

# Marital Rape in Denmark and Pakistan: Minorities, Culture and Law

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## Abstract

This article investigates how rape laws and rape cases are culturally influenced, with a focus on marital rape. The first part of the article looks at cultural influences on rape laws and compares the historical development of these laws in Danish legislation, Pakistani legislation and more broadly in Muslim law. Danish comparative law often compares with legislation in neighboring countries, but comparing to a more different legal system is valuable too. We find that in both Denmark and Pakistan, socio-economic changes challenge existing definitions of rape and marital rape, leading to demands for legal reform, while the legal system tries to maintain as much continuity in the legal definitions as possible. In both jurisdictions, societal views on women and sex also influence how judges and jurors interpret the law, sometimes leading them to contradict the written law. The second part of the article analyzes two court cases involving marital rape in Danish-Pakistani couples. Cultural considerations influenced every part of these court cases, from the questioning of witnesses to the judges' legal reasoning. Thus, having an understanding of the parties' culture is important for judges and lawyers. The cases show that culture varies markedly between people from the same national background. Because culture is not uniform, parties are likely to disagree on which cultural rules they followed in their marriage. Judges must be aware that parties may rely on stereotypical cultural views to portray the other party negatively. The article concludes with recommendations, including the need to educate the population as legal concepts of rape change, as well as for judges to be aware of not only the legal culture and the culture of the parties, but also of how their own culture might influence their decisions. The article also reflects on recent legislative changes in Denmark and Pakistan

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and points out that the debate in Denmark has not considered how consent and threats can have different implications in minority cultures.

## Introduction

This article is inspired by two recent Danish court cases, which both had the same theme: a woman accusing her former husband of raping her during their marriage. In both cases, the couple had an ethnic and cultural background from Pakistan but lived in Denmark.

The Danish judges had to deal with a combination of two difficult elements: 1) Rape, which is a notoriously difficult crime to prosecute, especially when it happens within a marriage, where the involved parties are assumed to normally participate in consensual sex. 2) Cultural differences, which influence concepts of marriage, gender roles and sexual expectations. Culture also influences the concept and regulation of rape, which is even today debated and undergoing change in Danish culture and law, as we will show.

These two elements became a motivation for us to investigate how rape laws and rape cases are culturally influenced. The article is divided into two parts.

In part one, we focus on the cultural influences on rape laws. We focus on marital rape, but also include regulation of adultery, fornication and rape outside of marriage, since the societal views on these concepts are linked with the view on marital rape. This part is a comparative study of the historical development of these laws in Danish, Pakistani and Muslim law. We wanted to see which insights could be gained about developments in these legal systems when comparing them with each other. We chose these legal systems based on the Danish-Pakistani element in the court cases. First, we provide a framework on how regulations differ based on societal views on gender and sexuality. We then investigate how these varying views have shown themselves in legislation across time. We look at the historical Danish regulation and on current debates in Denmark and compare with developments in Pakistan, although for the developments before Pakistan's independence, we look more broadly at Muslim law. We have chosen the term Muslim law instead of e.g. Islamic law to better highlight that laws among Muslims are not only influenced by Islam but also by various other cultural and historical influences and therefore differ widely among Muslims. We find that our comparison of the legal

systems offers valuable insights on similarities and differences in development and on how culture and socio-economic factors influence rape legislation.

In part two, we focus on other cultural influences than legislation on rape cases in Denmark. Here we analyze which role culture had in the two court cases on marital rape, e.g. in arguments of parties, lawyers and judges.

By combining the two parts and using the Danish-Pakistani angle as an example, this article will lead to recommendations and inspirations for judges, lawyers, legislators and other professional actors on what to be aware of in cases concerning elements of sexuality and culture, e.g. cases involving minority cultures. These recommendations include awareness of both the legal culture, the personal culture of the judge and the culture of the parties. The article will also show the importance of raising awareness in the population, both for majorities and minorities, about rape laws and sexuality.

## **Part 1: Cultural influences on rape legislation**

### **Framework for analysis**

Which actions should be categorized as rape? This question has been given different answers across various cultures and various historical times. The answer depends on how the society views sex, sexuality and gender roles (Graversen, 1990; Rosen, 2006). These disagreements especially show themselves in the question of whether rape should be illegal inside a marriage – and to which extent.

To help our analysis, we have decided on four main categories to describe the societal views that we have identified in the history of legislations. In the rest of the article, we will relate various legislations within Danish and Muslim/Pakistani legal history to these categories, and thereby provide further details of the exact way these views show themselves in reality. We will here give a brief explanation of each of these societal views on rape:

- 1) A proprietary view: Under this view, women are seen as the property of their male relatives. This means that if a man rapes a woman he is not married to, it is considered a crime against her male “owners”. The perpetrators’ punishment often differs based on the marriage status of the victim, since having sex with another man’s wife is considered worse than sex with an unmarried woman. Whether the relation was rape or consensual

sex is not necessarily considered important by the law. The woman does not have the legal right to consent and is often not seen as responsible, even when voluntarily engaging in fornication or adultery, while the man is punished regardless, since even consenting sex with her is a crime against her male relatives. In the proprietary view, marriage becomes the thing that makes sex legal. Since the husband becomes the new “owner” of the woman, this means that he in practice has a license to have sex with her regardless of her consent.

2) A theocentric view: Within the Abrahamic faiths, sex outside of marriage is generally considered illegal. However, in a theocentric view this is not seen as a crime against relatives, but as a crime against God. This means that under this societal view both the man and the woman are punished for fornication and adultery. As opposed to the proprietary view, their punishment will differ based on their own marriage status, since adultery is considered worse than fornication. Outside of marriage, it makes a difference whether the woman is raped or not, since she is only punished for intentionally participating in fornication or adultery. However, since only sex outside of marriage is seen as a crime against God, rape within marriage is also not considered a crime.

3) A morality view: If a society no longer views religion as being a valid reason for regulations, then another argument against rape can be morality. The main aim of this regulation is not the protection of the individual’s autonomy but of the moral standards of society. This may lead to prohibition against adultery or even fornication, but generally rape is seen as worse due to the threat to society’s order. However, in this view there is no direct reason for criminalizing rape within marriage, which might be regarded as a private issue that the wider society should not interfere with.

4) An autonomy (individualist) view: Under this view, both men and women are considered individuals who have the right to bodily autonomy. This means that it is seen as a crime to force them into having sex. In this understanding, it becomes irrelevant whether this crime takes place inside or outside of marriage, since a spouse does not have a license to disregard the other spouse’s autonomy. On the other hand, men and women are free to engage in adultery and fornication as they please.

Thus, to summarize: In the proprietary view the man is punished for sex outside of marriage, and the worst crime is sex with another man’s wife, regardless of whether it is rape or not. In the theocentric view, both parties are punished for sex outside

of marriage, but not if they have been raped, and the worst crime is having sex with someone else when you yourself is married. In the morality view, rape is seen as worse than adultery and fornication, but is still only a crime outside of marriage. In the autonomy view, it is rape that is forbidden, regardless of whether it is inside or outside of marriage. Only in the last view is marital rape criminalized.

Other reasons for regulating (or not regulating) rape could certainly be identified in other cultures or at other times than those we have investigated. Other elements could also be included in the analysis, we have e.g. not analyzed how the legislation differed in regards to same-sex relations, which is also influenced by the wider societal view. While we have decided on the exact definitions of these four categories, similar categories and explanations of the ideology behind legislation have been used by many other writers, which we have sought inspiration from (Azam, 2015; Conley, 2014; Dübeck, 2003).

The four descriptions above are ideal types of these views. As we will show below, societies generally lean more towards one view than other views. However, the change from one view to another can be gradual or contested, which means that two or more views might influence the legislation simultaneously.

Another important distinction lies in the definition of rape. In this article, two main definitions of rape will be discussed: 1) The violence-based definition, which criminalizes rape if the perpetrator has used violence or threat of violence. In this definition, having sex with someone against their will without using any violence is legal. 2) The consent-based definition, which criminalizes intercourse if one party did not consent to it, regardless of whether violence was used. Recently, Denmark has decided to move from a violence-based definition to a consent-based definition. During these discussions, a third definition was suggested: A voluntary-based definition, which criminalizes intercourse if one party did not voluntarily participate (Criminal Law Council, 2020). This definition is quite close to the consent-based definition. They differ in particular circumstances, where voluntary-based legislation would require the victim to signalize that they do not want the intercourse, while consent-based legislation leads to conviction as long as the victim did not signalize that they wanted the intercourse. It has been argued that the difference between these two definitions is miniscule (Vestergaard 2020). However, the consent-based definition makes it the responsibility of the person initiating the sexual intercourse to ensure that the other party has consented.

