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About the Centre for Human Rights

The Centre for Human Rights (CFHR), housed in Universal College Lahore, is a legal research institute that actively researches issues of human rights, and works on legal policy, due process, rule of law and criminal justice reforms in Pakistan. The Centre aims to provide legal analysis which are rights-based, human centric and aimed at enhancing the constitutional freedoms of equality and non-discrimination.

About the Human Rights Review

The Human Rights Review was conceptualized and first published in 2012 in collaboration with the American Bar Association - Rule of Law Initiative. Since then, seven volumes of the journal have been published online and in hard copy. The journal aims to promote legal scholarship and create an environment that facilitates dialogue on human rights issues and criminal justice reform in Pakistan. The journal includes contributions from both students and professionals, and has received widespread support from High Court Judges in Lahore, Human Rights Commission of Pakistan and several law firms in Pakistan.

The aim of this year's thematic edition journal is to advance the research and academic literature on barriers to women's understanding and enjoyment of their legal rights in marriage and encourage creative solutions to protect and promote marriage rights for all Pakistani women, regardless of religion.

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EDITOR'S NOTE

Within the broader sphere of women's rights, marriage rights remain a largely unconsidered point of discussion in Pakistan. The lack of awareness and non-enforcement of relevant laws results in women's rights in marriage remaining elusive to them, which allows for persistent and flagrant violations of women's legal rights to continue unabated. It is, therefore, paramount to generate discourse in academic and policy-making circles that paves the way for increased protection and actualisation of women's marital rights.

Amongst others, child marriages are one form in which the violation of women's marriage rights manifests itself. The year 2022 marked a significant step in advancing the conversation on the issue of child marriages in Pakistan. In March 2022, the Islamabad High Court unequivocally established eighteen as the minimum marriage age in Islamabad Capital Territory, and ruled any marriage contract involving a minor to be void, incurring serious criminal liability for the perpetrator.

This followed an earlier judgment of the Federal Shariat Court, which held that the State can legally regulate the permissible age for entering into marriage, and such regulation is not unIslamic. The case of Dua Zehra in April 2022, and the ensuing media coverage, further brought the issue of child marriages into public discourse. Articles authored by Dr. Afiya Sheherbano Zia and Tehreem Fatima Shahid explore the obstinate problem of child marriages and present potential reforms for its resolution.

In 2015, the Punjab Assembly enacted a law that obligated proper filling of the *nikahnama* clauses and criminalised any non-

compliance, alluding to the importance of the marriage contract. Dr. Nida Kirmani examines this significance, propounding the *nikahnama* as the principal marriage document from which several women's marriage rights emanate from. Many of such rights, however, remain unrealised due to lack of awareness and pernicious socio-cultural attitudes and beliefs. Maham Kashif and Aimen Zahra Mir appraise the legal process of dissolution of marriage for women in Pakistan, surveying the obstacles encountered by women in securing divorce.

Rafae Saigal and Fatima Jan review the often overlooked and hitherto unexplored problem of sexual abuse within marriage. They argue for legal reform to expressly criminalise and restrain marital rape in Pakistan. In addition, any discussion on marriage rights remains incomplete without accounting for the issues faced by women on the periphery of the society, i.e., women from religious minorities. Hania Riffat brings to light the lack of personal status law for Sikhs in Pakistan, which particularly leaves Sikh women vulnerable to forced conversions and marriages, deprives them of their inheritance rights, and results in non-materialisation of their marriage rights.

The eighth volume of the Human Rights Review explores a varied range of existing problems within the realm of marriage rights. The journal endeavours to create legal scholarship in this area and increase awareness regarding existing laws relating to the protection of women's marital rights. By identifying shortcomings in the existing legal framework as well as specifying best practices, the journal aims to initiate advocacy efforts in order to fill relevant legislative and policy gaps that inhibit the advancement of women's marriage rights in Pakistan.

The Age of Non-Consent: Underage Marriage in Pakistan

*Afiya Shehrbano Zia*¹

In 1929, a consensus developed between Hindu and Muslim Indian women across their communities (and not via imperialist ‘rescue’) which enabled the Child Marriage Restraint Act (or Sarda Act) of 1929. Mrinalini Sinha argues that this was “the first [...] law on marriage in India that was universally applicable across different religious communities each with their own separate laws”.² Feminist readings of historical landmarks in women’s struggles challenge the essentialist and masculinist presentation of inherent incompatibilities of liberal universalist ideals for Muslim cultures and the insistence that these must be ‘hybridized’.

For South Asian feminists, this milestone should serve as a relevant guiding principle, since nearly a century later, the concepts of marital rights, consent, and domestic violence continue to be resisted in postcolonial states and are subject to the scrutiny and opinions of male scholars, human rights activists, Islamic hermeneutics, international donor agencies, and state elites. In Pakistan, legal layering and religious reasonings have

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² M Sinha, ‘Historically Speaking: Gender and Citizenship in Colonial India’ in J Butler and E Weed, *The Question of Gender*: Joan W. Scott’s Critical Feminism (Indiana University Press 2011) 87.

converted the liberatory intent of the Child Marriage Restraint Act (“CMRA”) into a narrow and restrictive social straitjacket. Current advocacy around the prevention of underage marriages often revisits the kind of collusion that Indian men and colonial administrators applied in order to preserve their paternalistic control and patriarchal privileges in the name of rescuing girls. This article examines some of the core debates within women’s rights movements in light of some specific legal cases of underage marriages under trial in the courts of Pakistan.

State and Religious Laws

General Zia ul Haq’s dictatorship that ruled in Pakistan from 1977 to 1988, attempted to Islamize the colonial legal regime that had been inherited after Pakistan’s independence in 1947. *Sharia* courts were set up and the Federal Shariat Court held a status on par with the Supreme Court of Pakistan. The Offence of Zina (Enforcement of Hudood) Ordinance 1979 - a law that criminalized all extra-marital sexual relations and provided prescriptive Islamic punishments - radically redefined societal and gender norms and displaced or contradicted constitutional human rights in some cases. Gender relations were vigilantly policed in all public institutions and the State even intruded regularly in the private realm.³ An entire generation grew up in a social context of repressed sexual experiences and choices and women became the targets of discriminatory laws and policies.⁴ A decade of gender

³ A Jahangir and H Jilani, *The Hudood Ordinances; A Divine Sanction?* (Rohtas Books 1990). See also AS Zia, *Sex Crime in the Islamic Context; Rape, Class and Gender in Pakistan* (ASR Resource Centre 1994).

⁴ S Khan, *Zina; Transformational Feminism and the Moral Regulation of Pakistani Women* (Oxford University Press 2011). See also R Saigol,

apartheid inflicted widespread social damage and even the admission of sexual violation of a girl carried broader implications of social death, victim shaming, and community boycott. Perversely, if a woman could not prove her violation or got pregnant as a result of rape, it could be taken as self-indicting evidence of commission of the crime of zina (adultery or illicit fornication).⁵ When couples would elope or marry of their own choice, the parents availed themselves of this law of sexual control by filing police complaints and court cases of alleged abduction, especially if underage marriage would follow.⁶

After nearly 30 years of dedicated protest and advocacy by the pro-democracy, non-funded and secular lobby group of the Women's Action Forum, the zina laws were amended under the Protection of Women Act 2006. Despite the amendment,⁷ the

The Pakistan Project: A Feminist Perspective on Nation and Identity (Women Unlimited 2013).

⁵ *Abdullah v The State*, 1983 PCr.LJ Lahore High Court 371; *Jehan Mina v The State*, 1983 PLD Federal Shariat Court 183.

⁶ F Shaheed and others, *Shaping Women's Lives: Law, Practices and Strategies in Pakistan* (Shirkat Gah 1998).

⁷ This amendment was appealed at the Federal Shariat Court by the religious lobbies and on 22 December 2010, after three years and four petitions, the Federal Shariat Court (FSC) of Pakistan declared several critical clauses of the Protection of Women (Criminal Laws Amendment) Act of 2006 unconstitutional. In place of this act that legislated protections for women, the FSC supported the reinstatement of the Hudood Ordinances, which were used to discriminate against, falsely convict and imprison hundreds of women. See, Asian Human Rights Commission, 'Pakistan: Sharia Court Launches Major Challenge to Protection of Women Act' (23 December 2011) <<http://www.humanrights.asia/news/ahrc-news/AHRC-STM-268-2010/#:~:text=The%20FSC%20has%20claimed%20that%20elements%20of%20the,zina%20%28adultery%2C%20rape%29%20and%20qazf%20%28enforcement%20of%20hadd%29>> accessed 7 July 2023.

patriarchal resourcefulness of this law has become embedded in Pakistan's moral fabric, and it continues to influence legal and social treatment of marriage, adultery, extra-marital relations and sexual freedoms. This is aided by the patriarchal infantilization of women in marital arrangements and familial roles and which undergird the virtuosity prescribed and expected of Pakistani Muslim women.

Under Islamic provisions, of the four major Sunni schools of jurisprudence, only the Hanafi legal doctrine (which is Pakistan's majoritarian faith and legal premise) does *not* require a guardian for the lawful contract of marriage.⁸ This extends Muslim men and women the legal autonomy to contract marriage themselves and in cases where a Hanafi woman chooses not to contract marriage for herself, her consent must be obtained by her guardian.⁹ However, under the same Hanafi law, the parent or guardian of a pre-pubescent child may contract marriage on their behalf, as long as such a marriage is not consummated until they enter puberty.¹⁰

⁸ According to the general juristic consensus within the Maliki, Shafi'i and Hanbali schools of Sunni thought, a legal guardian has the ability to lawfully contract marriage on behalf of a virgin woman *without* her consent, even if she is a virgin woman of majority. See WB Hallaq, *Shar'i'a: Theory, Practise, Transformations* (Cambridge University Press 2009).

⁹ This is governed by her sexual status in that consent can be construed from her silence if she is a virgin and must be verbal if she is previously married (or non-virgin). This difference in the form of consent does not extend to Hanafi men, from whom explicit verbal consent is always required for valid marriage.

¹⁰ A Buchler and C Schlatter, 'Marriage Age in Islamic and Contemporary Muslim Family Laws. A Comparative Survey' (2013) 1 Journal of Islamic and Middle Eastern Law, 40. See also J Esposito, 'Perspectives on Islamic Law Reform: The Case of Pakistan' (1980)

Once puberty is established, the parties to such a marriage may object and recuse themselves from the marriage, if it has not been consummated.

Another proviso is that underage marriages are not rendered invalid under the provisions of the law – instead, the stipulation merely subjects adult parties to certain penalties.¹¹ Despite contravening the CMRA, the continuing validity of underage marriages in Pakistan stems from the constitutionally enshrined primacy of *Sharia* and because Hanafi legal doctrine also permits the legal (unconsummated) contracting of marriage of minors by guardians, therefore, the marriage itself remains valid. According to the provisions of the Indian Dissolution of Muslim Marriages Act 1939, a female minor who is married without consent before the age of sixteen may apply for repudiation of the marriage before turning eighteen, provided the marriage remains unconsummated but the absence of social and sexual agency and higher levels of physical and financial dependency obstruct women who are married off as minors, from exercising such rights in post-independent Pakistan.

Pakistan has neither ratified nor signed the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriage 1962 but all of these provisions are covered in the ICESCR and CEDAW treaties, to which Pakistan is a signatory, and the requirements are legislated for in domestic laws in the Births, Deaths, and Marriages Registration Act 1886.

13(2) New York University Journal of International Law and Politics 217, 223.

¹¹ L Carroll, 'The Muslim Family Laws Ordinance, 1961: Provisions and Procedures—A Reference Paper for Current Research' (1979) 13(1) Contributions to Indian Sociology 117, 134.

Apart from bureaucratic lapses, Pakistan's dual legal regime of colonial and Islamic laws challenges women's rights enacted under the more progressive family laws of 1961 due to competing judgements, legal clashes and constitutional confusion.¹² This means that women's movements are constantly pitched in legal battles to ensure their rights are protected and stabilized for the future.

Challenges to Advocacy

Historically, there has been constant political pressure from religious lobbies to amend and undermine Pakistan's family laws and they have opposed any amendments that would potentially reform these.¹³ In the past, some of these reforms have removed the clerical practices of mechanically voiding women's right to include their demands in the *nikah* (marriage contract), or from specifying their right to the *haq mehr* (dower or marital

¹² European Parliamentary Questions (2019) <https://www.europarl.europa.eu/doceo/document/E-8-2019-001104_EN.html> accessed 7 July 2023.

¹³ SS Ali, 'Modern Challenges to Islamic Law' (Cambridge University Press 2016) 110, where Ali observes, "Almost five decades of recommendations from four law reform commissions and as many decades of court judgments later, the Federal Sharia Court has struck down provisions of one of the few pieces of progressive legislations in Pakistan, i.e. the MFLO [Muslim Family Law Ordinance 1961]. The Council of Islamic Ideology (CII), a constitutional body tasked with determining the 'Islamic' nature of laws in Pakistan, has also put its weight behind those who believe some provisions of the MFLO to be 'un-Islamic'. This leaves law reform initiatives such as the MFLO on shaky ground and in a state of flux." She goes on to cite several examples of clerical opposition which watered down the more radical rights proposed in the MFLO. See also, the research archives of Pakistan's women's organizations working on reforming the law, especially, WLUML and AGHS.

promissory) or, including their right to maintenance, civil marriage options, and so on. Proposed amendments to the CMRA – such as raising the marriageable age of girls from 16 to 18 years, have been termed ‘blasphemous’ and deemed ‘un-Islamic’ and ‘irrelevant’ by the Council of Islamic Ideology (CII) - a constitutional body tasked with the provision of religious legal advice to the legislature.¹⁴ Detractors argue that the legal prohibition of the marriage of girls under 18 years of age would contradict the Islamic allowance for marriage upon puberty. The opposition to any amendments on the pretext that they contravene *Sharia* reflects the larger tensions that define the legislative process in Pakistan – particularly for those related to women’s rights - and are resisted as attempts to ‘secularise’ or ‘Westernise’ the marriage practices of Muslims in the country.¹⁵ This tension between religious and ‘secular’ laws has defined the contradictions of women’s and minorities’ rights in Pakistan both, legally and socio-politically.¹⁶

On the issue of underage marriage, campaigns by feminists and human rights activists in Pakistan have grappled with four key challenges around juridical attitudes and decisions on underage marriages. First, contrary to both the CMRA and the recently enacted Sindh Child Marriage Restraint Act 2013 (“SCMRA”) in one of the four provinces of Pakistan, many courts continue to use

¹⁴ F Ghani, ‘Pakistan failure to outlaw child marriage sparks outcry’ Al Jazeera (19 January 2016)

<<https://www.aljazeera.com/news/2016/1/19/pakistan-failure-to-outlaw-child-marriage-sparks-outcry>> accessed 7 July 2023.

¹⁵ H Pirzada, *Islam, Culture, and Marriage Consent: Hanafi Jurisprudence and the Pashtun Context* (Springer International Publishing AG 2022) 120.

¹⁶ AS Zia, *Faith and Feminism in Pakistan; Religious Agency or Secular Autonomy?* (Sussex Academic Press 2018).

puberty as the *sharia*-prescribed determinant of adulthood for purposes of marriage.¹⁷ Secondly, there are legal provisions whereby the minimum age of sexual consent itself makes no exception - even if the parties are married and if the girl is under the age of 16, the charge of rape is not precluded by the presence or absence of a *nikahnama* (marriage certificate). However, in practice, wherever the accused is able to provide a *nikahnama*, the Courts have refrained from convicting the ‘husband’ of rape, unless it can be proven that the marriage was contracted under duress.¹⁸ Thirdly, consent is a slippery legal concept and is not associated with marriage *per se* and there are no recorded cases of children/adolescents filing complaints for being forced/coerced into marital arrangements. This means, underage marriage cases are only filed by parents and often used as a lever of control, rather than in the interest of the adolescent’s protection and/or autonomy. Fourth, forced conversions (of faith) are incidents that are regularly reported in Sindh province where women of minority faith either willfully, or in many cases, are compelled to convert to Islam so as to marry a Muslim man.

Shahab notes that “while other religious affiliations also suffer from the menace of forced conversions, the minority community of Hindus of Sindh are particularly hard hit”.¹⁹ The general pattern followed in cases of forced conversion is that minor girls are seduced, groomed or abducted, converted to Islam, and then

¹⁷ *Muhammad Khalid v Magistrate*, 2021 PLD Lahore High Court 21; *Hira Imtiaz v State*, 2021 PCr.LJ Islamabad High Court 1188; *Hajra Khatoon v Station House Officer*, PLD 2005 Lahore High Court 316.

¹⁸ *Mauj Ali v Safdar Hussain*, 1970 PCr.LJ Supreme Court 1035; *Muhammad Khalid v State*, 2018 PCr.LJ Lahore High Court 29.

¹⁹ P Shahab, ‘State as the Absent Parent: Child Marriage in Sindh, Pakistan’ (2020) Legal Aid Society, 9.

ceremoniously committed into wedlock to a Muslim man. Shahab argues that this method of proselytization achieves two purposes; terrorizing and marginalizing a minority religion which practically does not have equal recourse to law enforcement apparatuses and judicial remedies and; to prevent population growth in the minority religion by ensuring that any child now produced by their women is a Muslim. However, while cases of forced conversion reveal obvious exploitation, grooming and even as a cover for the trafficking of women, the motivation is also quite often, genuine belief of earning heavenly rewards for converting an infidel into the Islamic fold.²⁰ It should be noted though, that the Hindu Marriage Act 2017 lays down certain criteria under which the marriage can be rendered void. These include but are not limited to, when either of the parties is below the age of 18 and when consent has been given by force, coercion or fraud. It is the only legislation regarding underage marriages that talks about the possibility of a marriage being declared void but the application of this is under-researched and unclear.

Absence of Consent

Research shows that the province of Khyber Pakhtunkhwa (KP) holds the highest rates of child marriage in Pakistan where over 25 percent of girls up to the age of 18 are married as legal minors. A United Nations report²¹ on child marriage in Pakistan found that

²⁰ D Khattak, 'Inside Pakistan's 'Conversion Factory' For Hindu Brides' *Gandhara* (20 April 2021) <<https://gandhara.rferl.org/a/pakistan-hindu-brides-conversion-sindh/31205637.html>> accessed 7 July 2023.

²¹ UNICEF Child Marriage Country Profile (based on demographic data 2017-18) <<https://www.unicef.org/pakistan/media/4151/file/Child%20Marriage%20Country%20Profile.pdf>> accessed 7 July 2023.

approximately 1.1 million girls are married below the age of 18 in KP, with an incidence percentage of up to 60 percent in some areas of the province. No figures on marriages contracted with or without consent were provided. However, it is evident that child marriage continues in spite of the laws and penalties that are operative in Pakistan. More importantly, however, regardless of the rationale of whether consent should be a Muslim woman's religious right or (secular) constitutional human right, the concept of women's consent as an ideal is rejected in total.

This crucial matter of refining the concept and legal implications of consent has been missing from feminist advocacy around marriage and sexualities, too. With regard to marriages, the common and legal conception about consent does not translate as the exercise of the independent *choice* of a spouse but the right, after maturity, to *refute* arranged marriages or those decided by parental choice. The age of sexual consent in Pakistan is 16 years but legal consent is defined in a negative sense - as when a child's consent will not be considered relevant to a charge of rape.

The importance of developing a clear conception on consent is not about applying or importing some western individualist right; the risks involved in non-marital relationships - for refusing arranged marriages or for initiating self-arranged marriages - if not accepted by the family, can make women targets of reprisals which include, honour crimes. According to the Human Rights Commission of Pakistan and a World Report from Human Rights Watch, there are approximately one thousand honour killings every year in Pakistan.²² *Sharam* (shame), *haya* (modesty), *fazeelat* (virtue),

²² See Human Rights Commission of Pakistan Annual Reports <<https://hrcp-web.org/hrcpweb/annual-reports/>> accessed 7 July 2023;

shaistagee (politesse), *taqva* (piety), *ikhlaaqiyaat* (ethics) are common terms and colloquial references that primarily allude to socio-sexual restraint and while the terms are gender neutral, most often these are associated with women's sexual virtue (just as, in cases of gendered slurs and insults).

The feminist movement in Pakistan in the 1990s was devoted to challenging these discriminatory notions in law, language and media but in the post 9/11 period, the Muslim female body, performativity and identity has received scholarly interest, almost exclusively, from the prism of religion or piety and this has split or displaced the focus of secular resistance and legal activism within progressive movements.²³ Muslim women's piety has been proposed as a viable alternative to western liberal feminist emancipatory goals and instead, an expression of their 'agency'.²⁴ However, such virtue-aspiration and self-disciplining aims to tame sexual lapses and prevent social disorder. While there is anticipated spiritual reward for such discipline, women's bodies (which are already valuable sites for marking sexual boundaries, as well as commodities for exchange, economic profit and social capital) become potential liabilities should their virtue/purity/piety lapse or is perceived to have been polluted.

The premium on virginity and restrictions in Muslim-majority states that permit Muslim women's sexual activity only within marriage, means that any transgression devalues them as women

and L Anderson 'TRUSTLAW POLL-Afghanistan is most dangerous country for women *Thomson Reuters* (15 June 2011) <<https://news.trust.org/item/20110615000000-naly8/?source=spotlight>> accessed 7 July 2023.

²³ Zia, note 16.

²⁴ Ibid.

and as pious subjects, quite apart from legal consequences. Recent scholarship that has privileged Muslim women's pious agency as a different kind of performance of their subjectivities and defended it as one that falls outside the pale of feminist understanding of (liberal) freedoms, has evaded the related subject of Muslim women's sexual agency. The inconvenient factor of how piety politics is devoted to curbing, tempering, taming and guarding women's sexual virtue in order to achieve an ethical self-formation and pious self-excellence that is invested in maintaining, in fact, stabilizing patriarchal social and gendered orders, is completely elided in such academic treatment.

Creative Consent

Judith Butler has framed gender as “a performative accomplishment compelled by social sanction and taboo,” and submitted that this identity is “instituted through the stylization of the body”.²⁵ They observe that “the ‘reality’ of gender is constituted by the performance itself”.²⁶ This concept of being compelled to perform due to social taboo can be applied to the practice of those women who exercise marital choice (and by extension, sexual agency) in defiance of parental arrangements, and where romantic relations are prohibited and women's sexualities heavily and communally policed.

For at least four decades, women in the province of Sindh have been posting declarations of their intent to elope with men of their choice in local newspapers. These testimonials are meant to

²⁵ J Butler, ‘Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory’ (1988) 40(4) Theatre Journal 519, 520.

²⁶ Ibid, 527.

preempt allegations of being a *kari* (a Sindhi term meaning ‘black woman’ or adulteress)²⁷ and to avail legal and social protection against anticipated false charges of kidnapping that may be registered by their parents to the police in order to forcibly recover them.²⁸ These ‘declarations’ have a template in which the woman posts her picture, asserts that she is an adult in full possession of her senses who has voluntarily chosen to elope to marry a man of her choice and is under no compulsion or duress, and that in case her parents register a legal case against her, her husband or his parents, it should be considered false.²⁹ The burden of publicizing this consent has historically been on women because they have no automatic legal or social reference that they can claim, since even Pakistan’s Hanafi religious right for women to marry by their own singular consent is mired in legal, constitutional and cultural contradictions.

Often, the time of intended departure of these elopements in Sindh is recorded in their ‘confessionaries’ and a list of ‘humble possessions’ that she is taking with her is provided to dispel the suspicion of any other ulterior motive.³⁰ Many posts include an explanatory reason justifying their actions; the fact that their parents were forcing them to marry a drug-addicted relative, or someone older, or a man they did not consent to marry. An investigative news report on this issue from 2011 notes that, “Couples who come to the newspaper’s officers are sometimes too poor to afford regular rates [for adverts], are often scared for their

²⁷ The term also extends to women who elope and marry against the family’s consent and who are targeted for honour killings.

²⁸ N Shah, *Honor and Violence: Gender, Power, and Law in Southern Pakistan* (Berghahn 2016).

²⁹ Ibid.

³⁰ Ibid.

lives, and sometimes send a relative or lawyer instead of risking a visit themselves. Before publishing the advertisements, the newspaper asks for signatures and NICs [National Identity Cards] from the couples, attested affidavits, and photographs of the women involved”.³¹ Bureaucracy looms to obstruct women’s autonomy everywhere. The report also cautions on how “[u]sing the media is a double-edged sword for the women of Sindh; the same declarations that can save them from honour killings can also leave them vulnerable to even more angry reprisals.”³² These women also post these intentions to avoid police harassment, which has not been a deterrence in the past but increasingly, as lawyers have become more involved in defending the rights of these women and the courts are now familiar with the fate of those who may be made to return to their families for having caused shame and disrepute, such an ‘insurance policy’ seems to be worth its investment.

Activist and professor, Amar Sindhu confirms that digitization has not necessarily altered this practice in Sindh and the reported average of 8 to 10 such adverts posted on a daily basis are accurate. This would mean that recorded elopements could range between 2000 to 3,600 annually just in Sindh (which also carries the highest rate of honour killings, which are estimated at 1000 per year (as the national figure). Although these women state they are adults, this is not the main concern for rural families; rather, the fact that women assert their autonomous right to marry is the cause of claimed dishonour. Several Hindu girls who wish to marry a Muslim man also avail of this practice to assert their

³¹ *Dawn*, ‘Sindhi women publicly announce free-will marriages’ (2 September 2011) <<https://www.dawn.com/news/656098/sindhi-women-publicly-announce-free-will-marriages>> accessed 7 July 2023.

