

within a social system which enhances extremist views, it is extremely hard for lawyers to defend a blasphemy case,⁶⁹ as it is for politicians to be opposed to blasphemy laws,⁷⁰ or for judges to issue acquitting judgement in the relevant cases.⁷¹ It seems, therefore, that alternative advice and reform are necessary, as well as more effective lobbying in order to promote the respect, the protection and fulfilment of women's and religious minorities' rights.⁷² The civil society's efforts seem crucial at this point in time.

SHARIA LAW & HUMAN RIGHTS: THE CASE OF MUKHTAR MAI

Introduction

On the 21st April 2011, the Supreme Court of Pakistan by two votes against one reversed the Appeal Court's decision that had found the appellants

How Punjab governor's killer became a hero, BBC News, available at <http://www.bbc.co.uk/news/magazine-16443556>.

- 69 J. Khan, *Death Threats for Asia Bibi's Lawyer and Human Rights Activists*, Jan. 7, 2012, <http://www.asianews.it/news-en/Lahore:-death-threats-for-Asia-Bibi%27s-lawyer-and-human-rights-activists-23630.html>; See also From Shaheed Justice Arif Iqbal Bhatti to Shaheed Salman Taseer: PPP's struggle against the Ziaist Blasphemy Law, Jan. 7, 2011.
- 70 Journalists argue that, after Salman Taseer and Shahbaz Bhatti, the "next on the list" might be the ruling party's legislator Sherry Rehman, who tried to table an amendment to blasphemy laws. D Walsh, *Pakistan MP Sherry Rehman drops Effort to Reform Blasphemy Laws*, THE GUARDIAN, Feb. 3, 2011, available at <http://www.guardian.co.uk/world/2011/feb/03/pakistan-blasphemy-laws-sherry-rehman>.
- 71 It is reported, however, that the LHC prosecutor has had some regrets: *D Wooding, Asia Bibi's accuser is said to have admitted that his charges are phony*, ASIAN NEWS, Jan. 22, 2012, <http://www.assistnews.net/Stories/2012/s12010128.htm>; M. Tossati, 'Strange developments in the Asia Bibi case', <http://vaticaninsider.lastampa.it/en/homepage/world-news/detail/articolo/pakistan-asia-bibi-cristiani-christians-cristianos-12175/>.
- 72 See e.g. A. Quraishi, *What if Sharia weren't the enemy?: rethinking international women's rights advocacy on Islamic Law*, 22 COLUM. J. GENDER & L. 1, 173-249 (2010), who argues that a modern apprehension of women's rights in the countries which apply Sharia law should be initiated with the assistance of women activists.

guilty of the gang rape of Mukhtaran Bibi (or Mukhtar Mai⁷³), an incident that had taken place in June 2002, in the Meerwala village in the area of Punjab in North Pakistan.⁷⁴ The judgement provoked the outrage of the international human rights community and is indicative of the failure to guarantee equality and respect for women in Pakistan.⁷⁵

1. Facts and Background of the Case

The case commenced when one of the brothers of Naseem-Salma, a girl belonging to the “influential” *Mastoi* tribe (a branch of the *Baloch* tribe) reported to the police on the 30th June 2002 that his sister maintained “illicit relations” with Abdul Shaqoor, a 12 year old boy belonging to a “humble family of Gujjar.”⁷⁶ The boy was, in reality, a victim of a sexual assault and

73 Mukhtār Mā’ī became a symbol for many women in Pakistan and is now a world-renowned human rights activist. In 2003, she started the Mukhtar Mai Women’s Welfare Organization to defend women’s rights and education, especially in the Southern region of Punjab Province (Pakistan) “a region with some of the world’s worst examples of women’s rights violations, such as rape, gang rape, domestic violence, honour killing, vani (exchange of women in settling the disputes), forced and child marriages.” Mukhtar Mai has also won the North-South Prize from the Council of Europe, see, MUKHTAR MAI WOMEN’S ORGANISATION, <http://www.mukhtarmai.org>.

74 Supreme Court of Pakistan: *State v. Abdul Khaliq and others* (Criminal Appeals No.163 to 171 and S.M. Case No.5/2005). See also U.N. C.H.R., REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ¶ 151, U.N. DOC. E/CN.4/2003/75/ADD.2 (JAN. 14, 2003) (PREPARED BY RADHIKA COOMARASWAMY). See also, U.N. H.R. COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, U.N. DOC. A/HRC/13/39/ADD.1 (FEB. 25, 2010) (PREPARED BY MANFRED NOWAK). See also *Reuters, Pakistan court acquits suspects in Mukhtaran Mai case*, DAWN.COM, Apr. 11, 2011, <http://www.dawn.com/2011/04/21/supreme-court-upholds-lhc%E2%80%99s-verdict-in-mukhtaran-mai-case.html>.

