far from being repressed, sexuality becomes implicit in all interactions between the sexes.

In Islam, then, family honour becomes closely associated with the sexual behaviour of its women. Abu-Odeh argues that the demands of the honour/shame society require that the female body becomes “inseparable from the performance of virginity” at a social level.²¹⁵ Women are required not only to preserve actual virginity, but to produce and perform the social affects of such virginity by conforming to the prohibitive demands imposed by the society and the law. For abu-Odeh, a woman’s vaginal hymen metaphorically becomes a social one as well, so that even after she marries, she must still *perform* virginity and her failure to do so is a social, rather than a private issue. Thus, it can be said that a woman’s body becomes conflated with the body of Islam – and as such must be protected from possible contamination. Women’s sexual practices are regulated and constantly monitored because they become a potential source of pollution for the collective *umma*.²¹⁶

Mernissi argues that female subordination in Islam is about the protection of the *umma*, rather than about women themselves. She states:

women’s disobedience is so feared in Islam because its implications are enormous. They refer to the most dreaded danger to Islam as a group psychology: individualism. I want to suggest here that Muslim societies resist women’s claims to changing status, that they repress feminist trends which are actually evident all over the Muslim world, and they condemn them as Western imports, not simply because these societies fear women, but because they fear individualism.

²¹⁴ Mernissi, *supra* note 189 at xvi.

²¹⁵ Lama abu-Odeh, “Crimes of Honour and the Construction of Gender in Arab Societies” in Mai Yamani, ed., *Feminism & Islam: Legal and Literary* (New York: New York University Press, 1996) 141.

²¹⁶ Juliette Minces, *The House of Obedience: Women in Arab Society*, trans., Micheal Pallis (London: Zed Press, 1982) has observed the power and freedom that Islamic woman gain as she grows older and attributes this to the fact that they are no longer sexual beings.

...the woman, identified in the Muslim order as the embodiment of uncontrolled desires and undisciplined passions, is precisely the symbol of heavily suppressed individualistic trends, I believe that if the issues of the veil are so central to Muslim fundamentalist movements today, it is because these movements can be interpreted as strong visceral reactions against individualism.²¹⁷

An independent woman is considered dangerous in Islam because a “women who rebels against her husband, for instance, is also rebelling against the *umma*, against reason order, and indeed, God. The rebellion of a woman is linked to individualism, not community (*umma*); passion, not reason; disorder, not order; lawlessness (*finta*) not law.”²¹⁸ Thus, when the *umma* is threatened, the response has traditionally been to reinforce women’s traditional roles. Bodman observes that “European occupation and colonization of Muslim societies tended to magnify the practice of women’s seclusion; guarding them from foreign eyes became a touchstone of the male concept of honour.”²¹⁹ This reaction was repeated during the independence movements in the middle part the century:

A key element of the nationalist agenda was the defense of Islamic culture. In the early stages of many nationalisms in Muslim societies, the social status of women, as more rigidly interpreted over the centuries, formed an integral part. The ideology demanded that women’s bodies symbolize the rejection of an alien culture by maintaining traditional customs, such as veiling, deprecating female opinion, and subordinating them all to male members of the family.²²⁰

It should be noted that, in general, women accept their roles as ‘guardians of the culture.’ Weiss in describing the institution of *pardah*, which “involves the physical and practical separation of the activities of men and women,” remarks that “[a]lthough not all women observe the restrictions the *pardah* imposes, most do embrace the inherent values, such as that a woman preserves her family’s honour by not mixing with unrelated men and by not wearing revealing clothing.”²²¹

²¹⁷ *Supra* note 187 at 89.

²¹⁸ *Ibid.* at 98.

²¹⁹ *Supra* note 157 at 13.

²²⁰ *Ibid.*

²²¹ *Supra* note 178 at 6.

