

NUMBER 9

# CMI WORKING PAPER

DECEMBER 2017



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CMI Working Paper number 9  
December 2017

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ISSN 0804-3639 (print)

ISSN 1890-5048 (PDF)

ISBN 978-82-8062-677-6 (print)

ISBN 978-82-8062-678-3 (PDF)

[www.cmi.no](http://www.cmi.no)

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## INTRODUCTION

Many countries with Sharia-derived legislation criminalize consensual sexual relations outside of marriage. This criminalization creates important barriers to women's access to protection against rape, as documented widely over the last two decades (Khan 2003; Lau 2007; Mir Hosseini and Hamzić 2010; Tønnessen 2014; 2017). These barriers may include an impossibly high evidentiary threshold for establishing rape in court and that victims who claim they have been raped risk being incriminated for adultery instead. However, the exact dynamics vary, depending on how the country categorizes the crime of adultery (*zina*) and to what extent the crime of *zina* is distinguished from that of rape. The answers to such questions are shaped by the specific approach to Islamic jurisprudence in the country at question and the status of such jurisprudence vis-à-vis codified law.

This working paper undertakes an initial survey of the dynamics through which the criminalization of female sexuality structures women's access to protection against rape in Afghanistan, examining both legislation and legal practice. Given the relative dearth of existing research and material on this topic in Afghanistan (but see Latiff 2009; Tawfik 2009), this paper is necessarily preliminary in scope. It nonetheless puts forward three, interrelated arguments. Firstly, the paper argues that rape victims' vulnerability to incrimination for *zina* (and the acute unpredictability about the grounds for incrimination) hinders their access to justice. Secondly, the paper argues that the *zina*-rape relationship in its narrow sense only partially addresses the nexus between the criminalization of female sexuality and protection against rape. A fuller appreciation of this nexus necessitates zooming out: initially to a peculiar Afghan legal practice—the detaining of women for “running away” from home—and then to how that practice blocks protection against a prevalent form of sexual violence in Afghanistan—forced marriage. Finally, the paper suggests that linkages between the protecting of women against sexual abuse and the policing of female sexual conduct must be understood in the context of a state whose default position has been to relegate female sexuality to family control, rather than to directly intervene. Thus, while the Afghan state has routinely prosecuted and detained women (as well as some men) for consensual sexual transgressions, it has not, by and large, sought to use the figure of the unchaste or immoral woman as a tool for expanding its power over society, in the way witnessed, for instance, in contemporary Iran and Sudan (as well as in Afghanistan during Taliban rule). Correspondingly, the state has also been a reluctant intervener in regulating coercive sexual crimes. In a number of high profile rape cases, the government has only acted when popular mobilization has forced it to. Its standard response, particularly during the Karzai presidency, seems to have been that the regulation of women's sexuality properly belongs to the domain of family control.

This working paper was written for the CMI research project *Women's Human Rights and Law Reform in the Muslim World*, funded by the Rafto Foundation. It draws upon material from my earlier research, funded by the Research Council of Norway's grants 190119, 199437 and 230315. I wish to acknowledge the valuable support of the Research Institute of Women, Peace and Security (RIWPS) and the Peace Research and Training Organisation (PTRO) to this research. I also want to thank my long time research partner Mohammad Jawad Shahabi for his essential contributions to my work over many years.

## HISTORICAL TRENDS

### Zina and rape in Islamic law

Any analysis of the relationship between the prosecution of consensual sex and protection against rape in Afghanistan must grapple with the basics of Islamic law. Of particular significance, classical Islamic law categorizes all (heterosexual) intercourse outside of marriage as the crime of *zina*, one of a small group of crimes classified as *hadd* crimes, crimes against God. Classical Islamic law operates with several categories of crimes: *hadd*, *tazir*, and *qisa*.<sup>1</sup> *Hadd* offenses are held to be derived from holy sources (the Quran and the sayings and deeds of the Prophet) and, as such, are immutable. The definitions, punishments, and evidentiary requirements of *hadd* crimes are seen as fixed.

