Adjudicating Custom, Religion and Gender Equality in Pluralistic Legal Systems

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Abstract

This study aims to assess how courts address the issue of gender discrimination especially within justice systems with plural elements where women's rights are affected by customary, religious or patriarchal practices.[1] It undertakes a comparative study to analyze the interpretative approaches that courts have adopted in South Africa, India and Pakistan. It finds courts have been able to generate favorable outcomes for gender equality by adopting a purposive approach towards the interpretation of legislation, interpreting rights in conformity with foundational constitutional values such as equality, dignity, and social justice, assessing the disadvantage that would be caused to women taking into account their socio-economic vulnerability, and choosing to interpret rights in a manner that avoids causing any further prejudice or disadvantage to women.

[1]Gender Equality and Women's Empowerment : Constitutional Jurisprudence, UN Women (2017) p. 12

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1. Introduction

This study aims to assess how courts address the issue of gender equality, within justice systems with plural elements where women's rights are affected by customary, religious or patriarchal laws or practices, which may pose a conflict to the gender equality norm[2]It endeavors to show how courts using constitutional provisions, "interpret, address and often change or limit religious, customary or traditional patriarchal laws or practices" which may be deeply rooted in a culture in order to reach a positive result that respects women's equality.[3]My interest in this query has steered me towards an analysis of cases which involve interplay or balancing between the gender equality on one side, with claims arising out of the religious, cultural or social context on the other end.

Moreover, I adopt a comparative approach to explore the similarities and differences between various judicial approaches to deal with gender equality when it is enmeshed with other rights in different jurisdictions, each with their unique socio-cultural context. For this study, I focus on the constitutional jurisprudence of the South African, Indian and Pakistani courts to understand the impact that different interpretative approaches have had on women's rights. In selecting South Africa, India, Pakistan for this study, there were several commonalities which were considered, which include the common presence of plural elements or different sources of law within their legal system (customary law and personal laws), which will be discussed in detail within this study. However, a main point of departure in the case of South Africa is that it does not officially recognize most of the religious laws, including Muslim Personal Law.

Further, the jurisdictions chosen for this study share many other commonalities. The three countries possess a written constitution with a justiciable right to sex and gender equality. Each country also has an

[2]Id.
[3]Id.13

apex court which has been granted the power to review the constitutionality of legislative and executive acts. Another similarity between them is their operation as a common law system, along with possessing a parliamentary system of government. Although South Africa is regarded as a "hybrid system, a mix of English common law and civilian Roman-Dutch legal principles" the operation of the courts borrows from the common law tradition. [4]

Moreover, it can be noted that South Africa, India and Pakistan are also post-colonial states which is significant given the role that colonialism had on the evolution of personal laws, particularly on Muslim Personal Law (MPL) in all three jurisdictions. Scholars have observed the dual influence that colonizers had on the evolution of personal laws in colonies where they "exempted parts of religious law from the purview of their regulatory action, at the same time the colonial system largely shaped the content of the personal laws" as they "interfered with these laws through legislation as well as through judges' interpretation."[5]Within this study, I will examine cases in which the courts have assessed the validity of practices arising outof MPL, and the later discussion will reveal how many of the aspects codified or acceptedwithin MPL (which are also deemed to be violative of gender equality) have nothing to do with Islamic law and are in need of reform. The Indian courts (to a limited extent) and Pakistani courts have extensively engaged with these questions in their jurisprudence.

[4]'UPDATE: Researching South African Law - Globalex' (*Nyulawglobal.org*, 2018)<https://www.nyulawglobal.org/globalex/South_Africa1.html>

[5]Tanja Herklotz (2017) Law, religion and gender equality: literature on the Indian personal law system from a women's rights perspective, Indian Law Review, 1:3, 250-268, 255

2. CUSTOM, LAW AND RELIGION : JURISPRUDENCE FROM SOUTH AFRICA

2.1 Introduction

South Africa serves as an interesting case study to study the interaction of gender equality with religion, culture, and customary norms, due to the country's strong multicultural composition and the presence of plural elements within its legal system. Along with the strong guarantees of gender equality in South Africa's constitution, it also provides recognition to customary law and permits legislation to give recognition to personal and family laws. It is noted that the state has not officially recognized religious laws, including Muslim Personal Law. What happens when the operation of customary and religious laws infringes upon women's equality rights? How do the courts deal with tensions between the different norms that regulate the lives of women from different religions and indigenous groups and the constitutional mandated gender equality constitutional protections? This chapter aims to explore, first, how the South African judiciary has interpreted the gender equality provisions in the Constitution within its jurisprudence. Second, it endeavors to explore the approaches adopted by the judiciary to address tensions between constitutional provisions that guarantee gender equality and other "customary, religious or 'traditional' (understood as patriarchal traditions) laws or practices."[6]

2.2 Gender Equality

2.2.1 Relevant Provisions

The 1996 South African Constitution (1996 Constitution), the current constitution of South Africa is recognized as being one of the most progressive "in seeking to recognize women's difference, promote

[6]UN Women

gender and racial equality, and redress past discrimination." [7]The 1996 Constitution stipulates that it has been built upon the foundation of "human dignity… achievement of equality… and non-sexism" [8] which together with the substantive rights contained therein demonstrate a robust commitment to gender equality. To appreciate the range of protections that are available to women on the ground of sex and gender under the Bill of Rights of the 1996 Constitution, s.9 needs to be examined carefully, along with an understanding of the conditions under which a limitation can be imposed on the rights granted therein. The 1996 Constitution contains an equal protection clause that acknowledges "everyone is equal before the law and has the right to equal protection and benefit of the law.[9] It further elaborates that the right to equality is not limited to formal equality and "includes the full and equal enjoyment of all rights and freedoms."[10] It enables the state to take affirmative action to "achieve substantial equality for all" [11] by making a provision for "legislative and other measures"[12] to be taken to "protect or advance persons, or categories of persons, disadvantaged by unfair discrimination."[13] Further, s. 9 prohibits both direct and indirect discrimination based on specific grounds, and it is important to note that it expressly provides coverage to gender-related categories:

> The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[14]

In addition to prohibiting the state from unfairly discriminating against citizens, the 1996 Constitution also applies this prohibition "horizontally between persons"[15] stipulating that "no person may unfairly

[7]Druscilla Scribner, Priscilla A. Lambert, Constitutionalizing Difference: A Case Study Analysis of Gender Provisions in Botswana and South Africa, Cambridge University Press, Politics & Gender, 6 (2010)46
[8]1996 South African Constitution, Sec. 1(a)–(b)
[9] Id., s.9(1)
[10]Id., s.9(2)
[11]Juliette Duara, Gender Justice and Proportionality in India: Comparative Perspectives, Routledge (2018)174
[12]Id., s.9(2)
[13]Id., s.9(2)
[14] Id., s. 9(3)

discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 3."[16] In addition to the prohibition on discrimination on the grounds of sex, gender, and other grounds listed in subsection 3, it also calls for the enactment of "national legislation…to prevent or prohibit unfair discrimination"[17] This led to the enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act (EqualityAct) [18] which is driven by the "principles of *de jure* and *de facto* equality and also equality in terms of outcomes"[19] and strives to promote the value of non-sexism contained in the Constitution. [20]

The Constitution further provides that "discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair", which essentially means that the burden to prove fairness is on the discriminating party. [21]

Moreover, s. 39 provides that the courts are constitutionally mandated to interpret the Bill of Rights in a manner that promotes "the values that underlie an open and democratic society based on human dignity, equality, and freedom."[22]

[15] Duara, 175.
[16] 1996 Constitution, s.9(4).
[17] Id., s.9(4).
[18]Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
[19]*Id.* at Preamble., s.1(ix).
[20]*Id.* s.2(b)(ii)–(iv)
[21]Id., s.9(5).
[22]Id., s.39

2.2.2 **Proportionality Analysis in South African Equality Jurisprudence**

Section 36 of the 1996 Constitution lays out the conditions which need to be met to place any limitation on the Bill of Rights. It requires that the limitation be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom"[23] and consider all relevant factors which include:[24]

a. the nature of the right;

b. the importance of the purpose of the limitation;

c. the nature and extent of the limitation;

d. the relation between the limitation and its purpose; and

e. less restrictive means to achieve the purpose.[25]

It is crucial to note that any limitation on the Bill of Rights falling outside the scope of the conditions laid out within subsection 1 of s. 36 is prohibited. [26] Even in the case of emergency, the right to human dignity is protected entirely and equality "with respect to unfair discrimination solely based on grounds of race, color, ethnic or social origin, sex, religion or language"[27] is protected as a non-derogable right.

The approach adopted within the equality jurisprudence developed by the Constitutional Court of South Africa (CCSA) can be conceptualized as a two-tier analysis, which constitutes the prima facie stage (determining whether the discrimination is unfair) followed by the justification stage. Only after it has been determined that the discrimination is unfair, the court moves to the justification stage of the

[23]Id., s.36 (1)
[24] Id.
[25] Id.
[26]Id., s.36(2)
[27]Id., s.37(5) Table of Non-Derogable Rights

proportionality analysis, to ascertain whether the unfairness can be justified unders. 36 of the 1996 Constitution.[28]

2.2.3 Gender Equality Jurisprudence

Although *Brink v. Kitschoff*[29] was a gender equality case about the interpretation of the 1993 Interim Constitution, the doctrine developed therein has enduring significance as it initiated the establishment of the "parameters of enquiry" for the adjudication of equality claims in South Africa. [30]Brink dealt with certain provisions of the Insurance Act 27 of 1943, which denied a married woman of the benefits under a life insurance policy which had been ceded to a woman, or effected in her favor, by her husband."[31] The CCSA recognized the absence of a "similar limitation" on a "life insurance policy ceded or effected in favor of a husband by a wife."[32]The CCSA "implicitly" followed the three-prong test which was later made clear in *Harksen v. Lane NO and Others.*[33]The determinative questions included the following: "1) Does the differential amountto discrimination? 2) If so, was it unfair? 3) If so, can it be justified in terms of thelimitations clause?"[34] The CCSA came to the conclusion that the distinction discriminated against based on sex, was unfair, lacked a reasonable basis, and was not justifiable.

