# MORALITY AND JUSTICE IN SEXUAL OFFENCES: A COMPARISON OF COMMON LAW AND SHARIA

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***Abstract***

*The tension between morality and accountability in relation to the treatment of sexual offences forms the central discussion of this article. Despite continued reforms, both Common Law and Sharia systems continue to manifest gender based assumptions that seek to limit the protection of the victims of sexual violence. This article reassesses the conceptualisation of sexual offences in these legal traditions, especially rape and zina bil-jabr, by examining how their normative frameworks promote or prevent gender equity. It employs a comparative doctrinal methodology to analyse statutory developments, judicial decisions, and scholarly discourse in evaluating the relationship between morality and legal responsibility. Drawing from Musa Usman Abubakar's re-examination of rape under Islamic law and Shaheen Sardar Ali's contextual feminist analysis of Islamic jurisprudence, the article will seek to expose both systems' historical tendency to link female chastity to evidential credibility and, by so doing, perpetuate biased standards of accountability. The findings reveal that as Sharia continues to complicate proof and prosecution of sexual offences by conflating moral sin (zina) with coercive crime (zina bil-jabr), the Common Law has evolved towards a consent-based definition of sexual offences. The article recommends that Islamic legal principles be interpreted in a more gender-sensitive manner to reflect the maqaṣid al-sharia. But both systems must integrate restorative justice models. It concludes that to safeguard the dignity and sanctity of the human person across both traditions, both must reconcile moral order with legal accountability.*

***Keywords:*** *Morality, Justice, Sexual Offences, Common Law, Sharia*

## I. Introduction

Sexual violence is among the most pervasive and under-reported forms of gender-based harm worldwide.[1] Despite significant statutory and judicial reform, both Common Law and Islamic legal traditions continue to wrestle with inherited moral assumptions that ignore the experience of the victims.[2] Each of them seeks to preserve moral order to deter wrongdoing as they struggle to balance morality with responsibility. Under Common Law, rape originated as an offence against property and patriarchal honour; under Sharia, it emerged within a moral taxonomy that conflated coercion with consensual *zina*.[3] The thesis of this article is that neither legal tradition can fully achieve justice in sexual-offence cases without re-evaluating the moral premises underlying their

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[1] Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press 2016) 12.
[2] Musa Usman Abubakar, 'Rethinking the Offence of Rape as Violence Against Women under Islamic Law: A Paradigm Shift' (2020) 5 *UNIMAID Journal of Contemporary Law* 1.
[3] Wael B Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge University Press 2009) 337–340.

doctrines. Both treat morality as the foundation of social order; however, the interpretation of morality has often been filtered through a patriarchal lens rather than universal principles of equality and dignity.

Historically, the Common Law located female virtue within male ownership. Hale infamously stated that rape "is an accusation easily to be made and hard to be proved." This dictum contributed to institutionalising judicial suspicion toward complainants.[4] Until the late twentieth century, courts required proof of resistance and corroboration, effectively demanding that victims perform morality rather than demonstrate coercion.[5] Even after the adoption of consent-based definitions, cultural expectations about female behaviour continue to influence evidentiary credibility.[6] Islamic criminal jurisprudence, by contrast, grounds moral authority in revelation. The Qur'an and the *Sunna* articulate chastity as a communal virtue and prohibit both fornication and compulsion: "Do not compel your slave-girls to prostitution if they desire chastity."[7] Yet the juristic tradition developed evidentiary rules, particularly the four-witness requirement - that, when applied mechanically, have discouraged victims from seeking justice.[8] Scholars such as Abubakar and Ali contend that this is a historical distortion rather than the intent of Sharia, whose overarching aim (*maqṣad*) is the protection of honour and life.[9]

This article proceeds comparatively. It first conceptualises the relationship between gender and morality in both systems; next, it analyses the evolution of rape law under Common Law and under Sharia; and finally, it offers a comparative reflection on morality, evidence, and accountability. The argument advanced is that both legal orders possess internal mechanisms—liberal human rights reasoning in the former and *ijtihad* and *maqaṣid al-shari'a* in the latter—through which they can reconcile moral integrity with gender-equal justice. The article employs a doctrinal and normative methodology, drawing on statutes, case law, Qur'anic exegesis, and leading scholarship. It adopts a balanced interpretive approach in its critique of patriarchal distortion, while respecting moral foundations. This approach aims to demonstrate that moral reasoning is not inherently antithetical to gender justice if it supports a jurisprudence of accountability viewed through the lens of compassion and equity. Ultimately, the reform of sexual-offence law in both systems depends less on importing foreign norms than on re-reading internal traditions. Common Law must confront the cultural residues of chastity morality that persist beneath its procedural modernity; Sharia must disentangle the divine objective of justice from human interpretations that conflate morality with control. Both can converge on a shared principle—that the sanctity of human dignity is the highest expression of moral order and the necessary end of law.

