WHAT'S THE CONSTITUTION GOT TO DO WITH IT? REGULATING MARRIAGE IN PAKISTAN

KARIN CARMIT YEFET*

I. INTRODUCTION

Pakistan's legal regime, particularly the status of its women, is the subject of considerable academic and media interest both domestically and internationally.[1] The legal plight of Pakistani women is well documented, and virtually all accounts stress the brutality with which their rights are violated. They are portrayed as subject to a legal system that allows them to be veiled, secluded, silenced, harassed, mutilated, forced into prostitution, beaten, raped, murdered, and otherwise humiliated.[2] This study, however, seeks to unravel for the first time a different and surprising picture of the marital rights of Pakistani women and the protection afforded them by the Constitution.

While the legal literature is replete with discussions of both marriage law and constitutional law, the interplay between the two within the context of Islam seems to have largely escaped scholarly attention. This article seeks to fill this gap; it explores the actual and potential intersections of Pakistan's

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1. *See* Riffat Hassan, *Are Human Rights Compatible with Islam?*, http://www.religiousconsultation.org/hassan2.htm (last visited Feb. 22, 2009).

2. For instance, on average, a woman is raped every two hours and gang raped every four hours in Pakistan. *See* Katherine M. Weaver, *Women's Rights and Shari'a Law: A Workable Reality? An Examination of Possible International Human Rights Approaches Through the Continuing Reform of the Pakistani Hudood Ordinance*, 17 DUKE J. COMP. & INT'L L. 483, 495 (2007); *see also* GOODWIN, *infra* note 143, at 48–75 (explaining the realities of rape and other forms of sexual oppression in Pakistan); HAIFAA A. JAWAD, THE RIGHTS OF WOMEN IN ISLAM 52–60 (1998); Federal Research Division, Library of Congress, *Men, Women, and Family Relations*, in PAKISTAN: A COUNTRY STUDY (Peter R. Blood ed., 6th ed. 1995), *available at* http://countrystudies.us/pakistan/36.htm (noting the cultural norms placed on women, known as purdah, for their own protection); Tina R. Karkera, *The Gang-Rape of Mukhtar Mai and Pakistan's Opportunity to Regain Its Lost Honor*, 14 AM. U.J. GENDER SOC. POL'Y & L. 163, 163–71 (2006) (providing a detailed look at the Mukhtar Mai rape case through Pakistan's judicial system); Siobhan Mullally, *"As Nearly as May Be": Debating Women's Human Rights in Pakistan*, 14 SOC. L. STUD. 341, 349–51 (2005) (describing the trials and tribulations that rape complainants face in the Pakistani justice system).

Constitution with legal regulation of marital love, and reveals the uniqueness of this system and its striking sensitivity to women's rights.

Examining the Constitution's impact on marriage law in Pakistan is a tricky endeavor. To begin with, the supreme law of the land seems to embody a blatant contradiction. The Pakistani Constitution extends protection to an impressive catalog of fundamental rights, placing Pakistan in line with some of the most western-minded constitutional regimes in the world.[3] At the same time, in contrast to the American-style constitutional commitment to *separate* church and state,[4] the Pakistani regime is constitutionally committed to *integrate* the two, in the sense that all laws must conform to the injunctions of Islam as a condition of their constitutional validity.[5] So the same Constitution that protects western fundamental rights also elevates Islamic law, a legal tradition usually associated with the loss of rights.[6] This raises the question of how a legal system is expected to adequately function when its defining document seems inherently flawed, and how its judges are meant to carry out its conflicting mandates faithfully, especially when dealing with the delicate regulation of marriage. Interestingly, this fundamental dilemma is not unique to Pakistan; more and more countries in the Islamic world are facing a similar problem.[7]

This article suggests an answer to this question. Using the fascinating Pakistani system as a case study, it argues that Islamic law and human rights are not competing or contradictory, but rather compatible and complimentary, and that together they have in fact provided comprehensive protection to Pakistani women's marital rights.

To fulfill its end, the article is comprised of two chief parts. The first is designed to familiarize the reader with the constitutional system of Islamic governance in Pakistan. It briefly sketches the fundamentals of Pakistan's constitutional jurisprudence and focuses on the tension between human rights and Islamic law at the heart of the Constitution. The second part analyzes the impact of these two constitutional norms on the regulation of marital love in Pakistan. It explores the ingenious interpretive techniques Pakistani courts have developed in order to harmonize the constitutional scheme and defend women's rights when addressing controversial issues, which range from prerequisites to marriage, legal and culturally based restrictions on marital freedom and

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3. This catalog of rights include social and economic, political and civil, explicitly-guaranteed and unenumerated rights. *See* the discussion *infra* Part II; Karin Carmit Yefet, *The Constitution and Female Marital Dissolution in Pakistan: Western Liberalism in Islamic Garb* (forthcoming 2009) (manuscript at 10, on file with author).

4. U.S. CONST. amend. I.

5. *See* Pak. Const. (1973) art. 2-A (1985), *available at* http://www.pakistani.org/pakistan/Constitution (last visited Feb. 22, 2009).

6. *See* Julie Dror Chadbourne, *Never Wear Your Shoes After Midnight: Legal Trends Under the Pakistan Zina Ordinance*, 17 WIS. INT'L. L.J. 179, 181–82 (1999); Naz K. Modirzadeh, *Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds*, 19 HARV. HUM. RTS. J. 191, 193–94 (2006); Asifa Quraishi, *Her Honor: An Islamique Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspectiv*e, 18 MICH. J. INT'L L. 287, 287–88 (1997).

7. This is the case in Egypt, for example, and other countries have followed suit and adopted "constitutional Islamization" provisions. *See* Karin Carmit Yefet, *Lifting the Egyptian Veil: the Islamic and Constitutional Road to Female Marital Emancipation* (forthcoming 2009) (manuscript at 21, on file with author).

polygamous marriage, to marriage and divorce registration. Ultimately the article concludes, the exemplary Pakistani regime may potentially serve as an illuminating model for the productive and complementary utilization of Islam and constitutional jurisprudence in the regulation of a marriage law respectful of human rights.

II. WEDDING ISLAMIC LAW TO HUMAN RIGHTS: OUTLINE OF A UNIQUE CONSTITUTIONAL PROFILE

The relationship between Pakistan and Islamic law is quite unique. Pakistan was envisioned and created in the name of Islam, and as a home for the Muslims of India.[8] It was the first country in modern history to introduce the concept of an *Islamic* Republic, a concept later copied by other Muslim nations.[9] Naturally, the Pakistani fascination with Islamic law was given expression in the supreme legal document of the land—the Pakistani Constitution. The most conspicuous feature of the 1973 Constitution is its painstaking devotion to Islamic law. Many of its articles serve to articulate the centrality of Islam, and indeed, it contains more Islamic provisions than any other constitution in the entire Muslim world.[10]

The predominantly Islamic character of the Constitution was dramatically strengthened when, in a revolutionary step in 1985, Article 2-A was incorporated into the Constitution to require that all laws be consistent with the injunctions of Islam, as laid down in the Qur'an and Sunna.[11] The Constitution also established special tribunals called the "Shariat Courts"—that is, the Federal Shariat Court (FSC)[12] and its appellate instance, the Shariat Appellate Bench of the Supreme Court (SAB)[13]—as the judicial bodies empowered to review legislation for consistency with the "injunctions of Islam."[14] This groundbreaking step was totally unprecedented; never before had a court

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8. Nausheen Ahmad, *The Superior Judiciary: Implementation of Law and Impact on Women*, in SHAPING WOMEN'S LIVES: LAWS, PRACTICES & STRATEGIES IN PAKISTAN 3, 4 (Farida Shaheed et. al. eds., 1998); Mullally, *supra* note 2, at 343–45.

9. ASIF SAEED KHAN KHOSA, HEEDING THE CONSTITUTION 107 (1995).

10. NIAZ A. SHAH, WOMEN, THE KORAN AND INTERNATIONAL HUMAN RIGHTS LAW: THE EXPERIENCE OF PAKISTAN 100 (2006). It is noteworthy that the Enforcement of Shari'a Act of 1991 was passed to enhance the process of Islamization. *See* Enforcement of Shari'a Act X of 1991, *available at* http://www.pakistani.org/pakistan/legislation/1991/actXof1991.html. Interestingly, while the law reaffirms the supremacy of Islamic law and instructs that all statutory law is to be interpreted in the light of "Islamic principles and jurisprudence," *id.* sec. 4, it still insists that "[n]otwithstanding anything contained in this Act, the rights of women as guaranteed by the Constitution shall not be affected," *id.* sec. 20. The actual affect of this piece of legislation remains uncertain. Mullally, *supra* note 2, at 350.

11. Pak. Const. (1973) art. 2-A (1985). Article 2-A incorporated the Objectives Resolution, which had until then functioned as preamble to the constitution, and made it a substantive provision thereof. The effect of this move was to render Islamic law the constitutional basis of all state law. *See* Pak. Const. (1973) Annex (Objectives Resolution), *available at* http://www.pakistani.org/pakistan/Constitution/annex_objres.html (last visited Feb. 22, 2009).

12. *Id.* art. 203-C (1980).

13. *Id.* art. 203-F, sec. 3 (1980).

14. *Id.* art. 203-D (1980).

anywhere in the world been authorized to examine nearly the entire legal system on the basis of Islam.[15] Moreover, the Shariat Court was granted *suo moto* power to review laws even on its own motion, a power almost unheard of in constitutional history.[16]

But fidelity to Islamic law is only one side of the constitutional story. Pakistan takes pride in its very generous Constitution, extending protection to an impressive catalog of "western" fundamental rights. It recognizes almost all of the rights guaranteed in the 1948 Universal Declaration of Human Rights, including the rights to life and liberty, privacy of home, human dignity, and equality.[17] The Pakistani right to equality is particularly strong; it encompasses both the English concept of equality—"all citizens are equal before the law"—as well as the American concept of "equal protection of the law,"[18] and further prohibits "discrimination on the basis of sex alone," unless it operates favorably as a protective measure for women or children.[19]

In addition to these explicitly-guaranteed fundamental rights, Pakistani constitutional thought further acknowledges the existence of rights even outside of the constitutional text, with the right to life as the chief constitutional basis for deriving unenumerated fundamental guarantees.[20] In the generous hands of the

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15. *See* Riazul Hasan Gilani, *A Note on Islamic Family Law and Islamization in Pakistan*, in ISLAMIC FAMILY LAW 339, 342–44 (Chibli Mallat & Jane Connors eds., 1990).

16. Pak. Const. (1973) art. 203-D, sec. 1 (1980) (stating that the Court's jurisdiction may be invoked by any citizen, by the federal or a provincial government, or it may act on its own motion). The only exceptions to the otherwise all-encompassing jurisdiction of the FSC are the constitution, fiscal law, and Muslim personal law. *See* discussion *infra* Part III.D; *see also* Pak. Const. (1973) art. 203-B ("'Law' includes any custom or usage having the force of law but does not include the Constitution [and] Muslim personal law…").

17. SHAH, *supra* note 10, at 109. *See generally* Pak. Const. (1973) pt. II (setting forth numerous individual rights and protections and establishing a policy framework to guide the legislature).

18. Shaheen Sardar Ali & Kamran Arif, *Parallel Judicial Systems in Pakistan and Consequences for Human Rights*, in SHAPING WOMEN'S LIVES: LAWS, PRACTICES & STRATEGIES IN PAKISTAN, *supra* note 8, at 29, 29–30 ("Equality before law is a somewhat negative concept implying the absence of any special privilege in favor of any individual and equal subjection of all classes to the ordinary law. Equal protection of laws, on the other hand, means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in like circumstances. Thus, compared to 'equality before law,' 'equal protection of law' is a more positive concept implying equality of treatment in equal circumstances.").

19. As the Pakistani Supreme Court explained in a landmark case:

> The Constitution assumes that the women and children in our society need protection and not the males and as long as the Constitution mentions that assumption and basis, we cannot reverse it by affording protection to males and adults at the cost of women and children. That would be opposed to the very fundamental mandate of the Constitution.

Shirin Munir v. Gov't of Punjab, PLD 1990 SC 292, 298.