[28] Duara, 178 ; Harksen v. Lane NO 1997 (11) BCLR 1489 (CC). 53
[29]Brink v Kitshoff 1996 (6) BCLR 752(CC)
[30]Duara,176
[31]Brink, 22
[32] Id.
[33] Duara, 176; 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) (Harksen).
[34] C. Albertyn and B. Goldblatt, "Equality" in S. Woolman et al. (eds) Constitutional Law of South Africa (Juta: Capetown, 2007)43.

2.3 Customary Law in the South African Legal System

2.3.1 Relevant Provisions

The 1996 Constitution expressly grants recognition to customary law, as a system that adds to the richness of the South African legal landscape. Respect for cultural diversity is enshrined within Sections 30 and 31 of the Constitution. The Constitution grants everyone the right to "participate in the cultural life of their choice"[35] and further provides that those who belong "to a cultural, religious or linguistic community may not be denied the right, with other members of that community…to enjoy their culture, practice their religion and use their language."[36] It is important to note, however, that the exercise of these rights is contingent upon compliance with the provisions of the Bill of Rights. [37]

In the same spirit, when the courts are undertaking the task of "developing common law or customary law" they are obligated to "promote the spirit, purport, and objects of the Bill of Rights."[38] Section 39(3) of the 1996 Constitution further clarifies that the "Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by customary law"[39] provided they remain in agreement with the Bill of Rights. In addition to the above, the Constitution also offers protection to institutions that fall within the ambit of customary law. [40]

2.3.2 Relevant Jurisprudence

The CCSA has interpreted the Constitution to eliminate any doubt about the key position that customary law holds in the legal system while adding the proviso that it should not conflict with the Bill of Rights.

[35] 1996 Constitution, Sec.30
[36]Id. Sec.31
[37] Id., Sec 30 and 31
[38] Id., Sec 39(2)
[39] Id., Sec.39(3)
[40]Id., Sec.211

Langa DCJ writing for the majority in *Bhe* has observed that "basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution."[41]

The CCSA's approach demonstrates that customary law should not be condemned just because it differs from common or statutory law. The key point here is that customary law should be interpreted "firstand foremost answering to the contents of the Constitution. It is protected byand subject to the Constitution in its own right."[42]

2.3.3 Customary Practices and Gender Equality

An assessment of the CCSA jurisprudence on s. 8(2) of the 1993 Interim Constitution and 9(3) of the 1996 Constitution demonstrates that on numerous occasions the Court has "found in favor of women litigating for equality" particularly when women have challenged the constitutionality of discriminatory customary practices.[43]

One of the key cases in this regard is *Bhe* which featured a conflict between the customary practice of male primogeniture and the constitutional guarantees of equality and dignity. *Bhe* offers a fascinating insight into the unique position of customary law within the South African legal system. The CCSA, in dealing with a constitutional challenge to the practice of male primogeniture, recognized the important status of customary law in the South African legal system. But at the same time, it followed an approach towards customary law as "living customary law"[44], drawing a contrast between rules which are adjusted

[41]Bhe and Others v. Magistrate of Khayelitsha and others 2005 (1) BCLR 1 (CC) 41
[42]Id., 41
[43]Rashida Manjoo, The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights, Human Rights Program at Harvard Law School Working Paper (2007) 16
[44] Bhe, 87

according to evolving circumstances and the rules of customary law codified in the statute books. In this spirit, it recognized that the customary practice of primogeniture, under which "only a male who is related to the deceased qualifies as intestate heir" while women are excluded from participating in "the intestate succession of deceased estates"[45] had failed to adapt to changing circumstances.

The CCSA also placed particular emphasis on the importance of examining rules of customary law, not in isolation but within the context in which they operated along with the purpose they served in society. It observed that that the customary law of succession was devised as a way to "preserve the cohesion and stability of the extended family unit and ultimately the entire community."[46] Under that system, the heir inherited the assets of the deceased not for his own benefit, instead, the property had to be "administered…for the benefit of the family unit as a whole."[47] The Court reasoned that the circumstances had changed with nuclear families replacing traditional families; the heir no longer lived with the extended family and "the succession …to the assets of the deceased does notnecessarily correspond in practice with an enforceable responsibility to providesupport and maintenance to the family and dependants of the deceased." [48]

CCSA found that the primogeniture rule in the context of the customary law of succession was not in harmony with the "notions of equality and human dignity as contained in the Bill of Rights." It noted that excluding women from inheritance on the grounds of gender reinforces "past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality."[49] Thus, the rule was found to violate the equality rights of women and

[45] Bhe, 77
[46] Bhe 75
[47] Bhe, 76
[48] Bhe, 80
[49] Bhe, 91

thus a clear infringement of s.9. The limitation on the right to equality was found to be neither reasonable nor justifiable. [50]

The CCSA also found the rule of primogeniture as applied to the customary law of succession be an affront to women's right to human dignity under section 10 of the Constitution due to the implication that "women are not fit or competent to own and administer property."[51] Its effect was also offensive as it relegated women to a "perpetual minority" position making them subject to the "control of male heirs."[52]

The CCSA creatively conceptualizes common law and customary law as "living" or evolving law, which should be allowed to develop, but not in a manner that infringes on the right to gender equality enshrined in the Constitution has generated positive outcomes for women. *Bhe*, *Mayelane v Ngwenyama*[53]and similar cases demonstrate the inclination of South African courts to tackle the infringement of women's right to equality, particularly when it arises from cultural and customary practices.

2.4 Dealing with tensions between religious freedom and gender equality

After discussing how the CCSA has dealt with tensions between customary practices and gender equality, I will now turn to another dimension of the gender equality debate, i.e., exploring how the constitutional guarantee of gender equality and nondiscrimination fares in the case of women who fall within the realm of personal laws that discriminate against women. It is believed that South Africa's legal provisions on equality are some of the best in the world but do they adequately protect women who belong to minority

[50] Duara, 179
[51] Bhe, 92
[52] Bhe, 92
[53]Ngwenyama v Mayelane and Another (474/2011) [2012] ZASCA 94; 2012 (4) SA 527 (SCA); 2012 (10) BCLR 1071 (SCA); [2012] 3 All SA 408 (SCA) (1 June 2012) (Supreme Court of Appeal)

religions in South Africa.[54]This issue has gained increasing prominence within the context of the ongoing debate about legal recognition of Muslim marriages and other aspects of MPL in South Africa. This section aims to explore the interaction of the right to freedom of religion and gender equality within the CCSA's jurisprudence and assess what kind of legal treatment is extended to these rights when they come in conflict with each other, particularly within the domain of Muslim Personal Law.

Under the era of colonialism and apartheid, both the legislature and courts refused to recognize Muslim marriages. The views held by the South African courts in the pre-constitutional era reflected a staunch refusal to recognize Muslim marriages, primarily because of their potentially polygynous naturethey were considered to becontrary to the bonos mores of society. Several cases from that period, including *Ismail v Ismail*,[55]*Bronn v Fritz Bronn's Executors and Others* and *Seedat's Executors v The Master (Natal)*, denied legal recognition to Muslim marriages. These decisions were based on dominant and fixed views about "what religionsand practices constituted civilized religious practices; what unions were considered an anathema to the dominant Christian norms; what marriages would not be reprobated by the majority of civilized peoples on grounds of morality and religion; what marriages were contrary to public policy etc."[56]

I assert that the non-recognition of Muslim marriages had a disproportionate impact on women due to their disadvantaged position within marriage and society. As a consequence of the state's failure to recognize their marriage, Muslim women were not able to access the benefits provided by common law, i.e., "maintenance and inheritance upon the dissolution of the marriage bydeath or divorce, nor were they able to enforce proprietary benefits recognized under Muslim family law [57].As a result, they faced severe

[54]Hoodah Abrahams-Fayker, Litigating for equality in South Africa: Muslim marriages< https://www.opendemocracy.net/en/5050/litigating-for-equality-in-south-africa-muslim-marriages/>
[55]Ismail v Ismail and Others (86) [2007] ZAECHC 3; 2007 (4) SA 557 (E)
[56] Manjoo, 17
[57] Albertyn2013, 399 ;Waheeda Amien (2010) 'A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Muslim Secular Context', International Journal of Law, Policy and theFamily 24(3): 361-96. P.363

economic disadvantages and were left "destitute at thedissolution of their marriages **by** divorce or death" of their spouse.[58]Muslim women also became victims of"unregulated polygyny" leaving them at the hands of clergy who in most instances possessed a patriarchal and misogynistic disposition towards women's rights.

As understood from the above discussion, women within Muslim marriages faced double ostracism, first, at the hands of the religious clergy and second, due to the state's refusal to provide any remedy for the discrimination they faced. This discrimination not only denied them of their rights under their own personal laws and common law but also excluded them from the constitutionally guaranteed protection from non-sexism and the right not to be discriminated against based on gender/sex, along with a further entrenchment of their subordinate status within their marriage, community and society as a whole.