³² *Ibid.*

willful conversion to Islam, which is a legal and religious requirement.

While all these complex legal and social dimensions continue to offer challenges to Pakistani activists, the religious right has also constantly exerted political and social pressure to reverse many of the rights codified in the Muslim Family Laws Ordinance 1961.³³ Conservatives, which includes judges, have even argued against the Hanafi right to uphold women's consent in marriage by claiming that the father is the rightful proxy as *wali*, or legal guardian, and that without his consent, Muslim women cannot contract marriage.³⁴ The women's movement had fought this legal battle in 1997 when human rights lawyer, Asma Jahangir successfully defended Saima Waheed's right as a Muslim woman to marry of her own consent and without the approval of a *wali* or guardian,³⁵ but Jahangir objected to the paternalistic tone of the judgment by the Lahore High Court which resolved the dispute by appealing to a protective *Sharia*. A dissenting note to the majority judgement invoked the role of judges as the 'custodians of the morals of Pakistan's citizens' and ranked cultural and communal values above Western individualism. While some intellectuals applauded this judgment as an example of Islamic egalitarianism, the Lahore High Court continued to deny nearly 250 couples the freedom to marry by consent, through pendency of appeals. Some appellants were even imprisoned or denied the right to live

³³ Carroll, note 11.

³⁴ See *Abdul Waheed v Asma Jehangir*, PLD 1997 Lahore High Court 301, where despite upholding the marriage contracted by a woman without her guardian's consent as valid under civil law, the judge derided the female respondent in the case for marrying against her father's consent.

³⁵ *Ibid*.

together for years, until Jahangir appealed to the Supreme Court which ruled against the conduct of the Lahore High Court in 2003.³⁶

In cases of underage marriages, legal advocacy for parents' right to recover underage women who have eloped (especially, if they are escaping from parental arranged marriages), inadvertently contributes to reverting to the father his claimed authority as *wali*. Feminists argue that the guardianship responsibilities of parents need to be separated (secularized?) from the concept of the *wali* as the patriarch who assumes the religious (and legal) right to contract an underage girl's marriage. Simply reverting an underage girl's custody to her parents while retaining the father's patriarchal right to arrange an underage marriage as per religious law strengthens patriarchal logic, disadvantages a woman's autonomous right to marry when she is of age, and undermines women's sexual autonomy overall.

In the absence of the legal right, physical space or cultural legitimacy to date or engage in non-marital sexual relations in Pakistan (that is, an age of sexual consent), access to cellular technology has enabled women to find creative ways to contract prohibited personal liaisons and relationships. Women across all classes own cell phones and this has spiked the rate of consumption and curation of aesthetics, blurred the lines of gendered propriety and rules of segregation, and enabled the development of on- and offline personas, identities and relationships. This has resulted in a conflicting culture of simultaneous empowerment and insecurities, as well as legal over-reach, as seen in the recent case of Dua Zehra, below.

³⁶ *Abdul Waheed v Asma Jehangir*, PLD 2004 Supreme Court 219.

The Dua Zehra Case

The case of Dua Zehra involved a teenage girl from Karachi in the province of Sindh, who was reportedly kidnapped in April 2022 and later discovered to have purportedly eloped to the province of Punjab. The alleged abduction was subsequently corrected by Dua in a media statement in which she confirmed her choice to marry Zaheer, a boy who she had met online (on the computer game PUBG), three years prior. Dua reported that her game gadget had been confiscated by her parents when they discovered this liaison, but the couple stayed in touch through other social networking applications. Dua's parents, on the other hand, insisted that as a minor she had been abducted or groomed by Zaheer and his family. This case sparked social media commentary and the subsequent legal journey has spanned across courts in two provinces and has become celebritized across media forums and triggered national debates.³⁷

When Dua's parents filed the case of kidnapping, they made public appeals on various media outlets asking for help in recovering their daughter. Her mother regretted that one mosque – which are common sites for issuing community announcements - refused to issue an appeal for her recovery, claiming that since the girl belonged to the minority Shia sect, so it was not the responsibility for a 'Sunni mosque' to do so. Several celebrities joined the chorus of concern on social media and such attention is

³⁷ For a succinct timeline of the case, see *Dawn*, 'Timeline: A Complex Case of a Karachi Teenage Girl's Alleged Kidnapping vs Legal Marriage' (4 July 2022) <<https://www.dawn.com/news/1696486>> accessed 7 July 2023.

claimed to be responsible for the recovery of Dua from Punjab.³⁸ Pre-emptively, Dua and Zaheer filed a petition in a Lahore district and sessions court against Dua's father and cousin, to end legal harassment directed at them.

Meanwhile, the police had also filed a plea in the Lahore model town court demanding that Dua be sent to the Darul Aman shelter until the case about her age was decided. However, the magistrate dismissed the petition and allowed Dua the right to live wherever she wanted. In May 2022, Dua's parents appealed to the Sindh High Court against the Lahore court's rejection of the petition on the grounds that they believed their daughter was being coerced and was a victim of grooming. Her father, Mehdi Kazmi stated in the petition that according to her educational, birth certificates and other records, Dua's age was 14 and under the Sindh Child Marriage Restraint Act 2013, it was illegal to marry a minor. He asked the court to conduct a medical examination of his daughter and by June 6, the Sindh court ordered that Dua be presented in Karachi to undergo an ossification test to determine her age. During the test period, Dua refused to meet her parents and was retained at a shelter home.³⁹

The cleric who solemnized the marriage was duly penalized and two days later, the ossification test concluded that Dua's age was between 16 and 17 years. Instead of restoring custody of the minor to her parents, the Sindh High Court ruled that Dua was free to decide her fate and found that the evidence did not qualify as a

³⁸ I Ali and Q Hassan, 'Missing Karachi teenager Dua Zehra recovered from Bahawalnagar: police' *Dawn* (5 June 2022) <<https://www.dawn.com/news/1693252>> accessed 7 July 2023.

³⁹ *Dawn*, note 37.

case of kidnapping.⁴⁰ The Court ruled in favour of Dua's autonomy to decide who she wanted to live with but without settling the controversy regarding the age of marriage (18 in Sindh). The parents then appealed for another medical exam which found her age to be between 15 and 16.

By July 2022, the case took a dramatic turn when the Karachi police informed the court of their suspicion that Zaheer had conspired with 24 persons to abduct Dua from Karachi to Punjab and then he had solemnized the illegal child marriage. Following this, a judicial magistrate in Lahore permitted the Sindh police to bring Dua back to Karachi, where she was placed in a child protection centre while the case against Zaheer proceeded. At the time of writing this, the Sindh High Court has ordered custody of Dua to her parents and dismissed Zaheer's bail application and taken cognizance of the trafficking charge in connection with the SCMRA.

Although cases of elopement, forced marriages and domestic violence are routinely on the increase, social media has inspired far more online outrage, commentary and activism on the issue of underage marriage than any other form of marital abuse or injustices. It is not just feminists but legal activists who remain divided over this issue and this is a generational shift in attitudes, too. Complicating matters is the commentary and celebritization of issues where national icons in the fields of film, TV, sport and fashion weigh in their opinions on such cases which fuels the sensationalism and feeds the media frenzy while dividing activist

⁴⁰ S Baloch, "'She is completely free': SHC allows Dua Zehra to decide who she wants to stay with' *Dawn* (8 June 2022) <<https://www.dawn.com/news/1693769>> accessed 7 July 2023.

and media attention from the dozens of other cases which then get far less coverage or legal response.

Based on the growing trend of self-arranged marriage, feminists who have been working on such cases for decades (particularly, in women's shelters), have lobbied for legal protection against forced or coerced underage marriages but they have also stressed for selectivity in the criminalizing of self-arranged marriages so that, the interests of minors are accommodated on a case to case basis and the couple is not automatically penalized. For many years, they have found that underage girls who contract self-arranged marriages often do so to escape domestic abuse, forced marriages, or simply because they fall in love, and that many of these adolescents are in sexually active consensual relationships despite the legal and social sanctions involved. They testify that lodging underage married girls in shelters rarely resolves the issue where they remain miserable and are subject to emotional blackmail by their parents, but they try to stick it out so that they can return to their husbands once they are the requisite legal age.

Interestingly, conservatives are split into two camps on this issue; the modernist Islamists and the orthodox purists. Both sets would agree on the precedence of *Sharia* which permits the arrangement of pre-pubescent marriages but in the absence of any legal status or control wielded by the *wali*/guardian within the Muslim Family Law (achieved by rights-based activists), the modernists do not support self-arranged teen-marriages. On underage marriage they support the (colonial) lay law and universalist principle that seeks to restrain girls' marriages to an arbitrary post-puberty age determined by the state.

While rights-based activists are more straightforward in their opposition to underage marriages, these often fail to account for the paradoxes of consent, autonomy, and the patriarchal familial controls that can be unwittingly reinforced, if a standardized approach to advocacy for all cases is applied. As an example of missing these anomalies, the arguments in a newspaper article by lawyer, Nida Usman Chaudhary is unpacked below,⁴¹ to illustrate the difficulties in building legal and feminist consensus on the issue of sexual and marital consent and its implications for advocacy around underage marriage.

Disputes of Advocacy

In her article opposing the inclusion of child rights within the women's rights prism in cases of self-arranged marriages, Chaudhary argues that the notion of an adolescent's rights to freedoms has been inspired by universal human rights conventions to which Pakistan may be a signatory but that the conservative cultural environment largely renders these inapplicable. She suggests that the ideals of trust and openness in discussions between Pakistani parents and children on the subject of sexualities is unrealistic and so, the right of choice for adolescent girls and respect and protection of these rights should not be equated with those of an adult woman.⁴²

Chaudhary's second objection relies on a common paternalistic sensibility about access to information and she argues that since Pakistan's is a closed society, the sources of information tapped

⁴¹ NU Chaudhary, 'Lens correction,' *The News* (19 June 2021) <<https://www.thenews.com.pk/tns/detail/966994-lens-correction>> accessed 7 July 2023.

⁴² Ibid.

by adolescents makes them vulnerable to grooming and abuse in online spaces. She questions, “what does them [adolescent girls] having agency even mean?” and whether “abusive parents and forced marriages can be used as an excuse to justify a self-arranged marriage as a counter measure?”⁴³

Chaudhary’s third concern is over the reproductive health of the adolescent who enters marriage and finally, she offers a positivist solution, which is to “harmonise [all] positive laws”. These and similar arguments have been made by male lawyers too, who work on human rights cases but some of these run counter to the views of feminist activists and their experiences of working with survivors. In light of this institutional memory, each of these objections is fleshed out below.

On the first count - of cultural incompatibility or Pakistan’s inability to adhere to or legally align with human rights conventions and agreements; Pakistan’s successes on women’s rights laws have depended not on harmonization but a sustained effort for rights-based reasoning to prevail *over* religious and cultural counter-arguments, so as to pass these pro-women laws. Regardless of the veracity of these laws or their (lack of) implementation, countering clerical opposition and attempts to deny or dilute equality-based legal rights via cultural and religious interpretation are critical victories – symbolically but practically, too. The Sindh CRMA is a case in point, since legislators and activists who were advocating for this law were fighting for an increase of the age from 16 to 18 but were not fixated on the age factor as much as, using it as a lever to align domestic law with the international benchmark because it was an important strategic pushback to clerical efforts at maintaining the protectionist and

⁴³ Ibid.

infantilized legal status of Muslim women. The victory was celebrated as a win for rights-based progress against the use of the *Sharia* provision that is often privileged over the CMRA in courts where judgements routinely permit the continuity of underage marriages rather than automatically annulling these.

The after-effect of this success in Sindh has had some kind of a deterring effect, since underage women in this province now have to elope to other provinces in order to be legally married (which in many cases, they were doing anyway to evade reprisal violence from their natal families or communities but now, they have no choice at all, since they cannot seek relief from the Sindh provincial authorities).⁴⁴ Unless the definition of consent is expanded as an autonomous right, or the religious law/reasoning which permits the contracting of underage marriage during the pre-pubescent period is unambiguously struck down, such strategic maneuvering on the part of parties and vagaries in legal judgements will continue, regardless of protectionist laws, cultural taboos, or internationally expected standards.

In the broader discussions about underage marriage, the *age* of consent has become fetishized rather than the *subject* of consent which is, choice of a sexual partner and/or spouse. Legal consent in Muslim marriages as it applies in Pakistan is a negative right. Consent is not defined as a pro-active option or choice to engage or determine terms within sexual relations (marital and non-marital), or even as the refusal to assent (until hitting puberty).

⁴⁴ The caveat remains, however, as seen in the Dua Zehra judgement, where the ossification test at the very least confirmed that she was under 18 and yet, the judges deferred to the precedent of neither annulling the marriage nor returning custody to her parents and permitted her to continue with her matrimonial status.

Pre-pubescent marriage agreements undermine the girl's negotiating power after puberty and such a disconnected and under-baked post-hoc right to 'consent' deflects the core issue of how consent is not just a technical matter of age. For this reason, a majority of women *over the age of 16* continue to be infantilized and do not have a bona fide de facto right to permit or deny consent in their marital arrangements, even as they graduate to adulthood. It is pivotal to resolve the issue of consent as a legal and social right, rather than be fixated over biological age.

A recent example from India, where underage marriage remains high, demonstrates feminist opposition to the proposal of raising the age of marriage to 21 based on the logic of avoiding the criminalizing of people between the ages of 18 and 21.⁴⁵ Indian feminists countered this proposal to raise the age by appealing on the need to offer positive alternatives or safety nets, like the campaign of 'Beti Bachao Beti Padhao' ('Save daughters, educate daughters') started by the Modi government. Reportedly, this policy has had significant impact in offering the positive attribute of education as a haven against adverse effects of early marriage.

Similarly, it is critical to curtail the right of Pakistani parents to contract underage marriages of their wards, since this reinforces parental authority at the expense of women's active consent. The challenge is intensified by the strategic arguments offered by non-feminists, or those who advocate 'Islamic feminism' and insist

⁴⁵ A Yerunkar, 'Women's legal age for marriage changed from 18 to 21 but will it stop child marriage? Read what experts have to say' *Free Press Journal* (25 December 2021) <<https://www.freepressjournal.in/india/womens-legal-age-for-marriage-changed-from-18-to-21-but-will-it-stop-child-marriages-read-what-experts-have-to-say>> accessed 7 July 2023.

that the religious reasoning is the only legitimate method of countering patriarchal interpretations of women's rights. This is not only time-consuming, historically unsuccessful and constantly in flux since the issue gets caught in endless debates on the Islamists' turf, but it also limits policy-making or discussion around other pragmatic solutions.

On the second brief that Chaudhary holds to the suggestion that parental authority over an adolescent's agency should be limited – agency, choice, and consent are indeed, intersectional concepts that are firmly linked to the authority of Muslim guardianship. The prevailing cultural expectations privilege parents/grandparents (especially, those on the paternal side) as familial authorities. Children, adolescents and women are expected to defer with absolute obedience within these domestic gendered hierarchies. There is no formal or mandated provision of sex education in Pakistan and instead, resistance to it, but this is deliberate, in order to uphold the broader patriarchal familial order and this allows for informal, pietist and community-based codes to police sexualities.

The risk of not acknowledging an adolescent's agency/choice/consent is to reinforce the concept of the *wali* or guardian in matters of marriage. This contradicts the strategic feminist advocacy from the 1990s, cited above. A holistic feminist vision is critical in advocacy planning since the notional power of patriarchy trickles into all aspects of Muslim women's paternalistic dependency and becomes the logic that translates into policies that reinforce the concept of men/fathers as 'heads of the household.' An uncritical acceptance of the notion of the father as *wali*/guardian can inadvertently reinforce the patriarchal logic of 'father knows best' until adolescents achieve a stage of maturity. Men are all too aware of this social privilege and use this to decide

marital arrangements for their children where the unspoken agreement is to exchange or barter control over a girl's virginity – a form of 'change of guard' which awards responsibility and ownership from father to husband seamlessly. It may be risk-laden and problematic but adolescent relationships and self-contracted marriages are the catechism that challenge this traditional rite of passage.

In one of her (now) regular YouTube interviews, Dua Zehra is asked by a viewer what she would do if she had a disobedient daughter just like herself and who eloped with her boyfriend. Dua responds by saying, 'I would cultivate a trusting relationship with her and support her choice rather than make her so desperate as to escape because of her marital choice.'

Agency is what Dua exercised when she repeatedly told her parents that she did not want to marry the cousin that they selected for her and insisted that her choice was to marry Zaheer instead, for whom she had developed romantic feelings. It's not complicated when we consider an entire younger generation of Pakistani women activists take to the streets to campaign for their right to exercise sexual agency in unconventional ways – rights that are categorically prohibited by state laws and clerics and refuted by elected representatives and, which the majority of citizens consider illicit, sinful, culturally misplaced and western inspired. Shelters are authorized to accept distressed adult married women or when directed by the court, but there is no refuge for adolescents who are being punished or restricted by families for wanting to be in relationships.

The state can cap a right at a fixed legal age (driving, voting, marriage) but how does one control (and more worryingly, police)

romantic inclination by enforcing an age limit that falls in the adolescent period? The political right to vote and pragmatic license to drive are not driven by the same agency – that is, sexual/romantic. In fact, even adult marital arrangements do not recognize this desire, since the majority of marriages are brokered according to kinship rules or driven by political economies/barters. Further, the premium placed on girls' virginities determines the change of guardianship from father to husband and families are eager to organize the swap of responsibility before any girl decides to convert her sexual agency or consent into action/decision. Until such time that non-marital sexual freedoms (which are widely prevalent, illicitly and illegally, across classes and genders in Pakistan) stop being illegal and punished, the escape routes for (underage) women from coercive/abusive parents or households and non-consenting arrangements, is to marry someone with who they may fall in love with.

Unless citizenship laws are amended so that women's citizenry is not bound to their fathers, husbands, brothers or male relatives and they are complete equals, women will find unconventional ways to negotiate between these limited patriarchal restrained choices. In the absence of choices, this is what the exercise of agency looks like. Activists have to focus on broadening the choices rather than restricting consent to a legal entity that is exclusively linked to age or parental/spousal authority, otherwise, adolescents and adult women will remain caught in a double bind and larger cultural trap where they can never graduate into fully and legally autonomous citizens.

On Chaudhary's third concern about reproductive health⁴⁶ – this is a concern for all Pakistani women where the maternal mortality rate and similar indicators are abysmally low on global scales, regardless of age. When lawyers raise this apprehension in arguing cases of underage marriage, (along with, the rightful point about the cost of educational opportunities), they seem far less concerned over the patriarchal pressures that rob women of their consent in these fields. Such a holistic concern would involve arguing against unmet contraceptive needs, unsafe abortions and lack of quality medical services – which are far more pressing than underage pregnancies. The concern over young mothers also needs to be contextualized in a broader rights-based frame, rather than thinking that preventing teen pregnancies will alleviate the status of reproductive health of women. Sex education is critically important but no one wants to take on clerical opposition and so, the advice tends to resort to 'harmonizing' religious reasonings and bargaining with male stakeholders – all in the name of making women's reproductive rights culturally acceptable to men. The direction and larger vision of activism must be holistic and committed to broadening and strengthening feminist ends and not to restricting and narrowing the lens which limit these preventive measures into legalistic straightjackets.

This leaves the final point about cross-sectional laws for the welfare of children and how to harmonize these, so as to prevent underage marriages. Grooming and trafficking (especially, in cases of inter-faith marriages) are serious crimes and usually run by criminal rings but there needs to be caution when these become handy tools to be applied to individual cases of willful or self-arranged relationships/marriage. The role of religious reward is

⁴⁶ Chaudhary, note 41.

critical in such cases and requires a legal amendment on inter-faith conversions – which the Sindh Assembly courageously attempted but was thwarted by the collusion of clerics and male legislators.⁴⁷ This is why the concept of agency is helpful, as it defines the condition that falls between motive and act – it is that intangible and critical sense of self-realization and conscious exercise of preference, choice and consent – and is always poised for conversion into action.

Digital Romance and Rights Advocacy

The Dua Zehra case is on-going and has become a social media sensation which is in sync with global trends in the use of apps aimed to facilitate non-conventional, transgressive and queer sex relationships, since they allow for increased interconnectivity and circumvent traditional gate-keeping. These forms of communication negate significant geographic distances between participants and virtual opportunities replace physical spatiality.

The role of aesthetics in curating social meaning is an expanding field of study - Benjamin Haber's work juxtaposes the ephemerality and promiscuity associated with popular preinstalled Phone apps and social networks, like Snapchat, and points out the safety and security implied by iMessage and Find My Friends.⁴⁸ Siân Lincoln's work points out the importance of the bedroom and the "realm of 'the private'" in determining public interactions and

⁴⁷ H Tunio, 'Sindh Governor Refuses to Ratify Forced Conversion Bill' *The Express Tribune* (7 January 2017) <<https://tribune.com.pk/story/1287146/sindh-governor-refuses-ratify-forced-conversion-bill>> accessed 7 July 2023.

⁴⁸ B Haber, 'The Digital Ephemeral Turn: Queer Theory, Privacy, and the Temporality of Risk' (2019) 41(8) *Media, Culture, and Society* 1069.

presentations and makes the connection between a young person's time spent in their private space and their consumption of media, which she argues corresponds with that person's identity in their offline and public lives.⁴⁹

Online dating platforms, that is, matchmaking sites or apps with user profiles that remain anonymous until the matched individuals decide to meet offline, have millions of users; 30% of German adults have used a digital dating service at some point;⁵⁰ in the United States, 46% of singles have used online dating to find a new partner, and one-third of all couples who married between 2005 and 2012 met online.⁵¹ Chakraborty (2012) has studied how Indian women in slums use the Internet to seek mates, defying norms of arranged marriages and how online space grants women physical safety in ways that meeting a man in person would not.⁵² Similar arguments have been made about young people in the Muslim world where online dating has increasingly taken its place among other mate selection strategies,⁵³ such as, in Morocco,

⁴⁹ S Lincoln, 'Young People and Mediated Private Space' in A Bennett and B Robards, *Mediated Youth Cultures* (Palgrave Macmillan UK 2014) 42.

⁵⁰ J Ponseti and others, 'Is Dating Behavior in Digital Contexts Driven by Evolutionary Programs? A Selective Review' (2022) 13 *Frontiers in Psychology* 678439.

⁵¹ J Jung and others, 'Love Unshackled: Identifying the Effect of Mobile App Adoption in Online Dating' (2019) 43 *MIS Quarterly* 47.

⁵² K Chakraborty, 'Virtual mate-seeking in the urban slums of Kolkata, India' (2012) 10(2) *South Asian Popular Culture* 197.

⁵³ E Hatfield and RL Richard, 'From Pen Pals to Chat Rooms: The Impact of Social Media on Middle Eastern Society' (2015) 4(1) *SpringerPlus* 254.

where young people can have intimate communications online without transgressing social taboos and physical boundaries.⁵⁴

In their comparative study on online dating in Muslim countries, Sotoudeh et. al. find that “Social media creates new virtual public spaces where young women and men living in socially conservative non-Western societies can communicate in order to meet and engage in forbidden intimacies”.⁵⁵ The study finds that male users of intimate internet use exceeds women’s access and arranging of dates by three-fold.⁵⁶ It also acknowledges that the Internet has become an important vehicle for the pursuit of romance in the Muslim world and that “there is no doubt that young people’s desire for love under conditions of gender restrictiveness is driving its expansion” but that their sample of young Facebook users is “not composed of secular, Westernized libertines... [and]... overwhelming majorities believe the hijab is obligatory for women”.⁵⁷ In their study, “Algeria and Pakistan have the highest overall level of belief that women should wear the hijab, whereas Tunisia and Turkey have the lowest”.⁵⁸ Pakistan is also the highest to score on disapproval of unmarried women holding hands in public.⁵⁹ Arora et al. argue that the Internet creates an alternative public space in conservative countries where physical public sphere is too restrictive and does not allow for young men and women to meet, interact and engage

⁵⁴ M Pourmehdi, ‘Globalization, the Internet and Guilty Pleasures in Morocco’ (2015) 3(9) *Sociology and Anthropology* 456.

⁵⁵ R Sotoudeh, R Friedland, and J Afary, ‘Digital Romance: The Sources of Online Love in the Muslim World’ (2017) 39(3) *Media, Culture & Society* 429.

⁵⁶ *Ibid*, 431.

⁵⁷ *Ibid*, 432.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*, 433.

in courtship practices.⁶⁰ This is not limited to Muslim contexts but also in India, where Hindu religious conservatives attack these cyberspaces as sites of immorality and ‘sluttiness’. Sotoudeh et al. also find that, “In the Muslim world, these romantic cyberspaces differentially afford the romantic agency of men. When women from these countries find themselves outside this world, they dramatically increase their use of the Internet in pursuit of partners”.⁶¹

Feminist and digital rights studies have proposed that in gender restrictive cultures where women’s mobility is strictly monitored and self-policed, digital spaces become sites that facilitate transgression without fear of moral impropriety or virtue-compromising, precisely because these are virtual and discursive rather than physical. Some work has pointed out to how anonymity does encourage excessive posturing, boldness and even promiscuity associated with popular social networks.⁶² In Dua’s case, the use of social and alternative media sites and citizen-journalism have become her tool to fight social perceptions and legal attitudes that would normally deny her voice, agency and expression of her consent in contracting marriage with Zaheer for both, genuine love and to avoid coerced arranged marriage by her parents.

