



LEGISLATIVE WATCH



Founded by Shahla Zia

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EDITORIAL

From proscribing rape, preventing cybercrimes and stalking, to the interdiction on acid throwing and forced marriages, there are at least 12 Violence Against Women (VAW)-related laws at the federal level and at least 4-6 at the provincial level in each of the provinces. In Pakistan, the government and especially women parliamentarians' commitment to addressing VAW must be acknowledged and praised.

However, often, legislation may be inadequate, underfunded, outdated, problematic and even when

it is praiseworthy, fail at the implementation level. Undergirding legislation and efforts at its implementation cannot succeed and VAW& G can never end in Pakistan, unless patriarchal assumptions of male superiority are not erased. Throughout this newsletter, this theme appears time and time again.

To address this, parliamentarians, civil society organizations, citizens, and other members of the society should come together and consider the many forms the misogynist culture takes in our

daily lives and take responsibility for our personal contributions to maintaining such a system. We must develop creative solutions to end the ways in which women are put down, building a space for dialogue, critical rethinking, and questioning of inequality wherever it appears.

All concerned stakeholders, above all the State, must ensure that they perform their duties and create an enabling environment where women could benefit from the laws made for them.

Critical Review of the Khyber Pakhtunkhwa Domestic Violence Against Women (Prevention and Protection) Act, 2021

By Beenish Riaz

With the onset of the COVID-19 pandemic, there has been a dramatic increase in domestic violence in Pakistan. Passage of the Khyber Pakhtunkhwa Domestic Violence Against Women (Prevention and Protection) Act, 2021 ("Domestic Violence Act") is an important step to address this violence. With its enactment, domestic violence becomes prohibited in all four provinces of the country.

Nevertheless, while the Domestic Violence Act is a welcome effort by the Government of Khyber Pakhtunkhwa recognizing the issue and the need to address it, it raises many difficult questions for implementation. The following is a section-by-section review of the law. The law is compared with "A framework for model legislation on domestic violence," ("Model Framework") created by the United Nations Special Rapporteur on violence against women, in 1996.

Generally, in accordance with best practices, the legislation should be amended to empower multiple agencies to provide holistic assistance to the survivor and to hold perpetrators accountable including through criminal prosecutions, strengthening the current system in place. It should also clearly define what domestic violence is and limit the discretion of judges to determine this, include the needs of special groups like transgender people as well as clarify distinctions between civil and criminal law. Further, to ensure implementation of the law currently in place, the Government of

Khyber Pakhtunkhwa should provide for funding, monitoring and evaluation of the law.

Preamble:

The Model Framework declares that legislation should begin with a declaration of purpose that recognizes domestic violence as "gender-specific," "a serious crime against the individual and society," and accepts the need to protect survivors and prevent the crime. The law should also refer to international human rights obligations. The Domestic Violence Act is gender specific in that it recognizes domestic violence as a serious crime committed specifically against women in its preamble. It does not reference international human rights law but is grounded in the Constitution of Pakistan.

Definitions:

Several definitions in the Domestic Violence Act, though, curtail its scope and limit its potential to respond to the needs of women. This includes the definition of "violence" itself. While stated broadly to include "physical, psychological, emotional and economic abuse," the definition has limits that may render the clause toothless.

The definition of "sexual abuse" is incomplete and vague, and much has been left to the discretion of the courts. This ambiguity appears again in 11(d). The law should instead be clear on what is or is not proscribed.

Two other definitions in the Domestic Violence Act are also underinclusive. First, a "complainant" includes "women against whom domestic vio-

lence has been committed." What is missing are children as well as transgender people who often face domestic violence and reportedly more so with the COVID-19 pandemic. The definition of a "domestic relationship" is a "relationship by consanguinity, marriage, kinship, affinity or other family relationships." While broader than that found in certain other jurisdictions, this excludes intimate partner violence not tied to family relationships, especially against transgender people or live in domestic workers.

Protection against Domestic Violence:

A general issue with the Domestic Violence Act is that it confuses civil and criminal law, so it is unclear what civil law provisions are available to women (such as to complain in court and receive compensation or property) as opposed to criminal law sanctions (such as offenders facing punishment by the state). Section 3(2) of the Act is on the criminal law side and states that someone who commits an offense under the Act shall face 1-5 years imprisonment "in addition to [a] fine as provided for the said offence in the Pakistan Penal Code." This provision covers all people who "commit, aid and abet for the commission of the act of domestic violence."

It is unclear whether this provision is intended to only cover offenses for which the PPC only provides a fine or whether it includes offenses like rape, torture etc. for which there is imprisonment. The scope of "domestic violence" as presented in the Act would cover not just the former, but also the latter so it makes little sense to extend

the punishment for crimes that otherwise require a fine and not for crimes that require imprisonment. However, if the clause as written is applied to crimes requiring imprisonment, it may in fact reduce the penalty the perpetrator has to face by limiting imprisonment to a maximum of 5 years. This lack of clarity as regards sentencing and area of law can create several problems at the implementation stage.

District Protection Committee:

The Domestic Violence Act, next, sets up a District Protection Committee. The District Protection Committee includes the Deputy Commissioner of the concerned district, one female member of the Provincial Assembly of Khyber Pakhtunkhwa, the Executive District Officer, Health, the District Officer, Social Welfare, the District Public Prosecutor, a representative of the District Police Officer, any female government officer not below the rank of BPS-17 from the concerned district, the District Khateeb of the District concerned, one gynaecologist in the district, one psychologist in the district, and the Chairperson of the concerned District Committee on the Status of Women or the District Social Welfare Officer. This committee has a number of relevant members who can connect complainants with medical and social assistance. The committee can also delegate its functions and create a robust network to support women.

Nevertheless, notably missing in the list of functions of the Committee is legal assistance. While the District Protection Committee is tasked with hearing and keeping a record of complaints, its

Continued on Page 6

No let up in violence against women and girls even during Covid-19 Pandemic

AF Report

As this newsletter has made clear, VAW is a global pandemic. Anecdotal evidence has long suggested that the COVID-19 pandemic has increased the prevalence of VAW in society. In Pakistan, a country where men have long denied women their rights, VAW is common, backed by unsubstantiated notions of honour. To record the incidences of VAW, AF in collaboration with South Asian Partnership - Pakistan (SAP-PK) published a study titled "Violence against Women and Girls in the Times of Covid-19 pandemic."