[4] Matthew Hale, *Historia Placitorum Coronae* (1736) 1 Hale PC 635.
[5] Susan Edwards, *Sexual Offences and the Common Law* (Routledge 2000) 41–45.
[6] Clare McGlynn, 'Feminism, Rape and the Search for Justice' (2011) 31 *Oxford Journal of Legal Studies* 825, 832.
[7] Qur'an 24:33.
[8] ibid 24:4.
[9] Abubakar (n 2) 6–7.

## II. Conceptualising Gender, Morality, and Sexual Offences

Law both reflects and reinforces the moral expectations of its society. Nowhere is this clearer than in the treatment of sexual offences, where questions of consent, virtue, and shame intersect.[10] Both Common Law and Sharia have historically treated sexual misconduct as a threat to communal order as well as individual harm. The difference lies not in whether morality matters, but in whose morality is codified and how it is used to define credibility and culpability.

### 1. Gender and the Moral Foundation of Sexual Offences

Morality in the early Common Law was based on Christian patriachy social hierachy. A woman chastity was linked to the honour of her family, and rape was more of a trespass against her husband or father than the woman's bodily integrity.[11] Over time, the Enlightenment's emphasis on autonomy reframed sexual morality around the individual, but gendered assumptions endured. Courts expected "modest" female behaviour as evidence of virtue and doubted claims of assault by women whose conduct deviated from that norm.[12] Even twentieth-century reforms, such as the shift toward consent-based definitions, retained traces of moralised scrutiny disguised as credibility assessment.[13] Islamic law also integrates morality into its legal reasoning, grounding it in divine revelation rather than social custom. The Qur'an condemns sexual coercion and false accusation while protecting privacy and reputation.[14] The offence of *zina* symbolises a breach of moral order, but jurists recognised a distinction between consensual sin and coercive violation. Classical schools developed two categories—*zina bi'l-riḍa* (consensual intercourse) and *zina bil-jabr* (rape)—yet later commentaries blurred the line, importing the evidentiary standard of *zina* into rape prosecutions.[15]

### 2. Morality and Proof

Evidence in sexual-offence cases reveals how morality governs procedure. Under Common Law, corroboration rules and the requirement of resistance reflected a belief that virtuous women would fight back or promptly complain.[16] In Islamic jurisprudence, the four-witness rule in *ḥudud* cases served a protective function—to deter malicious slander—but when extended to rape, it created impunity for offenders and fear of reprisal for victims.[17] In their gender bias interpretations, both systems have inadvertently substituted the evidentiary rigour with moral policing.

[10] Susan Edwards, *Sexual Offences and the Common Law* (Routledge 2000) 12–13.
[11] Jonathan Herring, *Criminal Law: Text, Cases, and Materials* (Oxford University Press 2021) 713.
[12] Edwards (n 10) 18.
[13] McGlynn (n 6) 831–833.
[14] Qur'an 24:33; Qur'an 24:4–5.
[15] Hallaq (n 3)
[16] Hale (n 4)
[17] Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oneworld 2008) 199–201.

### 3. Re-Defining Morality Through Justice

Modern reformers within each tradition advocate a moral re-orientation rather than a moral rejection. Feminist jurists in the Common Law argue that sexual autonomy, not chastity, should be the ethical core of rape law. Likewise, contemporary Muslim scholars such as Abubakar and Kamali argue that *maqaṣid al-shari'a*—the objectives of preserving life, honour, and dignity—require treating rape as violence, not immorality.[18] When morality is understood as the pursuit of justice rather than conformity, it becomes compatible with accountability and gender equality.

## III. Sexual Violence Under Common Law

The evolution of rape law under Common Law reveals a slow moral and conceptual shift from chastity to consent, from property to autonomy, and from moral suspicion to procedural recognition of gender equality.[19] Each phase of reform mirrored society's changing moral attitudes toward women, sexuality, and justice.

### 1. The Patriarchal Foundation

In medieval English law, rape was conceived as an offence against a man's proprietary interest in his wife or daughter rather than against the woman herself.[20] The injury lay in the violation of male honour and lineage, not in the infringement of personal autonomy. Early statutes, such as the Statute of Westminster 1285, criminalised "ravishment" with implicit concern for the woman's marriageability and dowry.[21] Thus, morality and ownership intertwined: a virtuous woman was a valuable possession, and the legal focus rested on chastity rather than consent. Hale's seventeenth-century writings reinforced this patriarchal positions and entrenched the idea that female testimony was suspect.[22] The presumption of fabrication shaped both evidentiary rules and judicial attitudes for centuries.[23] Victims were required to demonstrate "real resistance" and prompt complaint to prove non-consent; failure to do so was treated as evidence of moral deficiency.[24]

