

April 2020

## Consent in Marriage: A Radical Feminist Analysis of Pakistani Law

Iqra Saleem Khan

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Comparative and Foreign Law Commons](#), [Criminal Law Commons](#), [Family Law Commons](#), and the [Law and Gender Commons](#)

---

### Repository Citation

Iqra Saleem Khan, *Consent in Marriage: A Radical Feminist Analysis of Pakistani Law*, 26 Wm. & Mary J. Women & L. 671 (2020), <https://scholarship.law.wm.edu/wmjowl/vol26/iss3/6>

Copyright c 2020 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmjowl>

# CONSENT IN MARRIAGE: A RADICAL FEMINIST ANALYSIS OF PAKISTANI LAW

IQRA SALEEM KHAN\*

- I. PAKISTANI MARITAL RAPE LAWS
- II. MARITAL RAPE AND SPOUSAL RIGHTS UNDER ISLAMIC LAW
- III. RADICAL FEMINISM ON SEX, RAPE AND ‘CONSENT’
- IV. LEGAL SEX IN PAKISTAN
- V. OBLIGATION TO ‘CONSENT’
- VI. OBLIGED TO ‘CONSENT’
- VII. RECLAIMING SEXUAL AUTONOMY
  - A. *Reconceiving Marital Rape*
  - B. *Reconceiving Sex*

In *Abdul Kadir v. Salima*, Mahmood J summarised the nature of a Pakistani wife’s duties under Islamic Law.<sup>1</sup> The *nikkah* contract “imposes submission on the wife when summoned to the couch and confers on him the power of correction when she is disobedient or rebellious.”<sup>2</sup> Earlier, a similar pronouncement was made across the ocean in the United Kingdom by Sir Matthew Hale that through the marriage contract the “wife hath given herself to the husband, consent of which she cannot retract.”<sup>3</sup> Marital rape was later recognised as an offence in the UK by the House of Lords in *R v. R*.<sup>4</sup> In Pakistan, however, the jurisprudence behind the decision in *Abdul Kadir* continues to prevail.<sup>5</sup> This Essay will assess the offence of rape in Pakistan and analyse the difficulty in prosecuting marital rape cases. The discussion will also focus on the underlying source of this difficulty, being the corresponding rights of spouses under Islamic law, particularly the husband’s right to obedience and sexual access to the wife.<sup>6</sup> A critique of these spousal rights will then be presented using

---

\* Iqra Saleem Khan is a lecturer on Islamic Law and Legal Theory at The Institute of Legal Studies, Pakistan. She is a member of the Women’s Action Forum, Lahore and serves as an editor for the socio-legal feminist journal *Bayan*. Email iqra@tils.edu.pk.

1. See *Abdul Kadir v. Salima*, (1886) ILR 8 All 149 (Pak).

2. See *id.*

3. SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 628 (Sollom Emlyn ed., 1778).

4. *Regina v. R.*, (1991) UKHL 12 (Pak.).

5. See Shahbaz Ahmad Cheema, *Revisiting Abdul Kadir v Salima: Locus Classicus on Civil Nature of Marriage?*, 49 AL-ADWA 63 (2018).

6. See Mohd Mukhils Bin Mohd Nasri & Mohd Afandi Bin Awang Hamat, *Islamic Perspective on the Legality of Marital Rape in the Framework of Maqasid Al Shariah*, 3 6TH INTERNATIONAL CONFERENCE ON ISLAMIC JURISPRUDENCE 161, 162 (2017).

radical feminist jurisprudence, particularly the works of Catherine MacKinnon, Robin West, and Andrea Dworkin. The subject of inquiry is the nature of a Pakistani wife's 'consent' in light of social, economic and sexual inequalities prevalent in an Islamic marriage and whether exploitation of the same renders a consent-based definition of rape redundant.

### I. PAKISTANI MARITAL RAPE LAWS

Before 2006, Section 6 of Hudood Ordinance, 1979 defined rape (*zina bil-jabr*) as:

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

- (a) against the will of the victim,
- (b) without the consent of the victim,
- (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt, or
- (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.<sup>7</sup>

This language explicitly excluded marital rape from the legal definition of rape till 2006, when the Protection of Women (Criminal Laws Amendment) Act was enacted and the definition of the offence was amended:

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

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

---

7. The Offence of Zina (Enforcement Of Hudood) Ordinance, No. 7 of 1979, § 6(1) THE GAZETTE OF PAKISTAN EXTRAORDINARY, Feb. 9, 1979 (emphasis added) [hereinafter Zina Ordinance].

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.<sup>8</sup>

The new language is broad enough to include marital rape, as ‘a woman’ could refer to the perpetrator’s own wife.<sup>9</sup> Nevertheless, to date there have not been any reported cases involving marital rape.<sup>10</sup> A provision pertaining to ‘unnatural intercourse’ with a man, woman, or animal has been invoked in negligible instances by women accusing their husbands of non-consensual sodomy,<sup>11</sup> however that issue is separate and unrelated for our purposes.<sup>12</sup> This is not to say that there are no occurrences of non-consensual intercourse as defined in section 375 of the Pakistan Penal Code (PPC).<sup>13</sup> The scant number of local surveys conducted in Pakistan confirm this.<sup>14</sup> In a 2003 domestic violence survey, nearly 47% of married women living in Islamabad and Rawalpindi reported having non-consensual sex.<sup>15</sup> Zaman and Zia argue that the absence of any reported marital rape cases is likely due to “the ambiguity of the law and socio-cultural lack of acceptance of marital rape as an offence.”<sup>16</sup> These socio-cultural reasons include Islamic injunctions that impose rigid gendered rights and duties on each spouse.<sup>17</sup> It is also worth noting that Article 227 of the Pakistani Constitution requires all laws to be in conformity with the Quran and Sunnah.<sup>18</sup> Therefore, in order to understand the

---

8. The Penal Code, Act No. 45 of 1860, PAK. PENAL CODE § 375 (1860) (emphasis added).

9. *Id.*

10. Gulmeena Roghani, *Marital Rape: As Heinous as a War Crime*, COURTING THE LAW (Feb. 16, 2018), <http://courtingthelaw.com/2018/02/16/commentary/marital-rape-as-heinous-as-a-war-crime> [<https://perma.cc/3YZQ-CWFV>].