While these distinctions are used by Danish legal scholars, it is important to note that they are also to some extent ideal types and that the legislation might gradually change from one to another, as discussed in the following.

Other important distinctions relate to how the crime is proven. This is especially important in rape cases, since they are often difficult to prove. A very important element is the burden of proof. Is it the accused or the victim who has to prove what happened? Another important element concerns which arguments can be used in court. Is e.g. the victim's chasteness, class and caste, the parties' prior relationship or how quickly the crime was reported relevant as evidence? Our article does not systematically analyze the historical development of rules on evidence, which were of course very different before modern methods of evidence collection. In both Denmark and Pakistan today, the burden of proof in rape cases is on the prosecutor, since the accused is considered innocent until proven otherwise. In regulations that forbids adultery and fornication, the burden of proof can land on the victim to prove that it was indeed rape (only the perpetrator is punished) and not consensual sex (both are punished) depending on the exact definitions of these crimes and the rules on evidence. We will include rules on evidence in our analysis, when it is relevant for our main arguments. We will e.g. discuss the importance of the regulation in Pakistan, where the official definition of rape is focused on consent, but where case law suggests that the victim will frequently have to show evidence of violence to prove the non-consent, which in reality makes the application of the legislation violence-based.

### **Historical regulation in Denmark**

We have investigated the oldest legal development in Denmark through existing literature. After the democratic constitutions, we have investigated the development primarily through our own reading of the laws and amendments enacted. Thus, for this period our references will be directly to the laws instead of literature.

In the following, we show how Danish legal history can be divided based on the four societal views described above. Thus, we have divided the history into four periods, which follow these four different views. However, as mentioned above, the development from one view to another happens gradually, which is also highlighted in the following. After our analysis of these four periods, we will look at the Danish decision in 2020 to change the definition of rape.

### *1) Before the Lutheran Reformation in 1536: Proprietary view*

The proprietary view is clear in the earliest preserved Scandinavian laws, the Icelandic Grágás, written down in the 12th century. In these laws, it was the woman's husband, father or other male relative that could sue the rapist (Dennis et al., 2000, p. 70). If an unmarried woman voluntarily engaged in sex, she owed her own legal guardian a compensation (Dennis et al., 2000, p. 75). There is no indication in these laws that a woman could sue her husband for rape. On the contrary, if a woman fled and avoided her husband, he could declare it illegal for anyone in Iceland to house her, effectively forcing her back home to him (Dennis et al., 2000, p. 77).

The earliest recorded Danish laws are from the 13th century and have similar views. The man who had sex with an unmarried woman had to pay a compensation to her family (Koefoed, 2008, p. 80). However, in case of rape the money was to be used for the benefit of the woman or, according to some laws in Zealand, be given to the woman (Dübeck, 2003, p. 56). This is an early example of seeing the woman as the victim of rape.

As opposed to the Icelandic law, regardless of whether it was rape or not, the woman was considered to have been seduced and was not punished for sex before marriage (Koefoed, 2017; 2008, p. 80). Thus, she was seen as a passive element in these crimes, without any real agency of her own and not held responsible. There was no punishment for a man raping his own wife. Similarly, a man's relations with other women were not a crime against his wife (Koefoed, 2008, pp. 80–81) i.e. his punishment did not differ based on whether he was married. Instead, whether the woman he had relations with was married influenced his punishment, highlighting that the concern was her male family members.

In Jutland, the punishment for rape was instead outlawry, suggesting a deeper focus on rape as a societal crime. In 1396, the Danish Queen Margrete I further strengthened the idea of rape as a societal crime by introducing the term "kvindefred", stating that women, similar to the church and farmers, had a special right to peace during warfare (Jacobsen, 2005). These regulations could be said to show early signs of the morality view we have described above, since their focus was more on the societal protection and stability than on protecting the rights of the male family members.

## *2) From Reformation in 1536 until democratic constitution in 1849: Theocentric view*

Especially following the Lutheran Reformation, Danish laws became more strongly influenced by both Biblical principles and newer Christian ideas (Tamm, 2005, p. 168). This includes the theocentric view of rape described above.

Interestingly, the Bible itself contains a mixture of the theocentric and the proprietary view. Mosaic Law regulates rape in Deuteronomy 22, 23-29. According to this, if a man had sex with another man's fiancée, both he and the woman were stoned to death, unless the woman was considered to have screamed for help. If a man raped an unmarried woman, he had to pay her father a compensation and marry her. As we see, the man's punishment did not differ based on whether it was rape or not. It only differed based on the civil status of the woman. Together with the compensation to the father, this links with the proprietary view. However, the strict punishment of stoning, which is not to the benefit of the male relatives, and the fact that both the man and the (engaged) woman are held responsible for breaking the rules, link with the theocentric view. There is no mentioned regulation of marital rape.

Following the Reformation in Denmark, voluntary sex outside of marriage was still illegal, but the view on the crime had changed. Any married person who committed adultery was to be killed (Koefoed, 2008, p. 85), although the rules were softened in the Code of Denmark, generally requiring repeat offences before death penalty was applied (Koefoed, 2008, pp. 87, 108; Code of Denmark 6-13-24). Thus, as opposed to both earlier Danish law and Deuteronomy, the man's crime was now that he had broken his own marriage vows and his promise to God, in line with the theocentric view we have described. Similar to Deuteronomy, women were seen as playing an active role in the crime and could be held accountable for their own actions. While the view before the Reformation had been that an unmarried woman naturally must have been seduced by the man and therefore was not to be punished, the idea that women were active agents spread, maybe influenced by the Church's view of Eve as the temptress (Dübeck, 2003, p. 69). This also had a role in rape cases. Laws from 1582 gave death penalty for rape of chaste women (Dübeck, 2003, p. 59), introducing a difference between whether the woman was known for being chaste or not, which would persist until 1930. Raping an unchaste woman was not punishable in itself, but a man who raped several women without marrying any of them could receive death penalty for this, regardless of whether the women had been chaste or not (Koefoed, 2008, pp. 94-95). An even clearer expression of this idea of "tempting women" influencing the legislation appears in 1734.



Until then, an unmarried man who had sex with an unmarried woman was obligated to marry her, if she wanted this. This obligation was removed due to the impression that women were luring men into sexual relations as a way of forcing them into marriage. Suddenly, society saw the man as the victim of the premarital relation and the woman as the seducing party (Koefoed, 2008, p. 309).

Marital rape was still not a crime, and the rules generally encouraged marriage, e.g. by reducing or dropping the punishment for unmarried fornicators who chose to get married (Dübeck, 2003, pp. 60–61; Code of Denmark 6-13-1; Koefoed, 2008, p. 106).

### *3) The first criminal code of the democratic era: Morality view*

Denmark had its first democratic constitution in 1849 and a new criminal code in 1866 replaced the older laws. It removed the punishment for sex before marriage. However, it continued to be a punishable crime for a married person to engage in sex outside of marriage until 1930.

In 1866, the article on rape was placed in the chapter on vice crimes, suggesting that it was seen as a crime because it transgressed public morality, in accordance with the morality view on rape we described above. The article has remained in that chapter until today, which was criticized by Amnesty International in 2008 for conveying “a message that rape violates public morals, rather than the rights of an individual” and for still reflecting the original intention of the legislation as being “the protection not of the individual, but of the moral standards of society as a whole” (Amnesty International, 2008)

The law in 1866 criminalized the husband who forced his wife to have sexual intercourse with other men, but the punishment was less than for rape, and there was no mention of the possibility of punishing a husband for raping his own wife, although the law also did not directly state the opposite.

### *4) Since 1866: Towards an autonomy view*

Despite the article remaining in the chapter on vice crimes, it is our impression that the reasoning for rape being a crime quickly changed. In writings from the early 20th century, the Danish legal thinkers began arguing that the crime of rape was a crime against the woman’s sexual autonomy (Dübeck, 2003, p. 74). This did not immediately lead to major changes in the rape regulation. It is our conclusion that the autonomy

view on rape has slowly but surely influenced the legislation until the confrontation between the old views and the new view has come to a final (for now) confrontation in debates going on right now in Denmark.

Over the last 150 years, especially two tendencies have shown themselves in changes to rape legislation.

One tendency influenced by the autonomy view has been to include more and more types of violations in the definition of rape, slowly changing the definition of rape from violence-based towards consent-based.