75 See Siobhan Mullally, *Women, Islamisation and Human Rights in Pakistan*, in RELIGION, HUMAN RIGHTS AND INTERNATIONAL LAW: A CRITICAL EXAMINATION OF ISLAMIC STATE PRACTICE 379-408, especially 405 et seq. (JAVAIID REHMAN & SUSAN C. BREAU, eds., 2007).

76 *State v. Abdul Khaliq*, *supra* note 74, at ¶¶ 4-5, 14.

sodomy by these men.⁷⁷ One week earlier, on the 22nd June 2002, a tribal council had been conveyed (*panchayat*), with the participation of another two of the *Mastoi* tribe as “arbitrators.” The latter had also obliged the boy to stay confined in their house as a punishment for his alleged “illicit relations,” something which would allow the family to continue the boys’ sexual harassment with the *panchayat*’s blessings.⁷⁸

As a remedy for these alleged “illicit relations,” the *panchayat*, without conducting any kind of investigation, allegedly ordered “exchange marriages” to be arranged between the brothers of Naseem and Shaqoor’s sister, Mukhtaran Bibi, something that is a common practice in the village.⁷⁹ However, the arbitrator who was acting on behalf of Shaqoor declined the offer and Mukhtaran Bibi went, according to the village’s tradition, to visit the *Mastoi* house and seek forgiveness for her brother.⁸⁰ During this visit, a gang rape (*Zina-bil-jabr*) was committed against her.⁸¹

Mukhtaran Bibi accused 14 men of being involved in her raping and in 2002 an investigation took place. The 14 men were led to the police and charged with the offences described in the relevant legislation (i.e., Sections

77 During the trial, Shaqoor denied the fact that he had illicit relations with Naseem and claimed that he was sodomized by one of her brothers and the two other men acting on behalf of the *Mastoi* family during the *panchayat*. This claim was also the object of a debate during the proceedings (¶ 17 et seq.), despite the fact that the doctors noted that “a positive report of sexual intercourse was produced.”

78 *Abdul Khaliq*, *supra* note 74, at ¶¶ 4-5.

79 Also, interestingly, some of the witnesses of the case (e.g., Witness no. 13, ¶ 21) submitted that the *panchayat* commanded that *ziadati* be committed with Mukhtaran May. Such an atrocity is a common practice in this area of Pakistan. Moreover, it is expected that the woman who is the victim is killed afterwards or commit suicide, again in order to preserve the honour of the male members of the two families involved. In general on the women’s situation in the tribal areas, see Rebecca Conway, *Rape, mutilation: Pakistan’s tribal justice for women*, REUTERS, Aug. 12, 2011, <http://www.reuters.com/article/2011/08/12/us-pakistan-women-idUSTRE77B63I20110812>, and Waheed Khan, *Pakistani rape victim says attacks increasing*, REUTERS, Feb. 1, 2007, <http://uk.reuters.com/article/2007/02/01/idUKISL9288020070201>.

80 *Abdul Khaliq*, *supra* note 74, at, ¶ 2-3: “all dragged her into the room of Khaliq’s house, where zina- bil-jabbar was committed with her by all of them.” *Id.* at ¶ 4-5.

81 *Id.*

19(4), 11 of the Offence of *zina* (Enforcement of Hudood) Ordinance VII of 1979, combined with Section 149, 354-A⁸² and 109 of the Pakistani Penal Code and under Sections 10 and 7(c) of the 1997 Anti-Terrorism Act).⁸³ The Anti-Terrorist First Instance Court hence sentenced the six men to death and acquitted the other eight citing a “lack of evidence” and the benefit of Section 382-B Pakistani Criminal code.⁸⁴

The judgement of this Court was challenged before the Lahore High Court(LHC) by both parties. Five of the six men were acquitted of all charges citing a lack of evidence and advancing a number of reasons.⁸⁵ Only one man’s conviction was upheld, converted, however, from Section 10 paragraph 4 of the Ordinance to Section 10 paragraph 3 (reducing the capital punishment from death to life imprisonment).⁸⁶ The SC judgement said that the LHC had provided sufficient proof, noting that the HC’s con-

82 The article 354-A is entitled “Assault or use of criminal force to woman and stripping her of her clothes” says that “whoever assaults or uses criminal force to any woman and strips her of her clothes and in that condition, exposes her to the public view, shall be punished with death or with imprisonment for life, and shall also be liable to fine.”

83 Article 6(c) of the Terrorist Act states that: “A person is said to commit a terrorist act if he, (c) commits an act of gang rape, child molestation, or robbery coupled with rape as specified in the Schedule to this Act.” On 1 September 2002, the anti-terrorism Court in Punjab decided that six of the fourteen accused had “conveyed Panchayat, mostly of their Mastoi Baluch tribe of the area, along with others [...] and coerced, intimidated, overawed the complainant party, and the community; created a sense of fear and insecurity in society; and thereby committed the [related] offences.”