11. Staff Report, *Man in Jhelum Arrested for ‘Marital Rape and Sodomy’ on Wife’s Complaint*, PAKISTAN TODAY (Jan. 18, 2018), <https://www.pakistantoday.com.pk/2018/01/18/man-in-jhelum-arrested-for-marital-rape-and-sodomy-on-wifes-complaint> [<https://perma.cc/6DC2-27H2>].

12. The Penal Code § 377. Unnatural offences:

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

13. The Penal Code § 375.

14. See Ali Shaikh, *Is Domestic Violence Endemic in Pakistan: Perspectives from Pakistani Wives*, 10 PAK. J. MED. SCI. 23, 23 (2003).

15. *Id.* at 27.

16. See SARAH ZAMAN & MALIHA ZIA, WOMEN’S ACCESS TO JUSTICE IN PAKISTAN (2012), [https://www.ohchr.org/documents/HRBodies/CEDAW/AccessToJustice/AuratFoundationAndWarAgainstRape\\_Pakistan.pdf](https://www.ohchr.org/documents/HRBodies/CEDAW/AccessToJustice/AuratFoundationAndWarAgainstRape_Pakistan.pdf) (last visited Mar. 22, 2020).

17. See Qur’an 4:34.

18. See PAKISTAN CONST. art. 227, § 1. Section 1 Provisions relating to the Holy Quran and Sunnah: “(1) All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.”

legal nature of marriage in Pakistan, a discussion regarding the features of marriage under Islamic law becomes necessary.

## II. MARITAL RAPE AND SPOUSAL RIGHTS UNDER ISLAMIC LAW

The relationship between a husband and wife in Shariah is best elucidated by Surah An-Nisa, verse 34 in the Quran<sup>19</sup>: “Men are the protectors and maintainers of women, because Allah has given the one more [strength] than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in [the husband’s] absence what Allah would have them guard.”<sup>20</sup>

Marriage in Islamic law is a civil contract.<sup>21</sup> Each spouse has rights and corresponding duties towards the other within the union.<sup>22</sup> The husband, having authority (*qiwama*) over the wife, has an obligation to provide for her monetary welfare i.e., maintenance (*nafaqa*).<sup>23</sup> The wife has a reciprocal duty to obey (*ta’a*) the husband.<sup>24</sup> Abdur Rahman I. Doi remarks that this arrangement reflects the need for a figurehead in marriage to maintain peace and harmony.<sup>25</sup> The extent of the wife’s obedience towards the husband, however, is contested amongst jurists.<sup>26</sup> The majority argue that obedience extends to both social and sexual matters, in that the wife must not leave the matrimonial home without the husband’s permission and must fulfill every (legitimate) demand of the husband.<sup>27</sup> The minority, such as Asghar Ali Engineer, require obedience only in sexual matters.<sup>28</sup> It is argued that since intercourse outside of marriage is prohibited and criminalised under Shariah, spouses in a marriage have a right to sexual intercourse with, and company of each other.<sup>29</sup> This, it is

19. The Qur’an is the primary and most authoritative source of Islamic Law. All Pakistani laws are either expressly or tacitly in line with Quranic injunctions.

20. Qur’an 4:34 (stating “guarding what Allah would have them guard,” which here refers to the honor of the husband).

21. See Kecia Ali, *Marriage Contracts in Islamic Jurisprudence*, THE FEMINIST SEXUAL ETHICS PROJECT (June 19, 2003), <https://www.brandeis.edu/projects/fse/muslim/marriage.html> [<https://perma.cc/TEL8-ZN3M>].

22. See *id.*

23. GENDER AND EQUALITY IN MUSLIM FAMILY LAW: JUSTICE AND ETHICS IN THE ISLAMIC LEGAL TRADITION 10 (Ziba Mir-Hosseini et al. eds., 2013) [hereinafter GENDER AND EQUALITY IN MUSLIM FAMILY LAW].

24. See *id.*

25. See ABDUR RAHMAN I. DOI, SHARIAH: ISLAMIC LAW 216–17 (2 ed., 2008).

26. See Carolyn Fluehr-Lobban & Lois Bardsley-Sirois, *Obedience (Ta’a) in Muslim Marriage: Religious Interpretation and Applied Law in Egypt*, 21 J. COMP. FAM. STUD. 39, 40 (1990).

27. See *id.*

28. See ASGHARALI ENGINEER, THE RIGHTS OF WOMEN IN ISLAM 6–7 (2008).

29. See, e.g., *Islamic Scholar: Wife Cannot Deny Husband Sex Even When Riding on*

argued, is to prevent adultery and illicit sexual behaviour in society.<sup>30</sup> If, then, the wife refuses the sexual advances of her husband without a valid justification (health, menstruation or fasting), she is deemed to be disobedient (*nashiza*) and in breach of her moral and religious duties.<sup>31</sup> As a consequence, she loses her reciprocal right to maintenance from the husband.<sup>32</sup> No corresponding penalty exists for the sexually unwilling husband.<sup>33</sup> To prevent real or perceived disobedience from the wife, the husband can also physically chastise her.<sup>34</sup> Surah An-Nisa, verse 34 continues “. . . and the ones whom you fear their non-compliance, then admonish them and forsake them in their beds, and strike them (i.e., hit them lightly) yet in case they obey you, then do not seek inequitably any way against them.”<sup>35</sup>

It is no surprise then, that marital rape as a concept is largely unknown in traditional Islamic law. Forced intercourse, if coupled with excessive violence or cruelty (*dhara*), may constitute grounds for judicial dissolution of marriage for the *Maliki* school of thought.<sup>36</sup> However, non-consensual intercourse with a wife by itself is not a recognized legal offence in any of the Sunni or Shia schools of thought, although many Islamic jurists consider it a moral sin.<sup>37</sup>

Islamic feminists have criticised these injunctions as a product of patriarchal interpretations of ambiguous sacred texts by pre-twentieth century Islamic jurists.<sup>38</sup> Ziba Mir-Hosseini, for example, argues that these discriminatory rulings are in direct contradiction with equality and justice which are amongst the undisputed objectives of Shariah.<sup>39</sup>

---

*a Camel*, THE JERUSALEM POST (Apr. 28, 2015), <https://www.jpost.com/International/islamic-scholar-Wife-cannot-deny-husband-sex-even-when-riding-on-a-camel-399454> [<https://perma.cc/K8YZ-HCDE>] [hereinafter *Islamic Scholar*].