20. *See* Darshan Masih v. The State, PLD 1990 SC 513. In this case the Court ruled that the constitutional catalog of rights was not sealed or exhaustive, but open and evolving, receptive to incorporating additional unenumerated rights of a fundamental character. The Court further stressed that worthy candidates for inclusion in the pantheon of constitutional rights are the basic human rights recognized in Islam:

> There is no bar in the Constitution to the inclusion in such laws of these rights, in addition to the Fundamental rights contained in Chapter 1, Part II thereof… These aspects of the enforcement of Fundamental Rights guaranteed by the Constitution and other basic human rights ensured by Islam can, by law, be made also into an independent *inalienable* right, with self-operating mechanism for *its* enforcement as well.

Pakistani courts, the right to life has achieved promising breadth; it is construed expansively to secure not only physical life, but also the *quality* of life and the full enjoyment and meaning thereof.[21] For example, this right is so broad as to engender a positive state duty to ensure an adequate standard of living and education for its citizens, and even environmental rights, a policy which would do credit to even the most liberal, human-rights conscious states in the world.[22] Pakistani courts have also interpreted the right to life to include the right of a couple to marry, establish a home, and live together as a basic human guarantee.[23] Any law which infringes on the sanctity of these fundamental rights—enumerated and unenumerated alike—is invalid and void.[24]

To complete the constitutional picture, the Constitution also contains "principles of policy" which must guide policymakers, state organs, and courts in interpreting legislation, but cannot be used to challenge laws which fail to conform to their letter and spirit.[25] Two important principles of policy are securing women's full participation in all spheres of national life[26] and protecting the institution of marriage and the family.[27]

To the western observer, Pakistan must seem a constitutional battlefield between two central contradictory norms: "western" fundamental rights and Islamic law, which is notorious for its discriminatory treatment of women, especially in the area of marriage law.[28] Which commitment, then, is to gain the upper constitutional hand in the inevitable case of conflict? As the Supreme Court acknowledged, this critical question "shook the very constitutional foundations of the country,"[29] giving rise to fierce debates among the judiciary. For many lower courts this issue was rather simple; they treated Article 2-A's commitment to Islamic law as a paramount, supra-constitutional clause

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Id. at 546 (emphasis in original).

21. *See* Shehla Zia v. WAPDA, PLD 1994 SC 693; Employees of the Pakistan Law Commission v. Ministry of Works, 1994 SCMR 1548, 1548–49; *see also* I SYED SHABBAR RAZA RIZVI, CONSTITUTIONAL LAW OF PAKISTAN: TEXT, CASE LAW AND ANALYTICAL COMMENTARY 110 (2002) (stating that a narrow view of the meaning of the term 'life' is not intended by Pakistan's Constitution).

22. *See* EMMANUEL AZFAR, THE SHORTER CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN 94–96, 98, 134 (2d ed. 2007); *see, e.g.*, Salt Miners Union v. Dir. Mineral Dev., Indus., 1994 SCMR 2061 (a right to unpolluted water); Shehla Zia v. WAPDA, PLD 1994 SC 693 (the right to life must include a right to basic necessities of life and a right to clean atmosphere and healthy environment); Metro. Corp. v. Imtiaz Hussain Kazmi, PLD 1996 Lah. 499, 500 (an employee has a constitutionally protected right to earn a livelihood and to be paid); Ameer Bano v. S.E. Highways, PLD 1996 Lah. 592, 593 (a right to be protected from diseases and inconvenience); Shehri v. Province of Sindh, 2001 YLR 1139 (the right to protection from disease and inconvenience led the court to order the restoration of the city sewage system).

23. *See* discussion *infra* Part III.B.2 ("Although the right to marry is not explicitly protected… it has been recognised by the courts in numerous cases."); Sara Hossain & Suzanne Turner, *Abduction for Forced Marriage – Rights and Remedies in Bangladesh and Pakistan*, in INTERNATIONAL FAMILY LAW 16 (2001).

24. Pak. Const. (1973) art. 8 sec. 1.

25. SHAH, *supra* note 8, at 120–21.

26. Pak. Const. (1973) art. 34.

27. *Id.* art. 35.

28. *See* Mullally, *supra* note 2, at 344.

29. See the landmark decision of the Pakistani Supreme Court in Hakim Khan v. Gov't of Pakistan, PLD 1992 SC 595, 629.

controlling all other legislation and even the Constitution itself.[30] The Pakistani Supreme Court, however, rejected this simplistic solution—it declared Article 2-A equal in weight and status to the other provisions of the Constitution, and cautioned that courts, being themselves the creatures of the Constitution, cannot annul any existing constitutional provisions for inconformity with Islam.[31]

The question, then, remains: how can the constitutional commitment to human rights live side by side with an equally important constitutional commitment to Islamic law? This article attempts to resolve this pivotal question by examining selected issues relating to marriage through a constitutional prism. The discussion will demonstrate that the Pakistani experiment with Islamic law is nothing short of unique—both the regular and Shariat Court systems have interpreted the injunctions of Islam in such a liberal and progressive manner as to equate Islamic law in a *de facto* manner with fundamental rights and thus have been able to skillfully harmonize the constitutional framework.

III. WEDDING MARRIAGE TO THE CONSTITUTION: THE REGULATION OF LOVE IN PAKISTAN

This part explores the interplay between marital love and constitutional law in Pakistan, and the role the Constitution played in framing the debate and shaping the Pakistani law of marriage. I analyze the elements required for the contraction of a valid marriage, examine the extent to which a woman may enter into marriage of her own volition under both statutory law and customary practice, question the institution of polygamy and touch upon the procedural yet substantial issues of marriage and divorce registration.

A. Prerequisites to Marriage: The Meaning of "I Do NOT"

The Muslim Family Law Ordinance (MFLO) is the main body of law regulating marriage in Pakistan. The MFLO mainly deals with the procedural aspects of marriage, meaning that courts enjoy wide discretionary power to decide what the substantive, uncodified Muslim personal law is.[32] It follows that unlike legislation in many other Muslim countries, Pakistani law is silent as to the right of an adult woman to marry a person of her choice and as to whether her consent to marriage is sufficient or even required as a prerequisite for its validity.[33]

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30. The champion of this stance was Justice Tanzil-ur-Rahman, and many justices followed suit. *See, e.g.*, Nat'l Indus. Cooperation Credit Corp. Ltd. v. President of Punjab, PLD 1992 Lah. 462; Shahbazud Din Chaudhry v. Serv. I.T. Ltd., PLD 1989 Lah. 1; Miraz Qamar Raza v. Tahira Begum, PLD 1988 Kar. 169; Irshad H. Khan v. Parveen Ajaz, PLD 1987 Kar. 466; Habib Bank Ltd. v. Muhammad Hussain, PLD 1987 Kar. 612.

31. Hakim Khan v. Gov't of Pakistan, PLD 1992 SC 595.

32. SHAH, *supra* note 10, at 152.

33. *Id.* at 156. *See also* Tassaduq Hussain Jillani, *Implementing the Right to Marry—A View from the Pakistani Courts*, in INTERNATIONAL FAMILY L. 25, 26 (2001) (nothing that Pakistani legislation did not explicitly tackle the issue of a woman's choice in marriage).

Apparently, this basic requirement is not so self-evident in Pakistan. Quite to the contrary, absent any clear legislative guidance, the phenomena of forced and "exchange" marriages became prevalent in Pakistan, severely jeopardizing women's independent decision-making in marriage.[34] A girl is often promised in marriage to her parents' friend, sometimes even before she is born, or may be given in marriage in exchange for a young girl from the groom's family to be married to her brother or even her father.[35] Moreover, Pakistani criminal law inadvertently encourages forced marriages. The penal code allows the victim of a crime or his heirs to "forgive" the offense in return for compensation, and this has resulted in the practice of giving women in marriage to aggrieved parties in exchange for the waiving of criminal charges.[36] Of course these traded women, "have no more of a voice than the money, land, or other property that changes hands in these transactions."[37]

This grim reality did not escape the eye of Pakistani courts. On the occasions they were called upon to deal with forced marriages, the courts proved highly critical of what they regarded as an "inhuman" and "gender-insensitive" practice.[38] One such particularly brutal case of forced marriage reached the Pakistani court—the story of the 28 year-old Humaira Mehmood, the only daughter of a then-member of the Legislative Assembly.[39]

Humaira married against the wishes of her parents, who had already planned her entire marital fate: she was promised in marriage to her cousin

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34. *See* Hossain & Turner, *supra* note 23, at 16; Shaheen Sardar Ali, *Conceptualizing Islamic Law, CEDAW, and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of Application of CEDAW in Bangladesh, India, and Pakistan*, http://www.unifem.org.in/PDF/complete%20study.pdf, at 206, 228 [hereinafter *Conceptualizing Islamic Law*].

35. RASHIDA MOHAMMAD HUSSAIN PATEL, WOMAN VERSUS MAN: SOCIO-LEGAL GENDER INEQUALITY IN PAKISTAN 51 (2003) ("Women have become commodities, being sold for money, obligations, or honour in the name of marriage.").

36. *See id.* at 163. The law states that simply giving a woman in marriage is not enough as compensation, but does not outlaw this practice. SHAH, *supra* note 10, at 146. It is also noteworthy that according to the law, if the victim of a crime is a woman, then the compensation for offense against her would be half of that for a Muslim male. Ali, *Conceptualizing Islamic Law*, *supra* note 34, at 219; Amina Jamal, *Gender, Citizenship, and the Nation-State in Pakistan: Willful Daughters or Free Citizens?*, 31 SIGNS 283, 300, n.28 (2006).

37. Afshan Jafar, *Women, Islam, and the State in Pakistan*, 22 GENDER ISSUES 35, 51 (2005); Marie D. Castetter, *Taking Law into Their Own Hands: Unofficial and Illegal Sanctions by the Pakistani Tribal Councils*, 13 IND. INT'L & COMP. L. REV. 543, 559–60 (2003) (reporting that the handing over of women is a common method of dispute resolution, and that the women are not consulted nor do they give their consent to their being compensation).

38. *See* Jillani, *supra* note 33, at 25. See also the condemnation of the practice of "exchange marriage" in the landmark decision of Hafiz Abdul Waheed v. Asma Jahangir, PLD 1997 Lah. 301, 382 ("[T]he menace of SHIGHAAR (giving a girl in marriage to someone and taking a girl in return) and the menace of giving daughters and sisters etc. in marriage for money, are rampant in certain sections of our society. ALLAH condemns such-like practices. Any girl who is being forced into such a marriage shall have [a] right to approach a Court of Law to seek protection and if the Court finds that the girl is being bartered away, then the Court shall pass necessary orders including an order absolving the girl from her obligations towards such-like parents and elders etc. . . . ") (alteration in original).

39. For a detailed background of the case, see WOMEN'S HUMAN RIGHTS: LEADING INTERNATIONAL AND NATIONAL CASES 184–85 (Robyn Emerton et al. eds., 2005) [hereinafter WOMEN'S HUMAN RIGHTS].

when she was still a child in exchange for his sister who was to be given in marriage to Humaira's brother.[40] When her parents found out that their plan was frustrated, they went to extreme lengths to enforce their will on their wayward daughter.[41] The court narrated the tragic tale of her subsequent abduction, torture, attempted murder, and eventual forced marriage to her cousin: She was "chased, harassed, abused, beaten and disgraced, abducted from her husband with the help of the police, brought to the custody of her parents, and forcibly married to her cousin.[42] She was made to participate in a staged marriage ceremony, where she was videotaped sobbing and crying; her thumbprints were forcibly obtained on the marriage contract; and the forced marriage was even backdated in the Marriage Register, so as to appear to have taken place before her first, consensual marriage.[43] Humaira then managed to escape with her husband to a government-run shelter only to find that her cousin/"husband" pressed criminal charges against her for adultery and accused her husband of abduction.[44] A heavy contingent of police stormed the shelter, arrested the couple, beat and restrained them, and subsequently detained them at separate police stations.[45] Humaira in turn petitioned the Lahore High Court to quash the criminal charges against the couple on the grounds that her alleged marriage to her cousin had occurred under duress and was thus void.[46]

The Court did not mince words in its condemnation of forced marriages.[47] Justice Jilani noted the hypocrisy in calling Humaira "adulterous," and was highly critical of "the manner in which she was hunted like a prey and the way the State functionaries become partners in a feudal vendetta notwithstanding the mandate of their office."[48] The Court then held that a woman enjoys the right to marry the man of her choosing, and that her consent is indispensable and a *sine qua non* for a valid marriage.[49] This right, the Court stressed, is supported by the triple force of Islam, the Pakistani Constitution, and international human rights conventions.[50]

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40. *Id.*

41. *Id.*

42. *See* Humaira Mehmood v. The State, PLD 1999 Lah. 494, 514.