The fixed *hadd* punishment for *zina* is stoning of those who are married and lashing of those who are not. In order to apply this punishment, however, strict evidentiary requirements apply: four male witnesses must attest to the crime, or the perpetrator must give a personal confession (which is retractable at any time). As such, it has historically been rare for the *hadd* penalty for *zina* to be invoked. In cases where *hadd* is not invoked, judges may adjudicate the crime as a *tazir* offense. The category of *tazir* applies to sinful or forbidden acts that do not meet the procedural threshold of *hadd* or are not classified as *hadd* crimes. Whereas the application of *hadd* must adhere to fixed rules in terms of classification, evidence, and punishment, judges are afforded discretion to punish crimes under *tazir* as they see fit for the purpose of deterrence.

The adjudication of sexual violations under Islamic law through history have been a neglected topic in the academic literature. Scholars appear to disagree on whether *zina* (and therefore rape) has been punishable as a *tazir* as well as a *hadd* crime. The disagreement is especially the case with the Hanafi school of jurisprudence, the main school applied in Afghanistan. Some scholars have argued that the Hanafi school historically permitted *zina* to be adjudicated as a *hadd* crime only. If so, rape was unpunishable for all practical purposes, since admissible evidence (four male witnesses or a personal, repeated confession) would have been practically unobtainable (Azam 2015). Other scholars have suggested that sexual transgressions, including non-marital heterosexual intercourse, may and have been adjudicated under the rubric of *tazir*, meaning the *hadd* evidentiary threshold is not necessary for a conviction of rape (Peters 2005; Baldwin 2012). Whatever the case in earlier periods and places, modern –day legislation in Afghanistan has certainly categorized *zina* (and hereunder rape) as both *hadd* and *tazir*. In practice the application of the fixed *hadd* punishment for *zina* has remained largely theoretical, with offenders receiving prison sentences under *tazir* instead.

Still, the potential categorization of all non-marital intercourse as the *hadd* crime of *zina* is of importance for at least two reasons. Firstly, it invests the crime of adultery with strong religious significance. Secondly, as Azam argues, when rape is conceived

. . . as an act of nonconsensual or coercive fornication (*zina*), rather than as a discrete crime of its own[, this is] problematic . . . because of the presumption of consent that sometimes attends the notion of *zina*. The tendency of modern courts has been to regard rape as composite in nature. The first component, which is fornication, is often treated as separable from the second component, which is coercion, such that even if the coercive (or nonconsensual) aspect of the act cannot be proven, the fornication aspect can still stand on its own. (Azam 2015, 241)

Other aspects of Islamic law have also had implications for women’s access to protection against sexual violence in modern Afghanistan. As is discussed further below, the broad parameters set for *tazir* potentially conflicts with the principle of legality—that citizens can only be held criminally liable to acts identified as crimes in law. These broad parameters

1 “*Qisa*” refers to the right of retaliation for the families of murder victims and is not of relevance here.

has had important consequences for the adjudication of sexual crimes. They are in line with classical Islamic jurisprudence, where judges applied their knowledge of Islamic *fiqh* (established methodologies of legal reasoning) to adjudicate *tazir* crimes. However, as the *tazir* category of crimes increasingly became subject to codification, resembling Western codes, punishable crimes became limited to those clearly spelt out in written codes. Afghanistan, whilst fairly understudied as a case, is something of an exception to this trend, in the sense that its codifications have been more in line with classical Islamic traditions. Afghanistan's particular path towards legal modernization continues to shape how sexual violence and women's protection are governed in law today.

## Rape and zina in 20th century Afghanistan

Important origins of contemporary Afghan criminal law arose during the reign of Amanullah Khan (1919–1929). Under his rule, Afghanistan was one of very few independent Muslim nations in the world. In 1924, Amanullah promulgated a criminal code derived from Hanafi *fiqh* and resembling “classical *qanun* in that it only contains provisions based on *tazir* and does not specify the punishments for the offenses that are defined in the code” (Peters 2005, 105).<sup>2</sup> Subsequent criminal codes did specify punishments, but maintained the upholding of *hadd* and limited codification to *tazir* only. A preamble to the 1976 code, currently in force stated;

This law regulates the Tazir crimes and penalties. Those committing crimes of *Hudood*, *Qassas* and *Diat* shall be punished in accordance with the provisions of Islamic religious law (Hanafi religious jurisprudence)<sup>3</sup>