30. See, e.g., Betwa Sharma, *Islam's Sex License*, THE DAILY BEAST (Jul. 14, 2017), <https://www.thedailybeast.com/islams-sex-licenses> [<https://perma.cc/582W-2NZ5>].

31. See *Islamic Scholar*, *supra* note 29.

32. See Muhammad Jawad Mughniyya, *The Right to Maintenance*, AL-ISLAM, <https://www.al-islam.org/five-schools-islamic-law-sheikh-muhammad-jawad-mughniyya/right-maintenance> [<https://perma.cc/89N8-E95A>].

33. See, e.g., Naqiba Barikzai, *Afghanistan: The Taboo of Sexual Rejection*, REFWORLD, <https://www.refworld.org/docid/58875bbb4.html> [<https://perma.cc/J9JX-G7SU>].

34. See Qur'an 3:34.

35. See Qur'an 4:34. Doi asserts that while this is generally discouraged by jurists, if the husband finds the wife's behaviour going against Islam then "beating in a light manner may become necessary." Doi, *supra* note 25, at 217.

36. Delfina Serrano, *Rape in Maliki Legal Doctrine and Practice (8th–15th Centuries C.E.)*, 5 HAWWA 166, 170 (2007).

37. Nasri & Hamat, *supra* note 6, at 162, 168–75.

38. See GENDER AND EQUALITY IN MUSLIM FAMILY LAW, *supra* note 23, at 19–20.

39. See GENDER AND EQUALITY IN MUSLIM FAMILY LAW, *supra* note 23, at 8. The organisation *Musawah*, comprised of Islamic feminists, is proactively working to change patriarchal interpretations in Islamic Law from within the Islamic legal tradition. See MUSAWAH: FOR EQUALITY IN THE FAMILY, <https://www.musawah.org> [<https://perma.cc/P5V5-UGGG>] (last visited Mar. 22, 2020).

Fatima Mernissi, similarly, highlights the importance placed on women's sexual needs in primary Islamic sources, conveniently disregarded by orthodox Islamic jurists.<sup>40</sup>

Nonetheless, several modern Shariah-based legal systems have incorporated traditionally interpreted features of marriage as enforceable spousal rights and duties.<sup>41</sup> Examples include the UAE Federal Law (28) of 2005 on Personal Status,<sup>42</sup> the Tunisian Code of Personal Status,<sup>43</sup> and the Libyan Law of Personal Status No.10 of 1984.<sup>44</sup> In South Asia, the earlier quoted case of *Abdul Kadir v. Salima* is cited as an authority on the nature of Islamic marriage and its legal implications.<sup>45</sup> In Pakistan, Section 9 of the Muslim Family Law Ordinance 1961 imposes a legal duty on the husband to maintain his wife and children.<sup>46</sup> Paris Diwan argues that this duty is contingent upon the wife submitting to the husband's authority, obeying his reasonable orders, and remaining faithful.<sup>47</sup> The suit for restitution of conjugal rights, a remedy available in India, Pakistan, and Bangladesh, allows the husband to enforce his legal right of obedience through the courts.<sup>48</sup> In *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*, the court likened the remedy to specific performance, highlighting the 'proprietary interest' of the husband in the wife.<sup>49</sup> Although the court cannot physically compel the wife to return to her husband, once a decree of restitution has been awarded, the husband no longer has a legal duty to maintain his *nashiza* (disobedient) wife.<sup>50</sup>

The foregoing discussion indicates the reciprocal rights and duties of the spouses within Islamic Law, as traditionally interpreted and incorporated in Modern legislatures. The husband is the head of the household with economic, social and sexual powers vested in him by

40. FATIMA MERNISSI, *BEYOND THE VEIL: MALE-FEMALE DYNAMICS IN MODERN MUSLIM SOCIETY* (2d ed., 1987).

41. See GENDER AND EQUALITY IN MUSLIM FAMILY LAW, *supra* note 23, at 20–21.

42. See Federal Law No. (28) of 2005 on Personal Status, ch. 5: Mutual Rights (U.A.E.); George Sfeir, *The Tunisian Code of Personal Status*, 11 MIDDLE EAST J. 309, 310 (1957).

43. See Sfeir, *supra* note 42, at 310.

44. See Law of Personal Status No.10 of 1984, arts. 17–18 (Lybia).

45. See Cheema, *supra* note 5, at 63.

46. Muslim Family Law Ordinance, No. 8 of 1961 § 9, THE GAZETTE OF PAKISTAN EXTRAORDINARY, 1961 ("Maintenance. (1) If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may, in addition to seeking any other legal remedy available, apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.")

47. PARAS DIWAN, *MUSLIM LAW IN MODERN INDIA* (3d ed. 1985).

48. See Cheema, *supra* note 5, at 72.

49. See *Moonshee Buzloor Runeem v. Shumsoonissa Begum*, (1867) 11 M.I. A. 551.

50. See *Mst. Sahi Bi v. Khalid Hussain*, (1973) SCMR 577 (Pak.).

virtue of God, whereas the wife is deemed an economic and social dependant of the husband.<sup>51</sup>

### III. RADICAL FEMINISM ON SEX, RAPE AND ‘CONSENT’

The radical feminist view considers gender roles a product of male sexual domination of women.<sup>52</sup> Domination is constitutive of what being a woman *is* in a patriarchal society; to be a woman is to be sexually submissive and to be objectified.<sup>53</sup> She *provides* sex—while he *receives* it—in what is an unequal hierarchy of power relations.<sup>54</sup> Society reinforces this hierarchy; pornography fetishes it; the law protects it.<sup>55</sup> As Catherine MacKinnon asserts: “The state is male in the feminist sense: the law sees and treats women the way men see and treat women . . . . The state’s formal norms recapitulate the male point of view on the level of design.”<sup>56</sup>

Nowhere does this apply more aptly than to the model of marriage under Islamic law in Pakistan. As discussed earlier, sexual submission is an express obligation of the wife.<sup>57</sup> It is so important, that marriage isn’t deemed complete and maintenance isn’t deemed obligatory on the husband until the marriage is consummated.<sup>58</sup> Once she has submitted to the husband sexually, she can no longer withhold or refuse sex to compel the husband to pay *mahr*.<sup>59</sup> The Quran refers to wives as “tilth” to be “plowed” by their husbands when and however they wish.<sup>60</sup> Andrea Dworkin suggests that under

51. See Cheema, *supra* note 5, at 17.

52. See *id.* at 27.

53. John Gardner, *The Opposite of Rape*, 38 OXFORD J. OF LEGAL STUD. 48, 66 (2017).

54. Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL’Y REV. 431, 452 (2016).