The report has been produced under the auspices of the 'JAZBA-Democracy and Empowered Women or Jamhooriyat aur Baikhtiar Aurat' project. The report was launched in Islamabad on 12th February, 2021. Ms. Shandana Gulzar Khan, Member, National Assembly, was the chief guest. Dr. Aliya Khan, the renowned educationist and Member, Board of



Dr. Rakhshinda Perveen presenting the report

Governors, Aurat Foundation presided over the event. Mr. Christopher Khung, Head of Cooperation, High Commission of Canada, delivered his keynote address online. Mr. Irfan Mufti, Team Leader, JAZBA, Mr. Naeem Mirza, Executive Director, AF, Ms. Mumtaz Mughal, Director Programmes, AF, spoke on the occasion. Ms. Nousheen Khurram moderated the function.

The report is written and analysed by Dr. Rakhshinda Perveen, a renowned expert on issues of violence against women and girls. She was assisted by provincial and district teams of JAZBA.

The report focuses on VAW and uses empirical qualitative and quantitative evidence to document the rise of VAW during the pandemic.

The report has three key components: (1) A review and analysis of data on the incidents of VAW collected from selected newspapers, verified



Ms. Shandana Gulzar Khan, Member, National Assembly, speaking at the launching ceremony of the Report.

- by local police stations in 25 selected districts of Pakistan including all four provinces and Gilgit-Baltistan;
- (2) An analysis of 14 case studies of VAW based on long form interviews and;
- (3) An analysis of 6 interviews from key government officials in the provincial commissions on the status of women and the provincial offices of the ombudspersons.

The key findings of the review and analysis of the data are:

- 2297 cases of VAW reported in the 25 districts from January to December 2020. Despite the problem of underreporting during COVID and the limited sample size, the number of cases is shockingly high. Doing a month-to-month analysis of the cases reveals that at the peak of the pandemic in July, cases of VAW were at their highest. Following this, cases dropped again but rose in September due to a resurgence of COVID.
- 57% of all cases were reported from Punjab, 27% from Sindh, 8% from Khyber Pakhtunkhwa, 6% from Gilgit-Baltistan and 2% from Balochistan.
- Of all the provinces, Punjab reported the highest incidents of murder, rape, suicide, acid burning, kidnapping and miscellaneous violence against women cases (including domestic violence, child and forced marriages, dowry and inheritance).
- Sindh had the most "honour" killings in the country. The number of reported cases of abduction were the highest, followed by murder and rape.
- In Balochistan, the number of reported murders was the highest followed by the number of rapes.
- In Khyber-Pakhtunkhwa, murders were the highest followed by suicides and rapes.

- In Gilgit-Baltistan, suicides were the most prevalent followed by acid crimes and murder.

The case studies presented a number of trends including:

- Women survivors/victims of violence range from two-year-old girls to middle-aged married women.
- Women survivors/victims come from all socio-economic backgrounds - from the very poor to the middle class.
- Violence occurs any and everywhere at education institutions, in offices, and at homes.
- Child sexual abuse and exploitation is a common problem in society and often ends in out-of-court settlements as women cave under pressure from family members, neighbors, relatives, community members, police officers and others who push women to drop their court cases and release the accused.

These cases indicate both the pervasiveness of VAW, which is a threat to every household, every age group, every woman no matter where she is and the prevalence of a societal culture of patriarchy that makes it so that women and girls can never have justice for the violence inflicted on them.

The analysis of interviews by key government officials, in turn, revealed several flaws in the system namely:

- Even though Pakistan has both national and international obligations to combat VAW including by creating institutional mechanisms, it has so far failed to realize these.
- The National Commission on the Status of Women has no chairperson. The Punjab Commission on the Status of Women has no members and no chairperson appointed. The Balochistan Commission has yet to be formed and even the Sindh

Commission has four vacant seats for members.

- Punjab, Sindh, Balochistan and Khyber-Pakhtunkhwa all have a provincial ombudsperson. Even though Gilgit-Baltistan passed a law setting up an ombudsperson in 2013, it has not yet appointed one.
- Interviews with key officials show that women often lack awareness of their rights and the mechanisms of their redressal. Even when they do know of their rights and attempt to seek justice, they face extreme pressure to drop their cases.
- Interviews also show a problem of lack of government capacity and resources dedicated to women's issues and the failure of the government's service delivery mechanism.

Based on this, to eliminate VAW, the report gives a number of general recommendations:

- reconceiving the relationship between the elimination of violence and economic growth, poverty of income and opportunities promoting social justice including tax justice.
- mainstreaming gender: implementing gender equality and inclusion in all policies and budgets and actually allocating matching monetary resources to address the issue through gender and multidisciplinary experts and rehabilitation of the survivors of violence.
- implementing universal social protection with empathy and not for the sake of photoshoots, winning high profile awards and earning validation on Twitter.
- embracing participatory governance.
- centering the role of government and internalizing the spirit of democracy.
- Adopting an intersectional approach in all areas of work relating to ending VAWG.

Global comparison of ‘Rape Laws’ with the focus on Pakistan’s legislation

By Beenish Riaz

Pakistan is among the worst countries for rape in the world. In recent months, several rape cases have garnered media attention from the rape of a woman on the Lahore motorway to the rape of a two-year-old and a five-year-old a few weeks before this and that of an eight-year-old boy a few days after it. Given the prevalence of rape in the country, it is critical to determine how Pakistan’s rape law compares to those of other countries and how it can be improved. This article does that. The countries chosen include those that are geographically and culturally close to Pakistan such as India, Nepal, and Bangladesh, Islamic countries in the Middle East like Iraq and Egypt, three countries in the Global North, namely the U.S., Canada, and the U.K and the country known to have the most rape cases in the world, South Africa. Based on a review of these laws, this article presents a number of recommendations to improve the Pakistani law.