The central article on rape from 1866 was fully violence-based and only included forced intercourse through “violence or threats of immediate life-threatening violence” in its definition (although other articles criminalized other sexual crimes, such as intercourse with an unconscious woman). The 1930 law widened the definition of rape to “forced intercourse with a woman through violence, deprivation of liberty or by causing fear for her or her loved one’s life, health or well-being”, thus the focus was no longer only on immediate life-threatening violence. In 1967, the definition also came to include cases where a man had deliberately put a woman into a defenseless state (e.g. by drugging her) and then had intercourse with her. In 1981, it was further widened to include all threats of violence, not just those that caused fear for life or well-being. Simultaneously, the article was rewritten in a gender-neutral language, so that it now also included a woman raping a man. In 2013, the article was changed again to include any kind of intercourse achieved by illegal coercion, as well as intercourse with any person in a defenseless state (regardless of whether the perpetrator had placed them in that state himself). In this regard, illegal coercion included e.g. acquiring intercourse with a woman (or a man) by threatening to otherwise disclose to others that she has committed a crime, that she has been unfaithful or any other matters of private life that she would prefer to keep secret. The Criminal Law Council specifically considered in 2013 whether the legislation should be changed to consent-based, but rejected the idea (Vestergaard, 2019). However, as our description shows, there has been a gradual movement from the violence-based definition towards a consent-based definition, by including more and more in the definition of rape. It should be noted that some of these actions were also illegal in Danish law earlier than the year mentioned here, but were not defined as rape and were regulated by other articles. Thus, the movement has especially been towards including more and more in the legal definition of rape.

However, even after the change in 2013, having intercourse with a conscious person who had not consented and who did not want to have sex was still legal in Denmark, if there had been no forms of violence, threats or illegal coercion. This has led up to the 2020 decision on whether the legislation should be changed to a consent-based.

The other tendency influenced by the autonomy view has been a move towards also punishing husbands and other partners for rape.

In 1930, the law made it possible to punish for marital rape. However, while the law also removed the chaste vs unchaste distinction in rape cases, the law instead introduced a new distinction, with less severe punishment for a man raping a woman he was in a lasting sexual relationship with. Similarly, other sexual crimes than rape, such as having sex with an unconscious woman, was still not illegal within marriage. The law also reinvented the rule that the punishment was remitted or reduced if the parties married after the rape. In 1967, the less severe punishment for rape in lasting relationships was officially removed. Yet, in 1981, the legislator noticed that jurors often acquitted rapists of art. 216 (rape by use of violence or threat of violence) and instead convicted them of the lesser crime in art 217 (intercourse achieved by other forms of illegal coercion), despite violence having been used. This primarily happened in cases where the man and the woman had known each other before the rape, showing that the change in 1967 had not penetrated fully into court practice (Criminal Law Council, 2012, p. 150). The law was changed again to prevent this practice. In 2013, the rule allowing for remittance of punishment if the rapist married the victim was removed and all articles were changed to also apply within marriage. Thus, while the law began recognizing rape in marriage in 1930, it originally had several reservations, which has only gradually been removed.

##### *5) The 2020 decision: Autonomy and consent*

Legal scholars supporting a consent-based legislation have argued that it would strengthen the protection of sexual autonomy (Vestergaard, 2019), in accordance with the trend we have identified since 1866. Contrary to this, a Danish law professor in 2019 criticized that such legislation could make it illegal for a husband to pressure his wife into having sex with him by threatening divorce (Madsen, 2019). This highlights an existing cultural conflict concerning autonomy and the extent to which pressure should be legal in marital relations.

In 2020, the Danish Criminal Law Council (Straffelovrådet) gave their recommendations on the matter. The council had found several problematic Danish court cases that had led to acquittal. The cases that the Council mentioned in their report included a case where a woman had tried to push away her boyfriend but had eventually felt pressured to go through with the intercourse, because she did not want conflict in the house or for an argument to happen. Other cases referred to by the Council, which did not involve boyfriends, included 1) a woman who said no, but had then felt paralyzed and unable to resist when the man anyway initiated intercourse; 2) a 16-year old girl alone in a bathroom with three men, who clearly said no, but did not try to leave; and 3) a woman who was in a bathroom with a man, where he turned her around, pulled her pants down and initiated intercourse, while she was saying no. In these cases, the women had not consented to the intercourse, but none of these cases had been considered illegal under the Danish legislation, since there had been no violence or illegal coercion involved (Criminal Law Council, 2020, pp. 125–127, 200–202).

The Criminal Law Council highlighted the importance of protecting the victim's right to self-determination and recommended legal change, but the members were divided on how to change the law. The majority suggested a voluntary-based definition, while a minority of only one person suggested a consent-based. These terms are discussed above in our framework. The defining example used by the council was two people partying together with sexual communication or touching, going home together, voluntarily taking off their clothes and lying down in bed together. In this situation, if one party initiates sex, while the other party stays completely passive, the voluntary-based definition would not consider it rape (Criminal Law Council, 2020, p. 136). It was not explained what this would mean for married couples, who could often find themselves in that situation.

The minority in the council insisted that rape should not be defined in the victim's lack of opposition, but rather in both parties mutual interest in sex. The minority felt the need to make sure that situations where the victim had been passive were also criminalized, such as when feeling paralyzed and situations inside marriage or relationships where one party due to despair or fear is unable to resist (Criminal Law Council, 2020, p. 169). Under the consent-based definition, the initiating partner has a responsibility of ensuring that a passive partner has consented to the intercourse.

Shortly before the publication of this article, a new definition of rape was implemented in Danish law. The new definition follows the consent-based view proposed by the minority in the Criminal Law Council. Thus, the new legal definition of rape is “intercourse with a person, who has not consented to it”. The change came into effect on 1 January 2021.

### **Historical regulation in Muslim law**

Since Pakistan has only been independent since 1947, we will first look historically at how Muslim law regulated rape before turning to the modern development in Pakistan. For centuries following the rise of Islam, judges in the Muslim world would decide cases based on interpretations of the primary and secondary sources of Islam. This has changed in modern time, especially following the colonial era, where ideas from Western law have spread or directly been imposed on many Muslim countries (Anderson, 1990). However, concepts and ideas from earlier applications of Muslim law continue to play a role in many Muslim countries, including Pakistan (Pearl and Menski, 1998; Mehdi, 1994).

There is not just one interpretation of Islam’s sources. Denominations such as Shia and Sunni have different theological interpretations of the sources. Traditional Sunni Islam further consist of different legal schools, called “madhhabs”, which have derived different rules from the Islamic sources. The two oldest are the Hanafi madhhab and the Maliki madhhab, which originated 150 years after the death of the Prophet (Hallaq, 2009, pp. 63–64). Both before and after this time, other competing interpretations have also existed. In our time, feminist interpretations of Islam are one of these competing voices. Within each madhhab, there is agreement on certain rules and methodological principles. However, in concrete legal questions, it is also normal to find some disagreements within a madhhab, since it has developed over generations through internal debate (Hallaq, 2009, p. 65).

Within the discourse of the legal tradition, it is common to divide criminal punishments into different categories, including: 1) Hudood (Singular: Hadd) are punishments directly prescribed in the sources of Islam (Noor, 2010). If an accused is found guilty of a Hadd offence, the judge will apply the exact punishment prescribed by Islam. Hudood are seen as crimes against God, so the judge or ruler cannot pardon a person found guilty of these crimes (Munir, 2009) but they can also not apply the punishments unless a number of strict criteria have been fulfilled. 2) Ta’zir refers to

discretionary punishments, i.e. offences forbidden by Islam but for which the judge can decide whether to punish and (within certain limits) which punishment to apply (Peters, 2009, p. 68; Munir, 2009). 3) Syasa can be translated to policy, and is the discretionary power of the ruler to make something illegal and prescribe a punishment. In contemporary usages, Syasa and Ta'zir are often seen as the same category (Munir, 2009).

