

# DE-CONSTRUCTING CONJUGAL RIGHTS IN PAKISTANI LAW



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## Executive Summary

The Restitution of Conjugal Rights (RCR) is a legal provision present in Muslim, Hindu, Christian and Parsi personal laws in Pakistan. The primary objective of the RCR is to provide an opportunity for spouses to “reconcile”<sup>1</sup> a troubled marriage. The provision is invoked when one spouse leaves the marital home and the other can legally demand the return of the other spouse to the marital home and perform their marital duty. The defence to the execution of such a decree is to demonstrate a lawful or legitimate reason for leaving the marital home.

The legal provision of RCR in Pakistani law has been inherited by the sub-continent from the British Raj, as did several other colonies, many of which have since repealed the provision.<sup>2</sup> In the sub-continent, it was first used in Christian laws, followed by Islamic, Hindu and Parsi marriage laws – all using religious arguments to condone it.

The provision under Pakistani law is gender neutral, fulfilling formal equality requirements. Even so, the provision has been used disproportionately by men against women, demonstrating its anti-women and discriminatory outcomes, thereby not providing substantive equality. Two perspectives of conjugal rights emerge from this discourse i.e. conjugal rights as a tool for reconciliation of a couple, or as a tool used by men to control or intimidate women. The question arises, does the legal provision of RCR continue to have any relevance in Pakistan’s current legal system and society?

To respond to this question, the Sindh Advisory Call Centre (SLACC) in collaboration with the Law Department, Government of Sindh conducted this research using the SLACC data, case judgments from superior courts, desk research and analysis of the legal framework on Pakistan.

Out of the 789 SLACC calls analyzed from SLACC, 77% (611 calls) of the calls were from men or their families regarding RCR cases or potential RCR cases while only 23% (178 calls) of the calls were from women or men calling on behalf of female callers. Of the 233 reported case judgments examined for this paper, 99% of the cases were filed by men (230 cases) while only 1 woman filed an RCR and 2 cases were filed before the Federal Shariat Court questioning the execution and jurisdiction of conjugal rights. This demonstrates that women are the primary respondents in cases of RCR. The reasons given by men for asking for information or filing applications for RCR who approached the SLACC include a majority of cases relating to the wife leaving the marital home; or parents keeping the wife illegally confined; or the parents demanding property in exchange for their daughter’s return etc. Women who approached the SLACC about RCR were concerned about their legal rights in

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<sup>1</sup> Shahbaz Ahmed Cheema, “Islamization of Restitution of Conjugal Rights by Federal Shariat Court of Pakistan: A Critique” *SSRN*, (2019): 10, <https://ssrn.com/abstract=3329168>

<sup>2</sup> Shahbaz Ahmed Cheema, “Indigenization of Restitution of Conjugal Rights in Pakistan: A Plea for its Abolition,” *LUMS Law Journal* 4, (2019): 5

RCR and in separation from the husband; or how to get their economic rights of dower and maintenance; or how to reconcile with their husbands who may have abandoned them.

Out of the 233 case judgments examined for this paper, RCR was granted in only 12.8% of the cases (30 cases); it was denied in 56.6% of the cases (132 cases); undecided due to transfer to other courts or due to *Khula* or dissolution of marriage in 29.6% of the cases (69 cases); and 1% of the cases (2 cases) were filed and answered before the Federal Shariat Court on points of law. Out of the cases where RCR was granted, in 11 cases, RCR was granted unconditionally. In 19 cases conditions were imposed e.g. payment of dower, maintenance, medical expenses or providing separate accommodation to the wife. Courts also recommended divorce if spouse was not willing to return home even if conditions (if any) are met.

The burden of proof in RCR cases lies on the respondent to prove a legitimate reason for their departure from the marital home. In cases of women, this type of evidence is often hard to attain. If the courts find that there is no lawful excuse for a wife leaving, the husband is not bound to pay her maintenance any longer. Thus, it is in the men's interests to disparage the wife's character and intentions to demonstrate her lack of a legitimate reason. It is also common for men to file cases of RCR in retaliation for a woman filing for maintenance or divorce – to attempt to demonstrate their willingness to reconcile, which may gain them favour before the court, or which will intimidate, harass or annoy the wife, or at the very least, delay the legal process further. In some cases, the provision was invoked AFTER the divorce had already been affected. While the court does try to protect the women, which is also seen in the low success rates of cases of RCR, this does not stop men from filing the cases and trials being conducted in the court. Thus, women – the majority of the respondents – are forced to undergo a long trial with delays which are a part of the judicial process in Pakistan, resulting in increased frustration and psychological and mental pressure.

RCR cases are also not possible to execute as they require the voluntary return of the spouse to the marital home. A 2016 Peshawar High Court judgment<sup>3</sup> recommended attachment of the property to the decree, which is a dangerous step for women. Men are already encouraged in filing a suit of RCR for trivial matters, as discussed above, including as revenge for cases of *Khula* and maintenance being filed against them. The added incentive of property could result in even more cases being brought to court to harass and exploit women.

There exist alternative legal processes which cater to several aspects for which a decree of RCR is purportedly used. Section 10 of the Family Courts Act 1964 mandates attempts at reconciliation in cases of divorce. Maintenance and dower cases under Muslim Family Law Ordinance 1961 review the marriage rights and obligations of spouses. A woman who is not receiving maintenance or is being abused by her husband can file a case of economic abuse under the provincial domestic violence laws.<sup>4</sup> For effecting reconciliation during the

<sup>3</sup> Mst. Saima Tabbasam vs Syed Sher Shah 2016 MLD (Peshawar) 1430

<sup>4</sup> Sindh Domestic Violence (Prevention and Protection) Act 2013

<http://www.pas.gov.pk/uploads/acts/Sindh%20Act%20No.XX%20of%202013.pdf>; Balochistan Domestic

separation, options such as voluntary family mediation or counselling may be explored, which will not burden the courts nor mandate a protracted trial process.

The lack of women's voices and experiences are absent in the court judgments and precedents. This is demonstrated by the courts' inability to understand the issues faced by women. For example, although the legal provision is gender neutral, in reality women cannot freely and are unable to successfully use this provision due to social constraints and legal bias. If they do, they fear their husbands may divorce them, a process which is quicker than *Khula* proceedings for women. Another example is the courts' assertion that a woman who leaves her marital home should either go back to her husband and fulfil her marital obligations, or simply divorce him. This does not recognise the economically unstable position most women hold and their economic dependence on the men in their family. Coupled with social bias and ostracization of divorced women in Pakistani society, this results in great difficulty for women to make the decision to divorce their husbands for whatever reason. Additionally, it must be noted that often the very reason women leave their matrimonial homes is due to the lack of dower or maintenance being provided by the husband.

There is an absence of discussion on sexual bodily rights of the woman in the entire legal discourse. Sexual relationships are being coated in wider terms "wife's marital duties" or "marital obligations to the husband" or "return to her home" etc. Few cases specifically discuss or referred to her sexual rights. This gap limits the discourse on bodily rights and integrity of both spouses. Such a discussion and setting down of juridical law would be of particular importance to women, who are more vulnerable within the unequal power dynamics of a marriage in Pakistan.

RCR can also be seen to be violative of women's fundamental human rights, enshrined in the Constitution of Islamic Republic of Pakistan 1973 including those of privacy, dignity and equality.<sup>5</sup> It violates her right to freedom of choice, her autonomy and agency.

The provision of RCR is not effectively fulfilling the objective of its existence in the legal books i.e. reconciliation of estranged spouses. Instead it is a tool being used by men to control, intimidate and harass women, thereby making it a discriminatory law. It also violates the fundamental human rights of the woman. In addition to this, it is largely unsuccessful, with few successful cases. Thus, the paper concludes that the law is not only violative of women's rights and goes against Article 25 of the Constitution of the Islamic Republic of Pakistan 1973, but also is redundant. This paper recommends for the immediate repeal of the provision of RCR.

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Violence (Prevention and Protection) Act 2014

<http://www.pabalochoistan.gov.pk/uploads/acts/2014/Act072014.pdf>; Punjab Protection of Women Against Violence Act 2016 <http://punjablaws.gov.pk/laws/2634.html>; Khyber Pakhtunkhwa's draft bill was rejected by the Council of Islamic Ideology, deeming it to be "un-Islamic".

<sup>5</sup> Articles 14 and Article 25 of the Constitution of Islamic Republic of Pakistan 1973  
<http://www.pakistani.org/pakistan/constitution/>



# De-Constructing Conjugal Rights in Pakistani Law

Naima Qamar,<sup>6</sup> Maliha Zia<sup>7</sup> and Tara Khan<sup>8</sup>

## 1. Introduction

The concept of conjugal rights is an integral part of Pakistani marriage laws. Despite its existence and continued usage in the courts, the concept itself has not yet been defined in explicit terms in the law. Black's Law Dictionary defines conjugal rights as "[t]he rights and privileges arising from the marriage relationship, including the mutual rights of companionship, support and sexual relations."<sup>9</sup> However, in Pakistan, the courts have mainly been relied upon for the interpretation of this term based on individual cases coming up before it. This has resulted in its construction being largely within traditional Islamic discourse, upon which Pakistani courts commonly rely.

In Pakistani law, the concept becomes relevant when one spouse files for a decree for the Restitution of Conjugal Rights (RCR), when the other spouse has left them, and "*refuse[s] to live with the other without any lawful excuse*" or "*legitimate reason*."<sup>10</sup> The terms "*lawful excuse*" and "*legitimate reason*" remain legally undefined and subjective to each individual case and the discretion of the judge. The courts have essentially interpreted "conjugal rights" to infer a husband's sexual right and the woman's obligation to fulfil her marital obligations by satisfying the husband's sexual needs.<sup>11</sup> This indicates that conjugal rights are more than just the right to reside with one's spouse, as they are something that must be "performed."

The primary objective of the RCR is meant to provide for an opportunity for spouses to "*reconcile*"<sup>12</sup> a troubled marriage. Examining a marriage as a contract, and as identified as such under Islamic law, Malik asserts that RCR is applicable where "*neither party wants to end the marriage contract, yet one or both parties refuse to adhere to the terms of the same*"<sup>13</sup>

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<sup>9</sup> *Black's Law Dictionary*, 9<sup>th</sup> ed., s.v "Conjugal Rights."

<sup>10</sup> Muhammad Zubair Abbasi and Shahbaz Ahmed Cheema, *Family Laws in Pakistan* (Karachi: Oxford University Press, 2018), 66; Kashif Akram vs Mst. Naila 2011 MLD (Karachi) 571 stating "*The claim of wife, seeking past maintenance for the period when she herself by voluntarily deserting the petitioner, chose to remain in the house of her parents without any lawful excuse, was misconceived and not justified under the facts and circumstances of this case.*"

<sup>11</sup> Abbasi and Cheema, *Family Laws*, 111-112

<sup>12</sup> Cheema, "Islamization," 10

<sup>13</sup> Basil Nabi Malik, "Restitution of conjugal rights," *The Express Tribune*, June 28, 2010, <https://tribune.com.pk/story/24137/restitution-of-conjugal-rights/>

i.e. breaking the terms without legitimate justification. Though what constitutes a “legitimate justification” is not detailed, reasons such as non-payment of dower or maintenance by the husband to the wife have been considered Islamically valid reasons to leave the company of one’s spouse, as will be discussed in case law analysis below.<sup>14</sup> Cheema<sup>15</sup> and Malik,<sup>16</sup> both note that for such a reconciliation to be successful, there must be voluntary consent of both parties as opposed to coerced and compulsory reunification of a couple.

A decree of RCR falls within the larger category of personal laws, which mostly relate to family laws. The legal system of Pakistan is based on English common law and Islamic law, with the courts often leaning on the Quran and Sunnah for their interpretation of statutes.<sup>17</sup> The former is more influential in commercial law while the latter is more influential in personal status, criminal and to some extent, tax law. Personal laws i.e. family laws are a blend of codified law and customary law based on religious norms, with different laws for different religions. There are currently over fifty statutes relating to personal status of different religions in Pakistan. Provisions relating to decrees for RCR exist not only in Muslim law,<sup>18</sup> but also in Christian,<sup>19</sup> Hindu<sup>20</sup> and Parsi laws.<sup>21</sup>

The use of the legal mechanism of RCR has become an entrenched part of family law and proceedings between acrimonious spouses in the country,<sup>22</sup> with religious discourse being used to substantiate and justify its use. The commonality of recourse to RCR is reflected by the data emerging from the Government of Sindh’s (GoS) Sindh Legal Advisory Call Centre (SLACC)<sup>23</sup> which has received 789 queries (11%) relating to conjugal rights out of 6,955 calls relating to family laws from 2014 – 2018.

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<sup>14</sup> “It is settled law that where the husband refused to pay dower to the wife on demand, essential legal implication for non-payment of dower would be that wife will cease to have obligation to live with her husband but husband would be duty bound to maintain her during the period of separation.” In *Mst. Shazia vs Muhammad Nasir* 2014 YLR (Peshawar) 1563 and other cases

<sup>15</sup> Cheema, “Islamization,” 10

<sup>16</sup> Malik, “Restitution of conjugal rights.”

<sup>17</sup> Muhammad Munir, “Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan.” *Islamic Studies* 47, no. 4 (Winter 2008): 453

<sup>18</sup> Muslim Family Law Ordinance 1961 <http://pakistancode.gov.pk/english/UY2FqJw1-apaUY2Fqa-cJyX-sg-jjjjjjjjjjjj> and Family Courts Act 1964 <http://nasirlawsite.com/laws/fcourts.htm>

<sup>19</sup> Divorce Act 1869 <http://nasirlawsite.com/laws/da.htm>

<sup>20</sup> Hindu Marriage Act 2017 (applicable in Islamabad Capital Territory, Punjab, Khyber Pakhtunkhwa and Balochistan) [http://www.na.gov.pk/uploads/documents/1491458181\\_468.pdf](http://www.na.gov.pk/uploads/documents/1491458181_468.pdf); and Sindh Hindu Marriage (Amendment) Act 2018 <http://sindhlaws.gov.pk/setup/publications/PUB-18-000069.pdf>

<sup>21</sup> Parsi Marriage and Divorce Act (III of 1936) <http://pakistancode.gov.pk/english/UY2FqJw1-apaUY2Fqa-b56a-sg-jjjjjjjjjjjj>

<sup>22</sup> Maham Javaid, “Why women in Pakistan struggle to get ‘divorced with dignity,’” *Al Jazeera* July 3, 2019, <https://www.aljazeera.com/indepth/features/women-pakistan-struggle-divorced-dignity-190306231602365.html>

<sup>23</sup> The SLACC, previously known as the Legal Advisory Call Centre, is a free legal advisory helpline run by Legal Aid Society and Law Department, Government of Sindh

Due to law primarily being deconstructed within Islamic discourse in Pakistan, there is an assumption that the legal provision of RCR stem from Islamic jurisprudence. However, historically, the concept was alien to the sub-continent prior to the British Raj's presence,<sup>24</sup> including Islamic law. In fact, the very first judgment emanating during this time, was under Christian law,<sup>25</sup> and was subsequently adopted by other regional religious personal laws. It was only thereafter that Anglicised Muslim judges interpreted Islamic family law to justify this,<sup>26</sup> with Hindu jurists following suit,<sup>27</sup> and is even seen in Parsi law,<sup>28</sup> evidencing a cultural shift impacting religion, as opposed to one emerging from religious discourse. Thus, rather than originating from within Islamic law, the creation of legally enforceable conjugal rights was originally an English law that was then justified within Islamic doctrines, thereby becoming "Islamised." This has interesting implications that though the restitution of conjugal rights may be Islamically valid, it is neither inherently Islamic nor a decisively mandated law within Islamic jurisprudence.