Understanding the symbolic and psychological landscape of the honour/shame society is important to understanding rape law in Pakistan. Shahla states:

Pakistani women have for centuries buried in their hearts the rage and anguish of rape. In the interests of family honour and for fear of ostracism, they were (and still are) forced to keep quiet or face further humiliation and abandonment by their families. Pakistani families customarily hide the ‘shame’ of their women whose honour, *izzat*, has been ‘looted’. The society has actively discouraged public disclosures of rape, and until very recently it preferred not to know.²²²

In Pakistan, the question of rape is both a political and social issue. Siddiqi, for instance, describes how the female body became the metaphoric battleground where national identity was fought during the Bangali-Pakistani war. In the theatre of the collective psyche, women’s bodies were encoded as the symbolic stage upon which the conflict was ultimately acted out:

In popular plays on the theme of independence..., the violation of individual woman is often portrayed as sacrifice, for family as well as for nation. A standard plot revolves around the woman whose husband has been incarcerated by the military, who surrenders her body to the degradations of army personnel in order to secure her husband’s freedom. Yet the sacrifice of her body can only be redeemed by her exist from the plot, for her act signifies betrayal and shame as well as sacrifice. The choice of rejoining the family is rarely exercised; ideally, she encounters death through suicide or accident.²²³

Likewise, Shahla describes the emerging phenomenon of “political rape” in Pakistan. She argues that such rape is the modern equivalent to, and draws its symbolism from, feudal “honour rape” where the “target of humiliation and shame is not a particular women, but a political rival or an old enemy on whom revenge is to be taken.”²²⁴ Shahla states:

the act of rape is more than a show of dominance through brute force to keep women in their place. It is also more than an instrument of

²²² Haeri Shahla, “The Politics of Dishonour: Rape and Power in Pakistan” in Mahnaz Afkhami, ed., *Faith & Freedom: Women’s Human Rights in the Muslim World* (New York: Syracuse University Press, 1995) 161 at 163.

²²³ Dina Siddiqi, “Taslina Nasreen and Others: The Contest over Gender in Bangladesh” in Herbert Bodman & Nayereh Tohidi, eds., *Women in Muslim Societies: Diversity Within Unity* (Boulder: Lynnes Reiner Publishers, 1998) 205 at 209.

²²⁴ *Ibid.* at 162.

oppression to restrict women's movement and control their bodies. Nor is it merely to make public examples of raped women in order to strike in the hearts of other women, thus forcing them to obey the rules of male power structure, and to remain within certain culturally and religiously specified boundaries. While sharing aspects of these elements, the specificity of the cases of these three women involves an act of revenge aimed at dishonouring a powerful and potentially threatening rival...When female members of her party are raped, not only are individual women dishonoured, but symbolically Benazir Bhutto herself, the leader of the opposition and the model of womanhood, is 'raped' by association. How could a nation, any nation, choose to have a raped leader? Conversely, how could a leader who is unable to protect herself or her followers protect her country from being invaded by its 'enemies', real or imagined?²²⁵

It is interesting to note that, according to Shahla, "political rape" has the tacit acceptance of the Pakistani government.

5. Islamization of Pakistan and the Crime of Rape

In the years following partition, Islamic principles have increasingly been incorporated in the state's legal apparatus, but it was not until the Zia government came into power in February 1979, that the systematic process of Islamization, which involved "bringing all laws into conformity with Islamic tenets and values" and to "mandate the kind of political and social institutions that had been established and encouraged by the Prophet Mohammed," began.²²⁶ Several authors have theorized that tensions resulting from processes of modernization have led to the current strategies of Islamization. Mernissa argues, for instance, that

the primary issue being debated in the Muslim world today is democracy—the individual right to choose society's rulers. The right of each citizen to choose those who rule, through clear voting procedures, is a total reversal of the idea of personhood in Islam. It is the world upside-down.²²⁷

In Pakistan these tensions are complicated by the context in which the Pakistani state emerged – Pakistan was created by the Islamic minority in India who demanded a separate state in which their community

²²⁵ *Ibid* at 170.

