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ORIGINAL PAPER

Women's right to unilateral no-fault based divorce in Pakistan and India

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Abstract Pakistani judges dispensed with the requirement of the consent of the husband for a wife's right to unilaterally dissolve a marriage without assigning any of the reasons enumerated in the Dissolution of Muslim Marriages Act 1939. The Lahore HC laid down this rule for the first time in its decision in the *Balqis Fatima* case in 1959. Eight years later, the Supreme Court of Pakistan endorsed this rule in the *Khurshid Bibi* case. In 2014, the Federal Shariat Court of Pakistan declared this rule to be in conformity with the injunctions of Islam in the *Saleem Ahmed* case. In India, however, similar developments did not take place. Rather than extending women's right to divorce, Indian judges preferred to restrict the husband's right to divorce under Muslim Personal Law. The main argument in this article is that this divergent attitude of Pakistani and Indian judges toward Islamic divorce law is dictated by factors outside the law. While Pakistani judges felt obliged to reform Islamic family law in the absence of political consensus, Indian judges tried to harmonize Muslim Personal Law with other religious personal laws.

Keywords Women's rights · No-fault · Divorce · India · Pakistan

1 Introduction

At the time of their independence, Pakistan and India shared the same law and legal system, which were shaped during the colonial period (circa 1757 and 1947). However, the law on women's right to divorce diverged significantly during the

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post-colonial period in these two countries. Pakistani judges removed the requirement of the consent of a husband for a divorce initiated by a wife (*khula*)[1] by holding that a wife's right to dissolve her marriage is equal to a husband's right to divorce (*talaq*). In this way, they recognized a wife's unilateral right to no-fault based divorce. On the contrary, Indian judges did not develop such rule. The focus of Indian judges has been on putting restrictions on a Muslim husband's unilateral no-fault based right to divorce. In India, therefore, it is not the right of a wife to divorce that has been extended; rather, restrictions have been imposed on a husband's right to divorce his wife. In the end, both Pakistani and Indian judges seem to promote gender equality by allocating the same rights to divorce to both spouses.[2]

In this article, I explain the divergent attitude of Pakistani and Indian judges toward women's right to unilateral no-fault based divorce. I argue that Pakistani judges felt obliged to reform Islamic family law because of the lack of political consensus on this issue. Indian judges, however, faced a different challenge. Political imperatives in India such as the desire to implement a Uniform Civil Code (UCC) created pressure for the harmonization of various personal laws practiced in India. Muslim Personal Law was anomalous because it granted the husband a unilateral no-fault based right to divorce his wife. Therefore, Indian judges reformed Islamic divorce law by putting restrictions on a husband's right to divorce rather than extending the unilateral no-fault based right to divorce to Muslim wives.

The rest of this article traces the right of women to divorce under Muslim Personal Law during colonial and post-colonial periods. In 1861, the Judicial Committee of the Privy Council endorsed Islamic legal rule that requires the consent of a husband for the validity of a wife initiated divorce (*khula*) in the *Monshee Buzl-ul-Ruheem* case. After about a century, the Lahore High Court (HC) changed this rule in the *Balqis Fatima* case by removing the requirement of the consent of the husband. The Supreme Court of Pakistan (SCP) and the Federal Shariat Court endorsed this decision. In India, however, similar developments did not take place. Indian judges preferred to restrict the right of Muslim husbands to divorce their wives unilaterally and without assigning any reason. In the conclusion, I explain the possible causes of this divergence.

[1] The literal meaning of *khula* is "extracting oneself." The fifteenth century linguist, Jurjani defined *khula* as the "dissolution of marriage through taking money [by the husband]." *See* ALI B. MUHAMMAD AL-SHARIF AL-JURJANI, KITAB AL-TARIFAT 106 (1969). Under Islamic law, a wife can dissolve her marriage if this right is delegated to her by her husband. This delegation of divorce right is called *Talaq al-Tafwid*. *See* Muhammad Munir, *Stipulations in a Muslim Marriage Contract with Special Reference to Talaq al-Tafwid Provisions in Pakistan*, 12 Y.B. ISLAMIC & MIDDLE E. L. 235 (2005–2006).

[2] The constitutions of these two countries and their commitments under international human rights law require them to ensure gender equality. Though personal laws in these two countries are exempt from certain provisions of international human rights law and general constitutional principles, Pakistani and Indian judges still feel obliged to reform Muslim Personal Law. *See* SHAHEEN S. ALI, GENDER AND HUMAN RIGHTS IN ISLAM AND INTERNATIONAL LAW: EQUAL BEFORE ALLAH, UNEQUAL BEFORE MAN? (2000); YÜKSEL SEZGIN, HUMAN RIGHTS UNDER STATE-ENFORCED RELIGIOUS FAMILY LAWS IN ISRAEL, EGYPT AND INDIA 159–204 (2013).