### 2. The Modern Re-Definition of Rape

The nineteenth and twentieth centuries introduced gradual reform, but moral scrutiny endured beneath procedural change. Rape within marriage remained legally impossible until the landmark case of *R v R* (1991), in which the House of Lords unanimously held that a husband could be found guilty of raping his wife.[25] In his judgement, Lord Keith described the exception granted to marital-rape under Common Law as an "anachronistic and offensive fiction," arguing that even marriage

[18] Abubakar (n 2)
[19] Herring (n 11)
[20] Edwards (n 12) 13.
[21] Statute of Westminster 1285 (UK).
[22] Hale (n 4)
[23] Edwards (n 12) 45.
[24] ibid
[25] *R v R* [1991] 4 All ER 481 (HL).

does not imply perpetual consent. The decision created a moral realignment replacing conjugal duty with sexual autonomy as the central legal value.[26] This position has been incorporated in subsequent statutory developments, particularly the Sexual Offences Act 2003 (UK). Section 1 thereof defines rape as intentional penetration without consent and without reasonable belief in consent.[27] The Act explicitly frames consent as "freely given agreement," shifting moral emphasis from female chastity to mutual autonomy. Yet, as scholars such as McGlynn and Edwards observe, courtroom narratives continue to reproduce stereotypes about "real rape" and "ideal victims."[28] Legal actors may still assess credibility through moral filters—judging whether a complainant's behaviour aligns with traditional expectations of modesty or caution.[29]

### 3. Comparative Developments

Other Common Law jurisdictions have followed similar trajectories. In the United States, revisions to the Model Penal Code and state legislation redefined rape in terms of lack of consent rather than physical resistance. At the same time, Canadian jurisprudence, notably *R v Ewanchuk* (1999), confirmed that consent must be affirmatively communicated and cannot be inferred from silence or submission.[30] These reforms reflect a new moral foundation based on autonomy and dignity rather than virtue and reputation. Nevertheless, remnants of the old morality persist through evidentiary discretion and cultural assumptions. For example, section 41 of the Youth Justice and Criminal Evidence Act 1999 (UK) restricts the admission of evidence relating to a complainant's sexual history. However, exceptions still permit its use when "relevant to the issue of consent."[31] This discretionary space has reintroduced moral evaluation through the back door, allowing stereotypes to influence credibility assessments.

The modern Common Law framework thus occupies an uneasy middle ground: procedurally modern but morally conservative. It proclaims sexual autonomy as a right but continues to adjudicate it through cultural assumptions about respectability.[32] The persistence of these moral residues reveals that true reform requires not only legislative change but moral introspection—an acknowledgement that justice for sexual-violence victims demands dismantling the implicit moral hierarchies embedded in legal reasoning.

## IV. Sexual Violence Under Sharia Law

[26] Herring (n 19) 723.
[27] Sexual Offences Act 2003 (UK) s 1.
[28] McGlynn (n 6) 829–831.
[29] Edwards (n 12) 56–58.
[30] *R v Ewanchuk* [1999] 1 SCR 330 (Supreme Court of Canada).
[31] Youth Justice and Criminal Evidence Act 1999 (UK) s 41.
[32] McGlynn (n 6) 834.

Unlike Common Law, which evolved through judicial precedent, Islamic criminal law grounds its moral and legal categories in divine revelation. Sexual offences under Sharia fall within a moral framework aimed at preserving chastity (*iffah*), lineage (*nasab*), and honour (*ird*).[33] The offence of *zina*—unlawful sexual intercourse—belongs to the class of *ḥudūd* crimes, whose penalties are fixed by revelation. Within this framework, rape (*zina bil-jabr*) is treated as a coercive act that violates both divine morality and personal dignity.[34]

### 1. Classical Doctrine and Evidentiary Foundations

Classical jurists did not ignore the distinction between consent and coercion. The Qur'an expressly condemns sexual compulsion: "Do not compel your slave-girls to prostitution if they desire chastity".[35] Early *Hadith* reports record incidents where victims of rape were exonerated, establishing the principle that coercion negates culpability.[36] However, as the juristic schools of law developed, the evidentiary framework for *zina* - the requirement of four eyewitnesses - was extended to all forms of illicit intercourse, including rape.[37] This conflation inadvertently rendered rape nearly impossible to prove through direct testimony. The moral objective of the four-witness rule was protection, not punishment: to prevent false accusations of adultery. Yet when applied mechanically to rape, it produced procedural injustice.[38] Victims unable to produce witnesses risked being charged with *zina* themselves.[39] The doctrinal confusion stemmed from collapsing moral sin and criminal coercion into one legal category. As Abubakar argues, this approach "confused the law's moral objective of chastity with its legal duty of protection."[40]

### 2. Contemporary Reinterpretation and Reform

Modern jurists have sought to restore the balance between morality and accountability. Kamali distinguishes between *ḥudūd* and *taʿzīr* offences. When the evidentiary threshold for *ḥudud* cannot be met, the judge may impose *taʿzīr* punishment based on circumstantial or medical evidence.[41] This flexibility allows the state to prosecute rape without invoking the rigid proof of *zina*.