²²⁶ Anita Weiss, *supra* note 178 at 7.

²²⁷ *Supra* note 197 at 90.

“could practice their religion as they pleased—not only in private and family life, but also, perhaps, in the very organization of society and its institutions.”²²⁸ Thus, Islamization has been characterized as the *raison d’être* of the Pakistani state.²²⁹ Recently, Islamization is, in large part, a reaction to the processes of Western modernization. For those who insist that Pakistan be transformed into an Islamic state in the traditional sense of the word, it is because they see it as an alternative to the modern, capitalist state in which “men and women are virtually encouraged...to indulge in dishonesty or illicit sex.”²³⁰

In February 1979, the Zia government took the first concrete step towards Islamization in Pakistan with the introduction of the *Hudood Ordinance 1979*. Under this Ordinance, the *shari’a* offences of theft, drunkenness, *zina* (illicit sexual intercourse), and the bearing of false witness have become offences against the state, and, where the necessary burdens of proof have been met, subject to *hadd*. Adultery, fornication and rape are all captured under the *Zina Ordinance* and the evidentiary burden requires the testimony of four *tazikyah-al-shuhood*²³¹ who have witnessed actual penetration. Alternatively, *zina* can be established by confession. When the requirements of *hadd* have not been met, the offence attracts the lesser *ta’zir* punishment.

According to the legal definition, *zina* occurs when an adult woman and an adult man willfully commit sexual intercourse without being validly married to each other. Distinctions between fornication and adultery are relevant only in the context of sentencing, whereby the penalty for *muhsan* is death by stoning and for non-*muhsan* 100 lashes. Rape, *zina-bil-jabr* occurs when a person has sexual intercourse with a man or women, to whom he or she is not married in any of the following circumstances: a) against the will of the victim; b) without the consent of the victim; c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt; or, d) where the

²²⁸ Norman Anderson, *Law Reform in the Muslim World* (New Jersey: Humanities Press, 1976) at 174.

²²⁹ *Ibid.*

²³⁰ *Ibid.* at 180.

²³¹ Rubya Mehdi, “The Offence of Rape in Pakistan” in Jennifer Temkin, eds., *Rape and the Criminal Justice System* (Brookfield: Dartmouth, 1995), defines *tazikyah-al-shuhood* as “truthful male persons free from sin” – a hard standard to meet.

consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

Not surprisingly, the evidentiary burden required to attract the *hadd* punishment has proved, difficult to meet. In order to be found guilty under *hadd* of *zina* or *zina-bil-jabr*, the act would have to be done in public in the presence of four upstanding members of the community. Typically, then, *zina* is prosecuted as *ta'zir*, and punishment is at the discretion of the court. It should be emphasized that under *ta'zir*, a variety of types of evidence can be admitted, including the testimony of women.²³² Judicial discretion, however, has proven potentially perilous for women who are unable to substantiate their claims. In the well-known Safia Bibi case, for example, a young, blind woman who was working as a domestic servant became pregnant after being raped by her employer and his son. The men were not punished – the first was not charged for lack of evidence and the second was acquitted on the benefit of doubt. Bibi, however, was found guilty of *zina-bil-jabr* on the evidence of illegitimate pregnancy or “self-confession”, and was sentenced to 15 lashes. The Federal Shariat Court eventually reversed the ruling, distinguishing between rape and adultery, and dismissed Safia Bibi’s sentence.²³³ Since medical evidence is often not available to substantiate claims of rape, offenders are generally released for lack of evidence. The victims of rape, on the other hand, are often subject to prosecution because either their allegations of rape or subsequent pregnancy is treated as a confession of *zina*. Thus, the *Zina Ordinance* has increasingly been used as a mechanism of social control. The *Human Rights Global Watch Report on Women’s Human Rights*, for instance, states:

the vast majority of *Hudood* cases (most of which are registered by the woman’s husband or father) are not supported by the evidence and should not have been prosecuted. In many cases, women are wrongfully prosecuted for *Hudood* offences because they refuse to

²³² Human Rights Global Watch, in its *Report on Women’s Human Rights, 1995* reports that many of the same biases that have historically been exhibited in Western courts are prevalent in the Pakistan courts. A version of the fresh complaint rule, for example, can be found in the Pakistan Penal Code. In addition, in the absence of physical evidence of resistance, the courts are more likely to treat the intercourse as consensual.