Feminists and women's rights activists stress that the concept of conjugal rights is rooted in patriarchy<sup>29</sup> as opposed to religion. They assert that patriarchal stereotypes, such as ownership of women and their bodies, are seen to permeate religion and society, resulting in the formation of patriarchal cultures and in religious contexts, the interpretations of religion, and thus support concepts such as conjugal rights.<sup>30</sup>

The provision under Pakistani law is gender neutral. However, despite this supposed "neutrality," the provision has been used disproportionately by men against women, demonstrating its anti-women and discriminatory outcomes. This lends to the feminist assertion of law being made by men for men, particularly with the absence of women's voices in the process of creating law.<sup>31</sup> The majority of cases are presumed to be filed by husbands demanding the return of their wives who have left them or sought to end their marriages. This indicates a gendered and anti-women usage of the provision to penalise women for their departure, resulting in discrimination against women. Hadiya Aziz, an Islamabad based lawyer, notes that when "*women file for divorce, maintenance, or a dissolution of marriage*,"<sup>32</sup>

<sup>24</sup> Cheema, "Islamization," 4.

<sup>25</sup> The couple in this case were Parsis and the "*Privy Council suggested that such proceedings might be initiated in the civil jurisdiction of the courts as they properly took into account the personal laws of the parties before them and tailored the relief accordingly.*" Cheema, "Indigenization," 3

<sup>26</sup> Cheema, "Islamization," 7.

<sup>27</sup> Ibid., 6.

<sup>28</sup> Parsi Marriage and Divorce Act (III of 1936) <http://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-b56a-sg-jjjjjjjjjjjj>

<sup>29</sup> Matila Joslyn Gage, *Woman, Church and State: The Original Expose of Male Collaboration Against the Female Sex* (Watertown, Massachusetts: Persephone Press, 1991), 131.

<sup>30</sup> Nkiru Nzegwu, "Family matters: Feminist concepts in African philosophy of culture," in *African Philosophy of Culture* (New York: State University of New York Press, 2006), 42

<sup>31</sup> Maliha Zia, "Feminism and its Absence in Pakistani Legal Discourse," in *Feminism, Post feminism and Legal Theory*, ed. Dorota Gozdecka and Anne Macduff (London: Routledge, 2018), 70

<sup>32</sup> Javaid, "Why women."

approximately “80 percent of the time,”<sup>33</sup> the “men’s first response is to file an RCR”<sup>34</sup> as a form of revenge or delay tactics. Malik, argues that the court recognises this “potential misuse of this legal provision”<sup>35</sup> in the “patriarchal system in place”<sup>36</sup> and that it “usually goes out of its way to protect the woman from an estranged husband trying to harass her.”<sup>37</sup> However, the courts’ “protection” of women does not preclude the men from the institution of these cases in the first place. Resultantly, women are being entangled in unnecessary, frivolous litigation with delayed resolution for extended periods, which may extend to years in court.<sup>38</sup>

Two perspectives of how conjugal rights are used emerge from this discourse i.e. conjugal rights as a tool for reconciliation of a couple, or as a tool used by men to control or intimidate women. With this in mind, the question arises – as it has in several other jurisdictions with similar provisions around the world – does the legal provision of RCR continue to have any relevance in Pakistan’s current legal system and society? In order to respond to this, it is necessary to first understand how has this provision been employed and how have the superior courts responded to such cases. This paper contributes to this discourse by undertaking such an analysis.

This paper first examines what is understood to be conjugal rights. This requires an examination of the obligations of a husband and wife within marriage, identified in this paper as bodily rights and economic rights. These having been unpackaged within the women’s rights framework in order to assess their impact on women’s lives.

The paper goes on to use SLACC data and case law of the superior courts of Pakistan to identify how the law has been used and deliberate its effectiveness. It also examines any trends and patterns discernible from a reading of the case judgments and precedents being established by these courts.

It concludes with a review of the usefulness and continued relevance of the legal provision of RCR. It bases this critique on the evidence and analysis emerging from the appraisal of the above-mentioned sources, culminating in a recommendation for law reform for the Government of Sindh.

This paper will contribute to research regularly being conducted by the Law Department, Government of Sindh (GoS) in efforts to create evidence-based analysis and critiques on existing laws and policies to support its work. This issue was highlighted by the regular calls regarding this matter to the SLACC, resulting in the recognition of pursuing research on this topic. The GoS, with its commitment to ensuring a human rights and women’s rights-based

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<sup>33</sup> Ibid

<sup>34</sup> Ibid

<sup>35</sup> Malik, “Restitution of conjugal rights.”

<sup>36</sup> Ibid

<sup>37</sup> Ibid

<sup>38</sup> Ibid

approach to its law and policy, aims to use this and other such papers to ensure a reasoned and informed decision on any proposed law reform.

## 2. Methodology of the Paper

This paper uses a mixed methodology of using qualitative analysis of SLACC quantitative data as well as qualitative analysis of case law. There were four sources of data for this purpose.

1. A literature review was conducted consisting of academic and research texts, articles and papers relating to the roles of spouses within a marriage as understood within the lens of Islamic feminism, feminism and Islam; conjugal rights and family law in Pakistan and the legal system in Pakistan and internationally.

2. Pakistani family law was scrutinized to identify which laws contained references and provisions relating to RCR. Family laws relating to all religions, including Muslim, Hindu, Sikh, Christian, Parsi, were studied to analyze whether the concept of conjugal rights is associated with a particular religion, or more than one and its potential links to cultural contexts. To identify the exact laws containing legal provisions of RCR, the researchers used the online site [www.pakistanlawsonline.com](http://www.pakistanlawsonline.com), a database of cases containing all laws and published case judgments, law reports etc., operated by one of the oldest and most prominent legal publishing houses in the country, and the law reporting journals; and the Federal and Provincial Government's official law sites<sup>39</sup> containing provincial laws.

3. Reported case laws from the Federal Shariat Court (FSC), the Supreme Court of Pakistan (SC) and the five High Courts i.e. Islamabad High Court (IHC); Peshawar High Court (PHC); Balochistan High Court (BHC); Lahore High Court (LHC); and Sindh High Court (SHC), were examined from the online website [www.pakistanlawsonline.com](http://www.pakistanlawsonline.com). The judgments of these courts were selected as they set precedents for courts below them. Thus, these allow for an analysis of the legal principles and arguments discussed and laid down which interpret and discuss different facets of the legal provisions laid before them. There were two filters used to identify the sample research data. The first filter used was to examine all reported case law under laws identified containing provisions of RCR. A second filter was used whereby the term "conjugal rights" was typed in the keyword search to cover supplementary case law which provided significant cases interlinked with conjugal rights such as jactitation, habeas corpus, maintenance and polygamy cases. A final data set of 233 cases was identified for analysis for this paper.

4. An analysis of the data emerging from SLACC from 2014 – 2018 was conducted to better understand who is using these laws, their motivations for filing these cases; legal arguments

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<sup>39</sup> Federal: <http://pakistancode.gov.pk/>; Khyber Pakhtunkhwa: <http://www.kpcode.kp.gov.pk/>; Punjab: <https://punjabcode.punjab.gov.pk/>; Sindh: <http://sindhlaws.gov.pk/>; Balochistan: [https://www.balochistan.gov.pk/index.php?option=com\\_docman&task=cat\\_view&gid=1375&Itemid=677](https://www.balochistan.gov.pk/index.php?option=com_docman&task=cat_view&gid=1375&Itemid=677)

they put forth in their defense when such cases were instituted against them; or correlated issues in family law that affected their decisions in filing a case or exacerbated their own problems. The analysis also allowed substantiating any trends, patterns or points emerging from the analysis of case law emerging from superior courts in Pakistan.

A total of 62,061 calls have been registered from 2014 - 2018. Three filters were used to identify the final data set for analysis.

The first filter was to examine all calls tagged within the Civil-Family Law category i.e. a total of 6,955 calls. A second filter applied was to identify calls that were directly related to conjugal rights and others where conjugal rights was one of the many family matters discussed. A third and final filter was employed which was a keyword search for “conjugal rights” data set to identify any mention of this issue in other cases. For example, these included calls tagged as Family Law-Recovery of Maintenance, Dower, Dowry, Bridal gifts, where queries relating to conjugal rights were not the primary issue, but were nevertheless mentioned. The total number of cases used for analysis of SLACC data sifted down to 789.

The analysis and categorization of the calls were done through a multi-pronged approach. In several cases, the callers themselves were able to identify and correctly categorize their legal query. In other calls, the callers explained their problem, and the lawyer who received the call identified the legal issues emerging from the situation at hand. These were then checked by the SLACC senior legal adviser, a retired Judge of the Supreme Court of Pakistan and either approved or corrected. Lastly, the SLACC Senior Legal Research Associate read the report of each call as recorded on the SLACC database, and where necessary, heard the transcripts of the call, to identify additional other legal or social issues and further categorized them in the database and reports as needed.

The data was analyzed qualitatively by an examination of each case of the final data set by the authors, with the support of a Senior Legal Research Associate and a Research Assistant from Legal Aid Society.

### 3. Limitations

This paper was limited to an examination of reported judgments of the superior courts of Pakistan alone. This data was deliberately limited to examine the binding legal arguments and principles asserted in the judgments of superior courts, which essentially make law through their interpretation. This allowed for greater insight on how a legal provision is instrumentalized or used and whether, as has been analyzed in this paper, it has an inequitable or discriminatory impact on a certain group.

The analysis of judgments of the superior courts alone, however results in the inability to assess the duration of each case. Thus, the authors cannot make an informed comment on the longevity of the trial and appeal process and the resulting impact on parties to the case.

The examination of the SLACC data is discussed on the basis of the information provided by the caller. Therefore, the authors only had access to “one-side of the story.” Assumptions and connections have been made due to the overwhelming similarity between situations and cases. Due to this “one-sided” perspective, case studies are limited or incomplete in this regard. For example, male callers stated they did not know why their wives left them, and the authors were unable to speak to the wives to delve more deeply into specific cases to assess the reasons for marital dissolution or why they left their marital homes.

The case law examined is predominantly relating to Muslim personal laws, presumably due to the predominant Muslim majority in the country.<sup>40</sup> This is also due to the fact that personal laws, of other religious minorities are either outdated, such as the Christian<sup>41</sup> and Parsi<sup>42</sup> laws, or too new for cases to have reached the superior courts for appeal, such as the two recently passed Hindu laws.<sup>43</sup> The discussion in this paper, therefore, focuses largely on Islamic discourse relating to conjugal rights.

Due to the specific focus on conjugal rights, the paper avoids discussion on other areas of interest of family law relating to women’s rights activism including child marriage, polygamy, marital rape etc.

## 4. Understanding Conjugal Rights

To understand the relevance of conjugal rights within the framework of a marriage, it is essential to comprehend the importance of sexual relations within a marriage, particularly within an Islamic marriage. Comprehending its relevance, alongside a feminist and women’s rights perspective, this will allow for a more comprehensive understanding of the relevance of conjugal rights within family law, which remains not an automatically executable decree.

### Marital Obligations in an Islamic Marriage

Under Islam, sex is seen as a natural and sacred act, but required to be regulated for social and religious reasons.<sup>44</sup> Marriage is seen as a means of legitimising and regulating sex: *“marriage was, and continues to be, the central institution for sanctioned erotic pleasure in*

<sup>40</sup> “Pakistan country profile,” BBC News, February 18, 2019, <https://www.bbc.com/news/world-south-asia-12965779>.

<sup>41</sup> Divorce Act 1869 <http://nasirlawsite.com/laws/da.htm>

<sup>42</sup> Parsi Marriage and Divorce Act (III of 1936) <http://pakistancode.gov.pk/english/UY2FqJw1-apaUY2Fqa-b56a-sg-jjjjjjjjjjjj>

<sup>43</sup> Hindu Marriage Act 2017 (applicable in Islamabad Capital Territory, Punjab, Khyber Pakhtunkhwa and Balochistan) [http://www.na.gov.pk/uploads/documents/1491458181\\_468.pdf](http://www.na.gov.pk/uploads/documents/1491458181_468.pdf); and Sindh Hindu Marriage (Amendment) Act 2018 <http://sindhlaws.gov.pk/setup/publications/PUB-18-000069.pdf>

<sup>44</sup> Murtaza Mutahhari, “Chapter 10: The Human Status of Woman in the Qur'an,” in *Princeton Readings in Islamist Thought: Texts and Contexts from al-Banna to Bin Laden*, ed. Roxanne Leslie Euben and Muhammad Qasim Zaman (Princeton: Princeton University Press, 2009), 260.



*Islamic culture*”<sup>45</sup> and to prevent Islamically illicit sexual activity.<sup>46</sup> Thus, marriage and sex are reciprocally connected: marriage sanctions sexual activity, and sexual activity is intrinsic to marriage.

This observation of sex as a function of marriage is demonstrated in the different categories of marriage, with differing rights based on consummation of such marriage.<sup>47</sup> For example, an irregular marriage (*fasid*)<sup>48</sup> is not always legal, but may become so only if it is consummated, thereafter adopting elements of validity such as the woman’s right to a dower, eligibility of *Iddat*<sup>49</sup> and the legitimisation of any children born of the couple.<sup>50</sup> Similarly, if the prompt dower is unpaid or if the husband refuses to pay it, the wife refuses to have sexual relations with him, or lives separately while receiving maintenance, until the husband pays the due amount.

This indicates that though the marriage is legally recognised at the signing of the *Nikahnama*,<sup>51</sup> the second and more permanent recognition of the validity of the marriage is its consummation. Feminist scholars agree with this perspective.<sup>52</sup> They recognise that while marriage is indicated by a contract or ceremony, consummation formalises and legitimises a marriage; without consummation, marriage is a “*simulated contract*.”<sup>53</sup> The prominence of the role of sex within marriage raises questions relating to bodily rights of the spouses within a patriarchal society. The Islamic requirement presumes an equal status, which is not a reflection of the actual patriarchal society of Pakistan, whereby women are considered inferior to men<sup>54</sup> and thereby remain vulnerable to exploitation and violence, including within marriage.