There are constant political pressures on Pakistan’s family laws that rights-based activists have to contend with. The legal prohibition of the marriage of girls under 18 years of age

⁶⁰ P Arora and L Scheiber, ‘Slumdog romance: Facebook Love and Digital Privacy at the Margins’ (2017) 39(3) Media Culture & Society 408.

⁶¹ Sotoudeh, note 55, 437.

⁶² Haber, note 48.

contradicts the Islamic allowance for marriage upon puberty. This tension between religious and ‘secular’ laws has defined the contradictions of women’s and minorities’ rights in Pakistan both legally and socio-politically.⁶³

Studies of internet dating depend on internet opinions to assess restrictive norms facing these young users but at the other end is the Pakistani State that is unambiguous in confirmation of its censorious stance and orthodox policies on gender relations off and online. The Pakistan Telecom Authority regularly censors and imposes restrictions on the basis of ideological or moral objections to content – this could range from perceived blasphemy, to "immoral, obscene and vulgar" material on the video-sharing platforms of Grindr, TikTok, Tinder, Tagged, Scout and SayHi - and routinely blocks these apps.⁶⁴

Given the lack of legal consensus on how to resolve cases of underage marriage, and amidst growing discontent over the restrictions on sexual consent and expanding digital sexual services and experimentation and exposure to varieties of human sexual experiences, the human rights movement in Pakistan needs to urgently develop a more informed and practical strategy to ensure the gendered, legal and sexual rights of a very large sector of the population - adolescent citizens.

⁶³ Zia, note 16.

⁶⁴ *The Express Tribune*, ‘PTA blocks five dating apps over “immoral” content’ (1 September 2020) <<https://tribune.com.pk/story/2262053/pta-blocks-five-dating-apps-over-immoral-content>> accessed 7 July 2023.

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**The Answer to Our Prayers?:
The Possibilities and Limits of the Nikahnama as a Mean to
Protecting Muslim Women's Rights in Pakistan**

Nida Kirmani¹

Introduction

The *nikahnama*, or Muslim marriage contract, contains within it space for the articulation and protection of a variety of rights. For this reason, women's rights activists working in Muslim contexts throughout the world advocate for a more thorough awareness of this document as a tool for the protection of women's rights within marriage and the family. This paper focuses on the ways in which women's rights activists in Pakistan have used the *nikahnama* as a means of protecting women's rights within marriage. The findings are based on fieldwork conducted in parts of Punjab, particularly in Lahore, Sheikhpura, Multan and Burewala. Interviews were conducted with women's rights activists working with the non-governmental organization, Shirkat Gah, along with members of community-based organisations (CBOs) and *nikah*

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registrars that have participated in trainings related to women's legal rights. After outlining the legal significance of the *nikahnama* in Pakistani family laws, the paper presents a discussion of the ways in which activists have used this document as a platform for promoting a variety of rights through a combination of argumentative strategies, engaging with a combination of religious and secular discourses.

History of Muslim Family Laws

The family laws governing Muslims in Pakistan have their roots in the laws enacted during the period of colonial rule. During this time, separate sets of personal laws were codified for Muslims, Hindus, Christians and Parsis. The Muslim Personal Law (Shariat) Application Act was introduced in 1937 and the Dissolution of Muslim Marriages Act (DMMA) was introduced in 1939 in order to unify Muslims under one set of personal laws,² thus hardening the boundary between Muslims as a group and members of other religious groups. The DMMA provided Muslim women with the right to dissolve their marriages, which was a corrective to the Hanafi practice that disallowed women from seeking a divorce. This Act was actually initiated by members of the *ulama* who were concerned by the growing number of women who were converting to religions other than Islam in order to obtain divorces.³ This Act continues to be applied in Pakistan, except for certain

² D Pearl and W Menski, *Muslim Family Law* (3rd edn, Sweet and Maxwell 1998) 33.

³ K Sangari, 'Gender Lines: Personal Laws, Uniform Laws, Conversion' (1999) 27 *Social Scientist* 17.

amendments, which were introduced by the Muslim Family Laws Ordinance (MFLO) of 1961.⁴

The MFLO was introduced by Ayub Khan as part of his drive to modernize the Pakistani legal system. The passage of the MFLO was the result of years of struggle waged by women's rights activists and progressive elements during the 50s including groups such as the All Pakistan Women's Association (APWA).⁵ The debate regarding women's rights in marriage was initiated in 1955 when Muhammad Ali Bogra, the prime minister at the time, took a second wife. This led to a wide-scale debate amongst the educated elite regarding the legality of polygamy in Pakistani law. A commission of enquiry was appointed in 1956, the Rashid Commission, to look into the issue of family laws, and the MFLO was eventually passed in 1961.⁶ The main aim of the MFLO was to regulate the procedure for divorce and to discourage polygamy.⁷ The MFLO also raised the minimum age of marriage from 14 to 16 for girls and from 18 to 21 for boys.⁸ The relevant MFLO provision on minimum age of marriage was, however, omitted in 1981. Critics of the MFLO, such as Patel, argue that 'It

⁴ R Patel, *Gender Equality and Women's Empowerment in Pakistan* (OUP 2010) 111.

⁵ F Abbott, 'Pakistan's New Marriage Law: A Reflection of Qur'anic Interpretation' (1962) 1(11) *Asian Survey* 26.

⁶ K Mumtaz and F Shaheed, *Women of Pakistan: Two Steps Forward, One Step Back?* (Vanguard Books 1987) 56.

⁷ *Ibid*, 57.

⁸ Women's organisations are currently campaigning to raise the age of marriage for women from sixteen to eighteen years of age. Efforts for reform have bore fruit to a certain extent in recent years, as the province of Sindh raised the minimum age of marriage for women to eighteen through the Sindh Child Marriage Restraint Act 2013. In 2022, the Islamabad High Court also established eighteen as the minimum age of marriage for women in the Islamabad Capital Territory.

was a half-hearted attempt at best, and did not activate the legal reforms envisaged by the Rashid Report on Marriage and Family Laws'.⁹ However, as Ansari has pointed out, despite its relative weakness, the MFLO has continually been challenged by certain members of the *ulama* in Pakistan, and many of its stipulations, such as the requirement that a man must seek permission of the first wife before marrying a second wife, are deemed to be 'un-Islamic' by conservative elements.¹⁰

For the purposes of this paper, the MFLO is significant in that it formalized the *nikahnama* as a legal document issued by the state and made it a legal obligation for all marriages to be registered with the Union Council.¹¹ Before this time, most marriages in the subcontinent were contracted orally, which continues to be the dominant practice in many parts of the country today. However, formal registration of marriages has slowly been increasing since the introduction of the MFLO, using the standard *nikahnama* form. Hence, unlike in India, where women's rights activists have formulated their own 'model *nikahnamas*' in order to compensate for the weaknesses of Muslim personal laws, and which may or may not be viewed as legitimate by all sections of the Muslim population,¹² in Pakistan, one might assume that the *nikahnama* has greater potential to protect women's rights because it has been

⁹ Patel, note 4, 113.

¹⁰ S Ansari, 'Polygamy, Purdah and Political Representation: Engendering Citizenship on 1950s Pakistan' (2009) 43(6) *Modern Asian Studies*, 1421.

¹¹ Section 5 of the MFLO provides: '(1) Every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance.'

¹² N Kirmani, 'Re-thinking the Promotion of Women's Rights through Islam in India' in M Tadros, 'Gender, Rights and Religion at the Crossroads' (2011) 42(1) *IDS Bulletin* 56.

approved and issued by the state. However, as the findings of this study reveal, ‘Despite landmark laws enacted in the 20th century to protect women’s rights in marriage, Pakistan’s legal scholars and human rights organizations agree that girls and women continue to confront profound disadvantages in marriage and divorce’.¹³

The Legal Significance of the Nikahnama

Marriage in Islam is a contractual agreement between two parties rather than a sacrament. According to Agnes, ‘The law of marriage is not a law concerning sexuality or morality. The law of marriage in its essence...is a law regulating economic transactions, and more specifically, women’s access to and control over it’.¹⁴ In this context, the ‘*nikahnama*’ is the legal contract, which outlines the rights of both the husband and the wife. However, because of the imbalance of gendered power relations in society, this document has greater potential to serve as a tool to secure women’s rights in particular. For this reason, women’s rights activists in Muslim communities throughout the world have seized upon this document as a means of protecting women’s rights in a manner that is in accordance with both religious and state laws.¹⁵

¹³ World Bank, ‘Improving Gender Outcomes: The Promise for Pakistan, Environment and Social Development Sector Unit, South Asia Region’ (2005).

¹⁴ F Agnes, ‘Economic Rights of Women in Islamic Law’ (1996) 31(41-42) *Economic and Political Weekly* 2832.

¹⁵ See, for instance, L Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press 2007) 113.

This document includes critical information about the bride and groom, such as their ages and whether they have been married before, along with containing space for the articulation of rights and obligations by both parties. Hence, in theory at least, a certain amount of space exists for both parties to include particular terms and conditions within the agreement, as long as these do not violate the law or public morality. As Hooria Khan, a lawyer working for Shirkat Gah points out:

‘A properly concluded and valid *nikahnama* then triggers certain laws, which you have no choice but to abide by because you have entered in that *nikahnama*. So for instance laws related to paternity, maintenance, inheritance, divorce, *haq mehr*.... This is why it becomes really important to fill out the *nikahnama* properly. Because doing so ensures the protection of certain rights.’¹⁶

Hence, although the *nikahnama* might appear to be a simple contract, because it relates to most areas of family law, women’s rights activists in Pakistan as elsewhere have highlighted the importance of this document as part of their campaigning efforts.

Furthermore, the existence of a *nikahnama* itself acts as proof that a marriage has taken place, which can protect both women and men from charges of adultery. This is particularly important in the Pakistani context in which a charge of adultery can carry a heavy penalty under the Zina Ordinance.¹⁷ Although both women and

¹⁶ Interview with Hooria Khan, Shirkat Gah (Lahore, 22 March 2012).

¹⁷ The Offence of Zina (Enforcement of Hudood) Ordinance 1979 was part of the broader Hudood Ordinances, which were promulgated by Zia-ul Haq in 1979 as part of his infamous Islamisation programme. These

men can and do face charges of adultery, as Hameeda Kaleem points out, women are often more vulnerable to such accusations.¹⁸ Hence, the very existence of the *nikahnama*, even if it is partially filled, serves an important protective function in a context in which the punishment for adultery is stoning.

The first page of the state-issued *nikahnama* consists of basic information, including the name and age of the bride and groom along with the names of the witnesses and any *wakeel* (representative) who may have been appointed to arbitrate the proceedings of the contract. This is followed by clauses thirteen to sixteen, which outline the *haq mehr* or dower, which the groom has agreed to pay the bride both at the time of marriage (*muajjil*) and on demand at a later date (*muvajjil*), either in case of divorce, death, or if the wife demands it at any time during the course of their marriage. *Mehr* is considered a necessary element of any Muslim marriage,¹⁹ however, as will be discussed below, the amount given varies considerably, and very often, it is not given at all either because the woman has ‘forgiven’ it, or because it is simply overlooked as being unimportant.

laws introduced new punishments for crimes related to theft, the consumption of alcohol and the commitment of adultery or *zina*, introducing laws that prescribed stoning as a punishment for adultery and that required women to produce four male witnesses in order to prove the occurrence of rape. These laws were never repealed, but they were amended in 2006 under the Musharraf regime with the passage of the Women’s Protection Act, which essentially took the teeth out of the Hudood Ordinances.

¹⁸ Interview with Hameeda Kaleem, Shirkat Gah (Karachi, 20 September 2011).

¹⁹ AR Doi, *Shariah: The Islamic Law* (Ta Ha Publishers 1984) 159.

The second page of the *nikahnama* contains clauses seventeen to nineteen, which are key in terms of protecting women's rights. Clause seventeen provides a space for either party to include special terms and conditions in their marriage contract. This clause is relatively flexible in terms of the kinds of conditions one could specify, granted that they do not violate the law or public morality. Women's rights activists highlight the potential that this clause holds for protecting a variety of rights that may not otherwise be specified in the existing clauses provided within the *nikahnama* including rights related to mobility and financial security.

While the right of *talaq*, or unilateral divorce, is reserved for the husband in Islamic law, clause eighteen provides a space for the husband to delegate the right of divorce to his wife, which is known as *talaq-e-tafwid* in Islamic law. Theoretically, a husband can delegate the right of divorce to any third party at the time of marriage or even during the course of a marriage. According to Munir, the majority of Islamic scholars agree that the provision for *talaq-e-tafwid* is valid.²⁰ However, for the most part if the right of *talaq* is delegated at all, it is delegated to the wife. Unlike with the *khula*, this allows a woman to dissolve her marriage without the intervention of the court and without having to give up any part of her *mehr*.²¹ Apart from simplifying the procedure to obtain

²⁰ M Munir, 'Stipulations in a Muslim Marriage Contract with Special Reference to Talaq al-Tafwid Provisions in Pakistan (2005) 12 Year Book of Islamic & Middle Eastern Law 235.

²¹ L Carroll, 'Talaq-i-Tafwid and Stipulations in a Muslim Marriage Contract: Important means of Protecting the South Asian Muslim Wife' (1982) 16(2) Modern Asian Studies 277. In case of a *khula*, the wife is supposed to return the *mehr* she received at the time of her marriage, i.e. the prompt *mehr* (*mu'ajjal*). She still technically has a right to her deferred *mehr* (*mu'ajjal*). However, the popular belief and practice is that a

a divorce for a woman, this is also an important symbolic means of balancing the power relations within the marriage.

However, it is extremely rare that a woman is given this right within her *nikahnama*, and many continue to argue that this practice is un-Islamic. A survey of hundreds of *nikah* registrars and Union Council offices across the country found that the vast majority of *nikahnamas* did not contain a provision for *talaq-e-tafwid*, ranging from less than 1% amongst the poor and around 10% amongst the elite in urban centres. In some parts of the country, such as Khyber-Pakhtunkhwa, the prevalence rate was close to zero.²²

The research conducted for this paper confirmed these findings and found that, even amongst those who had attended training sessions or who worked with community-based organisations that were engaged with this issue, many were unaware of the importance of this clause, and some even felt that it was un-Islamic for a woman to be given the right to divorce. For example, a lawyer who works with the organization, Roshni in Multan, which provides legal advice and support to women, argued that *talaq-e-tafwid* went against the principles of Islam. He felt this way despite his awareness of the law and the fact that he handled women's cases. Similarly, a *maulvi*²³ who served as a *nikah* registrar in Sheikhpura had never officiated a marriage in his eighteen years as a *nikah* registrar in which the right of divorce

woman must give up all her *mehr* if she takes a *khula*, in a sense buying her way out of the marriage, regardless of her reasons for doing so.

²² Munir, note 20.

²³ The Urdu word '*maulvi*' refers to a clergyman, who often work additionally as *nikah* registrars after obtaining a licence from the local Union Council.

had been delegated to the wife. He also asked what man would risk his 'honour' in the eyes of the community by granting his wife such a right. For him, the inclusion of such a clause challenged the dominant conception of masculinity in society. He felt this way despite having attended a training session on the *nikahnama*. Hence, on this issue in particular, women's rights activists seem to be fighting an uphill battle in terms of challenging ideas that are based both on conservative interpretations of Islam as well as ideas around the maintenance of the gender hierarchy in society.

Clause 19 provides a space for the husband's right to unilateral divorce to be curtailed, which also would help balance the power relations within the marriage by making it more difficult for a man to arbitrarily divorce his wife. Again, this column is most often left blank according to discussions with women's rights activists working on the issue. However, despite the potential of the state-issued *nikahnama* to protect women's rights in a variety of areas, the fact remains that the majority of women (and men) in Pakistan do not know what the *nikahnama* is, or if they do, they have no access to this document. The Pakistan Rural Household Study-II (2004) found that 75% of women do not have a *nikahnama* or are unaware if they have one, and of those who do, 72% have never read it or had it read to them. This varies from region to region, however, for the most part, despite these laws having been in existence for over fifty years, most women in Pakistan have yet to feel their impact.

Where the *nikahnama* has been filled out, in the vast majority of cases, those sections which discuss women's rights have been crossed out without any discussion amongst the parties involved, oftentimes even before the *nikahnama* reaches the parties involved. In most instances, *nikah* registrars cross out clauses

pertaining to women's marriage rights of their own accord, as they perceive the potential rights extended to women in the standard *nikahnama* form as unIslamic and against Pakistan's cultural milieu.²⁴

Azmeh Khan, a lawyer, perceives the problem to be fundamentally rooted in the exclusion of the bride from the marriage ceremony.²⁵ It is commonplace for the *nikahnama* to be filled out in presence of the groom and male family elders, in absence of the bride. Besides denying women the possibility of negotiating the terms of the *nikahnama* to their benefit, this practice deprives them of the opportunity to demand a haq mehr of her choosing. Khan argues:

A plethora of problems arise during *nikah* ceremonies, chief of which is the fact that many *nikahs* are conducted without the presence of the woman. In turn allowing for a lack of consent on the part of the bride. Many *nikah* registrars (owing to pressure from the families themselves and/or cultural/religious reasoning) simply opt out of presenting women with their rights under the contract itself.²⁶

The 2005 study of women's position in Pakistan conducted by the World Bank found that 'Although the MFLO's *nikahnama* contained unprecedented protections for females entering into marriage, these protections have failed to bring sweeping improvements in Pakistan's marital practices'.²⁷ The report argues

²⁴ Ibid.

²⁵ Interview with Azmeh Khan, Lawyer (Lahore, 19 October 2022).

²⁶ Ibid.

²⁷ World Bank, note 13, 28.

that the two main reasons for this are the prevalence of customary practices, which conflict with the law, and the lack of accountability by authorities.

As Patel argues, awareness of the importance of the *nikahnama* is low even amongst ‘educated’ sections of the population. According to her this is because:

Too much sentimentality is attached to a marriage; besides, its arrangements are usually entirely the parents’ responsibility. The bride is too often absorbed in the frivolous demands of preparing a trousseau and on the wedding day, sits with her head lowered, unconcerned about the practicalities of the *nikahnama*. So many traditional rituals are performed that the bride and her family have little awareness of the contractual nature of the marriage and the possible rights and obligations which can be included in the marriage contract.²⁸

Patel blames the lack of awareness of the importance of the *nikahnama* on traditions and customs, which obscure the contractual nature of the marriage. Many of the activists I spoke to would agree with this assessment. Hence, there exists a wide gap between the law and women’s realities.

Campaigning Around the *Nikahnama*: Facing Realities

Shirkat Gah, which is one of the most prominent women’s organisations in Pakistan,²⁹ has been raising awareness of the

²⁸ Patel, note 4, 114.

²⁹ Shirkat Gah <<https://shirkatgah.org/>> accessed 7 July 2023.

importance of the *nikahnama* as a means of protecting women's rights since the mid-90s. They began this campaign following a study they conducted in 1992 with the international network, Women Living Under Muslim Laws,³⁰ which explored the relationship between the laws, customary practices, and women's lived experiences. This study found that one of the main obstacles in the achievement of women's rights was their lack of awareness of the law and the prevalence of discriminatory customary practices. Hence, Shirkat Gah partners with community-based organisations in different parts of the country to spread legal awareness on a variety of issues, including telling people about the importance of the *nikahnama*. Specifically, apart from educating people about the importance of simply getting one's marriage registered in the first place, women's rights activists emphasise the importance of stipulating a decent amount of *mehr* within the *nikahnama*, along with raising awareness of rights such as *talaq-e-tafwid* and the possibility of including 'special conditions' within the marriage contract, which could protect women's rights. To date, they have conducted hundreds of paralegal training sessions with community-based activists and *nikah* registrars throughout the country, and many CBOs have gone on to train others within their communities.

One of the main areas that women's rights activists highlight in their training sessions is the importance of specifying a decent amount of *haq mehr* within the *nikahnama*. Explanations of the purpose of the *mehr* vary. For most activists that I spoke to, the *mehr* was framed as a gift given to the wife by the husband, which is simply her right and which serves as a source of security for her.

³⁰ Women Living Under Muslim Laws <<https://www.wluml.org/>> accessed 7 July 2023.

Suhail Warraich says that the *mehr* is ‘a consideration of marriage’ or a gift.³¹ However, he also points out that the concept of a gift is voluntary while the *mehr* is mandatory. It is supposed to be a fair amount of either money or assets commensurate with the financial status of the husband and is a means of formalizing the contract.

Although the *mehr* is most often specified monetarily, activists encourage women’s families to specify assets instead, as money will lose value over time. For example, in the Seraiki belt of Punjab, it is common that women receive land as part of their *mehr*. However, what happens in many cases is that the amount of land will be specified without any reference to where this land is or whether the groom is in possession of this land in the first place. For this reason, women’s rights activists highlight the importance of specifying where the land is located and of getting the land registered in the woman’s name.³²

While they would probably have a difficult time finding religious backing for this argument, some women’s rights activists felt that a large *mehr* would act as a deterrent protecting a woman against arbitrary divorce, which in a context in which women have little independence, either socially or financially, can be extremely important. Rubina, who is a teacher that has received paralegal training from Shirkat Gah, recounted the case of one woman whose parents were unable to support her financially, and whose husband was constantly threatening to divorce her. However, Rubina told me that she assured the woman that she had no reason to worry as her husband has promised her a significant amount of

³¹ Interview with Suhail Warraich (Lahore, 12 April 2012).

³² Interview with Zahid, Activist (Lahore, 19 March 2012).

land as her *mehr* within the *nikahnama*, and hence would be too afraid of losing his land if he divorced her. When I asked a lawyer working with a community-based organization in Burewala, Yasmeen, who gave a similar justification for *mehr*, why a woman would want to stay with such a man, she responded:

Look, our society is a male-dominated society. It is a sure thing that in our society there is no protection without a male. You and I are both members of this society. From top to bottom, even our educated women need male protection. It is our natural process, and it is our need. We cannot move forward without this relationship. But if you bind people a little with the *nikahnama*, then it is more likely that relationships last.³³

Hence, despite this not being the ‘official’ justification for *mehr* in Islam, for many women’s rights activists working in the Pakistani context, the *mehr* served as a means of protecting a woman from becoming destitute in a society where many have few other options than to remain in their marital homes even if they are not being treated well by their husbands or in-laws.

Women’s rights activists also raise awareness around the clause that allows women to specify any special terms or conditions within their marriage contract. They highlight the types of conditions women might want to specify in the beginning of their marriage, for example preserving their right to work outside of the home after marriage or their right to visit their natal homes regularly. While in theory these rights cannot legally be denied to

³³ Interview with Yasmeen, Lawyer, Shirkat Gah (Lahore, 20 March 2012).

women anyway,³⁴ specifying them within the *nikahnama* can strengthen a woman's bargaining power within the marriage and serve an important symbolic function. Women's rights activists also point out that women can write down how much spending money they should receive on a monthly basis from their husbands. This reflects the common belief that it is the husband's responsibility to maintain his wife financially. Similarly, women's rights advocates also highlight what cannot be included in the special terms and conditions, for example, including a condition that another family member will be married into the bride or groom's family in exchange for the marriage taking place, what is known as *watta-satta* in the Pakistani context.³⁵ Identifying special terms and conditions can help clarify the terms and expectations of the marriage from the outset.

³⁴ For example, Article 18 of the Constitution of Pakistan 1973 extends the right to enter any lawful profession or occupation to all citizens. Whilst this right cannot be restricted or interfered with in any way, including in a marriage setting, stipulating the right to work as a special condition helps bolster and reinforce the right. In addition, in case a husband impedes his wife's pursuance of a vocation, she can simply file a suit before the family court to ensure realisation of this special condition, rather than having to file a petition before a constitutional court for effectuating her constitutional right.

³⁵ The practice of *watta-satta* is commonly practiced in rural Pakistan as a means of increasing family control over the married couple. Studies have found that such arrangements can hold potential benefits for women, in terms of keeping a check on itinerant sons-in-laws (see Jacoby and Mansuri 2007). At the same time *watta-satta* arrangements can have negative consequences by increasing the pressure on women and men to remain in unhappy marriages so as not to threaten the welfare of their siblings. See H Jacoby and G Mansuri, 'Watta Satta: Bride Exchange and Women's Welfare in Rural Pakistan' (2007) World Bank Policy Research Working Paper No. 4126.

However, activists point out that few people actually fill in these columns because it is considered inauspicious to discuss potential future disputes at the time of marriage. Furthermore, there is a common fear that if the bride's family is perceived as being too difficult or demanding, that the groom's family will simply walk away. This is a very real concern in a society where women are generally viewed as a burden until and unless they are married. Others point out that even when these columns are filled out, they are difficult to enforce after marriage.