43. WOMEN'S HUMAN RIGHTS, *supra* note 39, at 184.

44. *Id.*

45. *Id.*

46. *Id.* at 184–85.

47. *Humaira Mehmood*, PLD 1999 Lah. 494, 514–15. In a long monograph, the Court lamented that even though women are given equal rights in matters of marriage:

> [I]n our practical lives we are influenced by a host of other prejudices bequeathed by history, tradition and feudalism. . . . Behind the evangelistic facade there was a certain culture at play. It is that culture which needs to be tamed by law and an objective understanding of the Islamic values. Let us do a little self-accountability and a little soul searching both individually and collectively. Let there be no contradiction in our thoughts and actions. *Id.*

48. *Id.*

49. *See id.* at 501.

50. *Id.* at 512. The Court referred to Article 16 of the Convention on Elimination of All Forms of Discrimination against Women, obliging the state to secure women "the right freely to choose a spouse and to enter into marriage only with their free and full consent." Convention on the

The Court embraced an egalitarian interpretation of Islam over the claims of Humaira's family, and cautioned that "[m]ale chauvinism, feudal bias and compulsions of a conceited ego should not be confused with Islamic values."[51] It stressed that the advent of Islam was a milestone in human civilization, as it changed the status of women from that of serfs and chattel to that of equals and conferred upon them an equal right to choose their life partners of their own free will.[52] Thus, Humaira was entitled to exercise her right of exit and disassociation "from the high walls of a feudal bondage,"[53] and to marry whomever she desired.[54]

The Court further resorted to the Pakistani Constitution in support of its findings. It enlisted both the fundamental guarantee to equality and the State's duty, as established under the Constitution's principles of policy, to protect the institution of marriage,[55] and concluded that forced marriages were abhorrent to the very spirit of the Constitution.[56] Accordingly, the Court voided Humaira's forced marriage and quashed the criminal charges against the couple, thus restoring justice in the name of both Islam and the Constitution.[57] Henceforth, Pakistani women must enjoy the same right as men to marry the person of their choosing, and they must not and cannot be coerced into unwanted unions.

In another case, the Karachi High Court again invoked Islam and fundamental rights in order to alleviate the plight of a woman who was sold into marriage by her father. [58] The woman refused to accept the new marital status imposed on her, but her father refused to let her question the validity of his male authority and of the marriage.[59] She then petitioned for a court order restraining her father from preventing her approach to the family court to invalidate the marriage.[60]

The Court expressed sensitivity to her plight and relied on both the constitutional commitment to fundamental rights and Islamic law to grant her the requisite relief. As the Court explained, several fundamental rights were at stake in a case of forced marriage, in particular, a woman's right to liberty and human dignity,[61] as well as the constitutional prohibition against slavery and the

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Elimination of all Forms of Discrimination Against Women, art. 16(b), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. The Court also mentioned Articles 5 & 6 of the Cairo Declaration on Human Rights in Islam, establishing women's equal right to human dignity. Cairo Declaration on Human Rights in Islam, arts. 5–6, Aug. 5, 1990, http://www.oicun.org/articles/54/1/Cairo-Declaration-on-Human-Rights-in-Islam/1.html.

51. *Humaira Mehmood*, PLD 1999 Lah. 494, 515.

52. *Id.* at 514.

53. *Id.*

54. Mullally, *supra* note 2, at 353.

55. *Humaira Mehmood*, PLD 1999 Lah. 494, 512.

56. *Id.*

57. This case is extraordinary in that the Court severely chastised the police officers for their *mala fide* investigation and for arresting the couple despite the Court's contrary order. Consequently, the Court found one of the officers in contempt and sentenced him to imprisonment and a fine. *Id.* at 515–16.

58. Gulzaran v. Amir Bakhsh, PLD 1997 Kar. 309.

59. *Id.*

60. *Id.*

61. Pak. Const. (1973) art. 14.

trafficking of human beings.[62] Importantly, the Court also stressed that these rights were sanctioned by Islamic law and that the incorporation of Article 2-A rendered Islamic law an additional source in Pakistani constitutional law for the protection of human rights.[63] In conclusion, both prongs—the human rights prong and the Islamic law prong of the Pakistani Constitution—obligate the court to issue a restraining order against a father forcing his daughter into marriage as well as instruct the police to protect the woman and secure her way out of the coerced relationship.[64]

The combined force of the two constitutional commitments proved powerful enough to establish that a woman's consent is an indispensable condition for the validity of marriage. But is the additional consent of her male guardian also a prerequisite for the exercise of this fundamental right?

B. Love and Marriage: Can They Go Hand in Hand in Pakistan

While the role of the guardian in contracting a marriage is largely settled in traditional Muslim thought, it became the subject of a major controversy in Pakistan. All schools of Islamic thought but one consider an adult woman the same as an infant who cannot understand the nature of marriage, and who is "weak in reason, and open to flattery and deceit," and as such lacks the legal competence to enter into marriage of her own accord.[65] They therefore subject her right to marry to a superior right vested in her male guardian.[66] The Hanafi School stands alone in allowing women to marry independently, even without parental consent.[67]

Recent years, however, have witnessed many cases of so-called runaway "love- marriages," with more and more women marrying on their own initiative and without parental approval. Women, independently practicing decision-making in marriage, have created social and legal turmoil in Pakistan, leading to court battles, police raids and harassment, and even so-called "honor" killings. These phenomena and their contribution to the development of an equitable marriage law in Pakistan will be explored in the next section.

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62. Pak. Const. (1973) art. 11. Interestingly, the Court's invocation of slavery and trafficking of women in the context of forced marriage is a progressive reflection of international law perceptions on that phenomenon, where "[s]lavery-like practices" have been described in international documents as practices whereby "a woman without the right to refuse is promised or given in marriage." *See* Hossain & Turner, *supra* note 23, at 16. *Compare* CEDAW, *supra* note 50, art. 6 (directing all parties to "suppress all forms of traffic in women"), *with id.* art. 16 (guaranteeing women the right to enter into marriage "only with their free and full consent").

63. *Gulzaran*, PLD 1997 Kar. 309, 310.

64. *Id*.

65. *See generally* Shaheen Sardar Ali, *Is an Adult Muslim Woman Sui Juris? Some Reflections on the Concept of Consent in Marriage Without a Wali*, 3 Y.B. OF ISLAMIC AND MIDDLE E. L. 156, 166 (1996) (noting the differing views of women in the major Islamic schools of thought).

66. *Id.* at 165; TAHIR MAHMOOD, STATUTES OF PERSONAL LAW IN ISLAMIC COUNTRIES: HISTORY, TEXTS AND ANALYSIS 244 (2d ed. 1995).

67. Ali, *supra* note 65, at 165.

1. Love Marriages and the Male Guardian

In the closing years of the twentieth century, a case of love marriage reached the High Court and received massive media attention, both locally and internationally.[68] The sad story of Saima Waheed—often referred to in the literature as the "Saima Love Marriage" case—was highly publicized and touched off a flurry of debate over a woman's right to self-determination and choice in marriage.[69]

Saima Waheed, a twenty-two year old business student, married her sweetheart with neither the approval nor the knowledge of her parents.[70] When her father found out, it marked the beginning of a legal and human nightmare for Saima and her husband. Fearing for her life, she fled to a women's shelter to escape her family's anger, and ended up spending nearly a year there.[71] Her father and uncle used their political influence to put her husband in jail, where he spent almost two years and was tortured into signing a divorce decree.[72] The father then petitioned the Lahore High Court for custody of his daughter, claiming that her marriage was invalid absent his consent.[73] Saima in turn petitioned the Court for a declaration that she had been validly married and free to live with her husband.[74]

The father invoked Islamic law to support his petition and argued, *inter alia,* that if women were allowed to exercise choice in matters of marriage it would lead to the breakdown of the family unit and to the un-Islamic practice of "husband-shopping" and the "free mixing" of the sexes.[75] Saima primarily relied on constitutional rights, arguing that an adult woman was entitled to autonomy under the Constitution of Pakistan, and that conditioning her marriage upon a guardian's consent would deprive her of her fundamental rights to dignity, equality, and freedom of religion, and would violate the constitutional prohibition against traffic in human beings.[76]

The opinion of the minority of the Court reviewed the different positions of Islamic law, dismissed the view of the Hanafi School's minority opinion as inconsistent with the other Islamic schools, and embraced the majority Islamic view which insists on the guardian's authorization as a prerequisite to

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68. *See* Mullally, *supra* note 2, at 353. *See generally* Martin Lau, *Opening Pandora's Box: The Impact of the Saima Waheed Case on the Legal Status of Women in Pakistan*, 3 Y.B. OF ISLAMIC AND MIDDLE E. L. 518 (1996) (analyzing the Saima Waheed decision, which constituted a legal victory for that particular woman, but the impact on women's rights in Pakistan, generally, is still uncertain).

69. *See* Jamal, *supra* note 36, at 288, 301.

70. *Id.* at 287.

71. Amnesty International, *Women's Human Rights Remain a Dead Letter* (Mar. 1, 1997), http://www.asiapacific.amnesty.org/library/Index/ENGASA330071997?open&of=ENG-PAK.

72. Jamal, *supra* note 36, at 287. Saima's father even went so far as to accuse Saima's lawyer, the famous women's rights activist Asma Jahangir, of abducting and brainwashing his daughter. *Id.*

73. Hafiz Abdul Waheed v. Asma Jahangir (Saima Waheed Case), PLD 1997 Lah. 301. For the various procedures and rulings in the Saima Waheed Case, see Jamal, *supra* note 36, at 287–88.

74. *Saima Waheed Case*, PLD 1997 Lah. 301.

75. *Id.* at 301, 317; Ali, *supra* note 65, at 163.

76. *Saima Waheed Case*, PLD 1997 Lah. 301, at 321–22.

marriage.[77] In other words—no guardian, no marriage.[78] The dissent acknowledged that this Islamic rule was "harsh and offending to fundamental rights," but insisted that Islamic law was the "supreme law" of the land and thus must be followed.[79]

The majority opinion, however, ruled that the Constitution validates an adult woman's right to marry of her own free will, even without the consent of a guardian.[80] The lion's share of the Court's judgment was dedicated to investigating Islamic law.[81] The Court highlighted the range of competing interpretations of Islamic law, and embraced the one that was compatible with Pakistan's constitutional fundamental rights.[82] According to the Court, Islam accords the woman an elevated status, bestows upon her recognition as an independent social entity with a complete legal personality, and declares her worthy of the same honor and respect to which a man is entitled.[83] It is the right of every woman to exercise choice in marriage, regardless of the wishes of her guardian.[84] Remarkably, the Pakistani version of Islamic law as applied by the courts proved in perfect accord with the constitutional commitment to women's rights, and conducive to their realization.[85]

The Court was also mindful of the constitutional guarantee to equality - a woman's freedom to marry must equal that of man; she cannot be forced, sold, or bartered into marriage, and it is the Court's duty to set her free.[86] In sum, not only are Pakistani men free to marry without the consent of anyone but their prospective wives, but women, too, may validly contract their own marriages, regardless of their guardians' opinions.[87]

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77. *See generally id.* at 312–52, particularly at 340–41. The minority opinion of Justice Chaudhry explained that it was the duty of parents to arrange the marriages of their daughters as early as possible in order to prevent them from coming across male outsiders and sullying the purity of the home. *Id.* at 312–13.

78. The minority opinion implies that the lack of a guardian's involvement may lead to the "collapse of family nucleus," precisely what happened in the "evil empire" of the United States of America. *Id.* at 327.

79. *Id.* at 351.

80. Jamal, *supra* note 36, at 288.

81. *See* Lau, *supra* note 68, at 530. Indeed, some criticized the court for setting the judgment largely in terms of Islamic law whereas little reference was made to the Constitution. *See* Jamal, *supra* note 36, at 293; *Islamic Republic of Pakistan*, Islamic Family Law, http://www.law.emory.edu/ifl/legal/pakistan.htm (last visited Feb 23, 2009).

82. *Saima Waheed Case*, PLD 1997 Lah. 301, 352–53 (Qayyum, J.); *id.* at 353–84 (Ramday, J.).

83. *Id.* at 356–58, 361. The Court stressed that all the rights that the "West conceded to the women in the 19th and the 20th Century stood conferred, by Islam, on the females in the beginning of the 7th century." *Id.* at 356. For an analysis of this judgment, see Lau, *supra* note 68, at 537–38.

