THE CONSTITUTION AND FEMALE-INITIATED DIVORCE IN PAKISTAN: WESTERN LIBERALISM IN ISLAMIC GARB

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"[N]o nation can ever be worthy of its existence that cannot take its women along with the men."

Mohammad Ali Jinnah, Founder of Pakistan[1]

The legal status of Muslim women, especially in family relations, has been the subject of considerable international academic and media interest. This Article examines the legal regulation of divorce in Pakistan, with particular attention to the impact of the nation's dual constitutional commitments to gender equality and Islamic law. It identifies the right to marital freedom as a constitutional right in Pakistan and demonstrates that in a country in which women's rights are notoriously and brutally violated, female divorce rights stand as a ray of light amidst the "darkness" of the general legal status of Pakistani women. Contrary to the conventional wisdom construing Islamic law as opposed to women's rights, the constitutionalization of Islam in Pakistan has proven to be a potent tool in the service of women's interests. Ultimately, I hope that this Article may serve as a model for the utilization of both Islamic and constitutional law to benefit women throughout the Muslim world.

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[1] Russell Powell, *Catharine MacKinnon May Not Be Enough: Legal Change and Religion in Catholic and Sunni Jurisprudence*, 8 GEO. J. GENDER & L. 1, 6 n.23 (2007) (quoting Muhammad Ali Jinnah, Speech at Islamia College for Women (Mar. 25, 1940)).

Introduction

In recent years, there has been an ever-increasing fascination with human rights in the Muslim world, particularly the subordinate status of wo-

men in Islamic law and culture.[2] Westerners in general and feminists in particular have dreaded the possibility that the Islamic revival sweeping the Muslim world will turn back the clock on women's legal and social rights.[3] The West's growing unease with violations of women's rights in Muslim countries has made this issue a top priority for nations and advocates alike.[4] Since the position of women in a given society is perhaps nowhere better reflected than in the personal status laws of a nation,[5] this Article explores the legal norms surrounding divorce. Indeed, domestic life represents the sphere in which women across the globe tend to be the farthest from attaining equality, and subordination in the home serves as a springboard to women's subjugation in almost all conceivable spheres.[6] A path to freedom from tyrannical marriages is a key factor in promoting women's equality in social, political, and economic arenas.[7] Accordingly, the value of scholarly inquiry into Muslim women's struggles in—and to escape—oppressive familial settings cannot be overstated.

The Islamic Republic of Pakistan, the second largest nation in the world with a Muslim majority, represents a promising case study due to its unique constitutional system enshrining Islamic law alongside Western guarantees of gender equality.[8] With this in mind, this Article proposes a new strategy

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[2] Azizah al-Hibri, *Islam, Law, and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 4 (1997) (describing Western feminist concern with the "plight" of Muslim women); Naz K. Modirzadeh, *Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds*, 19 HARV. HUM. RTS. J. 191, 192 (2006) (noting "the increased global media, military, and economic focus" on the Muslim world, especially since the September 11, 2001 attacks).

[3] JOHN L. ESPOSITO WITH NATANA J. DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW 105 (2d ed. 2001); Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1, 3 (1995).

[4] Modirzadeh, *supra* note 2, at 192.

[5] *See, e.g.*, ESPOSITO WITH DELONG-BAS, *supra* note 3, at 134 (discussing how family law in Tunisia, Somalia, and Egypt is reflective of women's status in society); Essam Fawzy, *Muslim Personal Status Law in Egypt: The Current Situation and Possibilities of Reform Through Internal Initiatives*, *in* WOMEN'S RIGHTS & ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM 27 (Lynn Welchman ed., 2004) (describing how Egyptian divorce laws are symptomatic of women's low status in Egyptian society).

[6] Khaliq, *supra* note 3, at 17. For this reason, various commentators viewed the inclusion of Article 16 of the Convention for the Elimination of All Forms of Discrimination Against Women ("CEDAW") (which covers the family) as "a breakthrough in the international recognition of women's rights." *Id.* at 29. *See* Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1950–51 (1995) (noting that, of all the international instruments, it is CEDAW that "is the most comprehensive" and that is considered "a brand apart from other treaties because it seeks . . . to influence cultural values that may prescribe the traditional roles of men and women in marriage, family relations, and other situations that are fertile ground for sexual stereotypes").

[7] Indeed, it has already been acknowledged that the "discriminatory features of Muslim personal law have an enormous bearing on the social and economic well-being of women." Editorial, *Triple* Talaq, THE HINDU, July 13, 2004, http://www.hindu.com/2004/07/13/stories/2004071303270800.htm.

[8] Jeffery A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT'L L. 759, 761 (2004).

to ameliorate the gendered (im)balance of power in marital dissolution in Pakistan, as it has been and further could be molded by its unique Constitution. Existing accounts of the Pakistani divorce law are rather incomplete, however; most focus on statutory developments without recognizing the distinctive contributions of courts in the development of female divorce rights.[9] In particular, scholars of personal status laws have failed to explore the interaction between divorce laws and Pakistan's constitutional jurisprudence. Unfortunately, the constitutional groundwork vital for this study is largely absent, for the inherent contradictions at the heart of Pakistan's constitutional framework—which have the potential to jeopardize the entire enterprise of women's rights protection—have barely caught the attention of scholars.[10] An exploration of the interplay between the Pakistani Constitution and marital dissolution cannot help but grapple with the scholarly deficiencies.

This Article endeavors to fill the academic void on multiple levels: it seeks to present a more complete picture of the Pakistani divorce regime, offer new insights on the internal inconsistencies of Pakistani constitutional law, and provide the "missing link" between the two fields by scrutinizing the impact of constitutional jurisprudence on divorce law. My ultimate objective is to demonstrate how the constitutional scheme may be leveraged to improve the lives of Pakistani women, particularly their prospects for marital emancipation.

To that end, I first review the principles of classical Islamic divorce law, which laid the groundwork for the divorce regime that emerged in Pakistan. This discussion evokes the challenges faced by modern Islamic countries seeking to accommodate classical precepts with constitutional and social mandates. Second, I analyze Pakistan's intricate constitutional system, paying particular attention to the Constitution's allegiance to seemingly conflicting norms of Islamic law and gender equality principles, including, I shall argue, an unenumerated right to marital freedom. I assess the impact of these opposing constitutional impulses on women's marital emancipation

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[9] It is customary to portray a very narrow picture of Pakistani women's path to freedom, not only by underestimating the scope of divorce rights, but also by ignoring the distinctive contribution of the courts. Thus, one side of the divorce story is systematically overlooked. For a work that acknowledges the magnitude of the judicial contribution, see Nadya Haider, *Islamic Legal Reform: The Case of Pakistan and Family Law*, 12 YALE J.L. & FEMINISM 287 (2000).

[10] As late as 1995, it was lamented: "[n]o serious and exhaustive commentary on the Constitution of Pakistan has so far been published. . . . This absence . . . has occasioned an arrest of growth of learning in this crucial field and has, in turn, contributed towards a general apathy towards constitutionalism as a way of life." ASIF SAEED KHAN KHOSA, HEEDING THE CONSTITUTION 78–79 (1995). Work on the meaning of Islam as a constitutional guarantee, as well as its compatibility with other fundamental guarantees, is noticeably lacking. Not until 2006 did scholarly literature give serious consideration to Pakistan's constitutional commitment to Islamic law (and hence to the work of the Shariat courts). *See* MARTIN LAU, THE ROLE OF ISLAM IN THE LEGAL SYSTEM OF PAKISTAN 122 (2006) ("There is not a single academic article or monograph which has examined the judgments of the Federal Shariat Court . . . nor has there been any examination of the impact of these judgments on legal development in Pakistan.").

and conclude that adherence to Islamic precepts coexists with, and even contributes substantially to, the advancement of women's fundamental rights to equality and divorce. Third, I examine how Pakistan's Constitution has modified the traditional precepts of Islamic divorce law. I explore the conservative *statutory* underpinnings of the divorce regime and contrast that with the rather progressive *judicial* response to women's marital plight. I conclude that activist, creative courts have championed women's rights by radically liberalizing Pakistani divorce law.

My hope is that this Article, which concludes with proposals to enhance wives' dissolution rights within the Islamic constitutional structure, will inspire scholars to continue to address the constitutional dimensions of divorce law and equip advocates and policymakers with a potent tool to promote equal rights for women.

I. All-or-Nothing: Classical Islam's Gendered Divorce Regime

In classical Islam, marital dissolution is considered "most hateful,"[11] so much so that the Islamic Shari'a confers on men alone a comprehensive right to divorce.[12] That male prerogative is unilateral, arbitrary, and unfettered: men may exercise their dissolution power at will, anytime, and for any reason—or no reason at all. So comprehensive is this right that scholars suggest that no other principle of Islamic law so vividly crystallizes male supremacy over women,[13] who are given no—or only a weak and grudging—right to marital freedom. The following overview discusses men's blank check to divorce and women's narrow avenues to marital freedom.

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[11] Abdullah Yusuf Ali, The Meaning of the Holy Qur'an 1482 (8th ed. 1996) (The Prophet Muhammad is reported to have said, "[o]f all things permitted by Law, . . . divorce is the most hateful in the sight of Allah.") (internal quotation marks omitted); Esposito with DeLong-Bas, *supra* note 3, at 29 ("Many Quranic verses make clear the undesirability of divorce and the punishments awaiting those who exceed the limits set by God.").

[12] A clarification of the jurisprudential methodology of Islamic law is in order. Shari'a is the whole body of Islamic theology, referring to the general normative system of Islam as historically understood and developed by Muslim jurists, especially during the eighth through tenth centuries CE. The four primary sources of Islamic law are traditionally seen as the Qur'an, believed by Muslims to be the living word of God revealed to His Prophet; the Sunna, the deeds and sayings of the Prophet Muhammed, recorded in *hadith*; *ijma*, or consensus, which is the unanimous agreement of jurists on a specific issue; and *qiyas*, or reasoning by analogy. The prescriptions of the Qur'an are conclusive and binding, and the *hadith* of the Prophet is binding and attributed to divine revelation. However, *ijma* and *qiyas* are less immutable. For a discussion of the primary and secondary sources of the Shari'a, see, for example, Khaliq, *supra* note 3, at 8–12; Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can Teach The International Human Rights Movement*, 8 Yale Hum. Rts. & Dev. L.J. 67, 102–04 (2005).

[13] *See, e.g.*, Esposito with Delong-Bas, *supra* note 3, at 29; Asaf A.A. Fyzee, Outlines of Muhammadan Law 148 (4th ed. 1974) (invoking the metaphor of a "one-sided engine of oppression in the hands of the husband").

A. The Husband's Right to Untie the Knot

Classical Islamic law grants a husband the unilateral right to terminate a marriage at will.[14] One of the rationales most often invoked to justify men's unfettered divorce power is that "[t]he question of settling divorce should be in the hands of the wiser party, and that is men. Men are wise, which is why they do not have to go to court. Islamic law would consider the wise wife an exception and you cannot generalize an exception."[15] All that Islam requires is that a husband be a sane adult and that he give expression to a prescribed formula of repudiation known as a *talaq*, whether orally, in writing, or even digitally.[16] Moreover, in order to result in divorce, a man need not even intend to repudiate his wife—conditional, contingent, or qualified pronouncements of *talaq* are all adequate.[17] Hence, even a *talaq* pronounced in jest, anger, intoxication, mistake, fraud, or coercion is valid, effective, and binding.[18] While there are numerous techniques available for a husband to end his marriage,[19] the ideal method of divorce in Islam is *talaq al-sunna,* in the *Ahsan* (best form), when the husband pronounces a single repudiation during a period of *tuhr* (purity), when the wife is between two menstruations, and when intercourse has not taken place since the last menstruation.[20] The rationale is to ensure the possibility of reconciliation—when the wife "is in state of purity, [the husband] is physically close to her and in this case he might be persuaded to reconsider his decision."[21] Immediately on pro-

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[14] Rajni K. Sekhri, Aleem v. Aleem*: A Divorce From The Proper Comity Standard—Lowering The Bar That Courts Must Reach To Deny Recognizing Foreign Judgments*, 68 MD. L. REV. 662, 671 (2009) (noting that a husband may divorce his wife absent any cause and no action is required by a court of law). The most common method of divorce in the Muslim world is the husband's exercising his right of *talaq*. For a review of a husband's far-reaching prerogative to repudiate his wife, see, for example, DAWOUD SUDQI EL ALAMI & DOREEN HINCHCLIFFE, ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD 22–24 (1996).

[15] *See* HUMAN RIGHTS WATCH, DIVORCED FROM JUSTICE: WOMEN'S UNEQUAL ACCESS TO DIVORCE IN EGYPT 19 (2004) (quoting Chief Judge Ayman Amin Shash, Technical Bureau of the National Center for Judicial Studies, Cairo).

[16] *See* Jyothi Kiran, *SMS: Short-cut to marital separation*, THE TRIBUNE, June 15, 2003, http://www.tribuneindia.com/2003/20030615/herworld.htm#1.

[17] ESPOSITO WITH DELONG-BAS, *supra* note 3, at 29.

[18] The Hanafi school—which is one of the four Sunni schools and represents the majority of Sunnis—takes the most extreme view of all, accepting as valid a *talaq* pronounced while the husband is drunk or even under duress. *Id.* at 29; EL ALAMI & HINCHCLIFFE, *supra* note 14, at 22.

[19] While it is relatively easy to divorce one's wife practically speaking, it can be methodologically complicated to follow the various procedures diverging from this seemingly instant method of repudiation. A *talaq* may be either in accordance with the Sunna, known as *talaq al-sunna*, (which is in turn divided into *Ahsan* (best form) and *Hasan* (good form)), or *talaq* of innovation, in which case it is called *talaq al-bid'a*. For the different forms of repudiation available under Islamic law, see EL ALAMI & HINCHCLIFFE, *supra* note 14, at 22–24; *see also* Sampak P. Garg, *Law and Religion: The Divorce Systems of India*, 6 TULSA J. COMP. & INT'L L. 1, 7–10 (1998).

[20] ESPOSITO WITH DELONG-BAS, *supra* note 3, at 30.

[21] HAIFAA A. JAWAD, THE RIGHTS OF WOMEN IN ISLAM 78 (1998).

nouncement of *talaq* the wife enters the *idda*, a waiting period that lasts for three menstrual cycles.[22] Until the *idda* is terminated, the husband is free to revoke his repudiation and take back his wife, and he can do so even in the face of her opposition.[23] No specific procedures must be followed to revoke *talaq*; it may be made expressly by the husband or implied by his conduct, "such as resuming cohabitation" and even "by merely kissing or touching his wife."[24] Even after the *idda* is over and the *talaq* has become finalized, the parties may still remarry one another without restriction; however, if a husband pronounces *talaq* three times, it becomes irrevocable—and the parties may not remarry—unless certain procedures are followed (as described below).[25]

Although the single *talaq* followed by a period of *idda* remains the ideal approach to divorce, the most common method of divorce exercised today is *talaq al-bid'a*, that is, *talaq* of innovation, when the husband simply says "*anti taliq*" ("you are divorced") three times on a single occasion.[26] Since triple *talaq* constitutes the quickest and simplest way to divorce, becoming effective immediately and severing the marriage irrevocably, it has become ubiquitous and has displaced all other divorce methods.[27] In order to deter husbands from pursuing ill-advised divorces, the only way to undo the triple *talaq* and remarry is for the wife to consummate an intermediate marriage and then to be divorced by her second husband.[28]

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[22] A wife who has not begun to menstruate or has reached menopause is required to observe an *idda* of three months. *See* EL ALAMI & HINCHCLIFFE, *supra* note 14, at 23.

[23] This provision is based on the Qur'anic verse: "their husbands are entitled to take them back during this period provided they wish to put things right" and "divorced women must wait for three monthly periods before remarrying." Qur'an 2:228 (M. A. S. Abdel Haleem trans., Oxford Univ. Press 2004).

[24] EL ALAMI & HINCHCLIFFE, *supra* note 14, at 23.

[25] Major David J. Western, *Islamic "Purse Strings": The Key to the Amelioration of Women's Legal Rights in the Middle East*, 61 A.F. L. REV. 79, 121–22 (2008).

[26] For a critical examination of the institution of triple *talaq*, see Mohammed Imad Ali, *Triple Divorce: A Critical Analysis*, *in* ISLAMIC FAMILY LAW: NEW CHALLENGES IN THE 21ST CENTURY 133–60 (Zaleha Kamaruddin ed., 2004).

[27] ASHAR ALI ENGINEER, RIGHTS OF WOMEN IN ISLAM 150 (2004); Khaliq, *supra* note 3, at 35.

[28] Qur'an 2:230, *supra* note 23; *see also* ESPOSITO WITH DELONG-BAS, *supra* note 3, at 37 ("The damage to his pride that a husband in traditional society had to endure in order to remarry his wife after an irrevocable divorce was doubtless intended to serve as a strong deterrent against hastily conceived divorces."). In practice, a man could marry off his divorced wife to his adolescent slave, who would insert only "the tip of his penis into the meeting point of the lips of her vagina," after which he would withdraw from and divorce her to allow the reunification of the couple. Western, *supra* note 25, at 122. On the disastrous results of triple *talaq* for women and children, see Ali, *supra* note 26, at 145. Interestingly, a cardinal difference between Islamic law and Jewish law is manifested in this context. In the latter, though it is considered meritorious and praiseworthy for a husband to remarry his wife after he divorces her—since when they divorced "even the very altar sheds tears because of him"—there is one barrier: once his ex-wife remarries, even if her new husband divorces her or dies, the gate to remarriage is forever locked. Babylonian Talmud, Gittin 90b (HaMegaresh). The ex-wife is forbidden from re-marrying her first husband—"after that she is defiled"—and a reunion by any means is impossible, "for that is abomination before the Lord; and thou shalt not cause the land

Another extraordinary aspect of the male prerogative to divorce is its private and extrajudicial nature. According to the Sunni jurisprudence, divorce may be effectuated completely privately; neither the wife nor any witnesses must be present to preserve the validity of the *talaq*, nor must the wife even be informed of the repudiation; her presence or knowledge is utterly irrelevant.[29] Finally, and perhaps most consequentially for our purposes, divorce in classical Islam does not require the parties to resort to the courts. This lack of judicial involvement was justified as a means "to protect the secrecy of the home and the dignity and the honor of the parties involved. Any woman wishing to preserve her honor and dignity would not allow her privacy and reputation to be registered in official records for all to read."[30] Women's interests, then, are used to justify *men's* powers.

B. Tied Down: The Wife's Right to Divorce

In contrast to a husband's virtually unlimited power to divorce, a wife's way out of an undesirable marriage is almost entirely blocked.[31] A female divorce right, Muslim scholars feared, would emasculate men and be susceptible to women's highly emotional and irrational natures—it would be applied rashly over trivial disagreements, if a husband failed to appreciate the color of his wife's dress, failed to kiss their dog, or disliked her preferred films.[32] As one Muslim jurist concluded, "Shari'a's putting divorce in the hand of the man, and his divorcing his wife a thousand times a day, is better than what happens in America."[33] Consequently, all schools of Islam agree that a wife does not enjoy any privilege whatsoever to initiate a private di-

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to sin." *Deuteronomy* 24:1–4 (English Revised Version). Thus, ironically, what is a taboo and a grave sin in one legal system turns out to be a religious prerequisite in the other.

[29] ESPOSITO WITH DELONG-BAS, *supra* note 3, at 30; JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 109 (3d ed. 2002).

[30] Y. Qassem, *Law of the Family (Personal Status Law)*, *in* EGYPT AND ITS LAWS 19, 25 (Nathalie Bernard-Maugiron & Baudouin Dupret eds., 2002).

[31] ESPOSITO WITH DELONG-BAS, *supra* note 3, at 32.

[32] Najla Hamadeh, *Islamic Family Legislation: The Authoritarian Discourse of Silence*, *in* FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES 331, 337 (Mai Yamani ed., 1996) (citing the opinions of noted Islamic authorities al-Asfi, Mutahhari, and Bin Murad). If a woman was allowed free access to divorce, "[i]t will then become possible for any woman to get rid of the marriage tie—fickle minded and impressionable as she temperamentally is—on account of a passing fancy . . . it will reduce the marriages into more or less a farce." Mst. Umar Bibi v. Mohammad Din, (1944) I.L.R. 25 (Lah.) 542, 547 (India); Mst. Sayeeda Khanam v. Muhammad Sami, PLD 1952 Lah. 113, 136 ("if wives were allowed to dissolve their marriages, without the consent of their husbands, by merely giving up their dowers, paid or promised to be paid, the institution of marriage would be meaningless as there would be no stability attached to it."); *see also* Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 21 (1997); Mariz Tadros, *What Price Freedom?*, AL-AHRAM WEEKLY, Mar. 7–13, 2002, http://weekly.ahram.org.eg/2002/576/fe1.htm.

[33] Hamadeh, *supra* note 32, at 337 (quoting jurist Bin Murad).

vorce, unless her husband delegates such power to her.[34] A Muslim wife has two main avenues to marital freedom: one requires her husband's approval, while the other depends on the mercy of male judges. When husband and wife both seek marital dissolution, the process is known as *mubara'a*, but when it is the wife who desires to separate and the husband merely concedes, she must forgo some or all of her financial rights to obtain her husband's cooperation,[35] in a process called *khula*.[36] *Khula* thus signifies little more than a wife's buying her way to freedom,[37] and has accordingly been compared to "ransom."[38]

Without her husband's cooperation, a wife's only way out of marriage is a fault-based judicial divorce. While a wife's financial rights remain intact under this method of divorce,[39] available grounds for dissolution are limited in number and difficult to prove.[40] Among the Sunni schools of law, the Maliki School is known as the most liberal and flexible, followed by the Hanbali and Shafi'i, and then the Hanafi (and Shi'a sects), which are the least favorable to female divorce seekers.[41] The Hanafi School, to which most Muslims worldwide subscribe,[42] is so restrictive that wives have virtually no right to divorce. The sole grounds for divorce recognized by the Hanafi School are the husband's inability to consummate the marriage,[43] either spouse's apostasy or conversion from Islam,[44] or the husband's disappearance for a period of ninety years.[45] Occupying the median position, the moderate Hanbali School adds venereal disease, failure to provide financial support, or

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[34] Such delegated divorce is called *talaq-al-tafwid*, but this "power" of divorce is restricted in significant ways and includes procedural requirements that must be meticulously followed. *See* EL ALAMI & HINCHCLIFFE, *supra* note 14, at 24–25; ESPOSITO WITH DELONG-BAS, *supra* note 3, at 32.

[35] Svetlana Ivanova, *The Divorce Between Zubaida Hatun and Esseid Osman Aga: Women in the Eighteenth-Century* Shari'a *Court of Rumelia*, *in* WOMEN, THE FAMILY AND DIVORCE LAWS IN ISLAMIC HISTORY 112, 118–21 (Amira El Azhary Sonbol ed., 1996); *see also* ESPOSITO WITH DELONG-BAS, *supra* note 3, at 23.

[36] EL ALAMI & HINCHCLIFFE, *supra* note 14, at 27.

[37] BURHANUDDIN AL-MARGINANI, HEDAYA 112 (Charles Hamilton trans., 2d ed. 1870).

[38] *See* JAWAD, *supra* note 21, at 81.

[39] When a husband divorces his wife or when the court dissolves the marriage based on the husband's fault, he is obligated to maintain his wife and pay her immediately the total amount of the delayed dower. For women's financial rights upon divorce, see ESPOSITO WITH DELONG-BAS, *supra* note 3, at 23; IVANOVA, *supra* note 35, at 121.

[40] EL ALAMI & HINCHCLIFFE, *supra* note 14, at 30.

[41] *See* ESPOSITO WITH DELONG-BAS, *supra* note 3, at 33–34 (documenting differences in divorce law among the major schools of Islam); Khaliq, *supra* note 3, at 36–37; Venkatraman, *supra* note 6, at 1970–71.

[42] Geoffrey E. Roughton, *The Ancient and the Modern: Environmental Law and Governance in Islam*, 32 COLUM. J. ENVTL. L. 99, 120 n.181 (2007); *see also* Powell, *supra* note 1, at 20 (the Hanafi school dominates Pakistan and the entire subcontinent).

[43] Powell, *supra* note 1, at 29.

[44] TAHIR MAHMOOD, MUSLIM PERSONAL LAW: ROLE OF THE STATE IN THE SUBCONTINENT 57 (1977).