According to Islamic law, marriage is a legal contract enjoining spouses together under God and the state.<sup>55</sup> Under a contract, both parties i.e. husband and wife, have different contracted rights, duties and functions.<sup>56</sup> The marital rights of each spouse defined by Islam

<sup>45</sup> Ramon A. Gutiérrez, “Islam and Sexuality,” *Social Identities* 18, no. 2 (March 2012): 156.

<sup>46</sup> Abbasi and Cheema, *Family Laws in Pakistan*, 30.

<sup>47</sup> Meraj Ahmed Meraj, “The Importance of Marriage in Islam,” *International Journal of Research – Granthaalayah* 6, no. 11 (November 2018): 4. [http://granthaalayah.com/Articles/Vol6Iss11/01\\_IJR618\\_A09\\_1712.pdf](http://granthaalayah.com/Articles/Vol6Iss11/01_IJR618_A09_1712.pdf)

<sup>48</sup> An irregular marriage is one where there is an impediment or prohibition to marriage, but that impediment or prohibition is temporary or remedial and can be fixed to make marriage valid.

<sup>49</sup> Usually calculated as three months after the pronouncement of divorce and four months after the death of the husband where the wife must be maintained by the husband or his estate and is not permitted under Islam to marry.

<sup>50</sup> Abbasi and Cheema, *Family Laws in Pakistan*, 33.

<sup>51</sup> The Islamic marriage contract.

<sup>52</sup> Carole Pateman, *The Sexual Contract* (Palo Alto: Stanford University Press, 1988), 164.

<sup>53</sup> *Ibid.*

<sup>54</sup> Maliha Zia Lari, *Honour Killing and Compliance with Law* (Islamabad: Aurat Foundation, 2010) 12, [https://www.af.org.pk/pub\\_files/1366345831.pdf](https://www.af.org.pk/pub_files/1366345831.pdf)

<sup>55</sup> Meraj, “The Importance of Marriage,” 3; Abbasi and Cheema, *Family Laws in Pakistan*, 30.

<sup>56</sup> Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law* (London: C. Hurst & Co Ltd, 2005), 303.



and the conditions upon which those rights are gained will be discussed as bodily rights and economic rights. This discourse suggests the primarily bodily rights are of the husband over the wife, while economic rights are those of the wife over the husband.

Many Islamic scholars believe that the husband has a right to his wife's body, citing a Quran verse from Surah Al-Baqarah: "*Your wives are a place of sowing of seed for you, so come to your place of cultivation however you wish and put forth [righteousness] for yourselves.*"<sup>57</sup> This is taken to mean that a husband has the absolute right to his wife's body. Islamic texts also echo this sentiment in their instructions to wives about their marital obligations, stating that a woman must be sexually available to her husband.<sup>58</sup> This right, however, does not indicate an absolute license to a wife's body: "*[The Prophet] showed the way by saying: 'none of you must throw himself on his wife like an animal' ... it is necessary that the husband takes into account the rights (of his wife) during coitus.*"<sup>59</sup> Further, if certain conditions (most often relating to her economic rights) are unmet, the wife may refuse to have a sexual relationship with him. For example, where a prompt dower is not paid at the time of the *Nikah*.<sup>60,61</sup>

Although there is less emphasis placed on this, sexual availability is in fact a "*reciprocal right between husband and wife,*"<sup>62</sup> with a woman having rights to her husband's body equally. It is an obligation upon both spouses to "*associate*"<sup>63</sup> with each other sexually and several scholars, particularly Islamic feminists emphasise sexual rights of women<sup>64</sup> such as the "*wife's right to have an orgasm.*"<sup>65</sup> This indicates that sexual rights are not only rights that husbands have over wives; husbands are Islamically obligated to fulfil their wives' sexual pleasures and needs. However, due to the lack of wider recognition of this and absence in discourse, there are few legal or religious repercussions for a husband who fails to provide these rights. Thus, it could be argued that in practical reality, these rights are in fact, not reciprocal.

Women's economic rights start immediately at the time of marriage with her right to *Mehr/Mahr*<sup>66</sup> i.e. dower, which "*formalises the marriage.*"<sup>67</sup> This right is linked immediately to the husband's right to sexual relations with his wife, which, as mentioned earlier, may be

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<sup>57</sup> Quran, 2:223.

<sup>58</sup> Vikør, *Between God*, 303.

<sup>59</sup> Abdessamad Dialmy, "Sexuality and Islam," *The European Journal of Contraception & Reproductive Health Care* 15, no. 3, (2010): 161.

<sup>60</sup> The Islamic marriage contract.

<sup>61</sup> Abbasi and Cheema, *Family Laws in Pakistan*, 37; Asaf AA Fyzee, *Outlines of Muhammadan Law*, (India: Oxford University Press, 2008), 111.

<sup>62</sup> Vikør, *Between God*, 303.

<sup>63</sup> Hina Azam, "Sex, Marriage, and Eroticism in Contemporary Islamic Advice Literature," *Journal of Middle East Women's Studies* 9, no. 1 (Winter, 2013): 72.

<sup>64</sup> Fatema Mernissi, *Beyond the Veil: Male-Female Dynamics in Muslim Society*, (Cambridge: Schenkman Publishing Company, Inc, 1975), 62.

<sup>65</sup> Dialmy, "Sexuality and Islam," 162.

<sup>66</sup> Abbasi and Cheema, *Family Laws in Pakistan*, 69.

<sup>67</sup> Vikør, *Between God*, 301.

denied if she does not receive prompt dower.<sup>68</sup> After marriage, a husband is bound to financially maintain i.e. look after his wife:<sup>69</sup> *“all economic responsibilities fall on the husband, who must provide for the wife and children.”*<sup>70</sup> This inalienable right of the wife remains even if the wife has her own income, which *“she may still keep ... for her own purposes and demand that the man pays her the established maintenance.”*<sup>71</sup> However, this right to maintenance is conditional upon the wife fulfilling her “obligations”, which includes her remaining in the marital home<sup>72</sup> and being sexually available to her husband. Her exiting the marital home without cause and unwillingness to return results in disentitlement of maintenance<sup>73</sup> as the husband is bound to maintain her *“provided always that she is obedient and allows him free access at all lawful times.”*<sup>74</sup>

The concept of “obedient” and “disobedience” of a wife is a much-debated topic. Pakistani courts can be seen to have opposing opinions on denial of maintenance based on behaviour with some judgments declaring *“the maintenance of the wife cannot be withheld on the grounds that she was disobedient”*<sup>75</sup> and others stating *“a refractory wife is not entitled to maintenance unless she returns to her conjugal abode and obeys the lawful demands of husband.”*<sup>76</sup>

Hence, the right of the husband to his wife’s sexual company (and, therefore, the wife’s duty to be sexually available), is incumbent upon the wife to deliver sex on demand. Similarly, the economic right of the wife to consistent maintenance and economic support is incumbent upon the husband to provide. These rights – maintenance and sexual access – are reciprocal and interconnected rights; the wife only has the right to the former if she fulfils her husband’s right to the latter, and vice versa. Thus, both spouses have the right to demand each other to fulfil their obligations. The Islamic justification of RCR emerges from this premise i.e. a demand to the other spouse to fulfil their obligation to stay in the marital home and perform their marital duties i.e. sex.

The Pakistani courts have largely followed this perspective. The courts identify a Muslim marriage as a civil contract<sup>77</sup> with duties on spouses and conditions which must be fulfilled. Falling in line with traditional Islamic theory, this in general reflects the economic rights of

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<sup>68</sup> Fyzee, *Outlines*, 111;

<sup>69</sup> Meraj, “The Importance of Marriage,” 4.

<sup>70</sup> Vikør, *Between God*, 303.

<sup>71</sup> Ibid

<sup>72</sup> Ibid.

<sup>73</sup> Ibid; Abbasi and Cheema, *Family Laws in Pakistan*, 106.

<sup>74</sup> Fyzee, *Outlines*, 173-174.

<sup>75</sup> Cassandra Balchin, *A Handbook on Family Law in Pakistan*, (Lahore: Shirkat Gah, 1994), 88.

<sup>76</sup> Israfeel vs Nekam Zada 2016 YLR (Peshawar) 1103; and see other cases below.

<sup>77</sup> Bakht Zada vs Mst. Joomreza 2007 MLD (Peshawar) 570 and Saleem Ahmad v. Government of Pakistan PLD 2014 (Federal Shariat Court) 43

women over men i.e. dower<sup>78</sup> and maintenance;<sup>79</sup> and bodily rights of men over women, translating into women living with the husband, being obedient and continuing sexual relations.

With the few cases on conjugal rights emerging under Christian and Parsi laws, the courts employ largely the same perspective discussed above. Thus, this evidences patriarchal trends cutting across boundaries of religion and demonstrating cultural and societal expectations of women and men in a marriage with pre-defined set roles.

### Critiquing Division of Duties in Marriage

Feminist scholars acknowledge this division of obligations within a marriage.<sup>80</sup> However, they assert the specific gendered roles for each spouse are skewed in the favour of the husband, as *"gender-structured marriage makes women vulnerable"*<sup>81</sup> particularly in patriarchal societies in which male dominance is a core feature. Another key feature of patriarchy is the control and ownership of women and their bodies by men which they see being legitimised through marriage contracts and division of obligations in a marriage and greater emphasis on male bodily rights. As Nzegwu notes *"patriarchy and patriarchal rights lie in sexual rights, that is, in conjugal rights, or in a man's sexual access to the body of a woman and in his control of her personhood."*<sup>82</sup> Gage supports this with a specific reference to conjugal rights, asserting that *"male control of conjugal rights underpinned the idea of girls and women as property of men in a generic sense."*<sup>83</sup>

Islamic feminists argue that the traditional Islamic theories of marriage have emerged due to patriarchal readings and interpretations of the Quran.<sup>84</sup> They differentiate between religion, customs and culture, identifying culture and customs as being patriarchal.

Challenging the traditional Islamic notions of Islam and marriage, they opine that Islam in fact placed more right of the wife within marriage instead of that of the man.<sup>85</sup> Islamic feminism reframes and shifts the locus of sexual desire to the woman, who must be pleased regularly and have her sexual needs met.<sup>86</sup> They place women's sexual rights at the same par as men. In fact, their perspective on conjugal rights echo the gender neutral legal provisions in many

<sup>78</sup> Dr. Sabira Sultana vs Maqsood Sulari, Additional District and Sessions Judge, Rawalpindi and 2 others 2000 CLC (Lahore) 1384; Muhammad Azam vs Additional District Judge and others 2006 YLR (Lahore) 33.

<sup>79</sup> Farah Naz vs Judge Family Court, Sahiwal PLD 2006 (Supreme Court) 457.

<sup>80</sup> Pateman, *The Sexual Contract*, 165.

<sup>81</sup> Susan Moller Okin, *Justice, Gender and the Family*, (New York: Basic Books Inc., 1989), 5.

<sup>82</sup> Nzegwu, "Family matters," 42.

<sup>83</sup> Gage, *Woman, Church and State*, 131.

<sup>84</sup> Annie Serez, "Feminism in Pakistan: Dialogues between Pakistani Feminists." *Laurier Undergraduate Journal of the Arts* 3, no. 4 (February 2017): 64. <https://pdfs.semanticscholar.org/c18a/8ed24b2a03583ece263e8f7fa4e2992b0128.pdf>

<sup>85</sup> Azizah Yahia Al-Hibri, "Muslim Women's Rights in the Global Village: Challenges and Opportunities," *Journal of Law and Religion* 15, no. 1-2 (2000): 47.

<sup>86</sup> Mernissi, *Beyond the Veil*, 63.

legal texts, including Pakistan i.e. *“men have conjugal duties and women have conjugal rights.”*<sup>87</sup>

### Discriminatory Use of RCR

The women’s rights movement in Pakistan and India (which has a similar provision in its laws and has a legal framework similar to Pakistan) have long challenged the notion of RCR. In Pakistan, the discourse has revolved on how the conjugal rights have been used to target and discriminate against women. As noted above,<sup>88</sup> it is a common practice for men to file cases of RCR when their wife applies for maintenance, *Khula*<sup>89</sup> or dissolution of marriage. Javaid<sup>90</sup> emphasises the strategic use of this provision by men for purposes of harassment, intimidation and *“as a method of getting back at the woman.”* She highlighted the strategic use of this provision by them *“to demonstrate to the court that they never wanted this divorce and hence shouldn't have to pay a hefty maintenance; to put legal pressure on the woman and bury her in litigation; and/or to add to her financial burden”;* and *“to delay divorce proceedings, further intimidating women.”* Examining this scenario, Cheema identifies the *“remedy”* of RCR as *“a readymade ply, in the hands of unscrupulous husbands, which does not give a remotest semblance to any iota of harmony, affection and serenity of married life.”*<sup>91</sup>

### Legal Challenges to RCR

In India, women’s groups have been using legal tactics to challenge the RCR provision, with the most recent attempt being in March 2019, when a public interest litigation case challenged its constitutionality before the Supreme Court of India. The Indian Supreme Court has assigned a 3-member bench to hear the case. The arguments made by the petitioners echo the legal arguments made in Pakistan which has a similar legal and cultural set up i.e. that *“[A]ny provision that that[sic] forces an individual to have sexual relations or even cohabit a home without her will is violative of the right to privacy, individual autonomy and dignity that are guaranteed by the Constitution.”*<sup>92</sup> This assertion could be echoed in Pakistan, which has the same fundamental rights in its Constitution. The argument challenges the provision on the principle of a woman’s autonomy and protection of her bodily rights.

<sup>87</sup> Al-Hibri, “Muslim Women's Rights,” 47.

<sup>88</sup> Javaid, “Why women.”

<sup>89</sup> A woman’s right of divorce under Islamic and Pakistani law, whereby she has to file a case in court and go through court to be granted a divorce by it.

<sup>90</sup> Javaid, “Why women.”

<sup>91</sup> Cheema, “Islamization” 11.

<sup>92</sup> Samanwaya Rautray, “SC to examine whether forcing woman to stay with husband against her will is violative of her rights,” *The Economic Times*, March 5, 2019, <https://economictimes.indiatimes.com/news/politics-and-nation/sc-to-examine-whether-forcing-woman-to-stay-with-husband-against-her-will-is-violative-of-her-rights/articleshow/68274137.cms>

This argument supports the critique to the RCR provision although technically gender neutral, its impact is in fact disproportionately negative on women, resulting in discrimination, which violates Article 25 of the Constitution of the Islamic Republic of Pakistan.<sup>93</sup>

The law must be examined within the existing social structures in Pakistan, keeping in mind women's unequal status in marriage. The culture shields the husband, even in cases of domestic violence and marital rape. *"Placed in the context of a patriarchal family where a woman is legally deprived of sexual autonomy and choice, a court ordered requirement for a woman to cohabit with her husband takes away her right to make essential decisions relating to her bodily integrity and physical autonomy (both sexual and otherwise)."*<sup>94</sup>

With the arising of these legal challenges and gendered critiques of the provision of RCR, it is critical to have an informed understanding of the legal usage of RCR and how the courts have responded to it, in order to assess its utility within the Pakistani legal system. It is also important to further scrutinise the outcomes of such analysis to identify any trends and patterns supporting or opposing the reasoning and critiques highlighted in this paper.