Pakistan Context:

At independence, the offense of rape was present in the Pakistan Penal Code (“PPC”) Section 375 as an offense against girls under the age of fourteen

years old only. In 1979, with the introduction of The Offence of Zina (Enforcement of Hudood) Ordinance (“Hudood Ordinance”), rape was coupled with the newly created offenses of zina and adultery. Human rights and women’s rights organizations heavily condemned and criticized the Hudood Ordinance for its discriminatory impact on women. Finally, in 2006, the Hudood Ordinance was amended by the Protection of Women (Criminal Law) Amendment Act, which separated rape from adultery, changed applicable laws of evidence and procedures, and placed the offense squarely back in the PPC.

Since then, the law has gone through some minor amendments but stayed predominantly unchanged. The law was last amended by the Criminal Law (Amendment) (Offences Relating to Rape) Act, 2016 (Act XLIV of 2016).

Below are the relevant provisions of Pakistan’s rape law:

Section 375: A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

- (i) against her will;
- (ii) without her consent;

- (iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt;
- (iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or
- (v) with or without her consent when she is under sixteen years of age.

Section 376: (1) Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than ten years or more than twenty-five years and shall also be liable to fine. (2) When rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life. [Sentences cannot be commuted] (3) Whoever commits rape of a minor or a person with mental or physical disability shall be punished with death or imprisonment for life and fine. (4) Whoever being a public servant including a police officer, medical officer or jailor, taking advantage of his official position, commits rape shall be punished with death or imprisonment for life and fine.

Section 376A: Disclosure of identity of victim of rape, etc.: (1) Whoever prints or publishes name or any matter which may make known identity of victim...shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine. (2) Nothing in sub-section (1) extends to any printing or publication if it is (a) by or under order in writing of officer-in-charge of the police station or police officer making investigation into such offence acting in good faith for the purposes of such investigation? or (b) by or under order of Court? or (c) by or with authorization in writing of the victim? or (d) by or with the authorization in writing of natural or legal guardian of the victim where the victim is dead or a minor or of unsound mind.

Comparison:

The comparison tables below introduce the definition and provisions related to rape in other countries grouped by region.

We have seen that the focus in rape law and this article has generally been on defining a specific actus reus and not the mens rea of the offender. Mens rea could include acting with malice

Rape Laws in South Asia (India, Bangladesh, and Nepal)

Countries	India	Bangladesh	Nepal
Name of Law:	Indian Penal Code	Bangladesh Penal Code	Nepal Criminal Code
Most Recent Amendment:	Criminal Law (Amendment) Act, 2018	Women and Children Repression Prevention (Amendment) Bill, 2020	Last amended 2017
Definitions:	Section 375: “A <u>man</u> is said to commit “rape” who, except in the case hereinafter excepted, has <u>sexual intercourse with a woman</u> under circumstances falling under any of the six following descriptions:- (First) - <u>Against her will</u> . (Secondly) - <u>Without her consent</u> . (Thirdly) - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in <u>fear of death or of hurt</u> . (Fourthly) -With her consent, when the man knows that he is not her husband, and that her consent is given because she <u>believes that he is another man to whom she is or believes herself to be law- fully married</u> . (Fifthly) - With her consent, when, at the time of giving such consent, by reason of <u>unsoundness of mind or intoxication</u> ...she is unable to understand the nature and consequences of that to which she gives consent. (Sixthly) - With or without her consent, when she is <u>under sixteen years of age</u> . (Exception) -Sexual intercourse by a man with his own wife, <u>the wife not being under fifteen years of age, is not rape.</u> ”	Section 375: “A man is said to commit “rape” who except in the case hereinafter excepted, has <u>sexual intercourse with a woman</u> under circumstances falling under any of the five following descriptions: Firstly.- <u>Against her will</u> . Secondly.- <u>Without her consent</u> . Thirdly.- With her consent, when her consent has been obtained by putting her in <u>fear of death, or of hurt</u> . Fourthly.- With her consent, when the man knows that he is not her husband, and that her consent is given because <u>she believes that he is another man to whom she is or believes herself to be lawfully married</u> . Fifthly.- With or without her consent, when she is <u>under fourteen years of age</u> . Exception.- Sexual intercourse by a man with his own wife, <u>the wife not being under thirteen years of age, is not rape.</u> ”	<i>karani sambandhi kasur'</i> or 'crimes related to sex/ sexual penetration' Article 219 <i>Jabarjasti karani</i> or forcible sexual penetration: rape is:” <u>“sexual relations with a woman without her consent and with a girl under the age of 18 with her consent”</u> where “sexual relations” includes sexual intercourse, oral intercourse and penetration with objects and “consent by the way of coercion, fear, lying, kidnapping, or bondage shall not be considered consent and consent given when unconscious shall not be considered consent.”
Punishment:	Section 376: The term of imprisonment “shall <u>not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age</u> , in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both...” Punishment is different if certain aggravating conditions are present where the rapist acts in his or her capacity as a police officer or “commits rape on a woman knowing she is pregnant,” etc.	Section 376: There is <u>imprisonment “for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age</u> , in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.” 2020 amendment added the <u>death penalty</u> .	If the victim is under 10 or over 70, punishment is life imprisonment otherwise it is 7-10 years. For marital rape 5 years.
Disclosure of identity of the rape victim:	India also has a law prohibiting the disclosure of identity of victims of rape punished by either two years in prison or a fine. The Supreme Court of India has ruled that identity cannot be disclosed even if the person is dead.	Section 14 of the Women and Children Repression Prevention Act has a two-year penalty or a fine or both on anyone who discloses the identity of a rape victim.	Prohibitions on disclosure of identity comes from the general Crime Victim Protection Act, 2075 (2018)

Global comparison of ‘Rape Laws’