84. Though ruling in favor of women's independent right to marry, the rest of the decision was conservative and hostile to love marriages. The majority opinion stated that even though Saima's actions were constitutionally sound, they were socially and morally precarious, and then went on to urge the State to outlaw secret marriages. *Saima Waheed Case*, PLD 1997 Lah. 301, 383.

85. *See* Mullally, *supra* note 2, at 353.

86. *Saima Waheed Case*, PLD 1997 Lah. 301, 381–82..

87. Lest its judgment be read more broadly than the Court meant, it also stressed that all the Constitutions of the world allow reasonable restrictions on fundamental rights, and that in Pakistan such rights may be limited in the interests of "Islamic" values. The court feared that lack of appropriate limits on the extent of the individual's freedom will result in legislation legitimizing

The Court's decision in favor of women's liberty to marry became a rallying point for women's rights organizations; it was hailed as "historic" and a "landmark judgment,"[88] and as a "victory for constitutional rights."[89] Indeed, after the Saima Waheed case, similar cases were routinely resolved in favor of women's capacity to order their own personal lives.[90]

2. Love Marriages and the Police

Despite the judicial vindication of womens' right to marry, traditional perceptions of honor still severely limit some of the most basic rights of women.[91] Regrettably, many "love marriages" who disregarded their families' wishes find themselves subject to harassment by the Pakistani police,[92] who raid and search their homes, arrest them, and may even charge them with "pre"-marital sex—a severe offense under the infamous *Zina* Ordinance criminalizing adultery and fornication.[93] The police may even go so far as to harass the husband's family members to pressure him to divorce his wife.[94]

One such case reached the Pakistani court system. The Court enlisted the constitutional protection accorded to marriage in condemnation of the officers, viewing their behavior as based on tribal customs, social taboos, and barbarity.[95] The Court stressed that the police must yield to "the constitutional commands and to Islamic injunctions,"[96] and stated in no uncertain terms that

> [W]hen the marriage between a major Muslim woman with a major Muslim man has taken place . . . then every effort should be made to protect the marriage, because such is the command enshrined in Article 35 of the

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"carnal intercourse against the order of nature" and other evils like "unwed mothers and parentless children." *Id.* at 370. "If this is freedom," the Court admonished, then it is "only a freedom from all civilized norms of society and a freedom to take human beings back into the animal world." *Id.*

88. Jamal, *supra* note 36, at 289.

89. *Id.* at 291.

90. Salman Akram Raja, *Islamisation of Laws in Pakistan*, S. Asian J., October–December 2003, pt. 13, *available at* http://www.southasianmedia.net/magazine/journal/islamisation_laws.htm. In 2004 the Supreme Court reaffirmed the High Court's decision, stating that no further reasoning was needed to validate the marriage of Saima Waheed, since the FSC had previously acknowledged the absolute Islamic right of a woman to marry without her guardian's consent. *See* Hafiz Abdul Waheed v. Asma Jehangir, PLD 2004 SC 219.

91. PATEL, *supra* note 35, at 149.

92. *See, e.g.*, Castetter, *supra* note 37, at 563, 559 (noting that "the citizens fear the police, who are there to protect and enforce the law, more than fearing those that break the law").

93. *See* Sec. 4, Offense of Zina (Enforcement of Hudood) Ordinance (VII of 1979) (defining *zina* as a man and a woman who "willfully have sexual intercourse without being married to each other").

94. *See* Sajida Bibi v. Incharge, PLD 1997 Lah. 666, 670 (observing that such harassment is a common complaint against the police).

95. *Id.* at 670–71.

96. *Id.* at 669. For more decisions documenting the harassment to which married couples were subjected by the police, see Humaira Mehmood v. The State, PLD 1999 Lah. 494 (chastising the police and state functionaries and stating that they had become partners in a feudal vendetta notwithstanding the mandate of their office as the guardians of the equal protection of the lives, liberties, and honor of the citizens, and that they obstructed justice and lied to the court. One of the officers was sentenced to imprisonment for three months and a fine of Rs 5,000); Nazira Bibi v. SHO, PLD 1996 Lah. 709 (directing police to not harass the married couple or the husband's family).

> Constitution of Pakistan which reads . . . "The State shall protect the marriage [and] the family . . . ." [97]

Thus, neither the police nor any other state agency has the authority to interfere in the marital life of a couple; on the contrary, it is their constitutional *duty* to protect them.[98]

The Court further stressed that it was not merely the Constitution's principles of policy, but also the very fundamental right to life that stood violated when a married couple was harassed by the police or any other governmental agent.[99] For the Court, the right to life "does not merely mean vegetative or animal life," but must be construed broadly so as to encompass entitlement to a *happy* life, including such "amenities, facilities, and personal rights as should be enjoyed by a person born in a free country."[100] Naturally, the constitutional right to life shields the right of every couple to marry, establish a home, and live together "without fear or hindrance," regardless of the circumstances of their marriage.[101] The court's opinion reiterates repeatedly that "[i]t must be stated with all emphasis that a duly married couple has [an] inviolable right to live together,"[102] that the "relationship between husband and wife is so sacred and delicate that it ought to be respected by everyone, keeping aside all other considerations,"[103] and that interfering with a couple's right to live together and enjoy each other's company is one of the worst possible violations of their fundamental right to life.[104]

In another case, the Court strengthened the protection accorded to the privacy of the home and to the dignity of the individual by invoking the combined force of both the Constitution and Islam. This decision banned the police practice of raiding houses to intrude on the privacy of couples, harass them, and charge them with committing sex outside of wedlock (*zina*).[105] The Court stressed the importance and wide scope of the constitutional right to privacy,[106] explaining that this right originated in the Qur'an and found its way from Islam to the Constitution of Pakistan.[107] Furthermore, the incorporation of Article 2-A into the Constitution imbued Pakistani citizens with all the basic freedoms and rights enunciated by Islam, including the "inviolable and absolute" Islamic sanctity of the home.[108] In order to give true meaning to the

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97. *Sajida Bibi*, PLD 1997 Lah. 666, 668.

98. *Id.* at 669.

99. The right to life is specifically guaranteed by the constitution. Pak. Const. (1973) art. 9.

100. *Sajida Bibi*, PLD 1997 Lah. 666, at 670 (citing Shahla Zia v. WAPDA, PLD 1994 SC 693).

101. *Id.* at 670–71.

102. *Id.* at 671 (alteration in original).

103. *Id.* at 673.

104. *Id.* at 671.

105. Riaz v. Station House Officer, Police Station Jhang City, PLD 1998 Lah. 35, 51.

106. *Id.* at 42. Also, the Constitution states that the "dignity of man and, subject to law, the privacy of home, shall be inviolable." Pak. Const. (1973) art. 14, sec. 1.

107. *Riaz*, PLD 1998 Lah. 35, 50.

108. *Id.* 45–47. Indeed, privacy is an important right in Islam. The Qur'an forbids entering a home without the permission of its occupant, as well as spying on others. *See* Azizah Y. al-Hibri, *Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing?*, 1 U. PA. J. CONST. L. 492, 512 (1999).

intent of the Constitution, the court stressed that all laws must be accorded strict—not loose or liberal—interpretation, so as to honor and preserve the privacy of the home and the dignity of the individual.[109] Specifically, the *Zina* Ordinance is to be construed in the light of the constitutional and Islamic concept of privacy, meaning that its silence on the issue of search warrants should be read as excluding such authority and as preventing the police from interfering with the sacred privacy of the home.[110]

In summation, the constitutional commitment to Islamic law proved yet again harmonious with the constitutional commitment to human rights, and of particular benefit to couples of "love marriages" who are vulnerable to persecution by the police.

But harassment at the hands of the police is the least of the worries facing couples in love marriages. In Pakistan today, when a woman takes her sexuality into her own hands, exercising her freedom to choose a husband independently, she is perceived as violating her family's honor and as emasculating and undermining the male members of her family.[111] The only way to restore the men's tarnished honor is to eliminate the transgressing woman.[112] Indeed, innumerable cases attest to the horrific practice of fathers' murdering their "disobedient" daughters for getting married without permission.[113] One such case reached the Pakistani courts.[114] In order to grasp the resourcefulness and originality of the decision, a brief background of the indulgence with which both Pakistani society and the legal system treat "honor" crimes is in order.

3. Love Marriages and Honor Killings

Every year an immense number of women, of all ages and in all parts of Pakistan, are reported killed in the name of honor, making Pakistan the home of an "honor killing industry."[115] In fact, honor killings in general, and in response to love marriages in particular, are so prevalent that government statistics report that not a day goes by without at least one woman being killed in the name of

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109. *Riaz*, PLD 1998 Lah. 35, at 42.

110. *Id*. at 45.

111. Mazna Hussain, *Take My Riches, Give Me Justice: A Contextual Analysis of Pakistan's Honor Crimes Legislation*, 29 HARV. J. L. & GENDER 223, 227 (2006).

112. *Id*. at 227. *See also* Naeem Shakir, *Women and Minorities*, American Muslim, Nov. 19, 2005, http://www.theamericanmuslim.org/tam.php/features/articles/women_and_minorities (noting that "one who marries against the will of the family elders is a condemned person and thus must be killed to save and restore the family honor").

113. *See* Shakir, *supra* note 112.

114. *See, e.g.,* Muhammad Siddique v. The State, PLD 2002 Lah. 444.

115. Hussain, *supra* note 111, at 226–28; *see, e.g.*, MUHAMMAD JEHANZEB NOOR, DAUGHTERS OF EVE: VIOLENCE AGAINST WOMEN IN PAKISTAN 57 (2004); Amnesty International, *Pakistan: Violence Against Women in the Name of Honor* (1999), *available at* http://www.amnesty.org/en/library/asset/ASA33/017/1999/en/dom-ASA330171999en.pdf, [hereinafter Amnesty International, *Violence Against Women*]. *See generally* PATEL, *supra* note 35, at 149 (relying on data from the Chief of Sindh Police); Amnesty International, *Pakistan: No Progress on Women's Rights*, Sept. 1, 1998, http://asiapacific.amnesty.org/library/Index/ENGASA330131998?open&of=ENG-333#top [hereinafter Amnesty International, *Pakistan: No Progress*] (finding that the rights of women are "routinely ignored"); Amnesty International, *supra* note 71 (reporting that women's rights are not being properly safeguarded).

distorted notions of honor.[116] While a woman who marries without parental consent is frequently murdered to restore her family's honor, her husband can escape this fate by paying her father what her "worth" was.[117] More often than not, the man "pays" his wife's family not financial compensation, but another woman such as his sister or cousin.[118]

What's worse, honor killings, however repugnant, are nonetheless socially sanctioned; those who perpetrate them are not perceived as criminals, but rather as persons rendering punishment to a wrongdoer, they may even be applauded and respected by their peers, and may not face criminal prosecution.[119] Even when they do, lower courts have tended to be lenient and forgiving, either drastically reducing the killers' sentences or acquitting them of murder altogether.[120] As one court put it, the Qur'an establishes men as the "custodians of women;" so, a man who kills another man for tarnishing the honor of his wife or daughter is merely defending his property.[121]

Worse still are the *Qisas* (retribution) and *Diyat* (blood money) laws. This legislation privatizes the crime by placing the choice of prosecution wholly in the hands of the victim's heirs, allowing them to forgive the offense in exchange for compensation.[122] The far-reaching consequences of this legal privilege are most vividly expressed in honor killing cases, where the next of kin—who are

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116. Sherry Rehman, *No Honour in the Honour Killings Bill*, Jan. 13, 2005, http://www.dawn.com/2005/01/13/op.htm#2.

117. ALICE BETTENCOURT, VIOLENCE AGAINST WOMEN IN PAKISTAN 10 (2000); Amnesty International, *Pakistan: No Progress*, *supra* note 115.

118. As Bettencourt puts it: "women are viewed as property; therefore mere financial compensation to those 'who have restored the family's honor' suffices for the loss of the wife or daughter." *Id.* at 11.

119. Castetter, *supra* note 37, at 551–52, 563; Amnesty International, *Pakistan: No Progress*, *supra* note 115; *see also* PATEL, *supra* note 35, at 150 (honor murderers are often treated with respect and approval); Hussain, *supra* note 111, at 233 (only 3% of honor crimes result in conviction).