While *talaq-e-tafwid*, or the delegated right to divorce, is still extremely uncommon in Pakistan, women's rights activists are also working to raise awareness about the potential this clause holds for the protection of women's rights. Aneesa, who runs a school in a village near Multan and who has been trained by the CBO, Roshni, on the *nikahnama* says that she tells people that although Allah dislikes divorce, 'if there is a problem in the marriage where for instance the husband isn't providing for the wife, or is involved with other women, etc. then the woman should have the right to be able to leave him.' However, she says that very few women are convinced that it is important to include such a clause in their *nikahnamas* because they cannot imagine ever wanting to divorce their husbands. This is not because they assume they will always be happy in their marriages. Rather, they say 'what will we do with a divorce? Society will not accept us'.³⁶ Similarly, Asiya who also works as a teacher in a village neighbouring Multan says that women argue that if they divorce their husbands, they will have to work for their fathers or brothers, which is no better, and hence most end up staying with their

³⁶ Interview with Aneesa, Teacher (19 March 2012).

husbands regardless.³⁷ Hence, although women's rights activists raise awareness about the importance of *talaq-e-tafwid*, they are fighting an uphill battle in the face of a context in which there is little place in society for a divorced woman.

Challenging Patriarchal Privilege

One of the issues that this research aims to explore is the ways in which women's rights advocates couch their arguments both in terms of how they introduce issues and how they respond to opposition. Previous research on advocacy related to Muslim women's rights in India demonstrates that activists use a variety of registers in order to frame their arguments.³⁸ These involve appeals to religious arguments, engaging with Islamic texts and drawing on examples from people like Muhammad's first wife, Khadija, and his daughter, Fatima, as a means of strengthening their arguments as well as referring to state laws and international human rights norms.

Because family laws in Pakistan are derived at least in part from interpretations of Islamic law, advocacy related to women's rights in marriage will by default touch on questions related to Islam as well. As Suhail Warraich pointed out, 'you can't say that you have a secular or religious approach when the law is based on religion'.³⁹ At the same time, when asked whether activists engaged proactively with religious texts as part of their advocacy strategies, several activists felt that it was unnecessary to refer to religion explicitly as part of their campaigning. Rather, the

³⁷ Interview with Asiya, Teacher (19 March 2012).

³⁸ Kirmani, note 12.

³⁹ Warraich, note 31.

women's rights activists I interviewed most often appealed to logic and common sense as a means of convincing people of the importance of outlining women's rights within the *nikahnama* rather than engaging directly with religious texts.

Suhail Warraich spoke about the complications that can potentially arise from using religious-based arguments for women's rights. He said that the problem with using religion to frame arguments is that oftentimes in South Asia, religion gets too entangled with emotions, and hence it becomes difficult to put forward rational arguments. He also said that one can get trapped in an endless theological debate—a battle of *hadiths*—with neither side coming to any agreement. For this reason, he finds it more useful to use examples from the local context or logic to illustrate his arguments. For example, he counters the common practice of providing women with a 'sharia-compliant' *mehr*, which is nominal in sum, by pointing to the flaws in reasoning that underlie this practice:

They say that the *sharia* compliant amount is Rs. 25.50. When you ask them why, they'll give some example related to Bibi Fatima [the Prophet's daughter]. Then you can ask that the currency wasn't in rupees at that time... and that her *mehr* was in kind....Then if we ask people what the basis of *mehr* is they say that it depends on the wealth and social status of the man. Then you say that naturally not all men have the same social status. And what determines status? And then they'll say that it depends on the period we are talking about. Then you say

that after taking all this into account, how can you say that *mehr* should be Rs. 25.50? This is my approach.⁴⁰

Hence, Warraich essentially undoes people's arguments through a process of logical reasoning to prove his points rather than relying on religious sources, which can be interpreted and countered in multiple ways.

Nusrat Parveen argues that the most important thing when constructing an argument in support of women's rights is to highlight the fact that it is in the family's interest to protect their daughters. For example, when arguing against the practice of dowry, women's rights activists point out that dowry is both not a requirement in Islam, and that the money that one spends on their daughter's dowry could be put to better use by paying for her education, which will provide her with the skills that she needs to survive on her own. She says, 'Whether you approach the issue from a religious point of view or from a human rights framework people do understand that what we are saying is in their interest'.⁴¹

However, at times some activists felt that referring to Islam strengthened their arguments. Nusrat Parveen argues that it is in fact necessary to engage with Islam to be effective in the Pakistani context:

I believe that you can't work in isolation. When people give you reasons based on religion then you have to counter them through religion too. I am not against using

⁴⁰ Ibid.

⁴¹ Interview with Nusrat Parveen, Shirkat Gah (Lahore, 12 February 2012).

a human rights framework, but you have to look at the reality. When people are so rigid based on religion then you cannot not use religion.⁴²

Hence, for her there was no alternative but to engage with Islam to make her arguments, particularly in a context in which so many of the arguments against women's rights are based on religious arguments.

Similarly, Hameeda Kaleem, said that they used the example of the prophet Muhammad in order to emphasise the importance of the *nikahnama*: 'We give reference that Prophet Muhammad said that whoever agrees to a promise or contract must sign a written document, because a verbal contract has no basis'.⁴³ Activists such as Zahid use Islam to highlight the importance of gaining the consent of the bride and groom in order for a marriage to take place and says,

For instance, our Prophet (PBUH) said that you need the agreement of both the man and the women in order to marry them. But do our people our *maulvis* do that? No, they say it's not important to ask the girl. You only need the permission of the parents.⁴⁴

In this way, activists use Islam as a means of counteracting cultural practices that impede the realization of women's rights.

⁴² Ibid.

⁴³ Kaleem, note 18.

⁴⁴ Zahid, note 32.

The *nikahnama* can also be used as a springboard from which to talk about various other rights granted to women in Islam. For example, Nusrat Parveen said that in their trainings, they point out that in Islam, the *mehr* should be commensurate with the financial status of the husband while there is no concept of dowry in Islam, although this continues to be the dominant practice in South Asia. Following this she added that, ‘Similarly, we say that Islam doesn’t disapprove of education for girls and nor does it say that they shouldn’t get healthcare...that if their reproductive health is suffering, they shouldn’t be taken to a doctor.’⁴⁵ Hence, activists can use the discussion around the rights granted by Islam to women in marriage as a springboard to talk about a host of other rights such as the right to education and healthcare. Echoing the arguments put forward by Islamic feminists, Nusrat Parveen argued that Islam has given women many rights but that ‘people deny rights on basis of customs and only implement those parts of Islam that they like and also interpret religion in a way that denies women their rights.’⁴⁶

Legal Reform in Punjab

With *nikah* registrars often crossing out or leaving blank specific rights-related clauses, the marriage rights extended to women in the *nikahnama* remained unactualised in a vast majority of cases. Following years of campaigning and activism against these rights-violating practices of *nikah* registrars, the Punjab Legislative Assembly finally intervened and introduced reforms in 2015 to target this malady. The Assembly enacted the Punjab Muslim Family Laws (Amendment) Act 2015, which amended the MFLO,

⁴⁵ Parveen, note 41.

⁴⁶ Ibid.

mandating all clauses of the *nikahnama* to be unambiguously filled.⁴⁷

The *nikah* registrar must fill all clauses with specific answers from the bride and groom. Failure to do so would result in the registrar being criminally liable.⁴⁸ The amendment, therefore, has the effect that no clauses could now be crossed out or left blank, thereby addressing a key gap in the marriage process.

Despite the reform, activists remain sceptical of the effectiveness of the amendment. Azmeh Khan believes that the amendment has little to no significance, as the language of the Act leaves room for loopholes and subversion of women's marriage rights.⁴⁹ The amendment calls for specific answers from the bride or the groom. Khan believes this to make all the difference, as only one party must be consulted in order to satisfy the legal requirement.⁵⁰ A bride could thus be absent during the filling of the *nikahnama*, with the groom negatively responding to all *nikahnama* clauses concerning the bride's rights, and the procedure would still be considered legitimate.

Given that a significant number of marriages in Pakistan are solemnised without the physical presence of the bride and *nikahnama* is filled in her absence, the amendment has little to no

⁴⁷ Section 5(2A) of the amended MFLO in Punjab reads as: 'The *Nikah* Registrar or the person who solemnizes a *Nikah* shall accurately fill all the columns of the *nikah* nama form with specific answers of the bride or the bridegroom.'

⁴⁸ The 2015 amendment provides for one month imprisonment and twenty-five thousand rupees fine in case of violation.

⁴⁹ Khan, note 25.

⁵⁰ Ibid.

consequence. Even in instances where the bride is involved in the filling of *nikahnama*, *nikah* registrars could continue to cross out columns as there is no oversight mechanism to hold them to account for any contraventions.

In view of the loopholes in the amendment, lack of enforcement, and no reported cases of penalties for *nikah* registrars, the 2015 amendment is hardly the panacea policymakers originally hailed it to be. There may be some utility for other provincial legislatures to emulate the Punjab amendment with relevant changes made to address the loopholes. Without effective oversight mechanisms and routine checks on *nikah* registrar's obligation, however, there is unlikely to be any long-term success in removing barriers for women to secure their marriage rights through the *nikahnama*.

Conclusion: Impacts and Impasses

Despite the efforts of committed activists such as those working with Shirkat Gah, the impact of campaigning around the *nikahnama* seems to have been limited at best. Although activists recount several instances in which their interventions seem to have made a difference, the few *maulvis* who act as *nikah* registrars that I spoke to seemed to have little knowledge of the importance of specific clauses within the *nikahnama*, despite having undergone trainings on the subject. For example, one of the *maulvis* I spoke to brought a stack of *nikahnamas* with him. A quick flip through these documents revealed that most of the columns on the second page, those dealing with the delegated right of divorce, restrictions on a man's right to unilateral divorce, and the space for special conditions, had been left blank. Furthermore, the amount of *haq mehr* that had been stipulated rarely deviated from the standard 500-1000 rupees. Furthermore, when asked whether he has ever

overseen a *nikah* in which the woman's right to take a divorce was included in the contract, he said he had not come across such an instance in the 18 years that he had been a *maulvi*. He also asked what man in his right mind would give the woman such a right and threaten his honour in the eyes of the community. Hence, it seemed that particularly in the case of *talaq-e-tafwid*, this particular *maulvi* had not been impacted by his exposure to trainings conducted by women's rights activists.

There are several factors contributing to the slow progress made around the *nikahnama*. Apart from cultural barriers related to the maintenance of the gender order, which were repeatedly cited by activists as being the greatest impediment to progress, one of the main barriers to achieving social change in this area is simply the lack of even the most basic education amongst many *maulvis* who act as *nikah* registrars. Zahid mentioned one *maulvi* who was actually illiterate and would have to bring a boy along with him in order to fill out the *nikahnama* when he officiates a marriage.⁵¹ In such cases, the chances for errors are higher and crucial information can get left out of the *nikahnama* altogether. Zahid suggests that some minimum standard must be applied in terms of the appointment of such officials to maintain accountability.⁵² Furthermore, like most institutional processes in Pakistan, the system of registering *nikahnamas* is rife with corruption. Although the charge for registering a *nikahnama* is nominal, several activists reported that *nikah* registrars in their locality were charging up to five times the stipulated amount and either not registering the *nikahnama* or registering it and pocketing the remainder of the fees. Such practices discourage people from

⁵¹ Zahid, note 32.

⁵² Ibid.

registering their marriages and contribute to the general lack of confidence in state institutions.

Hence, although women's rights activists have been raising awareness on the importance of the *nikahnama* for over two decades now, and although it has been over sixty years since the passage of the MFLO, little progress has been made in terms of affecting widespread change in marriage practices. At the same time, one should not discount the efforts of women's rights activists in terms of beginning the process of changing mindsets with regards to women's rights within marriage. In order to make the change widespread, however, the state and the media would have to get involved in the awareness raising efforts. For example, including legal awareness within the school curriculum would be an effective means of reaching a mass audience. Similarly, public service announcements on the television, radio and in the newspapers would help reach the general public. Such efforts would contribute to affecting the wider cultural shift that must occur before such laws can have an impact on actual practice.

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Marital Rape: A Contemporary Islamist Perspective

Rafae Saigal¹ and Fatima Jan²

Introduction

Pakistan continually suffers from a myriad of problems related to sexual abuse. Marital rape is one of them. Typically, marital rape occurs within the four walls of a matrimonial home. Often, it is enveloped in societal notions on maintaining the decorum and privacy of the familial dwelling. Consequently, conversations on sexual abuse inside the marriage, such as marital rape, rarely—if ever—see the light of day. As a result, marital rape escapes scrutiny from public institutions and authorities, including law enforcement and courts—who, too, tread carefully in ‘disrupting’ the sanctity and secrecy of the institution of marriage. In the background of this context, marital rape is understood to be common, but frequently unreported crime in Pakistan. True estimates of its prevalence might not be accurate, but local research papers and statistics suggest that the frequency of marital rape and sexual abuse is more than public institutions and Pakistani society would like to acknowledge.³

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³ NS Ataullah and S Ijaz, “‘This Crooked System’: Police Abuse and Reform in Pakistan’ (*Human Rights Watch*, 25 September 2016), <<https://www.hrw.org/report/2016/09/25/crooked-system/police-abuse-and-reform-pakistan>> accessed 7 July 2023.

In its current form, the definition of marital rape in Pakistan's criminal law stands overridden by misimpressions of traditional Islamist thought, customary codes and societal norms. Any analysis of Pakistan's law on marital rape would be without context absent a comprehensive discussion on Islamist notions of rape within marriage.

By definition, marital rape refers to the idea of non-consensual sexual intercourse in the framework of an existing marriage. Traditional perspectives of Islamic jurisprudence are generally thought to carry misimpressions—that the offence of rape can never occur between spouses. As this paper will investigate, these conclusions have been informed by misplaced historical notions—of the sexuality of a wife belonging to her husband. Framed from this perspective, the concept of consent becomes non-retractable after marriage. And rape—an impossibility.

It is, therefore, the endeavor of this paper to inquire into traditional Islamist thought on the offence of marital rape. While relying on contemporary academic literature, this paper attempts to argue that traditional jurists, scholars and academics have failed to capture and encapsulate Islamist notions of gender-egalitarianism on the subject of marital rape. In doing so, the paper will seek to propose the true conception of marital rape through an analysis of corresponding Islamic rights and duties of the husband and wife. Consequently, this paper will attempt to posit that non-consensual sexual intercourse or rape has no basis in traditional Islamic theory.

Subsequently, this paper will seek to scrutinize the criminalization of marital rape and its development in Pakistan. As it stands, the current framework on marital rape is largely ineffective, with

little-to-none reporting of the crime. As a result, this paper will also endeavor to explore the reasons behind this underlying failure, and chart reasons behind the failure of the legal framework. Necessarily, this will also entail a discussion and conversation on potential reform, and the way forward.

Islamic Position

Conceptually, marital rape finds little mention in classical Islamic law or literature. *Al-Ightisab*, which means "taking the property of others by force or violence", is the root of the word rape in the Arabic Language.⁴ Rape, including marital rape, is not expressly mentioned in the Quran.⁵ Doctrinally, the Quran only references *Zina* (adultery and fornication), which demands four adult male witnesses in order to convict someone for it, making *Zina* a public indecent offence.⁶ One may argue, however, that the concept of *Zina* under duress—coined as rape—is included in Islamic law.⁷

All of this is not to suggest that marital rape is not prohibited in Islam. Conceptually, *Shariah* lays the background for sexual intercourse to occur between a husband and wife in the context of intimacy and life; in fact, the carrying of tenderness and gentle conduct is taken to be a sign of piety. As a matter of fact, when a husband resultantly uses force upon his wife in order to have

⁴ M Nasri and MAA Hamat, 'Islamic Perspectives on the Legality of Marital Rape in the Framework of Maqasid Al-Shariah' (2018) 62(1) The Islamic Quarterly 169.

⁵ A Quraishi-Landes, 'Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective' (1997) 18(2) Michigan Journal of International Law 287.

⁶ Ibid.

⁷ Ibid.

sexual intercourse—absent her consent—such act may only be carried out through the exertion of force and violence, the outcome of which is to inflict injury upon the wife. Fundamentally, the Quran stipulates protection from harm as a fundamental right of the wife—and any individual, on a broader level. As a result, when a husband forces sexual intercourse against his wife, such an act can be deemed contrary to fundamental tenets of Islam, and drawn under the umbrella of domestic violence.

While the validity of intimacy, sexual relations and intercourse between a man and woman in Islam is determined through the marital contract i.e., the *Nikah*, which deems such acts as valid in the eyes of Islamic law,⁸ at no point does the institution of marriage in Islam envisage or permit the use of force in case of the wife's refusal to submit to the husband's demands.⁹

Perhaps this concept is best encapsulated by Surah An-Nisa, Verse 19 in the Holy Quran: *“O you who believe! It is not lawful for you that you should take women as heritage against (their) will, and do not straiten them in order that you may take part of what you have given them, unless they are guilty of manifest indecency, and treat them kindly; then if you hate, it may be that you dislike a thing while Allah has placed abundant good in it.”*¹⁰

Resultantly, Islam indoctrinates and recognizes the principle of *mu'asarah bil ma'ruf*—through which the husband is asked to respect the willingness (consent) of his wife in sexual matters.¹¹ This is only further evidenced by the range of non-violent

⁸ Nasri and Hamat, note 4.

⁹ Ibid.

¹⁰ Quran, 4:19.

¹¹ Nasri and Hamat, note 4.

remedies afforded to a man by Islamic theory in the event that he is being denied intimacy or sexual relations by his wife, such as the woman losing her right to maintenance or the marriage being dissolved—these recourses are offered by Islamic law and *Shariah* for the ‘aggrieved’ husband.¹²

At this juncture, it would be prudent to examine the varying and conflicting conceptions amongst Islamic jurists with regards to the wife's marital obligations and sexual duties to her husband. According to Malikis’ traditional conception, having intercourse with one’s spouse is obligatory.¹³ Shafi jurists, however, do not carry this extreme view, but still deem sexual intercourse as obligatory, going on to maintain that it should be conducted at least once between the spouses.¹⁴ Hanbali jurists, on the contrary, propose that spouses should have sexual intercourse at least once every four months.¹⁵ Some Islamic Jurists while interpreting the *hadith* of the Holy Prophet (pbuh) view sexual intercourse as a joint and mutual right between the two spouses, thereby negating and questioning the majority scholarly view of sexual intercourse being the exclusive right of the husband.¹⁶

Although most Islamic jurists view it as a moral transgression, non-consensual sexual activity with a wife is not a recognised legal offence in the Sunni or Shia schools of thought. These views

¹² Ibid.

¹³ IJ al-Kalbi, *Al-Qawanin al-Fiqhiyyah* (Diwan Press 2019), cited in note 4.

¹⁴ S al-Sayyid, *Fiqh-Us-Sunnah* Vol. 2 (American Trust Publications 1992), cited in note 4.

¹⁵ Al-Bahuti, *Kashful Qana* (Maktabat al-aasr al-Haditha 1999), cited in note 4.

¹⁶ Nasri and Hamat, note 4.

have been condemned by Islamic feminists as being the outcome of patriarchal readings of obscure religious scriptures by Islamic jurists prior to the 20th century.¹⁷ Ziba Mir-Hosseini, an Islamic feminist, believes that *Shariah*'s two indisputable goals—equality and justice—clash with these discriminating interpretations.¹⁸

However, it is argued this interpretation of Islamic Jurists bears no roots within Islam. This paper argues that Islam fundamentally respects and recognizes the sexual autonomy and pleasure of women; Islam, in fact, views the sexuality of women as something that vests within themselves—not their husbands—and as the property of a woman, herself.¹⁹ Several jurists tend to categorize and classify rape under the doctrines of *Hirabah*, and *Jurh*.²⁰

Literally, *Hirabah* is defined as a 'violent taking'. By this extension, therefore, whenever a husband forces his wife to have intercourse with him, he takes, by force, her fundamental right to control and regulate her sexual activity—a right that Islam otherwise grants to her. To add, Islamic jurisprudence under *Jurh* expressly recognizes the concept of individuality and grants each individual with ownership rights over every part of their body. As a result, one might say that any harm sustained to any of those bodily parts during the course of forced sexual activity will also open up and entitle the victim to civil pecuniary compensation under the *Jurh* branch of law.²¹ Therefore, it can also be said that

¹⁷ Z Mir-Hosseini, *Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition* (Palgrave Macmillan 2013).

¹⁸ Ibid.

¹⁹ Quraishi-Landes, note 5.

²⁰ Ibid.

²¹ Ibid.

marital rape falls within prohibited conduct in Islamic jurisprudence under the branch of *Jurh*.²²

Quraishi argues that even in the context of *Jurh*, the injured party's consent plays a vital role.²³ Some Jurists presume consent by virtue of the marital relationship, while others view the occurrence of harm to be central to the award of appropriate *Jurh* compensation. As per them, harm should be considered as an assault, regardless of the consent.²⁴ Quraishi is of the view that the same sexual autonomy principles of Islam should be applied by present-day Islamic jurists and legislators to categorize and classify any sexual act without consent as a crime under *Hirabah* or *Jurh*—thereby officially terming it as a violation of the other party's sexual autonomy.²⁵

Pakistani Law and the Offence of Marital Rape

Pakistan, being a former colony of Great Britain prior to its independence in 1947, inherited a criminal penal framework that was enacted by the British in 1860. Till date, this penal framework continues to govern the country with several amendments—including Islamic offences—being included, thereby rendering it into a mix of Islamic and English penal laws. As a result, a discussion of the historical pretext and British involvement becomes necessary.

²² Ibid.

²³ Ibid.

²⁴ Ibn Quddamah, *Al Mughni* Vol. 8 (Dar Alam al Kutub 2013), cited in note 5.

²⁵ Quraishi-Landes, note 5.

Historically, British common law deemed rape as a crime committed against men by men, the complaint against which could only be lodged by the father – before marriage – or the husband of the woman raped.²⁶ Because the British ruled the sub-continent, rape laws in the sub-continent were imported from the common law, and those laws are still operative in India and Pakistan with negligible modifications.

Before the Protection of Women (Criminal Laws Amendment) Act, 2006, the legal definition of rape in Pakistan, excluded marital rape from the purview of rape. Section 6 of the Hudood Ordinance, 1979, defined rape as:

“... sexual inter-course with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely:—

- (a) against the will of the victim,*
- (b) without the consent of the victim,*
- (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt, or*

²⁶AS Zia, *Sex Crime in the Islamic Context: Rape, Class and Gender in Pakistan* (ASR 1994) (under the pre-Hudood criminal legal system inherited from the British, a complaint of adultery could only be lodged by the husband). DA Dripps, ‘*Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent*’ (1992) 92 *Columbia Law Review* 1780 (“Until the twentieth century... female sexual autonomy had little to with the law of rape. The law instead struck a balance between the interests of males-in-possession and their predatory counterparts.”).

(d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.”

Following the Criminal Laws Amendment Act of 2006, Section 375 of Pakistan’s Penal Code (the “PPC”) underwent amendments that removed the marital rape exception from the definition of rape:

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

- (i) against her will,*
- (ii) without her consent,*
- (iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt,*
- (iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or*

(v) With or without her consent when she is under sixteen years of age.”²⁷

Before proceeding further, examining the history, context, and origin of the marital rape exception—as well as whether or not it has Islamic roots and why the purportedly Islamic laws of Pakistan had such a provision—is essential. As previously discussed, Islam views marital rape as a crime under *Hirabah*. The Quranic verses on *zina* do not contain references or expressly mention rape or non-consensual sexual intercourse. Qureshi opines and is of the view that this omission tends to be deliberate.²⁸ As highlighted above, Islamic jurisprudence, in addressing *zina*, also discusses *zina* under duress—rape.²⁹ Intriguingly, the definition of rape under the PPC i.e., *zina bil jabbar*, appears to be founded on British common law conceptions of rape, and stands in stark contrast to Islamist definitions of rape.³⁰ This is despite the existence of Article 227 of the Constitution of the Islamic Republic of Pakistan (the “**Constitution**”), which demands and requires that every law must be in compliance with Islamic Injunctions and Quran and Sunnah. Perhaps the only explanation for this is that the individuals responsible for legislating and formulating the erstwhile definition of rape under the PPC tended to adopt the British common law definition of rape in a strait-jacket fashion, proceeding to repackage it, and portray it as Islamic law.

Critically, the ‘impossibility’ of marital rape is a conception that has no basis or roots in Islam. In fact, its origin and roots can be

²⁷ Section 375, Pakistan Penal Code 1860.

²⁸ Quraishi-Landes, note 5.

²⁹ Ibid.

³⁰ Ibid.

traced back to the writings of Sir Mathew Hale.³¹ Sir Mathew Hale, first proposed the theory of irrevocable consent, and presented an exemption for marital rape. He stated that “*the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself up to her husband, consent which she cannot retract*”.³² Some jurists further emphasized that “*a husband does not become guilty of rape by forcing his wife to his own embraces*,”³³ or that “[A] man cannot be guilty of this offense [rape] by having carnal knowledge of his wife, and it can make no difference that he does so by force and against her will”³⁴ and that “*the consent of the wife to sexual connection with the husband having been given by the act of marrying, he is not guilty of an assault in having such connection*.”³⁵ Instances of sexual attack on prostitutes were covered by the rape provisions of the British common law in the 19th century, but the offenders were allowed to use evidence of surrounding circumstances and the maligning of the victim’s character to be used against her in order to inculcate and connote the notion that the victim—the prostitute—had ‘probably’ given consent, even in instances where she may not have.³⁶ According to this argument, any female whether an “unchaste woman” or a “common prostitute” could be a victim of this rape.³⁷ However, in terms of evidence during trial, the lack of

³¹ M Hale, *The History of the Pleas of the Crown* (Pale 1800).

³² Ibid.

³³ JE Hasday, ‘Contest and Consent: A Legal History of Marital Rape’ (2000) 88 California Law Review 1373.

