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**“A COMPARATIVE ANALYSIS OF LAWS REGARDING RAPE OF WOMEN IN
PAKISTAN AND INDIA.”**

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I. ABSTRACT:

“In order to understand rape in Pakistan and the development of the laws governing rape over the years since the inception of the country, it is important to trace the changes made in the legislations regarding rape in Pakistan. After all the additions and deletions in the Indian Penal Code relating to rape, the outcome or the current standing law of rape in India is much more substantial, with numerous intricacies and nuances. A comparison of laws regarding rape in India and Pakistan reveal certain major similarities and dissimilarities. This paper aims to explain in detail the development of the laws regarding rape, along with the major amendments and bills that led to the moulding of the laws regarding rape in both India and Pakistan. This has been substantiated with case laws for both the countries and finally, a comparison between the two countries has been drawn, with a judgement of the laws pertaining to rape in both the countries.

Keywords: Rape, Zina, Sexual intercourse, Indian Penal Code, Penetration.”

II. INTRODUCTION:

Pakistan and India are two countries that share the same roots and have struggled as one, having been territorially and historically united under the same rules, regulations and administration. Having been united all the way up till independence, both the countries have had the same level of development till 1947, when the geographic territory of India was split into two, resulting in the birth of Pakistan. Post-1947, both countries evolved in different ways, taking their own paths.

Often, one gets curious to know which country is excelling in different fields, which leads to a comparison between the two on various grounds. This very curiosity has caused the formation of this paper, where a specific area of law, that is, the laws regarding rape, is compared.

Various comparisons between the two have been drawn in the past, on factors like demography, economy, and military and so on. However, comparisons made between laws of importance in the international sphere, especially in those related to social welfare and justice, are surprisingly limited and must be explored. Hence, this paper examines laws concerning a particular topic of utmost public interest.

III. RAPE IN PAKISTAN:

In order to understand rape in Pakistan and the development of the laws governing rape over the years since the inception of the country, it is important to trace the changes made in the legislations regarding rape in Pakistan. After the separation of Pakistan from India, Pakistan inherited the same penal code as the one made by Lord Macaulay in 1860, which came to be known as the Pakistan Penal Code.

Since 1947, when Pakistan came into existence, the Pakistan Penal Code defined rape as a crime as follows:

“Section 375 Rape:

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

- 1) Against her will,*
- 2) Without her consent with her consent,*
- 3) When the consent has been obtained by putting her in fear of death or of hurt,*
- 4) 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*
- 5) With or without her consent when she is under sixteen years of age.*

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.¹

“Section 376 Punishment for Rape:

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.²

These were the laws regarding rape for a few decades after Pakistan’s inception, which was shifted under the ambit of the Hudood Ordinance in 1977. This brought about a massive change in governance for the next few decades till 15th November, 2006. General Zia-Ul-Haq, during his military rule in Pakistan, implemented the Hudood Ordinance, that is, on the Sharia principles. Hudood basically means the limits of what is considered lawful and unlawful by God. Limits here means the punishments laid down by Allah or the Lord, for certain specific crimes. This included Zina, which means adultery or fornication, along with prostitution and rape which became a part of Zina. Zina was a crime as stated in the Quran.

Under Zina, whoever was blamed for rape was considered to have been involved in fornication or adultery. In order to prove rape, the victim was to bring in four credible male witnesses who also blame the accuser of the rape. The inability to bring these witnesses would lead to a Zina or offence by the person, which would, in most cases be a woman. Zina, in itself, means an extramarital affair, including adultery and fornication. Rape is not termed as a Zina but is a type of Zina, called Zina-Bil-Jabr. This term is probably a paradoxical as it means “consensual extramarital sex by force”, in literal terms. Zina is one of the most morally unsound crimes under Hadd, which increases the apprehension in the minds of women who want to proceed with a complaint of rape. It gives the woman a negative tag and her reputation may be ruined due to stigmatisation or exclusion in society. Sexual intercourse

¹ Section 375, Pakistan Penal Code, 1860, No. XLV, Acts of Parliament, 1860 (Pakistan).