2 Women's right to divorce under Muslim Personal Law

Women's right to divorce is governed by Muslim Personal Law (MPL) in both Pakistan and India. The primary sources of MPL include the judicial precedents (produced by the colonial Indian HCs and the Judicial Committee of the Privy Council—the highest court of appeal in the British Empire) and a few statutes (the most important include the Dissolution of Muslim Marriages Act 1939 and the Application of Muslim Personal Law (Shariat) Act 1937). The judicial precedents are based on the application and interpretation of classical Islamic law (*fiqh*) found in various books (the most important of them included the *Hidaya, Fatawa Alamgiriyya, Sirajiyya* and *Shara ul-Islam*). Legal commentaries systematized higher court decisions for the use of practitioners and judges. William Hay Macnaghten's *Principles and Precedents of Moohummudan Law* was the pioneering legal commentary. The tradition set by Macnaghten was followed by Shama Churun Sircar, Ameer Ali, Muhammad Yusuf, Abdur Rahman, RK Wilson, FB Tyabji, DF Mulla, Abdur Rahim, AA Fyzee and Vesey-Fitzgerald. These legal commentaries provided a critique of case law and went into several editions covering the latest judicial decisions. Mulla's *Mahomedan Law* continues to be published to this day, and judges in Pakistan and India consider it as a reliable source for MPL.[3]

Under Islamic law, a Muslim wife did not have a no-fault based right to dissolve her marriage equivalent to a Muslim husband's absolute right to divorce his wife without assigning any reason.[4] A Muslim wife could get a divorce only through a court presided over by a Muslim judge after establishing "fault" on the part of her husband under very limited circumstances. The rigidity of the law led to the enactment of the Dissolution of Muslim Marriages Act 1939, which provided a wife with nine grounds on which she could get a judicial divorce.[5] These grounds include the following:

i. Disappearance of the husband for 4 years;
ii. Husband's failure to provide maintenance for 2 years;
iii. Husband's imprisonment for seven or more years;
iv. Husband's failure to perform his marital obligations for 3 years;
v. Husband's impotency at the time of marriage and its continuity;
vi. Husband's insanity for 2 years or suffering from leprosy or a virulent venereal disease;
vii. Repudiation of marriage by a minor upon attaining the age of puberty;
viii. Cruel treatment of the wife by the husband (includes mental cruelty, association with women of ill repute or leading an infamous life, forcing a

[3] Shahbaz Ahmad Cheema & Samee Uzair Khan, *Genealogical Analysis of Islamic Law Books Relied on in the Courts of Pakistan*, AL-ADWA, Dec.13, 2013. *See* IQBAL ALI KHAN, MULLA'S PRINCIPLES OF MAHOMEDAN LAW (20th ed., 2013).

[4] In fact, the Hanafi school goes to the extent of regarding a wife divorced even when her husband pronounces divorce in jest, in state of drunkenness or under coercion. *Rashid Ahmad v Anisa Khatun* (1932) 59 I.A. 21.

[5] These grounds are somewhat similar to the grounds provided under § 13 in the Hindu Marriage Act 1955.

wife to live an immoral life, interference with wife's property, obstruction in her observation of religious profession or practice, and failure to treat wives equitably); and

ix. any other ground recognized as valid under Muslim law.

The last category includes a divorce initiated by the wife (*khula*).[6] Unlike a husband's no-fault based right to divorce, called *talaq*, which is not based on the consent of the wife, *khula* requires the consent of the husband. The Judicial Committee of the Privy Council—the highest court of appeal in the British Empire—noted this rule under Islamic law in its decision of 1867 and held:

> The matrimonial law of the Mohamedans, like that of every ancient community, favours the stronger sex. The husband can dissolve the tie at his will, subject to the condition of paying the wife her dower and other allowances; but she cannot separate herself from him except under the arrangement called Khoola [sic], which is made upon terms to which both are assenting parties, and operates in law as the divorce of the wife by the husband.[7]

This rule was continuously followed by the colonial Indian courts despite the fact that in 1939, the Dissolution of Muslim Marriages Act was passed with the clear objective of liberating Muslim women from broken marriages. Like the Egyptian family law of 1920 and 1929, this Act was primarily based on Maliki family law.[8] The Maliki school does not require the consent of a husband for *khula*.[9] The colonial Indian courts, however, did not follow the Maliki school on this point and the law remained unchanged. In *Umar Bibi v Muhammad Din*, the Lahore HC followed the Hanafi school and rejected the trial court decision that *khula* could be given by the court independently of the husband's consent. Justice Abdur Rahman

[6] Syed Ameer Ali, who later became a judge at the Judicial Committee of the Privy Council, defined *khula* as:

> When the wife, owing to her aversion to the husband, or her unwillingness to fulfil the conjugal duties, is desirous of obtaining a divorce, she may obtain release from the marital contract by giving up either her settled dower, or some other property….

See SYED A. ALI, MAHOMMEDAN LAW 1448 (2012). Dinshaw Mulla, later the judge at the Judicial Committee of the Privy Council, defined *khula* as "a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for the release from the marriage tie." DINSHAW F. MULLA, PRINCIPLES OF MAHOMEDAN LAW 164 (1905) 164. Another legal commentator, Abdur Rahim defined *khula* as "if the husband confers the power of dissolving the marriage on the wife in exchange for money or property." *See* ABDUR RAHIM, THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE 338 (1911). Similarly, Faiz Tyabji stated: "an agreement if the wife alone is desirous of having the marriage dissolved is called khula [sic]." *See* FAIZ B. TYABJI, MUHAMMADAN LAW 232 (3rd edn., 1940).