The 1976 penal code does not include rape as a distinct crime. Instead, it only refers to *zina*, which is punishable by 5–15 years imprisonment. The code appears to apply the crime of *zina* to both consensual (where both parties are punishable) and non-consensual (where only one party is punishable) acts, but without any guidance on how to distinguish between coercive and consensual scenarios. On the application of the *zina* provisions during the first years after the code's promulgation, little material is available. Legal officials working during the 1970s and 1980s confirm that the courts applied *zina* to cases of adultery as well as to cases of sexual violation. At the same time they recalled convictions for adultery to be far and few between, especially during the communist government of the 1980s (see Wimpelmann 2017). Moreover, the fixed *hadd* punishments of *zina* (and of other *hadd* crimes such as theft) had by then become obsolete.

However, this changed when Islamist movements came to power in Afghanistan, firstly during the brief Mujahedin rule (1992–1994), and then during the Taliban government (1996–2001). As in other places, Afghan Islamists made the “return” to Sharia central to their political projects, with the enforcement of the “God-given” *hadd* crimes assuming a special place. But unlike in other places where Islamists had seized power (for instance Iran, Libya, Pakistan, and Sudan), *hadd* punishments were never promulgated in law, but were enforced with reference to divine sources. According to a compilation of public executions, there were at least seven executions for adultery during Taliban rule, mostly by stoning of women (Strick 2015). Lashings of non-married offenders were frequent (as were amputations for theft). In addition, women were apprehended and sometimes imprisoned for leaving their homes unaccompanied by male relatives, or for “running away” from home without family permission, also with reference to sharia. Incarcerating women for the latter offense was a practice that would persist into the Karzai period, gradually becoming an important target for reform for women's rights promoters.

<sup>2</sup> “*Qanun*” is an Ottoman term referring to legislation promulgated by the ruler, which is (in theory) subservient and supplementary to non-codified Islamic *fiqh* (Vikør 2005, 207). The word is used in contemporary Afghanistan to refer to written laws.

<sup>3</sup> “*Hudood*” is the plural form of “*hadd*.”

## LEGAL DEVELOPMENTS IN THE OFFENSES OF RAPE, ZINA, AND RUNNING AWAY SINCE 2001

After the US-led overthrow of the Taliban government in October 2001, Afghanistan's political landscape changed dramatically and gave rise to new legal formations. Above all, unpredictability would come to characterize the post-2001 approach to *zina* and rape, both in legal texts and in legal practice. Afghanistan's legal corpus and the composition of its judiciary was marked by an extreme heterodoxy that reflected the turbulence of prior decades. The applicable (and often contradictory) legal framework included the old penal code, a new constitution, uncodified Sharia law, and eventually a new law specifically on violence against women. The judiciary was staffed with officials recruited in radically different political circumstances, from the eras of pre-war authoritarian government, Taliban, communist rule, and the new post-2001 period. Some had been educated at the secular university faculties of law and political science, others at Sharia faculties, whereas others still had no university education but were trained at religious madrassas. Unsurprisingly, these legal officials from different educational backgrounds and ideological dispositions differed in how they applied the law—or even in which laws they found applicable.

This section discusses a few of the major legal developments in Afghanistan since 2001 and then looks at application of the laws regulating sexual crimes in practice.

### Afghanistan's 2004 constitution

The penal code of 1976, which theoretically allows for the application of fixed *hadd* punishments for *zina*, has remained in place up until the time of this writing. In 2004, however, a new constitution proclaimed Afghanistan an Islamic Republic (as the country had briefly been during the Mujahedin government in the 1990s). Article 3 of the constitution states that no law can be contrary to the sacred religion of Islam. Article 130 also permits the application of (uncodified) Hanafi *fiqh* when no applicable (codified) law is available, so long as *fiqh* is applied within the constitution's limits. However, in potential direct contradiction to article 130, the constitution also establishes the principle of legality, that is, that crimes must be established by law (article 27). The constitution further declares that all Afghan citizens—men and women—“have equal rights and duties before the law” (article 22) and that the Afghan state should abide by the UN charter, the Universal Declaration of Human Rights, and other international treaties and conventions signed by the government (article 7).