120. *See* PATEL, *supra* note 35, at 150 (relying on the work of Justice Javid Iqbal); Ayra Inderyas, *Women's Sufferings Know No End*, http://www.thepost.com.pk/Previuos.aspx?dtlid=111390&src=Ayra%20Inderyas&date=08/08/2007 (in cases of honor killings, the murderer is usually an immediate family member of the victim, who easily gets pardoned by the heirs of the victim and goes unpunished); Ali, *supra* note 34, at 208, 225. Pakistani courts often use the mitigating "grave and sudden provocation" crime of passion clause to help honor killers, even though this clause was omitted in 1990 from the Pakistani Penal Code. PATEL, *supra* note 35, at 178. *See, e.g.*, Hussain, *supra* note 111, at 232, 235; Rehman, *supra* note 116. *See also* NOOR, *supra* note 115, at 80–95 (describing the aspects of the Pakistani legal system's response to violence against women).

121. BETTENCOURT, *supra* note 117, at 13.

122. The *qisas* and *diyat* concepts were first legalized as an ordinance in 1990, but were passed into law by the parliament in 1997. *See* Jafar, *supra* note 37, at 50, 54 n.10. Diyat must not be less than the value of thirty thousand six hundered and thirty grams of silver. *Id.* For a discussion of the Ordinance's birth and main provisions, see generally Evan Gottesman, *The Reemergence of Qisas and Diyat in Pakistan*, 23 COLUM. HUM. RTS. L. REV. 433 (1992); Hussain, *supra* note 111, at 233 ("Qisas and Diyat ordinances allow the government to avoid appointing itself as prosecutor of honor crimes, leaving it instead in the hands of individuals who either have little alternative but to drop charges, or who themselves were involved in committing the crime."); NOOR, *supra* note 115, at 93–94 (describing how the settlement system perpetuates bias against women); Rachel A. Ruane, *Murder in the Name of Honor: Violence Against Women in Jordan and Pakistan*, 14 EMORY INT'L L. REV. 1523, 1539 (2000) (noting that the reformation of the Qisas and Diyat laws from British common law resulted in leaving the state without "power to initiate prosecutions").

often themselves conspirators to the crime—may exercise their forgiveness rights under the law and may thus merely exchange money and walk away.[123] It is little wonder that ever since the passage of the law, honor killings have multiplied.[124]

Against this backdrop let us consider a novel decision, in which the fundamental nature of marriage was elucidated to negate what was until then a murderer's trump card.[125] The following facts typify the common scenario of a father whose daughter married against his wishes and who paid with her life for the exercise of her basic human right. The father in this case refused to come to terms with the new status of his daughter and instead cunningly arranged a "reconciliation meeting" with his estranged daughter, her husband, and their newborn baby, during which he murdered all three.[126] The legal heirs of the victims were willing to forgive the offence and reach a compromise under the *Diyat* law, which would normally have settled the matter; however, this case was different.[127] The father was prosecuted and expectedly appealed to the necessity of defending his family's honor in his quest to escape punishment. [128]

The High Court was unsympathetic. For the Court, there was nothing religious about the father's crime and nothing honorable either. No tradition was sacred and no convention indispensable, the Court observed, if it did not stand the test of "the fundamentals of a civil society generally expressed through law and the [C]onstitution."[129] A murder in the name of honor was particularly odious, the Court reasoned, as it was not merely the physical elimination of a woman, but also a blow to the concept of an egalitarian society—motivated as it is by a "certain mental outlook, and a creed which seeks to deprive equal rights to women, [that is], *inter alia* the right to marry or the right to divorce. . . ."[130] While the father's appeals to the sanctity of family honor were no more than "male chauvinism and gender bias at their worst,"[131] a woman's right to marry is fundamental and honored by both the Constitution and Islam.[132]

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123. *See* Jafar, *supra* note 37, at 50. *See also* Amnesty International, *supra* note 71 (a man who has committed an offence against a particular family may be let off by paying them compensation—often by handing over a female relative of his to the aggrieved family so that they may not initiate prosecution or seek formal redress); Raja, *supra* note 90 (relying, *inter alia*, on the 2002 report of the Human Rights Commission of Pakistan); Rehman, *supra* note 116 (noting that after the Qisas and Diyat laws went into effect, acquittals went up to 92% and convictions to less than 8%). The State, in turn, is statutorily required to do its best to assist family members who choose to exercise forgiveness rights under the Ordinance. Hussain, *supra* note 111, at 232.

124. Jafar, *supra* note 37, at 50; Rehman, *supra* note 116.

125. Muhammad Siddique v. The State, PLD 2002 Lah. 444.

126. *Id.* For an analysis of the case, see Shakir, *supra* note 112.

127. *Muhammad Siddique*, PLD 2002 Lah. 444. *See also* Shakir, supra note 112 (noting the boldness of the Court's opinon and concluding that this is "a novel case in which the Court did not agree to accord sanction to the compromise").

128. *Muhammad Siddique*, PLD 2002 Lah. 444; Shakir, supra note 112.

129. *Muhammad Siddique*, PLD 2002 Lah. 444, 457.

130. *Id.*

131. *Id.* at 455.

132. *Id.* at 457.

But what was the Court to do with the fact that the legal heirs had, after all, forgiven the offence? The Court admitted that the prosecution of a murder may be legally waived, but viewed itself as vested with discretion to reject compromises, depending on the "circumstances of the case" and "according to the nature of the offence."[133] When a fundamental right is at stake, the Court explained, and when a criminal act is committed in reaction to the exercise of this right, the case clearly justifies a departure from the Court's standard rubber-stamping of compromises.[134] In this case the "cold-blooded, calculated and brutal" gruesome triple murder was carried out in utter disregard of the basic right of an adult woman to marry, and in fact *because of* its independent exercise.[135] Therefore, the father did not deserve the indulgence of a compromise leading to acquittal; he must be punished with all severity so as to deter others from victimizing women for the exercise of their fundamental rights.[136] Accordingly, regardless of the compromise, the father was fittingly sentenced to death.[137]

This decision, which must seem obvious, if not trivial, to the western eye, is in fact revolutionary given the social and legal climate prevalent in Pakistan. The Court invoked the constitutional status of marriage to transform "honor killing" from a respected defense to a backward prejudice actually adding to the severity and gravity of the crime.

In conclusion, the Pakistani courts have generally recognized and respected women's basic Islamic and constitutional freedom to exercise choice in marriage. They have developed and implemented various techniques—invalidating forced unions, quashing criminal charges, issuing restraining orders, penalizing police officers, and rejecting compromises and the honor killing defense—all in order to preserve the sanctity of the right to marry. But there is a limit to the judiciary's ability to uphold the Constitution unaided. While courts have interpreted laws in the spirit of the Constitution and guided state functionaries to safeguard marriage, the Pakistani legislature has largely failed to translate constitutional guarantees from rhetoric into reality. The legislature has remained oblivious to customary practices, hindering the actualization of women's right to marry, and thus also to constitutional rights.

C. Regression: Customary Norms Thwarting the Right to Marry

Any discussion of Pakistan's marital regime and the implementation of constitutional rights within its borders cannot be confined to the black-letter

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133. *Id.* at 454.

134. *Id. See also* Shakir, *supra* note 112 (noting the novelty of the case since the court refused to accord sanction to the compromise).

135. *Muhammad Siddique*, PLD 2002 444, at 455, 457. The Court also noted the tears in the eyes of the husband's mother when she was questioned about the compromise, and did not mince words in stressing the cruelty of the murder. The Court stressed, "[t]he invitation from an estranged father to his daughter must have been a message of forgiveness, of love and hope. And for the credulous [husband] it must have been a moment of excitement. It would have ended the long chase . . . . It was a moment when his marriage with Mst. Salma was to be accorded recognition by his in-laws . . . " *Id.* at 452 (alteration of original).

136. *Id.* at 452, 457–58.

137. *Id.* at 458.

law.[138] In order to get a true sense of the extent to which women's marital rights are exercised and enjoyed, one must take into account customary practices that define and confine marriage in Pakistan. Indeed, such societal norms are identified as among the "most lethal forces" impacting on the dignity and security of Pakistani women.[139] This article argues that constitutional commitment to Islamic law and fundamental rights creates a positive duty for the legislature to combat and curb cultural traditions inimical to women's marital rights.

While socially-sanctioned practices such as forced and exchange marriages, marrying girls off to settle disputes, and even honor crimes stem from prejudices that are not country-specific,[140] there is one such custom, unique to Pakistan, which makes a mockery not only of Islamic injunctions and fundamental rights, but also of the entire institution of marriage. It is known as "Marriage to the Holy Qur'an," the most "barbaric abuse of women in Pakistan."[141]

A Qur'an marriage is meant to prevent a woman from contracting a normal marriage to a human being, who would then have a claim to her share in ancestral property and would thus divide the family's assets.[142] Thus, when families run out of available male relatives to marry their daughters, they forcibly "marry" the girls to the Qur'an in a wedding ceremony replete with all the grandeur, ritual and celebration of a normal wedding: "The bride is dressed in a bridal outfit for the nuptials, guests are invited to feast, and the ceremony is the same as if she were marrying a man."[143] There are no marital rights flowing from this unholy union and no divorce right either.[144] Once wedded to the Qur'an, the woman is sentenced to a life of emptiness and seclusion; she is not allowed to leave her home or see an adult male, even on television, and is destined to remain single and childless for the rest of her life.[145] Such "marriages" are unfortunately not uncommon—in the province of Sindh alone, 10,000 women are reported married to the Qur'an.[146]

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138. *See* Ali, *supra* note 65, 157.

139. Mullally, *supra* note 2, at 354 (quoting the Commission of Inquiry for Women). *See also* Shaheen Sardar Ali, *A Critical Review of Family Laws in Pakistan: A Women's Perspective*, *in* WOMEN'S LAW IN LEGAL EDUCATION AND PRACTICE IN PAKISTAN: NORTH SOUTH CO-OPERATION 198, 211 (R. Mehdi ed., 1997) (noting that cultural norms and religious rules are just as potent a force as legislative enactments).

140. Jillani, *supra* note 33, at 25.

141. *Mobeen Chughtai,* Patriarchy and Pakistani Society, *Oct. 25, 2007, http://redtribution.wordpress.com/category/marriage-to-the-quran/page/2/.*

142. NOOR, *supra* note 115, at 42–43. *E.g.*, *Pakistani Women "Married" to Qur'an to Keep Property in the Family, Protect Bloodlines*, Mar. 14, 2007, http://www.jihadwatch.org/dhimmiwatch/archives/015640.php; *Women's Bill in Pakistan Assembly*, Feb. 13, 2007, http://news.bbc.co.uk/2/hi/south_asia/6358837.stm.

143. JAN GOODWIN, PRICE OF HONOR: MUSLIM WOMEN LIFT THE VEIL OF SILENCE ON THE ISLAMIC WORLD 71 (1994).

144. *Id.*

145. *Id.*

146. Mohammed Al Shafey, *Married to the Quran*, July 22, 2007, http://www.aawsat.com/english/news.asp?section=3&id=9656.

Regrettably, this un-Islamic practice, depriving women of their human dignity and basic entitlement to marry someone of their own choice, is virtually ignored by both legal and religious authorities in Pakistan.[147] As of today, locking women up in such unnatural "marital" bonds is neither a crime under Pakistani law nor a practice that warrants the involvement of law enforcement agencies.[148] But if the constitutional commitment to both Islamic values and human rights is to mean anything, it must lead to the banning of this practice and to the criminalization of any participation in such "marriages."

Only very recently, after years of their unquestioned practice, have Qur'an marriages finally come under attack. President Hussain, the head of the ruling party in Pakistan, presented the National Assembly with the Prevention of Anti-Women Practices (Criminal Law Amendment) Bill, which seeks to end certain discriminatory practices against women in violation of their right to marry under both the Constitution and Islam.[149] The bill envisions the addition of a new chapter to the Pakistan Penal Code (PPC), Section 498C of which would prohibit marriage to the Qur'an and penalize offenders.[150] President Hussain underlined the importance of the proposed law as a tool for women's empowerment, threatening to tender his resignation if the "women bill" was not passed.[151] The bill is currently under review of the Select Committee of the National Assembly.[152] Whether the Constitution will be upheld and women's rights statutorily protected remains to be seen.

If this section has found fault with the legislature for its *inaction* in the service of women's rights, the next section finds legislative *actions* at fault for being inimical to the constitutional right to marry.