³⁴ WL Clark and WE Mikell, *Handbook of Criminal Law* (St Paul, Minn West 1894).

³⁵ E McClain, *A Treatise on the Criminal Law as Now Administered in the United States* (Callaghan and Co 1897).

³⁶ Hasday, note 33.

³⁷ Clark and Mikell, note 34.

chastity would bear great relevance and be read by reviewing courts as influencing and increasing the probability that the victim had, indeed, gave her consent—thereby acquitting perpetrators and sex offenders.³⁸

According to Jill Elaine Hasday, the common law marriage provisions imposed pre-determined restrictions on every husband and wife without allowing for individual discussion or permission.³⁹ Hale's theory of irrevocable consent applied this same understanding to one of the provisions that dealt with marital relations, and equated the wife's initial assent to marriage as a legal and continuous presumption of permanent and irrevocable consent.⁴⁰ At the time, the only exceptions to this principle of irrevocable consent were instances where there were forced or underage marriages, in which the woman had been forcefully wed or was too young to offer and submit consent.⁴¹

This paper argues that there is significant room for debate regarding the continuing importance of consent in marriage. Consent cannot be irrevocable, and is always subject to withdrawal, during the course of a marriage. Doctrinally, marriage

³⁸ JP Bishop, *Commentaries on the Criminal Law* (6th edn, Boston, Little, Brown, & Co 1877) ('This offence may be committed as well on a woman unchaste, or a common prostitute, as on any other female. In matter of evidence, however, want of chastity may, within recognized limits, be shown as rendering it more probable that she consented.'). Clark and Mikell, note 34 ('The fact, however, that the woman was a prostitute, or of unchaste character, may always be considered in determining whether she consented or not, as a prostitute would be more apt to consent than a chaste woman.').

³⁹ Hasday, note 33.

⁴⁰ Ibid.

⁴¹ Ibid.

is a perpetual contract, and either party to the contract carries the right to dissolve it—by filing for divorce. Therefore, one can argue that, in addition to being a condition for entering into the marriage contract, consent should additionally be regarded as a pre-requisite for the execution of some of its terms.

Echoing these notions of irrevocable consent are Western feminist groups that traditionally tend to place a greater emphasis on consent in lieu of marriage contracts as a means of legalizing sexual intercourse.⁴² Randall and Venkatesh, for instance, endeavor to eliminate the idea of the legal presumption of continuous and irrevocable consent for sex in marital relationships and, instead, argue that rape must be understood in terms of consent, rather than a definition premised on the use of force.⁴³ To the contrary, Robin West appears to be more inclined towards criminalizing marital rape through formulating a definition of rape that is based on coercion.⁴⁴

Consider the case of *R v. R*, where the legal fiction and impossibility of marital rape under the English law was, perhaps, most significantly tested in ways that it had never been before.⁴⁵ While delivering the judgment of the court, Lord Lane asserted “...the idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections is no longer acceptable.

⁴² Ibid.

⁴³ M Randall and V Venkatesh, ‘Criminalizing Sexual Violence Against Women in Intimate Relationships: State Obligations Under Human Rights Law’ (2015) 109 American Journal of International Law 189.

⁴⁴ R West, ‘Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment’, (1990) 42 Florida Law Review 45.

⁴⁵ *Regina v. R*. [1991] UKHL 12.

It can never have been other than a fiction, and fiction is a poor basis for the criminal law...".⁴⁶ In doing so, Lord Lane characteristically went on to state that "this is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it."⁴⁷ As a consequence, Britain declared marital rape to be a crime, rejecting any concept or notion of consent being perpetual in marriage.

How does Pakistani law compare and fare in this regard?

Before the passage of Protection of Women (Criminal Laws Amendment) Act, 2006, marital rape was excluded from Pakistan's criminal justice system and legal framework. Notwithstanding the passage of the amendment in 2006, however, the new terminology is broad enough to cover instances in marital rape, but only does so to the extent of an omission. That is, the crafting of Section 375 of the PPC still fails to expressly and explicitly criminalize the offence of marital rape, and simply recognizes it, through a deletion in the amendment, thereby encompassing it among many other definitions of rape.

Consequently, the law on marital rape remains unclear despite the 2006 amendment to Section 375 of the PPC. To add, till date, there have been no such reported judgements of the High Courts or Supreme Court of Pakistan that might have been litigated, or give judicial input on a much needed area of the law that requires interpretation and clarification. Perhaps this also points towards

⁴⁶ Ibid

⁴⁷ Ibid.

and reflects how little the offence is currently being reported before local law enforcement authorities.

For instance, in 2018 local news reported a woman in Multan making an accusation of marital rape against her husband.⁴⁸ Despite her criminal complaint, however, her case was registered by the police under Section 377 of the PPC,⁴⁹ which deals with crimes of a carnal nature and carries a maximum 10-year sentence. Yet, the police did not seek to charge the perpetrator with an offence under Section 375 of the PPC, which carried a maximum sentence of 25 years or even the death penalty. In similar terms, another instance of marital rape had been reported and registered by a woman against her husband. Yet, despite these facts, the Rawalpindi police, on the complaint of the wife, charged the perpetrator with the more lenient version of the offence under Section 377 of the PPC, and not Section 375 of the PPC.

In Pakistan, much of marital rape's weight as an offence tends to be taken away through the overwhelming force of societal norms and the 'sanctity' of the marital institution. Perhaps Zohra Yusuf, ex-chairperson of the Human Rights Commission of Pakistan

⁴⁸ 'Woman Files Case of "Marital Rape" against Husband' *The News International* (16 September 2018) <<https://www.thenews.com.pk/print/369113-woman-files-case-of-marital-rape-against-husband>> accessed 7 July 2023.

⁴⁹ Section 377, Pakistan Penal Code 1860: Unnatural offences—

'Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to fine.'

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.'

(HRCP) glaringly captures this dilemma. Yusuf opines that the reason for under-reporting finds reason in the fact that the society-at-large does not perceive the offence of marital rape as a crime—including, rather strikingly, the victims themselves too. It is likely for this reason that reported cases of marital rape tend to be in such negligible and significantly small numbers.

Much of this behavior is enabled and finds validity in the societal indoctrination of women to misplaced religious norms and their resultant underlying beliefs that men, as their husbands, have an inalienable right to demand sexual intercourse, and that women may not ever deny them.⁵⁰ Maliha Zia and Sarah Zaman unpack this by arguing that instances of marital rape

Maliha Zia and Sarah Zaman argue that marital rape cases are not reported due to “*the ambiguity of the law and socio-cultural lack of acceptance of marital rape as an offence.*”⁵¹ These socio-cultural reasons include misinterpretations of Islamic text and sources. The enmeshment of misinterpreted Islamist principles coupled with societal pressures create significant psychological deterrents to any woman thinking of legally pursuing prosecution for the criminal offence of marital rape. In fact, is often the case that women that experience and suffer marital rape will largely refrain from reporting their husbands given that they feel ashamed

⁵⁰ AM Comploi, ‘Marital Rape in Pakistan – Global Human Rights Defence’ <<https://ghrd.org/marital-rape-in-pakistan/>> accessed 7 July 2023.

⁵¹ S Zaman and M Zia, ‘Women’s Access to Justice in Pakistan’ *Aurat Foundation* <https://www.ohchr.org/sites/default/files/documents/HRBodies/CEDAW/AccessstoJustice/AuratFoundationAndWarAgainstRape_Pakistan.pdf> accessed 7 July 2023.

and know well that no individual will be held responsible. If anything, this intermingling of religion and the institution of marriage frequently tends to act as a buffer against women opting for legal proceedings against her husband.⁵²

Not only this, instances of marital rape are further exacerbated when, despite being reported, are subject to local law enforcement's ignorance or insensitivity in handling, dealing with and responding to reports of domestic violence. Tragically, these societal and unfounded religious pressures not only regulate the acts of women in suffering, but they frequently dictate the course that law enforcement officials tend to opt for—consider it is often the case that instances of both domestic abuse and marital rape are frequently ignored and overlooked by law enforcement, given they belong to the ‘privacy’ of the marital home, and are ultimately viewed as “family matters” that do not find mention or should be scrutinized publicly or institutionally.⁵³ Therefore, even in instances where marital rape is reported, a female victim has little to hope for. It is often the case that marital rape does not translate into a criminal trial and is typically brushed off and played down as a justification for separating from one’s spouse.⁵⁴

Perhaps this ties into how the sexual identities of women are frequently seen as essential and a component to the honor of their families in patriarchal societies, which typically tends to vest in

⁵² K Shairani, ‘Why Pakistani Feminists Won’t Talk about Marital Rape’ *DW News* (12 April 2022) <<https://www.dw.com/en/why-pakistani-feminists-are-reluctant-to-talk-about-marital-rape/a-61449046>> accessed 7 July 2023.

⁵³ AM Comptoi, note 50.

⁵⁴ *Ibid.*

the men of the families.⁵⁵ As Silvie Bovarnick points out, it is often the case that the honour of a man in scenarios like these vests in the body of a woman.⁵⁶ Framed in these terms, whenever a woman is a victim of a rape-crime, her victimization is transferred back to the man who is robbed of his commodity—‘honor’.⁵⁷ This, therefore, is an equation where the woman never remains in complete control of her sexual agency, which she may exercise with autonomy. Contrarily, the woman now acts and serves the role of a proxy for the honor of her husband. This, therefore, explains why marital rape has culminated into a common practice within societies. Discrepancies in the offense of rape only attract when a woman is raped by a man, and not when a wife is raped by a husband are too glaring to ignore—especially when the only difference between the two situations is the existence of a marital relationship.

The Way Forward

As things currently stand in Pakistan, the current definition of rape in Pakistani law does technically cover marital rape.⁵⁸ It, however,

⁵⁵ S Bovarnick, ‘Universal Human Rights and Non-Western Normative Systems: A Comparative Analysis of Violence against Women in Mexico and Pakistan’ (2007) 33 *Review of International Studies* 59.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Section 375, Pakistan Penal Code 1860: Rape—

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

(i) against her will.

(ii) without her consent

(iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt,

clashes with fundamental tenets of Islamist principles that have been drawn and concluded through misinterpretations of Islamic texts and customary codes.⁵⁹ Moreover, marital rape must also combat societal pressures that, when enmeshed with religion, bear heavily upon women that are otherwise seeking the confidence to make a firm decision. To add, this is also an area of the law where there seems to be a categorical and widespread reluctance from domestic Islamic quarters and organizations to actively address issues and barriers.

Granted, the 2006 amendment to the PPC might go a long way in bringing the offence under legal coverage. Yet, much more must be done. For starters, there needs to be an express prohibition on the offence of marital rape. Sneakily relying on deletions and omissions in 2006 may have been part of political calculus, however, the notional value of express criminalization will go a long way to inculcate societal and institutional thinking. For instance, law enforcement officers would have less manoeuvrability in trying to wiggle out or evade pressing charges of marital rape, where they attempt to avoid to. Yet, simply

(iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or

(v) With or without her consent when she is under sixteen years of age.

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

⁵⁹ Article 227, Constitution of Pakistan 1973: Provisions relating to the Holy Quran and Sunnah—

“(1) All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.”

amending legislative instruments will do little. This is because cosmetic changes to the legislative framework in isolation will not work. To bolster and couple this express criminalization, it is important to incorporate gender sensitization training within local law enforcement and ensure a growing and steady presence of female personnel in order to serve as rape crime officers.

Even otherwise, an express criminalization of marital rape will go a long way. This is because it will inevitably pave the way towards the gradual development of jurisprudence on a subject and area of the law that has not yet let the offence of marital rape establish itself within the Pakistani legal framework. As a result, a consistent line of interpretation and jurisprudence on marital rape is the need of the hour. One that reinforces notions of gender-egalitarianism and human rights on a more general level. This is because any conception of marital rape is more likely to succeed in the conceptualization of a human rights framework in lieu of seeking to redefine and dispel ages-old misimpression of Islamist theory on the offence of marital rape.

As a result, one might argue that victims of marital rape need not, in isolation, rely on dispelling traditional Islamic thought. To the contrary, reliance and enforcing human rights standards in order to protect survivors of marital rape appears to be a more rational and workable solution. This is because the legal system's foundation in human rights does afford women a platform from which they are able to, at the very least, assert the legal rights that are vested in them through operation of the law and the constitution. The emphasis should therefore be on incorporating the human rights framework into the current legal system so that the law is better able to address discrepancies between how Islamic texts are interpreted and how Pakistani law is applied.

One final comment here is that the current conceptualization of marital rape in the PPC only envisages a scenario where the male is the perpetrator and the female is the victim. While this may be the case more than often, it is a necessity that any discrimination by state laws be based on rationale and intelligible criteria in terms of the jurisprudence developed by Article 25 of the Constitution. The only answer to this, therefore, is that the definition of rape must be determined in gender-neutral terms, in the absence of imaging which subject is the perpetrator, and which is the victim.

Conclusion

At this juncture, it might seem important to state, in terms of the court in *R v R*, where even if the “*common law rule no longer even remotely represents what is the true position of a wife in present day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant Parliamentary enactment.*”

As a result, the law ultimately looks towards the acts of an individual rather than treating an individual to respect the authoring rights of the book. As a result, express penalization will remain a constant reminder under a penal framework for all offenders and perpetrators. As it stands, sexual violence against women is on the rise, and must, therefore, be catered to and addressed given its impacts on Pakistani women in political, economic and social spheres of society. This absence of perpetrators being held responsible, as a result, fails to timely hold perpetrators or offenders accountable. Consequently, this has significantly contributed in keeping the offence and its impacts invisible. As a consequence, several women that may have been

raped in the background of an existing marriage may now find themselves to be extremely uncomfortable in characterizing this behaviour as rape or 'forced sex'. This is significantly problematic from the perspective of crime enforcement.

Finally, the inevitable resistance to legal reform on marital rape may find attribution to the fact that any form of reform would also threaten the pre-existing positions of men who form part of the status quo, which places men at a higher pedestal where they are in dominating positions of power and control within the family. Yet, notwithstanding this, it is arguable that legal reform will ultimately push towards more gender-sensitivity policies and programmes, which will inevitably represent another necessary and critical step towards reducing the onset of marital rape in Pakistan.

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Divorce v. Dignity: Walking a Fine Line as a Pakistani Woman

Maham Kashif¹ and Aimen Zahra Mir²

Abstract

This article sheds light upon the nature of women's legal status through the prism of divorce. It highlights how, despite its advancements, Pakistan's current legal regime prevents women from obtaining speedy justice. The issue is explored under four core themes in this article: the manner and form of the dissolution of marriage, the application of the relevant rights of women within different forms of dissolution, the socioeconomic and psychological factors underlying women-initiated divorce and reforming the Pakistani legal system.

Introduction

The institution of marriage in Pakistan, like many other societies, is viewed as a sacred bond between a man and a woman. This

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bond is officialized and often immortalized upon the signing of the *Nikahnama*, i.e., the state-sanctioned document that records the contents of a *nikah*, tying the parties together in a legal contract. The blurred line between religion and culture creates difficulties in women obtaining their right to delegated divorce - the societal stigma and cultural bias attached to the delegated right to divorce often overshadow the importance of this right which is protected by religion through the *Nikahnama*.

While existing literature reveals that both men and women in Pakistan consider discussing divorce or questioning rights related to the same in the *Nikahnama* as taboo. Some groups of women and men also hold varied views on the delegation of the right to divorce to women in the *Nikahnama*. For instance, women believe that if they are delegated the right to divorce in the *Nikahnama*, it will increase trust in their relationship.³ Whereas men believe giving women this right would break up the family system and lead to the "destruction of the entire social system."⁴ This belief is premised on a misguided notion that women are more emotionally volatile than men and hence should not have a direct right to divorce.⁵

³ Aneela Maqsood and others, 'An Exploratory Study of Perceptions about the Delegated Right of Divorce for Women (Talaq-i-Tafwid) in Pakistan.' (2018) 12(1) FWU Journal of Social Sciences <http://sbbwu.edu.pk/journal/FWU_journal_Summer_2018_Part_1_Vol_12_No_1/21.%20An%20Exploratory%20Study%20of%20Perceptions%20about%20the%20Delegated.pdf> accessed 7 July 2023.

⁴ Ibid.

⁵ Javaid M, 'Why Women in Pakistan Struggle to Get 'Divorced with Dignity' (Al Jazeera Article, March 2019) <<https://www.aljazeera.com/features/2019/3/7/why-women-in-pakistan-struggle-to-get-divorced-with-dignity>>

Considering the aforementioned prevailing attitudes, when women exercise their right to dissolve a marriage through the delegated right to divorce or their *right to khula*, many believe such an attempt as an attack upon Islamic values and principles, rather than a termination of a contract between two parties. This attitude of viewing divorce as an attack upon Islamic values and principles is also reflected within Pakistani case law and its procedural rules. Therefore, women in the process of obtaining a decree for marital dissolution must fight multiple battles in the form of societal pressures, financial constraints, judicial biases, and legal and procedural hurdles within the justice system.

This article explores the Pakistani legal system and how existing legal barriers prevent women from exercising their right to dissolve a marriage. This article is divided into three key sections. First, the article sets forth the manner and form of the dissolution of marriage, as well as the rights each form (if any) gives women. Second, the article examines how the above mentioned rights are applied within the Pakistani legal system. Third, the socioeconomic and psychological impact of dissolution is highlighted. Based on an analysis of the above, this article concludes with reforms that reflect the will of the law and uphold the rights of Muslim Pakistani women within and beyond the judiciary.

The Various Forms of Divorce Under Pakistani Law

The various forms of marital dissolution are specified within the Muslim Family Law Ordinance of 1961 ("MFLO"). While the MFLO spells out the various forms of divorce available within Pakistan, the substance of each is often defined by classical Islamic jurisprudence. Classical Islamic jurisprudence is based

upon the principles of interpretation formulated centuries ago, known as the *usul al-fiqh* or the principles of jurisprudence, which proposes a method for how to conduct an appropriate understanding of Islam's sacred sources, the Qur'an and the Hadith compilations as well as the methodologies of *qiyas* (analogical reasoning) and *ijma* (consensus).

A. *Talaq*

While Section 7 of the MFLO spells out the requirements for a husband's unilateral divorce, known as *talaq*, the substance of this process is best understood in classical terms. *Talaq*, commonly translated as "repudiation," specifically refers to a husband's unilateral right to dissolve a marriage by simply announcing to his wife that he repudiates her without assigning a cause.⁶ Upon his pronouncement, the waiting period (*iddat*) commences and consists of three completed menstrual cycles. *Talaq* may be conducted through a single pronouncement while a wife is in a state of ritual purity (or not menstruating). If he does not resume conjugal relations during the waiting period, they are divorced at the end of the third purity (or point of purity after her third menses is accomplished). A husband may also make three separate pronouncements, each made during the wife's state of ritual purity and no intercourse during such time, with divorce culminating at the end of the third purity. If a wife is pregnant upon the *talaq* pronouncement, the waiting period is extended until the pregnancy is accomplished.

⁶ *Talaq* is the most common method of dissolving a marriage contract under classic Islamic law.

Section 7 aimed to avoid uncertainty in light of traditionally accepted oral pronouncements but did not depart from the classical approach by imposing additional legal or procedural steps. Specifically, Section 7 specifies a husband must give the Chairman of the Union Council written notice after his initial *talaq* pronouncement with a copy of the same provided to his wife.⁷ If a husband fails to send a notice to the Union Council, he shall be punishable with a simple imprisonment for up to one year or with a fine of Rs. 5,000, or both.⁸

Subsequently, the Chairman forms an Arbitration Council, a body consisting of the Chairman and a representative of each of the parties to take all necessary steps for reconciliation within 30 days. In cases where there can be no reconciliation, *talaq* must be finalized within a period of 90 days from the day on which the notice is delivered to the Chairperson.⁹

Under Section 8 of the MFLO, three other forms of divorce are also available: (1) *talaq-e-tafweez* (a wife's exercise of a delegated right of divorce), (2) *khula* (a wife's compensated divorce), and (3) *mubarat* (mutually agreed-upon divorce).¹⁰

B. *Talaq-e-Tafweez*

Talaq-e-tafweez, or delegated divorce, involves a husband's delegation to his wife the right to pronounce *talaq* on his behalf. In contrast to *talaq*, where a husband has the unilateral right to terminate a marriage at his will, classical Islamic

⁷ Section 7, Muslim Family Law Ordinance of 1961.

⁸ Section 7(2), MFLO 1961.

⁹ Section 7(3), MFLO 1961.

¹⁰ Section 8, Muslim Family Law Ordinance of 1961.

jurisprudence also grants the wife the right to divorce in the form of *talaq-e-tafweez* if the right is delegated to her and agreed to within the marriage contract. Delegated divorce is based on an incident in the Qur'an wherein the Prophet (peace be upon him) told his wives that they were at liberty to live with him or to get separated from him as they chose.¹¹ Relying upon this injunction, the Prophet empowered his wives to choose either him or separation, and classical Islamic law inferred from this tradition that a husband may lawfully delegate to his wife the power to dissolve the marriage if she so desires.¹² *Talaq-e-tafweez* also addresses the issue where a husband is reluctant to divorce his wife (using *talaq*) for various reasons but prefers to leave it to the wife to decide on her own whether to continue the marriage or to end it, even though his delegation does not deprive him of his right to *talaq*. This delegation may be explicitly noted in Column 18 of the *Nikahnama*. Finally, according to Pakistani case law, it cannot be revoked once *talaq-e-tafweez* has been delegated.¹³

¹¹ See Qur'an, 33:28-29.

¹² Moreover, the Companions of the Prophet also unanimously agreed upon the validity of delegating the right to divorce to the wife (al-Mawsili, *al-Ikhtiyar li ta'lil al-Mukhtar*, 2/166 and Zaylai'i, *Nab al-Raya*, 3/229). See also *Khawar Iqbal v. Federation of Pakistan* 2013 MLD 1711, holding a delegated divorce is valid under Islamic law and enabled women to keep a check on men who were cruel to them or neglectful of their marriage and maintenance responsibilities. Similarly, if a husband went missing, and his whereabouts were entirely unknown, the delegated right to divorce would be very beneficial to a woman as it would remove any ambiguity of her marital status, thus allowing her to move forward in her personal life instead of remaining stuck in a place like stagnant water.

¹³ See, e.g., *Khawaja Muhammad Shoaib v. Nazim Union Council and Others*, 2010 YLR 1; *Qambar Murtaza Bokhari v. Zainab Bashir*, 1995 PLD 187 Lahore High Court.

According to Section 8, should a wife exercise the right to divorce delegated to her, the requirements of Section 7 apply fundamentally as if the husband had exercised *talaq*. At the same time, there is no formal method for exercising a wife's rights. Written notice of its exercise must be submitted to the Union Council's Chairman. And like its husbandly counterpart, once pronounced, it would become effective 90 days after written notice was submitted, barring any revocation.

C. *Khula*

Khula, or "extracting oneself," is a means of divorce wherein a wife, in offering compensation, is released from her marital tie without showing cause or conceding other financial obligations to her husband.¹⁴ Qur'an 2:229 serves as the religious and legal basis for *khula*:

Divorce may be pronounced twice. Then they [women] are to be retained in a rightful manner or released with kindness. And it is unlawful for you. [men] to take back anything of what you have given them unless both parties fear that they cannot comply with Allah's bounds. If you fear they cannot do that, it is no offence if the woman ransoms herself. Those are the bounds set by Allah. Do not transgress them. Those who

¹⁴ Sajal Rasool, 'Khula: A Woman's Absolute Right To Divorce And A Remarkable Development Within The Islamic Legal System' (2021) 5(1) PCLSJL <<https://leappakistan.com/wp-content/uploads/2021/05/KHULA-A-WOMANS-ABSOLUTE-RIGHT-TO-DIVORCE-AND-A-REMARKABLE-DEVELOPMENT-WITHIN-THE-ISLAMIC-LEGAL-SYSTEM-1.pdf>>

violate the bounds set by Allah are the wrongdoers.

Khula also finds its basis in the following verse in the Qur'an 4:128:

And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them—and settlement is best. And present in [human] souls is stinginess. But if you do good and fear Allah, then Allah is ever Acquainted with what you do.

According to Maliki scholars, jurists must also refer to Qur'an 4:35:

If you fear a breach between the two, appoint an arbitrator from his people and an arbitrator from her people. If they both want to set things right, Allah will reconcile them. Allah knows all and is aware of everything.

The Qur'an's reference to an arbitrator allows a third party (or a government) to resolve a matter instead of the parties themselves—a particularly salient issue when considering who may resolve a marital dissolution. A wife may initiate this kind of divorce, and is not usually revocable within the *iddat* period prescribed for women before remarriage is allowed.

According to Section 8 of the MFLO, initiation of *khula* begins with a sworn petition to a Family Court in which she asserts that she cannot live with her husband “within the limits prescribed by Allah.” In the landmark decision *Balqis Fatima v. Najm-ul-Ikram*

Qureshi, the Lahore High Court decided a husband's consent was not required for a woman seeking a *khula* divorce.¹⁵ The High Court, however, conceded a wife must give up some or all financial consideration given at the time of the marriage, including dower (*haq mehar*) and maintenance, in exchange for a *khula* divorce.¹⁶ In another decision, another court held that if a wife lacks the means to repay the dower and if doing so would lead her to live an immoral life, she would not be obligated to repay.¹⁷

D. *Mubarat*

Mubarat, which means "obtaining release from one another," is a recognized form of divorce under Islamic law, where both the husband and wife obtain a release and freedom from their married state with mutual consent and desire. An offer for separation in *mubarat* may proceed *either* from the wife or from the husband, and as soon as it is accepted, dissolution is complete. It takes effect as an irrevocable divorce without the aid of a court. This dissolution may be conditional or unconditional, and the wife may or may not be required to give up her dower.