In its totality, the legal framework set up by the constitution is open to multiple interpretations when it comes to adjudicating *zina* and rape. One question is whether the legal framework recognizes *hadd* punishments. A number of legal scholars, including UN officials, argue that the constitution prohibits the application of *hadd* punishments on the basis of the principle of legality, as well its prohibition of torture and punishment contrary to human dignity (article 29). Others argue the opposite, either based on article 3 (which forbids laws contrary to Islam) or based on the fact that the penal code of 1976 recognizes *hadd*, which, as an immutable offense, needs no additional promulgation. Regardless of whether the application of *hadd* is constitutional, Afghan leaders would find it politically challenging, if not impossible—to publically repudiate *hadd*, or the idea that adultery and fornication are in principle punishable by stoning or lashing (Wimpelmann, 2017). In any case, the debate about the state's recognition of *hadd* has remained mainly theoretical, since there have been no significant calls for actual government enforcement.

Other ambiguities have had more practical importance, however. As discussed above, the 1976 penal code uses the word *zina* for both consensual sexual intercourse and rape, without any distinction. This conflation—combined with an absence of guidance about the definition of rape, its distinction from *zina*, admissible evidence, and whether a woman reporting rape risks facing a charge of *zina*—leaves victims of rape with little protection. As discussed in more detail below, soon after the 2004 constitution went into effect, creating a separate crime of rape became a priority for women's rights activists. They first achieved

this in the 2009 Law on Elimination of Violence Against Women (EVAW Law), although with some limitations.

However, yet another ambiguity in the legal framework initially became the main focus when it came to women's protection: whether women could be imprisoned and charged for running away from home (*farar az manzel*). At any time during the Karzai government, several hundred women lingered in jail for moral crimes. Many of them had been detained or sentenced for *zina*, but a considerable number were incarcerated for running away from home. The practice of incarcerating women for running away had its roots in the Mujahedin government and was accelerated by the Taliban. As pointed out by activists and human rights officials, the practice had no grounding in codified law. In some parts of the country, a woman who appeared to be travelling alone or in the company of an unrelated male could be apprehended by the police and arrested. Typically, she would be subject to a forced "virginity" test. If she was unmarried and failed the test, she would be charged with *zina* as well as with running away. In other scenarios, women were tracked down and arrested at the behest of families after they ran away from home, typically to escape unwanted or violent marriages and sometimes in the company of a lover, self-chosen fiancé, or male friend.

In response to increasing protestations that the practice of imprisoning women for running away was contrary to Afghan law, legal officials sometimes justified their decision based on article 130 of the constitution, which permitted the application of Hanafi *fiqh*. However, the crime of running away could not easily be derived from *fiqh* sources either, and the International Development Law Organization, an international NGO, eventually solicited the opinion of the Afghan Supreme Court. In 2010, the court issued a statement that established that a woman's running away from home (unless straight to a government office or to the house of a close relative) was *per se an act of attempted adultery*, and therefore a crime.<sup>4</sup> Referring to the Sharia principle of the "prohibition of means" the court reasoned that "any action that lead to leads to a prohibited action is prohibited. That is why running away [to stranger] is prohibited and punishable" (cited in Wimpelmann, 2017, 113).

Essentially, the Supreme Court articulated a gender and moral order where a woman's existence outside of recognized forms of surveillance (chiefly those of her family) is a transgression in itself. As I have argued elsewhere, this order hinges on a construction of women as legal minors who cannot be entrusted with their own bodies. Rather it is others—family members and government officials—who can claim legitimate stakes in women's sexuality and can serve as the only reliable witnesses to women's chastity (Wimpelmann, 2017). What was fundamentally at stake for the Supreme Court was the maintenance of a social order where women's sexual purity, and therefore marriageability, could be certified by those recognized as trustworthy—primarily family members and public officials, and certainly not women themselves.