² Section 376, Pakistan Penal Code, 1860, No. XLV, Acts of Parliament, 1860 (Pakistan).

without consent is termed Zina-Bil-Jabr and carries a penalty upon the discretion of the judge, known as Tazir, for the criminal, of 25 years in prison and 30 lashes. There is also a more severe punishment, but, as noted, this has never been implemented. However, these penalties offer close to no protection to women since, in practice, a woman who has been raped and makes an accusation of Zina-Biljabr can easily become a victim to accusations of adultery which can, in turn, lead to the conviction for Zina.

The Hudood law led to a large number of women being jailed for an offence that they had never committed in the first place. Under the pretext of protecting and upholding morality and decency, these laws blatantly ignored the fact that further sexual harassment of these women by the police was not uncommon.

What must be clarified is that the Sharia law did indeed differentiate between consensual and non-consensual sex. Hence, hypothetically, it endorsed morality, justice and protection of the weak and vulnerable at all costs. However, the implementation of these principles turned out immensely unjust and discriminatory.

The Hudood Ordinance had significant aspects. Firstly, the Quranic decree regarding Zina and its punishment emphasized that Islam condemns any sexual relationship like adultery and fornication that are outside of marital relations. Rapists were expected to voluntarily confess to their crime, due to fear of God. Secondly, women were not recognised as witnesses and their statements were not recorded as that of a witness. The act of penetration is a necessary sight that the four male witnesses need to have seen. This is discriminatory by gender. Also, a group of people watching the penetration is a rarity. Also, rape can be twisted into an adulterous relationship easily by the criminal, especially if he has the influence or wealth. The police can be swayed into deceit; they, in turn, persuade the woman to not file the complaint.

In Pakistan, "Of the 7,000 women in jail around the country awaiting trial, 88 percent are accused of crimes under Hudood, according to the Lawyers for Human Rights and Legal Aid. Ninety percent of these women have no lawyer, and 50 percent do not know they are entitled

to contact one. Most women accused of Hudood violations are acquitted, but lose an average of five years to confinement, and lose their reputations as well."³

This situation led to a fall in the number of complaints of rape filed in the court of Pakistan, as women now feared for their own lives which they could lose by being wrongly convicted. Their motivation to stand against rape declined. Due to the requirement of male Muslim witnesses of the rape to prove it in court, there was further reluctance as, if they had no male witnesses, they would most likely be put behind bars for adultery, and stoned to death by the State for the offence of adultery. This was the loophole in the Hudood Ordinance.

As a result, many women who were brave enough to speak up in the patriarchal society of oppression tragically became double victims (first raped, and then sexually assaulted by the police or prison guards). Where Islam claims to stand for justice, in order to protect the weak and vulnerable, the Hudood laws not only failed to deliver justice but in reality, became a legal nightmare for the less powerful and the disadvantaged segments of the society.

More often than not, under the Sharia law, a woman who complained or claimed to have been raped was charged for an offence of adultery instead. Case law to highlight the plight of women under the Hudood Ordinance is *Zafran Bibi v. The State*⁴, who was convicted for Zina that is an extramarital affair and was in turn punished by stoning to death, even after she persistently claimed to have been a victim of repeated rape. The sorrowful part of this was that such cases were of a large number, which invariably caused the wrongful punishment of many women.

Several other such cases had arisen during this time, the most prominent of which will be discussed below.

³ Dr. Mohammad Omar Farooq, *Rape and Hudood Ordinance: Perversions of Justice in the Name of Islam*, SSRN, 5th December, 2006, Page 1.

⁴ 54 P.L.D. 2002 F.S.C. 1 (2002).

One of the earliest cases recorded to highlight the fallacies in the Hudood Ordinance is the ***Jehan Mina v. The State***⁵. Jehan was barely sixteen years of age at the time of her arrest. She was five to six months pregnant. She claimed that her uncle and cousin had raped her while she was visiting their home to look after a sick aunt.