According to Section 8 of the MFLO, both husband and wife may send a written notice and sign a Mutual Divorce Deed to the Union Council.¹⁸ The Union Council is duty-bound to follow the procedure regarding the notice before issuing the dissolution of the marriage certificate. In cases of *mubarat*, like the delegated right of divorce and *talaq*, there is no need to appear before a court

¹⁵ *Balquis Fatima v Najm-ul-Ikram Qureshi*, PLD 1959 Lahore 566.

¹⁶ *Ibid.*

¹⁷ *Dr. Fakhr-ud-din v. Kausar Takreem and another*, PLD 2009 Peshawar 92.

¹⁸ Section 8, Muslim Family Law Ordinance of 1961.

to dissolve the marriage; both the husband and wife may sign a Mutual Divorce Deed along with a written notice and send it to the Union Council.

Women's Rights Under Pakistan's Marriage Laws

Before having set legal avenues that allowed Muslim women to dissolve their marriages during colonization, they often converted to Christianity to divorce their husbands or dissolve their marriages.¹⁹ The Dissolution of Muslim Marriage Act of 1939 ("DMMA") was enacted to respond to challenges arising out of the above mentioned issue and allowed women a certain degree of marital freedom to obtain dissolution from a court.²⁰ Despite the DMMA's enactment, problems persisted. For example, while impotence could serve as grounds for dissolution, the DMMA allowed a husband one year to prove his virility.²¹ And while abandonment could serve as grounds for dissolution, a husband's whereabouts must be proven to be unknown for four years.

Despite its many problems, the DMMA aided women in seeking marital dissolution.²² For example, the DMMA sets forth cruelty as grounds for dissolution and includes situations where a husband

¹⁹ Karin Carmit Yefet, *The Constitution and Female Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb* (2011) 34 (2) Harvard Journal of Law & Gender 553.

²⁰ Dissolution of Muslim Marriage Act, 1939, Section 2 (Grounds include if the husband is missing; if the husband is not providing maintenance; if the husband is sentenced to imprisonment; if the husband fails to perform marital obligation; if the husband remains impotent for one year, or having other physical defects, if the husband treats the wife with cruelty).

²¹ Ibid.

²² Dissolution of Muslim Marriages Act of 1939, Section 2(viii).

habitually assaults the wife, makes her life miserable, attempts to force her to lead an immoral life.²³ And while the burden of proof in such cases belongs with the wife, courts have routinely held that cruelty is not confined to physical violence; but can include mental abuse and abuse through an individual's conduct.²⁴

Besides the DMMA, the MFLO provided women with additional rights. During the 1950s, Pakistani women were increasingly educated, entered the workforce, and demanded more rights.²⁵ Women's groups like All Pakistan Women's Association and United Front for Women's Rights campaigned to pass a new ordinance that would put women on an equal footing with men, and the MFLO resulted.²⁶ For example, the MFLO's requirement that marriages and polygamous marriages be registered resulted in debates between modernists and traditionalists,²⁷ The MFLO was an attempt to set a middle ground between the two - the latter saw the state-based requirement as a religious innovation. In contrast, the former saw registration as a way to avoid the common claim to be married to the same woman and conviction under Section 498 of the Pakistan Penal Code.²⁸

While MFLO helped elevate women to an equal footing, as shall be seen in the subsequent section, the judiciary's various

²³ Ibid.

²⁴ *Muhammad Yasir Nazeer v. Lubna Kosar*, 2022 CLC 372.

²⁵ Nadya Haider, *Islamic Legal Reform: The Case of Pakistan and Family Law*, 12 Yale Journal of Law and Feminism 287 (2000).

²⁶ Ibid, 308.

²⁷ Ibid.

²⁸ Ibid, 309 and 310.

interpretations of the 1961 statute caused significant consternation.²⁹

Implementation of Women's Rights Under Pakistan's Marriage Laws

As mentioned, the DMMA sets out various grounds for obtaining a decree for dissolution without the husband's consent; however, interpreting key phrases such as "incompatibility" or "within the prescribed limits by Allah" created novel challenges for courts to consider. Regarding the standard set by courts regarding the grounds for dissolution, there are various cases where a liberal interpretation of the law is provided, one favouring a woman. The "hate standard" set through various judgments allows women to dissolve the union in cases where they can no longer live with their husbands.

In the landmark case of *Saleem Ahmed v. Government of Pakistan*,³⁰ the petitioner challenged Section 10(4) of the Family Courts Act of 1964, which allowed women to obtain a decree for marital dissolution without the need to prove hardship through the husband's fault as contrary to Islam's teachings.³¹ The Federal Shariat Court, however, upheld the statute's validity. Specifically, the Court held that under the auspices of Islam, a wife could not be forced to live miserably, holding, "If she is unhappy, and

²⁹ Maham Javaid, 'Why Women in Pakistan Struggle to Get 'Divorced with Dignity' *Al Jazeera* (7 March 2019) <<https://www.aljazeera.com/features/2019/3/7/why-women-in-pakistan-struggle-to-get-divorced-with-dignity>> accessed 7 July 2023.

³⁰ *Saleem Ahmed v. Government of Pakistan*, PLD 2014 FSC 43.

³¹ Previously, the DMMA required recording evidence of hardship through the husband's fault to seek a decree for dissolution.

reconciliation fails, she should be entitled to get relief whatsoever."³² The Court's decision emphasised the importance of granting women freedom from a marital bond that leaves them unhappy or miserable. It also established that the judiciary's responsible for upholding these freedoms and following the principles enshrined in the Qur'an and the Prophetic Sunnah.

In *Mir Qalam Khan v. Shamim Bibi*, where a husband's impotence after nine years of marriage was cited as grounds for marital dissolution, the presiding Court agreed to dissolve the marriage.³³ In particular, the Court held it was a man's duty to satisfy his wife sexually, and that included her ability to have children and the act of sex as well.³⁴ The Court further explained that physical shortcomings are bound to create a strained relationship between the spouses and pointed out that in the inverse situation, a Muslim man would be allowed to take on another wife should she be unable to procreate; therefore, a Muslim woman should be given the same right should he prove impotent.³⁵

Another interpretation of the law favouring women's rights can be seen in *Mumtaz Bibi v. Muhammad Ilyas*, where the Karachi High Court reversed a lower Family Court's decision denying *khula* because the petitioner had not established evidence of maltreatment.³⁶ Instead, the Court held that any aversion toward the husband fulfils the *khula* requirement of a wife being unable to live within the "limits prescribed by nature."³⁷ These judgments

³² Ibid, para 18.

³³ *Mir Qalam Khan v. Shamim Bibi*, 1995 CLC 731.

³⁴ Ibid.

³⁵ Ibid.

³⁶ *Mumtaz Bibi v. Muhammad Ilyas*, 1987 CLC 2323.

³⁷ Ibid.

expand the scope of the grounds taken by women to file for *khula*. However, the problem lies in the Family Courts' narrow interpretation of the law, where most cases are filed, heard, and decided.

A. *Family Court Obstinance*

While decisions like *Mumtaz Bibi* and *Shamim Bibi* clarified the requisite standard of proof women are required to obtain a marital dissolution, not to mention the statutory dictates of both the MFLO and FCA, which were aimed at expediting matters, many barriers preventing women from an easy exit from marriage can be found at the Family Court level.³⁸ Specifically, despite amendments to the law instructing Family Courts to dispose of cases within six months,³⁹ Family Court dockets remain backlogged and delayed.⁴⁰ Moreover, evidence suggests that even in cases where spousal reconciliation has failed, Family Courts simply remain reluctant to dissolve marriages.⁴¹ One example of such Family Court obstinance can be found in *Mst. Ghulam Zohra v. Faiz Rasool*, wherein a wife filed for marital dissolution on various grounds, including that she could not live with her husband within the limits prescribed by God.⁴² Both the Family Court and the District Court denied her petition.⁴³ The

³⁸ Ibid.

³⁹ Section 12A, Family Courts Act of 1964.

⁴⁰ Muhammad Munir, *Fast-Track Procedure and Slow-Track Results: Time Frame of Family Law Case Disposal in Pakistan*, (2021) 8 (1) LUMS Law Journal <<https://sahsol.lums.edu.pk/law-journal/fast-track-procedure-and-slow-track-results-time-frame-family-law-case-disposals>> accessed 7 July 2023.

⁴¹ *Dr. Fakhr-ud-din v Kausar Takreemn*, PLD 2009 Peshawar 92.

⁴² *Mst. Ghulam Zohra v. Faiz Rasool*, 1988 MLD 1353.

⁴³ Ibid, para. 1

High Court reversed, holding that the lower courts failed to take account of the wife's aversion toward her husband, not to mention the two years of prolonged litigation.⁴⁴ As stated by the judge in this case, "[t]he bitterness of litigation could have hardly softened the petitioner's (the wife) feelings towards her husband."⁴⁵

In another decision, *Razia Khatoon v. Muhammad Yousaf*, relations broke down after four years of marriage.⁴⁶ Marital relations were so poor that the wife was beaten and thrown out of the house, and the husband insisted on her living an immoral life. Regardless, the Additional District Judge refused to classify these facts as either cruelty or as facts sufficient to support a *khula* dissolution. Eventually, on appeal, the Lahore High Court reversed and remanded the case back to the District Court for a re-hearing.⁴⁷

Finally, in *Naseem Akhtar v. Muhammad Rafique*, a lower court judge refused to issue a marital dissolution to the wife on the grounds that "the entire family would be ruined."⁴⁸ The lower court reached its conclusion despite the wife's assertions that she would rather die than live with her husband and ignored her hatred toward her husband.⁴⁹ The court's sentiment reflected the perception that women should be mere vehicles for carrying family life. The Supreme Court held that lower courts could not overlook a wife's hatred in such circumstances, even as it

⁴⁴ Ibid, para 4.

⁴⁵ Ibid, para 3.

⁴⁶ *Mst. Razia Khatoon v. Muhammad Yousaf*, 1987 MLD 2486

⁴⁷ Ibid, para 2.

⁴⁸ *Naseem Akhtar v. Muhammad Rafique and others*, PLD 2005 Supreme Court 293.

⁴⁹ Ibid, para 3.

recognised the "positive attitude" of the lower courts to save the family from the crises.⁵⁰ Therefore, it is imperative to acknowledge the role of judicial attitudes toward family life and divorce as a more significant problem that has caused complications for women who seek a dissolution.

B. *Union Councils Intransigence*

The procedure followed for the delegated right of divorce or mutual divorce also creates difficulties for women. Certain legal proceedings have highlighted gaps in the procedure of seeking dissolution through the Union Council, leading to the courts resolving such matters. In *Muhammad Afzal Khan v. Chairman Arbitration Council*, the wife exercised her delegated right of divorce. She issued three notices to the Chairman of the Union Council.⁵¹ As per the law, the Chairman should have issued a notice of *talaq* after 90 days but was unwilling even after a year. The record indicated that neither the husband nor his representative(s) appeared despite being issued notices, and the Chairman had granted adjournments to him. The judge in this case then shed light upon the essence of the law governing divorce as:

Even otherwise, it is not the mandate of law to wait for (the) other person to join reconciliation proceedings even after the expiry of 90 days. The very mandate of the law is to provide a mechanism under which the parties have to go through the opportunity of reconciliation to settle their differences by way of arbitration mechanisms;

⁵⁰ Ibid, para 6.

⁵¹ *Muhammad Afzal Khan v. Chairman Arbitration Council*, 2018 CLC 1125.

however, when such efforts fail, despite elapsing of three months, the law presumes that reconciliation is not possible and there is irretrievable breakdown....⁵²

Institutions such as the Union Councils and Family Courts pride themselves as the protectors of family life but fail to consider the implications of their actions on women who rely upon them for quick justice. There have been several other cases where the Chairmen of the Arbitration Council have overlooked procedural and legal formalities to "protect" family life. In *Shamshad Mai v. Chairman Arbitration Council*, the marriage was dissolved through mutual divorce, and a notice was issued to the Arbitration Council.⁵³ Later, the Council sent a message stating that the husband had withdrawn the notice. The court then said that in cases of mutual divorce, one party could not remove the notice unilaterally, and the Chairman of the Arbitration Council had no authority to adjudicate upon this matter.⁵⁴

C. Intimidation through Restitution of Conjugal Rights ("RCR") Suits

Restitution of Conjugal Rights (RCR) is a legal remedy for both spouses, to be invoked if one spouse does not perform his/her role towards the marriage. While the remedy is available to both spouses, RCR is discriminately used by men against their 'disobedient' wives as a means of intimidation and harassment.⁵⁵

⁵² Ibid.

⁵³ *Shamshad Mai v. Chairman Arbitration Council and two others*, 2000 MLD 173.

⁵⁴ Ibid.

⁵⁵ Naima Qamar, Maliha. Zia, Tara. Khan, 'De-Constructing Conjugal Rights in Pakistani Law' (Legal Aid Society Publication 2019)

In Pakistan, the RCR is routinely used by the husband in response to his spouse filing a suit for *khula* or maintenance. In addition to this, the misuse of RCR by men is seen as a pressure tactic to deter women from leaving the marriage. This is evidenced by the fact that RCR is typically filed in response to a suit for *khula* or maintenance. A RCR suit also involves public character assassination of the wife during the proceedings, shaming the wife during the proceedings and claiming disloyalty of the wife in the marriage during the proceedings, which is used to harass and intimidate women into taking back a *khula* or maintenance suit.⁵⁶

It is pertinent to note that the RCR, like many other laws in Pakistan, is a remnant of the British colonisation of the sub-continent which continues to hamper women's rights, even in the 21st century.⁵⁷ The RCR was implanted within British colonies, like Pakistan, as a result of the predominantly Catholic interpretation of marriage in Britain, which relied on the belief that marriage is a sacred and eternal bond that cannot be dissolved through divorce.⁵⁸ The continued existence of RCR in Pakistan today can be attributed to the similar interpretation and understanding of marriage in Islam i.e. as a sacred union which places rights and responsibilities of obedience on the spouses and maintenance of the relationship. While RCR remains intact in the Pakistani legal system, there have been efforts by the legislature and courts to intervene and amend the laws pertaining to RCR to

⁵⁶ Ibid.

⁵⁷ Shahbaz Ahmad Cheema, 'Indigenization of Restitution of Conjugal Rights in Pakistan: A Plea for its Abolition' (2018) 5 (1) LUMS Law Journal <<https://sahsol.lums.edu.pk/law-journal/indigenization-restitution-conjugal-rights-pakistan-plea-its-abolition>> accessed 7 July 2023.

⁵⁸ Ibid.

ensure it does not disadvantage women seeking to enforce other marriage rights.⁵⁹

For instance, select amendments⁶⁰ to the FCA in 2022 have removed the ability of a husband to file an independent suit for RCR in response to a dissolution or maintenance case. Instead, the spouse has the right to claim RCR in the form of written statements, in response to the dissolution or maintenance case. This restriction on filing an independent suit for RCR aims to help reduce frivolous filing of RCR cases which increases both the general case load for the courts and adds delays to the ongoing Khula proceedings. One example of the misuse of the RCR can be seen in the case of *Abdul Hannan v Mst. Maqsood Illahi*, where a Family Court granted the ex-husband conjugal rights after he had divorced his wife and she had entered another marriage.⁶¹ The ex-husband alleged that his wife had forged the divorce deed and did not possess the legal right to live away from him. The Appellate Court overturned this decision of the Family Court. It stated that the wife is now “leading a second married life, which cannot be interrupted through a decree for restitution of conjugal rights...”⁶²

⁵⁹ Naima Qamar, Maliha. Zia, Tara. Khan, 'De-Constructing Conjugal Rights in Pakistani Law' (Legal Aid Society Publication 2019) and Shahbaz Ahmad Cheema, 'Indigenization of Restitution of Conjugal Rights in Pakistan: A Plea for its Abolition' (2018) 5 (1) LUMS Law Journal <<https://sahsol.lums.edu.pk/law-journal/indigenization-restitution-conjugal-rights-pakistan-plea-its-abolition>> accessed 7 July 2023.

⁶⁰ Section 9 (1a) and (1b) inserted by the Family Courts (Amendment) Ordinance 2022.

⁶¹ *Abdul Hannan v. Mst Maqsood Illahi*, 2006 YLR (Lahore) 912.

⁶² *Ibid.*

Moreover, the amendment to the FCA limiting the husband's ability to file an independent RCR suit in response to his wife's *khula* or maintenance suit also protects women from unfair attempts to prolong the marriage through filing an appeal for the RCR and hence limiting the implementation of a connected *khula* decree. Section 14 of the FCA lays down the procedure and options for appeals for different marriage rights related cases, including *khula*. It is essential to note that, section 14 does not allow an appeal against *khula*, once granted by the court. However, prior to the FCA Amendment, the husband's RCR suit was often used to unnecessarily delay the implementation of a *Khula* decree. For instance, in the case of *Mst. Moondan v Judge, Family Court*, the petitioner had been married to her husband for 24/25 years, and due to the strained nature of their relationship, she filed a suit for dissolution of marriage.⁶³ The husband never contested the case, and an *ex-parte* decree was passed to favour the wife. However, after the *iddat* period was completed and the petitioner married another person, the husband brought an application to set aside the *ex-parte* decree. When the trial judge dismissed his application, the husband filed an appeal where the Additional District Judge set aside the *ex-parte* order and remanded the case back to the trial court for a new decision. The husband filed an RCR suit as well, and after multiple lawsuits were filed, the petitioner filed a writ petition with the Lahore High Court. Ultimately, the Lahore High Court held that the *ex-parte* decree constituted a final dissolution in-line with the parameters of Section 14 of the FCA⁶⁴ and therefore, after five years of

⁶³ *Mst. Moondan v. Judge, Family Court*, 1989 MLD 339.

⁶⁴ Section 14 of the FCA deals with the process of filing appeals including that no appeal can be filed against a decree for dissolution of marriage.

unnecessary delay and burden caused by the ex-husband's misuse of the RCR the petitioner was able to move forward.

Another common misuse of the RCR suit involves using it as a means of publicly demeaning or dishonouring women through allegations on their character and loyalty in the marriage. In *Parveen Akhtar v Javed Akhtar*, the wife filed a suit for divorce and claimed unpaid maintenance, both of which were dismissed, and the appeal against the divorce was also rejected.⁶⁵ However, the husband's counter-suit of RCR against the wife succeeded and the wife was ordered to return to the marital home.⁶⁶ Despite this, the wife maintained her distance from her husband, and ultimately, the husband pronounced divorce to her on the basis of her disobedience.⁶⁷ It is pertinent to note, that during this case the wife was denied maintenance and the husband's RCR succeeded because of the wife's inability to discharge the burden of proof i.e. to show why she would not live with the husband. This case is one example of how a RCR suit can be used to build a hostile environment that bombards the wife with litigation as a form of public punishment / harassment since women are not able to share personal details or evidence of their marital lives and hence the burden of proof cannot be met. In the *Akhtar v Akhtar* case, it is the wife's failure to share detailed information on her marital situation that essentially disentitles her from seeking costs or maintenance.⁶⁸

While the attempts to limit the husband's ability to use the RCR as an intimidation tool are noteworthy, in practice the RCR still

⁶⁵ *Parveen Akhtar v Javed Akhtar*, 1985 MLD 454.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

continues to be relied upon as a convenient pressure tactic, which can create if nothing a situation of stress and embarrassment for women in court by bringing up marital affairs and allegations pertaining to the character of the women. It is pertinent to note, that in a country like Pakistan where honour is intertwined with a women's character, the process of dissolution or the desire to seek dissolution becomes compromised when tools like RCR are so commonly pitted against women.

While there have been some successful attempts by the courts in Pakistan to intervene in onerous RCR suits, these attempts have not effectively curtailed the husband's misuse of RCR. The continued use and reliance of both lawyers and husband's on the RCR as an intimidation tactic evidenced a greater need for intervention by relevant justice sector stakeholders.⁶⁹

⁶⁹ Naima Qamar, Maliha. Zia, Tara. Khan, 'De-Constructing Conjugal Rights in Pakistani Law' (Legal Aid Society Publication 2019).

Socioeconomic and Psychological Impact on Women

Given the comparatively high rate of illiteracy among women as well as their economic inactivity compared to men, women's oppression in marital setups takes root in their financial and social dependency upon their husbands.⁷⁰ When such a relationship is altered, the social status of the woman in question is also significantly debased. The notion hence exists that with the breakdown of the marriage comes the loss of the security afforded to the woman as their subordinate positions lead to further marginalization.⁷¹ Due to a lack of economic independence, women are, in many cases, the weaker party in a marriage. The end of marriage also becomes a concern for financial security for them and their children.⁷² In many cases, women have more difficulty when it comes to financially rebuilding themselves post-divorce in a society that prides the man as the family's breadwinner. In the case of *khula*, women have to go through lengthy and costly litigation processes. Upon initiating a divorce, the woman will not only have to bear the expense of hiring her legal representative. She must also pay for summons sent to the other party. In addition, women also have to give up their *haq mehar* in most cases, robbing them of the financial security

⁷⁰ Sundus Saleemi, 'How Illiteracy Perpetuates the Oppression of Pakistani Women,' *D+C Development and Corporation Article* (8 April 2021) <<https://www.dandc.eu/en/article/half-pakistan-women-cannot-read-or-write-any-language>> accessed 7 July 2023.

⁷¹ Aisha Anees, 'Abandoned and Destitute: A Case Study of Divorced Women Residing in a Welfare Complex in Pakistan' (2021) 5(II) PSSR <[https://doi.org/10.35484/pssr.2021\(5-ii\)29](https://doi.org/10.35484/pssr.2021(5-ii)29)> accessed 7 July 2023.

⁷² Wajiha Hyder, 'The Financial Impact of Divorce on Women' *The News International* (3 November 2019) <<https://www.thenews.com.pk/tns/detail/568799-financial-question>> accessed 7 July 2023.

otherwise afforded to them. The concept of alimony itself is not set in stone within Pakistan and is often dependent upon the decisions of judges who may approach such scenarios through a misogynistic lens. It is no strange occurrence to see female harassment in courtrooms where the appellant woman faces slanderous accusations and character assassination attempts that paint her out to be an unfaithful wife or a negligent mother- which would put both her own social status and custody rights at risk before she could win any battle for a financial settlement.⁷³

In addition, operating within a societal structure deeply entrenched in patriarchal notions, the concept of divorce is demonised for the havoc it wreaks upon the culturally glorified appearance of a 'family life'- irrespective of the legal and religious admissibility of a woman's right to dissolve her marriage.⁷⁴ Where tradition dictates the role of women enshrined primarily in domesticity, a wife's position is often delegated with the influence of the men of her family and certain female in-laws as the patrilocal residence pressures the bride into a place of subordination.⁷⁵

Pakistani culture has often perpetuated the idea of divorce as a doctrine that both victimises and simultaneously stigmatises divorced women primarily, hence attaching the stress and emotional baggage that intensifies their struggle to hold on to their

⁷³ Madiha Ishtiaque, 'Society: Unfriendly law' *Dawn* (10 January 2016) <<https://www.dawn.com/news/1231742>> accessed 7 July 2023.

⁷⁴ Paul Amato, 'The Consequence of Marriages of Divorce for Adults and Children' (2000) 64(2) *Journal of Marriage and Family* 1269.

⁷⁵ Muhammad Muzaffar, 'Child Marriages in Pakistan: Causes and Consequences' (2018) 4(2) *Journal of Indian Studies* 195

dignity after divorce.⁷⁶ More often than not, divorced women face derogatory treatment not only from the family they are escaping but also from their consanguineous relations, who blame them for the broken marriage.⁷⁷ Moreover, several legal formalities must be catered to in addition to the divorce proceedings, which include, among other things, the custody of children, visitation rights, maintenance, and child support. Amato (2000) notably remarked upon the stress-adjustment perspective of divorce, which illustrates divorce as a one-off event and a continuous spectrum of events that precede and follow legal proceedings. Research highlights that compared to divorced men, divorced women face more rejection, social ostracization, and other emotional and physical violations after the end of their marriage in Pakistan.⁷⁸ The stigma surrounding marital breakdowns is also fuelled by the societal allowance of the school of radicalized thought, which perpetuates the existence of divorced women as a mark of immorality and dishonour.⁷⁹

In many cases, Pakistani women face a threat of bodily harm or even death in an attempt to escape their marriages, often finding themselves as victims of honour killings upon initiating marital independence, which is seen as an act of defiance that undermines

⁷⁶ Javeria Waseem and others, 'Psychosocial Determinants of Divorce and Their Effects on Women in Pakistan: A National Review' (2020) 13(4) *International Journal of Human Rights in Healthcare* 299.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Maliha Gull Tarar and Venkat Pulla, 'Patriarchy, Gender Violence and Poverty Amongst Pakistani Women: A Social Work Inquiry' (2014) 2(2) *International Journal of Social Work and Human Services Practice* 56.

the husband's authority and subsequently taints the “image” of the family by shedding light on domestic problems.⁸⁰

In the case of *Humaira Mehmood v The State*, the court put forth an "egalitarian interpretation" of the marriage law, stressing that Humaira- who was forcefully married off- had the right to exit her marriage. Yet, the court noted that despite the equal marriage rights given to women in Islam, in practicality, a plethora of prejudices cemented in history, tradition, and feudalism must be culturally expelled and legally tamed.⁸¹

The power dynamics of gender cannot be ignored when reading into the intricacies of a dissolution of marriage in Pakistan- especially considering the victim-blaming divorced women go through, irrespective of which party initiated the legal proceedings.⁸² Such harrowing experiences negatively impact a woman's self-esteem as societal pressures and stigmatization force them to navigate the rejection and scrutiny that comes with their divorce as they simultaneously grapple with the dilemma of the reconstruction of their own social identity.⁸³

⁸⁰ Karin Carmit Yefet, ‘The Constitution and Female Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb’ (2011) 34(2) Harvard Journal of Law & Gender 553.