The recent rulings of the CCSA attest to the existence of "a scornful and offensive attitude towards persons married in terms of *Sharia* law."[59] The recent rulings express a strong disapproval of the State's failure to "take steps to afford legal recognition to Muslim marriages" while observing that the "historical disadvantages, hardships and prejudice for parties to Muslim marriages, especially Muslim women" remain intact.[60] Despite 27 years of democratic constitutional rule that is "founded, inter alia, on the values of '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms'[61]"[62]Muslim marriages remain outside the scope of legal recognition and regulation. This remains a contentious issue in South Africa to this day and continues to impact women disproportionately.

[58]Albertyn, 2013, 400
[59] Id. 2
[60]President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others (Case no 612/19) [2020] ZASCA 177 (18 December 2020) para 1
[61] Section 1(a) of the Constitution of the Republic of South Africa 108 of 1996.
[62] President of the RSA, para 1

Due to the absence of legal protection by the state, and the failure of quasi-judicial bodies regulating personal law to grant relief, Muslim women have approached courts for the recognition and enforcement of their rights to "maintenance, property and inheritance" based in "Muslim personal law, common law, statute and the Constitution." [63] Looking at more recent judgments, it can be observed that the Courts have "come a long way" since the earlier judgements in *Ismail, Kader, Bronn* and *Seedat* which failed to recognize Muslim marriages. The recent judgements have taken notice of the disproportionate disadvantage faced by Muslim women due to the state's failure to recognize Muslim marriages and other aspects of MPL. What ensues from these cases, which are discussed below, is a "limited recognition of Muslim marriages and the extension of certain statutory rights of inheritance to widows."[64]

In *Danielsv. Campbell*[65] the CCSA dealt with the case of a widow married according to Muslim rites who was being excluded from inheriting from the estate of her deceased husband. Her exclusion was based on the contention that she did not fall within the definition of spouse under the statute regulating succession and maintenance as she had not been married according to South African law. The CCSA ruled that the word "spouse" as used in the Acts[66] "includes the surviving partner to amonogamous Muslim marriage."[67]

To reach this result, the CCSA relied on the ordinary meaning of the word spouse, which included persons in Muslim marriages and clarified that the reason behind their exclusion flows from a culturally and racially hegemonic appropriation" revealing prejudice rather than a reliance on the real meaning of the word within English language. [68] Further, it employed a contextualized analysis of the word spouse as

[63]Albertyn, 2013 399
[64] Albertyn, 2013, 400
[65] Daniels v Campbell and Others, 2004 (7) BCLR 735 (CC) (Constitutional Court of South Africa)
[66] Intestate Succession Act 81 of 1987 and Maintenance of Surviving Spouses Act 27 of 1990
[67] Daniels, 40
[68] Daniels, 19

used in the Acts, by going back to the purpose of the Acts which was to provide relief to widows so that they would not be left to mercy of relatives. The Court held there was no reason why the "equitable principles underlying the statutes" should not apply to Muslim widows as they did to other widows.[69] It is important to note that the court undertook a gender analysis by relying on the value of non-sexism in the foundations of the Constitution.[70] While the wording of the Acts was gender neutral, the court found it pertinent to use social context analysis to underscore the financial vulnerability of women.

> The value of non- sexism is foundational to our Constitution and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally-backed social practices. This, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women.[71]

Thus, the CCSA placed reliance on what was defined as "common sense and justice" to hold that the Constitutional values and objectives behind the Acts would best be advanced through an interpretation that uses the ordinary meaning of the word spouse instead of relying on a discriminatory interpretation excluding Muslim widows from the protections afforded to other widows.

Subsequently, in *Hassam*[72] the CCSA dealt with the constitutionality of excluding spouses in polygynous Muslim marriages from the intestate succession system. It adopted a purposive approach and emphasized the purpose of the act was to prevent widows from falling into destitution and that the exclusion of Muslim widows in polygynous marriages from this protection would amount to discrimination on the basis of religion, marital status and gender. Thus, such exclusion was found to be discriminatory.

[69] Daniels, 22
[70] Id.
[71] Daniels, 22.
[72] Hassam v Jacobs NO and Others (CCT83/08) [2009] ZACC 19; 2009 (11) BCLR 1148 (CC); 2009 (5) SA 572 (CC) (15 July 2009) (Constitutional Court of South Africa)

2.5 Conclusion

Through an assessment of trends within the jurisprudence of the CCSA, I conclude that the Court has been diligent in identifying and dealing with discrimination based on gender and religion when it pertains to the interpretation or application of a statute. It utilizes a combination of interpretative tools, including the adoption of a purposive approach towards legislation, a detailed socio context analysis to identify vulnerabilities and an assessment of the disadvantage that would be caused to women which has led to favorable outcomes for women bringing equality claims to the Court. Overall, an assessment of the jurisprudence of the CCSA demonstrates a clear willingness to address and remedy those interpretations and applications of customary laws which are found to have a discriminatory impact upon women. In its recent jurisprudence, it has also shown an awareness of the critical issue of Muslim women being excluded from the benefits available under civil law due to the non-recognition of marriages performed according to Muslim rites.

However, it must be noted that the Court has refrained from addressing questions regarding the constitutionality of religious practices. It is contended that the court's strong avoidance from becoming entangled in debates about the discriminatory practices which persist within the personal law domain of minority religions, limits the scope of protection for women who belong to these minority communities, leaving them at the mercy of the religious clergy.

3. GENDER, LEGAL PLURALISM AND MUSLIM WOMEN IN INDIA

3.1 Introduction

Exploring the adjudication of the right to gender equality within India has generated a great amount of interest among scholars as it provides an interesting case study of a state which defines itself as secular[73]along with being what has been described as a "plurilegal system" of personal/ family law.[74] It is an arena with "shared adjudication" as the State "splits its adjudicative authority with religious and societal actors and organizations."[75] Within this framework, women's rights are affected by state laws on one hand, by other religious, customary, or community laws and practices on the other.[76]The question that then arises is how do women's right to equality fare within this framework, particularly when tensions arise between different norms? This chapter provides an overview of how the right to gender equality has been interpreted by the Indian judiciary, focusing on the jurisprudence of the Supreme Court of India (SCI). It endeavors to assess how the Indian judiciary has addressed tensions between the right to sex equality and religious or 'traditional' laws or practices. The particular aim of this chapter is to explore and analyze the approach that the judiciary has adopted to deal with the plight of Muslim women amidst tension between religion and gender, and whether the Indian approach supports positive outcomes for

[73]Tanja Herklotz, Shayara Bano versus Union of India and Others. The Indian Supreme Court's Ban of TripleTalaq and the Debate around Muslim Personal Law and Gender Justice, Law and Politics in Africa, Asia and Latin America, Vol. 50, No. 3, (2017), 302

Gary Jeffrey Jacobsohn, The Wheel of Law: India's Secularism in Comparative Constitutional Con text, Princeton and Oxford 2003, p. xii et seq.; Rajeev Bhargava, Should Europe learn from Indian Secularism? http://www.india-seminar.com/2011/621/621_rajeev_bhargava.htm (last ac

"The Indian notion of secularism is generally understood as one of equal protection of all reli gions and an equal distance towards all of them."

[74]Gopika Solanki, Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India (Cambridge University Press 2011).

[75]Tanja Herklotz (2017) Law, religion and gender equality: literature on the Indian personal law system from a women's rights perspective, Indian Law Review, 1:3, 251

Under the Indian personal law system, certain "family and property matters (marriage, divorce, maintenance, guardianship, adoption, succession and inheritance) of Hindus, Muslims, Parsis and Christians as well as Jews are governed by their respective religious laws. There have been recurrent debates about replacing the personal law system with a Uniform Civil Code (UCC), however, it remains in place while the Constitution's directive to "endeavour to secure for the citizens a uniform civil code"(Article 44) stays unfulfilled.

[76]UN Women 2017, 12

gender justice. It can be observed that the SCI in recent jurisprudence has recognized the disadvantaged position of Muslim women and has granted positive remedies in cases such as *Shah Bano*[77] and *Danial Latifi*[78], mainly by adopting a purposive approach in interpreting legislation and engaging in socio context analysis like the South African Supreme court. However, most of the favorable decisions contain a sparse analysis of the right to sex equality and have been reluctant to strike down laws and practices emanating from the religious domain as unconstitutional for being discriminating based on sex. [79]

3.2 Contextual Overview

Owing to the presence of a multiplicity of cultures and religions that exist in India, many tensions arise due to the clash between cultural, religious, and traditional norms. However, the plight of women under Muslim Personal Law has surfaced as a very contentious issue within debates. Muslims make up 14.2% of the total population and the largest minority in India. It has been observed that the personal laws of the minority "often function as a crucible in which larger conflicts between Hindus and Muslims are played out."[80] Thus, the case of Muslim women will serve as the focal point of inquiry within this chapter. The objective behind examining the case of India is to analyze the response of the judiciary towards the exclusion of Muslim women from the protection and benefits which are available to other citizens.

[77] Mohammad Ahmad Khan v. Shah Bano Begum, 1985AC R327

[78]Danial Latifi & Anr vs Union Of India on 28 September, 200

[79]Catharine A MacKinnon, 'Sex Equality under the Constitution of India: Problems, Prospects and "Personal Laws"' (2006) 4 International Journal of Constitutional Law 181,193. The author refers to the Madhu Kishwar case here, where the court stated: "We would rather … refrain from striking down the provisions as such on the touchstone of Article 14 as this would bring about a chaos in the existing state of law".