D. To Live in Pakistan or to Love Outside of it? The Right to Citizenship v. The Right to Marry

The previous sections observed that an individual's exercise of the right to marry may be shaped by both social customs and legal norms pertaining to marriage. This section further shows that also seemingly unrelated fields of law

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147. *See id.* (noting that the "absence of active state influence by the judiciary and executive authorities has allowed individuals to exploit women's rights").

148. Yefet, *supra* note 3, at 2.

149. *See* Human Rights Commission of Pakistan (HRCP), *Annual Report: State of Human Rights in 2007*, ch. 5 sec. 1 (Rights of the Disadvantaged: Women), *available at* http://hrcp-web.org/5-1%20women.pdf at 146 (last visited Feb. 24, 2009); Amir Wasim, *Bill Seeks to End Anti-Women Practices*, Feb. 14, 2007, http://www.dawn.com/2007/02/14/top1.htm; *Women's Bill in Pakistan Assembly*, Feb. 13, 2007, http://news.bbc.co.uk/2/hi/south_asia/6358837.stm.

150. Irfan Ghauri & Zulfiqar Ghuman, *Prevention of Anti-women Practices Bill Moved in NA*, Feb. 14, 2007, http://www.dailytimes.com.pk/default.asp?page=2007%5C02%5C14%5Cstory_14-2-2007_pg1_2; Inderyas, *supra* note 120.

151. Asghar Ali Mubarak, *Bill to End Forced Marriages Moved*, Feb. 14, 2007, http://dailymailnews.com/200702/14/news/dmtopstory01.html.

152. *See* Ministry of Women Development, http://202.83.164.26/wps/portal/Mowd/!ut/p/c0/04_SB8K8xLLM9MSSzPy8xBz9CP0os_hQN68AZ3dnIwML82BTAyNXTz9jE0NfQwNfA_2CbEdFAA2MC_Y!/?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/MowdCL/ministry/highlights/legal+empowerment (last visited Feb. 22, 2009); Introducing Women Protection Bill 2006 (Criminal Law), http://www.pakistan.gov.pk/ministries/ContentInfo.jsp?MinID=11&cPath=182_413&ContentID=4246 (last visited Feb. 22, 2009).

may affect the right to marry no less powerfully than the core formal body of marriage law. This is the case with the 1951 Pakistan Citizenship Act, which is in turn supposedly based on Islamic principles of citizenship.[153] The Act establishes an odd anomaly whereby citizenship status is conferred upon a foreign woman married to a Pakistani man, but is denied the foreign husband of a Pakistani woman; he and their children are forever barred from obtaining Pakistani citizenship.[154]

This piece of legislation is offensive to the Constitution in two ways: not only does it discriminate between male and female citizens in defiance of the fundamental right to equality, it also interferes with the basic constitutional freedom to choose marital partner. By withholding the most critical citizenship right, the law effectively dissuades foreigners from marrying Pakistani women, and confines the exercise of the freedom to marry to candidates within the borders of Pakistan alone as a *de facto* matter. If a woman steps outside the limits set by the law, she is caught between a rock and a hard place: she must either subject her spouse and children to the subordinate status of non-citizens, no matter how long they remain in Pakistan, or leave her country of origin and migrate to her husband's country.[155]

For more than half a century, the Citizenship Act was left untouched; all attempts to induce the legislature to respect women's rights drew a blank.[156] One High Court went so far as to reaffirm the law's constitutional validity, turning a blind eye to the chauvinism embedded in it: The Court acknowledged that the law differentiates between foreign men and women married to Pakistanis, but dismissed the case for the unpersuasive reason that constitutional protection is afforded only to citizens.[157] In so ruling the Court failed to take notice both of the fact that it was a Pakistani wife, not her foreign husband, who filed the petition, and of the serious abridgment of the wife's own fundamental rights to equality and marriage.

Still, better late than never; in the closing days of 2007, help came from an unexpected source. Ironically, it was not the regular court system—charged with

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153. SHAH, *supra* note 10, at 112, n.1.

154. *See* Art. 10, Pakistan Citizenship Act (II of 1951) (granting the right of female aliens to gain citizenship by marrying a male citizen of Pakistan, yet not extending this right to male aliens); *see also* Irfan Husain, *Paranoia and Patriotism* (June 17, 2006), http://www.dawn.com/weekly/mazdak/20060617.htm (criticizing Pakistan's national security rationale for keeping the statute in tact).

155. SHAH, *supra* note 10, at 112–13.

156. While the advent of the new millennium witnessed a legislative extension of citizenship status to children born outside of Pakistan to Pakistani women and foreign husbands, *see* S. 5, Pakistan Citizenship Act (XIII of 2000), http://lib.virginia.edu/area-studies/SouthAsia/SAserials/Dawn/2000/apr22.html#citi, legislative attempts to extend this privilege to foreign husbands were in vain, *see* Owais Mughal, *Should Foreign Men Marrying Pakistani Women Get Pakistani Citizenship?*, Jan. 3, 2008, http://pakistaniat.com/2008/01/03/marraige-pakistan-passport-citizenship. *See also* Husain, *supra* note 154 (noting that due to increasing intermarriages the pool of marriageable candidates is shrinking). To be sure, the obstacle to changing the law is not so much a desire to follow Islamic law, as a desire to benefit Pakistani men. While the latter may marry whomever they wish, the law discourages foreigners from marrying Pakistani women and thus efficiently keeps the pool of marriageable women intact, so as to allow Pakistani men to actualize their polygamy license to marry up to four women at a time. *Id.*

157. Sharifan Bibi, PLD 1998 Lah. 59, 59.

preserving fundamental rights—but rather the least foreseeable forum, the Federal Shari'at Court, in its capacity as a protector of Islamic law, which came to the rescue and expressed utmost sensitivity to women's fundamental rights. Interestingly, the FSC was not challenged by any petition forcing it to confront the highly sensitive issue of citizenship rights. On the contrary, the FSC acted on its own motion after the Justices were provoked by a news report on a Pakistani woman unable to get citizenship for her foreign husband.[158] Consequently, the FSC decided to use its special *sui moto* constitutional power to initiate examination of the Pakistani Citizenship Act.[159]

The government argued it was "in the best interest" of the country to "oppose gender equality;"[160] otherwise, innumerable men would marry Pakistani women in order to enjoy Pakistan's social and economic advantages, and worse, foreign countries would plant their "agents in Pakistan after arranging their marriages with Pakistani women. . . ."[161] But this argument only clarified the gender bias inherent in the law: while it assumes that a man is wise and may thus be freely entrusted with the right to enter into marriage with Pakistanis and foreigners alike, a woman is "too stupid" to be trusted to exercise "sound judgment" in the process of selecting a trustworthy marital partner.[162]

The FSC dismissed the national security arguments, reminding the government of its duty to giving equal and indiscriminate treatment to Pakistani women.[163] The Citizenship Act, however, is a clear manifestation of discrimination since it does not extend the same citizenship privilege to a Pakistani woman's foreign husband as it does to a Pakistani man's foreign wife.[164] As such, the Court observed, the Act makes a mockery of both Pakistan's constitutional commitment to gender equality and its international commitment to women's rights.[165] But "most importantly," the FSC stressed, the Act is repugnant to the very fundamentals of Islam— Islam stands wholeheartedly for the equality of rights between men and women; thus, any law that discriminates against either of the sexes is in violation of Islamic law and thereby unconstitutional and void.[166] The FSC ordered the Pakistani President to amend

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158. In re Suo Motu Case No. 1/K of 2006, PLD 2008 FSC 1, 3 [hereinafter Gender Equality Case].

159. *Gender Equality Case*, PLD 2008 at 11. For discussions of the case see *Pakistan Citizenship Act Attacked*, Dec. 20, 2007, http://www.upi.com/Top_News/2007/12/20/Pakistan_citizenship_act_attacked/UPI-75781198164988; *Pakistani Citizenship Act Discriminatory Against Women*, Dec. 20, 2007, http://www.thaindian.com/newsportal/south-asia/pakistani-citizenship-act-discriminatory-against-women_1009539.html. *See also* Mughal, *supra* note 156 (questioning the double standard imposed by the Citizenship Act).

160. *Gender Equality Case*, PLD 2008 at 5.

161. Husain, *supra* note 154 (quoting the interior ministry); *Gender Equality Case*, PLD 2008 **at 4.**

162. Husain, *supra* note 154.

163. *Gender Equality Case*, PLD 2008 at 14.

164. Art. 10, Pakistan Citizenship Act (II of 1951)

165. *Gender Equality Case*, PLD 2008 at 20–22; Nasir Iqbal, *'Citizenship Act Discriminatory'*, Dec. 20, 2007, http://server.kbri-islamabad.go.id/index.php?option=com_content&task=view&id=3249&Itemid=53.

166. *Gender Equality Case*, PLD 2008 at 21 (articulating the Islamic right to equality and stressing that the Qur'an and Sunnah "in unequivocal term[s] treat man and woman alike and repeatedly mention gender equality")

the law to accord full citizenship status to foreign husbands married to Pakistani women.[167]

This case neatly reaffirms that rather than the legislature, it is the Pakistani Judiciary—not only the regular/secular court system as would be expected, but also the Islamic court—that is the resourceful ally of women's rights. This achievement is particularly remarkable given that citizenship rights, an area in which courts all over the world afford legislatures the utmost deference, were at issue.[168] But most remarkable of all, where western fundamental rights failed, Islamic law counter-intuitively succeeded, proving yet again egalitarian, equitable, and conducive to the intensive protection of women's rights. Clearly, then, the constitutional commitments to both Islam and human rights are not competing or contradictory, but rather compatible and complimentary, with Islam being the true guarantor of women's rights in Pakistan.

E. Broadening Men's Right to Marry? The Case of Polygamous Unions

Under many interpretations of traditional Muslim law, women are subject to strict monogamy, yet men may be married to four women at a time.[169] A male right to plural marriages was not only entrenched in Pakistani law, but also became a popular practice.[170] While the Qur'anic purpose underlying the polygamy license was to establish social justice and protect widows and orphans,[171] in Pakistan today this moral duty has turned into a matter of sexual adventure.[172] Men have falsely understood polygamy to be the Qur'anic answer

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167. *Gender Equality Case*, PLD 2008 at 26.

168. This is the approach adopted by the American Supreme Court. *See* Miller v. Albright, 523 U.S. 420 (1998) (the American Supreme Court rejected a challenge to a federal law which automatically grants American citizenship upon birth to a child born out of wedlock in a foreign country if born to an American mother, but denies citizenship in the same circumstances if the only American parent is the father). This is even the approach of the Israeli Supreme Court, the most activist court in the world. *See* Karin Carmit Yefet, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom*, 20 YALE J.L. & FEMINISM 441, 458 (2009) (exemplifying the most activtist nature of the Israeli Supreme Court). In a recent decision, the Israeli Supreme Court ruled that an amendment to the Israeli Citizenship law which completely denied the possibility of family reunion within Israel of Israeli citizens and their partners who are Palestinian residents of the occupied territories is constitutional. *See* HCJ 7052/03 Adalah v. Minister of Internal Affairs [2006] (Isr.) (not yet reported), *available at* http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.pdf; Bethany M. Nikfar, *Families Divided: An Analysis of Israel's Citizenship and Entry into Israel Law*, 3 NW. U.J. INT'L HUM. RTS. 5 (2005).

169. Heather Johnson, *There Are Worse Things than Being Alone: Polygamy in Islam, Past, Present, and Future*, 11 WM. & MARY J. WOMEN & L. 563, 563–64 (2005).

170. SHIRKAT GAH, WOMEN'S RIGHTS IN MUSLIM FAMILY LAW IN PAKISTAN: 45 YEARS OF RECOMMENDATIONS VS. THE FSC JUDGEMENT 22–23 (2000), *available at* http://www.shirkatgah.org/SB%20MFLO%20-%20complete%20file.pdf.

171. SHAH, *supra* note 10, at 229. Thus the Qur'anic verse licensing polygamy was tellingly revealed in the immediate aftermath of a bloody battle where a large number of men had lost their lives and left myriad women and children unprotected. Ayesha I. Khan, *A Case for Banning Polygamy*, Dec. 3, 2003, http://www.chowk.com/articles/6862. Even then, polygamy was only allowed for men who could deal justly and with perfect equality with co-wives, financially, emotionally, and sexually. But if "you fear that you cannot do justice," the Qur'an admonishes, "then marry only one." Sura IV, verse 3.