²³³ See *ibid.* Several other cases are reported by the agency at 150-151.

marry men chosen by their families, decide to leave home or marry men against their parents' will, or seek to separate from or divorce abusive husbands.²³⁴

It has been estimated that two thousand women are sitting in prison on false rape charges.²³⁵ The problem, of course, has to do with the conflation of rape and adultery in the submission in evidence and the use of the victim's testimony of rape as evidence of a 'confession.'

6. Feminist Strategies respecting the Pakistani Rape Law

Deciding on appropriate strategies for law reform in Pakistan always involves an implicit debate as to whether the criminal law should be secularized and religion made a 'private affair.' For the most part, however, the political climate will not allow such a reconceptualization. Currently, the trend in Pakistan is towards greater Islamization, rather than less, where an accepted political strategy is to say one is more Muslim than his opponent.²³⁶ As one feminist argues, in a country where the Muslim majority represents over ninety percent of the population, Islam is a source of unity, "something upon which we can all agree."²³⁷ Human rights discourses, on the other hand, are seen as Western and antithetical to Islamic Pakistan. Thus the most effective strategies for improving women's positions in Pakistan inevitably involve working within Islam itself.

The basic strategy for Muslim feminist is reinterpretation of Islam law at both a macro and a micro level. At a macro level, this means that women are beginning to emphasize the spirit of Islam, and the position given to them in the collective *umma*. It means going back to the primary sources and reinterpreting, retranslating Islamic verses. More importantly, however, it also means revealing the ways in which current social practices contradict what has been 'revealed' by the *Qur'an* and the Prophet Muhammad. In the context of Pakistani rape laws, the emphasis is on the appropriation and misapplication of Islamic law in ways that are meant to subordinate women, rather than to obey *Allah's* divine command. At a micro level, women are returning to the particular

²³⁴ *Ibid.* at 151. See also Amnesty International External Archive online: (3 March 1990) <http://www.amnesty.se/aixweb97/405e.htm>.

²³⁵ Hebert, *supra* note 156.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

Islamic prescriptions and seeking reinterpretation. The difficulty, in the context of the *hadd* offences, and in particular in the case of *zina*, is the symbolic significance that these laws have in the construction of the Islamic identity. There is also the issue of the apparent “explicitness” of the language of the texts and the general consensus reached on these provisions by the early jurists in *fiqh*. To what extent are the doors of *ijtihad* still open?

Legal reform obviously requires a restructuring of the *Zina Ordinance*. Thus, Quaishi²³⁸ maintains that rape should not be subsumed under *zina* at all. She argues that rape is more analogous to the *hadd* offence of *hiraba* or “violent undertaking” than to *zina*. Traditionally, *hiraba* has been translated as “forcible taking”, “highway robbery”, “terrorism”, or “waging war against the state” and has generally been interpreted by the scholars to include “any type of forcible assault upon people involving some sort of taking of property. It differs from theft in that the *Qur’anic* crime of theft (*sariqa*) is taking by stealth whereas *hiraba* is taking by force.” Alternatively, she argues that there is textual support for treating rape as subject to civil liability (*quisas*), for “wounds” or “harm to sexual organs” (*jirah*). Interestingly, there seems to be some support for this approach under Iranian law.²³⁹