[7] *Monshee Buzl-ul-Ruheem v Luteefut-oon-Nissa* (Calcutta) [1867] 8 M.I.A. 379.

[8] *See* Fareeha Khan, Traditionalist Approaches to Shariah Reform: Mawlana Ashraf Ali Thanawi's Fatawa on Women's Right to Divorce (Sep. 1, 2011) (unpublished Ph.D. dissertation, University of Michigan).

[9] 2 SAHNUN B. SAID, AL-MUDAWWANA AL-KUBRA 231–232 (1323 A.H.). Ibn Rushd regards a wife's right to *khula* comparable to the husband's right to *talaq*. 3 MUHAMMAD B. AHMAD IBN RUSHD, BIDAYAT AL-MUJTAHID 1403 (Abdullah al-Abadi ed., 1995) 1403.

highlighted the dangers inherent in granting a woman a unilateral right to no-fault based divorce.

> It will then become possible for any woman to get rid of the marriage tie–fickle minded and impressionable as she temperamentally is–on account of a passing fancy and besides being open to the objection that she would be taking advantage in that case of her own wrongful act and conduct, it will make the marriages more or less a farce.[10]

He advised Muslim wives to be patient in their marital lives because even where there is mutual dislike or extreme incompatibility of temperament between the spouses, there may be love, satisfaction and blessing in married life, especially after the birth of children.[11]

3 Post-colonial legal developments in Pakistan

In its decision in 1952, the Lahore HC explained the rationale for the rule in the *Monshee Buzl-ul-Ruheem* case as follows:

> If wives were allowed to dissolve their marriages, without the consent of their husbands, by merely giving up their dowers, paid or promised to be paid, the institution of marriage would be meaningless as there would be no stability attached to it.[12]

This view changed in 1959, when a full bench of the Lahore HC addressed the question: "[w]hether under the Muslim Law the wife is entitled to *khula* as of right?" In this case, a simple *nikah* (marriage) ceremony of the parties took place in 1949 and *rukhsati* (bride's departure from her parent's house to her husband's house) was deferred. Meanwhile, disputes arose between the families of the parties and the couple never lived together. After about 2 years, the wife filed a suit for dissolution of marriage on the basis of her husband's failure to provide her maintenance. The case reached the Lahore HC, after the decisions of the trial court and district court. The judge of the HC observed that since the wife did not live with her husband, she was not entitled to maintenance and hence could not ask for dissolution of marriage on this ground. The counsel of the wife, however, argued that *khula* is a right of a wife, and she can demand dissolution of her marriage on restitution of dower to her husband. This was a question of law, and therefore, a full bench was constituted to hear the case.

Three judges unanimously held that a wife is entitled to *khula* as a right under Muslim Law. Instead of relying upon judicial authorities or the classical books of the Hanafi school, they referred to the primary sources of Islamic law—the Qur'an and Sunnah, and held that the Qur'anic verse 2: 229 does not require the consent of a husband for *khula*.[13] According to this verse:

[10] (1944) I.L.R. 25 Lahore 542.

[11] *Id.*

[12] *Sayeeda Khanam v Muhammad Sami* P.L.D. 1952 Lahore 113, ¶ 136 (per A.C.J Cornelius).

[13] *Balqis Fatima v Najam ul-Ikram Chaudhry* P.L.D. 1959 Lahore 566, ¶ 573.

> Divorce is only permissible twice: after that, the husbands should either retain wives on equitable terms, or let them go with kindness. It is not lawful for you, [men], to take back any of your gifts [from your wives], except when both parties fear that they would be unable to keep the limits ordained by Allah. If ye [judges] do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something for her freedom. These are the limits ordained by Allah; so do not transgress them. If any do transgress the limits ordained by Allah, such persons wrong [themselves as well as others].[14]

Justice Kaikaus, the author of the judgment, referred to the traditions of the Prophet, analyzed the views of various legal commentators and leading jurists, and examined prior judicial authorities. He foresaw the potential criticism on his judgment that it was in conflict with the views of classical jurists and replied:

> [O]n a question of interpretation we are not bound by the opinions of jurists. If we be [sic] clear as to what the meaning of a verse in the Qur'an is, it will be our duty to give effect to that interpretation irrespective of what has been stated by jurists. "Atiullah-ha-wa Ati-ur-Rasul" [obey God and obey the Prophet] is the duty cast on the Muslim and it will not be obedience to God or to the Prophet if in a case where our mind is clear as to the order of the Almighty or the Prophet we fail to decide in accordance with it.[15]

While endorsing a wife's no-fault based unilateral right to divorce, Justice Kaikaus asked, "if such power be [sic] granted to the husband, why should there be a great disparity between the rights of the wife and the husband?" He contended:

> But it does not seem reasonable that while to one of the two contracting parties has been granted a plenary power to put an end to the contract, there should be no power given to the other party and the wife must in order to get a release prove some such misconduct on the part of the husband as will disentitle him to the continuance of the marriage. The wife ought, in reason, to have a right similar to that of the husband subject only to the order of the Court.[16]

Following the same line of reasoning, Justice Kaikaus argued that a husband, who did not like his wife could divorce her at his will even when she is not at fault, but a wife is denied this right even when she is innocent. He asked, "[w]hy should there be a disparity between the rights of spouses?"[17]

Despite his assertion for gender equality under Islamic law of divorce, Justice Kaikaus argued that a wife can only exercise her right of *khula* in case of irretrievable breakdown of marriage:

> There is an important limitation on her right of *khula*. It is only if the judge apprehends that the limits of God will not be observed, that is, in their relation

[14] ABDULLAH YUSUF ALI, THE HOLY QUR'AN 39–40 (2007).