[80]Herklotz, 253

"While for many Muslims, their personal laws are a crucial marker of minority identity, for some Hindu nationalists, the laws are an example of Muslims being granted a special status in society in which they unjustifiably enjoy more rights than other communities. Scholarship has critically dealt with Muslim personal law provisions, while at the same time attempting to disrupt stereotypes and wrong understandings about Muslim personal law"

Scholars have observed that India's constitutional structure has transformative potential and encompasses a promising possibility to bring a substantive improvement in women's position within society.[81] Moreover, the SCI's jurisprudence in the area of women's rights is fairly progressive and has been able to generate positive outcomes for women's rights. Bringing the lens closer to the case of Muslim women in India, it is asserted that they are positioned at the "intersection of community and nation, public law and private law."[82] in effect, these women find themselves in an almost contradictory positioning, where they are "simultaneously included and excluded from the enjoyment of equal rights" by the state's abdication of responsibility towards them based on their involuntary placement within a personal law system which remains unregulated.[83] This chapter will explore the role SCI played in adjudicating Muslim women's claims to rights that are available to other citizens under the secular law, for instance, the right to maintenance after the dissolution of marriage.

3.3 Legal Framework

The Constitution of India contains a general equality clause that provides for formal equality, stating that the "State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."[84]Alongside the "broad right to equality for all," [85]under Article 15(1)the Constitution precludes the State from discriminating against its citizens based on several stipulated classifications including sex. It is provided that "the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."[86] Thus, it can be observed that under the Indian

[81] Mckinnon2006, 189.
[82]Narain, Vrinda. "Muslim Women's Equality in India: Applying a Human Rights Framework." *Human Rights Quarterly* 35, no. 1 (2013): 91-115, 92
[83]Narain, Vrinda. (2013) 92
[84] Art 14
[85] Duara,
[86] Art. 15(1)

Constitution, the right to equality and non-discrimination based on sex is conferred upon all citizens. Based on the recognition of inequality within society, particularly women's unequal status, Article 15(3) provides that the State can make special provisions" for "women and children", along with "socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes" to remedy the imbalance.

Moreover, it can be inferred from the SCI's jurisprudence that the Constitution prohibits discrimination based on both sex and gender. In *NALSA v. Union of India*[87], the SCI held that "Articles 15 and 16 prohibit discrimination against any citizen on certain enumerated grounds, including the ground of 'sex'. In fact, both the Articles prohibit all forms of gender bias andgender-based discrimination."[88]

In contrast to the South African 1996 Constitution which contains a general "limitations clause" that applies to the Bill of Rights, including the right to equality and nondiscrimination on the basis of sex and gender, [89] the Indian Constitution does not contain a textual limitations clause, neither for the "right to equality" and "equal protection of the laws" under Article 14 nor the prohibition of discrimination on the basis of sex, etc. under Article 15(1).[90]

Although the Constitution does contain a limitations clause that confines the right to equality and prohibition of discrimination based on sex, that does not mean that these rights are absolute. To

[87]AIR2014SC1863 (NALSA)
In NALSA, the SCI held that transgendered persons are protected not only under the right to equality (Article 14) but also had to be protected according to the antidiscrimination principle contained in Articles 15 and 16. (para 77)
[88] NALSA, 56.
[89] Under Sec.36 of the 1996 Constitution of South Africa, the Bill of Rights can be "limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom … "
[90] Duara, pg. 192
Article 15 contains exceptions to the prohibition on discrimination allow "special provisions" for "women and children", along with "socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes". Moreover, the presence of "only" in Article 15, section (1) operates as "a kind of limitation on the prohibition as it has been interpreted to allow for discrimination on two or more grounds."

adjudicate upon what qualifies as permissible limitations on these rights, the SCI has developed a test known as the Classification Doctrine. It is comprised of two main issues. i.e., "is the distinction drawn between people in a legislative Act based on an "intelligible differentia"? and, assuming such an intelligible differentia can be found, 2) Does that differentia "have a rational relation to the object sought to be achieved by the Act."[91] Following the Classification Doctrine approach, the Indian court's assessment entails a "presumption of validity in favor of the impugned Act." It has been observed that the approach is deferential to the State, and thus serves as a low standard of review.

Some judges have attempted to circumvent the limitations of the Classification Doctrine with the development of alternate approaches. A prominent example would be Justice Bhagwati who formulated the "New Principle Re-Arbitrariness" and has noted that "[t]he doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality."[92] Duara discusses the limitations of both the Classification Doctrine and the New Principle Re-Arbitrariness in her work, noting the former's deference to the state along with its emphasis on formal equality. [93]Furthermore, the New Principle Re- Arbitrariness falls short on its ability to properly "identify discrimination based on gender differences" because provisions infringing gender equality may not give the impression of arbitrariness, but rather appear as "natural" differences. [94] While the term "proportionality" has featured quite often in the SCI jurisprudence, the approach in India remains very different from the Proportionality Analysis as it has been developed in South African jurisprudence.[95]

[91] Duara, 173
[92] Id., 193 ; Ajay Hasia v. Khalid Mujib
[93] Duara, 193
[94] Id.
[95] Id. 194

As the drafter of the Indian Constitution sought to "redress the sharp inequalities in the country" equality attained a special place as a "fundamental organizing principle" and called for legal reform principally for the "women and the oppressed castes."[96] It is noted that the drafters acknowledged the entrenchment of women's inequality under personal laws. It was for this reason that Article 44, that calls for the enactment of a uniform civil code (UCC) was incorporated in the Constitution.[97] It must be noted however that Article 44 is not a "justiciable fundamental right, but a directive principle of state policy."[98] Although such principles are important for governance and the formulation of public policy, a UCC has not been constituted due to the "fear of alienating minority allegiance to the secular nation-state." [99]

3.4 Freedom of Religion

Having outlined the legal provisions regarding the right to equality and prohibition of discrimination in the Indian context, I now move to the right to freedom of religion. Examining the case of Muslim women in India enables us to understand the tensions between the right to freedom of religion and women's equality and the adverse impact that this conflict has had on women's rights.

With regards to freedom of religion, there are two key provisions, i.e. Articles 25 and 26. Article 25 protects the right to "profess, practice and propagate religion" but allows the State to regulate "economic, financial, political or other secular activity associated with religious practice" along with 'providing for social welfare and reform' of Hindu religious institutions."[100] Furthermore, Article 26

[96]Narain, 2017, 190-191 ; Gaurav Jain v Union of India, AIR 1997 SC 3021 ("The Preamble, an integral part of the Constitution, pledges to secure 'socio-economic justice' to all its citizens … in a united and integrated Bharat.").
[97]*Constitution*, art. 44.
[98] Vrinda Narain, Law, Gender, and Nation : Muslim Women and the Discontents of Legal Pluralism in India in Jocelyne Cesari and José Casanova, Islam, Gender, and Democracy in Comparative Perspective, (Oxford, 2017) 191
[99] Id. 191 ; Vrinda Narain, *Reclaiming the Nation: Muslim Women and the Law in India* (Toronto: University of Toronto Press, 2008), pp. 144–5.
[100] Constitution, Article 25

assures religious denominations, the right to "establish and maintain institutions for religious and charitable purposes" and to manage their religious affairs. [101] As will be discussed below, the right to freedom of religion and protection of minority rights has been used as a footing for religious clergy to assert the divide between secular and religious and to justify the operation of Muslim Personal Law within a silo, and exclusion of Muslim women from the rights guaranteed under the Constitution.

3.5 Muslim Personal Law in India

It is asserted that Muslim women in India face double discrimination, as they do not have access to the "rights and privileges as Muslim men" and also "other Indian women, in virtually any aspect of family law."[102] Scholars have noted that MPL operates as "a sphere of authority for religious leaders, exempt from the nation's wider constitutional requirements" and the arrangement is seen as a manifestation of the "postcolonial state's commitment to minority rights".[103] Furthermore, the stark contradictions between constitutional guarantees and MPL are prefaced on "the public/private split and a religious/secular binary" which has a disproportionate and grave impact on Muslim women who find themselves in an excruciating patriarchal space, with no protection from the state. [104]This arrangement takes women very far from the concept of equal citizenship, into a perpetual cycle of discrimination based on their gender.

In her book, Reclaiming the Nation, Narain discusses the dilemma that Muslim women face quite succinctly:

> [t]he state has accepted the equation of personal law with group identity and has notquestioned this definition of group accommodation or of group interest. By allowingMuslim leaders to continue to exercise authority over women

[101] Id., Article 26
[102]Narain, 2017, 191
[103]Id.
[104] Id.

> of the community byrefusing to reform the personal law, together with the state's policy of reinforcing thepublic/private split by claiming that no change is possible in the personal law unless thecall for change comes from the community itself, the state has abandoned Muslim womento patriarchal interpretations of personal law and has legitimized their continuedsubordination. [105]

I assert that the apathy of the state in the matter of Muslim women's rights can be witnessed most clearly through the observation that the codification and reform of Muslim Personal Law in India has never been undertaken in a systematic manner, empowering the ulema to assert unregulated control over the determination of rights of Muslim women along with enabling the exclusion of Muslim women from the rights accorded under the constitution. Scholars have pointed out that this lack of systematic codification of MPL in India, presents a marked contrast to the approach taken towards "Hindu family laws in India and to Islamic family laws in much of the Muslim-majority world, both of which have been subject to a far greater degree of codification."[106] The only attempt at codification has been the enactment of the Muslim Women (Protection of Rights on Divorce) Act 1986 (MWA) which is problematic in its own right and has been strongly criticized for further entrenching women's inequality within the realm of personal law. The SCI has adjudicated upon claims of Muslim women arising out of discriminatory provisions of the MWA, as will be discussed below.