55. See *id.* at 449–50.

56. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 162 (1989).

57. See Nasri & Hamat, *supra* note 6, at 165–66.

58. See Cheema, *supra* note 5, at 74.

59. Mahr is an obligatory monetary gift made by the husband to the wife at the time of marriage. Although earlier jurists considered mahr a consideration for the marriage contract, Pearl and Menski assert that it is an *effect* of marriage that signifies the new legal, social and sexual status of the wife. See DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW 178–79 (3d ed., 1998). Abu Hanifa, the founder of the *Hanifi* school of thought, opined that a wife can still refuse herself to her husband after consummation. Whereas Abu Yusuf and Shaybani deem that consummation forfeits all future rights of the wife to refuse her husband’s sexual rights. In India, the latter is binding. See *Mt. Anis Begam & Ors. v. Malik Muhammad Istafa Wali Khan*, (1933) AIR All 634 (Ind.). In Pakistan and Bangladesh, the opinion of Abu Hanifa holds authority. See *Rahim Jan v Muhammad*, (1955) PLD 2 Lahore 122 (Pak.).

60. Qur’an 2:223 (“Your women are cultivation for you; so approach your cultivation whenever you like . . . .” This *surah* was revealed in the context of what sexual positions the husbands can use with their wives. The language indicates the expected passivity of a wife in sex.)

conditions of patriarchy, sex is male-centric and coercive.<sup>61</sup> Through intercourse, the woman “is occupied—physically, internally, in her privacy.”<sup>62</sup> In a marriage under traditional Muslim Law, this becomes a central feature of her submissive experience as a woman.<sup>63</sup>

Rape, then, is but a manifestation of the far-reaching oppression and discrimination against women in society.<sup>64</sup> Rather than an act done by one individual to another, it is a *social practice* that sustains male domination through oppression and intimidation.<sup>65</sup> In legal terminology, consent is defined as “a voluntary agreement to another’s proposition.”<sup>66</sup> John Gardner, despite being a proponent of consent-based legal definition of rape, nonetheless acknowledges that “our fixation with sexual consent tends to affirm that women are sexual commodities, sex objects, available on certain terms for men to act upon.”<sup>67</sup>

Legal definitions of rape based on ‘consent’ disregard the fact that under unequal conditions “many women acquiesce in or tolerate sex they cannot as a practical matter avoid or evade.”<sup>68</sup> In Pakistan, a brief look at gender statistics is enough to prove these unequal conditions.<sup>69</sup> In marriage, the husband’s authority and right of obedience under Muslim family law also demonstrates this inequality.<sup>70</sup> Therefore, in Pakistan, the question of marital rape is not about the absence or presence of consent.<sup>71</sup> Rather, it pertains to the very nature of a wife’s ‘consent’.<sup>72</sup>

61. See ANDREA DWORKIN, INTERCOURSE 63–67 (1997).

62. *Id.* at 122.

63. See MacKinnon, *supra* note 54, at 442.

64. See *id.*

65. Susan Griffin, *Rape: The All-American Crime*, RAMPARTS MAGAZINE, Sept. 1971, 26–35 (stating “rape is a kind of terrorism which severely limits the freedom of women and makes women dependent on men . . . The threat of rape is used to deny women employment . . . The fear of rape keeps women off the streets at night. Keeps women at home. Keeps women passive and modest for fear that they be thought provocative.”).

66. *Consent*, COLLINS DICTIONARY OF LAW (3 ed. 2006), available at <https://legal-dictionary.thefreedictionary.com/consent> [<https://perma.cc/ZY97-PT4F>] (last visited Mar. 22, 2020).

67. Gardner, *supra* note 53, at 69.

68. MacKinnon, *supra* note 54, at 465.

69. Economically, the workforce constitutes thrice as many men as women. Only 3.6% of women have any landholdings. Politically, women occupy only 17% of the seats in Parliament. The Muslim Law of inheritance grants women half the inheritance of men. (For more information, see Naima Tabassum, WOMEN IN PAKISTAN: STATUS IN SOCIO-CULTURAL AND POLITICO-LEGAL DOMAINS, HIGHER EDUCATION COMMISSION PAKISTAN (2016).)

70. *Id.* at 155.

71. See *id.* at 259.

72. See Makhdoom Shahab-ud-Din, *Marital Rape a Non-Criminalized Crime*, DAILY TIMES (Apr. 13, 2019), <https://dailytimes.com.pk/376098/marital-rape-a-non-criminalized-crime> [<https://perma.cc/VKZ5-N6HU>].

## IV. LEGAL SEX IN PAKISTAN

In Western Jurisdictions, there are no laws restricting sex out of wedlock.<sup>73</sup> As long as there are two adult parties, along with the presence of consent—however troublesome a concept—the sex is deemed to be ‘legal’.<sup>74</sup> In Pakistan, however, sexual intercourse can *legally* only take place within a heterosexual marriage.<sup>75</sup> Sex outside marriage is criminalised and is classified into two separate offences: Adultery (*zina*) and fornication.<sup>76</sup> Adultery, in which at least one of the parties is or has been previously married, is a *hadd* (offence against God) in Pakistan and is liable to stoning to death, ten-year imprisonment or thirty lashes depending on the evidence available.<sup>77</sup> Whereas, fornication is where both parties have never been married.<sup>78</sup> After 2006, the offence is governed by s.496B of Pakistan Penal Code and is punishable by five years in prison or a fine.<sup>79</sup>