⁸¹ *Mst. Humaira Mehmood v. The State*, PLD 1999 Lahore 494.

⁸² Bharti Sharma, ‘Mental and Emotional Impact of Divorce on Women.’ [2011] 37 (1) Journal of the Indian Academy of Applied Psychology 125.

⁸³ David L Vogel and others, ‘Is Stigma Internalized? The Longitudinal Impact of Public Stigma on Self-Stigma.’ (2013) 60(2) Journal of Counseling Psychology 311.

Conclusion and Recommendations

Various legal changes have been made to make the process of dissolution of marriage easier for women. However, some challenges impacting women's decision to exercise their rights remain. To tackle these issues, Family Court judges must be trained to deal with sensitive family law issues without bringing in a bias toward protecting family life. Judges should consider the absence of husbands and deal with such cases swiftly and justly instead of giving the husband/his representative various chances to appear before the court.

While the FCA deals with an assortment of cases, the use of the remedy of RCR should be curtailed by the courts. In most cases, it is not invoked to repair the marital bond between the spouses. It is instead used as an intimidation tactic to punish women who exercise their marriage rights. Such cases affect the wife's financial rights and cause many psychological problems and grief, adding unnecessary pressure to an already stressful situation.

Furthermore, in light of tackling the societal perception surrounding divorce, educational and media campaigns should highlight marriage rights guaranteed to women under the *Nikahnama* and multiple laws. Awareness should be raised about the delegated right of divorce amongst young men and women to de-stigmatize the topic and ensure that women fully understand their rights.

Finally, it is imperative to de-stigmatize divorce as a concept, and divorced women should be afforded the necessary protection under the legal system. Many women go through the heavy burden of being labelled as a divorcee, which brings baseless

shame, criticism, and scrutiny that cripples a woman's self-esteem. In extreme cases, such societal prejudice threatens life as women fear being killed in the name of 'honour' by their former husbands or families. While shelters and *dar-ul-means* are present to aid women seeking protection, psychological support should also be provided.

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Deconstructing Mumtaz Bibi v. Qasim and Others: A Step in the Right Direction

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Abstract

Can a contract of marriage, involving a minor girl, be treated as a valid contract, while simultaneously creating criminal liability for the male carrying out sexual acts conceived by such a contract? On February 2, 2022, the Islamabad High Court was presented with this issue in the case of Mst. Mumtaz Bibi v. Qasim. The case, tragically, unveiled the anomalies of the law on child marriages in Pakistan with regard to the definition of a child, opening a window where a minor could be compelled to live with her sexual offender because the marriage would be considered valid under the Muslim Family Law Ordinance, 1961. This article aims to address how the seminal judgment successfully engages in a collective discussion of criminal, contract and civil law to discern the appropriate age for a girl to marry and discusses how the judgment has introduced and suggested the impending reforms on child marriages from a lens which transcends beyond the idea of “puberty” or physical development of the female child – an idea which was previously the key focus forming judgments surrounding child marriages.

Introduction

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The question whether a marriage contract involving a minor² be treated as both valid for Pakistan's Muslim Family Law Ordinance, 1961 ("MFLO") and simultaneously treating the husband to the novel marital bond as a criminal for his conjugal relationship under the Pakistani Penal Code, 1860 ("PPC") while contentious, yet remained unexposed, up until the *Mst. Mumtaz Bibi v Qasim* case. On February 2, 2022, the Islamabad High Court confronted this issue head-on in *Mst. Mumtaz Bibi v Qasim*.³ This case involved an adult male who contracted a consensual marriage with a 15-year-old girl. Despite the minor girl's consent to marry, her guardians instead sought her custody. They asserted that anyone who sought to marry and engage in sexual acts violated Sections 375 and 377A of the PPC, regardless of her stated consent. Said another way, the Mumtaz Bibi case unveiled the tensions surrounding a legal system that not only tolerates child marriage but also recognizes the criminality of child sexual abuse.

The foregoing analysis of the *Mumtaz Bibi* decision will not only delve into how the Islamabad High Court reached its holding that marriages between those under 18 are *void ab initio* but how, in arriving at its decision, the Court openly confronted the common-held discourse that puberty serves as the operative threshold for marriage and the decision's repercussions on women's rights within Pakistan.

² A minor refers to a person who has not attained legal adulthood by being younger than the established age of majority. Under the Majority Act of 1875, the age of majority in Pakistan is eighteen. However, for marriage, the specified age of majority differs among the provinces in Pakistan.

³ *Mumtaz Bibi v Qasim*, PLD 2022 Islamabad 228

The Definition of a Child in Pakistan

Before delving into a deeper discussion of the case within the child marriage context, it is pertinent to understand the uncertainty surrounding the definition of a child in Pakistan. The current legal framework surrounding child marriages within Pakistan remains murky at best. First, there is uncertainty about the definition of a child. The Child Marriage Restraint Act, 1929 (“CMRA”) defines a female child as sixteen years and below.⁴ Other laws, such as the Zainab Alert, Recovery and Response Act, 2020 (“ZARRA”)—which aims to notify the public and recover kidnapped children within Pakistan—define a child as anyone under eighteen. Perhaps equally confounding is that the definition of a child is not even uniform *within* the country’s criminal code. For example, Section 375 of PPC, which concerns rape, defines a child as anyone under *sixteen*, while Section 377A, which discusses sexual abuse, defines a child as anyone under *eighteen*. Adding to the disarray stands the definition of adulthood or majority for purposes of engaging in legal contracts, which according to the Majority Act, 1875 (“MA”), is eighteen.

Second, are the instances where the definition of a child invites and arguably requires certainty. Specifically, consider the current marital legal regime within Pakistan. First, stands the MFLO, which deals with the particulars associated with marriage and divorce but is stubbornly silent regarding the minimum age for which marriages can be legally recognized and, therefore, appears

⁴ Section 2 of the Child Marriage Restraint Act, 1929 refers to a child as “a person who, if a male, is under eighteen years of age and, if a female, is under sixteen.”

facially unconcerned with child marriage. Punctuating the legal system's apparent stands Section 23 of the Family Courts Act, 1964 ("FCA"), which prohibits a court from questioning the validity of a marriage registered under the MFLO. Perhaps, equally important, however, is the confluence of this legal disarray when juxtaposed with the realities of marriage itself. For example, marriage is regarded as a contractual bond; hence, does the MA's requirements of adulthood apply? Moreover, even though marriage under the MFLO legalizes sexual relations, what legal significance do Sections 375 and 377A of the PPC mean for sexual relations for those married under eighteen? At a minimum, the laws fail to clarify a rule of conduct to ensure that citizens do not fall afoul of criminal liability.⁵

The Mumtaz Bibi v Qasim Case

The case arose because the petitioner, Mumtaz Bibi, sought the return of her fifteen-year-old daughter, Swera Falak, who had been reportedly abducted on May 18, 2021. On June 6, 2021, Mumtaz Bibi filed a First Information Report ("FIR") against Qasim under section 365-B/34 of the PPC.⁶ After authorities

⁵ *Mumtaz Bibi*, note 3, page 9.

⁶ Section 365-B of the Pakistan Penal Code, 1860 states: "Kidnapping, abducting, or inducing woman to compel for marriage — Whoever kidnaps or abducts any woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or so that she may be forced, or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment for life, and shall also be liable to fine; and whoever employing criminal intimidation as defined in this Code, or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced

undertook various efforts, the minor appeared before the Court on December 6, 2021. Appearing before the Court, the minor asserted she was married to Qasim and unwilling to go home with her mother. The Court ordered the minor to be lodged in a *Dar-ul-Aman* (a women's shelter), where her mother was allowed to meet with her under an administrator's supervision and later undergo a psychological evaluation. The Court also directed the National Database and Registration Authority ("NADRA") to investigate the minor's age and familial ties, which it subsequently did, verifying that she was fourteen years and two months old when she was abducted.

While the High Court was principally charged with deciding the minor's custody, either to her mother or Qasim (with whom the minor claimed to have entered a marriage contract), there were fundamental issues that had to be addressed, including the governing age of majority, the validity of a marriage between an adult and a child, even with a child's consent, and whether a marriage contract can remain legally valid if it simultaneously creates criminal liability for one party carrying out sexual acts conceived by such a contract.

The Court's decision began by operating from a premise that a fundamental principle of the rule of law, enshrined in Article 4 of the Pakistani Constitution of 1973, is that all individuals are entitled to specific notice of the laws so that their behavior might accord with those established norms and laws. Hence, the Court launched into analysis from a constitutionally ordained command to resolve the apparent ambiguity caused by the myriad of laws

or seduced to illicit intercourse with another person shall also be punishable as aforesaid."

surrounding questions of adulthood and marriage. Next, the High Court undertook an exacting analysis of children's rights within Pakistan. The Court was particularly mindful of the need to establish a bright line between who constitutes an adult and a child largely because society fundamentally treats questions of rights and responsibilities in fundamentally different ways.⁷ The High Court conceded that within the realm of marriage, the picture of who may consent is opaque, since it relies upon the ambiguities inherent within Muslim Personal Law. The Court, however, challenged the assertion that such laws cannot be controlled by statute since Section 2 of the Muslim Personal Law (Shariat) Application Act, 1962 ("MPLAA") was superseded by the passage of the Enforcement of Shariat Act, 1991 ("ESA"), which permits courts, in their interpretation of statutes that have more than one interpretation, to prefer the one most consistent with Islamic principles and jurisprudence. From this vantage point, the Court then deferentially invoked the Federal Shariat Court's decisions to point out that as a court constitutionally charged with interpreting matters of Islamic Law, it was neither un-Islamic for the state to determine a permissible age for entering marriage contracts as articulated in *Farooq Omar Bhoja v Federation of Pakistan*⁸, and that consent to an Islamic marital contract (*nikah*), involves more than consenting to engage in conjugal relations but

⁷ The judgment lays out the constitutional rights of children, among other things, Article 9 of the Constitution, which concerns the right to life and liberty, and Article 25A, which holds that the State shall provide free and compulsory education to all children from the age of five to sixteen years in such manner as prescribed by the law, and Article 35 of the Constitution which holds that the State shall protect the marriage, the family the mother and the child.

⁸ *Farooq Omar Bhoja v. Federation of Pakistan*, PLD 2022 Federal Shariat Court 1.

also the capacity to contemplate the consequences that marriage entails as in *Muhammad Aslam v The State*.⁹

The High Court also distinguished the Supreme Court’s holding in *Mst Bakhshi v. Bashir Ahmad*¹⁰, which upheld the validity of a fifteen-year-old girl’s marriage by first, asserting that the constitutional order now in place includes specialized bodies charged with specifically contemplating the validity of matters vis-à-vis Islamic law, and second, stating that the ESA maintained a court’s ability to construe ambiguous statutes so long as their ultimate interpretation is consistent with Islamic law.

The High Court perhaps most unequivocally distinguished *Bashir Ahmad* and other precedents by pointing to Pakistan’s accession to the UN Convention on the Rights of the Child (“UNCRC”). By virtue of its treaty obligations, the Parliament enacted the Protection of Women (Criminal Laws Amendment) Act, 2006 (“PWA”) and the Criminal Law (Second Amendment) Act, 2016 (“CLA”). The PWA amended the PPC by inserting Sections 375 and 376, prohibiting sexual intercourse with a child under the age of sixteen, emphasizing that even if a child were to consent to engage in sexual intercourse, the action of the accused would still constitute rape for purposes of Section 375 and would be punishable with death or life imprisonment under Section 376.

Further, the High Court observed that the CLA added Sections 377A and 377B to the PPC. The sections define the attempt to persuade, induce or entice a child under eighteen to engage in sexually explicit conduct, either with or without their consent, as

⁹ *Muhammad Aslam v. The State*, 2012 P.Cr.L.J. 11.

¹⁰ *Mst Bakhshi v. Bashir Ahmad*, 1970 PLD SC 323.

an offense of sexual abuse, punishable with a jail term of up to 25 years.

The High Court observed that in a marriage contract, the parties agree to engage in sexual relations recognized by the State and society as legitimate for the purpose of procreation. The High Court noted that in view of the amendments introduced by PWA and CLA, as well as Pakistan's obligations under the provisions of the UNCRC, any contract of marriage where one of the contracting parties is below the age of eighteen would be a contract that is executed for an unlawful purpose (child rape and sexual abuse). In paragraph 27, Justice Babar Sattar completes his assertion that the Court's decision is consistent with the rule of law and any contrary opinion renders the concept an absurdity:

[This] court cannot read into Sections 375 and 377A of PPC the suggestion that such conduct would not attract criminal liability if the child in question was party to a marriage contract within the scope of which the sexual conduct was to take place. Such interpretation would make a mockery of the concept of rule of law by failing to provide in clear terms the conduct that is permissible in the eyes of law and the conduct that is prohibited and attracts penal liability.

Emphasizing that marriage remains contractual in nature, the Court held that such a contract would be *void ab initio* under the Contract Act, 1982 ("CA").¹¹ Therefore, the marriage contract can

¹¹ The decision then looks at the age of majority from the lens of contract law. Section 11 of the Contract Act of 1872 states that only a person

neither be registered nor given legal effect by a court, and the State cannot enforce a contract that is forbidden by law or is enabling an object which is prohibited and attracts criminal liability.¹² Ultimately, the High Court remanded the minor to her mother's custody until an age determination was conducted.

Beyond the Concept of Puberty – A Feminist Critique

While the CMRA criminalizes marriage of a female child under the age of sixteen and of a male child under the age of eighteen, the courts in Pakistan have historically relied on section 2 of the MPLAA to rule that the issue of the legal capacity of a minor to consent to a marriage is regulated by Muslim personal law, despite any statutory provisions on the subject. Accordingly, the courts have relied on specific commentaries on Muslim personal law to posit that a child can enter into a marriage contract after puberty.¹³

These commentaries relied on by the superior courts of Pakistan, define marriage itself as “a contract which has for its object the procreation and the legalizing of children.”¹⁴ This idea is akin to the radical feminist view that regards the gender roles prevalent in

who has reached the age of majority according to law is competent to contract. The age of majority is set at eighteen years under the Majority Act of 1875. Anyone who is under the age of eighteen does not possess the capacity to consent to a contract.

¹² *Mumtaz Bibi*, note 3, page 27.

¹³ The superior courts of Pakistan specifically cite paragraphs 250 and 251 of Dinshaw F. Mulla's commentary on Muslim Personal Law for this postulation. See DF Mulla, *Muhammadan Law* (3rd ed) 377. See, for example, *Mushtaq Ahmed v Mirza Muhammad Amin*, PLD 1962 Karachi 442; *Muhammad Sadiq v Sadiq Safoora*, PLD 1963 Lahore 534.

¹⁴ *Ibid*, Mulla, page 376.

a society as the product of male sexual domination of women.¹⁵ According to Catherine MacKinnon, “The state is male in the feminist sense: the law sees and treats women the way men see and treat women.... The state’s formal norms recapitulate the male point of view on the level of design.”¹⁶ The State views women usually as objects whose primary objective is procreation and eventually, they take over the role of caretaker in a household.¹⁷ Therefore, women's expectations manifest in the form of their physical capabilities more than their mental faculties, which results in the all-embracing focus on puberty being the sole determinant in deciding the age to marry.

Encouragingly, the reasoning in *Mumtaz Bibi* provided by Justice Babar Sattar transcends beyond the idea that "puberty," or the physical development of the female child, is the sole determinant of deciding the age to marry. The judgment rendered in *Mumtaz Bibi* emphasizes that the marriage relationship does not just entail engagement in proper sexual conduct. It defines marriage as: “The purpose of marriage is to enter into a contract whereby two people agree to become a family and look after one another, and further agree to bring children into this world and be responsible for such offspring's safety and physical and emotional well-being.”¹⁸

¹⁵ Shahbaz Ahmad Cheema, ‘Revisiting Abdul Kadir v Salima: Locus Classicus on Civil Nature of Marriage?’ (2018) 49(33) Al-Adwa 27

¹⁶ Catherine A. MacKinnon, *Toward A Feminist Theory of The State* (Harvard University Press 1991) 162.

¹⁷ Michael Ferguson, ‘Vulnerability by Marriage: Okin's Radical Feminist Critique of Structural Gender Inequality’ (2016) 31(3) Hypatia 687.

¹⁸ *Mumtaz Bibi*, note 3, page 31.

It also refers to the decision of the Federal Shariat Court in *Muhammad Aslam v The State*.¹⁹ This case defines consent in a marriage as the “ability to exercise free choice; capacity (legal capacity: not only sane but mature mind, i.e., not only puberty, mere majority but the age of responsive and conscious consent”²⁰

Since “law is considered the mind of the society”²¹ cases like *Mumtaz Bibi*, which legitimize and work towards changing the set standards of society on how marriage must be viewed, become a tool for women's betterment and status transformation in such a relationship. As mentioned above, the definition posited by Justice Babar Sattar appears to be free from the tethers of gender norms; 'both individuals agree to become a family and look after one another.' There is no underlying tone of gender hierarchy, where the male must be a breadwinner, and the female must be the primary caretaker. Such a fluid definition of a rather oppressive institution like marriage allows room for women to enjoy a better standing in their marital relationship. It encourages the idea of agency and autonomy in marriage. In addition, the focus on “responsive and conscious consent” allows the women to reach an age and understanding where they can comprehend the consequences of getting married and secure their rights in a marriage from a relatively empowered staging.

The definition of marriage provided by Justice Babar Sattar also disbands Mulla's definition of marriage, the object of which is merely 'procreating' and 'legalizing' children. It states that the

¹⁹ *Muhammad Aslam v The State*, 2012 PCr.LJ 11.

²⁰ *Ibid*, para 10.

²¹ Catherine A. MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (1983) 8(4) *The University Chicago Press* 635.

individuals must further agree to have children rather than assuming that procreation and childbearing are concomitant to marriage. It also hints at the fact that marriage is not synonymous to consent for engaging in sexual activities and presents hopefully the near possibility of having marital rape recognized in Pakistan.²²

Conclusion

While the decision rendered by Justice Babar Sattar in *Mumtaz Bibi* is a laudable attempt at introducing the impending reforms on child marriage and women's rights in marriage, the decision comes with its limitations which cannot be overlooked:

²² The Protection of Women (Criminal Laws Amendment) Act, 2006 amended the definition of rape under Section 6 of the Hudood Ordinance, 1979: 'A man is said to commit rape who has sexual intercourse with a woman under the circumstances falling under any of the five following descriptions —

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

The words 'intercourse with a man or woman, to whom he is not validly married' has been replaced with 'intercourse with a woman. "The new language is broad enough to include marital rape into the definition of rape as a 'woman' could be referred to as the perpetrator's wife". See Iqra Saleem Khan, 'Consent in Marriage: A Radical Feminist Analysis of Pakistani Law' (2020) 26(3) William and Mary Journal of Race, Gender, and Social Justice 671.

- a. *Mumtaz Bibi* is a decision of the Islamabad High Court. While it is a binding precedent within the capital territory and holds its persuasive value otherwise, it is not binding on all courts like a judgment of the Apex Court, i.e., the Supreme Court of Pakistan would be. It is yet to be seen if the case is appealed to the Apex Court and whether or not the judgment is upheld. Currently, each province has its law on child marriages, and the minimum age a female child can marry varies.
- b. The judgment asserted that the marriage contract in the case is *void ab initio*, i.e., that it had no legal effect from inception. The leading precedent on this, however, is the case of *Mst. Bakhshi v Bashir Ahmad*.²³ The Apex Court held that the marriage would not be invalid if a girl under sixteen got married in violation of the provisions of CMRA. However, the husband will be held criminally liable. The law likely laid down in *Mst. Bakhshi* will take precedence over the law laid down in *Mst. Mumtaz Bibi*. Hence, it is imaginable that such child marriages will remain valid, despite creating criminal liability for the male carrying out sexual acts conceived by such contract under the PPC.
- c. Towards the conclusion of the judgment, Justice Babar Sattar directed the relative authorities to bring to the attention of the Cabinet and the Parliament the absence of an explicit statutory provision in the MFLO stating the permissible age for marriage in Pakistan.²⁴ Even though

²³ *Mst. Bakhshi v Bashir Ahmad*, 1970 PLD SC 323.

²⁴ *Mumtaz Bibi*, note 3, page 42.

such legislative reforms are highly time-consuming, the efforts toward driving them are commendable in their own right.

- d. Even after the judgment given in *Mumtaz Bibi*, multiple cases of child marriages and abduction have emerged. A recent one is the *Dua Zehra* case, which again rekindled the much-needed conversation around child marriages in Pakistan.²⁵ Dua Zehra's case shows that, still, much is to be done regarding the law on child marriages in Pakistan. Nonetheless, the decision of *Mumtaz Bibi* seems to be a step in the right direction.

²⁵ See 'Dua Zehra Timeline: A Complex Case of a Karachi Teenage Girl's Alleged Kidnapping vs. Legal Marriage' *Dawn* (4 July 2022) <<https://www.dawn.com/news/1696486>> accessed 20 January 2023.

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Reviewing the Punjab Sikh Marriage Act 2018

*Hania Riffat*¹

Introduction

The Pakistani Sikh community despite its numerical minority has been a significant part of the country's political and cultural heritage.² More importantly, the Sikh community and all individuals within it, form part and parcel of the Pakistani population, entitling them to an equal right to life, dignity and freedom to enjoy basic fundamental freedoms. The recent initiative of the Government of Pakistan to open the Kartarpur Corridor — a visa-free border crossing and a religious corridor connecting two eminent Gurdwaras in Indian and Pakistani Punjab — signifies the importance of promoting and protecting cultural and religious sentiments of the Sikh community.³ While a noteworthy effort by the Government of Pakistan, the opening of the Kartarpur Corridor does not mitigate the historical and

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² V Walia 'Maryada May be in Danger, but Sikhs are Special in Pakistan' Tribune India (12 April 2003)
<<https://www.tribuneindia.com/2003/20030412/windows/main1.htm>>
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³ A Hashim and Z Saberin, 'Pakistan and India break ground on visa-free Kartarpur Corridor' Al Jazeera (28 November 2018)
<<https://www.aljazeera.com/news/2018/11/28/pakistan-and-india-break-ground-on-visa-free-kartarpur-corridor>> accessed 13 July 2023.

ongoing plight of the Sikh community, which remains a key target for attacks from religious extremist groups in Pakistan.⁴

The persecution of minority groups, including the Sikh community is further exacerbated by the failure of the Government of Pakistan to positively develop and support development of relevant laws and protections for minority communities. For example, in the seven decades since Pakistan's independence, no personal status law concerning the Sikh community had been enacted in Pakistan. Whilst the reasons for this statutory gulf may have been manifold — legislative inertia, lack of attention to the community's needs due to their low population, amongst others — the outcome is the same: no avenue for recognition and registration of Sikh marriages in Pakistan. In 2018, however, the Punjab Assembly attempted to remedy this by unanimously passing the Sikh Anand Karaj Marriage Act 2018 (the “Act”), which has been hailed as a landmark legislative feat for the Sikh community in Pakistan.⁵ Yet the Act remains in limbo five years later as it still awaits enforcement.

This paper seeks to explore this aspect of neglect on the part of the Government of Pakistan and how it contributes to inadequate provision of rights for the Sikh community in Pakistan and fuels ongoing religious extremism particularly in relation to forced conversion and marriages. This paper first sets out the need for a

⁴ SR Hassan, ‘In Historic Homeland, Pakistan's Sikhs Live Under Constant Threat’ Thomson Reuters (3 October 2014) <<https://www.reuters.com/article/uk-pakistan-sikh-idUKKCN0HS0U020141003>> accessed 13 July 2023.

⁵ A Malik ‘Punjab Assembly Unanimously Passes Landmark Bill to Regulate Sikh Marriages’ Dawn (14 March 2018) <<https://www.dawn.com/news/1395216>> accessed 13 July 2023.

personal status law for Sikhs by analysing the lack of adequate legislation governing their marriage rights, the brunt of which has been felt more closely by Sikh women. From there, this paper delves into a critical analysis of the Act's salient provisions, reflecting upon the shortcomings and exploring the reasons for the delay in implementation.

Background

Like most religious minorities in Pakistan, the Sikh community has also been a target of institutionalised neglect, discrimination and persecution.⁶ The Sikh community remains fairly small in size, constituting an estimated twenty-thousand individuals, with a majority ghettoised in parts of the northern and north-eastern provinces of Khyber Pakhtunkhwa and Punjab.⁷ Both the miniscule size of the community and the primary place of residence has contributed to increased vulnerability against the minority group, in particular from mainstream extremist groups in these areas.⁸ In particular, the threat from these extremist groups has manifested in the form of frequent attacks, abductions and violence against Sikh women, who have become the main targets

⁶ Hassan, note 4.