84 *State v. Abdul Khaliq*, *supra* note 74, at ¶ 5.

85 Among the reasons cited: “sole testimony of the prosecutrix to prove the occurrence, no one else had seen it and hence is insufficient to establish the guilt of the accused;” “the DNA and SEMEN tests were not conducted to prove the gang rape;” “there are contradictions and inconsistencies in the statements of the witnesses inter se and also with their previous statements;” “the occurrence has not taken place in the manner as is stated by the PWs;” “there are no significant marks or injuries on the body of the prosecutrix, which is very unusual in [a case of this kind].”

86 *Id.* at ¶ 6.

clusions “should [generally] not be upset, except when palpably perverse, suffering from serious and material factual infirmities.”⁸⁷

Consequently, the SC found no error in the application of the law, opining that the “factual conclusions” of the LHC “[did] not suffer from any factual or legal vice.”⁸⁸ In this respect, it agreed with the appreciations of the Lahore Court in all points related to the procedure⁸⁹ and dismissed the appeal.⁹⁰

2. COMMENTS ON THE SUPREME COURT’S JUDGEMENT

The Supreme Court’s decision raises a number of questions, which can be only succinctly addressed here and which mark a long way for the judiciary’s fight in the building of a better human rights record. It is optimistic however to note that most of these points are raised by Justice –Nasire ul-Mulk in his 36 pages dissenting opinion.

a. Incompatibility of the Islamic system of proof with human rights law

The Quran provides for a strict and rigid system of proof, incompatible with human rights law. The syllogism followed by the SC was based on a *lato-sensu* presumption of innocence for the accused rapists (paragraphs 17-31), something that makes particularly difficult to produce proof in cases regarding both violence and the most intimate sphere of a person.⁹¹ In this respect, the CS could have also advanced previous jurisprudence of

87 *Id.* at para. 15. Following several arguments on the version of the truth (5-17), the SC observed that “the foundational facts of the case [...] make the prosecution version implausible, flimsy and un-canny as set forth.” (¶ 20).

88 *Id.* at ¶ 22.

89 *E.g.*, the Court admitted that the delay of a lodging of a complaint by a rape victim is fatal to the prosecution or the fact that the testimony of a rape victim is not sufficient in a rape case.

90 *Id.* at ¶¶ 26-34.

91 This point is observed correctly only by the dissenting judge Nasir-ul-Mulk who highlighted that the High Court had erred in holding that the delay in lodging of F.I.R. was fatal to the prosecution case and insisted on the fact that in such cases there is no need that the testimony of the rape victim is corroborated. In this respect, Justice Ul-Mulk cited a number of related judgements of both the

international instances, such as the European Court of Human Rights 92 and the Committee Against Torture (CAT).⁹³

b. *Incompatibility of the zina offense, in particular, with human rights law and procedural guarantees*

Under Islamic law, any extramarital intercourse constitutes the Islamic sin of *zina* (illegal adultery).⁹⁴ An unproved imputation of *zina* is in itself a *had* offense, sometimes punishable by lashes, or even by lapidation (although the latter is not explicitly stated in the Quran).⁹⁵ However, this kind of understanding and interpretation of sexual relations and this system of proof have extremely damaging consequences, since a rape (which is a *zina*) would remain unpunished (since it is improbable to have four eye-witnesses), whereas a sexual intercourse of two adolescents (which is also a *zina*) could

Pakistani and the Indian Supreme Court. See para. 19-20 and 35 of the dissenting opinion.

- 92 The European Court has (1) assimilated rape with torture in specific cases as provoking a serious and inhuman treatment and (2) in assessing both written and oral evidence, the Court generally applies a “beyond a reasonable doubt” rule: “Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, e.g., *Ireland v. United Kingdom*, App. No. 5310/71, 2 EUR. H.R. REP. 25 (1978); *Ilascu and Others v. Moldova and Russia*, App. No. 48787/99, 40 EUR. H.R. REP. 46 (2004); more recently, *Zontul v. Greece*, App. No. 12294/07 (2012).
- 93 General Comment no. 2, CAT/C/GC/2, (Jan. 24, 2008) points 10-11: “in comparison to torture, ill treatment differs in the severity of pain and suffering and may not require proof of impermissible purposes;” See also a multiple rape case, *V.L. v. Switzerland*, CAT 262/2005 (Nov. 20, 2006).
- 94 Islamic law disposes for six hadd offenses theft, rebellion, illicit sexual intercourse, apostasy, the consumption of alcohol (wine: *sharb al khamr*), false accusation or unlawful sexual intercourse (*qudf*). See MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW, 79 et seq. (2005); NISRINE ABIAD, SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY (British Institute of International and Comparative Law, 2008).
- 95 See Noel J. Coulson, *Regulation of Sexual Behavior under Traditional Islamic Law*, in SOCIETY AND THE SEXES IN MEDIEVAL ISLAM 63-68 (AFAF LUFTI AL-SAYYID MARSOT, ed., 1979).