Asifa Quaraishi argues that these laws have been used to target unmarried women, due to pregnancy, which is considered sufficient evidence for imprisonment and lashes, whilst men are given the benefit of the doubt due to lack of evidence.<sup>80</sup> A particularly appalling example is the case *Safia Bibi v. The State*,<sup>81</sup> where an unmarried blind girl was charged with fornication and sentenced to three years of imprisonment, fifteen lashes and a 1000 rupee fine due to the ‘proof’ of her pregnancy, whereas the two men she accused of raping her were acquitted due to lack of evidence.<sup>82</sup> Before 2006, accusing a man of rape could be used as a confession of *zina*/fornication by the victim in the event of insufficient evidence of rape.<sup>83</sup>

---

73. See, e.g., Sasha Ingber, *Utah Repeals 1973 Law That Criminalized Sex Outside of Marriage*, NPR (Mar. 29, 2019), <https://www.npr.org/2019/03/29/708042810/utah-repeals-1973-law-that-criminalized-sex-outside-of-marriage> [<https://perma.cc/B68A-F2QN>].

74. See, e.g., *Massachusetts Law About Sex*, MASS.GOV (June 12, 2019), <https://www.mass.gov/info-details/massachusetts-law-about-sex> [<https://perma.cc/5WAC-76WW>].

75. In the event of rape, if proved in court, the victim becomes exempt from these laws, while the perpetrator is considered to commit *zina*/fornication.

76. *Zina Ordinance*, *supra* note 7, at §§ 4–5.

77. *Id.* If four males testify to witnessing the *zina*, the punishment is stoning to death. Evidence falling short of that results in the perpetrator getting jailed and/or flogged (*tazir*).

78. Protection of Women Act, No. 45 of 1860, § 496B, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Dec. 1, 2006.

79. *Id.* (“Fornication: (1) A man and a woman not married to each other are said to commit fornication if they wilfully have sexual intercourse with one another. (2) Whoever commits fornication shall be punished with imprisonment for a term which may extend to five years and shall also be liable to a fine not exceeding ten thousand rupees.”)

80. Asifa Quaraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*, 18 MICH. J. INT’L L. 287 (1997).

81. (1985) P.L.D. Fed. Shariat Ct. 120 (Pak.).

82. *Id.*

83. Quaraishi, *supra* note 80.

These laws, together with cultural segregation, ensure that for the vast majority of women in Pakistan, the only experience of sexual intercourse is within marriage.<sup>84</sup> The stakes in a law regarding marital rape, thus, are raised even higher, especially since many women in Pakistan are pressured and even forced into arranged marriages.<sup>85</sup> Against this background, a question that needs serious reflection is this; in a country where many women don't even have the power to 'consent' to a marriage, how many truly 'consent' to have sex *within* that marriage?

The Pakistani legal discourse on rape has not even begun to grapple with this dilemma. By borrowing an already inadequate consent-based definition of (marital) rape from the West, the context in which Pakistani women are compelled to have sex is completely ignored.<sup>86</sup>

#### V. OBLIGATION TO 'CONSENT'<sup>87</sup>

A qualitative study of wives in Iran—a neighbour state also governed by Islamic Law—found that the majority of women interviewed considered “unconditional sexual submission” towards the husband as their main religious duty.<sup>88</sup> These women also reported

---

84. RURAL DEVELOPMENT INSTITUTE, WOMEN'S INHERITANCE RIGHTS TO LAND AND PROPERTY IN SOUTH ASIA: A STUDY OF AFGHANISTAN, BANGLADESH, INDIA, NEPAL, PAKISTAN, AND SRI LANKA 58 (2009), [https://www.landesa.org/wp-content/uploads/WJF-Womens-Inheritance-Six-South-Asian-Countries.FINAL\\_12-15-09.pdf](https://www.landesa.org/wp-content/uploads/WJF-Womens-Inheritance-Six-South-Asian-Countries.FINAL_12-15-09.pdf) (last visited Mar. 22, 2020) (Women are expected to maintain the honour of their families which tends to restrict their freedom of mobility, dress, etc. and they are generally expected to take care of household tasks.).

85. Pakistani Law requires the female's “consent” for a marriage contract to be valid. See *Abdul Waheed v. Asthma Jahangir*, (1997) PLD Lahore 301. Despite this, forced arranged marriages are a common feature of Pakistani culture. According to the 2016 statistics released by the UK Forced Marriage Unit (FMU), 43% of cases involving a victim who was either at risk of being or had already been in a forced marriage that the Unit handled originated from Pakistan. UK HOME OFFICE AND FOREIGN & COMMONWEALTH OFFICE, FORCED MARRIAGE UNIT STATISTICS (2016), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/597869/Forced\\_Marriage\\_Unit\\_statistics-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/597869/Forced_Marriage_Unit_statistics-2016.pdf) (last visited Mar. 22, 2020).

86. See Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 U. FLA. L. REV. 45, 63–66 (1990); see also MacKinnon, *supra* note 54, at 435–36.

87. The language of *obligation* versus *obliged* is borrowed from H.L.A. Hart's linguistic philosophy in *The Concept of Law*. Obligation towards a rule is an internal phenomena, whereby in the event of deviation from the rule, the subject has a critical reflective attitude (CRA) recognising a broken standard of conduct, even if the subject personally doesn't like or want to follow that standard of conduct. An obliged subject, on the other hand, experiences no such critical reflection, merely following a rule due to fear of an unwanted consequence i.e., sanction. While Hart uses this in the context of positive law, the language is especially useful in differentiating how a woman may consent to intercourse she feels an obligation towards, versus her consent procured through fear of a consequence i.e., obliged. Both have negative consequences for women's freedom to have sex. The law of rape in Pakistan fails to adequately deal with both. See H.L.A. HART, *THE CONCEPT OF LAW* (1961).