Subsequent statements from the government seemingly uphold the possibility that women can be prosecuted with running away via the "attempted adultery" construction. A 2012 directive from the Attorney General's Office instructs its staff not to file cases under "running away," which is not a crime under Afghan law, but then states that the instruction does not apply to "other circumstances where people run away to commit any other crime" (quoted in Hashimi 2017, 216). As Hashimi points out, by adding this exception, the directive potentially permits the prosecution of runaway women for attempted adultery. A Supreme Court decree the following year similarly leaves room for doubt: "A large number of girls because of family violations are living in shelters; therefore, running away in this situation must not be prosecuted. However running away *for the purposes of moral crimes* . . . shall be prosecuted" (quoted in *ibid.*, 217; emphasis added). Again, in late 2015, the Supreme Court issued another, similarly ambiguous judicial ruling on the question of running away, which bans "the imprisonment of women for running away from their families, [but limited] the ban . . . to cases in which the women went to a medical provider, the police, or

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4 Approval 572, dated August 24, 2010 of High Council of the Supreme Court. English translation by UNODC, Kabul. On file with author.



the house of a close male relative (mahram)” (Human Rights Watch 2017). At the time of writing, this appears to be the most recent statement by Afghan authorities on the issue.

## The 2009 Law on Elimination of Violence against Women

In parallel to efforts to clarify the legal issues of running away, women’s rights activists have attempted to make rape a distinct crime from *zina*. The creation of rape as a separate crime took place through the Law on Elimination of Violence Against Women, which was signed into force as a presidential decree in 2009. The law defines 22 acts as violence against women, one of which is rape (*tajavoz-e jinsi*, literally, “sexual violation”). As I have discussed in detail elsewhere (Wimpelmann 2017), supporters of the EVAW Law found it necessary to make several compromises in the process of promoting the law and getting it enacted. Firstly, they opted to push for the creation of a separate law rather than amendments of the existing penal code. This choice had both strategic and symbolic dimensions. Strategically, it was thought that amending the existing penal code would generate resistance amongst conservative actors, both in the Ministry of Justice and in the parliament, creating unnecessary delays and unwanted compromises. Symbolically, supporters of the EVAW Law thought that obtaining “a separate law for women” would send stronger signals when it came to ending impunity for crimes of violence against them.

Secondly the EVAW Law was not submitted to parliament, but to the president for enactment as a presidential decree. Whilst article 79 of the constitution allows the president to enact laws through decrees in “emergency situations” when the parliament is in recess, those decrees must be submitted to parliament for subsequent ratification. Supporters of the EVAW Law (both local and international) choose to use this route to get the law passed.<sup>5</sup> However, they failed to secure the law’s ratification in parliament, where it met considerable conservative opposition. In particular, conservative members of parliament opposed provisions criminalizing underage marriage and certain forms of polygamy and wife-beating, which they argued were contrary to Hanafi *fiqh*. They also thought the punishments for rape were too strict and worried that they would infringe on husbands’ prerogatives of sexual access to their wives (even if the EVAW Law did not explicitly criminalize marital rape). As a result of its rejection in parliament, the law is currently of dubious standing to many, particularly more conservative legal officials who use the lack of parliamentary approval as a reason to ignore the law.

Thirdly, the speed through which the EVAW Law was pushed through, and a sentiment of “now or never,” meant that the enacted law contains some technical weaknesses. One of these weaknesses is an unclear definition of rape. The EVAW Law uses the word *tajavoz-e jinsi* (“sexual violation”), which it defines as the commitment of “*zina* or *lavat* [sodomy] on an adult woman with force or with an underage woman even with consent, or an attack on the chastity or honor of a woman.” (Article 3). This is an improvement on the existing penal code, which appears to use the word “*zina*” for both consensual and coerced acts. The definition of rape for the first time also makes sexual relations with a minor girl a punishable crime; neither statutory rape nor underage marriage was criminalized in the existing penal code. Furthermore, the EVAW Law increases the punishment for forced marriage of adult women from what is stipulated in the 1976 penal code.<sup>6</sup> However many think the EVAW Law’s definition of rape as forced *zina* or *lavat* is weak, since it does not

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<sup>5</sup> Supporters of many other standalone laws also used this strategy during this time period. Arguably the understanding of an ‘emergency situation’ was stretched rather far in many of these cases.