[45] Putative widowhood is established upon waiting a period of ninety years, starting at the husband's date of birth. *See* ESPOSITO WITH DELONG-BAS, *supra* note 3, at 33–34.

breach of the marriage contract to the list of justified dissolution grounds. Moreover, the Hanbali School allows wives to enlarge their own divorce rights through contractual stipulations.[46] Finally, the liberal Maliki School also allows divorce on the grounds of "cruelty," whereby a wife may invoke even a single wrongful act by her husband as a basis for divorce.[47]

Undeniably, traditional Islam's sense of women's marital dissolution rights is very limited. Ironically, what is considered so detestable in Islam is made so easy for a husband and so difficult for a wife to obtain. As centuries have passed, this double standard has been so liberally employed by men that *talaq* has emerged as the institution occasioning some of the most grievous harms to Muslim women.[48] Muslim countries worldwide, forced to face the challenges wrought by the modern era, have thus begun to provide for the protection and promotion of women's rights, particularly in the domestic setting.[49] As we shall see, Pakistan has implemented reforms that may be utilized to bring classical Islamic law into accord with the fundamental rights guarantees of contemporary constitutions and the modern ideas of social justice that have influenced them.

II. Opposites Attract?: Islamic Law and Gender Equality in Pakistan's Constitution

A. Islam and Human Rights Under the Same Roof: Pakistan's Complex Constitutional Pedigree

On August 14, 1947, Pakistan emerged onto the world scene as the first country in modern history to call itself an *Islamic* Republic.[50] Early attempts

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[46] *Id.* at 22, 103; El Alami & Hinchcliffe, *supra* note 14, at 30–31. The Hanbali law further recognizes the husband's absence for a prolonged, usually six month, period (or abstention from sexual relations for a similar period) as grounds for divorce. *See* El Alami & Hinchcliffe, *supra* note 14, at 30–31.

[47] El Alami & Hinchcliffe, *supra* note 14, at 31–32.

[48] *See* Alamgir Muhammad Serajuddin, Former Professor, University of Chittagong, Lecture at the Asiatic Society of Bangladesh's Professor Mahfuza and Barrister Shafique Ahmed Trust Fund Lecture (2009), *available at* http://www.asiaticsociety.org.bd/journals/June_2010/contents/03_Alamgir%20Muhammad%20Serajuddin.htm ("Referring to the unbridled and arbitrary power of Muslim husbands to divorce their wives, and lamenting the miserable lot of the wives, . . . [one court] asks: 'Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity.'") (quoting Mohammed Haneefa v. Pathummal Beevi, 1972 KLT 512, 514 (India)).

[49] Esposito with DeLong-Bas, *supra* note 3, at 157.

[50] Hassan Abbas, *Pakistan Through the Lens of the "Triple A" Theory*, 30 Fletcher F. World Aff. 181, 185 (2006) ("Pakistan was created in the name of Islam."); Manjeet S. Pardesi & Sumit Ganguly, *The Rise of India and the India-Pakistan Conflict*, 31 Fletcher F. World Aff. 131, 135 (2007) (noting that "Pakistan was created as the homeland for the subcontinent's Muslims, and the Pakistani constitution defines the state as an Islamic republic"); Osama Siddique, *The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies Under The Pakistani Constitution and its Discontents*,

to establish a national constitution, however, involved numerous false starts; various constitutions were contemplated and promulgated only to be abandoned, suspended, or abrogated.[51] As a result, for more than half of its existence as an independent state, Pakistan's people have not enjoyed any fundamental rights whatsoever.[52] A watershed in constitutional and Islamic history, however, followed the separation of Bangladesh from Pakistan, marked by Pakistan's adoption of its fourth Constitution on April 10, 1973. Known as the "People's Constitution," the 1973 Constitution was the first produced by a democratic process, and it consequently enjoyed widespread popular support.[53]

The most conspicuous feature of the People's Constitution is its painstaking devotion to Islamic law—"[i]t contains more Islamic provisions than any of the past constitutions of Pakistan as well as any of the other constitutions of Muslim countries."[54] While many of the articles of the 1973 Constitution affirm the centrality of Islam,[55] the Islamic character of the Constitution was dramatically enhanced in 1985, when the "Objectives Resolution" of the Preamble was made a substantive provision of the Constitution. The newly adopted Article 2A constitutionalized Islam, as all laws were required to be consistent with the Qur'an and Sunna.[56] Special tribunals called the "Shariat Courts"—the Federal Shariat Court ("FSC") and the Shariat Appellate Bench of the Supreme Court ("SAB")—were established to review legislation for its conformity with Islamic law.[57] This step was unprecedented, because never before had a court anywhere in the world

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23 ARIZ. J. INT'L & COMP. L. 615, 652 (2006) (quoting Chief Justice Salam) (Pakistan was created to "be an independent free democratic country in which the majority will be Muslims and they will be enabled to lead their lives in the best traditions of Islam.").

[51] Martin Lau, *The Islamization of Laws in Pakistan: Impact on the Independence of the Judiciary*, *in* THE RULE OF LAW IN THE MIDDLE EAST AND IN THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS 150, 150 (Eugene Cotran & Mai Yamani eds., 2000) (detailing the constitutional history of Pakistan, noting attempts to adopt a constitution and the precarious status of the supreme documents once they were formed, given that they were often suspended or entirely abrogated); Siddique, *supra* note 50, at 624–26 (noting the tortuous constitutional evolution of Pakistan and its several attempts at framing and sustaining a constitution).

[52] Lau, *supra* note 51, at 150.

[53] NIAZ A. SHAH, WOMEN, THE KORAN AND INTERNATIONAL HUMAN RIGHTS LAW: THE EXPERIENCE OF PAKISTAN 99 (2006); Redding, *supra* note 8, at 797–98.

[54] SHAH, *supra* note 53, at 100.

[55] For an excellent discussion of the Islamic character of the 1973 Constitution, see KHOSA, *supra* note 10, at 103–13.

[56] PAKISTAN CONST. art. 2A.

[57] *Id.* art. 203C–D. To complete the Islamic legal picture, it is worth noting the enactment of the Enforcement of Shariah Act (X of 1991), which reaffirms the elevation of Islamic law as the supreme law of the land. Section 4 provides: "For the purpose of this Act—(a) while interpreting the statute-law, if more than one interpretation is possible, the one consistent with the Islamic principles and jurisprudence shall be adopted by the Court; and (b) where two or more interpretations are equally possible the interpretation which advances the Principles of Policy and Islamic provisions in the Constitution shall be adopted by the Court." Still, the Act provides an exclusion clause, maintaining: "Notwithstanding anything contained in this Act, the rights of women as guaranteed by the Constitution shall not be affected." *Id.* S.20.

been authorized to examine almost an entire legal system on the basis of Islam.[58]

However, the Pakistani Constitution is characterized by more than its profound commitment to Islamic principles; it also pledges allegiance to an impressive catalog of fundamental rights.[59] The Constitution recognizes almost all the guarantees of the United Nations Universal Declaration of Human Rights, including the right to life and liberty, to privacy of home, and to human dignity, which is "unparalleled and could be found only in few Constitutions of the world."[60] The very article that constitutionalizes Islam also espouses principles of democracy, "freedoms, equality, tolerance and social justice."[61] Gender relations in Pakistan are anchored in Article 25's unqualified pledge that "[a]ll citizens are equal before the law and are entitled to equal protection of the law,"[62] a powerful and inclusive guarantee based on English and American concepts of equality.[63] The Constitution further prohibits "discrimination on the basis of sex alone," though it allows for "any special provision for the protection of women and children."[64] Finally, the Constitution's Principles of Policy aim to eradicate discrimination against women and encourage their full participation in all spheres of national life.[65]

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[58] *See, e.g.*, Nasim Hasan Shah, *Islamisation of Law in Pakistan*, 47 P.L.D. 1995 J. 37, 41–42 (1995) ("The conferment of such a power of judicial review, with a view to Islamising the existing laws, has no parallel in judicial history. No such power was conferred on Courts during the Muslim Rule when Islamic Fiqh was the governing law . . . This indeed was a most awesome and far-reaching power, without any parallel in the history of the Islamic world."). The Court's jurisdiction may be invoked by any citizen, or by the federal or a provincial government. Alternatively, the court may act on its own motion. *See* Riazul Hasan Gilani, *A Note on Islamic Family Law and Islamization in Pakistan*, *in* ISLAMIC FAMILY LAW 339, 342–44 (Chibli Mallat & Jane Connors eds., 1990).

[59] *See* PAKISTAN CONST. arts. 7–40 ("Fundamental Rights and Principles of Policy").

[60] Ms. Shehla Zia v. WAPDA, PLD 1994 SC 693, 697; *see also* PAKISTAN CONST. arts. 9 & 14; SHAH, *supra* note 53, at 109.

[61] PAKISTAN CONST. art. 2A (incorporating the Objectives Resolution of the Preamble).

[62] *Id.* art. 25(1).

[63] *See* Pakistan Petroleum Workers Union v. Ministry of Interior, CLC 1991 SC 13, 17–18 (analogizing the Pakistani guarantee of equal protection of law to the Fourteenth Amendment of the United States Constitution); Munir v. Punjab, PLD 1990 SC 295, 309; *see also* EMMANUEL AZFAR, THE SHORTER CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN 223 (2d ed. 2007); Shaheen Sardar Ali & Kamran Arif, *Parallel Judicial Systems in Pakistan and Consequences for Human Rights*, *in* SHAPING WOMEN'S LIVES: LAWS, PRACTICES & STRATEGIES IN PAKISTAN 29, 29–30 (Farida Shaheed et al. eds., 1998) [hereinafter SHAPING WOMEN'S LIVES]. For an overview of Pakistani equal protection principles, see I.A. Sharwani v. Government of Pakistan, 1991 SCMR 1041 (regarding discrimination in grant of pension benefits).

[64] PAKISTAN CONST. art. 25(2)–(3). The additional prohibitions against slavery and forced labor (art. 11), denial of admission to educational institutions (art. 22), denial of access to public places (art. 26), and discrimination in public services (art. 27) are all specific applications of the general Pakistani principle of equality.

[65] *Id.* art. 34.

These constitutionally-guaranteed fundamental rights have proven no paper tiger. The Pakistani courts have earned a record that is "enviable, to say the least,"[66] for their rigorous enforcement of these fundamental rights. Pakistani courts usually have respected the constitutional guarantee of equality and rendered Article 25 an effective tool for protecting women's rights.[67] They have insisted that the Constitution requires neither nominal nor formal equality, but genuine and substantial equality for women, and on some occasions they have maintained differences on the basis of sex only when they operate favorably to protect women.[68]

I contend that the Pakistani Constitution also affords women a constitutionally-guaranteed fundamental right to divorce. Pakistani constitutional thought, like its American counterpart,[69] acknowledges that fundamental rights may exist that are not enumerated in the constitutional text.[70] While the Due Process Clause of the Fourteenth Amendment in the U.S. Constitution functions as the ultimate source for deriving unenumerated rights,[71] in Pakistan, the right to life serves as the constitutional underpinning for deducing fundamental guarantees. Under the stewardship of the Pakistani Courts, the right to life has been construed expansively to include rights necessary for a dignified existence and for enjoying a meaningful *quality* of life.[72] The

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[66] KHOSA, *supra* note 10, at 155. For a summary of the leading cases elucidating the scope of fundamental rights protected by the Pakistani constitution, see generally A.G. CHAUDHRY, THE LEADING CASES IN CONSTITUTIONAL LAW 155–521 (2006).

[67] *See, e.g.*, Ghulam Mustafa Ansari v. Punjab, 2004 SCMR 1903; Government of Balochistan v. Azizullah Memon, PLD 1993 SC 341 (summarizing the equality doctrine and reviewing landmark cases); Shirin Munir v. Government of Punjab, PLD 1990 SC 292 (disallowing discrimination in admission to medical college); SHAH, *supra* note 53, at 110.

[68] *See* Mst. Fazal Jan v. Roshan Din, PLD 1990 SC 661 (holding that sex-based legislation is constitutionally legitimate only when it functions as a protective measure for women and not to disadvantage them); AZFAR, *supra* note 63, at 231.

[69] The American constitutional order designates certain rights as "fundamental"and the Supreme Court has recognized that such rights may fall outside the four corners of the Constitution's text, inferring their existence "from the basic constitutional order, the fundamental narratives of American history and American identity, the common and honored traditions of the American people, or the deepest meanings of liberty and equality in a free and democratic republic." PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1131 (4th ed. 2000). For a seminal article (among an enormous body of academic writing) that analyzes the phenomenon of unenumerated fundamental rights, see Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE. L.J. 1063 (1981).

[70] *See, e.g.*, Darshan Masih v. State, PLD 1990 SC 513 (holding that the constitutional catalog of rights is not sealed or exhaustive, but open and evolving).

[71] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997) (noting that the Due Process Clause includes rights such as the right to marry, to have children, to use contraception, to bodily integrity, and to have an abortion); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (the substantive component of the Due Process Clause "protects against 'certain government actions regardless of the fairness of the procedures used to implement them' ") (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

[72] *See, e.g.*, Ms. Shehla Zia v. WAPDA, PLD 1994 SC 693 (the right to life must include a right to basic necessities of life and a right to a clean atmosphere and healthy environment); Emps. of the Pakistan Law Comm'n v. Ministry of Works, SCMR 1994

right to life has proven so capacious as to encompass not only affirmative rights to proper nutrition, clothing, shelter, and even education, but also environmental rights.[73] This array of rights places Pakistan in line with some of the West's most liberal constitutional regimes. Most relevant for our purposes, the Pakistani courts have understood the right to life to imply the rights of couples to marry, establish a home, and live together as a basic human right.[74] If the rights to marry and have a family are fundamental, then the right to dissolve a marriage naturally follows.

To begin, the rights to marry and live with the person of one's choice necessarily include the right not to live with—and thus to leave—a person.[75] The decision to divorce is no less life altering than marriage itself; it is one of the most intimate and private personal decisions, indispensable from the definition of one's identity.[76] The dissolubility of marriage is a proper, even natural, candidate for inclusion within the ambit of the constitutional right to life because it deeply affects quality of life, with the potential to end intense suffering and restore tranquility.[77] Moreover, denial of the right to divorce

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Lah. 1548, 1553; *see also* I SYED SHABBAR RAZA RIZVI, CONSTITUTIONAL LAW OF PAKISTAN: TEXT, CASE LAW AND ANALYTICAL COMMENTARY 110 (2002).

[73] This catalogue of rights includes social and economic, political and civil, explicitly-guaranteed and unenumerated rights. *See* Karin Carmit Yefet, *What's the Constitution Got to Do with it? Regulating Marriage in Pakistan*, 16 DUKE J. GENDER L. & POL'Y 347, 351 (2009); *see also* AZFAR, *supra* note 63, at 94–96, 98, 134. For cases in which courts have discussed these rights, see General Secretary, West Pakistan Salt Miners Labour Union v. The Director, Industries and Mineral Development, 1994 SCMR 2061 (a right to unpolluted water); Shehri v. Province of Sindh, 2001 YLR 1139 (right to life in a clean and healthy environment); Ameer Bano v. S.E. Highways, PLD 1996 Lah. 592 (a right to be protected from diseases and inconvenience); Metro. Corp., Lahore v. Imtiaz Hussain Kazmi, PLD 1996 Lah. 499 (an employee has a constitutionally protected right to earn a livelihood and to be paid).

[74] The fundamental character of the right to marry and choose a spouse was established in a series of cases. *See, e.g.*, Humaira Mehmood v. State, PLD 1999 Lah. 494, 501 (holding that "[i]t is a settled proposition of law that in Islam a sui juris woman can contract Nikah of her own free will and a Nikah performed under coercion is no Nikah in law"); Mst. Sajida Bibi v. Incharge Chouki No. 2, Police Station Sadar, Sahiwal, PLD 1997 Lah. 666, 668–70 (Articles 9, 29, and 35 of the Pakistani Constitution command that the State protect marriage and the family). The most interesting case involved a father who disapproved of his daughter's marriage and murdered her, her husband, and their new baby. Muhammad Siddique v. State, PLD 2002 Lah. 444, 449. The court characterized "honour killing" as "male chauvinism and gender bias at their worst" and recognized the right to marry as fundamental under both Islam and the Pakistani Constitution. *Id.* at 455.

[75] In addition to implicating the right to life, divorce has a direct and profound bearing on marriage and family, each of which enjoys its own constitutional status. *See* PAKISTAN CONST. art. 35.

[76] *See generally* Karin Carmit Yefet, Marrying Divorce to the Constitution: Dissolution as a Fundamental Right (unpublished manuscript) (on file with author) (discussing the fundamental status of the right to divorce in the U.S. constitutional order, showing that the divorce decision is among those critical life-choices that determine one's lot in life and whose exercise reflects the kind of self the person is or wishes to become, and arguing that the state must carve out some space for the exercise of agency in the construction of identity by respecting people's right to control their marital destiny).

[77] Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 86 (2004).

means denial of the fundamental right to remarry.[78] Inhibiting divorce and thus preventing remarriage violates the right to life the same way that prohibitions on first marriages would—in either case, "to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance."[79] Indeed, commentators have stressed that marriage, whether a first or a subsequent marriage, actualizes the same social functions and satisfies the same individual needs; it constitutes "the most enriching and liberating relationship to facilitate human adults to personally develop and achieve their fullest potential,"[80] providing "love and friendship, security for adults and their children, economic protection, and public affirmation of commitment."[81] Deprivation of the right to divorce, however, violates more than just the right to remarry. When unmarried individuals are legally barred from marrying the partners of their choice because those individuals are trapped in moribund marriages that they are unable to formally dissolve, the right to marry can itself be violated.[82]

But it is not only the *quality* of life that divorce may promote. The right to marital freedom may provide a crucial safeguard for women's lives in abusive marriages, where women's health, safety, and entire existence may depend on the availability of means to end their marriages.[83] Marital exit in Pakistan, where seventy to ninety percent of all women suffer domestic violence,[84] thus appears an elementary component of a constitutional right to life. In conclusion, a right to marital dissolution deserves constitutional protection based on the rights to both marriage and life.

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[78] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 671 (1980).

[79] HCJ 7052/03 Adalah Legal Ctr. For Arab Minority Rights in Israel v. Minister of Interior 1 IsrLR 443, ¶ 35 [2006] (Isr.) (Barak, C.J.) (internal quotation marks omitted), *available at* http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.pdf (citing *Dawood v. Minister of Home Affairs*, 2000 (3) SA 936 (CC) (S. Afr.), which recognizes that divorce is a fundamental human right). Interestingly, most people about to remarry believe they will form better unions and that their new marriages will last a lifetime. This is the case even with couples entering a third, fourth, or fifth marriage. GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 172 (1991).

[80] Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 780 (2001).

[81] LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 6 (2006).

[82] This restriction surely pertains to women. However, it is also relevant with regard to men: under Islamic law, a man can marry up to four wives, but he must treat all of them equally. Qur'an 4:3, *supra* note 23. For most men, such a requirement is virtually impossible to meet, both financially and emotionally. Under such conditions, a bar to divorce is tantamount to a bar to marriage.

[83] *See infra* Part III.B.1.d and authorities cited therein.

[84] Lisa Hajjar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis*, 29 LAW & SOC. INQUIRY 1, 29 (2004).

B. War or Peace?: Reconciling Constitutional Commitments to Islam and Human Rights

To Western observers, the Pakistani Constitution must appear to be a battlefield between irreconcilable postulates[85]: fundamental guarantees that imply a liberal and equal right to divorce, on the one hand, and adherence to Islamic law, including discriminatory divorce entitlements, on the other. Can there be any point of convergence between Islamic law and women's marital rights? And where there is conflict, which constitutional mandate must be obeyed? To answer these questions, this Section explores Islam's status in Pakistan's legal system and its relationship to "Western" fundamental rights.

The role of Islamic law in Pakistan has not been uncontroversial. In fact, the Pakistani Supreme Court acknowledged that the issue had "no parallel" and shook "the very Constitutional foundations of the country,"[86] precipitating fierce debates within the judiciary. Early on, some judges insisted that Article 2A's embrace of Islam constitutes a supremacy clause of sorts, controlling all other laws and even the Constitution itself,[87] while others viewed it as a mere principle of policy, an aspirational guideline for the Constituent Assembly.[88] Many years passed before the Pakistani Supreme Court resolved the conflicting decisions animating this constitutional debate.[89] Interestingly, it was none other than the divorce provisions of the Muslim Family Laws Ordinance ("MFLO")[90] that moved the Court to reject the notion embraced by many lower courts that the judiciary "had the power to declare a law repugnant to Islam" and that "the injunctions of Islam are to

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[85] There is no conflict, however, between Pakistan's international obligation to equality and Islamic law, because its adherence to women's rights conventions are conditioned on its compatibility with the Pakistani Constitution. *See* Katherine M. Weaver, *Women's Rights and Shari'a Law: A Workable Reality? An Examination of Possible International Human Rights Approaches Through the Continuing Reform of the Pakistani Hudood Ordinance*, 17 DUKE J. COMP. & INT'L L. 483, 500–01 (2007).

[86] *See* Hakim Khan v. Government of Pakistan, PLD 1992 SC 595, 629.

[87] The champion of this stance was Justice Tanzil-ur-Rahman. *See, e.g.*, Irshad H. Khan v. Parveen Ajaz, PLD 1987 Kar. 466, 486 ("So, it is the Constitutional command for the State (Islamic Republic of Pakistan) to take such steps as would "enable" the Muslims of Pakistan to live as Muslims. Therefore, any law which not disregards such a commandment but positively violates it, is to be disregarded in view of Article 2-A."). Many other justices followed suit, viewing Islamic law as the supreme law of the land that all laws must obey. *See* Miraz Qamar Raza v. Tahira Begum, PLD 1988 Kar. 169; Habib Bank Limited v. Muhammad Hussain, PLD 1987 Kar. 612.

[88] *See, e.g.*, Habib Bank Ltd. v. Waheed Textile Mills Ltd., PLD 1989 Kar. 371, 385–88; Ghulam Mustafa Khar v. Pakistan, PLD 1988 Lah. 49, 118; *see also* Ali & Arif, *supra* note 63, at 40.

[89] *See* Ali & Arif, *supra* note 63, at 40.

[90] SHIRKAT GAH, WOMEN'S RIGHTS IN MUSLIM FAMILY LAW IN PAKISTAN: 45 YEARS OF RECOMMENDATIONS VS. THE FSC JUDGEMENT 9 (2000); Sohail Akbar Warraich & Cassandra Balchin, *Confusion Worse Confounded: A Critique of Divorce Law and Legal Practice in Pakistan*, *in* SHAPING WOMEN'S LIVES, *supra* note 63, at 181, 184, 213–14.

be supreme."[91] The Court held that Article 2A was not a "meta" or "super" article but a command that was equal in weight and status to the other provisions of the Constitution.[92] Accordingly, courts were not authorized to invalidate enumerated constitutional provisions based on any perceived repugnancy to Islamic injunctions. Any inconsistency among constitutional provisions had to be harmonized if at all possible,[93] and if reconciliation efforts failed, "the provision which contains lesser right must yield in favour of a provision which provides higher rights."[94] In a subsequent decision involving the MFLO, the Supreme Court broadened the ruling, holding that just as Article 2A cannot be used to invalidate constitutional provisions, neither could it be used to invalidate statutory law on the basis of Islam.[95] Only the Shariat Courts—the Federal Shariat Court and the Sharia Appellate Bench—have jurisdiction to invalidate laws repugnant to Islamic injunctions.[96]

With its disbarment as a benchmark for the constitutional review of legislation, Article 2A has been assigned a compensating role in the civil court system with several considerable functions: Islamic law is understood as a source of law to guide the interpretation of legislation, to fill gaps in the framework of statutory laws, and to Islamize the judicial discourse.[97] Most

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[91] GAH, *supra* note 90, at 9 (espousing the view of many lower courts).

[92] Hakim Khan v. Government of Pakistan, PLD 1992 SC 595, 617.

[93] *Id.; see also* Shrin Munir v. Gov't of Punjab, PLD 1990 SC 295, 312; Perry S. Smith, *Silent Witness: Discrimination Against Women in the Pakistani Law of Evidence*, 11 TUL. J. INT'L & COMP. L. 21, 25 (2003).

[94] Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan, PLD 1998 SC 1263, 1315.

[95] Mst. Kaneez Fatima v. Wali Muhammad, PLD 1993 SC 901, 912.

[96] *Id* at 912–13. Remarkably, this decision has been set aside time and again by lower courts, in repeated attempts to invalidate MFLO's regulation of divorce as repugnant to Islam. *See* LAU, *supra* note 10, at 70–71.