[105]Nivedita Menon, Seeing Like a Feminist (Penguin 2012) 90.
[106]Justin Jones (2020) Towards a Muslim Family Law Act? Debating Muslim women's rights and the codification of personal laws in India, Contemporary South Asia, 28:1, 1-14, DOI: 10.1080/09584935.2019.1684444

3.6 Law, Religion and Gender Equality : Jurisprudence of Indian Courts

Scholars including Mackinnon contend that those Indian sex equality cases in where the judiciary has evaluated the social context of "sex-based disadvantage" not only represent a substantive equality approach to sex [107] but also presages a move towards a favorable domain for the adjudication of women's equality claims. The jurisprudence wherein courts have upheld sex reservations in the realm of employment, the sexual harassment decision in *Vishaka*[108] and *Chopra*[109] referencing international law, and some other equal pay decisions [110] are enlivened by a substantive notion of sex equality. In another prominent case, the SCI has observed that "prostitution is anathema to sex equality."[111] These cases support Mackinnon's claim and provide an insight into the transformative potential of India's sex equality jurisprudence.

However, when it comes to sex inequality within personal laws, scholars have strongly criticized the backhanded approach adopted by the Indian courts. McKinnon, who has otherwise offered a positive review of the Indian court' approach with regards to women's rights, presents a strong critique of the Court's role in adjudicating women's equality claims pertaining to personal laws:

> In cases challenging sex inequality in personal laws, Indian courts appear paralyzed by the fear of being tarred by the brush of cultural insensitivity. Insensitivity to minority women's sex equality

[107] 2006, 188
[108]Vishaka v. State of Rajasthan, A.I.R. 1997 S.C. 3011 (providing guidelines to protect women workers from sexual harassment, where Articles 14 and 19 were found violated and the legislature had failed to act).
[109]Apparel Export Promotion Council v. A.K. Chopra, (1999) 1 S.C.C. 759 (finding distinction between attempt to molest and completed act erroneous in context of dismissal of employee for sexual harassment).
[110] One strong example is the decision by Chinnappa Reddy in Randhir Singh v. Union of India, (1982) 1 S.C.C. 618, granting substantive equal pay for equal work to the drivers for the Delhi police, referring to article 39(d).
[111] Gaurav Jain v. Union of India, (1997) 8 S.C.C. 114, 121, 133.

> rights, they appear able to live with. As to the family and religion, as they put it, reform has to come from within rather than being imposed from without.[112]

McKinnon's critique is best is illustrated through the controversy resulting from the 1985 landmark Supreme Court decision in the *Shah Bano* case,[113]displaying "the neglect of Muslim women's interests justified in the name of upholding group rights."[114] Shah Bano (the appellant) was a Muslim widow who was driven out of the house by her husband (the respondent). Subsequently, she filed a case for maintenance under sec. 125 of the Code of Criminal Procedure, which was the secular law of maintenance. She lower courts decided in her favor the case came to the Supreme Court as a result of her husband's appeal of the High Court's decision. He argued that on account of being a Muslim, the secular law of maintenance did not apply to him and that the Muslim personal law did not mandate payment of maintenance beyond the forty-day iddat period. The SCI rejected this rationale and held that sec 125 of the Code would apply. The SCI observed that Muslim Personal Law under which the provision of maintenance is limited to the period of iddat does not envisage the situation which s. 125 of the Code caters to, i.e., a case where a divorced wife is unable to maintain herself.[115] On that basis, the SCI held if the divorced wife is not able to maintain herself, she is entitled to maintenance beyond the iddat period. The Court also expressed its displeasure about the government's lack of action in enacting a UCC as directed by Article 44, which would resolve inconsistencies between the personal laws of different communities.

It is observed that the decision in *Shah Bano* case brought India to the brink of a constitutional crisis, by raising a range of questions regarding "gender equality, minority rights, and the relationship between

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[112] Mckinnon, 135
[113]Mohd. Ahmed Khan vs Shah Bano Begum, 1985 AIR 945, 1985 SCR (3) 844
[114] Narain, 2014, 101
[115] Shah Bano, 16

secular and religious law."[116] It also revealed the multi-tiered vulnerability of Muslim women who were caught between the state and the Ulema. [117] Succumbing to the pressure of religious leaders who rallied for the exclusion of women from the code's ambit, the government enacted the MWA. Narain explains the detrimental impact of the MWA on Muslim women:

> Far from rectifying the precarious vulnerabilities of Muslim women in the face of divorce, the MWA reaffirmed Muslim men's right to unregulated divorce, absolved them of the duty of spousal support, and, in so doing, stripped Muslim women of previously held rights, rights held by all Indian women.[118]

Post *Shah Bano* and the enactment of the MWA, there was a great degree of variance in the way Indian courts interpreted the maintenance provision under the Act which provided that "a divorced Muslim woman is entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband." [119] This confusion was settled by the SCI's decision in *DanialLatifi*, dealing with the question of whether the provisions of the MWA dealing with maintenance were unconstitutional and discriminated against Muslim women based on religion and gender. In a "somewhat strained process"[120] the Court interpreted the MWA to deduce a satisfactory outcome for the claimant. It reaffirmed the decision in *Shah Bano*, wherein the Court had applied s. 125 of the CrPc to hold men liable to pay maintenance to Muslim divorcees where they were unable to support themselves to prevent Muslim divorcees from destitution while noting that MPL did not envision the situation envisioned under s.125.

[116] Narain, 2017, 193.
[117]Hasan, Zoya. 2010. "Gender, Religion and Democratic Politics in India," *Third World Quarterly* 31/6: 941–2.
[118] Narain, 2017, 194
[119]Muslim Women (protection of Rights on Divorce) Act 1986, Sec. 3(1)
[120] Narain, 2014, 102

The Court emphasized the social welfare objective of Sec 125 and held the legislation should be applied accordingly to mitigate the financially vulnerable position of Muslim divorcees. In a similar vein, the SCI engaged in a socio context analysis, acknowledging the economic disadvantage faced by women in the male-dominated Indian society and women's dependence on men for financial sustenance.

Moreover, the SCI innovatively used precedent to forge a connection between the divorcees' plight and their right to dignity, which would be severely comprised if they were forced into a situation where they had to turn to relatives for support.

Despite the Court's refusal to declare the Act unconstitutional, it sought to interpret the MWA in light of the constitutional guarantee of equality and nondiscrimination. It was observed that if a provision were to exclude Muslim women from the benefits provided under Sec 125 of the CrPc and provide fewer benefits than the ones available to all other Indian women under s.125, it would amount to unfair discrimination. The Court made it clear that such a provision would violate both Article 14 of the Constitution which "ensures equality and equal protection of law to all persons otherwise similarly circumstanced" along with Article 15 of the Constitution which precludes discrimination based on religion, as it applies only to Muslim women based on their religion.

Overall, the SCI's approach in *Latifi* demonstrates the Court's development of a "comprehensive social justice jurisprudence" which adopts a contextual assessment of the financial vulnerability and disenfranchisement faced by Muslim divorcees. Adopting a purposive and context-sensitive approach, the SCI made effective links between the concepts of equality and non-discrimination with "notions of justice, equity, and good conscience and women's human rights" to conclude that Muslim women should be accorded the same right to spousal support as other Indian women. If a Muslim divorcee was unable to

support herself, the Court held the ex-husband was liable to pay maintenance even beyond the iddat period to prevent her from destitution.

While the way in which SCI in *Latifi* utilized a variety of tools to interpret the MWA through a gender-friendly lens to garner a favorable outcome for the claimant is laudable, the Court's reluctance to test the constitutionality of the discriminatory provisions of MWA's constitutionality is problematic. It is argued that a reluctance to test personal laws on the anvil of the equality provisions in the constitutions enables unequal and discriminatory laws to stand.

3.7 Conclusion

It is argued that the SCI in recent jurisprudence recognizes the disadvantaged position of Muslim women within personal law systems and has been able to generate positive outcomes for the claimants by adopting socio context analysis like the South African Supreme court. While courts have granted positive remedies in cases such as Shah Bano and Danial Latifi to Muslim women by ordering husbands to pay maintenance to divorced wives where they are unable to maintain themselves, in most cases the courts have not substantiated their decisions based on the ground of sex equality and avoided engaging with the question of the constitutional validity of the practices alleged to be discriminatory based on sex. [121]

[121]MacKinnon, 193.

4 ISLAM, DIVORCE AND GENDER EQUALITY IN PAKISTAN

4.1 Introduction

The Islamic Republic of Pakistan serves as a fascinating case study with a complex constitutional system which enshrines Islamic law alongside guarantees of gender equality.[122]Many observers would see such a constitutional arrangement to be a recipe for disaster, particularly for the cause of women's rights in Pakistan, due to the constitution's allegiance to "seemingly conflicting norms of Islamic law and gender equality principles."[123] This chapter aims to develop an understanding of the way in which Pakistani courts have evaluated women's rights and Islamic law. It explores the significance of Islamic law within the judicial discourse and assesses the impact that it has on the adjudication of issues pertaining to women's rights within the domain of family laws with a focus on marital dissolution.An assessment of the role of the judiciary particularly in the development of female divorce rights, can help to dispel the stereotype of Islamic law and women's rights being at crossroads with each other and demonstrates that it is indeed possible to reconcile and even advance women's rights using Islamic law within plural legal settings.