88. Zohreh Ghorashi, Mohammad Najafi & Effat Merghati Khoei, *Religious Teachings*

experiencing feelings of guilt and shame if they were unable to fulfil this religious duty, believing that they were not good Muslims.<sup>89</sup> A similar qualitative study in Pakistan, after interviewing participants living in Karachi, noted “Many men and also women believe that ‘sex is a man’s right in marriage.’”<sup>90</sup>

This is directly in line with authoritative religious traditions.<sup>91</sup> One *hadith* (saying) widely attributed to Prophet Muhammad states, “If a man calls his wife to his bed and she refuses, and he spends the night angry with her, the angels will curse her until morning.”<sup>92</sup>

When wives believe it is their religious *obligation* to physically satisfy the husband, does their consent to sex truly constitute a “voluntary” agreement? If so, *to what end?* “Consent,” as understood traditionally, fails to answer this question. It disregards the surrender of sexual autonomy and bodily integrity by a wife in an Islamic marriage to meet a prescriptive standard of piety. The Iranian study contends, “The emphasis on sexual obedience is so deeply rooted in the Islamic culture that even women who have adequately tried to be sexually obedient still may feel guilty . . . . This guilt weakens the woman’s sexual agency and in turn threatens her mental health and welfare.”<sup>93</sup>

Sex is no longer an activity two partners freely partake in for mutual pleasure. Rather, “consent” here legitimises cases where wives have sex that they don’t initiate, want, or desire, but still ‘voluntarily’ agree to.<sup>94</sup> The analysis of Robin West in this regard is particularly illuminating:

What the victim of routinised rape within marriage does, sexually, is a product not of what the victim wills but of what her attacker demands . . . she wants literally to please him rather than herself because to please herself is too dangerous. The victim of marital rape gains survival, but she sacrifices self-sovereignty.<sup>95</sup>

---

*and Sexuality of Women Living in Rafsanjan: A Qualitative Inquiry*, 15 INT’L J. REPROD. BIOMED. (YAZD) 771, 773 (2017).

89. *Id.* at 774.

90. Rafat Hussain & Adeel Khan, *Women’s Perceptions and Experiences of Sexual Violence in Marital Relationships and Its Effect on Reproductive Health*, 29 HEALTH CARE FOR WOMEN INT’L 468, 477 (2008).

91. *Id.*; Hadith No. 143, available at <https://sunnah.com/muslim/16/143> (last visited Mar. 22, 2020) (Muslim wives believe it is a sin to refuse sexual intercourse when demanded by the husband, which is punishable in the hereafter, purportedly through hellfire.).

92. See Hadith No. 143, *supra* note 91.

93. Ghorashi, Najafi & Khoei, *supra* note 88, at 774.

94. See MacKinnon, *supra* note 54, at 440, 447.

95. Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 U. FLA. L. REV. 45, 69 (1990).

Consider this: A Pakistani wife believes it is *morally right* to sexually submit to her husband even when she, at the particular moment or even generally, does not really want to have sex.<sup>96</sup> She believes the husband has more say over her body than she does.<sup>97</sup> That is the natural order of things.<sup>98</sup> That this is about *his* pleasure, as ordained by God.<sup>99</sup> She internalises this as an obligation. That she experiences internal conflict when she is, for whatever reason, unable to fulfill her sexual obligation indicates the depth of this internalisation. One participant in the Pakistani study described how, upon non-compliance, her husband's verbal taunts ("why did you get married?") only furthered her resentment.<sup>100</sup> The concept of consent (understood as a voluntary agreement) given by the wife to her husband's sexual advances doesn't contextualise this prescriptive power dynamic that has permeated the very sense of self of the wife.<sup>101</sup> She *has* to give "consent," because she is a good Muslim wife.<sup>102</sup> Catherine MacKinnon similarly argues that "consensual is a fall-back stand-in for 'it wasn't so bad' in societies in which sex by definition fulfills rather than violates women, because *sex is what women are for*."<sup>103</sup>

That Pakistani women have accepted their sexual submission is most evident by an older participant's response in the Pakistani study to the purported psychological trauma some younger wives expressed feeling from undesired sex, "This is part of marriage—many men behave like this, but young women these days think only of themselves."<sup>104</sup>

If the law of rape in Pakistan is meant to protect women's sexual autonomy and integrity, then it completely disregards the Pakistani woman's internalised sexual submission in marriage. And if *all* sex is legally supposed to occur within marriage, then the law of rape in Pakistan goes even further; it *sustains* this sexual submission by clothing it under the guise of 'consent'.

#### VI. OBLIGED TO 'CONSENT'<sup>105</sup>

Even if a Pakistani wife may not experience an internal obligation to sexually submit to her husband, there are *external* consequences

96. See Hussain & Khan, *supra* note 90, at 477.

97. See *id.*

98. See Hadith No. 143, *supra* note 91.

99. See *id.*

100. Hussain & Khan, *supra* note 90, at 472.

101. See *id.* at 477.

102. See Igor Primorac, *Radical Feminism on Rape*, 8 DRUSTVENA ISTRAZIVANJA 497, 501–02 (1999).

103. MacKinnon, *supra* note 54, at 452 (emphasis added).

104. Hussain & Khan, *supra* note 90, at 473.

105. *Supra* note 75.

for a disobedient wife—condoned and protected by Pakistani law—that still yet cast doubt on the nature of her ‘consent’.<sup>106</sup>

This may include:

1. Polygamy: Valid and practiced in Pakistan, the husband can legally contract up to four wives without the permission, or even knowledge, of his previous ones.<sup>107</sup> s.6 of the Muslim Family Law Ordinance (MFLO) 1961 attempted to regulate polygamy by requiring the husband to first seek permission from the Arbitration Council (which can grant such a permission without the consent of the first wife).<sup>108</sup> However, Pearl and Menski argue that this is a largely dead letter law, as marriages contravening Section 6 are still legally valid.<sup>109</sup> For many women, polygamy is considered an extreme affront to their status as a wife.<sup>110</sup> Fear or threat of a second marriage may oblige an unwilling wife to have intercourse, yet her compulsion would still constitute ‘consent’ within § 375 of the Pakistan Penal Code (PPC) that criminalises rape.<sup>111</sup>
2. Cutting-off of maintenance: As discussed earlier, the husband in Pakistan is the legally ordained breadwinner of the family.<sup>112</sup> The wife has no responsibility to earn or work.<sup>113</sup> On the surface this may seem to hold men financially accountable for their wives.<sup>114</sup> In reality,

106. Abira Ashfaq, *Pakistani Law for Women: A Friend or Foe?*, THE HERALD (Jan. 25, 2019), <https://herald.dawn.com/news/1398790> [<https://perma.cc/3C9V-6DNZ>].