[97] *See, e.g.*, Muhammad Bashir v. State, PLD 1982 SC 139, 142–43 (courts are duty-bound to apply Islamic law to areas of law not occupied by a statute); Hameed Ahmad Ayaz v. Government of Punjab, PLD 1997 Lah. 434 (ordering all courts in Punjab to ignore the increase of court fees based, *inter alia*, on Islam); Mst. Gulzaran v. Amir Bakhsh, PLD 1997 Kar. 309, 310 (using Islamic law as an additional source in the Pakistani constitutional fabric for safeguarding human rights in granting a restraining order against a father of a woman who had been sold into marriage and who feared that her father, with police cooperation, would abduct her in order to prevent her from obtaining a divorce decree); see also Riaz v. Station House Officer, Police Station Jhang City, PLD 1998 Lah. 35, which strengthens the protection accorded to the privacy of the home and to the dignity of the individual by invoking the combined force of both the Constitution and Islam. This decision banned the police practice of raiding houses to intrude on the privacy of couples, harass them, and charge them with committing sex outside of wedlock (zina). *Id.* at 41. The Court stressed the importance and wide scope of the constitutional right to privacy, explaining that this right originated in the Qur'an and found its way from Islam to the Constitution of Pakistan. *Id.* at 51. It noted that Article 2A imbued Pakistani citizens with all the basic freedoms and rights enunciated by Islam, including the "inviolable and absolute" Islamic sanctity of the home. *Id.* at 45–47. Accordingly, the court held that the *Zina* Ordinance is to be construed in light of the constitutional and Islamic concept of privacy, meaning that its silence on the issue of search warrants should be read as excluding such authority and as preventing the police from interfering with the sacred privacy of the home. *Id.* at 51.

importantly, Article 2A—and thus Islamic law—provides a basis for *expanding* rather than restricting the scope of constitutionally guaranteed fundamental rights,[98] and for *adding* new rights to the catalog of fundamental rights rather than limiting it.[99] The list of constitutional rights is thus not sealed or exhaustive in Pakistan, but receptive to the addition of evermore unenumerated rights recognized in Islam.[100]

The most significant contributions of Islamic law to the expansion of human rights norms in Pakistan, however, have come from *Shariat* court decisions. These special tribunals, constitutionally entrusted with safeguarding Islamic law, have devised an innovative, human-rights sensitive formula for carrying out their task: they have interpreted the constitutional commitment to Islam to imply conformity with general principles of Islamic law—particularly the right to equality and the right to be heard—rather than with

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[98] *See* Human Rights Case, No. 1 of 1992, PSC 1993 Lah. 1358, 1363. This case stated that Islam, when properly analyzed and construed, has higher human rights standards than the international community. For example, the right to obtain justice and the right to human dignity are "more pronounced in Islam than they are in any other system"; hence, when interpreting the fundamental rights and their scope as conferred by the Constitution, the court is obliged to give effect to the corresponding or extended right in Islamic jurisprudence that is broader in its scope of protection. *Id.*

[99] *See, e.g.*, LAU, *supra* note 10, at 98, 100. The Quetta Declaration, prepared by the Chief Justice Afazal Zullah together with the Chief Justices of all the courts in Pakistan, attests to the reformulation of human rights on the basis of Islam, and deserves to be quoted extensively:

> The mandate given to the nation by the founding fathers in the shape of the Objectives Resolution, now a substantive part of our Constitution, and other Articles of the Constitution, ensuring and guaranteeing all fundamental human rights and emphasizing social, economic, and political justice to all has yet to fully achieve its promise in practical terms. The Judiciary, before and after independence, time and again has come to the rescue of the citizens by safeguarding their rights whenever dictates of justice so demanded by following our own ethos and conscience . . . and by invoking directly, Muslim law and jurisprudence in individual cases for the protection of human rights in society . . . Superior Judiciary has clearly emphasized the need for a genuine effort for reconstruction of the Islamic concepts in this field and for evolving steps in an indigenous manner for guiding and motivating the citizens and the State for asserting, promoting and enforcing the legal rights of citizens guaranteed and provided by Islam, the Constitution and the law.

Id. at 98 (*citing* Scheme for the Protection of Human Rights of Classes of Society in the Country, PLD 1991 142, 142). One of the rare exceptions to this rule, which serves to attest to its general validity, is the case of Zaheeruddin v. State, 1993 SCMR 1718, 1780, in which the Supreme Court restricted a constitutionally guaranteed fundamental right (the freedom of religion) instead of interpreting it expansively on the basis of Islam. For analysis of this case, see Ann Elizabeth Mayer, *Protection For Religious Freedom: The Grim Legacy of Zaheeruddin v. State*, *in* DEMOCRACY, THE RULE OF LAW AND ISLAM 545 (Eugene Cotran & Adel Omar Sherif eds., 1999). For the restriction of human rights based on Islamic law, see LAU, *supra* note 10, at 112–19.

[100] *See* Darshan Masih v. State, PLD 1990 SC 513, 546 (Chief Justice Muhammad Afzal Zullah) ("There is no bar in the Constitution to the inclusion in such laws of these rights, in addition to the Fundamental rights contained in Chapter 1, Part II thereof . . . These aspects of the enforcement of Fundamental Rights guaranteed by the Constitution and other basic human rights ensured by Islam can, by law, be made also into an independent *inalienable* right, with self-operating mechanism for *its* enforcement as well.").

concrete, and often problematic, provisions of Shari'a, when deeming particular laws inconsistent with Islamic norms.[101] Refuting the conventional wisdom associating Islamic law with discrimination and prejudice, Pakistani-style Islamic law has thus generally operated to promote equality and enhance human rights.[102] The case law has interwoven the injunctions of Islam and fundamental rights, gradually yet steadily equating them.[103] The Islamic notion of equality, in particular, has proven to be a powerful mechanism to invalidate numerous statutes that breached the rule of equality before the law.[104] The Federal Shariat Court has exercised its constitutional command so vigorously that more legislation has been invalidated based on the *Islamic* principle of equality than on the *constitutional* right to equality.[105] If there is one conclusion to be drawn from cases exploring the human rights dimension of Islamic law, it is that the Islamic equality principle not only easily accommodates, but has become even broader in scope and more powerful in its effect, than the constitutional right to equality.[106] In short, the Pakistani

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[101] Martin Lau, *Human Rights, Natural Justice and Pakistan's Shariat Courts*, *in* RELIGION, HUMAN RIGHTS AND INTERNATIONAL LAW 359, 373–76 (Javaid Rehman & Susan C. Breau eds., 2007) (explaining that the FSC was criticized by the Supreme Court for not identifying concrete provisions of Qur'an and Sunna and instead relying on general principles of Islamic justice).

[102] Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspectiv*e, 18 MICH. J. INT'L L. 287, 288 (1997); *see also* Julie Dror unh, *Never Wear Your Shoes After Midnight: Legal Trends under the Pakistan Zina Ordinance*, 17 WIS. INT'L L.J. 179, 181–82 (1999). The interpretation of the Islamic right to be heard resulted, *inter alia*, in the invalidation of statutes authorizing the government to take action against citizens without giving them an opportunity to be heard. *See, e.g.*, Pakistan v. General Public, PLD 1989 SC 6 (recognizing a right of appeal that extended even to convictions recorded by the Court Martial and invalidating section 133 of the Pakistan Army Act 1952, section 162 of the Pakistan Airforce Act 1952, and section 140 of the Pakistan Navy Ordinance 1961); In Re: Passports Act 1974, PLD 1989 FSC 39 (establishing notice and reasoning requirements for individuals prosecuted under the Passports Act).

[103] The availability of a strong and independent suite of Islamic basic rights is particularly critical given the recurrent suspension of fundamental constitutional rights, as exemplified by Pervez Musharraf's 2007 coup. *See generally Coup number two: General Musharraf seizes power again*, THE ECONOMIST (Nov. 5, 2007), http://www.economist.com/world/asia/displaystory.cfm?story_id=10088419.

[104] There are plenty of instances of applying fundamental rights, derived from Islamic law, to invalidate legislation. *See, e.g.*, Nusrat Baig Mirza v. Gov't of Pakistan, PLD 1992 FSC 412 (holding the quota system for admission to the civil service to be repugnant to Islamic equality and thus void); S.A. Zuberi v. Nat'l Bank of Pakistan, PLD 1989 FSC 35 (invalidating the retirement provision of the National Bank of Pakistan Rules 1980).

[105] LAU, *supra* note 10, at 178. It became so difficult for a law to meet the rigorous equality standard of Islam that even in cases when the Federal Shariat Court agreed that a statute conformed with Islamic equality, the Shariat Appellate Bench set aside its usual judicial reluctance to intervene and overturned the Federal Shariat Court's ruling. *See, e.g.*, Irshad Ahmad v. Federation of Pakistan, PLD 1993 SC 464 (as a matter of equality, the government was prohibited from limiting the provision of medical benefits to just one wife of a polygamous civil-servant husband).

[106] For an excellent analysis of this point, see Lau, *supra* note 101, at 366–67. For example, while Pakistani constitutional jurisprudence acknowledges that the fundamental right to equality could be employed to challenge statutes discriminatory on their face,

experience with Islamic law confounds the premise that Islam and human rights are incompatible and that an Islamic right to equality is an oxymoron. Rather than ignoring or curtailing human rights, Islamic law has been highly conducive to their protection.

The arsenal of constitutional tools to promote women's equality and marital freedom brought to light in this section of the article paves the way for our investigation of Pakistan's divorce regime. How has the legislature maneuvered between its constitutional commitments to Islamic law and fundamental rights, and how have Pakistani courts carried out their duty to defend the Constitution in the explosive divorce arena?

III. Wedding Female-Initiated Divorce to the Constitution: Statutory and Judicial Sides of the Story

This section bears out the truism that there are two sides to every divorce story. That duality reflects not only Islam's gender-based divorce regime, but also stems from a deep discrepancy in Pakistan between the law on the books, as promulgated by the legislature, and the law in action, as applied by the courts. Part A analyzes the discriminatory statutory divorce regime in light of the constitutional mandates reviewed above, while Part B uncovers the resourcefulness of Pakistani courts in the service of women's fundamental rights.

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generally applied or seemingly neutral statutes are constitutionally immune unless it is proven that they have been applied in a discriminatory fashion. *See* Jibendra Kishore Acharyya Chowdhury v. Province of East Pakistan, PLD 1957 SC 9, 32–33. The Islamic equality right, however, is even broader in that it is based on a presumption that the civil officials in charge of executing the law are likely to carry out their discretionary powers in an inequitable manner. Hence, under the Islamic equality requirement, the magnitude of discretion statutorily accorded to public officials had to be substantially reduced so as to ensure it would not be inappropriately abused, as is manifested, for example, in Maqbool Ahmad Qureshi v. Gov't of Pakistan, PLD 1989 FSC 84. The FSC invalidated the immunity from prosecution accorded to public servants and judges, unless sanctioned by government, not because it offended the constitutional right to equality (it did not, since the classification is not arbitrary but rests on the reasonable goal of protecting civil servants from frivolous litigation), but because this immunity "deprive[d] the Courts of law of their power to adjudicate upon the grievances of a citizen and wors[t] of all . . . [was] based on the option and discretion of the executive." *Id.* at 88. Thus, such a statutory grant of broad discretionary power to the government offended the Islamic equality principle, because it was not immune from being misused and exercised arbitrarily and discriminatorily. *Id.* This decision was reaffirmed by the Shariat Appellate Bench in Federation of Pakistan v. Zafar Awan, Advocate, PLD 1992 SC 72. Regrettably, however, the Islamic right to equality has generally not been applied in the context of gender, as evidenced by the considerable number of discriminatory sex-based laws on the books in Pakistan. Lau, *supra* note 10, at 178. For a discussion of gender discrimination in Pakistani law, see generally Government of Pakistan, Report Of The Commission of Inquiry For Women (1997). *But see In re* Suo Motu Case No. 1/K of 2006, PLD 2008 FSC 1, where the Federal Shariat Court on its own initiative reviewed and invalidated section 10 of the Pakistan Citizenship Act (II of 1951), which conferred citizenship status upon a foreign woman married to a Pakistani man, but denied status to a foreign man married to a Pakistani woman.

When appropriate, Pakistani divorce regulations will be compared to those in other Muslim countries, especially Egypt, an undisputed role model of the Arab and Muslim worlds.[107] While both Pakistan and Egypt embrace classical Islamic law in the divorce arena, they have often reached remarkably different results.

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[107] Martin Haars, *Summary and Concluding Remarks*, *in* THE SHARI'A IN THE CONSTITUTIONS OF AFGHANISTAN, IRAN AND EGYPT—IMPLICATIONS FOR PRIVATE LAW 181, 193 (Nadjma Yassari ed., 2005). While this article was going to press, Egypt underwent extreme political turmoil, sparked by demands of demonstrators calling for greater rights and freedoms and a larger say in their government, which culminated in the forced removal from office of Egyptian President Hosni Mubarak. *See, e.g.*, Craig Kanally, *Egypt Revolution 2011: A Complete Guide to the Unrest*, HUFFINGTON POST (Jan. 30, 2011), http://www.huffingtonpost.com/2011/01/30/egypt-revolution-20110_n_816026.html. Given Egypt's special place in the minds of Muslims worldwide and its status as the Arab world's most powerful country, current events are likely to embolden similar movements in other nearby states. *See* Scott Ashley, *What's Behind the Turmoil in Egypt?*, GOOD NEWS MAGAZINE (Mar./Apr. 2011), http://www.gnmagazine.org/issues/gn93/whats-behind-the-turmoil-in-egypt.htm. While the turmoil in Egypt puts a glaring spotlight on the fragility of political stability in the entire Muslim world, its repercussions for the legal system and for the purposes of this Article are less clear. It is too soon to predict the course of the revolution and whether it will result in an enlightened new democratic rule (which is, concededly, a decades-long process) or the mere exchange of one set of rulers for another.

For our purposes, given the central place of Islam in the Egyptian nation and the firm constitutional commitment to follow Islamic law as embedded in Article 2, it seems plausible to assume that the legal system, under any form of government, will still pledge allegiance to Islamic law. *See* Karin Carmit Yefet, *Lifting the Egyptian Veil: A Constitutional Road Map to Female Marital Emancipation in the Islamic World*, *in* MARRIAGE, MINORITIES AND MULTI-CULTURALISM (Shahar Lifshitz & Rona Schoz eds., forthcoming 2012) (noting that the "Islamic Shari'a has always played a role in the Egyptian legal order" and discussing Shari'a-based constitutionalism in Egypt). Since family law, the subject of our inquiry, is in fact the *sole* area of law in Egypt that is totally transplanted from the Islamic Shari'a and not from European civil law, and the field is considered "the most explosive area of law to regulate," it seems plausible to assume that it is the least prone to change in the advent of the post-Mubarak era. Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND J. TRANSNAT'L L. 1043, 1046–47, 1097 (2004); Adel Omar Sherif, *Separation of Powers and Judicial Independence in Constitutional Democracies: The Egyptian and American Experiences*, *in* DEMOCRACY, THE RULE OF LAW AND ISLAM 25, 26–28 (Eugene Cotran & Adel Omar Sherif eds., 1999); Yefet, *supra*, at 53. If the predictions that the Muslim Brotherhood (the most prominent opposition group in Egypt advocating Islam as a political program) will take hold and dethrone Egypt's secular government are correct, then the current Islamic legal order is more likely to be maintained, not undermined. *See* Ashley, *supra*; Dana Karni, *Amid Turmoil in Egypt, Opposition Groups Emerge with Varied, Conflicting Agendas*, FOX NEWS (Feb. 3, 2011), http://www.foxnews.com/world/2011/02/03/opposition-groups-egypt-varied-conflicting-agendas.

A. The Statutory Side of the Story: Ongoing Discrimination

1. *The Dissolution of Muslim Marriages Act of 1939: A Fault(y) Approach to Female Marital Freedom*

For years, Muslim women living in British India before the establishment of Pakistan as an independent nation had no legal right to divorce.[108] Desperate for an exit route, alarming numbers of wives converted to Christianity, thereby automatically dissolving their marriages on the basis of apostasy.[109] Those forces internal to the Muslim community, along with external criticism from the West, conspired to produce a restructuring of Muslim family law—not to mention the entire Indian subcontinent—in 1939.[110] Designed to ameliorate the "unspeakable misery to innumerable Muslim women" trapped in unhappy marriages,[111] the Dissolution of Muslim Marriages Act ("DMMA") of 1939 finally recognized women's right to marital freedom.[112] When Pakistan became an independent state in 1947, it retained the law and has since only implemented limited reforms that are much less extensive than those enacted by most other Muslim countries, notably Egypt.[113]

The DMMA establishes new grounds for divorce, in cases of the husband's impotence, virulent venereal disease, insanity lasting two years, or failure to perform marital obligations, but exhibits no sensitivity to the centrality of conjugal life to marriage.[114] For example, a husband's unwarranted

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[108] Rohit De, *The Two Husbands of Vera Tiscenko: Apostasy, Conversion, and Divorce in Late Colonial India*, 28 LAW & HIST. REV. 1011, 1016 (2010) ("Classical Hindu law did not recognize divorce, holding the Hindu marriage to be a sacrament. The reliance the court placed on textual sources meant that customary practices of divorce were often not acknowledged."); *id.* at 1017 ("The only way many women could escape an unhappy marriage was to exit their system of personal law through apostasy or conversion.").

[109] Shaheen Sardar Ali & Rukhshanda Naz, *Marriage, Dower, and Divorce: Superior Courts and Case Law in Pakistan*, *in* SHAPING WOMEN'S LIVES, *supra* note 63, at 107, 108; Asma Jahangir, *The Origins of the MFLO: Reflections for Activism*, *in* SHAPING WOMEN'S LIVES, *supra* note 63, at 93, 95–96.

[110] ESPOSITO WITH DELONG-BAS, *supra* note 3, at 70, 76; Haider, *supra* note 9, at 296–97.

[111] *See* Martha C. Nussbaum, *India: Implementing Sex Equality Through Law*, 2 CHI. J. INT'L L. 35, 43 (2001) (quoting the Statement of Objects and Reasons attached to the Act) (internal quotation marks omitted).

[112] Dissolution of Muslim Marriages Act (VIII of 1939). In explaining this statute, the legislature disclosed its motivation to put an end to the "unspeakable misery [of] innumerable Muslim women" and noted that legislation was "necessary in order to relieve the sufferings of countless Muslim women." Nadya Haider, *Islamic Legal Reform: The Case of Pakistan and Family Law*, 12 YALE J.L. & FEMINISM 287, 297–98 (2000) (citation omitted) (quoting the Statement of Objects and Reasons appended to the DMMA); *see also* RASHIDA MOHAMMAD HUSSAIN PATEL, WOMAN VERSUS MAN: SOCIO-LEGAL GENDER INEQUALITY IN PAKISTAN 90–91 (2003).

[113] ESPOSITO WITH DELONG-BAS, *supra* note 3, at 76–77.

[114] S.2(iv)–(vi), Dissolution of Muslim Marriages Act (VIII of 1939); *see also* Kristen Cherry, *Marriage and Divorce Law in Pakistan and Iran: The Problem of Recognition*, 9 TULSA J. COMP. & INT'L L. 319, 330–31 (2001).

absence is inadequate to secure a divorce; marital desertion suffices only if the husband is a missing person for four full years[115]—mercifully less than the Hanafi School's ninety-year waiting period but much more than the one-year waiting period required in Egypt.[116] Moreover, the grounds that the DMMA does provide are stingy at best. The classical impotency ground provides an illuminating example, attesting to the DMMA's own impotence. For example, if the husband was not impotent at the time of the marriage, any subsequent impotence would not entitle his wife to seek a divorce; moreover, even when the alleged impotence does qualify as a divorce ground (such as when the husband *was* impotent at the time of marriage), the finality of divorce is still put on hold for one year to allow the husband time to prove his virility.[117] In Egypt, in sharp contrast, impotency during marriage is perhaps the most promising means of escape. Satisfying women's libido in Egypt is perceived as imperative to control women's sexuality and ensure female chastity, so any impediment that interferes with a husband's sexual function is a ticket to marital freedom.[118]

While claiming adherence to the same body of classical Islamic law, Pakistan also diverged from other Muslim countries with regard to the length of a husband's prison sentence sufficient to warrant a divorce. While the Pakistani legislature insisted on no less than a seven-year sentence, three years sufficed for its Egyptian counterpart.[119] The ground of failure to provide for two years, to take another example, was narrowly crafted to provide an additional grace period for a husband to pay his debt, allowing a husband to block a divorce altogether by resuming financial support of his wife.[120]

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[115] S.2(i), Dissolution of Muslim Marriages Act; ESPOSITO WITH DELONG-BAS, *supra* note 3, at 77.

[116] *Compare* S.2(i), Dissolution of Muslim Marriages Act, *with* Article 12 of the Egyptian Law No. 25 of 1929; *see also* EL ALAMI & HINCHCLIFFE, *supra* note 14, at 59; ESPOSITO WITH DELONG-BAS, *supra* note 3, at 55, 77.

[117] *See* Bibi Anwar Khatoon v. Gulab Shah, PLD 1988 Kar. 602, 611; PATEL, *supra* note 112, at 95.

[118] *See* Yefet, *supra* note 107, at 9. This article describes the Egyptian obsession with women's sexuality and the viewing of females as "temptresses" who constantly exploit their "irresistible" sexual power to entice men; Egyptians view women's sexuality as so strong that it threatens not only individuals and families, but the entire Egyptian nation. *Id.* at 8. Women utilize these patriarchal fears to avail themselves of marital freedom, and, despite the addition of other grounds to the Egyptian divorce catalog, the lawyerly advice for divorce-seekers "is to use the good old ground of impotence, and its hazard to female chastity." *Id.* at 72.

[119] *Compare* S.2(iii), Dissolution of Muslim Marriages Act, *with* Article 14 of Egypt's Law No. 25 of 1929; *see also* EL ALAMI & HINCHCLIFFE, *supra* note 14, at 59. However, while the Pakistani wife is entitled to apply immediately for divorce in such a case, her Egyptian counterpart may exercise her divorce right only after one year has elapsed since her husband's imprisonment. ESPOSITO WITH DELONG-BAS, *supra* note 3, at 78–79.

[120] S.2(ix)(b), Dissolution of Muslim Marriages Act; M. MAHMOOD, THE CODE OF MUSLIM FAMILY LAWS 321, 324 (6th ed. 2006). The Lahore High Court has held that it is "immaterial whether the failure to maintain [financially] is due to poverty, failing health, loss of work, imprisonment or to any other cause whatsoever." Manak Khan v. Mt. Mulkhan Bano, AIR 1941 Lah. 167, 167.

No retroactive payment to compensate for years of non-support was required.[121] The Pakistani law requiring women to endure at least two years of nonsupport before qualifying for a divorce and ignoring cumulative maintenance debts contrasted glaringly to the laws in Egypt and many other Muslim countries.[122]

One difference that benefited Pakistani women was the inclusion of cruelty in the catalog of divorce grounds, constituting the only instance in which Pakistani law adhered more closely than Egyptian law to liberal Maliki rules.[123] Cruelty in the DMMA is spread out over six sub-clauses, ranging from the severe—such as physical assault—to the relatively less extreme—such as taking multiple wives without treating them equitably, leading an infamous life, disposing of the wife's property, or obstructing her observance of religion.[124]

The statutory latitude granted to Pakistani women to dissolve their marriages is limited indeed.[125] Even classical Islamic law seems more generous

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[121] This is the regime provided for under Hanafi law. Other schools, however, bypass this hardship by viewing maintenance as an ongoing debt, open to claim without time limitation. ESPOSITO WITH DELONG-BAS, *supra* note 3, at 26.

[122] *Id.* at 77, 95–96 (noting that—in addition to Egypt—Jordan, Kuwait, Lebanon, Syria, Tunisia, and Yemen require payment of overdue spousal support).

[123] *See id.* at 78.

[124] S.2(viii), Dissolution of Muslim Marriages Act.