The primary focus of this project is to assess the way in which the courts have evaluated religion and gender equality norms within their adjudication, and to assess its impact on women's rightswithin the domain of family laws regulating divorce. It must be noted however, that this study does not include a detailed examination of the role of Islam in the legal system of Pakistan, Islamic law and Islamic jurisprudence require all separate projectsdue to the breadth of discussion which cannot be accommodated within the scope of this study.

[122]Jeffery A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT'L L. 759, 761 (2004)
[123]Yefet 2011, 556

4.2 Legal Provisions

One of the most prominent features of the Constitution of Pakistan, 1973 is its commitment to Islamic law. [124] It contains several provisions that establish the centrality of Islam, including Art. 2 which establishes Islam as the state religion. Further, with the insertion of Article 2A, the Objectives Resolution became a substantive part of the Constitution 1985. Through this new article, the "Islamic character of the Constitution was drastically enhanced"[125]through the stipulation that all laws have to be in conformity with the Quran and Sunnah. [126]

The Pakistan Supreme Court has clarified in its jurisprudence that Article 2A is not a "meta" or "super" article but "equal in weight and status to the other provisions of the Constitution. Accordingly, courts were not authorized to invalidate enumerated constitutional provisions based on any perceived repugnancy to Islamic injunctions."[127] Thus, it was clarified that the power to invalidate laws on the basis of repugnancy with Islamic Injunctions based on Quran and Sunnah only resides with thespecialized court known as the Federal Shariat Court ("FSC") and the Shariat Appellate Bench of the Supreme Court to review legislation for its conformity with Islamic law.[128]

Alongside its commitment to Islam, the Constitution also "pledges allegiance to an impressive catalog of fundamental rights"[129] recognizing most of the guarantees under the Universal Declaration of Human Rights. It is important to note that the Objectives Resolution which "constitutionalizes Islam" also

[124]Asif Saeed Khan Khosa, Heeding the Constitution (1995) 103–13.
[125] Yefet, 563
[126]Pakistan Const. art. 2A.
[127] Yefet, 2011 ; 92 PLD 1992 SC 595, 617 ; Shrin Munir v. Gov't of Punjab, PLD 1990 SC 295, 312
[128]Pakistan Const.Art. 203C–D
[129]Pakistan Const. Arts. 7–40

promotes principles of "freedoms, equality, tolerance and social justice."[130]Article 25 deals with gender equality, containing an unqualified providing that "[a]ll citizens are equal before the law and are entitled to equal protection of the law,"[131] which is considered to be a strong and "inclusive guarantee based on English and American concepts of equality."[132] "Discrimination on the basis of sex alone," is also prohibited under the Constitution but there is an allowance for "any special provision for the protection of women and children."[133]Finally, the Principles of Policy also aim to eradicate discrimination against women and encourage their full participation in all spheres of national life.[134]

The interpretative strategy of the superior judiciary in Pakistan (High Courts, Supreme Court and Federal Shariat Court) has been often based on the use of a "combination of constitutional rights, Islamic law and international human rights in order to advance women's rights."[135]What is particularly interesting in the context of Pakistani courts is that courts' reliance on Islamic law is not limited to referencing or using Islam as one source of law among others in the judicial toolkit. By interpreting the fundamental rights, including the right to equality in the light of Islam, the courts an "indigenised" approach to rights adjudication in Pakistan. [136]

Further, scholars have contended that the Supreme Court of Pakistan and the Federal Shariat Court's reliance on Islamic tools of interpretation has led to the development of a "human rights friendly approach" leading to the expansion of fundamental rights protections under the Constitution.[137] The

[130]Pakistan Const. Art. 2a (incorporating the Objectives Resolution of the Preamble).
[131]Art. 25(1).
[132] Yefet, 564 ; For an overview of Pakistani equal protection principles, I.A. Sharwani v. Government of Pakistan, 1991 SCMR 1041 (regarding discrimination in grant of pension benefits).
[133]Pakistan Const. art. 25(2)–(3).
[134]Art. 34.
[135] Yilmaz, 2014, 162 ; Ali, 2006: 11
[136]Martin Lau, The Role of Islam in the Legal System of Pakistan, The London-Leiden Series on Law, Administration andDevelopment, Martinus Nijhoff Publishers (2005) 98
[137]Yilmaz, Ihsan. (2014) 155

constitutional commitment to injunctions of Islam has been interpreted to mean conformity with general principles of Islamic law such as equality, justice (adl), and welfare (maslaha) rather than with concrete provisions of traditional Muslim law.[138]

I contend that the jurisprudence of the Pakistani courts embraces Islamic law as a source that guides legislative interpretation, fills gaps in statutory law laws, and "to Islamize the judicial discourse."[139] Several decisions have made it clear that Article 2A—and thus Islamic law—provides a basis for *expanding* rather than restricting the scope of constitutionally guaranteed fundamentalrights, and for *adding* new rights to the catalog of fundamentalrights rather than limiting it."[140]On certain occasions the courts have also observed that the human rights contained within Islamic law go further than the rights enshrined in the constitution and within international law. For example, the court has argued that "the right to obtain justice and human dignity are "more pronounced in Islam" thus the court is obligated to take into account the right in Islamic law which has a broader scope of protection. [141] While this chapter does not cover all the instances in which the courts have expanded the scope of rights, it aims provide an insight into the role that the courts have played in expanding women's rights in marital dissolution.

4.3 Liberalizing the Divorce Regime in Pakistan : The Role of Courts

A key piece of legislation in the context of family law (marriage and ancillary matters including maintenance and divorce) is the Muslim Family Laws Ordinance ("MFLO") which was enacted by the legislature in 1961. It aimed to "provide protection to the weaker sex from tyranny, highhandedness and

[138]Yilmaz, Ihsan. (2014) 155
[139] Yefet, 569 ; Muhammad Bashir v. State, PLD 1982 SC 139, 142–43 (courts are dutybound to apply Islamic law to areas of law not occupied by a statute)
[140] Yefet, 570
[141]Human Rights Case, No. 1 of 1992, PSC 1993 Lah. 1358, 1363. ; Yefer, 570

upper hand of man"[142]but it is ironic that the reforms it brought to the divorce regime engaged more with the men's side of the divorce equation. It attempted to place limits upon the "male repudiation prerogative" regarded as the strongest and most typical sign of men's dominance in Muslim society.[143] In this regard, the MFLO applied certain limits on men's "unbridled right to divorce" by imposing a notification requirement on the husband, thus requiring the talaq to be registered.[144]Furthermore, it stipulated all forms of talaq to be revocable[145], which had the effect of making the problematic *talaq al-bid'a* (triple *talaq* pronounced in one sitting) invalid. [146] The reforms brought through the MFLO ignored the women's side of the equation ; the only way Muslim women could initiate a divorce was by exercising the right to fault based talaq under the Dissolution of Muslim Marriages Act ("DMMA") of 1939, which offered very limited grounds for divorce.[147] Within this context, it is contended that setting of limits on the man's right to talaq did not equate to a woman having the freedom to divorce and exercising the same right as the man in dissolving the marriage. This is where the courts stepped in to craft a divorce law, known as the khula doctrine, which has been describe as being "Islamic in flavor, yet Western in practice,"[148]

The liberalization of the divorce regime, undertaken through an expansion of women's divorce powers serves as a notable example of the way in which the Pakistani judiciary "engaged in an unprecedented

[142]Muslim Family Laws Ordinance (VIII of 1961); John L. Esposito, Natana J. Delong-Bas, Women In Muslim Family Law 105 (2d ed. 2001) at 125

[143] Yefet, 2011, 579 ; On the legislative history of the MFLO, see Khawar Mumtaz, *Political Participation:Women in National Legislatures in Pakistan*, *in* Shaping Women's Lives, Laws, Practices & Strategies In Pakistan (Farida Shaheed et al. eds., 1998) , at 319, 328–39. To avoid getting burned by the fallout from tampering with men's traditional rights, the legislature preserved the extrajudicial nature of male divorce.

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

[145]Sohail Akbar Warraich & Cassandra Balchin, *Confusion Worse Confounded: A Critique of Divorce Law and LegalPractice in Pakistan*, *in* Shaping Women's Lives, at 203.

[146] S.7(6), Muslim Family Laws Ordinance (VIII of 1961) (requiring a husband whowishes to divorce to give notice to his wife and authorizing an Arbitration Council to take all steps necessary to bring about a reconciliation).

[147]S.2(iv)–(vi), Dissolution of Muslim Marriages Act (VIII of 1939); Yefet, 2011, 574

"The DMMA establishes new grounds for divorce, in cases of the husband's impotence, virulent venereal disease, insanity lasting two years, or failure to perform marital obligations, but exhibits no sensitivity to the centralityof conjugal life to marriage"

[148]Nadya Haider, *Islamic Legal Reform: The Case of Pakistan and Family Law*, 12 Yale J.L. & Feminism 287 (2000) at 294.

utilization of Islamic law to promote women's marital freedom" by constructing a "no fault, unilateral divorce right for women."[149] I contend that the khula doctrine emerged out of a process of skillful and diligent judicial artistry, which, in sharp contrast to the ambivalent approach adopted by the legislature towards divorce reform, focuses on the female side of divorce equation. Furthermore, the manner in which the doctrine has evolved over the years, has led to the removal of multiple roadblocks in the way of women's right to marital dissolution, creating a more equitable arrangement for women who want to exercise their choice to exit abusive or unhappy marriages.