## 5. Legal Framework on Conjugal Rights

The provisions of conjugal rights exist in the personal laws of Pakistan of Muslims, Hindus, Christians and Parsis, thereby reiterating its cultural connotations as opposed to purely religious ones. It must be noted, that many personal laws of minorities remain uncoded. Thus, the practice may exist, but it is not overseen or mandated by any legal obligations.

The relevant sections of the legal texts that do contain RCR provisions are:

- Section 32 & 33 of the Divorce Act 1869 applicable to Christians.
- Section 5 & related schedule 5, section 9(1a) & 9(1b) of the Family Courts Act 1964.
- Order 21, Rule 32 & 33 of the Civil Procedure Code (execution of conjugal rights).
- Section 2 of Dissolution of Muslim Marriages Act 1939.
- Section 36 of Parsi Marriage & Divorce Act 1936.
- Section 8 of Hindu Marriage Act 2017 applicable to Hindus resident in Punjab, Khyber Pakhtunkhwa and Balochistan.

<sup>93</sup> Article 25. Equality of citizens. — (1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex <sup>1</sup>[\*\*\*\*].

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children. The Constitution of Pakistan 1973 <http://www.pakistani.org/pakistan/constitution/>

<sup>94</sup> Divya Srinivasn, "'Restitution of conjugal rights' is an archaic, unconstitutional law and its time is up", *The Leaflet*, November 2, 2018, <https://theleaflet.in/restitution-of-conjugal-rights-is-an-archaic-unconstitutional-law-and-its-time-is-up/#>

- Section 8 of the Sindh Hindu Marriage Act 2018.

The process of filing of a conjugal rights case in Muslim, Hindu and Christian family laws of Pakistan are similar. Parties may file a suit before the District Family Court in their jurisdiction (Schedule 5 of Family Courts Act and s. 8 of Hindu Marriage Act). It proceeds on a trial basis, with both parties arguing their case and their demands. For example, a wife may demand maintenance, separate accommodation etc., which may or may not be accepted by the court as conditions for restitution of these rights. The husband may claim conjugal rights in his written statement in reply to a suit for maintenance and dissolution of marriage brought by the wife and the wife may claim *Khula* or dissolution, and either party may initiate divorce or judicial separation proceedings in reply to a suit for conjugal rights brought by the husband (sections 9(1a) and 9(1b) of Family Courts Act 1964). Furthermore, s. 2(iv) of the Dissolution of Muslims Marriages Act 1939 states that if the husband fails to perform his marital obligations (which remain undefined in legal text) without reasonable cause for three years, then a wife may apply for dissolution of marriage.

The Parsis have their own District Matrimonial Courts where such cases may be heard (s. 20 of Parsi Marriage & Divorce Act). Appeal lies to the Additional District and Sessions Judge, and then High Court having jurisdiction (i.e. Lahore High Court (LHC); Sindh High Court (SHC); Peshawar High Court (PHC); Balochistan High Court (BHC) and Islamabad High Court (IHC) and ultimately the Supreme Court. The Federal Shariat Court, which takes jurisdiction of cases relating to Islamic law, has also taken up cases of conjugal rights on occasions to settle principles of Islamic law.

Reconciliation is made mandatory under the Family Courts Act 1964 under sections 10 and 12 at pre-trial stage and at the conclusion of trial, after the closing of evidence. The Act which applies to both Muslims and non-Muslims assigns family court judges with the mandate to effect reconciliation.

## 6. Analysis of Cases and SLACC Calls

### RCR Cases filed primarily against women

Out of the 789 SLACC calls analysed from SLACC, 77% (611 calls) of the calls were from men or their families regarding RCR cases or potential RCR cases, while only 23% (178 calls) of the calls were from women or men calling on behalf of female callers.

Of the 233 reported case judgments examined for this paper, 99% of the cases were filed by men (230 cases) while only 1 woman filed an RCR and 2 cases were filed before the Federal Shariat Court questioning the execution and jurisdiction of conjugal rights.

The high number of calls by men seeking the return of their estranged wives to the marital home reinforces the presumption that this provision is primarily used by men against women. Women in Pakistan function in certain roles and boundaries established by the patriarchal

Pakistani society. The unequal distribution of power and privilege primarily in favour of men results in structural barriers for women in both public and private domains. Thus, men and society set “*standards within which women are ‘allowed’ to function. These frameworks control women’s behaviour, mobility, control over resources,*”<sup>95</sup> which has a direct impact on their agency and autonomy. The women are “*monitored not just by the men in her family but by the whole of society.*”<sup>96</sup>

These perspectives are embedded in the stereotypical expectations of women and the role they play in the family i.e. an “obedient wife.” Women who seek to challenge or break away from these norms may be controlled or punished.<sup>97</sup> Pakistan has a history of the use of law to control women’s freedoms, movement and choices i.e. the Offence of Zina (Enforcement of Hudood) Ordinance 1979. This provision seems to be another attempt of doing so by attempting to coerce women to return home or drop their case.

Reflecting the societal expectations, the courts do not favour women who leave their husband’s homes for whatever reason, as this is seen as the woman’s failure to fulfil her obligations and contractual conditions. The concept of the “disobedient” or *nazisha* (defined as disobedient) wives has developed who leave husbands’ home without his consent and thus lose their right to marital privileges, such as maintenance.

*According to prevailing law and Shariah a refractory wife is not entitled to maintenance unless she returns to her conjugal abode and obeys the lawful demands of husband ... the husband/petitioner is ready to maintain her as per her demands referred to above, but in the open Court, she refused to restart her marital life with the petitioner.*<sup>98</sup>

This attitude is supported by the calls received by the SLACC where several male callers also stated their wives had left home without their consent, which implies the expectation that wives must ask their husbands before stepping out of their homes. One example of a call is given below:

*Caller stated that his wife has left house without his consent and she has filed suit for maintenance in which the court has granted interim maintenance of wife and of minor. Caller further added that his wife has failed to perform conjugal rights. He inquired that if he proves that his wife was disobedient then can the court cancel the maintenance of wife in final order. His wife agrees to reside with him but he does not agree to continue his matrimonial relationship with her (M-Query 42571).*

The language of the court and how it addresses women’s “deviant” behaviour establishes the patriarchal mind set. As late as 2018, the PHC stated in disparaging terms, “*the wife left his house with her sweet will; therefore she being Nasheeza is not entitled to the decree of*

<sup>95</sup> Zia, “Feminism” 65.

<sup>96</sup> Ibid

<sup>97</sup> Lari, *Honour Killing*, 22.

<sup>98</sup> *Israfeel vs Nekam Zada and 2 others* 2016 YLR (Peshawar) 1103.



*maintenance allowance as granted by the learned Trial Court and duly affirmed by the learned appellate Court.*"<sup>99</sup>

The courts do allow an exception to this mandated "obedience" of the wife to her husband, or rather where she fails to fulfil her conditions to the marriage. If a legitimate reason or reasonable cause is demonstrated for the woman's refusal to fulfil her marital obligations, then this would be considered justifiable and entitle her to retain her marital rights such as maintenance.<sup>100</sup> Thus, the question that arises is what makes for a legitimate reason or reasonable cause for her to be able to leave home and still be able to retain these rights.

There is no clear-cut definition of what is considered reasonable grounds for a woman leaving the marital home, but there are some patterns that emerge from case law. Cruelty (which is how physical and sometimes psychological domestic violence is discussed in case law), is considered an acceptable reason. The courts have identified different types of cruelty, some of which are discussed below.

In a case before the PHC, the court held, "*When wife is abused, misbehaviour [sic] and disrespected it is also a cruelty and on the basis thereof she may refuse to live with her husband and so she is entitled to the maintenance allowance.*"<sup>101</sup> In another case, where the wife had been beaten and thrown out with her children, the court held that "*his duty to provide maintenance to them is absolute.*"<sup>102</sup> Courts have also recognised wilful neglect of a wife, or a second marriage without consent as cruelty."<sup>103</sup>

Other exceptions fall within the framework of the earlier discussed economic rights of women within marriage. This includes a Muslim woman's inalienable right to dower. The Courts have been consistent on the importance of dower in a Muslim marriage. "*Dower is a debt upon husband*", which if unpaid entitled the wife "*to live apart from her husband till her dower is paid.*"<sup>104</sup> Another judgment notes the "*non-payment of prompt dower is a complete defence to refuse her husband to sexual intercourse.*"<sup>105</sup> Further, in such case, "*she will cease to have obligation to live with her husband but husband would be duty bound to maintain her during the period of separation.*"<sup>106</sup> The husband is also bound to pay his wife maintenance throughout their marriage, which if he fails to do so, gives a justification for the wife to leave. If he fails to fulfill these conditions, she is entitled to "*refuse marital obligations to him.*"<sup>107</sup>

<sup>99</sup> Mohammad Raziq vs Mst. Farhana Bibi 2018 CLC (Peshawar) 93.

<sup>100</sup> Rukhsana Tabassam vs Judge, Family Court 1999 CLC (Lahore) 878.

<sup>101</sup> Syed Nobahar Shah vs Mst. Salma Bibi 2016 CLC (Peshawar) 1668.

<sup>102</sup> Nadir Khan vs Zeenat Bibi 1990 CLC (Peshawar) 293.

<sup>103</sup> Ibid

<sup>104</sup> Rukhsana Tabassam vs Judge, Family Court 1999 CLC (Lahore) 878; Muslim Sher vs Mst. Qudrat Bibi PLD 1984 (Peshawar) 91.

<sup>105</sup> Muzaffer Ali vs Mst. Mehrun Nisa 1989 CLC (Karachi) 1805; Tahir Ayub Khan vs Mrs. Alia Anwer 2017 MLD (Karachi) 412; Mst. Zulai Khan vs Noor Muhammad PLD 1986 (Quetta) 290.

<sup>106</sup> Mst. Shazia vs Muhammad Nasir 2014 YLR (Peshawar) 1563.

<sup>107</sup> Muslim Sher vs Mst. Qudrat Bibi PLD 1984 (Peshawar) 91.



The commonality of the use of this provision against women reflects how it is being used indiscriminately against women. In effect, by attempting to control or punish her choices and agency, the law is being used in a discriminatory manner against women, violating Article 25 of the Constitution of the Islamic Republic of Pakistan 1973, as noted earlier in this paper.

### Reasons for filing of an RCR

The SLACC calls and case law reveal a variety of different reasons for the institution or queries relating to RCR.

A total of 611 of the SLACC calls were from husbands or their families considering or already having filed for RCR. The reasons for these included where the wife had left the house for reasons they claimed were unknown to them; cases where freewill marriages had taken place but the wife's parents were not allowing her to return or join her husband; where the *Nikah* was conducted, but the woman's parents would not allow the *Rukhsati*<sup>108</sup> to take place; where conditions were placed by parents of the wife for property to be transferred in the wife's name before she was allowed to return home.

The 178 calls from women and their families corroborated the fact that, in many cases, it is the wife who leaves the home, resulting in the husband filing an RCR and provide reasons as to why they left. These include the fact that the husband refused to provide them dower, which is rightfully theirs as discussed above; the husband did not maintain them, which primarily means economic domestic violence (often defined as cruelty which includes physical, psychological, emotional, verbal and sexual abuse); and where the husband conducted a second marriage without the consent of the first wife.

In several cases, a suit of RCR was initiated by husbands as a counter-suit when their wives had filed for *Khula*, maintenance or demand for dower, a tactic that is unfortunately common in Pakistan. As noted earlier this is a legally strategic move for the man to attempt to indicate to the court that the man is not the one who seeks to dissolve the marriage, thereby avoiding payment of large sums of money for maintenance.<sup>109</sup>

The queries raised by women, are often related to the lack of dower or maintenance by the husband or, abandonment. An example of a SLACC call is given below:

*Caller stated that she contracted marriage for 15 months ago; her husband do[sic] not give her proper time and he was already married which concealing from her; further added that husband left her to her parents' house on 6th February; now neither come there nor maintain her; she is pregnant when such good news delivered him on which he refused to accept her baby and said her that he never continue such relation further; she seeks legal assistant[sic] (F-Query 15517).*

<sup>108</sup> The wedding ceremony where after the wife joins the husband in the matrimonial home

<sup>109</sup> Javaid, "Why women."

These few cases brought forward by women are often genuine attempts to reconcile or to understand what their legal rights are, of which unfortunately they are often unaware. This reflects that there is little misuse of this provision by women, thus eliminating the prospect of equal use of the law by both spouses.

### Burden of Proof on the Respondent

The evidence derived from the cases above shows that, the majority of cases of RCR filed are by men against their wives, who are commonly, the respondents. Practice has developed that the burden of proof does not lie upon the men to argue why this decree should be granted in their favour, as is often in trials. Instead, the burden of proof is flipped, lying instead upon the woman to provide a legitimate reason for her departure from the marital home.<sup>110</sup> An indication from the courts about legitimate reasons acceptable by the courts for a woman leaving the marital home have been discussed in detail above and include cruelty,<sup>111</sup> violation of a woman's economic rights in marriage such as dower<sup>112</sup> and maintenance.<sup>113</sup>

However, it is important to note that, in the adversarial trial system existing in Pakistan, this results in both parties disparaging each other, with the wife being painted as a "*disobedient wife*,"<sup>114</sup> which has become a legal necessity to avoid economic consequences for men, who will have to pay maintenance and/or dower etc. to his estranged wife if proven she has a legitimate reason for her departure. With the respondent bearing the burden of proof, she (as is common) has to prove the legitimate tangible evidentiary reasons, which can be difficult. For example, as noted by Justice Mrs Jamila Jahanoor Aslam, former Judge of the High Court of Lahore, in cases of cruelty, "*it is very difficult to prove grounds of cruelty and physical and mental torture.*"<sup>115</sup> While it may be somewhat easier to prove lack of dower or maintenance, but this is not always the case. Providing such a justification for her departure from the marital home to the satisfaction of the court is essential for her legal defence in a case of RCR and to avoid being ordered by the Court to return to the marital home.

### Decree of Restitution of Conjugal Rights Granted

Out of 233 court cases analysed, RCR was granted in only 30 cases (12.8%); denied in 132 cases (56.6%); 2 cases (1%) were filed in the FSC relating to questions of law and jurisdiction; and 69 cases (29.6%) were undecided due to reasons of transfer of cases to other courts, particularly when dealing with cases of child custody, dowry etc.