### *1) Early Muslim law: Theocentric view with a focus on consent*

The Quran forbids sex outside of marriage, including both adultery and fornication, which under one term is called "zina" (Quran 24.2). The Quran does not say anything directly about rape (Quraishi, 1997, p. 302), neither inside nor outside of marriage. Similar to the Bible, various statements telling husband and wife to be good to each other can be understood to mean that it is morally wrong to rape your spouse, but there is no direct mention of it being a criminal offence

The theocentric view on legislation is clear already in the beginning of Islam in the 7th century. In these rules, women and men were given the same punishment for zina (illegal sexual intercourse) (Bello, 2011, p. 171) and their punishment depended on their own civil status, similar to the laws written after the Reformation in Denmark. In the most prevalent early interpretations of Muslim law, a married person committing zina was stoned to death, while an unmarried was flogged 100 times. The Quran only mentions flogging as a punishment and makes no distinction in punishment based on civil status, but early jurists used other sources of Islam to argue for this distinction and the punishment of stoning. Thus, the punishment for zina was considered a Hadd punishment.

Early Muslim jurists saw the criminalization of rape in light of the prohibition on adultery (Noor, 2010, p. 429). Thus, the consequence of rape, i.e. forced zina, was primarily that a raped woman was not punished for zina, because she had been forced. The rapist was given the same punishment for rape as he would have been given for zina (Noor, 2010, p. 431). This also meant that marital rape was not considered, since zina could not take place in a marriage.

Muslim scholars thoroughly discussed and gave examples of different forms of duress that negated a woman's consent and therefore meant that she should not be punished for zina (Quraishi, 1997, p. 314). This included not only violent rape, but also having

zina with a sleeping or insane person or with a minor (Azam, 2015, pp. 103, 114, 132, 134). There are also examples of early Muslim rulers accepting that socio-economic factors could force a woman to engage in sexual acts, she would otherwise not have desired, and that she should therefore not be punished for such actions (Azam, 2015, p. 102; 2012, p. 456). Thus, the focus was not on violence, but on whether the woman had willingly participated in zina or not.

## *2) The madhhabs: Influences from proprietary, theocentric and autonomy views*

Interestingly, Azam has shown that already at the time of the madhhabs, there were at least two different views on the crime of rape (forced zina), which she herself distinguishes as proprietary and theocentric (Azam, 2015). She has found that the Hanafi madhhab viewed rape very similarly to our theocentric category. On the other hand, the Maliki madhhab viewed the female sexuality as a property and rape as a proprietary crime, somewhat similar to our proprietary category, although with the important difference that the woman herself was seen as the owner, not her male relatives. This in reality also makes this view somewhat similar to our autonomy category, since she was to be compensated if raped because her rights had been violated. Of course, there are also obvious differences to the autonomy view, such as marital rape not being a crime in the Maliki view and men and women not being allowed to consent to zina. Since the Maliki madhhab was also influenced by the theocentric views described above, it is an interesting mix of several different concerns.

This difference in how rape was classified had practical implications. Similar to zina, the Hanafis viewed rape as a crime towards God with no human victim. Therefore, the rapist was punished but did not have to pay any compensation to the woman for the sexual violation (Azam, 2015, pp. 156, 158). The Malikis disagreed and both punished the man and demanded that he paid compensation to the woman (Azam, 2015, pp. 130–31). The two remaining Sunni madhhabs, Shafis and Hanbalis, agreed with the Malikis on this (Noor, 2010, p. 431).

The other practical implication had to do with the burden of proof. For zina, traditionally the Hadd punishment was only carried out if the parties confessed freely or if four male witnesses had seen it take place. For this reason, many have described the rules as more symbolic, or as preventing the public spread of immorality but not the private (Quraishi, 1997, p. 296).

Since the Hanafis regarded rape as a Hadd like zina, a rapist could also only be punished if he confessed or if four male witnesses had seen the crime (Azam, 2015, pp. 188, 195). Historically, it seems that Hanafis did not allow judges to apply Ta'zir punishment in rape cases where this strict evidentiary criteria for Hadd had not been fulfilled (Azam 2015, p. 195). Ta'zir, the ability of a judge to apply a discretionary punishment, was reserved for crimes that did not fall under the definition of zina (and forced zina), e.g. anal sex (Azam, 2015, p. 173), while in cases concerning zina (and forced zina) Hanafi scholars applied the rules on Hadd, including the very strict evidence rules. If these were not met, Ta'zir was also not an option and the rapist/adulterer was not punished.<sup>2</sup>

As opposed to this, the Malikis clearly allowed for the woman to raise a rape case as a Ta'zir procedure and thereby purely on circumstantial evidence, such as her having screamed, immediately reporting the crime, bleeding afterwards etc. (Azam, 2015, p. 208). If the woman won such a circumstantial rape charge, the man was not stoned, since he had not been found guilty of the Hadd punishment, but he had to pay her a compensation and the judge could give him a discretionary punishment (Azam, 2015, pp. 210, 222, 225–27). However, the Malikis also allowed circumstantial evidence in zina cases. This meant that a pregnant unmarried woman could be punished for zina, unless she was able to prove that she had been raped. The Hanafis disagreed and accepted that neither the man nor the woman could be punished without witnesses.

Neither of the madhhabs recognized marital rape as a crime, although they did allow a woman to seek punishment of or compensation from her husband, if he caused damage to her during sex, e.g. through perineal tearing (Azam, 2015, p. 19).

### *3) Ongoing discussions in modern times*

These disagreements between madhhabs show the diversity within Muslim law. Despite both legal traditions using the same sources, they reached different results based on interpretations and categorizations. This diversity in classical Muslim law leaves a door open for modern Muslim reformers to suggest other categorizations of rape, which could potentially include marital rape. One modern tendency among Muslim thinkers

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2 As opposed to Azam's conclusions on this, Baldwin (2012, p. 128) says in the context of Ottoman Hanafi jurists that they could apply Ta'zir, when the strict evidence criteria for a Hadd crime had not been met. However, Baldwin's reference for this information, Peters (2009, pp. 65-67), appear to be talking generally about the concept of Ta'zir across the different madhhabs and not specifically about the Hanafi madhhab or Ottomans.



is to categorize rape as a violent crime, similar to other forms of assault (Noor, 2010, pp. 434–435). This categorization can also find support in opinions among earlier scholars (Quraishi, 1997, p. 315-319). Quraishi suggests including the crime of rape under *Hirabah* (rape as a violent taking) and *Jirah* (rape as bodily harm). Others have suggested that Islam leaves it up to the rulers' discretion to regulate and punish rape (Munir, 2009). These historic and modern disagreements show how the societal view on rape, be it proprietary, theocentric, moral or autonomy-focused, are also influencing how Islam's rules on rape are interpreted and applied.

### Historical regulation in Pakistan

In the following, we will look at four historical periods: 1) The Muslim rule in Pakistan before colonization, 2) colonial time and early independence, 3) the Hudood Ordinances from 1979, and 4) the Women's Protection Bill from 2006.

#### *1) Muslim rule: Diverse practices and local solutions*

Discussions on the right regulation of rape and zina among Hanafi and Maliki scholars interpreting Islam does not necessarily correspond directly with how Muslim rulers and judges historically punished such crimes. The region of Sindh in modern day Pakistan was conquered by Muslims as early as 712. However, due to political, administrative and military difficulties, rules based on Islam were only systematically applied in this area from around 1204 (Fyzee, 1963, p. 401). Even then, application was not necessarily in accordance with the theoretical framework developed in the madhhabs. There are examples of sultans in the area pardoning and remitting Hadd punishments for adultery, despite the madhhabs not allowing this. However, there are also e.g. reports about a woman accused of adultery and many other crimes, who was sentenced by the Muslim emperor to be torn to pieces by dogs, a punishment completely unheard of within the scholarly legal tradition of Islam (Fyzee, 1963, p. 409). Thus, the Muslim rulers did not necessarily follow the madhhabs.

We are not aware of any systematic analysis of how Muslim laws on rape and zina were applied during the Muslim rule of what is today Pakistan. Two things prevent a full analysis. First, there is not enough material about historical cases. Sangar suggests that due to the social stigma in relation to cases on zina, they were probably often dealt with between the involved families without being made public at court (1967, p. 183). However, the lack of Mughal state archives also contribute to the lack of material (Pirbhai, 2016). Second, the pure diversity of practices makes it difficult to say anything

in general about this period. From around 1206-1526 the area that is today India and Pakistan was primarily ruled by various sultanates based in Delhi. Following this, the Mughal Empire ruled until the colonial time. However, parts of what is today Pakistan have also been ruled by e.g. the Timurid Empire and the Safavid Dynasty. The diversity in practices is partly due to the rulers having different approaches. However, another reason is that the central rulers often allowed freedom to settle disputes privately, e.g. through local arbiters or assemblies that used customary laws with only limited relation to the religious rules (Giunchi, 2010, p. 1121). Giunchi also mentions that disputes concerning honor were almost entirely solved outside of court. On the other hand, Pirbhai argues that earlier scholars have underestimated how often the official courts handled local criminal cases (2016). Official courts would make reference to Hanafi interpretations of Islam. However, judges might dissent from the official opinions of the madhhab if they found other options more suited for the community (Giunchi, 2010, p. 1122). To some extent, this is fully within the Hanafi methodology, which allowed for taking culture and context into consideration (Giunchi, 2010; Pirbhai, 2016). Thus, the legal application in these times was flexible and dependent on context, which also made them ambiguous.