[125] It is of interest to note that while in a legally-sanctioned marriage women are accorded some limited dissolution right, there exists a parallel type of informal marriage, unique to Pakistan, that cannot be dissolved. It is known as "Marriage to the Qur'an," and it has been described as "the most barbaric abuse of women in Pakistan." Mobeen Chughtai, *Patriarchy and Pakistani Society*, THE REBEL ROAD. . . (Oct. 25, 2007, 6:45 AM), http://redtribution.wordpress.com/category/marriage-to-the-quran/page/2. This Pakistani custom, sanctioned by neither law nor Islam, is nothing but the forcible marriage of Pakistani women to the Qur'an when there are no male candidates available in their extended family to marry them. The rationale is to prevent the woman's inheritable portion of the family's assets from being lost to a "stranger" if she were to marry a male from outside the family. To avoid the division of assets, families marry their daughters in a wedding ceremony replete with all the grandeur, ceremony, and celebration of a "normal" wedding, except the groom is replaced by the Qur'an. JAN GOODWIN, PRICE OF HONOR: MUSLIM WOMEN LIFT THE VEIL OF SILENCE ON THE ISLAMIC WORLD 68–69 (rev. ed. 2003). Having the Qur'an as a husband, such women are sentenced to a life of seclusion and are destined to remain single and childless. *See* Yefet, *supra* note 73, at 365. According to reported statistics, the Qur'an has served as husband to numerous Pakistani women:

> [I]n the province of Sindh alone, 10,000 women are reported married to the Qur'an. Regrettably, this un-Islamic practice, depriving women of their human dignity and basic entitlement to marry someone of their own choice, is virtually ignored by both legal and religious authorities in Pakistan. As of today, locking women up in such unnatural "marital" bonds is neither a crime under Pakistani law nor a practice that warrants the involvement of law enforcement agencies. . . .
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> Only very recently, after years of their unquestioned practice, have Qur'an marriages finally come under attack. President Hussain, the head of the ruling party in Pakistan, presented the National Assembly with the Prevention of Anti-Women Practices (Criminal Law Amendment) Bill, which seeks to end certain discriminatory practices against women in violation of their right to marry under both the Constitution and Islam. The bill envisions the addition of a new chapter to the

regarding women's options for marital liberation than the divorce "reform" of 1939.[126] The Pakistani regime, by blindly incorporating the DMMA and failing to liberalize its mandates, missed at least three instances to avail itself of the entire breadth of divorce rights available under Islamic law. To begin, the DMMA refused to include as a basis for divorce a wife's renunciation of or conversion from Islam,[127] a ground recognized even by the extremely stringent Hanafi School.[128] This Pakistani departure from Islamic law proved detrimental to women, by blocking a relatively simple exit route—nominally renouncing or converting from Islam to escape from marriage[129]—thereby defying the common refrain that discarding Shari'a is the key to securing women's rights.[130]

Second, the Pakistani divorce reform has passed over one of the most important legal changes sweeping modern Muslim codes. Countries as diverse as Algeria, Bangladesh, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Syria, and Tunisia have all sanctioned a couple's right to stipulate the conditions of the marriage contract, thereby allowing for a judicial divorce if the contract is breached.[131] By failing to take advantage of this invaluable, Islamically-permissible tool to expand women's divorce grounds or restrain men's draconian *talaq* right, the Pakistani legislature missed an opportunity to redress a principal injustice inherent in the discriminatory di-

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Pakistan Penal Code (PPC), Section 498C of which would prohibit marriage to the Qur'an and penalize offenders. President Hussain underlined the importance of the proposed law as a tool for women's empowerment, threatening to tender his resignation if the "women bill" was not passed. The bill is currently under review of the Select Committee of the National Assembly.

Id. at 365–66.

[126] *See supra* Part I.B (outlining classical Islamic law's treatment of divorce).

[127] This legislative episode has led critics to censure the hypocrisy of religious authorities who are willing to manipulate religion and override its directives when it suits their interests. *See, e.g.*, Vrinda Narain, *Women's Rights and the Accommodation of "Difference:" Muslim Women in India*, 8 S. CAL. REV. L. & WOMEN'S STUD. 43, 49 (1998).

[128] S.4, Dissolution of Muslim Marriage Act. *See also* Yakare-Qule Jansen, *Muslim Brides and the Ghost of the Shari'a: Have The Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women's Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make It Stick?*, 5 NW. U. J. INT'L HUM. RTS. 181, 189 (2007) ("[P]ursuant to the Hanafi teachings, when a woman renounces Islam and converts to another religion, the bond of marriage is dissolved automatically. For women lacking the means to redeem themselves from an undesirable marriage and the possibility to have their marriage annulled by a judge, this can be the last resort.").

[129] ESPOSITO WITH DELONG-BAS, *supra* note 3, at 79; Narain, *supra* note 127, at 48–49; Nussbaum, *supra* note 111, at 43–44.

[130] *Introduction* to ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 9 (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., 2004) (quoting Professor Mohamed Charfi). Indeed, Pakistan is often cited as an example of oppressive implementation of Islamic law and as proof that Shari'a and human rights standards are incompatible. ESPOSITO WITH DELONG-BAS, *supra* note 3, at ix–x.

[131] ESPOSITO WITH DELONG-BAS, *supra* note 3, at 103.

vorce process.[132] Indeed, women have ranked the right to initiate divorce as their highest priority among all contractual stipulations.[133]

Third, the DMMA's architects left the door open for "any other ground which is recognized as valid for the dissolution of marriage under Muslim Law,"[134] leaving vague what constitutes a legitimate Islamic justification for marital exit. This generality proved a curse rather than a blessing; the lack of specificity turned the clause into a meaningless dead letter for decades. More than a quarter of a century passed before the judiciary took on the ambiguous clause and infused it with liberating meaning.[135] But without explicit legislative permission, some Islamic divorce grounds have never materialized; no judicial body has been courageous enough to utilize the invaluable "inequality in marriage" ground recognized by several Muslim authorities.[136]

To conclude, women's narrowly-crafted statutory entitlement to divorce was only embryonic in the DMMA, unable to meet even the most minimal constitutional benchmarks of either marital liberty or gender equality. But how was the legislature to handle male entitlement in Islam to both set free and get loose? Was it willing to compromise men's repudiation right to protect women and equalize the divorce power of the sexes?

2. *The Muslim Family Laws Ordinance of 1961: A Failure or Farewell to the Supremacy of the Male?*

The legal regulation of divorce was at a standstill for over twenty years following the passage of the DMMA. When reform eventually resumed, the legislature focused on men's side of the divorce equation. In 1961, the legislature ushered in the strongly contested Muslim Family Laws Ordinance ("MFLO")[137] to "provide protection to the weaker sex from tyranny, high-handedness and upper hand of man."[138] It must be stressed that the MFLO's architects were playing with fire when they began to curtail the husband's

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[132] As Part I detailed, the Hanabli school of Islamic law, which is moderate in its approach to women's divorce rights, recognizes the Islamic validity and legitimacy of such contractual stipulations. *See supra* Part I.B. It merits mention that the activist Pakistani Judiciary has quietly allowed such marital contractual stipulations, despite its supposed commitment to follow Hanafi law, which disapproves of this practice. *See also* ESPOSITO WITH DELONG-BAS, *supra* note 3, at 123.

[133] Lynn Welchman, *Introduction* to WOMEN'S RIGHTS & ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM 2, 10–11 (Lynn Welchman ed., 2004).

[134] S.2(ix), Dissolution of Muslim Marriages Act (VIII of 1939).

[135] *See* discussion *infra* Part III.B (evaluating the "brighter" side of the divorce story).

[136] PATEL, *supra* note 112, at 99.

[137] Muslim Family Laws Ordinance (VIII of 1961); ESPOSITO WITH DELONG-BAS, *supra* note 3, at 125.

[138] AKHTAR ALI KURESHE, TWENTY NINE YEARS' FAMILY LAWS DIGEST 1978–2006, at 138 (2006) (citing case reported in NLR 1992 Lah. 638); *see also* Haider, *supra* note 6, at 287–88 (the MFLO was enacted to protect women's interests).

all-powerful repudiation right.[139] After all, the male repudiation prerogative is considered the clearest and most characteristic indicator of male dominance in Muslim society.[140] Bearing in mind the masculine rage that accompanied passage of the statute (and that still threatens to erupt at any attempt to curtail divorce rights), the following examines the MFLO's framing of the male side of the divorce story—tackling the notification requirement, the triple *talaq*, and *talaq* pronounced in problematic mental states—and the statute's conformity with the gender equality and marital liberty dictates of Pakistan's Constitution.

a. Notification as a Means to Decrease Discrimination

Under Section 7 of the MFLO, a *talaq* must be duly registered—the husband must submit written notice of divorce to the chairman of the regional Union Council and to his wife.[141] The effect of the *talaq* remains frozen for the next ninety days, during which the Arbitration Council attempts to reconcile the couple.[142] The MFLO, however, was silent as to the legal consequences of a failure to provide notification of the *talaq*.[143] Thus, what had proved an eminently solvable problem in some other Muslim countries was seemingly too daunting for the Pakistani legislature to tackle outright.[144] How was this legislative silence to be interpreted by the Pakistani courts? Until the early 1980s, courts persistently held that a failure to fulfill the notification requirement invalidated the *talaq*.[145] This trend slowly

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[139] On the legislative history of the MFLO, see Khawar Mumtaz, *Political Participation: Women in National Legislatures in Pakistan*, *in* SHAPING WOMEN'S LIVES, *supra* note 63, at 319, 328–39. To avoid getting burned by the fallout from tampering with men's traditional rights, the legislature preserved the extrajudicial nature of male divorce. *See* ESPOSITO WITH DELONG-BAS, *supra* note 3, at 94 (conducting a survey of the legal codes of Muslim countries and concluding that in places like Libya, Malaysia, Morocco, Tunisia, and Yemen (but not in Pakistan) husbands are all dependent on courts of law to dissolve their marriages, rendering any extrajudicial repudiation invalid).

[140] *See, e.g.*, ESPOSITO WITH DELONG-BAS, *supra* note 3, at 29.

[141] S.7(1), Muslim Family Laws Ordinance.

[142] S.7(1), (4), Muslim Family Laws Ordinance. If the wife is pregnant, the *talaq* is frozen until the completion of the pregnancy. *Id.* S.7(3), (5). The purpose of the notification is twofold: to give certainty to an event of the utmost importance for spouses, their families, and Islamic society at large; and to avoid the harsh financial consequences of divorcing one's wife without her knowledge, though resuming cohabitation as if nothing had happened. *See* Allah Rakha v. Federation of Pakistan, PLD 2000 FSC 1, 61.

[143] Section 7(1) of the MFLO only requires that the husband give notice "as soon as may be after the pronouncement of *talaq*." It seemed that husbands could simply circumvent the law by not registering their divorces, as the law remains silent on the consequences of non-compliance (other than threatening such husbands with relatively insignificant punishments). *See* S.7(2), Muslim Family Laws Ordinance (the law threatens registration offenders with imprisonment up to one year and/or a maximum fine of Rs. 5,000).

[144] Jordan and Kuwait, for instance, do authorize a husband to divorce his wife outside of court, but condition the validity of the divorce upon notification to both the wife and the court. *See* ESPOSITO WITH DELONG-BAS, *supra* note 3, at 94.

[145] Importantly, not only lack of notification to the Chairman, but also to the wife, was regarded as an essential requirement for the validity of divorce, notwithstanding

faded, however, and courts in subsequent decades did not consistently treat notice of *talaq* as a prerequisite for a valid divorce.[146]

To the unschooled observer, the courts' reversal seems like judicial capitulation to male pressure to restore their unfettered power. However, the courts actually refused to enforce *talaq* notification requirements out of judicial sensitivity to, and in order to protect, repudiated women without legal documentation.[147] Tellingly, the judicial change of heart closely followed the enactment of the Offense of *Zina* (Enforcement of *Hudood*) Ordinance of 1979,[148] which criminalized extramarital sex and inflicted severe punishments on offenders.[149] Where divorce is invalid without proper registration, a woman who believes herself divorced and then remarries, even though her ex-husband failed to register the divorce, risks being charged with the criminal offense of *zina* (unlawful sexual intercourse), which until recently could be punished by stoning to death.[150] Indeed, Pakistani husbands frequently brought charges against their former wives who remarried, whether "to force them back into the first marriage, to humiliate or punish them, or just to prevent them from remarrying."[151] Even women who were eventually ac-

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Islamic injunctions that neither necessitate notice nor impose any restriction upon *talaq*. *See, e.g.*, Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf, PLD 1963 SC 51, 75; Mst. Fahmida Bibi v. Mukhtar Ahmad, PLD 1972 Lah. 694, 699.

[146] *See, e.g.*, Chuhar v. Mst. Ghulam Fatima, PLD 1984 Lah. 234, 236–39 (holding failure to give notice of *talaq* under MFLO will not affect the validity of the divorce where the decision was not arrived at hastily or unilaterally by the husband).

[147] *See, e.g.*, Mst. Bashiran v. Mohammad Hussain, PLD 1988 SC 186 (the Court dismissed *zina* charges against a wife who remarried even though her previous divorce was not registered).

[148] Offence of *Zina* (Enforcement of *Hudood*) Ordinance (VII of 1979); Moeen H. Cheema & Abdul-Rahman Mustafa, *From the Hudood Ordinances to the Protection of Women Act: Islamic Critiques of the Hudood Laws of Pakistan*, 8 UCLA J. ISLAMIC & NEAR E. L. 1, 14 (2008–2009).

[149] Prior to the *Zina* Ordinance, only a man could be guilty of adultery, which was punishable by imprisonment of up to five years, while a woman could not even be punished as an abettor. *See* PAK. PEN. CODE ch. 20, § 497 (1860) (repealed in 1979 by Offense of *Zina* Ordinance); *see also* Cheema & Mustafa, *supra* note 148, at 11. For discussion and critique of the *Zina* Ordinance, see generally ASMA JAHANGIR & HINA JILANI, THE HUDOOD ORDINANCES: A DIVINE SANCTION? (1990) (concluding that the *Zina* ordinance is not supported by Islam and offends women's rights); SHAHLA ZIA, VIOLENCE AGAINST WOMEN & THEIR QUEST FOR JUSTICE (2002) (discussing the *Hudood* laws and the gross injustices they generated); Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan From a Woman-Sensitive Perspective*, 18 MICH. J. INT'L L. 287 (1997); Anita M. Weiss, *Women's Position in Pakistan: Sociocultural Effects of Islamization*, 25 ASIAN SURV. 863 (1985).

[150] Farida Shaheed, *Engagements of Culture, Customs and Law: Women's Lives and Activism*, *in* SHAPING WOMEN'S LIVES, *supra* note 63, at 61, 72; *see also* Muhammad Sarwar v. The State, PLD 1988 FSC 42 (imposing a death sentence for *zina* on a woman who remarried subsequent to her unregistered divorce).

[151] AMNESTY INT'L, WOMEN IN PAKISTAN: DISADVANTAGED AND DENIED THEIR RIGHTS 6–7 (1995); Cheema & Mustafa, *supra* note 148, at 15–16 (noting the potential of the Offense of *Zina* Ordinance "for abuse as an effective tool for the harassment of women" and the "considerable proof" that it was abused by "former husbands vengeful after a divorce"; the Ordinance was used more than any other law to "reinforce the patriarchal and misogynistic structures of Pakistani society").

quitted, still suffered an irreparable harm to reputation, social relations, and livelihood. Given the "cognizable" and "non-bailable" nature of the offense, the police were authorized to initiate an investigation and arrest the woman without a warrant; on average, women were imprisoned for up to one or two years.[152] Ironically, then, the notice requirement initially designed to protect women provided a means for their persecution: research conducted after the passage of the ordinance found that an astonishing eight out of ten women in prison in Pakistan were charged with *zina*.[153] Court rulings therefore served to circumvent husbands' abuse of the *Zina* Ordinance—by recognizing divorces even where notification was lacking, they rescued remarried women from the grave charge of adultery, not only salvaging their new loves, but literally saving their lives.[154]

The MFLO's notification requirement proved unsatisfactory to women and men alike. Women were dissatisfied that their fate in marriage and divorce still rested almost solely in their husbands' hands, while men were furious at the violation of their expansive rights under Islamic law to control marital relations.[155] Challenging the MFLO turned out to be a tricky endeavor, however. In anticipation of attacks on the legislation, the legislature carefully designed the MFLO to immunize it from both constitutional and Islamic review. Because the Pakistani Constitution immunizes the Ordinance from judicial review on the basis of inconsistency with constitutional fundamental rights, it was impossible for women to invoke their right to equality as a defense against men's repudiation power.[156] Moreover, since the Constitution exempts "Muslim personal law" from the all-encompassing jurisdiction of the Shariat Courts to review the conformity of legislation with

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[152] Cheema & Mustafa, *supra* note 148, at 18.

[153] Javid Iqbal, *Crimes against Women in Pakistan*, PLD 1988 J. 195, 200.

[154] *See, e.g.*, Allah Dad v. Mukhtar 1992 SCMR 1273; Noor Khan v. Haq Nawaz, PLD 1982 FSC 265.

[155] The many petitions challenging the constitutionality of the MFLO, which were incorporated and adjudicated together in Allah Rakha v. Fed'n of Pakistan, PLD 2000 FSC 1, 24–29, demonstrated the fierce male discontent with the legislation.

[156] Siobhán Mullally, *Women, Islamisation and Human Rights in Pakistan: Developing Strategies of Resistance*, *in* RELIGION, HUMAN RIGHTS AND INTERNATIONAL LAW 379, 390 (Javaid Rehman & Susan C. Breau eds., 2007); Redding, *supra* note 8, at 774–75 (noting that early efforts to overturn the MFLO were frustrated by the constitutional immunization of Article 8). Interestingly enough, in Israel, where religious law governs family law, divorce law is constitutionally immune from judicial review. When drafting the Israeli Constitution, the religious parties in Israel, deeply concerned about the fate of the religious family law (particularly the unequal gendered divorce power), conditioned their approval of the passage of the "Basic Law: Human Dignity and Liberty" on the inclusion of a "savings clause." This "savings clause" immunized legislation already in force from application of the Basic Law. Thus, in order for the Israeli Constitution to come into being, it had to be limited in application for the primary purpose of protecting discriminatory family law from judicial review and possible invalidation. *See* Karin Carmit Yefet, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom*, 20 YALE J.L. & FEMINISM 441, 456 (2009).

Islam,[157] men could not invoke Islamic law to combat the MFLO's procedural limitations on their divorce right.

Nonetheless, the MFLO was attacked time and again in an attempt to undermine its safeguards for women's rights.[158] Despite the explicit jurisdictional hurdle, the Shariat Bench (the predecessor of the Federal Shariat Court) examined the MFLO and invalidated its divorce provisions.[159] The Shariat Appellate Bench, in its first-ever overruling of a decision of a Shariat Bench, held that it was barred from examining the MFLO on the basis of Islam due to the constitutional exclusion of Muslim personal law from its jurisdiction.[160] Still, the jurisdictional bar to reviewing family law—explicit in the Constitution and affirmed by the Shariat Appellate Bench—was no deterrent for judicial activism; judges simply refused to leave the MFLO in peace.[161] Nothing can explain this complete disregard for binding precedent but opposition to the state's control of the dissolution right and its disempowerment of men.[162]

This judicial conflict lasted until the beginning of the new millennium, when the Federal Shariat Court finally assumed judicial responsibility and removed the ambiguity from the divorce process. It took the Court no less than seven years to declare that it was within the purview of its constitutional jurisdiction to review the MFLO in light of Islamic parameters and to decide the (un)constitutionality of Section 7.[163] The Court found the notification requirement un-Islamic, not so much because it interfered with men's *talaq* right, but more out of concern for the plight of divorced women.[164] Aware that disgruntled former husbands abused the notification requirement to torment their divorced wives, the Federal Shariat Court explained that sustaining its validity would "keep the woman in suspended animation and cause her torture by keeping her bound, although according to the Quranic injunction she would stand released of the bond and under no obligation toward him [her husband]. This would certainly be a cruelty to the woman . . . ."[165]

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[157] PAKISTAN CONST. art. 203-B.

[158] Nausheen Ahmad, *The Superior Judiciary: Implementation of Law and Impact on Women*, *in* SHAPING WOMEN'S LIVES, *supra* note 63, at 3, 18; GAH, *supra* note 90, at 9, 64.

[159] Mst. Farishta v. Federation of Pakistan, PLD 1980 Pesh. 47, 65–66, 70–71, 78.

[160] Federation of Pakistan v. Mst. Farishta, PLD 1981 SC 120, 122, 125–27.

[161] *See, e.g.*, Mst. Muhammad Amin v. Government of Pakistan, PLD 1982 FSC 143 (holding that the Federal Shariat Court's jurisdiction extends to declaring personal law statutes repugnant to the Qu'ran and Sunna where they specifically contradict provisions of personal law found in the Qur'an and Sunna).

[162] LAU, *supra* note 10, at 54; Fawzy, *supra* note 5, at 17.

[163] Allah Rakha v. Federation of Pakistan, PLD 2000 FSC 1.

[164] *Id.* at 61–62.

[165] *Id.*; *see also* PATEL, *supra* note 112, at 85–86. Thus, both the suspension of the effect of *talaq* for ninety days from the date of receipt of the notice by the Chairman (instead of from the date of the actual pronouncement) in Section 7(3) of the MFLO, as well as Section 7(5), were invalidated. The total dispensation with notification and registration, however, was opposed by many as detrimental to women, making them again

In the meantime, the Supreme Court itself waded into the murky water of Islamic law and told the Federal Shariat Court to keep its hands off of the MFLO.[166] As only happens in the embattled divorce arena, other Pakistani courts were not troubled by their constitutional obligation to obey the Supreme Court, and at times disregarded the Court's ruling as well as the notification requirement.[167]

b. Done or Undone?: Triple Talaq *as a Blank Check to Mistreat Women*

The MFLO attempted another major break from tradition by rendering all forms of divorce revocable[168] and invalidating the *talaq al-bid'a*, the triple *talaq* pronounced in one sitting.[169] This statutory achievement has not always been safeguarded by the Pakistani judiciary, however; some courts occasionally proved willing to overturn the invalidation and recognized the infamous right of a husband to divorce his wife instantly.[170] Pursuant to such errant rulings, Pakistani men of the twenty-first century may, at least potentially, legitimately call it quits by courier, phone call, email, or even text message, snapping marital ties in one unfeeling breath.[171]

The occasional decisions in favor of this disturbing repudiation power are a dissapointing departure from the Pakistani judiciary's tradition of interpreting Muslim personal law to advance gender equality.[172] There is no other practice as repugnant to any notion of gender equality or regard for

"the playthings of men." *See* GAH, *supra* note 90, at 61. Critics charge that efforts to spare individual women have profoundly undermined the rights of women generally, returning them to their precarious pre-MFLO position. Warraich & Balchin, *supra* note 90, at 189. Accordingly, some have perceived the Federal Shariat Court's 2000 decision as such a blow to women's rights that they even called the legitimacy of the Court's existence into question. *See* GAH, *supra* note 90, at 63.

[166] *See* Muhammad Ishaque v. Manzooran Bibi, PLD 2003 SC 128, 131.

[167] PAKISTAN CONST. art. 189. Many courts continue to invalidate the notice requirement of Section 7 of the MFLO. *See, e.g.*, Samina Bibi v. Station Hosue [sic] Officer, Police Station, Tandlianwala, YLR 2004 Lah. 1791, 1792–93; Fida Hussain v. Najma, PLD 2000 Quetta 46, 50–52. *But see* Sohail Majeed Karim v. IInd Family Judge, PLD 2004 Kar. 498, 501–02.

[168] Warraich & Balchin, *supra* note 90, at 203.

[169] S.7(6), Muslim Family Laws Ordinance (VIII of 1961) (requiring a husband who wishes to divorce to give notice to his wife and authorizing an Arbitration Council to take all steps necessary to bring about a reconciliation). Numerous countries, including Bangladesh, Jordan, Kuwait, Morroco, Somalia, Syria, and Yemen have outlawed the triple *talaq* pronounced at a single sitting. *See* ESPOSITO WITH DELONG-BAS, *supra* note 3, at 105.

[170] *See* Amira Bokhari v. Jamiluddin Bokhari, PLD 1994 Lah. 236 (triple *talaq* is a valid and binding method of divorce); Warraich & Balchin, *supra* note 90, at 190–95. *But see, e.g.*, ISHFAQ ALI, MANUAL OF FAMILY LAWS 76–77 (3d ed. 2008) (citing the opinion of the court as negating the validity of triple *talaq* and as declaring any contrary view—that instant divorce through triple *talaq* is valid—as "only a blurred conception of the commandments of Almighty Allah").

[171] PATEL, *supra* note 112, at 72–73, 82–83.

[172] Haider, *supra* note 9, at 322–23.

women's rights as triple *talaq*.[173] The doctrine enables men to indulge their whims, dismissing wives lightly and imprudently, without any consideration for their mental or physical well-being.[174] Even if a man later regrets a capricious or hastily-made decision, the divorce is irrevocable. The only option for marital reunification is for the humiliated woman to undergo the ordeal of marrying another man and being divorced after consummation of the union.[175] Little wonder that the triple *talaq* doctrine has become a hallmark of the patriarchal system, serving to preserve women's subordination in domestic life and the entire social arena.[176]

Ironically, this degrading form of divorce not only lacks any Qur'anic support whatsoever—hence its name *talaq al-bid'a*, which signifies "an innovation"[177]—but directly *contradicts* Qur'anic prescriptions.[178] The Muslim Prophet Mohammed is believed to have denounced the triple *talaq* divorce practice; reportedly, the Prophet became furious upon encountering a husband using this technique, exclaiming, "You make fun of Allah's book and I am still there among you."[179] Accordingly, all schools of Islamic law, save one, disapprove of triple *talaq*.[180] Because the triple *talaq* is not a Qur'anic practice, but an innovation divorced from Islamic principles of justice, the Constitution's mandate to follow Islamic law should require courts to dispense with this form of divorce, especially since Pakistani law has tended to read Islamic law to enhance, rather than constrict, human rights, including

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[173] Triple *talaq* is the most notoriously discriminatory feature of Islamic family law. *See* Mohammed Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945, 946–47 (India) ("The Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad, or indifferent.").