Rape Laws in the Middle East (Egypt and Iraq) and in South Africa			
Countries:	Egypt	Iraq	South Africa
Name of Law:	Criminal Code of Egypt	Iraq Penal Code	Criminal Law Amendment Act
Most Recent Amendment:	Last amended 2020	Last amended 2010	Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
Definitions:	Article 267: (Not termed rape, but rather is) “indecent assault” includes “whoever lies with a female without her consent”	Article 393(1): “ <u>Any person</u> who has <u>sexual intercourse</u> with a female without her consent”	<u>Any person</u> (‘A’) who <u>unlawfully and intentionally commits an act of sexual penetration with a complainant</u> (‘B’), without the <u>consent</u> of B, is guilty of the offence of rape. There is an additional crime of “compelled rape where” where a third person compels another to rape.
Punishment:	Article 267: Permanent or temporary hard labor depending on “if the felon is from the victim’s ancestors, or those in charge of rearing, observing, or having power on her, or is a paid servant to her” or depending on other aggravating or mitigating factors.	Article 393(1) gives up to <u>15 years in prison</u> and lists a set of aggravating factors including that the victim at the time is under 18 years, the offender was a relative of the victim or guardian or the victim is the offender’s servant,” if the offender was a public official, etc. If the offense leads to death, the punishment is <u>life imprisonment</u> .	<u>Up to life imprisonment with a minimum of 15 years</u> that the judge can deviate from: see Section 51 of the Criminal Law Amendment Act of 1997. There are a number of aggravating and mitigating factors that may inform a judge’s decision.
Disclosure of identity of the rape victim:	In 2020, Egypt approved a law to protect the identity of women who come forward to report rape and imposes a penalty on those who violate it.	There are several specific rules of evidence but it is unclear if these provide sufficient or any protection from disclosure for a rape victim’s identity.	No specific law for survivors of rape exists but there is a broader robust framework of privacy laws that would protect the rape victim from harmful disclosure of her identity.
Rape Laws in the Global North			
Countries	U.S.	U.K.	Canada
Name of Law:	U.S. Penal Code	Sexual Offences Act 2003	Canada Criminal Code
Most Recent Amendment:	Last amended 2013	2003	1985 “rape” charged to “sexual assault”
Definitions:	10 U.S.C § 920 - Art. 120. “ <u>sexual act upon another person</u> by- (1) using <u>unlawful force against that other person</u> ; (2) using force causing or likely to cause <u>death or grievous bodily harm to any person</u> ; (3) threatening or placing that other person in fear that any person will be subjected to <u>death, grievous bodily harm, or kidnapping</u> ; (4) first rendering that other person <u>unconscious</u> ; or (5) administering to that other person by <u>force or threat of force, or without the knowledge or consent of that person, a drug</u> ... or control conduct; (b)(2) commits a sexual act upon another person- (A) <u>without the consent of the other person</u> ; or (B)when the person knows or reasonably should know that the other person is <u>asleep, unconscious, or otherwise unaware</u> that the sexual act is occurring; or (3) commits a sexual act upon another person when the other person is <u>incapable of consenting</u> to the sexual act due to- (A)impairment by any drug, ... or (B)a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person” “sexual act” means- (A)the penetration, however slight, of the penis into the vulva or anus or mouth; (B)contact between the mouth and the penis, vulva, scrotum, or anus; or (C)the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. (7)Consent.- (A)The term “consent” means a <u>freely given agreement to the conduct at issue by a competent person</u> . An expression of lack of consent through words or conduct means there is no consent. (B)A sleeping, unconscious, or incompetent person cannot consent... (C)All the surrounding circumstances are to be considered in determining whether a person gave consent.	Section 1: (1)A person (A) commits an offence if- (a)he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b)B does not consent to the penetration, and (c)A does not reasonably believe that B consents. (2)Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.	Section 265 defines assault: "A person commits an "assault" when: (a) <u>without the consent of another person, he applies force intentionally to that other person, directly or indirectly.</u> " "Aggravated sexual assault in Section 273(1) occurs when the person "in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant" where is 273.1(1) ""consent" means... <u>the voluntary agreement of the complainant to engage in the sexual activity in question.</u> "
Punishment:	There is a wide range from <u>fines to life imprisonment</u> depending on the age of the victim, the use of force, etc. (18 U.S.C. §§ 2241-2248) but death may not be imposed for rape.	Maximum penalty is life imprisonment	The term of imprisonment is maximum 10 years or, if the complainant is under the age of 16, 1-14 years.
Disclosure of identity of the rape victim:	No specific law for victims of rape but relies on a broader framework of privacy laws.	A broader framework of privacy laws exists.	The Criminal Code has a mandatory publication ban on victim identity.

(intentionally or purposively), strict liability, acting with criminal negligence or with knowledge etc. However, it is worth pointing out that some scholars have proposed changing mens rea requirements as a way to reform rape laws and this approach is worth considering.

Definitions: Basic elements:

All countries have the same general overarching framework of what con-

stitutes rape, but the particular words chosen have immense consequences for who is considered a perpetrator and who a victim/survivor and what conduct suffices as rape.

Almost all traditional definitions of rape begin by describing it as sexual intercourse between a man and a woman with intercourse defined as penetration by a penis. Pakistan, India, and Bangladesh draw from a similar

colonial heritage to define rape in this way. The laws in the U.S. and Canada, though, have a more progressive definition where rape or sexual assault may be committed by any “person” against any other person and the sexual act punished is not only penetration but also any “contact between the mouth and the” genitals or anus with penetration not just by a penis but by any part of the body or any object. This definition characterizes rape as an

exercise of power and covers transgender individuals, children, and other vulnerable people.

Other than the U.S. and Canada, the definition of rape in all other countries is deficient in some way. The laws in Egypt and Iraq expand on who the assailant can be (“any person”) but still limit the victim to a “female.” On the other end, the U.K. law begins with a gender-neutral perpetrator but

Global comparison of 'Rape Laws'

this person is automatically gendered as male since "he" is one who "intentionally penetrates the vagina, anus or mouth of another person with his penis." The South African law, for its part, does indicate that any person can commit the crime of rape on anyone but limits intercourse to penetration by a penis.

Given how prevalent rape is among transgender individuals and young boys in Pakistan, Pakistan should follow the Canadian and U.S. precedent and extend the coverage of rape laws.