It is outside the scope of this article to do a deeper analysis of the societal views influencing these various applications. Theocentric influences from Islam and the Hanafi madhhab prevalent in this area likely had influence, but if cases were solved privately by families due to issues of honor and social stigma, it would suggest that proprietary concerns also had a role.

When the East Indian Company first began the colonization process of the Mughal Empire, they originally wanted to apply the area's own laws, including the traditional Muslim law, although with the caveat that application of these laws should not be seen as contrary to the laws of England. In 1748, it was directly stated that this principle should also be applied for the regulation of sex offences, which meant application of Muslim law for Muslims (Giunchi, 2010, p. 1126). However, the British authorities wanted a clear and easily implementable law and did not take inspiration from the more pragmatic approach that Muslim judges had historically used. They also largely ignored the written collections on Muslim law that the Mughal emperors had gathered (Pirbhai, 2016). Instead, they used classical Hanafi books, primarily the 12th century book *Al-Hidaya* (Giunchi, 2010, p. 1127; Hallaq, 2009, p. 374). The British created a codification of one opinion within the Hanafi madhhab, excluding a variety of

contradicting opinions and nuances as well as the ability to take culture and context into consideration (Hallaq, 2009, p. 376). It was the first time that a unified Muslim law was applied within this area (Giunchi, 2010, p. 1129), but it was heavily influenced by the British legal perspective and was therefore an interesting mix of traditions that became known as Anglo-Muhammedan law (Hallaq, 2009, p. 377). The Muslim laws were altered in areas where they did not fit the British view on law and from 1790 to 1861, British criminal law gradually replaced Muslim law. The tendency in Hadd regulation to have very strict evidentiary criteria, making it difficult to convict criminals of these crimes, was found too lenient by the British (Hallaq, 2009, p. 378). Thus, while punishments like stoning and flogging were banned or restricted over time, the actual number of people punished for zina grew dramatically (Giunchi, 2010, p. 1131). This may suggest that the lack of documented zina cases from the earlier period was not only due to families hiding the cases from public view. It might also be because the population knew that it was difficult to get anyone convicted of zina and rape under the traditional Muslim laws. Eventually, a new penal code was drafted by the British, which replaced the Muslim laws completely.

## *2) Colonial Penal Code: Moral and proprietary, non-consent proven through violence*

Pakistan inherited the Indian Penal Code (since then called the Pakistan Penal Code) from 1860 as their criminal code. This Penal Code was made during the British colonization of India and Pakistan and was based on the English law on rape (Kolsky, 2010). It continued to be in use until 1979 with only few changes.

Before 1979, the wording of section 375 was:

A man is said to commit “rape” who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

First.— Against her will.

Secondly.— Without her consent.

Thirdly.— With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly.– With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.– With or without her consent, when she is under [sixteen] years of age.

Explanation.– Penetration is sufficient to constitute the sexual intercourse necessary to the offense of rape.

Exception.– Sexual intercourse by a man with his own wife, the wife not being under [fifteen] years of age, is not rape.

The age of consent was originally ten years of age in 1860, and the same was the case for the age mentioned in the exception-clause, which allows for marital rape as long as the wife is not below a certain age (Vibhute, 2001, p. 27). Both this age and the general age of consent were raised several times over the years (Law Commission of India, 1997, pp. 144-145).

Interestingly, the definition of rape in section 375 of this Code includes a man having sexual intercourse with a woman “against her will” or “without her consent”. Thus, already in 1860, the written law in what would become Pakistan defined rape based on whether the woman had willingly participated. Violence is also part of the written definition, but only to make sure that a woman violently forced into “consenting” is also considered raped. However, while the definition includes a focus on consent and willingness, this does not mean that the application of the law focused on the woman’s consent the same way the new Danish legislation is expected to do.

Kolsky has shown from case law in colonial India in the years leading up to 1947, that in the absence of violence and other circumstantial evidence colonial judges presumed that the woman had consented, and therefore based their decisions on other factors than the woman’s testimony. These factors included discussions on the woman’s previous sexual history, but the most important evidence was signs on the woman’s body of her having violently resisted. Consent was inferred from non-resistance, and no physical signs of resistance therefore meant acquittal (Kolsky, 2010). Thus, the application of the regulation was violence-based if we are to apply the terminology from the Danish

debate. Examples of these practices include a case from the Lahore High Court in 1935, in which four men were found guilty of breaking into a woman's house and abducting her. Despite this, they were not found guilty of rape, since there were no marks of injury to the woman's vagina. In a case from 1933, the Oudh Chief Court held that "the first and foremost circumstance that can be looked for in a case of rape is evidence of resistance which one would normally expect from a women unwilling to yield to a sexual intercourse forced upon her" (Kolsky, 2010, p. 121). Especially lower-class women were expected to put up their utmost resistance and therefore found it difficult to get a rapist convicted, even when some signs of violence were present (Kolsky, 2010). In a case from 1907, a female beggar claimed to have been raped by two men on a path close to a temple. She had screamed for help, which attracted nearby villagers who saw signs of struggle when they arrived. Clear signs of violence were found on her body. Yet, the Kathiawad Chief Court found that there were no signs of "real struggle" since she was a "strong and mature woman". The court also found that the physical signs of violence could simply be the result of the kind of sex people of "such low class" engaged in, including the fact that they had not cared to find a fitting site before engaging in the intercourse (Kolsky, 2010, p. 117).

It is our impression that the regulation can widely be included under the morality view on rape. The rape laws did not treat women as property of male relatives, but the focus seems to have been more on the protection of the society than on the individual woman's autonomy. However, other provisions clearly highlighted that the proprietary view also influenced the legislation, for example Section 497, which criminalized adultery, but only for a man having intercourse with a married woman. The married woman was not punished, and neither was a married man who committed adultery with an unmarried woman. Thus, adultery was treated as a man's crime against the woman's husband. Similarly, section 375 only criminalized a man raping a woman, not the opposite.

### *3) Hudood Ordinances in 1979: Same legislation in a new disguise*

Pakistan went through an islamization-process, which led to new criminal laws in 1979, entitled the Hudood Ordinances (Bubb, 2007, p. 71).

One of the new ordinances was the Zina Ordinance, which criminalized fornication and adultery, allegedly in accordance with classical interpretations of Islam, including the same punishments i.e. either stoning or flogging depending on the marital status,

if the requirements of e.g. four witnesses were met (Cheema, 2006, p. 134). However, if the strict criteria for evidence were not met the Ordinance also allowed for Ta'zir as an alternative punishment, which could lead to imprisonment and until 1996 also to flogging (Rathore, 2015, p. 9; Shah, 2010, p. 3). The Ordinance became very controversial and was criticized for not following the spirit of Islam, lacking public consensus and resulting in injustice against victims of rape (Mehdi 1990; 1992). Especially the inclusion of Ta'zir as a possible punishment for zina was criticized, since it made it much easier to prosecute women for zina, e.g. when they were unable to prove that they had been raped (Quraishi, 1999, p. 416).

The legislation placed rape as a subcategory of the wider crime of zina (fornication and adultery), calling it zina-bil-jabr (Literally: zina through force) and also here required four male eyewitnesses for Hadd and otherwise allowed for Ta'zir (Rathore, 2015, p. 10). The wording of the article of zina-bil-jabr was:

A person is said to commit zina-bil-jabr if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely:

- (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) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the 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.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of zina-bil-jabr.

The law clearly excluded marital rape from the provision. While the Federal Shariat Court directly stated that the new law was a “complete departure” from the previous

legislation (Cheema, 2006, p. 132), it is nevertheless striking how similar the actual wording of the provision of zina-bil-jabr was to the previous colonial rape legislation (Quraishi, 1999, p. 414). One obvious similarity is that the written definition of zina-bil-jabr in the law used almost the exact same wording on consent and willingness as the colonial law. Interestingly, as opposed to the earlier legislation, the article was gender neutral and explicitly stated that a man could be the victim of zina-bil-jabr.