107. Kalbe Ali, *Permission from Earlier Wives not Required for New Marriage: Sherani*, DAWN (Mar. 25, 2015), <https://www.dawn.com/news/1171757> [<https://perma.cc/RDL5-N7GV>].

108. Muslim Family Law Ordinance, *supra* note 46, § 6.

109. DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW (3d ed. 1998).

110. *Woman Set Herself on Fire After Husband's Threat of Second Marriage*, PAK. TODAY (May, 9 2016), <https://www.pakistantoday.com.pk/2016/05/09/woman-set-herself-on-fire-after-husbands-threat-of-second-marriage> [<https://perma.cc/ECK6-Z22D>] (last visited Mar. 22, 2020) (albeit an extreme case, it does reveal the sentiment of Pakistani women towards polygamy).

111. Act XLV of 1860, No. 375 of 1860, PAK. PENAL CODE (1860).

112. Muslim Family Law Ordinance, *supra* note 46, § 9.

113. Indeed, most don't. Only 25.7% of married Pakistani women reported being employed, compared to 95.7% married men, in a large-scale demographic survey. This may not always be out of choice. Strict gender roles put structural hurdles in the way of women who want to gain economic independence. See PAKISTAN NATIONAL INSTITUTE OF POPULATION STUDIES & ICF INTERNATIONAL, PAKISTAN DEMOGRAPHIC AND HEALTH SURVEY 2012/13 200 (2013), <https://dhsprogram.com/pubs/pdf/FR290/FR290.pdf> (last visited Mar. 22, 2020).

114. *See id.* at 45, 61.

however, this law furthers the power imbalance within a marriage, whereby the husband holds most, if not all, of the economic power.<sup>115</sup> His duty to maintain the wife is contingent upon her fulfilling the husband's marital needs, including sex.<sup>116</sup> To some, this arrangement may seem eerily akin to legally ordained prostitution; one cannot indeed deny the similarities. It is only natural then, that the wife 'consents' to his sexual advances—the alternative means the husband now has a right to deny food or shelter.<sup>117</sup>

3. Verbal or physical reprimand: Beyond severe physical injury, the Pakistani courts are largely indifferent towards abused wives.<sup>118</sup> In *Sayeeda Khanum v. Muhammad Sami*<sup>119</sup> the Lahore High Court termed the husband's use of occasional violence towards the wife as mere 'bad manners', and not habitual assault or cruelty for the purposes of judicial divorce under Section 2(vii)(a) of DMMA 1939.<sup>120</sup> Another example is the case of *Muhammad Sadiq v. Mst. Aisha* where the judge held *obiter* that cutting off the nose of the wife will not constitute "habitual" assault or cruelty under Section 2(vii)(a), as—naturally—that can only be done once.<sup>121</sup> The law, thus, offers negligible protection to battered wives. It officiates male physical dominance over the female. Under such circumstances, s.375 of PPC criminalising consent obtained through 'death or hurt' is of no real effect or use in marital rape cases.<sup>122</sup>
4. Perhaps worst of all—divorce: Divorce law in Pakistan allows the husband to *orally* divorce (*talaq*) his wife,<sup>123</sup> without the need of showing any just cause.<sup>124</sup> There is

---

115. See Rozina Karmalinani et al., UNDERSTANDING INTIMATE PARTNER VIOLENCE IN PAKISTAN THROUGH A MALE LENS (2017), <https://www.odi.org/sites/odi.org.uk/files/resource-documents/11398.pdf>.

116. *Id.*

117. *See id.*

118. *Khanam v. Sami*, (1952) IV PLD 113, 121 (Pak.).

119. *Id.*

120. Dissolution of Muslim Marriages Act, No. 8 of 1939, § 2 (viii)(a), PAK. CODE (1939).

121. (1975) PLD Lahore 615 (Pak.).

122. Act XLV of 1860, *supra* note 111.

123. Section 7(1) of the MFLO 1961 required a written notice of the *talaq* to the Union Chairman to be valid, this section was later deemed void and repugnant to Islam by the Federal Shariat Court in *Allah Rakha v. The Federation of Pakistan*, (2000) PLD FSC 1 (Pak.).

124. The wife, on the other hand, has to go through the tedious process of judicial dissolution (if she can prove one of the grounds under § 2 of Dissolution of Muslim Marriages Act 1939) or judicial khula (wherein she has to return her mahr).

no concept of alimony in Pakistani law after the three months of obligatory waiting period (*iddat*) the divorced wife has to observe.<sup>125</sup> Many divorced women, in addition to facing social stigma, are rendered destitute as a consequence, a fact noted in a report by the Pakistan Commission.<sup>126</sup> The practical consequences of divorce for most Pakistani women, therefore, far outweighs any perceived sense of sexual violation felt during marital rape.<sup>127</sup> When there is no way out of an abusive marriage due to economic and social dependency, toleration of abuse becomes the only option. The current law equates this toleration with ‘consent’.

None of the above cases would constitute marital rape in Pakistani law as it stands. Law and policymakers in Pakistan, thus, need to engage in a careful reconsideration of the nature of a Pakistani woman’s ‘consent’, placing it in context of the unequal arrangements, both legal and cultural, within which women have sex.

## VII. RECLAIMING SEXUAL AUTONOMY

Sexual autonomy is the right/capacity of an individual to decide the who, when, where, and how of their sex lives.<sup>128</sup> By employing the radical feminist lens, the inadequacy of consent as a legal standard of marital rape in a Pakistani marriage is revealed; the wife internalises an obligation of sexual submission, which is reinforced and strengthened through extrinsic detrimental consequences that discourage refusal. The law has utterly failed to protect women’s sexual autonomy in the *one* arrangement they can *legally* have sex i.e., marriage.<sup>129</sup> A reconception of marital rape in Pakistani law is direly required.

---

125. See *Inamul Ahsan v. Hussien Bano*, (1976) 18 PLD Lahore 1466 (Pak.); *Sadia Begum v. Jangreez*, (2004) Vol. LVI, Peshawar 213 (Pak.).