When her pregnancy was discovered, Jehan Mina was living with another uncle, Noor Said. Allegedly, Jehan Mina's grandfather, who was also her legal guardian, wanted Noor Said to hand Jehan Mina over to him so that he could kill her in order to preserve the family's honour. Noor Said refused his family's pressure and lodged an F.I.R. with the police.⁶ Instead of starting an investigation of Zina-Bil-Jabr, shockingly, the police made Jehan Mina a co-accused in the case of Zina. The court acquitted the two males since there was no concrete evidence of them being rapists. Instead, Jehan Mina was convicted for Zina liable to hadd, whose punishment was of one hundred lashes.

The Federal Shariat Court upheld Jehan Mina's conviction on appeal, but reduced her punishment, taking into consideration her age and lack of paternal love. The Court reduced her sentence to three years of rigorous imprisonment and ten lashes. This highlights the injustice and discrimination towards Jehan Mina as she was punished without concrete evidence, whereas the accused were let go for the very reason of lack of evidence.

Another case law on similar lines is ***Safia Bibi v. State***⁷, Safia Bibi was a twenty-year-old girl suffering from acute myopia such that she was almost blind. She was working as a domestic help at the household of Maqsood Ahmad. She alleged that on one occasion, while she was working, Ahmad raped her. According to her testimony, Ahmad's father had also raped her on a different day, but he was not charged with any offence. Safia Bibi had not filed a complaint with the police until she could no longer hide her pregnancy due to social and family pressure. The police arrested Safia and incriminated her in a case of Zina with Maqsood Ahmad after her medical examination revealed that she had been pregnant. The

⁵ 35 P.L.D 1983 F.S.C. 183 (1983).

⁶ Moeen H. Cheema, *Pregnancy as Proof of Guilt Under Pakistan's Hudood Laws*, 32. BROOK. J. INT'L L., 120 139-140 (2006).

⁷ PLD 1985 FSC 120.

Sessions Court acquitted Maqsood Ahmad at the trial, but convicted Safia Bibi of Zina and sentenced her to three years rigorous imprisonment and fifteen stripes. Such cases of blatant injustice were not tolerable to the women of Pakistan as it oppressed them in the male-dominated society. Their resentment grew with the passing years, and finally, gave rise to the Women's Protection Bill.

The Women's Protection Bill was successfully passed by the National Assembly of Pakistan on 15th November, 2006, as an attempt to amend the Hudood Ordinance. The bill brought rape back in the purview of the Pakistan Penal Code, creating a restoration of the legal system regarding rape, the way it used to be in 1979. A completely new set of rules governing the proceedings of the offences of adultery, fornication and whipping were removed as punishments. The law stated that women were not to be jailed if they were not able to prove rape. Rape could now be proved on grounds other than witnesses, such as forensics and DNA evidence. The Bill is still a subject of argument, where there are two sides, one in favour of the bill and one against the bill. Those against the bill are not in support of the punishments of the Bill as the penalties are less grave as compared to whipping.

The most recent development in the laws pertaining to rape in Pakistan is the Anti Rape Bill. This bill has been passed in 2016 as Criminal Law (Amendment Offences Relating to Rape) Act and gives legally allows the collection and use of DNA evidence in order to prove that rape has been committed. It aims at speeding up justice given to rape victims by punishing those who obstruct the legal process. Under this law, anyone who rapes a minor or disabled woman will be awarded a death penalty. The same punishment will be administered to a public servant like the police who uses his position to commit rape. Court appearances can also be avoided by the rape victim in order to avoid humiliation. Instead, they can digitally give their statements.

IV. RAPE IN INDIA:

Since India and Pakistan share the same parent document dealing in crimes, the provisions of rape are similar in both countries during independence. However, certain significant cases led

to major amendments in the laws that govern rape in India, mainly the ones in 1983 and 2013. In the absence of any sudden enforcement of a system like Sharia, the laws pertaining to rape in India has seen an evolution with cases that have been instrumental in bringing in changes. These cases and their consequential amendments will be studied in this chapter in order to understand the legal system regarding rape in India.