Practically, the Hadd punishments for zina and zina-bil-jabr were never carried out, due to the difficulty in providing enough evidence (Cheema, 2006, p. 151), making the Ta'zir regulation the primary practical regulation. Despite the consent-based wording, there were examples of cases where the intercourse had been established, but the male rapist was only convicted of zina instead of zina-bil-jabr, because the woman had not put up a struggle (Mehdi, 2003). Thus, not only the statutory wording but also the case law on rape borrowed many elements from colonial practices, including a focus on the moral character of the woman and physical signs of her utmost resistance. Elements, which were foreign to traditional Muslim law (Kolsky, 2010).

Thus, while the new laws were clearly claimed to be of the theocentric view, as opposed to the colonial law, the actual change specifically in regards to rape was miniscule. However, the new criminalization of adultery and fornication had direct consequences in rape cases. Firstly, rapists could no longer get out of punishment merely by claiming that the sex was consensual, since that could lead to them (but also their victim) being punished for zina instead (Cheema, 2018). Secondly, over the years, several cases from the lower courts in Pakistan received great criticism and media attention because women were sentenced to punishment for zina, either because a pregnancy was considered evidence or because them accusing a man of rape was seen as a confession to zina. When the cases were appealed to the Federal Shariat Court, these arguments would generally be rejected and the women acquitted, which shows the court preferring the view of the Hanafi (and Shafii) madhhab on this topic (Cheema, 2006, p. 149). However, since Zina was not aailable offence, these women would often have spent several years in jail at that time and had become ostracised by their families (Lau, 2007; Shah, 2010, p. 4).

#### *4) Women's Protection Bill: Going backwards to go forwards?*

The criticism of the law led to changes in 2006, when the Women's Protection Bill was passed. The change was supported both through arguments on women's rights

and feminism, but also by theological arguments stating that the correct application of Islamic law was more women-friendly (Lau, 2007).

The change in 2006 meant reinstating the old rape provision from the Pakistan Penal Code that had existed before the Zina Ordinance, which means that the legislation continues to define rape as lack of consent and as being against the will of the victim. While rape was removed from the Zina Ordinance, Hadd punishment for adultery and fornication is still regulated by the Ordinance. Ta'zir punishment for zina was removed from the ordinance, instead a new provision regulating these crimes was implemented in the Pakistan Penal Code (Shah, 2010, p. 5). Thus, the current legislation is influenced both by colonial and Hadd-legislation and is therefore also still influenced by the societal views, which created these legislations.

The reinstatement of the colonial rape legislation came with the significant change that marital rape is no longer explicitly exempted from the rape provision (Cheema, 2006, p. 159; Shah, 2010, p. 9). This was a progressive move not only compared to the Zina Ordinances, but also compared to the original rape provision from 1860 and to neighboring countries such as India, which continue to have a direct exemption for marital rape. While this would seem to mean that marital rape is now punishable in Pakistan, no such cases have been reported (Khan, 2020).

Discussions on what it means to consent and how non-consent is proven continue in Pakistan (Munir, 2009). One critique from feminist voices has been that a woman in Pakistan threatened with divorce if she does not engage in sex cannot be considered to have consented to sex, since a divorce in Pakistan will often leave the woman economically destitute and socially stigmatized (Khan, 2020). Thus, as in Denmark, newer voices are insisting on autonomy being the central element in rape legislation.

## Reflections

Comparing the development in legislation in Denmark and Pakistan, including the historical regulation in Muslim law leads to valuable insights. First of all, we can see how the socio-economic development has led to a changed view of women, which has influenced the culture and the regulation, in particular during the last century. The growing presence of women in the labor market, politics and public debate is undoubtedly one factor that has led to new views on what constitutes rape. This



highlights the importance of including all members of society in the development of law.

However, even more striking is the importance that the legal culture has. In both jurisdictions, rape has continued to be defined in accordance with the historical definition of rape in that legal system. In Denmark, rape has until 2021 been defined as involving violence, threat of violence or (more recently) illegal coercion, and legal scholars resisted a consent-based legislation. In contrast to this, a definition of rape that uses the term consent and is focused on the will of the victim has continued to exist in the written legislation of Pakistan, even as the legislation changed dramatically between secular and religious phrasing (and despite the actual application of the law mainly focusing on violence). It seems that jurists have a clear tendency to build on what is already present in the legal system, e.g. with Pakistan in 2006 reverting back to the wording in colonial law instead of developing an entirely new legislation

So far the legal culture, i.e. traditional legal concepts and definitions, have set the framework for the rape legislation, within which the socio-economic factors have been altering the legislation. However, in recent years the societal development seems to have changed the culture so much that the legal framework itself is now questioned. In Denmark, a completely new definition of rape has just been implemented, and in Pakistan, the Hudood-legislation has been altered through both secular and religious arguments, while feminist groups are pushing for even stronger change, also in relation to marital rape.

As we have shown, the written definition of rape is not the only thing of importance. The wider societal views on women can influence legal scholars and judges in how they interpret the law. In both Denmark and Pakistan, decisions have been made by jurors or judges in the lower courts, which were in direct conflict with the official legislation or the application by the higher courts. However, even within the wording of a legislation, cultural views can strongly influence the interpretation. In Pakistan, the fact that the legislation uses consent to define rape became almost irrelevant, especially during colonial times, because case law was based on the assumption that women have consented, unless they have violently fought back against the perpetrator. In that regard, it will be interesting to follow how Danish judges will interpret the new consent-based Danish legislation. Will they also hold on to previous understandings of rape, despite the legislation having changed?

Not only interpretations of legal texts but also of religious texts can vary wildly based on cultural views, as we saw in the different applications of Muslim rules on rape from the Hanafi and Maliki madhhab, but also from newer competing interpretations.

Thus, even the same text, legal or religious, can be interpreted and applied in very different ways depending on which of the four societal views, described by us, influence the interpreter. There are also other ways that culture can influence the exact outcome of marital rape cases, which we will look further at in the second part of this article.

## **Part 2: Cultural influences in marital rape cases in Denmark**

### **Method**

Above, we looked at the cultural influences on legislation. However, legislation is not the only culturally influenced factor in court cases. In the following, we will analyze the two Danish court cases with the aim of identifying to which extent culture influenced the cases. To identify this, we have looked for arguments that either the parties, their lawyers or the judges based on culture.

Both cases concern a woman accusing her former husband of rape in marriage with the couples having a background in Pakistan. However, they differ significantly from each other in their details. We have named one of the cases the “Conviction-case” and the other the “Acquittal-case”, due to the very different outcomes of the cases. Both cases were decided before the new consent-based definition of rape was implemented in Danish law.

In regards to the Conviction-case, we identified the case through a short description on the court’s website and subsequently received access to documents in the case at both the city court and the high court. In regards to the Acquittal-case, the defendant in the case, who was worried whether culture and language barriers could affect his case negatively, approached Rubya Mehdi. Subsequently, Mikele Schultz-Knudsen attended the court proceedings to observe the case. We did not assist either side in the proceedings. It should be noted that Danish court practice prevents access to the full testimony of an alleged rape victim. For this reason, we have not had access to the testimony of the accusing ex-wives in these cases, but we have been able to see what the lawyers or the judges have described them as saying.

Most Danish court case transcripts are not publically available. Therefore, we were not able to determine how often (former) spouses are prosecuted for rape charges in Denmark. However, these cases are rare, with one lawyer in the Acquittal-case specifically stating that he had not been able to find similar cases to compare with. We chose these two cases, because we were able to get access to both and because of their similarity due to the shared Pakistani background. We are however aware of other cases involving rape between spouses, including a case involving a Christian man accused of raping his wife and forcing her into reading the Bible (Ritzau, 2020). The fact that our cases have a relation to Pakistan is therefore only due to the theme of this article. More research into other marital rape cases is needed.