Of the cases where RCR was granted, it was granted unconditionally in only 11 cases. In one case, conjugal rights was granted as a result of a Habeas Corpus petition filed by the husband

<sup>110</sup> Kashif Akram vs Mst. Naila 2011 MLD (Karachi) 571; Parveen Akhtar vs Javed Akhtar 1985 MLD (Lahore) 454.

<sup>111</sup> Nadir Khan vs Zeenat Bibi 1990 CLC (Peshawar) 293.

<sup>112</sup> Rukhsana Tabassam vs Judge, Family Court 1999 CLC (Lahore) 878; Muslim Sher vs Mst. Qudrat Bibi 1984 PLD (Peshawar) 91.

<sup>113</sup> Muslim Sher vs Mst. Qudrat Bibi PLD 1984 (Peshawar) 91.

<sup>114</sup> Kashif Akram vs Mst. Naila 2011 MLD (Karachi) 571.

<sup>115</sup> Muhammad Afzal vs Additional District Judge, Attock 2010 CLC (Lahore) 369.

and where the wife had been detained by her parents.<sup>116</sup> In others, conditions were imposed on the husband which included payment of dower,<sup>117</sup> maintenance,<sup>118</sup> medical expenses<sup>119</sup> or providing separate accommodation to the wife<sup>120</sup> as reciprocal right to his demand for his wife to live with him again. Maintenance and dower have been highlighted by the courts as a reciprocal economic right of wife for husband's right to conjugal rights,<sup>121</sup> as discussed above. Once the husband agreed to provide these, then he is considered to have fulfilled his obligations, and it is considered the wife's duty to return to the matrimonial home.

For example, in one case<sup>122</sup> the PHC upheld a decree of RCR because the marriage was still subsisting so:

*The decree for conjugal rights in favour of the petition [sic] is a legal necessity and is declared as so granted but subject to the conditions as aforesaid. The petitioner shall offer the suitable premises for residence, and the proper maintenance to respondent No.1, and the respondent No.1 shall not remain entitled to future maintenance if she refuses to accept the said offer unreasonably. This writ petition shall stand dismissed if the petitioner does not perform his part of the obligation.*<sup>123</sup>

Courts, including the FSC, have noted that if a woman is so averse to returning to the matrimonial home, she should file for *Khula* and end the marriage<sup>124</sup> and she is not compelled to stay in an unhappy marriage. If she wishes to stay in the marriage, then she must be legally obliged to return to the marital home and both spouses must fulfil their duties,<sup>125</sup> as noted above.

### Decree of Restitution of Conjugal Rights Not Granted

In 132 cases (56.6%), RCR was not granted. Reasons for this rejection includes cases where the wife had applied and been granted *Khula*<sup>126</sup> or marriage has been dissolved, including where the husband himself had divorced his ex-wife; where the case was found to have been filed only as a response to the wife's case for past maintenance as opposed to a real desire for reconciliation;<sup>127</sup> where the court found the husband to have mala fide intentions in the

<sup>116</sup> Haider Abbas Bhindar vs District Police Officer, Sheikhpura 2018 MLD (Lahore) 1386.

<sup>117</sup> Saadia Usman vs Muhammad Usman Iqbal Jadoon 2009 SCMR 1458.

<sup>118</sup> Nobahar Shah vs Salma Bibi 2016 CLC (Peshawar) 1668.

<sup>119</sup> Shazia vs Muhammad Nasir 2014 YLR (Peshawar) 2616.

<sup>120</sup> Sajjad Ahmad vs Naeema Shafiq 2013 CLC (Peshawar) 1420.

<sup>121</sup> Ejaz Ahmad vs Hameed Fatima 1999 YLR (Lahore) 1177.

<sup>122</sup> Zahoor Deen vs Mst. Safina Bibi 2007 MLD (Peshawar) 1307.

<sup>123</sup> Ibid

<sup>124</sup> Nadeem Siddiqui vs Islamic Republic of Pakistan PLD 2016 (Federal Shariat Court) 1.

<sup>125</sup> Ibid

<sup>126</sup> See Wahid-ul-Islam vs Shaheen Akhtar 2011 CLC (Lahore) 566.

<sup>127</sup> Bakht Zada vs Mst. Joomreza 2007 MLD (Peshawar) 570; Wahid-ul-Islam vs Shaheen Akhtar 2011 CLC (Lahore) 566.

filing of the case;<sup>128</sup> where a wife converted to Islam;<sup>129</sup> where husband was found to have committed domestic violence; or where the “wife” was found to have been kidnapped and merely filing of conjugal rights case was not conclusive proof that the couple were married.<sup>130</sup> This includes past maintenance i.e. maintenance for the entire time she lived apart from her husband.<sup>131</sup>

In another case, where the wife lived with her in-laws and husband lived in the United States, upon her departure from the family home and husband’s suit of RCR, the appellate court not only provided her *Khula*, dower and maintenance, it also rejected the RCR suit, recognising that “*relations between the spouses were so strained that their living together as husband and wife within limits of Allah was no more possible.*”<sup>132</sup>

Where lower courts make decisions in favour of wives, and husbands appeal them in High Court, the High Court judges may require a greater degree of persuasion in order to understand the plight of women in order for conjugal rights not to be granted. In this case, the family court allowed *Khula*, dower and maintenance until *Iddat*, the Additional District and Sessions Judge upheld the trial judgment and then it was appealed to the High Court.

*It is an admitted fact on record that plaintiff/respondent No.1 was subjected to mental depression, maltreatment and even she has been given oral Talaq several times by the defendant/ petitioner, therefore, by all accounts, he is not entitled to the grant of decree for restitution of conjugal rights” and in upholding the lower courts’ judgements, the court justified its reasoning that “the plaintiff/respondent No.1 had developed such enormous hatred against her husband that it is in the evidence that she would prefer death instead of living as wife with the defendant/petitioner.*”<sup>133</sup>

The low percentage of success of RCR case must be commented upon. It begs consideration that where a provision fails 56% of the time, what value does it add to a marriage and does it instead inflict further pain and psychological pressure on the feuding couple, particularly the one seeking to leave. In fact, it emphasises that these attempts at ‘reconciliation’ are rarely successful, thus invalidating its effectiveness.

### Execution of a Decree of RCR

The execution of a decree of RCR is difficult if the wife continues to refuse to re-join her husband. In a 2016 case from the PHC, the judge followed the Civil Procedure Code 1908

<sup>128</sup> Mst. Zulai Khan vs Noor Muhammad PLD 1986 (Quetta) 290.

<sup>129</sup> Sharif Masih vs Jamila Marry 1984 SCMR 871.

<sup>130</sup> Muhammad Javed vs The State 2012 YLR (Federal Shariat Court) 695.

<sup>131</sup> Liaqat Ali vs Additional District Judge 2000 YLR (Lahore) 2084.

<sup>132</sup> Bashir Ahmad vs Mst. Nagina 2003 YLR (Peshawar) 1147.

<sup>133</sup> Mohammad Raziq vs Mst. Farhana Bibi 2018 CLC (Peshawar) 93.

mechanisms of attaching property of the person against whom the decree is to be enforced. Thus, it held that the:

*Decree for restitution of conjugal rights becomes incapable of execution if wife proves non-payment of dower on demand. The only process which can be issued in execution of a decree for restitution of conjugal rights is that of attachment of property. Simple is that in a decree for restitution of conjugal rights wife cannot be compelled to go and live with her husband. The executing court in cases like one at the most could go for attachment of property of the wife.*<sup>134</sup>

There are dangers for women in this approach. Given that men are already encouraged in filing a suit of RCR for trivial means, as discussed above, including as revenge for cases of *Khula* and maintenance being filed against them, the added incentive of property could result in even more cases being brought to court to harass and exploit women. Thus, a man so inclined to harass or intimidate his wife who has left him, now has the opportunity to gain financially by accessing her property. This puts greater pressure on the woman to return home or file for divorce (in whatever manner), and potentially forgo her own rights. For example, theoretically, if a judge refuses to accept her plea of cruelty, she may be forced to return to the home of a person who has abused her, or forgo her property.

### Habeas Corpus for RCR

In a few cases, the remedy of Habeas Corpus was filed due to the accusation that the wife was being unlawfully detained by her family. This has been used where, for example, in a case where a girl marries of her freewill without her family's consent and is subsequently restrained by her family.<sup>135</sup>

In a LHC case,<sup>136</sup> Justice Asif Saeed Khosa noted the false case of abduction, and ordered the release of the woman from her family to go to her husband. However, in two other judgments,<sup>137</sup> in the midst of responding to cases, where the wives were allegedly being wrongfully confined by families, the courts added in their social commentary. In one of the cases, the court stated that recovery of wife from the house of her parents through police, would definitely cause humiliation and disgrace to them in the society as well as in the eyes of relatives and the neighbourhood.<sup>138</sup> The custody of wife in house of her real parents could not be termed as unlawful and the path adopted by the husband indicated mala fide on his

<sup>134</sup> Mst. Saima Tabbasam vs Syed Sher Shah 2016 MLD (Peshawar) 1430.

<sup>135</sup> Haider Abbas Bhindar vs District Police Officer, Sheikhpura 2018 MLD (Lahore) 1386.

<sup>136</sup> Matloob Hussain Shah vs S.H.O. 2000 YLR (Lahore) 1907.

<sup>137</sup> Haider Abbas Bhindar vs District Police Officer, Sheikhpura 2018 MLD (Lahore) 1386 and Khushi Muhammad vs the State 2014 MLD (Karachi) 771 following Muhammad Javed Sagar vs Station House Officer and 2 others 2011 PCr.LJ (Lahore) 674, holding that custody of a girl with her parents (father, mother, brothers) cannot be termed as illegal or improper.

<sup>138</sup> Khushi Muhammad vs the State 2014 MLD (Karachi) 771.

part.<sup>139</sup> The husband in this case was told to seek enforcement of conjugal rights from a relevant forum.

The SHC judgment cites a number of cases that wholly condemn in harsh terms the use of Habeas Corpus and its root cause of love marriages while also placing the honour of families in such acts by the couple. It cites *Irfan Ahmed v SHO (2011 PCrLJ 597)*

*In order to save the honour and dignity of such like families in the circumstances stated above, this Court should not be party to such acts of disgracing the honour and dignity of the affected families. In such circumstance, I am not at all inclined to depute a bailiff or any other process for the recovery of the detainee and to declare a marriage which is the result of an illicit love affair to be solemnized in accordance with the dictates of Islam as according to me such like marriages do not bring harmony among the people rather create further friction amongst them resulting into severe rivalry which openly turns into bloodshed enmity.*

A more recent LHC case criticised the suit for Habeas Corpus in even harsher terms.

*It has become a trend in our society, rather it has shaped into a well thought out practice that girls come out of their houses for couple of hours on any pretext whatsoever; enter into marriage without the consent of their parents; file a complaint alleging harassment to them and their husbands; return back to their parental home and thereafter, the entire above exercise is followed by filing of petitions, like the instant one, before this court. All above is managed with a view to use this court as a stage of Rukhsati. This is prime time for the courts to notice and as far as practicable to plug such indecent activity nothing less than menace, which is not only destroying character of our youth; it is also stigmatizing and diminishing our moral values.<sup>140</sup>*

The courts have criticised the use of another legal method to effect return of the wife to a husband. These cases must be distinguished from those where a woman has left a marital home of her own accord. In cases where a woman has been kept against her will, a case of wrongful confinement may be more appropriate, or a Habeas Corpus petition seeking her release as opposed to RCR.

### RCR post-Divorce

There have been instances where men have filed a suit for RCR despite having already been divorced. In a case,<sup>141</sup> the husband had divorced his wife and after her remarriage filed for conjugal rights. He claimed she had forged the divorce deed, left his home and gotten married again. The family court had granted him conjugal rights erroneously while the appellate court had dismissed conjugal rights when it looked at the facts of the case. The LHC stated, “Respondent No.1 is leading a second married life, which cannot be interrupted through a

<sup>139</sup> Ibid.

<sup>140</sup> Haider Abbas Bhindar vs District Police Officer, Sheikhpura 2018 MLD (Lahore) 1386.

<sup>141</sup> Abdul Hannan vs Mst. Maqsood Illahi 2006 YLR (Lahore) 912.

*decree for restitution of conjugal rights, which stood dissolved by an intentional and active act of the petitioner himself."*

In another case,<sup>142</sup> the pregnant wife was thrown out of her home. Her husband later filed a suit of RCR, with an affidavit after obtaining a *Fatwa*<sup>143</sup> from a religious cleric revoking the divorce. While the court did ultimately reject the RCR and invoked the existing divorce, it still required the wife to go through the agony of an entire unnecessary trial process due to the man's insistence.

### RCR filed with Mala fide Intention

Some courts have recognised the need to ensure that the husband's institution of the case is genuine and not to misuse the law to intimidate or harass his wife or mala fide, which would result in the suit being dismissed.<sup>144</sup>

Thus, there is a need to examine the intention of the men who have filed the case to assess whether their purpose is genuine or mala fide. For example, in one case<sup>145</sup> the court recognised the husband filed a case to regain bridal gifts and ornaments and not truly reconcile with his wife, evidenced by the fact that he would accept wife only when she returned ornaments as he stated on at least three occasions. In another case, the man had been accused of rape whereas he had filed a suit of RCR. In this case, the RCR was rejected due to the on-going rape trial.<sup>146</sup>

### Khula, Divorce or Judicial Separation as Negation of a decree of RCR

The response of a husband who filed a case for RCR as a response to *Khula* or divorce proceedings has become a norm in family law practice in Pakistan. It is an unfortunate fact that even the SLACC lawyers are bound to give this as an option to callers due to their being obliged to provide full and complete legal information to their clients. This reveals the ease of how a decree of RCR can be obtained to harass women seeking to end their marriages.

A large number of RCR cases were not decided in the court due to the granting of *Khula* by the Courts. In several cases, the judges granted *Khula* when the wife demanded it upon reviewing her case. In *Khula* cases, unless there were exacerbating circumstances such as withholding of maintenance for many years, cruelty or domestic violence, courts did not provide any social commentary or discussion on a woman's rights or expand the discussion on RCR. In some cases, relating to *Khula*, the High Courts commented on the relationship between husband and wife, conjugal rights and why the wife had been forced to use her right of *Khula* when she would have otherwise liked to stay married. The case of *Abdul Fateh Sani*

<sup>142</sup> Safdar Iqbal vs Tahira Parveen 2010 YLR (Lahore) 582.

<sup>143</sup> A decision on a complicated matter provided by a religious scholar.

<sup>144</sup> Itwar. vs Smt. Asghari and others (A.I.R. 1960 All. 684).

<sup>145</sup> Mst. Zulai Khan vs Noor Muhammad PLD 1986 (Quetta) 290.