Quraishi, however, although grounding her arguments in the primary texts, implicitly uses the language of secular human rights in her arguments. She states, for instance, that “[i]n the face of any hint of a woman’s sexual impropriety, the *Qur’anic* response is: walk away. Leave her alone. Leave her dignity in tact. The honour of a women is not a tool, *it is her fundamental right*” [emphasis added]. Moreover, her criticisms of the placement of rape within the *Zina Ordinance* are conceptually based on the idea that, because the *Qur’an* requires four witnesses to the act and defamation is punishable by *hadd*, the crime of *zina* is really a crime of “public indecency.” Although this is true in a practical sense, and she is right to criticize the way *shari’a* evidence requirements are being used by men as instruments to terrorize and

²³⁸ Asifa Quraishi, Her Honour: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective: online (March 3, 1999) <http://www.untada.com/Karamah/publications/rape_main.htm>.

²³⁹ Mahnaz Afkhami and Erika Friedl, eds., “The Islamic Penal Code of the Islamic Republic of Iran: excerpts relating to women” in *In the Eye of the Storm: Women in Post-Revolutionary Iran* (London: I.B. Tauris) 180.

oppress women, her characterization of *zina* as a simple “act of indecency” serves to undermine her argument in Islamic Pakistan. It is a theoretical position that cannot be justified given the symbolic significance that *hadd* offences have in the creation of the collective *umma*. Moreover, she underestimates the importance that women, as a symbol of cultural purity, play in the Islamic psyche.

The proper vehicle for legal reform is still being debated in Pakistan. The challenge of such reform is to find a way of characterizing the crime of rape in a way that is sensitive to the fundamentalist nature of Pakistani law and the special status given to women’s sexuality within the context of an Islamic society.

V. FINAL THOUGHTS

[T]here is no final word concerning the political status of sexual struggles...Neither wholly a source of domination nor of resistance, sexuality is neither outside power nor wholly circumscribed by it. Instead, it is itself an arena of struggle. There are no inherently liberatory or repressive sexual practices, for any practice is co-optable and any is capable of becoming a source of resistance.²⁴⁰

In all three countries – Finland, Canada, and Pakistan – rape law has emerged as a site of gender conflict and negotiation. But in each case, the way in which the battle is articulated, as well as the terms of its engagement, is culturally specific. The way in which rape is culturally understood and personally experienced is, of course, a product of the sexual culture in which the act occurs. But sexual assault laws because of the inherent gendered nature of these offenses necessarily impact sexual culture. Law is always culturally symbolic. This is why feminists must inevitably embark on a dialogue with the law. In this dialogue, law becomes a site of gender renegotiation with its terms defined by the legal culture in which it takes place. In all three countries examined both the definition of the legal problem of rape and feminist strategies for reform have been and continue to be shaped by the criminal law culture in which they are situated.

²⁴⁰ Sawicki, *supra* note 38 at 184.

In Canada, feminists have explicitly engaged in and initiated legal reform. The reform has been an evolutionary process with both legislators and courts responding to feminist critiques as they emerge. There have been two generations of critique since the 1970s. The process of reform was initially spurred by feminist demands that it should be woman's experience of rape that forms the content of the law. In this early period, the feminist strategy was to divorce the crime of rape from its sexual quality. This was seen as necessary as the traditional legal framework had privileged an inherently androcentric sexual standpoint that disadvantaged women complainants in the courtroom. The second generation of critique, however, would see the rape-as-sex characterization re-emerge as a way of once again redefining the crime of rape. Informed by the American rape debate, the distinguishing feature of the Canadian reform process has been the emphasis on the *definition* of rape. This has proved to be a divisive issue for feminists. Liberal feminists have generally seen rape as a violent act, whereas radical feminists see rape as somehow implicated in normal gender relations and the prevailing norms of heterosexuality. Thinkers like Catherine MacKinnon, for instance, have argued that male power has been eroticized in contemporary North American society. The challenge for legal reformers has been how to respond to these criticisms in and through existing conceptual frameworks like legal liberalism. In other words, how can law be used, as an "instrument of truth", to disrupt existing social scripts? The courts have recently responded with a new conceptual framework for understanding rape, a framework that is implicitly informed by the second generation of feminist critique. The law is still evolving, however, and how this new model will impact on existing legal principles is still unknown.