### **Description of the cases**

The Conviction-case was decided in the City Court of Glostrup on 1 February 2019 and was appealed to the Eastern High Court who decided on the case on 7 November 2019. The defendant was accused of having abused his wife over a period of 5 years through both violence and rape. He was a Danish citizen, born in Denmark, with parents originally from Pakistan. In 2011, he was 19 and had an arranged marriage to a 21-year old woman in Pakistan. According to the Danish Aliens Act art. 9, a citizen of another country can only get family reunification in Denmark if both husband and wife are above 24 years of age (a law specifically made to hinder arranged marriages). For this reason, after living separated for 2 years, the couple officially moved to Sweden, but after less than a month moved into his parents' house in Denmark without notifying the authorities. Thus, the woman was in Denmark illegally and unable to get a job or use medical services. She had no network in Europe except people she met through her husband's family. After five years, she alarmed her brother to her situation and he informed their sister who had since then moved to Italy. The sister made a visit to Denmark unannounced and convinced the husband's family to let the wife go with her for a short while. Instead, the sisters went to the police and the wife never returned to the husband. Both the city court and the high court found him guilty of continuous violence towards her for 5 years. This was legally characterized as abuse, since he took advantage of her dependency on him. He was also convicted of regularly raping her, despite not explicitly using violence or threat of violence in every instance. The underlying threat of violence that existed in their relationship due to him earlier violently forcing her into vaginal, oral and anal sex was enough to make her feel forced to accept these acts later in their relationship, which were thus also characterized as rape.

The case involved testimonies from more than 10 witnesses, including family members and friends of both parties as well as a police officer.

The Acquittal-case was decided in the City Court of Copenhagen on 11 October 2019. The defendant was accused of one instance of raping his wife in 2014 during a trip to Pakistan and of another instance in Denmark in 2016, in which he was accused of having thrown their 4-month-old child down on a bed, punched his wife several times in the face and finally raped her. Further, he was accused of another instance of violence against her in 2017 and of having attempted in 2019 to threaten her into not testifying against him. The result of the case was a full acquittal. Both parties were born in Pakistan and had independently travelled to Denmark around 2009 to pursue PhD studies and later careers. Before this, the woman had spent 2 years in Germany, while the man arrived directly to Denmark from Pakistan. They met each other in Denmark through their work, fell in love, and initiated a romantic and sexual relationship in 2011, without the knowledge of their families in Pakistan (who would not have approved). They moved in together in 2012. In 2013, they were married with the blessing of their families. As opposed to the Conviction-case, they were not isolated from the rest of society in Denmark. On the contrary, they rented a room in the home of a Danish family in 2012-2015 and shared both kitchen and bath with this family. Their child went to daycare, they both worked and the wife's brother eventually moved to Denmark. In 2017, the husband applied for divorce. During the divorce proceedings, the parties had a bitter disagreement over the custody of their son. It was during these proceedings in 2018 that the wife first reported the accusations that led to the criminal proceedings. The wife originally won custody over their son but later contacted the husband and asked him to take over custody since she was about to get remarried and did not want the custody anymore. The criminal charges against the husband relied entirely on the wife's testimony, while his defense relied on his testimony. There was no other testimonies in the case.

Noticeable, the wife in the Acquittal-case was in a much stronger position in her marriage through higher education, deeper understanding of the society, legally being in Denmark etc., and her husband was in a similar position to herself, as opposed to the Conviction-case, where the husband was born in Denmark and had a strong family network. Similarly, the Conviction-case concerned a continuous abuse of the wife, while the Acquittal-case was focused on a few separate incidents.

## Analysis

Danish court case hearings can broadly be divided into four main steps. 1) Presentation of the facts of the case. 2) Parties and witnesses give testimonies and are questioned by lawyers. 3) Parties and their lawyers state their legal arguments. 4) The judges give their judgment and reasoning. Each step contains an important element for the final decision: Background information, testimonies and the legal reasoning of lawyers and judges. We have divided our analysis based on how culture was part of these four elements.

### *1) Culture as relevant fact*

In the judgment from the city court in the Conviction-case, which the high court later confirmed, the court directly mentioned that their decision was based on the fact that “The marriage was arranged by their parents and families. They only saw each other a few times before the marriage and without being alone together. [The wife’s sister] has explained about this that ‘After the decision had been made, [wife] was informed of it’.”

It is interesting that out of all the information in the case, the court highlight this as a fact that their decision was based on. The case was not about whether any of the parties had been forced into the marriage. It concerned actions that took place 2-7 years after the marriage. However, the court must have found that the arranged marriage indirectly had an important effect as a background information to the case.

The court mentioned this information together with the fact that the wife was illegally in Denmark. The context suggests that both elements were seen by the court as information explaining why she stayed with the husband for several years and did not go to the police earlier.

To which extent the marriage was arranged had been an area of contention in the case and had led to different descriptions of the relevant culture. The sister of the wife claimed that the wife was not part of the decision to marry at all. She even claimed that the families had discussed whether the woman should marry the husband or his older brother, and only after deciding on this informed her of the decision. The husband disagreed with this description, especially in his testimony for the high court, and claimed to have met the woman in a clothing store in Pakistan and asked for her number. According to him, the couple themselves decided to get married and then their families gave their permission to the marriage. While he did agree that according

to their culture the marriage had to be agreed on between the families, he also stated that “nowadays Pakistani men and women choose themselves who they want to marry”. Since the court specifically quoted the sister’s statement in the decision, it appears that they trusted her descriptions of the culture and factual events.

## *2) Culture in testimonies and as questioning tool*

In the Acquittal-case, one of the lawyers tried to find out if the defendant could remember an incident that, according to the wife, took place on 1 January 2014 during a trip to Pakistan. One of the lawyers in the case asked the defendant about his recollections of that day by using a cultural marker. He asked: “The incident is claimed to have happened on 1 January. That is a special day for Danes. Is it also a special day in Pakistan?” And when the defendant still did not recall the episode, the lawyer directly asked “Do you celebrate New Year’s in Pakistan”, to which the defendant replied “Yes, but not as much as in Denmark”.

This is an interesting tool by the lawyer, which would have had more effect if the defendant celebrated New Year’s. Most Danes would easily be able to remember how they celebrated New Year’s, especially if they were travelling in another country during the holiday. Thus, the lawyer was using a celebration in his own cultural background to dig deeper into the defendant’s story. This highlights how important it is for lawyers to have an understanding of the culture of the parties. In this case, the defendant had no special recollection of the New Year’s celebration, maybe due to his cultural background. In other cases, the opposite could be true, with a date that seems mundane to the average Danish lawyer having importance in the parties’ culture and therefore being useful for establishing facts of a case or digging deeper into a testimony.

In both court cases, culture was used frequently by the parties or witnesses to explain their actions and it was claimed several times that this or that was normal in Pakistani culture. The many references to what the parties and witnesses considered normal in their culture suggest that they found it necessary that the judges understood the cultural background before judging the case. Similarly, the lawyers also spend a great deal of their questions on asking about whether something was normal or not in the culture, suggesting that they also found that understanding the cultural background was important for reaching the right decision.

### 3) *Culture to frame the parties*

The defendant in the Acquittal-case made it clear in his final statement that in his opinion, his former wife had been trying to portray him within a stereotypical view of Pakistani men and that “she is using religion and culture against me. We are both liberal and well-educated. We are not fundamentalists or conservative”.

If true, his observation is in accordance with a previous study. This study found several Danish child custody cases in which one or both parties portrayed the other party as religious and conservative, while simultaneously portraying themselves as modern, secular and well-integrated in the Danish society (Schultz-Knudsen, 2019). The study suggests that Muslims in Denmark assume that Danish courts have a stereotypical view of Islam and see religiousness as a negative trait in custody cases and that Muslims therefore try to portray themselves as secular and the other party as religious.

The same could likely be true in cases of marital rape. Since this was a criminal case, the court could and did decide that the burden of proof was on the prosecutor, and that while the woman might be telling the truth, her testimony alone was not enough to establish that a crime had been committed. This is a privilege that the courts do not have to the same extent in civil cases and custody cases.

The courts should be aware of such tactics used by the parties and aim to not let stereotypical assumptions influence which party they believe, neither by assuming that stereotypes are correct, but also not by assuming that a stereotype is never true. In the Conviction-case, the court found similar claims to be true.

### 4) *Culture to determine the case*

In the Conviction-case, one cultural element made it directly into the written reasoning of the city court, which was confirmed by the high court. The city court noted that it had “attributed significant weight to the fact that [the wife] saw no other option than to leave [the husband], despite knowing full well that it would be connected with great shame for both her family and [his] family and that she risked serious, maybe life-threatening, retaliation from both families”.

This was part of the court’s discussion on whether the husband’s or the wife’s story were to be trusted. Thus, the court had become convinced that for cultural reasons it was more difficult for the woman in this case to leave her husband than it would be for

most Danish women. Therefore, her actions had to be understood in a different light than similar actions from other Danish women. Since she left her husband despite these obstacles, the court found her story more trustworthy.