[174] JAWAD, *supra* note 21, at 80–81. The practice has been "grossly abused by Muslims and non-Muslims alike." *Id.* at 73. Women in Muslim nations are reported to refuse to perform ordinary activities—such as answering phones or opening letters—lest a triple *talaq* lie in ambush. *See, e.g.*, Leela Jacinto, *Dumped Muslim Wives Dump 'Instant' Divorces*, ABC NEWS (Aug. 31, 2004), http://abcnews.go.com/International/story?id=84587.

[175] As described *supra* Part I, ending marriage by triple *talaq* renders remarriage impossible unless the ex-wife lawfully marries another husband and he divorces her after the marriage has actually been consummated. *See* Qur'an 2:230, *supra* note 23; JUDITH E. TUCKER, IN THE HOUSE OF THE LAW 88 (1998) (discussing graphically how the remarriage, consummation, and divorce work in practice).

[176] *See, e.g.*, ESPOSITO WITH DELONG-BAS, *supra* note 3, at 29.

[177] *See* Qur'an 2:229, *supra* note 23 ("Divorce can happen twice . . . wives [are] kept in an acceptable manner or released in a good way."). One court observed: "The Holy Qur'an never intended a divorce to act as a device of instant magic whereby a woman taken by a man to share his life with all its pleasures, sorrows, sufferings and happiness is made to disappear for all times to come from his home and heart." Sardar v. Malik Khan, 2003 YLR 2623, 2626; *see also* PATEL, *supra* note 112, at 80 (noting that the name *talaq al-bid'a* means "undesirable innovation").

[178] *See* Qur'an 65:1, *supra* note 23 (stating that "when any of you intend to divorce women, do so at a time when their proscribed waiting period can properly start, and calculate the period carefully").

[179] ENGINEER, *supra* note 27, at 148.

[180] The Hanafi, Maliki, and Hanbali schools are all of the opinion that this form of *talaq* is impermissible. Only the Shafi'i school dissents from this view. *See id.* at 147.

gender equality.[181] If the constitutional or Islamic rights to equality are to have any meaning, then triple *talaq* must be banned outright.

c. The Incredible Lightness of Divorcing: Repudiation Under Problematic Mental States

Whereas the MFLO adopted a progressive stance toward *talaq al-bid'a*, it did nothing to change classical Islamic law with regard to *talaq* pronounced unintentionally, involuntarily, or in inebriation, anger, or jest, leaving Pakistan behind countries such as Egypt, Syria, Morocco, Iraq, Jordan, Kuwait, Sudan, and Oman, which all refuse to recognize such repudiations.[182] The omission is especially unfortunate in Pakistan, where divorce is "not uncommonly pronounced in anger and with a desire to take revenge from the wife and every attempt is made to cause as much injury as possible."[183] Even where malicious intent is lacking, the consequences may be intolerable. In one case, an actor playing the part of the husband on a Pakistani television series pronounced *talaq* against the woman playing his wife, who happened to be his wife in real life as well.[184] The religious authorities "declared their marriage was dissolved by *talaq* and the only way for the [marriage to resume was for the wife] to undergo the ordeal of an intermediate marriage," requiring consummation and divorce by the second husband.[185] These results are not in line with Pakistan's modern Islamic system of constitutional governance. Egypt, for one, is no less constitutionally committed to the principles of Islamic Shari'a, but it still considers the validation of such pronouncements of *talaq* to be inconsistent with Islamic law.[186] Indeed, only the formalistic Hanafi School approves unintentional, conditional, or unconscious divorce declarations, contrary to all other Muslim jurists that reject such repudiations.[187]

Pakistan's rejection of the majority view is undesirable considering the nation's constitutional commitment not only to Islamic law, but also to marital freedom, as derived from the rights to life and marriage guarantees. The legal invalidation of *talaq* pronounced without any intent to actually divorce does not substantively restrict men's constitutional right to divorce. Rather,

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[181] *See supra* Part II.B.

[182] NASIR, *supra* note 29, at 108.

[183] GAH, *supra* note 90, at 31.

[184] S.A. KADER, MUSLIM LAW OF MARRIAGE AND SUCCESSION IN INDIA 38 (1998).

[185] *Id.*

[186] EGYPTIAN CONST. art. 2. *See* CLARK B. LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI'A INTO EGYPTIAN CONSTITUTIONAL LAW 123–258 (2006) (exploring the enactment and implementation of Article 2 in Egyptian jurisprudence). For the Egyptian treatment of these problematic types of *talaq*, see Articles 1, 2, and 4 of Law No. 25 of 1929; *see also* Yefet, *supra* note 107, at Part III.B.1 (noting that the Egyptian legislature invalidated *talaq* pronounced under problematic mental states such as under intoxication or coercion, and also invalidated conditional or ambiguously expressed pronouncements of *talaq*).

[187] *See supra* Part I (analyzing classical male *talaq* under Islamic law).

it serves to ensure that the right is exercised responsibly and meaningfully. These minimal conditions protect men from themselves, ensuring that a husband who divorces his wife be aware of the consequences of this weighty action.[188] Facilitating educated decision-making with respect to such life-altering events, these conditions actually *promote* an individual's free choice to divorce rather than *abridge* such a right, consistent with the mandates of the Pakistani Constitution. The result of preserving family life from unintentional dissolution is also consistent with the Constitution's Principles of Policy, aiming to "protect the marriage, the family, the mother and the child."[189]

To summarize, Pakistan's statutory divorce regime and the reforms that modified classical Islamic teaching are only a starting point. Not a single liberating statutory reform has been introduced to the discriminatory dissolution process in half a century.[190] While men's divorce rights have been somewhat curtailed by procedural hurdles, women still do not have much recourse. Indeed, more important than limiting men's unbridled right to divorce, both socially and constitutionally, is to ensure women a secure path to liberation from the patriarchal terms of Muslim matrimony.[191] While the Pakistani legislature has proved largely impotent in granting divorce rights to women (though rather potent in making a mockery of the rights to gender equality and divorce), the judiciary has engaged in an unprecedented utilization of Islamic law to promote women's marital freedom.

B. The Judiciary's Side of the Story: A Quasi-Legislative Enterprise in Service of Women's Rights

The discussion that follows reveals the major role that courts have played in the Pakistani divorce saga. First, it presents Pakistani courts at their finest, using Islamic law to construct a no-fault, unilateral divorce right

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[188] Indeed, the husband's *talaq* is irrevocable; that is, the only way to undo the divorce and restore his family is to give his wife to another man—borrowed for stud services—and only after she marries him and "taste[s] the sweet honey of sexual pleasure" may he take her back. Barbara Freyer Stowasser & Zenab Abul-Magd, *Tahlil Marriage in Shari'a, Legal Codes, and the Contemporary Fatwa Literature*, *in* ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 161, 163 (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., 2004).

[189] PAKISTAN CONST. art. 35.

[190] The only changes that were made to the statutes do not address the divorce right, but rather include provisions dealing with other aspects of the dissolution process. For instance, in 1964, the West Pakistan Family Court Act established separate family courts "for the expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith." Preamble, West Pakistan Family Court Act (XXXV of 1964).

[191] As one commentator sensibly observed: "It is sometimes suggested that the greatest defect of the Islamic system is the absolute power given to the husband to divorce his wife without cause . . . but experience shows that greater suffering is engendered by the husband's withholding divorce than by his irresponsible exercise of this right." Lucy Carroll, *Qur'an 2:229: "A Charter Granted To The Wife?" Judicial Khul' in Pakistan*, 3 ISLAMIC L. & SOC'Y 91, 95 (1996) (quoting A.A.A. Fyzee, *The Muslim Wife's Right of Dissolving Her Marriage*, 38 BOM. L. REP. J. 113, 123 (1936)).

for women. Second, it explores the courts' negative treatment of the DMMA's fault-based system and suggests that this hostility toward fault-based divorce has been designed to promote, rather than curtail, women's opportunities for exit from marriage.

1. *Divorce* Khula *Style: A Liberal Doctrine in Traditional Clothing*

While the DMMA gave the courts a blank check to apply any divorce ground sanctioned by Islamic law, this all-encompassing clause turned out to encompass nothing for more than a quarter of a century.[192] Only well into the second half of the twentieth century did courts take up the legislative invitation.[193] After a long wait, the courts finally "shaped a divorce law Islamic in flavor, yet Western in practice,"[194] by resurrecting the Islamic *khula* doctrine—i.e., divorce sought by the wife in return for financial concessions.

a. The Judicial Development of a Unilateral, No-Fault Female Divorce Right

Beginning in 1959, Pakistani courts adjudicating divorce claims began to construe the *khula* doctrine to mean that if the wife establishes "incompatibility of temperament" and is willing to return her dower, she is entitled to marital emancipation even *absent* her husband's consent.[195] Realizing that if husbandly approval were necessary, then *khula* would become a meaningless avenue to freedom,[196] the activist courts departed markedly from the traditional understanding of *khula* as a mutual-consent remedy.[197] In 1967, after some initial judicial resistance,[198] the Supreme Court followed suit and

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[192] *See supra* Part III.A.

[193] S.2(ix), Dissolution of Muslim Marriages Act (VIII of 1939) (allowing divorce on "any other ground which is recognized as valid under Muslim law"); *see also* Part III.B.1.a.

[194] Haider, *supra* note 9, at 294.

[195] Mst. Balquis Fatima v. Najm-ul-Ikram Qureshi, 1959 PLD Lah. 566, 575–76.

[196] *See* Ali Kureshe, *supra* note 138, at 358 (quoting case published in NLR 1982 Pesh. 158).

[197] *See* Haider, *supra* note 9, at 340 ("[C]ourts have created a common law 'hate standard' doctrine, by which a woman can be granted a divorce by merely articulating the words 'I hate him.'"). On the crucial point of consent, see Keith Hodkinson, Muslim Family Law: A Sourcebook 285–87 (1984). Indeed, the ingenuity of this ruling stems from its departure from traditional Hanafi law, which defines *khula* as an extrajudicial divorce based on mutual consent, a move that courts were reluctant to make until then. *See, e.g.*, Mst. Sayeeda Khanam v. Muhammad Sami, PLD 1952 Lah. 113, 123–24.

[198] Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis*, 30 Tex. Int'l L.J. 499, 529 n.208 (1995) (citing J.N.D. Anderson, *Reforms in the Law of Divorce in the Muslim World*, 31 Studia Islamica 41, 46–47 (1970)).

gave its blessing to this innovative modification of the traditional doctrine.[199] Armed with Islamic justification for women's empowerment, the Court supported its decision with both Qur'anic statements and authoritative Prophetic tradition,[200] making Pakistan the first Muslim nation to interpret classical Islamic law to grant women the right to no-fault unilateral divorce.[201] The doctrine was somewhat reformulated under the religious authority of the Federal Shariat Court, which couched the *khula* doctrine in Islamic, yet more lenient terms, merely requiring the wife to satisfy the court's conscience that the couple cannot reconcile and live a harmonious life "within the limits prescribed by Allah."[202]

The enthusiasm with which judges embraced this reformulated doctrine was nothing short of extraordinary; they routinely utilized *khula* to expand women's divorce rights, applying the doctrine almost mechanically.[203] Even when a woman had no enumerated fault grounds to claim, the judicial door was still open to *khula*: if a husband is absolved of any fault or blame, the wife may still invoke her *khula* right by meeting only the most minimal burden of proof.[204] A wife is required to give neither objective nor cogent reasons, nor does she even have to disclose (let alone prove) the circumstances justifying her aversion for her husband.[205] Merely the statement that she hates her husband suffices.[206] Accordingly, the case law is replete with "instant" freedom-buying statements, women who expressed their incurable hatred by proclaiming "she wanted to spit on her husband,"[207] or exclaiming she would rather "be shot with a bullet"[208] or "jump into river"[209] than re-

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[199] *See* Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 114 (though affirming a unilateral understanding of *khula*, the Court stated that women who ask for *khula* may be "deprived of the fragrance of paradise").

[200] *Id.* at 114, 120–21 (Rahman, J.); *id.* at 144–45 (Mahmood, J.).

[201] NADIA SONNEVELD, KHUL' DIVORCE IN EGYPT: PUBLIC DEBATES, JUDICIAL PRACTICE, AND EVERYDAY LIFE 40 n.40 (2009), *available at* http://dare.uva.nl/document/129513. This phenomenon is particularly remarkable given that in traditional Islamic legal thought there has been "principled reluctance to accord judges a meaningful role in developing the law," not unlike the legal approach prevalent in modern European civil law jurisdictions. Ford, *supra* note 198, at 528. Pakistani courts serve as an exception to this rule, as they modified the commandments of the shari'a as traditionally understood in the field of divorce law. *Id.* at 528–29. The judicial activism in favor of divorcing women becomes even more remarkable given that Pakistan is generally notorious as a place in which "*shari'a* is interpreted and enforced in a relentlessly conservative way." Hajjar, *supra* note 84, at 30 (noting that the liberalizing trends and female-centered interpretations of shari'a adopted elsewhere are "strikingly absent in Pakistan, where the trend has been toward more conservative interpretations of *shari'a*, to the detriment of women").

[202] Haider, *supra* note 9, at 329.

[203] *See id.* at 340.

[204] *See, e.g.*, Abdul Ghaffar v. Parveen Akhtar, 1999 YLR 2521, 2522–25; Shahid Javed v. Sabba Jabeen, 1991 CLC 805, 806–07.

[205] *See, e.g.*, Shakila Bibi v. Muhammad Farooq, 1994 CLC 231 ("[A] wife is not supposed to justify the reasons on account of which she had developed hatred for her husband.").

[206] *See id.*; Mst. Naseem Akhtar v. Muhammad Rafique, PLD 2005 SC 293, 296–97.

[207] Mst. Shah Begum v. District Judge, Saikot, PLD 1995 Lah. 19, 26.

[208] Mst. Rashidan Bibi v. Bashir Ahmed, KLR 1983 CC 31, 32.

main married. Freedom is only a statement away.[210] Even when wives failed to explicitly assert their *khula* rights or to express any hatred for their husbands, courts have invoked this ground for *khula* on their own initiative.[211] And even where trial courts have neglected to consider *khula*, appellate courts have come to the rescue and admitted the claim.[212]

Not only have courts imposed only a slight burden of proof for women under *khula*, but they have elevated the burden for men to establish the consideration they are entitled to receive in exchange for the divorce.[213] To be sure, for Pakistani courts, this consideration is not meant to indicate the inferiority or weakness of female divorce rights or to function as a punishment or the price of overriding husbandly consent. Quite the contrary, the duty of compensation stems precisely from the *equal* nature of men's *talaq* and women's *khula* dissolution powers:

> [A w]ife has been given charter by Islam to get dissolution of marriage through khula in the same manner and with the same right as [a] husband is entitled to terminate [a] marriage through talaq. Like [a] wife, [a] husband is entitled to get benefits returned to him from his wife when she . . . [seeks] khula.[214]

However, whereas upon *talaq* divorce a man must always pay his wife the total amount of dower owed to her, among other monetary obligations,[215] upon *khula* divorce, a wife may, though not necessarily, be obliged to return the amount of dower her husband *actually* paid her in consideration of the marriage and nothing more.[216] Pakistani courts further ingeniously devised doctrinal tools to minimize the economic consequences of *khula* divorce. Thus, for example, the courts have vested themselves with broad discretionary power to spare the wife from monetary reimbursement in appropriate circumstances, including in cases of longstanding marriages or where the

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[209] ALI KURESHE, *supra* note 138, at 400 (quoting case published in NLR 1991 AC 12); *see also id.* at 344 (quoting case published in 2001 CLC 1759) (wife would "prefer to die or drown in the river than to live in the house of her husband").

[210] *See, e.g.*, Mst. Nazir v. Additional District Judge Rhaim Yarkahan, 1995 CLC 296, 297–98 (a wife's statement admitting hatred of her husband is all it takes to effect a *khula* divorce).

[211] *See, e.g.*, Mir Qualam Khan v. Shamin Bibi, 1995 CLC 731 (granting the wife a *khula*-based divorce where the wife neither pled *khula* nor proved any of the divorce grounds); *see also* MAHMOOD, *supra* note 120, at 346.

[212] MAHMOOD, *supra* note 120, at 353. This favorable treatment has been applied by courts at all levels of appeal, even when a *khula* claim is first raised before the highest court of appeal. *Id.* at 360–61.

[213] The ingenuity and the judicial sensitivity to the need for an avenue to marital freedom that is legally available and practically affordable is accentuated when the Pakistani *khula* doctrine is compared to its Egyptian counterpart. *See infra* Part III.

[214] ALI KURESHE, *supra* note 138, at 383 (quoting case published in 2004 SD 894).

[215] *See* ESPOSITO WITH DELONG-BAS, *supra* note 3, at 23, 25, 35 (detailing the husband's financial obligation toward his wife in cases of *talaq* divorce, including dower and maintenance rights).

[216] *Id.* at 32.

wife risked destitution upon fulfilling the duty of reimbursement.[217] Courts also unflinchingly narrowed the definition of benefits and expenses to be returned to the husband, insisting that the monetary repayment is limited to returning the dower the wife *personally* received upon marriage.[218] Even when a certain benefit did fall within the category of returnable property, courts raised the bar for the husband to prove that he is entitled to the property in the specific circumstances of his case, requiring him to detail his claim and support it with "unimpeachable evidence."[219] Courts simultaneously diminished, and at times even eliminated, the pool of property returnable to the husband by deducting reciprocal benefits he received from his wife, including those as difficult to quantify as housework and childrearing.[220] Most strikingly, a wife's failure to pay her husband the stipulated consideration was not found to negate her entitlement to *khula*-based divorce or retroactively invalidate the decree, but only resulted in strictly civil liability.[221]

It is vividly apparent, then, that all of these carefully-crafted doctrinal innovations, taken together, have provided a powerful framework for female dissolution rights.[222] Against all expectations, the constitutional commit-

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[217] *See* ALI, *supra* note 170, at 238 (citing case published in 2006 CLC 1033) (noting that a court may order *khula* divorce without return of dower in certain circumstances).

[218] *See id.* at 68 (citing case published in PLD 2006 Kar. 272) (wife does not need to return to husband any bridal gifts given to her before or after marriage); *id.* at 243 (quoting case published in PLD 2007 Lah. 626) (noting that when husband is not at fault, "consideration of Khula cannot be any consideration except the amount of dower"). The courts narrowed the circumstances justifying the payment of consideration in return for *khula*, holding, for example, that the dower may be subject to restitution only when the wife received it herself, not her father. *Id.* at 241 (citing case published in 2002 CLC 1409). A wife's education expenses, to take another example, are not a returnable benefit, Malik Sanaullah v. Mst. Rohella Hassan, 1996 MLD 702, 703, nor is child support, Mst. Ruqqia Bibi v. Muhammad Munir, 1999 MLD 812, 817, or money paid to the wife's grandfather, Muhammad Aslam v. Kausar Parveen, 1987 CLC 256, 259. *See also* Shaheen Sardar Ali, *Testing the Limits of Family Law Reform in Pakistan: A Critical Analysis of the Muslim Family Laws Ordinance 1961*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 317, 334–35 (Andrew Bainham ed., 2002).

[219] This high burden of proof has oftentimes resulted in the husband's total failure to establish returnable property, thereby allowing the wife a divorce for free. *See, e.g.*, Mst. Nazir v. Additional District Judge Rahimyarkhan, 1995 CLC 296, 298; Bashir Ahmad v. Family Court, 1993 CLC 1126, 1126–27; *see also* ALI KURESHE, *supra* note 138, at 393 (when the husband does not prove the payment of dower, gifts, and ornaments, the court will grant *khula* divorce even without any compensation whatsoever).

[220] *See, e.g.*, M. Saqlain Zaheer v. Mst. Zaibun Nisa alias Zaibi, 1988 MLD 427, 430–31; Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi, PLD 1959 Lah. 566, 582, 593; *see also* ALI KURESHE, *supra* note 138, at 359–60 (courts take into account reciprocal benefits the husband received from wife when determining restitution of benefits for *khula* purposes); NAVEED ABBAS SYED, SELECT RULING ON FAMILY LAWS IN PAKISTAN 561 (1999) (listing a wide range of factors that courts liberally use in order to reduce or even eliminate the compensation a wife owes a husband in return for *khula*, including child bearing and child rearing, housework, and consortium).

[221] *See, e.g.*, Mst. Nablia Safdar v. Muneer Anwar, 2000 SD 560, 565; Bushra Bibi v. Judge Family Court Bahawalpur, PLD 2000 Lah. 95, 99–100.

[222] The court itself emphasized on several occasions the fundamentality of women's *khula* right, so that it "cannot be made hostage to husband's pleasure nor can it be sub-

ments to Islam and gender equality coexist peacefully in the divorce context, proving even mutually reinforcing.[223]

b. The Islamic Romanticism of the Khula *Doctrine: Judicial Rhetoric Sensitive to Women*

The sympathetic rhetoric employed by courts invoking *khula* confirms that the doctrinal innovation reflects judicial sensitivity to women's rights and their marital plight. An examination of the Pakistani case law on divorce exposes *khula* as a judicially-devised remedy designed to promote female well-being and circumscribe traditional male prerogatives. Whereas Egyptian divorce decisions are peppered with sexist language and derogatory stereotypes,[224] Pakistani courts have employed decidedly liberal rhetoric and woman-sensitive rationales to justify their decisions expanding *khula*. Defying social constraints of a culture of husbandly authority and male dominance, the courts express—in the name of Islam, no less—remarkable attention to women's feelings, wishes, domestic happiness, and sexual

jected to any social or family bounds." M. FARANI, COMPLETE FAMILY LAWS IN PAKISTAN 411, 417 (2006). Such restrictions belong to "medieval traditional society," but not to the twenty-first century's concept of justice, which "gives centrality to freedom and liberty" and is a better depiction of the tenets of the Qur'an. *Id.* In the same vein, the court invalidated a condition in a marriage contract preventing the wife from seeking *khula*-based divorce. The exercise of such a fundamental—both Islamic and constitutional—right is imperative to human happiness and could not be eliminated contractually. *See* MAHMOOD, *supra* note 120, at 109.

[223] As the Supreme Court reiterated, Islam accords women their "rightful place in society and is all out for the complete emancipation of women by breaking old shackles and bondages in which they were involved. The woman is not a chattel to be treated on the sweet will and mercy of the husband." Abdul Karim v. Mst. Parveen Akhtar, PLD 1982 SC (AJ&K) 33, 34; *see also* Humaira Mehmood v. State, PLD 1999 Lah. 494, 514 (noting that the advent of Islam was a milestone in human civilization, as it changed the status of women from that of serfs and chattel to that of equals).

[224] Egypt's highest Court, the Supreme Constitutional Court ("SCC") is widely considered among the most respected judicial bodies in the Islamic world, famous for its vehement defense of human rights and decidedly liberal, rights-oriented constitutional jurisprudence. LOMBARDI, *supra* note 186, at 253. The SCC, unfortunately, is also notable for its use of chauvinistic rhetoric in cases providing for women's rights. As I show elsewhere, the SCC has systematically upheld the validity of legislative reforms in favor of women, no matter how revolutionary and controversial, but conspicuously has failed to mention women's interests in its analysis, and even used derogatory language, underscoring male supremacy and female inferiority, and making patriarchal pronouncements on the limits of women's dissolution options. See, for example, Case No. 82, Judicial Year 17 (5 July 1997), in which the SCC upheld the validity of a divorce provision, but, rather than expressing sensitivity to women's rights, went out of its way to insult women. It questioned their capacity to make decisions for themselves in such matters and reaffirmed men's control over the divorce decision. In the Court's opinion, "men are more mindful—able to decide things rationally and with [more] foresight" than women. John Murray & Mohamed El-Molla, *Islamic Shari'a and Constitutional Interpretation in Egypt*, *in* DEMOCRACY, THE RULE OF LAW AND ISLAM 507, 514–15 (Eugene Cotran & Adel Omar Sherif eds., 1999) (translating an excerpt from Case No. 82). For other examples, see the discussion of the Court's rulings on issues of female maintenance rights, women's right to retroactive child-support, polygamy-based divorce right, and women's right to work in Yefet, *supra* note 107, at Section IV.B.1–6.

satisfaction.[225] The Muslim marriages portrayed by the courts resemble the blockbuster romances: emotions are primary among all considerations, happiness is promoted as life's ultimate goal, uncompromising love and romance constitute the foundation of marital bliss, and divorce is the only legitimate course, even a moral obligation, when feelings fade. In the *khula* case law, it is not at all uncommon to catch the court speaking the language of love.[226] For Pakistani courts, if one party does not love the other, then she cannot live alongside, and might as well leave, her partner: "when the spouses fail to maintain mutual respect, confidence and love and there develops extreme hatred, the separation is the only solution which the Courts should order."[227] Because the courts insist that a happy union is always bilateral,[228] the only touchstone for adjudicating *khula* divorce cases is the wife's inner feelings toward her husband.[229]

But whereas Hollywood conveys these messages in the name of Western liberalism, Pakistani courts promote these understandings of marriage and divorce in the name of Islamic faith. The courts stress ceaselessly that Islam does not compel parties to live in a hateful union nor does it force on them a life devoid of harmony and happiness; such a result would be "contrary to all norms of justice" in Islam.[230] Since a happy union is a sacred goal, an Islamic precept,[231] when there is no harmony left in the life of spouses, terminating a marriage becomes almost a religious duty "in order to save two living souls from the agony of hateful union."[232] The courts disap-

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[225] *See, e.g.*, Haider, *supra* note 9, at 327 (arguing that part of the court's agenda is "marital and domestic happiness, for love, and perhaps even for romance").