<sup>146</sup> Tanveer Aslam vs State 2005 MLD (Lahore) 460 and others.



*v Mst Naureen*<sup>147</sup> is an example of how husbands literally force their wives to resort to seeking *Khula* to prevent giving her rights and attempt to level allegations about the wives' character as immoral, while simultaneously filing a case of RCR.

As noted in In a LHC case,<sup>148</sup> a husband contested a case of *Khula* by filing a suit for RCR. The High Court noted that *"If it has become well nigh[sic] impossible for the spouses to make a happy home, it would evidently be better to snap such a marital tie, rather than forcing the spouses into a hateful reunion."* In a case before the BHC, the husband in fact filed the case even after the family court had granted his ex-wife a *Khula*,<sup>149</sup> which therefore had no legal value, but forced the woman to undergo a court trial to prove she was divorced and her ex-husband had no right to conjugal rights.

In a case relating to a Christian couple, the husband filed a suit of RCR after the wife had converted to Islam, re-married and had three children. Interestingly, the lower court actually granted him a decree of RCR, but this was overturned by the High Court in favour of the wife.<sup>150</sup>

In another case under Christian personal law, the wife had suffered a beating, been accused of adultery and thrown out of her home. The husband had filed for conjugal rights afterwards and the wife wished to counter his suit. While the District Court dismissed the case for RCR, the High Court identified that the wife needed to file a separate case of judicial separation under the Christian law and sent the case back to the lower courts to deliberate and resolve the case based on the wife's application for judicial separation.<sup>151</sup> This case emphasises the gap in Christian personal law in particular to respond to cases of RCR, where process and procedure remain unclear.

### Absence of Discussion on Sexual Rights

The case law on conjugal rights had little specific discussion on the actual concept of conjugal rights in terms of sexual rights of spouses. Instead, sexual relationships are being coated in wider terms e.g. "wife's marital duties" or "marital obligations to the husband" or "return to her home" etc. Only a few cases specifically discussed or referred to her sexual rights. This results in a gap in discussion on sexual rights of spouses within a marriage, hence limiting opportunities for discussion on bodily rights and integrity of both spouses. Such a discussion and setting down of juridical law would be of particular importance to women, who are more vulnerable within the unequal power dynamics of a marriage in the patriarchal society Pakistan.

<sup>147</sup> Abdul Fateh Babar Sani vs Mst. Naureen 2003 SCMR 1551.

<sup>148</sup> Ghulam Farid vs Muhammad Younas 1994 MLD (Lahore) 119.

<sup>149</sup> Razzak Hussain Shah vs Qazi with powers of Family Court 1986 CLC (Quetta) 1691.

<sup>150</sup> Sharif Masih vs Jamila Marry 1984 SCMR 871.

<sup>151</sup> Samual Masih vs Teresa Mariam PLD 1976 (Lahore) 290.



## 7. Conclusion

The provision of conjugal rights in Pakistani law purports to be equal for both men and women and fulfils the requirement of formal equality. However, its one-sided use has resulted in it being used primarily against women, as evidenced by this paper, thus violating their Constitutional rights of equality, privacy and dignity. Resultantly, the indiscriminate use of the provision has resulted in the lack of substantive equality for women.

While the institution of marriage as emphasised in Islam and other religions is positively highlighted and purportedly linked with principles of equality and fairness, the on-ground reality of women in Pakistan is far removed from these ideals. Viewed from a feminist framework, this is largely due to the lack of women's voices and experiences being included in the interpretation of the law.<sup>152</sup> For example, the historical lack of female judges and senior female legal academics in Pakistan results in the lack of women's perspectives in judgment writing and precedents used by the courts. Islamic feminists assert the same to be true of interpretation of religion. They believe that the absence of women's voices, narratives, experiences and exposure results in a lopsided interpretation of both.<sup>153</sup> This lack of inclusion of women's voices, coupled with patriarchal trends evident in Pakistan of male dominance, non-recognition of women's bodily rights and the perceived "purchase" of women through a marriage contract puts women at a disadvantage and unequal footing with men, thereby going against the very principles of gender equality.

The lack of a gendered approach results in lawmakers and courts not taking into account women's realities. For example, while purportedly the provision of RCR can be used by both spouses, women will have more difficulty using it due to social constraints and potential legal backlash. If for example, they do invoke it, it is much easier for men to simply divorce them as opposed to the long-winded *Khula* process women have to go through. It thus, becomes a weapon of defence for men who want to divorce without paying any penalties. Furthermore, there is a social taboo relating to women approaching court, making them reluctant to do so for even such cases. All this, therefore, would presumably fail to pass the Islamic feminism equality principles of bodily rights in marriage.

Another example relates to the courts' assertion that if a woman who leaves her marital home should either go back to her husband and fulfil her marital obligations, or simply divorce him. No doubt, a woman has every right to apply for a *Khula* if she is unhappy in her marriage. However, to obtain a *Khula*, the woman is obliged to give up her dower and is no longer entitled to any sort of maintenance from her husband. It must be kept in mind, that as seen in many cases, the very reason these women left the matrimonial home was because they had not been given their dower i.e. the consideration for the marriage contract and/or

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<sup>152</sup> Zia, "Feminism" 70.

<sup>153</sup> Ibid.

maintenance,<sup>154</sup> which as noted above, is the reciprocal/concurrent right of the wife in the marriage in consideration for providing sexual relations.

In a country like Pakistan, particularly, where women are economically dependent on their husbands for finances<sup>155</sup> and albeit their and their children's survival, this giving up of economic support, whether dower or maintenance, is unfeasible for them. Furthermore, divorced women are not looked upon favourably within the patriarchal society in Pakistan and are in fact ostracised from society,<sup>156</sup> which often extends to her family, particularly female siblings. Thus, in many cases, it is incorrect for courts to assume that the matter is as simple as a woman filing for divorce due to unhappiness in her marriage.

It must be noted, that a female judge of the Peshawar High Court Justice Mrs Irshad Qaiser has given a judgment which is cognizant of women's realities, but is unfortunately not often quoted. In a case of *Khula* before her, she held that the 16 years of fulfilling marital obligations was sufficient consideration for *Khula*, and the wife was not obliged to give up her dower where the fault was of the husband.<sup>157</sup>

The courts have also involved themselves into discussions on freewill marriages in Pakistan, as noted whilst discussing Habeas Corpus cases. It was a hard fought battle for Pakistani women to have the Supreme Court declare legal protection for their right to choose their spouse, a right given by Islam to men and women equally.<sup>158</sup> Comments by the judges in such matters that go beyond the scope of the law damage the path towards equality that women have to undertake in the face of patriarchy. Given the emphasis traditional Islamic thought places on marriage, coupled with the right to choose their spouse in marriage in Islam without permission of their guardian, this indicates the patriarchal cultural trends alluded by all types of feminism. Islamic feminism in particular highlights time and again the misinterpretation of Islamic texts to subjugate women in patriarchal systems.<sup>159</sup>

The discourse on conjugal rights in Pakistani courts has also not touched upon bodily rights, which has left a huge gap in this discourse. This gap can be said to be similar to the lack of reflection on the concept of consent in rape cases with all its complexities, and furthermore, the specific acceptance of the existence of marital rape.<sup>160</sup> It appears that Pakistani judges,

<sup>154</sup> See Tariq Mehmood vs Farah Shaheen 2010 YLR (Lahore) 349.

<sup>155</sup> Lari, *Honour Killing*, 10

<sup>156</sup> Ambreen Shah, "It's not easy being a female divorcee, especially in Pakistan," *The Express Tribune*, May 23, 2016 <https://blogs.tribune.com.pk/story/34354/its-not-easy-being-a-female-divorcee-especially-in-pakistan/>

<sup>157</sup> Abdul Rashid vs Mst. Shahida Parveen 2013 YLR (Peshawar) 2616 citing Parveen Begum v. Muhammad Ali PLD 1981 (Lahore) 116, Mst. Zahida Bi vs Muhammad Maqsood 1987 CLC (Azad J&K) 57, Shagufta Jabeen vs Sarwat Bi PLD 1990 (Karachi) 239 and Dilshad vs Musarrat Nisar PLD 1991 (Supreme Court) 779.

<sup>158</sup> See Abdul Waheed vs Asma Jahangir PLD 1997 (Lahore 301), called the Saima Waheed case.

<sup>159</sup> Al-Hibri, "Muslim Women's Rights," 57-58.

<sup>160</sup> Sara Zaman and Maliha Zia, "How much Rape is Rape: Understanding Normative Assumptions within Rape Victimology in Pakistan," in *Disputed Legacies: The Pakistan Papers*, ed. Neelam Hussain (New Delhi: Zubaan Books, 2018), 155. In Abdul Baqi Vs Abdul Basir Qureshi 1982 SCMR 478, the Supreme Court dismissed the conjugal rights case filed in response to the wife's case for payment of dower while acknowledging marital rape because the women stated she had been subjected to unnatural intercourse by her husband.

perhaps reflecting societal attitudes, are uneasy or unwilling to have a discussion on women's bodily rights in any context. Thus, there has been little or no debate at all in the courts on the feminist arguments on lack of equality of bodily rights of women in a marriage, or unequal bodily rights as per Islamic feminism.

Cases of RCR are commonly used by men against women. Whilst Malik asserts that the courts seek to protect the women from mala fide intentions, this does not stop men from filing the cases, which requires undergoing hours of trial, associated delays and psychological pressure and frustration.<sup>161</sup>

The majority of these suits filed are not decided in favour of the husband. In fact, RCR decrees have only EVER been given in 12.8% cases. That means in 87.2% cases, either the suit is rejected or case is transferred to another court for other proceedings. That means for 87% of the parties – most of whom are women – they are forced to go through an additional trial procedure in already protracted, expensive and arduous trials where women have to provide a “legitimate” reason why they left their husbands, before the case is ultimately decided in their favour. In addition to the waste of time and emotional and psychological harm to the woman, this also wastes the time, money and resources of the court and judge.

The odds as evidenced from this data do not justify why this provision still exists in law. The argument that it offers a chance for reconciliation of the spouses or helping women abandoned by their husbands are incompatible with the ground realities of its usefulness. There are alternative remedies in place. For example, a woman seeking financial support of her husband can file applications for her maintenance and dower under the Muslim Family Law Ordinance 1961. Another option is to file a case of economic abuse under the laws in Sindh,<sup>162</sup> Punjab<sup>163</sup> and Balochistan,<sup>164</sup> with Sindh having criminal remedies upon a guilty verdict. In both options, the conditions and obligations of marriage and fulfillment of conditions will be discussed. In addition to this, section 10 of the Family Courts Act 1964 first mandates efforts of reconciliation and section 12 after the closing of evidence again attempts reconciliation between the spouses when going through a divorce.

Furthermore, it has been proven to be ineffective in the reconciliation of a couple, as evidenced by the low number of successful passing of decrees in favour of the applicant. This does not support using the courts' valuable resources in the pursuance of this decree.

It might perhaps be better to look to develop mechanisms of voluntary alternative dispute resolution mechanisms such as family conciliation or mediation with trained family counselors and mediators.

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<sup>161</sup> Malik, “Restitution of conjugal rights.”

<sup>162</sup> Sindh Domestic Violence (Prevention and Protection) Act 2013

<http://www.pas.gov.pk/uploads/acts/Sindh%20Act%20No.XX%20of%202013.pdf>

<sup>163</sup> Punjab Protection of Women Against Violence Act 2016 <http://punjablaws.gov.pk/laws/2634.html>

<sup>164</sup> Balochistan Domestic Violence (Prevention and Protection) Act 2014  
<http://www.pabalochistan.gov.pk/uploads/acts/2014/Act072014.pdf>

The continued existence and use of this law is arguably violative of the principle of equality and non-discrimination under Article 25 of the Constitution of the Islamic Republic of Pakistan 1973. It also violates the fundamental rights of privacy granted under Article 14 of the Constitution by potentially forcing women to give up their privacy and live with a man they have chosen to leave; and dignity, for ignoring their individual autonomy and agency in individual choice by making them return to a man who they have chosen to leave.

Thus, to summarize, the provision of RCR is used primarily and discriminately against women; violates the fundamental rights of women guaranteed under the law; is largely unsuccessful in effecting reconciling couples; and thus wastes valuable time and resources of the courts.

This paper therefore recommends that the Government of Sindh and the other provinces and all courts across Pakistan should give serious consideration to the removal of this provision from the law. This would contribute greatly to the gender balance of equity in marital laws is restored in line with principles of dignity, equality and non-discrimination as enshrined in the Constitution of the Islamic Republic of Pakistan 1973.

## Glossary

**Conjugal rights:** The rights and privileges arising from the marriage relationship, including the mutual rights of companionship, support and sexual relations.

**Iddat:** Usually calculated as three months after the pronouncement of divorce and four months after the death of the husband where the wife must be maintained by the husband or his estate and is not permitted under Islam to marry.

**Fasid/Irregular marriage:** An irregular marriage is one where there is an impediment or prohibition to marriage, but that impediment or prohibition is temporary or remedial and can be fixed to make marriage valid.

**Fatwa:** A decision on a complicated matter provided by a religious scholar

**Khula:** A woman's right of divorce under Islamic and Pakistani law, whereby she has to file a case in court and go through court to be granted a divorce by it.

**Mehr/Mahr:** Known as dower, which 'formalises the marriage'

**Nazisha wife:** Disobedient wife

**Nikahnama:** The Islamic marriage contract

**Rukhsati:** The wedding ceremony where after the wife joins the husband in the matrimonial home

**Sindh Legal Advisory Call Centre (SLACC):** The SLACC, previously known as the Legal Advisory Call Centre, is a legal advisory helpline run by Legal Aid Society and Law Department, Government of Sindh

## Bibliography

### Primary Sources: Legislation and Cases

#### Legislation

- Balochistan Domestic Violence (Prevention and Protection) Act 2014  
<http://www.pabalochistan.gov.pk/uploads/acts/2014/Act072014.pdf>
- Divorce Act 1869 <http://nasirlawsite.com/laws/da.htm>
- Family Courts Act 1964 <http://nasirlawsite.com/laws/fcourts.htm>
- Hindu Marriage Act 2017 [http://www.na.gov.pk/uploads/documents/1491458181\\_468.pdf](http://www.na.gov.pk/uploads/documents/1491458181_468.pdf)  
<http://www.pas.gov.pk/uploads/acts/Sindh%20Act%20No.XX%20of%202013.pdf>
- Muslim Family Law Ordinance 1961 <http://pakistancode.gov.pk/english/UY2FqJw1-apaUY2Fqa-cJyX-sg-jjjjjjjjjjjj>
- Parsi Marriage and Divorce Act (III of 1936) <http://pakistancode.gov.pk/english/UY2FqJw1-apaUY2Fqa-b56a-sg-jjjjjjjjjjjj>
- Punjab Protection of Women Against Violence Act 2016  
<http://punjablaws.gov.pk/laws/2634.html>
- Sindh Domestic Violence (Prevention and Protection) Act 2013
- Sindh Hindu Marriage (Amendment) Act 2018  
<http://sindhlaws.gov.pk/setup/publications/PUB-18-000069.pdf>
- The Constitution of Pakistan 1973 <http://www.pakistani.org/pakistan/constitution/>

#### Supreme Court

- Abdul Baqi vs Abdul Basir Qureshi 1982 SCMR 478.
- Abdul Fateh Babar Sani vs Mst. Naureen 2003 SCMR 1551.
- Amanullah vs District Judge, Gujranwala 1996 SCMR 411.
- Dost Muhammad vs The State 1988 SCMR 1885.
- Ejaz Naseem vs Fareeha Ahmad 2009 SCMR 484.
- Inayatullah vs Additional District Judge, Gujranwala 1988 SCMR 2100.
- Issa Khan vs Mst. Razma 1991 SCMR 2454.
- Mst. Ghulam Sakina vs Umar Bakhsh PLD 1964 (Supreme Court) 456.
- Mst. Sahi Bi vs Khalid Hussain 1973 SCMR 577.
- Muhammad Afzal vs Mst. Rabia Bibi 1985 SCMR 1905.
- Muhammad Usman vs Mst. Amna 1972 SCMR 131.
- Saadia Usman vs Muhammad Usman Iqbal Jadoon 2009 SCMR 1458.
- Said Rehman vs Mst. Bacha Haram 1991 SCMR 1294.