The first case was that of *Tukaram v. State of Maharashtra (Mathura Case)*⁸, that India witnessed on 26th March, 1972, which ultimately led to significant amendments in the laws regarding rape in India. Mathura was a young tribal girl, between 14 to 16 years of age, who was raped by two policemen on the compound of Desai Ganj Police Station in Chandrapur district of Maharashtra. This tribal girl worked in a domestic household the nephew of her mistress wanted to marry her. However, her brother was hostile towards the possibility of her getting married to the boy and instead levelled charges of kidnapping of Mathura against the boy and his family. After the investigation of this case, both parties were permitted to leave, but Mathura was called back and consequently raped by the policemen. A case was filed in the sessions court on 1st June, 1974, whose judgement acquitted the policemen, on the grounds that Mathura was habituated to sexual intercourse, hence stating that her consent was voluntary. Only sexual intercourse could be proved and not rape under the circumstances.

On an appeal against this decision, the Bombay High Court set aside the judgement of the sessions court, sentencing the accused policemen to one and five years of imprisonment. This court held that consent does not involve submission due to the fear of induced threat.

The Supreme Court in *Tukaram v. State of Maharashtra*⁹, acquitted the two accused policemen on the ground that the victim has raised no alarm, there was no visible injury mark on her person thereby it could be assumed that she has consented and not protested, she is habituated to sex, 'she might have incited the two drunk policemen' and therefore no rape is committed.¹⁰

⁸ (1979) 2 S.C.C. 143 (India).

⁹ Ibid.

¹⁰ Shalu Nigam, *From Mathura to Farooqui Rape Case: The Regressive Patriarchy Found Its Way Back*, SSRN, 9th October, 2017, 1.

This case led to an uproar against the judgement, resulting in amendments to the laws in 1983. It mainly addressed three issues; firstly, minimum punishment in rape cases was shifted from unfixed to seven years. Secondly, in special cases of rape was shifted from seven to ten years.

Another case, *Sakshi v. Union of India*¹¹, is of great importance. An NGO called Sakshi filed a Public Interest Litigation in order to redefine the term rape. In this case, the Supreme Court of India directed the Law Commission of India to respond to the specific issue brought up in the petition. The highlights of the 172nd Law Commission report was that all forms of penetration should come under the purview of sexual intercourse as contained in 375 of Indian penal code.

In the year of 2002, an amendment of section 146 of the Indian Evidence Act has been made where no type of cross-examination of rape victims that directly or indirectly raised questions about the moral character of the rape victim or about the previous sexual experience of the victims could be done.

In *Delhi Domestic Working Women v. Union of India*¹², the Apex Court laid down the guideline that in all rape trials anonymity of the victim must be maintained as far as necessary, and interim compensation must be given to the victim if the case is still continuing in court.

“Late on a Sunday night on December 16, 2012, the victim along with her male companion was waiting for a ride back home from Saket. They were offered a ride by an off-duty bus driven by people not driving for commercial reasons. On taking the ride, the victim’s companion noticed the route taken by the driver was not the same as the normal route, and the doors of the bus were shut tight. On objection, the bus occupants criticised the boy and the girl for staying out late at night. This caused an argument between the victim and her companion and the other occupants of the bus, which ultimately resulted in a bloody fight

¹¹ A.I.R. 2004 S.C. 3566 (India).

¹² 1995 S.C.C. (1) 14 (India).

and the gang rape. The two victims, in the half-clothed and bloodied state, were thrown out of the bus. The victim was found by a pedestrian and rushed to the hospital, where she remained in a critical condition, until her death on 29th December. The country was rampant with protests when this case was reported and the whole country witnessed public protests of thousands that clashed with the police to continue their rally. Imminent personalities too joined the uproar. This ultimately led to the death sentence of rapists and the juvenile was sent to a reformatory home for three years. This case was the rarest of the rare case as the rape and brutalisation with the iron rod led to the death of the victim.¹³”

The much-required Criminal Law (Amendment Act), 2013, was created as a consequence of this case. In this Act rape now constitutes acts in addition to vaginal penetration. The section clarifies that penetration means penetration to any extent. The imprisonment as punishment is not less than seven years and may extend to imprisonment for life, along with a fine. In aggravated circumstances, punishment is stringent imprisonment for a term not less than ten years and extending to imprisonment for life, with a fine.