172. GAH, *supra* note 170, at 23.

to their "insatiable" sex drive,[173] meant to save "sex starved people" from the evils of illicit sex, adultery, and rape.[174]

The male polygamy license is in clear violation of women's constitutional rights: it offends both women's rights to equality with men and to enjoyment of marital life. This practice has subjected numerous women to misery, humiliation, and neglect; has proven instrumental in destroying family harmony; and has served as a constant source of insecurity for both wives and children, threatening their abandonment and destitution.[175]

But it is not only women's rights that polygamy abridges, it may very well damage men's own right to marry as well. Pakistan is one of a handful of countries in the world with an inverse sex ratio: there are far more men than women in Pakistan and fewer females of marriageable age than males.[176] Thus, every man who takes more than one wife is depriving one of his fellow countrymen of a wife, possibly condemning him to a life of celibacy or sin.

Despite polygamy's prevalence, when the first Prime Minister of Pakistan took his first wife's secretary as a second wife, the voices raised against polygamy reached a fever pitch.[177] Crowds of women gathered outside the Prime Minister's house in protest, leading him to appoint the Commission on Marriage and Family Laws to reconsider women's rights within the family.[178] The Commission's report served as the basis for the enactment of the Muslim Family Laws Ordinance (MFLO) of 1961.[179]

Section 6 of the MFLO restricts the right to polygamy so that a man who desires multiple wives must submit an application for permission to the Arbitration Council, stating the reasons for the proposed marriage and indicating whether the consent of the existing wife has been obtained.[180] The Arbitration Council is to consider the particular circumstances of each case and to grant permission only if it is satisfied that the proposed marriage is

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173. Prominent traditional Muslim scholars have pointed to men's hyperactive libidos as the rationale for allowing them to marry multiple wives. *See* JOHN L. ESPOSITO & NATANA J. DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW 136 (2d ed. 2001); ROBERT ROBERTS, THE SOCIAL LAWS OF THE QORAN 9 (1925); LAMIA RUSTUM SHEHADEH, THE IDEA OF WOMEN UNDER FUNDAMENTALIST ISLAM 65 (2003); Amira Mashhour, *Islamic Law and Gender Equality – Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 HUM. RTS. Q. 562, 571 (2005).

174. GAH, *supra* note 170, at 25. *See also* Hassan, *supra* note 1 (arguing that although the Qur'an envisioned polygamy for the protection of widows and orphans, "in practice Muslims have made it the Sword of Damocles which keeps women under constant threat").

175. GAH, *supra* note 170, at 27.

176. Federal Research Division, Library of Congress, *supra* note 2.

177. *See* Freeland Abbott, *Pakistan's New Marriage Law: A Reflection of Qur'anic Interpretation*, 1 ASIAN SURV. 26, 26–28 (1962).

178. *Id.*

179. Shaheen Sardar Ali, *Testing the Limits of Family Law Reform in Pakistan: A Critical Analysis of the Muslim Family Laws Ordinance 1961*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 317, 322–23 (Andrew Bainham ed., 2002) [hereinafter Ali, *Testing the Limits*]; *see also* Ali, *supra* note 65, at 212 (noting that the Commission's report called for the overall abolition of polygamy).

180. S.6(1)-(4), Muslim Family Laws Ordinance [hereinafter MFLO] (VIII of 1961). On the procedure sketched by § 6, see Ali, *Testing the Limits*, *supra* note 179, at 330–31.

"necessary and just."[181] Husbands who impermissibly contract polygamous marriages are subject to imprisonment and financial penalties,[182] and give their existing wives grounds to sue for divorce.[183]

This legislation was perceived as a great victory for women and an unacceptable defeat to men.[184] But men could not challenge the MFLO for interfering with their sacred, age-old polygamy prerogative,[185] since the MFLO was granted a constitutionally-protected status such that neither fundamental rights[186] nor Islamic law[187] can be raised to challenge its directives. Marriage law's immunity from constitutional attack notwithstanding, men still urged the FSC to declare the Ordinance's regulation of polygamy un-Islamic and thus unconstitutional and void.[188]

The FSC refused to cooperate. In a recent landmark decision, it peculiarly decided that the Constitution did not really mean what it said,[189] and thus that the MFLO must conform to Islamic law as a condition of its constitutional validity.[190] The FSC found that Islamic teachings—which are supposedly the

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181. The Arbitration Council is comprised of the Chairman as well as of representatives nominated by both the husband and the existing wife. *See* S.6(3), MFLO (VIII of 1961).

182. The penalties set forth in the MFLO are that the husband must immediately pay the entire dower to the existing wife or wives, and risks imprisonment for up to one year and a fine upon conviction. S.6(5), MFLO (VIII of 1961). However, it is noteworthy that the courts interpreted the silence of the MFLO to mean that even without the requisite permission, the second marriage is valid. *See* Mian Dad v. The State, PLD 1983 FSC 518, 518–19 (contraction of additional marriage in violation of Section 6 does not invalidate the marriage, but only exposes the offender to the MFLO's various sanctions). *See, e.g.*, Ali, *Testing the Limits*, *supra* note 179, at 331 (citing additional case law in support of this proposition).

183. A woman is entitled to a decree of the dissolution of her marriage if her "husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961." Art. 2 (ii-A), Dissolution of Muslim Marriages Act (VIII of 1939).

184. Pakistani husbands found it difficult to accept the limitation of their male polygamy prerogative and thus often ignored the mandate of Section 6 of the MFLO. *See* GAH, *supra* note 170, at 24, 27.

185. This prerogative stemmed explicity from the most authoritative text of the Islamic faith, the Qur'an. *See* Brooke D. Rodgers-Miller, *Out of Jahiliyya: Historic and Modern Incarnations of Polygamy in the Islamic World*, 11 WM. & MARY J. WOMEN & L. 541, 544-45 (2005).

186. *See* Pak. Const. (1973) art. 8, sec. 3 (1975); Mullally, *supra* note 2, at 348.

187. Pak. Const. (1973) art. 203-B (1985) (excluding the Constitution, as well as "Muslim personal law," from the otherwise all-encompassing jurisdiction of the Shariat Courts to measure legislation on the basis of Islam).

188. Many petitions challenging the constitutionality of the MFLO were incorporated and adjudicated together in Allah Rakha v. Federation of Pakistan, PLD 2000 FSC 1, 24–29.

189. *See* Pak. Const. (1973) art. 203-B (1985) (ruling that the Constitution's specific exclusion of Muslim Family Law – and thus the MFLO – precludes judicial review).

190. *Id.* By ruling that the MFLO was within the ambit of its constitutional jurisdiction to scrutinize laws for conformity with Islam, the FSC reversed both an early decision of the Supreme Court as well as its own decision holding that the MFLO was outside its jurisdiction. *See* Fed'n of Pakistan v. Farishta, PLD 1981 SC 120. According to the Court, its jurisdictional exemptions, such as "Muslim personal law," are to be construed narrowly, thereby referring only to personal laws based on a distinct interpretation of a particular school of thought. Since the MFLO is of general applicability to all Muslims, the Court is under a constitutional mandate to examine its validity vis-à-vis the injunctions of Islam. *Id.* By so ruling the FSC adopted the analysis set forth in Mahmood-ur-Rehman Faisal v. Government of Pakistan, PLD 1994 SC 607 (holding that all codified personal status laws which apply to the general body of Muslims, as opposed to the personal law of each sect

basis for polygamy—not only support the MFLO's restrictions, but call for their further enhancement.[191] Indeed, while polygamy is permitted, the very Qur'anic verse sanctioning this practice also prescribes a condition to its exercise, a condition which God himself admits is exceedingly difficult to fulfill: treating co-wives with perfect equality.[192] Thus, all that the MFLO does is ensure that this condition will be met and injustice to the existing wife prevented.[193]

The FSC further stressed that polygamy is not mandatory or even recommended in Islam, it is merely "tolerated,"[194] and may be restricted or even prohibited if it leads to unlawful consequences or injustice.[195] Accordingly, the FSC advised that "suitable measures" be adopted in order "to put an end to or at least minimize the instances of injustice being found abundantly" in Pakistani society.[196]

By upholding the MFLO's limitations on the male polygamy license, and by recommending the enactment of further necessary checks and balances to prevent polygamy's abuse and destructive effects, the Court again chose a liberal and equitable interpretation of Islamic law consonant with women's rights. The FSC skillfully contributed to the overall harmonization of the dual constitutional fidelity to Islam and fundamental rights, and demonstrated that Islam may be enlisted to aid women's rights when constitutional fundamental guarantees are of no avail.

F. Technical But Critical: The Registration of Marriage

On the subject of marriage registration, men again invoked the constitutional commitment to Islam in order to undermine the constitutional commitment to women's human rights. At first glance, marriage registration may appear to be a technical detail of insignificant importance. In practice, however, it is a substantial tool to secure women their fundamental rights and to avoid chaos and severe disturbance of the social order. Absent registration of a marriage, a man could easily deny its very existence and deprive his wife of the myriad legal rights flowing from it; succession, maintenance, dower, divorce, and legitimacy of children, being only a few examples.[197] While some men might

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of Muslims based on the interpretation of the Qur'an and Sunnah by that sect, is not immune from scrutiny by the FSC in exercise of its powers under article 203-D. A restrictive interpretation would reduce the effective role of the FSC, which could not be the intention of the Constitution).

191. Allah Rakha v. Fed'n of Pakistan, PLD 2000 FSC 1.

192. *Id.* at 56. The Qur'an unequivocally states that "[y]ou are never able to be fair and just as between women, even if it is your ardent desire." Sura IV, verse 29. Clearly, then, the conditions attached to polygamy are so rigorous as to make it a practical impossibility. *See* Ali, *supra* note 34, at 51–53 (discussing the scholarly views on interpreting that section of the Qur'an).

193. *Allah Rakha*, PLD 2000 FSC at 56.

194. *Id.* at 54.

195. *Id.* at 57.

196. *Id.*

197. One of the most common consequences of unregistered marriages was for a husband's family to claim his widow was not married to him and to deprive her of her part of the inheritance. *See* Ali, *Testing the Limits, supra* note 179, at 324. *See also* GAH, *supra* note 170, at 54 (contrasting the public nature of marriage with the private nature of divorce); Shah Din v. The State, PLD 1984 Lah. 137 (noting the importance of registering marriage).

deny that they were married, others might deny that they were single. It was not uncommon for rapists and abductors in Pakistan to claim that they were married to their victims as a defense against criminal charges.[198] Indeed, the Pakistani judiciary was not oblivious to these incidents and in several instances expressed its uneasiness about men who abducted and raped women only to force them later on into sham marriages to escape prosecution.[199]

With the promulgation of the notorious *Zina* Ordinance, which criminalized sex outside of valid marriage, the importance of one's marital status became critical: for the first time in Pakistan's history it carried not only civil, but also criminal consequences.[200] Incidentally, this new development was highly perilous to women's right to exercise free choice in marriage. Women who married without parental approval were open to charges of sex outside marriage (*zina)* by family members who questioned the fact of their marriages.[201] Indeed, in over 90% of cases in which fathers opposed their daughters' independent choice of marriage partners, they registered false criminal charges of *zina* and abduction against the couple, claiming that there was no marriage, or that their daughters were already married to other men.[202]

Registration of marriage would alleviate all doubts about the existence of a marriage, protect women's marital rights, and facilitate an uninhibited exercise of the right to marry the person of one's choosing. The MFLO's introduction of marriage registration as a compulsory requirement was thus celebrated as a

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198. The Zina Ordinance does not recognize the concept of marital rape. Thus, a married woman who is forced to have sex with her husband cannot bring criminal charges against him as long as he can establish he was married to the victim. *See* Riaz Hussain v. The State, PLD 1984 FSC 1. In one recent horrific case of gang rape, which was carried out as a punishment to the girl's brother, one of the accused tried to prove his innocence by claiming he was married to the victim. *See* Castetter, *supra* note 37, at 544–46. *See also* Asma Jahangir, *The Origins of the MFLO: Reflections for Activism*, in SHAPING WOMEN'S LIVES: LAWS, PRACTICES & STRATEGIES IN PAKISTAN, *supra* note 8, at 93, 102 (cautioning that if unregistered marriages are accepted by the courts liberally, rapists and abductors will invariably take the defense of being validly married to their victims); GAH, *supra* note 170, at 57 (recognizing the social disorder that is created by not registering marriage and divorce).

199. MARTIN LAU, THE ROLE OF ISLAM IN THE LEGAL SYSTEM OF PAKISTAN 203 (2006). *See, e.g.*, the case of Muhammad Azam v. Muhammad Iqbal, PLD 1984 SC 95, where a man who abducted and raped a 14-year-old girl forced her to sign a marriage contract so as to defend himself against the criminal charges.