Sharif Masih vs Jamila Marry 1984 SCMR 871.

#### Federal Shariat Court

Abdus Samad vs State 2005 PCr.LJ (Federal Shariat Court) 1071.

Muhammad Ashraf vs Muhammad Ilyas 2014 YLR (Federal Shariat Court) 2247.

Muhammad Javed vs The State 2012 YLR (Federal Shariat Court) 695.

Muhammad Safdar vs Sajjawal Khan 1998 MLD (Federal Shariat Court) 823.

Nadeem Siddiqui vs Islamic Republic of Pakistan PLD 2016 (Federal Shariat Court) 4.

Nadeem Siddiqui vs Islamic Republic of Pakistan PLD 2016 (Federal Shariat Court) 1.

Qari Abdur Rasheed vs The State 2012 YLR (Federal Shariat Court) 2142.

Sabir Hussain vs The State 1999 YLR (Federal Shariat Court) 2322.

#### Lahore High Court

Abdul Hannan vs Mst Maqsood Illahi 2006 YLR (Lahore) 912.

Abdul Jabbar vs Kalsoom Bibi 2007 CLC (Lahore) 1131.

Abdul Sattar vs Mst. Raeesa 2006 YLR (Lahore) 41.

Abida Parveen vs Nadeem Akhtar 1997 MLD (Lahore) 2603.

Ahmad Ali vs Mian Khadim Hussain 2002 YLR (Lahore) 2254.

Ahmad Hassan vs Judge Family Court 2006 CLC (Lahore) 1178.

Ahmed Bakhsh vs Judge Family Court 2003 YLR (Lahore) 2809.

Alam Sher vs S.H.O., Police Station Lower Mall, Lahore 1996 PCr.LJ (Lahore) 2029.

Aliya Farhan Rabbani vs Mirza Farhan Rabbani 2010 YLR (Lahore) 196.

Allah Nawaz vs Station House Officer, Police Station Mahmood Kot District, Muzaffargarh PLD 2013 (Lahore) 243.

Allah Wasaya vs Judge, Family Court 2010 CLC (Lahore) 1104.

Aman Ullah vs Mst. Perveen Akhtar 2010 MLD (Lahore) 1737.

Arshad Mahmood vs Additional District Judge, Jhelum 1999 MLD (Lahore) 2975.

Ataullah vs State 2000 MLD (Lahore) 504.

Atiqa Muzammil vs Muhammad Umar Farooq 2010 YLR (Lahore) 1519.

Bakhoo Khan vs District Judge Rahimyar Khan 1989 MLD (Lahore) 2181.

Bakshish vs Additional District Judge 2001 CLC (Lahore) 338.

Barkat Ali vs Mst. Sughran Bibi 1985 MLD (Lahore) 307.

Bushra Siddique vs Muhammad Aslam 1999 CLC (Lahore) 1913.

Ejaz Ahmad vs Hameed Fatima 1999 YLR (Lahore) 1177.

Faisal Hayat vs Additional District Judge, Jhang 2011 CLC (Lahore) 1526.

Fareeha Naz vs Muhammad Faisal Hayat Khan 1999 YLR (Lahore) 757.

- Fayyaz Ahmed vs State 1997 MLD (Lahore) 3078.
- Ghulam Fareed vs Additional District Judge 2003 YLR (Lahore) 358.
- Ghulam Farid vs Muhammad Younas 1994 MLD (Lahore) 119.
- Ghulam Haider vs Judge Family Court (Civil Judge 1st Class), Rahimyar Khan 1998 CLC (Lahore) 972
- Haider Abbas Bhindar vs District Police Officer, Sheikhpura 2018 MLD (Lahore) 1386.
- Haq Nawaz Alias Kali vs The State 2002 YLR (Lahore) 193.
- Hashim vs Family Judge 2002 CLC (Lahore) 1409.
- Liaqat Ali Khan vs Parveen Akhtar 1985 CLC (Lahore) 2686.
- Liaqat Ali vs Additional District Judge 2000 YLR (Lahore) 2084.
- Mah Jabeen vs Tahir Mahmood 2013 CLC (Lahore) 1595.
- Matloob Hussain Shah vs S.H.O. 2000 YLR (Lahore) 1907.
- Mrs. Rehana Bibi vs Muhammad Ijaz 2008 CLC (Lahore) 874.
- Mst. Fahmida Bibi vs Mukhtar Ahmad PLD 1972 (Lahore) 694.
- Mst. Johoro Jana vs Additional Judge 1991 CLC (Lahore) 1563.
- Mst. Kausar Jabeen vs Additional District Judge 2006 CLC (Lahore) 1185.
- Mst. Moondan vs Judge Family Court 1989 MLD (Lahore) 339.
- Mst. Nasira Parveen vs District Judge 1997 MLD (Lahore) 2627.
- Mst. Safia Bibi vs Mulazim Hussain 2001 YLR (Lahore) 3025.
- Mst. Saleema Bibi vs Additional District Judge Faisalabad 1985 CLC (Lahore) 1015.
- Mst. Sofia Rasool vs Judge 2004 CLC (Lahore) 1932.
- Mst. Allah Mafi vs Munir Ahmad 2005 MLD (Lahore) 194.
- Mst. Amira Bukhari vs Faqir Syed Jameel uddin Bukhari PLD 1994 (Lahore) 236.
- Mst. Arooj Malik vs Additional District Judge 2017 CLC(N) (Lahore) 16.
- Mst. Azra Bibi vs Muhammad Aslam 2000 MLD (Lahore) 825.
- Mst. Azra Syed vs Syed Tanvir Abbas Shamsi 1985 MLD (Lahore) 451.
- Mst. Balqees Bibi vs Abdul Sattar 2002 YLR (Lahore) 3743.
- Mst. Farida Khanum vs Deputy Commissioner/Collector, Okara, and others 2004 MLD (Lahore) 798.
- Mst. Farida Minto vs Muhammad Aslam 1985 CLC (Lahore) 1909.
- Mst. Farzana Mai vs State 2002 PCRLJ (Lahore) 598.
- Mst. Ghulam Sakina vs Khalid Masood Akhtar Niazi 1985 MLD (Lahore) 306.
- Mst. Hamida Yasmin vs Ahmad Ali 2009 CLC (Lahore) 438.
- Mst. Kalsoom Akhtar vs Rana Muhammad Talib Khan 1985 MLD (Lahore) 195.



- Mst. Kalsoom vs Muhammad Hanif 1985 CLC (Lahore) 1917.
- Mst. Khurshid Akhtar vs Muhammad Saleem Shah 1985 MLD (Lahore) 308.
- Mst. Manzooran Bibi vs Noor Ahmad 2002 YLR (Lahore) 3880.
- Mst. Nagina vs Muhammad Hussain 2008 YLR (Lahore) 1571.
- Mst. Naseem Hakim vs Jamil Ahmad and another 1985 MLD (Lahore) 294.
- Mst. Naveeda Kausar vs Mauzzam Khan 2016 CLC (Lahore) 180.
- Mst. Qammar vs Muhammad Nasir 1985 MLD (Lahore) 243.
- Mst. Razia Bibi vs Muhammad Iqbal 1985 CLC (Lahore) 1913.
- Mst. Ruqayya Bibi vs Additional District Judge, Khushab PLD 2012 (Lahore) 408.
- Mst. Saeedan vs Additional District Judge Lahore 1984 MLD (Lahore) 448.
- Mst. Sameena Shafi vs Malik Israr Ahmad 2017 YLRN (Lahore) 407.
- Mst. Shah Jahan vs Additional District Judge, Rawalpindi 2008 MLD (Lahore) 1692.
- Mst. Shazia Parveen vs Muhammad Ashraf 2002 MLD (Lahore) 1428.
- Mst. Shazia vs Sohail Nazir Khan 2015 YLR (Lahore) 684.
- Mst. Shehnaz Akhtar vs Fida Hussain 2007 CLC (Lahore) 1517.
- Mst. Sugra Bibi vs Muhammad Akbar Ali 2010 YLR (Lahore) 12.
- Mst. Zakia Nazar vs Tallat Mahmood 1985 MLD (Lahore) 253.
- Mst. Zeenat Bibi vs Muhammad Hayat 2012 CLC (Lahore) 837.
- Muhammad Afzal vs Additional District Judge, Attock 2010 CLC (Lahore) 369.
- Muhammad Afzal vs Additional District Judge, Faisalabad 2014 YLR (Lahore) 1569.
- Muhammad Akram vs Judge Family Court, Layyah 2000 YLR (Lahore) 2840.
- Muhammad Arshad vs Mst. Shagufta Parveen 1988 CLC (Lahore) 1978.
- Muhammad Aslam vs Additional District Judge PLD 2003 (Lahore) 264.
- Muhammad Bakhsh vs State 2008 YLR (Lahore) 2269.
- Muhammad Bashir vs Mst. Nasreen Akhtar PLD 2003 (Lahore) 260.
- Muhammad Din vs Mst. Aliya Bibi PLD 2007 (Lahore) 425.
- Muhammad Farooq vs Additional District Judge 2011 YLR (Lahore) 1135.
- Muhammad Hanif vs State 2011 YLR (Lahore) 253.
- Muhammad Iqbal vs Additional District Judge Chichawatni 2006 YLR (Lahore) 352.
- Muhammad Iqbal vs State 2006 YLR (Lahore) 2344.
- Muhammad Irfan vs The State 1997 PCr.LJ (Lahore) 817.
- Muhammad Ishaq vs State 1999 YLR (Lahore) 1281.
- Muhammad Ismail vs Judge Family Court, Rahim Yar Khan 2009 YLR (Lahore) 1700.
- Muhammad Khalid Siddiqui vs Mst. Samina Yasmin 2002 YLR (Lahore) 2699.

- Muhammad Khan vs The State 2003 YLR (Lahore) 2315.
- Muhammad Madni vs State 2014 YLR (Lahore) 2137.
- Muhammad Muzammal vs The State 2002 YLR (Lahore) 1165.
- Muhammad Nazir vs Anwar Ali Shah 2005 MLD (Lahore) 419.
- Muhammad Ramzan vs Additional Sessions Judge, Khushab 2008 MLD (Lahore) 951.
- Muhammad Rashid Rasoolan Bibee vs Muhammad Rashid 1985 MLD (Lahore) 1133.
- Muhammad Riaz vs Judge, Family Court, Sargodha and, another 2005 MLD (Lahore) 5.
- Muhammad Shafique vs State 2017 YLRN (Lahore) 418.
- Muhammad Shiraz vs Additional District Judge, Gujjar Khan PLD 2014 (Lahore) 154.
- Muhammad Siddiq vs State 2012 MLD (Lahore) 1530.
- Muhammad Yaqoob vs Mst. Siani Bibi Alias Shamma 2010 YLR (Lahore) 2466.
- Muhammad Yousuf vs The State 2000 YLR (Lahore) 2816.
- Muhammad Zahid Khan vs Additional District Judge, Rajanpur 2010 YLR (Lahore) 1120.
- Muhammad Zahoor Ahmad vs State 2010 PCr.LJ (Lahore) 113.
- Muhammad Zulfiqar vs Snober Perveen 2011 MLD (Lahore) 799.
- Mukhtar Ahmad vs State 2011 MLD (Lahore) 1020.
- Mukhtiyar Ahmad vs The State 2003 PCr.LJ (Lahore) 1057.
- Mumtaz Hussain vs Zaibun Nisa 1999 CLC (Lahore) 594.
- Munas Parveen vs Additional Sessions Judge/Ex-Officio Justice of Peace, Shorkot PLD 2015 (Lahore) 231.
- Mussarat Rani vs Muhammad Fazil 1999 CLC (Lahore) 1825.
- Naazreen Akhtar vs Family Judge PLD 1996 (Lahore) 394.
- Nasreen Akhtar vs Munir Ahmad 1985 MLD (Lahore) 1006.
- Nasreen Bibi vs Shabbir Hussain 2010 MLD (Lahore) 992.
- Nasrullah vs District Judge, Khushab 2000 YLR (Lahore) 703.
- Nisar Ahmad vs Additional District Judge 2014 CLC (Lahore) 1516.
- Nusrat Bibi vs Abdul Ghafar 1985 CLC (Lahore) 2693.
- Nusrat Bibi vs Faqir Hussain Shah 1985 CLC (Lahore) 2986.
- Nusrat Bibi vs The District Judge, Lahore and another 1985 CLC (Lahore) 759.
- Nuzhat Rehman vs Inam Ul Haq 2000 YLR (Lahore) 2624.
- Orangzeb vs Judge Family Court, Haroonabad District Bahawalnagar 2008 CLC (Lahore) 605.
- Parveen Akhtar vs Javed Akhtar 1985 MLD (Lahore) 454.
- Rana Ahsan Mahmood Ahid vs Judge Family Court, Faisalabad 2010 YLR (Lahore) 3264.
- Riffat Sultana vs Muhammad Iqbal 1994 MLD (Lahore) 732.