[226] *Id.* at 329 (citing the Family Court's discussion in Jan Ali v. Gul Raka, 1994 PLD 245, 247–48: "[t]he institution of marriage is based on mutual confidence, respect, and love"); *see also id.* at 336 (discussing the "language of love" used by the court in Allah Ditta v. Judge Family Court, 1995 MLD 1852, 1853).

[227] Sakhi Muhammad v. Taj Begum, 1985 CLC 734, 743; Jan Ali v. Gul Raja, PLD 1994 Pesh. 245, 249 (explaining that what is important to the success of a *khula* claim is that the wife "has fixed aversion to her husband and . . . cannot love within the limits of God").

[228] *See* MAHMOOD, *supra* note 120, at 347.

[229] Muhammad Arif Khan v. Shakoor Akhtar, 1999 YLR 985, 988.

[230] Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi, PLD 1959 Lah. 566, 567 ("Islam does not force on the spouses a life devoid of harmony and happiness . . . ."); ALI KURESHE, *supra* note 138, at 351 (quoting case reported in NLR 1998 Lah. 545); *see also* MAHMOOD, *supra* note 120, at 345 (summarizing cases that underscore the cruelty in forcing parties to remain in a hateful union).

[231] Dilshad Ahmad v. Sarwat Bi, PLD 1990 Kar. 239, 240 ("[l]imits prescribed by Allah" mean the directions regarding a happy social life); Muhammad Rizwan v. Samina Khatoon, PLJ 1989 Kar. 9, 12 ("Islam does not force on the spouses a life devoid of harmony and happiness."); ALI KURESHE, *supra* note 138, at 360 (quoting case reported in 1981 CLC 143) ("Marriage in Islam does not conceive of forcing parties to live in a hateful union.").

[232] Mst. Saffiya Bibi v. Fazal Din, 2000 SD 684, 686 (refusing to force a reunion that would "give birth to a hateful union"); Inamul Haque v. Sharifan Bibi, 1993 CLC 46, 48; Mst. Ghulam Zohra v. Faiz Rasool, 1988 MLD 1353, 1355 (citing Rashidan Bibi v. Bashir Ahmed, PLD 1983 Lah. 549) (forcing the parties to live in a hateful union is not in accord with the concept of marriage in Islam).

prove of couples who live in "an atmosphere perpetually saturated with suspicious, mental distrust, discord and [hatred] for each other. In an atmosphere of the type aforementioned, human life becomes a mere waste. . . . Islam does not thrust upon parties a marriage devoid of bliss and happiness."[233] Armed with this romantic Islamic vision of marital life, the courts have condemned those "women who are roped in hateful unions yet they do not want Khula and are ready to live even in those disgusted and disappointed unions."[234] For the courts, there is simply no choice but to officially declare the death of loveless marriages.[235]

Pakistani courts are noticeably attentive to human nature in general and psychological processes in particular. Recognizing the intensely personal nature of spousal dynamics and marital conflict, one court recognized: "[d]islike, hatred, abomination, detestation, repulsion or revulsion as grounds for Khula may arise by any incident of single word. . . . The causes, grounds and reasons can differ from one human being to another. It is a mind set of a person who is moved from an incident in which dislike, hatred or loathing is created."[236] The complexities of human emotion served to justify the judicial refusal to probe the reasons for a woman's marital dissatisfaction. "Aversion, disliking or hatred relate to mental perception of a person not susceptible to any measurement or proof, hence these feelings can never be subjected to any proof."[237] Inevitably, "emotion [sic] of love and hatred cannot be adjudged on [a] rational basis" and are oftentimes incomprehensible.[238] As such, "[a] lady cannot be pinned down to live with

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[233] Muhammad Amin v. Judge Family Court, Multan, MLD 2001 Lah. 52, 56.

[234] ALI KURESHE, *supra* note 138, at 397 (quoting case reported in 2004 UC 739).

[235] The court uses definite, rather than discretionary, terms. It states that it is left with no option other than to dissolve the marriage when an unbridgeable gap exists in the marriage. *See* Mst. Ruqqia Bibi v. Muhammad Munir, MLD 1999 Lah. 812, 816 ("If the Court is satisfied that parties cannot live as husband and wife within the prescribed limits, the decree has to be passed."); Saleem Akhter v. Judge Family Court, 1999 MLD 1679, 1686 ("Therefore, there was no choice with the learned Judge except to pass a decree for dissolution of marriage . . . ."); *see also* ALI KURESHE, *supra* note 138, at 347–48 (quoting case reported in 1999 MLD 812) ("Court could not allow such hateful union to continue."); *id.* at 353 (quoting case reported in 1999 SD 736) ("Court has no option but to decree dissolution of marriage on ground of Khula' when spouses develop hatred and disrespect against each other . . . ."); MAHMOOD, *supra* note 120, at 101 (summarizing the court's approach to *khula* petitions thus: "Once wife approaches the Court for dissolution of marriage on basis of khula, the Court has no option but to accede to her request because she is entitled to divorce . . . as of right").

[236] ALI KURESHE, *supra* note 138, at 397 (citing case reported in 2004 UC 739); *see also* MAHMOOD, *supra* note 120, at 356 ("Aversion/hatred can develop at any time . . . it depends upon man to man and person to person and cannot be measured through any measurement/scale and weight.").

[237] Mst. Sarwar Jan v. Abdur Rehman, NLR 2004 SD 129, 138–39; Noor Muhammad v. Judge Family Court, Burewala, District Vehari, PLD 1989 Lah. 31, 32 ("Hatred for a person or aversion to a situation is the accumulated effect of responses built gradually over a period of time and they may not always be capable of being proved by direct evidence.").

[238] Mst. Naseem Akhtar v. Muhammad Rafique, PLD 2005 SC 293, 295.

a man, against whom she had developed utmost aversion, and with whom she is finding it increasingly difficult to live a normal life as wife."[239]

The divorce jurisprudence reflects the belief that laws can and should be utilized to alleviate suffering. When marital life is in ruins, courts have ruled time and again, there is no greater blessing for a wife than marital freedom, the opportunity to escape.[240] From a moral and Islamic standpoint, "it is neither just nor equitable to keep the [woman] bound by the marriage tie which is abominated by her."[241] The courts found it "unfair, if not cruel" to oblige wives to remain in marriages while husbands may deal with wives "as if they were chattel which could be parted with at will."[242] Moreover, mindful of the consequences of an extended divorce battle for women, the courts have imposed only a minimal threshold of proof, refusing to allow unending litigation.[243]

The Pakistani courts have also been mindful of the importance of sexual gratification to marital satisfaction; indeed, they place an emphasis on a wife's right to a satisfactory sexual life, regardless of reproductive considerations.[244] Thus, even when the difficult-to-satisfy statutory impotence ground has been *technically* unavailable,[245] courts have used *khula* to emancipate them from marital frustration.[246] The courts have boldly interceded in the

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[239] Mst. Khurshid Mai v. Additional District Judge, Multan, MLD 1994 Lah. 1255, 1258.

[240] *See* SYED, *supra* note 220, at 555 (quoting case published in 1993 CLC 46) (*khula* is essential in order to "save two living souls from the agony of hateful union"); Fyzee, *supra* note 191, at 123.

[241] Mst. Hafeezan Bibi v. District Judge, Narowal, MLD 1995 Lah. 136, 140; Mst. Huma Hafeez v. Shaukat Javaid, CLC 1993 Lah. 855, 858 ("[A]n unhappy union should not be forced upon a wife who cannot not live with her husband.").

[242] Abdul Ghafoor v. Judge Family Court, CLC 1992 Lah. 2201, 2202; *see also* Ahmed Nadeem v. Assia Bibi, PLD 1993 Lah. 249, 252 ("[A] woman is not a chattel and there is no method by which she could be forced to live with her husband, if she herself has acquired hatred for him.").

[243] Mst. Khurshid Mai v. The Additional District Judge, Multan, MLD 1994 Lah. 1255, 1258 ("[I]t would be better for the spouses to get apart, in early phase of life, in youth, so that both of them may go in for second marriage."); Muhammad Sanaullah v. Muhammad Ilyas, PLJ 1987 Lah. 427, 430 (concerned for the respondent wife who had spent nine years litigating a divorce and was in danger of surpassing "marriageable age").

[244] *See* M. FARANI, COMPLETE FAMILY LAWS IN PAKISTAN 390 (2006) (explaining that courts find that "[a] great sanctity is attached to a marriage in Islam. It is a most intimate communion and the mystery of sex finds its highest fulfilment [sic] when intimate spiritual harmony is combined with the physical link."). It is important to note that the Qur'an itself recognizes that women have sexual needs and that sex should be available to them for pleasure, and not just for procreation. *See* Heather Johnson, *There Are Worse Things than Being Alone: Polygamy in Islam, Past, Present, and Future*, 11 WM. & MARY J. WOMEN & L. 563, 569, 571 (2005).

[245] *See* Bibi Anwar Khatoon v. Gulab Shah, PLD 1988 Kar. 602, 611 ("[T]he respondent No. 1 was not impotent at the time of the marriage. His subsequent impotency will not entitle the petitioner for the dissolution of her marriage on the ground of alleged impotency."); *see also supra* note 118 and accompanying text.

[246] Maulvi Mir Qalam Khan v. Mst. Shamim Bibi, CLC 1995 Pesh. 731, 734; Haider, *supra* note 9, at 330–32.

most intimate details of a spousal relationship, scrutinizing wives' sexual satisfaction in defiance of the common stereotype that a Muslim woman should be dedicated exclusively to her husband's desires and pleasure.[247] Where wives have not been pleased with their husbands' sexual performance—if a wife disapproves of her husband's fondness for oral or anal copulation, for instance—courts have readily agreed to set them free.[248] The male judges have gone so far as to crown the wife's physical pleasure as an "object of marriage," stressing that the "limits ordained by God Almighty connote performance of marital obligations honestly, faithfully and willingly by each spouse in relation to sex."[249] Hence, where a wife had developed hatred toward her husband that "prevented her to perform her part of marital obligations willingly and happily, it amounted to failure of the object of the marriage."[250]

Courts have proved attentive not only to wives' sexual well-being, but also to their emotions, explaining that they are more concerned with the wife's state of mind than with the basis for those feelings.[251] Sympathy for women's hurt feelings pervades multiple decisions. In one such case, an upset court was eager to set a woman free who discovered that her newly-wedded husband was already married to another woman: "[t]he institution of marriage is based on mutual confidence, respect and love inter se. . . . The severity of shock that [the wife] might have experienced on knowing that she had been made the victim of fraud by her very 'loving husband' is so apparent to warrant any observation."[252] In another case where a man exercised his legitimate right to take a second wife, the court conveyed its own aversion toward this not uncommon situation.[253] Noting the first wife's natural "inception of hatred" that "can be well imagined," the court used the

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[247] This is synonymous with the image of women in Muslim religious thought. Women are presented by some religious conservatives as inferior, "at worst devils, at best a tool for the sexual gratification of their husbands. . . . In such views, marriage is a framework in which women are a means of reproduction and of entertainment for men." Fawzy, *supra* note 5, at 24–25.

[248] *See, e.g.*, Abdul Baqi v. Abdul Bair Qureshi, 1982 SCMR 478, 479 (finding that a husband cannot subject his wife to "unnatural intercourse").

[249] SYED, *supra* note 220, at 557 (quoting Robina Kaursar v. Abdur Rehman, 1988 CLC 2399); *see also* Haider, *supra* note 6, at 331 (noting the Court's emphasis of sexual relations as an important part of marriage and finding that the "impotency of a husband is generally taken for his inability to give emotional sexual satisfaction to that particular woman who happens to be his wife.").

[250] SYED, *supra* note 220, at 557; Haider, *supra* note 6, at 331 (finding that for Pakistani courts, "sexual intercourse is central to the institution of marriage" and "integral to the definition of husband and wife" which necessarily means that if a woman lacks sexual life in marriage she cannot live with her husband).

[251] *See, e.g.*, Ghulam Zohra v. Faiz Rasool, 1988 MLD 1353, 1355 (Lahore High court set aside the Family Court's decision not to grant *khula* when it found that the woman was not prepared to live with the man as his wife); MAHMOOD, *supra* note 120, at 346.

[252] Jan Ali v. Mst. Gul Raja, PLD 1994 Pesh. 245, 248.

[253] *See* Allah Ditta v. Judge Family Court, MLD 1995 Lah. 1852, 1853 (taking a second wife deplorable without the blessing of the first wife).

rationale of a "broken heart" to free the insulted wife from this painful situation: "[s]uch conduct of the husband towards his wife certainly breaks her heart if not the bones and when [the] heart is broken it is simply immaterial if the bones are intact."[254] Unwilling to let economic considerations stand in the way of the wife's emotional welfare, the court even dispensed with the requirement that the wife forgo any of her property in return for the divorce.[255]

This female-sensitive judicial outlook explains the courts' practice—almost universal willingness to grant *khula* requests.[256] If in the past—before courts assumed this quasi-legislative role—it was nearly impossible for Pakistani women to win a divorce, today it is almost impossible for them to lose. And if Muslim women used to convert to Christianity purely in order to dissolve their marriages, the situation is now reversed, with some Christian women in Pakistan converting to Islam in order to enjoy the liberal divorce right of their Muslim sisters.[257] In order to provide a deeper understanding of the magnitude of the judicial innovation, a comparative examination follows in the next Part.

c. Khula *in a Comparative Context*

To fully appreciate the judicial innovation with respect to *khula*, it is enlightening to contrast the Pakistani regime with other systems of divorce in both the Islamic and Western worlds. To begin, the Pakistani experiment with liberal female divorce rights is unique even when compared to Egypt, the most modern Muslim nation and the role model for progressive family law reform in the Muslim world.[258] Despite its solid underpinning in Islamic law and clear potential to set women free—even if at a price—*khula* was virtually unheard of in the Egyptian legal scheme during the twentieth century. In fact, the Egyptian legislature did not provide this female divorce right until 2000.[259] Although this reform was a step forward legislatively, the reserved Egyptian judiciary proved reluctant to utilize *khula* to its full

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[254] *Id.* at 1853.

[255] *Id.*; *see also* Haider, *supra* note 9, at 336.

[256] In Ali's comprehensive compilation of *khula* decisions, there are only a handful of cases in which a wife left the court empty-handed; but usually, on appeal, she won freedom by merely restating her hatred for her husband. *See* ALI, *supra* note 170, at 68–70, 109–16, 234–48 (reviewing *khula*-based divorce jurisprudence and concluding that "[c]ourts are bound to grant right of Khula to a woman even if she expressly claims or omits to claim dissolution on ground of Khula in her pleadings and even if other grounds for seeking dissolution of marriage cannot be proved"). The same is true with regard to Ali Kureshe's decades-spanning digest of *khula* cases from 1978 to 2006. *See* ALI KURESHE, *supra* note 138, at 340–426; *see also, e.g.*, Mst. Nazir v. Additional District Judge Rahimyarkahan, CLC 1995 Lah. 296, 298.

[257] Warraich & Balchin, *supra* note 90, at 199–200.

[258] Venkatraman, *supra* note 6, at 1984; ESPOSITO WITH DELONG-BAS, *supra* note 3, at 52.

[259] ESPOSITO WITH DELONG-BAS, *supra* note 3, at 60; *see also* Fawzy, *supra* note 5, at 67–68.

potential.[260] Rather than manifesting the liberality and feminist sensitivity to women's divorce rights demonstrated by the Pakistani courts, the supposedly enlightened Egyptian system has treated marital freedom with hostility. As I have explored elsewhere, the Egyptian *khula* provision was so controversial that the bill received recommendations for an astonishing eighty amendments,[261] and parliamentary debates took on misogynistic overtones as legislators raised the specter of women renouncing male authority.[262]

When the bill finally passed, the legislative grant of *khula* proved stingy, burdened by a mandatory arbitration period, even in cases of domestic violence.[263] The cost of freedom in Egypt is far higher than in Pakistan: an Egyptian wife must promptly return her dower, gifts, and any property given to her by her husband, and forgo all financial and support rights.[264] Even though Egypt's concession to women's marital freedom was limited, no other law in the nation's history has sparked as much controversy as the *khula* divorce provision.[265] The reaction of Egyptian courts to *khula*-style divorce has been equally, if not more, unfavorable.[266] The backlogged and inefficient courts rejected the idea of *khula* as a faster way to freedom.[267] In marked contrast to the sensitivity exhibited by Pakistani judges, their Egyptian counterparts often viewed wives' requests for *khula* as so immoral and lewd, so surely motivated by a desire for another man, that they called such women "disobedient" and occasionally refused their requests or made them pay even more than the law required.[268] The judges showered "pity" upon the stigmatized children of *khula*-women but expressed little concern about the plight of the trapped wives.[269] Finally, again in sharp contrast to Pakistani courts, Egyptian judges succumbed to male attempts to sabotage *khula* proceedings. Courts have agreed to conduct extensive, expensive, and time-consuming investigations about the compensation husbands are entitled to in

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[260] *See, e.g.*, Leila Al-Atraqchi, The Women's Movement and The Mobilization For Legal Change In Egypt: A Century Of Personal Status Law Reform 387–91 (Mar. 2003) (unpublished Ph.D. dissertation, Concordia University) (on file with author).

[261] *Id.* at 299.

[262] Diane Singerman, *Rewriting Divorce in Egypt: Reclaiming Islam, Legal Activism, and Coalition Politics*, *in* REMAKING MUSLIM POLITICS: PLURALISM, CONTESTATION, DEMOCRATIZATION 161, 177 (Robert W. Hefner ed., 2005); *see also* Jasmine Moussa, *The Reform of Shari'a-Derived Divorce Legislation in Egypt: International Standards and the Cultural Debate*, 1 HUM. RTS. L. COMMENT., at 24 (2005), http://www.nottingham.ac.uk/hrlc/publications/humanrightslawcommentary.aspx. As a precaution, the *khula* proponents had to cast their arguments in a patriarchal tone, avoid the vocabulary of women's rights or gender equality, and "sell" their reform as upholding the rights of men and the family. *Id.*

[263] Yefet, *supra* note 107, at Part IV.C.3.

[264] Yefet, *supra* note 107, at 67–68.

[265] *See* Al-Atraqchi, *supra* note 260, at 305 ("No other law presented by the Egyptian government to the People's Assembly has sparked as much controversy as the new Personal Status Law of 2000.").

[266] Tadros, *supra* note 32.

[267] HUMAN RIGHTS WATCH, *supra* note 15, at 24.

[268] Yefet, *supra* note 107, at Part IV.C.3.

[269] Tadros, *supra* note 32.

exchange for their wives' freedom, and they have conditioned divorce on wifely payment.[270] In short, whereas Pakistani courts have paved an impressively smooth road to female marital liberty, Egyptian courts refused to use the Islamic mechanism of *khula* to equalize divorce powers, leaving Egyptian women with an uphill path to marital freedom.

The Pakistani divorce regime is impressive also in comparison to legal systems in which non-Muslim religious law controls domestic disputes. For example, in Israel, the only country in the world where Jewish personal status laws have legal force, Israeli women's entitlement to marital freedom pales in comparison to Pakistani women's *khula* divorce right. While Israeli women enjoy a wide array of rights compared to women in other nations, they are subject to a gendered marital regime, in which their rights to divorce are far more limited than men's divorce rights.[271] Israeli law accords Orthodox rabbinical courts exclusive control over divorce, and those courts in turn grant full control over divorce to men.[272] First, under the current Jewish-Israeli regime, technically either spouse may be released from the marriage upon establishing a recognized divorce ground.[273] However, men have more fault-based grounds at their exclusive disposal, and it is easier for them to establish those grounds and to persuade the rabbinical court that they are severe enough to warrant freedom.[274] Second, even in cases where the wife establishes the entire cluster of fault grounds possible and the rabbinical court declares that the husband must divorce her, she may be lawfully divorced *only* if the husband agrees to grant her a Jewish divorce decree known as a *get*.[275] Wives whose husbands refuse to deliver a *get* are properly called *agunot*, or chained women, for they are destined to remain

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[270] Sonneveld, *supra* note 201, at chs. 4.4–4.5, 4.7, 5.7.

[271] *See generally* Yefet, *supra* note 156, at 445 (reviewing the Israeli divorce regime and concluding that it "continues to display a systematic and prominent predisposition in favor of men, licensing them to enchain their wives indefinitely").

[272] *Id.* at 442–43 n.3. This article explains that:

> The Israeli courts, unique among modern legal systems, combine both civil and religious institutions. While the civil courts have jurisdiction over most legal questions, religious courts retain exclusive jurisdiction over certain areas of family law. Israelis must thus move between two completely different judicial systems, depending on the legal issue that brings them into court. For Jews, the religious courts, known as the rabbinical courts, retain exclusive jurisdiction over matters of marriage and divorce. . . . The civil system of family courts has parallel jurisdiction to handle questions of custody, child support, property distribution, and all matters not related to the narrow issue of getting married or divorced.

Id.

[273] *Id.* at 444–45.

[274] *Id.* at 445–47; *see also* Ruth Halperin-Kaddari, *Adultery of the Husband as a Ground for Divorce*, 7 MECHKAREI MISHPAT 79 (1989).

[275] *See, e.g.*, Heather Lynn Capell, *After the Glass Has Shattered: A Comparative Analysis of Orthodox Jewish Divorce in the United States and Israel*, 33 TEX. INT'L L.J. 331, 336 (1998) ("Although a wife might have legitimate grounds for divorce, she still cannot initiate or deliver the get.").

shackled in insufferable marital bonds for as long as their husbands desire.[276] Moreover, while a unilateral no-fault divorce regime like *khula* is unavailable for either men or women and instead mutual consent is theoretically required, in practice the husband's consent weighs more heavily than the wife's. If the wife withholds her consent to the divorce, the husband may, upon certain conditions, bypass her resistance and obtain a de facto divorce, absolving him of any marital duties to the recalcitrant wife and permitting him to remarry.[277] But if the husband contests the divorce, the wife has virtually no remedy against his recalcitrance; she is not divorced and cannot remarry or have legitimate children until her husband agrees to set her free.[278]

This process has been affirmed by the Israeli Supreme Court: when given the opportunity to narrow the conditions for granting a remarriage permit, the Court instead supported an expansive exercise of this discriminatory measure.[279] This unequal gender-based consideration of spousal consent has given rise to the pernicious practice of "*get* extortion."[280] Men have leveraged their veto power over the *get* as a bargaining chip to demand property concessions, evade financial obligations, and gain child custody rights.[281] Husbands can also validly condition their consent upon non-monetary criteria, even restraining their wives' most basic and private affairs by controlling, for example, what they can eat or wear following the divorce.[282] Finally, in recent years, the rabbinical court has reintroduced an obscure doctrine allowing for the retroactive invalidation of a *get* if an ex-wife fails to fulfill the conditions upon which she was divorced.[283] In short, the Israeli rabbinical courts, in marked contrast to their Pakistani counterparts, have done little to ameliorate Israeli women's marital plight and in fact have ac-

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[276] Yefet, *supra* note 156, at 443 n.5 ("This term was originally applied to galley slaves whose arms and legs were bound together."); *see also* Mark Washofsky, *The Recalcitrant Husband: The Problem of Definition*, 4 JEWISH L. ANN. 144, 144 (1981) (noting that in the history of Jewish law, the problem of *agunot* has been the greatest challenge to basic equity).

[277] Yefet, *supra* note 156, at 447; Erica R. Clinton, *Chains of Marriage: Israeli Women's Fight for Freedom*, 3 J. GENDER RACE & JUST. 283, 297–98 (1999).

[278] *See* Capell, *supra* note 275, at 336.

[279] *See, e.g.*, DN 10/69 Boronovsky v. Chief Rabbi 28(1) IsrSC 7 [1970] (holding in a case where the rabbinical court granted a remarriage permit to a husband over his wife's objection that the rabbinical court has broad discretion to grant permits and that it may do so in order to compel a wife to accept the *get*).