Section 376A is a new section that has been added, which states that if a person committing the offence of sexual assault, "inflicts an injury which causes the death of the person or causes the person to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death."¹⁴

In a case of "gang rape"¹⁵, imprisonment will be faced by rapists for a term which shall not be less than twenty years, but which may extend to life and monetary compensation to the victim which is enough to meet the medical expenses and rehabilitation of the victim. The age of consent in India has been increased to 18 years. This means that any sexual activity with a woman below the age of 18 will constitute statutory rape irrespective of the presence of consent of the woman.

¹³ Nirbhaya Gang Rape Case.

¹⁴ Section 376A, Indian Penal Code, Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

¹⁵ Section 376(g), Indian Penal Code, Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

After all the additions and deletions in the Indian Penal Code relating to rape, the outcome or the current standing law of rape in India is much more substantial, with numerous intricacies and nuances.

V. COMPARISON:

A comparison of laws regarding rape in India and Pakistan reveal certain major similarities and dissimilarities. Since the parent document of both India and Pakistan is created by Lord Macaulay himself, due to both countries being united before 1947, the laws regarding rape were no different during the time of independence. Hence, even after the passage of decades, the crux of the laws remains the same, including the section numbers of rape and its punishment being 375 and 376 respectively in each document.

However, numerous changes have been brought in the laws with time, which includes the repeal of the Pakistan Penal Code sections 375 and 376, which were now to be judged under the Hudood Ordinance. India continued to follow the same document throughout all the years since independence, whereas Pakistan switched documents in order to introduce Sharia, which was in turn reversed to rape coming under the Penal Code's ambit.

Sharia has never been implemented in India and hence India's timeline of laws regarding rape has no involvement of religion, unlike Pakistan that followed the Quran to judge the offence of rape. In this way, injustice relating to rape in Pakistan have been more rampant as compared to that in India, since the Hudood Ordinance often imprisoned rape victims for crimes that they had never committed in the first place, like that of adultery or fornication.

On a close search for dissimilarities between the currently standing penal codes of both the countries, several differences are observed. In Section 375, firstly, the words "sexual intercourse" is mentioned only in the Pakistan Penal Code, whereas the Indian Penal Code does not mention this term. Instead, the Indian Penal Code further elaborates on what acts fall under the ambit of rape, which are, the penetration of the penis into the vagina, mouth, urethra or anus, insertion of any object or body part apart from the penis in these parts,

manipulation of any body part in order for penetration, or application of the mouth to any of the parts. The Pakistan Penal Code is silent on the acts that cause rape.

In Section 375 of both the countries, the circumstances are similar, with India having two extra circumstances. The Indian Penal Code states “With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.”¹⁶

This is an addition along with the addition of the woman being unable to communicate her consent. Consent for penetration in Pakistan is irrespective for girls under 16, whereas, in India, the age is 18. Here, the Indian Penal Code further explains consent and include labia majora in penetration. Marital rape below the age of sixteen is a crime in Pakistan and below eighteen (earlier fifteen) is a crime in India.

In Pakistan, under section 376, there is a sub-section 1, which states a punishment of one to years of imprisonment to those who publish the identity of a rape victim by printing or publication. The exclusive aspects of publication are further elaborated upon in sub-section 2. Further, this section is not much elaborated upon, with simply the terms of punishment relating to individual and gang rape are mentioned, which is death, ten to twenty-five years and fine in the former, and death or imprisonment for life in the latter.

In the Indian Penal Code, however, details of each probable offender like a police officer, public servant, member of the armed forces, etc. and the further circumstances of rape, like rape during sectarian violence, pregnancy, age, capacity, disability and so on is described. These circumstances will lead to a punishment of imprisonment ranging from ten years to his death. The Indian Penal Code further discusses other cases that are termed as rape. These are sexual intercourse (which has been explained) between a married couple that has separated, gang rape and a repeated offender.