'Not his wife':

Historically, rape laws did not punish marital rape. The Indian and Bangladeshi laws have an explicit exception for rape for when a man has intercourse "with his own wife," which was removed from an early draft of the law in Pakistan. Article 427 of Iraq's penal code allows men to escape prosecution for rape if they marry the victims/survivors of the assault. Egypt had this marry-your-rapist law in place until the 1990s before it was amended. Other countries like Nepal implicitly punish marital rape by reserving a lesser, different penalty for the offense. Still others like Pakistan have a separate law for domestic violence that is expected to cover marital rape such as India and South Africa.

The U.S., U.K. and Canada have mostly relied on the absence of a carveout for marital rape to prohibit it and court cases such as *R v. R* in the U.K. affirm this.

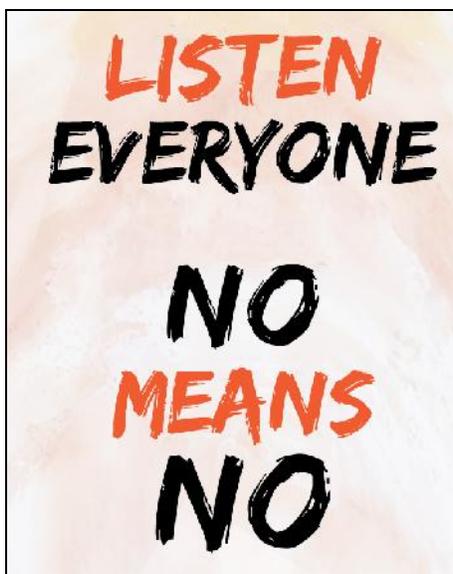
Following these countries, to promote a more progressive understanding, prosecutors and judges in Pakistan should take note of the absence of the exception for marital rape in Pakistan's law as implying that it is covered by the broader definition of rape. To make sure the crime is considered seriously, Pakistan should go one step further and affirmatively recognize the existence of marital rape here.

While all four provinces in Pakistan have enacted special domestic violence laws that do this to a degree (covering "sexual abuse"), the approach is fragmented. A common limitation on their implementation is the notion that punishing marital rape intrudes into the private sphere excessively in an un-Islamic, unconstitutional manner. The laws also frequently carry less harsh penalties than rape does even though rape whether it occurs inside or outside of marriage is no less traumatizing and harmful to the survivor. These limitations are not present in the legislation of other jurisdictions.

'With force and/or lack of consent':

At the core of what distinguishes lawful from unlawful sexual intercourse is lack of consent (except in the case of minors where intercourse is a crime even with consent). The India, Pakistan, and Bangladesh laws state that to be rape, intercourse must either be "against her [the woman's] will," without her full informed "consent" and "with or without her consent when she is under sixteen years of age." The Egypt, Iraq and U.K. laws similarly require a showing of a lack of consent generally with U.K. specifying that the belief must be reasonable.

While Pakistan has established that the sex is non-consensual, though, what remains is defining and understanding what constitutes "consent." In some countries, consent requires some showing of resistance from the woman such as a direct statement of "no" or conduct indicating dissent. In this view, silence and passivity in the face of another's advances itself is not construed as lack of consent. In the U.S., for example, lack of consent was traditionally closely connected to "force" or the "threat of



force," an act that generates fear and induces a woman to have intercourse. Courts often required proof that the defendant threatened or placed the woman in actual fear of direct bodily harm or injury. Canadian law provides a good model here. In its Criminal Code Section 273, it defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question" that may be expressed by "words or conduct." Consent does not exist "where the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority" and the defendant is also limited on his reliance on a mistaken belief "that the complainant consented to the activity...where (a) the accused's belief arose from the accused's (i) self-induced intoxication, or (ii) recklessness or wilful blindness; or (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting." While even this model has received much criticism, the best first step for Pakistan would be to move towards such a progressive understanding of consent in its legislation since courts in practice have tended to interpret consent conservatively and may require actual physical marks on the victim/survivor before considering the offense rape.

Punishment:

Rape is typically an offense severely punished under the laws of most countries. In Pakistan, the punishment is a minimum of ten years and a maximum of twenty-five years or death. Penalties are higher in certain circumstances such as when "rape is committed by two or more persons in furtherance of common intention of all," when rape is "of a minor or a person with mental or physical disabilities" and when "a public servant including a police officer, medical officer or jailor, taking advantage of his official position commits a rape." Here, punishment is either death or life imprisonment. In India, Nepal and Bangladesh reduce the minimum and maximum sentence for certain defendants in the case of marital rape and depending on the age of the survivor. Egypt, Iraq, U.K., and the U.S. limit sentences to temporary or life imprisonment with the specific sentence varying depending on aggravating and mitigating factors surrounding the circumstances of the crime.

The death penalty is widely considered a human rights violation, in particular against the right to life among others. It has high economic and social costs on society. Considering this, Pakistan should move away

from imposing the death penalty for any and all violations and limit the maximum term to life in prison.

Disclosure of identity of the rape victim:

With the Criminal Law (Amendment) (Offences Relating to Rape) Act, 2016, Pakistan prohibits the public disclosure of the identity of a rape victim. In doing this, Pakistan is similar to Bangladesh, India and Egypt. This is welcome protection for survivors. The only part of the Act that may prove problematic is where disclosure is authorized if the victim is dead since this may stigmatize the victim's family. As a result, the Indian Supreme Court in 2018 imposed an absolute and strict bar on disclosure. Canada too has a mandatory ban on disclosure that Pakistan should consider adopting.

Recommendations:

Below is a summative list of recommendations in light of precedents:

1. Pakistan should explicitly include transgender individuals and married women in the definition of rape. Rape is a crime best characterized by abuse of power generally.
2. Pakistan should expand the definition of intercourse to beyond penetration by a penis to explicitly include oral penetration or contact between the mouth and the genitals or anus and penetration by any part of the body or even an object.
3. Pakistan should specify and provide guidelines on what constitutes "consent" moving towards an affirmative consent standard.
4. Pakistan should abolish the death penalty for all offenses including rape.
5. Pakistan should consider further strengthening existing law on non-disclosure of a rape victim's identity.