[280] Pinchas Shifman, *Forty Years to Family Law—A Struggle Between Religious Law and Secular Law*, 19 MISHPATIM 847, 853 (1990).

[281] *See, e.g.*, Francine Klagsbrun, *The Struggle of the Agunot*, *in* WOMEN IN CHAINS 231 (Jack Nusan Porter ed., 1995); Clinton, *supra* note 277, at 285 n.20.

[282] *See, e.g.*, File No. 1-21-022290027 Rabbinical Court, 7 THE LAW AND ITS DECISOR: RABBINICAL COURT DECISIONS IN FAMILY MATTERS 6 (2004), *available at* http://sitesdesigning.com/rackman/archives/DinveDayan_en.php.

[283] Yefet, *supra* note 156, at 449–50; *see, e.g.*, File No. 1-23-9997 (TA) Rabbinical Court, 14 THE LAW AND ITS DECISOR: RABBINICAL COURT DECISIONS IN FAMILY MATTERS 8 (2007); *available at* http://sitesdesigning.com/rackman/archives/DinveDayan_en.php.

tively favored men, licensing them to enchain their wives indefinitely.[284] Thus, whereas a Pakistani Muslim woman may easily and irrevocably obtain marital freedom, either for free or at no greater cost than the amount of the dower her husband actually gave her,[285] an Israeli Jewish woman can never be free without her husband's approval; she often must purchase her freedom at tremendous monetary and psychological cost and can never be sure that her subsequent divorce is final.[286]

In addition to being relatively advanced and open-minded compared to some other religious legal systems, the ostensibly-medieval Pakistani legal system has produced a liberal regime that arguably rivals some aspects of the *Western* no-fault regime.[287] For example, despite New York's reputation for liberalism, cosmopolitanism, and social reform, the Empire State featured the nation's most restrictive divorce law until October 2010[288]—embracing true unilateral no-fault divorce only in the second decade of the twenty-first century.[289] Even now, some U.S. states adhere to restrictive no-

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[284] Yefet, *supra* note 156, at 448–50 (describing the insensitivity of the rabbinical courts to women's marital plight as exhibited in various rulings and the double standard applied to women seeking marital freedom); *see also* IRWIN H. HAUT, DIVORCE IN JEWISH LAW AND LIFE 19–20, 85–86 (1983).

[285] *See supra* Part III.B.1.a.

[286] Klagsbrun, *supra* note 281, at 231–32 (noting that records indicate that there are 16,000 *agunot*, whose husbands, just out of acrimony or jealousy, sadism or sheer cruelty, and sometimes even cupidity, refuse to grant them the desired *get*). Yefet, *supra* note 156, at 450 ("[A]n Israeli Jewish woman today can never be sure that her divorce is final and that she is free of her ex-husband's control."); *id.* at 451 ("[T]he Israeli dissolution regime is rife with prejudice and abuse and creates substantial incentives for men to oppose divorce. Both the religious and secular Israeli courts have unaccountably allowed, aided, and even incited husbands to prevent their wives from obtaining divorces—leaving women indefinitely enchained in their marriages as *agunot*. . . . It is little wonder that inequality in the divorce domain is considered the most severe discrimination faced by Israeli women today.").

[287] California became the first nearly exclusively no-fault jurisdiction in 1969, rendering the breakdown of the marriage, along with "incurable insanity," to be the sole grounds for divorce. CAL. FAM. CODE § 2310 (West 2004). Since then, no-fault divorce laws have swept the United States, generating a divorce revolution. HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 80–82 (1988). Fault divorce no longer exists as the *sole* avenue to freedom in any state, but as indicated *infra* notes 290–292, some states impose obstacles to obtaining no-fault divorces.

[288] Under prior New York law, if there was no mutual agreement to separate and one spouse contested the other spouse's action for a divorce, a divorce action could only be maintained if a fault ground was sufficiently pleaded. N.Y. DOM. REL. LAW § 170 (McKinney 2008) (amended 2010). Given both the stringency of the proof required for establishing the fault-grounds and the ease with which defenses could defeat these grounds, it was possible that a New York citizen wishing to dissolve a marriage would never be able to obtain a divorce from the contesting spouse. *See* Rhona Bork, *Taking Fault With New York's Fault-Based Divorce: Is the Law Constitutional?*, 16 ST. JOHN'S J. LEGAL COMMENT. 165, 168–79 (2002).

[289] On August 13, 2010, the New York legislature added § 170(7) to New York's divorce statute, allowing a husband or wife to obtain a divorce on the grounds that:

> The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. No

fault regimes. In contrast to the swift exit to which Pakistani women are entitled, many American jurisdictions delay marital freedom for anywhere from six months to two years.[290] Even battered women are not ordinarily exempted from the imposition of statutory waiting periods.[291] In addition to imposing mandatory wait periods, some states require marital counseling.[292] Conditioning dissolution on such compulsory counseling is an extreme intrusion into marital privacy, an affront to personal integrity, a limit on decisional autonomy, and raises concerns about the limits of state power in a free society.[293] Finally, a handful of states essentially make unilateral no-fault divorces impossible under some circumstances, such as when a spouse cannot be located or contests the divorce.[294] Since a bilateral regime gives each party veto power over the divorce, whoever wants freedom may need to pay for it; this makes women—the spouses who most often seek marital re-

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judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce.

N.Y. DOM. REL. LAW § 170(7) (McKinney 2010).

[290] *See, e.g.*, ARK. CODE ANN. § 9-12-301(b)(5) (2010) (requiring that spouses live separately for eighteen months before a no-fault divorce will be granted); TENN. CODE ANN. § 36-4-101(b) (2010) (requiring two years of living separately for no-fault divorce); VT. STAT. ANN. tit. 15, § 551(7) (2011) (requiring that spouses live separately for six months before divorce).

[291] Yefet, *supra* note 76, at ch. 7 § 8 ("Few states with waiting periods provide an exception for battered spouses, however, and some commentators even oppose such legislative exemptions.").

[292] *Id.* at ch. 7 § 5 (providing a comprehensive list of states that authorize divorce courts to require marital counseling at their discretion; states that also authorize either spouse to compel counseling; states that permit minor children to petition the court for an order for counseling, or simply mandate divorce counseling whenever minor children are involved; and states that make marital counseling a prerequisite in all contested no-fault divorces, unless the court is persuaded of the impossibility of reconciliation).

[293] *Id.*; *see also* HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 163–64, 168–69 (1997) (state-sponsored counseling involves troubling government interference in private life); Max Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 638–39 (1956) (capturing how counseling programs violate individual and marital privacy, and wondering: "Shall a citizen who is trying to be freed of a tie of marriage be compelled to submit to such a probing into his mind as a necessary condition for his petition to be considered? Shall such compulsion be exercised upon the other spouse?").

[294] *See, e.g.*, MISS. CODE ANN. § 93-5-2(1), (5) (2010) (providing for no-fault divorce with consent of both spouses, when other spouse has been personally served with process or has waived process, and when the divorce is uncontested); *see also* Ronni Mott, *Starting Again*, JACKSON FREE PRESS (July 21, 2010), http://www.jacksonfreepress.com/index.php/site/comments/starting_again_072110 ("For [Mississippi resident] Claire, and for many other women who want to leave a toxic marriage behind, it's not enough that she wants the divorce; [her husband] has to sign those papers, too, and she can't find him.").

lease[295]—particularly vulnerable to extortion.[296] Indeed, marital freedom often proved "an expensive commodity"[297] to purchase, forcing many women to sacrifice their economic security in order to win their husband's cooperation.[298]

In sum, Pakistani women may fare better under Pakistan's judicially-crafted liberal divorce regime than some American women do in certain jurisdictions, having at their disposal an absolute, unilateral, speedy no-fault right. While the *khula* remedy in theory entails economic price, in practice it has been largely marginalized; while no American regime formally conditions divorce on economic concessions, in effect some require them. Unimaginably, then, the female-initiated unilateral divorce right prevails in an Islamic country infamous worldwide for its unprecedented violation of women's rights, and in which female marital emancipation sounds more like an oxymoron than reality.[299]

d. Khula *in a Societal Context*

Pakistani female divorce rights appear progressive in a country where women's rights are otherwise notoriously and brutally violated—they are secluded, silenced, harassed, mutilated, forced into prostitution, beaten, raped, and even murdered.[300] The literature documents the marginalization of Pakistani women. They are confined to the four walls of their homes,[301] a lifestyle evoked by the Pakistani expression that "a woman should go out only three times in her life: when she is born, when she is married and taken

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[295] Two-thirds to three-quarters of all divorces are initiated by women. *See* Karen Turnage Boyd, *The Tale of Two Systems: How Integrated Divorce Laws Can Remedy the Unintended Effects of Pure No-Fault Divorce*, 12 CARDOZO J.L. & GENDER 609, 619 (2006); Sanford L. Braver et al., *Who Divorced Whom? Methodological and Theoretical Issues*, 20 J. DIVORCE & REMARRIAGE 1, 5–7 (1994). On the feminization of the divorce phenomenon, see Yefet, *supra* note 76, at ch. V.

[296] *See* Yefet, *supra* note 76, at ch. III.C.

[297] Sarah E. Fette, *Learning From Our Mistakes: The Aftermath of the American Divorce Revolution as a Lesson in Law to the Republic of Ireland*, 7 IND. INT'L & COMP. L. REV. 391, 417–18 (1997) (internal quotation marks omitted); James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 948 (2000) (restriction on divorce enhance "the likelihood that the spouse most anxious for the divorce will bargain away financial considerations").

[298] Fette, *supra* note 297, at 417–18.

[299] *See, e.g.*, Lisa Hajjar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis*, 29 LAW & SOC. INQUIRY 1, 29 n.24 (2004) ("Pakistan ranks near the bottom for almost every social indicator concerning the lives of women.").

[300] *See* Weaver, *supra* note 85, at 495; *see also* GOODWIN, *supra* note 125, at 48–53; JAWAD, *supra* note 21, at 52–60; Tina R. Karkera, *The Gang-Rape of Mukhtar Mai and Pakistan's Opportunity to Regain Its Lost Honor*, 14 AM. U. J. GENDER SOC. POL'Y & L. 163, 163–71 (2006); Mullally, *supra* note 156, at 404–05; Federal Research Division, Library of Congress, *Men, Women, and Family Relations*, *in* PAKISTAN: A COUNTRY STUDY (Peter R. Blood ed., 6th ed. 1995), *available at* http://countrystudies.us/pakistan/36.htm.

[301] Shaheed, *supra* note 150, at 71–72.

into her husband's home, and when she dies and is taken to be buried."[302] On the exceptional occasion that she does go out, a woman in some regions of Pakistan must wear a veil covering her from head to toe, leaving only a small, embroidered grille at eye level to provide a blurred glimpse of the world.[303] As noted earlier, Pakistani women also suffer from one of the highest rates of domestic violence in the world; seventy to ninety percent of Pakistani women regularly experience bodily integrity violations.[304] As the Human Rights Commission of Pakistan reported at the close of the twentieth century, domestic violence remains "a pervasive phenomenon. The supremacy of the male and subordination of the female assumed to be part of the culture and even to have sanction of religion made violence by one against the other in a variety of its forms an accepted and pervasive feature of domestic life."[305] The perceived inferiority of women by virtue of their sex has resulted in Pakistan ranking "near the bottom globally for almost every social indicator concerning the lives of women."[306]

The male-dominated environment is particularly pernicious for wives who attempt a permanent escape. While men may discard their wives with society's blessing "for reasons good, bad, or indifferent,"[307] it is still socially unacceptable for women to exercise their right to divorce, even from impotent husbands.[308] Upon initiating divorce proceedings, numerous Pakistani women are compelled to seek shelter outside the marital home; their own parents may even deny them support.[309] In addition to weathering tremendous social, economic, and psychological pressure, women seeking divorce face the threat of brutal violence and even murder.[310] While "honor" kill-

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[302] GOODWIN, *supra* note 125, at 55.

[303] *Id.* (stating that this custom is still practiced in conservative regions of Pakistan, especially in the provinces of Baluchistan and the Northwest Frontier).

[304] Hajjar, *supra* note 84, at 29.

[305] HUMAN RIGHTS COMM'N OF PAKISTAN, STATE OF HUMAN RIGHTS IN 1997, at 185 (1998).

[306] Hajjar, *supra* note 84, at 29 n.24.

[307] Mohammed Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 SC 945, 947–51 (India) (explaining that under Islamic law, a man has near absolute freedom to divorce, but in India a woman also has a right to sue for a post-divorce maintenance).

[308] JAWAD, *supra* note 21, at 73, 82.

[309] Shaheed, *supra* note 150, at 76.

[310] In addition to being beaten, slapped, kicked, or sexually abused by their husbands, many Pakistani women are also burned, doused with acid, or physically mutilated. Acid attacks are a common form of violence against women in Pakistan, often as a punishment against women who try to leave their husbands. *See* Hooma Shah, *Brutality By Acid: Utilizing Bangladesh As A Model To Fight Acid Violence In Pakistan*, 26 WIS. INT'L L.J. 1172, 1172–73, 1175 (2009). Statistics indicate that Pakistan is the place where the highest number of acid attacks have been registered, and this phenomenon appears to be spreading markedly, especially since the beginning of the twenty-first century. *Id.* at 1174–75. To compound the problem, most perpetrators of acid violence go unpunished; current estimates suggest that less than five percent of those who commit acid crimes are convicted in Pakistan. *Id.* at 1174. Equally dreadful is the "punishment" to which one cleric subjected his wife: injecting "a red-hot iron bar into her vagina." AMNESTY INT'L, *supra* note 151, at 3. Domestic violence in Pakistan also includes honor killings. *See* Manar Waheed, *Domestic Violence*, *in* PAKISTAN: THE TENSION BETWEEN INTERVENTION

ings may occur even for trivial reasons, as "when a wife does not serve a meal quickly enough or when a man dreams that his wife betrays him,"[311] one of the most popular motives is to frustrate a woman's attempt to divorce.[312] A wife who seeks marital freedom is seen as committing an act of "outright defiance which defile[s] a man's honor," which may be restored only by severe acts of violence, even death.[313] Despite the high rate of spousal abuse, "virtually no men have been prosecuted for assault and battery when the matter involved beating their wives,"[314] and when Pakistani authorities do intervene, it is typically to persuade the wife to return to her abusive husband.[315] To face these risks and break free requires enormous courage.

The deterrents to divorce do not end there. In a society where women are secluded and wives live with their husbands' extended family, devising proof of matrimonial offense becomes extremely difficult, causing divorce litigation to extend for six years or more.[316] The embarrassment and apprehension of exposing intimate matters further discourage wives from seeking legal redress.[317] Even more daunting are the devastating consequences of failure at court. The "rebellious" wife may suffer at the hands of her en-

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& SOVEREIGN AUTONOMY IN HUMAN RIGHTS LAW, 29 Brook. J. Int'l L. 937, 944–46 (2004); *see also* Marie D. Castetter, *Taking Law Into Their Own Hands: Unofficial and Illegal Sanctions by the Pakistani Tribal Councils*, 13 IND. INT'L & COMP. L. REV. 543, 550–51 (2003); Sohail Akbar Warraich, *'Honour Killing' and the Law in Pakistan*, *in* HONOUR 78, 83 (Lynn Welchman & Sara Hossain eds., 2005) (Pakistani courts gave male family members a "virtual license to kill their women on the pretext of 'honour'").

[311] *Pakistan: Violence Against Women in the Name of Honor*, AMNESTY INT'L (Sept. 22, 1999), http://www.amnestyusa.org/document.php?id=1DF2FA05A016701B8025690000693498&lang [hereinafter *Pakistan: Violence Against Women*]; *see also* Stephanie Palo, *A Charade of Change: Qisas and Diyat Ordinance Allows Honor Killings to Go Unpunished in Pakistan*, 15 U.C. DAVIS J. INT'L L. & POL'Y 93, 98 (2008) (describing how a woman's mere disobedience suffices to justify an honor killing).

[312] The most infamous honor killing in Pakistan was that of Samia Sarwar, who was murdered by her family to avoid the "shame" and "embarrassment" caused by her decision to divorce her abusive husband. *See* Rachel A. Ruane, *Murder in the Name of Honor: Violence against Women in Jordan and Pakistan*, 14 EMORY INT'L L. REV. 1523, 1523–25 (2000); *see generally* Mazna Hussain, *"Take My Riches, Give Me Justice": A Contextual Analysis of Pakistan's Honor Crimes Legislation*, 29 HARV. J. L. & GENDER 223, 223–24, 237–46 (2006).

[313] Ruane, *supra* note 312, at 1533.

[314] Rana Lehr-Lehnardt, *Treat Your Women Well: Comparisons and Lessons From an Imperfect Example Across the Waters*, 26 S. ILL. U. L.J. 403, 412 (2002).

[315] SAMYA BURNEY, HUMAN RIGHTS WATCH, CRIME OR CUSTOM? VIOLENCE AGAINST WOMEN IN PAKISTAN 31 (Regan E. Ralph & Cynthia Brown eds., 1999); *see also* Hajjar, *supra* note 84, at 29–30.

[316] Carroll, *supra* note 191, at 95.

[317] As the court noted on one occasion, "the relationship between the husband and wife is of a very intimat [sic] nature. It may also be too embarrassing for either of them to discolse [sic] to the Court what has transpired between them in the privacy of their home." JJ Amanullah v. District Judge, Jurjanwal, 1996 PSC 59, 61.

raged husband or family for undermining male authority and for airing marital travails in public.[318]

Khula divorce is structured to overcome many of these obstacles, enabling women to seek judicial divorce with the confidence that they will regain their freedom. The novelty of the doctrine is that it requires no proof of the grounds of marital breakdown. As I have observed, it suffices for the wife to state that she is fed up with her husband; the underlying reasons are of no significance. Escape from marriage thus no longer depends on the testimony of the husband's close kin or any objective evidence of matrimonial offense.[319] Strikingly, then, a doctrine that is "hardly ever practiced these days" elsewhere in the Islamic world[320] is fully accessible in Pakistan, guaranteeing women a meaningful right to divorce.

De jure gender differences, of course, persist in Pakistani divorce. Men's *talaq* is an extra-judicial divorce that a husband may exercise without explanation, while women's *khula* requires resort to a court of law and the satisfaction of the court's conscience that the couple cannot live together "within the limits prescribed by Allah."[321] Yet, courts have endeavored to provide *de facto* equality, often explicitly commenting that *khula* should be equated with a man's *talaq*.[322] Indeed, when dealing with *khula* requests, the court has stressed the "equal" divorce power of both sexes and the compatibility of women's liberal dissolution rights with "the letter and spirit of the Qur'an which places the husband and the wife on an equal footing."[323]

e. Khula *in Judicial Context*

The Pakistani courts' solicitude for women's rights has not been limited to the divorce setting. The development of the *khula* doctrine is a piece of an even greater feminist judicial enterprise, at least in the domestic sphere. When called upon to confront controversial social issues that threaten cultural beliefs about women's subordination in the family and society, Pakistani courts have promoted a more egalitarian corpus of law for Pakistan. The judicial treatment of marriage law has been particularly remarkable. For

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[318] Over ninety percent of married women suffer physical or sexual abuse by their husbands; those who dare to file for divorce and worse, those who ultimately fail, are subject to further atrocious abuse. Waheed, *supra* note 310, at 942.

[319] *See supra* Part III.B.1.a; *see also* ALI KURESHE, *supra* note 138, at 395 (quoting case published in PLD 1989 Lah. 31) ("hatred for a person or aversion to a situation is the accumulated effect of responses built gradually, over a period of time and that could not always be capable of being proved by direct evidence"); MAHMOOD, *supra* note 120, at 345 (a wife does not need to prove a claim of *khula*).

[320] JAWAD, *supra* note 21, at 81.

[321] Muhammad Abbasi v. Mst. Samia Abbasi, 1992 CLC 937, 940 ("A wife is entitled to have the marriage dissolved on the basis of Khula, if the conscience of the Court is satisfied that it shall not be possible for the parties to live together as husband and wife.").

[322] Haider, *supra* note 9, at 339. The courts themselves often comment that *khula* is to be equated with a man's *talaq*. *Id.*

[323] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97, 120.

example, the courts relied upon Islam, the Pakistani Constitution, and international human rights conventions to outlaw the phenomenon of forced and exchange marriages. Criticizing this widespread Pakistani practice as "inhuman" and "gender-insensitive,"[324] one High Court held that a woman enjoys the right to marry the man of her choosing; that her consent is indispensable for a valid marriage; and that any other approach would defy Islamic values and merely reflect "[m]ale chauvinism, feudal bias and compulsions of a conceited ego."[325] The court lamented that even though women are given equal Islamic rights in matters of marriage, "in our practical lives we are influenced by a host of other prejudices bequeathed by history, tradition and feudalism. . . . It is that culture which needs to be tamed by law and an objective understanding of the Islamic values."[326] In the same case, the court also advocated an egalitarian interpretation of Islamic marriage law, stressing that Islam conferred upon women an equal right to choose their life partners of their own free will.[327] Humaira, who was forcibly married to her cousin by her parents, was entitled to exercise her right of exit and disassociation "from the high walls of a feudal bondage," and to marry whomever she desired.[328]

Controversy over a woman's right to marry without the consent of her male guardian also sparked a flurry of debate over women's rights of self-determination and choice in marriage.[329] In the celebrated "Saima Waheed Love Marriage" case, the High Court held that just as Pakistani men are free to marry without the consent of anyone except their prospective wives, women can also validly contract their own marriages, regardless of their guardians' opinions.[330] The court contended that Islam elevates the status of women, recognizes them as independent social entities with complete legal personalities, and declares them worthy of the same honor and respect to

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[324] Tassaduq Hussain Jillani, *Implementing the Right to Marry—A View from the Pakistani Courts*, *in* INTERNATIONAL FAMILY LAW 25, 25 (Elizabeth Walsh et al. eds., 2001). One court held that:

> [t]he menace of SHIGHAAR (giving a girl in marriage to someone and taking a girl in return) and the menace of giving daughters and sisters etc. in marriage for money, are rampant in certain sections of our society. ALLAH condemns such-like practices. Any girl who is being forced into such marriage shall have right to approach a Court of Law to seek protection and if the Court finds that the girl is being bartered away, then the Court shall pass necessary orders including an order absolving the girl from her obligations towards such-like parents and elders etc.

Hafiz Abdul Waheed v. Miss Asma Jahangir, PLD 1997 Lah. 301, 382.

[325] Mst. Humaira Mehmood v. The State, PLD 1999 Lah. 494, 515.

[326] *Id.* at 514–15.

[327] *Id.* at 514.

[328] *Id.*

[329] *See* Amina Jamal, *Gender, Citizenship, and the Nation-State in Pakistan: Willful Daughters or Free Citizens?*, 31 SIGNS 283, 301 (Winter 2006).

[330] Hafiz Abdul Waheed v. Miss Asma Jahangir, PLD 1997 Lah. 301, 381 ("The consent of the man and the woman who are getting married is an indispensable condition for the validity of a marriage" and a guardian "has no right to grant such a consent on behalf of the woman without her approval.").

which men are entitled.[331] Accordingly, the court's decision reaffirming women's liberty to marry became a rallying point for women's rights organizations; it was hailed as "historic" and a "landmark judgment,"[332] and as a "victory for constitutional rights,"[333] after which similar cases were routinely resolved "in favor of women's capacity to order their own personal lives."[334]

Pakistani courts have further advanced women's rights in their treatment of honor killings. Every year an immense number of Pakistani women are murdered in the name of distorted notions of honor, making Pakistan home to an "honor killing industry."[335] The practice has been indulged by the criminal code, which treats murderers leniently so long as they attest to the necessity of defending their families' honor.[336] High courts, however, have transformed "honor killing" from a respected defense to a backward prejudice actually *adding* to the severity and gravity of the crime; for example in the *Muhammad Siddique* case, the High Court dealt with a father who protested his daughter's marriage by murdering her, her husband, and their newborn daughter.[337] The Court stressed that there was nothing religious or honorable about the father's crime; his appeals to the sanctity of family honor were no more than "male chauvinism and gender bias at their

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[331] *Id.* at 356–58, 361. The Court stressed that all the rights that the "West conceded to the women in the 19th and the 20th Century stood conferred, by ISLAM, on the females in the beginning of the 7th century A.D." *Id.* at 356. For analysis of this judgment, see Martin Lau, *Opening Pandora's Box: The Impact of the Saima Waheed Case on the Legal Status of Women in Pakistan*, 3 Y.B. OF ISLAMIC & MIDDLE E. L. 518 (1996).

[332] Jamal, *supra* note 329, at 289.