[15] *Balqis Fatima v Najam ul-Ikram Chaudhry* P.L.D. 1959 Lahore 566, ¶ 584.

[16] *Id*., at 581–82.

[17] *Id*., at 592.

> towards one another, the spouses will not obey God, that a harmonious married state, as envisage by Islam, will not be possible that he will grant a dissolution. The wife cannot have a divorce for every passing impulse. The judge will consider whether the rift between the parties is a serious one though he may not consider the reasons for the rift.[18]

A full bench of five judges of the SCP unanimously confirmed a wife's unilateral right to no-fault based divorce in 1967 in *Khurshid Bibi v Baboo Muhammad Amin*.[19] In this case, the courts recognized that the Qur'an is the basis of all the fundamental laws of Islam and it placed both the husband and the wife on an equal footing with regard to their mutual rights and obligations. The court held that a wife does not require the consent of her husband for *khula*. Further, it held that the Qur'an and Sunnah prescribe that persons in authority (*ulu al-amr*), including a judge, can order the dissolution of marriage on the basis of *khula* even if the husband disagrees.[20] On the issue of the requirement of the consent of the husband for *khula*, the court "observed it" is significant that according to the Qur'an, she can "ransom herself" or "get her release" and it is plain that these words connote an independent right in her. In this case, a childless wife wanted to get a divorce after her husband contracted a second marriage and neglected her. The husband, however, did not agree to divorce her.

The above judgment firmly established the unilateral right of a wife to no-fault based divorce under Islamic law. Despite criticism from religious scholars (ulama) that this right is not in accordance with Islam,[21] judicial practice on enforcing this right has been consistent and there are only a few reported cases in which the judges were reluctant to dissolve a marriage on the basis of *khula*.[22] Recent case law shows that a wife has to walk into a court of law and state that she wants to dissolve her marriage. The court is bound to "accede to her request."[23] It must be noted that *khula* operates as a single pronouncement of divorce, and the wife can remarry her ex-husband without an intervening marriage (*halala*).[24]

[18] *Id*., at 593.

[19] P.L.D. 1967 S.C. 97.

[20] *Id.*

[21] The leading Deobandi scholar, who served as a judge of the Shariat Appellate Bench of the SCP for more than two decades criticized the judgment in the *Khurshid Bibi* case in his extra judicial writing. *See* MUFTI TAQI USMANI, ISLAM MEIN KHULA KI HAQIQAT (THE REALITY OF KHULA IN ISLAM) 137–194 (1996).

[22] *Aali v Additional District Judge-I Quetta* 1986 C.L.C. 27 (*Khula* is not allowed on the mere asking of the wife); *Raisa Begum v Muhammad Hussain* 1986 M.L.D. 1418 (*Khula* depends upon the positive finding by the court that spouses cannot live within the limits prescribed by God); *Lal Muhammad v Gul Bibi* P.L.J. 1986 Quetta 159 (the court observed that if a woman were given a liberal right to the dissolution of marriage, it would frustrate the very purpose and objective of regulating the right of *khula* through courts).

[23] *Abdul Rasheed v Judge Family Court, Mian Channu* 2010 C.L.C. 797 (Once a wife approaches the court for the dissolution of marriage on the basis of *khula*, the court has no option but to accede to her request); *Abdul Hameed v Rubina Bibi* 2010 C.L.C. 1681 (if the wife categorically states that she wants divorce, the court may safely presume that the spouses cannot live together in harmony).

[24] *Danish v Fouzia Danish* P.L.D. 2013 Sindh 209. A few cases are reported in which wives remarried their former husbands after getting *khula*. Even after a family court passes the decree of khula, the chairman of a local council makes efforts for reconciliation between the spouses before issuing a certificate of effectiveness of divorce. This certificate serves as a proof of the dissolution of marriage.

In 2014, a wife's unilateral right to no-fault based divorce under Islamic law attained the sanction of the Federal Shariat Court (FSC), a constitutional Court established in 1980 to Islamize the laws of Pakistan. The FSC is empowered to examine any law, with the exception of Constitution, Muslim Personal Law and procedural law of any court or tribunal, and declare it invalid if found contrary to the injunctions of Islam as laid down in the Qur'an and Sunnah. Case law also cannot be examined by the FSC. Therefore, it could not examine the decisions of the Lahore HC and the SCP. In 2002, the legislature amended section 10(4) of the Family Courts Act 1964, authorizing family courts to dissolve a marriage on the basis of *khula* if reconciliation between the spouses fails. This amendment was challenged before the FSC on the ground that it was against the injunctions of Islam. After reviewing various juristic opinions (*fatawa*), which unanimously held that a judge does not have any authority to order the dissolution of a marriage on the basis of *khula* without the consent of the husband, the court held that it was not bound by these opinions. The court observed that the injunctions of Islam regarding gender are based on "equality without any discrimination whatsoever."[25] The court held:

> Obviously Islam does not intend to force a wife [to] live a miserable life, in a hateful unhappy union, forever. If she is unhappy and reconciliation fails, she should be entitled to get relief whatsoever.[26]

4 Post-colonial legal developments in India

The *khula* form of divorce is recognized in India. Under section 2 of the Muslim Personal Law (Shariat) Application Act 1937, *khula* is enumerated as an area that is governed by Sharia (Islamic law). The state laws for registration of Muslim marriages and divorce in Assam, Bihar, Meghalaya, Orissa and West Bengal also provide for the registration of *khula*.[27] Unlike Pakistani courts, the Indian courts have abstained from deviating from the dictates of the Hanafi school on the question of a husband's consent for *khula*. Indian judges continue to follow the *ratio decidendi* laid down in the *Moonshee Buzloor Ruheem* case. As mentioned earlier, in this case, the Judicial Committee of the Privy Council held that *khula* required the consent of a husband. Indian HCs continue to follow this rule.[28] In *Zohara Khatoon v Mohd. Ibrahim*, Justice Fazal Ali of the Supreme Court of India (SCI) described *khula* as a form of divorce initiated by the wife, which becomes valid only after the husband gives his consent.[29] Following the rule, the Bombay HC in *Mrs Sabah Adnan Sami Khan v Adnan Sami Khan* held:

[25] *Saleem Ahmad v Government of Pakistan* P.L.D. 2014 F.S.C. 43.

[26] *Id.*

[27] KAUSER EDAPPAGATH, DIVORCE AND GENDER EQUITY IN MUSLIM PERSONAL LAW OF INDIA 106 (2014).

[28] *Umar Bibi v Mohammad Din* A.I.R. 1945 Lah. 51; *Syeda Khanum v Muhammad Sami* P.L.D. 1952 Lah. 113 (FB); *Ghansi Bi v Ghulam Dastagir* (1968) 1 Mys. L.J. 566.

[29] A.I.R. 1981 S.C. 1243.

> [A] divorce by Khula is complete if the following conditions are satisfied: (i) if it is at the instance of the wife or there must be an offer from the wife; (ii) she gives or agrees to give a consideration to the husband for her release; and (iii) acceptance by the husband of the offer. Over and above this, under Sunni law, the husband must be adult and of sound mind.[30]

Though Indian judges continue to follow the rule laid down in the *Monshee Buzl-ul-Ruheem* case on the issue of consent of a husband for *khula*, it would be incorrect to assume that Islamic law of divorce has remained stagnant in India. Indian judges revisited the existing law and tried to accommodate it with the changing circumstances. Justice V.R. Krishna Iyer wrote an important judgment in *Yousuf Rawther v Sowramma* in 1971.[31] In this case, a 15-year-old girl was married to a man twice her age. The couple lived together only for 1 day, and the husband left for another city to attend to his business. One month later, the wife went back to live with her parents. The husband tried to convince her to return to his house, but she refused. After about 2 years, she filed a suit for the dissolution of her marriage, alleging non-provision of maintenance by the husband. The trial court dismissed her suit, but the lower appellate court decreed for the dissolution of her marriage. The husband filed an appeal before the Kerala HC. In his judgment, Justice Iyer made important observations on Islamic law of divorce. Though he does not expressly refer to women's right of *khula*, his remarks on the right of Muslim spouses to divorce are relevant to our discussion. He wrote:

> It is a popular fallacy that a Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage. "The whole Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (namely, women) obey you, then do not seek a way against them." (Quran IV:34)."[32]

Justice Iyer argued that under Islamic law a man can divorce his wife only when there is a justification for doing so.

> The Islamic law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law.[33]

Interestingly, Indian judges were aware of the legal developments on divorce in Pakistan. However, many of them were wary of the consequences of extending the no-fault based right to divorce to women. In his judgment, Justice Iyer criticized this view taken by Indian judges by reminding them that under the conventional understanding of Islamic law, Muslim husbands enjoy such an absolute right to

[30] A.I.R. 2010 Bom. 109.

[31] A.I.R. 1971 Kerala 261.

[32] *Id.*

[33] *Id.*

divorce. Further, he questioned the validity of the law that keeps a check on the right of a wife to end the wedlock in case of broken marriages. Justice Iyer observed:

> The Indian Judges have been sharply divided on the woman's right to divorce. Is she eligible only if she has not violated her conjugal duties? Or can she ask for it on mere failure of the husband to provide maintenance for her for two years, the wife's delinquency being irrelevant? If the latter view be the law, judges fear that women, with vicious appetite, may with impunity desert their men and yet demand divorce – forgetting, firstly that even under the present law, as administered in India, the Muslim husband has the right to walk out of the wedlock at his whim and secondly, that such an irreparably marred married life was not worth keeping alive.[34]

He regarded the no-fault based approach to divorce under Islamic law as "secular and pragmatic," which "happily harmonizes with contemporary concepts in advanced countries." Being a realist, Justice Iyer stated:

> "The law has to provide for possibilities; social opinion regulates the probabilities."[35] The view I have accepted has one other great advantage in that the Muslim woman (like any other woman) comes back into her own when the Prophet's words are fulfilled, when *roughly equal rights are enjoyed by both spouses*, when the talaq technique of instant divorce is matched somewhat by the Khula device of delayed dissolution operated under judicial supervision. The social imbalance between the sexes will thus be removed and the inarticulate major premise of equal justice realised.[36] (emphasis added)

Later case law on the issue of Muslim wives' unilateral no-fault based right to divorce in India did not "equalize" the rights of spouses. Rather, Indian judges developed the rule that *talaq* must be "for a reasonable cause." In this way, rather than equalizing the right of divorce of wives to that of husbands, Indian judges restricted the rights of husbands by equalizing their divorce rights to that of wives, who had to establish a valid cause for divorce. The Gauhati HC, in *Sri Jiauddin Ahmed v Mrs Anwara Begum,* held that *talaq* must be for reasonable cause and that it must be preceded by attempts at reconciliation between husband and wife by two arbiters—one from a wife's family and the other from a husband's. If such attempts fail, *talaq* could be effected. An attempt at reconciliation is an essential condition precedent to *talaq*.[37] Justice Baharul Islam observed:

> Though marriage under the Muslim Law is only a civil contract, yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage-tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution.[38]

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] (1981) 1 G.L.R. 358.

[38] *Id.*

The Division Bench of the Gauhati HC affirmed the above view in *Mst. Rukia Khatun v Abdul Khalique Lascar*.[39] The Court held that the correct law as ordained in the Qur'an requires: that (i) *talaq* must be for a reasonable cause; and (ii) it must be preceded by attempts of reconciliation by the nominees of the spouses, and it may be effected if the reconciliation attempts fail.

The SCI had the occasion to choose between the two approaches: One identified by Justice Iyer of Kerala HC of granting wives an equal right to unilateral no-fault based divorce, and the other laid down by the judges of the Gauhati HC of restricting the unilateral no-fault based right to divorce of husbands. In *Shamim Ara v State of Uttar Pradesh*, Justice R.C. Lahoti referred to these two approaches and preferred the latter. Before laying down the *ratio* in this judgment, he observed:

> We must note that the observations [of various HCs] were made 20–30 years before and our country has in recent times marched steps ahead in all walks of life including progressive interpretation of laws which cannot be lost sight of except by compromising with regressive trends. What this Court observed in *Bai Tahira v Ali Hussain* dealing with right to maintenance of a Muslim divorcee is noteworthy. To quote: "The meaning of meanings is derived from values in a given society and its legal system."[40]

In the end, Justice Lahoti held that in order to be effective, *talaq* must be for reasonable cause and must be preceded by efforts of reconciliation between the spouses. He added a third condition that a *talaq* must be proclaimed or formally pronounced and that a mere plea taken in a written statement that divorce has been pronounced sometime in the past cannot by itself be treated as effectuating *talaq*.[41] He refused to accept the judicial authorities referred to by Mulla in the *Mahomedan Law* and the view of Dr Tahir Mahmood expressed in *The Muslim Law of India*. According to these two authors, the plea of previous divorce taken in the written statement can be treated as husband's pronouncement of *talaq* on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife.

The facts in the *Shamim Ara* case were similar to the facts in the two cases decided by the Gauhati HC. In these cases, the wives filed for the provision of maintenance by their husbands, who rebutted their claim by arguing that since they had already divorced their wives, there was no obligation to provide maintenance. Interestingly, on similar facts, the SCP also refused to accept the claim of a husband and required proof of divorce. In *Manzoor Ahmad v Nargis Mirza*, the wife filed a suit for maintenance from her husband, who defended the suit by arguing that he had divorced his wife in presence of a witness. The court rejected this plea because he failed to notify the Chairman Union Council and the wife as required under section 7 of the Muslim Family Law Ordinance 1961 (MFLO).[42] On similar facts,

[39] (1981) 1 G.L.R. 375.

[40] A.I.R. 2002 S.C. 3551.

[41] *Id.*

[42] P.L.D. 2004 S.C. 132.

this principle is confirmed by Justice Rana Bhagwandas in *Farah Naz v Judge Family Court*.[43]

The *ratio* in the *Shamim Ara* case was confirmed by the SCI in a later case,[44] and it has been followed by the Karnataka HC,[45] the Bombay HC[46] and the Andhra Pradesh HC.[47] The judges in these cases held that *talaq* must be for a reasonable cause and must be preceded by attempts for reconciliation by two arbiters, one by the wife's family and the other from the husband's family. The Madras HC also took the same view in *Shahul Hameed v Salima*.[48] In *Ummer Farooque v Naseema,* a Division Bench of the Kerala HC held that, to be valid, a *talaq* should be for a reasonable cause and be preceded by an attempt at reconciliation between the husband and wife by two arbiters.[49] In *M. Mohamed Ibrahim v M. Inul Marliya*, the Madras HC refused to accept the validity of a divorce when there was neither any evidence to show a reasonable cause nor attempts for reconciliation between the spouses by two arbiters that preceded the *talaq*.[50]

In summary, the Indian law on the dissolution of marriage requires that a *talaq* initiated by a husband must fulfill three conditions: (i) reasonable cause; (ii) preceded by reconciliation efforts by two arbiters from the side of either spouse; and (iii) properly evidenced in the form of formal declaration by a husband. In this way, Indian judges have put a check on a Muslim husband's unilateral no-fault based right to divorce.[51]

5 Conclusion

The trend in case law in India is fairly different from the developments in the law of divorce in many Muslim and Western countries, where the law recognizes the no-fault based right of spouses.[52] There could be many explanations for this trend. One plausible explanation could be that within various religiously inspired personal laws

[43] P.L.D. 2006 S.C. 457.