<sup>6</sup> Specifically, the EVAW Law increases the punishment from one to two years in imprisonment for a forced marriage and from two to 10 years imprisonment if the marriage is forced in the context of a *baad* (giving a woman in marriage as a gesture of conciliation or compensation for a wrongdoing such as rape).

include the use of threats or other coerced, non-violent means of engaging in sex, nor does it provide a physical definition of the act of rape beyond merely referring to *zina* or *lavat*.<sup>7</sup>

### Afghanistan's new penal code

In 2012, the Ministry of Justice began working to develop a comprehensive penal code that would incorporate the proliferating number of standalone criminal laws produced since 2001. As could be expected, the process took several years and was not without controversy. At some point, a draft containing a codification of *hadd* (including the punishment of stoning for adultery) floated around the legal community in Kabul, generating a minor uproar in Western media. However, the final text was similar to the existing penal code in that it recognized but did not spell out *hadd* punishments, and declared itself to be regulating *tazir* crimes only. A more sustained point of controversy was the status of the ERAW Law and whether it would be incorporated into the new code or continue to exist as a standalone law. A number of Afghan legal scholars and Ministry of Justice officials, as well as expatriate advisors, argued that it should, pointing to the technical weakness of the ERAW Law and its possible marginalization if it were to remain as the only law outside the main penal code. Some also argued that the chances for parliamentary approval would be higher, since provisions on gender-based violence would be submitted as a part of large package. However, a group of Afghan women's activists wanted to keep the ERAW law as a separate piece of legislation and eventually prevailed. As a result, during the launch of the revised penal code in November 2017, a representative of the Ministry of Justice declared that "due to some considerations" the ERAW Law would remain a separate law, whereas all other laws with criminal provisions were now incorporated into the new penal code (Pajhwok, 2017).

Nonetheless, the new penal code contains more substantive provisions on sexual violence and rape than the ERAW Law. Firstly, it contains a clearer and more comprehensive definition of rape, which does not proceed from *zina* (as does the definition in the ERAW Law) and includes the use of threats and intimidation to coerce sex.<sup>8</sup> It also provides considerably stricter punishments for rape than for *zina*: the maximum punishment for *zina* in the new penal code is five years' imprisonment, whereas the punishment for rape is up to 16 years (20 years in aggravating circumstances, or the death penalty for group rape). Moreover, forced "virginity tests" without court order are listed under sexual assault, punishable with up to five years' imprisonment. Another article prohibits the prosecution of rape victims, which potentially signals better protection for women reporting rape. However, this article does not define who is considered a victim of rape; it could potentially be applied narrowly, so that only a woman whose claim of rape leads to an actual conviction is considered a victim. In general, however, the new penal code's provisions are stronger than corresponding articles in the ERAW Law. But there is now ambiguity about whether the ERAW Law or the new penal code will apply to cases of sexual violence after the new penal code enters into force in 2018.

### Application of the laws in practice

The laws applying to rape in Afghanistan lacks clarity, but information on actual legal practice is also difficult to obtain. Statistics on caseloads or conviction rates are generally not available in Afghanistan. The government has not made available any data on the number of registered criminal cases, let alone data on rates of indictment or conviction. Each institution (the police, the attorney general, and the judiciary) generally keeps its own separate record books, which are not always up to date and do not provide information about

7 Other aspects of the law have also come under technical scrutiny, for instance, the use of terms like "forced suicide" and "forced prostitution," which some legal scholars claim are unenforceable. For more details see Wimpelmann (2017, 63–64).

8 However, the new penal code implicitly links rape to *zina* by invoking *hadd* punishments for rape when the conditions for applying *hadd* is fulfilled (article 63(2)).

the final outcome of cases. The Afghan government does have data on its prison population, showing the number of convicted and detained inmates according to type of crime and gender. However, since crimes of rape, *zina*, attempted *zina*, and running away are often conflated, sometimes under a general rubric of “moral crimes,” these figures do not shed much light on the relative frequency of rape convictions compared to those of *zina*, or of the number of women convicted for *zina* as opposed to attempted *zina* or running away.