In both cases, it was a problem for the prosecutor that the women reported the crimes 4-5 years after the first incident that they considered rape. This would normally reduce the trustworthiness of their claims. In the Conviction-case, the court became convinced that the wife had been isolated and trapped and could reasonably claim to have made her accusations to the police as soon as she was able to flee her husband. In the Acquittal-case, the wife lived much more freely. Yet she continued her marriage, until her husband ended it in 2017, without telling anyone about the incidents that she considered rape until 2018. It was not discussed by the judges whether other cultural factors, such as a cultural taboo concerning sex and rape, might have made the women more hesitant to tell their stories.

## Reflections

Culture can influence court cases in many ways, especially in cases regarding close relations, sexuality and marriage, such as custody cases and marital rape cases. Having an understanding of the parties' culture can help the judges and lawyers ask the right questions and understand the statements of parties and witnesses in their right context. The cultural context can be directly relevant for evaluating which testimonies are most truthful or for understanding the motivations of actions.

However, what the comparison of the two cases especially shows is that culture can vary markedly between people who "on paper" would seem to have the same background. In the Conviction-case, several witnesses and the defendant agreed that their community did not take lightly to divorced women, with the defendant acknowledging that his former wife could be expelled from her own family due to the divorce. Other witnesses stated that Pakistani women risk being killed, will find it very difficult to get remarried and that the wife's own father and brothers disapproved of the divorce and wanted the families to negotiate a solution, despite the woman having been beaten by the husband. In the Acquittal-case, there was not nearly as much focus on the divorce being problematic, and both the man and the woman had remarried following the divorce.

The Acquittal-case was also about a more modern and liberal couple which fell in love and began a sexual relationship before marriage, while the Conviction-case concerned



a more traditional and conservative family with arranged marriages, the wife staying at home and the couple living with his parents and siblings.

Thus, it is important that the judges do not assume to know what e.g. Pakistani culture is, but listen to the actual cultural descriptions in the concrete case.

Because culture can vary among people from the same ethnicity, it is also likely that parties and witnesses will disagree on which cultural rules were actually followed in the marriage. The courts have to be aware that parties and lawyers might attempt to rely on stereotypical cultural views to portray the other party in a more negative light, or to portray themselves positively.

The cases also show that culture and religion do not necessarily follow each other. In the Conviction-case, the husband had a non-religious lifestyle, drank alcohol and had an affair. Simultaneously, he was found to be patriarchal and had forced his wife into submission. On the other hand, the wife and her sister were religious Muslims who refused to party, went to the mosque and taught others about religion, but they insisted on divorce even when their own father and brothers wanted to find a solution in accordance with their culture. Thus, it would be wrong of the courts to assume that a religious Muslim is necessarily culturally conservative or vice versa.

In our impression, the Danish courts in these two cases handled these challenges well. In the Conviction-case, there was significant evidence to suggest that the woman was telling the truth about the marriage. In the Acquittal-case, the only evidence against the husband was the testimony of the wife, and her description of him being a conservative and patriarchal man did not seem to correspond with objective facts in the case.

It is possible that culture can play a role in other ways in rape cases. In the Acquittal-case, the defendant was also accused of having tried to pressure his former wife into not testifying against him by threatening to tell her new fiancé and her new friends that the defendant and her had lived together before getting married. Such a statement has very different implications depending on whether the culture of the woman's family is accepting of premarital relations or not, but in this case it was not directly related to the rape accusations.

## Conclusions

This article shows how comparing Danish law with Muslim and Pakistani law can lead to powerful insights about both systems. Danish comparative law most often compares Danish legislation with legislation in neighboring countries or other similar countries, but comparing to a legal system developed in a more different culture and society is valuable too. As we have seen by comparing with the legislation in Pakistan, in both countries the socio-economic changes are challenging older views on women and rape, while the legal system tries to maintain as much continuity in the rape definition as possible. Thus, despite Pakistan in many ways being a much more conservative country than Denmark, the legal definition of rape uses the term “consent” simply because they have held on to the definitions used in their legal history, but their courts have similarly held on to old views on what constitutes consent.

The cases we have analyzed also give insights for current legal debates. In this article, we saw a Danish law professor argue that a man pressuring his wife into having sex twice a week by threatening to divorce her should not be criminalized, because she still had the choice. This seems to be a westernized and liberal view of free choice. In one of our cases, both the husband, wife and witnesses agreed that a divorce had harsh cultural implications for the woman, could lead to her own family killing her and could cause her deportation from Denmark. Feminist voices in Pakistan have argued that in such cases, it should be criminalized if a husband takes advantage of her vulnerable position and pressures her into fulfilling his sexual demands. This shows that areas of consent are grayed out in marriage and that even a legislation based on consent will have to further consider how to treat consent achieved under some form of pressure. It is our impression that the recent debates in Denmark have not really considered how consent and threats can have very different implications in minority cultures.

Concepts and definitions of rape are changing. In both societies in our analysis, cultural views on women have influenced what the population and legal scholars have considered to be rape. If a new legislation is more progressive than existing cultural views, it will be important for the society to educate the population on these new understandings of what constitutes rape and marital rape. This goes for both the majority and minority populations.

As we have shown in this article, many cultural themes are involved in rape cases at Danish courts, especially cases on marital rape. When making a judgment, the judges

have to be aware of 1) the legal culture, 2) their own personal culture and 3) the culture of the parties.

1) The judge needs to be aware of the cultural view on rape that the court itself is supposed to represent. This is the standard job of judges, who have to understand what the legislation wants them to do. In Denmark, this meant that regardless of the judges' own views on rape, the legal culture that they represented until 1 January 2021 did not automatically consider it a crime for a man to have sex with his wife without her consent. Instead, the action generally had to have involved an element of violence, threat of violence or similar. We have seen from the Criminal Law Council's report that even a girlfriend resisting and pushing her boyfriend away was not considered raped if she eventually gave in to avoid trouble or arguments. However, the case we analyzed which led to conviction showed that when the husband had previously violently raped his wife, the court could extend the verdict of rape to not only those instances where the husband violently forced his wife into intercourse, but also to sex which the wife engaged in because she knew that the husband could get violent.

2) While the culture of the legal system is important, the judge's or juror's own personal culture also plays a role. We have seen this in the legal history of Denmark, where the legislation had to be changed because the jurors were not applying the actual legal provisions to rape in existing relationships. We saw a similar trend in Pakistan, where the judges of the lower courts punished women for being pregnant outside of marriage or for having "admitted" to intercourse by reporting a rape, despite the highest court in Pakistan insisting that women were not to be held responsible in these situations. Thus, it is important for judges to make sure that they are not unduly influenced by their own cultural views. By reflecting on and being aware of their own cultural bias, they will better be able to avoid it influencing their decisions. This is however a difficult balance, since one of the reasons that the Danish court system use jurors in criminal law cases is directly to make sure that decisions are in accordance with the population's view on justice and crime (Melchior, 2009). While this is supposed to protect the general feeling of justice in the society, the examples in this article show that the weaker party – often the woman – risks having her legal rights undermined if the dominant cultural view is e.g. holding on to older patriarchal ideas. More research into the right balance between these opposing, but both valid, interests is needed.

3) The analysis of our two court cases have further shown how the culture of the two parties also influences the court case and judgment in various ways. For the lawyers and judges, it can be necessary to get a deep understanding of the culture to ask the right questions during the testimonies, to get all relevant facts into the case and to understand the parties' motivations. Thus, every case is different. The same actions might have to be understood and treated differently based on the cultural background. It should be noted that in 2009, Danish legislators explicitly prohibited judges from considering it as a mitigating circumstance in the sentencing that a crime was committed due to religious or cultural reasons (law no 330, which created the current art. 80, 3 in the Criminal Law Code). However, culture can still play a role in these cases. As our example with the threat to expose a premarital relation shows, culture can be the opposite of a mitigating circumstance, and be the very reason that something has to be considered a crime.

Importantly, culture is not uniform and is often contested in these cases. Not everyone from Pakistan has the same culture, and it can be an advantage for the victim and perpetrator of marital rape to present different descriptions of the cultural rules followed within their marriage. In these cases, the judges cannot just look at what is the norm for other people of the same ethnicity or nationality, but will have to assess which testimony is the most trustworthy given the context. The judge should especially be aware that parties might use cultural stereotypes to portray each other negatively, which should not be allowed to influence the decision unduly. The same goes for assumptions about religion and culture. As we have shown in one of the cases, being a deeply religious Muslim does not mean being culturally conservative, and being culturally conservative does not mean being religious. The courts must make sure to separate such terms.

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