On closing, it is critical to note that having a beneficial law is necessary but not sufficient to addressing the problem. If the law is not implemented, it can do little beyond symbolic change. Currently, according to the NGO, War Against Rape (WAR), "the conviction rate in rape and sexual assault cases is abysmally low, under 3%." Judges, lawyers, and the public must be made aware of the law and the ubiquity of the problem of rape and prosecutors must bring cases using it for the law to actually have an impact on the lives of rape survivors. Still, lack of prosecution is only part of the problem. To ensure full and proper implementation of the law, societal norms must fundamentally change to blame men who rape not the women who survive.





Legislative Watch is produced by the Resource Service of the JAZBA Programme of Aurat Publication and Information Service Foundation at Islamabad.

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Critical Review of the Khyber Pakhtunkhwa Domestic Violence Against Women (Prevention and Protection) Act, 2021

From Page 1

functions do not include assisting complainants to pursue their cases in court and hold the perpetrator accountable. Women especially from low-income communities may require this assistance. Also glaringly missing are requirements that the police and prosecutors take such complaints seriously. Instead, the Domestic Violence Act prioritizes mediation in section 8(2).

Further, for the District Protection Committee to truly function and assist women, the government of Khyber Pakhtunkhwa must allocate a sizeable budget to the committee. Proper rules of business will need to be created and staff hired to hear complaints otherwise responding to cases will take too long especially with quorum requirements. Biannual reports recording the number of complaints should be available in public records and accessible by NGOs working in the area.

The Model Framework not only provides social and medical assistance to survivors of domestic violence but emphasizes the role that the criminal justice system can play. It gives police officers a duty to respond to cases of domestic violence and demands that they not assign it "a lower priority." It also requires the police to take action when they receive a complaint including interviewing the parties and witnesses, creating a record, providing shelter, transportation to shelter and medical

assistance etc., and to file a detailed report and inform the victims of her rights. While police is overburdened in Pakistan it may be better to allocate many of these functions to the District Protection Committee, because in many cases of domestic violence, women may naturally approach the police first. The police should have gender sensitization training and have some responsibility to take and refer women to the District Protection Committee as well as filing a FIR. The police should also inform women of their rights.

Assistance by Government:

In Section 11, the Government agrees to establish a helpline, shelter homes, and make arrangements for psychological and other counselling and to hold sensitization and awareness trainings of government officers, police and public persons which is welcome if implemented. The Domestic Violence Act, though, mostly covers only emergency services, but what would happen when a woman needs further assistance? The Model Framework establishes crisis intervention services, counselling and long term job training, separating emergency from non-emergency services. The Model Framework also includes trainings not just for police officers, but also for judicial officers and counsellors and sets up free counselling programs as well as special family courts for domestic violence survivors.

Petition to the Court:

A woman is only given 15 days to approach a court and seek relief. Given the difficulties raised by domestic violence, this limit is inadequate and should be modified. Nevertheless, if a woman can get her case filed in time, the Court is empowered to pass several helpful orders. These include preliminary injunctions in case of an emergency. As in Punjab, the Court can stop the perpetrator "from dispossessing, or in any other manner, disturbing the possession of the complainants from the household" and direct the perpetrator "to return and put in possession the complainant in the same property to which she [the complainant] is entitled." The Court can also provide comprehensive monetary relief including "(a) compensation to the complainant for suffering as a consequence of economic abuse to be determined by the Court; (b) loss of earnings; (c) medical expense; (d) the loss caused due to the destruction, damage or removal of any property from the control of the complainant; and (e) the maintenance for the complainant and his [her] children, if any, under family laws for the time being enforce."

Monitoring and Evaluation:

There is no monitoring and evaluation process other than biannual reports by the District Protection Committee. The

Model Framework details the components of such a report and the content of each report. The annual report envisioned in the Model Framework should include "(a) The total number of reports received; (b) The number of reports made by victims of each sex; (c) The number of reports investigated; (d) The average time lapse in responding to each report; (e) The type of police action taken in disposing cases including the number of arrests" and others. The Model Framework also sets up a robust monitoring and evaluation framework.

Something to Consider:

All around the world to help improve access to justice, governments, human rights organizations, and others are looking to "community paralegals." These are individuals from the community trained in basic legal assistance who can help others access their rights. The Government should consider instituting a community paralegal type program for women suffering domestic violence to address the immense gap in access to justice. Community paralegals are an especially pragmatic solution because they are low-cost and in understanding the needs of the community, can provide holistic assistance including emotional solidarity and support. Community paralegals can help women pursue their cases in court if they so choose and inform them of their rights.

Federal Domestic Violence (Prevention and Protection) Bill, 2020, faces hurdles

AF Report

The Domestic Violence (Prevention and Protection) bill was an official bill and had the endorsement of the Federal Cabinet. It was introduced in the National Assembly, by Federal Minister for Human Rights Shireen Mazari, on April 19, 2021. The bill was passed the same day and was referred to the Senate.

The bill failed to get through in the Senate where the opposition defeated the government by one vote to block immediate passage of the proposed law. The bill, instead was referred to the relevant standing committee for further deliberations.

The Senate Committee on Human Rights submitted its report on June 18, 2021, recommending that the bill be passed by the senate with a few minor amendments. On June 21, the bill passed the Senate and was returned to National Assembly for passage.

The Federal Government and National Assembly, this time however, behaved differently. On 5 July 2021, the adviser

on parliamentary affairs to Pakistan's Prime Minister, Babar Awan, wrote a letter to National Assembly Speaker Asad Qaiser, and asked that the Domestic Violence (Prevention and Protection) bill, 2021 be referred for review to the Council of Islamic Ideology (CII). In providing this rationale for the referral, Babar Awan made reference to several Islamic provisions of the Constitution of Pakistan, including article 230 (1) (b), which provides that the functions of CII are "to advise a house, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether proposed law is or is not repugnant to the injunctions of Islam," and to "concerns of various segments of society."

The CII reportedly has already expressed reservations to the Ministry of Human Rights about several provisions in the bill on June 17, 2021 and had recommended a halt to the legislative process "until the Islamic constitutional body reviewed the bill and gave its finding to the Government."

In addition, a senior official of the Ministry of Human Rights had stated

that on receiving the June 17 letter from the CII, "the ministry had halted the process and now the ministry would move ahead in consultation with the CII."