A series of studies, most of them conducted by the UN mission in the country (UNAMA 2011; UNAMA and OHCHR 2012; 2015) have sought to produce data on the outcomes of registered cases of violence against women. The most comprehensive report, published in 2014, contains data suggesting that 96 cases of rape were registered with the prosecution nationwide over a one-year period. The conviction rate was 38% (or 36 convictions), which was higher than other types of crimes listed in the report, such as murder or injury (MOWA 2014)<sup>9</sup>. By comparison, the number of women imprisoned for “moral crimes” (*zina*, attempted *zina*, and running away) generally ranged between 400 and 600 at any given time during the Karzai presidency. Moreover, a review of a smaller sample of cases from the prosecution office in Kabul suggests that a not insignificant number of registered rape cases are cases where family members attempt to bring charges against men who have eloped with their daughters without their permission (Wimpelmann, Shahabi, and Elyasi 2016).

Even in the absence of systematic quantitative data on adjudication, some trends regarding how the criminalization of *zina* has impacted protection against rape are discernable. A notable trend in the post-2001 period has been a series of high profile rape cases from 2008 onwards, resulting from public mobilization to bring about government action to punish perpetrators. These cases have typically involved family members attempting to file reports of rape with local authorities, only to be rejected and sometimes abused by the same authorities, often as a result of pressure exerted by the perpetrators. Rather than accepting the situation, these victims’ family members have gone public with their demands, accusing the government of failing to hold perpetrators to account. To many Afghans, these public calls for state intervention in rape cases have been novel and monumental, signaling a shift away from the predominant idea of rape as a private, shameful matter and from the gender ideology associated with this idea (Wimpelmann 2017). However, a closer look at the cases that have entered the public domain in this way reveals that they generally involve victims of unquestionable chastity, of a very young of age, or who were forcefully abducted in front of witnesses. In this sense, their impact in expanding the parameters of protection against rape is limited, since there was never any real possibility that the women at the center of these cases would have faced charges of *zina* or of other moral crimes (*ibid.*).

For other rape victims, the risk of facing such charges continues to loom large. Until the introduction of the new penal code, Afghanistan’s legal framework contained no guidance about whether and on what grounds a claim of rape could be converted into a charge of *zina*. In practice, it appears this was left to the personal inclination of legal officials. Research carried out in rural provinces reveals several instances of individual prosecutors charging claimants of rape with *zina* upon further investigations. To many, this was a source of pride (Wimpelmann, Shahabi, and Elyasi 2016). On the other hand, in Kabul, officials in the dedicated unit for the prosecution of violence against women seem to have little interest in introducing charges of *zina* or other consensual moral crimes, which would be beyond the unit’s mandate, in any case (*ibid.*). However, even in Kabul this scenario is far from altogether unheard of. In the much publicized case of Gulnaz, a young woman from Kabul who reported being raped by her cousin’s husband was sentenced to jail for adultery instead (The Guardian, 2011). She was eventually pardoned on the condition that she would marry the man she identified as her rapist.

Even when prosecutors have not done so, judges have sometimes introduced the charge of *zina* during trial. On the flip side, women initially charged with *zina* have sometimes been acquitted if legal officials have found credible reasons to believe that they have been raped. Lawyers working for the legal aid organization Medica Afghanistan report several

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<sup>9</sup> See Shahabi and Wimpelmann (2016) for a calculation of the conviction rate based on the data provided in the MOWA report.

instances of this (Boggio-Cosadia 2014). Overall, the risk of incrimination for *zina* seems to serve as a strong deterrence against reporting a case of rape, especially in the absence of family support. It is rare for women to independently approach authorities with a claim, perhaps with the exception of instances where a rape has led to pregnancy. To complicate matters further, families sometimes pressure women to pursue rape charges in the aftermath of pre-marital affairs, sometimes to pressure the man's family on matters of marriage or bride price (Wimpelmann, Shahabi, and Elyasi 2016).

In a broader sense, there is a particularly troubling relationship between the criminalization of various forms of female transgressions—*zina*, attempted *zina*, and running away—and a lack of protection against the form of sexual violence by far most prevalent in Afghanistan—forced marriage. Even if technically a crime, both under the 1976 penal code and the 2009 ERAW Law, forced marriage is generally treated as a regrettable and unhealthy tradition, rather than as a criminal offense (Wimpelmann 2017). At the same time, many, if not the majority, of women who run away from home are fleeing unwanted marriages. Often, women or young girls who face marriages against their will see no other option than to run away. Whilst some (usually educated women living in urban areas) are more likely to know about shelters or petitioning government offices as a possibility, others (particularly younger girls in remote and conservative areas where it is difficult to travel alone as woman) more often seek out a male co-elooper (typically by mobile phone). In order to escape an abusive situation, they effectively face no real alternatives other than to become criminals in the eyes of their communities and the law.