Rizwan Maqsood vs Mst. Tahira Jabeen Kausar PLD 2012 (Lahore) 418.  
Rizwan Sarwar vs Sadia Majeed 2015 CLC (Lahore) 1048.  
Rukhsana Tabassam vs Judge, Family Court 1999 CLC (Lahore) 878.  
Safdar Iqbal vs Tahira Parveen 2010 YLR (Lahore) 582.  
Said Bibi vs Muhammad Arif 2003 CLC (Lahore) 1624.  
Saif Ullah vs Maimoona Almas 2013 CLC (Lahore) 897.  
Sajjad Ahmad alias Kaura vs The State 2003 MLD (Lahore) 1514.  
Samina Abid vs Abid Raza Sami 1985 CLC (Lahore) 2685.  
Sarfraz vs State 2017 PCr.LJN (Lahore) 112.  
Sayed Imran Hussain alias Masood Hussain vs Syed Ibrar Hussain Shah 2006 YLR (Lahore) 2883.  
Shahida Parveen vs Sami Ullah 1999 CLC (Lahore) 1863.  
Shahida Parveen vs Zafar Iqbal PLD 2014 (Lahore) 317.  
Shebnaz Begum vs Muhammad Afzal 1986 CLC (Lahore) 797.  
Sher Muhammad vs State 2006 YLR (Lahore) 1952.  
Shoukat Hayat vs Judge, Family Court, Fateh Jang 2007 CLC (Lahore) 630.  
Sobia Hina vs Additional District Judge, Rajanpur 2017 YLRN (Lahore) 316.  
Subhan vs Muhammad Moorad PLD 1963 (West Pakistan) Baghdad-ul-Jadid 34.  
Tanveer Aslam vs State 2005 MLD (Lahore) 460.  
Tariq Hussain Shah vs Additional District Judge, Sahiwal 1996 MLD (Lahore) 672.  
Tariq Mehmood vs Mst. Farah Shaheen 2010 YLR (Lahore) 349.  
Wahid-ul-Islam vs Shaheen Akhtar 2011 CLC (Lahore) 566.  
Zareena Bibi vs Zahoor Ahmed 1983 CLC (Lahore) 2798.  
Zulfiqar Ali vs Mst. Yasmeen Mukarram PLD 2011 (Lahore) 458.

#### [Peshawar High Court](#)

Abdul Rashid vs Mst. Shahida Parveen 2013 YLR (Peshawar) 2616.  
Abdur Rauf vs Mst. Rafia Gul 2003 YLR (Peshawar) 3047.  
Abid Ullah vs Mst. Bibi Naseem 2015 YLR (Peshawar) 1646.  
Akhtar Kamal vs Mst. Samreen Akhtar 2018 CLC (Peshawar) 887.  
Akram Said vs Mst. Safia 2009 YLR (Peshawar) 1323.  
Allah Dad vs SHO 2012 YLR (Peshawar) 2926.  
Amir Alam Khan vs Jehan Pari 2000 CLC (Peshawar) 1122.  
Amir Khoidad vs Jehan Zeb 1999 MLD (Peshawar) 1231.  
Arshad Habib vs Mst. Ghazala Akbar 2014 MLD (Peshawar) 988.

Bakht Zada vs Mst. Joomreza 2007 MLD (Peshawar) 570.  
Bashir Ahmad vs Mst. Nagina 2003 YLR (Peshawar) 1147.  
Chan Zed vs Mst. Khalida Shaheen 2006 MLD (Peshawar) 1495.  
Farkhanda Mumtaz vs Muhammad Shareef PLD 2006 (Peshawar) 96.  
Hamesh Gul vs Mst. Bakht Mana 2001 CLC (Peshawar) 557.  
Israfeel vs Nekam Zada 2016 YLR (Peshawar) 1103.  
Maqsood Ahmad vs Samina Shaheen PLD 2006 (Peshawar) 99.  
Miskeen Ahmed vs Mst. Sajida 2012 CLC (Peshawar) 160.  
Mohammad Raziq vs Mst. Farhana Bibi 2018 CLC (Peshawar) 93.  
Mst. Deeba Khanum vs Muhammad Jamshed 2005 YLR (Peshawar) 795.  
Mst. Rukhsana Younas vs Aziz-Ur-Rehman 2014 CLC (Peshawar) 1751.  
Mst. Saima Tabbasam vs Syed Sher Shah 2016 MLD (Peshawar) 1430.  
Mst. Shazia vs Muhammad Nasir 2014 YLR (Peshawar) 1563.  
Muslim Sher vs Mst. Qudrat Bibi PLD 1984 (Peshawar) 91.  
Nadir Khan vs Zeenat Bibi 1990 CLC (Peshawar) 293.  
Nazir Muhammad vs Shah Zarina PLD 2000 (Peshawar) 70.  
Rehana Khatun vs Rizwan Ullah 2011 YLR (Peshawar) 2231.  
Rozina Ashraf vs Khalid Mehmood 1993 MLD (Peshawar) 2070.  
Sajjad Ahmad vs Naeema Shafiq 2003 CLC (Peshawar) 1420.  
Shah Nawaz vs Mst. Suriya Bibi 2009 CLC (Peshawar) 1196.  
Sheheryar Gul vs Mst. Sadaf Bibi 2016 MLD (Peshawar) 200.  
Shoaib vs Saadia Altaf PLD 2015 (Peshawar) 34.  
Syed Nobahar Shah vs Mst. Salma Bibi 2016 CLC (Peshawar) 1668.  
Wazirzada vs Mst. Taj Bibi 2009 CLC (Peshawar) 850.  
Zahoor Deen vs Mst. Safina Bibi 2007 MLD (Peshawar) 1307.

#### [Sindh High Court](#)

Abdul Fateh Babar Sani vs Mst. Naureen 2001 CLC (Karachi) 1328.  
Allah Dad vs State 1984 PCr.LJ (Karachi) 627.  
Danish vs Mst. Fozia Danish PLD 2013 (Karachi) 209.  
Gulzar Ahmed vs 1st Additional District Judge (South), Karachi 1988 MLD (Karachi) 222.  
Kamal Hussain vs Mst. Arshi Abu Saad 2004 MLD (Karachi) 704.  
Kashif Akram vs Mst. Naila 2011 MLD (Karachi) 571.  
Khushi Muhammad vs The State 2014 MLD (Karachi) 771.

- Mst. Asmat vs Syed Hasan Mehtab Jafri 1993 CLC (Karachi) 351.
- Mst. Farah Shahwar vs Nayyar Khan 1986 MLD (Karachi) 1283.
- Mst. Haseena vs The State 1983 PCr.LJ (Karachi) 1742.
- Mst. Islam Khatoon vs S.H.O. Police Station Manjoo Shori, District Nasirabad, Balochistan 2011 PCr.LJ (Karachi) 871.
- Mst. Khairan vs Family Judge 1987 CLC (Karachi) 958.
- Mst. Khairun Nisa vs Sayed Abdur Rahim PLD 1973 (Karachi) 237.
- Mst. Naseem Jafri vs Syed Hashim Raza 2012 MLD (Karachi) 1593.
- Mst. Nausheba vs Muhammad Naseem 1993 CLC (Karachi) 1354.
- Mst. Nighat Aijaz vs Muhammad Jameel PLD 1994 (Karachi) 46.
- Mst. Raisa Begum vs Muhammad Hussain 1986 MLD (Karachi) 1418.
- Muhammad Younus vs Mst. Kaniz Fatima PLD 2000 (Karachi) 348.
- Muzaffer Ali vs Mst. Mehrun Nisa 1989 CLC (Karachi) 1805.
- Riaz Ahmad vs Mst. Jamila 1984 MLD (Karachi) 1086.
- Ruqia Tufail vs Sohail Rana 2000 YLR (Karachi) 40.
- Syed Ghulam Rasool vs Bilquees Siddique 1987 CLC (Karachi) 2211.
- Syed Muhammad Aslam vs IV- Additional District Judge, Karachi (South) 1997 MLD (Karachi) 1842.
- Syeda Shams Zehra Naqvi vs Miss Soofia Lateef 1986 MLD (Karachi) 991.
- Tahir Ayub Khan vs Mrs. Alia Anwer 2017 MLD (Karachi) 412.

#### [Balochistan and Islamabad High Courts](#)

- Fida Hussain vs Mst. Najma PLD 2000 (Quetta) 46.
- Khalil Ullah vs Mst. Sahib Bibi 2018 YLR (Quetta) 1525.
- Mst. Zulai Khan vs Noor Muhammad PLD 1986 (Quetta) 290.
- Mst. Safa Arshad vs Additional Sessions Judge (East), Islamabad 2017 CLC (Islamabad) 681.
- Razzak Hussain Shah vs Qazi with powers of Family Court 1986 CLC (Quetta) 1691.

#### [Minorities' Case Law](#)

- Mst. Philomina Zaraina Nawab vs Javaid Piaray Lal 1985 CLC (Lahore) 1907.
- Nawzer Dhunjishaw Kheswalla vs Mst. Khorshed PLD 1968 (Karachi) 541.
- Samual Masih vs Teresa Mariam PLD 1976 (Lahore) 290.

## Secondary Sources: Books, Articles, Reports, etc.

- Abbasi, Muhammad Zubair and Shahbaz Ahmed Cheema. *Family Law in Pakistan*. Karachi: Oxford University Press, 2018.
- Al-Hibri, Azizah Yahia. "Muslim Women's Rights in the Global Village: Challenges and Opportunities," *Journal of Law and Religion* 15, no. 1-2 (2000): 37-66.
- Azam, Hina. "Sex, Marriage, and Eroticism in Contemporary Islamic Advice Literature," *Journal of Middle East Women's Studies* 9, no. 1 (Winter, 2013): 54-80.
- Balchin, Cassandra. *A Handbook on Family Law in Pakistan*. Lahore: Shirkat Gah, 1994.
- BBC News. "Pakistan Country Profile." Feb., 18, 2019. <https://www.bbc.com/news/world-south-asia-12965779>
- Cheema, Shahbaz A. "Islamization of Restitution of Conjugal Rights by Federal Shariat Court of Pakistan: A Critique." *SSRN* (Feb., 2 2019) : 1-13 <https://ssrn.com/abstract=3329168>
- Dialmy, Abdessamad. "Sexuality and Islam." *The European Journal of Contraception & Reproductive Health Care* 15, no. 3 (2010): 160-168.
- Fyzee, Asaf AA. *Outlines of Muhammadan Law*. Edited by Tahir Mahmood. New Delhi: Oxford University Press, 2008.
- Gage, Matilda Joslyn. *Woman, Church and State: The Original Expose of Male Collaboration Against the Female Sex*. Massachusetts: Persephone Press, 1991.
- Garner, Bryan A. *Black's Law Dictionary*. Texas: Thomson Reuters, 2009. Ninth Edition.
- Gutiérrez, Ramon A. "Islam and Sexuality," *Social Identities* 18, no. 2 (Mar. 2012): 155-159.
- Javaid, Maham. "Why Women in Pakistan Struggle to Get 'Divorced with Dignity.'" *Al Jazeera*, Mar., 7, 2019. <https://www.aljazeera.com/indepth/features/women-pakistan-struggle-divorced-dignity-190306231602365.html>
- Lari, Maliha Zia. *Honour Killing and Compliance with Law*. Islamabad: Aurat Foundation, 2010. [https://www.af.org.pk/pub\\_files/1366345831.pdf](https://www.af.org.pk/pub_files/1366345831.pdf)
- Malik, Basil Nabi. "Restitution of Conjugal Rights." *The Express Tribune*, Jun., 28, 2010. <https://tribune.com.pk/story/24137/restitution-of-conjugal-rights/>
- Meraj, Meraj Ahmed. "The Importance of Marriage in Islam," *International Journal of Research – Granthaalayah* 6, no. 11 (Nov., 2018): 1-6. [http://granthaalayah.com/Articles/Vol6Iss11/01\\_IJR18\\_A09\\_1712.pdf](http://granthaalayah.com/Articles/Vol6Iss11/01_IJR18_A09_1712.pdf)
- Mernissi, Fatema. *Beyond the Veil: Male-Female Dynamics in Muslim Society*. Cambridge, Massachusetts: Schenkman Publishing Company, Inc., 1975.
- Munir, Muhammad. "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan." *Islamic Studies* 47, no. 4 (Winter 2008): 445–82
- Mutahhari, Murtaza. "The Human Status of Woman in the Qur'an." In *Princeton Readings in Islamist Thought: Texts and Contexts from al-Banna to Bin Laden*, edited by Roxanne

- Leslie Euben and Muhammad Qasim Zaman, 249-274. Princeton: Princeton University Press, 2009.
- Nzegwu, Nkiru. *Family Matters: Feminist Concepts in African Philosophy of Culture*. New York: State University of New York Press, 2006.
- Okin, Susan Moller. *Justice, Gender and the Family*. New York: Basic Books Inc., 1989.
- Pateman, Carole. *The Sexual Contract*. Palo Alto: Stanford University Press, 1988.
- Quraishi-Landes, Asifa. "A Meditation on *Mahr*, Modernity and Muslim Marriage Contract Law." In *Feminism, Law, and Religion*, edited by Marie A. Failing, M, Elizabeth R Schiltz and Susan J. Stabile, 173-195. New York: Routledge, 2016.
- Quran* 2:233.
- Rautray, Samanwaya. "SC to examine whether forcing woman to stay with husband against her will is violative of her rights." *The Economic Times*, Mar., 5, 2019. <https://economictimes.indiatimes.com/news/politics-and-nation/sc-to-examine-whether-forcing-woman-to-stay-with-husband-against-her-will-is-violative-of-her-rights/articleshow/68274137.cms>
- Serez, Annie. "Feminism in Pakistan: Dialogues between Pakistani Feminists." *Laurier Undergraduate Journal of the Arts* 3, no. 4 (Feb., 2017): 62-80. <https://pdfs.semanticscholar.org/c18a/8ed24b2a03583ece263e8f7fa4e2992b0128.pdf>
- Shah, Ambreen. "It's not easy being a female divorcee, especially in Pakistan." *The Express Tribune*, May 23, 2016. <https://blogs.tribune.com.pk/story/34354/its-not-easy-being-a-female-divorcee-especially-in-pakistan/>
- Srinivasn, Divya. "Restitution of conjugal rights' is an archaic, unconstitutional law and its time is up." *The Leaflet*, November 2, 2018. <https://theleaflet.in/restitution-of-conjugal-rights-is-an-archaic-unconstitutional-law-and-its-time-is-up/#>
- Vikor, Knut. *Between God and the Sultan: A History of Islamic Law*. New York: Oxford University Press, 2005.
- Walby, Sylvia. *Theorising Patriarchy*. Oxford: John Wiley & Sons, 1990.
- Zaman, Sarah and Maliha Zia. "How much Rape is Rape: Understanding Normative Assumptions within Rape Victimology in Pakistan." In *Disputed Legacies: The Pakistan Papers*, edited by Neelam Hussain, 155-213 New Delhi: Zubaan Books, 2019.
- Zia, Maliha. "Feminism and Its Absence in Pakistani Legal Discourse." In *Feminism, Postfeminism and Legal Theory*, edited by Dorota Gozdecka and Anne Macduff, 63-81 London: Routledge, 2018.
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