be punished by a violent physical assault (lashes) or death (lapidation). One should equally note that the repression of sexual tendencies as well as the extreme repression of sexuality (including homosexuality⁹⁶) in the context of Islamic states such as Pakistan, naturally has extreme consequences, such as sexual assault and rape, as in the present case.

c. *Incompatibility of Some Traditions in Pakistan and Particularly the Panchayat Institution with Pakistan's Human Rights Obligations*

There is some confusion in the judgement with regard to the place of tribal justice, and especially tribal practices such as the *panchayat*, which are contrary to human rights standards. The Supreme Court does not explicitly condemn the *panchayat*, even though this institution, subject to an extreme “patriarchal mindset,” is a *per se* violent institution against women, which applies harsh and partial tribal laws, and does not represent any standard of “fair justice,” as it is shown in the present case.⁹⁷

d. *Incompatibility of Islamic Law with Human Rights Law with Respect to Zina, “Illicit Relations” And Marital Rape Of Girls Over 12 (Which is Allowed According to Pakistani Laws)*

At the time of the incident, Mukhtaran Bibi was 16 year old and her brother 12 year old. Pakistan failed to protect both of them and there is not a single reference to human rights in the judgement. The fact that an “exchange

96 The Quran provides that a *zina* offense should be brought before a Court only when it is committed in a shameless and immodest way and there are four witnesses for it, while in all other cases, *zina* is not punishable by a Court. Further, as to male to male sexual intercourse in particular, in contrast with the Quran, which is (supposedly) hostile against homosexuality, and in contrast with several conservative Islamic scholars, this is an extremely common, yet extremely restricted, practice in several areas of South Asia, not acknowledged as such and punishable sometimes by death. See e.g., KHALED EL-ROUAYHEB, BEFORE HOMOSEXUALITY IN THE ARAB ISLAMIC WORLD, 1500-1800 (University of Chicago Press, 2005); ISLAM AND HOMOSEXUALITY, VOL 2 (Samar Habib ed., Greenwood, 2010).

97 This point of view is also supported by I Ahsan. See, *Irum Ahsan, Panchayat and jirgas (lok adalats): Alternative Dispute Resolution System in Pakistan*, in STRENGTHENING GOVERNANCE THROUGH ACCESS TO JUSTICE, 27, 27-37 (AMITA SINGH & NASIR ASLAM ZAHID, EDS., 2009).

marriage,” i.e., a gang rape of a 16 year old girl is allowed under tribal and national laws in Pakistan,⁹⁸ especially under the *panchayat* pretext to “seek forgiveness,” is an extreme violation of human rights law in the light of the UN human rights charter, the UDHR, the recently ratified ICCPR, the ICERD (non- discrimination is included within the definition of discrimination, since it prohibits acts when carried out for “any reason based on discrimination of any kind...”) and both the CEDAW and the CRC.

e. *Disregard for Women, Children's Rights, and for the Human Rights International System And Civil Society*

The fact that the SC disregarded the facts of a case of a woman against whom the SC itself acknowledges that “a blatant, heinous and untoward incident” took place, who herself became a symbol of the human rights struggle and for whom the international community of activists raised 1 million of signatures, is *per se* a flagrant disrespect for women’s value and rights, as proclaimed, for example, in article 4(c) of the UN GA Declaration on the Elimination of Violence against Women.⁹⁹ Judged at a public hearing (as opposed to a doors closed), with the rapists present and with Mukhtar Mai’s own absence, is inevitably also indicative of the failure to preserve a person’s right to privacy in the *par excellence* most intimate aspect of one’s private life.¹⁰⁰ In issues regarding to women’s and children’s rights there is unfortunately a long way to go for Pakistan to comply with international human rights law. For the moment, the hope is to be found in the judicial activism, and in the personal ethos of selective judges, who accomplish their mandate without fearing reprisals from religious extremists.

98 In Pakistan, marital rape is recognised only when the girl (wife) is under 12 years according to section 376 of the Penal Code (imprisonment for maximum 2 years and fine). See also, the World Organisation Against Torture, Rights of the Child in Pakistan, Report on the implementation of the Convention on the Rights of the Child by Pakistan, prepared for the Committee on the Rights of the Child (34th sess. – Geneva, Sept. 2003), *available at* www.juvenilejusticepanel.com/.../OMCTAltRepRChildPakistan03EN.

99 Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Feb. 23, 1994).

100 The judgement itself is a breach of Mukhtar Mai’s intimacy, characterizing her: “an unmarried virgin victim of a young age, whose future may get stigmatized.”