⁷ Dawn, 'Pakistan's dwindling Sikh community wants improved security' (17 April 2015) <<https://www.dawn.com/news/1176521/pakistans-dwindling-sikh-community-wants-improved-security>> accessed 13 July 2023. There are no official figures that determine the Sikh population in Pakistan, as Sikhs have been disregarded in all previous censuses.

⁸ Minorities Rights Group International, 'Religious Minorities in Pakistan' (2002) <<https://www.refworld.org/pdfid/469cbfc30.pdf>> accessed 13 July 2023.

for forced conversion in an attempt to be married off to Muslim men by these groups.⁹

Forced conversions and marriages are inextricably linked, as the guise of marriage is a contriving apparatus employed by Islamic zealots to forcibly convert and distance minority-religion women from their families. In certain instances, minority-religion women that are forcibly converted and married to Muslim men are often already married to someone from within their faith.¹⁰ Due to lack of documentary evidence, however, it becomes impossible for these women to prove the existence of their subsisting marriage.¹¹ For Sikh women, this inability to prove their marriage stems from the fact that there is no law that deals with registration of Sikh marriages or legally-recognised documentation of the same. In such a case, it is additionally challenging for a Sikh woman to prove that she had been coerced into converting and remarrying, thereby confining her to live in a forced marriage. Whereas had there been a law under which a married Sikh woman could

⁹ Office of the United Nations High Commissioner for Human Rights, 'Pakistan: UN experts urge action on coerced religious conversions, forced and child marriage' (2023) <<https://www.ohchr.org/en/press-releases/2023/01/pakistan-un-experts-urge-action-coerced-religious-conversions-forced-and>> accessed 13 July 2023.

¹⁰ S Shaikh and S Tunio, 'Kidnapping, Forced Marriage: Pakistan's Hindu Women Hope for Protection in New Law' Thomson Reuters (12 April 2017) <<https://www.reuters.com/article/us-pakistan-women-marriage-idUSKBN17E11J>> accessed 13 July 2023. Similar to Sikh women, but on a much larger scale, married Hindu women in Pakistan are forcibly converted and remarried to Muslim men. Prior to the enactment of the Sindh Hindu Marriage Act 2016 and Hindu Marriage Act 2017, Hindu women had no recourse to prove their subsisting marriages.

¹¹ Ibid.

establish her marital status, any such forced marriage would, in and of itself, be ruled void.

In addition to the malady of forced marriages, the absence of a specialised law catering to Sikh marriages creates several difficulties for Sikh spouses, particularly women. For example, in case of separation, a Sikh woman would be unable to prove her marriage due to lack of marriage documentation, and would have no possible course of action to claim her maintenance.¹² Similarly, in case of husband's death, Sikh widows could be deprived of their rightful share of inheritance by their in-laws, and would have no way of establishing her marriage and right to inheritance.¹³ The predicament of non-recognition of Sikh marriages further manifests itself in the case where a Sikh husband would contract a second marriage while already having a valid existing marriage. In this instance, the aggrieved spouse has no legal recourse to establish the bigamous nature of the marriage.¹⁴

The lack of registration and documentation impacts other aspects of personal life for Sikhs as well, including matters related to transfer of property, immigration, etc. But one of the most significant issues revolves around divorce. Without a personal law, Sikh spouses have no legal recourse to dissolve their

¹² N Kang, 'Women and Sikh Personal Law' Institute of Sikh Studies (1997) <http://www.sikhinstitute.org/sikh_p_l/ch_12.htm> accessed 13 July 2023.

¹³ Ibid.

¹⁴ Before the promulgation of the Hindu Marriage Act 2017, Hindu women in Pakistan had encountered a similar difficulty, resulting in a specific provision in the Act that made bigamy punishable. Although there are no comparable reported cases of bigamy concerning Sikhs, it can be extrapolated by way of analogy that a similar problem may exist within the Sikh community as well.

marriages. Oftentimes this also entails Sikh women being forced to live in abusive and violent marriages. Even in cases where Sikh spouses practise *de facto* separation, there is no legal mechanism to deal with the matter of child custody. Therefore, having no law governing registration, divorce, and other associated aspects of Sikh marriage gives rise to several complications for the Sikh community in Pakistan.

Constitutional and Legal Framework

“Sikhs dwelling in Pakistan are getting married but are unable to register their marriages which creates several legal issues, including division of inherited assets.”

Ramesh Singh Arora (Erstwhile Member, Punjab Assembly)

Owing to the lack of a specialised legal mechanism, Sikh couples who wish to contract marriages rely upon sketchy guidelines laid down in the Special Marriages Act 1872 and seek guidance from the Pakistan Sikh Gurdwara Prabhandak Committee.¹⁵ In Sindh, some Sikh couples rely upon the Sindh Hindu Marriage Act 2016 to register their marriages. However, the majority of Sikh couples residing in Punjab are deprived of official recognition as a married couple.

Comparatively, prior to the enactment of the Hindu Marriage Act 2017, when the Hindu community of Pakistan had no personal

¹⁵ The Pakistan Sikh Gurdwara Prabhandak Committee is an official body created by the Government of Pakistan for the regulation of the Sikh places of worship and to upkeep the wellbeing of the Sikh community. See Pakistan Sikh Gurdwara Prabhandak Committee (2023) <<https://psgpc.com.pk/who-we-are/>> accessed 13 July 2023.

status law regulating their marriages, the Supreme Court of Pakistan directed the National Database and Regulation Authority (“NADRA”) to register marriages and issue certificates to recognise Hindu marriages.¹⁶ There is no similar process in place for officiating Sikh marriages through issuance of marriage certificates by NADRA which makes them the only religious minority in Pakistan to not have a law governing matrimonial registration and rights.

Non-recognition of Sikh marriages or subjecting the Sikh community to register its marriages under the personal law of another religion violates their constitutional right to freedom of religion enshrined in Article 20 of the Constitution of Pakistan.¹⁷ Besides depriving the Sikh community of the various rights emanating from legal recognition of marriages, this further dispossesses them of their separate and distinct religious identity. By neglecting the Sikh community and their problems associated with non-recognition of marriages, the State of Pakistan has also disregarded the directive principles under Article 35¹⁸ and 36 of

¹⁶ ZS Haq, ‘The Sindh Hindu Marriage Bill 2016 – What About Hindu Pakistanis of Other Provinces?’ *Courting the Law* (7 June 2016) <<https://courtingthelaw.com/2016/06/07/commentary/the-sindh-hindu-marriage-bill-2016-what-about-hindu-pakistanis-of-other-provinces/>> accessed 13 July 2023.

¹⁷ Article 20 of the Constitution of Pakistan reads as: ‘*Subject to law, public order and morality—*

- a) *every citizen shall have the right to profess, practice and propagate his religion; and*
- b) *every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions,’*

¹⁸ Article 35 of the Constitution of Pakistan provides: ‘*The State shall protect the marriage, the family, the mother and the child.*’

the Constitution,¹⁹ which requires the State to protect the institution of marriage and to safeguard the rights of religious minorities respectively.

Despite the aforementioned constitutional obligations of the State, the institutionalised abandonment of the Sikh community coupled with the indifference and apathy of lawmakers, has resulted in the delayed enactment of a Sikh personal status law. Only with the devolution of the subject of personal status laws to provinces under the Eighteenth Amendment to Pakistan's Constitution and election of the first Sikh legislator in Pakistan has the path for a personal law catering to Sikh community been paved.²⁰

The Sikh Anand Karaj Marriage Act 2018

The Sikh Anand Karaj Marriage Act 2018 (herein 'the 2018 Act') was introduced as a private member bill in 2017 by Ramesh Singh Arora.²¹ As per Arora, the bill was presented in the Provincial Assembly and later taken up by the Standing Committee on Religious Affairs and Human Rights where the bill was perused by a politically and religiously diverse cohort of qualified legislators. After the Committee Stage, the bill was presented in the Provincial Assembly where it was unanimously approved and

¹⁹ Article 36 of the Constitution of Pakistan reads as: '*The State shall safeguard the legitimate rights and interests of minorities, including their due representation in Federal and Provincial services.*'

²⁰ Z Gishkori, 'First Sikh Parliamentarian in 67 Years Makes History' Express Tribune (17 June 2013) <<https://tribune.com.pk/story/564418/first-sikh-parliamentarian-in-67-years-makes-history>> accessed 13 July 2023.

²¹ Ibid. Ramesh Singh Arora is Punjab's, and Pakistan's, first Sikh lawmaker and moved the 'Sikh Anand Karaj Marriage Bill 2017' in the Punjab Assembly.

gained the status of law.²² This was the first law made in Pakistan to register Sikh marriages. However, before the Rules of Business for the 2018 Act could be drafted, the Punjab government completed its political tenure and a subsequent government of a rival political party was elected. The new government considered the 2018 Act deficient and consequently proposed amendments.

This oscillation of responsibilities caused by different legislative priorities of two distinct Punjab governments and the onset of the COVID-19 pandemic left the 2018 Act in limbo and progress has yet to be made to enforce the 2018 Act in Punjab.²³ In order to understand the contents and potential deficiencies of the 2018 Act, this paper will first analyse select provisions of the landmark law and then move towards identification and unpacking of deficiencies, if any.

Analysis

Definition of ‘Anand Karaj’

In the 2018 Act the definition of a Sikh marriage termed as ‘*Anand Karaj*’ has been defined as:

²² S Jamal, ‘Pakistan: Punjab Assembly passes Sikh Marriages Bill’ (Gulf News) <<https://gulfnews.com/world/asia/pakistan/pakistan-punjab-assembly-passes-sikh-marriages-bill-1.2188224>> accessed 13 July 2023.

²³ A Mehmood, ‘In limbo: Sikh Marriage Act Yet to be Actualised After Four Years’ Express Tribune (13 June 2022) <<https://tribune.com.pk/story/2361259/in-limbo-sikh-marriage-act-yet-to-be-actualised-after-four-years>> accessed 13 July 2023.

‘The lawful union of a Sikh male and Sikh female solemnised under the Act and conducted in accordance with the practices of the Sikh religion, where the four lavaan, permitted in Sri Guru Granth Sahib, are recited.’²⁴

In other words, *Anand Karaj* involves a religious ceremony for Sikhs who believe in *Guru Granth Sahib* as the only temporal and spiritual guide.²⁵ In India, the Anand Marriage (Amendment) Act 2012 that amended the Anand Marriage Act 1909 to include the complete term *Anand Karaj*, whereas the sole term Anand had been used in Indian law.²⁶

The definition of *Anand Karaj* in the 2018 Act limits the scope of the law purely to Sikh marriages and does mention interfaith marriages. The significance of this definition can be understood with reference to core Sikh beliefs that the marriage of a Sikh with a non-Sikh cannot take place in a Gurdwara as understood in the Sikh *Reht Maryada*, which espouses that a person who professes non-Sikh faith cannot be joined by wedlock by the *Anand Karaj* ceremony.²⁷

Minimum Age for Marriage

²⁴ Section 2(a) Sikh Anand Karaj Marriage Act 2018.

²⁵ Sikh Missionary Society UK ‘Mixed Marriages: Professing Non-Sikh Faith but Married in a Gurdwara’ () (2005) <<https://www.sikhmissionarysociety.org/sms/smsarticles/advisorypanel/gurmukhsinghsewauk/mixedmarriagesinsikhism/>> accessed 13 July 2023. The Guru Granth Sahib is the formative religious scripture of Sikhism, which delineates the mode of life for a Sikh.

²⁶ Section 2 Anand Marriage Act 1909, as amended by Anand Marriage (Amendment) Act 2012.

²⁷ Sikh Missionary Society UK, note 25.

Another of the 2018 Act's feature is the minimum age prescribed for *Anand Karaj*, specifically, that a boy and girl should be of a minimum age of eighteen years and should be of sound mind,²⁸ not be related by any degree of consanguinity or affinity which, as per Sikh customs, renders the marriage unlawful;²⁹ and they should be entering the marriage contract with their 'free and full consent.'³⁰ It is important to note that the law governing child marriages in Punjab is the Child Marriage Restraint Act 1929, according to which the minimum age for marriage of a boy is eighteen, while for girls, it is sixteen.³¹ Insofar, the 2018 Act adopts a progressive approach to prescribing a uniform age for both females and males. Accordingly, raising the minimum age for marriage of Sikh girls to eighteen has been hailed as a progressive legislative step.³²

The Process for Registration of Marriage

The first step to Sikh marital registration concerns granting licenses to *Anand Karaj* Registrars by the Federal government.³³ *Anand Karaj* Registrars, once licensed, would be authorised to issue *Anand Karaj* Certificates to married Sikh couples. The groom, bride, or the *Granthi* must, fill out the *Anand Karaj*

²⁸ Section 3(1)(a) of the Sikh Anand Karaj Marriage Act 2018.

²⁹ Section 3(1)(c) of the Sikh Anand Karaj Marriage Act 2018.

³⁰ Section 3(1)(b) of the Sikh Anand Karaj Marriage Act 2018.

³¹ Section 2(a) of the Child Marriage Restraint Act 1929.

³² Times of India 'Pakistan's Punjab Assembly passes Historic Bill to Regulate Sikh Marriages' (14 March 2018) <<https://timesofindia.indiatimes.com/world/pakistan/pakistans-punjab-assembly-passes-historic-bill-to-regulate-sikh-marriages/articleshow/63303961.cms>> accessed 13 July 2023.

³³ Section 5(2) of the Sikh Anand Karaj Marriage Act 2018.

Form,³⁴ and present it to the *Anand Karaj* Registrar for registration within thirty days of solemnization of the marriage.³⁵ If the *Anand Karaj* Registrar is satisfied that the marriage has been duly solemnised under the 2018 Act, he will issue the *Anand Karaj* Marriage Certificate.³⁶ A copy of the form would be sent to the Chairperson of a Union Council or Municipal Committee for record maintenance.³⁷

Separately, to deal with the issue of past, non-registered Sikh marriages, the law provides that the validity of marriages contracted under “Sikh customs” would be considered valid and, therefore, may be registered under the 2018 Act.³⁸

Although the critics of the 2018 Act have not objected to the registration process, the definition of the term ‘*Granthi*’ within the 2018 Act has been criticised by the Sikh community as it does not prescribe a criterion for the role of a *Granthi*. In different regions of the world, *Granthis* are central religious figures, appointed by the Gurdwara management committees.³⁹ Critics contend that the 2018 Act does not explicitly refer to the registration and regulation of *Granthis* since not everyone who professes to be a Sikh can be deemed a *Granthi* and be charged with solemnizing marriages.⁴⁰

³⁴ The Act defines a *Granthi* as a ‘a Sikh who recites the Guru Granth Sahib and solemnizes a marriage between Sikhs’.

³⁵ Section 2(f) of the Sikh Anand Karaj Marriage Act, 2018.

³⁶ Section 5(5) of the Sikh Anand Karaj Marriage Act 2018.

³⁷ Section 5(7) of the Sikh Anand Karaj Marriage Act 2018.

³⁸ Section 4 of the Sikh Anand Karaj Marriage Act 2018.

³⁹ IC Harris and others, *Contemporary Religions: A World Guide* (Longman 1992).

⁴⁰ Interview with representative of Pakistan Sikh Gurdwara Prabhandak Committee (Lahore 25 August 2022).

Dissolution of Marriage

The most debated aspect of the 2018 Act is the provisions regarding divorce.⁴¹ Specifically, the 2018 Act prescribes that any party in the contract of marriage who wishes to dissolve the marriage has to serve a notice to the Chairperson (or Chairperson of a Municipal Committee or Union Council).⁴² Within thirty days of receipt, the Chairperson has to form an Arbitration Council to reconcile the parties. If the parties cannot resolve their differences within ninety days, the Chairperson has been authorized to issue a certificate of dissolution of marriage.⁴³

The *Guru Granth Sahib* — the religious scripture of Sikhism — does not prescribe a word for divorce as this was an action not performed by any of the ten *gurus* (spiritual guides or masters in Sikhism). Even though the *Guru Granth* does not make an explicit reference to the word divorce, the Gurmukhi word, ‘*chutee*’, has been used in scripture which means ‘released’ or ‘escaped’, allowing for contrary interpretations by a minority of activists that there is room for dissolution of marriage in Sikhism.⁴⁴ Likewise, although in broader understanding, divorce has no religious grounding within Sikhism, there has been some flexibility in contemporary times. Some Sikh scholars have propounded, “*In the case of a broken marriage, divorce is impossible according to*

⁴¹ Section 6 of the Sikh Anand Karaj Marriage Act 2018.

⁴² Ibid.

⁴³ Section 6(1), (2) & (3) Sikh Anand Karaj Marriage Act 2018.

⁴⁴ Pakistan Sikh Gurdwara Prabhandak Committee, note 40.

*the Sikh religious tradition. The couple can, however, obtain a divorce under the civil law of the land.*⁴⁵

The analysis above demonstrates that there is room for divorce under civil law. However, contemporary Sikh scholars have iterated repeatedly that “direct divorce” is not permissible per Sikh traditions. In case of marital discord, the ‘*Sanghat*’ (the community) must be involved in resolving the dispute. If the matter persists, it must be referred to the ‘*Panj Pyare*’ who attempt to encourage reconciliation between the spouses.⁴⁶ However, the 2018 Act has yet to consider these details, eventually becoming one of the core areas of controversy and amendment.

Implementation

Even after five years since its promulgation, the 2018 Act awaits implementation due to the Rules of Business needing to be drafted.⁴⁷ In July 2020, the first committee for devising the Rules of the 2018 Act was formed. That committee was headed by a Member of the Punjab Assembly, Mahinder Pal Singh and had on board Sardar Satant Singh, head of the Pakistani Sikh Gurdwara

⁴⁵ SikhiWiki — Encyclomedia of the Sikhs ‘Sikhism Against Divorce’ <https://www.sikhiwiki.org/index.php/Sikhi_against_divorce#Divorce_is_taboo> accessed 13 July 2023.

⁴⁶ The *Panj Pyare* refers to an *ad hoc* group of five baptised Sikhs constituting a decision-making body and acting as leaders within the Sikh community. They are called upon to perform various critical services, including family dispute resolution. See GS Sandhu, *Who Are the Sikhs? An Exploration of the Beliefs, Practices, & Traditions of the Sikh People* (Archway Publishing, 2023).

⁴⁷ A Mehmood, ‘Two Years On, Sikh Marriage Act Still Awaits Implementation’ Express Tribune (21 June 2020) <<https://tribune.com.pk/story/2247045/two-years-sikh-marriage-act-still-awaits-implementation>> accessed 13 July 2023.

Parbandhak Committee, Gopal Singh Chawla, Giani Zail Singh, and Giani Ranjeet Singh.⁴⁸ As per Mahinder Pal Singh, the Committee faced a challenging situation as the community raised severe objections and reservations on various law provisions, making drafting Rules of Business for the same 2018 Act futile. The Committee instead took up the task of devising recommendations for draft amendments to the Act that addressed all the objections raised. For review, the draft recommendations were circulated to various government departments, including the Local Government, Law, and Higher Education Departments. The legislator also claimed that the draft recommendations were shared and later approved by the religious leaders of *Akal Takht*, the supreme Sikh *Takhts* (seats of power) located in Amritsar, India.⁴⁹

At the time of being interviewed, Mahinder Pal Singh, the legislator who led the drafting of the amendments, was hopeful that the amendments to the 2018 Act, which have been prepared after detailed consultation with the Sikh community both nationally and internationally, would be presented before the Punjab Cabinet for approval. Soon after, they would be taken up in the provincial assembly to be introduced as a bill.⁵⁰ Singh expressed that the amendments to the 2018 Act had been delayed

⁴⁸ R Piracha, 'Sikh Marriage Act: Never Implemented Now to be Amended Voicepk.net (15 March 2021)<<https://voicepk.net/2021/03/sikh-marriage-act-never-implemented-now-to-be-ammended/>> accessed 13 July 2023.

⁴⁹ Akal Takht is the principal seat of authority of the global Sikh community, symbolising dispensation of justice and temporal activity. See Encyclopedia Britannica, 'Akal Takht' <<https://www.britannica.com/topic/Akal-Takht>> accessed 13 July 2023.

⁵⁰ Interview with Mahinder Pal Singh, Member Punjab Assembly (Lahore, 3 September 2022).

initially because of the advent of the global pandemic. After that the political instability hampered the incumbent provincial government from presenting the amendment Bill in the Assembly. He also stated that the Rules pertinent for the implementation of the law have been prepared simultaneously, so there is no further delay. As soon as the bill receives the assent of the provincial assembly, it will be enforced. In spite of these claims, the amendments had yet to be presented before the Cabinet at the time of writing this paper.

Although the proposed amendments had not been publicly disclosed, Singh, in various interviews with newspapers and upon personal correspondence, detailed some areas in the original Act of 2018 that were sought to be reformed.⁵¹ The ensuing section reviews them at length.

Proposed Amendments

1. Addition of Sikh Religious Leaders' Titles:

The Sikh community had expressed profound regret with the failure of the drafters of the 2018 Act to include religious titles that are added by the community as a mark of respect to the names of their religious leaders. Section 2, in laying down definitions of terms used in the 2018 Act especially the terms 'Sikh' and 'Sikh religion' refers to several Sikh religious leaders. Still, a grave concern of the Sikh community remains that the appropriate titles have not been added. Singh has iterated that the spellings of the names of the religious leaders need to be corrected.⁵² After detailed consultation with

⁵¹ Ibid.

⁵² Section 2(h) and (i) of the Sikh Anand Karaj Marriage Act of 2018.

religious scholars, amendments to this section have been proposed.

2. Teachings of Guru Granth Sahib Incorporated in the Amendments:

Section 3 prescribes the method for solemnization of Sikh marriages by referring to the ‘marriage being in accordance with Sikh religion.’⁵³ However, there is no further elaboration on the teachings or ways of a Sikh marriage. The proposed amendments have introduced the provision for Sikh marriages to take place pursuant to the teachings of Guru Granth Sahib and a couple has been legally mandated to take four rounds at the time of the marriage.

3. Registration and Appointment of *Granthi*

Section 2(f), while defining the role of a *Granthi*, fails to prescribe criteria for his appointment. This means that any person who is a follower of the Sikh religion has been authorized to solemnise marriages. However, Singh expressed that the lack of criteria for the appointment of a *Granthi* is in fact a lacuna of the 2018 Act and the amendment being proposed has stipulated that only a select group of individuals as appointed by the Federal Government on the recommendation of the Pakistan Sikh Gurdwara Prabandhak Committee would be legally authorized to conduct Sikh marriages.

4. Revision of Divorce Provisions:

⁵³ Section 3(1) of the Sikh Anand Karaj Marriage Act 2018.

Mahinder Pal Singh has maintained that ‘direct divorce’ is not acknowledged within Sikhism. There is significant religious literature to confirm that there is no concept or *Maryada* (code) of divorce in the Sikh religion. Civil divorce is not recognised and is deemed a grave matter. If some marital discord arises, nominated senior members of the *Sangat* are expected to intervene and help resolve the dispute. In case the matter is not resolved by the intervention of the *Sangat* the couple is expected to consult the *Panj Pyare*. Section 6 of the 2018 Act does not make any of the above references therefore it has been amended to mandate Sikh couples seeking annulment of marriage to consult Sikh leaders part of the *Panj Pyare* who would first try to reconcile the differences. If unsuccessful the couple would be allowed to seek divorce.⁵⁴

Conclusion

For over seven decades, the Sikh community has been deprived of a legal mechanism for the recognition of their marital identity. While Punjab did take the lead by introducing the 2018 Act, even after the passage of five years, the 2018 Act awaits enforcement. The political musical chair in the province of Punjab has diverted the government’s attention from this crucial legislative amendment. Although upon being interviewed, Mahinder Pal Singh stated that the draft amendment bill would be presented before the Cabinet for approval ‘any day now’, this never came to fruition.

⁵⁴ A Mehmood, note 23.

Whilst certain proposed amendments hold significance in terms of respecting the sentiments of the Sikh community, the proposed discarding of the provision pertaining to dissolution of marriage may carry detrimental effects for the well-being of Sikh spouses, particularly women. Subjecting a Sikh woman — intending to dissolve her marriage due to domestic violence or some other serious concern, for instance — to long-winded attempts at reconciliation and community engagement may leave her vulnerable to perpetual abuse in case the annulment is disallowed on any grounds. Hence, a no-fault divorce provision is necessary to allow Sikh spouses to dissolve their marriages mutually or unilaterally.

It is also pertinent that other provinces, especially Khyber Pakhtunkhwa, which has the second-highest Sikh population in the country after Punjab, enact a law governing Sikh marriages. Preferably, however, broader country-wide consultation may help draft an improved version of the 2018 Act. By passing a resolution pursuant to Article 144 of the Constitution of Pakistan, the provinces can empower the National Assembly to enact a law concerning Sikh marriages that would be enforceable and accepted nationwide. In the meantime, however, the problems and difficulties stemming from no personal status law for Sikhs in Pakistan continue to persist, despite the dim glimmer of relief provided by the enactment of the 2018 Act. It is paramount that the federal and provincial legislators take concrete steps to remedy this predicament of the Sikh community in Pakistan.

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