200. LAU, *supra* note 199, at 206. Under the *Zina* (Enforcement of *Hudood*) Ordinance 1979, the *hadd* punishment (meaning a punishment which requires a more rigorous standard of proof) for a married person convicted of *zina* is stoning to death, and the *hadd* for an unmarried person found guilty of *zina* is one hundred lashes in a public place. If the higher standard of evidentiary requirements is not met, the *tazir* punishment is applied, defined as imprisonment for up to ten years, thirty lashes, and a fine. *See* Jafar, *supra* note 37, at 44; *Islamic Republic of Pakistan*, *supra* note 81. These penalties were recently amended and the death penalty abolished. *See Allah Rakha*, PLD 2000 FSC.

201. GAH, *supra* note 170, at 58.

202. *Id. See also* Beena Sarwar, *Fight Hudood, Protect Women*, Mar. 6, 2007, http://www.chowk.com/articles/11716. Traditionally, the criminal justice system favored the family since it was "inconceivable to some that a father, whose honor resides in his daughter, would falsely accuse her of illicit sex." Jafar, *supra* note 37, at 46. In recent years, the trend has begun to change and the majority of such couples are eventually acquitted, but only "after years of detention which alienate the accused women from their families and children and for which they receive no redress or compensation." Amnesty International, *Pakistan: No Progress*, *supra* note 115.

victory for women.[203] But the registration requirement was not welcomed by everyone—several challenges have been leveled against it, calling on the FSC to declare marriage registration against Islamic precepts, and as such, in violation of the Pakistani Constitution.[204]

The FSC was aware of the importance of marriage registration, and found this statutory requirement in accordance with the injunctions of Islam.[205] The Court's analysis suggests that since the registration requirement is beneficial and just—it clarifies an individual's marital status, which is helpful in establishing an orderly society, and frustrates the denial of women's and children's legal rights—it can "in no manner be termed as un-Islamic or opposed to the injunctions of Islam."[206] Accordingly, the Court upheld the constitutionality of the registration requirement, and further directed the legislature to provide substantial penalties as an effective deterrent against non-registration.[207] Islamic law, then, proved consonant yet again with women's human rights.

But if upholding the validity of marriage registration was important to assure women their rights and to secure the validity of their unions, in the case of divorce, it was precisely the *invalidity* of registration that was absolutely critical not only to women's right to love again and remarry, but also to their very lives.

G. To Love and Live: The Registration of Divorce

Divorce Pakistani style is an effortless endeavor—Islamic law authorizes men to divorce their wives, either orally or in writing. They may speak, write, fax, email, or even SMS the "magic" word *talaq* three times and instantuously be rid of their marital ties.[208] All the MFLO did to restrict this extraordinary divorce power was require the divorcing husband to register the divorce with the Union Council and withhold its validity for a period of ninety days.[209] While the MFLO threatened an offender with imprisonment and financial penalties, it remained

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203. S.5(1), MFLO (VIII of 1961); *see* Ali, *Testing the Limits*, *supra* note 179, at 324 (noting that the compulsory marriage registration "was considered a significant victory for women"). It is unfortunate, however, that the penalties the MFLO provided against violation are minor—Section 5(4) of the MFLO makes non-registration punishable with simple imprisonment of up to three months and a fine of up to 1,000 rupees or both—and are hardly ever enforced. This inadequate legal situation has made it socially acceptable for couples not to register their marriages. *See* Ali, *supra* note 65, at 207–08. Even when couples have wished to register their marriages, the Marriage Registrars—usually the heads of local mosques—have unjustifiably refused to do so in numerous instances. For instance, Marriage Registrars have refused to register marriages that were not solemnized by them personally, when the marriage ceremony was not public enough, the wedding was not approved by the couple's families, or when the bride was Christian. *See* GAH, *supra* note 170, at 55–56.

204. Allah Rakha v. Federation of Pakistan, PLD 2000 FSC 1.

205. *Id.* at 48–51.

206. *Id.* at 50.

207. *Id.* at 51.

208. PATEL, *supra* note 35, at 72.

209. S.7(1), (3) MFLO (VIII of 1961). Admittedly, the MFLO also sought to abolish the practice of triple *talaq*, but courts have revived this divorce technique and affirmed its validity. Yefet, *supra* note 3; Ali, *Testing the Limits*, *supra* note 179, at 323, 328.

silent as to the validity of unregistered divorce.[210] The Pakistani courts filled in this lacuna, consistently holding that compliance with Section 7's registration requirement is a prerequisite to the validity of a divorce.[211]

Decades later, this supposedly straightforward procedural requirement, when combined with the *Zina* Ordinance, became a deadly weapon in the hands of men.[212] When vindictive former husbands who divorced their wives orally realized that their ex-wives had remarried, they simply denied ever pronouncing *talaq* and charged them with *zina* (adultery), an offence that until very recently could carry the death penalty.[213] This cynical abuse of the *Zina* Ordinance as a tool to oppress women was made possible by the court's invalidation of unregistered divorce.[214] To understand the gravity and magnitude of this phenomenon suffice it to say that 95 percent of all women languishing in Pakistani prisons are there because they were accused of *zina*.[215]

But the plight of women could not be alleviated by resort to the constitutional commitment to fundamental rights. As noted earlier, the MFLO was immunized from such attack,[216] leaving the commitment to Islamic law the only constitutional avenue open to save these women's marriages, their liberty, and even their lives. This question of the Islamic validity of Section 7 created a legal turmoil in Pakistani case-law. Many conflicting decisions were rendered, supporting and then refuting the conformity of divorce registration with Islamic law.[217] The Supreme Court eventually intervened, holding that it was none the business of the 'regular' court system to measure Section 7 against Islamic law.[218] While their invalidation power was restricted to the enforcement of fundamental rights, the Shariat Court *alone* enjoyed the constitutional jurisdiction to investigate the Islamic standing of legislation.[219]

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210. S.7(2) MFLO (VIII of 1961).

211. *See* Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yousuf, PLD 1963 SC 51 (the leading Supreme Court case on the issue where a divorce that did not comply with Section 7 was invalid). *See also* LAU, *supra* note 199, at 206 (noting that Pakistani courts had insisted that only a divorce which met the procedural requirement of Section 7 is valid).

212. Ali, *Testing the Limits*, *supra* note 179, at 328.

213. *Id.*; PATEL, *supra* note 35, at 138–40. *See also* Jafar, *supra* note 37, at 45 (husbands often deceitfully deny the divorce in order to file *zina* charges against their ex-wives when they become involved with another man). Recently, the Protection of Women Act abolished the death penalty and flogging for those accused of sex outside marriage and also reversed its non-billable status. Art. 496B, Protection of Women (Criminal Laws Amendment) Act (VI of 2006), *available at* http://www.pakistani.org/pakistan/legislation/2006/wpb.html. *See* Miranda Husain, *'Rape to Riches' to the Women Protection Act*, Himal Southasian, January 2007, http://www.himalmag.com/2007/january/analysis2.htm.

214. Raja, *supra* note 90.

215. Shaheen Sardar Ali, *(Re)claiming Our Histories: A reflection on Women, Islam and Human Rights in Contemporary Muslim Communities*, Dec. 10, 2003, http://sachet.org.pk/home/gender_columns/webcolumn_26.asp.

216. *See* the discussion *supra* Chapter II-D.

217. *See* Yefet, *supra* note 3, at 23–25.

218. Kaneez Fatima v. Wali Muhammad, PLD 1993 SC 901.

219. The Supreme Court did leave one question open, whether a law that is "inconsistent with the injunctions of Islam" could involve a "violation of fundamental rights and be struck down?" *Id.* at 1391.

The Supreme Court's ruling did not end the battle over Section 7 of the MFLO, however. Pakistani courts refused to leave the MFLO in peace in their repeated attempts to determine its conformity with Islamic law.[220] Thus, for every woman whose divorce was unregistered the law became a cruel lottery: some found themselves convicted of *zina*; some were acquitted, but not without losing precious years of their lives in prison.[221]

In the beginning of the new millennium, the FSC recruited Islamic law to finally divorce the ambiguity from the divorce process and safeguard Pakistani women. The Court was concerned about the misuse of Section 7 by husbands who were simply withholding the divorce registration and thereby subjecting women to indefinite legal limbo.[222] Leaving women in such suspended animation, unable to remarry freely, was the embodiment of cruelty, the Court observed, and this could not be warranted by Islamic law. Islam, as "the protector of rights of all human beings" and as "the first religion which has conferred all possible rights that could be bestowed upon a woman"[223] neither requires nor approves of such obstacles on women's road to marital freedom.[224] The FSC consequently invalidated the registration requirement and thus finally severed the harmful tie between the MFLO and the *Zina* Ordinance. Henceforth, disgruntled former husbands can no longer abuse the MFLO to terrorize their ex-wives, reminding them that, "conceptually, they are chattel."[225]

IV. CONCLUSION

Examination of the intersection between marriage regulation and the Pakistani Constitution shows that it played a major role in delineating the scope and boundaries of women's marital rights and will continue to guide its articulation. Under the skillful interpretive hands of the Pakistani courts, the

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220. By disobeying the decision, the lower courts also ignored their constitutional duty to follow the Supreme Court. *See, e.g.*, Fida Hussain v. Najma, PLD 2000 Quetta 46; Case published in 1992 SCMR 173; Case published in PLJ 1992 SC 207. *See also* MARTIN LAU, THE ROLE OF ISLAM IN THE LEGAL SYSTEM OF PAKISTAN 71 (2006) ("attempts to invalidate provisions of the Muslim Family Laws Ordinance 1961 on the basis of Islam continued . . . many judges doubted the Islamic *vires* of section 7 [of the Ordinance] . . . and found support in Justice Tanzil-ur-Rahman's bold assertion that the intention of Article 2-A allowed them to declare parts of the Ordinance to be invalid on the basis of Islam").

221. LAU, *supra* note 199, at 208; Ali, *Testing the Limits*, *supra* note 179.

222. Allah Rakka v Federation of Pakistan, PLD 2000 FSC 1, 61–62 (explaining that the "husband may not give notice of *talaq*. . . with ill-intention for a long period, and thus, by virtue of sub-section (3) keep the woman in suspended animation and cause her torture by keeping her bound. . . . This will certainly be a cruelty to the woman who, by virtue of this provision, can be exposed to the hazards of litigation by an unscrupulous husband if she marries . . . .").

223. *Id.* at 61.

224. *Id.* at 62. The Court emphasized that the only waiting period required by Islamic law was the observation of *iddat* (roughly three menstrual periods), but that this period is in many cases shorter than the ninety-day delay prescribed uniformly by the MFLO. *Id.* at 61–62.

225. Chadbourne, *supra* note 6, at 261. It is noteworthy that this ruling was also criticized as detrimental to women. Some critics lamented the fact that the Court provided relief to individual women charged with *zina*, but in the process undermined the protection the MFLO provided for women. *See* Sohail Akbar Warraich & Cassandra Balchin, *Confusion Worse Confounded: A Critique of Divorce Law and Legal Practice in Pakistan*, in SHAPING WOMEN'S LIVES: LAWS, PRACTICES & STRATEGIES IN PAKISTAN, *supra* note 8, at 181, 183.

constitutional commitment to Islamic law has proven compatible with the constitutional commitment to human rights: when dealing with a woman's right to choose her own partner independent of the wishes of others, with the issue of polygamous marriage, and with the registration requirements of both marriage and divorce, the courts drew on Islamic law to reach a result that was just, equitable, in harmony with constitutional fundamental rights, and to the manifest advantage of Pakistani women.

The utilization of an egalitarian and equitable conception of Islam in the context of marriage law is particularly remarkable given the extreme cultural sensitivity surrounding the regulation of this area of law and the patriarchal misconceptions about religion and women's role within the family. Remarkably, Pakistani courts have managed to render Islamic law, even more than the Constitution's "western" fundamental rights, the true hero in the equitable regulation of marriage law. Ultimately, Pakistan's Judiciary has succeeded in confounding the perception that Islam is antithetical to human rights, and has shown that the two are in fact complimentary, if not identical.[226]

It is to be hoped that the unique Pakistani model will inspire other Muslim nations with similar dual constitutional frameworks to formulate marriage law that is respectful of women's human rights.

226. Hassan, *supra* note 1. *See* LAU, *supra* note 199, at 210.