The Council of Islamic Ideology (Pakistan) and reform-minded scholars across Nigeria, Malaysia, and Egypt have adopted this reasoning, arguing that rape is a *tazir* offence rooted in coercion rather than consent.[42] Legislative changes have reflected this shift. Pakistan's Protection of Women (Criminal Laws Amendment) Act 2006 relocated rape provisions from the *Zina Ordinance* to the Penal Code, effectively distinguishing *zina bil-jabr* from *zina bi'l-riḍa*.[43] In Nigeria, similar

[33] Hallaq (n 3) 341.
[34] Kamali (n 17) 198.
[35] Qur'an 24:33.
[36] *Sunan Abū Dāwūd*, Kitāb al-Ḥudūd, ḥadīth 4379.
[37] Qur'an 24:4.
[38] Hallaq (n 3) 343.
[39] Kamali (n 17) 200.
[40] Abubakar (n 2) 5.
[41] Kamali (n 3) 202.
[42] Ali (n 1) 117.
[43] Protection of Women (Criminal Laws Amendment) Act 2006 (Pakistan).

reforms came in the enactment of Violence Against Persons (Prohibition) Act 2015 defining rape as sexual intercourse without consent or against a person's will thereby remove the marital rape exception. Sexual intercourse without consent, is now punishable under both moral and legal frameworks.[44] These reforms illustrate that the moral and protective objectives of Sharia can coexist with modern legal standards. The Qur'an's injunction—"God commands justice, kindness, and giving to relatives, and forbids indecency, wrongdoing, and oppression" - anchors this approach in divine principle rather than imported liberalism.[45] Justice (*ʿadl*), not deterrence alone, is the essence of divine morality.

### 3. The Gendered Interpretation of Morality

The challenge lies less in revelation than in interpretation. Patriarchal exegesis has often equated female virtue with sexual silence and submission, discouraging victims from reporting violations.[46] As Shaheen Sardar Ali observes, "it is not divine law that silences women, but human interpretation clothed in divine authority."[47] The Qur'an itself affirms equality of moral responsibility between men and women, emphasising justice, compassion, and accountability.[48] The reinterpretation of rape under Sharia, therefore, is not a departure from tradition but a return to its ethical roots.

### 4. Toward a Protective Jurisprudence

Recent scholarship calls for a "jurisprudence of protection" that reconciles Sharia's moral imperatives with human rights.[49] Such an approach redefines morality not as control over women's bodies but as the preservation of human dignity. By applying *ijtihad* (independent reasoning) and *istiḥsan* (equity-based preference), jurists can adapt classical doctrine to contemporary realities without violating divine law. The Prophet's instruction to "avert the *ḥudud* by doubts" symbolises mercy as a legal principle, ensuring that procedural certainty does not become moral cruelty. In sum, Sharia's treatment of sexual violence illustrates both the power and peril of moral reasoning in law. Its theological framework provides an enduring moral vocabulary for justice, yet its application demands interpretive renewal. Through *maqaṣid al-shari'a*, Islamic law possesses the capacity to evolve toward accountability grounded in faith and compassion—a model from which secular systems may also learn.

## VI. Conclusion

This article examined the intersection of gender, morality, and accountability in the regulation of sexual offences under Common Law and Sharia. It argued that both systems, despite their distinct moral foundations, confront a shared dilemma: the difficulty of protecting victims without

[44] Violence Against Persons (Prohibition) Act 2015
[45] Qur'an 16:90.
[46] Ali (n 1) 120.
[47] ibid 122.
[48] Q 33:35.
[49] Abubakar (n 2) 8.

moralising their behaviour. In Common Law, reform has transformed rape from an offence against male honour into a violation of sexual autonomy, yet traces of moral suspicion persist through evidentiary culture. In Sharia, moral order remains central, but doctrinal conflation of *zina* and *zina bil-jabr* has obscured the law's protective intent. The analysis demonstrates that morality need not conflict with justice if interpreted through principles of accountability and compassion. Common Law must deepen its procedural reforms into substantive equality, while Sharia requires renewed *ijtihad* guided by *maqaṣid al-shari'a* to affirm dignity and protection. The comparative significance lies in showing that both traditions can converge toward a jurisprudence where moral integrity strengthens, rather than undermines, human rights. Ultimately, genuine reform in sexual-offence law depends not merely on new statutes but on a re-imagined moral vision of justice—one that recognises the sanctity of human dignity as the unifying foundation of law.