[44] *Iqbal Bano v State of UP* A.I.R. 2007 S.C. 2215.

[45] *Manoj v Vidhya* 2010 (2) K.L.T. 305.

[46] 2004 (2) K.L.T. S.N. 71 .

[47] *Shameem Baig v Najmunnisa Beegum* C.D.J. 2006 B.H.C. 1216.

[48] 2003 (2) K.L.T. SN. 121.

[49] 2005 (4) K.L.T. 565.

[50] MANU/TN/3111/2015.

[51] The last two conditions are similar to the provisions of the MFLO. By adding the requirement of a reasonable cause for divorce, SCI has gone ahead of the MFLO. Serajuddin argues that Indian courts achieved through judicial interpretation of the Qur'an and *hadith* what Pakistan tried to achieve through legislation. *See* ALAMGIR MUHAMMAD SERAJUDDIN, MUSLIM FAMILY LAW, SECULAR COURTS AND MUSLIM WOMEN OF SOUTH ASIA 248 (2011).

[52] *See* LYNN WELCHMAN, WOMEN AND MUSLIM FAMILY LAWS IN ARAB STATES (2007); Stephanie Coontz, *The Origins of Modern Divorce*, 46 (1) FAM. PROCESS 7–16 (2007); Bradford Wilcox, *The Evolution of Divorce*, 1(1) NAT'L AFF. 81–94 (2009); Kei Sakata & Colin R. McKenzie, *The Impact of Divorce Precedents on the Japanese Divorce Rate*, 79 (9) MATH. & COMP. SIM. 2917–2926 (2009); Libertad González & Tarja K. Viitanen, *The Effect of Divorce Laws on Divorce Rates in Europe*, 53(2) EURO. ECON. REV. 127–138 (2009).

in India, Muslim Personal Law holds an anomalous position on divorce. In a case decided in 1981, Justice S. Murtaza Fazal Ali of the SCI observed:

> A divorce given unilaterally by the husband is especially peculiar to Mahomedan law. In no other law has the husband got a unilateral right to divorce his wife by a simple declaration because other laws, viz., the Hindu law or the Parsi Marriage and Divorce Act, 1936, contemplate only a dissolution of marriage on certain grounds brought about by one of the spouses in a Court of law….[53]

Similarly, his fellow judge, Justice A.D Koshal, noted: "Divorce by the act of the husband is, broadly speaking, not recognized by any system of law except that applicable to Muslims (barring variations of personal law by custom)."[54] Indian judges, therefore, may have felt the need to harmonize Muslim Personal Law with other personal laws in India. Justice Islam of the Gauhati HC tried to justify this trend in Indian case law by arguing that "modern trend of thinking is to put restrictions on the caprice and whim of the husband to give talaq to his wife at any time without giving any reason whatsoever."[55]

On the contrary, the superior court judges in Pakistan faced a different type of challenge. They felt obliged to show that the principles of Islamic law are not archaic and rigid, as some colonial British judges had alleged,[56] and that Islamic law is compatible with modernity. This may explain their frequent references to gender equality while rationalizing the unilateral no-fault based right of wives to divorce. It is not a surprise that the judgment in *Balqis Fatima* (1959) was delivered at a time when conservatives and modernists were engaged in fierce debate to reform family laws in Pakistan. The government of Pakistan established the Marriage and Family Law Commission in 1955 as a result of the agitation by the All Pakistan Women's Association (APWA), which called for the reform of family laws in Pakistan following the second marriage of the then prime minister, Muhammad Ali Bogra.[57] The report of the Commission, however, drew strong criticism from the religious political parties and was shelved.[58] It was only after the military coup of Ayub Khan that the Muslim Family Law Ordinance 1961 (MFLO) was promulgated.[59] The

[53] *Zohara Khatoon v Mohd. Ibrahim* A.I.R. 1981 S.C. 1243.

[54] *Id.*

[55] (1981) 1 G.L.R. 358. This was indeed the case in 1960 s in the Muslim world. *See* J. N. D. *Anderson, Reforms in the Law of Divorce in the Muslim World*, 31 STUDIA ISLAMICA 41–52 (1970).

[56] Justice Beaman of the Bombay HC regarded certain notions of Muhammadan Law as "extremely crude and primitive." *Casamally Jairajbhoy Peerbhoy v Sir Currimbhoy Ebrahim Bart* [1911] I.L.R. 26 Bom. 214. These and similar remarks did not go unchallenged by Muslim legal commentators and judges such as Syed Mahmood, Syed Amir Ali and Faiz Tyabji. *See* Muhammad Zubair Abbasi, *Islamic Law and Social Change: An Insight into the Making of Anglo-Muhammadan Law*, 25 J. ISLAMIC STUD. 325–49 (2014).