It is noted that in the initial period of its formulation women could seek khula where there was an irretrievable breakdown of the marriage. [150] It is important to note that while jurists took different positions on the issue of khula, the Court directly relied on the Quran, and clarified that it was not bound by the positions taken by scholars and jurists.

Soon thereafter, by undertaking an innovative approach, the court moved away from the traditional conception of khula as a "mutual consent remedy"[151] and realized that by requiring the husband's consent khula would lose its purpose and put the prerogative back in the husband's hands, enabling him to withhold consent as a way to pester the woman. The rationale behind the doctrine appears to be that women who are unhappy within a marriage should not be forced to stay within an unhappy union.

In 1967 Supreme Court also recognized the inventive remodeling of the traditional doctrine: [152]

> Armed with Islamic justification for women's empowerment, the Court supported

[149] Yefet 2011, 586.
[150] Yilmaz, 2011, 163 ; Balqis Fatima v Najm-ul-Ikram Qureshi, PLD 1959 (Lahore) 566, para 42.
[151] Haider (2000) 340
[152]Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 114

> its decision with both Qur'anic statements and authoritative Prophetic tradition,[153] making Pakistan the first Muslim nation to interpret classical Islamic law to grant women the right to no-fault unilateral divorce.[154]

It is interesting to note that the doctrine underwent reformulation under the auspices of the Federal Shariat Court which imbued it with a stronger Islamic flavor. Contrary to the stereotypical perception that Islamization of laws often leads to unfavorable outcomes for women, the FSC's reasoning made khula more lenient for women, by only asking the wife to show that it was not possible to lead a harmonious life "within the limits prescribed by Allah."[155]

Over the years, the courts have been adopting a liberal approach to khula, using it to enhance women's ability to dissolve marriage and "applying the doctrine almost mechanically."[156] According to recent caselaw, a wife does not need to provide objective nor cogent reasons to ask for khula, nor "does she even have to disclose (let alone prove) the circumstances justifying her aversion for her husband. Merely the statement that she hates her husband suffices."[157]

Other than applying only a small burden of proof on women to obtain khula, as shown above, the courts have also taken into account the financial burden that a khula may impose on the women when she has to return the dower she received from the husband. To deal with this issue they have devised certain tools to reduce the economic burden on the woman. One of the ways they have done that is by increasing the burden of proof on men to prove the consideration they are eligible to receive. [158] While a man always has

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[153] Id. 114, 120–21 (Rahman, J.); *id.* at 144–45 (Mahmood, J.) ; Yefet 2011, 588

[154]Nadia Sonneveld, Khul' Divorce In Egypt: Public Debates, Judicial Practice, And Everyday Life 40 n.40 (2009)<http://dare.uva.nl/document/>129513 ; Yefet 2011, 588

[155] Haider, at 329.

[156] Yefet, 588 ' Yilmaz, 163

[157] Yilmaz 2011, Naseem Akhtar v Muhammad Rafique, PLD 2005 SC 293, 296–97.

[158] Yefet 2011, 589. "For Pakistani courts, this consideration is not meant to indicate the inferiority or weakness of female divorce rights or to function as a punishment or the price of overriding husbandly consent. Quite the contrary, the duty of compensation stems precisely from the *equal* nature of men's *talaq* and women's *khula* dissolution powers:"

to pay the *dower*(the amount paid by a husband to a wife) along with other financial obligations including maintenance, the woman has on certain occasions been released from the obligation to return the dower, "in appropriate circumstances…in cases of longstanding marriages or where the wife risked destitution upon fulfilling the duty of reimbursement."[159]

4.4 Impact of Divorce Reform

The judicial approach in matters of divorce, can be described as being many strides ahead of the Muslim Families Laws Ordinance (MFLO). The MFLO aimed to alleviate the suffering of women, by trying to place certain limitations on the male prerogative and unilateral power in matters of divorce while ignoring the female side of the divorce equation. On the other hand, the Courts have adopted a unique and rather creative approach to move beyond the curtailment of the male prerogative and focus on granting women the power to initiate divorce through khula. Further, the courts' willingness to look beyond the surface and conduct a socio-economic analysis enabled it to take into account the economic vulnerability women within the marriage and overall society. To prevent situations where women would be trapped within abusive or unhappy marriages if they were unable to return the dower amount, the courts have shown willingness to waive the obligation in certain situations.

Ali Kureshe, at 383 (quoting case published in 2004 SD 894)

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

[159] Ishfaq Ali, Manual of Family Laws 76–77 (3d ed. 2008) at 238 (citing case published in 2006 CLC 1033) (noting that a court may order *khula* divorce without return of dower in certain circumstances) ; Yefet 2011, 589-590.

Overall, the doctrinal tools devised by Pakistani courts have made a marked impact in the Muslim divorce regime by creating a "powerful framework for female dissolution rights"[160], and by making khula a feasible and practical option for women. Furthermore, the jurisprudential discourse on this matter shows the adoption of a gender sensitive approach to women's rights through a contextualized evaluation and foresight into the issues women face within marriage and in matters of divorce.

While the court's doctrinal creation of khula has made it easy for women to exit marriages even in the absence of a proper ground for dissolution, there is still a *de jure* difference between a man's right to an extra judicial divorce which does not require him to go to the court, and a woman's right to khula which involves the court. However, the courts have attempted to deliver" *de facto* equality, often explicitly commenting that *khula* should be equated with a man's *talaq*." When adjudicating upon *khula* requests, courts place emphasis upon the equal status of divorce powers of men and women, equating the khula right available to women with the right of talaq accorded to men.[161]It has premised the expansion and liberalization of women's right to dissolve the marriage upon "the letter and spirit of the Qur'an which places the husband and the wife on an equal footing."[162]

4.5 Conclusion

Overall, it is observed that Pakistani courts have used Islamic law as a key interpretative role in their adjudication, going back to the Quran and Sunnah and using judicial *Ijtihad* as tool to come up with answers to contemporary issues instead of relying on textual meaning of statutory law [163] which has enabled the courts to expand the protection of fundamental rights enshrined in the Constitution rather

[160] Yefet, 590
[161]Haider, 2000, at 339.
[162]Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97, 120.
[163]Suo Moto No. 1/K of 2006, Pakistan Citizenship Act 1951, Re: Gender Equality, at 12–13.

than limiting them based on repugnancy with religion. It is fair to assert that in the context of family law, particularly in the divorce regime, the courts have premised the expansion and liberalization of women's right to dissolve the marriage through khula upon Quranic injunctions of equality between men and women.[164]

Contrary to the general stereotype of Islamic law as being opposed to women's rights, the trends in Pakistani jurisprudence indicate that within the judicial reasoning the constitutional commitment to Islam and gender equality have not come at crossroads with each other but can be seen to coexist and even be "mutually reinforcing" within judicial decisions,[165] particularly within matters relating to divorce. Thus, it can be argued that within the Pakistani context, the role of the courts in the expansion of women's rights within the context of marital dissolution has been a positive step towards the achievement of gender equality.

[164]Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97, 120.
[165] Yefet, 590; Humaira Mehmood v. State, PLD 1999 Lah. 494, 514 (noting that the advent of Islam was a milestone in human civilization, as it changed the status of women from that of serfs and chattel to that of equals).

5 COMPARATIVE ANALYSIS OF JUDICIAL ENGAGEMENT WITH SEEMINGLY CONFLICTING NORMS

After a detailed discussion of the ways in which courts in South Africa, India and Pakistan have addressed the issue of gender equality when women's rights are affected by customary, religious or tradition laws and practices, this part of the study endeavors to explore the ways in which the interpretative approaches that the courts have adopted in South Africa, India and Pakistan converge and diverge.

5.1 Purposive approach

It is worth noting that the courts in all three jurisdictions have reached certainfavorable outcomes for gender equality by adopting a purposive approach to understand the rationale behind different rulesinstead of relying on textual interpretation of the black letter law, where it appears to be discriminatory.

One of the key cases in this regard is *Bhe*in which the CCSA, dealt with a constitutional challenge to the practice of male primogeniture under which "only a male who is related to the deceased qualifies as intestate heir" while women are excluded from participating in "the intestate succession of deceased estates."[166] The CCSA emphasizes the importance of examining rules of customary lawwithin the context in which they operated and particularly looking at the purpose they served in society. It noted that the customary law of succession was formulated to preserve the unity of the family unit and under that system, the assets that the heir inherited were intended to be "administered…for the benefit of the family unit as a whole."[167]Thus, by using utilizing the purposive approach, it invalidated the ruleof male

[166] Bhe, 77
[167] Bhe, 76

primogeniture based on its assessment that because the circumstances had changed with nuclear families replacing traditional families, the rule also had to adapt to changing times.

Subsequently, in *Hassam*[168] the CCSA again adopted a purposive approach to in dealing with the constitutionality of excluding spouses in polygynous Muslim marriages from the intestate succession system. The CCSA emphasized the purpose of the act was to prevent widows from falling into destitution. Thus, it found that the exclusion of Muslim widows in polygynous marriages from the protection discriminated on the basis of religion, marital status and gender.