¹⁶ Section 375, Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

These are the technical differences in the laws regarding the rape of both countries. This gives judges of the courts of Pakistan more liberty to give their judgements as they follow concise laws which do not include many prospective situations. Hence, their interpretation of the law will be of utmost importance. Judges in India will have comparatively lesser independence to decide cases due to the rigidity of the laws regarding rape and the codification of various probable circumstances through foresight.

These are the prominent differences between the laws pertaining to rape in both the countries, with both countries having major similarities as well as dissimilarities.

VI. CONCLUSION:

After a comparison of the set of laws of both the countries, the Indian Penal Code's sections of rape seem better codified. This is because there is less scope of ambiguity in it and it seems to have adapted and expanded since independence, by absorbing public opinion, morality and mishaps. Hence, it seems to be more deliberated upon, with little chance of public misinterpretation or twisting of facts. It seems to have evolved with every untoward event of rape, roping in more and more provisions and explanations in order to protect common interest and the general public, especially the vulnerable. Hence, according to the authors, it is holistic and well-rounded as compared to the Pakistan Penal Code's section on rape. The Pakistan Penal Code has much shorter provisions, which do not reflect the government's urge to reduce the terrifying statistics of rape. Many provisions are archaic and have not been altered since independence. The lack of revisions in the law regarding rape depicts the stagnancy of social development and the plight of Pakistani women who do not seem to be looked after and protected.

Pakistan however, issues much stricter deterrents as compared to India. Death punishments are much more common unlike in India, where there is a requirement of the determination of the rarest of the rare case. Also, these death penalties are executed faster than India, thus showing a fallacy in the Indian legal system which is clearly lagging in terms of speed. The speed of issuance of death penalties, however, is debatable since death penalties that are awarded without adequate enquiry is highly unjust.

However, sadly, none of these differences are giving either of the countries an upper hand in terms of achieving the ultimate goal of eliminating rape in the country. In the light of two of the most devastating cases of two minor girls, Zainab Ansari from Pakistan and Asifa Bano from India, both the countries have been thrown into the bouts of agony as none of the laws are helping individuals to change their mindset and stop invading other individuals' privacy and dignity. This is a major concern that needs to be addressed.

Also, certain judgements in both the countries are equally appalling, like the infamous judgements of honour rape given by the lower courts of Pakistan, and the courts in India adjudge the rape victim to be habitual of sexual intercourse. How should it affect the punishment; whether one should escape punishment or get a reduced punishment for raping a girl with loose morals?¹⁷

Inefficiency too is rampant, as substantiated by the infamous story of Mukhtar Mai of Pakistan¹⁸ and *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*¹⁹, India.

Hence, in conclusion, though India and Pakistan are both doing well in establishing laws and deterrents, it is immensely important for both the countries to come up with solutions to decrease the rate of rape. The first solution that can be offered is to deliberate upon the laws regarding marital rape in both the countries and enforcing stringent laws and criminalize marital rape altogether. Both India and Pakistan criminalize marital rape of women above a decided age.

This is inhuman and violative of those adult women who face rape in their own household since marital rape is a type of rape or forceful penetration. Another solution that can be offered is based on the proverb, "Prevention is better than Cure". Following this principle, a solution that can be suggested is that instead of making reforms after the commission of the offence, if a preventive measure can be taken, primarily the spread of sex education, the

¹⁷ Mehta, Siddharth (April 2013). Rape law in India: problems in prosecution due to loopholes in the law. Social Science Research Network, 13 April.

¹⁸ Farooq Tirmizi, Mukhtaran Mai: A Story of Extraordinary Courage, April 22, 2011.

¹⁹ *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, 1983 AIR 753, 1983 SCR (3) 280.

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situation of women in both the countries will be much better, with an environment safe for them. Sex education will alert women and enable them to defend themselves from a threat of sexual assault. This education will also caution men of the harm of rape to the society at large, and the consequence of their exploitative action to both the female who is physically and emotionally hurt beyond repair and the male, who will have to face stringent punishment for his actions.

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