## CONCLUSIONS

This paper has undertaken a preliminary survey of the relationship between the criminalization of consensual sexual crimes and women's protection against sexual violence in Afghanistan, as it has evolved in recent history. Given the centrality of the relationship between *zina* and rape in discussions about women's protection against sexual violence in Sharia-derived legal settings such as Afghanistan, it has attempted to explore provisions in Afghan law relevant to these two offenses, as well as how rape claimants may become vulnerable to charges of *zina*. Both Afghan's legal framework and its actual legal practices have been characterized by high levels of ambiguity and unpredictability, rooted both in Afghanistan's complicated and contradictory legal corpus and in the extreme heterodoxy of its legal personnel.

However, in Afghanistan the impact of criminalization of female sexuality on women's ability to protect themselves from sexual violence extends beyond the *zina*–rape nexus. An issue of equal, if not greater, importance is the practice of imprisoning women who run away from their homes, often from coerced marital unions. The effect of the practice of incarcerating women for “attempted adultery or running away” is to essentially close off many women's possibilities of escaping the sexual violence of a forced marriage.

The logic espoused in this practice relies on castigating women outside of family or government supervision as sexual transgressors. Furthermore, the government has proved reluctant to intervene in rape cases, instead upholding a system where women's bodies are managed by their families. The Afghan government does not seek to use the punishment of adulterous or otherwise “immoral” women as public spectacles or in other ways to demonstrate its power over society. Unlike in contemporary Sudan or Iran, government lashings of women is unheard of (apart from a few renegade provincial officials in rural areas), and the thought of outsiders such as the government inflicting physical punishment on women would likely offend the sensibilities of most Afghans. Instead, the state's routine detainment of women suspected of *zina* or who have escaped from home can be interpreted as an attempt to shore up a system where “normal” women belong under family surveillance. The government's reluctance to intervene in rape cases also suggests a sentiment that sexual transgressions by or against women only occasionally belong in the public domain. These attitudes make Afghan women dependent on their families, which is of little help when sexual violations originate there—often in the form of coerced marriage.

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**This working paper undertakes an initial survey** of the dynamics through which the criminalization of female sexuality structures women's access to protection against rape in Afghanistan, examining both legislation and legal practice. Given the relative dearth of existing research and material on this topic in Afghanistan (but see Latiff 2009; Tawfik 2009), this paper is necessarily preliminary in scope. It nonetheless puts forward three, interrelated arguments. Firstly, the paper argues that rape victims' vulnerability to incrimination for zina (and the acute unpredictability about the grounds for incrimination) hinders their access to justice. Secondly, the paper argues that the zina-rape relationship in its narrow sense only partially addresses the nexus between the criminalization of female sexuality and protection against rape. A fuller appreciation of this nexus necessitates zooming out: initially to a peculiar Afghan legal practice—the detaining of women for “running away” from home—and then to how that practice blocks protection against a prevalent form of sexual violence in Afghanistan—forced marriage. Finally, the paper suggests that linkages between the protecting of women against sexual abuse and the policing of female sexual conduct must be understood in the context of a state whose default position has been to relegate female sexuality to family control, rather than to directly intervene. Thus, while the Afghan state has routinely prosecuted and detained women (as well as some men) for consensual sexual transgressions, it has not, by and large, sought to use the figure of the unchaste or immoral woman as a tool for expanding its power over society, in the way witnessed, for instance, in contemporary Iran and Sudan (as well as in Afghanistan during Taliban rule). Correspondingly, the state has also been a reluctant intervener in regulating coercive sexual crimes. In a number of high profile rape cases, the government has only acted when popular mobilization has forced it to. Its standard response, particularly during the Karzai presidency, seems to have been that the regulation of women's sexuality properly belongs to the domain of family control.

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