Like the CCSA, the Indian Supreme Court also adopted the purposive approach to in *Latifi*, in applying s.125 of the CrPc to hold men liable to pay continue to pay maintenance to Muslim divorcees if they were unable to support themselves, even though the provisions of statute did not require Muslim men to pay maintenance after iddat. To reach its decision, the Court tried to assess the purpose of the statute, stating that its aim was to provide support to Muslim divorcees and to prevent them from falling into destitution. Keeping in view with the purpose of the statute, it interpreted it in a manner that resulted in the order of maintenance even beyond the iddat period.

While differences could be drawn between a religious and non-religious normative framework, it is fair to point out that Pakistani courts also adopt a purposive approach through the reliance on Quran. Instead of relying on textual interpretation of laws where it seems unfair, the Islamic law framework as contained in Art.2A of the constitution, guides courts to go the Quran understand the purpose of particular principles and to help in the determination of the interpretation that best serves justice. When it comes to issues regarding to women and the right to equality, the courts on many occasions relied on the Quran and to

[168] Hassam v Jacobs NO and Others (CCT83/08) [2009] ZACC 19; 2009 (11) BCLR 1148 (CC); 2009 (5) SA 572 (CC) (15 July 2009) (Constitutional Court of South Africa)

come up with less restrictive interpretations of laws. Scholars have observed that by employing Quranic verses in judicial decisions, the courts have adopted a more gender sensitive approach in order to reach positive outcomes for the women. Resorting to the Quran has also helped courts to expand the protections provided under the constitution. This can be evidence through an assessment of the Pakistani court's jurisprudence on divorce and khula, discussed in Chapter 3.

5.2 Socio Context Analysis

Another approach which the courts have been applying frequently is socio economic analysis which has enabled courts to assess the consequences of applying or not applying a particular rule.

In Bhe, the CCSA assessed the rule of primogeniture within the specific context of South African history and found that excluding women from inheritance on the grounds of gender reinforces "past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality."[169]

By engaging in a socio context assessment, the CCSA took into account the presence of strong patriarchal elements within society and found that the rule of primogeniture wouldalso be an affront to women's dignity under section 10 of the Constitution due to the implication that "women are not fit or competent to own and administer property."[170]In this regard, it also found it was offensive to relegated women to a "perpetual minority" position making them subject to the "control of male heirs."[171]

Then again, in dealing with the matter of a monogamous Muslim widow in *Daniels*, who was being excluded from succession as it was believed that she did not fall within the definition of "spouse" within

[169] Bhe, 91
[170] Bhe, 92
[171] Bhe, 92

the law on intestate succession. In this decision, the CCSA highlighted the importance of relying on the ordinary meaning of the word spouse, included persons married according to Muslim rites. It made it a strong point to criticize the adoption of any other any meaning, keeping in view the earlier "culturally and racially hegemonic appropriation" of the word which had excluded people married under Muslim rites. [172]

It is asserted that there is a parallel between the approach of the CCSA in *Daniels* (to the extent of employing a purposive and socio context analysis). In *Latifi*, the Indian Supreme Court focused on the social welfare objective the secular law of maintenance and held the legislation should be applied to mitigate the financially vulnerable position of Muslim divorcees and prevent them from falling into destitution. Like the CCSI, it acknowledged the patriarchal arrangement of society and considered the economic disadvantage women face in making the determination that Muslim divorcees should receive maintenance from their ex-husbands. Thus, by looking at the socio-economic factors, SCI like the CCSA, recognized the destitution that divorced wives would face if they were left without maintenance, which enabled it to reach positive outcome.

5.3 Position on Personal Laws based on Religion

It isobserved that the CCSA has refrained from engaging in questions regarding the constitutionality of religious practices within the domain of personal laws even if they discriminate on the basis of gender. It has also emphasized time and again that it does not "incorporate any aspect of Sharia law into South

[172] Daniels, 19

African law."[173]For instance, in Hassam, it made it clear that it was not dealing with the "constitutional validity of polygynous marriages entered into in accordance with Muslim rites."[174]

Like the CCSA which has abstained from adjudicating upon the constitutionality of religious practices, the Indian Supreme Court has also been rather reluctant to take a position on the personal laws of minorities including Muslims. In many cases, the ISC abstained from taking a position and chose to send the matter to the legislature. [175]In this regard it has been defined as adopting a "hands-off approach"[176] towards personal laws.

To a certain extent, this position shifted with the Shah Bano decision, the aftermath of which brought India to the precipice of a constitutional crisis. The Shah bano case dealt with a Muslim widow's claim for maintenance under the Code of Criminal Procedure, which was the secular law of maintenance. In Shah Bano, took a strong position by rejecting the husband's claim, that as Muslim Personal Law did not require him to pay maintenance beyond the iddat period, the code shouldn't apply to him. In this case, the way the court conceptualized MPL can in certain ways be compared to the CCSA's approach towards customary law, as not being a fixed body of law but as living or evolving law. What is notable here is that the court engaged with Quranic verses and reasoned there was no way the Quran would have encouraged an arrangement in which divorcees would be pushed into destitution. It applied the code to the situation MPL had not envisioned, i.e. where a divorced wife would not be able to maintain herself. This decision generated great uproar from the clergy who criticized the court for engaging in matters of religious interpretation.

[173] Hassam, 17
[174] Hassam, 17
[175] Maharshi Avadhesh v. Union of India (1994) Suppl (1) SCC 713 and Ahmedabad Women Action Group v. Union of India (1997) 3 SCC 573 ; Herklotz 2017, 304
[176] Indira Jaising, Gender Justice and the Supreme Court, in: B. N. Kirpal et al. (eds.), Supreme but not Infallible: Essays in Honour of the Supreme Court of India, New Delhi 2000, p. 290.

When the matter once more came before the SCI, it applied reasoning similar to the decision in Shah Bano to Latifi. While the way in which SCI utilized a variety of tools to interpret the MWA through a gender-friendly lens to garner a favorable outcome for the claimant is laudable, the Court's reluctance to test the constitutionality of the discriminatory provisions of MWA's constitutionality is problematic. It is argued that a reluctance to test personal laws on the anvil of the equality provisions in the constitution and/or the injunctions of Islamic law derived from the Quran and Sunnah (applicable both to Pakistan and to India to a limited extent) enables unequal and discriminatory laws to stand.

It should be noted however, that the SCI's reluctance to take a position on personal law seems to have taken a dramatic turn with its bold decision in *Shayar Bano* declaring the practice of Muslim divorce through triple talaq to be unconstitutional.[177]In thedecision,which was split three to two, the judges adopted very different reasoning. Three judges held triple talaq to be invalid and the others noted that triple talaq, although undesirable could not be declared void because it was protected under the freedom of religion.

The reasoning adopted by Justice Joseph, who joined the majority judgement, resembles the position adopted by Pakistani courts. Like the Pakistani courts, he engaged with Quranic verses and argued that triple talaq was contrary to the basic tenets of the Holy Quran as it eliminates the chance for reconciliation.

It is fair to point out that any discussion regarding women's rights, in particular the right to equality attracts a discussion on Islamic law in the jurisprudence of Pakistani courts. On most occasions, the court's assessment of Islamic injunctions is based on the approach of going back to the Quran and use it to come up with interpretations which are less restrictive, and gender sensitive. Reliance in this regard is

[177] Herklotz, 2017, 300. By way of triple talaq (talaq-e-biddat) Muslim men could divorce their wives instantly and without state intervention by pronouncing the word "talaq" thrice.

placed on verses which stipulate the equal status of men and women within Islam, instead of reliance on the views of religious scholars. Interpreting matters in light of Islamic injunctions has on many occasions helped in expanding the scope of rights available to women in Pakistan, as evidenced by the expansion of powers available to women in marital dissolution, through the introduction and reformulation of khula which is not subject to the consent of the man, which is a move in the positive direction towards the equalization of marital dissolution powers. There are clear benefits to use Islamic law as a tool to expand the scope of rights available to women and to enable the judiciary to continue to reform MPL for a move towards a greater realization of women's rights. However, this approach requires one to be aware of the danger that lies in restricting women's rights only to the scope of religious interpretation, as it limits the assessment of issues and limits claimants from bringing forth arguments which are not premised on Islam.[178]

5.4 Conclusion

Based on the cases which were assessed within this study, it can be observed that the courtsin South Africa, India and Pakistan seem to converge on the use of a purposive approach along with an engagement with socio context analysis to take into account the disadvantage faced by women within patriarchal societies.

[178]Shaheed, F. and Shirkat Gah. "Shaping women's lives : laws, practices and strategies in Pakistan." (1998) 23

6 Conclusion

This study has found that courts employ a combination of tools to balance between gender equality and freedom of culture or religion which may differ in their formulation but align on certain approaches. It finds that courts have reached favorable outcomes for gender equality by adopting a purposive approach to understand the rationale behind different rule and practices, interpreting rights in a manner that brings them in conformity with certain foundational principles including equality, diversity, dignity and social justice, assessing the disadvantage that would be caused to women taking into account their socio-economic vulnerability within patriarchal societies and have chosen to interpret rights in a manner that avoids causing any further prejudice or disadvantage to women.

Relying on the assessment of cases which favor women's equality (to varying degrees) within this study, it is argued that the courts in South Africa, India and Pakistan seem to converge on the use of a purposive approach. Moreover, they also engage through socio context analysis with the reality of women being in a vulnerable position as compared to men, to factor into their adjudication the disadvantages that women face within patriarchal societies.

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