Reform in Finland has taken place within a penal philosophy that emphasizes decriminalization and abolitionism. Within this structure, the rape reforms are anomalous to the larger penal reform movement in that they actually increased the scope of judicial jurisdiction. Like in Canada, the changes to the law are too recent for one to know for certain what their practical effects will be. What is interesting about the Finnish reforms is the way in which they have been, in large part, a response to the emerging feminist discourse of 'woman's law.' The challenge for Finnish feminists has been to find a way of articulating the crime of rape so as not to disrupt a culture of gender harmony. 'Woman's law' has

provided feminists with the discursive space to address issues, such as violence against women, that have traditionally been taboo within the conceptual framework of 'equality between the sexes'. It is important to note that the central issue for legal reformers in Finland has been somewhat different than it has been for reformers in Canada. In Finland, the focus has been on problems of evidence and issues of legal definition which arise within the context of solving these evidentiary problems. Within the discourse of 'woman's law', however, new issues may emerge, such as 'what is the appropriate level of fault required for conviction?' The question becomes, 'whose understanding of events should be emphasized?'

In order to understand the rape laws in Pakistan one must have an understanding of the nature and scope of Islam and the special status that women's sexuality occupies within fundamentalist Pakistan. Human rights activists have continually demanded a repeal of the *Zina Ordinance* on the basis that it is discriminatory to women and an affront to basic human rights. However, the language of human rights, with its emphasis on individualism, is problematic in the context of the increasing Islamization of the Pakistani state. The better approach, rather than to apply the human rights conceptual model, would be to search for strategies of change within the body of Islam itself. This approach may involve a juristic re-characterization of the crime of rape. The gender struggle in Pakistan is particularly salient, because it involves, at its most basic level, issues of collective identity. Therefore, strategies of change, if they are to be successful, must involve not only reinterpretation of the primary sources of law, but must take account of the symbolic significance of the existing legal regime. The proper characterization of rape must be found within this framework.

The purpose of this paper has been to provide a cross-cultural examination of the law of rape in order to come to some understanding of the way in which rape is both a social and a legal discourse. Engaging in such comparative analysis can bring greater understanding of one's own cultural and legal paradigms. This work has illustrated, for instance, that the philosophical inquiry surrounding the definition of rape as it has emerged within Canada and the United States is unique to the North American cultural context where liberal legalism with its emphasis on individualism and abstract autonomy prevails. In Finland and Pakistan, more communitarian legal visions produce sexual assault

laws and processes of legal reform very different than those seen in Canada. In all three countries examined, the way in which rape is legally defined is significant for the way gender relations are constructed. In each case the definition of rape is the result of a synergistic exchange between culture and law. Understanding this synergy is important in the development of effective strategies of resistance both within and outside of law. In this paper, for instance, making visible liberalism as the dominant legal form in Canada highlights alternative legal visions such as communitarianism. It can be argued that incorporating such communitarian values into Canadian Constitutional principles such as 'fair trial', 'fundamental justice' and 'full answer and defense' would be a significant progressive step to legal reform in Canada. Engaging in comparative analyses is thus an important area of inquiry for feminist researchers. The last word goes to Jennifer Nedelsky who states:

Feminists are centrally concerned with freeing women to shape our own lives, to define who we (each) are, rather than accepting the definition given to us by others (men and male dominated society, in particular). Feminists therefore need a language of freedom with which to express the value underlying this concern. But that language must also be true to the equally important feminist precept that any good theorizing will start with people in their social contexts.²⁴¹

²⁴¹ *Supra* note 40.