In many ways, the federal Domestic Violence Bill is better than the Domestic Violence Act. The Domestic Violence Bill covers not just women, but also "children, elders and any vulnerable persons." It also cites international obligations including CEDAW. It has an expansive definition of domestic violence covering "all acts of physical, emotional, psychological, sexual and economic abuse committed by a respondent against women, children, vulnerable persons, or any other person with whom the respondent is or has been in a domestic relationship that causes fear, physical or psychological harm to the aggrieved person" and defines "sexual abuse" as conduct that violates the dignity of the person.

Punishment is as provided under the PPC and if not in the PPC then 6 months to 3 years as well as a fine of 100,000 and a minimum of 20,000 as compensation to the victim. There is

also a penalty established for breach of an interim order by the respondent.

The Domestic Violence Bill provides a right to reside in the household and allows the court to consider just the respondent's affidavit to grant an interim order as well as to make protection orders and residence orders and grant compensation. It even directs the employer or debtor to pay the aggrieved person directly.

Like the Khyber Pakhtunkhwa Domestic Violence Act, the Domestic Violence Bill establishes a Protection Committee to support women. The Protection Committee is intended to be part of the Ministry of Human Rights and include protection officers who can help file applications for protection orders, report to the Committee, provide legal aid, connect an individual with service providers providing medical aid or counselling. The protection officer is similar to a community paralegal in helping connect and facilitate women to access resources and learn their rights. The Domestic Violence Bill also includes service provider obligations providing holistic assistance.

Why the Domestic Workers Bill, 2020 is needed

AF Report

The International Labour Organization (ILO) estimates that around 8.5 million people in Pakistan are domestic workers. Domestic workers include maids, individuals who provide elderly and childcare and others involved in "household work." Domestic work in Pakistan, like in other countries, is considered "women's work" and "care work". Domestic workers are underpaid, overlooked, and employed in the informal market unregulated by the government. The COVID-19 pandemic has greatly affected these women who have lost their livelihoods and been denied basic living wages and rights. Most domestic workers are women and girls, and many are from religious minorities, particularly the Christian community.

To address the plight of women, in 2011, the ILO adopted the Domestic Workers Convention. The Convention recognizes "that domestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights" and makes several recommendations for legislation.

Following this, as of April 2021, the Islamabad Capital Territory Domestic Workers Bill ("Domestic Workers Bill") has passed the National Assembly. This bill has yet to pass the Senate but if passed, will be an important step to support domestic workers and follow the example of the Punjab Domestic Workers Act, 2019.

Before passing the bill, though, the government should consider amending it to better reflect international best practice as identified by the ILO Domestic Workers Convention.

Rights provided

In many ways, the Domestic Workers

Bill as is already furthers workers' and women's rights. The bill (1) reinforces the prohibition on child and forced labour, (2) proscribes discrimination based on religion, race, caste, creed, sex, ethnic background, place of birth, residence, domicile, and migration, (3) provides overtime wages, (4) requires employers to follow certain occupational safety and health measures, (5) provides medical and maternity benefits, (5) free time for a fulltime/live in domestic worker including a day off and decent living conditions, (6) paid leave and holidays, and (7) submission of a notice of termination.

However, some essential rights are absent from the bill. For example, rights related to the "freedom of association and the effective recognition of the right to collective bargaining" which the ILO Convention recognizes as especially important because workers are often alone in a particular household. Additionally, it should be specified that sexual harassment and other discriminatory harassment is prohibited against domestic workers and that the Ombudsperson for Sexual Harassment at the Workplace has jurisdiction over such cases. Discrimination against workers because of pregnancy should also be proscribed. In some cases, workers may be employed through an agency that may exploit them including by charging excessive recruitment fees. This should be banned.

Provision 11 may also create issues. The provision states that "every employer, on [a] yearly basis, shall ensure medical examination of domestic worker in a household by a registered medical practitioner and the domestic worker shall also be vaccinated and inoculated" with the employer bearing the costs. While this provision is laudable in intent especially with the onset of COVID-19, it does not account for the rights of the worker to refuse medical treatment. These liberty rights should not be forcibly infringed by employers or the government.

Provisions for implementation of the legislation

Besides the rights provided, another key component of legislation is the process set out for its implementation. The Domestic Workers Bill requires the "issuance of a letter of employment." This follows the ILO Convention which requires written contracts but the Convention, additionally, specifies several parts of a contract needed including "(a) the name and address of the employer and of the worker; (b) the address of the usual workplace or workplaces; (c) the starting date and, whether the contract is for a specified period of time, its duration; (d) the type of work to be performed; (e) the remuneration, method of calculation and periodicity of payments; (f) the normal hours of work; (g) paid annual leave, and daily and weekly rest periods; (h) the provision of food and accommodation, if applicable; (i) the period of probation or trial period, if applicable; (j) the terms of repatriation, if applicable; and (k) terms and conditions relating to the termination of employment, including any period of notice by either the domestic worker or the employer." Paragraph 6 of the recommendations also provide that the terms and conditions include "(a) a job description; (b) sick leave and, if applicable, any other personal leave; (c) the rate of pay or compensation for overtime and standby consistent with Article 10(3) of the Convention; (d) any other payments to which the domestic worker is entitled; (e) any payments in kind and their monetary value; (f) details of any accommodation provided; and (g) any authorized deductions from the worker's remuneration" and that domestic workers be provided assistance to understand the terms.

To boost implementation, the bill requires the employer to send a copy of this letter to the commissioner's office as well. While this is a laudable step, the bill does not provide an immediately applicable mechanism for monitoring, enforcement, and evaluation to make sure that households are in fact comply-

ing with this provision. Monitors should work in collaboration with courts, relevant government departments and others. One option is to have the administrator whose functions and power at present is unclear survey households and issue fines for violations of the law that he or she identifies. Employers may also be required to keep a record of extra hours worked and set a general work schedule. For workers who care for children or people with disabilities, specific "on-call" or "standby periods" can be specified as in South Africa and France. Additionally, for those desirous of filing grievances, while a Dispute Resolution Committee is envisioned, the law does not institute such a committee, rather the government "may, by notification in the official Gazette, constitute" one at an unspecified later date. Without a committee, no sanction provided in the bill applies as section 31 states, "No prosecution under this Act or any rules made thereunder shall be instituted except by or with the previous sanction of the dispute resolution committee."