126. Pakistan Commission, *Report on Marriage and Family Law*, GAZETTE OF PAKISTAN EXTRAORDINARY, at 1199 (1956).

127. AURAT FOUNDATION, PAKISTAN: NGO ALTERNATE REPORT ON CEDAW 90 (2012) (“Marriage and family as institutions hold a great deal of importance in Pakistan and are often thought to be more important than the concerned individuals. It is considered important for women to not shame the family and not allow a marriage to fail. There are many taboos on divorce and unmarried women. Women are recognised primarily in their roles within the marriage and family as wives, mothers, daughters etc. Their identity is derived from their family.”).

128. Some radical feminists also criticise sexual autonomy as the basis of rape legislation. Favours instead a sex equality rationale for all kinds of sexual assault, as rape is a crime of sexual discrimination. See MacKinnon, *supra* note 54, at 436. However, in Pakistan, recognising women’s sexual autonomy is arguably a necessary first step.

129. Quaraishi, *supra* note 80, at 288.

### A. *Reconceiving Marital Rape*

Critics of the radical feminist analysis emphasise the difference in gravity between cases where a woman is “forced to have sex by a knife at her throat, and a woman having sex she has not initiated and does not want for its own sake but for [some other] extrinsic reason,”<sup>130</sup> but if that extrinsic reason is her own well-being, whether economic (*‘he may stop giving me maintenance’*), social (*‘he may marry another woman or divorce me’*) or physical (*‘he may hit me’*) and these are condoned and protected by law, her legally valid ‘consent’ becomes little more than a veil for coerced sex.<sup>131</sup>

This is not to say that *all* sex within a marriage governed by Muslim family laws is coercive. What it suggests is that any subsequent legislative or judicial endeavour on marital rape in Pakistan must take into account the subtleties and nuances of ‘consent’, including the circumstances where consent is procured through economic and social compulsion or exploitation. Catherine MacKinnon proposes such a definition of rape, based on whether circumstantial or legal inequalities are *directly* used to compel sex: “A physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability.”<sup>132</sup>

Mere contextual existence of inequalities between the spouses (whether economic, social, religious or legal) will not render a sexual encounter between them as *always* rape. Rather, when the husband explicitly *uses* these structural inequalities to compel sexual activity that the wife would otherwise not partake in, it would constitute as legally coercive—rape.<sup>133</sup> Legally valid consent is meaningless.

The laws that protect and enforce a Pakistani husband’s structural power in marriage should also be reformed. An Islamic country that can be used as an example is Tunisia; the girl’s explicit consent is required in marriage; polygamy is banned; divorce can only occur by order of the court; and the ex-wife gets postdivorce maintenance (alimony) depending on her financial circumstances.<sup>134</sup>

130. Igor Primorac, *Radical Feminism on Rape*, 8 DRUŠTVENA ISTRAŽIVANJA 497, 503 (1999).

131. *Id.* at 502, 504.

132. MacKinnon, *supra* note 54, at 474.

133. *Id.*

134. See Sfeir, *supra* note 42, at 309–10. While Tunisian family law is by no means perfect, it is by far the most progressive in the Islamic world. A recent bill was also approved by the Tunisian Cabinet abolishing discriminatory Islamic inheritance laws that give men double the inheritance of women. The bill is yet to be approved by the Tunisian Parliament. See George Sadek, *Tunisia: Cabinet Approves Bill Requiring Equal Inheritance Shares*

By using the concept of *ijtihad* (independent reasoning), the Tunisian state has sought to reinterpret traditional Islamic laws to redress some of the inequalities in an Islamic marriage.<sup>135</sup> A similar initiative should be taken in Pakistani family law.

### B. *Reconceiving Sex*

The husband's social/economic authority and the wife's sexual obedience in traditional Islamic Law has been criticised as a product of historical masculine hegemonic discourse rather than Quranic injunctions by both Muslim feminists and modernist scholars alike.<sup>136</sup> To achieve any meaningful change in Pakistani perceptions of sex, a reinterpretation of religious literature that emphasises *mutual* sexual rights, including the right of sexual autonomy, needs to be adopted by the legislature, and applied in the courts. Cases such as *Abdul Kadir* (quoted earlier) and *Resham Bibi vs. Muhammad Shafi*,<sup>137</sup> that legally endorse wife's obedience in marriage, need to be explicitly denounced by the Pakistani courts in light of Article 25 of the Pakistani Constitution, which provides for equality before the law and prohibits discrimination on the basis of sex.<sup>138</sup>

The laws on zina and fornication, passed by the controversial dictator Zia ul Haq in a move to gain power, as argued previously, have been disproportionately used against women.<sup>139</sup> Far from creating a Islamic 'morally pure' society, these laws have only furthered regressive perceptions about sex. Thus, either the courts must adopt a nondiscriminatory approach in applying this legislation, or the entire legislation ought to be reformed. It is bitter irony that a legal system failing to protect subjects from *unwanted* intercourse within marriage, is so keen on criminalising any *wanted* intercourse outside marriage. Sexual autonomy goes both ways.

---

for *Men and Women*, GLOBAL LEGAL MONITOR (2018), <http://www.loc.gov/law/foreign-news/article/tunisia-cabinet-approves-bill-requiring-equal-inheritance-shares-for-men-and-women> [https://perma.cc/MGF3-ZRPQ] (last visited Mar. 22, 2020).

135. See Sadek, *supra* note 134.

136. For an Islamic feminist criticism, see Zainah Anwar & Ziba Mir-Hosseini, *Decoding the "DNA of Patriarchy" in Muslim Family Laws*, OPEN DEMOCRACY (2012), <https://www.opendemocracy.net/en/5050/decoding-dna-of-patriarchy-in-muslim-family-laws> (last visited Mar. 22, 2020). For a modernist male critique, see Fazlur Rahman, *The Status of Women in Islam: a Modernist Interpretation*, in *WORLDS: STUDIES OF PURDAH IN SOUTH ASIA* (Hanna Papanek & Gail Minault eds., 1982).

137. (1967) PLD Azad J & K 32 (Pak).

138. PAKISTAN CONST. art. 25 ("Equality of citizens—(1) All citizens are equal before the law and are entitled to equal protection of law. (2) There shall be no discrimination on the basis of sex. (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.").

139. See Minah Ali Rathore, *Women's Rights in Pakistan: The Zina Ordinance & the Need for Reform*, 38 SCHOOL OF PUBLIC POLICY CAPSTONES 38 (2015).