[57] Sarah Ansari, Polygamy, *Purdah and Political Representation: Engendering Citizenship in 1950 s Pakistan*, 43 (6) MOD. ASIAN STUD. 1421–61(2009).

[58] KHURSHID AHMAD, STUDIES IN THE FAMILY LAW OF ISLAM (ed., 1959).

[59] Freeland Abbott, *Pakistan's New Marriage Law: A Reflection of Qur'anic Interpretation*, 1(11) ASIAN SURV. 26–32 (1962); Khawar Mumtaz, *Political Participation: Women in National Legislatures in Pakistan*, *in* SHAPING WOMEN'S LIVES: LAWS, PRACTICES AND STRATEGIES IN PAKISTAN 328–338 (Farida Shaheed et al., eds., 1998).

MFLO did not incorporate all the recommendations of the Commission. On the issue of divorce, the Commission had recommended that no person should be allowed to pronounce a divorce without obtaining a court order to that effect.[60] The MFLO did not incorporate this recommendation.

On the issue of a women's right to divorce, the Commission recommended that "supplementary legislation may be undertaken to make the *Khula* form more certain and precise."[61] The Commission did not make any recommendation regarding the requirement of the consent of the husband for *khula* and vaguely stated that the "incompatibility of temperament should not give the wife a right to demand a divorce except in the *Khula* form."[62] Even though the MFLO did not incorporate all the recommendations of the Commission, many religious scholars termed it as un-Islamic and motivated by pro-West women. A bill to repeal the MFLO was introduced at the National Assembly in 1962, but it was rejected by a majority vote. A decade later, in 1972, yet another attempt was made to bring the MFLO in "accordance with the Qur'an and Sunnah" by setting up a board of *ulama*.[63] In 1978, General Zia ul Haq directed the Council of Islamic Ideology to review the MFLO. The Council sent its recommendations to the the Ministry of Law, which in its letter dated 15 January 1980 responded to in the following words:

The Muslim Family Laws Ordinance 1961, is utterly un-Islamic. It is against the holy Qur'an and Sunnah. It has dared to amend the Qur'anic law to the extent of Irtidad [apostasy] and its existence is a slur, a blot, a bad blot on the glorious name of Islam and our Islamic country. Such a legislation or even its name need not be protected. Let us clean the blot altogether by its total repeal.[64]

The Ministry of Religious Affairs also agreed to repeal the MFLO. Two male and one female member of the Council, however, disagreed and proposed that MFLO should be amended.[65]

In this context, when politicians and policy makers in Pakistan were unable to develop a consensus to reform family laws, superior court judges felt obligated to undertake this task.[66]

[60] Mian Abdur Rashid, *Report of the Commission on Marriage and Family Law*, *in* STUDIES IN THE FAMILY LAW OF ISLAM 97 (Khurshid Ahmad ed., 1959).

[61] *Id.* 66.

[62] *Id.*

[63] Khawar Mumtaz, *Political Participation: Women in National Legislatures in Pakistan*, *in* SHAPING WOMEN'S LIVES: LAWS, PRACTICES AND STRATEGIES IN PAKISTAN 328–38 (Farida Shaheed et al., eds.,1998).

[64] COUNCIL OF ISLAMIC IDEOLOGY, REPORT ON MUSLIM FAMILY LAWS 32 (2nd ed. 1993).

[65] *Id*., at 33.

[66] In *Allah Rakha v The Federation of Pakistan* P.L.D. 2000 F.S.C. 1, the Federal Shariat Court scrutinized the provisions of the MFLO for their conformity with the injunctions of Islam. It held that the provisions controlling polygamy and regulating the process of talaq by requiring a husband to give notice to the wife and the Chairman of Union Council were not repugnant to the injunctions of Islam. However, the right of representation of orphaned grandchildren in the legacy of the grandfather and the fixed period of iddatwere declared un-Islamic.

This article tries to explain the divergence in case law on the right of women to unilateral no-fault based divorce in Pakistan and India. Its findings are based on a limited set of cases and require further support from not only a wider data set of case law, but also a deeper analysis of the sociology of judges by looking into their backgrounds, careers and extra judicial writings. Perhaps more importantly, these findings need to be contextualized within the political background of landmark judgments.[67] Bearing these qualifications in mind, this article lends support to the idea that just like secular law, various rules of Islamic law are determined by factors that are outside the domain of legal theory. Practical reality plays a key role in determining one among multiple theoretical justifications for a legal rule. It follows that the application of the same theory may yield entirely opposite results, depending upon how the theory is applied.[68] Judges in Pakistan and India continue to apply Islamic family law in their different sociopolitical and economic contexts. A comparative analysis of their judgments on divorce law shows that it is the context that appears to shape the law and not vice versa.

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[67] *See* Narendra Subramanian, *Legal Change and Gender Inequality: Changes in Muslim Family Law in India*, 33 (3) L. & SOC. INQ. 631–672 (2008).

[68] Sherman Jackson, *Fiction and Formalism: Towards a Functional Aalysis of Usūl al-Fiqh*, *in* STUDIES IN ISLAMIC LEGAL THEORY 177–201 (B.G. Weiss ed., 2002).