There is an opportunity to sanction employers who do not abide by the minimum wage. Section 19(2) says that "any employer who contravenes the provision of this section shall be liable, on conviction before a Magistrate of the first class, to a fine not exceeding ten thousand rupees, and if the court trying such contravention by order." A fine of 10,000 rupees is insufficient especially considering that the minimum wage rate is 17,500 rupees. Likewise, the punishment for child labour should be higher especially if the child is involved in a dangerous occupation.

The bill particularly, though, will face issues at the implementation stage especially if workers are not aware of the rights it provides them and so do not assert these.

The Parliament should, then, work to correct these loopholes and gaps in the legislation and pass an act that is critical for domestic workers.

Khyber Pakhtunkhwa Rehabilitation of Minorities (Victims of Terrorism) Endowment Fund Act, 2020: A Step in the Right Direction

Article 35 of the Constitution of Pakistan requires the State to "safeguard the legitimate rights and interests of minorities." Despite this constitutional protection, religious minorities are facing multiple problems in every area of life. They are marginalized in representation in elected institutions, public sector service institutions and job market. Although successive governments have taken measures to uplift their status and improve their living conditions, their plight continues to linger and requires more radical reforms in their favour.

To truly include minorities as equal citizens in the country, the federal and provincial governments must recognize their specific needs and interests.

Minorities are particularly vulnerable to targeted attacks and conflict and disproportionately suffer

from terrorist attacks in Pakistan. Victims and survivors deserve respect, recognition, reparations, and support following such attacks.

The Khyber Pakhtunkhwa Rehabilitation of Minorities (Victims of Terrorism) Endowment Fund Act sets up a fund with at least PKR100 million to provide such support. The law follows an order by the Supreme Court of Pakistan after a 2013 attack on the All Saints Church in Peshawar. It has several positive aspects including providing for audit to reduce corruption and allowing for the allocation of immediate emergency payments.

However, while a welcome addition and a long overdue recognition of minorities, this law has some key flaws that limit its reach. Most critically, the scope of the legislation remains unclear. It gives too much dis-

cretion to the Khyber Pakhtunkhwa Endowment Fund Assessment Committee to determine who counts as a "minority" and what counts as "terrorism" as the law leaves these essential terms undefined. Further, the committee structure and process makes it appear as if many applications are not expected since it is unclear how the Committee will investigate potential cases, whether hearings are expected etc.

Besides the lack of clarity as regards implementation, the law also does not account for the fact that survivors and victims may need support beyond monetary assistance in the form of psychological counselling, medical assistance, job training, development, and rehabilitative care. Ultimately, more laws like this are needed to spur a change in society to recognize minorities as full citizens, deserving of protection.



Women leaders and participants of the event organised on International Women's Day celebrations.



A view of the International Women's Day celebrations.

Women resolve to get 33% representation in local governments through direct elections

AF Report

Every year, on 8th March, the world celebrates International Women's Day. The United Nation's proposed theme for International Women's Day this year was "Women in Leadership: Achieving an Equal Future in a COVID-19 World." Keeping in mind the need for women's representation in political positions, especially at the local government level, Aurat Foundation celebrated the day by hosting a Women Leadership Assembly at the Rawalpindi Press Club followed by a women's rally.

The celebration brought together women leaders from all mainstream political parties (PMLN, PTI and PPP), human rights activists, artists, and other women participants under the network "Women Alliance Pakistan." Also present at the event was Mr. Christopher Khung, Head of Cooperation, High Commission of Canada.

Speakers included Ms. Tahira Aurenzaib, Member of the National Assembly (PML-N), Ms. Abida Munir (PTI) and Ms. Sumera Khan, City President (PPPP) who discussed strategies to mainstream women in leadership positions in political parties and legislatures as well as Ms. Rubina Akbar, ex-councilor (PTI), Ms. Samina Shoaib, ex-councilor (PML-N), and Ms. Azra Younas, ex-councilor (PPPP), stressing the need and significance of women leadership in local governments. Ms. Aliya Mirza, poet, artist and activist, and Ms. Huma, shared resistance poetry.

Ms. Tahira Abdullah, human rights activist, gave a personal and collective account of struggle for women empowerment.

Ms. Mumtaz Mughal, Director Programmes of AF, and Mr. Naeem Ahmed Mirza, Executive Director,

Celebrations of International Women's Day



Speakers of the event on the stage.

AF, also spoke at the event, giving an overview of the 2021 International Women's Day theme and the importance of women's leadership.

Ms. Razia Sultana, President of the Women Alliance Pakistan gave concluding remarks. The event was followed by a rally.

Women made the following demands to improve women's participation in politics, during the event:

- ensuring at least 33% representation for women in the general election and in all political parties at all government levels,
- guaranteeing direct election for all local government seats immediately,
- increasing representation of women as Chairpersons and vice-Chairpersons on general seats of local government,
- reserving seats for women peasant workers, religious minorities, transgender individuals, people with disabilities and youth,
- taking steps to ensure women's active participation in high-level decision-making including through training programs for women coun-

- creating women's caucuses,
- treating domestic violence as a serious offense with local rehabilitation and arbitration councils and councilors acknowledging its severity,
- improving women's mobility and safety in public spaces,
- granting women access to economic resources including land, and
- recognizing women's informal and care work.

Mr. Christopher Khung, Head of Cooperation, High Commission of Canada, also emphasized the need to include men in the struggle for women's rights and underscored that Pakistan cannot develop if its women are not empowered, stressing the full support of the Canadian government for the women of Pakistan's struggle for their political rights.

Ms. Abida Munir (PTI), Ms. Sumera Khan, City President (PPPP), and Ms. Tahira Aurenzaib, Member of the National Assembly (PML-N) all stressed the need to give women the rights promised to them by Islam and especially, to educate men and boys about the need to respect women.



Women leaders and participants at the event organised on IWD celebrations.