[333] *Id.* at 291. However, some reactions were more guarded. Amina Jamal argued that "although feminists and progressive groups welcomed the apparent victory of constitutional rights, it is important to explicate how and in what ways the validation of a woman's autonomy was overwritten by discourses of the protection of daughters and the nurturing of girls." *Id.*

[334] *Salman Akram Raja, Islamisation of Laws in Pakistan*, S. ASIAN J. (Oct.–Dec. 2003), http://www.southasianmedia.net/magazine/journal/islamisation_laws.htm. In 2004, the Supreme Court reaffirmed the High Court's decision, stating that no further reasoning was needed to validate the marriage of Saima Waheed, because the Federal Shariat Court had previously acknowledged the absolute Islamic right of a woman to marry without her guardian's consent. *See* Hafiz Abdul Waheed v. Asma Jehangir, PLD 2004 SC 219, 234.

[335] Hussain, *supra* note 312, at 226–28 (quoting Tahira Khan, Honor Killings in Pakistan: A Definitional and Contextual Overview, Paper Presented at the International Conference in Istanbul, Turkey (Mar. 9, 2000)); *see also Pakistan: Violence Against Women*, *supra* note 311.

[336] The enactment of the *Qisas* (retribution) and *Diyat* (blood money) laws, the primary legal tools under which domestic violence matters are dealt with, further encouraged honor killings. Palo, *supra* note 311, at 97. This legislation privatizes the crime by placing the choice of prosecution wholly in the hands of the victim's heirs, allowing them to forgive the offense in exchange for compensation. *Id.* at 99. The consequence is that the next of kin—who are often themselves conspirators to the crime—may merely exchange money and walk away. *Id.*; Yefet, *supra* note 73, at 362–63. Ever since the passage of the law, honor killings have multiplied. *Id.* at 363; *see generally* Ruane, *supra* note 312 (analyzing the honor killing phenomenon in Pakistan and its deficient legal treatment).

[337] Muhammad Siddique v. State, PLD 2002 Lah. 444, 449.

worst."[338] Recognizing that the triple murder was carried out "[i]n utter disregard to the basic right of an adult woman to marry,"[339] the court understood the murder as a blow to egalitarian society itself—motivated as it was by "a certain mental outlook, and a creed which seeks to deprive equal rights to women."[340] The father was sentenced to death in order to deter others from victimizing women for exercising their fundamental rights.[341]

Strikingly, the Pakistani courts even implemented their gender-equality vision in the context of citizenship rights, an area in which courts all over the world afford legislatures the utmost deference.[342] Pakistan's Citizenship Act conferred citizenship status upon foreign women married to Pakistani men, but not upon foreign husbands of Pakistani women; they and their children were forever barred from obtaining Pakistani citizenship.[343] The law thus not only discriminated between male and female citizens in defiance of the fundamental right to gender equality, but it also interfered with the basic constitutional right to choose one's marital partner. By withholding citizenship, the law effectively reduces the pool of marriageable candidates for Pakistani women, to the detriment of their fundamental right to marry.[344] A woman who ends up marrying a foreign husband is forced either "to subject her spouse to the subordinate status of non-citizen in her country, no matter how long he remains in Pakistan," or to emigrate from her country of origin and leave behind her family and past.[345] Provoked by a news report on a Pakistani woman unable to get citizenship for her foreign-born husband, the Federal Shariat Court acted on its own motion to combat sex discrimination in the name of Islamic law.[346] The court reasoned that the Citizenship Act not only made a mockery of Pakistan's constitutional commitment to gender equality and its international commitment to women's rights, but that it was

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[338] *Id.* at 455.
[339] *Id.* at 457.
[340] *Id.*
[341] *See id.* at 452, 457–58.
[342] This is the approach adopted by the Supreme Court of the United States. *See* Miller v. Albright, 523 U.S. 420 (1998) (rejecting a challenge to a federal law that automatically grants American citizenship upon birth to a child born out of wedlock in a foreign country if born to an American mother, but denies citizenship in the same circumstances if the only American parent is the father). This is even the approach of the Israeli Supreme Court, considered by many to be perhaps the most activist court in the world and a faithful defender of human rights. *See* Yefet, *supra* note 156, at 458. In a recent decision, the Israeli Supreme Court ruled that an amendment to the Israeli Citizenship Law, which completely denied the possibility of family reunification within Israel of Israeli citizens and their partners and children who are Palestinian residents of the occupied territories, is constitutional. *See* HCJ 7052/03 Adalah Legal Ctr. for Minority Rights in Israel v. Minister of Interior 1 IsrLR 443 [2006], *available at* http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.pdf.
[343] S.10, Pakistan Citizenship Act (II of 1951) (granting the right of female aliens to gain citizenship by marrying a male citizen of Pakistan, yet not extending this right to male aliens).
[344] *See* SHAH, *supra* note 53, at 112.
[345] *See id.* at 112–13.
[346] *In re* Suo Motu Case No. 1/K of 2006, PLD 2008 FSC 1, 3.

repugnant to the very fundamentals of Islam, which envision equality of rights between men and women.[347]

The courts have thus proven to be highly conducive to protecting gender equality and women's rights in various rulings, with the divorce jurisprudence standing out as a shining star amidst the constellation of marital relations cases.

f. Following Through: A Proposal to Transform Khula *Divorce from Pricey to Price-less*

Despite these strides toward realizing the egalitarian mandates underlying the Pakistani constitutional scheme, some features of the *khula* doctrine remain objectionable. The *khula* doctrine undeniably exonerates men and penalizes women; it compels them to pay to exercise individual constitutional rights; to "buy" marital freedom by forgoing financial rights to their dower. In theory, the restitution duty is meant as an *equitable* remedy, designed to achieve a balance of rights between the marital partners—the wife received a monetary benefit for agreeing to enter marriage and she properly needs to return it when seeking to exit the union.[348] In effect, however, given the economic inferiority of women in Pakistani society,[349] a woman may be consequently divorced not only from her husband, but also from financial security.

Perversely, the doctrine may intensify the stakes in divorce litigation; even if a husband wants the marriage dissolved, he may attempt to avoid the financial consequences of initiating divorce by inducing his wife to pursue *khula* by making marital life intolerable.[350] Likewise, it is not uncommon for husbands to contest fault-based petitions bitterly in order to absolve themselves of any financial liability and to reclaim any gifts or expenses they incurred in connection with the marriage.[351] This gamesmanship is all the

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[347] *Id.* at 14 (articulating the Islamic right to equality and stressing that the Qur'an and Sunna "in unequivocal term[s] treat man and woman alike and repeatedly mention gender equality").

[348] *See, e.g.*, ESPOSITO WITH DELONG-BAS, *supra* note 3, at 104–05 ("[The return of the dower] is considered to be a fair limit since the wife is effectively returning to the husband what he had paid to her in order to commence the marriage, in essence symbolizing the end of the marriage by the return of the gift.").

[349] *See supra* Part III.B.1.d (discussing the disadvantaged circumstances under which Pakistani women live); *see also* Rachel Bacon & Kate Booth, Case Note, *Persecution by Omission: Violence by Non-State Actors and the Role of the State under the Refugees Convention in* Minister for Immigration and Multicultural Affairs v Khawar, 24 SYDNEY L. REV. 584, 597 (2002) (noting "the poor social and economic status of women in Pakistan and the prevalence, indeed state tolerance, of domestic violence and abuse of women in that society").

[350] Husbands also manipulate *khula* divorce to extort financial concessions from women. The situation has deteriorated so severely that at times it has resembled blackmail. *See* al-Hibri, *supra* note 2, at 24–25.

[351] Carroll, *supra* note 191, at 125.

more problematic given that divorced women in Pakistan are already especially economically vulnerable.[352]

While Pakistani courts have commendably attempted to alleviate the financial burdens that the *khula* doctrine entails, they have hesitated to implement one important weapon that Islamic law puts at their disposal. Shari'a rulings prohibit men from coercing their wives into requesting *khula* divorce by making their lives so miserable that they would seek release at any price.[353] *Khula* under such circumstances is regarded and implemented as *talaq*, entitling the wife to get back any financial sacrifice she makes and, potentially, compensation beyond her delayed dower and alimony.[354] Only recently have Pakistan's High Courts exhibited awareness of this Islamic tool,[355] exempting women from *khula*'s adverse economic consequences altogether.[356] Application of this doctrinal twist follows dictates of the Pakistani Constitution, by adhering to Islamic law more closely, further equalizing the divorce rights of husbands and wives, and according women a more equal place in society.

2. *The Demise of Fault-Based Divorce in Pakistan*

When the courts revived the costly *khula* doctrine, they effectively put an end to the DMMA's costless, fault-based divorce.[357] While in most other Muslim nations and even in the United States, maltreatment has been the most popular divorce ground,[358] Pakistan's experiment with fault grounds—

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[352] *Id.* at 126.

[353] Jansen, *supra* note 128, at 189.

[354] This doctrine is well developed by the Maliki School. *See* AMIRA EL AZHARY SONBOL, WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY 121 (1996); Fawzy, *supra* note 5, at 63. For women's financial rights upon divorce, *see* ESPOSITO WITH DELONG-BAS, *supra* note 3, at 23 ("[U]pon dissolution of the marriage [the husband] is required to pay the total amount of the dower at once.").

[355] The Peshawar High Court declared: "the court has the powers to refuse the return of the dowered property/amount to husband . . . where due to his cruelty she was compelled to resort to Khula." Karim Ullah v. Shabana, PLD 2003 Pesh. 146, 148, 153; *see also* ALI, *supra* note 170, at 239 (citing case published in 2006 MLD 83) ("If husband by his cruel attitude compelled wife to seek Khula, [k]eeping behind the purpose of taking back dowered property given by him to the wife, in that case he would not be entitled to its restoration . . . .").

[356] ESPOSITO WITH DELONG-BAS, *supra* note 3, at 32; Carroll, *supra* note 191, at 125.

[357] S.5, Dissolution of Muslim Marriages Act (VIII of 1939); *see also* Warraich & Balchin, *supra* note 90, at 198–99.

[358] Before the no-fault revolution swept the United States in the 1970s, a fault-based divorce system governed the American legal landscape. Under American jurisprudence, fault-based grounds were broad enough to serve as a blank-check for divorce. Obtaining a divorce on the grounds of cruelty was so easy that it became one of "the dazzling success stories" of the American fictional fault divorce era. *See* Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 79–80 (1976). Divorce judges interpreted the traditional trinity of divorce grounds (adultery, desertion, and cruelty) extremely liberally. Mental cruelty, for example, was said to include "anything from a husband's reading too much to his disliking the way his wife cooks steak"; and the enhanced standard of "extreme and repeated

cruelty in particular—has proved remarkably unsuccessful.[359] It is so difficult to satisfy the cruelty ground that Pakistani lawyers have become ignorant of what statutory fault-based divorce entails,[360] viewing it as "a losing battle."[361] In one case, for example, a wife's testimony against her drunken, gambling, womanizing husband gave rise to several recognized divorce grounds, particularly physical and mental cruelty and misappropriation of her property, but the court refused to grant the woman a cost-free fault-based divorce and awarded her instead a *khula* divorce.[362] In another case, the fact that the husband had beaten his wife until she fled to her mother, then abducted her and her family and tortured them in order to compel his wife to transfer to him property she had inherited—all documented by a police report, an arrest order, a copy of a criminal complaint, medical evidence, and the mother's testimony—was not enough, according to the court, to qualify as "cruelty."[363] The wife had to settle for a *khula*-based divorce.[364]

The judicial construction of "cruelty" was further narrowed by a requirement that all kinds of ill-treatment enumerated in the DMMA be "habitual" and by the adoption of a rigorous standard of proof more appropriate for the criminal than the civil arena.[365] In one case, the court held that a wife failed to establish cruelty since "there was not enough evidence to come to a conclusion *beyond any reasonable doubt* that the petitioner was *habitually* cruel to the respondent."[366] Such requirements are not only contrary to the legislative text but also go beyond the requirements of Islamic law itself. As the review of classical Shari'a rulings in Part I indicates, the Maliki School is clear that a *single* act of maltreatment is sufficient to qualify for divorce.[367]

Another recurrent pattern in the judicial marginalization of fault-based divorce has been the invocation of *khula* even when an enumerated ground

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cruelty" could be satisfied upon mere showing that a "husband criticized his wife's clothing or refused to speak to her mother," in a proceeding that did not usually last more than six minutes. *See* HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 95, 147 (1997); *see also* Yefet, *supra* note 118.

[359] It is telling that Ali Kureshe's comprehensive work on family law dedicates an extensive section to *khula* divorce but fails to include a subheading on the omnibus cruelty clause. *See* ALI KURESHE, *supra* note 138, at 5–6 (2006).

[360] Sonneveld, *supra* note 201, at ch. 6.5.

[361] Warraich & Balchin, *supra* note 90, at 199.

[362] Mst. Shahida Khan v. Abdul Rehim Khan, PLD 1984 Lah. 365, 366–69.

[363] Bashiran Bibi v. Bashir Ahmad, PLD 1987 Lah. 376, 380–82.

[364] *Id.* at 382.

[365] Only the first sub-section of section 2(viii) mentions the "habitual" requirement. S.2(viii), Dissolution of Muslim Marriages Act (VIII of 1939). The court, however, applied this threshold to all other sub-sections unjustifiably. For the "habitual" requirement as well as the strict burden of proof, see, for example, Muhammad Abbasi v. Mst. Samia Abbasi, CLC 1992 Lah. 937, 940; *see also* Carroll, *supra* note 191, at 115.

[366] Abdul Majid v. Razia Bibi, PLD 1975 Lah. 766, 768 (emphasis added); *see* Muhammad Sadiq v. Mst. Aisha, PLD 1975 Lah. 615, 618–19 (holding that a husband merely chopping off his wife's nose did not technically prove habitual cruelty, but suffices to meet the legal standard for *khula* because of the accompanying psychological trauma and evidence of hatred between the parties).

[367] *See supra* Part I.B.

has been established to the satisfaction of the court.[368] In one case, for example, the court observed that the wife "was treated in a most cruel manner," but still severed the marital bond with *khula* instead of the DMMA.[369] In yet another decision, an eleven-year-old girl had been given in marriage to a seventy-nine-year-old man, who had become impotent six months after the marriage and proceeded to beat and mistreat his young wife, sell her property without her consent, and throw her back into her parent's house, where she stayed for three years.[370] Her marital experience gave rise to nearly the entire range of divorce grounds enumerated in the DMMA, yet the child-wife was refused fault-based divorce and was eventually freed only through *khula* divorce.[371]

There is nothing in the words of the DMMA to so restrict its application; on the contrary, cruelty was defined generously to encompass a wide array of conduct,[372] in order to enlarge the rights of Pakistani wives.[373] How is it that instances of marital fault that would satisfy both the conservative legislature and classical Islamic law could not satisfy the progressive court, the prime guardian of women's marital welfare in Pakistan? I suggest that this judicial inclination to downplay the fault options and to elevate the no-fault *khula* method has been a tactical maneuver. One cannot escape the feeling that courts have been motivated to apply the least controversial option for marital freedom: by freeing Pakistani wives through *khula*, which appeals to men's financial interests, the judiciary has diminished the prospect of male protest and social upheaval against its liberal, innovative "feminist" rulings.[374] While men strongly resist fault-based petitions because they raise

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[368] Shaheen Sardar Ali, *A Critical Review of Family Laws in Pakistan: A Women's Perspective*, *in* WOMEN'S LAW IN LEGAL EDUCATION AND PRACTICE IN PAKISTAN: NORTH SOUTH COOPERATION 198, 219 (R. Mehdi & Farida Shaheed eds., 1997); *see also* Mst. Hakimzadi v. Nawaz Aku, PLD 1972 Kar. 540, 542–47 (abused wife proved several different grounds, but was nevertheless still forced to purchase her freedom under the *khula* doctrine in lieu of benefiting from the DMMA's "free" divorce regime).

[369] Zafar Ali v. Judge, Family Court, CLC 1992 Lah. 1245, 1246.

[370] Bibi Anwar Khatoon v. Gulab Shah, PLD 1988 Kar. 602, 605. Such grounds include, *inter alia*, impotence, both physical and mental cruelty, non-maintenance, failure to fulfill marital obligations, misappropriation of property, and the "option of puberty." For a survey of the DMMA grounds, see *supra* Part II.C.1.

[371] Bibi Anwar Khatoon v. Gulab Shah, PLD 1988 Kar. 602, 615. In this case, not only did she provide evidence in support of her divorce petition, but this evidence went completely unchallenged. *Id.*

[372] Cruelty is well defined in section 2(viii) of the DMMA to include six different sub-sections. *See supra* note 124 and accompanying text.

[373] ASMA JAHANGIR, MANUAL OF FAMILY LAWS IN PAKISTAN 616 (2004).

[374] Indeed, the need to maintain social equilibrium and judicial legitimacy while promoting "feminist" agendas is a recurring concern of courts in Islamic legal systems. For example, the Supreme Constitutional Court of Egypt ("SCC") felt it necessary to use conservative and patriarchal rhetoric neglectful of women's interests to unnecessarily define, and thus limit, the extent of legislation favoring women's rights. This was done to justify an equitable outcome in the face of raging Islamist groups who identify Islam as patriarchal. *See generally* Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND J. TRANSNAT'L L. 1043 (2004) (showing that family law adjudication by lower family courts, as well as the constitutional adjudication of family law issues by

the financial stakes of divorce litigation,[375] wives have obtained divorces on a massive scale and with relatively weak opposition thanks to *khula*. *Khula* proceedings are not only less contentious, but also do not require any evidence or proof and thus constitute a much shorter, easier, and more dignified avenue to marital liberty,[376] sparing women the embarrassment[377] and expense of fault proceedings and the "inordinate delay that is a hallmark of [the Pakistani] judicial system."[378] Moreover, as noted above, the *khula* case law is becoming increasingly responsive to women's economic interests by developing doctrinal tools that may reduce, or even completely eliminate, the requirement of wifely restitution.[379] Beyond the upper limit of paying actually-received dower, the courts strictly safeguard the bounds of marital freedom, lest its liberating exercise be frustrated: in a 2008 case, the court dismissed as "absolutely frivolous"[380] a husband's argument that the wife had to pay him a high sum of money as stipulated in the marriage contract as compensation for *khula* divorce, finding it "against the basic principle of law which required the parties to remain in marital tie in a peaceful and tranquil atmosphere and [that they] were not required to be bound by stringent conditions to remain in [the] marriage bond."[381]

Conceived thus, the demise of fault-based divorce in Pakistan has been a judicial device to promote the use of a fault-free process that is less objectionable, less expensive, less time-consuming, and less offensive to marital

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the Supreme Constitutional Court of Egypt, is characterized by the policy of "splitting the difference between women activists pushing for liberal feminist reforms and those of a conservative religious intelligentsia that was antagonistic to these reforms"). I have described this judicial strategy in previous work:

> In order to appease Islamists, the secular SCC adopted a middle-ground strategy in the Egyptian battle of the sexes: it sustained the constitutional validity of woman-protective legislation, even when it was Islamically tricky to do so, while paying chauvinistic lip service to the anxious religious elite, preserving the status quo, without moving forward or beyond it. The Court's balancing act reassured Islamists that other, more far-reaching reforms were constitutionally impossible. At the same time, by artfully walking the line between Islamists on the one hand, and secularists and feminists on the other, the SCC was able to advance women's marital rights without creating a social upheaval and without destroying its legitimacy as the secular arbitrator of the Islamic Shari'a.

Yefet, *supra* note 118, at 54.

[375] *See* Carroll, *supra* note 191, at 125.

[376] *See supra* notes 319–320 and accompanying text (discussing how *khula* proceedings do not require proof).

[377] *See* ALI, *supra* note 170, at 237 (citing case published in 1996 SCMR 411) (noting that because the "[r]elationship between husband and wife [is] of [a] very intimate nature, it would be too embarrassing for either of them to disclose to [the] Court what had transpired between them in [the] privacy of their home"). Indeed, as has been discovered in the case of Muslim women in Egypt, many wives avoid divorce because they fear the shameful public exposure of their intimate lives imposed by court hearings. *See* Yefet, *supra* note 118.

[378] Ali & Naz, *supra* note 109, at 130.

[379] *See* discussion *supra* Part I.B.

[380] ALI, *supra* note 170, at 244 (citing case published in 2008 SCMR 186).

[381] *Id.*

privacy and human dignity, and that increasingly has been made cost-free. Indeed, compelling evidence of this judicial motive is the fact that in cases where the courts rejected fault-based pleas for freedom, they did not turn a blind eye to the wives' plight, but *systematically* resorted to *khula* to liberate them from matrimonial bondage.[382] In fact, the judicial attentiveness to women's interests is perhaps nowhere more pronounced than in cases that document and attest to the courts' struggle to strike a careful balance between the general welfare interest of women as a group (justifying the use of *khula* to maintain the collective good of easily attainable marital freedom, even at financial cost) and the particular economic interest of the individual women seeking dissolution (justifying a "cost-free" fault-based divorce).[383] While the courts typically weigh more heavily rights of exit from marital abuse and subordination, as the *khula* jurisprudence has crystalized,[384] when a specific woman stands to lose too much from having the marriage dissolved through *khula*, the female-welfare balance then tilts in favor of the economic interest of the particular wife (and fault-based divorce), and away from women as a group.[385] Thus, in a 2006 case, when *khula* divorce meant that a wife had to give up the house that was given to her as dower, the Appellate Court intervened to convert the dissolution of marriage from *khula* to "free" cruelty divorce in order to protect the wife's financial security.[386] Upon further modification of *khula*'s economic aspects, as recommended above, the groundbreaking judicial enterprise in favor of women's divorce rights will finally be completed.

Conclusion

This Article has striven to disprove facile assumptions of female oppression under an Islamic legal regime by shedding light on creative apparatuses that courts have pioneered to revolutionize the position of women in

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[382] In virtually all cases mentioned in this Part, women won their liberty if not by way of fault-divorce, then by *khula* divorce. *See, e.g.*, Mst. Hakimzadi v. Nawaz Aku, PLD 1972 Kar. 540, 542–47 (abused wife proved several different grounds, but was nevertheless forced to purchase her freedom under the *khula* doctrine in lieu of benefiting from the DMMA's "free" divorce regime).

[383] This judicial tendency is vividly apparent, for example, in the treatment of Section 7 of the MFLO, as documented *supra* Part II.A.2.a. In intermittently ignoring the husband's notification requirement, Pakistani courts carefully balanced the interests of women as a group in the context of divorce registration. In other words, Section 7 makes a dent in the unfettered unilateral right of the husband and protects wives by securing reconciliation opportunities and clarifying their marital status vis-à-vis the interests of particular women who believed they were free from husbands who in fact had failed to register the divorce. Whenever *zina* charges were involved, the courts justifiably preferred to undermine the rights of the wider group in an effort to spare individual women from severe criminal sanctions. *See supra* Part II.A.2.a.

[384] *See supra* Part III.B.1.A (outlining the development of a unilateral no-fault *khula* divorce right that is to the benefit of women).

[385] *See* Ali, *supra* note 170, at 237.

[386] *Id.* (citing case published in 2006 SCMR 100).

the domestic arena. While statutory mechanisms meant to curb injustices have only marginally tilted the balance toward women, Muslim jurisprudence has proven fully capable of equipping legislatures with Islamic approaches for liberal divorce reform and promoting more equal male and female dissolution opportunities in a religious system in which marital freedom is overtly gendered. The Pakistani judiciary is to be commended for its innovative efforts, taking into account cultural challenges while recognizing the importance of marital satisfaction. However, the Pakistani legislature cannot be allowed to hide behind the achievements of the courts. The legislature has yet to translate the constitutional guarantees of both gender equality and divorce rights from rhetoric to reality, by initiating laws to better the position of women and transform the gendered balance of power in the home.

The distinctive contribution of this work has been to develop a constitutional prism through which to analyze Pakistani divorce law. While the constitutional framework may seem to mix the legal messages by mandating gender equality and marital liberty alongside adherence to Islam, courts have managed to harmonize the dual mandates. Even in applying Islamic law, the Pakistani judiciary has liberalized women's fundamental right to marital dissolution, thus minimizing blatant gender inequality in divorce. The courts have proven that Islamic injunctions, when liberally interpreted and implemented, can promote gender justice.

Ultimately, the Pakistani regime has the potential to serve as a guidepost for contentious legal, political, and philosophical debates elsewhere in the Islamic world. It is precisely this type of creative judicial adaptation of Islam that may be the cure for the perceived "universal backwardness" of Muslim communities worldwide, allowing them to keep pace with rapid social, political, economic, and cultural advancement. After all, enhancing women's dissolution rights and ensuring them equal footing with men will not only improve their own position, but also promote the overall progress of the state. In the words of Pakistan's founder, Mohammad Ali Jinnah, "no nation can rise to the height of glory unless your women are side by side with you."[387]

[387] PAKISTAN: A COUNTRY STUDY, *supra* note 300, at 121 (internal quotation marks omitted) (quoting a 1944 speech by Mohammad Ali Jinnah).